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California Employment Law

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Statement on Fair Use

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1 California Employment Law Editorial Consultants

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Mr. Wilcox is the lead editorial consultant for this publication. He helped draft the original outline, reviewed the manuscript for each chapter, and provided commentary and practice tips based on his extensive experience in the field of employment law.

Mr. Wilcox is a partner in the San Francisco, California office of the firm of Paul, Hastings, Janofsky & Walker. Mr. Wilcox's practice involves all aspects of employment law, including counseling employers with respect to equal employment opportunity law, wrongful discharge, wage and hour law, collective bargaining, and occupational safety and health law. He has defended numerous employment law actions in federal and state courts, as well as before administrative agencies. Mr. Wilcox has also lectured widely on a variety of employment law topics. He is a member of the labor law sections of the American Bar Association, the State Bar of California, and the Bar Association of San Francisco.

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Erica B. Grubb contributed to the original outline of the publication and reviewed the equal employment opportunity chapters, as well as several others. Ms. Grubb is a former partner in the firm of Morrison and Foerster, practicing in the firm's Walnut Creek office. Her practice has included litigation before federal and state courts and administrative agencies, and counseling on issues arising under equal employment opportunity statutes, as well as other state and federal labor laws. She previously served as general counsel for the *Oakland Tribune* and as a trial attorney for the Equal Employment Opportunity Commission and for Public Advocates in San Francisco. She has also taught courses in employment discrimination law at the University of Texas School of Law.

William M. Crosby reviewed the chapters on wrongful termination liability and actions and provided practice tips from the plaintiff's perspective in such actions. Mr. Crosby practices in Irvine, California, with an emphasis on employment,

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Release 041 May 2010

A.M. v. Albertson's, LLC: Failure to Accommodate

In *A.M. v. Albertson's, LLC*, 178 Cal. App. 4th 455 (2009), the Court of Appeal held that an employer's single failure to make a reasonable accommodation, even during a long period of accommodation, violated the FEHA because it had tragic consequences for the employee who was not accommodated. A single failure to accommodate, even in the context of a larger pattern of successful accommodation, can serve as the basis for finding a failure to accommodate. See § 41.51[3][a].

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Voluntary Employee Incentive Compensation Plan: *Schachter v. Citigroup*. In *Schachter v. Citigroup*, 47 Cal. 4th 610 (2009) the California Supreme Court held that an employer's voluntary employee incentive compensation plan did not violate *Labor Code* §§ 201, 202, and 219, because no earned, unpaid wages remained outstanding upon termination according to the terms of the incentive plan. The plan provided employees with shares of restricted company stock at a reduced price in lieu of a portion of the employee's annual cash compensation, as to which employees agreed that, should they resign or be terminated for cause before their restricted shares of stock vested, they would forfeit the stock and the portion of cash compensation they directed be paid in the form of the restricted stock. See, e.g., § 4.01[2][d.1].

Changes to California Unemployment Insurance Code. The Unemployment Insurance Code now provides that the Appeals Board must permit a party or representative to participate in a hearing by telephone on the party's or representative's request and showing a good cause. See § 80.83[8].

U.S. Supreme Court to Address Privacy Issues in Regards to Employees' Text Messaging. The U.S. Supreme

Court has granted certiorari in *City of Ontario v. Quon*, 175 L. Ed. 2d 617 (2009). The case involves alpha-numeric pagers issued to police officers and the reasonable expectation of privacy in regards to text messaging on employer-issued devices. See, e.g., § 50.30[1][a].

New Alternative Workweek Provisions. The Legislature has amended *California Labor Code section 511*, regarding alternative workweek schedules, to provide that the regularly scheduled alternative workweek proposed by an employer for adoption by employees may be a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose. The menu of work schedule options may include a regular schedule of eight-hour days compensated in accordance with *Labor Code § 510(a)*. Employees who adopt a menu of work schedule options may, with employer consent, move from one schedule option to another on a weekly basis. See § 3.04[1][a][ii].

Hernandez v. Hillsides, Inc. In *Hernandez v. Hillsides, Inc.*, 47 Cal. 4th 272 (2009), the California Supreme Court addressed issues regarding an employer's surveillance in a semi-private office after business hours and employees' common law and constitutional privacy rights. Although the court found that the employees had a reasonable expectation of privacy in their workplace, it held that the employer's conduct was "drastically limited" in nature and scope and was not highly offensive or sufficiently serious to constitute a privacy violation. See § 50.30.

Owen v. Macy's. In *Owen v. Macy's*, 175 Cal. App. 4th 462 (2009), an express written company policy forewarned new employees that their compensation package did not include paid vacation during their initial employment. Thus, no vacation pay was earned and none vested during that initial period, and employees could not claim any right to vested vacation during their initial employment: they knew in advance they would not earn or vest vacation pay during that period. Further, the rule against forfeiture of accrued vacation rights, by its own terms, could not apply to vacation pay to be earned in the future, i.e., vacation pay that had not yet accrued. See § 4.01[2][d].

Ricci v. DeStefano. In *Ricci v. DeStefano*, 2009 U.S. LEXIS 4945 (2009), the U.S. Supreme Court held that a race-based action like refusing to certify the results of a promotional examination that appears to have a disparate impact on racial minorities is impermissible under Title VII, unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. See §§ 41.20, 41.45, and 41.66.

Gross v. FBL Financial Services, Inc. In *Gross v. FBL Financial Services, Inc.*, 174 L. Ed. 2d 119 (2009), the U.S. Supreme Court held that a plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Because Title VII is materially different with respect to the relevant burden of persuasion, this Court's interpretation of the ADEA is not governed by Title VII decisions. See § 41.31.

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General Scope and Purpose of Set

CALIFORNIA EMPLOYMENT LAW provides complete coverage of the most important legal issues involving private employers that may arise under California and federal law as a result of the employment relationship (with the exception of certain topics noted below, which are governed exclusively by federal law). The set highlights matters that may lead to disputes, and ultimately litigation, between the employer and the employee.



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Topics Covered and General Organization of Set

The set is divided in eight topical divisions, each of which is further subdivided into chapters. For a full list of chapters, see the General Table of Contents, *above*. The topics covered by the eight divisions are summarized below:

DIVISION I. WAGE AND HOUR LAWS. This division discusses statutes and regulations regulating the wages, hours, and working conditions of both adult and minor employees. The division discusses both state and related federal law.

DIVISION II. EMPLOYEE ILLNESSES AND INJURIES. This division outlines the general scope and applicability of California workers' compensation law, including the exclusive remedy doctrine and exceptions to that doctrine. (Detailed discussion of workers' compensation law may be found in Hannah, *LAW OF EMPLOYEE INJURIES AND WORKERS' COMPENSATION*.) The division also discusses administrative regulation of safety and health in the workplace, with an emphasis on the California Occupational Safety and Health Act.

DIVISION III. EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES. This division covers an employer's potential liability to third persons arising from the conduct of its employees. The division covers both tort liability arising from employees' conduct and contractual liability arising from transactions entered into by employees on behalf of their employers.

DIVISION IV. EQUAL EMPLOYMENT OPPORTUNITY. This division discusses state and federal laws protecting employees and applicants from discrimination on the basis of protected characteristics such as race, sex, age, religion, national origin, and handicap. The division covers substantive requirements imposed on employers under equal employment opportunity laws, as well as administrative and judicial enforcement of those laws. (For additional discussion of federal equal employment opportunity laws, see Larson, *EMPLOYMENT DISCRIMINATION*.)

DIVISION V. EMPLOYEE PRIVACY RIGHTS. This division discusses constitutional, statutory, and common law issues relating to employee privacy. The division covers limitations on employer collection, use, and disclosure of private information about employees.

DIVISION VI. WRONGFUL TERMINATION AND RELATED DISPUTES. This division covers decisional and

statutory exceptions to the doctrine of at-will employment, and discusses an employer's potential liability for wrongful termination of employment. The division also includes discussion of means for avoiding such liability.

DIVISION VII. TRADE SECRETS AND UNFAIR COMPETITION. This division discusses the employer's rights regarding an employee's use and disclosure of the employer's confidential and proprietary information obtained in the course of employment, as well as restrictions on an employee's or former employee's right to compete with his or her employer or former employer.

DIVISION VIII. UNEMPLOYMENT AND STATE DISABILITY INSURANCE. This division discusses unemployment and state disability insurance law, including eligibility requirements and claims procedures for benefits, and procedures by which employers may protest claims.



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A. SCOPE AND ORGANIZATION OF SET

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Topics Excluded

Employees of public entities and educational institutions in California are almost entirely governed by special statutory provisions contained in the Government and Education Codes, respectively. These provisions are beyond the scope of this set. Brief reference is made in appropriate places to the applicability of general rules and regulations regarding private employers to public entity employers. (For discussion of public sector labor relations law, including discipline, discharge, and layoff of state and local government employees, see Zerger et al., CALIFORNIA PUBLIC SECTOR LABOR RELATIONS.)

In addition, because this set focuses on California law, the following topics, which are governed exclusively by federal law, are omitted from this set:

1. Labor relations law in the private sector, including labor unions and collective bargaining. For discussion of these topics, see NATIONAL LABOR RELATIONS ACT: LAW & PRACTICE.
2. Employee benefit and retirement plans governed by the federal Employee Retirement Income Security Act of 1974 (ERISA).ⁿ¹ For discussion, see Bacon, Prater, and Tucker, EMPLOYEE BENEFITS GUIDE.
3. Federal immigration law. For discussion of employers' obligations under federal immigration law, see Frye and Klasko, EMPLOYERS' IMMIGRATION COMPLIANCE GUIDE.

The above topics are discussed, however, to the extent that they may preempt certain aspects of state law.

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 1001 et seq.



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Organization of Chapters

Each chapter begins with a Scope note, which briefly describes the subject matter of the chapter and contains references to other chapters covering related topics. Following the Scope note is the Synopsis, which is an outline of the parts, sections, and subsections into which the chapter is divided. The text of the chapter may consist of one or more parts, each of which is further subdivided into numbered sections and subsections. In addition to discussion of the applicable law, the text of each chapter may contain one or more of the following: Illustrations, Consultant's Comments, and Practice Tips. Chapters also contain illustrative practice and litigation forms, where appropriate, such as sample contract provisions and forms of complaints. Each statement of law in the text is supported by a footnote containing citations to appropriate legal authority. The last part of each chapter consists of a Bibliography, containing references to other legal texts, annotations, and law review articles for further research.



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B. HOW TO RESEARCH A PROBLEM

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In General--Finding Aids Available

The reader may locate discussion of a particular topic in CALIFORNIA EMPLOYMENT LAW through one or more of the following finding aids:

1. Subject Matter Index;
2. Table of Statutes;
3. Table of Cases; and
4. Table of Contents and Chapter Synopses.

Use of each of these finding aids is discussed below.



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Subject Matter Index

The Subject Matter Index, located in Volume 4, lists all major topics discussed in the set alphabetically by subject matter. Under each major topic heading is a detailed, alphabetical listing of subtopics relating to the major topic. Each subtopic listed is followed by a reference to the text section or sections in CALIFORNIA EMPLOYMENT LAW in which that subtopic is discussed. For example, to find discussion of administrative employees who are exempt from overtime compensation requirements, the reader would look under the major heading "OVERTIME COMPENSATION," and then refer to the subheading "Administrative, executive and professional employees."



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Tables of Statutes and Cases

The Table of Statutes and Table of Cases, also located in Volume 4, provide an alternative method of finding discussion of a particular topic. The Table of Statutes lists each constitutional provision, statute, administrative regulation, court rule, and similar authority cited in CALIFORNIA EMPLOYMENT LAW, followed by a reference to each text section in which it is cited. Thus, for example, a reader who is interested in discussion of California Labor Code Section 227.3, governing payment for unused vacation time on termination of employment, would turn to the heading "LABOR CODE" and look for the listing for Section 227.3, which would be followed by a reference to every text section in the set where that statute is cited. The reader would then refer to those text sections to find discussion of the statute.

Similarly, the Table of Cases can be used to find discussion of a particular case relating to a topic in which the reader is interested. The Table of Cases lists every case cited in the set, alphabetically by case name. Each case name listed is followed by a reference to every text section in which the case is cited.

In addition to the main Tables of Statutes and Cases (printed on white paper), Revision Tables of Statutes and Cases (printed on yellow paper) are included in certain releases. The Revision Tables, when included, are filed immediately before the main tables in Volume 4. The Revision Tables contain text section references for authorities cited in all replacement (revision) pages issued since the last complete revision of the main tables.



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Table of Contents/Chapter Synopsis

At the beginning of each volume is a Table of Contents that lists all the chapters in that volume. Volume 1 contains a General Table of Contents listing all the chapters in the set. The reader may use these tables to find the chapter that covers the general topic in which the reader is interested. The reader may then turn to the Synopsis at the beginning of that chapter and look for the sections or subsections that may relate to the particular topic in which the reader is interested.



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 1 Overview of Wage and Hour Laws

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AUTHOR: By Carol S. Sanders, J.D.

§ 1.syn Synopsis to Chapter 1: Overview of Wage and Hour Laws

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[2] Annotations

§ 1.22 Law Reviews and Legal Periodicals

By Carol S. Sanders, J.D. n*

FOOTNOTES:

(n1)Footnote *. Ms. Sanders is supervising attorney with Contra Costa Legal Assistance for the Elderly.

2004 Revisions by Peter Rukin, The Law Office of Peter Rukin, Oakland, CA, www.rukinlaw.com.



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 1 Overview of Wage and Hour Laws

1-1 California Employment Law Scope

AUTHOR: By Carol S. Sanders, J.D.

Scope

By Carol S. Sanders, J.D. n* SCOPE

This chapter discusses the coverage of state and federal wage and hour statutes and regulations, with emphasis on the California Labor Code, the wage orders promulgated by the California Industrial Welfare Commission, and the federal Fair Labor Standards Act. It outlines the powers and duties of government agencies responsible for enforcing wage and hour laws and sets forth the required procedures for promulgation of the California wage orders. It also sets forth the rules of construction when an employer is subject to both federal and state wage and hour laws, or when a contract or collective bargaining agreement contains provisions that conflict with wage and hour laws.

State and federal minimum wage law is discussed in Chapter 2. State and federal overtime compensation requirements are discussed in Chapter 3. Rules governing the time, place, and manner of payment of wages, and limitations on deductions from wage payments, are discussed in Chapter 4. Administrative and judicial remedies for violations of state and federal wage and hour laws are discussed in Chapter 5. Child labor laws are discussed in Chapter 6. Posting and recordkeeping requirements under state and federal wage and hour laws are discussed in Chapter 7.

FOOTNOTES:

(n2)Footnote *. Ms. Sanders is supervising attorney with Contra Costa Legal Assistance for the Elderly.

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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 1 Overview of Wage and Hour Laws
Part A. TEXT

1-1 California Employment Law § 1.01

AUTHOR: By Carol S. Sanders, J.D.

§ 1.01 Introduction

Both the federal government and the state of California have enacted comprehensive wage and hour laws establishing minimum wages, overtime compensation requirements, standards for working conditions, and restrictions on child labor for the primary purpose of protecting employees from oppressive working conditions.ⁿ¹ Employers covered by both federal and state wage and hour laws must comply with both and, to the extent that federal and state requirements conflict, must follow the law that provides the most protection for the employee.ⁿ²

The principal federal wage and hour legislation for most employers is the Fair Labor Standards Act (FLSA).ⁿ³ The FLSA is supplemented by the Portal-to-Portal Act, which contains certain limitations on liability under the FLSA.ⁿ⁴ In addition, special federal statutes have been enacted to govern wages and hours of employees employed pursuant to contracts with the federal government.ⁿ⁵

In California, pursuant to constitutional and statutory authority,ⁿ⁶ the Industrial Welfare Commission (IWC) has promulgated administrative regulations known as wage orders, which are codified in Title 8 of the California Code of Regulations.ⁿ⁷ Industry and occupation wage orders set forth labor standards (including minimum wage and overtime compensation requirements) that must be complied with by employers in specific industries or employing workers in specific occupations, and a general minimum wage order sets forth the minimum wage that must be paid to employees regardless of the industry or occupation in which they work. For a discussion of the California wage orders, see § 1.05[2].

In addition to authorizing promulgation of the wage orders, the California Labor Code contains numerous other provisions relating to wages, hours, and working conditions of employees. For an overview of these provisions, see § 1.05[1].

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour
 Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour
 Laws Coverage & Definitions Minimum Wage

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. § 202(b) (federal policy); *Lab. Code* § 90.5(a) (purpose of enforcement of minimum labor standards is to ensure that employees do not work under substandard or unlawful conditions or for employers that have not secured the payment of compensation, and to protect complying employers from competitive advantage of noncomplying employers at expense of workers).

(n2)Footnote 2. *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal. App. 3d 21, 34-35, 285 Cal. Rptr. 515 ; *see* 29 U.S.C. § 218(a); *see also* discussion under § 1.02.

(n3)Footnote 3. *See* 29 U.S.C. § 201 *et seq.*

(n4)Footnote 4. *See* 29 U.S.C. § 251 *et seq.*

(n5)Footnote 5. *See* discussion under § 1.06[2].

(n6)Footnote 6. *See* Cal. Const., art. XIV, § 1; *Lab. Code* § 1173.

(n7)Footnote 7. *See* 8 Cal. Code Reg. § 11000 *et seq.*



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 1 Overview of Wage and Hour Laws
Part A. TEXT

1-1 California Employment Law § 1.02

AUTHOR: By Carol S. Sanders, J.D.

§ 1.02 Standards of Construction Applicable When More Than One Law Addresses the Same Subject

Nothing in the FLSA excuses noncompliance with any federal or state law or municipal ordinance establishing a higher minimum wage or a lower maximum workweek or a higher standard relating to the employment of minors than that established under the FLSA.ⁿ¹ Thus, the FLSA does not preempt any state law that establishes a higher minimum wage or a shorter workweek than federal law. However, employees covered *only* under the FLSA may not claim benefits of more protective state law, since the FLSA does not purport to incorporate the more protective state law.ⁿ²

When a conflict exists between the FLSA and another federal law or state or local law, the law establishing the higher standard of protection for employees prevails.ⁿ³

In California, the state minimum wage may exceed the federal minimum wage, but may not fall below it.ⁿ⁴ In addition, the employer is subject to stricter overtime compensation rules than those under the FLSA in that, for example, maximum straight-time hours for the workday, in addition to the workweek, are generally applicable.ⁿ⁵ California law may be stricter than the FLSA in other areas as well. In those instances when California law imposes stricter standards, the employer subject to both the FLSA and California law must follow California law.ⁿ⁶

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 218(a).

(n2)Footnote 2. See *Cosme Nieves v. Deshler* (1st Cir. 1986) 786 F.2d 445, 452 .

(n3)Footnote 3. *See* 29 U.S.C. § 218(a); 29 C.F.R. § 778.5; *see also* *Aguilar v. Association for Retarded Citizens* (1991) 234 Cal. App. 3d 21, 34-35, 285 Cal. Rptr. 515 (state's authority to go beyond federal legislation in adopting more protective regulations for benefit of employees expressly recognized by FLSA).

(n4)Footnote 4. *See* Lab. Code § 1182(b). The California minimum wage, 8 Cal. Code Reg. §§ 11000, P2 (Cal. Wage Order No. MW-2001), 11010-11150 P4(A) (Cal. Wage Order Nos.1-2001-15-2001) is \$6.25 per hour for all hours worked (effective Jan. 1, 2001), \$6.75 per hour (effective Jan. 1, 2002), \$7.50 per hour (effective Jan. 1, 2007), and \$8.00 per hour (effective Jan. 1, 2008). *See also* 29 U.S.C. § 206(a) (federal minimum wage as of October 1, 1996). For discussion of minimum wages under state and federal law, *see* Chapter 2.

(n5)Footnote 5. *See* Chapter 3 for discussion of overtime compensation under state and federal law.

(n6)Footnote 6. *See* 29 U.S.C. § 218(a).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 1 Overview of Wage and Hour Laws
Part A. TEXT

1-1 California Employment Law § 1.03

AUTHOR: By Carol S. Sanders, J.D.

§ 1.03 Effect of Contractual Provisions

[1] Employment Contracts Generally

The decisions of the United States Supreme Court interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the FLSA.ⁿ¹ Thus, it has been held that rights conferred under the FLSA cannot be abridged by contract, including collective bargaining agreements, or otherwise waived, because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate.ⁿ² Contracts falling short of the FLSA's policy of achieving a uniform national policy of guaranteed minimum compensation for all work or employment engaged in by covered employees must be set aside.ⁿ³ Thus, as long as they comply with the provisions of the FLSA, employers and employees covered under the FLSA may contract for any terms they choose.ⁿ⁴ They may agree to wages higher than the statutory minimum, or to workweeks shorter than the statutory maximum.ⁿ⁵

However, an employment contract containing a mandatory arbitration agreement may displace judicial and other remedies under state wage and hour law if the contract is covered by the Federal Arbitration Act.ⁿ⁶ Thus, for example, a California court of appeal has held that the Labor Commissioner did not have jurisdiction to adjudicate a complaint brought by a brokerage employee for overtime because the employee had signed an employment contract agreeing to the arbitration of any employment-related controversies.ⁿ⁷ For additional discussion of the preemptive effect of the Federal Arbitration Act, *see* Chapter 90.

When an employment agreement provides that an employee is entitled to a commission only while employed by the company, it will not be a breach of contract for the employer to refuse to pay a commission if the transaction leading to the commission is finalized after the employee leaves the company.^{n7.1}

[2] Collective Bargaining Agreement

[a] State Law

The fact that wages, hours, and other conditions of labor may also constitute proper or mandatory subjects of collective bargaining does not preclude the state from adopting minimum standards to protect the welfare of workers who may not enjoy sufficient bargaining strength to obtain adequate protection from their employers at the bargaining table.ⁿ⁸ Thus, the provisions of the Labor Code and the wage orders prevail over less protective provisions of collective bargaining agreements.

In a few instances, however, the wage orders and the Labor Code expressly defer to the provisions of applicable collective bargaining agreements. For example, under all the wage orders overtime compensation provisions are not applicable to employees covered by collective bargaining agreements providing premium wage rates for overtime work, a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage.ⁿ⁹ As another example, many of the Labor Code provisions relating to the time for payment of wages during the course of employment are inapplicable if the terms of an applicable collective bargaining agreement provide for a different pay arrangement.ⁿ¹⁰

■ CONSULTANT'S COMMENT:

It is important for employers of unionized employees to note that the legislature amended Section 514 in 2001 to narrow the collective bargaining exception to the overtime provisions of the Labor Code (Sections 510 and 511) only. Gone, for example, is the argument that Section 514 is broad enough to encompass Section 512 (meal periods). *See, e.g., Valles v. Ivy Hill, Corp. (9th Cir. 2005) 410 F.3d 1071*. Thus employers of unionized employees are best advised to consult counsel to determine the scope of their need to comply with provisions of the Labor Code that they may mistakenly believe are preempted by the LMRA. *Commentary by Kirby Wilcox.*

In those instances in which a collective bargaining agreement covers wage and hour matters that are also covered by state law,ⁿ¹¹ section 301 of the Labor-Management Relations Act does not preempt state law under the following circumstances:

- If there is no dispute over the amount of the penalty and liability is governed by independent state law and the only need to refer to the collective-bargaining agreement is to compute damages;ⁿ¹²
- If there is no suggestion that the union sought or purported to bargain away the employee's state-law protections, and if so, whether the intention to waive such protections was clear and unmistakable;ⁿ¹³

If there is no indication that the parties to the collective bargaining agreement understood the binding arbitration provision to cover such state law claims.ⁿ¹⁴

[b] Federal Law

The Labor Management Relations Actⁿ¹⁵ reflects the congressional determination that, to improve the economic well-being of workers and promote industrial peace, the interests of some employees in a bargaining unit may have to be subordinated to the collective interests of a majority of their co-workers.ⁿ¹⁶ In contrast, the FLSA was designed to provide specific minimum protections to *individual* workers and to ensure that each employee covered by the FLSA would be protected from oppressive working conditions.ⁿ¹⁷ When the provisions of a collective bargaining agreement are in conflict with congressionally granted rights under the FLSA, the requirements of the FLSA take precedence.ⁿ¹⁸

However, in several instances, the FLSA provides for partial exemptions or exceptions to its general requirements on the basis of the provisions of collective bargaining agreements. For example, statutory overtime premiums for time worked in excess of the usual statutory maximum workweek need not be paid if the employee is employed under collective bargaining agreements guaranteeing specified hours of employment and meeting certain other

requirements.ⁿ¹⁹

[3] Lease for Employer-Provided Housing

In *Spinks v. Equity Residential Briarwood Apartments*,ⁿ²⁰ an employer entered into a lease directly with the landlords to provide housing for one of its employees for a stated period of time. During that period, the employee suffered an employment-related injury, and the employer notified the employee it would no longer provide the housing and directed the landlords to change the locks, which they did. The employee sued the landlords, asserting that she was a third-party beneficiary of the lease, and alleging breach of contract, tort and statutory claims. The appellate court reversed the trial court's grant of summary adjudication to the landlords, finding that the employee raised triable issues of material fact on the question of whether she was a third-party beneficiary of the lease agreement between her employer and defendants. The court found that because she raised a triable issue of material fact on the question of whether she was a third-party beneficiary of the lease, her contract, tort and statutory claims were cognizable, and there remained a triable issue on the question of whether defendants acted with malice, so that the availability of punitive damages arising from plaintiff's tort claims should not have been summarily adjudicated. As the lease language made clear, the most basic aspect of the landlords' performance was their obligation to supply the employer with a place for its staff to live. As an entity, the employer could not "reside" in the apartment, so the only way the landlords could perform their lease obligation was by providing the apartment to one or more of the employer's employees. As a member of the employer's staff when the lease was formed, the employee arguably was among a class of intended beneficiaries of the lease.

It was not clear from the lease, however, that the employer intended its staff to have the benefit of the landlords' performance without restriction, *i.e.*, for the entire term without regard to any other circumstance, such as continued employment, or that the landlords understood an intent by the employer that any given occupant would remain during the entire term. As to the intent to benefit the employee individually, the lease did not mention her explicitly, but the lease extension letter from the employer did identify her by name, raising an inference that the landlords' performance, at least during the lease extension period, was meant to benefit her specifically. Resort to the contract language alone did not resolve the question of the employee's status, so the court looked to the circumstances surrounding the formation and performance of the lease. Those circumstances raised an inference that the employee was an intended beneficiary of the lease, and they tended to show the employer's intent to benefit the employee by providing housing for her, procured via the lease. Subsequent events likewise suggested that she was the intended beneficiary of the lease, including the fact that she was allowed to move into the apartment.

Legal Topics:

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

Contracts Law Contract Conditions & Provisions General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. See *Barrentine v. Arkansas-Best Freight Sys.* (1981) 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (overview of cases).

(n2)Footnote 2. See *Brooklyn Savings Bank v. O'Neil* (1945) 324 U.S. 697, 706-707, 65 S. Ct. 895, 89 L. Ed. 1296 (nonwaivability of statutory liquidated damages for nonpayment of minimum wage under FLSA).

(n3)Footnote 3. See *Jewell Ridge Coal Corp. v. United Mine Workers* (1945) 325 U.S. 161 (prior custom or contract not to consider certain work compensable does not affect computation of workweek for purposes of determining overtime compensation under FLSA); *Tennessee C. I. & R. Co. v. Muscoda* (1944) 321 U.S. 590 (agreements to pay less than minimum wage requirements cannot be utilized to deprive employees of their statutory rights); *Martino v. Michigan Window Cleaning Co.* (1946) 327 U.S. 173, 177-178, 66 S. Ct. 379, 90 L. Ed. 603 (contractual provision regarding what constitutes overtime cannot supersede provisions of FLSA.).

(n4)Footnote 4. *Atlantic Co. v. Walling* (5th Cir. 1942) 131 F.2d 518, 522 .

(n5)Footnote 5. *See* 29 U.S.C. § 218(a).

(n6)Footnote 6. 9 U.S.C. § 1 *et seq.*

(n7)Footnote 7. *See Baker v. Aubry* (1989) 216 Cal. App. 3d 1259, 1266, 265 Cal. Rptr. 381 ; *see also Perry v. Thomas* (1987) 482 U.S. 483, 490-491, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (Act preempts Lab. Code § 229, which provides that employees must bring civil action to collect unpaid wages, notwithstanding any private agreement to arbitrate).

(n8)Footnote 7.1. *See Nein v. HostPro, Inc.* (2009) 174 Cal. App. 4th 833, 849-852, 95 Cal. Rptr. 3d 34 (where employment agreement provided that former employee was entitled to commission only while employed by company, and his employment was terminated before defendant and customer finalized asset purchase agreement, as matter of law, agreement by its plain language did not entitle him to commission, because agreement was reasonably susceptible to only one interpretation, *i.e.*, that once he ceased to be employed by defendant, he would no longer be eligible for commission pay; alleged later oral employment agreement that did not include termination clause was beyond scope of pleadings, because plaintiff did not allege that terms of his employment were dictated by oral agreement).

(n9)Footnote 8. *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal. 3d 690, 727-728, 166 Cal. Rptr. 331, 613 P.2d 579 .

(n10)Footnote 9. *See* 8 Cal. Code Reg. §§ 11010, 11020, 11060, 11090, 11110, 11150, P3(G)(1) (Cal. Wage Orders Nos. 1-2001, 2-2001, 6-2001, 9-2001, 11-2001, 15-2001), 11030, 11120, 11130, P 3(I)(1) (Cal. Wage Order Nos. 3-2001, 12-2001, 13-2001), 11040, 11070, 11080, 11100, 11160, P 3(H)(1) (Cal. Wage Order Nos. 4-2001, 7-2001, 8-2001, 10-2001, 16-2001), 11050, P 3(K)(1) (Cal. Wage Order No. 5-2001); *see also* 8 Cal. Code Reg. § 11140, P 3(E) (Cal. Wage Order No. 14-2001) (providing that overtime compensation provisions are not applicable if collective bargaining agreement provides premium wage rates for overtime and cash wage rate of not less than one dollar per hour more than the minimum wage); *see also* Cal. Interim Wage Order-2001, P 7A. For a full discussion of employees exempt from the overtime compensation provisions of the state wage orders, *see* ch. 3.

(n11)Footnote 10. *See* Lab. Code §§ 204, 204.1, 204.2. For discussion of wage payment rules, *see* ch. 4.

(n12)Footnote 11. In *Prachasaisoradej v. Ralphs Grocery Co.* (2004) 122 Cal. App. 4th 29, 18 Cal. Rptr. 3d 514 , *review granted*, (2004) 102 P.3d 903, 2004 Cal. LEXIS 11904 , an employee's allegations, both individually and as an asserted class representative, that the employer's bonus calculations violated *Business and Professions Code* section 17200 and *Labor Code* sections 221, 400-410, and 3751, were not preempted by *section 301 of the Labor Management Relations Act* (29 U.S.C. § 185(a)). Although the employment was governed by a collective bargaining agreement, the alleged state law statutory violations involved independent rights that neither derived from the CBA nor required an interpretation of the CBA. Rather they involved nonnegotiable rights not subject to preemption.

(n13)Footnote 12. *See Lividas v. Bradshaw* (1994) 512 U.S. 107, 124-125, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (only question was whether failure to pay wages upon discharge was "willful" and thus presented question of state law); *see also* 29 U.S.C. § 141 *et seq.*

(n14)Footnote 13. *See Lividas v. Bradshaw* (1994) 512 U.S. 107, 124-125, 114 S. Ct. 2068, 129 L. Ed. 2d 93.

(n15)Footnote 14. *See Lividas v. Bradshaw* (1994) 512 U.S. 107, 124-125, 114 S. Ct. 2068, 129 L. Ed. 2d 93.

(n16)Footnote 15. *See* 29 U.S.C. § 141 *et seq.*

(n17)Footnote 16. *See Barrentine v. Arkansas-Best Freight Sys.* (1981) 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed.

2d 641; 29 U.S.C. § 151.

(n18)Footnote 17. See *Barrentine v. Arkansas-Best Freight Sys.* (1981) 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 ; 29 U.S.C. § 202(a).

(n19)Footnote 18. See, e.g., *Martino v. Michigan Window Cleaning Co.* (1946) 327 U.S. 173, 177-178, 66 S. Ct. 379, 90 L. Ed. 603 (provisions of FLSA supersede collective bargaining agreement defining compensable overtime activities); *Jewell Ridge Coal Corp. v. United Mine Workers* (1945) 325 U.S. 161 (collective bargaining agreement defining workweek); see also *Bay Ridge Operating Co. v. Aaron* (1948) 334 U.S. 446, 474-475, 68 S. Ct. 1186, 92 L. Ed. 1502 (no decisive weight given to collective bargaining agreement's declarations regarding regular rate in determining mandated overtime compensation under FLSA).

(n20)Footnote 19. See 29 U.S.C. § 207(b)(1), (2), (e)(5)-(7), (h); see also discussion in Ch. 3.

(n21)Footnote 20. *Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal. App. 4th 1004, 1026-1056, 90 Cal. Rptr. 3d 453 .



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 1 Overview of Wage and Hour Laws
Part A. TEXT

1-1 California Employment Law § 1.04

AUTHOR: By Carol S. Sanders, J.D.

§ 1.04 Requirement of Employment Relationship

[1] State Law

[a] Employment and Related Terms Defined

An employment relationship must exist in order for the California wage orders or the provisions of the Labor Code governing wages, hours, and working conditions to apply.¹

"Employ," as used in the wage orders, means to engage, suffer, or permit to work.²⁻³ An "employee" means any person employed by an employer.⁵ In the personal service, public housekeeping, and mercantile industries,⁶ "employee" includes any lessee who is charged rent and who (1) does not use his or her own funds to purchase requisite supplies, (2) does not maintain an appointment book separate and distinct from that of the establishment in which the rented space is located, and (3) does not have a business license when applicable.⁷ For purposes of the wage orders, an "employer" means any person as defined in *Labor Code Section 18*^{7.1} who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person.^{7.2}

The Labor Code contains various definitions of the terms employee, employer and employing. For example, the statutes that regulate gratuities⁸ define "employing" as hiring, or in any way contracting for, the services of an employee.⁹ An "employee" is every person, including an alien or minor, who renders service gratuitously, for wages, or for pay in any business for an employer, regardless of whether any wages or pay are measured by a standard of time, piece, task, commission, or another method and regardless whether service is rendered on a commission, concessionaire, or other basis. The term "employer" is defined as every person engaging in any business or enterprise in California and having one or more persons in service under any express or implied, oral or written, appointment, contract of hire, or apprenticeship, regardless whether the employer owns the business or operates on a concessionaire or other basis.¹⁰

The "employee" status of alleged independent contractors, lessees, volunteers, students, trainees, members of religious orders not working in commercial establishments that serve the general public, applicants for relief who exchange labor

for aid or sustenance, and participants in a joint venture presents difficult coverage questions, resolution of which depends on the specific facts.

More than one entity may be responsible for the payment of wages or other benefits. The broad definition of "employer" for purposes of wage and hour law may allow more than one person to be liable for unpaid wages and penalties.ⁿ¹¹⁻¹³ⁿ¹⁴

Although there is a large volume of case authority defining the employment relationship for purposes of workers' compensationⁿ¹⁵ and tort law,ⁿ¹⁶ relatively few cases have interpreted the definitions of "employer" and "employee" for purposes of state wage and hour law.ⁿ¹⁷ Counsel should be careful when using workers' compensation or tort authority as a guide in determining whether an employment relationship exists in the wage and hour context. Although some legal principles may be similar, the results may differ.ⁿ¹⁸

[b] Independent Contractors

No employment relationship exists if the individual performing services for a principal is an independent contractor.ⁿ¹⁹ The Labor Code defines "independent contractor" as any person who renders service for a specified recompense for a specified result, under the control of the person's principal as to the result of the work only and not as to the means by which the result is accomplished.^{n19.1}

An independent contractor is customarily engaged in an independently established business and retains the right to control the manner in which he or she performs the contract. An employee, on the other hand, is subject to the absolute control and direction of the employer.ⁿ²⁰ Due to the numerous variables that can inform the employee/independent contractor distinction, the California Supreme Court has supplemented the statutory definition with classification factors, emphasizing that the most important factor is the right to control the manner and means of accomplishing the result desired.^{n20.1} Strong evidence in support of an employment relationship is the right to discharge at will, without cause. Other factors to be taken into consideration are the following:^{n20.2}

- Whether the one performing services is engaged in a distinct occupation or business.
- usually done under the direction of the principal or by a specialist without The kind of occupation, with reference to whether, in the locality, the work is supervision.
- The skill required in the particular occupation.
- Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work.
- The length of time for which the services are to be performed.
- The method of payment, *i.e.*, whether by the time or by the job.
- Whether the work is a part of the regular business of the principal.
- Whether the parties believe they are creating the relationship of employer-employee.

Each service arrangement must be evaluated on its facts, and the dispositive circumstances may vary from case to case.^{n20.3} Appellate case law arises primarily in the context of substantial evidence review of the determinations of the relevant fact finder.^{n20.4} Consequently, appellate courts have no authority to simply second-guess the conclusion reached by the fact finder; the substantive determination of employee or independent contractor is one of fact, and the

appellate court must affirm if it is supported by substantial evidence.^{n20.5}

Litigation to determine employee or independent contractor status may be pursued as a class action.^{n20.6}

A rebuttable statutory presumption affects the burden of proof with respect to the status of a licensed construction contractor, or a person who performs services for another who is required to be so licensed. Such a person is deemed an employee rather than an independent contractor.ⁿ²¹ The statute specifies factors that may be relevant in overcoming the presumption.ⁿ²²

For full discussion of the distinction between employers and independent contractors under workers' compensation law, *see* Chapter 20.

[c] Lessees

In some cases, the relationship between the parties may be nominally structured as a "lease," with the principal "renting" space to the worker. However, the actual relationship between the parties must be carefully examined to determine whether the nominal "lease" is in fact an employment relationship subject to the wage and hour laws. The wage orders covering the personal service, public housekeeping, and mercantile industries,ⁿ²³ contain express provisions distinguishing bona fide lessees from employees in beauty salons and similar establishments.ⁿ²⁴

[d] Volunteers

Questions may arise concerning the employment status of an individual who volunteers his or her services without requesting compensation.

■ CONSULTANT'S COMMENT:

The DLSE does not consider a bona fide volunteer to be an employee. The intent of the parties is controlling. If, for example, a person intends to volunteer his or her services for public service, religious, or humanitarian objectives, not as an employee and without expectation of pay, that individual is not an employee of the religious, charitable, or similar nonprofit corporation that receives the services.ⁿ²⁵ Conversely, a person who offers to work without compensation for the purpose of gaining experience in an occupation is deemed an employee, not a volunteer. Finally, the DLSE recognizes that an employee of a religious, charitable, or nonprofit organization may donate services to that employer as a volunteer. The donated services, however, may not be the usual duties of the employee. Thus, the DLSE offers the example that an office employee of a nonprofit hospital may volunteer to sit with sick patients outside normal work hours, but may not handle correspondence in connection with a special fund drive.
Commentary by Kirby Wilcox.

[e] Students

A variety of programs exist whereby students perform work for educational institutions or for third parties. The purpose of some of these programs is educational; others are merely intended to provide income to help students meet their educational expenses. Questions may arise concerning whether students performing work under such programs are "employees" for purposes of the Labor Code and wage orders.ⁿ²⁶

■ CONSULTANT'S COMMENT:

The DLSE has developed enforcement policies regarding various types of student employment programs, as indicated below.

Work Experience Education Programs. Under the DLSE guidelines, students enrolled in "exploratory work experience education" programs are not employees. *Title 5 of the California Code of Regulations,*

Section 10071(c), referred to in the DLSE guidelines, describes the responsibilities of students and employers under such a program. Generally, students do no productive work, and there is no intent to teach productive skills; they merely observe and sample a variety of work conditions. The students may not be paid, but they may receive school credit. The work must be related to a school course, and must be performed during school hours. Students are not issued work permits, and the number of work hours is limited. By contrast, students enrolled in "vocational work experience" programs,ⁿ²⁷ or "general work experience education" programsⁿ²⁸ are considered employees by the DLSE. Unlike "exploratory work experience education" programs, these programs stress the acquisition, reinforcement, and extension of vocational and other skills, and students are paid for their work experience.

Community Classroom Vocational Education Programs. According to the DLSE guidelines, students enrolled in "community classroom" programs, run by the Department of Education, are not employees, since the students do no productive work and are supervised by teachers with approved training plans, and the purpose of the programs is to learn.

Occupational Training for Disabled Students. The DLSE considers disabled students placed on jobs in private industry to perform productive work to be employees. However, as discussed in Chapter 2, such employees may be paid subminimum wages if special minimum wage permits are secured.ⁿ²⁹

Trainees or Interns. Students working as interns or trainees to fulfill licensing requirements, or to qualify for a skilled vocation or profession, are not employees under the DLSE guidelines if the training is academically oriented and designed primarily for the benefit of the student. The DLSE requires that the training be an essential part of an established course of an accredited school, or of an institution approved by a public agency to provide training for licensure. The program may not be for the benefit of any one employer, a regular employee may not be displaced by the trainee, and the training must be supervised by the school or a disinterested agency.^{n29.1} By contrast, the DLSE considers a student receiving on-the-job training with a specific employer to be an employee. Examples of classes of students that customarily require an internship period are medical student interns, dietician trainees, clinical laboratory technologist trainees, occupational therapist and physiotherapist trainees, and student radiologic technicians. In addition, the wage order governing the public housekeeping industry specifically exempts certain student nurses.ⁿ³⁰

Dental and medical assistant interns are not considered employees by the DLSE if all of the following criteria are fulfilled:

1. A regular, full-time medical or dental assistant is employed who is available to train and supervise the student;
2. The clinical practice period does not last longer than 10 days with any one dentist or doctor, and the student's total unpaid time worked does not exceed 160 hours;
3. The regularly employed medical or dental assistant submits a report to the school on the student's progress;
4. The school exercises absolute control over the placement of any student and supervises the training provided;
5. The interns are not used for vacation relief or reception work; and

6. The interns have a variety of learning experiences in each doctor's office.

Cosmetology school students in licensed schools, and beauty salon junior operators during the first 350 hours when they are not allowed to work on patrons, are likewise not considered employees. Dance studio students are not employees to the extent that they do not perform services or teach lessons, or remain on call.

Graduate Students Engaged in Research. Graduate students doing original professional-level research for the purpose of fulfilling advanced degree requirements are not considered employees by the DLSE, even if they are paid a stipend or given a grant. However, graduate students working as teaching assistants are considered employees by the DLSE.

Extracurricular Activities. High school or college students engaging in extracurricular activities primarily for their own benefit, or as part of an overall education program, are not considered employees by the DLSE. *Commentary by Kirby Wilcox.*

[f] Trainees

Ordinarily, an employer may not avoid its obligations under the wage and hour laws merely by labeling an employee a "trainee." The DLSE uses an 11-prong test to determine whether an individual is exempt from minimum wage and overtime compensation requirements. Under that test, a person not on the employer's payroll, but enrolled in a training program offered by the employer, is not an employee if all of the following eleven criteria are met:^{30.1}

1. The training, even though it includes actual operation of the employer's facilities, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the trainees or students.
3. The trainees or students do not displace regular employees, but work under their close supervision.
4. The employer derives no immediate advantage from the activities of the trainees or students, and on occasion the employer's operations may actually be impeded.
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
6. Any clinical training is part of an educational curriculum.
7. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.
8. The trainees or students do not receive employee benefits.
9. The training is general, so as to qualify the trainees or students for work in any similar business, rather than designed specifically for a job with the employer offering the program. In other words, on completion of the program, the trainees or students must not be fully trained to work specifically for only the employer offering the program.
10. The screening process for the program is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program.

11. Advertisements for the program are couched clearly in terms of education or training, rather than employment, although the employer may indicate that qualified graduates will be considered for employment.

Under certain circumstances, however, an employee may be paid a subminimum wage as a "learner" during the first 160 hours of employment in occupations in which the learner has no previous similar or related experience.ⁿ³¹

[g] Joint Venturers, Partners, and Shareholders

Relationships that are denoted as "joint enterprises," "joint ventures," "partnerships," or "shareholder agreements" may in some instances actually be employment relationships for purposes of wage and hour laws.

[h] Apprentices

Although apprentices are considered employees, apprentices who are "regularly indentured" under the State Division of Apprenticeship Standardsⁿ³² are exempt from the minimum wage provisions.ⁿ³³ For discussion of this exemption, see Chapter 2.

[i] Members of Religious Orders

The activities of members of religious orders may or may not render them "employees," depending on the nature of the services provided.ⁿ³⁴

■ CONSULTANT'S COMMENT:

Members of religious orders are not considered employees by the DLSE if their work is performed solely in the furtherance of the order's internal activities, the development of the order's facilities, or as part of the training offered by schools operated by a recognized church or denomination. However, members of religious orders who work at commercial enterprises operated by such orders that serve the general public, such as restaurants or thrift stores, or that contract to provide personal services to businesses, are considered employees by the DLSE. *Commentary by Kirby Wilcox.*

In the past, the DLSE followed the rule that members of religious orders and clergy in general are not employees unless they work in commercial establishments serving the general public, following the conclusions reached by the United States Supreme Court regarding enforcement of the Fair Labor Standards Act in *Alamo Foundation v. Secretary of Labor*.ⁿ³⁵ But in view of the broad inclusion of the provisions of *Labor Code sections 500 et seq.*, the DLSE now is reluctant to continue to take that view and advises that there is no specific exemption for clergy in California law. However, many clergy have advanced degrees in theology and may be exempt under the "learned professional" exemption, as long as the degree is required for the occupation in question. An advanced degree by itself does not satisfy the "learned professional exemption."ⁿ³⁶

[j] Spouses

In some occupations, it is not uncommon for an employee's spouse to assist an employee in the performance of his or her duties. Whether the spouse will also be considered an employee depends on the circumstances.

■ CONSULTANT'S COMMENT:

According to the DLSE, if an employer hires only one spouse and has no knowledge that the other spouse is also performing work for the employer, the latter spouse is not considered an employee of the employer. On the other hand, if the employer knows that both spouses are performing work assigned to one spouse, or that the work cannot be performed by one spouse without the help of the other, the DLSE considers both spouses to be employees. If both spouses are employees, the employer must keep separate

wage and hour records on each spouse. *Commentary by Kirby Wilcox.*

[k] Domestic Workers and Employment Agencies

Under certain conditions, an employment agency (as defined by *Civil Code Section 1812.501(a)* or *(h)*) is not the employer of any domestic worker for whom it procures, offers, refers, provides, or attempts to provide work.ⁿ³⁷ The first condition is that there must be a signed contract or agreement between the agency and the worker that contains, at a minimum, provisions specifying the following:ⁿ³⁸

1. That the employment agency will assist the domestic worker in securing work;
2. How the agency's referral fee will be paid; and
3. That the worker is free to sign agreements with other employment agencies and to perform domestic work for persons not referred by the agency.

The other conditions for negating an employment relationship between the domestic worker and the employment agency are the following:ⁿ³⁹

1. The worker informs the agency of any restrictions on hours, location, conditions, or type of work that the worker will accept, and the worker is free to select or reject any work opportunity offered, referred, or provided by the agency.ⁿ⁴⁰
2. The worker is free to renegotiate with the person hiring him or her the amount that the worker will be paid.ⁿ⁴¹
3. The worker receives no training from the agency other than a voluntary orientation session explaining the relationship between the agency and the worker, the agency's administrative and operating procedures, and the provisions of the contract or agreement the worker has signed.ⁿ⁴²
4. The agency provides no tools, supplies, or equipment necessary to perform domestic work.ⁿ⁴³
5. The worker is not obligated to pay the agency's referral fee, and the agency is not obligated to pay the worker, if the person for whom the worker performed services fails or refuses to pay for those services.ⁿ⁴⁴
6. Payments for domestic service are made directly to either the worker or the agency, and payments made to the agency are deposited into a trust account until they are made to the worker.ⁿ⁴⁵
7. Only the worker and the person for whom the worker performs services may terminate their relationship; the agency may not do so, but may decline to make additional referrals to a particular worker, and the worker may decline to accept a particular referral.ⁿ⁴⁶
8. The worker performs domestic work without any direction, control, or supervision exercised by the agency regarding the manner or means of performing that work.ⁿ⁴⁷

An employment agency is not deemed to exercise direction, control, or supervision for the above purposes by (1) informing the domestic worker about the services to be provided and the conditions of work specified by the person seeking to hire a domestic worker, (2) contacting the person who has hired the worker to determine if he or she is satisfied with the agency's referral service, (3) informing the worker when new referrals will be available, or (4)

requesting the worker to let the agency know if the worker is unable to perform the work accepted.ⁿ⁴⁸

[2] Federal Law

[a] Generally

An employment relationship must also exist in order for the FLSA to apply.ⁿ⁴⁹ The Act does not cover non-employees even if they engage in covered activities.ⁿ⁵⁰

The FLSA defines "employer" as including any person acting directly or indirectly in the interest of an employer in relation to an employee.ⁿ⁵¹ The definition is sufficiently broad to encompass corporate officers with a significant ownership interest who have operational control of significant aspects of the corporation's day to day functions.^{n51.1} The term "employee" means any individual employed by an employer,ⁿ⁵² including most individuals employed by public agencies.ⁿ⁵³ To "employ" means to suffer or permit to work.ⁿ⁵⁴ In *IBP, Inc. v. Alvarez*,^{n54.1} the Supreme Court cited to the definition of "work or employment" announced in *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*,^{n54.2} as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

The Ninth Circuit has held that under the doctrine of successorship liability, a successor employer can be held liable for the predecessor employer's FLSA wage payment violations.ⁿ⁵⁵

[b] Employees Covered

The FLSA applies to *all* persons employed by an employer,ⁿ⁵⁶ although certain employees may be wholly or partially exempt from some or all of its provisions.ⁿ⁵⁷ However, even exempt individuals are "employees" under the FLSA, since permits are required in some cases to avoid compliance with the FLSA,ⁿ⁵⁸ and the FLSA expressly refers to all categories of exempt individuals as "employees."ⁿ⁵⁹ Thus, the FLSA covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation.ⁿ⁶⁰ Similarly, students employed in retail establishments, agriculture, institutions of higher education,ⁿ⁶¹ and elementary or secondary schools,ⁿ⁶² as well as disabled workers,ⁿ⁶³ are "employees" for purposes of the FLSA.

Although the statutory definitions of the employment relationship have been construed expansively by the courts in order to effectuate the FLSA's broad remedial purposes,ⁿ⁶⁴ there are limits. Thus, an individual who, without promise or expectation of compensation, but solely for his or her personal purposes or pleasure, works in activities carried on by other persons either for their pleasure or profit, is outside the purview of the FLSA.ⁿ⁶⁵

Independent contractors are not "employees" under the FLSA.ⁿ⁶⁶ Whether an employment relationship exists depends on the circumstances of the whole activity (also known as the "economic realities" test), but factors that may be useful in distinguishing employees from independent contractors for FLSA purposes are (1) the degree to which the alleged employer has the right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending on managerial skills; (3) the alleged employee's investment in equipment or materials required to perform the work, or the employment of helpers; (4) whether work requires special skill; (5) the permanence of the working relationship; and (6) whether the work performed is an integral part of the employer's business.ⁿ⁶⁷

There are some persons who are expressly not "employees" under the FLSA. Thus, a person who volunteers to perform services for a state or local public agency is not an "employee" if he or she receives no compensation or only nominal fees, and the services are not the same type of services that the person is employed to perform for the agency.ⁿ⁶⁸

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. COUNSEL ARE CAUTIONED that the California Supreme Court's decision in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568-578, 59 Cal. Rptr. 2d 186, 927 P.2d 296, voided all written interpretive policies adopted by the DLSE, the agency charged with enforcing IWC wage orders; it is unclear whether the DLSE publication cited here has any continuing utility. See § 1.05[3][c] for a discussion of *Tidewater* and the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders.

See 8 Cal. Code Reg. §§ 11010-11160, P 1 (Cal. Wage Order Nos. 1-2001, 2-2001, 3-2001, 4-2001, 5-2001, 6-2001, 7-2001, 8-2001, 9-2001, 10-2001, 11-2001, 12-2001, 13-2001, 14-2001, 15-2001, 16-2001) (state wage order applies to persons "employed" in specified industry or occupation, other than specified exempt employees); *Lab. Code* § 1171 (wage and hour provisions apply to persons "employed" in any occupation, trade, or industry, other than persons employed as outside salespersons); see also 2002 Update of the DLSE Enforcement Policies and Interpretations Manual § 43.6.5 (wage orders do not apply in the absence of an employment relationship).

See *Smith v. Rae-Venter Law Group* (2002) 29 Cal. 4th 345, 356, superseded by statute on other grounds, see 2003 Stats. Ch. 93 § 1, citing Treatise.

(n2)Footnote 2-3. [Reserved]

(n3)Footnote 4. 8 Cal. Code Reg. §§ 11010-11030, 11060-11080, 11100-11130, P 2(E) (Cal. Wage Order Nos. 1-2001, 2-2001, 3-2001, 6-2001, 7-2001, 8-2001, 10-2001, 11-2001, 12-2001, 13-2001), 11040-11050, 11090, 11150, P 2(F) (Cal. Wage Order Nos. 4-2001, 5-2001, 9-2001, 15-2001), 11140, P 2(D) (Cal. Wage Order No. 14-2001), 11160, para 2(G) (Cal. Wage Order No. 16-2001).

(n4)Footnote 5. 8 Cal. Code Reg. §§ 11010-11030, 11060-11080, 11100-11130, P 2(F) (Cal. Wage Order Nos. 1-2001, 2-2001, 3-2001, 6-2001, 7-2001, 8-2001, 10-2001, 11-2001, 12-2001, 13-2001), 11040-11050, 11090, 11150, P 2(G) (Cal. Wage Order Nos. 4-2001, 5-2001, 9-2001, 15-2001), 11140, P 2(E) (Cal. Wage Order No. 14-2001), 11160, para 2(H) (Cal. Wage Order No. 16-2001). See also 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 2.1 ("employee" is variously defined in Wage Orders depending on extent of protections IWC intended, citing definition in Wage Order 5, § 2(F) covering lessees and § 2(G) defining employee in Healthcare Industry, but generally, term means any person employed by an employer).

(n5)Footnote 6. See § 1.05[2][b] for definitions of industries covered by wage orders.

(n6)Footnote 7. 8 Cal. Code Reg. §§ 11020, 11070, P 2(F) (Cal. Wage Order Nos. 2-2001, 7-2001), 11050, P 2(G) (Cal. Wage Order No. 5-2001).

(n7)Footnote 7.1. *Lab. Code* § 18 defines "person" as "any person, association, organization, partnership, business trust, limited liability company, or corporation."

(n8)Footnote 7.2. 8 Cal. Code Reg. §§ 11010-11030, 11060-11080, 11100-11130, P 2(G) (Cal. Wage Order Nos. 1-2001, 2-2001, 3-2001, 6-2001, 7-2001, 8-2001, 10-2001, 11-2001, 12-2001, 13-2001), 11040-11050, 11090, 11150, P 2(I) (Cal. Wage Order Nos. 4-2001, 5-2001, 9-2001, 15-2001), 11140, P 2(F) (Cal. Wage Order No. 14-2001). See also 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual 55.2.

(n9)Footnote 8. See *Lab. Code* § 350 et seq. For discussion of gratuities, see Ch. 4.

(n10)Footnote 9. *Lab. Code* § 350(c).

(n11)Footnote 10. *Lab. Code* §§ 350(a), (b).

(n12)Footnote 11-13. [Reserved]

(n13)Footnote 14. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 37.1.2, citing *Real v. Driscoll Strawberry Association* (9th Cir. 1979) 603 F.2d 748, 754 (wage claim against joint employer decided under the federal FLSA wage and hour laws); *Bonnette v. California Health and Welfare Agency* (9th Cir. 1983) 704 F.2d 1465, 1470 (wage claim decided in favor of employees against joint employer under the FLSA. wage and hour laws); *Michael Hat Farming Co. v. Agricultural Labor Relations Bd.* (1992) 4 Cal. App. 4th 1037, 6 Cal. Rptr. 2d 179 (some farming operations have multiple, joint agricultural employers), citing *Rivcom Corp. v. Agricultural Labor Relations Bd.* (1983) 34 Cal. 3d 743, 768-769, 195 Cal. Rptr. 651, 670 P.2d 305. For discussion of the variety of entities that can constitute an employer, see 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 37.

(n14)Footnote 15. See *Baugh v. Rogers*, 24 Cal. 2d 200 (1944) 205-207, 148 P.2d 633 (existence of relationship is question of law); *In-Home Supportive Services v. Workers' Comp. Appeals Bd.* (1984) 152 Cal. App. 3d 720, 729, 199 Cal. Rptr. 697 (same); see also *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal. 3d 771, 774, 100 Cal. Rptr. 377, 494 P.2d 1 (determination of employment relationship in workers' compensation law). For discussion of scope of workers' compensation law, see Ch. 20.

(n15)Footnote 16. See *Johnson v. Banducci* (1963) 212 Cal. App. 2d 254, 262, 27 Cal. Rptr. 764 (determination of employment relationship requires consideration of all relevant circumstances); see also *City of Los Angeles v. Vaughn* (1961) 55 Cal. 2d 198, 201, 10 Cal. Rptr. 457, 358 P.2d 913 (employment relationship exists if employer has right to exercise complete control); *Pierson v. Holly Sugar Corp.* (1951) 107 Cal. App. 2d 298, 301, 237 P.2d 28 (presumption of employment relationship). For full discussion, see Ch. 30.

(n16)Footnote 17. See *People v. Palma* (1995) 40 Cal. App. 4th 1559, 1567, 48 Cal. Rptr. 2d 334. See also *Reynolds v. Bement* (2005) 36 Cal. 4th 1075.

(n17)Footnote 18. See, e.g., *Grubb & Ellis Co. v. Spengler* (1983) 143 Cal. App. 3d 890, 895-897, 192 Cal. Rptr. 637 (real estate salesperson is broker's employee for purposes of real estate and tort law, but application of workers' compensation and wage and hour laws depends on salesperson's status as employee or independent contractor, which is question of fact); see also 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual §§ 28.3-28.4 (using factors developed under workers' compensation law to determine status of performing person in most cases); see also discussion in [b], below.

(n18)Footnote 19. See, e.g., *Ali v. L.A. Focus Publication* (October 31, 2003) 2003 Cal. App. LEXIS 1637, 2003 Cal. Daily Op. Service 9513 (discussing factors relevant to determination of independent contractor/employee status); *Grubb & Ellis Co. v. Spengler* (1983) 143 Cal. App. 3d 890, 897-898, 192 Cal. Rptr. 637; *Resnik v. Anderson & Miles* (1980) 109 Cal. App. 3d 569, 572, 167 Cal. Rptr. 340; see also 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual 28.2 (a presumption of employment exists, and the party seeking to avoid liability has the burden of proving independent contractor status).

(n19)Footnote 19.1. *Lab. Code* § 3353.

(n20)Footnote 20. *Resnik v. Anderson & Miles* (1980) 109 Cal. App. 3d 569, 572, 167 Cal. Rptr. 340; see also *Lab. Code* §§ 2700, 2750.5 (applicability of factors relevant to proof that construction contractor is independent contractor); 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 28 (applicability of factors for determining whether performing person is employee or independent contractor).

(n21)Footnote 20.1. *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal. 2d 33, 43-44, 168 P.2d 686.

(n22)Footnote 20.2. *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal. 2d 33, 43-44, 168 P.2d 686, citing Rest.2d Agency § 220. *See also* *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399 (listing factors and stating continuing viability of Rest.2d Agency § 220 in California); *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal. 3d 943, 88 Cal. Rptr. 175, 471 P.2d 975 (listing factors and reiterating that right to control means by which work is accomplished is clearly most significant test of employment relationship and other matters enumerated constitute merely "secondary elements"); *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal. App. 4th 72, 82-87, 89 Cal. Rptr. 3d 34 (trial court, after listing pertinent factors, was permitted to allow jury to apply factors as it saw fit and was not required to frame jury's deliberations in precise fashion preferred by plaintiff).

(n23)Footnote 20.3. *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal. 3d 341, 354, 256 Cal. Rptr. 543, 769 P.2d 399.

(n24)Footnote 20.4. *See* *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal. 3d 943, 946, 952, 88 Cal. Rptr. 175, 471 P.2d 975 (finding substantial evidence to support trial court's conclusion that writers were employees of Lassie Television); *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal. 2d 33, 36, 168 P.2d 686 (affirming trial court's conclusion that California Employment Commission erred in labeling certain miners independent contractors); *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal. 3d 341, 348-349, 256 Cal. Rptr. 543, 769 P.2d 399 (upholding trial court's ruling after court of appeal reversal that Division of Labor Standards Enforcement properly labeled cucumber harvesters employees rather than independent contractors); *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal. App. 4th 1, 4, 11, 64 Cal. Rptr. 3d 327 (upholding trial court's finding that certain delivery personnel were employees as supported by substantial evidence); *Air Couriers Internat. v. Employment Development Dept.* (2007) 150 Cal. App. 4th 923, 937, 59 Cal. Rptr. 3d 37 (upholding trial court's finding that drivers were employees as supported by substantial evidence).

(n25)Footnote 20.5. *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal. App. 4th 72, 78, 82-87, 89 Cal. Rptr. 3d 34.

(n26)Footnote 20.6. *See* *Cristler v. Express Messenger Systems, Inc.* (2009) 171 Cal. App. 4th 72, 79-80, 89 Cal. Rptr. 3d 34 (trial court granted class certification in action by messenger service drivers who alleged they were employees, not independent contractors; named plaintiff failed to carry his burden of demonstrating that trial court abused its discretion in declining to amend class definition to ensure that definition did not needlessly exclude otherwise eligible class members and that class membership was not manipulated by employer).

(n27)Footnote 21. *See* Lab. Code § 2750.5.

(n28)Footnote 22. *See* Lab. Code § 2750.5(a)-(c); *see also* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 28.4 (applying these factors as guidelines to determine status of person performing services for which contractor's license is required).

(n29)Footnote 23. *See* § 1.05[2][b] for definitions of industries covered by wage orders.

(n30)Footnote 24. *See* 8 Cal. Code Reg. §§ 11020, 11070, P 2(E) (Cal. Wage Order Nos. 2-2001, 7-2001) (personal service and mercantile industries), 11050, P 2(F) (Cal. Wage Order 5-2001) (public housekeeping industry); *see also* discussion in [a], *above*.

(n31)Footnote 25. COUNSEL ARE CAUTIONED that the California Supreme Court's decision in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568-578, 59 Cal. Rptr. 2d 186, 927 P.2d 296, voided all written interpretive policies adopted by the DLSE, the agency charged with enforcing IWC wage orders; it is unclear whether the DLSE publication cited here has any continuing utility. *See* § 1.05[3][c] for a discussion of *Tidewater* and the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders.

See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 43.6.7; See also DLSE Opinion Letter 1988.10.27.

(n32)Footnote 26. COUNSEL ARE CAUTIONED that the California Supreme Court's decision in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568-578, 59 Cal. Rptr. 2d 186, 927 P.2d 296, voided all written interpretive policies adopted by the DLSE, the agency charged with enforcing IWC wage orders; it is unclear whether the DLSE publication cited here has any continuing utility. See § 1.05[3][c] for a discussion of *Tidewater* and the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders.

See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 43.6.8; see also DLSE Opinion Letters 1993.10.21, 1993.01.07-1, 1993.09.07.

(n33)Footnote 27. See 5 Cal. Code Reg. § 10071(a).

(n34)Footnote 28. See 5 Cal. Code Reg. § 10071(b).

(n35)Footnote 29. See Lab. Code §§ 1191, 1193; 8 Cal. Code Reg. §§ 11010-11150, P 6 (Cal. Wage Order Nos. 1-2001, 2-2001, 3-2001, 4-2001, 5-2001, 6-2001, 7-2001, 8-2001, 9-2001, 10-2001, 11-2001, 12-2001, 13-2001, 14-2001, 15-2001).

(n36)Footnote 29.1. 2002 DLSE Policies and Interpretations Manual § 46.6.6; DLSE Opinion Letter 1996.12.30.

(n37)Footnote 30. See 8 Cal. Code Reg. § 11050, P 1(A) (student nurses in schools accredited by California Board of Registered Nursing or Board of Vocational Nurse and Psychiatric Technician Examiners, or exempted by Bus. & Prof. Code §§ 2789 or 2884, are not covered by Cal. Wage Order No. 5-2001); but see IWC Statement as to the Basis for the General Minimum Wage Order, MW-2001, P 1 (student nurse exemption from minimum wage order eliminated). See also discussion in ch. 2.

(n38)Footnote 30.1. DLSE Opinion Letter 1998.11.12.

(n39)Footnote 31. See Lab. Code § 1192; 8 Cal. Code Reg. §§ 11010-11150, P 4(A)(1) (Cal. Wage Order Nos. 1-2001-15-2001); see also discussion in ch 2.

(n40)Footnote 32. See Lab. Code § 3070 et seq.

(n41)Footnote 33. See 8 Cal. Code Reg. §§ 11010-11150, P 4(D) (Cal. Wage Order Nos. 1-2001-15-2001).

(n42)Footnote 34. COUNSEL ARE CAUTIONED that the California Supreme Court's decision in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568-578, 59 Cal. Rptr. 2d 186, 927 P.2d 296, voided all written interpretive policies adopted by the DLSE, the agency charged with enforcing IWC wage orders; it is unclear whether the DLSE publication cited here has any continuing utility. See § 1.05[3][c] for a discussion of *Tidewater* and the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders.

See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 43.6.9.

(n43)Footnote 35. See *Alamo Foundation v. Secretary of Labor* (1984) 471 U.S. 290, 105 S. Ct. 1953, 85 L. Ed. 2d 278.

(n44)Footnote 36. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 43.6.9.

(n45)Footnote 37. Civ. Code § 1812.5095(b). See *An Independent Home Support Service, Inc. v. Superior Court* (2006) 145 Cal. App. 4th 1418, 1424-1439, 52 Cal. Rptr. 3d 562 (domestic agency's compliance with Civ. Code § 1812.5095 exempted it from state law requirements of maintaining workers' compensation insurance for domestic

workers it referred to patients).

(n46)Footnote 38. *Civ. Code* § 1812.5095(b)(1).

(n47)Footnote 39. *Civ. Code* § 1812.5095(b)(2)-(9).

(n48)Footnote 40. *Civ. Code* § 1812.5095(b)(2).

(n49)Footnote 41. *Civ. Code* § 1812.5095(b)(3).

(n50)Footnote 42. *Civ. Code* § 1812.5095(b)(4).

(n51)Footnote 43. *Civ. Code* § 1812.5095(b)(6).

(n52)Footnote 44. *Civ. Code* § 1812.5095(b)(7).

(n53)Footnote 45. *Civ. Code* § 1812.5095(b)(8).

(n54)Footnote 46. *Civ. Code* § 1812.5095(b)(9).

(n55)Footnote 47. *Civ. Code* § 1812.5095(b)(5).

(n56)Footnote 48. *Civ. Code* § 1812.5095(b)(5).

(n57)Footnote 49. *See* 29 U.S.C. §§ 206(a) and Pub. Law 104-188 (every employer must pay to each employee specified minimum wage), 207(a) (no employer may employ any employee for longer than specified maximum hours without paying overtime compensation); *see also* *Tony & Susan Alamo Foundation v. Sec. of Labor* (1985) 471 U.S. 290, 295, 105 S. Ct. 1953, 85 L. Ed. 2d 278; *Walling v. Portland Terminal Co.* (1947) 330 U.S. 148, 152, 67 S. Ct. 639, 91 L. Ed. 809.

(n58)Footnote 50. *See* *Walling v. Portland Terminal Co.* (1947) 330 U.S. 148, 152-153, 67 S. Ct. 639, 91 L. Ed. 809 (unpaid brakemen trainees in railroad yard are not employees). *See also* *Morgan v. MacDonald* (9th Cir 1994) 41 F.3d 1291, 1292-1293 (prisoner working for prison-run program, who was statutorily required to work as a term of confinement, not an employee).

(n59)Footnote 51. 29 U.S.C. § 203(d).

(n60)Footnote 51.1. *Donovan v. Agnew* (1st Cir. 1983) 712 F.2d 1509, 1514; *Dole v. Elliott Travel & Tours, Inc.* (6th Cir. 1991) 942 F.2d 962; *Reich v. Circle C. Investments, Inc.* (5th Cir. 1993) 998 F.2d 324 (consultant with no ownership interest who exercised measure of control over work situation was employer). *see* DLSE Opinion Letter 2002.06.18.

(n61)Footnote 52. 29 U.S.C. § 203(e)(1).

(n62)Footnote 53. *See* 29 U.S.C. § 203(d), (e)(2), (x).

(n63)Footnote 54. 29 U.S.C. § 203(g).

(n64)Footnote 54.1. (2005) 126 S. Ct. 514.

(n65)Footnote 54.2. (1944) 321 U.S. 590.

(n66)Footnote 55. *Steinbach v. Hubbard* (9th Cir. 1995) 51 F.3d 843, 845 (but finding no FLSA liability based on facts of particular case).

(n67)Footnote 56. See *United States v. Rosenwasser* (1945) 323 U.S. 360, 362-363, 65 S. Ct. 295, 89 L. Ed. 301 .

(n68)Footnote 57. See 29 U.S.C. §§ 213, 214; see also discussion in Chs. 2, 3, and 6.

(n69)Footnote 58. *Walling v. Portland Terminal Co.* (1947) 330 U.S. 148, 151, 67 S. Ct. 639, 91 L. Ed. 809 ; see 29 U.S.C. § 214(a).

(n70)Footnote 59. See 29 U.S.C. § 213(a).

(n71)Footnote 60. *Walling v. Portland Terminal Co.* (1947) 330 U.S. 148, 151, 67 S. Ct. 639, 91 L. Ed. 809 .

(n72)Footnote 61. See 29 U.S.C. § 214(b).

(n73)Footnote 62. See 29 U.S.C. § 214(d).

(n74)Footnote 63. See 29 U.S.C. § 214(c).

(n75)Footnote 64. See *Real v. Driscoll Strawberry Associates, Inc.* (9th Cir. 1979) 603 F.2d 748, 754 .

(n76)Footnote 65. See *Walling v. Portland Terminal Co.* (1947) 330 U.S. 148, 151, 67 S. Ct. 639, 91 L. Ed. 809 (individuals training to be brakemen in railroad yard not employees, even though working in activities covered by FLSA); see also *Williams v. Jacksonville Terminal Co.* (1941) 315 U.S. 386, 398, 62 S. Ct. 659, 86 L. Ed. 914 (dictum; volunteers are not employees); *Williams v. Strickland* (9th Cir. 1996) 87 F.3d 1064, 1068 (participant in work therapy program of Salvation Army was not an employee for minimum wage purposes); but see *Tony & Susan Alamo Foundation v. Sec. of Labor* (1985) 471 U.S. 290, 301, 105 S. Ct. 1953, 85 L. Ed. 2d 278 (rehabilitated drug addicts and criminals working in religious foundation's commercial activities and receiving food, shelter, and clothing are employees for purposes of FLSA).

(n77)Footnote 66. See *Rutherford Food Corp. v. McComb* (1946) 331 U.S. 722, 729, 67 S. Ct. 1473, 91 L. Ed. 1772 ; see also *Real v. Driscoll Strawberry Associates, Inc.* (9th Cir. 1979) 603 F.2d 748, 754 (employees distinguished from independent contractors for FLSA purposes).

(n78)Footnote 67. See *Real v. Driscoll Strawberry Associates, Inc.* (9th Cir. 1979) 603 F.2d 748, 754 .

(n79)Footnote 68. See 29 U.S.C. § 203(e)(4)(A).



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 1 Overview of Wage and Hour Laws
Part A. TEXT

1-1 California Employment Law § 1.04A

AUTHOR: By Carol S. Sanders, J.D.

§ 1.04A Public Employers and Employees

Unless Labor Code provisions are specifically made applicable to public employers, they apply only to employers in the private sector. Thus, for example, *Labor Code* §§ 510ⁿ¹ and 512ⁿ² do not expressly apply to public entities, and therefore did not apply to a public water storage district.ⁿ³ *Labor Code* §§ 201, 202, and 220(b), requiring an employer to immediately pay wages to an employee upon that employee's termination, layoff or resignation,ⁿ⁴ and *Labor Code* § 203, which imposes penalties against an employer who willfully fails to pay those wages in accordance with §§ 201 and 202, do not apply to employees directly employed by any county, incorporated city, or town or other municipal corporation.ⁿ⁵

The majority of the wage orders expressly exempt public employees. Although Wage Order No. 17, which applies to any industry or occupation not previously covered by, and all employees not specifically exempted in, the wage orders in effect in 1997, or otherwise exempted by law,ⁿ⁶ does not expressly exempt public employees, it does not alter the public employee exemptions in the prior wage orders.ⁿ⁷

FOOTNOTES:

(n1)Footnote 1. For discussion of *Labor Code* § 510 and overtime compensation generally, see Ch. 3.

(n2)Footnote 2. For discussion of *Labor Code* § 512 and meal periods generally, see § 3.23.

(n3)Footnote 3. *Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal. App. 4th 729, 734-739, 95 Cal. Rptr. 3d 53 (water storage district was exempt from *Labor Code* §§ 510, 512, where legislature did not intend *Labor Code* §§ 510, 512 to apply to public agencies, and application of §§ 510, 512 would infringe on district's sovereign powers).

(n4)Footnote 4. See § 4.01[2].

(n5)Footnote 5. *Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal. App. 4th 729, 740-741, 95 Cal. Rptr. 3d 53 (water storage district was exempt from requirements of *Labor Code* §§ 201, 202, 203 as municipal

corporation).

(n6)Footnote 6. *8 Cal. Code Reg. § 11170.*

(n7)Footnote 7. *See Johnson v. Arvin-Edison Water Storage Dist. (2009) 174 Cal. App. 4th 729, 739-740, 95 Cal. Rptr. 3d 53* . For discussion of the wage orders generally, *see § 1.05[2], below.*



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 1 Overview of Wage and Hour Laws
Part A. TEXT

1-1 California Employment Law § 1.05

AUTHOR: By Carol S. Sanders, J.D.

§ 1.05 State Law Governing Wages and Hours

[1] Labor Code

[a] Overview of Provisions Affecting Wage and Hour Law

Wages, hours, and working conditions are generally governed by *Labor Code sections 1171-1205*. These provisions apply to adults and minors employed in any occupation, trade, or industry, whether compensation is measured by time, piece, or otherwise, but do not include any individual employed as an outside salesman.ⁿ¹ Among other things, this part of the Labor Code includes provisions that establish procedures for promulgation, review, and interpretation of wage orders;ⁿ² exempt certain industries and employees from various provisions of the wage orders;ⁿ³ authorize alternative workweek arrangements for certain employees;ⁿ⁴ authorize the IWC to establish special subminimum wages for certain types of employees;ⁿ⁵ and set forth various administrative and judicial remedies for violation of the wage and hour laws.ⁿ⁶ This section of the Labor Code also contains the Equal Pay Act,ⁿ⁷ discussed under [b], *below*. The provisions of the Labor Code governing wages, hours, and working conditions may not be deemed to restrict the exercise of local police powers in a more stringent manner.ⁿ⁸

Powers and duties of the Department of Industrial Relations and its subsidiary agencies, including the IWC and the Division of Labor Standards Enforcement (DLSE), are governed by *Labor Code sections 50 et seq.* For discussion of agency enforcement of state wage and hour law, *see* [3], *below*.

Payment of wages is governed by *Labor Code sections 200-272*. Rules governing assignment of wages are set forth in *Labor Code section 300*. Rules relating to employee gratuities are set forth in *Labor Code sections 350-356*. Prohibitions against coercing an employee to patronize his or her employer are set forth in *Labor Code sections 450-452*. Miscellaneous provisions relating to payment of wages on termination of employment and deductions from wages for tardiness are also set forth in *Labor Code sections 2926-2928*. For discussion of these topics, *see* Chapter 4.

The Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999,ⁿ⁹ governing overtime compensation and workweek schedules, is discussed in § 3.04[1][a]. Also, *Labor Code sections 510-856* contain restrictions on working

hours of some employees, which are discussed in Chapter 3, Part B.

Restrictions on the employment of minors are set forth in *Labor Code sections 1285-1399*. For a discussion of child labor laws, *see* Chapter 6.

Wage and hour provisions applicable to employees on public works are governed by *Labor Code sections 1720-1815*, as further discussed in [c], *below*.

[b] Equal Pay Act

Labor Code section 1197.5, popularly known as the California Equal Pay Act, prohibits any employer from paying any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.ⁿ¹⁰ An exception exists if the payment is made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.ⁿ¹¹ An employer who fails to comply with the equal pay requirements is liable to the affected employee in the amount of the wages, interest and in an additional equal amount as liquidated damages.ⁿ¹²

The provisions of the Equal Pay Act are administered and enforced by the DLSE.ⁿ¹³ Federal law provides similar restrictions regarding wage discrimination on the basis of sex.ⁿ¹⁴

For a full discussion of the state and federal equal pay statutes and related employment discrimination laws, *see* Chapters 40-43.

[c] Public Works

Special provisions govern the payment of wages to workers employed by a contractor for a public works project of more than \$1,000.ⁿ¹⁵ These workers must be paid not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work.ⁿ¹⁶ The prevailing rate is determined by the Director of Industrial Relations pursuant to procedures and standards set forth in the Labor Code.ⁿ¹⁷

The federal Immigration Reform and Control Act of 1986 (the IRCA)^{n17.1} does not prevent undocumented workers from suing under the provisions governing the payment of wages to workers employed by a contractor for a public works project, so long as there is no issue of whether the employee submitted false documents showing that the employee was authorized to work in the United States.^{n17.2} The U.S. Supreme Court had held in *Hoffman Plastic Compounds, Inc. v. NLRB* ^{n17.3} that allowing the National Labor Relations Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy as expressed in IRCA, encourage the successful evasion of immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However, the Court also held that undocumented workers had standing to file claims and were considered "employees" under the National Labor Relations Act,^{n17.4} and other courts have agreed that the IRCA did not foreclose all remedies for undocumented workers under FLSA, NLRA or other federal labor statutes.^{n17.5} The Court of Appeal was persuaded that IRCA did not prohibit undocumented workers from having standing to raise claims for prevailing wages on public works projects, as those claims were also for work already performed.^{n17.6} The court also found that the federal constitutional *Supremacy Clause* does not preempt California statutes declaring immigration status irrelevant to claims under California's labor, employment, civil rights and employee housing laws.^{n17.7}

For a discussion of the payment of minimum wage to public works employees, *see* Chapter 2.

[2] Industrial Welfare Commission Wage Orders

[a] Generally

The California wage orders, which are promulgated by the IWC pursuant to statutory mandate,ⁿ¹⁸ are administrative regulations that set forth requirements for minimum wages, overtime compensation, and working conditions in various industries and occupations in the state of California. They are codified in Title 8 of the California Code of Regulationsⁿ¹⁹ and generally provide greater protection to employer than does the FLSA.^{n19.1}

The IWC has promulgated eighteen wage orders. Twelve of the wage orders are "industry" orders, each of which applies to persons employed in the industry specified in the particular order.ⁿ²⁰ Four of the orders are "occupation" orders that apply to persons employed in specified types of occupations.ⁿ²¹ One order applies to any industry or occupation not previously covered by, and all employees not specifically exempted in, the Commission's wage orders in effect in 1997, or otherwise exempted by law.ⁿ²² One order is a general minimum wage order applicable to all California employers.ⁿ²³

■ CONSULTANT'S COMMENT:

Proper identification of the wage order that applies to a particular employer or employee is important, because the provisions of the various wage orders differ in many respects, including, for example, overtime compensation requirements.ⁿ²⁴ To determine which IWC wage order applies to an employee or group of employees, it is necessary first to determine whether the *employer's business* is covered by one of the *industry orders*. If it is, the industry order applies to all classifications of employees, regardless of the kind of work they do, unless they are specifically exempted by the applicability section of that order.ⁿ²⁵ For example, a clerical worker employed by a toy manufacturer is covered by Wage Order No. 1-2001, regulating the manufacturing industry,ⁿ²⁶ rather than by Wage Order No. 4-2001, which includes clerical occupations.ⁿ²⁷ A driver who delivers supplies for a chain of beauty shops is covered by Wage Order No. 2-2001, governing the personal service industry.ⁿ²⁸ A mechanic who works for a retail chain is covered by Wage Order No. 7-2001,ⁿ²⁹ governing the mercantile industry, rather than by Wage Order No. 4-2001, which includes mechanical occupations.ⁿ³⁰

If the *employer's business* is not covered by an *industry order* because it does not fall within a definition of one of the 12 covered industries, the *employee's occupation* must be examined to see which, if any, of the *occupation orders* applies. For example, an industrial nurse employed by a manufacturer would be covered under industrial Wage Order No. 1-98, governing the manufacturing industry.ⁿ³¹ A nurse employed by a hospital would be covered by industrial Wage Order No. 5-2001, governing the public housekeeping industry.ⁿ³² A nurse employed by a clinic that did not provide overnight beds or meals would not be covered under Wage Order No. 5-2001 or any other industry wage order. He or she would be covered under Wage Order No. 4-2001, governing the professional, technical, clerical, mechanical, and similar occupations.ⁿ³³

Until it promulgated Interim Wage Order-2000,ⁿ³⁴ effective October 1, 2000, those engaged in on-site construction activities, on-site logging, or on-site drilling and mining activities were covered only by the general minimum wage order.ⁿ³⁵ Employees engaged in those occupations are now covered by Wage Order 16-2001. *Commentary by Kirby Wilcox.*

The majority of the wage orders expressly exempt public employees. Although Wage Order No. 17, which applies to any industry or occupation not previously covered by, and all employees not specifically exempted in, the wage orders in effect in 1997, or otherwise exempted by law,ⁿ³⁶ does not expressly exempt public employees, it does not alter the public employee exemptions in the prior wage orders.ⁿ³⁷

[b] Industry Wage Orders

[i] Listing of Industries Covered

The 12 specific industries covered under the wage orders are the following:

1. Amusement and Recreation (Wage Order No. 10-2001);n38-42n43
2. Broadcasting (Wage Order No. 11-2001);n44
3. Canning, Freezing, and Preserving (Wage Order No. 3-2001);n45
4. Handling Products After Harvest (Wage Order No. 8-2001);n46
5. Laundry, Linen Supply, Dry Cleaning, and Dyeing (Wage Order No. 6-2001);n47
6. Manufacturing (Wage Order No. 1-2001);n48
7. Mercantile (Wage Order No. 7-2001);n49
8. Motion Picture (Wage Order No. 12-2001);n50
9. Personal Service (Wage Order No. 2-2001);n51
10. Preparing Agricultural Products on the Farm for Market (Wage Order No. 13-2001);n52
11. Public Housekeeping (Wage Order No. 5-2001);n53 and
12. Transportation (Wage Order No. 9-2001).n54

The definitions of each industry and examples of businesses covered by the definitions are discussed in [ii] through [xiii], *below*.

■ CONSULTANT'S COMMENT:

Under DLSE guidelines, an industry, business, or establishment generally is classified according to the *main purpose* of the business, except in the case of the public housekeeping industry classification, which may encompass a business that has only incidental housekeeping activities if it is not otherwise covered by a different industry order.n55 Most large businesses conduct a variety of operations, but if those operations further a common business purpose under common general control, they are treated as one business. For example, if a manufacturer with a production plant in California also has a separate warehouse and a fleet of trucks and separate sales offices to handle distribution of its products, all of the different entities are treated as part of one business under Wage Order No. 1-2001, regulating the manufacturing industry.n56

If a single business has several different types of operations, the DLSE will classify the business by making a broad assessment and determine the principal purpose of the business on the basis of simple observation and common sense. For instance, a car wash establishment that has one or two gas pumps and a few items for sale would be covered under Wage Order No. 9-2001, which governs the transportation industry and expressly includes businesses that maintain or clean vehicles.n57 In contrast, an establishment that has several rows of pumps and includes car wash facilities for the convenience of the customers, or as part of a bargain available if the customer "fills up," is primarily in the business of selling gas and would be covered under Wage Order No. 7-2001, governing the mercantile industry.n58

If, however, a multipurpose company has distinctly separate units operating for distinctly different business purposes, and the operational management is separately organized at all levels, each of the distinct operating units may be covered by a different wage order. For example, if a large retail department store chain also owns an insurance company and a savings and loan company, which are operated separately as separate corporate entities, the three operations likely will be separately classified.
Commentary by Kirby Wilcox.

[ii] Manufacturing Industry Defined

"Manufacturing industry," as used in Wage Order No. 1-98, means any industry, business, or establishment operated for the purpose of preparing, producing, making, altering, repairing, finishing, processing, inspecting, handling, assembling, wrapping, bottling, or packaging goods, articles, or commodities, in whole or in part.ⁿ⁵⁹ However, Wage Order No. 1-2001 does not apply to businesses engaged in such activities if they are covered by one of the following orders:ⁿ⁶⁰

1. Wage Order No. 3-2001, governing the canning, preserving, and freezing industry;ⁿ⁶¹
2. Wage Order No. 8-2001, governing industries handling products after harvest;ⁿ⁶²
3. Wage Order No. 13-2001, governing industries preparing agricultural products on the farm for market;ⁿ⁶³ or
4. Wage Order No. 12-2001, governing the motion picture industry.ⁿ⁶⁴

Examples of operations covered under the manufacturing industry wage order include aircraft and aircraft parts manufacturers; automobile manufacturers; any form of assembly plant; automobile wrecking; blueprinting; ceramics; dental laboratories; electronic products; film developing and processing; lumber products; metal products; machinery; needle trades; oil refining; paper products; photostating services; plastic products; printing; repackaging of bulk products; reweaving; rubber manufacturing; sheet metal shops; shipbuilding (other than repair); shoe manufacturing and repair; and taxidermy.ⁿ⁶⁵ The order also applies to certain food processing operations that are not covered by Wage Order No. 3-2001 (governing canning, freezing, and preserving industries), such as nonretail bakers, breweries, candy manufacturers, cotton seed oil manufacturers, potato and corn chip manufacturers, dehydrated soup manufacturers, and tortilla and pizza manufacturers.ⁿ⁶⁶

[iii] Personal Service Industry Defined

"Personal service industry," as used in Wage Order No. 2-2001, means any industry, business, or establishment operated for the purpose of rendering, directly or indirectly, any service, operation, or process used or useful in the care, cleansing, or beautification of the body, skin, nails, or hair, or in the enhancement of personal appearance or health, including but not limited to beauty salons, schools of beauty culture offering beauty care to the public for a fee, barber shops, bath and massage parlors, physical conditioning services or facilities, weight control salons, health clubs, and mortuaries.ⁿ⁶⁷ Suntanning parlors are also within the scope of this wage order.ⁿ⁶⁸

[iv] Canning, Freezing, and Preserving Industry Defined

"Canning, freezing, and preserving industry," as used in Wage Order No. 3-2001, means any industry, business, or establishment operated for the purpose of canning soups, or of cooking, canning, curing, freezing, pickling, salting, bottling, preserving, or otherwise processing any fruits or vegetables, seafood, meat, poultry, or rabbit product, when the purpose of processing is the preservation of the product; all operations incidental to that preservation are included.ⁿ⁶⁹ Businesses covered by this wage order include manufacturers of fruit jellies and preserves, fruit juice

concentrates, and T.V. dinners.n70

[v] Public Housekeeping Industry Defined

Wage Order No. 5-2001, governing the "public housekeeping industry," applies to any industry, business, or establishment that provides meals, housing, or maintenance services whether operated as a primary business or when incidental to other operations in an establishment not covered by another industry wage order.n71 Establishments covered under the public housekeeping industry wage order include, but are not limited to, the following:n72

1. Restaurants, nightclubs, taverns, bars, cocktail lounges, lunch counters, cafeterias, boarding houses, clubs, and all similar establishments where food in either solid or liquid form is prepared and served to be consumed on the premises;
2. Catering, banquet, box lunch service, and similar establishments that prepare food for consumption on or off the premises;
3. Hotels, motels, apartment houses, rooming houses, camps, clubs, trailer parks, office or loft buildings, and similar establishments offering rental of living, business, or commercial quarters;
4. Hospitals, sanitariums, rest homes, child nurseries, child care institutions, homes for the aged, and similar establishments offering board or lodging in addition to medical, surgical, nursing, convalescent, aged, or child care;
5. Private schools, colleges, or universities, and similar establishments that provide board or lodging in addition to educational facilities;
6. Establishments contracting for development, maintenance, or cleaning of grounds; or maintenance or cleaning of facilities and/or quarters of commercial units and living units; and
7. Establishments providing veterinary or other animal care services.

Other examples of establishments covered under Wage Order No. 5-2001 include fraternity and sorority houses, golf or other athletic clubs operating public eating facilities, landscaping firms, mini-storage establishments that are not connected with a transportation firm, organized camps, resorts, and pest control companies.n73

[vi] Laundry, Linen Supply, Dry Cleaning, and Dyeing Industry Defined

"Laundry, linen supply, dry cleaning, and dyeing industry," as used in Wage Order No. 6-2001, means any industry, business, or establishment operated for the purpose of washing, ironing, cleaning, refreshing, restoring, pressing, dyeing, storing, fumigating, mothproofing, waterproofing, or other processes incidental to these purposes, on articles or fabrics of any kind, including but not limited to clothing, hats, drapery, rugs, curtains, linens, household furnishings, textiles, furs, or leather goods.n74 The term includes self-service laundries and dry cleaning establishments, and "the collection, distribution, storage, sale or resale at retail or wholesale of the foregoing services."n75

[vii] Mercantile Industry Defined

Wage Order No. 7-2001 governs the "mercantile industry," which is defined as any industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail, or for the purpose of renting goods or commodities.n76 Establishments covered under the mercantile industry wage order include all retail stores, auctioneers, commodity agents and brokers, wholesale and retail florists, gas stations with car washes,

import-export businesses, mail order houses, businesses that rent equipment or other goods, telephone soliciting businesses, trading stamp redemption stores, and wholesale houses.ⁿ⁷⁷

■ **CONSULTANT'S COMMENT:**

A retail store operated incidentally as part of another business (such as a hotel, hospital, or theater), is covered by the industry order applicable to the main business, rather than by Wage Order No. 7-2001. However, a separate establishment under a distinctly different organization (for example, a telephone equipment store operated by the sales division of a telephone company) may be covered by Wage Order No. 7-2001, depending on the specific facts.ⁿ⁷⁸ *Commentary by Kirby Wilcox.*

[viii] Industries Handling Products After Harvest Defined

Wage Order No. 8-2001, governing "industries handling products after harvest," applies to any industry, business, or establishment operated for the purpose of grading, sorting, cleaning, drying, cooling, icing, packing, dehydrating, cracking, shelling, candling, separating, slaughtering, picking, plucking, shucking, pasteurizing, fermenting, ripening, molding, or otherwise preparing any agricultural, horticultural, egg, poultry, meat, seafood, rabbit, or dairy product for distribution, including all the operations incidental to these activities.ⁿ⁷⁹

Examples of operations covered under the wage order for industries handling products after harvest include beet sugar mills,ⁿ⁸⁰ cotton gins, dairies, fresh fruit and vegetable packing companies, dried fruit processing, commercial fish hatcheries, ice creameries that use whole milk, and wineries.ⁿ⁸¹

For a discussion of distinctions between operations falling under Wage Order No. 8-2001 and those falling under Wage Order No. 13-2001, governing industries preparing agricultural products on the farm for market, *see* [xiii], *below*. For a discussion of distinctions between operations falling under Wage Order No. 8-2001 and those falling under Wage Order No. 14-2001, governing the agricultural occupations, *see* [c][iii], *below*.

[ix] Transportation Industry Defined

"Transportation industry," as used in Wage Order No. 9-2001, means any industry, business, or establishment operated for the purpose of conveying persons or property from one place to another whether by rail, highway, air, or water, and all operations and services in connection with that purpose, and also includes storing or warehousing of goods or property, and the repairing, parking, rental, maintenance, or cleaning of vehicles.ⁿ⁸²

Examples of businesses covered under the transportation industry wage order include airlines and railroads, ambulance services, armored car services, bus lines (privately owned), car washes, car and truck rental companies, ferry boats, garages and parking lots, garbage collection services, moving and storage companies, taxi services, and vehicle repair shops.ⁿ⁸³

■ **CONSULTANT'S COMMENT:**

Many types of businesses employ individuals to operate and maintain vehicles and warehouses; however, Wage Order No. 9-2001 applies only to businesses which have such operations as their *main purpose*. For example, a hotel employee who drives a courtesy van is covered by Wage Order No. 5-2001, governing the public housekeeping industry, rather than Wage Order No. 9-2001. In addition, a farm employee who delivers farm products to their first point of distribution would be covered by Wage Order No. 14-2001, governing agricultural occupations, rather than Wage Order No. 9-2001. And mechanics employed by an automobile dealership (as opposed to a repair shop having no connection with a dealership) are covered by Wage Order No. 7-2001, governing the mercantile industry, rather than Wage Order No. 9-2001.ⁿ⁸⁴ By contrast, a trucking company that ships mostly farm products is nevertheless primarily in the trucking business and would be covered by Wage Order No. 9-98. Classification depends on the primary purpose of the business.ⁿ⁸⁵ *Commentary by Kirby Wilcox.*

[x] Amusement and Recreation Industry Defined

"Amusement and recreation industry," as used in Wage Order No. 10-2001, means any industry, business, or establishment operated for the purpose of furnishing entertainment or recreation to the public, including but not limited to theaters, dance halls, bowling alleys, billiard parlors, skating rinks, riding academies, race tracks, amusement parks, athletic fields, swimming pools, gymnasiums, golf courses, tennis courts, carnivals, and wired music studios.ⁿ⁸⁶ Although the employment of stable employees, including those working at amusement sites such as race tracks and riding academies, was previously governed by the wage order governing agricultural occupations,ⁿ⁸⁷ Wage Order No. 10-2001 now expressly applies to all employees employed by any employer operating a business at a horse racing facility, including stable employees. Stable employees include, but are not limited to grooms, hot walkers, exercise workers, and any other employees engaged in the raising, feeding, or management of racehorses, employed by a trainer at a racetrack or other non-farm training facility.ⁿ⁸⁸

■ CONSULTANT'S COMMENT:

The gymnasiums referred to in the definitional section of Wage Order No. 10-2001 are those used primarily for spectator or participatory sports and should be distinguished from establishments offering bodybuilding or weight control facilities, which are covered by Wage Order No. 2-2001 (governing personal services industry).ⁿ⁸⁹ Moreover, according to the DLSE, food service provided incidentally by a firm whose main business is offering entertainment, such as a theatre, bowling alley, or nightclub, does not affect its classification under Wage Order No. 10-2001. However, a golf club that has a public dining room is deemed to be operating a restaurant, and all employees of the club are covered by Wage Order No. 5-2001 (governing the public housekeeping industry). *Commentary by Kirby Wilcox.*

[xi] Broadcasting Industry Defined

Wage Order No. 11-2001, which governs the "broadcasting industry," applies to any industry, business, or establishment operated for the purpose of broadcasting or taping and broadcasting programs through the medium of radio or television.ⁿ⁹⁰

■ CONSULTANT'S COMMENT:

According to the DLSE, the production of motion pictures on videotape for a purpose other than broadcasting is covered by Wage Order No. 12-2001 (governing the motion picture industry). If a company both tapes and broadcasts, such as when a television station tapes and broadcasts a news program, the taping operations are covered by Wage Order No. 11-2001. However, if a broadcaster contracts with another firm for the production of a videotape, the firm making the tape is covered by Wage Order No. 12-2001. If the main business of a company is to reproduce (that is, manufacture) tapes for wholesale or retail trade, Wage Order No. 1-2001 (governing the manufacturing industry) applies. If video production is incidental to an employer's main business (for example, a function performed by a promotion department of an industrial or financial corporation), the order covering the main business applies. Finally, the DLSE considers cable television companies to be operated for the purpose of providing a communications service. Cable television employees, therefore, are not covered by Wage Order No. 11-2001, but instead by Wage Order No. 4-2001 (governing professional, technical, clerical, mechanical, and similar occupations). *Commentary by Kirby Wilcox.*

[xii] Motion Picture Industry Defined

Wage Order No. 12-2001, which governs the "motion picture industry," applies to any industry, business, or establishment operated for the purpose of motion picture or television film production, or primarily allied with theatrical or television motion picture productions, including but not limited to motion pictures for entertainment, commercial, religious, or educational purposes, whether made by film, tape, or otherwise.ⁿ⁹¹

[xiii] Industries Preparing Agricultural Products on the Farm for Market Defined

Wage Order No. 13-2001, governing "industries preparing agricultural products for market, on the farm," applies to any operation performed in a permanently fixed structure or establishment on the farm or on a moving packing plant on the farm for the purpose of preparing agricultural, horticultural, egg, poultry, meat, seafood, rabbit, or dairy products for market when these operations are done on the premises owned or operated by the same employer who produced the products referred to and includes all operations incidental thereto.ⁿ⁹²

Certain food processing operations such as slaughtering or poultry processing that are ordinarily covered under Wage Order No. 8-2001 (governing industries handling farm products after harvest)ⁿ⁹³ will be covered under Wage Order No. 13-2001 if the operation is carried out on the employer's own crop or animal product, or, in the case of egg processing, if handling is involved.ⁿ⁹⁴ Note, however, that if the grower processes crops or animal products for *other growers*, in addition to his or her own, the packing or processing operation is covered by Wage Order No. 8-2001.

For a discussion of distinctions between operations falling under Wage Order No. 13-80 and Wage Order No. 14-2001 (governing the agricultural occupations), *see* [c][iii], *below*.

[c] Occupation Wage Orders

[i] Listing of Occupations Covered

The four occupation wage orders are the following:

1. Professional, Technical, Clerical, Mechanical, and Similar Occupations (Wage Order No. 4-2001);ⁿ⁹⁵
2. Agricultural Occupations (Wage Order No. 14-2001);ⁿ⁹⁶
3. Household Occupations (Wage Order No. 15-2001);ⁿ⁹⁷
4. On-Site Occupations in the Construction, Drilling, Logging and Mining Industries (Wage Order No. 16-2001).ⁿ⁹⁸

The definitions of these occupations and illustrations of each are set forth in [ii] through [v], *below*. As noted in [a], *above*, these orders apply only if the employer's business is not covered by one of the 12 industry wage orders.

[ii] Professional, Technical, Clerical, Mechanical, and Similar Occupations Defined

Wage Order No. 4-2001 covers the "professional, technical, clerical, mechanical, and similar occupations," which includes professional, semiprofessional, managerial, supervisorial, laboratory, research, technical, clerical, office work, and mechanical occupations.ⁿ⁹⁹

Examples of the wide variety of employees covered under Wage Order No. 4-2001 include the following:ⁿ¹⁰⁰

1. Accountants and bookkeepers;
2. Agents;
3. Appraisers;
4. Artists;

5. Attendants;
6. Audio-visual, communications, and sound technicians;
7. Bundlers;
8. Billposters and canvassers;
9. Carriers;
10. Cashiers, checkers, and clerks;
11. Collectors;
12. Compilers;
13. Copy holders, readers, and writers, and proof readers;
14. Computer programmers and operators;
15. Demonstrators and display representatives;
16. Dispatchers;
17. Distributors;
18. Doorkeepers;
19. Drafters;
20. Editors;
21. Elevator operators;
22. Estimators;
23. Graphic arts technicians;
24. Guards;
25. Guides and hosts;
26. Inspectors;
27. Installers;
28. Instructors and teachers;
29. Interviewers;

- 30. Investigators;
- 31. Librarians;
- 32. Laboratory workers;
- 33. Machine operators;
- 34. Mechanics;
- 35. Mailers;
- 36. Messengers;
- 37. Medical and dental technicians and technologists, including X-ray technicians;
- 38. Models;
- 39. Nurses;
- 40. Packagers;
- 41. Photographers;
- 42. Porters and cleaners;
- 43. Process servers;
- 44. Printers;
- 45. Proof Readers;
- 46. Salespersons, sales agents, and solicitors, including ticket agents;
- 47. Secretaries and typists;
- 48. Sign erectors and painters;
- 49. Social workers;
- 50. Statisticians;
- 51. Stenographers;
- 52. Telephone, radio-telephone, telegraph, and call-out operators;
- 53. Tellers;
- 54. Ticket agents;

55. Tracers;

56. Vehicle operators.

Also covered under Wage Order No. 4-2001 are assistants to the above employees and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations.ⁿ¹⁰¹

■ CONSULTANT'S COMMENT:

Most employees who are not covered by industry orders are engaged in listed or related occupations covered by Wage Order No. 4-2001. Several major kinds of business that are not covered by any of the industry wage orders, but which generally employ the classes of occupations covered by Wage Order No. 4-2001, are accounting firms, advertising agencies, banks, cemeteries, contractors, employment agencies, insurance companies, loan companies, investment firms, medical clinics other than hospitals, newspaper publishers, professional offices (such as for architects, attorneys, dentists, engineers, and physicians), public utilities, real estate offices, research and development firms, private schools or colleges not offering boarding, security guard services, telephone answering services, telephone and telegraph companies, and travel agencies.ⁿ¹⁰² *Commentary by Kirby Wilcox.*

[iii] Agricultural Occupations Defined

Wage Order No. 14-2001 applies to all nonexempt persons employed in an agricultural occupation,ⁿ¹⁰³ except to employees covered by Wage Order No. 8-2001(handling products after harvest) or Wage Order No. 13-2001 (preparing agricultural products on the farm for market).ⁿ¹⁰⁴

"Employed in an agricultural occupation" means any of the following described occupations:ⁿ¹⁰⁵

1. The preparation, care, and treatment of farmland, pipeline, or ditches, including leveling for agricultural purposes, plowing, discing, and fertilizing the soil;
2. The sowing and planting of any agricultural or horticultural commodity;
3. The care of any agricultural or horticultural commodity, including, but not limited to, cultivation, irrigation, weed control, thinning, heating, pruning, tying, fumigating, spraying, and dusting;
4. The harvesting of any agricultural or horticultural commodity, including, but not limited to, picking cutting, threshing, mowing, knocking off, field chopping, bunching, baling, balling, field packing, and placing in field containers or in the vehicle in which the commodity will be hauled, and transportation on the farm or to the place of first processing or distribution;
5. The assembly and storage of any agricultural or horticultural commodity, including, but not limited to, loading, road siding, banking, stacking, binning, and piling.
6. The raising, feeding, and management of livestock, fur-bearing animals, poultry, fish, mollusks, and insects, including, but not limited to, herding, housing, hatching, milking, shearing, handling eggs, and extracting honey.
7. The harvesting of fish, as defined by *Section 45 of the Fish and Game Code*, for commercial sale.ⁿ¹⁰⁶
8. The conservation, improvement, or maintenance of a farm and its tools and equipment.

Other examples of activities covered under Wage Order No. 14-2001 include dairy farms where no processing except cooling is performed, trout farms, and oyster farms.ⁿ¹⁰⁷

Clerical workers employed by an agricultural company are not considered to be engaged in an agricultural occupation. Therefore, they are governed by Wage Order 4-2001,ⁿ¹⁰⁸ which applies to clerical occupations.ⁿ¹⁰⁹

[iv] Household Occupations Defined

"Household occupations," as used in Wage Order No. 15-2001, means all services related to the care of persons or maintenance of a private household or its premises by an employee of a private householder. These occupations include, but are not limited to, butlers, chauffeurs, companions, cooks, day workers, gardeners, graduate nurses, grooms, housecleaners, housekeepers, maids, practical nurses, tutors, valets, and other similar occupations.ⁿ¹¹⁰

Previously, personal attendants were expressly excluded from coverage under Wage Order No. 15.ⁿ¹¹¹ Under Wage Order 15-2001, the employment of personal attendantsⁿ¹¹² is governed under some, but not all, of the provisions Wage Order No. 15-2001.ⁿ¹¹³

■ CONSULTANT'S COMMENT:

A secretary who works for a private householder rather than for a business is covered under Wage Order No. 15-2001, governing household occupations, rather than under Wage Order No. 4-2001, governing clerical occupations. *Commentary by Kirby Wilcox.*

[v] Construction, Drilling, Logging, Mining

"Construction occupations" include alteration, demolition, building, renovation, excavation, maintenance, remodeling, improvement and repair work as defined in the California Business and Professions Code Division 3, Chapter 9, section 7025 et seq., and any other similar occupations or trades.ⁿ¹¹⁴ "Drilling Occupations" include all work associated with the exploration or extraction of oil, gas, or water resources work, including but not limited to the installation, establishment, reworking, maintenance or repair of wells and pumps by boring, drilling, excavating, casting, cementing and cleaning for the extraction or conveyance of fluids such as water, steam, gases, or petroleum.ⁿ¹¹⁵ "Logging occupations" means any work for which a timber operator's license is required pursuant to *California Public Resources Code sections 4571 through 4586*, including the cutting or removal or both of timber or other solid wood forest products, including Christmas trees, from timberlands for commercial purposes, together with all the work that is incidental thereto, including but not limited to construction and maintenance of roads, fuel breaks, fire breaks, stream crossings, landings, skid trails, beds for the falling of trees, and fire hazard abatement.ⁿ¹¹⁶ "Mining Occupations" mean miners and other associated and related occupations (not covered by *Labor Code Sections 750 et seq.*) required to engage in excavation or operations above or below ground including work in mines, quarries, or open pits, used for the purposes of exploration or extraction of nonmetallic minerals and ores, coal, and building materials such as stone, gravel, and rock, or other materials intended for manufacture or sale, whether paid on a time, piece rate, commission, or other basis.ⁿ¹¹⁷

[d] General Minimum Wage Order

In addition to the 16 industry and occupation wage orders, the IWC has promulgated a general minimum wage order requiring that every employer pay to each employee, other than outside salespersons, and any individual who is a parent, spouse, or child of the employer, not less than \$6.25 per hour (effective January 1, 2001) and not less than \$6.75 per hour (effective January 1, 2002) for all hours worked.ⁿ¹¹⁸ The new minimum wage order has eliminated exemptions from the minimum wage for:ⁿ¹¹⁹

- Employees of the State and local government and any political subdivision thereof,

- Full-time carnival ride operators,
- Professional actors,
- Personal attendants in private homes except for persons under the age of eighteen who are employed as baby sitters for a minor child of the employer in the employer's home,
- Student nurses,
- Minors paid not less than 85% of the minimum wage rounded to the nearest nickel.

The IWC has also amended the previous partial exemption for learners to include minors. The general minimum wage order applies to employees not otherwise covered by an industry or occupation wage order, but does not apply to employees who are expressly exempt from all provisions, or from the minimum wage provisions, of a wage order otherwise covering those employees.ⁿ¹²⁰

[e] Substantive Coverage

The wage orders cover the following facets of employment:

1. Hours and days of work and overtime compensation;ⁿ¹²¹
2. Minimum wages;ⁿ¹²²
3. Reporting time pay (minimum wages payable to employee who reports to work as required, but is not put to work or is furnished less than half the usual or scheduled day's work).ⁿ¹²³
4. Licenses for employment of certain disabled workers at less than minimum wage;ⁿ¹²⁴
5. Recordkeeping and paycheck statement requirements;ⁿ¹²⁵
6. Deductions from pay;ⁿ¹²⁶
7. Provision of uniforms and equipment by employer;ⁿ¹²⁷
8. Crediting of meals and lodging against minimum wage under certain circumstances;ⁿ¹²⁸
9. Meal period requirements;ⁿ¹²⁹
10. Rest period requirements;ⁿ¹³⁰
11. Change rooms and resting facilities requirements;ⁿ¹³¹
12. Seating requirements;ⁿ¹³²
13. Temperature requirements;ⁿ¹³³
14. Requirements for adequate elevators, escalators, or similar services;ⁿ¹³⁴

15. Exemptions from provisions governing recordkeeping, meal periods, rest periods, and certain physical plant requirements by the DLSE;ⁿ¹³⁵ and

16. A requirement that copies of the applicable wage order be posted or made available to employees.ⁿ¹³⁶

[f] Exempt Employees

Certain categories of employees are exempt from all provisions of all of the wage orders, including outside salespersons, government employees,ⁿ¹³⁷ and members of the employer's immediate family.ⁿ¹³⁸ Persons employed in administrative, executive, and professional capacities are exempt from most of the provisions of the wage orders, including the minimum wage and overtime compensation requirements and the provisions requiring rest and meal periods.ⁿ¹³⁹

In addition, the new minimum wage order has eliminated exemptions from the minimum wage and meals and lodging credits for:ⁿ¹⁴⁰

- Employees of the State and local government and any political subdivision thereof,
- Full-time carnival ride operators,
- Professional actors,
- Personal attendants in private homes except for persons under the age of eighteen who are employed as baby sitters for a minor child of the employer in the employer's home,
- Student nurses,
- Minors paid not less than 85% of the minimum wage rounded to the nearest nickel.

The IWC has also amended the previous partial exemption for learners to include minors.

In addition, certain categories of employees are exempt from all provisions of the wage order regulating the particular industry or occupation in which they work, or are wholly or partly exempt from the minimum wage and/or overtime compensation provisions of that order.

The employer bears the responsibility of proving any exemption from the requirements of the IWC Wage Orders.ⁿ¹⁴¹

The DLSE opines that finding an employee exempt from the Wage Orders has far-reaching ramifications because exempt status deprives the employee not only of the right to overtime compensation, but also to most of the other protections afforded to non-exempt employees by the Wage Orders:ⁿ¹⁴²

- Section 3 overtime premium.ⁿ¹⁴³
- Section 4 minimum wage.ⁿ¹⁴⁴
- Section 5 reporting time pay.ⁿ¹⁴⁵
- Section 7 requirement of records under IWC Orders, but not records required by the Labor Code.ⁿ¹⁴⁶

- Section 9 requirement that the employer furnish a uniform. However, *Labor Code section 2802* would provide some protection for the exempt employee).
- Section 10 requirement that meals and lodging amounts be limited.ⁿ¹⁴⁷
- Section 11 meal period requirement, and Section 12, rest period requirement.ⁿ¹⁴⁸

For a discussion of employees exempt from all provisions of the wage orders, or only from the minimum wage provisions, *see* Chapter 2. For a discussion of employees wholly or partly exempt only from the overtime compensation provisions of the wage orders, *see* Chapter 3. For discussion of coverage and exemptions from child labor laws, *see* Chapter 6.

[g] Procedures for Amending, Rescinding, or Adopting Wage Orders

[i] Generally

Wage orders may be adopted, amended, or rescinded by the IWC pursuant to procedures set forth in the Labor Code.ⁿ¹⁴⁹ IWC orders fixing minimum wages, maximum hours, and standard conditions of labor, when promulgated in accordance with the procedures specified in the Labor Code, are expressly exempted from the usual procedures for adopting administrative regulations set forth under *Government Code sections 11346-11347.5*.ⁿ¹⁵⁰

The IWC has the continuing duty to ascertain the wages paid and hours and conditions of labor and employment in the various occupations and industries in California.ⁿ¹⁵¹ If, after investigation, the IWC finds that wages paid to employees may be inadequate to supply the cost of proper living or that hours or conditions of labor may be prejudicial to the health or welfare of employees in any occupation, trade, or industry, the IWC must select a wage board to make recommendations regarding the adoption, amendment, or rescission of wage orders,ⁿ¹⁵² as discussed in [iv], *below*. In addition, as discussed in [ii] and [iii], *below*, the process of adopting, amending, or rescinding a wage order may be initiated by petition of interested parties.ⁿ¹⁵³

In addition to the procedures discussed below, specific procedures are applicable to promulgation of IWC minimum wage orders.ⁿ¹⁵⁴ For a discussion of procedures for promulgating minimum wage orders, *see* Chapter 2.

[ii] Petition by Interested Party

Any interested party may petition the IWC requesting the adoption, amendment, or repeal of a regulation. The petition must state the substance and nature of the regulation, amendment, or repeal that is requested and the reason for the request, and must refer to the IWC's authority to take the action that is requested.ⁿ¹⁵⁵

Within 120 days of the receipt of the petition, the IWC must notify the petitioner in writing of the receipt of the petition, set the matter for consideration at a public meeting, and issue a written decision that either (1) sets the matter for public hearing pursuant to *Labor Code section 1178* or *1178.5*,ⁿ¹⁵⁶ or (2) denies the petition and states the reasons for the denial.ⁿ¹⁵⁷ The petitioner may request reconsideration of any part or all of a decision denying the petition. The IWC's reconsideration of any matter relating to a petition is subject to the same procedures as prescribed for responding to the original petition, except that a decision to deny reconsideration is final.ⁿ¹⁵⁸

If a petition is referred to a wage board,ⁿ¹⁵⁹ the IWC must complete its final actions on the petition within 90 days after completion of the public hearing process.ⁿ¹⁶⁰

[iii] Petition Affecting Health Care Industry

If a labor organization or a trade association recognized in the health care industry files a petition with the IWC that requests an amendment to an order of the IWC that would directly regulate only the health care industry, the petitioner may request that the ordinary procedures for the review of such petitions not be used and that the special procedures prescribed under *Labor Code section 1182.7(c) and (d)* be followed instead.ⁿ¹⁶¹ If this request is made, the IWC must follow the special procedures.ⁿ¹⁶²

Under the special procedures, the IWC must, within 45 days after the date that the petition is filed, propose either the adoption or rejection of the petition, in whole or in part, without appointing a wage board.ⁿ¹⁶³ Thereafter, the usual procedures for publication of and hearings on IWC actions apply,ⁿ¹⁶⁴ except that hearings must be conducted within 90 days after the date the petition is originally filed.ⁿ¹⁶⁵ Not more than 30 days following the hearings, the IWC must take final action with respect to its proposal, and no later than 15 days following final action, notice of the action taken must be given.ⁿ¹⁶⁶ Any action adopting, amending, or repealing an order directly regulating only the health care industry takes effect 60 days following the date of notice of the final action.ⁿ¹⁶⁷

[iv] Investigation and Selection of Wage Board

Except in the case of petitions from labor organizations or trade associations in the health care industry,ⁿ¹⁶⁸ or amendments to minimum wage requirements necessary to conform to federal law,ⁿ¹⁶⁹ the adoption, amendment, or repeal of a wage order is commenced by appointment of a wage board by the IWC.ⁿ¹⁷⁰ Pursuant to *Labor Code section 1178*, the IWC must appoint a wage board if, after investigation, it finds that in any occupation, trade, or industry, the wages paid to employees may be inadequate to supply the cost of proper living, or that the hours or conditions of labor may be prejudicial to the health, morals, or welfare of employees.ⁿ¹⁷¹ The IWC must transmit to the wage board the information supporting the IWC's findings gathered in its investigation, which must include at least one public hearing.ⁿ¹⁷² The investigation contemplated in *Labor Code section 1178* is a preliminary inquiry to determine whether there is sufficient question about the adequacy of the existing wage orders that wage boards ought to be selected. The IWC may rely on statistical and other data compiled in its normal investigative process, along with its consideration of the obvious effects of inflation.ⁿ¹⁷³

The wage board must be composed of an equal number of representatives of employers and employees in the occupation, trade, or industry in question, and a nonvoting representative of the IWC, designated by the IWC, who acts as the chairperson.ⁿ¹⁷⁴ The wage board must consider the findings of the IWC and any other information it deems appropriate and report to the IWC its recommendation regarding the proper minimum wage or other matters submitted to the board for its consideration.ⁿ¹⁷⁵

The proceedings and deliberations of the wage board must be made a matter of record for the use of the IWC and are admissible as evidence in any proceeding before the IWC.ⁿ¹⁷⁶

[v] Public Hearings on Proposed Regulations

Before amending or rescinding any existing order or adopting any new order, and after receipt of the wage board's report and recommendation, the IWC must prepare proposed regulations with respect to the matter under consideration.ⁿ¹⁷⁷ The proposed regulations must include any recommendations of the wage board that received the support of at least two thirds of the members of the wage board.ⁿ¹⁷⁸ A public hearing on the proposed regulations must be held in each of at least three cities in California; however, when the proposed regulations would affect only an occupation, trade, or industry that is not statewide in scope, a public hearing must be held in the locality in which the occupation, trade, or industry prevails.ⁿ¹⁷⁹ The proceedings must be recorded and transcribed and must thereafter be a matter of public record.ⁿ¹⁸⁰

[vi] Notice of Hearing and Publication

When the time and place for the holding of a hearing for the purpose of considering and acting on proposed regulations or similar matters has been set,ⁿ¹⁸¹ the IWC must give public notice thereof through advertisements in specified cities.ⁿ¹⁸² A copy of the notice and the proposed regulations must be mailed to the county clerk of each county in the state to be posted at the courthouse, and to each association of employers or employees that, in the opinion of the IWC, would be affected by the hearing.ⁿ¹⁸³ In addition, any person or organization in California filing with the IWC a written request for notice of the hearing must be provided with a copy of the notice and the proposed regulations.ⁿ¹⁸⁴ However, failure to mail this notice does not invalidate any IWC order issued after the hearing.ⁿ¹⁸⁵

The notice must state the time and place fixed for the hearing, which may not be less than 30 days from the date of publication and mailing of the notices.ⁿ¹⁸⁶

[vii] Procedures When Proposal Changed After Hearing

The IWC may not adopt, amend, or repeal a proposal that has been changed from that which had originally been made available to the public unless the change is nonsubstantive in nature.ⁿ¹⁸⁷ If a substantive change is made to the original proposal after the close of the public hearing, the full text of the change must be noticed within five days and made available to the public for comments for at least 10 days before the IWC adopts, amends, or repeals the regulation.ⁿ¹⁸⁸ No later than 10 days following the close of the public comment period, the IWC must take final action with respect to its modified proposal, and give notice of that action within 10 days according to the prescribed notice procedures.ⁿ¹⁸⁹ In no case may any action adopting, amending, or repealing an order take effect more than 60 days following the close of the public comment period.ⁿ¹⁹⁰

[viii] Amendment, Rescission, or Promulgation of Order

After receipt of the wage board report and the public hearings on the proposed regulations, the IWC may, on its own motion, amend or rescind an existing order or promulgate a new order.ⁿ¹⁹¹ However, with respect to proposed regulations based on recommendations supported by at least two thirds of the members of the wage board, the IWC must adopt the proposed regulations, unless it finds there is no substantial evidence to support such recommendations.ⁿ¹⁹²

Any action taken by the IWC in amending or rescinding an existing wage order, or promulgating a new one, must be published in at least one newspaper in each of the cities of Los Angeles, Sacramento, Oakland, San Jose, Fresno, San Diego, and San Francisco.ⁿ¹⁹³ A summary of the action taken and notice of where the complete text of the new or amended order may be obtained may be published in lieu of the complete text if the IWC determines that the summary and notice will adequately inform the public.ⁿ¹⁹⁴ The IWC's finding that there has been publication of any action taken by the IWC as required by *Labor Code Section 1182.1* is conclusive as to the obligation of an employer to comply with the order.ⁿ¹⁹⁵ The statement of basisⁿ¹⁹⁶ need not be published.ⁿ¹⁹⁷ Any actions taken by the IWC in amending, rescinding, or promulgating orders become effective on the first day of the succeeding January or July, and not less than 60 days from the date of publication.ⁿ¹⁹⁸

[ix] Rehearing Procedure

Any person aggrieved directly or indirectly by any final rule or regulation of the IWC may apply to the IWC for a rehearing with respect to any matters determined or covered by the rule or regulation.ⁿ¹⁹⁹ The application must be verified and fully state the grounds on which rehearing is sought and must be made within 20 days after publication of the rule or regulation.ⁿ²⁰⁰ The IWC may grant or deny rehearing by order and notice given to the party applying for rehearing.ⁿ²⁰¹ If rehearing is granted, the IWC may redetermine the matter on the record before it and give notice of its redetermination in the same manner as provided for an original order.ⁿ²⁰² Rehearing is deemed denied unless acted on by the IWC within 30 days after the application is filed.ⁿ²⁰³

[x] Statement Regarding Basis

A majority of the commissioners must concur with each IWC order.ⁿ²⁰⁴ The IWC must prepare a statement regarding the basis on which the adopted or amended order is predicated. A majority of the commissioners must concur in the statement.ⁿ²⁰⁵ The IWC must publish a copy of the statement with the order in the California Regulatory Notice Register, and must provide a copy of the statement to any interested party on request.ⁿ²⁰⁶ The statement regarding basis must be more than a listing of authorizing statutes for the agency's regulatory action and must provide a reasoned explanation that reflects the factual, legal, and policy foundations for the action taken.ⁿ²⁰⁷ The California Supreme Court has expressly found that the statements regarding basis for the 1980 wage orders are adequate.ⁿ²⁰⁸

[xi] Mailing and Posting of Wage Orders

The IWC must send by mail, so far as practicable, to each employer in the occupation or industry affected by a wage order a copy of the applicable order.ⁿ²⁰⁹ The IWC must also send a copy of the order to each employer registering its name with the IWC for the purpose of receiving orders. Failure of the IWC to mail the order or notice of it to an affected employer does not relieve the employer of the duty of complying with the order.ⁿ²¹⁰

The employer must post a copy of the order in the building in which employees affected by the order are employed.ⁿ²¹¹

Employers who are subject to an order must also post a copy of the order and keep it posted in a conspicuous location frequented by employees during the day.ⁿ²¹² For a full discussion of posting requirements, *see* Chapter 7.

[xii] Summary of Orders' Regulations

The IWC must prepare a summary of the regulations contained in its orders.ⁿ²¹³ The summary must be printed on the first page of the document containing the full text of the order, and must include a brief description of the following subjects of the orders: minimum wage, hours and days of work, reporting time, pay periods, cash shortages and breakage, uniforms and equipment, meals and lodging, meal and rest periods, and seats.ⁿ²¹⁴ The summary must also include information on how to contact the field office of the Division of Labor Standards Enforcement, how to obtain a copy of the full text of the order and the statement regarding the basis of the order, and any other information the IWC considers necessary.ⁿ²¹⁵ At its discretion, the IWC may prepare a separate summary for each order or any combination of orders, or it may incorporate the regulations of all its orders into a single summary.ⁿ²¹⁶

[h] Validity of Wage Orders

State regulation of minimum wages, maximum hours, and working conditions carries with it a strong presumption of regularity, since the legislative power to regulate employment conditions is very broad, even though such regulations almost inevitably impose some economic burden on employers.ⁿ²¹⁷

Orders of the IWC fixing minimum wages, maximum hours, and standard conditions of labor for all employees, when promulgated in accordance with the applicable provisions of the Labor Code, are valid.ⁿ²¹⁸ Findings of fact made by the IWC in promulgating, amending, or rescinding wage orders are, in the absence of fraud, conclusive.ⁿ²¹⁹ The California Supreme Court has rejected challenges to the 1980 wage orders on the basis of procedural and constitutional defects, and has expressly ruled Wage Order Nos. 1-80 (now 1-2001), 3-80 (now 3-2001), 4-80 (now 4-2001), 5-80 (now 5-2001), 8-80 (now 8-2001), 9-80 (now 9-2001), 10-80 (now 10-2001), 13-80 (now 13-2001), and 14-80 (now 14-2001) to be valid.ⁿ²²⁰

In *Small v. Superior Court*, ^{n220.1} the Court of Appeal expressly found Wage Order 16, regulating the hours, wages, and working conditions of California employees engaged in onsite construction, drilling, logging, and certain mining occupations, valid. The trial court had concluded that the Wage Order was invalid, because it was not accompanied by a

sufficient statement of the basis, was not properly published, and contained an unworkable definition of "given craft," which made the order unreasonable, arbitrary, capricious, and unfair. In reversing that conclusion, the Court of Appeal held that the IWC complied with various Labor Code provisions in adopting Wage Order 16;n220.2 the 14-page statement prepared by the IWC as to the basis for Wage Order 16 was adequate;n220.3 the employer challenging Wage Order 16 failed to carry its burden of proving that the IWC did not perform its official duty to publish the order under *Labor Code § 1182.1*;n220.4 and the definition of "work unit" in the Wage Order as adopted was based on the recommendation of at least two-thirds of the members of the wage board, which was comprised of representatives of both employers and employees,n220.5 and was implicitly supported by substantial evidence so that it was not arbitrary and capricious. The court also rejected the trial court's conclusion that the definition of "work unit" was unreasonable and unfair, finding that such policy determinations were matters for the wage board, whose recommendation, when supported by at least two-thirds of its members, the IWC was obligated to follow.n220.6

[3] Enforcement and Remedies

[a] Administrative Enforcement by Division of Labor Standards and Enforcement

The Division of Labor Standards Enforcement (DLSE) is one of six mandatory divisions of the Department of Industrial Relations,n221 a department of the state government that also includes the IWC.n222 The structure and operations of the DLSE are governed by *Labor Code sections 79-105*. The DLSE is under the direction of the Chief of the Division of Labor Standards Enforcement, also known as the "Labor Commissioner,"n223 who is appointed by the governor, subject to confirmation by the state senate, and holds office at the pleasure of the Director of Industrial Relations.n224

The DLSE is specifically responsible for administering and enforcing the provisions of *Labor Code sections 1171 et seq.*, governing wages, hours, and working conditions,n225 and for enforcing wage orders promulgated by the IWC.n226 In addition, the DLSE may enforce other provisions of the Labor Code and all labor laws of the state not otherwise specifically vested in another officer, board, or commission.n227

The DLSE succeeded, and is vested with all of the powers, duties, purposes, responsibilities and jurisdiction of, the former Division of Labor Law Enforcementn228 and the Division of Industrial Welfare.n229 Any regulation or other action made by the abolished Division of Labor Law Enforcement or the Division of Industrial Welfare in the administration of a function transferred to the DLSE remains in effect, and is deemed to be a regulation or action of the DLSE unless and until repealed, modified, or rescinded by the DLSE.n230

The DLSE is headquartered in San Francisco.n231 Offices are also maintained in Los Angeles, Sacramento, San Diego, Oakland, Fresno, San Jose, and such other places as the Labor Commission may deem necessary.n232

In enforcing state wage and hour and other labor laws, the DLSE has authority, among other things, to issue subpoenas to compel the attendance of witnesses and the production of documents, and administer oaths and examine witnesses under oath;n233 take assignment of wage and other employee claims;n234 collect wages and benefits without assignment;n235 investigate and conduct hearings on employee complaints;n236 prosecute actions for collection of wages generallyn237 and for minimum wages or overtime compensation specifically;n238 and seek injunctions against willful violations of state wage and hour laws by employers.n239 The DLSE is also authorized to investigate complaints that wages paid are less than the wages to which the employee is entitled under the California Equal Pay Act,n240 and to prosecute actions on that employee's behalf.n241

For a full discussion of administrative remedies under California wage and hour laws, see Chapter 5.

[b] Judicial Enforcement

In lieu of the administrative remedies provided by the Labor Code for collection of unpaid wages and enforcement of

wage and hour laws, referred to in [a], *above*, an aggrieved employee may maintain a civil action to collect unpaid wages or otherwise enforce his or her rights.ⁿ²⁴² Furthermore, administrative hearings before the Labor Commissioner are subject to de novo judicial review.ⁿ²⁴³ For discussion of civil actions by employees, see Chapter 5.

[c] Administrative Statements or Interpretations

The policy statements, interpretive bulletins and informational pamphlets issued by the DLSE have long been given great weight by appellate courts in California when determining questions regarding the meaning of the wage orders and other labor laws.ⁿ²⁴⁴ However, the Supreme Court, in *Tidewater Marine Western, Inc. v. Bradshaw* ⁿ²⁴⁵ concluded that these written interpretations should be given "no weight" in interpreting the wage orders. *Tidewater* involved the application of wage orders 4-89 and 9-90 to the employers' offshore activities. Defendants relied on the interpretations issued by the DLSE. The Supreme Court noted that the IWC, when promulgating its wage orders, must comply with rule-making procedures, including public hearings and input, which are analogous to the notice and public hearing procedures of the Administrative Procedures Act, *Gov. Code § 11340.5(a)*, (*APA*). The Court contrasted this with the DLSE, which utilizes no such procedures when it issues its interpretations. It then determined that the DLSE interpretations constituted regulations because they are rules of "general application" and are interpretations of the wage laws. Accordingly, the Supreme Court concluded that the interpretations set forth in the DLSE Operations and Procedures Manual and its other publications constitute regulations and are therefore void because they are not promulgated in accordance with the APA. Interpretive bulletins, policy statements, and other informational pamphlets issued by the DLSE are cited throughout Chapters 1-7; however, counsel are cautioned that the future utility of these publications is unclear.

In 1998, in response to the *Tidewater* decision, the DLSE issued an Enforcement Policies and Interpretations Manual. In late 2002, the DLSE issued the 2002 Update to the Manual.ⁿ²⁴⁶ In *Tidewater*, the Supreme Court had held that "if an agency prepares a policy manual that is no more than a restatement or a summary, without commentary, of the agency's prior decisions in specific cases and its prior advice letters, the agency is not adopting regulations."ⁿ²⁴⁷ According to the DLSE, its 1998 Enforcement Policies and Interpretations Manual and the 2002 Update comply with *Tidewater* because the Manual and Update summarize policies and interpretations the DLSE has followed in discharging its duty to administer and enforce California labor statutes and regulations.ⁿ²⁴⁸ In the 2002 Update, the DLSE cites the sources from which the summarized policies and interpretations are derived as:ⁿ²⁴⁹

1. Decisions of California's courts construing California's labor statutes and regulations and otherwise applying relevant California law.
2. California statutes and regulations which are clear and susceptible to only one reasonable interpretation.
3. Federal court decisions which define or circumscribe the jurisdictional scope of California's labor laws and regulations or which are instructive in interpreting California laws that incorporate, are modeled on, or parallel federal labor laws and regulations.
4. Selected opinion letters issued by DLSE in response to requests from private parties, setting forth the policies and interpretations of DLSE with respect to the application of the state's labor statutes and regulations to a specific set of facts.
5. Selected prior decisions rendered by the Labor Commissioner or the Labor Commissioner's hearing officers in the course of adjudicating disputes arising under California's labor statutes and regulations.

In *Morillion v. Royal Packing Co.*, ⁿ²⁵⁰ the Supreme Court held that advice or opinion letters of the DLSE are not subject to the rulemaking provisions of the APA, citing two of the Division's advice letters regarding the DLSE's

interpretation of the term "hours worked and noting that the DLSE interpretation was consistent with the Court's independent analysis of hours worked.n251

In the 2002 Update, the DLSE stated that certain opinion letters cited in the Manual refer to "Interpretive Bulletins" previously issued by the DLSE and noted that in *Tidewater* the Supreme Court had held that the DLSE's use of interpretive bulletins violated the Administrative Procedures Act to the extent that they went beyond a simple restatement or summary of existing laws, duly promulgated regulations, judicial decisions, the DLSE's opinion letters, or administrative decisions. The DLSE concluded that to the extent any such interpretive bulletin purports to interpret the law by setting out rules of general application *and* fails to present the interpretation as a restatement or summary of the above enumerated sources, it is invalid.n252

DLSE opinion letters, administrative decisions, precedent decisions and other unreported sources of the DLSE's interpretations are contained in a companion volume to the 2002 Update.n253 The 2002 Update, along with the companion volume, can be found on the Internet at <http://www.dir.ca.gov/DLSE>.

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Statutory Application General Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 1171.*

(n2)Footnote 2. *See Lab. Code §§ 1173-1182.1, 1182.7, 1183, 1184, 1187-1190, 1198.4, 1204; see also* discussion in [2][h], *below*.

(n3)Footnote 3. *See Lab. Code §§ 1182.4 (camp counselors) 1182.7 (health care industry procedures to change wage order); see also Lab. Code § 1198.3 (DLSE authority to exempt employers or employees from day-off requirements).* For full discussions of exemptions from wage orders, *see* chs. 2 and 3.

(n4)Footnote 4. *See Lab. Code §§ 1182.5, 1182.6. See* ch. 3 for discussion of alternative workweek arrangements as they affect overtime compensation requirements.

(n5)Footnote 5. *See Lab. Code §§ 1191-1193; see also* discussion in ch. 2.

(n6)Footnote 6. *See Lab. Code §§ 1193.5-1197.1, 1199, 1199.5, 1200; see also* discussion in [3], *below*, and in ch. 5.

(n7)Footnote 7. *See Lab. Code § 1197.5.*

(n8)Footnote 8. *See Lab. Code § 1205.*

(n9)Footnote 9. *Lab. Code § 510 et seq.*

(n10)Footnote 10. *See Lab. Code § 1197.5(a).*

(n11)Footnote 11. *See Lab. Code § 1197.5(a).*

(n12)Footnote 12. *See Lab. Code § 1197.5(b).*

(n13)Footnote 13. *See Lab. Code § 1197.5(c).*

(n14)Footnote 14. *See* 29 U.S.C. § 206(d); *see also* discussion under § 1.06[1][c][iii].

(n15)Footnote 15. *See* Lab. Code §§ 1770-1780, 1815. The term "public works" is defined in Lab. Code §§ 1720-1720.4. *See also* City of Long Beach v. Dept. of Industrial Relations (2004) 34 Cal. 4th 942, 949-954, 22 Cal. Rptr. 3d 518, 102 P.3d 904 (under law in effect when contract was executed, project that private developers built solely with private funds on land leased from public agency remained private and did not become public work subject to prevailing wage law merely because city had earlier contributed funds to owner/lessee to assist in defraying preconstruction costs or expenses, such as legal fees, insurance premiums, architectural design costs, and project management and surveying fees).

(n16)Footnote 16. *See* Lab. Code §§ 550-558, 1771. *But see* Labor Code §§ 1771.5, 1771.55 (exceptions to prevailing rate requirement for employers meeting specific requirements).

(n17)Footnote 17. *See* Lab. Code §§ 1770, 1773, 1773.4-1773.6, 1773.9.

(n18)Footnote 17.1. 8 U.S.C. § 1101 *et seq.*

(n19)Footnote 17.2. *Reyes v. Van Elk, Ltd.* (2007) 148 Cal. App. 4th 604, 610-618 (issue of whether employees had submitted false authorization documents to obtain employment was not before the court).

(n20)Footnote 17.3. *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, 149, 122 S. Ct. 1275, 152 L. Ed. 2d 271 .

(n21)Footnote 17.4. *Hoffman Plastic Compounds, Inc. v. NLRB* (2002) 535 U.S. 137, 149-150 n.4, 122 S. Ct. 1275, 152 L. Ed. 2d 271 .

(n22)Footnote 17.5. *See, e.g., Patel v. Quality Inn South* (11th Cir. 1988) 846 F.2d 700, 703-704 (and cases cited therein); *Mester Mfg. Co. v. I.N.S.* (9th Cir. 1989) 879 F.2d 561, 567 ; *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.* (N.D. Cal. 1998) 25 F. Supp. 2d 1053, 1056 . *See also* *Zavala v. Wal-Mart Stores, Inc.* (D. N.J. 2005) 393 F. Supp. 2d 295, 325 (FLSA did not preclude undocumented workers from obtaining relief for work already performed).

(n23)Footnote 17.6. *Reyes v. Van Elk, Ltd.* (2007) 148 Cal. App. 4th 604, 613-615 .

(n24)Footnote 17.7. *Reyes v. Van Elk, Ltd.* (2007) 148 Cal. App. 4th 604, 615-618 .

(n25)Footnote 18. *See* Lab. Code §§ 550-558, 1173, 1182; *see also* discussion in [g], *below*.

(n26)Footnote 19. *See* 8 Cal. Code Reg. §§ 11000-11170 (Cal. Wage Order Nos. MW-2001, 1-2001-17-2001).

(n27)Footnote 19.1. *See* *Ramirez v. Yosemite Water Co.* (1999) 20 Cal. 4th 785, 795, 85 Cal. Rptr. 2d 844, 978 P.2d 2 (California Supreme Court noted that wage orders, although at times patterned after federal regulations, provide greater protection than is provided under FLSA and accompanying federal regulations). *See also* DLSE Opinion Letter 2002.06.18.

(n28)Footnote 20. *See* 8 Cal. Code Reg. §§ 11010-11030, 11050-11130 (Cal. Wage Order Nos. 1-2001-3-2001, 5-2001-13-2001); *see also* [b], *below*, for descriptions of 12 industry orders.

(n29)Footnote 21. *See* 8 Cal. Code Reg. §§ 11040, 11140, 11160 (Cal. Wage Order Nos. 4-2001, 14-2001, 16-2001); *see also* [c], *below*, for descriptions of occupational orders.

(n30)Footnote 22. 8 Cal. Code Reg. § 11170 (Cal. Wage Order No. 17-2001).

(n31)Footnote 23. *See* 8 Cal. Code Reg. § 11000 (Cal. Wage Order No. MW-2001); *see also* [d], *below*, for

discussion of general minimum wage order.

(n32)Footnote 24. *See generally* discussion in ch. 3, Part A.

(n33)Footnote 25. *See* ch. 2 for discussion of employees exempted under wage orders.

(n34)Footnote 26. *See* 8 Cal. Code Reg. § 11010, PP 1, 2(C) (Cal. Wage Order No. 1-2001).

(n35)Footnote 27. *See* 8 Cal. Code Reg. § 11040, PP 1, 2(C) (Cal. Wage Order No. 4-2001).

(n36)Footnote 28. *See* 8 Cal. Code Reg. § 11020, PP 1, 2(C) (Cal. Wage Order No. 2-2001).

(n37)Footnote 29. *See* 8 Cal. Code Reg. § 11070, PP 1, 2(C) (Cal. Wage Order No. 7-2001).

(n38)Footnote 30. *See* 8 Cal. Code Reg. § 11040, PP 1, 2(C) (Cal. Wage Order No. 4-2001).

(n39)Footnote 31. *See* 8 Cal. Code Reg. § 11010, PP 1, 2(C) (Cal. Wage Order No. 1-2001).

(n40)Footnote 32. *See* 8 Cal. Code Reg. § 11050, PP 1, 2(C) (Cal. Wage Order No. 5-2001).

(n41)Footnote 33. *See* 8 Cal. Code Reg. § 11040, PP 1, 2(C)) (Cal. Wage Order No. 4-2001).

(n42)Footnote 34. Interim Wage Order-2000 has since been superseded by Wage Order 16-2001.

(n43)Footnote 35. *See* 8 Cal. Code Reg. § 11000 (Cal. Minimum Wage Order No. MW-2001); *see also* [d], *below*, for discussion of general minimum wage order.

(n44)Footnote 36. 8 Cal. Code Reg. § 11170.

(n45)Footnote 37. *See Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal. App. 4th 729, 739-740, 95 Cal. Rptr. 3d 53. For discussion of the wage orders generally, *see* § 1.05[2], *below*.

(n46)Footnote 38-42. [Reserved]

(n47)Footnote 43. *See* 8 Cal. Code Reg. § 11100.

(n48)Footnote 44. *See* 8 Cal. Code Reg. § 11110.

(n49)Footnote 45. *See* 8 Cal. Code Reg. § 11030.

(n50)Footnote 46. *See* 8 Cal. Code Reg. § 11080.

(n51)Footnote 47. *See* 8 Cal. Code Reg. § 11060.

(n52)Footnote 48. *See* 8 Cal. Code Reg. § 11010.

(n53)Footnote 49. *See* 8 Cal. Code Reg. § 11070.

(n54)Footnote 50. *See* 8 Cal. Code Reg. § 11120.

(n55)Footnote 51. *See* 8 Cal. Code Reg. § 11020.

(n56)Footnote 52. *See* 8 Cal. Code Reg. § 11130.

(n57)Footnote 53. *See* 8 Cal. Code Reg. § 11050.

(n58)Footnote 54. *See* 8 Cal. Code Reg. § 11090.

(n59)Footnote 55. *See* 8 Cal. Code Reg. § 11050, P 2(C) (Cal. Wage Order No. 5-2001); *see also* discussion in [v], *below*.

(n60)Footnote 56. *See* 8 Cal. Code Reg. § 11010 (Cal. Wage Order No. 1-2001).

(n61)Footnote 57. *See* 8 Cal. Code Reg. § 11090, P 2(N) (Cal. Wage Order No. 9-2001); *see also* discussion in [ix], *below*.

(n62)Footnote 58. *See* 8 Cal. Code Reg. § 11070, P 2(H) (Cal. Wage Order No. 7-2001); *see also* discussion in [vii], *below*.

(n63)Footnote 59. 8 Cal. Code Reg. § 11010, P 2(H) (Cal. Wage Order No. 1-2001).

(n64)Footnote 60. 8 Cal. Code Reg. § 11010, P 2(H) (Cal. Wage Order No. 1-2001).

(n65)Footnote 61. *See* discussion under [iv], *below*.

(n66)Footnote 62. *See* discussion under [viii], *below*.

(n67)Footnote 63. *See* discussion under [xiii], *below*.

(n68)Footnote 64. *See* discussion under [xii], *below*.

(n69)Footnote 65. *See* Ind. Welf. Comm., Classification of Industries and Occupations by Industrial Welfare Commission Order--A Partial Listing (Aug. 1981).

(n70)Footnote 66. *See* Ind. Welf. Comm., Classification of Industries and Occupations by Industrial Welfare Commission Order--A Partial Listing (Aug. 1981).

(n71)Footnote 67. 8 Cal. Code Reg. § 11020, P 2(J) (Cal. Wage Order No. 2-2001).

(n72)Footnote 68. *See* Ind. Welf. Comm., Classification of Industries and Occupations by Industrial Welfare Commission Order--A Partial Listing (Aug. 1981).

(n73)Footnote 69. 8 Cal. Code Reg. § 11030, P 2(B) (Cal. Wage Order No. 3-2001).

(n74)Footnote 70. *See* Ind. Welf. Comm., Classification of Industries and Occupations by Industrial Welfare Commission Order--A Partial Listing (Aug. 1981).

(n75)Footnote 71. 8 Cal. Code Reg. § 11050, P 2(P) (Cal. Wage Order No. 5-2001).

(n76)Footnote 72. 8 Cal. Code Reg. § 11050, P 2(P)(1)-(7) (Cal. Wage Order No. 5-2001).

(n77)Footnote 73. *See* Ind. Welf. Comm., Classification of Industries and Occupations by Industrial Welfare Commission Order--A Partial Listing (Aug. 1981).

(n78)Footnote 74. 8 Cal. Code Reg. § 11060, P 2(H) (Cal. Wage Order No. 6-2001).

(n79)Footnote 75. 8 Cal. Code Reg. § 11060, P 2(H) (Cal. Wage Order No. 6-2001).

(n80)Footnote 76. 8 Cal. Code Reg. § 11070, P 2(H) (Cal. Wage Order No. 7-2001).

(n81)Footnote 77. *See* Ind. Welf. Comm., Classification of Industries and Occupations by Industrial Welfare Commission Order--A Partial Listing (Aug. 1981).

(n82)Footnote 78. *See* comment under [i], *above*.

(n83)Footnote 79. 8 *Cal. Code Reg.* § 11080, P 2(H) (Cal. Wage Order No. 8-2001).

(n84)Footnote 80. Note that cane sugar refining involving *purchased* raw sugar or syrup is covered by Wage Order No. 1-2001, governing the manufacturing industry. *see* discussion in [ii], *above*.

(n85)Footnote 81. *See* Ind. Welf. Comm., Classification of Industries and Occupations by Industrial Welfare Commission Order--A Partial Listing (Aug. 1981).

(n86)Footnote 82. 8 *Cal. Code Reg.* § 11090, P 2(N) (Cal. Wage Order No. 9-2001).

(n87)Footnote 83. *See* Ind. Welf. Comm., Classification of Industries and Occupations by Industrial Welfare Commission Order--A Partial Listing (Aug. 1981).

(n88)Footnote 84. *See Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 *Cal. App. 3d* 557, 562, 242 *Cal. Rptr.* 873, *fn.* 2 .

(n89)Footnote 85. *See* comment under [i], *above*.

(n90)Footnote 86. 8 *Cal. Code Reg.* § 11100, P 2(A) (Cal. Wage Order No. 10-2001).

(n91)Footnote 87. *See* former *Lab. Code* § 1182.10, which expired July 1, 2000.

(n92)Footnote 88. 8 *Cal. Code Reg.* § 11100, P 1(B) (Cal. Wage Order No. 10-2001).

(n93)Footnote 89. *See* 8 *Cal. Code Reg.* § 11020, P 2(J) (Cal. Wage Order No. 2-2001); *see also* discussion in [iii], *above*.

(n94)Footnote 90. 8 *Cal. Code Reg.* § 11110, P 2(B) (Cal. Wage Order No. 11-2001).

(n95)Footnote 91. 8 *Cal. Code Reg.* § 11120, P 2(K) (Cal. Wage Order No. 12-2001).

(n96)Footnote 92. 8 *Cal. Code Reg.* § 11130, P 2(H) (Cal. Wage Order No. 13-2001).

(n97)Footnote 93. *See* discussion under [viii], *above*.

(n98)Footnote 94. *See* Ind. Welf. Comm., Classification of Industries and Occupations by Industrial Welfare Commission Order--A Partial Listing (Aug. 1981).

(n99)Footnote 95. *See* 8 *Cal. Code Reg.* § 11040, *see* [2], *below*.

(n100)Footnote 96. *See* 8 *Cal. Code Reg.* § 11140.

(n101)Footnote 97. *See* 8 *Cal. Code Reg.* § 11150.

(n102)Footnote 98. *See* 8 *Cal. Code Reg.* § 11160.

(n103)Footnote 99. 8 *Cal. Code Reg.* § 11040, P 2(O) (Cal. Wage Order No. 4-2001).

(n104)Footnote 100. *See* 8 *Cal. Code Reg.* § 11040, P 2(O) (Cal. Wage Order No. 4-2001).

(n105)Footnote 101. *8 Cal. Code Reg. § 11040*, P 2(O) (Cal. Wage Order No. 4-2001).

(n106)Footnote 102. *See Ind. Welf. Comm., Classification of Industries and Occupations by Industrial Welfare Commission Order--A Partial Listing* (Aug. 1981).

(n107)Footnote 103. *See 8 Cal. Code Reg. § 11140*, P 1 (Cal. Wage Order No. 14-2001).

(n108)Footnote 104. *See 8 Cal. Code Reg. § 11140*, P 1(D) (Cal. Wage Order No. 14-2001). For discussion of industries handling products after harvest and industries preparing agricultural products on the farm for market, respectively, *see [b][viii] and [b][xiii], above*.

(n109)Footnote 105. *8 Cal. Code Reg. § 11140*, P 2(D) (Cal. Wage Order No. 14-2001).

(n110)Footnote 106. *8 Cal. Code Reg. § 11140*, P 2(d)(7), Cal. Wage Order No. 14-2001 (provision not previously in Wage Order No. 14).

(n111)Footnote 107. *See Ind. Welf. Comm., Classification of Industries and Occupations by Industrial Welfare Commission Order--A Partial Listing* (Aug. 1981).

(n112)Footnote 108. *8 Cal. Code Reg. § 11040*; *see discussion in [ii], above*.

(n113)Footnote 109. *See Harris Feeding Co. v. Department of Industrial Relations* (1990) 224 Cal. App. 3d 464, 473-476, 273 Cal. Rptr. 598 .

(n114)Footnote 110. *8 Cal. Code Reg. § 11150*, P 2(I) (Cal. Wage Order No. 15-2001).

(n115)Footnote 111. *See former Wage Order 15-86*, P1(B).

(n116)Footnote 112. *See Wage Order 15-2001*, P2(J) (" 'Personal attendant' includes baby sitters and means any person employed by a private householder or by any third party employer recognized in the health care industry to work in a private household, to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision. The status of 'personal attendant' shall apply when no significant amount of work other than the foregoing is required").

(n117)Footnote 113. *8 Cal. Code Reg. 11150*, P 1(B) ("Except as provided in sections 1 [Applicability of Order], 2 [Definitions], 4 [Minimum Wages], 10 [Meals and Lodging], and 15 [Penalties], the provisions of this Order shall not apply to personal attendants. The provisions of the Order shall not apply to any person under the age of eighteen who is employed as a baby sitter for a minor child of the employer in the employer's home").

(n118)Footnote 114. Wage Order No. 16-2001, P 2(C).

(n119)Footnote 115. Wage Order No. 16-2001, P 2(E).

(n120)Footnote 116. Wage Order No. 16-2001, P 2(K).

(n121)Footnote 117. Wage Order No. 16-2001, P 2(L).

(n122)Footnote 118. *8 Cal. Code Reg. § 11000*, PP 1, 2, Cal. Wage Order MW-2001. Note that effective January 1, 2007, the minimum wage for all industries will be not less than \$7.50 per hour, and effective January 1, 2008, the minimum wage for all industries will be not less than \$8.00 per hour. *Lab. Code § 1182.12*. The Legislature has directed the Department of Industrial Relations to amend and republish the Industrial Welfare Commission's wage orders to be consistent with these changes. *Lab. Code § 1182.13(b)*.

(n123)Footnote 119. *See* Statement as to the Basis for the General Minimum Wage Order, Industrial Welfare Commission MW-2001, P1.

(n124)Footnote 120. *See* 8 *Cal. Code Reg.* § 11000, P 1 (Wage Order No. MW-2001; exceptions and modification provided by statute or by other wage orders may be used when enforceable and applicable to the employer); *see also* [f] *below*, for discussion of exemptions from wage order coverage.

(n125)Footnote 121. *See* 8 *Cal. Code Reg.* §§ 11010-11160, P 3 (Cal. Wage Order Nos. 1-2001-16-2001). For a discussion of maximum hours of work and overtime compensation requirements under state law, *see* ch. 3.

(n126)Footnote 122. *See* 8 *Cal. Code Reg.* §§ 11000, P 2 (Cal. Wage Order No. MW-2001 (reflecting changes in the state and federal minimum wages)), 11010-11160, P 4 (Cal. Wage Order Nos. 1-2001-16-2001); for a discussion of minimum wages under state law, *see* ch. 2.

(n127)Footnote 123. *See* 8 *Cal. Code Reg.* §§ 11010-11160, P 5 (Cal. Wage Order Nos. 1-2001-16-2001). For a discussion of reporting time pay under state law, *see* ch. 2.

(n128)Footnote 124. *See* 8 *Cal. Code Reg.* §§ 11010-11150, P 6 (Cal. Wage Order Nos. 1-2001-15-2001). For a discussion of exemption of certain disabled workers from minimum wage requirements, *see* ch. 2.

(n129)Footnote 125. *See* 8 *Cal. Code Reg.* §§ 11010- 11150, P 7 (Cal. Wage Order Nos. 1-2001-15-2001); 8 *Cal. Code Reg.* § 11060, 5 (Cal. Wage Order No. 16-2001). For a discussion of recordkeeping requirements under state law, *see* ch. 7. For a discussion of itemized statements required to accompany payments of wages, *see* Chapter 4.

(n130)Footnote 126. *See* 8 *Cal. Code Reg.* §§ 11010-11150, P 8 (Cal. Wage Order Nos. 1-2001-15-2001); 8 *Cal. Code Reg.* § 11060, P 7 (Cal. Wage Order No. 16-2001). For a discussion of limitations on permissible wage deductions, *see* ch. 4.

(n131)Footnote 127. *See* 8 *Cal. Code Reg.* §§ 11010-11150, P 9 (Cal. Wage Order Nos. 1-2001-15-2001); 8 *Cal. Code Reg.* § 11060, P 8 (Cal. Wage Order No. 16-2001).

(n132)Footnote 128. *See* 8 *Cal. Code Reg.* §§ 11000, P 3 (Cal. Wage Order No. MW-2001 (reflecting changes in the state and federal minimum wages)), 11010-11150, P 10 (Cal. Wage Order Nos. 1-2001-15-2001); 8 *Cal. Code Reg.* § 11060, P 9 (Cal. Wage Order No. 16-2001). For a discussion of crediting meals and lodging against minimum wage under state law, *see* ch. 2.

(n133)Footnote 129. *See* 8 *Cal. Code Reg.* §§ 11010-11150, P 11 (Cal. Wage Order Nos. 1-2001-15-2001); 8 *Cal. Code Reg.* § 11060, P 10 (Cal. Wage Order No. 16-2001). For a discussion of required meal periods, *see* ch. 3.

(n134)Footnote 130. *See* 8 *Cal. Code Reg.* §§ 11010-11150, P 12 (Cal. Wage Order Nos. 1-2001-15-2001); 8 *Cal. Code Reg.* § 11060, P 11 (Cal. Wage Order No. 16-2001). For a discussion of required rest periods, *see* ch. 3.

(n135)Footnote 131. *See* 8 *Cal. Code Reg.* §§ 11010-11130, P 13 (Cal. Wage Order Nos. 1-2001-15-2001).

(n136)Footnote 132. *See* 8 *Cal. Code Reg.* §§ 11010-11130, P 14 (Cal. Wage Order Nos. 1-2001-13-2001), 11140, P 13 (Cal. Wage Order No. 14-2001); 8 *Cal. Code Reg.* § 11060, P 12 (Cal. Wage Order No. 16-2001).

(n137)Footnote 133. *See* 8 *Cal. Code Reg.* §§ 11010-11130, P 15 (Cal. Wage Order Nos. 1-2001-15-2001); 8 *Cal. Code Reg.* § 11060, P 13 (Cal. Wage Order No. 16-2001).

(n138)Footnote 134. *See* 8 *Cal. Code Reg.* §§ 11010-11130, P 16 (Cal. Wage Order Nos. 1-2001-15-2001); 8 *Cal. Code Reg.* § 11060, P 14 (Cal. Wage Order No. 16-2001).

(n139)Footnote 135. *See* 8 Cal. Code Reg. §§ 11010-11130, P 17 (Cal. Wage Order Nos. 1-2001-13-2001); 8 Cal. Code Reg. § 11140, P 14 (Cal. Wage Order No. 14-2001); 8 Cal. Code Reg. § 11060, P 15 (Cal. Wage Order No. 16-2001).

(n140)Footnote 136. *See* 8 Cal. Code Reg. §§ 11010-11130, P 22 (Cal. Wage Order Nos.1-2001-13-2001), 11140, P 19 (Cal. Wage Order No. 14-2001), 11150, P 17 (Cal. Wage Order No. 15-2001); 8 Cal. Code Reg. § 11060, P 20 (Cal. Wage Order No. 16-2001). For discussion of posting requirements, *see* Chapter 7.

(n141)Footnote 137. *See* 8 Cal. Code Reg. §§ 11000 P 1 (Cal. Wage Order No. MW-2001) 11010-11130, 11160 P 1(B) (Cal. Wage Order Nos. 1-2001-13-2001; 16-2001).

(n142)Footnote 138. *See* 8 Cal. Code Reg. §§ 11000-11160, P 1 (Cal. Wage Order Nos. MW-2001, 1-2001-16-2001) (reflecting changes in the state and federal minimum wages).

(n143)Footnote 139. *See* 8 Cal. Code Reg. §§ 11010-11160, P 1 (Cal. Wage Order Nos. 1-2001-16-2001).

(n144)Footnote 140. *See* Statement as to the Basis for the General Minimum Wage Order, Industrial Welfare Commission MW-2001, P 1.

(n145)Footnote 141. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 50.2, citing *Walling v. General Industries Co.* (1947) 330 U.S. 545, 67 S. Ct. 883, 91 L. Ed. 1088 .

(n146)Footnote 142. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.1.

(n147)Footnote 143. *See* Chapter 3.

(n148)Footnote 144. *See* Chapter 2.

(n149)Footnote 145. *See* § 2.06[1][b].

(n150)Footnote 146. *See* Chapter 7.

(n151)Footnote 147. *See* Chapter 2.

(n152)Footnote 148. *See* Chapter 3.

(n153)Footnote 149. *See* Lab. Code §§ 1173, 1176-1182.1, 1182.5, 1182.7, 1184-1190.

(n154)Footnote 150. Lab. Code § 1185.

(n155)Footnote 151. Lab. Code § 1173.

(n156)Footnote 152. *See* Lab. Code §§ 1178, 1178.5.

(n157)Footnote 153. *See* Lab. Code §§ 1176.1, 1176.3, 1182.7.

(n158)Footnote 154. *See* Lab. Code §§ 1178.5(a), 1182(b), 1184.

(n159)Footnote 155. Lab. Code § 1176.1.

(n160)Footnote 156. Lab. Code § 1176.3(a)(1); *see also* [v], *below*, for discussion of public hearing process.

(n161)Footnote 157. Lab. Code § 1176.3(a)(2).

(n162)Footnote 158. *See Lab. Code § 1176.3(b).*

(n163)Footnote 159. *See [iv], below, for discussion of wage board selection.*

(n164)Footnote 160. *Lab. Code § 1176.3(c); see [v], below, for discussion of public hearing process.*

(n165)Footnote 161. *Lab. Code § 1182.7(b).*

(n166)Footnote 162. *Lab. Code § 1182.7(b).*

(n167)Footnote 163. *Lab. Code § 1182.7(c).*

(n168)Footnote 164. *See Lab. Code §§ 1178.5(c), 1181; see also discussion in [v] and [vi], below.*

(n169)Footnote 165. *Lab. Code § 1182.7(c).*

(n170)Footnote 166. *Lab. Code § 1182.7(d).*

(n171)Footnote 167. *Lab. Code § 1182.7(d).*

(n172)Footnote 168. *See Lab. Code § 1182.7(b), (c); see also discussion in [iii], above.*

(n173)Footnote 169. *See Lab. Code § 1182(b); see also discussion in Chapter 2.*

(n174)Footnote 170. *See Lab. Code §§ 1178, 1178.5.*

(n175)Footnote 171. *Lab. Code § 1178; see Lab. Code § 1178.5(a), (b).*

(n176)Footnote 172. *Lab. Code § 1178.*

(n177)Footnote 173. *See Industrial Welfare Comm'n v. Superior Court (1980) 27 Cal. 3d 690, 707, 166 Cal. Rptr. 331, 613 P.2d 579, app. dis. & cert. denied sub nom. California Mfrs. Ass'n v. Industrial Welfare Comm'n (1980) 449 U.S. 1029, 101 S. Ct. 602, 66 L. Ed. 2d 492 (promulgation of challenged 1980 wage orders complied with requirement that investigation precede selection of wage boards).*

(n178)Footnote 174. *Lab. Code § 1178.5(a), (b).*

(n179)Footnote 175. *Lab. Code § 1178.5(a), (b); see also 8 Cal. Code Reg. §§ 11530-11538 (wage board regulations).*

(n180)Footnote 176. *Lab. Code § 1180.*

(n181)Footnote 177. *Lab. Code § 1178.5(c).*

(n182)Footnote 178. *Lab. Code § 1178.5(c).*

(n183)Footnote 179. *Lab. Code § 1178.5(c).*

(n184)Footnote 180. *Lab. Code § 1178.5(c).*

(n185)Footnote 181. *See Lab. Code § 1178.5(c); see also discussion in [v], above.*

(n186)Footnote 182. *See Lab. Code § 1181(a).*

(n187)Footnote 183. *Lab. Code § 1181(b).*

(n188)Footnote 184. *Lab. Code § 1181(b)*.

(n189)Footnote 185. *Lab. Code § 1181(b)*.

(n190)Footnote 186. *Lab. Code § 1181(b)*.

(n191)Footnote 187. *See Lab. Code § 1182.7(e)*.

(n192)Footnote 188. *Lab. Code § 1182.7(e)*.

(n193)Footnote 189. *Lab. Code § 1182.7(e); see also* discussion in [viii] and [xi], *below*.

(n194)Footnote 190. *See Lab. Code § 1182.7(e)*.

(n195)Footnote 191. *Lab. Code § 1182(a)*.

(n196)Footnote 192. *Lab. Code § 1182(a)*.

(n197)Footnote 193. *Lab. Code § 1182.1*.

(n198)Footnote 194. *Lab. Code § 1182.1*.

(n199)Footnote 195. *Lab. Code § 1183(c)*.

(n200)Footnote 196. *See* discussion in [x], *below*.

(n201)Footnote 197. *Lab. Code § 1182.1*.

(n202)Footnote 198. *Lab. Code § 1184*.

(n203)Footnote 199. *Lab. Code § 1188*.

(n204)Footnote 200. *See Lab. Code § 1188*.

(n205)Footnote 201. *See Lab. Code § 1188*.

(n206)Footnote 202. *Lab. Code § 1188*.

(n207)Footnote 203. *Lab. Code § 1188*.

(n208)Footnote 204. *Lab. Code § 1177(a)*.

(n209)Footnote 205. *Lab. Code § 1177(b)*.

(n210)Footnote 206. *Lab. Code § 1177(b)*.

(n211)Footnote 207. *See California Hotel & Motel Ass'n v. Industrial Welfare Comm'n (1979) 25 Cal. 3d 200, 213-214, 157 Cal. Rptr. 840, 599 P.2d 31*.

(n212)Footnote 208. *See Industrial Welfare Comm'n v. Superior Court (1980) 27 Cal. 3d 690, 709-716, 166 Cal. Rptr. 331, 613 P.2d 579*.

(n213)Footnote 209. *Lab. Code § 1183(a)*.

(n214)Footnote 210. *Lab. Code § 1183(a)*.

(n215)Footnote 211. *See Lab. Code § 1183(a); see also 8 Cal. Code Reg. §§ 11010-11130*, P 22 (Cal. Wage Order Nos. 1-2001-13-2001), 11140, P 19 (Cal. Wage Order No. 14-2001), 11150, P 17 (Cal. Wage Order No. 15-2001).

(n216)Footnote 212. *Labor Code § 1183(d)*.

(n217)Footnote 213. *Labor Code § 1183(b)*.

(n218)Footnote 214. *Labor Code § 1183(b)*.

(n219)Footnote 215. *Labor Code § 1183(b)*.

(n220)Footnote 216. *Labor Code § 1183(b)*.

(n221)Footnote 217. *See Industrial Welfare Comm'n v. Superior Court* (1980) 27 Cal. 3d 690, 731-732, 166 Cal. Rptr. 331, 613 P.2d 579. *See also Harris Feeding Co. v. Department of Indus. Relations* (1990) 224 Cal. App. 3d 464, 473-474, 273 Cal. Rptr. 598.

(n222)Footnote 218. *Lab. Code § 1185; see also Lab. Code § 1200* (in prosecution for violation of *Lab. Code § 1171 et seq.*, minimum wages, maximum hours, and standard labor conditions fixed by IWC are presumed to be reasonable and lawful).

(n223)Footnote 219. *Lab. Code § 1187*.

(n224)Footnote 220. *See Industrial Welfare Comm'n v. Superior Court*, 27 Cal. 3d 690, 698 fn. 2, 735, 166 Cal. Rptr. 331, 613 P.2d 579 (1980). *See also Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal. 4th 785, 799-801, 85 Cal. Rptr. 2d 844, 978 P.2d 2 (IWC had authority to implement Wage Order No. 7-80 (former 8 Cal. Code Reg. § 11070(2)(I)) defining term "outside salesperson").

(n225)Footnote 220.1. *Small v. Superior Court* (2007) 148 Cal. App. 4th 222, 55 Cal. Rptr. 3d 410.

(n226)Footnote 220.2. *Small v. Superior Court* (2007) 148 Cal. App. 4th 222, 230-232, 55 Cal. Rptr. 3d 410.

(n227)Footnote 220.3. *Small v. Superior Court* (2007) 148 Cal. App. 4th 222, 232-236, 55 Cal. Rptr. 3d 410.

(n228)Footnote 220.4. *Small v. Superior Court* (2007) 148 Cal. App. 4th 222, 236-237, 55 Cal. Rptr. 3d 410.

(n229)Footnote 220.5. *Lab. Code § 1178.5*.

(n230)Footnote 220.6. *Small v. Superior Court* (2007) 148 Cal. App. 4th 222, 237-238, 55 Cal. Rptr. 3d 410.

(n231)Footnote 221. *See Lab. Code § 56*.

(n232)Footnote 222. *See Lab. Code §§ 50-64, 70*.

(n233)Footnote 223. *Lab. Code § 21*.

(n234)Footnote 224. *Lab. Code § 79*.

(n235)Footnote 225. *Lab. Code §§ 61, 1193.5. See also 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 1.1* (primary function of DLSE is to enforce state's labor laws regulating wages, hours and working conditions for employees in the State of California [*Lab. Code § 95*], but Division's enforcement powers are limited by phrase "enforcement of which is not specifically vested in any other officer, board or commission").

(n236)Footnote 226. *See Lab. Code §§ 74, 1193.5; see also Aguilar v. Association for Retarded Citizens (1991) 234 Cal. App. 3d 21, 25, 285 Cal. Rptr. 515*. Effective July 1, 2004, the California Legislature de-funded the IWC. However, the wage orders are still in effect, and the DLSE will continue to enforce them. *See* <http://www.dir.ca.gov/IWC/iwc.html>.

(n237)Footnote 227. *Lab. Code § 95(a)*.

(n238)Footnote 228. *See Lab. Code § 82(a)*.

(n239)Footnote 229. *See Lab. Code § 83(a)*.

(n240)Footnote 230. *See Lab. Code §§ 82(c), 83(c)*.

(n241)Footnote 231. *See Lab. Code § 80*.

(n242)Footnote 232. *Lab. Code § 81*.

(n243)Footnote 233. *See Lab. Code § 74*.

(n244)Footnote 234. *See Lab. Code § 96*.

(n245)Footnote 235. *See Lab. Code § 96.7*.

(n246)Footnote 236. *See Lab. Code § 98*.

(n247)Footnote 237. *See Lab. Code § 98.3*.

(n248)Footnote 238. *See Lab. Code § 1193.6*.

(n249)Footnote 239. *See Lab. Code § 1194.5*.

(n250)Footnote 240. *See Lab. Code §§ 98.7, 1197.5(e)*. For discussion of California Equal Pay Act, *see* [1][b], *above*.

(n251)Footnote 241. *Lab. Code § 1197.5(c)*.

(n252)Footnote 242. *See Lab. Code §§ 218, 229, 1194. See also Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc. (2002) 102 Cal. App. 4th 765, 772-780, 125 Cal. Rptr. 2d 804* (workers have private statutory rights to recover unpaid prevailing wages under *Lab. Code §§ 1194, 1774* and waiting time wages under *Lab. Code § 203* and could assign rights to union).

(n253)Footnote 243. *See Lab. Code § 98.2(a)*.

(n254)Footnote 244. *Aguilar v. Association for Retarded Citizens (1991) 234 Cal. App. 3d 21, 28, 285 Cal. Rptr. 515*; *Monzon v. Schaefer Ambulance Serv., Inc. (1990) 224 Cal. App. 3d 16, 30, 273 Cal. Rptr. 615*; *Keyes Motors, Inc. v. Division of Labor Standards Enforcement (1987) 197 Cal. App. 3d 557, 564, 242 Cal. Rptr. 873*; *Alcala v. Western AG Enterprises (1986) 182 Cal. App. 3d 546, 551, 227 Cal. Rptr. 453*.

(n255)Footnote 245. *Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 568-578, 59 Cal. Rptr. 2d 186, 927 P.2d 296*, *cert. denied*, 520 U.S. 1248, 117 S. Ct. 1862, 137 L. Ed. 2d 1062 (1997).

(n256)Footnote 246. Practitioners may find the manual at: <http://www.dir.ca.gov/DLSE>.

(n257)Footnote 247. *Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 571, 59 Cal. Rptr. 2d*

186, 927 P.2d 296 .

(n258)Footnote 248. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 1.1.6.

(n259)Footnote 249. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 1.1.6.

(n260)Footnote 250. *Morillion v. Royal Packing Co. (2000) 22 Cal. 4th 575, 94 Cal. Rptr. 2d 3, 995 P.2d 139 .*

(n261)Footnote 251. *Morillion v. Royal Packing Co. (2000) 22 Cal. 4th 575, 584, 94 Cal. Rptr. 2d 3, 995 P.2d 139 . See also Bell v. Farmers Ins. Exchange (2001) 87 Cal. App. 4th 805, 815 (advisory opinions, while not controlling on courts by reason of their authority, constitute body of experience and informed judgment to which courts and litigants may properly resort for guidance).*

(n262)Footnote 252. 2002 Update to DLSE Enforcement Policies and Interpretation Manual § 1.1.6.3.

(n263)Footnote 253. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 1.1.6.2.



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 1 Overview of Wage and Hour Laws
Part A. TEXT

1-1 California Employment Law § 1.06

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§ 1.06 Federal Law Governing Wages and Hours

[1] Fair Labor Standards Act

[a] Generally

The Fair Labor Standards Act (FLSA),ⁿ¹ as limited by the Portal-to-Portal Act,ⁿ² is the primary federal statute governing wages and hours of employment. Other federal statutes regulating wages and hours apply to employers who have contracts to provide services or goods for the federal government.ⁿ³

The FLSA does not apply to Indian tribes when application of the FLSA would interfere with tribal self-government, *i.e.*, protecting the tribes' exclusive rights of self-governance in purely intramural matters.^{n3.1} Thus, for example, the FLSA did not apply to law enforcement officers of the Navajo Nation Division of Public Safety suing the tribe. The officers maintain law and order within the reservation, which is a part of tribal government and an appropriate activity to exempt as intramural.^{n3.2} The FLSA also did not apply to claims against the United States, because the claims against the United States were in reality claims against the tribe.^{n3.3} The overtime provisions of the FLSA may apply to a retail business located on an Indian reservation and owned by Indian tribal members, and the Secretary of Labor may have the authority to enter the Indian reservation to inspect the books of that business. For example, the FLSA applied to a retail store located on trust land within an Indian reservation, which was owned by a member of the tribe. The intramural exception did not apply because the tribe had not enacted wage and hour laws, and because the store was a purely commercial enterprise engaged in interstate commerce selling out-of-state goods to non-Indians and employing non-Indians. The treaty rights exception did not apply because there was nothing in the treaty directly on point discussing employment or wages and hours, and language in the treaty regarding the tribe's agreement to free all slaves was not so ambiguous that it could be construed to cover the payment of required wages. Further, the treaty right to occupy and exclude did not give the store owners a right to regulate employment relationships with non-tribal members who consented to employment by tribal members, and the right to exclude and prevent non-Indians from living on tribal land did not prevent the Department of Labor from entering the reservation to investigate FLSA violations.^{n3.4}

[b] Purpose of Act

The FLSA was enacted on the basis of the congressional finding that the existence, in industries engaged in commerce or in the production of goods for commerce,ⁿ⁴ of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and the general well-being of workers causes commerce to be used to spread and perpetuate such conditions among the workers of the several states, burdens commerce and the free flow of commerce, constitutes an unfair method of competition in commerce, leads to labor disputes, and interferes with the orderly and fair marketing of goods in commerce.ⁿ⁵ It is the policy of the FLSA to correct and as rapidly as practicable eliminate these conditions without substantially curtailing employment or earning power.ⁿ⁶

[c] Scope of Coverage

[i] Wages, Hours, and Conditions of Employment Generally

The FLSA establishes minimum wages to be paid employees covered by its provisions,ⁿ⁷ and maximum hours of employment, beyond which overtime compensation must be paid.ⁿ⁸ It also regulates employment of minors in activities related to interstate commerce,ⁿ⁹ prohibits wage discrimination based on sex,ⁿ¹⁰ and contains recordkeeping requirements.ⁿ¹¹

[ii] Compensable Activity: Portal-to-Portal Act

The Portal-to-Portal Actⁿ¹² relieves employers from liability for minimum wages or overtime compensation under the FLSA resulting from the failure to compensate employees for certain specified activities unless, at the time the activity was engaged in, it was made compensable by the terms of an express contractual provision, or by custom or practice not inconsistent with a contractual provision.ⁿ¹³

The Portal-to-Portal Act was intended to curtail the numerous suits for unpaid compensation and liquidated damages under the FLSA that were filed after the United States Supreme Court ruled in *Anderson v. Mt. Clemens Pottery Co.*ⁿ¹⁴ that the FLSA provided compensation for certain activities for which employees had historically and customarily not been reimbursed.ⁿ¹⁵

In 1996, Congress amended the Portal-to-Portal Act by enacting the Employee Commuting Flexibility Act,^{n15.1} which provides that an employer need not compensate an employee for specified activities.

For a full discussion of the Portal-to-Portal Act as it affects the computation of work hours for purposes of determining overtime compensation and minimum wages, see Chapter 3, Part A.

[iii] Wage Discrimination on Basis of Sex: Equal Pay Act

Included in the FLSA is Title 29 of the *United States Code*, section 206(d), known as the Federal Equal Pay Act. This statute prohibits employers from discriminating between employees on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex in the same establishment on jobs requiring equal skill, effort, and responsibility, and performed under similar working conditions, unless the unequal payment is made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any other factor other than sex.ⁿ¹⁶ The Act also prohibits labor organizations from causing or attempting to cause an employer to discriminate against an employee on the basis of sex by paying lower wages to that employee.ⁿ¹⁷ Similar provisions have been enacted under state law.ⁿ¹⁸

For a full discussion of the provisions of the Federal Equal Pay Act and related statutory provisions regarding sex discrimination, as well as remedies for such discrimination, see Chapters 40-44.

[d] Geographical Coverage

The provisions of the FLSA are applicable only to employees whose services during the workweek are performed in a workplace in any state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf Lands,ⁿ¹⁹ American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, and Johnston Island.ⁿ²⁰ Piece workers in Puerto Rico and the Virgin Islands are subject to specified minimum piece rates; and certain employees in Puerto Rico are subject to different minimum wage standards set forth in the FLSA.ⁿ²¹

Employees working in other United States territories or in foreign countries are not covered under the FLSA, even if they are United States citizens.ⁿ²²

[e] Individual Employee Coverage

[i] Generally

An employee may be covered by the provisions of the FLSA either (1) *individually*, as described in this subsection, or (2) as an employee of a covered *enterprise*, as discussed in [f], below.ⁿ²³

An employee is individually covered under the minimum wage, overtime, and child labor provisions of the FLSA if he or she in any workweek is engaged (1) in commerce, or (2) in the production of goods for commerce.ⁿ²⁴ The term "commerce," as used in the FLSA, means trade, commerce, transportation, transmission, or communication among the several states or between any state and any place outside of the state.ⁿ²⁵ The term "state" also includes the District of Columbia and any territory or possession of the United States.ⁿ²⁶

To be covered, the employee need not engage solely, or even primarily, in commerce or in the production of goods for commerce. Every employee whose engagement in such activities, even though small in amount, is regular and recurring is covered by the FLSA.ⁿ²⁷ However, an employee engaged in purely local (that is, noninterstate) activities is not covered individually.ⁿ²⁸

[ii] Employees Engaged in Commerce

Employees who are engaged in commerce include those who use interstate instrumentalities of commerce as a regular and recurrent part of their duties,ⁿ²⁹ engage in the distribution of goods across state lines,ⁿ³⁰ or perform work that facilitates the operation of instrumentalities of commerce, including maintaining, repairing, or improving those instrumentalities.ⁿ³¹ Employees are also covered as "engaged in commerce" if they contribute directly to the movement of commerce by providing goods or facilities to be used or consumed by the instrumentalities of commerce in the direct furtherance of their activities of transportation, communication, transmission, or other movement in interstate or foreign commerce.ⁿ³² For example, employees who provide such items as energy or fuel to railroads, radio stations, airports, or other instrumentalities of commerce are deemed to be covered because they are so related to the actual movement of commerce as to be considered an essential and indispensable part thereof.ⁿ³³

In determining whether employees are "engaged in commerce," the activities of the employees, and not the business of the employer, is considered.ⁿ³⁴

[iii] Employees Engaged in Production of Goods for Commerce

An employee is individually covered under the FLSA if he or she is engaged in the production of goods for commerce.ⁿ³⁵ This test for coverage requires analysis of three elements: (1) the "production" of (2) "goods" (3) "for commerce."ⁿ³⁶

An employee is deemed to have been engaged in the "production" of goods if he or she was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on the goods, or in any closely related

process or occupation directly essential to production, in any state.ⁿ³⁷ If the employee's work is part of the employer's actual production of the goods, he or she is engaged in the "direct" production of goods. However, if the employee did not work on or even come into actual contact with the goods, he or she may still be engaged in the "indirect" production of goods if the work was closely related and directly essential to production.ⁿ³⁸

"Goods" are wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient of those "goods." They include ships and marine equipment; they do not include goods after they are delivered into the actual physical possession of the ultimate consumer other than a producer, manufacturer, or processor.ⁿ³⁹ "Goods" are not limited to commercial goods or articles of trade. They are also not limited to tangible property, but may be "ideas, wishes, orders, and intelligence."ⁿ⁴⁰ In addition, written materials are "goods" under the FLSA.ⁿ⁴¹ Gold,ⁿ⁴² livestock, poultry and eggs, vessels, vehicles, aircraft, garments being laundered or rented, ice, containers, electrical energy or power, gas, and by-products are also considered "goods."ⁿ⁴³ "Goods" do not include dams, river improvements, highways and viaducts, or railroad lines.ⁿ⁴⁴

The term "commerce" is defined in [i], *above*. Goods are produced "for" commerce when the employer intends, hopes, expects, or has reason to believe that the goods, or any unsegregated part of them, will move in interstate or foreign commerce.ⁿ⁴⁵ It makes no difference whether the employer, or a subsequent owner or possessor of the goods, actually puts them into interstate or foreign commerce, as long as such movement was reasonably anticipated at the time the employer's employees worked on the goods. The fact that the goods do in fact move in interstate or foreign commerce will be considered strong evidence that the employer intended, hoped, expected, or had reason to believe that the goods would move in that way.ⁿ⁴⁶

Goods produced for direct furtherance of interstate movement are produced "for" commerce regardless of the employer's intent.ⁿ⁴⁷ Thus, ice produced for use by interstate rail carriers for refrigeration is produced "for" commerce.ⁿ⁴⁸ However, production of goods for the instrumentalities of interstate commerce is not always production "for" commerce when the goods are used in the same state. For example, employees producing ice in a local plant that delivers ice for the water cooler in the community railroad station are not producing goods "for" commerce.ⁿ⁴⁹

Whether goods are produced "for" commerce depends on circumstances that exist at the time the goods are being produced rather than on some subsequent event. For example, goods produced to fill an out-of-state order that are destroyed by fire before they leave the state are nevertheless produced "for" commerce, and the employees who produced the goods are covered by the FLSA.ⁿ⁵⁰ Conversely, goods produced for a local contractor in the expectation that they will be used within the state are not produced "for" commerce, even if the contractor sells them to someone who moves to another state.ⁿ⁵¹ The practitioner should remember, however, that goods disposed of locally to persons who place them in commerce are produced "for" commerce if the employer intended, hoped, expected, or had reason to believe that the goods would be taken or sent out of the state.ⁿ⁵²

[f] Enterprise Coverage

All employees of an enterprise, including employees who would not be covered under the individual coverage test discussed in [e], *above*, ⁿ⁵³ are covered by the FLSA if the enterprise is engaged in commerce or in the production of goods for commerce.ⁿ⁵⁴

An "enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, whether performed in one or more establishments, or by one or more corporate or other organizational units, but does not include the related activities performed for an enterprise by an independent contractor.ⁿ⁵⁵ Certain activities in connection with hospitals and other care institutions, educational institutions, state or local agency-regulated carriers, and public agencies are specifically deemed to be performed for a "business purpose."ⁿ⁵⁶

A retail or service establishment that is under independent ownership will not be deemed to be other than a separate or distinct enterprise because of any arrangement that includes, but is not limited to, the following:ⁿ⁵⁷

1. An agreement to sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser;
2. An agreement to join with other establishments in the same industry for the purpose of collective purchasing; or
3. An agreement to have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area.

In addition, an independent retail or service establishment will not be considered otherwise simply because it occupies premises leased to it by a person who also leases premises to other retail or service establishments.ⁿ⁵⁸

Pursuant to the Fair Labor Standards Amendment of 1989, an "enterprise engaged in commerce or in the production of goods for commerce," means an enterprise that:

1. Has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated);ⁿ⁵⁹
2. Is engaged in the operation of a hospital; an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such an institution; a school for mentally or physically handicapped or gifted children; a preschool, elementary, or secondary school; or an institution of higher education (regardless of whether or not the hospital, institution, or school is public or private or operates for profit or not for profit);ⁿ⁶⁰ or
3. Is an activity of a public agency.ⁿ⁶¹

An establishment that has as its only regular employees the owner or the owner's parent, spouse, child, or other member of the owner's immediate family is not considered an enterprise engaged in commerce or in the production of goods for commerce or part of such an enterprise under the FLSA, and its sales may not be included for the purpose of determining the annual gross volume of sales of any other enterprise.ⁿ⁶²

Any enterprise that on March 31, 1990, was subject to the payment of minimum wages pursuant to *29 United States Code section 206(a)(1)* and that because of amendments to the enterprise test made by the Fair Labor Standards amendments of 1989, discussed *above*, is no longer subject to section 206(a)(1) must do all of the following:ⁿ⁶³

1. Pay its employees not less than the minimum wage in effect under *29 United States Code section 206(a)(1)* on March 31, 1990 (or \$3.35 per hour);
2. Pay its employees in accordance with the overtime compensation provisions of *29 United States Code section 207*; and
3. Remain subject to the child labor provisions of *29 United States Code section 212*.

Violation of any of these requirements by the employer is considered a violation of *29 United States Code section 206*,

207, or 212, respectively.ⁿ⁶⁴

[g] Exemptions From Coverage

There are specific exemptions from coverage under which certain employees otherwise covered individually or as employees of a covered enterprise are wholly or partially excluded from the FLSA's provisions.ⁿ⁶⁵ For a discussion of employees who are exempt from both minimum wage and overtime compensation provisions, or from minimum wage provisions only, see Chapter 2. For a discussion of employees who are exempt from overtime compensation provisions only, see Chapter 3. For a discussion of exemptions under the child labor provisions of the FLSA, see Chapter 6.

[h] Enforcement and Remedies

[i] Administrative Enforcement

The provisions of the FLSA are administered, enforced, and interpreted by the Secretary of Labor, through the Wage and Hour Division of the Department of Labor.ⁿ⁶⁶ The Wage and Hour Division is under direction of an Administrator, who is appointed by the President with the advice and consent of the Senate,ⁿ⁶⁷ and whose principal office is located in the District of Columbia (although the Division maintains offices throughout the country).ⁿ⁶⁸ The Division issues regulations and bulletins interpreting the provisions of the FLSA, which are set forth in Title 29 of the Code of Federal Regulations, Parts 500 et seq. Advisory interpretations by the Wage and Hour Division indicate the construction of the law that guides the Administrator and the Division in enforcing the FLSA.ⁿ⁶⁹ Although the Division's regulations and interpretations are not binding on the courts,ⁿ⁷⁰ good-faith reliance on such regulations and interpretations may constitute a defense to an action against an employer for violation of the minimum wage and overtime requirements of the FLSA, even if the regulation or interpretation is subsequently held to be invalid.ⁿ⁷¹

The Division is authorized to conduct investigations and gather data on wages, hours, and other employment conditions or practices.ⁿ⁷² In conducting such investigations, the Division is authorized to make on-site inspections of places of employment, interview employees, and examine employer records to determine whether any violations of the FLSA have occurred or to aid in the enforcement of the FLSA.ⁿ⁷³ When violations are found, the Administrator or his or her representative may seek voluntary compliance by the employer. The Division is also authorized to issue regulations requiring employers to maintain certain records concerning employees, and their wages, hours, and conditions of employment and to make certain reports to the Division to aid it in the enforcement of the FLSA and regulations thereunder.ⁿ⁷⁴

The Secretary of Labor is authorized to supervise the voluntary payment of unpaid minimum wages or overtime compensation and may bring a court action on behalf of an employee to recover the amount of unpaid minimum wages or overtime wages and an equal amount of liquidated damages.ⁿ⁷⁵ An action may also be maintained in federal court to enjoin future violations of the FLSA.ⁿ⁷⁶

For full discussion of enforcement procedures, see Chapter 5.

[ii] Judicial Enforcement

An employee may bring a civil action in a state or federal court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation due under the FLSA, plus an equal amount as liquidated damages.ⁿ⁷⁷ The court must also award reasonable attorney's fees if the plaintiff employee recovers judgment.ⁿ⁷⁸ An individual employee may bring such an action on behalf of other employees similarly situated if each such employee gives his or her written consent to be made a party to such an action and if the consent is filed in the court in which the action is brought.ⁿ⁷⁹ The employee's right to bring such an action is terminated, however, if the Secretary of Labor brings an action to restrain violations of the FLSA and collect unpaid minimum wages and overtime compensation on behalf of the employee.ⁿ⁸⁰

For full discussion of civil actions under the FLSA, see Chapter 5.

[2] Federal Contractors

[a] Generally

Certain employers working under contract with the federal government, including employers not otherwise subject to the FLSA, are subject to special wage and hour legislation. Although detailed treatment of these federal statutes is beyond the scope of this treatise, the principal statutes are summarized below. If an employer is subject to both the FLSA and a special government-contract statute, that employer must comply with the requirements of both statutes; to the extent that they conflict, the employee must be paid according to the statute that requires the greatest pay.ⁿ⁸¹

[b] Walsh-Healey Act: Supply Contracts

[i] Generally

The Walsh-Healey Actⁿ⁸² establishes minimum wage and overtime compensation requirements, as well as other labor standards, applicable to employees working on contracts with a federal government agency or the District of Columbia for the manufacture or furnishing of materials, supplies, articles, or equipment in any amount over \$10,000.ⁿ⁸³ All persons employed by the contractor in the manufacture or furnishing of the items used in the performance of the contract must be paid, without substantial deduction or rebate, prevailing minimum rates based on the standard for persons performing similar work in the industry in the locality where the work is performed, as determined by the Secretary of Labor, even if these wages are higher than the minimum wage established under the FLSA.ⁿ⁸⁴ The Walsh-Healey Act and federal regulations also prohibit work in excess of 40 hours a week, except when an employer enters into a bona fide collective bargaining agreement pursuant to Title 29 of the *United States Code*, section 207(b)(1) or (2),ⁿ⁸⁵ unless an employee who works overtime is paid an overtime rate set by the Secretary of Labor, which must be at least 1 1/2 times the basic hourly rate.ⁿ⁸⁶

The Walsh-Healey Act is deemed applicable only to employees engaged in, or connected with, the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under the contract. It is not deemed applicable to employees performing only office or custodial work, nor to any employee employed in a bona fide executive, administrative, professional, or outside salesperson capacity.ⁿ⁸⁷

[ii] Exceptions and Exemptions

The Secretary of Labor may make exceptions to the requirements of the Walsh-Healey Act on a written finding by the head of the contracting agency or department that the requirements will seriously impair the conduct of government business, or when justice or the public interest will be served.ⁿ⁸⁸ The Secretary also has the power to modify existing contracts, and may make rules and regulations allowing reasonable variances, tolerances, and exemptions to the requirements.ⁿ⁸⁹ If an increase in the maximum hours of labor stipulated in the contract is allowed, the Secretary of Labor must set a rate of overtime pay at not less than 1 1/2 times the basic hourly rate.ⁿ⁹⁰

The Walsh-Healey Act does not apply to purchases of materials, supplies, articles, or equipment that may usually be bought on the open market.ⁿ⁹¹ It also does not apply to perishables, including dairy, livestock, and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities, or the products of those commodities.ⁿ⁹² Also, the Act may not be construed to apply to the carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect, or to common carriers subject to Title 47 *United States Code*, sections 151 to 610 (Communications Act of 1934), which governs interstate wire or radio communication.ⁿ⁹³

[iii] Enforcement and Remedies

The Secretary of Labor is empowered to make investigations,ⁿ⁹⁴ hold hearings, and issue orders requiring the attendance and testimony of witnesses, as well as the production of evidence under oath, concerning breaches and violations of the Walsh-Healey Act.ⁿ⁹⁵ The Administrative Procedure Actⁿ⁹⁶ is applicable to these hearings.ⁿ⁹⁷

Breaches and violations of contract stipulations required by the Walsh-Healey Act are subject to liquidated, general, and statutory damages, and the contract may be canceled. Damages either may be withheld from amounts due the contractor, or may be recovered in suits brought by the United States Attorney General. Money due aggrieved employees may be recovered by the employees if they submit claims within one year from the date of actual notice to the contractor of withholding or recovery by the United States.ⁿ⁹⁸ Furthermore, lists of contractors that breach the Walsh-Healey Act must be distributed to all government agencies, and no federal contracts may be awarded to those contractors for three years following the date that the Secretary of Labor finds that the breach occurred, unless the Secretary recommends otherwise.ⁿ⁹⁹

[c] Davis-Bacon Act: Construction Contracts

[i] Generally

The Davis-Bacon Actⁿ¹⁰⁰ establishes minimum wage standards for mechanics and laborers working under federal contracts in excess of \$2,000 for construction, alteration, and/or repair of federal public buildings or public works located within any state of the United States or the District of Columbia.ⁿ¹⁰¹ Specifications for any such contract must contain a clause stating that minimum wages to be paid various classes of laborers and mechanics will be based on the wages determined by the Secretary of Labor to be prevailing for corresponding classes of laborers and mechanics employed on similar projects in the locality in which the work is to be performed. Every contract based on these specifications must contain a stipulation that the contractor will pay wages not less than those stated in the specification.ⁿ¹⁰²

The Davis-Bacon Act does not contain any express provision requiring overtime compensation. However, applicable federal regulations provide that a covered contract must contain a clause that states that no contractor or subcontractor may require or permit work in excess of 40 hours per workweek, unless compensation at a rate of 1 1/2 times the basic rate of pay is provided.ⁿ¹⁰³ Also, the Davis-Bacon Act does imply that covered employees are entitled to overtime compensation, by describing how the basic rate of pay, on which "overtime pay to which ... [the employee] is entitled under any [f]ederal law," is computed.ⁿ¹⁰⁴

[ii] Exceptions and Exemptions

Variations, tolerances, and exemptions may not be made from the requirements of the Davis-Bacon Act, because it does not specifically provide for them.ⁿ¹⁰⁵ However, apprentices may work at less than the rate predetermined in a covered contract if they are registered in a bona fide apprenticeship program registered with the Department of Labor or a recognized state apprenticeship agency, or are in their first 90 days of certified probationary employment as apprentices in a registered program.ⁿ¹⁰⁶ Similarly, registered trainees may also work at less than the predetermined rate.ⁿ¹⁰⁷

[iii] Enforcement and Remedies

The contracting agency must ascertain whether the required clauses are contained in the contract.ⁿ¹⁰⁸ The agency must also conduct investigations to ensure compliance with the clauses.ⁿ¹⁰⁹ If (1) underpayments by a contractor or subcontractor total \$1,000 or more, or (2) there is reason to believe violations were aggravated or willful, or (3) the contractor disregarded its obligations to employees or subcontractors, the agency must furnish a detailed enforcement report to the Administrator of the Wage and Hour Division of the Department of Labor.ⁿ¹¹⁰ If the foregoing circumstances do not exist, an enforcement report need not be submitted, unless the investigation was made at the

request of the Department of Labor. In that case, the agency must submit a factual summary report detailing any violations.n111

The Administrator must also conduct investigations to ensure compliance with the labor standards of the Davis-Bacon Act, or to affirm or reject recommendations by the head of the contracting agency relating to labor standards matters.n112 If (1) underpayments disclosed by an investigation total \$1,000 or more, (2) there is reason to believe violations were aggravated or willful, or (3) the contractor disregarded its obligations to employees or subcontractors, the Department of Labor must provide the federal agency with an enforcement report detailing the violations and any actions taken by the contractor to correct them.n113

The Administrator resolves wage disputes under the Davis-Bacon Act after investigation and notifies the contractor of its findings.n114 However, the affected contractor may request a hearing if he or she disagrees with the Administrator.n115 The contractor may also petition the Wage Appeals Board for review of the Administrator's rulings.n116

If a contractor fails to pay the minimum wages specified in the contract, the government contracting officer may withhold so much of the accrued payments as may be considered necessary to pay the laborers and mechanics the difference between the contract wages and those actually paid.n117 In addition, the contract may be terminated.n118 If the amounts withheld and paid by the federal government are insufficient to pay the wages required by the act, the laborers and mechanics may maintain a civil action against the contractor and its sureties for the difference.n119 If there is substantial evidence that violations were willful and in violation of a criminal statute, the matter must be forwarded to the United States Attorney General for prosecution.n120

The Comptroller General must distribute a list to all federal government departments of the names of persons or firms found to have disregarded their obligations to employees and subcontractors under the Davis-Bacon Act. Furthermore, no contract may be awarded to persons or firms appearing on the list, or to any firm, corporation, partnership, or association in which they have an interest, until three years after the date of the publication of the list.n121

[d] Service Contract Act

[i] Generally

The Service Contract Act (SCA)n122 imposes special minimum wage and fringe benefit requirements applicable to employers working under federal contracts in excess of \$2,500, the principal purpose of which is to furnish services in the United States through the use of service employees.n123 A "service employee" is any person engaged in the performance of a services contract (other than a person employed in a bona fide executive, administrative, or professional capacity, as defined by the FLSA and regulations thereunder), regardless of any alleged contractual relationship between a contractor or subcontractor and that person.n124 The Service Contract Act does not expressly define or limit the types of "services" covered, but federal regulations cite the following examples: laundry and dry cleaning; transportation of the mail; custodial, janitorial, and guard service; packing and crating; food service; and miscellaneous housekeeping services.n125

Wages and fringe benefits specified in a service contract must be in accordance with those found by the Secretary of Labor to be prevailing in the locality for similar work.n126 Pursuant to the SCA and its regulations, the Secretary issues determinations, usually denominated "wage determinations," for localities, which encompass wages and fringe benefits for different categories of service employees.n127 The regulations implementing the SCA require that the minimum monetary wages and fringe benefits set forth in wage determinations be based on all available pertinent information as to wage rates and fringe benefits being paid at the time the determination is made. That information is most frequently derived from area surveys made by the Bureau of Labor Statistics, U.S. Department of Labor, or other Labor Department personnel. Information may also be obtained from government contracting officers and other available

sources, including employees and their representatives and employers and their associations. The determinations may be based on the wage rates and fringe benefits contained in collective bargaining agreements when they have been determined to prevail in a locality for specified occupational classes of employees.ⁿ¹²⁸ The Secretary may also give due consideration to wage rates and fringe benefits that would be paid under federal pay systems.

Although the SCA administrative process provides the sole remedies for claims arising under the SCA itself, the SCA does not preclude an action under the False Claims Actⁿ¹²⁹ arising out of violations of the SCA.ⁿ¹³⁰ The SCA also does not preempt suits for wages, fringe benefits, and other compensation predicated on state or local laws consistent with the SCA and its goals.ⁿ¹³¹ Thus, for example, in *Naranjo v. Spectrum Security Services, Inc.*,ⁿ¹³² the Court of Appeal held that a state court action for violations of various California Labor Code sections by an employee of a company that provided security services under a contract with Immigration and Customs Enforcement was not preempted by the SCA, because the litigation would not conflict with the SCA or hinder the achievement of its goals. The claim to recover additional wages under *Labor Code Section 226.7* regarding meal periods and rest breaksⁿ¹³³ neither conflicted with the SCA nor hindered the achievement of its goals. The wage determination attached to the employer's contract with the ICE set forth the minimum basic wage rates for a large number of employment categories, including the employee's category of detention officer, and contained provisions setting minimum rates for night pay, Sunday pay, and a hazardous pay differential, but contained no provisions regarding additional pay for the denial of meal and rest breaks. The claim thus sought state-required wages exceeding the minimum wages determined by the Secretary. Similarly, the claim under *Labor Code Section 203*, which imposes a penalty on employers willfully failing to pay discharged employees their full compensation in a timely manner, seeking a penalty for the additional wages allegedly not paid under *Labor Code Section 226.7*, was not preempted, because it also neither hindered nor conflicted with the SCA.ⁿ¹³⁴ Finally, the claim under *Labor Code Section 226*, which obliges employers to provide their employees with records of their earnings and deductions, and imposes penalties on employers who knowingly and intentionally fail to supply the records, was not preempted because *Labor Code section 226* complemented the SCA and facilitated its goals by enhancing scrutiny of the employers' conduct.ⁿ¹³⁵ In no event may service contract wages be less than the minimum wage specified under the FLSA.ⁿ¹³⁶ Also, no part of the covered services may be performed in unsanitary, hazardous, or dangerous buildings or surroundings.ⁿ¹³⁷

The Service Contract Act also requires that a contractor or subcontractor who succeeds to a contract subject to the act and who provides substantially similar services must pay any service employee under that contract no less than the wages and fringe benefits to which that employee would have been entitled if employed under the predecessor's contract.ⁿ¹³⁸

[ii] Exceptions and Exemptions

The Service Contract Act does not apply to the following:ⁿ¹³⁹

1. Any contract of the United States or District of Columbia for construction, alteration, and/or repair, including painting or decorating, of public buildings or public works;
2. Any work required to be done in accordance with the Walsh-Healey Act;ⁿ¹⁴⁰
3. Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline when published tariff rates are in effect;
4. Any contract for the furnishing of services by radio telephone, telegraph, or cable companies, subject to the Communications Act of 1934;ⁿ¹⁴¹
5. Any contract for public utility services, including electric light and power, water, steam, and gas;

6. Any employment contract providing for direct services to a federal agency by an individual or individuals; and

7. Any contract with the Post Office Department, the principal purpose of which is the operation of postal contract stations.

In addition, the Secretary of Labor may provide reasonable limitations and make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from the Service Contract Act, except for the provision dealing with wage and fringe benefit determinations.ⁿ¹⁴² The Secretary may make limitations, variations, tolerances, and exemptions only in special circumstances in which he or she determines that they are necessary and proper in the public interest, or to avoid the serious impairment of government business.ⁿ¹⁴³ Any limitation, variation, tolerance, or exemption must be in accord with the remedial purpose of the Service Contract Act to protect prevailing labor standards.ⁿ¹⁴⁴

[iii] Enforcement and Remedies

The Service Contract Act is enforced by the head of the contracting federal agency or the Secretary of Labor.ⁿ¹⁴⁵ The enforcement provisions of the Walsh-Healey Actⁿ¹⁴⁶ govern the Secretary's authority to enforce the Service Contract Act.ⁿ¹⁴⁷ Thus, the Secretary may hold hearings and make decisions based on findings of fact as necessary to enforce the Service Contract Act.ⁿ¹⁴⁸ Wage and hour violations may be reported to any office of the Department of Labor, Wage and Hour Division, by any employer, employee, labor or trade organization, contracting agency, or other interested person or organization.ⁿ¹⁴⁹ Federal regulations govern administrative enforcement proceedings under the Service Contract Act.ⁿ¹⁵⁰

Employees have no private right of action against their employers under the Service Contract Act.ⁿ¹⁵¹ Moreover, if an employee is not satisfied with the amount of payments recovered on his or her behalf by the Wage and Hour Division of the Department of Labor, the employee is not entitled to a writ of mandamus compelling federal officials to bring additional enforcement action against the employer, unless the employee can prove that those officials failed to perform a ministerial (rather than discretionary) duty, violated a standard, or failed entirely to carry out the purposes of the Service Contract Act.ⁿ¹⁵²

Violations of the Service Contract Act will render the responsible party liable for a sum equal to the amount of any deductions, rebates, refunds, or underpayment of compensation. Funds due on the affected contract, or any other contract between the contractor and the federal government, may be withheld as necessary to pay aggrieved employees.ⁿ¹⁵³ Also, the contract may be canceled on written notice, and if the federal government enters into contracts with other contractors to complete the original contract, the violating party may be charged any additional cost.ⁿ¹⁵⁴ Moreover, the Comptroller General must distribute a list of the names of the violating persons or firms to all federal government agencies. Unless the Secretary of Labor recommends otherwise because of unusual circumstances, no federal contracts may be awarded to those persons or firms, or any firm, corporation, partnership, or association in which they have a substantial interest, for three years after publication of the list.ⁿ¹⁵⁵ Finally, if withheld funds are insufficient to satisfy the claims of all aggrieved employees, the United States may sue the responsible party to recover the remaining amount.ⁿ¹⁵⁶

[e] Contract Work Hours and Safety Standards Act

[i] Generally

The Contract Work Hours and Safety Standards Actⁿ¹⁵⁷ applies to contracts involving employment of laborers or mechanics on federal public works, and to the employment of laborers under a contract to which the United States or any federal agency is a party, or that is made on behalf of the United States or a federal agency, or that is financed by

federal loans or grants under a federal statute providing wage standards.n158

Like the FLSA, the Contract Work Hours and Safety Standards Act imposes overtime compensation requirements for hours worked in excess of 40 in a week; daily overtime compensation requirements have been repealed.n159

[ii] Exceptions and Exemptions

The Contract Work Hours and Safety Standards Act does not apply to work in which United States or agency assistance is only in the nature of a loan guarantee or insurance.n160 The Act also does not apply to contracts for transportation by land, air, or water, or for the transmission of intelligence, or for the purchase of supplies or materials or articles ordinarily available in the open market; nor does it apply to any work required to be done in accordance with the Walsh-Healey Act.n161

In 1994, the Contract Work Hours and Safety Standards Act was amended to provide that the Act does not apply to a contract for an amount less than \$100,000.n162 In addition, the Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from the Contract Work Hours and Safety Standards Act if necessary and proper in the public interest to prevent injustice or undue hardship, or to avoid serious impairment of the conduct of government business.n163 Pursuant to such regulations, the following classes of contracts are exempt:n164

1. Contracts of \$2,000 or less;
2. Purchases or contracts, other than construction contracts, in the aggregate amount of \$2,500 or less;
3. Contract work performed in a workplace within a foreign country, or within a territory under United States jurisdiction other than a state, the District of Columbia, Puerto Rico, the Virgin Islands, the Outer Continental Shelf lands, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, or Johnston Island;
4. Agreements entered into or on behalf of the Commodity Credit Corporation providing for the storing in or handling by commercial warehouses of wheat, corn, barley, rye, grain sorghums, soybeans, flaxseed, rice, naval stores, tobacco, peanuts, dry beans, seeds, cotton, and wool; and
5. Sales of surplus power by the Tennessee Valley Authority to state government entities, farmer or citizen organizations, and other individuals.n165

Federal regulations also contain several tolerancesn166 and variationsn167 to the Contract Work Hours and Safety Standards Act. For example, time spent in an organized program of related, supplemental instruction by laborers or mechanics employed under bona fide apprenticeship or training programs may be excluded from working time if certain criteria are met.n168

[iii] Enforcement and Remedies

Under federal regulations, the contracting federal agency and the Administrator of the Wage and Hour Division of the Department of Labor are initially responsible for enforcing contracts and labor standards under the Contract Work Hours and Safety Standards Act.n169 Inspectors of the work performed must report violations, together with the name of each aggrieved employee and the day or days of the violation, to the proper federal officer.n170 For a detailed discussion of the administrative enforcement procedures, see [c][iii], above.

A contractor who violates the act is liable to affected employees for unpaid wages. The contractor will also be liable to

the United States for liquidated damages in the amount of \$100 per violation per day.ⁿ¹⁷¹ The amount of unpaid wages and liquidated damages must be administratively determined and withheld, and the Comptroller General must pay the amounts determined to be due directly to the aggrieved employees from the withheld funds.ⁿ¹⁷² Moreover, if the violation was aggravated or willful, the contractor, or any entity in which it has a substantial interest, will be ineligible to receive contracts or subcontracts under the Contract Work Hours and Safety Standards Act for three years from the date that the Comptroller General publishes a list of ineligible contractors that includes the violating contractor's name.ⁿ¹⁷³

Aggrieved employees have a private right of action against violating contractors if the amount withheld to satisfy unpaid damages is insufficient to reimburse them.ⁿ¹⁷⁴ Also, intentional violations of the Contract Work Hours and Safety Standards Act are subject to criminal sanctions.ⁿ¹⁷⁵

[f] Copeland Act: "Anti-Kickback" Act

The Copeland Actⁿ¹⁷⁶ does not establish minimum labor standards but rather protects federal public works employees by making it a crime to induce an employee to give up any part of the wages to which he or she is entitled. The Copeland Act ensures that, pursuant to the Davis-Bacon Act, laborers and mechanics working on federal construction projects will be paid the prevailing wage without substantial rebate or deduction.ⁿ¹⁷⁷ However, the Copeland Act is broader in scope than the Davis-Bacon Act in that it applies to all public work projects regardless of contract value, and to all employees working on those projects. Violations of the Copeland Act are punishable by a fine of up to \$5,000 or imprisonment for up to five years, or both.ⁿ¹⁷⁸

[g] Miller Act: Bond-Posting Requirement

The Miller Actⁿ¹⁷⁹ requires prime contractors for the construction or repair of federal public buildings or public works to post payment bonds to ensure payment of wages to all persons supplying labor or materials.ⁿ¹⁸⁰ The Miller Act applies to contracts exceeding \$25,000 in amount.ⁿ¹⁸¹ Persons furnishing labor or material who were not paid in full by the contractor may sue on the payment bond.ⁿ¹⁸² The suit must be brought in the federal district court for the district in which the contract was to be performed and executed and must be brought in the name of the United States for the use of the person suing.ⁿ¹⁸³

[3] Family and Medical Leave Act of 1993

The Family and Medical Leave Act of 1993 ("FMLA")ⁿ¹⁸⁴ requires covered employers to provide eligible employees with unpaid family care leave for specified purposes, including the birth or adoption of a child of the employee, or the serious health condition of the employee or specified members of his or her family.ⁿ¹⁸⁵ For full discussion of the FMLA, see Chapter 8.

The Department of Labor's Wage and Hour Division enforces the FMLAⁿ¹⁸⁶ and promulgates implementing regulations.ⁿ¹⁸⁷ An employee may bring a civil action in state or federal court to recover damages caused by an employer's failure to provide leave as required by the FMLA.ⁿ¹⁸⁸

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Statutory Application General Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 201 *et seq.*

(n2)Footnote 2. 29 U.S.C. § 251 *et seq.*

(n3)Footnote 3. *See* discussion under [2], *below*.

(n4)Footnote 3.1. *See Donovan v. Coeur D'Alene Tribal Farm (9th Cir. 1985) 751 F.2d 1113, 1116 .*

(n5)Footnote 3.2. *Snyder v. Navajo Nation (9th Cir. 2004) 371 F.3d 658, 660-662 .*

(n6)Footnote 3.3. *Snyder v. Navajo Nation (9th Cir. 2004) 371 F.3d 658, 662-663 .*

(n7)Footnote 3.4. *Solis v. Matheson (9th Cir. 2009) 563 F.3d 425, 2009 U.S. App. LEXIS 8243, *5-*29*

(n8)Footnote 4. *See* discussion in [e] and [f], *below*.

(n9)Footnote 5. 29 U.S.C. § 202(a).

(n10)Footnote 6. 29 U.S.C. § 202(b); *see also Barrentine v. Arkansas-Best Freight Sys. (1981) 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 .*

(n11)Footnote 7. *See* 29 U.S.C. § 206; *see also* discussion in ch. 2.

(n12)Footnote 8. *See* 29 U.S.C. § 207; *see also* discussion in ch. 3, Part A.

(n13)Footnote 9. *See* 29 U.S.C. § 212; *see also* discussion in ch. 6.

(n14)Footnote 10. *See* 29 U.S.C. § 206(d); *see also* discussion in [iii], *below*.

(n15)Footnote 11. *See* 29 U.S.C. § 211(c); *see also* discussion in ch. 7.

(n16)Footnote 12. *See* 29 U.S.C. § 251 *et seq.*

(n17)Footnote 13. *See* 29 U.S.C. §§ 252(a), 254(a), (b).

(n18)Footnote 14. *Anderson v. Mt. Clemens Pottery Co. (1946) 328 U.S. 680, 687 .*

(n19)Footnote 15. *See Unexcelled Chemical Corp. v. United States (1953) 345 U.S. 59, 61, 73 S. Ct. 580, 97 L. Ed. 821 ; 29 U.S.C. § 251(a).*

(n20)Footnote 15.1. 29 U.S.C. § 254(a)(2). For discussion of ECFA, *see* § 3.07[2][c].

(n21)Footnote 16. *See* 29 U.S.C. § 206(d)(1).

(n22)Footnote 17. *See* 29 U.S.C. § 206(d)(2).

(n23)Footnote 18. *See Lab. Code § 1197.5; see also* discussion in § 1.05[1][b].

(n24)Footnote 19. *See 43 U.S.C. §§ 1331-1356 (Outer Continental Shelf Lands Act).*

(n25)Footnote 20. *See* 29 U.S.C. § 213(f); *see also* 29 C.F.R. § 776.7 (employees within designated territories are covered on same basis as persons employed in any of the 50 states).

(n26)Footnote 21. *See* 29 U.S.C. § 206(a)(2), (3), (c).

(n27)Footnote 22. 29 U.S.C. § 213(f); *see, e.g., Bernhard v. Metcalfe Const. Co. (D. Neb. 1946) 64 F. Supp. 953, 954 (American worker on Canadian construction project).*

(n28)Footnote 23. *See* 29 U.S.C. §§ 206(a), 207(a), 212(c); 29 C.F.R. § 776.0.

(n29)Footnote 24. *See* 29 U.S.C. §§ 206(a), 207(a), 212(c); *see also* 29 C.F.R. § 776.2 (determination of individual coverage generally).

(n30)Footnote 25. 29 U.S.C. § 203(b).

(n31)Footnote 26. *See* 29 U.S.C. § 203(c).

(n32)Footnote 27. *See* 29 C.F.R. § 776.3.

(n33)Footnote 28. *See Mitchell v. C.W. Vollmer & Co. (1955) 349 U.S. 427, 429, 75 S. Ct. 860, 99 L. Ed. 1196 .*

(n34)Footnote 29. *See* 29 C.F.R. § 776.10(a), (b) (examples include employees of telephone, telegraph, broadcasting, and transportation companies, as well as businesses such as banking, insurance, and newspaper publishing).

(n35)Footnote 30. *See* 29 C.F.R. § 776.10(b).

(n36)Footnote 31. *See* 29 C.F.R. § 776.11(a), (b).

(n37)Footnote 32. 29 C.F.R. § 776.11(d).

(n38)Footnote 33. 29 C.F.R. § 776.11(d).

(n39)Footnote 34. *Mitchell v. Lublin, McGaughy & Associates (1959) 358 U.S. 207, 211, 79 S. Ct. 260, 3 L. Ed. 2d 243 .*

(n40)Footnote 35. *See* 29 U.S.C. §§ 206(a), 207(a), 212(c).

(n41)Footnote 36. *See* 29 C.F.R. § 776.14.

(n42)Footnote 37. *See* 29 U.S.C. § 203(j); 29 C.F.R. § 776.14-776.21 (determining coverage on basis of engagement in production of goods for commerce).

(n43)Footnote 38. *See* 29 C.F.R. § 776.15(b); *Kirschbaum v. Walling (1942) 316 U.S. 517, 524-526, 62 S. Ct. 1116, 86 L. Ed. 1638* (employees engaged in operation and maintenance of loft building in which goods for interstate commerce produced are covered employees).

(n44)Footnote 39. 29 U.S.C. § 203(i).

(n45)Footnote 40. *See* 29 C.F.R. § 776.20(b); *Western Union Tel. Co. v. Lenroot (1944) 323 U.S. 490, 502-503, 65 S. Ct. 335, 89 L. Ed. 414* (telegraphic messages).

(n46)Footnote 41. *See* 29 C.F.R. § 776.20(b) (magazines; brochures; pamphlets, bulletins, and announcements; fiscal and other statements and accounts; correspondence; lawyers' briefs and other documents; advertising, motion picture, newspaper, and radio copy; artwork and manuscripts for publication; sample books; letterheads; envelopes; shipping tags; labels; checkbooks; blank books; book covers; advertising circulars; and candy wrappers).

(n47)Footnote 42. *See Fox v. Summit King Mines (9th Cir. 1944) 143 F.2d 926, 928 .*

(n48)Footnote 43. 29 C.F.R. § 776.20(b).

(n49)Footnote 44. 29 C.F.R. § 776.20(b).

- (n50)Footnote 45. *29 C.F.R. § 776.21(a).*
- (n51)Footnote 46. *29 C.F.R. § 776.21(a).*
- (n52)Footnote 47. *See 29 C.F.R. § 776.21(b)(1).*
- (n53)Footnote 48. *See 29 C.F.R. § 776.21(b)(2).*
- (n54)Footnote 49. *See 29 C.F.R. § 776.21(b)(3).*
- (n55)Footnote 50. *See 29 C.F.R. § 776.21(c)(1).*
- (n56)Footnote 51. *See 29 C.F.R. § 776.21(c)(2).*
- (n57)Footnote 52. *See 29 C.F.R. § 776.21(a), (d).*
- (n58)Footnote 53. *See 29 C.F.R. § 776.0.*
- (n59)Footnote 54. *See 29 U.S.C. §§ 206(a), 207(a), 212(c).*
- (n60)Footnote 55. *29 U.S.C. § 203(r)(1).*
- (n61)Footnote 56. *See 29 U.S.C. § 203(r)(2).*
- (n62)Footnote 57. *29 U.S.C. § 203(r)(1).*
- (n63)Footnote 58. *See 29 U.S.C. § 203(r)(1).*
- (n64)Footnote 59. *29 U.S.C. § 203(s)(1)(A)(i), (ii).*
- (n65)Footnote 60. *29 U.S.C. § 203(s)(1)(B).*
- (n66)Footnote 61. *29 U.S.C. § 203(s)(1)(C).*
- (n67)Footnote 62. *See 29 U.S.C. § 203(s)(2).*
- (n68)Footnote 63. *Pub. L. No. 101-157, § 3(b)(1).*
- (n69)Footnote 64. *Pub. L. No. 101-157, § 3(b)(1).*
- (n70)Footnote 65. *29 C.F.R. § 776.0a(b); see generally 29 U.S.C. § 213.*
- (n71)Footnote 66. *See 29 U.S.C. §§ 204, 209, 211, 216, 217.*
- (n72)Footnote 67. *See 29 U.S.C. § 204(a).*
- (n73)Footnote 68. *See 29 U.S.C. § 204(c).*
- (n74)Footnote 69. *See 29 C.F.R. § 775.1.*
- (n75)Footnote 70. *See 29 C.F.R. § 775.1.*
- (n76)Footnote 71. *See 29 U.S.C. § 259.*
- (n77)Footnote 72. *See 29 U.S.C. § 211(a).*

(n78)Footnote 73. *See* 29 U.S.C. § 211(a).

(n79)Footnote 74. *See* 29 U.S.C. § 211(c).

(n80)Footnote 75. *See* 29 U.S.C. § 216(c).

(n81)Footnote 76. *See* 29 U.S.C. § 217.

(n82)Footnote 77. 29 U.S.C. § 216(b).

(n83)Footnote 78. *See* 29 U.S.C. § 216(b).

(n84)Footnote 79. *See* 29 U.S.C. § 216(b).

(n85)Footnote 80. *See* 29 U.S.C. § 216(b), (c); *see also* discussion under [i], *above*.

(n86)Footnote 81. *See* 29 U.S.C. § 218(a); 29 C.F.R. § 778.5; *Masters v. Maryland Management Company* (4th Cir. 1974) 493 F.2d 1329, 1332 ; *see also* discussion in § 1.02.

(n87)Footnote 82. 41 U.S.C. § 35 *et seq.*

(n88)Footnote 83. *See* 41 U.S.C. § 35; *see also* 41 C.F.R. § 50-201.1 (regulatory stipulations that must be inserted or incorporated by reference in federal contract).

(n89)Footnote 84. *See* 41 U.S.C. § 35(a); *see also* 29 U.S.C. § 218(a) (no provision of FLSA excuses noncompliance with any federal law establishing minimum wage higher than that established by act).

(n90)Footnote 85. *See* 41 U.S.C. § 35(b). For discussion of the special rules under the FLSA relating to employees covered by collective bargaining agreements, *see* ch. 3.

(n91)Footnote 86. *See* 41 C.F.R. §§ 50-201.1, 50-201.103; *see also* 41 U.S.C. § 40.

(n92)Footnote 87. 41 C.F.R. § 50-201.102; *see also* 29 C.F.R. §§ 541.0-541.602 (defining and delimiting "bona fide executive, administrator, professional, outside salesperson" for purposes of FLSA). For discussion of exemptions for executive, administrative, and professional employees and outside sales personnel, *see* ch. 2.

(n93)Footnote 88. *See* 41 U.S.C. § 40; *see also* 41 C.F.R. §§ 50-201.601(a)(1), 50-203.13(a).

(n94)Footnote 89. 41 U.S.C. § 40; 41 C.F.R. §§ 50-201.603 (full administrative exemptions), 50-201.604 (partial administrative exemptions); *see also* 41 C.F.R. §§ 50-201.601(a)(2), 50-203.13(b), 50-203.14 (procedure for requesting exceptions and exemptions).

(n95)Footnote 90. 41 U.S.C. § 40.

(n96)Footnote 91. 41 U.S.C. § 43; *see* 41 C.F.R. § 50-201.2(a).

(n97)Footnote 92. 41 U.S.C. § 43; *see* 41 C.F.R. § 50-201.2(b)-(d).

(n98)Footnote 93. 41 U.S.C. § 43; *see* 41 C.F.R. § 50-201.2(e), (f).

(n99)Footnote 94. *See* 41 U.S.C. § 38.

(n100)Footnote 95. *See* 41 U.S.C. § 39; *see also* 41 C.F.R. §§ 50-203.1-50-203.12 (proceedings relating to Walsh-Healey Act breaches or violations).

(n101)Footnote 96. *See* 5 U.S.C. §§ 551 *et seq.*, 701-706, 3105, 3344.

(n102)Footnote 97. *See* 41 U.S.C. § 43a(a).

(n103)Footnote 98. *See* 41 U.S.C. § 36; *see also* 41 C.F.R. § 50-201.201.

(n104)Footnote 99. *See* 41 U.S.C. § 37.

(n105)Footnote 100. 40 U.S.C. § 276a *et seq.*

(n106)Footnote 101. *See* 40 U.S.C. § 276a(a); *see also* *Universities Research Assn. v.outu* (1981) 450 U.S. 754, 773-774, 101 S. Ct. 1451, 67 L. Ed. 2d 662 (Davis-Bacon Act designed to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in area, and to give local labor and contractors fair opportunity to participate in federal building programs).

(n107)Footnote 102. *See* 40 U.S.C. § 276a(a); 29 C.F.R. § 5.5 (required contract provisions).

(n108)Footnote 103. *See* 29 C.F.R. § 5.5(b)(1).

(n109)Footnote 104. *See* 40 U.S.C. § 276a(b).

(n110)Footnote 105. *See* 29 C.F.R. § 5.14.

(n111)Footnote 106. *See* 29 C.F.R. § 5.5(a)(4)(i).

(n112)Footnote 107. *See* 29 C.F.R. § 5.5(a)(4)(ii).

(n113)Footnote 108. *See* 29 C.F.R. § 5.6(a)(1).

(n114)Footnote 109. *See* 29 C.F.R. § 5.6(a)(3).

(n115)Footnote 110. *See* 29 C.F.R. § 5.7(a)(2).

(n116)Footnote 111. *See* 29 C.F.R. § 5.7(a)(1); *see also* 29 C.F.R. § 5.7(b) (agencies required to submit semiannual enforcement reports to Secretary of Labor relating to compliance with, and enforcement of, labor standard provisions of Davis-Bacon Act).

(n117)Footnote 112. *See* 29 C.F.R. § 5.6(b).

(n118)Footnote 113. *See* 29 C.F.R. § 5.6(b). If these findings are not made, the contracting agency must be furnished with a letter of notification summarizing the investigation. *See* 29 C.F.R. § 5.6(b).

(n119)Footnote 114. *See* 29 C.F.R. § 5.11(a), (b)(1) (notification of investigation findings and, if reasonable cause, debarment under Davis-Bacon Act when relevant facts at issue), (c)(1) (notification of investigation findings and ruling on issues of law when there are no relevant facts at issue).

(n120)Footnote 115. *See* 29 C.F.R. § 5.11(b)(2), (3), (c)(2); *see also* 29 C.F.R. §§ 6.30-6.35 (administrative hearing proceedings under Davis-Bacon Act).

(n121)Footnote 116. *See* 29 C.F.R. § 5.11(c)(3); *see also* 29 C.F.R. §§ 7.2-7.8 (review of wage determinations).

(n122)Footnote 117. *See* 40 U.S.C. §§ 276a(a), 276a-2(a); *see also* 29 C.F.R. §§ 5.9 (agency empowered to suspend payment to contractor until violations discontinued or sufficient funds withheld to compensate aggrieved employees), 5.10(a) (agency or Department of Labor representative required to request restitution).

(n123)Footnote 118. *See* 40 U.S.C. § 276a-1; 29 C.F.R. § 5.5(a)(7).

(n124)Footnote 119. *See* 40 U.S.C. § 276a-2(b).

(n125)Footnote 120. *See* 29 C.F.R. § 5.10(b).

(n126)Footnote 121. 40 U.S.C. § 276a-2(a); *see* 29 C.F.R. § 5.12(a)(2), (b) (debarment proceedings; notice and hearing, procedure); *see also* 29 C.F.R. §§ 6.30-6.35 (enforcement proceedings under Davis-Bacon Act).

(n127)Footnote 122. 41 U.S.C. § 351 *et seq.*

(n128)Footnote 123. *See* 41 U.S.C. § 351(a); 29 C.F.R. § 4.6 (labor standards clauses for federal service contracts exceeding \$2,500); *see Menlo Service Corp. v. United States* (9th Cir. 1985) 765 F.2d 805, 809 (Service Contract Act designed to fill gap between Walsh-Healey Act, applicable to supply contracts, and Davis-Bacon Act, applicable to construction contracts, and to be construed liberally).

(n129)Footnote 124. 41 U.S.C. § 357(b); 29 C.F.R. § 4.113(b); *see also* 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.0-541.315 (definitions of executive, administrative, and professional employees under FLSA). For discussion of exemptions for executive, administrative, and professional employees, *see* ch. 2.

(n130)Footnote 125. 29 C.F.R. § 4.111(b); *see also* 29 C.F.R. § 4.130 (extensive illustrative listing of types of service contracts).

(n131)Footnote 126. *See* 41 U.S.C. § 351(a)(1), (2).

(n132)Footnote 127. *See* 29 C.F.R. § 4.52(a).

(n133)Footnote 128. 29 C.F.R. § 4.51(a).

(n134)Footnote 129. 31 U.S.C. § 3729 *et seq.*

(n135)Footnote 130. *U.S. ex rel. Sutton v. Double Day Office Services* (9th Cir. 1997) 121 F.3d 531, 534-535 (SCA did not bar action, because FCA attached liability to employer's false statements regarding its compliance with SCA, not to noncompliance itself, and employee sought damages as determined by FCA, rather than by SCA).

(n136)Footnote 131. *See, e.g., Labor & Indus. v. Lanier Brugh* (2006) 135 Wash. App. 808, 811, 147 P.3d 588, 589-590 (in enacting SCA, Congress did not expressly preempt state overtime laws, and SCA did not preempt action by state agency against employers providing services under contract to Postal Service for violations of state overtime compensation laws, because contract expressly obliged employers to comply with state laws according employees higher wage); *Butler v. Fidelity Technologies Corp.* (La. Ct. App. 1996) 685 So.2d 676, 680 (action by employee seeking penalties from employer under Louisiana law for failure to pay wages within three days of his discharge from employment was not preempted by SCA, where state statutes did not prevent or interfere with purpose of SCA, and depriving Louisiana employees of remedy would have been inconsistent with objectives of SCA to ensure employees were guaranteed same benefits as other employees in same locality and state); *Lebron Diaz v. General Sec. Services Corp.* (D.P.R. 2000) 93 F. Supp. 2d 129, 135-136 (action by security guards in federal courthouses seeking fringe benefits mandated by Puerto Rican law was not precluded by SCA, where, under its regulations, SCA applied only to fringe benefits not otherwise required by federal, state, or local law).

(n137)Footnote 132. *Naranjo v. Spectrum Security Services, Inc.* (2009) 172 Cal. App. 4th 654, 663-669, 91 Cal. Rptr. 3d 393.

(n138)Footnote 133. For discussion of *Lab. Code* § 226.7 generally, *see* § 3.07[1][b], [c].

(n139)Footnote 134. For discussion of *Lab. Code* § 203 generally, *see* § 4.01[2].

(n140)Footnote 135. For discussion of *Lab. Code* § 226 generally, *see* § 4.03.

(n141)Footnote 136. *41 U.S.C. § 351(b)(1)*; *see* *29 C.F.R. §§ 4.2* (minimum wage specified by FLSA controls regardless of contract amount), *4.7* (labor standards clause for federal service contracts not exceeding \$2,500); *see also* *29 U.S.C. § 206(a)* (FLSA minimum wage), discussed in ch. 2, Part A.

(n142)Footnote 137. *See 41 U.S.C. § 351(a)(3)*.

(n143)Footnote 138. *See 41 U.S.C. § 353(c)*; *see also* *Trinity Services, Inc. v. Marshall (D.C. Cir. 1978) 593 F.2d 1250, 1258-1261, 193 U.S. App. D.C. 96* (a principal purpose of Service Contract Act is to establish minimum wage and fringe benefit standards to be provided by successor employees, in order to preserve benefits gained by service employees under prior employers).

(n144)Footnote 139. *41 U.S.C. § 356*; *see* *41 C.F.R. §§ 4.115-4.122*.

(n145)Footnote 140. *See* discussion in [b], *above*.

(n146)Footnote 141. *See 47 U.S.C. § 151 et seq.*

(n147)Footnote 142. *41 U.S.C. § 353(b)*; *29 C.F.R. § 4.123*; *see, e.g., 29 C.F.R. §§ 4.5(b)* (exemption for contracts under which five or fewer service employees are employed), *4.6(o)* (variances, tolerances, and exemptions relating to apprentices, student learners, and handicapped and aged workers); *see also 41 U.S.C. § 358* (wage and fringe benefit determinations).

(n148)Footnote 143. *See 41 U.S.C. § 353(b)*; *29 C.F.R. § 4.123(a), (d), (e)*.

(n149)Footnote 144. *41 U.S.C. § 353(b)*; *29 C.F.R. § 4.123(b)*.

(n150)Footnote 145. *41 U.S.C. § 352(b)*; *29 C.F.R. § 4.102*.

(n151)Footnote 146. *See 41 U.S.C. §§ 38, 39*; *see also* discussion in [b][iii], *above*.

(n152)Footnote 147. *41 U.S.C. § 353(a)*.

(n153)Footnote 148. *29 C.F.R. § 4.189*.

(n154)Footnote 149. *29 C.F.R. § 4.191*.

(n155)Footnote 150. *See 29 C.F.R. §§ 6.15-6.21*.

(n156)Footnote 151. *Barron v. Reich (9th Cir. 1994) 13 F.3d 1370, 1373*; *Misc. Service Workers, etc. v. Philco-Ford Corp. (9th Cir. 1981) 661 F.2d 776, 779-782* (employee's remedies for claims under SCA lie exclusively within its administrative process). *See also* *Danielsen v. Burnside-Ott Aviation Training Center (D.C. Cir. 1991) 941 F.2d 1220, 1226-1229, 291 U.S. App. D.C. 303*; *District Lodge No. 166, International Ass'n of Machinists & Aerospace Workers v. TWA (11th Cir. 1984) 731 F.2d 711, 714-716*.

(n157)Footnote 152. *Barron v. Reich (9th Cir. 1994) 13 F.3d 1370, 1373-1376*.

(n158)Footnote 153. *See 41 U.S.C. § 352(a)*; *29 C.F.R. § 4.187*.

(n159)Footnote 154. *See 41 U.S.C. § 352(c)*; *29 C.F.R. § 4.190*.

(n160)Footnote 155. *See* 41 U.S.C. § 354(a); 29 C.F.R. § 4.188.

(n161)Footnote 156. *See* 41 U.S.C. § 354(b).

(n162)Footnote 157. *See* 40 U.S.C. § 327 *et. seq.*

(n163)Footnote 158. 40 U.S.C. § 329(a).

(n164)Footnote 159. *See* 40 U.S.C. § 328(a), as amended by Pub. Law 99-145 (effective Jan. 1, 1986); *see also* 29 C.F.R. § 5.5(b) (contract clauses required by Contract Work Hours and Safety Standards Act).

(n165)Footnote 160. *See* 40 U.S.C. § 329(a).

(n166)Footnote 161. *See* 40 U.S.C. § 329(b); for discussion of the Walsh-Healey Act, *see* [b][i], *above*.

(n167)Footnote 162. 40 U.S.C. § 329(c).

(n168)Footnote 163. 40 U.S.C. § 331.

(n169)Footnote 164. *See* 29 C.F.R. § 5.15(b).

(n170)Footnote 165. *See* 16 U.S.C. § 8311 (Tennessee Valley Authority Act of 1933).

(n171)Footnote 166. *See* 29 C.F.R. § 5.15(c).

(n172)Footnote 167. *See* 29 C.F.R. § 5.15(d).

(n173)Footnote 168. *See* 29 C.F.R. § 5.15(c)(4).

(n174)Footnote 169. *See* 29 C.F.R. §§ 5.6, 5.7, 5.11, 5.12(b), 6.15-6.35 (enforcement proceedings under Contract Work Hours and Safety Standards Act).

(n175)Footnote 170. *See* 40 U.S.C. § 330(a).

(n176)Footnote 171. *See* 40 U.S.C. § 328(b)(2); 29 C.F.R. § 5.8.

(n177)Footnote 172. *See* 40 U.S.C. §§ 328(b)(2), 330(a); *see also* 29 C.F.R. §§ 5.5(b)(3) (required withholding contract clause), 5.9 (suspension of payment to contractor), 5.15(d) (variation; unpaid wages have priority over liquidated damages).

(n178)Footnote 173. *See* 29 C.F.R. § 5.12(a).

(n179)Footnote 174. *See* 40 U.S.C. § 330(b).

(n180)Footnote 175. *See* 40 U.S.C. § 332; 29 C.F.R. § 5.10.

(n181)Footnote 176. *See* 18 U.S.C. § 874.

(n182)Footnote 177. *See* discussion under [c], *above*.

(n183)Footnote 178. 18 U.S.C. § 874.

(n184)Footnote 179. *See* 40 U.S.C. §§ 270a-270d.

(n185)Footnote 180. *See* 40 U.S.C. § 270a(a)(2).

(n186)Footnote 181. *See 40 U.S.C. § 270a(a).*

(n187)Footnote 182. *See 40 U.S.C. § 270b(a).*

(n188)Footnote 183. *See 40 U.S.C. § 270b(b).*

(n189)Footnote 184. *See 29 U.S.C. § 2601 et seq.*

(n190)Footnote 185. *See 29 U.S.C. § 2612.*

(n191)Footnote 186. *See 29 U.S.C. §§ 2611(10), 2617(b).*

(n192)Footnote 187. *See 29 U.S.C. § 2654; 29 C.F.R. pt. 825.*

(n193)Footnote 188. *See 29 U.S.C. § 2617(a).*



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 1 Overview of Wage and Hour Laws
Part A. TEXT

1-1 California Employment Law §§ 1.07 through 1.19

AUTHOR: By Carol S. Sanders, J.D.

[Reserved]

§§ 1.07[Reserved]



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Part B. BIBLIOGRAPHY

1-1 California Employment Law § 1.20

AUTHOR: By Carol S. Sanders, J.D.

§ 1.20 Legal Texts

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Simmons, Wage and Hour Manual for California Employers, chs. 2, 3 (Castle Publications 4th ed. 1988).

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour
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1-1 California Employment Law § 1.21

AUTHOR: By Carol S. Sanders, J.D.

§ 1.21 Encyclopedias and Annotations

[1] Encyclopedias

41 Cal. Jur. 3d, *Labor*, §§ 28-38.

[2] Annotations

Annot., Validity of Federal Regulation of Wage Rates and Hours of Service as Affected by Commerce Clause of Federal Constitution (Art. I, § 8, Cl. 3)-- *Validity of federal regulation of wage rates and hours of service as affected by commerce clause of Federal Constitution (Art I, sec. 8, cl 3)--Supreme Court cases, 83 L. Ed. 2d 1163 (1987) .*

Legal Topics:

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

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Part B. BIBLIOGRAPHY

1-1 California Employment Law § 1.22

AUTHOR: By Carol S. Sanders, J.D.

§ 1.22 Law Reviews and Legal Periodicals

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Legal Topics:

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

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Laws Coverage & Definitions General Overview



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 2 Minimum Wages

1-2 California Employment Law 2.syn

AUTHOR: By Carol S. Sanders, J.D.

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[a] Persons Employed in Administrative, Executive, or Professional Capacities

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[a] California Law

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[1] California Law

[a] Generally

[b] Meals

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[ii] Employee Consent

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[2] Federal Law

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[2] Federal Law

§ 2.23 Provision of Uniforms, Tools, and Equipment

[1] California Law

[2] Federal Law

§ 2.24 Contract Provisions

§§ 2.25 through 2.29 [Reserved]

§ 2.30 Legal Texts

§ 2.31 Encyclopedias and Annotations

[1] Encyclopedias

[2] Annotations

§ 2.32 Law Reviews and Legal Periodicals

*By Carol S. Sanders, J.D. n**

FOOTNOTES:

(n1)Footnote *. Ms. Sanders is supervising attorney with Contra Costa Legal Assistance for the Elderly.

2004 Revisions by Peter Rukin, The Law Office of Peter Rukin, Oakland, CA, www.rukinlaw.com.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 2 Minimum Wages

1-2 California Employment Law Scope

AUTHOR: By Carol S. Sanders, J.D.

Scope

By Carol S. Sanders, J.D. n SCOPE*

This chapter discusses minimum wage obligations under state and federal law. Part A sets forth the prevailing minimum wages, and the interrelationship between the state and federal minimum wage law. It discusses the categories of employees who are entirely exempt from the provisions of the minimum wage laws, or who may be paid specified subminimum wages authorized under state and federal law. It also considers special applications of minimum wage laws, including split-shift premiums and piecework rates under California law, payment of minimum wages when wages are in the form of commissions, and the payment of prevailing wage rates, rather than minimum wages, applicable to employees of certain government contractors. Part B discusses the credits against minimum wage obligations that an employer may take for meals, lodging, and similar facilities provided to the employee, as well as the application of tips against minimum wages under federal law.

An overview of the applicability of the various wage and hour laws is set forth in Chapter 1. Procedures for determining hours worked (on which the minimum wage for a given pay period is determined) are discussed in Chapter 3. Rules governing the time and manner of payment of wages are discussed in Chapter 4. Remedies for failure to pay required wages are discussed in Chapter 5.

FOOTNOTES:

(n2)Footnote *. Ms. Sanders is supervising attorney with Contra Costa Legal Assistance for the Elderly.

2004 Revisions by Peter Rukin, The Law Office of Peter Rukin, Oakland, CA, www.rukinlaw.com.



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 2 Minimum Wages
Part A. MINIMUM WAGE REQUIREMENTS

1-2 California Employment Law § 2.01

AUTHOR: By Carol S. Sanders, J.D.

§ 2.01 Federal and State Minimum Wage Law Compared

In recent history, the federal and California minimum wage rates have variously been different and equal. After January 1, 2002, California employers were required to pay each employee covered under California wage orders not less than \$6.75 per hour for all hours worked.ⁿ¹ On and after January 1, 2007, the minimum wage for all industries was not less than \$7.50 per hour, and on and after January 1, 2008, the minimum wage for all industries became not less than \$8.00 per hour.^{n1.1} The federal minimum wage rate as of September 1, 1997, was \$5.15 per hour; effective July 24, 2007, the federal minimum wage became \$5.85 an hour; effective July 24, 2008, it rose to \$6.55 an hour; and effective July 24, 2009, it rises to \$7.25 an hour.ⁿ²

As discussed in Chapter 1, the provisions of the FLSA do not preempt the state from setting a higher minimum wage.ⁿ³ In addition to differences that may exist between state and federal law in the amount of the minimum wage, the rules governing coverage, exemptions, subminimum wages, and credits are often not coextensive. For example, tips received by an employee may be credited against an employer's minimum wage obligations under federal law,ⁿ⁴ but not under state law.ⁿ⁵ Under both federal and state law, employees who work in an executive, administrative, or professional capacity are exempt from application of minimum wage requirements,ⁿ⁶ but the definitions of these exemptions under federal law differ from the definitions under state law.ⁿ⁷ California and federal law differ in other respects, as discussed further in this chapter.

If a California employer is obligated to meet minimum wage requirements under both the FLSAⁿ⁸ and the state wage orders, and the rules differ with respect to a particular application of the minimum wage, the employer must adhere to the rule most protective of the employee in order to avoid liability for failure to pay the required minimum wage.ⁿ⁹ For further discussion of the interrelationship between state and federal wage and hour laws, *see* Chapter 1. For discussion of enforcement of minimum wage obligations, *see* Chapter 5.

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour
Laws Coverage & Definitions Minimum Wage

FOOTNOTES:

(n1)Footnote 1. 8 *Cal. Code Reg. § 11000*, P 2 (Cal. Wage Order No. MW-2001); *see* 8 *Cal. Code Reg. §§ 11010-11150*, P 4 (Cal. Wage Order Nos. 1-2001-15-2001).

Since 1996, the California minimum wage rate has changed several times. In 1996, the rate became \$4.75 per hour to reflect the newly-increased federal minimum wage (Cal. Wage Order No. MW-96 (Revised)) and to incorporate the change mandated by the November, 1996, passage of Proposition 210 (*Lab. Code § 1182*). As of March 1, 1997, the state rate increased to \$5.00 per hour, and again on September 1, 1997, to \$5.15 per hour (*Lab. Code § 1182.11*). The California minimum wage increased to \$5.75 per hour on March 1, 1998, and to \$6.25 per hour on January 1, 2001 (Cal. Wage Order No. MW-98).

(n2)Footnote 1.1. *Lab. Code § 1182.12*. *See also Lab. Code § 1182.13(b)*, directing the Department of Industrial Relations to amend and republish the Industrial Welfare Commission's wage orders to be consistent with these changes.

(n3)Footnote 2. *See 29 U.S.C. § 206(a)* (Small Business Job Protection Act of 1996).

(n4)Footnote 3. *See 29 U.S.C. § 218(a)*; *see also* discussion in § 2.02[1][b].

(n5)Footnote 4. *See 29 U.S.C. § 203(m)*.

(n6)Footnote 5. *See Lab. Code § 351*; *Henning v. IWC (1988) 46 Cal. 3d 1262, 1279, 252 Cal. Rptr. 278, 762 P.2d 442*; *see also* discussion under § 2.22.

(n7)Footnote 6. *See 29 U.S.C. § 213(a)(1)* (executive, administrative, and professional exemption under FLSA); 8 *Cal. Code Reg. §§ 11010-11150*, P 1(A) (Cal. Wage Order Nos. 1-2001-15-2001) (executive, administrative, and professional exemption under state wage orders).

(n8)Footnote 7. *See discussion under § 2.04*.

(n9)Footnote 8. *29 U.S.C. §§ 201-219*.

(n10)Footnote 9. *See 29 U.S.C. § 218(a)* (no provision of FLSA excuses noncompliance with more stringent state laws).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 2 Minimum Wages
Part A. MINIMUM WAGE REQUIREMENTS

1-2 California Employment Law § 2.02

AUTHOR: By Carol S. Sanders, J.D.

§ 2.02 Minimum Wages and Method of Determination

[1] California Law

[a] Prevailing Minimum Wage

The current minimum wage for all industries under the wage orders promulgated by the California Industrial Welfare Commission (IWC)ⁿ¹ is not less than \$8.00 per hour, as of January 1, 2008.^{n1.1} The minimum wage provisions apply to the vast majority of employees. However, the minimum wage order contains classes of employees who are exempt from its coverage (outside salespersons and individuals who are the parent, spouse or child of the employer); and the industry and occupation orders contain additional exemptions, exceptions, and qualifications.ⁿ² Wage Order MW-2001 has also eliminated non-statutory full and partial former exemptions of several large groups of employees: "employees of the State and local government and any political subdivision thereof, full-time carnival ride operators, professional actors, personal attendants in private homes except for persons under the age of eighteen who are employed as baby sitters for a minor child of the employer in the employer's home, student nurses, and minors paid not less than 85% of the minimum wage rounded to the nearest nickel. Additionally, the IWC amended the present partial exemption for learners to include minors."ⁿ³

Specified subminimum wages may be paid to certain other categories of employees to the extent authorized by the IWC.ⁿ⁴ In all other cases, an employer's failure to pay at least the minimum wage to nonexempt employees is unlawful and subjects the employer to civil penalties.ⁿ⁵ The employer's obligation to pay to the employee the required minimum wage cannot be waived by the employee's agreement to work for less.ⁿ⁶ For a discussion of remedies for failure to pay minimum wages, *see* Chapter 5.

In July, 1988, when the IWC raised the minimum wage to \$4.75, it adopted a separate, lower minimum wage for "tipped employees," which the California Supreme Court subsequently invalidated.ⁿ⁷ The Court held that the provision of a lower minimum wage for tipped employees violates *Labor Code section 351*, which declares that tips are the sole property of the employee to whom they are given and which prohibits employers from crediting tips against an employee's wages.ⁿ⁸ In response, the IWC amended the wage orders to repeal the subminimum wage for tipped

employees.

For discussion of prohibitions against crediting tips against an employee's wage,ⁿ⁹ see § 2.22 and Chapter 4.

[b] Effect of Federal Minimum Wage on State Minimum Wage

The state minimum wage must be *at least* equal to the federal minimum wage applicable to employees covered by the FLSA.ⁿ¹⁰ However, the IWC may set a minimum wage that exceeds the federal wage.ⁿ¹¹ If the IWC determines that the existing minimum wage is inadequate to supply the necessary cost of proper living to and maintain the health and welfare of California employees, it may amend or rescind existing orders fixing minimum wages, or it may promulgate a new order.ⁿ¹²

[c] Procedures for Determining Minimum Wage

[i] Generally

The California Constitution authorizes the Legislature to provide for minimum wages and for the general welfare of employees, and for these purposes to confer on a commission legislative, executive, and judicial powers.ⁿ¹³

The Industrial Welfare Commission must conduct a full review of the adequacy of the minimum wage at least once every two years.ⁿ¹⁴ On its own motion or on petition, the IWC may amend any order or portion of any order or adopt an order covering any occupation, trade, or industry not covered by an existing order.ⁿ¹⁵

If, after investigation, the IWC finds that wages paid to employees may be inadequate to supply the cost of proper living, it must select one wage board composed of an equal number of representatives of employers and employees, and a nonvoting representative of the IWC who will act as chairperson.ⁿ¹⁶ The wage board must consider the findings of the IWC and other information it deems appropriate.ⁿ¹⁷ It must thereafter report to the IWC its recommendation of a minimum wage adequate to supply the necessary cost of proper living and maintain the health and welfare of employees in the state, and its recommendations on other matters related to the minimum wage on which the IWC has requested recommendations.ⁿ¹⁸

After following mandatory procedures for preparing proposed regulations and holding public hearings on them,ⁿ¹⁹ the IWC may amend or rescind an existing order fixing minimum wages, or may promulgate a new order.ⁿ²⁰ If proposed regulations are based on recommendations supported by at least two-thirds of the wage board members, the IWC must adopt them unless it finds there is no substantial evidence to support the recommendations.ⁿ²¹

The Legislature may set the minimum wage and then direct the Department of Industrial Relations to amend and republish the Industrial Welfare Commission's wage orders to be consistent with those changes.^{n21.1}

[ii] The Living Wage Act of 1996

On November 5, 1996, the California voters passed Proposition 210. The declared purpose of this act was to raise the minimum wage above that of people on welfare.ⁿ²² This Act added *Labor Code § 1182.11*, increasing the minimum wage to not less than \$5.00 on March 1, 1997, and to not less than \$5.75 on and after March 1, 1998.ⁿ²³ *Labor Code Section 1182.11* also provides that the IWC shall adopt minimum wage orders consistent with this section without convening wage boards.ⁿ²⁴

[ii.a] Increases in Minimum Wage Order No. MW-2001

The Industrial Welfare Commission adopted the 2001 and 2002 increases in the minimum wage rate pursuant to its authority in the Labor Code and *Cal. Const., art. 14, § 1*.ⁿ²⁵ In a challenge to the IWC's authority to proceed on this

basis when it adopted minimum wage order MW-98, a court of appeal has held that the commission did not err or exceed the scope of its authority in amending its own prior wage orders so as to delete the requirement of overtime pay after eight hours of work per day, and to conform those overtime rules to the federal forty-hour week standard under the Fair Labor Standards Act.ⁿ²⁶

[iii] When Federal Minimum Wage Exceeds State Minimum Wage

If at any time the federal minimum wage is scheduled to exceed the minimum wage fixed by the IWC, the usual procedures pertaining to wage boards are waived and the IWC must, in a public meeting, adopt an order fixing a new minimum wage at the scheduled higher federal minimum wage.ⁿ²⁷ The effective date of the order must be the same as the effective date of the federal minimum wage increase, and the order does not become operative in the event the scheduled increase in the federal minimum wage does not become operative.ⁿ²⁸

[iv] Effective Date of Changes in State Minimum Wage

Pursuant to *Labor Code section 1184*, any amendments, rescissions, or promulgations of orders by the IWC affecting minimum wage rates become effective on the first day of the following January or July, and not less than 60 days from the date of publication.ⁿ²⁹ For a discussion of procedures for promulgating wage orders generally, *see* Chapter 1.

[d] "Averaging Method" to Determine Minimum Wage

In *Armenta v. Osmose, Inc.*, ^{n29.1} employees paid an hourly wage under a collective bargaining agreement sued their employer for compensation for driving time and, for the foremen, time spent processing paperwork, which was not covered by the collective bargaining agreement. The court rejected the employer's argument that the required minimum wage should be determined using the Federal Labor Standards Act model of "averaging" all hours worked and the compensation received for those hours. The employer had argued that because the average hourly rate in any given pay period was higher than California's minimum wage, the employer had not violated California's minimum wage law.^{n29.2}

The *Armenta* court first noted that California courts have long recognized that California's wage laws are patterned on federal statutes, and that authorities construing those federal statutes provide persuasive guidance to state courts.^{n29.3} However, California courts also recognize an important qualification on the relevance of federal authorities in this area, which is that the state is empowered to go beyond the federal statutes and regulations in adopting protective laws and regulations for the benefit of employees. Thus, the federal authorities are of little assistance, if any, in construing state laws and regulations that provide greater protection to workers.^{n29.4} Similarly, when the language or intent of state and federal labor laws substantially differs, reliance on federal regulations or interpretations to construe state regulations is misplaced.^{n29.5} The court found that the minimum wage provisions of the FLSA differ significantly from California's minimum wage law, and the California legislature has expressed a clear intent to protect the minimum wage rights of California employees to a greater extent than federal law does.^{n29.6} The FLSA requires payment of minimum wage to employees who "in any work week" are engaged in commerce. In contrast, *Labor Code section 1194(a)* provides that any employee receiving "less than the legal minimum wage" is entitled to recover the unpaid balance of the "full amount" owed. The court found the minimum wage applicable to the employees in *Armenta* in Wage Order No. 4, section 4(A), which provided a minimum wage of \$ 6.75 per hour for all hours worked, expressing the intent to insure that employees be compensated at the minimum wage for each hour worked.^{n29.7} The court then concluded that the averaging method utilized by the federal courts for assessing a violation of the federal minimum wage law is inappropriate for determining an employer's minimum wage obligation under California law.^{n29.8}

[e] Effect of Tips

The California Supreme Court has accepted review of *Grodensky v. Artichoke Joe's Casino*,^{n29.9} in which dealers at a casino failed to establish by a preponderance of the evidence that by requiring them to pool tips with shift managers, the

casino violated *Labor Code § 1194*.

It was undisputed that every dealer was paid and received a weekly paycheck for the minimum hourly wage regardless of tips and that every dealer contributed daily to the tip pool from chips received as tips. Thus, none of the money from the tip pool came from the dealers' wages, and the wages were not below minimum wage. Further, the dealers presented no evidence that the tips collected for the pool were used to offset the wages owed. On the other hand, in *California Drive-in Restaurant Association v. Clark*,^{29.10} decided when it was lawful for an employer to take employees' tips, the employment arrangement was that the tips received by the people serving cars constituted their wages, and the employer added any amount necessary to ensure that they received the minimum wage. The end result was that tips were counted as a part of the legal wage. The California Supreme Court noted that the statute at that time would not have been violated if the employer retained the entire amount of all tips received above the minimum wage, or deducted the tips from the amount of any wages the employer agreed to pay in excess of the specified minimum.

[2] Federal Law

[a] Prevailing Minimum Wage

The federal minimum wage rate is \$5.85 per hour as of July 24, 2007.³⁰ The federal minimum wage rose to \$6.55 per hour as of July 24, 2008, and will rise to \$7.25 per hour as of July 24, 2009.^{30.1}

Specified subminimum wages may be paid to certain categories of employees to the extent authorized by the FLSA, on issuance of special certificates by the Wage and Hour Administration.³¹ In all other cases, an employer's failure to pay at least the prevailing minimum wage to nonexempt employees subjects the employer to liability for damages and civil penalties.³² For a discussion of remedies for failure to pay minimum wages, *see* Chapter 5.

[b] Procedures for Determining Minimum Wage

Minimum wages are set by Congress pursuant to statute.³³ To assist Congress in determining the proper minimum wage, the Secretary of Labor is required by statute to submit an annual report containing an evaluation and appraisal of the minimum wage and overtime coverage under the FLSA, together with recommendations to Congress. In making the evaluation and appraisal, the Secretary must take into consideration any changes that may have occurred in the cost of living, productivity and level of wages in manufacturing, the ability of employers to absorb wage increases, and other pertinent factors.³⁴

[3] Prior Minimum Wage Rates Under California and Federal Law

It is important to be aware of prior minimum wage rates in the event that an audit covers periods prior to the establishment of the prevailing minimum wage rates, or a minimum wage violation is alleged to have occurred when a different minimum wage requirement was in effect.³⁵

Since January 1, 1978, the federal and state minimum wage rates have been as follows:³⁶

Effective Date	State	Federal
January 1, 1978:	--	\$2.65
April 1, 1978:	\$2.65	--
January 1, 1979:	\$2.90	\$2.90
January 1, 1980:	\$3.10	\$3.10
January 1, 1981:	\$3.35	\$3.35
July 1, 1988:	\$4.25	--

April 1, 1990:	--	\$3.80
April 1, 1991:	--	\$4.25
October 1, 1996:	\$4.75	\$4.75
March 1, 1997:	\$5.00	--
September 1, 1997:	--	\$5.15
March 1, 1998:	\$5.75	--
January 1, 2001:	\$6.25	--
January 1, 2002:	\$6.75	--
January 1, 2007:	\$7.50	--
July 24, 2007:	--	\$5.85
January 1, 2008:	\$8.00	--
July 24, 2008:	--	\$6.55
July 24, 2009:	--	\$7.25

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Minimum Wage

FOOTNOTES:

(n1)Footnote 1. *See* 8 Cal. Code Reg. §§ 11000, P 2 (Cal. Wage Order No. MW-2001); 11010-11150, P 4(A) (Cal. Wage Order Nos. 1-2001-15-2001).

(n2)Footnote 1.1. *Lab. Code* § 1182.12. *See also* *Lab. Code* § 1182.13(b), directing the Department of Industrial Relations to amend and republish the Industrial Welfare Commission's wage orders to be consistent with these changes.

(n3)Footnote 2. *See* 8 Cal. Code Reg. § 11000, PP 1, 5 (Cal. Wage Order No. MW-2001). For listing of specific industries and occupations subject to wage orders, *see* ch. 1. For discussion of exemptions from state minimum wage requirements, *see* § 2.04[1].

(n4)Footnote 3. *See* Ind. Welf. Comm., Statement of Basis for Cal. Wage Order No. MW-2001, P1.

(n5)Footnote 4. *See* *Lab. Code* §§ 1191-1193; 8 Cal. Code Reg. §§ 11010-11150, PP 4(A)(1), (D), (Cal. Wage Order Nos. 1-2001-15-2001); *but see* *Lab. Code* § 1391.2(b) (exception to subminimum wage for certain minors). For discussion of payment of subminimum wages under state law, *see* § 2.05[1].

(n6)Footnote 5. *See* *Lab. Code* §§ 1197, 1197.1. *See also* 8 Cal. Code Reg. §§ 11010-11150, P 20 (Cal. Wage Order Nos. 1-2001-15-2001).

(n7)Footnote 6. *See* *Lab. Code* § 1194.

(n8)Footnote 7. *See* *Henning v. Industrial Welfare Com.* (1988) 46 Cal. 3d 1262, 252 Cal. Rptr. 278, 762 P.2d 442 .

(n9)Footnote 8. *Henning v. Industrial Welfare Com.* (1988) 46 Cal. 3d 1262, 1280, 252 Cal. Rptr. 278, 762 P.2d 442 .

(n10)Footnote 9. *See Lab. Code § 351.*

(n11)Footnote 10. *See Lab. Code § 1182(b).*

(n12)Footnote 11. *See 29 U.S.C. § 218(a)* (no provision of FLSA will excuse noncompliance with any state law establishing minimum wage higher than minimum wage established under FLSA).

(n13)Footnote 12. *See Lab. Code § 1182(a).* For discussion for procedures for promulgating orders fixing minimum wages, *see [c], below.*

(n14)Footnote 13. *Cal. Const., art. XIV, § 1; see also* discussion in ch. 1.

(n15)Footnote 14. *Lab. Code § 1173.*

(n16)Footnote 15. *Lab. Code § 1173.*

(n17)Footnote 16. *Lab. Code § 1178.5(a); see also Lab. Code § 1178* (appointment of wage board to review wages in a particular occupation, trade, or industry).

(n18)Footnote 17. *Lab. Code § 1178.5(a).*

(n19)Footnote 18. *Lab. Code § 1178.5(a).*

(n20)Footnote 19. *See Lab. Code §§ 1178.5, 1181; see also* discussion in Ch. 1.

(n21)Footnote 20. *Lab. Code § 1182(a).*

(n22)Footnote 21. *Lab. Code § 1182(a).*

(n23)Footnote 21.1. *See, e.g., Lab. Code § 1182.12*, setting the minimum wage effective January 1, 2007, at \$7.50 per hour and effective January 1, 2008, at \$8.00 per hour, and *Lab. Code § 1182.13(b)*, directing the Department of Industrial Relations to amend and republish the Industrial Welfare Commission's wage orders to be consistent with these changes.

(n24)Footnote 22. *See* Section 1 of Proposition 210.

(n25)Footnote 23. *Lab. Code § 1182.11.*

(n26)Footnote 24. *Lab. Code § 1182.11.*

(n27)Footnote 25. 8 *Cal. Code Reg. § 11000*, P "Summary of Actions" (Cal. Minimum Wage Order No. MW-2001).

(n28)Footnote 26. *California Labor Fed'n v. Industrial Welfare Comm'n* (1998) 63 *Cal. App. 4th* 982, 993-998, 74 *Cal. Rptr. 2d* 397 (*Cal. Const. art. XIV, § 1*, gives IWC plenary jurisdiction over wages and welfare of employees and *Lab. Code § 1173* gives it power to "amend or rescind" its prior orders; *see also 29 U.S.C. § 201 et seq.*

(n29)Footnote 27. *Lab. Code § 1182(b).*

(n30)Footnote 28. *Lab. Code § 1182(b).*

(n31)Footnote 29. *See Lab. Code § 1182.1.*

(n32)Footnote 29.1. *Armenta v. Osmose* (2005) 135 *Cal. App. 4th* 314, 37 *Cal. Rptr. 3d* 460 .

(n33)Footnote 29.2. *Armenta v. Osmose* (2005) 135 Cal. App. 4th 314, 319, 322-323, 37 Cal. Rptr. 3d 460 . See, e.g., *Medrano v. D'Arrigo Bros. Co. of California* (N.D. Cal. 2004) 336 F. Supp. 2d 1053, 1057-1058 (interpreting Wage Order No. 14-80 and holding that employer meets minimum wage requirements as long as agricultural worker is paid no less than sum worker would have been paid during pay period if employer paid according to following formula: number of hours worked [including compulsory waiting and travel time] during pay period multiplied by minimum wage as defined in Wage Order No. 14-80; formula applies whether employer determined worker's compensation according to guaranteed minimum hourly wage, piece rate wage, or some other method; employer is liable if it paid agricultural workers less than Wage Order No. 14-80 required during pay period, regardless of how it determined wages it paid employees), citing *U.S. Dept. of Labor v. Cole Enterprises, Inc.* (6th Cir. 1995) 62 F.3d 775, 780 ; *Hensley v. MacMillan Bloedel Containers* (8th Cir. 1986) 786 F.2d 353, 357 ; *Dove v. Coupe* (D.C. Cir. 1985) 759 F.2d 167, 171, 245 U.S. App. D.C. 147 ; *Blankenship v. Thurston Motor Lines, Inc.* (4th Cir. 1969) 415 F.2d 1193, 1198 ; *United States v. Klinghoffer Bros. Realty Corp.* (2d Cir. 1960) 285 F.2d 487, 490 .

(n34)Footnote 29.3. *Armenta v. Osmose* (2005) 135 Cal. App. 4th 314, 319, 322, 37 Cal. Rptr. 3d 460 . See *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal. 3d 651, 658, 224 Cal. Rptr. 688, 715 P.2d 648 ; *Bell v. Farmers Ins. Exchange* (2001) 87 Cal. App. 4th 805, 817, 105 Cal. Rptr. 2d 59 .

(n35)Footnote 29.4. *Armenta v. Osmose* (2005) 135 Cal. App. 4th 314, 319, 323, 37 Cal. Rptr. 3d 460 . See *Bell v. Farmers Ins. Exchange* (2001) 87 Cal. App. 4th 805, 817-818, 87 Cal. App. 4th 805, 105 Cal. Rptr. 2d 59 .

(n36)Footnote 29.5. *Armenta v. Osmose* (2005) 135 Cal. App. 4th 314, 319, 323, 37 Cal. Rptr. 3d 460 . See *Ramirez v. Yosemite Water Co.* (1999) 20 Cal. 4th 785, 798, 85 Cal. Rptr. 2d 844, 978 P.2d 2 .

(n37)Footnote 29.6. *Armenta v. Osmose* (2005) 135 Cal. App. 4th 314, 319, 323-324, 37 Cal. Rptr. 3d 460 (California employees allowed higher minimum wage than federal statutes allow--\$ 5.15 per hour federally under 29 U.S.C. § 206(a)(1) compared to \$ 6.75 per hour in California; FLSA allows subminimum wage to be paid to new hires under 20 years of age for first 90 days of employment [29 U.S.C. § 206(g)(1)], while California law limits subminimum wage to first 160 hours, approximately 20 days [8 Cal. Code Regs. §§ 11010-11150]; employer may pay student learners in vocational training programs 75 percent of minimum wage under federal law [29 C.F.R. § 520.200 et seq.], while California law increases amount to no less than 85 percent of minimum wage [Cal. Code Regs., §§ 11010-11050]; FLSA gives employers tip credit for employees earning tips [29 U.S.C. § 203(m); 29 C.F.R. § 531.50], while California law expressly forbids tip credit and employees must receive the full minimum wage [Lab. Code, § 351]).

(n38)Footnote 29.7. *Armenta v. Osmose* (2005) 135 Cal. App. 4th 314, 319, 323, 37 Cal. Rptr. 3d 460 . See also Wage Order No. 4, section 4(B) (every employer must pay to each employee, on established payday for period involved, not less than applicable minimum wage for all hours worked in payroll period, whether remuneration is measured by time, piece, commission, or otherwise).

(n39)Footnote 29.8. *Armenta v. Osmose* (2005) 135 Cal. App. 4th 314, 319, 324, 37 Cal. Rptr. 3d 460 (trial court correctly determined employer violated Lab. Code § 1194 by failing or refusing to pay for driving time and time spent by foremen processing paperwork). See also Lab. Code §§ 221, 222, 223 (articulating principle that all hours must be paid at statutory or agreed rate and no part of rate may be used as credit against minimum wage obligation).

(n40)Footnote 29.9. *Grodensky v. Artichoke Joe's Casino* (2009) 171 Cal. App. 4th 1399, 1449-1451 .

(n41)Footnote 29.10. *California Drive-In Restaurant Asso. v. Clark* (1943) 22 Cal. 2d 287, 293, 140 P.2d 657 .

(n42)Footnote 30. 29 U.S.C. § 206(a)(1)(A) as amended by P.L. 110-28 § 8101 et seq., "The Fair Minimum Wage Act of 2007," which became effective 60 days after P.L. 110-28 was signed into law by the President, on May 26, 2007.

(n43)Footnote 30.1. 29 U.S.C. § 206(a)(1)(B), (C).

(n44)Footnote 31. *See* 29 U.S.C. § 214; *see also* discussion in § 2.05[2].

(n45)Footnote 32. *See* 29 U.S.C. § 216(b).

(n46)Footnote 33. *See* 29 U.S.C. § 206 (federal minimum wage).

(n47)Footnote 34. 29 U.S.C. § 204(d)(1).

(n48)Footnote 35. *See* ch. 5 for discussion of administrative and judicial remedies for failure to pay minimum wage.

(n49)Footnote 36. *See* 29 U.S.C. § 206(a) (federal minimum wage rates since 1978); 8 Cal. Code Reg. § 11000 (Cal. Wage Order No. MW-2001); former Cal. Wage Order Nos. MW-78, MW-80, MW-88, MW-98.



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 2 Minimum Wages
Part A. MINIMUM WAGE REQUIREMENTS

1-2 California Employment Law § 2.03

AUTHOR: By Carol S. Sanders, J.D.

§ 2.03 Employees Covered by Minimum Wage Provisions

[1] California Law

The minimum wages set by the IWC apply to all nonexempt employees, including those not specifically covered under wage orders applicable to specific occupations, trades, or industries.ⁿ¹ For discussion of the scope of coverage of the various wage orders, *see* Chapter 1.

[2] Federal Law

[a] Generally

The federal minimum wage under the FLSA applies to any nonexempt employeeⁿ² who in any workweek is employed in an enterprise engaged in commerce or in the production of goods for commerce.ⁿ³ In addition, even if the employer's enterprise is not so engaged, the individual employee must be paid the minimum wage if during the workweek he or she is engaged in commerce or in the production of goods for commerce.ⁿ⁴ For purposes of the FLSA, "commerce" is defined as trade, commerce, transportation, transmission, or communication among the several states (including the District of Columbia and any territory or possession of the United States) or between any state and any place outside that state.ⁿ⁵ For additional discussion of coverage under the FLSA generally, including the definition of an "enterprise engaged in commerce," *see* Chapter 1.

[b] Domestic Service Workers

Domestic service employees are deemed to affect commerce, for purposes of applying the FLSA.ⁿ⁶ The prevailing federal minimum wage must be paid to (1) an employee who in any workweek is employed in domestic service in a household unless that employee's compensation does not constitute wages under the Social Security Act,ⁿ⁷ that is, if compensation paid in cash is less than \$1,000 per calendar year, or such increased amount as is dictated by the Social Security Actⁿ⁸ or (2) an employee who in any workweek is employed in domestic service in one or more households for more than eight hours in the aggregate.ⁿ⁹ For full discussion of what constitutes work time under the FLSA, *see*

Chapter 3.

Domestic service employees who reside in the household where they work are entitled to the same minimum wage as domestic service employees who work by the day. In determining the hours worked by live-in domestic employees for purposes of calculating the minimum wage, the employer and employee may exclude by agreement the amount of sleeping time, meal time, or other periods of complete freedom from duties.ⁿ¹⁰

[c] Government Service Contractors

Every employer providing contract services under a contract with the United States, or any subcontract thereunder, must pay the prevailing minimum wage to each employee whose rate of pay is not governed by the Service Contract Act of 1965ⁿ¹¹ or who is not otherwise covered as an employee engaged in commerce or in the production of goods for commerce, or as an employee of an enterprise that is so engaged.ⁿ¹²

[d] State and Local Government Employees

Except for certain high level officers and advisors, state and local government employees are generally subject to the minimum wage (and overtime) provisions of the FLSA to the same extent as private employees.ⁿ¹³ The United States Supreme Court overruled a previous holding that state and local government employees engaged in traditional government activities are constitutionally exempt from minimum wage requirements under federal law.ⁿ¹⁴

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Minimum Wage

FOOTNOTES:

(n1)Footnote 1. *See* 8 Cal. Code Reg. §§ 11000, P 2 (Cal. Wage Order No. MW-2001); 11010-11150, P 4(A) (Cal. Wage Order Nos. 1-2001-15-2001); *see also* Ind. Welf. Comm., Statement as to the Basis at IWC website www.ca.gov.dir/IWC. For discussion of exempt employees, *see* § 2.04.

(n2)Footnote 2. *See* § 2.04 [2] for discussion of exempt employees under federal minimum wage law.

(n3)Footnote 3. *See* 29 U.S.C. § 206(a).

(n4)Footnote 4. *See* 29 U.S.C. § 206(a).

(n5)Footnote 5. 29 U.S.C. § 203(b), (c); *see also* 29 U.S.C. § 203(s) (further defining "enterprise engaged in commerce").

(n6)Footnote 6. *See* 29 U.S.C. § 202(a); 29 C.F.R. §§ 552.2(b), 552.99.

(n7)Footnote 7. 29 U.S.C. § 206(f)(1).

(n8)Footnote 8. *See* 29 C.F.R. § 552.2(b); *see also* 42 U.S.C. § 409(c) (defining "wages" for purposes of Social Security Act).

(n9)Footnote 9. 29 U.S.C. § 206(f)(2); *see* 29 U.S.C. § 206(a)(1), (b); *but see* 29 U.S.C. § 213(a)(15); 29 C.F.R. §§ 552.4-552.6, 552.104-552.106 (individuals casually employed as babysitters or companions entirely exempt from federal minimum wage requirements). For discussion of exempt employees under federal law, *see* § 2.04[2].

(n10)Footnote 10. *See* 29 C.F.R. § 552.102(a).

(n11)Footnote 11. *See* 41 U.S.C. § 351; *See also* § 2.06 [4] for discussion of payment of prevailing wage rates to employees covered under Service Contract Act.

(n12)Footnote 12. 29 U.S.C. § 206(e)(1).

(n13)Footnote 13. *See* 29 U.S.C. § 203(d), (e), (s)(1)(C), (x).

(n14)Footnote 14. *See* *Garcia v. San Antonio Metro* (1985) 469 U.S. 528, 531, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (overruling *National League of Cities v. Usery* (1976) 426 U.S. 833, 96 S. Ct. 2465, 49 L. Ed. 2d 245). In response to *Garcia*, Congress enacted the Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 2(c)(1), 99 Stats. 788-789 (reprinted as a note at 29 U.S.C. § 216), which provide that *Garcia* is non-retroactive. *See also* *Austin v. City of Bisbee, Ariz.* (9th Cir. 1988) 855 F.2d 1429, 1432-1434 (*Garcia* is non-retroactive).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 2 Minimum Wages
Part A. MINIMUM WAGE REQUIREMENTS

1-2 California Employment Law § 2.04

AUTHOR: By Carol S. Sanders, J.D.

§ 2.04 Exempt Employees

[1] California Law

[a] Persons Employed in Administrative, Executive, or Professional Capacities

[i] Generally

Minimum wage and overtime provisions of most of the wage orders do not apply to persons "employed in an administrative, executive, or professional capacity."ⁿ¹ The sole exception is the wage order regulating the agricultural occupations, which does not apply to employees engaged in work (a) that is primarily intellectual, managerial, or creative; (b) that requires exercise of discretion and independent judgment; and (c) for which the remuneration is not less than two times the monthly state minimum wage for full time employment.ⁿ² Prior to their amendment effective, January 1, 2001, the wage orders themselves did not separately define what was meant by "administrative," "executive," and "professional" capacities. Instead, they provided a two-prong test under which a person was not considered to be employed in any of these capacities unless he or she met one of two alternative criteria.ⁿ³ Under the 2001 wage orders, the criteria are set forth in each wage order.

The current criteria for this exemption are further discussed in [ii]-[iii], *below*.

■ CONSULTANT'S COMMENT:

As further discussed *below*, the exemption for executive, administrative, and professional employees under the California wage orders is narrower than many employers realize. There is *no* blanket exemption for salaried employees or for "white collar" work in general. To qualify for the exemption for executive, administrative, and professional employees, the criteria set forth in the wage orders must be satisfied. In determining whether the exemption applies, the DLSE closely examines the employee's actual duties and responsibilities. The employee's title is not controlling.ⁿ⁴ *Commentary by Kirby Wilcox.*

Each of the exemptions, *i.e.*, administrative, executive or professional, requires that the employee be "primarily engaged in" the duties which meet the test for the exemption.ⁿ⁵ The DLSE defines "primarily engaged in" to mean that more than one-half of the employee's work time is spent engaged in exempt work. The DLSE definition differs substantially from the federal test, which simply requires that the "primary duty" of the employee fall within the exempt duties.ⁿ⁶

The DLSE also takes the position that activities constituting exempt work and non-exempt work under the Wage Orders are to be construed in the same manner as those terms are construed in the listed sections of the Code of Federal Regulations under the Fair Labor Standards Act effective as of the date of the Wage Order, which is October 1, 2000, for all Orders except Order 16, which is effective January 1, 2001.ⁿ⁷ In each instance, the federal regulations listed are the same federal regulations utilized by the DLSE for at least the past twenty years to interpret and enforce the Wage Orders. The IWC has detailed the definitions to be used in determining the administrative, executive and professional exemptions by specifying the federal regulations on which the IWC relies.ⁿ⁸ However, the Wage Orders reference the old federal regulations, which the Department of Labor recently superseded by enacting the new overtime regulations that took effect in August of 2004.

Activities to be considered exempt include work "directly and closely related" to exempt work and work properly viewed as a means for carrying out exempt functions.ⁿ⁹ The DLSE takes the position that the definitions of "directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions" differ from exemption to exemption. Specific examples for each of the exemptions are set out at former 29 CFR sections 541.108 (managerial), 541.208 (administrative), and 541.308 (professional).ⁿ¹⁰ It is not the intent of this definitional language to expand the exemption, but simply to recognize that there are limited instances when production-type activities must be utilized to carry out the duties of the otherwise exempt employee.ⁿ¹¹ Examples include:ⁿ¹²

- An attorney drafting a brief on a computer or typewriter.
- A manager preparing a personal memo to his or her staff on a computer.
- Driving visiting management to the airport so further discussions regarding management activities can be carried on.

Former 29 CFR section 541.110 refers to "occasional tasks" that are not "directly and closely related." The IWC does not intend for these tasks to be included in the determination of exempt work.ⁿ¹³ Thus, non-exempt work performed by an otherwise exempt manager on an occasional basis may not be counted toward the 50% time requirement. This reflects the long-established DLSE enforcement policy. Any past enforcement policy statement that may have been interpreted to countenance non-exempt work by exempt employees, even on an occasional basis, is a misinterpretation of DLSE policy and clearly inapplicable to the current Wage Orders.ⁿ¹⁴

The Legislature has stated in each of the exempt categories that as a condition of the exemption the employee must "customarily and regularly exercise discretion and independent judgment in performing" the duties.ⁿ¹⁵ The Wage Orders provide that the provisions of former 29 CFR section 541.107 are to be used to determine the activities constituting exempt versus non-exempt work. That section, however, only addresses the term "discretionary powers," not the exercise of discretion and independent judgment. The confusion arises from the fact that after the initial draft of the Wage Orders was produced, the California Legislature amended *Labor Code section 515(a)* to require, unlike the federal regulations, that to meet the criteria for exempt status, the employee "customarily and regularly exercises discretion and independent judgment in performing" the duties. In the Statement As To The Basis, the IWC cited, *inter alia*, former 29 CFR section 541.207 and specifically mentioned that section 541.207 contains a "description of what is meant by the phrase 'discretion and independent judgment.'" ⁿ¹⁶ For enforcement purposes, DLSE disregards the language of former 29 CFR section 541.107 and relies on the language of 29 CFR section 541.207 to define the term "discretion and independent judgment" in each of the exempt classifications.ⁿ¹⁷ Additionally, the stated intent of the

IWC that the California "quantitative test" continue to be different from and more protective of employees than the federal "qualitative" or "primary duty" test must be considered in applying the "directly and closely related" examples.¹⁸

The Wage Orders also provide that the work actually performed by the employee during the course of the work week must, first and foremost, be examined, and the amount of time the employee spends on exempt work, together with the employer's realistic expectations and the realistic requirements of the job, be considered in determining whether the employee satisfies the requirements to be exempt.¹⁹ In determining realistic expectations, consideration must be given to the following:²⁰

- Whether the employee's practice diverges from the employer's realistic expectations.
- Whether there was any concrete expression of employer displeasure over an employee's substandard performance.
- Whether the expressions were realistic, given the actual overall requirements of the job.

Thus, an employer may not choose to ignore the fact that it would not be reasonable to expect an employee to perform the duties assigned without performing work exceeding the duties test requirements.²¹

■ ILLUSTRATION:

When assessing a managerial exemption, a "straw boss" or working foreman has duties designed to be production duties and may also have some limited managerial duties. The production duties the straw boss is assigned would not be counted toward the "directly and closely related" work because they are designed to fulfill the production aspect of the worker's assigned duties. The fact that the straw boss performs production-type duties is not an outgrowth of his or her limited supervisory role, but is simply a part of his or her production duties.²²

It is long-standing DLSE enforcement policy that an employer may not, through the use of an idealized job description, thrust an employee into exempt status when the duties imposed on that employee would not realistically allow the employee to perform exempt activities more than 50% of the time. By the same token, an employee in an otherwise exempt position may not surreptitiously perform non-exempt duties that are not within the realistic expectations of the employer in order to defeat the exemption.²³

To meet the test for exempt status, an employee must, in addition to the above requirements, also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.²⁴ The DLSE has promulgated extensive policy regarding the meaning of this requirement and the interaction of California law and federal regulations.²⁵

[ii] Executive Employees

To be exempt from the minimum wage and overtime provisions of the wage orders because of an employee's executive status, the employee must be one:²⁶

- (a) Whose duties and responsibilities involve the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof; and
- (b) Who customarily and regularly directs the work of two or more other employees therein; and
- (c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as

to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretion and independent judgment; and

(e) Who is primarily engaged in duties which meet the test of the exemption.

The employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment is defined in *Labor Code § 515(c)* as 40 hours per week.

The Wage Orders further require that the activities constituting exempt work and non-exempt work be construed in the same manner as such items are construed in specified regulations under the Fair Labor Standards Act (now superseded).ⁿ²⁷ Exempt work shall include, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the work week must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, must be considered in determining whether the employee satisfies this requirement.ⁿ²⁸

■ CONSULTANT'S COMMENT:

The portion of the text immediately following the required elements of exempt executive status contains a sentence that refers to "the employer's realistic expectations and the realistic requirements of the job." This passage reflects the view that the IWC has formed of the portion of *Ramirez v. Yosemite Water Co.*ⁿ²⁹ that grants to employers the right to sustain the exempt status of employees who perform non-exempt work over employer objection.ⁿ³⁰ Employers will argue that *Ramirez* grants a broad affirmative defense, so long as they attempt to enforce the performance of the exempt duties that they intend a job to encompass. Employees will argue that *Ramirez* grants a limited affirmative defense that should rarely be granted. The IWC position lies somewhere in the middle. The IWC reference to the "realistic requirements of the job" is intended to bar the affirmative defense where there is a showing that, despite an employer's expression of displeasure at the performance of non-exempt work, the realistic requirements of the job compel the performance of such work. The example that the DLSE uses to explain its position involves the following Catch-22 hypothetical comment by an employer to an employee who is performing clerical work despite a request not to do so: "You may not perform clerical work in the future. However, due to limitations on staff headcount, you may not hire additional clerical employees to assist you." Employers, therefore, should be careful to make sure that instructions to refrain from the performance of non-exempt work are reasonably enforceable. *Commentary by Kirby Wilcox.*

The DLSE has promulgated extensive policy regarding the executive employee exemption from the Wage Orders and the interaction of California law and federal regulations.ⁿ³¹

[iii] Administrative Employees

To be exempt from the minimum wage and overtime provisions of the wage orders, an administrative employee must be one:ⁿ³²

(a) Whose duties and responsibilities involve either:

(1) The performance of office or non-manual work directly related to management policies or general business operations of his or her employer or his or her employer's customers, or

(2) The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and

(b) Who customarily and regularly exercises discretion and independent judgment; and

(c) Who meets at least one of the following classifications:

(1) Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity (as such terms are defined for purposes of this section), or

(2) Who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or

(3) Who executes under only general supervision special assignments and tasks.

(d) Who is primarily engaged in duties which meet the test of the exemption.

The employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment is defined in *Lab. Code § 515(c)* as 40 hours per week.

The Wage Orders further require that the activities constituting exempt work and non-exempt work be construed in the same manner as such terms are construed in specified regulations under the Fair Labor Standards Act (now superseded).ⁿ³³ Exempt work includes, for example, all work that is directly and closely related to exempt work and work which is properly viewed as a means for carrying out exempt functions. The work actually performed by the employee during the course of the work week must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, must be considered in determining whether the employee is primarily engaged in duties that meet the test of the exemption.ⁿ³⁴

In *Bell v. Farmers Ins. Exchange*,ⁿ³⁵ the court held that branch office insurance claims representatives were properly classified as production, rather than administrative, employees under Wage Order 4 and therefore not exempt. In doing so, the court found that the term "administrative" in Wage Order 4,ⁿ³⁶ has a meaning independent of the limitations of Cal. Code Reg. § 11040 P 1(A)(1), (2).ⁿ³⁷ The court found further that federal authorities construing parallel provisions of the Fair Labor Standards Act are relevant to interpretation of the administrative exemption.ⁿ³⁸ The court then applied the dichotomy between administrative workers, described as employees performing work directly related to management policies or general business operations of the employer or the employer's customers, and production workers, whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce, as elucidated by federal decisions, as a useful approach to construing the meaning of "administrative" in Wage Order 4.ⁿ³⁹ The court concluded that the work of the claims representatives placed them squarely on the production side of the dichotomy, since the undisputed evidence established that claims adjusting is the sole mission of the branch claims offices in which the representatives worked and they are fully engaged in performing the day-to-day activities of that important component of the business.ⁿ⁴⁰

■ CONSULTANT'S COMMENT:

Bell v. Farmers Insurance Exchange ⁿ⁴¹ restricts the availability of exempt "administrative" status under federal and state wage and hour law. Both the California Labor Code and the FLSA provide an exemption from the payment of overtime for employees employed in an "administrative capacity." However, the regulations that implement the FLSA draw a distinction between "administrative" and

"production" work. "Administrative" work encompasses tasks related to the "servicing" of a business, such as planning, negotiating, purchasing, marketing and business research. "Production" work encompasses tasks related to the manufacture of the employer's goods or the performance of the employer's core services. For many years, federal courts placed limited emphasis upon this administrative/production dichotomy, focusing instead upon other elements of the test, such as whether the employee performed work of "substantial importance" to the enterprise. Starting in 1990, however, a few federal circuit courts expanded upon this dichotomy by first identifying the "production" work of the employer (whether goods or services) and then denying exempt administrative status to employees primarily engaged in such activity.

Before *Bell*, no California state appellate court had comprehensively addressed the administration/production dichotomy and its application, if any, to California's wage and hour laws. In *Bell*, the First Appellate District held that it does apply. Stating it was following the federal cases, the court held that claims adjusters for Farmers Insurance Exchange ("FIE") "produced" the company's primary product--defined by the court as "the handling of insurance claims"--and were not exempt administrative employees.ⁿ⁴²

Facts of Bell

FIE is one of many affiliated entities within the Farmers Insurance Group of Companies. According to the court, the sole and exclusive business of FIE is handling insurance claims. The other affiliated entities handle sales and "activities that would normally be included within the executive and administrative functions of a corporation."ⁿ⁴³ Plaintiffs were a class of current and former claims adjusters who worked within FIE's network of branch offices. The adjusters were responsible for settling claims for FIE, determining liability, recommending coverage, estimating damage, detecting fraud and various other duties associated with claims adjusting.

Plaintiffs filed a motion for summary adjudication, arguing that FIE's primary product is "claims handling" and that claims adjusters are therefore non-exempt employees engaged in "producing" the adjustment of claims. The trial court, applying the administrative/productive dichotomy, granted plaintiff's motion.

The Significance of Federal Authorities When Interpreting

The Administrative Exemption Under State Law

After extended analysis, the court concluded that federal authorities may serve as an aid to determining whether an employee is an exempt administrative employee under state law. Looking to those federal authorities, the court identified three distinct sets of criteria for determining exempt "administrative" status: (1) the role of the employees within the organization; (2) the job duties of the employees; and (3) the employees' level of remuneration. Addressing the employees' role within the organization, the court commented that, unlike federal cases which had focused on the administrative/production dichotomy, Wage Order No. 4ⁿ⁴⁴ covered the duties and level of remuneration required for administrative exempt status, but did not address the employee's "role." Accordingly, the court deemed it useful to look to federal law to make this assessment.

The Administrative/Production Dichotomy

The federal regulations provide that exempt administrative status applies only to employees who perform work "directly related to management policies or general business operations." The federal interpretive regulations explain that this requirement is met only by employees performing administrative work, not by those employees performing primarily production work.ⁿ⁴⁵ *Bell* accepted the argument that the federal courts have expanded this distinction, specifically noting that recent cases have focused on the "nature of the employer's business," distinguishing between employees who administer the business

affairs of the enterprise and those whose primary duty is producing the commodity (goods or services) that the enterprise exists to provide.ⁿ⁴⁶

Implications

By elevating a brief regulatory reference to production work to a major basis for denying exempt administrative status, the *Bell* court has upset fifty years of commonly held beliefs regarding exempt status. Now, analyzing job duties, formerly the foundation of exempt analysis, is subordinate to evaluating the employee's behavior to determine if it constitutes production work. Nothing could be less substantive, more confusing, or more unhelpful. *Commentary by Kirby Wilcox.*

On appeal after trial, the California Court of Appeal refused to reconsider its prior decision in light of recent developments in federal case law, finding that reconsideration was precluded by the law of the case doctrine and that FIE failed to show an intervening change in the controlling rules of law to justify a departure from the procedural rule.^{n46.1} The court also found that FIE had not demonstrated that the trial court abused its discretion in granting class certification and later denying the two motions for decertification.^{n46.2} The court also upheld the trial court's use of the statistical methodology of random sampling and extrapolation for the determination of aggregate classwide damages,^{n46.3} but remanded to the trial court for limited amendment of the postjudgment plan of distribution of damages and the order approving claim forms and instructions, which will authorize the claims administrator to challenge suspect claims.^{n46.4}

In *Eicher v. Advanced Business Integrators, Inc.*, ^{n46.5} a consultant to a computer software company was found not to fall with the administrative exemption. He was hired with a starting salary of \$60,000 and no overtime compensation. His college degree was in sociology, not computer science. He spent half of his time in the office and the other half onsite at customers' venues. He primarily provided customer service and training on the software. He did not hire or fire employees, negotiate contracts with customers, or consult with the employer or its customers about business policies and practices. The employer carefully monitored the hours he worked, requiring him to account for at least 40 hours per week, and deducted from his pay for partial-day absences if he had no accrued paid time off for the absence. The trial court properly found that the employer did not meet its burden of proof with respect to the first element of the five-part test for an administrative exemption,^{n46.6} whether he performed office or nonmanual work directly related to management policies or general business operations of the employer or its customers, and thus did not need to examine the other four elements.^{n46.7}

On the other hand, in *Combs v. Skyriver Communications, Inc.*, ^{n46.8} the employer did establish the application of the administrative exemption. Substantial evidence supported the finding that a former employee whose core responsibility was maintaining the well-being of the network of an Internet service provider was an administratively exempt employee. In a key distinction from *Bell*, the trial court concluded that the administrative/production worker dichotomy did not apply. The *Combs* court distinguished the *Bell* decisions both factually and legally. Factually, the court noted, the evidence in *Bell* showed that the employer itself characterized the plaintiff's responsibilities as "routine and unimportant." No such evidence was presented in *Combs*. Legally, the *Combs* court observed that the *Bell* decisions created the "administrative/production worker dichotomy" in analyzing a prior wage order that did not incorporate any federal regulations and did not contain a detailed definition of the administrative exemption. Because Wage Order 4-2001 did incorporate federal regulations and did define relevant terms, the dichotomy created in *Bell* was not dispositive. Indeed, the *Combs* court noted that the *Bell* court itself expressly cautioned against a broad application of the administrative/production dichotomy. The court analyzed the evidence of Combs' job responsibilities and concluded that they satisfied the elements of the administrative exemption.

The DLSE has promulgated extensive policy regarding the administrative employee exemption from the Wage Orders and the interaction of California law and federal regulations.ⁿ⁴⁷

[iv] Professional Employees

To be exempt from the minimum wage and overtime provisions of the wage orders, a professional employee must be one:⁴⁸

(a) Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching,⁴⁹ or accounting; or

(b) Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession, as construed in accordance with federal regulations.^{49.1} For the purposes of this subsection, "learned or artistic profession" means an employee who is primarily engaged in the performance of:

(i) Work requiring knowledge of an advanced type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work that is an essential part of or necessarily incident to any of the above work; or

(ii) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work; and

(iii) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(c) Who customarily and regularly exercises discretion and independent judgment in the performance of duties set forth in paragraph (a).

(d) Who earns a monthly salary⁵⁰ equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment is defined in *Labor Code section 515(c)* as 40 hours in a week.

(e) Notwithstanding the general definition of a professional employee, pharmacists employed to engage in the practice of pharmacy, and registered nurses employed to engage in the practice of nursing, are not to be considered exempt professional employees, nor are they to be considered exempt from coverage for the purposes of this subsection unless they individually meet the criteria established for exemption as executive or administrative employees. This rule for pharmacists and registered nurses does not apply to the following advanced practice nurses:

(i) Certified nurse midwives who are primarily engaged in performing duties for which certification is required pursuant to Article 2.5 (commencing with *Section 2746*) of *Chapter 6 of Division 2 of the Business and Professions Code*.

(ii) Certified nurse anesthetists who are primarily engaged in performing duties for which certification is required pursuant to Article 7 (commencing with *Section 2825*) of *Chapter 6 of Division 2 of the Business and Professions Code*.

(iii) Certified nurse practitioners who are primarily engaged in performing duties for which certification is required pursuant to Article 8 (commencing with *Section 2834*) of *Chapter 6 of Division 2 of the Business and Professions Code*.

(iv) These three occupations may meet the general requirements of exemption for professional employees

(f) Except as provided below, an employee in the computer software field will be exempt, if all of the following apply:^{50,1}

(i) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment, and the employee is primarily engaged in duties that consist of one or more of the following:

(ii) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications. The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to, user or system design specifications. The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

■ CONSULTANT'S COMMENT:

As under federal law, the phrase "discretion and independent judgment" for purposes of the wage orders does not have a lay meaning. It has a technical, legal meaning that is frequently misunderstood in three respects. First, "discretion and independent judgment" encompasses only decisions in which an employee has the power to make a choice free from immediate supervision. An employee who applies his or her knowledge in following prescribed procedures, in determining which procedures to follow, or in determining whether specified standards are met is not exercising discretion and independent judgment.⁵¹ Second, "discretion and independent judgment" encompasses only decisions affecting matters of consequence. Matters of consequence are those of real and substantial significance to the policies or general operation of the employer's business or the employer's customers. Third, "consequence" encompasses only decisions having a substantial effect on the general direction of a business as a whole. (An employee can have responsibilities related only to a segment of a business and still make decisions having a substantial effect on a business as a whole.) Decisions that are important to an employer only because they can lead to serious loss through the choice of incorrect techniques, the improper application of skills, neglect, or failure to follow instructions are not decisions of "consequence."⁵² *Commentary by Kirby Wilcox.*

(iii) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, or software engineering. A job title shall not be determinative of the applicability of this exemption.

(iv) The employee's hourly rate of pay is not less than \$36.00 or, if the employee is paid on a salaried basis, the employee earns an annual salary of not less than \$75,000 for full-time employment, which is paid at least once a month and in a monthly amount of not less than \$6,250. The Division of Labor Statistics and Research will adjust both the hourly pay rate and the salary level on October 1 of each year

(to be effective on January 1 of the following year) by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers. Effective January 1, 2009, the new amounts became the following: \$37.94 per hour or an annual salary of \$79,050 (in a monthly amount of not less than \$6,587.50).

(g) This exemption for an employee in the computer software field does not apply to an employee if any of the following apply:^{n52.1}

(i) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(ii) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(iii) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

(iv) The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

(v) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for on screen media or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

(vi) The employee is engaged in any of the activities that would make the employee eligible for the exemption for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

■ CONSULTANT'S COMMENT:

It is important to emphasize that the computer professional exemption found in the Wage Orders applies to specified *software* professionals only. The limitation to software-related tasks does not preclude a finding that a computer *hardware* professional is exempt, but that showing must satisfy the executive, administrative or non-computer related professional guidelines for determining exempt status.
Commentary by Kirby Wilcox.

The Wage Orders state that employees in the computer software field are exempt if they meet the listed criteria. *Labor Code section 515.5* provides that employees in the computer software field are exempt from the requirement that overtime compensation be paid if they meet similar criteria. The DLSE takes the position that the computer software exemption is limited to the overtime exemption and that employees in the computer software field remain covered by the other protections in the Wage Orders.ⁿ⁵³

The DLSE has promulgated extensive policy regarding the professional employee exemption from the Wage Orders and the interaction of California law and federal regulations.ⁿ⁵⁴

[b] Other Persons Exempt From Minimum Wage and Overtime Provisions of All Wage Orders

[i] Outside Salespersons

Under *Labor Code section 1171*, outside salespersons are excluded from coverage of the provisions of Part 4, Chapter 1 of the Labor Code governing wages, hours, and working conditions.ⁿ⁵⁵ and the minimum wage and overtime provisions of the wage orders do not apply to these persons.ⁿ⁵⁶ The California regulations define an outside salesperson as any person, 18 years of age or older, who customarily and regularly works more than half the working time away from the employer's place of business, selling tangible or intangible items or obtaining orders or contracts for products, services, or use of facilities.ⁿ⁵⁷

In *Ramirez v. Yosemite Water Co., Inc.*,ⁿ⁵⁸ the California Supreme Court held that the definition of outside salesperson contained in Wage Order No. 7-80,ⁿ⁵⁹ not the definition in the federal regulationsⁿ⁶⁰ is determinative and provides that a person who "regularly works more than half the working time" engaged in sales activities outside the employer's place of business is exempt from California overtime law under *Labor Code section 1171*.ⁿ⁶¹

Unlike the qualitative approach taken under the federal exemption, which focuses on defining the employee's "primary function," rather than on the amount of time spent selling,ⁿ⁶² the California regulation takes a purely quantitative approach, focusing exclusively on whether the employee works more than half the time selling or obtaining orders or contracts.ⁿ⁶³ In this case, the trial court and the court of appeal erred in employing the federal method, or an improper hybrid of the state and federal methods, to determine whether the employee was an outside salesperson.ⁿ⁶⁴

Having recognized California's distinctive quantitative approach to determine which employees are outside salespersons, the *Ramirez* court then addressed whether the number of hours an employee works in sales should be determined by number of hours the employer (by job description or estimation) claims the employee should be devoting to sales or by the actual number of hours the employee spends on sales. The Court held that a combination of the two should be used to make that determination, so that neither the employer nor the employee can manipulate the numbers. Thus, a court should first determine the number of hours the employee actually spends on sales; but the court should then consider whether the employee's work diverges from the employer's reasonable expectations, whether there was any concrete expression of employer displeasure because of this divergence, and whether such expressions were realistic, given the actual overall job requirements.ⁿ⁶⁵ The Court added that the trial court should itemize the types of activities it considers to be sales-related, and the approximate average time that it finds the employee spent on each of these activities. Because the question whether a particular activity is sales-related is a mixed one of law and fact, this itemization will enable an appellate court to review whether the trial court's legal classifications are correct, and whether its factual findings are supported by substantial evidence.ⁿ⁶⁶

■ CONSULTANT'S COMMENT:

In *Ramirez v. Yosemite Water Co., Inc.*,ⁿ⁶⁷ the California Supreme Court announced evidentiary rules for the litigation of certain wage and hour cases that will complicate and prolong discovery and trial for both plaintiffs and defendants. At the heart of the problem lies a simple, but powerful, reality. Many jobs are comprised of multiple job duties that frequently change to reflect evolving business needs. As a consequence, many employees complete their job duties by engaging in tasks with which their supervisors may be generally, but not intimately, familiar. In litigation involving challenges to exempt status, courts must be careful that these timing and content issues are neither understated nor overstated to gain an improper advantage. Unfortunately, even in the absence of concerns regarding evidentiary advantages, the time it will now take to reconstruct each and every detail of a job in order to quantify its weight will be significant for the parties and for the judiciary. In jury trials, moreover, the special verdict forms that will be necessary to preserve exempt/non-exempt issues for appellate review will be especially difficult to draft and especially difficult for juries to parse. Hopefully, the courts will develop a "totality of the circumstances" or "reasonable inferences" test that will permit practitioners to more efficiently evaluate and resolve these claims. Alternatively, or in addition, the courts could rule certain types of activities to be exempt or non-exempt as a matter of law. As matters now stand, these cases will

be complicated and protracted until further guidance is provided. *Commentary by Kirby Wilcox*

The apparent reason for specifically providing that minimum wage and other provisions do not apply to individuals employed as outside salespersons is that these employees normally control their own hours and are paid on a commission basis.ⁿ⁶⁸

■ CONSULTANT'S COMMENT:

The exemption for an "outside salesperson" does not apply to minors or to any employee who spends as much as one half of his or her working time at the employer's place of business.ⁿ⁶⁹ The DLSE's position is that when an employer establishes *any fixed location* at which the employee must work, that location constitutes one of the employer's places of business, and the exemption will not apply if the employee works 50 percent or more of the time at one or more such locations. Thus, for example, an employee who is required to sell flowers on a designated street corner is not an "outside salesperson." An employee who drives and makes sales from a catering or ice cream truck is not considered an "outside salesperson" because the truck is considered the employer's "place of business." *Commentary by Kirby Wilcox.*

[ii] State and Local Government Employees

Prior to January 1, 2001, none of the provisions of the wage orders applied to employees directly employed by the State of California or any county, incorporated city or town, or other municipal corporation. However, Minimum Wage Order MW-2001 and Wage Order Nos. 1-2001-13-2001 repealed features of the exemption that previously applied to these employees.ⁿ⁷⁰

Additionally, state and local government employees are generally covered by the FLSA to the same extent that private employees are.ⁿ⁷¹

[iii] Family of Employer

None of the provisions of the wage orders applies to individuals who are the parents, spouses, or children or legally adopted children of the employer.ⁿ⁷²

[iv] Employees Licensed Under Fish and Game Code

No employee holding a commercial fishing license pursuant to *Fish and Game Code Sections 7850-7856* or who is employed on a commercial passenger fishing boat licensed pursuant to *Fish and Game Code Sections 7920-7925* may be subject to a minimum wage or maximum hour (overtime) order of the IWC.ⁿ⁷³

[v] Live-In Alternatives to Incarceration Rehabilitation Programs for Substance Abusers

Notwithstanding any other provision of law, the participants, director, and staff of a live-in alternative to incarceration program with special focus on substance abusersⁿ⁷⁴ are exempt from the wage and hour provisions of the Labor Code when participating in operations owned and operated by the program, as long as all revenues generated by the operation are used for the support of the program.ⁿ⁷⁵

[vi] Employees in Computer Software Field

As indicated in [iii], *above*, an employee in the computer software field is exempt from the daily overtime pay provisions of *Labor Code section 510* if all of the following apply:ⁿ⁷⁶

- (a) The employee is primarily engaged in work that is intellectual or creative and that requires the exercise of discretion and independent judgment, and the employee is primarily engaged in duties that

consist of one or more of the following:

- (i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.
- (ii) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to, user or system design specifications.
- (iii) The documentation, testing, creation, or modification of computer programs related to the design of software or hardware for computer operating systems.

(b) The employee is highly skilled and is proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, or software engineering. A job title shall not be determinative of the applicability of this exemption.

(c) The employee's hourly rate of pay is not less than \$36.00 or, if the employee is paid on a salaried basis, the employee earns an annual salary of not less than \$75,000 for full-time employment, which is paid at least once a month and in a monthly amount of not less than \$6,250. The Division of Labor Statistics and Research will adjust both the hourly pay rate and the salary level on October 1 of each year (to be effective on January 1 of the following year) by an amount equal to the percentage increase in the California Consumer Price Index for Urban Wage Earners and Clerical Workers. Effective January 1, 2009, the new amounts became the following: \$37.94 per hour or an annual salary of \$79,050 (in a monthly amount of not less than \$6,587.50).

This exemption does not apply to an employee if any of the following apply:ⁿ⁷⁷

(a) The employee is a trainee or employee in an entry-level position who is learning to become proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering.

(b) The employee is in a computer-related occupation but has not attained the level of skill and expertise necessary to work independently and without close supervision.

(c) The employee is engaged in the operation of computers or in the manufacture, repair, or maintenance of computer hardware and related equipment.

(d) The employee is an engineer, drafter, machinist, or other professional whose work is highly dependent upon or facilitated by the use of computers and computer software programs and who is skilled in computer-aided design software, including CAD/CAM, but who is not in a computer systems analysis or programming occupation.

(e) The employee is a writer engaged in writing material, including box labels, product descriptions, documentation, promotional material, setup and installation instructions, and other similar written information, either for print or for on screen media or who writes or provides content material intended to be read by customers, subscribers, or visitors to computer-related media such as the World Wide Web or CD-ROMs.

(f) The employee is engaged in any of the activities set forth in *Labor Code section 515.5(a)* for the purpose of creating imagery for effects used in the motion picture, television, or theatrical industry.

[vii] Licensed Physician or Surgeon

Labor Code section 510 does not apply to an employee who is a licensed physician or surgeon, whose primary duties require licensure pursuant to *Business & Professions Code section 2000 et seq.*, and whose hourly rate of pay is equal to or greater than a specified rate (currently \$55, to be increased every January 1).ⁿ⁷⁸ The exemption does not apply to employees in a medical internship or resident program or to a physician employee covered by a valid collective bargaining agreement pursuant to *Labor Code section 514*.ⁿ⁷⁹

[c] Inapplicability of Certain Wage Orders to Specified Occupations**[i] Student Nurses**

Before January 1, 2001, none of the provisions of the wage order regulating wages, hours, and working conditions in the public housekeeping industryⁿ⁸⁰ applied to student nurses in a school accredited by the California Board of Registered Nursing or by the Board of Vocational Nurse and Psychiatric Technician Examiners or exempted by the provisions of the *Business and Professions Code Sections 2789* or *2884*.ⁿ⁸¹ However, Minimum Wage Order MW-2001 and Wage Order No. 5-2001 repealed features of the exemption that previously applied to student nurses.ⁿ⁸²

[ii] Carnival Ride Operators

Before January 1, 2001, the minimum wage and overtime provisions of the wage order regulating the amusement and recreation industryⁿ⁸³ did not apply to full-time ride operators employed by traveling carnivals.ⁿ⁸⁴ However, Minimum Wage Order MW-2001 and Wage Order No. 10-2001 repealed features of the exemption that previously applied to carnival ride operators.ⁿ⁸⁵

[iii] Professional Actors

Before January 1, 2001, the provisions of the wage orders regulating the broadcasting and motion picture industriesⁿ⁸⁶ did not apply to professional actors. However, Minimum Wage Order MW-2001 and Wage Order No. 10-2001 repealed features of the exemption that previously applied to professional actors in the broadcasting industryⁿ⁸⁷ and in the motion picture industry industryⁿ⁸⁸

[iv] Shepherders

Shepherders were entirely exempt from the Wage Orders until Wage Order 14-2001ⁿ⁸⁹ became effective on July 1, 2001. Since then, Sections 3, 4(A)-(D), 5, 6, 9, 11, 12 and 13 of Wage Order 14 do not apply to shepherders. Otherwise, Wage Order 14, including Section 4(A), applies to any workweek during which a shepherd employee is engaged in any non-shepherding agricultural or other work.ⁿ⁹⁰ "Non-shepherding work" is any work except work defined in Wage Order Section 2(N).ⁿ⁹¹ Wage Order 14 Section 14 provides special requirements applicable only to shepherders, *i.e.*, that they be provided with regular mail service, an appropriate means to communicate with employers, health care providers and government regulators, and visitor access to a fixed housing site and, when applicable, mobile housing.ⁿ⁹²

A "shepherd" is any individual employed to do any of the following:ⁿ⁹³

- Tend flocks of sheep grazing on range or pasture.
- Move sheep to and about an area assigned for grazing.
- Prevent sheep from wandering or becoming lost, or using trained dogs to round up strays and protect sheep against predators and the eating of poisonous plants.

- Assist in the lambing, docking, and shearing of sheep.
- Provide water or feed supplementary rations to sheep.
- Perform the work of a sheepherder pursuant to an approved job order filed under the provisions of the federal Immigration and Nationality Act, commonly referred to as the "H-2A" program⁹⁴ or any successor provisions.

This exemption is only effective while the person is engaged for the entire workweek in sheepherding as that term is defined in Order 14.⁹⁵

■ CONSULTANT'S COMMENT:

The DLSE interprets the sheepherder exemption as applying only to shepherds who attend grazing flocks and bed down near evening campsites. They may help to shear sheep, but shearers who do not herd do not qualify for the exemption. Handlers of animals other than sheep are not exempt. *Commentary by Kirby Wilcox.*

[v] Babysitters and Other Personal Attendants

Before January 1, 2001, none of the wage order provisions regulating household occupations⁹⁶ applied to personal attendants.⁹⁷ "Personal attendant" includes babysitters and any person employed by a private householder, or by any third-party employer recognized in the health care industry to work in a private household, to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision, if there is no other significant amount of work required.⁹⁸

■ CONSULTANT'S COMMENT:

The DLSE's position is that household work related to the care of the child or infirm person, such as cooking, making beds, or washing clothes for that individual, may be included in the duties of a personal attendant. Other general housework may be included only if it does not constitute a "significant" amount of the employee's duties. The DLSE defines "significant amount" as not exceeding 20 percent of the hours worked in a workweek.⁹⁹ The DLSE also interprets this exemption as *not* including "practical nurses" (who are explicitly covered by the wage order)¹⁰⁰ and any other employee who performs any "intrusive procedure" (including taking or recording temperature, pulse, or respiration rate; giving medication; or emptying bedpans) on a regular basis. *Commentary by Kirby Wilcox.*

However, Minimum Wage Order MW-2001 and Wage Order No. 15- 2001 repealed features of the exemption that previously applied to babysitters and professional attendants.¹⁰¹ Under Wage Order 15, "'Personal attendant' includes baby sitters and means any person employed by a private householder or by any third party employer recognized in the health care industry to work in a private household, to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision."¹⁰² However, this change in the coverage of Wage Order No. 15-2001, does not apply to any babysitter under age 18 employed as a sitter for a minor child of the employer in the employer's home.¹⁰³

Note, however, that a personal attendant who is *not* employed in a private household would be covered by the minimum wage and overtime requirements of Wage Order No. 5-2001, subject to special overtime rules for employees of nonprofit organizations.¹⁰⁴

[vi] National Service Program Participants

Since January 1, 2001, none of the provisions of the wage orders has applied to individuals participating in national

service programs, such as AmeriCorps, carried out using assistance provided under *42 U.S.C. § 12571*.ⁿ¹⁰⁵

[d] Inapplicability of Minimum Wage Provisions of All Wage Orders to Apprentices

The minimum wage provisions of all wage orders other than Wage Order 16-2001 do not apply to apprentices regularly indentured under the State Division of Apprenticeship Standards.ⁿ¹⁰⁶ Other provisions of the wage orders are applicable to these apprentices.

The Labor Code provisions governing apprenticeship programs define an apprentice as a person at least 16 years of age who has entered into a written agreement (known as an "apprenticeship agreement") with an employer or program sponsor.ⁿ¹⁰⁷ The term of apprenticeship for each apprenticeable occupation must be approved by the Chief of the Division of Apprenticeship Standards and must not in any case provide for less than 2,000 hours of reasonably continuous employment for the apprentice and for his or her participation in an approved program of training through employment and through education in related and supplemental subjects.ⁿ¹⁰⁸

The exemption from minimum wage obligations applies only to apprentices who are regularly indentured pursuant to programs governed by *Labor Code sections 3070-3098*;ⁿ¹⁰⁹ therefore, it does not apply to on-the-job trainees generally, even if the employer calls such employees "apprentices."

By contrast, the FLSA does not provide a complete exemption from minimum wages for apprentices; instead, it provides that apprentices may be employed at a subminimum wage if the employer obtains a special certificate from the Wage and Hour Division pursuant to regulations promulgated under the FLSA.ⁿ¹¹⁰ Thus, a California employer who is subject to the FLSA will need to follow the procedures set forth in the federal regulations and obtain the required certificate before employing an apprentice at less than the regular minimum wage. For discussion of the federal provisions regarding apprentices, *see § 2.05[2][b][iii]*.

[2] Federal Law

[a] Generally

The minimum wage and overtime provisions under the FLSAⁿ¹¹¹ do not apply to certain categories of employees described below.ⁿ¹¹² The employer claiming an exemption bears the burden of proving that the exemption exists,ⁿ¹¹³ and exemptions are strictly interpreted.ⁿ¹¹⁴ However, in some cases the FLSA may provide a "safe harbor" defense to employers who unintentionally cause the loss of an exempt status and who reimburse the employee for any impermissible salary deductions.ⁿ¹¹⁵

Certain exemptions under the FLSA are not identical to the comparable exemptions under the California wage orders, and some exemptions under the FLSA have no counterpart under the wage orders whatsoever. Where state and federal law diverge, the FLSA requires the employer to comply with whichever standard, or portion of it, is the more restrictive. Thus, the employer should be aware that the existence of a federal minimum wage or overtime exemption is no defense to liability under the wage orders if there is no corresponding California exemption.ⁿ¹¹⁶

The FLSA's overtime provisions presumptively apply to federal employees unless a specific FLSA exemption applies.ⁿ¹¹⁷ⁿ¹¹⁸

[b] Persons Employed in Executive, Administrative, or Professional Capacities

[i] Generally

Persons employed in a bona fide executive, administrative, or professional capacity are exempt from federal minimum wage and overtime provisions.ⁿ¹¹⁹ The criteria for these exemptions are set forth in detail in regulations promulgated

by the U.S. Department of Labor (DOL), as recently revised, effective August 23, 2004.ⁿ¹²⁰ The new DOL regulations have replaced the former "short" and "long" tests for exempt status with single tests for determining whether an employee is exempt as an executive, administrative or professional employee. Common to all three sets of criteria is a requirement that employees earn at least \$455 per week (equivalent to \$23,660 per year), exclusive of board, lodging or other facilities.ⁿ¹²¹ Employers must pay this amount by means of a salary or, in the case of administrative and professional employees, a fee.^{n121.1}

[ii] Executive Capacity

Under the new regulations, employees are deemed exempt as employed in a bona fide executive capacity if (1) they are compensated on a salary basis at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities; (2) their primary duty^{n121.2} is management of the enterprise in which they are employed or of a customarily recognized department or subdivision thereof; (3) they customarily and regularly^{n121.3} direct the work of two or more other employees; and (4) they have the authority to hire or fire other employees or their suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.^{n121.4} The executive exemption also applies to business owners, defined as employees who own at least a bona fide 20 % equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who are actively engaged in its management.^{n121.5} The new regulations deleted the "sole charge" provision contained in the former regulations, under which employees who were in "sole charge of an independent establishment or a physically separated branch establishment" could be exempt under the executive exemption even though they exceeded the applicable percentage limitations on nonexempt work contained in the former regulations.^{n121.6}

"Management" under the new regulations includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the types of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.^{n121.7}

A "customarily recognized department or subdivision" is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. A customarily recognized department or subdivision must have a permanent status and a continuing function. For example, a large employer's human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and personnel management, each of which has a permanent status and function.^{n121.8} When an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise.^{n121.9} A recognized department or subdivision need not be physically within the employer's establishment and may move from place to place. The mere fact that the employee works in more than one location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized unit with a continuing function in the organization.^{n121.10} Continuity of the same subordinate personnel is not essential to the existence of a recognized unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function.^{n121.11}

The phrase "two or more other employees" refers to two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees, as are four half-time employees.^{n121.12}

The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. Thus, for example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each such supervisor customarily and regularly directs the work of two of those workers.^{n121.13} An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement.^{n121.14} An employee's hours worked cannot be credited more than once for different executives. Thus, a shared responsibility for the supervisor of the same two employees in the same department does not satisfy this requirement. However, a full-time employee who works four hours for one supervisor and four hours for a different supervisor, for example, can be credited as a half-time employee for both supervisors.^{n121.15}

Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements for the exemption, as described above, are otherwise met.^{n121.16} Whether an employee meets the requirements of the exemption when the employee performs concurrent duties is determined on a case-by-case basis, based on such factors as the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.^{n121.17} Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.^{n121.18} For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management.^{n121.19} An assistant manager can supervise employees and serve customers at the same time, or simultaneously direct the work of other employees and stock shelves, without losing the exemption.^{n121.20} In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is unavailable.^{n121.21} Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.^{n121.22}

Prior to August 23, 2004, when the old DOL overtime regulations were in effect, exempt executive status was based on the application of a "short" or "long" test, depending on the amount of the employee's earnings. Under the "short test," an employee was deemed exempt as employed in a bona fide executive capacity if (1) he or she was compensated on a salary basis at a rate of not less than \$250 per week (exclusive of board, lodging, or other facilities), (2) his or her primary duty consisted of managing the enterprise or one of its customarily recognized departments or subdivisions, and (3) he or she customarily and regularly directed the work of at least two other employees.ⁿ¹²²

Under the "long test," an employee who was compensated on a salary basis at a rate of less than \$250 per week, but at least \$155 per week,ⁿ¹²³ was exempt as an executive if, in addition to meeting the above requirements regarding managerial and supervisory duties,ⁿ¹²⁴ he or she (1) had authority to hire or fire other employees or to make suggestions and recommendations regarding hiring, firing, advancement, promotion, and other changes of status, that were given particular weight;ⁿ¹²⁵ (2) customarily and regularly exercised discretionary powers;ⁿ¹²⁶ and (3) with limited exceptions, devoted no more than 20 percent of work hours to other activities, or, if employed in a retail or service establishment, devoted no more than 40 percent of work hours to other activities.ⁿ¹²⁷

[iii] Administrative Capacity

Under the new DOL regulations, an employee is exempt as an "employee employed in a bona fide administrative

capacity" if (1) he or she is compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities; (2) his or her primary dutyⁿ¹²⁸ is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (3) his or her primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.ⁿ¹²⁹

The phrase "directly related to the management of general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.ⁿ¹³⁰ This includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.ⁿ¹³¹ Some of these activities may be performed by employees who also would qualify for another exemption.ⁿ¹³² An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.ⁿ¹³³

The exercise of discretion and independent judgment generally involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.ⁿ¹³⁴ The phrase "discretion and independent judgment" is to be applied in the light of all the facts involved in the particular employment situation in which the question arises, considering such factors as whether the employee has authority to formulate, affect interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long-term or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.ⁿ¹³⁵

The new DOL regulations clarify that the exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.ⁿ¹³⁶ However, the mere fact that an employee use manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills, does not preclude exemption.ⁿ¹³⁷ The exercise of discretion and judgment does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.ⁿ¹³⁸ The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.ⁿ¹³⁹ The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level.ⁿ¹⁴⁰ An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly.ⁿ¹⁴¹

The DOL regulations contain a number of specific examples of jobs that the DOL deems to meet or not meet the requirements for the administrative exemption. Specifically, the regulations discuss insurance claims adjusters,

employees in the financial services industry, persons who lead teams or other employees in major projects, executive or administrative assistants, human resources managers, purchasing agents, inspectors, examiners or graders, comparison shoppers for retail stores, and public sector investigators.ⁿ¹⁴²

The administrative exemption also applies to employees (1) who are compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and (2) whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.ⁿ¹⁴³ⁿ¹⁴⁴⁻¹⁴⁸

Prior to August 23, 2004, when the old DOL overtime regulations were in effect, exempt administrative status was based on the application of a "short" or "long" test, depending on the amount of the employee's earnings. Under the "short test," an employee was deemed exempt as employed in a bona fide administrative capacity if (1) he or she was compensated on a salary or fee basis at a rate of not less than \$250 per week (exclusive of board, lodging, or other facilities); (2) his or her primary duty consisted of either (a) the performance of office or nonmanual work directly related to management policies or general business operations of the employer or its customers, or (b) the performance of functions in the administration of a school system or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and (3) the performance of his or her primary duty included work requiring the exercise of discretion and independent judgment.ⁿ¹⁴⁹ The first part of the short test is commonly referred to as the "salary basis test"; the last two parts are known as the "duties test."

Under the "long test," an employee who was compensated on a salary or fee basis at a rate of less than \$250 per week, but at least \$155 per week,ⁿ¹⁵⁰ was exempt if, in addition to meeting the above requirements regarding primary duties, he or she (1) customarily and regularly exercised discretion and independent judgment;ⁿ¹⁵¹ (2)(a) regularly and directly assisted a proprietor or an employee employed in a bona fide executive or administrative capacity; or (b) performed, under only general supervision, specialized or technical work requiring special training, experience, or knowledge; or (c) executed under only general supervision special assignments and tasks;ⁿ¹⁵² and (3) devoted no more than 20 percent of the hours in a workweek to other activities, or, in the case of an employee of a retail or service establishment, no more than 40 percent of the hours in a workweek to other activities.ⁿ¹⁵³ⁿ¹⁵⁴

In *Bothell v. Phase Metrics, Inc.*, decided under the former DOL regulations,ⁿ¹⁵⁷ the Ninth Circuit examined the exempt status of a field service engineer for a company that designed, manufactured, and sold robotic test and inspection equipment for the data storage industry. The employee worked with only one of the employer's clients, and the parties disputed whether the customer service he provided was "administrative," so as to exempt him from the wage and overtime requirements of the FLSA. Under the "primary duty" prong of the "short test," the court found that the customer service activities he performed went to the heart of the employer's marketplace offerings, not to the internal administration of its business or that of its client for whom he provided the service.ⁿ¹⁵⁸ Under the "substantial importance" prong, because the record could support the conclusion that the employee was essentially a highly skilled repairman, it was premature to conclude at the summary judgment stage that his work was "substantially important" to the management or operation of either the employer or its client.ⁿ¹⁵⁹ Under the "discretion and independent judgment prong," the court found that there were genuine issues of fact regarding the extent to which the employee was permitted to make decisions and the importance of the decisions over which he had control.ⁿ¹⁶⁰

■ CONSULTANT'S COMMENT:

In *Bothell v. Phase Metrics, Inc.*, ⁿ¹⁶¹ the Ninth Circuit rendered two holdings of critical importance to the analysis of the administrative exemption. First, it held that the regulatory mandate that an employee perform duties related to the general business operations of an employer or an employer's customers includes the requirement that the employee play a role in "running the business itself or determining its overall course or policies." Whether this interpretation raises the bar for finding exempt administrative

status depends upon whether the phrase "running the business itself" is the functional equivalent of its counterpart phrase ("or determining its overall course or policies") or something less difficult to satisfy. Plaintiffs will argue that the Ninth Circuit has rendered the administrative exemption available only to a small number of highly-placed managers. Defendants will argue that the executive exemption already covers most highly-placed managers and that the administrative exemption must encompass supervisors and managers at the lower end of the organizational hierarchy.

Second, *Bothell* held that the administrative/production dichotomy does not set an absolute bar to a finding of administrative status, as a California Court of Appeal held in *Bell v. Farmers Insurance Group*. Rather, the administrative/production distinction "should only be employed as a tool towards answering the ultimate question, whether work is directly related to management policies or business operations, not as an end in itself." Because both federal and state case law analysis of this dichotomy find their source in the same passage from the Code of Federal Regulations, this split of authority leaves practitioners (both plaintiffs and defendants) with competing arguments, but no clear resolution of their dispute. *Commentary by Kirby Wilcox*.

[iv] Professional Capacity

Generally

Under the new DOL regulations, employees are exempt as "employed in a bona fide professional capacity" if (1) they are compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging, or other facilities; and (2) their primary duty is the performance of work (i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (ii) requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.¹⁶² The new DOL regulations thus retain the distinction between "learned" and "artistic" professionals.

Learned Professionals

To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.¹⁶³ This primary duty test includes three elements: (1) the employee must perform work requiring advanced knowledge; (2) the advanced knowledge must be in a field of science or learning; and (3) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.¹⁶⁴

The phrase "work requiring advanced knowledge" means work which¹⁶⁵ is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.¹⁶⁶ The phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status, as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.¹⁶⁷

The phrase "customarily acquired by a prolonged course of specialized instruction" restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is also available to employees in such professions who have

substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.n168

The regulations provide examples of jobs that the DOL deems to meet or not meet the requirements for the learned professional exemption. Specifically, the regulations discuss the circumstances under which registered or certified medical technologists, nurses, dental hygienists, physician assistants, accountants, chefs, paralegals, athletic trainers and funeral directors may qualify for the exemption.n169

Creative Professionals

To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training.n170 The work must be "in a recognized field of artistic or creative endeavor." This includes such fields as music, writing, acting and the graphic arts.n171

The requirement of "invention, imagination, originality or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of exempt status, therefore, must be made on a case-by-case basis. This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen play writers who choose their own subjects and hand in a finished piece of work to their employers; and persons holding the more responsible writing positions in advertising agencies. This requirement generally is not met by a person who is employed as a copyist, as an "animator" of motion-picture cartoons, or as a retoucher of photographs, since such work is not properly described as creative in character.n172

Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.n173

Teachers

The professional exemption also applies to any employee whose primary duty is teaching, tutoring, instructing or

lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment.^{173.1} by which the employee is employed.^{173.2} The exemption applies whether or not teachers meet the salary requirements or the other criteria required for other learned or creative professionals generally, as discussed above.^{173.3}

Practice of Law or Medicine

The professional exemption also applies to any employee who is the holder of (1) a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; or (2) the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession.^{173.4} This exemption applies whether or not the employee meets the salary requirements or the other criteria required for other learned or creative professionals generally, as outlined above.^{173.5}

In the case of medicine, the exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term "physicians" includes medical doctors including general practitioners and specialists, osteopathic physicians, podiatrists, dentists, and optometrists.^{173.6} Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.^{173.7}

Veterinarians may fall within the professional exemption for physicians and other practitioners.^{173.8}

Computer Professionals

The professional exemption also applies to salaried or hourly-paid computer systems analysts, computer programmers, software engineers, and other similarly skilled employees who meet certain requirements.¹⁷⁴ First, the employee's primary duty must be one of the following;¹⁷⁵

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
2. The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design modifications;
3. The design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or
4. A combination of the above duties, the performance of which requires the same level of skills.

Second, in the case of an hourly employee, the employee must be compensated at a rate of at least \$27.63 per hour.¹⁷⁶ In the case of a salaried employee, the employee must earn a salary of at least \$455 per week.¹⁷⁷ No particular license, certification, or academic degree is required for this exemption, but it is unavailable to trainees or employees in entry-level positions.¹⁷⁸ The exemption does not apply to employees who operate computers, employees who manufacture, repair, or maintain computer hardware or related equipment, or employees whose work is highly dependent on, or facilitated by, the use of computers but who are not engaged in computer systems analysis and programming occupations.^{178.1}

As discussed previously,¹⁷⁹ the professional exemption under the California wage orders is narrower than the federal exemption.¹⁸⁰ Moreover, California has a wage order expressly covering most nonexempt "professionals."^{180.1} Therefore, even if the employee satisfies the requirements for the "professional capacity" exemption under the FLSA,

the employer will be required to comply with minimum wage and overtime requirements under California law, unless the employee qualifies for some other exemption, such as that for executives or administrators.

Professional Capacity under Former Regulations

Under the FLSA's old "short test," an employee was deemed exempt as employed in a bona fide professional capacity if the following criteria were met:^{n180.2}

1. He or she was compensated on a salary or fee basis at a rate of not less than \$250 per week (exclusive of board, lodging, or other facilities); and
2. His or her primary duty
 - a. Included work requiring the consistent exercise of discretion and judgment,^{n180.3} and consisted of (i) the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study (as distinguished from a general academic education, apprenticeship, or training in routine mental, manual, or physical processes); or (ii) teaching, tutoring, instructing, or lecturing as an employee of a school system or educational establishment or institution; or
 - b. Consisted of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.

Under the former "long test," an employee who was compensated on a salary or fee basis at a rate of less than \$250 per week, but at least \$170 per week,^{n180.4} was exempt as a professional if

1. His or her primary duty consisted of (a) work requiring advanced knowledge, as described in paragraph 2(a), *above*, or (b) work that was original and creative in character in a recognized field of artistic endeavor (as opposed to work that could be produced by a person endowed with general manual or intellectual ability and training) and the result of which depended primarily on the invention, imagination, or talent of the employee, or (c) teaching, tutoring, instructing, or lecturing as an employee of a school system or educational establishment or institution;^{n180.5}
2. His or her work required the consistent exercise of discretion and judgment in its performance;^{n180.6}
3. The work was predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and was of such character that the output produced or result accomplished could not be standardized in relation to a given period of time;^{n180.7} and
4. The employee devoted no more than 20 percent of his or her workweek to activities that were not an essential part of, and necessarily incident to, the work described above.^{n180.8}

The requirement of a minimum salary of \$170 per week did not apply to an employee (1) who held a license or certificate permitting the practice of law or medicine and who was actually engaged in that practice, (2) who held the requisite medical degree and who was engaged in an internship or residency, or (3) who was employed as a teacher.^{n180.9}

[v] Highly Compensated Employees

An employee with total annual compensation of at least \$100,000 is deemed exempt under the executive, administrative or professional exemptions if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in the applicable DOL regulations.¹⁸¹

"Total annual compensation" must include at least \$455 per week on a salary or fee basis,^{181.1} and it also may include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period.^{181.2} If an employee's total annual compensation does not total at least \$100,000 by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level.^{181.3}

An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption under these highly-compensated-employee provisions if the employee receives a pro rata portion of the required \$100,000 minimum, based upon the number of weeks that the employee will be or has been employed.^{181.4} The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply.^{181.5}

[vi] Salary Basis

In most cases, as discussed above, an employee must be paid on a salary basis to qualify for exemption under the executive, administrative or professional exemptions.^{181.6} In general, an employee will be considered to be paid on a "salary basis" if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his or her compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.^{181.7} Thus, subject to certain exceptions enumerated in the regulations, an employee must receive the full salary for any week in which he or she performs any work without regard to the number of days or hours worked.^{181.8} Exempt employees need not be paid for any workweek in which they perform no work. However, an employee is not paid on a salary basis if the employer makes deductions from the employee's predetermined compensation for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.^{181.9}

The DOL regulations list the following seven exceptions to the general prohibition against deductions from salary in increments of less than a full workweek:

(1) An employer may make deductions from pay in full-day increments when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability.^{181.10}

(2) An employer may make salary deductions in full-day increments for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if it makes the deduction in accordance with a bona fide plan, policy or practice of providing compensation for less of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. It may deduct for such full-day absences even though the employee has not yet qualified for benefits under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Similarly, an employer may make deductions from pay for absence of one or more full days if salary replacement benefits are provided under a state disability insurance law or workers' compensation law.^{181.11}

(3) An employer may not make deductions from pay in less than full-week increments for absences occasioned by jury duty, attendance as a witness or temporary military leave, but can offset any amounts that the employee received as jury fees, witness fees or military pay for a particular week against the salary due for that particular week.n181.12

(4) An employer may make deductions from pay for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.n181.13

(5) An employer may make salary deductions for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules, but only if it imposes the suspension pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment, or for 12 days for violating a generally applicable written policy prohibiting workplace violence.n181.14

(6) An employer is not required to pay the full salary in the initial or terminal week of an employee's employment. Rather, it may pay a proportionate part of the employee's full salary for the time that the employee actually worked in the first and last week of employment, based on an hourly or daily equivalent of the employee's full salary.n181.15

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the FMLA, the employer may pay a proportionate part of the full salary for the time that the employee actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid FMLA leave, the employer could deduct 10 percent of the employee's normal salary that week.n181.16

The effect of making an improper salary deduction, depending on the circumstances, is loss of the employee's exempt status and possibly that of other exempt employees in the same job classification. Specifically, according to the DOL regulations, an employer who makes improper deductions from salary will lose the exemption if the facts demonstrate that the employer "did not intend to pay employees on a salary basis."n181.17 An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The factors to consider when determining whether an employer has an actual practice of making improper deductions, according to the regulations, include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.n181.18

The regulations provide that if the facts demonstrate that the employer has an actual practice of making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. Employees in different job classifications or who work for different managers do not lose their status as exempt employees. Thus, for example, if a manager at a company facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager would lose the exemption; engineers at other facilities or working for other managers, however, would remain exempt.n181.19 Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper

deductions.n181.20

The new regulations contain a "safe harbor" by which employers may protect themselves against continuing liability as a result of making one or more improper salary deductions under the DOL's salary basis rules. Specifically, if an employer (1) has a clearly communicated policy that prohibits the improper pay deductions specified in the regulations, (2) includes a complaint mechanism in the policy, (3) reimburses employees for any improper deductions, and (4) makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer "willfully" violates the policy by continuing to make improper deductions after receiving employee complaints.n181.21 According to the regulations, if an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.n181.22 The regulations state that the best evidence of a "clearly communicated policy" is a written policy that the employer distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's intranet.n181.23

The DOL regulations clarify that an employer is permitted to provide exempt employees with additional compensation beyond the guaranteed minimum salary of at least \$455 per week, and doing so will not cause the employees to lose their exempt status. Thus, for example, if an employer guarantees an exempt employee at least \$455 each week paid on a salary basis and also pays additional compensation based on hours worked beyond the normal workweek, the employer does not thereby lose the right to classify the employee as exempt.n181.24 The same is true if the employer pays the additional compensation by commissions, percentage of the profits, bonus, or any other basis, including paid time off.n181.25

[c] Outside Sales Employees

Persons employed in the capacity of outside sales employees are exempt from the minimum wage and overtime provisions of the FLSA.n182 The definition of an employee employed in the capacity of an outside salesperson is set forth in detail in the regulations.n183 Broadly defined,n184 an outside salesperson is an employee whose primary duty is making salesn185 or obtaining orders or contracts for services or the use of facilities,n186 and who is customarily and regularly engaged away from the employer's place or places of businessn187 in performing such primary duty. The new regulations have removed the former requirement that, to be exempt, the employee's hours spent doing other work not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employers.n188 Work that is performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, are not regarded as nonexempt work for this purpose.n189

Special considerations apply to drivers who deliver the employer's products and also perform functions concerned with the selling of these products. If it appears that the drivers' primary duty is to engage in selling activity, the exemption for outside salespersons may apply.n190 The regulations also contain detailed provisions concerning the effect of promotional work on an employee's status as an outside salesperson.n191

Note that the definition of an outside salesperson under the FLSA and federal regulations differs in some respects from the definition set forth in the California wage orders, particularly with regard to the amount and nature of nonexempt work permitted.n192 Sales personnel must meet the criteria under both definitions to qualify as exempt from minimum wage and overtime requirements.

[d] Reserved

[e] Employees of Seasonal Recreational Establishments

Employees of certain seasonal amusement or recreational establishments, organized camps, or religious nonprofit education conference centers are exempt from federal minimum wage and overtime provisions. Employees of private entities serving national parks, forests, or wildlife refuges are not exempt, except that employees of ski-related facilities remain exempt with respect to minimum wages.ⁿ¹⁹³ There is no comparably broad exemption under California law, although there are a few, narrower exemptions.ⁿ¹⁹⁴

[f] Other Exemptions

The FLSA contains several other exemptions, listed below. Note that many of these exemptions do not have counterparts under the California wage orders. Thus, many of these employees will be entitled to minimum wages and overtime, pursuant to California law. Other employees who are exempt from the federal minimum wage and overtime provisions are as follows:

1. Employees employed in certain fishing operations, or in the processing of marine products in conjunction with those fishing operations;ⁿ¹⁹⁵
2. Certain employees employed in agriculture, including those employed by an employer who used less than 500 man-days of agricultural labor during the preceding year, certain relatives of the employer, hand harvesters under specified conditions, and employees principally engaged in the range production of livestock;ⁿ¹⁹⁶
3. Employees exempted by regulation, order, or certificate issued under Title 29 *United States Code* section 214;ⁿ¹⁹⁷
4. Employees employed in connection with the publication of certain small, local newspapers;ⁿ¹⁹⁸
5. Switchboard operators employed by an independently owned public telephone company that has not more than 750 stations;ⁿ¹⁹⁹
6. Seamen on a foreign vessel;ⁿ²⁰⁰
7. Employees employed on a casual basis in domestic service employment to provide babysitting services or companionship services for individuals unable, due to age or infirmity, to care for themselves;ⁿ²⁰¹
8. Criminal investigators who are paid "availability pay" under Title 5, *United States Code*, section 5545a;ⁿ²⁰²
9. Employees engaged in the delivery of newspapers to consumers, or homeworkers engaged in the making of evergreen wreaths;ⁿ²⁰³ and
10. Employees whose services are performed in a foreign country or certain territories under the jurisdiction of the United States.ⁿ²⁰⁴

Postal inspectors may be exempt from the overtime requirements of the FLSA.ⁿ²⁰⁵

[g] Employment of Students by Elementary or Secondary Schools

The Secretary of Labor may by regulation or order provide that the minimum wage and overtime provisions of the

FLSA do not apply to the employment by any elementary or secondary school of its students if that employment constitutes an integral part of the regular education program provided by the school and is in accordance with applicable child labor laws.ⁿ²⁰⁶ The Secretary to date has not promulgated any regulations implementing this exemption.

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Minimum Wage

FOOTNOTES:

(n1)Footnote 1. 8 *Cal. Code Reg.* §§ 11010-11040, 11060-11130, 11150, 11160 P 1(A) (Cal. Wage Order Nos. 1-2001-4-2001, 6-2001-13-2001, 15-2001, 16-2001); 11050, P 1(B) (Cal. Wage Order No. 5-2001). *See Lab. Code* § 115(a); *See also* § 3.04[1][a].

(n2)Footnote 2. 8 *Cal. Code Reg.* § 11140, P 1(A); minimum monthly amount is \$2,340 (Cal. Wage Order No. 14-2001).

(n3)Footnote 3. *See* former 8 *Cal. Code Reg.* §§ 11020-11030, 11060-11080, 11110-11130, 11150, P 1(A)(1) (Cal. Wage Order Nos. 2-80, 3-80, 6-80-8-80, 11-80-13-80, 15-86); *see* 8 *Cal. Code Reg.* § 11140, P 1(A) (Cal. Wage Order No. 14-80).

(n4)Footnote 4. COUNSEL ARE CAUTIONED that the California Supreme Court's decision in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 *Cal. 4th* 557, 568-578, 59 *Cal. Rptr. 2d* 186, 927 *P.2d* 296 voided all written interpretive policies adopted by the DLSE, the agency charged with enforcing IWC wage orders; it is unclear whether the DLSE publications cited here have continuing utility. *See* § 1.05[3][c] for a discussion of *Tidewater* and the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders.

See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 52.3.1.

(n5)Footnote 5. *See, e.g.,* 8 *Cal. Code Reg.* §§ 11010-11130, 11150, P 1(A)(1) (stating criteria for exemption as executive) 8 *Cal. Code Reg.* § 11160, P 1(A) (Wage Order No. 16-2001) (establishing less rigorous test for exempt status).

(n6)Footnote 6. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.2. (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see* Statement As To The Basis of October 2000 IWC Orders (this "quantitative test" continues to be different from and more protective of employees than federal "qualitative" or "primary duty" test).

(n7)Footnote 7. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.3 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders). Copies of the applicable federal regulations can be found as an Addendum at the end of the Manual.

(n8)Footnote 8. *See* Statement As To The Basis of Orders (new regulations in section of wage orders regarding administrative, executive, and professional exemption are consistent with existing law and enforcement practices).

(n9)Footnote 9. *See, e.g.,* 8 *Cal. Code Reg.* §§ 11010-11130, 11150, P 1(A)(1)(e) (regarding executive exemption).

(n10)Footnote 10. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.4.1 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n11)Footnote 11. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.4.2 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n12)Footnote 12. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.4.2.1 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n13)Footnote 13. Statement As To The Basis for the current Orders. *see* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.4.2.2 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n14)Footnote 14. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.4.2.2 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n15)Footnote 15. *See Lab. Code 515(a).*

(n16)Footnote 16. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.5 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n17)Footnote 17. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.5.1 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n18)Footnote 18. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.5.1.1 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n19)Footnote 19. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.5.2 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n20)Footnote 20. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual §§ 51.5.3, 51.5.3.3 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 801-802, 85 Cal. Rptr. 2d 844, 978 P.2d 2 .*

(n21)Footnote 21. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.5.3 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n22)Footnote 22. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.5.3.1 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n23)Footnote 23. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.5.3.2 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n24)Footnote 24. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 51.6

(CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n25)Footnote 25. See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual Chapter 51 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n26)Footnote 26. 8 Cal. Code Reg. §§ 11010-11130, 11150, P 1(A)(1) (Cal. Wage Order Nos. 1-2001-13-2001, 15-2001).

(n27)Footnote 27. See former 29 C.F.R. §§ 541.102, 541.104-541.111, 541.115-541.116.

(n28)Footnote 28. 8 Cal. Code Reg. §§ 11010-11130, 11150, P 1(A)(1)(e) (Cal. Wage Order Nos. 1-2001-13-2001, 15-2001).

(n29)Footnote 29. *Ramirez v. Yosemite Water Co.* (1999) 20 Cal. 4th 785, 85 Cal. Rptr. 2d 844, 978 P.2d 2 .

(n30)Footnote 30. *Ramirez v. Yosemite Water Co.* (1999) 20 Cal. 4th 785, 801-802, 85 Cal. Rptr. 2d 844, 978 P.2d 2 .

(n31)Footnote 31. See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual Chapter 53 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n32)Footnote 32. 8 Cal. Code Reg. §§ 11010-11130, 11150, P 1(A)(2) (Cal. Wage Order Nos. 1-2001-13-2001, 15-2001).

(n33)Footnote 33. See former 29 C.F.R. §§ 541.201-541.205, 541.207-541.208, 541.210, 541.215.

(n34)Footnote 34. 8 Cal. Code Reg. §§ 11010-11130, 11150, P 1(A)(2)(d) (Cal. Wage Order Nos. 1-2001-13-2001, 15-2001).

(n35)Footnote 35. *Bell v. Farmers Ins. Exchange* (2001) 87 Cal. App. 4th 805 . To view Court of Appeal briefs related to the *Bell* case that are available on Lexis.com, go to 2000 CA App. Ct. Briefs 91134A .

(n36)Footnote 36. 8 Cal. Code Reg. § 11040 P 1(A).

(n37)Footnote 37. *Bell v. Farmers Ins. Exchange* (2001) 87 Cal. App. 4th 805, 809-812 .

(n38)Footnote 38. *Bell v. Farmers Ins. Exchange* (2001) 87 Cal. App. 4th 805, 812-819 .

(n39)Footnote 39. *Bell v. Farmers Ins. Exchange* (2001) 87 Cal. App. 4th 805, 820 .

(n40)Footnote 40. *Bell v. Farmers Ins. Exchange* (2001) 87 Cal. App. 4th 805, 826 .

(n41)Footnote 41. *Bell v. Farmers Ins. Exchange* (2001) 87 Cal. App. 4th 805 .

(n42)Footnote 42. *Bell v. Farmers Ins. Exchange* (2001) 87 Cal. App. 4th 805, 822 .

(n43)Footnote 43. *Bell v. Farmers Ins. Exchange* (2001) 87 Cal. App. 4th 805, 823 .

(n44)Footnote 44. 8 Cal. Code Reg. § 11040 (state wage order applicable to insurance companies).

(n45)Footnote 45. Former 29 C.F.R. § 541.205(a).

(n46)Footnote 46. *Bell v. Farmers Ins. Exchange* (2001) 87 Cal. App. 4th 805, 826-827 (citing *Reich v. American Int'l Adjust. Co. Inc.* (D. Conn. 1994) 902 F. Supp. 321, 325 , which found that business of "resolving damages claims" rendered appraisers employees "producing" the service that defendant provides, rather than "administering" the business.

(n47)Footnote 46.1. *Bell v. Farmers Insurance Exchange* (2004) 115 Cal. App. 4th 715, 727-739, 9 Cal. Rptr. 3d 544 .

(n48)Footnote 46.2. *Bell v. Farmers Insurance Exchange* (2004) 115 Cal. App. 4th 715, 739-746, 9 Cal. Rptr. 3d 544 .

(n49)Footnote 46.3. *Bell v. Farmers Insurance Exchange* (2004) 115 Cal. App. 4th 715, 746-758, 9 Cal. Rptr. 3d 544 .

(n50)Footnote 46.4. *Bell v. Farmers Insurance Exchange* (2004) 115 Cal. App. 4th 715, 758-763, 9 Cal. Rptr. 3d 544 .

(n51)Footnote 46.5. *Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal. App. 4th 1363, 61 Cal. Rptr. 3d 114 .

(n52)Footnote 46.6. *See* 8 Cal. Code Regs. § 11040.

(n53)Footnote 46.7. *Eicher v. Advanced business Integrators, Inc.* (2007) 151 Cal. App. 4th 1363, 1371-1375, 61 Cal. Rptr. 3d 114 .

(n54)Footnote 46.8. *Combs v. Skyriver Communications, Inc.* (2008) 159 Cal. App. 4th 1242, 1252-1267, 72 Cal. Rptr. 3d 171 .

(n55)Footnote 47. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual Chapter 52 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n56)Footnote 48. 8 Cal. Code Reg. §§ 11010-11130, 11150, P 1(A)(3) (Cal. Wage Order Nos. 1- 2001-13-2001, 15-2001).

(n57)Footnote 49. *See Kettenring v. Los Angeles Unif. Schl. Dist.* (2008) 167 Cal. App. 4th 507, 512-514 (adult education teachers fall within professional exemption to Industrial Welfare Commission Wage Order No. 4-2001); *California School of Culinary Arts v. Lujan* (2003) 112 Cal. App. 4th 16, 4 Cal. Rptr. 3d 785 (exemption afforded by Wage Orders to persons teaching in accredited college or university may encompass teachers at trade and vocational schools, as well as four-year institutions).

(n58)Footnote 49.1. *See* former 29 C.F.R. §§ 541.207, 541.301(a)-(d), 541.302, 541.306, 541.307, 541.308, 541.310.

(n59)Footnote 50. *See Kettenring v. Los Angeles Unif. Schl. Dist.* (2008) 167 Cal. App. 4th 507, 513-514 (compensation structure for adult education teachers was "salary" for application of professional exemption to the Wage Order 4-2001, where language of collective bargaining agreement established that teachers received predetermined amount constituting all or part of their compensation, which amount was not subject to reduction because of variations in quantity of work performed; that CBA took into consideration as part of calculation negotiated hourly rate did not make compensation structure other than salary).

(n60)Footnote 50.1. *Lab. Code* § 515.5(a).

(n61)Footnote 51. *See Nordquist v. McGraw-Hill Broadcasting Co. (1995) 32 Cal. App. 4th 555, 572-574, 38 Cal. Rptr. 2d 221* (television sports director/newscast anchor not exempt administrative employee because work did not involve "discretion and independent judgement," but rather skilled application of station and industry guidelines and techniques).

(n62)Footnote 52. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 52.3.8 et seq. (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n63)Footnote 52.1. *Lab. Code § 515.5(b)*.

(n64)Footnote 53. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 50.3 (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n65)Footnote 54. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual Chapter 54 (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n66)Footnote 55. *See Lab. Code § 1171 et seq.*

(n67)Footnote 56. 8 *Cal. Code Reg. §§ 11010-11040, 11060-11100, 11130, 11160*, P 1(C) (Cal. Wage Order Nos. 1-2001-4-2001, 6-2001-10-2001, 13-2001, 16-2001) 11050, 11110, 11120, P 1(D) (Cal. Wage Order Nos. 5-2001, 11-2001, 12-2001); *see* 8 *Cal. Code Reg. § 11000*, P 1 (Cal. Wage Order No. MW-2001); general minimum wage order). Note that the wage orders covering agricultural and household occupations do not contain an "outside salesperson" exclusion. *see* 8 *Cal. Code Reg. §§ 11140, 11150*, P 1 (Cal. Wage Order Nos. 14-2001, 15-2001).

(n68)Footnote 57. 8 *Cal. Code Reg. §§ 11010-11030, 11060-11100, 11130*, P 2(J) (Cal. Wage Order Nos. 1-2001-4-2001, 6-2001-10-2001, 13-2001), 11040, 11050, 11160, P 2(N) (Cal. Wage Order Nos. 4-2001-5-2001, 16-2001), 11110, P 2(K) (Cal. Wage Order No. 11-2001); 11120, P 2(L) (Cal. Wage Order No. 12-2001); *see also Grubb & Ellis Co. v. Spengler (1983) 143 Cal. App. 3d 890, 898, 192 Cal. Rptr. 637* (evidence that real estate brokerage company and salesperson entered into agreement stating that agreement did not constitute a "hiring" and salesperson was "independent contractor" supported finding that salesperson was not employee for purposes of entitlement to minimum wages).

(n69)Footnote 58. *Ramirez v. Yosemite Water Co. (1999) Inc., 20 Cal. 4th 785, 85 Cal. Rptr. 2d 844, 978 P.2d 2*, citing *Wilcox, California Employment Law*.

(n70)Footnote 59. Former 8 *Cal. Code Reg. § 11070(2)(I)*.

(n71)Footnote 60. *See* former 29 C.F.R. § 541.5 et seq.

(n72)Footnote 61. *Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 797-798, 85 Cal. Rptr. 2d 844, 978 P.2d 2*.

(n73)Footnote 62. *See* former 29 C.F.R. §§ 541.5, 541.505 ("[I]n the case of outside salesmen ..., the employee's chief duty or primary function must be the making of sales or the taking of orders if he is to qualify under the definition in § 541.5").

(n74)Footnote 63. *Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 797-798, 85 Cal. Rptr. 2d 844, 978 P.2d 2*.

(n75)Footnote 64. *Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 798, 85 Cal. Rptr. 2d 844, 978*

P.2d 2 .

(n76)Footnote 65. *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal. 4th 785, 802, 85 Cal. Rptr. 2d 844, 978 P.2d 2 .

(n77)Footnote 66. *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal. 4th 785, 803, n.5, 85 Cal. Rptr. 2d 844, 978 P.2d 2 .

(n78)Footnote 67. *Ramirez v. Yosemite Water Co. (1999) Inc.*, 20 Cal. 4th 785, 85 Cal. Rptr. 2d 844, 978 P.2d 2 .

(n79)Footnote 68. *See Review of Selected 1972 Legislation*, 4 Pac. L.J. 482-483 (1973).

(n80)Footnote 69. *See* 8 Cal. Code Reg. §§ 11010-11030, 11060-11100, 11130, P 2(J) (Cal. Wage Order 1-2001-4-2001, 6-2001-10-2001, 13-2001), 11040, 11050, 11160, P 2(N) (Cal. Wage Order Nos. 4-2001, 5-2001, 16-2001), 11110, P 2(K) (Cal. Wage Order No. 11- 2001); 11120, P 2(L) (Cal. Wage Order No. 12-2001).

(n81)Footnote 70. 8 Cal. Code Reg. § 11000, P 5 (Cal. Minimum Wage Order MW-2001); *cf.* 8 Cal. Code Reg. §§ 11010-11080, P 1 (B), 11090, P 1(C), 11110, P 1(C), 11120, P 1(B), 11130, P 1(B), (Cal. Wage Order Nos. 1-2001-8-2001, 9-2001, 10-2001, 12-2001-13-2001) ("Except as provided in Sections 1, 2, 4, 10 and 20, the provisions of this order shall not apply to employees directly employed by the State or any political subdivision thereof, including any city, county, or special district") with IWC Statement as to the Basis for the General Minimum Wage Order, MW-2001, P 1 (government employee exemption from minimum wage order eliminated).

(n82)Footnote 71. *See* 29 U.S.C. § 203(d), (e), (s)(1)(C), (x); *Garcia v. San Antonio Metro* (1985) 469 U.S. 528, 531, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (overruling previous holding that FLSA could not be constitutionally applied to state and local governments in areas of "traditional government functions"); *see also* discussion in § 2.03[2][d].

(n83)Footnote 72. 8 Cal. Code Reg. §§ 11000, P 1(Cal. Wage Order No. MW-2001); 11010-11040, 11060-11100, 11130, 11150, P 1(C) (Cal. Wage Order Nos. 1-2001-4-2001, 6-2001-10-2001, 13-2001, 15-2001); 11050, 11110, 11120, 11160, P 1(D) (Cal. Wage Order Nos. 5-2001, 11-2001, 12-2001, 16-2001), 11140, P 1(B) (Cal. Wage Order No. 14-2001).

(n84)Footnote 73. 8 Cal. Code Reg. § 11110, P 1(H) (Cal. Wage Order No. 10-2001).

(n85)Footnote 74. *See Penal Code § 8001* (definition of qualifying programs).

(n86)Footnote 75. *Penal Code § 8002*.

(n87)Footnote 76. *Lab. Code § 515.5(a)*. 8 Cal. Code Reg. §§ 11010-11130, 11150, 1(A)(3) (Cal. Wage Order Nos. 1-2001-13-2001, 15-2001).

(n88)Footnote 77. *Lab. Code § 515.5(b)*. Interim Wage Order 2001, P 1(C).

(n89)Footnote 78. *Lab. Code § 515.6(a)*.

(n90)Footnote 79. *Lab. Code § 515.6(b)*.

(n91)Footnote 80. For definition of "public housekeeping industry," *see* 8 Cal. Code Reg. § 11050, P 2(C) (Cal. Wage Order No. 5-2001), discussed in ch. 1.

(n92)Footnote 81. 8 Cal. Code Reg. § 11050, P 1(A) (Cal. Wage Order No. 5-2001).

(n93)Footnote 82. *8 Cal. Code Reg. § 11000*, P 5 (Minimum Wage Order MW-2001); *cf. 8 Cal. Code Reg. § 11050*, P 1(A) (Cal. Wage Order No. 5-2001) ("Except as provided in Sections 1, 2, 4, 10 and 20, the provisions of this order shall not apply to student nurses ...") *with* IWC Statement as to the Basis for the General Minimum Wage Order, MW-2001, P 1 (student nurse exemption from minimum wage order eliminated).

(n94)Footnote 83. For definition of "amusement and recreation industry," *see 8 Cal. Code Reg. § 11100*, P 2(A) (Cal. Wage Order No. 10-2001), discussed in ch. 1.

(n95)Footnote 84. *8 Cal. Code Reg. § 11100*, P 1(D) (Cal. Wage Order No. 10-89).

(n96)Footnote 85. *8 Cal. Code Reg. § 11000*, P 5 (Minimum Wage Order MW-2001); *cf. 8 Cal. Code Reg. § 11100* P 1(F) (Cal. Wage Order No. 10-2001) ("Except as provided in Sections 1, 2, 4, 10 and 20, the provisions of this order shall not apply to full-time carnival ride operators ...") *with* IWC Statement as to the Basis for the General Minimum Wage Order, MW-2001, P 1 (full-time carnival ride operator exemption from minimum wage order eliminated).

(n97)Footnote 86. For definitions of "broadcasting industry" and "motion picture industry," *see 8 Cal. Code Reg. §§ 11110*, P 2(B)(Cal. Wage Order No. 11-2001) (broadcasting industry), *11120*, P 2(K)(Cal. Wage Order No. 12-2001) (motion picture industry), discussed in ch. 1.

(n98)Footnote 87. *8 Cal. Code Reg. § 11000*, P 1(B)(Minimum Wage Order MW-2001); *cf. 8 Cal. Code Reg. § 11110* P 1(F) (Cal. Wage Order No. 11-2001) ("Except as provided in Sections 1, 2, 4, 10 and 20, the provisions of this order shall not apply to professional actors") *with* IWC Statement as to the Basis for the General Minimum Wage Order, MW-2001, P 1 (professional actors exemption from minimum wage order eliminated).

(n99)Footnote 88. *8 Cal. Code Reg. § 11000*, P 1(B)(Minimum Wage Order MW-2001); *cf. 8 Cal. Code Reg. § 11120* P 1(F) (Cal. Wage Order No. 12-2001) ("Except as provided in Sections 1, 2, 4, 10 and 20, the provisions of this order shall not apply to professional actors") *with* IWC Statement as to the Basis for the General Minimum Wage Order, MW-2001, P 1 (professional actors exemption from minimum wage order eliminated).

(n100)Footnote 89. *8 Cal. Code Reg. § 11140*.

(n101)Footnote 90. *8 Cal. Code Reg. § 11140*, P 1(F).

(n102)Footnote 91. *8 Cal. Code Reg. § 11140*, P 2(I). For the definition of "open range sheepherding," *see 8 Cal. Code Reg. § 11140*, P 2(J).

(n103)Footnote 92. *8 Cal. Code Reg. § 11140*, P 14.

(n104)Footnote 93. *8 Cal. Code Reg. § 11140*, P 2(N).

(n105)Footnote 94. *See 8 U.S.C. § 1101 et seq.*

(n106)Footnote 95. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 50.3.

(n107)Footnote 96. For definition of "household occupations," *see 8 Cal. Code Reg. § 11150*, P 2(I) (Cal. Wage Order No. 15-2001), discussed in ch. 1.

(n108)Footnote 97. *8 Cal. Code Reg. § 11150*, P 1(B) (Cal. Wage Order No. 15-2001).

(n109)Footnote 98. *8 Cal. Code Reg. § 11150*, P 2(J) (Cal. Wage Order No. 15-2001).

(n110)Footnote 99. *See D.L.S.E. Interpretive Bulletin No. 86-1* (Mar. 12, 1986); 2002 Update to 1998 DLSE

Enforcement Policies and Interpretation Manual § 55.3.3 (DLSE uses same quantitative test as federal government (20%) but language of California definition concerning qualitative (duties) test differs from federal regulation, because California law requires that performance of any significant amount of work other than supervising, feeding or dressing will defeat exemption, so that any cooking, cleaning, laundering, shopping, etc., will be counted as other work), citing DLSE Opinion Letter 1994.10.03-2 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see also Cardenas v. Mission Industries (1991) 226 Cal. App. 3d 952, 959, 277 Cal. Rptr. 247* (trial court's express finding that plaintiff was not personal attendant implied that her housework duties exceeded 20 percent of the hours worked each week).

(n111)Footnote 100. *See 8 Cal. Code Reg. § 11150, P 2(I)* (Cal. Wage Order No. 15-2001).

(n112)Footnote 101. *8 Cal. Code Reg. § 11000, P 1(B)*(Minimum Wage Order MW-2001); *cf. 8 Cal. Code Reg. § 11150 P 1(B)* (Cal. Wage Order No. 15-2001) ("Except as provided in Sections 1, 2, 4, 10 and 20, the provisions of this order shall not apply to personal attendants.") with IWC Statement as to the Basis for the General Minimum Wage Order, MW-2001, P 1 (personal attendant "in private home[s] exemption from minimum wage order eliminated).

(n113)Footnote 102. *8 Cal. Code Reg. § 11150, P 2(J)* (Cal. Wage Order 15-2001).

(n114)Footnote 103. *8 Cal. Code Reg. § 11150, P 1(B)*.

(n115)Footnote 104. *See 8 Cal. Code Reg. § 11050, PP 2(N), 3(E)* (Cal. Wage Order No. 5-2001); *see also* discussion in ch.3.

(n116)Footnote 105. *8 Cal. Code Reg. §§ 11010-11040, 11060-11080, 11130-11160, P 1(E)* (Cal. Wage Order Nos. 1-2001-4-2001, 6-2001-8-2001, 13-2001-16-2001); *11050, 11090-11120, P 1(F)* (Cal. Wage Order Nos. 5-2001, 9-2001-12-2001).

(n117)Footnote 106. *8 Cal. Code Reg. §§ 11010-11150, P 4(D)* (Cal. Wage Order Nos. 1-2001-15-2001); *cf. 8 Cal. Code Reg. § 11160, P 4* (Cal. Wage Order No. 16-2001) *See also Lab. Code §§ 3070-3098* (apprenticeship under State Division of Apprenticeship). The minimum wage provisions of the "household occupations" wage order do not contain an exemption for indentured apprentices.

(n118)Footnote 107. *Lab. Code § 3077*.

(n119)Footnote 108. *Lab. Code § 3077*.

(n120)Footnote 109. *See 8 Cal. Code Reg. §§ 11010-11150, P 4(D)* (Cal. Wage Order Nos. 1-2001-15-2001).

(n121)Footnote 110. *See 29 U.S.C. § 214(a)*.

(n122)Footnote 111. *See 29 U.S.C. §§ 206* (minimum wage), *207* (overtime).

(n123)Footnote 112. *See 29 U.S.C. § 213*.

(n124)Footnote 113. *Baldwin v. Trailer Inns, Inc. (9th Cir. 2001) 266 F.3d 1104, 1112* ; *Klem v. County of Santa Clara (9th Cir. 2000) 208 F.3d 1085, 1089* .

(n125)Footnote 114. *Do v. Ocean Peace, Inc. (9th Cir. 2002) 279 F.3d 688, 691* ; *Webster v. Public School Employees of Washington (9th Cir. 2001) 247 F.3d 910, 914* .

(n126)Footnote 115. *29 C.F.R. § 541.603(d)*.

(n127)Footnote 116. *See 29 U.S.C. § 218(a)*. For additional discussion of the interrelationship between federal and

state wage and hour laws, *see* ch. 1.

(n128)Footnote 117. *See Nigg v. United States Postal Svc. (9th Cir. 2009) 555 F.3d 781, 2009 U.S. App. LEXIS 8826, *3 . See 5 C.F.R. § 551.202(a)* (each federal employee is presumed to be FLSA nonexempt unless employing agency correctly determines employee clearly meets one or more of exemption criteria).

(n129)Footnote 118. [Reserved]

(n130)Footnote 119. *See 29 U.S.C. § 213(a)(1).*

(n131)Footnote 120. *See 29 C.F.R. §§ 541.0-541.3, 541.100-541.402, 541.600-541.606.*

(n132)Footnote 121. *29 C.F.R. § 541.600(a).*

(n133)Footnote 121.1. *29 C.F.R. § 541.600(a).*

(n134)Footnote 121.2. *See 29 C.F.R. § 541.700* for discussion of "primary duty."

(n135)Footnote 121.3. *See 29 C.F.R. § 541.701* for discussion of "customarily and regularly."

(n136)Footnote 121.4. *29 C.F.R. § 541.100. See 29 C.F.R. § 541.105* for discussion of "particular weight."

(n137)Footnote 121.5. *29 C.F.R. § 541.101.*

(n138)Footnote 121.6. *See former 29 C.F.R. § 541.113.*

(n139)Footnote 121.7. *29 C.F.R. § 541.102.*

(n140)Footnote 121.8. *29 C.F.R. § 541.103(a).*

(n141)Footnote 121.9. *29 C.F.R. § 541.103(b).*

(n142)Footnote 121.10. *29 C.F.R. § 541.103(c).*

(n143)Footnote 121.11. *29 C.F.R. § 541.103(d).*

(n144)Footnote 121.12. *29 C.F.R. § 541.104(a).*

(n145)Footnote 121.13. *29 C.F.R. § 541.104(b).*

(n146)Footnote 121.14. *29 C.F.R. § 541.104(c).*

(n147)Footnote 121.15. *29 C.F.R. § 541.104(d).*

(n148)Footnote 121.16. *29 C.F.R. § 541.106(a).*

(n149)Footnote 121.17. *29 C.F.R. §§ 541.106(a), 541.700(a).*

(n150)Footnote 121.18. *29 C.F.R. § 541.106(a).*

(n151)Footnote 121.19. *29 C.F.R. § 541.106(b).*

(n152)Footnote 121.20. *29 C.F.R. § 541.106(b).*

(n153)Footnote 121.21. *29 C.F.R. § 541.106(c).*

(n154)Footnote 121.22. 29 C.F.R. § 541.106(c).

(n155)Footnote 122. Former 29 C.F.R. §§ 541.1(f), 541.119; *see also* former 29 C.F.R. §§ 541.101-541.105 (interpreting basic requirements).

(n156)Footnote 123. *See* former 29 C.F.R. § 541.1(f); *see also* former 29 C.F.R. §§ 541.117-541.118 (salary requirements); *Brock v. Claridge Hotel and Casino* (3d Cir. 1988) 846 F.2d 180, 184-186 (what constitutes "salary basis" for purpose of exemption; "salary" requirement was not satisfied when employees were paid by the hour, subject to a weekly minimum "guarantee" of \$250).

(n157)Footnote 124. *See* former 29 C.F.R. § 541.1(a), (b).

(n158)Footnote 125. Former 29 C.F.R. § 541.1(c); *see also* former 29 C.F.R. § 541.106.

(n159)Footnote 126. Former 29 C.F.R. § 541.1(d); *see also* former 29 C.F.R. § 541.107 (defining discretionary power).

(n160)Footnote 127. *See* former 29 C.F.R. § 541.1(e); *see also* former 29 C.F.R. §§ 541.111-541.115 (nonexempt work limitations and exceptions).

(n161)Footnote 128. *See* 29 C.F.R. § 541.700 for discussion of "primary duty."

(n162)Footnote 129. 29 C.F.R. § 541.200.

(n163)Footnote 130. 29 C.F.R. § 541.201(a).

(n164)Footnote 131. 29 C.F.R. § 541.201(b).

(n165)Footnote 132. 29 C.F.R. § 541.201(b).

(n166)Footnote 133. 29 C.F.R. § 541.201(c).

(n167)Footnote 134. 29 C.F.R. § 541.202(a).

(n168)Footnote 135. 29 C.F.R. § 541.202(b).

(n169)Footnote 136. 29 C.F.R. § 541.202(e).

(n170)Footnote 137. 29 C.F.R. § 541.704.

(n171)Footnote 138. 29 C.F.R. § 541.202(e).

(n172)Footnote 139. 29 C.F.R. § 541.202(d).

(n173)Footnote 140. 29 C.F.R. § 541.202(c).

(n174)Footnote 141. 29 C.F.R. § 541.202(f). *See* 29 C.F.R. § 541.202 for a fuller discussion of what constitutes the exercise of "discretion and independent judgment."

(n175)Footnote 142. *See* 29 C.F.R. § 541.203. *See also* *Miller v. Farmers Ins. Exchange* (*In re Farmers Ins. Exchange*) (9th Cir. 2007) 481 F.3d 1119, 2007 U.S. App. LEXIS 7403, *11-*29 (insurance claims adjusters exempt under § 541.203, where, regardless of the type [personal injury v. property] or size [large v. small] of claims handled, adjusters were required to do virtually all things § 541.203 contemplated: use discretion to determine whether loss was covered, set reserves, decide who was to blame for loss and negotiate with insured or lawyer).

(n176)Footnote 143. 29 C.F.R. § 541.204.

(n177)Footnote 144-148. [Reserved]

(n178)Footnote 149. See former 29 C.F.R. §§ 541.2(a), (e)(2), 541.214; see also former 29 C.F.R. §§ 541.201-541.213 (interpreting basic requirements), 541.215(administrative work in schools).

(n179)Footnote 150. See former 29 C.F.R. § 541.2(e)(1); see also former 29 C.F.R. §§ 541.211-541.213 (salary or fee requirements).

(n180)Footnote 151. Former 29 C.F.R. § 541.2(b); see also former 29 C.F.R. § 541.207 (further interpreting requirement of discretion and independent judgment).

(n181)Footnote 152. Former 29 C.F.R. § 541.2(c).

(n182)Footnote 153. See former 29 C.F.R. § 541.2(d); see also former 29 C.F.R. § 541.209 (further discussing limitations on nonexempt duties).

(n183)Footnote 154. [Reserved]

(n184)Footnote 157. *Bothell v. Phase Metrics, Inc.* (9th Cir. 2002) 299 F.3d 1120 .

(n185)Footnote 158. *Bothell v. Phase Metrics, Inc.* (9th Cir. 2002) 299 F.3d 1120, 1125-1128 .

(n186)Footnote 159. *Bothell v. Phase Metrics, Inc.* (9th Cir. 2002) 299 F.3d 1120, 1128-1129 .

(n187)Footnote 160. *Bothell v. Phase Metrics, Inc.* (9th Cir. 2002) 299 F.3d 1120, 1129-1130 .

(n188)Footnote 161. *Bothell v. Phase Metrics, Inc.* (9th Cir. 2002) 299 F.3d 1120 .

(n189)Footnote 162. 29 C.F.R. § 541.300.

(n190)Footnote 163. 29 C.F.R. § 541.301(a).

(n191)Footnote 164. 29 C.F.R. § 541.301(a).

(n192)Footnote 165. [Reserved]

(n193)Footnote 166. 29 C.F.R. § 541.301(b).

(n194)Footnote 167. 29 C.F.R. § 541.301(c).

(n195)Footnote 168. 29 C.F.R. § 541.301(d).

(n196)Footnote 169. 29 C.F.R. § 541.301(d).

(n197)Footnote 170. 29 C.F.R. § 541.302(a).

(n198)Footnote 171. 29 C.F.R. § 541.302(b).

(n199)Footnote 172. 29 C.F.R. § 541.302(c).

(n200)Footnote 173. 29 C.F.R. § 541.302(d).

(n201)Footnote 173.1. See 29 C.F.R. § 541.204(b)(2) for the definition of "educational establishment."

(n202)Footnote 173.2. *29 C.F.R. § 541.303(a).*

(n203)Footnote 173.3. *29 C.F.R. § 541.303(d). See also 29 C.F.R. § 541.303(b), (c)* for discussion of the professional exemption for teachers.

(n204)Footnote 173.4. *29 C.F.R. § 541.304(a).*

(n205)Footnote 173.5. *29 C.F.R. § 541.304(d).*

(n206)Footnote 173.6. *29 C.F.R. § 541.304(b).*

(n207)Footnote 173.7. *29 C.F.R. § 541.304(c).*

(n208)Footnote 173.8. *Clark v. United Emergency Animal Clinic (9th Cir. 2004) 390 F.3d 1124, 1125-1128 .*

(n209)Footnote 174. *See 29 U.S.C. § 213(a)(17).*

(n210)Footnote 175. *See 29 U.S.C. § 213(a)(17).*

(n211)Footnote 176. *See 29 U.S.C. § 213(a)(17).*

(n212)Footnote 177. *See 29 C.F.R. § 541.600.*

(n213)Footnote 178. *See 29 C.F.R. § 510.705.*

(n214)Footnote 178.1. *See 29 C.F.R. § 541.401.*

(n215)Footnote 179. *See discussion in [1][a][ii], above.*

(n216)Footnote 180. *See 8 Cal. Code Reg. §§ 11010-11040, 11060-11150, P 1(A)(3) (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-15-2001), 11050, P 1(B)(3) (Cal. Wage Order No. 5-2001).*

(n217)Footnote 180.1. *See 8 Cal. Code Reg. § 11040, PP 1, 2(C) (Cal. Wage Order No. 4-2001).*

(n218)Footnote 180.2. *See former 29 C.F.R. §§ 541.3(a)(1), (3), (e), 541.315; see also former 29 C.F.R. §§ 541.300 (professional work generally), 541.301 (learned professions), 541.302 (artistic professions), 541.304-541.306 (characteristics of professional duties); see also O'Dell v. Alyeska Pipeline Service Co. (9th Cir. 1988) 856 F.2d 1452, 1453-1454 (criteria for short test as distinguished from long test).*

(n219)Footnote 180.3. *See O'Dell v. Alyeska Pipeline Service Co. (9th Cir. 1988) 856 F.2d 1452, 1453-1454 (meaning of exercise of "discretion" and "judgment").*

(n220)Footnote 180.4. *See former 29 C.F.R. § 541.3(e); see also former 29 C.F.R. §§ 541.311-541.313 (salary or fee requirements).*

(n221)Footnote 180.5. *See former 29 C.F.R. § 541.3(a).*

(n222)Footnote 180.6. *See former 29 C.F.R. § 541.3(b).*

(n223)Footnote 180.7. *See former 29 C.F.R. §§ 541.3(c), 541.306.*

(n224)Footnote 180.8. *See former 29 C.F.R. §§ 541.3(d), 541.308-541.309.*

(n225)Footnote 180.9. *See former 29 C.F.R. §§ 541.3(e), 541.314.*

(n226)Footnote 181. *29 C.F.R. § 541.601(a); See also §§ 541.100, 541.200 and 541.300 for the criteria applicable to each of the exemptions.*

(n227)Footnote 181.1. *29 C.F.R. § 541.601(b)(1).* Computer professionals who are paid by the hour may not, therefore, qualify for exemption under the provisions for highly compensated employees.

(n228)Footnote 181.2. *29 C.F.R. § 541.601(b)(1).*

(n229)Footnote 181.3. *29 C.F.R. § 541.601(b)(2).*

(n230)Footnote 181.4. *29 C.F.R. § 541.601(b)(3).*

(n231)Footnote 181.5. *29 C.F.R. § 541.601(b)(4).*

(n232)Footnote 181.6. Administrative and professional employees also may be paid on a fee basis, and computer professionals also may be paid on an hourly basis. *See 29 C.F.R. §§ 541.400(b), 541.600(a).* Teachers and certain others in the medical and legal professions are exempt from the salary requirements. *29 C.F.R. §§ 541.303(d), 541.304(d).*

(n233)Footnote 181.7. *29 C.F.R. § 541.602(a).*

(n234)Footnote 181.8. *29 C.F.R. § 541.602(a).*

(n235)Footnote 181.9. *29 C.F.R. § 541.602(a).*

(n236)Footnote 181.10. *29 C.F.R. § 541.602(b)(1).*

(n237)Footnote 181.11. *29 C.F.R. § 541.602(b)(2).*

(n238)Footnote 181.12. *29 C.F.R. § 541.602(b)(3).*

(n239)Footnote 181.13. *29 C.F.R. § 541.602(b)(4).*

(n240)Footnote 181.14. *29 C.F.R. § 541.602(b)(5).*

(n241)Footnote 181.15. *29 C.F.R. § 541.602(b)(6).*

(n242)Footnote 181.16. *29 C.F.R. § 541.602(b)(7).*

(n243)Footnote 181.17. *29 C.F.R. § 541.603(a).*

(n244)Footnote 181.18. *29 C.F.R. § 541.603(a).*

(n245)Footnote 181.19. *29 C.F.R. § 541.603(b).* This insert is misplaced.

(n246)Footnote 181.20. *29 C.F.R. § 541.603(c).*

(n247)Footnote 181.21. *29 C.F.R. § 541.603(d).*

(n248)Footnote 181.22. *29 C.F.R. § 541.603(d).*

(n249)Footnote 181.23. *29 C.F.R. § 541.603(d).*

(n250)Footnote 181.24. *29 C.F.R. § 541.604.*

(n251)Footnote 181.25. *29 C.F.R. § 541.604.*

(n252)Footnote 182. *29 U.S.C. § 213(a)(1).*

(n253)Footnote 183. *See 29 C.F.R. §§ 541.500-541.504.*

(n254)Footnote 184. *See 29 C.F.R. § 541.500.*

(n255)Footnote 185. *See 29 U.S.C. § 203(k); 29 C.F.R. § 541.501(b)* (definition of "sales").

(n256)Footnote 186. *See 29 C.F.R. § 541.501(c)* (rules regarding obtaining orders or contracts for services or use of facilities).

(n257)Footnote 187. *See 29 C.F.R. § 541.502* (characteristics of engagement away from employer's place of business).

(n258)Footnote 188. *See* former *29 C.F.R. § 541.507* (20 percent limitation on nonexempt work).

(n259)Footnote 189. *29 C.F.R. § 541.500(b); see 29 C.F.R. § 541.503.*

(n260)Footnote 190. *See 29 C.F.R. § 541.504.*

(n261)Footnote 191. *See 29 C.F.R. § 541.503.*

(n262)Footnote 192. *See 8 Cal. Code Reg. §§ 11010-11030, 11060-11100, 11130, P 2(J)* (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-10-2001, 13-2001), *11040, 11050, P 2(N)* (Cal. Wage Order Nos. 4-2001, 5-2001), *11120, P 2(L)* (Cal. Wage Order No. 12-2001), discussed in [1][a] [iii], *above*.

(n263)Footnote 193. *See 29 U.S.C. § 213(a)(3).*

(n264)Footnote 194. *See e.g., 8 Cal. Code Reg. § 11100, P 1(F)* (Cal. Wage Order No. 10-2001) (minimum wage and overtime provisions now applicable in part to full-time ride operator in traveling carnival).

(n265)Footnote 195. *29 U.S.C. § 213(a)(5); see Do v. Ocean Peace, Inc. (9th Cir. 2002) 279 F.3d 688, 691-693* (employees working respectively as fish processor and housekeeper on trawler were within "first processing" aspect of exemption). This exemption appears somewhat narrower than the comparable California exemption, which applies only to certain employees licensed pursuant to the Fish and Game Code or employed on licensed commercial passenger fishing boats. *See 8 Cal. Code Reg. § 11100, P 1(H)* (Cal. Wage Order No. 10-2001).

(n266)Footnote 196. *29 U.S.C. § 213(a)(6)*. Note that agricultural employees are covered by the California wage orders, but that special overtime rules apply to such employees. *See 8 Cal. Code Reg. § 11140* (Cal. Wage Order No. 14-2001).

(n267)Footnote 197. *See 29 U.S.C. § 213(a)(7)*. This section primarily provides partial exemptions to learners, students, handicapped persons and others, who may be employed at subminimum wages as specified in special certificates. *See § 2.05[2]* for discussion of exemptions under *29 U.S.C. § 214*.

(n268)Footnote 198. *See 29 U.S.C. § 213(a)(8)*. Most such employees would be covered under the California wage order governing professional, technical, clerical, mechanical, and similar occupations. *See 8 Cal. Code Reg. § 11040, PP 1, 2(C)* (Cal. Wage Order No. 4-2001).

(n269)Footnote 199. *See 29 U.S.C. § 213(a)(10).*

(n270)Footnote 200. *See 29 U.S.C. § 213(a)(12)*. Seaman on American vessels are not exempt from minimum

wage requirements, but are exempt from overtime requirements. *See* 29 U.S.C. § 213(b)(6); *see also* discussion in ch. 3.

(n271)Footnote 201. *See* 29 U.S.C. § 213(a)(15); *cf.* 29 U.S.C. § 206(f) (domestic service workers covered under federal minimum wage and overtime provisions). *See also* *Long Island Care at Home, Ltd. v. Coke* (2007) 127 S. Ct. 2339, 2345-2352, 168 L. Ed. 2d 54 (29 C.F.R. § 552.109(a), providing that 29 U.S.C. § 213(a)(15) statutory exemption included all third-party-employed companionship workers, was valid and binding, where regulation concerned details Congress entrusted Department of Labor to work out; although 29 C.F.R. §§ 552.3 and 552.109(a) were inconsistent, § 552.109(a) governed because, *inter alia*, it was the more specific regulation with respect to the third-party-employment question, Department intended regulation as binding application of its rulemaking authority, and Department satisfied notice requirements of 5 U.S.C. § 553(b)(3)). *See* § 2.03[2][b] for discussion of covered domestic service workers.

(n272)Footnote 202. *See* 29 U.S.C. § 213(a)(16), (b)(30).

(n273)Footnote 203. *See* 29 U.S.C. § 213(d).

(n274)Footnote 204. *See* 29 U.S.C. § 213(f).

(n275)Footnote 205. *See* *Nigg v. United States Postal Svc.* (9th Cir. 2009) 555 F.3d 781, 2009 U.S. App. LEXIS 8826, *4-*21 (Ninth Circuit could not determine for first time on appeal whether compensation provision in 39 U.S.C. § 1003(c), which requires Postal Service to pay postal inspectors on basis of "comparability" to other similarly tasked federal executive branch employees, permitted Postal Service to provide "availability pay" comparable to certain other federal law enforcement officers who receive availability pay under Law Enforcement Availability Pay Act [5 U.S.C. § 5545a], rather than FLSA overtime; in enacting § 1003(c), Congress did not explicitly amend or repeal FLSA and whether these statutes implicitly conflicted depended on whether any employees of executive branch were both engaged in work comparable to that of postal inspectors and paid FLSA over-time, and district court did not consider whether employees in specified federal law enforcement positions performed work comparable to that of postal inspectors).

(n276)Footnote 206. *See* 29 U.S.C. § 214(d). *See* ch. 6 for discussion of child labor laws.



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 2 Minimum Wages
Part A. MINIMUM WAGE REQUIREMENTS

1-2 California Employment Law § 2.05

AUTHOR: By Carol S. Sanders, J.D.

§ 2.05 Employees Who May Be Paid Subminimum Wage

[1] California Law

[a] Apprentices and Learners

For any occupation in which a minimum wage has been established, the IWC is authorized by statute to issue to an apprentice or learner a special license authorizing employment of that apprentice or learner for the time and under the conditions that the IWC determines, and at a less than minimum wage. The IWC must fix a special wage for such apprentices or learners.ⁿ¹ The IWC may also fix the maximum number of employees to be employed under the license in any occupation, trade, industry, or establishment in which a minimum wage has been established.ⁿ²

Pursuant to its statutory authorization, the IWC has provided in its wage orders that employees who are "learners" may be paid not less than 85 percent of the minimum wage rounded to the nearest nickel (or \$5.30 per hour based on the current minimum wage) during the first 160 hours of employment in occupations in which the learner has no previous similar or related experience.ⁿ³ Effective January 1, 2002, the minimum amount that employers may pay to learners is \$5.75.ⁿ⁴ Although the IWC has eliminated the subminimum wage provisions for minors, it has amended the learners provisions of the wage orders to include minors.ⁿ⁵ In its Statement of Basis for the establishment of subminimum wages for learners, the IWC noted that learners usually are not as productive as experienced employees and that the subminimum wage increases job opportunities for persons new to the labor market.

As noted previously,ⁿ⁶ apprentices regularly indentured under State Division of Apprenticeship standards are completely exempt from the minimum wage provisions of the all wage orders other than Wage Order No. 16-2001.ⁿ⁷

The DLSE has stated that the learner's provision must be strictly construed, and that employers may pay learners' rate only to those learners who have no previous similar or related experience.ⁿ⁸ The DLSE has stated that before paying the learner's rate, an employer is responsible for determining whether the employee has any such previous similar or related experience, and that the employee's unfamiliarity with the employer's systems or procedures is sufficient to permit use of the rate.ⁿ⁹ The burden is on the employer to demonstrate these facts to avoid assessment and payment of

the full minimum wage.ⁿ¹⁰

Neither the Employment Retirement Income Security Act (ERISA)ⁿ¹¹ nor the National Labor Management Relations Act (NLRA)ⁿ¹² preempts the application of California's apprenticeship prevailing wage lawⁿ¹³ that requires payment of prevailing wages to employees in apprenticeship programs that have not received state approval, but allows payment of lower apprenticeship wages to employees participating in state-approved apprenticeship programs.ⁿ¹⁴

For discussion of the federal provisions for subminimum wages for learners, students, and apprentices, *see* [2][a], *below*. Note that the federal provisions for learners are not identical to the California provisions in that they are limited to specific industries and in many cases provide for a longer learning period and a lower subminimum wage than permitted by the California wage order provisions. Furthermore, the federal subminimum wage for learners may not be paid unless the employer first applies for and obtains a special certificate.ⁿ¹⁵ Because of the differences and inconsistencies between the requirements under state and federal laws, a California employer that is subject to the FLSA and desires to pay a subminimum wage for learners must make sure that it has taken the necessary steps to comply with both laws.ⁿ¹⁶ For example, an employer subject to both laws may pay 18-year-olds and 19-year-olds the learner rate either for the first 90 consecutive calendar days or for the first 160 work hours, whichever occurs earlier; and that employee must be working for that employer for the first time and must not have previous similar or related work experience.ⁿ¹⁷ For discussion of the requirements of the federal training wage, *see* [2][e], *below*.

[b] Minors

For the purposes of the wage orders, "minor" means any person under the age of 18 years.ⁿ¹⁸ In its Statement as to the Basis for the General Minimum Wage Order, MW-2001, the IWC announced the elimination of the previous exemption of minors from the minimum wage provisions of the wage orders.ⁿ¹⁹ The IWC also amended the partial exemption for learners to include minors.ⁿ²⁰

The FLSA provides a subminimum "opportunity wage" for employees under age 20 during the first 90 consecutive calendar days after the employee is initially employed.ⁿ²¹

For additional discussion of child labor restrictions, *see* Chapter 6.

[c] Mentally or Physically Disabled Persons

[i] Individual Licenses

For any occupation in which a minimum wage has been established, the IWC is authorized by statute to issue to an employee who is mentally or physically disabled, or both, a special license authorizing the employment of the licensee for a period not to exceed one year from the date of the license's issuance, at a wage less than the legal minimum wage. The IWC must fix the special minimum wage for the licensee.ⁿ²² The license may be renewed on a yearly basis.ⁿ²³ The IWC is authorized to fix the maximum number of disabled employees to be employed under these licenses in any occupation, trade, industry, or establishment in which a minimum wage has been established.ⁿ²⁴

Pursuant to its statutory authority, the IWC has promulgated orders empowering the DLSE to issue licenses authorizing employment of a person whose earning capacity is impaired by physical disability or mental deficiency at subminimum wages.ⁿ²⁵ The licenses may be granted only on joint application of the employer and employee and the employee's representative, if any, and must be renewed on a yearly basis, or more frequently at the discretion of the DLSE.ⁿ²⁶ The wage orders do not specify the subminimum wages to be paid to disabled workers pursuant to such licenses or the criteria for granting such licenses.

For discussion of the provisions for subminimum wages for disabled employees under the FLSA, *see* [2][d], *below*.

[ii] Organizational Licenses

The IWC is empowered to issue a special license to a nonprofit organization such as a sheltered workshop or rehabilitation facility to permit employment at subminimum wages of employees who have been determined by the IWC to be mentally or physically disabled, or both, without requiring individual licenses of such employees, notwithstanding the provisions of *Labor Code section 1191* (governing issuance of licenses to individual disabled employees).ⁿ²⁷ The IWC must fix a special minimum rate for these employees.ⁿ²⁸ The IWC has delegated this authority to the DLSE.ⁿ²⁹ The special license for the nonprofit corporation must be renewed on a yearly basis, or more frequently, as determined by the IWC or the DLSE.ⁿ³⁰ The IWC may fix the maximum number of employees to be employed under an organizational license.ⁿ³¹

For discussion of the provisions for subminimum wages for disabled employees under the FLSA, *see* [2][d], *below*.

[d] Student Employees and Counselors in Camps

Labor Code section 1182.4 provides that no student employee, camp counselor, or program counselor of an organized camp may be subject to a minimum wage or overtime provision of a wage order if that employee or counselor receives a weekly salary of at least 85 percent of the minimum wage for a 40-hour week,ⁿ³² regardless of the number of hours per week that the student employee or counselor actually works at the organized camp.ⁿ³³ However, if the employee works less than 40 hours a week, he or she must be paid at 85 percent of the hourly minimum wage for each hour worked.ⁿ³⁴

The camp may deduct the value of meals and lodging from the employee's salary in accordance with the requirements of the wage orders.ⁿ³⁵

An "organized camp" for purposes of *Labor Code section 1182.4* means a site with programs and facilities established for the primary purposes of providing an outdoor group living experience with social, spiritual, educational, or religious objectives, for five days or more during one or more seasons of the year,ⁿ³⁶ and which meets the standards of the American Camping Association.ⁿ³⁷ The term does not include a motel, tourist camp, trailer park, resort, hunting camp, auto court, labor camp, penal or correctional camp, child care institution, or homefinding agency.ⁿ³⁸ The term also does not include any charitable or recreational organization that complies with rules and regulations for recreational trailer parks.ⁿ³⁹

[2] Federal Law**[a] Generally**

Under regulations and orders promulgated by the Secretary of Labor pursuant to the FLSA, the categories of employees discussed in [b]-[d] *below*, may be employed under special certificates at wages lower than the federal minimum wage, to the extent necessary to prevent curtailment of opportunities for employment.ⁿ⁴⁰ In addition, by statutory amendment to the FLSA, a subminimum "opportunity wage," discussed in [e], *below*, has been created for workers under 20 years old during the first 90 consecutive calendar days after that employee is initially employed.ⁿ⁴¹

[b] Learners, Apprentices, and Messengers**[i] Generally**

Learners, apprentices, and messengers employed primarily in delivering letters and messages may be employed under special certificates issued pursuant to regulations of the Secretary of Labor at wages lower than the regular minimum wage and subject to limitations as to time, number, proportion, and length of service.ⁿ⁴²

[ii] Student-Learners

A student-learner is a student who is receiving instruction in an accredited school, college, or university, and who is employed on a part-time basis under a bona fide vocational training program administered by the school, college or university.ⁿ⁴³ A student-learner generally must be at least 16 years of age, and must be 18 years of age if he or she is to be employed in certain hazardous occupations.ⁿ⁴⁴

A student-learner may be employed at a subminimum wage only under a special certificate issued by the Wage and Hour Division pursuant to the procedures set forth in the regulations.ⁿ⁴⁵ The certificate may not be issued retroactively.ⁿ⁴⁶ Application for a special certificate must be made on the official form available from the appropriate regional office of the Wage and Hour Division, and must be signed by the employer, the appropriate school official, and the student learner.ⁿ⁴⁷ Note that the California wage orders do not contain a subminimum wage provision for student-learners.

For discussion of the subminimum wage provisions for minors under the California wage orders, *see* [1][b], *above*.

[iii] Apprentices

Under the FLSA, an "apprentice" means a worker at least 16 years of age, except when a higher minimum age standard is otherwise fixed by law, who is employed to learn a skilled trade.ⁿ⁴⁸ Special certificates may be issued to employers or joint apprenticeship committees authorizing the employment of apprentices in skilled trades at wages lower than the prevailing minimum wage under federal law.ⁿ⁴⁹ To obtain a special certificate, the employer or joint apprenticeship committee must have the apprenticeship agreement registered by the appropriate recognized apprenticeship agency and then submit the agreement to the Wage and Hour Division for a determination regarding whether the agreement meets the requirements set forth in the regulations.ⁿ⁵⁰ If the Division finds that the agreement meets the requirements of the regulation, it will issue the special certificate, which specifies the terms and conditions under which it is granted, including the wage rate to be paid to the apprentice.ⁿ⁵¹

For discussion of the provisions of the California wage orders relating to apprentices, *see* § 2.04[1][d].

[iv] Learners

A "learner" under the FLSA is a worker whose total experience in an authorized learner occupation in the industry within the past three years is less than the period of time allowed as a learning period for that occupation in a learner certificate.ⁿ⁵²

An employer who wishes to utilize the federal subminimum wage for learners must apply for a special certificate on the official form furnished by the Wage and Hour Division.ⁿ⁵³ The certificate may not be issued retroactively.ⁿ⁵⁴

Certain conditions, intended to protect experienced workers, govern the issuance of the special certificates for employment of learners at subminimum wages. These include a showing by the employer that reasonable efforts have been made to recruit experienced workers, that the issuance of the certificate will not tend to create unfair competitive labor cost advantages, and that abnormal labor conditions such as a strike, lockout or other similar condition do not exist at the plant for which a learner certificate is requested.ⁿ⁵⁵

If learners are paid on a piece rate basis, they must be paid at least the same piece rate as experienced workers employed in the same plant for the same work, and must receive earnings based on these piece rates whenever the earnings exceed the subminimum rates permitted in the certificate.ⁿ⁵⁶

For discussion of the California wage order provisions for subminimum wages for learners, *see* [1][a], *above*.

[v] Messengers

Federal regulations provide that an application may be made to employ messengers to be engaged primarily in delivering letters and messages at a wage lower than the minimum wage applicable under federal law.ⁿ⁵⁷ There is no comparable provision under California law. In fact, messengers are expressly covered by the wage order governing the professional, technical, clerical, mechanical, and similar occupationsⁿ⁵⁸ and must be paid the California minimum wage unless some other exemption or partial exemption applies to the particular employee.

[c] Full-Time Students

Under the FLSA, full-time students employed in retail or service establishments,ⁿ⁵⁹ any occupation in agriculture,ⁿ⁶⁰ or in an institution of higher education in which they are enrolledⁿ⁶¹ may be employed at a wage rate not less than 85 per cent of the minimum wage.ⁿ⁶² The students may be employed at the subminimum wage regardless of age, but in compliance with applicable child labor laws.ⁿ⁶³

Restrictions apply to limit the weekly hours of employment to no more than 20, except during vacation periods,ⁿ⁶⁴ and, in the case of retail and service establishments and agricultural employment, to safeguard against the reduction of the full-time employment opportunities of employees other than full-time students employed under certificates.ⁿ⁶⁵

An employer wishing to employ a full-time student under the federal subminimum wage provision must apply for a special certificate on the official form available at the appropriate Regional Office of the Wage and Hour Division.ⁿ⁶⁶ A certificate may not be issued retroactively.ⁿ⁶⁷

[d] Disabled Workers in Competitive Industry

Special certificates may be issued for the employment of individuals whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury at subminimum wages that are commensurate with wages paid to nondisabled workers employed in the same vicinity for essentially the same type of work, and related to the disabled individual's productivity.ⁿ⁶⁸ The employer must provide written assurances that he or she will review the subminimum wage rate at least every six months, and adjust the rate at least once a year to reflect the prevailing wage paid to experienced nondisabled individuals employed in the locality for essentially the same type of work.ⁿ⁶⁹ⁿ⁷⁰

An employee, or a parent or guardian on the employee's behalf, may petition the Secretary of Labor to obtain an administrative review of the special minimum wage rate set by the employer.ⁿ⁷¹

The 1986 amendments to Title 29 *United States Code*, section 214 eliminated prior provisions authorizing special certificates for payment of subminimum wages to workers in work activities centers (also known as sheltered workshops).ⁿ⁷² However, nothing in the amended statute may be construed to prohibit an employer from maintaining or establishing work activities centers to provide therapeutic activities for disabled clients.ⁿ⁷³

For discussion of the provisions for special licenses for employment of disabled individuals at subminimum wages under the California wage orders, *see* [1][c], *above*.

[e] Opportunity Wage

The Small Business Job Protection Act of 1996ⁿ⁷⁴ contains provisions for the establishment, as of October 1, 1996, of an "opportunity wage" for employees under the age of 20 during the first 90 consecutive calendar days after they are initially employed.ⁿ⁷⁵ This wage must be at least \$4.25 per hour,ⁿ⁷⁶ and it is illegal for an employer to displace a current employee or reduce a current employee's work hours or benefits in order to pay the opportunity wage.ⁿ⁷⁷ The Department of Labor guidelines regarding the opportunity wage set forth the following points:ⁿ⁷⁸

1. The opportunity wage is not limited to only \$4.25 per hour; any higher rate is permitted.
2. The \$4.25 rate is specified in the statute and is not a percentage of the minimum wage. Thus, when the federal wage increased to \$5.15 per hour on September 1, 1997, the minimum opportunity wage continued to be \$4.25.
3. Each consecutive calendar day beginning with the first day of work, counts against the 90-day eligibility period, regardless of the actual days or hours worked. The day of the job offer or acceptance does not count unless work begins on that day. The 90-day period runs even if the employee comes off payroll during that period.
4. Employment prior to October 1, 1996, counts toward the 90-day period. If, as of October 1, 1996, an employer was beyond 90 calendar days into employment, he or she was ineligible for the opportunity wage from that employer.
5. An eligible youth is "initially employed" only once by any particular employer, but may be initially employed by more than one employer. Simultaneous employment by two separate (but not joint) employers does not affect eligibility.
6. A person already employed at a rate higher than \$4.25 and otherwise eligible for the opportunity wage may not have his or her wage reduced to \$4.25, since that would constitute an unlawful partial displacement.
7. The opportunity wage is a permanent part of the FLSA and is not scheduled to expire (like the prior "training wage," which expired in 1993).
8. Payment of the opportunity wage does not require a special federal certificate or other prior approval by the U.S. Department of Labor, nor does it have any training requirements or other limitations other than those described.

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Minimum Wage

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 1192; see also 1 Ops. Cal. Atty. Gen. 251 (1943)* (minimum wage fixed by regularly promulgated commission orders have force and effect of statutes and will prevail over any minimum wage fixed and approved in an apprenticeship agreement).

(n2)Footnote 2. *Lab. Code § 1193.*

(n3)Footnote 3. *8 Cal. Code Reg. §§ 11010-11150, P 4(A)(1)* (Cal. Wage Order Nos. 1-2001-15-2001); but see *8 Cal. Code Reg. § 11160* (Cal. Wage Order 16-2001) (no reduction in minimum wage rate for learners).

(n4)Footnote 4. *8 Cal. Code Reg. §§ 11000, P 2* (Minimum Wage Order MW-2001); *11010-11150, P 4(A)(1)* (Wage Order Nos. 1-2001-15-20001).

(n5)Footnote 5. IWC Statement as to the Basis for the General Minimum Wage Order, MW-2001, P 1; *8 Cal. Code*

Reg. §§ 11010-11150, P 4(A)(1) (Cal. Wage Order Nos. 1-2001-15-2001); *but cf.*, 8 *Cal. Code Reg. § 11150*, P 1(B) (Cal. Wage Order 15-2001) (subminimum wage applies to babysitters under age 18).

(n6)Footnote 6. *See* discussion in § 2.04[1][d].

(n7)Footnote 7. *See* 8 *Cal. Code Reg. §§ 11010-11140*, P 4(D) (Cal. Wage Order Nos. 1-2001-14-2001); *see also Lab. Code §§ 3070-3098* (apprenticeship under State Division of Apprenticeship). The minimum wage provisions of the "household occupations" wage order do not contain an exemption for indentured apprentices. *see* 8 *Cal. Code Reg. § 11150*, P 4 (Cal. Wage Order No. 15-2001).

(n8)Footnote 8. *See* D.L.S.E. Interpretive Bulletin No. 88-2 (June 27, 1988) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n9)Footnote 9. *See* D.L.S.E. Interpretive Bulletin No. 88-2 (June 27, 1988) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n10)Footnote 10. *See* D.L.S.E. Interpretive Bulletin No. 88-2 (June 27, 1988) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n11)Footnote 11. 29 *U.S.C. § 1001 et seq.*

(n12)Footnote 12. 29 *U.S.C. § 141 et seq.*

(n13)Footnote 13. *Lab. Code §§ 3070-3098*.

(n14)Footnote 14. *California Div. of Labor Stds. Enforcement v. Dillingham Constr. (1997) N.A., 519 U.S. 316, 323-334* (ERISA); *Dillingham Constr. N.A., Inc. v. County of Sonoma (9th Cir. 1999) 190 F.3d 1034, 1040-1041* (NLRA).

(n15)Footnote 15. *See generally* 29 *U.S.C. § 214(a)*.

(n16)Footnote 16. *See* D.L.S.E. Memorandum (October 9, 1996) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n17)Footnote 17. *See* D.L.S.E. Memorandum (October 9, 1996)(containing chart of consolidated state and federal requirements) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n18)Footnote 18. 8 *Cal. Code Reg. §§ 11010-11030, 11060-11100, 11130*, P 2(H) (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-10-2001, 13-2001); *11040, 11050*, P 2(L) (Cal. Wage Order Nos. 4-2001, 5-2001); *11110*, P 2(J) (Cal. Wage Order No. 11-2001); *11120, 11150*, P 2(K) (Cal. Wage Order Nos. 12-2001, 15-2001); *11140*, P 2(H) (Cal. Wage Order No. 14-2001); *11160*, P 2(M) (Cal. Wage Order No. 16-2001).

(n19)Footnote 19. *See* Cal. Ind. Welf. Comm., Statement as to the Basis for the General Minimum Wage Order, P 1.

(n20)Footnote 20. *See* 8 *Cal. Code Reg. §§ 11010-11150*, P 4(A)(1) (Cal. Wage Order Nos. 1-2001-15-2001).

(n21)Footnote 21. *See* 29 *U.S.C. § 206(g)*.

(n22)Footnote 22. *Lab. Code § 1191*.

(n23)Footnote 23. *Lab. Code § 1191*.

(n24)Footnote 24. *Lab. Code § 1193.*

(n25)Footnote 25. *8 Cal. Code Reg. §§ 11010-11150*, P 6 (Cal. Wage Order Nos. 1-2001-15-2001).

(n26)Footnote 26. *8 Cal. Code Reg. §§ 11010-11150*, P 6 (Cal. Wage Order Nos.1-2001-15-2001).

(n27)Footnote 27. *Lab. Code § 1191.5.*

(n28)Footnote 28. *Lab. Code § 1191.5.*

(n29)Footnote 29. *See 8 Cal. Code Reg. §§ 11010-11150*, P 6 (Cal. Wage Order Nos. 1-2001-15-2001). Note that the wage order covering household occupations contains no provision for organizational licenses, and that the wage order covering construction, drilling, logging and mining occupations contains no provision at all for subminimum wage licenses. *see 8 Cal. Code Reg. § 11150; 11160*, P 6 (Cal. Wage Order Nos. 15-2001, 16-2001).

(n30)Footnote 30. *Lab. Code § 1191.5; see 8 Cal. Code Reg. §§ 11010-11150*, P 6 (Cal. Wage Order Nos.1-2001-15-2001).

(n31)Footnote 31. *See Lab. Code § 1193.*

(n32)Footnote 32. *See 8 Cal. Code Reg. §§ 11000*, P 2 (Cal. Wage Order No. MW-2001), *11010-11160*, P 4(A).

(n33)Footnote 33. *Lab. Code § 1182.4(a).*

(n34)Footnote 34. *Lab. Code § 1182.4(a).*

(n35)Footnote 35. *Lab. Code § 1182.4(b)*. For discussion of permissible deductions for food and lodging under wage orders, *see § 2.21[1][b], [c]*.

(n36)Footnote 36. *See Health & Safety Code § 18897(a).*

(n37)Footnote 37. *See Lab. Code § 1182.4* ("organized camp" as defined in *Health & Safety Code § 18897*).

(n38)Footnote 38. *See Health & Safety Code § 18897(b).*

(n39)Footnote 39. *See Health & Safety Code § 18897(c).*

(n40)Footnote 40. *See 29 U.S.C. § 214.*

(n41)Footnote 41. *See 29 U.S.C. § 206(g).*

(n42)Footnote 42. *See 29 U.S.C. § 214(a).*

(n43)Footnote 43. *See 29 C.F.R. §§ 520.201(c)* (definition of "student-learner"); *520.300* (definition of "bona-fide vocational training program").

(n44)Footnote 44. *See 29 C.F.R. § 520.300.*

(n45)Footnote 45. *See 29 C.F.R. § 520.500 et. seq.*

(n46)Footnote 46. *See 29 C.F.R. § 520.504.*

(n47)Footnote 47. *See 29 C.F.R. § 520.502.*

(n48)Footnote 48. *See 29 C.F.R. § 520.300* (definition of "skilled trade").

(n49)Footnote 49. *See* 29 C.F.R. § 520.200 *et seq.*.

(n50)Footnote 50. *See* 29 C.F.R. § 520.402.

(n51)Footnote 51. *See* 29 C.F.R. § 520.402.

(n52)Footnote 52. *See* 29 C.F.R. § 520.300.

(n53)Footnote 53. *See* 29 C.F.R. § 520.402.

(n54)Footnote 54. *See* 29 C.F.R. § 520.408.

(n55)Footnote 55. *See* 29 C.F.R. § 520.404.

(n56)Footnote 56. 29 C.F.R. § 520.408(g).

(n57)Footnote 57. *See* 29 C.F.R. § 520.402.

(n58)Footnote 58. *See* 8 Cal. Code Reg. § 11040, P 2(O) (Cal. Wage Order No. 4-2001).

(n59)Footnote 59. *See* 29 U.S.C. § 214(b)(1).

(n60)Footnote 60. *See* 29 U.S.C. § 214(b)(2).

(n61)Footnote 61. *See* 29 U.S.C. § 214(b)(3).

(n62)Footnote 62. *See* 29 U.S.C. § 214(b)(1)-(4); *see also* 29 U.S.C. § 206(a)(1) (prevailing minimum wage); 29 C.F.R. §§ 519.1-519.20 (regulations governing issuance of special certificates to full-time students).

(n63)Footnote 63. *See* 29 U.S.C. § 214(b)(1)-(3); (*see* Chapter 6 for discussion of child labor laws).

(n64)Footnote 64. *See* 29 U.S.C. § 214(b)(4)(A).

(n65)Footnote 65. *See* 29 U.S.C. §§ 214(b)(1)(B), (4)(B); *see also* 29 C.F.R. §§ 519.1(b), 519.5(b).

(n66)Footnote 66. *See* 29 U.S.C. § 214(b)(4)(D) (Secretary of Labor must prescribe simplified application forms to minimize paperwork and encourage small businesses to employ students under special certificates); 29 C.F.R. §§ 519.3, 519.13 (procedures for applying for student certificate).

(n67)Footnote 67. 29 C.F.R. §§ 519.6(a), 519.16(a).

(n68)Footnote 68. *See* 29 U.S.C. § 214(c)(1); *see also* 29 C.F.R. §§ 524.1-524.13.

(n69)Footnote 69. *See* 29 U.S.C. § 214(c)(2).

(n70)Footnote 70. [Reserved]

(n71)Footnote 71. *See* 29 U.S.C. § 214(c)(5)(A)-(G) (procedures for petition).

(n72)Footnote 72. *See* former 29 U.S.C. § 214(c)(3).

(n73)Footnote 73. 29 U.S.C. § 214(c).

(n74)Footnote 74. Pub. L. No. 104-188.

(n75)Footnote 75. *See* 29 U.S.C. § 206(g)(1) (Pub. L. No. 104-188).

(n76)Footnote 76. *See* 29 U.S.C. § 206(g)(1) (Pub. L. No. 104-188).

(n77)Footnote 77. *See* 29 U.S.C. § 206(g)(2) (Pub. L. No. 104-188).

(n78)Footnote 78. D.L.S.E. Memorandum (October 11, 1996) (Department of Labor Guidelines for use by California employers) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 2 Minimum Wages
Part A. MINIMUM WAGE REQUIREMENTS

1-2 California Employment Law § 2.06

AUTHOR: By Carol S. Sanders, J.D.

§ 2.06 Other Applications of Minimum Wage Law

[1] Split-Shift and Reporting Time Premiums Under California Law

[a] Split-Shift Premium

A "split shift" means a work schedule that is interrupted by nonpaid nonworking periods established by the employer, other than bona fide rest or meal periods.ⁿ¹ An interruption initiated by the employee for personal reasons does not constitute a split shift, because it is not established by the employer.

All of the industry and occupation wage orders except Wage Order 16-2001 (construction, drilling, logging and mining occupations) require that when an employee works a split shift, one hour's pay at the minimum wageⁿ² must be paid in addition to the minimum wage for that workday, except when the employee resides at the place of employment.ⁿ⁴

■ CONSULTANT'S COMMENT:

The split-shift premium must be paid in addition to the *minimum wage* for the day, not in addition to whatever regular rate is paid. If the wage rate is higher than the applicable minimum wage, the excess over the minimum wage is credited toward the split-shift premium. *Commentary by Kirby Wilcox.*

[b] Reporting Time Pay

All of the wage orders promote proper notice and scheduling of work by employers by mandating reporting time pay when an employee is required to report to work and does report, but is either not put to work, or is furnished less than half his or her usual or scheduled day's work.ⁿ⁵ In such cases, the employee must be paid for half the usual or scheduled day's work, but in no event for less than two hours nor more than four hours, of the employee's regular rate of pay.ⁿ⁶ which may not be less than the minimum wage.ⁿ⁷ In addition, all of the wage orders except Wage Order No. 16-2001 (construction, drilling, logging, and mining occupations) mandate that if the employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, the employee must be paid for two hours at the employee's regular rate of pay, which may not be less than the minimum wage. Alone

among the wage orders, Wage Order 16-2001 contains a unique provision requiring that all employer-mandated travel occurring after the employee reports to his first work location must be compensated at the employee's regular rate of pay or any mandated applicable premium rate.ⁿ⁸ⁿ⁹

The reporting time pay provisions are not applicable under any of the following circumstances:ⁿ¹⁰

1. Operations cannot commence or continue because of threats to employees or property, or when recommended by civil authorities;
2. Public utilities fail to supply electricity, water, or gas, or there is a failure in the public utilities or sewer system; or
3. The interruption of work is caused by an Act of God or other cause not within the employer's control.

The reporting time pay provisions also do not apply to an employee on paid standby statusⁿ¹¹ who is called to perform assigned work at a time other than the employee's scheduled reporting time.ⁿ¹²

The DLSE has opined in a variety of situations involving the reporting time pay requirements:

- What the reporting time pay requirements are when an employee is told to report at a specific time and is then told that there is no work available at that time but that he or she is to report again, for example, two hours later. The language of the regulation requires that the applicable premium be paid if, at the first reporting of the day, the employee is not put to work or is provided less than one-half the scheduled or usual number of hours. This would be the result despite the fact that the employee might, eventually, work more than the scheduled hours in the day in a subsequent reporting. At the second reporting of the day, the same plain language of the regulation requires that in the event the employee is furnished with less than two hours of work, the employee is, nevertheless, entitled to recover two hours at the employee's regular rate of pay.ⁿ¹³ If the employee was not simply told to report later, but the employee's activities were restricted by the employer pending the second reporting time, the time spent would be compensable as waiting time.ⁿ¹⁴

- If an employee has no regularly scheduled shift, the employer must pay the usual shift worked, but in no event less than two or more than four hours. If an employee has a regularly contracted "scheduled" relief shift of less than two hours, the reporting time penalty is not applicable. However, the employee must be paid for the regularly scheduled contracted amount.ⁿ¹⁵

■ ILLUSTRATION:

Assume a worker is scheduled to work four days of two hours each and one day of one hour. The regularly contracted relief shifts are not subject to the reporting time penalty. This exception would not apply unless the shift is regularly scheduled and is less than two hours.ⁿ¹⁶

- How the reporting time requirements affect a situation in which the employer requires employees to attend a short training meeting, staff meeting or similar gathering.ⁿ¹⁷

■ ILLUSTRATION:

Assume the required meeting is scheduled for a day when the worker is not usually scheduled to work. The employer tells all of the workers that attendance at the meeting is mandatory and a one- or two-hour shift is "scheduled" for this meeting. Workers not "regularly scheduled" to work must be paid at least one-half of their usual or scheduled day's work. On the other hand, assume the required meeting is

scheduled on the day a worker is scheduled to work, but after the worker's scheduled shift ends. If there is an unpaid hiatus between the end of the shift and the meeting, the employee must be paid at least two hours for reporting a second time in one day. If the meeting is scheduled to immediately follow the scheduled shift, there is no requirement to pay reporting time no matter how long the meeting continues.

■ Rain or other inclement weather that makes it impossible or unsafe to work falls into the category of an Act of God or other cause not within the employer's control, which does not require reporting time pay. If workers are sent home, either immediately on reporting to work or during the workday, because of rain or other inclement weather, there is no obligation to pay reporting time pay.ⁿ¹⁸

However, employees must be paid for all time they are restricted to the employer's premises or worksite while waiting out a delay caused by rain or other inclement weather, if they are not free to leave the premises during that time, even if the employees are relieved of all other duty while they are waiting for weather conditions to improve.ⁿ¹⁹ The employees must be paid their regular rate of compensation, which cannot be less than the minimum wage, or any overtime rate if applicable.ⁿ²⁰ Even if the employee is given some limited freedom to leave the employer's premises or worksite while waiting out a delay caused by rain or inclement weather, the employer still must pay the employee for the time if the employee is so restricted geographically and/or temporally that the employee is deprived of effective use of his or her own time.ⁿ²¹

■ ILLUSTRATION:

If a worker is told he can go across the street to a cafe during a rain delay, but he must report back to work within five minutes of being notified that work is starting, the entire time the worker is waiting in the cafe will constitute controlled stand-by time, which is treated as hours worked.ⁿ²²

[2] Piecework for Industrial Homeworkers Under California Law

Special regulations apply to persons employed as industrial homeworkers. They are considered employees and not independent contractors. They must be paid a piece rate sufficient to yield to workers in similar operations in the factory the legally established minimum wage.ⁿ²³

The DLSE has issued an interpretive bulletin stating that, by verbal or written agreement with the employee, the employer may not be obligated to pay for the cost or time required to repair a piece that was incorrectly made, for which the piece rate has already been paid, or to pay in whole or in part for a piece that is rejected as unsaleable. However, the total amount paid must be no less than the minimum wage for all hours worked. The employer is not required to pay separately for time spent in pickup or cleanup, or for company meetings at which attendance is compulsory. However, time spent in all these activities is considered work time and must be paid at a piece rate that results in total compensation of not less than minimum wage.ⁿ²⁴

[3] Employees Paid on Commission Basis

[a] California Law

Commission wages generally refer to compensation paid to a person for services rendered in the sale of the employer's property or services and based proportionately on the value of the property or services.ⁿ²⁵ Under the wage orders, the definition of "wages" means all amounts paid for labor performed by employees of every description, including, *inter alia*, amounts fixed by a commission basis.ⁿ²⁶

Under the wage orders, every employer must pay to each employee, on the established pay day for the period involved,ⁿ²⁷ not less than the minimum wage for all hours worked in the payroll period,ⁿ²⁸ whether the remuneration is paid by time, piece, commission, or otherwise.ⁿ²⁹ Thus, an employee who is paid on a commission basis, other than

an outside salesperson who is wholly exempt from the minimum wage,ⁿ³⁰ must be paid an amount at least equal to the minimum wage for the hours worked during the pay period, even if the commissions actually earned during that period were less than this amount.

[b] Federal Law

Under the FLSA, commissions paid to employees must be sufficient to meet minimum wage requirements for hours worked during the pay period. Although the Wage and Hour Division's Field Operations Handbook states that commissions earned in excess of the minimum wage during a pay period may be carried over to satisfy the employer's minimum wage obligations for the next pay period,ⁿ³¹ one federal court of appeals has held that the employee must actually receive, during each pay period, an amount equal to the minimum wage for each hour worked during that period. An accounting entry crediting the employer for excess commissions earned by the employee during the previous pay period will not suffice.ⁿ³²

[4] Prevailing Rates for Employees of Government Contractors

[a] California Law

The Legislature and some local governments have adopted provisions requiring certain agencies and their contractors to pay employees no less than the prevailing wage rate for the work to be performed. Most prominent are the prevailing-rate requirements of *Labor Code sections 1770 through 1774*, applicable to construction work done under contract and paid in whole or in part out of public funds,ⁿ³³ or construction work done under private contract when more than 50 percent of the property is leased to the state or a political subdivision and other conditions are met.ⁿ³⁴ Workers on construction projects financed under the California Industrial Development Financing Act must also be paid no less than the general prevailing rate as determined in accordance with *Labor Code Section 1773*.ⁿ³⁵ However, the prevailing wage rate does not apply to contracts which are under the control of the federal government or its agencies, even when the federally mandated wages would be lower and the project is part of a local cooperation agreement with a state or local agency.ⁿ³⁶ⁿ³⁷

Effective until January 1, 2012, and retroactive to otherwise covered work concluded on or after January 1, 2002 to the extent permitted by law, an awarding public entity need not pay the general prevailing wage rate on public works contracts for work performed by the following:ⁿ³⁸

- A volunteer, defined as an individual who performs work for civic, charitable, or humanitarian reasons for a public agency or corporation qualified under *section 501(c)(3) of the Internal Revenue Code* as a tax-exempt organization, without promise, expectation, or receipt of any compensation for work performed.
- A volunteer coordinator, defined as an individual paid by a corporation qualified under *section 501(c)(3) of the Internal Revenue Code* as a tax-exempt organization, to oversee or supervise volunteers.
- Members of the California Conservation Corps or of Community Conservation Corps certified by the California Conservation Corps pursuant to *Public Resources Code section 14507.5*.

Prevailing wage regulations are substantially different from minimum wage statutes. A prevailing wage is in the nature of an average wage.ⁿ³⁹ The prevailing rate required under state statute is calculated on a per diem basis, and is determined by the Director of the Department of Industrial Relations, who must ascertain the prevailing rate for similar work in the locality where the work is performed, taking into consideration applicable wage rates established by collective bargaining agreements and other data.ⁿ⁴⁰

A public works contractor or subcontractor who pays less than the prevailing wage may be liable to the worker for the difference,ⁿ⁴¹ even if the public entity that awarded the contract failed to specify or keep on file the applicable prevailing rate as required under *Labor Code Sections 1773 and 1773.2*.ⁿ⁴² However, a subcontractor's employee on a public works project cannot sue the prime or general contractor on theories of statutory or contractual liability for the nonpayment of prevailing wages by the subcontractor, who was the employee's direct employer. There is no private right of action for enforcement by a subcontractor's employee against parties other than the subcontractor.ⁿ⁴³

Because California's prevailing wage lawⁿ⁴⁴ does not address matters of statewide concern, charter cities are not required to comply with the prevailing wage law with respect to public works contracts financed solely from city revenues. Those contracts are municipal affairs over which charter cities have paramount power under *Cal. Const., art XI, § 5(a)*.ⁿ⁴⁵

ERISA does not preempt enforcement of California's prevailing wage law with respect to either state-approved apprenticeship programs or apprenticeship programs that are not state-approved.ⁿ⁴⁶ Where prevailing wage provisions regulate wages generally, as opposed to regulating wages that are part of a particular employee benefit plan, they do not sufficiently "relate" to ERISA to be preempted.ⁿ⁴⁷ Similarly, in *Associated Builders & Contractors v. Golden Gate Chapter*,ⁿ⁴⁸ the court decided whether a union's claims against an employer association's job targeting program under both the prevailing wage law and *California Business and Professions Code section 17200* were preempted by the Labor Management Relations Act (LMRA).ⁿ⁴⁹ The court reasoned that because the claims could be resolved without interpreting the job targeting agreements, the LMRA did not preempt the claims.ⁿ⁵⁰ In *Dillingham Const., N. A., Inc. v. County of Sonoma*,ⁿ⁵¹ the court held that the National Labor Relations Act does not preempt the California law that requires the payment of prevailing wages to employees in apprenticeship programs that have not received state approval, although it allows the payment of lower apprenticeship wages to employees participating in state-approved apprenticeship programs.ⁿ⁵²

A requirement that wages be paid at a rate no lower than prevailing rates has been invalidated as applied to workers other than those employed in public works as defined in *Labor Code Sections 1720 and 1720.2*.ⁿ⁵³

[b] Federal Law

Employees covered under the following federal acts must be paid prevailing minimum rates based on the standard for persons performing similar work in the industry in the locality where the work is performed, as determined by the Secretary of Labor, even if these wages are higher than the minimum wage established under the FLSA:ⁿ⁵⁴

1. The Walsh-Healey Act,ⁿ⁵⁵ which covers employees working on contracts with a federal government agency for the manufacture or furnishing of materials, supplies, articles, or equipment in any amount over \$10,000.
2. The Davis-Bacon Act,ⁿ⁵⁶ which covers mechanics and laborers constructing, altering, or repairing public buildings or public works under federal contracts in any amount over \$2,000.
3. The Service Contract Act of 1965,ⁿ⁵⁷ which applies to contracts or subcontracts exceeding \$2,500 for the provision of services to the federal government.ⁿ⁵⁸ (The Act does not apply to contracts covered under the Walsh-Healey or Davis-Bacon Acts, nor to contracts involving certain transportation, communication, public utility, or employment services, or to any contracts with the Post Office Department for the operation of postal contract stations.)ⁿ⁵⁹

Other acts relevant to the payment of prevailing wages to employees of government contractors are the Copeland Actⁿ⁶⁰ and the Miller Act.ⁿ⁶¹ The Copeland Act compels compliance with the requirements of the Davis-Bacon Act and prohibits any person from inducing employees on public works to give up any part of wages to which the employee

is entitled. The Act has broader applicability than the Davis-Bacon Act, since it covers all persons employed in the construction of public works, including those other than mechanics and laborers, regardless of the monetary amount of the contract.

The Miller Act requires prime contractors for the construction or repair of public works to post payment bonds to ensure payment of wages to all persons supplying labor or materials.

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Minimum Wage

FOOTNOTES:

(n1)Footnote 1. 8 *Cal. Code Reg.* §§ 11010-11030, 11060-11100, 11130, 11140, P 2(M) (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-10-2001, 13-2001, 14-2001); 11040, 11160, P 2(Q) (Cal. Wage Order Nos. 4-2001, 16-2001); 11050, P 2(R) (Cal. Wage Order No. 5-2001); 11110, 11150, P 2(N) (Cal. Wage Order Nos. 10-2001, 15-2001); 11120, P 2(O) (Cal. Wage Order No. 12-2001).

(n2)Footnote 2. See § 2.02[1][a] for discussion of prevailing minimum wage rate.

(n3)Footnote 3. [Reserved]

(n4)Footnote 4. 8 *Cal. Code Reg.* §§ 11010-11150, P 4(C) (Cal. Wage Order Nos. 1-2001-15-2001).

(n5)Footnote 5. Note that the wage order covering construction, drilling, logging and mining occupations provides that its reporting time pay provisions shall not apply to employees covered by a collective bargaining agreement unless the agreement requires it. see 8 *Cal. Code Reg.* § 11160, P 5(D) (Wage Order No. 16-2001).

(n6)Footnote 6. For discussion of computation of the regular rate of pay, see ch. 3.

(n7)Footnote 7. 8 *Cal. Code Reg.* §§ 11010-11150, P 5(A) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 5(B) (Cal Wage Order No. 16-2001).

(n8)Footnote 8. 8 *Cal. Code Reg.* § 11160 (Wage Order No. 16-2001).

(n9)Footnote 9. [Reserved]

(n10)Footnote 10. 8 *Cal. Code Reg.* §§ 11010-11160, P 5(C) (Cal. Wage Order Nos. 1-2001-16-2001).

(n11)Footnote 11. For discussion of when an employee is required to be compensated for standby time, see ch. 3.

(n12)Footnote 12. 8 *Cal. Code Reg.* §§ 11010-11150, P 5(D) (Cal. Wage Order Nos. 1-2001-15-2001).

(n13)Footnote 13. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 45.1.2 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n14)Footnote 14. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 45.1.2.2 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n15)Footnote 15. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 45.1.3

(CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n16)Footnote 16. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 45.1.3.1 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n17)Footnote 17. See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 45.1.4 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n18)Footnote 18. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 45.1.5 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n19)Footnote 19. See *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 94 Cal. Rptr. 2d 3, 995 P.2d 139 ; *Bono Enterprises, Inc. v. Bradshaw* (1995) 32 Cal. App. 4th 968 .

(n20)Footnote 20. DLSE Opinion Letter 1998.12.28; see 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 45.1.5.1 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n21)Footnote 21. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 45.1.6 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n22)Footnote 22. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 45.1.6.1 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders). See generally, *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d 1174 .

(n23)Footnote 23. See 8 Cal. Code Reg. § 13600; see also Lab. Code § 200 (definition of "wages" includes amounts fixed or ascertained by piecework).

(n24)Footnote 24. D.L.S.E. Interpretive Bulletin No. 84-3 (Feb. 1, 1984) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n25)Footnote 25. Cf. Lab. Code § 204.1 (defining commissions of employees of licensed vehicle dealers).

(n26)Footnote 26. 8 Cal. Code Reg. §§ 11010-11030, 11060-11100, 11130, P 2(O) (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-10-2001, 13-2001); 11040, P 2(N) (Cal. Wage Order No. 4-2001); 11050, P 2(T) (Cal. Wage Order No. 5-2001); 11110, 11120, 11150, P 2(P) (Cal. Wage Order Nos. 11-2001, 12-2001, 15-2001); 11140, P 2(N) (Cal. Wage Order No. 14-2001); see Lab. Code § 200(a).

(n27)Footnote 27. For discussion of rules regarding when employees must be paid, see ch. 4.

(n28)Footnote 28. For discussion of what constitutes "hours worked," see ch. 3.

(n29)Footnote 29. 8 Cal. Code Reg. §§ 11010-11160, P 4(B) (Cal. Wage Order Nos. 1-2001-16-2001); see also 8 Cal. Code Reg. § 11000, P 2(Cal. Wage Order No. MW-2001).

(n30)Footnote 30. See Lab. Code § 1171; 8 Cal. Code Reg. §§ 11010-11040, 11060-11100, 11130, P 1(B) (Cal. Wage Order Nos. 1-2001-4-2001, 6-2001-10-2001, 13-2001); 11050, 11110, 11120, 11160 P 1(C) (Cal. Wage Order Nos. 5-2001, 11-2001, 12-2001, 16-2001); see 8 Cal. Code Reg. § 11000, P 1 (Cal. Wage Order No. MW-2001, general

minimum wage order). For discussion of exemption for outside salespersons, see § 2.04[1][a][iii].

(n31)Footnote 31. See Wage & Hour Div., Field Operations Handbook, § 30605.

(n32)Footnote 32. See *Olson v. Superior Pontiac-GMC, Inc.* (11th Cir. 1985) 776 F.2d 265 .

(n33)Footnote 33. See *Lab. Code § 1720*; see also *State Bldg. & Constructions Trades Council of Cal. v. Duncan* (2008) 162 Cal. App. 4th 289 . 76 Cal. Rptr. 3d 507, 2008 Cal. App. LEXIS 606, *21-*75 (tax credits provided by state to facilitate construction of low-income housing do not come within definition of "paid for in whole or in part out of public funds" under *Lab. Code § 1720*); *Greystone Homes, Inc. v. Cake* (2005) 135 Cal. App. 4th 1, 37 Cal. Rptr. 3d 183 (project to build a housing development did not constitute public work subject to former version of *Lab. Code § 1720(a)*, where use of city redevelopment agency's funds to reimburse developer for land acquisition costs of project did not constitute payment for "construction" under former § 1720(a), and developer paid all demolition and construction costs with private funds); *McIntosh v. Aubry* (1993) 14 Cal. App. 4th 1576, 1585-1594, 18 Cal. Rptr. 2d 680 (county's agreement to forego rent and pay for services provided in building, pay bond premiums, and absorb inspection costs held not to be payment for construction out of public funds).

(n34)Footnote 34. See *Lab. Code § 1720.2*; *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal. App. 4th 1083, 1088-1093, 69 Cal. Rptr. 3d 184 (renovation performed by contractor of building owned by private party and leased in part to county qualified as public works project under *Lab. Code § 1720.2*). See also *City of Long Beach v. Dept. of Industrial Relations* (2004) 34 Cal. 4th 942, 949-954, 22 Cal. Rptr. 3d 518, 102 P.3d 904 (under law in effect when contract was executed, project that private developers built solely with private funds on land leased from public agency remained private and did not become public work subject to prevailing wage law merely because city had earlier contributed funds to owner/lessee to assist in defraying preconstruction costs or expenses, such as legal fees, insurance premiums, architectural design costs, and project management and surveying fees); *McIntosh v. Aubry* (1993) 14 Cal. App. 4th 1576, 1585, 18 Cal. Rptr. 2d 680 (prevailing wage requirement not applicable to construction work done under contract between county and private entity).

(n35)Footnote 35. See *Gov. Code § 91533(l)*; see also *J & K Painting Co. v. Bradshaw* (1996) 45 Cal. App. 4th 1394, 1397, 53 Cal. Rptr. 2d 496 .

(n36)Footnote 36. *Southern California Labor Management Operating Engineers Contract Compliance Committee v. Aubry* (1997) 54 Cal. App. 4th 873, 885-887, 63 Cal. Rptr. 2d 106 .

(n37)Footnote 37. [Reserved]

(n38)Footnote 38. *Lab. Code § 1720.4*.

(n39)Footnote 39. See *San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal. 3d 785, 790, 163 Cal. Rptr. 460, 608 P.2d 277 .

(n40)Footnote 40. See *Lab. Code §§ 1770, 1773, Lab. Code § 1773.9*; see also *Independent Roofing Contractors v. Department of Industrial Relations* (1994) 23 Cal. App. 4th 345, 354-355, 28 Cal. Rptr. 2d 550 (DIR's elimination of wage determination after rescission of collective bargaining agreement not unconstitutional delegation of administrative power to private parties because *Lab. Code § 1773* requires DIR to consider wage rates set by collective bargaining).

(n41)Footnote 41. See *Lab. Code § 1775*; See also, § 5.31[3]. See also *Violante v. Communities Southwest Development & Constr. Co.* (2006) 138 Cal. App. 4th 972, 41 Cal. Rptr. 3d 673, 2006 Cal. App. LEXIS 560, *12 (subcontractor's employee on a public works project cannot bring action against prime or general contractor where subcontractor was the direct employer).

(n42)Footnote 42. See *Waters v. Division of Labor Standards Enforcement* (1987) 192 Cal. App. 3d 635, 639,

237 Cal. Rptr. 546 .

(n43)Footnote 43. *Violante v. Communities Southwest Development & Constr. Co.* (2006) 138 Cal. App. 4th 972, 41 Cal. Rptr. 3d 673, 2006 Cal. App. LEXIS 560, *8-*12 .

(n44)Footnote 44. *Lab. Code §§ 1720-1780.*

(n45)Footnote 45. *State Building & Construction Trades Council of California, AFL-CIO v. City of Vista* (2009) 173 Cal. App. 4th 567, 93 Cal. Rptr. 3d 95, 2009 Cal. App. LEXIS 627, *13-*60 .

(n46)Footnote 46. *See California Division of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.* (1997) 519 U.S. 316, 334, 117 S. Ct. 832, 136 L. Ed. 2d 791 . For discussion of the requirements of state-approved apprenticeship programs, *see* §§ 2.04[1][c], 2.05[1][a].

(n47)Footnote 47. *See WSB Electric Inc. v. Curry*, 88 F.3d 788, 793-794 (9th Cir. 1996) ; *see also Division of Industrial Relations v. Nielsen Construction Co.* (1997) 51 Cal. App. 4th 1016, 1024-1030, 59 Cal. Rptr. 2d 785 .

(n48)Footnote 48. *Associated Builders & Contractors v. Local 302 IBEW* (9th Cir. 1997) 109 F.3d 1353 .

(n49)Footnote 49. 29 U.S.C. § 141 *et seq.*

(n50)Footnote 50. *Associated Builders & Contractors v. Local 302 IBEW* (9th Cir. 1997) 109 F.3d 1353, 1357 .

(n51)Footnote 51. *See Dillingham Constr. N.A. v. County of Sonoma* (9th Cir. 1999) 190 F.3d 1034 .

(n52)Footnote 52. *See Dillingham Const. N. A, Inc. v. County of Sonoma* (9th Cir. 1999) 190 F.3d 1034, 1041 .

(n53)Footnote 53. *See San Francisco Labor Council v. Regents of University of California* (1980) 26 Cal. 3d 785, 788-791, 163 Cal. Rptr. 460, 608 P.2d 277 (invalidating requirement under *Educ. Code* § 92611 that Regents pay prevailing rate to certain workers as violating constitutional provision granting broad powers to University and limiting Legislature's power to regulate University or Regents; *Bishop v. City of San Jose* (1969) 1 Cal. 3d 56, 63, 81 Cal. Rptr. 465, 460 P.2d 137 (*Lab. Code* §§ 1771 and 1773 applicable only to public works performed under contract and not to work carried out by municipal agency with its own forces).

(n54)Footnote 54. *See 29 U.S.C. § 218(a)* (no provision of FLSA excuses noncompliance with any federal law establishing minimum wage higher than that established by FLSA).

(n55)Footnote 55. *See 41 U.S.C. § 35(b).*

(n56)Footnote 56. 40 U.S.C. § 276a *et seq.*

(n57)Footnote 57. *See 41 U.S.C. § 351 et seq.*

(n58)Footnote 58. *See 41 U.S.C. § 351(a)(1).*

(n59)Footnote 59. *See 41 U.S.C. § 356.*

(n60)Footnote 60. 18 U.S.C. § 874.

(n61)Footnote 61. 40 U.S.C. § 270a *et seq.*



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 2 Minimum Wages
Part A. MINIMUM WAGE REQUIREMENTS

1-2 California Employment Law § 2.07

AUTHOR: By Carol S. Sanders, J.D.

§ 2.07 Local Living Wage Laws

Some local governments, such as cities, have enacted "living wage" ordinances.ⁿ¹ These ordinances require certain employers to pay employees wages approximating the real cost of living in the locality, which is often significantly higher than the applicable state or federal minimum wage. These ordinances routinely exempt smaller or less profitable employers from their coverage.

In *RUI One Corp. v. City of Berkeley*, ⁿ² the Ninth Circuit held that Berkeley's living wage ordinanceⁿ³ did not violate the Contract Clause of the United States Constitution, the *Equal Protection Clause* of the United States and California Constitutions, or the state and federal Due Process Clauses as an impermissible delegation of legislative power to unions.

In *Amaral v. Cintas Corp. No. 2*, ⁿ⁴ the court considered the constitutionality and application of a living wage ordinance enacted by the City of Haywardⁿ⁵ and incorporated into its municipal contracts. A class action was filed against a company that entered into contracts with the City, but did not provide the minimum wages or benefits required by the ordinance to employees who worked in the company's facilities located outside of Hayward. The court held that the ordinance did not violate *California Constitution article XI, section 7*, because the constitutional prohibition applies only when a local government exercises its regulatory or police power, as opposed to its contracting or proprietary power, and because the ordinance did not purport to regulate conduct outside of Hayward's boundaries. Rather, the ordinance specified certain conduct the city wanted its contracting partners to follow, and it did not matter, for constitutional purposes, whether contractors may have to perform the required conduct outside the city's boundaries.ⁿ⁶ The court then found that the ordinance was not unconstitutionally vague.ⁿ⁷

Turning to the trial court's application of the ordinance, the court held that the trial court properly interpreted the requirements of the ordinance to find that it applied to the employer's contracts with Hayward,ⁿ⁸ that it required contractors to compensate every individual they employ to perform work on or under a service contract with Hayward with the hourly wage specified in the ordinance,ⁿ⁹ that all of the class members were "employees" entitled to the specified wage under the ordinance,ⁿ¹⁰ and that the purchase contracts the employer entered into with the city during

the relevant timeframe were not too uncertain to be enforced and plaintiffs were intended third party beneficiaries of the contracts.ⁿ¹¹ The court also held that plaintiffs were entitled to recover penalties for various Labor Code violations for the employer's failure to pay class members full wages and benefits due upon termination,ⁿ¹² for the employer's secret payment of a lower wage than required,ⁿ¹³ for the employer's failure to provide itemized wage statements,ⁿ¹⁴ and for the employer's failure to provide paid vacation time upon termination,ⁿ¹⁵ all arising out of the employer's failure to compensate plaintiff class members in accordance with the ordinance. Finally the court found that the trial court properly calculated those penalties.ⁿ¹⁶

In *Aguilar v. Cintas Corp. No. 2*,ⁿ¹⁷ an action for violation of the Los Angeles Living Wage Ordinanceⁿ¹⁸ and related claims, the trial court erroneously denied plaintiff's motion for class certification, finding that the proposed class was not ascertainable and lacked a well-defined community of interest and that class treatment was not the superior means to resolve the litigation. The Court of Appeal found that the complexities of the case on which the trial court relied to find class certification inappropriate could be addressed by the use of subclasses and, with those issues resolved, the requirements for class treatment were satisfied.ⁿ¹⁹ In a subsequent opinion, the Court of Appeal held that a regulation promulgated to implement the Los Angeles Living Wage Ordinance (LWO) was in conflict with the ordinance and unenforceable in its entirety.ⁿ²⁰

Legal Topics:

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

Constitutional Law
Congressional Duties & Powers
Contracts
Clause
General Overview
Labor & Employment Law
Wage & Hour Laws
General Overview
Labor & Employment Law
Wage & Hour Laws
Coverage & Definitions
General Overview

FOOTNOTES:

(n1)Footnote 1. *See RUI One Corp. v. City of Berkeley* (9th Cir. 2004) 371 F.3d 1137, 1141 (City of Berkeley, California, joined dozens of other cities nationwide to help bridge gap between federal and state laws setting minimum wage, real value of which has decreased over past few decades, and costs of modern urban living by enacting "living wage" ordinances).

(n2)Footnote 2. *RUI One Corp. v. City of Berkeley* (9th Cir. 2004) 371 F.3d 1137, 1141-1157 .

(n3)Footnote 3. Berkeley Ordinance No. 6548-N.S. (2000) (creating Berkeley Municipal Code ch. 13.27), amended by Berkeley Ordinance No. 6583-N.S. (2000) ("Marina Amendment").

(n4)Footnote 4. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 78 Cal. Rptr. 3d 572 .

(n5)Footnote 5. *See* Hayward Ord. No. 99-03, adding ch. 2, art. 14, § 2-14.010 et seq. to Hayward Mun. Code.

(n6)Footnote 6. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1174-1178, 78 Cal. Rptr. 3d 572 .

(n7)Footnote 7. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1178-1183, 78 Cal. Rptr. 3d 572 .

(n8)Footnote 8. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1183-1185, 78 Cal. Rptr. 3d 572 .

(n9)Footnote 9. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1185-1187, 78 Cal. Rptr. 3d 572 .

(n10)Footnote 10. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1187-1191, 78 Cal. Rptr. 3d 572 .

(n11)Footnote 11. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1191-1194, 78 Cal. Rptr. 3d 572 .

(n12)Footnote 12. *See Lab. Code §§ 201, 202, 204.*

(n13)Footnote 13. *See Lab. Code § 223.*

(n14)Footnote 14. *See Lab. Code § 226(a).*

(n15)Footnote 15. *See Lab. Code § 227.3.*

(n16)Footnote 16. *Amaral v. Cintas Corp. No. 2 (2008) 163 Cal. App. 4th 1157, 1194-1214, 78 Cal. Rptr. 3d 572*
. For discussion of actions to enforce Labor Code violations generally, *see* Ch. 5.

(n17)Footnote 17. *Aguiar v. Cintas Corp. No. 2 (2006) 144 Cal. App. 4th 121, 50 Cal. Rptr. 3d 135* .

(n18)Footnote 18. L.A. Admin. Code § 10.37 et seq.

(n19)Footnote 19. *Aguiar v. Cintas Corp. No. 2 (2006) 144 Cal. App. 4th 121, 132-138, 50 Cal. Rptr. 3d 135* .

(n20)Footnote 20. *Aguiar v. Superior Court (2009) 170 Cal. App. 4th 313, 323-331, 87 Cal. Rptr. 3d 813*
(Regulation 5, limiting employees entitled to benefits of LWO to those working at least 20 hours during month on service contract, conflicted with LWO, where by its terms and as evident by its legislative history, LWO required employers who were recipients of service contract with city to pay covered LWO wages to any employee of city service contractor who spent any time at all working on city service contract subject to LWO without regard to minimum time requirements, and where hours-worked component of Regulation 5, providing that if employee worked at least 20 hours on subject agreement during month, employee had to be paid appropriate LWO wage rate for each hour worked on agreement, was unenforceable and not severable from 20-hour rule).



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 2 Minimum Wages

Part A. MINIMUM WAGE REQUIREMENTS

1-2 California Employment Law §§ 2.08 through 2.19

AUTHOR: By Carol S. Sanders, J.D.

[Reserved]

§§ 2.08[Reserved]



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 2 Minimum Wages
Part B. CREDITS AGAINST MINIMUM WAGE

1-2 California Employment Law § 2.20

AUTHOR: By Carol S. Sanders, J.D.

§ 2.20 Limitations on Crediting Employer-Provided Facilities Against Minimum Wage Pay

[1] California Law

California has a strong public policy favoring full payment of minimum wages,ⁿ¹ and an express statutory prohibition against employers compelling or coercing any employee or applicant for employment to patronize the employer in the purchase of anything of value.ⁿ² The promulgation of minimum wage orders under *Labor Code Sections 1182 and 1184* must be construed in harmony with the prohibition against compelled patronage by an employee so as to carry out the fundamental legislative purpose of the entire Labor Code.ⁿ³ Accordingly, the employer-provided facilities that may be applied as credits against minimum wage pay are limited to the provision of meals and lodging, and then only if the employee gives prior, voluntary consent to the application of these credits.ⁿ⁴

[2] Federal Law

In view of the clear intention of Congress to protect the basic minimum wage required to be paid under federal lawⁿ⁵ from profiteering or manipulation by the employer in dealings with the employee, limitations and safeguards are prescribed to control the payment of wages in other than cash or its equivalent. While these do not prohibit payment of wages in the form of facilities furnished, they do prohibit the use of this medium of payment to avoid cash payment of the minimum wage obligations imposed by the FLSA.ⁿ⁶ Essential among the safeguards prescribed are the requirements that the employee actually receive the benefits of the facility for which he or she is charged,ⁿ⁷ and that the facility is furnished primarily for the benefit or convenience of the employee, rather than for the employer.ⁿ⁸ Although the regulations provide that the employee's acceptance of the facility must be voluntary and uncoerced,ⁿ⁹ some courts have held that the Secretary of Labor was without authority to promulgate this requirement, and have refused to enforce it.ⁿ¹⁰

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws Coverage & Definitions Minimum Wage Labor & Employment

LawWage & Hour LawsStatutory ApplicationGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See California State Restaurant Assn. v. Whitlow (1976) 58 Cal. App. 3d 340, 347-348, 129 Cal. Rptr. 824 .*

(n2)Footnote 2. *See Lab. Code § 450.*

(n3)Footnote 3. *California State Restaurant Assn. v. Whitlow (1976) 58 Cal. App. 3d 340, 348, 129 Cal. Rptr. 824 .*

(n4)Footnote 4. *See § 2.21 [1]* for discussion of meal and lodging credits under state law.

(n5)Footnote 5. *See 29 U.S.C. § 206(a)(1)* (minimum wage).

(n6)Footnote 6. *See 29 C.F.R. § 531.28.*

(n7)Footnote 7. *See 29 C.F.R. § 531.30.*

(n8)Footnote 8. *See 29 C.F.R. § 531.3(d)(1); see also Soler v. G & U, Inc. (S.D.N.Y. 1985) 615 F. Supp. 736, 746* (no credit for lodging provided migratory farm workers at workplace, since, although it benefited workers, it primarily benefited employer). *See § 2.21[2][c]* for discussion of employer-benefit test in determining reasonable cost of facilities furnished.

(n9)Footnote 9. *See 29 C.F.R. § 531.30.*

(n10)Footnote 10. *See, e.g., Morrison, Inc. v. Donovan (11th Cir. 1983) 700 F.2d 1374, 1375 ; see also discussion under § 2.21[2][d].*



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 2 Minimum Wages
Part B. CREDITS AGAINST MINIMUM WAGE

1-2 California Employment Law § 2.21

AUTHOR: By Carol S. Sanders, J.D.

§ 2.21 Meals, Lodging, and Similar Facilities

[1] California Law

[a] Generally

The wage orders allow the value of meals and lodging to be credited toward minimum wage obligation only with a voluntary written agreement between the employer and the employee,ⁿ¹ and only if the meals are actually received or the lodging is actually used.ⁿ²

The credits permitted for food and lodging under the California wage orders, as described in [b] and [c], *below*, are not necessarily the same as those permitted under the FLSA. Thus, a California employer who is subject to both laws will be restricted to the lesser of the two credits.ⁿ³

■ CONSULTANT'S COMMENT:

In contrast to the FLSA,ⁿ⁴ the California wage orders do not expressly permit a credit for facilities other than meals and lodging against the minimum wage.ⁿ⁵ However, the DLSE has indicated that it may consider permitting credit for certain other goods and services if (1) the value of the goods or services can be established, (2) there is a voluntary written agreement between the employer and employee before performance of the work to include a specified item at the agreed upon value, and (3) records are kept of the hours worked and all payments made. The DLSE may determine the fair value of such goods and services based on average cost to the employer or groups of employers similarly situated. *Commentary by Kirby Wilcox.*

[b] Meals

[i] Generally

A "meal" means an adequate, well-balanced serving of a variety of wholesome, nutritious foods.ⁿ⁶ Meals evaluated as

part of the minimum wage must be bona fide meals, consistent with the employee's work shift.ⁿ⁷

■ CONSULTANT'S COMMENT:

The wage orders generally provide that meals may not be credited against the minimum wage unless they are actually received.ⁿ⁸ However, the DLSE has taken the position that credits may be taken for occasional meals not eaten for personal reasons. *Commentary by Kirby Wilcox.*

Generally, credit for meals is used to meet part of the employer's minimum wage obligation. The amounts credited may not be more than the following:ⁿ⁹

Breakfast:	\$2.45
Lunch:	\$3.35
Dinner:	\$4.50

[ii] Employee Consent

In order for meals to be credited against the employer's minimum wage obligations, there must be a voluntary written agreement between the employer and the employees.ⁿ¹⁰

The requirement of employee consent to meal credits may be met without the individual employee's specific consent if a lawful, written collective bargaining agreement between the union, on behalf of the employees, and the employer permits the employer to apply meals toward the minimum wage.ⁿ¹¹ A collective bargaining agreement permitting meal credits takes precedence over any individual contract, and binds all members of the bargaining unit, whether or not they are union members or were employed in the bargaining unit at the time the agreement was entered into or ratified.ⁿ¹²

If the employees are not covered by a collective bargaining agreement, the employee must specifically authorize the meal credits.ⁿ¹³

■ CONSULTANT'S COMMENT:

The DLSE takes the position that the employee must be furnished with a copy of the agreement, and may change or revoke the agreement by filing a new meal deduction authorization or revocation. The employee's election must be given effect at the beginning of the first payroll period that starts 30 or more days after the employee files his or her election. *Commentary by Kirby Wilcox.*

[c] Lodging

"Lodging" means living accommodations available to the employee for full-time occupancy that are adequate, decent, and sanitary according to usual and customary standards.ⁿ¹⁴ "Available for full-time occupancy" means available to the employee throughout the seven days in the week, even if the workweek is only five days per week.ⁿ¹⁵ Employees may not be required to share a bed.ⁿ¹⁶

When credit for lodging is used to meet part of the employer's minimum wage obligation, the amounts credited may not be more than the following:ⁿ¹⁷

Room occupied alone:	\$31.75 per week
Room shared:	\$26.70 per week
Apartments:	
2/3 of ordinary rental value and in no event more than	\$381.20 per month
When a couple are both employed by	\$563.90 per month

employer, 2/3 of ordinary rental value and in no event more than

If, as a condition of employment, the employee must live at the place of employment or occupy quarters owned or under the control of the employer, the employer may not charge rent in excess of the maximum amount creditable against the minimum wage.ⁿ¹⁸ However, in the case of resident apartment managers, an employer will not be in violation of any provision of an applicable wage order relating to credit or charges for lodging if the employer charges the manager, pursuant to a voluntary written agreement, up to two-thirds of the fair market rental value of the apartment supplied to the manager, even if it exceeds the maximum amount creditable against the minimum wage, if no credit for the apartment is used to meet the employer's minimum wage obligation to the employee.ⁿ¹⁹

As in the case of meal credits, the value of lodging may not be credited against the minimum wage without a voluntary written agreement between the employer and the employee.ⁿ²⁰

[2] Federal Law

[a] Generally

Pursuant to the FLSA,ⁿ²¹ employers may, under specified conditions, credit against their federal minimum wage obligations the value of board, lodging or "other facilities" customarily furnished,ⁿ²² unless a bona fide collective bargaining agreement precludes these costs from being calculated as wages.ⁿ²³ The amount of the credit will be determined either by the reasonable cost to the employer or by the fair value of the facilities.ⁿ²⁴

The types of facilities and amount of permissible credit under the FLSA and applicable regulations may not necessarily be the same in a given case as those permitted under the California wage orders. Therefore, an employer subject to both laws will be limited to the lower of the two credits. For discussion of permissible credits under the wage orders, *see* [1], above.

[b] Nature of Facilities That May Be Credited

"Other facilities" as used in the federal regulations must be similar to board or lodging.ⁿ²⁵ Some items deemed to be within the meaning of this term, and therefore creditable against wages, include tuition furnished by a college to student employees, general merchandise furnished at company stores, fuel, utilities, and transportation between home and work when the travel time does not constitute hours worked, and the transportation is not incidental or necessary to the employment.ⁿ²⁶ Meals furnished at company restaurants or cafeterias, by hospitals, hotels, or restaurants to their employees, or by colleges to their student employees, are explicitly recognized as "other facilities" that may be credited against wages.ⁿ²⁷

The cost of furnishing facilities that are primarily for the benefit or convenience of the employer may not be included in computing wages.ⁿ²⁸

Under the regulations, meals furnished to the employee are always regarded as primarily for the benefit and convenience of the employee.ⁿ²⁹ However, it should be noted that an employer's *reimbursement* to an employee for meal expenses incurred primarily for the employer's benefit or convenience, as an incident of employment, are not considered as meals furnished, and may not be included as wages.ⁿ³⁰

[c] Determination of Credit Amount

[i] Reasonable Cost

The "reasonable cost" to the employer of furnishing an employee with board, lodging, or other facilities may not be more than the actual cost to the employer of these facilities and may not include a profit to the employer or to any affiliated person.ⁿ³¹ The cost of furnishing facilities found by the Administrator of the Wage and Hour Division to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.ⁿ³² Such items include tools of the trade, required uniforms, certain safety equipment used in the mining industry, company security, and transportation charges when the transportation is an incident of and necessary to the employment.ⁿ³³

[ii] Fair Value

The Secretary of Labor may determine the "fair value" of board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value.ⁿ³⁴ A determination of fair value, when applicable and pertinent, must be used in lieu of the actual measure of costs in determining the wage paid to an employee.ⁿ³⁵

[d] Employee Consent

The regulations promulgated by the Secretary of Labor provide that, for the reasonable cost of board, lodging, or other facilities to be considered part of the wage paid, the employee must accept the facility voluntarily and without coercion.ⁿ³⁶ However, some courts have taken the position that the Secretary is without statutory authority to impose the requirement of employee acceptance of a specific facility, and have held that regularly furnished meals or lodging may be credited against minimum wages even though the employee would prefer cash, since the employee's voluntary acceptance of employment included acceptance of the lawful conditions of employment.ⁿ³⁷ Cases that have held to the contrary have been distinguishedⁿ³⁸ as involving grossly inadequate facilities for which employers sought excessive credit,ⁿ³⁹ or exploitation of an uneducated alien who was paid little more than room and board.ⁿ⁴⁰

Although there may be some doubt whether voluntary acceptance of a credit for meals and lodging is required under federal law, the California wage orders clearly require a voluntary written consent to any such credit.ⁿ⁴¹

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 8 Cal. Code Reg. §§ 11000, P 3 (Cal. Wage Order No. MW-2001), 11010-11150, P 10(C) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 9(C) (Cal. Wage Order No. 16-2001); *see also* California State Restaurant Assn. v. Whitlow (1976) 58 Cal. App. 3d 340, 346-348, 129 Cal. Rptr. 824 (crediting of meal credits without employee consent violated proscription of Lab. Code § 450 against compelled employee purchases from employer).

(n2)Footnote 2. *See* 8 Cal. Code Reg. §§ 11010-11150, P 10(C) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 9(C) (Cal. Wage Order No. 16-2001).

(n3)Footnote 3. *cf.* 29 U.S.C. § 218(a) (compliance with FLSA does not excuse compliance with state law requiring payment of higher minimum wage).

(n4)Footnote 4. *See* 29 U.S.C. § 203(m); 29 C.F.R. § 531.32(a); *see also* discussion in [2][b], *below*.

(n5)Footnote 5. *See* 8 Cal. Code Reg. §§ 11000, P 3 (Cal. Wage Order No. MW-2001), 11010-11150, P 10 (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 9 (Cal. Wage order No. 16-2001).

(n6)Footnote 6. 8 Cal. Code Reg. §§ 11010-11150, P 10(A) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 9(A) (Cal. Wage Order No. 16-2001).

(n7)Footnote 7. 8 Cal. Code Reg. §§ 11010-11150, P 10(D) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 9(D) (Cal. Wage Order No. 16-2001).

(n8)Footnote 8. *See* 8 Cal. Code Reg. §§ 11010-11150, P 10(D)10(C) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 9(D) (Cal. Wage Order. No. 16-2001).

(n9)Footnote 9. 8 Cal. Code Reg. §§ 11000, P 3(Cal. Wage Order No. MW-2001); 11010-11150, P 10(C)10(B) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 9(C) (Cal. Wage Order No. 16-2001).

(n10)Footnote 10. 8 Cal. Code Reg. §§ 11000, P 3(Cal. Wage Order No. MW-1-2001-15-2001); 11010-11150, P 10) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 9(C) (Cal. Wage Order No. 16-2001) *See also* Lab. Code § 450 (employers prohibited from coercing employees to patronize employer in purchase of anything of value). *See* § 2.20[1] for discussion of restrictions on applying employer-provided facilities against minimum wage under state law.

(n11)Footnote 11. *See* *Porter v. Quillin* (1981) 123 Cal. App. 3d 869, 876, 177 Cal. Rptr. 45 ; *Division of Labor Standards Enforcement v. Williams* (1981) 121 Cal. App. 3d 302, 308, 175 Cal. Rptr. 347 .

(n12)Footnote 12. *See* *Porter v. Quillin* (1981) 123 Cal. App. 3d 869, 876, 177 Cal. Rptr. 45 .

(n13)Footnote 13. *See* 8 Cal. Code Reg. §§ 11000, P 3 (Cal. Wage Order No. MW-2001), 11010-11150, P 10(C) (Cal. Wage Order Nos. -2001-15-2001); 11160, P 9(C) (Cal Wage Order No. 16-2001).

(n14)Footnote 14. 8 Cal. Code Reg. §§ 11010-11150, P 10(B) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 9(B) (Cal. Wage Order No. 16-2001).

(n15)Footnote 15. *See* Cal. Ind. Welf. Comm., Statement of Basis for Cal. Wage Order Nos. 1-80-14-80, 15-86, P 10.

(n16)Footnote 16. 8 Cal. Code Reg. §§ 11010-11150, P 10(B) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 9(B) (Cal. Wage Order No. 16-2001).

(n17)Footnote 17. 8 Cal. Code Reg. §§ 11000, P 3(Cal. Wage Order No. MW-2001); 11010-11150, P 10(B) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, 9(B) (Cal. Wage Order No. 16-2001).

(n18)Footnote 18. 8 Cal. Code Reg. §§ 11010-11150, P 10(E) (Cal. Wage Order Nos.1-2001-15-2001); 11160, P 9(E) (Cal. Wage Order No. 16-2001).

(n19)Footnote 19. Lab. Code § 1182.8.

(n20)Footnote 20. 8 Cal. Code Reg. §§ 11000, P 3(Cal. Wage Order No. MW-2001); 11010-11150, P 10(C) (Cal. Wage Order Nos.1-2001-15-2001); 11160, P 9(C) (Cal. Wage Order NO. 16-2001) *See also* Lab. Code § 450 (employers prohibited from compelling or coercing employee to patronize employer in purchase of anything of value).

(n21)Footnote 21. *See* 29 U.S.C. § 203(m) (definition of "wage" paid).

(n22)Footnote 22. *See* 29 C.F.R. § 531.31 for definition of "customarily" furnished.

(n23)Footnote 23. *See* 29 U.S.C. § 203(m); 29 C.F.R. § 531.2(a); *see also* 29 C.F.R. § 531.6 (effect of collective bargaining agreements).

(n24)Footnote 24. *See* 29 C.F.R. §§ 531.2(a), 531.3-531.5, 531.27(a); *see also* [c], *below*, for discussion of procedures for determining credit amount.

(n25)Footnote 25. 29 C.F.R. § 531.32(a).

(n26)Footnote 26. *See* 29 C.F.R. § 531.32(a).

(n27)Footnote 27. *See* 29 C.F.R. § 531.32(a).

(n28)Footnote 28. 29 C.F.R. §§ 531.3(d)(1), 531.32(c); *see* discussion under [c], *below*.

(n29)Footnote 29. 29 C.F.R. § 531.32(c).

(n30)Footnote 30. *See* 29 C.F.R. § 778.217(a); *see also* *Wirtz v. Nurserymen's Supply Co.* (D.C. Fla. 1968) 58 Lab. Cas. (CCH) P 32,068 (meal expenses of long-haul truck drivers while on road not creditable against minimum wage obligations).

(n31)Footnote 31. 29 C.F.R. § 531.3(a), (b); *see* 29 C.F.R. § 531.33(b).

(n32)Footnote 32. *See* 29 C.F.R. §§ 531.3(d)(1), 531.32(c).

(n33)Footnote 33. 29 C.F.R. §§ 531.3(d)(1), (2), 531.32(c); *see* § 2.23 [2] for discussion of allowances for required uniforms under federal law.

(n34)Footnote 34. 29 U.S.C. § 203(m).

(n35)Footnote 35. 29 U.S.C. § 203(m); *see also* 29 C.F.R. § 531.5 (determination of fair value).

(n36)Footnote 36. *See* 29 C.F.R. § 531.30.

(n37)Footnote 37. *See Morrison, Inc. v. Donovan* (11th Cir. 1983) 700 F.2d 1374, 1375 ; *Davis Brothers, Inc. v. Donovan* (11th Cir. 1983) 700 F.2d 1368, 1370 ; *Lopez v. Rodriguez* (D.C. Cir. 1981) 668 F.2d 1376, 1379-1381, 215 U.S. App. D.C. 344 ; *Marshall v. Truman-Arnold Distributing Co. Inc.* (8th Cir. 1981) 640 F.2d 906, 909 ; *Donovan v. Miller Properties, Inc.* (M.D. La. 1982) 547 F. Supp. 785 , *aff'd*, (5th Cir. 1983) 711 F.2d 49 .

(n38)Footnote 38. *See Davis Brothers, Inc. v. Donovan* (11th Cir. 1983) 700 F.2d 1368, 1371 .

(n39)Footnote 39. *See Hodgson v. Frisch Dixie, Inc.* (W.D. Ky. 1971) 20 Wage & Hour Cas. (BNA) 167, 171 , *aff'd*, (6th Cir. 1972) 469 F.2d 82 ; *Williams v. Atlantic Coast Line Railroad Co.* (E.D.N.C. 1940) 1 Wage & Hour Cas. (BNA) 289 (cited in 29 C.F.R. § 531.30 as authority for requirement of employee acceptance of facility).

(n40)Footnote 40. *See Marshall v. Intraworld Commodities Corp.* (E.D. N.Y. 1980) 24 Wage & Hour Cas. (BNA) 860, 864 .

(n41)Footnote 41. *See* 8 Cal. Code Reg. §§ 11000, P 3 (Cal. Wage Order No. MW-2001); 11010-11150, P 10(C) (Cal. Wage Order Nos. 1-2001-15-2001); *see also* discussion in § 2.21[1].



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 2 Minimum Wages
Part B. CREDITS AGAINST MINIMUM WAGE

1-2 California Employment Law § 2.22

AUTHOR: By Carol S. Sanders, J.D.

§ 2.22 Gratuities

[1] California Law

A "gratuity" is defined by the Labor Code as any tip, gratuity, money, or part thereof, that has been paid or given to or left for an employee by a patron of a business over and above the actual amount due the business for services rendered or for goods, food, drink, or articles sold or served to that patron.ⁿ¹ Any amounts paid directly by a patron to a dancer employed by an employer subject to Industrial Welfare Commission Wage Order Nos. 5 or 10 are deemed a gratuity.ⁿ²

Labor Code section 351 declares that gratuities are the sole property of the employee or employees to whom they are given or for whom they are left. Accordingly, except as described below, an employer is prohibited from collecting, taking, or receiving any portion of a gratuity given to or left for any employee by a patron, or from making wage deductions or credits on account of these gratuities.ⁿ³ As a matter of public policy, this prohibition cannot be contravened by private agreement.ⁿ⁴

The Supreme Court and IWC have construed this prohibition to eliminate the IWC's authority to allow a tip credit against the state minimum wage.ⁿ⁵

Labor Code Section 351 does not, however, prohibit an employer from requiring that tips be pooled among employees who directly provided service to the tipping patron.ⁿ⁶

An employer that permits patrons to pay gratuities by credit card must pay the employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deductions for any credit card payment processing fees or costs that may be charged to the employer by the credit card company.ⁿ⁷ Payment of gratuities made by patrons using credit cards shall be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment.ⁿ⁸

The DLSE's position is that compulsory service charges imposed on customers (e.g., service charges added to food costs

for large banquets) are not gratuities or tips within the meaning of *Labor Code Section 351*, but are part of the employer's gross receipts. They are therefore not considered the property of the employees who performed the services.ⁿ⁹ If a portion of these service charges is subsequently paid over to the employees, the charges are considered wages, which may be credited against the employer's minimum wage obligations, but which must be included in the employee's regular rate of pay for purposes of computing overtime compensation.ⁿ¹⁰

For additional discussion of section 351, *see* Chapter 4.

[2] Federal Law

The Small Business Job Protection Act of 1996ⁿ¹¹ altered the federal tip credit, as previously set forth in 29 *U.S.C. section 203(m)*, so that a tipped employee making at least \$30 in tips must now be paid at least half of the new federal minimum wage of \$4.25.ⁿ¹² This new law further provides that if the hourly wage added to the employee's actual tips does not equal the minimum wage, then the employer must make up the difference.ⁿ¹³ The gratuities credit does not apply to any tipped employee unless he or she has been informed by the employer of the provisions of Title 29 *United States Code, section 203(m)*, governing the determination of wages of a tipped employee, and all tips received by the employee have been retained by the employee. The pooling of tips among employees who customarily and regularly receive tips is not prohibited.ⁿ¹⁴

As noted in [1], above, California law prohibits an employer from crediting gratuities against the state minimum wage.ⁿ¹⁵ Therefore, in practical effect, a California employer cannot utilize the federal credit for gratuities in meeting its minimum wage obligations.ⁿ¹⁶

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 350(e)*.

(n2)Footnote 2. *Lab. Code § 350(e)*.

(n3)Footnote 3. *See Jameson v. Five Feet Restaurant, Inc. (2003) 107 Cal. App. 4th 138, 142-145, 131 Cal. Rptr. 2d 771* (substantial evidence supported jury's verdict that employer required tip sharing with agent as defined in *Lab. Code § 350(d)*, in violation of *Lab. Code § 351*); *but see* D.L.S.E. Interpretive Bulletin No. 87-6 (July 27, 1987) (employers may require involuntary tip splitting with other employees as long as the employer's policy is reasonable) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n4)Footnote 4. *Lab. Code § 356*.

(n5)Footnote 5. *See Henning v. Industrial Welfare Com. (1988) 46 Cal. 3d 1262, 252 Cal. Rptr. 278, 762 P.2d 442* (also holding that *Lab. Code § 351* deprives IWC of authority to establish separate, lower minimum wage for employees who receive tips); 2002 Update to 1998 DLSE Enforcement Policies & Interpretations Manual § 19.3.3 (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n6)Footnote 6. *See Leighton v. Old Heidelberg, Ltd. (1990) 219 Cal. App. 3d 1062, 1068, 1071, 268 Cal. Rptr. 647*; *see also* 2002 Update to 1998 DLSE Enforcement Policies & Interpretations Manual § 19.3.1 (instructing DLSE

personnel to narrowly construe the holding in *Leighton*) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders). For further discussion of tip-pooling agreements, see ch 4.

(n7)Footnote 7. *Lab. Code § 351*.

(n8)Footnote 8. *Lab. Code § 351*.

(n9)Footnote 9. See D.L.S.E. Div. Management Memo. No. 89-2 (June 9, 1989); see also 2002 Update to 1998 DLSE Enforcement Policies & Interpretations Manual § 19.3.5(charge is a gratuity rather than a service charge if it is waivable or negotiable or described as something less than a fixed amount which must be paid) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n10)Footnote 10. See D.L.S.E. Div. Management Memo No. 89-2 (June 9, 1989) (superseding D.L.S.E. Policy & Procedure Memo. No. 82-5 and reinstating D.L.S.E. Policy & Procedure Memo. No. 76-1) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n11)Footnote 11. Pub. L. No. 104-188.

(n12)Footnote 12. See 29 U.S.C. § 203(m)(1) (Pub. L. No. 104-188).

(n13)Footnote 13. See 29 U.S.C. § 203(m)(2).

(n14)Footnote 14. 29 U.S.C. § 203(m); see 29 C.F.R. §§ 531.50-531.60 (payment of wages to tipped employees); see also *Doty v. Elias* (10th Cir. 1984) 733 F.2d 720, 724 (employer must pay tipped employees at least required percentage of applicable minimum wage even if tips substantially exceed minimum wage).

(n15)Footnote 15. See *Lab. Code § 351*; *People v. Los Angeles Palm, Inc.* (1981) 121 Cal. App. 3d 25, 33-35, 175 Cal. Rptr. 257.

(n16)Footnote 16. cf. 29 U.S.C. § 218(a) (nothing in FLSA relieves employer from paying higher state minimum wage).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 2 Minimum Wages
Part B. CREDITS AGAINST MINIMUM WAGE

1-2 California Employment Law § 2.23

AUTHOR: By Carol S. Sanders, J.D.

§ 2.23 Provision of Uniforms, Tools, and Equipment

[1] California Law

Under the California wage orders, uniforms, tools, and equipment required by the employer or necessary to the performance of a job must generally be provided by the employer, and the cost to the employer of furnishing them are not treated as credits against the minimum wage.ⁿ¹ However, an employee whose wages are at least two times the minimum wage may be required to provide and maintain hand tools and equipment customarily required by the trade or craft.ⁿ² Likewise, apprentices who are regularly indentured under the State Division of Apprenticeship Standards may be required to furnish the tools of their trade.ⁿ³ When tools, equipment, and uniforms are provided by the employer, the employer may require the employee to post a reasonable security deposit for the return of such items or, with prior written consent of the employee, may deduct the cost of such items from the employee's final pay check if an item is not returned to the employer.ⁿ⁴ However, the employer may not deduct for lost tools or uniforms without a showing of theft or culpable negligence, even if the employee authorized such deductions in writing. The employer must issue a receipt for the deposit, and no deduction may be made for normal wear and tear.ⁿ⁵ For further discussion, *see* Chapter 4.

[2] Federal Law

Under federal law, the cost of furnishing required uniforms and tools of the trade is generally not treated as wages paid for purposes of determining compliance with minimum wage and overtime requirements,ⁿ⁶ and the deduction of these costs from wages is illegal if the deduction reduces the wages to less than the prevailing minimum wage.ⁿ⁷

The cost to an employee of minimal maintenance necessary to keep a required uniform clean need not be reimbursed by the employer. However, if the uniform requires frequent or special maintenance care, the employer must reimburse costs incurred by the employee to the extent these costs reduce the employee's wages below the minimum wage level.ⁿ⁸

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 8 Cal. Code Reg. §§ 11010-11150, PP 4, 9 (Cal. Wage Order Nos. 1-2001-15-2001). For DLSE policy and interpretations regarding provision of uniforms, tools and equipment, *see* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 45 et seq.

(n2)Footnote 2. 8 Cal. Code Reg. §§ 11010-11150, P 9(B) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 8(B) (Cal. Wage Order No. 16-2001).

(n3)Footnote 3. *See* 8 Cal. Code Reg. §§ 11010-11150, P 9(B) (Cal. Wage Order Nos. 1-2001-15-2001).

(n4)Footnote 4. *See* 8 Cal. Code Reg. §§ 11010-11150, P 9(C) (Cal. Wage Order Nos. 1-2001-15-2001); *see also* Lab. Code §§ 400-410 (regulating posting of security by employees).

(n5)Footnote 5. *See* 8 Cal. Code Reg. §§ 11010-11150, P 9(C) (Cal. Wage Order Nos. 1-2001-15-2001).

(n6)Footnote 6. *See* 29 C.F.R. §§ 531.3(d)(2), 531.32(c).

(n7)Footnote 7. *See, e.g., Marshall v. Krystal Co. (E.D. Tenn. 1978) 467 F. Supp. 9, 13 .*

(n8)Footnote 8. *See* Wage and Hour Op. Letter No. WH 511 (July 31, 1981).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 2 Minimum Wages
Part B. CREDITS AGAINST MINIMUM WAGE

1-2 California Employment Law § 2.24

AUTHOR: By Carol S. Sanders, J.D.

§ 2.24 Contract Provisions

The DLSE interprets California law to explicitly prohibit employers from paying employees less than the wages required under any statute or less than the wages required under any contract or collective bargaining agreement.ⁿ¹ Under *Labor Code section 221*, an employer cannot collect or receive from an employee any part of the wages paid by the employer to the employee. Under *Labor Code section 222*, in any wage agreement arrived at through collective bargaining, an employer cannot wilfully or unlawfully with intent to defraud an employee, a competitor, or any other person, withhold from the employee any part of the agreed upon wage. Under *Labor Code section 223*, when a statute or contract requires an employer to maintain the designated wage scale, it is unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or contract.

This statutory scheme prevents an employer who operates under a contract that expressly pays employees less than the minimum wage for certain activities, *e.g.*, washup time, recording time, etc., which constitute "hours worked" within the meaning of state law, from using any part of the wage payments required under the contract for activities compensated in an amount that equals or exceeds the minimum wage, as a credit toward satisfying minimum wage obligations for activities that under the contract terms are to be compensated at less than the minimum wage. Instead, all hours for which the employees are entitled to an amount equal or greater than the minimum wage pursuant to the provisions of the contract must be compensated precisely in accordance with the provisions of the contract. All other hours or parts of hours which the contract explicitly states will be paid at less than the minimum wage, but which constitute "hours worked" under state law, must be compensated at the minimum wage.ⁿ²

Further, averaging all wages paid under a contract within a particular pay period in order to determine whether the employer complied with its minimum wage obligations is not permitted. To do so would result in the employer paying the employees less than the contract rate for activities for which the contract requires payment of a specified amount equal to or greater than the minimum wage, which would violate *Labor Code sections 221-223*.ⁿ³

Legal Topics:

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

Contracts Law Contract Conditions & Provisions General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 44.2 et seq. (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n2)Footnote 2. DLSE Opinion Letter 2002.01.29.

(n3)Footnote 3. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 44.2.2.1 (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 2 Minimum Wages

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1-2 California Employment Law §§ 2.25 through 2.29

AUTHOR: By Carol S. Sanders, J.D.

[Reserved]

§§ 2.25[Reserved]



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 2 Minimum Wages

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1-2 California Employment Law § 2.30

AUTHOR: By Carol S. Sanders, J.D.

§ 2.30 Legal Texts

Lareau, *Labor and Employment Law*, Pt. VI, *Wages and Hours* (Matthew Bender).

Leader, *Wages and Hours: Law and Practice*, chs. 3, 4 (Matthew Bender).

RIA *Employment Coordinator*, Vol. 5, "Minimum Wages," P C-14,001.

Simmons, *Wage and Hour Manual for California Employers* (3d ed. 1986) Ch. 6, "Minimum Wages."

Witkin, *Summary of California Law* (8th ed. 1974) Vol. 5, "Constitutional Law," § 526.

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour
Laws Coverage & Definitions General Overview



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Part C. BIBLIOGRAPHY

1-2 California Employment Law § 2.31

AUTHOR: By Carol S. Sanders, J.D.

§ 2.31 Encyclopedias and Annotations

[1] Encyclopedias

41 Cal. Jur. 3d, "Labor," §§ 28-38.

[2] Annotations

"Validity of Federal Regulation of Wage Rates and Hours of Service as Affected by Commerce Clause of Federal Constitution (Art. I, § 8, Cl. 3)--Supreme Court Cases," 83 L. Ed. 2d 1163 (1987) .

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview



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Part C. BIBLIOGRAPHY

1-2 California Employment Law § 2.32

AUTHOR: By Carol S. Sanders, J.D.

§ 2.32 Law Reviews and Legal Periodicals

Clarke & Watson, *The Ramifications of California's Minimum Wage Increase*, 2007 Bender's Calif. Lab. & Empl. Bull. 9 (January/February 2007).

Goldsmith, *Living Wages: California's Local Labor Laws*, 2005 Bender's Calif. Lab. & Empl. Bull. 136 (April 2005).

Brock, "The Applicability of the Fair Labor Standards Act to State and Local Governments," *36 Lab. L.J.* 739 (1985).

Review of Selected 1972 Legislation, "Employment Practices; Wages, Hours, and Working Conditions," *4 Pacific L.J.* 482-483 (1973).

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked

1-3 California Employment Law 3.syn

AUTHOR: By Carol S. Sanders, J.D.

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§ 3.20 Generally

§ 3.21 One Day's Rest in Seven

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[5] Statutory Limits Applicable to Certain Occupations

[6] Lost Work Time Made Up by Health Care Industry Employees

§ 3.23 Meal Periods

§ 3.24 Rest Periods

§§ 3.25 through 3.29 [Reserved]

§ 3.30 Legal Texts

§ 3.31 Encyclopedias

§ 3.32 Law Reviews and Legal Periodicals

*By Carol S. Sanders, J.D. n**

FOOTNOTES:

(n1)Footnote *. Ms. Sanders is supervising attorney with Contra Costa Legal Assistance for the Elderly.

2004 Revisions by Peter Rukin, The Law Office of Peter Rukin, Oakland, CA, www.rukinlaw.com.



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked

1-3 California Employment Law Scope

AUTHOR: By Carol S. Sanders, J.D.

Scope

By Carol S. Sanders, J.D. n SCOPE*

This chapter discusses maximum hour regulations and overtime compensation requirements under state and federal law. It sets forth the basic overtime compensation requirements and the many exemptions from and exceptions to those requirements under state and federal law.

This chapter also examines the factors pertinent to determining whether overtime compensation is due, and, if so, the amount of that overtime compensation. It discusses when nonproductive employee time constitutes hours worked for purposes of overtime compensation, the various formulae for computing the employee's regular rate of pay for purposes of calculating overtime, and the circumstances under which sums paid to employees in addition to wages must be included in determining the regular rate of pay. It also discusses pay plans that impermissibly circumvent the overtime compensation requirements and the use of compensatory time off in lieu of overtime compensation payments. Restrictions on the number of hours that certain employees may work, regardless of whether overtime compensation is paid, are also discussed.

For an overview of the applicability of the various wage and hour laws, see Ch. 1. The minimum wage under state and federal law, below which an employee's regular rate may not fall, is discussed in Ch. 2. The time and manner in which wages, including overtime compensation, must be paid are discussed in Ch. 4. Remedies for failure to pay overtime compensation are discussed in Ch. 5. Special rules restricting working hours of minors are discussed in Ch. 6.

FOOTNOTES:

(n2)Footnote *. Ms. Sanders is supervising attorney with Contra Costa Legal Assistance for the Elderly.

2004 Revisions by Peter Rukin, The Law Office of Peter Rukin, Oakland, CA, www.rukinlaw.com.



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.01

AUTHOR: By Carol S. Sanders, J.D.

§ 3.01 Introduction

Both the the California wage ordersⁿ¹ and the federal Fair Labor Standards Act (FLSA)ⁿ² have provisions requiring payment of an overtime premium to nonexempt employees who work more than a specified number of hours.

All of the California wage orders provide that an overtime premium must be paid if a nonexempt employee works more than a specified number of hours in a workday or more than a specified number of hours in a workweek.ⁿ³ For all industries and for all occupations except the agricultural occupations and the household occupations, an overtime premium must be paid for hours worked in excess of eight hours per workday or 40 hours per workweek, and for worked performed on the seventh consecutive day of work in a workweek.ⁿ⁴

Employers covered under the FLSA must also comply with applicable state laws or local ordinances that establish a maximum workweek that is shorter than that established by the Act.ⁿ⁵

Overtime compensation requirements are the primary legal restriction on the number of hours that an employee may be required to work. The purpose of the overtime premium requirements is to induce the employer to reduce the hours of work and employ more individuals, while compensating employees for the burdens of a long workweek.ⁿ⁶

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Overtime & Work Period

FOOTNOTES:

(n1)Footnote 1. *See* 8 Cal. Code Reg. §§ 11010-11160, P 3 (Cal. Wage Order Nos. 1-2001-16-2001).

(n2)Footnote 2. *See* 29 U.S.C. § 207.

(n3)Footnote 3. *See* 8 Cal. Code Reg. §§ 11010-11130, 11160 P 3(A) (Cal. Wage Order Nos. 1-2001-13-2001, 16-2001); 11140, 11150, P 3 (Cal. Wage Order Nos. 14-2001, 15-2001).

(n4)Footnote 4. *See* 8 Cal. Code Reg. §§ 11010-11130, 11160, P 3(A) (Cal. Wage Order Nos. 1-2001-13-2001, 16-2001).

(n5)Footnote 5. *See* 29 U.S.C. § 218(a).

(n6)Footnote 6. *See* *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, 423-424, 65 S. Ct. 1242, 89 L. Ed. 1705 ; *see also* *Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal. App. 3d 557, 564, 242 Cal. Rptr. 873 (purpose of premium pay for overtime hours is to regulate maximum hours consistent with health and safety of employees).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.02

AUTHOR: By Carol S. Sanders, J.D.

§ 3.02 Overview of Factors Pertinent to Determining Overtime Compensation Obligations

On the surface, compliance with the overtime compensation requirements under state and federal law may appear to be a simple matter of paying to employees a specified premium rate for each hour worked in excess of a specified maximum number of hours during the workday or workweek. In practice, however, a complex analysis of multiple factors may be required in order to determine whether overtime compensation must be paid and, if so, the amount of that compensation. Pay plans that fail to take into strict account the rules and principles of overtime compensation law may be found to be in circumvention of the law,ⁿ¹ and may result in substantial liability for overtime compensation accrued over a past period.

In order to determine whether overtime compensation is due and the amount of that compensation, the following factors must be examined:

1. Is the *employer* covered by one of the California wage orders or by the FLSA, or both?ⁿ² If the employer is covered by both, the employer will need to examine the following factors under both laws and must pay overtime to the employee if *either* law so requires.
2. Is the *employee* entirely *exempt* from the overtime provisions of the California wage orders and/or the FLSA?ⁿ³
3. If the employee is *nonexempt* under either or both laws, what is the *maximum-hour standard* applicable to the employee? Under both state and federal law, hours worked in excess of 40 during the workweek will trigger the obligation to pay overtime compensation,ⁿ⁴ unless (a) the employee is covered by special maximum hour schedules applicable to particular occupations and industries,ⁿ⁵ or (b) an alternative work schedule that meets certain legal requirements is operative.ⁿ⁶ Under federal law, daily premiums are sometimes applicable.ⁿ⁷
4. Has the employee worked in excess of the maximum-hour standard applicable to him or her? To

determine whether the employee worked in excess of the specified maximum number of hours, the employer must be aware of whether certain "nonproductive" time (such as traveling in connection with employment, being "on-call" in case work is required, or taking a duty-free meal period) must be counted as *hours worked* under state and federal law.ⁿ⁸ A determination of the number of hours worked is also necessary to determine the employee's regular rate of pay (*see* Paragraph 6, *below*) on which overtime is computed, unless the employee is paid solely on an hourly basis.ⁿ⁹

5. What *overtime premium rate* is applicable to the employee? Under state law, the premium is 1 1/2 times the employee's regular rate of pay during nonovertime hours, or, in some cases, double the regular rate.ⁿ¹⁰ Under the FLSA, the premium is 1 1/2 times the employee's regular rate during nonovertime hours,ⁿ¹¹ except in certain limited situations when an agreement meeting certain legal requirements is in effect.ⁿ¹² A premium based on a higher multiplier may be applicable under a private contract or agreement.

6. What is the employee's "*regular rate*" of pay? The employee's regular rate must be determined in order to determine overtime compensation due based on a multiple of 1 1/2 times or double that rate. Different formulas for determining the regular rate will be applicable depending on whether the employee is paid an hourly wage, or earns a fixed salary, commission, piece rate, or some other form of compensation.ⁿ¹³ If the employer has paid the employee certain sums in addition to his or her regular wages for hours worked, it must determine whether the additional sums must be included in calculating the regular rate or whether they may be excluded.ⁿ¹⁴

California law clearly delineates standards regarding which wage provisions an employer may negotiate in the context of a collective bargaining agreement.ⁿ¹⁵ In addition, a defendant may not attempt to inject a federal question into an action plainly asserting a state law claim in order to transform the action into one arising under federal law, thereby selecting the forum.ⁿ¹⁶

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Overtime & Work Period

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 3.12.

(n2)Footnote 2. For discussion of scope of coverage of the FLSA and the wage orders, *see* ch. 1.

(n3)Footnote 3. *See* discussion in § 3.03.

(n4)Footnote 4. *See* 8 *Cal. Code Reg.* §§ 11010-11160, P 3(A) (Cal. Wage Order Nos. 1-2001-16-2001); 29 *U.S.C.* § 207(a); *see also* discussion in § 3.04.

(n5)Footnote 5. *See* discussion in § 3.05.

(n6)Footnote 6. *See* discussion in § 3.06.

(n7)Footnote 7. *See* discussion in § 3.04[2][a][ii].

(n8)Footnote 8. *See* discussion in § 3.07.

(n9)Footnote 9. *See* discussion in §§ 3.08-3.09.

(n10)Footnote 10. *See* discussion in § 3.04[1].

(n11)Footnote 11. *See* 29 U.S.C. § 207; *see also* discussion in § 3.04[2].

(n12)Footnote 12. *See* discussion in § 3.10.

(n13)Footnote 13. *See* discussion in § 3.09.

(n14)Footnote 14. *See* discussion in § 3.08.

(n15)Footnote 15. *Lab. Code* § 219; *Lujan v. Southern California Gas Co.* (2002) 96 Cal. App. 4th 1200, 117 Cal. Rptr. 2d 828, citing *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 212, 105 S. Ct. 1904, 85 L. Ed. 2d 206, *Balcorta v. Twentieth Century-Fox Film Corp.* (9th Cir. 2000) 208 F.3d 1102, 1111.

(n16)Footnote 16. *Lujan v. Southern California Gas Co.* (2002) 96 Cal. App. 4th 1200, 117 Cal. Rptr. 2d 828 (although employer computed overtime compensation according to complex mathematical formula corresponding to federal standard, parties did not dispute the calculation method; thus, while factual inquiry would necessarily include reference to collective bargaining agreement, no preemption occurred), citing *Caterpillar, Inc. v. Williams* (1987) 482 U.S. 386, 399, 107 S. Ct. 2425, 96 L. Ed. 2d 318; *Cramer v. Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683, 694. *See also* *Gregory v. RSWL SCIE* (9th Cir. 2003) 317 F.3d 1050, 1052-1054 (overtime claim by employee in entertainment industry covered by collective bargaining agreement was not preempted by LMRA; state law exclusively determined whether overtime rate calculation accorded with *Lab. Code* § 510, and there was no dispute over terms or interpretation of CBA).



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.03

AUTHOR: By Carol S. Sanders, J.D.

§ 3.03 Employees Exempt From Overtime Pay Requirements

[1] California Law

[a] Exemptions From Both Minimum Wage and Overtime Provisions

Certain employees are exempt from both the overtime and minimum wage provisions of all the California wage orders. These employees include:

1. Persons employed in administrative, executive, or professional capacities;n1
2. Outside salespersons;n2
3. Certain members of the employer's family.n3

For a full discussion of the requirements for these exemptions, *see* ch. 2.

[b] Exemptions From Overtime Pay Provisions

[i] Employees Covered Under Collective Bargaining Agreements

Under all wage orders except the order governing agricultural occupations, the overtime pay provisions for adult employees do not apply to any employee covered by a collective bargaining agreement if that agreement provides premium wage rates for all overtime hours worked and a regular hourly rate for the employee of not less than 30% more than the state minimum wageⁿ⁴ (or at least \$10.40 per hour, effective January 1, 2008).ⁿ⁵ Under the wage order for the agricultural occupations, the overtime pay provisions for adult employees do not apply to any employee covered by a collective bargaining agreement if that agreement provides premium wage rates for overtime work and a cash wage rate for the employee of not less than \$1.00 per hour more than the minimum wage.ⁿ⁶ In addition, the overtime provisions of the wage order governing the transportation industry do not apply to employees who have entered into a collective

bargaining agreement under and in accordance with the provisions of the federal Railway Labor Act.ⁿ⁷

For discussion of the special rules under the FLSA relating to employees covered by collective bargaining agreements,ⁿ⁸ see § 3.06[2][c].

[ii] Certain Commissioned Employees

The overtime payment provisions of Wage Order Numbers 4-2001 (governing professional, technical, clerical, mechanical, and similar occupations) and 7-2001 (governing the mercantile industry) do not apply to any employee whose earnings exceed 1½ times the minimum wage (or \$10.13 per hour at the current hourly minimum wage of \$6.75)ⁿ⁹ if more than half of that employee's compensation represents commissions.ⁿ¹⁰

In interpreting this exemption, in *Keyes Motors, Inc. v. Division of Labor Standards Enforcement*,ⁿ¹¹ the court of appeal applied the definition of "commission wages" contained in *Labor Code section 204.1*.ⁿ¹² That statute provides in part that "[c]ommission wages are compensation paid to any person for services rendered in the sale of such employer's property or services and based proportionately upon the amount or value thereof."ⁿ¹³ Applying this definition, the court held that the exemption contained in Wage Order Number 7-80 for employees who receive more than half of their compensation in the form of commissions was inapplicable to mechanics employed by an automobile dealer, even though the mechanics' compensation was based on a fixed percentage of the amounts charged to customers.ⁿ¹⁴ The court noted that the mechanics had no direct dealings with the dealer's customers and thus were not engaged in the sale of the dealer's repair services.ⁿ¹⁵ The court further observed that mechanics perform hard physical labor and that an interpretation entitling them to overtime compensation was compatible with the intent behind the overtime requirements, which is to protect the health and safety of employees.ⁿ¹⁶

In *Ramirez v. Yosemite Water Co., Inc.*,ⁿ¹⁷ the California Supreme Court looked to the definition of "commission" contained in *Labor Code section 204.1*, which applies specifically to employees of vehicle dealers, but which both parties and the Court agreed was more generally applicable, to determine whether an outside salesperson was a commissioned employee.ⁿ¹⁸ Citing *Keyes Motors, Inc. v. Division of Labor Standards Enforcement*,ⁿ¹⁹ the Court stated that *Labor Code section 204.1* sets up two requirements, both of which must be met before a compensation scheme is deemed to constitute "commission wages." First, the employees must be involved principally in selling a product or service. Second, the amount of their compensation must be a percentage of the price of the product or service.ⁿ²⁰ In this case, the Court determined that it was unclear from the evidence presented whether the first prong of the test was met, and remanded for a determination on this issue.ⁿ²¹

An exemption similar to the California exemption exists under the FLSA, but the federal exemption is limited to commissioned employees of "retail or service establishments," as defined by federal statute.ⁿ²² For discussion of the federal exemption, see [2][c], below.

"Outside salespersons," as defined in the wage orders, are exempt from all provisions of all the wage orders, including the overtime provisions.ⁿ²³ For discussion of the exemption for outside sales personnel, see ch. 2.

[iii] Certain Motor Carrier Drivers

The overtime payment provisions of all wage orders, except the wage orders governing household occupationsⁿ²⁴ and the broadcasting and motion picture industries,ⁿ²⁵ are inapplicable to employees whose hours of service are regulated by the United States Department of Transportation under Title 49, *Code of Federal Regulations sections 395.1-395.13* or by Title 13, *California Code of Regulations sections 1200-1293*, which regulate hours of drivers of certain vehicles, including farm buses, farm labor vehicles, and other motor carriers.ⁿ²⁶

For a listing of federal exemptions, some of which relate to employees of motor carriers, see [2][b], below.

[iv] Taxicab Drivers and Certain Airline Employees

The overtime payment provisions of the wage order governing the transportation industry are not applicable to taxicab drivers.ⁿ²⁷ Taxicab drivers are also exempt from overtime compensation requirements under the FLSA.ⁿ²⁸

The overtime provisions of the transportation industry wage order are also inapplicable to employees of an airline certificated by the federal or state government who work up to 60 hours in a workweek due to a temporary modification in the employee's normal work schedule not required by the employer but arranged at the request of the employee, including but not limited to situations in which the employee requests a change in days off or trades days off with another employee.ⁿ²⁹

All transportation industry employees, including airline employees, are exempt from state overtime requirements if they are covered by a collective bargaining agreement entered into pursuant to the federal Railway Labor Act.ⁿ³⁰ Such airline employees are also exempt from the overtime provisions of the FLSA.ⁿ³¹

[v] Motion Picture Projectionists

The overtime payment provisions of the wage order governing the amusement and recreation industry are not applicable to employees whose duties are exclusively those of a motion picture projectionist.ⁿ³²

All motion picture theater employees are exempt from the overtime requirements of the FLSA.ⁿ³³

[vi] Certain Employees in Broadcasting Industry

The overtime payment provisions of the wage order governing the broadcasting industry are not applicable to any person employed as an announcer, news editor, or chief engineer by a radio or television station in a city or town that has a population of 25,000 or less.ⁿ³⁴

A similar exemption for these categories of broadcasting employees exists under the FLSA, except that the exemption is both broader, in that it encompasses larger cities and towns, and narrower, in that employers in even small cities and towns are not exempt if they are located within a certain distance from the principal city in a standard metropolitan statistical area with a population in excess of 100,000.ⁿ³⁵

[vii] Irrigators

The overtime payment provisions of the wage order governing agricultural occupations are not applicable to an employee during any week in which more than half of his or her working time is devoted to performing the duties of an irrigator.ⁿ³⁶

■ CONSULTANT'S COMMENT:

The wage order itself does not define the term "irrigator." For enforcement purposes, the DLSE defines an irrigator as a person who applies water to agricultural crops through the use of portable pipes, ditches, sprinkler systems, or gravity flow methods. Irrigators may carry, lay out, and connect pipes; monitor rates of flow; adjust valves; shovel dirt in building and repairing ditches and levees; start, stop, and repair pumping equipment or other water conveyance systems; disassemble sprinkler systems and move them to the next location; and perform other duties in connection with the application of water to agricultural field crops. The duties may also include rodent control. The term normally does not apply to persons employed in greenhouses or nurseries. *Commentary by Kirby Wilcox.*

An exemption for irrigation workers also exists under the FLSA, but with additional qualifications regarding the operation of the waterway and the exclusivity of its use for supply and storing of water for agricultural purposes.ⁿ³⁷

Note that *all* agricultural workers, not just irrigators, are exempt from the overtime requirements of the FLSA.ⁿ³⁸

[2] Federal Law

[a] Exemptions From Both Minimum Wage and Overtime Provisions

Employees who are exempt from both the overtime and minimum wage provisions of the Fair Labor Standards Act are discussed in Chapter 2. These employees include persons employed in executive, administrative, or professional capacities; outside salespersons; employees of certain retail or service establishments; employees of seasonal recreational establishments; and certain other employees specified in Title 29 *United States Code*, section 213(a).

[b] Exemptions From Overtime Pay Provisions Under Title 29 United States Code, Section 213(b)

In addition to employees who are wholly exempt from both the minimum wage and overtime provisions of the FLSA, several categories of employees are exempt from the overtime provisions only.ⁿ³⁹ Many of these federal exemptions are of limited use to California employers because the California wage orders do not contain a comparable exemption, or the comparable California exemption is narrower, thus leaving the employee subject to the overtime provisions of the applicable California wage order. The following categories of employees are exempt from the overtime provisions of the FLSA:

1. Employees of motor carriers engaged in interstate commerce who are subject to the maximum hours regulations of the Secretary of Transportation;ⁿ⁴⁰
2. Employees engaged in the operation of a common carrier by rail and subject to the maximum hours provisions of the Interstate Commerce Act;ⁿ⁴¹
3. Employees of an air carrier subject to the provisions of the Railway Labor Act;ⁿ⁴²
4. Individuals employed as outside buyers of poultry, eggs, cream, or milk, in their raw or natural state;ⁿ⁴³
5. Employees employed as seamen;ⁿ⁴⁴

■ CONSULTANT'S COMMENT:

Although seamen are not covered by the FLSA, they are covered under the California wage order governing the transportation industry,ⁿ⁴⁵ to the extent that California has jurisdiction over such employees. The DLSE's position is that the wage order covers such employees if they (1) are employed on a vessel that operates exclusively between California ports or that leaves from and returns to the same California port, (2) entered into their employment agreements in California, and (3) are California residents.ⁿ⁴⁶ *Commentary by Kirby Wilcox.*

6. Employees employed as announcers, news editors, or chief engineers by a radio or television station, if the station's major studio is located (A) in a city or town with a population of 100,000 or less, unless the city or town is part of a standard metropolitan statistical area that has a total population in excess of 100,000, or (B) in a city or town that has a population of 25,000 or less and is located in such a metropolitan statistical area, but is at least 40 airline miles from the principal city in the metropolitan area;ⁿ⁴⁷

7. Salespersons, partsmen, or mechanics primarily engaged in selling or servicing automobiles, trucks, or farm implements, if employed by nonmanufacturing establishments primarily engaged in the business of

selling the vehicles or implements to ultimate purchasers;ⁿ⁴⁸ "this exemption does not include employees whose primary duties are selling financing and warranties, not vehicles;ⁿ⁴⁹

8. Salespersons primarily engaged in selling trailers, boats, or aircraft, if employed by nonmanufacturing establishments primarily engaged in the business of selling these items to ultimate purchasers;ⁿ⁵⁰

9. Drivers or driver's helpers making local deliveries, compensated on the basis of trip rates or other delivery payment plan, if the Secretary finds that the plan has the purpose and effect of reducing hours worked by these employees to, or below, the maximum workweek under the FLSA;ⁿ⁵¹

10. Employees employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways not owned or operated for profit, or operated on a sharecrop basis, which are used exclusively for the supply and storing of water for agricultural purposes;ⁿ⁵²

11. Agricultural workers who are employed by farmers in livestock auction operations of such farmers, if the employee is primarily employed in agriculture, and is paid at least the minimum wage for work in connection with the livestock auction operations.ⁿ⁵³

12. Certain employees of country elevators.ⁿ⁵⁴

13. Employees engaged in the processing of maple sap into sugar (other than refined sugar) or syrup;ⁿ⁵⁵

14. Employees engaged in the transportation and preparation for transportation of fruits and vegetables from the farm to a place of first processing or marketing within the state, or engaged in the transportation of harvest workers to be employed within the same state;ⁿ⁵⁶

15. Drivers employed by employers engaged in the business of operating taxicabs;ⁿ⁵⁷

16. Employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions) for a public agency that employs less than five employees in these activities;ⁿ⁵⁸

17. Live-in domestic service employees;ⁿ⁵⁹

18. Married couples employed by a nonprofit educational institution to serve as resident parents to orphans or other children who reside at the institution, if the couple resides in the facilities, receives free board and lodging, and cash compensation of at least \$10,000;ⁿ⁶⁰

19. Motion picture theater employees;ⁿ⁶¹ and

20. Certain employees of logging and forestry operations employing no more than eight employees.ⁿ⁶²

[c] Commissioned Employees of Retail or Service Establishments

Under the FLSA, overtime compensation need not be paid to employees of a retail or service establishment if the employee's regular rate is in excess of 1 1/2 times the minimum hourly rateⁿ⁶³ and more than half of the employee's compensation for a representative period of not less than one month represents commissions on goods or services.ⁿ⁶⁴

A similar exemption exists under California law for commissioned employees in the professional, technical, clerical, and mechanical industriesⁿ⁶⁵ and the "mercantile" industry.ⁿ⁶⁶ The state exemption is broader than the federal exemption, because the definition of the "mercantile industry" is not limited to retail sales establishments, but applies to

"any industry, business, or establishment for the purpose of *purchasing, selling, or distributing* goods or commodities *at wholesale or retail*; or for the purpose of renting goods or commodities."n67 For discussion of the state exemption, *see* [1][b][ii], *above*.

Legal Topics:

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

Labor & Employment Law Collective Bargaining & Labor Relations General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Minimum Wage

FOOTNOTES:

(n1)Footnote 1. *See* 8 Cal. Code Reg. §§ 11010-11040, 11060-11160, P 1(A) (Cal. Wage Order Nos. 1-2001-4-2001, 6-2001-16-2001); 11050, P 1(B) (Cal. Wage Order No. 5-2001); Interim Wage Order 2001, P 3.

(n2)Footnote 2. *See* Lab. Code § 1171; 8 Cal. Code Reg. §§ 11010-11040, 11060-11100, 11130, P 1(B) (Cal. Wage Order Nos. 1-2001-4-2001, 6-2001-10-2001, 13-2001); 11050, 11110, 11120, 11160 P 1(C) (Cal. Wage Order Nos. 5-89, 11-80, 12-80, 16-2001).

(n3)Footnote 3. *See* 8 Cal. Code Reg. §§ 11010-11040, 11060-11100, 11130, 11150, P 1(C) (Cal. Wage Order Nos. 1-2001-4-2001, 6-2001-10-2001, 13-2001, 15-2001); 11050, 11110, 11120, 11160 P 1(D) (Cal. Wage Order Nos. 5-2001, 11-2001, 12-2001, 16-2001); 11140, P 1(B) (Cal. Wage Order No. 14-2001).

(n4)Footnote 4. *See* 8 Cal. Code Reg. § 11010, 11020, 11060, 11090, 11110, 11160, P 3(H); 11030, 11120, 11130, P 3(J); 11040, 11070, 11080, 11100, P 3(I), 11050, P 3(L); 11150, P 3(G) (Cal. Wage Order Nos. 1-2001, 2-2001, 6-2001, 9-2001, 10-2001, 16-2001, 3-2001, 12-2001, 13-2001, 4-20001, 7-2001, 8-2001, 10-2001, 5-2001, 15-2001). *See also* *Fitz-Gerald v. SkyWest, Inc.* (2007) 155 Cal. App. 4th 411, 418-419, 65 Cal. Rptr. 3d 913 (under 8 Cal. Code Reg. § 11090, airline was exempt from having to pay flight attendants overtime wages, because claim was subject to collective bargaining agreement negotiated and approved by flight attendants); *Lujan v. Southern California Gas Co.* (2002) 96 Cal. App. 4th 1200, 117 Cal. Rptr. 2d 828 (under Wage Order 4-89, parties to collective bargaining agreement providing for payment of "cash wage rate" of at least one dollar more than minimum wage are free to negotiate manner of calculating overtime pay without considering terms of subdivision 3(A) as long as "premium" is paid).

(n5)Footnote 5. *See* 8 Cal. Code Reg. §§ 11010-11160, P 4(A) (Cal. Wage Order Nos. 1-2001-16-2001). For discussion of minimum wages, *see* ch. 2. Note that the hourly minimum wage, became \$8.00, effective January 1, 2008.

(n6)Footnote 6. 8 Cal. Code Reg. 11140, P 3(E) (Cal. Wage Order No. 14-2001).

(n7)Footnote 7. 8 Cal. Code Reg. § 11090, P 1(D) (Cal. Wage Order No. 9-2001); *see* 45 U.S.C. § 151 *et seq.* (Railway Labor Act). *See, e.g.,* *Fitz-Gerald v. SkyWest, Inc.* (2007) 155 Cal. App. 4th 411, 419-422, 65 Cal. Rptr. 3d 913 (action by flight attendants alleging violations of California labor law regarding minimum wages and meal/rest breaks was preempted by Railway Labor Act, where trial court could not determine regular rate of compensation without interpreting collective bargaining agreement).

(n8)Footnote 8. *See* 29 U.S.C. § 207(b)(1), (2).

(n9)Footnote 9. *See* 8 Cal. Code Reg. §§ 11010-11150, P 4(A) (Cal. Wage Order Nos. 1-2001-15-2001). *See* ch. 2 for discussion of minimum wages. Note that the hourly minimum wage will be \$7.50 effective January 1, 2007, and \$8.00 January 1, 2008.

(n10)Footnote 10. 8 Cal. Code Reg. §§ 11040, 11070, P 3(D) (Cal. Wage Order Nos. 4-2001, 7-2001). *See also*

Harris v. Investor's Business Daily, Inc. (2006) 138 Cal. App. 4th 28, 36-39, 41 Cal. Rptr. 3d 108 (trial court erred in granting employer summary adjudication on claim that telemarketers who sold newspaper subscriptions were denied overtime compensation, since employees raised material issue of fact as to whether they were subject to commission exemption from California overtime protections, where employees clearly sold product, and where employer did not meet burden of demonstrating that more than half of employees' compensation was from commissions and that employees received more than one and one-half times the minimum wage).

(n11)Footnote 11. *Keyes Motors v. Division of Labor Standards Enforcement*(1987) 197 Cal. App. 3d 557, 242 Cal. Rptr. 873 .

(n12)Footnote 12. *See Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal. App. 3d 557, 562-563, 242 Cal. Rptr. 873 .

(n13)Footnote 13. *Lab. Code § 204.1* (emphasis added).

(n14)Footnote 14. *See Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal. App. 3d 557, 562-564, 242 Cal. Rptr. 873 ; *see* current Wage Order No. 7-2001.

(n15)Footnote 15. *See Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal. App. 3d 557, 563, 242 Cal. Rptr. 873 .

(n16)Footnote 16. *See Keyes Motors, Inc. v. Division of Labor Standards Enforcement* (1987) 197 Cal. App. 3d 557, 564, 242 Cal. Rptr. 873 .

(n17)Footnote 17. *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal. 4th 785, 85 Cal. Rptr. 2d 844, 978 P.2d 2 (citing Wilcox, California Employment Law).

(n18)Footnote 18. *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal. 4th 785, 803, 85 Cal. Rptr. 2d 844, 978 P.2d 2 .

(n19)Footnote 19. *Keyes Motors v. Division of Labor Standards Enforcement* (1987) 197 Cal. App. 3d 557, 242 Cal. Rptr. 873 .

(n20)Footnote 20. *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal. 4th 785, 804, 85 Cal. Rptr. 2d 844, 978 P.2d 2 .

(n21)Footnote 21. *Ramirez v. Yosemite Water Co., Inc.* (1999) 20 Cal. 4th 785, 804, 85 Cal. Rptr. 2d 844, 978 P.2d 2 .

(n22)Footnote 22. *See 29 U.S.C. § 207(i).*

(n23)Footnote 23. *See Lab. Code § 1171; 8 Cal. Code Reg. §§ 11010-11040, 11060-11090, 11100, 11130, 11160 P 1(C)* (Cal. Wage Order Nos. 1-2001-4-2001, 6-2001-10-2001, 13- 2001, 16-2001), *11050, 11110, 11120, P 1(C)* (Cal. Wage Order Nos. 5-2001, 11-2001, 12-2001).

(n24)Footnote 24. *See 8 Cal. Code Reg. § 11150, P 3* (Cal. Wage Order No. 15-2001).

(n25)Footnote 25. *See 8 Cal. Code Reg. §§ 11110, 11120, P 3* (Cal. Wage Order Nos. 11-2001, 12-2001).

(n26)Footnote 26. *See 8 Cal. Code Reg. § 11010, P 3(A)(2); 11020, 11060, P 3(J); 11030, 11050, 11130, P 3(I); 11040, 11070, 11080, P 3(K); 11090, 11100, 11160, P 3(L); 11140, P 3(D)* (Cal. Wage Order Nos. 1-2001, 2-2001, 6-2001, 3-2001, 5-2001, 13-2001, 4-2001, 7-2001, 8-2001, 9-2001, 11-2001, 16-2001, 14-2001). *See also Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, 824-827 (driver for company supplying uniforms and building

maintenance products was not exempt from overtime pay requirements under 8 C.C.R. §§ 11090(3)(F)(1), 11090(3)(H)(1), because driver was not engaged in transporting property in interstate commerce so as to be subject to federal regulations referenced in IWC order); *Gomez v. Lincare, Inc.* (2009) 173 Cal. App. 4th 508, 93 Cal. Rptr. 3d 388, 2009 Cal. App. LEXIS 634, *11-*22 (trial court erred in granting summary adjudication to employer as to employees' cause of action for failure to pay overtime compensation on ground that they were exempt from state overtime provisions as drivers of hazardous materials, where employer failed to meet its burden of presenting evidence showing that each plaintiff drove vehicle containing hazardous materials for some period of time on each and every workday); *Collins v. Overnite Transp. Co.* (2003) 105 Cal. App. 4th 171, 129 Cal. Rptr. 2d 254 (exemption for drivers survives Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999).

(n27)Footnote 27. 8 Cal. Code Reg. § 11090, P 3(M) (Cal. Wage Order No. 9-2001).

(n28)Footnote 28. See 29 U.S.C. § 213(b)(17).

(n29)Footnote 29. 8 Cal. Code Reg. § 11090, P 3(N) (Cal. Wage Order No. 9-2001).

(n30)Footnote 30. See 8 Cal. Code Reg. § 11090, P 1(E) (Cal. Wage Order No. 9-2001); see also 45 U.S.C. §§ 151-188 (Railway Labor Act).

(n31)Footnote 31. See 29 U.S.C. § 213(b)(3); see also discussion in [2][b], below.

(n32)Footnote 32. 8 Cal. Code Reg. § 11100, P 3(G) (Cal. Wage Order No. 10-2001).

(n33)Footnote 33. See 29 U.S.C. § 213(b)(27); see also discussion under [2][b], below.

(n34)Footnote 34. 8 Cal. Code Reg. § 11110, P 3(K) (Cal. Wage Order No. 11-2001).

(n35)Footnote 35. See 29 U.S.C. § 213(b)(9); see also discussion in [2][b], below.

(n36)Footnote 36. 8 Cal. Code Reg. § 11140, P 3(C) (Cal. Wage Order No. 14-2001).

(n37)Footnote 37. See 29 U.S.C. § 213(b)(12); see also discussion under [2][b], below.

(n38)Footnote 38. See 29 U.S.C. § 213(b)(12).

(n39)Footnote 39. See 29 U.S.C. § 213(b).

(n40)Footnote 40. 29 U.S.C. § 213(b)(1); *Reich v. American Driver Service, Inc.* (9th Cir. 1994) 33 F.3d 1153, 1155; see 49 U.S.C. § 3102 (authority of Secretary of Transportation to establish qualifications and maximum hours of service); 49 C.F.R. §§ 395.1-395.13 (federal maximum hours regulations for employees of motor carriers). See also *Klitzke v. Steiner Corp.* (9th Cir. 1997) 110 F.3d 1465, 1470 (intrastate private motor carriers of goods obtained from out-of-state vendors are exempt from FLSA). These employees are also exempt from the overtime provisions of the California wage orders. see 8 Cal. Code Reg. §§ 11010-11030, 11060, 11080, 11130, P 3(G) (Cal. Wage Order Nos. 1-2001-3-2001, 5-2001, 6-2001, 8-2001, 13-2001); 11040, 11050, 11070, 11090, 11100, P 3(H) (Cal. Wage Order Nos. 4-2001, 5-2001, 7-2001, 8-2001, 9-2001); 11140, P 3(D) (Cal. Wage Order No. 14-80).

(n41)Footnote 41. See 29 U.S.C. § 213(b)(2); see 45 U.S.C. §§ 61-66 (statutory maximum hours limitations for employees of rail carriers). see *Klitzke v. Steiner Corp.* (9th Cir. 1997) 110 F.3d 1465, 1470 (intrastate private motor carriers of goods obtained from out-of-state vendors are exempt from FLSA).

(n42)Footnote 42. See 29 U.S.C. § 213(b)(3); see 45 U.S.C. § 181 et seq. (regulation of air carriers and employees under Railway Labor Act); see also 29 C.F.R. §§ 782.0-782.8. Such employees are also exempt under the California wage order applicable to the transportation industry. see 8 Cal. Code Reg. § 11090, P 1(E) (Cal. Wage Order No.

9-2001); *see also* discussion in [1][b][iv], *above*.

(n43)Footnote 43. *See* 29 U.S.C. § 213(b)(5). No comparable exemption exists under the California wage orders.

(n44)Footnote 44. *See* 29 U.S.C. § 213(b)(6); *see also* 29 C.F.R. §§ 783.0-783.51 (applications of FLSA to seamen). This exemption is limited to employees who perform services rendered primarily as an aid in the operation of a vessel as a means of transportation and who perform no substantial amount of work of a different character. *see* 29 C.F.R. § 783.31; *Worthington v. Icicle Seafoods, Inc.* (9th Cir. 1986) 796 F.2d 337, 338 ; *Donovan v. Nekton, Inc.* (9th Cir. 1983) 703 F.2d 1148, 1151 .

(n45)Footnote 45. *See* 8 Cal. Code Reg. § 11090, P 1, 2(N) (Cal. Wage Order No. 9-2001).

(n46)Footnote 46. *Pacific Merchant Shipping Ass'n v. Aubry* (9th Cir. 1990) 918 F.2d 1409, 1415-1427 (application of California overtime pay laws to seamen working on vessels that service oil rigs on high seas or territorial waters along coast was not preempted by federal law).

(n47)Footnote 47. 29 U.S.C. § 213(b)(9); *see also* 29 C.F.R. §§ 793.0-793.18. Under California law, announcers, news editors, or chief engineers are exempt only if the radio or television station employing them is located in a city or town with a population of 25,000 or less. *see* 8 Cal. Code Reg. § 11110, P 3(K) (Cal. Wage Order No. 11-2001); *see also* discussion under [1][b][vi], *above*. Unlike the FLSA, the wage order contains no exception to the exemption for radio or television stations in small towns located within large metropolitan areas.

(n48)Footnote 48. 29 U.S.C. § 213(b)(10). Under California law, such sales employees are exempt only if their earnings exceed 1 1/2 times the minimum wage and more than half of their compensation represents commissions; 8 Cal. Code Reg. §§ 11040, 11070, P 3(D) (Cal. Wage Order Nos. 4-2001, 7-2001).

(n49)Footnote 49. *See Gieg v. Howarth* (9th Cir. 2001) 244 F.3d 775, 776 ; *see also* discussion in [1][b][ii], *above*. The wage orders contain no exemption for mechanics.

(n50)Footnote 50. 29 U.S.C. § 213(b)(10)(B). Under California law, such employees would be exempt only if their earnings exceed 1 1/2 times the minimum wage and more than half of their compensation represents commissions. *see* 8 Cal. Code Reg. §§ 11040, 11070, P 3(D) (Cal. Wage Order Nos. 4-2001, 7-2001); *see also* discussion in [1][b][ii], *above*.

(n51)Footnote 51. 29 U.S.C. § 213(b)(11); *see also* 29 C.F.R. §§ 779.509-779.511. No comparable exemption exists under California law.

(n52)Footnote 52. 29 U.S.C. § 213(b)(12); *see also* 29 C.F.R. §§ 780.400-780.409. Under California law, agricultural workers, other than certain employees working on irrigation activities, are *not* exempt from overtime compensation requirements, although special overtime rules are applicable to them. *see* 8 Cal. Code Reg. § 11140, P 3(C) (Cal. Wage Order No. 14-2001); *see also* discussion under § 3.05[1][b].

(n53)Footnote 53. 29 U.S.C. § 213(b)(13); *see also* 29 C.F.R. §§ 780.600-780.621. No comparable exemption exists under California law; agricultural employees are the subject of a special wage order. *see* 8 Cal. Code Reg. § 11140, P 3 (Cal. Wage Order No. 14-2001); *see also* discussion under § 3.05[1][b].

(n54)Footnote 54. 29 U.S.C. § 213(b)(14); *see also* 29 C.F.R. §§ 780.700-780.724. No comparable exemption exists under California law.

(n55)Footnote 55. 29 U.S.C. § 213(b)(15); *see also* 29 C.F.R. §§ 780.800-780.819. Note that portions of the latter regulations are based on the pre-1974 version of 29 U.S.C. § 213(b)(15), which provided for a broader exemption. There is no comparable exemption under California law for such employees, who would be covered by 8 Cal. Code Reg. §

11080 (Cal. Wage Order No. 8-2001), governing "industries handling products after harvest."

(n56)Footnote 56. 29 U.S.C. § 213(b)(16); *see also* 29 C.F.R. §§ 780.900-780.917. There is no such specific exemption under the California wage orders. Such employees would be covered under one of several different wage orders, depending on the nature of the employer's business. *see* 8 Cal. Code Reg. §§ 11080, 11090, 11130, 11140, P 2(C) (Cal. Wage Order Nos. 8-2001, 9-2001, 13-2001, 14-2001) (wage orders governing industries handling products after harvest, transportation industry, industries preparing agricultural products for market on the farm, and agricultural occupations). However, the employee will be exempt from the overtime requirements of those wage orders if the employee is a driver whose hours of service are subject to certain federal or state regulations. *see* 8 Cal. Code Reg. § 11080, P 3(G) (Cal. Wage Order Nos. 8-2001) 11090, P 3(J) (Cal. Wage Order No. 9-2001); 11130, P 3(H) (Cal. Wage Order No. 13-2001), 11140, P 3(D) (Cal. Wage Order No. 14-2001); *see also* discussion in [1][b][iii], *above*.

(n57)Footnote 57. 29 U.S.C. § 213(b)(17). Taxicab drivers are also exempt from overtime requirements under state law. *see* 8 Cal. Code Reg. § 11090, P 3(M) (Cal. Wage Order No. 9-2001).

(n58)Footnote 58. 29 U.S.C. § 213(b)(20); *see also* 29 U.S.C. § 207(k) (partial exemption for employees in fire protection or law enforcement activities other than in public agency employing less than five employees in these activities), discussed in § 3.05[2][b].

(n59)Footnote 59. 29 U.S.C. § 213(b)(21); *see also* 29 C.F.R. § 552.102 (applicability of overtime provisions to domestic service employees generally). Under California law, live-in domestic service employees are not exempt, but are subject to special overtime compensation requirements. *see* 8 Cal. Code Reg. § 11150, P 3(A),(B) (Cal. Wage Order No. 15-2001); *see also* discussion in § 3.05[1][c].

(n60)Footnote 60. 29 U.S.C. § 213(b)(24). Although no comparable complete exemption exists under the California wage orders, such employees would be subject to the special 54-hour workweek provision for "personal attendants," discussed in § 3.05[1][d]. *see* 8 Cal. Code Reg. § 11050, PP 2(N), 3(E) (Cal. Wage Order No. 5-2001).

(n61)Footnote 61. 29 U.S.C. § 213(b)(27). Under the California wage order governing the recreation and amusement industries, only employees whose duties are exclusively those of a motion picture projectionist are exempt from overtime compensation requirements. *see* 8 Cal. Code Reg. § 11100, P 3(G) (Cal. Wage Order No. 10-2001); *see also* discussion under [1][b][v], *above*.

(n62)Footnote 62. *See* 29 U.S.C. § 213(b)(28). California Interim Wage Order 2000, effective October 1, 2000, regulates logging work activities. For discussion of the scope of the various wage orders, *see* ch. 1.

(n63)Footnote 63. *See* 29 U.S.C. § 206(a). For discussion of minimum wages, *see* ch. 2.

(n64)Footnote 64. 29 U.S.C. § 207(i); *see* 29 C.F.R. §§ 779.410-779.421. *See, e.g., Gieg v. DRR* (9th Cir. 2005) 407 F.3d 1038, 1045-1053 (finance and insurance managers of retail automobile dealerships, who were compensated almost exclusively by commission, were not entitled to overtime pay for hours worked beyond standard 40-hour workweek pursuant to 29 U.S.C. § 207(a), even if dealerships derived significant income from lease agreements with end use customers, where exemption under 29 U.S.C. § 207(i) was not limited to dealerships' personnel who actually sold cars, but applied also to finance and insurance professionals because by its terms, exemption applied to "any employee" of dealerships who met compensation requirements and did not apply solely to employees selling retail goods and services).

(n65)Footnote 65. *See* 8 Cal. Code Reg. § 11040, P 3(D) (Cal. Wage Order No. 4-2001).

(n66)Footnote 66. *See* 8 Cal. Code Reg. § 11070, P 3(D) (Cal. Wage Order No. 7-2001).

(n67)Footnote 67. *See* 8 Cal. Code Reg. § 11070, P 2(H) (Cal. Wage Order No. 7-2001) (emphasis added); *see*

also discussion in ch. 1, regarding scope of wage orders.



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.04

AUTHOR: By Carol S. Sanders, J.D.

§ 3.04 Determining Basic Maximum Hour Standards and Overtime Premium Rates

[1] California Law

[a] Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999

[i] Overtime Requirements Generally

Reaffirming California's "unwavering commitment to uphold the eight-hour workday as a fundamental protection for working people[.]" the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 (the Act) generally provides for overtime premium rates for work in excess of eight hours in one workday and work in excess of 40 hours in any one workweek.ⁿ¹

The Act, which provides that eight hours of labor constitute a day's work,ⁿ² deletes the authority of parties under prior law to otherwise expressly stipulate the number of hours that constitute a day's work.ⁿ³ Instead, the Act provides that, except for an employee working pursuant to an alternative workweek schedule, as specified,ⁿ⁴ hours worked in excess of eight hours in one day, hours worked in excess of 40 hours in one workweek, and the first eight hours worked on the seventh day of work in a given workweek must be compensated at the rate of no less than one and one-half times the regular rate of pay of an employee.ⁿ⁵ Hours worked in excess of 12 hours in one day as well as hours worked in excess of eight hours on any seventh day of a workweek must be compensated at the rate of no less than twice the regular rate of pay of an employee.ⁿ⁶ Employees working under an alternative workweek schedule under other specified provisions of the Act are exempt from these requirements.ⁿ⁷

■ CONSULTANT'S COMMENT:

Readers should be aware that the text of this treatise correctly states that *Labor Code Section 510(a)* provides for double time "for any work in excess of eight hours on any seventh day of a workweek." As phrased, this would permit an employee to take vacation or be absent for any other permissible reason on the first six days of a workweek and nevertheless receive double time for any work performed after eight hours on the seventh day. However, the IWC has interpreted Section 510(a) for all wage orders as if it

said all hours worked in excess of eight (8) hours on *the seventh (7th) consecutive day of work in a workweek*. *Commentary by Kirby Wilcox.*

Nothing in section 510 requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work.^{n7.1} Thus, for example, when an employer pays an employee a premium rate of time and one-half for work on holidays, the plain language of *Labor Code section 510* does not require the employer to compensate an employee at a rate higher than one and one-half times the regular rate of pay if the employee works more than eight hours in one day or 40 hours in one week.^{n7.2}

[ii] Permissible Alternative Workweeks

An employer may propose, and employees may adopt, an alternative workweek schedule that permits work by affected employees for no longer than ten hours per day within a 40-hour workweek without the payment of overtime to the affected employees, provided the schedule is approved by secret ballot by at least two-thirds of the affected employees in a work unit.ⁿ⁸ For these purposes, a "work unit" includes a division, department, job classification, shift, separate physical location, or subdivisions of any of those. A work unit may consist of an individual employee, as long as the criteria for an identifiable work unit are met.^{n8.1}

The regularly scheduled alternative workweek proposed by an employer for adoption by employees may be a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose.^{n8.2} The menu of work schedule options may include a regular schedule of eight-hour days compensated in accordance with *Lab. Code § 510(a)*.^{n8.3} Employees who adopt a menu of work schedule options may, with employer consent, move from one schedule option to another on a weekly basis.^{n8.4}

An employee working more than eight hours, but not more than 12 hours, in a day under an alternative workweek schedule is required to be paid an overtime rate of compensation of no less than one and one-half times his or her regular rate of pay for work in excess of the regular hours established by that schedule and for work in a workweek in excess of 40 hours per week and an overtime rate of compensation of no less than double his or her regular rate of pay for any work in excess of 12 hours per day and work in excess of eight hours on days worked beyond the regularly scheduled workweek under the agreement.ⁿ⁹ For example, an alternative workweek approved by the employees, during which the employees work three 12-hour days and one six-hour day, for which the employer pays overtime at time and one-half for the 11th and 12th hours on the 12-hour days, complies with *Labor Code section 511*.^{n9.1} Nothing in *Labor Code § 511* requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work.^{n9.2}

An employer may not reduce an employee's regular rate of hourly pay as a result of the adoption, repeal, or nullification of an alternative workweek schedule.^{n9.3}

An employer must make a reasonable effort to find a work schedule not to exceed eight hours in a workday to accommodate an employee eligible to vote in an alternative workweek election who is unable to work the alternative schedule hours established as the result of the election. The employer may provide a work schedule not to exceed eight hours in a workday to accommodate any employee hired after the date of the election who is unable to work the alternative schedule established as the result of the election.^{n9.4} The employer must explore any available reasonable alternative means of accommodating the religious belief or observance of an affected employee that conflicts with an adopted alternative workweek schedule.^{n9.5}

■ CONSULTANT'S COMMENT:

According to pre-1998 enforcement policy, the DLSE required payment of overtime to employees governed by an alternative workweek who worked on any day other than a day covered by the schedule.

Thus, for example, an employee whose work is governed by an alternative work schedule comprised of four nine-hour days from Monday through Thursday was entitled to overtime for work on Friday, even if the work did not take the employee beyond forty hours in the workweek. (This hypothetical assumes a workweek from Sunday midnight to Sunday midnight.) The DLSE has followed a similar enforcement rule since the enactment of AB 60 on January 1, 2000. *Commentary by Kirby Wilcox.*

[iii] Makeup Work Time Due to Employee's Personal Obligation

If an employer approves the written request of an employee to make up work time that is lost as a result of a personal obligation of the employee, the hours of that makeup work time, if performed in the same workweek in which the time was lost, may not be counted towards computing the total number of hours worked in a day for purposes of the overtime requirements of *Labor Code* §§ 510 and 511,ⁿ¹⁰ except for hours in excess of 11 hours of work in one day or 40 hours in one workweek.ⁿ¹¹ An employee must provide a signed written request for each occasion he or she makes that request.ⁿ¹² An employer is prohibited from encouraging or otherwise soliciting an employee to make that request.ⁿ¹³

■ CONSULTANT'S COMMENT:

Labor Code Section 513 begins with the word, "If." Practitioners should expect the DLSE to interpret this Section as providing for make-up time only at the employer's discretion. Make-up time is not a mandatory right. Thus, employers likely are permitted to implement Section 513, or not, at any time. For example, absent evidence of discriminatory treatment actionable under some other statute, an employer has the discretion to grant requests for make-up time at certain times of the year or under certain circumstances, but not others. Furthermore, if an employer already has a make-up time policy, it is not required to supplant that policy with the terms of Section 513. However, if an employer has no make-up time policy, or if it has a make-up time policy that will create overtime obligations under the new eight-hour day, Section 513 offers the only means to secure relief from such overtime. *Commentary by Kirby Wilcox.*

[iv] Exceptions for Administrative, Executive, and Professional Employees

Previous wage orders provided that no person employed in an administrative, executive, or professional capacity was required by those wage orders to be compensated for overtime work.ⁿ¹⁴ The Act authorizes the IWC to establish exemptions, with specified limitations, from the requirement that overtime compensation be paid for overtime workⁿ¹⁵ for executive, administrative, and professional employees, provided that the employee is primarily engaged in the duties which meet the test of the exemption and the employee earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.ⁿ¹⁶ In wage orders effective January 1, 2001, the IWC defined what it means to be employed in an executive, administrative or professional capacity.ⁿ¹⁷

■ CONSULTANT'S COMMENT:

Labor Code Section 515(a) requires the payment of at least one-month's salary to all exempt employees, equivalent to "two times the state minimum wage for full-time employment." The drafters of the statute may not have considered that exempt employees can be part-time or full-time. Read literally, Section 515(a) requires the payment of a month's salary (based on twice the minimum wage) to exempt employees who may work only one workweek in a month. This base salary requirement may be low enough to permit many employers to avoid the consequences of a literal reading of Section 515(a), but practitioners will need to wait to determine whether the DLSE will apply some form of pro rata interpretation rule to part-time exempt workers. *Commentary by Kirby Wilcox.*

In addition to exemptions to overtime payment requirements in wage orders for professional, executive or administrative employees in *Labor Code Section 515*, the overtime payment requirements of *Labor Code Section 510* do not apply to a teacher at a private elementary or secondary academic institution in which pupils are enrolled in kindergarten or any of grades 1 to 12, inclusive.^{n17.1} Further, unless Labor Code provisions are specifically made

applicable to public employers, they apply only to employers in the private sector. *Labor Code* § 510 does not expressly apply to public entities. Therefore, for example, it did not apply to a public water storage district.^{n17.2}

[v] Exceptions for Employees of Specified Industries

The Act repealed provisions of the Labor Code which contained specific workday and workweek requirements relating to employees of ski establishments,ⁿ¹⁸ employees of licensed hospitals,ⁿ¹⁹ and stable employees engaged in the raising, feeding, or management of racehorses.ⁿ²⁰ The Act also repealed the provisions exempting employers engaged in specified commercial fishing enterprises from the minimum wage and maximum hour provisions of existing law.ⁿ²¹

[vi] Other Exceptions

The Act does not apply to employees covered by a valid collective bargaining agreement, if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage.ⁿ²² When determining the scope of the collective bargaining exemption for any particular circumstance, it will be necessary to focus on the first two words of *Labor Code Section 514* "This chapter" and make certain that the chapter extends to the policy or practice in question.

In addition, employment in which the hours of work do not exceed 30 hours in a week or 6 hours in a day are exempt from the general provisions of the Act relating to the hours and days that constitute a workday and a workweek, and related provisions.ⁿ²³

Further, persons employed in an agricultural occupation generally are exempt from specified regulation under the Labor Code.ⁿ²⁴

[vii] Meal Periods

The Act codifies the prohibition against employing an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, with the exception that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.ⁿ²⁵ The Act further prohibits an employer from employing an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, with a specified exception.ⁿ²⁶ Notwithstanding the foregoing, the Industrial Welfare Commission (IWC) may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.ⁿ²⁷ Meal periods are discussed in detail in § 3.23, *below*. The meal requirement does not apply to employees in the wholesale baking industry who are subject to an Industrial Welfare Commission Wage Order and are covered by a valid collective bargaining agreement with specific provisions.ⁿ²⁸

■ CONSULTANT'S COMMENT:

Read in conjunction with one another, *Labor Code Sections 512* and *515(a)*, do not provide an exception to the meal period rules for exempt employees. Whether the DLSE will make such an exception as an enforcement practice is uncertain. *Commentary by Kirby Wilcox.*

[viii] Days of Rest

With specified exceptions, the Act relaxes portions of *Labor Code Sections 551* and *552*, which pertain to one day of rest in every period of seven days.ⁿ²⁹ In general, an employer is not required to adhere to a strict requirement of one day's rest in seven and may accumulate days of rest for its employees, so long as: (1) the nature of the employment reasonably requires that the employee work seven or more consecutive days; and (2) in each calendar month, the

employees receive days of rest equivalent to one day's rest in seven.ⁿ³⁰

[ix] Civil Penalties

An employer, or other person acting on behalf of an employer, is subject to civil penalties for the violation of provisions of the Act or provisions regulating hours and days of work of wage orders of the IWC.ⁿ³¹ The Labor Commissioner is authorized to issue citations for violations of the Act regulating the payment of wages for overtime work and provisions regulating hours and days of work in wage orders of the IWC.ⁿ³²

[x] Wage Order Nos. 1-2001-16-2001

The IWC adopted, effective January 1, 2001, wage orders governing overtime compensation and certain elements of alternative workweek schedules, including conduct of employee workweek elections.ⁿ³³

[a.1] Workday and Workweek as Basic Units for Determining Entitlement to Overtime Pay

All of the California wage orders provide that an overtime premium must be paid if a nonexempt employee works more than a specified number of hours in a workday and more than a specified number of hours in a workweek. For all industries and for all occupations except the agricultural occupations and the household occupations, an overtime premium must be paid for hours worked in excess of eight hours per workday or 40 hours per week and for work performed on the seventh consecutive day of work in a workweek.ⁿ³⁴

A "workday" means any 24 consecutive hours beginning at the same time each calendar day.ⁿ³⁵ A "workweek" means any seven consecutive days, starting with the same calendar day each week. Thus, a "workweek" is a fixed and regularly recurring period of 168 hours or seven consecutive 24-hour periods.ⁿ³⁶

Once established by the employer, the workweek is deemed as fixed by the DLSE for purposes of overtime pay computation. The DLSE permits a change in the workweek under the wage orders only if the change is intended to be permanent and is not designed to evade overtime obligations.ⁿ³⁷ If the employee's workweek is not specified in the employer's records, the DLSE will for enforcement purposes use the calendar week, from 12:01 a.m. Sunday through midnight Saturday, with each workday ending at midnight.ⁿ³⁸ For discussion of how overtime is computed when there is a change in the workweek, *see* § 3.11[2].

Under federal law, with certain limited exceptions discussed in this chapter, only the workweek is used as the measuring unit for overtime worked, because overtime compensation is required only for hours worked in excess of 40 during one workweek, and there is no overtime premium for hours worked during any given workday.ⁿ³⁹

[b] Overtime Premium Requirements Based on Workday: Wage Order Nos. 2-2001, 3-2001, 6-2001, 8-2001, 10-2001, 11-2001, 12-2001, 13-2001, 14-2001, 15-2001

[i] Premium of 1 1/2 -Time Pay for Hours Worked Over Eight During Weekday or Hours Worked Over 40 During Workweek

In the following industries and occupationsⁿ⁴⁰ nonexempt employees must be paid an overtime premium for all hours worked in excess of eight during the workday and in excess of 40 during the workweek, as well as for work performed on the seventh workday in a workweek:

1. Manufacturing industry;ⁿ⁴¹

2. Personal service industry;ⁿ⁴²

3. Canning, freezing, and preserving industry;n43
4. Professional, technical, clerical, mechanical and similar occupations;n44
5. Public housekeeping industry;n45
6. Laundry, linen supply, dry cleaning, and dyeing industry;n46
7. Mercantile industry;n47
8. Industries handling products after harvest;n48
9. Transportation industry;n49
10. Amusement and recreation industry;n50
11. Broadcasting industry;n51
12. Motion picture industry;n52
13. Industries preparing agricultural products for market, on the farm;n53
14. On-site construction, drilling, logging, and mining occupations;n54
15. Any industry or occupation not previously covered.n55

However, a nonexempt employee in the agricultural occupations may be employed on seven workdays in one workweek with no overtime pay required if the total hours of employment during the workweek do not exceed 30, and the total hours of employment in any one workday during that workweek do not exceed six.n56 Nonexempt live-in employees in the household occupations must be paid an overtime premium for time worked in excess of five workdays in a workweekn57 and for work performed during scheduled off-duty hours.n58 Nonexempt non-live-in employees in the household occupations must be paid an overtime premium for hours worked in excess of eight in one day and in excess of 40 in one week.n59

Except as noted in [ii], *below*, employees in the industries governed by these wage orders who work more than 40 hours in any workweek must be paid at least 1 1/2 times their regular rate of pay for all hours worked in excess of 40 hours.n60 Except as noted below,n61 in these industries employees must be paid at least 1 1/2 times their regular rate of pay for all hours worked in excess of eight hours, up to and including 12 hours, in any workday, and for the first eight hours worked on the seventh workday in a workweek.n62 Thereafter, the employees must be paid a premium of double their regular rate of pay, as discussed in [iii], *below*.

■ ILLUSTRATION 1 (Weekly Overtime Premium):

Employee is employed in a business covered by Wage Order No. 3-2001 and is not exempt from its provisions. Employee's regular rate of pay is \$10.00 per hour. No special overtime exception is applicable. Employee's regular workweek runs from 12:01 a.m. Monday through midnight Sunday. During one workweek, Employee worked the following number of hours: Monday--8 hours; Tuesday--2 hours; Wednesday--8 hours; Thursday--8 hours; Friday--8 hours; Saturday--8 hours, for a total of 42 hours. Employee is entitled to overtime compensation of 1 1/2 times Employee's regular rate of pay (or \$15.00 per hour) for the two hours worked in excess of 40 during the workweek. Therefore, Employee's gross pay for the week equals \$430.00 (40 hours times \$10.00, plus two hours times \$15.00).

■ ILLUSTRATION 2 (Daily Overtime Premium):

Employee is employed in a personal service industry covered by California Wage Order No. 2-2001 and is not exempt from its provisions. Employee's regular rate of pay is \$10.00 per hour. No special overtime exception is applicable. Employee's regular workweek runs from 12:01 a.m. Monday through midnight Sunday. During one workweek, Employee worked the following number of hours: Monday--8 hours; Tuesday--10 hours; Wednesday--6 hours; Thursday--12 hours; Friday--4 hours. Although the total hours worked by Employee during the workweek does not exceed 40, Employee is entitled to overtime compensation of 1 1/2 times Employee's regular rate of pay (or \$15.00 per hour) for the two hours worked in excess of eight hours on Tuesday, and for the four hours worked in excess of eight hours on Thursday. Therefore, Employee's gross pay for the week equals \$430.00 (34 hours times \$10.00, plus six hours times \$15.00).

[ii] Exceptions

Agricultural employees are paid 1 1/2 times their regular rate of pay only after working 10 hours in a workday or six days in a workweek.ⁿ⁶³ Live-in domestic employees qualify for 1 1/2 times their regular rate of pay for work performed during scheduled off-duty hoursⁿ⁶⁴ or for up to nine hours worked on the sixth day in a workweek.ⁿ⁶⁵ For a discussion of the special maximum work schedules applicable to these and certain other employees, *see* § 3.05[1]. For a discussion of different premiums applicable to agreements for alternative work schedules under California law, *see* § 3.06[1]. For a discussion of complete exemptions to overtime compensation requirements under California law, *see* § 3.03[1].

[iii] Premium of Double-Time Pay for Over 12 Hours Worked During Workday

Generally, an employee must be paid double his or her regular rate of pay for all hours worked in excess of 12 hours in any one workday and for all hours worked in excess of eight hours on the seventh day of work in any workweek.ⁿ⁶⁶ However, agricultural and non-live-in household employees are paid double their regular rate of pay only for hours worked in excess of eight on the seventh day of work in the workweek.ⁿ⁶⁷ Live-in household employees qualify for double their regular rate of pay for time worked in excess of nine hours on the sixth and seventh workday.ⁿ⁶⁸ Non-live-in employees in the household occupations are paid double time for the first eight hours worked on the seventh consecutive day of work in a workweek.ⁿ⁶⁹ For a discussion of the special maximum work schedules applicable to these and certain other employees, *see* § 3.05[1]. For a discussion of different premiums applicable to agreements for alternative work schedules under California law, *see* § 3.06[1]. For a discussion of complete exemptions to overtime compensation requirements under California law, *see* § 3.03[1].

[iv] Minors

Under the Labor Code, with certain exceptions,ⁿ⁷⁰ minors may not be employed more than eight hours in any workday, nor more than 40 hours per workweek if the minor is age 15 or younger, or 48 hours per workweek if the minor is age 16 or 17.ⁿ⁷¹ Thus, as a practical matter the daily premium under the wage orders in these industries and occupations is not operative for minors. However, most of the 2001 wage orders, except Wage Order No. 12-2001 (governing the motion picture industry) and Wage Order No. 14-2001 (governing agricultural occupations), provide that 1 1/2 times the minor's regular rate of pay must be paid for all hours worked in excess of 40 in any workweek.ⁿ⁷² Minors in the motion picture industry must be paid 1 1/2 times their regular rate of pay for all hours worked on the sixth consecutive day in a workweek.ⁿ⁷³

Minors who are 16 and 17 years of age and who are not required by law to attend school are an exception. They may be employed for the same hours as an adult and are subject to the overtime provisions applicable to adults employed in the same industry or occupation.ⁿ⁷⁴ The wage order covering agricultural occupations contains no provision for overtime for minors unless the minors fall within this exception.ⁿ⁷⁵

For a full discussion of permissible hours and times of employment of minors, *see* Ch. 6.

[2] Federal Law

[a] Workweek as Basic Unit for Determining Entitlement to Overtime Pay

[i] Generally

Under the FLSA, except for certain categories of employees,ⁿ⁷⁶ there is no provision for overtime compensation on a daily basis.ⁿ⁷⁷ Rather, overtime compensation is based only on hours worked in excess of 40 during the workweek.ⁿ⁷⁸

For purposes of the FLSA, an employee's workweek is defined as a fixed and regularly recurring period of 168 hours, or seven consecutive 24-hour periods.ⁿ⁷⁹ It need not coincide with the calendar week, but may begin on any day and at any hour of the day.ⁿ⁸⁰ For purposes of computing pay due under the FLSA, a single workweek may be established as a whole or different workweeks may be established for different employees or groups of employees.ⁿ⁸¹ Once the beginning of the workweek is established it remains fixed, regardless of the schedule of hours worked by the employee; however, a change in the beginning of the workweek may be made if it is intended to be permanent and is not designed to evade the overtime requirements of the Act.ⁿ⁸²

[ii] When Workday Applicable

Overtime compensation is payable for hours worked in one workday in excess of specified maximums under special rules applicable to the following categories of employees:

1. Employees covered under a collective bargaining agreement guaranteeing specified hours of work;ⁿ⁸³
2. Certain employees in the petroleum industry;ⁿ⁸⁴
3. Hospital employees on a 14-day work schedule;ⁿ⁸⁵
4. Certain employees in the tobacco industry;ⁿ⁸⁶ and
5. Certain employees in the cotton and sugar processing industries.ⁿ⁸⁷

[b] General Overtime Compensation Requirements

No employer subject to the FLSAⁿ⁸⁸ may employ any nonexempt employeeⁿ⁸⁹ for a workweek longer than 40 hours unless that employee receives compensation for employment in excess of 40 hours at a rate not less than 1 1/2 times the regular rate at which he or she is employed.ⁿ⁹⁰ For discussion of special maximum work schedules applicable to certain types of employees, *see* § 3.05[2]. For discussion of special rules regarding overtime for employees under certain voluntary agreements, *see* § 3.06[2].

[c] Domestic Service Employees

Employees in domestic service are expressly included as employees to whom the employer must pay overtime compensation of 1 1/2 times the employee's regular rate of pay for all hours in excess of 40 during the workweek.ⁿ⁹¹ However, domestic service workers who reside in the household in which they workⁿ⁹² and persons employed on a casual basis as babysitters or companionsⁿ⁹³ are exempt from the overtime provisions.ⁿ⁹⁴

Note that both live-in and non-live-in domestic service workers (except for "personal attendants," as defined in the wage

orders) are subject to overtime requirements under California law.ⁿ⁹⁵

[d] Nonwaivability

The employer's obligation to pay overtime compensation as required under the FLSA cannot be waived or substituted by an agreement to work overtime at a lesser rate.ⁿ⁹⁶ Furthermore, an employee's entitlement to overtime cannot be waived by an agreement to work only a specified number of hours if in fact the employee works more than the number of hours agreed to.ⁿ⁹⁷

Legal Topics:

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

Labor & Employment Law
Collective Bargaining & Labor Relations
General Overview
Labor & Employment Law
Wage & Hour Laws
Coverage & Definitions
Overtime & Work Period
Labor & Employment Law
Wage & Hour Laws
Statutory Application
General Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 510; see also 1999 Stats. Ch. 134, § 2(g).*

(n2)Footnote 2. *Lab. Code § 510.*

(n3)Footnote 3. *See former Lab. Code § 510.*

(n4)Footnote 4. *See Lab. Code §§ 511, 514, 554.*

(n5)Footnote 5. *Lab. Code § 510(a). See, e.g., Gieg v. DRR (9th Cir. 2005) 407 F.3d 1038, 1045-1053* (finance and insurance managers of retail automobile dealerships, who were compensated almost exclusively by commission, were not entitled to overtime pay for hours worked beyond standard 40-hour workweek pursuant to 29 U.S.C. § 207(a), even if dealerships derived significant income from lease agreements with end use customers, where exemption under 29 U.S.C. § 207(i) was not limited to dealerships' personnel who actually sold cars, but applied also to finance and insurance professionals because by its terms, exemption applied to "any employee" of dealerships who met compensation requirements and did not apply solely to employees selling retail goods and services).

(n6)Footnote 6. *Lab. Code § 510(a).*

(n7)Footnote 7. *Lab. Code § 510(a)(1)-(3).*

(n8)Footnote 7.1. *Lab. Code § 510(a).*

(n9)Footnote 7.2. *Advanced-Tech Security Services, Inc. v. Superior Court (2008) 163 Cal. App. 4th 700, 705-710, 77 Cal. Rptr. 3d 757.*

(n10)Footnote 8. *Lab. Code § 511(a).*

(n11)Footnote 8.1. *Lab. Code § 511(i).*

(n12)Footnote 8.2. *Lab. Code § 511(a).*

(n13)Footnote 8.3. *Lab. Code § 511(a).*

(n14)Footnote 8.4. *Lab. Code § 511(a).*

(n15)Footnote 9. *Lab. Code § 511(b).*

(n16)Footnote 9.1. *Mitchell v. Yoplait (2004) 19 Cal. Rptr. 3d 267*.

(n17)Footnote 9.2. *Lab. Code § 511(b)*.

(n18)Footnote 9.3. *Lab. Code § 511(c)*.

(n19)Footnote 9.4. *Lab. Code § 511(d)*.

(n20)Footnote 9.5. *Lab. Code § 511(d)*. *See Gov. Code § 12940(j)*.

(n21)Footnote 10. *See [i], [ii], above*.

(n22)Footnote 11. *Lab. Code § 513*.

(n23)Footnote 12. *Lab. Code § 513*.

(n24)Footnote 13. *Lab. Code § 513*.

(n25)Footnote 14. *See § 2.04[1][a][i] for a complete discussion*.

(n26)Footnote 15. *See Lab. Code §§ 510, 511; see also [i], [ii]*.

(n27)Footnote 16. *Lab. Code § 515(a); see Lab. Code § 515(b)* (IWC authorized to adopt or modify regulations relating to duties that meet test of exemption).

(n28)Footnote 17. *See 8 Cal. Code Reg. §§ 11010-11130, 11150-11160, P 1(A)* (Cal. Wage Order Nos. 1-2001-13-2001, 15-2001-16-2001).

(n29)Footnote 17.1. *See Lab. Code § 515.8*.

(n30)Footnote 17.2. *Johnson v. Arvin-Edison Water Storage Dist. (2009) 174 Cal. App. 4th 729, 734-739, 95 Cal. Rptr. 3d 53* (water storage district was exempt from *Labor Code § 510*, where legislature did not intend § 510 to apply to public agencies, and application of § 510 would infringe on district's sovereign powers).

(n31)Footnote 18. *See former Lab. Code § 1182.2; §§ 1.05[1][a], 3.05[1][e]*.

(n32)Footnote 19. *See former Lab. Code § 1182.9; §§ 1.05[1][a], 3.05 [1][f]*.

(n33)Footnote 20. *See former Lab. Code § 1182.10; § 1.05[2][c][iii]; but see Cal. Code Reg. § 11100, P 1(B)* (Cal. Wage Order No. 10-2001).

(n34)Footnote 21. *See former Lab. Code § 1182.3; § 1.05[1][a]; but see 8 Cal. Code Reg. § 11100, P 1(H)* (Cal. Wage Order No. 10-2001).

(n35)Footnote 22. *Lab. Code § 514*.

(n36)Footnote 23. *Lab. Code § 556; see § 3.21[2]*.

(n37)Footnote 24. *See Lab. Code § 554; see also § 3.21[2] discussing this exemption*.

(n38)Footnote 25. *Lab. Code § 512(a); see § 3.23*.

(n39)Footnote 26. *See Lab. Code § 512(a)*.

(n40)Footnote 27. *Lab. Code § 512(b)*.

(n41)Footnote 28. *Labor Code § 512(c)*.

(n42)Footnote 29. *Lab. Code § 554*.

(n43)Footnote 30. *Lab. Code § 554*.

(n44)Footnote 31. *See Lab. Code § 558(a). See also Lab. Code § 2699*.

(n45)Footnote 32. *Lab. Code § 558(b); see Lab. Code § 1197.1* (procedures for issuing, contesting, and enforcing assessments of civil penalties).

(n46)Footnote 33. *See 8 Cal. Code Reg. §§ 11010-11150* (Cal. Wage Order Nos. 1-2001-16-2001). Effective July 1, 2004, the California Legislature de-funded the IWC. However, the wage orders are still in effect, and the DLSE will continue to enforce them. *see* <http://www.dir.ca.gov/IWC/iwc.html>.

(n47)Footnote 34. *See 8 Cal. Code Reg. §§ 11010-11130, 11160, P 3(A)* (Cal. Wage Order Nos. 1-2001-13-2001, 16-2001); *11140, 11150, P 3* (Cal. Wage Order Nos. 14-2001, 15-2001).

(n48)Footnote 35. *8 Cal. Code Reg. §§ 11010-11030, 11060-11100, 11120, 11130, P 2(P)* (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-10-2001, 12-2001, 13-2001); *11160 3(S)* (Cal. Wage Order No. 16-2001); *11040, P 2(T)* (Cal. Wage Order No. 4-2001); *11050, P 2(U)* (Cal. Wage Order No. 5-2001).

(n49)Footnote 36. *8 Cal. Code Reg. §§ 11010-11030, 11060-11130, 11150, P 2(Q)* (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-13-2001, 15-2001); *11160 3(T)* (Cal. Wage Order No. 16-2001); *11040, P 2(U)* (Cal. Wage Order No. 4-2001); *11050, P 2(V)* (Cal. Wage Order No. 5-2001); *11140, P 2(P)* (Cal. Wage Order No. 14-2001).

(n50)Footnote 37. *See D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders"* (Sept. 1986) p. 6. *See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 48.1.3*. (CAUTION: *see § 1.05[3][c]*, *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n51)Footnote 38. *See D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders"* (Sept. 1986) p. 6. *See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 48.1.3.1*. (CAUTION: *see § 1.05[3][c]*, *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n52)Footnote 39. *See 29 U.S.C. § 207(a); 29 C.F.R. § 778.102; see also* discussion under [2][a], *below*.

(n53)Footnote 40. *See* discussion in §§ 3.05-3.06.

(n54)Footnote 41. *8 Cal. Code Reg. 11010, P 3(A)* (Cal. Wage Order No. 1-2001).

(n55)Footnote 42. *8 Cal. Code Reg. § 11020, P 3(A)* (Cal. Wage Order No. 2-2001).

(n56)Footnote 43. *8 Cal. Code Reg. § 11030, P 3(A)* (Cal. Wage Order No. 3-2001).

(n57)Footnote 44. *8 Cal. Code Reg. § 11040, P 3(A)* (Cal. Wage Order No. 4-2001).

(n58)Footnote 45. *8 Cal. Code Reg. § 11050, P 3(A)* (Cal. Wage Order No. 5-2001).

(n59)Footnote 46. *8 Cal. Code Reg. § 11060, P 3(A)* (Cal. Wage Order No. 6-2001).

(n60)Footnote 47. *8 Cal. Code Reg. § 11070, P 3(A)* (Cal. Wage Order No. 7-2001).

- (n61)Footnote 48. *8 Cal. Code Reg. § 11080*, P 3(A) (Cal. Wage Order No. 8-2001).
- (n62)Footnote 49. *8 Cal. Code Reg. § 11090*, P 3(A) (Cal. Wage Order No. 9-2001).
- (n63)Footnote 50. *8 Cal. Code Reg. § 11100*, P 3(A) (Cal. Wage Order No. 10-2001).
- (n64)Footnote 51. *8 Cal. Code Reg. § 11110*, P 3(A) (Cal. Wage Order No. 11-2001).
- (n65)Footnote 52. *8 Cal. Code Reg. § 11120*, P 3(A) (Cal. Wage Order No. 12-2001).
- (n66)Footnote 53. *8 Cal. Code Reg. § 11130*, P 3(A) (Cal. Wage Order No. 13-2001).
- (n67)Footnote 54. *8 Cal. Code Reg. § 11160*, P 3(A) (Cal. Wage Order No. 16-2001).
- (n68)Footnote 55. *8 Cal. Code Reg. § 11170*, P 4 (Cal. Wage Order No. 17-2001).
- (n69)Footnote 56. *8 Cal. Code Reg. § 11140*, P 3(B) (Cal. Wage Order No. 14-2001).
- (n70)Footnote 57. *8 Cal. Code Reg. § 11150*, P 3(B) (Cal. Wage Order No. 15-2001).
- (n71)Footnote 58. *8 Cal. Code Reg. § 11150*, P 3(A) (Cal. Wage Order No. 15-2001).
- (n72)Footnote 59. *8 Cal. Code Reg. § 11150*, P 3(C) (Cal. Wage Order No. 15-2001).
- (n73)Footnote 60. *See 8 Cal. Code Reg. §§ 11010-11130, 11160* P 3(A) (Cal. Wage Order Nos. 1-2001-13-2001, 16-2001); *11150*, P 3(C) (Cal. Wage Order No. 15-2001).
- (n74)Footnote 61. *See* discussions under [ii], *below*, and § 3.06[1][a].
- (n75)Footnote 62. *See 8 Cal. Code Reg. §§ 11010-11130, 11160* P 3(A) (Cal. Wage Order Nos. 1-2001-13-2001, 16-2001); *11150*, P 3(C) (Cal. Wage Order No. 15-2001).
- (n76)Footnote 63. *See 8 Cal. Code Reg. § 11140*, P 3(A) (Cal. Wage Order No. 14-2001).
- (n77)Footnote 64. *See 8 Cal. Code Reg. § 11150*, P 3(A)(2) (Cal. Wage Order No. 15-2001).
- (n78)Footnote 65. *See 8 Cal. Code Reg. § 11150*, P 3(B) (Cal. Wage Order No. 15-2001).
- (n79)Footnote 66. *See 8 Cal. Code Reg. §§ 11010-11130, 11160* P 3(AD) (Cal. Wage Order Nos. 1-2001-13-2001, 16-2001).
- (n80)Footnote 67. *See 8 Cal. Code Reg. §§ 11140*, P 3(A) (Cal. Wage Order No. 14-2001); *11150*, P 3(C) (Cal. Wage Order No. 15-2001).
- (n81)Footnote 68. *See 8 Cal. Code Reg. § 11150*, P 3(B) (Cal. Wage Order. No. 15-2001).
- (n82)Footnote 69. *8 Cal. Code Reg. § 11150*, P 3(C) (Cal. Wage Order No. 15-2001).
- (n83)Footnote 70. *See Lab. Code §§ 1391.2(a), 1394.*
- (n84)Footnote 71. *See Lab. Code §§ 1391(a), 1308.7; see also § 3.22[4] and ch. 6.*
- (n85)Footnote 72. *See 8 Cal. Code Reg. §§ 11010-11030, 11060, 11080, 11100, 11130*, P 3(D) (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001, 8-2001, 10-2001, 13-2001); *11040, 11070, 11150*, P 3(D) (Cal. Wage Order Nos. 4-2001, 7-2001, 15-2001); *11050*, P 3(e) (Cal. Wage Order No. 5-2001).

(n86)Footnote 73. *8 Cal. Code Reg. § 11120*, P 3(E) (Cal. Wage Order No. 12-2001).

(n87)Footnote 74. *See Lab. Code §§ 1391.2(a), 1394(b); 8 Cal. Code Reg. §§ 11010-11030, 11060, 11080-11110, 11130*, P 3(A), (C) (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001, 8-2001-11-2001, 13-2001); *11040, 11070, 11120*, P 3(A), (D) (Cal. Wage Order Nos. 4-2001, 7-2001, 12-2001); *11050*, P 3(A), (E) (Cal. Wage Order No. 5-2001); *11140*, P 3(A) (Cal. Wage Order No. 14-2001); *11150*, P 3(D) (Cal. Wage Order No. 15-2001).

(n88)Footnote 75. *See 8 Cal. Code Reg. § 11140*, P 3 (Cal. Wage Order No. 14-2001).

(n89)Footnote 76. *See* discussion under [ii], *below*.

(n90)Footnote 77. *See 29 C.F.R. § 778.102*.

(n91)Footnote 78. *See 29 U.S.C. § 207(a); 29 C.F.R. § 778.602(a)*.

(n92)Footnote 79. *29 C.F.R. § 778.105*.

(n93)Footnote 80. *29 C.F.R. § 778.105*.

(n94)Footnote 81. *29 C.F.R. § 778.105*.

(n95)Footnote 82. *29 C.F.R. § 778.105*.

(n96)Footnote 83. *See 29 U.S.C. § 207(b)(1),(2); see also discussion under § 3.06[2][c]*.

(n97)Footnote 84. *See 29 U.S.C. § 207(b)(3); see also discussion under § 3.05[2][a]*.

(n98)Footnote 85. *See 29 U.S.C. § 207(j); see also discussion under § 3.06[2][b]*.

(n99)Footnote 86. *See 29 U.S.C. § 207(m)(2)(A); see also discussion under § 3.05[2][c]*.

(n100)Footnote 87. *See 29 U.S.C. § 213(h)-(j); see also discussion under § 3.05[2][d]*.

(n101)Footnote 88. For discussion of which employers are subject to the FLSA, *see* ch. 1.

(n102)Footnote 89. *See § 3.03[2]* for discussion of exemptions from overtime requirements under the FLSA.

(n103)Footnote 90. *29 U.S.C. § 207(a)(1); see 29 C.F.R. §§ 778.100, 778.101*.

(n104)Footnote 91. *See 29 U.S.C. § 207(l)*.

(n105)Footnote 92. *See 29 U.S.C. § 213(b)(21)*.

(n106)Footnote 93. *See 29 U.S.C. § 213(a)(15)*.

(n107)Footnote 94. *See 29 C.F.R. § 552.102* (applicability of overtime provisions to domestic service employees generally); *See also § 3.03[2]* for discussion of exemptions from overtime provisions under federal law.

(n108)Footnote 95. *See 8 Cal. Code Reg. § 11150*, PP 1(B), 3(A), (C) (Cal. Wage Order No. 15-2001); *see also* discussion in *§ 3.05[1][c]*.

(n109)Footnote 96. *See Mumbower v. Callicott* (8th Cir. 1975) 526 F.2d 1183, 1188 .

(n110)Footnote 97. *See Johnson v. Dierks Lumber & Coal Co.* (8th Cir. 1942) 130 F.2d 115, 118 .



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.05

AUTHOR: By Carol S. Sanders, J.D.

§ 3.05 Special Maximum Hour Standards Applicable to Certain Employees

[1] California Law

[a] Motion Picture Industry

[i] Generally

The wage order governing the motion picture industryⁿ¹ contains special overtime provisions for employees in that industry.ⁿ² Motion picture employees may not be employed more than eight hours in any workday, or more than forty hours in any workweek, unless paid appropriate overtime compensation. Employees may be employed up to a maximum of sixteen hours, including meal periods, in any one day from the time they are required and do report until dismissed, provided they are compensated for the overtime.ⁿ³ Daily employees and weekly employees,ⁿ⁴ excluding weekly employees guaranteed more than forty hours each workweek and "on call" employees,ⁿ⁵ must be compensated for the overtime at 1 1/2 times the employee's regular rate of pay for all hours worked in excess of eight hours up to and including twelve hours in any one workday, and for the first eight hours worked on the seventh consecutive day of work in a workweek,ⁿ⁶ and double the employee's regular rate of pay for all hours worked in excess of twelve hours in any workday, and for all hours worked in excess of eight hours on the seventh consecutive day of work in a workweek.ⁿ⁷ Overtime payments may not be compounded, and all payments made by the employer for daily overtime on the basis specified in the wage order must be applied toward any sum for weekly overtime.ⁿ⁸ The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee must be computed by using the employee's regular hourly salary as 1/40th of the employee's weekly salary.ⁿ⁹

[ii] Extra Players

"Extra players," as defined in the wage order, are subject to special rules with regard to the daily overtime premium. An "extra player" is defined by the wage order as any person employed by an employer in the production of motion pictures to perform any work, including but not limited to that of a general extra, stand-in, photographic double, sports player, silent bit, or dress extra; or as extras employed in dancing, skating, swimming, diving, riding, driving, or singing; or as

extras employed to perform any other actions, gestures, facial expressions, or pantomime.ⁿ¹⁰

Extra players should be distinguished from "professional actors," who are partially exempt from the provisions of the wage order governing the motion picture industry.ⁿ¹¹

■ CONSULTANT'S COMMENT:

Although the wage order defines an "extra player" as any person hired by an employer in the production of a motion picture "to perform any work, including but not limited to" the specified tasks,ⁿ¹² the DLSE interprets this definition of "extra player" as being limited to persons who actually perform or act in motion pictures. The tasks specified in the wage order are examples of activities engaged in by such persons. Camera operators, technicians, or other nonperformance employees are thus not "extra players." In determining whether an employee is an "extra player," who is subject to the wage order, or a "professional actor," who is exempt, the DLSE looks primarily to the agreement of the parties.
Commentary by Kirby Wilcox.

An extra player employed in excess of eight hours in any workday from the time that the extra player is required to and does report until dismissed must be paid 1 1/2 times his or her regular rate of pay for the ninth and tenth hours worked and not less than double the extra player's regular rate of pay for all hours worked thereafter, computed in units of 1/10 of an hour.ⁿ¹³ For an extra player who works more than 40 hours in a workweek for a particular employer, the person's compensation is computed by multiplying the extra player's hourly rate of pay times 40, then adding 1 1/2 times the regular hourly rate of pay for all hours worked in excess of 40 during that workweek. The regular hourly rate is determined by dividing the amount of the extra player's weekly salary by the number of regular hours in a workweek.ⁿ¹⁴ An extra player employed by the week receives payment of daily overtime for all hours or fractions thereof worked beyond eight hours in any workday on which daily overtime occurs, as provided in the wage order. However, overtime payments may not be compounded, and all daily overtime payments made by the employer on the basis specified in the wage order must be applied toward any sum due for weekly overtime.ⁿ¹⁵ For additional discussion of computing the regular rate of pay, *see* §§ 3.08-3.09.

[b] Agricultural Occupations

An agricultural employeeⁿ¹⁶ who is employed more than 10 hours in one workday or more than six days in one workweek must receive 1 1/2 times his or her regular rate of pay for all hours worked over 10 in any workday and for the first eight hours worked on the seventh day of work. The employee must be paid double his or her regular rate of pay for all hours worked over eight on the seventh day of work in the workweek.ⁿ¹⁷

The overtime provisions applicable to agricultural workers are not applicable to an agricultural worker during any week in which more than half of that employee's worktime is devoted to performing the duties of an irrigator,ⁿ¹⁸ or to employees whose hours of service are regulated by the United States Department of Transportation under Title 49 *Code of Federal Regulations* §§ 395.1-395.13, or by 13 *Cal. Code Reg. § 1200 et seq.* (both relating to hours of service of drivers).ⁿ¹⁹ Clerical workers employed by an agricultural company are not considered to be engaged in an agricultural occupation; therefore, they are governed by occupational Wage Order 4-2001,ⁿ²⁰ which applies to clerical workers generally and which requires overtime pay after 8 hours per day or 40 hours per week.ⁿ²¹ For discussion of exemptions to the overtime compensation requirements under California law, *see* § 3.03[1].

Agricultural employees are exempt from overtime compensation requirements under the FLSA.ⁿ²² Thus, such employees are not subject to the federal provision for overtime compensation after 40 hours worked in a workweek.ⁿ²³

[c] Household Employees

Ordinarily, a live-in household worker must have at least 12 consecutive hours free of duty during each workday of 24

hours, and the total span of hours for a day of work may be no more than 12 hours.ⁿ²⁴ However, the span of hours may exceed 12 if the employee has at least three hours free of duty during the 12-hour span of work.ⁿ²⁵ The off-duty hours need not be consecutive, and the schedule for the hours must be set by mutual agreement of the employer and the employee, provided that an employee who is required or permitted to work during scheduled off-duty hours must be compensated at the rate of 1 1/2 times the employee's regular rate of pay for all such hours worked.ⁿ²⁶

Generally, a live-in employee may not be required to work more than five days in any one workweek without a day off of not less than 24 consecutive hours, except in an emergency.ⁿ²⁷ If the live-in employee does work in excess of these limits, he or she must be compensated for time worked in excess of five workdays in any workweek 1 1/2 times the regular rate of pay for hours worked up to and including nine hours; and for time worked in excess of nine hours on the 6th and 7th workdays, compensation must be double the regular rate of pay.ⁿ²⁸ A non-live-in domestic employee is subject to the eight-hour workday, 40-hour workweek, and overtime provisions that pertain to most California employees.ⁿ²⁹

Live-in domestic service workers are completely exempt from the federal overtime compensation provisions.ⁿ³⁰

[d] Personal Attendants, Camp Counselors, and Resident Managers of Homes for Aged

The wage order governing the "public housekeeping industry"ⁿ³¹ provides an exception to the usual overtime requirements for the following types of employees:ⁿ³²

1. Personal attendants;ⁿ³³
2. Adult employees or minors who are permitted to work as adults who have direct responsibility for minors receiving 24-hour care;
3. Organized camp counselors;ⁿ³⁴ and
4. Resident managers of homes for the aged having less than eight beds.

The above employees are not covered by the usual overtime requirements. However, they may not be employed more than 54 hours nor more than six days in any workweek except in the case of an emergency.ⁿ³⁵ If an emergency arises, the employee may be employed in excess of 54 hours or six days in any workweek if the employee is compensated for all such excess hours and days in the workweek at not less than 1 1/2 times the employee's regular rate of pay.ⁿ³⁶ An emergency is defined as an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.ⁿ³⁷

[e] Employees of Ski Establishments

Since January 1, 2001, the wages, hours, and working conditions of ski establishment employees have been governed by Wage Order No. 10, regulating the amusement and recreation industry. An employer who operates a ski establishment may institute a regularly scheduled workweek of not more than 48 hours during any month of the year when Alpine or Nordic skiing activities, including snowmaking and grooming activities, are actually being conducted by the ski establishment.ⁿ³⁸ However, for any hours worked in excess of ten hours in a day or 48 hours in a workweek, the employer must pay compensation at a rate of not less than 1 1/2 times the employee's regular rate of pay. For purposes of this provision, "ski establishment" means an integrated, geographically limited recreational industry which is comprised of basic skiing facilities, together with all operations and facilities related thereto.ⁿ³⁹ During any other time of the year, employees must be paid overtime compensation according to the general rules under any applicable wage order.ⁿ⁴⁰

There is no specific comparable provision under the FLSA for ski establishments. However, the FLSA does contain a 56-hour workweek provision for employees of an amusement or recreational establishment located in a national park or national forest or on land in the National Wildlife Refuge System if the employer is a private entity engaged in providing such services or facilities under a contract with the Secretary of Interior or the Secretary of Agriculture.ⁿ⁴¹ In addition, employees of certain other seasonal amusement and recreation establishments are completely exempt from both minimum wage and overtime requirements under the FLSA.ⁿ⁴² For discussion of this federal exemption, *see* Ch. 2.

[f] Health Care Employees and Ambulance Drivers and Attendants

The wage orders regulating the professional, technical, clerical, mechanical, and similar occupationsⁿ⁴³ and the public housekeeping industryⁿ⁴⁴ contain special overtime premium payment provisions for employees in the health care industry. Subject to the election procedures in the wage orders, an employer of employees in the healthcare industry may institute a regularly scheduled alternative workweek schedule that includes work days exceeding ten hours, but not more than 12 hours, within a forty 40-hour workweek without the payment of overtime compensation.ⁿ⁴⁵ However, this alternative schedule is only permissible if:ⁿ⁴⁶

- An employee who works beyond 12 hours in a workday shall be compensated at double the regular rate of pay for all hours in excess of 12;
- An employee who works in excess of 40 hours in a workweek shall be compensated at 1 1/2 times the employee's regular rate of pay for all hours over 40 hours in the workweek;
- Any alternative workweek agreement adopted provides for not less than four hours of work in any shift.
- The same overtime standards apply to employees who are temporarily assigned to a work unit covered by this subsection;
- Any employer who instituted an alternative workweek schedule pursuant to this subsection makes a reasonable effort to find another work assignment for any employee who participated in a valid election prior to 1998 pursuant to the provisions of Wage Orders 4 and 5 and who is unable to work the alternative workweek schedule established.ⁿ⁴⁷

Wage Order Nos. 4-2001 and 5-2001 impose further limitations on employers who require healthcare employees to work overtime hours or shifts. An employee assigned to work a 12-hour shift may not be required to work more than 12 hours in any 24-hour period unless the Chief Nursing Officer or authorized executive declares that:ⁿ⁴⁸

- A "healthcare emergency" exists;ⁿ⁴⁹ and
- All reasonable steps have been taken to provide required staffing, and
- Considering overall operational status needs, continued overtime is necessary to provide required staffing.

As an example of compensation under an alternative workweek schedule, an alternative workweek schedule for registered nurses employed by a particular health care provider provided for three 12-hour days per week at the regular rate of pay, one and one-half times the regular rate of pay for work performed beyond 40 hours in the workweek; and double the regular rate of pay for work in excess of 12 hours in a workday. In that case, under the plain language of Wage Order 5,^{n49.1} overtime was only due after 40 hours of work in a week, rather than for hours worked beyond the

36 in the regular schedule, but less than the 40 hours at which time-and-a-half began.^{n49.2}

No employee is required to work more than 16 hours in a 24-hour period unless by voluntary mutual agreement of the employee and employer; and no employee may work more than 24 consecutive hours until he or she receives not less than eight consecutive hours off-duty immediately following the 24 consecutive hours of work.ⁿ⁵⁰ Notwithstanding this provision, an employee may be required to work up to 13 hours in any 24-hour period if the employee scheduled to relieve the employee does not report for duty as scheduled and does not inform the employer more than two hours in advance that he or she will not be appearing for duty as scheduled.ⁿ⁵¹

Employers of ambulance drivers and attendants in the public housekeeping industry and in the transportation industry are required to provide adequate dormitory and kitchen facilities for those employees, if they are scheduled for 24-hour shifts and have agreed in writing to exclude from daily time worked not more than three meal periods of not more than one hour each and a regularly scheduled uninterrupted sleeping period of not more than eight hours.ⁿ⁵²

[2] Federal Law

[a] Employees of Certain Distributors of Petroleum Products

Special overtime compensation requirements are applicable to employees employed by an independently owned and controlled local enterprise engaged in the wholesale or bulk distribution of petroleum products that has an annual gross sales volume of less than \$1 million exclusive of excise taxes, if (1) 75 percent of those sales are made within the state where the enterprise is located, (2) not more than 25 percent of those sales are to customers who are engaged in the bulk distribution of these products for resale, and (3) the employees in question receive compensation for employment in excess of 40 hours in a workweek at a rate not less than 1 1/2 times the federal minimum wage rate applicable to those employees.ⁿ⁵³ⁿ⁵⁴ These employees need not be paid 1 1/2 times their regular rate of pay for hours worked in excess of 40 during a workweek, but must be paid at a rate not less than 1 1/2 times their regular rate for hours worked in excess of 12 in one workday, or for employment in excess of 56 hours in one workweek.ⁿ⁵⁵

Note that there is no such special provision under the California wage orders for petroleum distributors; therefore, employees of such enterprises would appear to be covered by the regular overtime provisions of either the wage order governing the mercantile industryⁿ⁵⁶ or the wage order governing the manufacturing industry,ⁿ⁵⁷ depending on whether the employer produces, as well as sells, such products.

[b] Employees of Public Fire Protection and Law Enforcement Agencies

The usual overtime compensation requirements are not applicable to employees in fire protection or law enforcement activities (including security personnel in correctional institutions) if, after tours of duty of 216 hours within a work period of 28 consecutive days, or the average number of hours for such tours of duty as determined by the Secretary of Labor, or a proportionate ratio of such hours for a work period of less than 28 days but at least seven days, the employee receives compensation at a rate not less than 1 1/2 times his or her regular rate of pay.ⁿ⁵⁸ Employees engaged in fire protection or law enforcement activities in public agencies employing fewer than five employees in such activities are completely exempt from federal overtime compensation requirements.ⁿ⁵⁹ However, the fire protection exemption does not apply to dual function or cross-trained paramedics, who are individuals trained in both fire suppression and advanced life saving.^{n59.1}

Persons directly employed by the State of California, or any county, incorporated city or town, or other "municipal corporation" previously were entirely exempt from the overtime requirements and other provisions of the California wage orders. Since January 1, 2001, these employees no longer have been exempt from the minimum wage provisions and are only partially exempt from the other provisions of the California Wage Orders.ⁿ⁶⁰

[c] Employees in Tobacco Industry

For a period of not more than 14 workweeks in the aggregate in any calendar year, the usual overtime compensation requirements do not apply to employees engaged in providing services necessary and incidental to the sale at auction of specified types of tobacco, or engaged in other specified activities involving the growing, harvesting, and sale of tobacco, if the employee receives 1 1/2 times his or her regular rate of pay for hours worked in excess of 10 hours in a workday, or in excess of 48 hours in a workweek.ⁿ⁶¹ An employer receiving this exemption is not eligible for any other exemptions under Title 29 *United States Code*, section 207.ⁿ⁶²

The above federal rule is not effective in California because such employees are subject to the California wage orders governing the processing of agricultural products after harvest and would therefore be subject to the eight-hour workday and 40-hour workweek provisions of that wage order.ⁿ⁶³

[d] Employees in Ginning and Marketing of Cotton or Processing of Sugar

Employees engaged in certain activities related to the ginning of cotton or the processing of sugar need not be paid the usual overtime compensation under the FLSA for a period of not more than 14 workweeks in the aggregate, provided that during that time the employee receives 1 1/2 times his or her regular rate of pay for hours worked in excess of 10 in a workday and in excess of 48 in a workweek.ⁿ⁶⁴ An employer who receives an exemption under Title 29 *United States Code*, section 213(h) is not eligible for any other exemption under Title 29 *United States Code*, sections 207 or 213.ⁿ⁶⁵

The above federal rule is not effective in California because such employees are subject to the California wage orders governing the manufacturing industry or the processing of agricultural products after harvest and would therefore be subject to the eight-hour workday and 40-hour workweek provisions of those wage orders.ⁿ⁶⁶

[e] Employees of Private Recreational Establishments on National Park Lands

The general federal overtime compensation requirements are not applicable to employees of private amusement or recreational establishments located in a national park or forest or on land in the National Wildlife Refuge Systems and under contract with the Secretary of the Interior or the Secretary of Agriculture to provide services or facilities, if the employee receives compensation for employment in excess of 56 hours in any workweek at a rate not less than 1 1/2 times his or her regular rate of pay.ⁿ⁶⁷

No such provision exists under the California wage orders, and employees of such establishments are covered by the regular eight-hour workday and 40-hour workweek provisions of the wage order governing the amusement and recreation industry.ⁿ⁶⁸ If, however, the employing facility is a ski establishment, it is now governed by Cal. Wage Order No. 10-2001, and the employer may utilize a longer workweek during the months of actual skiing activities, provided employees are compensated at 1 1/2 times their regular rate of pay for hours worked in excess of ten per day or 48 per week.ⁿ⁶⁹

[f] Employees Receiving Remedial Education

The general federal overtime requirements do not apply to an employee for a period of not more than 10 hours in excess of the usual weekly maximum hour limitation if during that period the employee is receiving remedial education that meets specified requirements.ⁿ⁷⁰ To qualify for the overtime exemption, the remedial education must (1) be provided to employees who lack a high school diploma or educational attainment at the eighth grade level; (2) be designed to provide reading and other basic skills at an eighth grade level or below; and (3) not include job specific training.ⁿ⁷¹ Alternatively, the remedial education may be designed to fulfill the requirements for a high school diploma or a General Education Development (GED) certificate. The remedial education must be conducted during discrete times set aside for the program. To the maximum extent practicable, it must be held away from the employee's usual work station.ⁿ⁷²

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Overtime & Work Period

FOOTNOTES:

(n1)Footnote 1. "Motion picture industry" means any industry, business, or establishment operated for the purpose of motion picture or television film production, or primarily allied with theatrical or television, motion picture productions, including but not limited to motion pictures for entertainment, commercial, religious, or educational purposes, whether made by film, tape, or otherwise. *8 Cal. Code Reg. § 11120, P 2(K)*.

(n2)Footnote 2. *Lab. Code § 1308.7* sets forth the special maximum hours applicable to minors employed in the entertainment industry.

(n3)Footnote 3. *8 Cal. Code Reg. § 11120, P 3(A)(1)(a)*.

(n4)Footnote 4. The terms "daily employee" and "weekly employee" are not defined in the wage order.

(n5)Footnote 5. The term "on call employee" is not defined in the wage order.

(n6)Footnote 6. *8 Cal. Code Reg. § 11120, P 3(A)(1)(a)(1)*.

(n7)Footnote 7. *8 Cal. Code Reg. § 11120, P 3(A)(1)(a)(2)*.

(n8)Footnote 8. *8 Cal. Code Reg. § 11120, P 3(A)(1)(a)(3)*.

(n9)Footnote 9. *8 Cal. Code Reg. § 11120, P 3(A)(1)(a)(4)*.

(n10)Footnote 10. *8 Cal. Code Reg. § 11120, P 2(G)* (Cal. Wage Order No. 12-2001).

(n11)Footnote 11. *See 8 Cal. Code Reg. § 11120, P 1(C)* (Cal. Wage Order No. 12-2001) (effective 1-1-01, professional actors partially exempt from provisions of wage order).

(n12)Footnote 12. *See 8 Cal. Code Reg. § 11120, P 2(H)* (Cal. Wage Order No. 12-2001) (emphasis added).

(n13)Footnote 13. *8 Cal. Code Reg. § 11120, P 3(D)(1)* (Cal. Wage Order No. 12-2001).

(n14)Footnote 14. *8 Cal. Code Reg. § 11120, P 3(D)(2)* (Cal. Wage Order No. 12-2001).

(n15)Footnote 15. *8 Cal. Code Reg. § 11120, P 3(D)(3)*.

(n16)Footnote 16. The provisions of this wage order apply to employees who are 18 years or older, or minors who are 16 or 17 years old and not required by law to attend school. There is no provision for paying overtime to other minors employed in agricultural occupations. *see 8 Cal. Code Reg. § 11140, P 3(A)* (Cal. Wage Order No. 14-2001).

(n17)Footnote 17. *8 Cal. Code Reg. § 11140, P 3(A)* (Cal. Wage Order No. 14-2001).

(n18)Footnote 18. *8 Cal. Code Reg. § 11140, P 3(C)* (Cal. Wage Order No. 14-2001).

(n19)Footnote 19. *8 Cal. Code Reg. § 11140, P 3(D)* (Cal. Wage Order No. 14-2001).

(n20)Footnote 20. *8 Cal. Code Reg. § 11040*.

(n21)Footnote 21. *See Harris Feeding Co. v. Department of Industrial Relations* (1990) 224 Cal. App. 3d 464, 475-476, 273 Cal. Rptr. 598 .

(n22)Footnote 22. *See 29 U.S.C. § 213(b)(12)* (employees employed in agriculture or in certain agricultural irrigation activities, as exempt from overtime provisions); *see also discussion under § 3.03[2][b]*.

(n23)Footnote 23. *See 29 U.S.C. § 207(a)(1)*.

(n24)Footnote 24. 8 Cal. Code Reg. § 11150, P 3(A) (Cal. Wage Order No. 15-2001).

(n25)Footnote 25. 8 Cal. Code Reg. § 11150, P 3(A)(1) (Cal. Wage Order No. 15-2001).

(n26)Footnote 26. 8 Cal. Code Reg. § 11150, P 3(A)(1), (2) (Cal. Wage Order No. 15-2001).

(n27)Footnote 27. 8 Cal. Code Reg. § 11150, P 2(B) (Cal. Wage Order No. 15-2001) ("emergency" is unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action).

(n28)Footnote 28. 8 Cal. Code Reg. § 11150, P 3(B) (Cal. Wage Order No. 15-2001).

(n29)Footnote 29. *See 8 Cal. Code Reg. § 11150, P 3(C)* (Cal. Wage Order No. 15-2001).

(n30)Footnote 30. *See 29 U.S.C. § 213(b)(21)*; *see also discussion in § 3.03[2][b]*.

(n31)Footnote 31. This wage order covers a wide variety of establishments that provide meals, housing, or maintenance services, including, among other things, restaurants, taverns, hotels, hospitals, child care facilities, nursing homes, and educational institutions. *See 8 Cal. Code Reg. § 11050, P 2(P)* (Cal. Wage Order No. 5-2001). For full discussion of the scope of the various wage orders, *see ch. 1*.

(n32)Footnote 32. 8 Cal. Code Reg. § 11050, P 3(E) (Cal. Wage Order No. 5-2001).

(n33)Footnote 33. COUNSEL ARE CAUTIONED that the California Supreme Court's decision in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568-578, 59 Cal. Rptr. 2d 186, 927 P.2d 296 voided all written interpretive policies adopted by the DLSE, the agency charged with enforcing IWC wage orders; it is unclear whether the DLSE publications cited here have any continuing utility. *See § 1.05[3][c]* for a discussion of *Tidewater* and the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders.

Under the wage order, the term "personal attendant" includes baby sitters and means any person employed by a nonprofit organization covered by the wage order to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision and who is required to perform no significant amount of other work. 8 Cal. Code Reg. § 11050, P 2(N) (Cal. Wage Order No. 5-2001). For discussion of this latter exemption, *see ch. 2*.

(n34)Footnote 34. The wage order provides no definition of this term. Note that counselors and student employees of an "organized camp," as defined in *Health & Safety Code § 18897*, are *statutorily exempt* from both minimum wage and overtime requirements of the wage orders if they receive a weekly salary of at least 85 percent of the minimum wage for a 40-hour week, regardless of the number of hours actually worked. *see Lab. Code § 1182.4*. For discussion of this exemption, *see ch. 2*. Certain camp counselors are also exempt from minimum wage and overtime requirements of the FLSA. *See 29 U.S.C. § 213(a)(3)*.

(n35)Footnote 35. 8 Cal. Code Reg. § 11050, P 3(E) (Cal. Wage Order No. 5-2001).

(n36)Footnote 36. 8 Cal. Code Reg. § 11050, P 3(E) (Cal. Wage Order No. 5-2001).

(n37)Footnote 37. 8 *Cal. Code Reg.* § 11050, P 2(E) (Cal. Wage Order No. 5-2001).

(n38)Footnote 38. 8 *Cal. Code Reg.* § 11100, P 3(K) (Cal. Wage Order No. 10-2001).

(n39)Footnote 39. 8 *Cal. Code Reg.* § 11100, P 3(K) (Cal. Wage Order 10-2001).

(n40)Footnote 40. *See, e.g.,* 8 *Cal. Code Reg.* § 11100, P 3 (Cal. Wage Order No. 10-2001), governing the "amusement and recreation industry."

(n41)Footnote 41. *See* 29 *U.S.C.* § 213(b)(29); *see also* discussion in [2][f], *below*.

(n42)Footnote 42. *See* 29 *U.S.C.* § 213(a)(3).

(n43)Footnote 43. 8 *Cal. Code Reg.* § 11040 (Cal. Wage Order No. 4-2001).

(n44)Footnote 44. 8 *Cal. Code Reg.* § 11050 (Cal. Wage Order No. 5-2001).

(n45)Footnote 45. 8 *Cal. Code Reg.* §§ 11040, 11050 P 3(B)(8) (Cal. Wage Order Nos. 4-2001, 5-2001).

(n46)Footnote 46. 8 *Cal. Code Reg.* §§ 11040, 11050 P 3(B)(8)(a)-(e) (Cal. Wage Order Nos. 4-2001, 5-2001).

(n47)Footnote 47. However, an employer is not required to offer a different work assignment if such a work assignment is not available or if the employee was hired after the adoption of the 12-hour, three-day alternative workweek schedule; *see* 8 *Cal. Code Reg.* §§ 11040, 11050, P 3(B)(8)(f) (Cal. Wage Order Nos. 4-2001, 5-2001).

(n48)Footnote 48. 8 *Cal. Code Reg.* §§ 11040, 11050 P 3(B)(9) (Cal. Wage Order Nos. 4-2001, 5-2001).

(n49)Footnote 49. "Healthcare emergency" in this context, means an unpredictable or unavoidable occurrence at unscheduled intervals relating to healthcare delivery, requiring immediate action. *See* 8 *Cal. Code Reg.* §§ 11040, 11050 P 2(I) (Cal. Wage Order Nos. 4-2001, 5-2001).

(n50)Footnote 49.1. *See* 8 *Cal. Code Reg.* § 11050 P 3(B)(8).

(n51)Footnote 49.2. *See Singh v. Superior Court* (2006) 140 *Cal. App. 4th* 387, 392-401, 44 *Cal. Rptr. 3d* 348 .

(n52)Footnote 50. 8 *Cal. Code Reg.* §§ 11040, 11050 P 3 (10) (Cal. Wage Order Nos. 4-2001, 5-2001).

(n53)Footnote 51. 8 *Cal. Code Reg.* §§ 11040, 11050 P 3 (11) (Cal. Wage Order Nos. 4-2001, 5-2001).

8 *Cal. Code Reg.* § 11040 (Cal. Wage Order No. 4-98 P 3(H)).

(n54)Footnote 52. 8 *Cal. Code Reg.* §§ 11050, P 3(H); 11090, P 3(E) (Cal. Wage Order Nos. 5-2001, 9-2001).

(n55)Footnote 53. *See* 29 *U.S.C.* § 207(b)(3); *see also* 29 C.F.R. Part 794. *See* 29 *U.S.C.* § 206(a) (prevailing federal minimum wage); *see also* ch. 2 for discussion of minimum wage obligations under federal law.

(n56)Footnote 54. [Reserved]

(n57)Footnote 55. *See* 29 *U.S.C.* § 207(b)(3).

(n58)Footnote 56. *See* 8 *Cal. Code Reg.* § 11070, PP 1, 2(H) (Cal. Wage Order No. 7-2001).

(n59)Footnote 57. *See* 8 *Cal. Code Reg.* § 11010, PP 1, 2(H) (Cal. Wage Order No. 1-2001).

(n60)Footnote 58. *See* 29 U.S.C. § 207(k); *see also* 29 C.F.R. § 553.1-553.21; *California Ass'n of Highway Patrolmen v. Department of Personnel Admin.* (1986) 185 Cal. App. 3d 352, 365-366, 229 Cal. Rptr. 729 .

(n61)Footnote 59. *See* 29 U.S.C. § 213(b)(20); *see discussion under* § 3.03[2][b].

(n62)Footnote 59.1. *Cleveland v. City of Los Angeles* (9th Cir. 2005) 420 F.3d 981, 988-991 (plaintiffs did not have responsibility to engage in fire prevention as required by 29 C.F.R. § 553.210(a) and 29 U.S.C. § 203(y)).

(n63)Footnote 60. *See discussion at* § 2.04[1][b][ii].

(n64)Footnote 61. *See* 29 U.S.C. § 207(m).

(n65)Footnote 62. *See* 29 U.S.C. § 207(m).

(n66)Footnote 63. *See* 8 Cal. Code Reg. §§ 11080, PP 2(H), 3(A) (Cal. Wage Order No. 8-2001).

(n67)Footnote 64. *See* 29 U.S.C. § 213(h) (cotton ginning and processing of sugar cane or sugar beets at certain kinds of establishments; 14-week period must fall in calendar year), (i) (ginning of cotton for market in place of employment located where cotton is grown in commercial quantities; 14-week period may fall in any period of 52 consecutive weeks), and (j) (processing of sugar beets, sugar beet molasses, or sugar cane into unrefined sugar or syrup; 14-week period may fall in any period of 52 consecutive weeks).

(n68)Footnote 65. 29 U.S.C. § 213(h).

(n69)Footnote 66. *See* 8 Cal. Code Reg. §§ 11010, 11030, 11080, PP 2(C), 3(A) (Cal. Wage Order Nos. 1-2001, 3-2001, 8-2001).

(n70)Footnote 67. 29 U.S.C. § 213(b)(29); *see also* 29 U.S.C. § 213(a)(3) (complete exemption of seasonal amusement or recreational establishment from minimum wage and overtime provisions as not applicable to private entities on national lands under contract to provide services and facilities), discussed in ch. 2.

(n71)Footnote 68. *See* 8 Cal. Code Reg. § 11100, PP 2(A), 3 (Cal. Wage Order No. 10-2001).

(n72)Footnote 69. 8 Cal. Code Reg. § 11100, P 3(K) (Cal. Wage Order No. 10-2001).

(n73)Footnote 70. *See* 29 U.S.C. § 207(q).

(n74)Footnote 71. 29 U.S.C. § 207(q)(1)-(3).

(n75)Footnote 72. 29 C.F.R. § 778.603.



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.06

AUTHOR: By Carol S. Sanders, J.D.

§ 3.06 Special Alternative Work Schedules by Agreement

[1] California Law

[a] Agreement for Alternate Work Schedule

[i] In General

Under 14 of the wage orders,ⁿ¹ employers and employees may, by agreement, provide for alternative workweeks with work days longer than eight hours without a right to receive overtime premium if certain criteria are met. When originally enacted, all the wage orders had the same alternate workweek requirements. In 1989, Wage Order Nos. 1-80, 4-80, 5-80, and 10-80 were amended, and in 1990 the IWC amended the alternate workweek provisions of Wage Order No. 9-80. Prior to 1997, the criteria for Wage Order No. 1-89 differed from those in Wage Order Nos. 4-89, 5-89, 9-90, and 10-89. Then in 1997, the IWC adopted further amendments to Wage Order Nos. 1-98, 4-98, 5-98, 7-98, and 9-98. Most recently, in 2000, the IWC adopted Wage Order Nos. 1-2000-13-2000, and Interim Wage Order 2000, all effective January 1, 2001, that contain provisions for alternative workweeks provided that (1) the alternative workweek meets certain requirements, and (2) the alternative workweek schedule is either (a) in effect pursuant to prior rules or (b) adopted pursuant to prescribed election procedures.ⁿ²

[ii] Alternative Workweek

The California wage orders for all occupations except the agricultural and household occupationsⁿ³ and for all industries provide that an employer does not violate the daily overtime provisions of the wage orders if a regularly scheduled, alternative workweek is adopted pursuant to election procedures set forth in the wage orders.ⁿ⁴ Still, under such alternative workweek schedules, work in excess of ten hours per day (or twelve hours per day in the healthcare industry) must be compensated at an overtime rate.ⁿ⁵

Excepting the healthcare industry and certain offshore oil and gas production, drilling, and servicing occupations, which permit twelve-hour workdays in alternative workweek schedules, all work performed in any workday beyond the

schedule established by the agreement up to 12 hours a day or beyond 40 hours per week must be paid at one and one-half times the employee's regular rate of pay. All work performed in excess of 12 hours per day and any work in excess of eight hours on those days worked beyond the regularly scheduled number of workdays established by the alternative workweek agreement shall be paid at double the employee's regular rate of pay.ⁿ⁶

■ **CONSULTANT'S COMMENT:**

In the "Statement as to the Basis" that accompanies the new Wage Orders, the IWC has taken the position that, once employees vote for an alternative workweek schedule, the employer must set the actual work days and the starting and ending time(s) of the shift(s) in advance of their commencement. The employer also may change any such schedule(s) with reasonable advance notice, so long as such changes are "occasional." The DLSE takes the position that occasional means not more often than once every four months.ⁿ⁷ *Commentary by Kirby Wilcox.*

Alternative workweek schedules under Wage Order Nos. 1-2001 through 13-2001 must provide for not less than four hours of work in any shift.ⁿ⁸ The employer may, at the request of the employee, substitute one day of work for another day of the same length in the shift provided by the alternative workweek agreement on an occasional basis to meet the personal needs of the employee without the payment of overtime.ⁿ⁹ No hours paid at either one and one-half or double the regular rate of pay shall be included in determining when 40 hours have been worked for the purpose of computing overtime compensation.ⁿ¹⁰

If an employer whose employees have adopted an alternative workweek agreement permitted by the wage order requires an employee to work fewer hours than those that are regularly scheduled by the agreement, the employer shall pay the employee overtime compensation at a rate of one and one-half times the employee's regular rate of pay for all hours worked in excess of eight hours.ⁿ¹¹

An employer may not reduce an employee's regular rate of hourly pay as a result of the adoption, repeal or nullification of an alternative workweek schedule.ⁿ¹² An employer must explore any available reasonable alternative means of accommodating the religious belief or observance of an affected employee that conflicts with an adopted alternative workweek schedule, in the manner provided by subdivision (l) of *Section 12940 of the Government Code*.ⁿ¹³

Similarly, an employer must make a reasonable effort to find a work schedule not to exceed eight hours in a workday in order to accommodate any affected employee who was eligible to vote in an election authorized by the wage order and who is unable to work the alternative workweek schedule established as the result of that election.ⁿ¹⁴

An employer may, but is not required, to provide a work schedule not to exceed eight hours in a workday to accommodate any employee who is hired after the date of the election and who is unable to work the alternative workweek schedule established by the election.ⁿ¹⁵

New alternative workweek arrangements can be entered into only pursuant to the provisions of the new wage orders.ⁿ¹⁶ Arrangements adopted in a secret ballot election held prior to 1998, or under the rules in effect prior to 1998, and before the performance of the work, are valid after July 1, 2000, provided that the results of the election were reported by the employer to the Division of Labor Statistics and Research by January 1, 2001, in accordance with the requirements of the election procedures set forth in the election procedures section of the wage orders.ⁿ¹⁷ If a health care industry employer implemented a reduced rate for 12-hour shift employees in the last quarter of 1999 and desires to reimplement a flexible work arrangement that includes 12-hour shifts at straight time for the same work unit, the employer must pay a base rate to each affected employee in the work unit that is no less than that employee's base rate in 1999 immediately prior to the date of the rate reduction.ⁿ¹⁸

[iii] Specific Provisions for Certain Industries and Occupations

Alternative workweek schedules for employers covered by wage orders regulating the manufacturing industry, the personal service industry, the canning, freezing and preserving industry, the laundry, linen supply, dry cleaning, and dyeing industry, the mercantile industry, the industries handling products after harvest, the broadcasting industry, the motion picture industry and the industries preparing agricultural products for the market on the farm must provide that employees have not less than two consecutive days off within a workweek.ⁿ¹⁹

It is not a violation of the daily overtime provisions if an employer in the healthcare industry institutes, pursuant to the alternative workweek election procedures, a regularly scheduled alternative workweek schedule that includes work days exceeding 10 hours but not more than 12 hours within a 40-hour workweek without the payment of overtime compensation, provided that:ⁿ²⁰

- (a) An employee who works beyond 12 hours in a workday must be compensated at double the employee's regular rate of pay for all hours in excess of 12;
- (b) An employee who works in excess of 40 hours in a workweek must be compensated at one and one-half times the employee's regular rate of pay for all hours over 40 hours in the workweek;
- (c) Any alternative workweek agreement adopted pursuant to this section must provide for not less than four hours of work in any shift;
- (d) The same overtime standards must apply to employees who are temporarily assigned to a work unit covered by an alternative workweek schedule;
- (e) Any employer who instituted an alternative workweek schedule pursuant to Wage Order No. 4-2001, must make a reasonable effort to find another work assignment for any employee who participated in a valid election prior to 1998 pursuant to the provisions of Wage Order 4 and who is unable to work the alternative workweek schedule established;
- (f) An employer engaged in the operation of a licensed hospital or in providing personnel for the operation of a licensed hospital who institutes, pursuant to a valid order of the Commission, a regularly scheduled alternative workweek that includes no more than three 12-hour workdays, must make a reasonable effort to find another work assignment for any employee who participated in the vote which authorized the schedule and is unable to work the 12-hour shifts. An employer shall not be required to offer a different work assignment to an employee if such a work assignment is not available or if the employee was hired after the adoption of the 12-hour, three-day alternative workweek schedule.

Additionally, no employee assigned to work a 12-hour shift established pursuant to Wage Order No. 4-2001 may be required to work more than 12 hours in any 24-hour period unless the Chief Nursing Officer or authorized executive declares that:ⁿ²¹

- (a) A "healthcare emergency,"ⁿ²² exists, and
- (b) All reasonable steps have been taken to provide required staffing, and
- (c) Considering overall operational status needs, continued overtime is necessary to provide required staffing.

Notwithstanding the provisions regarding a healthcare emergency, an employee may be required to work up to 13 hours in any 24-hour period if the employee scheduled to relieve the subject employee does not report for duty as scheduled and does not inform the employer more than two hours in advance of that scheduled shift that he/she will not be

appearing for duty as scheduled.n23

In alternative workweek schedules adopted for employees in the public housekeeping industry, no employee shall be required to work more than 16 hours in a 24-hour period unless by voluntary mutual agreement of the employee and the employer, and no employee shall work more than 24 consecutive hours until the employee receives not less than eight consecutive hours off duty immediately following the 24 consecutive hours of work.n24

If an employee working in the industries preparing agricultural products for the market was voluntarily working an alternative workweek schedule as of July 1, 1999, based on an individual agreement made after January 1, 1998 between the employee and employer, and that agreement provides for a workday of not more than 10 hours, that employee may continue to work that alternative workweek schedule without payment of an overtime rate of compensation if the employee submits, and the employer approves, a written request to do so. Any such request and approval had to be made on or before May 30, 2000. An employee may revoke his or her voluntary authorization to continue such a schedule with 30 days' written notice to the employer.n25

Employees working in offshore oil and gas production, drilling, and servicing occupations, as well as for employees working in onshore oil and gas separation occupations directly servicing offshore operations, may work an alternative workweek schedule of up to 12 hours per day within a 40-hour week without the payment of overtime, provided that such employees are paid an overtime rate of no less than two (2) times their regular rate of pay in excess of the regularly scheduled hours established by the alternative workweek agreement, and for one and one-half (1) times their regular rate of pay for any work in excess of 40 hours per week.

[iv] Election Procedures

The procedure by which an alternative workweek schedule is adopted or repealed is the same for all occupations and industries in which an alternative workweek schedule is available, except for certain on-site occupations in the construction, drilling, logging and mining industries. For example, unlike the other wage orders, Wage Order No. 16-2001 requires the employer to post the results of an alternative workweek election at the job site in an area frequented by employees.n26 The required procedures are:n27

- (1) Each proposal for an alternative workweek schedule must be in the form of a written agreement proposed by the employer. The proposed agreement must designate a regularly scheduled alternative workweek in which the specified number of work days and work hours are regularly recurring. The actual days worked within that alternative workweek schedule need not be specified. The employer may propose a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose. If the employer proposes a menu of work schedule options, the employee may, with the approval of the employer, move from one menu option to another.
- (2) In order to be valid, the proposed alternative workweek schedule must be adopted in a secret ballot election by at least a 2/3 vote of the affected employees in the work unit. The election must be held during regular working hours at the employees' work site. "Affected employees in the work unit" may include all employees in a readily identifiable work unit, such as a division, a department, a job classification, a shift, a separate physical location, or a recognized subdivision of any such work unit. A work unit may consist of an individual employee as long as the criteria for an identifiable work unit is met.
- (3) Prior to the secret ballot vote, any employer who proposed to institute an alternative workweek schedule must have disclosed in writing to the affected employees the effects of the proposed arrangement on the employees' wages, hours, and benefits. This disclosure must include duly noticed

meetings, held at least 14 days prior to voting, for the specific purpose of discussing the effects of the alternative workweek schedule. An employer must provide the written disclosure in a non-English language, as well as in English, if at least five percent of the affected employees primarily speak that non-English language. The employer must mail the written disclosure to employees who do not attend the meeting. Failure to comply with these requirements shall make the election null and void.

(4) Any election to establish or repeal an alternative workweek schedule must be held at the worksite of the affected employees. The employer must bear the costs of conducting any election. Upon a complaint by an affected employee, and after an investigation by the Labor Commissioner, the Labor Commissioner may require the employer to select a neutral third party to conduct the election.

(5) Any type of alternative workweek schedule that is authorized by the Labor Code may be repealed by the affected employees. Upon a petition of 1/3 of the affected employees, a new secret ballot election shall be held and a 2/3 vote of the affected employees is required to reverse the alternative workweek schedule. The election to repeal the alternative workweek schedule must be held not more than 30 days after the petition is submitted to the employer, except that the election must be held not less than 12 months after the date that the same group of employees voted in an election held to adopt or repeal an alternative workweek schedule. The election must take place during regular working hours at the employees' work site. If the alternative workweek schedule is revoked, the employer must comply within 60 days. Upon proper showing of undue hardship, the Division of Labor Standards Enforcement may grant an extension of time for compliance.

(6) Only secret ballots may be cast by affected employees in the work unit at any election held. The results of the election must be reported by the employer to the Division of Labor Statistics and Research within 30 days after the results are final, and the report of election results must be a public document. The report must include the final tally of the vote, the size of the unit, and the nature of the business of the employer.

(7) Employees affected by a change in the work hours resulting from the adoption of an alternative workweek schedule may not be required to work those new work hours for at least 30 days after the announcement of the final results of the election.

(8) Employers may not intimidate or coerce employees to vote either in support of or in opposition to a proposed alternative workweek. No employees may be discharged or discriminated against for expressing opinions concerning the alternative workweek election or for opposing or supporting its adoption or repeal. The employer, however, also may express his or her position concerning the proposed alternative workweek to the affected employees.

■ CONSULTANT'S COMMENT:

The Wage Orders are silent on the procedures applicable to employer-initiated termination of alternative workweeks. From an enforcement perspective, the Labor Commissioner will permit an employer to terminate an alternative workweek schedule at any time at its discretion. *Commentary by Kirby Wilcox.*

Regarding employees who work part-time under an alternative workweek schedule (for example, two ten-hour days), the Labor Commissioner has interpreted this type of work schedule to require payment of premium pay for *all* hours worked on any day beyond the regularly scheduled days, even if the employee works less than eight hours on the extra day and less than 40 hours in the workweek.ⁿ²⁸ The Labor Commissioner reasoned that since the "regularly scheduled hours established by the agreement for that workday" is zero, overtime must be paid for any hours worked on an extra day.ⁿ²⁹

[b] Agreement for Long Workdays for Employees in Mining Operations

Pursuant to *Labor Code Section 750.5*, employers who employ workers in underground mines or smelters and plants for the reduction or refining of ores may, pursuant to an agreement between the employer and a 2/3 majority of the affected workers, adopt a policy specifying that periods of work may exceed eight hours in a 24-hour period.

Under this extended workday arrangement, employees must be compensated at 1 1/2 times their regular rate of pay for all work performed in any workday in excess of the scheduled hours established by the agreement, up to and including 12 hours, or in excess of 40 hours in one workweek. All work performed in excess of 12 hours in a workday must be compensated at double the regular rate of pay.ⁿ³⁰

The agreement must be confirmed in a secret-ballot election, held during regular working hours,ⁿ³¹ by at least 2/3 of the affected employees.ⁿ³² Affected employees are those employees whose hours are regulated by Chapter 3 of Division 2, Part 1 of the Labor Code, and who have become employed by the employer within 24 hours of the time the election begins.ⁿ³³ A policy adopted pursuant to these provisions is effective only for so long as specified in the agreement, but not to exceed 12 months.ⁿ³⁴

Not later than 14 days prior to the election, the employer must notify affected employees, in writing, of the following: how the proposed new work schedule would affect wages, hours, and benefits;ⁿ³⁵ the right to request a neutral third party to conduct the election;ⁿ³⁶ the right to file a complaint against the employer for election misconduct;ⁿ³⁷ and an explanation of any health or safety considerations of extended work shifts.ⁿ³⁸

The employer also must hold pre-election informational meetings to explain the effect of the proposed work schedule on the hours and compensation of the employees. Notice regarding the time, date, place, and purpose of the meetings and the election must be posted in at least three locations throughout the mine site for at least seven days prior to the election. Failure to comply with the meeting and notice requirements will render the election results null and void.ⁿ³⁹

Under an extended workday agreement, an employer must make a reasonable attempt to place an employee in an alternative work assignment that the employee is capable of performing, provided that the employee was eligible to participate in the election and is unable or unwilling to work the extended schedule. However, an employer is not required to make this accommodation if an alternative work assignment that the employee is capable of performing is not available or if the employee commenced his or her employment after the election.ⁿ⁴⁰

[2] Federal Law

[a] Irregular Work Schedules ("Belo Contracts")

Employees employed pursuant to a bona fide individual contract (oral or written) or a bona fide collective bargaining agreement, whose duties necessitate irregular hours or work, may be employed in excess of the maximum 40-hour workweek if the contract or agreement has been entered into before performance of the work andⁿ⁴¹

1. Specifies a regular rate of pay of not less than the federal statutory minimum hourly rateⁿ⁴² and compensation at not less than 1 1/2 times the specified rate for all hours worked in excess of the applicable statutory maximum workweek; and
2. Provides a weekly guaranty of pay for not more than 60 hours based on the rates specified above.

Contracts or agreements embodying these conditions are known as "Belo" contracts or agreements, after the United States Supreme Court case that validated their use.ⁿ⁴³ For the Belo exemption to apply, straight time as well as overtime hours must be irregular.ⁿ⁴⁴

In the absence of a Belo arrangement, computation on an hourly rate basis of the wages of employees who have irregular hours would vary widely. The Belo arrangement is intended to permit the creation of an artificial "regular rate," and to allow a means for employers to guarantee the same payment each week of at least a fixed amount based on a regular hourly rate for all work performed up to the maximum amount specified in the agreement. Consequently, the employee can rely on a regular weekly income, and the employer retains some control over labor costs.ⁿ⁴⁵

A wage plan must satisfy *all* the requirements of Title 29, *United States Code, Section 207(f)* to qualify as exempt from the overtime provisions of the FLSA.ⁿ⁴⁶ For a discussion of computation of the regular rate and overtime compensation for fluctuating workweek schedules under federal law in the absence of a Belo agreement, *see* § 3.09[2][b][iv].

The guaranteed fixed pay established by the Belo agreement may not cover more than the number of hours specified in the agreement (up to a maximum of 60) at the specified rates.ⁿ⁴⁷ If the employee works more than the specified number of hours, he or she must be paid additional overtime compensation, at the rates specified in the agreement, in addition to the guaranteed amount.ⁿ⁴⁸ However, the employee must be paid at least the full amount guaranteed by the agreement every week in which the employee performs any work for the employer, even if the employee works considerably fewer hours than specified in the agreement.ⁿ⁴⁹

California law contains no exception for an agreement comparable to a Belo agreement. Under certain circumstances, however, the overtime provisions of the California wage orders do not apply to employees covered by collective bargaining agreements.ⁿ⁵⁰ For discussion of this exemption, *see* § 3.03[1][b][i]. For discussion of the types of alternative workweek agreements that are permissible under California law, *see* [1], *above*.

[b] 14-Day Schedules for Hospital Workers

Employers engaged in the operation of a hospital or an institution primarily engaged in the care of sick, aged, or mentally ill residents may, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, establish a work period of 14 consecutive days in lieu of the workweek of seven consecutive days for purposes of overtime computation. Under this schedule, the employee must receive compensation at a rate not less than 1 1/2 times his or her regular rate of pay for employment in excess of eight hours during any workday, and in excess of 80 hours in the 14-day period.ⁿ⁵¹

When a hospital changes its shift schedule to accommodate its employees' scheduling desires, a change in pay rates between the old and new scheduling schemes in an attempt to keep overall pay revenue-neutral does not establish a violation of the FLSA's overtime pay requirements. Thus, for example, in response to nurses' requests for 12-hour shift schedules rather than 8-hour shift schedules, a hospital developed and implemented an optional 12-hour shift schedule and pay plan that did not violate the FLSA. The pay plan provided nurses the option of working a 12-hour shift schedule in exchange for receiving a lower base hourly salary that at all times exceeded the minimum wage set forth by the FLSA and time-and-a-half pay for hours worked in excess of eight per day. The result was that nurses who volunteered for the 12-hour shift schedule made approximately the same amount of money as they made on the 8-hour shift schedule while working the same number of hours and performing the same duties. There was no evidence to suggest the hospital was attempting to avoid paying its employees overtime wages, and there was no authority prohibiting the hospital from paying employees different hourly rates when assigned different shifts.^{n51.1}

California law provides nearly identical provisions for a 14-day workweek for hospital employees.ⁿ⁵²

[c] Employees Covered Under Collective Bargaining Agreement Limiting Hours of Employment

Overtime compensation for hours worked in excess of 40 during the workweek need not be paid to employees employed pursuant to a bona fide collective bargaining agreement that provides either:

1. That no employee shall be employed more than 1,040 hours during any period of 26 consecutive weeks;ⁿ⁵³ or

2. That during a specified period of 52 consecutive weeks the employee will be employed not more than 2,240 hours and guaranteed between 1,840 hours (or not less than 46 weeks at the normal number of work hours per week, but not less than 30 hours per week) and 2,080 hours of employment for which the employee shall receive compensation at rates not less than those applicable under the agreement, and that for all hours in excess of the guaranty that are also in excess of 40 per week, or in excess of 2,080 during the 52-week period, the employee will receive compensation at 1 1/2 times his or her regular rate.ⁿ⁵⁴

Employees covered under one of the above-described collective bargaining agreements must also receive compensation for employment in excess of 12 hours in any workday, and for employment in excess of 56 hours in any workweek, at a rate not less than 1 1/2 times their regular rate of pay.ⁿ⁵⁵

Excepting employees governed by Wage Order No. 14, employees covered under collective bargaining agreements providing for overtime premiums for all overtime hours worked and a regular hourly rate for the employee of not less than 30% more than the state minimum wage are completely exempt from the overtime provisions of the California wage orders.ⁿ⁵⁶ Under Wage Order No. 14, the collective bargaining exception applies if the agreement provides premium wage rates for overtime work and a cash wage rate of not less than one dollar (\$1.00) more than the minimum wage.ⁿ⁵⁷ For discussion, *see* § 3.03[1][b][i].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law Wage & Hour Laws General Overview

FOOTNOTES:

(n1)Footnote 1. The agricultural occupations wage order has never provided for special workweeks by agreement because the order already permits a 10-hour work day before overtime compensation is required. *see* 8 Cal. Code Reg. § 11140, P 3 (Cal. Wage Order No. 14-2001). The wage order for household occupations also does not provide for alternative workweek agreements; employees must be paid overtime for hours worked in excess of 9 hours in the case of a live-in employee and 8 hours in the case of a non-live-in employee. *See* 8 Cal. Code Reg. § 11150, P 3(B), (C) (Cal. Wage Order No. 15-2001).

(n2)Footnote 2. The IWC has since renumbered the wage orders, with minor amendments, to 2001. *See* 8 Cal. Code Reg. §§ 11010-11130, 11160, PP 3(B)(1), (2) (Cal. Wage Order No. 1-2001-13-2001, 16-2001); Interim Wage Order 2000, P 5.

(n3)Footnote 3. *See* 8 Cal. Code Reg. §§ 11140, 11150, P 3 (Cal. Wage Order Nos. 14-2001, 15-2001).

(n4)Footnote 4. 8 Cal. Code Reg. §§ 11010-11130, 11160, P 3(B)(1) (Cal. Wage Order Nos. 1-2001-13-2001, 16-2001), Interim Wage Order 2001, P 5(A).

(n5)Footnote 5. 8 Cal. Code Reg. §§ 11010-11130, 11160, P 3(B)(1) (Cal. Wage Order Nos. 1-2001-13-2001, 16-2001), 11170, P 5 (Cal. Wage Order No. 17-2001).

(n6)Footnote 6. 8 Cal. Code Reg. §§ 11010-11130, 11160 P 3(B)(1) (Cal. Wage Order Nos. 1-2001-13-2001, 16-2001); 11170 P 5 (Cal. Wage Order No. 17-2001).

(n7)Footnote 7. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 56.23.1

(CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n8)Footnote 8. 8 *Cal. Code Reg.* §§ 11010-11130, P 3(B)(1) (Cal. Wage Order Nos. 1-2001-13-2001), 11170, P 5(A) (Cal. Wage Order No. 17-2001).

(n9)Footnote 9. 8 *Cal. Code Reg.* §§ 11010-11130, P 3(B)(1) (Cal. Wage Order No. 1-2001-13-2001), 11170, P 5(A) (Cal. Wage Order No. 17-2001).

(n10)Footnote 10. 8 *Cal. Code Reg.* §§ 11010-11130, P 3(B)(1) (Cal. Wage Order No. 1-2001-13-2001), 11170, P 5(A) (Cal. Wage Order No. 17-2001).

(n11)Footnote 11. 8 *Cal. Code Reg.* §§ 11010-11030, 11060-11080, 11110-11130, P 3(B)(1), (2) (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-8-2001, 11-2001-13-2001), 11040, 11050, 11090, 11100, P 3(B)(1), (2) (Cal. Wage Order Nos. 4-2001, 5-2001, 9-2001, 10-2001), 11170, P 5(B) (Cal. Wage Order No. 17-2001).

(n12)Footnote 12. 8 *Cal. Code Reg.* §§ 11010-11030, 11060-11080, 11110-11130, P 3(B)(1), (3) (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-8-2001, 11-2001-13-2001), 11040, 11050, 11090, 11100, P 3(B)(1), (2) (Cal. Wage Order Nos. 4-2001, 5-2001, 9-2001, 10-2001), 11160, P 3(B)(1)(d) (Cal. Wage Order No. 16-2001) 11170, P 5(C) (Cal. Wage Order No. 17-2001).

(n13)Footnote 13. 8 *Cal. Code Reg.* §§ 11010-11030, 11060-11080, 11110-11130, P 3(B)(1), (4) (Cal. Wage Order No. 1-2001-3-2001, 6-2001-8-2001, 11-2001-13-2001), 11040, 11050, 11090, 11100, P 3(B)(1), (3) (Cal. Wage Order Nos. 4-2001, 5-2001, 9-2001, 10-2001), 11160, P 3(B)(1)(g) (Cal. Wage Order No. 16-2001) 11170, P 5(D) (Cal. Wage Order No. 17-2001).

(n14)Footnote 14. 8 *Cal. Code Reg.* §§ 11010-11030, 11060-11080, 11110-11130, P 3(B)(1), (5) (Cal. Wage Order No. 1-2001-3-2001, 6-2001-8-2001, 11-2001-13-2001); 11040, 11050, 11090, 11100, P 3(B)(1), (4) (Cal. Wage Order Nos. 4-2001, 5-2001, 9-2001, 10-2001); 11160, P 3(B)(1)(e) (Cal. Wage Order No. 16-2001) 11170, P 5(E) (Cal. Wage Order No. 17-2001).

(n15)Footnote 15. 8 *Cal. Code Reg.* §§ 11010-11030, 11060-11080, 11110-11130, P 3(B)(1), (6) (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-8-2001, 11-2001-13-2001); 11040, 11050, 11090, 11100, P 3(B)(1), (5) (Cal. Wage Order Nos. 4-2001, 5-2001, 9-2001, 10-2001); 11160, P 3(B)(1)(f) (Cal. Wage Order No. 16-2001) 11170, P 5(F) (Cal. Wage Order No. 17-2001).

(n16)Footnote 16. 8 *Cal. Code Reg.* §§ 11010-11030, 11060-11080, 11110-11120, P 3(B)(8) (Cal. Wage Order Nos. 1-2001 3-2001, 6-2001 8-2001, 10-2001 12-2001), 11040-11050, 11090-11100 P 3(B)(7) (Cal. Wage Order Nos. 4-2001 5-2001, 9-2001 10-2001), 11170, P 5(H) (Cal. Wage Order No. 17-2001).

8 *Cal. Code Reg.* §§ 11010-11030, 11060-11080, 11110, 11120, P 3(B)(1), (7) (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-8-2001, 11-2001, 12-2001), 11040, 11050, 11090, 11100, P 3(B)(1), (6) (Cal. Wage Order Nos. 4-2001, 5-2001, 9-2001, 10-2001); 11130, P 3(B)(1), (8) (Cal. Wage Order No. 13-2001); Interim Wage Order 2001, P 5(H).

(n17)Footnote 17. 8 *Cal. Code Reg.* §§ 11010-11030, 11060-11080, 11110, 11120, P 3(B)(1), (7) (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-8-2001, 11-2001, 12-2001); 11040, 11050, 11090, 11100, P 3(B)(1), (6) (Cal. Wage Order Nos. 4-2001, 5-2001, 9-2001, 10-2001); 11130, P 3(B)(1), (8) (Cal. Wage Order No. 13-2001); 11170, P 5(H) (Cal. Wage Order No. 17-2001). For information on election procedures, see 8 *Cal. Code Reg.* §§ 11010-11130, 3(B)(2) (Cal. Wage Order Nos. 1-2001-13-2001).

(n18)Footnote 18. 8 *Cal. Code Reg.* §§ 11040, 11050, P 3(B)(1), (6) (Cal. Wage Order Nos. 4-2001, 5-2001).

(n19)Footnote 19. *8 Cal. Code Reg. §§ 11010-11030, 11060-11080, 11110, 11120, 11130*, P 3(B)(1), (2) (Cal. Wage Order Nos. 1-2001-3-2001, 6-2001-8-2001, 10-2001, 11-2001, 13-2001).

(n20)Footnote 20. *8 Cal. Code Reg. §§ 11040, 11050*, P 3(B)(1), (7) (Cal. Wage Order Nos. 4-2001, 5-2001).

(n21)Footnote 21. *8 Cal. Code Reg. § 11040*, P 3(B)(1), (8) (Cal. Wage Order No. 4-2001).

(n22)Footnote 22. *See 8 Cal. Code Reg. §§ 11040, 11050*, P 2(J) (Cal. Wage Order Nos. 4-2001, 5-2001) for definition of "healthcare emergency."

(n23)Footnote 23. *8 Cal. Code Reg. §§ 11040, 11050*, P 3(B)(1), (9) (Cal. Wage Order Nos. 4-2001, 5-2001).

(n24)Footnote 24. *8 Cal. Code Reg. § 11050*, P 3(B)(1), (8) (Cal. Wage Order No. 5-2001).

(n25)Footnote 25. *8 Cal. Code Reg. § 11130*, P 3(B)(1), (7) (Cal. Wage Order No. 13-2001).

(n26)Footnote 26. *See 8 Cal. Code Reg. §§ 11010-11130*, P 3(B)(2) (Cal. Wage Order Nos. 1-2001-13-2001), *11160*, P 3C(7) (Cal. Wage Order No. 16-2001).

(n27)Footnote 27. *8 Cal. Code Reg. §§ 11010-11130*, P 3(B)(2) (Cal. Wage Order Nos. 1-2001-13-2001), Interim Wage Order 2001, P 5.

(n28)Footnote 28. D.L.S.E. Interpretive Bulletin No. 89-3 (Nov. 30, 1989) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n29)Footnote 29. D.L.S.E. Interpretive Bulletin No. 89-3 (Nov. 30, 1989) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n30)Footnote 30. *Lab. Code § 751.8(b)*.

(n31)Footnote 31. *Lab. Code § 750.5(b)(2)*.

(n32)Footnote 32. *Lab. Code § 750.5(b)*.

(n33)Footnote 33. *Lab. Code § 750.5(b)(3)*.

(n34)Footnote 34. *Lab. Code § 750.5(b)(4)*.

(n35)Footnote 35. *Lab. Code § 750.5(b)(5)(A)*.

(n36)Footnote 36. *Lab. Code § 750.5(b)(5)(A)*. *See Lab. Code § 750.5(b)(2)*.

(n37)Footnote 37. *Lab. Code § 750.5(b)(5)(A)*. *See Lab. Code § 752(a)*.

(n38)Footnote 38. *Lab. Code § 750.5(b)(5)(B)*.

(n39)Footnote 39. *Lab. Code § 750.5(b)(5)(C)*.

(n40)Footnote 40. *Lab. Code § 750.5(b)(6)*.

(n41)Footnote 41. *29 U.S.C. § 207(f)*; *see also 29 C.F.R. §§ 778.402-778.414*.

(n42)Footnote 42. *See 29 U.S.C. § 206(a)*; *see also* ch. 2 for discussion of minimum wage obligations under federal law.

(n43)Footnote 43. *See Walling v. A.H. Belo Corp.* (1942) 316 U.S. 624, 62 S. Ct. 1223, 86 L. Ed. 1716 .

(n44)Footnote 44. 29 C.F.R. § 778.406; *see Donovan v. Brown Equipment & Service Tools, Inc.* (5th Cir. 1982) 666 F.2d 148, 154 (irregularity only in overtime hours does not constitute "irregular hours" for purposes of the Belo requirements).

(n45)Footnote 45. *See* 29 C.F.R. § 778.404; *Walling v. A.H. Belo Corp.* (1942) 316 U.S. 624, 635, 62 S.Ct. 1223, 86 L. Ed. 1716 .

(n46)Footnote 46. 29 C.F.R. § 778.404.

(n47)Footnote 47. *See* 29 U.S.C. § 207(f); 29 C.F.R. § 778.411.

(n48)Footnote 48. 29 C.F.R. § 778.411.

(n49)Footnote 49. *See* 29 C.F.R. § 778.410(a).

(n50)Footnote 50. 8 Cal. Code Reg. §§ 11010, 11020, 11060, 11110, 11160, P 3(H) (Cal. Wage Orders Nos. 1-2001, 2-2001, 6-2001, 11-2001, 16-2001); 11040, 11070, 11080-11100, P 3(I) (Cal. Wage Order Nos. 4-2001, 7-2001, 8-2001-10-2001); 11030, 11120, 11130, P 3(J) (Cal. Wage Order Nos. 3-2001, 12-2001, 13-2001); 11050, P 3(L) (Cal. Wage Order No. 5-2001); 11140, P 3(E) (Cal. Wage Order No. 14-2001); 11150, P 3(G) (Cal. Wage Order No. 15-2001).

(n51)Footnote 51. 29 U.S.C. § 207(j).

(n52)Footnote 51.1. *Parth v. Pomona Valley Hospital Medical Center* (9th Cir. 2009)584 F.3d 794, 2009 U.S. App. LEXIS 23329, *7-*22 .

(n53)Footnote 52. *See* 8 Cal. Code Reg. § 11050, P 3(D) (Cal. Wage Order No. 5-2001); *see also* discussion under [1][b], *above*.

(n54)Footnote 53. 29 U.S.C. § 207(b)(1).

(n55)Footnote 54. 29 U.S.C. § 207(b)(2).

(n56)Footnote 55. 29 U.S.C. § 207(b).

(n57)Footnote 56. 8 Cal. Code Reg. §§ 11010, 11020, 11060, 11110, 11160, P 3(H) (Cal. Wage Orders Nos. 1-2001, 2-2001, 6-2001, 11-2001, 16-2001); 11040, 11070, 11080-11100, P 3(I) (Cal. Wage Order Nos. 4-2001, 7-2001, 8-2001-10-2001); 11030, 11120, 11130, P 3(J) (Cal. Wage Order Nos. 3-2001, 12-2001, 13-2001); 11050, P 3(L) (Cal. Wage Order No. 5-2001); 11140, P 3(E) (Cal. Wage Order No. 14-2001); 11150, P 3(G) (Cal. Wage Order No. 15-2001).

(n58)Footnote 57. 8 Cal. Code Reg. § 11140, P 3(E) (Cal. Wage Order No. 14-2001).



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.07

AUTHOR: By Carol S. Sanders, J.D.

§ 3.07 Determining Hours Worked

[1] California Law

[a] "Hours Worked" Defined

[i] Employees Generally

In order to determine whether an employer has complied with both its minimum wage and its overtime compensation obligations, it must determine the number of hours worked by the employee during a workweek and during each workday.ⁿ¹ The wage orders broadly define "hours worked" as the time during which an employee is subject to the control of the employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.ⁿ² In addition, certain periods of time that may not ordinarily be thought of as worktime must be included in "hours worked," as discussed below.

■ CONSULTANT'S COMMENT:

Because "hours worked" under the wage orders include time when the employee is "permitted to work, whether or not required to do so,"ⁿ³ the DLSE takes the position that an employee who works overtime even though not requested to do so must be paid overtime compensation as required by the wage orders if the employer or supervisor knew or had reason to believe that the employee was working and did not prevent the overtime work. The DLSE also takes the position that the mere promulgation of a rule against overtime work is not enough to avoid liability for overtime pay. Management must make every effort to enforce such a rule. Thus, although an employer may discipline an employee for working unauthorized overtime, it cannot avoid payment for overtime it knew or had reason to know was performed.ⁿ⁴ *Commentary by Kirby Wilcox.*

[ii] Professional, Technical, Clerical, Mechanical, and Public Housekeeping Employees in Health Care Industry

A special definition of "hours worked" applies to workers in the health care industry who are in professional, technical, clerical, mechanical, and similar occupations,ⁿ⁵ and public housekeeping workers in the health care industry. For these employees, "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the federal Fair Labor Standards Act (FLSA).ⁿ⁶ Whether an employee is subject to the employer's control, such as by beeper or pager, is no longer a factor in determining the number of hours worked.ⁿ⁷

For a discussion of the FLSA provisions governing hours worked, *see* [2][a], *below*.

[b] Travel Time

The DLSE's position is that arrival at the designated or prescribed reporting place starts the day's work unless travel time to that place is beyond the time required by the normal or usual commuting distance between home and work. The same rule applies with respect to the end of the day's work.ⁿ⁸ Thus, time spent traveling between home and the usual work place is not counted as hours worked. The fact that the employee commutes in a vehicle that is owned, leased, or subsidized by the employer and is used for the purpose of ridesharing, as defined in *Vehicle Code Section 522*, does not alter this rule.ⁿ⁹

In the absence of a collective bargaining agreement covering pay for travel time, time spent traveling during either regular working hours or in addition to regular working hours will be counted as hours worked if the travel is done pursuant to the employer's instructions.ⁿ¹⁰ This means that extended travel time is considered hours worked even though no productive work is performed.ⁿ¹¹ In *Morillion v. Royal Packing Co.*,ⁿ¹² agricultural workers were required by their employer to assemble at one location and be bussed to the job site; they were not permitted to travel to the job site on their own.ⁿ¹³ The Supreme Court found that the time on the bus was compensable.ⁿ¹⁴ On the other hand, if employees are not required to take the employer's bus, time spent on the bus is not compensable.^{n14.1}

■ CONSULTANT'S COMMENT:

Morillion v. Royal Packing Co.,ⁿ¹⁵ is significant for two primary reasons. First, *Morillion* notes that federal and state law regarding travel time differ substantially. Specifically, California has no analogue to the Portal-to-Portal Act.ⁿ¹⁶ Furthermore, the FLSA, with one limited exception for "clothes changing and wash-up time" contains no definition of "hours worked." Although the same term appears in the regulations under the FLSA, it is in a formulation that does not precisely parallel the state definition. Therefore, *Morillion* finds federal precedent regarding the compensability of commute time to be unpersuasive.

Second, *Morillion* ⁿ¹⁷ holds that the California wage orders define "hours worked" as covering *both* "the time that the employee is suffered or permitted to work, whether or not required to do so" and "the time during which an employee is subject to the control of an employer." That is, the state definition of "hours worked" provides two separate and distinct tests for determining the compensability of time. Each of those tests--the "suffered or permitted to work" test and the "control" test--function independently.

Morillion does not stand for the proposition that travel time is compensable--only that compulsory travel time may be compensable. Thus, the Court specially noted that "employers may provide optional free transportation to employees without having to pay them for their travel time, as long as employers do not require employees to use this transportation."^{n17.1} *Morillion*, however, does stand for the proposition that the "control" test has independent vitality. Therefore, employers are cautioned to review their policies and practices regarding compensable time in light of this development. *Commentary by Kirby Wilcox.*

The existence of a collective bargaining agreement does not necessarily determine the compensability of travel time. If

a collective bargaining agreement controls, § 301 of the Labor Management Relations Act will preempt a state law claim. Similarly, if the right exists independently of the collective bargaining agreement, courts still will consider whether it is nevertheless substantially dependent on analysis of a collective-bargaining agreement, in which case the state law claim still is preempted. However, if the state right exists totally independent of the collective bargaining agreement, there is no preemption.ⁿ¹⁸

If the total compensable travel time exceeds eight hours in one day, the employee must be paid 1 1/2 times his or her regular rate of pay for travel in excess of eight hours, less meals, time for relaxation, and the equivalent time that would normally be spent traveling from the employee's residence to his or her regular place of employment.ⁿ¹⁹

■ ILLUSTRATION:

Employee regularly works in San Francisco and his usual hours of employment are 9 a.m. to 5 p.m. The commute time from his home to his usual work location is approximately the same as the time from his home to the San Francisco airport. Employee is given a special one-day assignment in the desert east of San Diego, with instructions to leave San Francisco at 8 a.m. Employee leaves his home at 8 a.m., arrives at his work destination at noon, completes his assignment at 3 p.m., and arrives back at home in San Francisco at 9 p.m., making the best transportation connections he can. All the time between 8 a.m. and 9 p.m., including travel time, counts as hours worked except the travel time between Employee's home and the San Francisco airport and the usual meal time (unless Employee performs work for Employer during the meal period).

[c] Meal Periods

An employer cannot require any employee to work during any meal mandated by an applicable order of the Industrial Welfare Commission.ⁿ²⁰ If an employer fails to provide a non-exempt employee a meal period in accordance with an applicable order of the Industrial Welfare Commission, the employer must pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided.ⁿ²¹ The additional hour of pay required for failure to provide a meal period constitutes wages, not a penalty, so that a three-year statute of limitation applies to actions to collect the additional pay, rather than a one-year statute of limitations.^{n21.1}

If the employee is not relieved of all duty during the 30-minute meal period required under the wage orders,ⁿ²² the meal period is considered an "on-duty" meal period and counted as time worked.ⁿ²³ An "on-duty" meal period is permitted under the wage orders only when the nature of the work prevents an employee from being relieved of all duty and when a written agreement between the parties provides for a paid on-duty meal period.ⁿ²⁴

■ CONSULTANT'S COMMENT:

Although not directly stated in the wage orders, the DLSE and one court of appeal consider a meal period to be "on-duty" (and therefore counted toward hours worked) if an employee is not permitted to leave his or her work station or the employer's premises, even if the employee is otherwise relieved of all duties.ⁿ²⁵ Furthermore, even if not "on-duty," a meal period will be counted as hours worked if it is less than the 30-minute minimum required by the wage orders. By contrast, under the FLSA, a "bona fide meal period," which is excluded from hours worked, may exist even though the employee is not permitted to leave the premises, as long as the employee is otherwise completely relieved from his or her duties.ⁿ²⁶ *Commentary by Kirby Wilcox.*^{n26.1}

In determining whether restrictions on a meal period are sufficient to make the period "on duty," a two-step analysis is required. First, the restrictions must be primarily directed toward the fulfillment of the employer's requirements and policies. Second, the employees' time must be so substantially restricted that they are unable to engage in private pursuits.ⁿ²⁷ In *Madera Police Officers Assn. v. City of Madera*,ⁿ²⁸ the California Supreme Court found that police officers were "on duty" during meal periods scheduled by the watch commanders, when the officers were required to

remain on call, leave a telephone number where they could be reached, and respond to citizen inquiries and crimes committed in their presence, and were prohibited from conducting personal business during the meal period if in uniform.ⁿ²⁹ The Court disapproved the analysis applied in *Fowler v. State Personnel Board*,ⁿ³⁰ which reached a contrary result in a similar fact situation, insofar as the *Fowler* court evaluated individual restrictions independently, without consideration of the net impact on the officer's time.ⁿ³¹

The state requirements regarding compensation for meal periods are similar to those under the FLSA, which require that meal periods during which the employee is required to perform any duties, including inactive duties (such as a requirement that the employee remain at a desk or machine while eating) be counted as worktime. However, the FLSA does not restrict an employer's right to require on-duty meals, as long as they are included in hours worked.ⁿ³²

[d] Rest Periods

The wage orders require that employers authorize and permit rest periods of a minimum duration during the workday. An employer cannot require an employee to work during any rest period mandated by an applicable order of the Industrial Welfare Commission.ⁿ³³ If an employer fails to provide an employee a rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer must pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.ⁿ³⁴

■ CONSULTANT'S COMMENT:

Because an employer is not required to record time taken for rest periods, it is reasonable to expect that the Labor Commissioner will pursue rest period claims under *Lab. Code* § 226.7 only if an employee provides evidence that an employer has denied rest periods that the employee has sought to take.
Commentary by Kirby Wilcox.

Authorized rest period time must be counted as hours worked, for which there may be no deduction from wages.ⁿ³⁵ By statute, California also requires employers to provide a reasonable amount of break time for an employee to express breast milk for an infant child.ⁿ³⁶

For discussion of the requirements for rest periods, *see* § 3.24.

[e] Standby or On-Call Time

[i] Generally

Neither the wage orders nor the Labor Code define standby time, or establish rules for determining when it must be included in hours worked. However, the DLSE's policies and interpretations manual states that "free" on-call or standby time occurs when the employee is not required to remain on the employer's premises and is free to engage in personal pursuits, subject only to the requirement that the employee can be reached if needed. Free on-call or standby time is not considered hours worked.ⁿ³⁷

According to the Labor Commissioner, the central inquiry is whether the time in question is better characterized as "controlled" or "uncontrolled." For example, an employee who is required to stay at home and keep the telephone line free for calls from the employer is not free to engage in personal pursuits. Such on-call time would be considered hours worked. However, beeper systems or arrangements for periodic call-ins that allow normal movement in the community are alternatives that usually do allow the employee to engage in personal pursuits.^{n37.1} The bottom-line consideration is the amount of control the employer exercises over the employees' activities.ⁿ³⁸

The state guidelines are similar to the federal regulations on standby time, pursuant to which an employee who is not required to remain on the employer's premises but merely required to leave word at home or with company officials where he or she may be reached is not working while on call.ⁿ³⁹ However, the state guidelines' emphasis on freedom of

movement for the employee during "free" standby time suggest that a requirement that the employee remain at a place where he or she may be reached during on-call time might be viewed as worktime under state law, although not under federal law. This view does not necessarily apply to at least two types of employees--certain health care industry employees and resident employees in the public housekeeping industry.ⁿ⁴⁰

Standby time is to be distinguished from reporting time. All of the wage orders mandate that employees be paid for a minimum amount of hours if the employee is required to report to work and does report, but is either not put to work, or is furnished less than a specified amount of work.ⁿ⁴¹ Only the hours that the employee actually worked or waited on the employer's premises after reporting need be counted as hours worked for purposes of computing overtime, even though the employee may be required to be compensated in excess of those hours. Under both federal and state law, reporting time payments made pursuant to the wage orders that are in excess of actual worktime are considered payments made other than for hours worked and are excluded from computation of the employee's regular rate.ⁿ⁴²

For a discussion of reporting time pay requirements under California law, see Ch. 2.

■ CONSULTANT'S COMMENT:

Except for household occupations,ⁿ⁴³ the wage orders generally do not specify whether employees who are "on duty" (i.e., required to remain on the premises) for extended periods of time (such as building security personnel, hotel desk clerks, firefighters, and ambulance drivers) must be compensated for free time, other than meal periods, that may occur during the shift. In practice, the DLSE applies a 24-hour test. If the employee is required to be on duty for less than 24 hours, the employee is considered to be working for the *entire period* (except for scheduled meal periods that meet the requirements set out in [c], *above*), even though the employee is permitted to sleep or engage in other activities when not busy. On the other hand, if the employee's on-duty period extends for 24 hours or more, both sleep time and uninterrupted meal periods of at least 30 minutes may be excluded from working time. The sleep time exclusion may not exceed eight hours during each 24 hours of duty, and the employer must furnish adequate sleeping facilities. If the employee does not have an opportunity to get at least five hours of sleep, the entire sleeping period must be counted as hours worked. The five hours need not necessarily be continuous and uninterrupted, but if interruptions are so frequent as to prevent reasonable periods of sleep totaling five hours, the entire period is considered hours worked.ⁿ⁴⁴ *Commentary by Kirby Wilcox.*

[ii] Callbacks

Time spent on callbacks to the employer during a standby period is counted as time worked, and the employee who is called back to work must be paid at appropriate rates for the time worked, including a reasonable time for travel. If an employee's activities are restricted by the employer pending the second reporting time, then the intervening on-call or standby period is counted as time worked.ⁿ⁴⁵

[iii] Resident Employees in Public Housekeeping Industry

The wage order governing the "public housekeeping" industry (which covers a wide variety of facilities or businesses that provide meals and/or accommodations)ⁿ⁴⁶ provides that in the case of an employee who is required to reside on the premises, "hours worked" includes time spent carrying out assigned duties.ⁿ⁴⁷ Sleep time, meal periods, and other nonactive times that the employee can use for private pursuits (such as personal cooking and cleaning or watching television) are not considered hours worked.ⁿ⁴⁸

■ CONSULTANT'S COMMENT:

In determining hours worked for resident employees such as motel or apartment house managers, the DLSE considers such factors as (1) the number of units in the motel or apartment building; (2) the duties assigned by the employer and a realistic estimate of the time necessary to perform those duties; (3) the employer's instructions concerning the showing of vacant apartments or motel rooms, including the

amount of discretion the employee has in being available to show apartments or rooms, or to turn on the "no vacancy" sign; (4) the occupancy level; (5) the nature and transiency of tenants; (6) the amount of nonworktime during the day that the employee can use for private pursuits on or off the premises; (7) the frequency and nature of interruptions at night and the amount of time required to handle those interruptions; (8) the frequency and nature of the employer's supervision; and (9) any unusual restrictions imposed by the employer on the nonworking hours of the employee. To avoid any disputes regarding the computation of hours worked for such employees, employers are advised to prepare an accurate written list of the employee's duties, including a realistic estimate of the amount of time necessary to perform each of those duties, and make clear to the employee *in advance* the employer's policy regarding payment for "nonactive" periods. *Commentary by Kirby Wilcox.*

In at least one case,ⁿ⁴⁹ the DLSE took a position regarding Wage Order No. 5-89ⁿ⁵⁰ that was then contrary to its existing operations and procedures manual, which provided that a resident employee need not be paid for time he or she is required to be on the premises but is free to engage in personal activities.ⁿ⁵¹ The case involved a live-in motel employee who was expected to remain on the motel premises 24 hours a day but whose actual duties required, on average, less than 5 hours a day to perform. The employee had filed a claim for overtime pay, which the Labor Commissioner granted, and his employer appealed. At the ensuing trial, the Labor Commissioner, who represented the employee, unsuccessfully argued that Wage Order No. 5-2000 should be interpreted to mean that the employee was entitled to compensation for the entire time he spent at the motel, less certain allowances for sleep and meals.ⁿ⁵² The Labor Commissioner pursued this same argument on appeal, where it was equally unsuccessful. The appellate court rejected the Labor Commissioner's interpretation as contrary to the plain meaning of the wage order.ⁿ⁵³ The court also found the interpretation unconvincing because, as the Labor Commissioner had admitted at trial, it relies solely on the first clause of the wage order, which provides that employees must be paid for time during which they are subject to the employer's control, and thereby renders redundant the second clause, which provides that resident employees must be paid only for time spent carrying out assigned duties.ⁿ⁵⁴ Finally, the court refused to defer to the Labor Commissioner's interpretation because of the inconsistency between the DLSE's manual and the Labor Commissioner's position in this case, which the Labor Commissioner tried to explain by claiming that the DLSE's own manual was "inartfully drafted."ⁿ⁵⁵

Similarly, employees of a property management company who were required to live on the premises and to be on call and respond to emergencies were not entitled to overtime compensation for the time spent on call, but not responding to emergencies. The employees were able to attend to personal activities while they were not responding to an emergency, so long as they remained available to respond, *i.e.*, within audible range of the telephone and alarm. The fact that they were required to remain in their apartment or the building office in order to hear the telephone and alarms did not make them more like a security guard or a receptionist (who had to remain at a duty station) than like the motel clerk in *Brewer* (who could enjoy the amenities of the motel). Like the motel clerk in *Brewer*, the employees could leave the premises if arrangements were made for their replacements.^{n55.1}

[iv] Professional, Technical, Clerical, Mechanical, and Public Housekeeping Employees in the Health Care Industry

For workers in the health care industry who are in professional, technical, clerical, mechanical, and similar occupations, and for public housekeeping workers in the health care industry, "hours worked" means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act (FLSA).ⁿ⁵⁶ Therefore, in conformity with the FLSA guidelines, the fact that an employee is subject to his or her employer's control during free on-call or standby time because of the use of a beeper or pager or otherwise does not necessarily result in classification of that time as hours worked.ⁿ⁵⁷

[f] Time Spent in Adjusting Grievances

There are no state rules or guidelines regarding whether time spent in adjusting grievances will be considered worktime. Under federal law, time spent in adjusting grievances during the time the employees are required to be on the premises is hours worked, except that, if a union is involved, the determination of whether the time should be compensable is left to the collective bargaining process.ⁿ⁵⁸

However, a California court has held that, at least in regard to time spent participating in "walkaround inspections" authorized by the California Occupational Safety and Health Act,ⁿ⁵⁹ the employee must be compensated.ⁿ⁶⁰ The court in that case expressly rejected contrary holdings by the United States Court of Appeals for the District of Columbia Circuit.ⁿ⁶¹

[g] Work Recesses

California Wage Order Nos. 3-2001 (governing the canning, freezing, and preserving industry), 8-2001 (governing the industries handling products after harvest), and 13-2001 (governing agricultural occupations) provide that an employer may declare a "work recess" of 1/2 hour or more in addition to the meal period(s).ⁿ⁶² These recesses need not be included in hours worked if (1) the employer notifies the employees of the time to report back for work, (2) the employer permits the employees to leave the premises during the recess, (3) there are no more than two such recess periods within one shift, and (4) the total duration of the recess periods does not exceed two hours.ⁿ⁶³ Work stoppages of less than 1/2 hour may not be deducted from hours worked.ⁿ⁶⁴

[h] Voting Time

Employers are required to allow employees compensable time off of up to two hours for the purpose of voting in a statewide election if the employee does not have sufficient time during nonworking hours to vote.ⁿ⁶⁵

[i] Attendance at Judicial Proceedings

Although employers are prohibited by statute from discharging or "in any manner discriminating against" an employee for taking time off to serve as required by law on a jury or to appear as a witness,ⁿ⁶⁶ there is no requirement that the time taken be counted as compensable worktime.

Under California law, an employer may not deduct from an exempt employee's salary for jury duty or witness time.ⁿ⁶⁷

An employer must allow an employee who is a victim of a crime, an immediate family member of a victim,ⁿ⁶⁸ a registered domestic partner of a victim,ⁿ⁶⁹ or the child of a registered domestic partner of a victim to be absent from work in order to attend judicial proceedings related to that crime.ⁿ⁷⁰ For these purposes, a victim is defined as a person against whom one of the following crimes has been committed:ⁿ⁷¹

- (A) A violent felony, as defined in *Penal Code section 667.5(c)*.
- (B) A serious felony, as defined in *Penal Code section 1192.7(c)*.
- (C) A felony provision of law proscribing theft or embezzlement.

Before an employee may be absent from work for one of these reasons, the employee must give the employer a copy of the notice of each scheduled proceeding provided to the victim by the agency responsible for providing notice, unless advance notice is not feasible. When advance notice is not feasible or an unscheduled absence occurs, the employer may not take any action against the employee if the employee, within a reasonable time after the absence, provides the employer with documentation evidencing the judicial proceeding from a specified entity.ⁿ⁷² An employee may elect to

use accrued paid vacation time, personal leave time, sick leave time, compensatory time off, or unpaid leave time, unless otherwise provided by a collective bargaining agreement, for any of these absences. The entitlement of any employee under *Labor Code section 230.2* may not be diminished by any collective bargaining agreement term or condition.ⁿ⁷³ The employer must keep confidential any records regarding the employee's absence from work.ⁿ⁷⁴ The employer may not discharge from employment or in any manner discriminate against an employee, in compensation or other terms, conditions, or privileges of employment, including, but not limited to the loss of seniority or precedence, because the employee is absent from work pursuant to *Labor Code section 230.2*.ⁿ⁷⁵ Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment by his or her employer because the employee exercised his or her rights under *Labor Code section 230.2* may file a complaint with the Division of Labor Standards Enforcement pursuant to *Labor Code section 98.7*. Notwithstanding any time limitation in Section 98.7, an employee filing a complaint has one year from the date of occurrence of the violation to file his or her complaint.ⁿ⁷⁶

[j] Other Activities

Neither the Labor Code nor the wage orders specifically address the question of whether other, work-related activities, such as washing up, changing uniforms, and attending training seminars, must be counted as hours worked. However, the DLSE policies and interpretations manual provides that time spent washing up at work and changing uniforms is compensable if it is compelled by the necessities of the employer's business.ⁿ⁷⁷ With respect to other activities, in some cases the DLSE will rely on analogous rules followed by the Wage and Hour Division under the FLSA, although the federal regulations are not binding on the DLSE.ⁿ⁷⁸ For discussion of FLSA regulations regarding hours worked, see [2], *below*.

By statute, time off work for an employee to enroll and participate in an adult literacy education program, whether provided on or off the jobsite, need not be counted as hours worked.ⁿ⁷⁹

[k] Absences From Work

There is no requirement in either the Labor Code or the wage orders that excused absences from work by private employees (such as for holidays, vacations, or illnesses) be included as worktime. In this regard, state and federal policy are the same. Nothing in California law precludes an employer from following the established federal policy permitting employers to deduct from exempt employees' vacation leave, when available, on account of partial-day absences from work.^{n79.1} For discussion of absences from work under federal law, see [2][o], *below*.

[l] Lost Work Time Made Up by Health Care Industry Employees

Employees in the health care industry may make up work time lost as a result of personal obligations, if the employee requests permission in writing and the employer concurs.ⁿ⁸⁰ This arrangement applies to health-care workers in professional, technical, clerical, mechanical, and similar occupations,ⁿ⁸¹ and to health-care workers in the public housekeeping industry. This lost time cannot exceed two hours in any one workweek or, where applicable, four hours in any 14-day work period,ⁿ⁸² and must be made up during that workweek or work period. The overtime provisions of the wage orders governing these two types of employees do not apply to this make-up time.ⁿ⁸³

[2] Federal Law

[a] Working ("Employment") Time Defined

In order to determine whether an employer has complied with its minimum wage and overtime compensation obligations under the FLSA, the number of hours that the employer has "employed" an employee during a given workweek must be determined.ⁿ⁸⁴ The FLSA defines the word "employ" as including "to suffer or permit to work."ⁿ⁸⁵ Thus, work not requested but suffered or permitted must be counted as worktime,ⁿ⁸⁶ including work performed at

home that the employer knows or has reason to believe is being performed.ⁿ⁸⁷ An employee's failure to report overtime work will not defeat a claim for overtime if the employer knew that the employee worked the unreported overtime.ⁿ⁸⁸ The mere promulgation of a rule against overtime work is not enough. Management has the power to enforce that rule and must make every effort to do so.ⁿ⁸⁹ Conversely, work performed without the employer's knowledge need not be counted in determining entitlement to overtime compensation under the FLSA,ⁿ⁹⁰ even if the extra work was undertaken because of the difficulty of meeting the employer's production standards.ⁿ⁹¹

The workweek ordinarily includes all the time during which an employee is necessarily required to be on the employer's premises, on duty, or at a prescribed work place.ⁿ⁹² Work time may include waiting time when the employee does nothing other than being ready to serve at the employer's direction, since "readiness to serve may be hired, quite as much as service itself ...".ⁿ⁹³ However, travel time to and from work and certain "preliminary" and "postliminary" activities performed prior or subsequent to the workday are eliminated from working time under the Portal-to-Portal Act.ⁿ⁹⁴

If an individual works for more than one company at a time, it is necessary to undertake two separate inquiries to determine whether the employers are jointly responsible, separately responsible or not responsible for FLSA violations that their employees have alleged against them collectively.ⁿ⁹⁵ The first inquiry is whether the employees can prove that they or their employers are subject to the jurisdiction of the FLSA. The second inquiry is whether the employers are "joint for the purposes of sharing individually and collectively in any underlying FLSA liability."ⁿ⁹⁶

In *Chao v. A-One Medical Services, Inc.*, plaintiffs worked for two employers, one of which met the jurisdictional prerequisite for FLSA "enterprise" coverage (annual gross revenues of \$500,000 or greater) and one of which did not. Thus, a question arose whether the larger and the smaller company were a "single enterprise," obviating the need to establish the "enterprise" coverage of the smaller company alone. To answer that question, the court applied the three-part test found in the FLSA at 29 C.F.R. § 203(r)(1): (1) "related activities"; (2) "unified operations or common control"; and (3) "common business purpose." The court found that plaintiffs had established all three elements of the test and, therefore, agreed with the district court that the FLSA applied to both employers. The court then addressed the question whether the two employers for whom the plaintiffs worked were "joint employers" for the purposes of assessing liability jointly and severally.ⁿ⁹⁷ The court rejected use of the eight-part "economic realities" test, stating that the economic realities test was applicable only to circumstances in which one employer contracted for workers from another employer. Instead, the court applied the three-part test set forth in 29 C.F.R. § 791.2(a).ⁿ⁹⁸ The court concluded that the plaintiffs had met their burden of demonstrating joint employer status, thus resulting in an aggregation of the work done for both employers.

[b] Portal-to-Portal Act: Travel Time and Preliminary or Postliminary Activities Excluded From Working Time

[i] Generally

Pursuant to the Portal-to-Portal Act,ⁿ⁹⁹ an employer need not pay to an employee minimum wages or overtime compensation under the FLSA for or on account of the following activities engaged in by the employee:ⁿ¹⁰⁰

1. Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities that the employee is employed to perform; and
2. Activities that are "preliminary to or postliminary to" the principal activity or activities that the employee is employed to perform.

However, these activities must be taken into account in determining compliance with federal minimum wages and overtime compensation requirements if they are compensable (1) by an express provision of a written or nonwritten

contract in effect at the time of the activity between the employee, or his or her agent or collective bargaining representative, and the employer;ⁿ¹⁰⁰ (2) by a custom or practice in effect at the time of the activity, which is not inconsistent with the written or nonwritten contract referred to in (1).ⁿ¹⁰¹ For a discussion of compensable and noncompensable travel time, see [c], *below*.

[ii] What Constitutes "Principal Activities"

For purposes of the Portal-to-Portal Act, the term "principal activities" includes all activities that are an integral part of a principal activity.ⁿ¹⁰² "Principal activities" is to be liberally construed to include any work of consequence performed for an employer no matter when the work is performed.^{n102.1} Preparatory activities, which the Administrator has always regarded as compensable under the FLSA, remain so under the Portal-to-Portal Act, regardless of contrary custom or contract.ⁿ¹⁰³ Thus, for example, an employee who, at the commencement of the workday, oils, greases, or cleans the lathe machine he or she operates is engaging in an integral part of the principal activity of operating the machine. A garment worker in a textile mill who is required to report early to distribute clothing at the workbenches of other employees and to ready machines for operation by other employees is also engaging in an integral part of a principal activity.

Activities such as checking in and out and waiting to do so would not ordinarily be regarded as integral parts of a principal activity.ⁿ¹⁰⁴ Under the FLSA, commuting is presumptively noncompensable and is clearly distinct from principal activities.

[iii] Changing Clothes and Washing Up

Activities closely related to a principal activity constitute an integral part of the employee's principal activity. Time spent changing into clothes required for the performance of the principal activity is compensable as an integral part of that activity, but changing clothes merely for the convenience of the employee is considered a noncompensable "preliminary" or "postliminary" activity.ⁿ¹⁰⁵ Changing clothes as a cautionary measure after working in a toxic environment has been deemed an integral part of a principal activity and therefore must be counted as compensable worktime under the FLSA.ⁿ¹⁰⁶

However, regardless of the reason for changing clothes or washing up at the beginning and end of the workday, time spent in doing so will be excluded from measured working time if it has been excluded during the week involved by the express terms of or by custom or practice under a bona fide collective bargaining agreement applicable to the employee.ⁿ¹⁰⁷ During any week in which clothes changing or washing time was not so excluded, it must be counted as hours worked if the changing of clothes or washing is indispensable to the performance of the employee's work, is required by law or by the rules of the employer, or was a preliminary or postliminary activity compensable pursuant to the Portal-to-Portal Act.ⁿ¹⁰⁸ Putting on and taking off personal protective equipment, *i.e.*, materials worn by an individual to provide a barrier against exposure to workplace hazards, does not constitute "changing clothes" as that phrase is used in 29 U.S.C. section 203(o) to describe certain noncompensable activities.ⁿ¹⁰⁹

In *IBP v. Alvarez*,ⁿ¹¹⁰ the United States Supreme Court agreed with the Ninth Circuit and held that under the FLSA as amended by the Portal-to-Portal Act of 1947, with respect to activities of employees who must don specialized or elaborate protective clothing on the employer's premises before they engage in the productive labor for which they are primarily hired, the time employees spend walking between the changing area and the production area, *i.e.*, postdonning and predoffing walking time, is compensable under the FLSA. In reaching this conclusion the Court held first that activities, such as the donning and doffing of specialized or elaborate protective gear, that are performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workers are employed and are not specifically excluded by Section 4(a)(1) of the Portal-to-Portal Act.ⁿ¹¹¹

The Court then found that the locker rooms where special or elaborate safety gear is donned and doffed are the relevant place of performance of the principal activity the employee was employed to perform within the meaning of section 4(a)(1) of the Portal-to-Portal Act.ⁿ¹¹² Walking to that place *before* starting work is excluded from FLSA coverage, but the statutory text does not exclude walking from that place to another area within the plant immediately after the workday has commenced.ⁿ¹¹³ The Court distinguished its holding in *Anderson v. Mt. Clemens Pottery*,ⁿ¹¹⁴ which led to the adoption of the Portal-to-Portal Act, that the FLSA mandated compensation for the time that employees spent walking from time clocks located near the plant entrance to their respective places of work prior to the start of their productive labor. The Court found a critical difference between the walking in *Anderson*, which preceded the employees' principal activity because it occurred before the workday began, and the walking in *IBP*, which occurred after the workday began and before it ended. The Court found the walking time in *IBP* to be more comparable to time spent walking between two different positions on an assembly line than to the prework walking in *Anderson*.ⁿ¹¹⁵

The Court also held that regulations adopted by the Secretary of Labor in 1947 supported the view that when donning and doffing of protective gear are compensable activities, they may also define the outer limits of the workday. Under those regulations, the few minutes spent walking between the locker rooms and the production area are similar to the time spent walking between two different workplaces on the disassembly line.ⁿ¹¹⁶

The Court further held, however, that the time employees spend waiting to put on the protective gear, *i.e.*, time that elapses *before* the principal activity of donning integral and indispensable gear, is not compensable.^{n116.1} Predonning waiting time, which is two steps removed from productive activity on the assembly line, is not a principal activity under § 4(a). The fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are integral and indispensable to a principal activity. For example, even though walking from a time clock near the factory gate to a workstation is certainly necessary for employees to begin their work, the Portal-to-Portal Act evinces Congress' intent to repudiate *Anderson's* holding that such walking time was compensable under the FLSA. The Court noted that the analysis would be different if the employer required its employees to arrive at a particular time in order to begin waiting.^{n116.2} In this regard, the Court found pertinent a regulation characterizing the time employees must spend waiting to check in or to receive their paychecks as generally a preliminary activity covered by the Portal-to-Portal Act. The Court found that regulation fully consistent with statutory provisions allowing the compensability of such collateral activities to depend on either the agreement of the parties or the custom and practice in the particular industry.ⁿ¹¹⁷

In *Ballaris v. Wacker Siltronic Corp.*,^{n117.1} the Ninth Circuit held that an employer should have compensated employees for time spent changing into and out of their plant uniforms, because the employer required the employees to conduct the changing activities on-site. The employer received the primary benefit from the dress it ordered, because the uniforms were required to limit potential contamination and to assist the employer in ensuring the quality of the silicon chips manufactured at its plant; further, the uniforms were mandated to keep the company competitive, to promote a clean internal philosophy, and to attract favorable industry attention. Unlike *Alvarez*, however, the time involved was not insubstantial nor was it difficult to monitor.

[c] Travel Time

[i] Effect of Portal-to-Portal Act

As noted in [b][i], above, the Portal-to-Portal Actⁿ¹¹⁸ provides in part that no employer will be liable for the failure to pay the minimum wage or overtime compensation for time spent in walking, riding, or traveling to and from the actual place of performance of the employee's principal activity or activities, either prior to the commencement of the workday or subsequent to the time on the workday at which the employee ceases the principal activity or activities, unless that time is made compensable by express contract or by custom or practice not inconsistent with an express contract.ⁿ¹¹⁹ Thus certain travel time at the commencement or cessation of the workday, which was originally considered as working time under the FLSA (such as underground travel in minesⁿ¹²⁰ or walking from time clock to workbench),ⁿ¹²¹ need

not be counted as working time unless it is compensable by contract, custom, or practice.ⁿ¹²²

The Employee Commuting Flexibility Act ("ECFA").^{n122.1} To be entitled to compensation for "off-the-clock" activities under ECFA, the employee must show that those activities are related to the employee's "principal activities" for the employer. In addition, activity that might otherwise be compensable is not if the time involved is *de minimis*.^{n122.2}

[ii] Ordinary Travel Between Home and Work

Normal travel time to and from work from the employee's home is not considered worktime for purposes of the FLSA regardless of whether the employee works at a fixed location or at different job sites.ⁿ¹²³ Travel need not occur frequently in order to be "normal" or "ordinary." For example, the Ninth Circuit has held that travel to mandatory off-site training occurring only a few times a year is noncompensable home-to-work travel, even though that time exceeds the employee's regular commute.ⁿ¹²⁴ Further, ordinary home-to-work travel is not considered worktime for purposes of the FLSA, even if the employer agrees to pay for the time.ⁿ¹²⁵ Activities incidental to securing entry to the employer's premises will also be considered noncompensable travel time.ⁿ¹²⁶

[iii] Emergency Travel Between Home and Work

Under some circumstances, travel from home to work constitutes worktime, as, for example, when an employee returns home after completing the workday and is called out to travel a substantial distance to perform an emergency job for one of the employer's customers. However, the Wage and Hour Division has not taken a position on whether travel to and from work by an employee who receives an emergency call outside of regular hours to report back to his or her regular place of business to do a job constitutes working time.ⁿ¹²⁷

[iv] Special One-Day Assignments in Another City

If an employee regularly works at a fixed location in one city, and is given a special one-day work assignment in another city, the travel time involved is considered worktime.ⁿ¹²⁸ Because, except for the special assignment, the employee would have had to report to his or her regular place of work, the travel time between the employee's home and a point of departure or arrival (such as a railroad depot) may be excluded as ordinary home-to-work travel.ⁿ¹²⁹ Similarly, the usual meal time is excludable.ⁿ¹³⁰

[v] Travel That Is Part of Work

Time spent by an employee in travel as part of his or her principal activity, such as traveling to different job sites during the workday, or reporting to meeting places to receive instructions, perform work, or pick up tools, is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice.ⁿ¹³¹

[vi] Travel Away From Home Community

Travel that keeps an employee away from home overnight is worktime when it cuts across the employee's regular workday and corresponding hours on nonworking days, excluding regular meal periods.ⁿ¹³² Thus, if an employee regularly works from 9 a.m. to 5 p.m. on Monday through Friday, travel time during these hours is worktime on the weekends as well as on the other days. As an enforcement policy, however, the Wage and Hour Division will not consider as worktime time spent in travel away from home as a passenger on an airplane, train, boat, bus, or automobile outside of regular working hours.ⁿ¹³³ If the employee is offered public transportation but requests permission to drive his or her car instead, the employer may count as hours worked either the actual time spent driving the car or the time that would have been consumed during working hours if the employee had used the public conveyance.ⁿ¹³⁴

[vii] Work Performed While Traveling

Any work that the employee is required to perform while traveling must be counted as hours worked.ⁿ¹³⁵ An employee who operates a vehicle, boat, or airplane, or who is required to ride along as an assistant or helper, is considered to be working except during bona fide meal periods or when he or she is permitted to sleep in adequate facilities furnished by the employer.ⁿ¹³⁶

[d] Waiting or Standby Time

[i] Generally

Whether waiting time must be counted as time worked under the FLSA depends on the particular circumstances.ⁿ¹³⁷ The test is whether the time spent waiting is primarily for the benefit of the employer and its business.ⁿ¹³⁸ The determination involves scrutinizing the agreements between the parties, the conduct of the parties toward the agreements, the nature of the employee's duties, and their relation to the waiting time.ⁿ¹³⁹

In the case of homeworkers who bring their completed work to the employer, the Wage and Hour Division's position is that compelled waiting time after arriving at the employer's premises at the scheduled time is compensable. However, time spent waiting is not considered worktime if the homeworker reports at a time that is not prearranged.ⁿ¹⁴⁰ Employees of temporary help firms may enter into agreements with their employers to exclude from time worked time spent waiting at the firm's premises for jobs to become available with third parties.ⁿ¹⁴¹

[ii] On Duty

Time spent on duty during periods of unplanned inactivity, usually of short duration, is counted as worktime when the employee is unable to use the time effectively for his or her own purposes, and the time is controlled by the employer. Thus, a stenographer who reads while waiting for dictation, a fireman who plays checkers while waiting for an alarm, a factory worker who talks to fellow employees while waiting for machinery to be repaired, and a repair person who waits for the employer's customer to make the premises available are all regarded as working during these periods of inactivity.ⁿ¹⁴²

In the case of seamen on American vessels, for purposes of determining compliance with minimum wage requirements,ⁿ¹⁴³ on-duty time includes periods aboard ship on watch, performing work, or standing by at the direction of a superior officer.ⁿ¹⁴⁴

For discussion of when sleeping time during "on duty" periods must be counted as working time under the FLSA, see [g], *below*.

[iii] Off-Duty

Periods during which an employee is completely relieved from duty and which are long enough to enable the employee to use the time effectively for his or her own purposes are not considered to be hours worked.ⁿ¹⁴⁵ To be completely relieved from duty, the employee must be definitely told in advance that he or she may leave the job and need not commence work until a specified hour. Whether the time is long enough to enable the employee to use the time effectively for his or her own purposes depends on all the facts and circumstances of the case.ⁿ¹⁴⁶ In the case of truck drivers, for example, if the driver who reaches his or her destination must care for the employer's property while awaiting the return trip, the driver is working while waiting. If the driver is completely relieved from duty for a period of, for example, six hours between reaching the point of destination and the return trip, the driver is not working during the idle time.ⁿ¹⁴⁷

In the case of seamen on American vessels, off-duty periods include shore leave and time on board when the seaman is free to use time for personal purposes, even though the seaman is required to remain on-call.ⁿ¹⁴⁸ Live-in domestic

service workers and their employers may agree to exclude from time worked free time other than for meals and sleeping, if the periods are of sufficient duration for the employee to make effective use of his or her time.ⁿ¹⁴⁹

Under the continuous workday theory, principal activities performed by employees before and/or after regular working hours may extend the workday. The time spent on those activities therefore may be compensable.^{n149.1} If an employee may perform those activities at any time, however, there can be periods during which the employee is relieved from duty and thus the workday will not be continuous.^{n149.2}

[iv] On-Call Time

"On-call" time refers to time when an employee is not actually on duty, but is subject to a requirement that he or she be available to be called in to work. In determining whether on-call time must be considered "hours worked" under the FLSA, the courts examine two factors: (1) the degree to which the employee is free to engage in personal activities; and (2) any agreements between the parties.ⁿ¹⁵⁰

The following types of agreements may be relevant to the issue of on-call compensation: (1) a collective bargaining agreement that provides overtime compensation for actual call-in work, but not for other off-duty time; (2) a constructive agreement arising because employees have been informed of the employer's overtime compensation policy and continue to work under the disclosed terms of that policy; and (3) an express agreement created by employees' voluntarily accepting the terms of the employers' overtime compensation policy by becoming employed after the policy has been implemented.ⁿ¹⁵¹ In determining whether an employee has free use of on-call time for personal purposes, courts have considered a number of factors, including the following:ⁿ¹⁵²

1. Whether there was an on-premises living requirement;^{n152.1}
2. Whether there were excessive geographical restrictions on employees' movements;
3. Whether the frequency of calls was unduly restrictive;
4. Whether a fixed time limit for response was unduly restrictive;
5. Whether the on-call employee could easily trade on-call responsibilities;
6. Whether the use of a pager could ease restrictions; and
7. Whether the employee had actually engaged in personal activities during call-in time.

The above list is illustrative, not exhaustive. No one factor is determinative.ⁿ¹⁵³ In determining whether employees are free to engage in personal activities, a court cannot take into consideration whether on-call duties are similar to and as demanding as regular duties; the relevant inquiry is whether on-call waiting time is substantially similar to regular work.ⁿ¹⁵⁴ On the other hand, an employee need not have substantially the same flexibility or freedom as the employee would if not on call. If that were true, all or almost all on-call time would be working time, which is a proposition the settled case law and administrative guidelines reject.^{n154.1}

An employee who is required to remain on call on the employer's premises or so close that the employee cannot use the time effectively is deemed to be working while "on call."ⁿ¹⁵⁵ Whether time spent on the premises is compensable time depends on the degree to which the employee is free to engage in personal activities during periods of idleness when he or she is subject to call, and the number of consecutive hours that the employee is subject to call without being required to work.ⁿ¹⁵⁶ In the case of employees who must remain on the premises for consecutive days, performing productive labor only part of the time, free time while on the employer's premises may not be includable as worktime depending on

the facts of the case.ⁿ¹⁵⁷ A different approach is applicable when the employee resides, on an ongoing basis, on the employer's premises.ⁿ¹⁵⁸

In a case involving utility employees required to live on the work premises, the court found that as to the degree to which the employees were free to engage in personal activities, the balance of the factors listed above weighed narrowly in favor of the employees. The court identified the relevant factors in the balance as follows: The employer required the employees to live on premises (factor 1) and forbade them from maintaining an off-site primary residence. While on-call, the employees were subject to strict geographic constraints (factor 2), and they had to remain within earshot of their home phones and alarm systems because they were required to respond instantaneously to any alerts (factor 4). Use of a pager (or, for that matter, a wireless phone or two-way radio) would do little to lessen these burdens (factor 6), as the plant was readily accessible only by foot from the employees' homes. On the other hand, the employees acknowledged that each was called out, on average, only about once or twice a month (factor 3). When an employee was sick, on vacation, or otherwise occupied by personal needs, the employee usually was able to trade duty shifts with colleagues (factor 5). Perhaps most notable, the employees routinely engaged in personal activities while they were on-call (factor 7). They used portions of their duty shifts to sleep, eat, read, study, exercise, watch television, help their children with homework, play games, maintain their homes and yards, work on their motorcycles, and entertain guests. The court found that the geographic and response-time restrictions associated with their duty shifts were especially restrictive, and the fact that the average number of call-outs and emergency alarms were low was less important because while on call, the employees were responsible for the safety of thousands of people and accordingly had to be absolutely prepared to respond at all times (i.e., rested, sober, clothed, and otherwise able to race immediately to the trouble source if needed), without regard to how often they were actually called out.^{n158.1} As to the parties' agreement, the court found that there was an agreement, and that the agreement treating otherwise uncompensated duty shift call time as equivalent to four hours' actual work was eminently reasonable. However, the court found that it was not clear that the employees always worked the precise schedule and remanded to the trial court to calculate the overtime due each employee.^{n158.2}

In another case, hours spent by probation officers assigned to standby duty at county probation facilities were held to be hours worked, because the officers were required to remain on the premises (unless they obtained prior permission from a supervisor to leave), where they were given sleeping and shower facilities and had access to various recreational activities and equipment.ⁿ¹⁵⁹ Standby time spent by nurses working at these probation facilities was also held to be worktime, because the nurses were required to remain on the premises (where they were provided with sleeping, living, bath, and kitchen facilities), abide by rules governing staff on the premises, and keep their supervisor informed of their whereabouts.ⁿ¹⁶⁰

An employee who is not required to remain on the employer's premises but merely required to leave word at his or her home or with company officials where he or she may be reached is not generally regarded as working while on call.ⁿ¹⁶¹ In *Owens v. Local No. 169*,ⁿ¹⁶² for example, the employer had a policy of requiring mechanics to be on call during off-duty hours (except vacation periods) for possible return to work to make repairs on the employer's equipment. Mechanics received calls on a rotating basis and were placed at the bottom of the list each time they responded to and accepted a call back to work. The mechanics were not required to remain on the employers' premises; were not required to respond to all calls or to a fixed percentage of calls, but were only to accept a "fair share" of calls; and were not required to be reachable by pager. Those who did not request pagers were not required to respond to calls within a fixed time. Each mechanic received an average of six calls per year. The Ninth Circuit held that the employer's policy did not so restrict the employees' activities as to require the on-call time to be treated as compensable hours worked.ⁿ¹⁶³

Another Ninth Circuit case followed *Owens* to hold that county coroners were not entitled to compensation for on-call time. The court cited the following factors: (1) the coroner on call was required to respond to a page or telephone call within 15 minutes by telephone or two-way radio, but was not required to return to the employer's premises; (2) the coroners were not required to use pagers, but doing so voluntarily meant that the coroner on call was not restricted to

areas with a telephone or two-way radio; (3) the coroners could easily trade shifts, although they were seldom willing to impose on each other's off-duty time by doing so; (4) the coroners had, while on call, engaged in a variety of personal activities, such as socializing, dining out, and hobbies, as well as working at second jobs and their own businesses; and (5) there was no on-premises living requirement.ⁿ¹⁶⁴ Although the frequency of calls resulting in the coroners being called back to duty (once every 6.45 hours) arguably supported the conclusion that their on-call time should be treated as hours worked, it was outweighed by the other factors.ⁿ¹⁶⁵

[e] Rest Periods

Short rest periods of approximately five to twenty minutes are common in industry and must be counted as hours worked.ⁿ¹⁶⁶ Time spent during such rest periods therefore may not be offset against other working time such as compensable waiting or on-call time as a way of reducing hours worked.ⁿ¹⁶⁷ Short coffee breaks and snack periods constitute compensable rest periods and are distinguished from bona fide meal periods, which are not considered worktime.ⁿ¹⁶⁸

[f] Meal Periods

Bona fide meal periods are not considered worktime.ⁿ¹⁶⁹ To constitute a bona fide meal period, the employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not relieved if he or she is required to perform any duties, including inactive ones, while eating.ⁿ¹⁷⁰ Thus, for example, an office employee who is required to eat at his or her desk or a factory worker required to remain at his or her machine is working while eating.ⁿ¹⁷¹ However, if the employee is otherwise completely freed from his or her duties, the fact that he or she is not permitted to leave the premises during a meal period does not in itself require that the period be counted as working time.ⁿ¹⁷²

Ordinarily, 30 minutes will suffice for a bona fide meal period under the FLSA, although shorter durations may be long enough under special circumstances.ⁿ¹⁷³ Meal periods may be bona fide and not compensable even if they are not scheduled regularly, but are allowed when time is available.ⁿ¹⁷⁴

[g] Sleeping Time and Other Personal Activities

[i] Generally

An employee who is required to be on duty for less than 24 hours is considered to be working even when he or she is permitted to sleep or engage in other personal activities when not busy.ⁿ¹⁷⁵

If the employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of no more than eight hours, provided that adequate sleeping facilities are furnished and the employee can usually enjoy an uninterrupted night's sleep.ⁿ¹⁷⁶ In the absence of an agreement, the eight hours of sleeping time and meal periods constitute hours worked.ⁿ¹⁷⁷

Any interruptions in the sleeping period caused by a call to duty must be counted as hours worked.ⁿ¹⁷⁸ Furthermore, time spent sleeping will be counted as hours worked if the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep.ⁿ¹⁷⁹ For enforcement purposes, the Wage and Hour Division has adopted the rule that an entire sleeping period is considered working time if the employee cannot get at least five hours of sleep during the scheduled period.ⁿ¹⁸⁰

[ii] Residence on Employer's Premises

Special considerations are applicable to employees who reside on the employer's premises on a permanent basis or for extended periods of time and who do not perform duties during the entire time that they are on the premises. Ordinarily,

time spent engaging in normal private pursuits such as eating, sleeping, entertaining, and other periods of complete freedom from all duties, is not worktime. Because of the difficulty of determining the exact hours worked under these circumstances, any reasonable agreement of the parties that takes into consideration all of the pertinent facts will be accepted.ⁿ¹⁸¹

[h] Lectures, Meetings, and Training Programs

Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if all of the following criteria are met:ⁿ¹⁸²

1. Attendance is outside of the employee's regular working hours.
2. Attendance is in fact voluntary.
3. The course, lecture, or meeting is not directly related to the employee's job. (Training is directly related to the job if it is designed to make the employee handle the job more effectively, as distinguished from training the employee for another job or in a new or additional skill.)ⁿ¹⁸³
4. The employee does not perform any productive work during his or her attendance.

Attendance is not voluntary if the employee is led to believe that his or her working conditions or continuance of employment would be adversely affected by nonattendance.ⁿ¹⁸⁴ If an employee on his or her own initiative attends an independent school, college, or independent trade school after hours, the time does not count as hours worked for the employer even if the courses are related to the employee's job.ⁿ¹⁸⁵

There are some special situations in which the time spent in attending lectures, training sessions, and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his or her employees a program of instruction that corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to the employee's job, or paid for by the employer.ⁿ¹⁸⁶ Even when the employee's attendance is involuntary, exclusion from hours worked of time spent in attending lectures, training sessions, and courses of instruction may apply, but such an exception will only rarely be allowed.ⁿ¹⁸⁷

[i] Apprenticeship Training

Time spent in an organized program of related, supplemental instruction by employees working under bona fide apprenticeship programs may be excluded from working time if the following criteria are met:ⁿ¹⁸⁸

1. The apprentice is employed under a written apprenticeship agreement or program that substantially meets the fundamental standards of the Bureau of Apprenticeship and Training of the United States Department of Labor; and
2. The time does not involve productive work or performance of the apprentice's regular duties.

Time spent in related instruction will be counted as hours worked if the written agreement specifies that it is hours worked. However, the mere payment or agreement to pay for time spent in related instruction does not constitute an agreement that the time is counted as hours worked.ⁿ¹⁸⁹

[j] Time Spent Adjusting Grievances

Time spent in adjusting grievances between an employer and employees during the time the employees are required to be on the premises is counted as hours worked.ⁿ¹⁹⁰ However, if a bona fide union is involved, the counting of time so spent will, as a matter of enforcement policy, be left to the collective bargaining process or to the custom or practice under the collective bargaining agreement.ⁿ¹⁹¹

[k] Government Health and Safety Inspections

Under the federal Occupational Safety and Health Administration Act (OSHA),ⁿ¹⁹² authorized employee representatives must be given the opportunity to accompany an inspector on a tour of inspection, but are not required to accompany the inspector. If an employee representative does participate in the walkaround tour, the time so spent does not constitute hours worked, because it is not an activity controlled by the employer, and is not engaged in primarily for the employer's benefit.ⁿ¹⁹³ However, time spent by employees consulting with the OSHA inspector during the normal workday, at the inspector's request, is considered time worked.ⁿ¹⁹⁴ By analogy, time spent by employees during the normal workday consulting with government agents at the agents' request, pursuant to other official inspections of the place of employment, might also be considered time worked.

By contrast, a California court has taken the position that employee time spent participating in a walkaround tour under the California Occupational Safety and Health Act, *Labor Code section 6314*, is compensable as worktime.ⁿ¹⁹⁵

[l] Medical Attention

Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on workdays constitutes hours worked.ⁿ¹⁹⁶

[m] Civic and Charitable Work

Time spent in work for public or charitable purposes at the employer's request or under the employer's direction or control, or while the employee is required to be on the premises, is working time. Time spent voluntarily in these activities outside of normal working hours does not constitute hours worked.ⁿ¹⁹⁷

[n] Suggestion Systems

Time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time. If, however, an employee is permitted to work on suggestions during regular working hours, or assigned to work on the development of a suggestion, the time is considered hours worked.ⁿ¹⁹⁸

[o] Absences From Work

The FLSA does not require an employer to pay an employee for absence from work for vacations, holidays, illness, or any other reason. Thus, courts have held that the granting of leaves of absence with or without pay is a matter of agreement between the employer and employee, and that the time need not be counted as worktime for purposes of the FLSA.ⁿ¹⁹⁹ For a discussion of exclusion of payments for absences from work in the computation of the regular rate of pay, see § 3.08[2][g][iii].

[p] Hours Made Worktime by Agreement

In some cases, an agreement provides for compensation for hours spent in certain activities that are not regarded as working time under the FLSA, such as preliminary and postliminary activities and duty-free meal periods. The agreement of the parties to provide compensation for such hours may or may not convert them into hours worked for purposes of the FLSA, depending on whether it appears from all the pertinent facts that the parties have agreed to treat this time as hours worked. Except for certain activity governed by the Portal-to-Portal Act that must be counted as hours

worked,ⁿ²⁰⁰ the agreement of the parties will be respected, if reasonable.ⁿ²⁰¹ Thus, time spent in an activity that is not hours worked under the FLSA and not hours worked under the Portal-to-Portal Act, even when made compensable by contract, custom, or practice, may be excluded from computation of hours worked if the parties so agree. Payment for such time may be excluded from the regular rate of pay under Title 29, *United States Code section 207(e)(2)*, but does not count as an overtime premium creditable toward the employer's overtime compensation obligations.ⁿ²⁰² For discussion of statutory exclusions from the regular rate of pay under the FLSA, see § 3.08[2][g].

[p.1] Agreement as to Hours Worked

When an employee resides on the employer's premises or works at home, it may be difficult to determine the exact number of overtime hours worked. Any reasonable agreement of the employer and employee as to overtime hours worked which takes into consideration all of the pertinent facts will be accepted.^{n202.1} Such an agreement must take into account some approximation of the hours actually worked or reasonably required to be worked by the employee.^{n202.2}

[q] De Minimis Time

Federal courts have held that insignificant periods of time worked before the official commencement or after the official close of the workday are regarded as de minimis and should not be counted as time worked.ⁿ²⁰³ There is no precise rule for determining the amount of time that may be excluded from the computation of hours worked as de minimis; the determination depends on the facts of each case.ⁿ²⁰⁴

One court has stated that the following factors should be considered in determining whether otherwise compensable time may be excluded as de minimis:ⁿ²⁰⁵

1. The administrative difficulty of recording the additional time;
2. The aggregate amount of compensation claimed for the time;ⁿ²⁰⁶ and
3. The regularity with which the employees perform the additional work.

The Ninth Circuit applied the de minimis rule to a claim for additional compensation by employees who arrived seven or eight minutes early to review log books and exchange information with employees from a preceding shift. Because there was a wide variance in the amount of time spent on compensable activities as opposed to social interaction, the court held that the difficulty of recording the time, and the irregularity of the additional preshift work, warranted application of the de minimis rule.ⁿ²⁰⁷ The result may be different, however, if the employee is directed by the employer to arrive a few minutes prior to the scheduled start of the workday.ⁿ²⁰⁸

The Ninth Circuit has not adopted a ten or fifteen minute *de minimis* rule. Although most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable, there is no precise amount of time that may be denied compensation as *de minimis* and no rigid rule can be applied with mathematical certainty.^{n208.1}

[r] Statutory Exclusion of Certain Types of Employment in Computing Hours Worked

[i] Charter Activities by Employees in Railway or Motor Carrier Operations

In determining for overtime compensation purposes the hours worked for an employee of an employer engaged in the business of operating a street, suburban, or interurban electric railway, or a local trolley or motorbus carrier, whether or not for profit, hours employed in charter activities must be excluded if the employee's employment in these activities (1) was pursuant to an agreement or understanding with the employer arrived at before engaging in the employment, and (2) was not part of the employee's regular employment.ⁿ²⁰⁹

[ii] Public Employees

The FLSA contains special rules requiring the exclusion of certain employment of public employees from hours worked for overtime compensation purposes.ⁿ²¹⁰ The exclusions apply to (1) public fire protection and law enforcement employees who voluntarily perform work on a special detail involving fire protection or law enforcement activities for a separate and independent public employer;ⁿ²¹¹ (2) occasional or sporadic, voluntary part-time work by a public employee for his or her employer in a capacity different from that in which he or she is regularly employed;ⁿ²¹² and (3) a public employee's voluntary agreement to substitute for another public employee employed in the same capacity.ⁿ²¹³

[s] Use of Time Clocks

The FLSA does not require the use of time clocks to record hours worked.ⁿ²¹⁴ When time clocks are used, employees who voluntarily punch in before their regular starting time or remain after their closing time need not be paid for such periods, provided that they do not engage in any work.ⁿ²¹⁵ Although minor differences between clock records and actual hours worked cannot ordinarily be avoided, major discrepancies should be discouraged, since they raise doubt about the accuracy of the records of hours actually worked.ⁿ²¹⁶

In industries where time clocks are used, employers often make a practice of recording the employees' starting and stopping times to the nearest five minutes, or to the nearest one-tenth or one-quarter of an hour. The Wage and Hour Division presumes that this arrangement normally averages out and permits the practice, as long as it is not used in such a manner that it results, over a period of time, in failure to properly compensate employees for all time that they actually worked.ⁿ²¹⁷

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See generally* 8 Cal. Code Reg. §§ 11010-11160, PP 3, 4 (Cal. Wage Order Nos. 1-2001-16-2001).

(n2)Footnote 2. *See* 8 Cal. Code Reg. §§ 11010, 11020, 11060-11090, 11130, P 2(G) (Cal. Wage Order Nos. 1-2001, 2-2001, 6-2001-9-2001, 13-2001); 11030, 11100-11120, 11150, P 2(H) (Cal. Wage Order Nos. 3-2001, 10-2001-12-2001, 15-2001); 11160, P 2(J) (Cal. Wage Order No. 16-2001); 11040, 11050, P 2(K) (Cal. Wage Order Nos. 4-2001, 5-2001).

(n3)Footnote 3. *See* 8 Cal. Code Reg. §§ 11010-11020, 11060-11090, 11130, P 2(G) (Cal. Wage Order Nos. 1-2001-2-2001, 6-2001-9-2001, 13-2001); 11030, 11100-11120, 11150, P 2(H) (Cal. Wage Order Nos. 3-2001, 10-2001-12-2001, 15-2001); 11160, P 2(J) (Cal. Wage Order No. 16-2001); 11040-11050, P 2(K) (Cal. Wage Order Nos. 4-2001-5-2001).

(n4)Footnote 4. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 48.1.3 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n5)Footnote 5. For discussion of the types of work included in these occupations, *see* ch. 1.

(n6)Footnote 6. 8 Cal. Code Reg. §§ 11040, P 2(L), 11050, P 2(K) (Cal. Wage Order Nos. 4-2001, 5-2001).

(n7)Footnote 7. D.L.S.E. Interpretive Bulletin No. 94-2 (Feb. 16, 1994) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n8)Footnote 8. D.L.S.E. Interpretive Bulletin No. 84-6-Rev. (Feb. 21, 1984) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n9)Footnote 9. *See Lab. Code § 510(b)*.

(n10)Footnote 10. D.L.S.E. Interpretive Bulletin No. 84-6-Rev. (Feb. 21, 1984); 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual 46.2 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n11)Footnote 11. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 46.3.1 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n12)Footnote 12. *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 94 Cal. Rptr. 2d 3, 995 P.2d 139 .

(n13)Footnote 13. *See Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 579, 94 Cal. Rptr. 2d 3, 995 P.2d 139 .

(n14)Footnote 14. *See Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 578, 94 Cal. Rptr. 2d 3, 995 P.2d 139 .

(n15)Footnote 14.1. *See Overton v. Walt Disney Co.* (2006) 136 Cal. App. 4th 263, 269-274, 38 Cal. Rptr. 3d 693 (where employee was assigned parking in employer's parking lot one mile from employee entrance to work place, time spent on shuttle bus provided by employer from parking lot to work place was not compensable, where employee was not required to drive to work and take shuttle).

(n16)Footnote 15. *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 94 Cal. Rptr. 2d 3, 995 P.2d 139 .

(n17)Footnote 16. *See Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 588-589, 94 Cal. Rptr. 2d 3, 995 P.2d 139 ; *see also* 29 U.S.C. § 251 *et seq.*

(n18)Footnote 17. *See Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 586-587, 94 Cal. Rptr. 2d 3, 995 P.2d 139 .

(n19)Footnote 17.1. *See Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 594, 94 Cal. Rptr. 2d 3, 995 P.2d 139 .

(n20)Footnote 18. *Burnside v. Kiewit Pacific Corp.* (9th Cir. 2007) 491 F.3d 1053, 1058-1074 (employees' state law claims for compensation for travel time mandated by employer were not preempted by § 301, where right to be compensated for compulsory travel time is right conferred as matter of state law, existing independently of terms of collective bargaining agreements, and because claims to compensation for that time could be resolved without interpreting collective bargaining agreements).

(n21)Footnote 19. D.L.S.E. Interpretive Bulletin No. 84-6-Rev. (Feb. 21, 1984). (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n22)Footnote 20. *Lab. Code § 226.7(a)*.

(n23)Footnote 21. *Lab. Code § 226.7(b)*.

(n24)Footnote 21.1. *Murphy v. Kenneth Cole Productions* (2007) 40 Cal. 4th 1094, 155 P.3d 284, 2007 Cal. LEXIS 3596, *9-*39 . To view California Supreme Court briefs and other documents related to the *Murphy* case that are available on Lexis.com, go to 2006 CA S. Ct. Briefs 140308 . *See Code Civ. Proc. § 338(a)* (three-year statute of

limitations for wages); *Code Civ. Proc.* § 340(a) (one-year statute of limitations for penalty).

(n25)Footnote 22. For discussion of meal periods required under the wage orders, *see* § 3.23.

(n26)Footnote 23. 8 *Cal. Code Reg.* §§ 11010-11150, P 11 (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 10 (Cal. Wage Order No. 16-2001).

(n27)Footnote 24. 8 *Cal. Code Reg.* §§ 11010-11150, P 11 (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 10 (Cal. Wage Order No. 16-2001).

(n28)Footnote 25. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 46.5 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n29)Footnote 26. *See* 29 *C.F.R.* § 785.19(a).

(n30)Footnote 26.1. *See Westside Concrete Co., Inc. v. Dept. of Industrial Relations* (2004) 123 *Cal. App. 4th* 1317, 1324-1329 (in action by employer challenging interpretation of off-duty and on-duty meal period provisions of Wage Order 1 by Dept. of Industrial Relations, Division of Labor Standards Enforcement and Industrial Welfare Commission as invalid "underground" regulations, trial court erred in sustaining demurrers without leave to amend as to whether DLSE has adopted underground regulations in violation of Administrative Procedures Act; however, because legislative enactments [*Lab. Code* § 226.7(b)] rendered issue of IWC's authority to promulgate penalties for violation of meal period provisions moot, dismissal of that claim was appropriate).

(n31)Footnote 27. *See Madera Police Officers Assn. v. City of Madera* (1984) 36 *Cal. 3d* 403, 409-410, 204 *Cal. Rptr.* 422, 682 *P.2d* 1087 .

(n32)Footnote 28. *Madera Police Officers Assn. v. City of Madera* (1984) 36 *Cal. 3d* 403, 204 *Cal. Rptr.* 422, 682 *P.2d* 1087 .

(n33)Footnote 29. *See Madera Police Officers Assn. v. City of Madera* (1984) 36 *Cal. 3d* 403, 410-413, 204 *Cal. Rptr.* 422, 682 *P.2d* 1087 .

(n34)Footnote 30. *Fowler v. State Personnel Board* (1982) 134 *Cal. App. 3d* 964, 185 *Cal. Rptr.* 292 .

(n35)Footnote 31. *See Madera Police Officers Assn. v. City of Madera* (1984) 36 *Cal. 3d* 403, 411, 204 *Cal. Rptr.* 422, 682 *P.2d* 1087 .

(n36)Footnote 32. *See* 29 *C.F.R.* § 785.19; *see also* discussion under [2][e], *below*.

(n37)Footnote 33. *Lab. Code* § 226.7(a).

(n38)Footnote 34. *Lab. Code* § 226.7(b). *See Murphy v. Kenneth Cole Productions* (2007) 40 *Cal. 4th* 1094, 155 *P.3d* 284, 2007 *Cal. LEXIS* 3596, *9-*39 (additional hour of pay required for failure to provide rest period constitutes wages, so that three-year statute of limitation [*Code Civ. Proc.* § 338(a)] applies to actions to collect additional pay, and is not a penalty to which a one-year statute of limitations [*Code Civ. Proc.* § 340(a)] would apply).

(n39)Footnote 35. 8 *Cal. Code Reg.* §§ 11010-11150, P 12 (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 11 (Cal. Wage Order No. 16-2001).

(n40)Footnote 36. *See Lab. Code* § 1030 *et seq.*

(n41)Footnote 37. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 47.5.2

(CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n42)Footnote 37.1. *See, e.g., Gomez v. Lincare, Inc. (2009) 173 Cal. App. 4th 508, 93 Cal. Rptr. 3d 388, 2009 Cal. App. LEXIS 634, *27-*33* (on-call waiting time did not unduly restrict employees' ability to engage in personal activities and was not included in hours worked, where employer did not impose on-site living requirement and did not impose excessive geographic restrictions on employees; time limits set by employer for responses to pages were not unduly restrictive; on-call employees were permitted to trade on-call responsibilities; employees were provided pagers by employer; and employees' unilateral decisions to avoid personal activities while on call did not change fact that they did engage in some activities and could have continued to do so).

(n43)Footnote 38. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 47.5 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *but see* D.L.S.E. Interpretive Bulletin No. 94-2 (Feb. 16, 1994) (control of employer, including use of beepers and pagers, is not a factor used to determine hours worked by health care industry employees), discussed in [iv], below.

(n44)Footnote 39. *See* 29 C.F.R. § 785.17; *see also* discussion under [2][c], below.

(n45)Footnote 40. *See* discussion under [iii] and [iv], below.

(n46)Footnote 41. *See* 8 Cal. Code Reg. §§ 11010-11160, P 5 (Cal. Wage Order Nos. 1-2001-16-2001).

(n47)Footnote 42. *See* discussion in § 3.08[1][c], [2][g][v].

(n48)Footnote 43. *See* 8 Cal. Code Reg. § 11150, P 3 (Cal. Wage Order No. 15-2001).

(n49)Footnote 44. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 47.3.1 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see also* *Aguilar v. Association for Retarded Citizens (1991) 234 Cal. App. 3d 21, 30, 285 Cal. Rptr. 515* (DLSE'S interpretation is reasonable); *Monzon v. Schaefer Ambulance Service, Inc. (1990) 224 Cal. App. 3d 16, 46, 273 Cal. Rptr. 615* (agreement need not be written if adequate sleeping facilities are provided by employer and employee has opportunity to sleep at least five hours uninterrupted; if five hours of sleep are interrupted, entire time is considered hours worked).

(n50)Footnote 45. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 45.1.2.2 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see also* Gov. Code § 19849.1 (callback time for state employees).

(n51)Footnote 46. *See* 8 Cal. Code Reg. § 11050, P 2(P) (Cal. Wage Order No. 5-2001).

(n52)Footnote 47. 8 Cal. Code Reg. § 11050, P 2(K) (Cal. Wage Order No. 5-2001).

(n53)Footnote 48. *Brewer v. Patel (1993) 20 Cal. App. 4th 1017, 1021-1022, 25 Cal. Rptr. 2d 65*.

(n54)Footnote 49. *Brewer v. Patel (1993) 20 Cal. App. 4th 1017, 1021-1022, 25 Cal. Rptr. 2d 65*.

(n55)Footnote 50. *See* former Cal. Wage Order No. 5-89, now 8 Cal. Code Reg. § 11050 (Cal. Wage Order No. 5-2001).

(n56)Footnote 51. *See* *Brewer v. Patel (1993) 20 Cal. App. 4th 1017, 1022, 25 Cal. Rptr. 2d 65*.

(n57)Footnote 52. *Brewer v. Patel (1993) 20 Cal. App. 4th 1017, 1019-1020, 25 Cal. Rptr. 2d 65*.

(n58)Footnote 53. *Brewer v. Patel* (1993) 20 Cal. App. 4th 1017, 1022, 25 Cal. Rptr. 2d 65 .

(n59)Footnote 54. *Brewer v. Patel* (1993) 20 Cal. App. 4th 1017, 1022, 25 Cal. Rptr. 2d 65 .

(n60)Footnote 55. *Brewer v. Patel* (1993) 20 Cal. App. 4th 1017, 1022, 25 Cal. Rptr. 2d 65 .

(n61)Footnote 55.1. *Isner v. Falkenberg/Gilliam & Associates, Inc.* (2008) 160 Cal. App. 4th 1393, 1399-1401, 73 Cal. Rptr. 3d 433 .

(n62)Footnote 56. 8 Cal. Code Reg. §§ 11040, 11050, P 2(K) (Cal. Wage Order Nos. 4-2001, 5-2001); *see* discussion under [a][ii], *above*.

(n63)Footnote 57. D.L.S.E. Interpretive Bulletin No. 94-2 (Feb. 16, 1994)(CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders). For discussion of FLSA guidelines regarding "on-call" time, *see* [2][d], *below*.

(n64)Footnote 58. 29 C.F.R. § 785.42; *see* discussion under [2][j], *below*.

(n65)Footnote 59. *See Lab. Code § 6314*. For discussion of safety inspections under the California Occupational Safety and Health Act, *see* ch. 21.

(n66)Footnote 60. *See Division of Labor Standards Enforcement v. Texaco, Inc.* (1983) 152 Cal. App. 3d Supp. 1, 199 Cal. Rptr. 561 .

(n67)Footnote 61. *See Chamber of Commerce v. Occupational Safety & Health Administration* (D.C. Cir. 1980) 636 F.2d 464, 467 ; *Leone v. Mobil Oil Corp.* (D.C. Cir. 1975) 523 F.2d 1153, 1159-1160 (employee's participation in federal O.S.H.A. inspection need not be included as time worked); *see* [2][k], *below*, for discussion of government safety inspections as worktime under federal law.

(n68)Footnote 62. 8 Cal. Code Reg. §§ 11030, 11080, 11130, P 3(F) (Cal. Wage Order Nos. 3-2001, 8-2001, 13-2001).

(n69)Footnote 63. 8 Cal. Code Reg. §§ 11030, 11080, 11130, P 3(F) (Cal. Wage Order Nos.3-2001, 8-2001, 13-2001).

(n70)Footnote 64. 8 Cal. Code Reg. §§ 11030, 11080, 11130, P 3(F) (Cal. Wage Order Nos.3-2001, 8-2001, 13-2001).

(n71)Footnote 65. *See Elec. Code § 14000*.

(n72)Footnote 66. *See Lab. Code § 230(a), (b)*; *see generally* discussion in ch. 60.

(n73)Footnote 67. *See, e.g.,* 2002 DLSE Enforcement Policies & Interpretations Manual, § 56.6.21. The federal FLSA likewise prohibits salary deductions for jury duty or witness time. Although the federal regulations expressly allow an employer to deduct jury pay from salary [29 CFR § 541.602(b)(3)], California law contains no such provision. If a California employer were to deduct jury pay from an exempt employee's salary, this almost certainly would violate the state statute on wage deductions [Lab. Code § 224], as well as California's salary basis rules. The preceding discussion applies only to salary docking. The rules on drawing down an employee's accrued vacation leave bank may be different, based on the recent California court of appeal decision in *Conley v. PG&E* and a recent change in the DLSE's enforcement position. For further discussion, *see* Consultant's Comment at § 2.04[1][a][i].

(n74)Footnote 68. *Lab. Code § 230.2(a)(1)* (defined as spouse, child, stepchild, brother, stepbrother, sister, stepsister, mother, stepmother, father, or stepfather).

(n75)Footnote 69. *Lab. Code* § 230.2(a)(2) (defined as domestic partner as defined in *Fam. Code* § 297 and registered pursuant to *Fam. Code* § 298 *et seq.*

(n76)Footnote 70. *Lab. Code* § 230.2(b).

(n77)Footnote 71. *Lab. Code* § 230.2(a)(3).

(n78)Footnote 72. *Lab. Code* § 230.2(c).

(n79)Footnote 73. *Lab. Code* § 230.2(d).

(n80)Footnote 74. *Lab. Code* § 230.2(e).

(n81)Footnote 75. *Lab. Code* § 230.2(f).

(n82)Footnote 76. *Lab. Code* § 230.2(g). For discussion of *Lab. Code* § 98.7, *see* § 5.51.

(n83)Footnote 77. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 46.6.4 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n84)Footnote 78. *See, e.g.*, 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 46.6.5 (training programs, lectures and meetings) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n85)Footnote 79. *See Lab. Code* §§ 1041, 1043.

(n86)Footnote 79.1. *Conley v. Pacific Gas & Electric Co.* (2005) 131 Cal. App. 4th 260, 267-271, 31 Cal. Rptr. 3d 719 (nothing in California law precludes employers from following federal rule permitting them to require use of vacation leave for partial-day absences without causing otherwise exempt employees to become nonexempt under salary basis test).

(n87)Footnote 80. 8 Cal. Code Reg. § 11040, P 3(M) (Cal. Wage Order No. 4-2001); 8 Cal. Code Reg. § 11050, P 3(N) (Cal. Wage Order No. 5-2001).

(n88)Footnote 81. For discussion of the types of work included in these occupations, *see* § 1.05[2][c][ii].

(n89)Footnote 82. For discussion of 14-day work periods, *see* § 3.06[1][b].

(n90)Footnote 83. 8 Cal. Code Reg. § 11040, P 3(M) (Cal. Wage Order No. 4-2001); 8 Cal. Code Reg. § 11050, P 3(N) (Cal. Wage Order No. 5-2001).

(n91)Footnote 84. *See* 29 U.S.C. §§ 206(a), 207(a).

(n92)Footnote 85. *See* 29 U.S.C. § 203(g).

(n93)Footnote 86. *See* 29 C.F.R. § 785.11.

(n94)Footnote 87. 29 C.F.R. § 785.12.

(n95)Footnote 88. *See Forrester v. Roth's I.G.A. Foodliner, Inc.* (9th Cir. 1981) 646 F.2d 413, 414 .

(n96)Footnote 89. 29 C.F.R. § 785.13.

(n97)Footnote 90. *See Forrester v. Roth's I.G.A. Foodliner, Inc.* (9th Cir. 1981) 646 F.2d 413, 414 .

(n98)Footnote 91. *See Davis v. Food Lion* (4th Cir. 1984) 792 F.2d 1274, 1277-1278 .

(n99)Footnote 92. *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687 , *superseded by statute on other grounds, see 29 U.S.C. § 251 et seq.*

(n100)Footnote 93. *Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133, 65 S. Ct. 165, 89 L. Ed. 118 (employees engaged in standby capacity in auxiliary firefighting service). For discussion of standby time, see [c], *below*.

(n101)Footnote 94. 29 U.S.C. § 254; *see* discussion under [b], *below*.

(n102)Footnote 95. *Chao v. A-One Medical Services, Inc.* (9th Cir. 2003) 346 F.3d 908, 2003 U.S. App. LEXIS 20304, at *16-17 .

(n103)Footnote 96. *Chao v. A-One Medical Services, Inc.* (9th Cir. 2003) 346 F.3d 908, 2003 U.S. App. LEXIS 20304, at *15

(n104)Footnote 97. The same factual considerations that lead a court to conclude that two entities constituted one enterprise can lead the court to find that they are joint employers as well. *see Chao v. A-One Medical Services, Inc.* (9th Cir. 2003) 346 F.3d 908, 2003 U.S. App. LEXIS 20304, at *17-20 (two corporations were both one enterprise and joint employers for FLSA purposes).

(n105)Footnote 98. *Chao v. A-One Medical Services, Inc.* (9th Cir. 2003) 346 F.3d 908, 2003 U.S. App. LEXIS 20304, at *17-20 . *See 29 C.F.R. § 791.2(a), (b).*

(n106)Footnote 99. *See 29 U.S.C. §§ 251-262.*

(n107)Footnote 100. 29 U.S.C. § 254(a).

(n108)Footnote 100.1. *See Dept. of the Treasury--IRS v. Fed. Labor Rels. Auth.* (9th Cir. 2008) 521 F.3d 1148, 2008 U.S. App. LEXIS 7056, *17-*21 (provision of CBA that when employee travels from his/her residence to point of destination within his/her official duty station, he/she should not be required to leave home any earlier or arrive home any later than he/she does when he/she travels to and from his/her usual assigned place of business was type of express provision of contract necessary to fall under 29 U.S.C. § 254(b)(1) and was not clear statement of agreement to allow payment to affected employees for their commute time).

(n109)Footnote 101. *See 29 U.S.C. § 254(b), (c), (d).*

(n110)Footnote 102. *See 29 C.F.R. §§ 785.24, 790.8(b).*

(n111)Footnote 102.1. *Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1061 (9th Cir. 1984) . *See also 29 C.F.R. § 790.8(a).*

(n112)Footnote 103. *See 29 C.F.R. §§ 785.24, 790.8(b); see also Mitchell v. King Packing Co.* (1956) 350 U.S. 260, 263, 76 S. Ct. 337, 100 L. Ed. 282 (sharpening of knives before and after scheduled workday by knifemen in meatpacking plant as integral part of employees' principal activities); *Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1060 (pre-shift activities are compensable if they are integral and indispensable part of principal activities for which covered workers are employed); *Barrentine v. Arkansas-Best Freight Sys.* (8th Cir. 1984) 750 F.2d 47, 50 (time spent by driver in performing safety inspection of truck pursuant to federal regulation and in transporting vehicle to repair facility as time worked).

(n113)Footnote 104. *See 29 C.F.R. §§ 785.24, 790.8(c).*

(n114)Footnote 105. *See* 29 C.F.R. §§ 785.24, 790.8(c).

(n115)Footnote 106. *See Steiner v. Mitchell* (1956) 350 U.S. 247, 252, 76 S. Ct. 330, 100 L. Ed. 267 ; *Alvarez v. IBP* (9th Cir. 2003) 339 F.3d 894 .

(n116)Footnote 107. 29 U.S.C. § 203(o).

(n117)Footnote 108. *See* 29 U.S.C. § 203(o); 29 C.F.R. § 785.26.

(n118)Footnote 109. *Alvarez v. IBP, Inc.* (9th Cir. 2003) 339 F.3d 894, 904-905 .

(n119)Footnote 110. *IBP v. Alvarez* (2005) 126 S. Ct. 514 , *affirming Alvarez v. IBP* (9th Cir. 2003) 339 F.3d 894 .

(n120)Footnote 111. *IBP v. Alvarez* (2005) 126 S. Ct. 514, 2005 U.S. LEXIS 8373, *20 (employer that was large producer of fresh beef, pork and related products did not challenge holding in lower court that donning and doffing of protective gear were principal activities under § 4 of Portal-to-Portal Act), *32 (because doffing gear that was integral and indispensable to employees' work was principal activity, continuous workday rule mandated that time spent waiting to doff was not affected by Portal-to-Portal Act and was instead covered by FLSA).

(n121)Footnote 112. *IBP v. Alvarez* (2005) 126 S. Ct. 514, 2005 U.S. LEXIS 8373, *23 ; *see also IBP v. Alvarez* (2005) 126 S. Ct. 514, 2005 U.S. LEXIS 8373, *32 (doffing gear that was integral and indispensable to employees' work was principal activity).

(n122)Footnote 113. *IBP v. Alvarez* (2005) 126 S. Ct. 514, 2005 U.S. LEXIS 8373, *23 .

(n123)Footnote 114. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-691 .

(n124)Footnote 115. *IBP v. Alvarez* (2005) 126 S. Ct. 514, 2005 U.S. LEXIS 8373, *23-25 .

(n125)Footnote 116. *IBP v. Alvarez* (2005) 126 S. Ct. 514, 2005 U.S. LEXIS 8373, *25-28 . *see* 29 C.F.R. § 790.7(c) (explaining that Portal-to-Portal Act does not affect compensability of time spent traveling from place of performance of one principal activity to that of another); *see also* 29 C.F.R. § 785.38 (explaining, in later regulation interpreting FLSA, that when employee is required to report at meeting place to receive instructions or perform other work there, or to pick up and carry tools, travel from designated place to work place is part of day's work and must be counted as hours worked).

(n126)Footnote 116.1. *IBP v. Alvarez* (2005) 126 S. Ct. 514, 2005 U.S. LEXIS 8373, *28-*36 .

(n127)Footnote 116.2. *IBP v. Alvarez* (2005) 126 S. Ct. 514, 2005 U.S. LEXIS 8373, *34 n.8 .

(n128)Footnote 117. *IBP v. Alvarez* (2005) 126 S. Ct. 514, 2005 U.S. LEXIS 8373, *35-*36 . *See* 29 C.F.R. § 790.7(g).

(n129)Footnote 117.1. *Ballaris v. Wacker Siltronic Corp.* (9th Cir. 2004) 370 F.3d 901, 910-912 .

(n130)Footnote 118. *See* 29 U.S.C. §§ 251-262.

(n131)Footnote 119. *See* 29 U.S.C. § 254(a)(1),(b). *See Dept. of the Treasury--IRS v. Fed. Labor Rels. Auth.* (9th Cir. 2008) 521 F.3d 1148, 2008 U.S. App. LEXIS 7056, *17-*21 (provision of CBA that when employee travels from his/her residence to point of destination within his/her official duty station, he/she should not be required to leave home any earlier or arrive home any later than he/she does when he/she travels to and from his/her usual assigned place of business was type of express provision of contract necessary to fall under 29 U.S.C. § 254(b)(1) and was not clear

statement of agreement to allow payment to affected employees for their commute time).

(n132)Footnote 120. *See Tennessee C., I. & R. Co. v. Muscoda (1944) 321 U.S. 590, 598, 64 S. Ct. 698, 88 L. Ed. 949 .*

(n133)Footnote 121. *See Anderson v. Mt. Clemens Pottery Co. (1946) 328 U.S. 680, 687 , superseded by statute on other grounds, see 29 U.S.C. § 251 et seq.*

(n134)Footnote 122. *See 29 U.S.C. § 254(a), (b); see also 29 U.S.C. § 251(a)* (purpose of Portal-to-Portal Act was in part to change previous interpretations of FLSA).

(n135)Footnote 122.1. *29 U.S.C. § 254(a)(2)* amended the Portal-to-Portal Act in 1996. Under those amendments, an employer need not compensate an employee for walking, riding, or traveling to and from the actual place of performance of the principal activities the employee is employed to perform. The employer also need not compensate an employee for activities that are preliminary to or postliminary to the principal activities, whether they occur either prior to the time the employee commences the principal activities or subsequent to the time the employee ceases the principal activities. The use of an employer's vehicle for an employee's travel, and activities performed by an employee incidental to the use of the vehicle for commuting, are not considered part of the employee's principal activities if the use of the vehicle is within the employer's normal commuting area and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of the employee.

(n136)Footnote 122.2. For discussion of "principal activities" generally, *see [b][ii], above*. For discussion of *de minimis* time, *see [q], below*.

(n137)Footnote 123. *29 C.F.R. § 785.35.*

(n138)Footnote 124. *Imada v. City of Hercules (9th Cir. 1998) 138 F.3d 1294, 1297* (Fair Labor Standards Act does not require employer to compensate employees for time spent commuting from their homes to mandatory off-site training when that time exceeds their regular commute).

(n139)Footnote 125. *29 C.F.R. § 785.34.*

(n140)Footnote 126. *See Lindow v. United States (9th Cir. 1984) 738 F.2d 1057, 1064* (employee's time of three minutes spent in opening and closing security gates to site where they worked as part of noncompensable travel time).

(n141)Footnote 127. *See 29 C.F.R. § 785.36.*

(n142)Footnote 128. *29 C.F.R. § 785.37.*

(n143)Footnote 129. *29 C.F.R. § 785.37; but see Imada v. City of Hercules (9th Cir. 1998) 138 F.3d 1294, 1297* (off-site mandatory training for police officers could not be characterized as "special" or "unusual" since it was normal, mandatory activity that was contemplated even in officers' collective bargaining agreement).

(n144)Footnote 130. *29 C.F.R. § 785.37.*

(n145)Footnote 131. *29 C.F.R. § 785.38; see also Secretary of Labor v. E. R. Field, Inc. (1st Cir. 1974) 495 F.2d 749, 751 .*

(n146)Footnote 132. *29 C.F.R. § 785.39.*

(n147)Footnote 133. *29 C.F.R. § 785.39; see, e.g., Imada v. City of Hercules (9th Cir. 1998) 138 F.3d 1294, 1297* (*29 C.F.R. § 785.39* plainly exempted from compensation police officers' travel to overnight training activities in another city when that travel time did not cut across normal working day or corresponding hours on nonworking days).

Federal and state law differ on this issue. *see* D.L.S.E. Interpretive Bulletin No. 84-6-Rev. (Feb. 21, 1984) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see also* discussion in [1][b], *above*.

(n148)Footnote 134. 29 C.F.R. § 785.40.

(n149)Footnote 135. 29 C.F.R. § 785.41.

(n150)Footnote 136. 29 C.F.R. § 785.41.

(n151)Footnote 137. *Armour & Co. v. Wantock* (1944) 323 U.S. 126, 133, 65 S. Ct. 165, 89 L. Ed. 118 ; *Owens v. Local No. 169* (9th Cir. 1992) 971 F.2d 347, 350 .

(n152)Footnote 138. *Armour & Co. v. Wantock* (1944) 323 U.S. 126, 132, 65 S. Ct. 165, 89 L. Ed. 118 ; *Owens v. Local No. 169* (9th Cir. 1992) 971 F.2d 347, 350 .

(n153)Footnote 139. *See Skidmore v. Swift* (1944) 323 U.S. 134, 137, 65 S. Ct. 161, 89 L. Ed. 124 .

(n154)Footnote 140. *See* Wage & Hour Div., Field Operations Handbook, P 31a02.

(n155)Footnote 141. *See* Wage & Hour Div., Field Operations Handbook, P 31c09.

(n156)Footnote 142. *See* 29 C.F.R. § 785.15.

(n157)Footnote 143. Seamen on both American and foreign vessels are exempt from overtime requirements under the FLSA. *See* 29 U.S.C. § 213(b)(6); *See also* discussion in § 3.03[2][b]. However, seamen on American vessels are subject to minimum wage requirements under the FLSA. *See* 29 U.S.C. § 213(a)(12) (exemption from both minimum wage and overtime only extends to seamen on foreign vessels).

(n158)Footnote 144. *See* 29 U.S.C. § 206(a)(4).

(n159)Footnote 145. 29 C.F.R. § 785.16(a).

(n160)Footnote 146. 29 C.F.R. § 785.16(a).

(n161)Footnote 147. *See* 29 C.F.R. § 785.16(b).

(n162)Footnote 148. *See* 29 C.F.R. § 783.47.

(n163)Footnote 149. *See* 29 C.F.R. § 552.102(a).

(n164)Footnote 149.1. *See Dooley v. Liberty Mutual Ins. Co.* (D. Mass. 2004) 307 F. Supp. 2d 234 .

(n165)Footnote 149.2. *See Mireles v. Frio Foods, Inc.* (5th Cir. 1990) 899 F.2d 1407, 1413 (waiting time greater than forty-five minutes was not compensable because plaintiffs were not required to remain on defendant's premises during those periods and could use periods effectively for their own purposes).

(n166)Footnote 150. *Brigham v. Eugene Water & Electric Board* (9th Cir. 2004) 357 F.3d 931, 936 , citing *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d 1174, 1180 ; *Owens v. Local No. 169* (9th Cir. 1992) 971 F.2d 347, 350 .

(n167)Footnote 151. *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d 1174, 1180 , citing *Owens v. Local No. 169* (9th Cir. 1992) 971 F.2d 347, 354-355 .

(n168)Footnote 152. *Owens v. Local No. 169* (9th Cir. 1992) 971 F.2d 347, 351 ; *see also* *Berry v. County of*

Sonoma (9th Cir. 1994) 30 F.3d 1174, 1184-1186 .

(n169)Footnote 152.1. *See, e.g., Brigham v. Eugene Water & Electric Board* (9th Cir. 2004) 357 F.3d 931, 936 n. 12 .

(n170)Footnote 153. *Brigham v. Eugene Water & Electric Board* (9th Cir. 2004) 357 F.3d 931, 936 (because no one factor is dispositive, court should balance factors permitting personal pursuits against factors restricting personal pursuits to determine whether employee is so restricted that employee is effectively engaged to wait); *Owens v. Local No. 169* (9th Cir. 1992) 971 F.2d 347, 351 .

(n171)Footnote 154. *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d 1174, 1183-1184 .

(n172)Footnote 154.1. *Brigham v. Eugene Water & Electric Board* (9th Cir. 2004) 357 F.3d 931, 936 .

(n173)Footnote 155. 29 C.F.R. § 785.17; *see Brock v. DeWitt* (W.D. Mo. 1986) 633 F. Supp. 892, 895-896 (restaurant employees directed to report but not permitted to clock in until there was sufficient work entitled to compensation for on-call time); *Brock v. El Paso Natural Gas Co.* (W.D. Tex. 1986) 644 F. Supp. 1202, 104 Lab. Cas. (CCH) P 34,794 (pipeline employees living on satellite station who remained on call from late afternoon until next morning and were required to respond if station alarm sounded were entitled to compensation for on-call time, less meals and sleeptime).

(n174)Footnote 156. *Allen v. Atlantic Richfield Co.* (5th Cir. 1984) 724 F.2d 1131, 1137 .

(n175)Footnote 157. *See, e.g., Rousseau v. Teledyne Movable Offshore, Inc.* (5th Cir. 1986) 805 F.2d 1245, 1248-1249 , *modified*, 812 F.2d 971 (1987) (employees required by agreement to remain on barges for seven full days although compensated only for time spent in active physical labor, and free when not on-duty to sleep, eat, watch television, etc., held not entitled to compensation for off-duty time); *Allen v. Atlantic Richfield Co.* (5th Cir. 1984) 724 F.2d 1131, 1135-1136 (in situation where plant security guards worked 12-hour on-duty shifts but were required, pursuant to agreement, to remain on premises 24 hours a day for duration of wildcat strike, and free during that time to sleep, eat at no expense, play cards, and engage in other personal pursuits, fact question was raised as to whether free time must be counted as time worked).

(n176)Footnote 158. *See* discussion under [g][ii], *below*.

(n177)Footnote 158.1. *Brigham v. Eugene Water & Electric Board* (9th Cir. 2004) 357 F.3d 931, 936-937 .

(n178)Footnote 158.2. *Brigham v. Eugene Water & Electric Board* (9th Cir. 2004) 357 F.3d 931, 937-943 .

(n179)Footnote 159. *Service Employees Int'l Union, Local 102 v. County of San Diego* (9th Cir. 1994) 35 F.3d 483, 490 .

(n180)Footnote 160. *Service Employees Int'l Union, Local 102 v. County of San Diego* (9th Cir. 1994) 35 F.3d 483, 490 .

(n181)Footnote 161. 29 C.F.R. § 785.17; *see also Leonard v. Carmichael Prop. and Management Co., Inc.* (S.D. Fla. 1985) 614 F. Supp. 1182, 1186 (employee on call weeknights and weekends to perform duties in apartment complex in which he resided, and required to remain within range of beeper to be reached in case of emergency, but otherwise free to pursue personal pursuits, not entitled to compensation for time not actually spent in performance of duties).

(n182)Footnote 162. *Owens v. Local No. 169* (9th Cir. 1992) 971 F.2d 347 .

(n183)Footnote 163. *See Owens v. Local No. 169* (9th Cir. 1992) 971 F.2d 347, 348-349, 353-354 .

(n184)Footnote 164. *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d 1174, 1184-1186 .

(n185)Footnote 165. *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d 1174, 1186 .

(n186)Footnote 166. 29 C.F.R. § 785.18; *Mitchell v. Greinetz* (10th Cir. 1956) 235 F.2d 621, 625 .

(n187)Footnote 167. 29 C.F.R. § 785.18; *Ballard v. Consolidated Steel Corporation* (S.D. Cal. 1945) 61 F. Supp. 996, 1006 .

(n188)Footnote 168. See 29 C.F.R. § 785.19(a); see also [f], below, for discussion of meal periods.

(n189)Footnote 169. 29 C.F.R. § 785.19(a).

(n190)Footnote 170. 29 C.F.R. § 785.19(a).

(n191)Footnote 171. 29 C.F.R. § 785.19(a).

(n192)Footnote 172. See 29 C.F.R. § 785.19(b).

(n193)Footnote 173. See 29 C.F.R. § 785.19. By contrast, a meal period may not be excluded from hours worked under the California wage orders unless it is at least 30 minutes long. see 8 Cal. Code Reg. §§ 11010-11150, P 11 (Cal. Wage Order Nos. 1-2001-15-2001); 11160 P 10 (Cal. Wage Order No. 16-2001) See also discussion in [1][c], above, and in § 3.23.

(n194)Footnote 174. See *Duplessis v. Delta Gas, Inc.* (E.D. La. 1986) 640 F. Supp. 891, 895 .

(n195)Footnote 175. See 29 C.F.R. § 785.21; *Central Missouri Tel. Co. v. Conwell* (8th Cir. 1948) 170 F.2d 641, 646 (switchboard operators on 11-hour night shift, paid for eight hours and permitted to rest on cot provided in switchboard room, held to be working for full shift time).

(n196)Footnote 176. 29 C.F.R. § 785.22(a).

(n197)Footnote 177. 29 C.F.R. § 785.22(a); see also *Kelly v. Ballard* (S.D. Cal. 1969) 298 F. Supp. 1301, 1308 (ambulance drivers required to remain on call at station on 24-hour basis entitled to compensation calculated without subtracting mealtimes and sleeping time which, under circumstances, were primarily for employer's benefit and subject to interruption by emergency calls).

(n198)Footnote 178. 29 C.F.R. § 785.22(b).

(n199)Footnote 179. 29 C.F.R. § 785.22(b); see also *Lowe v. Bell House Inc.* (D.N.C. 1985) 74 N.C. App. 196, 103 Lab. Cas. (CCH) P 34,682 (sleep time of employee on-call in apartment on premises of residential care facility was worktime since interruptions were frequent and irregular).

(n200)Footnote 180. 29 C.F.R. § 785.22(b).

(n201)Footnote 181. See 29 C.F.R. § 785.23; see also *Service Employees Int'l Union, Local 102 v. County of San Diego* (9th Cir. 1994) 35 F.3d 483, 491 .

(n202)Footnote 182. 29 C.F.R. § 785.27.

(n203)Footnote 183. 29 C.F.R. § 785.29.

(n204)Footnote 184. 29 C.F.R. § 785.28; but see *Price v. Tampa Elec. Co.* (M.D. Fla. 1987), 105 Lab. Cas. (CCH) P 34,860 (fact that employee's salary changes on taking certain training courses did not necessarily show

involuntary participation).

(n205)Footnote 185. 29 C.F.R. § 785.30.

(n206)Footnote 186. 29 C.F.R. § 785.31.

(n207)Footnote 187. See *Ballou v. General Electric Company* (1st Cir. 1970) 433 F.2d 109, 113 (voluntary program only one example of "special situation" under 29 C.F.R. § 785.31); Wage & Hour Op. Letter No. 502 (Oct. 23, 1980) (time spent in state-mandated programs for ambulance paramedics designed primarily for benefit of employees does not constitute compensable hours worked).

(n208)Footnote 188. 29 C.F.R. § 785.32.

(n209)Footnote 189. See 29 C.F.R. § 785.32.

(n210)Footnote 190. 29 C.F.R. § 785.42.

(n211)Footnote 191. 29 C.F.R. § 785.42.

(n212)Footnote 192. 29 U.S.C. §§ 651-673.

(n213)Footnote 193. See *Chamber of Commerce v. Occupational Safety & Health Administration* (D.C. Cir. 1980) 636 F.2d 464, 467; *Leone v. Mobil Oil Corporation* (D.C. Cir. 1975) 523 F.2d 1153, 1159-1160.

(n214)Footnote 194. See Wage & Hour Div., Field Operations Handbook, P 31b16(c).

(n215)Footnote 195. See *Division of Labor Standards Enforcement v. Texaco, Inc.* (1983) 199 Cal. Rptr. 561; see discussion under [1][f], above.

(n216)Footnote 196. 29 C.F.R. § 785.43.

(n217)Footnote 197. 29 C.F.R. § 785.44.

(n218)Footnote 198. 29 C.F.R. § 785.45.

(n219)Footnote 199. See *Boll v. Federal Reserve Bank of St. Louis* (E.D. Mo. 1973) 365 F. Supp. 637, 646-647.

(n220)Footnote 200. See 29 U.S.C. § 254(a)(1),(b); see also discussion under § 3.07[2][b].

(n221)Footnote 201. 29 C.F.R. § 778.320.

(n222)Footnote 202. 29 C.F.R. § 778.320(b).

(n223)Footnote 202.1. 29 C.F.R. § 785.23. Although § 785.23 by its terms applies to employees residing on the employer's premises, the section title indicates it also applies to employees working at home.

(n224)Footnote 202.2. *Leever v. City of Carson* (9th Cir. 2004) 360 F.3d 1014, 1018-1020 (agreement negotiated between city and union to pay police officers who cared for assigned police dogs at home a flat fee salary differential in lieu of overtime pay was not reasonable as matter of law, because it failed to take into account approximation of number of hours actually worked in caring for dogs or that employees could reasonably be required to work, and salary differential bore no resemblance to compensation to which employee who sued would be entitled in overtime pay based on number of hours she claimed she actually worked); see also *Brock v. City of Cincinnati* (6th Cir. 2001) 236 F.3d 793, 807 (actual amount of time spent working was reference point for range of reasonable agreements, but range was widened by variety of non-monetary costs and benefits provided by employer; allowance of two on-duty days per

28-day cycle to exercise and train police dogs, providing officers with official vehicles to transport dogs to and from work, giving officers paid time off to travel to police dog competitions, and compensating officers for costs associated with caring for dogs made agreement reasonable).

(n225)Footnote 203. *See Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687, *superseded by statute on other grounds, see 29 U.S.C. § 251 et seq.; 29 C.F.R. § 785.47; see also E. I. Du Pont De Nemours & Co. v. Harrup* (4th Cir. Va. 1955) 227 F.2d 133, 136 (preshift worktime of 10 minutes de minimis).

(n226)Footnote 204. *Lindow v. United States*, (9th Cir. 1984) 738 F.2d 1057, 1062 .

(n227)Footnote 205. *Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1062-1063 .

(n228)Footnote 206. *See Addison v. Huron Stevedoring Corp.* (2d Cir. 1953) 204 F.2d 88, 95 (aggregate claim based on repeated failure to compensate unit of worktime worth \$1.00 or less to employee not defeated by de minimis rule).

(n229)Footnote 207. *Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1063-1064 .

(n230)Footnote 208. *See Brock v. Mercy Hospital & Medical Center* (S.D. Cal. 1986) 105 Lab. Cas. (CCH) P 34,822 .

(n231)Footnote 208.1. *Lindow v. United States* (9th Cir. 1984) 738 F.2d 1057, 1062 .

(n232)Footnote 209. 29 U.S.C. § 207(n); *see* 29 C.F.R. § 553.32(g).

(n233)Footnote 210. *See* 29 U.S.C. § 207(p).

(n234)Footnote 211. *See* 29 U.S.C. § 207(p)(1).

(n235)Footnote 212. *See* 29 U.S.C. § 207(p)(2); 29 C.F.R. § 553.30.

(n236)Footnote 213. *See* 29 U.S.C. § 207(p)(3); 29 C.F.R. § 553.31.

(n237)Footnote 214. 29 C.F.R. § 785.48(a).

(n238)Footnote 215. 29 C.F.R. § 785.48(a).

(n239)Footnote 216. 29 C.F.R. § 785.48(a).

(n240)Footnote 217. 29 C.F.R. § 785.48(b).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.08

AUTHOR: By Carol S. Sanders, J.D.

§ 3.08 Determining the Regular Rate of Pay--Compensation Included and Excluded

[1] California Law

[a] Generally--Relationship to Federal Law

Both California and federal law provide for overtime compensation premiums based on a multiple of the employee's "regular rate" of pay.ⁿ¹ Unlike federal law, however, no definition of "regular rate" is provided under either the California wage orders or the Labor Code. Except as discussed in [b] through [d], *below*, no specific guidelines exist for determining the types of compensation that are to be included or excluded in determining the regular rate. An informational pamphlet issued by the DLSE states only that "[t]he regular rate of pay includes many different types of remuneration, for example: hourly earnings, salary, piecework earnings, commission, bonus, value of meals and lodging."ⁿ² The DLSE takes the position that the failure of the IWC to define the term "regular rate" indicates the Commission's intent that in determining the payments to be included in or excluded from the calculation of the regular rate of pay, California will adhere to the standards adopted by the federal Department of Labor to the extent those standards are consistent with California law.^{n2.1}

California's wage orders are closely modeled after, although they do not duplicate, the provisions of the FLSA requiring an overtime premium for hours worked during the workweek in excess of 40.ⁿ³ When California laws are patterned on federal statutes, the federal laws construing that statute provide persuasive guidance; thus, federal rules for computing the regular rate for purposes of overtime compensation for workweek hours over 40 may be useful in construing state law.ⁿ⁴ The federal rules are discussed in [2], *below*.

[b] Payment for "Free" Standby Time

Some employees, such as nurses, laboratory and x-ray technicians, mortuary attendants, utility employees, and security guards, receive special compensation for uncontrolled or "free" standby time. "Free" standby time refers to time during which the employee must be available to be called back to work but is otherwise free to pursue personal interests. The DLSE has taken the position that compensation for any "free" standby time that does not constitute hours workedⁿ⁵ is

not included in determining the employee's regular rate.ⁿ⁶ Under the FLSA, payment for uncontrolled standby time *is* included in the regular rate, even though such time is not regarded as working time,ⁿ⁷ since it was paid as compensation for performing a duty involved in the employee's job.ⁿ⁸

[c] Split-Shift Premium and Reporting Time Pay

As discussed in Chapter 2, an employee who is assigned a split shift, or who is required to report to work but is not given at least a certain minimum number of hours of work to perform, is under some circumstances entitled to certain minimum additional compensation under the wage orders.ⁿ⁹ Additional payments required under the California wage orders for split shifts or for reporting or "show-up" time that exceed the amount due for hours actually worked are considered penalties by the DLSE rather than compensation for hours worked, and are not included in computation of the regular rate.ⁿ¹⁰ The same is true under the FLSA.ⁿ¹¹

[d] Gratuities Versus "Service Charges"

As further discussed in Chapters 2 and 4, tips or gratuities left by customers for employees that are over and above the amount charged by the employer for the employees' services are, with limited exceptions, considered the exclusive property of the employee; they are not considered part of the employee's wages paid by the employer and thus may not be credited against the employer's minimum wage obligations under California law.ⁿ¹² Ordinarily, therefore, tips are not included in the employee's regular rate of pay for purposes of computing overtime compensation. However, the DLSE has drawn a distinction between tips and mandatory service charges that are added *by the employer* to the customer's bill (e.g., a service charge added on to the food costs for a banquet). The DLSE considers such charges to be part of the employer's gross receipts, rather than the property of the employees who performed the services.ⁿ¹³ If a portion of these service charges is subsequently paid over to the employees, the charges are considered wages, which may be credited against the employer's minimum wage obligations but which also must be included in the employee's regular rate of pay for purposes of computing overtime compensation.ⁿ¹⁴

[2] Federal Law

[a] Generally

Under the FLSA, the required overtime compensation must be paid at a rate not less than 1 1/2 times the "regular rate" at which the employee is employed.ⁿ¹⁵ The "regular rate" at which an employee is employed must be at least the federal statutory minimum wage.ⁿ¹⁶ If the employee's regular rate of pay is higher than the statutory minimum, his or her overtime compensation must be computed at a rate not less than 1 1/2 times that higher rate.ⁿ¹⁷

The regular rate includes all remuneration for employment paid to, or on behalf of, the employee, except those payments specifically excluded pursuant to Title 29 *United States Code*, section 207(e)(1)-(8).ⁿ¹⁸ The types of payments that are included and excluded from computation of the regular rate are discussed in [b] through [i], *below*. Only the statutory exclusions are authorized. All remuneration paid to employees which does not fall within one of the exclusions must be added into the total compensation before the regular hourly rate of pay is determined.^{n18.1}

For purposes of computing overtime compensation under the FLSA, the regular rate is always expressed as a per-hour rate.ⁿ¹⁹ The regular rate is the hourly rate *actually paid* the employee for the normal, nonovertime workweek for which he or she is employed. The regular rate under the FLSA may not be affected by any designation of a contrary "regular rate" in the wage contracts.ⁿ²⁰

Although the regular rate under the FLSA is always an amount per hour, the FLSA does not require that employees be compensated for nonovertime work on an hourly basis; regular earnings may be determined on a piece-rate, salary, commission, or other basis. In cases in which regular compensation is other than on an hourly basis, the hourly "regular rate" for overtime purposes must be computed by dividing the employee's total remuneration for employment (except

statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which the compensation was paid.ⁿ²¹ For discussion of rules governing computation of the regular rate under different types of pay practices, such as salaries, commissions, and piece rates, see § 3.09.

[b] Noncash Payments Included in Regular Rate

If payments are made to employees in the form of goods or facilities that are regarded as part of wages, such as meals or lodgings, the reasonable cost to the employer or the fair value of the goods or of furnishing the facilities must be included in the regular rate.ⁿ²² For discussion of rules governing the determination of the value or cost of meals and lodging included as part of wages, see Ch. 2.

[c] Premiums for Overtime Work Excluded From Regular Rate

[i] Generally

The FLSA excludes from a determination of an employee's regular rate certain types of payments made by employers for work in excess of or outside of specified daily or weekly standard work periods or on certain special days.ⁿ²³ These payments are regarded as overtime premiums for purposes of the FLSA.ⁿ²⁴ They are not only excluded from the employee's regular rate of pay for the purpose of computing overtime compensation, but may be credited toward overtime compensation due under the FLSA.ⁿ²⁵ No other types of remuneration for employment may be so credited.ⁿ²⁶ Payments that do not meet the criteria discussed below must be included in the regular rate, as further discussed in [vi] through [viii], *below*.

[ii] Requirement That Extra Compensation Be Rate Per Hour in Excess of Regular Rate

To qualify as excludable overtime premiums, the extra compensation for overtime hours must be paid pursuant to a premium rate which, like the regular rate and the statutory overtime rate, is a rate per hour.ⁿ²⁷ To qualify as excludable premium pay for excess daily or weekly hours,ⁿ²⁸ the overtime rate must be greater than the regular rate, either a fixed amount per hour or a multiple of the nonovertime rate, such as 1 1/3, 1 1/2, or two times that rate.ⁿ²⁹

To qualify as excludable premium pay for work on weekends and other special days,ⁿ³⁰ or for work outside hours of the basic workday or workweek,ⁿ³¹ the overtime rate may not be less than 1 1/2 times the bona fide rate established in good faith for like work performed during nonovertime. The overtime rate may be a standard multiple greater than 1 1/2 (for example, double time), or it may be a fixed sum of money per hour which is, as an arithmetical fact, at least 1 1/2 times the nonovertime rate.ⁿ³²

■ ILLUSTRATION:

Employee is paid \$5.00 per hour for nonovertime work. The overtime rate may not be less than \$7.50, but may be set at a higher fixed figure such as \$8.00 per hour.ⁿ³³

Certain forms of payments that are ostensibly extra compensation for overtime, such as lump sums attributable to overtimeⁿ³⁴ or payment on a "task" basisⁿ³⁵ do not qualify as overtime premiums, and must be included in computation of the regular rate. For a discussion of inclusion of nonqualifying additional compensation in the regular rate, see [vi] through [viii], *below*.

[iii] Premium Pay for Excess Daily or Weekly Hours

An employee's regular rate does not include extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum 40-hour workweek, or in excess of the employee's normal working hours or regular working hours.ⁿ³⁶

The payment of the contractual overtime premium must be contingent on the employee having worked more than eight hours in a day or 40 hours in a week or the specified normal working schedule.ⁿ³⁷ In applying this rule to situations in which it is the custom to pay employees for hours during which no work is performed because of vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause, it is permissible (but not required) to count these hours as hours worked in determining the amount of overtime premium pay due for more than eight hours worked per day or the maximum applicable hours standard, which may be excluded from the regular rate and credited toward the statutory overtime compensation.ⁿ³⁸

■ **ILLUSTRATION:**

Employer customarily pays its employees for time off work caused by bona fide illnesses. Employer also pays its employees at double their straight time hourly rate for hours worked in excess of 40 during a workweek. A standard workday is eight hours. In one workweek, Employee misses one workday, Monday, due to illness. Employee works a normal eight-hour shift on Tuesday through Thursday and an additional eight-hour shift on Saturday. Under the FLSA, Employer is permitted, but not required, to count the eight paid hours missed because of illness as "hours worked" for purposes of determining Employee's eligibility for the double time premium for the hours worked on Saturday. If Employer elects to treat the sick day as "hours worked," and pay the premium rate, the amount of the premium paid in excess of Employee's straight time rate would be excluded from computation of Employee's statutory regular rate and would be credited toward Employer's statutory overtime compensation obligation.ⁿ³⁹

An employer may not claim credit for "extra compensation ... for hours worked ... in excess of the employee's normal ... or regular working hours"ⁿ⁴⁰ by artificially dividing the employee's normal workday into a "straight time" period to which one rate is assigned, followed by a so-called "overtime period" for which a higher rate is specified, and claiming credit for this "overtime rate" against statutory compensation due for hours worked in excess of 40.ⁿ⁴¹ Such an arrangement will be regarded as a device to contravene the statutory purposes, and the premiums will be considered part of the regular rate.ⁿ⁴² For additional discussion of the prohibition against such "split-day" payments, see § 3.12[3].

Payment of premium rates for hours worked in excess of specified daily or weekly standards under California law are regarded as true overtime premiums for purposes of the FLSA and are credited against federal statutory overtime compensation obligations.ⁿ⁴³ The same is true of payment of premium rates pursuant to contract or California law on the sixth or seventh day worked in the workweek.ⁿ⁴⁴ For discussion of overtime premiums under California law, see § 3.04[1].

[iv] Premium Pay for Work on Weekends and Other Special Days

An employee's regular rate does not include extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, if the premium rate is not less than 1 1/2 times the rate established in good faith for like work performed in nonovertime hours on other days.ⁿ⁴⁵ If the premium rate is less than 1 1/2 times the nonovertime rate, the extra compensation provided by the premium rate must be included in determining the employee's regular rate of pay, and cannot be credited toward statutory overtime due, unless it qualifies as an overtime premium for excess daily or weekly hours under Title 29 *United States Code*, section 207(e)(5),ⁿ⁴⁶ as discussed in [iii], above.

■ **ILLUSTRATION:**

Employee's straight-time hourly rate is \$10.00. Employee is paid \$15.00 per hour for all hours worked on Sundays or holidays. Employee's applicable maximum workweek is 40 hours. In a particular workweek, Employee works eight hours on each of seven workdays, for a total of 56 hours. One of the workdays is a Sunday and another is a holiday. Under the employment agreement, Employee would be entitled to \$640.00 for the workweek. The \$5.00 per hour paid in excess of Employee's straight-time rate for 16

hours worked on Sunday and the holiday would be credited against and fully satisfy Employer's overtime compensation obligations under the FLSA.ⁿ⁴⁷

The requirement that the premium rates for special days be based on a "rate established in good faith for like work performed in nonovertime hours on other days" is meant to distinguish bona fide employment standards from fictitious schemes and artificial devices to evade the overtime compensation requirements of the FLSA.ⁿ⁴⁸ For discussion of pay plans that are designed to circumvent overtime compensation requirements, see § 3.12.

To qualify as an overtime premium for special days, the premium must be paid because work is performed on the days specified, and not for some other reason that would not qualify the premium as an overtime premium. Thus, a premium paid to an employee because of the employer's failure to give adequate notice that the employee would be required to work on his or her regular day of rest would not qualify as an overtime premium for work on that day, and would be part of the employee's regular rate of pay unless it otherwise qualifies as an excludable premium.ⁿ⁴⁹

[v] "Clock Pattern" Premiums Pursuant to Agreement for Work Outside Hours of Basic Workday or Workweek

An employee's regular rate does not include extra compensation provided by a premium rate paid to the employee, pursuant to an applicable employment contract or collective bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum 40-hour workweek), if the premium rate is not less than 1 1/2 times the rate established in good faith by the contract or agreement for like work performed during the workday or workweek.ⁿ⁵⁰ Extra compensation for such outside hours is sometimes known as "clock pattern" premium pay.ⁿ⁵¹

■ ILLUSTRATION:

Employee is employed pursuant to a collective bargaining agreement that establishes the regular workday as the hours between 8 a.m. and 12 noon and between 1 p.m. and 5 p.m., Monday through Friday. The bona fide straight-time rate for work performed during such hours is \$10.00 per hour, and Employee is paid \$15.00 per hour for the same work performed outside of such hours. The extra \$5.00 per hour for work performed outside the regular workday would not be included in computing Employee's regular rate and would be credited toward Employer's statutory overtime obligations.ⁿ⁵²

When the employment agreement provides for a premium only for certain undesirable hours worked outside the basic workday or workweek (such as for hours between midnight and 6 a.m.) or only for outside hours worked under undesirable conditions (such as when the employee has gone without a meal or rest period), such a premium may not be excluded from the regular rate.ⁿ⁵³ When there is an agreement for higher pay for after-hours work, a factual question may arise in regard to whether the agreement is a true overtime pay agreement rather than a production or incentive arrangement, or a night shift differential, more properly includable in the regular rate. If there is sufficient evidence that the higher hourly pay for after-hours work was both conceived by the employer and perceived by the employees as a reward for putting in hours beyond the established workweek, the pay would be excludable from the regular rate as an overtime premium.ⁿ⁵⁴

[vi] Fixed Sum or Flat Rate for Varying Amounts of Overtime Not Excludable

A premium in the form of a lump sum that is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an excludable overtime premium under Title 29 *United States Code*, section 207(e). It must be included with the employee's other compensation in computing the regular rate and cannot be credited against statutory overtime compensation due.ⁿ⁵⁵ This is true even if the lump sum, under the particular circumstances, coincidentally equals or exceeds 1 1/2 times the employee's regular rate.ⁿ⁵⁶

■ ILLUSTRATION:

Employee is employed pursuant to an arrangement providing for payment of a flat sum of \$100.00 to employees who work on Sunday. Employee's hourly straight-time rate for work performed Monday through Friday is \$10.00 per hour. During a workweek, Employee works 40 hours, Monday through Friday, and four hours on Sunday. To compute Employee's regular rate, the \$100.00 flat rate premium would be added to Employee's straight time wages (\$400.00) and divided by the total number of hours worked (44), which yields a regular rate of \$11.36 per hour. Employee would therefore be entitled to extra compensation of \$22.72, which equals \$5.68 per hour (1/2 the regular rate) for each hour worked in excess of 40 during the workweek. The \$100.00 "premium" may *not* be credited against the additional overtime compensation due.ⁿ⁵⁷

The same reasoning applies when employees are paid a flat rate for a special job performed during overtime hours, without regard to the time actually consumed in performance.ⁿ⁵⁸ This situation is distinguishable from guaranteed "show-up" or "callback" pay, which may qualify as excludable from the regular rate to the extent that it covers more hours than the employee actually worked after reporting to work.ⁿ⁵⁹

[vii] Pay for Task Without Regard to Hours Worked Not Excludable

Some employment agreements provide for payment according to a job or task without regard to the number of hours consumed in completing the task. Under a common form of "task" payment plan, a determination is made that an employee should complete a particular task in eight hours. When the task is completed the employee is credited with eight "hours" of work, even though he or she may have actually worked more or less than that number of hours to complete the task. At the end of the week, an employee entitled to statutory overtime compensation for work in excess of 40 hours is paid at an established hourly rate for the first 40 of the "hours" credited and at 1 1/2 times the established rate for the "hours" credited in excess of 40. These employees are actually being compensated on a daily rate of pay basis.ⁿ⁶⁰ The number of "hours" credited to the employee bears no necessary relationship to the number of hours actually worked, which may be greater or less than 40.ⁿ⁶¹ The established "hourly" rate never controls the compensation that any employee actually receives, and therefore cannot be regarded as the regular rate for purposes of statutory overtime computation.ⁿ⁶² Since the premium rate is payable for hours worked without regard to whether or not the hours are in excess of eight per day or 40 per week, it cannot qualify as an excludable overtime premium under the FLSA.ⁿ⁶³ It must therefore be included in the regular rate and may not be credited against statutory overtime compensation due.ⁿ⁶⁴

[viii] Other Types of Premium Pay Not Qualifying for Statutory Exclusion

Any other form of premium pay that does not satisfy the requirements for statutory exclusion under Title 29 *United States Code*, section 207(e)(5), (6), (7) and (8) must be included in the employee's regular rate for purposes of overtime pay compensation and may not be credited toward statutory overtime pay requirements.ⁿ⁶⁵ Examples of other nonexcludable premiums include premiums for nightshift differentials; for hazardous, arduous, or dirty work; or for rapid performance of work.ⁿ⁶⁶

[ix] Value Derived from Stock Rights

The regular rate at which an employee is employed does not include any value or income derived from employer-provided grants or rights given pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program subject to certain conditions.ⁿ⁶⁷

[d] Payments in the Nature of Gifts as Reward for Service Excluded From Regular Rate

An employee's regular rate does not include sums paid as gifts, including payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency.ⁿ⁶⁸ To qualify for exclusion under this provision, a bonus must

be actually a gift or in the nature of a gift. A payment will not be considered in the nature of a gift if (1) it is measured by hours worked, production, or efficiency; (2) it is so substantial that it can be assumed that employees consider it a part of the wages for which they work; or (3) it is paid pursuant to a contract (so that the employee has a legal right to the payment and could bring suit to enforce it).ⁿ⁶⁹ On the other hand, if the bonus paid at Christmas or on another special occasion is a gift or in the nature of a gift, it may be excluded from the regular rate even though it is paid with sufficient regularity so that the employees are led to expect it.ⁿ⁷⁰ Such a bonus is excludable even though the amounts paid to different employees or groups of employees vary with the amount of the salary or regular hourly rate or according to length of service, so long as the amounts are not measured by or directly dependent on hours worked, production, or efficiency.ⁿ⁷¹

■ ILLUSTRATION:

Each year, Employer pays a Christmas bonus (not pursuant to contract) in the amount of two weeks' salary to all employees and an equal additional amount for each five years of service. This bonus would be excludable from the regular rate.ⁿ⁷²

Although bonuses paid as service rewards are excluded in computing the regular rate, such bonuses may *not* be credited toward overtime compensation due under the FLSA.ⁿ⁷³

[e] Payments to Profit-Sharing, Thrift, and Savings Plans Excluded From Regular Rate

An employee's regular rate does not include sums paid in recognition of services performed during a given period if the payments are made pursuant to a bona fide profit-sharing plan or trust or a bona fide thrift or savings plan, meeting the requirements of the Wage and Hour Administrator set forth in appropriate regulations,ⁿ⁷⁴ having due regard among other relevant facts, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency.ⁿ⁷⁵ Such sums may not, however, be credited toward overtime compensation due under the FLSA.ⁿ⁷⁶

[f] Payments to Benefit Plans Excluded From Regular Rate

An employee's regular rate does not include contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees.ⁿ⁷⁷

For purposes of excludability from computation of an employee's regular rate, it makes no difference whether or not the benefit plan is one financed out of profits or one which matches employee contributions or otherwise encourages thrift or savings. If the plan is combined in a single program with a plan or trust for providing profit-sharing payments to employees, the profit-sharing payments may be excluded from the regular rate if they meet the requirements of the regulations governing profit-sharing plans,ⁿ⁷⁸ and the contributions made by the employer for providing the benefits may be excluded if they meet the conditions governing exclusion of benefit-plan contributions.ⁿ⁷⁹ Advance approval by the Department of Labor is not required.ⁿ⁸⁰ Detailed requirements for exclusion of benefit-plan payments are set forth in Title 29 *Code of Federal Regulations*, section 778.215.

If the contribution is not made as provided under Title 29 *United States Code*, section 207(e)(4) or if the plan does not qualify as a bona fide benefit plan, the contribution is treated the same as a bonus payment that is part of the regular rate of pay, and at the time the contribution is made the amount of the contribution must be apportioned back over the workweeks of the period during which it may be said to have accrued.ⁿ⁸¹ Overtime compensation based on the resultant increases in the regular hourly rate is due for each overtime hour worked during any workweek of the period.ⁿ⁸² For discussion and illustration of the method of allocating an includable bonus to determine the regular rate, see [h][iv], *below*.

Special rules apply to employer contributions included in fringe benefit wage determinations under the Davis-Bacon Actⁿ⁸³ and the Service Contract Act.ⁿ⁸⁴ For discussion of when these acts apply, see Ch. 1.

[g] Payments for Periods of No Work and Reimbursement for Employee Expenses Excluded From Regular Rate

[i] Generally

An employee's regular rate does not include the following:ⁿ⁸⁵

1. Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause;
2. Reasonable payments for traveling expenses, or other expenses incurred by an employee in the furtherance of the employer's interests and properly reimbursable by the employer; and
3. Other similar payments to an employee which are not made as compensation for his or her hours of employment.

Under federal regulations, examples of "other similar payments" include sums paid to an employee for the rental of a vehicle, loans made by the employer to the employee, and the costs to the employer of furnishing such employee conveniences as parking spaces, on-the-job medical care, and recreational facilities.ⁿ⁸⁶ In addition, one federal appellate court, interpreting the phrase "other similar payments," has concluded that the exclusion is not limited to payments that are "similar" to the specific examples set forth in paragraphs (1) and (2), above, but applies to any type of payment that is not made as compensation for hours worked or services rendered.ⁿ⁸⁷ In that case, the court held that the exclusion for "other similar payments ... not made as compensation for ... hours of employment"ⁿ⁸⁸ was applicable to lump sum payments made to employees pursuant to a collective bargaining agreement, which the employer had negotiated for in lieu of wage increases.ⁿ⁸⁹ The payment involved was not conditioned on the number of hours worked, although there was a requirement that the employee had worked for the employer for a certain minimum period of time.ⁿ⁹⁰

[ii] Payment for Nonproductive Hours Distinguished

As discussed previously in this chapter,ⁿ⁹¹ working time is not limited to hours spent in active productive labor, but includes certain "nonproductive" time given by the employee to the employer, such as time spent waiting for work, remaining "on-call" or traveling on the employer's business or to and from other workplaces. To the extent that these hours are regarded as working time, payment made as compensation for these hours must be included in computation of the regular rate of pay.ⁿ⁹²

Even if payment is ostensibly made as compensation for nonproductive hours that are *not* regarded as working time under the FLSA (for example, for "on-call" time during which employees are free to engage in personal pursuits),ⁿ⁹³ that payment is nevertheless made as compensation for performing a duty involved in the employee's job and is not of a type excludable from the regular rate as a payment when no work is performed, unless it qualifies for exclusion because of the employer's failure to provide sufficient work or other similar cause.ⁿ⁹⁴ The Ninth Circuit had held that if, as frequently happens, employers pay employees for their duty-free meal periods, these wages may be includable in the regular rate of pay, even though the time expended by the employee during a duty-free meal period is not worktime for purposes of computing hours worked.ⁿ⁹⁵ However, two years after that decision, the regulation on which it was basedⁿ⁹⁶ was amended to provide that payments for meal periods not counted as hours worked should generally be excluded in computing the regular rate of pay when the parties have agreed to exclude such activities from hours worked. Under those amendments, if it appears from all the pertinent facts that the parties have agreed to exclude the

meal period or other activities that would not constitute hours worked under the FLSA if not compensated from hours worked, payment for the period should be excluded from the regular rate.ⁿ⁹⁷ even if made compensable by contract, custom, or practice.^{n97.1}

[iii] Absences From Work Generally

The exclusion from regular rate of payments made when an employee is absent from work contemplates absences that are infrequent, sporadic, or unpredictable, and does not apply to regular "absences" such as lunch periods or regularly scheduled days of rest.ⁿ⁹⁸ The term "holiday" as used in the statutory exclusion is interpreted according to its ordinary usage to refer to those days customarily observed in the community in celebration of some historical or religious occasion; it does not refer to days of rest given to employees in lieu of or as an addition to compensation for working on other days.ⁿ⁹⁹

The term "failure of the employer to provide sufficient work" is intended to refer to occasional, sporadically recurring situations when the employee would normally be working but for such factors as machinery breakdown, nondelivery of supplies, weather conditions, and similarly unpredictable obstacles beyond the control of the employer.ⁿ¹⁰⁰ The term does not include reduction in work schedule,ⁿ¹⁰¹ ordinary temporary layoff situations, or any type of routine, recurrent absence of the employee.ⁿ¹⁰²

Examples of payments for absences that are excludable from the regular rate as similar to payments for periods of absence due to holidays, vacations, or failure of the employer to provide work include payments for absences due to jury service, reporting to a draft board, attending a funeral of a family member, or inability to reach the workplace because of weather conditions.ⁿ¹⁰³

[iv] Pay for Foregoing Holidays and Vacations

If an employee entitled to a paid idle holiday or vacation foregoes the holiday or vacation to perform work and is paid (in addition to the sum paid for the holiday or vacation) his or her customary rate or higher, the sum allocable to holiday or vacation pay is still excluded from the regular rate, but is not credited toward overtime compensation.ⁿ¹⁰⁴ This situation is distinguished from a situation in which an employee is entitled to idle holiday pay *only* when he or she is actually idle on that day, and foregoes the holiday idle pay to work at a premium rate on the holiday. Under these circumstances, the holiday premium portion of the pay is excluded from the regular rate as an overtime premium,ⁿ¹⁰⁵ and may be credited toward the statutory overtime compensation due.ⁿ¹⁰⁶

[v] "Show-Up," "Callback," and Similar Payments

Under some employment agreements, an employee may be paid a minimum of a specified number of hours' pay at the applicable straight time or overtime rate on infrequent and sporadic occasions when, after reporting to work at the scheduled starting time, the employee is not provided with the expected amount of work.ⁿ¹⁰⁷ Show-up, or reporting-time, pay is also mandated under all the California wage orders.ⁿ¹⁰⁸ Under the FLSA, reporting time payments made in excess of compensation for hours actually worked by the employee are considered payments other than for hours worked and are excluded from computation of the employee's regular rate.ⁿ¹⁰⁹

■ ILLUSTRATION:

An employment agreement provides that if Employee reports for scheduled work on any day, he will receive a minimum of four hours' work or pay for that many hours. Employee's applicable maximum workweek is 40 hours, and his regular straight-time hourly wage is \$10.00. On Monday of a given workweek, Employee reports for work at the scheduled time, but there are only two hours of work for the Employee to perform. Employee then works eight hours a day on Tuesday through Saturday, for a total of 42 hours for the workweek. Under the agreement, Employee is entitled to \$440.00 for the week, including \$20.00 "show-up" pay for the two idle hours on Monday. The extra two hours of "show-up"

pay is not regarded as compensation for hours worked and is excluded from computation of Employee's regular rate, which remains \$10.00 per hour. Employee is therefore entitled to additional overtime compensation of \$10.00 (1/2 times his regular rate for the two hours worked in excess of 40).ⁿ¹¹⁰ The \$20.00 "show-up" pay may *not* be credited toward Employer's overtime obligation.ⁿ¹¹¹

The same principles are applicable with respect to typical minimum "callback" pay agreements, under which an employee must receive payment for a specified minimum number of hours for returning to work after scheduled work hours have ended to perform extra work in response to the employer's call.ⁿ¹¹² These principles also apply to certain types of extra payments that are similar to "callback" pay. These include payments made to employees, on infrequent and sporadic occasions, for failure to give the employee sufficient notice to report for work on days of rest or during hours outside of the regular work schedule, or for being called back to work before the expiration of a specified number of hours between shifts or tours of duty, sometimes referred to as a "rest period." The extra payment, over and above the employee's earnings for the hours actually worked at the applicable straight time or overtime rate, is considered as a payment that is not made for hours worked.ⁿ¹¹³

[vi] Reimbursable Expenses

As noted in [i], above, payments made to reimburse an employee for expenses incurred by the employee on behalf of the employer or for the employer's convenience are not included in computing the employee's regular rate.ⁿ¹¹⁴ Examples of such expenses include the following:ⁿ¹¹⁵

1. Actual amounts expended by an employee in purchasing supplies, tools, materials, or equipment on behalf of the employer;
2. Actual or reasonably approximate amounts spent by an employee in purchasing, laundering, or repairing required uniforms or special clothing;
3. Actual or reasonably approximate amounts expended by an employee while traveling "over the road" on the employer's business, including transportation and living expenses away from home;
4. "Supper money" when a day-shift employee is requested to continue work during the evening hours;
5. Temporary excess home-to-work travel expenses incurred when the employer has moved the workplace to another town before the employee has had an opportunity to find living quarters in the new location, or when the employee must report for work at a place other than the regular workplace on a particular occasion.

If the amount paid as "reimbursement" is disproportionately large, the excess amount will be included in the regular rate.ⁿ¹¹⁶ If the employer reimburses the employee for expenses normally incurred by the employee for his or her own benefit rather than the employer's benefit (such as for regular home-to-work travel, buying lunch, paying rent, and the like), that amount must be included in computing (and will increase) the employee's regular rate.ⁿ¹¹⁷

[h] Discretionary Bonuses Excluded From Regular Rate

[i] General Rule

An employee's regular rate does not include sums paid in recognition of services performed during a given period if both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly.ⁿ¹¹⁸ Although excludable from the regular rate, such sums may not be

credited toward overtime compensation due.ⁿ¹¹⁹

[ii] Nondiscretionary Bonuses Not Excludable

If the employer promises in advance to pay a bonus, the employer has abandoned his or her discretion with regard to it, and the bonus may not be excluded from the regular rate.ⁿ¹²⁰ The bonus will not qualify for exclusion from the regular rate if the employer abandons his or her discretion with regard to *either* the fact that payment will be made *or* the amount of the payment.ⁿ¹²¹

■ ILLUSTRATION:

Employer promises to sales employees that they will receive a monthly bonus computed by allocating a specified amount for each item sold whenever, in the employer's discretion, the financial condition of the firm warrants such payments. Employer has abandoned its discretion with regard to the *amount* of the bonus, even if not with regard to the fact of payment, and the bonus must therefore be included in computing the employees' regular rates.ⁿ¹²²

[iii] Incentive or Production Bonuses Not Excludable

Bonuses that are announced to employees to induce them to work more steadily or rapidly or efficiently, or to remain with the firm, are regarded as part of the regular rate of pay.ⁿ¹²³ Bonuses based directly on attendance, individual or group production, or quality and accuracy of work; bonuses contingent on the employee's continuing in employment until the time the payment is to be made; and similar types of bonuses are not discretionary bonuses and must be included in the regular rate of pay.ⁿ¹²⁴

[iv] Method of Computing Regular Rate Based on Nonexcludable Bonus

If the nonexcludable bonus covers only one weekly pay period, the amount of the bonus is merely added to the other includable earnings of the employee for that workweek and the total is then divided by the total hours worked to obtain the regular rate.ⁿ¹²⁵

Under many bonus plans, however, calculation of the bonus may necessarily be deferred over a period of time longer than a workweek. In such a case, the employer may disregard the bonus in computing the regular hourly rate until the time when the amount of the bonus can be ascertained, and pay overtime compensation at 1 1/2 times the employee's regular hourly rate, exclusive of the bonus.ⁿ¹²⁶ When the amount of the bonus can be ascertained, it must be apportioned back over the workweeks of the period during which it may be said to have been earned.ⁿ¹²⁷ The employee must then receive an additional amount of compensation for each workweek that he or she worked overtime during the period equal to 1/2 of the increase in the hourly rate of pay allocable to the bonus for that week multiplied by the number of statutory overtime hours worked during the week.ⁿ¹²⁸

■ ILLUSTRATION:

Employee is employed to produce widgets for Employer. Employee is compensated at \$10.00 per hour, and earns a "bonus" based on his rate of production of widgets. The applicable maximum workweek is 40 hours. During Workweek 1, Employee works 44 hours and earns a bonus based on his production rate, but the amount of the bonus is not ascertainable until several weeks later. Initially, Employee must be paid 1 1/2 times the regular hourly rate (or \$15.00) for the four hours worked in excess of 40 hours during the workweek. When the amount of Employee's bonus is ascertained, Employer finds that \$220.00 is attributable to Workweek 1. To compute Employee's adjusted regular rate for Workweek 1, Employer must add the amount of the bonus earned during that week to the amount of Employee's hourly wages for the week, excluding the overtime premium (\$220.00 plus \$440.00 equals \$660.00) and dividing by the total number of hours worked (\$660.00 divided by 44 equals \$15.00 per hour). Employee is therefore entitled to \$10.00 in additional overtime compensation for Workweek 1, which is equal to

1/2 the increase in the regular rate of pay attributable to the bonus (\$15.00 minus \$10.00 equals \$5.00, divided by two equals \$2.50) multiplied by the number of hours (four) worked in excess of 40 during Workweek 1.n129

If it is impossible to allocate the bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted. For example, under certain circumstances it may be reasonable and equitable to assume that the employee earned an equal amount of bonus each week of the period to which the bonus related, or each hour of the pay period, and to compute the additional overtime based on this assumption.n130

In some instances, the contract or plan for the payment of a bonus may also provide for the simultaneous payment of overtime compensation due on the bonus that satisfies in full the overtime provisions of the FLSA, making recomputation unnecessary. Such would be the case if, for example, a contract made prior to the performance of services provided for the payment of additional compensation in the way of a bonus at the rate of 10 percent of the employee's straight-time earnings, and 10 percent of overtime earnings.n131

[v] Prizes and Suggestion System Awards

Prizes are includable in the regular rate as a form of bonus if they are paid to an employee as remuneration for employment.n132 Prizes awarded for the quality, quantity, or efficiency of work done by employees during their customary working hours at their normal assigned tasks are part of the regular rate of pay.n133 Whether prizes awarded for activities outside the customary working hours of the employee, beyond the scope of the employee's duties, or away from the employer's premises are part of the regular rate depends on various factors, such as the amount of time spent by the employee in competing, the relationship between the contest activities and the usual work of the employee, whether the competition involves work usually performed by other employees for employers, and whether the employee was specifically urged to participate or led to believe that promotion or advancement depends on his or her participation.n134 For example, a prize paid for work performed in obtaining new business for an employer would be regarded as remuneration for employment, even though the duties of the participating employees do not normally encompass this type of work.n135 In contrast, a prize for recommending a good sales prospect to whom a sale was actually made would not be regarded as compensation for services if in fact the prizewinner performed no work or spent no time on the matter.n136

Prizes paid pursuant to a bona fide suggestion system are not included in the regular rate, at least when (1) the amount of the prize is based on the value of the suggestion to the company rather than the employee's earnings (that is, the prize is not a substitute for wages), (2) the suggestion is the result of additional effort unrelated to the employee's usual duties, (3) participation was not directly or indirectly coerced by the employer, (4) the invitation to submit suggestions is general in nature and no specific assignment is outlined to employees (either as individuals or as a group) to work on, (5) there is no time limit during which suggestions must be submitted, and (6) the employer has no knowledge, prior to submission of the suggestion, that the employee is working on preparation of a suggestion under circumstances suggesting that the task and schedule of work has been approved by the employer.n137

[i] Talent Fees in the Radio and Television Industry Excluded From Regular Rate

An employee's regular rate does not include sums paid in recognition of services performed during a given period if the payments constitute "talent fees," as defined and delimited by regulations of the Administrator of the Wage and Hour Division,n138 paid to performers, including announcers, on radio and television programs.n139

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 8 Cal. Code Reg. §§ 11010-11160, P 3 (Cal. Wage Order Nos. 1-2001-16-2001); 29 U.S.C. § 207(a). *See also* Lab. Code § 510(a) (employee is entitled to overtime pay at one and one-half times "regular rate" for work in excess of eight hours in one day and twice "regular rate" for work in excess of 12 hours in one day).

(n2)Footnote 2. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 49.1.2; D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders" (Sept. 1986) p. 7 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n3)Footnote 2.1. *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 902-903, citing Cal. Dept. Industrial Relations, DLSE Chief Counsel H. Thomas Cadell, Jr., advice letters, Calculation of Regular Rate of Pay (Jan. 29, 2003) pp. 2, fn. 1, 3; Calculation of Regular Rate of Pay in Cases Involving Piece Rate (Feb. 22, 1993) p. 2 & fn. 2; Explicit Wage Agreements (Jan. 29, 1992) p. 1; Calculation of Regular Rate of Pay (Mar. 6, 1991) p. 1. For discussion of judicial deference to DLSE advice letters, *see* § 1.05[3][c], *above*.

(n4)Footnote 3. *See* *Alcala v. Western AG Enterprises* (1986) 182 Cal. App. 3d 546, 550, 227 Cal. Rptr. 453.

(n5)Footnote 4. *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 903 (even though case involved California law, payment of overtime for work in excess of eight hours in one day, and federal law requires overtime pay only for work exceeding 40 hours in one workweek, federal authorities provided useful guidance in applying state law); *see* *Alcala v. Western Ag Enterprises* (1986) 182 Cal. App. 3d 546, 550, 227 Cal. Rptr. 453 (applying holdings in Ninth Circuit cases to resolve state overtime compensation claim); *see also* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 49.1.2 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n6)Footnote 5. *See* § 3.07[1][e] for discussion of when standby time is not considered hours worked.

(n7)Footnote 6. *See* D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders" (Sept. 1986) p. 11. (CAUTION: *see* § 1.05[3][c], *above*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n8)Footnote 7. *See* § 3.07[2][d] for discussion of when standby time is not considered working time under federal law.

(n9)Footnote 8. *See* 29 C.F.R. § 778.223; *see also* [2][g][ii], *below*, for discussion of inclusion of uncontrolled standby time in regular rate under the FLSA.

(n10)Footnote 9. *See* 8 Cal. Code Reg. §§ 11010-11160, PP 4, 5 (Cal. Wage Order Nos. 1-2001-16-2001).

(n11)Footnote 10. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 49.1.3; D.L.S.E. Pamphlet, *Overtime Requirements --Industrial Welfare Commission Orders* p. 11 (Sept. 1986) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n12)Footnote 11. *See* 29 C.F.R. § 778.220; *see also* discussion under [2][g][v], *below*.

(n13)Footnote 12. *See* Lab. Code §§ 350(e), 351; *Henning v. Industrial Welfare Com.* (1988) 46 Cal. 3d 1262, 1278-1279, 252 Cal. Rptr. 278, 762 P.2d 442.

(n14)Footnote 13. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 19.3.5; D.L.S.E. Div. Management Memo. No. 89-2 (June 9, 1989) (superseding D.L.S.E. Policy & Procedure Memo. No. 82-5 and reinstating D.L.S.E. Policy & Procedure Memo. No. 76-1) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n15)Footnote 14. *See* D.L.S.E. Div. Management Memo. No. 89-2 (June 9, 1989) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n16)Footnote 15. 29 U.S.C. § 207(a).

(n17)Footnote 16. *See* 29 U.S.C. § 206(a); *see also* ch. 2 for discussion of minimum wages under federal law.

(n18)Footnote 17. 29 C.F.R. § 778.107.

(n19)Footnote 18. 29 U.S.C. § 207(e); 29 C.F.R. § 778.108.

(n20)Footnote 18.1. 29 C.F.R. § 778.200(c); *see* U.S. Dept. of Lab., Wage and Hour Div., opinion letter (Feb. 25, 1994) p. 1 (cost-of-living allowance must be included in regular rate because it does not come within statutory exclusions); U.S. Dept. of Lab., Wage and Hour Div., opinion letter (Jan. 23, 1997) p. 1 (lump-sum bonuses based on improvements in plant safety and production efficiency are not within statutory exclusions and must be included in regular rate); 29 C.F.R. §§ 778.201-778.224 (discussing exclusions). *See also* *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 904 .

(n21)Footnote 19. *See* 29 C.F.R. § 778.109; *see also* *Bay Ridge Operating Co. v. Aaron* (1948) 334 U.S. 446, 474-475, 68 S. Ct. 1186, 92 L. Ed. 1502 (regular rate of pay for overtime purposes is hourly rate actually paid employee for nonovertime workweek).

(n22)Footnote 20. *See* *Bay Ridge Operating Co. v. Aaron* (1948) 334 U.S. 446, 474-475, 68 S. Ct. 1186, 92 L. Ed. 1502 . *See also* *Walling v. Hardwood Co.* (1945) 325 U.S. 419, 424-425, 65 S. Ct. 1242, 89 L. Ed. 1705 , quoted with approval in 29 C.F.R. § 778.108 (as long as minimum hourly rates are respected, employer and employee may establish regular rate at any point and in any manner they see fit and agree to pay compensation according to any time or work measurement they desire. However, freedom of contract does not include right to compute regular rate in wholly unrealistic and artificial manner so as to negate statutory purposes; once parties have decided on amount of wages and mode of payment, determination of regular rate becomes matter of mathematical computation, the result of which is unaffected by any designation of contrary "regular rate" in wage contract).

(n23)Footnote 21. 29 C.F.R. § 778.109.

(n24)Footnote 22. 29 C.F.R. § 778.116.

(n25)Footnote 23. *See* 29 U.S.C. § 207(e)(5), (6), (7), (8); *see also* discussion under [ii]-[v], *below*.

(n26)Footnote 24. *See* 29 C.F.R. § 778.201(a), (b).

(n27)Footnote 25. *See* 29 U.S.C. § 207(h). *See* *Ballaris v. Wacker Siltronic Corp.* (9th Cir. 2004) 370 F.3d 901, 912-913 (employer could not use agreed-upon compensation for non-work lunch time as credit to avoid paying overtime compensation required by FLSA).

(n28)Footnote 26. 29 C.F.R. § 778.201(c); *see also* *Local 246 Util. Workers Union v. Southern Cal. Edison* (9th Cir. 1996) 83 F.3d 292, 296 (defendant failed to show that supplemental payments made to bring partially disabled employees up to their predisability level were not part of employee's regular rate of pay).

(n29)Footnote 27. *See* 29 C.F.R. § 778.308(a).

(n30)Footnote 28. *See* 29 U.S.C. § 207(e)(5); *see also* discussion in [iii], *below*.

(n31)Footnote 29. 29 C.F.R. § 778.308(a),(b).

(n32)Footnote 30. *See* 29 U.S.C. § 207(e)(6); *see also* discussion under [iv], *below*.

(n33)Footnote 31. *See* 29 U.S.C. § 207(e)(7); *see also* discussion under [v], *below*.

(n34)Footnote 32. 29 C.F.R. § 778.308(b).

(n35)Footnote 33. *See* 29 C.F.R. § 778.308(b).

(n36)Footnote 34. *See* 29 C.F.R. § 778.308-778.311.

(n37)Footnote 35. *See* 29 C.F.R. § 778.312-778.314.

(n38)Footnote 36. 29 U.S.C. § 207(e)(5); *see also* 29 C.F.R. § 778.202.

(n39)Footnote 37. *See* 29 C.F.R. § 778.202(a).

(n40)Footnote 38. *See* 29 C.F.R. § 778.202(a).

(n41)Footnote 39. *See* 29 C.F.R. § 778.202(a).

(n42)Footnote 40. *See* 29 U.S.C. § 207(e)(5).

(n43)Footnote 41. 29 C.F.R. §§ 778.202(c), 778.501.

(n44)Footnote 42. 29 C.F.R. § 778.202(c).

(n45)Footnote 43. *See* 29 C.F.R. § 778.202(d) (premium pay for excess hours made pursuant to requirements of another applicable statute).

(n46)Footnote 44. *See* 29 C.F.R. § 778.202(e).

(n47)Footnote 45. 29 U.S.C. § 207(e)(6); *see also* 29 C.F.R. § 778.203.

(n48)Footnote 46. *See* 29 C.F.R. § 778.203.

(n49)Footnote 47. *See* 29 C.F.R. § 778.205.

(n50)Footnote 48. *See* 29 C.F.R. § 778.203(b).

(n51)Footnote 49. *See* 29 C.F.R. § 778.203(d). For discussion of distinction between work on a holiday and idle holiday pay, *see* [g][iv], *below*.

(n52)Footnote 50. 29 U.S.C. § 207(e)(7); 29 C.F.R. § 778.204(a).

(n53)Footnote 51. *See* 29 C.F.R. §§ 778.204, 778.206.

(n54)Footnote 52. *See* 29 C.F.R. § 778.206.

(n55)Footnote 53. *See* 29 C.F.R. § 778.204(b).

(n56)Footnote 54. *See* *Brennan v. Valley Towing Co., Inc.* (9th Cir. 1975) 515 F.2d 100, 108-109 ; *see also*

Brock v. Wilamowsky (S.D.N.Y. 1986) 639 F. Supp. 1166, 1169-1171 (distinguishing between shift differentials and excludable clock pattern premiums).

(n57)Footnote 55. 29 C.F.R. § 778.310.

(n58)Footnote 56. 29 C.F.R. § 778.310.

(n59)Footnote 57. 29 C.F.R. § 778.310.

(n60)Footnote 58. See 29 C.F.R. § 778.311(a).

(n61)Footnote 59. See 29 C.F.R. §§ 778.311(a), 778.220-778.222; see also discussion under [g][v], below.

(n62)Footnote 60. See § 3.09[2][e] for discussion of computation of regular rate when earnings based on day rates.

(n63)Footnote 61. See 29 C.F.R. § 778.312(a)(1).

(n64)Footnote 62. See 29 C.F.R. § 778.312(b).

(n65)Footnote 63. See 29 C.F.R. § 778.312(c); see also 29 U.S.C. § 207(e)(5)-(8) (excludable overtime premiums).

(n66)Footnote 64. See 29 C.F.R. § 778.312(c).

(n67)Footnote 65. See 29 C.F.R. § 778.207(a).

(n68)Footnote 66. See 29 C.F.R. § 778.207(b); see also 29 C.F.R. § 778.308(a) (to qualify as excludable premium, premium rate must be rate per hour).

(n69)Footnote 67. 29 U.S.C. § 207(e)(8).

(n70)Footnote 68. 29 U.S.C. § 207(e)(1); 29 C.F.R. § 778.212(a).

(n71)Footnote 69. 29 C.F.R. § 778.212(b). For discussion of bonuses that are includable in the regular rate, see [h][ii]-[iv], below.

(n72)Footnote 70. 29 C.F.R. § 778.212(c).

(n73)Footnote 71. 29 C.F.R. § 778.212(c).

(n74)Footnote 72. See 29 C.F.R. § 778.212(c).

(n75)Footnote 73. 29 C.F.R. § 778.212(a).

(n76)Footnote 74. See 29 C.F.R. §§ 547.0-547.3, 549.0-549.4 (requirements for bona fide profit-sharing, thrift, and savings plans).

(n77)Footnote 75. 29 U.S.C. § 207(e)(3)(b); see also 29 C.F.R. § 778.213.

(n78)Footnote 76. 29 C.F.R. § 778.213.

(n79)Footnote 77. 29 U.S.C. § 207(e)(4).

(n80)Footnote 78. See 29 U.S.C. § 207(e)(3)(b); 29 C.F.R. §§ 549.0-549.4.

(n81)Footnote 79. *See* 29 U.S.C. § 207(e)(4); 29 C.F.R. §§ 778.214(b), 778.215.

(n82)Footnote 80. 29 C.F.R. § 778.214(b).

(n83)Footnote 81. 29 C.F.R. § 778.214(c).

(n84)Footnote 82. 29 C.F.R. § 778.214(c).

(n85)Footnote 83. *See* 29 C.F.R. § 778.214(d).

(n86)Footnote 84. *See* 29 C.F.R. § 778.214(e).

(n87)Footnote 85. 29 U.S.C. § 207(e)(2).

(n88)Footnote 86. *See* 29 C.F.R. § 778.224(b).

(n89)Footnote 87. *See* *Minizza v. Stone Container Corp.* (3d Cir. 1988) 842 F.2d 1456, 1461-1462 .

(n90)Footnote 88. *See* 29 U.S.C. § 207(e)(2).

(n91)Footnote 89. *See* *Minizza v. Stone Container Corp.* (3d Cir. 1988) 842 F.2d 1456, 1461-1462 .

(n92)Footnote 90. *See* *Minizza v. Stone Container Corp.* (3d Cir. 1988) 842 F.2d 1456, 1458, 1462 .

(n93)Footnote 91. *See* § 3.07 for discussion of nonproductive hours constituting worktime.

(n94)Footnote 92. *See* 29 C.F.R. § 778.223; *see also* 29 C.F.R. § 778.318(a) (invalidity of agreements not to pay for nonproductive time worked).

(n95)Footnote 93. *See* § 3.07[2][d][iv] for discussion of "on-call" time not considered as worktime.

(n96)Footnote 94. *See* 29 C.F.R. § 778.223. The DLSE has taken a contrary position in interpreting the California wage orders. *see* D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders" (Sept. 1986) p. 11 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see also* discussion in [1][b], *above*.

(n97)Footnote 95. *See* *Marshall v. Valhalla Inn* (9th Cir. [Cal.] 1979) 590 F.2d 306, 308 (restaurant employees). For discussion of noncompensable meal periods, *see* § 3.07[2][f].

(n98)Footnote 96. 29 C.F.R. § 778.320.

(n99)Footnote 97. 29 C.F.R. § 778.320(b). *See* *Ballaris v. Wacker Siltronic Corp.* (9th Cir. 2004) 370 F.3d 901, 908-909 (where parties agreed that lunch period was excluded from hours worked and throughout litigation parties treated half-hour paid lunch period as non-working time, so that payments for lunch periods constituted additional benefit for employees and not compensation for hours worked, payments for meal period were properly excluded from calculation of regular rate under 29 U.S.C. § 207(e)(2) as interpreted by revised 29 C.F.R. § 778.320). For discussion of hours made worktime by agreement, *see* § 3.07[2][p].

(n100)Footnote 97.1. *See* 29 U.S.C. § 254(a)(1), (b); *see also* discussion under § 3.07[2][b], [c].

(n101)Footnote 98. 29 C.F.R. § 778.218(b).

(n102)Footnote 99. 29 C.F.R. § 778.218(b).

(n103)Footnote 100. *29 C.F.R. § 778.218(c).*

(n104)Footnote 101. *See 29 C.F.R. §§ 778.321-778.329.*

(n105)Footnote 102. *29 C.F.R. § 778.218(c).*

(n106)Footnote 103. *See 29 C.F.R. § 778.218(d).*

(n107)Footnote 104. *See 29 C.F.R. § 778.219(a).*

(n108)Footnote 105. *See discussion under [a][iv], above.*

(n109)Footnote 106. *See 29 U.S.C. § 207(h); 29 C.F.R. § 778.219(b).*

(n110)Footnote 107. *See 29 C.F.R. § 778.220.*

(n111)Footnote 108. *See 8 Cal. Code Reg. §§ 11010-11160, P 5 (Cal. Wage Order Nos. 1-2001-16-2001); see also discussion in ch. 2.*

(n112)Footnote 109. *See 29 C.F.R. § 778.220(a).*

(n113)Footnote 110. *See 29 C.F.R. § 778.220(b).*

(n114)Footnote 111. *See 29 C.F.R. § 778.220(a).*

(n115)Footnote 112. *See 29 C.F.R. § 778.221; see also 8 Cal. Code Reg. §§ 11010-11160, P 5(B) (Cal. Wage Order Nos. 1-2001-16-2001) (reporting time pay mandated when employee required to report for work a second time in any one workday and is furnished less than two hours of work on second reporting), discussed in ch. 2.*

(n116)Footnote 113. *29 C.F.R. § 778.222.*

(n117)Footnote 114. *See 29 U.S.C. § 207(e)(2); 29 C.F.R. § 778.217(a).*

(n118)Footnote 115. *See 29 C.F.R. § 778.217(b).*

(n119)Footnote 116. *29 C.F.R. § 778.217(c).*

(n120)Footnote 117. *See 29 C.F.R. § 778.217(d); see also 29 C.F.R. §§ 531.37(b) (cost of certain employer-furnished facilities as part of regular rate), 778.116 (inclusion in wages of reasonable cost of employer-furnished facilities). For discussion of the extent to which services and facilities furnished by the employer may be credited toward minimum wage and overtime pay, see ch. 2.*

(n121)Footnote 118. *29 U.S.C. § 207(e)(3)(a).*

(n122)Footnote 119. *29 C.F.R. § 778.211(a).*

(n123)Footnote 120. *29 C.F.R. § 778.211(b).*

(n124)Footnote 121. *See 29 U.S.C. § 203(e)(3)(a); 29 C.F.R. § 778.211(b).*

(n125)Footnote 122. *29 C.F.R. § 778.211(b).*

(n126)Footnote 123. *29 C.F.R. § 778.211(c).*

(n127)Footnote 124. *29 C.F.R. § 778.211(c).*

(n128)Footnote 125. 29 C.F.R. § 778.209(a).

(n129)Footnote 126. 29 C.F.R. § 778.209(a).

(n130)Footnote 127. 29 C.F.R. § 778.209(a).

(n131)Footnote 128. See 29 C.F.R. § 778.209(a).

(n132)Footnote 129. See 29 C.F.R. § 778.209(a).

(n133)Footnote 130. See 29 C.F.R. § 778.209(b); see also *Walling v. Harnischfeger Corp.* (1945) 325 U.S. 427, 432-433, 65 S. Ct. 1246, 89 L. Ed. 1711 (if correct overtime compensation cannot be determined until some time after regular time period, employer must pay premium as soon as practicable under the circumstances).

(n134)Footnote 131. See 29 C.F.R. § 778.210.

(n135)Footnote 132. See 29 C.F.R. § 778.330.

(n136)Footnote 133. See 29 C.F.R. § 778.331.

(n137)Footnote 134. 29 C.F.R. § 778.332(a).

(n138)Footnote 135. See 29 C.F.R. § 778.332(b).

(n139)Footnote 136. See 29 C.F.R. § 778.332(b).

(n140)Footnote 137. See 29 C.F.R. § 778.333.

(n141)Footnote 138. See 29 C.F.R. §§ 550.1-550.3 (regulations defining "talent fees").

(n142)Footnote 139. 29 U.S.C. § 207(e)(3)(c); see 29 C.F.R. § 778.225.



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.09

AUTHOR: By Carol S. Sanders, J.D.

§ 3.09 Determining the Regular Rate of Pay--Computation Under Different Types of Pay Practices

[1] California Law

[a] Generally

As noted previously,ⁿ¹ the California wage orders and Labor Code provide no definition of the regular rate, and few guidelines exist regarding computation of the regular rate based on different types of pay arrangements. In most cases, federal rules for computing the regular rate are useful in construing state law.ⁿ² However, there are situations, discussed below, when federal formulas for computing the regular rate for purposes of overtime compensation may not be applied under state law.

[b] Hourly Rate Plus Production Bonus

When the employee receives a bonus based on hours worked, production, or efficiency, the bonus must be included in determining the employee's regular rate of pay for computing overtime.ⁿ³ The regular rate of pay for the bonus is computed by dividing the bonus by the total number of hours worked. The employee must then receive overtime compensation on the bonus, which is equal to (1) one-half times the bonus regular rate for each overtime hour worked during which the employee is ordinarily entitled to 1½ times the regular rate of pay, plus (2) the full amount of the bonus regular rate for each overtime hour worked during which the employee is ordinarily entitled to double the regular rate of pay.ⁿ⁴ The same formula is applied under the FLSA.ⁿ⁵

In *Marin v. Costco Wholesale Corp.*,^{n5.1} an employer that paid a nondiscretionary, formulaic bonus, based on paid hours, to long-term hourly employees, which increased the regular rate of pay, calculated the overtime owed on the bonus by dividing the employee's maximum base bonus by the minimum number of paid hours required to achieve the maximum bonus to determine a regular hourly bonus rate, and then by multiplying the number of overtime hours worked during the bonus period by one-half of that regular bonus rate. Plaintiffs contended that the employer was required to calculate the regular bonus rate by dividing the base bonus the employee earned by the number of straight time hours worked during the bonus period, and then multiplying the number of overtime hours by 1.5 times that

regular bonus rate. The trial court concluded that the employer's bonus plan complied with California law when an employee worked less than 1,000 hours in a bonus period, but violated California law when an employee worked more than 1,000 hours because the formula paid the employee for only 1/3 of the bonus overtime due on hours worked beyond 1,000. Moreover, the trial court found that use of plaintiffs' formula to compute the bonus overtime owed was compelled by case law^{5.2} and sections of the Division of Labor Standards Enforcement's (DLSE) 2002 Enforcement Policies and Interpretations Manual distinguishing "flat sum" bonuses^{5.3} from bonuses based on a percentage of production or some formula other than a flat amount.^{5.4} The trial court conceded that its conclusion yielded apparently irrational results, *e.g.*, that two employees working different amounts of straight time work but the same amount of overtime would have different hourly rates for purposes of calculating overtime and would be paid different amounts of overtime pay.^{5.5}

The Court of Appeal held that the employer's formula did not violate California law.^{5.6} No California court decision, statute, or regulation governed bonus overtime because the case on which the trial court relied^{5.7} was inapplicable; the DLSE Manual sections on the subject did not have the force of law because they were void regulations under the reasoning of *Tidewater v. Marine Western Inc.*;^{5.8} and DLSE opinion letters on the subject were not on point. The only authority was the statutory directive that overtime hours be compensated at a rate of no less than one and one-half times the regular rate of pay.^{5.9} The court found that the employer's bonus plan fulfilled that directive, relying on the Manual provisions for overtime on production bonuses as setting forth a valid formula.^{5.10} While the employer's bonus did not fit neatly into either of the categories the DLSE posited, but was, in a sense, a hybrid of the DLSE categories, it functioned for the most part like a production bonus, and the employer was not required to treat it as a flat sum bonus to effectuate the DLSE's policy concerns. The bonus was in the nature of a production bonus until the 1,000-paid-hour threshold was reached, and while it had some qualities of a flat sum bonus on hours paid thereafter, it did not encourage imposition of overtime during the post-1,000-hour period in a way that would support the use of the DLSE's flat sum bonus formula even as to overtime worked during that period.

[c] Regular Rate When Earnings Based on Fixed Salary

[i] Generally

The DLSE has taken the position that the hourly regular rate of pay of a salaried employee cannot be based on hours in excess of the maximum number of straight-time workweek hours permissible for the particular type of employment, even if the employment agreement contemplates that the salary will cover a longer workweek.⁶ The DLSE's method of computation has been held valid and applied by the courts.⁷ While the usual maximum straight-time workweek is 40 hours, California law permits a longer workweek for certain types of employees, as previously discussed. For example, employees of ski establishments may be required to work 48 hours in a workweek before overtime must be paid,⁸ and certain agricultural workers may be required to work 60 hours without being paid the overtime premium.⁹ In *Espinoza v. Classic Pizza, Inc.*,^{9.1} in calculating the plaintiff's regular rate of pay, the court was required to use a divisor of 40 for the period beginning with plaintiff's employment and ending December 31, 1997, during which plaintiff was covered by a wage order regulating the public housekeeping industry and mandating overtime pay for workweek exceeding 40 hours or a workday exceeding eight hours. However, the court was required to use a divisor of 60 for the period beginning January 1, 1998, through end of plaintiff's employment, when plaintiff was covered by a non-superseded wage order mandating overtime pay only for hours worked in excess of 40 hours per week.^{9.2}

Under the wage orders, as interpreted by the DLSE, if an employee on a weekly salary has a regularly scheduled workweek in excess of the maximum straight-time workweek hours applicable to the employee's occupation, his or her "regular" hourly rate for overtime compensation purposes would be higher than under federal law.

■ ILLUSTRATION:

Employee's maximum hours standard is 40 hours per workweek under the applicable wage order.

Employee is hired at a fixed salary of \$550.00 for 55 hours. Employee's regular rate under federal law for

a week in which Employee worked his or her regularly scheduled number of hours would be determined by dividing \$550.00 by 55, yielding a regular rate of \$10.00 per hour.ⁿ¹⁰ Applying the DLSE's computation rule, the regular rate under California law would be determined by dividing \$550.00 by 40, yielding a regular rate of \$13.75 per hour.

By contrast, the agreed regular hours of work *are* used to compute the regular rate of pay if they are *less than* the legal maximum applicable to the employee.ⁿ¹¹

■ ILLUSTRATION:

Employee is hired pursuant to an agreement under which 35 hours constitutes the regular workweek. Employee's weekly salary is \$350.00, and the applicable maximum workweek is 40 hours. Employee's regular rate under the wage orders is \$10.00 per hour (\$350.00 divided by 35 hours).

[ii] Fixed Salary for Fluctuating Workweek

Under a fluctuating workweek arrangement, the employee may have hours of work that fluctuate from week to week, but the employee is paid a fixed salary pursuant to an understanding that the fixed amount represents straight time pay for whatever number of hours the employee is called on to work that week.ⁿ¹²

Under federal law, the regular rate in a fluctuating workweek is determined by dividing the number of hours actually worked in the particular workweek into the salary amount. Thus, the regular rate will vary from week to week, and the longer hours the employee works, the lower the regular rate will be. Overtime compensation will amount to an additional one-half of the regular rate for that workweek for all hours worked in excess of the maximum workweek.ⁿ¹³

[d] Employees Paid on Piecework or Commission Basis

For employees paid on a commission or piecework basis, the DLSE endorses either of two methods for calculating the regular rate. The most commonly used method is to compute the regular rate by dividing the total earnings for the week, including earnings during overtime hours, by the total hours worked during the week, including overtime hours. The employee is entitled to receive an additional 1/2 times the regular rate for each overtime hour for which he or she would be entitled to 1 times the regular rate under the applicable wage order; for each overtime hour that he or she would be entitled to double the regular rate, the employee must receive an additional amount equal to the full regular rate. Although recognizing that it is rarely used, the DLSE also permits using the piece or commission rate as the regular rate and paying one and one half times this rate for production during overtime hours.ⁿ¹⁴ The FLSA also permits this method of overtime compensation but requires that the employer and employee have an agreement in advance permitting the use of this method.ⁿ¹⁵

[2] Federal Law

[a] Regular Rate When Earnings Based on Hourly Rate

[i] Hourly Rate Exclusively

Under the FLSA, if the employee is employed solely on the basis of a single hourly rate, that rate is his or her regular rate. For overtime work, that employee must be paid, in addition to straight time hourly earnings, a sum determined by multiplying 1/2 the hourly rate by the number of hours worked in excess of 40 in the week.ⁿ¹⁶

[ii] Hourly Rate Plus Bonus

Any production bonuses received during the workweek must be added to the straight-time earnings to determine the hourly "regular rate" for overtime compensation purposes under the FLSA.ⁿ¹⁷

■ ILLUSTRATION:

Employee is employed at a straight-time hourly rate of \$10.00, plus production bonuses. During a workweek, Employee works 46 hours and earns a production bonus of \$20.00. Under the FLSA, Employee's regular rate is computed by first multiplying the straight-time rate times the number of hours actually worked (\$10.00 times 46 equals \$460.00), and adding the amount of the production bonus (\$460.00 plus \$20.00 equals \$480.00). This total is then divided by the total hours worked (46), yielding an hourly regular rate of \$10.22. Employee is entitled to be paid a total wage of \$500.78 for 46 hours (40 hours at \$10.22, plus six hours at \$15.33).¹⁸

The DLSE follows the same formula for computing the regular rate on bonuses under the wage orders.¹⁹

In *Marin v. Costco Wholesale Corp.*,^{19.1} an employer that paid a nondiscretionary, formulaic bonus, based on paid hours, to long-term hourly employees, which increased the regular rate of pay, calculated the overtime owed on the bonus by dividing the employee's maximum base bonus by the minimum number of paid hours required to achieve the maximum bonus to determine a regular hourly bonus rate, and then by multiplying the number of overtime hours worked during the bonus period by one-half of that regular bonus rate. The employer's plan did not violate federal law under a federal regulation^{19.2} providing that if it is impossible to allocate a bonus among the workweeks of the period in proportion to the amount of the bonus actually earned each week, some other reasonable and equitable method of allocation must be adopted.^{19.3} Under the regulation, it could have been reasonable and equitable to assume that an employee earned an equal amount of bonus each week of the period to which the bonus related, and if the facts supported this assumption, additional compensation for each overtime week of the period could be computed and paid in an amount equal to one-half of the average hourly increase in pay resulting from bonus allocated to the week, multiplied by the number of statutory overtime hours worked in that week. On the other hand, if there were facts making it inappropriate to assume equal bonus earnings for each workweek, it could have been reasonable and equitable to assume that the employee earned an equal amount of bonus each hour of the pay period and the resultant hourly increase could have been determined by dividing the total bonus by the number of hours worked by the employee during the period for which it was paid. The additional compensation due for the overtime workweeks in the period could then have been computed by multiplying the total number of statutory overtime hours worked in each such workweek during the period by one-half the hourly increase.^{19.4} The court found that while the regulation may not have been directly on point, it was generally supportive of the employer's formula insofar as it contemplated an overtime-hour multiplier of 0.5, rather than 1.5, to compute the bonus overtime. Further, nothing in the regulation prohibited the employer's method of calculating bonus overtime.

[iii] Variation of Hourly Rate Based on Hours Worked

When an employee temporarily or sporadically works workweeks of varying lengths, it would be arithmetically possible for the employer to artificially vary the hourly rate paid for the same type of work from week to week based solely on the number of hours worked by the employee (that is, the more hours worked, the lower the rate paid), so that the employee would always earn the same average hourly rate, no matter how many hours he or she worked. For example, if an employer set up a schedule whereby the employee's hourly rate was \$12.00 per hour for weeks in which the employee worked 40 hours, approximately \$11.86 for weeks in which the employee worked 41 hours, approximately \$11.64 for weeks in which the employee worked 42 hours, and so forth, the employee would always make \$12.00 per hour, regardless of how many hours were worked in a particular week. Such a plan, however, is considered a bookkeeping device intended to circumvent the overtime provisions of the FLSA and is prohibited by federal regulations.²⁰ Overtime rates cannot be avoided by manipulating the pay for regular hours or otherwise reducing the pay for regular hours to make up for the overtime rate that will have to be paid.^{20.1} Under such circumstances, the hourly rate actually paid in the shorter or nonovertime week is deemed to be the regular rate in all weeks for overtime computation purposes.²¹ A shift differential, in which an employee receives additional pay due to the nature of the work, such as working a nightshift or performing undesirable tasks, must be included in the regular rate.^{21.1}

By contrast, the parties may, pursuant to a definite plan for the permanent reduction of the normal scheduled workweek (for example, from 48 to 40 hours), agree to a rising scale of hourly rates as the workweek is gradually reduced, in order to lessen the shock caused by the expected reduction in take-home pay. In order for the varying rates to be recognized as bona fide, certain criteria must be met, including that there be a clear downward trend in the duration of the workweek throughout the period of the plan, and that the various rates remain operative for substantial periods and do not vary from week-to-week in accordance with the number of hours that any particular employee or group happens to work.ⁿ²²

[b] Regular Rate When Earnings Based on Salary

[i] Weekly Salary for Fixed Workweek

If the employee is employed solely on a weekly salary basis, his or her regular hourly rate of pay is computed by dividing the salary by the number of hours per workweek for which the salary is intended to compensate.ⁿ²³

■ ILLUSTRATION:

Employee is hired at a weekly salary of \$350.00, and it is understood that this salary is compensation for a regular workweek of 35 hours. Employee's regular rate of pay is \$10.00 per hour (\$350.00 divided by 35 hours). For overtime work, the employee is entitled to receive \$10.00 per hour for each overtime hour up to 40 hours, and \$15.00 for each hour worked thereafter.ⁿ²⁴

The same rule of computation applies if the employee is hired for a fixed workweek that exceeds the statutory maximum. All of the employee's salary must be included in computing the regular rate, and a premium equal to 1/2 the regular rate must be paid in addition to the employee's salary for all hours in excess of the maximum workweek applicable to that employee up to the number of hours regularly worked.ⁿ²⁵ In addition, the employee must be paid 1 1/2 times the regular rate for any hours worked in excess of his or her regular workweek.ⁿ²⁶ Federal regulations do not permit the employer to enter into an agreement under which the employee's salary purports to cover both overtime and nonovertime work, even if the same number of overtime hours are worked each week.ⁿ²⁷ The employee's entire salary must be credited toward the regular rate, and an additional, separately designated overtime premium, based on the number of overtime hours worked, must be paid to the employee. However, if the employee works exactly the same number of overtime hours each week, the additional premium may be stated in the form of a lump sum, as long as it is properly computed based on the number of overtime hours worked.ⁿ²⁸ For discussion of the requirements for exclusion of overtime premium payments from computation of the regular rate, see § 3.08[2][a].

If an employee is hired at a fixed salary for a specified workweek, and the workweek is subsequently reduced without a change in salary, the employee's regular rate will increase.ⁿ²⁹

■ ILLUSTRATION:

Employee is hired at a salary of \$400.00 for a fixed workweek of 40 hours, and the workweek is then reduced to 35 hours with no change in salary. Employee's regular rate has increased from \$10.00 per hour (\$400.00 divided by 40) to \$11.43 (\$400.00 divided by 35). Assuming the applicable statutory maximum workweek is 40 hours, if Employee worked beyond 35 hours, the \$11.43 hourly rate would apply up to 40 hours of work. After 40 hours, the overtime rate of 1 1/2 times \$11.43 (or \$17.15 per hour) would be owed to Employee. Thus, if Employee worked 41 hours in a particular week, he or she would be owed a salary of \$400.00 covering 35 hours, plus five hours at \$11.43 per hour (for the hours in excess of 35 up to and including 40), and \$17.15 for the one hour worked in excess of 40, for total earnings of \$474.30 for the week.ⁿ³⁰

[ii] Salary Covering Period Longer Than Workweek

A salary covering a period longer than a workweek must be reduced to its workweek equivalent.ⁿ³¹ Thus, a monthly salary is translated into its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52

(the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is computed, the regular hourly rate of pay will be calculated in the same manner as a weekly salary,ⁿ³² as discussed in [i], above.

Alternatively, under federal regulations,ⁿ³³ the parties may provide that the regular rates will be determined by dividing the monthly salary by the number of working days in the month, and then by the number of hours of the normal or regular workday, as long as the resultant rate is not less than the statutory minimum wage.ⁿ³⁴

[iii] Fixed Salary for Variable Workweek Less Than Statutory Maximum

As in all cases of employees hired on a salaried basis, the regular rate for employees hired to work a variable number of hours depends in part on the agreement of the parties concerning the number of hours the salary is intended to compensate.ⁿ³⁵ If an employee is hired to work a variable number of hours up to a certain maximum number that is less than or equal to the statutory maximum, the regular rate is calculated by dividing the employee's total salary by the actual number of hours worked up to the maximum number specified in the agreement.ⁿ³⁶

■ ILLUSTRATION:

A customary workweek schedule is reduced from 40 hours to 35 hours, and the parties agree to change the basis of the employment arrangement by providing that the salary that formerly covered a fixed workweek of 40 hours now covers a variable workweek up to 40 hours. Under this agreement, Employee receives \$400.00 for workweeks of varying lengths, such as 35, 36, 38, or 40 hours. The rate thus varies from week to week, but in weeks of 40 hours or more, the regular rate is \$10.00 per hour (\$400.00 divided by 40, the maximum amount of hours covered by the salary), and the overtime rate, for hours in excess of 40, remains \$15.00 per hour. Because this salary arrangement presumably contemplates that the full salary will be paid for any workweek of 40 hours or less, Employee would be entitled to the full salary if he or she worked only 25 or 30 hours.ⁿ³⁷

[iv] Fixed Salary for Fluctuating Hours Including Overtime

Regulations issued pursuant to the FLSA permit a salary arrangement under which an employee whose work hours fluctuate from week to week may, pursuant to a clear mutual understanding of the parties, be paid a fixed salary as compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number.ⁿ³⁸ However, except in the case of "Belo" agreements satisfying the requirements of Title 29, *United States Code section 207(f)*,ⁿ³⁹ a salary arrangement under which the employer pays a fixed amount purporting to cover *both* straight time and overtime compensation for an employee who does not work a fixed schedule does not satisfy the requirements of the FLSA.ⁿ⁴⁰ The employee must receive extra compensation, in addition to the regular salary, for all overtime hours worked at a rate not less than 1/2 his or her regular rate of pay.ⁿ⁴¹ The regular hourly rate for each workweek is determined by dividing the number of hours actually worked in that workweek into the amount of the salary. Since the salary is intended to compensate the employee at straight-time rates for whatever hours are worked in the workweek, the regular rate will vary from week to week. Additional payment for overtime hours at 1/2 this regular rate satisfies the overtime pay requirement because these hours have already been compensated at the straight-time regular rate under the salary arrangement.ⁿ⁴²

The fluctuating workweek method of overtime payment may only be used if the fixed salary is sufficient to assure that the employee's average hourly earnings will not fall below the minimum wageⁿ⁴³ for workweeks in which the number of hours worked by the employee is greatest.ⁿ⁴⁴ In addition, the employee must clearly understand that the salary covers whatever hours the job may demand in a particular workweek, except for overtime premiums,ⁿ⁴⁵ and the employer must pay the full salary even in workweeks in which a full schedule of hours is not worked.ⁿ⁴⁶

[v] Fixed Weekly Salary for Alternating Workweeks of Different Fixed Lengths

In some cases, an employee may be hired under an arrangement whereby the employee earns a fixed salary covering alternating workweeks of different fixed lengths (for example, 35 hours one week and 40 hours the next week). Under such an arrangement, the employee will have two, alternating regular rates. Federal regulations permit such an arrangement, as long as the lengths of the alternating workweeks are fixed on a permanent basis far in advance, are not subject to the control of the employer, and do not vary with fluctuations in the employer's business.ⁿ⁴⁷ Overtime compensation must, of course, be paid to the employee for hours worked in excess of the statutory maximum in any workweek, based on 1 1/2 times the regular rate applicable in that particular workweek.ⁿ⁴⁸

[c] Regular Rate When Earnings Based on Piece Rates

The hourly rate of pay for an employee employed on a piece-rate basis is computed by adding together the employee's total earnings for the workweek from piece rates and all other sources (such as production bonuses), and any sums paid for waiting time or other hours worked.ⁿ⁴⁹ To yield the pieceworker's regular rate for that workweek, the total sum of earnings is then divided by hours worked in the workweek for which this compensation was paid. For overtime work, the pieceworker is entitled to be paid, in addition to total weekly earnings at this regular rate for all hours worked, including overtime hours, a sum equivalent to one-half this regular rate multiplied by the number of hours worked in excess of 40.ⁿ⁵⁰

■ ILLUSTRATION:

Employee earns \$450.00 based on piece rates, for 46 hours of productive work during a workweek. In addition, Employee is compensated at an hourly rate of \$10.00 for four hours of waiting time during that week. Employee's regular rate is calculated by dividing the total regular compensation (piece-rate compensation plus waiting time compensation) for the week by the total number of hours worked during the week (\$490.00 divided by 50 equals \$9.80 per hour). Employee is entitled to receive additional overtime compensation of \$4.90 per hour for the 10 hours worked in excess of 40, for total overtime compensation of \$49.00.ⁿ⁵¹

In some cases, an employee is hired on a piece-rate basis coupled with a minimum hourly guaranty. If an employee's piece-rate earnings for a given workweek fall short of the amount that would be earned for the total hours of work at the guaranteed rate, the employee is paid the difference. In such weeks, the employee is in fact paid at an hourly rate, and the minimum hourly guaranteed pay is treated as the employee's regular rate of pay for purposes of the FLSA.ⁿ⁵²

For a discussion of an alternative method of computing overtime compensation for piecework, based on a multiple of the applicable piece rates, see § 3.10[1][b].

[d] Regular Rate When Earnings Based on Commission

[i] Generally

Commissions are considered payments for hours worked and must be included in the regular rate, regardless of the formula on which the commission is based or the method of computing, allocating, and paying the commission, and regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a guaranteed salary or hourly rate, or on some other basis.ⁿ⁵³ For discussion of the exemption of certain commissioned employees of retail or service establishments from overtime compensation requirements, see § 3.03[2][c].

[ii] Commission Paid on Workweek Basis

If the commission is paid on a weekly basis, the regular hourly rate for the workweek is obtained by adding commission payments to the employee's other includable earnings for that workweek, and dividing that amount by the total number of hours worked in that workweek.ⁿ⁵⁴ The employee must then be paid extra compensation at 1/2 of that rate for each hour worked in excess of the applicable maximum hour standard for that employee.ⁿ⁵⁵

[iii] Deferred Commission Payments

If the calculation and payment of the commission cannot be completed until sometime after the regular payday for the workweek, the employer may disregard the commission in computing the regular hourly rate until the amount of commission can be ascertained.ⁿ⁵⁶ Until that is done, the employer may pay compensation for overtime based on the employee's hourly rate, exclusive of the commission.ⁿ⁵⁷ When the commission can be computed and paid, additional overtime compensation due by reason of the inclusion of the commission in the employee's regular rate must also be paid. To compute this additional overtime compensation, the commission must be apportioned back over the workweeks of the period during which it was earned.ⁿ⁵⁸ The employee must then receive additional overtime compensation for each week during the period in which he or she worked in excess of the applicable maximum hours standard.ⁿ⁵⁹ The additional compensation for that workweek must be not less than 1/2 of the increase in the hourly rate of pay attributable to the commission for that week multiplied by the number of hours worked in excess of the applicable maximum hours standards in that week.ⁿ⁶⁰

■ ILLUSTRATION:

Employee is compensated at \$10.00 per hour, plus commissions. The applicable maximum workweek is 40 hours. During Workweek 1, Employee works 44 hours and earns commissions on the sale of Employer's products, but the amount of the commissions is not ascertainable until sales invoices are processed several weeks later. Initially, Employee must be paid 1 1/2 times the regular hourly rate (or \$15.00) for the four hours worked in excess of 40 hours during the workweek. When Employee's commissions are ascertained, Employer finds that \$220.00 is attributable to Workweek 1. To compute Employee's adjusted regular rate for Workweek 1, Employer must add the amount of the commissions earned during that week to the amount of Employee's hourly wages for the week, excluding the overtime premium (\$440.00 plus \$220.00 equals \$660.00) and divide by the total number of hours worked (\$660.00 divided by 44 equals \$15.00 per hour).ⁿ⁶¹ Employee is entitled to \$20.00 in additional overtime compensation for Workweek 1, which is equal to 1/2 the increase in the regular rate of pay attributable to the commissions (\$15.00 minus \$5.00 equals \$10.00, divided by two equals \$5.00) multiplied by the number of hours (four) worked in excess of 40 during Workweek 1.ⁿ⁶²

If it is not possible or practicable to allocate the commission among the workweeks of the period in proportion to the amount of commission actually earned or reasonably presumed to have been earned each week, computation may be based on the assumption that the employee earned an equal amount of commission for each hour worked during the commission computation period.ⁿ⁶³ After the increase in the hourly rate based on the deferred commission allocation is determined, additional overtime due is computed by multiplying 1/2 of this figure by the number of overtime hours worked in each of the overtime workweeks of the commission computation period.ⁿ⁶⁴

[e] Regular Rate When Earnings Based on Day Rates and Job Rates

If an employee is paid a flat sum for a day's work or for a particular job, without regard to the number of hours worked in that day or at that job, his or her regular rate of pay is determined by adding all sums received at that rate in the workweek (assuming no other forms of compensation for services), and dividing the total by the number of hours actually worked. The employee is then entitled to an extra 1/2 times this rate for all hours worked in excess of 40 in the workweek.ⁿ⁶⁵

[f] Regular Rate When Employee Works at More Than One Rate

If an employee in a single workweek works at two or more different types of work for which different nonovertime rates of pay have been established, the employee's regular rate for that week is the weighted average of those rates. The employee's total includable earnings are computed to include his or her compensation during the workweek from all applicable rates, and are then divided by the total number of hours worked at all jobs.ⁿ⁶⁶

■ ILLUSTRATION:

Employee is compensated at \$10.00 per hour to perform Job A and \$15.00 per hour to perform Job B. During a given workweek, Employee works 40 hours at Job A and 10 hours at Job B. Employee's regular rate for that workweek would be \$11.00 per hour, which equals the total nonovertime pay due for both jobs (\$550.00) divided by the total number of hours worked during the week (50).ⁿ⁶⁷ Employee would be entitled to additional compensation of \$55.00 for that workweek, which equals 1/2 times the regular rate of pay (\$5.50) times the number of hours worked in excess of 40 (10 hours).

Alternatively, the parties may agree that the amount to be paid to the employee for performance of a particular type of work during overtime hours will be computed at rates not less than 1 1/2 times the bona fide rate applicable to the same work when performed during nonovertime hours.ⁿ⁶⁸ For a discussion of this alternative method of computing overtime pay, see § 3.10[1][c].

[g] Regular Rate When Compensation Includes Payment for Nonproductive Hours of Work

An agreement may not provide that nonproductive worktime, such as hours spent in waiting time or travel time on the employer's behalf,ⁿ⁶⁹ is noncompensable or not counted in calculating hours worked for purposes of overtime compensation requirements.ⁿ⁷⁰ However, the parties may agree to compensate nonproductive hours worked at a rate that is lower than the rate applicable to productive work (as long as the lower rate is at least as high as the applicable minimum wage). In such a case, the regular rate is the weighted average of the two rates, and computation is determined in the same manner as in any situation in which the employee works at two or more different rates for different work.ⁿ⁷¹ In the absence of an agreement setting a different rate for nonproductive hours, the employee would be owed compensation at the regular hourly rate set for productive work for all hours worked up to the applicable maximum workweek and at least 1 1/2 times that rate for hours worked in excess of the maximum.ⁿ⁷²

It is permissible to assign no special hourly rate to nonproductive hours if they are properly counted when computing hours worked, and if the parties understand that the other compensation received by the employee is intended to cover pay for nonproductive hours. For example, the parties may agree that the pay earned by employees at piece rates is intended to compensate them for all hours worked, productive as well as nonproductive. In this case, the regular rate of the pieceworker will be determined by dividing the total piecework earnings by the total hours worked (including nonproductive hours), and an additional 1/2 times that rate would be due for each hour worked in excess of the maximum workweek.ⁿ⁷³

Payment for nonproductive worktime, which is includable in the regular rate, is distinguished from payment for hours when no work is performed, such as for absences or for hours spent in certain activities that are not regarded as worktime under the FLSA. Payment for hours when no work is performed may be excluded from computation of the regular rate.ⁿ⁷⁴

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. See discussion in § 3.08[1][a].

(n2)Footnote 2. See *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 901-911 (utilizing federal rules to find that trial court properly denied summary adjudication to employer where employees argued that short-shift differential for nurses hired to work 12-hour days but who work fewer than 10 hours in one day should be included in regular rate, because hospital paid differential for all hours worked in non-overtime shift, and

employer's motion did not establish as matter of law that short-shift differential was not subterfuge or artifice to avoid overtime pay); *Alcala v. Western AG Enterprises* (1986) 182 Cal. App. 3d 546, 550, 227 Cal. Rptr. 453 (applying holdings in Ninth Circuit cases to resolve state overtime compensation claim).

(n3)Footnote 3. See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 49.1.2.1; D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders" (Sept. 1986) p. 10. (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n4)Footnote 4. See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 49.2.4; D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders" (Sept. 1986) p. 10 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n5)Footnote 5. See 29 C.F.R. § 778.110(b); see also discussion under [2][a][ii], below.

(n6)Footnote 5.1. *Marin v. Costco Wholesale Corp.* (2008) 169 Cal. App. 4th 804, 87 Cal. Rptr. 3d 161 .

(n7)Footnote 5.2. See *Skyline Homes, Inc v. Dept. of Industrial Relations* (1985) 165 Cal. App. 3d 239, 211 Cal. Rptr. 792 .

(n8)Footnote 5.3. See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 49.2.4.2.

(n9)Footnote 5.4. See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 49.2.4.

(n10)Footnote 5.5. *Marin v. Costco Wholesale Corp.* (2008) 169 Cal. App. 4th 804, 806-810, 87 Cal. Rptr. 3d 161 .

(n11)Footnote 5.6. *Marin v. Costco Wholesale Corp.* (2008) 169 Cal. App. 4th 804, 811-819, 87 Cal. Rptr. 3d 161 .

(n12)Footnote 5.7. See *Skyline Homes, Inc v. Dept. of Industrial Relations* (1985) 165 Cal. App. 3d 239, 245, 211 Cal. Rptr. 792 .

(n13)Footnote 5.8. See *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568-578, 59 Cal. Rptr. 2d 186, 927 P.2d 296 , (voiding all written interpretive policies adopted by DLSE). For discussion of *Tidewater*, see § 1.05[3][c].

(n14)Footnote 5.9. See *Lab. Code* § 510(a).

(n15)Footnote 5.10. See *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 563, 67 Cal. Rptr. 3d 468, 169 P.3d 889 (court could adopt DLSE statutory interpretation embodied in void regulation if it independently determined interpretation was correct).

(n16)Footnote 6. See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 48.1.5.4; D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders" (Sept. 1986) pp. 7-8 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n17)Footnote 7. See *Ghory v. Al-Lahham* (1989) 209 Cal. App. 3d 1487, 1490-1491, 257 Cal. Rptr. 924 ; see also *Alcala v. Western AG Enterprises* (1986) 182 Cal. App. 3d 546, 551-552, 227 Cal. Rptr. 453 ; *Espinoza v. Classic Pizza, Inc.* (2003) 114 Cal. App. 4th 968, 974, 8 Cal. Rptr. 3d 381 (where parties agreed on amount employee would be paid per week and there was general, but vague, understanding as to total hours he was to work, but there was

no agreement as to hourly rate of pay, agreement did not qualify as explicit, mutual wage agreement eliminating overtime pay, because agreement did not specify basic hourly rate of compensation on which guaranteed salary was based and was not made before work was performed); *Hernandez v. Mendoza* (1988) 199 Cal. App. 3d 721, 725-726, 245 Cal. Rptr. 36 (court implied that explicit, mutual wage agreement may provide for fixed salary covering more than 40 hours per week, but found no evidence of such an agreement in the particular case).

(n18)Footnote 8. 8 Cal. Code Reg. § 11100, P 3(I) (Cal. Wage Order No. 10-2001); *see discussion under § 3.04[1][a], [e]*.

(n19)Footnote 9. *See* 8 Cal. Code Reg. § 11140, P 3(A) (Cal. Wage Order No. 14-2001); *see discussion under § 3.04[1][b]*; *see also Alcala v. Western Ag Enterprises* (1986) 182 Cal. App. 3d 546, 549, 550, 227 Cal. Rptr. 453 (applying DLSE rule to 60-hour maximum workweek of agricultural worker).

(n20)Footnote 9.1. *Espinoza v. Classic Pizza, Inc.* (2003) 114 Cal. App. 4th 968, 8 Cal. Rptr. 3d 381 .

(n21)Footnote 9.2. *See, e.g., Espinoza v. Classic Pizza, Inc.* (2003) 114 Cal. App. 4th 968, 972-974, 8 Cal. Rptr. 3d 381 .

(n22)Footnote 10. *See* 29 C.F.R. § 778.325; *see also discussion under [2][b][i], below*.

(n23)Footnote 11. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 48.1.5.4; D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders" (Sept. 1986) p. 7 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n24)Footnote 12. *See* 29 C.F.R. § 778.114(a); *see also* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 48.1.5.1; (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n25)Footnote 13. *See* 29 C.F.R. § 778.114(a); *see also discussion under [2][b][iv], below*.

(n26)Footnote 14. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 49.2.1.2; D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders" (Sept. 1986) p. 8 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n27)Footnote 15. *See* 29 U.S.C. § 207(g)(1); *see also discussion in § 3.10[1][b]*.

(n28)Footnote 16. 29 C.F.R. § 778.110(a).

(n29)Footnote 17. *See* 29 C.F.R. § 778.110(b).

(n30)Footnote 18. 29 C.F.R. § 778.110(b); *see also* 29 C.F.R. § 778.502 (artificial labeling of part of regular wages as "bonus"); 29 C.F.R. § 778.503 (pseudo "percentage bonuses"). *See* § 3.12[4] for discussion of prohibition against pseudo-bonuses.

(n31)Footnote 19. *See* D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders" (Sept. 1986) p. 10 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see discussion under [1][b], above*.

(n32)Footnote 19.1. *Marin v. Costco Wholesale Corp.* (2008) 169 Cal. App. 4th 804, 87 Cal. Rptr. 3d 161 .

(n33)Footnote 19.2. *See* 29 C.F.R. § 778.209(b).

(n34)Footnote 19.3. *Marin v. Costco Wholesale Corp.* (2008) 169 Cal. App. 4th 804, 820, 87 Cal. Rptr. 3d 161 .

(n35)Footnote 19.4. 29 C.F.R. § 778.209(b).

(n36)Footnote 20. See 29 C.F.R. § 778.327. See also *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 905 , citing 29 C.F.R. § 778.327(b) (when different rates are paid from week to week for same work and difference is justified by no factor other than number of hours worked by individual employee, *i.e.*, the longer an employee works, the lower the regular rate, device is evasive and rate actually paid in shorter or nonovertime period is regular rate for overtime purposes in all weeks), 29 C.F.R. § 778.500(b) (hourly rate paid for identical work during overtime hours cannot be lower than rate paid for nonovertime hours).

(n37)Footnote 20.1. *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 901-911 (trial court properly denied summary adjudication to employer where employees argued that short-shift differential for nurses hired to work 12-hour days working fewer than 10 hours in one day should be included in regular rate because hospital paid differential for all hours worked in non-overtime shift, and employer's motion did not establish as matter of law that short-shift differential was not subterfuge or artifice to avoid overtime pay).

(n38)Footnote 21. See 29 C.F.R. § 778.327.

(n39)Footnote 21.1. *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 905 , citing *O'Brien v. Town of Agawam* (1st Cir. 2003) 350 F.3d 279, 295 .

(n40)Footnote 22. See 29 C.F.R. § 778.328.

(n41)Footnote 23. 29 C.F.R. § 778.113(a).

(n42)Footnote 24. See 29 C.F.R. § 778.113(a); see *Marshall v. Chala Enterprises, Inc.* (9th Cir. 1981) 645 F.2d 799, 801 (when employees compensated on lump sum basis, absent proof of another mutually agreed on rate of pay, court must infer that regular rate actually paid was that obtained by dividing weekly wage by number of hours in scheduled workweek).

(n43)Footnote 25. See 29 C.F.R. § 778.325.

(n44)Footnote 26. See 29 C.F.R. § 778.325.

(n45)Footnote 27. See 29 C.F.R. §§ 778.308, 778.309.

(n46)Footnote 28. See 29 C.F.R. § 778.309.

(n47)Footnote 29. See 29 C.F.R. § 778.322. The same result follows when employees have been hired at an hourly rate of pay and have customarily worked a fixed workweek, and the workweek is subsequently reduced without a reduction in pay. See 29 C.F.R. § 778.324.

(n48)Footnote 30. See 29 C.F.R. § 778.322.

(n49)Footnote 31. 29 C.F.R. § 778.113(b).

(n50)Footnote 32. 29 C.F.R. § 778.113(b).

(n51)Footnote 33. See 29 U.S.C. § 207(g)(3); 29 C.F.R. §§ 548.1-548.102, 778.400-778.402.

(n52)Footnote 34. 29 C.F.R. § 778.113(b).

(n53)Footnote 35. See 29 C.F.R. § 778.323.

(n54)Footnote 36. *See* 29 C.F.R. § 778.323.

(n55)Footnote 37. *See* 29 C.F.R. § 778.323.

(n56)Footnote 38. *See* 29 C.F.R. § 778.114(a).

(n57)Footnote 39. For discussion of "Belo" agreements, *see* §§ 3.06[2][a], 3.10[2].

(n58)Footnote 40. *See* 29 C.F.R. §§ 778.310, 778.326.

(n59)Footnote 41. 29 C.F.R. § 778.114(a).

(n60)Footnote 42. 29 C.F.R. § 778.114(a).

(n61)Footnote 43. *See* 29 U.S.C. § 206(a) (Pub. L. No. 104-188). For discussion of minimum wages under federal law, *see* ch. 2.

(n62)Footnote 44. 29 C.F.R. § 778.114(a).

(n63)Footnote 45. *See* *Highlander v. K.F.C. Nat. Management Co.* (6th Cir. 1986) 805 F.2d 644, 648 (written acknowledgment that fluctuating workweek method of overtime compensation was explained was sufficient to support trial court's finding that employee had clear understanding that fluctuating workweek method was applicable).

(n64)Footnote 46. 29 C.F.R. § 778.114(c).

(n65)Footnote 47. *See* 29 C.F.R. § 778.329.

(n66)Footnote 48. *See* 29 C.F.R. § 778.329.

(n67)Footnote 49. For discussion of what constitutes hours worked under federal law, *see* § 3.07[2].

(n68)Footnote 50. *See* 29 C.F.R. § 778.111(a).

(n69)Footnote 51. 29 C.F.R. § 778.111(a).

(n70)Footnote 52. 29 C.F.R. § 778.111(b).

(n71)Footnote 53. *See* 29 C.F.R. § 778.117.

(n72)Footnote 54. 29 C.F.R. § 778.118.

(n73)Footnote 55. 29 C.F.R. § 778.118.

(n74)Footnote 56. 29 C.F.R. § 778.119.

(n75)Footnote 57. 29 C.F.R. § 778.119.

(n76)Footnote 58. 29 C.F.R. § 778.119.

(n77)Footnote 59. 29 C.F.R. § 778.119.

(n78)Footnote 60. 29 C.F.R. § 778.119.

(n79)Footnote 61. *See* 29 C.F.R. § 778.118.

(n80)Footnote 62. *See* 29 C.F.R. § 778.119.

(n81)Footnote 63. *See* 29 C.F.R. § 778.120(b). If the employee worked roughly the same number of hours during each workweek, the employer may compute the overtime by assuming that the commissions earned were equal for all workweeks during the period. *See* 29 C.F.R. § 778.120(a).

(n82)Footnote 64. *See* 29 C.F.R. § 778.120(a), (b); *see also* 29 C.F.R. § 778.121 (delayed credits and debits on commission payments).

(n83)Footnote 65. 29 C.F.R. § 778.112; *see also* 29 C.F.R. § 778.312-778.314 (task basis of payment for overtime).

(n84)Footnote 66. *See* 29 C.F.R. § 778.115.

(n85)Footnote 67. *See* 29 C.F.R. § 778.115.

(n86)Footnote 68. *See* 29 U.S.C. § 207(g)(2); 29 C.F.R. § 778.419.

(n87)Footnote 69. *See* § 3.07[2] for discussion of types of nonproductive time constituting work hours under federal law.

(n88)Footnote 70. *See* 29 C.F.R. § 778.318(a).

(n89)Footnote 71. *See* 29 C.F.R. § 778.318(b). For discussion of computation of regular rate when two or more rates are applicable, *see* [f], *above*.

(n90)Footnote 72. *See* 29 C.F.R. § 778.318(b).

(n91)Footnote 73. *See* 29 C.F.R. § 778.318(c).

(n92)Footnote 74. *See* discussion in § 3.08[2][g].



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.10

AUTHOR: By Carol S. Sanders, J.D.

§ 3.10 Exceptions to Requirement of Computing Overtime Based on Regular Rate of Pay Under Federal Law

[1] Alternative Computation for Pieceworkers and Other Employees

[a] Generally

Title 29 *United States Code*, section 207(g) provides limited exceptions to the normal requirement that overtime compensation be based on the employee's regular rate of pay, as defined in the FLSA and its regulations. These provisions are discussed in [b] through [d], *below*. These alternative methods of computing overtime may only be used by the employer pursuant to an agreement or understanding arrived at before performance of the work.ⁿ¹ Furthermore, under any such agreement, the employee's average hourly earnings for the workweek (exclusive of premiums that are not part of the statutory regular rate)ⁿ² must be not less than the minimum hourly wage permissible under law.ⁿ³ In addition, extra overtime compensation must be properly computed and paid on other forms of additional pay that are required to be included in computing the regular rate.ⁿ⁴

[b] Overtime Compensation Computed on Basis of Piece Rates

In the case of employees employed at piece rates, the parties may agree to compute overtime compensation at piece rates not less than 1 1/2 times the bona fide piece rates applicable to the same work when performed during nonovertime hours.ⁿ⁵ The agreement must be entered into before performance of the work, and overtime must be properly computed and paid on all other forms of compensation required to be included in the regular rate.ⁿ⁶ The piece rate will be regarded as bona fide if it is the rate actually paid for work performed during the nonovertime hours and is sufficient to yield at least the minimum wage per hour.ⁿ⁷

The DLSE also permits use of the above method of computing overtime based on piece rates under the California wage orders, but does not expressly require an advance agreement between the parties.ⁿ⁸ Under the FLSA, however, in the absence of an alternative computation agreement, overtime compensation must be computed by adding together the employee's total earnings for the workweek from piece rates and other includable earnings, and dividing that sum by the hours worked in the workweek to obtain the pieceworker's regular rate for that workweek.ⁿ⁹ For discussion of

computation of regular rate based on piece rates under the FLSA in the absence of an agreement for alternative computation of overtime, see § 3.09[2][c].

[c] Employees Performing Two or More Kinds of Work

In the case of employees performing two or more kinds of work for which different hourly or piece rates have been established, the parties may agree that compensation for a particular type of work performed during overtime hours will be computed at rates not less than 1 1/2 times the bona fide rates applicable to the same work when performed during nonovertime hours.ⁿ¹⁰ An hourly rate will be regarded as a bona fide rate for a particular kind of work if it is equal to or greater than the minimum wage and if it is the rate actually paid for that kind of work when performed during nonovertime hours.ⁿ¹¹

An hourly rate at least equal to the minimum wage may be regarded as a bona fide rate even though it applies solely to a type of work that is performed only during overtime hours. For example, in one case, nurses at a hospital were paid at their regular rate during their regular weekday shift. In addition, nurses were assigned to an additional overtime shift during which they were "on premises on-call." The hospital paid the nurses 1 1/2 times their regular rate for active periods during these overtime shifts, but only 1 1/2 times the federal minimum wage for periods during which the nurses were waiting to be called for active duty. The appellate court held that the minimum wage could be established as a bona fide rate for the waiting periods because the work was different in kind from the work performed during the nurses' regular shifts. The fact that the type of work to which the lower rate applied was never performed during overtime hours did not prevent the rate from being a bona fide rate for purposes of the FLSA.ⁿ¹²

If the employee works at a combination of hourly and piece rates, the payment of a rate not less than 1 1/2 times the hourly or piece rate applicable to the type of work being performed during the overtime hours will meet the overtime requirements of the FLSA if the provisions concerning alternative computation of piece ratesⁿ¹³ and those concerning hourly ratesⁿ¹⁴ are respectively met.ⁿ¹⁵

In the absence of an alternative computation agreement, overtime compensation for an employee working at two or more different types of work for which different rates are applicable must be based on the regular rate. The regular rate is computed by adding together total includable earnings during the workweek from all applicable rates, and dividing the sum by the total hours worked at all jobs during that workweek.ⁿ¹⁶

[d] Overtime Compensation Computed on "Basic Rate" Established by Agreement

The parties may agree to compute overtime compensation at a rate not less than 1 1/2 times the rate established by the agreement or understanding as the "basic rate" to be used in computing overtime compensation, provided that the rate so established is authorized by regulation of the Administrator of the Wage and Hour Division as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time.ⁿ¹⁷ Payments made in conformity with regulations issued pursuant to Title 29 *United States Code*, section 207(g)(3)ⁿ¹⁸ satisfy the overtime pay requirements of the FLSA.ⁿ¹⁹

[2] Guaranteed Compensation Including Overtime Pay Under "Belo Contracts"

Under a "Belo contract" for employees whose duties necessitate irregular hours of work, a fixed weekly guarantee of pay is established for up to 60 hours during a workweek, which includes overtime compensation for hours worked in excess of 40 during the workweek. Under such an agreement, the parties specify a "regular rate," which is used to compute the employee's straight time and overtime compensation for the maximum number of hours specified in the agreement.ⁿ²⁰ For a discussion of requirements for a Belo contract under Title 29 *United States Code*, section 207(f), see § 3.06[2][a].

The specified regular rate of pay under a Belo contract may be any hourly amount (not less than the applicable minimum wage) that the parties agree to and that can reasonably be expected to be operative in controlling the employee's compensation.ⁿ²¹ The rate specified must be one that would be operative and unvarying in determining the *total* amount of the employee's compensation (that is, the rate must be one that the FLSA does not require be recalculated from week to week). Thus, it is not possible to enter into a Belo contract with an employee whose regular weekly earnings are made up in part by the payment of regular bonuses and commissions that are required to be included in the computation of the regular rateⁿ²² because that employee's total compensation is controlled *both* by the additional payments *and* by the hourly rate.ⁿ²³

The regular rate specified in the contract together with the guarantee must be the actual measure of the regular wages that the employee receives. However, the payment of extra compensation, over and above the guaranteed amount, which is excludable from computation of the regular rate under Title 29 *United States Code*, section 207(e), such as for work on holidays or for discretionary bonuses,ⁿ²⁴ will not invalidate a contract that otherwise qualifies under Title 29 *United States Code*, section 207(f).ⁿ²⁵

The Belo contract must provide for compensation of not less than 1 1/2 (or any agreed higher multiple) times the specified regular rate for *all* hours worked in excess of the applicable maximum hours standard for the particular workweek.ⁿ²⁶ Thus, if the employee works more than the specified number of hours covered by the guarantee, he or she must be paid, for each such hour, overtime compensation as provided in the contract, in addition to the guaranteed amount.ⁿ²⁷ The amount of weekly pay guaranteed may not exceed compensation due at the specified regular rate for the applicable maximum hours standards and at the specified overtime rate for excess hours, and the number of hours to which the guarantee applies may not exceed a total of 60.ⁿ²⁸

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Overtime & Work Period

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 207(g).

(n2)Footnote 2. See § 3.08[2][c] for discussion of premiums excludable from regular rate.

(n3)Footnote 3. 29 U.S.C. § 207(g).

(n4)Footnote 4. 29 U.S.C. § 207(g); see § 3.10 for discussion of additional pay includable in computation of regular rate.

(n5)Footnote 5. 29 U.S.C. § 207(g)(1).

(n6)Footnote 6. 29 U.S.C. § 207(g).

(n7)Footnote 7. 29 C.F.R. § 778.418(b).

(n8)Footnote 8. See D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders" (Sept. 1986) p. 8 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); see also discussion in § 3.09[1][d].

(n9)Footnote 9. See 29 C.F.R. § 778.111(a).

(n10)Footnote 10. 29 U.S.C. § 207(g)(2).

(n11)Footnote 11. *29 C.F.R. § 778.419(b).*

(n12)Footnote 12. *See Townsend v. Mercy Hosp. of Pittsburgh (3d Cir. 1988) 862 F.2d 1009, 1012-1013* (interpreting *29 U.S.C. § 207(g)(2)*).

(n13)Footnote 13. *See 29 C.F.R. § 778.418.*

(n14)Footnote 14. *See 29 C.F.R. § 778.419.*

(n15)Footnote 15. *See 29 C.F.R. § 778.420.*

(n16)Footnote 16. *29 C.F.R. § 778.115. See § 3.09[2][f]* for discussion of computing regular rate when employee works at more than one rate.

(n17)Footnote 17. *29 U.S.C. § 207(g)(3).*

(n18)Footnote 18. *See 29 C.F.R. §§ 548.1-548.502.*

(N19)Footnote 19. *See 29 C.F.R. § 778.401.*

(n20)Footnote 20. *See 29 U.S.C. § 207(f); 29 C.F.R. §§ 778.402-778.414; see also L. Metcalfe Walling v. A.H. Belo Corp. (1942) 316 U.S. 624, 635, 62 S. Ct. 1223, 86 L. Ed. 1716 .*

(n21)Footnote 21. *See 29 C.F.R. § 778.408(b).*

(n22)Footnote 22. For discussion of payments included and excluded in determining the regular rate, see § 3.08.

(n23)Footnote 23. *See 29 C.F.R. § 778.408(c).*

(n24)Footnote 24. *See discussion in § 3.08[2][g],[h].*

(n25)Footnote 25. *See 29 C.F.R. § 778.408(d).*

(n26)Footnote 26. *See 29 C.F.R. § 778.409.*

(n27)Footnote 27. *See 29 C.F.R. § 778.411.*

(n28)Footnote 28. *29 C.F.R. § 778.411.*



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.11

AUTHOR: By Carol S. Sanders, J.D.

§ 3.11 Special Problems in Computing Overtime Pay

[1] Daily and Weekly Overtime Applicable

Generally, overtime compensation under the FLSA applies only when the number of hours worked exceeds the standard specified for the workweek.ⁿ¹ However, in some instances, the FLSA provides for a daily premium. For example, the partial exemption under Title 29 *United States Code, section 207(b)* for employees covered under certain collective bargaining agreements limiting hours of employment requires overtime compensation for hours worked in excess of 12 in any one *workday*, as well as hours hours worked in excess of 56 during a workweek.ⁿ² Under this arrangement, the employee must be paid at the overtime rate for all hours worked in the workweek in excess of the applicable daily maximum *or* in excess of the applicable weekly maximum, whichever number of hours is greater.ⁿ³

■ ILLUSTRATION:

Employee is employed under a collective bargaining agreement providing for payment at 1 1/2 times the regular hourly rate for hours worked in excess of 12 during a workday and 56 in a workweek.

Employee's regular hourly rate is \$10.00. During a particular workweek, Employee works the following schedule:

Monday:	14 hours
Tuesday:	9 hours
Wednesday:	10 hours
Thursday:	15 hours
Friday:	12 hours
Saturday:	8 hours
TOTAL:	68 hours

Employee has worked five hours over the 12-hour daily maximum and 12 hours over the 56-hour weekly

maximum. Since the weekly overtime hours are greater, Employee is entitled to pay for 12 hours at \$15.00 an hour (1 1/2 times \$10.00), a total of \$180.00 for the 12 overtime hours, and to pay at his or her regular rate for the remaining 56 hours (56 times \$10.00) in the amount of \$560.00, for a total of \$740.00 for the week. If Employee had not worked the eight hours on Saturday, total hours worked in the week would have been 60, of which five were daily overtime hours. Under this schedule, the daily overtime hours exceed the weekly overtime hours (four); therefore, Employee would be entitled to five hours of overtime pay at 1 1/2 times the regular rate, or \$75, plus the pay at his or her regular rate for the remaining 55 hours (55 times \$10.00) in the amount of \$550.00, or a total of \$625.00 for the week.ⁿ⁴

The California requirements for daily and weekly overtime compensation may also overlap if an employee works in excess of both the daily and the weekly maximum hours.ⁿ⁵ If the wage order providing for overtime pay is not clear with respect to the premium to be paid,ⁿ⁶ California courtsⁿ⁷ follow a rule similar to that applied under the FLSA. That is, the employee must be paid overtime for all hours worked in a workweek in excess of the applicable daily or weekly maximum, whichever number of hours is greater. If interpreted otherwise, the employee would receive weekly overtime pay in addition to daily overtime.ⁿ⁸

To calculate overtime when the daily and weekly maximum hours have been exceeded, the employer must do the following: (1) review all hours worked during the workweek; (2) calculate the value of all daily overtime hours, including double time; and (3) calculate the value of all weekly overtime hours. The employer must then pay the employee for the greater of the value of the daily overtime hours or the value of the weekly overtime hours. Note that if the daily maximum hours are exceeded, only the regular hours worked per day are counted toward the weekly maximum of 40 hours.ⁿ⁹ For example, an employee who works 45 hours in the first 3 days of a week has worked only 24 hours toward the weekly 40-hour maximum. If the employee does no work for the rest of the week, then the weekly maximum is not exceeded.

[2] Overlapping Workweeks

When the beginning of a workweek is permanently and legitimately changed for an employee or for a group of employees, a situation results in which one or more hours or days fall in both the "old" and "new" workweek. Thus, if the workweek commenced at 7 a.m. on Monday and it is changed to begin at 7 a.m. on Sunday, the hours worked from 7 a.m. on Sunday to 7 a.m. on Monday will constitute both the last hours of the old workweek and the first hours of the newly established workweek.ⁿ¹⁰ Under the FLSA, if the employee's working time falls within hours included in both workweeks, the Department of Labor, as an enforcement policy, will assume that the statutory overtime requirements have been satisfied if computation is made as follows: a total computation of straight time and overtime is made first on the assumption that the overlapping hours are includable only in the "old" workweek, and then on the assumption that they are includable only in the "new" workweek, and the employee is paid the greater of the amounts computed under these two assumptions.ⁿ¹¹

■ ILLUSTRATION:

Employee's regular hourly rate is \$10.00, and the applicable maximum workweek is 40 hours. On Sunday, November 8, 1987, Employee worked five hours. Employee's last "old" workweek commenced at 7 a.m. on Monday, November 2, and he worked 40 hours for the period from November 2 through November 6, so that for the "old" workweek ending on November 8, Employee would be owed straight-time and overtime compensation for 45 hours. Employer proposes to permanently change Employee's workweek schedule so that it would commence at 7 a.m. on Sunday, November 8. In the "new" workweek commencing November 8 and ending November 14, Employee works a total of 40 hours, including the five hours worked on November 8. Employee would receive more total compensation for the 13-day period from November 2 through November 14 if the five hours worked on November 8 are considered part of the "old" workweek, rather than the "new" workweek (since he would receive overtime premium pay for the five hours worked on November 8 only if it is considered part of

the "old" workweek). Therefore, the hours should be considered part of the "old" workweek, and Employee should receive \$475.00 (40 hours at \$10.00 per hour, plus five hours at \$15.00 per hour) for the period from November 2 through November 8, and \$350.00 (35 hours at \$10.00 per hour) for the period from November 9 through November 14.ⁿ¹²

The California wage orders do not specify how overtime should be computed in the above situation. Generally, however, the workweek, once established by the employer, is deemed as fixed by the DLSE for purposes of overtime pay computation. The DLSE permits a change in workweek under the wage orders only if the change is intended to be permanent and is not designed to evade overtime obligations.ⁿ¹³ The federal approach illustrated above appears to satisfy the DLSE's criteria since it would prevent the employee from losing overtime compensation because of the change in the work schedule.

[3] Additional Pay for Past Period

Under the FLSA, if a retroactive pay increase is awarded to employees, their regular rate of pay increases for the period of retroactivity, and the employee is owed 1 1/2 times the amount of the increase for each overtime hour worked during the retroactive period, regardless of any contrary agreement among the parties.ⁿ¹⁴ A retroactive pay increase in the form of a lump sum for a particular period must be prorated back over the hours of the period to determine the resultant increases in the regular rate, in precisely the same manner as a lump-sum deferred bonus is prorated.ⁿ¹⁵ For a discussion of computing deferred bonuses in regular rate of pay, *see* § 3.08[2][h][iv].

[4] Wage Deductions

[a] Generally

The word "deduction" may refer to reductions in pay resulting from several causes:

1. Deductions to cover the cost to the employer of furnishing "board, lodging, or other facilities," within the meaning of Title 29 *United States Code*, section 203(m);ⁿ¹⁶
2. Deductions for other items such as tools and uniforms, which are not regarded as "facilities";
3. Deductions authorized by the employee (such as union dues) or required by law (such as taxes and garnishments);
4. Reductions in a fixed salary paid for a fixed workweek in weeks in which the employee fails to work the full schedule; and
5. Deductions for disciplinary reasons.

As discussed below, these wage deductions do not affect computation of an employee's regular rate under the FLSA.ⁿ¹⁷

In *Sumuel v. ADO, Inc.*,^{n17.1} the employer's disability policies and practices complied with the salary basis tests, even though employees who returned to work after an illness were not paid their regular salaries until payroll received the proper documentation confirming that the employees had returned to work and the employer deducted improper amounts from the employees' company-paid disability benefits based on imputed state disability benefits the employees did not actually receive. A delay in receiving normal salary payments when an employee returned from disability leave was not an improper deduction, because there was no evidence any employee was not ultimately paid in full. Further, the deduction based on imputed SDI was miscalculation of a disability benefit, not a deduction from salary implicating the salary basis test.^{n17.2} The employer's policy not to pay a full week's salary to employees who worked a partial week

before going out on short-term disability leave was a deduction in salary.^{n17.3} However, the employer's policy of stopping salary payments as of the first day of a disability period qualified as bona fide under federal regulations and state law.^{n17.4}

For a full discussion of restrictions on deductions from wages, *see* Ch. 4.

[b] Deductions to Reimburse Employer for Certain Costs Authorized by Employee or Required by Law

In the case of deductions for board, lodging, or other facilities, or for other items such as tools and uniforms, or deductions authorized by the employee (such as union dues) or required by law (such as taxes or garnishments), the employee's regular rate under the FLSA is the same as it would have been if the occasion for the deduction had not arisen.ⁿ¹⁸ The regular rate is determined by dividing total includable compensation before deductions by the total hours worked in the workweek.ⁿ¹⁹

[c] Salary Reduction for Short Workweek

When a proportionate reduction is made in a fixed salary paid for a fixed workweek in weeks in which the employee fails to work the full schedule,ⁿ²⁰ the reduction is not, properly speaking, a "deduction" at all. In such cases, the employee is, for practical purposes, employed at an hourly rate of pay.ⁿ²¹ The hourly rate is the quotient of the fixed salary divided by the fixed number of hours it is intended to compensate.

■ ILLUSTRATION:

Employee is hired at a fixed salary of \$400 per week. Employee's normal work schedule is 40 hours per week. The employment agreement provides that if the employee does not work the full schedule during a workweek, the salary will be a percentage of the full salary equal to the quotient of the number of hours worked divided by 40. During one workweek, Employee works only 36 hours. Under the agreement, Employee's salary for that workweek would be reduced to \$360. Since in either case the employee's regular rate is equal to total compensation divided by the actual number of hours worked,ⁿ²² the "deduction" of \$40 from Employee's salary does not alter the regular rate, which remains \$10.00 per hour.ⁿ²³

When an employee is paid a fixed salary for a workweek of variable hoursⁿ²⁴ or receives guaranteed pay under a "Belo agreement,"ⁿ²⁵ the understanding is that the salary or guarantee is due the employee in short workweeks as well as in longer ones, and "deductions" for short workweeks are not made. In cases in which the understanding of the parties is not clearly shown in regard to whether a fixed salary is intended to cover a fixed or variable workweek, the practice of making "deductions" from the salary for hours not worked in short workweeks will be considered strong, if not conclusive, evidence that the salary covers a fixed workweek.ⁿ²⁶

■ CONSULTANT'S COMMENT:

The federal overtime and minimum wage exemptions for executive, administrative, and professional employees are based on minimum levels of *salary* without regard to the number of days or hours worked in a pay period.ⁿ²⁷ Thus, the employer should take extreme care not to make any deductions from the salary of an otherwise exempt executive, administrative, or professional employee that might result in loss of the exemption for the workweek involving the deduction. The new 2004 Department of Labor overtime regulations contain guidelines regarding such deductions.ⁿ²⁸ *Commentary by Kirby Wilcox.*

[d] Disciplinary Deductions

When deductions are made for disciplinary reasons, the regular rate of an employee is computed before deductions are made. These deductions may never reduce the employee's earnings to an average below the applicable minimum wage or cut into any part of the overtime compensation due the employee.ⁿ²⁹

■ ILLUSTRATION:

Employer has a policy of penalizing its employees for lateness by deducting a half-hour's straight-time pay from their wages for each half hour, or fraction of an hour, that an employee is late. Employee's regular hourly rate is \$10.00 per hour, and the applicable maximum hour standard is 40 hours. In a given workweek, Employee is 15 minutes late for work on one occasion, and Employer deducts \$5.00 from Employee's paycheck. Employee actually works 41 hours during that workweek. For purposes of computing overtime compensation for that workweek, Employer must count as hours worked all the time actually worked by Employee; Employer may not consider the \$5.00 disciplinary deduction in computing Employee's regular rate for the week, which remains \$10.00. Employee is entitled to \$15.00 for the one overtime hour worked.ⁿ³⁰

Under California law, an employer may not deduct from an exempt employee's salary for disciplinary reasons.ⁿ³¹

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Overtime & Work Period

FOOTNOTES:

(n1)Footnote 1. *See* § 3.04[2] for discussion of maximum workweek under federal law.

(n2)Footnote 2. *See discussion under* § 3.06[2][c].

(n3)Footnote 3. *See* 29 C.F.R. § 778.602(a).

(n4)Footnote 4. *See* 29 C.F.R. § 778.602(b).

(n5)Footnote 5. *See* § 3.04[1] in text for discussion of maximum workweek under California law.

(n6)Footnote 6. *See* 8 Cal. Code Reg. § 11090, P 3(A) (Cal. Wage Order No. 9-2001); *see also* *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal. App. 3d 16, 37, 273 Cal. Rptr. 615 .

(n7)Footnote 7. *See* *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal. App. 3d 16, 37, 273 Cal. Rptr. 615 .

(n8)Footnote 8. *See* *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal. App. 3d 16, 37, 273 Cal. Rptr. 615 .

(n9)Footnote 9. *See* *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal. App. 3d 16, 37-38, 273 Cal. Rptr. 615 .

(n10)Footnote 10. *See* 29 C.F.R. § 778.301.

(n11)Footnote 11. *See* 29 C.F.R. § 778.302.

(n12)Footnote 12. *See* 29 C.F.R. § 778.302(b).

(n13)Footnote 13. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 48.1.3; D.L.S.E. Pamphlet, "Overtime Requirements--Industrial Welfare Commission Orders" (Sept. 1986) p. 6 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n14)Footnote 14. *See* 29 C.F.R. § 778.303.

(n15)Footnote 15. *See* 29 C.F.R. § 778.303; *see also* 29 C.F.R. § 778.209 (inclusion of bonuses in regular rate of pay).

(n16)Footnote 16. *See generally* discussion in ch. 2.

(n17)Footnote 17. *See* 29 C.F.R. §§ 778.304-778.307.

(n18)Footnote 17.1. *Sumuel v. ADVO, Inc. (2007) 155 Cal. App. 4th 1099* .

(n19)Footnote 17.2. *Sumuel v. ADVO, Inc. (2007) 155 Cal. App. 4th 1099, 1106-1107* .

(n20)Footnote 17.3. *See* 29 C.F.R. § 541.602(a), former 29 C.F.R. § 541.118(a).

(n21)Footnote 17.4. *Sumuel v. ADVO, Inc. (2007) 155 Cal. App. 4th 1099, 1107-1112* .

(n22)Footnote 18. *See* 29 C.F.R. § 778.304(a)(1)-(3),(b).

(n23)Footnote 19. 29 C.F.R. § 778.305; *see also* 29 C.F.R. §§ 531.36-531.40 (limitations on crediting such deductions against minimum wage).

(n24)Footnote 20. *See* 29 C.F.R. § 778.304(a)(4).

(n25)Footnote 21. *See* 29 C.F.R. § 778.306(a).

(n26)Footnote 22. *See* 29 C.F.R. § 778.113(a); *see also* discussion in § 3.09[2][b].

(n27)Footnote 23. *See* 29 C.F.R. § 778.306(a).

(n28)Footnote 24. *See* discussion in § 3.09[2][b][iv].

(n29)Footnote 25. *See* 29 U.S.C. § 207(f); *see also* discussion under §§ 3.06[2][a], 3.10[2].

(n30)Footnote 26. 29 C.F.R. § 778.306(b).

(n31)Footnote 27. *See* 29 C.F.R. §§ 541.1(f), 541.2(e), 541.3(e), 541.118(a), 541.212, 541.312; *see also* discussion in ch. 2.

(n32)Footnote 28. *See* 29 C.F.R. §§ 541.118, 541.212, 541.312; *see also* *Brock v. Claridge Hotel and Casino (3d Cir. 1988) 846 F.2d 180, 183-187* (discussing "salary" requirement for executive exemption).

(n33)Footnote 29. 29 C.F.R. § 778.307.

(n34)Footnote 30. *See* 29 C.F.R. § 778.307.

(n35)Footnote 31. For further discussion, *see* Consultant's Comment at § 2.04[1][a][i], and ch. 4, *below* .



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.12

AUTHOR: By Carol S. Sanders, J.D.

§ 3.12 Pay Plans That Circumvent Overtime Provisions

[1] Generally

The overtime provisions of the FLSA may not be avoided by setting an artificially low hourly rate on which overtime pay is to be based, and making up the additional compensation due to employees by other means.ⁿ¹ An artificial regular rate exists when a varying rate is set that decreases as the length of the workweek increases, or when includable sums (such as for bonuses not in the nature of a gift, facilities furnished by the employer, or pay for nonproductive worktime) are excluded from computation of the regular rate.ⁿ²

[2] Low Hourly Rate Plus Guarantee

An example of a scheme that was held to be an unlawful attempt to evade the overtime penalties of the FLSA was the setting of an arbitrarily low hourly rate on which overtime compensation would be computed, coupled with a guarantee that if the employee's straight-time and overtime compensation based on this rate fell short, in any week, of the compensation that would be due on a piece-rate basis of a specified amount per piece, the employee would be paid on the piece-rate basis instead. The hourly rate was set so low that it was seldom operative, so that the employee's pay was determined by the piece rate rather than an amount per hour. The actual regular rate of the employee under these circumstances must be the quotient of total piece-rate earnings paid in any week divided by the total hours worked in that week.ⁿ³

[3] Split-Day Plan

Under a "split-day" or "Poxon" plan, a regular workday is artificially divided into two portions. One portion is labeled the "straight-time" portion of the day, for which a low hourly rate is paid, designated as the regular rate. The other portion of the day is labeled "overtime," for which 1 1/2 times the low "straight-time" hourly rate is paid.ⁿ⁴

■ ILLUSTRATION:

Employee to whom a 40-hour maximum workweek is applicable works a normal eight-hour day, and is

arbitrarily assigned an hourly rate of \$10.00 per hour under a contract that provides for "overtime" pay of 1 1/2 times this rate for all hours in excess of four each day. Employee receives \$40 for the first four hours, and \$60 for the remaining four hours (four hours at \$15 per hour), or a total of \$100 each normal workday. If Employee worked a sixth eight-hour day at \$100 for the day, Employer might claim to owe no additional overtime pay, on the basis that Employee had already been compensated at "overtime" rates for 20 hours of the workweek. In fact, Employee's regular rate of pay is \$12.50 (\$100 divided by eight hours), and Employee is entitled to overtime compensation based on 1 1/2 times this regular rate, or \$18.75, for each hour worked in excess of the applicable maximum workweek. The alleged "overtime" rate of \$15 per hour must be included in computing Employee's regular rate and may not be credited toward Employer's overtime obligations, since it is not based on either hours worked in excess of Employee's normal or regular working hours, or work performed outside of the hours established in good faith as the basic, normal, or regular workday, pursuant to Title 29 *United States Code, Section 207(e)*.ⁿ⁵

[4] Pseudo-Bonuses

The term "bonus" is improperly applied if it is used to designate a portion of regular wages that the employee is entitled to receive under his or her regular wage contract, with the purpose of avoiding payment of overtime compensation on that portion of the wages.ⁿ⁶ The general rule is that whenever the employee is guaranteed a fixed or determinable sum as his or her wages each week, no part of this sum is a true bonus and the rules for determining overtime due on bonuses do not apply.ⁿ⁷

■ ILLUSTRATION:

Employee is paid a fixed sum of \$600 per week, regardless of the number of hours worked in the week. Employer sets an arbitrary hourly wage of \$9.60 for the first 40 hours, overtime compensation at \$14.40 per hour, and labels as a "bonus" whatever portion of the \$600 that remains after straight-time and overtime compensation is paid based on these arbitrary hourly rates. The bonus will vary from week to week, decreasing as the hours worked increase, and vanishing entirely in any week in which the employee works 55 hours or more. This "bonus" is not the type excludable from the regular rate.ⁿ⁸ Instead, Employee's regular rate of pay under the FLSA must be determined each week by dividing the \$600 sum by the number of hours worked in the week.ⁿ⁹

The artificial labeling of part of the regular wage as a bonus is in no way legitimized if the employer proceeds to compute and pay overtime compensation due on the "bonus" by prorating it back over the hours of the workweek. Overtime compensation has still not been properly computed for this employee at the regular rate.ⁿ¹⁰

A pseudo-bonus is also created when a "percentage bonus" is separated out of a fixed weekly wage, and decreases in amount in direct proportion to increases in the number of hours worked.ⁿ¹¹ A true percentage bonus is based on a percentage of total wages, both straight-time and overtime. Since such a bonus is paid on the overtime compensation as well as the straight-time compensation, no recomputation of the regular rate is necessary and no additional compensation need be paid.ⁿ¹²

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Overtime & Work Period Labor & Employment Law Wage & Hour Laws Coverage & Definitions Regular Rate

FOOTNOTES:

(n1)Footnote 1. *See* 29 C.F.R. § 778.500(a).

(n2)Footnote 2. *See* 29 C.F.R. § 778.500(a), (b). For discussion of sums in addition to hourly wage that are includable in or excludable from the regular rate, *see* § 3.08.

(n3)Footnote 3. *See* *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, 424-426, 65 S. Ct. 1242, 89 L. Ed. 1705 ; 29 C.F.R. § 778.500(d). For discussion of proper method for determining regular rate of employees paid by piece rate, *see* § 3.09[2][c].

(n4)Footnote 4. *See* 29 C.F.R. § 778.501.

(n5)Footnote 5. *See* 29 C.F.R. § 778.501; *Walling v. Helmerich & Payne, Inc.* (1944) 323 U.S. 37, 40-41, 65 S. Ct. 11, 89 L. Ed. 29 ; *see also* discussion in § 3.08 [2][c].

(n6)Footnote 6. *See* 29 C.F.R. § 778.502(a).

(n7)Footnote 7. 29 C.F.R. § 778.502(e).

(n8)Footnote 8. *See* 29 C.F.R. § 778.502(b), (c).

(n9)Footnote 9. *See* 29 C.F.R. § 778.502(b); *see also* discussion in § 3.09[2][b][iv], [2][c][ii].

(n10)Footnote 10. 29 C.F.R. § 778.502(b).

(n11)Footnote 11. *See* 29 C.F.R. § 778.503.

(n12)Footnote 12. *See* 29 C.F.R. § 778.210; *see also* discussion in § 3.08[2][h][iv].



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law § 3.13

AUTHOR: By Carol S. Sanders, J.D.

§ 3.13 Use of Compensatory Time Off in Lieu of Overtime Pay

[1] California Law

Labor Code Section 204.3 permits employees to receive compensatory time off in lieu of overtime compensation at a rate of not less than 1 1/2 hours for each hour of employment for which overtime compensation is required by law. However, if an hour of employment would otherwise be paid at a rate of more than 1 1/2 times the employee's regular rate of compensation, then the employee may receive compensatory time off measured at this higher rate.n1

Compensatory time off (also referred to as "compensating time" and "compensating time off") is defined as hours during which an employee is not working, which are not counted as hours worked during the workweek or work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.n2 Employers must keep records that accurately reflect compensatory time off earned and used.n3

Employers may not provide compensatory time off in lieu of overtime compensation unless the following four conditions are met:n4

1. The compensatory time off is provided pursuant to a collective bargaining agreement, memorandum of understanding, or other written agreement between the employer and the duly authorized representative of the employees, or, for employees not covered by a collective bargaining agreement or memorandum of understanding, pursuant to a written agreement entered into between the employer and employee before performance of the work.
2. The employee has requested in writing compensatory time off in lieu of overtime compensation.
3. The employee is regularly scheduled to work no less than 40 hours in a workweek.
4. The employee has not accrued more than 240 hours of compensatory time off (any employee who has

accrued 240 hours of compensatory time off must be paid overtime compensation for any additional overtime hours of work).

Employers must allow an employee who has accrued compensatory time off to use the time within a reasonable period after the employee so requests, if the use of the time does not unduly disrupt the employer's operations.ⁿ⁵ Whether an employer has granted a request within a reasonable period depends on the normal schedule of work, anticipated peak workloads based on past experience, emergency requirements for staff and services, and the availability of qualified substitute staff.ⁿ⁶ An employer has the option, at the employee's request, to pay the employee overtime compensation in lieu of compensatory time off that has accrued for at least two pay periods.ⁿ⁷

Any compensation paid to an employee for accrued compensatory time off must be paid at the regular rate earned by the employee at the time the employee receives payment.ⁿ⁸ However, if an employee who has accrued compensatory time off terminates his or her employment, the employer must pay the employee for the unused compensatory time off at a rate not less than the higher of either (1) the average regular rate received by the employee during the last three years of employment, or (2) the employee's final regular rate.ⁿ⁹

Labor Code section 204.3 does not apply to employees who are exempt from the overtime provision of the California wage orders,ⁿ¹⁰ or to any employees subject to the following wage orders of the IWC:ⁿ¹¹

1. Order No. 1-2001 (manufacturing industry);ⁿ¹²
2. Order No. 3-2001 (canning, freezing, and preserving industries);ⁿ¹³
3. Order No. 5-2001 (public housekeeping industry);ⁿ¹⁴
4. Order No. 10-2001 (amusement and recreation industries);ⁿ¹⁵ and
5. Order Nos. 8-2001, 13-2001, and 14-2001 (handling products after harvest, preparing agricultural products for market on the farm, and agricultural occupations).ⁿ¹⁶

Before the enactment of *Labor Code Section 204.3* in 1993, the use of compensatory time off in lieu of overtime compensation was not expressly provided for in either the Labor Code or the wage orders. However, the DLSE had a written policy permitting the use of compensatory time off, subject to several conditions.ⁿ¹⁷ Currently, the DLSE takes the position that *Labor Code section 204.3* only applies to public employers, and that private employers in California may not utilize compensatory time off provisions under any circumstances.ⁿ¹⁸ However, private employers who receive a written request from an employee to make up time which would be lost as a result of a personal obligation may find a safe harbor from overtime under *Labor Code section 513*, so long as the provisions of that section are satisfied.ⁿ¹⁹

■ CONSULTANT'S COMMENT:

Labor Code Section 204.3 permits the substitution of compensatory time off in lieu of overtime compensation. The new statute, however, is of limited value to California employers for at least four reasons. First, as noted above, it does not apply to employers subject to Wage Orders No. 1-2001, 3-2001, 5-2001, 8-2001, 10-2001, 13-2001, or 14-2001.ⁿ²⁰ Second, it permits time off only if all of the following conditions are met:ⁿ²¹ (1) the compensatory time off is provided pursuant to applicable provisions of a collective bargaining agreement, or, if not covered by a collective bargaining agreement, pursuant to a written agreement entered into between the employer and the employee before the performance of the work; (2) the employee may only accrue a maximum of 240 hours of compensatory time off; (3) the employee has requested, in writing, compensatory time off in lieu of overtime pay; and (4) the employee is regularly scheduled to work no less than 40 hours in a workweek. Third, current

federal law, discussed in [2], *below*, which applies to all employers who engage in interstate commerce, provides that, if compensatory time off is granted, it must be taken in the pay period in which the overtime is worked thereby rendering impossible an accrual of 240 hours of compensatory time off. Thus, because the stricter standard controls in any conflict between federal and state law, the federal "same pay period" requirement effectively preempts the state law provision for accrual of 240 hours of compensatory time off. Fourth, compensatory time off policies are subject to other limitations as well and are carefully scrutinized by the regulating agencies. All doubts regarding the proper payment of overtime compensation are resolved against the employer. In short, employers who wish to substitute compensatory time off in lieu of overtime pay may wish to consult legal counsel. *Commentary by Kirby Wilcox.*

[2] Federal Law

Except for state and local government employees,ⁿ²² the FLSA does not permit the use of compensatory time off in lieu of overtime pay. However, federal enforcement policy permits the employer to restrict the employee's workweek hours to 40 or under by the use of mandatory compensatory time off within that particular workweek. For example, if an employer anticipates that it will be necessary for an employee who normally works 40 hours, Monday through Friday, to work two hours on Saturday, the employer could avoid overtime liability by requiring the employee to take two hours off on one of the other workdays during the same workweek, thereby assuring that the employee does not work in excess of the statutory maximum workweek.ⁿ²³

If the employee works more than 40 hours during the workweek, the employer may not use compensatory time off during subsequent workweeks as payment for the overtime hours. However, the employer may nevertheless achieve essentially the same result by reducing the employee's work schedule during a subsequent week within the same pay period by 1 1/2 hours for each overtime hour worked during the previous week, resulting in the employee's compensation for the two-week period being the same as if the employee had worked two normal 40-hour workweeks.ⁿ²⁴ To satisfy the requirements of the FLSA, the "time-off" plan must meet the following conditions:ⁿ²⁵

1. The employee must be employed by the hour, at fixed hourly rates of pay, or be paid a regular salary for a fixed number of hours per week;
2. The pay period must be longer than a week (for example, biweekly, semimonthly, or monthly);
3. Time-off adjustments, in the ratio of 1 1/2 hours for each overtime hour worked, must be made within the pay period; and
4. Straight-time and overtime compensation for the hours actually worked in each workweek of the pay period must be computed on the established hourly rates and paid currently at the end of each period, without regard to the hours worked or earnings in any other pay period.

■ ILLUSTRATION:

Employee's straight-time hourly rate is \$10.00, and the applicable maximum workweek is 40 hours. Employee normally works 40 hours per week and is paid every other week, resulting in a usual biweekly paycheck of \$800. During Workweek 1, Employee is required to work two hours of overtime for a total of 42 hours, resulting in total compensation for the week of \$430 (including time-and-a-half for the two overtime hours). During Workweek 2, Employer reduces Employee's work schedule to 37 hours (essentially requiring Employee to take three hours off). Assuming that this does not violate the employment agreement between the parties, this is permissible under the FLSA and would reduce Employee's compensation for Workweek 2 to \$370. Employee's total compensation for Workweeks 1 and 2 would therefore be \$800--the same as if Employee had not worked any overtime during Workweek

1.

Note that the above time-off plan may not be utilized unless the Employee is either paid on an hourly wage basis or receives a fixed salary for a fixed number of hours per week.ⁿ²⁶ Such a plan would not be permissible when the employee is paid a fixed salary for a fluctuating workweek, since such employees are entitled to be paid their full salary for short as well as long workweeks.ⁿ²⁷

The FLSA expressly provides that employees of a state, political subdivision of a state, or interstate governmental agency may under certain conditions be afforded compensatory time off in lieu of monetary overtime compensation. The circumstances under which state and local government employers may provide compensatory time off in lieu of overtime are specified in Title 29, *United States Code*, Section 207(o).

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Overtime & Work Period Labor & Employment Law Wage & Hour Laws Coverage & Definitions Regular Rate

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 204.3(a)*.

(n2)Footnote 2. *Lab. Code § 204.3(g)*.

(n3)Footnote 3. *Lab. Code § 204.3(f)*.

(n4)Footnote 4. *Lab. Code § 204.3(b), (c)*.

(n5)Footnote 5. *Lab. Code § 204.3(e)(1)*.

(n6)Footnote 6. *Lab. Code § 204.3(e)(3)*.

(n7)Footnote 7. *Lab. Code § 204.3(e)(2)*.

(n8)Footnote 8. *Lab. Code § 204.3(c)*.

(n9)Footnote 9. *Lab. Code § 204.3(d)*.

(n10)Footnote 10. *Lab. Code § 204.3(h)*.

(n11)Footnote 11. *Lab. Code § 204.3(i)*.

(n12)Footnote 12. *8 Cal. Code Reg. § 11010*.

(n13)Footnote 13. *8 Cal. Code Reg. § 11030*.

(n14)Footnote 14. *8 Cal. Code Reg. § 11050*.

(n15)Footnote 15. *8 Cal. Code Reg. § 11100*.

(n16)Footnote 16. *8 Cal. Code Reg. §§ 11080, 11130, 11140*.

(n17)Footnote 17. *See D.L.S.E. Interpretive Bulletin No. 86-2 (Aug. 1, 1986) (superseding Interpretive Bulletin*

No. 84-2); D.L.S.E. Operations & Proc. Man. § 10.05.

(n18)Footnote 18. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 6.1 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n19)Footnote 19. California *Labor Code* § 513; 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 48.2 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n20)Footnote 20. *Lab. Code* § 204.3(i); see 8 *Cal. Code Reg.* §§ 11010, 11030, 11050, 11080, 11100, 11130, 11140.

(n21)Footnote 21. *Lab. Code* § 204.3(b), (c)(1).

(n22)Footnote 22. See 29 *U.S.C.* § 207(o).

(n23)Footnote 23. See Wage & Hour Div., Field Operations Handbook P 32j16(b).

(n24)Footnote 24. See Wage & Hour Div., Field Operations Handbook P 32j16(b); Wage & Hour Opinion Letter No. 389 (Sept. 1, 1965).

(n25)Footnote 25. Wage & Hour Opinion Letter No. 389 (Sept. 1, 1965).

(n26)Footnote 26. See Wage & Hour Opinion Letter No. 389 (Sept. 1, 1965).

(n27)Footnote 27. Cf. 29 *C.F.R.* § 778.114(c) (fluctuating workweek method of calculating regular rate may only be used if employee is paid full salary for weeks when he or she works less than full schedule of hours).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part A. OVERTIME COMPENSATION

1-3 California Employment Law §§ 3.14 through 3.19

AUTHOR: By Carol S. Sanders, J.D.

[Reserved]

§§ 3.14[Reserved]



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part B. OTHER RESTRICTIONS ON HOURS WORKED

1-3 California Employment Law § 3.20

AUTHOR: By Carol S. Sanders, J.D.

§ 3.20 Generally

As noted previously, the overtime pay requirements discussed in Part A constitute the principal legal limitation on the number of hours that may be worked by adult employees. In addition to the overtime requirements, the Labor Code and the California wage orders provide some additional restrictions on employee work schedules. These provisions are discussed in the succeeding sections of this part.

The FLSA (apart from child labor limitations discussed in Chapter 6) contains no absolute limitation on the number of hours that an employee may be required to work in a workweek, as long as the overtime payment requirements are complied with.ⁿ¹

Apart from the limitations described in this part, additional limitations on hours worked may be imposed by federal or state safety regulations applicable to particular types of hazardous workⁿ² or by collective bargaining agreements or individual employment contracts. Such limitations are beyond the scope of this chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour
Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 C.F.R. § 778.102.

(n2)Footnote 2. *See, e.g.,* 49 C.F.R. §§ 395.1-395.13 (federal maximum hours regulations for employees of motor carriers).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part B. OTHER RESTRICTIONS ON HOURS WORKED

1-3 California Employment Law § 3.21

AUTHOR: By Carol S. Sanders, J.D.

§ 3.21 One Day's Rest in Seven

[1] Generally

Labor Code Section 551 provides that every employee in any occupation of labor is entitled to one day's rest in seven. *Labor Code Section 552* prohibits any employer from requiring his or her employees to work more than six days in seven. However, several exceptions to the day-of-rest requirement are set forth in *Labor Code Sections 554* and *556*, as discussed in [2], *below*. Furthermore, *Labor Code Section 554* provides that the one-day-of-rest requirement may be met by accumulating days of rest when the nature of the employment reasonably requires that the employee work seven or more consecutive days, provided that in each calendar month the employee receives days of rest equivalent to one day's rest in seven.

■ CONSULTANT'S COMMENT:

As an enforcement policy, the DLSE interprets *Labor Code Sections 551* and *554* as permitting employees to work more than six consecutive days when it is reasonably required by the nature of the work, provided that employees (1) receive an average of one day off in seven during the calendar month, and (2) are properly compensated for overtime hours worked. As discussed in Part A,ⁿ¹ the wage orders require that an overtime premium be paid for hours worked on the seventh workday in a workweek.ⁿ² *Commentary by Kirby Wilcox.*

For discussion of the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999, governing overtime compensation and workday and workweek schedules, refer to § 3.04[1][a], *above*.

[2] Exceptions

The day-of-rest requirements of *Labor Code Sections 551* and *552* do not apply to any of the following situations:ⁿ³

- "Cases of emergency";ⁿ⁴

- Work performed in the protection of life or property from loss or destruction; or
- Any common carrier engaged in or connected with the movement of trains.

The statutory day-of-rest requirements will also not apply when the hours of employment do not exceed 30 hours in any week or six hours in any one day of the week.ⁿ⁵

Persons employed in an agricultural occupation, as defined in the wage order of the IWC relating to agricultural operationsⁿ⁶ are exempt from statutory day-of-rest requirements, with a prescribed exception.ⁿ⁷

If a valid collective bargaining agreement pursuant to *Lab. Code § 514* exists regarding hours of work, the day-of-rest requirement does not apply.ⁿ⁸ However, employees subject to such an agreement must still receive an *average* of one day off in seven during each calendar month, unless the agreement expressly provides otherwise.ⁿ⁹

In addition to the statutory exceptions to the day-of-rest requirements, the Chief of the DLSE may exempt any employer or employees from the day-of-rest requirements when, in his or her judgment, hardship will otherwise result.ⁿ¹⁰

It should be noted that the Industrial Welfare Commission, under its general authority to fix the maximum hours of work and conditions of labor,ⁿ¹¹ may promulgate wage orders requiring a day of rest that override the exceptions provided by statute.ⁿ¹² Employment of any employee for longer hours than those permitted by the wage orders is unlawful.ⁿ¹³ For discussion of limitations on hours of work set forth in the wage orders, *see* § 3.22.

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 3.04[1].

(n2)Footnote 2. *See* 8 *Cal. Code Reg.* §§ 11010, 11020, 11040-11070, 11090-11110, 11140, 11160 P 3(A) (Cal. Wage Order Nos. 1-2001, 2-2001, 4-2001-7-2001, 9-2001-11-2001, 14-2001, 16-2001); 11030, 11080, 11120, 11130, P 3(A)(1) (Cal. Wage Order Nos. 3-2001, 8-2001, 12-2001, 13-2001); 11150, P 3(C) (Cal. Wage Order No. 15-2001).

(n3)Footnote 3. *Lab. Code* § 554.

(n4)Footnote 4. The term "emergency," as used in *Lab. Code* § 554, is not defined in the Labor Code. Three of the wage orders contain a definition of "emergency" that may be applicable by analogy; *see* 8 *Cal. Code Reg.* §§ 11040, P 2(E), 11050, P 2(I), 11150, P 2(D) (Cal. Wage Order Nos. 4-2001, 5-2001, 15-2001), "emergency" defined as unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action.

(n5)Footnote 5. *See* *Lab. Code* § 556.

(n6)Footnote 6. Cal. Wage Order No. 14-2001 (operative January 1, 2001).

(n7)Footnote 7. *Lab. Code* § 554; *see* *Lab. Code* § 558 (exception for civil penalties for violation of any provision regulating hours and days of work in any IWC order).

(n8)Footnote 8. *Lab. Code* § 554.

(n9)Footnote 9. *See* *Lab. Code* § 554; *see also* discussion in [1], *above*.

(n10)Footnote 10. *Lab. Code § 554; see also Lab. Code § 1198.3(a)* (Chief of DLSE may grant exemptions from day-off requirements contained in wage orders in certain circumstances).

(n11)Footnote 11. *See Lab. Code § 1198.*

(n12)Footnote 12. *See Industrial Welfare Com. v. Superior Court (1980) 27 Cal. 3d 690, 733-734, 166 Cal. Rptr. 331, 613 P.2d 579* (upholding validity of day-of-rest provisions of wage orders governing agricultural workers despite statutory day-of-rest exemption in cases of crops and agricultural lands).

(n13)Footnote 13. *Lab. Code § 1198.*



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part B. OTHER RESTRICTIONS ON HOURS WORKED

1-3 California Employment Law § 3.22

AUTHOR: By Carol S. Sanders, J.D.

§ 3.22 Restrictions on Hours of Duty

[1] Seventy Two-Hour Weekly Limits

[a] Canning, Freezing, and Preserving Industry

Employees in the canning, freezing, and preserving industry must be given a 24-hour period off duty after working up to a maximum of 72 hours in a period of seven consecutive days.n1

[b] Industries Handling Products After Harvest

In industries handling products after harvest, an employee may work up to a maximum of 72 hours in any workweek, after which the employee must have a 24-hour period off duty.n2 However, in the grape and tree fruit industry, receivers, loaders, fork lift operators, shipping clerks, and maintenance workers are exempt from the mandatory day-off requirement.n3 In the cotton ginning industry, employees may voluntarily exempt themselves from the mandatory day-off provision by notifying the employer in writing. The employee may withdraw the exemption by notifying the employer in writing at least five days before the desired day off.n4 The notice provision does not apply to instances of illness or emergencies.n5

In the exercise of any exemption from the mandatory day off provided under Wage Order No. 8-2001 (governing industries handling products after harvest) or pursuant to administrative exemptions granted by the Labor Commissioner under *Labor Code Section 1198.3*, the employer may not discriminate against any employee who desires to take 24 hours off after 72 hours worked in a workweek.n6 An employer who permits employees to work more than 72 hours per workweek pursuant to any exemption must give each employee a copy of the applicable legal provision for the exemption, in both English and Spanish, and post it at all times in a prominently visible place.n7

[c] Industries Preparing Agricultural Products for Market

In industries preparing agricultural products for market on the farm, any work by an employee in excess of 72 hours in a

workweek must be on a voluntary basis. No employee may be discharged or in any other manner discriminated against for refusing to work in excess of 72 hours in a workweek.ⁿ⁸

[2] Sixteen-Hour Daily Limit for Motion Picture Employees

Employees in the motion picture industry may be employed up to a maximum of 16 hours, including meal periods, in any one day from the time they are required to and do report until the time they are dismissed.ⁿ⁹

[3] Limits for Live-In Household Employees

Live-in household employees must have at least 12 consecutive hours free of duty during each workday of 24 hours, unless overtime compensation is paid and other conditions are met.ⁿ¹⁰ A live-in employee may not be required to work more than five days in a workweek without a day off of at least 24 consecutive hours except in an emergency (defined as an unpredictable or unavoidable occurrence at unscheduled intervals requiring immediate action),ⁿ¹¹ and then only on condition that overtime compensation is paid.ⁿ¹²

The exceptions to limits on consecutive hours of duty for live-in domestic service employees are related to the special overtime payment provisions applicable to these employees, and are *discussed under § 3.05[1][c]*.

[4] Limits for Minors

As discussed in Chapter 6, the Labor Code contains numerous limitations on the hours and types of employment that may be engaged in by minors.ⁿ¹³ However, the IWC has amended all the 2001 wage orders to eliminate the minimum wage exemption for employees who are minors.ⁿ¹⁴ The IWC has also amended the previous partial exemption for learners to include minors.ⁿ¹⁵

For a full discussion of restrictions on hours and times of day worked by minors, *see* Ch. 6.

[5] Statutory Limits Applicable to Certain Occupations

The Labor Code prohibits the employment of employees in certain occupations beyond a specified number of consecutive hours, regardless of whether overtime premiums are available. The occupations whose hours are restricted include trainmen and dispatchers,ⁿ¹⁶ miners,ⁿ¹⁷ and pharmacists.ⁿ¹⁸

[6] Lost Work Time Made Up by Health Care Industry Employees

Employees in the health care industry may make up work time lost as a result of personal obligations, if the employee requests permission in writing and the employer concurs.ⁿ¹⁹ This lost time cannot exceed two hours in any one workweek or, where applicable, four hours in any 14-day work period,ⁿ²⁰ and must be made up during that workweek or work period.ⁿ²¹ Such make-up time generally is not subject to the overtime provisions of the wage orders governing these two types of employees. But any time worked in excess of 11 hours in a workday or 40 hours per week or 80 hours in a 14-day work period must be paid at the overtime premium rate.ⁿ²²

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 8 Cal. Code Reg. § 11030, P 3(A)(1) (Cal. Wage Order No. 3-2001).

- (n2)Footnote 2. 8 *Cal. Code Reg.* § 11080, P 3(A) (Cal. Wage Order No. 8-2001).
- (n3)Footnote 3. 8 *Cal. Code Reg.* § 11080, P 3(A)(2) (Cal. Wage Order No. 8-2001).
- (n4)Footnote 4. 8 *Cal. Code Reg.* § 11080, P 3(A) (Cal. Wage Order No. 8-2001).
- (n5)Footnote 5. 8 *Cal. Code Reg.* § 11080, P 3(A) (Cal. Wage Order No. 8-2001).
- (n6)Footnote 6. 8 *Cal. Code Reg.* § 11080, P 3(A) (Cal. Wage Order No. 8-2001).
- (n7)Footnote 7. 8 *Cal. Code Reg.* § 11080, P 3(A) (Cal. Wage Order No. 8-2001).
- (n8)Footnote 8. 8 *Cal. Code Reg.* § 11130, P 3(A) (Cal. Wage Order No. 13-2001).
- (n9)Footnote 9. 8 *Cal. Code Reg.* § 11120, P 3(A) (Cal. Wage Order No. 12-2001).
- (n10)Footnote 10. *See* 8 *Cal. Code Reg.* § 11150, P 3(A) (Cal. Wage Order No. 15-2001).
- (n11)Footnote 11. *See* 8 *Cal. Code Reg.* § 11150, P 2(B) (Cal. Wage Order No. 15-2001).
- (n12)Footnote 12. *See* 8 *Cal. Code Reg.* § 11150, P 3(B) (Cal. Wage Order No. 15-2001).
- (n13)Footnote 13. *See Lab. Code* § 1285 *et seq.*
- (n14)Footnote 14. 8 *Cal. Code Reg.* § 11000, PP 1, 2 (Cal. Wage Order MW-2001); *see* Statement as to the Basis for the General Minimum Wage Order, Industrial Welfare Commission MW-2001, P1.
- (n15)Footnote 15. *See* 8 *Cal. Code Reg.* § 11000-11150 P 4(A)(10) (Cal. Wage Order Nos. 1-2001-15-2001).
- (n16)Footnote 16. *See Lab. Code* §§ 601-607.
- (n17)Footnote 17. *See Lab. Code* §§ 750-752; *but see Lab. Code* § 750.5 (providing specified exceptions to the maximum hours rule).
- (n18)Footnote 18. *See Lab. Code* §§ 850-856.
- (n19)Footnote 19. 8 *Cal. Code Reg.* § 11040, P 3(M) (Cal. Wage Order No. 4-2001); 8 *Cal. Code Reg.* § 11050, P 3(N) (Cal. Wage Order No. 5-2001).
- (n20)Footnote 20. For discussion of 14-day work periods, *see* § 3.06[1][b].
- (n21)Footnote 21. 8 *Cal. Code Reg.* § 11040, P 3(M) (Cal. Wage Order No. 4-2001); 8 *Cal. Code Reg.* § 11050, P 3(N) (Cal. Wage Order No. 5-2001).
- (n22)Footnote 22. 8 *Cal. Code Reg.* § 11040, P 3(M) (Cal. Wage Order No. 4-2001); 8 *Cal. Code Reg.* § 11050, P 3(N) (Cal. Wage Order No. 5-2001).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part B. OTHER RESTRICTIONS ON HOURS WORKED

1-3 California Employment Law § 3.23

AUTHOR: By Carol S. Sanders, J.D.

§ 3.23 Meal Periods

A nonexempt employee¹ working more than five hours must be provided with a meal period of at least 30 minutes. However, if a work period of not more than six hours will complete the day's work, the meal period may be waived by mutual consent of employer and employee.² In addition, an employee working more than 10 hours per day must be provided with a second meal period of not less than 30 minutes. However, if the total hours worked are no more than 12, the second meal period may be waived by mutual consent of the employer and the employee, but only if the first meal period was not waived.³ Notwithstanding the foregoing, the Industrial Welfare Commission may adopt a working condition order permitting a meal period to commence after six hours of work if the commission determines that the order is consistent with the health and welfare of the affected employees.⁴

The meal requirement in *Labor Code section 512* applies to employees covered by collective bargaining agreements, because it is a non-negotiable state law right.¹ The meal requirement in *Labor Code section 512(a)* does not apply to an employee in the wholesale baking industry who is subject to an Industrial Welfare Commission Wage Order and is covered by a valid collective bargaining agreement providing for a 35-hour workweek consisting of five seven-hour days, payment of 1 1/2 times the regular rate of pay for time worked in excess of seven hours per day, and a rest period of not less than 10 minutes every two hours.² Further, unless Labor Code provisions are specifically made applicable to public employers, they apply only to employers in the private sector, and *Labor Code § 512* does not expressly apply to public entities. Therefore, for example, it did not apply to a public water storage district.³

The Industrial Welfare Commission may not enact wage orders inconsistent with *Labor Code section 512*. Thus, for example, the IWC exceeded its authority in adopting a provision in the Wage Order covering employees in construction, drilling, logging, and mining, exempting employees covered by qualifying collective bargaining agreements from meal period requirements.⁴

In the broadcasting and motion picture industries, meal periods of between 30 minutes and one hour must be provided *after* six hours of work. Subsequent meal periods for all employees must be provided not later than six hours after the termination of the preceding meal period.⁵

In agricultural work, the employer must authorize and permit all employees after a work period of not more than five hours to take a meal period of at least 30 minutes. The parties may mutually waive the meal period if a work period of not more than six hours will complete the day's work.ⁿ⁷

Employees in the health care industry who work shifts of more than eight total hours in a workday may voluntarily waive their right to one of the meal periods they would otherwise receive.ⁿ⁸ This arrangement applies to health care workers in professional, technical, clerical, mechanical, and similar occupations,ⁿ⁹ and to health care workers in the public housekeeping industry.ⁿ¹⁰ The waiver must be in writing and voluntarily signed by both the employee and the employer; an employee may revoke the waiver at any time by giving the employer at least one day's written notice.ⁿ¹¹

The meal period rules applicable to employees in certain on-site construction, drilling, mining and logging occupations do not apply to those employees who are covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of the employees, and if the agreement provides premium wage rates for all overtime hours worked and a regular hourly rate of pay for those employees of not less than 30 percent more than the state minimum wage.ⁿ¹²

■ CONSULTANT'S COMMENT:

There is some confusion regarding the meaning of Wage Order 5, Section 11(D), which states that "employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods." *Labor Code Section 512* seems to permit waivers of first meal periods for days over 6 hours, because the second sentence of that statute states "if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived." However, the first sentence of *Labor Code Section 512* seems to say the opposite--that employers and employees cannot mutually agree to waive the first meal period for days over 6 hours. Employers will argue that the second sentence is the more specific and provides the authority for Wage Order 5, Section 11(D). Employees will argue that the second sentence of *Labor Code Section 512* merely confirms the prohibition against first meal period waivers in the first sentence, and that the IWC lacked the authority to promulgate Wage Order 5, Section 11(D). Ultimately, only the legislature or the courts can resolve this issue. *Commentary by Kirby Wilcox.*

Wage Order 9 covers employees in the transportation industry. The exemption in Section 3 of Wage Order 9 for employees whose hours of service are regulated by state and federal regulations concerning drivers' hours of service refers only to section 3 of the Wage Order, which governs hours of service, and not to the entire Wage Order. Thus, the meal period requirement in Wage Order 9 applies to all employees covered by the Wage Order.^{n12.1} For example, in *Cicairos v. Summit Logistics, Inc.*,^{n12.2} on a summary judgment motion, the employer failed to show that it provided its employee truck drivers with adequate meal breaks. A declaration by the employer's payroll department manager stated that, because drivers were constantly on the road, their activity could not be regulated by the employer and the decision by a driver to take meal breaks and rest periods was left to the driver's discretion. However, the employer had a computerized system on each truck allowing it to keep track of various aspects of the drivers' activities, such as speed, starts and stops, and elapsed time, and drivers could input other factors manually, such as road construction and heavy traffic, that the computer system could not sense itself. By requiring its drivers to keep track of these factors, the employer had the ability to regulate driver activity, but did not schedule meal periods, did not provide an activity code for them, or monitor compliance. Furthermore, the employer's management pressured drivers to make more than one daily trip, making drivers feel that they should not stop for lunch. The employer's obligation to provide the plaintiffs with an adequate meal period was not satisfied by assuming the meal periods were taken, because employers have an affirmative obligation to ensure workers are actually relieved of all duty.^{n12.3} Employers also have a duty under Wage

Order 9, to record their employees' meal periods.

Under all the wage orders, if the employee is not relieved of all duty during the 30-minute meal period, it will be considered an "on-duty" meal period and counted as time worked. An "on-duty" meal period is permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job *paid* meal period is agreed to.ⁿ¹³ For a discussion of what constitutes a compensable "on-duty" meal period, *see* § 3.07[1][c].

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 3.03[1][a].

(n2)Footnote 2. *Lab. Code* § 512(a); *see* 8 *Cal. Code Reg.* §§ 11010-11150, P 11 (Cal. Wage Order Nos. 1-2001-15-2001); *see also* *Lab. Code* § 800 (required midday meal periods for lumber industry employees).

(n3)Footnote 3. *Lab. Code* § 512.

(n4)Footnote 4. *Lab. Code* § 512(b).

(n5)Footnote 4.1. *Valles v. Ivy Hill Corp.* (9th Cir. 2005) 410 F.3d 1071, 1076-1082 (because unionized employees based meal period claim on protections afforded by California state law, without any reference to expectations or duties created by their collective bargaining agreement, claim was not subject to preemption under § 301 of LMRA).

(n6)Footnote 4.2. *Lab. Code* § 512(c).

(n7)Footnote 5. *Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal. App. 4th 729, 734-739, 95 Cal. Rptr. 3d 53 (water storage district was exempt from *Labor Code* § 512, where legislature did not intend § 512 to apply to public agencies, and application of § 512 would infringe on district's sovereign powers).

(n8)Footnote 5. *Bearden v. U.S. Borax, Inc.* (2006) 41 Cal. Rptr. 3d 482. *See* 8 *Cal. Code Regs.* § 11160(10)(E).

(n9)Footnote 6. 8 *Cal. Code Reg.* §§ 11110, 11120, P 11 (Cal. Wage Order Nos. 11-2001, 12-2001).

(n10)Footnote 7. 8 *Cal. Code Reg.* § 11140, P 11 (Cal. Wage Order No. 14-2001). This wage order also covers "stable employees" engaged in the raising, feeding, and management of racehorses, as defined by statute. *see* § 3.04[1][a].

(n11)Footnote 8. 8 *Cal. Code Reg.* § 11040, P 11(C) (Cal. Wage Order No. 4-2001); 8 *Cal. Code Reg.* § 11050, P 11(C) (Cal. Wage Order No. 5-2001).

(n12)Footnote 9. For discussion of the types of work included in these occupations, *see* ch. 1.

(n13)Footnote 10. 8 *Cal. Code Reg.* § 11040, P 11(C) (Cal. Wage Order No. 4-2001); 8 *Cal. Code Reg.* § 11050, P 11(C) (Cal. Wage Order No. 5-2001).

(n14)Footnote 11. 8 *Cal. Code Reg.* § 11040, P 11(C) (Cal. Wage Order No. 4-2001); 8 *Cal. Code Reg.* § 11050, P 11(C) (Cal. Wage Order No. 5-2001).

(n15)Footnote 12. 8 *Cal. Code Reg. § 11160* P 10(E) (Cal. Wage Order No. 16-2001); 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 45.2.10 (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n16)Footnote 12.1. *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal. App. 4th 949, 2005 Cal. App. LEXIS 1672, *13-*16 .

(n17)Footnote 12.2. *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal. App. 4th 949, 2005 Cal. App. LEXIS 1672, *21-*24 .

(n18)Footnote 12.3. Dept. of Industrial Relations, DLSE, Opinion Letter 2002.01.28, p. 1.

(n19)Footnote 13. 8 *Cal. Code Reg. § 11010-11150*, P 11 (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 10 (Cal. Wage Order. No. 16-2001).



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Part B. OTHER RESTRICTIONS ON HOURS WORKED

1-3 California Employment Law § 3.24

AUTHOR: By Carol S. Sanders, J.D.

§ 3.24 Rest Periods

Every employer covered by a California wage order must authorize and permit nonexempt employees¹ to take rest periods, which insofar as practicable must be in the middle of each work period. The authorized rest period time must be based on the total hours worked daily at the rate of 10 minutes rest time per four hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than 3 1/2 hours.² An opinion letter from DLSE states that the rest period requirement is a state-mandated minimum labor standard.³

In the motion picture industry, additional interim rest periods must be provided during periods of actual rehearsal or shooting for swimmers, dancers, skaters, and other performers engaged in strenuous physical activities.⁴

Wage Order No. 9, which regulates employers in the transportation industry, requires every employer to authorize and permit all employees to take rest periods, which insofar as practicable should be in the middle of each work period. The exemption in Section 3 of Wage Order 9 for employees whose hours of service are regulated by state and federal regulations concerning drivers' hours of service refers only to section 3 of the Wage Order, which governs hours of service, and not to the entire Wage Order. Thus, the rest period requirement in Wage Order 9 applies to all truck drivers covered by the Wage Order.⁵ In *Cicairos v. Summit Logistics, Inc.*,⁶ on a motion for summary judgment by the employer, the court found that the employer did not prove it supplied truck drivers with the required rest periods. Although the employer was not required to keep records of the drivers' rest periods, it could still be liable if as a result of employer coercion or encouragement, the drivers did not take their full 10-minute rest period. The computer system on each truck did not include a code for rest breaks, which may have encouraged drivers not to take breaks. Drivers said they felt pressured not to take rest breaks because rest breaks were not on the list of delays that were paid. Finally, it appeared that the employer's management was aware that some drivers were not taking rest breaks. In *Bell v. Superior Court*,⁷ in which drivers for a petroleum company sought class certification for claims based on the employer's failure to provide rest periods, evidence supported the trial court's conclusion that common issues did not predominate, because the employer provided substantial evidence that there was no uniform policy or practice forbidding or preventing breaks, and a driver who did not take the necessary breaks did so for reasons that required independent adjudication.⁸

The rest period requirement contained in Wage Order 16-2001 (certain on-site construction, drilling, mining and logging occupations) does not apply to any employee covered by a valid collective bargaining agreement which provides equal or greater protection.ⁿ⁹ Further, rest periods in those occupations need not be authorized when the disruption of continuous operations would jeopardize the product or process of the work, but the employer in such circumstances is required to make up the missed rest period that day or pay the employee for the missed ten (10) minutes at the employee's regular rate of pay.ⁿ¹⁰

Every employer, including the state and political subdivisions, must provide a reasonable amount of break time to accommodate an employee desiring to express breast milk for an infant child,ⁿ¹¹ unless the provision of such break time would seriously disrupt the employer's operations.ⁿ¹² An employer may schedule the break time to express breast milk to run concurrently with break time already provided to the employee. If concurrent scheduling is not possible, an employer must provide additional, unpaid time for expressing milk.ⁿ¹³ An employer must make reasonable efforts to provide a room or other location (other than a toilet stall) to express milk in private. The room must be in close proximity to the employee's work area, and may include the place the employee normally works.ⁿ¹⁴ An employer who violates these requirements is subject to a civil penalty of \$100 for each violation.ⁿ¹⁵

■ CONSULTANT'S COMMENT:

New *Labor Code* §§ 1030-1032 pose a number of questions for which there are no clear answers. The following guidance, however, appears prudent:

How substantial a showing must an employer make that allowing break time would seriously disrupt its operations? The statute does not define "seriously disrupt." The absence of a definition, coupled with the Legislature's choice not to impose on employers the burden of proving "undue hardship," suggests that the employer's burden is not onerous. However, because employers must already provide nonexempt employees with specified break and meal periods during the work day, the "seriously disrupt" standard may be difficult to meet if an employee is prepared to confine the time when she expresses milk to her required break and meal periods.

May an employee consistently refuse to use her usual break time to express milk? While the statute allows an employee to assert that concurrent scheduling is not possible, an employer should reasonably be able to require an employee to use her usual break time, absent special circumstances. For the employee who consistently requires more than her usual break time to express milk, the employer is obligated to afford the additional time on an unpaid basis. Of course, an employer need not accede to the employee's schedule if doing so would seriously disrupt its operations.

May an employee insist that she be allowed to express milk in the place where she normally works, rather than in an employer-designated area? The statute does not guarantee an employee the use of her normal work area; rather, it identifies the work area as an option. However, unless employers have legitimate business reasons for denying employees the option to use their normal work areas, they should refrain from imposing such a restriction. Additionally, as a practical matter, providing employees with the use of a room in or near their normal work areas will increase the amount of time such employees are available to perform their job duties.

Must employers provide any amenities in the "room or other location?" The statute does not require anything other than a simple room or other location. However, the essence of the statute, as indicated by its exclusion of a "toilet stall" as an acceptable location, is that employees be provided with a private space to express milk. Thus, employers able to provide a locked room--with a key made generally accessible--should consider doing so. While not required, additional amenities might include a chair and cold storage for expressed milk.

Must employers provide multiple rooms if more than one employee needs to express milk at a given time? No. Commentary by Kirby Wilcox.

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 3.03[1][a].

(n2)Footnote 2. 8 *Cal. Code Reg. §§ 11010-11150*, P 12 (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 11 (Cal. Wage Order No. 16-2001).

(n3)Footnote 3. Dept. of Industrial Relations, DLSE, Opinion Letter 1995.06.02, p. 2, quoted in *Cicairos v. Summit Logistics, Inc.* (2005) 133 *Cal. App. 4th* 949, 2005 *Cal. App. LEXIS* 1672, *4 .

(n4)Footnote 4. 8 *Cal. Code Reg. § 11120*, P 12(B) (Cal. Wage Order No. 12-2001).

(n5)Footnote 5. *Cicairos v. Summit Logistics, Inc.* (2005) 133 *Cal. App. 4th* 949, 2005 *Cal. App. LEXIS* 1672, *13-*16 .

(n6)Footnote 6. *Cicairos v. Summit Logistics, Inc.* (2005) 133 *Cal. App. 4th* 949, 2005 *Cal. App. LEXIS* 1672, *24-*26 .

(n7)Footnote 7. *Bell v. Superior Court* (2007) 158 *Cal. App. 4th* 147, 159-160, 170-171, 69 *Cal. Rptr. 3d* 328 .

(n8)Footnote 8. For discussion of class actions related to wage and hour claims generally, *see* § 5.40[7].

(n9)Footnote 9. 8 *Cal. Code Reg. § 11160*, P11(E) (Cal. Wage Order No. 16-2001).

(n10)Footnote 10. 8 *Cal. Code Reg. § 11160*, P 11(B) (Cal. Wage Order No. 16-2001).

(n11)Footnote 11. *Lab. Code § 1030*.

(n12)Footnote 12. *Lab. Code § 1032*.

(n13)Footnote 13. *Lab. Code § 1030*.

(n14)Footnote 14. *Lab. Code § 1031*.

(n15)Footnote 15. *Lab. Code § 1032(a)*.



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part B. OTHER RESTRICTIONS ON HOURS WORKED

1-3 California Employment Law §§ 3.25 through 3.29

AUTHOR: By Carol S. Sanders, J.D.

[Reserved]

§§ 3.25[Reserved]



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CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
Part C. BIBLIOGRAPHY

1-3 California Employment Law § 3.30

AUTHOR: By Carol S. Sanders, J.D.

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 3 Overtime Compensation and Regulation of Hours Worked
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1-3 California Employment Law § 3.31

AUTHOR: By Carol S. Sanders, J.D.

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 4 Payment of Wages

1-4 California Employment Law 4.syn

AUTHOR: By Susan Spurlark, J.D.

§ 4.syn Synopsis to Chapter 4: Payment of Wages

§ 4.01 Time and Place of Payment

[1] During the Course of Employment

[a] General Rules

[b] Nonsalaried Employees

[i] Payment of Regular (Straight-Time) Wages

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§ 4.20 Legal Texts

§ 4.21 Encyclopedias

§ 4.22 Law Reviews and Legal Periodicals

By Susan Spurlark, J.D. n*

FOOTNOTES:

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2004 Revisions by Peter Rukin, The Law Office of Peter Rukin, Oakland, CA, www.rukinlaw.com.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 4 Payment of Wages

1-4 California Employment Law Scope

AUTHOR: By Susan Spurlark, J.D.

Scope

By Susan Spurlark, J.D. n* SCOPE

This chapter discusses legal requirements relating to the timing, location, and form of wage payments by private employers. The chapter also discusses rules regarding itemized wage statements, wage setoffs, assignment of wages, and wage garnishment, as well as penalties for violation of wage payment obligations. Payment of wages by public employers is beyond the scope of this chapter.

Additional information regarding penalties for violations of wage payment rules and enforcement procedures is set forth in Chapter 5. For discussion of recordkeeping requirements, see Chapter 7. For discussion of minimum wage requirements, see Chapter 2. For discussion of rules regarding payment of overtime compensation, see Chapter 3. For an overview of wage and hour laws, including discussion of the scope and applicability of various state and federal statutes, see Chapter 1.

FOOTNOTES:

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 4 Payment of Wages

Part A. TIME, PLACE, AND FORM OF WAGE PAYMENTS

1-4 California Employment Law § 4.01

AUTHOR: By Susan Spurlark, J.D.

§ 4.01 Time and Place of Payment

[1] During the Course of Employment

[a] General Rules

During the course of employment, wages for most employees must be paid at least twice each month.ⁿ¹ The dates for payment of the wages must be designated in advance by the employer as regular paydays and published in a payday notice.ⁿ² However, different pay periods are prescribed by the Labor Code for certain types of employees. The rules governing time of payment for various types of employees and the penalties for violations of these rules are set forth *below*.

[b] Nonsalaried Employees

[i] Payment of Regular (Straight-Time) Wages

Unless they are covered by a collective bargaining agreement that makes other provision for time of payment,^{n2.1} most non-salaried employees, other than employees engaged in seasonal labor as defined in *Labor Code Section 250*,ⁿ³ must be paid their wages twice each calendar month during the course of employment on days designated in advance by the employer as the regular paydays.ⁿ⁴ *Labor Code Section 204* provides that labor performed between the 1st and 15th day of a calendar month must be paid for between the 16th and 26th day of that month.ⁿ⁵ Labor performed between the 16th day of the month and the last day of the month must be paid for between the 1st day and the 10th day of the following calendar month.ⁿ⁶ If such employees are paid biweekly (every other week), semimonthly, or weekly, the requirements of *Labor Code Section 204* are satisfied if the employees are paid no more than seven calendar days after the close of the payroll period.ⁿ⁷

Labor Code Section 204 is inapplicable to employees who are paid on a weekly basis on a regular payday designated by the employer in advance of rendition of services by the employee.ⁿ⁸ Such employees must be paid in compliance with *Labor Code Section 204b*, which provides that if work is performed prior to or on the regular payday in a given

week, it must be paid for not later than the payday in the next calendar week.ⁿ⁹ If the work is performed after the payday in a given week, it must be paid for within seven days after the payday in the next calendar week.ⁿ¹⁰

■ **ILLUSTRATION:**

Employer pays its hourly employees every Thursday. Employee commenced working for Employer on Monday of Week 1. On Monday through Friday of Week 1, Employee worked eight hours each, at \$10.00 per hour. On Thursday of Week 2, Employee would receive a check for \$320, less deductions, representing his or her pay for Monday through Thursday of Week 1. On Thursday of Week 3, Employee would receive a check for \$80, less deductions, representing his or her pay for Friday of Week 1, plus any amounts earned during Monday through Thursday of Week 2.ⁿ¹¹

Salaried executive, administrative, and professional employees are subject to special rules, as discussed in [c], *below*.ⁿ¹²

[ii] Payment of Overtime

If an hourly employee has worked overtime, *Labor Code Section 204* provides that payment for "labor in excess of the normal work period" must be made "no later than the payday for the next regular payroll period."^{n12.1} An employer is in compliance with the requirements of *Labor Code Section 226(a)* relating to total hours worked by the employee, if hours worked in excess of the normal work period during the current pay period are itemized as corrections on the pay stub for the next regular pay period.^{n12.2}

The Fair Labor Standards Act (FLSA) itself does not address this question.ⁿ¹³ However, federal regulations require payment on the regular payday for the period when the overtime was worked, if practicable.ⁿ¹⁴ Overtime payments may not in any case be delayed longer than is reasonably necessary to calculate the amount of the payment.ⁿ¹⁵

Rules regarding overtime pay for salaried executives, administrative, and professional employees are set forth in subsection [c], *below*. For complete discussion of rules pertaining to overtime, including the provision of compensatory time off in lieu of paying the overtime premium, see Chapter 3.

[c] Salaried Executive, Administrative, and Professional Employees

Payment requirements for salaried executive, administrative, and professional employees depend on whether or not the employee is exempt from the requirements of the federal FLSA.ⁿ¹⁶ The exemption for executive, administrative, and professional employees is discussed in Chapter 2.

Salaried executive, administrative, and professional employees of employers who are covered by (that is, not exempt from) the FLSA must be paid their regular, straight-time wages at least monthly.ⁿ¹⁷ If this monthly option is chosen, wages must be paid on or before the 26th day of the month during which the work was performed, and the payment must include the entire month's salary, including the unearned portion between the date of payment and the last day of the month.ⁿ¹⁸ However, if there is an applicable collective bargaining agreement that provides a different pay arrangement, the terms of that agreement control.ⁿ¹⁹

The Labor Code provides that if an exempt salaried executive, administrative, or professional employee earns wages for hours worked in excess of 40 in a calendar week, those wages must be paid on or before the 26th day of the calendar month immediately following the month in which the labor was performed, unless the employee is covered by a collective bargaining agreement that has different provisions.ⁿ²⁰ However, federal regulations under the FLSA require payment for overtime by the payday for the period during which the overtime was worked, or as soon as practicable thereafter.ⁿ²¹

Salaried executive, administrative, and professional employees who are exempt from the requirements of the FLSA are not subject to the requirements of *Labor Code Section 204* (requiring monthly payments on the 26th of the month) provided all of the following apply:ⁿ²²

1. They are not covered by a collective bargaining agreement;
2. They do not receive overtime pay; and
3. They are paid within seven days of the close of their monthly pay period.

[d] Agricultural and Domestic Employees

Agricultural employees (including viticultural and horticultural employees), other than seasonal laborersⁿ²³ and employees of a farm labor contractor, who receive board and lodging as a part of their remuneration must be paid at least once each calendar month on a date designated in advance as the regular payday.ⁿ²⁴ Regular paydays cannot be more than 31 days apart, and all wages earned up to that payday must be included in the payment.ⁿ²⁵

These payment provisions for agricultural employees also apply to household domestic workers who receive board and lodging as part of their remuneration.ⁿ²⁶ By implication, domestic workers who do not receive room and board are covered by the rules set forth in [b], *above*.ⁿ²⁷

Agricultural employees, other than seasonal laborers as defined in *Labor Code Section 250*,ⁿ²⁸ who do not receive board and lodging and do not work for a farm labor contractor, and who are not covered by the National Labor Relations Act or the FLSA, must be paid twice each month.ⁿ²⁹ Wage payments to such employees for work performed between the 1st day and 15th day of each month must be made between the 16th day and 22nd day of that month, and payments for work performed between the 16th day and the last day of the month must be made between the 1st day and the 7th day of the following month.ⁿ³⁰

Finally, agricultural employees who are employed by a farm labor contractor,ⁿ³¹ including those who receive room and board as part of their compensation, must be paid on a weekly basis.ⁿ³² The payday must be designated in advance; the payment must include all wages earned up to and including the fourth day before the payday.ⁿ³³

[e] Commissioned Employees of Motor Vehicle Dealers

Commission wages paid to employees of a licensed vehicle dealer must be paid once each calendar month on a day designated in advance by the employer as the regular payday.ⁿ³⁴ Commission wages are defined as compensation paid to any person for the sale of the employer's property or services and which is based proportionately on the amount or value of the property or services.ⁿ³⁵ This provision does not apply when there is a collective bargaining agreement between the employer and the employees that sets the date on which payment must be made.ⁿ³⁶

[f] Employees Covered by Collective Bargaining Agreement

For employees who are subject to a collective bargaining agreement containing provisions regarding time for payment of wages that differ from the Labor Code provisions, the provisions of the agreement govern the time for payment.ⁿ³⁷

[f.1] Temporary Services Employees

If an employee of a temporary services employer is assigned to work for a client, the employee's wages are due and payable no less frequently than weekly, regardless of when the assignment ends. Wages for work performed during any calendar week are due and payable not later than the regular payday of the following calendar week. A temporary services employer is deemed to have timely paid wages upon completion of an assignment if wages are paid in

compliance with *Lab. Code* § 201.3(b)(1).n37.1

If an employee of a temporary services employer is assigned to work for a client on a day-to-day basis, the employee's wages are due and payable at the end of each day, regardless of when the assignment ends, if each of the following occurs:n37.2

- The employee reports to or assembles at the office of the temporary services employer or other location.
- The employee is dispatched to a client's worksite each day and returns to or reports to the office of the temporary services employer or other location upon completion of the assignment.
- The employee's work is not executive, administrative, or professional, as defined in the wage orders of the Industrial Welfare Commission, and is not clerical.

If an employee of a temporary services employer is assigned to work for a client engaged in a trade dispute, the employee's wages are due and payable at the end of each day, regardless of when the assignment ends.n37.3

If an employee of a temporary services employer is assigned to work for a client for over 90 consecutive calendar days, *Labor Code* section 201.3 does not apply, unless the temporary services employer pays the employee weekly in compliance with *Labor Code* section 201.3(b)(1).n37.4

For these purposes, a "temporary services employer" is an employing unitn37.5 that contracts with clients or customers to supply workers to perform services for the clients or customersn37.6 and that performs all of the following functions:n37.7

- Negotiates with clients and customers for matters such as the time and place where the services are to be provided, the type of work, the working conditions, and the quality and price of the services.
- Determines assignments or reassignments of workers, even if workers retain the right to refuse specific assignments.
- Retains the authority to assign or reassign a worker to another client or customer when the worker is determined unacceptable by a specific client or customer.
- Assigns or reassigns workers to perform services for clients or customers.
- Sets the rate of pay of workers, whether or not through negotiation.
- Pays workers from its own account or accounts.
- Retains the right to hire and terminate workers.

"Temporary services employer" does not include any of the following:n37.8

- A bona fide nonprofit organization that provides temporary service employees to clients.
- A farm labor contractor, as defined in *Labor Code* section 1682(b).
- A garment manufacturing employer, which, for these purposes, has the same meaning as "contractor"

as defined in *Labor Code section 2671(d)*.

A temporary services employer who violates *Labor Code section 201.3* is subject to the civil penalties provided for in *Labor Code section 203*,^{n37.9} and to any other penalties available at law.^{n37.10} Nothing in *Labor Code § 201.3* can be interpreted to limit any rights or remedies otherwise available under state or federal law.^{n37.11}

[g] Penalty for Nonpayment

In addition to and apart from the general penalties discussed in § 4.04[2], an employer who fails to pay wages within the time periods discussed in [a]-[f.1], *above*, is subject to the following civil penalty:ⁿ³⁸

1. For any initial violation, \$100 for each failure to pay each employee; or
2. For each subsequent violation, or for any willful or intentional violation, \$200 for each failure to pay each employee, plus 25% of the amount unlawfully withheld.

The penalty may be recovered by the Labor Commissioner as part of a hearing held to recover unpaid wages or in an independent civil action against the employer.ⁿ³⁹ For further discussion of procedures for recovery of civil penalties by the Labor Commissioner, see Chapter 5.

Persons who violate these provisions are also guilty of a misdemeanor.ⁿ⁴⁰

[h] Late Payment as Violation of FLSA

An employer who does not pay an employee's wages on the employee's regular payday is in violation of the federal Fair Labor Standards Act (FLSA).ⁿ⁴¹ Although the FLSA says only that employers "shall pay" a minimum wage and does not specifically provide that that minimum wage must be paid promptly,ⁿ⁴² the statutory scheme taken as a whole necessarily assumes that wages are due at some point and thereafter become "unpaid."ⁿ⁴³ Once a payday has passed without a payment, an employer has not met the obligation to "pay" the minimum wage.ⁿ⁴⁴ Thus, the Ninth Circuit had held that the State of California violated the FLSA when a budget impasse developed in the Legislature, no funds were appropriated for payment of salaries, and state employees did not receive their paychecks until 14 to 15 days after their normal payday.ⁿ⁴⁵

For discussion of enforcement procedure and remedies under the FLSA, see Chapter 5.

[2] Payment on Discharge, Layoff, or Resignation

[a] Payment Generally

[i] Discharge or Layoff

With certain limited exceptions,ⁿ⁴⁶ when an employee is discharged or laid off, all of the employee's earned and unpaid wages are due and payable at the time of the discharge or layoff.ⁿ⁴⁷ An employee who is discharged must be paid at the place of discharge.ⁿ⁴⁸

Labor Code Section 201 does not define "discharge." The California Supreme Court has defined the "discharge" element of *Lab. Code § 201* to include (but not require) an involuntary termination from an ongoing employment relationship, such as when an employer fires an employee. The "discharge" element also may be met when an employer releases an employee after completion of the specific job assignment or time duration for which the employee was hired.^{n48.1}

[ii] Resignation

If an employee who does not have a written contract for a definite period resigns, his or her wages are due and payable not later than 72 hours after the resignation.ⁿ⁴⁹ However, if the employee has given at least 72 hours' notice of his or her intention to quit, the final payment of all wages is due at the time of quitting.ⁿ⁵⁰ An employee who quits must be paid at the office or agency of the employer in the county where the employee worked.ⁿ⁵¹ However, an employee who quits without providing a 72-hour notice is entitled to receive payment of wages by mail if he or she so requests and designates a mailing address. The date of mailing constitutes the date of payment for purposes of the requirement that wages be paid within 72 hours after notice of quitting.ⁿ⁵²

[iii] Commissions Earned After Termination

When an employment agreement provides that an employee is entitled to a commission only while employed by the company, it will not be a breach of contract or a breach of the implied covenant of good faith and fair dealing for the employer to refuse to pay a commission if the transaction leading to the commission is finalized after the employee leaves the company.^{n52.1}

Commissions are "wages" for the purposes of *Labor Code* §§ 2926, 206.^{n52.2} For purposes of enforcing the provisions of the Labor Code, however, the right to a commission depends on the terms of the contract for compensation.^{n52.3} There is an exception to this principle when a contract provision is unconscionable.^{n52.4}

[b] Exceptions**[i] Seasonal Employees**

An employer who lays off employees because of the termination of seasonal employment in the curing, canning, or drying of any variety of perishable fruit, fish, or vegetables is deemed to have made immediate payment when the employee's wages are paid within 72 hours of termination or such reasonable time as is necessary for computation and payment of the wages, whichever is less.ⁿ⁵³ Payments to such employees may be made by mail if the employee so requests and designates a mailing address.ⁿ⁵⁴

[ii] Motion Picture Employees

Because persons engaged in the production of motion pictures are often employed at various locations far removed from the employer's principal administrative office and because of the unusual or uncertain hours often worked by such employees, the Legislature has made special provision for the payment of wages of such employees on termination of employment.ⁿ⁵⁵ Under *Labor Code Section 201.5*, an employee engaged in the production or broadcasting of motion pictures whose employment terminates is entitled to receive payment of the wages earned and unpaid at the time of the termination by the next regular payday.ⁿ⁵⁶ "Next regular payday" for these purposes means the day designated by the employer pursuant to *Labor Code* § 204 for payment of wages earned during the payroll period in which the termination occurs.ⁿ⁵⁷ "Production or broadcasting of motion pictures" in this context means the development, creation, presentation, or broadcasting of theatrical or televised motion pictures, television programs, commercial advertisements, music videos, or any other moving images, including, but not limited to, productions made for entertainment, commercial, religious, or educational purposes, whether these productions are presented by means of film, tape, live broadcast, cable, satellite transmission, Web cast, or any other technology that is now in use or may be adopted in the future.ⁿ⁵⁸

Under *Labor Code Section 201.5*, an employment terminates when the employment relationship ends, whether by discharge, lay off, resignation, completion of employment for a specified term, or otherwise.^{n58.1} "An employee engaged in the production or broadcasting of motion pictures" is defined for purposes of Section 201.5 as an employee to whom both of the following apply:^{n58.2}

1. The employee's job duties relate to or support the production or broadcasting of motion pictures or the facilities or equipment used in the production or broadcasting of motion pictures.
2. The employee is hired for a period of limited duration to render services relating to or supporting a particular motion picture production or broadcasting project, or is hired on the basis of one or more daily or weekly calls.^{n58.3}

The payment of wages to employees covered by Section 201.5 may be mailed to the employee or made available to the employee at a location specified by the employer in the county where the employee was hired or performed labor.^{n58.4} The payment is deemed to have been made on the date that the employee's wages are mailed to the employee or made available to the employee at the location specified by the employer, whichever is earlier.^{n58.5}

Nothing in Section 201.5 prohibits the parties to a valid collective bargaining agreement from establishing alternative provisions for final payment of wages to employees covered by Section 201.5 if those provisions do not exceed the time limitation established in *Labor Code Section 204*.^{n58.6}

In the case of movie extras, the DLSE has analyzed the question of which Labor Code provision applies to the timely payment of wages.ⁿ⁵⁹ The determination is made complex because three different entities are often involved: the production company, a casting agency, and a payroll service. Thus, the threshold determination the DLSE must make is which entity or combination of entities is the employer for purposes of determining compliance with wage payment rules.ⁿ⁶⁰ Once that determination is made, the DLSE inquires whether the employment is of an irregular, uncertain nature (in which case, *Labor Code section 201.5*, discussed above, applies) or a more permanent relationship exists between the employer and the extra (in which case *Labor Code section 204* applies).ⁿ⁶¹ For example, if the extras are paid directly by the production company on a one-time basis, the employment is irregular and uncertain, termination of each particular job is essentially a "lay off," and the DLSE's position is that *Labor Code § 201.5* is applicable.ⁿ⁶² By contrast, if a casting agent or payroll agency works regularly with an extra, sending him or her out on jobs on a continuous, although intermittent, basis and pays the extra his or her wages, the relationship between the casting agent or payroll service and the extra is similar to that of a temporary services agency and its temporary employees, and payment must be made pursuant to *Labor Code section 204*, which provides that payment of wages be made to nonsalaried employees twice a month.ⁿ⁶³

[iii] Oil Drilling Employees

As in the case of the motion picture business, the Legislature has made special provision for the payment of oil drilling employees on discharge because such employees are often employed at sites located at great distances from the employer's principal administrative offices.ⁿ⁶⁴ An employer who lays off oil drilling employees is deemed to have made timely payment of wages if the wages of those employees are paid within such reasonable time as is necessary for computation of the wages and payment thereof.ⁿ⁶⁵ⁿ⁶⁶ The reasonable time allowed for payment may not exceed 24 hours, excluding Saturdays, Sundays, and holidays, and payment may be made by mail and will be deemed made at the time of mailing.ⁿ⁶⁷

[iv] Employees Paid at a Central Place

When employees are engaged in an employment that normally involves working for several employers in the same industry interchangeably, the employers, or some of them, may cooperate to establish a plan for the payment of wages at a central place or places, in accordance with a unified schedule of paydays.ⁿ⁶⁸ In such cases, all workers, including those who have been discharged, receive their wages at the central place(s), and the provisions of *Labor Code Sections 201* (immediate payment on discharge or layoff), *202* (payment on resignation), and *208* (place of payment on discharge or resignation) do not apply.ⁿ⁶⁹ Instead, the employers should follow the established payment plan.ⁿ⁷⁰

A central payment plan may not be considered in effect until 10 days after the employers give notice of intention to establish the plan to the California Labor Commissioner.ⁿ⁷¹ Further, once established, the plan cannot be abandoned without giving notice of intention to abandon the plan to the Labor Commissioner.ⁿ⁷²

[v] Employees at Venue Hosting Theatrical or Concert Events

Notwithstanding *Labor Code Section 201(a)*, which governs payment on discharge or layoff generally,^{n72.1} employees employed at a venue that hosts live theatrical or concert events and who are enrolled in and routinely dispatched to employment through a hiring hall or other system of regular short-term employment established in accordance with a bona fide collective bargaining agreement may, along with their employers, establish by express terms in their collective bargaining agreement the time limits for payment of wages to an employee who is discharged or laid off.^{n72.2}

[vi] Temporary Services Employees

If an employee of a temporary services employer is assigned to work for a client and is discharged by the temporary services employer or leasing employer, wages are due and payable as provided in *Labor Code section 201*.^{n72.3} If an employee of a temporary services employer is assigned to work for a client and quits his or her employment with the temporary services employer, wages are due and payable as provided in *Labor Code section 202*.^{n72.4}

A temporary services employer who violates *Labor Code section 201.3* is subject to the civil penalties provided for in *Labor Code section 203*.^{n72.5} and to any other penalties available at law.^{n72.6} Nothing in *Labor Code § 201.3* can be interpreted to limit any rights or remedies otherwise available under state or federal law.^{n72.7}

[vii] Public Employees

Labor Code §§ 201 and 202 do not apply to employees directly employed by any county, incorporated city, or town or other municipal corporation.^{n72.8}

[c] Severance Pay

There is no state or federal law requiring employers to pay severance pay to discharged employees in the absence of an agreement to do so. To the extent that an employer has established a plan or fund for the purpose of making severance payments, such plans have been held to be "employee welfare benefit plans," which are governed by the provisions of the federal Employee Retirement Income Security Act (ERISA).ⁿ⁷³ However, severance pay will not be considered a plan within the meaning of ERISA if the benefit package does not implicate an ongoing administrative scheme.ⁿ⁷⁴ Although the Labor Commissioner is authorized by the Labor Code to enforce, and take assignment of, severance pay claims pursuant to the general statutory procedure for enforcement of claims for wages and supplemental compensation,ⁿ⁷⁵ several federal court decisions have held that state regulation of severance pay benefits is pre-empted by the enforcement provisions of ERISA.ⁿ⁷⁶ Although the Labor Commissioner and Division of Labor Standards Enforcement have been enjoined from enforcing severance pay claims against employers in or affecting commerce,ⁿ⁷⁷ the DLSE takes the position that the Labor Commissioner may accept claims for severance pay so long as the severance pay plan at issue is not subject to ERISA.ⁿ⁷⁸

■ CONSULTANT'S COMMENT:

Although discussion of ERISA-related wage issues is beyond the scope of this treatise, it should be noted that ERISA may cover some unfunded severance pay plans or policies of non-governmental employers.

As a consequence, all California employers who have severance pay plans or policies should consult counsel to determine whether they must prepare written severance plan documents, summary plan descriptions, and annual IRS Form 5500's, as required by ERISA. *Commentary by Kirby Wilcox.*

[d] Vacation Pay**[i] Generally**

Labor Code Section 227.3 and the California Supreme Court's decision in *Suastez v. Plastic Dress-Up Co.*ⁿ⁷⁹ govern payment for accrued and unused vacation time on termination of employment. *Labor Code Section 227.3* provides that, unless otherwise provided by a collective bargaining agreement, whenever an employment contract or employer policy provides for paid vacations, and an employee is terminated without having taken off his or her vested vacation time, all vested vacation must be paid to the employee as wages at his or her final rate in accordance with the provisions of the employment contract or employer policy regarding eligibility or time served.ⁿ⁸⁰ Furthermore, an employment contract or employer policy may not provide for forfeiture of vested vacation time on termination of employment.ⁿ⁸¹ A local living wage ordinance may apply of its own force as a governing legal entitlement, allowing employees to recover vacation pay and serving as the basis for penalties under section 227.3.^{n81.1} The Labor Commissioner or designated representative, in the resolution of any dispute with regard to vested vacation time, is directed to apply the principles of equity and fairness.ⁿ⁸²

Labor Code Section 227.3 merely provides that if an employer promises, by contract or policy, to give its employees paid vacations, the employer must pay an employee wages for all "vested vacation time" the employee has accrued but not taken at the time of termination. Section 227.3 does not specify the manner in which the employee must have accrued the time. Thus, section 227.3 does not require that an employer pay wages for vacation time that was accrued only "in accordance with" or "as a result of" or "pursuant to" an employment contract or policy. Rather, it states that if the entitlement to paid vacation leave in general is given to employees in a contract or policy, the employer must pay the employee wages, in accordance with the contract or policy, for accrued vacation time.^{n82.1}

An employer may offer new employees no vacation time. For example, where an express written company policy forewarned new employees that their compensation package did not include paid vacation during their initial employment, no vacation pay was earned and none vested during that initial period. Employees could not claim any right to vested vacation during their initial employment, because they knew in advance they would not earn or vest vacation pay during that period.^{n82.2}

In *Massachusetts v. Morash*,ⁿ⁸³ the United States Supreme Court has held that the lump sum payment from an employer's general assets to an employee for the value of his or her unused vacation benefits on termination of employment is not governed by ERISA.ⁿ⁸⁴ Thus, the Court reversed a Massachusetts decision holding that a criminal action to enforce payment to discharged employees for their unused vacation time was preempted by ERISA.ⁿ⁸⁵ In making its decision that vacation payments paid out of an employer's general assets do not fall within the ambit of ERISA regulation, the Court pointed out that this type of benefit is not subject to the risks and abuses that are inherent in plans having accumulated separate assets, which are the type of plans Congress intended to protect by enacting ERISA.ⁿ⁸⁶ The Court gave great weight to the regulations issued by the Department of Labor,ⁿ⁸⁷ which excluded such vacation pay from the definition of welfare benefit plans subject to ERISA.ⁿ⁸⁸ The Court also stated that the payment of wages, including vacation pay, is an area that the states have traditionally regulated.ⁿ⁸⁹ The Court indicated that an entirely different situation would be presented if a separate fund had been created by a group of employers to guarantee the payment of vacation benefits to workers who regularly shift their jobs from one employer to another. The Court stated that in such a case, the risks to the funds and the need to adhere to reporting and disclosure requirements are greater, and that ERISA would probably apply to the payment of vacation pay from such funds.ⁿ⁹⁰

Thus, *Labor Code Section 227.3* and state enforcement thereof is not pre-empted by ERISA with regard to vacation compensation paid from the employer's general payroll accounts, but vacation benefits funded from some source other than the employer's general assets, such as a trust fund or benefit association probably may be covered by ERISA. The California Labor Commissioner and Division of Labor Standards Enforcement, which enforce *Labor Code Section 227.3*, take the position that application of that Section to funded vacation plans is pre-empted by ERISA.ⁿ⁹¹

As noted above, *Labor Code Section 227.3* by its terms does not apply if the employee is covered by a collective bargaining agreement that contains other provisions regarding vacation pay. The Labor Commissioner has stated that when a collective bargaining agreement contains a provision governing vacation pay that would otherwise be barred by *Section 227.3*, the collective bargaining agreement will control.ⁿ⁹²

Some employers do not provide separate arrangements for vacation and sick leave; instead, employees are granted a certain number of "paid days off," which can be used for any purpose, including vacation and sick leave. Since employees have an absolute right to take these days off (unlike traditional sick leave, which is contingent on the employee actually being ill), the Labor Commissioner treats these "paid days off" as vacation days for purposes of applying *Labor Code Section 227.3*.ⁿ⁹³

Some employers have attempted to evade application of *Labor Code Section 227.3* by establishing a Voluntary Employees' Beneficiary Association Trust (VEBA), normally a funded plan, which uses an "advance and recapture" method that permits the VEBA to disburse large amounts of vacation pay but maintain virtually no accumulated funds in its account.ⁿ⁹⁴ Courts have held that this type of plan is not an ERISA employee welfare benefit plan and is therefore not exempt from the requirements of *Labor Code Section 227.3*.ⁿ⁹⁵

[Ii] When Vacation Pay Vests

Labor Code Section 227.3 provides that the employer must pay a discharged employee wages for all unused *vested* vacation time and prohibits any employment contract or employer policy that provides for forfeiture of such vacation time on termination. In *Suastez v. Plastic Dress-Up Co.*,ⁿ⁹⁶ the California Supreme Court addressed the issue of when vacation time vests for purposes of *Labor Code Section 227.3*. In *Suastez*, the employer had a rule that employees were not eligible to receive their annual allotments of vacation days until they had passed their anniversary dates each year; any employee who was terminated before his or her anniversary date was not paid any vacation pay.ⁿ⁹⁷ The Supreme Court held that paid vacation time, when granted, is a form of additional compensation for the employee's services and that the right to vacation time therefore vests as it is earned; that is, "a proportionate right to a paid vacation 'vests' as the labor is rendered ... On termination of employment, ... [*Labor Code Section 227.3*] requires that an employee be paid in wages for a pro rata share of his vacation pay."ⁿ⁹⁸

In *Suastez*, the employer had contended that, because employees were not permitted vacation pay under its policy unless they were employed on their anniversary dates, employment on that date was a "condition precedent" to vesting. Thus, the employer argued, an employee terminated before his or her anniversary date had no "vested vacation time."ⁿ⁹⁹ The Court rejected this argument, holding that the employer's policy was, in effect, a condition subsequent that attempted to effect a forfeiture of vested vacation rights, in violation of *Labor Code Section 227.3*.ⁿ¹⁰⁰

The *Suastez* decision does not expressly state whether vacation time accrues on an hourly, daily, weekly, or some other basis. The Labor Commissioner interprets *Suastez* as providing for payment at termination based on a *daily* pro-rata share of the final rate of pay as of the date of termination.ⁿ¹⁰¹

■ ILLUSTRATION:

Employer's policy provides that all employees are entitled to receive 12 paid vacation days per year. New employees are not entitled to take any vacation time, however, until they have been with the company for six months. Employee A is hired on January 1 and discharged on April 1. On discharge, Employee A is entitled to all wages due, plus the equivalent of three days' pay, representing his vested, unused vacation time.ⁿ¹⁰²

An employer may expressly limit the vesting of vacation time by establishing a "no additional accrual" vacation policy. Such a policy prevents an employee from earning vacation time over a designated limit. Once the employee has accrued

vacation time to the limit, the employee cannot earn more time until the employee takes some of the accrued time. This type of vacation policy is permissible because it does not involve a forfeiture of vested vacation time, but merely limits the amount of time that vests. However, the policy must be explicitly provided in the employment agreement. In the absence of an express provision, vacation will accumulate without limit.ⁿ¹⁰³

The rule against forfeiture of accrued vacation rights, by its own terms, cannot apply to vacation pay to be earned in the future, *i.e.*, vacation pay that has not yet accrued.^{n103.1}

The statutes of limitation applicable to an employee's right to sue for payment of unused vacation potentially apply twice in the analysis of vacation entitlement. To understand this concept, consider the case of a terminated employee who seeks lost vacation pay before the Labor Commissioner or in court. The first question concerns the amount of unused vacation the employee may claim to exist as of the time of his or her termination. The Labor Commissioner takes the position that the employee may not reach back further than two years in the case of an oral employment contract or four years in the case of a written employment contract.ⁿ¹⁰⁴ The second question concerns the length of time after termination that an employee may wait to file a claim for the vacation entitlement that existed at the time of termination. Again, the answer is two or four years, depending on whether the agreement with the employer was oral or written.ⁿ¹⁰⁵ Thus, one court of appeal has held that an employee could claim payment only for unused time that accrued under a written contract during the four-year period preceding termination, even though the employee had accrued 12 years of vacation.ⁿ¹⁰⁶

[iii] Labor Commissioner's Guidelines on Vacation Pay

As discussed in [i] and [ii], *above*, *Labor Code Section 227.3*, as interpreted by the Supreme Court in *Suastez*, provides that an employee's right to vacation pay vests on a pro-rata basis as labor is performed during the year and prohibits any policy that results in forfeiture of vested vacation pay. In light of the *Suastez* decision, the Labor Commissioner has issued the following guidelines concerning which vacation policies will be regarded as valid for enforcement purposes:

1. An employer may choose not to provide any vacation benefits to any of its employees or may choose to limit that benefit to certain classifications of employees (for example, only full-time employees).ⁿ¹⁰⁷
2. An employer may provide that employees do not earn any vacation until they have been employed for a certain period of time (for example, the probationary period or a certain number of months or years). Such a rule will be recognized by the Labor Commissioner *only* if it is not a subterfuge and, in fact, no vacation is implicitly earned or accrued during the waiting period.ⁿ¹⁰⁸ According to the Labor Commissioner, an example of a plan that would be "an obvious subterfuge" would be one in which an employee "earns" no vacation during his or her first year of employment, four weeks during the second year, and only two weeks per year thereafter.ⁿ¹⁰⁹ In that case, it is clear that the rule is intended to avoid paying any vacation pay earned by employees during their first year who are terminated prior to their anniversary date.ⁿ¹¹⁰

■ ILLUSTRATION:

Employer's policy provides that all employees are entitled to receive 12 paid vacation days per year, accrued at a rate of one day per month worked. Employer expressly provides, however, that new employees do not accrue any vacation time until they have been with the company for six months. Employee A is hired on January 1 and discharged on April 1. Employee B is hired on January 1 and discharged on August 1. On discharge, Employee A is entitled to no vacation pay; Employee B is entitled to one day's vacation pay.ⁿ¹¹¹ If instead, Employer's policy provided that new employees accrued vacation time at a rate of two days per month during the second six-month period of their first year of employment, and one day per month thereafter, the Labor Commissioner would disregard the accrual provisions of the plan as a "subterfuge." In that case, Employee A would be entitled to three days'

vacation pay on discharge, and Employee B would be entitled to seven days' vacation pay.ⁿ¹¹²

3. The DLSE presently takes the position that vacation earnings must be proportional. Arbitrary dates or accelerated earning periods which would allow for a disproportionate rate of earning are prohibited.ⁿ¹¹³

4. The Labor Commissioner interprets *Labor Code Section 227.3* and *Suastez* as prohibiting a "use it or lose it" policy, under which an employee who fails to use all of his or her accrued vacation time by a certain date loses the right to take that time off and is not compensated for the unused time.ⁿ¹¹⁴

However, the Labor Commissioner has stated that an employer can, in effect, achieve the same result by providing for a "ceiling" on the amount of unused vacation time that may be accrued at any one time; that is, an employer's policy may provide that once a certain amount of vacation time is accrued, but not taken, vacation pay ceases to accrue until the employee takes vacation time.ⁿ¹¹⁵ The time periods provided for taking vacation must be reasonable, and the plan must not be a subterfuge for denying employees vacation benefits.ⁿ¹¹⁶ⁿ¹¹⁷⁻¹¹⁸

In all cases, the employer's rules regarding vacation must be clearly stated and not be a subterfuge for avoiding the requirements of *Labor Code Section 227.3* and *Suastez*.ⁿ¹¹⁹ Any doubts will be resolved against the employer.ⁿ¹²⁰

■ CONSULTANT'S COMMENT:

Misstatements regarding the primary holding in *Suastez* are still common. *Suastez* is not primarily a case prohibiting forfeiture of vested vacation pay because *Labor Code Section 227.3* already prohibited such conduct. The importance of *Suastez* is its declaration regarding *when* vacation pay vests--"as the labor is rendered."ⁿ¹²¹ For example, suppose Employer's vacation policy is to allot 10 days of vacation to each employee on January 1 of each year. Employee resigns on June 30, having taken no vacation in that year or in the prior year. Under *Suastez*, as interpreted by the Labor Commissioner, Employer owes Employee 25 days of vacation pay--10 days for the prior year, 10 days for the current year, and 5 days for the ensuing year. That is, the policy of allotting 10 days of vacation on each January 1 is construed as the allotment of a fully-vested vacation entitlement that accrued over the course of the *previous* year, and not over the course of the year of its allotment. Thus, when Employee resigns on June 30, he or she also has accrued 1/2 of the vacation entitlement for the *ensuing* January 1.

Most employers have responded to *Suastez* and to the DLSE's Interpretive Bulletin by implementing vacation plans that provide for vacation allotment in other than annual increments--for example, on a weekly or monthly basis. If Employer in the previous hypothetical case had implemented a vacation plan providing for the accrual of 10/12 of one vacation day for each month worked (that is, 10 days per year), it would have owed Employee only 15 vacation days on the June 30 resignation day--10 days for the previous year and 5 days for the current year.

The DLSE's Interpretive Bulletin regarding *Suastez* also, as stated in the text, permits an employer to tailor a vacation plan to its particular circumstances. It can provide for no vacation accrual whatsoever during an initial period of employment.ⁿ¹²² It can suspend all further vacation accruals when an employee reaches an accumulated maximum vacation entitlement.ⁿ¹²³ⁿ¹²⁴

An employer may not, however, force an employee to "use or lose" accrued vacation under any circumstances.ⁿ¹²⁵ Accrued vacation is a form of wages and may not be forfeited on termination.ⁿ¹²⁶ In addition, an employer may not, on the one hand, purport to deny vacation accrual during an initial period of employment, and, on the other hand, permit that employee to take a full year's vacation entitlement between the end of the introductory period and the end of the vacation year. The DLSE will interpret such a practice as a retroactive accrual credit for the introductory period.ⁿ¹²⁷ *Commentary by*

Kirby Wilcox.

■ **CONSULTANT'S COMMENT:** Note

that the DLSE also takes the position that floating holidays are vacation days. Thus, at termination, an employer must pay a departing employee for all unused floating holidays. As a sole exception, an employer may link the availability of a floating holiday to a specific event, such as a birthday or an anniversary. For example, an employer may require that an employee use floating holidays within a window period spanning one week before and one week after the event in question. If an employee does not take the floating holiday within the window period (and has no claim that the employer frustrated the ability to do so), the employee forfeits the day. The DLSE has not addressed the question whether its nine-month rule applies to an employer's ability to cap floating holidays, to keep them from accumulating in subsequent years. Nonetheless, it would appear reasonable to deal with this enforcement vacuum in two steps. First, the DLSE should recognize the right of an employer to cap floating holidays at the maximum annual entitlement, because, by December 31 of any year, an employee has had more than nine months to use the days granted on January 1. Second, employers, to avoid forfeiture arguments, should draft their floating holiday policies to state that employees are entitled to X days per year, and that employees who use fewer than the allotted days during the year will receive only those additional days on January 1 to restore their allotment to the annual maximum. *Commentary by Kirby Wilcox.*

[d.1] Incentive Compensation

Incentive compensation, whether in the form of a traditional cash bonus program or a more complex restricted stock plan, is generally understood as an "inducement to employees to procure efficient and faithful service."^{n127.1} Eligibility to receive incentive compensation is properly determined by the plans' specific terms and general contract principles.^{n127.2} Only when an employee satisfies the conditions precedent to receiving incentive compensation, which often includes remaining employed for a particular period of time, can the employee be said to have earned the incentive compensation, thereby necessitating payment upon resignation or termination.^{n127.3}

In *Schachter v. Citigroup*,^{n127.4} the employer offered a voluntary employee incentive compensation plan providing employees with shares of restricted company stock at a reduced price in lieu of a portion of the employee's annual cash compensation. Employees agreed that, should they resign or be terminated for cause before their restricted shares of stock vested, they would forfeit the stock and the portion of cash compensation they directed be paid in the form of the restricted stock. The California Supreme Court held that the plan's forfeiture provision did not violate *Labor Code* §§ 201, 202, and 219, because no earned, unpaid wages remained outstanding upon termination according to the terms of the incentive plan.

The Court concluded that no employee who participated in the incentive plan would be owed and therefore required to forfeit any "earned and unpaid" wages upon resigning or being terminated for cause.^{n127.5} For these purposes, a wage is defined as "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard for time, task, piece, commission basis, or other method of calculation."^{n127.6} The term "wages" is broadly construed to include not only the periodic monetary earnings of the employee, but also the other benefits to which the employee is entitled as a part of his or her compensation.^{n127.7} Incentive compensation, such as bonuses and profit-sharing plans, also constitute wages.^{n127.8}

In *Schachter*, the percentage of an employee's annual compensation he directed be paid to him in the form of shares of restricted stock did not constitute a wage that remained earned but unpaid following his resignation. All cash compensation he received constituted a wage, and shares of restricted stock issued to him also constituted a wage. *Labor Code* § 219 prohibited the employer and employee from agreeing, even voluntarily, to circumvent provisions of the Labor Code relating to the payment of wages. However, the employer and employee were free to prospectively and bilaterally alter the terms of employment. For example, straight-time wages above the minimum wage are a matter of

private contract between the employer and employee.^{n127.9} When the employee submitted his plan election form, he agreed to a restructured compensation package that included a lower annual salary and payment in the form of restricted stock subject to all of the provisions and administrative rules of the plan, and he acknowledged that his resignation or termination for cause before the end of the two-year vesting period would result in forfeiture of the restricted stock and the percentage of his compensation that he authorized to be paid in the form of such restricted stock. The employer was thus not required to pay the portion of compensation he directed be paid to him in the form of restricted stock as a cash payment upon his resignation. He necessarily agreed his compensation would consist of cash payments and a retention-based conditional interest in the shares, with his interest in the shares being earned only if he remained with the company for two years, and he elected not to remain for the designated period, voluntarily terminating his employment before his restricted stock fully vested. By the terms of the plan, he was not entitled to the unvested shares of restricted stock. Having elected to receive some of his compensation in the form of restricted stock, a transaction he was aware carried risk as well as the potential for reward, the employee could not later assert that he should have been paid in cash that portion of his compensation he elected to receive as restricted stock.

Further, there is no requirement that the incentive compensation, like vacation pay, vest on a pro rata basis, entitling an employee to at least some payment upon resignation. Unlike vacation pay, the purpose of incentive compensation is to serve as an inducement to employees to procure efficient and faithful service.^{n127.10}

[e] Penalty for Nonpayment on Discharge or Quitting

Labor Code Section 203 provides a penalty when an employer fails to pay wages in accordance with *Labor Code Sections 201* (payment on discharge), 201.3 (payment by temporary services employer), 201.5 (payment of movie production employees on termination), and 202 (payment on quitting). It provides that if an employer willfully fails to pay wages of an employee pursuant to the above *Labor Code Sections*, that employee's daily wages will continue as a penalty from the date that the wages were due until they are paid or an action is commenced, but for no more than 30 days.ⁿ¹²⁸ Penalties accrue not only on the days that the employee might have worked, but also on nonworkdays.ⁿ¹²⁹ Thus, under *Section 203*, an employee's daily rate of pay is multiplied by the number of days of nonpayment for a maximum of 30 days.ⁿ¹³⁰

■ CONSULTANT'S COMMENT:

The decision in *Mamika* is not surprising, but it produces a result that some practitioners do not often stop to consider. The 30-day wage continuation penalty in *Labor Code Section 203* is not a sanction equal to one month of continued pay. It is a penalty equal to more than five weeks of continued pay. That is, a month of work typically consists of approximately 4.3 weeks, or 23 days. The sanction in *Labor Code Section 203*, however, provides for an additional seven days of pay beyond the "typical" month. This is true, even for exempt employees who are paid on a monthly basis. The remuneration of all employees (whether exempt, salaried non-exempt, commissioned, or paid on any other basis) must be reduced to a daily rate and multiplied by 30 to comply with the statute. The bottom line is that waiting time penalties often far exceed the actual damages in the underlying dispute. *Commentary by Kirby Wilcox.*

Section 203 does not apply to any period during which the employee hides, otherwise absents himself or herself in order to avoid payment, or refuses to receive full payment, including penalties under *Section 203*, tendered to him or her.ⁿ¹³¹ It also does not apply pursuant to the terms of a settlement agreement resolving termination claims if the agreement is silent as to penalties.ⁿ¹³² One case has indicated, however, that tender of wages due, without a tender of any alleged penalties or interest, is sufficient to preclude further imposition of penalties, at least when the amount of the penalties and/or interest due is insignificant.ⁿ¹³³

Labor Code § 203 does not apply to employees directly employed by any county, incorporated city, or town or other municipal corporation.^{n133.1}

The term "willfully," as used in *Labor Code Section 203*, has been defined to include an intentional failure or refusal to pay wages that are due and does not require proof of a deliberate evil purpose to defraud the employee.ⁿ¹³⁴ In unusual cases in which the employer's obligation to make payments is unclear due to the uncertain state of the law, the court may in its discretion determine that waiting time penalties should not be imposed.ⁿ¹³⁵ Under a DLSE regulation, a failure to pay is not "willful" if there is a "good faith dispute" regarding whether any wages are due.ⁿ¹³⁶ A good faith dispute occurs, under the regulation:

when an employer presents a defense, based in law or fact which, if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a "good faith dispute."ⁿ¹³⁷

If the amount of wages due is not capable of ascertainment at the time of termination, no penalty is imposed if the money is paid immediately after ascertainment and consistent with the parties' agreement and/or past practice.ⁿ¹³⁸

As noted above, *Labor Code section 203* provides that penalties cease when an "action" for recovery of wages is commenced. In *Triad Data Services, Inc. v. Jackson*,ⁿ¹³⁹ the court reviewed the logic behind the penalty provisions of *Labor Code section 203* and held that the term "action" refers to a civil action filed in a court of law.ⁿ¹⁴⁰ The court further held that the filing of a claim with the Labor Commissioner does not constitute the commencement of an "action" within the meaning of section 203 and that the "waiting time" penalty provided by that section therefore does not cease on the filing of such a claim.ⁿ¹⁴¹

[3] Payment of Striking Employees

Labor Code section 209 provides that striking employees must be paid all unpaid wages by the next regular payday following the beginning of the strike without "abatement or reduction."ⁿ¹⁴² In addition, the employer must return to each striking employee any deposits, money, or other guaranty required of the employee to secure faithful performance of the employee's duties.ⁿ¹⁴³ *Labor Code section 209* does not apply to employers of seasonal labor, as defined in *Labor Code section 250*.ⁿ¹⁴⁴

[4] Payday Notice

[a] Requirement for Payday Notice

The Labor Code requires every employer to post conspicuously a notice stating the employer's regular pay days and the time and place of payment, in accordance with *Labor Code sections 200 through 243*.ⁿ¹⁴⁵ The notice must be posted at the place of work, if practicable.ⁿ¹⁴⁶ Otherwise, it must be posted where it can be seen by employees as they come and go to work, or at the office or nearest agency for payment kept by the employer.ⁿ¹⁴⁷

The posting requirement does not apply to seasonal labor as defined in *Labor Code section 250*.ⁿ¹⁴⁸

[b] FORM--Sample Payday Notice

[i] Comment

The form set forth in [ii], *below*, is a sample notice informing employees of the regular date, time, and place for payment of wages, as required by *Labor Code section 207*. The notice should contain at least the following information:ⁿ¹⁴⁹

1. The name of the employer;
2. The regular paydays for that employer;
3. The time when wage payments will be made available; and
4. The place where the payments will be made.

The form must be posted conspicuously, and it is preferable that it be posted where the employees work or where they pass as they come to and from work (for example, at a time clock or entry way for employees).ⁿ¹⁵⁰ The additional identifying information suggested below may be useful, but is not required by statute.

The Division of Labor Standards Enforcement also provides a form that may be used by employers to comply with the requirements of the Labor Code. That form may be obtained from any office of the Division of Labor Standards Enforcement.ⁿ¹⁵¹

[ii] Form

NOTICE OF PAYDAYS

The regular paydays of _____ [*employer's name*] are as follows: _____ [*Specify dates, e.g., the 15th of the month and the last day of the month, or in the event of a holiday or weekend, the last day of work closest to those dates*]. Checks will be _____ [*specify method of distribution, e.g., available for pick up from the employees' supervisor or distributed to work station*] _____ [*after or between*] _____ [*specify time, e.g., 3:00 P.M. or 3:00-5:30 P.M.*] on each pay day. [If there are any questions about these paydays or if an employee wishes to make alternative arrangements for the pick-up of a check, inquiries should be directed to _____ (*specify name, title, and location and/or telephone number of person to whom questions should be directed*).]

Date: _____ By _____ [*name*]
 _____ [*title*]

[c] Penalty for Failure to Post Notice

An employer's failure to post the required payday notice constitutes prima facie evidence that the employer has violated *Labor Code sections 201.3, 204, 204b, 205, 207, 208, 209, and 212*.ⁿ¹⁵² In addition, the employer, or any responsible agent, manager, superintendent, or officer of the employer, who fails to post a payday notice as required by *Labor Code section 207* is guilty of a misdemeanor.ⁿ¹⁵³ An employer who is convicted of a violation of this provision may be required to post a bond in a sum to be determined by the Labor Commissioner.ⁿ¹⁵⁴ An employee or a former employee may bring an action against an employer convicted of a second violation of *Labor Code section 200 et seq.* for a temporary restraining order prohibiting that employer from doing business in California unless that employer posts a bond.ⁿ¹⁵⁵

see Chapter 5 for additional discussion of the remedies for violations of the wage payment laws and the procedures for effectuating those remedies.

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 204.*

(n2)Footnote 2. *See Lab. Code §§ 204, 207; see also discussion in [4], below.*

(n3)Footnote 2.1. *See Lab. Code § 204(c).*

(n4)Footnote 3. *See Lab. Code § 257.*

(n5)Footnote 4. *See Lab. Code § 204.*

(n6)Footnote 5. *Lab. Code § 204(a).*

(n7)Footnote 6. *Lab. Code § 204(a).*

(n8)Footnote 7. *Lab. Code § 204(d).*

(n9)Footnote 8. *Lab. Code § 204b.*

(n10)Footnote 9. *Lab. Code § 204b.*

(n11)Footnote 10. *Lab. Code § 204b.*

(n12)Footnote 11. *See Lab. Code § 204b.*

(n13)Footnote 12. *See Lab. Code §§ 204(a), 204c, 204.2.*

(n14)Footnote 12.1. *Lab. Code § 204(b)(1).*

(n15)Footnote 12.2. *Lab. Code § 204(b)(2).* For discussion of *Lab. Code § 226* and requirements for itemized statements of wages, *see § 4.03, below.*

(n16)Footnote 13. *See 29 U.S.C. § 207.*

(n17)Footnote 14. *See 29 C.F.R. § 778.106; United States v. Klinghoffer Bros. Realty Corp. (2d Cir. 1960) 285 F.2d 487, 491-492 .*

(n18)Footnote 15. *See 29 C.F.R. § 778.106.*

(n19)Footnote 16. *See Lab. Code §§ 204(a), 204c, 204.2; see also 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.1-541.315 (requirements for exemption from FLSA for bona fide executive, administrative, and professional employees).*

(n20)Footnote 17. *See Lab. Code § 204(a).*

(n21)Footnote 18. *Lab. Code § 204(a).*

(n22)Footnote 19. *Lab. Code § 204(c).*

(n23)Footnote 20. *Lab. Code* § 204.2.

(n24)Footnote 21. *29 C.F.R. § 778.106; see United States v. Klinghoffer Bros. Realty Corp. (2d Cir. 1960) 285 F.2d 487, 491-492 .*

(n25)Footnote 22. *Lab. Code* § 204c.

(n26)Footnote 23. *See Lab. Code* § 257.

(n27)Footnote 24. *Lab. Code* § 205.

(n28)Footnote 25. *Lab. Code* § 205.

(n29)Footnote 26. *Lab. Code* § 205.

(n30)Footnote 27. *See Lab. Code* § 204.

(n31)Footnote 28. *See Lab. Code* § 257.

(n32)Footnote 29. *Lab. Code* §§ 205, 205.5; *see Lab. Code* § 1140.5(b) ("agricultural employee" includes only those persons who are excluded as "agricultural employees" from the coverage of federal labor laws pursuant to 29 U.S.C. §§ 152(3) or 203(f)).

(n33)Footnote 30. *Lab. Code* § 205.5.

(n34)Footnote 31. *See Lab. Code* § 1682(b) (definition of farm labor contractor).

(n35)Footnote 32. *Lab. Code* §§ 205, 1696.5.

(n36)Footnote 33. *Lab. Code* § 205.

(n37)Footnote 34. *Lab. Code* § 204.1.

(n38)Footnote 35. *Lab. Code* § 204.1.

(n39)Footnote 36. *Lab. Code* § 204.1.

(n40)Footnote 37. *See Lab. Code* §§ 204(c), 204.1, 204.2.

(n41)Footnote 37.1. *Lab. Code* § 201.3(b)(1).

(n42)Footnote 37.2. *Lab. Code* § 201.3(b)(2).

(n43)Footnote 37.3. *Lab. Code* § 201.3(b)(3).

(n44)Footnote 37.4. *Lab. Code* § 201.3(b)(6).

(n45)Footnote 37.5. *See Lab. Code* § 201.3(a)(3) ("employing unit" has same meaning as defined in *Unemp. Ins. Code* § 135).

(n46)Footnote 37.6. *See Lab. Code* § 201.3(a)(4) ("client" and "customer" means person with whom temporary services employer has contractual relationship to provide services of one or more individuals employed by temporary services employer).

(n47)Footnote 37.7. *Lab. Code* § 201.3(a)(1).

(n48)Footnote 37.8. *Lab. Code § 201.3(a)(2)*.

(n49)Footnote 37.9. *See [2][e], below*.

(n50)Footnote 37.10. *Lab. Code § 201.3(c)*.

(n51)Footnote 37.11. *Lab. Code § 201.3(d)*.

(n52)Footnote 38. *Lab. Code § 210*.

(n53)Footnote 39. *Lab. Code § 210*.

(n54)Footnote 40. *Lab. Code § 215*.

(n55)Footnote 41. *Biggs v. Wilson (9th Cir. 1993) 1 F.3d 1537, 1538 ; see 29 U.S.C. § 201 et seq.*

(n56)Footnote 42. *See 29 U.S.C. § 206(b)*.

(n57)Footnote 43. *Biggs v. Wilson (9th Cir. 1993) 1 F.3d 1537, 1539 .*

(n58)Footnote 44. *Biggs v. Wilson (9th Cir. 1993) 1 F.3d 1537, 1539 ; see 29 U.S.C. § 216(b)* (liability of employer for amount of employee's "unpaid" wages).

(n59)Footnote 45. *Biggs v. Wilson (9th Cir. 1993) 1 F.3d 1537, 1538 .*

(n60)Footnote 46. *See discussion in [b], below*.

(n61)Footnote 47. *See Lab. Code § 201; see also Lab. Code § 2926* (employee not hired for specified term is entitled to all compensation earned up to time of discharge). *See Kelly v. Stamps.com Inc. (2005) 135 Cal. App. 4th 1088, 1103, 38 Cal. Rptr. 3d 240* (trial court erred in granting employer summary adjudication on cause of action alleging that by terminating her employment and failing to pay employee bonus, which she had been promised and had earned, employer violated *Lab. Code §§ 201 and 2926*, requiring prompt payment of earned wages after employee is discharged; employer failed to show employee was terminated for good cause prior to bonus date; if employee established she was unlawfully terminated before bonus due date, she could assert that termination excused fulfillment of condition that she be employed on the date of payment, which would render bonus payable upon termination). For penalty for nonpayment on discharge, *see [e], below*.

(n62)Footnote 48. *Lab. Code § 208*.

(n63)Footnote 48.1. *Smith v. Superior Court (L'Oreal USA, Inc.) (2006) 39 Cal. 4th 77, 82-94* (employer who waited over two months to pay a model after completion of day's work violated *Lab. Code § 201* by effectuating discharge within contemplation of statutory scheme).

(n64)Footnote 49. *Lab. Code § 202; see Villafuerte v. Inter-Con Security Systems (2002) 96 Cal. App. 4th Supp. 45* (no evidence of employer payment to employee who quit because although employer mailed check, evidence showed interception by third party prevented tender or delivery to employee; no evidence that employee had requested that check be mailed, so that employer had obligation to tender or deliver check at employer's place of business).

(n65)Footnote 50. *Lab. Code § 202*.

(n66)Footnote 51. *Lab. Code § 208; see Villafuerte v. Inter-Con Security Systems (2002) 96 Cal. App. 4th Supp. 45* (no evidence that employer tendered or delivered paycheck to quitting employee at employer's place of business or that employee expressly requested that his final paycheck be mailed).

(n67)Footnote 52. *Lab. Code* § 202.

(n68)Footnote 52.1. *See* *Nein v. HostPro, Inc.* (2009) 174 Cal. App. 4th 833, 849-852, 95 Cal. Rptr. 3d 34 (where employment agreement provided that former employee was entitled to commission only while employed by company, and his employment was terminated before defendant and customer finalized asset purchase, agreement by its plain language, as matter of law, did not entitle him to commission, because agreement was reasonably susceptible to only one interpretation, i.e., that once he ceased to be employed by defendant, he would no longer be eligible for commission pay; because express terms of agreement permitted employer to deny him further commissions after his termination, doing so could not violate implied covenant of good faith and fair dealing).

(n69)Footnote 52.2. *See* *Lab. Code* § 200(a) (wages "includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation"); *Steinhebel v. Los Angeles Times Communications, LLC* (2005) 126 Cal. App. 4th 696, 705, 24 Cal. Rptr. 3d 351 ("commissions are 'wages' "). For discussion of payment of wages during the course of employment generally, *see* § 4.01[1], *above*. For discussion of payment of wages on discharge, layoff or resignation generally, *see* [a], *above*.

(n70)Footnote 52.3. *Nein v. HostPro, Inc.* (2009) 174 Cal. App. 4th 833, 853-854, 95 Cal. Rptr. 3d 34 (where pursuant to plain language of written employment agreement, former employee was not entitled to further commissions after he was terminated, employer's failure to pay such commissions did not violate Labor Code); *Koehl v. Verio, Inc.* (2006) 142 Cal. App. 4th 1313, 1330, 48 Cal. Rptr. 3d 749. *See also* *Steinhebel v. Los Angeles Times Communications, LLC* (2005) 126 Cal. App. 4th 696, 705, 24 Cal. Rptr. 3d 351 ("contractual terms must be met before an employee is entitled to a commission").

(n71)Footnote 52.4. *Nein v. HostPro, Inc.* (2009) 174 Cal. App. 4th 833, 853 n.6, 95 Cal. Rptr. 3d 34. *See* *Ellis v. McKinnon Broadcasting Co.* (1993) 18 Cal. App. 4th 1796, 1800, 1806, 23 Cal. Rptr. 2d 80 (term of employment agreement providing that advertising salesman forfeited his right to commission if he terminated his employment before his employer received payment for advertising, was unconscionable and unenforceable); *compare* *American Software, Inc. v. Ali* (1996) 46 Cal. App. 4th 1386, 1388, 1393, 54 Cal. Rptr. 2d 477 (provision of plaintiff's employment contract terminating her right to receive commissions on payments received on her accounts 30 days after severance of her employment was not unconscionable).

(n72)Footnote 53. *Lab. Code* § 201.

(n73)Footnote 54. *Lab. Code* § 201.

(n74)Footnote 55. *See* *Lab. Code* § 201.5.

(n75)Footnote 56. *Lab. Code* § 201.5(b).

(n76)Footnote 57. *Lab. Code* § 201.5(a)(3).

(n77)Footnote 58. *Lab. Code* § 201.5(a)(4).

(n78)Footnote 58.1. *Lab. Code* § 201.5(d).

(n79)Footnote 58.2. *Lab. Code* § 201.5(a)(1).

(n80)Footnote 58.3. "Daily or weekly call" means an employment that, by its terms, will expire at the conclusion of one day or one week, unless renewed. *Lab. Code* § 201.5(a)(2).

(n81)Footnote 58.4. *Lab. Code* § 201.5(c).

(n82)Footnote 58.5. *Lab. Code § 201.5(c)*.

(n83)Footnote 58.6. *Lab. Code § 201.5(e)*.

(n84)Footnote 59. See D.L.S.E. Interpretive Bulletin No. 88-1 (Feb. 19, 1988) (CAUTION: see § 1.05[3][c], above, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n85)Footnote 60. See D.L.S.E. Interpretive Bulletin No. 88-1 (Feb. 19, 1988) (CAUTION: see § 1.05[3][c], above, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n86)Footnote 61. See D.L.S.E. Interpretive Bulletin No. 88-1 (Feb. 19, 1988) (CAUTION: see § 1.05[3][c], above, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n87)Footnote 62. See D.L.S.E. Interpretive Bulletin No. 88-1 (Feb. 19, 1988) (CAUTION: see § 1.05[3][c], above, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n88)Footnote 63. See D.L.S.E. Interpretive Bulletin No. 88-1 (Feb. 19, 1988) (CAUTION: see § 1.05[3][c], above, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders). For discussion of payment under *Lab. Code § 204* generally, see § 4.01[1][b].

(n89)Footnote 64. See *Lab. Code § 201.7*.

(n90)Footnote 65. *Lab. Code § 201.7*.

(n91)Footnote 66. [Reserved]

(n92)Footnote 67. See *Lab. Code § 201.7*.

(n93)Footnote 68. See *Lab. Code § 204a*.

(n94)Footnote 69. See *Lab. Code § 204a*.

(n95)Footnote 70. See *Lab. Code 204a*.

(n96)Footnote 71. See *Lab. Code § 204a*.

(n97)Footnote 72. See *Lab. Code § 204a*.

(n98)Footnote 72.1. See discussion in [a], above.

(n99)Footnote 72.2. *Lab. Code § 201.9*.

(n100)Footnote 72.3. *Lab. Code § 201.3(b)(4)*. For definitions of "temporary services employer" and "client," see [1][f.1], above.

(n101)Footnote 72.4. *Lab. Code § 201.3(b)(5)*.

(n102)Footnote 72.5. See [2][e], below.

(n103)Footnote 72.6. *Lab. Code § 201.3(c)*.

(n104)Footnote 72.7. *Lab. Code § 201.3(d)*.

(n105)Footnote 72.8. *Lab. Code § 220(b)*. See *Johnson v. Arvin-Edison Water Storage Dist.* (2009) 174 Cal. App.

4th 729, 740-741, 95 Cal. Rptr. 3d 53 (water storage district was exempt from requirements of *Labor Code* §§ 201, 202, 203 as municipal corporation).

(n106)Footnote 73. See *Scott v. Gulf Oil Corp.* (9th Cir. 1985) 754 F.2d 1499, 1503-1506 ; *Blau v. Del Monte Corp.* (9th Cir. 1984) 748 F.2d 1348, 1352 ; see 29 U.S.C. §§ 1001-1461(ERISA); cf. *Stone v. Travelers Corp.* (9th Cir. 1995) 58 F.3d 434, 437 (ERISA preempts California Fair Employment and Housing Act claim founded on age-based denial of benefits under severance pay plan).

(n107)Footnote 74. See *Delaye v. Agripac, Inc.* (9th Cir. 1994) 39 F.3d 235, 237 ; *Velarde v. PACE Membership Warehouse, Inc.* (9th Cir. 1994) 105 F.3d 1313, 1316-1317 (ERISA does not preempt state-law contract action based on a "stay on" letter promising severance benefits).

(n108)Footnote 75. See *Lab. Code* §§ 96(h), 96.7, 98-98.3. For discussion of procedures for enforcement of wage claims generally, see ch. 5.

(n109)Footnote 76. See *Scott v. Gulf Oil Corp.* (9th Cir. 1985) 754 F.2d 1499, 1503-1506 ; *Blau v. Del Monte Corp.* (9th Cir. 1984) 748 F.2d 1348, 1356 ; *California Chamber of Commerce v. Simpson* (C.D. Cal. 1985) 601 F. Supp. 104, 109 ; see also 29 U.S.C. § 1144(a) (pre-emption of state laws by ERISA).

(n110)Footnote 77. *California Chamber of Commerce v. Simpson* (C.D. Cal. 1985) 601 F. Supp. 104, 109 .

(n111)Footnote 78. See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 16 (CAUTION: see § 1.05[3][c], above, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n112)Footnote 79. *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 183 Cal. Rptr. 846, 647 P.2d 122 ; see discussion in [ii], below.

(n113)Footnote 80. *Lab. Code* § 227.3.

(n114)Footnote 81. *Lab. Code* § 227.3; see *Henry v. Amrol, Inc.* (1990) 222 Cal. App. 3d Supp. 1, 6-7 , 272 Cal. Rptr. 134 (employee who voluntarily refrains from taking vacation and who knows employer's policy is "use it or lose it" does not waive statutory right to payment for accrued but unused time).

(n115)Footnote 81.1. See *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1206-1207, 78 Cal. Rptr. 3d 572 (under local living wage ordinance, employer violated *Lab. Code* § 227.3 when it failed to pay terminated plaintiffs for additional vacation time they accrued pursuant to ordinance).

(n116)Footnote 82. *Lab. Code* § 227.3.

(n117)Footnote 82.1. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1206-1207, 78 Cal. Rptr. 3d 572 (because employer did not dispute that plaintiffs' employment contracts provided for paid vacations or that it failed to pay terminated class members for vacation time they accrued under living wage ordinance, violation of § 227.3 was established and \$500 penalty properly imposed). See also *Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal. App. 4th 1595, 1598, 8 Cal. Rptr. 2d 600 (accumulation of vacation time does not depend on agreement that expressly permits it; unused vacation accumulates unless employment agreement legally prevents it).

(n118)Footnote 82.2. *Owen v. Macy's* (2009) 175 Cal. App. 4th 462, 468-471, 96 Cal. Rptr. 3d 70 .

(n119)Footnote 83. *Massachusetts v. Morash* (1989) 490 U.S. 107, 114-119, 109 S. Ct. 1668, 104 L. Ed. 2d 98 .

(n120)Footnote 84. See also *California Hosp. Ass'n v. Henning* (9th Cir. 1985) 770 F.2d 856, 858-862 , reh'g denied and modified, 783 F.2d 946 (California laws relating to payment of unfunded vacation benefits are not

preempted by ERISA).

(n121)Footnote 85. *Massachusetts v. Morash* (1989) 490 U.S. 107, 111-112, 121, 109 S. Ct. 1668, 104 L. Ed. 2d 98 .

(n122)Footnote 86. *Massachusetts v. Morash* (1989) 490 U.S. 107, 115, 109 S. Ct. 1668, 104 L. Ed. 2d 98 .

(n123)Footnote 87. *See* 29 C.F.R. § 2510.3-1(b)(3)(i).

(n124)Footnote 88. *Massachusetts v. Morash* (1989) 490 U.S. 107, 116-117, 109 S. Ct. 1668, 104 L. Ed. 2d 98 .

(n125)Footnote 89. *Massachusetts v. Morash* (1989) 490 U.S. 107, 119, 109 S. Ct. 1668, 104 L. Ed. 2d 98 .

(n126)Footnote 90. *Massachusetts v. Morash* (1989) 490 U.S. 107, 120, 109 S. Ct. 1668, 104 L. Ed. 2d 98 .

(n127)Footnote 91. *See* D.L.S.E. Interpretive Bulletin No. 86-3, P 1 (Sept. 30, 1986); *see* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 15.1.7 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n128)Footnote 92. D.L.S.E. Interpretive Bulletin No. 86-3, P 3 (Sept. 30, 1986); *see* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 15.1.6 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n129)Footnote 93. D.L.S.E. Interpretive Bulletin No. 86-3, P 8 (Sept. 30, 1986); *see* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 15.1.12 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n130)Footnote 94. *See Czechowski v. Tandy Corp.* (N.D. Cal. 1990) 731 F. Supp. 406, 408 ; *Millan v. Restaurant Enterprises Group, Inc.* (1993) 14 Cal. App. 4th 477, 483, 18 Cal. Rptr. 2d 198 .

(n131)Footnote 95. *See Czechowski v. Tandy Corp.* (N.D. Cal. 1990) 731 F. Supp. 406, 408 ; *Millan v. Restaurant Enterprises Group, Inc.* (1993) 18 Cal. Rptr. 2d 198 .

(n132)Footnote 96. *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 183 Cal. Rptr. 846, 647 P.2d 122 .

(n133)Footnote 97. *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 776-777, 183 Cal. Rptr. 846, 647 P.2d 122 .

(n134)Footnote 98. *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d. 774, 781, 784, 183 Cal. Rptr. 846, 647 P.2d 122 .

(n135)Footnote 99. *See Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d. 774, 778, 183 Cal. Rptr. 846, 647 P.2d 122 .

(n136)Footnote 100. *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d. 774, 781-782, 183 Cal. Rptr. 846, 647 P.2d 122 .

(n137)Footnote 101. D.L.S.E. Interpretive Bulletin No. 86-3, P 10 (Sept. 30, 1986) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n138)Footnote 102. *See Lab. Code* §§ 201, 227.3; *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 781, 784, 183 Cal. Rptr. 846, 647 P.2d 122 .

(n139)Footnote 103. *Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal. App. 4th 1595, 1598, 1601-1602, 8 Cal.

Rptr. 2d 600 .

(n140)Footnote 103.1. *Owen v. Macy's* (2009) 175 Cal. App. 4th 462, 471-472, 96 Cal. Rptr. 3d 70 (no vacation rights accrued for new employee during initial employment period under employer's policy precluding vacation benefits during first six months of employment, even though new employee could expect to earn future vacation compensation after waiting period). *See also Kistler v. Redwoods Community College Dist.* (1993) 15 Cal. App. 4th 1326, 1334, 19 Cal. Rptr. 2d 417 .

(n141)Footnote 104. *See* D.L.S.E. Interpretive Bulletin No. 87-7, P 2 (July 29, 1987); 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 15.1.9 (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders) *See also Code Civ. Proc.* §§ 337, 339 (4-year and 2-year statutes of limitation for actions based on written and oral contracts, respectively).

(n142)Footnote 105. *See* D.L.S.E. Interpretive Bulletin No. 87-7, P 2 (July 29, 1987) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n143)Footnote 106. *Sequeira v. Rincon-Vitova Insectaries, Inc.* (1995) 32 Cal. App. 4th 632, 636, 38 Cal. Rptr. 2d 264 ; *see also* D.L.S.E. Interpretive Bulletin No. 87-7, P 2 (July 29, 1987) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n144)Footnote 107. *See* D.L.S.E. Interpretive Bulletin No. 86-3, P 4 (Sept. 30, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n145)Footnote 108. D.L.S.E. Interpretive Bulletin No. 86-3, P 7(a) (Sept. 30, 1986); *see* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 15.1.3 (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n146)Footnote 109. D.L.S.E. Interpretive Bulletin No. 86-3, P 7(a) (Sept. 30, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n147)Footnote 110. *See* D.L.S.E. Interpretive Bulletin No. 86-3, P 7(a) n.2 (Sept. 30, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n148)Footnote 111. *See* D.L.S.E. Interpretive Bulletin No. 86-3, P 7(a) (Sept. 30, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *Lab. Code* §§ 201, 227.3; *Suarez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 781, 784, 183 Cal. Rptr. 846, 647 P.2d 122 .

(n149)Footnote 112. *See* D.L.S.E. Interpretive Bulletin No. 86-3, P 7(a) (Sept. 30, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *Lab. Code* §§ 201, 227.3; *Suarez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d. 774, 781, 784, 183 Cal. Rptr. 846, 647 P.2d 122 .

(n150)Footnote 113. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 15.1.5 (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); but *see* D.L.S.E. Interpretive Bulletin No. 86-3, P 7(b) (Sept. 30, 1986) (accelerated accrual rate permitted so long as the acceleration period is reasonable and uniformly applied).

(n151)Footnote 114. D.L.S.E. Interpretive Bulletin No. 86-3, P 6 (Sept. 30, 1986); *see* 2002 Update to 1998 DLSE

Enforcement Policies and Interpretation Manual § 15.1.4 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); cf. *Berardi v. General Motors Corp.* (1983) 143 Cal. App. 3d Supp. 7, 11-12, 192 Cal. Rptr. 392 (court rejected employer's argument that employee had forfeited previously vested vacation time by not using it during previous year because employer's policy on forfeiture of vacation during employment was not clearly and unambiguously set forth); see also *Henry v. Amrol, Inc.* (1990) 222 Cal. App. 3d Supp. 1, 6-7, 272 Cal. Rptr. 134 (employee who voluntarily refrains from taking vacation and who knows employer's policy is "use it or lose it" does not waive statutory right to payment for accrued but unused time).

(n152)Footnote 115. D.L.S.E. Interpretive Bulletin No. 86-3, P 6(a) (Sept. 30, 1986); 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 15.1.4 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); see *Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal. App. 4th 1595, 1601-1602, 8 Cal. Rptr. 2d 600 (finding express employment agreement provision for "no additional accrual" policy permissible).

(n153)Footnote 116. D.L.S.E. Interpretive Bulletin No. 86-3, P 6(a) (Sept. 30, 1986); 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 15.1.4.1 (a worker must have at least nine months after the accrual of the vacation within which to use it before a cap is effective) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n154)Footnote 117-118. [Reserved]

(n155)Footnote 119. See D.L.S.E. Interpretive Bulletin No. 86-3, P 7 (Sept. 30, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *Berardi v. General Motors Corp.* (1983) 143 Cal. App. 3d Supp. 7, 12, 192 Cal. Rptr. 392.

(n156)Footnote 120. See *Berardi v. General Motors Corp.* (1983) 143 Cal. App. 3d Supp. 7, 12, 192 Cal. Rptr. 392; see also *Civ. Code § 1442* (condition involving forfeiture must be strictly construed against person for whose benefit it is created).

(n157)Footnote 121. *Suarez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 784, 183 Cal. Rptr. 846, 647 P.2d 122.

(n158)Footnote 122. See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 15.1.2; D.L.S.E. Interpretive Bulletin No. 86-3, P 7(a) (Sept. 30, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n159)Footnote 123. See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 15.1.4; D.L.S.E. Interpretive Bulletin No. 86-3, P 6(a) (Sept. 30, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n160)Footnote 124. [Reserved]

(n161)Footnote 125. See 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 15.1.4; D.L.S.E. Interpretive Bulletin No. 86-3, P 6 (Sept. 30, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n162)Footnote 126. See *Suarez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 784, 183 Cal. Rptr. 846, 647 P.2d 122; *Lab. Code § 227.3*.

(n163)Footnote 127. See D.L.S.E. Interpretive Bulletin No. 86-3, P 7(a) (Sept. 30, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage

Orders).

(n164)Footnote 127.1. Dept. of Industrial Relations, Div. of Labor Stds. Enforcement (DLSE), Enforcement Policies and Interpretations Manual (Rev. 2006) § 35.1; quoting *Duffy Bros. v. Bing & Bing* (1926) 215 N.Y.S. 755, 758 .

(n165)Footnote 127.2. *Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal. App. 4th 509, 523, 49 Cal. Rptr. 3d 216 .

(n166)Footnote 127.3. *Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal. App. 4th 509, 523, 49 Cal. Rptr. 3d 216 ; *Lucian v. All States Trucking Co.* (1981) 116 Cal. App. 3d 972, 975, 171 Cal. Rptr. 262 (employee who voluntarily leaves employment before bonus calculation date not entitled to receive it).

(n167)Footnote 127.4. *Schachter v. Citigroup* (2009) 47 Cal. 4th 610, 101 Cal. Rptr. 3d 2, 218 P.3d 262, 2009 Cal. LEXIS 11056, *13-*26 .

(n168)Footnote 127.5. *See Lab. Code § 201(a).*

(n169)Footnote 127.6. *Lab. Code § 200(a).*

(n170)Footnote 127.7. *See Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094, 1103, 56 Cal. Rptr. 3d 880, 155 P.3d 284 ("wages" also include benefits to which employee is entitled as part of compensation, including money, room, board, clothing, vacation pay, and sick pay); *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 780, 183 Cal. Rptr. 846, 647 P.2d 122 ; *Wise v. Southern Pac. Co.* (1970) 1 Cal. 3d 600, 607, 83 Cal. Rptr. 202, 463 P.2d 426 ; *Dept. of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal. App. 4th 1084, 1091 ; 64 Cal. Rptr. 2d 457 .

(n171)Footnote 127.8. *Schachter v. Citigroup* (2009) 47 Cal. 4th 610, 101 Cal. Rptr. 3d 2, 218 P.3d 262, 2009 Cal. LEXIS 11056, *14 . *See Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal. App. 4th 509, 522, 49 Cal. Rptr. 3d 216 ; *Lucian v. All States Trucking Co.* (1981) 116 Cal. App. 3d 972, 974, 171 Cal. Rptr. 262 ; *Ware v. Merrill Lynch* (1972) 24 Cal. App. 3d 35, 44, 100 Cal. Rptr. 791 .

(n172)Footnote 127.9. *Gentry v. Superior Court* (2007) 42 Cal. 4th 443, 456, 64 Cal. Rptr. 3d 773, 165 P.3d 556 .

(n173)Footnote 127.10. *Schachter v. Citigroup* (2009) 47 Cal. 4th 610, 101 Cal. Rptr. 3d 2, 218 P.3d 262, 2009 Cal. LEXIS 11056, *24 , citing Dept. of Industrial Relations, Div. of Labor Stds. Enforcement (DLSE), Enforcement Policies and Interpretations Manual (Rev. 2006) § 35.1.

(n174)Footnote 128. *Lab. Code § 203.* The language of the statute requires payment of any wages "without abatement or reduction." That term has been defined to mean without discount on account of early payment. *See Sayre v. Western Bowl* (1946) 76 Cal. App. 2d 793, 797-798, 174 P.2d 466 , *disapproved on other grounds*, *Reid v. Overland Machined Prods.* (1961) 55 Cal. 2d 203, 207-208, 10 Cal. Rptr. 819, 359 P.2d 251 . For the standard jury instruction on the waiting-time penalty for nonpayment of wages, *see* CACI 2704. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for waiting-time penalty for nonpayment of wages, *see* CACI VF-2703. For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n175)Footnote 129. *Mamika v. Barca* (1998) 68 Cal. App. 4th 487, 492-493, 80 Cal. Rptr. 2d 175 , *modified*, *Mamika v. Barca* (1998) 98 CDOS 9087 (larger penalty acts as disincentive to employers who are reluctant to pay wages in timely manner).

(n176)Footnote 130. *See Mamika v. Barca* (1998) 68 Cal. App. 4th 487, 493-494, 80 Cal. Rptr. 2d 175 , *modified*, *Mamika v. Barca* (1998) 98 CDOS 9087 .

(n177)Footnote 131. *Lab. Code § 203*.

(n178)Footnote 132. *Department of Indus. Relations v. UI Video Stores, Inc. (1997) 55 Cal. App. 4th 1084, 1096, 64 Cal. Rptr. 2d 457*.

(n179)Footnote 133. *See Oppenheimer v. Sunkist Growers (1957) 153 Cal. App. 2d Supp. 897, 898-899, 315 P.2d 116*.

(n180)Footnote 133.1. *Lab. Code § 220(b)*. *See Johnson v. Arvin-Edison Water Storage Dist. (2009) 174 Cal. App. 4th 729, 740-741, 95 Cal. Rptr. 3d 53* (water storage district was exempt from requirements of *Lab. Code § 203* as municipal corporation).

(n181)Footnote 134. *See Ghory v. Al-Lahham (1989) 209 Cal. App. 3d 1487, 1492, 257 Cal. Rptr. 924; Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 7-8, 177 Cal. Rptr. 803; Davis v. Morris (1940) 37 Cal. App. 2d 269, 274, 99 P.2d 345; see also 8 Cal. Code Reg. § 13520* (DLSE regulation defining "willful" for purposes of *Lab. Code § 203*).

(n182)Footnote 135. *See, e.g., Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 8-9, 177 Cal. Rptr. 803; see also 8 Cal. Code Reg. § 13520* (DLSE regulation).

(n183)Footnote 136. *See 8 Cal. Code Reg. § 13520. See, e.g., Amaral v. Cintas Corp. No. 2 (2008) 163 Cal. App. 4th 1157, 1201-1204, 78 Cal. Rptr. 3d 572* (In action alleging Labor Code violations based on employer's violation of city's living wage ordinance, plaintiffs were not entitled to waiting time penalties under *Lab. Code § 203*, where legal obligations imposed on employers by ordinance were unclear at time of employer's violations. There were numerous arguments concerning constitutionality of ordinance and its proper interpretation, and before trial court rulings in case, no court had previously addressed the scope or validity of ordinance).

(n184)Footnote 137. *8 Cal. Code Reg. § 13520*.

(n185)Footnote 138. *See, e.g., Sayre v. Western Bowl (1946) 76 Cal. App. 2d 793, 798-799, 174 P.2d 466, disapproved on other grounds, Reid v. Overland Machined Prods. (1961) 55 Cal. 2d 203, 207-208, 10 Cal. Rptr. 819, 359 P.2d 251*.

(n186)Footnote 139. *Triad Data Servs., Inc. v. Jackson (1984) 153 Cal. App. 3d Supp. 1, 200 Cal. Rptr. 418*.

(n187)Footnote 140. *Triad Data Servs., Inc. v. Jackson (1984) 153 Cal. App. 3d Supp. 1, 12-13, 200 Cal. Rptr. 418*.

(n188)Footnote 141. *Triad Data Servs., Inc. v. Jackson (1984) 153 Cal. App. 3d Supp. 1, 11-12, 200 Cal. Rptr. 418*.

(n189)Footnote 142. *Lab. Code § 209*.

(n190)Footnote 143. *Lab. Code § 209*.

(n191)Footnote 144. *Lab. Code § 257*.

(n192)Footnote 145. *Lab. Code § 207*.

(n193)Footnote 146. *Lab. Code § 207*.

(n194)Footnote 147. *Lab. Code § 207*.

(n195)Footnote 148. *See Lab. Code § 257.*

(n196)Footnote 149. *See Lab. Code § 207.*

(n197)Footnote 150. *See Lab. Code § 207.*

(n198)Footnote 151. *See D.L.S.E. Form 8.*

(n199)Footnote 152. *Lab. Code § 215.*

(n200)Footnote 153. *Lab. Code § 215.*

(n201)Footnote 154. *See Lab. Code § 240(a).*

(n202)Footnote 155. *See Labor Code § 243.*



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 4 Payment of Wages

Part A. TIME, PLACE, AND FORM OF WAGE PAYMENTS

1-4 California Employment Law § 4.02

AUTHOR: By Susan Spurlark, J.D.

§ 4.02 Form of Payment

[1] State Law

Labor Code section 212 prohibits an employer or its agent or officer from issuing any order, check, draft, note, memorandum, or other acknowledgment of indebtedness as payment of wages due, or to become due, or as an advance on wages to be earned, unless the instrument meets all of the following requirements:n1

1. The instrument must be negotiable and payable in cash, on demand, without discount;
2. The instrument must be payable at some established place of business in California, the name and address of which must appear on the instrument; and
3. At the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer of the instrument must have sufficient funds in, or credit, arrangement, or understanding with the drawee for payment of the instrument.

■ CONSULTANT'S COMMENT:

The requirement in *Labor Code section 212* that the instrument issued in payment of wages must be payable at an established place of business in California warrants special mention. Many employers that are domiciled outside California or that use payroll services located outside California issue wage checks drawn on out-of-state financial institutions having no place of business in California. Under *Labor Code section 212*, these wage checks must state on their face a California place of business where they may be cashed. *Commentary by Kirby Wilcox.*

Labor Code section 212 further prohibits an employer from issuing any "scrip, coupon, cards, or other thing redeemable, in merchandise or purporting to be payable or redeemable otherwise than in money" as payment of wages.n2

An employer who violates the provisions of *Labor Code section 212* is guilty of a misdemeanor.ⁿ³ In addition, the employer may be subject to a variety of civil penalties.ⁿ⁴ For discussion of civil penalties under *Labor Code section 225.5*, which apply to violations of *Labor Code section 212*, see § 4.04[2]. For additional discussion of enforcement of wage and hour laws, see Chapter 5.

Labor Code section 212 does not prohibit an employer from guaranteeing the payment of bills incurred by an employee for the "necessaries of life" or for tools or other implements used by the employee in the performance of his or her duties.ⁿ⁵ Section 212 also does not prohibit an employer from depositing wages in an account in any bank, savings and loan association, or credit union of the employee's choice with a place of business located in California, provided that the employee has voluntarily authorized the deposit.ⁿ⁶ If an employer discharges an employee or the employee quits, the employer may pay the wages earned and unpaid at the time the employee is discharged or quits by making a deposit into the account, provided the employer complies with the provisions relating to the payment of wages on termination or quitting of employment.ⁿ⁷

Students of nonprofit schools, colleges, universities, and other nonprofit educational institutions are exempted from the requirements set forth in *Labor Code section 212*.ⁿ⁸

Labor Code section 212 on its face only prohibits payment of wages by certain types of instruments that are not redeemable in cash; it does not prohibit the payment of additional compensation in forms other than cash. Furthermore, section 212 does not expressly prohibit *deductions* from cash wages to cover the costs of meals, lodging, or similar facilities provided by the employer. However, the amount of such deductions and the circumstances under which they may be deducted are both limited by other provisions of state law.ⁿ⁹ For discussion of limitations on crediting of amounts for employer-supplied meals and lodging against the employer's minimum wage obligations, see Chapter 2. For discussion of other limitations on deductions from wages, see § 4.10.

[2] Federal Law

Regulations promulgated pursuant to the FLSA require that minimum wage and overtime compensation payments mandated by the FLSA be made in cash or a negotiable instrument payable at par.ⁿ¹⁰ However, under specified circumstances, the "reasonable cost" or "fair value," as determined by the Secretary of Labor, of food, lodging, and "other facilities" furnished by the employer are included in the definition of "wages" under the FLSA and may therefore be credited toward wage payments required by the FLSA.ⁿ¹¹ For discussion of the circumstances under which food, lodging, and other facilities may be credited against federal minimum wage and overtime obligations, see Chapter 2.

The FLSA regulations prohibit payment of minimum wages and overtime in the form of scrip, tokens, credit cards, "dope checks," coupons, and similar devices since they are neither cash nor "other facilities" within the meaning of the FLSA.ⁿ¹² The regulations do permit employers to use tokens or scrip for purposes of determining the amount of cash wages due at the end of the pay period. For example, wages of piece workers may be calculated by issuing tokens representing a fixed amount of work performed, which are redeemed at the end of the pay period for cash.ⁿ¹³

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Wage Payments

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 212(a)*.

(n2)Footnote 2. *Lab. Code § 212(a)*.

(n3)Footnote 3. *See Lab. Code § 215; see also Penal Code § 476a* (criminal penalty for issuing bad check with intent to defraud).

(n4)Footnote 4. *See Lab. Code § 225.5; see also Civ. Code § 1719* (civil penalty for payment with bad check); *Lab. Code § 203.1* (civil penalty for payment of wages by employer in construction industry with bad check).

(n5)Footnote 5. *Lab. Code § 213(a).*

(n6)Footnote 6. *Lab. Code § 213(d).*

(n7)Footnote 7. *Lab. Code § 213(d).*

(n8)Footnote 8. *Lab. Code § 213(c).*

(n9)Footnote 9. *See 8 Cal. Code Reg. §§ 11010-11150*, P 10 (Cal. Wage Order Nos. 1-2001-15-2001); *11160*, P 9 (Cal. Wage Order. No. 16-2001); *see also Lab. Code § 450* (prohibiting employer from compelling employee or applicant to patronize or purchase anything of value from employer).

(n10)Footnote 10. *See 29 C.F.R. § 531.27(a).*

(n11)Footnote 11. *See 29 U.S.C. § 203(m); 29 C.F.R. § 531.27(b).*

(n12)Footnote 12. *29 C.F.R. § 531.34.*

(n13)Footnote 13. *See 29 C.F.R. § 531.34.*



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 4 Payment of Wages

Part A. TIME, PLACE, AND FORM OF WAGE PAYMENTS

1-4 California Employment Law § 4.03

AUTHOR: By Susan Spurlark, J.D.

§ 4.03 Itemized Statement of Wages and Deductions

[1] General Requirement

Every employer is required to furnish his or employees with an itemized statement of wages and deductions either semi-monthly or at the time of each payment of wages.ⁿ¹ The statement must either be a detachable part of the check, draft, or voucher paying the wages, or a separate statement, if the wages are paid by personal check or cash.ⁿ² The written statement must contain the following information:ⁿ³

1. Gross wages earned by the employee;
2. Total hours worked by the employee, except for an employee whose compensation is solely based on a salary and who is exempt from payment of overtime;^{n3.1}
3. The number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;
4. A separate listing of all deductions made from the gross wages, except that all deductions made at the written request of the employee may be aggregated and shown as a separate item;
5. Net wages earned;
6. The dates of the beginning and the end of the period for which the employee is being paid;
7. The employee's name and his or her social security number, except that by January 1, 2008, only the last four digits of the social security number or an employee identification number other than a social security number may be shown on the check;

8. The employer's name and address; and

9. All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

An opinion letter from DLSE states that the obligation to list the total hours worked during the pay period can only be satisfied by listing the precise, actual number of hours worked. If it is left to the employee to add up the daily hours shown on the time cards or other records so that the employee must perform arithmetic computations to determine the total hours worked during the pay period, the requirements of Section 226 would not be met.ⁿ⁴

Deductions made from cash payments of wages must be recorded in ink or other indelible form, and properly dated, showing the month, day, and year.^{n4.1} A copy of either the itemized statement, or a record of the deductions, must be kept on file by the employer for at least three years at either the place of employment or a central location within California.ⁿ⁵ The employer must afford a current or former employee the right to inspect and copy records of this information pertaining to that current or former employee, on reasonable request to the employer.ⁿ⁶

The employer may take reasonable steps to assure the identity of the current or former employee, and, if the employer provides copies of records, it may charge the current or former employee the actual cost of reproduction.ⁿ⁷ An employer who receives a written or oral request to inspect or copy records pertaining to a current or former employee must comply with the request as soon as practicable, but no later than 21 calendar days from the date of the request. A violation of this obligation is an infraction.ⁿ⁸ Impossibility of performance, not caused by or a result of a violation of law, is an affirmative defense for an employer in any action alleging a violation of this requirement. An employer may designate the person to whom a request will be made.ⁿ⁹ An employer's failure to permit a current or former employee to inspect or copy records in a timely manner entitles the current or former employee or the Labor Commissioner to recover a \$750 penalty from the employer.ⁿ¹⁰ An employee may also sue for injunctive relief to ensure compliance with *Lab. Code* § 226 and is entitled to an award of costs and reasonable attorney's fees.ⁿ¹¹

For full discussion of recordkeeping requirements, see Chapter 7.

[2] Exceptions

Owners and occupants of residential dwellings who employ persons to perform duties incidental to the ownership, maintenance, or use of the residence, including the care and supervision of children, or duties that are of a personal nature and are not in the course of the trade, business profession, or occupation of the owner or occupant of the residence are exempt from the Labor Code provision requiring written statements.ⁿ¹² However, such employers are required to maintain certain records regarding identities, wages, and hours worked by employees.ⁿ¹³ For additional discussion of recordkeeping requirements, see Chapter 7.

Labor Code Section 226 does not apply to the state, or any city, county, city and county, district, or any other governmental entity, except that if the governmental entity furnishes its employees with a check, draft, or voucher paying the employee's wages, the state or a city, county, city and county, district, or other governmental entity must, by January 1, 2008, use no more than the last four digits of the employee's social security number or an employee identification number other than the social security number on the check, draft, or voucher.ⁿ¹⁴

[3] Penalties for Failure to Provide Statement

An employer who violates the itemized statement provisions may face a civil penalty of \$250 per employee for each violation in an initial citation and \$1000 per employee for each violation in a subsequent violation.ⁿ¹⁵ In enforcing this provision, the Labor Commissioner has discretion not to penalize the employer for a first violation if the violation was due to a clerical error or inadvertent mistake.ⁿ¹⁶ The penalty may be imposed by the Labor Commissioner by citation

after notice and opportunity for a hearing.ⁿ¹⁷ For further discussion of enforcement procedures, see Chapter 5.

An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with *Lab. Code* § 226(a) is entitled to recover the greater of all actual damages or \$50 for the initial pay period in which a violation occurs, and \$100 per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of \$4,000, and is entitled to an award of costs and reasonable attorney's fees.ⁿ¹⁸ A prevailing employee is entitled to an award of reasonable attorney's fees under *Lab. Code* § 226(e) as a matter of right.^{n18.1}

■ CONSULTANT'S COMMENT:

As a practical matter, it is difficult to imagine the circumstance in which an employee would secure entitlement to the \$50 and \$100 penalties specified in *Labor Code* § 226(e). Entitlement is a function of proof both that an employer knowingly and intentionally failed to provide a conforming wage statement and that the failure caused injury. Although it is possible, for example, that a wage statement might misstate an employee's earnings and cause an employee to overdraft an account and suffer overdraft charges, such errors are typically clerical and not the result of intentional conduct. *Commentary by Kirby Wilcox*

In addition, an employer who knowingly and intentionally fails to provide itemized statements of wages and deductions as required by statute is guilty of a misdemeanor, punishable by a fine of not more than \$1,000 or imprisonment not to exceed one year, or both.ⁿ¹⁹ This penalty also applies to any officer, agent, employee, fiduciary of the employer, or any other person who is in control, receipt, custody, or disposal of the wages due to an employee and who knowingly or intentionally participates or aids in the violation of the statement requirements.ⁿ²⁰ This penalty is in addition to any others provided by law.ⁿ²¹ This penalty does not apply to the state, or any city, county, city and county, district, or any other governmental entity.ⁿ²²

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws Wage Payments

FOOTNOTES:

(n1)Footnote 1. *Lab. Code* § 226(a); 8 *Cal. Code Reg. §§ 11010-11150*, P 7 (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 6 (Cal. Wage Order. No. 16-2001).

(n2)Footnote 2. *Lab. Code* § 226(a); 8 *Cal. Code Reg. §§ 11010-11150*, P 7(B) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 6(B) (Cal. Wage Order No. 16-2001).

(n3)Footnote 3. *Lab. Code* § 226(a); see 8 *Cal. Code Reg. §§ 11010-11150*, P 7(B) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 6(B) (Cal. Wage Order. No. 16-2001).

(n4)Footnote 3.1. See *Lab. Code* § 515(a) and applicable orders of the Industrial Welfare Commission. For discussion of exemptions from payment of overtime, see Ch. 3. See *Cicairos v. Summit Logistics, Inc.* (2005) 133 *Cal. App. 4th* 949 (employer violated *Lab. Code* § 226 and IWC Wage Order 9 § 7 [8 *Cal. Code Reg. § 11090(7)*] by failing to give truck drivers adequate itemized wage statements, where earnings statements provided to drivers were confusing and did not reflect accurate information and trip summaries did not remedy deficiencies in earnings statements, and where earnings statements and driver trip summaries failed to list employer's name and address). See also *Lab. Code* § 204(b)(2) (employer is in compliance with requirements of *Lab. Code* § 226(a) relating to total hours worked by employee, if hours worked in excess of normal work period during current pay period are itemized as corrections on pay stub for next regular pay period, and any corrections set out in subsequently issued pay stub must state inclusive dates of pay period for which employer is correcting its initial report of hours worked).

(n5)Footnote 4. Dept. of Industrial Relations, DLSE, Opinion Letter 2002.05.17, p. 3, quoted in *Cicairos v. Summit Logistics, Inc.* (2005) 133 Cal. App. 4th 949 .

(n6)Footnote 4.1. *Lab. Code* § 226(a).

(n7)Footnote 5. *Lab. Code* § 226(a).

(n8)Footnote 6. *Lab. Code* § 226(b).

(n9)Footnote 7. *Lab. Code* § 226(b).

(n10)Footnote 8. *Lab. Code* § 226(c).

(n11)Footnote 9. *Lab. Code* § 226(c).

(n12)Footnote 10. *Lab. Code* § 226(f).

(n13)Footnote 11. *Lab. Code* § 226(g).

(n14)Footnote 12. *Lab. Code* § 226(d).

(n15)Footnote 13. *See Lab. Code* § 1174.

(n16)Footnote 14. *Lab. Code* § 226(h).

(n17)Footnote 15. *See Lab. Code* § 226.3.

(n18)Footnote 16. *See Lab. Code* § 226.3.

(n19)Footnote 17. *See Lab. Code* §§ 226.4, 226.5.

(n20)Footnote 18. *Lab. Code* § 226(e).

(n21)Footnote 18.1. *Harrington v. Payroll Entertainment Services, Inc.* (2008) 160 Cal. App. 4th 589, 593-594, 72 Cal. Rptr. 3d 922 (employee who successfully settled claim under *Lab. Code* § 226 was entitled as matter of right to reasonable fee; given nature of dispute and amount of settlement, trial court could not reasonably award amount in excess of \$ 500).

(n22)Footnote 19. *Lab. Code* § 226.6.

(n23)Footnote 20. *Lab. Code* § 226.6.

(n24)Footnote 21. *Lab. Code* § 226.6.

(n25)Footnote 22. *Lab. Code* § 226(h).



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 4 Payment of Wages

Part A. TIME, PLACE, AND FORM OF WAGE PAYMENTS

1-4 California Employment Law § 4.04

AUTHOR: By Susan Spurlark, J.D.

§ 4.04 Wage Disputes

[1] Procedure for Resolution

As discussed previously,ⁿ¹ California law requires prompt payment of wages due to employees on the specified payday.ⁿ² Failure to pay wages when due may lead to the imposition of civil and criminal penalties.ⁿ³

When there is a dispute about the amount of wages due, the employer is required to pay, without any condition, any part of the employee's wages that the employer concedes is due within the time limits set by law.ⁿ⁴ As to any remaining balance claimed to be due, the employee may pursue any remedies available to him or her.ⁿ⁵ An employee's remedies include a hearing before the Labor Commissioner, followed by a de novo court appeal,ⁿ⁶ or an independent civil action.ⁿ⁷ These remedies and applicable procedures are discussed in Chapter 5.

[2] Penalties for Willful Failure to Pay Wages

In addition to the penalties applicable to violations of specific provisions of the Labor Code governing wage payment,ⁿ⁸ which are referred to elsewhere in this chapter, *Labor Code section 216* makes it a misdemeanor (1) for an employer who has the ability to pay wages to willfully refuse to pay wages that are due and payable after a demand has been made,ⁿ⁹ or (2) for an employer to falsely deny the amount or validity of a wage claim, or that wages are due, with the intent to secure any discount of the wages due or with the intent to annoy, harass, oppress, hinder, delay, or defraud the person to whom the wages are due.ⁿ¹⁰

Violations of *Labor Code section 216* may also result in the imposition of the following civil penalties:

1. For the first violation, \$100 for each failure to pay each employee;ⁿ¹¹ and
2. For each subsequent violation, or any willful or intentional violation, \$200 for each failure to pay each employee, plus 25% of the amount unlawfully withheld.ⁿ¹²

The penalty may be recovered by the Labor Commissioner as part of a hearing held to recover unpaid wages and penalties or in an independent civil action.ⁿ¹³

A court does not have discretion to forgo imposing penalties under *Labor Code section 225.5*, even when there is a good faith dispute as to whether wages were due.ⁿ¹⁴

If after investigation and hearing of a wage claim, the Labor Commissioner upholds the validity of the claim, *Labor Code section 206(b)* requires that the employer pay the amount found to be due within ten days after the employer receives notice of the amount due. If the employer has ability to pay the amount due and willfully fails to do so within ten days, the employer will, in addition to all other penalties, be required to pay treble the amount of damages to the employee that occurred as a "direct and foreseeable consequence" of the failure to pay,ⁿ¹⁵ unless the employer files its notice of appeal of the Commissioner's decision within that period.ⁿ¹⁶ For discussion of proceedings before the Labor Commissioner, see Chapter 5.

Employers who fail to make timely payment of wages may also be required to furnish a bond in order to secure future compliance.ⁿ¹⁷

[3] Prohibition Against Requiring Release of Wage Claims

An employer may not require the execution of a release of any claim or right on account of wages due unless the wages have been paid.ⁿ¹⁸ Any release that violates this rule is null and void as between the employer and employee, and the violation is a misdemeanor.ⁿ¹⁹ For these purposes, "execution of a release" includes requiring an employee, as a condition of being paid, to execute a statement of the hours the employee worked during a pay period, which the employer knows to be false.ⁿ²⁰

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 4.01.

(n2)Footnote 2. *See generally* *Lab. Code* §§ 201-210, 215-216.

(n3)Footnote 3. *See Lab. Code* §§ 203, 210, 215, 216, 225, 225.5; *see also* discussion in [2], *below*, and in §§ 4.01[1][g], [2][e], 4.03[3].

(n4)Footnote 4. *Lab. Code* § 206(a).

(n5)Footnote 5. *Lab. Code* § 206(a).

(n6)Footnote 6. *See Lab. Code* §§ 98, 98.2.

(n7)Footnote 7. *See Lab. Code* § 218.

(n8)Footnote 8. *See, e.g., Lab. Code* §§ 203, 210.

(n9)Footnote 9. *Lab. Code* § 216(a).

(n10)Footnote 10. *Lab. Code* § 216(b).

(n11)Footnote 11. *Lab. Code § 225.5(a)*. See *Amaral v. Cintas Corp. No. 2 (2008) 163 Cal. App. 4th 1157, 1207-1209, 78 Cal. Rptr. 3d 572* (each time employer fails to pay its employee in accordance with specified Labor Code provision, penalty will result under *Labor Code § 225.5(a)*; until employer has been notified it is violating Labor Code provision, whether or not commissioner or court chooses to impose penalties, employer cannot be presumed to be aware that its continuing underpayment of employees is "violation" subject to penalties; but after employer has learned its conduct violates Labor Code, employer is on notice that any future violations will be punished like violations that are willful or intentional at twice the rate of penalties that could have been imposed or that were imposed for initial violation).

(n12)Footnote 12. *Lab. Code § 225.5(b)*.

(n13)Footnote 13. *Lab. Code § 225.5(a)*.

(n14)Footnote 14. *Amaral v. Cintas Corp. No. 2 (2008) 163 Cal. App. 4th 1157, 1209-1213, 78 Cal. Rptr. 3d 572*

(n15)Footnote 15. *Lab. Code § 206(b)*.

(n16)Footnote 16. See *Triad Data Services, Inc. v. Jackson (1984) 153 Cal. App. 3d Supp. 1, 7-8, 200 Cal. Rptr. 418*; see also *Lab. Code § 98.2(a)* (right to de novo judicial review of Labor Commissioner's decision).

(n17)Footnote 17. See *Lab. Code §§ 240(a), 243*; see also discussion in Chapter 5.

(n18)Footnote 18. *Lab. Code § 206.5(a)*.

(n19)Footnote 19. *Lab. Code § 206.5(a)*.

(n20)Footnote 20. *Lab. Code § 206.5(b)*.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 4 Payment of Wages

Part A. TIME, PLACE, AND FORM OF WAGE PAYMENTS

1-4 California Employment Law § 4.05

AUTHOR: By Susan Spurlark, J.D.

§ 4.05 Payment of Employees of Unlicensed Subcontractor

An employee of an unlicensed subcontractor may assert a wage claim against the general contractor. In *Sanders Construction Co. v. Cerda*, n1 laborers who worked for an unlicensed subcontractor filed wage claims against the general contractor with the Labor Commissioner, seeking wages, interest, and waiting time penalties.n2 The Court of Appeal found that the general contractor was the statutory employer of the laborers by the operation of *Labor Code* § 2750.5, which does not apply only to cases involving workers' compensation and unemployment benefits.n3

FOOTNOTES:

(n1)Footnote 1. *Sanders Construction Co. v. Cerda* (2009) 175 Cal. App. 4th 430, 433-436, 95 Cal. Rptr. 3d 911 .

(n2)Footnote 2. *See Lab. Code* §§ 98.1, 202, 203.

(n3)Footnote 3. *See Lab. Code* § 2750.5 (under workers' compensation law, rebuttable presumption affecting burden of proof that worker performing services for person required to obtain license is employee rather than independent contractor). *See also Bus. & Prof. Code* §§ 7031(a) (prohibiting legal action by unlicensed contractor), 7053 (limiting application of § 7031); *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal. 3d 5, 15, 219 Cal. Rptr. 13, 706 P.2d 1146 (pursuant to plain language of *Lab. Code* § 2750.5, unlicensed subcontractor is deemed statutory employee of general contractor); *Hunt Building Corp. v. Bernick* (2000) 79 Cal. App. 4th 213, 220, 93 Cal. Rptr. 2d 883 (*Lab. Code* § 2750.5 operates to conclusively determine that general contractor is employer of its unlicensed subcontractors and those employed by unlicensed subcontractors); *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal. App. 3d 325, 328, 265 Cal. Rptr. 788 (general contractor is liable to EDD for unpaid contributions and withholding taxes for its unlicensed subcontractor's employees); *Rinaldi v. Workers' Comp. Appeals Bd.* (1987) 196 Cal. App. 3d 571, 574, 242 Cal. Rptr. 895 (where subcontractor is unlicensed, workers' compensation liability for subcontractor's employees will be imposed on general contractor as matter of law). *But see Furtado v. Schrieffer* (1991) 228 Cal. App. 3d 1608, 1616-1617, 280 Cal. Rptr. 16 (statutory employee presumption in *Lab. Code*, § 2750.5 supplements but does not override statutory definitions of employee and independent contractor).



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 4 Payment of Wages

Part A. TIME, PLACE, AND FORM OF WAGE PAYMENTS

1-4 California Employment Law §§ 4.06 through 4.09

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§§ 4.06[Reserved]



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 4 Payment of Wages

Part B. WAGE DEDUCTIONS, ASSIGNMENTS, AND GARNISHMENTS

1-4 California Employment Law § 4.10

AUTHOR: By Susan Spurlark, J.D.

§ 4.10 Wage Deductions and Set-Offs

[1] California Law

[a] Authorized Deductions

[i] Generally

An employer's right to deduct from or withhold a portion of wages when due is limited by a variety of provisions in the Labor Code,ⁿ¹ Industrial Welfare Commission wage orders,ⁿ² and case law. The limitations are discussed in subsections [b]-[g], below.

Permissible deductions from wages may generally be classified as follows:ⁿ³

1. Deductions that are required or authorized by state or federal law;
2. Deductions that are expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute; and
3. Deductions to cover health and welfare or pension plan contributions that are expressly authorized by a collective bargaining or wage agreement.

[ii] Examples of Deductions Required or Authorized by Law

Examples of deductions expressly required by law are deductions for state and federal income taxes, social security taxes, and state disability insurance taxes. Other examples are deductions pursuant to the statutory procedures for wage garnishment.ⁿ⁴

Labor Code Section 2928 authorizes an employer to make deductions from wages for tardiness that are proportionate to the wage that would have been earned during the time actually lost, or for a half-hour's wages if the time lost is less than 30 minutes. In addition, under some circumstances, an employer may deduct certain losses caused by an employee from his or her wages, as further discussed in [c], *below*.ⁿ⁵

[iii] Examples of Deductions Authorized by Employee

Examples of items that may be deducted from wages if authorized in advance by the employee in writing include:

1. Premiums for life, health, or disability insurance;ⁿ⁶
2. Deductions made pursuant to voluntary wage assignments complying with the requirements of the Labor Code;ⁿ⁷
3. Contributions to pension or retirement plans;ⁿ⁸
4. Deductions from final pay check to recoup the cost of uniforms and equipment that are provided by the employer and that are not returned by the employee on completion of the job;ⁿ⁹ and
5. Periodic deductions from wages authorized by employee to repay certain types of indebtedness owed to the employer.ⁿ¹⁰

[b] Wage Deductions or Setoffs to Recover Debts Owed by Employee to Employer

No provision of the Labor Code specifically regulates the use of wage deductions to setoff debts owed to the employer by an employee. Setoffs are defined as an equitable principle that "either party to a transaction involving mutual debts and credits can strike a balance, holding himself owing or entitled only to the net difference."ⁿ¹¹ Employers have often used deductions from wages as a means of recovering amounts owed by employees in a variety of situations, including repayment of employee loans, recoupment of wage overpayment and wage advances, and payment for employee purchases.

In *Barnhill v. Robert Saunders & Co.*,ⁿ¹² a court of appeal imposed limitations on an employer's right to recoup an employee's debt to the employer by deducting the amount owed from the employee's wages. *Barnhill* involved a situation in which an employee had signed a promissory note allowing the deduction of a specified amount from her wages each pay period in order to pay a debt owed to the employer. At the time of termination, the employer accelerated the indebtedness and deducted the entire amount of the outstanding balance from the employee's final paycheck, leaving the employee with no net pay.ⁿ¹³ The court of appeal held that the employer was not permitted to offset the indebtedness due against the wages owed to the employee.ⁿ¹⁴ The court reasoned that to permit such an offset would in effect allow the employer to obtain prejudgment attachment of the employee's wages, despite the fact that wages are completely exempt from attachment pursuant to *Code of Civil Procedure Sections 487.020(c)* and *706.011(a)*.ⁿ¹⁵

The Division of Labor Standards Enforcement (DLSE) has interpreted *Barnhill* as prohibiting an employer from deducting from the employee's final paycheck any amount representing the unpaid balance of a debt owed by the employee to the employer, which was the specific action taken by the employer in *Barnhill*.ⁿ¹⁶ Such deductions are prohibited even if the indebtedness is evidenced by a written promise to pay "on demand."ⁿ¹⁷ Examples of the kinds of indebtedness that the DLSE regards to be governed by *Barnhill* include:ⁿ¹⁸

1. Loans to the employee;
2. Obligations incurred from a product purchase plan;

3. Educational assistance;
4. Moving expenses that the employee agrees to reimburse in whole or in part;
5. Amounts owed to the employer by purchases charged on a monthly revolving account; and
6. Overpayment of wages or salaries if the employee was not aware or could not reasonably be expected to have been aware of the overpayment.

However, the DLSE's interpretive bulletin on *Barnhill* also states that "[w]ith regard to indebtedness, the periodic amount regularly deducted with the employer's [sic, employee's] written authorization may be deducted from the final paycheck," as long as the employer does not attempt to deduct the entire outstanding indebtedness in the final check.ⁿ¹⁹

■ CONSULTANT'S COMMENT:

Whether an employer may deduct salary or wage advances from a final paycheck is unclear. The 1985 interpretive bulletin regarding *Barnhill* ⁿ²⁰ indirectly addresses the issue by sanctioning the deduction of salary and wage overpayments from final paychecks if an employee is aware or reasonably could have been expected to be aware of the overpayment. The 1986 interpretive bulletin regarding vacation payⁿ²¹ directly addresses the issue by declaring vacation advances to be wage advances and stating that "an employer will be permitted to reconcile the account and recoup the wage advances from the employee's final paycheck." The 1988 court of appeal decision in *California State Employees' Ass'n v. State of California*, ⁿ²² however, seriously undermines the validity of both interpretive bulletins by declaring inadvertent wage overpayments to be debts that are not recoverable by setoff from any paycheck. The court held that the employer's exclusive remedy in such circumstances are the state's wage garnishment and attachment laws. A 1991 unpublished opinion letter by H. Thomas Cadell, Jr., chief counsel for the Labor Commissioner at that time, further complicates the issue by citing the *Barnhill* and *State Employees* cases as authority for the proposition that a signing bonus that is deemed an advance on wages and that is extinguished if the recipient remains employed for a specified period is a debt that cannot be deducted from the final paychecks. The opinion letter does not cite either the 1985 or 1986 interpretive bulletins mentioned above and would appear to overrule them, but for comments in its closing paragraphs. Specifically, the Chief Counsel indicates that an employer may advance wages already earned but not yet payable, provided that the deduction is made from the paycheck for the same payroll period (even if it is the final paycheck). In addition, the Chief Counsel's letter appears to regard as lawful the deduction from final paychecks of draws or advances on sales commissions, provided that the deduction is the subject of a prior agreement, the deduction is made from a commission payment, and the deduction does not leave the employee with less than the minimum wage for the services performed. Note, however, that a separate unpublished opinion letter from 1990 by Chief Counsel Cadell severely limits the right of an employer to make deductions from subsequent sales commissions under circumstances in which prior commissions were paid for sales that have become delinquent or uncollectible.

Such inconsistent authority is disconcerting. Employers, therefore, should be wary of adopting or continuing any policies or practices that contemplate salary, wage, or commission deductions without first consulting a competent personnel professional or attorney. *Commentary by Kirby Wilcox.*

Moreover, in *Phillips v. Gemini Moving Specialists*, ⁿ²³ the court of appeal held that there is a fundamental public policy against an employer's retaliation for its employee having asserted a right to be free of the employer's withholding of pay.ⁿ²⁴ The court cited *Barnhill v. Robert Saunders & Co.* ⁿ²⁵ That holding was based on the rationale that the state's wage exemption statutes were meant to protect an employee's basic standard of living regardless of any debts

owed.ⁿ²⁶ The *Phillips* court found a clear fundamental and substantial public policy, set forth in many Labor Code sections and in *Code of Civil Procedure, section 487.020*, protecting an employee's wages generally and further protecting wages from setoffs such as the one in this case, taken without written authorization, contrary to plaintiff's request, and for an amount in excess of the agreed-on sum.ⁿ²⁷

[c] Cash Shortages, Breakage, and Loss of Equipment or Uniforms

[i] General Prohibition Against Deduction for Simple Negligence

An employer may not make any deduction from an employee's wage (or require any reimbursement from the employee) because of a cash shortage, breakage, or loss of equipment that results from simple negligence.ⁿ²⁸ Such losses are regarded by law as the costs of doing business that must be borne by the employer. Allowing deductions from wages to cover those losses would obviate the need for the rules governing the use of cash bonds to secure proper performance.ⁿ²⁹ This rule also bars bonuses that are based in part on the amount of cash shortages or other losses.ⁿ³⁰

[ii] Limited Exceptions for Dishonest or Willful Acts or Gross Negligence

All California wage orders except the wage order governing employees in certain on-site construction, drilling, logging, and mining occupations permit an employer to make a deduction from an employee's wages for cash shortage, breakage, or loss of equipment if the employer can show that the shortage, breakage, or loss was caused by a dishonest or willful act, or by the gross negligence of the employee.ⁿ³¹ Substantially the same provision was upheld in *Kerr's Catering Service v. Department of Industrial Relations*.ⁿ³² However, before making such a deduction, the employer should have proof that the loss was caused by the employee to be charged and that the loss was the result of dishonesty, willful conduct, or gross negligence, rather than simple negligence; the Labor Commissioner places the burden on the employer to establish these facts by the weight of the evidence.ⁿ³³ If the employer fails to meet the burden of proof, waiting time penalties under *Labor Code Section 203* may be assessed.ⁿ³⁴

The decision in *Barnhill v. Robert Saunders & Co.* ⁿ³⁵ arguably casts some doubt on the continuing validity of the wage order provision allowing wage deductions for losses caused by dishonest or willful conduct or gross negligence. As discussed in [b], *above*, the court in *Barnhill* held that an employer may not deduct a debt owed by the employee from the employee's final paycheck.ⁿ³⁶ The rationale behind the court's decision was that such a deduction was tantamount to prejudgment attachment of an employee's wages and was contrary to the legislative policy behind the statutory exemption of such wages from attachment.ⁿ³⁷ Although the facts in *Barnhill* involved an outstanding *contractual* indebtedness, rather than a wage deduction based on cash shortages or damage to the employer's property, the rationale behind the court's decision seems equally applicable to the latter situation. In addition, one court of appeal, in applying the analysis in *Barnhill v. Robert Saunders & Co.*, ⁿ³⁸ has held that there is a fundamental public policy against an employer's retaliation for its employee having asserted a right to be free of the employer's withholding of pay.ⁿ³⁹

[iii] Limited Exception for Failure to Return Equipment or Uniforms

Wage orders 1-2001 through 15-2001 also provide an exception to the prohibition against deductions for losses in cases in which an employee fails to return a uniform or equipment issued to him or her by the employer and has given a prior written authorization for the deduction.ⁿ⁴⁰

[d] Gratuities

[i] Generally

Under the Labor Code, any gratuities received by an employee are deemed to be his or her sole property, and an employer generally may not collect, take, or receive any gratuity (or any part thereof) that is paid, given to, or left for an

employee by a patron.ⁿ⁴¹ Except as indicated *below*, the employer also may not deduct any such amount from the wages owed to the employee or credit that amount toward the employee's wages.ⁿ⁴² In this context, a gratuity includes any tip, money, or part thereof, that has been paid or given to or left for an employee by the patron of a business over and above the amount actually due to the business for services rendered or for goods, food, drink, or articles sold or served to the patron.ⁿ⁴³ The employer is required to keep records of gratuities it receives or holds for any purpose.ⁿ⁴⁴ A violation of these provisions is a misdemeanor.ⁿ⁴⁵

The DLSE's position is that compulsory service charges imposed on customers (e.g., service charges added to food costs for large banquets) are not gratuities or tips within the meaning of *Labor Code section 351*, but are part of the employer's gross receipts. Such service charges are therefore not considered the property of the employees who performed the services.ⁿ⁴⁶ The Labor Commissioner also stated that if a portion of the service charge is subsequently paid to employees, the charges are considered wages, which may be credited against the employer's minimum wage obligations, but which also must be included in the employee's regular rate of pay for purposes of computing overtime compensation.ⁿ⁴⁷

An employer that permits patrons to pay gratuities by credit card must pay the employees the full amount of the gratuity that the patron indicated on the credit card slip, without any deductions for any credit card payment processing fees or costs that may be charged to the employer by the credit card company.ⁿ⁴⁸ Payment of gratuities made by patrons using credit cards shall be made to the employees not later than the next regular payday following the date the patron authorized the credit card payment.ⁿ⁴⁹

Under certain circumstances, the FLSA permits an employer to credit tips received by its employees against its minimum wage and overtime obligations.ⁿ⁵⁰ However, this provision is of no use to California employers, since *Labor Code Section 351* prevents an employer from crediting tips received by employees against the state or federal minimum wage.ⁿ⁵¹ For further discussion of crediting tips toward minimum wage obligations, see Chapter 2.

[ii] Tip-Pooling Agreements

The DLSE has indicated that tip splitting or pooling arrangements, whether voluntary or involuntary, do not violate the provisions of *Labor Code Section 351*, and are permissible, so long as certain requirements are met.ⁿ⁵² The DLSE reasons that even involuntary tip-pooling is permissible because *Labor Code Section 351* contemplates that a particular tip could have been left by a patron for more than one employee, and it generally would not be feasible to find out what portion of each tip was intended to be left for which employees. Hence, an employer may adopt a reasonable policy requiring employees to contribute to a tip-pooling arrangement, as long as the employer does not share in any part of the tips.ⁿ⁵³ Courts of appeal also have held that *Labor Code Section 351* does not prohibit employers from requiring pooling of tips.ⁿ⁵⁴

In *Jameson v. Five Feet Restaurant, Inc.*,^{n54.1} a court found that there was substantial evidence that a restaurant's floor managers were "agents" of the restaurant as defined by *Labor Code section 350(d)*, and therefore the restaurant's policy requiring servers to give the floor manager 10 percent of their nightly tips violated *Labor Code section 351*. For these purposes, "employer" and "agent" are defined in *Labor Code section 350*.^{n54.2} Section 350(d) does not require that an agent's duties exclusively consist of hiring, discharging, or supervising employees or require that an agent spend the majority of his or her time performing those functions. Therefore, it is irrelevant that the agents perform other duties in addition to the functions described in section 350(d).ⁿ⁵⁵

On the other hand, an employer may require equitable allocation of tips placed in a collective tip box for employees providing service to the customer, even when an employee also has limited supervisory duties, and even if the supervisor could be considered to be an "agent" under *Labor Code § 350*. Section 351 does not prohibit an employee who is also an agent from keeping his or her own tip.ⁿ⁵⁶

The California Supreme Court has accepted review of *Grodensky v. Artichoke Joe's Casino*.^{n56.1}

For discussion of restitution as a remedy for tip-pooling violations under the Unfair Competition Law, *see* Ch. 70, *Trade Secrets, Unfair Competition, and Related Issues*, § 70.03[2][e].

[e] Costs of Physical and Medical Examinations

Labor Code Section 222.5 forbids any deduction from wages, or any other requirement that an employee or applicant pay, for the cost of any pre-employment medical or physical examination taken as a condition of employment.ⁿ⁵⁷ The statute further prohibits an employer from deducting from wages or requiring an employee to pay for any medical or physical examination required by state, federal, or local law or regulation.ⁿ⁵⁸ Under the DLSE's interpretation of this provision, an employer *may* require an *applicant* to pay for pre-employment medical or physical examinations that are required by law as a condition of employment, but may not require an existing employee to pay for a legally-required examination during the course of employment.ⁿ⁵⁹ A violation of this provision is a misdemeanor.ⁿ⁶⁰

Labor Code Section 231 requires an employer to pay for the cost of a physical examination for an employee required in connection with the issuance of a driver's license when the employer requires the driver's license as a condition of employment.ⁿ⁶¹

If an employer requests that an employee obtain a second or third opinion as to whether or not he or she needs to take a medical leave under the family care leave provisions of the Government Code,ⁿ⁶² the employer must pay for the costs involved with obtaining those opinions.ⁿ⁶³

[e.1] Cost of Workers' Compensation

Labor Code Section 3751(a) prohibits an employer from exacting or receiving any contribution, or making or taking any deduction from the earnings of any employee, either directly or indirectly, to cover the whole or part of the cost of workers' compensation.ⁿ⁶⁴ An employer's violation of this provision is a misdemeanor.ⁿ⁶⁵

[f] Costs of Bonds and Photographs

Labor Code Section 401 requires an employer to pay the cost of bonds or photographs required for employment.ⁿ⁶⁶ A violation of *Labor Code Section 401* is a misdemeanor.ⁿ⁶⁷

[g] Other Statutorily Prohibited Withholding

Unless otherwise authorized, *Labor Code Section 221* makes it unlawful for an employer to collect or receive from its employees any part of the wage previously paid to the employee. This is the "anti-kickback" statute, and a violation of its provisions constitutes a misdemeanor.ⁿ⁶⁸ In *Steinhebel v. Los Angeles Times Communications*,^{n68.1} the court found that an employer's chargeback of commission advances on newspaper subscriptions against telemarketers' future advances on commission if customers did not keep their subscriptions was not a violation of Section 221. The telemarketers were aware that a sale did not qualify as a "commissionable order" until the customer kept the subscription for 28 days, and the telemarketers agreed that they would receive advances before the employer could ascertain whether the sales would actually ripen into "commissionable orders." The court held that advances on commissions did not constitute the payment of "wages," and the 28-day requirement was a condition precedent to the telemarketers' entitlement to a commission. On the other hand, in *Harris v. Investor's Business Daily, Inc.*,^{n68.2} the trial court erred in granting the employer's motion for summary adjudication that the employer's chargeback policy was lawful. Under the policy, newspaper subscription telemarketers were "charged back" the points earned from a sale if the customer cancelled within 16 weeks, which affected commissions and any bonuses earned by the employee. The appellate court distinguished *Steinhebel* on the ground that in *Steinhebel*, the employment agreement clearly identified the commission as an advance; because a condition to the employee's right to the commission had yet to occur, an

advance was not a wage within the meaning of *Labor Code section 221*. Unlike the employees in *Steinhebel*, the *Harris* telemarketers did not expressly agree to the chargeback policy in writing. Further, even if the employees knew about the policy, the employer's materials suggested that the points were earned at the time of the sale, not at some designated point in the future.

Labor Code Sections 222 and 223 bar payment of less than the wage called for by a collective bargaining agreement or by statute or other wage agreement. In the case of wages set by collective bargaining agreements, a violation occurs when the contractual rate is withheld either willfully, unlawfully, or with an intent to defraud an employee, a competitor, or any other person.ⁿ⁶⁹ The fact that an individual employee has signed a private agreement to the lower wage rate is not sufficient to overcome the requirements of the contract.ⁿ⁷⁰ *Labor Code Section 223* bars the "secret" payment of wages at a rate that is less than that set by contract or statute (for example, state and federal minimum wage rates).^{n70.1} Such an unlawful withholding may occur when the deduction for meals or other facilities is exorbitant.ⁿ⁷¹ Violations of these provisions are also misdemeanors.ⁿ⁷²

Labor Code Section 224 prohibits deductions for taxation by local jurisdictions of employees working but not residing in that jurisdiction if resident employees are not similarly taxed, irrespective of any employee authorization.ⁿ⁷³ *Section 224* also provides that *Labor Code sections 221, 222, and 223* do not make it unlawful for an employer to withhold or divert any portion of an employee's wages when a deduction is expressly authorized in writing by the employee to cover deductions not amounting to a rebate or deduction from the standard wage. In *Koehl v. Verio, Inc.*,^{n73.1} sales associates' compensation plans provided for base pay and payment of commissions when an order was booked, but which the employer could recover or charge back if specified conditions were not met. Thus, under *Labor Code section 224*, the chargebacks were made pursuant to written commission plans which expressly authorized them. Further, the chargebacks were not taken against the employee's standard wage. Although "standard wage" is not defined in section 224, common usage of the term refers to an employee's base pay, and the associates themselves referred to their base pay as their "standard" wage.

[h] Deduction of Unidentified Returns From Earned Commissions

A court of appeal has held that a retail employer's policy of deducting a proportionate amount of "unidentified returns" (i.e., returns of merchandise for which it was not possible to identify the specific salesperson who had sold the merchandise) from the earned commissions of all sales employees violated state wage and hour law.ⁿ⁷⁴ Relying in part on a previous California Supreme Court decision involving deductions for cash and merchandise shortages,ⁿ⁷⁵ the court held that the employer's policy violated *Labor Code Section 221* (discussed in [g], above), which prohibits an employer from receiving back any part of wages previously paid by the employer to an employee.ⁿ⁷⁶ The court rejected the employer's argument, backed by a private opinion letter written by the Labor Commissioner, that the amounts withheld were not a deduction, but merely a device for taking account of returned merchandise as a basis for computing employees' commissions. The court observed that to the extent the employer deducts for unidentified returns resulting from *other employees'* abuse, the conscientious sales person is required to return a portion of commissions that he or she has legitimately earned from completed sales in order to compensate the employer for commissions paid on sales that other employees did not complete--amounts that otherwise would be a business loss that the conscientious sales employee had done nothing to cause. The court further noted that another cause of unidentified returns was customer neglect that was tolerated by the employer (e.g., the customer's failure to obtain or retain the sales document, the "return" of stolen or damaged merchandise, etc.). To that extent, the employer was requiring employees to compensate the employer for losses caused by its generous return policy. The court concluded that such a policy of punishing all employees for the sins of a few employees (or for those of its customers) could not stand scrutiny under California law.ⁿ⁷⁷

[i] Deductions from Incentive Compensation Plan

In *Prachasaisoradej v. Ralphs Grocery Co., Inc.*,^{n77.1} the California Supreme Court held that a retail employer's

profit-based supplementary incentive compensation plan was not invalid, even though calculation of payments under the plan included subtracting store expenses from store revenues. The plan was not illegal simply because, pursuant to normal concepts of profitability, ordinary business expenses, such as storewide workers' compensation costs, and storewide cash and merchandise losses, were figured in, along with such other store expenses as the electric bill and the cost of goods sold, to determine the store's profit, upon which the supplementary incentive compensation payments were calculated. The employer did not illegally shift those costs to employees. After fully absorbing the expenses at issue, the employer simply determined what remained as profits to share with its eligible employees in addition to their normal wage.

[2] Federal Law

Federal regulations bar deductions that have the effect of lowering the employee's wages below the rates required by the minimum wage and overtime provisions of the FLSA.ⁿ⁷⁸ Thus, for example, deductions for items provided by the employer that do not constitute "board, lodging, or other facilities" within the meaning of the FLSA,ⁿ⁷⁹ or that exceed the "reasonable cost" for such items as defined by the regulations,ⁿ⁸⁰ would be improper if those deductions reduce the employee's wages below the federal minimum wage.ⁿ⁸¹ For discussion of rules permitting employers to credit amounts for food, lodging, and other facilities against the minimum wage, see Chapter 2.

A police officer trainee's agreement to reimburse the employer for training costs if the trainee voluntarily left employment before five years, did not violate FLSA's minimum wage and overtime mandates. Though the employer paid the employee well above the minimum wage during his tenure with the police department, he did not receive his wages unconditionally or free and clear, as required by federal regulations.^{n81.1} Even assuming *arguendo* that providing training to the trainee was primarily for the benefit of the employer, and that the employer therefore could not deduct the cost of the training from the trainee's wages if to do so would drive wages below the minimum wage, the trainee failed to establish a violation of the FLSA, because the trainee received training while he was an employee and receiving wages, so that he thus incurred no "pre-employment expenses." Further, even assuming the employer had deducted the cost of training as he received it, it was unclear whether such a hypothetical deduction would have driven the trainee's salary below the minimum wage.^{n81.2} However, the employer was not permitted to withhold the trainee's final paycheck in order to satisfy the debt that arose when he left employment within the first year. Under the FLSA, an employee is entitled to keep any compensation the FLSA specifies as a statutory floor below which no contract may go, so that the trainee was entitled to at least the statutory minimum wage for the final pay period he worked.^{n81.3}

The regulations permit employers to deduct taxes that are assessed against the employee and forwarded to a government agency, such as federal, state, and local income taxes, Social Security taxes, and state disability insurance, even if the employee's net wages are thereby reduced below the minimum wage.ⁿ⁸² The regulations also permit an employer to deduct amounts properly withheld pursuant to a wage garnishment order,ⁿ⁸³ as well as deductions voluntarily authorized by the employee pursuant to a wage assignment or other order to pay a sum for the benefit of the employee to a creditor, donee, or other bona fide third party.ⁿ⁸⁴ Cases have also indicated that the FLSA permits deductions for repayment of wage advancesⁿ⁸⁵ and amounts that were misappropriated by the employee.ⁿ⁸⁶ The employer may not, however, routinely deduct "cash shortages" that result from the ordinary operation of the business, rather than from theft or misappropriation by the employee.ⁿ⁸⁷

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Assignments, Deductions & Garnishments

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code §§ 221-222.5, 224, 351, 2928.*

(n2)Footnote 2. *See 8 Cal. Code Reg. §§ 11010-11150*, PP 8-10 (Cal. Wage Order Nos. 1-2001-15-2001); *11160*, PP 7-9 (Cal. Wage Order No. 16-2001).

(n3)Footnote 3. *See Lab. Code § 224.*

(n4)Footnote 4. *See Code Civ. Proc. §§ 706.010-706.154; see also discussion in § 4.12.*

(n5)Footnote 5. *See 8 Cal. Code Reg. §§ 11010-11150*, P 8 (Cal. Wage Order Nos. 1-2001-15-2001).

(n6)Footnote 6. *See Lab. Code § 224; see also Lab. Code § 300(g)* (restrictions on assignment of wages not applicable to certain deductions requested by employee to cover cost of insurance benefits); *but see Social Services Union v. Board of Supervisors* (1990) 222 Cal. App. 3d 279, 286-288, 271 Cal. Rptr. 494 (county could retroactively recoup through wage deductions an increase in health insurance premiums subsequently authorized during collective bargaining; the county had no obligation to file individual wage garnishment actions).

(n7)Footnote 7. *See Lab. Code § 300; see also discussion in § 4.11.*

(n8)Footnote 8. *See Lab. Code § 224; see also Lab. Code § 300(g)* (restrictions on assignment of wages not applicable to certain deductions requested by employee to cover cost of retirement or pension plans).

(n9)Footnote 9. *See 8 Cal. Code Reg. §§ 11010-11150*, P 9(C) (Cal. Wage Order Nos. 1-2001-15-2001); *see also discussion in [c][iv], below.*

(n10)Footnote 10. *See D.L.S.E. Interpretive Bulletin No. 85-3* (Feb. 6, 1985) (CAUTION: *see § 1.05[3][c]*, *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see also discussion in [b], below.*

(n11)Footnote 11. *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal. App. 3d 1, 4-5, 177 Cal. Rptr. 803 (quoting *Kruger v. Wells Fargo Bank* (1974) 11 Cal. 3d 352, 362, 113 Cal. Rptr. 449, 521 P.2d 441); *see also Code Civ. Proc. § 431.70* (setoff of cross demands for money as defense or partial defense).

(n12)Footnote 12. *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal. App. 3d 1, 177 Cal. Rptr. 803 .

(n13)Footnote 13. *See Barnhill v. Robert Saunders & Co.* (1981) 125 Cal. App. 3d 1, 4, 177 Cal. Rptr. 803 .

(n14)Footnote 14. *See Barnhill v. Robert Saunders & Co.* (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803 .

(n15)Footnote 15. *See Barnhill v. Robert Saunders & Co.* (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803 ; *see also D.L.S.E. Interpretive Bulletin No. 85-3* (Feb. 6, 1985) (explaining rationale for *Barnhill* decision) (CAUTION: *see § 1.05[3][c]*, *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n16)Footnote 16. *See D.L.S.E. Interpretive Bulletin No. 85-3* (Feb. 6, 1985); 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 11.25 (CAUTION: *see § 1.05[3][c]*, *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n17)Footnote 17. *See D.L.S.E. Interpretive Bulletin No. 85-3* (Feb. 6, 1985) (CAUTION: *see § 1.05[3][c]*, *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n18)Footnote 18. *See D.L.S.E. Interpretive Bulletin No. 85-3* (Feb. 6, 1985); *see also D.L.S.E. Interpretive Bulletin No. 84-4* (Feb. 3, 1984) (CAUTION: *see § 1.05[3][c]*, *supra*, for a discussion of the weight to be accorded

DLSE interpretations of statutory law and IWC Wage Orders).

(n19)Footnote 19. D.L.S.E. Interpretive Bulletin No. 85-3 (Feb. 6, 1985); but see 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 1511.2.6 (opining that the decision in *Barnhill* allowing deduction for repayment of loans is "open to question" in light of *Labor Code* § 300, which prohibits assignment of future wages except for the necessities of life) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n20)Footnote 20. D.L.S.E. Interpretive Bulletin No. 85-3 (Feb. 6, 1985) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n21)Footnote 21. D.L.S.E. Interpretive Bulletin No. 86-3 (Sept. 6, 1985) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n22)Footnote 22. *California State Employees' Assn. v. State of California* (1988) 198 Cal. App. 3d 374, 376-378, 243 Cal. Rptr. 602 .

(n23)Footnote 23. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 74 Cal. Rptr. 2d 29 .

(n24)Footnote 24. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 571, 74 Cal. Rptr. 2d 29 .

(n25)Footnote 25. *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803 (employer has no right to offset from employee's final wages money that plaintiff owed employer on promissory note); see discussion, *above*.

(n26)Footnote 26. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 572-573, 74 Cal. Rptr. 2d 29, citing *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803 .

(n27)Footnote 27. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 574, 74 Cal. Rptr. 2d 29 (employee may bring tortious discharge action based on fundamental policy of right to be free from employee's withholding of pay).

(n28)Footnote 28. See *Kerr's Catering Service v. Dep't of Industrial Relations* (1962) 57 Cal. 2d 319, 329-330, 19 Cal. Rptr. 492, 369 P.2d 20; see also 8 Cal. Code Reg. §§ 11010-11150, P 8 (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 7 (Cal. Wage Order No. 16-2001) D.L.S.E. 85-3 (Feb. 2, 1985); 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 11.2.3 (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n29)Footnote 29. See *Kerr's Catering Serv. v. Dep't of Industrial Relations* (1962) 57 Cal. 2d 319, 327-329, 19 Cal. Rptr. 492, 369 P.2d 20; see also *Lab. Code* §§ 400-410 (regulating employee performance bonds).

(n30)Footnote 30. See *Quillian v. Lion Oil Co.* (1979) 96 Cal. App. 3d 156, 162-163, 157 Cal. Rptr. 740 .

(n31)Footnote 31. 8 Cal. Code Reg. §§ 11010-11150, P 8 (Cal. Wage Order Nos. 1-2001-15-2001); but see 8 Cal. Code Reg. § 11160, P 7 (Cal. Wage Order No. 16-2001) (prohibiting any deduction from wages); see also *Lab. Code* § 2865 (employee liable to employer for damage caused by "culpable" negligence); *O'Hara v. Teamsters Union Local 856* (9th Cir. 1998) 151 F.3d 1152, 1160 (union was not entitled to indemnity by union officials under *Lab. Code* § 2865 when claims against officials and union were settled with no admission of wrongdoing).

(n32)Footnote 32. *Kerr's Catering Serv. v. Dep't of Industrial Relations* (1962) 57 Cal. 2d 319, 322, 19 Cal. Rptr. 492, 369 P.2d 20 .

(n33)Footnote 33. See D.L.S.E. Interpretive Bulletin No. 85-3 (Feb. 6, 1985) (CAUTION: see § 1.05[3][c], supra,

for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n34)Footnote 34. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 11.2.4; *see also* D.L.S.E. Interpretive Bulletin No. 85-3 (Feb. 6, 1985) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see also* discussion in *sect; 4.01[2][e]*.

(n35)Footnote 35. *Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 177 Cal. Rptr. 803*.

(n36)Footnote 36. *See Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803*.

(n37)Footnote 37. *See Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803*; *see also Code Civ. Proc. §§ 487.020(c), 706.011(a)* ("earnings," as defined, exempt from prejudgment attachment).

(n38)Footnote 38. *Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803*.

(n39)Footnote 39. *Phillips v. Gemini Moving Specialists (1998) 63 Cal. App. 4th 563, 571, 74 Cal. Rptr. 2d 29*; *see* discussion in [b], *above*.

(n40)Footnote 40. *See 8 Cal. Code Reg. §§ 11010-11150, P 9(C)* (Cal. Wage Order Nos. 1-2001-15-2001).

(n41)Footnote 41. *Lab. Code § 351*.

(n42)Footnote 42. *Lab. Code § 351*.

(n43)Footnote 43. *Lab. Code § 350(e)*.

(n44)Footnote 44. *See Lab. Code § 353*.

(n45)Footnote 45. *Lab. Code § 354*.

(n46)Footnote 46. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 19.3.5; D.L.S.E. Div. Management Memo. No. 89-2 (June 9, 1989) (superceding D.L.S.E. Policy & Procedure Memo. No 82-5 and reinstating D.L.S.E. Policy and Procedure Memo. No. 76-1) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n47)Footnote 47. *See* Div. Management Memo. No. 89-2 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders). For discussion of minimum wages and overtime, *see* chs. 2, 3.

(n48)Footnote 48. *Lab. Code § 351*.

See also 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 19.6 (since any cost of doing business must be borne by employer and not employee under *Hudgins v. Neiman Marcus (1995) 34 Cal. App. 4th 1109, 41 Cal. Rptr. 2d 46*, and inasmuch as credit card purchases are common, cost of credit card charges are cost of doing business, and *Hudgins* has been interpreted by DLSE to prohibit any deduction from employee's wages by employer to recover costs incidental to tips left for employees) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n49)Footnote 49. *Lab. Code § 351*. Under certain circumstances, the FLSA permits an employer to credit tips received by its employees against its minimum wage and overtime obligations.

(n50)Footnote 50. *See 29 U.S.C. § 203(m), (t); 29 C.F.R. §§ 531.50-531.59*.

(n51)Footnote 51. *See* 29 U.S.C. § 218(a) (compliance with FLSA does not excuse failure to comply with state law requiring higher minimum wage than that permitted by FLSA). *See also* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 19.5.2 (California courts have determined that employer policy of crediting tips of restaurant employees against their minimum wage violates *Lab. Code* § 351 and damages are recoverable under *Bus. & Prof. Code* § 17200 as unfair business practice), citing *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61 Cal. App. 4th 881, 907-908; *Hudgins v. Neiman Marcus* (1995) 34 Cal. App. 4th 1109, 1126-1127, 41 Cal. Rptr. 2d 46.

(n52)Footnote 52. *See* 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 19.3.1 (tip pooling permissible so long as the arrangement is limited to employees directly servicing the customer and the waiter or waitress is required to share no more than 15% of his or her tip with the busboy and 5% with the bartender); D.L.S.E. Interpretive Bulletin No. 87-6 (July 27, 1987) (superceding previous interpretive bulletin stating that involuntary tip-pooling was impermissible) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n53)Footnote 53. D.L.S.E. Interpretive Bulletin No. 87-6 (July 27, 1987) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n54)Footnote 54. *See Etheridge v. Reins Intl. Cal., Inc.* (2009) 172 Cal. App. 4th 908, 918-924 (employer-mandated tip pool, in which restaurant servers were required to share tips with employees not providing direct table service, did not violate *Lab. Code* § 351, where participants in tip pool contributed to patrons' service, even if not providing direct table service); v. *Budrow v. Dave & Buster's of California, Inc.* (2009) 171 Cal. App. 4th 875, 878-884, 90 Cal. Rptr. 3d 239 (restaurant owner's tipping policy requiring that servers contribute 1% of their gross sales to bartenders and other employees, which provided distributions from tip pool to persons who did not provide direct table service, did not violate *Lab. Code* § 351, where employer did not permit any member of management to participate in, or retain any proceeds of, tipping pool); *Leighton v. Old Heidelberg, Ltd.* (1990) 219 Cal. App. 3d 1062, 1068, 1071-1072, 268 Cal. Rptr. 647 (without citing DLSE interpretations, holding that *Lab. Code* § 351 did not prohibit employer require tip pooling among employees directly providing service to tipping patron).

(n55)Footnote 54.1. (2003) 107 Cal. App. 4th 138, 140, 143-145, 131 Cal. Rptr. 2d 771.

(n56)Footnote 54.2. "Employer" means every person engaged in any business or enterprise in California that has one or more persons in service under any appointment, contract of hire, or apprenticeship, express or implied, oral or written, irrespective of whether the person is the owner of the business or is operating on a concessionaire or other basis. *Lab. Code* § 350(a). "Agent" means every person other than the employer with the authority to hire or discharge any employee or supervise, direct, or control the acts of employees. *Lab. Code* § 350(d).

(n57)Footnote 55. *Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal. App. 4th 138, 140, 144, 131 Cal. Rptr. 2d 771.

(n58)Footnote 56. *Chau v. Starbucks Corp.* (2009) 174 Cal. App. 4th 688, 695-707, 94 Cal. Rptr. 3d 593 (coffee chain's policy permitting service employees known as shift supervisors to share in tips customers placed in a collective tip box did not violate *Labor Code* § 351, even if shift supervisors could be considered "agents" under *Labor Code* § 350(d), where customer left money in tip boxes for entire "team" of employees serving customer; where allocation of tips in proportion to number of hours employee worked during that week was fair and permissible under § 351; and where chain prohibited store managers and assistant managers from participating in collective tip).

(n59)Footnote 56.1. *Grodensky v. Artichoke Joe's Casino* (2009) 171 Cal. App. 4th 1399. *But see Matoff v. Brinker Restaurant Corp.* (C.D. Cal. 2006) 439 F. Supp. 2d 1035 (*Lab. Code* § 351 did not create private right of action).

(n60)Footnote 57. *Lab. Code* § 222.5.

(n61)Footnote 58. *Lab. Code* § 222.5.

(n62)Footnote 59. 2002 Update to 1998 DLSE Enforcement Policies and Interpretation Manual § 13.1.2; *see* D.L.S.E. Interpretive Bulletin No. 87-4 (May 18, 1987) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n63)Footnote 60. *See Lab. Code* § 225.

(n64)Footnote 61. *Lab. Code* § 231.

(n65)Footnote 62. *See Gov. Code* § 12945.1 *et seq.*

(n66)Footnote 63. *See Gov. Code* § 12945.2(k)(3)(A), (C).

(n67)Footnote 64. Medical service providers are also prohibited from collecting money from an employee to cover medical services to cure or relieve the effects of an injury for which the employee has filed a workers' compensation claim, unless the provider has received a written notice from the employer denying liability for the claim and the provider has provided a copy of this notice to the employee. *See Lab. Code* § 3751(b). *See Albillo v. Intermodal Container Services, Inc.* (2003) 114 Cal. App. 4th 190, 197-207, 8 Cal. Rptr. 3d 350 (election in agreement between lessor truck-owner operators and drivers and lessee freight transportation companies under *Lab. Code* § 4150 for lessees to procure insurance for lessors expressly subjected parties to *Lab. Code* § 3751, and by deducting amounts from lessors' compensation to secure workers' compensation coverage, lessees violated *Lab. Code* § 3751).

(n68)Footnote 65. *Lab. Code* § 3571(a).

(n69)Footnote 66. *Lab. Code* § 401.

(n70)Footnote 67. *See Lab. Code* § 408.

(n71)Footnote 68. *Lab. Code* § 225.

(n72)Footnote 68.1. *Steinhebel v. Los Angeles Times Communications* (2005) 126 Cal. App. 4th 696, 704-711, 24 Cal. Rptr. 3d 351. *See also Koehl v. Verio, Inc.* (2006) 142 Cal. App. 4th 1313, 1329-1337, 48 Cal. Rptr. 3d 749 (commissions paid to sales associates at Internet service provider under compensation plans providing for base pay and commissions paid when order was booked (but which employer could recover or charge back if specified conditions were not met) were not wages under *Lab. Code* § 221 and employer was entitled to chargebacks. Associates had post-booking responsibilities necessary to earn their commissions, and, although commission plans provided that commissions would be paid at booking or installation, associates agreed that they were not in fact earned at that time).

(n73)Footnote 68.2. *Harris v. Investor's Business Daily, Inc.* (2006) 138 Cal. App. 4th 28, 40-41, 41 Cal. Rptr. 3d 108.

(n74)Footnote 69. *Lab. Code* § 222.

(n75)Footnote 70. *See Lab. Code* § 219; *Waters v. San Dimas Ready Mix Concrete* (1963) 222 Cal. App. 2d 380, 382-383, 35 Cal. Rptr. 215; *Breitman v. Brody* (1952) 113 Cal. App. 2d 642, 644, 248 P.2d 932.

(n76)Footnote 70.1. *See Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1204-1205, 78 Cal. Rptr. 3d 572 (in action based on employer's violation of local living wage ordinance, trial court properly awarded penalties for violation of *Lab. Code* § 223, where, although employer was on notice of its obligations under ordinance and certified to city its intention to comply with ordinance, employer failed to pay class members at ordinance rate).

(n77)Footnote 71. *See, e.g., Shalz v. Union Sch. Dist.* (1943) 58 Cal. App. 2d 599, 607, 137 P.2d 762.

(n78)Footnote 72. *See Lab. Code § 225.*

(n79)Footnote 73. *See also Gov. Code § 50026* (certain local taxes prohibited).

(n80)Footnote 73.1. *See also Koehl v. Verio, Inc. (2006) 142 Cal. App. 4th 1313, 1337-1338, 48 Cal. Rptr. 3d 749*

(n81)Footnote 74. *See Hudgins v. Neiman Marcus Group, Inc. (1995) 34 Cal. App. 4th 1109, 1117-1124, 41 Cal. Rptr. 2d 46 .*

(n82)Footnote 75. *See Kerr's Catering Serv. v. Department of Industrial Relations (1962) 57 Cal. 2d 319, 327-329, 19 Cal. Rptr. 492, 369 P.2d 20 ; see also discussion in [c][i],[ii], above.*

(n83)Footnote 76. *See Hudgins v. Neiman Marcus Group, Inc. (1995) 34 Cal. App. 4th 1109, 1118-1123, 41 Cal. Rptr. 2d 46 .*

(n84)Footnote 77. *See Hudgins v. Neiman Marcus Group, Inc. (1995) 34 Cal. App. 4th 1109, 1122-1124, 41 Cal. Rptr. 2d 46 .*

(n85)Footnote 77.1. *Prachasaisoradej v. Ralphs Grocery Co., Inc. (2007) 42 Cal. 4th 217, 223-224, 226-244, 64 Cal. Rptr. 3d 407, 165 P.3d 133 .*

(n86)Footnote 78. *See Brennan v. Veterans Cleaning Serv., Inc. (5th Cir. 1973) 482 F.2d 1362, 1368-1369 ; 29 C.F.R. §§ 531.35-531.37, 778.307.*

(n87)Footnote 79. *See 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.1-531.35.*

(n88)Footnote 80. *See 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3-531.35.*

(n89)Footnote 81. *29 C.F.R. § 531.36(b).*

(n90)Footnote 81.1. *See 29 C.F.R. § 531.35.*

(n91)Footnote 81.2. *City of Oakland v. Hassey (2008) 163 Cal. App. 4th 1477, 1486-1491, 78 Cal. Rptr. 3d 621 .*

(n92)Footnote 81.3. *City of Oakland v. Hassey (2008) 163 Cal. App. 4th 1477, 1491-1494, 78 Cal. Rptr. 3d 621 . See 29 C.F.R. § 531.35* (wage requirements of FLSA will not be met when employee kicks-back all or part of wage delivered to employee).

(n93)Footnote 82. *See 29 C.F.R. § 531.38.*

(n94)Footnote 83. *See 29 C.F.R. § 531.39; see also discussion in § 4.12.*

(n95)Footnote 84. *See 29 C.F.R. § 531.40; Brennan v. Veterans Cleaning Serv., Inc. (5th Cir. 1973) 482 F.2d 1362, 1369 ; see also discussion in § 4.11.*

(n96)Footnote 85. *See Brennan v. Veterans Cleaning Serv., Inc. (5th Cir. 1973) 482 F.2d 1362, 1369 .*

(n97)Footnote 86. *See Mayhue's Super Liquor Stores, Inc. v. Hodgson (5th Cir. [Fla.] 1972) 464 F.2d 1196, 1198-1199 , cert. denied, 409 U.S. 1108 .* The Wage and Hour Division's guidelines require a conviction for misappropriation before the deduction can be made. *See Wage & Hour Opinion Letter No. 1291 (Oct. 1, 1973).*

(n98)Footnote 87. *See Mayhue's Super Liquor Stores, Inc. v. Hodgson (5th Cir. [Fla.] 1972) 464 F.2d 1196, 1198-1199 , cert. denied, 409 U.S. 1108 .*



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 4 Payment of Wages

Part B. WAGE DEDUCTIONS, ASSIGNMENTS, AND GARNISHMENTS

1-4 California Employment Law § 4.11

AUTHOR: By Susan Spurlark, J.D.

§ 4.11 Assignment of Wages

[1] Transactions Governed

Assignments of wages are generally governed by *Labor Code section 300*. However, the rules regarding wage assignments set forth in section 300 do not apply to (1) earnings assignment orders for support issued in family law proceedings,ⁿ¹ or (2) wage assignment orders issued under *Probate Code section 3088* (wage assignment for support of conservatee from community property of conservatee's spouse).ⁿ² In addition, the Labor Commissioner, in accepting assignment of wage claims for enforcement purposes pursuant to *Labor Code section 96*,ⁿ³ is not bound by any technical rules regarding the validity of assignments.ⁿ⁴ The rules governing wage assignments also do not apply to deductions authorized by the employee for the following purposes:ⁿ⁵

1. Payment for life, retirement, disability, or unemployment insurance premiums;
2. Payment of taxes owed by the employee;
3. Contributions to funds, plans, or systems providing for death, retirement, disability, unemployment, or other benefits;
4. Payment for goods or services furnished by the employer to the employee or the employee's family at the employee's request; and
5. Contributions "for charitable, educational, patriotic or similar purposes."

[2] Requirements for Validity

Except for certain types of wage assignments mentioned in [1], above, a wage assignment must meet the requirements of *Labor Code section 300* to be valid. First, at the time the assignment is made, the wages or salary to be assigned must have been earned unless the assignment (1) is for the necessities of life, (2) is made directly to the person furnishing

those necessities, and (3) does not exceed the amount needed to furnish those necessities.ⁿ⁶ This provision has been interpreted to allow assignment of future earnings from a current employment, but not earnings from future employment.ⁿ⁷

Second, an assignment is not valid if, at the time the assignment is filed with the employer, another assignment of wages by the employee is subject to payment or if an earnings withholding order against the employee's wages or salary is in force.ⁿ⁸ In addition, assignments are not allowed if the employee is paid under a plan for payment by several different employers at a central place as provided for in *Labor Code section 204a*.ⁿ⁹ No more than 50% of the assignor's wages may be withheld at the time of each payment of wages.ⁿ¹⁰

The wage assignment must be in writingⁿ¹¹ and must contain the following elements:

1. The assignment must be signed by the person whose wages are to be assigned and must specifically identify the transaction to which it applies;ⁿ¹²
2. If the person making the assignment is married, written consent of that person's spouse must be attached, unless the assignor attaches a written statement setting forth the fact that (1) a judgment decreeing a legal separation has been entered, or (2) the spouses are living apart after entry of an interlocutory judgment dissolving the marriage;ⁿ¹³
3. If the assignment is by a minor, the written consent of the minor's parent or guardian must be attached to the assignment;ⁿ¹⁴
4. To the extent requirements (2) and (3), above, are inapplicable, the assignment must include a written statement that the person is unmarried and/or is an adult;ⁿ¹⁵ and
5. The written assignment must contain a statement attesting to the fact that no other assignment exists with respect to the same transaction or series of transactions.ⁿ¹⁶

A copy of the assignment and of any required consents and statements, authenticated by a notary public, must be filed with the employer along with an itemized statement of the amount then due to the assignee.ⁿ¹⁷ The employer is entitled to rely on the statements of fact in the consents or statement of age and marital status without making an independent investigation of the truth of those facts and may not be held liable for any payment made to an assignee in reliance on those facts.ⁿ¹⁸

The assignment and any power of attorney to assign or collect wages is revocable at any time by the employee.ⁿ¹⁹ The revocation is not effective, however, until the employer receives written notice of the revocation from the employee.ⁿ²⁰

If the employee is covered by the FLSA, the assignment may not be made in favor of the employer.ⁿ²¹

[3] Labor Commissioner as Assignee of Wage Claims

Labor Code Section 96 authorizes the Labor Commissioner and his or her deputies and representatives to take assignments of wage claims and certain other employee claims for purposes of enforcement. Such assignments need not comply with the requirements of *Labor Code Section 300*, discussed in [2], *above*.ⁿ²²

Labor Code Section 96 authorizes the Labor Commissioner to take assignments of the following types of claims:

- Wage claims and incidental expense accounts and advances;

- Mechanics' and other liens of employees;
- Claims based on "stop orders" for wages and on bonds for labor;
- Claims for damages for misrepresentations of conditions of employment;
- Claims for unreturned bond money of employees;
- Claims for penalties for nonpayment of wages;
- Claims for return of workers' tools in the illegal possession of another person;
- Claims for vacation pay, severance pay, or other compensation supplemental to a wage agreement;ⁿ²³
- Awards for workers' compensation benefits in which the Worker's Compensation Appeals Board has found that the employer has failed to secure payment of compensation and where the award remains unpaid for more than 10 days after having become final;ⁿ²⁴
- Claims for loss of wages as the result of discharge from employment for garnishment of wages;ⁿ²⁵ and
- Claims for lost wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises.

■ CONSULTANT'S COMMENT:

Practitioners were not generally aware of the proposal to add the final listed claim to *Labor Code Section 96* until the amendment became law, effective January 1, 2000. Nor, from a bare reading of the addition, is it clear whether the legislature intended it to reflect existing law or to create new substantive rights. At the least, the addition affirms privacy rights embodied in *article I, § 1 of the State Constitution*. Whether the courts will view the provision more expansively is uncertain and will require a review of the limited legislative history of the amendment. *Commentary by Kirby Wilcox.*

These assignments can only be made on behalf of employees, not independent contractors.ⁿ²⁶ However, if the employee is covered by a collective bargaining agreement, the employee's collective bargaining representative may act as assignee of wage claims for enforcement by the Labor Commissioner, subject to the employee's option to reject such representation and to represent himself or herself.ⁿ²⁷ A complete discussion of the procedures for such an assignment and enforcement proceedings generally is set forth in Chapter 5.

Legal Topics:

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

Contracts Law Performance Assignment General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Assignments, Deductions & Garnishments

FOOTNOTES:

(n1)Footnote 1. *See Fam. Code § 5200 et seq.*

(n2)Footnote 2. *See Lab. Code § 300(a).*

(n3)Footnote 3. *See discussion in [3], below.*

(n4)Footnote 4. *Lab. Code* § 97.

(n5)Footnote 5. *Lab. Code* § 300(g).

(n6)Footnote 6. *Lab. Code* § 300(h). The term "necessities of life" is similar to the term "necessaries of life" used in conjunction with wage garnishments. The latter term has been defined to include both items required to support life and other conveniences. *See, e.g., Ratzlaff v. Portillo* (1971) 14 Cal. App. 3d 1013, 1015, 92 Cal. Rptr. 722 .

(n7)Footnote 7. *See, e.g., Walker v. Rich* (1926) 79 Cal. App. 139, 144 .

(n8)Footnote 8. *Lab. Code* § 300(b)(7). For discussion of earnings withholding orders, see § 4.12[1][a].

(n9)Footnote 9. *Lab. Code* § 300(f); *see also* discussion in § 4.01[2][b][iv].

(n10)Footnote 10. *Lab. Code* § 300(c).

(n11)Footnote 11. *Lab. Code* § 300(b)(1).

(n12)Footnote 12. *Lab. Code* § 300(b)(1).

(n13)Footnote 13. *Lab. Code* § 300(b)(2).

(n14)Footnote 14. *Lab. Code* § 300(b)(3).

(n15)Footnote 15. *Lab. Code* § 300(b)(4).

(n16)Footnote 16. *Lab. Code* § 300(b)(5).

(n17)Footnote 17. *Lab. Code* § 300(b)(6).

(n18)Footnote 18. *Lab. Code* § 300(d).

(n19)Footnote 19. *Lab. Code* § 300(e).

(n20)Footnote 20. *Lab. Code* § 300(e).

(n21)Footnote 21. *See* 29 C.F.R. § 531.40(a), (b).

(n22)Footnote 22. *See Lab. Code* § 97.

(n23)Footnote 23. Enforcement of severance pay claims by the Labor Commissioner has been enjoined. *See California Chamber of Commerce v. Simpson* (C.D. Cal. 1985) 601 F. Supp. 104, 109 , discussed in § 4.01[2][c]. For discussion of possible pre-emption of certain vacation pay claims, *see* § 4.01[2][d][i].

(n24)Footnote 24. For general discussion of employee remedies against employers who fail to secure payment of workers' compensation benefits, *see* ch. 20.

(n25)Footnote 25. For discussion of protection against discharge as a result of garnishment of wages, *see* § 4.12 [3]. For discussion of wrongful termination generally, *see* ch. 60.

(n26)Footnote 26. *Fitch v. Pacific Fid. Life Ins. Co.* (1975) 54 Cal. App. 3d 140, 146-148, 126 Cal. Rptr. 445 .

(n27)Footnote 27. *Lab. Code* § 96.3



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 4 Payment of Wages

Part B. WAGE DEDUCTIONS, ASSIGNMENTS, AND GARNISHMENTS

1-4 California Employment Law § 4.12

AUTHOR: By Susan Spurlark, J.D.

§ 4.12 Wage Garnishment

[1] Procedure and Limitations

[a] California Law

Under California law, the judicial procedures governing withholding of wages from an employee's paycheck for payment of a debt to a third party are set forth in *Code of Civil Procedure Section 706.010 et seq.*ⁿ¹ known as the Wage Garnishment Law.ⁿ² Special statutory provisions govern judicially ordered wage assignments to secure payment of child, spousal, and family support,ⁿ³ which are referred to as "earnings assignment orders for support" in the Wage Garnishment Law.ⁿ⁴ In addition, as discussed in [3], *below*, the Labor Code contains provisions protecting employees from discharge whose wages have been garnished for the payment of one judgment or whose wages have been threatened with garnishment.ⁿ⁵

Except for proceedings by the state to collect a state tax liabilityⁿ⁶ and certain support proceedings,ⁿ⁷ California law only permits garnishment of wages to enforce a judgment.ⁿ⁸ Wages are exempt from pre-judgment attachment.ⁿ⁹

The procedures for withholding of wages to enforce judgments under California law apply to all "earnings," which are defined as any compensation payable by an employer to an employee for personal services performed by the employee, whether denominated as wages, salary, commission, bonus, or otherwise.ⁿ¹⁰ An employee for purposes of these provisions includes any individual who performs services subject to the right of the employer to control both what shall be done and how it shall be done.ⁿ¹¹

The Judicial Council has promulgated official forms for all applications, notices, claims, claims of exemption, orders, and other documents required under the Wage Garnishment Law.ⁿ¹² Use of the Judicial Council forms is mandatory.ⁿ¹³ The forms most applicable to employers are reproduced in [2], *below*. For blank copies of all Judicial Council wage garnishment forms suitable for reproduction and use, see California Forms of Pleading and Practice, *Judicial Council Forms*, Volume I, Part D (Matthew Bender).

■ CONSULTANT'S COMMENT:

The California Judicial Council forms pertaining to garnishment are well-drafted. Each includes detailed instructions. Counsel who are asked to address technical or practical questions regarding the procedures for responding to wage garnishment orders are advised to consult both the forms and the Code of Civil Procedure. *Commentary by Kirby Wilcox.*

Enforcement of a judgment or a state tax liability from the earnings of an employee is accomplished by service of an "earnings withholding order" on the employer.ⁿ¹⁴ On being served with an earnings withholding order, the employer must give notice of the order to the employee as required by statute,ⁿ¹⁵ complete and mail a return form to the levying officer specified in the order,ⁿ¹⁶ withhold the specified amounts from the employee's wages until the order terminates as specified by law,ⁿ¹⁷ and pay the amounts withheld to the levying officer.ⁿ¹⁸ The official Judicial Council form of earnings withholding order contains detailed instructions for the employer on the reverse side.ⁿ¹⁹ Failure to withhold and pay over the amounts specified in the order may result in civil and criminal liability.ⁿ²⁰

If more than one order is served on an employer with respect to the same employee, the statute sets forth the rules governing priority of orders, based on the type of order, date of service, and date of judgment.ⁿ²¹ The rules of priority are explained on the Judicial Council form of employer's return.ⁿ²²

The Wage Garnishment Law also contains limitations on the amount of wages per workweek that may be subject to garnishment.ⁿ²³ The Wage Garnishment Law incorporates limitations set forth in the federal Consumer Credit Protection Act,ⁿ²⁴ except that the California statute provides for more limited garnishment of wages for payment of support or state taxes than is permitted under the federal law.ⁿ²⁵ An explanation of these rules and of the amounts to be withheld is printed on the reverse side of the Judicial Council earnings withholding order forms.ⁿ²⁶ Under certain circumstances, the employee may be entitled to obtain an additional exemption, thereby further reducing the amount withheld, if he or she can establish that an additional amount is required for his or her own support or for the support of family members who rely on the employee for support.ⁿ²⁷

Service of an earnings withholding order creates a lien not only on the earnings of the judgment debtor-employee that are required to be withheld but also on all property of the *employer* that is subject to enforcement of a money judgment in an amount equal to the amount required to be withheld under the order.ⁿ²⁸ The lien continues for a period of one year from the date that the earnings become payable to the employee unless the amount required to be withheld pursuant to the order is paid as required by law.ⁿ²⁹

A detailed description of the procedures for garnishment of wages is beyond the scope of this chapter. For full treatment of this topic, see California Forms of Pleading and Practice, "Garnishment."

[b] Federal Law

Federal law also contains restrictions on garnishment of wages, as part of the Consumer Credit Protection Act.ⁿ³⁰ Enacted pursuant to Congress' general power to regulate interstate commerce and to establish uniform bankruptcy laws,ⁿ³¹ the federal provisions limit the amount of wages that may be garnished per week to a specified percentage of an employee's "disposable earnings,"ⁿ³² which are defined as that part of an individual's earnings remaining after the deduction from those earnings of any amounts required by law to be withheld,ⁿ³³ such as income, social security, and other withholding taxes.ⁿ³⁴ The Act provides for a separate, higher limitation on the amount that may be withheld from an employee's wages pursuant to a court order for support.ⁿ³⁵

The Consumer Credit Protection Act does not limit the amounts that may be withheld under a federal court order pursuant to Chapter 13 of the federal bankruptcy lawsⁿ³⁶ or for any debt for state or federal taxes.ⁿ³⁷ However, the Internal Revenue Code and Treasury Department regulations set forth limitations on the amounts that may be withheld for federal taxes,ⁿ³⁸ and the California Wage Garnishment Law contains limitations on the amount that may be

withheld for California state taxes.n39

The Consumer Credit Protection Act is superceded by state laws that prohibit wage garnishment or that provide for more limited garnishment than is permitted under the Act.n40 As noted in [a], *above*, California's Wage Garnishment Law incorporates the federal limitations on amount by reference and in some cases provides for even more limited garnishments than permitted by federal law.n41

The Act also prohibits discharge of any employee based on the fact that his or her wages have been garnished for any one indebtedness, as discussed in [3], *below*. n42

[2] Judicial Council Wage Garnishment Forms

[a] FORM--Earnings Withholding Order and Employer Instructions--General

[i] Comment

The Judicial Council's most recent official form of general earnings withholding order with accompanying employer's instructions is set forth in [ii], *below*. n43

CAUTION:

This form does not reflect 1996 and later changes in minimum wage.n44 The original and one copy is completed and served on the employer by the levying officer or a registered process server.n45 The contents of the order is prescribed by statute,n46 and use of the form is mandatory.n47 The levying officer or registered process server must also serve the form for the employer's return and the form of notice to the employee along with the earnings withholding order.n48 For reproductions of those forms, see [c] and [d], *below*.

The employer must deliver a copy of the earnings withholding order and the notice of earnings withholding order to the employee within 10 days from the date that the order was served on the employer, unless the employee is no longer employed by the employer and the employer owes no wages to the employee.n49 For detailed discussion concerning use and service of this form, see California Forms of Pleading and Practice, "Garnishment." For a blank copy of this form suitable for reproduction and use, see California Forms of Pleading and Practice, "Judicial Council Forms," Volume I, Part D.

If the withholding order is for child or spousal support, the Judicial Council Form of earnings withholding order for support will be served on the employer in lieu of this form.n50 For a reproduction of that form, see [b], *below*. In the case of state tax liabilities, the state agency uses its own prescribed form.n51

[ii] Form Earnings Withholding Order and Employer Instructions- General

[Click here to view image.](#)

[b] FORM--Earnings Withholding Order for Support and Employer Instructions

[i] Comment

The Judicial Council's official form of earnings withholding order for support with accompanying employer's instructions is set forth in [ii], *below*. n52 This form is used to collect delinquent amounts payable under a judgment for the support of a child, spouse, or former spouse of the affected employee.n53 The original and one copy is completed and served on the employer by the levying officer or a registered process server.n54 The contents of the order is prescribed by statute,n55 and use of the form is mandatory.n56 The levying officer or registered process server must

also serve the form for the employer's return and the form of notice to the employee along with the earnings withholding order.ⁿ⁵⁷ For reproductions of those forms, see [c] and [d], *below*.

The employer must deliver a copy of the earnings withholding order and the notice of earnings withholding order to the employee within 10 days from the date that the order was served on the employer, unless the employee is no longer employed by the employer and the employer owes no wages to the employee.ⁿ⁵⁸ For detailed discussion concerning use and service of this form, see California Forms of Pleading and Practice, *Garnishment*. For a blank copy of this form suitable for reproduction and use, see California Forms of Pleading and Practice, *Judicial Council Forms*, Volume I, Part D.

If the withholding order is not for child or spousal support, the Judicial Council Form of general earnings withholding order for support will be served on the employer in lieu of this form.ⁿ⁵⁹ For a reproduction of that form, see [a], *above*. However, in the case of state tax liabilities, the state agency uses its own prescribed form.ⁿ⁶⁰

[ii] Form Earnings Withholding Order for Support and Employer Instructions

[Click here to view image.](#)

[Click here to view image.](#)

[c] FORM--Notice to Employee of Earnings Withholding Order (Employee Instructions)

[i] Comment

The Judicial Council's official form of notice to employee of earnings withholding order (entitled "Employee Instructions") is set forth in [ii], *below*.ⁿ⁶¹ The levying officer or registered process server is required to serve a copy of this form on the employer along with the earnings withholding order and form of employer's return.ⁿ⁶² The form and contents of the notice are prescribed by statute.ⁿ⁶³ and use of the form is mandatory.ⁿ⁶⁴

The employer must deliver a copy of the notice along with a copy of the earnings withholding order within 10 days from the date that the order and notice were served on the employer, unless the employee is no longer employed by the employer and the employer owes no wages to the employee.ⁿ⁶⁵ For detailed discussion concerning use and service of this form, see California Forms of Pleading and Practice, *Garnishment*. For a blank copy of this form suitable for reproduction and use, see California Forms of Pleading and Practice, *Judicial Council Forms*, Volume I, Part D.

In the case of state tax liabilities, the state agency uses its own prescribed form.ⁿ⁶⁶

[ii] Form Notice to Employee of Earnings Withholding Order (Employee Instructions)

[Click here to view image.](#)

[d] FORM--Employer's Return

[i] Comment

The Judicial Council's official form of employer's return is set forth in [ii], *below*.ⁿ⁶⁷ The levying officer or registered process server must serve a copy of the return form on the employer along with the earnings withholding order and notice to employee of earnings withholding order.ⁿ⁶⁸ The contents of the return form are prescribed by statute,ⁿ⁶⁹ and use of the form is mandatory.ⁿ⁷⁰

The employer must complete the form and mail it by first-class mail, postage prepaid, to the levying officer designated on the form within 15 days from the date of service.ⁿ⁷¹ If the earnings withholding order is ineffective (because another

order has higher priority or because the employee is no longer employed and owed no wages by the employer), the employer must send the order back to the levying officer along with the completed return form.ⁿ⁷² The rules governing priority of orders are summarized on the reverse side of the form. For detailed discussion concerning completion of this form, see California Forms of Pleading and Practice, *Garnishment*. For a blank copy of this form suitable for reproduction and use, see California Forms of Pleading and Practice, *Judicial Council Forms*, Volume I, Part D.

In the case of state tax liabilities, the state agency uses its own prescribed form.ⁿ⁷³

[ii] Form Employer's Return

[Click here to view image.](#)

[3] Prohibition Against Discharge of Employee for Garnishment

Both state and federal law contain prohibitions against discharging employees whose wages have been garnished.ⁿ⁷⁴ Under the federal Consumer Credit Protection Act, an employer may not discharge an employee because that employee's earnings have been garnished for one indebtedness.ⁿ⁷⁵ Under this provision, if two garnishment orders are served but only one is effective, there has been only one garnishment, and any discharge would be unlawful.ⁿ⁷⁶ The penalty for a willful violation of the federal act is a fine of not more than \$1,000 or imprisonment for not more than 1 year, or both.ⁿ⁷⁷ The Secretary of Labor is charged with enforcement of the Act.ⁿ⁷⁸ Numerous decisions have ruled that there is no private right of action to enforce the anti-discrimination provisions of the federal act.ⁿ⁷⁹ However, alternative causes of action may be available to challenge the termination.ⁿ⁸⁰

California *Labor Code Section 2929* prohibits the termination of an employee because the employee's wages were threatened with garnishment or because the employee's wages were garnished for the payment of one judgment.ⁿ⁸¹ This protection cannot be abrogated by contract.ⁿ⁸² This section was intended to aid enforcement of the above federal statute barring discharge because of one garnishmentⁿ⁸³ and is to be interpreted in a manner consistent with federal law.ⁿ⁸⁴

Unlike the federal act, the state statute provides a private remedy. *Labor Code Section 2929* provides that unless the employee has greater contractual rights, his or her wages (in an amount not to exceed the wages earned during the 30 calendar days immediately preceding the date of the levy of execution on the employee's wage) shall continue as a penalty until reinstatement or for 30 days, whichever occurs sooner.ⁿ⁸⁵ The employee must give the employer notice of intention to make a wage claim under this subdivision within 30 days after being discharged, and, if he or she wishes the Labor Commissioner to take assignment of his wage claim, he or she must file a wage claim with the Labor Commissioner within 60 days after being discharged.ⁿ⁸⁶ The Labor Commissioner has the discretion to take assignment of wage claims under Section 2929.ⁿ⁸⁷ However, if a criminal prosecution based on the same discharge has been commenced for violation of the federal Consumer Credit Protection Act,ⁿ⁸⁸ the employee may not recover under *Labor Code Section 2929*.ⁿ⁸⁹

The employee's statutory remedy under *Labor Code Section 2929* does not affect any other rights that the employee may have against the employer.ⁿ⁹⁰ Thus, an employee who has been discharged because his or her wages have been garnished or threatened with garnishment may also possibly have a common law tort or contract cause of action for wrongful termination. In that event, the terms of the statute do not affect the employee's cause of action; for example, the fact that the employee's wages have been garnished for more than one judgment (so that the statutory protection does not apply)ⁿ⁹¹ does not in itself preclude common law liability for wrongful termination.ⁿ⁹² For full discussion of an employer's liability for wrongful termination, see Chapter 60.

In addition to *Labor Code section 2929*, a statutory provision governing judicially ordered wage assignments of child, spousal, and family support prohibits an employer from using such an assignment as grounds for refusing to hire a

person, for discharging or taking disciplinary action against an employee, for denying a promotion to an employee, or for taking any other action adversely affecting the terms and conditions of employment of an employee.ⁿ⁹³ An employer's violation of this provision may result in an assessment of a civil penalty of up to \$500.ⁿ⁹⁴

The federal bankruptcy law provides additional protection for indebted employees who become involved in bankruptcy proceedings or who may seek the protection of such proceedings. Title 11 *United States Code*, section 525(b) provides as follows:

No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt--

(1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;

(2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or

(3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

Legal Topics:

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

Civil Procedure Judgments Entry of Judgments Enforcement & Execution Garnishments Civil Procedure Remedies Provisional Remedies Garnishments Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Assignments, Deductions & Garnishments

FOOTNOTES:

(n1)Footnote 1. *See Code Civ. Proc.* § 706.020.

(n2)Footnote 2. *Code Civ. Proc.* § 706.010.

(n3)Footnote 3. *See Fam. Code* § 5200 *et seq.*; *Prob. Code* § 3088(e). For complete discussion of procedures relating to earnings assignment orders for support, *see* Kirkland, Lurvey, & Richmond, *California Family Law Practice and Procedure*, ch. 141 (2d ed. Matthew Bender).

(n4)Footnote 4. *See Code Civ. Proc.* §§ 706.011(b), 706.020, 706.031.

(n5)Footnote 5. *See Lab. Code* § 2929(b).

(n6)Footnote 6. *See Code Civ. Proc.* § 706.072(d).

(n7)Footnote 7. *See Fam. Code* § 5200 *et seq.*; *Prob. Code* § 3088(e).

(n8)Footnote 8. *See Code Civ. Proc.* § 706.102.

(n9)Footnote 9. *See Code Civ. Proc.* §§ 487.020(c), 706.011(a); *see also* *McCallop v. Carberry* (1970) 1 Cal.

3d 903, 904-907, 83 Cal. Rptr. 666, 464 P.2d 122 (holding former pre-judgment wage garnishment law to be unconstitutional deprivation of procedural due process).

(n10)Footnote 10. Code Civ. Proc. § 706.011(a); *see also* 15 U.S.C. § 1672(a) (definition of earnings under Consumer Credit Protection Act).

(n11)Footnote 11. Code Civ. Proc. § 706.011(c).

(n12)Footnote 12. *See* Cal. Judicial Council Forms WG-002 et seq.

(n13)Footnote 13. Code Civ. Proc. § 706.120.

(n14)Footnote 14. Code Civ. Proc. § 706.021. For reproduction of the Judicial Council forms of earnings withholding orders, *see* [2][a] and [b], *below*.

(n15)Footnote 15. *See* Code Civ. Proc. §§ 706.075(b), 706.076(f), 706.104(a); Cal. Judicial Council Form WG-003 (Judicial Council form of notice to employee and instructions). For a reproduction of the prescribed notice, *see* [2][c], *below*.

(n16)Footnote 16. *See* Code Civ. Proc. §§ 706.073, 706.104(b), 706.126; *see also* Cal. Judicial Council Form WG-005. For a reproduction of the employer's return form, *see* [2][d], *below*.

(n17)Footnote 17. *See* Code Civ. Proc. §§ 706.022, 706.078.

(n18)Footnote 18. *See* Code Civ. Proc. § 706.025.

(n19)Footnote 19. *See* Cal. Judicial Council Form WG-002; *see also* forms set forth in [2][a] and [b], *below*.

(n20)Footnote 20. *See* Code Civ. Proc. §§ 706.152-706.154.

(n21)Footnote 21. *See* Code Civ. Proc. §§ 706.023, 706.030, 706.031, 706.077.

(n22)Footnote 22. *See* Cal. Judicial Council Form WG-005; *see also* form set forth in [2][d], *below*.

(n23)Footnote 23. *See* Code Civ. Proc. §§ 706.050-706.051.

(n24)Footnote 24. *See* Code Civ. Proc. § 706.050; 15 U.S.C. § 1673(a); *see also* discussion in [b], *below*.

(n25)Footnote 25. Compare Code Civ. Proc. §§ 706.052, 706.074(b), 706.076 with 15 U.S.C. § 1673(b).

(n26)Footnote 26. *See* Code Civ. Proc. §§ 706.125(e), 706.127; Cal. Judicial Council Form WG-002; *see also* forms set forth in [2][a] and [b], *below*.

(n27)Footnote 27. *See* Code Civ. Proc. § 706.051; *see also* Code Civ. Proc. § 706.105 (procedure for claiming exemption).

(n28)Footnote 28. Code Civ. Proc. § 706.029.

(n29)Footnote 29. Code Civ. Proc. § 706.029.

(n30)Footnote 30. *See* 15 U.S.C. §§ 1671-1677.

(n31)Footnote 31. *See* 15 U.S.C. § 1671.

(n32)Footnote 32. *See* 15 U.S.C. § 1673(a).

(n33)Footnote 33. 15 U.S.C. § 1672(b).

(n34)Footnote 34. *See* *Marshall v. Dist. Ct. for Forty-First-b Jud. Dist.* (E.D. Mich. 1978) 444 F. Supp. 1110, 1115 .

(n35)Footnote 35. *See* 15 U.S.C. § 1673(b)(1)(A),(2).

(n36)Footnote 36. 15 U.S.C. § 1673(b)(1)(B); *see* 11 U.S.C. §§ 1301-1330(Chapter 13 of bankruptcy law).

(n37)Footnote 37. 15 U.S.C. § 1673(b)(1)(C).

(n38)Footnote 38. *See* 26 U.S.C. § 6334(a)(9),(d); 26 C.F.R. § 301.6334-2 *et seq.*

(n39)Footnote 39. *See* *Code Civ. Proc.* §§ 706.074(b), 706.076.

(n40)Footnote 40. *See* 15 U.S.C. § 1677(1).

(n41)Footnote 41. *See* *Code Civ. Proc.* §§ 706.050, 706.052.

(n42)Footnote 42. *See* 15 U.S.C. § 1674.

(n43)Footnote 43. *See* *Code Civ. Proc.* §§ 706.125, 706.127; Cal. Judicial Council Form WG-002.

(n44)Footnote 44. *See* 29 U.S.C. § 206(a) (Pub. L. No. 104-188).

(n45)Footnote 45. *See* *Code Civ. Proc.* §§ 706.103(a)(1), (b), 706.108(c)(1), (4).

(n46)Footnote 46. *See* *Code Civ. Proc.* § 706.125.

(n47)Footnote 47. *See* *Code Civ. Proc.* § 706.120.

(n48)Footnote 48. *See* *Code Civ. Proc.* §§ 706.103(a)(2), (3), 706.108(c)(2), (3).

(n49)Footnote 49. *See* *Code Civ. Proc.* § 706.104(a).

(n50)Footnote 50. *See* Cal. Judicial Council Form WG-004.

(n51)Footnote 51. *See* *Code Civ. Proc.* §§ 706.081, 706.120.

(n52)Footnote 52. *See* *Code Civ. Proc.* §§ 706.125, 706.127.

(n53)Footnote 53. *See* *Code Civ. Proc.* § 706.030(a).

(n54)Footnote 54. *See* *Code Civ. Proc.* §§ 706.103(a)(1), (b), 706.108(c)(1), (4).

(n55)Footnote 55. *See* *Code Civ. Proc.* § 706.125.

(n56)Footnote 56. *See* *Code Civ. Proc.* § 706.120.

(n57)Footnote 57. *See* *Code Civ. Proc.* §§ 706.103(a)(2), (3), 706.108(c)(2), (3).

(n58)Footnote 58. *See* *Code Civ. Proc.* § 706.104(a).

(n59)Footnote 59. *See* Cal. Judicial Council Form WG-002.

(n60)Footnote 60. *See Code Civ. Proc.* §§ 706.081, 706.120.

(n61)Footnote 61. *See Code Civ. Proc.* § 706.122. Cal. Judicial Council Form WG-003.

(n62)Footnote 62. *See Code Civ. Proc.* §§ 706.103(a), (b), 706.108(c). For reproductions of the earnings withholding order forms, *see* [a] and [b], *above*. For a reproduction of the form of return, *see* [d], *below*.

(n63)Footnote 63. *See Code Civ. Proc.* § 706.122.

(n64)Footnote 64. *See Code Civ. Proc.* § 706.120.

(n65)Footnote 65. *See Code Civ. Proc.* § 706.104(a).

(n66)Footnote 66. *See Code Civ. Proc.* §§ 706.081, 706.120.

(n67)Footnote 67. *See Code Civ. Proc.* § 706.126; Cal. Judicial Council Form WG-005.

(n68)Footnote 68. *See Code Civ. Proc.* §§ 706.103(a), (b), 706.108(c). For reproductions of the earnings withholding order forms, *see* [a] and [b], *above*. For a reproduction of the form of notice (entitled "Employee Instructions"), *see* [c], *above*.

(n69)Footnote 69. *See Code Civ. Proc.* § 706.126.

(n70)Footnote 70. *See Code Civ. Proc.* § 706.120.

(n71)Footnote 71. *Code Civ. Proc.* § 706.104(b).

(n72)Footnote 72. *See Code Civ. Proc.* § 706.104(b).

(n73)Footnote 73. *See Code Civ. Proc.* §§ 706.081, 706.120.

(n74)Footnote 74. *See 15 U.S.C.* § 1674; *Lab. Code* § 2929.

(n75)Footnote 75. *15 U.S.C.* § 1674(a).

(n76)Footnote 76. *See Brennan v. Kroger Company* (7th Cir. 1975) 513 F.2d 961, 963-964 .

(n77)Footnote 77. *15 U.S.C.* § 1674(b).

(n78)Footnote 78. *15 U.S.C.* § 1676.

(n79)Footnote 79. *See, e.g., LeVick v. Skaggs Companies, Inc.* (9th Cir. [Ariz.] 1983) 701 F.2d 777, 779-780 .

(n80)Footnote 80. *See, e.g., Johnson v. Pike Corporation of America* (C.D. Cal. 1971) 332 F.Supp. 490, 496 , which held that a cause of action would lie if a discharge of a garnishee was discriminatory on the basis of race, sex, color, religion, or national origin.

(n81)Footnote 81. *Lab. Code* § 2929(b).

(n82)Footnote 82. *Lab. Code* § 2929(b).

(n83)Footnote 83. *See 15 U.S.C.* § 1674.

(n84)Footnote 84. *Lab. Code* § 2929(e).

(n85)Footnote 85. *See Lab. Code* § 2929(c).

(n86)Footnote 86. *Lab. Code* § 2929(c).

(n87)Footnote 87. *Lab. Code* § 2929(c).

(n88)Footnote 88. *See 15 U.S.C.* § 1674(b).

(n89)Footnote 89. *Lab. Code* § 2929(c).

(n90)Footnote 90. *Lab. Code* § 2929(d).

(n91)Footnote 91. *See Lab. Code* § 2929(b).

(n92)Footnote 92. *See* Cal. Law Rev. Comm. Comment to *Lab. Code* § 2929 (1971); *see also 15 U.S.C.* § 1677 (federal act does not preclude enforcement of state law that prohibits discharge of employee whose wages have been subject to garnishment for more than one indebtedness).

(n93)Footnote 93. *See Fam. Code* § 5290.

(n94)Footnote 94. *See Fam. Code* § 5290.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 4 Payment of Wages

Part B. WAGE DEDUCTIONS, ASSIGNMENTS, AND GARNISHMENTS

1-4 California Employment Law §§ 4.13 through 4.19

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§§ 4.13[Reserved]



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AUTHOR: By Susan Spurlark, J.D.

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Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Assignments, Deductions & Garnishments



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CHAPTER 4 Payment of Wages

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1-4 California Employment Law § 4.21

AUTHOR: By Susan Spurlark, J.D.

§ 4.21 Encyclopedias

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16 Cal. Jur. 3d, "Creditor's Rights and Remedies," §§ 34-37, 123-127.

29 Cal. Jur. 3d, "Employer and Employee," §§ 32, 33, 42, 45, 46, 63.

41 Cal. Jur. 3d, "Labor," §§ 1, 12, 18, 21, 25, 28-35, 152, 201.

52 Cal. Jur. 3d, "Public Officers and Employees," §§ 278-283.

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour
Laws Assignments, Deductions & Garnishments



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Legal Topics:

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

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

1-5 California Employment Law 5.syn

AUTHOR: By Susan Spurlark, J.D.

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FOOTNOTES:

(n1)Footnote *. Ms. Spurlark specializes in representation of private and public employers in matters involving labor and employment law. She received her J.D. from Stanford Law School in 1975.

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

1-5 California Employment Law Scope

AUTHOR: By Susan Spurlark, J.D.

Scope

By Susan Spurlark, J.D. n SCOPE*

This chapter discusses remedies for failure to comply with wage and hour laws. Part A covers remedies under California law for failure to pay wages, including a discussion of the jurisdiction of the California Labor Commissioner and the Department of Labor Standards Enforcement, administrative proceedings under the California Labor Code, actions by the Labor Commissioner on behalf of employees, and civil penalties imposed under the Labor Code. Part A also discusses civil actions by employees for violation of the wage payment laws and the legal protection given to employees who file a wage claim or testify against an employer. Finally, Part A briefly discusses criminal sanctions and bond requirements that may be imposed against an employer who wilfully violates the Labor Code.

Part B discusses additional remedies available for failure to pay required minimum wages or overtime compensation under both state and federal law.

Recordkeeping obligations are discussed in Chapter 7. For discussion of remedies for violations of child labor laws, *see* Chapter 6. For an overview of the applicability of the various wage and hour laws, *see* Chapter 1.

FOOTNOTES:

(n2)Footnote *. Ms. Spurlark specializes in representation of private and public employers in matters involving labor and employment law. She received her J.D. from Stanford Law School in 1975.

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
Subpart 1. Generally

1-5 California Employment Law § 5.01

AUTHOR: By Susan Spurlark, J.D.

§ 5.01 Available Remedies

If an employer fails to pay contractually or statutorily required wages or fails to pay wages in the manner or at the time required by law, California law provides a number of remedial procedures.ⁿ¹ The two most commonly used remedial procedures are set forth in the Labor Code and lie within the jurisdiction of the California Labor Commissioner. The first procedure is set forth in *Labor Code Sections 98-98.2* and is known as the "Berman" hearing procedure. It is discussed in Part A, Subpart 2, §§ 5.10-5.18. The second procedure, set forth in *Labor Code Section 98.3*, authorizes the Labor Commissioner to bring a civil action on behalf of an aggrieved employee for recovery of unpaid wages and penalties. It is discussed in Subpart 3, § 5.30.

State and federal law provide five other procedures to remedy violations of wage and hour laws. First, the Labor Commissioner is empowered by *Labor Code Sections 210* and *225.5* to bring a civil action to recover statutory penalties for failure to pay wages due. This procedure is discussed in Part A, Subpart 3, § 5.31. Second, *Labor Code Section 218* authorizes any individual wage claimant to file a civil action to recover wages due, either directly or through an assignee, on his or her own behalf or on behalf of a class of employees, and also to seek an award of civil penalties under the Private Attorneys General Act of 2004, *Labor Code Section 2699 et seq.* This procedure is discussed in Part A, Subpart 4, §§ 5.40-5.42 and Part B, Subpart 1, § 5.72. Third, *Labor Code Sections 98.6* and *98.7*, as well as provisions of the Fair Labor Standards Act,ⁿ² provide administrative remedies for unlawful discrimination or retaliation against an employee or applicant for filing a wage claim or testifying against an employer with regard to a wage claim.ⁿ³ These remedies are discussed in §§ 5.50- 5.51 and 5.83. Fourth, the Labor Code contains numerous sections that provide for the imposition of criminal penalties and bond requirements on employers who violate the wage and hour laws. These provisions are discussed in Part A, Subpart 6, §§ 5.60-5.62. Fifth, state and federal law provide administrative and civil procedures specifically intended to remedy failure to pay mandated minimum wages or overtime compensation. These remedies overlap with, but are narrower in scope than, the procedures set forth above. The state administrative procedures are set forth in *Labor Code Sections 1193.5-1197.1* and are discussed in Part B, Subpart 1, §§ 5.70-5.71. The federal administrative procedures are set forth in the Fair Labor Standards Actⁿ⁴ and are discussed in Part B, Subpart 2, § 5.81. Civil actions for failure to pay minimum wages or overtime are discussed in §

5.72 (state actions) and § 5.82 (federal actions).

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Remedies General Overview Labor & Employment Law Wage & Hour Laws Wage Payments

FOOTNOTES:

(n1)Footnote 1. *See Smith v. Rae-Venter Law Group* (2002) 29 Cal. 4th 345, 350, *superseded by statute on other grnds.*, *see* 2003 Stats. Ch. 93 § 1 (if employer fails to pay wages in amount, time, or manner required by contract or by statute, employee has two principal options: seek judicial relief by filing civil action for breach of contract and/or wages prescribed by statute or seek administrative relief by filing wage claim with Labor Commissioner under *Lab. Code* §§ 98-98.8); *overruled on other grounds by amendment to Civ. Code* § 98.2. *see* 2003 Stats. Ch. 93 § 1.

(n2)Footnote 2. *See* 29 U.S.C. §§ 215(a)(3), 216(b).

(n3)Footnote 3. Under California law, a civil action for wrongful discharge may lie for similar conduct. *see Montalvo v. Zamora* (1970) 7 Cal. App. 3d 69, 76, 86 Cal. Rptr. 401. For discussion of common law liability for wrongful discharge, *see* ch. 60.

(n4)Footnote 4. *See* 29 U.S.C. §§ 209, 211, 215, 216, 217.



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
Subpart 1. Generally

1-5 California Employment Law § 5.02

AUTHOR: By Susan Spurlark, J.D.

§ 5.02 Jurisdiction of Labor Commissioner Over Administrative Claims

[1] Jurisdiction

[a] In General

The California Labor Commissioner is the Chief of the Division of Labor Standards Enforcement (DLSE).ⁿ¹ The DLSE, under the direction of the Labor Commissioner, is responsible for enforcement of all provisions of the Labor Code unless jurisdiction is specifically vested in another officer, board, or commission.ⁿ² The DLSE's jurisdiction includes all laws and penalties relating to the payment of minimum wages and overtime compensation,ⁿ³ the time and manner of payment of wages,ⁿ⁴ collection of unpaid wages and benefits,ⁿ⁵ and discrimination against wage claimants and witnesses in wage claim proceedings.ⁿ⁶ The DLSE also enforces child labor restrictions under the Labor Code.ⁿ⁷

The Labor Commissioner's jurisdiction does not limit the authority of prosecuting attorneys of the cities and/or counties and affected employees or their assignees to prosecute civil and/or criminal actions for violations of *Labor Code Section 200 et seq.*, governing payment of wages.ⁿ⁸ For discussion of civil actions by employees, *see* §§ 5.40-5.41; for discussion of ERISA preemption, *see* § 2.06[4][a].

[b] Wage Disputes Involving Application of Collective Bargaining Agreements

The Labor Code provides that the Labor Commissioner does not have jurisdiction over wage disputes involving the interpretation or application of collective bargaining agreements that provide for arbitration.ⁿ⁹ The Labor Commissioner has in the past interpreted this rule as precluding its adjudication of such wage disputes,ⁿ¹⁰ and has adopted a policy of declining to enforce any state-law claims by employees covered by collective bargaining agreements if those claims involve relief based on the employee's wage rate, as set forth in the agreement.ⁿ¹¹ However, in *Livadas v. Bradshaw*,ⁿ¹² the United States Supreme Court held that the National Labor Relations Act (NLRA) preempts this policy because the policy penalizes an employee's right to bargain collectively with his or her employer. The Court reasoned that the policy presents the employee with the "unappetizing choice" of either enforcing his or her

rights under state law or exercising the right under the NLRA to enter into a collective-bargaining agreement with an arbitration clause.ⁿ¹³ The employee in *Livadas* claimed that her employer had not paid the wages owed her on discharge, as required by *Labor Code Section 201*, and that she was therefore entitled to the penalty provided under *Labor Code Section 203*, namely the continuation of her daily wages at the same rate until the wages due on discharge were paid or an action was commenced, but for no more than 30 days.ⁿ¹⁴ The Court rejected the Commissioner's argument that determining the "same rate" required interpretation and application of the employee's collective bargaining agreement, noting that deciding the validity of the employee's claim required reference not to the terms of the agreement but to a calendar.ⁿ¹⁵

According to the Labor Commissioner, the Court in *Livadas* did not open the door to unlimited adjudication by the DLSE of claims filed by employees covered by collective bargaining agreements containing arbitration clauses, but neither did the Court offer any guidelines in determining when adjudication by the DLSE is precluded.ⁿ¹⁶ However, following a more recent United States Supreme Court decision regarding whether an employee's claim is independent of a collective bargaining agreement and can be resolved or enforced without interpretation of the agreement,ⁿ¹⁷ the Labor Commissioner has issued interim guidelines to be used by all DLSE personnel until new written directives are issued.ⁿ¹⁸ Under these guidelines, the DLSE will not reject any claim solely because the claimant's employment was covered by the terms of a collective bargaining agreement.ⁿ¹⁹ The guidelines outline the procedures for handling (1) claims that clearly indicate that a collective bargaining agreement covers the employment, (2) situations in which the existence of a collective bargaining agreement is not initially clear, and (3) situations in which the resolution of the meaning of the agreement's terms is the subject of dispute.ⁿ²⁰ The guidelines also prescribe the role of DLSE attorneys in reviewing this type of case, and require DLSE legal staff to address the following issues: (1) whether the claim is based on a state law right; (2) whether the state law right is a minimum standard that cannot be bargained away; (3) whether the state law claim is independent of the collective bargaining agreement; and (4) whether the collective bargaining agreement is the only source of the claimant's right.ⁿ²¹ The guidelines give the following examples of how the DLSE will treat cases of this type:

■ **ILLUSTRATION 1:**

X, a union-represented employee, claims that her former employer delayed three days in making her final wage payment. The employer does not dispute X's rate of pay, hours worked, or when it paid X's final wages. The DLSE may proceed with X's claim for waiting time penalties.ⁿ²²

■ **ILLUSTRATION 2:**

Y, a union-represented employee, claims that he was entitled to a wage of \$8 per hour. His employer claims that Y was only entitled to \$7 per hour under the collective bargaining agreement, and therefore made a full and immediate final wage payment to Y based on the \$7 per hour rate. Because the only dispute is whether Y is entitled to \$7 per hour or \$8 per hour, the DLSE must hold Y's claim in abeyance until the parties reach a final resolution of the wage-rate issue under the collective bargaining agreement. If the arbitrator concludes that Y was only entitled to \$7 per hour, the employer is not liable for any penalties. If the arbitrator concludes that Y was entitled to \$8 per hour, the DLSE may proceed with Y's claim for penalties after receiving a definitive resolution of the contractual issues.ⁿ²³

■ **ILLUSTRATION 3**

Z, a union-represented employee, claims that she is entitled to a rate of pay of \$8 per hour. Z's employer has not paid her any final wages for thirty days. Z's employer admits that it owes Z wages for her final pay period, but claims it only owes her wages at the rate of \$7 per hour. The DLSE may hold Z's claim in abeyance so that the arbitrator may resolve whether Z was entitled to \$7 per hour or \$8 per hour under the applicable collective bargaining agreement. However, even if the arbitrator rules that Z is only entitled to \$7 per hour (or the union withdraws or abandons the grievance), the employer will still be liable for penalties at the rate of \$7 per hour. Under *Labor Code Section 206(a)*, the employer had a duty to make immediate payment of all wages it conceded were due to Z, and the dispute over Z's rate of pay

does not prevent the DLSE from enforcing the penalty claim at least as to the amount the employer has conceded was due.ⁿ²⁴

In a case involving claims for overtime compensation under federal and state law, the Ninth Circuit found that *section 301 of the Labor Management Relations Act* preempted a state law claim because resolution of the dispute required interpretation of the pay and overtime pay provisions in a collective bargaining agreement.ⁿ²⁵

[2] Types of Proceedings

[a] Generally

The DLSE may pursue one of two procedures for adjudication of wage claims filed pursuant to *Labor Code Sections 96* (assignment of claims for wages and other benefits), 96.7 (wage and benefit claims which are not assigned), 98 (complaints for recovery of wages, penalties, and other demands for compensation), and 1195.5 (nonpayment of wages in excess of the minimum wage). The two procedures are (1) the "Berman" hearing procedure pursuant to *Labor Code Sections 98-98.2*,ⁿ²⁶ and (2) a civil action by the Labor Commissioner under *Labor Code Section 98.3*.ⁿ²⁷

Separate procedures are provided for the imposition of penalties paid to the State of California.ⁿ²⁸ In addition, there are special provisions governing claims of discrimination under various provisions of the Labor Code.ⁿ²⁹

[b] "Berman" Hearings

"Berman" proceedings are authorized in cases of complaints for wages, penalties, and other demands for compensation and may also be used where a claim is filed by the holder of a payroll check or other instrument returned for insufficient funds *if* the holder, after a diligent search, cannot return the dishonored check and recover the sums at issue.ⁿ³⁰ The proceeding involves an employee complaint, investigation, administrative hearing before a hearing officer, and decision and award by the Labor Commissioner.ⁿ³¹ There is a right of appeal with a hearing de novo by the court.ⁿ³²

"Berman" proceedings may not be used in the case of claims involving bankruptcies or probate; mechanics', loggers', or miners' claims; preferred wage claims under *Code of Civil Procedure sections 1204, 1205 or 1206*;ⁿ³³ discrimination and retaliation complaints under *Labor Code section 98.6* (prohibiting discrimination as a result of filing wage claim or testifying in wage claim proceeding); cases involving discrimination or retaliation for engaging in certain other protected activities;ⁿ³⁴ other nonwage matters where criminal or civil citations are used (such as violations of child labor laws, itemized wage and deduction statement violations, matters involving unlicensed contractors, health and welfare benefits, and payday violations); and anonymous or confidential complaints of Industrial Welfare Commission wage order violations.ⁿ³⁵

"Berman" proceedings are discussed in depth in Subpart 2, §§ 5.10-5.18.

[c] Civil Actions Under Labor Code Section 98.3

Under *Labor Code section 98.3*, following an investigation and/or "hearing" conducted by an assigned Deputy Labor Commissioner, a civil action may be brought by the Labor Commissioner on behalf of the claimant.ⁿ³⁶ Generally, the Labor Commissioner is authorized to bring suit under section 98.3 when the employee has a valid claim and cannot afford to employ counsel.ⁿ³⁷ However, authority exists for the Labor Commissioner to prosecute actions on behalf of employees in other circumstances.ⁿ³⁸ These proceedings are discussed in Subpart 3, §§ 5.30-5.32.

[3] Investigatory Powers

The Labor Commissioner's authority to conduct investigations is delineated in the Labor Code. The code gives the Labor Commissioner and his deputies and agents "free access to all places of labor" to conduct investigations.ⁿ³⁹

Refusal of such admission or a willful failure to furnish the Labor Commissioner with statistics or information is a misdemeanor, which is punishable by a fine of up to \$1000.ⁿ⁴⁰ In the course of its investigation, the Commissioner or other DLSE employees may inspect or make excerpts from books, reports, contracts, payrolls, documents, or other papers relating to employees.ⁿ⁴¹

In addition, the Labor Commissioner may issue subpoenas to compel the attendance of witnesses or production of records; administer oaths; examine witnesses under oath; take verifications, acknowledgments, or proofs of written instruments; and take depositions and affidavits in order to carry out the provisions of the Labor Code and other laws within the jurisdiction of the DLSE.ⁿ⁴² Obedience to subpoenas issued by the Labor Commissioner is enforced by the courts.ⁿ⁴³ The DLSE's subpoena power extends to records necessary to determine whether the employer or entity is subject to the DLSE's jurisdiction and whether there has been a violation of provisions that the DLSE is authorized to regulate.ⁿ⁴⁴ For example, in a case involving the issue of whether an employer maintaining a Voluntary Employees' Beneficiary Association Trust (VEBA) was subject to California law governing payment of accrued vacation time,ⁿ⁴⁵ the DLSE was entitled to subpoena all of the following items filed or maintained by the VEBA: (1) IRS exempt organization returns; (2) IRS employee benefit plan returns; (3) IRS applications for recognition of exemption; (4) California Franchise Tax Board exempt organization returns and applications; (5) the plan description and summary plan description; (6) annual reports; (7) bank statements reflecting all receipts and disbursements; and, (8) all written guidelines, manuals, policy memos, or employee handbooks provided by the employer or the VEBA to employees regarding the establishment, funding, or operation of the VEBA.ⁿ⁴⁶

Officers and employees of the DLSE may be designated as peace officers with the authority to make arrests, serve processes and notices throughout the state, and in some instances to carry firearms.ⁿ⁴⁷ DLSE employees who are not peace officers may make arrests without a warrant if a person, in their presence, violates any law that the DLSE is authorized to enforce, or if there is probable cause to believe that such laws have been violated.ⁿ⁴⁸

Limitations have been placed on the DLSE's investigatory authority, particularly when access to an employer's premises is sought. The Labor Commissioner has established the following policies regarding inspections of employer premises:ⁿ⁴⁹

1. The Labor Commissioner (or other authorized DLSE employees) may have free access, without consent, to public areas of an employer's premises;
2. Consent is required for entry into nonpublic areas of an employer's premises, whether for inspection of records or other inspections;ⁿ⁵⁰
3. Consent cannot be coerced by intimidation or color of legal right. The Labor Commissioner may not cite *Labor Code sections 90, 1174, or 1175* as authority for an inspection of a nonpublic area of the work place;
4. If consent is withheld or an inspection is refused on request, an administrative search warrant must be obtained if an actual inspection of the premises is desired;ⁿ⁵¹
5. In order to review books and records, a subpoena duces tecum issued pursuant to *Labor Code section 92* should be used. If the subpoena is issued by the DLSE, it cannot refer to criminal penalties for disobedience;
6. Inspections pursuant to administrative search warrants may not be made between 6 p.m. of any day and 8 a.m. of the succeeding day, in the absence of the employer or his or her representative, and there may be no forcible entry, unless there is a compelling reason and such inspection is authorized by the judge issuing the warrant;

7. And, if prior consent for the inspection has been refused, notice that a warrant has issued must be given at least 24 hours in advance of execution, unless the judge for good cause orders otherwise.

The use of subpoenas issued pursuant to *Labor Code section 92*, which threatened criminal prosecution under *Labor Code section 93* in the event of noncompliance, was challenged in *California Restaurant Assn. v. Henning*.ⁿ⁵² In that case, the court of appeal held that *Labor Code section 93* is unconstitutional on its face and as applied "because it provides for strict criminal liability in the event a subpoenaed party refuses to surrender his rights against unreasonable searches and seizures without a prior judicial validation of the subpoena as required by the *Fourth Amendment*."ⁿ⁵³ In the face of this ruling, the Labor Commissioner has advised DLSE staff that the DLSE can no longer file criminal complaints against an employer who has willfully ignored a subpoena issued by the Labor Commissioner pursuant to *Labor Code section 92*.ⁿ⁵⁴ Investigatory subpoenas may, however, be issued pursuant to *Labor Code section 74* and are enforceable by the courts.ⁿ⁵⁵

The California Supreme Court has rejected constitutional challenges to judicial enforcement of administrative subpoenas issued by the DLSE under *Labor Code section 74* that order employers to produce wage and hour records required to be maintained under *Labor Code section 1174*.ⁿ⁵⁶ The Court held that judicial enforcement of such subpoenas violates neither the *Fourth Amendment* proscription against unreasonable searches and seizures nor the *Fifth Amendment* privilege against self-incrimination.ⁿ⁵⁷

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Remedies General Overview Labor & Employment Law Wage & Hour Laws Wage Payments

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code §§ 21, 79*. References to the Labor Commissioner include his or her deputies and agents unless otherwise stated.

(n2)Footnote 2. *Lab. Code § 95(a)*; *see Aguilar v. Association for Retarded Citizens (1991) 234 Cal. App. 3d 21, 26-28, 285 Cal. Rptr. 515*.

(n3)Footnote 3. *Lab. Code §§ 61, 1193.5*; *see Lab. Code §§ 1193.6-1197.1*; *see also Lab. Code §§ 856* (DLSE to enforce provisions relating to working hours of pharmacists).

(n4)Footnote 4. *Lab. Code § 217*; *see Lab. Code §§ 206, 210, 226.4-226.5, 253-256, 355, 410*.

(n5)Footnote 5. *See Lab. Code §§ 96, 96.7*.

(n6)Footnote 6. *See Lab. Code §§ 98.6, 98.7*.

(n7)Footnote 7. *Lab. Code §§ 1311, 1398*; *see also* discussion in ch. 6.

(n8)Footnote 8. *See Lab. Code § 218*.

(n9)Footnote 9. *See Lab. Code § 229*; *Plumbing, Heating etc. Council v. Howard (1975) 53 Cal. App. 3d 828, 834-835, 126 Cal. Rptr. 406*.

(n10)Footnote 10. D.L.S.E. Policy and Procedure Memo. No. 76-6 (Mar. 22, 1976).

(n11)Footnote 11. See *Livadas v. Bradshaw* (1994) 512 U.S. 107, 114 S. Ct. 2068, 129 L. Ed. 2d 93, 102-103 .

(n12)Footnote 12. *Livadas v. Bradshaw* (1994) 512 U.S. 107, 114 S. Ct. 2068, 129 L. Ed. 2d 93 .

(n13)Footnote 13. *Livadas v. Bradshaw* (1994) 512 U.S. 107, 114 S. Ct. 2068, 129 L. Ed. 2d 93, 105-106, 110 ; but see *Viceroy Gold Corp. v. Aubry* (9th Cir. 1996) 75 F.3d 482, 490 (*Livadas* rationale allows for opt-out provisions such as *Lab. Code* § 750.5, which are not preempted by *NLRA*) and *National Broadcasting Corporation v. Bradshaw* (9th Cir. 1995) 70 F.3d 69, 73 (opt-out overtime provision in broadcasting industry not preempted).

(n14)Footnote 14. See *Lab. Code* § 203; see also discussion in ch. 4.

(n15)Footnote 15. *Livadas v. Bradshaw* (1994) 512 U.S. 107, 114 S. Ct. 2068, 129 L. Ed. 2d 93, 110 .

(n16)Footnote 16. D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994) (CAUTION: see § 1.05[3][c], above, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n17)Footnote 17. See *Hawaiian Airlines, Inc. v. Norris* (1994) 512 U.S. 246, 256-261, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (involving wrongful discharge, not wage and hour issues).

(n18)Footnote 18. D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n19)Footnote 19. D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n20)Footnote 20. D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n21)Footnote 21. D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n22)Footnote 22. D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n23)Footnote 23. D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n24)Footnote 24. D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n25)Footnote 25. *Firestone v. Southern Cal. Gas Co.* (9th Cir. 2000) 219 F. 3d 1063, 1066-1067 , *reh'g denied*, 281 F.3d 801 (no change in prior holding that claim required interpretation of CBA and was preempted). Compare *Gregory v. RSWL SCIE* (9th Cir. 2003) 317 F.3d 1050, 1052-1054 (overtime claim by employee in entertainment industry covered by collective bargaining agreement was not preempted by LMRA; state law exclusively determined whether overtime rate calculation accorded with *Lab. Code* § 510, and there was no dispute over terms or interpretation of CBA).

(n26)Footnote 26. See discussion in [b], *below*.

(n27)Footnote 27. See discussion in [c], *below*.

(n28)Footnote 28. See *Lab. Code* §§ 210, 226.4, 226.5, 408-410, 1175; see also discussion in § 5.31.

(n29)Footnote 29. *See Lab. Code §§ 98.6, 98.7; see also* discussion in §§ 5.50-5.51.

(n30)Footnote 30. *Lab. Code § 98(a)*.

(n31)Footnote 31. *See Lab. Code §§ 98-98.2; 8 Cal. Code Reg. §§ 13501-13508*.

(n32)Footnote 32. *See Lab. Code §§ 98.1, 98.2*.

(n33)Footnote 33. *Code Civ. Proc. §§ 1204, 1205, and 1206* provide limited priority for certain wage claimants when an employer (1) assigns assets or transfers property for the benefit of creditors as a result of insolvency or receivership proceedings; (2) sells or transfers any business or stock in trade, or a substantial part thereof, other than in the ordinary course of business; or (3) has property subject to levy under a writ of execution or attachment.

(n34)Footnote 34. The specific statutory provisions referred to are *Lab. Code §§ 132a* (prohibiting discrimination for filing workers' compensation claim or testifying in such a proceeding), 432.2 (prohibiting employer from requiring applicant or employee to submit to lie detector test), 6310-6312 (prohibiting discrimination against employees for filing certain complaints regarding worker health and safety). For discussion of these provisions, *see* chs. 20, 50, and 60, respectively.

(n35)Footnote 35. *See D.L.S.E. Div. Management Memo. No. 84-3 (Feb. 14, 1984)*.

(n36)Footnote 36. *See Lab. Code § 98.3; D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986)*.

(n37)Footnote 37. *Lab. Code § 98.3(a)*.

(n38)Footnote 38. *See Lab. Code §§ 96, 96.7, 98.3(b),(c), 1195.5*.

(n39)Footnote 39. *Lab. Code § 90; see also Lab. Code § 1174(b)* (employers required to allow DLSE employees free access to places of business or employment to secure information and make investigations authorized by Labor Code provisions governing wages and hours).

(n40)Footnote 40. *Lab. Code § 90*.

(n41)Footnote 41. *See Lab. Code § 1174(b)*.

(n42)Footnote 42. *Lab. Code § 92; see Lab. Code § 74*. As discussed below, the Labor Commissioner's ability to enforce subpoenas was severely impaired by the decision in *California Restaurant Assn. v. Henning* (1985) 173 Cal. App. 3d 1069, 1075-1077, 219 Cal. Rptr. 630 .

(n43)Footnote 43. *Lab. Code § 74*.

(n44)Footnote 44. *See Millan v. Restaurant Enterprises Group, Inc.* (1993) 14 Cal. App. 4th 477, 491-493, 18 Cal. Rptr. 2d 198 .

(n45)Footnote 45. *See Labor Code § 227.3*, discussed in Chapter 4.

(n46)Footnote 46. *See Millan v. Restaurant Enterprises Group, Inc.* (1993) 14 Cal. App. 4th 477, 491-493, 18 Cal. Rptr. 2d 198 .

(n47)Footnote 47. *See Lab. Code § 95(c),(d); D.L.S.E. Div. Management Memo. No. 85-1 (Oct. 10, 1985)*.

(n48)Footnote 48. *Lab. Code § 95(a)*.

(n49)Footnote 49. *See D.L.S.E. Policy and Procedure Memo. No. 82-1, (Jan. 8, 1982) (CAUTION: see §*

1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n50)Footnote 50. *See People v. Los Angeles Palm, Inc. (1981) 121 Cal. App. 3d 25, 29, 175 Cal. Rptr. 257* (also noting that consent must be obtained from an authorized person and must be voluntary).

(n51)Footnote 51. *See People v. Los Angeles Palm, Inc. (1981) 121 Cal. App. 3d 25, 28-29, 175 Cal. Rptr. 257* .

(n52)Footnote 52. *California Restaurant Assn. v. Henning (1985) 173 Cal. App. 3d 1069, 219 Cal. Rptr. 630* .

(n53)Footnote 53. *California Restaurant Assn. v. Henning (1985) 173 Cal. App. 3d 1069, 1077, 219 Cal. Rptr. 630* .

(n54)Footnote 54. D.L.S.E. Div. Management Memo. No. 86-1 (Jan. 2, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n55)Footnote 55. D.L.S.E. Div. Management Memo. No. 86-1 (Jan. 2, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n56)Footnote 56. For discussion of recordkeeping requirements under wage and hour laws, *see* Chapter 7.

(n57)Footnote 57. *See Craib v. Bulmash (1989) 49 Cal. 3d 475, 485, 490, 261 Cal. Rptr. 686, 777 P.2d 1120* .



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY

Subpart 1. Generally

1-5 California Employment Law §§ 5.03 through 5.09

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§§ 5.03[Reserved]



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY

Subpart 2. "Berman" Hearings (Labor Code Sections 98-98.2)

1-5 California Employment Law § 5.10

AUTHOR: By Susan Spurlark, J.D.

§ 5.10 Initial Investigation and Processing of Employee Complaints

■ **PRACTICE TIP:**

Most of the administrative procedures utilized by the Labor Commissioner and the DLSE are not described in regulations or official bulletins of that department. However, the DLSE's Operations and Procedures Manuals contain detailed guidelines for the DLSE's staff in handling wage claims and administrative hearings, particularly under the "Berman" procedure. Description of DLSE procedures contained in this subpart are based in part on the guidelines in those manuals. Counsel may wish to check with the DLSE in case of doubt about current procedures. *Commentary by Susan Spurlark.*

Labor Code section 98(a) authorizes the Labor Commissioner to investigate employee complaints for unpaid wages, penalties, and other compensation. The powers of the Labor Commissioner with regard to the investigation are discussed in § 5.02 [3] and include the right to make inspections, subpoena witnesses and documents, and conduct depositions and other examinations of witnesses.n1

An investigation may be initiated by the claimant's completion of a form called the "Initial Report or Claim" (DLSE 1). That form assigns the employee's claim to the Labor Commissioner and allows an initial screening of the claim. Formal proceedings before the Labor Commissioner are subsequently initiated by completion and filing of the DLSE "Complaint" form (DLSE 530),n2 which is set forth and discussed in § 5.11.

After receipt of the initial claim, the DLSE may attempt to encourage the parties to settle the claim without the need for further investigation.n3 In addition, employers may be invited at the investigative stage to provide pertinent information and documents, and an informal conference may be held.n4 If settlement is not possible, within 30 days of filing of the complaint, the DLSE must decide to (1) conduct a "Berman" hearing pursuant to *Labor Code sections 98-98.2*; (2) pursue a civil action pursuant to *Labor Code section 98.3*;n5 or (3) take no further action on the complaint.n6

■ **PRACTICE TIP:**

According to its Operations and Procedures Manual, the DLSE treats the date of the execution of the

"complaint" form (DLSE 530), and not the date of the filing of the claim (DLSE 1), as the significant date for purposes of the 30-day time limit for action set forth in *Labor Code section 98(a)*. *Commentary by Susan Spurlark*.

Guidelines have been established to assist Deputy Labor Commissioners in determining which course of action to follow.⁷ The alternative of taking no action on the complaint is self-explanatory. The principal difference between the other two procedural alternatives is that a decision after a "Berman" proceeding under *Labor Code sections 98-98.2* automatically becomes a judgment if not appealed or paid, whereas a proceeding under *Labor Code section 98.3* requires institution of a civil action.⁸ However, as discussed in § 5.02[2][b], a "Berman" proceeding is not applicable or amenable to all situations.⁹ The guidelines suggest that complex unliquidated claims in which the claimant appears to be able to afford private counsel should not be processed by the Labor Commissioner at all and that a private civil action by the claimant should be undertaken.¹⁰ Once a decision has been made to proceed under *Labor Code section 98 or 98.3*, that decision may be changed if the circumstances warrant.¹¹

If the Labor Commissioner decides to conduct a "Berman" hearing, the hearing must be held within 90 days of that determination.¹²

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies Investigative Authority Labor & Employment Law Wage & Hour Laws Wage Payments

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code §§ 74, 92.*

(n2)Footnote 2. *See 8 Cal. Code Reg. §§ 13501, 13501.5.*

(n3)Footnote 3. *See D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).*

(n4)Footnote 4. *See D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).*

(n5)Footnote 5. *See discussion in § 5.30.*

(n6)Footnote 6. *Lab. Code § 98(a); see D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).*

(n7)Footnote 7. *See D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).*

(n8)Footnote 8. Compare *Lab. Code § 98.1* with *Lab. Code § 98.3*.

(n9)Footnote 9. *See Lab. Code § 98(a); D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).*

(n10)Footnote 10. *See D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], above, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).*

(n11)Footnote 11. *See* D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n12)Footnote 12. *Lab. Code* § 98(a).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
Subpart 2. "Berman" Hearings (Labor Code Sections 98-98.2)

1-5 California Employment Law § 5.10A

AUTHOR: By Susan Spurlark, J.D.

§ 5.10A Statute of Limitations

The three-year statute of limitationsⁿ¹ applies to claims for unpaid wages filed under *Labor Code section 98(a)*. In *Cuadra v. Millan*,ⁿ² plaintiffs sought back pay for the three-year period preceding the filing date of their claim. However, the Labor Commissioner argued that the statute was tolled from the date of their "Berman hearing."ⁿ³ Noting the frequently appreciable delay between the dates of filing claims for back pay and the dates of the hearings on such claims, the Supreme Court held that the Commissioner's policy constituted an abuse of discretion because it penalized employees who exercised their right to a "Berman hearing" and frustrated the remedial purpose of legislation entitling employees to all back wages due.ⁿ⁴

■ CONSULTANT'S COMMENT:

In *Cuadra v. Millan*,ⁿ⁵ the California Supreme Court has made it clear that employers should seek early determination of their Labor Commissioner claims. That is, back pay liability, if any, will be calculated up to three (or four) years back from the date that an employee files his or her underlying complaint, not from the date of the administrative hearing. Because the hearing can follow the filing of the complaint by months (and sometimes more than a year), there is significant value in agreeing to early hearing dates for claims that implicate ongoing liability. *Commentary by Kirby Wilcox.*

Legal Topics:

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

Governments
Legislation
Statutes of Limitations
Time Limitations
Labor & Employment Law
Wage & Hour Laws
Administrative Proceedings & Remedies
General Overview
Labor & Employment Law
Wage & Hour Laws
Wage Payments

FOOTNOTES:

(n1)Footnote 1. *See Cal. Code Civ. Proc.* § 338.

(n2)Footnote 2. *Cuadra v. Millan* (1998) 17 Cal. 4th 855, 72 Cal. Rptr. 2d 687, 952 P.2d 704 .

(n3)Footnote 3. *Cuadra v. Millan* (1998) 17 Cal. 4th 855, 72 Cal. Rptr. 2d 687, 952 P.2d 704 ; *see also* , Code Civ. Proc. § 338(a); Lab. Code § 98 *et seq.*

(n4)Footnote 4. *Cuadra v. Millan* (1998) 17 Cal. 4th 855, 860, 870, 72 Cal. Rptr. 2d 687, 952 P.2d 704 .

(n5)Footnote 5. *Cuadra v. Millan* (1998) 17 Cal. 4th 855, 72 Cal. Rptr. 2d 687, 952 P.2d 704 .



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
Subpart 2. "Berman" Hearings (Labor Code Sections 98-98.2)

1-5 California Employment Law § 5.11

AUTHOR: By Susan Spurlark, J.D.

§ 5.11 Pleadings

[1] Pleadings Allowed

Only two pleadings are required in "Berman" proceedings; they are the complaint and the answer.ⁿ¹ These pleadings are to be in writing and must conform to the form and rules of practice and procedure adopted by the Labor Commissioner.ⁿ² Pursuant to that authority, the Labor Commissioner has promulgated a form for the complaint and answer in these proceedings.ⁿ³

[2] FORM--Complaint to Labor Commissioner for Recovery of Wages, Penalties, or Other Compensation

[a] Comment

The complaint initiates formal action on a claim for wages, penalties, or other demand for compensation.ⁿ⁴ It is based on information provided by the complaining employee on the "Initial Report or Claim" (DLSE 1). Although the complaint is often completed by the DLSE's staff, it must be signed by the employee making the claim.ⁿ⁵

The initial report and/or the complaint may be filed in any of the DLSE's district offices; however, it will be referred to the office for the county in which the compensation claimed was earned, or in which the acts complained of were performed, for investigation and hearing.ⁿ⁶ No fee for filing the complaint is prescribed by the code or by any regulation or rule.

The form of the complaint is prescribed by the Labor Commissioner and is found in standard form DLSE 530.ⁿ⁷ A copy of that form is set forth in subsection [b], below. The information required by the form is largely self-explanatory. The statement of amounts claimed required by Paragraph 4 of the form should include separate dollar calculations for all matters that arise from the same transaction in order to assure proper notice to the employer. The calculations may be put on a separate attached sheet of paper marked Exhibit A if there is not enough room on the complaint. If the claimant is a minor, the signature of his or her parent or guardian should be included.

The form set forth in [b], below, should not be used by merchants who seek to collect for dishonored payroll checks. A separate complaint procedure and form (DLSE 532) applies to such claimants.ⁿ⁸

[b] Form Complaint to Labor Commissioner for Recovery of Wages, Penalties, or Other Compensation

[Click here to view image.](#)

[3] FORM--Answer to Complaint to Labor Commissioner for Recovery of Wages, Penalties, or Other Compensation

[a] Comment

A copy of the form of an answer to an administrative complaint under *Labor Code section 98(a)* (DLSE 531) is set forth in subsection [b], below. The answer is not filed until after service of the complaint and a notice of hearing.ⁿ⁹ In practice, the Labor Commissioner may also serve a Notice of Claim Filed and Conference (DLSE 563) prior to requiring an answer.ⁿ¹⁰

There is no requirement that an answer be filed.ⁿ¹¹ The question of whether to file an answer depends on the circumstances of the case and the strategy of the employer and its counsel. In determining whether or not to file an answer, defense counsel should note that the Labor Code places the introduction of evidence on matters not included in an answer within the discretion of the Labor Commissioner and provides for a continuance in order to allow the claimant to respond to the new evidence.ⁿ¹² The Labor Commissioner is ordinarily reluctant to grant continuances of hearings and may refuse to open up areas not pled, particularly if they are considered of marginal relevance.ⁿ¹³ On the other hand, if the employer fails to answer or appear at the hearing, no default may be taken and the employer maintains its right to file an appeal for a hearing de novo before the appropriate court.ⁿ¹⁴

The precise form of the answer is prescribed by the Labor Commissioner and is set forth in standard form DLSE 531.ⁿ¹⁵ As a matter of practice, the standard form of answer is usually served on the defendant at the time of service of the notice of hearing. The answer is completed by the defendant and should be filed within 10 days after service of the complaint and notice of hearing.ⁿ¹⁶ It is filed with the Labor Commissioner,ⁿ¹⁷ which currently forwards a copy to the plaintiff.

The standard form is largely self-explanatory. In the space provided (or on an additional attached sheet), the employer should state which allegations of the complaint it agrees with and which ones it denies. The answer should also set forth any affirmative defenses, either in the space provided or on an attached additional sheet. Some of the most common defenses are that the employer is exempt from the wage orders or requirements of the Labor Code; that the alleged employee is an independent contractor or otherwise exempt from the requirements of the wage orders or the Labor Code; and that the complaint is untimely. Other defenses relate to the imposition of penalties and are discussed in § 5.31.

[b] Form Answer to Complaint to Labor Commissioner for Recovery of Wages, Penalties, or Other Compensation

[Click here to view image.](#)

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Wage Payments

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 98(d)*.

(n2)Footnote 2. *Lab. Code § 98(d)*; *see Lab. Code § 98.8* (Labor Commissioner's authority to promulgate rules of practice and procedure).

(n3)Footnote 3. *See 8 Cal. Code Reg. §§ 13501.5-13501.7*.

(n4)Footnote 4. *8 Cal. Code Reg. § 13501*.

(n5)Footnote 5. *See DLSE 530*, as set forth in *8 Cal. Code Reg. § 13501.5*.

(n6)Footnote 6. *See 8 Cal. Code Reg. § 13501*.

(n7)Footnote 7. *See Lab. Code § 98(d)*; *8 Cal. Code Reg. § 13501.5*.

(n8)Footnote 8. *See Lab. Code § 98(a)*; *8 Cal. Code Reg. § 13501.6*.

(n9)Footnote 9. *Lab. Code § 98(c)*.

(n10)Footnote 10. *See D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (CAUTION: see § 1.05[3][c] above, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders). For a discussion of the notice of claim filed and conference, see § 5.12.*

(n11)Footnote 11. *See Lab. Code § 98(c)* (defendant "may" file answer); *see also Lab. Code § 15* (as used in Labor Code, "may" is permissive).

(n12)Footnote 12. *Lab. Code § 98(e)*.

(n13)Footnote 13. *See 8 Cal. Code Reg. § 13508*; D.L.S.E. Div. Management Memo. No. 84-6 (June 20, 1984) (CAUTION: see § 1.05[3][c], above, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n14)Footnote 14. *See Lab. Code § 98(f), 98.2(a)*; *Jones v. Basich (1986) 176 Cal. App. 3d 513, 518, 222 Cal. Rptr. 26*.

(n15)Footnote 15. *See Lab. Code § 98(c), (d)*; *8 Cal. Code Reg. § 13501.7*.

(n16)Footnote 16. *Lab. Code § 98(c)*.

(n17)Footnote 17. *See Lab. Code § 98(c)*.



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 Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
 Subpart 2. "Berman" Hearings (Labor Code Sections 98-98.2)

1-5 California Employment Law § 5.12

AUTHOR: By Susan Spurlark, J.D.

§ 5.12 Voluntary Conference and Settlement Procedures

[1] FORM--Notice of Claim Filed and Conference

[a] Comment

The Labor Code does not provide for either a "notice of claim filed" or any "conference." These procedures have been developed pursuant to the Labor Commissioner's authority to establish procedures for investigation and resolution of wage and other monetary claims.ⁿ¹ Under this procedure, at the time the claim is filed or within 48 hours, the DLSE decides to either send the matter to a conference or directly to a hearing, and a notice of claim and of either a conference or hearing is sent to the parties.ⁿ² A copy of the Notice of Claim Filed and Conference (DLSE 563/PLT.) is set forth in [b], *below*, and is self-explanatory. If a conference is held, it is supposed to take place within at least 30 days of the notice.ⁿ³

If a Notice of Claim Filed and Hearing (DLSE 565) is served instead of proceeding with a conference, the form is identical, except for the title, to the Notice of Hearing (DLSE 533), discussed in § 5.13[2].

[b] Form Notice of Claim Filed and Conference

[Click here to view image.](#)

[2] Conduct of Conference

The conference is conducted in an informal manner by the investigating deputy Labor Commissioner, and the defendant's attendance is voluntary.ⁿ⁴ Its purpose is to attempt conciliation and, if that is not possible, to decide which of the following courses of action is appropriate: (1) dismiss the claim, (2) recommend settlement and advise of the consequences of failure to settle, (3) refer to a *Labor Code section 98(a)* ("Berman") hearing, or (4) refer to a *Labor Code section 98.3* hearing.ⁿ⁵ In addition, the conference may also be used to resolve entity issues (that is, to determine

which entity is liable for wages or other compensation claimed to be due).ⁿ⁶

If the employer does not appear for the conference, the deputy Labor Commissioner may further interview the employee and may dismiss the claim if the employee cannot make a prima facie showing of his or her claim.ⁿ⁷ If the employee does not appear for the conference, the complaint will be dismissed, unless good cause is shown for the nonappearance.ⁿ⁸ If the matter is dismissed, a Notice of Investigation Completed (DLSE 15) is used.ⁿ⁹

[3] Procedures on Settlement or Partial Payment of Claim

Under the DLSE's internal operating practices, as described in its Operations and Procedures Manual, if a compromise is reached or payment in full is received at any time before an order, decision, and award is issued,ⁿ¹⁰ the complaining employee is required to sign a release (DLSE 51) of the claims set forth in the complaint. If there is no mutual settlement and monies are received that reflect less than the total amount claimed to be due, the procedures depend on whether a hearing date has been set and whether conditions are attached to the payment. If no hearing date has been set and no conditions are attached to the payment, the monies are remitted to the complainant and only the remaining issues are tried at the hearing. If conditions are placed on the payment, the monies are placed in trust pending the hearing. If less than the full amount due is received after a Notice of Hearing (DLSE 533)ⁿ¹¹ has been served, the investigating deputy Labor Commissioner testifies about the date of receipt, the amount received, and any relevant circumstances during the hearing; the receipt of those monies may be reflected in an amended complaint if service has not been effected.

Legal Topics:

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

Civil Procedure Settlements General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies Investigative Authority

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 98.8*; D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n2)Footnote 2. *See D.L.S.E. Div. Management Memo. No. 86-4* (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n3)Footnote 3. *See D.L.S.E. Div. Management Memo. No. 86-4, P 6* (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders). This memorandum is somewhat confusing because it also states in P 1 that the conference is to be within 30 days of the time the complaint was filed.

(n4)Footnote 4. *See D.L.S.E. Div. Management Memo. No. 86-4* (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n5)Footnote 5. *See D.L.S.E. Div. Management Memo. No. 86-4* (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n6)Footnote 6. *See D.L.S.E. Div. Management Memo. No. 86-4* (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders). The burden is upon the complaining employee to assure that necessary information about the employing entity is available and the matter may be taken off calendar if that information is not available.

(n7)Footnote 7. *See* D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n8)Footnote 8. *See* D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n9)Footnote 9. *See* D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n10)Footnote 10. For discussion of Labor Commissioner's order, decision, and award, *see* § 5.16.

(n11)Footnote 11. *See* discussion in § 5.13.



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 Subpart 2. "Berman" Hearings (Labor Code Sections 98-98.2)

1-5 California Employment Law § 5.13

AUTHOR: By Susan Spurlark, J.D.

§ 5.13 Notice of Hearing

[1] Requirement

The "Berman" hearing must be held within 90 days after the Labor Commissioner's decision to hold such a hearing.ⁿ¹ However, the Commissioner may postpone or grant additional time before setting a hearing if the Commissioner finds that it would lead to an equitable and just resolution of the dispute.ⁿ² Once a hearing date is set, the DLSE must serve a notice of the time and place of the hearing on all parties personally or by certified mail.ⁿ³ A copy of the complaint, showing the amount of compensation requested by the claimant, must be served with the notice.ⁿ⁴

[2] FORM--Notice of Hearing

[a] Comment

A copy of the DLSE's Notice of Hearing (DLSE 533) to the defendant is set forth in [b], *below*; a copy of the DLSE's Notice of Hearing (DLSE 533) to the Plaintiff is set forth in [c], *below*. Both forms are self explanatory. They are prepared by the DLSE calendar clerk once the date of the hearing has been set and signed by the hearing officer. They set forth the place, date, and time of the hearing and are accompanied by a copy of the complaint.ⁿ⁵

If the return receipt for the plaintiff's Notice of Hearing is not received 10 days or more before the hearing date, the plaintiff is advised that if the notice is not picked up by a specified date, the matter will be closed without prejudice for lack of interest.ⁿ⁶ If the return receipt form for the defendant is returned unclaimed, the Notice of Hearing is sent to the plaintiff or others with instructions to arrange for service, and the matter may be taken off calendar if timely service is not possible; the plaintiff should check in these circumstances to assure that the hearing will take place as scheduled. Finally, if service on the defendant can not be effected, the file is returned to the investigating deputy Labor Commissioner and is rescheduled when service is arranged, provided the statute of limitations has not expired.

[b] Form--Notice of Hearing--Defendant Notice of Hearing--Defendant

[Click here to view image.](#)

[c] Form--Notice of Hearing--Plaintiff Notice of Hearing--Plaintiff

[Click here to view image.](#)

Legal Topics:

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

Civil Procedure
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 General Overview
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 Wage & Hour Laws
 General Overview
 Labor & Employment Law
 Wage & Hour Laws
 Administrative Proceedings & Remedies
 General Overview
 Labor & Employment Law
 Wage & Hour Laws
 Administrative Proceedings & Remedies
 Investigative Authority

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 98(a)*; *see also* D.L.S.E. Div. Management Memo. No. 88-3 (Nov. 1, 1988) (discussing time limit for holding hearing) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders). That decision typically must be made within 30 days after the complaint is filed. *see Lab. Code § 98(a)*; *see also* discussion in § 5.10, *below*.

(n2)Footnote 2. *See Lab. Code § 98(a)*; *see also* D.L.S.E. Div. Management Memo. No. 88-3 (Nov. 1, 1988)(examples of situation in which postponement may be appropriate) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n3)Footnote 3. *Lab. Code § 98(b)*.

(n4)Footnote 4. *Lab. Code § 98(b)*.

(n5)Footnote 5. *See Lab. Code § 98(b)*.

(n6)Footnote 6. *See* D.L.S.E. 559 (Pickup Hearing Notice).



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1-5 California Employment Law § 5.14

AUTHOR: By Susan Spurlark, J.D.

§ 5.14 Default

[1] Generally

No default can be entered against an employer for failure to answer the complaint and/or appear at the "Berman" hearing.ⁿ¹ In that circumstance, the Labor Commissioner is required to hear the available evidence and to render a decision based on that evidence.ⁿ² If the plaintiff fails to appear for a hearing, under the DLSE's internal guidelines, no hearing is conducted and the matter is dismissed without prejudice.

[2] Relief From Adverse Ruling After Failure to Appear

A defendant employer who fails to answer or appear because of lack of notice of the pendency of the proceedings may apply to the Labor Commissioner for relief from the Commissioner's decision or award.ⁿ³ If an application is made, the Labor Commissioner may grant relief in accordance with the provisions of *Code of Civil Procedure section 473*,ⁿ⁴ including setting aside any order, decision, or award rendered as a result of the proceedings and granting a new hearing.ⁿ⁵ This right is independent of the right of appeal under *Labor Code section 98.2*.ⁿ⁶

■ PRACTICE TIP:

There is no comparable statutory procedure for a plaintiff who fails to appear at a "Berman" hearing; however, under the DLSE's internal procedures, relief is afforded through the use of administrative dismissal without prejudice, which is to protect a plaintiff who unavoidably or excusably fails to appear.
Commentary by Susan Spurlark.

A defendant seeking relief under *Labor Code section 98(f)* must file an application form (DLSE 536) in the DLSE office where the hearing was held. The application must be filed within 6 months of the date of entry of the Labor Commissioner's decision.ⁿ⁷ A defendant who fails to appear may not seek relief from the courts because of alleged lack of knowledge of the proceedings or because "the findings or award ... are void upon their face" without first having exhausted this administrative remedy.ⁿ⁸

■ PRACTICE TIP:

Under the DLSE's procedures, a Stay of Execution of the Judgment is filed pending action on the application, and efforts to collect the judgment are halted.ⁿ⁹ A hearing is held on the application for relief on a priority basis and a decision is rendered on DLSE form 535(b). If the application is denied, the defendant can appeal; if the application is granted, a new hearing under *Labor Code section 98(a)* is held before a new hearing officer, as if no prior hearing had been held. *Commentary by Susan Spurlark.*

Legal Topics:

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

Civil Procedure
Pretrial Judgments
Default
Default Judgments
Labor & Employment Law
Wage & Hour Laws
General Overview
Labor & Employment Law
Wage & Hour Laws
Administrative Proceedings & Remedies
General Overview
Labor & Employment Law
Wage & Hour Laws
Remedies
General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 98(f)*.

(n2)Footnote 2. *Lab. Code § 98(f)*.

(n3)Footnote 3. *Lab. Code § 98(f)*.

(n4)Footnote 4. *Code Civ. Proc. § 473* permits the court to relieve a party from a judgment, order, or other proceeding taken against him or her resulting from that party's "mistake, inadvertence, surprise, or excusable neglect" if application is made within a reasonable time (not more than six months) after the judgment, dismissal, order, or other proceeding was taken. For general discussion of proceedings for relief under *Code Civ. Proc. § 473*, see California Forms of Pleading and Practice, "Defaults and Default Judgments," Part II.

(n5)Footnote 5. See *Lab. Code § 98(f)*; *Code Civ. Proc. § 473*.

(n6)Footnote 6. *Jones v. Basich* (1986) 176 Cal. App. 3d 513, 518, 222 Cal. Rptr. 26. For discussion of right to appeal the Labor Commissioner's decision, see § 5.18.

(n7)Footnote 7. See *Lab. Code § 98(f)*; *Code Civ. Proc. § 473*.

(n8)Footnote 8. See *Lab. Code § 98(f)*. See *Gonzalez v. Beck* (2007) 158 Cal. App. 4th 598, 604-607, 69 Cal. Rptr. 3d 843 (according to plain language of last sentence of *Lab. Code § 98(f)*, right to administrative relief must be exercised and exhausted prior to employer seeking relief from failure to answer or appear in any court; because employers did not apply to Commissioner to set aside award prior to filing motion to set aside award to former employee in trial court, they had no right to relief they sought).

(n9)Footnote 9. See *Lab. Code § 98.2(g)* (Labor Commissioner's authority to stay execution of judgment entered on Commissioner's decision); see also discussion in § 5.17[2].



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1-5 California Employment Law § 5.15

AUTHOR: By Susan Spurlark, J.D.

§ 5.15 Hearing

[1] Hearing Officer's Role and Authority

A *Labor Code* section 98 hearing is presided over by a hearing officer, who is a deputy Labor Commissionerⁿ¹ other than the investigating deputy Labor Commissioner. The hearing officer has the authority to (1) issue subpoenas, (2) grant or deny requests for continuances or changes of venue, and (3) control the conduct of the hearing, including limiting the number of witnesses for corroboration and/or to establish a fact, excluding evidence, excusing witnesses, and determining the order of the presentation of evidence.ⁿ² Detailed guidelines for hearing officers are found in the DLSE's Operations and Procedures Manual.

As a matter of internal policy, hearing officers are encouraged to attempt to arrange settlement before conducting a "Berman" hearing.ⁿ³ If settlement attempts prove unsuccessful, the hearing officer will seek stipulations by the parties to eliminate unnecessary proof of any facts that are not disputed.ⁿ⁴

[2] Conduct of Hearing

The Labor Code provides that "Berman" hearings are governed by the DLSE and by rules of practice and procedure adopted by the Labor Commissioner.ⁿ⁵ Regulations adopted by the Commissioner provide that hearings are to be reported or phonographically recorded (by use of tape recorder).ⁿ⁶ Either party may request a copy of the transcript or recording, but the requesting party must bear all costs incidental to preparation of the transcript or recording.ⁿ⁷ If the hearing is transcribed by a party, a copy of the transcription must be provided to the Labor Commissioner, free of charge, within five days after the transcription.ⁿ⁸

The regulations further provide that the hearing need not be conducted according to technical rules of evidence, as further discussed in [3], *below*.ⁿ⁹ In presiding over the hearing, the hearing officer controls the order of the presentation of evidence and rules on matters concerning the conduct of the hearing and of the parties appearing.ⁿ¹⁰ All parties have a right, but are not required, to be represented by counsel.ⁿ¹¹

■ PRACTICE TIP:

Additional procedures governing such hearings have not been officially promulgated as regulations, but are contained in the DLSE's Operations and Procedures Manual. The guidelines provide for use of stipulations to expedite the hearing, swearing of witnesses, and explanations of proceedings at the beginning and the end of the hearing; they establish the order of the hearing so that the DLSE, the complainant, and then the defendant may present witnesses. Guidelines regarding amendments of pleadings during the hearing, use of closing briefs (which are not favored by the DLSE), and reports required from the hearing officer (Hearing Report--DLSE 539) are also provided. Finally, the guidelines suggest that requests by the parties to make their own tapes of the proceedings should be denied, but that the parties and their representatives should be allowed to listen to, copy, and transcribe the DLSE's recordings at their own expense and that inspection of the hearing file, other than the hearing officer's notes, by the parties or the public is acceptable. *Commentary by Susan Spurlark.*

[3] Evidence

The Labor Commissioner's regulations provide that proceedings in a "Berman" hearing need not be conducted according to technical rules of evidence and witnesses.ⁿ¹² Instead, any relevant evidence is admitted "if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions."ⁿ¹³

Oral evidence is taken on oath and affirmation, and each party has the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any relevant matter even if that matter was not raised on direct examination, to impeach any witness (regardless of which party called that witness to testify), and to rebut evidence against the party.ⁿ¹⁴ The DLSE's Operations and Procedures Manual contains the only current guidelines regarding use of documentary exhibits and provides for their marking, identification, and efforts to resolve any objections by assuring a proper foundation for the evidence.

[4] Continuances

The Commissioner's regulations provide that continuances of a hearing are ordinarily not granted.ⁿ¹⁵ Continuances may be granted at the discretion of the hearing officer "upon a showing of *extraordinary circumstances and good cause* for continuance by the party requesting same."ⁿ¹⁶ However, under *Labor Code section 98(e)*, a continuance must be granted to a claimant to review any evidence introduced by the defendant employer relating to a matter that was not pleaded in the answer (assuming that the hearing officer, in his or her discretion, permits any such evidence to be introduced).ⁿ¹⁷

■ PRACTICE TIP:

Under the DLSE's internal guidelines, continuances must be granted if the complaint is amended and may be granted if the hearing cannot be completed in the allotted time or if there is to be a submission of documents or briefs. Dates for any continuance or waiver of notice by certified mail are to be established on the record. *Commentary by Susan Spurlark.*

Legal Topics:

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

Labor & Employment Law
 Wage & Hour Laws
 General Overview
 Labor & Employment Law
 Wage & Hour Laws
 Administrative Proceedings & Remedies
 General Overview
 Labor & Employment Law
 Wage & Hour Laws
 Administrative Proceedings & Remedies
 Investigative Authority
 Labor & Employment Law
 Wage & Hour Laws
 Remedies
 General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 8 Cal. Code Reg. § 13502.

(n2)Footnote 2. *See* 8 Cal. Code Reg. §§ 13506, 13508.

(n3)Footnote 3. D.L.S.E. Div. Management Memo. No. 84-6 (June 20, 1984) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n4)Footnote 4. *See* D.L.S.E. Div. Management Memo. No. 84-6 (June 20, 1984) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n5)Footnote 5. *Lab. Code* § 98(g); *see also* *Lab. Code* § 98.8 (Commissioner's general authority to promulgate rules of practice and procedure for proceedings under his or her jurisdiction).

(n6)Footnote 6. 8 Cal. Code Reg. § 13502.

(n7)Footnote 7. 8 Cal. Code Reg. § 13502.

(n8)Footnote 8. 8 Cal. Code Reg. § 13502.

(n9)Footnote 9. *See* 8 Cal. Code Reg. § 13502.

(n10)Footnote 10. 8 Cal. Code Reg. § 13506.

(n11)Footnote 11. 8 Cal. Code Reg. § 13507.

(n12)Footnote 12. 8 Cal. Code Reg. § 13502.

(n13)Footnote 13. 8 Cal. Code Reg. § 13502.

(n14)Footnote 14. 8 Cal. Code Reg. § 13505.

(n15)Footnote 15. 8 Cal. Code Reg. § 13508.

(n16)Footnote 16. 8 Cal. Code Reg. § 13508(emphasis added).

(n17)Footnote 17. *See* *Lab. Code* § 98(e).



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1-5 California Employment Law § 5.16

AUTHOR: By Susan Spurlark, J.D.

§ 5.16 Order, Decision, or Award by Labor Commissioner

[1] Generally

Within 15 days after the hearing is concluded, the hearing officer must file his or her order, decision, or award.ⁿ¹ The order, decision, or award must include a summary of the hearing and the reasons for the decision, as well as notice of the parties' right to appeal and of the consequences of failure to do so in a timely manner.ⁿ² In addition, there must be a statement of any sums due either as proven damages or as penalties.ⁿ³ Interest on any award granted accrues on all due and unpaid wages at the same rate as prescribed by subdivision (b) of *section 3289 of the Civil Code*.ⁿ⁴ from the date that the wages were due pursuant to *Labor Code sections 200-452* until the date that they are paid.ⁿ⁵

After filing the order, decision, or award, the Labor Commissioner must serve a copy of the decision personally or by first-class mail on all of the parties.ⁿ⁶ If a claim is filed under *Labor Code sections 98-98.2* against a person operating or doing business under a fictitious business name, as defined in *Bus. & Prof. Code § 17900*, the DLSE is required to inquire, as of the time of the hearing, whether the name of the person is the legal name under which the business or person has been licensed, registered, incorporated, or otherwise authorized to do business.ⁿ⁷ Prior to the entry of judgment on an award under *Lab. Code § 98.2*, the DLSE may amend an order, decision, or award to conform to the legal name of the business or the person who is the defendant to a wage claim, provided it can be shown that the proper service was made on the defendant or the defendant's agent--unless a judgment had been entered on the order, decision, or award pursuant to *Labor Code Section 98.2(d)*.ⁿ⁸ Following such entry of judgment, the Labor Commissioner may apply to the clerk of the court that entered the judgment pursuant to the Commissioner's final order, decision, or award to conform the judgment to the defendant's legal name, provided that it can be shown that proper service was made on the defendant or the defendant's agent.ⁿ⁹

The Labor Commissioner cannot dismiss a claim after conducting an administrative (Berman) hearing.ⁿ¹⁰ The California Supreme Court has held that the Labor Commissioner is under no obligation to accept a claim, but that once he or she does so and conducts a Berman hearing, *Labor Code section 98.1* does not give the Labor Commissioner the

option to summarily dismiss a wage claim.ⁿ¹¹

■ **PRACTICE TIP:**

Under the DLSE's internal guidelines, the order, decision, or award, once issued, cannot be amended to correct an oversight or error in judgment. However, obvious clerical errors on the order, decision, or award can be corrected by the hearing officer before the date an appeal is filed or judgment is entered; the amended order, decision, or award is dated as the date of the original order, decision or award and is called "Amended Order, Decision or Award of Labor Commissioner (nunc pro tunc)." *Commentary by Susan Spurlark.*

[2] FORM--Order, Decision, or Award of Labor Commissioner

[a] Comment

The order, decision, or award is prepared by the hearing officer (the deputy Labor Commissioner).ⁿ¹² A copy of the standard form used (DLSE 535) is set forth in subsection [b], *below*.

As required by statute,ⁿ¹³ the form contains space for entry of the amount, if any, awarded to the complainant, and advises the parties of their right to appeal and of the consequences of their failure to do so. The hearing officer enters the name and address of the appropriate court for appeal at the bottom of the form just after the notice of appeal rights, next to the asterisk. The summary of the hearing and reasons for decision, as required by the Labor Code,ⁿ¹⁴ are contained on a separate formⁿ¹⁵ and are incorporated by reference in the form of order, decision, or award (DLSE 535).

[b] Form Order, Decision, or Award of Labor Commissioner

[Click here to view image.](#)

[3] FORM-Reserved

[4] Filing of Labor Commissioner's Order, Decision, or Award With Court Clerk and Entry of Judgment Thereon

If the order, decision, or award is properly served on the parties,ⁿ¹⁶ and no notice of appeal is filed within the period allowed for appeal of the award,ⁿ¹⁷ the decision or award is deemed a final order, in the absence of fraud.ⁿ¹⁸ Within 10 days after the order, decision, or award becomes final, the Labor Commissioner must file a certified copy of the final order with the clerk of the appropriate superior court of the appropriate county, unless a settlement has been reached by the parties and approved by the Labor Commissioner,ⁿ¹⁹ or unless the DLSE receives full payment of the award or ascertains that the defendant-employer has made direct payment of the award to the claimant within that period.ⁿ²⁰

On filing, judgment is entered immediately by the court clerk in conformity with the order, decision, or award.ⁿ²¹ The judgment so entered has the same force and effect as, and is subject to all provisions of law relating to, a judgment in a civil action.ⁿ²² For discussion of enforcement of the award after entry of judgment by the court, see § 5.17.

[5] Penalty for Failure to Pay Wages After Notice of Commissioner's Order

Labor Code section 206(b) imposes a penalty on an employer having the ability to pay who, after investigation and hearing by the Labor Commissioner, willfully fails to pay wages found to be due within 10 days of receipt of notice of wages due from the Labor Commissioner. That employer is subject to a penalty of treble the amount of any damages accruing to the employee as a direct and foreseeable consequence of the failure to pay, in addition to any other applicable penalty.ⁿ²³ Other penalties that may apply are those imposed by *Labor Code sections 203, 210, and 1197.1*

.n24*Labor Code section 206(b)* is not applicable if the employer takes a timely appeal from the decision of the Labor Commissioner.n25

[6] Interest on Unpaid Wages

In any action brought for the nonpayment of wages, the court must award interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of *Section 3289 of the Civil Code*.n26 Interest shall accrue from the date the wages were due and payable as provided in the Labor Code Part 1 (commencing with Section 200) of Division 2.n27

Legal Topics:

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

Labor & Employment LawWage & Hour LawsGeneral OverviewLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesGeneral OverviewLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesEnforcementLabor & Employment LawWage & Hour LawsRemediesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 98.1(a)*.

(n2)Footnote 2. *See Lab. Code § 98.1(a); see discussion in §§ 5.16[4], 5.18.*

(n3)Footnote 3. *See Lab. Code § 98.1(b)*.

(n4)Footnote 4. Rev. & Tax. Code § 19521provides for an adjusted annual interest rate for various income tax purposes, which is determined by reference to specified provisions of the Internal Revenue Code.

(n5)Footnote 5. *Lab. Code § 98.1(c)*. For discussion of rules governing time for payment of wages, *see Chapter 4*.

(n6)Footnote 6. *Lab. Code § 98.1(a)*.

(n7)Footnote 7. *See Lab. Code § 98(h)*.

(n8)Footnote 8. *See Lab. Code § 98(h); see also discussion under [4], below.*

(n9)Footnote 9. *See Lab. Code § 98(h)*.

(n10)Footnote 10. *Post v. Palo/Haklar & Assocs. (2000) 23 Cal. 4th 942, 948, 98 Cal. Rptr. 2d 671, 4 P.3d 928 .*

(n11)Footnote 11. *Post v. Palo/Haklar & Assoc. (2000) 23 Cal. 4th 942, 948, 98 Cal. Rptr. 2d 671, 4 P.3d 928 .*

(n12)Footnote 12. *See Lab. Code § 98.1(a)*.

(n13)Footnote 13. *See Lab. Code § 98.1(a), (b)*.

(n14)Footnote 14. *See Lab. Code § 98.1(a)*.

(n15)Footnote 15. *See discussion in [3], below.*

(n16)Footnote 16. *See Lab. Code § 98.1(a)* (service of order, decision, or award); *see also discussion in [1], above.*

(n17)Footnote 17. *See Lab. Code § 98.2(a)* (time limit for filing appeal); *see also discussion in § 5.18[1].*

(n18)Footnote 18. *Lab. Code* § 98.2(d). For discussion of appeals, see § 5.18.

(n19)Footnote 19. *Lab. Code* § 98.2(e).

(n20)Footnote 20. D.L.S.E. Div. Management Memo. No. 87-4 (Sept. 4, 1987), "Collection Activities to Be Undertaken by the Division," P 1 (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n21)Footnote 21. *Lab. Code* § 98.2(e).

(n22)Footnote 22. *Lab. Code* § 98.2(e).

(n23)Footnote 23. *Lab. Code* § 206(b).

(n24)Footnote 24. See § 5.31 for a further discussion of actions to collect these penalties.

(n25)Footnote 25. *Triad Data Servs., Inc. v. Jackson* (1984) 153 Cal. App. 3d Supp. 1, 5, 7-8, 200 Cal. Rptr. 418. For discussion of appeals, see § 5.18.

(n26)Footnote 26. *Lab. Code* § 218.6. See also *Bell v. Farmers Ins. Exchange* (2006) 135 Cal. App. 4th 1138, 1145-1150, 38 Cal. Rptr. 3d 306 (10 percent prejudgment interest rate specified in *Civ. Code* § 3289, rather than seven percent interest rate specified in *Cal. Const.*, art. XV, § 1, applied to award of overtime compensation, even though compensation was at least partially earned before enactment of *Lab. Code* § 218.6, where strong and persuasive authority favored application of *Civ. Code* § 3289 even before it was expressly made applicable to unpaid wages with enactment of *Lab. Code* § 218.6, and legislative history and statutory language supported conclusion Legislature intended reference to *Civ. Code* § 3289 in *Lab. Code* § 218.6 solely as clarification of existing law).

(n27)Footnote 27. *Lab. Code* § 218.6.



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
Subpart 2. "Berman" Hearings (Labor Code Sections 98-98.2)

1-5 California Employment Law § 5.17

AUTHOR: By Susan Spurlark, J.D.

§ 5.17 Enforcement of Labor Commissioner's Award

[1] Generally

Enforcement of the judgment entered pursuant to *Labor Code section 98.2*ⁿ¹ may be accomplished "in the same manner as any other judgment of the court in which it is entered."ⁿ² Enforcement of such judgments has court priority.ⁿ³

The Labor Commissioner is required by statute to make "every reasonable effort" to assure that judgments resulting from wage hearings are satisfied, including taking all appropriate legal action and requiring the employer to deposit a bond as provided in *Labor Code section 240*.ⁿ⁴ Furthermore, to ensure that judgments are satisfied, the Labor Commissioner is now authorized to serve on the judgment debtor (i.e., the employer) a form similar to, and requiring reporting of the same information as, the form approved or adopted by the Judicial Council for use in small claims court proceedingsⁿ⁵ to assist in identifying the nature and location of any assets of the judgment debtor. The Labor Commissioner may serve this form personally or by first-class mail at the judgment debtor's last known address listed with the DLSE.ⁿ⁶ The judgment debtor must complete the form and deliver it to the DLSE at the address listed on the form within 35 days after the form is served on the judgment debtor, unless the judgment has been satisfied.ⁿ⁷ In the case of willful failure by the judgment debtor to comply with this provision, the DLSE or judgment creditor may request the court to apply the sanctions provided by *Code of Civil Procedure section 708.170* (sanctions for failure to appear at judgment debtor's examination).ⁿ⁸

The Commissioner's guidelines for DLSE enforcement of judgments are set forth in a division management memorandum.ⁿ⁹ Generally, the Commissioner will accept assignment of judgments for collection if the defendant has known assets; however, the Commissioner and the DLSE will execute only on liquid assets (defined as cash or assets that may be immediately converted to cash, such as bank accounts and accounts receivable).ⁿ¹⁰ The Commissioner will also record the judgment with the county recorder's office in any county where the defendant is believed to have real property.ⁿ¹¹ If it is apparent that the defendant has assets, but the claimant and the DLSE are not readily able to locate those assets, the DLSE may schedule a debtor's examination to attempt to locate the defendant's assets.ⁿ¹² If all

collection attempts prove futile, the DLSE will, at the end of six months, close its files and reassign the judgment to the claimant.n13

The judgment creditor, or the Labor Commissioner as assignee of the judgment creditor, is entitled to court costs and reasonable attorney fees for enforcing the judgment rendered pursuant to *Labor Code section 98.2*.n14

[2] Stay of Execution of Judgment

[a] Power of Labor Commissioner

Pursuant to Labor Code *section 98.2(g)*, the Labor Commissioner may "stay execution of any judgment entered upon an order, decision, or award that has become final upon good cause appearing therefor." The Labor Commissioner may impose "terms and conditions" on the stay, if granted, and must file a certified copy of the stay with the clerk entering judgment.n15

[b] FORM--Request for Stay of Execution of Judgment

[i] Comment

A form for a request for stay of execution of judgment is set forth in subsection [ii], *below*. No particular form is prescribed for such a request and it may take the form of a letter or a pleading. The only circumstance where the Labor Commissioner has established procedures relating to a stay is in conjunction with an application for relief from default under *Labor Code section 98(g)*.n16 In that circumstance, no particular request for a stay appears to be necessary; the stay (DLSE 541) is automatically entered when an application for relief (DLSE 536) is filed.

In other circumstances, the request for a stay also, in all probability, will be made by the defendant. It must include a showing of good cause in order to receive favorable consideration by the Labor Commissioner.n17 In addition, the proposed form contains information about the judgment which will assist the Labor Commissioner in completing the requested order. No time limit for such a request is set forth by the code, but it should be made immediately after the necessity arises in order to support the good cause requirement. The request should be filed in the office of the DLSE where the hearing was conducted, and proof of service should be shown on all other parties.

■ PRACTICE TIP:

In most circumstances, other than where an application for relief from default is sought, a request for stay of execution of the judgment will be unnecessary because the defendant will have appealed the award or decision and the judgment will not have been entered.n18 *Commentary by Susan Spurlark.*

[ii] Form BEFORE THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA

_____ [name(s)],	)	
Plaintiff(s),	)	NO. _____
vs.	)	REQUEST FOR STAY OF EXECUTION OF
_____ [name(s)], Defendant(s).	)	JUDGMENT
	)	(Lab. Code § 98.2(g))
	)	

TO: THE LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA:

Defendant(s), _____ [name(s)] hereby request(s) that a stay of execution of judgment be entered in Case No. _____, which was entered on _____ [date] in the _____

1-5 California Employment Law § 5.17

Court of California, _____ County, [_____ Judicial District,] Book _____, Volume _____, Page _____ in the amount of \$ _____. This request is made on the grounds that: _____ [state grounds, e.g., the parties entered into settlement negotiations on _____ (date) with the assistance of Deputy Labor Commissioner _____ and such negotiations cannot be concluded for ten (10) days].

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at _____, on _____ [date].

_____ [signature]

Defendant

[3] Satisfaction of Judgment

[a] Labor Commissioner's Power to Order Entry of Satisfaction

If the judgment is satisfied, other than by execution, the Labor Commissioner may, at the request of either party or on its own motion, order entry of satisfaction of judgment.ⁿ¹⁹ If a certified copy of such an order is filed with the clerk of the appropriate court, the clerk must enter a satisfaction of the judgment in its records.ⁿ²⁰

■ PRACTICE TIP:

Although the Labor Code appears to make entry of a satisfaction of judgment permissive,ⁿ²¹ the Labor Commissioner's internal guidelines require such entry on notice that the judgment has been paid either through the DLSE or directly to the plaintiff, and plaintiffs are instructed to report direct payments.
Commentary by Susan Spurlark.

[b] FORM--Request for Order for Entry of Satisfaction of Judgment

[i] Comment

A form for a request for an order for entry of satisfaction of judgmentⁿ²² is set forth in subsection [ii], *below*. No particular form is prescribed by the code or the Labor Commissioner. The suggested form contains all of the information regarding the judgment necessary for the Labor Commissioner to prepare the requested order (DLSE 542). The request may be made by either party, although it will most often be made by the employer who is the judgment debtor. There is no time limit for this request, but it is in the interest of the judgment debtor to have it entered as soon as the judgment has been satisfied. The request is filed with the Labor Commissioner in the office that conducted the hearing, and proof of service should be shown on all other parties. The employer should also assure that the satisfaction of judgment is filed in each county where a judgment lien has been recorded.

[ii] Form BEFORE THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA

_____ [name(s)],	)	
Plaintiff(s),	)	NO. _____
vs.	)	REQUEST FOR ENTRY OF
_____ [name(s)], Defendant(s).	)	_____ [FULL or PARTIAL] SAT-
	)	ISFACTION OF JUDGMENT
	)	(Lab. Code § 98.2(h))

TO: THE LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA:

Defendant(s), _____ [name(s)] hereby request(s) that an order of satisfaction of judgment be entered in Case No. _____ where judgment was entered in the _____ Court of California, _____ County, [_____ Judicial District,] on _____ [date] in Book _____, Volume _____, Page _____ in the amount of \$ _____ [and recorded on _____ (date) in _____ County in Book _____, Page _____.] This request is made on the grounds that defendant(s) _____ [has or have] paid plaintiff(s) the sum of \$ _____ on _____ [date] in _____ [full or partial] satisfaction of the judgment in Case No. _____, which is referred to above.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at _____, on _____ [date].

_____ [signature]

Defendant

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies Enforcement Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 5.16[4].

(n2)Footnote 2. *Lab. Code* § 98.2(e). For general discussion of procedures for enforcement of money judgments, *see* California Forms of Pleading and Practice, ch. 254, *Executions and Enforcement of Judgments*.

(n3)Footnote 3. *Lab. Code* § 98.2(e).

(n4)Footnote 4. *Lab. Code* § 98.2(i). For discussion of bonds to secure compliance with wage payment laws, *see* § 5.62.

(n5)Footnote 5. *See Code Civ. Proc.* § 116.830.

(n6)Footnote 6. *Lab. Code* § 98.2(f).

(n7)Footnote 7. *Lab. Code* § 98.2(f).

(n8)Footnote 8. *Lab. Code* § 98.2(f).

(n9)Footnote 9. *See* D.L.S.E. Div. Management Memo. No. 87-4 (Sept. 4, 1987), "Collection Activities to Be Undertaken by the Division." (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n10)Footnote 10. *See* D.L.S.E. Div. Management Memo. No. 87-4 (Sept. 4, 1987), "Collection Activities to Be Undertaken by the Division," P 2 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded

DLSE interpretations of statutory law and IWC Wage Orders).

(n11)Footnote 11. *See* D.L.S.E. Div. Management Memo. No. 87-4 (Sept. 4, 1987), "Collection Activities to Be Undertaken by the Division," PP 2(a), 3(a) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n12)Footnote 12. *See* D.L.S.E. Div. Management Memo. No. 87-4 (Sept. 4, 1987), "Collection Activities to Be Undertaken by the Division," P 4 (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see generally* Code Civ. Proc. § 708.110 *et seq.* (procedures for examination of judgment debtor).

(n13)Footnote 13. *See* D.L.S.E. Div. Management Memo. No. 87-4 (Sept. 4, 1987), "Collection Activities to Be Undertaken by the Division," P 9 (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n14)Footnote 14. *Lab. Code* § 98.2(j).

(n15)Footnote 15. *Lab. Code* § 98.2(g).

(n16)Footnote 16. *See* discussion in § 5.14[2].

(n17)Footnote 17. *See Lab. Code* § 98.2(g).

(n18)Footnote 18. *See Lab. Code* § 98.2.

(n19)Footnote 19. *Lab. Code* § 98.2(h).

(n20)Footnote 20. *Lab. Code* § 98.2(h).

(n21)Footnote 21. *See Lab. Code* §§ 15, 98.2(h).

(n22)Footnote 22. *See Lab. Code* § 98.2(h).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
Subpart 2. "Berman" Hearings (Labor Code Sections 98-98.2)

1-5 California Employment Law § 5.18

AUTHOR: By Susan Spurlark, J.D.

§ 5.18 Appeal of Labor Commissioner's Award

[1] Right to Appeal and Time Limit

Labor Code Section 98.2(a) gives either party the right to appeal the award of the Labor Commissioner to the court, as a limited or unlimited civil case, depending on the jurisdictional amount. A limited civil case involves a claim for damages of less than \$25,000; an unlimited civil case involves a claim for damages of \$25,000 or more.ⁿ¹ The defendant need not have participated in the proceedings before the Labor Commissioner in order to prosecute an appeal.ⁿ²

Any appeal must be filed within 10 days after service of notice of the order, decision, or award.ⁿ³ If the order is served by mail, service is deemed complete at the time of deposit, but the 10-day period for filing the appeal is extended by 5 calendar days if the place of address and the place of mailing are both within California, 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States.ⁿ⁴ This requirement is considered jurisdictional and mandatory and is strictly enforced.ⁿ⁵ Relief from this time limit will not be afforded on the grounds of mistake, inadvertence, or excusable neglect.ⁿ⁶ In addition, *Labor Code section 98.2(a)* requires the appellant to serve a copy of the appeal request on the Labor Commissioner.

Once a party has filed an appeal for a trial de novo under *Labor Code Section 98.2*, no statutes or regulations provide procedures for withdrawing that appeal.ⁿ⁷ Thus, a non-appealing party can reasonably expect that it need take no action, such as a cross-appeal, to preserve its rights once the adverse party has filed a notice of appeal.ⁿ⁸ Conversely, the party that has filed an appeal does not have the unilateral right to withdraw its appeal by filing a request for dismissal, because this action affects the rights of the other party.ⁿ⁹ For example, an employer may appeal to the appropriate court for a trial de novo following an adverse decision by the Labor Commissioner.ⁿ¹⁰ However, that employer cannot file an appeal and then unilaterally request its dismissal because the dismissal could deprive the employee of participation in proceedings that potentially could lead to additional damages and reimbursement of

attorney's fees.n11

Although the proceeding is referred to as an "appeal" in *Labor Code Section 98.2(a)*, that section also provides that the case is to be heard by the court "de novo." Thus, as discussed further in [3], *below*, an "appeal" of the Labor Commissioner's decision is actually a full new trial conducted by the court on the evidence presented to it rather than a conventional "appeal" limited to a review of the previous proceedings.n12 The decision of the reviewing court, following a de novo hearing, is subject to a conventional appeal to the appropriate appellate court.n13

While the parties to the de novo proceeding are generally the claimant and the employer, the Labor Commissioner may intervene "where questions of the interpretation of statutes or administrative regulations are present."n14

[1A] Appellant Employer Must Post Undertaking

Whenever an employer files an appeal pursuant to *Labor Code Section 98.2*, the employer must post an undertaking with the reviewing court in the amount of the order, decision, or award issued by the Labor Commissioner.n15 The undertaking may be either an appeal bond issued by a licensed surety or a cash deposit with the court.n16 The employer must notify the other parties and the Labor Commissioner in writing of the posting of the undertaking.n17 If the employer ultimately owes the employee some amount pursuant to judgment, withdrawal or dismissal of appeal without entry of judgment, or settlement agreement and fails to pay the amount owed within 10 days of entry of the judgment, dismissal, or withdrawal of the appeal, or the execution of a settlement agreement, a portion of the undertaking equal to the amount owed, or the entire undertaking if the amount owed exceeds the undertaking, shall be forfeited to the employee.n18

An employer's failure to post the required undertaking does not deprive the trial court of jurisdiction to review an award issued by the Labor Commissioner on the employer's appeal. The requirement of an undertaking in *Labor Code section 98.2(b)* is directory rather than mandatory and jurisdictional. However, the trial court may promptly issue, either *sua sponte* or on an employee's application or motion, an order requiring the appealing employer to post an undertaking in a certain amount by a certain date or be subject to sanctions, including dismissal of the appeal.n18.1

[2] FORM--Appeal of Labor Commissioner's Award

[a] Comment

As discussed further in [3], *below*, a proceeding under *Labor Code Section 98.2(a)*, although denoted an "appeal" is actually a trial de novo by the court.n19 The Labor Code, Code of Civil Procedure, and California Rules of Court provide no guidance regarding the nature of the pleading, notice, or other document necessary to initiate an "appeal" under that statute. In practice, the procedures vary from court to court. Some courts may require filing of a formal civil complaint, others may accept a copy of the complaint before the Labor Commissioner, while others may require a "notice of appeal" accompanied by a copy of the Labor Commissioner's decision (and possibly a brief). Counsel would therefore be well-advised to check the local court rules and contact the clerk of the court to determine the nature of the document necessary to initiate a de novo proceeding under *Labor Code Section 98.2(a)* in that particular court. One court of appeal has held that a notice of appeal under *Labor Code Section 98.2(a)* is not an initial pleading and therefore does not require the signature of an attorney. Thus, the court held that a corporate officer may sign the notice of appeal.n20 Note, however, that under subsequent legislation, if the appealing party is represented by an attorney, the attorney of record may be required to sign the notice of appeal.n21

The Labor Commissioner has promulgated a form of Notice of Appeal (DLSE 537), which it suggests using in appealing a decision of the Commissioner under *Labor Code Section 98.2(a)*. A copy of that form is set forth in subsection [b], *below*. The form is modeled after the notice of appeal used in conventional civil appeals.n22 The form requests that the clerk of the court give notice of the date, time, and place of the de novo hearing before the court. A

copy of the Labor Commissioner's order, decision, or awardⁿ²³ should be attached to the notice of appeal, if used. However, counsel should check with the particular court in which the appeal is to be filed before using this form because the rules of that court will govern the format of the papers to be filed,ⁿ²⁴ and some courts may not accept the DLSE form or may require additional supporting papers.

[b] Form Appeal of Labor Commissioner's Award to Superior, Municipal, or Justice Court

[Click here to view image.](#)

[3] De Novo Hearing by Court

Although a proceeding under *Labor Code section 98.2(a)* to review the Labor Commissioner's decision is referred to in the statute as an "appeal," the proceeding differs significantly from an ordinary appeal. Whereas a conventional appeal in a civil action is limited to a review of the record in the trial court, and the appellate court is precluded from retrying the case or reweighing the evidence, the reviewing court in an "appeal" under *Labor Code section 98.2(a)* hears the case "de novo"; that is, the parties literally receive a new trial.ⁿ²⁵ In the de novo hearing, the court may hear testimony, including entirely new evidence, and the decision of the Labor Commissioner is entitled to no weight.ⁿ²⁶ Rather than basing its decision on a review of the proceedings before the Labor Commissioner, the court decides the case based on the evidence presented directly to the court.ⁿ²⁷

In the de novo hearing, the court has discretion to consider wage-related claims not raised by the employee before the Labor Commissioner. Thus, for example, on the employer's appeal of the Labor Commissioner's determination that the employer was liable for unpaid overtime and waiting time penalties, the trial court had discretion to consider the employee's claims for rest and meal period and itemized pay statement violations, even though the employee had not raised them before the Labor Commissioner.^{n27.1}

The Labor Code, Code of Civil Procedure, and California Rules of Court provide no specific procedures for the hearing of *Labor Code section 98.2(a)* appeals. Since such an appeal involves a trial de novo in the reviewing court, the proceeding is generally subject to all of the procedures incident to any other trial in the particular reviewing court.ⁿ²⁸ However, the reviewing court has discretion to establish procedures for handling such cases to assure that the purposes of the wage claim statutes in providing an expedited proceeding will not be thwarted.ⁿ²⁹ Thus, for example, discovery is permissible in such proceedings, but the court may limit discovery under its inherent power to control actions in order to assure that use of that procedure is not inconsistent with the expeditious resolution of wage disputes.ⁿ³⁰

[4] Award of Costs and Attorney's Fees Against Unsuccessful Appellant

If the party seeking the de novo appeal is unsuccessful, the court is required by statute to determine the costs and reasonable attorney's fees incurred by any respondents and to assess that amount as a cost on the appellant.ⁿ³¹ The right to costs and attorney's fees does not apply if the party seeking the de novo appeal is successful.^{n31.1} The standards for determining a reasonable attorney's fee appear to be the same as in any other action.ⁿ³²

An indigent employee represented by the Labor Commissioner may collect attorney's fees when the appellant-employer is unsuccessful. Although the employee does not pay attorney's fees to the Commissioner for the representation, the fees have been incurred on the employee's behalf.ⁿ³³ Allowing such awards serves the legislative purpose of discouraging unmeritorious appeals of wage claims, thereby reducing the costs and delays of prolonged disputes by imposing the full costs of litigation on the unsuccessful appellant.ⁿ³⁴ The threat of statutory attorney's fees offers equal treatment to indigent claimants and those that can afford private counsel by equally deterring time-consuming and costly appeals by employers.ⁿ³⁵

For purposes of an attorney's fees award under section 98.2(c), a party who elects a trial de novo after the Commissioner issues a decision and award and is unsuccessful in the trial de novo is liable for the other party's fees and costs.^{n35.1}

The right of a party who chooses to pursue the administrative remedy under *Labor Code section 98 et seq.* rather than filing a civil action under *Labor Code section 1194* to recover attorney's fees is governed by *Labor Code section 98.2(c)* rather than by section 1194. The trial de novo in superior court under *Labor Code section 98.2(a)* is not a civil proceeding contemplated by *Labor Code section 1194*.^{n35.2}

The right to recover attorney fees in *Labor Code section 98.2(c)* is limited to fees incurred on appeal from the commissioner's decision.^{n35.3} If the resulting trial court judgment is more favorable to the appealing party than was the administrative award from which the appeal was taken, the appealing party will not be liable for the other's fees and costs. Success does not require a complete reversal of the earlier award. In an employer appeal, an incremental reduction in the administrative award constitutes success. Likewise, in an employee appeal, an incremental increase in the administrative award constitutes success.ⁿ³⁶ An employee is successful if the court awards an amount greater than zero.ⁿ³⁷

In *Smith v. Rae-Venter Law Group*,ⁿ³⁸ the California Supreme Court disapproved the contrary views in *Triad Data Services, Inc. v. Jackson*,ⁿ³⁹ and *Cardenas v. Mission Industries*.ⁿ⁴⁰ *Triad* and *Cardenas* were both decided in the context of employer appeals, but stated a rule applicable in both employer and employee appeals. In those cases, the courts had held that the fee-shifting provision of *Labor Code section 98.2(c)* becomes operative only when the judgment of the trial court completely eliminates the Commissioner's administrative award. In *Smith*, on the employee's appeal, the superior court entered a judgment in favor of the employee nearly identical to the Commissioner's except for a \$230 variance in prejudgment interest awards (based on the trial court's prejudgment-interest award on nonwage items, which the Commissioner was not empowered to award). The trial court then denied the employer's motion for attorney's fees on the ground that the employee's appeal was successful because he had obtained a judgment in his favor. The Supreme Court, however, declined to decide whether the employee's award of prejudgment interest on his nonwage claims rendered his appeal successful for purposes of cost and fee shifting. The Court held that because its decision was a clear break from the previously uniform application of the *Triad* and *Cardenas* courts' construction of section 98.2(c), its decision could not be retroactively applied to *Smith*.ⁿ⁴¹ However, the Legislature overturned the decision in *Smith* by amending *Labor Code section 98.2(c)* to provide that an employee is successful if the court awards an amount greater than zero.ⁿ⁴²

The provisions of *Labor Code section 98.2(c)* authorizing an award *against an unsuccessful appellant* do not authorize an award *to a successful appellant*.ⁿ⁴³ The purpose of the statute is to promote the finality of the Commissioner's awards and discourage meritless and unwarranted appeals by assessing costs and attorney fees against unsuccessful appellants. Thus, *Labor Code Section 98.2(c)* does not provide a basis for recovery of fees and costs by an employer that prevailed in its challenge to an adverse Labor Commissioner determination.ⁿ⁴⁴

Attorney's fees have also been assessed as costs as a condition of granting relief under *Code of Civil Procedure section 473* from a default entered as a result of a party's nonappearance at a hearing de novo by the court.ⁿ⁴⁵ In the latter case, the court assessed the fees against the responsible attorney (the Labor Commissioner's office, who was representing the claimant) rather than the claimant himself.ⁿ⁴⁶

[4A] Award of Prejudgment Interest to Successful Employee-Appellant

Labor Code Section 98.1 provides for an award of prejudgment interest to an employee who is awarded compensation by the Labor Commissioner.ⁿ⁴⁷ One court of appeal has held that an employee who is unsuccessful before the Labor Commissioner, and who, therefore, is not entitled to prejudgment interest under *Labor Code Section 98.1*, is nevertheless entitled to an award of prejudgment interest under *Civil Code Section 3287* (the statute providing for interest on damages generally) if the employee prevails on appeal in a judicial trial de novo under *Labor Code Section 98.2*.ⁿ⁴⁸

[5] Representation of Indigent Employee by Labor Commissioner in De Novo Court Hearing

The Labor Commissioner may, on request, represent a claimant who cannot financially afford counsel in the de novo proceedings provided for under *Labor Code Section 98.2*.ⁿ⁴⁹ *Labor Code Section 98.4* further provides that the Labor Commissioner "shall" represent the claimant if the claimant "is attempting to uphold the amount awarded by the Labor Commissioner and is not objecting to any part of the Labor Commissioner's final order."ⁿ⁵⁰ Representation in the de novo proceedings includes representation in any further appeal.ⁿ⁵¹

The claimant must request representation by the Labor Commissioner.ⁿ⁵² A form has been promulgated by the Labor Commissioner for requesting representation (DLSE 553) and must be completed along with a "Statement of Financial Status" (DLSE 554). The language in those forms appears to ignore the Commissioner's discretionary power to provide representation when the claimant challenges some aspect of the decisionⁿ⁵³ and requires certification that the indigent claimant is satisfied with and does not object to the final order, decision, or award.ⁿ⁵⁴

The Labor Commissioner's decision regarding financial ability to afford counsel is discretionary, and there is a presumption that such discretion will be exercised conscientiously.ⁿ⁵⁵ The Labor Commissioner's decision in this regard is not subject to review in the proceedings that occasion the representation.ⁿ⁵⁶

An indigent employee represented by the Labor Commissioner may collect attorney's fees when the appellant-employer is unsuccessful.ⁿ⁵⁷

Legal Topics:

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

Administrative Law
Judicial Review
Reviewability
General Overview
Civil Procedure
Appeals
General Overview
Labor & Employment Law
Wage & Hour Laws
Administrative Proceedings & Remedies
General Overview
Labor & Employment Law
Wage & Hour Laws
Administrative Proceedings & Remedies
Enforcement

FOOTNOTES:

(n1)Footnote 1. *See Code Civ. Proc.* § 86.

(n2)Footnote 2. *Jones v. Basich* (1986) 176 Cal. App. 3d 513, 518-519, 222 Cal. Rptr. 26 .

(n3)Footnote 3. *Lab. Code* § 98.2(a).

(n4)Footnote 4. *See Lab. Code* § 98.2(a); *Code Civ. Proc.* § 1013(a); *see Clavell v. North Coast Bus. Park* (1991) 232 Cal. App. 3d 328, 332, 283 Cal. Rptr. 419 (provision of *Code Civ. Proc.* § 1013 that exempts "notices of appeal" from time extension provisions is inapplicable to notices seeking de novo judicial review of Labor Commissioner decisions); *see also Code Civ. Proc.* § 1013(c), (e) (extension if service is by Express Mail, overnight delivery, or fax).

(n5)Footnote 5. *Pressler v. Donald L. Bren Co.* (1982) 32 Cal. 3d 831, 837, 187 Cal. Rptr. 449, 654 P.2d 219 .

(n6)Footnote 6. *Pressler v. Donald L. Bren Co.* (1982) 32 Cal. 3d 831, 837, 187 Cal. Rptr. 449, 654 P.2d 219 ; *see REO Broadcasting Consultants v. Martin* (1999) 69 Cal. App. 4th 489, 496, 81 Cal. Rptr. 2d 639 (applying *Pressler's* general holding--that timeliness of filing notice of appeal from Labor Commissioner's final decision is jurisdictional and cannot be disregarded even on grounds of appellant's excusable neglect--to administrative proceeding under Talent Agencies Act (*Lab. Code* §§ 1700-1700.46) and noting that it applies to administrative proceedings in general).

(n7)Footnote 7. *Miller v. Foremost Motors, Inc.* (1993) 16 Cal. App. 4th 1271, 1274-1275, 20 Cal. Rptr. 2d 503 .

(n8)Footnote 8. *Miller v. Foremost Motors, Inc.* (1993) 16 Cal. App. 4th 1271, 1274-1275, 20 Cal. Rptr. 2d 503 .

(n9)Footnote 9. *Miller v. Foremost Motors, Inc.* (1993) 16 Cal. App. 4th 1271, 1274-1275, 20 Cal. Rptr. 2d 503 .

(n10)Footnote 10. *See, e.g., Miller v. Foremost Motors, Inc.* (1993) 16 Cal. App. 4th 1271, 1274-1275, 20 Cal. Rptr. 2d 503 .

(n11)Footnote 11. *Miller v. Foremost Motors, Inc.* (1993) 16 Cal. App. 4th 1271, 1274-1275, 20 Cal. Rptr. 2d 503 .

(n12)Footnote 12. *See Pressler v. Donald L. Bren Co.* (1982) 32 Cal. 3d 831, 835-836, 187 Cal. Rptr. 449, 654 P.2d 219 ; *Sales Dimensions v. Superior Court* (1979) 90 Cal. App. 3d 757, 762-763, 153 Cal. Rptr. 690 .

(n13)Footnote 13. *See Peer v. California Indus. for the Blind, Inc.* (1979) 95 Cal. App. 3d 945, 947, 157 Cal. Rptr. 464 .

(n14)Footnote 14. *Lab. Code § 98.5.*

(n15)Footnote 15. *Lab. Code § 98.2(b).* *See, e.g., Williams v. Freedomcard, Inc.* (2004) 123 Cal. App. 4th 609, 2004 Cal. App. LEXIS 1806, *4-*10 (because employer posted no bond and statutory requirements for relief from posting bond were not satisfied, trial court did not abuse its discretion in dismissing employer's appeal de novo from Labor Commissioner's order awarding employee earned but unpaid wages plus penalties and interest).

(n16)Footnote 16. *Lab. Code § 98.2(b).*

(n17)Footnote 17. *Lab. Code § 98.2(b).*

(n18)Footnote 18. *Lab. Code § 98.2(b).*

(n19)Footnote 18.1. *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal. App. 4th 540, 545-553, 38 Cal. Rptr. 3d 939 (trial court properly considered employer's appeal of Labor Commissioner's award to employee, even though employer failed to post required undertaking, where language of *Lab. Code § 98.2(b)* did not expressly provide that posting undertaking by appealing employer was mandatory and jurisdictional and, if not posted, Commissioner's order, decision or award became final; legislative purpose of § 98.2(b) did not show posting of required undertaking was mandatory and jurisdictional, rather than merely directory; and existence of statutory exceptions to undertaking requirement weighed against conclusion that undertaking requirement was mandatory and jurisdictional).

(n20)Footnote 19. *See Lab. Code § 98.2(a); Sales Dimensions v. Superior Court* (1979) 90 Cal. App. 3d 757, 762-763, 153 Cal. Rptr. 690 .

(n21)Footnote 20. *Rogers v. Municipal Court* (1988) 197 Cal. App. 3d 1314, 1318-1319, 243 Cal. Rptr. 530 .

(n22)Footnote 21. *See Code Civ. Proc. § 128.7(a)* (attorney of record required to sign pleading, petition, written notice of motion, or other similar paper).

(n23)Footnote 22. *Cf. Cal. Rules of Ct., Rules 8.100(a), 8.750(a)* (governing notices of appeal in civil actions).

(n24)Footnote 23. *See discussion in § 5.16.*

(n25)Footnote 24. *Cf. Sales Dimensions v. Superior Court* (1979) 90 Cal. App. 3d 757, 761-763, 153 Cal. Rptr. 690 .

(n26)Footnote 25. *Pressler v. Donald L. Bren Co.* (1982) 32 Cal. 3d 831, 835-836, 187 Cal. Rptr. 449, 654 P.2d 219 ; *see Lab. Code § 98.2(a); Triad Data Services, Inc. v. Jackson* (1984) 153 Cal. App. 3d Supp. 1, 14 , 200 Cal. Rptr. 418 .

(n27)Footnote 26. See *Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal. App. 4th 555, 561, 38 Cal. Rptr. 2d 221 ; *Cardenas v. Mission Industries* (1991) 226 Cal. App. 3d 952, 960, 277 Cal. Rptr. 247 ; *Hernandez v. Mendoza* (1988) 199 Cal. App. 3d 721, 725, 245 Cal. Rptr. 36 ; *Sales Dimensions v. Superior Court* (1979) 90 Cal. App. 3d 757, 762-763, 153 Cal. Rptr. 690 ; see *Pressler v. Donald L. Bren Co.* (1982) 32 Cal. 3d 831, 835-836, 187 Cal. Rptr. 449, 654 P.2d 219 .

(n28)Footnote 27. See *Cardenas v. Mission Industries* (1991) 226 Cal. App. 3d 952, 960, 277 Cal. Rptr. 247 ; *Sales Dimensions v. Superior Court* (1979) 90 Cal. App. 3d 757, 762-763, 153 Cal. Rptr. 690 .

(n29)Footnote 27.1. *Murphy v. Kenneth Cole Productions* (2007) 40 Cal. 4th 1094, 155 P.3d 284, 2007 Cal. LEXIS 3596, *45-*54 .

(n30)Footnote 28. See *Sales Dimensions v. Superior Court* (1979) 90 Cal. App. 3d 757, 761-762, 153 Cal. Rptr. 690 .

(n31)Footnote 29. See *Sales Dimensions v. Superior Court* (1979) 90 Cal. App. 3d 757, 763-764, 153 Cal. Rptr. 690 .

(n32)Footnote 30. *Sales Dimensions v. Superior Court* (1979) 90 Cal. App. 3d 757, 763-764, 153 Cal. Rptr. 690 .

(n33)Footnote 31. *Lab. Code* § 98.2(c).

(n34)Footnote 31.1. *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal. App. 4th 540, 554, 38 Cal. Rptr. 3d 939 (employer who appealed Commissioner's award to superior court and obtained more favorable award, but did not reverse the award, was not entitled to attorney's fees award under *Lab. Code* § 98.2(c)).

(n35)Footnote 32. Cf. *Sales Dimensions v. Superior Court* (1979) 90 Cal. App. 3d 757, 761, 153 Cal. Rptr. 690 (de novo hearing under *Lab. Code* § 98.2(c) subject to usual procedural rules of reviewing court). For a general discussion of the standards for determining the reasonableness of an award of attorney's fees, see California Attorney Practice, Ch. 12, "Recovering Attorney's Fees and Costs From Adverse Party in Litigation."

(n36)Footnote 33. *Lolley v. Campbell* (2002) 28 Cal. 4th 367, 372-379, 121 Cal. Rptr. 2d 571, 48 P.3d 1128 .

(n37)Footnote 34. *Lolley v. Campbell* (2002) 28 Cal. 4th 367, 376, 121 Cal. Rptr. 2d 571, 48 P.3d 1128 .

(n38)Footnote 35. *Lolley v. Campbell* (2002) 28 Cal. 4th 367, 376, 121 Cal. Rptr. 2d 571, 48 P.3d 1128 .

(n39)Footnote 35.1. *Smith v. Rae-Venter Law Group* (2002) 29 Cal. 4th 345, 345-370, overruled on other grounds by amendment to Civ. Code § 98.2 .

(n40)Footnote 35.2. *Sampson v. Parking Service 2000 Com., Inc.* (2004) 117 Cal. App. 4th 212, 218-228, 11 Cal. Rptr. 3d 595 .

(n41)Footnote 35.3. *Sampson v. Parking Service* (2004) 117 Cal. App. 4th 212, 228-230, 11 Cal. Rptr. 3d 595 .

(n42)Footnote 36. *Smith v. Rae-Venter Law Group* (2002) 29 Cal. 4th 345-370, ; overruled on other grounds by amendment to Civ. Code § 98.2 . See 2003 Stats. Ch. 93 § 1.

(n43)Footnote 37. *Lab. Code* § 98.2(c).

(n44)Footnote 38. *Smith v. Rae-Venter Law Group* (2002) 29 Cal. 4th 345 , overruled on other grounds by amendment to Civ. Code § 98.2 . See 2003 Stats. Ch. 93 § 1.

(n45)Footnote 39. *Triad Data Services, Inc. v. Jackson* (1984) 153 Cal. App. 3d Supp. 1 , 200 Cal. Rptr. 418 .

(n46)Footnote 40. *Cardenas v. Mission Industries* (1991) 226 Cal. App. 3d 952, 960, 277 Cal. Rptr. 247 .

(n47)Footnote 41. *Smith v. Rae-Venter Law Group* (2002) 29 Cal. 4th 345-351, , overruled on other grounds by amendment to Civ. Code § 98.2 . See 2003 Stats. Ch. 93 § 1.

(n48)Footnote 42. *Lab. Code* § 98.2(c); see 2003 Stats. Ch. 93 § 1 (Legislature's intent in amending *Lab. Code* § 98.2 to overturn decision in *Smith v. Rae Venter Law Group*).

(n49)Footnote 43. See *Dawson v. Westerly Investigations, Inc.* (1988) 204 Cal. App. 3d Supp. 20, 24 , 251 Cal. Rptr. 633 (former *Lab. Code* § 98.2(b)).

(n50)Footnote 44. *Smith v. Rae-Venter Law Group* (2002) 29 Cal. 4th 345-363, ; superseded on other grounds by amendment to Civ. Code § 98.2 . See 2003 Stats. Ch. 93 § 1. See *Dawson v. Westerly Investigations, Inc.* (1988) 204 Cal. App. 3d Supp. 20, 24 , 251 Cal. Rptr. 633 .

(n51)Footnote 45. *Prieto v. Rivero* (1979) 95 Cal. App. 3d 275, 277-278, 157 Cal. Rptr. 40 .

(n52)Footnote 46. *Prieto v. Rivero* (1979) 95 Cal. App. 3d 275, 278, 157 Cal. Rptr. 40 . *Code Civ. Proc.* § 473 was subsequently amended to authorize the court to direct the attorney to pay reasonable compensatory legal fees and costs, but not to condition relief from a default or default judgment on the attorney's payment of such fees, costs, or other monetary penalties imposed by the court. See Stats. 1991, ch. 1003.

(n53)Footnote 47. *Lab. Code* § 98.1 provides that "[a]ll awards granted pursuant to a hearing under this chapter [administrative proceedings] shall accrue interest on all due and unpaid wages at the adjusted annual rate established pursuant to [former] Section 19269 [now Section 19521] of the Revenue and Taxation Code. The interest shall run until the wages are paid from the date that the wages were due and payable."

(n54)Footnote 48. *Nordquist v. McGraw-Hill Broadcasting Co.* (1995) 32 Cal. App. 4th 555, 575-576, 38 Cal. Rptr. 2d 221 .

(n55)Footnote 49. *Lab. Code* § 98.4.

(n56)Footnote 50. *Lab. Code* § 98.4.

(n57)Footnote 51. *Gipe v. Superior Court* (1981) 124 Cal. App. 3d 617, 625-626, 177 Cal. Rptr. 590 .

(n58)Footnote 52. See *Lab. Code* § 98.4.

(n59)Footnote 53. See *Lab. Code* § 98.4.

(n60)Footnote 54. See DLSE Form No. 553.

(n61)Footnote 55. *Gipe v. Superior Court* (1981) 124 Cal. App. 3d 617, 624-625, 177 Cal. Rptr. 590 .

(n62)Footnote 56. *Gipe v. Superior Court* (1981) 124 Cal. App. 3d 617, 624-625, 177 Cal. Rptr. 590 .

(n63)Footnote 57. *Lolley v. Campbell* (2002) 28 Cal. 4th 367, 372-379, 121 Cal. Rptr. 2d 571, 48 P.3d 1128 . See § 5.18[4], above.



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
Subpart 2. "Berman" Hearings (Labor Code Sections 98-98.2)

1-5 California Employment Law § 5.19

AUTHOR: By Susan Spurlark, J.D.

§ 5.19 Offsets of Unsatisfied Judgments

An employer must satisfy a judgment in proceedings under *Labor Code Section 98.2* within 90 days after issuance of a final judgment or be subject to having the unpaid amount of the judgment offset against various amounts due to the employer from the State of California.ⁿ¹ These amounts include refunds of personal income tax, bank and corporation tax, and sales and use tax, as well as winnings in the California State Lottery.ⁿ²

To enforce these provisions, employers must provide the Labor Commissioner with identifying numbers at the time the judgment becomes final.ⁿ³ A corporate employer must provide the corporation's identification number issued by the Secretary of State, and an employer who is an individual must provide his or her Social Security number.ⁿ⁴

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewLabor & Employment LawWage & Hour
LawsAdministrative Proceedings & RemediesGeneral OverviewLabor & Employment LawWage & Hour
LawsCoverage & DefinitionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12419.11(a)*.

(n2)Footnote 2. *Gov. Code § 12419.11(a)*.

(n3)Footnote 3. *Gov. Code § 12419.11(b)*.

(n4)Footnote 4. *Gov. Code § 12419.11(b)*.



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DIVISION I WAGE AND HOUR LAWS

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Subpart 2. "Berman" Hearings (Labor Code Sections 98-98.2)

1-5 California Employment Law §§ 5.20 through 5.29

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§§ 5.20[Reserved]



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
Subpart 3. Other Actions by Labor Commissioner

1-5 California Employment Law § 5.30

AUTHOR: By Susan Spurlark, J.D.

§ 5.30 Actions by Labor Commissioner to Collect Wages

[1] Generally

[a] Prosecution of Action Under Labor Code Section 98.3

As an alternative to conducting a "Berman" hearing and representing indigent claimants in a de novo court review of that proceeding, as discussed in Subpart 2, *above*, the Labor Commissioner and DLSE may also prosecute civil actions for (1) collection of wages, penalties, and demands of persons who (in the opinion of the Commissioner) have valid claims and are financially unable to employ counsel;ⁿ¹ (2) return of worker's tools that are illegally in the possession of another;ⁿ² (3) collection of wages and other moneys payable to employees *or* to the State of California arising out of the employment relationship or an order of the Industrial Welfare Commission;ⁿ³ and (4) recovery of wages or other monetary benefits that are owed to the Industrial Relations Unpaid Wage Fund.ⁿ⁴ The apparent intent of these provisions is to allow the Labor Commissioner to act in cases in which the procedures under *Labor Code sections* 98-98.2 are not applicable or would be impracticable (for example, actions to recover the cost of uniforms employees were wrongfully required to purchase,ⁿ⁵ class claims, claims involving bankruptcies, and claims of failure to provide itemized statements).ⁿ⁶

If the Labor Commissioner pursues a matter under *Labor Code section* 98.3, the Commissioner is not required to pay the normal filing fees.ⁿ⁷ In the event of a recovery, the amount ordinarily charged as a filing fee is assessed as part of the judgment and is paid by the Commissioner if sufficient money is collected over and above the wages, penalties, or demands due to the claimant(s).ⁿ⁸ Similar provision is made for payment and recoupment of other court costs, service of process fees, storage charges, and keeper's fees.ⁿ⁹

Although the Labor Commissioner is authorized to accept assignments of wage claims from employees,ⁿ¹⁰ the Commissioner may, after investigation and determination that wages or monetary benefits are due and unpaid to any California employee, also take action to collect unpaid wages and benefits without taking an assignment.ⁿ¹¹ If the Commissioner acts without taking an assignment, he or she acts as trustee of any wages recovered and must make a

diligent search to locate the employees to whom those wages are owed.ⁿ¹² The wages collected must be remitted to the employees to whom they are owed, when located.ⁿ¹³ Until remitted, the collected wages are deposited in the Industrial Relations Unpaid Wage Fund.ⁿ¹⁴

[b] Investigation and Enforcement of Wage Claims Under Labor Code Section 1195.5

Labor Code section 1195.5 also gives the Labor Commissioner and the DLSE authority to investigate and enforce claims for wages. It applies when a claim is made that wages, which are conceded to be above the minimum set by law, have not been computed or paid correctly.ⁿ¹⁵ Representation does not appear from the language of the statute to be dependent on inability to afford counsel; however, like *Labor Code section 98.3(b)*, *Labor Code section 1195.5* does appear to include class claims.ⁿ¹⁶

Labor Code section 1195.5 provides that the DLSE "shall determine" the amount of wages due to the complainant employees and that the DLSE "shall enforce payment of any sums found ... to be due and unpaid," but the statute does not specify the procedures to be utilized in enforcing payment of such claims.ⁿ¹⁷ A decision regarding the procedures to be used would likely be handled like similar decisions involving other types of employee claims for unpaid wages.ⁿ¹⁸ The DLSE may proceed either by a hearing under *Labor Code sections 98-98.2* or by a civil action under *Labor Code section 98.3*.

[2] Criteria for Taking Action on Behalf of Employee

The Labor Commissioner is authorized to seek enforcement of some claims under *Labor Code sections 98.3* and *1195.5* without regard to the claimant's financial ability to afford counsel.ⁿ¹⁹ The statutory authorization to pursue claims for illegally withheld tools, claims of employees or the state arising out of an employment relationship or the Industrial Welfare Commission orders, claims for monies due to the Industrial Relations Unpaid Wage Fund, and claims for wages that have been improperly calculated or paid is not expressly made contingent on a finding of inability to afford counsel.ⁿ²⁰ In cases in which representation is dependent on inability to afford counsel,ⁿ²¹ the standards and rules are the same as those applied when an indigent claimant seeks representation by the Labor Commissioner in a de novo court hearing under *Labor Code section 98.4*, as discussed in § 5.18[5].

Legal Topics:

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

Administrative Law Agency Adjudication General Overview Labor & Employment Law Wage & Hour
Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour
Laws Administrative Proceedings & Remedies Investigative Authority Labor & Employment Law Wage & Hour
Laws Wage Payments

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 98.3(a)*.

(n2)Footnote 2. *Lab. Code § 98.3(a)*.

(n3)Footnote 3. *Lab. Code § 98.3(b)*.

(n4)Footnote 4. *Lab. Code § 98.3(c)*. This would occur when the employees who are owed the wages or other monetary sums could not be found and the action was taken without benefit of assignment. *see Lab. Code §§ 96.6, 96.7*.

(n5)Footnote 5. *Department of Industrial Relations v. UI Video Stores, Inc. (1997) 55 Cal. App. 4th 1084, 1091-1092, 64 Cal. Rptr. 2d 457*.

(n6)Footnote 6. *See generally Lab. Code §§ 98, 98.3; see also* discussion in §§ 5.02[2] and 5.10.

(n7)Footnote 7. *See Lab. Code § 101; Division of Labor Law Enforcement v. Moroney (1946) 28 Cal. 2d 344, 345-346, 170 P.2d 3 .*

(n8)Footnote 8. *Lab. Code § 101.5.*

(n9)Footnote 9. *See Lab. Code §§ 101, 102; 31 Ops. Cal. Atty. Gen. 179 (1958) (reporter's fees).*

(n10)Footnote 10. *See Lab. Code § 96.*

(n11)Footnote 11. *See Lab. Code § 96.7.*

(n12)Footnote 12. *Lab. Code § 96.7(a), (b).*

(n13)Footnote 13. *See Lab. Code § 96.7(c).*

(n14)Footnote 14. *See Lab. Code § 96.7(a), (d).* If, however, the amount in the Unpaid Wage Fund exceeds \$200,000, the excess must be transmitted to the Controller for deposit into the State General Fund. *See Lab. Code § 96.7(e), (f).*

(n15)Footnote 15. *Lab. Code § 1195.5.*

(n16)Footnote 16. Compare *Lab. Code § 1195* (wages paid to "an" employee) with *Lab. Code § 1195.5* ("wages of employees").

(n17)Footnote 17. *See Lab. Code § 1195.5.*

(n18)Footnote 18. *See §§ 5.02 and 5.10* for a discussion of those procedures.

(n19)Footnote 19. *See Lab. Code §§ 98.3, 1195.5.*

(n20)Footnote 20. *See Lab. Code §§ 98.3, 1195.5.*

(n21)Footnote 21. *See Lab. Code § 98.3(a).*



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1-5 California Employment Law § 5.31

AUTHOR: By Susan Spurlark, J.D.

§ 5.31 Actions by Labor Commissioner to Collect Civil Penalties

[1] Penalties Imposed Pursuant to Labor Code Sections 210 and 225.5

Labor Code sections 210 and 225.5 provide civil penalties for violations of various Labor Code provisions relating to the time, manner, and place for payment of wages.ⁿ¹ *Labor Code section 210* provides penalties for failure to pay wages in violation of *Labor Code sections 201.3* (payments by temporary services employer), 204 (general provision for semimonthly wage payments), 204b (weekly wage payments), 204.1 (monthly payments to commissioned employees of vehicle dealers), 204.2 (payments to exempt executive, administrative, and professional employees), 205 (payments to agricultural and domestic employees), 205.5 (payments to other agricultural employees), and 1197.5 (wage discrimination based on sex). *Labor Code section 225.5* provides penalties for employers who unlawfully withhold wages in violation of *Labor Code sections 212* (dishonored checks and prohibited forms of payment), 216 (willful refusal to make wage payments when due), 221 (repayment of wages to employer), 222 (withholding part of wage agreed on through collective bargaining), and 223 (payment of less than the statutory or contractual wage). Under both statutes, the penalties are as follows:ⁿ²

1. For any initial violation, \$100 for each failure to pay each employee; or
2. For each subsequent violation, or any willful or intentional violation, \$200 for each failure to pay each employee, plus 25% of the amount unlawfully withheld.

There is an additional civil penalty for violation of *Labor Code section 212* (dishonored checks) under *Civil Code section 1719*; this penalty is not enforced by the Labor Commissioner.ⁿ³

The Labor Commissioner interprets *Labor Code sections 210 and 225.5* as allowing the DLSE discretion in determining whether a penalty will be assessed.ⁿ⁴ A DLSE interpretive bulletin states that "[p]enalties should not be assessed when there is evidence of a good-faith dispute, when the wages are paid as a result of a voluntary settlement conference, of if

there is other substantial evidence of an absence of intentional violation."⁵ The DLSE defines an "initial violation" as any violation occurring after the operative date of the statutes (January 1, 1984), regardless of whether penalties were assessed; a "subsequent violation" is any violation that occurs after notice of a previous violation, regardless of whether penalties were assessed for the previous violation.⁶ A "willful or intentional violation," according to the DLSE's interpretation, includes all employment practices engaged in deliberately or knowingly, rather than accidentally or inadvertently.⁷

If penalties are sought, the Labor Commissioner is required to take the necessary civil action to collect the penalties; the action is brought in the name of the people of the State of California and the Commissioner is authorized to act on the people's behalf when bringing such an action.⁸ Alternatively, the Labor Commissioner may include a claim for penalties in a "Berman" hearing to recover unpaid wages⁹ if there is at least one underlying wage claim related to the penalty claim, or may file a civil action pursuant to *Labor Code section 98.3*.¹⁰ The DLSE's current procedures for handling claims under *Labor Code sections 210* and *225.5* are set forth in Division Management Memoranda issued by the DLSE.¹¹ In an action to recover these civil penalties, the Labor Commissioner is not required to pay any court costs or service fees; however, if the action is successful, the cost of those fees are added to the amount of the judgment and are paid out of the *first* money received on the judgment.¹² Twelve and one half percent of penalties recovered is paid into a fund within the Labor and Workforce Development Agency dedicated to educating employers about state labor laws, and the remainder is payable to the state's General Fund.¹³

In addition to the civil penalties set forth above, the Labor Commissioner may seek criminal sanctions for violations covered by *Labor Code sections 210* and *225.5*.¹⁴ These actions may be taken in the case of "flagrant" violations and are initiated by filing a criminal complaint with the appropriate prosecuting attorney in accordance with the DLSE's internal procedures.¹⁵

[2] Penalties Imposed For Violation of Labor Code Section 226

[a] Imposition of Penalty

Labor Code section 226 requires employers to provide non-salaried, non-exempt employees, either semi-monthly or at the time of each wage payment, with itemized statements of:

- gross wages earned
- total hours worked
- the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis
- all deductions made on written orders of the employee
- net wages earned
- the inclusive dates of the period for which the employee is paid
- the name of the employee and his or her social security number^{15.1}
- the name and address of the legal entity that is the employer
- all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.¹⁶

When an employer knowingly and intentionally fails to provide the required statement, the injured employee is entitled to recover the greater of all actual damages or \$50 per employee for the initial pay period in which a violation occurs, and \$100 per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of \$4,000 and all costs and reasonable attorneys' fees in an action in the appropriate court.ⁿ¹⁷

An employer who violates *Labor Code section 226* is also subject to a civil penalty of \$250 per employee for each violation in an initial citation and \$1,000 per employee for each violation in a subsequent violation for which the employer fails to provide a wage deduction statement or fails to keep the written records required by that statute.ⁿ¹⁸ In enforcing this provision, the Labor Commissioner will take into account whether the violation is inadvertent, and has discretion not to penalize the employer for a first violation if the violation was due to a clerical error or inadvertent mistake.ⁿ¹⁹ These penalties are in addition to any other penalty provided by law.ⁿ²⁰

The above civil penalty may be imposed by citations issued by the Labor Commissioner after inspection or investigation.ⁿ²¹ Citations must be in writing and contain a description of the nature of the violation, including a reference to the statutory provision that was allegedly violated.ⁿ²² As a matter of enforcement policy, the DLSE issues citations for "the maximum penalties attached to the violation(s) found to have been committed for a period of up to one year prior to the date of discovery of the violation(s)," and field personnel are not allowed to agree to or to attempt to negotiate a compromise of the civil penalty assessment prior to the issuance of the citation.ⁿ²³ The citation is either served personally or by registered mail in accordance with *Government Code section 11505(c)*.ⁿ²⁴

[b] Contesting Penalty

An employer who receives a citation may contest the citation or the proposed penalty assessment by notifying the office of the Labor Commissioner listed on the citation within 15 business days after service of the citation that an informal hearing is desired.ⁿ²⁵

■ PRACTICE TIP:

While the form of the notice is not specified by the Labor Code, in order to avoid disputes, the notice should be in writing and served in a manner that records the time of delivery (for example, personally or by registered mail with return receipt requested). *Commentary by Susan Spurlark.*

The Labor Commissioner is required by statute to hold a hearing on the contest within 30 days and to render a decision at the conclusion of the hearing that either affirms, modifies, or dismisses the citation or proposed assessment of penalty.ⁿ²⁶ D.L.S.E. Division Management Memo. No. 88-5 describes the procedures for conducting such hearings. The hearing must be recorded on equipment that will produce an audio record of adequate quality to allow a Certified Shorthand Reporter to produce a transcript of the proceedings for use in the event of judicial review.ⁿ²⁷

The Labor Commissioner's decision must consist of a notice of findings, findings, and order, which must be served on all parties to the hearing within 15 days after the hearing by regular first-class mail at the party's last known address on file with the Labor Commissioner.ⁿ²⁸ Any amount found to be due by the Commissioner as a result of the hearing is due and payable 45 days after notice of the findings and written findings and order have been mailed to the party assessed.ⁿ²⁹ A writ of mandate may be sought from the appropriate court to review the Labor Commissioner's findings, as long as the party agrees to pay any judgment and costs ultimately rendered by the court against the party for the assessment.ⁿ³⁰ The writ must be sought within 45 days after service of the notice of findings, findings, and order.ⁿ³¹ However, pursuant to *Code of Civil Procedure section 1013*, the 45-day period is extended by 5 calendar days if the place of address and the place of mailing are both within California, 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States.ⁿ³² As in the case of any administrative mandate proceeding, the proceeding is not de novo, and the court reviews only the transcript of the hearing and any evidence introduced at the

hearing.ⁿ³³

As a matter of enforcement policy, civil penalty assessments may be settled or compromised before, during, or after a hearing when the DLSE feels it is warranted by a "justifiable and substantial reason" and provided it is not based on any "practice of 'across-the-board' percentage reduction in penalties."ⁿ³⁴ Permissible reasons for compromise or settlement include (1) absence of bad-faith, culpability, or willfulness, and (2) excessiveness of the penalty under the circumstances (including the employer's financial ability).ⁿ³⁵

A person who does not contest a citation is expected to transmit payment of the penalty to the Labor Commissioner's office designated on the citation within 15 days after issuance of the citation.ⁿ³⁶

If no petition contesting the citation or assessment of penalty is filed, the Labor Commissioner may file a certified copy of the citation or assessment in the office of the clerk of the superior court in any county in which the person assessed has or had a place of business.ⁿ³⁷ Similarly, if findings and an order are made affirming or modifying a citation or assessment of penalty, the Labor Commissioner may file a certified copy of the findings and order in the office of the clerk of the superior court in any county in which the person assessed has property or has or had a place of business.ⁿ³⁸ In either case, immediately on filing, the clerk must enter judgment for *the state* against the person assessed in the amount shown on the citation, proposed assessment, or order, as the case may be.ⁿ³⁹ A judgment so entered bears the same rate of interest and has the same effect as other judgments and must be given the same preference allowed by the law on other judgments rendered for claims for taxes.ⁿ⁴⁰ The clerk may make no charge for entering the judgment.ⁿ⁴¹

[3] Penalties Imposed for Violation of Provisions Requiring Payment of Prevailing Rates to Public Works Employees

Labor Code Sections 1770 through 1774 require certain contractors and subcontractors on public works to pay the "prevailing rates of wages" and to comply with statutory provisions governing hours of work.ⁿ⁴² A contractor or subcontractor who violates those requirements forfeits not more than \$50 for each calendar day, or portion thereof, for each worker paid less than the prevailing rates for his or her craft,ⁿ⁴³ and \$25 for each worker for each calendar day that the worker is required or permitted to work more than 8 hours per day or 40 hours in a calendar week without being paid overtime compensation, in violation of *Labor Code Sections 1810 through 1815*.ⁿ⁴⁴ The amount of the forfeiture in cases of failure to pay the prevailing wage is determined by the Labor Commissioner and must be based on consideration of both of the following:ⁿ⁴⁵

- (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
- (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

The penalty may not be less than \$10 for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, unless the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor. The penalty may not be less than \$20 for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the contractor or subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned. The penalty may not be less than \$30 for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful.ⁿ⁴⁶ The Labor Commissioner's determination of the amount of the penalty is reviewable only for abuse of discretion.ⁿ⁴⁷

When the amount due under Section 1775 is collected from the contractor or subcontractor, any outstanding wage claim under Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 against that contractor or subcontractor⁴⁸ must be satisfied before applying that amount to the penalty imposed on that contractor or subcontractor pursuant to Section 1775.ⁿ⁴⁹ The contractor or subcontractor must pay the difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate. The body awarding the contract must insert in the contract a stipulation that the contractor or subcontractor will comply with Section 1775.ⁿ⁵⁰

If an employee of a public works project subcontractor does not receive the general prevailing per diem wages, the prime contractor is not liable for penalties unless the prime had knowledge of the subcontractor's failure to pay the specified prevailing wagesⁿ⁵¹ or unless the prime contractor failed to do the following:

1. The contractor and the subcontractor failed to execute a contract which included the provisions of *Labor Code sections 1771, 1775, 1776, 1777.5, 1813, and 1815*; and
2. The contractor failed to monitor payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees by periodic review of the subcontractor's certified payroll records; and
3. Upon becoming aware of the subcontractor's failure to pay specified prevailing wages, the contractor failed to diligently take corrective action, including retaining sufficient funds due the subcontractor; and
4. Prior to making final payment to the subcontractor, the contractor failed to obtain the subcontractor's signed affidavit attesting to payment of the specified general prevailing rate to his or her employees.ⁿ⁵²

Within 15 days of receipt by the Division of Labor Standards Enforcement, the Division must notify the contractor on a public works project of a complaint of the failure of a subcontractor on that public works project to pay workers the general prevailing rate of per diem wages.ⁿ⁵³ The contractor and subcontractor are jointly liable for all amounts due pursuant to a final order or a judgment on a final order; and the Labor Commissioner is required to collect any amounts due from the subcontractor before pursuing the claim against the contractor.^{n53.1}

A subcontractor's employee on a public works project cannot sue the prime or general contractor on theories of statutory or contractual liability for the nonpayment of prevailing wages by the subcontractor (who is the employee's direct employer). There is no private right of action for enforcement by a subcontractor's employee against parties other than the subcontractor.ⁿ⁵⁴

In *Lujan v. G & G Fire Sprinklers, Inc.*,^{n54.1} the United States Supreme Court reversed, for the second time, the Ninth Circuit's holding that Labor Code provisions authorizing the state to seize money and impose penalties for a subcontractor's failure to comply with prevailing wage requirementsⁿ⁵⁵ violate the *Due Process Clause of the Fourteenth Amendment*. The Ninth Circuit had based its holding on the ground that the statutory scheme does not afford the subcontractor any prior notice or hearing.ⁿ⁵⁶ The Supreme Court held that California law affords subcontractors sufficient opportunity to challenge state prevailing wage determinations in breach-of-contract actions in superior court,ⁿ⁵⁷ thus refuting the claim of deprivation of payment without due process.ⁿ⁵⁸ In *Mobley v. Los Angeles Unified School Dist.*,ⁿ⁵⁹ the Court of Appeal criticized the decision in *Lujan* because of "serious limitations with the breach of contract avenue." However, the court recognized that because the enactment of *Labor Code sections 1741 and 1742*, effective July 1, 2001, clarifies that an administrative hearing on the merits must be afforded contractors and subcontractors who are denied payments under their state contracts for alleged violations of prevailing wage law, these issues may now be moot.

Until July 1, 2001, the following rules applied when employees were not paid the general prevailing wage on a public works project. When penalties or amounts due employees could not have been satisfied from payments owed to the contractor by the public agency awarding the contract, the agency was required to notify the DLSE of the violation.ⁿ⁶⁰ The DLSE, with the assistance of the awarding public agency, was authorized to maintain an action in any court of competent jurisdiction to recover the amounts due as penalties or wages.ⁿ⁶¹ The action must have been commenced within 180 days after the filing of notice of completion or acceptance of the public work, whichever was later.ⁿ⁶² The only issue in that action was the liability of the contractor or subcontractor for the sums alleged as penalties and wages, and the burden of proof was on the contractor to establish that those sums were not due.ⁿ⁶³ Any recovery was used to pay the workers first, and if the amount recovered was not sufficient to pay all of the workers, the amount was prorated.ⁿ⁶⁴ In addition to the penalties noted above, *Labor Code section 98.9* required the Labor Commissioner to certify any "willful or deliberate" violations of the Labor Code by a licensed contractor to the Contractors' State License Board for appropriate disciplinary action.ⁿ⁶⁵

Effective July 1, 2001, the DLSE is required only to notify the contractor within 15 days of receiving a complaint that prevailing wages have not been paid to workers on a public works project.ⁿ⁶⁶

Legal Topics:

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

Administrative Law Agency Adjudication General Overview Civil Procedure Remedies General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Remedies General Overview Labor & Employment Law Wage & Hour Laws Wage Payments

FOOTNOTES:

(n1)Footnote 1. For discussion of the substantive provisions of the wage payment statutes, see Chapter 4.

(n2)Footnote 2. *Lab. Code §§ 210, 225.5*.

(n3)Footnote 3. *See* D.L.S.E. Interpretive Bulletin No. 84-8 (June 19, 1984) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n4)Footnote 4. *See* D.L.S.E. Div. Management Memo. No. 84-4 (Feb. 22, 1984) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n5)Footnote 5. D.L.S.E. Div. Management Memo. No. 84-4 (Feb. 22, 1984) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n6)Footnote 6. D.L.S.E. Div. Management Memo. No. 84-4 (Feb. 22, 1984) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n7)Footnote 7. D.L.S.E. Div. Management Memo. No. 84-4 (Feb. 22, 1984) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n8)Footnote 8. *Lab. Code §§ 210, 225.5*.

(n9)Footnote 9. *See Lab. Code § 98(a)*; *see also* discussion in §§ 5.10-18.

(n10)Footnote 10. *See Lab. Code §§ 210, 225.5*; D.L.S.E. Div. Management Memo. No. 84-4 (Feb. 22, 1984) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n11)Footnote 11. *See* D.L.S.E. Div. Management Memo. No. 84-4 (Feb. 22, 1984) (penalties under *Lab. Code §§*

210, 225.5) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n12)Footnote 12. *Lab. Code* § 211.

(n13)Footnote 13. *Lab. Code* §§ 210, 225.5.

(n14)Footnote 14. D.L.S.E. Div. Management Memo. No. 84-4 (Feb. 22, 1984) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n15)Footnote 15. D.L.S.E. Div. Management Memo. No. 84-4 (Feb. 22, 1984) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n16)Footnote 15.1. By January 1, 2008, only the last four digits of the social security number or an employee identification number other than a social security number may be shown on the check. *Lab. Code* § 226(a).

(n17)Footnote 16. *Lab. Code* § 226(a); see also discussion in Chapter 4.

(n18)Footnote 17. *Lab. Code* § 226(e); see also discussion in §§ 5.40, 5.41.

(n19)Footnote 18. *Lab. Code* § 226.3.

(n20)Footnote 19. See *Lab. Code* § 226.3.

(n21)Footnote 20. *Lab. Code* § 226.3.

(n22)Footnote 21. *Lab. Code* §§ 226.4, 226.5(a).

(n23)Footnote 22. *Lab. Code* § 226.4.

(n24)Footnote 23. D.L.S.E. Div. Management Memo. No. 84-5 (June 20, 1984) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n25)Footnote 24. *Lab. Code* § 226.4.

(n26)Footnote 25. *Lab. Code* § 226.5(a).

(n27)Footnote 26. *Lab. Code* § 226.5(a).

(n28)Footnote 27. D.L.S.E. Div. Management Memo. No. 88-5 (Dec. 9, 1988) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n29)Footnote 28. *Lab. Code* § 226.5(a); see D.L.S.E. Div. Management Memo. No. 88-5 (Dec. 9, 1988) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n30)Footnote 29. *Lab. Code* § 226.5(a).

(n31)Footnote 30. *Lab. Code* § 226.5(a).

(n32)Footnote 31. *Lab. Code* § 226.5(a).

(n33)Footnote 32. See *Lab. Code* § 226.5(a); *Code Civ. Proc.* § 1013(a); see also *Code Civ. Proc.* § 1013(c), (e) (extension when service is by Express Mail, overnight delivery, or fax).

(n34)Footnote 33. *See* D.L.S.E. Div. Management Memo. No. 88-5 (Dec. 9, 1988) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n35)Footnote 34. D.L.S.E. Div. Management Memo. No. 84-5 (June 20, 1984) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n36)Footnote 35. D.L.S.E. Div. Management Memo. No. 84-5 (June 20, 1984) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n37)Footnote 36. *Lab. Code* § 226.5(b).

(n38)Footnote 37. *Lab. Code* § 226.5(c).

(n39)Footnote 38. *Lab. Code* § 226.5(d).

(n40)Footnote 39. *Lab. Code* § 226.5(c), (d).

(n41)Footnote 40. *Lab. Code* § 226.5(e).

(n42)Footnote 41. *Lab. Code* § 226.5(e).

(n43)Footnote 42. *See Lab. Code* §§ 1770, 1771, 1774, 1810, 1815. *see* chs. 1 and 2 for a discussion of prevailing wage rate requirements.

(n44)Footnote 43. *Lab. Code* § 1775(a).

(n45)Footnote 44. *Lab. Code* § 1813.

(n46)Footnote 45. *Lab. Code* § 1175(a)(2)(B).

(n47)Footnote 46. *Lab. Code* § 1775(a)(2)(B). For definition of willful, *see Lab. Code* § 1777.1(c).

(n48)Footnote 47. *Lab. Code* § 1775(a)(2)(D).

(n49)Footnote 48. *See Lab. Code* § 1720 *et seq.*

(n50)Footnote 49. *Lab. Code* § 1775(a)(2)(C).

(n51)Footnote 50. *Lab. Code* § 1775(a)(2)(E).

(n52)Footnote 51. *Lab. Code* § 1775(b).

(n53)Footnote 52. *Lab. Code* § 1775(b).

(n54)Footnote 53. *Lab. Code* § 1775(c).

(n55)Footnote 53.1. *See* Stats. 2000, ch. 954 § 14; *Lab. Code* § 1743(a) (operative July 1, 2001).

(n56)Footnote 54. *Violante v. Communities Southwest Development & Constr. Co.* (2006) 138 Cal. App. 4th 972, 41 Cal. Rptr. 3d 673, 2006 Cal. App. LEXIS 560, *8-*12 .

(n57)Footnote 54.1. *Lujan v. G & G Fire Sprinklers, Inc.* (2001) 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391 .

(n58)Footnote 55. *Lab. Code* §§ 1727, 1729 (authorizing state to withhold payments from contractor and

contractor to withhold payments from subcontractor).

(n59)Footnote 56. See *G & G Fire Sprinklers, Inc. v. Bradshaw* (9th Cir. 2000) 204 F.3d 941 (G & G II); *G & G Fire Sprinklers, Inc. v. Bradshaw* (9th Cir. 1998) 156 F.3d 893 (G & G I).

(n60)Footnote 57. *Lab. Code* §§ 1731, 1732.

(n61)Footnote 58. *Lujan v. G & G Fire Sprinklers, Inc.* (2001) 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391, 398-400 .

(n62)Footnote 59. *Mobley v. Los Angeles Unified School Dist.* (2001) 90 Cal. App. 4th 1221, 1237-1238, 109 Cal. Rptr. 2d 591 .

(n63)Footnote 60. Former *Lab. Code* § 1775(d).

(n64)Footnote 61. Former *Lab. Code* § 1775(d). However, *Lab. Code* § 1775 is not the exclusive remedy for violation of prevailing wage laws. Depending on the circumstances, the aggrieved employee may bring an action against the employer based on breach of contract or an action based on breach of the statutory duty to pay prevailing wages. see *Tippett v. Terich* (1995) 37 Cal. App. 4th 1517, 1531-1532, 44 Cal. Rptr. 2d 862 .

(n65)Footnote 62. Former *Lab. Code* § 1775(d); see *Kray Cabling Co. v. County of Contra Costa* (1995) 39 Cal. App. 4th 1588, 1592-1594, 46 Cal. Rptr. 2d 674 .

(n66)Footnote 63. Former *Lab. Code* § 1775(d).

(n67)Footnote 64. Former *Lab. Code* § 1775(d).

(n68)Footnote 65. *Lab. Code* § 98.9; D.L.S.E. Div. Management Memo. No. 87-2 (April 6, 1987) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n69)Footnote 66. See Stats. 2000, ch. 954.



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
Subpart 3. Other Actions by Labor Commissioner

1-5 California Employment Law § 5.32

AUTHOR: By Susan Spurlark, J.D.

§ 5.32 Disputes Regarding Seasonal Laborers

The Labor Commissioner must hear and decide all wage disputes involving seasonal laborers, as defined in the Labor Code.ⁿ¹ No specific procedures are set forth in the Labor Code for such hearings. After the final hearing, the Labor Commissioner must file a copy of the findings of fact and award in the office of the DLSE, and the amount of the award is "conclusively presumed to be the amount of wages due and unpaid to the employee at the time of termination," subject to review by the courts.ⁿ²

When wages for "seasonal employees" are not paid when due, the Labor Commissioner must impose a civil penalty of no more than 30 days' pay as a waiting time penalty consistent with the terms of *Labor Code Section 203* (penalty for failure to pay wages due on termination of employment).ⁿ³ The procedures for assessing and contesting those penalties are the same as those used for penalties imposed pursuant to *Labor Code Sections 210* and *225.5*.ⁿ⁴

Legal Topics:

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

Administrative Law Agency Adjudication General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Employ Labor & Employment Law Wage & Hour Laws Wage Payments

FOOTNOTES:

(n1)Footnote 1. *Lab. Code* § 253. These procedures apply to persons hired in California to perform out-of-state work and who are paid in California at the end of the employment. *See Lab. Code* § 250. The provisions do not apply to seamen and other persons whose payment is regulated by federal statute. *See Lab. Code* § 251.

(n2)Footnote 2. *Lab. Code* §§ 254, 255.

(n3)Footnote 3. *Lab. Code* § 256. For discussion of waiting time penalties under *Lab. Code* § 203, *see* ch. 4.

(n4)Footnote 4. *See* D.L.S.E. Div. Management Memo. No. 84-4 (Feb. 22, 1984) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see also* discussion in § 5.31[1].



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY

Subpart 3. Other Actions by Labor Commissioner

1-5 California Employment Law §§ 5.33 through 5.39

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§§ 5.33[Reserved]



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
Subpart 4. Civil Action by Employee

1-5 California Employment Law § 5.40

AUTHOR: By Susan Spurlark, J.D.

§ 5.40 Civil Action by Employee or Former Employee to Recover Wages

[1] Right of Action

Although many (perhaps most) wage claimants choose to utilize the administrative remedies described in Subparts 2 and 3, above, to pursue wage claims, claimants are not statutorily required to pursue their remedies through the Labor Commissioner. *Labor Code Section 218* authorizes a wage claimant to bring a civil action, directly or through an assignee, to recover any wages or penalties due under *Labor Code Section 200 et seq.*ⁿ¹ In addition, agreements to pay an employee are contractual, and causes of action for breach of contract, an accounting, or declaratory relief may be added when wages and/or benefits are not paid consistent with the agreement.ⁿ² However, breach of contract and other state-law claims related to most employee benefit agreements generally are preempted by the remedies of the Employee Retirement Income Security Act (ERISA).ⁿ³

An employee seeking only statutory Labor Code penalties that already were recoverable by employees prior to the adoption of the Private Attorneys General Act of 2004,^{n3.1} is not required to comply with the Act's administrative prerequisites before filing suit directly under *Labor Code section 218*.^{n3.2} Further, employees may rely on PAGA to penalize conduct that occurred before the statute went into effect.^{n3.3}

An employee's right to maintain a civil action to recover due and unpaid wages is unaffected by the existence of a private agreement to arbitrate.ⁿ⁴ However, if the wages are set by a collective bargaining agreement, claims must be submitted to any arbitration procedure under the agreement.ⁿ⁵ Furthermore, the U.S. Supreme Court has held that the Federal Arbitration Actⁿ⁶ preempts *Labor Code Section 229* with regard to agreements that are covered by the Act.ⁿ⁷ Thus, if an employee is subject to an arbitration agreement covered by the Act,ⁿ⁸ he or she may be required to arbitrate a wage claim, notwithstanding Section 229.ⁿ⁹

Consistent with the strong public policy behind *Labor Code Section 1194*, employers cannot use class arbitration waivers to weaken or undermine the private enforcement of overtime pay legislation by placing formidable practical

obstacles in the way of employees' prosecution of those claims. Thus, a trial court should not enforce class arbitration waivers in employment arbitration agreements that preclude class arbitrations by employees whose statutory rights to overtime pay pursuant to *Labor Code Sections 500 et seq.* and *1194* allegedly have been violated if the court determines, based on the following factors, that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration:n9.1

- ☐ The modest size of the potential individual recovery.
- ☐ The potential for retaliation against members of the class.
- ☐ The fact that absent members of the class may be ill-informed about their rights.
- ☐ Other real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration.

Further, a finding of procedural unconscionability is not required to invalidate a class arbitration waiver if that waiver implicates unwaivable statutory rights. But such a finding is a prerequisite to determining that the arbitration agreement as a whole is unconscionable.n9.2

Employees of charter counties may not sue under Labor Code provisions governing compensation, including matters such as overtime,n9.3 and meal and rest periods,n9.4 because charter counties have exclusive power under the California Constitution to determine the compensation of their employees.n9.5

[2] Statute of Limitations

[a] Generally

The general rules contained in the Code of Civil Procedure govern the time for institution of an action to recover unpaid wages after the claim has accrued.n10 A claim based on an oral contract must be brought within two years after accrual of the cause of action.n11 Actions based on a written agreement must be commenced within four years after accrual of the cause of action.n12 An action to recover a statutory penalty or forfeiture must be brought within one year of the accrual of the cause of action.n13 If a claim is included for waiting time penalties allowed under *Labor Code Section 203*, that claim may be brought within the time allowed for bringing the underlying claim for wages rather than the one-year period set forth in *Code of Civil Procedure Section 340*.n14 On the other hand, when the employee's action seeks only waiting time penalties (and not the accompanying wages), the one-year statute under *Code of Civil Procedure Section 340(a)* governs.n14.1

In addition, *Code of Civil Procedure Section 338(a)* provides a three-year limitations period for actions based on a liability created by statute, other than a penalty or forfeiture. One court of appeal has held that this three-year limitations period, rather than the two-year limitations period applicable to actions based on oral contracts, applies to an action to recover unpaid overtime compensation.n15 The California Supreme Court has held that the additional hour of pay required under *Lab. Code § 226.7* for failure to provide a meal period constitutes wages, so that a three-year statute of limitation applies to actions to collect the additional pay. The court rejected the argument that the payment was a penalty to which a one-year statute of limitations would apply.n15.1 Additionally, employees may in certain circumstances pursue wage claims under the four-year statute of limitations contained in California's Unfair Business Practices Act, *Business & Professions Code section 17200 et seq.*

The cause of action for recovery of unpaid wages accrues from each payday or date when the required compensation

was not paid.ⁿ¹⁶

[b] Vacation Pay Claims

As discussed in Chapter 4, an employee is entitled to payment for all unused, vested vacation time on termination of employment.ⁿ¹⁷ Because an employee has the right to be paid for unused vacation only after the employee is terminated without having taken off the vested vacation time,^{n17.1} termination of employment is the event that converts the employer's obligation to allow an employee to take vacation from work into the monetary obligation to pay that employee for unused vested vacation time.^{n17.2} When a terminated employee brings a claim based on vacation pay allegedly due, issues may arise regarding when the statute of limitations on such claims begins to run. The DLSE has taken the position that the applicable statute of limitations (either two years or four years)ⁿ¹⁸ is applied twice in such cases: first, to determine the amount of liability, and then to determine the period within which the claim must be brought.ⁿ¹⁹

For purposes of determining the amount of liability, the DLSE has stated that the statute begins to run as the vacation is earned or at the point when the employee is eligible to take the vacation, rather than at the date of termination.ⁿ²⁰ Thus, ordinarily, only vacation pay that accrued within the statutory limitation period prior to termination may be recovered on termination.ⁿ²¹ One court of appeal has held that an employee could claim payment only for unused time that accrued under a written contract during the four-year period preceding termination, even though the employee had accrued 12 years of vacation.ⁿ²² Another court of appeal disagreed with the DLSE, rejecting its dual application of the statute of limitations, and held that (1) A cause of action for breach of contract accrues for statute of limitations purposes only after there has been a breach of the contract, (2) the point at which vacation time is earned cannot be equated to a breach of contract and, therefore, (3) the statute of limitations applicable to contracts does not begin to run when vacation time is earned. Accordingly, the statute of limitations cannot be applied as a "look-back period" to limit an employer's statutory obligation to pay for all vested vacation time that an employee did not take before the employment was terminated.^{n22.1} The DLSE has also stated that if the employer has a policy or rule that precludes the employee from taking his or her vacation within the limitations period or that results in forfeiture of vacation during the term of employment, the statute of limitations will be deemed to be tolled and would not begin to run until the date of termination.ⁿ²³

As noted above, a cause of action to enforce the statutory right to be paid for vested vacation does not accrue until the date employment is terminated.^{n23.1} A cause of action seeking payment for unused vested vacation before employment is terminated will be dismissed as premature.^{n23.2}

There are three statutes of limitations that might apply to a claim by a former employee seeking payment for unused vested vacation, because the claim could be characterized as one based on (1) an oral employment contract, (2) a written employment contract, or (3) a liability created by statute.^{n23.3} A two-year limitations period applies to oral contract claims.^{n23.4} A four-year limitations period applies to claims based on written contracts.^{n23.5} A three-year limitations period applies to an action upon a liability created by statute.^{n23.6} The DLSE takes the position that once the employee is terminated, he or she must bring an action to recover the total amount of vacation pay due on termination within two years or four years after the date of termination.ⁿ²⁴

[3] Jurisdiction

The principal determinant of subject matter jurisdiction in state courts is the amount in controversy. Cases involving less than \$25,000 are "limited civil cases,"ⁿ²⁵ and cases involving less than \$5,000 generally must be brought in the small claims division of that court.ⁿ²⁶ Actions seeking equitable relief (*e.g.*, injunctions, declaratory relief, or an accounting) are "unlimited civil cases,"ⁿ²⁷ except that an action for equitable relief that may be necessary to preserve the rights and property of parties to a limited civil case over which the court otherwise has jurisdiction is also a "limited civil case."ⁿ²⁸

State-law claims for failure to pay wages provided under a collective bargaining agreement or to provide employment benefits may be preempted by the Labor Management Relations Act (LMRA) and/or ERISA, respectively, and the action must be brought in the United States District Court.ⁿ²⁹

[4] Recovery of Attorney's Fees and Costs

In an action brought for the nonpayment of wages and other employment benefits, the court is required by *Labor Code Section 218.5* to award reasonable costs and attorney's fees to the prevailing party if any party to the action requests attorney's fees and costs on initiation of the action. *Labor Code Section 218.5* does not apply to (1) actions brought by the Labor Commissioner, (2) sureties issuing a bond under Business and Professions Code provisions regulating licensed contractors, and (3) actions to enforce mechanics' liens under *Civil Code Sections 3109 et seq.*ⁿ³⁰ *Labor Code Section 218.5* does not apply to any action for which attorney's fees are recoverable under *Labor Code Section 1194.*ⁿ³¹

In an action for nonpayment of overtime wages, *Labor Code Section 1194* is applicable and not *Labor Code section 218.5.*ⁿ³² A prevailing employee is entitled to an award of reasonable attorney's fees under *Labor Code Section 1194* as a matter of right.^{n32.1} In an action to recover unpaid overtime wages, the successful defendant is not entitled to receive attorney's fees.ⁿ³³ *Labor Code Section 1194* also authorizes an award of attorney's fees for fees incurred in the trial court when an employee prevails in the trial court in a *Labor Code Section 98.2* "appeal" from an administrative decision.^{n33.1}

Labor Code Section 218.5 does apply, however, to actions brought to recover wages of salaried executive employees. For purposes of the Labor Code,ⁿ³⁴ the salaries of executives are protected wages, and a cause of action for nonpayment of such wages falls under *Labor Code section 218.5.*ⁿ³⁵

Code of Civil Procedure Section 1031 provides additional authority for an award of attorney's fees in an action to recover unpaid wages. However, Section 1031 only applies if the demand, excluding interest, does not exceed \$300.ⁿ³⁶ An award under section 1031 may only be made to a prevailing plaintiff or cross complainant, and the amount of the fee awarded may not exceed 20% of the amount recovered.ⁿ³⁷

The right of a party to recover attorney's fees when the party pursues the administrative remedy under *Lab. Code § 98 et seq.* rather than filing a civil action under *Lab. Code § 1194* is governed by *Lab. Code § 98.2(c)* rather than by section 1194 or *Lab. Code § 218.5*. The trial de novo in superior court under *Lab. Code § 98.2(a)* is not a civil proceeding contemplated by *Lab. Code § 1194.*ⁿ³⁸

[5] Recovery of Statutory Penalties

In 2004, the California Legislature added *Labor Code section 2699*. Previously, only the DLSE had the authority to collect statutory penalties. Labeled the "Private Attorney General Act of 2004," section 2699 allows current and former employees to bring private lawsuits for violation of any provision of the Labor Code other than the workers' compensation provisions. Although some Labor Code provisions previously had no penalties for violations, section 2699 now imposes penalties for each of those sections. Employers are liable for the penalties regardless of whether their violations were willful. Furthermore, employees claiming to be aggrieved may sue not only on their own behalf but on behalf of all similarly-situated current and former employees.

The California Supreme Court has addresses two procedural issues arising from the statutory language: (1) can an "aggrieved employee" assign his or her claim to a non-aggrieved representative, such as a union, and (2) must an aggrieved employee who seeks to bring a representative action on behalf of others under the Private Attorney General Act meet the requirements for maintaining a class action? The Supreme Court answered both questions "No."

In *Amalgamated Transit Union v. Superior Court*, n38.1 the California Supreme Court addressed the assignment issue. n39 The Court found that the Private Attorney General Act "does not create property rights or any other substantive rights." Rather, the Act is procedural only, allowing an aggrieved employee to recover civil penalties for Labor Code violations that otherwise would have been sought by state labor law enforcement agencies. Because the right to a statutory penalty cannot be assigned, the aggrieved employee "does not own an assignable interest." As a result, the union that brought the claim on behalf of its members had no standing to bring the claim, even though the members themselves were aggrieved employees.

In *Arias v. Superior Court*, n39.1 the California Supreme Court addressed the class action question. The Court held that an employee who brings a representative action under the Private Attorney General Act need not satisfy the requirements of a class action. In *Arias*, a former employee sued his former employer, on behalf of himself and other current and former employees, for, among other things, various labor code violations. He sought recovery under California's Unfair Competition Law, *California Business and Professions Code § 17200* and under the Private Attorney General Act. The trial court struck the claims under the Act on the ground that the plaintiff failed to comply with the pleading requirements of class actions. The court of appeal issued a peremptory writ of mandate, holding that the representative claims under the Act were not subject to class action requirements.

The Supreme Court affirmed the court of appeal. The Court first rejected the employer's argument that class action requirements apply generally to any form of representative action absent statutory language precluding their application. The Court next rejected a contention that the legislative history supported application of class action requirements, finding that the history did not expressly refer to class actions. Finally, the Court reasoned that its holding did not violate employer's due process rights, because a judgment in a representative action under the Act is binding "not only on the named employee plaintiff but also on government agencies *"and any aggrieved employee not a party to the proceeding."* Thus, the Court concluded, employers will not be faced with "one-way intervention," where successive plaintiffs could sue the employer until one prevailed, allowing all others to ride on that single success. n40

Under section 2699, the civil penalty for any Labor Code violation that does not already have an assigned penalty amount is \$100 per pay period for a first violation and \$200 per pay period for any subsequent violation. n41 In addition to their other remedies, aggrieved employees are entitled to retain 25% of any civil penalties awarded and to recover their attorneys' fees and costs. The remaining 75% of any penalty award goes to the State's Labor and Workforce Development Agency. n42

■ CONSULTANT'S COMMENT:

Given the significant exposure section 2699 creates, employers likely will question whether the statute can be applied to Labor Code violations that took place before the statute's enactment. The general rule is that a new law will not be applied retroactively absent a clear expression of this intention by the Legislature. Notwithstanding the general rule, courts will allow a new law to be applied to pending litigation if the law is determined to be "procedural" in nature (meaning, it does not change the legal effect of past conduct). *Labor Code section 2699* does not contain a clear indication that the Legislature intended it to apply retroactively. However, employers can expect plaintiffs' lawyers to argue in existing cases that the new law, especially those portions providing for recovery of existing civil penalties, is not substantive change but merely a procedural change and, therefore, that they should be allowed to amend the complaint to seek those additional penalties and attorney's fees. *Commentary by Kirby Wilcox.*

Because *Labor Code Section 2699(g)* provides that an employee "shall be entitled" to an award of attorney's fees, a reasonable award to a prevailing employee is a matter of right. n43

An arbitration agreement that precludes an employee from acting as "a private attorney general" may be unconscionable and unenforceable. In *Franco v. Athens Disposal Co., Inc.*, n44 a former trash truck driver filed a class action against his former employer for alleged violations of California's meal and rest period laws. The company petitioned to compel

arbitration based on a written agreement containing a waiver of class arbitration and precluding an employee from acting in a private attorney general capacity, which the trial court granted. The Court of Appeal first held that the class arbitration waiver was unconscionable.ⁿ⁴⁵ The court then held that an employer could not preclude an employee or former employee from acting as a private attorney general, as that would violate the PAGA, which authorizes an aggrieved employee to recover civil penalties "on behalf of himself ... and other current or former employees."ⁿ⁴⁶ The Legislature made clear that an action under the PAGA is in the nature of an enforcement action, with the aggrieved employee acting as a private attorney general to collect penalties from employers who violate labor laws. Such an action is fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct. By prohibiting enforcement of the PAGA, the arbitration agreement impeded the goal of comprehensively enforcing a statutory scheme through the imposition of statutory sanctions and fines as articulated by the California Supreme Court in *Gentry v. Superior Court*.ⁿ⁴⁷ Thus, the prohibition of private attorneys general was invalid. Further, because the arbitration agreement contained a class arbitration waiver and precluded plaintiff from seeking civil penalties on behalf of other employees contrary to the PAGA, the agreement as a whole was tainted with illegality and was unenforceable.ⁿ⁴⁸

[6] Defenses

In addition to making admissions and denials, as appropriate, of the facts alleged in the employee's complaint,ⁿ⁴⁹ the employer's answer should separately allege any new facts (not alleged in the complaint) constituting defenses to the causes of action alleged in the complaint.ⁿ⁵⁰ Examples of affirmative defenses to an action for failure to pay wages or benefits as required by the Labor Code include the following:

1. The parties are independent contractors, rather than an employer and employee subject to the provisions of the Labor Code;ⁿ⁵¹
2. The defendant-employer and/or plaintiff-wage claimant is exempt from the applicable provision(s) of the Labor Code;ⁿ⁵²
3. The cause of action is based upon an interpretation and/or application of a collective bargaining agreement and is barred by *Labor Code section 229*;ⁿ⁵³
4. The cause of action is preempted by the federal Labor Management Relations Act (LMRA);ⁿ⁵⁴
5. The cause of action is preempted by the federal Employee Retirement Income Security Act (ERISA);ⁿ⁵⁵
6. The defendant and/or plaintiff are not proper parties to the action;ⁿ⁵⁶ or
7. Plaintiff secreted or absented himself or herself in order to avoid payment of wages or refused to receive the payment fully tendered to him or her, thereby relieving defendant of liability for waiting time penalties.ⁿ⁵⁷

Other potential defenses include lack of subject matter jurisdiction,ⁿ⁵⁸ failure to state a cause of action,ⁿ⁵⁹ and failure to commence the action within the applicable statute of limitations.ⁿ⁶⁰

A release executed by an employee may provide an employer with a defense to a later action on the same claim. In *Chindarah v. Pick Up Stix, Inc.*,ⁿ⁶¹ the trial court properly found that releases barred a class action against the employer based on alleged misclassification of employees as exempt from overtime. *Labor Code section 206.5*, which prohibits an employer from requiring the execution of a release of a claim on account of wages due, unless payment of those wages has been made, did not render the releases invalid. Nor did section 1194(a), which provides that

notwithstanding any agreement to work for a lesser wage, an employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest, reasonable attorney's fees, and costs of suit. Former employees had sued the employer in a class action. The employer then settled with as many putative class members as possible, and they signed a settlement agreement including a release of all issues and claims for unpaid overtime. The court found that there is no statute providing that an employee cannot release claims to past overtime wages as part of a settlement of a bona fide dispute over those wages. The releases settled a dispute over whether the employer had violated wage and hour laws in the past, and they did not purport to exonerate it from future violations. They also did not condition the payment of wages concededly due on execution of the releases.

In *Watkins v. Wachovia Corp.*,ⁿ⁶² a release (of all claims against an employer) executed by an employee in exchange for enhanced severance benefits, which the employee received, was not unenforceable as violative of *Labor Code Section 206.5*. In addition to the enhanced severance benefits, the employee received all pay concededly due her, and she conceded that she would have received that pay and standard severance benefits had she not executed the release. In a subsequent action for allegedly unpaid overtime, the employer was granted summary judgment based on the release. Citing *Chindarah*, and reading *Labor Code Section 206.5* in connection with *Labor Code Section 206*, the court concluded that *Labor Code Section 206.5* did not prevent the settlement of wage claims, but did prevent the employer from withholding wages concededly due in order to coerce a settlement of the disputed amount. The court also concluded that a bona fide dispute existed when the employee signed the release, and under the circumstances, the release was enforceable, making the grant of summary judgment to the employer appropriate.

If the grounds for objecting to the complaint appear on the face of the complaint (or from any matter of which the court is required or permitted to take judicial notice), the objection should be made by demurrer rather than answer.ⁿ⁶³

[7] Class Actions

A civil action to recover allegedly unpaid wages may appropriately be brought as a class action under *Code of Civil Procedure section 382*.ⁿ⁶⁴ In *Sav-On Drug Stores, Inc. v. Superior Court (Rocher)*,ⁿ⁶⁵ the trial court did not abuse its discretion in certifying as a class action an action for recovery of unpaid overtime compensation based on the allegation that the employer improperly classified employees as managers exempt from overtime requirements under the IWC wage order.

In *Bufile v. Dollar Financial Group, Inc.*,ⁿ⁶⁶ the trial court denied a motion for class certification in an action alleging denial of lunch and rest breaks required by the Labor Code and Wage Orders on the grounds of collateral estoppel, *i.e.*, that a previous attempt to certify the class by a different named plaintiff had been denied. The Court of Appeal found that the classes in the two cases were not the same and thus the issues were different. Under the current named plaintiff's structuring of the case, the court could identify the class from the employer's records and determine liability as a matter of law.ⁿ⁶⁷ The Court of Appeal then found that the motion for class certification satisfied the commonality, ascertainability and superiority requirements.ⁿ⁶⁸

In *Lee v. Dynamex, Inc.*,ⁿ⁶⁹ after first denying a former employee's motion to compel the employer to identify and provide contact information for potential putative class members, the trial court abused its discretion in refusing to certify a class action alleging the employer improperly reclassified drivers from employees to independent contractors in violation of California Labor Code requirements for employees. The basic parameters of the proposed class could be readily ascertained through company records, and the trial court unnecessarily confused issues of ascertainability with the merits of the underlying claims.ⁿ⁷⁰ Further, in light of the trial court's erroneous discovery order precluding identification of potential class members before certification, the putative class representative was not provided with an adequate opportunity to meet his burden with regard to a community of interest among potential class members in terms of the predominance of common questions of law or fact, the typicality of the class representative's claims or the adequacy of his representation as the sole named plaintiff.ⁿ⁷¹

In *Ghazaryan v. Diva Limousine, Ltd.*,ⁿ⁷² an action challenging a limousine service's policy of paying its drivers an hourly rate for assigned trips, but failing to pay for on-call time between assignments ("gap time"), the trial court incorrectly focused on the potential difficulty of assessing the validity of the employer's compensation policy in light of variations in how drivers spent their gap time. The court of appeal reversed the trial court's denial of the plaintiff's motion to certify two proposed overlapping subclasses and remanded with directions to certify the proposed subclasses. The trial court fundamentally misconceived the import of the rule against evaluating the merits of a plaintiff's claims in deciding whether class treatment is appropriate. Rather than denying certification because it could not reach the merits, the trial court should have evaluated whether the theory of recovery advanced by the plaintiff was likely to prove amenable to class treatment. The proposed class was properly defined in terms of objective characteristics and common transactional facts, not by identifying the ultimate facts that would establish liability. The proposed class of all drivers employed by the limousine service during a specific period of time was identified by the service through computerized employment records, and the existence of separate assignments with separate compensation schemes did not render the proposed class unascertainable. Inherent differences among employees in the amount of gap time accumulated and how that time was spent did not destroy the community of interest, because determining whether a sufficient community of interest existed to warrant class certification did not depend on the differences among individual drivers' use of their gap time but on the reasonableness of the policies as applied to the drivers as a whole. There was no question that class treatment constituted the superior mode of resolving plaintiff's claims, because there was no advantage to either party to resolution of the validity of the policies on a piecemeal basis, and that prospect jeopardized the ability of employees to find competent representation if restricted to their own individual claims.

On the other hand, in *In re BCBG Overtime Cases*,ⁿ⁷³ the trial court properly granted a motion by the employer to strike class allegations from the employee's complaint alleging that the employer designated all managers and assistant managers as "exempt" to avoid paying them overtime wages. The employer could properly bring the motion to strike the class allegations from the complaint before the plaintiffs had filed their motion to certify the class. Under both California and federal law, either party could initiate the class certification process, and the employer's motion to strike the class allegations was not made before plaintiffs had a chance to conduct discovery on class certification issues. Plaintiffs received proper notice of the employer's motion and had the opportunity to respond with evidence of their own, but they presented nothing to counter the employer's evidence that the action did not meet the requirements of a class action.

Similarly, in *Ali v. U.S.A. Cab Ltd.*,^{n73.1} the trial court did not abuse its discretion in denying a motion to certify a class of lessees of taxicabs, in an action alleging they were improperly classified as independent contractors rather than employees. The Court of Appeal held that the trial court's finding that the putative class representative failed to meet his burden of showing a predominance of common issues of fact and law was amply supported by the declarations of 36 putative class members as to their actual conduct. Although leases of cabs and training manuals were uniform, the court reasonably found the testimony of putative class members would be required on the issues of employment and fact of damage. The trial court also did not abuse its discretion in finding that a class action was not a superior method of trying the case, because individual issues of fact predominated over common issues, making a class action extremely difficult to manage.

In a wage and hour action brought in federal court under California law, a class may be certified under Fed. R. Civ. Proc. 23 when the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.^{n73.2} The focus in the predominance inquiry is on the relationship between the common and individual issues.^{n73.3} For example, while uniform policies classifying employees as exempt from overtime laws are relevant to the Rule 23(b)(3) analysis, it is an abuse of discretion to rely on those policies to the near exclusion of other relevant factors touching on predominance.^{n73.4}

In the litigation of a class action involving wage and hour issues, the court may compel the employer to provide the

names and contact information of all current and former employees and adopt a proposed notice to those individuals requiring them to object in writing in order to prevent information about them from being disclosed to the named plaintiffs.ⁿ⁷⁴

In a class action brought in federal court for wage and hour violations, nothing in Federal Rule *Civil Procedure* 23 precludes an employer from preemptively moving to deny certification of a class action before the putative class representatives move for certification. The plain language of Rule 23(c)(1)(A), which provides that at an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action, neither vests plaintiffs with the exclusive right to put the class certification issue before the district court nor prohibits a defendant from seeking early resolution of the class certification question.^{n74.1} Further, the court may grant the employer's motion before the pretrial motion cutoff and the discovery cutoff, so long as plaintiffs have sufficient time to prepare for the employer's motion.^{n74.2}

A trial court must approve the settlement of a class action. In evaluating the reasonableness of a class action settlement agreement, the trial court should consider the following factors:ⁿ⁷⁵

- The strength of plaintiffs' case.
- The risk, expense, complexity and likely duration of further litigation.
- The risk of maintaining class action status through trial.
- The amount offered in settlement.
- The extent of discovery completed and the stage of the proceedings.
- The experience and views of counsel.
- The presence of a governmental participant.
- The reaction of the class members to the proposed settlement.

A presumption of fairness exists when each of the following is true:ⁿ⁷⁶

- The settlement is reached through arm's-length bargaining.
- Investigation and discovery are sufficient to allow counsel and the court to act intelligently.
- Counsel is experienced in similar litigation.
- The percentage of objectors is small.

In *Kullar v. Foot Locker Retail, Inc.*,ⁿ⁷⁷ the trial court concluded that the four factors supporting a presumption of fairness were established and were sufficient to support a finding that the settlement of the class action alleging violations of the Labor Code and Wage Orders was fair, adequate and reasonable. However, with regard to the claims that class members were not provided meal periods required under the Labor Code,ⁿ⁷⁸ no discovery was conducted, no declarations were filed in support of the settlement indicating the nature of the investigation that had been conducted to determine the number of employees that had allegedly been denied meal breaks, the frequency with which the denials had occurred, or the circumstances surrounding those denials, and no analysis was provided of the factual or legal issues that required resolution to determine the extent of any one-hour-pay penalties to which class members may have been

entitled. Further, no time records were produced in discovery nor was the trial court presented any estimated quantification of the number of one-hour-pay penalties that might be due or any explanation of the factors that were considered in discounting the potential recovery for purposes of settlement. While information may have been exchanged informally by counsel during the course of a mediation session, there was nothing before the court to establish the sufficiency of class counsel's investigation other than their assurance that they had seen what they needed to see. Further, the trial court could not determine the adequacy of a class action settlement without independently satisfying itself that the consideration being received for the release of the class members' claims was reasonable in light of the strengths and weaknesses of the claims and the risks of the litigation. The trial court acknowledged that it would have been preferable for it to have been presented with data permitting it to review class counsel's evaluation of the sufficiency of the settlement, but felt that this was precluded because the supporting information was exchanged in the course of mediation. However, the fact that the settlement was reached during mediation to which *Evid. Code § 1119* applied did not eliminate the court's obligation to evaluate the terms of the settlement and to ensure that they were fair, adequate and reasonable. If relevant information was subject to a privilege, other data had to be provided enabling the court to make an independent assessment of the adequacy of the settlement terms. Further, the fact that communications were made during the mediation and writings prepared for use in the mediation that were inadmissible and not subject to compulsory production did not mean the underlying data, not otherwise privileged, was also immune from production.ⁿ⁷⁹ For example, payroll records, if relevant to the quantification of the claims being settled, were subject to discovery and could be introduced in opposition to the settlement even if they were disclosed to class counsel during the mediation, and even if class counsel was shown only a summary or analysis of those records that was not itself subject to production because it was prepared for use in the mediation.

On the other hand, in *Clark v. American Residential Services, LLC*, ^{n79.1} after certifying the class in an action for damages and penalties for allegedly unpaid minimum and overtime wages, failure to provide meal and rest periods, and other Labor Code violations and unfair business practices, the trial court approved a settlement reached by the parties after a one-day mediation before a respected mediator, apparently in reliance on counsel's evaluation of the class's overtime claim as having "absolutely no" value, without regard to objectors' claim that counsel's evaluation was based on an allegedly "staggering mistake of law." The Court of Appeal vacated the order, finding that while the trial court need not have determined the ultimate legal merit of the claims, it was obliged to determine, at a minimum, whether a legitimate controversy existed, so that it had some basis for assessing whether the parties' evaluation of the case was within the "ballpark" of reasonableness. The trial court simply accepted class counsel's conclusion the overtime claim had "absolutely no" value, without a substantiated explanation of the manner in which it evaluated a core legal issue.

Once a purported class representative settles the action and enters into a stipulated judgment based on the settlement, an appeal of the denial of class certification is moot.ⁿ⁸⁰ Further, a putative class representative who settles his or her own claim after denial of class certification does not have standing to appeal the denial of the class certification.ⁿ⁸¹

In wage and hour class actions, class counsel owes a duty of care to the class as a whole to represent all class members with the skill, prudence, and diligence that attorneys of ordinary skill and capacity commonly possess and exercise in the performance of their tasks. But class counsel is not negligent and does not commit legal malpractice by not contacting a putative class member before the claim filing deadline to inquire as to why the putative class member did not file a claim and to make sure the putative class member is aware of the need to do so.^{n81.1}

[8] Punitive Damages

Under California law, punitive damages ordinarily are recoverable only in an action for the breach of an obligation not arising from contract, in which the requisite culpable conduct is also present.ⁿ⁸² The word "contract" in this context means an agreement between the parties, not an obligation imposed by law despite the absence of any agreement.ⁿ⁸³ The availability of punitive damages may also be constrained by the "new right-exclusive remedy" doctrine, *i.e.*, when a statute creates new rights and obligations not previously existing in the common law, the express statutory remedy is deemed to be the exclusive remedy available for statutory violations, unless it is inadequate.ⁿ⁸⁴ When the statute

merely recognizes a cause of action because the claim had a preexisting common law analogue, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears.ⁿ⁸⁵

In *Brewer v. Premier Golf Properties, LP*,ⁿ⁸⁶ the Court of Appeal held that both under general principles (barring punitive damages awards absent breach of an obligation not arising from contract) and by application of the "new right-exclusive remedy" doctrine, punitive damages were not recoverable when liability was premised solely on the employer's violation of Labor Code statutes regulating meal and rest breaks,ⁿ⁸⁷ pay stubs, and minimum wage laws. Those claims, on which a former employee recovered in an action against the former employer, accreted to the employment contract between the employer and the employee. The Labor Code provisions governing meal and rest breaks, minimum wages, and accurate pay stubs constitute statutory obligations and are imposed only when the parties have entered into an employment contract. The breach of an obligation arising out of an employment contract, even when the obligation is implied in law, permits contractual damages, but does not support tort recoveries.ⁿ⁸⁸ Further, the Labor Code statutes regulating pay stubsⁿ⁸⁹ and minimum wagesⁿ⁹⁰ created new rights and obligations not previously existing in the common law and provided express statutory remedies, including punitive penalties for the violation of those statutes.ⁿ⁹¹ In *Brewer*, the former employee sought and recovered the maximum penalty available for the employer's pay stub violations, and the judgment contained an additional penalty for the overtime violations. Similarly, the Labor Code section requiring employers to provide meal breaksⁿ⁹² and the regulations requiring employers to provide rest breaksⁿ⁹³ and providing numerous forms of remedies for their violation, created new rights and obligations not previously existing in the common law, and the statutory and regulatory scheme provided a comprehensive and detailed remedial scheme for its enforcement.ⁿ⁹⁴ Those remedies included an award in the nature of liquidated damages under *Labor Code section 226.7*,ⁿ⁹⁵ injunctive relief,ⁿ⁹⁶ and potential statutory penaltiesⁿ⁹⁷

Legal Topics:

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

Labor & Employment Law
Wage & Hour Laws
General Overview
Labor & Employment Law
Wage & Hour Laws
Wage Payments

FOOTNOTES:

(n1)Footnote 1. For the standard jury instruction on the essential factual elements of a claim for nonpayment of wages asserted in a civil action, *see* CACI 2700. For the CACI special verdict form for a claim for nonpayment of wages, *see* CACI VF-2700. For the standard jury instruction on the waiting-time penalty for nonpayment of wages, *see* CACI 2704. For the CACI special verdict form for the waiting-time penalty for nonpayment of wages, *see* CACI VF-2703. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n2)Footnote 2. *See, e.g., Nelson v. Abraham* (1947) 29 Cal. 2d 745, 751, 177 P.2d 931 ; *Percival v. National Drama Corp.* (1919) 181 Cal. 631, 633, 185 P. 972 ; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware* (1973) 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348 ; *Montalvo v. Zamora* (1970) 7 Cal. App. 3d 69, 76, 86 Cal. Rptr. 401 .

(n3)Footnote 3. *See, e.g., Scott v. Gulf Oil Corp.* (9th Cir. 1985) 754 F.2d 1499, 1503-1505 .

(n4)Footnote 3.1. *See Lab. Code § 2698 et seq.*

(n5)Footnote 3.2. *Dunlap v. Superior Court* (2006) 142 Cal. App. 4th 330, 335-343, 47 Cal. Rptr. 3d 614 (employee bringing action under *Lab. Code* § 218 seeking damages and statutory penalties for violation of *Lab. Code* §§ 203, 226(e), 226.7(b) was not required to exhaust administrative remedies under Act, because penalties sought were already recoverable by employees prior to adoption of Act).

(n6)Footnote 3.3. *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal. App. 4th 1157, 1194-1204, 78 Cal. Rptr. 3d 572

(trial court properly ruled that expanded standing granted to private parties under PAGA could be applied immediately, but plaintiffs were precluded from pursuing any new penalties created by PAGA for claims that accrued before statute went into effect, and plaintiffs' claim for PAGA-based penalties related back to their original complaint).

(n7)Footnote 4. *Lab. Code* § 229.

(n8)Footnote 5. *See, e.g., Griggs v. Transocean Air Lines* (1960) 176 Cal. App. 2d 843, 847, 1 Cal. Rptr. 803 ; *Hagin v. Pacific Gas & Elec. Co.* (1957) 152 Cal. App. 2d 93, 96-97, 312 P.2d 356 ; *but see Albertson's, Inc. v. United Food* (9th Cir. 1998) 157 F.3d 758, 762 , (employees covered by collective bargaining agreement are entitled to take their Fair Labor Standards Act claims to court regardless of whether those claims also may be covered by a collectively bargaining grievance and arbitration procedure); *National Broadcasting Co., Inc. v. Bradshaw* (9th Cir. 1995) 70 F.3d 69, 72 (state's application of overtime provisions during "gap period" between collective bargaining agreements did not interfere with the collective bargaining process); *see also Lab. Code* § 229 and discussion under [3], *below* and § 5.82[1].

(n9)Footnote 6. 9 U.S.C. § 1 *et seq.*

(n10)Footnote 7. *Perry v. Thomas* (1987) 482 U.S. 483, 490-491, 107 S. Ct. 2520, 96 L. Ed. 2d 426 .

(n11)Footnote 8. The Act applies to arbitration provisions contained in "a contract evidencing a transaction involving commerce." *see* 9 U.S.C. § 2.

(n12)Footnote 9. *See Perry v. Thomas* (1987) 482 U.S. 483, 489-491, 107 S. Ct. 2520, 96 L. Ed. 2d 426 ; *See also Hall v. Nomura Sec. Int'l* (1990) 219 Cal. App. 3d 43, 48-49, 268 Cal. Rptr. 45 (discussing *Perry* and holding that Act requires arbitration of state-law age discrimination and wrongful termination claims).

(n13)Footnote 9.1. *Gentry v. Superior Court* (2007) 42 Cal. 4th 443, 453-466, 64 Cal. Rptr. 3d 773, 165 P.3d 556 . For discussion of enforceability of employment-related arbitration agreements generally, *see* Ch. 90.

(n14)Footnote 9.2. *Gentry v. Superior Court* (2007) 42 Cal. 4th 443, 466-473, 64 Cal. Rptr. 3d 773, 165 P.3d 556 (arbitration agreement had element of procedural unconscionability notwithstanding opt-out provision; remanded for determination of whether provisions of arbitration agreement were substantively unconscionable). For discussion of unconscionability in arbitration agreements generally, *see* § 90.20[1][e].

(n15)Footnote 9.3. *See Lab. Code* §§ 510(a), 1194.

(n16)Footnote 9.4. *See Lab. Code* §§ 226.7, 512.

(n17)Footnote 9.5. *Dimon v. County of Los Angeles* (2008) 166 Cal. App. 4th 1276, 1281-1290, 83 Cal. Rptr. 3d 576 (deputy probation officer employed by charter county could not sue employer for violations of Labor Code and wage orders, by failing to provide meal periods and to pay for missed meal periods, where county had exclusive authority to provide for compensation and conditions of employment of its employees, and county had regulated compensation and employment conditions through collective bargaining agreement, which, among other things, contained express provision governing meal periods for deputy probation officers); *Curcini v. County of Alameda* (2008) 164 Cal. App. 4th 629, 639-648, 79 Cal. Rptr. 3d 383 (jail chaplains could not sue charter county for compensation for violations of Labor Code, where statutes and memoranda of understanding with public employees' union addressed matters of employee compensation falling within county's exclusive constitutional purview as charter county). *See Cal. Const., art. XI, § 1(b)*; *County of Riverside v. Superior Court* (2003) 30 Cal. 4th 278, 284-285, 132 Cal. Rptr. 2d 713, 66 P.3d 718 ; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal. 3d 296, 317 152 Cal. Rptr. 903, 591 P.2d 1 (charter counties have right to determine compensation of their employees, and determination of wages paid to employees of charter cities as well as charter counties is matter of local rather than statewide concern).

(n18)Footnote 10. *See Code Civ. Proc. § 312.*

(n19)Footnote 11. *See Code Civ. Proc. § 339; see also Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 328-329, 325 P.2d 130* (despite request for "accounting" in complaint, action for breach of oral employment contract was barred by 2-year statute of limitations); D.L.S.E. Interpretive Bulletin No. 87-7 (July 29, 1987) (statute of limitations on claim for vacation pay under *Lab. Code § 227.3*) (CAUTION: *see § 1.05[3][c]*, supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n20)Footnote 12. *See Code Civ. Proc. § 337(1); see also D.L.S.E. Interpretive Bulletin No. 87-7 (July 29, 1987)* (statute of limitations on claim for vacation pay under *Lab. Code § 227.3*) (CAUTION: *see § 1.05[3][c]*, supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n21)Footnote 13. *See Code Civ. Proc. § 340(a), (b).*

(n22)Footnote 14. *See Lab. Code § 203.*

(n23)Footnote 14.1. *McCoy v. Superior Court (2007) 157 Cal. App. 4th 225, 228-233, 68 Cal. Rptr. 3d 483 .*

(n24)Footnote 15. *Aubry v. Goldhor (1988) 201 Cal. App. 3d 399, 404, 247 Cal. Rptr. 205 .*

(n25)Footnote 15.1. *Murphy v. Kenneth Cole Productions (2007) 40 Cal. 4th 1094, 155 P.3d 284, 2007 Cal. LEXIS 3596, *9-*39 . See Code Civ. Proc. § 338(a)* (three-year statute of limitations for wages); *Code Civ. Proc. § 340(a)* (one-year statute of limitations for penalty).

(n26)Footnote 16. *Shuler v. Corl (1918) 39 Cal. App. 195, 196-198, 178 P. 535 ; see also Calvao v. Superior Court (1988) 201 Cal. App. 3d 921, 923, 247 Cal. Rptr. 470* (unpaid salary); *Aubry v. Goldhor (1988) 201 Cal. App. 3d 399, 406, 247 Cal. Rptr. 205* (unpaid overtime compensation).

(n27)Footnote 17. *See Lab. Code § 227.3.*

(n28)Footnote 17.1. *Lab. Code § 227.3.*

(n29)Footnote 17.2. *Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1576, 50 Cal. Rptr. 3d 166 .*

(n30)Footnote 18. *See discussion in [a], above.*

(n31)Footnote 19. D.L.S.E. Interpretive Bulletin No. 87-7 (July 29, 1987) (CAUTION: *see § 1.05[3][c]*, supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n32)Footnote 20. *See D.L.S.E. Interpretive Bulletin No. 87-7 (July 29, 1987)* (CAUTION: *see § 1.05[3][c]*, supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n33)Footnote 21. *See D.L.S.E. Interpretive Bulletin No. 87-7 (July 29, 1987)* (CAUTION: *see § 1.05[3][c]*, supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n34)Footnote 22. *See Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 636, 38 Cal. Rptr. 2d 264 .*

(n35)Footnote 22.1. *Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1577-1583, 50 Cal. Rptr. 3d 166 .*

(n36)Footnote 23. *See D.L.S.E. Interpretive Bulletin No. 87-7 (July 29, 1987)* (CAUTION: *see § 1.05[3][c]*, supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n37)Footnote 23.1. *Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1576, 50 Cal. Rptr. 3d 166 .*

(n38)Footnote 23.2. *Church v. Jamison* (2006) 143 Cal. App. 4th 1568, 1577, 50 Cal. Rptr. 3d 166 (where former employee alleged that his employment continued until May 1, 2001, cause of action seeking payment for unused vested vacation did not accrue and could not have been filed in court earlier than May 1, 2001), *citing Code Civ. Proc. § 312* (civil actions can only be commenced within applicable period after cause of action accrues).

(n39)Footnote 23.3. *Church v. Jamison* (2006) 143 Cal. App. 4th 1568, 1577, 50 Cal. Rptr. 3d 166 (not deciding which applied because action was filed within one year of termination).

(n40)Footnote 23.4. *Code Civ. Proc. § 339(1)*.

(n41)Footnote 23.5. *Code Civ. Proc. § 337(1)*.

(n42)Footnote 23.6. *Code Civ. Proc. § 338(a)*.

(n43)Footnote 24. *See* D.L.S.E. Interpretive Bulletin No. 87-7 (July 29, 1987) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n44)Footnote 25. *Code Civ. Proc. § 85 et seq.*

(n45)Footnote 26. *See Code Civ. Proc. § 116.220(a)*.

(n46)Footnote 27. *Code Civ. Proc. § 88*.

(n47)Footnote 28. *See Code Civ. Proc. § 86(a)(8); see Code Civ. Proc. 85* (when action is limited civil case).

(n48)Footnote 29. *See generally 29 U.S.C. §§ 185(a), 1001 et seq.*

(n49)Footnote 30. *Lab. Code § 218.5*.

(n50)Footnote 31. *Lab. Code § 218.5*.

(n51)Footnote 32. *Earley v. Superior Court* (2000) 79 Cal. App. 4th 1420, 1429-1430, 95 Cal. Rptr. 2d 57 .

(n52)Footnote 32.1. *Harrington v. Payroll Entertainment Services, Inc.* (2008) 160 Cal. App. 4th 589, 593-594, 72 Cal. Rptr. 3d 922 (employee who successfully settled claim under *Lab. Code § 1194* was entitled as matter of right to reasonable fee; given nature of dispute and amount of settlement, trial court could not reasonably award amount in excess of \$500).

(n53)Footnote 33. *Earley v. Superior Court* (2000) 79 Cal. App. 4th 1420, 1429-1430, 95 Cal. Rptr. 2d 57 .

(n54)Footnote 33.1. *Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal. App. 4th 1363, 1378-1384, 61 Cal. Rptr. 3d 114 . For discussion of § 98.2 appeals, *see* § 5.18, *above*.

(n55)Footnote 34. *See Lab. Code § 200(a)* (defining wages as all amounts for labor performed by employees of every description, whether amount is fixed or ascertained by standard of time, task, piece, commission basis, or other method of calculation); *Lab. Code §§ 201-202* (calling for payment of wages upon termination or resignation of employees working in various fields); *Lab. Code § 203* (providing penalties for employers who fail to pay any wages of employee in violation of these sections); *Lab. Code § 204* (requiring payment of wages at specified times during course of employment, but permitting payment of wages on monthly basis to executive, administrative, and professional employees covered by Fair Labor Standards Act).

(n56)Footnote 35. *On-Line Power, Inc. v. Mazur* (2007) 149 Cal. App. 4th 1079, 57 Cal. Rptr. 3d 698, 2007 Cal. App. LEXIS 587, *10-*13 .

(n57)Footnote 36. *See Code Civ. Proc. § 1031.*

(n58)Footnote 37. *See Code Civ. Proc. § 1031.*

(n59)Footnote 38. *Sampson v. Parking Service 2000 Com., Inc.* (2004) 117 Cal. App. 4th 212, 218-228, 11 Cal. Rptr. 3d 595 .

(n60)Footnote 38.1. *Amalgamated Transit Union v. Superior Court* (2009) 46 Cal. 4th 993, 1001, 1003-1005, 95 Cal. Rptr. 3d 605, 209 P.3d 937 .

(n61)Footnote 39. The Court also addressed the assignability of claims under California's Unfair Competition Law, *California Business & Professions Code § 17200*

(n62)Footnote 39.1. *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 977-988, 95 Cal. Rptr. 3d 588, 209 P.3d 923 .

(n63)Footnote 40. *See Deleon v. Verizon Wireless* (2008) 170 Cal. App. 4th 519, 527-533, 88 Cal. Rptr. 3d 29 (class action brought under PAGA was barred with respect to claimed violations of Labor Code settled in previous action against employer as unfair competition action by application of res judicata, where complaint pled same set of operative facts violating same primary right as raised in earlier settled action, even though two operative complaints sought different forms of relief, where dismissal with prejudice of earlier action following settlement of class claims constituted final judgment on merits, and where party against whom res judicata was asserted was in privity with earlier class plaintiffs in prior adjudication; however, plaintiff should have been given opportunity to amend his complaint to allege violations of Labor Code accruing after release period in earlier settlement).

(n64)Footnote 41. If, at the time of the alleged violation, the employer has no employees, the new penalty is \$500 per violation.

(n65)Footnote 42. Note also that, effective in 2004, the Legislature increased some, but not all, of the previously existing penalties in the Labor Code from \$50 and \$100 to \$100 and \$200.

(n66)Footnote 43. *Harrington v. Payroll Entertainment Services, Inc.* (2008) 160 Cal. App. 4th 589, 593-594, 72 Cal. Rptr. 3d 922 (employee who successfully settled action for overtimes wages entitled to attorney's fees under *Lab. Code § 2699(g)*; given nature of dispute and amount of settlement, trial court could not reasonably award amount in excess of \$ 500).

(n67)Footnote 44. *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal. App. 4th 1277, 1300-1303, 90 Cal. Rptr. 3d 539 .

(n68)Footnote 45. *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal. App. 4th 1277, 1288-1299, 90 Cal. Rptr. 3d 539 . See at § 90.20[1][g].

(n69)Footnote 46. *Lab. Code § 2699 (a).*

(N70)Footnote 47. *Gentry v. Superior Court* (2007) 42 Cal. 4th 443, 462, 463, 64 Cal. Rptr. 3d 773, 165 P.3d 556 . For discussion of *Gentry*, see § 5.40[1], above.

(n71)Footnote 48. *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal. App. 4th 1277, 1288-1303, 90 Cal. Rptr. 3d 539 .

(n72)Footnote 49. *See Code Civ. Proc. §§ 431.20(a), 431.30(b), (f).*

(n73)Footnote 50. *See Code Civ. Proc. § 431.30(b)(2), (g).*

(n74)Footnote 51. *See, e.g., Fitch v. Pacific Fid. Life Ins. Co. (1975) 54 Cal. App. 3d 140, 145-146* (alleged employee was independent contractor, not subject to Labor Code protections relating to wage assignments); *cf. Zaremba v. Miller (1980) 113 Cal. App. 3d Supp. 1, 5-6* (alleged independent contractor was, in fact, an employee entitled to protection of *Lab. Code* §§ 201-203); *see also* discussion in ch. 1. Note that although an independent contractor would not be entitled to the various protections of the Labor Code, he or she still may have a cause of action for breach of contract against the defendant.

(n75)Footnote 52. *See, e.g., Div. of Labor Law Enforcement v. El Camino Hosp. Dist. (1970) 8 Cal. App. 3d Supp. 30, 33, 87 Cal. Rptr. 476* (employer was a "municipal corporation" exempt from wage payment provisions of Labor Code). For discussion of various exemptions from wage and hour laws, *see* chs. 1-4.

(n76)Footnote 53. *See* discussion in [1] and [3], *above*.

(n77)Footnote 54. *See 29 U.S.C. § 185(a)*.

(n78)Footnote 55. *See 29 U.S.C. § 1144(a)* (pre-emption of state laws by ERISA). For example, several cases have held that state law enforcement of severance benefit claims are preempted by ERISA. *See, e.g., Scott v. Gulf Oil Corp. (9th Cir. [Cal.] 1985) 754 F.2d 1499, 1503-1506; California Chamber of Commerce v. Simpson (C.D. Cal. 1985) 601 F. Supp. 104, 109; see also* discussion in ch. 4.

(n79)Footnote 56. *See Code Civ. Proc. § 430.10(d)*. For example, if the employee's supervisor is not a party to the employment agreement, he or she would not be liable for the failure to pay wages, and should not be named as a defendant. *See Oppenheimer v. Robinson (1957) 150 Cal. App. 2d 420, 424, 309 P.2d 887*.

(n80)Footnote 57. *See Lab. Code § 203; see also* discussion in ch. 4.

(n81)Footnote 58. *See Code Civ. Proc. § 430.10(a); see also* discussion in [3], *above*.

(n82)Footnote 59. *See Code Civ. Proc. § 430.10(e)*.

(n83)Footnote 60. *See, e.g., Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 328-329, 325 P.2d 130; see also* discussion in § 5.40[2].

(n84)Footnote 61. *Chindarah v. Pick Up Stix, Inc. (2009) 171 Cal. App. 4th 796, 799-803, 90 Cal. Rptr. 3d 175*.

(n85)Footnote 62. *Watkins v. Wachovia Corp. (2009) 172 Cal. App. 4th 1576, 92 Cal. Rptr. 3d 409, 2009 Cal. App. LEXIS 556, *13-*19*.

(n86)Footnote 63. *See Code Civ. Proc. § 430.30(a), (b)*.

(n87)Footnote 64. *See, e.g., Prince v. CLS Transportation, Inc. (2004) 118 Cal. App. 4th 1320, 1324-1329, 13 Cal. Rptr. 3d 725* (in wage and hour action, trial court erred by determining class action not suitable at pleading stage, where complaint alleged institutional practices by employer affecting all members of potential class in same manner and it appeared all liability issues could be determined on class-wide basis, and where class allegations could not be dismissed out of hand simply because plaintiffs might each have other remedies before Labor Commissioner). *See also Morillion v. Royal Packing Co. (2000) 22 Cal. 4th 575, 579, 94 Cal. Rptr. 2d 3, 995 P.2d 139* (class action proper for past and present agricultural employees claiming they were entitled to compensation for time spent going to and from employer's fields); *Madera Police Officers Assn. v. City of Madera (1984) 36 Cal. 3d 403, 204 Cal. Rptr. 422, 682 P.2d 1087* (class action proper for police officers seeking payment of overtime wages, accounting, and declaratory relief); *Bell v. Superior Court (2007) 158 Cal. App. 4th 147, 69 Cal. Rptr. 3d 328* (trial court should have granted class certification with respect to employees' claims for unpaid overtime and vacation pay, as well as previously certified claim for pro rata vacation pay on termination); *Bell v. Farmers Ins. Exchange (2001) 87 Cal. App. 4th 805* (class

action proper to recover for alleged nonpayment of overtime compensation); *Parris v. Superior Court* (2003) 109 Cal. App. 4th 285, 135 Cal. Rptr. 2d 90 (class action proper by group of employees alleging violations of state wage and hour laws regarding overtime compensation). But see *Dunbar v. Albertson's, Inc.* (2006) 141 Cal. App. 4th 1422, 1431-1433, 47 Cal. Rptr. 3d 83 (trial court did not err in denying class certification in action brought on behalf of plaintiff and approximately 900 other grocery store managers for overtime compensation and other relief on theory that employer erroneously classified managers as executive employees exempt from overtime wage laws, where trial court expressly recognized its obligation to weigh common issues against individual issues to determine which were predominant and found that individual issues predominated).

(n88)Footnote 65. *Sav-On Drug Stores, Inc. v. Superior Court (Rocher)* (2004) 34 Cal. 4th 319, 326-340, 17 Cal. Rptr. 3d 906, 96 P.3d 194 .

(n89)Footnote 66. *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal. App. 4th 1193, 76 Cal. Rptr. 3d 804 .

(n90)Footnote 67. *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal. App. 4th 1193, 1203-1204, 76 Cal. Rptr. 3d 804 .

(n91)Footnote 68. *Bufil v. Dollar Financial Group, Inc.* (2008) 162 Cal. App. 4th 1193, 1204-1208, 76 Cal. Rptr. 3d 804 .

(n92)Footnote 69. *Lee v. Dynamex, Inc.* (2008) 166 Cal. App. 4th 1325, 83 Cal. Rptr. 3d 241 .

(n93)Footnote 70. *Lee v. Dynamex, Inc.* (2008) 166 Cal. App. 4th 1325, 1334-1336, 83 Cal. Rptr. 3d 241 .

(n94)Footnote 71. *Lee v. Dynamex, Inc.* (2008) 166 Cal. App. 4th 1325, 1336, 83 Cal. Rptr. 3d 241 .

(n95)Footnote 72. *Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal. App. 4th 1524, 1530-1539, 87 Cal. Rptr. 3d 518 .

(n96)Footnote 73. *In re BCBG Overtime Cases* (2008) 163 Cal. App. 4th 1293, 1297-1302, 78 Cal. Rptr. 3d 257 .

(n97)Footnote 73.1. *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal. App. 4th 1333, 1345-1353, 98 Cal. Rptr. 3d 568 .

(n98)Footnote 73.2. Fed. R. Civ. Proc. 23(b)(3).

(n99)Footnote 73.3. *Mevorah v. Wells Fargo Home Mortg. (In re Wells Fargo Home Mortg.)* (9th Cir. 2009) 571 F.3d 953, 957 .

(n100)Footnote 73.4. *Mevorah v. Wells Fargo Home Mortg. (In re Wells Fargo Home Mortg.)* (9th Cir. 2009) 571 F.3d 953, 956-959 (district court abused its discretion in finding Rule 23(b)(3)'s predominance requirement was met based on employer's internal policy of treating all home mortgage consultants as exempt from state and federal overtime laws, where, although internal policy suggesting employer believed some degree of homogeneity existed among employees was permissible factor for consideration, blanket exemption policy did nothing to facilitate common proof on otherwise individualized issues); *Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 944-947 (class certification was not warranted under Rule 23(b)(3) simply because employer uniformly classified outside salesmen as exempt, where district court was required to conduct individualized analysis of each employee's actual work activity under California law and FLSA; district court did not abuse its discretion in granting employer's motion to decertify class after weighing relevant considerations and properly focusing on whether class certification would enhance efficiency and further judicial economy).

(n101)Footnote 74. See *Crab Addison, Inc. v. Superior Court* (2008) 169 Cal. App. 4th 958, 965-975, 87 Cal. Rptr. 3d 400 (prior to class certification, trial court properly ordered employer to respond to employee's special interrogatories requesting identification of class members' names, addresses, and telephone numbers, where *Code Civ.*

Proc. § 2017.010 provided broad right to discover any relevant information that was not privileged, including identity and location of witnesses; right of privacy in *Cal. Const., art. I, § 1*, protected individual's reasonable expectation of privacy against serious invasion and discovery of employee contact information should not be restricted unless privacy concerns or potential discovery abuses outweighed right to discovery; employees who had indicated they did not want their contact information disclosed were unaware of litigation); *Puerto v. Superior Court* (2008) 158 Cal. App. 4th 1242, 1249, 70 Cal. Rptr. 3d 701 (in action alleging wage and hour violations in which employer provided list of names but objected to production of contact information in response to interrogatory, trial court abused its discretion in instructing parties to develop procedure whereby witnesses would be notified of request for contact information and would have to consent in writing to disclosure of their information rather than have the employer disclose requested contact information with appropriate safeguards to protect witnesses' privacy, where opt-in system imposed by trial court significantly advantaged employer by greatly increasing likelihood it would be able to retain for its own exclusive use and benefit contact information of potential witnesses and effectively gave more protection to nonparty witnesses' contact information than Discovery Act gave to much more sensitive consumer or employment records); *Belaire-West Landscape, Inc. v. Superior Court* (2007) 149 Cal. App. 4th 554, 558-562, 57 Cal. Rptr. 3d 197 (in putative class action alleging wage and hour violations, opt-out notice adequately protected privacy rights of current and former employees involved, where trial court properly evaluated rights and interests at stake, considered alternatives, balanced competing interests, and permitted disclosure of contact information regarding current and former employees unless, following proper notice, they objected in writing to disclosure). *See also Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal. 4th 360, 53 Cal. Rptr. 3d 513, 150 P.3d 198 (in putative class action against seller of DVD player, trial court's order adopting named plaintiff's proposed language for letter to seller's customers was sufficient and involved no serious breach of privacy in violation of *Cal. Const., art. I, § 1*); *Lee v. Dynamex, Inc.* (2008) 166 Cal. App. 4th 1325, 1336-1338, 83 Cal. Rptr. 3d 241 (in action alleging employer improperly reclassified drivers from employees to independent contractors in violation of California Labor Code requirements for employees, trial court erred in denying former employee's motion to compel employer to identify and provide contact information for potential putative class members).

(n102)Footnote 74.1. *Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 939-941 .

(n103)Footnote 74.2. *Vinole v. Countrywide Home Loans, Inc.* (9th Cir. 2009) 571 F.3d 935, 941-944 .

(n104)Footnote 75. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 128, 85 Cal. Rptr. 3d 20 ; *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801, 56 Cal. Rptr. 2d 483 (list is not exhaustive and should be tailored to each case).

(n105)Footnote 76. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 128, 85 Cal. Rptr. 3d 20 ; *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1802, 56 Cal. Rptr. 2d 483 .

(n106)Footnote 77. *Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App. 4th 116, 127-133, 85 Cal. Rptr. 3d 20 .

(n107)Footnote 78. *See Lab. Code § 226.7(b)*, discussed at § 3.07[1][c].

(n108)Footnote 79. *See Evid. Code § 1120* (evidence otherwise admissible or subject to discovery outside of mediation is not or does not become inadmissible or protected from disclosure solely by reason of its introduction or use in mediation). *See also Rojas v. Superior Court* (2004) 33 Cal. 4th 407, 417, 15 Cal. Rptr. 3d 643, 93 P.3d 260 ; *Wimsatt v. Superior Court* (2007) 152 Cal. App. 4th 137, 157-158, 61 Cal. Rptr. 3d 200 .

(n109)Footnote 79.1. *Clark v. American Residential Services, LLC* (2009) 175 Cal. App. 4th 785, 798-804, 96 Cal. Rptr. 3d 441 .

(n110)Footnote 80. *See Larner v. Los Angeles Doctors Hospital Associates, LP* (2008) 168 Cal. App. 4th 1291, 1300-1304, 86 Cal. Rptr. 3d 324 (action by nurse against hospital for alleged overtime violations, brought on her own

behalf and as class representative; after she lost her motion to certify class and then voluntarily settled all claims against defendant, she retained no continuing interest in litigation, such as shifting attorney's fees to class members, so that her appeal of denial of class certification was without substance, her express reservation of right to appeal was toothless, and appeal was moot).

(n111)Footnote 81. *See Watkins v. Wachovia Corp.* (2009) 172 Cal. App. 4th 1576, 92 Cal. Rptr. 3d 409, 2009 Cal. App. LEXIS 556, *19-*32 (appeal of denial of class certification by named plaintiff who settled her own claims had to be dismissed, where plaintiff voluntarily released her wage claim against employer in exchange for payment, and her attempt to reserve her right to pursue her class claim, which was simply procedural device by which she pursued her substantive claim for overtime wages, was unavailing because, having settled her substantive claim, the class claim disappeared; plaintiff could not salvage her right to appeal by asserting economic interest in class certification in terms of right to shift her attorney's fees to class if successful, where any recovery obtained by class would belong to class, and having voluntarily settled, plaintiff was, by her own choice, no longer member of class and could not share in any recovery).

(n112)Footnote 81.1. *Martorana v. Marlin & Saltzman* (2009) 175 Cal. App. 4th 685, 692-698, 96 Cal. Rptr. 3d 172 .

(n113)Footnote 82. *Brewer v. Premier Golf Properties, LP* (2008) 168 Cal. App. 4th 1243, 1251, 86 Cal. Rptr. 3d 225 . *See Civ. Code* § 3294.

(n114)Footnote 83. *Ward v. Taggart* (1959) 51 Cal. 2d 736, 743, 336 P.2d 534 ; *Brewer v. Premier Golf Properties, LP* (2008) 168 Cal. App. 4th 1243, 1251-1252, 86 Cal. Rptr. 3d 225 . *See also Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal. 4th 503, 516, 28 Cal. Rptr. 2d 475, 869 P.2d 454 (when cause of action is based on agreement between parties, rather than ex delicto obligations arising by law, punitive damages are ordinarily not recoverable, even when defendant has violated his or her obligations maliciously or in bad faith).

(n115)Footnote 84. *Brewer v. Premier Golf Properties, LP* (2008) 168 Cal. App. 4th 1243, 1252, 86 Cal. Rptr. 3d 225 ; *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal. App. 4th 890, 912, 114 Cal. Rptr. 2d 708 . *See also Rojo v. Kliger* (1990) 52 Cal. 3d 65, 79, 276 Cal. Rptr. 130, 801 P.2d 373 (in those situations statutory remedy is exclusive); cf. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 900, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 .

(n116)Footnote 85. *Brewer v. Premier Golf Properties, LP* (2008) 168 Cal. App. 4th 1243, 1252, 86 Cal. Rptr. 3d 225 ; *Turnbull & Turnbull v. ARA Transportation, Inc.* (1990) 219 Cal. App. 3d 811, 826, 268 Cal. Rptr. 856 .

(n117)Footnote 86. *Brewer v. Premier Golf Properties, LP* (2008) 168 Cal. App. 4th 1243, 1251-1256, 86 Cal. Rptr. 3d 225 .

(n118)Footnote 87. *See Lab. Code* § 226.7, discussed at § 3.07[1][c].

(n119)Footnote 88. *Brewer v. Premier Golf Properties, LP* (2008) 168 Cal. App. 4th 1243, 1256, 86 Cal. Rptr. 3d 225 . Cf. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 700, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n120)Footnote 89. *See Lab. Code* § 226, discussed at § 5.60.

(n121)Footnote 90. *See Lab. Code* § 1197.1, discussed at § 5.71[4][a].

(n122)Footnote 91. *See Lab. Code* §§ 226(e), 1197.1(a).

(n123)Footnote 92. *Lab. Code* § 512.

(n124)Footnote 93. 8 Cal. Code Reg. § 11090(12)(A).

(n125)Footnote 94. *Brewer v. Premier Golf Properties, LP* (2008) 168 Cal. App. 4th 1243, 1254, 86 Cal. Rptr. 3d 225 . See also *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 79, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n126)Footnote 95. cf. *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal. 4th 1094, 1112, 56 Cal. Rptr. 3d 880, 155 P.3d 284 (because damages from missed meal and rest breaks are obscure and difficult to prove, Legislature could select set amount of compensation for violation without converting remedy into penalty for statute of limitations purposes).

(n127)Footnote 96. See generally *Lab. Code § 1194.5*.

(n128)Footnote 97. See *Lab. Code § 558*.



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
Subpart 4. Civil Action by Employee

1-5 California Employment Law § 5.41

AUTHOR: By Susan Spurlark, J.D.

§ 5.41 FORM--Complaint by Former Employee for Failure to Pay Wages or Other Compensation Due on Termination

[1] Comment

The form set forth in [b], *below*, is for use by a former employee seeking recovery of wages and penalties pursuant to the provisions of the Labor Code governing payment of wages.ⁿ¹ Causes of action for breach of contract, an accounting, or declaratory relief may also be included when appropriate.ⁿ²

The complaint set forth below contains the following allegations:

1. The existence of an employment relationship, including the dates of employment, position(s) held, and the relevant terms of any employment agreement (Paragraphs 2 through 4);
2. The amount of wages (and, if appropriate, unused vested vacation pay)ⁿ³ due at discharge, or to date, or facts from which that amount can be readily ascertained (Paragraphs 5 and 6);
3. The fact of nonpayment of wages when due (Paragraphs 7 and 8);ⁿ⁴ and
4. If appropriate, facts showing plaintiff's entitlement to waiting time penalties under *Labor Code section 203* (Paragraph 11).ⁿ⁵ⁿ⁶

If attorney's fees are sought under *Labor Code section 218.5*, a request for fees must be included in the complaint (Paragraph 9).ⁿ⁷

Plaintiff is entitled to pre-judgment interest on the portion of the judgment representing unpaid wages.ⁿ⁸ Pre-judgment interest may also be awarded at the discretion of the trier of fact on any remaining portion of the judgment representing

damages for breach of a noncontractual obligation or for unliquidated contractual claims, or when there is evidence of oppression, fraud, or malice.n9

[2] Form

SUPERIOR COURT OF CALIFORNIA

COUNTY OF _____

[or other as appropriate]

_____, [name],

Plaintiff,

vs.

_____, [name],

Defendant.

)

)

)

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)

)

NO. _____

COMPLAINT FOR DAMAGES AND PENALTIES

(Recovery of Unpaid Wages)

[Civ. Code §§ 3287, 3300, 3302; Lab. Code §§ 201,

202, 203, 218, 218.5.]

Plaintiff alleges:

FIRST CAUSE OF ACTION

(Nonpayment of Wages)

1. _____ [Allege capacity and residence of defendant, if a venue allegation is desired, e.g., Defendant is, and at all times relevant herein was, a corporation organized under the laws of the State of _____, which maintains its headquarters and principal place of business in the City of _____, County of _____, California].

2. Beginning on or about _____ [date] and continuing until _____ [date], plaintiff was employed by defendant as a _____ [state job title or describe the nature of the work, e.g., keypunch operator] at defendant's facility located in _____ [city], California, in the County of _____.

3. Plaintiff's employment was pursuant to _____ [a written or an oral] employment agreement. The terms of that agreement were _____ [state pertinent terms of the agreement, including wage rate and any changes in that rate, contractual right to any benefits claimed, and term, or refer to and incorporate written agreement, e.g., as stated in the agreement entered into on _____ [date]. A true and correct copy of that agreement is attached to this complaint as Exhibit _____ and is incorporated herein by reference].

4. Effective _____ [date], _____ [plaintiff resigned from or defendant terminated] that employment. [If a resignation add: Plaintiff gave notice of his/her intent to resign on or about _____ (date).]

5. On _____ [date], at the time that _____ [plaintiff resigned or defendant terminated plaintiff's employment], plaintiff had last been paid accrued wages on _____ [date] and was owed wages for _____ [number] _____ [days or weeks] in the amount of \$ _____ based on a wage rate of \$ _____ per _____ [week or hour or month], as provided for in the employment agreement referred to in Paragraph 3.

[6. In addition, as of _____ (date), plaintiff had accrued _____ days of paid time off pursuant to the policies of defendant at the rate of \$ _____ per day, of which plaintiff had not taken _____ days, and

was therefore owed the amount of \$_____ for accrued paid time off.]

7. At the time of termination, defendant_____ [failed to pay plaintiff any of the amounts due, as set forth in Paragraph(s) 5 (and 6) *or* paid plaintiff only the sum of \$_____]. Defendant's failure to pay the full amount due plaintiff on termination violates the provisions of Labor Code section _____ [specify applicable statute, *e.g.*, 201]. There is now due and owing to plaintiff the sum of \$_____. Defendant has failed and refused, and continues to fail and refuse, to pay the amount due.

[8. Pursuant to *Labor Code section 218.5*, plaintiff requests that the court award plaintiff reasonable attorney's fees and costs incurred by him/her in this action.]

WHEREFORE plaintiff prays judgment as set forth below.

SECOND CAUSE OF ACTION

(Waiting Time Penalties Under *Lab. Code* § 203)

9. Plaintiff hereby incorporates by reference and re-alleges all of the allegations contained in paragraphs 1 through 8, above.

10. The defendant's failure to pay wages, as alleged in Paragraph 7 was willful in that_____ [*specify*], thus entitling plaintiff to penalties under *Labor Code section 203*, which provides that an employee's wages shall continue as a penalty until paid or for a period of up to 30 days from the time they were due, whichever period is shorter.

11. Defendants failed to pay plaintiff the sum of \$_____ at the time of termination and has failed to pay those sums for _____ [*days*] thereafter. Pursuant to the provisions of *Labor Code section 203*, plaintiff is entitled to a penalty in the amount of \$_____, which is his/her daily rate multiplied by _____ [*number*] days.

WHEREFORE plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the amount of \$_____, representing wages and other compensation owed to plaintiff on _____ [*date*];

2. For interest on the amount of \$_____ from _____ [*date that compensation was due*];

3. For penalties in the amount of \$_____ pursuant to *Labor Code section 203*;

4. For reasonable attorney's fees pursuant to *Labor Code section 218.5*;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court may deem appropriate.

[signature]

Attorney for Plaintiff

[Verification, if desired.

See Code Civ. Proc. §§ 446, 2015.5 for required form.]

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Wage
Payments Labor & Employment Law Wrongful Termination General Overview

FOOTNOTES:

(n1)Footnote 1. See Lab. Code § 218.

(n2)Footnote 2. For discussion and forms relating to the pleading of such causes of action, see California Forms of Pleading and Practice, ch. 7, "Accounting, Action for," ch. 182, "Declaratory Relief," and ch. 250, "Employment Law: Wage and Hour Disputes."

(n3)Footnote 3. See Lab. Code § 227.3; *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal. 3d 774, 781, 784, 183 Cal. Rptr. 846, 647 P.2d 122 ; see also discussion in ch. 4.

(n4)Footnote 4. See Lab. Code §§ 201, 201.5, 201.7, 202 (time for payment of wages on termination of employment); see generally discussion in Chapter 4.

(n5)Footnote 5. See discussion in Chapter 4.

(n6)Footnote 6. [Reserved]

(n7)Footnote 7. See Lab. Code § 218.5; see also discussion in § 5.40[4].

(n8)Footnote 8. See Civ. Code §§ 3287(a), 3302; *Marc Bellaire, Inc. v. Fleischman* (1960) 185 Cal. App. 2d 591, 598, 8 Cal. Rptr. 650 .

(n9)Footnote 9. See Civ. Code §§ 3287(b), 3288; *Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal. 3d 801, 814, 148 Cal. Rptr. 22, 582 P.2d 109 .



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DIVISION I WAGE AND HOUR LAWS
 CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
 Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
 Subpart 4. Civil Action by Employee

1-5 California Employment Law § 5.42

AUTHOR: By Susan Spurlark, J.D.

§ 5.42 Action by Assignee to Recover Wages Owed

[1] Generally

Labor Code section 218 authorizes an action by an employee's assignee to collect wages that are due. However, except in the case of an assignment to the Labor Commissioner,ⁿ¹ the assignment must meet the requirements of *Labor Code section 300*.ⁿ² For discussion of those requirements, see Chapter 4.

If the assignment is valid, the assignee has the same enforcement rights and is subject to the same defenses as the assignor (i.e., the employee assigning the wages).ⁿ³ However, any claim for penalties by an assignee appears to be limited to the portion of the penalty that had accrued prior to the assignment.ⁿ⁴

[2] FORM--Complaint by Assignee for Wages Owed

[a] Comment

The form set forth in subsection [b], *below*, is a complaint for wages by an assignee to recover wages owed to the assignor-employee or former employee. The plaintiff-assignee must allege facts showing the assignor's entitlement to the wages, as set forth in § 5.41[1]. The assignee should also plead facts that show that a proper assignment has been made; however, any defect in the assignment under *Labor Code section 300* is an affirmative defense, which must be pleaded and proved by the defendant.ⁿ⁵ For discussion of the requirements for validity of a wage assignment, see Chapter 4.

[b] Form

[Caption. *see* form set out in § 5.41[2].]

Plaintiff alleges: FIRST CAUSE OF ACTION

(Nonpayment of Wages)

1. _____ [Allege capacity and residence of defendant, if a venue allegation is desired. *see* Paragraph 1 of form set out in § 5.41[2].]

2. Beginning on or about _____ [date] and continuing until _____ [date], _____ [name of assignor-employee] was employed by defendant as a _____ [state job title or describe the nature of the work, *e.g.*, keypunch operator] at defendant's facility located in _____ [city], California, in the County of _____.

3. _____'s [Name of assignor-employee] employment was pursuant to _____ [a written or an oral] employment agreement. The terms of that agreement were _____ [state pertinent terms of the agreement, including wage rate and any changes in that rate, contractual right to any benefits claimed, and term, or refer to and incorporate written agreement, *e.g.*, as stated in the agreement entered into on _____ (date). A true and correct copy of that agreement is attached to this complaint as Exhibit _____ and is incorporated herein by reference].

4. Effective _____ [date], _____ [_____ (name of assignor-employee)] resigned from or defendant terminated] that employment. [If a resignation add: (Name of assignor-employee) gave notice of his/her intent to resign on or about _____ (date).]

5. On _____ [date], at the time that _____ [_____ (name of assignor-employee)] resigned or defendant terminated _____'s (name of assignor-employee) employment], _____ [name of assignor-employee] had last been paid accrued wages on _____ [date] and was owed wages for _____ [number] _____ [days or weeks] in the amount of \$ _____ based on a wage rate of \$ _____ per _____ [week or hour or month], as provided for in the employment agreement referred to in Paragraph 3.

[6. In addition, as of _____ [date], _____ (name of assignor-employee) had accrued _____ days of paid time off pursuant to the policies of defendant at the rate of \$ _____ per day, of which _____ (name of assignor-employee) had not taken _____ days, and was therefore owed the amount of \$ _____ for accrued paid time off.]

7. At the time of termination, defendant _____ [failed to pay _____ (name of assignor-employee) any of the amounts due, as set forth in Paragraph(s) 5 (and 6) or paid _____ (name of assignor-employee) only the sum of \$ _____]. Defendant's failure to pay the full amount due _____ [name of assignor-employee] on termination violates the provisions of Labor Code section _____ [specify applicable statute, *e.g.*, 201]. There is now due and owing to _____ [name of assignor-employee] the sum of \$ _____. Defendant has failed and refused, and continues to fail and refuse, to pay the amount due.

[EITHER]

8. On or about _____ [specify date after the wages were earned], _____ [name of assignor-employee] properly assigned to plaintiff, pursuant to Labor Code section 300, the sum of \$ _____, which represents the wages and salary then owed to him/her, as set forth in Paragraph 7, above.

[OR]

8. _____ [If assignment represented wages not yet earned at the time of assignment, in whole or in part, allege facts showing that assignment was made as consideration for provision of necessities of life, as required by *Lab. Code § 300(h)*, e.g., On or about _____ (date), plaintiff furnished _____ (name of assignor-employee) with the following necessities of life, at the latter's request: _____ (specify, e.g., food and necessary medications for _____ (name of assignor-employee) and his/her family). The reasonable cost and value of these items is \$ _____. In consideration and as security for reimbursement of plaintiff for the cost of these necessities, _____ (name of assignor-employee) agreed to assign all wages then due and owing to him/her and to be earned by him/her thereafter, up to the maximum amount of \$ _____ (cost of necessities), to plaintiff. On or about _____ (date), _____ (name of assignor-employee) executed a separate written assignment of such wages, in compliance with the requirements of *Labor Code section 300*].

[CONTINUE]

9. A copy of the written assignment referred to in Paragraph 8 was filed with defendant on _____ [date] [along with the statements required by *Labor Code section 300*]. A true and correct copy of that written assignment [and supporting documents] is attached to this complaint as Exhibit _____ and is incorporated herein by reference.

10. On or about _____ [date], plaintiff demanded payment of \$ _____, the amount of wages currently due to _____ [name of assignor-employee], pursuant to the terms of the written assignment, but defendant has failed and refused to pay the sums owed.

[11. Pursuant to *Labor Code section 218.5*, plaintiff requests that the court award plaintiff reasonable attorney's fees and costs incurred by him/her in this action.]

SECOND CAUSE OF ACTION

(Waiting Time Penalties Under *Lab. Code § 203*)

12. Plaintiff hereby incorporates by reference and re-alleges all of the allegations contained in paragraphs 1 through 11 above.

13. The defendant's failure to pay wages, as alleged in Paragraph 7 was willful in that _____ [specify]. Thus, at the time of the assignment herein alleged, _____ [name of assignor-employee] was entitled, and plaintiff as his/her assignee is entitled, to penalties under *Labor Code section 203*, which provides that an employee's wages shall continue as a penalty until paid or for a period of up to 30 days from the time they were due, whichever period is shorter.

14. Defendant failed to pay _____ [name of assignor-employee] the sum of \$ _____ at the time of termination and has failed to pay those sums for _____ [days] thereafter [up to the time of the assignment]. Pursuant to the provisions of *Labor Code section 203*, plaintiff is entitled to a penalty in the amount of \$ _____, which is _____'s [name of assignor-employee] daily rate multiplied by _____ [number] days.

WHEREFORE plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the amount of \$ _____, representing wages and other compensation owed to plaintiff, pursuant to the written assignment of _____ [*name of assignor-employee*], on _____ [*date*];
2. For interest on the amount of \$ _____ from _____ [*date that compensation was due*];
3. For penalties in the amount of \$ _____ pursuant to *Labor Code section 203*;
- [4. For reasonable attorney's fees pursuant to *Labor Code section 218.5*;
5. For costs of suit incurred herein; and
6. For such other and further relief as the court may deem appropriate.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired.*

See Code Civ. Proc. §§ 446, 2015.5 for required form.]

Legal Topics:

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

Contracts Law Performance Assignment General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws Wage Payments

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 5.30[1][a].

(n2)Footnote 2. *See Lab. Code* §§ 97, 300.

(n3)Footnote 3. *See Teater v. Good Hope Dev. Corp. (1942) 55 Cal. App. 2d 459, 462, 130 P.2d 812 .*

(n4)Footnote 4. *See Martin v. Going (1922) 57 Cal. App. 631, 636, 207 P. 935 .*

(n5)Footnote 5. *See Mathewson v. Alderman (1930) 107 Cal. App. 272, 275-276, 290 P. 317 ; Berg v. Standard Light Co. of Cal. (1928) 89 Cal. App. 542, 544-545, 265 P. 369 (decided under former Civ. Code § 955; now see Lab. Code § 300).*



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CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY

Subpart 4. Civil Action by Employee

1-5 California Employment Law §§ 5.43 through 5.49

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§§ 5.43[Reserved]



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
Subpart 5. Protection of Employee or Claimant Against Retaliation

1-5 California Employment Law § 5.50

AUTHOR: By Susan Spurlark, J.D.

§ 5.50 Discrimination and Retaliation Forbidden

Labor Code section 98.6(a) forbids discrimination or retaliation against an employee or applicant for employment on the following bases:

- The employee or applicant engaged in any conduct delineated in *Labor Code section 79 et seq.*, including the conduct described in 96(k) (making claim for loss of wages as result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from employer's premises) and *Labor Code section 1101 et seq.* (political affiliations).n1
- The employee or applicant filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights, which are under the jurisdiction of the Labor Commissioner.
- The employee has initiated any action or notice pursuant to *Labor Code section 2699* (recovery of civil penalty for violation of Labor Code through civil action brought by aggrieved employee).n1.1
- The employee testified or is about to testify in any such proceeding.
- The employee or applicant exercised on behalf of himself, herself, or others any rights afforded him or her.

Acts of discrimination and retaliation include discharge, threats of discharge, demotion, suspension, and any other discrimination in terms and conditions of employment.n1.2

An employee who is discriminated or retaliated against because he or she made a bona fide complaint is entitled to reinstatement and/or reimbursement for wages and benefits lost as a result.n2 An employer who *willfully* refuses to hire,

promote, or otherwise restore such an employee following a decision by a grievance procedure, arbitration, or other hearing authorized by law is guilty of a misdemeanor.ⁿ³ However, the legislation enacting *Labor Code section 98.6* provides that it may not be construed to entitle an employee to reinstatement or reimbursement for lost wages or work benefits if the employee willfully misrepresents any facts to support a complaint or claim filed with the Labor Commissioner.ⁿ⁴

An applicant for employment is entitled to employment and reimbursement for lost wages and work benefits caused by the acts of the prospective employer if the applicant engaged in any protected conduct or made a bona fide complaint or claim and was: refused employment, not selected for a training program leading to employment, or in any other manner discriminated against in the terms and conditions of an offer of employment.ⁿ⁵ However, *Labor Code section 98.6* may not be construed to invalidate a collective bargaining agreement requiring an applicant for a position that is subject to the collective bargaining agreement to sign a contract that protects either or both of the following:ⁿ⁶

- Protection of the employer against conduct in direct conflict with the essential enterprise-related interests of the employer and in which breach of the contract would constitute a material and substantial disruption of the employer's operation.
- Protection of a firefighter against any disease presumed to arise in the course and scope of employment, by limiting his or her consumption of tobacco products on and off the job.

Similarly, *Labor Code section 98.6* may not be construed to invalidate an employer requirement of an applicant for a position that is not subject to a collective bargaining agreement to sign an employment contract that provides the foregoing protections.ⁿ⁷

The provisions of *Labor Code section 98.6*, as amended by AB 1015 to create new actions or remedies for employees or applicants effective on January 1, 2002, do not apply to the following:ⁿ⁸

- A state or local law enforcement agency.
- A religious association or corporation under *Gov. Code section 12926(d)*, except as provided in *Gov. Code section 12926.2*.ⁿ⁹
- Any person described in *Evidence Code section 1070*, governing a news person's immunity from contempt for refusing to disclose a news source.ⁿ¹⁰

■ CONSULTANT'S COMMENT:

Labor Code Section 98.6 poses many questions for employment law practitioners.

Does AB 1015, the bill that amended section 98.6, evidence the Legislature's intent to create a substantive right for employees under Labor Code Section 96(k)? Following the passage of Assembly Bill 1689, which added subsection (k) to *Labor Code Section 96* (effective January 1, 2001), debate focused on whether Section 96(k) created a new substantive right for employees subjected to adverse action for engaging in "lawful conduct during nonworking hours," or merely created a new procedural right--by allowing the Labor Commissioner to take assignment of such a claim that would have been actionable in a lawsuit by an individual employee prior to the addition of subsection (k). At least one appellate court has held that Section 96(k) merely creates a new procedural remedy, not a new public policy.ⁿ¹¹

What kind of conduct does Section 96(k), and by extension Section 98.6, protect? Examples of "lawful conduct during nonworking hours" by employees and applicants might include engaging in consulting

work for a competitor company or membership in an extremist political group. At least one court has held that it does not include dating a subordinate, where the employer has a policy prohibiting such a relationship and the employee has advance notice of the policy.ⁿ¹²

May an employer restrict an employee's conduct that is protected under Section 96(k)? Employers should tread carefully here. Under Section 98.6, such conduct may be restricted only if it directly conflicts with the employer's "essential enterprise-related interests," a term which is not defined. For example, is an employer's interest in preventing sexual harassment in the workplace an "essential enterprise-related interest," such that an employee and her supervisor can be restricted from engaging in an off-premises dating relationship? The answer is unclear. Thus, an employer that demotes, suspends, or discharges the employee or her supervisor for engaging in the off-premises dating relationship risks the filing of claims under Section 98.6 for lost wages resulting from the adverse action.

If an employer seeks to restrict certain protected conduct, what is the mechanism under Section 98.6 for doing so? By its terms, Section 98.6 does not invalidate "employment contracts" between an employer and employee or applicant that protect the employer against conduct in direct conflict with the employer's essential enterprise-related interests. Whether prohibitions against such conduct contained in employee handbooks or personnel policy manuals will be deemed sufficient to constitute an exclusion from Section 98.6 protections remains an open question.

Under AB 1015, may an employer refuse to hire an otherwise qualified applicant based on information obtained during the pre-hire screening process reflecting the applicant's "lawful conduct during nonworking hours" of which the employer does not approve? Section 98.6 states that it does not invalidate employment contracts with applicants to prohibit off-premises conduct that directly conflicts with the employer's essential enterprise-related interests. However, as a practical matter, such contracts generally will only be entered into after an applicant is hired to curb prospective conduct. Whether an employer can enter into such an "employment contract" with an applicant during the pre-hire process remains to be seen. *Commentary by Kirby Wilcox.*

For a discussion of other statutory and common law remedies for discrimination and/or retaliation for exercise of statutory rights, see Chapter 60.

Legal Topics:

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

Labor & Employment Law
Discrimination
Actionable Discrimination
Labor & Employment Law
Wage & Hour Laws
General Overview
Labor & Employment Law
Wage & Hour Laws
Wage Payments

FOOTNOTES:

(n1)Footnote 1. For discussion of *Lab. Code § 1101 et seq.*, see § 60.03[2][r].

(n2)Footnote 1.1. For discussion of *Lab. Code § 2699*, see § 5.72[1].

(n3)Footnote 1.2. See *Lab. Code § 98.6(b)*.

(n4)Footnote 2. *Lab. Code § 98.6(b)*.

(n5)Footnote 3. *Lab. Code § 98.6(b)*.

(n6)Footnote 4. 1978 Stats. ch. 1250, § 6.

(n7)Footnote 5. *Lab. Code § 98.6(c)(1)*.

(n8)Footnote 6. *Lab. Code § 98.6(c)*.

(n9)Footnote 7. *Lab. Code § 98.6(c)*.

(n10)Footnote 8. *Lab. Code § 98.6(d)*.

(n11)Footnote 9. For discussion of *Gov. Code §§ 12926(d), 12926.2, see § 40.10[3]*.

(n12)Footnote 10. [Reserved]

(n13)Footnote 11. *Barbee v. Household Automotive Finance Corp. (2003), 113 Cal. App. 4th 525, 6 Cal. Rptr. 3d 406* .

(n14)Footnote 12. *Barbee v. Household Automotive Finance Corp. (2003), 113 Cal. App. 4th 525, 6 Cal. Rptr. 3d 406* .



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DIVISION I WAGE AND HOUR LAWS
 CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws
 Part A. REMEDIES FOR FAILURE TO PAY WAGES GENERALLY
 Subpart 5. Protection of Employee or Claimant Against Retaliation

1-5 California Employment Law § 5.51

AUTHOR: By Susan Spurlark, J.D.

§ 5.51 Procedure in Case of Complaint of Discrimination or Retaliation

Labor Code section 98.7 provides an administrative mechanism for remedying complaints of discrimination and/or retaliation in violation of any law under the jurisdiction of the Labor Commissioner.ⁿ¹ It is not the exclusive remedy for such claims; the employee may pursue any other remedies that may be available.ⁿ² Thus, there is no requirement that a plaintiff proceed through the Labor Code administrative procedure provided in *Labor Code Section 98.7* in order to pursue a statutory cause of action.^{n2.1}

The Labor Commissioner is required to establish procedures for the administrative review of retaliation claims.ⁿ³ Any complaint should be filed with the Labor Commissioner within six months after the occurrence of the violation, although that time limit may be extended for good cause.ⁿ⁴ When a complaint is filed, the Labor Commissioner must give a summary of its procedures to both the employee and the respondent.ⁿ⁵

The complaint is assigned as a priority matter for investigation and preparation of a report to the Labor Commissioner.ⁿ⁶ The investigation, which is conducted by an investigator who specializes in such complaints, may include interviews with the parties and witnesses and a review of documents, all of which should be included in the report.ⁿ⁷ However, the identity of witnesses remains confidential unless disclosure is necessary to facilitate the investigation or any prosecution.ⁿ⁸

The Labor Commissioner, or his or her designee, reviews the report to determine whether or not a violation has occurred.ⁿ⁹ The Labor Commissioner may hold a hearing to further ascertain the facts and may issue, serve, and enforce any necessary subpoenas in conjunction with that hearing.ⁿ¹⁰ The Labor Commissioner must issue a decision within 60 days of the filing of the complaint.ⁿ¹¹ Either party may appeal that decision to the Director of Industrial Relations within 10 days of notice of the Labor Commissioner's decision.ⁿ¹² The appeal must contain a statement of the grounds for the appeal and every issue that is to be considered.ⁿ¹³ The Director of Industrial Relations must issue a decision either modifying, affirming, or reversing the Labor Commissioner's determination within 10 days; that decision is not subject to further administrative appeal.ⁿ¹⁴

If a violation is found, the Labor Commissioner must order the respondent to cease and desist and to make the complainant whole, including rehiring or reinstatement, back pay with interest, and payment for reasonable attorney's fees incurred for any hearing held during the investigation.ⁿ¹⁵ If the respondent fails to comply within 10 working days after notification of the Labor Commissioner's determination, the Commissioner must initiate an action in the appropriate court to secure the remedy.ⁿ¹⁶ In addition, the Commissioner is required to seek appropriate temporary relief or restraining orders, unless he or she determines that good cause exists for not doing so.ⁿ¹⁷ The Labor Commissioner is the only person authorized to institute this action; however, if the Labor Commissioner fails to act promptly, the complainant may petition for a writ of mandate to compel the action and, if successful, is entitled to recover reasonable attorney's fees and costs.ⁿ¹⁸ Further, the complainant may intervene in any action filed by the Labor Commissioner.ⁿ¹⁹ Appropriate relief in such an action includes, but is not limited to, rehiring or reinstatement of the complainant, reimbursement of lost wages with interest thereon, and other appropriate compensation or equitable relief.ⁿ²⁰

If the Labor Commissioner finds no violation and dismisses the complaint, he or she must notify the complainant of his or her right to seek full relief by bringing an action in the appropriate court and of the right to file a claim with the U.S. Department of Labor where appropriate.ⁿ²¹ The filing of a timely complaint against the state program with the U.S. Department of Labor stays the Labor Commissioner's dismissal until the U.S. Secretary of Labor makes a determination regarding the alleged violation. Within 15 days of receiving that determination, the Labor Commissioner must notify the parties whether he or she will reopen the complaint or reaffirm the dismissal.ⁿ²² The Labor Commissioner may also assess reasonable attorney's fees associated with any investigatory hearing against the complainant if the Commissioner finds that the complaint was frivolous, unreasonable, and brought in bad faith.ⁿ²³

Legal Topics:

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

Labor & Employment Law
Discrimination
Retaliation
General Overview
Labor & Employment Law
Wage & Hour Laws
General Overview
Labor & Employment Law
Wage & Hour Laws
Wage Payments

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code §§ 98.6(a), 98.7(a).*

(n2)Footnote 2. *Lab. Code § 98.7(f); see also* discussion in Chapter 60.

(n3)Footnote 2.1. *Lloyd v. County of Los Angeles* (2009) 172 Cal. App. 4th 320, 331-332, 90 Cal. Rptr. 3d 872 (former county employee's causes of action alleging statutory violations of Labor Code were not barred by his failure to exhaust administrative remedy afforded by *Lab. Code § 98.7*); *Daly v. Exxon Corp.* (1997) 55 Cal. App. 4th 39, 46, 63 Cal. Rptr. 2d 727 (suit under *Lab. Code § 6310* alleging retaliation for complaint of unsafe working conditions); *Murray v. Oceanside Unified School Dist.* (2000) 79 Cal. App. 4th 1338, 1359, 95 Cal. Rptr. 2d 28 (suit under former *Lab. Code § 1102.1* relating to sexual orientation discrimination).

(n4)Footnote 3. *Lab. Code § 98.7(a).*

(n5)Footnote 4. *Lab. Code § 98.7(a).*

(n6)Footnote 5. *Lab. Code § 98.7(a).* In addition, complainants claiming violations of *Lab. Code §§ 6310* or *6311* (relating to discrimination against employees for complaints relating to occupational safety and health) must be advised of their right to file concurrent complaints with the United States Department of Labor within 30 days of the violation. *See Lab. Code § 98.7(a).*

(n7)Footnote 6. *See Lab. Code § 98.7(a), (b); 1985 Stats. ch. 1479, § 8.*

(n8)Footnote 7. *See Lab. Code § 98.7(b)*; 1985 Stats. ch. 1479, § 8.

(n9)Footnote 8. *Lab. Code § 98.7(b)*.

(n10)Footnote 9. *See Lab. Code § 98.7(b), (c), (d)*.

(n11)Footnote 10. *Lab. Code § 98.7(b)*.

(n12)Footnote 11. *Lab. Code § 98.7(e)*.

(n13)Footnote 12. *Lab. Code § 98.7(e)*.

(n14)Footnote 13. *Lab. Code § 98.7(e)*.

(n15)Footnote 14. *See Lab. Code § 98.7(e)*.

(n16)Footnote 15. *Lab. Code § 98.7(c)*.

(n17)Footnote 16. *Lab. Code § 98.7(c)*.

(n18)Footnote 17. *Lab. Code § 98.7(c)*.

(n19)Footnote 18. *Lab. Code § 98.7(c)*.

(n20)Footnote 19. *Lab. Code § 98.7(c)*.

(n21)Footnote 20. *Lab. Code § 98.7(c)*.

(n22)Footnote 21. *Lab. Code § 98.7(d)(1)*.

(n23)Footnote 22. *Lab. Code § 98.7(d)(2)*.

(n24)Footnote 23. *Lab. Code § 98.7(d)*.



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Subpart 5. Protection of Employee or Claimant Against Retaliation

1-5 California Employment Law §§ 5.52 through 5.59

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§§ 5.52[Reserved]



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Subpart 6. Criminal Sanctions and Bond Requirements

1-5 California Employment Law § 5.60

AUTHOR: By Susan Spurlark, J.D.

§ 5.60 Violations for Which Criminal Sanctions Are Provided

The Labor Code is replete with criminal sanctions for violations of its requirements. In conjunction with requirements relating to wages and hours of work, the following are among those sections imposing criminal sanctions:

1. *Labor Code sections 90, 91, 93, 1175* (impeding investigations and other duties of Labor Commissioner and DLSE; refusal to obey subpoenas);
2. *Labor Code section 206.5* (prohibition against requiring release of claim for wages);
3. *Labor Code section 215* (violation of certain provisions relating to time and manner of payment of wages and pay day notices);
4. *Labor Code section 216* (willful failure to pay wages by person with ability to do so; false denial of amount or validity of wage claim);
5. *Labor Code section 225* (violation of certain prohibitions against improper withholding or reduction of wages);
6. *Labor Code section 226.6* (violation of requirements for itemized wage and deduction statements);
7. *Labor Code section 227* (failure to make certain employee benefit payments);ⁿ¹
8. *Labor Code sections 270-272* (violation of wage security requirements for certain occupations);
9. *Labor Code section 354* (violation of provisions relating to employee tips);

10. *Labor Code section 408* (violation of provisions relating to payment for bonds and employee photographs);
11. *Labor Code section 451* (violation of prohibition against coerced patronage of employer by employee);
12. *Labor Code sections 553, 605, 606, 752, 801, and 853* (violation of statutory provisions limiting maximum hours of work);
13. *Labor Code sections 1199, 1199.5* (violation of minimum wage, maximum hour, and other provisions of wage orders and of statutory equal pay requirements);
14. *Labor Code sections 1303, 1308, 1308.1, 1308.3, 1308.5, 1308.7, 1309, 1309.5, 1391, and 1392* (violation of restrictions on employment of minors);
15. *Labor Code section 1697(a)* (violation of various requirements relating to farm labor contractors); and
16. *Labor Code section 1777* (violation of provisions requiring payment of prevailing wages to certain laborers on public works projects).

■ **PRACTICE TIP:**

The above list is not meant to be exhaustive. Related criminal provisions may be contained in the Penal Code or other codes. While in this author's experience criminal sanctions are not imposed often, they may be considered by the Labor Commissioner or other prosecuting authority whenever there are flagrant and continuing violations. The actual provisions of the Labor Code should be reviewed in each case when advising a client of the possible penalties. *Commentary by Susan Spurlark.*

The penalties for these violations are either set forth in the section making the violation a crime,ⁿ² in *Labor Code section 23*, or in the Penal Code. *Labor Code section 23* provides that unless a different punishment is expressly prescribed, every offense declared by the Labor Code to be a misdemeanor is punishable by imprisonment in the county jail not exceeding 6 months, or by a fine not exceeding \$1,000, or both.

Legal Topics:

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

Criminal Law & Procedure Criminal Offenses Miscellaneous Offenses General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Wage Payments

FOOTNOTES:

(n1)Footnote 1. Note, however, that this provision has been held to be preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA), set forth in 29 U.S.C. §§ 1001-1461. *See Cairy v. Superior Court (1987) 192 Cal. App. 3d 840, 842, 237 Cal. Rptr. 715 ; see also 29 U.S.C. § 1144(a)* (preemption of certain state laws by ERISA).

(n2)Footnote 2. *See, e.g., Lab. Code § 1391.*



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Subpart 6. Criminal Sanctions and Bond Requirements

1-5 California Employment Law § 5.61

AUTHOR: By Susan Spurlark, J.D.

§ 5.61 Standards for Imposition of Criminal Sanctions

Constitutional challenges to the imposition of criminal sanctions for failure to pay wages have been made based on the prohibition against imprisonment for debt.ⁿ¹ The courts have rejected these challenges on the grounds that the statutes imposing criminal penalties require "willfulness" and that purposeful failure to pay wages owed when there is no claim of inability to pay is a fraud and constitutes an exception to the prohibition against imprisonment for debt.ⁿ² In cases involving payment of wages by bad checks,ⁿ³ the necessary willfulness may be shown by failure to assure the sufficiency of the payment.ⁿ⁴

Legal Topics:

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

Criminal Law & Procedure Criminal Offenses Miscellaneous Offenses General Overview Labor & Employment Law Wage & Hour Laws General Overview

FOOTNOTES:

(n1)Footnote 1. *See Cal. Const. art. I, § 10; In re Trombley (1948) 31 Cal. 2d 801, 804-805, 193 P.2d 734 .*

(n2)Footnote 2. *See, e.g., In re Trombley (1948) 31 Cal. 2d 801, 805-806, 193 P.2d 734 ; People v. Bishopp (1976) 56 Cal. App. 3d Supp. 8, 12-13 , 128 Cal. Rptr. 923 ; People v. Hampton (1965) 236 Cal. App. 2d 795, 804-805, 46 Cal. Rptr. 338 ; Ephraim v. Jamestown Judicial Dist. Ct. (1953) 120 Cal. App. 2d 741, 745-746, 262 P.2d 56 .*

(n3)Footnote 3. *See Lab. Code § 212.*

(n4)Footnote 4. *See People v. Hampton (1965) 236 Cal. App. 2d 795, 804-805, 46 Cal. Rptr. 338 .*



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Subpart 6. Criminal Sanctions and Bond Requirements

1-5 California Employment Law § 5.62

AUTHOR: By Susan Spurlark, J.D.

§ 5.62 Bond Requirements

[1] Penalty Bonds

The Labor Commissioner may, in addition to all other penalties, require an employer who has been convicted of a violation of any provision of *Labor Code sections 200 et seq.* (relating to payment of wages), or who has not paid a judgment for nonpayment of wages within 10 days after expiration of the appeal period, to post a bond to secure future compliance with payment requirements.ⁿ¹ The amount of the bond is in the Labor Commissioner's discretion; it is payable to the Labor Commissioner and is conditioned on payment of any judgment for nonpayment of wages against the employer and on the employer's payment, for a definite period not exceeding 6 months, of wages in accordance with the law.ⁿ²

If the employer fails to deposit the bond within 10 days after demand by the Labor Commissioner, the Commissioner may bring an action on behalf of the people of the State of California to compel the employer to furnish the bond or to cease doing business until the bond is furnished.ⁿ³ In such an action, the employer has the burden of proving that the bond is unnecessary or that the amount demanded is excessive.ⁿ⁴ If the court finds just cause for requiring the bond or that the bond is reasonably necessary or proper to secure prompt payment of wages to the employer's employees and to assure employer's compliance with the wage payment statutes, it may enjoin the operations of that employer until the bond is furnished and order other appropriate relief to compel compliance with that requirement.ⁿ⁵

The Labor Commissioner's internal procedures for requirement of penalty bonds provide, in part, that a bond should not be sought until normal collection efforts have been exhausted,ⁿ⁶ and that Deputy Labor Commissioners should not contravene the normal processes of law concerning examination of judgment debtors but may seek information regarding assets informally.ⁿ⁷ In addition, an action under *Labor Code section 240* against a specific employer is not necessarily binding if that employer goes into business as another entity.ⁿ⁸

[1A] Action by Current or Former Employee to Require Employer to Deposit Bond

Labor Code section 243 provides a procedure by which a current or former employee may obtain a temporary restraining order requiring an employer to cease doing business unless it deposits a bond securing its compliance with wage payment laws. If, within 10 years after an employer either is convicted of a violation of *Labor Code sections 200 et seq.* (regarding payment of wages) or has failed to satisfy a judgment for nonpayment of wages, or both, the employer is alleged on a second occasion to have been convicted of such a violation or to have failed to satisfy a judgment for nonpayment of wages, an employee may bring an action in a court of competent jurisdiction for a temporary restraining order prohibiting the employer from doing business in the State of California unless the employer deposits with the court a bond to secure the employer's compliance with the Labor Code provisions regarding payment of wages or to satisfy the judgment for nonpayment of wages.ⁿ⁹ The action may be brought by the employee on his or her own behalf and on behalf of others.ⁿ¹⁰ A former employee who was a party to an earlier action against an employer in which a judgment for payment of wages was obtained, and who alleges that the employer has failed to satisfy the judgment, may also petition the court for such a temporary restraining order, in addition to any other available remedy.ⁿ¹¹

On filing of an affidavit that, to the court's satisfaction, shows reasonable proof that the employer, for the second time within 10 years, has been convicted of violating *Labor Code sections 200 et seq.* or has failed to satisfy a judgment for nonpayment of wages, or both, the court may grant a temporary restraining order pursuant to *Code of Civil Procedure section 527* that prohibits the employer "within 30 days" from conducting any business in the State of California unless the employer deposits a bond payable to the Labor Commissioner that is conditioned on the employer making wage payments in accordance with *Labor Code sections 200 et seq.* or satisfying any judgment for nonpayment of wages, or both.ⁿ¹² The court must order the employer to deposit the bond with the court at any point in time, within in a five-year period from the date of the order, that the employer employs more than 10 employees.ⁿ¹³ The bond must be in an amount equal to \$25,000, or 25% of the employer's weekly gross payroll at the time the bond is posted, whichever is greater.ⁿ¹⁴ The term of the bond must be for the duration of the service of the employee who brought the action until past due wages have been paid or until satisfaction of any judgment for nonpayment of wages.ⁿ¹⁵

An employer who, for the third time within 10 years after the first occurrence, is alleged to have violated *Labor Code sections 200 et seq.* or to have failed to satisfy a judgment for nonpayment of wages, or both, will be deemed by the court to have commenced a new five-year period within which the court may order posting of a bond as specified in *Labor Code section 243(b)*.ⁿ¹⁶ In such a case, the court may, in its discretion, require the posting of a bond in an amount greater than that specified above, if appropriate under the circumstances.ⁿ¹⁷

For purposes of *Labor Code section 243(b)*, an employer is deemed to have been convicted of having violated *Labor Code sections 200 et seq.* or to have failed to satisfy a judgment for the second time within 10 years if, to secure labor or personal services in connection with his or her business, the employer uses the services of an agent, contractor, or subcontractor who is convicted of violating *Labor Code sections 200 et seq.* or who fails to satisfy a judgment for wages respecting those employees, or both, but only if the employer had actual knowledge of the latter's failure to pay wages.ⁿ¹⁸ In issuing a temporary restraining order under this provision, the court must count the agent's, contractor's, or subcontractor's employees as part of the employer's total work force for purposes of determining the amount and term of the bond.ⁿ¹⁹ The agent's, contractor's, or subcontractor's violation of the wage payment statutes or failure to satisfy a judgment for nonpayment of wages will not, however, be attributed to the employer if a temporary restraining order under *Labor Code section 243* has already been issued against the agent, contractor, or subcontractor, acting as an employer.ⁿ²⁰

Actions brought under *Labor Code section 243* are required to be set for trial at the earliest possible date and take precedence over all other cases, except older matters of the same character and matters to which special precedence may be given by law.ⁿ²¹

[2] Wage Security Bonds

The requirements for wage security bonds are found in *Labor Code sections 270 et seq.*, 2675, and 2679 and in *Title 8*

California Code of Regulations, sections 13300 et seq. Employers in the mining, logging and saw mill, door-to-door selling or telephone solicitation, theatrical and garment industries are required to maintain a bond, cash deposit, or other salable surety, sufficient to assure their ability to make payroll obligations.ⁿ²² Guidelines for imposition of such bonds may be found in the DLSE's Operations and Procedures Manual.ⁿ²³

[3] Penalty for Refusal by Bonding Company or Surety to Pay Wage Claim

If a bonding company that has issued a bond to secure the payment of wages for labor, or the surety on such a bond, willfully fails to pay, without abatement or reduction, any verified claim for wages found to be due and payable, the wage claim continues as a penalty against the bonding company or surety at the same rate as the wages on which the claim is based from the date on which demand for payment was made until the date of payment or 30 days, whichever occurs first.ⁿ²⁴ This provision does not apply to contractor's bonds required pursuant to *Business and Professions Code section 7071.6*.ⁿ²⁵

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies Rulemaking Authority

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 240(a)*.

(n2)Footnote 2. *Lab. Code § 240(a)*.

(n3)Footnote 3. *Lab. Code § 240(b)*.

(n4)Footnote 4. *Lab. Code § 240(b)*.

(n5)Footnote 5. *Lab. Code § 240(b)*.

(n6)Footnote 6. *See* discussion in § 5.17[1].

(n7)Footnote 7. D.L.S.E. Policy and Procedure Memo. No. 80-6 (Dec. 31, 1980) (CAUTION: see § 1.05[3][c], above, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n8)Footnote 8. *See* D.L.S.E. Policy and Procedure Memo. No. 80-6 (Dec. 31, 1980) (CAUTION: see § 1.05[3][c], above, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n9)Footnote 9. *Lab. Code § 243(a)*. The action may also be brought by the employee's legal representative, provided that the representative is an attorney licensed to practice law in California.

(n10)Footnote 10. *Lab. Code § 243(a)*.

(n11)Footnote 11. *See Lab. Code § 243(e)*.

(n12)Footnote 12. *Lab. Code § 243(b)*. It appears that the statute is intended to require the employer to cease doing business within 30 days from the issuance of the TRO unless it deposits the required bond, but the language of the statute is not entirely clear in this respect.

(n13)Footnote 13. *Lab. Code § 243(b)*.

(n14)Footnote 14. *Lab. Code § 243(b)*.

(n15)Footnote 15. *Lab. Code § 243(b)*.

(n16)Footnote 16. *Lab. Code § 243(d)*.

(n17)Footnote 17. *See Lab. Code § 243(d)*.

(n18)Footnote 18. *Lab. Code § 243(c)*.

(n19)Footnote 19. *Lab. Code § 243(c)*.

(n20)Footnote 20. *See Lab. Code § 243(c)*.

(n21)Footnote 21. *Lab. Code § 243(f)*.

(n22)Footnote 22. *See Lab. Code §§ 270, 270.5, 270.6, 271, 272, 2675*.

(n23)Footnote 23. *See also* D.L.S.E. Interpretive Bulletin No. 88-3(July 22, 1988) (explaining application of statutes requiring wage security bonds in garment industry) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and *IWC Wage Orders*); *C & C Partners, Ltd. v. Dept. of Indus. Relations* (1999) 70 Cal. App. 4th 603, 606, 82 Cal. Rptr. 2d 783 (garment manufacturer who has been cited and penalized under any garment manufacturing statute within preceding three years must post bond in order to secure registration certificate).

(n24)Footnote 24. *See Lab. Code § 203.5(a)*.

(n25)Footnote 25. *Lab. Code § 203.5(b)*.



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DIVISION I WAGE AND HOUR LAWS

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Subpart 6. Criminal Sanctions and Bond Requirements

1-5 California Employment Law §§ 5.63 through 5.69

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§§ 5.63[Reserved]



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DIVISION I WAGE AND HOUR LAWS

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Part B. ADDITIONAL REMEDIES FOR FAILURE TO PAY MINIMUM WAGES OR OVERTIME
COMPENSATION

Subpart 1. California Law

1-5 California Employment Law § 5.70

AUTHOR: By Susan Spurlark, J.D.

§ 5.70 Available Remedies

An employee who receives less than the minimum wage or overtime compensation required under the California wage orders may pursue the general administrative procedures for resolving wage claims under *Labor Code section 98*, as described in §§ 5.10-5.18. Alternatively, *Labor Code sections 1193.5* and *1195-1197.1* provide additional administrative remedies specifically designed to remedy unlawful failure to pay minimum wages.ⁿ¹ These provisions are discussed in § 5.71. Civil actions for violation of the minimum wage and overtime compensation provisions of the wage orders may also be brought by the DLSEⁿ² or by the employee;ⁿ³ they are discussed in §§ 5.71[6] and 5.72, respectively.

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Minimum Wage Labor & Employment Law Wage & Hour Laws Coverage & Definitions Overtime & Work Period

FOOTNOTES:

(n1)Footnote 1. *See also* D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n2)Footnote 2. *See Lab. Code* §§ 1193.6, 1194.5.

(n3)Footnote 3. *See Lab. Code* § 1194.



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

Part B. ADDITIONAL REMEDIES FOR FAILURE TO PAY MINIMUM WAGES OR OVERTIME COMPENSATION

Subpart 1. California Law

1-5 California Employment Law § 5.71

AUTHOR: By Susan Spurlark, J.D.

§ 5.71 Role of Division of Labor Standards Enforcement

[1] Acceptance and Investigation of Complaints

Any person may register a complaint with the DLSE that an employee has been paid less than the minimum wage.ⁿ¹ Since the provision does not specifically require that the employee file the complaint, the complaint may be filed anonymously or by one person on behalf of others. The DLSE is required to investigate all such complaints and "take all proceedings necessary to enforce payment of a wage not less than the minimum wage."ⁿ²

The DLSE is authorized to supervise payment of any unpaid minimum wages or overtime compensation found to be owed to any employee under *Labor Code sections 1171 et seq.* or the provisions of the wage orders.ⁿ³ An employee who accepts payment of sums found to be due on demand of the DLSE thereby waives his or her right to sue the employer directly under *Labor Code section 1194*.ⁿ⁴

[2] Administrative Rulings

The Labor Commissioner and DLSE are authorized to administer and enforce *Labor Code sections 1171 et seq.* and wage orders promulgated thereunder.ⁿ⁵ On request, the Labor Commissioner is required to make available enforcement policy statements and interpretations of the California IWC wage orders.ⁿ⁶

The policy statements, interpretive bulletins and informational pamphlets issued by the DLSE have long been given great weight by appellate courts in California when determining questions regarding the meaning of the wage orders and other labor laws.ⁿ⁷ However, the Supreme Court, in *Tidewater Marine Western, Inc. v. Bradshaw* ⁿ⁸ has concluded that these written interpretations should be given "no weight" in interpreting the wage orders. *Tidewater* involved the application of wage orders 4-89 and 9-90 to the employers' offshore activities. Defendants relied on the interpretations issued by the DLSE. The Supreme Court noted that the IWC, when promulgating its wage orders must comply with rule-making procedures, including public hearings and input, which are analogous to the notice and public hearing

procedures of the Administrative Procedures Act, *Government Code section 11340.5, subdivision a*, (APA). The Court contrasted this with the DLSE, which utilizes no such procedures when it issues its interpretations. It then determined that the DLSE interpretations constituted regulations because they are rules of "general application" and are interpretations of the wage laws. Accordingly, the Supreme Court concluded that the interpretations set forth in the DLSE Enforcement Policies and Interpretations Manual and in other publications constitute regulations and are therefore void because they are not promulgated in accordance with the APA.ⁿ⁹

[3] Examination of Employer's Records

The Industrial Welfare Commission (IWC), which promulgates the wage orders,ⁿ¹⁰ and the DLSE are charged with ascertaining the wages paid to all employees in California and the hours and conditions of employment in various occupations, and with investigating the "health, safety, and welfare of such employees."ⁿ¹¹ Employers are required to give representatives of the DLSE and members of the IWC access to places of business to secure information or make any authorized investigation; allow inspection and/or make excerpts from books, reports, contracts, payrolls, documents or papers relating to the employment of employees; maintain certain records;ⁿ¹² and furnish the IWC with requested reports and information.ⁿ¹³ Refusal to comply is a misdemeanor.ⁿ¹⁴ Willful failure either to maintain the required records or to allow IWC members or DLSE employees to inspect records subjects an employer to a civil penalty.ⁿ¹⁵ For a full discussion of the DLSE's investigatory powers and limitations on the right to examine employer records, see §§ 5.02 [3] and 5.10.

[4] Penalties

[a] Issuance of Citation of Penalty

Labor Code section 1197.1(b) provides that if, after an investigation, the Labor Commissioner determines that an employee has been paid "wages less than the minimum," the Commissioner "may issue" a penalty citation. The Commissioner may also assess such penalties at the conclusion of a "Berman" hearing under *Labor Code section 98(a)*.ⁿ¹⁶ For enforcement purposes, the Labor Commissioner has interpreted payment of "wages less than the minimum" to include (1) payment of less than the minimum amount required under an IWC wage order; (2) improper credit of tips against the minimum wage; (3) deductions for meals without an advance written agreement; (4) unauthorized deductions for cash shortages or breakage; (5) failure to pay for all hours worked, including on-duty meal periods; and (6) paying a piece rate which does not equal the minimum wage.ⁿ¹⁷ The penalty set forth in *Labor Code section 1197.1* is not applicable to (1) nonpayment of wages for overtime when the hourly rate received for all hours is higher than the minimum wage; (2) nonpayment of split-shift premiums or reporting time pay; (3) failure to provide tools, equipment or uniforms or the maintenance of those items; or (4) overcharging for room and board where it is *not* credited against the minimum wage.ⁿ¹⁸

Labor Code section 1197.1(a) provides the following penalties for such violations:

1. For any initial violation that is intentionally committed, \$100 for each underpaid employee for each pay period for which the employee is underpaid; and
2. For each subsequent violation for the same specific offense, \$250 for each underpaid employee for each pay period for which the employee is underpaid, regardless of whether the initial violation is intentionally committed.

Because the statute provides that the Commissioner "may" issue a penalty when it finds a violation,ⁿ¹⁹ the DLSE takes the position that the Commissioner is entitled to "exercise judgment as to whether penalties should be assessed."ⁿ²⁰ As interpreted by the DLSE, intentional violations are ones that are "engaged in deliberately or knowingly, rather than accidentally or inadvertently."ⁿ²¹ In assessing whether there is an intentional violation, "evidence of a good-faith

dispute, or the payment of wages as a result of a voluntary settlement conference or other mitigating circumstances may be substantial evidence of an absence of intentional violation."ⁿ²² Subsequent violations include any violation occurring after notice of a previous violation, irrespective of whether a citation was issued, and the "same specific offense" includes any failure to pay minimum wages, regardless of the reason.ⁿ²³

Generally, penalties will not be pyramided; that is, if the employer has failed to pay the minimum wage to a single employee as a result of several improper practices (for example, improper crediting of tips *and* overcharging for meals), the failure will nevertheless be considered one violation.ⁿ²⁴ However, if there are separate violations applicable to different employees, each of those violations may be attributed to the affected employee and multiple penalties may be assessed.ⁿ²⁵ In addition, a violation at one branch of a business (having a separate manager) will not be considered a previous violation, for purposes of assessing penalties against the employer, if a violation is subsequently committed at another branch of the business under different supervision.ⁿ²⁶

The citation must be in writing and describe the nature of the violation and refer to any statutory provisions allegedly violated.ⁿ²⁷ The citation may be served personally or by registered mail.ⁿ²⁸ An employer who does not contest the citation must pay the penalty within 15 business days after issuance of the citation.ⁿ²⁹ In addition, the Labor Commissioner may file a certified copy of the uncontested citation or proposed assessment in the appropriate superior court, and the court clerk must enter judgment for the state against the employer in the amount shown on the citation or the proposed assessment.ⁿ³⁰ The Labor Commissioner must take all appropriate action, including bringing a civil action, to enforce the citation and recover the penalty.ⁿ³¹

In addition to these civil penalties, the employer may be subject to a civil action by the affected employee(s).ⁿ³² The employer or its agent who violates these laws is also subject to criminal prosecution, particularly when the violations are flagrant.ⁿ³³

[b] Contesting Proposed Citation/Assessment of Penalty

Within 15 business days after the service of a citation assessing a civil penalty pursuant to *Labor Code Section 1197.1(b)*, the employer may request an informal hearing to contest the citation and penalty by notifying the office of the Labor Commissioner listed on the citation.ⁿ³⁴ This request may be either oral or written, and notice of the hearing by the DLSE may be oral with a confirming letter.ⁿ³⁵ The DLSE requires that the offender receive at least 3 days' notice of the hearing.ⁿ³⁶ Within 30 days after the request, the Labor Commissioner, or his or her designee, must hold a hearing and affirm, modify, or dismiss the citation.ⁿ³⁷ The decision of the Labor Commissioner must consist of a notice of findings, findings, and an order, and must be served on all parties within 15 days after the hearing.ⁿ³⁸ Any amount found due as a result of the hearing becomes due and payable 45 days after service of the Labor Commissioner's decision.ⁿ³⁹ Within 45 days after service of the decision, the employer may take a writ of mandate to the appropriate superior court.ⁿ⁴⁰ The employer must pay any judgment and costs ultimately rendered against it by the court.ⁿ⁴¹ The Labor Commissioner is required to take all appropriate action, including a civil action, to enforce the citation and recover the penalty.ⁿ⁴²

[5] Injunction

Labor Code Section 1194.5 authorizes the DLSE to seek an injunction in a court of competent jurisdiction barring further violations "in any case in which a person employing an employee has willfully violated any of the laws, regulations, or orders governing the wages, hours of work, or working conditions of such employee" If an injunctive action is brought it is governed by the procedures generally applicable to injunctive procedures and actions by the Labor Commissioner.ⁿ⁴³

[6] Civil Action by Agency on Behalf of Employee

The DLSE or the Department of Industrial Relations (DIR) may institute civil actions on behalf of employees who have been paid less than the minimum wage or who did not receive the required overtime compensation.ⁿ⁴⁴ The affected employees must consent to such an action.ⁿ⁴⁵ An employee's consent to institution of a civil action by the DLSE or DIR pursuant to *Labor Code Section 1193.6* waives the employee's right to institute a civil action against the employer pursuant to *Labor Code Section 1194*, unless the Labor Commissioner's action is dismissed without prejudice by the DLSE or the DIR.ⁿ⁴⁶

If a civil suit is instituted, the Labor Commissioner may recover "costs of suit" in addition to unpaid wages and compensation. If recovered, costs will then be paid if there is sufficient money after payment of the wages, penalties, or demands due to the employees.ⁿ⁴⁷ Although the DLSE is exempt from paying the filing fees and other fees charged by a court in connection with litigation,ⁿ⁴⁸ it is not exempt from paying the costs of litigation specified in *Code of Civil Procedure section 1033.5*, incurred by an opponent, when the opponent is the prevailing party under *Code of Civil Procedure section 1032*.ⁿ⁴⁹

On or after January 1, 1992, the DLSE or DIR may commence and prosecute the civil action with or without the consent of the employee. If the action is commenced on or after that date, the DLSE or DIR may also recover interest on the unpaid wages or compensation. In addition to the wages, compensation, and interest awarded, the court must award costs of suit plus reasonable attorney's fees.ⁿ⁵⁰ If the action is brought to recover amounts unpaid in violation of the minimum wage fixed by an order of the commission, the court may also award liquidated damages equal to the amount of wages unlawfully unpaid plus interest. Liquidated damages are not recoverable for failure to pay overtime compensation.ⁿ⁵¹

If within six months after collection, the Labor Commissioner cannot deliver any monies recovered to the person to whom they are due, the monies are deposited in the Industrial Relations Unpaid Wage Fund in the State Treasury until that person can be found.ⁿ⁵²

The owners, officers and managers of corporate employers cannot be personally liable in an action by the Commissioner under *Labor Code Section 1193.6* under the IWC "employer" definition.ⁿ⁵³ In *Reynolds v. Bement*,ⁿ⁵⁴ the California Supreme Court held that the IWC employer definition did not apply to hold corporate control figures liable for the failure of the corporation to pay overtime in an action by an employee under *Labor Code Section 1194*. In *Bradstreet v. Wong*,ⁿ⁵⁵ the Court of Appeal found that *Labor Code Section 1193.6*, like *Labor Code Section 1194*, uses the term "employee" but does not define it, leaving the court with the same basic issue of statutory interpretation as the Court in *Reynolds*, i.e., that neither the term "employer" nor the term "employee" are statutorily defined in the substantive Labor Code provisions that were allegedly violated. Absent a clear and unequivocal expression of contrary legislative intent, the court assumed the Legislature intended these terms would be interpreted in accordance with the common law.ⁿ⁵⁶ Although the court cautioned against reading the narrow holding in *Reynolds* as a categorical decision that all provisions of the Labor Code using the term "employer" or "employee" must be interpreted in accordance with the common law definitions, the court concluded that the mere reference in *Labor Code Section 1193.6* to "the orders of the commission" did not evince a clear and unequivocal legislative intent to depart from the established common law meaning of those terms, and that the trial court correctly concluded that, under the common law definition, the corporations, not the individual owners, directors and managers, were the employers liable for the alleged violations of the Labor Code arising out of the failure of the corporations to pay its employees.

Legal Topics:

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

Labor & Employment Law
 Wage & Hour Laws
 General Overview
 Labor & Employment Law
 Wage & Hour Laws
 Administrative Proceedings & Remedies
 General Overview
 Labor & Employment Law
 Wage & Hour Laws
 Administrative Proceedings & Remedies
 Investigative Authority
 Labor & Employment Law
 Wage & Hour Laws
 Coverage & Definitions
 General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 1195.*

(n2)Footnote 2. *Lab. Code § 1195; see Lab. Code § 1193.5(a).*

(n3)Footnote 3. *Lab. Code § 1193.5(b).*

(n4)Footnote 4. *Lab. Code § 1193.5(b); see discussion in § 5.72.*

(n5)Footnote 5. *See Lab. Code §§ 61, 1193.5.*

(n6)Footnote 6. *Lab. Code § 1198.4.*

(n7)Footnote 7. *See , Ghory v. Al-Lahham (1989) 209 Cal. App. 3d 1487, 1492, 257 Cal. Rptr. 924 (upholding DLSE construction of wage orders; contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized); Keyes Motors, Inc. v. Division of Labor Standards Enforcement (1987) 197 Cal. App. 3d 557, 564, 242 Cal. Rptr. 873 ; Alcala v. Western Ag Enters. (1986) 182 Cal. App. 3d 546, 551, 227 Cal. Rptr. 453 .*

(n8)Footnote 8. *Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 568-578, 59 Cal. Rptr. 2d 186, 927 P.2d 296 .*

(n9)Footnote 9. [Reserved]

(n10)Footnote 10. *See generally* discussion in ch. 1.

(n11)Footnote 11. *See Lab. Code §§ 61, 1173, 1193.5(a).*

(n12)Footnote 12. For full discussion of recordkeeping requirements, *see* ch. 7.

(n13)Footnote 13. *Lab. Code § 1174.*

(n14)Footnote 14. *Lab. Code § 1175.*

(n15)Footnote 15. *See Lab. Code § 1174.5.*

(n16)Footnote 16. D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: *see § 1.05[3][c]*, *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n17)Footnote 17. D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: *see § 1.05[3][c]*, *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders). For discussion of rules governing minimum wages and allowable credits against minimum wage requirements, *see* Chapter 2.

(n18)Footnote 18. *See* D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: *see § 1.05[3][c]*, *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n19)Footnote 19. *See Lab. Code § 1197.1(b).*

(n20)Footnote 20. D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: *see § 1.05[3][c]*, *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n21)Footnote 21. D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: *see § 1.05[3][c]*, *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n22)Footnote 22. D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n23)Footnote 23. D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n24)Footnote 24. *See* D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n25)Footnote 25. D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n26)Footnote 26. D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n27)Footnote 27. *Lab. Code* § 1197.1(b).

(n28)Footnote 28. *Lab. Code* § 1197.1(b); *see Gov. Code* § 11505(c).

(n29)Footnote 29. *Lab. Code* § 1197.1(d).

(n30)Footnote 30. *Lab. Code* § 1197.1(e).

(n31)Footnote 31. *See Lab. Code* § 1197.1(b), (f).

(n32)Footnote 32. *See Lab. Code* § 1194; *see also* discussion in § 5.72.

(n33)Footnote 33. *See Lab. Code* § 1199(b); D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984).

(n34)Footnote 34. *Lab. Code* § 1197.1(c).

(n35)Footnote 35. D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n36)Footnote 36. D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n37)Footnote 37. *Lab. Code* § 1197.1(c).

(n38)Footnote 38. *Lab. Code* § 1197.1(c). *See Code Civ. Proc.* § 1013.

(n39)Footnote 39. *Lab. Code* § 1197.1(c).

(n40)Footnote 40. *Lab. Code* § 1197.1(c).

(n41)Footnote 41. *Lab. Code* § 1197.1(c).

(n42)Footnote 42. *Lab. Code* § 1197.1(b), (f).

(n43)Footnote 43. *See generally Lab. Code* §§ 101-102; *Civ. Code* §§ 3420-3423; *Code Civ. Proc.* §§ 526, 527.

(n44)Footnote 44. *Lab. Code* § 1193.6.

(n45)Footnote 45. *Lab. Code* § 1193.6.

(n46)Footnote 46. *Lab. Code § 1193.6; see discussion in § 5.72.*

(n47)Footnote 47. *See Lab. Code §§ 101, 102, 1193.6.*

(n48)Footnote 48. *See Lab. Code § 101; Department of Industrial Relations v. Lee (1999) 73 Cal. App. 4th 763, 769, 86 Cal. Rptr. 2d 710, citing Gue v. Superior Court (1934) 1 Cal. App. 2d 91, 97-98, 36 P.2d 202 (allowing DSLE to be charged for court reporter fees).*

(n49)Footnote 49. *Department of Industrial Relations v. Lee (1999) 73 Cal. App. 4th 763, 769, 86 Cal. Rptr. 2d 710.*

(n50)Footnote 50. *Lab. Code § 1193.6.*

(n51)Footnote 51. *Lab. Code § 1194.2(a), (c).*

(n52)Footnote 52. *See Lab. Code §§ 96.7, 1193.5.*

(n53)Footnote 53. *Bradstreet v. Wong (2008) 161 Cal. App. 4th 1440, 2008 Cal. App. LEXIS 553, *14-*26.*

(n54)Footnote 54. *Reynolds v. Bement (2005) 36 Cal. 4th 1075, 32 Cal. Rptr. 3d 483, 116 P.3d 1162. See also Jones v. Gregory (2006) 137 Cal. App. 4th 798, 40 Cal. Rptr. 3d 581. For discussion, see § 5.72[1].*

(n55)Footnote 55. *Bradstreet v. Wong (2008) 161 Cal. App. 4th 1440, 2008 Cal. App. LEXIS 553.*

(n56)Footnote 56. *Bradstreet v. Wong (2008) 161 Cal. App. 4th 1440, 2008 Cal. App. LEXIS 553, *19-*20.*



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

Part B. ADDITIONAL REMEDIES FOR FAILURE TO PAY MINIMUM WAGES OR OVERTIME COMPENSATION

Subpart 1. California Law

1-5 California Employment Law § 5.72

AUTHOR: By Susan Spurlark, J.D.

§ 5.72 Civil Action by Employee

[1] Right of Action

Any employee who has been paid less than the required minimum wage or overtime compensation is entitled to institute a civil action to recover any sums that are due.ⁿ¹ The averaging method utilized by the federal courts for assessing a violation of the federal minimum wage law is inappropriate for determining an employer's minimum wage obligation under California law. California's labor statutes reflect a strong public policy in favor of full payment of wages for all hours worked.ⁿ² The employee is additionally entitled to recover interest on the unpaid wages or compensation, plus reasonable attorney's fees.ⁿ³ If the employee seeks recovery of amounts unpaid in violation of the minimum wage fixed by an order of the IWC, the court may also award liquidated damages equal to the amount of wages unlawfully unpaid plus interest. An employee may not recover liquidated damages for failure to pay overtime compensation.ⁿ⁴ The waiting time penalties prescribed in *Labor Code section 203* may also apply in an action to recover payment of minimum wage.^{n4.1} When a violation of the minimum wage law is claimed, waiting time penalties must be assessed by arriving at a daily wage using the minimum wage claimed by the employee.^{n4.2} The right to bring a civil action cannot be waived by the employee's agreement to work at a rate less than the minimum wage or without overtime compensation, or by acquiescence in payment of less than the statutorily required amounts.ⁿ⁵

If the employee in such an action proves that he or she performed work for which he or she did not receive the proper minimum wage or overtime compensation and produces sufficient evidence to permit a reasonable inference as to the amount and extent of that work, the burden shifts to the employer to come forward with evidence of the precise amount of work performed or to negate the inference drawn from the employee's evidence.ⁿ⁶ If the employer fails to produce such evidence because it has failed to keep proper records of the employee's time, the court may award damages based on the employee's evidence, even if such damages only approximate the actual hours worked.ⁿ⁷

An action for recovery of unpaid overtime compensation must be brought within the three-year limitations period

provided by *Code of Civil Procedure Section 338(a)* for actions based on a liability created by statute, other than a penalty or forfeiture.ⁿ⁸ A separate cause of action for overtime compensation accrues on each regular pay day immediately following the work period during which the services were performed and for which overtime compensation is claimed.ⁿ⁹ Thus, an action for unpaid overtime compensation under section 338(a) is timely only with respect to those paydays that occur within three years prior to commencement of the action.ⁿ¹⁰ However, employees also may be permitted to pursue overtime claims under the four-year statute of limitations contained in the Unfair Business Practices Act, *Business & Professions Code section 17200 et seq.*

Individuals who exercise corporate control over a corporate employer may not be held personally liable for overtime or other compensation owed an employee under *Labor Code section 1194*. Further, although corporate directors may be personally liable for tortious activity, a simple failure to comply with statutory overtime requirements does not qualify.^{n10.1} Addressing an issue left open in *Reynolds*, a court of appeal has held that a chief executive officer of a corporation, even one with operational control, is not liable for the corporation's delinquencies in paying wages, even if the Department of Labor Standards Enforcement, rather than the individual employee, brings the action in court.^{n10.2} The court also opined that dicta in *Reynolds* leaving open questions concerning the DLSE's use, in administrative proceedings, of the IWC employer definition may be an empty one, since "Berman" hearings are reviewed *de novo* in superior court at the request of either party.^{n10.3} Additionally, even in the administrative context, the DLSE in its adjudicatory role is obligated to follow the substantive law. Nothing in that process precludes hearing officers from finding individual corporate agents liable for unpaid wages when liability is proven on established common law theories, such as alter ego, or statutory theories. But those are the only theories on which liability against an individual corporate officer may be based.^{n10.4}

Any provision of the Labor Code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of the Labor Code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in *Labor Code section 2699.3*.ⁿ¹⁰ For these purposes, an aggrieved employee is any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.ⁿ¹¹ An aggrieved employee may not maintain an action if the agency or any of its departments, divisions, commissions, boards, agencies, or employees, on the same facts and theories, cites a person for a violation of the same section or sections of the Labor Code under which the aggrieved employee is attempting to recover a civil penalty on behalf of himself or herself or others, or initiates a proceeding pursuant to *Labor Code section 98.3*.ⁿ¹² Before an employee may file an action seeking to recover civil penalties for violations of any of the Labor Code provisions enumerated in *Labor Code § 2699.5*, however, the employee must comply with the Labor Code Private Attorneys General Act's administrative procedures as set forth in *Labor Code § 2699.3(a)*. Those procedures include providing notice to the Labor and Workforce Development Agency (LWDA) and the employer and waiting a prescribed period of time to permit the LWDA to investigate and to decide whether to cite the employer for the alleged violations.^{n12.1}

For these purposes, whenever the Labor and Workforce Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees has discretion to assess a civil penalty, a court is authorized to exercise the same discretion, subject to the same limitations and conditions, to assess the penalty.ⁿ¹³ The civil penalty for violation of all provisions of the Labor Code except those for which a civil penalty is specifically provided is as follows:ⁿ¹⁴

- (1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is \$500.
- (2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation.

(3) If the alleged violation is a failure to act by the Labor and Workplace Development Agency, or any of its departments, divisions, commissions, boards, agencies, or employees, there is no civil penalty.

In any action by an aggrieved employee seeking recovery of a civil penalty available under *Labor Code section 2699 (a)* or *(f)*, a court may award a lesser amount than the maximum civil penalty amount if, based on the facts and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory.^{n14.1}

Any employee who prevails in this action is entitled to an award of reasonable attorneys' fees and costs.ⁿ¹⁵ Nothing in *Labor Code section 2699* operates to limit an employee's right to pursue other remedies available under state or federal law, either separately or concurrently with an action taken under Section 2699.ⁿ¹⁶ Retroactive to January 1, 2004, and applicable to all pending proceedings, no action may be brought for any violation of a posting, notice, agency reporting, or filing requirement of the Labor Code, except where the filing or reporting requirement involves mandatory payroll or workplace injury reporting.^{n16.1}

Civil penalties recovered against a person who employs one or more employees are distributed as follows: 75% to the Labor and Workforce Development Agency for education of employers and employees about their rights and responsibilities under the Labor Code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes, and 25% to the aggrieved employees.ⁿ¹⁷ Civil penalties recovered against a person who does not employ one or more employees are to be distributed to the Labor and Workforce Development Agency for enforcement of labor laws and education of employers and employees about their rights and responsibilities under the Labor Code, to be continuously appropriated to supplement and not supplant the funding to the agency for those purposes.ⁿ¹⁸

Retroactive to January 1, 2004, and applicable to all pending proceedings, the superior court must review and approve any penalties sought as part of a proposed settlement agreement pursuant to *Labor Code section 2699*.^{n18.1}

Nothing contained in these provisions is intended to alter or otherwise affect the exclusive remedy provided by the workers' compensation provisions.ⁿ¹⁹

A civil action by an aggrieved employee pursuant to *Labor Code 2699(a)* or *(f)* alleging a violation of any provision listed in *Labor Code section 2699.5* may commence only after the following requirements have been met:^{n19.1}

(1) The aggrieved employee or representative must give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the alleged violation.

(2) The agency must notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 30 calendar days of the postmark date of the notice. Upon receipt of that notice or if no notice is provided within 33 calendar days of the postmark date of the notice, the aggrieved employee may commence a civil action pursuant to *Labor Code section 2699*. If the agency intends to investigate the alleged violation, it must notify the employer and the aggrieved employee or representative by certified mail of its decision within 33 calendar days of the postmark date of the notice. Within 120 calendar days of that decision, the agency may investigate the alleged violation and issue any appropriate citation. If the agency determines that no citation will be issued, it must notify the employer and aggrieved employee of that decision within five business days by certified mail. Upon receipt of that notice or if no citation is issued by the agency within the 158-day period or if the agency fails to provide timely or any notification, the aggrieved employee may commence a civil action. Notwithstanding any other provision of law, a plaintiff may as a matter of right

amend an existing complaint to add a cause of action arising under *Labor Code section 2699* at any time within 60 days of the specified time periods.

A civil action by an aggrieved employee pursuant to *Labor Code section 2699(a)* or *(f)* alleging a violation of any provision of the Labor Code provisions relating to occupational health and safety must meet specified requirements.^{n19.2} A civil action by an aggrieved employee pursuant to *Labor Code section 2699(a)* or *(f)* alleging a violation of any provision other than those listed in *Labor Code section 2699.5* or the occupational health and safety provisions may commence only after the following requirements have been met:^{n19.3}

- (1) The aggrieved employee or representative must give written notice by certified mail to the Labor and Workforce Development Agency and the employer of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the alleged violation.
- (2) The employer may cure the alleged violation within 33 calendar days of the postmark date of the notice. The employer must give written notice by certified mail within that period of time to the aggrieved employee or representative and the agency if the alleged violation is cured, including a description of actions taken, and no civil action pursuant to *Labor Code section 2699* may commence. If the alleged violation is not cured within the 33-day period, the employee may commence a civil action. No employer may avail himself or herself of the notice and cure provisions more than three times in a 12-month period for the same violation or violations contained in the notice, regardless of the location of the worksite.
- (3) If the aggrieved employee disputes that the alleged violation has been cured, the aggrieved employee or representative must provide written notice by certified mail, including specified grounds to support that dispute, to the employer and the agency. Within 17 calendar days of the postmark date of that notice, the agency must review the actions taken by the employer to cure the alleged violation, and provide written notice of its decision by certified mail to the aggrieved employee and the employer. The agency may grant the employer three additional business days to cure the alleged violation. If the agency determines that the alleged violation has not been cured or if the agency fails to provide timely or any notification, the employee may proceed with the civil action. If the agency determines that the alleged violation has been cured, but the employee still disagrees, the employee may appeal that determination to the superior court.

The time periods specified in *Labor Code section 2699.3* are not counted as part of the time limited for the commencement of the civil action to recover penalties under *Labor Code section 2699*.^{n19.4}

[2] FORM--Complaint for Minimum Wages or Overtime Compensation

[a] Comment

The form of complaint set forth in [b], *below*, is for use by an employee in an action under *Labor Code Section 1194* seeking damages for failure to pay minimum wages and/or overtime compensation as required under the California wage orders.ⁿ²⁰ The complaint includes the following allegations:

1. The existence of an employment relationship, including the dates of employment, position held, and the agreed-on wage rate and hours (Paragraphs 2 and 3);ⁿ²¹
2. Facts showing the actual hourly rate received and hours worked by the employee (Paragraph 4);ⁿ²²
3. References to the applicable portions of the relevant wage orders and/or statutory provisions with

1-5 California Employment Law § 5.72

respect to minimum wage rates and overtime hours (Paragraphs 5 and 6); and

4. The fact of nonpayment of the required minimum wage and/or overtime compensation (Paragraphs 7 and 8).

Violations of minimum wage and/or overtime compensation laws and orders may also involve violations of the provisions of the Labor Code governing payment of wages,ⁿ²³ and causes of action under those provisions or for breach of contractⁿ²⁴ may be included, when appropriate, as well as claims under *Business and Professions Code section 17200* for unfair business practices. For a form of complaint for recovery of unpaid wages, *see* § 5.41[2].

[b] Form Form

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [name], Defendant.	)	(Failure to Pay _____ [Minimum
	)	Wages and/or Overtime Compensation])
	)	[Civ. Code § 3287; Lab. Code §§ 1194, 1197, 1198]

Plaintiff alleges:

1. _____ [Allege capacity and residence of defendant, if a venue allegation is desired. See Paragraph 1 of form set out in § 5.41[2].]

2. _____ [Allege employment relationship between plaintiff and defendant. See Paragraph 2 of form set out in § 5.41[2].]

3. _____ [Allege terms of employment and, if appropriate, incorporate by reference the terms of any written employment agreement. See Paragraph 3 of form set out in § 5.41[2].]

4. During the period from _____ [date] to _____ [date], plaintiff worked a total of _____ hours and received a total compensation for that period of \$ _____. A detailed statement of the days worked, the hours worked each day, and the payment received therefor is attached hereto as Exhibit _____ and incorporated herein by reference.

5. Labor Code Section(s) _____ [identify appropriate provisions, e.g., 1197 and/or 1198] provide(s) that it is unlawful to _____ [set forth terms of the applicable statute, e.g., pay less than the minimum wage established by law or to employ persons for longer than the hours set by the Industrial Welfare Commission or under conditions prohibited by the applicable wage orders].

6. At all times relevant herein, Industrial Welfare Commission Wage Order No. _____ [state number and/or give citation to the California Code of Regulations provision, e.g., 5-2001 (8 Cal. Code Reg. § 11050)], which applies to plaintiff's employment by defendant, provided for payment of a minimum wage of \$ _____ [state applicable minimum wage] per hour and that employees employed for more than _____ [state relevant portions of the regulations governing overtime work, e.g., 8 hours in one day are entitled to payment at the rate of time and one half for hours in excess of 8 in one day].

7. Under the provisions of the Wage Order referred to in Paragraph 6, plaintiff should have received a total of \$ _____ for hours worked during the period referred to in Paragraph 4. Defendant therefore owes plaintiff the sum of \$ _____, representing the difference between the amount of wages owed pursuant to the Wage Order and the amount actually paid to plaintiff. Defendant has failed and refused and continues to fail and refuse to pay plaintiff the amount owed.

8. Defendant's failure to pay plaintiff the sum of \$ _____, as required by the applicable Wage Order, violates the provision of Labor Code _____ [state applicable code provision, e.g., 1197 and/or 1198] and is therefore unlawful.

WHEREFORE plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the amount of \$ _____, representing the amount of unpaid _____ [minimum wages and/or overtime compensation] owed on _____ [date];
2. For interest on any _____ [minimum wages and/or overtime compensation] due from the day such amounts were due;
- [3. For liquidated damages pursuant to *Labor Code Section 1194.2(a)* in the amount of \$ _____, which amount equals the minimum wages unpaid and interest on that amount;]
4. For an award of civil penalties pursuant to *Labor Code Section 2699*.
5. For reasonable attorney's fees pursuant to *Labor Code Section 1194(a)*;
6. For costs of suit incurred herein; and
7. For such other and further relief as the court may deem appropriate.

_____ [signature]

Attorney for Plaintiff

[Verification, if desired.

See Code Civ. Proc. §§ 446, 2015.5 for required form.]

[3] Defenses

In addition to admitting or denying the allegations of the complaint (for example, denying that an employment relationship existed or that the wages paid to the plaintiff violated the applicable minimum wage or overtime requirements), the employer's answer should set forth any applicable affirmative defenses,ⁿ²⁵ including the following, as appropriate:

1. The employer and/or employee is exempt from the minimum wage and/or overtime compensation requirements of the wage orders;ⁿ²⁶
2. The hours claimed are not "hours worked" within the meaning of the wage orders, so that minimum wage and overtime compensation need not be paid for those hours;ⁿ²⁷

3. The employee was properly paid a subminimum wage pursuant to the provisions of the wage orders;ⁿ²⁸ or

4. Liquidated damages should be denied or reduced because the employer's act or omission was in good faith and the employer had reasonable grounds for believing that the act or omission did not violate any Labor Code provision relating to minimum wage or any order of the IWC.ⁿ²⁹

Note that the fact that an employee agreed to work for less than the legal minimum wage is *not* a defense to such an action.ⁿ³⁰

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Minimum Wage

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 1194*. For the standard jury instruction on the essential factual elements of a cause of action for nonpayment of minimum wage, *see* CACI 2701. For the CACI special verdict form for a claim of nonpayment of minimum wage, *see* CACI VF-2701. For the standard jury instruction on the essential factual elements of a cause of action for nonpayment of overtime compensation, *see* CACI 2702. For the CACI special verdict form for nonpayment of overtime compensation, *see* CACI VF-2702. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n2)Footnote 2. *Armenta v. Osmose* (2005) 135 Cal. App. 4th 314, 321-324, 37 Cal. Rptr. 3d 460. For discussion, *see* § 2.02[1][d].

(n3)Footnote 3. *Lab. Code § 1194(a)*; *see Espinoza v. Classic Pizza, Inc.* (2003) 114 Cal. App. 4th 968, 975, 8 Cal. Rptr. 3d 381 (trial court erroneously calculated interest on annual basis, where plaintiff's overtime wages accrued on weekly basis, so that he was entitled to prejudgment interest computed from date on which each of his overtime payments was due); *Earley v. Superior Court* (2000) 79 Cal. App. 4th 1420, 1429-1430, 95 Cal. Rptr. 2d 57 (*Lab. Code § 1194* controls award of attorney's fees on action for unpaid overtime, not *Lab. Code § 218.5*); *see also Bell v. Farmers Ins. Exchange* (2001) 87 Cal. App. 4th 805, 829-833 (*Lab. Code § 1194* does not authorize award of interim attorney's fees, must be final judgment).

(n4)Footnote 4. *Lab. Code § 1194.2(a), (c)*.

(n5)Footnote 4.1. *See Armenta v. Osmose* (2005) 135 Cal. App. 4th 314, 325-326, 37 Cal. Rptr. 3d 460 (in action to recover minimum wage for hours not covered by collective bargaining agreement, evidence supported trial court's award of waiting time penalties under *Lab. Code § 203*, where evidence showed employer was aware employees were not being compensated for nonproductive time and that employer's failure to pay for nonproductive time was intentional and willful).

(n6)Footnote 4.2. *See Armenta v. Osmose* (2005) 135 Cal. App. 4th 314, 325-326, 37 Cal. Rptr. 3d 460.

(n7)Footnote 5. *See Lab. Code § 1194*; *Gregory v. RSWL SCIE* (9th Cir. 2003) 317 F.3d 1050, 1054 n.5 (employer's argument that employees covered by CBA gave up statutory right to premium wage rates for all overtime hours worked in exchange for CBA's benefits flies in face of *Lab. Code § 1194(a)*; CBA must include clear and unmistakable language waiving covered employee's right for court even to consider whether it could be given effect); *Ghory v. Al-Lahham* (1989) 209 Cal. App. 3d 1487, 1492, 257 Cal. Rptr. 924; *Bartholomew v. Heyman Properties*

(1955) 132 Cal. App. 2d Supp. 889, 893-895 , 281 P.2d 921 .

(n8)Footnote 6. *Hernandez v. Mendoza* (1988) 199 Cal. App. 3d 721, 727, 245 Cal. Rptr. 36 (quoting *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687 , *superseded by statute on other grounds, see 29 U.S.C. § 251 et seq.*).

(n9)Footnote 7. *See Hernandez v. Mendoza* (1988) 199 Cal. App. 3d 721, 727, 245 Cal. Rptr. 36 . For discussion of recordkeeping requirements, *see* ch. 7. For the standard jury instruction on the jury's ability to estimate hours worked on the employer's failure to present proper proof of overtime hours worked, *see* CACI 2703. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n10)Footnote 8. *Aubry v. Goldhor* (1988) 201 Cal. App. 3d 399, 404, 247 Cal. Rptr. 205 .

(n11)Footnote 9. *Aubry v. Goldhor* (1988) 201 Cal. App. 3d 399, 406, 247 Cal. Rptr. 205 .

(n12)Footnote 10. *See Aubry v. Goldhor* (1988) 201 Cal. App. 3d 399, 406, 247 Cal. Rptr. 205 .

(n13)Footnote 10.1. *Reynolds v. Bement* (2005) 36 Cal. 4th 1075, 1084-1092, 32 Cal. Rptr. 3d 483 (had Legislature meant in *Lab. Code § 1194* to expose to personal civil liability any corporate agent who exercises control over employee's wages, hours, or working conditions, it would have manifested its intent more clearly than by mere silence after IWC's promulgation of Wage Order No. 9, which defines "employer" to include individual who exercises control over wages, hours, or working conditions of any person).

(n14)Footnote 10.2. *Jones v. Gregory* (2006) 137 Cal. App. 4th 798, 40 Cal. Rptr. 3d 581 .

(n15)Footnote 10.3. *Jones v. Gregory* (2006) 137 Cal. App. 4th 798, 806, 40 Cal. Rptr. 3d 581 . *See Lab. Code § 98.2.*

(n16)Footnote 10.4. *Jones v. Gregory* (2006) 137 Cal. App. 4th 798, 806-810, 40 Cal. Rptr. 3d 581 (trial court expressly declined to premise its ruling on alter ego theory), *citing Reynolds v. Bement* (2005) 36 Cal. 4th 1075, 1089, 32 Cal. Rptr. 3d 483, 116 P.3d 1162 , which cited *Lab. Code § 2673.1* (requiring personal guarantee of minimum wage and overtime compensation in garment manufacturing operations).

(n17)Footnote 10. *Lab. Code § 2699(a).*

(n18)Footnote 11. *Lab. Code § 2699(c).*

(n19)Footnote 12. *Lab. Code § 2699(h).* For discussion of *Lab. Code § 98.3*, *see* § 5.02[2][c].

(n20)Footnote 12.1. *Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal. App. 4th 365, 374-386, 36 Cal. Rptr. 3d 31 (trial court should have sustained, without leave to amend, former employer's demurrer to action by aggrieved employees, on behalf of themselves individually and as putative class representatives, as to causes of action seeking only civil penalties for violations of several Labor Code provisions specified in *Lab. Code § 2699.5*, where employees did not allege they had satisfied Act's prefiling notice and exhaustion requirements before initiating lawsuit; as to causes of action seeking civil penalties as well as unpaid wages and statutory penalties payable to employees, demurrer was properly overruled; only portions of the causes of action seeking civil penalties were objectionable based on failure to plead compliance with § 2699.3(a), and those portions seeking civil penalties would be stricken; demurrer was properly overruled as to causes of action not seeking civil penalties at all and as to cause of action under *Bus. & Prof. Code section 17200*).

(n21)Footnote 13. *Lab. Code § 2699(e)(1).*

(n22)Footnote 14. *Lab. Code § 2699(f).*

(n23)Footnote 14.1. *Lab. Code § 2699(e)(2). See Amaral v. Cintas Corp. No. 2 (2008) 163 Cal. App. 4th 1157, 1213-1214, 78 Cal. Rptr. 3d 572* (in action based on employer's violation of local living wage ordinance, trial court did not abuse its discretion in declining to reduce the PAGA penalties pursuant to *Lab. Code § 2699(e)(2)* on ground that court did not find reason to exercise its discretion to reduce amount of penalties; trial court was not required to ignore remedial purpose of PAGA when it declined to reduce penalties, and employer failed to show penalty award was unjust, arbitrary and oppressive, or confiscatory).

(n24)Footnote 15. *Lab. Code § 2699(g)(1).*

(n25)Footnote 16. *Lab. Code § 2699(g)(1).*

(n26)Footnote 16.1. *Lab. Code § 2699(g)(2). See Stats. 2004 Ch. 221 § 6(b)(1).*

(n27)Footnote 17. *Lab. Code § 2699(i).*

(n28)Footnote 18. *Lab. Code § 2699(j).*

(n29)Footnote 18.1. *Lab. Code § 2699(l). See Stats. 2004 Ch. 221 § 6(b)(1).*

(n30)Footnote 19. *Lab. Code § 2699(k).* For the exclusivity of the workers' compensation remedy, *see § 20.10 et seq.*

(n31)Footnote 19.1. *Lab. Code § 2699.3(a). See Lab. Code § 2699.5. See also Dunlap v. Superior Court (2006) 142 Cal. App. 4th 330, 335-343, 47 Cal. Rptr. 3d 614* (employee bringing action under *Lab. Code § 218* seeking damages and statutory penalties for violation of *Lab. Code §§ 203, 226(e)*, and *226.7(b)* was not required to exhaust administrative remedies under Act, because the penalties sought already were recoverable by employees prior to adoption of Act).

(n32)Footnote 19.2. *Lab. Code § 2699.3(b).* For discussion of *Lab. Code § 6300 et seq.*, governing occupational health and safety, *see Ch. 21.*

(n33)Footnote 19.3. *Lab. Code § 2699.3(c).*

(n34)Footnote 19.4. *Lab. Code § 2699.3(d).*

(n35)Footnote 20. *See 8 Cal. Code Reg. §§ 11010-11150*, PP 3, 4 (Cal. Wage Order Nos. 1-2001-15-2001); *see generally* discussion in chs. 2 and 3.

(n36)Footnote 21. *See 8 Cal. Code Reg. §§ 11010-11150*, PP 1, 3, 4 (Cal. Wage Order Nos. 1-2001-15-2001) (minimum wage and overtime must be paid to "employees"); *see also* discussion in ch. 1.

(n37)Footnote 22. For discussion of what constitutes "hours worked" for purposes of minimum wage and overtime compensation, *see ch. 3.*

(n38)Footnote 23. *See Lab. Code § 200 et seq.*

(n39)Footnote 24. *See Anders v. State Board of Equalization (1947) 82 Cal. App. 2d 88, 94, 185 P.2d 883* (IWC wage order provisions are part of contract between employer and employee).

(n40)Footnote 25. *See Code. Civ. Proc. § 431.30(b).*

(n41)Footnote 26. For a full discussion of complete and partial exemptions, *see chs. 2 and 3.*

(n42)Footnote 27. *See 8 Cal. Code Reg. §§ 11010-11150*, PP 2, 3, 4 (Cal. Wage Order Nos. 1-2001-15-2001). For

discussion of what constitutes "hours worked," *see* ch.3.

(n43)Footnote 28. *See* 8 Cal. Code Reg. §§ 11010-11150, PP 4, 6 (Cal. Wage Order Nos. 1-2001-15-2001). For discussion of circumstances under which certain employees may be paid subminimum wages, *see* ch. 2.

(n44)Footnote 29. *See* Lab. Code § 1194.2(b).

(n45)Footnote 30. *See* Lab. Code § 1194.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

Part B. ADDITIONAL REMEDIES FOR FAILURE TO PAY MINIMUM WAGES OR OVERTIME

COMPENSATION

Subpart 1. California Law

1-5 California Employment Law §§ 5.73 through 5.79

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§§ 5.73[Reserved]



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

Part B. ADDITIONAL REMEDIES FOR FAILURE TO PAY MINIMUM WAGES OR OVERTIME COMPENSATION

Subpart 2. Federal Law

1-5 California Employment Law § 5.80

AUTHOR: By Susan Spurlark, J.D.

§ 5.80 Types of Remedies Available Under Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) provides a remedial scheme for failure to pay federally required minimum wages and overtime compensation.ⁿ¹ There are six remedies available for FLSA violations. First, voluntary payment of unpaid minimum wages and overtime payments may be sought under the aegis of the Secretary of Labor through the Wage and Hour Division.ⁿ² Second, the Secretary of Labor may bring a civil action to recover unpaid minimum wages or overtime compensation and liquidated damages in any court of competent jurisdiction.ⁿ³ Third, the Secretary of Labor may seek injunctive relief in federal court against an employer who violates the minimum wage, overtime, discrimination, and other provisions of the FLSA.ⁿ⁴ Fourth, an employee or group of employees may bring a civil action in any court of competent jurisdiction for violation of the minimum wage and overtime rules or alleged discrimination or retaliation.ⁿ⁵ Fifth, civil penalties may be assessed against the employer for repeated or willful violations of minimum wage or overtime provisions.ⁿ⁶ Finally, criminal proceedings may be brought against an employer who willfully violates the FLSA.ⁿ⁷ These are the sole remedies allowed for violations of FLSA.ⁿ⁸

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Remedies General Overview Labor & Employment Law Wage & Hour Laws Remedies Backpay Labor & Employment Law Wage & Hour Laws Statutory Application General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. §§ 216, 217. For discussion of minimum wage and overtime requirements under the FLSA, *see* chs. 2 and 3.

(n2)Footnote 2. *See* 29 U.S.C. § 216(c); *see also* discussion in § 5.81[1].

(n3)Footnote 3. *See* 29 U.S.C. § 216(c); *see also* discussion in § 5.81[5].

(n4)Footnote 4. *See* 29 U.S.C. § 217; *see also* discussion in § 5.81[6].

(n5)Footnote 5. *See* 29 U.S.C. §§ 215(a)(3), 216(b); *see also* discussion in §§ 5.82, 5.83.

(n6)Footnote 6. *See* 29 U.S.C. § 216(e); *see also* discussion in § 5.81[7].

(n7)Footnote 7. *See* 29 U.S.C. § 216(a); *see also* discussion in § 5.81[4].

(n8)Footnote 8. *Lerwill v. Inflight Motion Pictures, Inc.* (N.D. Cal. 1972) 343 F. Supp. 1027, 1029 .



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

Part B. ADDITIONAL REMEDIES FOR FAILURE TO PAY MINIMUM WAGES OR OVERTIME

COMPENSATION

Subpart 2. Federal Law

1-5 California Employment Law § 5.81

AUTHOR: By Susan Spurlark, J.D.

§ 5.81 Role of Wage and Hour Division of Department of Labor

[1] Supervision Over Payment of Minimum Wages and/or Overtime Compensation

The Secretary of Labor is authorized to supervise payment of unpaid minimum wages and/or overtime compensation due pursuant to the provisions of the FLSA.ⁿ¹ Such payment may occur following an investigation by the Wage and Hour Division.ⁿ² When unpaid minimum wages and overtime compensation are recovered by the Secretary of Labor, they are held in a special deposit account for three years for purposes of payment to the affected employees and, if not payable in that time, are remitted to the United States Treasury.ⁿ³ An employee's acceptance of such amounts recovered by the Secretary as payment in full constitutes a waiver of that employee's right to bring a civil action against the employer pursuant to Title 29 *United States Code Section 216(b)*.ⁿ⁴ The Secretary may delegate his or her enforcement functions under the FLSA to state or local labor authorities, such as the DLSE, with the consent and cooperation of those authorities.ⁿ⁵

[2] Investigation of Employer's Records

The Administrator of the Wage and Hour Division of the Department of Labor or his or her representative may investigate and gather data regarding wages, hours, and working conditions in any industry subject to the FLSA.ⁿ⁶ That authority includes the authority to enter and inspect the place of business, inspect and copy the employer's records, and question employees.ⁿ⁷

The Secretary's authority is circumscribed by the requirement that the investigation be directed to ascertaining whether violations have occurred or to aiding enforcement of the FLSA.ⁿ⁸ The purpose of such an investigation may be to determine whether an employer or employee is covered under the FLSA and may be conducted even though no complaint is pending.ⁿ⁹

The Secretary may issue subpoenas for witnesses and records, which will be enforced if they are reasonably relevant to

a subject matter within the scope of the Secretary's authority.ⁿ¹⁰ Contempt is available to enforce a subpoena issued under this provision.ⁿ¹¹ However, the employer has a right to challenge the subpoena before suffering any penalties for noncompliance.ⁿ¹² With their consent and cooperation, the Secretary may utilize the services of state and local authorities, such as the DLSE, in carrying out such investigations in addition to the bureaus or divisions of the Department of Labor.ⁿ¹³

[3] Administrative Rulings

The Wage and Hour Administration issues administrative rulings, interpretive bulletins, and regulations relating to the provisions of the FLSA. These rulings are relied on by employers and employees in determining rights and obligations under that act and, while not binding on the courts, they are entitled to substantial weight.ⁿ¹⁴ In addition, the employer's good-faith reliance on written regulations or interpretations by the Division may in some cases provide a complete and/or partial defense to a civil action under the FLSA.ⁿ¹⁵ For discussion of this defense, see § 5.82[6][b].

[4] Criminal Penalties Against Employers

Criminal penalties may be imposed for a willful violation of the FLSA.ⁿ¹⁶ Criminal sanctions may not be based on an individual act, but require proof of a course of unlawful conduct.ⁿ¹⁷ A person convicted may be subject to a fine of up to \$10,000, or imprisonment of up to 6 months, or both.ⁿ¹⁸ Imprisonment may not be imposed, however, unless there has been a prior conviction under the FLSA.ⁿ¹⁹ A plea of nolo contendere will serve as a prior conviction for this purpose.ⁿ²⁰ Since the criminal sanctions are applicable to "any person," not just employers, a manager or supervisor may be held criminally liable under this provision.ⁿ²¹

[5] Complaint Brought by Agency on Behalf of Employee

[a] Generally

The Secretary of Labor is authorized by statute to bring a civil action on behalf of an employee or employees to recover unpaid minimum wages and/or overtime compensation and an equal amount of liquidated damages.ⁿ²² The Secretary does not need the authorization of the affected employees to proceed, and the employees need not be joined as parties.ⁿ²³ Furthermore, the employees' right to bring a civil action on their own behalfⁿ²⁴ terminates when the Secretary files the complaint in such an action, unless the action is dismissed without prejudice on the Secretary's motion.ⁿ²⁵ The affected employees are not permitted to intervene in an action commenced by the Secretary.ⁿ²⁶

The Ninth Circuit has held that a defendant employer is entitled to a jury trial in an action brought by the Secretary to recover liquidated damages under the FLSA, even if the action is combined with a claim for equitable relief.ⁿ²⁷

[b] Jurisdiction

An action by the Secretary of Labor to recover unpaid minimum wages and overtime compensation may be brought in any federal or state court of competent jurisdiction.ⁿ²⁸ Jurisdiction in the federal courts is not dependent on the amount in controversy.ⁿ²⁹

[c] Statute of Limitations

The statute of limitations for actions to recover unpaid minimum wages, overtime compensation, or liquidated damages under the FLSA is set forth in the Portal-to-Portal Act.ⁿ³⁰ Most cases must be brought within two years of the accrual of the cause of action;ⁿ³¹ however, in the case of willful violations, the statute of limitations is extended to three years.ⁿ³² A violation is "willful" for purposes of the FLSA if the employer either knew its conduct was prohibited by the FLSA or showed reckless disregard for the matter of whether its conduct was prohibited.ⁿ³³ The cause of action accrues on each pay day immediately following the period during which services were rendered for which unpaid

compensation is claimed,ⁿ³⁴ and the action is deemed commenced on the date that the complaint is filed.ⁿ³⁵

[d] Damages

When the Secretary of Labor brings an action under the FLSA against an employer on behalf of several or many employees, the court may award damages to employees other than those who directly testified based on testimony that fairly represents a percentage of the employer's employees.ⁿ³⁶ Once the employees have established a prima facie case that they have worked hours for which they were not properly compensated, the employer has the burden of coming forward with evidence of the precise amount of work performed or of evidence to negate the reasonableness of the inference to be drawn from the employees' evidence.ⁿ³⁷ If an employer fails to meet its burden, the court may award damages to the employees even if the result is only approximate.ⁿ³⁸ In *McLaughlin v. Ho Fat Seto*,ⁿ³⁹ the Ninth Circuit affirmed the district court award of damages to the Secretary of Labor for 23 employees, even though only 5 employees had testified at trial, because the damages were an approximation based on reasonable inferences drawn from the employees' testimony, with consideration given to the inconsistencies in the testimony and the court's conclusion that the rebuttal witnesses were not credible.

[6] Injunctions

[a] Generally

Both prospective and restitutionary injunctive relief may be sought for violations of the FLSA.ⁿ⁴⁰ An action for injunctive relief may be brought by the Secretary in conjunction with an action under Title 29 *United States Code Section 216(c)* to recover unpaid minimum wages and overtime compensation.ⁿ⁴¹ Actions for injunctive relief may only be brought by the Secretary of Labor and only in the United States District Courts.ⁿ⁴²

[b] Types of Violations That May Be Restrained

The following acts may be enjoined by the court in an injunction proceeding brought by the Secretary of Labor:ⁿ⁴³

1. Transportation by any person other than a common carrier of "hot goods" (that is, goods that were produced by employment of employees in violation of the minimum wage or overtime compensation requirements of the FLSA);ⁿ⁴⁴
2. Violations of the minimum wage or overtime compensation requirements of the FLSA,ⁿ⁴⁵ except when the employee would be barred from recovery of those sums by the statute of limitations;ⁿ⁴⁶
3. Discharge of or discrimination against an employee who has initiated or participated in proceedings under the FLSA;ⁿ⁴⁷
4. Violation of the child labor provisions of the FLSA;ⁿ⁴⁸ and
5. Failure to comply with recordkeeping obligations imposed by the FLSA.ⁿ⁴⁹

Injunctions are issued to secure future compliance with the FLSA and to restrain withholding of wages that are due, but not to punish for past violations.ⁿ⁵⁰ In either case, issuance of the injunction is in the public interest and remedies a public offense.ⁿ⁵¹

The grant of an injunction is discretionary.ⁿ⁵² The factors that a court will consider in determining whether to issue an injunction are the duration of the violation, whether the violation was willful as opposed to inadvertent, the probability that the violation will continue without the injunction, and considerations of equity; however, the size of the business and the possible harm the injunction may cause are not reasons to refuse the injunction.ⁿ⁵³

[c] Contempt

An employer or other person who violates an injunction issued pursuant to Title 29 *United States Code Section 217* may be held in civil and/or criminal contempt of court.ⁿ⁵⁴ Whether the contempt is civil or criminal depends on the nature of the remedy.ⁿ⁵⁵ In the case of civil contempt, the order is directed toward assuring compliance and may also include an award of costs for the Secretary of Labor's further expenses of investigation and other expenses related to the litigation.ⁿ⁵⁶ In the case of criminal contempt, the object of the action is penal, and the employer may be punished for violation of the injunction by imprisonment or fines even if there is no violation of the criminal provisions of the FLSA.ⁿ⁵⁷ A finding of contempt will not be relieved because the employer's actions were not willful.ⁿ⁵⁸ Further, it is not necessary to show that the employer purposely evaded the prior order to obtain an order holding the employer in contempt.ⁿ⁵⁹ Finally, the usual statute of limitations is not applicable, and an order of contempt can be sought although the injunction was issued more than three years prior to institution of the contempt proceedings.ⁿ⁶⁰

[7] Civil Penalties**[a] Imposition of Penalty**

The Administrator of the Wage and Hour Division, or an official authorized by the Administrator, has authority to determine when a person has repeatedly or willfully violated the minimum wageⁿ⁶¹ or overtimeⁿ⁶² laws and whether a civil money penalty for the violation is appropriate.ⁿ⁶³ An employer's violation is deemed to be repeated under two circumstances. First, it is repeated if the employer previously violated the minimum wage or overtime laws, provided that the employer previously received notice, through a responsible Wage and Hour Division official or through another authority, of the alleged violation. Second, a violation is repeated if a court or other tribunal finds that an employer previously violated those laws, unless an appeal from that finding has been timely filed and is pending before a court or other tribunal with jurisdiction to hear the appeal, or unless the finding has been set aside or reversed by the appellate tribunal.ⁿ⁶⁴

An employer is deemed to have willfully violated the minimum wage or overtime laws if the employer knew that its conduct was prohibited by the minimum wage and overtime laws or showed reckless disregard for the requirements of those laws.ⁿ⁶⁵ One situation in which an employer's conduct is deemed knowing is when the employer received advice from a responsible Wage and Hour Division official to the effect that the conduct was not lawful.ⁿ⁶⁶ If the employer was required to inquire further into whether its conduct was in compliance with the laws but failed to do so adequately, its conduct is in reckless disregard of the requirements of those laws.ⁿ⁶⁷ The Administrator may impose a civil penalty not exceeding \$1,100 on the employer.ⁿ⁶⁸ The amount of the penalty is determined with consideration for the appropriateness of the penalty in relation to the size of the business of the person charged and the gravity of the violation.ⁿ⁶⁹ If appropriate, the Administrator may also consider other relevant factors in assessing the penalty, such as:ⁿ⁷⁰

1. Whether the employer has made efforts in good faith to comply with the provisions of the FLSA and its regulations;
2. The employer's explanation for the violations, including whether the violations were the result of a bona fide dispute of doubtful legal certainty;
3. The previous history of violations, including whether the employer is subject to injunction against violation of the FLSA;
4. The employer's commitment to future compliance;
5. The interval between violations;

6. The number of employees affected; and
7. Whether there is a pattern to the violations.

[b] Procedures for Assessment and Collection**[i] Notice of Penalty**

If the Administrator decides to impose a civil penalty on any person, the Administrator must issue and serve a notice of the penalty on that person.ⁿ⁷¹ The notice must state the following:ⁿ⁷²

1. The amount of the penalty;
2. The reason or reasons for imposing it;
3. The right of the person to take exception to the assessment and to request a hearing;
4. The fact that the determination becomes final and unappealable if no timely exception and request for a hearing are received; and
5. The time, method, and procedures for taking exception and requesting a hearing.

Service of the notice must be in person or by certified mail.ⁿ⁷³ Personal service is made by delivering the notice to the individual, an officer of the corporation, or the attorney of record. The service is deemed complete when the notice is handed to the party, officer, or attorney, or when it is left at the office with a clerk or person in charge, in a conspicuous place in the office if no one is in charge, or at the residence of the party or attorney.ⁿ⁷⁴

Service by mail is made by sending the notice to the last known address of the individual, corporate officer, or attorney, and such service is deemed complete on mailing.ⁿ⁷⁵ If service by certified mail is not accepted, notice is deemed received on the date of the attempted delivery, and the Administrator has discretion to serve the notice by regular mail.ⁿ⁷⁶

The amount of the penalty determined by the Administrator and set forth in the notice becomes final and may be collected,ⁿ⁷⁷ unless the person charged with the violation takes a timely exception and requests a hearing.ⁿ⁷⁸

[ii] Exception and Request for Hearing

A person who takes exception to the penalty determination must request an administrative hearing. The exception must be mailed to the official who issued the penalty determination at the address of the Wage and Hour Division appearing on the determination notice. It must be received by the Administrator no later than 15 days after the date the person charged receives the notice of the penalty.ⁿ⁷⁹ The 15-day period begins on the day following receipt and includes the fifteenth day. If the fifteenth day is a Saturday, Sunday, or federally observed holiday, the period is extended to include the next business day.ⁿ⁸⁰ No additional time is allowed when service of the notice or of the exception is made by mail.ⁿ⁸¹

The requirements for the contents of the written exception and request for a hearing are minimal. No particular form is prescribed,ⁿ⁸² but precise drafting is important because the exception and request will be given the effect of a responsive pleading in the subsequent administrative hearing.ⁿ⁸³ The request must be dated and typed or legibly written. It must specify which issues stated in the notice give rise to the request and why the person believes that the

determination is wrong. The request must be signed by the person making it, or by an authorized representative of that person. It must also include the address at which the person or authorized representative desires to receive further communications relating to the request.ⁿ⁸⁴

[iii] Pre-Hearing Procedures

On receipt of a timely exception and request for hearing, the Administrator, through the Associate or Regional Solicitor for the Division of Fair Labor Standards, must issue an Order of Reference, referring the matter to the Chief Administrative Law Judge. The notice of the penalty determination and the request for a hearing must be attached to the referral order.ⁿ⁸⁵ Counsel for the Administrator must serve a copy of the referral order and attachments, plus a copy of the Procedures for Assessing and Contesting Civil Money Penalties,ⁿ⁸⁶ on the person who requests the hearing in the same manner as service of the notice of determination.ⁿ⁸⁷

The notice of determination and request for hearing are given the effect of a complaint and answer for purposes of the administrative proceeding.ⁿ⁸⁸ Amendments to the notice or request may be permitted by the administrative law judge in compliance with the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.ⁿ⁸⁹

The party who requests an administrative hearing must serve copies of all pleadings and other documents required for the hearing on the following persons:ⁿ⁹⁰

1. Two copies on the attorneys for the Department of Labor;
2. One copy on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of *Labor*, 200 Constitution Avenue NW, Washington, DC 20210; and
3. One copy on the attorney representing the Department of Labor in the proceeding.

The administrative law judge appointed to hear the case will notify the parties of the time and place of the prehearing conference and the hearing.ⁿ⁹¹

[iv] Administrative Hearing and Decision

The hearing is conducted in accordance with the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.ⁿ⁹² To the extent those Rules conflict with the Procedures for Assessing and Contesting Civil Money Penalties,ⁿ⁹³ the latter control.ⁿ⁹⁴ An exception to the Rulesⁿ⁹⁵ is made to allow for the admissibility of testimony by current or former Department of Labor employees concerning information obtained in the course of investigations and conclusions drawn from that information. Any documents in the Department of Labor files, except the investigation file on the violations at issue, are also admissible in the proceeding.ⁿ⁹⁶

The administrative law judge must render a decision on the issues referred by the Administrator.ⁿ⁹⁷ With respect to each material issue presented on the record, the decision must state the findings, conclusions, and reasons for such conclusions. It must also wholly or partially affirm, deny, reverse, or modify the Administrator's determination.ⁿ⁹⁸ The decision must be limited to a determination of whether the respondent committed a repeated or willful violation of the minimum wage or overtime laws and whether the penalty assessed was appropriate. The judge may not determine the legality of a regulation or the constitutionality of a statute.ⁿ⁹⁹

The administrative law judge must serve copies of the decision on each party.ⁿ¹⁰⁰ The decision constitutes the final order of the Secretary of Labor, unless a party appeals.ⁿ¹⁰¹ The official record of each completed administrative hearing is filed with the Chief Administrative Law Judge.ⁿ¹⁰²

[v] Appeal to Secretary of Labor

A party who desires to have the decision of an administrative law judge reviewed must file an original and two copies of a petition for review with the Department of Labor's Administrative Review Board in Washington, DC.ⁿ¹⁰³ The petition must be received by the Secretary within 30 days of the date of the decision.ⁿ¹⁰⁴ If a petition for review is timely filed, the decision of the Administrative Law Judge is inoperative unless and until the Board dismisses the appeal or issues a decision affirming the decision of the Administrative Law Judge.ⁿ¹⁰⁵ Documents are not deemed filed with the Board until actually received by the Board, either on or before the due date. No additional time is added when service of a document requiring action within a prescribed time was made by mail.^{n105.1}

Copies of the petition for review must be served on all parties and on the Chief Administrative Law Judge,ⁿ¹⁰⁶ who is required to forward the administrative hearing record to the Secretary on receipt of the petition for review.ⁿ¹⁰⁷ A copy of each document filed with the Board must be served on all other parties involved in the proceeding. Service must be by personal delivery or by mail. Service by mail is deemed effected at the time of mailing to the last known address of the party.ⁿ¹⁰⁸

The final decision of the Board must be served on all parties and on the Chief Administrative Law Judge. Service must be in person or by mail to the last known address.ⁿ¹⁰⁹

[vi] Collection of Penalty

When the penalty determination becomes final, the amount of the penalty is immediately due and payable to the U.S. Department of Labor. Payment must be made by certified check or money order, payable to the Wage and Hour Division, and must be delivered or mailed to the District Office of the Wage and Hour Division which issued and served the original notice of the penalty.ⁿ¹¹⁰

The Secretary has authority to collect an unpaid penalty by any of three methods. First, if the person charged is owed any sums by a United States agency, the Secretary may request the agency to withhold the penalty amount from the sums owed and to remit it to the Secretary.ⁿ¹¹¹ Second, if the person charged does not remit the penalty within a reasonable time after notification to do so, the Secretary may institute a civil action to recover the penalty in any court of competent jurisdiction.ⁿ¹¹² Third, if the penalty is imposed as part of a court order in a civil action brought by the Secretary to enjoin a violation of the child labor lawⁿ¹¹³ or a repeated or willful violation of the wageⁿ¹¹⁴ or overtimeⁿ¹¹⁵ laws, or in a criminal proceeding brought by the Department of Justice to enforce compliance with these same statutes,ⁿ¹¹⁶ a noncomplying party may be subject to contempt proceedings.ⁿ¹¹⁷

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Minimum Wage Labor & Employment Law Wage & Hour Laws Coverage & Definitions Overtime & Work Period Labor & Employment Law Wage & Hour Laws Remedies General Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 216(c); *see also* 29 U.S.C. §§ 206, 207 (minimum wage and overtime compensation requirements).

(n2)Footnote 2. *See* 29 U.S.C. § 211(a); *see also* discussion in § 5.81[2].

(n3)Footnote 3. 29 U.S.C. § 216(c).

(n4)Footnote 4. 29 U.S.C. § 216(c); *see* discussion in § 5.82.

(n5)Footnote 5. *See* 29 U.S.C. § 211(b).

(n6)Footnote 6. 29 U.S.C. § 211(a).

(n7)Footnote 7. *See* 29 U.S.C. § 211(a). Statements of witnesses obtained during such investigations are entitled to a qualified privilege of confidentiality. *See, e.g., Donovan v. Forbes* (D. Vt. 1985) 614 F. Supp. 124, 126 .

(n8)Footnote 8. *See* 29 U.S.C. § 211(a).

(n9)Footnote 9. *See, e.g., Oklahoma Press Pub. Co. v. Walling* (1946) 327 U.S. 186, 209, 214, 66 S. Ct. 494, 90 L. Ed. 614 .

(n10)Footnote 10. *See* 29 U.S.C. § 209; *Oklahoma Press Pub. Co. v. Walling* (1946) 327 U.S. 186, 209, 214, 66 S. Ct. 494, 90 L. Ed. 614 ; *Walling v. Detweiler Bros* (S.D. Idaho 1944) 58 F.Supp. 201, 202 , *aff'd*, 157 F.2d 841 (9th Cir. 1946) , *cert. denied*, 330 U.S. 819 ; *Fleming v. Cudahy Packing Co.* (S.D. Cal. 1941) 41 F. Supp. 910, 915 .

(n11)Footnote 11. *See, e.g., Fenton v. Walling* (9th Cir. 1943) 139 F.2d 608, 609-610 , *cert. denied*, 321 U.S. 798 , *reh'g denied* 322 U.S. 769 .

(n12)Footnote 12. *Donovan v. Lone Steer, Inc.* (1984) 464 U.S. 408, 415, 104 S. Ct. 769, 78 L. Ed. 2d 567 .

(n13)Footnote 13. *See* 29 U.S.C. § 211(b).

(n14)Footnote 14. *See, e.g., Mabee v. White Plains Pub. Co.* (1946) 327 U.S. 178, 181-182, 66 S. Ct. 511, 90 L. Ed. 607 ; *Craig v. Far West Engineering Company* (9th Cir. 1959) 265 F.2d 251, 257 , *cert. denied*, 361 U.S. 816 .

(n15)Footnote 15. *See* 29 U.S.C. §§ 259, 260.

(n16)Footnote 16. 29 U.S.C. § 216(a); *see United States v. F.W. Darby Co* (1941) 312 U.S. 100, 125-126, 61 S. Ct. 451, 85 L. Ed. 609 .

(n17)Footnote 17. *United States v. Universal C.I.T. Credit Corp.* (1952) 344 U.S. 218, 224, 73 S. Ct. 227, 97 L. Ed. 260 .

(n18)Footnote 18. 29 U.S.C. § 216(a).

(n19)Footnote 19. 29 U.S.C. § 216(a).

(n20)Footnote 20. *United States v. Dasher* (E.D. Pa. 1943) 51 F. Supp. 805, 806 .

(n21)Footnote 21. *Hertz Drivursself Stations v. United States* (8th Cir. [Mo.] 1945) 150 F.2d 923, 928-929 .

(n22)Footnote 22. *See* 29 U.S.C. § 216(c).

(n23)Footnote 23. *Donovan v. Hamm's Drive Inn* (5th Cir. [La.] 1981) 661 F.2d 316, 318 .

(n24)Footnote 24. *See* 29 U.S.C. § 216(b); *see also* discussion in § 5.82.

(n25)Footnote 25. 29 U.S.C. § 216(c).

(n26)Footnote 26. *See* 29 U.S.C. § 216(c); *Marshall v. United States Postal Service* (D.D.C. 1979) 481 F. Supp. 179, 180 .

(n27)Footnote 27. *McLaughlin v. Owens Plastering Co.* (9th Cir. [Nev.] 1988) 841 F.2d 299, 300-301 .

(n28)Footnote 28. 29 U.S.C. § 216(c).

(n29)Footnote 29. *See, e.g., Bledsoe v. Wirtz* (10th Cir. [Okla.] 1967) 384 F.2d 767, 769 .

(n30)Footnote 30. *See* 29 U.S.C. § 255(a).

(n31)Footnote 31. 29 U.S.C. § 255(a). *See City of Oakland v. Hassey* (2008) 163 Cal. App. 4th 1477, 1495-1499, 78 Cal. Rptr. 3d 621 (former employee's action under FLSA against individual to recover money illegally withheld from his last paycheck was barred by statute of limitations, where action was filed more than two years after allegedly unauthorized deductions; court could not determine whether employee's cross-complaint against employer, who had sued him, was untimely, where it was filed more than two, but less than three, years after employer's complaint, and court could not determine if employer's violation of FLSA was willful).

(n32)Footnote 32. 29 U.S.C. § 255(a); *Hodgson v. Cactus Craft of Arizona* (9th Cir. [Ariz.] 1973) 481 F.2d 464, 467 ; *Houser v. Matson* (9th Cir. [Ariz.] 1971) 447 F.2d 860, 863 .

(n33)Footnote 33. *See McLaughlin v. Richland Shoe Co.* (1988) 486 U.S. 128, 108 S. Ct. 1677, 100 L. Ed. 2d 115, 122-123 ; *Brock v. Claridge Hotel and Casino* (3d Cir. 1988) 846 F.2d 180, 188 . In adopting this standard, the Supreme Court in *McLaughlin* rejected the standard set forth in *Coleman v. Jiffy June Farms, Inc.* (5th Cir. [Ala.] 1972) 458 F.2d 1139, 1142 , in which the Fifth Circuit held that a violation was willful if the employer knew that its conduct "might" violate the FLSA, i.e., if the employer knew that "the FLSA was in the picture." . *See also Chao v. A-One Medical Services, Inc.* (9th Cir. 2003) 346 F.3d 908, 2003 U.S. App. LEXIS 20304, at *20-24 (prior FLSA violations, especially when combined with undisputed testimony of former employees, proved, at very least, reckless disregard on part of owner of one corporation that was joint employer for FLSA purposes for illegality of treating two corporations separately for purpose of determining overtime pay); *Alvarez v. IBP, Inc.* (9th Cir. 2003) 339 F.3d 894, 908-909 , *aff'd on other grounds*, (2005) 126 S. Ct. 514 (determination of willfulness is a mixed question of law and fact; district court did not err in applying § 255's three-year statute of limitations to plaintiffs' FLSA claims, where employer recklessly disregarded possibility it was violating FLSA).

(n34)Footnote 34. *Soler v. G & U, Inc.* (S.D. N.Y. 1980) 86 F.R.D. 524, 528 .

(n35)Footnote 35. *See* 29 U.S.C. § 256.

(n36)Footnote 36. *McLaughlin v. Ho Fat Seto* (9th Cir. 1988) 850 F.2d 586, 589 (citing *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687 , *superseded by statute on other grounds*, *see* 29 U.S.C. § 251 *et seq.*).

(n37)Footnote 37. *McLaughlin v. Ho Fat Seto* (9th Cir. 1988) 850 F.2d 586, 589 (citing *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687 , *superseded by statute on other grounds*, *see* 29 U.S.C. § 251 *et seq.*).

(n38)Footnote 38. *McLaughlin v. Ho Fat Seto* (9th Cir. 1988) 850 F.2d 586, 589 (citing *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 688 , *superseded by statute on other grounds*, *see* 29 U.S.C. § 251 *et seq.*).

(n39)Footnote 39. *McLaughlin v. Ho Fat Seto* (9th Cir. 1988) 850 F.2d 586, 589 .

(n40)Footnote 40. *See* 29 U.S.C. § 217.

(n41)Footnote 41. *See, e.g., Ford v. Alfaro* (9th Cir. 1986) 785 F.2d 835, 838-839 ; *Marshall v. Chala Enterprises, Inc.* (9th Cir. 1981) 645 F.2d 799, 802-804 ; *see also* discussion in [5], *above*.

(n42)Footnote 42. *See* 29 U.S.C. §§ 211(a), 217.

(n43)Footnote 43. 29 U.S.C. § 217.

(n44)Footnote 44. *See* 29 U.S.C. § 215(a)(1); *see also* *Citicorp Industrial Credit, Inc. v. Brock* (1987) 483 U.S. 27, 39, 107 S. Ct. 2694, 97 L. Ed. 2d 23 (restriction on interstate transportation of "hot goods" applies to holders of collateral under security agreement).

(n45)Footnote 45. *See* 29 U.S.C. §§ 206, 207.

(n46)Footnote 46. *See* 29 U.S.C. §§ 215(a)(2), 217.

(n47)Footnote 47. *See* 29 U.S.C. § 215(a)(3); *see also* discussion in § 5.83.

(n48)Footnote 48. 29 U.S.C. § 215(a)(4); *see* 29 U.S.C. § 212; *see also* discussion in ch. 6.

(n49)Footnote 49. 29 U.S.C. § 215(a)(5); *see* 29 U.S.C. § 211(c), (d); *see also* discussion in ch. 7.

(n50)Footnote 50. *See* *Walling v. Clinchfield Coal Corporation* (4th Cir. 1946) 159 F.2d 395, 399 .

(n51)Footnote 51. *See, e.g.,* *Marshall v. Chala Enterprises, Inc.* (9th Cir. 1981) 645 F.2d 799, 802-804 .

(n52)Footnote 52. *See* *Brennan v. Saghatelian* (9th Cir. 1975) 514 F.2d 619, 621-622 , *reh'g denied sub nom. Dunlop v. Saghatelian*, 520 F.2d 788 .

(n53)Footnote 53. *See, e.g.,* *Marshall v. Chala Enterprises, Inc.* (9th Cir. 1981) 645 F.2d 799, 803-804 ; *Wirtz v. Milton J. Wershow Co.* (9th Cir. 1969) 416 F.2d 1071, 1072 ; *Wirtz v. Malthor, Inc.* (9th Cir. 1968) 391 F.2d 1, 3 ; *Goldberg v. Cockrell* (5th Cir. 1962) 303 F.2d 811, 813-814 .

(n54)Footnote 54. *See, e.g.,* *Mitchell v. Fiore* (3d Cir. 1972) 470 F.2d 1149, 1153-1154 , *cert. denied sub nom. Fiore v. Brennan*, 411 U.S. 938 (1973) ; *Walling v. Crane* (5th Cir. 1946) 158 F.2d 80, 83-84 ; *Fenton v. Walling* (9th Cir. 1943) 139 F.2d 608, 609 , *cert. denied*, 321 U.S. 798 (1944) , *reh'g denied* 322 U.S. 769 (1944) .

(n55)Footnote 55. *See, e.g.,* *Fenton v. Walling* (9th Cir. 1943) 139 F.2d 608, 609 , *cert. denied*, 321 U.S. 798 (1944) , *reh'g denied* 322 U.S. 769 (1944) .

(n56)Footnote 56. *See, e.g.,* *Tobin v. La Duke* (9th Cir. 1951) 190 F.2d 677, 678 .

(n57)Footnote 57. *See* *Walling v. Crane* (5th Cir. 1946) 158 F.2d 80, 83-85 .

(n58)Footnote 58. *See* *Hodgson v. Hotard* (5th Cir. 1971) 436 F.2d 1110, 1114 .

(n59)Footnote 59. *See* *Donovan v. Sureway Cleaners* (9th Cir. 1981) 656 F.2d 1368, 1373 .

(n60)Footnote 60. *See* *Donovan v. Sureway Cleaners* (9th Cir. 1981) 656 F.2d 1368, 1373-1376 .

(n61)Footnote 61. *See* 29 U.S.C. § 206(a).

(n62)Footnote 62. *See* 29 U.S.C. § 207.

(n63)Footnote 63. 29 C.F.R. §§ 580.1, 580.3.

(n64)Footnote 64. *See* 29 C.F.R. § 578.3(b).

(n65)Footnote 65. *See* 29 C.F.R. § 578.3(c)(1).

(n66)Footnote 66. *See* 29 C.F.R. § 578.3(c)(2).

(n67)Footnote 67. *See* 29 C.F.R. § 578.3(b)(3).

(n68)Footnote 68. 29 U.S.C. § 216(e); 29 C.F.R. §§ 580.1, 580.3.

(n69)Footnote 69. 29 U.S.C. § 216(e); 29 C.F.R. § 578.4.

(n70)Footnote 70. *See* 29 C.F.R. § 578.4(b)

(n71)Footnote 71. 29 C.F.R. § 580.3.

(n72)Footnote 72. 29 C.F.R. § 580.4.

(n73)Footnote 73. 29 C.F.R. § 580.3.

(n74)Footnote 74. 29 C.F.R. § 580.8(a).

(n75)Footnote 75. 29 C.F.R. § 580.8(a).

(n76)Footnote 76. 29 C.F.R. § 580.3.

(n77)Footnote 77. *See* discussion in [vi], *below*.

(n78)Footnote 78. 29 C.F.R. § 580.5; *see* discussion in [ii], *below*.

(n79)Footnote 79. 29 C.F.R. § 580.6(a).

(n80)Footnote 80. 29 C.F.R. § 580.8(c).

(n81)Footnote 81. 29 C.F.R. § 580.6(a).

(n82)Footnote 82. 29 C.F.R. § 580.6(b).

(n83)Footnote 83. *See* 29 C.F.R. § 580.6(b); *see also* discussion in [iii], *below*.

(n84)Footnote 84. 29 C.F.R. § 580.6(b)(1)-(6).

(n85)Footnote 85. 29 C.F.R. § 580.10(a).

(n86)Footnote 86. *See* 29 C.F.R. § 580 et seq.

(n87)Footnote 87. 29 C.F.R. § 580.10(a); *see* 29 C.F.R. § 580.8(a); *see also* discussion in [i], *above*.

(n88)Footnote 88. 29 C.F.R. § 580.10(a).

(n89)Footnote 89. 29 C.F.R. § 580.10(a); *see* 29 C.F.R. § 18.5(e).

(n90)Footnote 90. 29 C.F.R. § 580.8(b).

(n91)Footnote 91. 29 C.F.R. § 580.11.

(n92)Footnote 92. 29 C.F.R. § 580.7; *see* 29 C.F.R. § 18 et seq.

(n93)Footnote 93. *See* 29 C.F.R. § 580 et seq.

(n94)Footnote 94. 29 C.F.R. § 580.7(a).

(n95)Footnote 95. *See* 29 C.F.R. § 18.802 (hearsay rule).

(n96)Footnote 96. 29 C.F.R. § 580.7(b).

(n97)Footnote 97. 29 C.F.R. § 580.12(a).

(n98)Footnote 98. 29 C.F.R. § 580.12(c).

(n99)Footnote 99. 29 C.F.R. § 580.12(b).

(n100)Footnote 100. 29 C.F.R. § 580.12(d); *see* [i], *above* (method of service).

(n101)Footnote 101. 29 C.F.R. § 580.12(e); *see* [v], *below*.

(n102)Footnote 102. 29 C.F.R. § 580.17.

(n103)Footnote 103. 29 C.F.R. § 580.13(a), (b).

(n104)Footnote 104. 29 C.F.R. § 580.13(a).

(n105)Footnote 105. 29 C.F.R. § 580.13(a).

(n106)Footnote 105.1. 29 C.F.R. § 580.13(c).

(n107)Footnote 106. 29 C.F.R. § 580.13(a).

(n108)Footnote 107. 29 C.F.R. § 580.15.

(n109)Footnote 108. 29 C.F.R. § 580.13(d).

(n110)Footnote 109. 29 C.F.R. § 580.16.

(n111)Footnote 110. 29 C.F.R. § 580.18(a).

(n112)Footnote 111. 29 C.F.R. § 580.18(b)(1).

(n113)Footnote 112. 29 C.F.R. § 580.18(b)(2).

(n114)Footnote 113. *See* 29 U.S.C. §§ 212, 215(a)(4).

(n115)Footnote 114. *See* 29 U.S.C. §§ 206, 215(a)(2).

(n116)Footnote 115. *See* 29 U.S.C. §§ 207, 215(a)(2).

(n117)Footnote 116. *See* 29 U.S.C. §§ 206, 207, 212, 216(a).

(n118)Footnote 117. 29 C.F.R. § 580.18(b)(3); *see also* discussion in [4], [6][c], *above*.



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

Part B. ADDITIONAL REMEDIES FOR FAILURE TO PAY MINIMUM WAGES OR OVERTIME

COMPENSATION

Subpart 2. Federal Law

1-5 California Employment Law § 5.82

AUTHOR: By Susan Spurlark, J.D.

§ 5.82 Claim of Employee

[1] Procedure for Bringing Claim

Title 29 *United States Code Section 216(b)* authorizes the institution of actions by aggrieved employees for recovery of unpaid minimum wages and overtime compensation as well as an equal amount of liquidated damages, attorney's fees, and costs. The employee is not required to pursue any administrative procedure, give notice of the claim, or exhaust arbitration or grievance proceedings prior to bringing such an action.ⁿ¹ The action may also be brought even if the employee previously raised the issue of FLSA violations in arbitration and lost.ⁿ² However, the employee's right to bring an action terminates if he or she accepts payment of sums recovered by the Secretary of Labor as payment in full or if the Secretary brings an action to recover unpaid minimum wages and overtime compensation or to enjoin withholding of such compensation.ⁿ³

Such actions are governed by the same statute of limitations as actions by the Secretary of Labor under Title 29 *United States Code Section 216(c)*,ⁿ⁴ which is discussed in § 5.81[5][c]. The statute of limitations is tolled by the filing of the complaint where all plaintiffs are named and consent to the suit at the outset.ⁿ⁵ If an action is brought on behalf of other unnamed individuals who are similarly situated, it is not commenced as to those individuals until they have filed effective consents to be parties and to be bound by the action with the court.ⁿ⁶

Similarly, in *Albertson's, Inc. v. United Food* ⁿ⁷ a suit brought under Title 29 *United States Code Section 185*, the Ninth Circuit held that employees who were forced to work "off the clock" (that is, without having punched in and received their proper pay) have the right to sue under the FLSA, regardless of whether their claims also are covered by the terms of a collectively bargained grievance and arbitration procedure.ⁿ⁸ The court explained that in submitting a grievance to arbitration, an employee seeks to vindicate his or her contractual right under a collective bargaining agreement, while in filing a lawsuit under the FLSA, an employee asserts independent statutory rights granted by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both are violated as a result of the

same factual occurrence.ⁿ⁹

■ CONSULTANT'S COMMENT:

Although *Albertson's* holds that a collectively bargaining grievance and arbitration procedure does not bar an employee from pursuing his or her statutory FLSA claims in court,ⁿ¹⁰ it does not follow that an employee who has arbitrated his or her wage claim and lost may bring an FLSA lawsuit without fear of res judicata or collateral estoppel. Practitioners should research the current status of federal and state law to determine whether the arbitration decision may preempt some or all of the issues presented in the employee's court complaint. *Commentary by Kirby Wilcox.*

[2] Jurisdiction

Both the federal and state courts of general jurisdiction can entertain actions by employees to recover unpaid minimum wages and/or overtime compensation.ⁿ¹¹ The federal courts may also exercise pendent jurisdiction over related state claims.ⁿ¹² The provision of the FLSA that suit under the Act "may be maintained... in any Federal or State court of competent jurisdiction,"ⁿ¹³ does not bar removal of a suit from state to federal court.ⁿ¹⁴

[3] Parties

Actions for recovery of unpaid minimum wages and/or overtime compensation under the FLSA may not be maintained by representatives of the affected employees such as unions or assignees.ⁿ¹⁵ As noted in [1], *above*, any represented employees must file their consent to participate in such an action.ⁿ¹⁶ However, the courts give a liberal construction to "related" claims in determining what claims may be brought together.ⁿ¹⁷ In addition, such an action may be maintained by the estate of a deceased employee.ⁿ¹⁸

The requirement that employees cannot be party plaintiffs unless (a) they give their consent in writing to participate in the action and (b) the consent is filed with the court^{n18.1} is known as the "opt-in" provision.^{n18.2} Actions involving opt-in provisions are known as "collective actions" rather than "class actions."^{n18.3} Further, because of the opt-in provision, actions for unpaid minimum wages or overtime compensation under the FLSA cannot be brought as class actions governed by Fed. R. Civ. Proc. 23.^{n18.4} In a Rule 23 proceeding, a class is described in the complaint. If the action is maintainable as a class action, each person within the description is considered to be a class member and, as such, is bound by the judgment, whether favorable or unfavorable, unless the person has "opted out" of the suit. Under the opt-in provision of the FLSA, no person can become a party plaintiff or be bound by or benefit from a judgment unless that person has affirmatively "opted into" the class, i.e., given written, filed consent.^{n18.5} Other differences include the following:^{n18.6}

- The tolling of the statute of limitations. In federal class actions the statute of limitations is tolled for all class members until the class certification has been made or the individual class member opts out,^{n18.7} while in an FLSA action the statute is tolled only after the plaintiff has opted in.
- The definitions of parties "similarly situated."
- The considerations affecting the trial court's involvement in an FLSA action in the process of notifying potential additional plaintiffs. The problems generated by the notice of the pending action to potential plaintiffs in a collective action with the opt-in feature call for early and active intervention by the trial court.^{n18.8} In a class action, the trial court's role, at least at the outset of the action, is more passive and restricted to ruling on whether the action should be certified as a class action.

Further, a FLSA plaintiff who voluntarily settles individual claims prior to being joined by opt-in plaintiffs does not retain a personal stake in the appeal of the trial court's class action certification denial so as to preserve appellate

jurisdiction.^{n18.9}

The proper defendant to be joined will vary according to the employer's form of business. A corporate employer, for example, may be sued after merger.ⁿ¹⁹ Individual stockholders may be liable if the corporation has been dissolved and insufficient assets remain to pay the wage claims.ⁿ²⁰ Suit may be brought against an individual who is the principal stock holder and manager in a corporate employer.ⁿ²¹ Suit may also be brought against individuals who would not be considered common law "employers." When an individual exercises "control over the nature and structure of the employment relationship," or "economic control" over the relationship, that individual is an employer within the meaning of the FLSA.ⁿ²² Partners may be held liable in proportion to their interest in the partnership.ⁿ²³

Individual managers can be held liable under the FLSA even after the corporation has filed for bankruptcy.^{n23.1}

Joint employers may both be held liable.ⁿ²⁴ An employer and union that violate provisions of the FLSA may be sued jointly.ⁿ²⁵

Because states enjoy sovereign immunity from FLSA claims, employees may not sue a state in federal court in the absence of a waiver by the state.ⁿ²⁶ Such a waiver will only be found when stated "by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction."ⁿ²⁷

Parties may preserve their anonymity in filing a suit under the FLSA in special circumstances when the need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity.ⁿ²⁸ The Ninth Circuit has held that in cases in which pseudonyms are used to shield the anonymous party from retaliation, the district court should determine the need for anonymity by evaluating the following factors: (1) the severity of the threatened harm, (2) the reasonableness of the anonymous party's fears, and (3) the anonymous party's vulnerability to such retaliation.ⁿ²⁹

[3A] Discovery and Evidence

Fed. R. Civ. Proc. 26(a)(1)(A)(iii) requires the disclosure of a computation of each category of damages claimed by the disclosing party. Rule 26(e)(1)(A) requires disclosing parties to supplement their prior disclosures in a timely manner when the prior response is incomplete or incorrect. Fed. R. Civ. Proc. 37(c)(1) gives teeth to these requirements by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed.^{n29.1}

Under Fed. R. Civ. Proc. 37, exclusion of evidence not disclosed is appropriate unless the failure to disclose was substantially justified or harmless.^{n29.2} In actions brought under the FLSA, a plaintiff may be substantially justified in failing to disclose damage computations for each opt-in plaintiff, because the law is unsettled as to the obligation to disclose such information on an individual basis in FLSA opt-in class of actions.^{n29.3} However, when individual opt-in plaintiffs also proceed on state law causes of action that were not included in the class action, disclosure on an individual basis is required under Fed. R. Civ. P. 26(a).^{n29.4}

[4] Amounts Recoverable

In an action under Title 29 *United States Code Section 216(b)*, the employer is liable to the plaintiff-employees for any unpaid minimum wages and/or overtime compensation found to be due under the terms of the FLSA.ⁿ³⁰ Assuming that the plaintiffs can show by reasonable inference that work was performed and not properly compensated, recovery is proper even if the damages cannot be calculated with precision because of the employer's failure to keep proper records.ⁿ³¹

In addition, the successful plaintiff is entitled to an award of liquidated damages equal to the amount of minimum wages or overtime compensation found to be due, unless the employer can show that the act or omission was in good faith and

that the employer had reasonable grounds for believing that there was no violation of the FLSA.ⁿ³² If the employer establishes such good faith, the court has "discretion" to award no liquidated damages or to award an amount less than the amount to which the employee would otherwise be entitled under Title 29 *United States Code, section 216*.ⁿ³³ although the court is not required to so limit the award.ⁿ³⁴ A claim for liquidated damages arises when the minimum wages and/or overtime compensation are not paid when due, and a claim may be brought for liquidated damages even if the underlying wages are subsequently paid.ⁿ³⁵ A finding of the employer's good faith is plainly inconsistent with a finding of the employer's willfulness, allowing extension of the statute of limitations from two to three years under 29 *U.S.C. § 255(a)*.ⁿ³⁶ The only circuit to address the issue has concluded that punitive damages are available under the FLSA.ⁿ³⁷

Interest on the judgment may also be awarded. Prejudgment interest is not awarded when liquidated damages are awarded.ⁿ³⁸ The Ninth Circuit awards prejudgment interest on the grounds that compensation should be provided for the loss of the use of the money that was owed.ⁿ³⁹ However, not all the circuits agree.ⁿ⁴⁰ Awards of postjudgment interest are made as a matter of course.ⁿ⁴¹

Finally, the plaintiff-employees are entitled to recover attorney's fees and costs if successful.ⁿ⁴² The award of attorney's fees may include fees for work on appeal and post-remand matters if the judgment is upheld.ⁿ⁴³ The award of fees is mandatory, but the amount is within the discretion of the court.ⁿ⁴⁴ The factors that are considered in making the fee award are those enumerated in the case of *Kerr v. Screen Extras Guild, Inc.* ⁿ⁴⁵

[5] FORM--Complaint for Minimum Wages or Overtime Pay

[a] Comment

The form set forth in subsection [b], *below*, is a complaint for recovery of minimum wages and/or overtime compensation by an employee pursuant to Title 29 *United States Code, section 216(b)*. The form set forth below is designed for use in an action in United States District Court, although its substantive allegations may be modified for use in an action brought in state court.

If brought in federal court, the complaint is subject to the requirements of the Federal Rules of Civil Procedure, Rule 8.ⁿ⁴⁶ The complaint must include the following allegations:

1. Facts showing that the federal court has subject matter jurisdiction (Paragraph 1);ⁿ⁴⁷
2. Facts showing that the employer and employee are covered under the FLSA, either because the employee is personally engaged in commerce or the production of goods for commerce or because the employee is employed by an "enterprise" engaged in commerce or the production of goods for commerce (Paragraph 3);ⁿ⁴⁸
3. Facts showing the existence of an employer-employee relationship (Paragraph 2);ⁿ⁴⁹
4. The nature of the alleged violation of the FLSA (that is, payment of less than the minimum wage or overtime compensation required under the FLSA);ⁿ⁵⁰
5. The amount of unpaid minimum wages and/or overtime compensation sought, the period for which it is claimed, and the rate at which it is calculated; and
6. Facts sufficient to take the complaint outside of the limitations of the Portal-to-Portal Act (if the facts alleged in the complaint show the potential applicability of those limitations).ⁿ⁵¹

[b] Form

UNITED STATES DISTRICT COURT

_____ DISTRICT OF CALIFORNIA

_____ [name],)

Plaintiff,)

vs.)

_____ [name], Defendant.)

)

NO. _____

COMPLAINT FOR WAGES, LIQUIDATED DAMAGES, ATTORNEYS' FEES, AND COSTS

[29 U.S.C. §§ 206, 207, 216(b)]

Plaintiff alleges:

1. This is an action brought to recover unpaid _____ [overtime compensation *and/or* minimum wages] owed to plaintiff pursuant to the Fair Labor Standards Act, Title 29 *United States Code*, sections 201 *et seq.* Plaintiff seeks unpaid compensation, an equal amount of liquidated damages, attorney's fees, and costs pursuant to Title 29 *United States Code*, section 216(b). Jurisdiction over this action is conferred on this court by section 216(b) and by the provisions of Title 28 *United States Code*, section 1337.

2. Plaintiff _____ [has been *or* was] employed by defendant _____ [since _____ (date) *or* from _____ (date) until _____ (date)] as _____ [state nature of position, *e.g.*, a warehouseman].

3. _____ [Allege facts showing either (1) that plaintiff is or was personally employed in commerce or in the production of goods for commerce during the period for which compensation is owed, or (2) that the "enterprise" employing plaintiff is or was engaged in commerce or the production of goods for commerce during that period, as required for coverage under 29 U.S.C. §§ 206 or 207, *e.g.*, Defendant is, and at all times relevant herein was, a corporation organized under the laws of the State of California, which maintains its headquarters and principal place of business in _____, California. At all times relevant herein, its principal business has been _____ (state nature of business and relationship to commerce, *e.g.*, the operation of a warehouse and distribution of periodicals throughout the States of California, Nevada, and Oregon. Virtually all of the goods handled by defendant during the relevant periods, have been sold, transported, and delivered in interstate commerce from and to defendant's place of business in _____, California, to various points both in and outside the State of California)].

4. During the period from _____ [date] to _____ [date], plaintiff worked a total of _____ hours and received a total compensation for that period of \$ _____. A detailed statement of the days worked, the hours worked each day, and the payment received therefor is attached hereto as Exhibit _____ and incorporated herein by reference.

5. Pursuant to the provisions of the Fair Labor Standards Act (Title 29 *United States Code*, sections 206 and 207) and regulations thereunder, defendant should have paid plaintiff the sum of \$ _____ for work performed during the period set forth in Paragraph 4. Defendant therefore owes plaintiff the sum of \$ _____.

WHEREFORE, plaintiff prays that this court:

1. Award compensatory damages in the amount of \$ _____, representing the amount of unpaid _____ [minimum wages *and/or* overtime compensation] due to plaintiff under the Fair Labor Standards Act;

2. Award additional liquidated damages in the amount of \$ _____, pursuant to Title 29 *United States Code*, section 216(b);

3. Award reasonable attorney's fees and costs pursuant to Title 29 *United States Code*, section 216(b); and

4. Award such other and further relief as the court may deem appropriate.

_____[signature]

Attorney for Plaintiff _____

[6] Defenses

[a] Generally

Potential defenses to an action under the FLSA to recover unpaid minimum wages and/or overtime compensation, plus liquidated damages, include the following:

1. The employer or employee is statutorily exempt from the minimum wage and/or overtime compensation requirements of the FLSA;n52
2. The employee was employed by a public agency and received compensatory time off in lieu of overtime, as allowed by the FLSA;n53
3. The hours for which the employee claims compensation are not considered working time under the FLSA and Portal-to-Portal Act;n54
4. The action is barred by the statute of limitations;n55 or
5. The plaintiff-employee accepted payment of back wages under the supervision of the Secretary of Labor as payment in full.n56

In addition, as discussed in [b], *below*, the employer's good-faith belief in the legality of its actions may under certain circumstances constitute a complete or partial defense to such an action.n57

[b] "Good-Faith" Defenses Under Portal-to-Portal Act

The Portal-to-Portal Act provides two separate defenses based on the employer's good-faith belief in the legality of its actions.n58 First, Title 29 *United States Code*, section 259 provides that an employer shall not be subject to *any* liability or punishment for failure to pay minimum wages or overtime compensation under the FLSA if the employer pleads and proves that it acted in good-faith conformity with and reliance on any written administrative regulation, order, ruling, approval, or interpretation of the Administrator of the Wage and Hour Division of the Department of Labor or any administrative practice or enforcement policy of that agency with respect to the class of employers to which it belongs. This defense, once established, bars liability even if, subsequent to the act or omission, the administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.n59 This defense and the definitions of the terms used are set forth in further detail in the regulations issued by the Wage and Hour Division.n60 To be insulated from liability under this good faith exception, an employer must show that it acted in (1) good faith, (2) conformity with, and (3) reliance on the Department of Labor's regulations or the Administrator's Opinion Letter.n61 The test has both objective and subjective components. The test is whether the employer acted as a reasonably prudent person would have acted under the same or

similar circumstances. It also requires that the employer have honesty of intention and no knowledge of circumstances that ought to put the employer on inquiry.ⁿ⁶² The test also places on employers an affirmative duty to inquire about uncertain FLSA coverage issues.ⁿ⁶³ The employer bears the burden of proof to establish this exception.ⁿ⁶⁴ⁿ⁶⁵ There must be an affirmative writing by the agency. For example, the failure of the agency to respond to an employer's request for a ruling is not considered an interpretation or ruling of the agency.ⁿ⁶⁶ Furthermore, the administrative regulation, order, ruling, approval, or interpretation must be in effect at the time of the reliance.ⁿ⁶⁷

A separate defense established by Title 29 *United States Code*, section 260 bars recovery of *liquidated damages* under the FLSAⁿ⁶⁸ if the employer proves to the satisfaction of the court that the act or omission complained of was in good faith *and* that the employer had reasonable grounds for believing that its act or omission was not a violation of the FLSA.ⁿ⁶⁹ The employer bears the difficult burden of proving both subjective good faith and objective reasonableness, with double damages being the norm and single damages the exception.ⁿ⁷⁰ This defense, if established, permits the court to exercise its discretion as to whether or not to award liquidated damages and, if so, whether to award an amount less than the amount to which the plaintiff would otherwise be entitled under Title 29 *United States Code*, section 216.ⁿ⁷¹ If the defendant employer fails to sustain its burden of proof, an award of liquidated damages equal to the amount of back wages due is mandatory.ⁿ⁷²

[7] Termination of Right to Bring Claim

An agreement to accept sums recovered pursuant to a settlement under the Secretary of Labor's supervision as payment in full of minimum wages and overtime compensation due waives the employee's rights to bring a civil action on receipt of full payment, including liquidated damages.ⁿ⁷³ The right to bring an action for recovery of minimum wages and/or overtime compensation or to join in such an action also terminates when the Secretary of Labor files a complaint for minimum wages, overtime compensation, liquidated or other damages, or for injunctive relief.ⁿ⁷⁴ The right to maintain an individual action is reinstated if the Secretary's action under Title 29 *United States Code*, section 216(c) is dismissed without prejudice on motion of the Secretary.ⁿ⁷⁵

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions Employees

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. § 216(b); *Leone v. Mobil Oil Corp.* (D.C. Cir. 1975) 523 F.2d 1153, 1157-1158 ; *Aguilar v. Clayton* (E.D. Okla. 1978) 452 F. Supp. 896, 899-900 .

(n2)Footnote 2. *Barrentine v. Arkansas-Best Freight Sys.* (1981) 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 .

(n3)Footnote 3. *See* 29 U.S.C. § 216(b), (c); *see also* discussion in [7], *below*, and in § 5.81[5], [6].

(n4)Footnote 4. *See* 29 U.S.C. § 255(a).

(n5)Footnote 5. *See* 29 U.S.C. § 256; *Gray v. Swanney-McDonald, Inc.* (9th Cir. 1971) 436 F.2d 652, 654-655 , *cert. denied*, 402 U.S. 995 .

(n6)Footnote 6. *See* 29 U.S.C. § 256; *Kinney Shoe Corp. v. Vorhes* (9th Cir. 1977) 564 F.2d 859, 862 . For a discussion of the rules regarding maintenance of such class actions, *see* Moore's Federal Practice, vol. 5, ch. 23.

(n7)Footnote 7. *Albertson's, Inc. v. United Food* (9th Cir. 1998) 157 F.3d 758 , *cert. denied* (1999) 528 U.S. 809 .

(n8)Footnote 8. *Albertson's, Inc. v. United Food* (9th Cir. 1998) 157 F.3d 758, 762 , cert. denied (1999) 528 U.S. 809 .

(n9)Footnote 9. *Albertson's, Inc. v. United Food* (9th Cir. 1998) 157 F.3d 758, 762 , cert. denied (1999) 528 U.S. 809 .

(n10)Footnote 10. *Albertson's, Inc. v. United Food* (9th Cir. 1998) 157 F.3d 758, 762 , cert. denied (1999) 528 U.S. 809 .

(n11)Footnote 11. See 29 U.S.C. § 216(b).

(n12)Footnote 12. See *Marchak v. Observer Publications, Inc.* (D. R.I. 1980) 493 F. Supp. 278, 282 .

(n13)Footnote 13. 29 U.S.C. § 216(b).

(n14)Footnote 14. *Breuer v. Jim's Concrete of Brevard, Inc.* (2003) 538 U.S. 691, 123 S. Ct. 1882, 155 L. Ed. 2d 923 .

(n15)Footnote 15. See *Gibbons v. Trapnell* (S.D. Cal. 1955) 151 F. Supp. 453, 454-455 ; see also 29 U.S.C. § 216(b).

(n16)Footnote 16. See 29 U.S.C. §§ 216(b), 256; *Kinney Shoe Corp. v. Vorhes* (9th Cir. 1977) 564 F.2d 859, 862 . District courts may facilitate notice of class action by authorizing court-approved notice to potential plaintiffs under 29 U.S.C. § 216(b). See also *Hoffmann-La Roche, Inc. v. Sperling* (1989) 493 U.S. 165, 169, 110 S. Ct. 482, 107 L. Ed. 2d 480 (decision involved ADEA action which incorporates and implements 29 U.S.C. § 216(b)).

(n17)Footnote 17. See, e.g., *Culver v. Bell & Loffland* (9th Cir. 1944) 146 F.2d 29, 31 .

(n18)Footnote 18. See *Mitchell v. Lancaster Milk Co.* (M.D. Pa. 1960) 185 F. Supp. 66, 71 .

(n19)Footnote 18.1. 29 U.S.C. § 216(b).

(n20)Footnote 18.2. *Haro v. City of Rosemead* (2009) 174 Cal. App. 4th 1067, 1071, 94 Cal. Rptr. 3d 874 .

(n21)Footnote 18.3. *Haro v. City of Rosemead* (2009) 174 Cal. App. 4th 1067, 1072, 94 Cal. Rptr. 3d 874 . See also *Smith v. T-Mobile USA, Inc.* (9th Cir. 2009) 570 F.3d 1119, 1122-1123 (FLSA case cannot become collective action unless other plaintiffs affirmatively opt in by giving written and filed consent).

(n22)Footnote 18.4. *Haro v. City of Rosemead* (2009) 174 Cal. App. 4th 1067, 1070-1077, 94 Cal. Rptr. 3d 874 .

(n23)Footnote 18.5. *Haro v. City of Rosemead* (2009) 174 Cal. App. 4th 1067, 1071, 94 Cal. Rptr. 3d 874 . See also *Smith v. T-Mobile USA, Inc.* (9th Cir. 2009) 570 F.3d 1119, 1122-1123 (FLSA representative's right to represent class depends entirely on whether other plaintiffs have opted in).

(n24)Footnote 18.6. *Haro v. City of Rosemead* (2009) 174 Cal. App. 4th 1067, 1071-1072, 94 Cal. Rptr. 3d 874 .

(n25)Footnote 18.7. See *American Pipe & Construction Co. v. Utah* (1974) 414 U.S. 538, 551-552, 94 S. Ct. 756, 38 L. Ed. 2d 713 .

(n26)Footnote 18.8. See *Hoffman-La Roche Inc. v. Sperling* (1989) 493 U.S. 165, 171-172, 110 S. Ct. 482, 107 L. Ed. 2d 480 .

(n27)Footnote 18.9. *Smith v. T-Mobile USA, Inc.* (9th Cir. 2009) 570 F.3d 1119, 1122-1123 (because plaintiffs voluntarily settled all of their claims after district court's denial of class certification, they failed to retain personal stake

in litigation and their appeal was moot). *See also Sandoz v. Cingular Wireless LLC* (5th Cir. 2008) 553 F.3d 913, 915-919; *Cameron-Grant v. Maxim Healthcare Servs., Inc.* (11th Cir. 2003) 347 F.3d 1240, 1247-1249.

(n28)Footnote 19. *See, e.g., Fleming v. Southern Kraft Corp.* (S.D.N.Y. 1942) 43 F. Supp. 541, 542.

(n29)Footnote 20. *See, e.g., Bloch v. Bell* (W.D. Ky. 1945) 63 F. Supp. 863, 866, modified, 152 F.2d 962 (6th Cir. 1946).

(n30)Footnote 21. *See, e.g., Shultz v. Chalk-Fitzgerald Constr. Co.* (D. Mass. 1970) 309 F. Supp. 1255, 1257.

(n31)Footnote 22. *Lambert v. Ackerley* (9th Cir. 1999) 180 F.3d 997, 1012 (individual defendants who exercised economic and operational control over employment relationship with plaintiff-sales agents could be held liable under FLSA).

(n32)Footnote 23. *See, e.g., Divine v. Levy* (W.D. La. 1942) 45 F. Supp. 49, 51.

(n33)Footnote 23.1. *Boucher v. Shaw* (9th Cir. 2009) 572 F.3d 1087, 1090-1094 (despite bankruptcy of employer, chairman and chief executive officer, manager responsible for handling labor and employment matters, and chief financial officer of employer at time plaintiffs were discharged, could all be found liable under FLSA, where, as managers, they were independently liable under FLSA, and automatic stay has no effect on that liability). *See Donovan v. Agnew* (1st Cir. 1983) 712 F.2d 1509, 1511, 1514 (managers of bankrupt corporation [individually] jointly and severally liable under FLSA for unpaid wages); *Chung v. New Silver Palace* (S.D.N.Y. 2002) 246 F. Supp. 2d 220, 226 (automatic stay in bankruptcy affected only debtor and did not apply to plaintiff's FLSA claims against the debtor's non-debtor co-defendants).

(n34)Footnote 24. *See, e.g., Morales v. Compania Azucarera Del Toa* (D. P.R. 1946) 68 F. Supp. 346, 347.

(n35)Footnote 25. *See, e.g., Dunlop v. Beloit College* (W.D. Wis. 1976) 411 F. Supp. 398, 402.

(n36)Footnote 26. *Quillin v. State of Or.* (9th Cir. 1997) 127 F.3d 1136, 1138 (federal courts lack subject matter jurisdiction to review FLSA claims of overtime violations absent waiver); *see Seminole Tribe of Fla. v. Florida* (1996) 517 U.S. 44, 116 S. Ct. 1114, 1131-1132, 134 L. Ed. 2d 252 (Eleventh Amendment prevents congressional authorization of private party suits against consenting states).

(n37)Footnote 27. *Quillin v. State of Or.* (9th Cir. 1997) 127 F.3d 1136, 1138-1139 (quoting *Edelman v. Jordan* (1974) 415 U.S. 651, 673, 94 S. Ct. 1347, 39 L. Ed. 2d 662, and holding that state's failure to raise immunity defense when clearly foreclosed by then-applicable Supreme Court precedent does not constitute express or implied waiver).

(n38)Footnote 28. *Doe v. Advanced Textile Corp.* (9th Cir. 2000) 214 F.3d 1058, 1068-1069.

(n39)Footnote 29. *Doe v. Advanced Textile Corp.* (9th Cir. 2000) 214 F.3d 1058, 1068-1069.

(n40)Footnote 29.1. *Hoffman v. Construction Protective Services* (9th Cir. 2008) 541 F.3d 1175, 1179.

(n41)Footnote 29.2. *Hoffman v. Construction Protective Services* (9th Cir. 2008) 541 F.3d 1175, 1179.

(n42)Footnote 29.3. *Hoffman v. Construction Protective Services* (9th Cir. 2008) 541 F.3d 1175, 1179. Compare *Adkins v. Mid-American Growers, Inc.* (N.D. Ill. 1992) 143 F.R.D. 171, 174 (precluding individual discovery in FLSA case as inappropriate under circumstances) with *Krueger v. N.Y. Tel. Co.* (S.D.N.Y. 1995) 163 F.R.D. 446, 451 (permitting individualized discovery relating to damages in opt-in class action).

(n43)Footnote 29.4. *See Hoffman v. Construction Protective Services* (9th Cir. 2008) 541 F.3d 1175, 1179-1180. *See also* Fed. R. Civ. P. 26(a)(1)(A)(iii) (requiring disclosure by each party of computation of each category of damages

claimed).

(n44)Footnote 30. *See* 29 U.S.C. § 216(b).

(n45)Footnote 31. *See, e.g., Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 687, *superseded by statute on other grounds, see* 29 U.S.C. § 251 *et seq.*; *Brock v. Seto* (9th Cir. 1986) 790 F.2d 1446, 1448; *Houser v. Matson* (9th Cir. 1971) 447 F.2d 860, 863.

(n46)Footnote 32. 29 U.S.C. §§ 216(b), 260; *SEIU, Local 102 v. County of San Diego* (9th Cir. 1995) 60 F.3d 1346, 1355-1356; *Bureerong v. Uvawas* (C.D. Cal 1996) 922 F. Supp. 1450, 1479; *Local 246 Util. Workers Union v. Southern Cal. Edison* (9th Cir. 1996) 83 F.3d 292, 297-298 (employer has burden of establishing subjective and objective good faith; if it fails to do so, liquidated damages are mandatory); *see also Chao v. A-One Medical Services, Inc.* (9th Cir. 2003) 346 F.3d 908, 2003 U.S. App. LEXIS 20304 at *25-27 (owner's reckless belief that formal separation of two entities found to be both single enterprise and joint employers for FLSA coverage and overtime purposes would justify nonpayment of overtime wages was legally insufficient as good faith defense); *Craig v. Far West Eng'g Co.* (9th Cir. 1959) 265 F.2d 251, 261; *Kelly v. Ballard* (S.D. Cal. 1969) 298 F. Supp. 1301, 1309.

(n47)Footnote 33. 29 U.S.C. § 260; *see also Bureerong v. Uvawas* (C.D. Cal 1996) 922 F. Supp. 1450, 1479.

(n48)Footnote 34. For further discussion, *see* [6][b], *below*.

(n49)Footnote 35. *See Birbalas v. Cuneo Printing Indus.* (7th Cir. 1944) 140 F.2d 826, 829.

(n50)Footnote 36. *Chao v. A-One Medical Services, Inc.* (9th Cir. 2003) 346 F.3d 908, 2003 U.S. App. LEXIS 20304 at *26. For discussion of the statute of limitations under 29 U.S.C. § 255(a), *see* § 5.81[5][c].

(n51)Footnote 37. *See Travis v. Gary Community Mental Health Ctr.* (7th Cir. 1990) 921 F.2d 108, 112; *see also Lambert v. Ackerley* (9th Cir. 1999) 180 F.3d 997, 1011 (court suggested it would likely conclude punitive damages are available under FLSA, but treated issue as waived because defendant did not raise any objection in district court).

See King v. J.C. Penney Co., Inc. (N.D. Ga. 1973) 58 F.R.D. 649, 650.

(n52)Footnote 38. *See Brooklyn Sav. Bank v. O'Neil* (1945) 324 U.S. 697, 715-716, 65 S. Ct. 895, 89 L. Ed. 1296.

(n53)Footnote 39. *See, e.g., Ford v. Alfaro* (9th Cir. 1986) 785 F.2d 835.

(n54)Footnote 40. *See, e.g., Addison v. Huron Stevedoring Corp.* (2d Cir. 1953) 204 F.2d 88, 96.

(n55)Footnote 41. *See* 28 U.S.C. § 1961.

(n56)Footnote 42. 29 U.S.C. § 216(b).

(n57)Footnote 43. *See, e.g., Newhouse v. Robert's Ilima Tours, Inc.* (9th Cir. 1983) 708 F.2d 436, 441.

(n58)Footnote 44. *See* 29 U.S.C. § 216(b); *Houser v. Matson* (9th Cir. 1971) 447 F.2d 860, 863.

(n59)Footnote 45. *See Kerr v. Screen Extras Guild, Inc.* (9th Cir. 1975) 526 F.2d 67, 69-70; *see also Hensley v. Eckerhart* (1983) 461 U.S. 424, 433-434, 103 S. Ct. 1933, 76 L. Ed. 2d 40; *Haworth v. State of Nev.* (9th Cir. 1994) 56 F.3d 1048, 1052 (rejection of Rule 68 offer of judgment must be taken into account in determining reasonableness of attorney's fee award when final judgment was less than offer); *Newhouse v. Robert's Ilima Tours, Inc.* (9th Cir. 1983) 708 F.2d 436, 441.

(n60)Footnote 46. *See Daves v. Hawaiian Dredging Co. (D. Hawaii 1953) 114 F. Supp. 643, 645-646 .*

(n61)Footnote 47. *See Fed. R. Civ. P. 8(a)(1); see also Gustafson v. Fred Wolferman (W.D. Mo. 1945) 6 F.R.D. 503, 504 .*

(n62)Footnote 48. *See 29 U.S.C. §§ 203(b), (r), (s), 206(a), 207(a); see also Childress v. Earl Whitley Enterprises, Inc. (4th Cir. 1968) 388 F.2d 742, 745 ; Tipton v. Bearl Sprott Co. (9th Cir. 1949) 175 F.2d 432, 436 ; Gustafson v. Fred Wolferman (W.D. Mo. 1945) 6 F.R.D. 503, 504-505 .* For discussion of the rules for determining applicability of the FLSA to an employee or employer under the "commerce" tests, *see* Ch. 1.

(n63)Footnote 49. *See 29 U.S.C. §§ 203(d), (e), (g), 206(a), 207(a); see also Huntley v. Gunn Furniture Co. (W.D. Mich. 1948) 79 F. Supp. 110, 111 ; Anderko v. Courtland Handbag Co. (D.N.J. 1943) 53 F. Supp. 140, 142-143 .* For discussion of the rules for determining when an employer-employee relationship exists under the FLSA, *see* Ch. 1.

(n64)Footnote 50. *See 29 U.S.C. §§ 206(a), 207; see also* discussion in Chapters 2 and 3.

(n65)Footnote 51. *See 29 U.S.C. § 254.* For discussion of provisions of the Portal-to-Portal Act limiting an employer's liability under the FLSA for travel time and certain other employee activities, *see* Chapter 3.

(n66)Footnote 52. *See 29 U.S.C. §§ 207(b), (f), (g), (i)-(k), (m), (p), (q), 213.* For discussion of exemptions to minimum wage and overtime requirements under the FLSA, *see* Chapters 2 and 3.

(n67)Footnote 53. *See 29 U.S.C. § 207(o).*

(n68)Footnote 54. *See 29 U.S.C. § 254.* For discussion of what constitutes working time under the FLSA and Portal-to-Portal Act, *see* Chapter 3.

(n69)Footnote 55. *See 29 U.S.C. § 255; see also* discussion in § 5.81[5][c].

(n70)Footnote 56. *See 29 U.S.C. § 216(c); Lynn's Food Stores, Inc. v. United States, etc. (11th Cir. [Ga.] 1982) 679 F.2d 1350, 1352-1353 ; see also* discussion in § 5.81[1].

(n71)Footnote 57. *See 29 U.S.C. §§ 259, 260.*

(n72)Footnote 58. *See 29 U.S.C. §§ 259, 260.*

(n73)Footnote 59. *29 U.S.C. § 259(a).*

(n74)Footnote 60. *See 29 C.F.R. §§ 790.13-790.19.*

(n75)Footnote 61. *Alvarez v. IBP, Inc. (9th Cir. 2003) 339 F.3d 894, 907 , aff'd on other grounds, (2005) 126 S. Ct. 514 ; Frank v. McQuigg (9th Cir. 1991) 950 F.2d 590, 598 .*

(n76)Footnote 62. *Alvarez v. IBP, Inc. (9th Cir. 2003) 339 F.3d 894, 907 , aff'd on other grounds, (2005) 126 S. Ct. 514 ; Frank v. McQuigg (9th Cir. 1991) 950 F.2d 590, 598 , quoting 29 C.F.R. § 790.15(a).*

(n77)Footnote 63. *Alvarez v. IBP, Inc. (9th Cir. 2003) 339 F.3d 894, 907 , aff'd on other grounds, (2005) 126 S. Ct. 514 ; see Keeley v. Loomis Fargo & Co. (3d Cir. 1999) 183 F.3d 257, 271 , citing 29 C.F.R. § 790.15(b).*

(n78)Footnote 64. *Alvarez v. IBP, Inc. (9th Cir. 2003) 339 F.3d 894, 907-908 , aff'd on other grounds, (2005) 126 S. Ct. 514* (employer's reliance on Department of Labor's litigation strategy was not good faith defense because court decisions, agency litigation positions and self-initiated activities are not administrative rulings or interpretations).

(n79)Footnote 65. [Reserved]

(n80)Footnote 66. *See* 29 U.S.C. § 259(a); 29 C.F.R. § 790.17(f).

(n81)Footnote 67. *See* 29 C.F.R. § 790.17(h).

(n82)Footnote 68. *See* 29 U.S.C. § 216(b), (c).

(n83)Footnote 69. 29 U.S.C. § 260.

(n84)Footnote 70. *Alvarez v. IBP, Inc.* (9th Cir. 2003) 339 F.3d 894, 909-910, *aff'd on other grounds*, (2005) 126 S. Ct. 514 (employer's efforts did not constitute evidence of taking steps necessary to ensure FLSA compliance, and, without such evidence, district court did not abuse its discretion in awarding liquidated damages).

(n85)Footnote 71. 29 U.S.C. § 260; *see Bratt v. County of Los Angeles* (9th Cir. 1990) 912 F.2d 1066, 1071-1073 (county's evidence that its interpretation of exemption was reasonable and in good faith made liquidated damages award discretionary); *Bertrand v. Orkin Exterminating Co.* (N.D. Ill. 1978) 454 F. Supp. 78, 82 ; *see also* discussion in [4], *above*.

(n86)Footnote 72. *See Brock v. Claridge Hotel and Casino* (3d Cir. 1988) 846 F.2d 180, 187 ; *see also Brock v. Vafra Corp.* (M.D. Fla. 1987) 668 F. Supp. 1516, 1522 (holding that employer failed to sustain burden of showing good faith when it took no meaningful steps to determine applicability of exemption from minimum wage and overtime provisions).

(n87)Footnote 73. *See* 29 U.S.C. § 216(c).

(n88)Footnote 74. 29 U.S.C. § 216(b), (c).

(n89)Footnote 75. 29 U.S.C. § 216(c).



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

Part B. ADDITIONAL REMEDIES FOR FAILURE TO PAY MINIMUM WAGES OR OVERTIME

COMPENSATION

Subpart 2. Federal Law

1-5 California Employment Law § 5.83

AUTHOR: By Susan Spurlark, J.D.

§ 5.83 Protection of Employee for Filing Claim or Testifying Against Employer

The FLSA makes it unlawful for "any person" to discharge or in any other manner discriminate against any employee because that employee has (1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the FLSA, or (2) has testified or is about to testify in any such proceeding.ⁿ¹ This anti-retaliation provision has been held applicable to an employee who resigned because of alleged discrimination and to an employee who testified in a criminal proceeding against an employer.ⁿ² Another example of an act of retaliation prohibited by this provision is the filing of a lawsuit against an employee who brought a claim against the employer.ⁿ³ An employer may be held liable for such retaliation even if the employer is ultimately determined not to be covered by the FLSA and regardless of the merits of the underlying claims.ⁿ⁴

In a case of first impression in the circuit, the Ninth Circuit concluded that the FLSA's antiretaliation provision should be interpreted broadly to include informal complaints made to employers.ⁿ⁵ The court pointed out, however, that the complaints made cannot be too amorphous, informal, or generalized.ⁿ⁶ The issue of specificity must be determined on a case-by-case basis, but as long as the employee communicates the substance of the allegations to the employer, he or she will be protected by the antiretaliation provision. In addition, the employee may communicate the complaint either orally or in writing, and need not refer to the statute by name.ⁿ⁷

An employer who unlawfully discriminates against a claimant or witness in a proceeding under the FLSA is liable for legal or equitable relief as appropriate under the circumstances, including employment, reinstatement, promotion, back pay, and an additional equal amount as liquidated damages.ⁿ⁸ The purpose of the award is to return the employee to the position he or she would have been in but for the discrimination.ⁿ⁹ However no award will be made for gross humiliation, embarrassment, and inconvenience.ⁿ¹⁰ The court has discretion with regard to the propriety of an order of reinstatement, and such a remedy will be denied where there is evidence of dishonesty or incompetence.ⁿ¹¹

An employee injured by such discrimination or retaliation may bring a civil action on his or her own behalf or on behalf

of other employees similarly situated (with their written consent) to obtain the remedies described above, subject to the same provisions applicable to actions to recover minimum wages or overtime compensation, as discussed in § 5.82.ⁿ¹² However, the employee's right to bring or to become a party to such an action terminates if the Secretary of Labor brings an action pursuant to Title 29 *United States Code*, section 217 for legal and equitable relief as a result of such discrimination or retaliation.ⁿ¹³

For discussion of other statutory and common law remedies for unlawful termination or retaliation, *see generally* Chapter 60.

Legal Topics:

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

Labor & Employment Law Discrimination Retaliation General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 215(a)(3).

(n2)Footnote 2. *See, e.g., Ford v. Alfaro* (9th Cir. 1986) 785 F.2d 835 ; *Wirtz v. Home News Publishing Company* (5th Cir. 1965) 341 F.2d 20, 23 .

(n3)Footnote 3. *See Martinez v. Deaf Smith County Grain Processors* (N.D. Tex. 1984) 583 F. Supp. 1200, 1209-1210 .

(n4)Footnote 4. *See, e.g., Wirtz v. Ross Packaging Company* (5th Cir. 1966) 367 F.2d 549, 550-551 .

(n5)Footnote 5. *Lambert v. Ackerley* (9th Cir. 1999) 180 F.3d 997, 1007-1008 , *pet. for cert. filed* 10/20/99.

(n6)Footnote 6. *Lambert v. Ackerley* (9th Cir. 1999) 180 F.3d 997, 1007 , *pet. for cert. filed* 10/20/99.

(n7)Footnote 7. *Lambert v. Ackerley* (9th Cir. 1999) 180 F.3d 997, 1007-1008 , *pet. for cert. filed* 10/20/99.

(n8)Footnote 8. 29 U.S.C. § 216(b); *Mitchell v. De Mario Jewelry* (1960) 361 U.S. 288, 295-296, 80 S. Ct. 332, 4 L. Ed. 2d 323 . *See Lambert v. Ackerley* (9th Cir. 1999) 180 F.3d 997, 1011 , *pet. for cert. filed* 10/20/99 (court suggested it would likely conclude that punitive damages are available under FLSA, but treated issue as waived because defendant did not raise any objection in district court).

(n9)Footnote 9. *See Reeves v. International Tel. and Tel. Corp.* (5th Cir. [La.] 1980) 616 F.2d 1342, 1353 .

(n10)Footnote 10. *See Martinez v. Behring's Bearings Service, Inc.* (M.D. La. 1973) 363 F. Supp. 428, 430 , *aff'd*, 501 F.2d 104 (5th Cir. 1974) .

(n11)Footnote 11. *See, e.g., Hodgson v. Texaco Inc.* (5th Cir. [Fla.] 1971) 440 F.2d 662, 663 ; *Goldberg v. Bama Manufacturing Corporation* (5th Cir. 1962) 302 F.2d 152, 156 .

(n12)Footnote 12. *See* 29 U.S.C. § 216(b).

(n13)Footnote 13. *See* 29 U.S.C. § 216(b); *see also* discussion in §§ 5.81[6], 5.82[7].



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 5 Administrative and Judicial Remedies Under Wage and Hour Laws

Part B. ADDITIONAL REMEDIES FOR FAILURE TO PAY MINIMUM WAGES OR OVERTIME

COMPENSATION

Subpart 2. Federal Law

1-5 California Employment Law §§ 5.84 through 5.89

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§§ 5.84[Reserved]



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1-5 California Employment Law § 5.90

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§ 5.90 Legal Texts

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Legal Topics:

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

Labor & Employment LawDiscriminationRetaliationGeneral OverviewLabor & Employment LawWage & Hour
LawsGeneral OverviewLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesGeneral
OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral Overview



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1-5 California Employment Law § 5.91

AUTHOR: By Susan Spurlark, J.D.

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§ 5.91[Reserved]



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Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Administrative Proceedings & Remedies General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws Remedies General Overview



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 6 Child Labor Laws

1-6 California Employment Law 6.syn

AUTHOR: By Susan Spurlark, J.D.

§ 6.syn Synopsis to Chapter 6: Child Labor Laws

§ 6.01 Persons Covered and Exempted

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[b] Exemptions

[2] Federal Law

[a] Generally

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[ii] Fair Labor Standards Act--"Hot Goods" Prohibited

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§§ 6.06through 6.09 [Reserved]

§ 6.10 Legal Texts

§ 6.11 [Reserved]

§ 6.12 Legal Periodicals

*By Susan Spurlark, J.D. n**

FOOTNOTES:

(n1)Footnote *. Ms. Spurlark specializes in representation of private and public employers in matters involving labor and employment law. She received her J.D. from Stanford Law School in 1975.

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 6 Child Labor Laws

1-6 California Employment Law Scope

AUTHOR: By Susan Spurlark, J.D.

Scope

By Susan Spurlark, J.D. n SCOPE*

This chapter discusses state and federal laws and regulations that restrict and regulate the employment of minors. The chapter identifies the persons covered by child labor laws and persons who are exempt from coverage. The chapter also discusses limitations on the time of day or night and the total number of hours that may be worked by minors, as well as the type of work in which minors may engage. Finally, the chapter discusses the permits that are required when minors are employed, the penalties for violations of child labor laws, and enforcement procedures.

Remedies for violations of wage and hour laws generally are covered in Chapter 5. Minimum wage requirements as they relate to minors are discussed in Chapter 2. Overtime compensation requirements are discussed in Chapter 3. For an overview of the applicability of various wage and hour laws, including the child labor provisions thereof, see Chapter 1.

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 6 Child Labor Laws

Part A. TEXT

1-6 California Employment Law § 6.01

AUTHOR: By Susan Spurlark, J.D.

§ 6.01 Persons Covered and Exempted

[1] California Law

[a] Generally

The California Labor Code and California Education Code contain numerous provisions regulating the employment of minors. These statutory provisions restrict both (1) the hours that minors may be employed,ⁿ¹ and (2) the types of work that minors may perform.ⁿ² The Education Code also contains provisions regulating the employment of minors by requiring minor pupils to obtain work permits.ⁿ³ The purpose of these laws is to "protect minors against the risk of injuries generally associated with child labor, such as overwork and exposure to dangerous, immoral, or unhealthful conditions."ⁿ⁴

As used in the Labor Code provisions, a minor is any person who is under the age of 18 years and required to attend school pursuant to the compulsory education laws.ⁿ⁵ However, under that definition, a person under the age of 18 who is not required to attend school solely because he or she is not a resident of California is still considered a minor.ⁿ⁶ A minor also includes any person under the age of six years.ⁿ⁷ Some of the child labor provisions apply only to minors under the age of 16 years,ⁿ⁸ and some are limited to younger minors.ⁿ⁹

Civil and criminal sanctions for violations of the child labor laws apply to any person, or agent or officer thereof, who employs a minor directly or indirectly through third persons in violation of the Labor Code provisions, and also to parents and guardians who violate those provisions.ⁿ¹⁰ These provisions, and civil penalties for their violation, also apply to persons who own or control the real property on which the minor is employed, regardless of whether the owner is the minor's employer, if the employment is for such owner's benefit and he or she knowingly permits the violation or continuation of the violation.ⁿ¹¹

[b] Exemptions

The Labor Code restrictions on employment of minors do not prohibit or prevent the following:

1-6 California Employment Law § 6.01

1. Employment by the minor's parent(s) or guardian(s) if the work involves agricultural, horticultural, viticultural, or domestic labor, is performed when the public schools are not in session or outside of school hours, and is performed on or in connection with premises owned, operated, or controlled by the parent or guardian;ⁿ¹²
2. Employment of minors who are exempt from compulsory school attendance under *Education Code Section 48231* (exemption for pupils who enter from another state within ten school days before end of school term);ⁿ¹³ or
3. The appearance of a minor in (a) any church, public or religious school, or community entertainment, (b) any school entertainment or any entertainment for charity or for children, for which no admission fee is charged, (c) any radio or television broadcasting exhibition, if the minor receives no compensation directly or indirectly therefore, the engagement is limited to a single appearance lasting no more than one hour, and no admission fee is charged, or (d) any one event during a calendar year, occurring on a day when school attendance is not required or on the preceding day, lasting four hours or less, provided the minor's parent or guardian is present and the minor does not directly or indirectly receive any compensation.ⁿ¹⁴

Furthermore, minors 14 and 15 years of age may be employed in occupations not otherwise prohibited by the child labor provisions of the Labor Code, including, but not limited to, the following:

1. Office and clerical work, including operation of office machines;ⁿ¹⁵
2. Cashiering, selling, modeling, art work, work in advertising departments, window trimming, and comparative shopping;ⁿ¹⁶
3. Price marking and tagging by hand or by machine, assembling orders, packing, and shelving;ⁿ¹⁷
4. Bagging and carrying out customers' orders;ⁿ¹⁸
5. Errand and delivery work by foot, bicycle, or public transportation;ⁿ¹⁹
6. Cleanup work, including the use of vacuum cleaners and floor waxers, and maintenance of grounds (other than the use of power-driven mowers or cutters);ⁿ²⁰
7. Kitchen work and other work involved in preparing and serving food and beverages, including operation of machines and devices used in the performance of this work;ⁿ²¹ or
8. Cleaning vegetables and fruits, and wrapping, sealing, labelling, weighing, pricing, and stocking goods (if performed in areas physically separate from areas where meat is prepared and outside freezers or meat coolers).ⁿ²²

The Labor Commissioner may issue an exemption from laws regulating the employment of minors to employers operating agricultural packing plants that employ minors 16 and 17 years of age on days when school is not in session.ⁿ²³ The exemptions allow employment of these minors for up to 10 hours per day during the peak harvest season.ⁿ²⁴ The Labor Commissioner may grant an exemption only if it will not materially affect the safety and welfare of minor employees and if it will prevent undue hardship on the employer.ⁿ²⁵ An employer must apply for the exemption and may have to undergo an inspection of the plant before the Labor Commissioner issues the exemption.ⁿ²⁶

In addition, many of the specific statutory restrictions contain exceptions specifically applicable to those provisions. These exceptions are discussed under the specific provisions to which they relate.

[2] Federal Law

[a] Generally

[i] Fair Labor Standards Act--Oppressive Child Labor

The Fair Labor Standards Act (FLSA)ⁿ²⁷ prohibits any employer from employing any "oppressive child labor" in commerce or the production of goods for commerce, or in any enterprise engaged in commerce or the production of goods for commerce.ⁿ²⁸ For general discussion of the applicability of the FLSA, including a discussion of what constitutes employment in commerce or the production of goods for commerce (or an "enterprise" engaged in such activities), see Chapter 1.

Except as discussed in [b], *below*, employment of a minor under the age of 16 years in *any* occupation constitutes "oppressive child labor,"ⁿ²⁹ and is therefore prohibited by the FLSA.ⁿ³⁰ Employment of minors between the ages of 16 and 18 years in occupations determined by the Secretary of Labor to be particularly hazardous for the employment of minors or detrimental to their health or well-being also constitutes "oppressive child labor."ⁿ³¹ For discussion of particular occupations that have been determined to be hazardous to minors by the Secretary, see § 6.03[2].

[ii] Fair Labor Standards Act--"Hot Goods" Prohibited

A separate provision applicable to producers, manufacturers, and dealers bars such persons or entities from shipping or delivering for shipment in commerce any goods that have been produced in an establishment located in the United States where oppressive child labor was employed within 30 days prior to the removal of the goods from that establishment.ⁿ³² Under this provision, goods produced in such an establishment may not lawfully be shipped in commerce even if oppressive child labor was not employed to produce those particular goods.ⁿ³³

This provision, often referred to as the "hot goods" provision, is not applicable to a purchaser who acquires the goods in good faith in reliance on a written assurance from the producer, manufacturer, or dealer that the goods were produced in compliance with the child labor provisions of the FLSA, and who acquired the goods for value without notice of any violation of the FLSA.ⁿ³⁴ In addition, a prosecution and conviction of a defendant for shipping or delivering goods in violation of the FLSA acts as a bar to any further prosecution against the same defendant for shipments or deliveries of such goods that occurred before the beginning of the prosecution.ⁿ³⁵

[iii] Other Laws

The provisions of the FLSA regarding child labor must be complied with in addition to any other applicable law, and do not pre-empt other federal, state, or local laws that impose higher standards than the FLSA.ⁿ³⁶ Thus, if more than one law or regulation applies to a particular activity governed by various child labor laws, the more stringent standard applies.ⁿ³⁷

Other federal laws containing provisions that relate to child labor include the Walsh-Healy Act,ⁿ³⁸ which governs the use of child labor by federal contractors;ⁿ³⁹ and the Mineral Land Leasing Act,ⁿ⁴⁰ which, among other things, restricts the employment of children under 16 years of age in certain mining operations.ⁿ⁴¹

[b] Exemptions

[i] Employment by Parents

Although employment of a minor under the age of 16 years in commerce or the production of goods for commerce generally constitutes "oppressive child labor" and is prohibited by the FLSA,ⁿ⁴² the FLSA permits a parent or person standing in the place of a parent to employ his or her own child or ward who is under the age of 16 years in an occupation other than manufacturing, mining, or those that have been found to be particularly hazardous or detrimental to the health and well being of children between the ages of 16 and 18 years.ⁿ⁴³ This exemption does not apply unless the child works exclusively for the parent or person standing in the parent's place.ⁿ⁴⁴ A minor below the age of 16 years who is employed in agricultural occupations that are particularly hazardous to children under the age of 16 years is also exempt from the child labor provisions of the FLSA if the minor is employed by his or her parent (or a person standing in the place of a parent) on a farm owned or operated by that parent.ⁿ⁴⁵

[ii] Agricultural Occupations

The child labor provisions of the FLSA do not apply to a minor employed in agriculture outside of school hours for the school district in which the minor resides, if one of the following conditions also exists:ⁿ⁴⁶

1. The employee is less than 12 years old, and is employed either (a) by his or her parent (or by a person standing in the place of a parent) on a farm owned or operated by the parent, or (b) with the consent of his or her parent (or a person standing in the place of a parent) on a farm where none of the employees must be paid the federal minimum wage because of the exemption provided by Title 29 *United States Code*, Section 213(a)(6)(A);ⁿ⁴⁷ or
2. The employee is 12 or 13 years old, and (a) the employment is with the consent of his or her parent (or a person standing in the place of a parent), or (b) his or her parent (or a person standing in the place of a parent) is employed on the same farm; or
3. The employee is 14 years old or older.

The exemption does *not* apply to an employee under the age of 16 years who is employed in an agricultural occupation found to be particularly hazardous for children below the age of 16, except when the employee is employed by his or her parent (or a person standing in place of the parent) on a farm owned or operated by the parent.ⁿ⁴⁸ For discussion of agricultural occupations that have been found to be hazardous to minors, see § 6.03[2][c].

Under specified conditions, the FLSA permits agricultural employers to apply to the Secretary of Labor for a waiver of the child labor provisions for a period not to exceed 8 weeks in any calendar year to allow employment of minors between the ages of 10 and 12 years as hand harvest laborers.ⁿ⁴⁹ For discussion, see § 6.04[2][b].

It should be noted that the federal exemption for agricultural employees is not coextensive with the analogous California exemption. For discussion of the latter, see §§ 6.02[1][b][i], 6.03[1][b].

[iii] Actors and Performers

The FLSA provides a complete exemption from its child labor provisions for children employed as actors or performers in motion pictures or theatrical productions, or in radio or television productions.ⁿ⁵⁰ The term "performer" is defined by federal regulationsⁿ⁵¹ and is broader than the term "actor."ⁿ⁵²

Although exempt from the child labor provisions of the FLSA, child actors and performers are subject to statutory and administrative regulation under California law.ⁿ⁵³ For discussion of these provisions, see §§ 6.03[1][c], 6.04[1][b].

[iv] Newspaper Carriers and Wreathmakers

The child labor provisions of the FLSA (as well as the minimum wage and overtime provisions) do not apply to any employee engaged in the delivery of newspapers to the consumer.ⁿ⁵⁴ Examples of the kinds of work covered by the exemption for newspaper delivery are found at Title 29 *Code of Federal Regulations Section 570.124*. The same provision of the FLSA exempts "any homemaker engaged in the making of wreaths composed principally of natural holly, pine, cedar, or other evergreens (including the harvesting of evergreens or other forest products used in making such wreaths)."ⁿ⁵⁵ No such blanket exemption exists under California law.

[v] Other Exemptions

The child labor, minimum wage, and overtime provisions of the FLSA do not apply to work performed within a foreign country or to work performed within a United States territory other than a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, the outer Continental Shelf lands,ⁿ⁵⁶ American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, and Johnston Island.ⁿ⁵⁷

Further, by regulation, the Secretary of Labor permits employment of children between the ages of 14 and 16 years in certain occupations, including those in retail, food service, and gasoline service establishments, if certain requirements are met, and in certain school administered and supervised "work experience and career exploration" programs that meet the standards of the state educational agency.ⁿ⁵⁸ For discussion, see § 6.03[2][a].

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Child Labor Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code §§ 1297, 1308.7, 1390-1399; Educ. Code § 49116.*

(n2)Footnote 2. *See Lab. Code §§ 1285-1312.*

(n3)Footnote 3. *See Educ. Code §§ 49100-49183.*

(n4)Footnote 4. *Ramos v. County of Madera (1971) 4 Cal. 3d 685, 696, 94 Cal. Rptr. 421, 484 P.2d 93 ; see also Maryland Casualty Co. v. Industrial Acci. Com. (1919) 179 Cal. 716, 720, 178 P. 858 ; Boyles v. Hamilton (1965) 235 Cal. App. 2d 492, 498, 45 Cal. Rptr. 399 .*

(n5)Footnote 5. *See Lab. Code § 1286(c); see Educ. Code §§ 48200-48342.5 (compulsory education), 48400-48454 (compulsory continuing education); see also Fam. Code § 6500 (general definition of minor as person under age of 18 years).*

(n6)Footnote 6. *Lab. Code § 1286(c).*

(n7)Footnote 7. *Lab. Code § 1286(c).*

(n8)Footnote 8. *See, e.g., Lab. Code §§ 1290-1293, 1294, 1297, 1308(a)(1), (2), (4), 1308.5, 1308.6.*

(n9)Footnote 9. *See Lab. Code §§ 1293.1 (minors under age of 12 years may not be employed in agricultural zone of danger), 1298 (minors under age of 10 years may not be employed in certain street occupations); see also Lab. Code § 1308.7 (restrictions on hours worked by minors of any age employed in entertainment industry).*

(n10)Footnote 10. *See Lab. Code §§ 1287, 1303, 1308, 1308.7, 1391; see also Educ. Code §§ 49180-49183, and*

discussion in § 6.05[1][b].

(n11)Footnote 11. *See Lab. Code § 1301*. The Division of Labor Standards Enforcement issued a pamphlet entitled "California Child Labor Laws, 1995-1996" which contains a helpful chart of both the state and federal regulations regarding child labor laws.

(n12)Footnote 12. *Lab. Code § 1394(a)*; *see also Educ. Code § 49141* (work permits generally not required for minors employed by parent or guardian on premises owned, operated, or controlled by parent or guardian).

(n13)Footnote 13. *Lab. Code § 1394(b)*.

(n14)Footnote 14. *Lab. Code § 1310*.

(n15)Footnote 15. *Lab. Code § 1294.3(a)*.

(n16)Footnote 16. *Lab. Code § 1294.3(b)*.

(n17)Footnote 17. *Lab. Code § 1294.3(c)*.

(n18)Footnote 18. *Lab. Code § 1294.3(d)*.

(n19)Footnote 19. *Lab. Code § 1294.3(e)*.

(n20)Footnote 20. *Lab. Code § 1294.3(f)*.

(n21)Footnote 21. *Lab. Code § 1294.3(g)*.

(n22)Footnote 22. *Lab. Code § 1294.3(h)*.

(n23)Footnote 23. *Lab. Code § 1393(a)*.

(n24)Footnote 24. *Lab. Code § 1393(a)*.

(n25)Footnote 25. *Lab. Code § 1393(a)*.

(n26)Footnote 26. *Lab. Code § 1393(a), (c)*.

(n27)Footnote 27. *See 29 U.S.C. § 201 et seq.*

(n28)Footnote 28. *29 U.S.C. §§ 212(c), 215(a)(4)*; *see 29 C.F.R. §§ 570.112, 570.113*.

(n29)Footnote 29. *See 29 U.S.C. § 203(l)(1)*; *29 C.F.R. §§ 570.2(a)(1)(i), (2), 570.117(b)*.

(n30)Footnote 30. *See 29 U.S.C. § 212(c)*.

(n31)Footnote 31. *See 29 U.S.C. § 203(l)(2)*; *29 C.F.R. §§ 570.2(a)(1)(ii), 570.120*.

(n32)Footnote 32. *29 U.S.C. §§ 212(a), 215(a)(4)*; *see 29 C.F.R. §§ 570.104-570.111*; *see also 29 U.S.C. § 203(b), (i), (j)* (definitions of "commerce," "goods," and "produced"). For general discussion of applicability of the FLSA, *see ch. 1*.

(n33)Footnote 33. *See 29 C.F.R. § 570.114*.

(n34)Footnote 34. *29 U.S.C. § 212(a)*.

(n35)Footnote 35. *29 U.S.C. § 212(a).*

(n36)Footnote 36. *29 U.S.C. § 218(a); 29 C.F.R. §§ 570.25, 570.50(a), 570.129.*

(n37)Footnote 37. *29 C.F.R. §§ 570.25, 570.50(a).*

(n38)Footnote 38. *See 41 U.S.C. § 35 et seq.*

(n39)Footnote 39. *See 41 U.S.C. § 35(c).*

(n40)Footnote 40. *See 30 U.S.C. §§ 181-287.*

(n41)Footnote 41. *See 30 U.S.C. § 187.*

(n42)Footnote 42. *See 29 U.S.C. §§ 203(l)(1), 212(c).*

(n43)Footnote 43. *29 U.S.C. § 203(l)(1); 29 C.F.R. §§ 570.2(a)(2), 570.126.* For discussion of occupations in which children between ages of 16 and 18 may not be employed, *see § 6.03[2].*

(n44)Footnote 44. *29 C.F.R. § 570.126.*

(n45)Footnote 45. *See 29 U.S.C. § 213(c)(2); 29 C.F.R. § 570.70(b).*

(n46)Footnote 46. *29 U.S.C. § 213(c)(1); see 29 C.F.R. § 570.2(b).*

(n47)Footnote 47. For discussion of exemptions to minimum wage requirements, *see ch. 2.*

(n48)Footnote 48. *See 29 U.S.C. §§ 213(c)(1), (2); 29 C.F.R. §§ 570.2(b), 570.123(d).*

(n49)Footnote 49. *See 29 U.S.C. § 213(c)(4); 29 C.F.R. §§ 575.1-575.9.*

(n50)Footnote 50. *29 U.S.C. § 213(c)(3); see 29 C.F.R. § 570.122.*

(n51)Footnote 51. *See 29 C.F.R. § 550.2(b).*

(n52)Footnote 52. *29 C.F.R. § 570.125.*

(n53)Footnote 53. *See Lab. Code §§ 1308.5, 1308.6, 1309, 1309.5, 1309.6, 1310; 8 Cal. Code Reg. §§ 11750-11765; see also 29 U.S.C. § 218(a); 29 C.F.R. § 570.25 (nothing in FLSA excuses employer from compliance with state child labor law establishing higher standard).*

(n54)Footnote 54. *29 U.S.C. § 213(d).*

(n55)Footnote 55. *29 U.S.C. § 213(d).*

(n56)Footnote 56. *See definition in 43 U.S.C. § 1331.*

(n57)Footnote 57. *29 U.S.C. § 213(f).*

(n58)Footnote 58. *See 29 C.F.R. §§ 570.31-570.38; see also 29 U.S.C. § 203(l) (Secretary's authority to provide by regulation that employment of minors between ages of 14 and 16 years in certain occupations other than manufacturing and mining does not constitute oppressive child labor).*



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 6 Child Labor Laws

Part A. TEXT

1-6 California Employment Law § 6.02

AUTHOR: By Susan Spurlark, J.D.

§ 6.02 Restrictions on Hours of Work

[1] California Law

[a] Generally

Restrictions on the hours that a minor may work are found in both the Labor Code and the Education Code.ⁿ¹ Except as discussed in [b], *below*, the Labor Code provides that no minor may be employed for more than 8 hours in a 24-hour day.ⁿ² A minor who is age 15 or younger may not be employed for more than 40 hours in a week, nor for any time before 7:00 a.m. or after 7:00 p.m., except that the minor may work until 9:00 p.m. from June 1 through Labor Day.ⁿ³ A minor who is age 16 or 17 may not be employed for more than 48 hours in a week, nor for any time before 5:00 a.m. or after 10:00 p.m. on any day preceding a schoolday, although the minor may be employed on any evening preceding a nonschoolday until 12:30 a.m. on the nonschoolday.ⁿ⁴ A schoolday is any day on which the minor is required to attend school for 240 minutes or more.ⁿ⁵ The Labor Code provision is inapplicable to any minor employed to deliver newspapers to consumers.ⁿ⁶

Pursuant to the Education Code and with the exceptions explained in [b], *below*, a minor who must obtain a school work permitⁿ⁷ and who is age 14 or 15 may not work more than 3 hours outside school hours on a school day.ⁿ⁸ An employer may not employ such a minor for more than 3 hours in a day or for more than 18 hours in a week, nor may such a minor be employed during school hours.ⁿ⁹ A minor who is 16 or 17 may not work more than 4 hours outside school hours on any day on which the minor is required by law to attend school.ⁿ¹⁰ An employer is prohibited from employing such a minor for more than 4 hours in any day on which the minor must by law attend school for 240 minutes or more.ⁿ¹¹ However, such a minor may work outside school hours for no more than 8 hours on any day that the minor is required by law to attend school and that is immediately prior to a nonschoolday.ⁿ¹² In addition, a 13-year-old who has completed the sixth grade, who is identified as having exhibited the potential to drop out of school, and who participates in an employment program sponsored by a school district, may be issued a work permit, within the school district's discretion, to work two hours a day, with a maximum of four hours a week.ⁿ¹³ Employment for the delivery of newspapers to consumers is excluded from the Education Code provisions.ⁿ¹⁴

[b] Exceptions**[i] Agricultural and Related Occupations**

The general work hour restrictions do not apply to any minor employed in agricultural, horticultural, viticultural, or domestic labor outside of school hours who is working for or under the control of the minor's parent or guardian, and who is performing that work on or in connection with premises owned, operated, or controlled by the parent or guardian. However, minors who are under school age may not engage in such activities during school hours.ⁿ¹⁵

In addition, the Labor Commissioner may issue an exemption from laws regulating the employment of minors to employers operating agricultural packing plants that employ minors 16 and 17 years of age on days when school is not in session.ⁿ¹⁶ The exemptions allow employment of these minors for up to 10 hours per day during the peak harvest season.ⁿ¹⁷ The Labor Commissioner may grant an exemption only if it will not materially affect the safety and welfare of minor employees and if it will prevent undue hardship on the employer.ⁿ¹⁸ An employer must apply for the exemption and may have to undergo an inspection of the plant before the Labor Commissioner issues the exemption.ⁿ¹⁹

[ii] Entertainment Industry

Labor Code Section 1308.7 restricts the hours that any minor may work in the entertainment industry.ⁿ²⁰ No minor may be employed more than eight hours in one day of 24 hours, or more than 48 hours in one week.ⁿ²¹ In addition, a minor may not work before 5:00 a.m. or after 10:00 p.m. on any day preceding a schoolday.ⁿ²² However, a minor may work during any evening preceding a nonschoolday until 12:30 a.m. on the nonschoolday.ⁿ²³ A schoolday is any day in which a minor is required to attend school for 240 minutes or more.ⁿ²⁴

Prior to the enactment of *Labor Code Section 1308.7*, the Labor Commissioner, pursuant to his or her authority to enforce the child labor provisions of the Labor Code,ⁿ²⁵ issued regulations providing guidelines for the employment of minors in the entertainment industry.ⁿ²⁶ Among other things, these regulations limit the hours that minors of certain ages may remain at the place of employment and the hours that they may actually work.ⁿ²⁷ The time limits range from 2 hours (of which no more than 20 minutes may be work time) for babies from the age of 15 days until 6 months, to 10 hours (of which 6 hours are normally work time, 3 are for school, and 1 for rest and relaxation) for minors between the ages of 16 and 18 years.ⁿ²⁸

The regulations define the extent to which certain activities such as meal periods, travel to and from the place of performance, and time spent at home in make-up and hairdressing, must be counted as work time.ⁿ²⁹ Make-up and hairdressing with the assistance of another person may not begin before 8:30 a.m.ⁿ³⁰ The hours of the day during which infants under the age of six months may work is more strictly limited.ⁿ³¹ A period of 12 hours must elapse between the time work ends on one day and begins on the next.ⁿ³² Permission to vary or extend the hours of minors in the entertainment industry must be obtained from the Labor Commissioner and may be granted only for limited reasons and for limited periods.ⁿ³³

[iii] Messengers

Minors under the age of 18 years may be employed or permitted to work as messengers for telephone, telegraph, or messenger companies (or for the United States government or any of its departments while operating a telephone, telegraph, or messenger service) only between the hours of 6:00 a.m. and 9:00 p.m.ⁿ³⁴ Minors under the age of 16 years may not be employed as messengers at all except in cities with 15,000 or fewer inhabitants.ⁿ³⁵ Employment for the delivery of newspapers to consumers is excluded from these requirements.ⁿ³⁶

[iv] Work Experience and Cooperative Vocational Education Programs

Under *Labor Code Section 1391.1*, minors who are of ages 16 or 17 and who are enrolled in work experience or cooperative vocational education programs approved by the State Department of Education (or in similar programs conducted by private schools) may work between the hours of 10:00 p.m. and 12:30 a.m. *if* such employment is not detrimental to the health, education, or welfare of the minor and the work hours are approved by the minor's parents and work experience coordinator.ⁿ³⁷ A minor who works such hours must be paid no less than the adult minimum wage for those hours.ⁿ³⁸

An exemption is also available for minors who are enrolled in, and employed pursuant to, a work experience and career exploration program that is supervised and administered by a school. However, the minor may be employed for no more than 23 hours per week, any portion of which may be during school hours.ⁿ³⁹

A similar exemption authorizes forestry and conservation work, including firefighting, which is a part of training and rehabilitation programs for 16- to 18-year-old wards of the youth authority.ⁿ⁴⁰

[v] High School Graduates

Labor Code Section 1391.2(a) provides that any minor under 18 years old who has been graduated from a high school maintaining a four-year course above the eighth grade (or who has received an equal amount of education in a private school or by private tuition), or who has been awarded a certificate of proficiency pursuant to *Education Code Section 48412*, may be employed for the same hours that an adult may be employed for performing the same work. Such minors must be paid at the same rate as similarly situated adult workers, in the absence of differences in seniority, ability, skill, or other "reasonable [basis for] differentiation."ⁿ⁴¹

[vi] Minors Exempt From Compulsory School Attendance

The general limitations on employment of minors contained in *Labor Code Section 1285 et seq.* do not prohibit the full-time employment of minors who are exempt from compulsory school attendance pursuant to *Education Code Section 48231*.ⁿ⁴² That section of the Education Code provides that a minor between the ages of 12 and 18 years who enters "an attendance area" in California from another state within 10 school days before the end of the school term during which such entrance occurs is exempt from school attendance for the remainder of the term.ⁿ⁴³

[vii] Permits for Full-Time Employment

As noted in [a], *above*, the Education Code provides that minors who are of age 14 or 15 may be employed for no more than 3 hours on a schoolday, minors who are of age 16 or 17 may be employed for no more than 4 hours on a schoolday, and minors of age 13 who have been issued a permit under limited circumstances may be employed for no more than 2 hours a day and no more than 4 hours per week.ⁿ⁴⁴ However, *Education Code Section 49130* provides that minors between the ages of 14 and 16 who have graduated from elementary school may receive a permit to work full time if any of the following conditions apply: (1) the minor's parent or guardian cannot work due to illness or injury;ⁿ⁴⁵ (2) the minor's family needs the minor's earnings because of the death or desertion of the minor's mother or father and the inability to secure sufficient aid in any other manner;ⁿ⁴⁶ (3) the minor cannot reside with his or her family and the minor's earnings are necessary for the minor's support;ⁿ⁴⁷ or (4) the minor is living in foster care, and the purpose of the minor's employment is to further the minor's emancipation or enable the minor to obtain necessary work skills and habits.ⁿ⁴⁸ The permit is only valid until the end of the school year in which it was issued, and the minor must enroll in a work experience education program.ⁿ⁴⁹ Minors who are of age 16 or 17 may be issued a permit for full-time employment without regard to the provisions of *Education Code Sections 49130, 49132, 49133(d)* or *49134* (general requirements for full-time work permits).ⁿ⁵⁰

Although a minor who obtains such a permit may be exempt from the work time restrictions in the Education Code, none of the Education Code provisions regarding work permits purport to supersede the time restrictions contained in

the Labor Code. Thus, the minor is still subject to the hour limits contained in *Labor Code Section 1391*.

[2] Federal Law

The FLSA itself contains no express limitation on work hours for minors (other than the overtime compensation provisions applicable to all employees).ⁿ⁵¹ However, the FLSA authorizes the Secretary of Labor to issue child labor regulations determining that certain occupations (other than manufacturing and mining), work hours, and work conditions are not deemed to be "oppressive" because they do not interfere with the schooling, health, or well-being of 14 to 16-year-old minors.ⁿ⁵² Pursuant to this statutory authority, the Secretary has promulgated regulations permitting employment of 14 to 16-year-old minors in certain occupations in retail, food service, and gasoline service establishments and other nonprohibited occupations under certain conditions.ⁿ⁵³ These occupations include office and clerical work; cashiering; advertising work; selling; price marking; assembling, packing, or shelving orders; bagging and carrying orders; errand and delivery work by foot, bicycle, or public transportation; clean up work; certain kitchen work; and certain work at gasoline stations, such as pumping gas.ⁿ⁵⁴

Among other things, these regulations restrict the hours during which minors between 14 and 16 years old may be employed in such occupations.ⁿ⁵⁵ Generally, employment in such occupations may only occur outside of school hours.ⁿ⁵⁶ In all cases, when school is not in session, a minor may work no more than 40 hours in any one week and 8 hours in any one day.ⁿ⁵⁷ When school is in session, the minor may work no more than 18 hours in any one week and 3 hours in any one day.ⁿ⁵⁸ Such work must be performed between the hours of 7 a.m. and 7 p.m., except that between June 1 and Labor Day, the minor may work until 9 p.m.ⁿ⁵⁹ A limited exception exists for minors working as attendants at sporting events.ⁿ⁶⁰

Under the FLSA, minors over the age of 16 years may engage in agricultural work during school hours.ⁿ⁶¹ Minors between the ages of 14 and 16 years may perform agricultural work only outside of school hours for the school district where such minor is living.ⁿ⁶²

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Child Labor Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. See *Lab. Code* §§ 1297, 1308.5(a)(4), 1308.7, 1391-1394; *Educ. Code* §§ 49112, 49116.

(n2)Footnote 2. *Lab. Code* § 1391(a); see *Lab. Code* § 1392.

(n3)Footnote 3. *Lab. Code* § 1391(a)(1).

(n4)Footnote 4. *Lab. Code* § 1391(a)(2).

(n5)Footnote 5. *Lab. Code* § 1391(b).

(n6)Footnote 6. *Lab. Code* § 1391(d).

(n7)Footnote 7. For discussion of work permits, see § 6.04.

(n8)Footnote 8. *Educ. Code* § 49112(a).

(n9)Footnote 9. *Educ. Code* § 49116(a).

(n10)Footnote 10. *Educ. Code* § 49112(a).

(n11)Footnote 11. *Educ. Code* § 49116(b).

(n12)Footnote 12. *Educ. Code* §§ 49112(c), 49116(b)(2).

(n13)Footnote 13. *Educ. Code* § 49112(b).

(n14)Footnote 14. *Educ. Code* §§ 49112(d), 49116(d).

(n15)Footnote 15. *Lab. Code* § 1394(a).

(n16)Footnote 16. *Lab. Code* § 1393(a).

(n17)Footnote 17. *Lab. Code* § 1393(a).

(n18)Footnote 18. *Lab. Code* § 1393(a).

(n19)Footnote 19. *Lab. Code* § 1393(a), (c).

(n20)Footnote 20. *Lab. Code* § 1308.7(a). For definition of the "entertainment industry," see discussion in § 6.04[1][b][ii].

(n21)Footnote 21. *Lab. Code* § 1308.7(a).

(n22)Footnote 22. *Lab. Code* § 1308.7(a).

(n23)Footnote 23. *Lab. Code* § 1308.7(a)

(n24)Footnote 24. *Lab. Code* § 1308.7(b)

(n25)Footnote 25. See *Lab. Code* §§ 1311, 1398.

(n26)Footnote 26. See 8 *Cal. Code Reg.* §§ 11750-11765.

(n27)Footnote 27. See 8 *Cal. Code Reg.* §§ 11760, 11763, 11764.

(n28)Footnote 28. See 8 *Cal. Code Reg.* §§ 11760(a)-(f), 11764.

(n29)Footnote 29. See 8 *Cal. Code Reg.* §§ 11759, 11761, 11763.

(n30)Footnote 30. See 8 *Cal. Code Reg.* § 11763.

(n31)Footnote 31. See 8 *Cal. Code Reg.* § 11764.

(n32)Footnote 32. See 8 *Cal. Code Reg.* §§ 11760(i), 11763.

(n33)Footnote 33. See *Lab. Code* § 1308.5(a)(4); 8 *Cal. Code Reg.* § 11760(g); D.L.S.E. Interpretive Bulletin No. 87-1 (Feb. 25, 1987) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n34)Footnote 34. *Lab. Code* § 1297.

(n35)Footnote 35. *Lab. Code* § 1297; see also discussion in § 6.03[1][i].

(n36)Footnote 36. *See Lab. Code § 1297.*

(n37)Footnote 37. *Lab. Code § 1391.1; see Educ. Code § 49116(b)(1).*

(n38)Footnote 38. *Lab. Code § 1391.1.* For discussion of minimum wage, *see* ch. 2.

(n39)Footnote 39. *Educ. Code § 49116(a).*

(n40)Footnote 40. *See 63 Ops. Cal. Atty. Gen. 616, 621 (1980) ; Welf. & Inst. Code §§ 1760.4, 1760.5.*

(n41)Footnote 41. *See Lab. Code § 1391.2(b); see also* discussion in ch. 2.

(n42)Footnote 42. *Lab. Code § 1394(b).*

(n43)Footnote 43. *Educ. Code § 48231.*

(n44)Footnote 44. *See Educ. Code §§ 49112(a), (b), 49116(a), (b).*

(n45)Footnote 45. *Educ. Code § 49130(b)(1).*

(n46)Footnote 46. *Educ. Code § 49130(b)(1).*

(n47)Footnote 47. *Educ. Code § 49130(b)(2).*

(n48)Footnote 48. *Educ. Code § 49130(b)(3).*

(n49)Footnote 49. *Educ. Code § 49130.*

(n50)Footnote 50. *Educ. Code § 49131.*

(n51)Footnote 51. *See 29 U.S.C. § 207; see also* discussion in ch. 3.

(n52)Footnote 52. *See 29 U.S.C. § 203(l); 29 C.F.R. § 570.2(a)(i).*

(n53)Footnote 53. *See 29 C.F.R. §§ 570.31-570.38.*

(n54)Footnote 54. *See 29 C.F.R. § 570.34(a).*

(n55)Footnote 55. *See 29 C.F.R. § 570.35.*

(n56)Footnote 56. *29 C.F.R. § 570.35(a)(1).*

(n57)Footnote 57. *29 C.F.R. § 570.35(a)(2), (4).*

(n58)Footnote 58. *29 C.F.R. § 570.35(a)(3), (5).*

(n59)Footnote 59. *29 C.F.R. § 570.35(a)(6).*

(n60)Footnote 60. *See 29 C.F.R. § 570.35(b).*

(n61)Footnote 61. *29 C.F.R. § 570.2(b); see 29 U.S.C. §§ 203(l), 213(c).*

(n62)Footnote 62. *See 29 U.S.C. § 213(c)(1)(C); 29 C.F.R. § 570.2(b).* Certain minors under 14 years of age may also be so employed. *see 29 U.S.C. § 213(c)(1)(A), (B); 29 C.F.R. § 570.2(b); see also* discussion in § 6.01[2][b][iii].



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 6 Child Labor Laws

Part A. TEXT

1-6 California Employment Law § 6.03

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§ 6.03 Restrictions Relating to Type of Work

[1] California Law

[a] Generally

The Labor Code prohibits or otherwise restricts employment of minors in certain specified occupations and industries.ⁿ¹ In addition, *Labor Code Section 1296* allows the Division of Labor Standards Enforcement (DLSE) to determine whether other trades, processes of manufacture, or occupations are "sufficiently dangerous to the lives and limbs or injurious to the health or morals of minors under 16 years of age to justify their exclusion therefrom."ⁿ² Such a determination may be made only after a hearing to determine the existence of the necessary facts,ⁿ³ and the DLSE's determination may be reviewed by the superior court.ⁿ⁴

■ CONSULTANT'S COMMENT:

Labor Code Section 1290 provides that "[n]o minor under the age of 16 years shall be employed, permitted, or suffered to work in or in connection with any manufacturing establishment *or other place of labor or employment* at any time except as may be provided in this article [*Labor Code Sections 1285-1312*] or by [the Education Code provisions governing mandatory school attendance]."ⁿ⁵ Because many of the cited Labor Code Sections *prohibit* employment of minors under 16 years old in specified occupations,ⁿ⁶ rather than permitting employment, the italicized language in Section 1290 could be read literally to ban employment of minors under the age of 16 years *in any occupation*. However, such a literal interpretation would render superfluous numerous specific Labor Code prohibitions, as well as the DLSE's authority to prohibit employment of minors under the age of 16 years in occupations where such employment "is not already forbidden by law."ⁿ⁷ The italicized language was therefore probably intended to refer to other places of employment similar to "manufacturing establishments,"ⁿ⁸ and *not* to bar all employment of minors under 16 years old. A California Supreme Court decision adopted this interpretation in construing a former statute containing similar language.ⁿ⁹ Thus, notwithstanding the literal terms of *Labor Code Section 1290*, California law appears to permit employment of minors under the age of 16 years in nonmanufacturing establishments, except when such employment is otherwise

prohibited or restricted by law. *Commentary by Kirby Wilcox.*

[b] Agricultural Zone of Danger

Minors under 12 years may not work or accompany an employed parent or guardian in an "agricultural zone of danger," except when the work is performed outside of school hours for, or under the control of, that parent or guardian and on premises owned, operated, or controlled by the parent or guardian.ⁿ¹⁰ An "agricultural zone of danger" means any or all of the following:ⁿ¹¹

1. On or about moving equipment;
2. In or about unprotected chemicals;
3. In or about any unprotected water hazard; and
4. In or about other hazards that are determined, after hearing, by the Department of Industrial Relations to constitute an agricultural zone of danger.

[c] Entertainment

Labor Code Sections 1294 and 1308 prohibit any person (including employers, parents, guardians, or relatives) from employing a minor under 16 years of age (or causing, procuring, or encouraging the engagement of the minor) in any business, occupation, exhibition, or vocation that is injurious to the minor's health or morals or that is dangerous to the minor's life or limb.ⁿ¹² Specifically, *Labor Code Section 1308* prohibits employment of such minors in singing, playing musical instruments, rope or wire walking, dancing, begging, or peddling.ⁿ¹³ Section 1308 also prohibits employment of such minors as gymnasts, acrobats, contortionists, or riders;ⁿ¹⁴ or in "any mendicant or wandering business."ⁿ¹⁵ Section 1308 also prohibits employment of minors under 18 years of age in any "obscene, indecent, or immoral purposes, exhibition, or practice whatsoever."ⁿ¹⁶

Labor Code Section 1308 expressly does not prohibit the following:

1. The employment or use of any minor as a singer or musician in any church, school, or academy or the teaching or learning of the science or practice of music;ⁿ¹⁷
2. The employment of any minor as a musician at any concert or other musical entertainment, or as a performer in any form of entertainment, with the written consent of the Labor Commissioner pursuant to *Labor Code Section 1308.5*;ⁿ¹⁸
3. The participation by a minor of any age in a horseback riding exhibition, contest, or event other than a rough stock rodeo event,ⁿ¹⁹ circus, or race.ⁿ²⁰ and
4. The leading of livestock by a minor in nonprofit fairs, stock parades, livestock shows, and exhibitions.ⁿ²¹

Moreover, if *Labor Code Section 1308* is read in conjunction with *Labor Code Section 1310*,ⁿ²² the following activities are also permitted:

1. The appearance by a minor in any church, public or religious school, or community entertainment;ⁿ²³
2. The appearance by a minor in any school entertainment or in any entertainment for charity or for

children, where no admission fee is charged;n24

3. An appearance in any radio or television broadcasting exhibition, where the minor receives no compensation, the engagement lasts no more than one hour, and no admission fee is charged;n25 and

4. An appearance of a minor at any one event during a calendar year, occurring on a day when school attendance is not required or on the preceding day, lasting four hours or less, provided the minor's parent or guardian is present and the minor does not directly or indirectly receive any compensation.n26

Minors under the age of 16 years, who are not otherwise exempted by *Labor Code Section 1285 et seq.*, may be employed in various other occupations in the entertainment industry with the written consent of the Labor Commissioner.n27 Permits for such employment are discussed in § 6.04[1][b].

■ CONSULTANT'S COMMENT:

Despite the prohibition of *Labor Code Section 1308* against minors under 16 years participating in such activities as "singing," "playing on musical instruments," and "dancing," the section must be construed along with other provisions of the Labor Code and the California Code of Regulations. These provisions establish that minors may work in certain types of entertainment with the consent of the Labor Commissioner if the work environment is proper,n28 and that minors need not obtain the consent of the Labor Commissioner if they are performing without compensation under the conditions specified in *Labor Code Section 1310*, set forth *above*. The DLSE concurs with this approach.n29 *Commentary by Kirby Wilcox.*

[d] Manufacturing

Minors under the age of 16 years may not be employed in or in connection with any manufacturing establishment except as provided by relevant provisions of the Labor and Education Codes.n30 The restriction on work in a manufacturing establishment applies to work done "at any place upon the work of a manufacturing establishment, or upon any of the materials entering into the products of a manufacturing establishment, whether under contract or arrangement with any person in charge of or connected with a manufacturing establishment directly or indirectly through contractors or third persons."n31

In addition, the Labor Code contains prohibitions against employment of minors under 16 years old in certain specific kinds of tasks associated with manufacturing,n32 as discussed in [e] through [g], *below*.

[e] Machinery

The Labor Code contains a number of specific prohibitions against the employment of minors under 16 years old in certain hazardous tasks relating to the operation of various types of machinery. *Labor Code Section 1292* provides that no minor under the age of 16 years may be permitted to work in any capacity involving any of the following tasks:

1. Adjusting any belt to any machinery;n33
2. Sewing or lacing machine belts in any workshop or factory;n34 or
3. Oiling, wiping, or cleaning machinery, or assisting therein.n35

Labor Code Section 1293 prohibits an employer from employing such minors (or permitting them to work) in any capacity in operating or assisting in the operation of the following machines:

1-6 California Employment Law § 6.03

1. Circular or band saws, wood shapers, wood-jointers, planers, sandpaper or wood-polishing machinery, or wood turning or boring machinery;n36
2. Picker machines or machines used in picking wool, cotton, hair, or other material; carding machines; leather-burnishing machines; or laundry machinery;n37
3. Printing-presses of all kinds; boring or drill presses; stamping machines used in sheet-metal and tinware, in paper and leather manufacturing, or in washer and nut factories; metal or paper-cutting machines; or paper-lace machines;n38
4. Corner-staying machines in paper-box factories; or corrugating rolls, such as are used in corrugated paper, roofing, or washboard factories;n39
5. Dough brakes or cracker machinery of any description;n40
6. Wire or iron straightening or drawing machinery; rolling-mill machinery; power punches or shears; washing, grinding, or mixing machinery; calendar rolls in paper and rubber manufacturing; steamboilers;n41 or
7. Any work in proximity to any hazardous or unguarded belts, machinery, or gearing.n42

For discussion of an exception to *Labor Code Sections 1292* and *1293*, which relates to certain student and apprentice employees,n43 see [j], *below*.

In addition, regulations promulgated by the Labor Commissioner pursuant to statutory authorityn44 bar employment of minors under the age of 16 years from *any* occupation in which such minors come in close proximity to moving machinery.n45

[f] Transportation and Gas Service Stations

Pursuant to *Labor Code Section 1294*, minors under the age of 16 years may not be employed in any capacity in any of the following tasks:

1. Working on a railroad, whether steam, electric, or hydraulic;n46
2. Working on a vessel or boat engaged in navigation or commerce within the jurisdiction of the State of California;n47 or
3. Operating any automobile, motor car, or truck.n48

For discussion of an exception to *Labor Code Section 1294* for certain student and apprentice employees,n49 see [j], *below*.

Minors 16 and 17 years of age may work in gas service stations in the following activities:n50

1. Dispensing gas or oil;
2. Courtesy service;
3. Car cleaning, washing, and polishing; or

4. Activities specified in *Labor Code Section 1294.3* (clerical, retail, cleanup, and food service activities).ⁿ⁵¹

However, no minor 16 or 17 years of age may perform work in a gas service station that involves either (1) the use of pits, racks, or lifting apparatus, or (2) the inflation of a tire mounted on a rim equipped with a removable retaining ring.ⁿ⁵² Minors under the age of 16 years may be employed in gas service stations to perform only those activities specified in *Labor Code Section 1294.3* (clerical, retail, cleanup, and food service activities).ⁿ⁵³

Regulations promulgated by the Labor Commissionⁿ⁵⁴ prohibit employment of minors under the age of 16 years in the following tasks:

1. Delivering goods, merchandise, commodities, papers, or packages from motor vehicles;ⁿ⁵⁵ or
2. Working in close proximity to the functioning parts of unguarded and dangerous moving equipment, aircraft, or vessels, or functioning blades or propellers.ⁿ⁵⁶

However, legislation enacted after the promulgation of the above regulations specifically permits a minor to deliver newspapers to consumers by an automobile that is driven by a person 16 years of age or older, or by foot, bicycle, or public transportation.ⁿ⁵⁷

[g] Other Hazardous Occupations

In addition to the general prohibition against employing minors under 16 years old in occupations that are injurious to the health or dangerous to the life and limb of such minors,ⁿ⁵⁸ *Labor Code Section 1294* prohibits the following specific types of hazardous employment for such minors:

1. Working in, about, or in connection with any processes in which dangerous or poisonous acids are used; in the manufacture or packing of paints, colors, or white or red lead; or in soldering;ⁿ⁵⁹
2. Working in occupations causing dust in injurious quantities; in the manufacture or use of dangerous or poisonous dyes; in the manufacture or preparation of compositions with dangerous or poisonous gases; or in the manufacture or use of compositions of lye in which the quantity thereof is injurious to health;ⁿ⁶⁰
3. Working on scaffolding; in heavy work in the building trades; in any tunnel or excavation; or in, about, or in connection with any mine, coal breaker, coke oven, or quarry;ⁿ⁶¹ and
4. Assorting, manufacturing, or packing tobacco;ⁿ⁶²

For discussion of an exception to *Labor Code Section 1294* for certain student and apprentice employees,ⁿ⁶³ see [j], *below*.

Furthermore, regulations promulgated by the Labor Commissioner pursuant to the Labor Codeⁿ⁶⁴ prohibit the following specific types of hazardous employment for minors under the age of 16 years:

1. All building or construction work of any kind;ⁿ⁶⁵
2. All occupations in or about any plant manufacturing explosives or articles containing explosive components, and all occupations in the transportation and sale of explosives or articles containing

explosive components;n66 or working in close proximity to explosives;n67

3. Door-to-door selling of newspaper or magazine subscriptions other than in connection with a regular news carrier delivery route, or of candy, cookies, flowers or other merchandise or commodities unless the requirements of *Title 8 California Code of Regulations Section 11706(a)(1)-(4)* are met;n68 and

4. Selling to passing motorists of newspapers, candy, flowers, or other merchandise or commodities from a fixed location on a street, highway, or freeway island or divider, or freeway on or off ramp, or the side of a freeway or highway entrance or exit shoulder.n69

[h] Occupations Affecting Morals

Minors under 16 years are barred from any employment that is "injurious to the ... morals of the minor."n70*Labor Code Section 1308(a)(3)* prohibits the employment of any minor under the age of 18 years in "any obscene, indecent, or immoral purposes, exhibition, or practice whatsoever." Separate statutory provisions prohibit farm labor contractors and talent agencies from sending any minors to places where their morals, health, safety, or welfare could be adversely affected (such as houses of prostitution, gambling houses, saloons, etc.) if the character of the place could have been ascertained on reasonable inquiry.n71 Finally, several provisions of the Penal Code bar employment of minors in certain situations that would be inimical to their morals.n72

[i] Messengers and Street Occupations

Minors under the age of 16 years may not be employed as messengers for telegraph, telephone, or messenger companies (or for the United States government operating such service) in distributing, transmitting, or delivering goods or messages in cities with more than 15,000 inhabitants.n73 This restriction is inapplicable to minors employed to deliver newspapers to consumers.n74

No minor under 12 years of age may be employed or permitted to work at any time in, or in connection with, the occupation of selling or distributing newspapers, magazines, periodicals, or circulars. This provision prevails over *Labor Code Section 1308.1*, which allows minors to sell newspaper subscriptions door to door.n75 However, this provision does not apply to minors who are at least 10 years of age and engaged as newspaper carriers on January 1, 1995.n76

[i.1] Door-to-Door Sales

No minor under the age of 6 years is permitted to engage in the door-to-door sales or street sales of candy, cookies, flowers, or any other merchandise or commodities.n77

A minor under the age of 16 years who is permitted by law or regulation to engage in door-to-door selling of newspaper or magazine subscriptions or of candy, flowers, or other merchandise or commodities may not be employed in those activities more than 50 miles from his or her residence.n78

"Door-to-door sales" has the same meaning as "home solicitation contract or offer," as defined in *Civil Code Section 1689.5(a)*, except that the minimum monetary limitation of that provision does not apply.n79

[i.2] Incorporation of Federal Restrictions

Minors under the age of 16 years may not be employed or permitted to work in either of the following:

1. Any occupation declared particularly hazardous for the employment of minors under 16 in Title 29 *Code of Federal Regulations Section 570.71*, which covers a variety of activities related to agriculture,

such as operating certain farm machinery, working with certain animals, or handling certain chemicals and explosives;ⁿ⁸⁰ or

2. Any occupation excluded from the application of Subpart C of Part 570 of Title 29 of the Code of Federal Regulations, as set forth in Title 29, *Code of Federal Regulations, Sections 570.33 and 570.34(b)*;ⁿ⁸¹

In addition, minors may not be employed or permitted to work in any occupation declared particularly hazardous for the employment of minors between 16 and 18 years of age, or detrimental to their health or well-being, in Title 29 Code of Federal Regulations, Part 570, Subpart E.ⁿ⁸²

None of these restrictions prohibits minors who process and deliver newspapers from entering areas of a newspaper plant, other than areas where printing presses are located, for purposes related to newspaper processing or delivery.ⁿ⁸³

[j] Exceptions

The restrictions in *Labor Code Sections 1292, 1293, and 1294*ⁿ⁸⁴ do not apply to the following:

1. Courses of training in vocational or manual training schools or in state institutions;ⁿ⁸⁵
2. Apprenticeship training provided in a program established pursuant to *Labor Code Section 3070 et seq.*;ⁿ⁸⁶ or
3. Work experience education programs conducted pursuant to relevant provisions of the Education Code,ⁿ⁸⁷ provided that the work experience coordinator determines that the students have been sufficiently trained, parental approval is obtained, and the principal or student counselor has determined that the student's progress toward graduation will not be impaired.ⁿ⁸⁸

The restrictions in *Labor Code Section 1294.1*ⁿ⁸⁹ do not apply to the following:

1. Student-learners in a bona fide vocational agriculture program working under a written agreement;ⁿ⁹⁰ or
2. Minors 14 or 15 years of age who hold certificates of completion of either a tractor operation or a machine operation program and who are working in the occupations for which they have been trained.ⁿ⁹¹

For discussion of other exceptions to the child labor laws, see § 6.01[1][b].

[2] Federal Law

[a] Employment of Minors Between 14 and 16 Years Old

As noted previously,ⁿ⁹² except when the minor is employed by his or her parent or guardian under specified circumstances, the FLSA prohibits as "oppressive child labor" the employment of minors under 16 years old in any occupation.ⁿ⁹³ While the Secretary of Labor has authority to promulgate regulations permitting employment of 14 to 16-year-old minors in certain occupations under certain conditions,ⁿ⁹⁴ the Secretary has, by regulation, found that employment in the following occupations constitutes oppressive child labor for 14 to 16-year-old minors and is therefore prohibited by the FLSA:ⁿ⁹⁵

1. Manufacturing, mining, or processing occupations, including occupations requiring the performance of any duties in work rooms or work places where goods are manufactured, mined, or otherwise processed;n96
2. Occupations that involve the operation or tending of hoisting apparatus or any power-driven machinery other than office machines;n97
3. The operation of motor vehicles or service as helpers on such vehicles;n98
4. Public messenger service;n99
5. Occupations that have been declared by the Secretary of Labor to be hazardous for the employment of minors between the ages of 16 and 18 years or detrimental to their health and well-being;n100 and
6. Occupations in connection with (a) transportation of persons or property by rail, highway, air, water, pipeline, or other means; (b) warehousing and storage; (c) communications and public utilities; and (d) construction, demolition, and repair.n101 (Minors between the ages of 14 and 16 years may, however, engage in office work (including ticket office work) or sales work in connection with these occupations, as long as the work does not involve the performance of any duties on trains, motor vehicles, aircraft, vessels, or other modes of transportation, or at the actual site of construction operations.)n102

The regulations do permit minors between the ages of 14 and 16 years to engage in specified work in connection with retail, food service, and gasoline service establishments.n103 The permitted occupations are set forth in Title 29 *Code of Federal Regulations Section 570.34(a)* and include such jobs as office work (including the operation of office machines); cashiering; selling; modeling; art work; price marking and tagging; assembling and packing orders; shelving; bagging and carrying out customer orders; errand and delivery work (by foot, bicycle, or public transportation only); cleanup work (including operation of vacuum cleaners and floor waxers, but not power mowers or cutters); kitchen work involving preparing and serving food and beverages (including the operation of specified kitchen machines and devices); cleaning vegetables and fruits; and wrapping, labeling, sealing, weighing, pricing, and stocking goods. However, such minors may not be employed to perform any of the following:n104

1. Work performed in or about boiler or engine rooms;
2. Work in connection with maintenance or repair of the establishment, machines, or equipment;
3. Outside window washing from window sills and all work requiring the use of ladders, scaffolds, or their substitutes;
4. Cooking and baking, except that cooking is permitted with electric or gas grilles, which does not involve cooking over an open flame or with equipment such as rotisseries, broilers, pressurized equipment including fryolators, and cooking devices that operate at extremely high temperatures such as ""Neico broilers"", and cooking is permitted with deep fryers that are equipped with and utilize a device which automatically lowers the baskets into the hot oil or grease and automatically raises the baskets from the hot oil or grease;
5. Occupations that involve operating, setting up, adjusting, cleaning, oiling, or repairing power-driven food slicers and grinders, food choppers and cutters, and bakery-type mixers;
6. Work in freezers and meat coolers and all work in preparation of meats for sale other than as allowed by Title 29 *Code of Federal Regulations Section 570.34(a)(9)* (permitting wrapping, sealing, labeling,

and weighing, pricing, and stocking of goods performed in areas physically separate from freezers, coolers, and other places where preparation of meat is performed);

7. Loading and unloading goods to and from trucks, railroad cars, or conveyors; and

8. All occupations in warehouses other than office and clerical work.

Employment of minors *under* 14 years old constitutes oppressive child labor in all cases unless the minor is employed by his or her parent, or a person standing in the parent's place, or the minor is otherwise exempt under Title 29 *United States Code Section 213*.ⁿ¹⁰⁵

[b] Occupations Hazardous to Minors Between Ages of 16 and 18 Years

[i] Generally

The FLSA prohibits employment of a minor between the ages of 16 and 18 years in any occupation that has been declared by the Secretary of Labor to be particularly hazardous to, or otherwise detrimental to the health and well-being of, such minors.ⁿ¹⁰⁶ Pursuant to this statutory authority, the Secretary of Labor has promulgated orders declaring specified occupations to be particularly hazardous for such minors.ⁿ¹⁰⁷ The regulations also set forth procedures for investigating the employment conditions in various occupations and for adding to or modifying the list of hazardous occupations.ⁿ¹⁰⁸

The current designations of hazardous occupations include restrictions applicable to specific occupations and to entire industries.ⁿ¹⁰⁹ When the restriction is made on an occupational basis, it applies regardless of the industry in which the occupation is performed.ⁿ¹¹⁰

[ii] Specific Occupations

Pursuant to the FLSA,ⁿ¹¹¹ the Secretary of Labor has issued orders identifying 17 types of industries or occupations that are particularly hazardous to, or detrimental to the health or well-being of, minors between the ages of 16 and 18 years. These occupations and industries are identified and defined in detail in the Code of Federal Regulations.ⁿ¹¹² In some cases, the orders prohibit all work in the designated occupation or industry, *except* for specified tasks.ⁿ¹¹³ In other cases, the orders simply list specific prohibited types of work in a particular occupation.ⁿ¹¹⁴ The following is a list of covered industries and occupations, by order number:

1. Occupations in or about plants or establishments manufacturing or storing explosives or articles containing explosive components;ⁿ¹¹⁵
2. Motor-vehicle driver and outside helper;ⁿ¹¹⁶
3. Coal-mine occupations;ⁿ¹¹⁷
4. Logging occupations and occupations in the operation of any sawmill, lath mill, shingle mill, or cooperage stock mill;ⁿ¹¹⁸
5. Occupations involved in the operation of power-driven woodworking machines;ⁿ¹¹⁹
6. Exposure to radioactive substances and to ionizing radiations;ⁿ¹²⁰
7. Occupations involved in the operation of power-driven hoisting apparatus;ⁿ¹²¹

8. Occupations involved in the operations of power-driven metal forming, punching, and shearing machines;n122
9. Occupations in connection with mining, other than coal;n123
10. Occupations involving slaughtering, meat packing or processing, or rendering;n124
11. Occupations involved in the operation of bakery machines;n125
12. Operations involved in the operation of paper-products machines, scrap paper balers, and paper box compactors;n126
13. Occupations involved in the manufacture of brick, tile, and kindred products;n127
14. Occupations involved in the operations of circular saws, band saws, and guillotine shears;n128
15. Occupations involved in wrecking, demolition, and shipbreaking operations;n129
16. Occupations in roofing operations and on or about a roof;n130 and
17. Occupations in excavations operations.n131

[iii] Exemptions for Apprentices and Student-Learners

Some of the orders listed in [ii], *above*, contain exemptions from their restrictions for the employment of apprentices or student-learners under the conditions described below.n132

The exemption for employment of apprentices applies only when (1) the minor is employed in a craft recognized as an apprenticeable trade; (2) the work of the apprentice in the occupation declared to be particularly hazardous is incidental to the apprentice's training; (3) such work is intermittent and engaged in only for short periods of time, is performed under the direct and close supervision of a journeyman, and is necessary for the training; and (4) the apprentice is registered as an apprentice in accordance with standards of the federal Bureau of Apprenticeship and Training or of a state agency recognized by the Bureau, or is employed in a program that the Secretary of Labor finds to conform substantially with such federal or state standards.n133

The exemption for student-learners applies when the minor is enrolled in a recognized course of study and training in a cooperative vocational training program under a recognized state or local educational authority (or a substantially similar program conducted by a private school) and the employment is pursuant to a written agreement that provides (1) that the student-learner's work in the occupation declared to be particularly hazardous is incidental to the training; (2) that the work shall be intermittent and for short periods of time and shall be conducted under the direct and close supervision of a qualified and experienced person; (3) that safety instructions will be given by the school and correlated by the employer with on-the-job training; and (4) that a schedule of organized and progressive work processes will be prepared.n134 The written agreement must bear the student-learner's name and must be signed by the employer and by the school coordinator or principal of the student-learner's school.n135 Copies of the agreement must be kept on file by both the school and the employer, and the agreement may be revoked if it is found that reasonable precautions have not been observed for the safety of any minors employed under the agreement.n136

[c] Agricultural Occupations

[i] Generally

As discussed previously,ⁿ¹³⁷ the child labor provisions of the FLSA do not apply to employment in agriculture outside of school hours under certain conditions.ⁿ¹³⁸ However, the agricultural exemption does not permit the employment of minors under the age of 16 years in agricultural occupations that the Secretary of Labor has determined to be particularly hazardous for such minors, except when the minor is employed by his or her parent (or by a person standing in the place of the parent) on a farm owned or operated by the parent (or person standing in the parent's place).ⁿ¹³⁹ The Secretary of Labor has promulgated regulations declaring specified agricultural occupations to be particularly hazardous to minors under the age of 16 years.ⁿ¹⁴⁰ The specified occupations are as follows:

1. Operation of a tractor of over 20 PTO horsepower; connecting or disconnecting an implement or any of its parts to such a tractor;ⁿ¹⁴¹
2. Operating or assisting to operate (including starting, stopping, adjusting, feeding, or other activity involving physical contact with the operation) various designated farm machines (including corn pickers, cotton pickers, hay mowers and balers, grain combines, feed grinders, power post-hole diggers, trenchers, earth-moving equipment, fork-lifts, and various power saws, among others);ⁿ¹⁴²
3. Working in a yard, pen, or stall occupied by a bull, boar, or stud horse maintained for breeding purposes; or a sow or cow with newborn young;ⁿ¹⁴³
4. Felling, bucking, skidding, loading, or unloading timber with a butt diameter of more than six inches;ⁿ¹⁴⁴
5. Working from a ladder or scaffold at a height of over 20 feet;ⁿ¹⁴⁵
6. Driving motor vehicles when transporting passengers, or riding on a tractor as a passenger or helper;ⁿ¹⁴⁶
7. Working inside certain storage areas or silos and manure pits;ⁿ¹⁴⁷
8. Handling or applying certain toxic agricultural chemicals (including cleaning or decontaminating equipment, disposal or return of empty containers, or serving as a flag person for an aircraft applying those chemicals);ⁿ¹⁴⁸
9. Handling any blasting agents;ⁿ¹⁴⁹ and
10. Transporting, transferring, or applying anhydrous ammonia.ⁿ¹⁵⁰

[ii] Exemptions

The prohibition against employment of minors under 16 years old in occupations listed in paragraphs (1) through (5) of subsection [i], *above*, do not apply to the employment of any minor as a vocational agriculture student-learner if certain requirements for training and safety are met.ⁿ¹⁵¹ Further, minors between the ages of 14 and 16 years who have successfully completed certain 4-H or equivalent training programs in tractor operation and/or farm machine operation may perform work described in paragraphs (1) and/or (2) of subsection [i], *above*, if they have been given instructions on the safe and proper operation of the specific equipment to be used and are as continuously and closely supervised by the employer as feasible.ⁿ¹⁵² Students between the ages of 14 and 16 years who have successfully completed the U.S. Department of Health, Education, and Welfare's Vocational Agriculture Training Programs in Safe Tractor Operation or Safe Farm Machinery Operation may also perform the work listed in paragraphs (1) and (2) under subsection [i], *above*.

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Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Child Labor Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code §§ 1290-1295, 1297, 1298, 1308, 1308.5, 1309.5.*

(n2)Footnote 2. *See also 8 Cal. Code Reg. §§ 11701-11707* (occupations determined to be dangerous or injurious to minors under 16 years old).

(n3)Footnote 3. *See Lab. Code § 1296; 56 Ops. Cal. Atty. Gen. 248, 249 (1973) .*

(n4)Footnote 4. *Lab. Code § 1296.*

(n5)Footnote 5. *Lab. Code § 1290* (emphasis added).

(n6)Footnote 6. *See Lab. Code §§ 1292-1294.1, 1297, 1298, 1308, 1308.5.*

(n7)Footnote 7. *See Lab. Code § 1296.*

(n8)Footnote 8. *See Lab. Code § 1291* (definition of manufacturing establishment).

(n9)Footnote 9. *See Williams v. Southern Pac. Co. (1916) 173 Cal. 525, 536-537, 160 P. 660* (construing Stats. 1911, p. 282, P 1, which provided in part that minors under age of 18 years may not be employed "in any manufacturing, mechanical, or mercantile establishment, or other place of labor," for more than nine hours in a day).

(n10)Footnote 10. *Lab. Code §§ 1293.1, 1394(a).*

(n11)Footnote 11. *Lab. Code § 1293.1*

(n12)Footnote 12. *Lab. Code §§ 1294(h), 1308(a)(1).*

(n13)Footnote 13. *Lab. Code § 1308(a)(2).*

(n14)Footnote 14. *Lab. Code § 1308(a)(2).*

(n15)Footnote 15. *Lab. Code § 1308(a)(4).*

(n16)Footnote 16. *Lab. Code § 1308(a)(3).*

(n17)Footnote 17. *Lab. Code § 1308(b)(1).*

(n18)Footnote 18. *Lab. Code § 1308(b)(2).*

(n19)Footnote 19. A "rough stock rodeo event" is a rodeo operated by a for-profit organization in which unbroken, little-trained, or imperfectly trained animals are handled or ridden in events such as saddle bronc riding, bareback riding, and bull riding. *see Lab. Code § 1308(b)(3).*

(n20)Footnote 20. *Lab. Code § 1308(b)(3); see Educ. Code § 49119* (minor engaging in such events also exempt from work permit requirements). For this purpose, a "race" means a speed contest between two or more animals that are

on a course at the same time and that is operated for profit or by other than a nonprofit organization. *Lab. Code* § 1308(b)(3).

(n21)Footnote 21. *Lab. Code* § 1308(b)(4).

(n22)Footnote 22. *See generally* DLSE Digest of California Child Labor Laws 1995-1996.

(n23)Footnote 23. *See Lab. Code* § 1310(a).

(n24)Footnote 24. *See Lab. Code* § 1310(b).

(n25)Footnote 25. *Lab. Code* § 1310(c).

(n26)Footnote 26. *Lab. Code* § 1310(d).

(n27)Footnote 27. *See Lab. Code* § 1308.5(a); 8 *Cal. Code Reg.* §§ 11750-11765.

(n28)Footnote 28. *See Lab. Code* §§ 1308.5, 1308.6; *see also* 8 *Cal. Code Reg.* § 11750 *et seq.*, and discussion in § 6.04[1][b].

(n29)Footnote 29. *See* D.L.S.E. Child Labor Laws 1995-1996 (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n30)Footnote 30. *Lab. Code* § 1290.

(n31)Footnote 31. *Lab. Code* § 1291.

(n32)Footnote 32. *See Lab. Code* §§ 1292, 1293, 1294.

(n33)Footnote 33. *Lab. Code* § 1292(a).

(n34)Footnote 34. *Lab. Code* § 1292(b).

(n35)Footnote 35. *Lab. Code* § 1292(c).

(n36)Footnote 36. *Lab. Code* § 1293(a).

(n37)Footnote 37. *Lab. Code* § 1293(b).

(n38)Footnote 38. *Lab. Code* § 1293(c).

(n39)Footnote 39. *Lab. Code* § 1293(d).

(n40)Footnote 40. *Lab. Code* § 1293(e).

(n41)Footnote 41. *Lab. Code* § 1293(f).

(n42)Footnote 42. *Lab. Code* § 1293(f).

(n43)Footnote 43. *See Lab. Code* § 1295.

(n44)Footnote 44. *See Lab. Code* § 1296.

(n45)Footnote 45. 8 *Cal. Code Reg.* §§ 11701(a), 11702.

(n46)Footnote 46. *Lab. Code § 1294(a)*.

(n47)Footnote 47. *Lab. Code § 1294(b)*.

(n48)Footnote 48. *Lab. Code § 1294(g)*. In addition, *Veh. Code § 12515(a)* provides that no person under the age of 18 years may be employed for compensation for the purpose of driving a motor vehicle "on the highways," and *Veh. Code § 12515(b)* prohibits employment of persons under the age of 21 years to operate specified types of commercial vehicles, including vehicles transporting hazardous materials.

(n49)Footnote 49. *See Lab. Code § 1295*.

(n50)Footnote 50. *Lab. Code § 1294.5(a)*.

(n51)Footnote 51. *See § 6.01[1][b]* for a description of these activities.

(n52)Footnote 52. *Lab. Code § 1294.5(b)*.

(n53)Footnote 53. *Lab. Code § 1294.5(c)*; *see § 6.01[1][b]* for a description of these activities.

(n54)Footnote 54. *See Lab. Code § 1296* (authority to determine whether particular occupation, in which employment of minors under age of 18 years is not already prohibited, is dangerous to lives or limbs or injurious to health of such minors).

(n55)Footnote 55. *8 Cal. Code Reg. § 11701(c)*.

(n56)Footnote 56. *8 Cal. Code Reg. § 11707*.

(n57)Footnote 57. *Lab. Code § 1294.4*.

(n58)Footnote 58. *See Lab. Code § 1294(h)*.

(n59)Footnote 59. *Lab. Code § 1294(c)*.

(n60)Footnote 60. *Lab. Code § 1294(d)*.

(n61)Footnote 61. *Lab. Code § 1294(e)*.

(n62)Footnote 62. *Lab. Code § 1294(f)*.

(n63)Footnote 63. *See Lab. Code § 1295*.

(n64)Footnote 64. *See Lab. Code § 1296*.

(n65)Footnote 65. *8 Cal. Code Reg. §§ 11701(b), 11702*.

(n66)Footnote 66. *8 Cal. Code Reg. §§ 11703, 11704*.

(n67)Footnote 67. *8 Cal. Code Reg. § 11707*.

(n68)Footnote 68. *8 Cal. Code Reg. §§ 11706(a), 11706.1, 11706.2*. The regulations permit such door-to-door selling only if the minors work in pairs, as a team, on the same or opposite sides of the street; are supervised by one adult supervisor for each crew of 10 or fewer minors; are within sight or sound of the supervisor at least once every 15 minutes; and are returned to their respective homes or places of rendezvous after each day's work. *8 Cal. Code Reg. § 11706(a)(1)-(4)*.

(n69)Footnote 69. *8 Cal. Code Reg. § 11706(b)*.

(n70)Footnote 70. *Lab. Code § 1294(h)*.

(n71)Footnote 71. *See Lab. Code §§ 1698.4, 1698.5, 1700.33, 1700.34*.

(n72)Footnote 72. *See, e.g., Penal Code §§ 273e, 273f, 311.4*.

(n73)Footnote 73. *Lab. Code § 1297*.

(n74)Footnote 74. *Lab. Code § 1297*.

(n75)Footnote 75. *Lab. Code § 1298(a); see [i.1], below*.

(n76)Footnote 76. *Lab. Code § 1298(b)*.

(n77)Footnote 77. *Lab. Code § 1308.1(a)*.

(n78)Footnote 78. *Lab. Code § 1308.1*.

(n79)Footnote 79. *Lab. Code § 1286(e)*.

(n80)Footnote 80. *Lab. Code § 1294.1(a)(1); 29 C.F.R. § 570.71*.

(n81)Footnote 81. *Lab. Code § 1294.1(a)(2); 29 C.F.R. §§ 570.31-570.38*.

(n82)Footnote 82. *Lab. Code § 1294.1(b); 29 C.F.R. §§ 570.50-570.68*.

(n83)Footnote 83. *Lab. Code § 1294.1(c)*.

(n84)Footnote 84. For discussion, *see [e]-[g], above*.

(n85)Footnote 85. *Lab. Code § 1295(a)(1)*.

(n86)Footnote 86. *Lab. Code § 1295(a)(2)*.

(n87)Footnote 87. *See Educ. Code §§ 51760-51769.5*. Note that the provisions of the Education Code specifically referred to in *Lab. Code § 1295(c)* were repealed when the Education Code was reorganized in 1976.

(n88)Footnote 88. *Lab. Code § 1295(a)(3); Educ. Code § 51769.5*.

(n89)Footnote 89. *See discussion in [i.2], above*.

(n90)Footnote 90. *Lab. Code § 1295(b)(1)*.

(n91)Footnote 91. *Lab. Code § 1295(b)(2), (3)*.

(n92)Footnote 92. *See discussion in § 6.01[2][a][i]*.

(n93)Footnote 93. *See 29 U.S.C. §§ 203(l)(1), 212(c); 29 C.F.R. §§ 570.2(a)(1)(i), (2), 570.117(b)*.

(n94)Footnote 94. *29 U.S.C. § 203(l); see 29 C.F.R. §§ 570.2(a)(1)(i), 570.31-570.38*.

(n95)Footnote 95. *See 29 U.S.C. §§ 203(l), 212(c); 29 C.F.R. §§ 570.2(a)(1)(i), 570.31, 570.32*.

(n96)Footnote 96. 29 C.F.R. § 570.33(a); *see* 29 U.S.C. § 203(l).

(n97)Footnote 97. 29 C.F.R. § 570.33(b).

(n98)Footnote 98. 29 C.F.R. § 570.33(c).

(n99)Footnote 99. 29 C.F.R. § 570.33(d).

(n100)Footnote 100. 29 C.F.R. § 570.33(e); *see* 29 U.S.C. § 203(l)(2). For discussion of such occupations, *see* [b], *below*.

(n101)Footnote 101. 29 C.F.R. § 570.33(f).

(n102)Footnote 102. 29 C.F.R. § 570.33(f).

(n103)Footnote 103. *See* 29 C.F.R. § 570.34(a).

(n104)Footnote 104. 29 C.F.R. § 570.34(b).

(n105)Footnote 105. *See* 29 U.S.C. §§ 203(l), 213(c), (d), (f); *see also* discussion in § 6.01[2][b].

(n106)Footnote 106. *See* 29 U.S.C. §§ 203(l)(2), 212(c).

(n107)Footnote 107. *See* 29 C.F.R. §§ 570.50-570.68; *see also* discussion in [ii], *below*. Employment of minors under 16 years old in such occupations is, of course, also prohibited. *see* 29 C.F.R. § 570.33(e).

(n108)Footnote 108. *See* 29 C.F.R. §§ 570.41-570.49.

(n109)Footnote 109. *See* *Winchell's Donut House v. United States Dep't of Labor* (D.D.C. 1980) 526 F. Supp. 608, 610, *aff'd*, 672 F.2d 898 (D.C. Cir. 1981).

(n110)Footnote 110. *See* *Winchell's Donut House v. United States Dep't of Labor* (D.D.C. 1980) 526 F. Supp. 608, 610, *aff'd*, 672 F.2d 898 (D.C. Cir. 1981).

(n111)Footnote 111. *See* 29 U.S.C. § 203(l)(2).

(n112)Footnote 112. *See* 29 C.F.R. §§ 570.51-570.68.

(n113)Footnote 113. *See, e.g.*, 29 C.F.R. § 570.54(a) (all occupations in logging and certain types of mills prohibited, except for certain designated types of work).

(n114)Footnote 114. *See, e.g.*, 29 C.F.R. § 570.55(a) (particular types of work involving operation of power-driven woodworking machines prohibited).

(n115)Footnote 115. *See* 29 C.F.R. § 570.51.

(n116)Footnote 116. *See* 29 C.F.R. § 570.52.

(n117)Footnote 117. *See* 29 C.F.R. § 570.53.

(n118)Footnote 118. *See* 29 C.F.R. § 570.54.

(n119)Footnote 119. *See* 29 C.F.R. § 570.55.

(n120)Footnote 120. *See* 29 C.F.R. § 570.57.

(n121)Footnote 121. *See* 29 C.F.R. § 570.58.

(n122)Footnote 122. *See* 29 C.F.R. § 570.59.

(n123)Footnote 123. *See* 29 C.F.R. § 570.60.

(n124)Footnote 124. *See* 29 C.F.R. § 570.61.

(n125)Footnote 125. *See* 29 C.F.R. § 570.62.

(n126)Footnote 126. *See* 29 C.F.R. § 570.63.

(n127)Footnote 127. *See* 29 C.F.R. § 570.64.

(n128)Footnote 128. *See* 29 C.F.R. § 570.65.

(n129)Footnote 129. *See* 29 C.F.R. § 570.66.

(n130)Footnote 130. *See* 29 C.F.R. § 570.67.

(n131)Footnote 131. *See* 29 C.F.R. § 570.68.

(n132)Footnote 132. *See* 29 C.F.R. §§ 570.55(c) (operation of power-driven woodworking machines), 570.59(c) (operation of power-driven metal-forming, punching, and shearing machines), 570.61(c)(2) (slaughtering, meat packing or processing, and rendering), 570.63(c) (operation of paper-products machines), 570.65(c) (operation of circular saws, band saws, and guillotine blades), 570.67(c) (roofing operations), 570.68(c) (excavation operations).

(n133)Footnote 133. 29 C.F.R. § 570.50(b).

(n134)Footnote 134. 29 C.F.R. § 570.50(c).

(n135)Footnote 135. 29 C.F.R. § 570.50(c).

(n136)Footnote 136. 29 C.F.R. § 570.50(c).

(n137)Footnote 137. *See* discussion in § 6.01[2][b][ii].

(n138)Footnote 138. *See* 29 U.S.C. § 213(c).

(n139)Footnote 139. 29 U.S.C. § 213(c)(2); 29 C.F.R. § 570.70(a).

(n140)Footnote 140. *See* 29 C.F.R. § 570.71.

(n141)Footnote 141. 29 C.F.R. § 570.71(a)(1).

(n142)Footnote 142. *See* 29 C.F.R. § 570.71(a)(2), (3).

(n143)Footnote 143. 29 C.F.R. § 570.71(a)(4).

(n144)Footnote 144. 29 C.F.R. § 570.71(a)(5).

(n145)Footnote 145. 29 C.F.R. § 570.71(a)(6).

(n146)Footnote 146. 29 C.F.R. § 570.71(a)(7).

(n147)Footnote 147. *See* 29 C.F.R. § 570.71(a)(8).

(n148)Footnote 148. *See* 29 C.F.R. § 570.71(a)(9).

(n149)Footnote 149. 29 C.F.R. § 570.71(a)(10).

(n150)Footnote 150. 29 C.F.R. § 570.71(a)(11).

(n151)Footnote 151. *See* 29 C.F.R. § 570.72(a).

(n152)Footnote 152. *See* 29 C.F.R. § 570.72(b).

(n153)Footnote 153. *See* 29 C.F.R. § 570.72(c).



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 6 Child Labor Laws

Part A. TEXT

1-6 California Employment Law § 6.04

AUTHOR: By Susan Spurlark, J.D.

§ 6.04 Required Permits

[1] California Law

[a] General Permits to Work and to Employ

[i] Requirement for Issuance

The Education Code contains provisions governing the issuance of work permits to nonexempt minorsⁿ¹ and "permits to employ" to employers wishing to hire such minors.ⁿ² The minor's work permit is issued by the superintendent of the school district or county in which the minor resides, the chief executive officer or the equivalent position of a charter school that a minor attends, by certain school personnel authorized by the superintendent, or, subject to specific requirements and conditions, the principal of a public or private school, after the minor's parent, guardian, foster parent, caregiver with whom the minor resides, or residential shelter services provider has signed and filed a written request for the permit.ⁿ³ An employer of a minor subject to the permit requirement must also obtain a permit to employ the minor by sending a form prescribed by the Department of Education to the officer authorized to issue the permit.ⁿ⁴ No person, firm, or corporation may employ, suffer, or permit any minor under the age of 18 years to work in any establishment or occupation without a permit to employ issued by the proper educational officers in accordance with law.ⁿ⁵

Permits to work in establishments and occupations not prohibited by law may be issued to any minor between the ages of 12 and 18 years who is to be employed during regular school holidays, regular or specified occasional public school vacations, and times when the student is exempt from compulsory education pursuant to *Education Code Section 48231*.ⁿ⁶ Permits may also be given to minors between the ages of 14 and 18 years for part-time work outside of school hours on school days, if the minor has completed the equivalent of the 7th grade,ⁿ⁷ and in conjunction with work experience education courses that meet the requirements of *Education Code Sections 51760-51769*.ⁿ⁸ Permits may also be issued for 13-year-old minors who have completed the sixth grade, who are identified as having exhibited the potential to drop out of school, and who participate in an employment program sponsored by a school district, to work two hours per day, with a maximum of four hours per week.ⁿ⁹ Permits for full-time work may be issued to minors between the ages of 16 and 18 years.ⁿ¹⁰ Permits for full-time work may also be issued to minors between the ages of

14 and 16 years in cases of extreme family financial hardship; there are special requirements for the issuance of such permits.ⁿ¹¹

For a minor who is not required by law to attend school, but who is otherwise required to hold a permit to work, the person authorized to issue such permits may issue a "certificate of age" instead.ⁿ¹² That certificate may be issued when the minor, accompanied by his or her parent, guardian or other responsible person, presents evidence of the minor's age to the issuing authority.ⁿ¹³

If the minor has been legally emancipated pursuant to *Family Code Section 7000 et seq.*, the minor may apply for a work permit without the consent of a parent or guardian.ⁿ¹⁴ Such minors must, however, have a work permit unless otherwise exempt.ⁿ¹⁵

Permits to work and to employ, and certificates of age, must be issued on forms prepared and provided by the Superintendent of Public Instruction or authorized local school districts.ⁿ¹⁶ The permit to employ must contain the minor's name, age, birthdate, address, and phone number; the place and hours of compulsory school attendance (or a statement of exemption therefrom); the maximum number of hours per day and per week that the student may work while school is in session;ⁿ¹⁷ the minor's social security number; the signature of the minor and the issuing authority; and the date on which the permit expires.ⁿ¹⁸

[ii] Maintaining Permit on File

Every person, agent, or officer thereof who employs a minor, either directly or indirectly through a third person, must keep on file all permits and certificates that are issued pursuant to *Labor Code Section 1285 et seq.* or *Education Code Section 49100 et seq.*ⁿ¹⁹ The files of such permits must be open at all times to inspection by school attendance and probation officers, the State Board of Education, and officers of the DLSE.ⁿ²⁰ Failure to produce a work permit, a permit to employ, or a certificate of age relating to a particular minor is prima facie evidence of illegal employment of that minor.ⁿ²¹

[iii] Expiration and Revocation of Permit

Permits to work during a particular school year expire five days after the opening of the next succeeding school year.ⁿ²²

The certificates and permits to work or employ are subject to revocation whenever the Labor Commissioner or issuing authority finds that the conditions for legal issuance of the permit or certificate no longer exist or never existed; that the employment is impairing the health or education of the minor; that the work being performed is in violation of law; or that any provision or condition of the permit is being violated.ⁿ²³ School authorities empowered to issue such permits may enter any place of employment within their jurisdiction to examine permits and certificates relating to all minors employed in that place, and to investigate any violations of the child labor and permit provisions of the Education Code and Labor Code.ⁿ²⁴

[iv] Exemptions

Minors who have graduated from a high school maintaining a four-year course above the eighth grade, or who have received an equal amount of education in a private school or by private tuition, or who have been awarded a certificate of proficiency under *Education Code Section 48412*, are exempt from the work permit requirements of the Education Code.ⁿ²⁵ In addition, permits to work or to employ are not required in case of employment by and for, or under the control of, a parent or guardian on or in connection with premises owned, operated, or controlled by the parent or guardian, unless the work is in manufacturing, mercantile, or similar commercial enterprises, or is otherwise forbidden by *Labor Code Sections 1294, 1296, or 1308.5*.ⁿ²⁶ Permits to work or to employ are also not required in the case of

horseback riding exhibitions, contests, or events permitted by *Labor Code Section 1308(b)(3)*.ⁿ²⁷

[b] Entertainment Industry Permits

[i] Statutory Requirements

Labor Code Section 1308.5(a) requires the written consent of the Labor Commissioner for the employment of nonexempt minors under the age of 16 years in the following specified occupations within the entertainment industry:

1. Employment of any minor in the presentation of any drama, legitimate play, or radio broadcasting or television studio;ⁿ²⁸
2. Employment of any minor 12 years old or older in any other performance, concert, or entertainment;ⁿ²⁹
3. Appearance of a minor over the age of 8 years in any performance, concert, or entertainment during the public school vacation;ⁿ³⁰
4. Appearance of any minor in noncommercial entertainment;ⁿ³¹
5. Employment of a minor in the making of phonograph recordings or as an advertising or photographic model;ⁿ³² and
6. Employment or appearance of any minor pursuant to a contract approved by the superior court under the provisions of *Family Code Section 6750 et seq.* (requiring court approval of certain contracts to employ minors in entertainment industry).ⁿ³³

In addition, the Labor Commissioner's written consent is required for any minor between the age of 8 and 18 years, who is otherwise permitted by law to be employed as an actor, actress, or performer in a theater, motion picture studio, radio broadcasting studio, or television studio, to continue working between 10 p.m. and midnight in a performance or production beginning at an earlier hour.ⁿ³⁴

Prior to giving such consent, the Labor Commissioner must determine that the environment in which the performance, concert, or entertainment is to be produced is proper for the minor; that the conditions of employment are not detrimental to the minor's health; and that the minor's education will not be neglected or hampered.ⁿ³⁵

The Labor Commissioner's written consent is void after the expiration of 10 business days from the date it was granted, unless it is attached to a true and correct copy of the trustee's statement evidencing the establishment on behalf of the minor of a "Coogan Trust Account."ⁿ³⁶ If the consent is attached to a true and correct copy of the trustee's statement, the written consent is valid for a six month period.ⁿ³⁷

A person may not apply for the Commissioner's written consent to employ the same minor under a contract in the entertainment industry more than once in any six month period. If the Commissioner issues written consent for the employment of the same minor more than once within any six month period, the earliest dated written consent is valid, and any other written consent issued during that six month period is void.ⁿ³⁸

[ii] DLSE Regulations

Pursuant to its authority to enforce the child labor provisions of the Labor Code,ⁿ³⁹ the DLSE has promulgated regulations requiring employers in the entertainment industry to obtain a permit to employ any minor under 18 years old

who is required by law to attend school (or who is not required to attend school solely because he or she is a nonresident of California).ⁿ⁴⁰ In addition, any such minor who desires to be employed in the entertainment industry must obtain an entertainment work permit.ⁿ⁴¹ The permit requirements are set forth in *Title 8 California Code of Regulations Sections 11750-11765*. As used in the regulations, the "entertainment industry" is defined as any organization or individual using the services of any minor in any of the following:ⁿ⁴²

1. Any motion picture of any type (including film and videotape), using any format (such as theatrical film, commercial, documentary, television program, etc.) by any medium (including theater, television, or videocassette);
2. Photography;
3. Recording;
4. Modeling;
5. Theatrical productions;
6. Publicity;
7. Rodeos;
8. Circuses;
9. Musical performances; and
10. Any other performances where minors perform to entertain the public.

■ **CONSULTANT'S COMMENT:**

The regulations, in part, implement the consent requirements of *Labor Code Section 1308.5(a)*, discussed in [i], *above*, but they are not limited to the particular types of work specified in that section and are not limited to employees under 16 years old.ⁿ⁴³ The regulatory breadth is attributable to the DLSE's reliance on other Labor Code provisions in addition to Section 1308.5 as authority for its entertainment industry permit requirements. *Commentary by Kirby Wilcox.*

[iii] Procedure for Obtaining Permits to Employ

Permits to employ minors and permits for minors to work in the entertainment industry are issued by the DLSE.ⁿ⁴⁴ Employers who wish to employ minors in the entertainment industry must complete and submit an application (DLSE 281) to the DLSE along with verification of a current and valid worker's compensation insurance policy (DLSE 601).ⁿ⁴⁵ Once issued, the permit has no expiration date but is voided if the insurance lapses.ⁿ⁴⁶

If the employer wishes to employ a group of minors, a "Blanket Entertainment Work Permit" (DLSE 287) may be sought by filing a separate application (DLSE 280).ⁿ⁴⁷ Blanket permits are valid only for particular productions and for the periods of times stated in the permit, and they are subject to the employer's compliance with all relevant laws and regulations.ⁿ⁴⁸ The application for such a permit must show that there will be sufficient studio teachers provided;ⁿ⁴⁹ proof of worker's compensation insurance; the presence of a parent or guardian for every 20 minors or fraction thereof; a list of the names of all minors to be employed under the permit; and necessary school, parental, and medical authorizations.ⁿ⁵⁰

[iv] Procedure for Obtaining Work Permits

Minors desiring to work in the entertainment industry must also obtain an entertainment work permit.ⁿ⁵¹ An application for such a permit must be completed and signed by the minor's parent or guardian (unless the minor is emancipated) and must contain identifying information; verification of the minor's school record, attendance, and satisfaction of the school district's requirements with respect to age, school record, attendance, and health.ⁿ⁵² A birth certificate may be required of minors who are under the age for mandatory school attendance, and the Deputy Labor Commissioner may require a physical examination if it is felt necessary to assure that the minor's condition permits the work called for by the employer.ⁿ⁵³

The work permit, if issued, is valid for a six-month period, and must be renewed in the same manner as provided for its original issuance.ⁿ⁵⁴

[v] Denial, Suspension, or Revocation of Permit

The DLSE may deny an entertainment industry permit to employ if the employment will be hazardous or detrimental to the health, safety, morals, or education of the minor.ⁿ⁵⁵ In addition, the DLSE may deny, revoke, or suspend a permit to employ if the employer violates the DLSE's entertainment industry regulations or commits a misdemeanor violation of any Labor Code provision regarding child labor.ⁿ⁵⁶ A permit may also be denied, suspended, or revoked if a studio teacher has been discharged or discriminated against for (1) complaining to the DLSE or to the permit holder (or its agents or employees) that conditions on the set or location were dangerous to the health, safety, or morals of minors employed on the set or location; or (2) taking any action to preclude, suspend, or terminate the employment of minors on a set or location for reasons of health, safety, or morals of the minors.ⁿ⁵⁷ If a permit is denied, suspended, or revoked, an appeal may be taken, and the Labor Commissioner will hold an administrative hearing.ⁿ⁵⁸

[vi] Presence of Parents, Guardians, and Studio Teachers

DLSE regulations require that a parent or guardian of any minor under 16 years old be present with and accompany the minor on the set or location, and to be within sight or sound of the minor at all times.ⁿ⁵⁹

The regulations also require employers in the entertainment industry to provide studio teachers for all minors between the ages of 15 days and 16 years, and for minors between the ages of 16 and 18 years if necessary for their education.ⁿ⁶⁰ Studio teachers must hold current, valid elementary and secondary teaching credentials, and must be certified by the Labor Commissioner following a written examination that tests the teacher's knowledge of child labor laws.ⁿ⁶¹ In addition to teaching,ⁿ⁶² studio teachers are responsible for "caring and attending to the health, safety and morals of minors under sixteen (16) years of age for whom they have been provided by the employer, while such minors are engaged or employed in any activity pertaining to the entertainment industry and subject to these regulations."ⁿ⁶³ On schooldays, one studio teacher must be provided for each group of 10 or fewer minors between the ages of 15 days and 16 years.ⁿ⁶⁴ During weekends, holidays, or school vacation periods, one studio teacher must be provided for each group of 20 or fewer such minors.ⁿ⁶⁵ Studio teachers must be provided for minors between the ages of 18 and 16 years when required for their education.ⁿ⁶⁶ The studio teacher's remuneration must be paid by the employer.ⁿ⁶⁷

A studio teacher may refuse to allow the engagement of a minor on a set or location and may remove the minor therefrom if, in the teacher's judgment, conditions present a danger to the health, safety, or morals of the minor.ⁿ⁶⁸ Any such action by the studio teacher may be immediately appealed to the Regional Manager of the DLSE (representing the Labor Commissioner), who may affirm or countermand the action.ⁿ⁶⁹

[c] Door-to-Door Sales Registration

Anyone 18 years or older who transports, or provides direction or supervision during transportation of, a minor under 16 years of age to any location more than 10 miles from the minor's residence, or who directs or supervises the minor, for the purpose of facilitating the minor's participation in door-to-door sales of any merchandise or commodity must register annually with the Labor Commissioner.ⁿ⁷⁰ Registration requires the execution under penalty of perjury of a written application, an investigation of the applicant's character, competency, and responsibility, and payment of a fee.ⁿ⁷¹ These registration requirements do not apply to the minor's parents or guardians, to anyone solely providing transportation for hire, or to anyone acting on behalf of a trustee or charitable corporationⁿ⁷² or an entity described in *Government Code Section 12583*.ⁿ⁷³

Similar registration requirements apply to individuals, associations, corporations, or other entities that employ or use, indirectly through third persons or directly, minors under 16 years of age in door-to-door sales at any location more than 10 miles from the minor's residence.ⁿ⁷⁴ Registration requires the execution under penalty of perjury of a written application (including a copy of any written contract or agreement offered to the minor or used in the sales), an investigation into whether the applicant has previously violated the California child labor laws and whether the minors will be exposed to hazardous or unsafe working conditions, and payment of a fee.ⁿ⁷⁵ Registrants must make all of their payroll records available for inspection by the Labor Commissioner.ⁿ⁷⁶ These registration requirements do not apply to a trustee or charitable corporationⁿ⁷⁷ or to an entity described in *Government Code Section 12583*.ⁿ⁷⁸

The Labor Commissioner may revoke, suspend, or refuse to renew a registration if any of the following have occurred:

1. The registrant or an agent of the registrant has violated or failed to comply with the provisionsⁿ⁷⁹ governing registration;ⁿ⁸⁰
2. The registrant has made any misrepresentation or false statement in the application for registration;ⁿ⁸¹
3. The Labor Commissioner or a court of law has found that the registrant or an agent of the registrant has violated, or willfully aided or abetted the violation of, any California law regulating employment of minors;ⁿ⁸² or
4. The Secretary of Labor or a court of law has found that the registrant has violated the child labor provisions of the FLSA.ⁿ⁸³

[2] Federal Law

[a] Age Certificates

The FLSA authorizes the Secretary of Labor to promulgate regulations requiring employers to obtain proof of age from employees.ⁿ⁸⁴ If an employer has on file an unexpired certificate, issued and held in accordance with the Secretary's regulations, which certifies that the minor who is employed is above the oppressive child labor age for the occupation in question, no oppressive child labor shall be deemed to exist.ⁿ⁸⁵

The certificate may be either (1) a federal certificate of age issued by a person authorized by the Administrator of the Wage and Hour Division, or (2) a California work permit or age certificate issued pursuant to the California Labor and Education Codes.ⁿ⁸⁶ An application for a federal age certificate must be made by the minor seeking the employment, or by the prospective employer.ⁿ⁸⁷ Satisfactory documentary evidence of age must be provided, which may take the form of (1) a birth certificate or other similar record issued by the registrar of vital statistics; (2) a record of baptism, family bible record of births, passport, immigration records, or the like, provided that such documents have been in existence for at least one year before the time they are offered as evidence of age; or (3) a school record of age, accompanied by a sworn statement of the parent or parent substitute, and a certificate of a physician concerning the physical age of the minor, containing specified information.ⁿ⁸⁸ There is a preference for the first form of evidence, and

the others will generally not be accepted unless the preceding form is unavailable.ⁿ⁸⁹

The federal age certificate must be in the form provided by regulation and must contain the signature of the minor and the issuing officer.ⁿ⁹⁰ Once issued, a certificate for a person under 18 years is sent to the minor's prospective employer. The employer must keep the certificate on file at the minor's workplace. When the minor terminates employment, the employer must give the certificate to the minor. The minor may then present the previously issued certificate to future employers as proof of age.ⁿ⁹¹ⁿ⁹²

If substantial evidence exists that the age given on a federal age certificate is incorrect, the investigating authority may request a determination of the continued acceptability of the age certificate.ⁿ⁹³ The Administrator of the Wage and Hour Division will forward the request to the DLSE for action to establish the minor's age and, if necessary, to revoke the certificate.ⁿ⁹⁴ The Administrator of the Wage and Hour Division has final authority to determine the continued acceptability of a certificate for purposes of the FLSA,ⁿ⁹⁵ and will give notice of any determination to the employer and minor.ⁿ⁹⁶ A revoked certificate has no force and effect after notice of revocation.ⁿ⁹⁷

[b] Waivers for Minors Between Ages of 10 and 12 Years Employed in Hand Harvest Labor

Employers may seek a waiver from the Secretary of Labor permitting the employment of minors between 10 and 12 years old in hand harvest labor for periods not to exceed 8 weeks if certain conditions are met.ⁿ⁹⁸ The agricultural operation involved must be one that is customarily paid on a piece rate basis in the region in which the individuals would be employed.ⁿ⁹⁹ The Secretary may grant such a waiver only after making the following findings, based on objective data submitted by the applicant: (1) the crop to be harvested has a particularly short harvesting season and application of the FLSA child labor provisionsⁿ¹⁰⁰ would cause severe economic disruption in the industry; (2) employment of such minors would not be deleterious to their health and well-being; (3) the level and type of pesticides and other chemicals used will not have a deleterious effect on the health or well-being of the minors; (4) persons over the age of 12 years are not available for such employment; and (5) persons under the age of 12 years have traditionally and substantially been employed for such work without displacing job opportunities for persons over 16 years old.ⁿ¹⁰¹ Any waiver granted by the Secretary must require that the minors covered by the waiver (1) will be employed outside of school hours for the school district where they are living, (2) will commute daily from their permanent residence to the farm on which they are employed; and (3) will be employed under the waiver for not more than 8 weeks between June 1 and October 15 of any calendar year, and in accordance with any other terms and conditions that the Secretary may prescribe for the minors' protection.ⁿ¹⁰² Procedures for obtaining such waivers and further details regarding their issuance are set forth in Title 29 *Code of Federal Regulations Sections 575.1-575.9*.

Legal Topics:

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

Labor & Employment LawWage & Hour LawsGeneral OverviewLabor & Employment LawWage & Hour LawsChild LaborLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. For discussion of exemptions, *see* [iv], *below*.

(n2)Footnote 2. *See Educ. Code § 49100 et seq.*; Cal. Dept. of Educ. Form B1-4 (Rev. 5-91) (valid only if employer has filed Form B1-1). Note: the reverse of this form contains information on employment of minors which predates the 1995 changes in child labor laws in California.

(n3)Footnote 3. *See Educ. Code §§ 49110, 49110.1*; Cal. Dept. of Educ. Form B1-1 (Rev. 9-89). Note: the reverse of this form contains information on employment of minors which predates the 1995 changes in child labor laws in California.

(n4)Footnote 4. *See Educ. Code §§ 49160, 49162, 49163.*

(n5)Footnote 5. *Educ. Code § 49160; see also Lab. Code § 1290* (minor under 16 years old may not be employed in manufacturing establishment or other place of labor or employment except as may be provided in *Lab. Code § 1285 et seq.* and *Educ. Code § 48000 et seq.*).

(n6)Footnote 6. *Educ. Code § 49111.*

(n7)Footnote 7. *See Educ. Code § 49112.*

(n8)Footnote 8. *See Educ. Code § 49113.*

(n9)Footnote 9. *Educ. Code §§ 49112(b), 49116(b)(2).*

(n10)Footnote 10. *See Educ. Code § 49131.*

(n11)Footnote 11. *See Educ. Code §§ 49130, 49132-49134; see also* discussion at § 6.02[1][b][viii].

(n12)Footnote 12. *See Educ. Code § 49114.*

(n13)Footnote 13. *Educ. Code § 49114.*

(n14)Footnote 14. D.L.S.E. Policy & Proc. Memo. No. 79-1 (Jan. 2, 1979) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n15)Footnote 15. D.L.S.E. Policy & Proc. Memo. No. 79-1 (Jan. 2, 1979) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n16)Footnote 16. *Educ. Code § 49117.*

(n17)Footnote 17. For discussion of limits on number of hours that a minor may work while school is in session, see § 6.02.

(n18)Footnote 18. *Educ. Code § 49115.*

(n19)Footnote 19. *Lab. Code § 1299; see Educ. Code § 49161.*

(n20)Footnote 20. *See Lab. Code § 1299; Educ. Code § 49164.*

(n21)Footnote 21. *See Lab. Code § 1304; Educ. Code § 49181.*

(n22)Footnote 22. *Educ. Code § 49118.*

(n23)Footnote 23. *See Educ. Code § 49164; Lab. Code § 1300; 1 Ops. Cal. Atty. Gen. 31, 33 (1943) .*

(n24)Footnote 24. *See Lab. Code § 1302.*

(n25)Footnote 25. *Educ. Code § 49101.*

(n26)Footnote 26. *Educ. Code § 49141.*

(n27)Footnote 27. *Educ. Code §§ 49119, 49165.*

(n28)Footnote 28. *Lab. Code § 1308.5(a)(1).*

(n29)Footnote 29. *Lab. Code § 1308.5(a)(2)*.

(n30)Footnote 30. *Lab. Code § 1308.5(a)(3)*.

(n31)Footnote 31. *Lab. Code § 1308.5(a)(5)*.

(n32)Footnote 32. *Lab. Code § 1308.5(a)(6), (7)*.

(n33)Footnote 33. *Lab. Code § 1308.5(a)(5)*.

(n34)Footnote 34. *See Lab. Code § 1308.5(a)(4); see also* discussion in § 6.02[1][b][ii].

(n35)Footnote 35. *Lab. Code § 1308.6*.

(n36)Footnote 36. *See Fam. Code § 6750 et seq.*

(n37)Footnote 37. *Lab. Code § 1308.9(a)*.

(n38)Footnote 38. *Lab. Code § 1308.9(b)*.

(n39)Footnote 39. *See Lab. Code §§ 95(a), 1311, 1398*.

(n40)Footnote 40. *See 8 Cal. Code Reg. § 11751(b); see also 8 Cal. Code Reg. § 11750; Lab. Code § 1286(c)* (definition of "minors" subject to permit requirement).

(n41)Footnote 41. *See 8 Cal. Code Reg. § 11753(a); see also* discussion in [iv], *below*.

(n42)Footnote 42. *8 Cal. Code Reg. § 11751(a)*.

(n43)Footnote 43. *Compare 8 Cal. Code Reg. §§ 11750, 11751(a)* (definition of "minor" and "entertainment industry") *with Lab. Code § 1308.5(a)* (types of employment for which Labor Commissioner's consent is statutorily required).

(n44)Footnote 44. *8 Cal. Code Reg. §§ 11752, 11753(b)*.

(n45)Footnote 45. D.L.S.E. Div. Management Memo. No. 86-2 (June 3, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see 8 Cal. Code Reg. § 11751(b)*.

(n46)Footnote 46. D.L.S.E. Div. Management Memo. No. 86-2 (June 3, 1986) (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n47)Footnote 47. *See 8 Cal. Code Reg. § 11754; D.L.S.E. Div. Management Memo. No. 86-2 (June 3, 1986)* (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n48)Footnote 48. *See 8 Cal. Code Reg. § 11754(b); D.L.S.E. Div. Management Memo. No. 86-2 (June 3, 1986)* (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n49)Footnote 49. *See* discussion in [vi], *below*.

(n50)Footnote 50. *See 8 Cal. Code Reg. § 11754(c)-(e); D.L.S.E. Div. Management Memo. No. 86-2 (June 3, 1986)* (CAUTION: see § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of

statutory law and IWC Wage Orders).

(n51)Footnote 51. *8 Cal. Code Reg. § 11753(a)*.

(n52)Footnote 52. *See 8 Cal. Code Reg. § 11753(a)*; D.L.S.E. Div. Management Memo. No. 86-2 (June 3, 1986); D.L.S.E. Div. Management Memo. No. 87-1 (Feb. 25, 1987) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n53)Footnote 53. *See 8 Cal. Code Reg. § 11753(a)*; D.L.S.E. Div. Management Memo. No. 86-2 (June 3, 1986).

(n54)Footnote 54. *8 Cal. Code Reg. § 11753(b)*.

(n55)Footnote 55. *See 8 Cal. Code Reg. § 11751(b)*; *see also Lab. Code § 1308.6* (requirements for written consent to employment of minor); *8 Cal. Code Reg. § 11752* (provisions relating to permissible work of minors under *8 Cal. Code Reg. §§ 11701, 11703, 11705, 11707* must be satisfied).

(n56)Footnote 56. *8 Cal. Code Reg. § 11758*.

(n57)Footnote 57. *8 Cal. Code Reg. § 11758.1*; *see D.L.S.E. Div. Management Memo. No. 86-2* (June 3, 1986).

(n58)Footnote 58. *See 8 Cal. Code Reg. § 11758.2*.

(n59)Footnote 59. *8 Cal. Code Reg. § 11757*.

(n60)Footnote 60. *See 8 Cal. Code Reg. § 11755.2*; *see D.L.S.E. Div. Management Memo. No. 87-1* (Feb. 25, 1987)(conditions under which studio teacher not required for minors between ages of 16 and 18 years) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n61)Footnote 61. *See 8 Cal. Code Reg. § 11755*; D.L.S.E. Div. Management Memo. No. 86-2 (June 3, 1986).

(n62)Footnote 62. *See 8 Cal. Code Reg. § 11760*; D.L.S.E. Div. Management Memo. No. 87-1 (Feb. 25, 1987) (requirements that employers provide schooling to certain minor employees).

(n63)Footnote 63. *8 Cal. Code Reg. § 11755.3*.

(n64)Footnote 64. *8 Cal. Code Reg. § 11755.2*.

(n65)Footnote 65. *8 Cal. Code Reg. § 11755.2*.

(n66)Footnote 66. *8 Cal. Code Reg. § 11755.2*.

(n67)Footnote 67. *8 Cal. Code Reg. § 11755.4*.

(n68)Footnote 68. *See 8 Cal. Code Reg. § 11755.2*; *see D.L.S.E. Div. Management Memo. No. 86-2* (June 3, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n69)Footnote 69. D.L.S.E. Div. Management Memo. No. 86-2 (June 3, 1986) (CAUTION: see § 1.05[3][c], supra, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); *see 8 Cal. Code Reg. § 11755.3*.

(n70)Footnote 70. *Lab. Code § 1308.2(a)*.

(n71)Footnote 71. *Lab. Code § 1308.2(b).*

(n72)Footnote 72. *See Gov. Code §§ 12582, 12582.1.*

(n73)Footnote 73. *Lab. Code § 1308.2(f).*

(n74)Footnote 74. *Lab. Code § 1308.3(a).*

(n75)Footnote 75. *Lab. Code § 1308.3(b).*

(n76)Footnote 76. *Lab. Code § 1308.3(c).*

(n77)Footnote 77. *See Gov. Code §§ 12582, 12582.1.*

(n78)Footnote 78. *Lab. Code § 1308.3(g).*

(n79)Footnote 79. *Lab. Code §§ 1308.2, 1308.3.*

(n80)Footnote 80. *Lab. Code § 1308.4(a).*

(n81)Footnote 81. *Lab. Code § 1308.4(b).*

(n82)Footnote 82. *Lab. Code § 1308.4(c).*

(n83)Footnote 83. *Lab. Code § 1308.4(c); see 29 U.S.C. § 212 (FLSA child labor provisions).*

(n84)Footnote 84. *See 29 U.S.C. § 212(d).*

(n85)Footnote 85. *See 29 U.S.C. § 203(l); 29 C.F.R. §§ 570.5(a), 570.36, 570.121.*

(n86)Footnote 86. *See 29 C.F.R. §§ 570.5(b), 570.9(a).* For discussion of California work permit requirements, *see* [1], *above*.

(n87)Footnote 87. *29 C.F.R. § 570.7(a).*

(n88)Footnote 88. *See 29 C.F.R. § 570.7(a).*

(n89)Footnote 89. *See 29 C.F.R. § 570.7(b).*

(n90)Footnote 90. *See 29 C.F.R. §§ 570.6(a), 570.121.*

(n91)Footnote 91. *29 C.F.R. § 570.6(b)(1); see 29 C.F.R. § 570.5.*

(n92)Footnote 92. [Reserved]

(n93)Footnote 93. *29 C.F.R. § 570.11(a).*

(n94)Footnote 94. *See 29 C.F.R. § 570.11(a).*

(n95)Footnote 95. *29 C.F.R. § 570.11(b).*

(n96)Footnote 96. *29 C.F.R. § 570.11(b).*

(n97)Footnote 97. *29 C.F.R. § 570.12.*

(n98)Footnote 98. *See* 29 U.S.C. § 213(c)(4); 29 C.F.R. § 575.1(a).

(n99)Footnote 99. *See* 29 U.S.C. § 213(c)(4)(A).

(n100)Footnote 100. *See* 29 U.S.C. § 212.

(n101)Footnote 101. 29 U.S.C. § 213(d)(4)(A); *see also* 29 C.F.R. § 575.5 (further defining requirements for waiver).

(n102)Footnote 102. 29 U.S.C. § 213(d)(4)(B).



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS

CHAPTER 6 Child Labor Laws

Part A. TEXT

1-6 California Employment Law § 6.05

AUTHOR: By Susan Spurlark, J.D.

§ 6.05 Penalties and Enforcement

[1] California Law

[a] Authority to Investigate and Enforce

The DLSE is empowered to enforce the provisions of the Labor Code relating to child labor.ⁿ¹ For general discussion of the investigative and enforcement powers of the DLSE, see Chapter 5.

In addition, a full-time attendance supervisor of a county, city and county, or school district where the employer is located, or a probation officer of such county, may at any time enter the place of employment to examine work permits for minors employed at that place or to investigate violations of the child labor laws or the compulsory education laws.ⁿ² If a violation is found or access is denied, the investigating officer or the Superintendent of Public Instruction must notify the Labor Commissioner in writing within 48 hours that there is good cause to believe that a violation is occurring and must describe the nature of the violation.ⁿ³ On receipt of such a report, the Labor Commissioner must investigate and, if a violation is found, issue a citation pursuant to *Labor Code Section 1287*.ⁿ⁴

[b] Penalties

[i] Civil

For purposes of assessing civil penalties, the Labor Code and DLSE regulations divide violations of the child labor provisions into "Class A" violations and "Class B" violations.ⁿ⁵

"Class A" violations are the following:ⁿ⁶

1. Any violation of *Labor Code Section 1290* (prohibited employment in manufacturing establishment);ⁿ⁷

2. Any violation of *Labor Code Sections 1292 and 1293* (prohibited tasks relating to operation of machinery);ⁿ⁸
3. Any violation of *Labor Code Section 1293.1* (agricultural zones of danger);ⁿ⁹
4. Any violation of *Labor Code Section 1294* (prohibited occupations relating to transportation and other dangerous occupations);ⁿ¹⁰
5. Any violation of *Labor Code Section 1294.1* (occupations considered hazardous under, or not meeting limitations of, federal regulations);ⁿ¹¹
6. Any violation of *Labor Code Section 1294.5* (prohibited work in gas service stations);ⁿ¹²
7. Any violation of *Labor Code Section 1308* (certain other prohibited occupations);ⁿ¹³
8. Any violation of *Labor Code Section 1308.1* (certain prohibited employment in door-to-door sales);ⁿ¹⁴
9. Any violation of *Labor Code Section 1391* (restrictions on working hours for minors);ⁿ¹⁵
10. Any violation of *Labor Code Section 1392* (violation of 8-hour day maximum by person with control of ward or apprentice); and
11. Any other violation that the Labor Commissioner determines presents an imminent danger to minor employees or a substantial probability of death or serious physical harm.

Although *Labor Code Section 1288* classifies only the *third or subsequent* violation of *Labor Code Section 1391* as a "Class A" violation and classifies the first and second violations as "Class B" violations, DLSE regulations classify *all* violations of *Labor Code Section 1391* as "Class A" violations.ⁿ¹⁶ This appears to be within the Labor Commissioner's discretion to determine that any violation that "present[s] an imminent danger to minor employees" is a "Class A" violation.ⁿ¹⁷

The civil penalty for a "Class A" violation is a minimum of \$5,000 per violation and a maximum of \$10,000 per violation.ⁿ¹⁸ Willful or repeated violations are subject to higher penalties (up to \$10,000) than those imposed for nonwillful or first violations.ⁿ¹⁹

"Class B" violations are the following:ⁿ²⁰

1. Any violation of *Labor Code Section 1299* (requiring employers to maintain certificates and permits on file);ⁿ²¹
2. Any violation of *Labor Code Section 1308.5* (requiring Labor Commissioner consent to certain employment of minors in entertainment industry);ⁿ²²
3. A first or second violation of *Labor Code Section 1391* (restrictions on working hours for minors);ⁿ²³ and
4. Any other violation that the Labor Commissioner determines has a direct or immediate relationship to the health, safety, or security of minor employees, other than "Class A" violations.

The civil penalty for a "Class B" violation is a minimum of \$500 and a maximum of \$1000.ⁿ²⁴

Labor Code Section 1308.7 restricts the hours that any minor may work in the entertainment industry.ⁿ²⁵ Violation of these provisions has not yet been classified by the Labor Code or DLSE regulations as either a "Class A" or a "Class B" violation.ⁿ²⁶

The civil penalty for a violation of *Labor Code § 1309.5*, which prohibits the sale of films, photographs, slides, or magazines depicting a minor engaged in sexual conduct, may not exceed \$7,500 per violation.ⁿ²⁷

For purposes of determining the appropriate penalty, a prior violation is one that was not contested or that was upheld in proceedings relating to that violation.ⁿ²⁸ Each citation is treated as a single violation irrespective of the number of minors involved.ⁿ²⁹ A violation is deemed "willful" if it implies a purpose or willingness to engage, employ, or assign minors to activities proscribed by any of the above-listed statutes.ⁿ³⁰

[ii] Criminal

It is a misdemeanor to employ (directly or indirectly through third persons) a minor affected by *Labor Code Sections 1285-1312* in violation of those sections, or to permit any minor to be employed in violation of those sections.ⁿ³¹ A parent or guardian of a minor who permits the minor to be employed in violation of those sections is also guilty of a misdemeanor.ⁿ³² It is also a misdemeanor to violate the provisions of *Labor Code Sections 1391* and *1392* regarding hours of employment for minors.ⁿ³³

Violations of *Labor Code Section 1285-1312* are punishable by a fine of not less than \$1,000 and not more than \$5,000, or by imprisonment in the county jail for not more than six months, or both.ⁿ³⁴ Willful violations of these sections are punishable by a fine of not more than \$10,000, imprisonment in the county jail for not more than six months, or both.ⁿ³⁵

Violations of *Labor Code Section 1391* are punishable by a fine of not less than \$1,000 and not more than \$5,000, or by imprisonment in the county jail for not more than 60 days, or both. Willful violations of this section are punishable by a fine of not more than \$10,000, imprisonment in the county jail for not more than six months, or both.ⁿ³⁶

It is a misdemeanor to violate the provisions of *Labor Code Section 1308.7* regarding hours of employment for minors in the entertainment industry. Violation of these provisions is punishable by a fine of not less than \$500 nor more than \$1,000, or by imprisonment in the county jail for not more than 60 days, or both.ⁿ³⁷

Violation of provisions of the Education Code regarding employment of minors and work permits is also a misdemeanor, punishable by a fine of not less than \$100, nor more than \$400, or by imprisonment in the county jail for not more than 60 days, or both.ⁿ³⁸ In addition, any person authorized to sign an age certificate, permit to work, or permit to employ who knowingly certifies to any false statement therein is guilty of a misdemeanor, punishable by a fine of not less than \$10, nor more than \$100, or by imprisonment in the county jail for not more than 30 days, or both.ⁿ³⁹

Violation of the child labor provisions of the Labor Code regarding farm labor contractors is also a misdemeanor.ⁿ⁴⁰ For such violations, fines of up to \$1000 may be assessed in addition to or in lieu of imprisonment up to 6 months in the county jail.ⁿ⁴¹ Violations of the child labor laws may also constitute violations of various Penal Code provisions.ⁿ⁴²

It is also a misdemeanor to violate the provisions of *Labor Code Sections 1308.2* and *1308.3*, which require registration by persons employing minors to make door-to-door sales and persons involved in transporting the minors.ⁿ⁴³ First-time convictions are punishable by a fine of \$1,000 for each affected minor, second-time convictions are punishable by a fine of \$2,500 for each affected minor, and any subsequent convictions are punishable by a fine of \$10,000 for each affected minor.ⁿ⁴⁴

[c] Enforcement Procedures**[i] Administrative Procedures**

If, after inspection or investigation, the Labor Commissioner (or his or her designee or deputy) finds a violation of the laws relating to child labor, he or she may issue a written citation describing the nature of the violation and referring to any statute or regulation allegedly violated.ⁿ⁴⁵ The citation may be served personally or by registered mail in accordance with *Government Code Section 11505(c)*.ⁿ⁴⁶

The recipient of such a citation may contest the citation or proposed penalty assessment by notifying the office of the Labor Commissioner that is listed on the citation of a request for an informal hearing.ⁿ⁴⁷ The request must be made within 15 business days after service of the citation.ⁿ⁴⁸ The request must be in writing.ⁿ⁴⁹

An informal hearing must be conducted within 30 days after that notice,ⁿ⁵⁰ and the DLSE must give the person cited at least 3 days' notice, which may be oral with a confirming letter, of the time of the hearing.ⁿ⁵¹ The hearing is conducted by the Labor Commissioner, or a deputy or agent assigned by the Commissioner.ⁿ⁵² D.L.S.E. Division Management Memo. No. 88-5 describes the procedures for conducting such hearings. The hearing must be recorded on equipment that will produce an audio record of adequate quality to allow a Certified Shorthand Reporter to produce a transcript of the proceedings for use in the event of judicial review.ⁿ⁵³ At the conclusion of the hearing, the civil penalty assessment is modified, affirmed, or dismissed.ⁿ⁵⁴ The Labor Commissioner's decision consists of a notice of findings, findings, and order, which must be served on all parties to the hearing within 15 days after the hearing by regular first-class mail at the last known address of the party on file with the Labor Commissioner.ⁿ⁵⁵

Any amount found due by the Labor Commissioner is due and payable 45 days after the notice, written findings, and order have been mailed to the party assessed.ⁿ⁵⁶ The party assessed may seek judicial review of the Labor Commissioner's decision by writ of mandate in the appropriate superior court within that period, provided that the party agrees to pay any judgment and costs ultimately rendered by the court against the party for the assessment.ⁿ⁵⁷ If the notice, findings, and order are served by mail, the time within which the party must either pay the assessment or seek a writ of mandate is extended by 5 calendar days if the place of address and the place of mailing are both within California, 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States.ⁿ⁵⁸ As in the case of any administrative mandate proceeding, the proceeding is not de novo, and the court reviews only the transcript of the hearing and any evidence introduced at the hearing.ⁿ⁵⁹ If the findings or order affirm or modify a citation or proposed assessment of a civil penalty, a certified copy of the findings and order may be entered by the Labor Commissioner in the office of the clerk of the superior court in any county in which the person assessed has property or in which the person assessed has or had a place of business.ⁿ⁶⁰ Immediately on filing, the clerk must enter judgment for the State of California against the person assessed in the amount shown on the certified order.ⁿ⁶¹

Penalties in cases in which the citation is not contested must be remitted within 15 business days after the issuance of the citation.ⁿ⁶² If no petition objecting to a citation or proposed assessment of civil penalty is filed, a certified copy of the penalty and citation may be filed by the Labor Commissioner in the office of the clerk of the superior court in any county in which the person assessed has property or in which the person assessed has or had a place of business.ⁿ⁶³ The clerk, immediately on filing, must enter judgment for the State of California against the person assessed in the amount shown on the citation of proposed assessment of penalty.ⁿ⁶⁴

Any judgment entered on an assessment or order of the Labor Commissioner bears the same rate of interest and has the same effect as other judgments and must be given the same preference allowed by law on other judgments rendered for claims for taxes.ⁿ⁶⁵ The clerk may make no charge for entering such a judgment.ⁿ⁶⁶

[ii] Judicial Proceedings

The state attorney general or county district attorney may prosecute both civil and criminal actions, either on their own motion or on the complaint of others, for violations of laws relating to employment of minors.ⁿ⁶⁷

No express private right of action exists for violations of the child labor laws. Moreover, the exclusive remedy provisions of the worker's compensation law bar any claim against the employer or co-employees for damages for personal injury or death arising out of employment in violation of the child labor laws, unless an exception to those provisions applies.ⁿ⁶⁸ For discussion of the scope of the workers' compensation law, and the exclusive remedy provisions thereof, see Chapter 20.

[d] Additional Workers' Compensation Benefits Payable to Illegally Employed Minors

An employer (other than the State of California or its political subdivisions or districts) who illegally employs a minor under 16 years of age is liable for additional workers' compensation if the minor employee suffers a work-related injury.ⁿ⁶⁹ This additional amount is equal to 50 percent of the entire compensation otherwise recoverable, but cannot be more than the maximum sum an employer must pay under *Labor Code Section 4553* for serious and willful misconduct.ⁿ⁷⁰ The employer must pay these additional benefits at the same time and the same manner as the normal compensation benefits.ⁿ⁷¹

An employer is not liable for the additional benefits if the employee was hired because the employee had a birth certificate, driver's license, or other reasonable evidence that he or she was over 15 years of age.ⁿ⁷² This rule applies even if the employee falsely obtained this evidence of age.ⁿ⁷³

For further discussion of workers' compensation benefits, see Hanna, California Law of Employee Injuries and Workers' Compensation (Matthew Bender).

[2] Federal Law

[a] Authority to Investigate and Enforce

The Secretary of Labor administers all provisions of the FLSA relating to child labor.ⁿ⁷⁴ The Secretary (or an authorized representative) must make investigations and inspections pursuant to Title 29 *United States Code Section 211(a)* with respect to employment of minors.ⁿ⁷⁵ Subject to the direction and control of the Attorney General, the Secretary must also bring all actions to enjoin any act or practice that is unlawful because it constitutes oppressive child labor.ⁿ⁷⁶

[b] Penalties

Any person who wilfully violates the child labor provisions of the FLSA is subject to criminal prosecution and on conviction may be fined up to \$10,000, or imprisoned for not more than 6 months, or both.ⁿ⁷⁷

The FLSA also provides civil penalties for violation of its child labor provisions and regulations.ⁿ⁷⁸ The maximum civil penalty under the FLSA is \$11,000 for each employee who is a subject of a violation.ⁿ⁷⁹ The amount of the penalty is determined with consideration for the size of the business, the gravity of the violation charged, and any evidence of willfulness.ⁿ⁸⁰

[c] Enforcement Procedures

[i] Administrative Procedures

The Administrator of the Wage and Hour Division, or an official authorized by the Administrator, has authority to

determine whether a person has violated the child labor provisions of the FLSA and whether a civil money penalty for the violation is appropriate.ⁿ⁸¹ If the Administrator decides to impose a civil penalty on any person, the Administrator must issue and serve a notice of the penalty on that person.ⁿ⁸² The amount of the penalty determined by the Administrator and set forth in the notice becomes final and may be collected, unless the person charged with the violation takes a timely exception and requests a hearing.ⁿ⁸³ The exception must be in writing to the official who issued the determination at the Wage and Hour Division address appearing on the determination notice, and must be received no later than 15 days after the date the person charged receives the notice of the penalty. No additional time is added when service of the determination of penalties or of the exception is by mail. If a request for an administrative hearing is timely filed, the Administrator's determination is inoperative unless and until the case is dismissed or the Administrative Law Judge issues a decision affirming the determination.ⁿ⁸⁴ Penalties collected for violations of the child labor provisions must be deposited in the general fund of the United States Treasury.ⁿ⁸⁵

The administrative procedures for imposition, appeal, and collection of a civil penalty for a child labor law violation are the same as those for violations of minimum wage and overtime laws.ⁿ⁸⁶ The procedures are discussed in Chapter 5.

[ii] Judicial Proceedings

Subject to the direction and control of the United States Attorney General, the Secretary may bring actions under Title 29 *United States Code Section 217* to enjoin acts of oppressive child labor.ⁿ⁸⁷ For discussion of actions to enjoin violations of the FLSA, see Chapter 5.

The Secretary, as represented by the Solicitor of Labor, may institute a civil action to collect the penalties referred to in [i], *above*, in any court of competent jurisdiction.ⁿ⁸⁸ Civil or criminal contempt proceedings may be brought against a person who fails to comply with a court order imposing such penalties in a civil or criminal proceeding for violation of the child labor provisions.ⁿ⁸⁹ For further discussion of the collection of civil penalties for violations of the child labor provisions, which are recovered in the same manner as civil penalties for minimum wage and overtime violations, see Chapter 5.

There is no private right of action for personal injury, wrongful death, or other damages caused by violations of the child labor provisions of the FLSA.ⁿ⁹⁰

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Child Labor Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws Remedies General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code §§ 1311, 1398; see Lab. Code § 95(a).*

(n2)Footnote 2. *Lab. Code § 1302.*

(n3)Footnote 3. *Lab. Code § 1302; Educ. Code § 49180.*

(n4)Footnote 4. *Educ. Code § 49180; see discussion in [b][i], below.*

(n5)Footnote 5. *See Lab. Code § 1288; 8 Cal. Code Reg. §§ 11779-11782.1.*

(n6)Footnote 6. *Lab. Code § 1288(a); 8 Cal. Code Reg. §§ 11780, 11780.1.*

(n7)Footnote 7. *See discussion in 6.03[1][d].*

- (n8)Footnote 8. *See* discussion in § 6.03[1][e].
- (n9)Footnote 9. *See* discussion in § 6.03[1][b].
- (n10)Footnote 10. *See* discussion in § 6.03[1][f],[g].
- (n11)Footnote 11. *See* discussion in § 6.03[1][i.2].
- (n12)Footnote 12. *See* discussion in 6.03[1][f].
- (n13)Footnote 13. *See* discussion in § 6.03[1][c],[h],[i].
- (n14)Footnote 14. *See* discussion in 6.03[1][i.1].
- (n15)Footnote 15. *See* discussion in § 6.02[1][a].
- (n16)Footnote 16. *See* 8 Cal. Code Reg. § 11780.
- (n17)Footnote 17. *See* Lab. Code § 1288(a); 8 Cal. Code Reg. § 11780.
- (n18)Footnote 18. Lab. Code § 1288(a); 8 Cal. Code Reg. § 11779.
- (n19)Footnote 19. Lab. Code § 1288(a); *see* 8 Cal. Code Reg. §§ 11779, 11779.1.
- (n20)Footnote 20. Lab. Code § 1288(b); 8 Cal. Code Reg. §§ 11782, 11782.1.
- (n21)Footnote 21. *See* discussion in § 6.04[1][a][ii].
- (n22)Footnote 22. *See* discussion in § 6.04[1][b][i].
- (n23)Footnote 23. *See* discussion in 6.02[1][a].
- (n24)Footnote 24. Lab. Code § 1288(b); *see* 8 Cal. Code Reg. § 1178.1 (promulgated before 1994 legislation increasing amount of penalties).
- (n25)Footnote 25. Lab. Code § 1308.7(a).
- (n26)Footnote 26. *See* Lab. Code § 1288; 8 Cal. Code Reg. §§ 11779-11782.1.
- (n27)Footnote 27. Lab. Code § 1309.6(a).
- (n28)Footnote 28. 8 Cal. Code Reg. §§ 11779, 11781.
- (n29)Footnote 29. 8 Cal. Code Reg. §§ 11779, 11781.
- (n30)Footnote 30. *See* 8 Cal. Code Reg. §§ 11799.1, 11781.1.
- (n31)Footnote 31. *See* Lab. Code § 1303; *see also* Lab. Code §§ 1308, 1308.5, 1309 (employment of minor in certain specified occupations is a misdemeanor).
- (n32)Footnote 32. *See* Lab. Code § 1303.
- (n33)Footnote 33. *See* Lab. Code §§ 1391, 1392.
- (n34)Footnote 34. Lab. Code §§ 1303, 1309.

(n35)Footnote 35. *Lab. Code* §§ 1303, 1309.

(n36)Footnote 36. *Lab. Code* § 1391.

(n37)Footnote 37. *Lab. Code* § 1308.7(c).

(n38)Footnote 38. *Educ. Code* § 49182.

(n39)Footnote 39. *Educ. Code* § 49183.

(n40)Footnote 40. *Lab. Code* § 1697(a).

(n41)Footnote 41. *Lab. Code* § 1697(a).

(n42)Footnote 42. *See, e.g., Penal Code* §§ 273e, 273f, 311.

(n43)Footnote 43. *Lab. Code* §§ 1308.2(e), 1308.3(f); *see* discussion in § 6.04[1][c].

(n44)Footnote 44. *Lab. Code* §§ 1308.2(e), 1308.3(f).

(n45)Footnote 45. *Lab. Code* § 1287; *see* 8 *Cal. Code Reg.* §§ 11775, 11777; *Lab. Code* § 1286(a), (d).

(n46)Footnote 46. *Lab. Code* § 1287; *see* 8 *Cal. Code Reg.* § 11777(e).

(n47)Footnote 47. *Lab. Code* § 1289(a).

(n48)Footnote 48. *Lab. Code* § 1289(a).

(n49)Footnote 49. D.L.S.E. Div. Management Memo. No. 88-5 (Dec. 9, 1988) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n50)Footnote 50. *Lab. Code* § 1289(a).

(n51)Footnote 51. 8 *Cal. Code Reg.* § 11783.

(n52)Footnote 52. *Lab. Code* § 1289(a).

(n53)Footnote 53. D.L.S.E. Div. Management Memo. No. 88-5 (Dec. 9, 1988) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n54)Footnote 54. *Lab. Code* § 1289(a).

(n55)Footnote 55. *Lab. Code* § 1289(a); *see* D.L.S.E. Div. Management Memo. No. 88-5 (Dec. 9, 1988) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n56)Footnote 56. *Lab. Code* § 1289(a).

(n57)Footnote 57. *See Lab. Code* § 1289(a).

(n58)Footnote 58. *See Lab. Code* § 1289(a); *Code Civ. Proc.* § 1013(a).

(n59)Footnote 59. *See* D.L.S.E. Div. Management Memo. No. 88-5 (Dec. 9, 1988).

(n60)Footnote 60. *Lab. Code* § 1289(d).

(n61)Footnote 61. *Lab. Code § 1289(d)*.

(n62)Footnote 62. *See Lab. Code § 1289(b); 8 Cal. Code Reg. § 11785*.

(n63)Footnote 63. *Lab. Code § 1289(c)*.

(n64)Footnote 64. *Lab. Code § 1289(c)*.

(n65)Footnote 65. *Lab. Code § 1289(e)*.

(n66)Footnote 66. *Lab. Code § 1289(e)*.

(n67)Footnote 67. *Lab. Code §§ 1312, 1399*.

(n68)Footnote 68. *See Lab. Code §§ 3351, 3601, 3602; Leong v. Postal Telegraph Cable Co. (1944) 66 Cal. App. 2d 849, 851, 153 P.2d 204*.

(n69)Footnote 69. *Lab. Code § 4557*.

(n70)Footnote 70. *Lab. Code § 4557*.

(n71)Footnote 71. *Lab. Code § 4557*.

(n72)Footnote 72. *Lab. Code § 4557*.

(n73)Footnote 73. *Lab. Code § 4557*.

(n74)Footnote 74. *29 U.S.C. § 212(b)*.

(n75)Footnote 75. *29 U.S.C. § 212(b)*. *see* ch. 5 for a discussion of the Secretary's investigative authority under *29 U.S.C. § 211(a)*.

(n76)Footnote 76. *29 U.S.C. § 212(b)*; *see* discussion in [c][ii], *below*.

(n77)Footnote 77. *See 29 U.S.C. §§ 215(a)(4), 216(a)*.

(n78)Footnote 78. *See 29 U.S.C. § 216(e)*.

(n79)Footnote 79. *29 U.S.C. § 216(e); 29 C.F.R. §§ 579.1(a), 579.9*.

(n80)Footnote 80. *See 29 U.S.C. § 216(e); 29 C.F.R. § 579.5*.

(n81)Footnote 81. *29 C.F.R. §§ 580.1, 580.3*.

(n82)Footnote 82. *29 C.F.R. § 580.3*.

(n83)Footnote 83. *29 C.F.R. § 580.5*.

(n84)Footnote 84. *29 C.F.R. § 580.6(a)*.

(n85)Footnote 85. *29 U.S.C. § 216(e); 29 C.F.R. § 579.1(a)(7)*.

(n86)Footnote 86. *See 29 C.F.R. § 580.2*.

(n87)Footnote 87. *29 U.S.C. § 212(b)*.

(n88)Footnote 88. *29 C.F.R. § 580.18(b)(2)*.

(n89)Footnote 89. *29 C.F.R. § 580.18(b)(3)*.

(n90)Footnote 90. *See, e.g., Breitwieser v. KMS Industries, Inc. (5th Cir. 1972) 467 F.2d 1391, 1394 , cert. denied, 410 U.S. 969 (1973) .*



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 6 Child Labor Laws

Part A. TEXT

1-6 California Employment Law §§ 6.06through 6.09

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§§ 6.06[Reserved]



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 6 Child Labor Laws

Part B. BIBLIOGRAPHY

1-6 California Employment Law § 6.10

AUTHOR: By Susan Spurlark, J.D.

§ 6.10 Legal Texts

Leader, Wages and Hours: Law and Practice, chs. 3, 7 (Matthew Bender).

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Child Labor Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws Remedies General Overview



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 6 Child Labor Laws

Part B. BIBLIOGRAPHY

1-6 California Employment Law § 6.11

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§ 6.11[Reserved]



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 6 Child Labor Laws

Part B. BIBLIOGRAPHY

1-6 California Employment Law § 6.12

AUTHOR: By Susan Spurlark, J.D.

§ 6.12 Legal Periodicals

Note, *Minor Oversight: A Survey and Critical Overview of California Laws Relating to Youths*, 13 U.W.L.A. L. Rev. 15 (1981).

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Child Labor Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws Remedies General Overview



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 7 Posting and Recordkeeping Requirements Under Wage and Hour Laws

1-7 California Employment Law 7.syn

AUTHOR: By Susan Spurlark, J.D.

§ 7.syn Synopsis to Chapter 7: Posting and Recordkeeping Requirements Under Wage and Hour Laws

§ 7.01 Posting Requirements

[1] General Requirements

[a] California Law

[i] Posting of Wage Orders

[ii] Other Posting Requirements

[b] Federal Law

[2] Effect of Failure to Post

[a] California Law

[b] Federal Law

§ 7.02 Recordkeeping Requirements

[1] California Law

[a] General Requirements

[b] Special Rules

[i] Wage Payments

[ii] Gratuities

[iii] Minors' Work Permits

[iv] Talent Agencies

[v] Public Works

[vi] Garment Manufacturers

[vii] Household Occupations

[c] Requirements Regarding Form of Records, Length of Retention, and Location

[d] Effect of Failure to Keep Records

[2] Federal Law

[a] Generally

[b] Exceptions and Special Provisions

[i] Executive, Administrative, Professional, and Outside Sales Employees

[ii] Other Exempt Employees

[iii] Other Special Rules

[c] Requirements Regarding Types of Documents, Length of Retention, and Location of Records

[d] Other Federal Laws

[e] Effect of Failure to Keep Records

[i] Presumptions

[ii] Penalties

§§ 7.03 through 7.09 [Reserved]

§ 7.10 Legal Texts

*By Susan Spurlark, J.D. n**

FOOTNOTES:

(n1)Footnote *. Ms. Spurlark specializes in representation of private and public employers in matters involving labor and employment law. She received her J.D. from Stanford Law School in 1975.

2004 Revisions by Peter Rukin, The Law Office of Peter Rukin, Oakland, CA, www.rukinlaw.com.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 7 Posting and Recordkeeping Requirements Under Wage and Hour Laws

1-7 California Employment Law Scope

AUTHOR: By Susan Spurlark, J.D.

Scope

By Susan Spurlark, J.D. n SCOPE*

This chapter discusses state and federal requirements regarding posting of notices and recordkeeping under the wage and hour laws. The chapter also discusses the penalties for and effects of noncompliance with recordkeeping obligations.

For discussion of posting and recordkeeping requirements relating to designation of the regular payday, as well as wage statement requirements, see Chapter 4. Chapter 5 discusses the investigatory powers of the Labor Commissioner and the Department of Labor, as well as remedies for violation of wage and hour laws. For an overview of the applicability of the various wage and hour laws, see Chapter 1.

Posting and recordkeeping requirements under equal employment opportunity laws are discussed in Chapter 41.

FOOTNOTES:

(n2)Footnote *. Ms. Spurlark specializes in representation of private and public employers in matters involving labor and employment law. She received her J.D. from Stanford Law School in 1975.

2004 Revisions by Peter Rukin, The Law Office of Peter Rukin, Oakland, CA, www.rukinlaw.com.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 7 Posting and Recordkeeping Requirements Under Wage and Hour Laws

Part A. TEXT

1-7 California Employment Law § 7.01

AUTHOR: By Susan Spurlark, J.D.

§ 7.01 Posting Requirements

[1] General Requirements

[a] California Law

[i] Posting of Wage Orders

Labor Code section 1183 requires employers to post Industrial Welfare Commission (IWC) Wage Orders applicable to their industry or to occupations of persons in their employ.n1 The IWC is required to send copies of the relevant orders to all affected employers and to any employer requesting a copy; however, failure to provide the copy does not relieve the employer of its obligation to comply with the order.n2 The provisions of the wage orders further require posting in a location frequented by employees during the workday.n3 When the location of work or other conditions make posting not feasible, a copy of the order may be maintained and made available to employees on request.n4

[ii] Other Posting Requirements

California employers are also required to conspicuously post at the work place (or at the office or nearest agency for payment) a notice of paydays and of the time and place of payment.n5 For discussion of this notice and a sample form, see Chapter 4.

Mining employers, logging and saw mill employers, employers of door-to-door or telephone salespersons, and employers engaged in the business of promoting theatrical industries or enterprises must conspicuously post on the premises where persons are employed a notice specifying the name and address of the financial institution holding cash or securities to secure payment of wages or the name of the surety guaranteeing payment of wages, as required by wage security provisions of the Labor Code.n6

Farm labor contractors must post notices at the site where work is to be performed and on all vehicles used for the transportation of employees (in English and Spanish and in lettering of a size prescribed by the Department of Industrial

Relations), specifying the rate of compensation paid by the contractor to his or her employees for their services.ⁿ⁷

Talent agency employers must post conspicuously in their offices a printed copy of the Labor Code provisions governing talent agencies,ⁿ⁸ the name and address of the person charged with enforcing those provisions, and printed copies of such other statutes as the Labor Commissioner may specify.ⁿ⁹

[b] Federal Law

Regulations promulgated under the Fair Labor Standards Act (FLSA) require employers to post notices explaining the provisions of the FLSA, as prescribed by the Wage and Hour Division.ⁿ¹⁰ The posting requirement applies to any employer who employs any employees who are subject to the minimum-wage provisions of the FLSA.ⁿ¹¹ The notices must be posted in conspicuous places in every establishment where such employees are employed so that the notice may readily be observed.ⁿ¹²

■ PRACTICE TIP:

If an employer employs employees to whom the overtime provisions of the FLSA are not applicable because of an exemption that is broadly applicable to the particular establishment, the employer may alter or modify the prescribed notice with a legible notation to show that the overtime provisions do not apply.ⁿ¹³ For example, a taxicab service may add a notation to the poster stating that "overtime provisions are not applicable to taxicab drivers," with a citation to the relevant statute setting forth the exemption.ⁿ¹⁴ *Commentary by Kirby Wilcox.*

Regulations under the FLSA relating to the employment of persons at subminimum wages under special certificates (for example, learners, employees in sheltered workshops, patient workers, handicapped workers) also contain posting requirements.ⁿ¹⁵ Finally, regulations issued under the Walsh-Healey Act,ⁿ¹⁶ Davis-Bacon Act,ⁿ¹⁷ Migrant and Seasonal Agricultural Worker Protection Act,ⁿ¹⁸ and Service Contract Actⁿ¹⁹ also contain posting requirements relating to wages and hours of employees. For discussion of the scope of these statutes, see Chapter 1.

[2] Effect of Failure to Post

[a] California Law

Failure to post notices required by *Labor Code sections 207 and 1183* and the wage orders is a misdemeanor.ⁿ²⁰ In the event of a willful violation of state labor laws, regulations, or orders, the Division of Labor Standards Enforcement (DLSE) may seek an injunction against further violations.ⁿ²¹ For further discussion of such actions, see Chapter 5.

[b] Federal Law

The FLSA provides no specific criminal or civil penalties for failure to post prescribed notices. Arguably, the provisions of Title 29 *United States Code, sections 215(a)(5) and 216(a)* are applicable if a violation of the regulation requiring posting can be construed to be a violation of Title 29 *United States Code section 211(c)*. However, section 211(c) refers to maintenance of records and only by implication authorizes promulgation of related regulations requiring posting. Thus, the penalties for violations of that statute would not appear to be applicable.

Legal Topics:

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

Labor & Employment Law Posting & Recordkeeping Labor & Employment Law Wage & Hour Laws General
Overview Labor & Employment Law Wage & Hour Laws Recordkeeping Requirements

FOOTNOTES:

(n1)Footnote 1. For a discussion of the industries and occupations to which the various orders apply, *see* Chapter 1.

(n2)Footnote 2. *Lab. Code § 1183(a)*.

(n3)Footnote 3. *Lab. Code § 1183(d)*; *see* 8 *Cal. Code Reg. §§ 11010-11100, 11120, 11130*, P 22 (Cal. Wage Order Nos. 1-2001-10-2001, 12-2001, 13-2001);, 11110, 11150 P 21 (Cal. Wage Order Nos. 11-2001, 15-2001); 11140, 11160 P 2019 (Cal. Wage Order Nos. 14-2001, 16-2001).

(n4)Footnote 4. 8 *Cal. Code Reg. §§ 11010-11100, 11120, 11130*, P 22 (Cal. Wage Order Nos. 1-2001-10-2001, 12-2001, 13-2001); 11110, 11150 P 21 (Cal. Wage Order Nos. 11-2001, 15-2001); 11140, 11160 P 20 (Cal. Wage Order Nos. 14-2001, 16-2001).

(n5)Footnote 5. *See Lab. Code § 207*.

(N6)Footnote 6. *Lab. Code § 272*; *see Lab. Code §§ 270, 270.5, 270.6, 271* (wage security requirements for specified businesses); *see also* discussion in chs. 4 and 5.

(n7)Footnote 7. *Lab. Code § 1695(a)(7)*.

(n8)Footnote 8. *See Lab. Code §§ 1700-1700.47*.

(n9)Footnote 9. *See Lab. Code § 1700.28*.

(n10)Footnote 10. 29 *C.F.R. § 516.4*; *see* 29 *U.S.C. § 211(c)* (Secretary of Labor's authority to promulgate regulations governing maintenance of employer records and other information necessary to enforcement of FLSA).

(n11)Footnote 11. 29 *C.F.R. § 516.4*; *see* 29 *U.S.C. § 206* (minimum-wage provisions). For discussion of applicability of FLSA and its minimum-wage provisions, *see* chs. 1 and 2.

(n12)Footnote 12. 29 *C.F.R. § 516.4*.

(n13)Footnote 13. 29 *C.F.R. § 516.4*.

(n14)Footnote 14. 29 *C.F.R. § 516.4*; *see* 29 *U.S.C. § 213(b)(17)* (overtime exemption for taxicab drivers). For discussion of exemptions from minimum-wage and overtime provisions, *see* chs. 2 and 3.

(n15)Footnote 15. *See* 29 *C.F.R. § 520.405*. For discussion of permits for subminimum wages, *see* ch. 2.

(n16)Footnote 16. *See* 41 *C.F.R. § 50-201.1(g)*.

(n17)Footnote 17. *See* 29 *C.F.R. § 5.5(a)(1)(i)*.

(n18)Footnote 18. *See* 29 *C.F.R. §§ 500.75(c), (e), 500.76(d), (e)*.

(n19)Footnote 19. 29 *C.F.R. §§ 4.6(e), 4.184*.

(n20)Footnote 20. *See Lab. Code §§ 215, 1199(c)*.

(n21)Footnote 21. *Lab. Code § 1194.5*.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 7 Posting and Recordkeeping Requirements Under Wage and Hour Laws

Part A. TEXT

1-7 California Employment Law § 7.02

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§ 7.02 Recordkeeping Requirements

[1] California Law

[a] General Requirements

California employers subject to the Labor Code and wage orders must maintain certain information regarding wages and hours separately for each of their employees.ⁿ¹ The following information must be maintained:

1. The employee's full name;ⁿ²
2. The employee's home address;ⁿ³
3. The employee's occupation and social security number;ⁿ⁴
4. The employee's birthdate, if under 18 years, and designation as a minor;ⁿ⁵
5. Time records showing when the employee begins and ends each work period, meal periods (except where operations cease), split shift intervals, and total daily hours worked;ⁿ⁶
6. Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished;ⁿ⁷
7. Total hours worked by the employee in the payroll period and applicable rates of pay;ⁿ⁸ and
8. Accurate production records for the employee, when a piece rate or incentive plan is in operation.ⁿ⁹

[b] Special Rules

[i] Wage Payments

Employers who pay wages are required to maintain a record of deductions from wages in ink or other indelible form for at least three years.ⁿ¹⁰ For a discussion of required statements of wages and deductions, see Chapter 4.

[ii] Gratuities

Employers must maintain records of all gratuities received, whether directly from the employee or indirectly by means of a deduction from wages or otherwise. The record must be open to inspection at all reasonable hours by the DLSE.ⁿ¹¹ For discussion of restrictions on employer collection or crediting of gratuities received by employees, see Chapters 2 and 4.

[iii] Minors' Work Permits

Employers of minors must maintain all permits and certificates issued pursuant to the Labor or Education Codes.ⁿ¹² For further discussion, see Chapter 6.

[iv] Talent Agencies

Talent agencies that receive funds on behalf of any artist must maintain a separate record for each artist of all funds received on behalf of that artist and of the disposition of those funds.ⁿ¹³ In addition, the agency must keep records in a form approved by the Labor Commissioner, containing names and addresses of each artist employing that agency, any fees received from the artist, any employments secured by the artist during the term of the contract between the artist and the agency, the amount of any compensation received by the artist pursuant to such employment, and such other information as the Labor Commissioner may require.ⁿ¹⁴ No talent agency, its agent, or its employees shall make any false entry in any records.ⁿ¹⁵

[v] Public Works

Employers involved in public works projects must keep accurate records of the following information for each person employed in connection with the public works project: (1) name, (2) address, (3) social security number, (4) work classification, (5) straight time and overtime hours worked each calendar day and week, and (6) actual per diem wages paid.ⁿ¹⁶

[vi] Garment Manufacturers

In addition to the records required of all employers,ⁿ¹⁷ garment manufacturers are required to keep accurate records of the following information: (1) daily production sheets, including piece rates;ⁿ¹⁸ (2) contract worksheets indicating the price per unit agreed to between a contractor and the manufacturer;ⁿ¹⁹ and (3) any other conditions of employment.ⁿ²⁰

Under the statutory provisions relating to garment manufacturers, when all employees in a major identifiable work unit take a meal period at a uniform time, a group record of the time taken for meals may be kept.ⁿ²¹ However, if a garment manufacturer permits staggered or intermittent meal periods by its employees, separate records must be maintained showing when each employee begins and ends his or her meal period.ⁿ²² In addition, individual records of the beginning and end of the workday must be maintained pursuant to the requirements of the wage order governing the manufacturing industry generally.ⁿ²³

[vii] Household Occupations

The wage order governing household occupations was amended effective October 1, 2000, to include the same recordkeeping requirements set forth in the other wage orders.ⁿ²⁴ Employers of persons in such occupations now are

required to keep the records of the information specified in [a], *above*.n25

[c] Requirements Regarding Form of Records, Length of Retention, and Location

Records required under the Labor Code and wage orders must be in English, recorded in ink or some other indelible form, and dated to show the month, day, and year.n26 Records must be retained for a period of three years at the place of employment or at a central location in California.n27

[d] Effect of Failure to Keep Records

Failure to maintain the records required by *Labor Code section 1174* or the wage orders is a misdemeanor,n28 punishable by a fine of between \$100 and \$1,000 or by imprisonment of between 30 days and six months, or both.n29 The Labor Commissioner may also seek injunctive relief to remedy the violation.n30 Furthermore, any person employing labor who willfully fails to maintain either the records required by *Labor Code section 1174(c)*, or accurate and complete records required by *Labor Code section 1174(d)*, or to allow any IWC member or DLSE employee to inspect records pursuant to *Labor Code section 1174(b)*, is subject to a civil penalty of \$500.n31

Knowing and intentional violation of *Labor Code section 226*, including its recordkeeping requirements, is also a misdemeanor, punishable by a fine of not more than \$1,000 or imprisonment not to exceed one year, or both.n32

In addition, an employer who fails to keep proper records, as required by the Labor Code and wage orders, cannot rely on the lack of precise evidence of the number of hours worked by an employee to defeat an action by the employee to recover unpaid minimum wages and overtime compensation.n33 If the employee proves that he or she worked hours for which he or she was not properly compensated, the burden shifts to the employer to produce evidence of the precise amount of time that the employee worked. If the employer is not able to produce such evidence because of its failure to keep the required records, the court may award damages on the basis of the employee's testimony, even if it is not possible to calculate the precise amount of compensation due to the employee.n34

For further discussion of remedies under wage and hour laws, including criminal penalties, see Chapter 5.

[2] Federal Law

[a] Generally

The FLSA requires that every employer subject to any provision of the FLSA make and retain records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment in accordance with regulations promulgated by the Secretary of Labor for purposes of enforcing the FLSA.n35 The FLSA recordkeeping requirements apply to all employers who have *any* employees covered by the FLSA.n36 Certain recordkeeping requirements also apply to employees who are subject to certain *exemptions* from the FLSA.n37 It is the employer's burden to maintain the required records, and that obligation cannot be delegated to employees so as to avoid employer liability.n38 Nothing in the regulations governing FLSA recordkeeping requirements excuses an employer from complying with any other recordkeeping or reporting requirement imposed by any other federal, state, or local law, ordinance, regulation, or rule.n39

The FLSA regulations require that employers record and maintain the following information separately for each covered employee (i.e., those employees subject to both the minimum wage and overtime provisions of the FLSA):n40

1. Full name as used for social security purposes and, on the same record, the employee's identifying symbol or number if that is used in place of a name on any time, work, or payroll record;
2. Home address, including zip code;

3. Date of birth, if under 19 years old;
4. Sex (which may be designated by prefixes such as Ms. or Mr.);
5. Occupation;
6. Time of day and day of week on which the employee's workweek begins;n41
7. Regular hourly rate of pay for any week during which overtime compensation is due under the FLSA;n42
8. Basis on which wages are paid (for example, amount per hour, per week, per year, or per piece);
9. Amount and nature of each payment that is excluded from the regular rate pursuant to Title 29 *United States Code, section 207(e)*.
10. Hours worked each workday and total hours worked each workweek;n43
11. Total of daily or weekly straight-time earnings or wages for all hours worked before any overtime premium is added;
12. Total amount paid as an overtime premium for each workweek;
13. Total additions to or deductions from wages paid each pay period, including a record of the dates, amounts, and nature of the items which make up the total additions and deductions;
14. Total wages paid each pay period; and
15. Date of payment and pay period covered by the payment.

In the case of retroactive payments made pursuant to Title 29 *United States Code, section 216(c)*, under supervision of the Wage and Hour Administrator, the employer must make and preserve an entry in its payroll records showing the amount of the payment, the period covered by the payment, and the date of the payment.n44 In addition, the employer must report the above information to the Wage and Hour Administrator and preserve a copy of the report.n45

No particular order or form for the records is prescribed.n46 Thus, records may be in the form of computer printouts, automatic processing tape, or microfiche, provided that the records are sufficiently legible, adequate viewing facilities are available, and the employer will make any requested extensions, recomputations, or transcripts.n47 However, the records must be plain, intelligible, objective, and accurate and cannot be based on estimates of hours worked or artificially restrict the number of hours reported.n48

[b] Exceptions and Special Provisions

[i] Executive, Administrative, Professional, and Outside Sales Employees

Employers of "bona fide executive, administrative, or professional" employees (including employees employed in the capacity of academic administrative personnel or teachers in elementary or secondary schools) or outside sales employeesn49 need not maintain the information listed in paragraphs (7)-(13) in subsection [a], above, with respect to those employees.n50 However, employers must maintain records showing the basis on which they pay wages to such

employees, in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment, including fringe benefits and perquisites.ⁿ⁵¹

■ PRACTICE TIP:

Employers may wish to have exempt employees fill out time sheets so that they have an accurate record of the hours these employees have worked. These time sheets can be helpful in determining overtime hours worked if the employee is later reclassified as non-exempt or brings a wage claim for unpaid overtime wages. These time sheets may also be used to determine if the employee has worked the minimum number of hours (1250 hours) to be eligible for family and medical leaves under state or federal law.ⁿ⁵² *Commentary by Lori A.M. Middlehurst*

[ii] Other Exempt Employees

The regulations contain special recordkeeping requirements for other categories of employees who are exempt from minimum-wage and/or overtime compensation requirements under the FLSA.ⁿ⁵³ These regulations exempt employers from recording and maintaining some of the information listed in [a], above, but in many cases also require additional information to be maintained. For description of the various exemptions from minimum-wage and overtime compensation requirements, see Chapters 2 and 3.

The following categories of exempt employees are subject to special recordkeeping requirements:

1. Employees exempt from both minimum-wage and overtime requirements pursuant to Title 29 *United States Code*, sections 213(a)(3), (5), (8), (10), (12) or 213(d);ⁿ⁵⁴
2. Employees exempt from overtime pay requirements pursuant to Title 29 *United States Code*, section 213(b)(1)-(3), (5), (7), (9), (10), (15)-(17), (20), (21), (24), (27), or (28);ⁿ⁵⁵
3. Livestock auction employees exempt from overtime pay requirements pursuant to Title 29 *United States Code*, section 213(b)(13);ⁿ⁵⁶
4. Country elevator employees exempt from overtime pay requirements pursuant to Title 29 *United States Code*, section 213(b)(14);ⁿ⁵⁷
5. Local delivery employees exempt from overtime pay requirements pursuant to Title 29 *United States Code*, section 213(b)(11);ⁿ⁵⁸
6. Commissioned employees of a retail or service establishment exempt from overtime pay requirements pursuant to Title 29 *United States Code*, section 207(i);ⁿ⁵⁹ and
7. Seamen exempt from overtime pay requirements pursuant to Title 29 *United States Code*, section 213(b)(6).ⁿ⁶⁰

Special recordkeeping requirements are also imposed on employers of employees who are exempt from overtime compensation while they are receiving remedial education.ⁿ⁶¹

[iii] Other Special Rules

The following categories of employees subject to special overtime rules are also subject to special rules regarding recordkeeping under the FLSA:

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1. Employees employed in certain tobacco, cotton, sugar cane, or sugar beet services, who are subject to special overtime work schedules under Title 29 *United States Code*, sections 207(m) or 213(h)-(j);n62
2. Employees under certain collective bargaining agreements who are partially exempt from overtime pay requirements as provided by Title 29 *United States Code*, section 207(b)(1) or (2);n63
3. Bulk petroleum employees partially exempt from overtime pay requirements pursuant to Title 29 *United States Code*, section 207(b)(3).n64
4. Employees engaged in charter activities for certain carriers pursuant to Title 29 *United States Code*, section 207(n);n65
5. Hospital employees compensated for overtime work on the basis of a 14-day work period pursuant to Title 29 *United States Code*, section 207(j);n66
6. Employees employed under "Belo" contracts pursuant to Title 29 *United States Code*, section 207(f);n67
7. Employees paid for overtime on the basis of "applicable" rates provided in Title 29 *United States Code*, section 207(g)(1), (2);n68
8. Employees paid for overtime at premium rates computed on a "basic" rate authorized in accordance with Title 29 *United States Code*, section 207(g)(3);n69
9. Employees receiving "board, lodging, or other facilities," as defined by Title 29 *United States Code*, section 203(m);n70
10. Tipped employees;n71
11. Employees employed by a private entity operating an amusement or recreational establishment located on certain national park or forest land who are partially exempt from overtime pay requirements pursuant to Title 29 *United States Code*, section 213(b)(29);n72
12. Learners, apprentices, messengers, students, or handicapped workers employed under special certificates pursuant to Title 29 *United States Code*, section 214;n73
13. Industrial homeworkers;n74 and
14. Agricultural employees.n75

For discussion of the applicability of the special overtime rules referred to above, see Chapter 3.

[c] Requirements Regarding Types of Documents, Length of Retention, and Location of Records

Employers must preserve the following types of records for at least three years from the date of last entry or their last effective date:

1. Payroll and other records containing the information and data required to be maintained pursuant to the FLSA recordkeeping requirements described in [a] and [b], above;n76

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2. Written collective bargaining agreements that are (a) relied on for exclusion of costs for boarding, lodging, or other facilities pursuant to Title 29 *United States Code*, section 203(m), or (b) used as the basis for partial exemptions from overtime allowed under Title 29 *United States Code*, section 207(b)(1) or (2) or any amendments or additions thereto;n77
3. Plans, trusts, employment contracts, collective bargaining agreements, and employer-provided stock option plans and other grants of stock rights used to determine exclusions from the employee's "regular rate" under Title 29 *United States Code*, section 207(e);n78
4. Individual contracts or collective bargaining agreements providing for employment for "irregular hours of work," as used in Title 29 *United States Code*, section 207(f) or, if no written contract or agreement is available, a written memorandum summarizing the terms of the contract or agreement;n79
5. Written agreements or memoranda summarizing the terms of oral agreements or understandings as allowed by Title 29 *United States Code*, section 207(g) or (j);n80
6. Certificates and notices listed or named in any applicable section of Title 29 Code of Federal Regulations, Part 516;n81 and
7. Sales and purchase records showing total dollar volume of sales or business and total volume of goods purchased or received during such periods and in such form as the employer maintains in the ordinary course of its business.n82

Employers must preserve the following supplementary records for at least two years from the date of last entry or their last effective date:

1. Basic time and earnings cards or sheets that show (a) daily starting and stopping time of individual employees, or of separate work forces, or (b) the amounts of work accomplished by individual employees on a daily, weekly, or pay period basis, when those amounts determine in whole or in part the pay period earnings or wages of that employee;n83
2. Wage rate tables or schedules that provide the piece rates or other rates used in computing straight-time earnings, wages, or salary, or overtime pay computation;n84
3. Originals or true copies of any and all customer orders or invoices received, incoming or outgoing shipping or delivery records, bills of lading, and all billings to customers (except individual sales slips, cash register tapes, and the like) that the employer retains or makes in the usual course of its business operations.n85
4. Records of additions to, or deductions from, wages of individual employees, as required by Title 29 *Code of Federal Regulations*, section 516.2(a)(10);n86 and
5. All records used by the employer in determining the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs and charges are involved in the additions to or deductions from wages paid.n87

Employers must maintain all records in a safe and accessible place either at the place or places of employment or at central recordkeeping offices where such records are customarily maintained.n88 If the records are maintained at a central place, they must be made available for inspection within 72 hours after notice from the Administrator of the Wage and Hour Division or his or her duly authorized and designated representative.n89

Difficulty and impracticability are not grounds for a unilateral failure to maintain the required records.ⁿ⁹⁰ If an employer or group of employers, because of the peculiar conditions under which it or they operate, desires authority to maintain records in a manner different from that outlined in the regulations, or to be relieved of some requirement of the regulations, the employer(s) may petition the Wage and Hour Administrator for such authority with a statement of the reasons for the petition.ⁿ⁹¹ The Administrator may grant the petition if he or she finds that the authority requested will not hinder enforcement of the FLSA.ⁿ⁹² The Administrator may grant the petition subject to such conditions as he or she may impose and subject to subsequent revocation.ⁿ⁹³ Submission of a petition, absent favorable action by the Administrator, does not relieve the employer or employers from the obligation to comply with the requirements of the regulations regarding recordkeeping.ⁿ⁹⁴ However, the Administrator must act on all petitions as soon as possible.ⁿ⁹⁵

There are special provisions regarding retention of records related to learners, apprentices, messengers, students, and handicapped workers employed pursuant to special certificates that should be reviewed in case of employment of such persons.ⁿ⁹⁶

[d] Other Federal Laws

Regulations promulgated pursuant to the following federal statutes also contain recordkeeping requirements related to employee wages, hours, and working conditions: Walsh-Healey Act,ⁿ⁹⁷ Davis-Bacon Act,ⁿ⁹⁸ Contract Work Hours and Safety Standards Act,ⁿ⁹⁹ Service Contract Act,ⁿ¹⁰⁰ Copeland Act,ⁿ¹⁰¹ and Migrant and Seasonal Agricultural Workers' Protection Act.ⁿ¹⁰² For discussion of the scope and applicability of these statutes, see Chapter 1.

[e] Effect of Failure to Keep Records

[i] Presumptions

As discussed in Chapter 5, if an employer fails to keep required records or fails to keep accurate records, certain presumptions exist in favor of an employee bringing a claim for unpaid overtime or minimum wages.ⁿ¹⁰³ In such circumstances, if an employee can establish a right to certain wages, the inability to prove the exact amount with certainty will not bar recovery.ⁿ¹⁰⁴

[ii] Penalties

There is no private right of action for violations of federal recordkeeping obligations.ⁿ¹⁰⁵ There are potential criminal penalties that may consist of a fine of up to \$10,000 or imprisonment for not more than six months, or both.ⁿ¹⁰⁶ The employer may also be subject to an injunctive action pursuant to Title 29 *United States Code*, section 217. For further discussion of these remedies, see Chapter 5.

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Recordkeeping Requirements

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 1174(c), (d)*; 8 *Cal. Code Reg. §§ 11010-11150*, P 7 (Cal. Wage Order Nos. 1-2001-15-2001); 8 *Cal. Code Reg. § 11160*, P 6 (Cal. Wage Order No. 16-2001).

(n2)Footnote 2. *Lab. Code § 1174(c)*; 8 *Cal. Code Reg. §§ 11010-11150*, P 7(A)(1) (Cal. Wage Order Nos. 1-2001-15-2001); *11160*, P 6(A)(1) (Cal. Wage Order No. 16-2001); *see also Lab. Code § 2673(a)* (special rules for garment manufacturers).

(n3)Footnote 3. *Lab. Code* § 1174(c); 8 *Cal. Code Reg.* §§ 11010-11150, P 7(A)(1) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, 6(A)(1) (Cal. Wage Order No. 16-2001); *see also* *Lab. Code* § 2673(a) (special rules for garment manufacturers).

(n4)Footnote 4. 8 *Cal. Code Reg.* §§ 11010-11150, P 7(A)(1) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 6(A)(1) (Cal. Wage Order No. 16-2001).

(n5)Footnote 5. 8 *Cal. Code Reg.* §§ 11010-11150, P 7(A)(2) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 6(A)(1) (Cal. Wage Order No. 16-2001); *see* *Lab. Code* §§ 1174(c), 2673(f).

(n6)Footnote 6. 8 *Cal. Code Reg.* §§ 11010-11150, P 7(A)(3) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 6(A)(1) (Cal. Wage Order No. 16-2001); *Lab. Code* § 2673(b) (garment workers). *Lab. Code* § 1174(d) requires that employers keep records of hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees at respective plants or establishments, but does not require records showing the beginning and end of the work period, meal periods, or split shift intervals.

(n7)Footnote 7. 8 *Cal. Code Reg.* §§ 11010-11150, P 7(A)(4) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 6(A)(2) (Cal. Wage Order No. 16-2001); *Lab. Code* § 2673(d) (garment workers); *see* *Lab. Code* § 1174(d).

(n8)Footnote 8. 8 *Cal. Code Reg.* §§ 11010-11150, P 7(A)(5) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 6(A)(3) (Cal. Wage Order No. 16-2001); *see* *Lab. Code* § 1174(d); *see also* *Lab. Code* § 2673(b), (d) (garment workers).

(n9)Footnote 9. 8 *Cal. Code Reg.* §§ 11010-11150, P 7(A)(6) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 6(A)(3) (Cal. Wage Order No. 16-2001); *see also* *Lab. Code* § 2673(c) (garment workers).

(n10)Footnote 10. *Lab. Code* § 226(a).

(n11)Footnote 11. *Lab. Code* § 353.

(n12)Footnote 12. *Lab. Code* § 1299.

(n13)Footnote 13. *Lab. Code* § 1700.25(b).

(n14)Footnote 14. *Lab. Code* § 1700.26.

(n15)Footnote 15. *Lab. Code* § 1700.26.

(n16)Footnote 16. *Lab. Code* §§ 1776(a), 1812.

(n17)Footnote 17. *See* discussion in [a], *above*.

(n18)Footnote 18. *Lab. Code* § 2673(c).

(n19)Footnote 19. *Lab. Code* § 2673(e).

(n20)Footnote 20. *Lab. Code* § 2673(g).

(n21)Footnote 21. D.L.S.E. Interpretive Bulletin No. 87-3 (April 6, 1987) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders).

(n22)Footnote 22. D.L.S.E. Interpretive Bulletin No. 87-3 (April 6, 1987) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders). Employers other than garment manufacturers are not required to record the beginning and end of meal periods during which

operations cease. *see* 8 *Cal. Code Reg.* §§ 11010-11140, P 7(A)(3) (Cal. Wage Order Nos. 1-89, 2-80, 3-80, 4-89, 5-89, 6-80, 7-80, 9-90, 10-89, 11-80, 12-80, 13-80, 14-80); *see also* discussion in [a], *above*.

(n23)Footnote 23. *See* D.L.S.E. Interpretive Bulletin No. 87-3 (April 6, 1987) (CAUTION: *see* § 1.05[3][c], *supra*, for a discussion of the weight to be accorded DLSE interpretations of statutory law and IWC Wage Orders); 8 *Cal. Code Reg.* § 11010, P 7(A)(3) (Cal. Wage Order No. 1-2001).

(n24)Footnote 24. *See* 8 *Cal. Code Reg.* § 11150, P 7 (Cal. Wage Order No. 15-2001). For definition of the "household occupations," *see* ch. 1.

(n25)Footnote 25. Federal and state tax authorities require employers to maintain records of social security numbers; and immigration laws may require keeping this information as a form of proof of right to work in the United States. For example, household employers in California must file Quarterly Wage Reports (DE 6) setting forth their employees' social security numbers with the Employment Development Department for payroll tax purposes.

(n26)Footnote 26. 8 *Cal. Code Reg.* §§ 11010-11150, P 7(C) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 6(C) (Cal. Wage Order No. 16-2001); *see Lab. Code* §§ 226(a), 1174(d).

(n27)Footnote 27. 8 *Cal. Code Reg.* §§ 11010-11150, P 7(C) (Cal. Wage Order Nos. 1-2001-15-2001); 11160, P 6(C) (Cal. Wage Order No. 16-2001); *see Lab. Code* §§ 226(a), 1174(d). *Lab. Code* § 1174(d) provides for retention pursuant to rules established by the IWC; it imposes a minimum retention period of two years.

(n28)Footnote 28. *Lab. Code* §§ 1175, 1199(c).

(n29)Footnote 29. *See Lab. Code* §§ 23, 1199.

(n30)Footnote 30. *Lab. Code* § 1194.5.

(n31)Footnote 31. *Lab. Code* § 1174.5.

(n32)Footnote 32. *See Lab. Code* § 226.6.

(n33)Footnote 33. *See Hernandez v. Mendoza* (1988) 199 *Cal. App. 3d* 721, 727, 245 *Cal. Rptr. 36* .

(n34)Footnote 34. *See Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 *Cal. App. 3d* 16, 46, 273 *Cal. Rptr. 615* ; *Hernandez v. Mendoza* (1988) 199 *Cal. App. 3d* 721, 727, 245 *Cal. Rptr. 36* .

(n35)Footnote 35. *See* 29 *U.S.C.* § 211(c).

(n36)Footnote 36. *See* 29 *U.S.C.* § 211(c); 29 *C.F.R.* § 516.1(b); *Brennan v. Valley Towing Co., Inc.* (9th Cir. 1975) 515 *F.2d* 100, 111 ; *Wirtz v. Intravaia* (9th Cir. 1967) 375 *F.2d* 62, 65 .

(n37)Footnote 37. *See* 29 *C.F.R.* § 516.1(b).

(n38)Footnote 38. *See, e.g., Castillo v. Givens* (5th Cir. 1983) 704 *F.2d* 181, 194 .

(n39)Footnote 39. 29 *C.F.R.* § 516.1(c).

(n40)Footnote 40. 29 *C.F.R.* § 516.2(a).

(n41)Footnote 41. This may be a single notation for the entire work force or for a group of employees if the beginning of the workweek does not vary for any employee in the work force or in the particular group; otherwise there must be an individual notation. 29 *C.F.R.* § 516.2(a)(5).

(n42)Footnote 42. For discussion of overtime requirements under the FLSA, *see* Chapter 3.

(n43)Footnote 43. If employees work fixed schedules, the employer may instead maintain records of the schedule of daily and weekly hours normally worked by that employee with a notation that those hours were in fact worked; if those hours are varied, the record must indicate the exact number of hours worked each day or week in question. *see* 29 C.F.R. § 516.2(c).

(n44)Footnote 44. 29 C.F.R. § 516.2(b)(1).

(n45)Footnote 45. *See* 29 C.F.R. § 516.2(b)(2).

(n46)Footnote 46. 29 C.F.R. § 516.1(a); *Daves v. Hawaiian Dredging Co. (D. Hawaii 1953)* 114 F. Supp. 643, 648 .

(n47)Footnote 47. *See* Wage & Hour Opinion Letter Nos. 104 (July 3, 1962) and 132 (Sept. 20, 1962).

(n48)Footnote 48. *See Williams v. Tri-County Growers, Inc. (3d Cir. 1984)* 747 F.2d 121, 127-128 ; *Walling v. Panther Creek Mines (7th Cir. 1945)* 148 F.2d 604, 607 ; *Hodgson v. General Motors Acceptance Corporation (S.D. Fla. 1972)* 347 F. Supp. 9, 11-12 , *aff'd*, 482 F.2d 825 (5th Cir. 1973) ; *Usery v. Godwin Hardware, Inc. (W.D. Mich. 1976)* 426 F. Supp. 1243, 1265-1266 .

(n49)Footnote 49. *See* ch. 2 for discussion of exemptions from FLSA provisions for these categories of employees.

(n50)Footnote 50. 29 C.F.R. § 516.3.

(n51)Footnote 51. 29 C.F.R. § 516.3.

(n52)Footnote 52. *See Gov. Code § 12945.2(a); 29 U.S.C. § 2611(2)(A)(ii)*. For a complete discussion of family and medical leaves, *see* ch. 8.

(n53)Footnote 53. *See* 29 C.F.R. § 516.11 *et seq.*

(n54)Footnote 54. *See* 29 C.F.R. § 516.11.

(n55)Footnote 55. *See* 29 C.F.R. § 516.12.

(n56)Footnote 56. *See* 29 C.F.R. § 516.13.

(n57)Footnote 57. *See* 29 C.F.R. § 516.14.

(n58)Footnote 58. *See* 29 C.F.R. § 516.15.

(n59)Footnote 59. *See* 29 C.F.R. § 516.16.

(n60)Footnote 60. *See* 29 C.F.R. § 516.17.

(n61)Footnote 61. *See* 29 C.F.R. §§ 516.34, 778.603.

(n62)Footnote 62. *See* 29 C.F.R. § 516.18.

(n63)Footnote 63. *See* 29 C.F.R. § 516.20.

(n64)Footnote 64. *See* 29 C.F.R. § 516.21.

(n65)Footnote 65. *See* 29 C.F.R. § 516.22.

(n66)Footnote 66. *See* 29 C.F.R. § 516.23.

(n67)Footnote 67. *See* 29 C.F.R. § 516.24.

(n68)Footnote 68. *See* 29 C.F.R. § 516.25.

(n69)Footnote 69. *See* 29 C.F.R. § 516.26.

(n70)Footnote 70. *See* 29 C.F.R. § 516.27. For discussion of what constitutes "board, lodging, or other facilities" and limitations on deducting the cost of such items from wages, *see* ch. 2.

(n71)Footnote 71. *See* 29 C.F.R. § 516.28. For discussion of rules regarding employee tips, *see* chs. 2 and 4.

(n72)Footnote 72. *See* 29 C.F.R. § 516.29.

(n73)Footnote 73. *See* 29 C.F.R. § 516.30. For discussion of rules permitting employment of such persons at subminimum wages pursuant to special certificates, *see* ch. 2.

(n74)Footnote 74. *See* 29 C.F.R. § 516.31.

(n75)Footnote 75. *See* 29 C.F.R. § 516.33.

(n76)Footnote 76. 29 C.F.R. § 516.5(a).

(n77)Footnote 77. 29 C.F.R. § 516.5(b).

(n78)Footnote 78. 29 C.F.R. § 516.5(b)(3).

(n79)Footnote 79. 29 C.F.R. § 516.5(b)(4).

(n80)Footnote 80. 29 C.F.R. § 516.5(b)(5).

(n81)Footnote 81. 29 C.F.R. § 516.5(b)(6).

(n82)Footnote 82. 29 C.F.R. § 516.5(c). This information is needed to determine applicability of the FLSA under the "enterprise" test. *see* 29 U.S.C. § 203(s)(1)(A)(ii). For discussion of rules for determining applicability of the various wage and hour laws, *see* ch. 1.

(n83)Footnote 83. 29 C.F.R. § 516.6(a)(1).

(n84)Footnote 84. 29 C.F.R. § 516.6(a)(2).

(n85)Footnote 85. 29 C.F.R. § 516.6(b).

(n86)Footnote 86. 29 C.F.R. § 516.6(c)(1); *see* discussion in [a], *above*.

(n87)Footnote 87. 29 C.F.R. § 516.6(c)(2).

(n88)Footnote 88. 29 C.F.R. § 516.7(a).

(n89)Footnote 89. 29 C.F.R. § 516.7(a).

(n90)Footnote 90. *See, e.g., Walling v. Panther Creek Mines (7th Cir. 1945) 148 F.2d 604, 607.*

(n91)Footnote 91. 29 C.F.R. § 516.9(a).

(n92)Footnote 92. 29 C.F.R. § 516.9(b).

(n93)Footnote 93. 29 C.F.R. § 516.9(b).

(n94)Footnote 94. 29 C.F.R. § 516.9(c).

(n95)Footnote 95. 29 C.F.R. § 516.9(c).

(n96)Footnote 96. See 29 C.F.R. §§ 521.8(c), 522.7(d), 525.13(k), 527.7(b).

(n97)Footnote 97. See 41 C.F.R. §§ 50-201.1(g), 50-206.1.

(n98)Footnote 98. See 29 C.F.R. § 5.5(a)(3).

(n99)Footnote 99. See 29 C.F.R. § 5.5(b), (c).

(n100)Footnote 100. See 29 C.F.R. § 4.185.

(n101)Footnote 101. See 29 C.F.R. §§ 3.3, 3.4.

(n102)Footnote 102. See 29 C.F.R. § 500.80.

(n103)Footnote 103. See, e.g., *Brock v. Seto* (9th Cir. 1986) 790 F.2d 1446, 1448-1449 .

(n104)Footnote 104. See, e.g., *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680 , *superseded by statute on other grounds*, see 29 U.S.C. § 251 *et seq.*; *Brock v. Seto* (9th Cir. 1986) 790 F.2d 1446, 1448-1449 .

(n105)Footnote 105. See *O'Quinn v. Chambers County, Tex.* (S.D. Tex. 1986) 636 F. Supp. 1388, 1392 .

(n106)Footnote 106. 29 U.S.C. § 216(a).



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 7 Posting and Recordkeeping Requirements Under Wage and Hour Laws

Part A. TEXT

1-7 California Employment Law §§ 7.03 through 7.09

AUTHOR: By Susan Spurlark, J.D.

[Reserved]

§§ 7.03[Reserved]



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 7 Posting and Recordkeeping Requirements Under Wage and Hour Laws

Part B. BIBLIOGRAPHY

1-7 California Employment Law § 7.10

AUTHOR: By Susan Spurlark, J.D.

§ 7.10 Legal Texts

Morrison & Foerster, California Employer's Guide to Employee Handbooks and Personnel Policy Manuals (Matthew Bender).

Leader, *Wages and Hours: Law and Practice*, §§ 8.01, 8.02 (Matthew Bender)

Advising the California Employer (Cal. C.E.B. 1981) Ch. 1., "Personnel Administration," §§ 1.86-1.97; Ch. 4., "Wages, Hours, and Occupational Safety and Health," §§ 4.29-4.30, 4.55-4.58.

Simmons, Wage and Hour Manual for California Employers (3d ed. 1986), Ch. 13, "Records."

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Recordkeeping Requirements



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 8 Leaves of Absence

1-8 California Employment Law 8.syn

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.syn Synopsis to Chapter 8: Leaves of Absence

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§ 8.02 Federal Law

§ 8.03 Interaction of Federal and State Laws

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§ 8.60 Legal Texts

§ 8.61 Law Reviews and Legal Periodicals

By Christine Curtis, J.D.,^{n*} Judy B. Freeman J.D.,^{n**}
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(n2)Footnote **. Judy Freeman is an attorney specializing in writing and editing in the area of employment law. She has co-authored several chapters in this publication, is author/editor of Matthew Bender's California Employment Law Reporter, and is Co-Managing Editor of the California State Bar's Labor and Employment Law Quarterly. She is also a member of the State Bar Labor and Employment Law Section's Executive Committee.

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2004 Revisions to this chapter by Peter Rukin, The Law Office of Peter Rukin, Oakland, CA, www.rukinlaw.com.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 8 Leaves of Absence

1-8 California Employment Law Scope

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

Scope

By Christine Curtis, J.D.,^{n*} Judy B. Freeman J.D.,^{n**}
Edward Baskauskas, J.D.,^{n***} and Elizabeth W. Mandel, J.D.^{n****} SCOPE

This chapter discusses the substantive provisions of California and federal authorities granting and regulating leaves of absence. Among the statutes discussed are the Moore-Brown-Roberti Family Rights Act (CFRA) (*Gov. Code* § 12945.2), the California pregnancy disability leave provisions of the Fair Employment and Housing Act (FEHA) codified in *Gov. Code* § 12945, the federal Family and Medical Leave Act (FMLA) (*29 U.S.C. § 2101 et seq.*), the leave provisions of the *California Military and Veterans Code Section 394* and *Lab. Code* § 233. The implementing regulations of CFRA and FMLA, published by the California Fair Employment and Housing Commission and the Department of Labor, respectively, are also discussed. In addition, this chapter discusses the interaction of these statutes and the potential impact of the Americans with Disabilities Act (ADA) and Title VII on an employer's obligation to grant leave to qualifying employees.

FOOTNOTES:

(n5)Footnote *. Christine Curtis is an employment law attorney who has practiced in California and New York and has also worked for the California State Legislature, Joint Committee on Legal Equality, and the California State Department of Industrial Relations, Office of the Director.

(n6)Footnote **. Judy Freeman is an attorney specializing in writing and editing in the area of employment law. She has co-authored several chapters in this publication, is author/editor of Matthew Bender's California Employment Law Reporter, and is Co-Managing Editor of the California State Bar's Labor and Employment Law Quarterly. She is also a member of the State Bar Labor and Employment Law Section's Executive Committee.

(n7)Footnote ***. Edward Baskauskas is a member of the California Bar and an adjunct professor of law at Golden Gate University.

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2004 Revisions to this chapter by Peter Rukin, The Law Office of Peter Rukin, Oakland, CA, www.rukinlaw.com.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 8 Leaves of Absence

Part A. OVERVIEW OF LAWS GOVERNING LEAVES OF ABSENCE

1-8 California Employment Law § 8.01

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.01 California Law

Under California law, leaves of absence (up to four months) are available for pregnancy, childbirth or related medical conditions pursuant to the 1992 amendment to the Fair Employment and Housing Act (FEHA).ⁿ¹ Leaves of absence (up to 12 weeks in a 12 month period) are also available for family care and medical leave (excluding pregnancy related disability) under the California Family Rights Act, which is known as the Moore-Brown-Roberti Family Rights Act (CFRA).ⁿ² The provisions of CFRA are to be construed as separate and distinct from the provisions of the FEHA.ⁿ³ *Labor Code section 233* provides that, under certain conditions, an employee may use his or her sick leave to attend to an illness of his or her child, parent, spouse, or domestic partner.

Legal Topics:

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

Labor & Employment Law
Leaves of Absence
Family & Medical Leave Act
General Overview
Labor & Employment Law
Wage & Hour Laws
General Overview
Labor & Employment Law
Wage & Hour Laws
Coverage & Definitions
General Overview

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12945*.

(n2)Footnote 2. *Gov. Code § 12945.2*.

(n3)Footnote 3. *Gov. Code § 12945.2(o)*.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 8 Leaves of Absence

Part A. OVERVIEW OF LAWS GOVERNING LEAVES OF ABSENCE

1-8 California Employment Law § 8.02

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.02 Federal Law

Under the federal Family Medical Leave Act (FMLA)ⁿ¹ leaves of absence (up to 12 weeks in a 12-month period) are available for serious health conditions, including pregnancy disability, of either the employee or the employee's parent, spouse, or child, and for birth or placement for adoption or foster care of a child.

Legal Topics:

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

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

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 2611 et seq.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 8 Leaves of Absence

Part A. OVERVIEW OF LAWS GOVERNING LEAVES OF ABSENCE

1-8 California Employment Law § 8.03

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.03 Interaction of Federal and State Laws

Depending upon the size of the employer's workforce and the employee's length of service, one or more of the state and federal laws may govern a given situation. Also, overlapping application of one or more provisions of these laws is permissible in some instances. Finally, some situations may arise where an employee who is qualified to take leave under one of these statutes may have related rights under Title VIIⁿ¹ or the ADA.ⁿ²

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws Statutory Application Title VII of the Civil Rights Act of 1964

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. § 2000e et seq.; for a discussion of the substantive provisions of Title VII, see ch. 41.

(n2)Footnote 2. 42 U.S.C. § 12101 et seq.; for a discussion of the substantive provisions of the ADA, see ch. 41.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 8 Leaves of Absence

Part A. OVERVIEW OF LAWS GOVERNING LEAVES OF ABSENCE

1-8 California Employment Law §§ 8.04 through 8.09

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

[Reserved]

§§ 8.04[Reserved]



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part B. PREGNANCY AND CHILDBEARING LEAVE

1-8 California Employment Law § 8.10

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.10 General Standards

Most female employees in California (those working for an employer regularly employing five or more employees) can take up to four months' leave for childbearing and pregnancy-related disability under state law.ⁿ¹ For employers of 50 or more, both federal and state law require family and medical leave. An employee is entitled to take leave for, among other reasons, the birth or adoption of a child or for disability of the employee due to a health condition.ⁿ²

The federal and state acts are in alignment except that in California, a woman can take a four-month pregnancy disability leave,ⁿ³ followed by a three-month family medical leave.

None of these governing laws requires that the employee receive paid leave. However, under certain circumstances an employee may elect to use, or an employer may require the use of, accrued vacation or other accrued leave. Under such an election, the accrued leave runs concurrently with FMLA or CFRA leave.ⁿ⁴ In addition, an employee on pregnancy disability leave may also be eligible for payments under the State Disability Insurance program.

The right to be free of pregnancy discrimination in employment existed under California law prior to amendment of the Fair Employment and Housing Act. Since the *California Constitution, Article I, Section 8*, proscribes discrimination in employment on the basis of sex,ⁿ⁵ employees not covered under either the federal or state laws may nevertheless have a right to seek pregnancy and childrearing leave on state constitutional grounds.

Legal Topics:

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

Labor & Employment Law
Leaves of Absence
Family & Medical Leave Act
General Overview
Labor & Employment Law
Leaves of Absence
Family & Medical Leave Act
Coverage & Definitions
General Overview
Labor & Employment Law
Wage & Hour Laws
General Overview
Labor & Employment Law
Wage & Hour Laws
Coverage & Definitions
General Overview

FOOTNOTES:

(n1)Footnote 1. *See Gov. Code § 12945.*

(n2)Footnote 2. *29 U.S.C. § 2601 et seq . (FMLA) (includes leave for pregnancy-related disability); California Gov. Code § 12945.2 (CFRA).*

(n3)Footnote 3. *See Gov. Code § 12945.*

(n4)Footnote 4. *See 29 C.F.R. § 2616(d); Gov. Code § 12945.2(e).*

(n5)Footnote 5. *See Merrell v. All Seasons Resorts, Inc. (C.D. Ca.11989) 720 F. Supp. 815, 819-823 ; see also discussion at 8.20[3][b].*



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part B. PREGNANCY AND CHILDBEARING LEAVE

1-8 California Employment Law § 8.11

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.11 Federal Requirements

[1] Title VII

Congress amended Title VII¹ in response to the holding in *General Electric Co. v. Gilbert*² to expressly include a prohibition against pregnancy discrimination.³ In *Gilbert*, the Court held that discrimination on the basis of pregnancy was not sex discrimination under Title VII.⁴ The dissenters in *Gilbert* noted that the grouping between pregnant and non-pregnant persons involved sex-based discrimination because only women could be pregnant.⁵ Congress responded by passing the Pregnancy Discrimination Act of 1978 (PDA), which amended Title VII to expressly clarify that pregnancy was included in the definition of sex-based discrimination. The House Report stated: "It is the Committee's view that the dissenting justices [in *Gilbert*] correctly interpreted the Act."

Congressional history clarifies that Title VII was always intended to include pregnancy related issues and that the PDA was necessitated by the Supreme Court's interpretations.⁶

The PDA prohibits an employer from treating pregnant employees differently than other disabled employees. In *California Federal Savings & Loan Association v. Guerra*,⁷ the Supreme Court held that Title VII grants pregnant employees the right to take disability leave if such leave is provided for others with similar ability or disability to work. Thus, an employer must apply its leave policy to pregnant workers on the same terms it applies the policy to other workers. The federal effort is to provide for equality of treatment and non-discrimination on the basis of sex.⁸ The *Guerra* Court cited with approval the remarks of Senator Williams, one of PDA's sponsors, "The entire thrust of this legislation is to guarantee women the right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."⁹

Additionally, employers must provide the same pregnancy benefits to all employees. In *Newport News Shipbuilding & Dry Dock v. EEOC*,¹⁰ an employer's health insurance plan, amended after passage of the Pregnancy Disability Act, provided full hospitalization pregnancy health coverage for female employees but not full coverage for spouses of male employees. Other spousal benefits were covered at 100 percent; pregnancy was the only exception. The Court found

that the benefit was not provided on an equal basis to dependents of employees and was thus unlawful because the protection afforded to married male employees was less comprehensive than the protection afforded married female employees. The Court found the policy discriminatory and in violation of the PDA of Title VII.ⁿ¹¹

In *International Union v. Johnson Controls*,ⁿ¹² the Court considered a policy barring women who could be fertile from jobs with potential occupational exposure and found it violative of Title VII. The Court held the policy was not neutral because it did not apply equally to male and female employees, even though the potential exposure might have negatively affected male reproduction. The employer's policy was found to inappropriately classify employees on the basis of gender and childbearing capacity, rather than fertility alone. The Court also held that absence of a malevolent motive did not excuse the practice.

Similarly, in *United Teachers v. Board of Education of City of Los Angeles*,ⁿ¹³ the Ninth Circuit held that medical benefits for pregnancy-related expenses of spouses of male employees must be provided at the same level as coverage for non-pregnancy related medical expenses provided spouses.ⁿ¹⁴

The Ninth Circuit Court of Appeals has held that terminating pregnant workers rather than giving them a leave of absence violates the PDA, *42 U.S.C. §§ 2000e(k), 2000e-2(a)*.ⁿ¹⁵ Title VII also takes precedence over religious concerns regarding the propriety of sexual relations, and a pregnant employee cannot be discharged based on that pregnancy.ⁿ¹⁶

The implementing EEOC Guidelinesⁿ¹⁷ provide that:

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth, or related medical conditions is in prima facie violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

(d) (2) Any fringe benefit program implemented after October 31, 1978, must comply with the provisions of § 1604.10(b) upon implementation.

[2] Family and Medical Leave Act (FMLA)

[a] Purposes

The purposes of the Family and Medical Leave Act (FMLA) are:¹⁸

1. To balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;
2. To entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition;
3. To accomplish the purposes [of the act] in a manner that accommodates the legitimate interests of employers;
4. To accomplish the purposes [of the act] in a manner that, consistent with the *Equal Protection Clause of the Fourteenth Amendment*, minimizes the potential for employment discrimination on the basis of sex, by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis; and
5. To promote the goal of equal employment opportunity for women and men ...

[b] Leave Entitlement

The FMLA expressly provides, among other things, leave of up to 12 workweeks in a 12 month period because of the serious health condition of an employee, including pregnancy disability, and the birth of the employee's child or the placement of a child with the employee for adoption or foster care.¹⁹ Because the FMLA also provides for leave to care for a spouse, parent, or child with a serious health condition, the act may also apply in cases of the pregnancy disability of a qualifying family member.

Spouses employed by the same employer may take a combined total of 12 workweeks for the birth or placement of a child for adoption or foster care.²⁰ Leave for birth of the employee's child or because of placement of a child for adoption or foster care must conclude within 12 months from the date of the birth or placement.²¹

The FMLA also provides for leave of either 12 or 26 weeks, depending on the situation, for family members of those in the Armed Forces.^{21.1}

[c] Covered Employers

FMLA applies to (1) all private employers that have employed 50 or more employees in 20 or more workweeks in the current or preceding calendar year and that are engaged in commerce or in any industry or activity affecting commerce, including joint employers and successors of covered employers, and (2) public agencies, including state, local, and federal employers, and local education agencies.²²

[d] Eligible Employees

To be eligible for benefits, an employee must (1) work for a covered employer, (2) have worked for the employer for a total of at least 12 months, (3) have worked at least 1,250 hours over the previous 12 months, and (4) work at a location where at least 50 employees are employed by the employer within 75 miles of that location.²³

The FMLA also includes family and medical leave rights for the spouses, children, or parents of military service members on active duty.²⁴

Legal Topics:

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

Labor & Employment Law Leaves of Absence Family & Medical Leave Act General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Statutory Application Title VII of the Civil Rights Act of 1964

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. § 2000e et seq.

(n2)Footnote 2. *General Elec. Co. v. Gilbert* (1976) 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 .

(n3)Footnote 3. 42 U.S.C. § 2000e(k).

(n4)Footnote 4. *General Elec. Co. v. Gilbert* (1976) 429 U.S. 125, 133-140, 97 S. Ct. 401, 50 L. Ed. 2d 343 .

(n5)Footnote 5. *General Elec. Co. v. Gilbert* (1976) 429 U.S. 125, 148-153, 97 S. Ct. 401, 50 L. Ed. 2d 343 .

(n6)Footnote 6. Appendix to 29 C.F.R., Part 1604 -Questions and Answers on the Pregnancy Discrimination Act, Public Law 95-555, 92 Stat. 2076 (1978) states: "1. Q. What is the effective date of the Pregnancy Discrimination Act? A. ...P To the extent that title VII already required employers to treat persons affected by pregnancy-related conditions the same as persons affected by other medical conditions, the Act does not change employee rights arising prior to ... 1978 Most employment practices relating to pregnancy, childbirth and related conditions--whether concerning fringe benefits or other practices--were already controlled by Title VII prior to this Act. For example, Title VII has always prohibited an employer from firing, or refusing to hire or promote, a woman because of pregnancy or related conditions, and from failing to accord a woman on pregnancy-related leave the same seniority retention and accrual accorded those on other disability leaves."

(n7)Footnote 7. *California Federal S. & L. Ass'n v. Guerra* (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 .

(n8)Footnote 8. *California Federal S. & L. Ass'n v. Guerra* (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 .

(n9)Footnote 9. *California Federal S. & L. Ass'n v. Guerra* (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 .

(n10)Footnote 10. *Newport News Shipbuilding & Dry Dock v. EEOC* (1983) 462 U.S. 669, 103 S. Ct. 2622, 77 L. Ed. 2d 89 .

(n11)Footnote 11. 42 U.S.C. §§ 2000e(k), 2000e-2(a).

(n12)Footnote 12. *Int'l Union, United Auto., etc. v. Johnson Controls* (1991) 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 .

(n13)Footnote 13. *United Teachers v. Board of Education of City of Los Angeles* (9th Cir. 1983) 712 F.2d 1349 .

(n14)Footnote 14. See *United Teachers v. Board of Education of City of Los Angeles* (9th Cir. 1983) 712 F.2d 1349, 1350 ; see also *Byrd v. Lakeshore Hospital* (11th Cir. 1994) 30 F.3d 1380 (legitimate use of sick leave for pregnancy cannot be a basis to discharge employee); *Morgan v. Safeway Stores, Inc.* (9th Cir. 1989) 884 F.2d 1211 (female employee could not obtain pregnancy disability benefits under employer's credit union disability plan; the court held employer was not responsible for credit union's policy, absent proof it directed the policy or had other control).

(n15)Footnote 15. See *EEOC v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1511 .

(n16)Footnote 16. *See Vigars v. Valley Christian Center of Dublin, Cal. (N.D. Cal. 1992) 805 F. Supp. 802, 809-810* (librarian dismissed for out-of-wedlock pregnancy could challenge employer's actions; defense of religious belief in sinful nature of extramarital pregnancy insufficient).

(n17)Footnote 17. *29 C.F.R. § 1604.10.*

(n18)Footnote 18. *29 U.S.C. § 2601(b).*

(n19)Footnote 19. *See 29 U.S.C. § 2612.*

(n20)Footnote 20. *See 29 U.S.C. § 2612(a)(1), (f).*

(n21)Footnote 21. *See 29 U.S.C. § 2612(a)(2).*

(n22)Footnote 21.1. *See § 8.21[4], below.*

(n23)Footnote 22. *See 29 U.S.C. § 2611.*

(n24)Footnote 23. *See 29 U.S.C. § 2611(2).*

(n25)Footnote 24. *See § 8.21[4], below.*



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 8 Leaves of Absence

Part B. PREGNANCY AND CHILDBEARING LEAVE

1-8 California Employment Law § 8.12

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§ 8.12 California Requirements

[1] Governing Statutes

[a] Moore Brown Roberti Family Rights Act (CFRA)

The California Family Rights Act (also known as the Moore Brown Roberti Family Rights Act or CFRA) provides for leave for the birth of a child of the employee, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, and the care of a parent, child, or a spouse who has a serious health condition.ⁿ¹ Although CFRA provides leave for the employee's own serious health condition, CFRA leave is not available for the employee's own pregnancy disability.ⁿ²

Employee eligibility for CFRA leave is the same as employee eligibility for FMLA leave except that under CFRA, an employee must have worked for an employer for more than 12 months (not "at least").ⁿ³

In most respects, pursuant to amendments passed in 1993, the coverage regarding eligible employees and eligibility requirements are the same as those of the FMLA. For a discussion of the provisions of the FMLA, see § 8.11[2].

[b] Pregnancy Disability Leave (FEHA)

The Fair Employment and Housing Act (FEHA) grants eligible pregnant employees the right to take a pregnancy disability leave for a reasonable period of time, not to exceed four months.ⁿ⁴ Eligible pregnant employees are those employed by employers of five or more employees, whether they are employed full-time or part-time. However, employees of nonprofit religious associations or corporations are not eligible.ⁿ⁵

Fair Employment and Housing Commission (FEHC) regulations interpreting the FEHA include specific regulations applicable to pregnancy disability leave.ⁿ⁶ For purposes of these regulations, a "pregnancy disability leave" is any leave, whether paid or unpaid, taken by an employee, for any period up to a total of four months during which she is disabled by pregnancy or related medical condition.ⁿ⁷ A "reasonable" period of time for purposes of the CFRA is the

period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.ⁿ⁸

There is no length of service requirement before an employee disabled by pregnancy is entitled to a pregnancy disability leave.ⁿ⁹ An employee may elect to use any accrued sick leave during the leave.ⁿ¹⁰ A woman may also use any accrued vacation leave or other accrued paid leave during that period of time.ⁿ¹¹

An employer may require any employee who plans to take such a leave to give the employer reasonable notice of the date the leave will commence and its estimated duration.ⁿ¹² An employer that provides a more generous leave policy for other temporary disabilities must provide the same amount of leave to employees temporarily disabled by pregnancy.ⁿ¹³

Although Title VII does not expressly provide for pregnancy leaves of absence, the United States Supreme Court held in *California Federal Savings & Loan Association v. Guerra* that Title VII nevertheless does not preempt the California law requiring pregnancy disability leave.ⁿ¹⁴

One federal court has distinguished the pregnancy leave required by FEHA from a one-year "childrearing" leave required by a collective bargaining agreement and available only to female employees. Holding that the agreement's "childrearing" leave provision violated Title VII, the Third Circuit Court of Appeals explained that in *Guerra*, the United States Supreme Court emphasized that FEHA covers only the period of physical disability caused by pregnancy. By contrast, the collective bargaining agreement did not require that a female be disabled to obtain "childrearing" leave, and thus was "per se void for any leave granted beyond the period of actual physical disability on account of pregnancy, childbirth, or related medical condition."ⁿ¹⁵

After FEHA pregnancy leave, an employee may be entitled to additional leave to care for her baby or herself or a close relative with a serious illness under the Family Medical Leave Act (FMLA)^{n15.1} and Moore-Brown-Roberti Family Rights Act (CFRA).^{n15.2} Pregnancy disability leave under FEHA is a distinct and additional entitlement to that granted by FMLA and CFRA.^{n15.3}

[2] Covered Employers

Under the FEHA, the definition of "employer" as one regularly employing five or more employees does not mean five or more employees every day, or five or more employees at the time of discrimination, but rather an employer "regularly employing" five employees. Thus, five part-time employees at work on one day will bring an employer under the act. This construction effectuates the broad and remedial intent of the law.ⁿ¹⁶

[3] "Disabled by Pregnancy" Requirement

The FEHA, implemented by FEHC regulations, provides that all employers must provide a leave of up to four months, as needed, for the period of time a woman is actually disabled by pregnancy, even if an employer has a policy or practice that provides less than four months of leave for other similarly situated temporarily disabled employees.ⁿ¹⁷ A woman is "disabled by pregnancy" if, in the opinion of her health care provider, she is unable because of pregnancy to work at all or is unable to perform one or more of the essential functions of her job or to perform these functions without undue risk to herself, the successful completion of her pregnancy, or to other persons.ⁿ¹⁸ A woman is also considered to be "disabled by pregnancy" if she is suffering from severe "morning sickness" or needs to take time off for prenatal care.ⁿ¹⁹

[4] Calculation of Four-Month Period

A woman can take the four months at one time or in increments as required by her medical condition. The regulations

define a "four-month leave" as the number of days the employee would normally work within four months.ⁿ²⁰ For a full-time employee who works five eight-hour days per week, this would mean 88 working or paid eight-hour days of leave entitlement, based on an average of 22 working days per month for four months.ⁿ²¹ Pregnancy disability leave may also be taken intermittently or on a reduced work schedule when medically advisable, as determined by the employee's health care provider.ⁿ²²

[5] Payment During Leave

An employer is not required to pay an employee during a pregnancy disability leave unless the employer pays for other temporary disability leaves.ⁿ²³ However, a non-Title VII employer with five to 14 employees is only required to pay an employee disabled by a normal pregnancy six weeks of accrued, paid leave, regardless of the leave policy for other disabled employees.ⁿ²⁴ An employee may elect, at her option, to use any vacation time or other accrued personal time off (including undifferentiated paid time off) that the employee is otherwise eligible to take during the otherwise unpaid portion of the pregnancy disability leave.ⁿ²⁵

An employer may require an employee to use, or an employee may elect to use, accrued sick leave during the otherwise unpaid portion of her pregnancy disability leave.ⁿ²⁶

An employer subject to the Fair Labor Standards Act (FLSA) that "docks" the pay of an exempt employee who takes pregnancy leave of less than a full day may jeopardize the exempt status of that employee.ⁿ²⁷ The regulations promulgated under the FMLA provide for a special exception to the salary basis exemption of the FLSA by allowing employers to dock the pay of exempt employees taking intermittent FMLA leave. However, if the leave being taken does not qualify as FMLA leave, the employer must either (1) pay the exempt employee for leaves of less than one day taken or (2) treat the employee as nonexempt, in which case it may dock his or her pay but must pay for overtime hours.ⁿ²⁸

[6] Notice of Leave

[a] Notice Informing Employee of Right to Take Leave

Employers must give notice to employees of their right to request pregnancy disability leave by posting a notice in a conspicuous place where employees congregate, by providing a pregnant employee with a copy of such a notice as soon as practicable after learning of the pregnancy, and by including a description of pregnancy disability leave in any employee handbook.ⁿ²⁹

[b] Arranging Leave--Employee's Notice of Intent to Take Leave

An employer may require that employees who plan to take pregnancy disability leave provide the employer with at least verbal notice sufficient to make the employer aware of the employee's need of a pregnancy disability leave and the anticipated time and duration of the leave.ⁿ³⁰ If the need for the leave is foreseeable, the employee must provide at least 30 days' advance notice before the leave is to begin.ⁿ³¹ When 30 days' notice is not practicable, for example because the employee lacks knowledge of when the leave will need to begin or because of a medical emergency, the employee must give notice as soon as practicable.ⁿ³² In such a situation, the employer may not deny leave for failure to provide advance notice.ⁿ³³ An employer's failure to inform employees concerning any notice requirements it adopts precludes it from taking any adverse action against the employee, including denying the leave for the employee's failure to furnish advance notice.ⁿ³⁴

The employer must attempt to respond to the leave request as soon as practicable and before the employee's requested commencement date for the leave, and in any event no later than ten calendar days after the employer receives the request. Once given, approval is retroactive to the date of the first day of the leave. Employers may require written medical confirmation of the disability before granting pregnancy disability leave if there is a similar policy or practice

for other temporarily disabled employees. Note that for pregnancy-related disabilities, there is no process for obtaining more than one medical opinion, and there is no reinstatement exception for key employees.ⁿ³⁵

[7] Arranging Return From Leave

When an employee who has taken pregnancy disability leave of up to four months is able to return to her job, the employer must return her to her original job unless either (1) the job has ceased to exist because of legitimate business reasons unrelated to the employee's pregnancy disability leave (such as layoff or plant closure), or (2) each means of preserving the job for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently.ⁿ³⁶ If the employer is excused by any of the above reasons from returning the employee to her original job, the employer must provide the employee with a comparable position, unless either (1) there is no comparable position available, or (2) a comparable position is available, but filling the available position with the returning employee would substantially undermine the employer's ability to operate the business safely and efficiently.ⁿ³⁷ An employee who takes a pregnancy disability leave of longer than four months must be afforded the same right to reinstatement as any other employees who have taken a disability leave of similar length.ⁿ³⁸

The employee's right to reinstatement is different if, at the expiration of a pregnancy disability leave, the employee takes a family care leave for the reason of the birth of her child under the Moore-Brown-Roberti Family Rights Act (CFRA);ⁿ³⁹ in that case, the employee's right to reinstatement will be governed by CFRA and not by the regulations governing pregnancy disability leave.ⁿ⁴⁰ Under CFRA, an employer may reinstate an employee either to her same job or to a comparable job.ⁿ⁴¹ Additionally, any employer in California subject to the FEHA and Title VII is required to transfer a pregnant employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests.ⁿ⁴²

When an employer and employee agree at the beginning of the leave to a definite date of reinstatement, the employer must reinstate the employee by the agreed date.ⁿ⁴³ If the employer and employee did not agree on a specific date, the employer must reinstate the employee within two business days, if feasible, after the employee notifies the employer of her readiness to return.ⁿ⁴⁴

If the employer has a similar policy with regard to other temporarily disabled employees, it may require a written medical verification that the employee's disability has ceased before allowing the employee to return to work.ⁿ⁴⁵

[8] Effect on Seniority and Benefits

A pregnancy disability leave does not constitute a break in service for purposes of longevity and/or seniority.ⁿ⁴⁶ During the period of the leave, the employee is entitled to accrual of seniority and to participate in health plans and any other benefit plans to the same extent as any other employee on an unpaid disability leave granted by the employer for other reasons.ⁿ⁴⁷ Benefits must be resumed on the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualification period, physical exam, or other prerequisite.ⁿ⁴⁸

Legal Topics:

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

Labor & Employment LawLeaves of AbsenceGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12945.2(c)(3)(A), (B).*

(n2)Footnote 2. *See Gov. Code § 12945.2(c)(3)(C).*

(n3)Footnote 3. *See Gov. Code § 12945.2(a), (b); 2 Cal. Code Reg. § 7279.0(e).*

(n4)Footnote 4. *Gov. Code § 12945(a); 2 Cal. Code Reg. § 7291.7(a).*

(n5)Footnote 5. [Reserved]

(n6)Footnote 6. *See 2 Cal. Code Reg. §§ 7291.2, 7291.7 et seq.*

(n7)Footnote 7. *2 Cal. Code Reg. § 7291.1(o).*

(n8)Footnote 8. *Gov. Code § 12945(a); see DFEH v. J.E. Robinson, D.D.S. (1989) FEHC Dec. No. 89-02, (1992).*

(n9)Footnote 9. *2 Cal. Code Reg. § 7291.7(c).*

(n10)Footnote 10. *2 Cal. Code Reg. § 7291.11(b)(1).*

(n11)Footnote 11. *Gov. Code § 12945; 2 Cal. Code Reg. § 7291.11; see discussion in [5], below.*

(n12)Footnote 12. *Gov. Code § 12945(a); 2 Cal. Code Reg. § 7291.10(a); see discussion in [6][b], below.*

(n13)Footnote 13. *2 Cal. Code Reg. § 7291.7(b).*

(n14)Footnote 14. *California Federal S. & L. Ass'n v. Guerra (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613; 42 U.S.C. § 2000e(k)* (employees cannot be discriminated against because of pregnancy, childbirth, or related medical conditions; pregnancy-related disabilities must be treated the same as other disabilities).

(n15)Footnote 15. *Schafer v. Board of Public Educ. (3rd Cir. 1990) 903 F.2d 243, 248; see also 42 U.S.C. § 2000e(k)* (Title VII; discrimination based on pregnancy, childbirth, or related medical conditions is sex discrimination). For further discussion, *see ch. 41.*

(n16)Footnote 15.1. *29 U.S.C. § 2612(a).*

(n17)Footnote 15.2. *Gov. Code § 12945.2(a).* For discussion of the FMLA and CFRA, *see § 8.20 et seq.*

(n18)Footnote 15.3. *2 Cal. Code Reg. § 7297.6(a).* *see Liu v. Amway Corp. (9th Cir. 2004) 347 F.3d 1125, 1132* (employee was entitled to unpaid leave under FMLA and CFRA after her FEHA pregnancy disability leave expired).

(n19)Footnote 16. *See 2 Cal. Code Reg. § 7286.5(a)(1); see also Robinson v. Fair Employment & Housing Com. (1992) 2 Cal. 4th 226, 238, 5 Cal. Rptr. 2d 782, 825 P.2d 767.*

(n20)Footnote 17. *See Gov. Code § 12945; 2 Cal. Code Reg. § 7291.7(a).*

(n21)Footnote 18. *2 Cal. Code Reg. § 7291.2(g).*

(n22)Footnote 19. *See Gov. Code § 12926(f)* (definition of essential job functions).

(n23)Footnote 20. *2 Cal. Code Reg. §§ 7291.2(l); 7291.7(a).*

(n24)Footnote 21. *See 2 Cal. Code Reg. § 7291.7(a)(2)* (contains examples). For employees who work more or less than five days a week or who work on alternative work schedules, the number of working days that constitutes four months is calculated on a pro rata or proportional basis.

(n25)Footnote 22. *2 Cal. Code Reg. § 7291.7(a)(3).* However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave.

(n26)Footnote 23. *2 Cal. Code Reg. § 7291.11(a)(1).*

(n27)Footnote 24. *2 Cal. Code Reg. § 7291.11(a)(1)(A).*

(n28)Footnote 25. *2 Cal. Code Reg. § 7291.11(b)(2); see Gov. Code § 12945(a).*

(n29)Footnote 26. *2 Cal. Code Reg. § 7291.11(b)(1).*

(n30)Footnote 27. *29 C.F.R. § 825.206.*

(n31)Footnote 28. *29 C.F.R. § 825.206.*

(n32)Footnote 29. *2 Cal. Code Reg. § 7291.16(a).* The regulations set forth sample text that can be used for such a notice. *2 Cal. Code Reg. § 7291.16(d),(e), Notices A and B; see 2 Cal. Code Reg. § 7291.10(a)(5).*

(n33)Footnote 30. *2 Cal. Code Reg. § 7291.10(a)(1).*

(n34)Footnote 31. *See 2 Cal. Code Reg. § 7291.10(a)(2).*

(n35)Footnote 32. *2 Cal. Code Reg. § 7291.10(a)(3).*

(n36)Footnote 33. *2 Cal. Code Reg. § 7291.10(a)(4).*

(n37)Footnote 34. *2 Cal. Code Reg. § 7291.10(a)(5).*

(n38)Footnote 35. *2 Cal. Code Reg. § 7291.10(b); see 2 Cal. Code Reg. § 7291.2(d) (certification).*

(n39)Footnote 36. *2 Cal. Code Reg. § 7291.9(c)(1).*

(n40)Footnote 37. *2 Cal. Code Reg. § 7291.9(c)(2).*

(n41)Footnote 38. *2 Cal. Code Reg. § 7291.9(d).*

(n42)Footnote 39. *See Gov. Code § 12945.2; see discussion in § 8.30.*

(n43)Footnote 40. *2 Cal. Code Reg. § 7291.9(e).*

(n44)Footnote 41. *2 Cal. Code Reg. § 7291.9(e).*

(n45)Footnote 42. *Gov. Code § 12945(b)(3).*

(n46)Footnote 43. *2 Cal. Code Reg. § 7291.9(b)(1).*

(n47)Footnote 44. *2 Cal. Code Reg. § 7291.9(b)(2).*

(n48)Footnote 45. *2 Cal. Code Reg. § 7291.10(c).*

(n49)Footnote 46. *2 Cal. Code Reg. § 7291.11(d).*

(n50)Footnote 47. *2 Cal. Code Reg. § 7291.11(c).*

(n51)Footnote 48. *2 Cal. Code Reg. § 7291.11(d).*



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 8 Leaves of Absence

Part B. PREGNANCY AND CHILDBEARING LEAVE

1-8 California Employment Law §§ 8.13 through 8.19

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

[Reserved]

§§ 8.13[Reserved]



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part C. FAMILY CARE AND MEDICAL LEAVE

1-8 California Employment Law § 8.20

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§ 8.20 General Standards

[1] Applicability of CFRA and FMLA

Both California and federal law require certain employers to provide eligible employees with family care and medical leave under specified circumstances. The governing statutes are the Moore-Brown-Roberti Family Rights Act (CFRA),ⁿ¹ which is part of the Fair Employment and Housing Act (FEHA), and the federal Family and Medical Leave Act (FMLA).ⁿ² CFRA provisions conform to those of FMLA.ⁿ³ Regulations pertaining to CFRA are set forth in *Title 2, California Code of Regulations, Section 7297.0 et seq.* FMLA regulations are set forth in Title 29, Code of Federal Regulations, Part 825.

The CFRA regulations provide that they incorporate by reference the FMLA regulations to the extent they are not inconsistent with CFRA regulations, other state law, or the California Constitution.ⁿ⁴ FMLA states that "[n]othing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act or any amendment made by this Act."ⁿ⁵ Further, FMLA regulations state that FMLA does not modify or affect any federal or state antidiscrimination law and that employers must, therefore, comply with whichever law provides the greater rights to employees.ⁿ⁶ Thus, CFRA is not preempted by FMLA to the extent that the state law provides equal or greater family care and medical leave rights. Accordingly, when faced with a leave request for a purpose governed by both CFRA and FMLA, a covered employer must analyze both statutes on a provision-by-provision basis to determine which one provides the greater benefit to the employee on each aspect of the request.ⁿ⁷ FMLA regulations provide a number of examples of the effect of this nonpreemption principle.ⁿ⁸

When the provisions of both laws apply, FMLA and CFRA leaves run concurrently and may be simultaneously counted against the employee's entitlements under both laws.ⁿ⁹ If an employee takes leave for a purpose that is recognized under only one of the two laws, only that law governs the leave rights and obligations, and the amount of leave is charged according to that law only.ⁿ¹⁰

The 1993 amendments to CFRA, which largely conformed it to FMLA,ⁿ¹¹ have greatly reduced the differences between the two acts, thereby simplifying such a comparative analysis. One of the most significant differences between the two laws arises from the distinctions made under California law between pregnancy disability leave and birth-bonding leave. For discussion of the interaction between California's pregnancy disability leave lawⁿ¹² and the state and federal family leave laws, *see* § 8.33.

[2] General Requirements

Both CFRA and FMLA provide that a private employer of 50 or more employees must grant a request by any employee with 12 months of service, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. An employer will not be deemed to have granted leave under CFRA or FMLA unless the employer provides the employee, on granting the leave request, a guarantee of employment in the same or a comparable position on termination of the leave.ⁿ¹³

The FMLA and the CFRA make it unlawful for an employer to interfere with, restrain, or deny an employee's exercise of, or attempt to exercise, any right they provide.ⁿ¹⁴ Thus, for example, an employer normally may not consider an employee's use of FMLA leave as a factor in making an adverse employment decision.ⁿ¹⁵ However, an employer may still terminate an employee during FMLA leave if the employer would have made the same decision had the employee not taken leave.^{n15.1} The prohibition against interference or restraint, however, is distinct from the prohibitions against retaliation and discrimination under the FMLA.ⁿ¹⁶ It is the employer's responsibility, not the employee's, to determine whether a leave request is likely to be covered by the FMLA.ⁿ¹⁷

Thus, to prevail on FMLA or CFRA interference claims, an employee need not satisfy the burden-shifting paradigm applicable to EEO claims,^{n17.1} but need only show by a preponderance of the evidence that taking FMLA-protected leave constituted a negative factor in the adverse employment decision. The employee can prove this claim by direct or circumstantial evidence, or both.ⁿ¹⁸ Under the FMLA, the employer's good faith or lack of knowledge that its conduct violates the Act is, as a general matter, pertinent to only the question of damages, not to liability.ⁿ¹⁹ Of course, the FMLA is not implicated and does not protect an employee against disciplinary action if the employee's absences are for reasons other than those enumerated in the Act.ⁿ²⁰

The FMLA provides that employee rights under it "shall not be diminished by any collective bargaining agreement," nor does FMLA diminish the obligation of employers under any collective bargaining agreement that provides greater family or medical leave rights than FMLA.ⁿ²¹

An employer complies with the FMLA by meeting or exceeding the minimum requirements.ⁿ²² But an employer may freely change its program, even if the change results in a reduction in benefits.ⁿ²³ Thus, the FMLA does not require an employer to "lock-in" a particular benefits package.ⁿ²⁴

■ CONSULTANT'S COMMENT:

Employers should note that the holding in *Asmus v. Pacific Bell* ⁿ²⁵ may limit the freedom to modify some benefit plans. In that case, the California Supreme Court found that an employer could unilaterally modify a mandatory policy (the opportunity to transfer to avoid layoff), provided that the employer effected the change after a reasonable time, on reasonable notice, and without interfering with employees' vested benefits. The scope of the holding in *Asmus* is not entirely clear. Until further case guidance is available, employers must attempt to determine whether benefits that they seek to change unilaterally are akin to--or different than--the benefits at issue in *Asmus*. *Commentary by Kirby Wilcox*

[3] Effect of Other Laws

An employee may be able to assert rights under FMLA, a state antidiscrimination statute, or both.ⁿ²⁶ Additionally, if an employee is a qualified individual with a disability within the meaning of the Americans With Disabilities Act (ADA),ⁿ²⁷ the employer must make reasonable accommodations in accordance with the ADA, while at the same time affording an employee his or her rights under FMLA.ⁿ²⁸ FMLA may also interact with state workers' compensation law, with which it may run concurrently. However, with regard to offers to return to light-duty assignment, an employee who declines to do so might be disqualified from receiving further workers' compensation benefits but might still be entitled to unpaid leave under FMLA.ⁿ²⁹

Legal Topics:

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

Labor & Employment LawLeaves of AbsenceGeneral OverviewLabor & Employment LawLeaves of AbsenceFamily & Medical Leave ActGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12945.2.*

(n2)Footnote 2. *29 U.S.C. § 2601 et seq.*

(n3)Footnote 3. *See Stats. 1993, ch. 827 (A.B. 1460) (effective Sept. 8, 1993, as urgency legislation).*

(n4)Footnote 4. *2 Cal. Code Reg. § 7297.10.*

(n5)Footnote 5. *29 U.S.C. § 2651(b); see also 29 C.F.R. § 825.701(a).*

(n6)Footnote 6. *29 C.F.R. § 825.702(a).*

(n7)Footnote 7. *See Department of Labor accompanying explanatory text to 29 C.F.R. § 825.701.*

(n8)Footnote 8. *See 29 C.F.R. § 825.701.*

(n9)Footnote 9. *Gov. Code § 12945.2(s); 29 C.F.R. § 825.701(a); see U.S. Dept. of Labor, Wage and Hour Div. Summary of Major Comments on 29 C.F.R. § 825.701.*

(n10)Footnote 10. *29 C.F.R. § 825.701(a).*

(n11)Footnote 11. *See Gov. Code § 12945.2.*

(n12)Footnote 12. *See Gov. Code § 12945; See also § 8.12.*

(n13)Footnote 13. *29 U.S.C. § 2612; Gov. Code § 12945.2(a); 2 Cal. Code Reg. § 7297.0(h). See Bachelder v. America West Airlines, Inc. (9th Cir. 2001) 259 F.3d 1112, 1122 (FMLA creates two interrelated, substantive employee rights: (1) employee's right to use certain amount of leave for protected reasons; (2) employee's right to return to job or equivalent after using protected leave). For the standard jury instructions regarding claims for violation of CFRA, see CACI 2600 et seq. For discussion of the CACI standard jury instructions generally, see § 61.05.*

(n14)Footnote 14. *29 U.S.C. § 2615(a)(1); see Liu v. Amway Corp. (9th Cir. 2004) 347 F.3d 1125, 1133-1135 (employee presented triable issue of fact that employer denied employee's right to FMLA leave by rejecting her requests for additional leave and forcing her to take shorter extensions of additional leave and by mischaracterizing FMLA protected leave as personal leave); Bachelder v. America West Airlines, Inc. (9th Cir. 2001) 259 F.3d 1112, 1124 (employer actions deterring employees' participation in protected activities constitute interference or restraint with employees' exercise of their rights); Faust v. California Portland Cement Co. (2007) 150 Cal. App. 4th 864, 879, 58 Cal. Rptr. 3d 729 (interference claim under FMLA and thus under CFRA does not involve burden-shifting analysis of*

McDonnell Douglas).

(n15)Footnote 15. 29 C.F.R. § 825.220(c) (employers cannot use FMLA leave as negative factor in employment actions, such as hiring, promotions, or disciplinary actions; FMLA leave cannot be counted under "no fault" attendance policies); *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1122 . *Liu v. Amway Corp.* (9th Cir. 2004) 347 F.3d 1125, 1135-1137 (employee presented triable issue of fact: whether FMLA leave was factor in her termination during company-wide reduction in force).

(n16)Footnote 15.1. See 29 U.S.C. § 2614(a); 29 C.F.R. § 825.216(a)(1). See also *Gambini v. Total Renal Care, Inc.* (9th Cir. 2007) 486 F.3d 1087, 2007 U.S. App. LEXIS 9290, *18-*21 (any arguable error in instructing jury as to employer's burden of proving that employee's federally-protected leave was not factor in its decision to terminate her employment was harmless in light of employer's uncontroverted evidence it would have fired employee for her conduct regardless of her leave status).

(n17)Footnote 16. 29 U.S.C. § 2615(a)(2), (b). For the prohibition of discrimination or retaliation, See § 8.32.

(n18)Footnote 17. *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1130-1131 .

(n19)Footnote 17.1. *Xin Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1135 (violation of FMLA simply requires that employer deny employee's entitlement to FMLA leave); *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1131 (no room for *McDonnell Douglas* type of pretext analysis when evaluating interference claim under FMLA); *Faust v. California Portland Cement Co.* (2007) 150 Cal. App. 4th 864, 879, 58 Cal. Rptr. 3d 729 (interference claim under CFRA does not involve burden-shifting analysis of *McDonnell Douglas*).

(n20)Footnote 18. *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1125 .

(n21)Footnote 19. *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1130 .

(n22)Footnote 20. *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1125 ; see also *Marchisheck v. San Mateo County* (9th Cir. 1999) 199 F.3d 1068, 1077 (terminated employee had no cause of action under FMLA because absences for which she was fired were not protected by Act). For permissible reasons for leave, see § 8.21, below.

(n23)Footnote 21. 29 U.S.C. § 2652(b).

(n24)Footnote 22. *Funkhouser v. Wells Fargo Bank, N.A.* (9th Cir. 2002) 289 F.3d 1137, 1140-1141 . See 29 C.F.R. § 825.700(b); see also *Covey v. Methodist Hosp.* (W.D. Tenn. 1999) 56 F. Supp. 2d 965, 971-972 ; *Hite v. Biomet, Inc.* (N.D. Ind. 1999) 53 F. Supp. 2d 1013, 1019 n. 5 ; *Rich v. Delta Airlines, Inc.* (N.D. Ga. 1996) 921 F. Supp. 767, 773 .

(n25)Footnote 23. *Funkhouser v. Wells Fargo Bank, N.A.* (9th Cir. 2002) 289 F.3d 1137, 1141 . See 29 C.F.R. § 825.700(b) (nothing in Act prevents employer from amending existing leave and employee benefit programs, provided they comply with Act).

(n26)Footnote 24. *Funkhouser v. Wells Fargo Bank, N.A.* (9th Cir. 2002) 289 F.3d 1137, 1141 .

(n27)Footnote 25. *Asmus v. Pacific Bell* (2000) 23 Cal. 4th 1, 16-17, 96 Cal. Rptr. 2d 179, 999 P.2d 71 .

(n28)Footnote 26. See 29 C.F.R. § 825.702(a).

(n29)Footnote 27. See 42 U.S.C. § 12101 et seq .

(n30)Footnote 28. See 29 C.F.R. § 825.702(e); 29 C.F.R. § 825.702(c)-(e) (providing examples of how the two

laws interact with respect to disabled employees).

(n31)Footnote 29. *See* 29 *C.F.R.* §§ 825.207(d)(2), 825.702(d)(2).



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part C. FAMILY CARE AND MEDICAL LEAVE

1-8 California Employment Law § 8.21

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.21 Reasons for Leave

[1] Birth or Adoption of Child; Foster Care Placement

Both CFRA and FMLA allow family leave for the birth of a child of the employee or for the adoptive or foster-care placement of a child with the employee.ⁿ¹

FMLA allows an expectant mother to take leave before the actual date of birth of the child for prenatal care or if the mother's condition makes her unable to work.ⁿ² Birth leave under FMLA also includes time to care for the newborn child.ⁿ³

In the case of an adoptive or foster-care placement of a child with an employee, FMLA allows the employee's leave to begin before the actual placement if necessary to allow the placement to proceed.ⁿ⁴ For example, the employee's absence from employment may be necessitated by attendance at counseling sessions, court proceedings, consultations with the employee's attorney or with attorneys and doctors representing the birth parent, or physical examinations. However, the source of an adopted child (that is, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.ⁿ⁵

Effective January 16, 2009, the Department of Labor reorganized rules and changed the definition of "serious medical condition" under the FMLA, in part to make it easier to find information in the regulations. In earlier versions of the regulations, there was no single place in the regulations addressing leave taken for the birth of a child or placement with the employee of a child for adoption or foster care.^{n5.1} The regulations now address leave taken prior to the birth of a child or placement with the employee of a child for adoption or foster care in sections that cover pregnancy, birth, adoption and foster care.^{n5.2}

CFRA leave for the birth of a child may be used solely for purposes of bonding with the child. Therefore, CFRA entitlement for this purpose is distinct from pregnancy disability leave.ⁿ⁶

[2] Serious Health Condition of Family Member or Employee

[a] Medical Leave for Employee's Serious Health Condition

Both CFRA and FMLA allow medical leave for an employee's own serious health condition that renders the employee unable to perform the functions of his or her position.ⁿ⁷ For discussion of the definition of "serious health condition," *see [c], below*.

An employee is "unable to perform the functions of the position" if the employee's health care providerⁿ⁸ finds that the employee is unable to work at all or is unable to perform any of the essential functions of the employee's job within the meaning of the Americans with Disabilities Act (ADA).ⁿ⁹ For example, an employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.^{n9.1} An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held either at the time notice is given or at the time leave commenced, whichever is earlier.ⁿ¹⁰

If a full-time employee, during the period in which medical leave was sought, continues to perform a similar job for another employer on a part-time basis, that does not conclusively establish the ability to do the job for the original employer; the part-time job is evidence of ability to do similar work for the original employer from whom the employee has sought medical leave, but that evidence is not conclusive.ⁿ¹⁰

To qualify an employee for medical leave, his or her serious health condition need not have a job-related cause.ⁿ¹¹

In contrast to FMLA, leave taken under CFRA for the employee's own serious health condition excludes leave taken for pregnancy disability, which is subject to separate disability leave rights.ⁿ¹² For discussion of those rights, *see* § 8.12.

[b] Leave to Care for Family Member With Serious Health Condition

Both CFRA and FMLA allow leave for an employee to care for his or her parent, child, or spouse who has a serious health condition.ⁿ¹³ "Caring for" encompasses both physical and psychological care and involves some level of participation in the ongoing treatment of a serious health condition.ⁿ¹⁴ The term "needed to care for" also includes situations in which the employee may be needed to substitute for others who normally care for the family member, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the family member.^{n14.1} For purposes of the FMLA, an employee is not "caring for" her child when she moves him, not to seek medical attention, but to remove him from an unwholesome and physically violent social environment.ⁿ¹⁵ An employee's cross-country trip to retrieve the family car to reassure his pregnant wife she would soon have reliable transportation and his phone calls to her while he drove back did not provide care to a family member as required by the FMLA.^{n15.1} Similarly, when an employee took leave to help her elderly mother move from one home to another, that did not qualify as leave to care for a parent under CFRA.ⁿ¹⁶ The court held CFRA required that participation in providing care for a parent be warranted during a period of treatment, and although plaintiff's mother was under medical supervision, none of the mother's various conditions had flared into incapacity.ⁿ¹⁷ On the other hand, a plaintiff in an action under the FMLA raised a genuine issue of material fact as to whether his activities (talking with his father about his sister's death, performing various household chores, and driving his father to counseling) were necessary to care for his father's basic needs because of severe depression after his daughter's murder by her ex-husband.ⁿ¹⁸

■ CONSULTANT'S COMMENT:

In *Marchischeck v. San Mateo County*,ⁿ¹⁹ the Ninth Circuit interpreted both the FMLA and CFRA to

exclude from their coverage a trip by the plaintiff to the Philippines to remove her child from a violent community and to place him under the custody of her brother. The panel based its decision on both a lack of proof that the child suffered from "a serious health condition" and a lack of proof that the plaintiff's trip to the Philippines was an act of "caring for" her child. The discussion of the definition of "serious health condition" is exclusively fact-dependent, but the discussion of the "care for" standard has broad application. In brief, "caring for" an individual must involve some level of participation in the treatment of a serious health condition. The only mention of transport in the regulations pertains to transportation to or from a doctor. Thus, *Marchisheck* makes it clear that it is one thing to take a leave to "care for" an ill parent, spouse or child and another thing to take a leave to "be with" an ill parent, spouse or child for reasons unrelated to direct participation in care-giving activity. *Commentary by Kirby Wilcox.*

For purposes of CFRA and FMLA, an employee's "parent" includes an individual who stood *in loco parentis* to the employee when that employee was a child.ⁿ²⁰ An employee's parent-in-law is not considered the employee's parent for this purpose.ⁿ²¹

A "child" of an employee is a biological, adopted, or foster child; a stepchild; a legal ward; or a person for whom the employee stands *in loco parentis*.ⁿ²² However, a person age 18 or over does not qualify as a child for purposes of family leave unless he or she is incapable of self-care because of a mental or physical disability.ⁿ²³ "Incapable of self-care because of a mental or physical disability" under the FMLA means that the child requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" (ADLs) or "instrumental activities of daily living" (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.^{n23.1} "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of the major life activities of an individual.^{n23.2}

Regulations issued by the Department of Labor under the FMLA now define terms related to leave to care for a child. "In loco parentis" includes day-to-day responsibilities to care for and financially support a child, or, in the case of an employee who is the child, responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.^{n23.3} "Adoption" means legally and permanently assuming the responsibility of raising a child as one's own; the source of an adopted child, such as whether from a licensed placement agency or otherwise, is not a factor in determining eligibility for FMLA leave.^{n23.4} "Foster care" is 24-hour care for children in substitution for, and away from, their parents or guardian. The placement is made by or with the agreement of the state as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the state and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, state action is involved in the removal of the child from parental custody.^{n23.5}

For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.^{n23.6}

[c] "Serious Health Condition" Defined

A "serious health condition" under FMLA and CFRA is an illness, injury, impairment, or physical or mental condition that involves either of the following:ⁿ²⁴

- Inpatient care, which means an overnight stay in a hospital, hospice, or residential medical care

facility. "Inpatient care" includes any period of incapacity (that is, an inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment for it, or recovery from it) and any subsequent treatment in connection with such inpatient care.n25

■ Continuing treatment by a health care provider.n26 For purposes of the FMLA, the term "treatment" includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication, such as an antibiotic, or therapy requiring special equipment to resolve or alleviate the health condition, such as oxygen. A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves (or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider) is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.n26.1

Conditions for which cosmetic treatments are administered, such as most treatments for acne or plastic surgery, are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the following are examples of conditions that do not meet the definition of "serious health condition" and do not qualify for FMLA leave:n26.2

- The common cold.
- The flu.
- Ear aches.
- Upset stomach.
- Minor ulcers.
- Headaches other than migraine.
- Routine dental or orthodontia problems, periodontal disease.

On the other hand, restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions, provided all the other conditions of the regulations promulgated under the FMLA are met. Mental illness or allergies may be serious health conditions, but only if all the conditions of the regulations are met.n27

Substance abuse may be a serious health condition under the FMLA if the conditions of the FMLA regulations are met.n27.1 However, FMLA leave may be taken only for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.n27.2 While treatment for substance abuse does not prevent an employer from taking employment action against an employee, the employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. But if the employer has an established policy (applied in a non-discriminatory manner) that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, an employee may be terminated pursuant to that policy whether or not the employee is presently taking FMLA leave. An employee also may take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.n27.3

■ CONSULTANT'S COMMENT:

The CFRA incorporates the FMLA Regulations promulgated by the U.S. Department of Labor in 1995 ("FMLA regulations of 1995" or "1995 FMLA regulations") to the extent they are not inconsistent with the CFRA.n27.4 The California Fair Employment and Housing Commission (FEHC) has declined to incorporate the new FMLA regulations into the CFRA.n27.5 Until the CFRA regulations are amended, where the CFRA is silent, the FMLA regulations of 1995 will continue to apply.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:n27.6

- A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstancesn27.7 exist,n27.8 by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services, *e.g.*, a physical therapist, under orders of, or on referral by, a health care provider;n27.9 or treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.n27.10 This requires an in-person visit to a health care provider, and the first or only in-person treatment visit must take place within seven days of the first day of incapacity.n27.11 Whether additional treatment visits or a regimen of continuing treatment is necessary within the 30-day periodn27.11.1 will be determined by the health care provider.n27.12

- Any period of incapacity due to pregnancy, or for prenatal care.n27.13

- Any period of incapacity or treatment for incapacity due to a chronic serious health condition. A chronic serious health condition is one that meets each of the following conditions:n27.14

[Circled ring operator] Requires periodic visits, defined as at least twice a year, for treatment by a health care provider or by a nurse under direct supervision of a health care provider.n27.15

[Circled ring operator] Continues over an extended period of time, including recurring episodes of a single underlying condition.n27.16

[Circled ring operator] May cause episodic rather than a continuing period of incapacity, such as asthma, diabetes, epilepsy, etc.n27.17

- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.n27.18

- Any period of absence to receive multiple treatments, including any period of recovery from the treatments, by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for either restorative surgery after an accident or other injury or a condition that would likely result in a period of incapacity of more than three consecutive, full calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).n27.19

Absences attributable to incapacity due to pregnancy or prenatal care or for chronic conditions qualify for FMLA leave

even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive, full calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. As a further example, an employee who is pregnant may be unable to report to work because of severe morning sickness.^{n27.20}

In *Marchisheck v. San Mateo County* ⁿ²⁸ the Ninth Circuit held that the plaintiff's son's injuries from being beaten, his chronic behavioral problems and his combined psychological and physical condition did not qualify as "serious health conditions" under the FMLA.ⁿ²⁹ On the other hand, in *Scamihorn v. Gen. Truck Drivers, Local 952*, ⁿ³⁰ the court found a genuine question of material fact precluding summary judgment because plaintiff's father's depression after the murder of his daughter by her ex-husband resulted in an incapacity, *i.e.*, more than three consecutive days' absence from work or other daily activities and continuing treatment by a psychologist and two psychiatrists constituted a serious medical condition under the FMLA.

One district court case has held that a child's ear infection was not a serious health condition, where the condition did not require the child's absence from day care for three days, the child was not under the continuing treatment of a physician, and the potential dangers of improper treatment were not relevant to the actual incapacity or treatment involved in the case.ⁿ³¹ On the other hand, if the child is seen by a health care provider, receives prescribed medication, and is incapacitated for more than three days, the child may be deemed to have a serious health condition.ⁿ³²

The FMLA defines "health care provider" as a doctor of medicine or osteopathy authorized to practice medicine or surgery as appropriate by the state in which the doctor practices, or any other person determined by the Secretary of Labor to be capable of providing health care services.^{n32.1} Others "capable of providing health care services" include only the following:

- Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors, who are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist, authorized to practice in the state and performing within the scope of their practice as defined under state law.^{n32.2}
- Nurse practitioners, nurse-midwives, clinical social workers and physician assistants authorized to practice under state law and performing within the scope of their practice as defined under state law.^{n32.3}
- Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. When an employee or family member receives treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination, but not treatment, to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable state or local law or collective bargaining agreement.^{n32.4}
- Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits.^{n32.5}
- A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under that law.^{n32.6}

"Authorized to practice in the state" as used in the regulations means that the provider must be authorized to diagnose and treat physical or mental health conditions.^{n32.7}

[3] Leave Given For Reasons Not Covered by Statutes

Both CFRA and FMLA are minimum standards, not maximum limits. Employers may adopt leave policies that are more generous than those mandated by the two acts.ⁿ³³

However, an employer that provides more generous benefits than those mandated by CFRA and FMLA cannot count such additional leave against the 12-week entitlement under CFRA and FMLA. For example, paid sick leave used for a medical condition that is not a serious health condition does not count against the 12-week entitlement, and the employee will still have 12 weeks of leave available if the employee or a family member subsequently develops a serious health condition.ⁿ³⁴

■ CONSULTANT'S COMMENT:

If an employer chooses to provide its employees with additional uses of "family leave" that are not required by CFRA or FMLA, such as leave to care for a sibling with a serious health condition, the employer must still provide employees with 12 weeks of unpaid leave for the uses that are specifically provided for by CFRA or FMLA. In other words, leave to care for a sibling, for example, is in addition to the 12 weeks of unpaid leave to which the employee is entitled under CFRA or FMLA. *Commentary by Kirby Wilcox.*

[4] Family of Armed Forces Members

[a] Leave Based on Contingency Operation

Subject to the medical certification requirements of 29 U.S.C. § 2613,ⁿ³⁵ an eligible employee is entitled to a total of 12 workweeks of leave during any 12-month period because of any qualifying exigency as the Secretary of the Department of Labor determines by regulation,^{n35.1} arising out of the fact that the spouse, child, or parent of the employee is on covered active duty, or has been notified of an impending call or order to active duty, in the Armed Forces.ⁿ³⁶

In addition to the general medical certification requirements under the FMLA, an employer may require that a request for this type of leave be supported by a certification issued at a time and in a manner as the Secretary of Labor may prescribe by regulation. If the Secretary issues a regulation requiring certification, the employee must provide in a timely manner a copy of the certification to the employer.ⁿ³⁷

For these purposes, "active duty" means either of the following:ⁿ³⁸ⁿ³⁹

- In the case of a member of a regular component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country.
- In the case of a member of a reserve component of the Armed Forces, duty during the deployment of the member with the Armed Forces to a foreign country under a call or order to active duty under a provision of law referred to in 10 U.S.C. § 101(a)(13)(B).

This leave may be taken on an intermittent or reduced leave schedule.ⁿ⁴⁰

In any case in which the necessity for this leave is foreseeable, whether because the spouse, child, or parent of the employee is on covered active duty, or because of notification of an impending call or order to active duty, the employee must provide notice to the employer as is reasonable and practicable.ⁿ⁴¹

[b] Leave Based on Serious Injury or Illness

Subject to the medical certification requirements of 29 U.S.C. § 2613,ⁿ⁴² an eligible employee who is the spouse, child, parent, or next of kinⁿ⁴³ of a covered member of the Armed Forces is entitled to a total of 26 workweeks of leave during a 12-month period to care for the servicemember.ⁿ⁴⁴ This leave is only available during a single 12-month period.ⁿ⁴⁵ During this single 12-month period, an eligible employee is entitled to a combined total of 26 workweeks of leave, whether the leave is based on a qualifying contingencyⁿ⁴⁶ or because of the service member's serious injury or illness.ⁿ⁴⁷ However, this does not limit the availability of leave under the FMLA during any other 12-month period.ⁿ⁴⁸

For these purposes, a "covered member" of the Armed Forces is defined as either of the following:ⁿ⁴⁹

- A member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.
- A veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces, including a member of the National Guard or Reserves, at any time during the period of five years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

"Serious injury or illness" for these purposes means either of the following:^{n49.1}

- In the case of a member of the Armed Forces, including a member of the National Guard or Reserves, an injury or illness that was incurred by the member in the line of duty on active duty in the Armed Forces, or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.
- In the case of a veteran who was a member of the Armed Forces, including a member of the National Guard or Reserves, at any time during a period described in 29 U.S.C. § 2611(15)(B) (defining veterans who are "covered members"), a qualifying injury or illness (as defined by the Secretary of Labor) that was incurred by the member in the line of duty on active duty in the Armed Forces, or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that manifested itself before or after the member became a veteran.

For these purposes, "veteran" is defined by the meaning given the same term under 38 U.S.C. § 101.^{n49.2} "Outpatient status," with respect to a covered servicemember, means the status of a member of the Armed Forces assigned to either of the following:ⁿ⁵⁰

- A military medical treatment facility as an outpatient.
- A unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients.

This leave may be taken on an intermittent or reduced leave schedule.ⁿ⁵¹ Further, an eligible employee may elect or an employer may require the employee to substitute accrued paid vacation leave, personal leave, family leave, or medical or sick leave of the employee for this leave for any part of the 26-week period, except that nothing requires an employer to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide any such paid leave.ⁿ⁵²

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),ⁿ⁵³ veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Therefore, under USERRA, a returning service member would be eligible for FMLA leave if the months and hours that he or she would have worked for the civilian employer during the period of military service, combined with the months employed and the hours actually worked, meet the FMLA eligibility threshold of 12 months and 1,250 hours of employment.ⁿ⁵⁴

Legal Topics:

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

Labor & Employment Law Leaves of Absence General Overview Labor & Employment Law Leaves of Absence Family & Medical Leave Act Coverage & Definitions Adoption & Maternity Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 2612(a)(1)(A),(B); Gov. Code § 12945.2(c)(3)(A); 29 C.F.R. § 825.120 *et seq.*

(n2)Footnote 2. 29 C.F.R. § 825.112(c).

(n3)Footnote 3. 29 U.S.C. § 2612(a)(1)(A); 29 C.F.R. § 825.112(a)(1). Effective January 16, 2009, the Department of Labor moved the language from former 29 C.F.R. § 825.207(d)(2), addressing the interaction between workers' compensation, light duty and the FMLA, to 29 C.F.R. § 825.207(e) with no change. Additional discussion of light duty is also found in 29 C.F.R. § 825.220(c).

(n4)Footnote 4. 29 C.F.R. § 825.112(d).

(n5)Footnote 5. 29 C.F.R. § 825.112(d).

(n6)Footnote 5.1. *See* former 29 C.F.R. § 825.112(c), (d).

(n7)Footnote 5.2. *See* 29 C.F.R. § 825.120 *et seq.*

(n8)Footnote 6. *See* 2 Cal. Code Reg. § 7291.13(a).

(n9)Footnote 7. 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 825.112(a)(4); Gov. Code § 12945.2(c)(3)(C). *see Rowe v. Laidlaw Transit, Inc.* (9th Cir. 2001) 244 F.3d 1115, 1118 (serious ankle injury qualified employee for coverage under FMLA and reduced schedule qualified as FMLA leave, because it was undisputed that physician restricted her activities, including those that had been essential part of her job and she presented request for temporary part-time duty on that basis).

(n10)Footnote 8. *See* 29 C.F.R. § 825.118.

(n11)Footnote 9. 29 C.F.R. § 825.123(a); *see* 42 U.S.C. § 12101 *et seq.* (ADA); 29 C.F.R. § 1630.2(n).

(n12)Footnote 9.1. 29 C.F.R. § 825.123(a).

(n13)Footnote 10. 29 C.F.R. § 825.123(b). *See* 29 C.F.R. § 825.306.

(n14)Footnote 10. *Lonicki v. Sutter Health Central* (2008) 43 Cal. 4th 201, 74 Cal. Rptr. 3d 570, 180 P.3d 321, 2008 Cal. LEXIS 3796, *22-31 (because parties presented contrary evidence on summary judgment motion as to whether employee had serious health condition making her unable to do her full-time job, there was disputed issue of fact to be resolved at trial).

(n15)Footnote 11. *2 Cal. Code Reg. § 7297.0(o).*

(n16)Footnote 12. *Gov. Code § 12945.2(c)(3)(C); see Gov. Code § 12945.*

(n17)Footnote 13. *29 U.S.C. § 2612(a)(1)(C); 29 C.F.R. § 825.112(a)(3); Gov. Code § 12945.2(c)(3)(A),(B).*

(n18)Footnote 14. *29 C.F.R. § 825.124(a).*

(n19)Footnote 14.1. *29 C.F.R. § 825.124(b).*

(n20)Footnote 15. *See Marchisheck v. San Mateo County (9th Cir. 1999) 199 F.3d 1068, 1076 , cert. denied, (2000) 530 U.S. 1214, 120 S. Ct. 2217, 147 L. Ed. 2d 250 .*

(n21)Footnote 15.1. *Tellis v. Alaska Airlines, Inc. (9th Cir. 2005) 414 F.3d 1045, 1046-1048 .*

(n22)Footnote 16. *Pang v. Beverly Hospital, Inc. (2000) 79 Cal. App 4th 986, 996, 94 Cal. Rptr. 2d 643 .*

(n23)Footnote 17. *Pang v. Beverly Hospital, Inc. (2000) 79 Cal. App 4th 986, 996, 94 Cal. Rptr. 2d 643 .*

(n24)Footnote 18. *Scamihorn v. Gen. Truck Drivers, Local 952 (9th Cir. 2002) 282 F.3d 1078 .*

(n25)Footnote 19. *Marchisheck v. San Mateo County (9th Cir. 1999) 199 F.3d 1068, 1076 , cert. denied (2000) 530 U.S. 1214, 120 S. Ct. 2217, 147 L. Ed. 2d 250 .*

(n26)Footnote 20. *29 U.S.C. § 2611(7); 29 C.F.R. § 825.122(b); Gov. Code § 12945.2(c)(7); 2 Cal. Code Reg. § 7297.0(l).*

(n27)Footnote 21. *29 C.F.R. § 825.122(b); 2 Cal. Code Reg. § 7297.0(l).*

(n28)Footnote 22. *29 U.S.C. § 2611(12); 29 C.F.R. § 825.122(c); Gov. Code § 12945.2(c)(1); 2 Cal. Code Reg. § 7297.0(c).*

(n29)Footnote 23. *29 U.S.C. § 2611(12); 29 C.F.R. § 825.122(c); Gov. Code § 12945.2(c)(1).*

(n30)Footnote 23.1. *29 C.F.R. § 825.122(c)(1).*

(n31)Footnote 23.2. *29 C.F.R. § 825.122(c)(2). See 29 C.F.R. § 1630.2(h), (i), (j), discussed in Ch. 41, issued by Equal Employment Opportunity Commission under Americans with Disabilities Act for definitions of these terms.*

(n32)Footnote 23.3. *29 C.F.R. § 825.122(c)(3).*

(n33)Footnote 23.4. *29 C.F.R. § 825.122(e). See 29 C.F.R. § 825.121, governing leave for adoption.*

(n34)Footnote 23.5. *29 C.F.R. § 825.122(f). See 29 C.F.R. § 825.121, governing leave for foster care.*

(n35)Footnote 23.6. *29 C.F.R. § 825.122(j).*

(n36)Footnote 24. *29 U.S.C. § 2611(11); 29 C.F.R. § 825.114; Gov. Code § 12945.2(c)(8); 2 Cal. Code Reg. § 7297.0(o). See also 29 C.F.R. § 825.113(b) (defining "incapacity"). For the definition of "serious injury or illness" as it pertains to members of the Armed Forces and veterans, see [4][a], below.*

(n37)Footnote 25. *29 C.F.R. § 825.114(a)(1), (2).*

(n38)Footnote 26. *See 29 U.S.C. § 2611(6); 29 C.F.R. § 825.118; Gov. Code § 12945.2(c)(6) ("health care*

provider" defined).

(n39)Footnote 26.1. *29 C.F.R. § 825.113(c).*

(n40)Footnote 26.2. *29 C.F.R. § 825.113(d).*

(n41)Footnote 27. *29 C.F.R. § 825.113(d).*

(n42)Footnote 27.1. *29 C.F.R. § 825.119(a). See 29 C.F.R. §§ 825.113-825.115.*

(n43)Footnote 27.2. *29 C.F.R. § 825.119(a).*

(n44)Footnote 27.3. *29 C.F.R. § 825.119(b).*

(n45)Footnote 27.4. *See 2 Cal. Code Regs. tit. § 7297.10.*

(n46)Footnote 27.5. *See <http://www.fehc.ca.gov/act/regulation.asp> (last visited Mar. 30, 2009).*

(n47)Footnote 27.6. *29 C.F.R. § 825.115.*

(n48)Footnote 27.7. *See 29 C.F.R. § 825.115(a)(5)* ("extenuating circumstances" means circumstances beyond employee's control that prevent follow-up visit from occurring as planned by health care provider, and whether extenuating circumstances exist depends on facts).

(n49)Footnote 27.8. *See 29 C.F.R. § 825.115(a)(5)* (giving example of health care provider determining that second visit is needed within 30-day period, but health care provider does not have any available appointments during that time period).

(n50)Footnote 27.9. *29 C.F.R. § 825.115(a)(1).*

(n51)Footnote 27.10. *29 C.F.R. § 825.115(a)(2).*

(n52)Footnote 27.11. *29 C.F.R. § 825.115(a)(3).*

(n53)Footnote 27.11.1. Despite the fact that the new FMLA regulations call for specific timing of doctor's visits in order to meet the criteria for "serious health condition," the 1995 FMLA regulations have no such requirement. Therefore, for leaves under the CFRA, there is no requirement that treatment occur "within 30 days of the first day of incapacity," nor is there a requirement that "the first or only-in person treatment visit must take place within seven days of the first day of incapacity." *See 29 C.F.R. § 825.114 (1995).*

(n54)Footnote 27.12. *29 C.F.R. § 825.115(a)(4).*

(n55)Footnote 27.13. *29 C.F.R. § 825.115(b). See also 29 C.F.R. § 825.120.*

(n56)Footnote 27.14. *29 C.F.R. § 825.115(c).*

(n57)Footnote 27.15. *29 C.F.R. § 825.115(c)(1).*

(n58)Footnote 27.16. *29 C.F.R. § 825.115(c)(2).*

(n59)Footnote 27.17. *29 C.F.R. § 825.115(c)(3).*

(n60)Footnote 27.18. *29 C.F.R. § 825.115(d).*

(n61)Footnote 27.19. *29 C.F.R. § 825.115(e).*

(n62)Footnote 27.20. *29 C.F.R. § 825.115(f).*

(n63)Footnote 28. *Marchisheck v. San Mateo County (9th Cir. 1999) 199 F.3d 1068 , petition for cert. filed, 4-11-00.*

(n64)Footnote 29. *See Marchisheck v. San Mateo County (9th Cir. 1999) 199 F.3d 1068, 1074-1076 , petition for cert. filed, 4-11-00.*

(n65)Footnote 30. *Scamihorn v. Gen. Truck Drivers, Local 952 (9th Cir. 2002) 282 F.3d 1078 .*

(n66)Footnote 31. *Seidle v. Provident Mutual Life Insurance Co. (E.D. Pa. 1994) 871 F. Supp. 238, 243-246 .*

(n67)Footnote 32. *Brannon v. Oshkosh B'Gosh, Inc. (M.D. Tenn. 1995) 897 F. Supp. 1028 .*

(n68)Footnote 32.1. *29 C.F.R. § 825.125(a).*

(n69)Footnote 32.2. *29 C.F.R. § 825.125(b)(1).*

(n70)Footnote 32.3. *29 C.F.R. § 825.125(b)(2).*

(n71)Footnote 32.4. *29 C.F.R. § 825.125(b)(3).*

(n72)Footnote 32.5. *29 C.F.R. § 825.125(b)(4).*

(n73)Footnote 32.6. *29 C.F.R. § 825.125(b)(5).*

(n74)Footnote 32.7. *29 C.F.R. § 825.125(b)(6).*

(n75)Footnote 33. *29 U.S.C. § 2653; 2 Cal. Code Reg. § 7297.5(a).*

(n76)Footnote 34. *See 29 C.F.R. § 825.207(c).*

(n77)Footnote 35. *See § 8.26, below.*

(n78)Footnote 35.1. *See 29 C.F.R. § 825.126, governing leaves under FMLA because of qualifying exigency.*

(n79)Footnote 36. *29 U.S.C. § 2612(a)(1)(E).*

(n80)Footnote 37. *29 U.S.C. § 2613(f). See 29 C.F.R. § 825.309.*

(n81)Footnote 38. *29 U.S.C. § 2611(14).*

(n82)Footnote 39. [Reserved]

(n83)Footnote 40. *29 U.S.C. § 2612(b); 29 C.F.R. §§ 825.202(d) and 825.203. For discussion of intermittent or reduced leave, see § 8.24[2], below.*

(n84)Footnote 41. *29 U.S.C. § 2612(e)(3). For discussion of employees' notice requirements under FMLA generally, see § 8.25[2], below.*

(n85)Footnote 42. *See § 8.26, below.*

(n86)Footnote 43. *See 29 U.S.C. § 2611(17) (defining "next of kin" for these purposes as nearest blood relative of*

individual). *See also* 29 C.F.R. § 825.127(b) (defining "son or daughter" and "parent" of covered service member to include *in loco parentis* status, and defining "next of kin").

(n87)Footnote 44. 29 U.S.C. § 2612(a)(3). *See also* 29 C.F.R. § 825.127.

(n88)Footnote 45. 29 U.S.C. § 2612(a)(3).

(n89)Footnote 46. *See* [a] *above*.

(n90)Footnote 47. 29 U.S.C. § 2612(a)(4). *See also* 29 C.F.R. § 825.127(c).

(n91)Footnote 48. 29 U.S.C. § 2612(a)(4).

(n92)Footnote 49. 29 U.S.C. § 2611(15).

(n93)Footnote 49.1. 29 U.S.C. § 2611(18).

(n94)Footnote 49.2. 29 U.S.C. § 2611(19).

(n95)Footnote 50. 29 U.S.C. § 2611(16); 29 C.F.R. § 825.127(a)(2).

(n96)Footnote 51. 29 U.S.C. § 2612(b). For discussion of intermittent or reduced leave, see § 8.24[2], *below*.

(n97)Footnote 52. 29 U.S.C. § 2612(d)(2)(B). For discussion of pay during sick or medical leave generally, see § 8.28[2], *below*.

(n98)Footnote 53. 38 U.S.C. § 4301 *et seq.* For discussion of USERRA generally, *see* § 40.24.

(n99)Footnote 54. 29 C.F.R. § 825.702(g). *See* 29 C.F.R. § 825.110(b)(2)(i), (c)(2).



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part C. FAMILY CARE AND MEDICAL LEAVE

1-8 California Employment Law § 8.22

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.22 Covered Employers

[1] Under FMLA

Under FMLA, an "employer" is any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees within 75 miles for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.ⁿ¹ The "engaged in commerce" requirement differs from CFRA, which has no such requirement.ⁿ² Also, unlike CFRA, FMLA includes in its definition of employer any person acting, directly or indirectly, in the interest of an employer toward any of the employees of that employer, any successor in interest to an employer, and any public agency.ⁿ³

In determining whether an employer has employed 50 or more employees for each working day for 20 calendar workweeks, Department of Labor regulations provide that each employee whose name appears on the employer's payroll during a given calendar week will be counted as being employed during each day of that week, regardless of whether he or she received any compensation for that week.ⁿ⁴ Furthermore, it is not necessary that every employee actually perform work on each working day.ⁿ⁵ Finally, because FMLA uses a "continuing employment relationship" principle,ⁿ⁶ part-time employees and employees on paid or unpaid leave are counted, as long as there is a reasonable expectation that the employee will later return to active employment. Employees that are laid off, however, are not counted.ⁿ⁷ FMLA regulations provide examples of when an employer satisfies the 50-employee/20-workweek test for purposes of determining whether an employer is covered by FMLA.ⁿ⁸

When two or more businesses exercise some control over the work or working conditions of an employee, the businesses may be joint employers under the FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. When the employee performs work that simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in the following situations:ⁿ⁹

- (1) The employers have an arrangement to share an employee's services or to interchange employees;

- (2) One employer acts directly or indirectly in the interest of the other employer in relation to the employee;
- (3) The employers are not completely disassociated with respect to the employee's employment and may be deemed to share direct or indirect control of the employee, because one employer controls, is controlled by, or is under common control with the other employer.

Whether a joint employment relationship exists is not determined by the application of any single criterion. The entire relationship is viewed in its totality. For example, joint employment will ordinarily be found when a temporary or leasing agency supplies employees to a second employer.ⁿ¹⁰ The Department of Labor has promulgated a new rule^{n10.1} to clarify how the joint employment rules apply to "Professional Employer Organizations" (PEOs). PEOs that contract with client employers merely to perform administrative functions--including payroll, benefits, regulatory paperwork, and updating employment policies--are not joint employers with their clients, provided that they do not have the right to exercise control over the activities of the client's employees, and do not have the right to hire, fire or supervise them, or determine their rates of pay, and that they do not benefit from the work the employees perform. On the other hand, if a particular PEO has the right to hire, fire, assign, or direct and control the employees, or benefits from the work that the employees perform, that PEO would be a joint employer with the client employer. The Department has also changed the determination of the "worksite" for purposes of employee eligibility with respect to employees who are placed by a primary employer at the worksite of a secondary employer for more than 12 months.^{n10.2} In joint employment relationships, only the primary employer is responsible for giving required notices to employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the primary employer include authority/responsibility to hire and fire, assign/place the employee, make payroll and provide employment benefits.ⁿ¹¹ If a joint employment relationship exists, employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employers' payroll, in determining employer coverage and employee eligibility under the FMLA.ⁿ¹²

In *Moreau v. Air France*,ⁿ¹³ the Ninth Circuit addressed the issue of joint employment under the FMLA for the first time. In doing so, the court looked to joint employer cases arising under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act.ⁿ¹⁴ The court found that under the totality of circumstances and economic realities, Air France was not a joint employer with a company providing ground handling services at San Francisco International Airport, such as ramp and towing service, baggage handling, and aircraft cleaning; a company providing catering services for return flights to France; or a company providing cargo handling services, and thus was not subject to the FMLA as to its San Francisco International Airport employees.ⁿ¹⁵ Air France did not directly control any of the other companies' employees. Indirect supervision or control exercised to ensure compliance with safety and security regulations is not control or supervision of employees so as to constitute joint employment.ⁿ¹⁶

Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it no longer has employed 50 employees for 20 workweeks in the current and preceding calendar year.ⁿ¹⁷ The Department of Labor views employer manipulation of workforce levels in an effort to deny employees' eligibility for leave as a violation of the FMLA.ⁿ¹⁸

States and state agencies are subject to private actions for violation of the provisions of the FMLA regarding sick leave to care for family members.ⁿ¹⁹

[2] Under CFRA

Under CFRA, a "covered employer" is any person or individual engaged in any business or enterprise in California who directly employs 50 or more persons within any state of the United States, the District of Columbia, or any U.S. territory or possession.ⁿ²⁰ Unlike the FEHA, CFRA does not exempt religious nonprofit organizations from the definition of

employer. The CFRA definition of employer also includes state and local government employers, but not federal employers.ⁿ²¹ There is no requirement that the 50 employees work at the same location (rather, the requirement is only that they be employed within a 75-mile radius),ⁿ²² or that they work full time.ⁿ²³ The employer must maintain an aggregate of at least 50 part-time or full-time employees on its payroll for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year (i.e., the calendar year in which the employee requests the leave or the calendar year preceding the request).ⁿ²⁴ The workweeks need not be consecutive.

The CFRA is silent on the issue of joint employment. Therefore, the FMLA regulations of 1995 govern.ⁿ²⁵ The 1995 FMLA regulations did not specifically address the treatment of PEOs.ⁿ²⁶ Consequently, for leaves under the CFRA, the question of whether a PEO is a joint employer should be analyzed in accordance with the test laid out in the 1995 FMLA regulations.ⁿ²⁷ The 1995 regulations also did not contain the new FMLA regulations' revised definition of "worksites."ⁿ²⁸ Accordingly, for purposes of leave under the CFRA, joint employment should be analyzed under the 1995 FMLA regulations' definition of worksite which provided, in relevant part, "when an employee is jointly employed by two or more employers (citation omitted), the employee's worksite is the primary employer's office from which the employee is assigned or reports."ⁿ²⁹

Legal Topics:

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

Labor & Employment Law
Leaves of Absence
Family & Medical Leave Act
General Overview
Labor & Employment Law
Leaves of Absence
Family & Medical Leave Act
Coverage & Definitions
General Overview
Labor & Employment Law
Wage & Hour Laws
General Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 2611(4)(A)(i), (2)(B)(ii); 29 C.F.R. §§ 825.104, 825.105.

(n2)Footnote 2. See [2], *below*.

(n3)Footnote 3. 29 U.S.C. § 2611(4)(A)(ii), (B); see 29 C.F.R. § 825.104; U.S. Dept. of Labor, Wage and Hour Div. Summary of Major Comments on 29 C.F.R. § 825.104; 29 C.F.R. § 825.108 (definition of "public agency"). *But cf.* Gov. Code § 12945.2(c)(2); 2 Cal. Code Reg. § 7297.0(d) (CFRA definition).

(n4)Footnote 4. 29 C.F.R. § 825.105(b)-(e).

(n5)Footnote 5. U.S. Dept. of Labor, Wage and Hour Div. Summary of Major Comments on 29 C.F.R. § 825.105; see also 29 C.F.R. § 825.105.

(n6)Footnote 6. U.S. Dept. of Labor, Wage and Hour Div. Summary of Major Comments on 29 C.F.R. § 825.105 and 29 C.F.R. § 825.105.

(n7)Footnote 7. See 29 C.F.R. § 825.105(c).

(n8)Footnote 8. See 29 C.F.R. § 825.105(f).

(n9)Footnote 9. 29 C.F.R. § 825.106(a).

(n10)Footnote 10. 29 C.F.R. § 825.106(b).

(n11)Footnote 10.1. 29 C.F.R. § 825.106(b)(2).

(n12)Footnote 10.2. 29 C.F.R. § 825.111(a)(3).

(n13)Footnote 11. 29 C.F.R. § 825.106(c).

(n14)Footnote 12. 29 C.F.R. § 825.106(d).

(n15)Footnote 13. *Moreau v. Air France* (9th Cir. 2003) 343 F.3d 1179 .

(n16)Footnote 14. See *Bonnette v. Cal. Health and Welfare Agency* (9th Cir. 1983) 704 F.2d 1465 (FLSA); *Torres-Lopez v. May* (9th Cir. 1997) 111 F.3d 633 (AWPA); *Zhao v. Bebe Stores, Inc.* (C.D. Cal. 2003) 247 F. Supp. 2d 1154 (FLSA).

(n17)Footnote 15. *Moreau v. Air France* (9th Cir. 2003) 343 F.3d 1179, 1188-1191 .

(n18)Footnote 16. *Moreau v. Air France* (9th Cir. 2003) 343 F.3d 1179, 1188-1189 .

(n19)Footnote 17. 29 C.F.R. § 825.105(f); 29 C.F.R. § 825.110(d), (f).

(n20)Footnote 18. 29 C.F.R. § 825.220(b); see also U.S. Dept. of Labor, Wage and Hour Div. Summary of Major Comments on 29 C.F.R. § 825.104.

(n21)Footnote 19. See *Nev. Dep't of Human Res. v. Hibbs* (2003) 538 U.S. 721 (congressional intent to abrogate state sovereign immunity is sufficiently clear, and Congress validly exercised its power under *U.S. Const., Amend. XIV*, § 5 when it gave state employees right to sue their employers for violations of 29 U.S.C. § 2612(a)(1)(C)).

(n22)Footnote 20. 2 Cal. Code Reg. § 7297.0(d); Gov. Code § 12945.2(c)(2)(A).

(n23)Footnote 21. 2 Cal. Code Reg. § 7297.0(d); Gov. Code § 12945.2(c)(2)(B).

(n24)Footnote 22. 2 Cal. Code Reg. § 7297.0(e)(3)(A).

(n25)Footnote 23. 2 Cal. Code Reg. § 7297.0(d).

(n26)Footnote 24. 2 Cal. Code Reg. § 7297.0(d)(1).

(n27)Footnote 25. See 2 Cal. Code Regs. tit. § 7297.10.

(n28)Footnote 26. See 29 C.F.R. § 825.106 (1995).

(n29)Footnote 27. See 29 C.F.R. § 825.106 (1995).

(n30)Footnote 28. See 29 C.F.R. § 825.111 (1995).

(n31)Footnote 29. See 29 C.F.R. § 825.111(a)(3) (1995).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part C. FAMILY CARE AND MEDICAL LEAVE

1-8 California Employment Law § 8.23

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.23 Eligible Employees

[1] Under FMLA

FMLA covers employees who (1) work for a covered employer; (2) have been employed by the employer for at least twelve months; (3) have been employed by the employer for at least 1,250 hours during the 12-month period preceding the leave; and (4) are employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.ⁿ¹ The 12-month qualifying period for employment need not be consecutive.ⁿ² However, even though the 12 months of employment need not be consecutive, employment prior to a continuous break in service of seven years or more need not be counted.^{n2.1} On the other hand, employment periods preceding a break in service of more than seven years must be counted in determining whether the employee has been employed by the employer for at least 12 months in the following situations:^{n2.2}

- The employee's break in service is occasioned by the fulfillment of a National Guard or Reserve military service obligation. The time served performing the military service must be also counted in determining whether the employee has been employed for at least 12 months by the employer. However, this does not provide any greater entitlement to the employee than would be available under the Uniformed Services Employment and Reemployment Rights Act (USERRA).^{n2.3}

- A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service, such as for purposes of the employee furthering his or her education or for childrearing purposes.

If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer, such as workers' compensation, group health plan benefits, etc., the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as "at least 12 months," 52 weeks is deemed to be equal to 12 months.^{n2.4} Nothing prevents employers from considering employment prior to a continuous break in service of more

than seven years when determining whether an employee has met the 12-month employment requirement. However, if an employer chooses to recognize prior employment, the employer must do so uniformly, with respect to all employees with similar breaks in service.^{n2.5} The FMLA requires covered employers to maintain records for three years.^{n2.6} Employers would have documentation to confirm previous employment for a former employee who at the time of rehiring had a break in service of three years or less. When an employee relies on a period of employment that predates the employer's records, it will be incumbent upon the employee to put forth some proof of the prior employment, consistent with the employee's obligation to establish he or she is an eligible employee.^{n2.7}

The terms "employ" and "employee" have the same meaning as under the Fair Labor Standards Act (FLSA).ⁿ³ Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the FLSA for determining compensable hours of work.ⁿ⁴ The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used.ⁿ⁵ However, pursuant to USERRA,ⁿ⁶ an employee returning from fulfilling a National Guard or Reserve military obligation must be credited with the hours of service that would have been performed but for the period of military service in determining whether the employee worked the 1,250 hours of service. Accordingly, a person reemployed following military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250-hour requirement. In order to determine the hours that would have been worked during the period of military service, the employee's pre-service work schedule can generally be used for calculations.ⁿ⁷ In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked, such as bona fide executive, administrative, and professional employees as defined in FLSA Regulations, the employer has the burden of showing that the employee has not worked the requisite hours. An employer must be able to clearly demonstrate, for example, that full-time teachersⁿ⁸ of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution, who often work outside the classroom or at their homes, did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not eligible for FMLA leave.^{n8.1}

The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start. An employee may be on "non-FMLA leave" at the time he or she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be "FMLA leave."^{n8.2}

Whether at least 50 employees are employed within 75 miles of the worksite of the employee requesting leave is determined as of the time the employee gives notice of the need for leave. Once an employer determines that the employee is eligible, that eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the worksite with regard to that specific leave request.ⁿ⁹ A worksite can refer to a single location or a group of contiguous locations; and separate buildings not directly connected are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment.ⁿ¹⁰ For employees who work at no fixed worksite (such as construction workers, travelling salespersons), a "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report.ⁿ¹¹ The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways, and waterways, by the shortest route from the facility where the employee requesting FMLA leave is employed.ⁿ¹² Absent available surface transportation, the distance is measured by using the most frequently used mode of transportation, for example, airline miles. The determination of how many employees are employed within 75 miles of the employee's worksite is based on the number of employees maintained on the payroll.ⁿ¹³

[2] Under CFRA

CFRA covers full-time or part-time employees working in California who (1) have been employed by the employer for more than twelve months (52 weeks) at any time (i.e., not necessarily consecutive weeks); (2) have been employed by the employer for at least 1,250 hours during the 12-month period preceding the leave; and (3) who are employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.ⁿ¹⁴ CFRA eligibility requirements therefore follow FMLA requirements for employee eligibility, except that CFRA requires that the employee have worked for the employer for more than twelve months, whereas FMLA only requires that the employee have worked for the employer for at least twelve monthsⁿ¹⁵ (i.e., CFRA requires one more day of employment than FMLA).

Legal Topics:

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

Labor & Employment Law Leaves of Absence Family & Medical Leave Act General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 2611(2); 29 C.F.R. § 825.110(a).

(n2)Footnote 2. 29 C.F.R. § 825.110(b).

(n3)Footnote 2.1. 29 C.F.R. § 825.110(b)(1).

(n4)Footnote 2.2. 29 C.F.R. § 825.110(b)(2).

(n5)Footnote 2.3. 38 U.S.C. 4301 *et seq.*

(n6)Footnote 2.4. 29 C.F.R. § 825.110(b)(3).

(n7)Footnote 2.5. 29 C.F.R. § 825.110(b)(4).

(n8)Footnote 2.6. 29 C.F.R. 825.500(b).

(n9)Footnote 2.7. *See Novak v. MetroHealth Medical Center* (6th Cir. 2007) 503 F.3d 572, 577 ; *Burnett v. LFW, Inc.* (7th Cir. 2006) 472 F.3d 471, 477 .

(n10)Footnote 3. 29 U.S.C. § 2611(3); *see* 29 C.F.R. §§ 825.105(a), 825.110(c); *see also* 29 U.S.C. § 203(e) (definition of "employee" under FLSA). For discussion of who is a covered employee under the FLSA, *see* ch. 1.

(n11)Footnote 4. 29 C.F.R. § 825.110(c)(1).

(n12)Footnote 5. 29 C.F.R. § 825.110(c)(1).

(n13)Footnote 6. For discussion of USERRA generally, *see* § 40.24.

(n14)Footnote 7. 29 C.F.R. § 825.110(c)(2).

(n15)Footnote 8. *See* 29 C.F.R. § 825.800 (defining full-time teachers).

(n16)Footnote 8.1. 29 C.F.R. § 825.110(c)(3).

(n17)Footnote 8.2. 29 C.F.R. § 825.110(d). *See* 29 C.F.R. § 825.300(b) for rules governing content of eligibility

notice given to employees.

(n18)Footnote 9. *29 C.F.R. § 825.110(f)*.

(n19)Footnote 10. *29 C.F.R. § 825.111(a)(1)*.

(n20)Footnote 11. *29 C.F.R. § 825.111(a)(2)*.

(n21)Footnote 12. *29 C.F.R. § 825.111(b)*.

(n22)Footnote 13. *29 C.F.R. § 825.111(c)*.

(n23)Footnote 14. *Gov. Code § 12945.2(a), (b)*; *see 2 Cal. Code Reg. § 7297.0(e)*. For the standard jury instruction on the employees eligibility to assert a claim under CFRA, *see* CACI 2601. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n24)Footnote 15. *See* discussion in [1], *above*.



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
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1-8 California Employment Law § 8.24

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.24 Duration of Leave

[1] Calculation of 12-Week and 12-Month Periods

[a] Method of Calculation

Both CFRA and FMLA allow an eligible employee to take up to twelve workweeks of leave within any 12-month period.ⁿ¹

Twelve workweeks means the equivalent of twelve of the employee's normally scheduled workweeks.ⁿ² For purposes of determining the amount of leave used by an employee, holidays falling within a week taken of family care leave are counted as part of the leave, but time during which the employer's business activities have ceased (e.g., schools closing for vacation, plant closing for repairs or retooling) are not counted.ⁿ³ The 12-week maximum under CFRA does not include pregnancy disability leave,ⁿ⁴ which is a separate entitlement of up to four months, in addition to CFRA leave.ⁿ⁵

Both CFRA and FMLA provide a choice of the following four methods for measuring the 12-month period from which the employer may choose, so long as the method chosen is uniformly and consistently applied to all employees:ⁿ⁶

- The calendar year.
- Any fixed 12-month "leave year," such as the fiscal year, a year required by state law, or a year starting on an employee's "anniversary" date.
- The 12-month period measured forward from the date on which the employee begins his or her first leave.
- A "rolling" 12-month period measured backward from the date that an employee uses any leave.

■ CONSULTANT'S COMMENT:

How the 12-month period is calculated has significant ramifications. For instance, if the period is calculated on a fixed 12-month period, such as a calendar or fiscal year, then an employee could be entitled to two 12-week leaves within a short span of time. For example, assume that the 12-month period is calculated on a calendar year basis and that an employee takes 12 weeks of leave from October to December of Year 1. The employee could then be eligible for an additional 12 weeks of leave starting in January of Year 2.ⁿ⁷

The CFRA and FMLA regulations, however, specifically permit employers to prohibit employees from stacking leave as described above, by calculating leaves backward on a rolling basis. The regulations specify that if the 12-month period is "rolling," i.e., measured backward from the date on which the employee uses any leave, then each time an employee takes leave for any purpose, the remaining leave entitlement would be the balance of the 12 weeks that has not been used during the immediately preceding 12 months.ⁿ⁸ Assume that an employee takes 8 weeks of leave from October 1 through December 1 of Year 1. If the employee requests additional leave at any time between October 1 of Year 1 and October 1 of Year 2, the 8 weeks of leave that the employee took beginning on October 1 of Year 1 is counted against the employee's leave entitlement. A leave scheduled to begin in May of Year 2, for example, could not be for more than 4 weeks. But if the employee had used all of his or her 12-week entitlement commencing in October of Year 1, he or she would not be entitled to any further leave until October of Year 2. Assume that an employee has taken 8 weeks of leave beginning in October of Year 1 and 4 weeks of leave beginning in May of Year 2. In October of Year 2, the employee would be eligible to take 8 weeks of leave. In May of Year 3, the employee would be eligible to take 4 weeks of leave.ⁿ⁹ *Commentary by Kirby Wilcox.*

■ CONSULTANT'S COMMENT:

In *Bachelder v. America West Airlines, Inc.*,ⁿ¹⁰ the employer terminated the plaintiff for taking time off that qualified as FMLA leave. The plaintiff characterized the employer's action as retaliation, on the theory that the employer had taken an adverse action (termination) in response to the plaintiff's exercise of a protected right (using leave time). The court, however, found that the employer's actions constituted interference, not retaliation, on the theory that the employer simply denied the exercise of lawful rights. Even though *Bachelder* drew this distinction to make a point about burdens of proof in interference cases (on the one hand) and retaliation and discrimination cases (on the other hand), the logic of *Bachelder* extends further. Often, plaintiffs allege that an employer's conduct was retaliation, thereby permitting the addition of individual defendants and avoiding removal to federal court. However, many times the conduct of which a plaintiff complains is nothing more than interference with a protected right, not retaliation. For example, if a plaintiff seeks an accommodation for a disability and is terminated because no such accommodation can be found, the adverse action is not retaliation. It is, at most, discrimination.

Bachelder is powerful authority for ensuring that trial courts are able to discern retaliation from interference. By making that distinction clear, the decision insures that only those individual defendants who truly belong in case will remain. *Commentary by Kirby Wilcox.*

[b] Notice

The regulations allowing employers to choose among four methods for calculating employees' eligibility for FMLA leaveⁿ¹¹ do not specifically state how an employer must communicate its choice to the employees. However, the regulations do require covered employers who provide written guidance to employees concerning employee benefits or leave rights, such as employee handbook discussions, to incorporate in the handbook information on FMLA rights and responsibilities and the employer's FMLA policies.ⁿ¹² Employers who do not have employee handbooks must provide written guidance to employees concerning all of their rights and obligations under the FMLA.ⁿ¹³ This includes the

employer's method of calculating the use of FMLA leave, which necessarily requires the designation of one of the four permissible leave years.ⁿ¹⁴ By failing to provide notice, an employer fails to select a calculation method; in a dispute without a noticed calculation method, the method with the most beneficial outcome for the employee will be used.ⁿ¹⁵

An employer wishing to change to a different method for calculating FMLA leave eligibility must give at least 60 days' notice to all employees. The transition must take place so that employees retain the full benefit of 12 weeks' leave under whichever method affords the greatest benefit to the employee.ⁿ¹⁶ If an employer initially has failed to select a calculation method, the employer may subsequently select a method only by providing all employees 60 days' notice of the method the employer intends to implement. For any leave request made before the employer has selected a calculation method, the employer may properly be held to the rule that the option providing the most beneficial outcome for the employee must be used.ⁿ¹⁷

■ CONSULTANT'S COMMENT:

In *Bachelder v. America West Airlines, Inc.*,ⁿ¹⁸ the court held that an employer has an obligation to give employees advance notice of the type of leave year that it has chosen for the calculation of leave entitlement. Many employers provide such advance notice in the form of FMLA leave policies in employee handbooks. It is not sufficient, however, to indicate simply that an employee is entitled to twelve weeks of leave in twelve months. *Bachelder* requires that employers inform employees of the precise leave year that the employer has chosen for its FMLA leave program (from the present back, from the present forward, the calendar year, or any other twelve-month period). Theoretically, employers who inform employees of their leave rights only through letters issued at the start of the leave meet the advance notice requirement, so long as the letter clearly defines the applicable leave year. *Commentary by Kirby Wilcox*

[2] Intermittent or Reduced Leave

CFRA and FMLA leave may be taken intermittently or on a "reduced leave schedule" under certain circumstances.ⁿ¹⁹ Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason.^{n19.1} A "reduced leave schedule" means a leave schedule that reduces an employee's usual number of working hours per workweek or hours per workday.^{n19.2} A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.ⁿ²⁰ Leave may be taken intermittently or on a reduced leave schedule when medically necessary for treatment of a serious health condition, to care for a member of the Armed Forces,^{n20.1} for recovery from treatment from a serious health condition, or to provide care or psychological comfort to an immediate family member with a serious health condition.ⁿ²¹

An employee's intermittent leave or a reduced leave schedule necessary to care for a family member or covered military servicemember includes not only a situation in which the condition of the family member or covered servicemember itself is intermittent, but also when the employee is only needed intermittently, such as when other care is normally available, or care responsibilities are shared with another member of the family or a third party.ⁿ²²

Under the FMLA, if an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.ⁿ²³ On the other hand, unless and until the CFRA is amended to incorporate the new FMLA regulations, California employees can only be required to make an "attempt" (rather than a "reasonable effort") to schedule treatment to avoid unduly disrupting the employer's operations.^{n23.1}

The employer must account for leave on an intermittent or reduced leave schedule basis using an increment no greater than the shortest period of time the employer uses to account for use of other forms of leave, provided that it is not greater than one hour and that an employee's FMLA leave entitlement may not be reduced by more than the amount of leave actually taken. If an employer accounts for use of leave in varying increments at different times of the day or shift,

the employer may not account for FMLA leave in a larger increment than the shortest period used to account for other leave during the period in which the FMLA leave is taken. If an employer accounts for other forms of leave use in increments greater than one hour, the employer must account for FMLA leave use in increments no greater than one hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave. For example, an employer that accounts for other forms of leave in one-hour increments may account for FMLA leave in a shorter increment when the employee arrives at work several minutes late, and the employer wants the employee to begin work immediately. Accounting for FMLA leave will not alter the increment considered to be the shortest period used to account for other forms of leave or the use of FMLA leave in other circumstances.ⁿ²⁴ If it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as when a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, the entire period the employee is forced to be absent is designated as FMLA leave and counts against the employee's FMLA entitlement.ⁿ²⁵

Only the amount of leave actually taken may be counted toward the employee's leave entitlement.ⁿ²⁶ The actual workweek is the basis of leave entitlement. Therefore, if an employee who would otherwise work 40 hours a week takes off 8 hours, the employee would use 1/5th of a week of FMLA leave. Similarly, if a full-time employee who would otherwise work 8-hour days works 4-hour days under a reduced leave schedule, the employee would use 1/2 of a week of FMLA leave. When an employee works a part-time schedule or variable hours, the amount of FMLA leave that an employee uses is determined on a pro rata or proportional basis. For example, if an employee would otherwise work 30 hours per week, but works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute 1/3 of a week of FMLA leave for each week the employee works the reduced leave schedule. An employer may convert these fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours.^{n26.1} If an employer has made a permanent or long-term change in the employee's schedule for reasons other than FMLA, and prior to the notice of need for FMLA leave, the hours worked under the new schedule are to be used for making this calculation.^{n26.2} If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked but for the taking of FMLA leave, the employer may use a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period, including any hours for which the employee took leave of any type, for calculating the employee's leave entitlement.^{n26.3} If an employee would normally be required to work overtime, but is unable to do so because of a FMLA-qualifying reason that limits the employee's ability to work overtime, the hours the employee would have been required to work may be counted against the employee's FMLA entitlement. In that case, the employee is using intermittent or reduced schedule leave. For example, if an employee would normally be required to work for 48 hours in a particular week, but due to a serious health condition the employee is unable to work more than 40 hours that week, the employee would utilize eight hours of FMLA-protected leave out of the 48-hour workweek ($8/48 = 1/6$ workweek). Voluntary overtime hours an employee does not work due to a serious health condition may not be counted against the employee's FMLA leave entitlement.^{n26.4}

Leave for the birth, adoption, or foster-care placement of a child of the employee may also be taken intermittently or on a reduced leave schedule under both CFRA and FMLA,ⁿ²⁷ but different rules apply. Under FMLA, the employer's agreement is not required if the intermittent or reduced leave is taken for the serious health condition of the mother in connection with the birth of her child or if the newborn child has a serious health condition. If there is no serious health condition of the mother or child involved, the employer's agreement is required for intermittent or reduced leave for birth, adoption, or foster-care placement.ⁿ²⁸ Under CFRA, the basic minimum duration for leave for birth, adoption, or foster care placement is two weeks; however, employers must grant a request for leave of less than two weeks' duration on any two occasions.ⁿ²⁹ Under both CFRA and FMLA, such leave must be concluded within one year of the birth or placement of the child with the employee.ⁿ³⁰ As noted above, under California law, there is a separate four-month pregnancy disability leave available in addition to either CFRA leave or leave on the same basis as other workers under Title VII.ⁿ³¹

An employer may require an employee who needs intermittent leave or leave on a reduced leave schedule to transfer temporarily to a different job that has the equivalent pay and benefits (though not necessarily equivalent duties) that can better accommodate recurring periods of leave.ⁿ³² The employer may not transfer an employee to an alternative position to discourage the employee from taking leave or to otherwise work a hardship on the employee.ⁿ³³ When there is no longer an employee need for intermittent or reduced schedule leave, the employer must transfer the employee back to his or her original position.ⁿ³⁴

[3] Special Rules Regarding Spouses/Parents Working for Same Employer

Under FMLA, a husband and wife employed by the same employer are limited to a combined total of twelve weeks of leave during any 12-month period (1) for the birth of a son or daughter or to care for the child after birth; (2) for placement of a son or daughter with the employees in connection with adoption or foster care or for care after such placement;^{n34.1} or (3) to care for an employee's parent with a serious health condition.ⁿ³⁵ The Department of Labor has explained that the legislative history of FMLA manifested an intent to eliminate any employer incentive to refuse to hire married couples.ⁿ³⁶ Any portion of FMLA entitlement beyond what is used for the purposes enumerated above is available individually to the husband and wife for leave to be taken for any nonrestricted purposes.ⁿ³⁷ Moreover, the restriction does not apply to leave to care for the serious health condition of an employee's spouse, son, or daughter, or the employee's own serious health condition.

■ ILLUSTRATION

Husband and Wife, both employed by the same employer, each take six weeks' leave to care for their newborn, healthy child. This exhausts their leave entitlement for the year to care for the healthy child. However, each spouse remains eligible for an additional six weeks' leave to care for the child if the child develops a serious health condition.ⁿ³⁸

With regard to the special leave rules for the family members of members of the Armed Forces,^{n38.1} the FMLA provides that, for an employer who employs both spouses, the aggregate number of workweeks of leave to which both spouses may be entitled may be limited to 26 workweeks during a single 12-month period if the leave is for the family member to care for the servicemember who has a serious injury or illness or is a combination of that type of leave and leave (a) to care for a child after birth, (b) for placement of a son or daughter in connection with adoption or foster care or for care after the placement, or (c) to care for a parent with a serious health condition. If the leave taken by the spouses includes leave other than to care for a servicemember with a serious injury or illness, the limitation for leave of that type applies to that leave.^{n38.2}

There is a conflict between CFRA and FMLA because CFRA places a limit of a combined total of 12 workweeks on "parents" (rather than a "husband and wife") working for the same employer in connection with the birth, adoption, or foster care of a child.ⁿ³⁹ The Fair Employment and Housing Commission apparently took the position that placing a restriction solely on husbands and wives would constitute discrimination on the basis of marital status in violation of *Government Code Section 12940(a)*.ⁿ⁴⁰ Thus, parents who are married may have different family care leave rights from unmarried parents under CFRA and FMLA.ⁿ⁴¹

Another conflict between the CFRA and the FMLA relates to leave to care for a parent with a serious health condition. Under the CFRA, employers may only limit parents employed by the same employer to a combined total of 12 workweeks of leave for the birth, adoption, or foster care placement of their child.ⁿ⁴² Under the FMLA, in addition to limiting leave for birth, adoption or foster care placement, employers may limit spouses employed by the same company to 12 workweeks of leave to care for a parent with a serious health condition.ⁿ⁴³

Legal Topics:

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

Labor & Employment Law Leaves of Absence General Overview Labor & Employment Law Leaves of Absence Family & Medical Leave Act General Overview Labor & Employment Law Wage & Hour Laws General Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 2612(a)(1); 29 C.F.R. §§ 825.100(a), 825.200(a); Gov. Code § 12945.2(a); 2 Cal. Code Reg. § 7297.0(h).

(n2)Footnote 2. 29 C.F.R. § 825.200(f); 2 Cal. Code Reg. §§ 7297.0(q), 7297.3(c).

(n3)Footnote 3. 29 C.F.R. § 825.200(f); 2 Cal. Reg. § 7297.3(c)(3).

(n4)Footnote 4. See Gov. Code § 12945.2(c)(3)(C).

(n5)Footnote 5. See discussions in §§ 8.12[1][a], 8.21[1], [2][a].

(n6)Footnote 6. 29 C.F.R. § 825.200(b), (d); 2 Cal. Code Reg. § 7297.3(b); *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1126 (FMLA).

(n7)Footnote 7. See 29 C.F.R. § 825.200(c); *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1126 (FMLA).

(n8)Footnote 8. See 29 C.F.R. § 825.200(c); *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1126 (FMLA); see also 2 Cal. Code Reg. § 7297.3(b).

(n9)Footnote 9. See 29 C.F.R. 825.200(c).

(n10)Footnote 10. *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1126 .

(n11)Footnote 11. See [a], above.

(n12)Footnote 12. 29 C.F.R. § 825.301(a)(1); see *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1127 (employer who has employee handbook is bound by § 825.301(a)(1)).

(n13)Footnote 13. 29 C.F.R. § 825.301(a)(2).

(n14)Footnote 14. *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1129 .

(n15)Footnote 15. *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1129-1130 (statement in employee handbook to effect that employees are entitled to up to twelve calendar weeks of unpaid FMLA leave within any twelve month period lacked sufficient notice that employer used rolling method for calculating leave eligibility because it simply parroted language of Act; inasmuch as employer failed to fulfill obligation to inform employees of choice of rolling method, it failed to select calculation method, and calendar year option--the most beneficial for employee--was used instead).

(n16)Footnote 16. 29 C.F.R. § 825.200(d)(1).

(n17)Footnote 17. 29 C.F.R. § 825.200(e); *Bachelder v. Am. W. Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1128 .

(n18)Footnote 18. *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1126 .

(n19)Footnote 19. 29 U.S.C. § 2612(b); 29 C.F.R. § 825.202(a); Gov. Code § 12945.2(p); 2 Cal. Code Reg. §

7297.3(a).

(n20)Footnote 19.1. 29 *C.F.R.* § 825.202(a).

(n21)Footnote 19.2. 29 *C.F.R.* § 825.202(a).

(n22)Footnote 20. 29 *C.F.R.* § 825.202(a).

(n23)Footnote 20.1. *See* § 8.21[4].

(n24)Footnote 21. 29 *U.S.C.* § 2612(b)(1); *see* 29 *C.F.R.* § 825.202(a), (b) (discussing "medical necessity"); 2 *Cal. Code Reg.* § 7297.3(e).

(n25)Footnote 22. 29 *C.F.R.* § 825.124(c).

(n26)Footnote 23. 29 *C.F.R.* § 825.203.

(n27)Footnote 23.1. *See* 2 *Cal. Code Regs.* tit. § 7297.10; 29 *C.F.R.* § 825.117 (1995).

(n28)Footnote 24. 29 *C.F.R.* § 825.205(a)(1).

(n29)Footnote 25. 29 *C.F.R.* § 825.205(a)(2).

(n30)Footnote 26. 29 *C.F.R.* § 825.205(b)(1). *See also* 2 *Cal. Code Reg.* § 7297.3(c)(2).

(n31)Footnote 26.1. 29 *C.F.R.* § 825.205(b)(1). *See also* 29 *C.F.R.* §§ 825.601, 825.602 (special rules for schools).

(n32)Footnote 26.2. 29 *C.F.R.* § 825.205(b)(2).

(n33)Footnote 26.3. 29 *C.F.R.* § 825.205(b)(3).

(n34)Footnote 26.4. 29 *C.F.R.* § 825.205(c).

(n35)Footnote 27. 29 *C.F.R.* § 825.202(c); 2 *Cal. Code Reg.* § 7297.3(d).

(n36)Footnote 28. 29 *C.F.R.* § 825.202(c).

(n37)Footnote 29. 2 *Cal. Code Reg.* § 7297.3(d).

(n38)Footnote 30. 29 *C.F.R.* §§ 825.120(a)(2), 825.121(a)(2); 2 *Cal. Code Reg.* § 7297.3(d).

(n39)Footnote 31. *Gov. Code* § 12945(a); *see* discussion in § 8.12[1][b].

(n40)Footnote 32. 29 *U.S.C.* § 2612(b)(2); 29 *C.F.R.* § 825.204(a), (c); 2 *Cal. Code Reg.* § 7297.3(e)(1).

(n41)Footnote 33. 29 *C.F.R.* § 825.204(d).

(n42)Footnote 34. 29 *C.F.R.* § 825.204(e).

(n43)Footnote 34.1. 29 *U.S.C.* § 2612(f)(1); 29 *C.F.R.* §§ 825.120(a)(3), 825.121(a)(3).

(n44)Footnote 35. 29 *U.S.C.* § 2612(f)(1); 29 *C.F.R.* § 825.201(b).

(n45)Footnote 36. U.S. Dept. of Labor, Wage and Hour Div. Summary of Major Comments on 29 *C.F.R.* § 825.202. The Department of Labor is proposing to incorporate 29 *C.F.R.* § 825.202 into proposed 29 *C.F.R.* §§ 825.120

, 825.121. For discussion of the new proposed rules, see § 8.21[1].

(n46)Footnote 37. 29 *C.F.R.* §§ 825.120(a)(3), 825.121(a)(3), 825.201(b).

(n47)Footnote 38. See 29 *C.F.R.* §§ 825.120(a)(3), 825.121(a)(3), 825.201(b).

(n48)Footnote 38.1. See § 8.21[4], *above*.

(n49)Footnote 38.2. 29 *U.S.C.* § 2612(f)(2).

(n50)Footnote 39. *Gov. Code* § 12945.2(q) 2 *Cal. Code Reg.* § 7297.1(c).

(n51)Footnote 40. See discussion of marital status discrimination at § 41.36[2][b].

(n52)Footnote 41. See *Gov. Code* § 12945.2(q); 2 *Cal. Code Reg.* § 7297.1(c); for further discussion of the interaction between CFRA and FMLA, see § 8.20[1].

(n53)Footnote 42. See 2 *Cal. Code Regs.* tit. § 7297.1(c).

(n54)Footnote 43. 29 *C.F.R.* § 825.201(b).



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part C. FAMILY CARE AND MEDICAL LEAVE

1-8 California Employment Law § 8.25

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§ 8.25 Notice Requirements

[1] Employer's Notice Requirements

[a] Employer's Notice: Right to Ask for Leave

CFRA and FMLA each require the employer to prominently post a notice providing information regarding an employee's right to take family care leave. The notice must be posted in conspicuous places on the employer's premises where notices to employees and applicants are customarily posted.ⁿ¹ Under the FMLA, covered employers must post this notice even if no employees are eligible for FMLA leave.^{n1.1} Under CFRA, the employer's failure to give or post notice precludes the employer from taking any adverse action against the employee, including denying CFRA leave, for failing to furnish the employer with advance notice of a need to take CFRA leave.^{n1.2} The civil penalty for a willful violation of the posting requirement is \$110 for each separate violation under FMLA.ⁿ² CFRA regulations "encourage" employers to give a copy of the notice to each current and new employee and to otherwise disseminate the notice.ⁿ³ The statutory notice, however, may not be sufficient to inform employees of the method that the employer uses to calculate the 12-month period during which the employee can take up to 12 weeks' leave.ⁿ⁴

The Department of Labor and the FEHC have each provided form notices for use by employers,^{n4.1} but the CFRA notice is only a suggested notice, and an employer is free to develop its own notice that accurately reflects its own policy.ⁿ⁵ For CFRA, the text of the minimum notice requirements is provided in the California Code of Regulations.^{n5.1} If an employer's workforce is made up of a significant portion of workers who are literate in a language other than English, the employer must post the notice in a language in which the employees are literate.ⁿ⁶ Under the FMLA, employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.^{n6.1}

If an employer has an employee handbook or other written guidance for employees regarding employee benefits or rights, information concerning CFRA and FMLA entitlement must be included in that handbook or document.ⁿ⁷ Under the FMLA, the employer may provide a copy of the notice by distributing it to each new employee upon hiring.ⁿ⁸ In either case, distribution may be accomplished electronically.ⁿ⁹

Under the FMLA, when an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances.n9.1 Employee eligibility is determined and notice must be provided at the commencement of the first instance of leave for each FMLA-qualifying reason in the applicable 12-month period.n9.2 The eligibility notice must state whether the employee is eligible for FMLA leave.n9.3 If the employee is not eligible for FMLA leave, the notice must state at least one reason why the employee is not eligible.n9.4 Notification of eligibility may be oral or in writing.n9.5 If the employer is obligated to translate the general notice into one or more other languages, the employer must also translate the eligibility notice.n9.6 If, at the time an employee provides notice of a subsequent need for FMLA leave during the applicable 12-month period due to a different FMLA-qualifying reason, and the employee's eligibility status has not changed, no additional eligibility notice is required. If, however, the employee's eligibility status has changed, the employer must notify the employee of the change in eligibility status within five business days, absent extenuating circumstances.n9.7

[b] Employer's Notice: Rights and Responsibilities

Under the FMLA, employers are also required to provide written notice of rights and responsibilities, detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet the obligations.n9.8 If the employer is obligated to translate the general notice into one or more other languages, the employer must also translate this notice.n9.9 The employer must provide this notice to the employee each time the employer provides the eligibility notice.n9.10 If leave has already begun, the notice should be mailed to the employee's address of record. The notice must include the following, as appropriate:n9.11

- That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifyingn9.12 and the applicable 12-month period for FMLA entitlement.n9.13
- Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active duty status, and the consequences of failing to do so.n9.14
- The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not meet the conditions for paid leave.n9.15
- Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making the payments,n9.16 and the possible consequences of failure to make the payments on a timely basis, *i.e.*, the circumstances under which coverage may lapse.
- The employee's status as a "key employee" and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for denial.n9.17
- The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave.n9.18
- The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave.n9.19

If the specific information provided by the notice changes, the employer must provide written notice referencing the prior notice and setting forth any of the information in the notice of rights and responsibilities that has changed within

five business days of receipt of the employee's first notice of need for leave subsequent to any change. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.n9.20

A prototype notice of rights and responsibilities is contained in 29 C.F.R. Part 825, Appendix D and may be obtained from local offices of the Department of Labor's Wage and Hour Division or from the Internet at www.wagehour.dol.gov. Employers may adapt the prototype notice as appropriate to meet the notice requirements. The notice of rights and responsibilities may be distributed electronically so long as it otherwise meets the requirements for the notice.n9.21

The notice of rights and responsibilities may include other information, such as whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so.n9.22 The notice may be accompanied by any required certification form.n9.23 Employers are expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.n9.24

[c] Employer's Designation Notice

The employer is responsible in all circumstances for designating leave as FMLA-qualifying, and for giving notice of the designation to the employee.n9.25 When the employer has enough information to determine whether the leave is being taken for an FMLA-qualifying reason, such as after receiving a certification, the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days, absent extenuating circumstances.n9.26 If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave,n9.27 the employer may provide the employee with the designation notice at that time.n9.28

The designation notice must be in writing. A prototype designation notice is contained in 29 C.F.R. Part 825, Appendix E and may be obtained from local offices of the Labor Department's Wage and Hour Division or from the Internet at <http://www.wagehour.dol.gov> .n9.29 If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.n9.30

Only one notice of designation is required for each FMLA-qualifying reason per applicable 12-month period, regardless of whether the leave taken due to the qualifying reason will be a continuous block of leave or intermittent or reduced schedule leave. If the employer determines that the leave will not be designated as FMLA-qualifying, for example if the leave is not for a reason covered by FMLA or the FMLA leave entitlement has been exhausted, the employer must notify the employee of that determination. If the employer requires paid leave to be substituted for unpaid FMLA leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, the employer must inform the employee of that designation at the time of designating the FMLA leave.n9.31

If the employer will require the employee to present a fitness-for-duty certification to be restored to employment, the employer must provide notice of that requirement with the designation notice. If the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee's position.n9.32 If the employer handbook or other written documents, if any, describing the employer's leave policies clearly provide that a fitness-for-duty certification will be required in specific circumstances, for example by stating that fitness-for-duty certification will be required in all cases of back injuries for employees in a certain occupation, the employer is not required to provide written notice of the requirement with the designation notice, but must provide oral notice no later than with the designation notice.n9.33

The employer must notify the employee of the amount of leave counted against the employee's FMLA leave

entitlement. If the amount of leave needed is known at the time the employer designates the leave as FMLA-qualifying, the employer must notify the employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. If it is not possible to provide the hours, days, or weeks that will be counted against the employee's FMLA leave entitlement, such as in the case of unforeseeable intermittent leave, the employer must provide notice of the amount of leave counted against the employee's FMLA leave entitlement upon the request by the employee, but no more often than once in a 30-day period and only if leave was taken in that period. The notice of the amount of leave counted against the employee's FMLA entitlement may be oral or in writing. If the notice is oral, the employer must confirm it in writing, no later than the following payday, unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday. Written notice may be in any form, including a notation on the employee's pay stub.^{n9.34}

If the information provided by the employer to the employee in the designation notice changes, the employer must provide written notice of the change within five business days of receipt of the employee's first notice of need for leave subsequent to any change.^{n9.35}

[d] Employer's Failure to Provide FMLA Notice

The employer's failure to follow notice requirements under the FMLA may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.^{n9.36}

[2] Employee's Request for Leave

FMLA and CFRA both require that the employee give the employer notice of the need for family care leave.ⁿ¹⁰ The employee must give at least verbal notice sufficient to make the employer aware of the employee's need of leave, and of the anticipated timing and duration of the leave.ⁿ¹¹ Both CFRA and the FMLA require the employee to give the employer at least 30 days' notice for foreseeable events, such as a foreseeable birth or adoption or foster care placement, or foreseeable, planned medical treatment.ⁿ¹² If 30 days' notice is not practicable, notice must be given as soon as practicable.ⁿ¹³ which, under the FMLA means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. When an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee could practicably provide notice must take into account the individual facts and circumstances.^{n13.1} If the need for the leave is based on foreseeable planned medical treatment, the employee must make a reasonable effort to schedule the treatment so as not to disrupt the employer's operations, subject to the approval of the health care provider involved. An employer may for justifiable cause require an employee to attempt to reschedule treatment, subject to the health care provider's approval of the modification and his or her ability to reschedule.ⁿ¹⁴ If the employee gives less than 30 days' advance notice, the employee must respond to a request from the employer and explain why it was not practicable to give 30 days' notice.^{n14.1}

Under the FMLA, when the approximate timing of the need for leave is not foreseeable, it generally should be practicable for the employee to provide notice of leave within the time prescribed by the employer's usual and customary notice requirements.^{n14.2} Notice may be given by the employee's spokesperson, such as a spouse, adult family member, or other responsible party, if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.^{n14.3} The

employee must provide sufficient information for the employer to reasonably determine whether the FMLA applies to the leave request, and the anticipated duration of the absence. When an employee seeks leave due to a qualifying reason, for which the employer has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations under the FMLA.ⁿ¹⁴ When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. Similarly, in the case of an emergency requiring leave because of an FMLA-qualifying reason, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. If an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, the employer may delay or deny FMLA-protected leave.^{n14.5}

The employee need not expressly assert rights under CFRAⁿ¹⁵ or the FMLAⁿ¹⁶ or even mention them, but the employee must state the reason leave is needed (for example, for the birth of a child, or for medical treatment).ⁿ¹⁷ In one case interpreting CFRA, the court of appeal held that the employer did not violate that Act when, although the plaintiff had a serious health condition under CFRA, she failed to give the employer notice of her need for leave under the serious health condition provisions, and instead gave notice of a cold or flu condition.ⁿ¹⁸ The court emphasized that a cold or flu is not a "serious health condition" requiring leave under CFRA because it is not an illness involving either in-patient care or continuing treatment or supervision by a health provider.ⁿ¹⁹ The court rejected plaintiff's contention that her cold or flu symptoms alerted her employer that she had a serious health condition because she was receiving continuing treatment from a health care provider. Rather, the court found that the record suggested that the jury did find that plaintiff had a serious health condition under CFRA definitions, but that the condition was not the cold or flu and that plaintiff had not notified her employer of the serious health condition sufficient to qualify her for leave under the CFRA.ⁿ²⁰

■ CONSULTANT'S COMMENT:

Gibbs v. American Airlines, Inc., ⁿ²¹ is one of only a handful of California decisions interpreting CFRA,ⁿ²² and it is welcome on two counts. First, CFRA was enacted, in part, to provide leave for an employee's "serious health condition," not leave for everyday injury or illness, such as the common cold or the flu. Nonetheless, before *Gibbs*, it was possible to read CFRA (and the FMLAⁿ²³) loosely to hold that, if an employee was absent for more than three days with a cold or the flu and visited a doctor twice or visited a doctor once and received a course of antibiotics, he or she qualified for CFRA leave. The practical consequence of this "loose" interpretation was that an employee could take off Friday through Monday, appear on Tuesday with the requisite doctors' notes saying that he or she had been seen for flu or cold symptoms, and secure CFRA protection. These CFRA "holidays" are gone. *Gibbs* requires that the statute and its regulations be taken "as a whole." According to the appellate panel, "The regulation anticipates that a variety of health matters may involve absence from work and continuing medical treatment but still not properly be accorded FMLA (or CFRA) leave."ⁿ²⁴ In short, serious means serious.

Second, *Gibbs* makes it clear that an employee does not place an employer on notice of the need for CFRA leave for a serious health condition, unless such leave is expressly requested or unless the employee explains his or her absence in terms that indicate the existence of a serious health condition. The fact that a cold or a flu could constitute a serious health condition under unusual circumstances does not mean that the announcement of cold or flu symptoms qualifies as adequate notice. The decision implies that an employer has no obligation to anticipate "a worst case scenario." *Commentary by Kirby Wilcox.*

Once the employee states the reason leave is needed under CFRA or the FMLA, the employer should inquire further if it is necessary to have more information concerning whether CFRA or FMLA is involved, and the employer should obtain the details of the leave, including whether a serious medical condition exists for which certification will be required.ⁿ²⁵ An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.^{n25.1}

Under FMLA, if an employee fails to give the requisite notice for foreseeable leave, an employer may waive the notice obligations.ⁿ²⁶ However, absent a reasonable excuse for the employee's delay in requesting leave, the employer may under certain conditions delay the leave.ⁿ²⁷ In all cases, for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements.ⁿ²⁸ When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.ⁿ²⁹ When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employer two weeks' notice but instead only provided one week's notice, the employer may delay FMLA-protected leave for one week. Thus, for example, if the employer elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice, *i.e.*, a week before the two-week notice period has been met, the leave will not be FMLA-protected.^{n29.1} When the need for FMLA leave is unforeseeable and an employee fails to give the required notice,^{n29.2} the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employer notice of the need for leave very soon after the need arises consistent with the employer's policy, but instead the employee provided notice two days after the leave began, the employer may delay FMLA coverage of the leave by two days.^{n29.3}

Under CFRA, if an employee requests to use his or her paid vacation or other paid time off without reference to a CFRA-qualifying purpose, an employer generally may not ask whether the employee is taking the time off for a CFRA-qualifying purpose.ⁿ³⁰ If, however, the employer refuses the request, and the employee then provides information that the requested time off is for a CFRA-qualifying purpose, the employer may inquire further into the reason for the time off.ⁿ³¹

CFRA regulations require the employer to give employees reasonable advance notice of any notice requirements that it adopts, which may be incorporated in any general notice given pursuant to posting requirements.ⁿ³² The employer's failure to give or post notice regarding CFRA leaves precludes the employer from taking any adverse action against the employee, including denying CFRA leave, for failing to furnish the employer with advance notice of a need to take CFRA leave.ⁿ³³

Legal Topics:

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

Labor & Employment LawLeaves of AbsenceGeneral OverviewLabor & Employment LawLeaves of AbsenceFamily & Medical Leave ActGeneral OverviewLabor & Employment LawLeaves of AbsenceFamily & Medical Leave ActPosting & RecordkeepingLabor & Employment LawWage & Hour LawsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 2619(a); 29 C.F.R. § 825.300(a); 2 Cal. Code Reg. § 7297.9(a).

(n2)Footnote 1.1. 29 C.F.R. § 825.300(a)(2).

(n3)Footnote 1.2. 2 Cal. Code Reg. § 7297.4(a)(5).

(n4)Footnote 2. 29 U.S.C. § 2619(b); 29 C.F.R. § 825.300(a)(1).

(n5)Footnote 3. 2 Cal. Code Reg. § 7297.9(b).

(n6)Footnote 4. *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1127-1130 ; see § 8.24[1][b].

(n7)Footnote 4.1. Prototypes of notice required by FMLA are available from offices of Department of Labor's Wage and Hour Division or on the Internet at <http://www.wagehour.dol.gov> . 29 C.F.R. § 825.300(a)(4).

(n8)Footnote 5. 29 C.F.R. pt. 825, Appendix C; 2 Cal. Code Reg. § 7297.9(d).

(n9)Footnote 5.1. *Faust v. California Portland Cement Co.* (2007) 150 Cal. App. 4th 864, 879, 58 Cal. Rptr. 3d 729 . See 2 Cal. Code Reg. § 7297.9(d).

(n10)Footnote 6. 29 C.F.R. § 825.300(a)(4); 2 Cal. Code Reg. § 7297.9(c).

(n11)Footnote 6.1. 29 C.F.R. § 825.300(a)(4).

(n12)Footnote 7. 29 C.F.R. § 825.300(a)(3); 2 Cal. Code Reg. § 7297.9(a).

(n13)Footnote 8. 29 C.F.R. § 825.300(a)(3).

(n14)Footnote 9. 29 C.F.R. § 825.300(a)(3).

(n15)Footnote 9.1. 29 C.F.R. § 825.300(b)(1). See 29 C.F.R. § 825.110 for definition of eligible employee.

(n16)Footnote 9.2. 29 C.F.R. § 825.300(b)(1); see 29 C.F.R. §§ 825.127(c), 825.200(b).

(n17)Footnote 9.3. 29 C.F.R. § 825.300(b)(2); see 29 C.F.R. § 825.110(a).

(n18)Footnote 9.4. 29 C.F.R. 825.300(b)(2).

(n19)Footnote 9.5. 29 C.F.R. § 825.300(b)(2). For a form for the notification, see 29 C.F.R. Part 825, Appendix D.

(n20)Footnote 9.6. 29 C.F.R. § 825.300(b)(2). See 29 C.F.R. § 825.300(a)(4).

(n21)Footnote 9.7. 29 C.F.R. § 825.300(b)(3).

(n22)Footnote 9.8. 29 C.F.R. § 825.300(c)(1).

(n23)Footnote 9.9. 29 C.F.R. § 825.300(c)(1). See 29 C.F.R. § 825.300(a)(4).

(n24)Footnote 9.10. 29 C.F.R. § 825.300(c)(1).

(n25)Footnote 9.11. 29 C.F.R. § 825.300(c)(1).

(n26)Footnote 9.12. See 29 C.F.R. §§ 825.300(c), 825.301).

(n27)Footnote 9.13. *See* 29 C.F.R. §§ 825.127(c), 825.200(b), (f), (g).

(n28)Footnote 9.14. *See* 29 C.F.R. §§ 825.305, 825.309, 825.310, 825.313.

(n29)Footnote 9.15. *See* 29 C.F.R. § 825.207.

(n30)Footnote 9.16. *See* 29 C.F.R. § 825.210.

(n31)Footnote 9.17. *See* 29 C.F.R. § 825.218.

(n32)Footnote 9.18. *See* 29 C.F.R. §§ 825.214, 825.604.

(n33)Footnote 9.19. *See* 29 C.F.R. § 825.213.

(n34)Footnote 9.20. 29 C.F.R. § 825.300(c)(4).

(n35)Footnote 9.21. 29 C.F.R. § 825.300(c)(6).

(n36)Footnote 9.22. 29 C.F.R. § 825.300(c)(2).

(n37)Footnote 9.23. 29 C.F.R. § 825.300(c)(3).

(n38)Footnote 9.24. 29 C.F.R. § 825.300(c)(5).

(n39)Footnote 9.25. 29 C.F.R. § 825.300(d)(1). For designation of FMLA leave, *see* 29 C.F.R. § 825.301, discussed at § 8.27, below.

(n40)Footnote 9.26. 29 C.F.R. § 825.300(d)(1).

(n41)Footnote 9.27. *See* [2], below.

(n42)Footnote 9.28. 29 C.F.R. § 825.300(d)(2).

(n43)Footnote 9.29. 29 C.F.R. § 825.300(d)(4).

(n44)Footnote 9.30. 29 C.F.R. § 825.300(d)(4).

(n45)Footnote 9.31. 29 C.F.R. § 825.300(d)(1).

(n46)Footnote 9.32. 29 C.F.R. § 825.300(d)(3). *See* 29 C.F.R. § 825.312.

(n47)Footnote 9.33. 29 C.F.R. 825.300(d)(3).

(n48)Footnote 9.34. 29 C.F.R. § 825.300(d)(6).

(n49)Footnote 9.35. 29 C.F.R. § 825.300(d)(5).

(n50)Footnote 9.36. 29 C.F.R. § 825.300(e). *See* 29 C.F.R. § 825.400(c).

(n51)Footnote 10. 29 U.S.C. § 2612(e)(1), (2)(B); 29 C.F.R. § 825.302(a); *Gov. Code* § 12945.2(h),(i); 2 *Cal. Code Reg.* § 7297.4. *See* *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1131 (FMLA; if employee completely fails to give notice that absence is for potentially FMLA-qualifying reason, absence is not protected by Act).

(n52)Footnote 11. 29 C.F.R. § 825.302(c); 2 *Cal. Code Reg.* § 7297.4(a)(1). For the standard jury instructions of what constitutes reasonable notice by the employee, *see* CACI 2602. For discussion of the CACI standard jury

instructions generally, *see* § 61.05.

(n53)Footnote 12. 29 U.S.C. § 2612(e)(1), (2)(B); 29 C.F.R. § 825.302(a); 2 Cal. Code Reg. § 7297.4(a)(2).

(n54)Footnote 13. 29 C.F.R. § 825.302(a); 2 Cal. Code Reg. § 7297.4(a)(3)

(n55)Footnote 13.1. 29 C.F.R. § 825.302(b).

(n56)Footnote 14. 29 U.S.C. § 2612(e)(2)(A); 29 C.F.R. § 825.302(e); Gov. Code § 12945.2(i); 2 Cal. Code Reg. § 7297.4(a)(2).

(n57)Footnote 14.1. 29 C.F.R. § 825.302(a).

(n58)Footnote 14.2. 29 C.F.R. § 825.303(a). *See* 29 C.F.R. § 825.303(c).

(n59)Footnote 14.3. 29 C.F.R. § 825.303(a).

(n60)Footnote 14.4. 29 C.F.R. § 825.303(b).

(n61)Footnote 14.5. 29 C.F.R. § 825.303(c).

(n62)Footnote 15. Gov. C. § 12945.2.

(n63)Footnote 16. 29 U.S.C. § 2601 *et seq.*

(n64)Footnote 17. 29 C.F.R. §§ 825.302(c), 825.303(b); 2 Cal. Code Reg. § 7297.4(a)(1); *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1130-1131 (FMLA; providing two doctors' notes to employer regarding absences placed employer on notice leave might be covered by FMLA, and employer could have inquired further to determine whether absences were likely to qualify for protection); *Stevens v. Cal. Dept. of Corrections* (2003) 107 Cal. App. 4th 285, 289-293, 132 Cal. Rptr. 2d 19 (employee's request for vacation time over Christmas holiday to visit his ailing parents, without any reference to his intent to care for them, affirmatively suggested it was not CFRA-qualifying request, because statutory language of CFRA reveals it is not triggered by mere notice that parent has serious medical condition).

(n65)Footnote 18. *Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 7-9, 87 Cal. Rptr. 2d 554 .

(n66)Footnote 19. *Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 8, 87 Cal. Rptr. 2d 554 ; *see* 2 Cal. Code Reg. § 7297.0(o); *see also* 29 C.F.R. § 825.114(c) (specifically excluding cold or flu from definition of FMLA-qualifying illness).

(n67)Footnote 20. *Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 8-9, 87 Cal. Rptr. 2d 554 . *Compare* *Faust v. California Portland Cement Co.* (2007) 150 Cal. App. 4th 864, 881-882, 58 Cal. Rptr. 3d 729 (employee did give employer sufficient notice of CFRA-qualifying leave by providing verbal notice sufficient to make employer aware employee needed leave pursuant to CFRA).

(n68)Footnote 21. *Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 87 Cal. Rptr. 2d 554 .

(n69)Footnote 22. Gov. C. § 12945.2.

(n70)Footnote 23. 29 U.S.C. § 2601 *et seq.*

(n71)Footnote 24. *Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 8, 87 Cal. Rptr. 2d 554 .

(n72)Footnote 25. *See* 29 C.F.R. § 825.302(c); 2 Cal. Code Reg. § 7297.4(a)(1). *See* *Faust v. California*

Portland Cement Co. (2007) 150 Cal. App. 4th 864, 882-884, 58 Cal. Rptr. 3d 729 (employee's refusal to communicate directly with employer's human resources manager was not unreasonable failure to respond to employer's follow-up inquiries regarding his medical condition; evidence showed employee's psychiatrist advised him to stay away from stressful situations and employee's wife responded to manager on her husband's behalf; moreover, nothing precluded manager from contacting employee's workers' compensation attorney, and previous human resources person routinely contacted employees' doctors for clarification; employee's chiropractor's conclusions regarding his inability to perform regular job duties placed employer on notice CFRA leave might be required, and it was obligated to inquire further to determine whether absence was likely to qualify for CFRA protection).

(n73)Footnote 25.1. 29 C.F.R. § 825.302(c).

(n74)Footnote 26. 29 C.F.R. § 825.304(e).

(n75)Footnote 27. 29 C.F.R. § 825.304(b)-(d).

(n76)Footnote 28. 29 C.F.R. § 825.304(a). See [1][a], above.

(n77)Footnote 29. 29 C.F.R. § 825.304(b).

(n78)Footnote 29.1. 29 C.F.R. § 825.304(c).

(n79)Footnote 29.2. See 29 C.F.R. § 825.303.

(n80)Footnote 29.3. 29 C.F.R. § 825.304(d).

(n81)Footnote 30. 2 Cal. Code Reg. § 7297.5(b)(2)(A).

(n82)Footnote 31. 2 Cal. Code Reg. § 7297.5(b)(2)(A)(1).

(n83)Footnote 32. 2 Cal. Code Reg. § 7297.4(a)(5); see [1], above.

(n84)Footnote 33. 2 Cal. Code Reg. § 7297.4(a)(5). See *Faust v. California Portland Cement Co.* (2007) 150 Cal. App. 4th 864, 881, 58 Cal. Rptr. 3d 729 (employer's failure to establish it complied with its notice obligations under CFRA precluded it from obtaining summary judgment with respect to claim that employee failed to give notice, where there was no evidence to indicate employer posted or gave employee notice of his right to leave under CFRA, employee gave employer sufficient information to notify employer of need for leave pursuant to CFRA, and employer terminated employee while he was out on medical leave pursuant to health care provider's report).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part C. FAMILY CARE AND MEDICAL LEAVE

1-8 California Employment Law § 8.26

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§ 8.26 Medical Certification

[1] Generally

CFRA and FMLA each permit the employer to require the employee to submit a doctor's certification of the serious health condition of the family member involved and to require such certification for the employee's own serious health condition.ⁿ¹ Optional certification forms are provided by regulations under both CFRAⁿ² and FMLA.ⁿ³

Under FMLA regulations, in most cases, the employer should request that an employee furnish certification at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts or the employer provides more than 15 calendar days to return the requested certification.ⁿ⁴

Under FMLA, an employer may also request certification from an employee who fails to return to work because of the continuation, recurrence, or onset of a serious health condition of the employee or family member, thereby precluding the employer from recovering its share of health benefit premiums paid on the employee's behalf during the leave period.ⁿ⁷ On such a request, the employee must provide certification in a timely manner, which must be within 30 days of the date the request is made, or repay 100 percent of the premiums paid by the employer.ⁿ⁸

Under FMLA regulations, the employee must provide a complete and sufficient certification to the employer if required by the employer.^{n8.1} The employer must advise the employee whenever the employer finds a certification incomplete or insufficient, and state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The employer must

provide the employee with seven calendar days to cure any deficiency, unless that is not practicable under the particular circumstances despite the employee's diligent good faith efforts. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the FMLA leave.n8.2 Under the CFRA, which incorporates the 1995 FMLA regulations, an employer is required to advise an employee of an incomplete certification and to provide the employee with a "reasonable opportunity" to cure the deficiency.n8.2.1 A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.n8.3

At the time the employer requests certification, the employer must also advise the employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employer with a complete and sufficient certification, despite the opportunity to cure the certification,n8.4 or fails to provide any certification, the employer may deny the taking of FMLA leave.n8.5 It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employer to support the employee's FMLA request. This applies any time an employer requests a certification permitted by the regulations, whether it is the initial certification, a recertification,n8.6 a second or third opinion,n8.7 or a fitness for duty certificate,n8.8 including any clarifications necessary to determine if the certifications are authentic and sufficient.n8.9

Under the FMLA, when the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's covered family member, lasts beyond a single leave year,n8.10 the employer may require the employee to provide a new medical certification in each subsequent leave year. The new medical certifications are subject to the regulations for authentication and clarification,n8.11 including second and third opinions.n8.12 Under the CFRA, recertification may be requested upon the expiration of the time period which the health care provider originally estimated that the employee needed to take leave.n8.12.1 Neither the CFRA nor the FMLA regulations of 1995 explicitly provide for annual recertification. The 1995 FMLA regulations provide that "[t]he employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration."n8.12.2

The CFRA defines the term "health care provider" for purposes of certifying a serious medical condition.n8.13 Under the CFRA, which incorporates the federal definition of that term, a chiropractor is a health care provider limited to treatment consisting of manual manipulation of the spine to correct a subluxation, as demonstrated by x-ray to exist.n8.14

FMLA regulations also cover certification for leave taken by the family of a covered servicemember because of a qualifying exigency,n8.15 and certification for leave taken to care for a covered servicemember (military caregiver leave).n8.16 For discussion of the application of the FMLA to the family of armed forces members generally, *see* § 8.21[4].

[2] Contents of Certification

Under the FMLA, when leave is taken because of an employee's own serious health condition, or the serious health condition of a family member, an employer may require a medical certification from a health care provider that sets forth the following information:n9

- The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization.
- The approximate date on which the serious health condition commenced, and its probable duration.

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- A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment such as physical therapy, for example, or any other regimen of continuing treatment.
- If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job, as well as the nature of any other work restrictions, and the likely duration of that inability.ⁿ¹⁰
- If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care,ⁿ¹¹ and an estimate of the frequency and duration of the leave required to care for the family member.
- If an employee requests leave on an intermittent or reduced schedule basis^{n11.1} for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for the intermittent or reduced schedule leave and an estimate of the dates and duration of the treatments and any periods of recovery.
- If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, which may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for the intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity.
- If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that the leave is medically necessary to care for the family member,^{n11.2} which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions, and information received under those provisions may be considered in determining the employee's entitlement to FMLA-protected leave. Similarly, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of those payments or benefits. Any information received pursuant to a policy or plan may be considered in determining the employee's entitlement to FMLA-protected leave. An employee's failure to provide the information required for receipt of those payments or benefits will not affect the employee's entitlement to take unpaid FMLA leave.^{n11.3}

If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA),^{n11.4} the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. Any information received pursuant to those procedures may be considered in determining the employee's entitlement to FMLA-protected leave.^{n11.5}

An employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health care provider of the employee or his or her covered family member. However, the employee may not be required to provide an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer

with complete and sufficient certification. Failure to do so may result in the denial of FMLA leave.^{n11.6}

Certification under CFRA is essentially the same,ⁿ¹² except that the health care provider need not identify the serious health condition of the employee's family member.ⁿ¹³ For certification of the employee's own serious health condition under CFRA, the identity of the condition need not be given, but it may be given at the employee's option.ⁿ¹⁴ CFRA regulations state that the employer may not ask the employee to provide additional information beyond that allowed in the regulations and that the employer must comply with all applicable laws regarding confidentiality of medical information.ⁿ¹⁵

The Department of Labor has developed two optional forms (Form WH-380E and Form WH-380F, as revised) for use in obtaining medical certification under the FMLA, including second and third opinions,^{n15.1} from health care providers that meets FMLA's certification requirements.^{n15.2} Optional Form WH-380E is for use when the employee's need for leave is due to the employee's own serious health condition. Optional form WH-380F is for use when the employee needs leave to care for a family member with a serious health condition. These optional forms reflect certification requirements so as to permit the health care provider to furnish appropriate medical information. Form WH-380E and WH-380F, as revised, or another form containing the same basic information, may be used by the employer. However, no information may be required beyond that specified in the regulations.^{n15.3} In all instances, the information on the form must relate only to the serious health condition for which the current need for leave exists.ⁿ¹⁶

The Department of Labor has also revised its FMLA regulations and optional certification form for the purpose of allowing employers to obtain information from a health care provider to verify that an employee in fact has a serious health condition and requires leave, but not to obtain unnecessary information for privacy and confidentiality reasons.ⁿ¹⁷ For example, the revised form requires certification as to which aspect of the definition of serious health condition applies and a statement of the medical facts supporting the definition, but it no longer provides for a diagnosis, and makes clear that all information on the form relates only to the condition for which the employee is taking FMLA leave.ⁿ¹⁸ However, information is still required regarding the regimen of treatment in general terms, since the Department of Labor views that as one of the specific requirements of a serious health condition under Title 29, *Code of Federal Regulations*, § 825.114(a)(2)(i)(B).ⁿ¹⁹ Thus, although steps have been taken to protect employees' privacy rights under FMLA, CFRA is stricter in terms of providing such protection because it does not permit an employer to require that the medical certification specify the serious health condition that led to the leave request. When both CFRA and FMLA are applicable, CFRA must be applied in this circumstance because it provides more protection to the employee.ⁿ²⁰

[3] Second and Third Opinions

Under both CFRA and FMLA, the employer can challenge the certification if the employer "has reason to doubt the validity of the certification."ⁿ²¹ However, under CFRA, the employer may challenge only the validity of a certification of the employee's own serious health condition,ⁿ²² and not a certification for leave taken for the serious health condition of the employee's child, spouse, or parent.ⁿ²³

Under the FMLA, if an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the health care provider. However, the employer may contact the health care provider for purposes of clarification and authentication of the medical certification, whether it is an initial certification or recertification, after the employer has given the employee an opportunity to cure any deficiencies.^{n23.1} To make that contact, the employer must use a health care provider, a human resources professional, a leave administrator, or a management official. Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider.

Under the CFRA, which incorporates the 1995 FMLA regulations, employers may only contact an employee's health care provider for purposes of clarification or authentication through a health care provider representing the employer

and only with the employee's permission.ⁿ²⁴

For purposes of the FMLA regulations, "authentication" means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested. "Clarification" means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that required by the certification form. The requirements of the Health Insurance Portability and Accountability Act ("HIPAA") Privacy Rule,^{n24.1} which governs the privacy of individually-identifiable health information created or held by HIPAA-covered entities, must be satisfied when individually-identifiable health information of an employee is shared with an employer by a HIPAA-covered health care provider. If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear.^{n24.2} It is the employee's responsibility to provide the employer with a complete and sufficient certification and to clarify the certification if necessary.^{n24.3}

CFRA and FMLA each provide that the employer may require that the employee obtain, at the employer's expense, a second opinion from an employer-approved health care provider regarding any of the information contained in the original certification.ⁿ²⁵ The health care provider selected to provide the second opinion cannot be employed on a regular basis by the employer.ⁿ²⁶ FMLA regulations further provide that the employer may not regularly contract with or otherwise regularly use that health care provider's services unless the employer is located in an area where access to health care is extremely limited.ⁿ²⁷ Similarly, CFRA regulations specify that the health care provider must not be employed on a regular basis by the employer.ⁿ²⁸

Under both CFRA and FMLA, if the second opinion is contrary to the first, the employer may require, again at the employer's expense, that the employee obtain a third medical opinion from a third health care practitioner approved by both employee and employer.ⁿ²⁹ The third opinion is binding on the parties.ⁿ³⁰ However, an employer's failure to have a health care provider jointly chosen by the parties make a binding determination as to the employee's entitlement to medical leave does not bar the employer from later claiming in litigation brought by the employee under CFRA that the employee did not suffer from a serious health condition and was capable of performing the employee's job.^{n30.1}

The employer must provide to the employee on his or her request a copy of any second or third medical opinions without cost to the employee.ⁿ³¹ In addition, FMLA regulations provide that the employer must reimburse the employee or his or her family member for any reasonable out-of-pocket travel expenses incurred in obtaining a second or third medical opinion.ⁿ³² FMLA regulations also provide that the employer may not require the employee or family member to travel outside normal commuting distance to obtain a second or third opinion except in very unusual circumstances.ⁿ³³

Under FMLA, pending receipt of a second or third opinion, the employee is provisionally entitled to FMLA leave benefits, including maintenance of health benefits.ⁿ³⁴ If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave will not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies.ⁿ³⁵

[4] Recertification

CFRA allows the employer to require recertification if additional leave is requested by the employee after the expiration of the originally estimated duration of the leave.ⁿ³⁶

Under the FMLA, in general an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee.ⁿ³⁷ However, if the medical certification indicates that the minimum

duration of the condition is more than 30 days, the employer must wait until the minimum duration expires before requesting a recertification. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification. In all cases, an employer may request a recertification of a medical condition every six months in connection with an absence by the employee. Accordingly, even if the medical certification indicates that the employee will need intermittent or reduced schedule leave for a period in excess of six months, such as for a lifetime condition, the employer would be permitted to request recertification every six months in connection with an absence.ⁿ³⁸

However, an employer may request recertification in less than 30 days under the following circumstances:ⁿ³⁹

- The employee requests an extension of leave.
- Circumstances described by the previous certification have changed significantly, such as the duration or frequency of the absence, or the nature or severity of the illness or complications. For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his or her last two migraines lasted four days each, the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his or her scheduled days off, the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days.
- The employer receives information casting doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, that information might be sufficient to cast doubt upon the continuing validity of the certification, allowing the employer to request a recertification in less than 30 days.

The employee must provide the requested recertification to the employer within the timeframe requested by the employer, which must allow at least 15 calendar days after the employer's request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.ⁿ⁴⁰ The employer may ask for the same information when obtaining recertification as that permitted for the original certification.ⁿ⁴¹ The employee has the same obligations to participate and cooperate in the recertification process as in the initial certification process, including providing a complete and sufficient certification or adequate authorization to the health care provider.ⁿ⁴² As part of the information allowed to be obtained on recertification for leave taken because of a serious health condition, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with that pattern.^{n42.1}

Recertification requested by the employer will be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.^{n42.2}

[5] Intent to Return to Work and Return-to-Work Certification

Under the FMLA, an employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding these reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.^{n42.3} If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits, subject to COBRA requirements, and to restore the employee cease. However, these obligations continue if an employee indicates the employee may be unable to return to work but expresses a continuing desire to do

so.n42.4 If an employee discovers after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary, the employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In that case, and also if it is necessary for an employee to take more leave than originally anticipated, the employer may require that the employee provide the employer reasonable notice, *i.e.*, within two business days, of the changed circumstances when foreseeable. The employer may also obtain information on changed circumstances through requested status reports.n42.5

CFRA and FMLA each provide that as a condition of an employee's return from leave taken because of the employee's own serious health condition, the employer may require that the employee, at his or her own cost,n42.6 obtain certification that the employee is able to resume work. This requirement may only be made if the employer has a uniformly applied practice or policy of requiring such releases from other employees returning to work after illness, injury, or disability.n43

Under FMLA regulations, the employee has the same obligations to participate and cooperate in the fitness-for-duty certification process as in the initial certification process, including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer.n44 An employer may seek a fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. Additionally, an employer may require that the certification specifically address the employee's ability to perform the essential functions of the employee's job. In order to require this certification, the employer must provide the employee with a list of the essential functions of the employee's job no later than with the designation notice,n45 and must indicate in the designation notice that the certification must address the employee's ability to perform those essential functions.n46 If the employer satisfies these requirements, the employee's health care provider must certify that the employee can perform the identified essential functions of the job. The employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification.n47 Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required.n48

The employer may delay restoration to employment until the employee submits a required fitness-for-duty certification unless the employer has failed to provide the required designation notice. If the employer provides the required designation notice, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA.n48.1

An employer is not entitled to a certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule.n48.2 However, under the FMLA an employer is entitled to a certification of fitness to return to duty for these absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform the employee's duties, based on the serious health condition for which the employee took leave. If an employer chooses to require a fitness-for-duty certification under these circumstances, the employer must inform the employee at the same time it issues the designation notice that for each subsequent instance of intermittent or reduced schedule leave, the employee will be required to submit a fitness-for-duty certification unless one has already been submitted within the past 30 days. Alternatively, an employer can set a different interval for requiring a fitness-for-duty certification, as long as it does not exceed once every 30 days and the employer advises the employee of the requirement in advance of the employee taking the intermittent or reduced schedule leave. The employer may not terminate the employment of the employee while awaiting a certification of fitness to return to duty for an intermittent or reduced schedule leave absence. Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others. In determining whether reasonable safety concerns exist, an employer should consider the nature and severity of the potential harm and the likelihood that potential harm will occur.n48.3

The CFRA is silent with regard to fitness for duty certifications for leave taken on an intermittent basis, therefore, for

California employers the 1995 FMLA regulations govern such that employers are not entitled to fitness for duty certifications for intermittent leave.^{n48.4}

If state or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions must be applied.^{n48.5} Requirements under the Americans with Disabilities Act (ADA) apply. After an employee returns from FMLA leave, the ADA requires any medical examination at an employer's expense by the employer's health care provider be job-related and consistent with business necessity. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore that inquiry would not be job-related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require that employee to submit to an HIV test when the test is not related to either the essential functions of the job or to the impairment. If an employee's serious health condition may also be a disability within the meaning of the ADA, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.^{n48.6}

[6] Effect of Failure to Provide Required Certification or Recertification

[a] Foreseeable Leave

Under the FMLA, in the case of foreseeable leave, if an employee fails to provide certification in a timely mannerⁿ⁴⁹ the employer may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employer can deny FMLA protections for the 30-day period following the expiration of the 15-day time period, if the employee takes leave during that period.ⁿ⁵⁰

[b] Unforeseeable Leave

Under the FMLA, in the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a certification within 15 calendar days from receipt of the request for certification, unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.ⁿ⁵¹

[c] Recertification

An employee must provide recertification within the time requested by the employer, which must allow at least 15 calendar days after the request, or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, the employer may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave. Recertification does not apply to leave taken for a qualifying exigency or to care for a covered servicemember.ⁿ⁵²

[d] Fitness-for-Duty Certification

When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification, at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to workⁿ⁵³ if the employer has provided the required notice.ⁿ⁵⁴ The employer may delay restoration until the certification is provided. Unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at

the time FMLA leave is concluded, the employee may be terminated.n55

Legal Topics:

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

Labor & Employment LawLeaves of AbsenceGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 2613(a); 29 C.F.R. § 825.305(a); Gov. Code § 12945.2(j), (k); 2 Cal. Code Reg. § 7297.4(b). For discussion of certification for leave related to a qualifying exigency involving a member of the Armed Forces, see § 8.21[4][a], *above*. For the standard jury instruction on the employers affirmative defense to an action under CFRA that the employee did not provide a health-care providers certification of the need for the leave, *see CACI 2610*. For the standard jury instruction on the employers affirmative defense to an action under CFRA that the employee did not provide a written statement from a health-care provider that the employee was fit to return to work, *see CACI 2611*. For discussion of the CACI standard jury instructions generally, *see § 61.05*.

(n2)Footnote 2. 2 Cal. Code Reg. § 7297.11.

(n3)Footnote 3. 29 C.F.R. Part 825, Appendix B (form WH-380).

(n4)Footnote 4. 29 C.F.R. § 825.305(b).

(n5)Footnote 7. 29 C.F.R. § 825.213(a)(3).

(n6)Footnote 8. 29 C.F.R. § 825.213(a)(3).

(n7)Footnote 8.1. 29 C.F.R. § 825.305(c). *See also* 29 C.F.R. §§ 825.306, 825.309, 825.310. For discussion of the contents of a certification, *see* [2], *below*.

(n8)Footnote 8.2. 29 C.F.R. § 825.305(c). *See also* 29 C.F.R. § 825.313.

(n9)Footnote 8.2.1. *See* 29 C.F.R. § 825.305(d) (1995).

(n10)Footnote 8.3. 29 C.F.R. § 825.305(c). For discussion of the effect of the failure to provide certification, *see* [6], *below*.

(n11)Footnote 8.4. *See* 29 C.F.R. § 825.305(c).

(n12)Footnote 8.5. 29 C.F.R. § 825.305(d). *See also* 29 C.F.R. § 825.313.

(n13)Footnote 8.6. *See* [4], *below*.

(n14)Footnote 8.7. *See* [3], *below*.

(n15)Footnote 8.8. *See* [5], *below*.

(n16)Footnote 8.9. 29 C.F.R. § 825.305(d).

(n17)Footnote 8.10. *See* 29 C.F.R. § 825.200 for definition of "single leave year."

(n18)Footnote 8.11. *See* 29 C.F.R. § 825.307.

(n19)Footnote 8.12. 29 C.F.R. § 825.305(e).

(n20)Footnote 8.12.1. *See* 2 Cal. Code Regs. tit. § 7297.4(b).

(n21)Footnote 8.12.2. *See* 29 C.F.R. § 825.305(c) (1995).

(n22)Footnote 8.13. *See* Gov. Code § 12945.2 (c)(6).

(n23)Footnote 8.14. *Faust v. California Portland Cement Co.* (2007) 150 Cal. App. 4th 864, 880 n.12, 58 Cal. Rptr. 3d 729. *See* 29 C.F.R. § 825.118(b)(1); Gov. Code § 12945.2(c)(6)(B).

(n24)Footnote 8.15. *See* 29 C.F.R. § 825.309.

(n25)Footnote 8.16. *See* 29 C.F.R. § 825.310.

(n26)Footnote 9. 29 C.F.R. § 825.306(a). *See also* 29 U.S.C. § 2613(b)(1)-(4)(A).

(n27)Footnote 10. *See* 29 C.F.R. § 825.123(b), (c).

(n28)Footnote 11. *See* 29 C.F.R. § 825.124.

(n29)Footnote 11.1. *See* § 8.24[2], *above*.

(n30)Footnote 11.2. *See* 29 C.F.R. §§ 825.124, 825.203(b).

(n31)Footnote 11.3. 29 C.F.R. § 825.306(c).

(n32)Footnote 11.4. For discussion of the ADA generally, *see* Chs. 40, 41.

(n33)Footnote 11.5. 29 C.F.R. § 825.306(d).

(n34)Footnote 11.6. 29 C.F.R. § 825.306(e). For discussion of the effect of failure to provide certification, *see* [6], *below*.

(n35)Footnote 12. Gov. Code § 12945.2(j), (k); 2 Cal. Code Reg. § 7297.0(a).

(n36)Footnote 13. 2 Cal. Code Reg. § 7297.0(a)(1).

(n37)Footnote 14. 2 Cal. Code Reg. § 7297.0(a)(2).

(n38)Footnote 15. 2 Cal. Code Reg. § 7297.4(b)(2)(A)(1), (2). For discussion of laws relating to confidentiality of medical information, *see* ch. 50.

(n39)Footnote 15.1. *See* [3], *below*.

(n40)Footnote 15.2. *See* 29 C.F.R. Part 825, Appendix B.

(n41)Footnote 15.3. 29 C.F.R. § 825.306(b). *See* 29 C.F.R. §§ 825.306, 825.307, 825.308.

(n42)Footnote 16. 29 C.F.R. § 825.306(b).

(n43)Footnote 17. *See* U.S. Dept. of Labor, Wage and Hour Div. Summary of Major Comments on 29 C.F.R. § 825.306; 29 C.F.R. Part 825, Appendix B (form WH-380).

(n44)Footnote 18. *See* U.S. Dept. of Labor, Wage and Hour Div. Summary of Major Comments on 29 C.F.R. § 825.306.

(n45)Footnote 19. 29 C.F.R. § 825.306; *see* U.S. Dept. of Labor, Wage and Hour Div. Summary of Major Comments on 29 C.F.R. § 825.306.

(n46)Footnote 20. *See* 29 U.S.C. § 2651(b); *see* § 8.20[1].

(n47)Footnote 21. 29 U.S.C. § 2613(c)(1); 29 C.F.R. § 825.307(a)(2); Gov. Code § 12945.2(k)(3)(A); 2 Cal. Code Reg. § 7297.4(b)(2)(A).

(n48)Footnote 22. *See* Gov. Code § 12945.2(k)(3); 2 Cal. Code Reg. § 7297.4(b)(2).

(n49)Footnote 23. Gov. Code § 12945.2(j); 2 Cal. Code Reg. § 7297.4(b)(1).

(n50)Footnote 23.1. 29 C.F.R. § 825.307(a). *See* 29 C.F.R. § 825.305(c).

(n51)Footnote 24. *See* 29 C.F.R. § 825.307(a) (1995).

(n52)Footnote 24.1. *See* 45 CFR Parts 160, 164.

(n53)Footnote 24.2. 29 C.F.R. § 825.307(a). *See* 29 C.F.R. § 825.305(d).

(n54)Footnote 24.3. 29 C.F.R. § 825.307(a).

(n55)Footnote 25. 29 U.S.C. § 2613(c)(1); 29 C.F.R. § 825.307(b); Gov. Code § 12945.2(k)(3)(A); 2 Cal. Code Reg. § 7297.4(b)(2)(A).

(n56)Footnote 26. 29 C.F.R. § 825.307(b)(2); Gov. Code § 12945.2(k)(3)(A); 2 Cal. Code Reg. § 7297.4(b)(2)(A).

(n57)Footnote 27. 29 C.F.R. § 825.307(b)(2).

(n58)Footnote 28. 2 Cal. Code Reg. § 7297.4(b)(2)(A).

(n59)Footnote 29. 29 U.S.C. § 2613(d)(1); 29 C.F.R. § 825.307(c); Gov. Code § 12945.2(k)(3)(C); 2 Cal. Code Reg. § 7297.4(b)(2)(B).

(n60)Footnote 30. 29 U.S.C. § 2613(d)(2); 29 C.F.R. § 825.307(c); Gov. Code § 12945.2(k)(3)(D); 2 Cal. Code Reg. § 7297.4(b)(2)(C).

(n61)Footnote 30.1. *Lonicki v. Sutter Health Central* (2008) 43 Cal. 4th 201, 74 Cal. Rptr. 3d 570, 180 P.3d 321, 2008 Cal. LEXIS 3796, *11-22.

(n62)Footnote 31. 29 C.F.R. § 825.307(d); 2 Cal. Code Reg. § 7297.4(b)(2)(D).

(n63)Footnote 32. 29 C.F.R. § 825.307(e).

(n64)Footnote 33. 29 C.F.R. § 825.307(e).

(n65)Footnote 34. 29 C.F.R. § 825.307(b)(1).

(n66)Footnote 35. 29 C.F.R. § 825.307(a)(2).

(n67)Footnote 36. Gov. Code § 12945.2(j)(2), (k)(2); 2 Cal. Code Reg. § 7297.4(b)(1), (2).

(n68)Footnote 37. 29 C.F.R. § 825.308(a).

(n69)Footnote 38. 29 C.F.R. § 825.308(b).

(n70)Footnote 39. 29 C.F.R. § 825.308(c).

(n71)Footnote 40. 29 C.F.R. § 825.308(d).

(n72)Footnote 41. 29 C.F.R. § 825.308(e). See 29 C.F.R. § 825.306, discussed in [2], *above*.

(n73)Footnote 42. 29 C.F.R. § 825.308(e). See 29 C.F.R. § 825.305(d).

(n74)Footnote 42.1. 29 C.F.R. § 825.308(e).

(n75)Footnote 42.2. 29 C.F.R. § 825.308(f).

(n76)Footnote 42.3. 29 C.F.R. § 825.311(a).

(n77)Footnote 42.4. 29 C.F.R. § 825.311(b).

(n78)Footnote 42.5. 29 C.F.R. § 825.311(c).

(n79)Footnote 42.6. See 29 C.F.R. § 825.312(c) (cost of certification is borne by employee, and employee is not entitled to be paid for time or travel costs spent in acquiring certification).

(n80)Footnote 43. 29 U.S.C. § 2614(a)(4); 29 C.F.R. § 825.312(a); Gov. Code § 12945.2(k)(4); 2 Cal. Code Reg. § 7297.4(2)(E); see discussion of restoration or reinstatement to job in § 8.30.

(n81)Footnote 44. 29 C.F.R. § 825.312(a). See 29 C.F.R. § 825.305(d).

(n82)Footnote 45. See 29 C.F.R. § 825.300(d), discussed in § 8.27, *below*.

(n83)Footnote 46. 29 C.F.R. § 825.312(b). See also 29 C.F.R. § 825.312(d) (designation notice required in 29 C.F.R. § 825.300(d) must advise employee if employer will require fitness-for-duty certification to return to work and whether fitness-for-duty certification must address employee's ability to perform essential functions of employee's job.).

(n84)Footnote 47. See 29 C.F.R. § 825.307, discussed in [3], *above*.

(n85)Footnote 48. 29 C.F.R. § 825.312(b). For discussion of second or third opinions, see [3], *above*.

(n86)Footnote 48.1. 29 C.F.R. § 825.312(e). See 29 C.F.R. § 825.313(d), discussed in [6], *below*.

(n87)Footnote 48.2. For discussion of intermittent or reduced leave, see § 8.24[2].

(n88)Footnote 48.3. 29 C.F.R. § 825.312(f).

(n89)Footnote 48.4. See 29 C.F.R. § 825.310(g) (1995).

(n90)Footnote 48.5. 29 C.F.R. § 825.312(g).

(n91)Footnote 48.6. 29 C.F.R. § 825.312(g). For discussion of the ADA generally, see Chs. 40, 41.

(n92)Footnote 49. See 29 C.F.R. § 825.305, discussed at § 8.26, *above*.

(n93)Footnote 50. 29 C.F.R. § 825.313(a).

(n94)Footnote 51. 29 C.F.R. § 825.313(b).

(n95)Footnote 52. 29 C.F.R. § 825.313(c).

(n96)Footnote 53. *See 29 C.F.R. § 825.312(a)*, discussed at § 8.26[5], *above*.

(n97)Footnote 54. *29 C.F.R. § 825.313(d)*. *See 29 C.F.R. § 825.300(e)*.

(n98)Footnote 55. *29 C.F.R. § 825.313(d)*. *See also 29 C.F.R. § 825.213(a)(3)*.



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California Employment Law

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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part C. FAMILY CARE AND MEDICAL LEAVE

1-8 California Employment Law § 8.27

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§ 8.27 Designation of Leave

[1] Designation as Employer's Responsibility

CFRA and FMLA regulations each provide that it is always the employer's responsibility to designate any leave, including paid and unpaid leave, as CFRA or FMLA leave based on information provided by the employee or the employee's spokesperson and to give notice of such a designation to the employee.ⁿ¹ Under the FMLA, if the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether leave is potentially FMLA-qualifying.ⁿ² Once the employer has acquired knowledge that the leave is being taken for an FMLA-qualifying reason, the employer must notify the employee.ⁿ³

An employee giving notice of the need for FMLA or CFRA leave need not expressly assert rights under the FMLA or CFRA,ⁿ⁴ or even mention the FMLA to meet the obligation to provide notice,ⁿ⁵ although the employee needs to state a qualifying reason for the needed leaveⁿ⁶ and otherwise satisfy the notice requirements.ⁿ⁷ If the employee fails to explain the reasons for the leave, the employer may deny the leave.ⁿ⁸ In many cases, in explaining the reasons for a request to use leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the leave as FMLA leave. An employee using accrued paid leave may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. However, if an employee requesting to use paid leave for an FMLA-qualifying reason does not explain the reason for the leave and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave, so that the employer is aware that the leave may not be denied and may designate that the paid leave be appropriately counted against (substituted for) the employee's FMLA leave entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying reason will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying reason against the employee's FMLA leave entitlement.ⁿ⁹

Any dispute between an employer and an employee as to whether leave qualifies as FMLA leave should be resolved through discussions between the employee and the employer. These discussions and the decision must be documented.ⁿ¹⁰

If the employer's failure to timely designate leave causes the employee to suffer harm, it may constitute an interference with, restraint of, or denial of the exercise of the employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.ⁿ¹¹ For example, if an employer that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented the employee from returning to work during that time period regardless of the designation, the employee may not be able to show that the employee suffered harm as a result of the employer's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward the employee's FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly. The employee might establish this by showing that the employee would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated timely.ⁿ¹²

In an unusual case, the FMLA did not apply when the employee conceded that, because she did not have a qualifying health condition, she never requested FMLA leave, nor would she have taken FMLA leave had it been offered. The court held that because she never sought to invoke FMLA rights, she could not argue that her employer interfered with the exercise of her rights when it suggested the FMLA might apply, provided her with information on it, and sought a medical certification of her condition.ⁿ¹³

Mischaracterization of CFRA leave as personal leave can subject the employer to liability as "interference" with the leave. A violation of the CFRA simply requires that the employer deny the employee's entitlement to leave.ⁿ¹⁴

Under CFRA, employer's duty is somewhat complicated by the fact that employers are constrained in their ability to elicit information from employees with regard to paid leave requests. If an employee requests the use of accrued vacation time or other paid accrued time off without reference to a CFRA-qualifying purpose, the employer may not know whether the requested leave does qualify under CFRA. The employer may not ask whether the employee is taking the time off for a CFRA-qualifying purpose.ⁿ¹⁵

If the employer denies the employee's request for a particular type of leave (as a paid leave) and the employee still seeks leave rights, the employee would have to make a more complete disclosure of the reason for the leave, such as information showing his or her right to a leave under CFRA.ⁿ¹⁶ CFRA regulations provide that only if the employee so informs the employer may the employer then inquire further into the reasons for the absences and find out if the leave should actually be designated as CFRA leave.ⁿ¹⁷ⁿ¹⁸⁻²⁰

[2] When Retroactive Designation Is Allowed

CFRA regulations state that an employer may not retroactively designate leave as CFRA leave after the employee has returned to work, except under those same circumstances provided for in the FMLA and its implementing regulations for retroactively counting leave as FMLA leave.ⁿ²¹ Under the FMLA, if the employer does not designate leave as required,ⁿ²² the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee, provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases in which leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.ⁿ²³

Legal Topics:

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

Labor & Employment Law Leaves of Absence General Overview Labor & Employment Law Leaves of Absence Family & Medical Leave Act Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. 29 C.F.R. § 825.301; 2 Cal. Code Reg. § 7297.3(a)(1)(A).

(n2)Footnote 2. 29 C.F.R. § 825.301(a). See *Bailey v. Southwest Gas Co.* (9th Cir. 2002) 275 F.3d 1181, 1185-1186 (once employee and her physician asserted her medication precluded safely performing her job function of working with natural gas, employer had obligation to explore her status under FMLA and had the right, under company policies to which employee had agreed at start of employment, to obtain more information regarding whether she remained fit for duty).

(n3)Footnote 3. 29 C.F.R. § 825.301(a). See 29 C.F.R. § 825.300(d).

(n4)Footnote 4. 29 C.F.R. § 825.301(b); 2 Cal. Code Reg. § 7297.4(a)(1).

(n5)Footnote 5. 29 C.F.R. § 825.301(b).

(n6)Footnote 6. 29 C.F.R. § 825.301(b); 2 Cal. Code Reg. § 7297.4(a)(1).

(n7)Footnote 7. 29 C.F.R. § 825.301(b). See 29 C.F.R. §§ 825.302 (notice requirements for foreseeable leave); 825.303 (notice requirements for unforeseeable leave). See also § 8.25[2], discussing the employee's request for leave.

(n8)Footnote 8. 29 C.F.R. § 825.301(b).

(n9)Footnote 9. 29 C.F.R. § 825.301(b).

(n10)Footnote 10. 29 C.F.R. § 825.301(c).

(n11)Footnote 11. 29 C.F.R. § 825.301(3). See 29 U.S.C. § 2617; 29 C.F.R. § 825.400(c).

(n12)Footnote 12. 29 C.F.R. § 825.301(e).

(n13)Footnote 13. *Bailey v. Southwest Gas Co.* (9th Cir. 2002) 275 F.3d 1181, 1186 .

(n14)Footnote 14. 29 C.F.R. § 825.220(a)(1), b). see *Liu v. Amway Corp.* (9th Cir. 2004) 347 F.3d 1125, 1134-1135 (employer failed in its responsibility to assess employee's entitlement to leave and denied her substantive right under FMLA and CFRA, constituting violation of FMLA and CFRA; further, designation of leave as personal deprived employee of rights under FMLA and CFRA, because by designating leave as personal, she was subject to control and discretion of supervisor in taking leave she had statutory right to take so that employee presented triable issue of fact as to whether her rights were violated by misidentification of leave as personal).

(n15)Footnote 15. 2 Cal. Code Reg. § 7297.5(b)(2)(A).

(n16)Footnote 16. 2 Cal. Code Reg. § 7297.5(b)(2)(A).

(n17)Footnote 17. 2 Cal. Code Reg. § 7297.5(b)(2)(A)(1).

(n18)Footnote 18-20. Reserved

(n19)Footnote 21. *2 Cal. Code Reg. § 7297.3(a)(1)(A).*

(n20)Footnote 22. *See 29 C.F.R. § 825.300.*

(n21)Footnote 23. *29 C.F.R. § 825.301(d).*



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part C. FAMILY CARE AND MEDICAL LEAVE

1-8 California Employment Law § 8.28

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.28 Pay During Leave

[1] Vacation and Other Accrued Paid Leave

Both FMLA and CFRA generally provide for unpaid leaves,ⁿ¹ but under both laws the employer may require, or the employee may elect, to substitute any accrued paid vacation or other accrued paid time off (other than sick leave) for the otherwise unpaid family care or medical leave.ⁿ² Under the FMLA, "substitute" means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements of the paid leave policy only in connection with the receipt of payment.ⁿ³ If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave. Employers may not discriminate against employees on FMLA leave in the administration of their paid leave policies.ⁿ⁴ If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under these conditions and circumstances, the employee remains entitled to all the paid leave earned or accrued under the terms of the employer's plan.ⁿ⁵

Under the FMLA, if an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the employee's FMLA leave entitlement.ⁿ⁶

The Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the FLSA. The FLSA also limits the number of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). In addition, under the FLSA,

an employer always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires that use pursuant to the FLSA, the time taken may be counted against the employee's FMLA leave entitlement.ⁿ⁷

Under CFRA, employers are prohibited from asking whether the employee is taking paid time off for CFRA purposes.^{n7.1} Thus, if the employee does not make any reference to CFRA, it may be difficult for an employer to know if a request to take vacation or other accrued paid leave is for a CFRA event.

Under both FMLA and CFRA, an employee has the right to substitute paid vacation and personal leave without limitation. Thus, the employer cannot override the employee's election to use such paid leave, nor can it restrict its use by requiring, for example, the use of full days or weeks at a time. Likewise, the employer has the right to require the employee to substitute such paid leave for otherwise unpaid FMLA/CFRA leave (in the absence of other limiting factors like a collective bargaining agreement), and the employee must accept the employer's decision to require it, even if the employee would desire a different result.^{n7.2}

[2] Sick or Medical Leave

CFRA and FMLA also allow the employer to require, or the employee to elect, to use any accrued paid sick/medical leave for the otherwise unpaid medical leave for the employee's own serious health condition.ⁿ⁸ FMLA also provides for the use of sick leave for the care of a family member with a serious health condition.ⁿ⁹ CFRA, however, does not grant the employee this right. Instead, CFRA authorizes use of accrued sick leave for other than the employee's own serious health condition only if mutually agreed upon by the employer and the employee.ⁿ¹⁰ However, *Labor Code* § 233 provides that an employer who provides sick leave for employees must permit an employee to use sick leave in any calendar year in an amount not less than the amount earned in six months's employment, to attend to the illness of a child, parent, spouse, or domestic partner of the employee.ⁿ¹¹ All conditions and restrictions placed by an employer on the use by an employee of sick leave also apply to the employee's use of sick leave to attend to the illness of a child, parent, spouse, or domestic partner.ⁿ¹² These provisions, however, do not extend the maximum period of leave to which an employee is entitled under the CFRA or FMLA.ⁿ¹³

[3] Overlap With Other Benefit Plans

Leave taken pursuant to a disability leave plan may be considered FMLA leave for a serious health condition and counted in the leave entitlement permitted under FMLA if it meets the criteria.ⁿ¹⁴ In those cases, the employer may designate the leave as FMLA leave and count the leave against the employee's FMLA leave entitlement. Because leave pursuant to a disability benefit plan is not unpaid, the provision for substitution of the employee's accrued paid leave is inapplicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, when state law permits, to have paid leave supplement the disability plan benefits, such as when a plan provides replacement income for only two-thirds of an employee's salary.ⁿ¹⁵

Under the FMLA, a serious health condition may result from injury to the employee "on or off" the job. If the employer designates the leave as FMLA leave,ⁿ¹⁶ the leave counts against the employee's FMLA leave entitlement. Because a workers' compensation absence is not unpaid, the provision for substitution of the employee's accrued paid leave is not applicable, and neither the employee nor the employer may require the substitution of paid leave. However, employers and employees may agree, when state law permits, to have paid leave supplement workers' compensation benefits, such as when workers' compensation provides replacement income for only two-thirds of an employee's salary. If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a "light duty job," but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a "light duty job." As a result, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the employee's FMLA leave entitlement is exhausted. As of the date workers' compensation

benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave.^{n16.1}

[4] Substitution of Other Time Off

CFRA regulations state that the employer and employee may negotiate for the use of any additional paid or unpaid time off to substitute for CFRA leave.ⁿ¹⁷

[5] Family Temporary Disability Insurance Benefits

Effective January 1, 2004,ⁿ¹⁸ employees eligible to take family-care leave under the federal Family and Medical Leave Act (FMLA)ⁿ¹⁹ or the California Family Rights Act (CFRA),ⁿ²⁰ to care for a seriously ill child, spouse, parent, or domestic partner, or to bond with a new child, are eligible to receive up to six weeks of wage replacement benefits.ⁿ²¹ This applies to leave taken after July 1, 2004.ⁿ²² For discussion of family temporary disability insurance benefits, see Chapter 80, § 80.13.

Legal Topics:

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

Labor & Employment LawLeaves of AbsenceGeneral OverviewLabor & Employment LawLeaves of AbsenceFamily & Medical Leave ActCoverage & DefinitionsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsHoliday, Sick & Vacation Pay

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 2612(c); 29 C.F.R. § 825.207(a); Gov. Code § 12945.2(d); 2 Cal. Code Reg. § 7297.5(b).

(n2)Footnote 2. 29 U.S.C. § 2612(d)(2)(A); 29 C.F.R. § 825.207(a); Gov. Code § 12945.2(e); 2 Cal. Code Reg. § 7297.5(b)(1).

(n3)Footnote 3. 29 C.F.R. § 825.207(a). See 29 C.F.R. § 825.300(c).

(n4)Footnote 4. 29 C.F.R. § 825.207(a).

(n5)Footnote 5. 29 C.F.R. § 825.207(b).

(n6)Footnote 6. 29 C.F.R. § 825.207(c).

(n7)Footnote 7. 29 C.F.R. § 825.207(f).

(n8)Footnote 7.1. 2 Cal. Code Reg. § 7297.5(b)(2)(A); see discussion in §§ 8.25[2], 8.27[1].

(n9)Footnote 7.2. See U.S. Dept. of Labor, Wage and Hour Div. Summary of Major Comments on 29 C.F.R. § 825.207; 2 Cal. Code Reg. § 7297.5(b)(1).

(n10)Footnote 8. 29 U.S.C. § 2612(d)(2)(B); 29 C.F.R. § 825.207(c); Gov. Code § 12945.2(e); 2 Cal. Code Reg. § 7297.5(b)(3)(A).

(n11)Footnote 9. 29 U.S.C. § 2612(d)(2)(B).

(n12)Footnote 10. Gov. Code § 12945.2(e); 2 Cal. Code Reg. § 7297.5(b)(3)(B).

(n13)Footnote 11. Lab. Code § 233(a); see Lab. Code § 233(b) (definitions).

(n14)Footnote 12. *Lab. Code* § 233(a).

(n15)Footnote 13. *Lab. Code* § 233(a); see *Gov. C.* § 12945.2; 29 *U.S.C.* § 2601 *et seq.*

(n16)Footnote 14. 29 *C.F.R.* § 825.207(d). See 29 *C.F.R.* §§ 825.112-825.115.

(n17)Footnote 15. 29 *C.F.R.* § 825.207(d).

(n18)Footnote 16. See § 8.27[1], *above*.

(n19)Footnote 16.1. 29 *C.F.R.* § 825.207(e). See also 29 *C.F.R.* §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a), 825.702(d)(1), (2) regarding the relationship between workers' compensation absences and FMLA leave.

(n20)Footnote 17. 2 *Cal. Code Reg.* § 7297.5(b)(4).

(n21)Footnote 18. See Stats. 2002, Ch. 901, § 7.

(n22)Footnote 19. 29 *U.S.C.* § 2611 *et seq.*

(n23)Footnote 20. *Gov. Code* § 12945.2.

(n24)Footnote 21. *Unemp. Ins. Code* § 3301(a), (d) (no more than six weeks of benefits can be paid within any 12-month period).

(n25)Footnote 22. Stats. 2002, ch. 901, § 7.



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1-8 California Employment Law § 8.29

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.29 Maintenance of Employee Status and Benefits

[1] Employee Status and Seniority

During CFRA or FMLA leave, employees retain their employee status. Employees return from leave with the same benefits and seniority they had when the leave commenced, and the taking of leave does not constitute a break in service for purposes of longevity, seniority under any collective bargaining agreement, or any employee benefit plan.ⁿ¹ However, under CFRA, if the employer's policy allows seniority to accrue while employees are out on paid leave, then seniority will accrue during any part of a paid CFRA leave.ⁿ²

[2] Group Health Plans

Under both CFRA and FMLA, the employer is required to maintain health care coverage under any group health plan for the duration of the leave at the same level and under the same terms and conditions as if the employee had continued in employment,ⁿ³ subject to the proviso that if the employee fails to return to work at the end of the leave, the employer may recover from the employee premiums paid for maintaining coverage during the employee's absence.ⁿ⁴ The obligation commences on the date leave first begins under FMLA or both FMLA and CFRAⁿ⁵ and continues for the duration of the leave up to a maximum of 12 workweeks in a 12-month period.ⁿ⁶ If an employee chooses not to retain group health plan coverage during his or her FMLA/CFRA leave, the employee is entitled, on his or her return from leave, to be reinstated to health benefits on the same terms as prior to taking leave.ⁿ⁷ Additionally, under both FMLA and CFRA, if the employee's position would have terminated if the employee were not out on leave (for example, if the employee's position is legitimately eliminated), the employer's obligation to provide group health benefits also ceases.ⁿ⁸

[3] Other Benefits

Under CFRA, the employee is entitled to participate in health plans for any additional period of leave not covered by the group health plans referred to in [2], *above*, and in any employee benefit plans including life, short-term or long-term disability or accident insurance, pension and retirement plans, and supplemental unemployment benefit plans

to the same extent and under the same conditions that would apply to any other non-CFRA leave granted by the employer.ⁿ⁹ If there are no such existing conditions established, the employer must allow the employee to continue to participate in these plans, but the employer can require the employee to pay the premiums at the group rate during unpaid periods of family leave. The employee's election not to pay those premiums to continue the benefits does not constitute a break in service for purposes of longevity, seniority under a collective bargaining agreement, or any employee benefit plan requiring the payment of premiums.ⁿ¹⁰ An employer is not required to make retirement or pension plan payments or to count the leave period for purposes of "time accrued" under such a plan during any unpaid portion of CFRA leave.ⁿ¹¹ However, employees are allowed to continue making contributions in accordance with the terms of those plans.ⁿ¹²

FMLA does not require any other employee benefits except to the extent that such other benefits are provided by the employer's established policy for other forms of leave.ⁿ¹³ However, since employers are required to restore employees to the equivalent of their pre-leave benefits,ⁿ¹⁴ and cannot require the employees to meet any new qualifications (e.g., a physical to qualify for life insurance), some employers may elect to maintain other benefits and pay premiums for their continuation, which may or may not be subject to recovery from the employee on his or her return from leave.ⁿ¹⁵

[4] Repayment of Premiums to Employer

If the employee fails to return to work after the expiration of the period of leave to which he or she is entitled, the employer may recover the premiums paid for maintaining the health coverage, unless the employee's failure to return is because of (1) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave, or (2) other extenuating circumstances beyond the control of the employee.ⁿ¹⁶ An employee is deemed to have "failed to return from leave" if he or she works fewer than 30 days after returning from leave.ⁿ¹⁷ FMLA allows an employer (1) to deduct these costs from any sums due the employee (for example, unpaid wages, vacation pay, profit-sharing), provided that such deductions do not violate federal or state wage laws, or (2) to initiate a legal action against the employee to recover these costs.ⁿ¹⁸ For discussion of California law governing deductions from employee's paychecks generally, *see* Chapter 4.

If paid leave has been substituted for FMLA leave by requirement of the employer or election of the employee, the employer may not recover its share of health insurance premiums for any period of FMLA leave covered by paid leave.ⁿ¹⁹

Legal Topics:

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

Labor & Employment Law Leaves of Absence General Overview Labor & Employment Law Leaves of Absence Family & Medical Leave Act Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. 26 U.S.C. § 2614(a); 29 C.F.R. §§ 825.214, 29 C.F.R. § 825.215(d); Gov. Code § 12945.2(g); 2 Cal. Code Reg. § 7297.5(d); *see* discussion of reinstatement to equivalent position in § 8.30.

(n2)Footnote 2. 2 Cal. Code Reg. § 7297.5(d)(2).

(n3)Footnote 3. 29 U.S.C. § 2614(c)(1); 29 C.F.R. § 825.209(a), (b); Gov. Code § 12945.2(f)(1); 2 Cal. Code Reg. § 7297.5(c)(1).

(n4)Footnote 4. 29 U.S.C. § 2614(c); *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 1112 n.7 .

(n5)Footnote 5. This distinction is made because pregnancy disability leave is counted under FMLA but not under CFRA. *see* 2 *Cal. Code Reg.* § 7297.6; *see also* discussion in § 8.21[2].

(n6)Footnote 6. 2 *Cal. Code Reg.* § 7297.5(c)(2).

(n7)Footnote 7. 29 *C.F.R.* § 825.209(e); 2 *Cal. Code Reg.* § 7297.5(f).

(n8)Footnote 8. 29 *C.F.R.* § 825.209(f); 2 *Cal. Code Reg.* § 7297.2(c)(1)(A).

(n9)Footnote 9. *Gov. Code* § 12945.2(f)(2); 2 *Cal. Code Reg.* § 7297.5(d).

(n10)Footnote 10. *Gov. Code* § 12945.2(f)(2); 2 *Cal. Code Reg.* § 7297.5(e)(1).

(n11)Footnote 11. *Gov. Code* § 12945.2(f)(2); 2 *Cal. Code Reg.* § 7297.5(e)(2).

(n12)Footnote 12. *Gov. Code* § 12945.2(f)(2); 2 *Cal. Code Reg.* § 7297.5(e)(2).

(n13)Footnote 13. 29 *C.F.R.* § 825.209(h).

(n14)Footnote 14. 29 *C.F.R.* §§ 825.214, 825.215(a); *see* discussion of reinstatement in § 8.30.

(n15)Footnote 15. 29 *C.F.R.* § 825.213(b), 29 *C.F.R.* § 825.215(d)(1), (2).

(n16)Footnote 16. 29 *U.S.C.* § 2614(c)(2); 29 *C.F.R.* § 825.213(a)(1), (2); *Gov. Code* § 12945.2(f)(1)(A), (B); 2 *Cal. Code Reg.* § 7297.5(c)(5)(A), (B).

(n17)Footnote 17. 29 *C.F.R.* § 825.213(c); 2 *Cal. Code Reg.* § 7297.5(c)(5)(A).

(n18)Footnote 18. 29 *C.F.R.* § 825.213(f).

(n19)Footnote 19. 29 *C.F.R.* § 825.213(d).



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1-8 California Employment Law § 8.30

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.30 Reinstatement to Job

[1] Generally

Under both CFRA and FMLA, an employee is entitled to reinstatement to his or her former job at the end of CFRA/FMLA leave.ⁿ¹ CFRA states that the employee is guaranteed the right to reinstatement in "the same or a comparable position,"ⁿ² and FMLA states that the employee is entitled to be restored to "the position of employment held by the employee when the leave commenced" or "an equivalent position with equivalent benefits, pay, and other terms and conditions of employment."ⁿ³ Although the wording of the two statutes is slightly different, apparently CFRA is meant to model FMLA in this regard, as indicated by the CFRA regulations, which state that "reinstatement" means "restoration" within the meaning of FMLA and its implementing regulations.ⁿ⁴ However, CFRA provides that the right to reinstatement in the same or a comparable position is a "guarantee" made to the employee at the time leave is granted, and refusal to honor the guarantee constitutes an unlawful employment practice.ⁿ⁵ FMLA includes no such "guarantee" language.

[2] Definition of "Equivalent Position"

FMLA regulations state that an "equivalent position" is one that is virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites, and status.ⁿ⁶ It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.ⁿ⁷ Employees who are no longer qualified for their position because of their inability to meet certain qualifications while they were on leave (for example, renew a license, attend a necessary course) must be given a reasonable opportunity to fulfill those conditions on their return to work.ⁿ⁸ That entitlement is not affected by either the fact that the employee has been replaced during his or her absence or the fact that the position has been restructured to accommodate the absence.ⁿ⁹

FMLA regulations also specify that the employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance), to the same work shift or an equivalent work schedule, and to the same or an equivalent opportunity for bonuses, profit-sharing, and other similar

discretionary and nondiscretionary payments.ⁿ¹⁰

[3] Establishing Refusal to Reinstate

CFRA regulations set forth rules for determining a refusal to reinstate.ⁿ¹¹ When a definite reinstatement date was agreed to at the beginning of the leave, a refusal to reinstate is established if it can be proven by a preponderance of the evidence that the leave was granted by the employer, and the employer failed to reinstate the employee to the same or a comparable position by the date previously agreed upon.ⁿ¹² If the reinstatement date is different from the original agreed-on date, a refusal to reinstate is established if it is proven by a preponderance of the evidence that the employer failed to reinstate the employee to the same or a comparable position within two business days, when feasible, after the employee notified the employer of his or her readiness to return as required by FMLA regulations.ⁿ¹³

[4] Denial of Reinstatement if Employee Would Not Have Remained Continuously Employed

Under both CFRA and FMLA, an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the leave period.ⁿ¹⁴ For example, while an employer's duties under the FEHA include extending reasonable accommodations to an employee if reasonable accommodations will enable the employee to perform his or her essential duties,^{n14.1} there is no similar provision in the CFRA requiring an employer to provide reasonable accommodation to an employee returning from CFRA leave.^{n14.2} Under the FMLA, once the 12-week leave period ends, an employee who remains unable to perform an essential function of the position because of a physical or mental condition has no right to restoration to another position under the FMLA.^{n14.3}

In order to justify denial of reinstatement, an employer has the burden of showing that an employee would not otherwise have been employed at the time reinstatement is requested.ⁿ¹⁵ Under FMLA, if a shift was eliminated or overtime was decreased, the employee would not be entitled to return to that shift or the original overtime hours; but if another employee has filled the position of the employee on leave on a certain shift, the employee is entitled to return to the same shift on which he or she was employed before taking FMLA leave.ⁿ¹⁶ Similarly, if a contract ended, the employer would not have to reinstate the employee.ⁿ¹⁷

■ ILLUSTRATION

While on leave, an employee's position is eliminated and the employee is laid off. If the employer can establish that the employee would not otherwise have remained employed at the scheduled end of the leave period, the employer's responsibility to continue leave, to maintain benefits, and to reinstate the employee ceases, provided the employer has no continuing obligations under a collective bargaining agreement.ⁿ¹⁸

[5] Denial of Reinstatement of "Key Employee"

Both CFRA and FMLA exempt certain "key employees" from the employer's obligation to reinstate employees following leave under limited circumstances.ⁿ¹⁹ For purposes of this exemption, a "key employee" is a salaried employee who is among the highest paid ten percent of all the employees employed by the employer within 75 miles of the employee's worksite.ⁿ²⁰ An employer may deny reinstatement to a key employee only under the following circumstances:ⁿ²¹

- The denial of restoration is necessary to prevent "substantial and grievous economic injury" to the operation of the employer, based on whether the restoration, not the leave itself, would cause such injury;
- The employer notifies the employee of its intent to deny restoration as soon as it determines that such injury would occur; and

- If the leave has already commenced, the employee has been given an opportunity to elect to return to work and elects not to do so after receiving such notice.

Although it is generally anticipated that such notice will be given prior to commencement of the leave, if leave has already commenced, the employer must provide the employee a reasonable time to return to work following the prescribed notice.ⁿ²²

FMLA regulations provide guidance regarding the meaning of the term "substantial and grievous economic injury." The regulations provide that an employer may take into account its ability to replace on a temporary basis the employee on FMLA leave. They further state that if permanent replacement is unavoidable, the cost of then reinstating the employee into an equivalent position can be considered in evaluating whether substantial and grievous economic injury will occur from restoration.ⁿ²³ The regulations provide that if the reinstatement of a key employee threatens the economic viability of the firm, it would constitute a "substantial and grievous economic injury."ⁿ²⁴ A lesser injury that causes substantial, long-term economic injury also would be sufficient to meet the standard, but minor inconveniences and costs that the employer would experience in the normal course of doing business would definitely not meet the test.ⁿ²⁵ However, the regulations and the accompanying summary explain that a precise test cannot be set for the level of hardship or injury that must be sustained due to the fact-specific circumstances that must be evaluated on a case-by-case basis. The summary also explains that the "substantial and grievous economic injury" standard is different from, and more stringent than, the "undue hardship" standard required under the Americans With Disabilities Act (ADA) to justify a failure to accommodate an employee's disability.ⁿ²⁶

Under FMLA, an employer is required to give a key employee notice of his or her status as a key employee and of the ramifications of a finding that reinstatement of the employee will cause substantial and grievous economic injury.ⁿ²⁷ The employer must also give a key employee notice of its good-faith determination that reinstatement of the employee will cause substantial and grievous economic injury, that the employer cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the leave. Although it is generally anticipated that such notice will be given prior to commencement of the leave, if leave has already commenced, the employer must provide the employee a reasonable time to return to work.ⁿ²⁸ A key employee is entitled to a continuation of group health insurance benefits unless and until (1) the employee advises the employer that he or she does not desire reinstatement at the end of the leave period, (2) FMLA leave entitlement is exhausted, or (3) reinstatement is actually denied.ⁿ²⁹ If the key employee takes leave after notice has been given, the employee may request reinstatement at the end of the leave period, and the employer must again make a determination of whether there will be substantial and grievous economic injury from reinstatement based on the facts at that time, and, if so, notify the employee in writing of the denial of reinstatement.ⁿ³⁰

Legal Topics:

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

Labor & Employment Law
Leaves of Absence
Family & Medical Leave Act
General Overview
Labor & Employment Law
Leaves of Absence
Family & Medical Leave Act
Coverage & Definitions
General Overview
Labor & Employment Law
Wage & Hour Laws
General Overview
Labor & Employment Law
Wage & Hour Laws
Coverage & Definitions
General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.214(a); *Gov. Code* § 12945.2(a); 2 *Cal. Code Reg.* § 7297.2(a).

(n2)Footnote 2. *Gov. Code* § 12945.2(a); *see* 2 *Cal. Code Reg.* § 7297.2(a). For the standard jury instruction of what constitutes a "comparable job under CFRA, *see* CACI 2603. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n3)Footnote 3. 29 U.S.C. § 2614(a)(1)(A), (B); *see* 29 C.F.R. § 825.214(a).

(n4)Footnote 4. 2 *Cal. Code Reg.* § 7297.0(n).

(n5)Footnote 5. *Gov. Code* § 12945.2(a); 2 *Cal. Code Reg.* § 7297.2(a).

(n6)Footnote 6. 29 *C.F.R.* § 825.215(a); 29 *C.F.R.* § 825.215(c), (d) (specifics and examples of entitlement to pay, benefits).

(n7)Footnote 7. 29 *C.F.R.* § 825.215(a); *see* discussion of maintenance of benefits in § 8.29.

(n8)Footnote 8. 29 *C.F.R.* § 825.215(b).

(n9)Footnote 9. 29 *C.F.R.* § 825.214(a).

(n10)Footnote 10. 29 *C.F.R.* § 825.215(e)(1)-(3).

(n11)Footnote 11. 2 *Cal. Code Reg.* § 7297.2(b).

(n12)Footnote 12. 2 *Cal. Code Reg.* § 7297.2(b)(1).

(n13)Footnote 13. 2 *Cal. Code Reg.* § 7297.2(b)(1); former 29 *C.F.R.* § 825.309(c) [*now see* 29 *C.F.R.* § 825.311].

(n14)Footnote 14. 29 *C.F.R.* § 825.216(a), (b); 2 *Cal. Code Reg.* § 7297.2(c)(1).

(n15)Footnote 14.1. *See Gov. Code* § 12940(a)(1), (2). For discussion of an employer's reasonable accommodation obligations under the FEHA, *see* § 41.51[3] of this text.

(n16)Footnote 14.2. *Neisendorf v. Levi Strauss & Co.* (2006) 143 *Cal. App. 4th* 509, 49 *Cal. Rptr. 3d* 216, 2006 *Cal. App. LEXIS* 1520, *12*20 (employee had no basis to proceed under CFRA, where employee was not released to return to work without accommodation by end of 12 weeks of CFRA leave, and released only with accommodation at end of 14 weeks, so that employer was not under express statutory duty to reinstate her to former position or equivalent position; unchallenged finding that employer had legitimate, nondiscriminatory reason to discharge employee (which had nothing to do with her CFRA leave) barred employee from articulating cognizable cause of action for jury's consideration based on employer's alleged refusal to honor CFRA's right to reinstatement).

(n17)Footnote 14.3. *Neisendorf v. Levi Strauss & Co.* (2006) 143 *Cal. App. 4th* 509, 49 *Cal. Rptr. 3d* 216, 2006 *Cal. App. LEXIS* 1520, *12. *See* 29 *C.F.R.* § 825.214(b).

(n18)Footnote 15. 29 *C.F.R.* § 825.216(a); 2 *Cal. Code Reg.* § 7297.2(c)(1). *See Gambini v. Total Renal Care, Inc.* (9th Cir. 2007) 486 *F.3d* 1087, 2007 *U.S. App. LEXIS* 9290, *21-*22 (because of uncontradicted evidence that employer terminated employee for conduct unrelated to FMLA leave, any putative error as to employer's burden of proof as to liability for failure to reinstate her after her period of FMLA leave was harmless). For the standard jury instruction on the employer's affirmative defense that employment would have ceased for other reasons, *see CACI* 2612. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form on the affirmative defense that employment would have ceased for other reasons, *see CACI VF-2601*. For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n19)Footnote 16. 29 *C.F.R.* § 825.216(a)(2).

(n20)Footnote 17. 29 *C.F.R.* § 825.216(b).

(n21)Footnote 18. 29 *C.F.R.* § 825.216(a)(1); 2 *Cal. Code Reg.* § 7297.2(c)(1)(A). *See, e.g., Tomlinson v. Qualcomm, Inc.* (2002) 97 *Cal. App. 4th* 934, 939-943, 118 *Cal. Rptr. 2d* 822 (grant of family leave did not confer any greater right on plaintiff to escape effects of company-wide workforce reduction than if she had not taken leave, and

employer's obligation to reinstate her terminated when her employment was terminated).

(n22)Footnote 19. 29 U.S.C. § 2614(b); 29 C.F.R. § 825.216(c); Gov. Code § 12945.2(r); 2 Cal. Code Reg. § 7297.2(c)(2).

(n23)Footnote 20. 29 U.S.C. § 2614(b)(2); 29 C.F.R. § 825.217(a); Gov. Code § 12945.2(r)(1)(A); 2 Cal. Code Reg. § 7297.2(c)(2)(A), (B).

(n24)Footnote 21. 29 U.S.C. § 2614(b); 29 C.F.R. § 825.216(c), 29 C.F.R. § 825.218(a), 29 C.F.R. § 825.219(a)(b); Gov. Code § 12945.2(r)(1); 2 Cal. Code Reg. § 7297.2(c)(2). For the standard jury instruction on the employers affirmative defense that the employee was a key employee, see CACI 2613. For discussion of the CACI standard jury instructions generally, see § 61.05.

(n25)Footnote 22. Gov. Code § 12945.2(r)(1); 2 Cal. Code Reg. § 7297.2(c)(2).

(n26)Footnote 23. 29 C.F.R. § 825.218(b).

(n27)Footnote 24. 29 C.F.R. § 825.218(c).

(n28)Footnote 25. 29 C.F.R. § 825.218(c).

(n29)Footnote 26. 29 C.F.R. § 825.218(c); see U.S. Dept. of Labor, Wage and Hour Div. Summary of Major Comments on 29 C.F.R. § 825.218.; 42 U.S.C. § 12101 et seq .

(n30)Footnote 27. 29 C.F.R. § 825.219(a).

(n31)Footnote 28. 29 C.F.R. § 825.219(b).

(n32)Footnote 29. 29 C.F.R. § 825.219(c).

(n33)Footnote 30. 29 C.F.R. § 825.219(d).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part C. FAMILY CARE AND MEDICAL LEAVE

1-8 California Employment Law § 8.31

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.31 Enforcement and Remedies

[1] Under FMLA

Under FMLA, the employee or another person, on behalf of the employee, may file a complaint regarding alleged violations with the U.S. Department of Labor.ⁿ¹ These complaints are to be investigated in the same manner as are complaints under the FLSA.ⁿ² An administrative complaint must be in writing and must be filed within a reasonable time after the employee discovers that his or her FMLA rights have been violated, and in no event more than two years after the violation occurred, or three years in the case of a willful violation.ⁿ³ For discussion of administrative enforcement of the FLSA, *see* Chapter 5, Part B, Subpart 2.

Either the aggrieved employee or the Secretary of Labor may file a civil action for violation of FMLA against the employer in federal or state court.ⁿ⁴ However, the employee's right to bring an individual action terminates if the Secretary brings an action to recover amounts due to that employee, unless the action is dismissed without prejudice on the Secretary's motion.ⁿ⁵ The statute of limitations for a civil action under FMLA is two years after the date of the last event constituting the alleged violation of FMLA, or three years for willful violations.ⁿ⁶

Under FMLA, the employee may recover wages, salary, employment benefits, or other compensation denied or lost because of the violation, plus interest.ⁿ⁷ If no tangible employment loss has occurred, the employee may recover any actual monetary losses sustained by the employee as a result of the violation, such as the cost of providing care to a family member for up to 12 weeks, or 26 weeks in a case involving leave resulting from the serious injury to or illness of a member of the Armed Forces, plus interest.ⁿ⁸ The employee may also be entitled to an additional amount of liquidated damages equal to the sum of the actual damages plus interest, unless the employer proves to the satisfaction of the court that its actions were taken in good faith and that the employer had reasonable grounds to believe that its actions did not violate FMLA, in which case the court has discretion not to award liquidated damages.ⁿ⁹ FMLA allows a plaintiff to recover damages for absences from work that were caused by an emotional condition that itself resulted from the employer's wrongful denial of FMLA leave.^{n9.1} In an appropriate case, the court may also award equitable relief, such as employment, reinstatement, and promotion.ⁿ¹⁰ A prevailing plaintiff is also entitled to recover

reasonable attorney's fees, expert witness fees, and other costs.ⁿ¹¹

[2] Under CFRA

CFRA is a part of the FEHA and is therefore enforced by the DFEH and FEHC under the general enforcement provisions of the FEHA.ⁿ¹² However, the remedy for a violation of the requirement of posting notice of CFRA rights is an order that the employer provide such notice.ⁿ¹³

An aggrieved employee may bring a civil action after exhausting the administrative remedy.ⁿ¹⁴ In addition, one federal district court has held that a claim of public policy wrongful termination may be based on a violation of CFRA.ⁿ¹⁵

An action under CFRA may be preempted by federal law if determination of the claim involves the interpretation of a collective bargaining agreement. Thus, in *Dept. of Fair Employment & Housing v. Verizon California Inc.*,ⁿ¹⁶ a unionized employee's claim under CFRA that she should have been paid for the full twelve weeks of family leave, but where she had not provided verification of injury from a medical specialist as requested by the employer, was preempted by § 301 of the Labor Management Relations Act of 1947.ⁿ¹⁷ The claim was substantially dependent on an interpretation of the collective bargaining agreement.ⁿ¹⁸

For discussion of administrative enforcement of the FEHA, *see* Chapter 42, Part B. For discussion of civil actions under the FEHA, *see* Chapter 43, Part A.

Legal Topics:

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

Labor & Employment Law
Leaves of Absence
Family & Medical Leave Act
General Overview
Labor & Employment Law
Leaves of Absence
Family & Medical Leave Act
Coverage & Definitions
General Overview
Labor & Employment Law
Wage & Hour Laws
General Overview
Labor & Employment Law
Wage & Hour Laws
Coverage & Definitions
General Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 2617(b)(1); 29 C.F.R. § 825.400(a)(1).

(n2)Footnote 2. 29 U.S.C. § 2617(b)(1).

(n3)Footnote 3. 29 C.F.R. § 825.401(b), (c).

(n4)Footnote 4. 29 U.S.C. § 2617(a)(2), (b)(2); 29 C.F.R. § 825.400(a)(2).

(n5)Footnote 5. 29 U.S.C. § 2617(a)(4).

(n6)Footnote 6. 29 U.S.C. § 2617(c)(1), (2); 29 C.F.R. § 825.400(b).

(n7)Footnote 7. 29 U.S.C. § 2617(a)(1)(A)(i), (ii); 29 C.F.R. § 825.400(c).

(n8)Footnote 8. 29 U.S.C. § 2617(a)(1)(A)(i), (ii); 29 C.F.R. § 825.400(c).

(n9)Footnote 9. 29 U.S.C. § 2617(a)(1)(A)(iii); 29 C.F.R. § 825.400(c).

(n10)Footnote 9.1. *Farrell v. Tri-County Metropolitan Transportation District* (9th Cir. 2008) 530 F.3d 1023, 1024-1025 (jury's verdict properly reflected that employee was not awarded FMLA damages for emotional distress, but rather for days of work that he missed because of stress or other mental problems resulting from wrongful denial of FMLA leave).

(n11)Footnote 10. 29 U.S.C. § 2617(a)(1)(B); 29 C.F.R. § 825.400(c).

(n12)Footnote 11. 29 U.S.C. § 2617(a)(3); 29 C.F.R. § 825.400(c).

(n13)Footnote 12. 2 Cal. Code Reg. § 7297.8; *see generally* Gov. Code §§ 12930, 12935, 12960, 12965(a), 12970.

(n14)Footnote 13. 2 Cal. Code Reg. § 7297.8.

(n15)Footnote 14. Gov. Code §§ 12960, 12965(b); *Baker v. Children's Hospital Medical Center* (1989) 209 Cal. App. 3d 1057, 1062, 257 Cal. Rptr. 768 . For the standard jury instruction for the essential factual elements of a claim for violation of CFRA, *see* CACI 2600. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the special verdict form for violation of CFRA rights, *see* CACI VF-2600. For discussion of CACI special verdict forms generally, *see* § 61.06.

(n16)Footnote 15. *See Ely v. Wal-Mart* (C.D. Cal. 1995) 875 F. Supp. 1422, 1425, 1426, 1429 . For discussion of liability for wrongful termination in violation of public policy, *see* ch. 60.

(n17)Footnote 16. *Dept. of Fair Employment & Housing v. Verizon California Inc.* (2003) 108 Cal. App. 4th 160, 133 Cal. Rptr. 2d 258 .

(n18)Footnote 17. 29 U.S.C. § 185.

(n19)Footnote 18. *Dept. of Fair Employment & Housing v. Verizon California Inc.* (2003) 108 Cal. App. 4th 160, 133 Cal. Rptr. 2d 258, 261-267 . *see* Gov. Code § 12945.2(e) (specifically referring to "any other paid or unpaid time off negotiated with the employer" to determine employee's right to be paid for family leave time).



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part C. FAMILY CARE AND MEDICAL LEAVE

1-8 California Employment Law § 8.32

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.32 Prohibition Against Discrimination or Retaliation

Under CFRA, it is unlawful to refuse to hire, or to discharge, fine, suspend, expel, or otherwise discriminate against, any individual because of (1) the individual's exercise of the right to CFRA leave, or (2) the individual's giving of information or testimony as to his or her own, or another person's, CFRA leave in any inquiry or proceeding related to family care and medical leave rights.ⁿ¹ The elements of a cause of action for retaliation in violation of CFRA are:ⁿ²

- The defendant was an employer covered by CFRA.
- The plaintiff was an employee eligible to take CFRA leave.
- The plaintiff exercised the right to take leave for a qualifying CFRA purpose.
- The plaintiff suffered an adverse employment action, such as termination, fine, or suspension because of the exercise of the right to CFRA leave.

In *Dudley v. Dept. of Transportation*,ⁿ³ the plaintiff alleged that, as a consequence of leaves taken to address her health problems, she was criticized, subjected to leave control, and "required to account for each and every day of her illness in a manner which was not required of other employees." She further alleged that, following two leaves of absence she took to control her medical condition, the defendant served her with Notice[s] of Adverse Action, which resulted in a salary reduction and 10-day suspension. The court of appeal found these assertions, if proven, would have been sufficient to allege a cause of action for retaliation under CFRA.

In *Faust v. California Portland Cement Co.*,^{n3.1} the former employee made out a prima facie case of retaliation under CFRA by presenting evidence that he was entitled to leave under the CFRA, he availed himself of that right, and was terminated for taking the leave to which he was entitled. The burden then shifted to the employer to present evidence to establish a legitimate, nonretaliatory reason for the discharge.^{n3.2} The employer failed to meet that burden. Although it asserted that it legitimately discharged the employee for insubordination for failing to respond to repeated inquiries by

its human resources manager regarding his medical condition, the employer's refusal to communicate with any of the employee's representatives, particularly his workers' compensation attorney, undermined the contention that, as a matter of law, it legitimately fired the employee for ignoring the manager's inquiries.

In *Avila v. Continental Airlines, Inc.*,^{n3.3} plaintiff raised a triable issue of fact as to whether he was discharged in retaliation for taking leave under CFRA. Plaintiff had called in sick and submitted forms showing that he had been hospitalized. The court found that the fact that plaintiff called in sick was, by itself, insufficient to put the employer on notice that he needed CFRA leave for a serious health condition. However, in a case involving a medical emergency, notice on a hospital's preprinted form that an employee was hospitalized and unable to work may be sufficient to inform an employer that the employee might have suffered a serious medical condition under CFRA, and of the timing and duration of the necessary leave. Further, the absence itself under those circumstances suggests the necessity of a leave, at least as to those absent days. Thus, a reasonable trier of fact could conclude that plaintiff provided sufficient notice to put the employer on notice that plaintiff needed CFRA-qualifying leave. Because plaintiff's need for leave was unforeseeable due to an emergency medical condition, and because plaintiff testified that he both called in sick during his absence and submitted the forms to the employer upon returning to work, a reasonable trier of fact could also conclude that plaintiff requested leave "as soon as practicable."^{n3.4} Further, there was proof of a causal connection between plaintiff's protected status or conduct and his termination, even though the employees who fired him did not know about his illnesses or hospitalization. The employer did not dispute that the employees who fired plaintiff knew of his absences and discharged him in reliance on those absences.

In *Tomlinson v. Qualcomm, Inc.*,ⁿ⁴ the court found that terminating the employment of an employee on family leave under CFRA pursuant to a company-wide workforce reduction did not violate CFRA. The employee claimed that she was subject to the workforce reduction in retaliation for taking family leave. The court held that although *Gov. Code § 12945.2(a)* requires an employer to provide a guarantee of employment in the same or comparable position on termination of family leave, *Cal. Code Reg., title 2, § 7297.2(c)* clarifies that the guarantee of reinstatement to the same or comparable position does not preclude an employer from terminating the employee's employment as part of a workforce reduction. Thus, the grant of family leave did not confer any greater right on the plaintiff to avoid a company-wide workforce reduction than she would have possessed had she not taken the leave. The employer's obligation to reinstate her terminated when her employment was terminated.ⁿ⁵

■ CONSULTANT'S COMMENT:

Employers should note that the rules regarding reinstatement under CFRA are different than the rules regarding reinstatement under the California Pregnancy Disability Act ("PDA"). As the text passage states, both the regulations and the case law under CFRA permit an employer to terminate an employee on CFRA leave as part of a workforce reduction. By contrast, the PDA requires an employer to proceed in two steps, which may result in termination--but not necessarily.

First, the employer must return the employee to her same position, unless it "proves, by a preponderance of the evidence" that "the employee would not otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking a pregnancy disability leave or transfer (such as a layoff pursuant to a plant closure)."

Second, the employer must return the employee to a comparable position, unless it "proves, by a preponderance of the evidence" that "there is no comparable position available. A position is 'available' if there is a position open on the employee's scheduled date of reinstatement or within 10 working days thereafter for which the employee is qualified, or to which the employee is entitled by company policy, contract, or collective bargaining agreement." See *Cal. Code Reg. § 7291.9. Commentary by Kirby Wilcox.*

A similar prohibition exists under FMLA.ⁿ⁶ However, the regulation covering protection of FMLA rights also includes

prohibitions against interfering with employee rights under FMLA by manipulations intended to avoid FMLA responsibilities, including (1) employer manipulation of the number of employees at a worksite for purposes of affecting the 50-employee threshold for employee eligibility, (2) employer changes to the essential functions of the job to preclude the taking of leave, and (3) reduction of available work hours to avoid employee eligibility.ⁿ⁷

However, termination of employment does not violate family leave rights under either CFRA or FMLA, whether or not the employee was on leave at the time and whether or not the employer failed properly to advise the employee about family leave rights. The critical issue is whether the employer maintained a good-faith, reasonable belief that the discharged employee had abused the leave. An honest mistake may excuse an employee's trivial misuse of family leave. But, in one case, the court found that even if the employee was mistaken about when he should return to work, the employer's justifiable conclusion that he had misused leave in other ways and was untruthful allowed the employer to terminate him anyway.ⁿ⁸

Legal Topics:

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

Labor & Employment Law Discrimination Retaliation General Overview Labor & Employment Law Leaves of Absence Family & Medical Leave Act General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12945.2(1)*; *2 Cal. Code Reg. § 7297.7*; *see Gov. Code § 19702* (similar prohibition applying to employers of state civil service employees).

(n2)Footnote 2. *Dudley v. Dept. of Transportation* (2001) 90 Cal. App. 4th 255, 261, 108 Cal. Rptr. 2d 739 (plaintiff's complaint under FEHA, barred by res judicata judgment on ADA claim, could be amended to state facts sufficient to constitute cause of action for retaliation in violation of CFRA). For the standard jury instruction on the essential factual elements of a claim of retaliation under CFRA, *see CACI 2620*. For discussion of the CACI standard jury instructions generally, *see § 61.05*. For the special verdict form for CFRA rights retaliation, *see CACI VF-2602*. For discussion of the CACI special verdict forms generally, *see § 61.06*.

(n3)Footnote 3. *Dudley v. Dept. of Transportation* (2001) 90 Cal. App. 4th 255, 264-265, 108 Cal. Rptr. 2d 739 .

(n4)Footnote 3.1. *Faust v. California Portland Cement Co.* (2007) 150 Cal. App. 4th 864, 885, 58 Cal. Rptr. 3d 729 .

(n5)Footnote 3.2. *See Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1042, 32 Cal. Rptr. 3d 436, 116 P.3d 1123 .

(n6)Footnote 3.3. *Avila v. Continental Airlines, Inc.* (2008) 165 Cal. App. 4th 1237, 1253-1261, 82 Cal. Rptr. 3d 440 .

(n7)Footnote 3.4. *See 2 Cal. Code Regs. § 7297.4(a)(3)*.

(n8)Footnote 4. *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal. App. 4th 934, 118 Cal. Rptr. 2d 822 .

(n9)Footnote 5. *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal. App. 4th 934, 939-943, 118 Cal. Rptr. 2d 822 .

(n10)Footnote 6. *29 U.S.C. § 2615*; *29 C.F.R. § 825.220*.

(n11)Footnote 7. *29 C.F.R. § 825.220(b)*.

(n12)Footnote 8. *McDanel v. Eastern Municipal Water District Board* (2003) 109 Cal. App. 4th 702, 707-708, 135 Cal. Rptr. 2d 267 .



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DIVISION I WAGE AND HOUR LAWS
CHAPTER 8 Leaves of Absence
Part C. FAMILY CARE AND MEDICAL LEAVE

1-8 California Employment Law § 8.33

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.33 Interaction of Family Leave and Pregnancy Disability Leave Laws

Under FMLA, any period of incapacity or treatment due to pregnancy, including prenatal care, is a "serious health condition,"ⁿ¹ and therefore leave taken for that purpose must be counted as part of the 12-week total entitlement under FMLA.^{n1.1}

The right to take leave under CFRA is separate and distinct from the right to take pregnancy disability leave under *Government Code Section 12945(a)*.ⁿ² An employee's own disability due to pregnancy, childbirth, or related medical conditions is not included as a "serious health condition" under CFRA.ⁿ³ Thus, at the end of an employee's four-month pregnancy disability leave under *Government Code Section 12945(a)*, the employee may take CFRA leave of up to twelve workweeks for reason of the birth of her child, if the child has been born by that date.ⁿ⁴ There is no requirement that either the employee or child have a serious health condition or that the employee continue to be disabled by her pregnancy, childbirth, or related medical condition in order to take CFRA leave for the birth of the child.ⁿ⁵ CFRA regulations also provide that an employer may (but is not required to) allow an employee to use CFRA leave prior to the birth of the child if the employee has used four months of pregnancy disability leave prior to the birth and the employee's health care provider determines that a continuation of the leave is medically necessary.ⁿ⁶ Doing so would not require the employer to provide more than the amount of CFRA leave to which the employee was otherwise entitled.ⁿ⁷

Under CFRA, the maximum possible combined leave entitlement for both pregnancy disability leave and CFRA leave for the birth of the child is four months and twelve workweeks.ⁿ⁸ That assumes that the employee is disabled by pregnancy, childbirth, or a related medical condition for four months and then requests and is eligible for a full 12-week CFRA leave for the reason of the birth of her child.ⁿ⁹

However, when a plaintiff alleges that he or she was terminated for unlawful reasons, courts will not accept a reduction in force as the conclusory explanation for the employee's termination. Thus, for example, in *Liu v. Amway Corp.*,^{n9.1} the Ninth Circuit found that under both the FMLA and CFRA, there was a triable issue of fact as to whether the employer impermissibly used an employee's leave as a factor in the decision to terminate her employment in a

company-wide reduction in force.^{n9.2}

For purposes of determining whether an employee who has taken a pregnancy disability leave (which is also a FMLA leave)ⁿ¹⁰ and who then wants to take a CFRA leave for the birth of her child has met the CFRA employee eligibility requirements, the 12-month period during which the employee must have worked 1,250 hours is the period immediately preceding the employee's first day of FMLA leave based on her pregnancy, not the first day of the subsequent CFRA leave for reason of the birth of her child.ⁿ¹¹

Legal Topics:

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

Labor & Employment Law Leaves of Absence Family & Medical Leave Act General Overview Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 C.F.R. § 825.114(a)(2)(ii).

(n2)Footnote 1.1. But *see* *Liu v. Amway Corp.* (9th Cir. 2004) 347 F.3d 1125, 1132 (after FEHA pregnancy leave, employee was entitled to additional leave to care for her baby or herself or a close relative with serious illness under FMLA).

(n3)Footnote 2. *Gov. Code* § 12945.2(o); 2 *Cal. Code Reg.* § 7297.6(a); *see* discussion of pregnancy disability leave in § 8.12.

(n4)Footnote 3. 2 *Cal. Code Reg.* § 7297.6(b).

(n5)Footnote 4. 2 *Cal. Code Reg.* § 7297.6(c). *see* *Liu v. Amway Corp.* (9th Cir. 2004) 347 F.3d 1125, 1132 (employee was entitled to unpaid leave under CFRA after her FEHA pregnancy disability leave expired).

(n6)Footnote 5. 2 *Cal. Code Reg.* § 7297.6(c).

(n7)Footnote 6. 2 *Cal. Code Reg.* § 7297.6(c)(1).

(n8)Footnote 7. *See* 2 *Cal. Code Reg.* § 7297.6(c)(1).

(n9)Footnote 8. *Gov. Code* § 12945.2(s); 2 *Cal. Code Reg.* § 7297.6(d).

(n10)Footnote 9. *Gov. Code* § 12945.2(s); 2 *Cal. Code Reg.* § 7297.6(d).

(n11)Footnote 9.1. *Liu v. Amway Corp.* (9th Cir. 2004) 347 F.3d 1125 .

(n12)Footnote 9.2. *Liu v. Amway Corp.* (9th Cir. 2004) 347 F.3d 1125, 1135-1137 (employee presented evidence from which jury could conclude that supervisor took fact she took leave into account in giving her low score on her evaluation and recommending her for termination, because evidence that subjective evaluation served as central, if not sole, factor in termination was significant, 19% drop in overall score from former evaluation could also create inference of impermissible motivation, and proximity in time between leave and termination provided supporting evidence of connection between events).

(n13)Footnote 10. *See* discussions in §§ 8.12[1][b], 8.21.

(n14)Footnote 11. 2 *Cal. Code Reg.* § 7297.0(e)(2).



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 8 Leaves of Absence

Part C. FAMILY CARE AND MEDICAL LEAVE

1-8 California Employment Law §§ 8.34 through 8.39

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[Reserved]

§§ 8.34[Reserved]



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 8 Leaves of Absence

Part D. MILITARY LEAVE

1-8 California Employment Law § 8.40

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.40 Federal Law

Under federal law, a person who leaves a position with an employer to enter into uniformed service is considered as having been on a leave of absence during the period of military training and service, and has the right to be restored or reemployed without loss of seniority and with the benefits offered to other employees on leaves of absence.ⁿ¹ For further discussion of veterans' reemployment rights under federal law, *see* Chapter 40, Part C.

Legal Topics:

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

Labor & Employment LawLeaves of AbsenceMilitary LeaveLabor & Employment LawWage & Hour LawsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See generally* 38 U.S.C. § 4301 *et seq.*



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 8 Leaves of Absence

Part D. MILITARY LEAVE

1-8 California Employment Law § 8.41

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.41 California Law

No employer may discharge any employee because of the employee's performance of any ordered military training or duty or because the employee is an officer, warrant officer, or enlisted person of the state military forces.ⁿ¹ Employers are also prohibited from (1) hindering or preventing a person from performing any military service or from attending any military encampment or place of drill or instruction; (2) prejudicing or harming a person in any manner in his or her employment, position, or status because of his or her performance of military service or duty or attendance at military encampments or places of drill or instruction; and (3) dissuading, preventing, or stopping any person from enlisting or accepting a warrant or commission in the California National Guard or Naval Militia by threat or injury to the person with respect to his or her employment, position, status, trade, or business because of enlistment or acceptance of a warrant or commission.ⁿ²

Persons who violate these provisions are subject to criminal penalties as well as civil liability for actual damages and attorney's fees incurred by the injured party.ⁿ³ The remedies under this provision are not exclusive.ⁿ⁴

Every officer and enlisted member of the California National Guard who, in order to undertake active military duty in the service of the state when the Governor has issued a proclamation of a state of insurrectionⁿ⁵ or a proclamation of a state of extreme emergency, or when the California National Guard is on active duty,ⁿ⁶ or a service member called to active service or duty,ⁿ⁷ has left a position, other than a temporary position, in private employment, receives a certificate of satisfactory service in the California National Guard or its equivalent, is still qualified to perform the duties of that position, and makes application within 40 days after release from service is considered as on leave of absence during that period and must be restored by the former employer to the former position or to a position of similar seniority, status, and pay without loss of retirement or other benefits, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Further, the employee may not be discharged from the position without cause within one year after being restored to the position.ⁿ⁸ Every officer and enlisted member who has left a part-time position in private employment for purposes of service, receives a certificate of satisfactory service in the California National Guard or its equivalent, is still qualified to perform the duties of that position, and makes application within five days after release from service is considered as on leave of absence during that period and must

be restored by the former employer to the former position, or to a position of similar seniority, status, and pay, if any exist, and may not be discharged from the position without cause within one year after being restored to the position.ⁿ⁹ If any employer fails or refuses to comply with these provisions, the superior court of the county in which the employer maintains a place of business may, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of these provisions, specifically require the employer to comply and compensate the person for any loss of wages or benefits suffered by reason of the employer's unlawful action. The court must order a speedy hearing and advance it on the calendar. Upon application to the district attorney of the county in which the employer maintains a place of business by any person claiming to be entitled to these benefits, the district attorney, if reasonably satisfied that the person is entitled to these benefits, will appear and act as attorney for the person in the amicable adjustment of the claim or in the filing and prosecution of any motion, petition, or other appropriate pleading to specifically require the employer to comply. No fees or court costs are required to be paid by the person applying for these benefits.ⁿ¹⁰ Upon application to the city prosecutor of the city in which the employer maintains a place of business by any person claiming to be entitled to these benefits, the city prosecutor, if reasonably satisfied that the person is entitled to these benefits, may appear and act as attorney for the person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to

specifically require the employer to comply, and no fees or court costs are required to be paid by the person applying for these benefits.^{n10.1}

The Military and Veterans Code provisions granting employment related benefits during temporary military leaves of absenceⁿ¹¹ are not applicable to employees who are residents of California and working in California but who are members of the militia of another state and who seek leaves of absence for service in the militia of another state.ⁿ¹²

California law also allows spouses of members of the armed services up to 10 days of unpaid leave during a period that the spouse (who is the member of the armed forces) is on leave from deployment during a period of military conflict.ⁿ¹³ To be eligible, the employee spouse must satisfy all of the following requirements:ⁿ¹⁴

- ☐ Be the spouse of a qualified member of the armed forces.ⁿ¹⁵
- ☐ Perform service for hire for an employer an average of 20 or more hours per week, and is not an independent contractor.
- ☐ Provide the qualified employer with notice, within two business days of receiving official notice that the qualified member will be on leave from deployment, of the employee's intention to take the leave.
- ☐ Submit written documentation to the employer certifying that the qualified member will be on leave from deployment during the time the leave is requested.

The leave requirement only applies to employers, including governmental employers, that employ 25 or more employees.ⁿ¹⁶

An employer may not retaliate against an employee for requesting or taking the leave.ⁿ¹⁷ This leave does not affect or prevent an employer from allowing a qualified employee to take a leave the employee is otherwise entitled to take.ⁿ¹⁸ This leave also does not affect a qualified employee's rights with respect to any other employee benefit provided for in other laws.ⁿ¹⁹

Legal Topics:

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

Labor & Employment LawLeaves of AbsenceGeneral OverviewLabor & Employment LawLeaves of AbsenceMilitary
LeaveLabor & Employment LawWage & Hour LawsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Mil. & Vet. Code § 394(d)*.

(n2)Footnote 2. *Mil. & Vet. Code § 394(d)*.

(n3)Footnote 3. *Mil. & Vet. Code § 394(g)*.

(n4)Footnote 4. *Mil. & Vet. Code § 394(h)*.

(n5)Footnote 5. *See Mil. & Vet. Code § 143*.

(n6)Footnote 6. *See Mil. & Vet. Code § 146*.

(n7)Footnote 7. *See Mil. & Vet. Code § 400 et seq.*

(n8)Footnote 8. *Mil. & Vet. Code § 395.06(a)*.

(N9)Footnote 9. *Mil. & Vet. Code § 395.06(b)*.

(n10)Footnote 10. *Mil. & Vet. Code § 395.06(c)*.

(n11)Footnote 10.1. *Mil. & Vet. Cod § 395.06(d)*.

(n12)Footnote 11. *See Mil. & Vet. Code §§ 389-395.8; see also 38 U.S.C. § 4303(16)* (federal Uniformed Services Employment and Reemployment Rights Act [38 U.S.C. § 4301 *et seq.*] applies only to periods of federal military service).

(n13)Footnote 12. *02 Ops. Cal. Atty. Gen. 213 (2003)* .

(n14)Footnote 13. *Mil. & Vet. Code § 395.10(a)*. *See Mil. & Vet. Code § 395.10(b)(1)* (defining "period of military conflict"); (b)(5) (defining "qualified leave period").

(n15)Footnote 14. *Mil. & Vet. Code § 395.10(b)(2)*.

(n16)Footnote 15. *See Mil. & Vet. Code § 395.10(b)(4)* (defining "qualified member").

(n17)Footnote 16. *Mil. & Vet. Code § 395.10(b)(3)*.

(n18)Footnote 17. *Mil. & Vet. Code § 395.10(c)*.

(n19)Footnote 18. *Mil. & Vet. Code § 395.10(d)*.

(n20)Footnote 19. *Mil. & Vet. Code § 395.10(e)*.



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DIVISION I WAGE AND HOUR LAWS

CHAPTER 8 Leaves of Absence

Part D. MILITARY LEAVE

1-8 California Employment Law §§ 8.42 through 8.49

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

[Reserved]

§§ 8.42[Reserved]



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CHAPTER 8 Leaves of Absence

Part E. SICK LEAVE

1-8 California Employment Law § 8.50

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.50 Sick Leave Use for Immediate Family

An employer that provides accrued sick leave for employees must allow an employee to use a portion of that sick leave to attend to an illness of his or her child, parent, spouse, or domestic partner.ⁿ¹ The employee is entitled to use not less than the amount he or she would accrue in a six-month period in any calendar year.ⁿ² "Sick leave" means accrued increments of compensated leave provided as a benefit for use by an employee during absence from work for any of the following reasons:ⁿ³

- The employee is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition.
- The absence is for the purpose of obtaining professional diagnosis or treatment for a medical condition.
- The absence is for other medical reasons, such as pregnancy or obtaining a physical examination.

"Sick leave" does not include benefits provided under an employee welfare benefit plan subject to ERISA and does not include any insurance benefit, workers' compensation benefit, unemployment compensation, disability benefit, or benefit not payable from the employer's general assets.ⁿ⁴

Legal Topics:

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

Labor & Employment LawLeaves of AbsenceGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsHoliday, Sick & Vacation Pay

FOOTNOTES:

(n1)Footnote 1. *Lab. Code* § 233(a).

(n2)Footnote 2. *Lab. Code § 233(a).*

(n3)Footnote 3. *Lab. Code § 233(b)(4).*

(n4)Footnote 4. *Lab. Code § 233(b).*



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CHAPTER 8 Leaves of Absence

Part E. SICK LEAVE

1-8 California Employment Law § 8.51

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.51 Cause of Action for Violation

An employer cannot deny an employee the right to use sick leave and cannot discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using, or attempting to exercise the right to use, sick leave to attend to an illness of a child, parent, spouse, or domestic partner of the employee.ⁿ¹ An employer absence-control policy that counts sick leave taken pursuant to *Lab. Code* § 233 as an absence that may lead to or result in discipline, discharge, demotion, or suspension is a per se violation of *Lab. Code* § 233. An employee working under such a policy is entitled to appropriate legal and equitable relief pursuant to *Lab. Code* § 233.ⁿ²

■ **CONSULTANT'S COMMENT:**

Labor Code § 233 refers to an employer's obligation to permit an employee to use his or her "accrued and available" sick leave to care for an ill family member. It is arguable, therefore, that, if an employer has a policy under which employees accrue sick leave, it is permissible to count as an "occurrence" under an attendance program any sick leave taken that is not yet accrued and available, even if additional sick leave will be accrued and available at some future time during the year. Before taking this step, however, it is advisable to consult with counsel. *Commentary by Kirby Wilcox.*

If an employer denies an employee the right to use his or her sick leave as prescribed in *Labor Code section 233(a)*, the employee is entitled to reinstatement and actual damages or one day's pay, whichever is greater.ⁿ³ If he or she prevails, the employee may be awarded reasonable attorney's fees.ⁿ⁴ The rights and remedies specified in *Labor Code Section 233* are cumulative, nonexclusive, and in addition to any other rights or remedies afforded by contract or other provisions of law.ⁿ⁵

■ **CONSULTANT'S COMMENT:**

*Labor Code Section 233*ⁿ⁶ has created a great deal of confusion with respect to the conditions that trigger its applicability. On its face, the section applies only to sick leave benefits that accrue. Consider, therefore, three different--but very common--types of sick leave policies. First, the statute clearly covers sick leave that accumulates at a prescribed rate--for example, 10/12ths of one day for each full month worked, for a total of 10 days per year. Second, less obviously covered (but likely to be treated as within

the ambit of the Statute by the California Labor Commissioner), is sick leave that is granted as a lump sum at the start of each year--for example, 10 days each January 1. Third, likely uncovered are sick leave benefits that do not accrue and are available in any amount for certain types of employees. For example, an employer may provide unlimited sick leave to its exempt employees. The Labor Commissioner has not yet issued published guidance on this sick leave variation. As a hedge against the possibility that the Labor Commissioner might apply *Labor Code Section 233* to this form of policy, an employer may wish to create a separate family sick leave benefit and prescribe an associated number of days. To ensure the reasonableness of the number of days selected, the employer may wish to calculate the average number of sick leave days used by its employees each year and divide by two. *Commentary by Kirby Wilcox.*

Legal Topics:

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

Labor & Employment Law Leaves of Absence General Overview Labor & Employment Law Leaves of Absence Family & Medical Leave Act General Overview Labor & Employment Law Wage & Hour Laws General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 233(c).*

(n2)Footnote 2. *Lab. Code § 244.*

(n3)Footnote 3. *Lab. Code § 233(d).*

(n4)Footnote 4. *Lab. Code § 233(e).*

(n5)Footnote 5. *Lab. Code § 233(f).*

(n6)Footnote 6. *Lab. Code § 233.*



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CHAPTER 8 Leaves of Absence

Part E. SICK LEAVE

1-8 California Employment Law § 8.52

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.52 Local Laws Requiring Paid Sick Leave

San Francisco requires employers to provide paid sick leave to employees (including part-time employees, temporary workers and participants in Welfare-to-Work Programs) who are employed within the geographical limits of the City and County of San Francisco.ⁿ¹ The ordinance does not apply to employees covered by a collective bargaining agreement expressly waiving the requirements in clear and unambiguous terms.ⁿ² If an employer has a paid-time-off policy that already provides employees with an amount of paid leave that meets the requirements of the ordinance, the employer is not required to provide additional paid sick leave.ⁿ³

Employers must provide one hour of paid sick leave for every 30 hours worked.ⁿ⁴ The ordinance limits the accrual of paid leave to a maximum of 40 hours for small businessesⁿ⁵ and 72 hours of paid leave for larger employers.ⁿ⁶ However, employers are free to provide more generous leave policies.ⁿ⁷ Accrued unused paid leave carries over from year to year up to the maximum leave limits.ⁿ⁸ Employees may take paid sick leave for their own illness or to provide care for a sick child, parent, sibling, grandparent, grandchild, spouse, domestic partner, or "designated person."ⁿ⁹ Employers must permit employees to use any or all accrued paid sick leave for kin care.ⁿ¹⁰ An employer is not required to provide financial reimbursement for unused accrued paid sick leave to an employee upon the employee's separation from employment.ⁿ¹¹

An employer may not require, as a condition of an employee's taking sick leave, that the employee find a replacement worker to cover the hours during which the employee is on paid sick leave.ⁿ¹² An employer may, however, require employees to give reasonable notification of an absence from work for which paid sick leave is or will be used.ⁿ¹³ An employer may take only reasonable measures to verify or document that an employee's use of paid sick leave is lawful.ⁿ¹⁴

Employers must post a notice published by the Office of Labor Standards Enforcement informing employees of their rights under the ordinance. The notice must be in English, Spanish, Chinese, and any language spoken by at least five percent of the employees at the workplace.ⁿ¹⁵ Additionally, employers must maintain records regarding paid sick leave for a period of four years, and make the records available to the OLSE for the purpose of monitoring compliance. If

there is a dispute regarding an employee's entitlement and the employer fails to maintain appropriate records, it will be presumed that the employer has violated the sick leave ordinance absent clear and convincing evidence otherwise.ⁿ¹⁶

Los Angeles also has adopted mandatory sick leave as part of its ordinance governing living wages paid by private employers with contracts to provide services to the city. In Los Angeles, private employers who have contracts to provide services to the city must provide employees with 12 compensated days off per year for sick leave, vacation or personal necessity at the employee's request and, if that time is exhausted, an additional 10 days per year of uncompensated time for sick leave for the illness of the employee or a member of his or her immediate family.ⁿ¹⁷

FOOTNOTES:

(n1)Footnote 1. San Francisco Admin. Code § 12W.2(c).

(n2)Footnote 2. San Francisco Admin. Code § 12W.9.

(n3)Footnote 3. San Francisco Admin. Code § 12W.3(d).

(n4)Footnote 4. San Francisco Admin. Code § 12W.3(b).

(n5)Footnote 5. San Francisco Admin. Code § 12W.2(c) (defining "small business" as employer employing fewer than 10 employees).

(n6)Footnote 6. San Francisco Admin. Code § 12W.3(c).

(n7)Footnote 7. San Francisco Admin. Code § 12W.11.

(n8)Footnote 8. San Francisco Admin. Code § 12W.3(c).

(n9)Footnote 9. San Francisco Admin. Code § 12W.4(a).

(n10)Footnote 10. San Francisco Admin. Code § 12W.4(a).

(n11)Footnote 11. San Francisco Admin. Code § 12W.3(e).

(n12)Footnote 12. San Francisco Admin. Code § 12W.4(b).

(n13)Footnote 13. San Francisco Admin. Code § 12W.4(c).

(n14)Footnote 14. San Francisco Admin. Code § 12W.4(d).

(n15)Footnote 15. San Francisco Admin. Code § 12W.5.

(n16)Footnote 16. San Francisco Admin. Code § 12W.6.

(n17)Footnote 17. L.A. Admin. Code § 10.37.2(b).



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1-8 California Employment Law §§ 8.53 through 8.59

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

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1-8 California Employment Law § 8.60

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.60 Legal Texts

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1-8 California Employment Law § 8.61

AUTHOR: By Christine Curtis, J.D., Judy B. Freeman J.D., Edward Baskauskas, J.D., and Elizabeth W. Mandel, J.D.

§ 8.61 Law Reviews and Legal Periodicals

Bertrand, Audero, Carter, Schisler & Seifert, *U.S. Department of Labor Issues New FMLA Regulations Effective January 16, 2009*, 2008 Bender's Calif. Lab. & Empl. Bull. 417 (November/December 2008).

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Legal Topics:

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

Labor & Employment LawLeaves of AbsenceFamily & Medical Leave ActGeneral OverviewLabor & Employment
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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

1-20 California Employment Law 20.syn

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

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§ 20.61 Encyclopedias

§ 20.62 Law Reviews and Periodicals

By Judy B. Freeman, J.D., n Edward Baskauskas, J.D. n***

FOOTNOTES:

(n1)Footnote *. Publisher's Editorial Staff.

(n2)Footnote **. Edward Baskauskas is a member of the California Bar and an adjunct professor of law at Golden Gate University.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

1-20 California Employment Law Scope

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

Scope

By Judy B. Freeman, J.D., n Edward Baskauskas, J.D. n** SCOPE*

This chapter discusses liability for work-related injuries and illnesses in the context of California workers' compensation law. Part A contains an overview of the workers' compensation system and includes a discussion of the requirements for workers' compensation insurance and of the exclusive remedy doctrine, a summary of the procedure for obtaining workers' compensation benefits, and a discussion of additional penalties that may be imposed for unjustified delay in benefit payments or for actions against an employee because he or she has applied for or intends to apply for workers' compensation benefits. Part B discusses and provides forms for use in suits involving coemployees or third parties. Additionally, Part B covers the issues of the employer's right to reimbursement from third-party tortfeasors for workers' compensation benefits paid to employees and provides forms for the employer to obtain reimbursement by means of an independent action, intervention in the employee's suit, or a lien on the employee's recovery. Also discussed is the employer's right to assert the employee's recovery from a third party as a credit against its liability for future workers' compensation benefits.

For more detailed coverage of the procedure for obtaining workers' compensation benefits before the Workers' Compensation Appeals Board, see Hanna, California Law of Employee Injuries and Workers' Compensation, Chapter 25, Part A (Matthew Bender). For coverage of the defense of workers' compensation claims, see Hanna, California Law of Employee Injuries and Workers' Compensation, Chapter 25, Part B (Matthew Bender).

Chapter 21 discusses regulation of occupational safety and health under federal and California law.

FOOTNOTES:

(n3)Footnote *. Publisher's Editorial Staff.

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 1. Overview of Workers' Compensation System

1-20 California Employment Law § 20.01

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.01 Purposes and Application of Workers' Compensation System

The California Workers' Compensation Actⁿ¹ is a statutory scheme designed to afford workers a determination of their claims for work-related injury without regard to common-law questions of liability, negligence, or fault on the part of the employer.ⁿ² Workers' compensation is designed to provide that industry bear the burden of industrial accidents while protecting workers from the special risks of employment.ⁿ³ Liability under the Workers' Compensation Act is based not on any act or omission of the employer, but on the fact that the injury arises out of and in the course of the employment.ⁿ⁴ The workers' compensation system has been described as a socially enforced bargain that compels an employee to give up his or her rights to sue in the courts for full compensation for damages caused by certain job-related torts in exchange for certain, but limited, awards in all cases of job-related injury regardless of tort defenses that would otherwise have been available to the employer.ⁿ⁵ The Workers' Compensation Act, insofar as it deprives a claimant of an action at law, has been held not to violate due process or equal protection.ⁿ⁶

If the so-called "conditions of compensation" exist, the workers' compensation system provides the exclusive remedy against an employer for injury or death, including any right or liability that is incidental to the injury or death.ⁿ⁷ The system also normally provides the exclusive method for enforcement against the employer or an insurer of any adjudged liability.ⁿ⁸

The provisions of the Workers' Compensation Act are to be liberally construed in favor of awarding worker's compensation in both civil actions and in workers' compensation actions which seek to obtain compensation benefits and to avoid civil litigation.ⁿ⁹

Generally speaking, the Workers' Compensation Act applies in cases in which the employee sustains a work-related injury or dies as a result of work-related causes.ⁿ¹⁰ For the sake of convenience, this chapter broadly uses the term "injury" to cover injury, disease, and death.

The right to workers' compensation benefits is entirely statutory and is not derived from the common law.ⁿ¹¹ Under the

plenary power that the California Constitution has granted to the Legislature to create and enforce a complete system of workers' compensation,ⁿ¹² the Legislature has created a statutory scheme requiring all employers to secure the payment of workers' compensation to injured employees, either by obtaining insurance coverage of their liability or by obtaining a certificate of consent to self-insure issued by the Director of Industrial Relations.ⁿ¹³

■ PRACTICE TIP--EMPLOYER'S PERSPECTIVE:

Although the rights to workers' compensation benefits may derive from statutes, case law is determinative of disputes which arise in many situations. Counsel are cautioned that knowledge of both is essential to doing an adequate job as an employer, claim examiner, or defense attorney without knowing both. *Commentary by John W. Miller.*

In certain limited circumstances, an employer in the construction, or other industries may, pursuant to a collective bargaining agreement with its employees, "opt out" of portions of the workers' compensation system.ⁿ¹⁴

■ PRACTICE TIP--EMPLOYER'S PERSPECTIVE:

Costs of defending claims are increasing according to the California Workers' Compensation Institute. Since the abolishment of "minimum rates" in insurance pricing, rate wars have been raging between carriers. Because market influences have caused premiums to be low, carriers are looking at methods of decreasing expenses, since the income side of business has actually decreased. Using methods such as overworked hearing representatives and house-counsel, and flat rate billing by defense attorneys, results are poor. This, in turn, pits employers against carriers in many instances. As carriers try to balance their profit against the rights of their insureds, in increasing numbers they are losing or settling actions by employers against them. Because they are paying out claims by their insureds while waiting for the premiums to rise, the industry is going to be looking for other means to decrease the costs. Arbitration, while expensive, may be more cost effective in the overall scheme of claim handling, because the arbitrator will not have multiple cases set and continuances will not be necessary, as frequently happens at the Appeals Board. If this works for the construction industry, as it seems to be, we may see other industries obtaining exemption legislation and union cooperation to use the streamlined arbitration process. *Commentary by John W. Miller.*

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Workers' Compensation & SSDI Administrative Proceedings General Overview Workers' Compensation & SSDI Remedies Under Other Laws General Overview Workers' Compensation & SSDI Remedies Under Other Laws Common Law

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 3201 et seq.*

(n2)Footnote 2. *Portillo v. G. T. Price Products, Inc.* (1982) 131 Cal. App. 3d 285, 287, 182 Cal. Rptr. 291 , disapproved on other grounds, *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 454, 959 P.2d 752 .

(n3)Footnote 3. *Laeng v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal. 3d 771, 782, 100 Cal. Rptr. 377, 494 P.2d 1 ; *California Comp. Ins. Co. v. Industrial Accident Commission* (1954) 128 Cal. App. 2d 797, 805, 277 P.2d 442 .

(n4)Footnote 4. *Shields v. County of San Diego* (1984) 155 Cal. App. 3d 103, 112, 202 Cal. Rptr. 30 .

(n5)Footnote 5. *Iverson v. Atlas Pacific Engineering* (1983) 143 Cal. App. 3d 219, 223, 191 Cal. Rptr. 696 ; *Van Horn v. Industrial Accident Commission* (1963) 219 Cal. App. 2d 457, 467, 33 Cal. Rptr. 169 .

(n6)Footnote 6. *Nelson v. Metalclad Insulation Corp.* (1975) 44 Cal. App. 3d 474, 477-478, 118 Cal. Rptr. 725 .

(n7)Footnote 7. *See Lab. Code §§ 3600(a), 3602(a), 5300(a).*

(n8)Footnote 8. *See Lab. Code § 5300(b); Santiago v. Employee Benefits Services* (1985) 168 Cal. App. 3d 898, 901, 214 Cal. Rptr. 679 .

(n9)Footnote 9. *Lab. Code § 3202; see Argonaut Insurance Co. v. Superior Court* (1985) 164 Cal. App. 3d 320, 323-324, 210 Cal. Rptr. 417 ; *Dixon v. Ford Motor Co.* (1975) 53 Cal. App. 3d 499, 506, 125 Cal. Rptr. 872 .

(n10)Footnote 10. *See Lab. Code §§ 3208, 3600; see also* discussion in § 20.05[1].

(n11)Footnote 11. *DuBois v. Workers' Compensation Appeals Board* (1993) 5 Cal. 4th 382, 388, 20 Cal. Rptr. 2d 523, 853 P.2d 978 .

(n12)Footnote 12. *Cal. Const., art. XIV, § 4.*

(n13)Footnote 13. *DuBois v. Workers' Compensation Appeals Board* (1993) 5 Cal. 4th 382, 388, 20 Cal. Rptr. 2d 523, 853 P.2d 978 . For discussion of the insurance requirements generally, *see* § 20.03.

(n14)Footnote 14. *See Lab. Code §§ 3201.5, 3201.7.* For discussion, *see* § 20.02.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 1. Overview of Workers' Compensation System

1-20 California Employment Law § 20.02

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.02 Privatized Workers' Compensation System Under Collective Bargaining Agreements in Construction Industry

The Department of Industrial Relations and the courts of this state must recognize as valid and binding any provision of a collective bargaining agreement between a private employer or groups of employers engaged in construction, construction maintenance, and related activities,ⁿ¹ or other industries,ⁿ² and a recognized or certified exclusive bargaining representative that establishes any of the following:ⁿ³

1. An alternative dispute resolution system governing disputes between employees and employers or their insurers that supplements or replaces all or part of those dispute resolution processes contained in the Workers' Compensation Act, including, but not limited to, mediation and arbitration;^{n3.1}
2. The use of an agreed list of providers of medical treatment that may be the exclusive source of all medical treatment provided under the Workers' Compensation Act;
3. The use of an agreed, limited list of qualified medical evaluators that may be the exclusive source of qualified and agreed medical evaluators under the Workers' Compensation Act;
4. Joint labor-management safety committees;
5. A light-duty, modified job, or return-to-work program; or
6. A vocational rehabilitation or retraining program utilizing an agreed list of providers of rehabilitation services that may be the exclusive source of providers of rehabilitation services under the Workers' Compensation Act.

A collective bargaining agreement in construction industries may not diminish an employee's entitlement to

compensation payments for total or partial disability, temporary disability, vocational rehabilitation, or medical treatment fully paid by the employer as otherwise provided by the Workers' Compensation Act.ⁿ⁴ Any agreement that violates this provision is null and void.ⁿ⁵ However, the parties may negotiate any aspect of the delivery of medical benefits and the delivery of disability compensation to employees of the employer or group of employers that are eligible for group health benefits and nonoccupational disability benefits through their employer.^{n5.1}

Employers and labor representatives meeting the eligibility requirements of *Labor Code* § 3201.5 will be issued a letter advising each employer and labor representative that, based on the review of all documents and materials submitted as required by the administrative director, each has met the eligibility requirements of section 3201.5.^{n5.2} No employer or collective bargaining representative may establish or continue such a program until it has met specific statutory requirements.ⁿ⁶

In industries other than construction and construction-related activities meeting specific statutory requirements including eligibility of employees for group health and nonoccupational disability benefits,^{n6.1} a collective bargaining agreement may not diminish the entitlement of an employee to compensation payments for total or partial disability, temporary disability, vocational rehabilitation, or medical treatment fully paid by the employer as otherwise provided in the Workers' Compensation Act. An agreement also may not deny any employee the right to representation by counsel at all stages during the alternative dispute resolution process. The portion of any agreement that violates these provisions will be declared null and void.^{n6.2} The parties may negotiate any aspect of the delivery of medical benefits and the delivery of disability compensation to employees of the employer or group of employers that are eligible for group health benefits and nonoccupational disability benefits through their employer.^{n6.3}

A recognized or certified exclusive bargaining representative in an industry not covered by *Lab. Code* § 3201.5 may file a petition with the administrative director seeking permission to negotiate with an employer or group of employers to enter into a labor-management agreement pursuant to *Lab. Code* § 3201.7. On receipt of the petition, the administrative director must promptly verify the petitioner's status as the exclusive bargaining representative. If the petition satisfies the statutory requirements, the administrative director will issue a letter advising each employer and labor representative of their eligibility to enter into negotiations, for a period not to exceed one year, for the purpose of reaching agreement on a labor-management agreement pursuant to § 3201.7. The parties may jointly request an additional one-year period to negotiate an agreement.^{n6.4} No employer or collective bargaining representative may establish or continue such a program until it has met specific statutory requirements.^{n6.5}

The Administrative Director has the power to determine whether construction industry employers and unions are eligible to enter into collective bargaining agreements under *Labor Code Section* 3201.5.ⁿ⁷ Regulations set forth specific procedures the Administrative Director must follow to determine eligibility, as well as procedures to follow after eligibility has been determined.ⁿ⁸

Legal Topics:

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

Labor & Employment Law Collective Bargaining & Labor Relations General Overview Labor & Employment Law Wage & Hour Laws General Overview Workers' Compensation & SSDI Coverage General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code* § 3201.5(a); see *Lab. Code* § 3201.5(c) (employers who may participate).

(n2)Footnote 2. *Lab. Code* § 3201.7(a); see *Lab. Code* § 3201.7(c) (employers who may participate).

(n3)Footnote 3. *Lab. Code* §§ 3201.5(a), 3201.7(a).

(n4)Footnote 3.1. Any system of arbitration must provide that the decision of the arbiter or board of arbitration is

subject to review by the Workers' Compensation Appeals Board in the same manner as provided for reconsideration of a final order, decision, or award made and filed by a workers' compensation administrative law judge pursuant to the procedures in *Lab. Code § 5900 et seq.*, and the court of appeals pursuant to the procedures in *Lab. Code § 5950 et seq.*, governing orders, decisions, or awards of the appeals board. The findings of fact, award, order, or decision of the arbitrator must have the same force and effect as an award, order, or decision of a workers' compensation administrative law judge. Any provision for arbitration established pursuant to *Lab. Code § 3201.5* is not subject to *Lab. Code §§ 5270, 5270.5, 5271, 5272, 5273, 5275, 5277. Lab. Code §§ 3201.5(a)(1), 3201.7(a)(3)(A).*

(n5)Footnote 4. *Lab. Code § 3201.5(b)(1); see Costa v. Workers' Compensation Appeals Bd. (1998) 65 Cal. App. 4th 1177, 1185* (alternative dispute resolution plan in collective bargaining agreement requiring claimant to go through three procedural levels before reaching Workers' Compensation Appeals Board, although public adjudicatory system required only one procedural level, did not violate state constitution by creating incumbrance to workers' compensation system when nothing in constitution mandated establishment of expedited proceeding or limited number of procedural levels to be used; given informality and short time limits provided for two levels, there was no reason why disputes should not be resolved quickly and less expensively than under public system).

(n6)Footnote 5. *Lab. Code § 3201.5(b)(1).*

(n7)Footnote 5.1. *Lab. Code § 3201.5(b)(2).*

(n8)Footnote 5.2. *Lab. Code § 3201.5(d).*

(n9)Footnote 6. *See Lab. Code § 3201.5(f), (g).*

(n10)Footnote 6.1. *See Lab. Code § 3201.7(c)* (employers to whom these provisions apply).

(n11)Footnote 6.2. *Lab. Code § 3201.7(b)(1).*

(n12)Footnote 6.3. *Lab. Code § 3201.7(b)(2).*

(n13)Footnote 6.4. *Lab. Code § 3201.7(d).*

(n14)Footnote 6.5. *See Lab. Code § 3201.7(e), (f).*

(n15)Footnote 7. *See 8 Cal. Code Reg. §§ 10200-10204.*

(n16)Footnote 8. *8 Cal. Code Reg. §§ 10200-10204.*



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 1. Overview of Workers' Compensation System

1-20 California Employment Law § 20.03

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.03 Insurance Requirements for Employers

[1] Employers' Responsibilities

Every private employer in California must either carry compensation insurance or obtain a certificate of self-insurance.ⁿ¹ Insurance may be obtained privately or through the state's own insurance fund, the State Compensation Insurance Fund (SCIF).ⁿ² The insurer must be authorized to write workers' compensation insurance in California.^{n2.1}

■ PRACTICE TIP--EMPLOYER'S PERSPECTIVE:

You can be of great assistance to your employer clients regarding their workers' compensation insurance if you just remember that, according to the California Workers' Compensation Institute, there are over 300 carriers licensed to write workers' compensation insurance in California. With the advent of "open rating" and the repeal of the "minimum rates" guarantees for insurance companies, the marketplace really controls pricing. The more carriers your client can approach, probably through many agents, the better price and benefits they will obtain. *Commentary by John W. Miller.*

Failure to comply with the requirement to secure payment of compensation through insurance or self-insurance is a misdemeanor punishable by either or both imprisonment and a fine.ⁿ³ Effective March 1, 2005, on a first conviction, the person may be charged the costs of investigation at the court's discretion. On a subsequent conviction, the person must be charged the costs of investigation in addition to any other penalties.^{n3.1} The employer may also be subject to civil suit by an injured employeeⁿ⁴ and to a claim filed by the injured employee with the Workers' Compensation Appeals Board.ⁿ⁵ Additionally, the Director of Industrial Relations may issue a work stoppage order, which will be in effect until the employer complies with the requirement to secure payment of compensation.ⁿ⁶ Failure to comply with such a stop order may subject the employer to a fine and imprisonment.ⁿ⁷

When an insurer fails to give timely notice of nonrenewal of a workers' compensation insurance policy, the policy must be continued for a period of 60 days after the insurer gives the notice.^{n7.1} If notice of nonrenewal is not given, the

policy continues in effect as a matter of law. Thus, an employer could not be penalized for being uninsured at the time the Division of Labor Standards Enforcement did an inspection and issued a "stop order-penalty assessment."^{n7.2} The insurer failed to give notice of nonrenewal of the policy, and administrative error prevented the insurer from timely entering the policy renewal information into its system.^{n7.3}

An employer can secure the payment of compensation on employees provided to the employer through an agreement with another employer, by entering into a valid and enforceable agreement with the other employer under which the other employer agrees to obtain, and does obtain, workers' compensation coverage for those employees.ⁿ⁸ In such cases, both employers will be considered to have secured the payment of compensation. Employers who comply with this rule will not be subject to civil, criminal, or other penalties for failure to provide workers' compensation coverage or tort liability in the event an employee is injured, but may, in the absence of compliance, be subject to all three.ⁿ⁹

The Department of Industrial Relations (DIR) establishes procedures to be followed by employers wishing to operate as self-insureds.ⁿ¹⁰ Any employer may opt for self-insurance by applying for a certificate of consent to self-insure from the DIR and by demonstrating the ability to pay compensation to employees should it become necessary.ⁿ¹¹ The application may be made either as an individual employer or as one employer in a group of employers.ⁿ¹² This requires the posting of a security deposit in the amount of \$220,000 or 125 percent of the employer's liability for the payment of compensation, whichever is greater.ⁿ¹³ Various auditing and reporting requirements guarantee the employer's continued ability to self-insure.ⁿ¹⁴

Employers who choose not to be self-insured may obtain insurance from a number of private carriers or from the SCIF, a division of the DIR.ⁿ¹⁵ The SCIF was created in 1913 to guarantee the existence of reliable and equitably priced workers' compensation insurance in California. Public agencies throughout the state must maintain insurance through the SCIF unless it rejects their applications. The SCIF is a nonprofit organization whose operation is strictly governed by statute.ⁿ¹⁶

The purpose of the SCIF is to ensure that affordable compensation coverage will be available to all employers. Pursuant to the provisions of the Insurance Code governing the SCIF,ⁿ¹⁷ the SCIF is granted greater freedom in conducting its affairs than that granted to most other state agencies so that it may compete with private insurers.ⁿ¹⁸ By virtue of *Insurance Code Section 11873*, the SCIF is not entitled to the protection from liability for punitive damages provided by *Government Code Section 818* to most public entities.ⁿ¹⁹ In addition, the SCIF is not entitled to governmental immunity from tort claims.ⁿ²⁰ Thus, an employer insured with the SCIF is not precluded from bringing suit against the SCIF for tortious breach of the implied covenant of good faith and fair dealing and for negligence, based on the SCIF's delay in processing claims and its overestimation of reserves for claims that adversely affect the insured employer's premiums and policy dividends.ⁿ²¹ The California Tort Claims Act is not applicable to the SCIF by virtue of *Insurance Code Section 11873*, which excludes the SCIF from the immunities of the act and places it in the same position as other workers' compensation insurers.ⁿ²²

The Uninsured Employers Fund was created by the Legislature in 1971 to provide a source of funds for injured employees whose employers have failed or refused either to obtain workers' compensation insurance coverage or to qualify as self-insurers.ⁿ²³ The Fund is financed from various penalties that may be assessed against uninsured employers, as well as from state tax revenues.ⁿ²⁴ The Fund's liability for payment of an award of workers' compensation benefits is derivative rather than vicarious. The employer is primarily responsible for payment of the award even in a case in which the Fund has participated, and is ultimately required to pay the award. The Fund is not liable to pay any amount in excess of, or different from, the amount awarded against the uninsured employer.ⁿ²⁵

[2] Notification of Benefits

An employer must, on request from the DIR, furnish a written statement showing the name of its insurer or the manner in which it has secured payment of compensation benefits.ⁿ²⁶ The failure of the employer for a period of 10 days to

furnish the requested written statement constitutes prima facie evidence that it has failed to obtain insurance or to obtain a certificate of consent to self-insure from the DIR.ⁿ²⁷

In general, every employer subject to workers' compensation laws must post and keep posted a notice in a conspicuous location frequented by employees, and where it may be easily read by the employees during workday hours, stating the employer's current compensation insurance carrier or a statement to the effect that the employer is self-insured, identifying the person responsible for claims adjustment.ⁿ²⁸ The form and content of the notice are prescribed by the administrative director of the Division of Workers' Compensation,ⁿ²⁹ who must make it available to self-insured employers and insurers. Insurers must provide the notice to each of their policyholders, with advice concerning the requirements of this section and the penalties for a failure to post this notice.ⁿ³⁰ The notice must advise employees that all injuries should be reported to their employer. It must be easily understood, and must be posted in both English and Spanish where there are Spanish-speaking employees.ⁿ³¹ The notice must include the following information:ⁿ³²

1. How to get emergency medical treatment, if needed;
2. The kinds of events, injuries, and illnesses covered by workers' compensation;
3. The injured employee's right to receive medical care;
4. The rights of the employee to select and change the treating physician pursuant to the provisions of *Labor Code Section 4600*;
5. The rights of the employee to receive temporary disability indemnity, permanent disability indemnity, vocational rehabilitation services, and death benefits, as appropriate;
6. To whom injuries should be reported;
7. The existence of time limits for the employer to be notified of an occupational injury;
8. The protections against discrimination provided pursuant to *Labor Code Section 132a*; and
9. The location and telephone number of the nearest information and assistance officer.

The notice must also contain the following information:ⁿ³³

1. Generally, how to obtain appropriate medical care for a job injury;
2. The role and function of the primary treating physician; and
3. A form the employee may use as an optional method for notifying the employer of the name of the employee's "personal physician," as defined by *Labor Code Section 4600*, or "personal chiropractor," as defined by *Labor Code Section 4601*.

Additionally, every employer must give each new employee, either at the time the employee is hired or by the end of the first pay period, written notice of these rights.ⁿ³⁴ The employer's failure to meet the notice requirements constitutes a misdemeanor, is prima facie evidence of noninsurance, and automatically entitles the employee to be treated by his or her physician for any injury that occurs during the failure.ⁿ³⁵

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

However, the statute's use of the phrase "personal physician," indicates this option may be limited to

workers who have designated a "personal physician" prior to the injury under *Labor Code section 4600*.
Commentary by Robert Levin.

One exception to these notice requirements is made with respect to persons who are employed by the owner or occupant of a residential dwelling and whose duties are incidental to the ownership, maintenance, or use of the dwelling (including the care and supervision of children), or whose duties are personal and not carried out in the course of the trade, business, profession, or occupation of the owner or occupant.ⁿ³⁶

Every employer must file a complete report of every occupational injury or occupational illnessⁿ³⁷ to each employee that results in lost time beyond the date of the injury or illness, or which requires medical treatment beyond first aid. Each report of occupational injury or occupational illness must indicate the Social Security number of the injured employee.ⁿ³⁸ An insured employer must file the report with the insurer on a form prescribed by the Administrative Director of the Division of Workers' Compensation for that purpose within five days after the employer obtains knowledge of the injury or illness that has, or is alleged to have, arisen out of and in the course of employment.ⁿ³⁹ A self-insured employer, the state of California, or the insurer of an insured employer must file the report in the electronic form prescribed for that purpose by the Administrative Director pursuant to *Labor Code section 138.6* within the time prescribed by the Administrative Director.ⁿ⁴⁰

If the employee subsequently dies as a result of the reported injury or illness, the employer must file an amended report indicating the death with the Department of Industrial Relations, through its Division of Workers' Compensation or, if an insured employer, with the insurer, within five days after the employer is notified or learns of the death. A copy of any amended reports received by the insurer must be filed with the Division of Workers' Compensation in electronic form as prescribed by the Administrative Director.ⁿ⁴¹

In every case involving a serious injury or illness, or death, in addition to the report described *above*, the employer must immediately make a report to the Division of

Occupational Safety and Health by telephone or telegraph. An employer who violates this requirement may be assessed a civil penalty of not less than five thousand dollars.^{n41.1} However, nothing in *Labor Code section 6409.1(b)* may be construed to increase the maximum civil penalty that may be imposed for a violation of *Labor Code section 6409.1*.^{n41.2}

For further discussion of reporting requirements regarding occupational injuries or illnesses, *see* Chapter 21.

When an injury causes (or is claimed to cause) temporary or permanent disability, the employer must comply with detailed notice requirements set forth in *Title 8, California Code of Regulations, Section 9812(a), (e)-(g)* regarding the employee's right to disability benefits. The employer must also comply with specified notice requirements (1) when the employer denies liability for all compensation benefits,ⁿ⁴² (2) when the employer delays determining its liability for an injury,ⁿ⁴³ (3) when the employer terminates payment of benefits,ⁿ⁴⁴ (4) when the employer resumes payment of benefits after terminating payment,ⁿ⁴⁵ or (5) when the employer changes the benefit rate or schedule for a class of benefits.ⁿ⁴⁶ The regulations also contain specific notice requirements pertaining to vocational rehabilitation benefitsⁿ⁴⁷ and death benefits.ⁿ⁴⁸

Legal Topics:

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

Insurance LawGeneral Liability InsuranceGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral OverviewWorkers' Compensation & SSDIBenefit DeterminationsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 3700; see also Lab. Code § 90.3(a)* (state policy to vigorously enforce laws requiring employers to secure payment of compensation required by § 3700 and to protect employers who comply with law from those who attempt to gain competitive advantage at expense of their workers by failing to secure payment of compensation), (b) (program targeting employers in industries with highest incidence of unlawfully uninsured employers).

(n2)Footnote 2. *Lab. Code § 3211.*

(n3)Footnote 2.1. *See Lab. Code § 3700; Starving Students, Inc. v. Dept. of Industrial Relations* (2005) 125 Cal. App. 4th 1357, 1361, 23 Cal. Rptr. 3d 583 .

(n4)Footnote 3. *See Lab. Code § 3700.5(a), (b).*

(n5)Footnote 3.1. *Lab. Code § 3700.5(c).* The costs of investigation are to be paid only after the payment of any benefits owed to injured workers, any reimbursement owed to the Director of Industrial Relations for benefits provided to the injured worker pursuant to *Lab. Code § 3717*, and any other penalty assessments that may be owed. *Lab. Code § 3700.5(c).*

(n6)Footnote 4. *Lab. Code § 3706.* For discussion, *see § 20.40[1][a].*

(n7)Footnote 5. *Lab. Code § 3715(a).* For discussion, *see § 20.40[1][c].*

(n8)Footnote 6. *Lab. Code § 3710.1. See Leo's Associates, Inc. v. Dept. of Industrial Relations* (2004) 120 Cal. App. 4th 628, 631, 15 Cal. Rptr. 3d 594 (stop work order and penalty assessment pursuant to *Lab. Code §§ 3710.1, 3722* for failure to provide proof of workers' compensation insurance were proper despite subsequent reinstatement of insurance, because retroactive reinstatement of lapsed policy did not satisfy requirement that workers' compensation insurance be in effect on day of inspection, and did not preclude statutory penalty assessment).

(n9)Footnote 7. *See Lab. Code § 3710.2.* The penalty provisions of *Lab. Code § 3710.2* and their procedural prerequisites have been upheld against constitutional challenge based on arguments that such provisions violate the separation of powers doctrine, due process, and the principle of check. *Bradshaw v. Park* (1994) 29 Cal. App. 4th 1267, 1274-1279, 34 Cal. Rptr. 2d 872 .

(n10)Footnote 7.1. *Ins. Code § 11664(d).*

(n11)Footnote 7.2. *See Lab. Code §§ 3710.1, 3722.*

(n12)Footnote 7.3. *Catalina Car Wash, Inc. v. Department of Industrial Relations* (2003) 105 Cal. App. 4th 162, 167-170, 129 Cal. Rptr. 2d 118 .

(n13)Footnote 8. *See Lab. Code § 3602(d).*

(n14)Footnote 9. *See Lab. Code § 3602(d).*

(n15)Footnote 10. *See 8 Cal. Code Reg. § 15200 et seq.*

(n16)Footnote 11. *Lab. Code § 3700(b).*

(n17)Footnote 12. *Lab. Code § 3700(b).*

(n18)Footnote 13. *Lab. Code § 3701.*

(n19)Footnote 14. *See 8 Cal. Code Reg. § 15250 et seq.*

(n20)Footnote 15. *Lab. Code § 3700(a)*; see *Lab. Code § 56*. See also *American Manufacturers Mut. Ins. Co. v. Sullivan* (1999) 526 U.S. 40, 43, 119 S. Ct. 977, 982, 143 L. Ed. 2d 130 (private insurers providing workers' compensation coverage under state laws are not "state actors" under *Fourteenth Amendment*; thus, a private insurer's decision under Pennsylvania's workers' compensation system to withhold payment and seek "utilization review" by private utilization review organization of reasonableness and necessity of particular medical treatment for employee's work-related injury, without predeprivation notice and opportunity to be heard, did not satisfy state-action requirement for finding deprivation of due process under *Fourteenth Amendment*).

(n21)Footnote 16. See *Ins. Code § 11770 et seq.*

(n22)Footnote 17. *Ins. Code § 11770 et seq.*

(n23)Footnote 18. *Courtesy Ambulance Serv. v. Superior Court* (1992) 8 Cal. App. 4th 1504, 1511-1513, 11 Cal. Rptr. 2d 161 .

(n24)Footnote 19. *Courtesy Ambulance Serv. v. Superior Court* (1992) 8 Cal. App. 4th 1504, 1513-1519, 11 Cal. Rptr. 2d 161 .

(n25)Footnote 20. *Security Officers Serv., Inc. v. State Compensation Ins. Fund* (1993) 17 Cal. App. 4th 887, 892-893, 21 Cal. Rptr. 2d 653 .

(n26)Footnote 21. *Security Officers Serv., Inc. v. State Compensation Ins. Fund* (1993) 17 Cal. App. 4th 887, 899-900, 21 Cal. Rptr. 2d 653 .

(n27)Footnote 22. *Maxon Industries, Inc. v. State Compensation Ins. Fund* (1993) 16 Cal. App. 4th 1387, 1390-1395, 20 Cal. Rptr. 2d 730 .

(n28)Footnote 23. *DuBois v. Workers' Compensation Appeals Bd.* (1993) 5 Cal. 4th 382, 388-389, 20 Cal. Rptr. 2d 523, 853 P.2d 978 ; see *Lab. Code §§ 3710-3732*.

(n29)Footnote 24. *DuBois v. Workers' Compensation Appeals Bd.* (1993) 5 Cal. 4th 382, 396, 20 Cal. Rptr. 2d 523, 853 P.2d 978 .

(n30)Footnote 25. *DuBois v. Workers' Compensation Appeals Bd.* (1993) 5 Cal. 4th 382, 396, 20 Cal. Rptr. 2d 523, 853 P.2d 978 .

(n31)Footnote 26. *Lab. Code § 3711*.

(n32)Footnote 27. *Lab. Code § 3711*; see *Lab. Code § 3700(a), (b)*.

(n33)Footnote 28. *Lab. Code § 3550(a)*.

(n34)Footnote 29. *Lab. Code § 3550(d)*.

(n35)Footnote 30. *Lab. Code §§ 3550(f), 3551(c)*.

(n36)Footnote 31. *Lab. Code §§ 3550(d), 3551(b)*.

(n37)Footnote 32. *Lab. Code § 3550(d)*.

(n38)Footnote 33. *Lab. Code § 3551(b)*.

(n39)Footnote 34. *Lab. Code § 3551(a)*.

(n40)Footnote 35. *Lab. Code* § 3550(b), (e).

(n41)Footnote 36. *See Lab. Code* §§ 3550(c), 3351(d); *see also Lab. Code* § 3352(h) (certain persons employed as provided in *Lab. Code* § 3351(d) are excluded from coverage of workers' compensation).

(n42)Footnote 37. *See Lab. Code* § 6409 for definitions.

(n43)Footnote 38. *Lab. Code* § 6409.1(a).

(n44)Footnote 39. *Lab. Code* § 6409.1(a). *See also 8 Cal. Code Reg.* § 14001.

(n45)Footnote 40. *Lab. Code* § 6409.1(a).

(n46)Footnote 41. *Lab. Code* § 6409.1(a).

(n47)Footnote 41.1. *Lab. Code* § 6409.1(b).

(n48)Footnote 41.2. *Lab. Code* § 6409.1(b). *See Lab. Code* § 6427 *et seq.*

(n49)Footnote 42. *See 8 Cal. Code Reg.* § 9812(i).

(n50)Footnote 43. *See 8 Cal. Code Reg.* § 9812(j).

(n51)Footnote 44. *See 8 Cal. Code Reg.* § 9812(d).

(n52)Footnote 45. *See 8 Cal. Code Reg.* § 9812(b).

(n53)Footnote 46. *See 8 Cal. Code Reg.* § 9812(c).

(n54)Footnote 47. *See 8 Cal. Code Reg.* § 9813.

(n55)Footnote 48. *See 8 Cal. Code Reg.* § 9812(h).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 1. Overview of Workers' Compensation System

1-20 California Employment Law § 20.04

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.04 Medical Provider Networks

On or after January 1, 2005, an insurer or employern¹ may establish or modify a medical provider network for the provision of medical treatment to injured employees, which must include physicians primarily engaged in the treatment of occupational injuries and physicians primarily engaged in the treatment of nonoccupational injuries.n² An insurer or employer offering a medical provider network using economic profiling must file with the administrative director a description of any policies and procedures related to economic profiling utilized by the insurer or employer.n³ An insurer or employer arranging for care for injured employees through a medical provider network must file a written continuity of care policy with the administrative director.n⁴

When the injured employee notifies the employer of the injury or files a claim for workers' compensation with the employer, the employer must arrange an initial medical evaluation and begin treatment as required by *Lab. Code* § 4600.n⁵ The employer must notify the employee of his or her right to be treated by a physician of his or her choice after the first visit from the medical provider network and the method by which the employee may access the list of participating providers.n⁶ If an injured employee disputes either the diagnosis or the treatment prescribed by the treating physician, the employee may seek the opinion of another physician in the medical provider network. If the injured employee disputes the diagnosis or treatment prescribed by the second physician, the employee may seek the opinion of a third physician in the medical provider network.n⁷

The injured employee's selection of a treating physician and any subsequent physicians must be based on the physician's specialty or recognized expertise in treating the particular injury or condition in question.n⁸ Treatment by a specialist who is not a member of the medical provider network may be permitted on a case-by-case basis if the medical provider network does not contain a physician who can provide the approved treatment and the treatment is approved by the employer or the insurer.n⁹ If after the third physician's opinion the treatment or diagnostic service remains disputed, the injured employee may request independent medical review regarding the disputed treatment or diagnostic service.n¹⁰ If the independent medical reviewer finds that the disputed treatment or diagnostic service is consistent with *Lab. Code* § 5307.27 or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice

Guidelines, the injured employee may seek the disputed treatment or diagnostic service from a physician of his or her choice from within or outside the medical provider network. Treatment outside the medical provider network must be provided consistent with *Lab. Code* § 5307.27 or the American College of Occupational and Environmental Medicine's Occupational Practice Guidelines. The employer is liable for the cost of any approved medical treatment in accordance with *Lab. Code* §§ 5307.1 or 5307.11.n11

The Workers' Compensation Appeals Board cannot order additional examinations, and no other reports will be admissible to resolve any controversy arising out of the provisions governing medical provider networks.n12

Legal Topics:

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

Insurance LawGeneral Liability InsuranceGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral OverviewWorkers' Compensation & SSDICoverageGeneral Overview

FOOTNOTES:

(n1)Footnote 1. For these purposes, an "employer" is defined as a self-insured employer, a joint powers authority, or the state. *Lab. Code* § 4616.5.

(n2)Footnote 2. *Lab. Code* § 4616(a). A health care organization certified pursuant to *Lab. Code* § 4600.5 will be deemed approved if it meets the percentage required for physicians primarily engaged in nonoccupational medicine and all the other requirements for medical provider networks. A health care service plan licensed pursuant to *Health & Saf. Code* § 1340 *et seq.* will be deemed approved for purposes of this article if it has a reasonable number of physicians with competency in occupational medicine. A group disability insurance policy as defined in *Ins. Code* § 106(b) that covers hospital, surgical, and medical care expenses will be deemed approved if it has a reasonable number of physicians with competency in occupational medicine. A group disability insurance policy must not include Medicare supplement, vision-only, dental-only, Champus-supplement insurance, hospital indemnity, accident-only, and specified disease insurance that pays benefits on a fixed benefit, cash-payment-only basis. Any Taft-Hartley health and welfare fund will be deemed approved if it has a reasonable number of physicians with competency in occupational medicine. *Lab. Code* § 4616.7.

(n3)Footnote 3. *Lab. Code* § 4616.1(a).

(n4)Footnote 4. *Lab. Code* § 4616.2(a).

(n5)Footnote 5. *Lab. Code* § 4616.3(a).

(n6)Footnote 6. *Lab. Code* § 4616.3(b).

(n7)Footnote 7. *Lab. Code* § 4616.3(c).

(n8)Footnote 8. *Lab. Code* § 4616.3(d)(1).

(n9)Footnote 9. *Lab. Code* § 4616.3(d)(2).

(n10)Footnote 10. *Lab. Code* § 4616.4(b). For the procedure for an independent medical review, *see Lab. Code* § 4616.4(c)-(h).

(n11)Footnote 11. *Lab. Code* § 4616.4(i).

(n12)Footnote 12. *Lab. Code* § 4616.6.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 1. Overview of Workers' Compensation System

1-20 California Employment Law §§ 20.05 through 20.09

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

[Reserved]

§§ 20.05[Reserved]



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 2. Exclusive Remedy Doctrine in Employee Injury Cases

1-20 California Employment Law § 20.10

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.10 Scope of Exclusive Remedy Doctrine

[1] Injuries to Employee

When the conditions of compensation exist (that is, when an employee is entitled to receive workers' compensation benefits),ⁿ¹ workers' compensation is the exclusive remedy for injuries incurred by an employee arising out of and in the course of his or her employment.ⁿ² The exclusive remedy provisions of workers' compensation law thus provide tort immunity for employers and coemployees of an injured worker. Authority for the exclusive remedy provisions of the Workers' Compensation Act, as applied to employers for injuries to their employees, is found in two sections of the Labor Code.ⁿ³ *Labor Code Section 3600* provides that compensation under the Workers' Compensation Act, except as specifically provided for in *Labor Code Section 3602*,ⁿ⁴ *Section 3706*,ⁿ⁵ and *Section 4558*,ⁿ⁶ is in lieu of any other liability of an employer for injuries arising out of and in the course of the employment in those cases in which the conditions of compensation exist. The import of *Section 3600* regarding the exclusive remedy doctrine is duplicated by *Labor Code Section 3602*, which provides that, excepting specified situations, when the conditions of compensation found in *Section 3600* exist, the right to recover under workers' compensation law is the exclusive remedy for the injured employee, or his or her dependents, against the employer.

A two-step analysis normally is required to determine whether a claim is within the exclusive jurisdiction of the Workers' Compensation Appeals Board (WCAB):^{n6.1}

- The court must initially determine whether the alleged injury falls within the scope of the exclusive remedy provisions.^{n6.2} The first step normally entails simply determining whether the plaintiff is seeking to recover for "industrial personal injury or death," *i.e.*, for personal injury or death sustained in and arising out of the course and scope of employment.^{n6.3}
- If the plaintiff's claim comes within the conditions of compensation, the second step is to determine whether the acts or motives giving rise to the injury constitute a risk reasonably encompassed within the

compensation bargain.^{n6.4} The motive element of a cause of action excepts that cause of action from exclusivity only if it violates a fundamental public policy of the state.^{n6.5}

The exclusive remedy provisions of the Workers' Compensation Act apply when the employer is a licensed farm labor contractor, registered pursuant to the California Farm Labor Contractor Act (FLCA).ⁿ⁷ The fact that an aggrieved farm laborer may have a private right of action against a contractor under the FLCA, does not take the contractor out of the exclusivity provisions of the Workers' Compensation Act when the worker is injured in the course and scope of employment.ⁿ⁸

As a general rule, suits against coemployees are barred by the exclusive remedy provisions of workers' compensation law in the same manner as suits against employers.ⁿ⁹ A suit by an injured person against a coemployee may be maintained, however, if one of the exceptions in *Labor Code Section 3601* is satisfied.ⁿ¹⁰ In such a suit, the employer of the parties is normally not vicariously liable for the tortious acts of the coemployee.ⁿ¹¹ However, when a complaint alleges that an employer has ratified a tortious act of an employee, the employer may be liable as a joint tortfeasor.ⁿ¹²

When an employee is injured by an uninsured motorist while the employee is acting within the course and scope of his or her employment, the employee may make a claim under the uninsured motorist coverage provision of the employee's automobile insurance policy as well as filing a workers' compensation claim against his or her employer.ⁿ¹³ However, an insurer has no duty to pay its insured benefits under an uninsured motorist provision until the insured's workers' compensation claim is resolved.ⁿ¹⁴ A worker's exclusive remedy lay in workers' compensation for a claim that the employer negligently failed to discover, diagnose or inform the worker of a significant hearing abnormality, which was a symptom of a growing brain tumor. The employer undertook testing of its employees to detect hearing abnormalities due to noise exposure. The employee claimed that the employer's negligence caused a delay in treatment of a preexisting condition which resulted in permanent disability and injury. But for his employment, the employee had no basis for any claim against the employer under any legal theory, mandating the conclusion that the exclusive remedy lay in workers' compensation.^{n14.1}

One court of appeal has held that the exclusivity doctrine bars an action against an employer for negligent or reckless failure to provide adequate security on the employer's premises, despite knowledge of the potential danger, when such failure allegedly resulted in an assault and kidnapping against two employees perpetrated by third parties who were not employees.ⁿ¹⁵

Another court of appeal has held that an employee's death caused by unsafe working conditions was compensable solely under workers' compensation, even if the employer recklessly or deliberately failed to correct known safety violations.ⁿ¹⁶ Another court found that an employee's injuries resulting from the employer's conduct were compensable solely under the workers' compensation bargain, even though the employer had deceived and defrauded him by not revealing that a chemical solution was unsafe to use, by assuring him that it was safe to use, failing to provide adequate gloves, clothing, and other protective gear, failing to provide training in using and handling the solution, removing warning labels from containers, and violating government safety regulations regarding use of the solution and warnings to employees about its toxic chemical properties.^{n16.1}

The exclusivity rule also barred a tort action against the State by a park ranger, who was injured as a result of the State's failure to complete repairs on a house in which he and his wife were living. As an inducement to accept a new ranger position, the State offered the ranger and his wife, as an employment benefit, residence in a home that the State owned, for which they paid monthly rent. Under the bunkhouse rule,^{n16.2} the ranger's exclusive remedy was in the workers' compensation system, because he was injured in the course of employment. Residence in the house was part of his compensation package, and he resided in the house out of work necessity and used a portion of the house as his office. The injury arose out of employment, even though the ranger was injured on his personal day off, while engaged in an activity having nothing to do with his employment as a park ranger. The injury occurred while the ranger resided on his employer's premises while engaged in an activity incidental to his employment.ⁿ¹⁷

When workers' compensation provides the exclusive remedy for an employment-related injury, and the employee sues the employer under other theories, such as unlawful discrimination or employment-related torts, the trial court may have to determine whether to admit evidence of the injury. To make that determination, the trial court should apply the traditional tort "substantial factor" test to assess whether the unlawful or discriminatory act was a substantial factor in causing the employment-related injury. Thus, for example, in *Huffman v. Interstate Brands Corp.*,ⁿ¹⁷ the employer demoted a long-time employee, who then suffered a knee injury in the course of employment. The employee sued the employer for wrongful demotion and age discrimination. The trial court admitted evidence of the employee's knee injury and subsequent surgery under a "but for" standard, *i.e.*, but for the demotion or unlawful act, the employee would not have suffered emotional distress arising from his subsequent industrial injury. The subsequent workplace injury followed an allegedly unlawful demotion that was concededly outside the compensation bargain and not itself subject to the Workers' Compensation Act exclusive remedy provisions. However, the "but for" test applied by the trial court was an unwarranted expansion of the exemption to the Workers' Compensation Act's exclusive remedy provisions. The better approach to determine whether the exclusivity provisions apply to a subsequent injury following an unlawful act, such as a discriminatory demotion, is to determine whether the discriminatory conduct was a substantial factor in the subsequent industrial injury. In this case, applying the substantial factor test, the appellate court concluded that the alleged unlawful demotion was not a substantial factor in the subsequent knee injury. Had the employee alleged a disability discrimination or failure to accommodate claim, his emotional distress damages arising from his knee injury would have been exempt from the exclusive remedy provisions. The unlawful demotion to a position in which the employer knew the employee could not perform because of a physical disability would be a substantial factor in subsequent workplace injury sustained by that employee while attempting to perform his or her job duties. However, the employee here claimed that he had been demoted because of his age and replaced by a younger man. The injury the employee sustained was because of the physical requirements of the job, not because he was unlawfully replaced as a district manager by a younger man. There was no evidence the knee problems were related to the employee's age. Further, the age discrimination complaint was filed with the Department of Fair Employment and Housing long before he suffered his knee injury.

[2] Applicability of Exclusive Remedy Doctrine to Injuries Suffered by Third Persons

If an injury to a non-employee derives from an injury the employee sustained in the course of employment, the exclusivity of the workers' compensation remedy bars the third person from bringing a separate civil action against the employer. This "derivative-injury" rule is based on the language of *Labor Code Section 3600*, which provides that when the conditions of compensation exist, the employer's liability to pay workers' compensation is "in lieu of any other liability whatsoever to any person."ⁿ¹⁸

An employee seeking to state a cause of action against an employer under section 3602(b)(2) must plead in general terms facts that, if found true by the trier of fact, establish the existence of three essential elements:ⁿ¹⁹

1. The employer knew that the plaintiff had suffered a work-related injury.
2. The employer concealed that knowledge from the plaintiff.
3. The injury was aggravated as a result of such concealment.

In determining whether the allegations in a complaint are legally sufficient under § 3602(b)(2), the trial court must liberally construe the pleading with a view to achieving substantial justice between the parties.ⁿ²⁰

For example, workers' compensation proceedings are the exclusive remedy for the following kinds of non-employee claims that are collateral to or derivative of employee's injuries:

- A claim by nondependent parents of an employee based on the employee's wrongful death.ⁿ²¹
- A claim by the spouse of an injured employee for loss of services or loss of consortium.ⁿ²²
- A claim by an employee's spouse for emotional distress suffered in witnessing the employee's injuries.ⁿ²³

A professional who renders services to an injured employee is barred by the derivative injury rule from filing a civil action for payment, because the professional's work is compensable through the workers' compensation system. For example, a psychologist retained as an expert by the attorneys representing workers in both their workers' compensation claims and in a civil suit against a third party, whose bills were partly paid through the workers' compensation system, could not seek payment for the rest in a separate civil suit, because his work was compensable through the workers' compensation system.^{n23.1}

However, if the third person's injury is not legally dependent on the employee's injury, then it is not a "derivative injury." In such a case, the third party may bring a separate civil action against the employer.ⁿ²⁴ For example, a plaintiff who was injured in utero when the plaintiff's mother inhaled toxic fumes at her place of employment may sue the mother's employer if the plaintiff's injury resulted from the plaintiff's own exposure to the toxic substance. The fact that the mother was also injured does not bar the plaintiff's action unless the plaintiff's injury is necessarily dependent on the existence of the mother's injury.ⁿ²⁵

Legal Topics:

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

Workers' Compensation & SSDIRemedies Under Other LawsGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* §§ 20.20-20.23.

(n2)Footnote 2. *See Lab. Code* §§ 3600, 3602. For the standard jury instruction on the employer's affirmative defense that the employee's injury was covered by workers' compensation, see Judicial Council of California Civil Jury Instructions, *CACI No. 2800* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n3)Footnote 3. *See Lab. Code* §§ 3600, 3602.

(n4)Footnote 4. *See Lab. Code* § 3602 (providing for three exceptions discussed in § 20.06[1][a]-[d]).

(n5)Footnote 5. *See Lab. Code* § 3706 (providing for exception for uninsured employer discussed in § 20.20[1]).

(n6)Footnote 6. *See Lab. Code* § 4558 (providing exception for certain power press injuries discussed in § 20.12[1][e]).

(n7)Footnote 6.1. *Operating Engineers Local 3 v. Johnson* (2003) 110 Cal. App. 4th 180, 185-186, 1 Cal. Rptr. 3d 552 .

(n8)Footnote 6.2. *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal. 4th 800, 811, 102 Cal. Rptr. 2d 562, 14 P.3d 234 .

(n9)Footnote 6.3. *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal. 4th 800, 812-814, 102 Cal. Rptr. 2d 562, 14 P.3d 234 ; *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 752-753, 7 Cal. Rptr. 2d 808, 828

P.2d 1195; *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303, 801 P.2d 1054. See *Operating Engineers Local 3 v. Johnson* (2003) 110 Cal. App. 4th 180, 187, 1 Cal. Rptr. 3d 552 (unlike damage to one's reputation caused by defamation, nature of harm from breach of right to privacy constitutes personal injury, bringing claim within conditions of compensation and satisfying first step of exclusivity analysis).

(n10)Footnote 6.4. *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal. 4th 800, 819-820, 102 Cal. Rptr. 2d 562, 14 P.3d 234; *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303, 801 P.2d 1054. See *Operating Engineers Local 3 v. Johnson* (2003) 110 Cal. App. 4th 180, 187-188, 1 Cal. Rptr. 3d 552 (invasion of privacy claim avoids exclusivity provisions of Workers' Compensation Act because it does not stem from risk reasonably encompassed within compensation bargain).

(n11)Footnote 6.5. *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal. 4th 800, 823, 102 Cal. Rptr. 2d 562, 14 P.3d 234; see *Operating Engineers Local 3 v. Johnson* (2003) 110 Cal. App. 4th 180, 188, 1 Cal. Rptr. 3d 552 (employer's violation of employee's privacy by intentional disclosure of reprimand to coemployees with no need to know violated right conferred by California Constitution and was contrary to fundamental public policy).

(n12)Footnote 7. *Ruiz v. Cabrera* (2002) 98 Cal. App. 4th 1198, 1200-1203, 120 Cal. Rptr. 2d 320.

(n13)Footnote 8. *Ruiz v. Cabrera* (2002) 98 Cal. App. 4th 1198, 1200-1203, 120 Cal. Rptr. 2d 320.

(n14)Footnote 9. *Lab. Code* § 360I; see discussion in § 20.43[1].

(n15)Footnote 10. *Lab. Code* § 360I(c). For discussion of suits against coemployees, see § 20.43.

(n16)Footnote 11. See *Lab. Code* § 360I(c); *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1487-1489, 82 Cal. Rptr. 2d 359 (only "positive misconduct" by employer, not by employee, can be basis for employer liability for assault and battery).

(n17)Footnote 12. *Iverson v. Atlas Pacific Eng'g* (1983) 143 Cal. App. 3d 219, 228, 191 Cal. Rptr. 696; accord, *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1489-1491, 82 Cal. Rptr. 2d 359.

(n18)Footnote 13. *Rangel v. Interinsurance Exch.* (1992) 4 Cal. 4th 1, 8, 14 Cal. Rptr. 2d 783, 842 P.2d 82.

(n19)Footnote 14. *Rangel v. Interinsurance Exch.* (1992) 4 Cal. 4th 1, 17, 14 Cal. Rptr. 2d 783, 842 P.2d 82.

(n20)Footnote 14.1. *Weber v. United Parcel Service, Inc.* (2003) 107 Cal. App. 4th 801, 806-809, 132 Cal. Rptr. 2d 412. See *Wickham v. North American Rockwell Corp.* (1970) 8 Cal. App. 3d 467, 87 Cal. Rptr. 563 (workers' compensation was exclusive remedy for employee's claim that employer's physician failed to diagnose active tuberculosis and progressive inflammation of plaintiff's lung).

(n21)Footnote 15. *Arendell v. Auto Parts Club, Inc.* (1994) 29 Cal. App. 4th 1261, 1265, 35 Cal. Rptr. 2d 83.

(n22)Footnote 16. *Vuillemainroy v. American Rock & Asphalt, Inc.* (1999) 70 Cal. App. 4th 1280, 1285; see § 20.12[2][c].

(n23)Footnote 16.1. *Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal. App. 4th 710, 719-723, 112 Cal. Rptr. 2d 195.

(n24)Footnote 16.2. See § 20.22[5][d], below.

(n25)Footnote 17. *Vaught v. State of California* (2007) 157 Cal. App. 4th 1538, 1544-1549, 69 Cal. Rptr. 3d 605.

(n26)Footnote 17.1. See, e.g., *Huffman v. Interstate Brands Corp.* (2004) 121 Cal. App. 4th 679, 692-700, 17

Cal. Rptr. 3d 397 .

(n27)Footnote 18. *Lab. Code § 3600*; see *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal. 4th 991, 996-997, 68 Cal. Rptr. 2d 476, 945 P.2d 781 ; *Williams v. Schwartz* (1976) 61 Cal. App. 3d 628, 634, 131 Cal. Rptr. 200 .

(n28)Footnote 19. *Foster v. Xerox Corp.* (1985) 40 Cal.3d 306, 312, 219 Cal. Rptr. 485, 707 P.2d 858 ; see *Palestini v. General Dynamics Corp.* (2002) 99 Cal. App. 4th 80, 89-98, 120 Cal. Rptr. 2d 741 (complaint stated facts sufficient to constitute cause of action for fraudulent concealment resulting in aggravation of alleged work-related injuries within meaning of § 3602(b)(2) by alleging defendants knew physical problems were caused by carcinogenic chemicals and that injuries as reported to defendants and well known to them were aggravated by continued exposure to carcinogenic chemicals).

(n29)Footnote 20. *Foster v. Xerox Corp.* (1985) 40 Cal.3d 306, 312, 219 Cal. Rptr. 485, 707 P.2d 858 ; *Palestini v. General Dynamics Corp.* (2002) 99 Cal. App. 4th 80, 89-90 .

(n30)Footnote 21. *Treat v. Los Angeles Gas & Elec. Corp.* (1927) 82 Cal. App. 610, 615-616, 256 P. 447 .

(n31)Footnote 22. *Colombo v. State of California* (1991) 3 Cal. App. 4th 594, 599, 5 Cal. Rptr. 2d 567 ; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 ; *Gillespie v. Northridge Hosp. Found.* (1971) 20 Cal. App. 3d 867, 868-870, 98 Cal. Rptr. 134 .

(n32)Footnote 23. *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 .

(n33)Footnote 23.1. *Perrillo v. Picco & Presley* (2007) 157 Cal. App. 4th 914, 928-937, 70 Cal. Rptr. 3d 29 .

(n34)Footnote 24. *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal. 4th 991, 998-999, 68 Cal. Rptr. 2d 476, 945 P.2d 781 .

(n35)Footnote 25. *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal. 4th 991, 998-1002, 68 Cal. Rptr. 2d 476, 945 P.2d 781 (disapproving *Bell v. Macy's California* (1989) 212 Cal. App. 3d 1442, 261 Cal. Rptr. 447 , which had held as matter of law that all fetal injuries are derivative of mother's injuries).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 2. Exclusive Remedy Doctrine in Employee Injury Cases

1-20 California Employment Law § 20.11

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.11 When Exclusive Remedy Defense Is Inapplicable

An employee or his or her dependents may wish to avoid the application of the Workers' Compensation Act in order to bring a tort action. In a tort suit by an employee or the employee's dependents against the employer, the exclusive remedy provisions of the Labor Code may be avoided by showing one of the following:

1. The employer of the injured worker was uninsured.n1
2. The injury was of a type outside the application of the Act.n2
3. The employee was not acting within the course of employment at the time of the injury.n3
4. The employee was not performing service growing out of and incidental to his or her employment at the time of the injury.n4
5. The injury meets the requirements of an exception to the exclusive remedy doctrine.n5

In addition, when an injury was caused at least in part by a third person, a civil suit against that person is not barred by the exclusive remedy provision of the workers' compensation system.n6

The exclusivity doctrine of the workers' compensation law also does not bar a statutory employment discrimination action by an employee who alleges that he or she suffered physical, mental, or emotional injury resulting from racial, religious, sex, age, or other discrimination by the employer in violation of the Fair Employment and Housing Act (FEHA).n7 In *City of Moorpark v. Superior Court*,n8 the California Supreme Court addressed the relationship between *Labor Code section 132a*, which prohibits employers from discriminating against employees "injured in the course and scope of their employment,"n9 and the FEHA and other common law remedies for disability discrimination. Disapproving a line of court of appeal decisions holding otherwise, the Court concluded that the FEHA and other

common law remedies are available to an employee subject to discrimination on the basis of a work-related disability.ⁿ¹⁰ However, the Court noted that standards for establishing disability discrimination under the FEHA and under *Labor Code Section 132a* might well be different and that, to the extent the remedies overlap, equitable principles precluded double recovery for employees.ⁿ¹¹

In general, the exclusive remedy rule does not preclude an employee from suing his or her employer for damages for breach of an employment contract.ⁿ¹² Similarly, the rule does not preclude an employee from maintaining a contractual cause of action against the employer for breach of an implied promise not to discharge him or her without good cause.ⁿ¹³ However, when the employee prevails on a cause of action for breach of contract, the employer has the right to set off from any contract damages the amount of any compensation paid to the employee representing lost wages.ⁿ¹⁴

The exclusivity doctrine does not bar claims against an employer for unlawful discrimination under FEHA. Exclusivity also does not bar emotional distress claims founded on discrimination.

Legal Topics:

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

Workers' Compensation & SSDI Coverage General Overview
Workers' Compensation & SSDI Remedies Under Other Laws
Exclusivity General Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 3706*, discussed in § 20.40[1].

(n2)Footnote 2. *See Lab. Code § 3600(a)(1)*, discussed in § 20.21.

(n3)Footnote 3. *See Lab. Code § 3600(a)(2)*, discussed in § 20.22.

(n4)Footnote 4. *See Lab. Code § 3600(a)(2)*, discussed in § 20.22.

(n5)Footnote 5. *See Lab. Code §§ 3600, 3602*, discussed in § 20.12.

(n6)Footnote 6. *See Lab. Code § 3852*, discussed in § 20.24.

(n7)Footnote 7. *Goldman v. Wilsey Foods, Inc.* (1989) 216 Cal. App. 3d 1085, 1095-1096, 265 Cal. Rptr. 294 (religious discrimination); *Meninga v. Raley's, Inc.* (1989) 216 Cal. App. 3d 79, 91, 264 Cal. Rptr. 319 (sex discrimination); *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal. App. 3d 590, 622, 262 Cal. Rptr. 842 (race discrimination); *Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1285-1287, 261 Cal. Rptr. 204 (race and age discrimination); *see Gov. Code § 12900 et seq.* (FEHA). *See also Rissetto v. Plumbers and Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 606 (in FEHA age discrimination case, plaintiff estopped from claiming she could perform her work adequately because plaintiff had obtained favorable settlement in workers' compensation claimed based on contrary assertion that she could not perform her work). For discussion of the FEHA, *see* chs. 40-43.

(n8)Footnote 8. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445, 959 P.2d 752.

(n9)Footnote 9. *Lab. Code § 132a*.

(n10)Footnote 10. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1158, 77 Cal. Rptr. 2d 445, 448, 959 P.2d 752; *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1485-1492, 82 Cal. Rptr. 2d 359 (applying *Moorpark's* holding that *Lab. Code § 132a* is not exclusive remedy for work-related injury discrimination and allowing claims against two coemployees for disability discrimination in violation of FEHA and for emotional distress).

(n11)Footnote 11. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1158, 77 Cal. Rptr. 2d 445, 454, 959 P.2d 752 .

(n12)Footnote 12. *Pichon v. Pacific Gas and Elec. Co.* (1989) 212 Cal. App. 3d 488, 500-501, 260 Cal. Rptr. 677 .

(n13)Footnote 13. *Panopulos v. Westinghouse Elec. Corp.* (1989) 216 Cal. App. 3d 660, 667-668, 264 Cal. Rptr. 810 , disapproved on other grounds, *Turner v. Anheuser Busch, Inc.* (1994) 7 Cal. 4th 1238, 1254 .

(n14)Footnote 14. *Panopulos v. Westinghouse Elec. Corp.* (1989) 216 Cal. App. 3d 660, 667-668, 264 Cal. Rptr. 810 , disapproved on other grounds, *Turner v. Anheuser Busch, Inc.* (1994) 7 Cal. 4th 1238, 1254 ; *Pichon v. Pacific Gas and Elec. Co.* (1989) 212 Cal. App. 3d 488, 500-501, 260 Cal. Rptr. 677 .



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 2. Exclusive Remedy Doctrine in Employee Injury Cases

1-20 California Employment Law § 20.12

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.12 Exceptions to Exclusive Remedy Doctrine

[1] Statutory Exceptions

[a] Generally

Even when an injury is otherwise compensable under the workers' compensation law, the employee may in certain limited instances be entitled to bring a tort action against the employer either in lieu of or in addition to the workers' compensation remedy.ⁿ¹ The Legislature has enacted some express exceptions to the exclusive remedy doctrine, which are discussed in [b]-[e], *below*.ⁿ² In these circumstances, an employee or his or her dependents can bring an action at law against the employer, as if the workers' compensation remedy did not apply.ⁿ³

There is no exception to the workers' compensation exclusivity rule for a claim of emotional distress based on conduct that violates the Fair Employment and Housing Act as discriminatory, even if the discriminatory conduct may be characterized as intentional, unfair or outrageous.^{n3.1}

[b] Physical Assault by Employer

An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer when the employee's injury or death is caused by a willful physical assault by the employer.ⁿ⁴ To come within this exception to the exclusivity rule, the employee must show that the employer used force or violence. The employer's use of deceit does not constitute or substitute for the use of force or violence.^{n4.1} Under another similarly worded provision of the Labor Code, providing that liability may attach to an employee for "a willful and unprovoked physical act of aggression" on another employee,ⁿ⁵ a court of appeal has held that the harm to a plaintiff need not be physical in order for the exception to apply.ⁿ⁶ Under the common legal meaning of the term "assault," physical contact is not necessary to complete an act of assault.ⁿ⁷ A later case interpreting the current statutory language reached the same conclusion and found sufficient evidence to support a jury finding of "willful physical assault" when the employee's supervisor had waived a pistol at the employee and threatened to "blow his ... head off."ⁿ⁸ Nonetheless,

"willful" assaults include only those common-law batteries that are specifically intended to injure. Thus, the plaintiff must show that the defendant specifically intended to injure him or her.ⁿ⁹

However, this specific exception to workers' compensation exclusivity when an employer commits a willful physical assault on an employee^{n9.1} does not authorize a private action against an employer based on another *employee's* willful and unprovoked physical act of aggression.^{n9.2} In *Fretland v. County of Humboldt*,^{n9.3} the court of appeal rejected plaintiff's argument that employer liability in these circumstances is based on the doctrine of respondeat superior.^{n9.4} The court concluded that only "positive misconduct" by the employer can be the basis for an employer's liability for assault and battery, and the imposition of respondeat superior liability in these circumstances would directly violate *Labor Code Section 3601(b)*.^{n9.5} The court acknowledged, however, that if the employer had joined in the assault, or ratified it, the employer could be jointly liable with the coemployee.^{n9.6}

■ CONSULTANT'S COMMENT:

The holding in *Fretland* ^{n9.7} is important for reasons beyond its relevance to worker's compensation law. In equal employment opportunity lawsuits under the Fair Employment and Housing Act, it is unfortunate, but not uncommon, for employees to become involved in altercations that are alleged to be motivated by race or gender. Occasionally, the protected employee who is involved in the altercation seeks to hold the employer liable on the ground that it should have known that the altercation was possible and taken corrective measures to avoid the conflict. If there is no evidence that the employer should have known that an altercation was brewing, and if there is no evidence after the altercation that the employer ratified the conduct of the aggressor, *Fretland* bars employer liability for the injuries sustained in the altercation. *Commentary by Kirby Wilcox*

For a form of complaint for use in a tort action against an employer for injuries caused by a willful physical assault by the employer, *see* § 20.41[3].

[c] Aggravation of Injury Caused by Employer's Fraudulent Concealment

An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer when the employee's injury is aggravated by the employer's fraudulent concealment of the injury and its connection with the employment. In such a case, the employer's liability is limited to those damages proximately caused by the aggravation.ⁿ¹⁰ However, punitive damages are also available in such a case.ⁿ¹¹ The burden of proof of apportioning damages between those caused by the initial injury and those caused by the aggravation of the injury is on the employer.ⁿ¹² This statutory provision codifies the rule of *Johns-Manville Products Corp. v. Superior Court*.ⁿ¹³

"Fraudulent concealment" under *Labor Code Section 3602(b)(2)* may consist of a failure to disclose facts when there is a duty to do so, as well as an affirmative misrepresentation.ⁿ¹⁴ For example, a cause of action under *Labor Code Section 3602(b)(2)* occurs when an employer knows that an employee has contracted a disease from employment and conceals that knowledge from the employee, thereby aggravating the illness.ⁿ¹⁵ However, actual knowledge of the industrial injury on the part of the employer is required to establish a cause of action under *Labor Code Section 3602(b)(2)*.ⁿ¹⁶

An employee seeking to state a cause of action against an employer under section 3602(b)(2) must plead in general terms facts that, if found true by the trier of fact, establish the existence of three essential elements:^{n16.1}

1. The employer knew that the plaintiff had suffered a work-related injury.
2. The employer concealed that knowledge from the plaintiff.
3. The injury was aggravated as a result of such concealment.

In determining whether the allegations in a complaint are legally sufficient under § 3602(b)(2), the trial court must liberally construe the pleading with a view to achieving substantial justice between the parties.ⁿ¹⁶²

In one case, the employer established by uncontroverted evidence that the employee had known for years about possible health problems arising from exposure to asbestos and other chemicals used in the course of his work; and there was nothing in the record to suggest that the employer withheld any information relevant to the employee's condition from the employee. The court held that the employee was not entitled, as a matter of law, to bring a civil action against the employer pursuant to *Labor Code Section 3602(b)(2)*.ⁿ¹⁷

In another case, the court held that the federal Labor Management Relations Act did not preempt a former employee's claim under *Labor Code Section 3602(b)(2)* that the employer fraudulently concealed the fact that her illness was caused by exposure to toxic chemicals in the workplace. Section 301 of that actⁿ¹⁸ may preempt a state claim if the application of the law is substantially dependent on an analysis of a collective bargaining agreement or if the claim is founded directly on rights created by such an agreement. However, in this case, the court found that the Section 3602(b)(2) claim was not preempted because it involved neither a strictly factual inquiry into the employer's knowledge and actions, nor interpretation of the collective bargaining agreement, nor a claim founded on rights created by that agreement.ⁿ¹⁹ For additional discussion of federal labor law preemption of wrongful termination and related claims, see Chapter 60.

For a form of complaint by an employee against an employer for damages for fraudulent concealment, see § 20.41[2].

[d] Dual Capacity Doctrine

[i] Current Statutory Exception When Employer Is Manufacturer of Product Causing Injury

An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer when the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for an employee's use by a third person.ⁿ²⁰ As discussed in [ii], below, this rule, which is codified in *Labor Code Section 3602(b)(3)*, is considerably more narrow than the judicially created doctrine it replaced.ⁿ²¹

[ii] Comparison With Prior Judicial Doctrine

Under the former judicially created dual capacity doctrine, an employer was liable in tort for injuries that arose out of and in the course of employment if the employer was deemed to have committed the tortious act not in the capacity of an employer, but in the "dual capacity" of a third person, thus rendering the employer liable under *Labor Code Section 3852*. For example, in *Duprey v. Shane*,ⁿ²² an employee injured in the course of employment was negligently treated by her employer, a physician. The California Supreme Court held that the employer had a dual legal personality, and while he could not be liable in tort as the plaintiff's employer, he was liable in his other capacity as a physician.ⁿ²³ The dual capacity doctrine applied not only to cases in which the employer took on the dual capacity of physician, but also to cases in which the employer was liable in a dual capacity as manufacturer of a defective product.ⁿ²⁴

In 1982, the Legislature amended Labor Code Section 3602 to specifically limit the dual capacity doctrineⁿ²⁵ to state that the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury does not in itself permit the employee or his or her dependents to bring an action at law for damages against the employer.ⁿ²⁶

Because the language of *Labor Code Section 3602(a)* prohibits actions at law for damages when a dual capacity

relationship exists "prior to or at the time of the employee's industrial injury," the dual capacity doctrine may still be available if the employer does not occupy a dual capacity until *after* the employee suffers a compensable injury.ⁿ²⁷

[e] Power Press Injury

An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer when the employee's injury or death is proximately caused by the employer's knowing removal of, or failure to install, a point-of-operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death.ⁿ²⁸ Liability does not arise, however, unless the plaintiff proves that the manufacturer designed, installed, required, or otherwise provided by specification for attachment of a guard and this was communicated to the employer.ⁿ²⁹

The term "power press," as used in *Labor Code Section 4558*, means any material-forming machine that utilizes a die designed for use in the manufacture of other products.^{n29.1} Because *Labor Code Section 4558* does not define the term "die," the courts have interpreted the term.^{n29.2} A "die" is a device that imparts form to material by impact or pressure against the material and imparts some version of its own shape to the material.^{n29.3} As a matter of law, a circular saw blade, as used in a hand-held saw, is not a die.^{n29.4} A linear cutting blade also is not a "die" because it moves along the surface of the material, cutting out any shape desired.^{n29.5} A saw blade is not a "die" because it did not determine the shape of the product formed by the machine.ⁿ³⁰ On the other hand, a jury had to decide whether the blades, one movable and one fixed, of a hydraulic metal cutting or shearing device were a "die." At the operator's command, hydraulic movement lowers the upper movable blade, which cuts through sheets of metal or stock resting on the bottom fixed blade. Because the blades were square and nearly parallel and the machine employed hydraulic pressure, a fact finder could conclude that the blades cut primarily by impact or pressure against the material, leaving an impression of the blades in the stock, namely, a straight line. Alternatively, a reasonable fact finder could determine that the machine did not use a die because it cut along the stock, given that the blades were not precisely parallel.^{n30.1} A printing press is not a machine that *forms* materials to be used in the manufacture of other products.ⁿ³¹

The term "guard," as used in *Labor Code Section 4558*, includes the myriad types of apparatuses available to keep workers' hands outside the point of operation, and is not a term of art.ⁿ³² A point of operation guard is "removed" for purposes of *Labor Code Section 4558* when it is rendered dysfunctional or unavailable for use by the operator for the particular task assigned.ⁿ³³

One court has said that the Legislature used the word "known" in *Labor Code Section 4558* to mean actual awareness. Nothing in that section suggests that courts may impute knowledge to or impose constructive knowledge on the employer regarding the danger to employees.ⁿ³⁴ Thus, the court held that Section 4558 does not encompass situations in which the employer does not know of any danger at the time the employer replaces a guard initially installed by the manufacturer, and is subsequently negligent in failing to maintain the replacement guard, because the statute requires that the employer know of the potential danger in removing or replacing the guard at the time the employer actually removes or replaces it.ⁿ³⁵ Section 4558 does not apply to an employer's mere act of removing the manufacturer's guard and replacing it with a new guard, without regard to the employer's state of mind in doing so.ⁿ³⁶

The meaning of "specifically authorized" as defined in *Labor Code section 4558* is a question of statutory construction.^{n36.1} The statutory definition of "specifically authorized" unambiguously requires an "affirmative instruction" by the employer.^{n36.2} The ordinary meaning of the words "affirmative instruction" in the context of section 4558 is an express directive statement, rather than an implied statement or tacit acquiescence.^{n36.3}

An employer who designs, manufactures, and installs its own power presses is considered to be a "manufacturer" for purposes of *Labor Code Section 4558*. In an action against an employer-manufacturer of a power press for failure to install a point-of-operation guard, the injured employee was required to prove that the employer's design of the press

provided for a guard that was later removed or never installed. Alternatively, the employee was required to prove that a guard was necessary to protect against a known risk of serious injury, but was deliberately omitted by the employer from the design fabrication or assembly of the machine. An employer may be liable even if the design of the press did not provide for attachment of a guard, as long as a guard was required to protect against a known risk of serious injury and the press was capable of functioning with the required guard.ⁿ³⁷

An employee who brings a civil action pursuant to *Labor Code Section 4558* may not also allege other causes of action such as negligence and strict liability that require lesser standards of proof.ⁿ³⁸

[2] Wrongful Termination and Related Intentional Torts

[a] Generally

As discussed in [1][b] and [c], *above*, the Workers' Compensation Act provides express exceptions to the exclusive remedy doctrine for certain types of intentional torts, such as a willful physical assault by the employer or fraudulent concealment of a prior work-related injury or its relationship to the employment.ⁿ³⁹ Whether the exclusive remedy doctrine bars civil tort actions for emotional distress damages arising from wrongful termination or other intentional misconduct that does not fall within one of the express statutory exceptions has been the subject of considerable conflict in the case law.

Before 1987, a number of court of appeal decisions reached seemingly conflicting results regarding the issue of whether an action against an employer for intentional infliction of emotional distress was barred by the exclusive remedy provisions of the workers' compensation law.ⁿ⁴⁰ In *Cole v. Fair Oaks Fire Protection District*,ⁿ⁴¹ a case that involved allegations of intentional infliction of emotional distress causing disability to the employee, the California Supreme Court stated that previous appellate decisions permitting recovery in tort for intentional misconduct causing disability have involved employer conduct with a "questionable" relationship to the employment, an injury that did not occur while the employee was performing services incidental to the employment and that would not be viewed as a risk of the employment, or conduct in which the employer or insurer stepped out of their proper roles.ⁿ⁴² The Court in *Cole* held that if the misconduct attributed to the employer involves actions that are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations about grievances, workers' compensation is the exclusive remedy.ⁿ⁴³ Characterization of the employer's conduct as outrageous, unfair, or intended to cause mental disability is not sufficient to avoid the exclusive remedy provisions of the Labor Code.ⁿ⁴⁴ In such cases, the employee's remedy is to seek increased compensation for "serious and willful misconduct" under *Labor Code Section 4553*.ⁿ⁴⁵

Subsequently, in *Shoemaker v. Myers*,ⁿ⁴⁶ the Court reaffirmed its holding in *Cole* and held that termination of employment, and the events leading up to termination, are also a "normal part of the employment relationship" for purposes of the exclusive remedy doctrine.ⁿ⁴⁷ Thus, for example, the exclusive remedy doctrine applies with respect to an alleged wrongful termination of employment even if part of the employer's wrongful conduct occurred after the employee's final official day on the payroll and even if the employer's conduct was motivated by its desire to extract a waiver from the employee of his or her right to sue for wrongful termination.ⁿ⁴⁸ Except as discussed in [b] through [d], *below*, the exclusive remedy doctrine bars most civil actions seeking damages for mental and physical injuries and resulting disability arising out of allegedly wrongful termination or discipline.

Despite the difficulty in avoiding the exclusivity doctrine in order to state a cause of action for intentional infliction of emotional distress, a civil action may lie if the underlying employer conduct violates public policy. Relying on the California Supreme Court's opinion in *Gantt v. Sentry Insurance*,ⁿ⁴⁹ the Ninth Circuit Court of Appeals held in *Maynard v. City of San Jose*ⁿ⁵⁰ that claims under California law for intentional and negligent infliction of emotional distress are not preempted by the California workers' compensation statute when the claims implicate fundamental public policy considerations.ⁿ⁵¹ In that case, the court allowed the claims because they were based on personnel moves

allegedly made in retaliation for plaintiff's having reported perceived discrimination in a hiring decision and perceived irregularities in the purchase of communications equipment. While offering limited discussion of the issue, the court noted that California statutes explicitly prohibit retaliation against employees for opposing or participating in the investigation of discriminatory practices and for disclosing to the government violations of state or federal statutes or regulations.ⁿ⁵²

Also relying on *Gantt v. Sentry Insurance*,ⁿ⁵³ the court of appeal held in *Phillips v. Gemini Moving Specialists*ⁿ⁵⁴ that workers' compensation does not prevent an employee from recovering for infliction of emotional distress if he or she has a tort cause of action for wrongful termination in violation of public policy or in violation of an express statute. The court reasoned that in these contexts, emotional distress damages are simply a component of compensatory damages.ⁿ⁵⁵

Another court of appeal held that to the extent that a plaintiff's emotional distress claim is premised on the employer's intentional violation of a fundamental public policy, the misconduct lies outside the exclusive remedy provisions of the Labor Code, and the plaintiff may state a cause of action for intentional infliction of emotional distress.ⁿ⁵⁶ Relying upon the reasoning in *Gant v. Sentry Ins.*,ⁿ⁵⁷ the court concluded that an employer's decision to discharge an employee resulting from an animus that violates fundamental policy is misconduct that cannot be considered a normal part of the employment relationship.ⁿ⁵⁸

■ CONSULTANT'S COMMENT:

The holding in *Cabesuela*^{n58.1} does not stand for the proposition that claims for intentional infliction of emotional distress must survive demurrers or motions for summary judgment whenever a plaintiff also has plead a public policy claim. First, if the public policy claim already permits the recovery of emotional distress damages, the separate claim for intentional infliction of emotional distress is cumulative. This commentator has found the California judiciary increasingly willing to strike redundant causes of action. Therefore, if the public policy claim survives demurrer or summary judgment, the intentional infliction claim should be struck, because it adds nothing and potentially confuses the jury. Second, if the public policy claim does not permit the recovery of emotional distress damages, the separate claim for intentional infliction of emotional distress may be premised upon the same facts as the public policy claim. Therefore, if the public policy claim does not survive demurrer or summary judgment for lack of a sufficient factual predicate, the intentional infliction claim also should fail for the same reason. *Commentary by Kirby Wilcox.*

However, in *Miklosy v. Regents of University of California*,^{n58.2} the California Supreme Court held that the workers' compensation exclusivity doctrine barred intentional infliction of emotional distress claims of former employees of the University of California, who attempted to bring an action for wrongful termination in violation of public policy based on termination in retaliation for whistleblowing. In *Miklosy*, the Court held that the employees could not assert common-law tort claims for termination in violation of public policy, because *Government Code section 815* precluded those actions against public entities.^{n58.3} The Court noted that *Shoemaker v. Myers*^{n58.4} was of particular relevance, because it involved termination of a whistleblower employee. In *Shoemaker*, the Court had found that to the extent plaintiff purported to allege a distinct cause of action for infliction of emotional distress, not dependent on the violation of an express statute or violation of fundamental public policy, but rather directed at the intentional, malicious aspects of defendants' conduct, plaintiff's claim was precluded by the workers' compensation exclusivity doctrine, because the kinds of conduct at issue, *e.g.*, discipline or criticism, were a normal part of the employment relationship.^{n58.5} This holding was reaffirmed in *Livitsanos v. Superior Court*,^{n58.6} which also involved a terminated employee. The *Miklosy* Court found that none of the exceptions stated in *Livitsanos* were applicable. For example, the exception for conduct that "contravenes fundamental public policy," which was aimed at permitting a *Tameny* action to proceed despite the workers' compensation exclusive remedy rule, did not apply, because plaintiffs' *Tameny* action was barred by *Gov. Code § 815*. The Court also reaffirmed its conclusion in *Shoemaker*, rejecting application of the exception for conduct exceeding the risks inherent in the employment relationship.^{n58.7}

In *Operating Engineers Local 3 v. Johnson*, n58.8 the court held that an employee's civil action based on her employer's intentional disclosure of a reprimand to coworkers with no need to know was a violation of her constitutional right to privacy in violation of public policy, and was not precluded by the exclusivity provision of the Workers' Compensation Act.n59

[b] Effect of Compensability of Alleged Emotional Distress

In *Livitsanos v. Superior Court*, n60 the California Supreme Court specifically addressed the issue of whether or not an employee's claim against an employer for intentional or negligent infliction of emotional distress, unaccompanied by any physical disability, was within the workers' compensation exclusive remedy rule. As noted in [a], *above*, a number of decisions of the courts of appeal, most notably *Renteria v. County of Orange*, n61 had held that absent allegations of physical injury, a claim of emotional distress is outside the workers' compensation scheme; therefore it could be the subject of a civil tort action by the employee against the employer. The Supreme Court in *Livitsanos* rejected this distinction, holding that even when no physical injury or disability is alleged, a claim for intentional or negligent infliction of emotional distress is within the exclusive remedy provisions of the Workers' Compensation Act, so long as the basic conditions of compensation are otherwise satisfied and the employer's conduct neither contravenes a fundamental public policy nor exceeds the risks inherent in the employment relationship.n62

The *Livitsanos* Court observed that in order for an emotional injury to be compensable under the Workers' Compensation Act, the injury must result in an industrial disability or a need for medical treatment.n63 Thus, the Court acknowledged, it is theoretically possible for an employee to incur a work-related emotional injury that results in no compensable industrial disability. The Court concluded that, nevertheless, the exclusive remedy provisions of the Workers' Compensation Act are not abrogated by the fact that in a limited number of cases an employee might be left without a remedy either in tort or in workers' compensation.n64

[c] Exception for Conduct Outside the "Compensation Bargain"

In *Shoemaker v. Myers*, n65 the California Supreme Court observed that the legal theory supporting the exclusive remedy doctrine is a presumed "compensation bargain," pursuant to which the employer assumes liability for work-related injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payments to cure or relieve the effects of work-related injury without having to prove fault, but, in exchange gives up the wider range of damages potentially available in tort. The function of the exclusive remedy rule is to give efficacy to this theoretical "compensation bargain."n66 Accordingly, the Court stated, the exclusive remedy doctrine does not apply when "the injury is the result of [employer] conduct, whether in the form of discharge or otherwise, not seen as reasonably coming within the compensation bargain."n67 In such cases, a separate civil action may be brought against the employer.n68

The Court in *Shoemaker* did not further elaborate on the type of conduct that may be found to be outside the "compensation bargain." The Court expressly left open the question of whether a common-law tort action alleging wrongful termination in violation of public policy lies outside the compensation bargain so as to avoid the exclusive remedy doctrine.n69 However, the Court did hold, as further discussed in [d], *below*, that the Legislature's enactment of express statutory protection for governmental whistleblowers, including a civil remedy for damages,n70 constituted a statutory exception to the exclusive remedy doctrine, and the Court added that "such conduct [i.e., violation of the statute] lies well outside the compensation bargain."n71

Subsequently, in *Gantt v. Sentry Insurance*, n72 the California Supreme Court specifically held that a cause of action for tortious discharge in violation of public policy is not preempted by workers' compensation law.n73 In *Gantt*, the Supreme Court determined that an employee who was terminated in retaliation for supporting a coworker's claim of sexual harassment was entitled to state a cause of action for tortious discharge against public policy, and that the

exclusive remedy provisions of the Workers' Compensation Act do not bar such an action. In this case, the public policy involved was the statutory prohibition set forth in *Government Code Section 12975* against any obstruction of a Department of Fair Employment and Housing investigation of sexual harassment or other employment discrimination. The Court noted that when an employer's decision to discharge an employee results from an animus that violates the fundamental policy of the state proscribing any interference in the official investigation of sexual harassment, this misconduct cannot, under any reasonable viewpoint, be considered either a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain.ⁿ⁷⁴

In *Fermino v. Fedco, Inc.*,ⁿ⁷⁵ the Court held that false imprisonment committed by an employer against an employee is always "outside the compensation bargain" and that an action for false imprisonment is therefore not barred by the exclusive remedy principle.ⁿ⁷⁶ The Court noted that an employer has a privilege to reasonably detain an employee suspected of theft, in which case there is no false imprisonment.ⁿ⁷⁷ However, once it is determined that a false imprisonment has taken place, such an action cannot be said to be a "normal part of the employment relationship."ⁿ⁷⁸ In determining that false imprisonment falls outside the compensation bargain, the Court observed that, unlike the tort of intentional infliction of emotional distress involved in *Cole*, the tort of false imprisonment involves criminal conduct against the employee's person, not permissible conduct that only becomes intentionally tortious in light of the employer's supposed malicious state of mind.ⁿ⁷⁹ The Court suggested, in dictum, that those classes of intentional employer crimes against employee's persons by means of violence and coercion, such as those set forth in Title 8 of the Penal Code,ⁿ⁸⁰ violate the employee's reasonable expectations and transgress the limits of the compensation bargain, but that "regulatory crimes," such as violations of health and safety laws, would not fall outside the normal course of employment.ⁿ⁸¹

In *Miklosy v. Regents of University of California*,^{n81.1} the Court held that the workers' compensation exclusivity doctrine barred intentional infliction of emotional distress claims of former employees of the University of California, who attempted to bring an action for wrongful termination in violation of public policy based on termination in retaliation for whistleblowing. The Court reaffirmed its conclusion in *Shoemaker v. Myers* and rejected application of the exception for conduct exceeding the risks inherent in the employment relationship.^{n81.2}

Accordingly, one court of appeal held that an employee's death caused by unsafe working conditions was compensable solely under workers' compensation, even if the employer recklessly or deliberately failed to correct known safety violations.ⁿ⁸² The court relied on the dictum in *Fermino*, specifically excluding from the scope of its exception for conduct outside the compensation bargain regulatory crimes based on violations of health and safety standards.ⁿ⁸³ The court stated that plaintiff's use of the label "manslaughter" did not avoid the application of the workers' compensation exclusivity provisions because defendant's actions involved the creation of unsafe working conditions; this has consistently been held to be limited to workers' compensation remedies.ⁿ⁸⁴

Another court found that an employee's injuries resulting from the employer's conduct were compensable solely under the workers' compensation bargain, even though the employer had deceived and defrauded him by not revealing that a chemical solution was unsafe to use, by assuring him that it was safe to use, failing to provide adequate gloves, clothing, and other protective gear, failing to provide training in using and handling the solution, removing warning labels from containers, and violating government safety regulations regarding use of the solution and warnings to employees about its toxic chemical properties.^{n84.1} Another court of appeal, in applying the Supreme Court's analysis from *Fermino*, has noted that there is no "beyond the compensation bargain" exception for employer behavior that is merely negligent or reckless.ⁿ⁸⁵

In *Lenk v. Total-Western, Inc.*,^{n85.1} the court held that a former employee's emotional distress damages awarded in connection with his allegations of fraud relating to the termination of his employment were not barred by the workers' compensation exclusivity rule. The court reasoned that the former employer's misrepresentations made to induce the former employee to become an employee, were not a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain. Citing *Shoemaker* ^{n85.2} the court held that the former employer stepped

out of its proper role as an employer. Specifically, the court concluded that the conduct alleged, *i.e.*, misrepresentations related to the financial stability of a company, the company's future plans to relocate its operations, and the job applicant's promotion in the corporate ranks, were all designed to induce employment. They were neither a normal part of the employment relationship nor matters expected to occur with substantial frequency in the working environment.^{85,3}

[d] Statutory Protections Against Wrongful Termination and Discipline

As discussed in Chapter 60, numerous statutes provide express statutory restrictions on the employer's right to terminate and discipline employees, and many of these statutes provide statutory remedies for their violation. The Supreme Court's holding in *Cole* specifically did not address whether the exclusive remedy provision of the workers' compensation law bars causes of action created by statute.⁸⁶ However, it appears that in many cases, conduct that violates an express statutory provision may be deemed to be outside the "compensation bargain,"⁸⁷ so as to avoid the bar of the exclusive remedy doctrine.

In *Shoemaker v. Myers*,⁸⁸ the California Supreme Court held that former *Government Code Section 19683*,⁸⁹ which protected state employees from retaliation for reporting violations of state law to appropriate authorities and provided a civil damages remedy for employees injured by a violation of the statute, constituted a specific statutory exception to the exclusive remedy provisions of the workers' compensation law.⁹⁰ The Court noted that the Legislature, in enacting the whistleblower statute, clearly intended to afford an additional remedy to those already granted under other provisions of law. Furthermore, the Court observed that the evils addressed by the whistleblower statute are different from those addressed by workers' compensation law and that the Legislature could not have intended that objectives of the whistleblower statute to be defeated by the exclusive remedy bar of the Workers' Compensation Act.⁹¹

Several court of appeal decisions have found that the exclusive remedy provisions do not bar a civil action for damages for most forms of prohibited employment discrimination under the Fair Employment and Housing Act (FEHA).⁹² The courts have reasoned that prohibited discrimination is not considered a normal incident of employment under *Cole*, because such discrimination is contrary to California law and public policy.⁹³

In *City of Moorpark v. Superior Court* ⁹⁴ the California Supreme Court held that the exclusive remedy doctrine does not bar California employees from bringing a FEHA action if the alleged discrimination is a result of a work-related disability.⁹⁵

Similar federal remedies may not be restricted by the exclusivity provision of the California workers' compensation statute. For example, the United States District Court, Northern District of California, has held that the exclusive remedy provision of the California Workers' Compensation Act is preempted by the federal Americans With Disabilities Act (ADA).⁹⁶

[e] Retaliation for Filing Workers' Compensation Claim

Labor Code Section 132a provides for increased benefits, reinstatement, and backpay for an employee who is fired or otherwise discriminated against for filing a workers' compensation claim or for engaging in other specified, protected conduct under the workers' compensation law. *Labor Code Section 132a* does not provide an exclusive remedy for employees alleging that they were subject to discrimination based on a work related disability.⁹⁷ For further discussion of Section 132a, see § 20.32.

[f] Insurer's Duty to Defend

The scope of a workers' compensation insurer's duty to defend an employer against an employee's civil action is largely a matter of contract interpretation. In one case, the California Supreme Court held that when the "Workers'

Compensation Insurance" portion of a policy is not ambiguous and does not provide coverage for an employee's civil damages action alleging race discrimination and wrongful termination in violation of public policy, the insurer has no duty to defend the employer against such an action.ⁿ⁹⁸ The Court held that, under Division 4 of the Workers' Compensation and Insurance section of the Labor Code, the term "compensation" is defined by Labor Code Section 3207 as including every benefit or payment conferred by Division 4, including vocational rehabilitation, while the term "damages" is defined by *Labor Code Section 3209* as "the recovery allowed in an action at law as contrasted with compensation." The Court thus concluded that, given the statutory definition of "compensation," which expressly *includes* the payment of benefits, and the corresponding definition of "damages," which expressly *excludes* compensation, the language in the "Workers' Compensation Liability" portion of the policy at issue was susceptible of no other objective construction than providing coverage solely for workers' compensation benefits, or claims, proceedings, or suits for such benefits, and not for civil suits for damages.ⁿ⁹⁹ In addition, the Court held that the civil action involved no potential for damages within the coverage of the policy because the superior court has no jurisdiction to award workers' compensation benefits; an award of such benefits is exclusively within the jurisdiction of the Workers' Compensation Appeals Board.ⁿ¹⁰⁰

Even if the language in a particular workers' compensation policy may be interpreted as requiring the insurer to defend civil actions, *Insurance Code Section 533*, which prohibits liability coverage for an insured's "wilful acts," may relieve the insurer of any obligation to defend such actions. In one case, for example, the court held that an insurer had no duty to defend an employer in a case in which the employer intentionally interfered with an employee's protected labor union rights and had discriminated against the employee on the basis of her age, gender, and ethnicity.ⁿ¹⁰¹

For additional discussion of a liability or workers' compensation insurer's potential duty to defend an insured employer against employment discrimination and related wrongful termination actions, *see* Chapter 43, Part C.

[3] Spoliation of Evidence

An employee is permitted, as a matter of law, to pursue a tort action against his or her employer for negligent spoliation of evidence needed for the employee's third-party action.ⁿ¹⁰² In *Coca-Cola Bottling Co. v. Superior Court*,ⁿ¹⁰³ an employee and his wife brought an action against the employer for negligent spoliation of evidence, alleging that the employer lost parts of a truck after having agreed to preserve the parts for the employee's use in his third-party action against the manufacturer of the truck. The court of appeal held that the employee's tort action was not barred by the exclusive remedy doctrine, reasoning that spoliation of evidence does not constitute an injury to the person, but rather to property interests. Thus, the conditions necessary to invoke the exclusivity provisions of workers' compensation were absent.ⁿ¹⁰⁴

The court of appeal in *Gomez v. Acquistapace* ⁿ¹⁰⁵ relied, in part, on the reasoning set forth in *Coca-Cola Bottling Co. v. Superior Court* to similarly conclude that the exclusive remedy rule does not bar an employee's tort claim against an employer for spoliation of evidence. In *Gomez*, an employee choked to death when his clothing became tangled in an allegedly defective machine. Several days after the accident, the employer destroyed the machine. The employee's widow sued her husband's employer for negligent and intentional spoliation of evidence, claiming that destruction of the machine prevented her from recovering damages in a third-party action against the machine's manufacturer. The trial court held that the widow's negligent spoliation action was barred by the exclusive remedy rule and that her intentional spoliation claim was barred because she had failed to show that the employer acted with the intent to prejudice her chances of prevailing in the third-party action. Reversing the trial court's ruling, the court of appeal explained that the exclusive remedy rule did not apply to the negligent spoliation claim because the claim involved damage to property interests, not to the person. Such damage is not an "injury" within the meaning of *Labor Code Sections 3208* and *3600*.ⁿ¹⁰⁶ The court of appeal also discussed the Supreme Court's opinion in *Fermino v. Fedco, Inc.*,ⁿ¹⁰⁷ noting that the employer's conduct in this case was not a normal incident of employment because the average employee would not expect an employer to destroy evidence relating to an industrial injury. Moreover, the court pointed out, there is a fundamental public policy in California against the spoliation of evidence. Allowing an employee's civil action for

spoliation supports this public policy while preserving the equally important public policy favoring the exclusivity rule.¹⁰⁸ With regard to intentional spoliation, the court of appeal opined that the trial court improperly read the definition of the "intent" element too narrowly, making it tantamount to a "specific intent" crime in criminal law. The court concluded that the "intent" element is satisfied when the employer destroys an object that may constitute evidence in a lawsuit, either with the purpose of harming the lawsuit or when harm to the lawsuit is substantially certain to follow.¹⁰⁹

Legal Topics:

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

Workers' Compensation & SSDI Coverage General Overview Workers' Compensation & SSDI Remedies Under Other Laws Exclusivity General Overview Workers' Compensation & SSDI Remedies Under Other Laws Exclusivity Exceptions

FOOTNOTES:

(n1)Footnote 1. For discussion of whether the employee must "elect" one remedy or the other, *see* § 20.41[1].

(n2)Footnote 2. *See Lab. Code* §§ 3602(b), 4558(b).

(n3)Footnote 3. *See Lab. Code* §§ 3602(b), 4558(b).

(n4)Footnote 3.1. *Jones v. Dept. of Corrections* (2007) 152 Cal. App. 4th 1367, 1382, 62 Cal. Rptr. 3d 200. For discussion of the FEHA and discrimination generally, *see* Chs. 40, 41.

(n5)Footnote 4. *See Lab. Code* § 3602(b)(1). For the standard jury instruction on the essential factual elements of a claim of willful assault by the employer, *see* Judicial Council of California Civil Jury Instructions, CACI 2801 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form on the employer's willful physical assault, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2800. (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n6)Footnote 4.1. *Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal. App. 4th 710, 727-728, 112 Cal. Rptr. 2d 195.

(n7)Footnote 5. *See Lab. Code* § 3601(a)(1). For discussion of a coemployees' liability, *see* § 20.43 *infra*.

(n8)Footnote 6. *See Iverson v. Atlas Pacific Eng'g* (1983) 143 Cal. App. 3d 219, 225, 191 Cal. Rptr. 696.

(n9)Footnote 7. *See Lowry v. Standard Oil Co.* (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57 (pointing gun at person may constitute assault). For discussion of assault generally, *see* Levy, Golden, and Sacks, California Torts, ch. 41 (Matthew Bender).

(n10)Footnote 8. *See Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal. App. 4th 1608, 1617, 24 Cal. Rptr. 2d 203.

(n11)Footnote 9. *See Soares v. City of Oakland* (1992) 9 Cal. App. 4th 1822, 1825-1831, 12 Cal. Rptr. 2d 405 (construing *Lab. Code* § 3601(a)).

(n12)Footnote 9.1. *Lab. Code* § 3602(b)(1).

(n13)Footnote 9.2. *Fretland v. County of Humboldt*, (1999) 69 Cal. App. 4th 1478, 1486-1487, 82 Cal. Rptr. 2d 359; *see Lab. Code* § 3601(a)(1) (authorizing suit for assault against coemployee, but not against employer); *Lab. Code* § 3601(b) (prohibiting imposition of civil liability on employer for one employee's assault and battery against coemployee); *cf. Lab. Code* § 3602(b)(1) (addressing assault on employee by employer, not by coemployee).

(n14)Footnote 9.3. *Fretland v. County of Humboldt*, (1999) 69 Cal. App. 4th 1478, 1487, 82 Cal. Rptr. 2d 359 .

(n15)Footnote 9.4. *Fretland v. County of Humboldt*, (1999) 69 Cal. App. 4th 1478, 1487, 82 Cal. Rptr. 2d 359 .

(n16)Footnote 9.5. *Fretland v. County of Humboldt* (1999) 69 Cal. App. 4th 1478, 1487, 82 Cal. Rptr. 2d 359 ; accord, *Iverson v. Atlas Pacific Eng'r* (1983) 143 Cal. App. 3d 219, 226, 191 Cal. Rptr. 696 .

(n17)Footnote 9.6. *Fretland v. County of Humboldt*, (1999) 69 Cal. App. 4th 1478, 1487-1488 ; see, e.g., *Iverson v. Atlas Pacific Eng'r* (1983) 143 Cal. App. 3d 219, 228, 191 Cal. Rptr. 696 .

(n18)Footnote 9.7. *Fretland v. County of Humboldt*, (1999) 69 Cal. App. 4th 1478 .

(n19)Footnote 10. See *Lab. Code* § 3602(b)(2); see also *Transport Indem. Co. v. Aerojet Gen. Corp.* (1988) 202 Cal. App. 3d 1184, 1186-1191, 249 Cal. Rptr. 463 (employer's aggravation of injuries by fraudulent concealment is not necessarily a willful act within meaning of *Ins. Code* § 533, and does not necessarily release insurer from duty to defend or indemnify employer in civil action by employee for aggravation of injury caused by employer's fraudulent concealment of nature and extent of work-induced injuries). For the standard jury instruction on the essential factual elements of a claim of the employer's fraudulent concealment of injury, see Judicial Council of California Civil Jury Instructions, *CACI* 2802 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, see § 61.05. For the CACI special verdict form on fraudulent concealment of injury, see Judicial Council of California Civil Jury Instructions, *CACI VF-2801* (Matthew Bender). For discussion of the CACI special verdict forms generally, see § 61.06.

(n20)Footnote 11. See *McDonald v. Superior Court* (1986) 180 Cal. App. 3d 297, 301, 225 Cal. Rptr. 394 ; see *Civ. Code* § 3294.

(n21)Footnote 12. See *Lab. Code* § 3602(b)(2).

(n22)Footnote 13. *Johns-Manville Prods. Corp. v. Superior Court* (1980) 27 Cal. 3d 465, 478-479, 165 Cal. Rptr. 858, 612 P.2d 948 .

(n23)Footnote 14. See *Foster v. Xerox Corp.* (1985) 40 Cal. 3d 306, 309-311, 219 Cal. Rptr. 485, 707 P.2d 858 .

(n24)Footnote 15. See *Foster v. Xerox Corp.* (1985) 40 Cal. 3d 306, 309-311, 219 Cal. Rptr. 485, 707 P.2d 858 .

(n25)Footnote 16. See *Hughes Aircraft Co. v. Superior Court* (1996) 44 Cal. App. 4th 1790, 1797, 52 Cal. Rptr. 2d 514 ; *Foster v. Xerox Corp.* (1985) 40 Cal. 3d 306, 312, 219 Cal. Rptr. 485, 707 P.2d 858 ; *Santiago v. Firestone Tire & Rubber Co.* (1990) 224 Cal. App. 3d 1318, 1334, 274 Cal. Rptr. 576 . See *Jensen v. Amgen, Inc.* (2003) 105 Cal. App. 4th 1322, 1325-1328, 129 Cal. Rptr. 2d 899 (summary judgment properly granted to employer when employer did not conceal existence of injury because employee knew of her symptoms before anyone at employer).

(n26)Footnote 16.1. *Foster v. Xerox Corp.* (1985) 40 Cal. 3d 306, 312, 219 Cal. Rptr. 485, 707 P.2d 858 ; see *Palestini v. General Dynamics Corp.* (2002) 99 Cal. App. 4th 80, 89-98, 120 Cal. Rptr. 2d 741 (complaint stated facts sufficient to constitute cause of action for fraudulent concealment resulting in aggravation of alleged work-related injuries within meaning of § 3602(b)(2) by alleging defendants knew physical problems were caused by carcinogenic chemicals and that injuries as reported to defendants and well known to them were aggravated by continued exposure to carcinogenic chemicals).

(n27)Footnote 16.2. *Foster v. Xerox Corp.* (1985) 40 Cal. 3d 306, 312, 219 Cal. Rptr. 485, 707 P.2d 858 ; *Palestini v. General Dynamics Corp.* (2002) 99 Cal. App. 4th 80, 89-90 .

(n28)Footnote 17. *Davis v. Lockheed Corp.* (1993) 13 Cal. App. 4th 519, 522-523, 17 Cal. Rptr. 2d 233 .

(n29)Footnote 18. *See* 29 U.S.C. § 185(a).

(n30)Footnote 19. *Lopez v. Continental Can Co., Inc.* (9th Cir. 1992) 961 F.2d 147, 148-149 .

(n31)Footnote 20. *Lab. Code* § 3602(b)(3). For the standard jury instruction on the essential factual elements of a claim under *Lab. Code* § 3602(b)(3) that the employee was harmed by a defective product manufactured by the employer, *see* Judicial Council of California Civil Jury Instructions, *CACI* 2803 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form on the employer's defective product, *see* Judicial Council of California Civil Jury Instructions, *CACI* VF-2802 (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n32)Footnote 21. *Compare Lab. Code Section 3602(b)(3) with Douglas v. E. and J. Gallo Winery* (1977) 69 Cal. App. 3d 103, 107, 137 Cal. Rptr. 797 ; *see Behrens v. Fayette Mfg. Co.* (1992) 4 Cal. App. 4th 1567, 1572-1575, 7 Cal. Rptr. 2d 264 (statutory exception did not apply when employee came into contact with allegedly defective product as primary objective of her job and not as consumer, and she was not provided with product for her use but rather because her job required her to perform tasks on product).

(n33)Footnote 22. *Duprey v. Shane* (1952) 39 Cal. 2d 781, 249 P.2d 8 .

(n34)Footnote 23. *Duprey v. Shane* (1952) 39 Cal. 2d 781, 793-794, 249 P.2d 8 .

(n35)Footnote 24. *See D'Angona v. County of Los Angeles* (1980) 27 Cal. 3d 661, 665-666, 166 Cal. Rptr. 177, 613 P.2d 238 ; *Douglas v. E. and J. Gallo Winery* (1977) 69 Cal. App. 3d 103, 107, 137 Cal. Rptr. 797 .

(n36)Footnote 25. *See Jones v. Kaiser Indus. Corp.* (1987) 43 Cal. 3d 552, 560-561, 237 Cal. Rptr. 568, 737 P.2d 771 ; *see also Perry v. Heavenly Valley* (1985) 163 Cal. App. 3d 495, 500-505, 209 Cal. Rptr. 771 (*Lab. Code* § 3602 amendment limiting dual capacity doctrine is not retroactive).

(n37)Footnote 26. *Lab. Code* § 3602(a).

(n38)Footnote 27. *See, e.g., Weinstein v. St. Mary's Med. Ctr.* (1997) 58 Cal. App. 4th 1223, 1233-1236, 68 Cal. Rptr. 2d 461 (employee may sue hospital employer for premises liability after slip-and-fall reinjury aggravated previous on-the-job injury because dual capacity arose after initial injury, and employee was not acting within course and scope of employment at time of reinjury); *Coca-Cola Bottling Co. v. Superior Court* (1991) 233 Cal. App. 3d 1273, 1292-1293, 286 Cal. Rptr. 855 (injured employee permitted to maintain action against employer for negligent spoliation of evidence that employer had agreed to preserve for employee's use in his third-party action because employer's alleged dual capacity arose after employee injury, i.e., when evidence was lost); *Sturtevant v. County of Monterey* (1991) 228 Cal. App. 3d 758, 766-768 (medical center employee permitted to maintain action against center, for medical malpractice based on medical care provided after employee's admission to center subsequent to injury). *cf. Lake v. Lakewood Chiropractic Ctr.* (1993) 20 Cal. App. 4th 47, 52-53, 24 Cal. Rptr. 2d 358 (distinguishing *Sturtevant* and holding that when employee's injury was caused by free chiropractic adjustment provided by employer as a benefit of employment, employer's dual capacity arose prior to and at the time of her injury; therefore employee's tort action for medical malpractice was barred by exclusive remedy doctrine).

(n39)Footnote 28. *See Lab. Code* § 4558(b); *see Lab. Code* § 4558(a) (providing definitions applicable to this rule); *see also Watters Assoc. v. Superior Court* (1990) 218 Cal. App. 3d 1322, 1325, 267 Cal. Rptr. 696 (temporary machine operator trainee injured by an unguarded power press may not maintain cause of action against employment agency that placed him in job, having failed to allege employment agency removed or authorized removal of guard; *Lab. Code* § 4558 is applicable only to employers who directly authorize removal of a guard and a general agency allegation is insufficient to support a cause of action).

For the standard jury instruction on the essential factual elements of a claim of the employer's removal or noninstallation of power press guards, *see* Judicial Council of California Civil Jury Instructions, *CACI 2804* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form on the employer's removal or noninstallation of power press guards, *see* Judicial Council of California Civil Jury Instructions, *CACI VF-2803* (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n40)Footnote 29. *See Lab. Code § 4558(c); see Aguilera v. Henry Soss & Co. (1996) 42 Cal. App. 4th 1724, 1731, 50 Cal. Rptr. 2d 477* (power press exception inapplicable when employee failed to provide evidence that employer was aware machine was missing safety device); *Bryer v. Santa Cruz Pasta Factory (1995) 38 Cal. App. 4th 1711, 1714-1715, 45 Cal. Rptr. 2d 750* (power press exception inapplicable absent evidence manufacturer informed employer of need for point of operation guard); *Jones v. Keppeler (1991) 228 Cal. App. 3d 705, 710-713, 279 Cal. Rptr. 168* (employer held not liable under *Lab. Code § 4558* when information about guard was provided by previous owner of machine and by manufacturer of control system added as modification to machine, but not provided by original manufacturer); *Swanson v. Matthews Prods., Inc. (1985) 175 Cal. App. 3d 901, 906-907, 221 Cal. Rptr. 84*; *see also Uriarte v. United States Pipe and Foundry Co. (1996) 51 Cal. App. 4th 780, 791, 59 Cal. Rptr. 2d 332* (summary judgment set aside when employee subsequently discovered evidence indicating guard was available for machine that injured him).

(n41)Footnote 29.1. *Lab. Code § 4558(a)(4); see McCoy v. Zahniser Graphics, Inc. (1995) 39 Cal. App. 4th 107, 111, 45 Cal. Rptr. 2d 871* (printing press not machine that *forms* materials to be used in manufacture of other products).

(n42)Footnote 29.2. *Islas v. D & G Manufacturing Co., Inc. (2004) 120 Cal. App. 4th 571, 575, 15 Cal. Rptr. 3d 559*.

(n43)Footnote 29.3. *See Rosales v. Depuy Ace Medical Co. (2000) 22 Cal. 4th 279, 284-286, 92 Cal. Rptr. 2d 465, 991 P.2d 1256*.

(n44)Footnote 29.4. *Ceja v. J. R. Wood, Inc. (1987) 196 Cal. App. 3d 1372, 1376-1377, 242 Cal. Rptr. 531*.

(n45)Footnote 29.5. *See Rosales v. Depuy Ace Medical Co. (2000) 22 Cal. 4th 279, 285, 92 Cal. Rptr. 2d 465, 991 P.2d 1256*; *see also Graham v. Hopkins (1993) 13 Cal. App. 4th 1483, 1487-1490, 17 Cal. Rptr. 2d 82* (saw blade not "die" because it did not determine shape of product formed by machine; employee not denied equal protection because Legislature distinguished between type of machine he was operating and power presses as dangerous machines).

(n46)Footnote 30. *See Graham v. Hopkins (1993) 13 Cal. App. 4th 1483, 1487-1490, 17 Cal. Rptr. 2d 82* (also rejecting employee's contention that he was denied equal protection because there was no reason for Legislature to have distinguished between type of machine he was operating and power presses as dangerous machines).

(n47)Footnote 30.1. *Islas v. D & G Manufacturing Co., Inc. (2004) 120 Cal. App. 4th 571, 579-580, 15 Cal. Rptr. 3d 559*.

(n48)Footnote 31. *See McCoy v. Zahniser Graphics, Inc. (1995) 39 Cal. App. 4th 107, 111, 45 Cal. Rptr. 2d 871*.

(n49)Footnote 32. *See Bingham v. CTS Corp. (1991) 231 Cal. App. 3d 56, 65, 282 Cal. Rptr. 161*.

(n50)Footnote 33. *See Bingham v. CTS Corp. (1991) 231 Cal. App. 3d 56, 68, 282 Cal. Rptr. 161*.

(n51)Footnote 34. *See Saldana v. Globe-Weis Sys. Co. (1991) 233 Cal. App. 3d 1505, 1516-1517, 285 Cal. Rptr. 385*.

(n52)Footnote 35. See *Saldana v. Globe-Weis Sys. Co.* (1991) 233 Cal. App. 3d 1505, 1519, 285 Cal. Rptr. 385 .

(n53)Footnote 36. See *Saldana v. Globe-Weis Sys. Co.* (1991) 233 Cal. App. 3d 1505, 1519-1520, 285 Cal. Rptr. 385 .

(n54)Footnote 36.1. *Mora v. Hollywood Bed & Spring* (2008) 164 Cal. App. 4th 1061, 1068, 79 Cal. Rptr. 3d 640 .

(n55)Footnote 36.2. *Lab. Code § 4558(a)(6)*.

(n56)Footnote 36.3. *Mora v. Hollywood Bed & Spring* (2008) 164 Cal. App. 4th 1061, 1068-1071, 79 Cal. Rptr. 3d 640 (injured worker cited no evidence that employer expressly directed failure to install or removal of point of operation guard, so summary judgment was proper). Cf. *Flowmaster, Inc. v. Superior Court* (1993) 16 Cal. App. 4th 1019, 1032, 20 Cal. Rptr. 2d 666 (when employer is also power press manufacturer, "specifically authorized" is not limited to "affirmative instruction," but can include other willful acts on part of employer despite actual knowledge of probability of serious harm).

(n57)Footnote 37. *Flowmaster, Inc. v. Superior Court* (1993) 16 Cal. App. 4th 1019, 1031, 20 Cal. Rptr. 2d 666 .

(n58)Footnote 38. See *Award Metals, Inc. v. Superior Court* (1991) 228 Cal. App. 3d 1128, 1131, 279 Cal. Rptr. 459 .

(n59)Footnote 39. See *Lab. Code § 3602(b)(1), (2)*.

(n60)Footnote 40. Compare *Renteria v. County of Orange* (1978) 82 Cal. App. 3d 833, 838-842, 147 Cal. Rptr. 447 (allowing civil action when worker had no workers' compensation remedy because emotional distress was unaccompanied by physical injury) with *Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal. App. 3d 531, 533-536, 151 Cal. Rptr. 828 (prohibiting civil action when workers' compensation benefits were available because emotional distress was accompanied by physical injury) and *Gates v. Trans Video Corp.* (1979) 93 Cal. App. 3d 196, 204-206, 155 Cal. Rptr. 486 (same).

(n61)Footnote 41. *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 .

(n62)Footnote 42. *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 ; see, e.g., *Johns-Manville Prods. Corp. v. Superior Court* (1980) 27 Cal. 3d 465, 477, 477-478, 165 Cal. Rptr. 858, 612 P.2d 948 ; *Unruh v. Truck Ins. Exch.* (1972) 7 Cal. 3d 616, 630, 102 Cal. Rptr. 815, 498 P.2d 1063 ; *Magliulo v. Superior Court* (1975) 47 Cal. App. 3d 760, 779, 121 Cal. Rptr. 621 ; *Ramey v. Gen. Petroleum Corp.* (1959) 173 Cal. App. 2d 386, 402, 343 P.2d 787 .

(n63)Footnote 43. *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 .

(n64)Footnote 44. *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 ; see *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 25, 276 Cal. Rptr. 303, 801 P.2d 1054 .

(n65)Footnote 45. *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 ; *Johns-Manville Prods. Corp. v. Superior Court* (1980) 27 Cal. 3d 465, 472, 474, 165 Cal. Rptr. 858, 612 P.2d 948 .

(n66)Footnote 46. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 276 Cal. Rptr. 303, 801 P.2d 1054 .

(n67)Footnote 47. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 17-20, 276 Cal. Rptr. 303, 801 P.2d 1054 ; see also

Miklosy v. Regents of University of California (2008) 44 Cal. 4th 876, 902-903, 80 Cal. Rptr. 3d 690, 188 P.3d 629 (reaffirming *Shoemaker* in holding that alleged infliction of severe emotional distress occurred as part of termination of employment, at worksite, in normal course of employer-employee relationship, so that workers' compensation was plaintiffs' exclusive remedy for any injury that may have resulted); *Jenkins v. Family Health Program* (1989) 214 Cal. App. 3d 440, 448-450, 262 Cal. Rptr. 798; *Pichon v. Pacific Gas and Electric Co.* (1989) 212 Cal. App. 3d 488, 496, 260 Cal. Rptr. 677 (same).

(n68)Footnote 48. *Horn v. Bradco Int'l, Ltd.* (1991) 232 Cal. App. 3d 653, 662-664, 283 Cal. Rptr. 721; see *Kacludis v. GTE Sprint Communications Corp.* (N.D. Cal. 1992) 806 F. Supp. 866, 871 (generalized statements by supervisor concerning intent to assist employee in finding replacement employment were not sufficient to take case out of ambit of workers' compensation; holding otherwise would exempt all cases of physical or emotional injury resulting from termination from the workers' compensation system simply by claiming that employer led employee to believe he would not be fired).

(n69)Footnote 49. See *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 1090-1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680, overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80, fn.6, 78 Cal. Rptr. 2d 16, 24, 960 P.2d 1046; see discussion in [c], below.

(n70)Footnote 50. *Maynard v. City of San Jose* (9th Cir. 1994) 37 F.3d 1396.

(n71)Footnote 51. *Maynard v. City of San Jose* (9th Cir. 1994) 37 F.3d 1396, 1405-1406.

(n72)Footnote 52. *Maynard v. City of San Jose* (9th Cir. 1994) 37 F.3d 1396, 1405-1406; see *Gov. Code* § 12940(h); *Lab. Code* § 1102.5.

(n73)Footnote 53. See *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 1099, 4 Cal. Rptr. 2d 874, 824 P.2d 680, overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80, fn.6, 78 Cal. Rptr. 2d 16, 24, 960 P.2d 1046.

(n74)Footnote 54. See *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 74 Cal. Rptr. 2d 29.

(n75)Footnote 55. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 577, 74 Cal. Rptr. 2d 29 (workers' compensation does not preempt emotional distress action against employer in context of tort cause of action for wrongful termination in violation of public policy or in violation of express statute).

(n76)Footnote 56. *Cabesuela v. Browning-Ferris Indus. of California, Inc.* (1998) 68 Cal. App. 4th 101, 112-113, 80 Cal. Rptr. 2d 60.

(n77)Footnote 57. *Gantt v. Sentry Insurance* (1992) 1 Cal. 4th 1083, 1100, 4 Cal. Rptr. 2d 874, 824 P.2d 680, overruled on other grounds, *Green v. Ralee Eng'r Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046.

(n78)Footnote 58. *Cabesuela v. Browning-Ferris Indus. of California, Inc.* (1998) 68 Cal. App. 4th 101, 112-113, 80 Cal. Rptr. 2d 60.

(n79)Footnote 58.1. *Cabesuela v. Browning-Ferris Indus. of California, Inc.* (1998) 68 Cal. App. 4th 101, 80 Cal. Rptr. 2d 60.

(n80)Footnote 58.2. *Miklosy v. Regents of University of California* (2008) 44 Cal. 4th 876, 902-903, 80 Cal. Rptr. 3d 690, 188 P.3d 629.

(n81)Footnote 58.3. See discussion in § 60.04[5].

- (n82)Footnote 58.4. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 276 Cal. Rptr. 303, 801 P.2d 1054 .
- (n83)Footnote 58.5. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 25, 276 Cal. Rptr. 303, 801 P.2d 1054 .
- (n84)Footnote 58.6. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 754 7 Cal. Rptr. 2d 808, 828 P.2d 1195 .
- (n85)Footnote 58.7. *Miklosy v. Regents of University of California* (2008) 44 Cal. 4th 876, 902-903, 80 Cal. Rptr. 3d 690, 188 P.3d 629 . See *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 25, 276 Cal. Rptr. 303, 801 P.2d 1054 .
- (n86)Footnote 58.8. *Operating Engineers Local 3 v. Johnson* (2003) 110 Cal. App. 4th 180, 1 Cal. Rptr. 3d 552 .
- (n87)Footnote 59. *Operating Engineers Local 3 v. Johnson* (2003) 110 Cal. App. 4th 180, 184-192, 1 Cal. Rptr. 3d 552 .
- (n88)Footnote 60. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 .
- (n89)Footnote 61. *Renteria v. County of Orange* (1978) 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 .
- (n90)Footnote 62. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 ; see, e.g., *Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 9-10, 87 Cal. Rptr. 2d 554 (plaintiff's emotional distress action was preempted by workers' compensation law because workers' compensation is exclusive remedy for intentional infliction of emotional distress by employer's work-related conduct when that conduct does not contravene public policy); see also *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1492-1493, 82 Cal. Rptr. 2d 359 (plaintiff's claims for emotional distress for alleged work-related injury discrimination were not barred by the worker's compensation exclusive remedy provisions because "work-related injury discrimination" is not normal risk of compensation bargain); *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 577, 74 Cal. Rptr. 2d 29 (workers' compensation does not preempt emotional distress action against employer in context of tort cause of action for wrongful termination in violation of public policy or in violation of express statute); *Maynard v. City of San Jose* (9th Cir. 1994) 37 F.3d 1396, 1405-1406 (claims under California law for intentional and negligent infliction of emotional distress as not preempted by California workers' compensation statute when claims implicate fundamental public policy considerations).
- (n91)Footnote 63. See *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 753, 754, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 .
- (n92)Footnote 64. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 .
- (n93)Footnote 65. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 276 Cal. Rptr. 303, 801 P.2d 1054 .
- (n94)Footnote 66. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 15-16, 276 Cal. Rptr. 303, 801 P.2d 1054 .
- (n95)Footnote 67. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 20, 276 Cal. Rptr. 303, 801 P.2d 1054 .
- (n96)Footnote 68. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 20, 276 Cal. Rptr. 303, 801 P.2d 1054 .
- (n97)Footnote 69. See *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 23, 276 Cal. Rptr. 303, 801 P.2d 1054 .
- (n98)Footnote 70. See former Gov. Code § 19683.
- (n99)Footnote 71. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 23, 276 Cal. Rptr. 303, 801 P.2d 1054 .
- (n100)Footnote 72. *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 1090-1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680 ,

overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80, fn.6, 78 Cal. Rptr. 2d 16, 24, 960 P.2d 1046 .

(n101)Footnote 73. *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 1090-1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80, fn.6, 78 Cal. Rptr. 2d 16, 24, 960 P.2d 1046 . For discussion of tort actions for wrongful termination in violation of public policy, *see* ch. 60.

(n102)Footnote 74. *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 1090-1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80, fn.6, 78 Cal. Rptr. 2d 16, 24, 960 P.2d 1046 . Relying on *Gantt*, the Ninth Circuit Court of Appeals held in *Maynard v. City of San Jose* (9th Cir. 1994) 37 F.3d 1396, 1405-1406 , that claims under California law for intentional and negligent infliction of emotional distress are not preempted by the California workers' compensation statute when the claims implicate fundamental public policy considerations, although the federal court did not address the issue in terms of whether the conduct was "outside the compensation bargain." Also applying the Supreme Court's analysis in *Gantt*, the court in *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 577, 74 Cal. Rptr. 2d 29 held that workers' compensation does not preempt an emotional distress action against the employer in the context of a tort cause of action for wrongful termination in violation of public policy or in violation of an express statute, but, similarly, did not address the issue in terms of whether the conduct was "outside the compensation bargain."

(n103)Footnote 75. *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 715, 30 Cal. Rptr. 2d 18, 872 P.2d 559 .

(n104)Footnote 76. *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 715, 30 Cal. Rptr. 2d 18, 872 P.2d 559 .

(n105)Footnote 77. *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 715, 30 Cal. Rptr. 2d 18, 872 P.2d 559 ; *see also* Penal Code § 490.5(f) (merchant's or librarian's privilege to detain a person for a reasonable time to investigate a potential theft). For discussion of the elements and defenses to false imprisonment claims in the employment context, *see* ch. 63.

(n106)Footnote 78. *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 715, 30 Cal. Rptr. 2d 18, 872 P.2d 559 .

(n107)Footnote 79. *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 715, 30 Cal. Rptr. 2d 18, 872 P.2d 559 .

(n108)Footnote 80. Penal Code § 187 *et seq.*

(n109)Footnote 81. *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 715, 30 Cal. Rptr. 2d 18, 872 P.2d 559 .

(n110)Footnote 81.1. *Miklosy v. Regents of University of California* (2008) 44 Cal. 4th 876, 902-903, 80 Cal. Rptr. 3d 690, 188 P.3d 629 .

(n111)Footnote 81.2. *Miklosy v. Regents of University of California* (2008) 44 Cal. 4th 876, 902-903, 80 Cal. Rptr. 3d 690, 188 P.3d 629 . *See* *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 25, 276 Cal. Rptr. 303, 801 P.2d 1054 .

(n112)Footnote 82. *Vuillemainroy v. American Rock & Asphalt, Inc.* (1999) 70 Cal. App. 4th 1280, 1285 (workers' compensation exclusivity provisions bar civil action for wrongful death of employee caused by employer's criminal negligence).

(n113)Footnote 83. *Vuillemainroy v. American Rock & Asphalt, Inc.* (1999) 70 Cal. App. 4th 1280, 1285 .

(n114)Footnote 84. *Vuillemainroy v. American Rock & Asphalt, Inc.* (1999) 70 Cal. App. 4th 1280, 1286 (collecting cases).

(n115)Footnote 84.1. *Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal. App. 4th 710, 719-723, 112 Cal. Rptr. 2d 195 , citing *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal. 3d 465, 165 Cal. Rptr. 858, 612

P.2d 948 .

(n116)Footnote 85. *Arendell v. Auto Parts Club, Inc.* (1994) 29 Cal. App. 4th 1261, 1265, 35 Cal. Rptr. 2d 83 (exclusivity doctrine as barring action against employer for negligent or reckless failure to provide adequate security on employer's premises, despite knowledge of potential danger).

(n117)Footnote 85.1. *Lenk v. Total-Western, Inc.* (2001) 89 Cal. App. 4th 959, 108 Cal. Rptr. 2d 34 .

(n118)Footnote 85.2. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 276 Cal. Rptr. 303, 801 P.2d 1054 .

(n119)Footnote 85.3. *Lenk v. Total-Western, Inc.* (2001) 89 Cal. App. 4th 959, 970-973, 108 Cal. Rptr. 2d 34 .

(n120)Footnote 86. *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 ; *see Jones v. Los Angeles Community College Dist.* (1988) 198 Cal. App. 3d 794, 804, 807-808, 244 Cal. Rptr. 37 .

(n121)Footnote 87. *See* discussion in [c], *above*.

(n122)Footnote 88. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 276 Cal. Rptr. 303, 801 P.2d 1054 .

(n123)Footnote 89. *Now see Gov. Code § 8547 et seq.* (California Whistleblower Protection Act).

(n124)Footnote 90. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 23, 276 Cal. Rptr. 303, 801 P.2d 1054 .

(n125)Footnote 91. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 22, 276 Cal. Rptr. 303, 801 P.2d 1054 . In *Shoemaker v. Myers* (1992) 2 Cal. App. 4th 1407, 1419-1425, 4 Cal. Rptr. 2d 203 , the court of appeal, on remand, held that the employee had stated a cause of action for wrongful discharge against the employer because the employee alleged he was terminated in retaliation for exercising his right to counsel under the Public Safety Officers Procedural Bill of Rights Act (*Gov. Code § 3300 et seq.*), and that the workers' compensation law did not preempt such claims. In that case, however, the court also held that the retaliation cause of action was subject to the immunity provided to public employees and employers by *Gov. Code § 821.6*, but that the employee's "whistleblower" claim was not subject to this immunity.

(n126)Footnote 92. *See Goldman v. Wilsey Foods, Inc.* (1989) 216 Cal. App. 3d 1085, 1095-1096, 265 Cal. Rptr. 294 (religious discrimination); *Meninga v. Raley's, Inc.* (1989) 216 Cal. App. 3d 79, 91, 264 Cal. Rptr. 319 (sex discrimination); *Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1286-1287, 261 Cal. Rptr. 204 (age and race discrimination); *Jones v. Los Angeles Community College Dist.* (1988) 198 Cal. App. 3d 794, 804, 807-808, 244 Cal. Rptr. 37 (race discrimination); *see also Flait v. North American Watch Corp.* (1992) 3 Cal. App. 4th 467, 475-478, 4 Cal. Rptr. 2d 522 (retaliation for efforts to prevent sexual harassment); *Rissetto v. Plumbers and Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 606 (in FEHA age discrimination case, plaintiff estopped from claiming she could perform her work adequately because plaintiff had obtained favorable settlement in workers' compensation claimed based on contrary assertion that she could not perform her work).

(n127)Footnote 93. *Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1286-1287, 261 Cal. Rptr. 204 .

(n128)Footnote 94. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n129)Footnote 95. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1148, 77 Cal. Rptr. 2d 445, 448, 959 P.2d 752 .

(n130)Footnote 96. *Wood v. County of Alameda* (N.D. Cal. 1995) 875 F. Supp. 659, 665 ; *see 42 U.S.C. § 12101*

et seq. (ADA); *see also* discussion in § 20.13.

(n131)Footnote 97. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1161, 77 Cal. Rptr. 2d 445, 448, 959 P.2d 752 (FEHA and other common law remedies available).

(n132)Footnote 98. *See La Jolla Beach and Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal. 4th 27, 46, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 (issue of whether the insurer had a duty to defend the employer under the employer's liability portion of the insurance policy court of appeal decision not reached because limited to the issue of whether the insurer had a duty to defend under the workers' compensation liability portion of the policy); *see also Michaelian v. State Compensation Ins. Fund* (1996) 50 Cal. App. 4th 1093, 1105-1106, 58 Cal. Rptr. 2d 133 (insurer had no duty to indemnify or defend employer against sexual harassment claim when neither workers' compensation policy nor general liability policy provided coverage for such claim); *General Star Indemnity Co. v. Schools Excess Liability Fund* (N.D. Cal. 1995) 888 F. Supp. 1022, 1026-1027 (insurers had no duty to defend or indemnify insured employer under workers' compensation or employer's liability portions of their policies when insured's claim was based on discrimination and intentional conduct excluded from coverage under policy); *cf. Transamerica Insurance Co. v. Superior Court* (1994) 29 Cal. App. 4th 1705, 1715, 35 Cal. Rptr. 2d 259 (no duty to defend because policy clearly stated that insured had no coverage under employer's liability portion of policy when underlying claim was covered by workers' compensation policy).

(n133)Footnote 99. *See La Jolla Beach and Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal. 4th 27, 36, 42, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 . The Court disapproved *Wong v. State Compensation Insurance Fund* (1993) 12 Cal. App. 4th 686, 16 Cal. Rptr. 2d 1 , to the extent it is inconsistent with *La Jolla*. *See La Jolla Beach and Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal. 4th 27, 46 n.4, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 .

(n134)Footnote 100. *See La Jolla Beach and Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal. 4th 27, 43, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 .

(n135)Footnote 101. *See B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 86-87 n.8, 9 Cal. Rptr. 2d 894 .

(n136)Footnote 102. *See Coca-Cola Bottling Co. v. Superior Court* (1991) 233 Cal. App. 3d 1273, 1292, 286 Cal. Rptr. 855 .

(n137)Footnote 103. *Coca-Cola Bottling Co. v. Superior Court* (1991) 233 Cal. App. 3d 1273, 286 Cal. Rptr. 855 .

(n138)Footnote 104. *See Coca-Cola Bottling Co. v. Superior Court* (1991) 233 Cal. App. 3d 1273, 1285-1287, 286 Cal. Rptr. 855 .

(n139)Footnote 105. *Gomez v. Acquistapace* (1996) 50 Cal. App. 4th 740, 751-752, 57 Cal. Rptr. 2d 821 .

(n140)Footnote 106. *See Gomez v. Acquistapace* (1996) 50 Cal. App. 4th 740, 749, 57 Cal. Rptr. 2d 821 .

(n141)Footnote 107. *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 30 Cal. Rptr. 2d 18, 872 P.2d 559 .

(n142)Footnote 108. *See Gomez v. Acquistapace* (1996) 50 Cal. App. 4th 740, 751, 57 Cal. Rptr. 2d 821 .

(n143)Footnote 109. *See Gomez v. Acquistapace* (1996) 50 Cal. App. 4th 740, 747, 57 Cal. Rptr. 2d 821 .



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
 CHAPTER 20 Liability for Work-Related Injuries
 Part A. WORKERS' COMPENSATION
 Subpart 2. Exclusive Remedy Doctrine in Employee Injury Cases

1-20 California Employment Law § 20.13

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.13 Preemption of Exclusive Remedy Doctrine by Americans With Disabilities Act (ADA)

A case of first impression from the United States District Court, Northern District of California, has held that the exclusive remedy provision of the California Workers' Compensation Act is preempted by the Americans With Disabilities Act (ADA).ⁿ¹ In *Wood v. County of Alameda*,ⁿ² the plaintiff suffered an on-the-job injury, became disabled, and received workers' compensation benefits under California law. When plaintiff was cleared by her doctor to return to work, she was not returned to her former position or a comparable position with her employer. Plaintiff brought suit, alleging that the defendant employer's actions constituted a denial of "reasonable accommodation" to a "qualified individual with a disability" in violation of the ADA. The defendant argued that plaintiff was barred from bringing the ADA claim on the ground that the California Workers' Compensation Act provided the sole remedy for such claims.ⁿ³

The District Court disagreed with the defendant and held that the exclusive remedy provision of the California act was preempted by the ADA. Relying on the United States Supreme Court's analysis in *Adams Fruit Co. v. Barrett*,ⁿ⁴ the court held first that the language of the ADA that it does not "limit or invalidate" certain state lawsⁿ⁵ means that the ADA does not excuse defendants from fulfilling their parallel obligations under other compatible state laws, and does not mean that the federal statute should defer to state remedies.ⁿ⁶ The court further held that, under the Supremacy Clause of the U.S. Constitution, which preempts state law to the extent it conflicts with federal law or when the state law is an obstacle to the accomplishment of the full purposes and objectives of Congress, giving effect to the exclusive remedy provision in the state statute in a manner that limits the availability of federal remedies under the ADA would clearly stand as an obstacle to Congress' stated purposes in enacting the ADA. These stated purposes include providing a national mandate for the elimination of discrimination against the disabled, establishing strong and consistent standards addressing such discrimination, and ensuring that the federal government plays a central role in remedying this type of discrimination.ⁿ⁷

The District Court limited its holding in *Wood*, however, concluding that only the exclusive remedy doctrine, and not the substantive protections, of the California Workers' Compensation Act is preempted by the ADA.^{n7.1} As stated by

the court, Congress intended plaintiffs to have the benefit of both federal and state causes of action to the extent that the two are compatible. When, as here, they are not wholly compatible, preemption principles clearly require that those parts and only those parts of the state law that hinder the accomplishment of federal objectives be denied effect.ⁿ⁸

For further discussion of the ADA, *see* Chapters 40-43 of this publication, as well as Hanna, California Law of Employee Injuries and Workers' Compensation, Chs. 10 and 35 (Matthew Bender), and Americans with Disabilities Act: employee rights and employer obligations, Chapters 6 and 8 (Matthew Bender).

Legal Topics:

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

Civil Rights Law
Protection of Disabled Persons
Americans With Disabilities Act
General Overview
Workers' Compensation & SSDI
Remedies Under Other Laws
Americans With Disabilities Act

FOOTNOTES:

(n1)Footnote 1. *Wood v. County of Alameda* (N.D. Cal. 1995) 875 F. Supp. 659, 665 ; *see* 42 U.S.C. § 12101 *et seq.* (ADA).

(n2)Footnote 2. *Wood v. County of Alameda* (N.D. Cal. 1995) 875 F. Supp. 659 .

(n3)Footnote 3. *Wood v. County of Alameda* (N.D. Cal. 1995) 875 F. Supp. 659, 660-661 .

(n4)Footnote 4. *See Adams Fruit Co. v. Barrett* (1990) 494 U.S. 638, 642, 110 S. Ct. 1384, 108 L. Ed. 2d 585 .

(n5)Footnote 5. *See* 42 U.S.C. § 12201(b).

(n6)Footnote 6. *Wood v. County of Alameda* (N.D. Cal. 1995) 875 F. Supp. 659, 662-664 .

(n7)Footnote 7. *Wood v. County of Alameda* (N.D. Cal. 1995) 875 F. Supp. 659, 664-665 .

(n8)Footnote 7.1. *See also* 42 U.S.C. § 12201(e), added to Americans With Disabilities Act effective January 1, 2009 (nothing in ADA alters standards for determining eligibility for benefits under state worker's compensation laws or under state and federal disability benefit programs).

(n9)Footnote 8. *Wood v. County of Alameda* (N.D. Cal. 1995) 875 F. Supp. 659, 665-666 .



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
 CHAPTER 20 Liability for Work-Related Injuries
 Part A. WORKERS' COMPENSATION
 Subpart 2. Exclusive Remedy Doctrine in Employee Injury Cases

1-20 California Employment Law § 20.14

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.14 Burden of Proof

As a general rule, a defendant has the burden of pleading and proving as an affirmative defense that the Workers' Compensation Act is a bar to an employee's civil action.ⁿ¹ Failure to plead the exclusive remedy provision as an affirmative defense results in a waiver of that defense.ⁿ² However, when the complaint affirmatively alleges facts indicating coverage by the workers' compensation laws, if it fails to allege additional facts negating application of the exclusive remedy provision, no civil action will lie and the complaint is subject to demurrer.ⁿ³

Legal Topics:

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

EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Popejoy v. Hannon* (1951) 37 Cal. 2d 159, 173-174, 231 P.2d 484 ; *Green v. City of Oceanside* (1987) 194 Cal. App. 3d 212, 224, 239 Cal. Rptr. 470 ; *Iverson v. Atlas Pacific Engineering* (1983) 143 Cal. App. 3d 219, 225, 191 Cal. Rptr. 696 .

(n2)Footnote 2. *Green v. City of Oceanside* (1987) 194 Cal. App. 3d 212, 224, 239 Cal. Rptr. 470 ; *see also Lucich v. City of Oakland* (1993) 19 Cal. App. 4th 494, 498, 23 Cal. Rptr. 2d 450 (defendant's failure to raise defense of workers' compensation exclusivity at or before trial precluded defendant from raising issue on appeal).

(n3)Footnote 3. *Colombo v. State of California* (1991) 3 Cal. App. 4th 594, 599, 5 Cal. Rptr. 2d 567 ; *Halliman v. Los Angeles Unified School Dist.* (1984) 163 Cal. App. 3d 46, 50, 209 Cal. Rptr. 175 ; *Dorado v. Knudsen Corp.* (1980) 103 Cal. App. 3d 605, 610-611, 163 Cal. Rptr. 477 ; *see also Young v. Libbey-Owens Ford Co.* (1985) 168 Cal. App. 3d 1037, 1039-1040, 214 Cal. Rptr. 400 (summary judgment in employer's favor proper when complaint affirmatively indicates employee's coverage by workers' compensation and does not state facts negating application of

exclusive remedy provisions of workers' compensation system).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 2. Exclusive Remedy Doctrine in Employee Injury Cases

1-20 California Employment Law §§ 20.15 through 20.19

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

[Reserved]

§§ 20.15[Reserved]



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 3. Conditions of Workers' Compensation

1-20 California Employment Law § 20.20

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§ 20.20 Existence of Employer-Employee Relationship

[1] Generally

An employer is required to provide workers' compensation benefits, and is consequently shielded from tort liability to an injured worker under the exclusive remedy doctrine, only in cases in which the injured party is an employee, as defined in the Labor Code, and the injury arises out of and in the course of his or her employment and is proximately caused by the employment.ⁿ¹ In the absence of such an employment relationship, workers' compensation benefits need not be provided,ⁿ² and normal tort liability applies.ⁿ³ The existence of an employment relationship within the scope of workers' compensation principles is a question of law when the facts of employment are not in dispute.ⁿ⁴

A person rendering service for another, other than as an independent contractor, is presumed to be an employee unless the Labor Code expressly excludes that type of employment.ⁿ⁵ This presumption has been held to shift the burden of proof to the party attempting to establish that the injured worker was not an employee.ⁿ⁶

Because the relevant condition of compensation is that "at the time of the injury, both the employer and the employee are subject to the compensation provisions" of workers' compensation law,^{n6.1} proof of insurance coverage is not required.^{n6.2} Rather, workers' compensation insurance coverage is presumed when a plaintiff alleges facts establishing an employment relationship and work-related injury.^{n6.3}

[2] Existence of Relationship

[a] Employer Defined

For the purposes of workers' compensation law, the term "employer" means (1) the state of California and every state agency; (2) each county, city, district, and all public and quasi-public corporations and public agencies therein; (3) every person, including any public service corporation, which has a natural person in service; and (4) the legal representative of a deceased employer.ⁿ⁷

The federal government and federal agencies are generally outside the scope of California workers' compensation. Federal employees are generally covered by the Federal Employees' Compensation Act.ⁿ⁸

An employment agency may not be an employer for workers' compensation insurance purposes. For example, when an employment agency that supplied domestic workers to patients complied with *Civ. Code § 1812.5095* (governing when an employment agency is or is not the employer of a domestic worker for whom it procures, offers, refers, provides or attempts to provide work), it was exempt from state law requirements of maintaining workers' compensation insurance for domestic workers it referred to patients.^{n8.1}

[b] Employee Defined

For the purposes of workers' compensation law, the term "employee" means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether or not the employment is otherwise lawful.ⁿ⁹ The term "employees" includes the following:

1. Aliens and minors;ⁿ¹⁰
2. Elected and appointed paid public officials;ⁿ¹¹
3. Paid corporate officers and directors (with some exceptions);ⁿ¹²
4. Certain household laborers;ⁿ¹³
5. Prison inmates engaged in assigned work;ⁿ¹⁴
6. Certain paid members of a partnership or limited liability company;ⁿ¹⁵
7. Persons whose employment training is arranged by the State Department of Rehabilitation;ⁿ¹⁶
8. Certain persons providing in-home domestic services to elderly or disabled persons under Article 7 of the Welfare and Institutions Code;ⁿ¹⁷
9. Certain authors under contract to publishers;ⁿ¹⁸ and
10. Members of the California National Guard and the state militia who are injured, disabled, or killed on active service in the line of duty.ⁿ¹⁹

The term "employee" excludes the following:

1. Household workers employed by a parent, spouse, or child, or working less than a specified number of hours, depending on the type of injury;ⁿ²⁰
2. Persons performing services in return for aid or sustenance only, received from a religious, charitable, or relief organization;ⁿ²¹
3. Certain deputy officials;ⁿ²²
4. Certain volunteer helpers at camps run by nonprofit organizations;ⁿ²³

5. Certain voluntary ski patrol members and other employees of ski lift operators;n24
6. Student athletes and other sports participants, other than regular employees, who receive no compensation other than certain specified expenses, and certain persons officiating at sporting events;n25
7. Volunteers serving public agencies or private nonprofit agencies for no remuneration other than certain specified expenses;n26
8. Certain law enforcement officers who are regularly employed by a law enforcement agency in an adjoining state and who are deputized to work in California;n27
9. Certain law enforcement officers from adjoining states who are acting as peace officers in California pursuant to *Penal Code Section 830.32*(specifying conditions when such officer may act as peace officer in California);n28
10. Certain workers who would otherwise be covered but for the preemptive effect of superseding federal compensation schemes;n29 and
11. Owner-builders participating in mutual self-help housing programs sponsored by nonprofit corporations.n29.1

An employee of a partnership is considered an employee of each partner.n30

An independent contractor is not an employee.n31

A university student injured during the field portion of a class in animal husbandry is not an "employee" at the time of injury and not entitled to workers' compensation benefits.n31.1

One court has held that jurors are employees within the meaning of the Workers' Compensation Act, reasoning that, although a county does not exercise control over jury deliberations, it does control every other aspect of a juror's work environment, and benefits from the services provided by jurors. Thus, the county has the responsibility to insure against injuries that a juror may sustain while the juror is providing services to the county.n32

Federal law providing separate and distinct workers' compensation benefits preempts California workers' compensation law, so that certain classes of employees who are within the application of federal employment laws are not subject to California's workers' compensation rules.n33 Employees of the federal government are governed by the Federal Employees' Compensation Act.n34 Employees engaged in interstate commerce by rail are provided a remedy by the Federal Employers' Liability Act.n35 Employees engaged in work of a maritime character on navigable waters are subject to federal admiralty lawn36 and may be governed by either the Jones Actn37 or the Longshore and Harbor Workers' Compensation Act.n38 However, maritime workers employed on the waterfront, in the so-called "twilight zone," where the distinction between federal and state law is unclear, must have their rights determined on a case-by-case basis.n39 Injuries to migrant farmworkers employed by agricultural employers are governed by the Migrant and Seasonal Agricultural Worker Protection Act.n40

[c] Determination of Employer-Employee Relationship

Generally, subsisting employment is needed before it may be found that an injury arose out of and in the course of employment.n41 However, an "employment relationship" sufficient to bring workers' compensation law into play cannot always be determined by the common-law rules governing contracts and, in some instances, must be resolved by

reference to the history and fundamental purposes underlying the Workers' Compensation Act.ⁿ⁴² For example, a person who participates in a "tryout" for employment is not an employee within the strict contractual sense of the word. However, such a person is properly compensable under workers' compensation law.ⁿ⁴³

Employment may extend beyond the point in time at which the contract of employment has technically been severed. A court of appeal has held that a person who was discharged and then sustained an injury while leaving the jobsite was still an employee for the purposes of workers' compensation law.ⁿ⁴⁴

A contract of employment, while normally present in an employment relationship, is not necessary to an employer-employee relationship.ⁿ⁴⁵ An indigent person who is required to work in order to receive welfare benefits is an employee within the Workers' Compensation Act.ⁿ⁴⁶

All reasonable doubts whether an injury arose out of employment and occurred during the course of employment are resolved against the right of the employee to bring a civil action and in favor of the applicability of the Workers' Compensation Act.ⁿ⁴⁷ For further discussion, see § 20.22.

[d] Joint, Concurrent, and Special Employment

An employee may have more than one employer for the purposes of workers' compensation law.ⁿ⁴⁸ Concurrent employment exists when an employee holds two or more jobs that are totally unrelated. In such a case, the provisions of workers' compensation law apply to the employment situation at which the employee is rendering service at the time of the injury, and the other employer is treated as an unrelated third party.ⁿ⁴⁹ Joint employment exists when employers are engaged in a joint enterprise in which they unite to employ workers over whom they each have the right of control. In cases of joint employment, the provisions of workers' compensation law apply simultaneously to each of the employers.ⁿ⁵⁰

In certain cases, a worker who is clearly an employee of one employer will perform services for another employer. In such a situation, under the doctrine of "special employment," the employee, if injured during employment, may be considered an employee of both employers for the purposes of workers' compensation law.ⁿ⁵¹ If one employer (the general employer) sends an employee to work for another party (the special employer) and both have the right to control the activities of the employee, the employee becomes a special employee of the special employer.ⁿ⁵² Of prime importance in determining whether a special employment relationship exists is the right of the party in the position of the special employer to exercise control over the manner in which the employee performs the details of his or her work.ⁿ⁵³ The power to discharge or remove the employee is evidence of a special employment relationship; and the payment of wages, while relevant, is not determinative.ⁿ⁵⁴

■ PRACTICE TIP--EMPLOYER'S PERSPECTIVE:

Employers' counsel should bear in mind that *Insurance Code Section 11663* provides that the insurer of the liability of the general employer is liable for all workers' compensation benefits payable for an industrial injury to an employee arising out of and in the course of the general and special employment unless the special employer had the employee on his or her payroll at the time of the injury. In that case the insurer of the special employer is solely liable. *Commentary by John W. Miller.*

In *Riley v. Southwest Marine, Inc.*,ⁿ⁵⁵ the court articulated several factors relevant to determining whether an employee is the borrowed employee of another, including: (1) whether the borrowing employer's control over the employee and the work the employee is performing extends beyond mere suggestion of details or cooperation; (2) whether the employee is performing the special employer's work; (3) whether there was an agreement, understanding, or meeting of the minds between the original and special employer; (4) whether the employee acquiesced in the new work situation; (5) whether the original employer terminated his or her relationship with the employee; (6) whether the special employer furnished the tools and place for performance; (7) whether the new employment was over a considerable

length of time; (8) whether the borrowing employer had the right to fire the employee; and (9) whether the borrowing employer had the obligation to pay the employee).ⁿ⁵⁶ The existence of a special employment relationship may be negated by evidence that (1) the employee is not paid and cannot be discharged by the borrowing employer, (2) the employee is a skilled worker with substantial control over operational details of his or her employment duties, (3) the employee is not engaged in the borrowing employer's usual business, (4) the period of employment is short, or (5) the employee uses tools furnished by his or her general employer.ⁿ⁵⁷

Most cases determine whether a worker is a special employee by reference to the above-noted factors without reference to the specific activity the employee was engaged in at the time of the injury. In one case, the court of appeal rejected defendant's argument that the determinative question is the *right* to control the employee and that other factors discussed above, such as *exercise* of control, are mere evidentiary indicia on the issue of right to control.ⁿ⁵⁸ The court stated that each of the factors listed by the California Supreme Court in *Kowalski v. Shell Oil Co.* ⁿ⁵⁹ has legal and factual significance and makes sense only if right to control is not the exclusive and determinative question.ⁿ⁶⁰ Thus, the court upheld a determination that an employee was not a special employee despite the employer's naked right to control the employee, because other factors, including the fact that there was no *actual* control of the employee, indicated otherwise.ⁿ⁶¹

If a special employment relationship exists and the special employee is injured while rendering services to the special employer, workers' compensation provides the exclusive remedy against the special employer in the same manner as if the worker were injured while rendering service to a general employer.ⁿ⁶² In such cases, the injured worker is normally entitled to recover benefits from, and is barred from maintaining an action for damages against, either employer.ⁿ⁶³ However, an employer can secure the payment of compensation on employees provided to another employer through a valid and enforceable agreement with the other employer under which the other employer agrees to obtain, and does obtain, workers' compensation coverage for those employees.ⁿ⁶⁴

When the tortious act of a special employee injures another of the special employer's workers, workers' compensation law does not bar a tort action against the general employer of the tortfeasor based on a theory of respondeat superior.ⁿ⁶⁵ The general employer is liable if, at the time of the injury, it retained total or partial concurrent control over the tortfeasor's work.ⁿ⁶⁶ The special employee tortfeasor is, however, protected by the exclusive remedy provisions of *Labor Code Section 3601*.ⁿ⁶⁷

[3] Independent Contractors

[a] Effect of Independent Contractor Status

An independent contractor is not an employee.ⁿ⁶⁸ An independent contractor is thus not entitled to benefits under the Workers' Compensation Act and is not barred from bringing a tort suit against his or her hirer by the exclusive remedy provisions of the Labor Code.ⁿ⁶⁹ For these purposes, an independent contractor is a person who renders service for a specified recompense for a specified result, under the control of the principal as to the result of the work only and not as to the means by which the result is accomplished.^{n69.1}

[b] Burden of Proof and Presumptions

[i] In Workers' Compensation Proceeding

In a proceeding to recover workers' compensation benefits, when there is proof that an injured person claiming to be an employee was actually performing services for the alleged employer at the time of the injury, the employer has the burden of proving the affirmative defense that the injured person was an independent contractor or was otherwise excluded from the protection of the workers' compensation laws.ⁿ⁷⁰ Additionally, *Labor Code Section 3202* provides for liberal construction of the Workers' Compensation Act for the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment.

Labor Code Section 3357 provides a statutory presumption that any person rendering service for another, "other than as an independent contractor," or unless expressly excluded by statute, is presumed to be an employee.ⁿ⁷¹ One court has held that the "presumption" set forth in *Labor Code Section 3357* is not in itself sufficient to support a finding that an individual is an employee, since it is dependent on a finding that the individual is not an independent contractor.ⁿ⁷² Nevertheless, the provisions of *Labor Code Section 5705(a)* appear to create such a presumption by placing on the employer the burden of proving that an injured person rendering services for the employer is in fact an independent contractor.ⁿ⁷³

If a person performs services for which a license is required under *Business and Professions Code Section 7000 et seq.* (building contractors), or a person performs services for a person who is required to obtain such a license, there is a rebuttable presumption affecting the burden of proof that such a person is an employee rather than an independent contractor.ⁿ⁷⁴ Furthermore, a contractor who is required to have a license, but does not, may not be considered an independent contractor for the purposes of determining whether the provisions of workers' compensation apply to him or her if he or she is injured.ⁿ⁷⁵ The presumptions regarding unlicensed contractors supplement rather than override the statutory definitions of employee and independent contractor. Therefore, although an unlicensed contractor who performs work for which a license is required cannot be deemed an independent contractor, he or she may not be an employee either, if any of the statutory exclusions to workers' compensation coverage are applicable.ⁿ⁷⁶

In a complex case, the Court of Appeal had occasion to sort out a variety of employment relationships to determine who was responsible for workers' compensation for an injured employee.^{n76.1} A condominium homeowners association hired a property manager to manage the property as its agent. The association members then agreed to install new rain gutters on part of the condominium building. The property manager hired an unlicensed contractor, whose employee was injured on the first day of work. The court found first that the unlicensed contractor was a dual employer of the injured worker and liable for workers' compensation. It was undisputed that the contractor hired the worker to perform service.^{n76.2} By rendering service, the worker was presumed to be the contractor's employee.^{n76.3} The worker rendered the service as an employee, not as an independent contractor, because the contractor was in the business of rain gutter installation, contracted with the property manager, paid wages and controlled the worker's work and hours.^{n76.4} The court also found that the property manager was a liable employer under *Lab. Code § 2750.5*, because the property manager hired the unlicensed contractor.^{n76.5} Further, the property manager was the association's agent under a written agreement and the Davis-Stirling Common Interest Development Act,^{n76.6} but as the agent of the association or individual owners, it did not have the same rights or legal status as its principal under *Civ. Code § 2330* and was not an owner and exempt employer under *Lab. Code §§ 3351(d)* and *3352(h)*.^{n76.7} The court found that the condominium owners association was liable as a principal, and was not an owner and exempt employer under *Lab. Code §§ 3351(d)* and *3352(h)*, because the duties of the unlicensed contractor and his injured worker were not personal and were in the trade or business of the association, contrary to *Lab. Code § 3351(d)*.^{n76.8} However, the individual condominium owners were not liable for workers' compensation as either an employer under *Lab. Code § 2750.5* or under *Lab. Code § 3351(d)*, because the injured worker did not work sufficient hours under section 3352(h). Employer liability for workers' compensation would not be imputed to the owners as principals because of the statutory immunity provided under the Labor Code. Nor were the owners liable as an employer for workers' compensation solely for being a member of the association, since generally a member of an unincorporated association does not incur liability for acts of the association or acts of its members which the member did not authorize or perform.^{n76.9}

For purposes of the workers' compensation law, there is a rebuttable presumption affecting the burden of proof that a licensed physician or surgeon who enters into a contract for the performance of health care services on behalf of a licensed primary care health clinic is an independent contractor rather than an employee.ⁿ⁷⁷

[ii] In Civil Damages Action

In a civil action for damages, the contentions of the parties with respect to employee status are generally the opposite of

those made in a workers' compensation proceeding. The injured person generally will contend that he or she was not an employee (or that the exclusive remedy doctrine⁷⁸ otherwise does not apply to him or her), while the defendant employer generally will argue the contrary. In such cases, the defendant bears the burden of pleading and proving, as an affirmative defense, that the plaintiff is an employee and that the Workers' Compensation Act is a bar to the civil action.⁷⁹

■ PRACTICE TIP--EMPLOYER'S PERSPECTIVE:

In close factual cases employers' counsel might want to consider whether workers' compensation benefits, in total, would be less expensive (or otherwise more desirable) than a civil action. This is because counsel may, to some extent, be able to determine which action will apply. Since the WCAB, by virtue of *Labor Code Section 3202*, is liberal in determining benefits, counsel may be able to obtain a determination with a finding of employee, rather than independent contractor. This can be secured fairly swiftly and may then act as res judicata on that issue in any civil proceeding. *Commentary by John W. Miller.*

[c] Factors Used in Determination of Independent Contractor Status

The Labor Code defines an "independent contractor" as any person who renders service for a specified recompense for a specified result, under the control of his or her principal regarding only the result of his or her work and not regarding the means by which the result is accomplished.⁸⁰ Proof of independent contractor status includes satisfactory proof of the following:⁸¹

- The individual has the right to control and discretion in the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.⁸²
- The individual is customarily engaged in an independently established business.⁸³
- The individual's independent contractor status is bona fide and not a subterfuge.⁸⁴

A bona fide independent contractor status is further evidenced by the presence of the following cumulative factors:⁸⁵

- Substantial investment other than personal services in the business.
- Holding out that one is in business for oneself.
- Bargaining for a contract to complete a specific project for compensation by project rather than by time.
- Control over the time and place the work is performed.
- Supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees.
- Hiring employees.
- Performing work that is not ordinarily in the course of the principal's business.⁸⁶
- Performing work that requires a particular skill.⁸⁷⁸⁸

- Holding a license pursuant to the Business and Professions Code.
- The parties' intention that the work relationship be that of independent contractor or that the relationship is not severable or terminable at will by the principal, but gives rise to an action for breach of contract.

Among these factors, the most important is the right to control the manner and means of accomplishing the result desired.ⁿ⁸⁹ If the employer has the authority to exercise control in this regard, whether or not that right is in fact exercised with respect to all details, an employer-employee relationship exists.ⁿ⁹⁰ For example, the person who hires a taxi exercises a certain amount of control over the driver and clearly controls the destination but is not the driver's employer.ⁿ⁹¹ Thus, one who contracts with another is entitled to retain certain measures of control over the results to be obtained without becoming an employer of that person.ⁿ⁹² One way to determine whether the right to control exists is to ascertain whether the worker must obey the instructions of the hirer.ⁿ⁹³ A business entity may not, however, avoid its statutory obligations under the workers' compensation law by carving up its production process into minute steps, then asserting that it lacks "control" over the exact means by which one such step is performed by the responsible workers.ⁿ⁹⁴ A worker's adherence to a federally dictated work protocol does not by itself establish his or her status as an employee rather than an independent contractor.^{n94.1}

A form contract stating that person doing the work has the right to control the manner and means of performance does not necessarily mean that the person is an independent contractor. For example, in *Antelope Valley Press v. Poizner*,^{n94.2} a form contract between a newspaper publisher and individuals who delivered the newspapers, known as carriers, stated that each carrier had the right to control the manner and means of delivery of the publisher's publications and the right to determine the equipment and supplies needed to perform delivery services. However, there was substantial evidence this was not actually the case. The pages of the form contract also were filled with manner and means provisions regarding the task of delivering the publications, as well as detailed negative consequences to the carriers if they did not comply with those manner and means directives. These provisions enabled the publisher to maintain significant supervision over the carriers. Further, the publisher had control over the price paid by customers to the publisher, which included both the cost of the newspaper and the delivery service. Under several provisions of the contract, the carriers were responsible for procuring new subscribers, and a decrease in subscribers on a carrier's route of more than two per cent gave the publisher the right to terminate the contract. However, there was no indication that persons working in the publisher's circulation department and having procurement of new subscribers as one of their tasks were not considered employees by the publisher. Under the contract, the carriers could choose the sequence of their delivery, the vehicle they used to make deliveries, whether and when to take breaks, and the clothes they wore during their deliveries; however, those choices were, in reality, a function of the weather, the size and density of their routes, and whether they could afford to have a vehicle for deliveries separate and apart from a vehicle for their own personal use.

While the right of control is the principal test of an employment relationship, other factors will be considered by the courts.ⁿ⁹⁵ Courts have also relied on factors similar to those listed in *Labor Code Section 2750.5*, set forth above, as well factors such as the following:ⁿ⁹⁶

- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision.
- The length of time for which the services are to be performed.
- The method of payment, whether by time or by the job.

Generally, the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight often depends on particular combinations.ⁿ⁹⁷

The determination of the status of a worker should also be made with reference to the history and fundamental purposes of workers' compensation law.ⁿ⁹⁸ In *Johnson v. Workmen's Compensation Appeals Board*,ⁿ⁹⁹ the court held that it was proper to consider the following public policy factors in determining whether a worker is an employee or an independent contractor: (1) the purpose of the workers' compensation statutes and the intention of the Legislature, (2) the persons sought to be protected, (3) whether the worker is within the class of persons sought to be protected, (4) statutory exclusions, and (5) the relative bargaining positions of the parties, mentally, economically, and educationally. The court then held that the injured worker, a cleaning woman who was hired under an informal arrangement by an apartment manager to clean a vacant apartment for \$16, was an employee. The court based its decision largely on the premise that the workers' compensation system was designed to protect persons in the class of the injured apartment cleaner who are in need of the protection of workers' compensation law. This analysis was followed in a case in which a beauty operator and manager of a shop was held to be an independent contractor rather than an employee. The court stated that a person who performs services for the public and engages in retail sales in specialized shops operated by others is within the class of persons the legislative scheme was meant to protect, no statutory exclusions applied, and such a person has little or no bargaining position.ⁿ¹⁰⁰

In *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*,ⁿ¹⁰¹ the Supreme Court held that migrant harvesters of the grower's cucumber crop were employees and not independent contractors, even though the written contract between the harvesters and the grower expressly provided that the harvesters were independent contractors, not employees, and were not covered by workers' compensation. The grower had claimed that the workers were not employees because it had control only over the result and not over the means by which the result was accomplished. In reaching its conclusion that the workers were employees, the Court said the "control-of-work details" test for determining whether a person rendering service to another is an "employee" or an excluded "independent contractor" must be applied with deference to the purposes of the protective legislation. The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the "history and fundamental purposes" of the workers' compensation law.ⁿ¹⁰²

One of the factors set out in *Labor Code Section 2750.5* to show independent contractor status is that the person performing a service holds a license under the Business and Professions Code.ⁿ¹⁰³ Thus, a building contractor must, as a general rule, have a licenseⁿ¹⁰⁴ in order to be considered an independent contractor,ⁿ¹⁰⁵ and an unlicensed contractor injured during employment will be deemed to be an employee within the meaning of the workers' compensation system regardless of whether or not the contractor otherwise satisfies the requirements of independent contractor status.ⁿ¹⁰⁶ Further, an employee of an independent contractor who is required to hold a license but who is unlicensed at the time of injury is treated as an employee of the hirer, rather than as an employee of the unlicensed contractor.^{n106.1}

In cases in which a contractor has represented to a principal that he or she is licensed, the contractor may be estopped from asserting employee status.ⁿ¹⁰⁷ But this does not apply to the employee of the unlicensed contractor because estoppel is an equitable doctrine and will not be applied against one who is blameless.ⁿ¹⁰⁸ Thus, for example, if a subcontractor is unlicensed, workers' compensation liability for the subcontractor's employees will be imposed on the general contractor as a matter of law.ⁿ¹⁰⁹ In addition, the employee of an unlicensed subcontractor will be presumed to be an employee of the general contractor without regard to the fact that the unlicensed subcontractor was independently insured for workers' compensation.ⁿ¹¹⁰

[d] Examples of Status as Independent Contractor or Employee

Courts have found employer-employee relationships in the following cases:

- A golf course was the employer of caddies paid and directed by individual golfers.ⁿ¹¹¹

- A hospital was the employer of a student nurse working for school credit and not a salary.n112
- A jockey hired to ride one race was an employee.n113
- A booking agent was the employer of a high-wire performer.n114
- A movie stuntman hired to perform a rodeo stunt during a three-day engagement was an employee.n115
- A cosmetologist working at a beauty shop was an employee.n116
- A newspaper carrier hired to deliver newspapers, despite a signed agreement stating the carrier was an independent contractor.n117
- A taxicab driver was an employee of a taxicab company notwithstanding an agreement between the driver and the company purporting to establish a lessor-lessee relationship.n118

Courts have found hirer-independent contractor relationships in the following cases:

- A contract hauler engaged to haul crops.n119
- A route salesman acting without supervision.n120
- An unsupervised painter paid on a per diem basis.n121
- A carpenter hired by a homeowner to assist in completion of a house.n122
- A self-employed gardener.n123
- Truck drivers (hired by a trucking broker) who had complete control over their working conditions, could terminate their contracts or be terminated at will, were engaged in a distinct occupation and had their own trade association, could work for other businesses, made capital investments in providing their own trucks, were compensated by the job and could refuse any assignment without retribution, and expressly and voluntarily agreed to independent contractor status.n124

Legal Topics:

For related research and practice materials, see the following legal topics:
 Workers' Compensation & SSDICoverageEmployment RelationshipsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code §§ 3351-3352, 3600(a)(1)-(3); see also* discussion in § 20.05.

(n2)Footnote 2. *See Lab. Code § 3600(a)(1).*

(n3)Footnote 3. *See Lab. Code § 3602(c).*

(n4)Footnote 4. *Baugh v. Rogers (1944) 24 Cal. 2d 200, 206, 148 P.2d 633 ; In-Home Supportive Services v. Workers' Compensation Appeals Board (1984) 152 Cal. App. 3d 720, 729, 199 Cal. Rptr. 697 .*

(n5)Footnote 5. *Lab. Code § 3357.*

(n6)Footnote 6. *See Johnson v. Workmen's Compensation Appeals Board* (1974) 41 Cal. App. 3d 318, 321, 115 Cal. Rptr. 871 .

(n7)Footnote 6.1. *See Lab. Code § 3600(a)(1)*.

(n8)Footnote 6.2. *Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 11-12, 87 Cal. Rptr. 2d 554 .

(n9)Footnote 6.3. *Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 11-12, 87 Cal. Rptr. 2d 554 ; *see § 20.03[1]*, discussing compensation insurance requirements for employers.

(n10)Footnote 7. *Lab. Code § 3300*.

(n11)Footnote 8. *5 U.S.C. § 8101 et seq.*; *see 5 U.S.C. § 8101(1)* (defining "employee" for purposes of Federal Employees' Compensation Act), discussed in [b], *below*.

(n12)Footnote 8.1. *An Independent Home Support Service, Inc. v. Superior Court* (2006) 145 Cal. App. 4th 1418, 1424-1439, 52 Cal. Rptr. 3d 562 .

(n13)Footnote 9. *Lab. Code § 3351*.

(n14)Footnote 10. *Lab. Code § 3351(a)*.

See Farmer Brothers Coffee v. Workers' Comp. Appeals Bd. (2005) 133 Cal. App. 4th 533, 537-544, 35 Cal. Rptr. 3d 23 (applicant need not be lawfully documented alien to be employee entitled to workers' compensation benefits; *Lab. Code §§ 1171.5, 3351* were not pre-empted by employment provisions of Internal Revenue Code [8 U.S.C. § 1324a]).

But see Del Taco v. Workers' Compensation Appeals Bd. (2000) 79 Cal. App. 4th 1437, 1442, 94 Cal. Rptr. 2d 825 (injured employee is not entitled to vocational rehabilitation services where employee is unable to return to work solely because of immigration status).

(n15)Footnote 11. *Lab. Code § 3351(b)*.

(n16)Footnote 12. *Lab. Code § 3351(c)*.

(n17)Footnote 13. *See Lab. Code §§ 3351(d), 3352(a), (h), 3354-3356. See Cal. State. Auto. Ass'n Inter-Ins. Bureau v. Workers' Compensation Appeals Board* (2006) 137 Cal. App. 4th 1040, 1043-1048, 40 Cal. Rptr. 3d 743 (unlicensed painter hired to paint homeowners' living and dining rooms and kitchen was not their employee for workers' compensation purposes, where painter had not worked at least 52 hours and earned at least \$100 during 90 days preceding date of injury, so that he was excluded from coverage under *Lab. Code § 3352(h)*).

(n18)Footnote 14. *Lab. Code §§ 3351(e), 3370; see Arriaga v. County of Alameda* (1995) 9 Cal. 4th 1055, 1066-1067, 40 Cal. Rptr. 2d 116, 892 P.2d 150 (person convicted of crime who is not incarcerated but who undertakes community service for county in lieu of paying fine is "employee" as matter of law for purposes of exclusive remedy doctrine of workers' compensation law). *But see California Dept. of Corrections v. Workers' Compensation Appeals Board* (2003) 109 Cal. App. 4th 1720, 1723-1727, 1 Cal. Rptr. 3d 348 (state prisoner earning only sentencing credits and no wages at time of his injury while employed as sorter/steam cleaner in prison laundry was not entitled to temporary disability indemnity).

(n19)Footnote 15. *Lab. Code § 3351(f); see Guzman v. Workers' Compensation Appeals Board* (1985) 158 Cal. App. 3d 190, 194-196, 204 Cal. Rptr. 527 (under *Lab. Code § 3360*, workers associating under partnership whose principal purpose is to perform labor for third party are employees of that party regardless of whether partnership is employee or independent contractor).

(n20)Footnote 16. *Lab. Code § 3351.5.*

(n21)Footnote 17. *Lab. Code § 3351.5.*

(N22)Footnote 18. *Lab. Code § 3351.5.*

(n23)Footnote 19. *Mil. & Vet. Code §§ 340-340.2.*

(n24)Footnote 20. *Lab. Code § 3352(a), (h); see Zaragoza v. Ibarra (2009) 174 Cal. App. 4th 1012, 1016-1022, 95 Cal. Rptr. 3d 264* (where no facts suggested that homeowner's garage conversion was part of her occupation, trade, profession or business, she was true owner, so *Labor Code § 3352(h)* applied because *Labor Code § 3351(d)* applied, and there was no workers' compensation exclusivity to preclude employee of unlicensed contractor injured working on garage for less than 52 hours from suing homeowner in negligence); *Cedillo v. Workers' Comp. Appeals Bd. (2003) 106 Cal. App. 4th 227, 234-237, 130 Cal. Rptr. 2d 581* (although under *Lab. Code § 2750.5*, unlicensed contractor's employee would be employee of contractor's hirer, *Lab. Code §§ 3351(d), 3352(h)* applied so that contractor's employee, who worked less than 52 hours for hirer, was excluded from being hirer's employee because § 2750.5 supplements definitions of employees and independent contractor in the workers' compensation statutory scheme and does not purport to override those definitions); *Johnson v. Workmen's Compensation Appeals Board (1974) 41 Cal. App. 3d 318, 322, 115 Cal. Rptr. 871* (under language of pre-1977 version of *Lab. Code § 3352* domestic workers in business premises are not excluded employees regardless of total hours worked).

(n25)Footnote 21. *Lab. Code § 3352(b).*

(n26)Footnote 22. *See Lab. Code § 3352(c).*

(n27)Footnote 23. *Lab. Code § 3352(d).*

(n28)Footnote 24. *Lab. Code § 3352(e), (f).*

(n29)Footnote 25. *Lab. Code § 3352(g), (j), (k), (n); Graczyk v. Workers' Compensation Appeals Board (1986) 184 Cal. App. 3d 997, 1007-1009, 229 Cal. Rptr. 494* (retroactively applying *Lab. Code § 3352(k)* to exclude student athlete from employee status for purposes of workers' compensation benefits).

(n30)Footnote 26. *Lab. Code § 3352(i); see Lab. Code § 3363.5.*

(n31)Footnote 27. *Lab. Code § 3352(l).*

(n32)Footnote 28. *Lab. Code § 3352(m).*

(n33)Footnote 29. *Lab. Code § 3203.*

(n34)Footnote 29.1. *Lab. Code § 3352(o).* "Owner-builder" is defined in *Health & Safety Code § 50692(a)*. "Mutual self-help housing program" is defined in *Health & Safety Code § 50087*.

(n35)Footnote 30. *Reed v. Industrial Accident Commission (1937) 10 Cal. 2d 191, 193, 73 P.2d 1212 .*

(n36)Footnote 31. *Automatic Canteen Co. v. State Bd. of Equalization (1965) 238 Cal. App. 2d 372, 47 Cal. Rptr. 848 .* For discussion of independent contractors, see [3], *below*.

(n37)Footnote 31.1. *Land v. Workers' Compensation Appeals Board (2002) 102 Cal. App. 4th 491, 494-497, 125 Cal. Rptr. 2d 432 . See JKH Enterprises, Inc. v. Dep't of Indus. Relations (2006) 142 Cal. App. 4th 1046, 1062-1065* (substantial evidence supported finding that 15 of 16 drivers who accomplished actual delivery services for courier service were properly classified as employees for workers' compensation purposes--rather than independent

contractors).

(n38)Footnote 32. *Waggener v. County of Los Angeles* (1995) 39 Cal. App. 4th 1078, 1083, 46 Cal. Rptr. 2d 141 .

(n39)Footnote 33. *See* 5 U.S.C. § 8101(1)(A) (defining "employee" for purposes of Federal Employees' Compensation Act); Hanna, California Law of Employee Injuries and Workers' Compensation, Vol. 2, Ch. 21, § 21.01[1]; *see also* Lab. Code § 3203 (providing that workers' compensation law does not extend to employers or employees who are so engaged in interstate commerce as not to be subject to the laws of California).

(n40)Footnote 34. 5 U.S.C. § 8101 *et seq.*

(n41)Footnote 35. 45 U.S.C. § 51 *et seq.*

(n42)Footnote 36. *See Dean v. United States* (9th Cir. 1969) 418 F.2d 1236, 1237-1238 .

(n43)Footnote 37. *See* 46 U.S.C. § 688.

(n44)Footnote 38. 33 U.S.C. § 901 *et seq.*

(n45)Footnote 39. *Duong v. Workers' Comp. Appeals Bd.* (1985) 169 Cal. App. 3d 980, 981-984, 215 Cal. Rptr. 609 (land-based shipyard worker injured when repairing vessel that was docked on navigable waters subject to California's workers' compensation laws as well as the federal Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*). *See Robert E. Blake, Inc. v. Excel Envtl.* (9th Cir. 1997) 104 F.3d 1158, 1160-1163 (state law governed indemnity claim by mothballed-ship contractor against subcontractor for injuries sustained by subcontractor's employee when ship was out of service at time general contractor and subcontractor formed contract).

(n46)Footnote 40. 29 U.S.C. § 1801 *et seq.*; *see Adams Fruit Co. v. Barrett* (1990) 494 U.S. 638, 646-649, 110 S. Ct. 1384, 108 L. Ed. 2d 585, 597-598 (exclusivity provisions of state workers' compensation laws do not preclude remedy under Act).

(n47)Footnote 41. *Mitchell v. Hizer* (1977) 73 Cal. App. 3d 499, 503, 140 Cal. Rptr. 790 .

(n48)Footnote 42. *Laeng v. Workers' Comp. Appeals Bd.* (1972) 6 Cal. 3d 771, 774, 100 Cal. Rptr. 377, 494 P.2d 1 .

(n49)Footnote 43. *Laeng v. Workers' Comp. Appeals Bd.* (1972) 6 Cal. 3d 771, 776-778, 100 Cal. Rptr. 377, 494 P.2d 1 (plaintiff injured while participating in physical agility test as part of pre-employment procedure).

(n50)Footnote 44. *Gates v. Trans Video Corp.* (1979) 93 Cal. App. 3d 196, 202, 155 Cal. Rptr. 486 .

(n51)Footnote 45. *County of Los Angeles v. Workers' Compensation Appeals Board* (1981) 30 Cal. 3d 391, 398-399, 179 Cal. Rptr. 214, 637 P.2d 681 (overruling prior case law).

(n52)Footnote 46. *County of Los Angeles v. Workers' Compensation Appeals Board* (1981) 30 Cal. 3d 391, 404-405, 179 Cal. Rptr. 214, 637 P.2d 681 .

(n53)Footnote 47. *Eckis v. Sea World Corp.* (1976) 64 Cal. App. 3d 1, 7, 134 Cal. Rptr. 183 ; *Transactron, Inc. v. Workers' Compensation Appeals Board* (1977) 68 Cal. App. 3d 233, 236, 137 Cal. Rptr. 142 .

(n54)Footnote 48. *National Auto. Casualty & Insurance Co. v. Industrial Accident Commmission* (1947) 80 Cal. App. 2d 769, 774-775, 182 P.2d 634 (distinguishing joint employment from concurrent employment); *see* Hanna, California Law of Employee Injuries and Workers' Compensation, vol. 1, ch. 3, §§ 3.140-3.142 (Matthew Bender).

(n55)Footnote 49. *Hiner v. Olson* (1937) 23 Cal. App. 2d 227, 230, 72 P.2d 890, 73 P.2d 945 ; *National Auto. Casualty & Insurance Co. v. Industrial Accident Commmission* (1947) 80 Cal. App. 2d 769, 774-775, 182 P.2d 634 .

(n56)Footnote 50. *In-Home Supportive Services v. Workers' Compensation Appeals Board* (1984) 152 Cal. App. 3d 720, 732, 199 Cal. Rptr. 697 ; *Horney v. Guy F. Atkinson Co.* (1983) 140 Cal. App. 3d 923, 927-928, 190 Cal. Rptr. 18 ; see *Orosco v. Sun-Diamond Corp.* (1997) 51 Cal. App. 4th 1659, 1670, 60 Cal. Rptr. 2d 179 (no joint enterprise existed between injured employee's employer and various other companies when other companies had no control over production or sale of employer's goods, did not share profits with employer, and had no ownership interest in employer's assets); *National Auto. Casualty & Insurance Co. v. Industrial Accident Commmission* (1947) 80 Cal. App. 2d 769, 774-775, 182 P.2d 634 (worker is joint employee when both employers, although not in joint enterprise, share cost of services and exercise joint control over employee).

(n57)Footnote 51. *McFarland v. Voorheis-Trindle Co.* (1959) 52 Cal. 2d 698, 705, 343 P.2d 923 , discussed below; see *Riley v. Southwest Marine, Inc.* (1988) 203 Cal. App. 3d 1242, 1247-1249, 250 Cal. Rptr. 718 ; *Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal. App. 3d 575, 578, 239 Cal. Rptr. 578

(n58)Footnote 52. *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 494-495, 162 Cal. Rptr. 320, 606 P.2d 355 ; see *Johnson v. Berkofsky-Barret Productions, Inc.* (1989) 211 Cal. App. 3d 1067, 1070 n.3, 260 Cal. Rptr. 67 ; *Von Beltz v. Stuntman, Inc.* (1989) 207 Cal. App. 3d 1467, 1486, 255 Cal. Rptr. 755 ; Hanna, California Law of Employee Injuries and Workers' Compensation, vol. 1, ch. 3, § 3.142 (Matthew Bender).

(n59)Footnote 53. *McFarland v. Voorheis-Trindle Co.* (1959) 52 Cal. 2d 698, 705, 343 P.2d 923 ; *Johnson v. Berkofsky-Barret Productions, Inc.* (1989) 211 Cal. App. 3d 1067, 1072 n.4, 260 Cal. Rptr. 67 ; *Riley v. Southwest Marine, Inc.* (1988) 203 Cal. App. 3d 1242, 1250, 250 Cal. Rptr. 718 .

(n60)Footnote 54. *Kowalski v. Shell Oil Co.* (1979) 23 Cal. 3d 168, 177, 151 Cal. Rptr. 671, 588 P.2d 811 ; see *Martin v. Phillips Petroleum Co.* (1974) 42 Cal. App. 3d 916, 922-923, 117 Cal. Rptr. 269 (applying a number of factors in concluding that injured worker was special employee notwithstanding contract between general and special employers that expressly purported to avoid this result).

(n61)Footnote 55. *Riley v. Southwest Marine, Inc.* (1988) 203 Cal. App. 3d 1242, 1250, 250 Cal. Rptr. 718 .

(n62)Footnote 56. *Riley v. Southwest Marine, Inc.* (1988) 203 Cal. App. 3d 1242, 1250, 250 Cal. Rptr. 718 .

(n63)Footnote 57. *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 492, 162 Cal. Rptr. 320, 606 P.2d 355 ; *Johnson v. Berkofsky-Barret Productions, Inc.* (1989) 211 Cal. App. 3d 1067, 1072-1073, 260 Cal. Rptr. 67 ; *Riley v. Southwest Marine, Inc.* (1988) 203 Cal. App. 3d 1242, 1250, 250 Cal. Rptr. 718 .

(n64)Footnote 58. *Barajas v. USA Petroleum Corp.* (1986) 184 Cal. App. 3d 974, 984, 229 Cal. Rptr. 513 .

(n65)Footnote 59. *Kowalski v. Shell Oil Co.* (1979) 23 Cal. 3d 168, 177, 151 Cal. Rptr. 671, 588 P.2d 811 .

(n66)Footnote 60. *Barajas v. USA Petroleum Corp.* (1986) 184 Cal. App. 3d 974, 984, 229 Cal. Rptr. 513 .

(n67)Footnote 61. *Barajas v. USA Petroleum Corp.* (1986) 184 Cal. App. 3d 974, 984, 229 Cal. Rptr. 513 .

(n68)Footnote 62. *McFarland v. Voorheis-Trindle Co.* (1959) 52 Cal. 2d 698, 702, 343 P.2d 923 ; *Wedeck v. Unocal Corp.* (1997) 59 Cal. App. 4th 848, 858-860, 69 Cal. Rptr. 2d 501 (under *Riley*, employer of temporary employee is special employer because, among other reasons, employee was expected to follow company's particularized procedures and exercise skills under company's systems and procedures; *McFarland* distinguished because employee lacked unlimited discretion to achieve result); *Enslow v. United States* (C.D. Cal. 1992) 811 F. Supp. 503, 506 (firefighter employed by California Department of Forestry and Fire Protection killed fighting forest fire while under

contract to U.S. Interior Department was "special employee" of U.S. Government which was immune from wrongful death suit under Federal Tort Claims Act, but subject to payment of compensation under California's workers' compensation law).

(n69)Footnote 63. *McFarland v. Voorheis-Trindle Co.* (1959) 52 Cal. 2d 698, 702, 343 P.2d 923 ; see also *Riley v. Southwest Marine, Inc.* (1988) 203 Cal. App. 3d 1242, 1248, 250 Cal. Rptr. 718 .

(n70)Footnote 64. *Lab. Code § 3602(d)*.

(n71)Footnote 65. *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 490, 162 Cal. Rptr. 320, 606 P.2d 355 .

(n72)Footnote 66. *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 490, 162 Cal. Rptr. 320, 606 P.2d 355 .

(n73)Footnote 67. *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 495, 162 Cal. Rptr. 320, 606 P.2d 355 . For discussion of suits against coemployees generally, see § 20.43.

(n74)Footnote 68. *Automatic Canteen Co. v. State Bd. of Equalization* (1965) 238 Cal. App. 2d 372, 47 Cal. Rptr. 848 .

(n75)Footnote 69. *Lab. Code § 3600*; *Baugh v. Rogers* (1944) 24 Cal. 2d 200, 206-207, 148 P.2d 633 (barring plaintiff's tort action on ground she was an employee rather than an independent contractor); *Antelope Valley Press v. Poizner* (2008) 162 Cal. App. 4th 839, 75 Cal. Rptr. 3d 887, 2008 Cal. App. LEXIS 657 , * (persons who made deliveries of newspapers for newspaper publisher were employees, not independent contractors); cf. *Holmes v. Roth* (1992) 11 Cal. App. 4th 931, 936-937, 14 Cal. Rptr. 2d 315 (doorman was employee of condominium homeowners' association but not of individual homeowners, who had no ability to control or discharge him or otherwise exercise the control of an employer over an employee; thus, he was not barred from bringing a civil action against negligent homeowner).

(n76)Footnote 69.1. *Lab. Code § 3353*.

(n77)Footnote 70. *Lab. Code § 5705(a)*; *Schaller v. Industrial Accident Comm'n* (1938) 11 Cal. 2d 46, 51, 77 P.2d 836 ; *Johnson v. Workmen's Compensation Appeals Bd.* (1974) 41 Cal. App. 3d 318, 321, 115 Cal. Rptr. 871 .

(n78)Footnote 71. *Lab. Code § 3357*.

(n79)Footnote 72. See *Mission Ins. Co. v. Workers' Compensation Appeals Bd.* (1981) 123 Cal. App. 3d 211, 226, 176 Cal. Rptr. 439 .

(n80)Footnote 73. The court in *Mission Insurance Co.* did not discuss *Lab. Code § 5705(a)*, apparently because it had concluded that the employer had established as a matter of law that the injured person was an independent contractor.

(n81)Footnote 74. *Lab. Code § 2750.5*; *Mission Ins. Co. v. Workers' Compensation Appeals Bd.* (1981) 123 Cal. App. 3d 211, 217, 176 Cal. Rptr. 439 . The presumption of employee status based on a lack of permit or license only applies when there is a statutory provision creating such a presumption. See *State Compensation Ins. Fund v. Brown* (1995) 32 Cal. App. 4th 188, 203, 38 Cal. Rptr. 2d 98 (no presumption of employee status for truck drivers merely because insured provided no evidence drivers had PUC or Cal-Trans permits).

(n82)Footnote 75. *Lab. Code § 2750.5*; *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1985) 40 Cal. 3d 5, 12-15, 219 Cal. Rptr. 13, 706 P.2d 1146 .

(n83)Footnote 76. *Cedillo v. Workers' Comp. Appeals Bd.* (2003) 106 Cal. App. 4th 227, 234-237, 130 Cal. Rptr. 2d 581 ; *Furtado v. Schrieffer* (1991) 228 Cal. App. 3d 1608, 280 Cal. Rptr. 16 ; see *Lab. Code § 3352* (exclusions to

workers' compensation law).

(n84)Footnote 76.1. *Heiman v. Workers' Compensation Appeals Board* (2007) 149 Cal. App. 4th 724, 57 Cal. Rptr. 3d 56, 2007 Cal. App. LEXIS 525, *13-*41 .

(n85)Footnote 76.2. *See Lab. Code §§ 3351, 3300.*

(n86)Footnote 76.3. *See Lab. Code § 3357.*

(n87)Footnote 76.4. *Heiman v. Workers' Compensation Appeals Board* (2007) 149 Cal. App. 4th 724, 57 Cal. Rptr. 3d 56, 2007 Cal. App. LEXIS 525, *17-*20 . *See S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 350-355, 256 Cal. Rptr. 543, 769 P.2d 399 .

(n88)Footnote 76.5. *Heiman v. Workers' Compensation Appeals Board* (2007) 149 Cal. App. 4th 724, 57 Cal. Rptr. 3d 56, 2007 Cal. App. LEXIS 525, *22-*24 .

(n89)Footnote 76.6. *Heiman v. Workers' Compensation Appeals Board* (2007) 149 Cal. App. 4th 724, 57 Cal. Rptr. 3d 56, 2007 Cal. App. LEXIS 525, *24-*29 .

(n90)Footnote 76.7. *Heiman v. Workers' Compensation Appeals Board* (2007) 149 Cal. App. 4th 724, 57 Cal. Rptr. 3d 56, 2007 Cal. App. LEXIS 525, *29-*31 .

(n91)Footnote 76.8. *Heiman v. Workers' Compensation Appeals Board* (2007) 149 Cal. App. 4th 724, 57 Cal. Rptr. 3d 56, 2007 Cal. App. LEXIS 525, *31-*39 .

(n92)Footnote 76.9. *Heiman v. Workers' Compensation Appeals Board* (2007) 149 Cal. App. 4th 724, 57 Cal. Rptr. 3d 56, 2007 Cal. App. LEXIS 525, *40-*41 .

(n93)Footnote 77. *See Lab. Code § 2750.6.*

(n94)Footnote 78. *Lab. Code §§ 3601, 3602.*

(n95)Footnote 79. *See Iverson v. Atlas Pacific Eng'g* (1983) 143 Cal. App. 3d 219, 224, 191 Cal. Rptr. 696 ; *See also § 20.14.*

(n96)Footnote 80. *Lab. Code § 3353.*

(n97)Footnote 81. *Lab. Code § 2750.5. See S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 351 n.5, 354, 256 Cal. Rptr. 543, 769 P.2d 399 (noting that standards set forth for contractor's licensees in *Lab. Code § 2750.5* are also helpful means of identifying employee-contractor distinction in workers' compensation cases other than those involving contractors licensed under Contractors' State License Law (*Bus. & Prof. Code § 7000 et seq.*); *Foss v. Anthony Industries* (1983) 139 Cal. App. 3d 794, 797-799, 189 Cal. Rptr. 31 (suggesting that factors listed in *Lab. Code § 2750.5* are those traditionally used and apply in tort actions as well as workers' compensation cases).

(n98)Footnote 82. *Lab. Code § 2750.5(a). See Antelope Valley Press v. Poizner* (2008) 162 Cal. App. 4th 839, 75 Cal. Rptr. 3d 887, 2008 Cal. App. LEXIS 657, *26-*30 .

(n99)Footnote 83. *Lab. Code § 2750.5(b).*

(n100)Footnote 84. *Lab. Code § 2750.5(c).*

(n101)Footnote 85. *Lab. Code § 2750.5(c).*

(n102)Footnote 86. See *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 351, 256 Cal. Rptr. 543, 769 P.2d 399 (citing Restatement (Second) of Agency, § 330).

(n103)Footnote 87. See *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 351, 256 Cal. Rptr. 543, 769 P.2d 399 (citing Restatement (Second) of Agency, § 330).

(n104)Footnote 88. [Reserved]

(n105)Footnote 89. *Truesdale v. Workers' Compensation Appeals Bd.* (1987) 190 Cal. App. 3d 608, 614, 235 Cal. Rptr. 754 (citing *Tieberg v. Unemployment Insurance Appeals Board* (1970) 2 Cal. 3d 943, 946, 88 Cal. Rptr. 175, 471 P.2d 975).

(n106)Footnote 90. *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal. 2d 33, 43, 168 P.2d 686 (overruled on other grounds in *People v. Sims* (1982) 32 Cal. 3d 468, 479 n.8, 186 Cal. Rptr. 77, 651 P.2d 321).

(n107)Footnote 91. See *Western Indemnity Co. v. Pillsbury* (1916) 172 Cal. 807, 811, 159 P. 721 .

(n108)Footnote 92. *Mountain Meadow Creameries v. Industrial Accident Comm'n* (1938) 25 Cal. App. 2d 123, 129, 76 P.2d 724 ; see *Mission Insurance Co. v. Workers' Compensation Appeals Board* (1981) 123 Cal. App. 3d 211, 223-224, 176 Cal. Rptr. 439 .

(n109)Footnote 93. *Press Publishing Co. v. Industrial Accident Comm'n* (1922) 190 Cal. 114, 121, 210 P. 820 .

(n110)Footnote 94. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 357, 256 Cal. Rptr. 543, 769 P.2d 399 .

(n111)Footnote 94.1. *Southwest Research Institute v. Unemployment Insurance Appeals Board* (2000) 81 Cal. App. 4th 705, 709-710, 96 Cal. Rptr. 2d 769 .

(n112)Footnote 94.2. *Antelope Valley Press v. Poizner* (2008) 162 Cal. App. 4th 839, 75 Cal. Rptr. 3d 887, 2008 Cal. App. LEXIS 657, *28-*30 .

(n113)Footnote 95. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 350, 256 Cal. Rptr. 543, 769 P.2d 399 .

(n114)Footnote 96. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 350-351, 354, 256 Cal. Rptr. 543, 769 P.2d 399 (citing Restatement (Second) of Agency, § 330, and stating that factors set forth in *Lab. Code* § 2750.5 are helpful even in cases not involving unlicensed contractors).

(n115)Footnote 97. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 351, 354, 256 Cal. Rptr. 543, 769 P.2d 399 .

(n116)Footnote 98. *In-Home Supportive Services v. Workers' Compensation Appeals Bd.* (1984) 152 Cal. App. 3d 720, 728, 199 Cal. Rptr. 697 ; *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 351, 256 Cal. Rptr. 543, 769 P.2d 399 .

(n117)Footnote 99. *Johnson v. Workmen's Compensation Appeals Bd.* (1974) 41 Cal. App. 3d 318, 322, 115 Cal. Rptr. 871 .

(n118)Footnote 100. *Truesdale v. Workers' Compensation Appeals Bd.* (1987) 190 Cal. App. 3d 608, 617, 235 Cal. Rptr. 754 .

(n119)Footnote 101. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 256

Cal. Rptr. 543, 769 P.2d 399 .

(n120)Footnote 102. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 354-355, 256 Cal. Rptr. 543, 769 P.2d 399 ; *Rinaldi v. Workers' Compensation Appeals Bd.* (1991) 227 Cal. App. 3d 756, 760-765, 278 Cal. Rptr. 105 (crew supervisor who agreed with almond grower to harvest and prune grower's trees was not an independent contractor because grower had power of control over performance of work; injured agricultural worker was therefore employee of grower for purposes of workers' compensation).

(n121)Footnote 103. *Lab. Code § 2750.5(c).*

(n122)Footnote 104. *See Bus. & Prof. Code § 7000 et seq.*

(n123)Footnote 105. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1985) 40 Cal. 3d 5, 15, 219 Cal. Rptr. 13, 706 P.2d 1146 .

(n124)Footnote 106. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1985) 40 Cal. 3d 5, 12-15, 219 Cal. Rptr. 13, 706 P.2d 1146 . *See also Cedillo v. Workers' Comp. Appeals Bd.* (2003) 106 Cal. App. 4th 227, 233, 130 Cal. Rptr. 2d 581 (conclusive presumption that person who employs unlicensed contractor is employer).

(n125)Footnote 106.1. *Cedillo v. Workers' Comp. Appeals Bd.* (2003) 106 Cal. App. 4th 227, 233, 130 Cal. Rptr. 2d 581 (hirer of contractor for job requiring license is statutory employer of unlicensed contractor and of workers employed by unlicensed contractor); *Zellers v. Playa Pacifica, Ltd.* (1998) 61 Cal. App. 4th 129, 70 Cal. Rptr. 2d 919 (court noted that purpose of rule is to ensure that all employees receive compensation for injuries occurring on job; plaintiff's remedies against hirer limited to exclusive workers' compensation remedy).

(n126)Footnote 107. *Fillmore v. Irvine* (1983) 146 Cal. App. 3d 649, 656, 194 Cal. Rptr. 319 (person performing work on construction job for which license is required without holding valid license, person is by definition employee not independent contractor); *but see State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1985) 40 Cal. 3d 5, 16, 219 Cal. Rptr. 13, 706 P.2d 1146 (mere failure of contractor to disclose to prospective employer that he or she is unlicensed is not sufficient basis for finding of estoppel).

(n127)Footnote 108. *Nick Hagopian Drywall v. Workers' Compensation Appeals Bd.* (1988) 204 Cal. App. 3d 767, 772, 251 Cal. Rptr. 455 .

(n128)Footnote 109. *Nick Hagopian Drywall v. Workers' Compensation Appeals Bd.* (1988) 204 Cal. App. 3d 767, 772, 251 Cal. Rptr. 455 .

(n129)Footnote 110. *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal. App. 3d 325, 327-330, 333-334, 265 Cal. Rptr. 788 .

(n130)Footnote 111. *Claremont Country Club v. Industrial Acci. Com.* (1917) 174 Cal. 395, 397-398, 163 P.209 ; *Ware v. Workers' Compensation Appeals Bd.* (1999) 78 Cal. App. 4th 508, 514-515, 92 Cal. Rptr. 2d 744 (although members paid caddies, club provided them as integral part of its business and therefore employment was presumed).

(n131)Footnote 112. *Anaheim General Hospital v. Workmen's Comp. App. Bd.* (1970) 3 Cal. App. 3d 468, 472-474, 83 Cal. Rptr. 495 .

(n132)Footnote 113. *Drillon v. Industrial Accident Comm'n* (1941) 17 Cal. 2d 346, 350-353, 110 P.2d 64 .

(n133)Footnote 114. *Schaller v. Industrial Accident Comm'n* (1938) 11 Cal. 2d 46, 51, 77 P.2d 836 .

(n134)Footnote 115. *Durae v. Industrial Accident Comm'n* (1962) 206 Cal. App. 2d 691, 699-700, 23 Cal. Rptr. 902 .

(n135)Footnote 116. See *Truesdale v. Workers' Compensation Appeals Bd.* (1987) 190 Cal. App. 3d 608, 617, 235 Cal. Rptr. 754 .

(n136)Footnote 117. *Antelope Valley Press v. Poizner* (2008) 162 Cal. App. 4th 839, 75 Cal. Rptr. 3d 887, 2008 Cal. App. LEXIS 657, *24-*37 ; *Gonzalez v. Workers' Compensation Appeals Bd.* (1996) 46 Cal. App. 4th 1584, 1594, 54 Cal. Rptr. 2d 308 .

(n137)Footnote 118. *Yellow Cab Cooperative, Inc. v. Workers' Compensation Appeals Bd.* (1991) 226 Cal. App. 3d 1288, 1297-1300, 277 Cal. Rptr. 434 .

(n138)Footnote 119. *Clarke v. Hernandez* (1947) 79 Cal. App. 2d 414, 423-424, 179 P.2d 834 .

(n139)Footnote 120. *Bates v. Industrial Accident Comm'n* (1958) 156 Cal. App. 2d 713, 719-720, 320 P.2d 167 .

(n140)Footnote 121. *Los Flores S. District v. Industrial Accident Comm'n* (1936) 13 Cal. App. 2d 180, 184-185, 56 P.2d 581 .

(n141)Footnote 122. *Germann v. Workers' Compensation Appeals Bd.* (1981) 123 Cal. App. 3d 776, 786-787, 176 Cal. Rptr. 868 .

(n142)Footnote 123. *Torres v. Reardon* (1992) 3 Cal. App. 4th 831, 837-838, 5 Cal. Rptr. 2d 52 (independent contractor as matter of law, where he was engaged to produce result and means by which result was to be produced were not discussed and were not part of any agreement, work was performed in course of his independently established business in which he customarily engaged, he supplied equipment and was not hired by day or hour, work was not ordinarily done in course of clients' business, gardener had substantial investment in his business, and gardener had employees who assisted him).

(n143)Footnote 124. *State Compensation Ins. Fund v. Brown* (1995) 32 Cal. App. 4th 188, 203, 38 Cal. Rptr. 2d 98 .



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 3. Conditions of Workers' Compensation

1-20 California Employment Law § 20.21

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.21 Types of Injuries Within Coverage of Workers' Compensation

[1] Compensable Injuries Generally

"Injury" within the meaning of workers' compensation law includes any injury or disease arising out of the employment, including injuries to artificial members, dentures, hearing aids, eyeglasses, and medical braces (if the injury to those devices is incident to an injury causing disability).ⁿ¹ The injury may be either "specific," occurring as the result of one incident or exposure, or may be "cumulative," occurring as repetitive mentally or physically traumatic activities extending over time.ⁿ²

Both the original injury and any aggravation, including negligent medical treatment of the injury, are compensable under workers' compensation law; thus, recovery of workers' compensation benefits is generally the exclusive remedy against the employer for both the original injury and the aggravation.ⁿ³ In such a case, however, the employee may sue any third party who is responsible for the aggravation.ⁿ⁴ Also, as discussed in § 20.12[1][c], the employee may sue the employer in tort if the aggravation results from the employer's fraudulent concealment of the injury and its connection with the employment.ⁿ⁵

In any given case, there can be more than one injury, either specific or cumulative, or a combination of both, arising from the same event or from separate events. The number and nature of the injuries sustained are questions of fact for the workers' compensation judge or the Appeals Board, to be determined by the events leading to the injury, the employee's medical history, and the medical testimony received.ⁿ⁶

[2] Mental or Psychiatric Disorders

Disability from a mental or nervous condition proximately caused by the employment is also compensable.ⁿ⁷ To be compensable, the psychiatric injury must have arisen out of the employment, occurred in the course of employment, and been proximately caused by the employment.ⁿ⁸ Compensable psychoneurotic injuries may also result from a physical injury.ⁿ⁹ Employees can also recover for psychoneurotic injuries that are the result of the cumulative effect of daily

stress and strain.ⁿ¹⁰

To establish that a psychiatric injury is compensable, an employee must demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all combined causes of the psychiatric injury.ⁿ¹¹ "Predominant as to all causes" means that the work-related cause is more than 50 percent of all the causal factors.ⁿ¹² A psychiatric injury satisfies the standard for compensability set forth in section 3208.3 only if it is proven that events of employment were predominant as to all causes combined of the psychiatric disability taken as a whole.^{n12.1} Substantial medical evidence must be adduced to support the award.ⁿ¹³ In 1989, the Legislature enacted *Labor Code Section 3208.3*. As originally enacted, section 3208.3 required the employee to demonstrate by a preponderance of the evidence that actual events of employment were responsible for at least 10 percent of the total causation from all sources contributing to the psychiatric injury.ⁿ¹⁴ In 1993, however, the Legislature amended section 3208.3(b) to require that to establish that a psychiatric injury is compensable, the employee must show by a preponderance of the evidence that actual events of employment were predominant as to all combined causes of the psychiatric injury.ⁿ¹⁵ This compensability threshold applies to any claim for psychiatric injury, whether or not it is related to a compensable physical injury.^{n15.1} One court has held that "predominant as to all causes" means that the work-related cause is more than 50 percent of all the causal factors.ⁿ¹⁶ Another court has held that the statutory predominant-cause requirement for psychiatric injury^{n16.1} (compared to the lower threshold applied to physical injuries which aggravate preexisting conditions) does not offend a claimant's substantive due process rights.ⁿ¹⁷

Employee stress resulting from fluctuations in the value of an employer's stock or from uncertainty about an employer's future in the face of a downturn in the employer's business is not a compensable event of employment under *Labor Code Section 3208.3*.^{n17.1}

Under this statute, a psychiatric injury is compensable if it is a mental disorder that causes disability or need for medical treatment, and is diagnosed either pursuant to procedures promulgated by the Industrial Medical Council pursuant to *Labor Code Section 139.2(j)(4)*, or, until those procedures are promulgated, is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.ⁿ¹⁸

An employee whose injuries result from being a victim of a violent act or from direct exposure to a significant violent act must demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.ⁿ¹⁹ "Substantial cause" means at least 35 to 40 percent of the causation from all sources combined.^{n19.1}

An employee who claims a psychiatric injury based on the harassment or persecution of coworkers must establish objective evidence of harassment, persecution, or other such basis for the alleged psychiatric injury. Disdainful reactions of a supervisor and coworkers to an employee's mistreatment of them do not constitute "actual events of employment"^{n19.2} for which the employee can obtain workers' compensation benefits for the psychological stress the employee experiences (because of those disdainful reactions to the employee's own inappropriate conduct). For example, a claimant's subjective misperception as harassment of the disdainful reaction of her coworkers to the claimant's mistreatment of them by being rude, inflexible, easily upset, and demeaning toward other employees did not entitle her to workers' compensation benefits for psychiatric injury.ⁿ²⁰

■ PRACTICE TIP--EMPLOYER'S PERSPECTIVE:

The role of counsel to the employer cannot be overemphasized. Cumulative trauma psychiatric claims are difficult to defend. Psychiatrists, judges, and attorneys wrestle with what is a 'substantial cause,' 'preponderance of the evidence,' and what is '35% to 40%' relative to all sources of stress combined. It is important, then, that the employer work closely with its claims examiner to determine what, if any, other causes of psychiatric stress affected the employee; and this starts with information the employer either knows, or has in its files, or is known to the employee's co-workers. *Commentary by John W. Miller.*

Further, notwithstanding any other provision of the workers' compensation law, compensation will not be paid for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months.^{n20.1} "Employment" means the performance of actual service for the employer.^{n20.2} The six months of employment need not be continuous.ⁿ²¹ The six-month rule does not apply, however, if the psychiatric injury is caused by a sudden and extraordinary employment condition.ⁿ²² The sudden and extraordinary employment condition is limited to the type of events that would naturally be expected to cause psychic disturbances even in a diligent and honest employee.^{n22.1} The sudden and extraordinary condition could certainly include occurrences such as gas main explosions or workplace violence. However, the Legislature intended to except from the six-month limitation psychiatric injuries caused by a sudden and extraordinary employment condition, and not by a regular or routine employment event.^{n22.2} *Labor Code Section 3208.3* does not authorize an employee or the dependents of an employee to bring an action at law or equity for damages against an employer for a psychiatric injury, when those rights would not exist pursuant to the exclusive remedy doctrineⁿ²³ in the absence of the amendment of Section 3208.3 by Statutes of 1991, Chapter 115.ⁿ²⁴

If the claim for compensation is filed after notice of termination of employment or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of the notice and on or after July 16, 1993, no compensation is payable unless the employee demonstrates by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury and that one or more of the following conditions exist:ⁿ²⁵

1. Sudden and extraordinary events of employment were the cause of the injury.
2. The employer has notice of the psychiatric injuryⁿ²⁶ prior to the notice of termination or layoff.
3. The employee's medical records existing prior to notice of termination or layoff contain evidence of treatment of the psychiatric injury.
4. A finding of sexual or racial harassment has been made by any trier of fact, whether contractual, administrative, regulatory, or judicial.
5. Evidence exists that the date of injuryⁿ²⁷ is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

A notice of termination or layoff that is not followed within 60 days by termination or layoff is not subject to these provisions, and these provisions do not apply until the employee receives a later notice of termination or layoff.ⁿ²⁸ The issuance of frequent notices of termination or layoff to an employee is considered a bad faith personnel action and makes these provisions inapplicable to the employee.ⁿ²⁹

No compensation is payable for a psychiatric injury that was substantially caused by a lawful, nondiscriminatory, good faith personnel action.ⁿ³⁰ The burden of proof rests with the party asserting the issue.ⁿ³¹

When a psychiatric injury claim is filed against an employer, and an application for adjudication of claim is filed by an employer or employee, the Division of Workers' Compensation must provide the employer with information concerning psychiatric injury prevention programs.ⁿ³²

An employee who is an inmate, or the family of the inmate on his or her behalf, is not entitled to compensation for a psychiatric injury sustained while the inmate was incarcerated.ⁿ³³

The California Supreme Court has held that compensable injuries may be physical, emotional, or both, so long as they

are disabling.ⁿ³⁴ For further discussion, *see* § 20.12[2].

[3] Injury to Reputation Not Covered

In *Howland v. Balma*,ⁿ³⁵ the court of appeal held that an action for libel or slander is outside the application of the workers' compensation system. In so holding, the court reasoned that the conditions of workers' compensation attach only when a *personal injury* arises out of and in the course of employment.ⁿ³⁶ The court then held that personal injury includes physical and mental suffering but does not include such injuries as damage to reputation. In support of its holding, the court quoted with approval the statement, "If the essence of the tort, in law, is non-physical, and if the injuries are of the usual nonphysical sort, with physical injury being at most added to the list of injuries as a makeweight, the [tort] suit should not be barred. But if the essence of the action is recovery for physical injury or death, the action should be barred even if it can be cast in the form of a normally non-physical tort."ⁿ³⁷

Legal Topics:

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

Workers' Compensation & SSDICompensabilityGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesGeneral OverviewWorkers' Compensation & SSDICoverageGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code* § 3208.

(n2)Footnote 2. *Lab. Code* § 3208.1; *Western Growers Ins. Co. v. Workers' Compensation Appeals Bd.* (1993) 16 Cal. App. 4th 227, 236, 20 Cal. Rptr. 2d 26 (employee who suffers from cumulative injury may invoke rights and benefits provided under workers' compensation laws if cumulative effects of repetitive events result in compensable injury, i.e., one resulting in lost wages or need for medical treatment); *see Beckstead v. Workers' Compensation Appeals Bd.* (1998) 60 Cal. App. 4th 787, 791, 71 Cal. Rptr. 2d 254 (WCAB abuses its discretion by refusing to consider cumulative trauma injury when employee, unrepresented by counsel, alleged specific rather than cumulative injury and misdated date of injury, and employers indisputably knew that employee suffered from cumulative injury caused by repetitive writing and completing orders).

(n3)Footnote 3. *D'Angona v. County of Los Angeles* (1980) 27 Cal. 3d 661, 664, 166 Cal. Rptr. 177, 613 P.2d 238; *Lab. Code* §§ 3600, 3602(a). *See also Alander v. Vaca Valley Hospital* (1996) 49 Cal. App. 4th 1298, 1304, 1307, 57 Cal. Rptr. 2d 40 (hospital employee who sustained nerve injury while undergoing treatment by hospital-employer for prior industrial injury, pursuant to hospital's protocol, was barred by exclusive remedy rule from pursuing tort action against employer).

(n4)Footnote 4. *D'Angona v. County of Los Angeles* (1980) 27 Cal. 3d 661, 664, 166 Cal. Rptr. 177, 613 P.2d 238 (case decided prior to amendment to *Lab. Code* § 3602, when suits were permitted against employer under dual-capacity doctrine).

(n5)Footnote 5. *Lab. Code* § 3602(b)(2).

(n6)Footnote 6. *Western Growers Insurance Co. v. Workers' Compensation Appeals Board* (1993) 16 Cal. App. 4th 227, 234-235, 20 Cal. Rptr. 2d 26 .

(n7)Footnote 7. *Georgia-Pacific Corp. v. Workers' Compensation Appeals Board* (1983) 144 Cal. App. 3d 72, 75, 192 Cal. Rptr. 643; *Baker v. Workers' Compensation Appeals Board* (1971) 18 Cal. App. 3d 852, 861, 96 Cal. Rptr. 279. For full discussion of recovery of workers' compensation benefits for mental and nervous disorders generally, *see* Hanna, California Law of Employee Injuries and Workers' Compensation, Vol. 1, Ch. 4.

(n8)Footnote 8. *See, e.g., Atascadero Unified School District v. Workers' Compensation Appeals Board* (2002)

98 Cal. App. 4th 880, 883-885, 120 Cal. Rptr. 2d 239 (psychiatric injury from workplace gossip about employee's extramarital affair with another employee is not compensable because injury did not arise out of employment); *Rodriguez v. Workers' Compensation Appeals Board* (1994) 21 Cal. App. 4th 1747, 1760, 27 Cal. Rptr. 2d 93 (psychiatric injury arising from employee's reaction to employer's discontinuation of vocational rehabilitation benefits is not a compensable consequence of employment); *Cooper v. Workers' Compensation Appeals Board* (1985) 173 Cal. App. 3d 44, 48-49, 218 Cal. Rptr. 783 (incorrect diagnosis and treatment for asbestos disease caused by exposure at work was held to be precipitating cause of applicant's psychiatric disorder).

(n9)Footnote 9. *See, e.g., Zurich Insurance Co. v. Workmen's Compensation Appeals Board* (1973) 9 Cal. 3d 848, 853, 109 Cal. Rptr. 211, 512 P.2d 843 (employee's back injuries initiated later psychoneurotic condition).

(n10)Footnote 10. *Baker v. Workers' Compensation Appeals Board* (1971) 18 Cal. App. 3d 852, 862, 96 Cal. Rptr. 279 .

(n11)Footnote 11. *Lab. Code* § 3208.3(b).

(n12)Footnote 12. *See Department of Corrections v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal. App. 4th 810, 815-816, 90 Cal. Rptr. 2d 716 . It seems unlikely that after *Garcia* an employee could establish that a psychiatric injury is compensable based on an honest misperception of job harassment, as in *Albertson's, Inc. v. Workers' Comp. Appeals Bd.* (1982) 131 Cal. App. 3d 308, 313-317, 182 Cal. Rptr. 304 (court upheld WCAB determination that worker had sustained cumulative psychic injury because of worker's honest misperception of job harassment, which interacted with a preexisting psychiatric condition, thereby causing job stress).

(n13)Footnote 12.1. *Sonoma State Univ. v. Workers' Compensation Appeals Board (Hunton)* (2006) 142 Cal. App. 4th 500, 503-506 (WCAB erred in concluding that although only 35 percent of applicant's permanent disability was work-related, she satisfied requirement of § 3208.3 because 100 percent of her adjustment disorder was industrially caused).

(n14)Footnote 13. *Georgia-Pacific Corp. v. Workers' Compensation Appeals Board* (1983) 144 Cal. App. 3d 72, 76, 192 Cal. Rptr. 643 .

(n15)Footnote 14. Former *Lab. Code* § 3208.3(b).

(n16)Footnote 15. *Lab. Code* § 3208.3(b)(1).

(n17)Footnote 15.1. *Lockheed Martin v. Workers' Compensation Appeals Board* (2002) 96 Cal. App. 4th 1237, 1240, 117 Cal. Rptr. 2d 865 .

(n18)Footnote 16. *See Department of Corrections v. Workers' Comp. Appeals Bd. (Garcia)* (1999) 76 Cal. App. 4th 810, 815-816, 90 Cal. Rptr. 2d 716 .

(n19)Footnote 16.1. *See Lab. Code* § 3208.3(b)

(n20)Footnote 17. *Sakotas v. Workers' Compensation Appeals Bd.* (2000) 80 Cal. App. 4th 262, 271-273, 95 Cal. Rptr. 2d 153 .

(n21)Footnote 17.1. *Pacific Gas & Electric Co. v. Workers' Compensation Appeals Board* (2004) 114 Cal. App. 4th 1174, 1180-1184, 8 Cal. Rptr. 3d 467 (three of four factors relied on by WCAB to find injuries compensable were invalid: generalized anxiety about employer's downsizing, losses in employer's stock prices in which employee was invested, and employee's concern over employer's future and his retirement funds; however, WCAB could reasonably conclude that employee's confrontations with angry, threatening or deceitful customers packed in large numbers in confining small office caused him specific and identifiable work-related stress).

(n22)Footnote 18. *Lab. Code § 3208.3(a)*.

(n23)Footnote 19. *Lab. Code § 3208.3(b)(2)*.

(n24)Footnote 19.1. *Lab. Code § 3208.3(b)(3)*.

(n25)Footnote 19.2. *See Lab. Code § 3208.3(h)*.

(n26)Footnote 20. *Verga v. Workers' Compensation Appeals Board (2008) 159 Cal. App. 4th 174, 178, 184-188, 70 Cal. Rptr. 3d 871*.

(n27)Footnote 20.1. *See Wal-Mart Stores v. Workers' Compensation Appeals Board (2003) 112 Cal. App. 4th 1435, 1438-1443, 5 Cal. Rptr. 3d 822* (employee who files workers' compensation claim seeking benefits for injury to psyche derived from effects of admittedly routine physical injury cannot recover unless employee has worked for employer for at least six months).

(n28)Footnote 20.2. *Wal-Mart Stores v. Workers' Compensation Appeals Board (2003) 112 Cal. App. 4th 1435, 1442, 5 Cal. Rptr. 3d 822* ("employment" does not include time until employee received workers' compensation claim form or time on disability leave).

(n29)Footnote 21. *Lab. Code § 3208.3(d)*; *Hansen v. Workers' Compensation Appeals Bd. (1993) 18 Cal. App. 4th 1179, 1184, 23 Cal. Rptr. 2d 30* (six-month employment requirement does not violate equal protection or due process).

(n30)Footnote 22. *Lab. Code § 3208.3(d)*.

(n31)Footnote 22.1. *Wal-Mart Stores, Inc. v. Workers' Compensation Appeals Board (2003) 112 Cal. App. 4th 1435, 1441 n. 9, 5 Cal. Rptr. 3d 822*; *Matea v. Workers' Compensation Appeals Board (2006) 144 Cal. App. 4th 1435, 1448, 51 Cal. Rptr. 3d 314*.

(n32)Footnote 22.2. *Matea v. Workers' Compensation Appeals Board (2006) 144 Cal. App. 4th 1435, 1445-1450, 51 Cal. Rptr. 3d 314* (worker carried his burden of showing by preponderance of evidence in light of entire record that he suffered compensable psychiatric injury as result of admitted leg injury during first six months of his employment resulting from rack of lumber falling on his left leg, where all lumber in rack falling into aisle and onto employee's leg causing injury to employee was uncommon, unusual, and totally unexpected event or occurrence).

(n33)Footnote 23. *Lab. Code § 3602*.

(n34)Footnote 24. *Lab. Code § 3208.3(d)*.

(n35)Footnote 25. *Lab. Code § 3208.3(e)*.

(n36)Footnote 26. *See Lab. Code § 5400 et seq.*

(n37)Footnote 27. *See Lab. Code §§ 5411, 5412*.

(n38)Footnote 28. *Lab. Code § 3208.3(g)*.

(n39)Footnote 29. *Lab. Code § 3208.3(g)*.

(n40)Footnote 30. *Lab. Code § 3208.3(h)*; *see, e.g., Northrop Grumman Corp. v. Workers' Compensation Appeals Board (2002) 103 Cal. App. 4th 1021, 1033-1035, 127 Cal. Rptr. 2d 285, 2002 Cal. App. LEXIS 5011* (workers' compensation judge's finding that accusation and investigation for allegedly racially discriminatory conduct resulting in

psychiatric injury was not lawful, nondiscriminatory, good-faith personnel action within meaning of *Lab. Code* § 3208.3(h) and was not supported by substantial evidence; investigation was mandated by law, and employer, faced with accusation by coworker that supervisor engaged in racial discrimination against subordinate, had legal obligation to investigate claim); *Bray v. Workers' Compensation Appeals Board* (1994) 26 Cal. App. 4th 530, 539-540, 31 Cal. Rptr. 2d 580 (employee not entitled to workers' compensation benefits for post-termination psychiatric injury due solely to his termination from employment and not to any pre-termination event).

(n41)Footnote 31. *Lab. Code* § 3208.3(h).

(n42)Footnote 32. *Lab. Code* § 3208.3(i).

(n43)Footnote 33. *Lab. Code* § 3208.3(j).

(n44)Footnote 34. See *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 753, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 .

(n45)Footnote 35. *Howland v. Balma* (1983) 143 Cal. App. 3d 899, 904-905, 192 Cal. Rptr. 286 .

(n46)Footnote 36. *Howland v. Balma* (1983) 143 Cal. App. 3d 899, 904-905, 192 Cal. Rptr. 286 .

(n47)Footnote 37. *Howland v. Balma* (1983) 143 Cal. App. 3d 899, 905, 192 Cal. Rptr. 286 (quoting from Larson's Workers' Compensation Law (Matthew Bender)); see also *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303, 801 P.2d 1054 (citing *Howland* with apparent approval).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 3. Conditions of Workers' Compensation

1-20 California Employment Law § 20.22

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.22 Requirement That Injury Arise Out of and in Course of Employment

[1] Generally

For workers' compensation to apply, an injury to a worker must (1) arise out of employment, and (2) arise in the course of employment.ⁿ¹ In addition, two of the conditions of compensation are that (1) at the time of the injury, the employee must be performing a service growing out of and incidental to his or her employment and be acting within the course of his or her employment,ⁿ² and (2) the injury must be proximately caused by the employment.ⁿ³ These criteria overlap a great deal. For example, the California Supreme Court, in discussing the meaning of the requirement that the injury "arise out of the employment," stated that this means that the injury must occur by reason of a condition or incident of the employment, which the Court explained means that the injury and employment must be linked in a causal fashion.ⁿ⁴ The Court further explained that the proximate cause requirement is not separate from the proximate cause requirement related to the injury arising out of the employment, but merely elaborates on it.ⁿ⁵ The Court stated that the requirement that the injury occur "in the course of the employment" refers to the time, place, and circumstances under which the injury occurs.ⁿ⁶ Many cases, in determining whether an injury is sufficiently connected with employment to be compensable under workers' compensation law, do not attempt to apply all of the statutory requirements noted above.ⁿ⁷

The determination whether an injury arises out of and in the course of the employment is normally an issue of fact.ⁿ⁸ However, when there is no real dispute about the facts, the issue becomes one of law,^{n8.1} so that a purported finding of fact is not binding on an appellate court,ⁿ⁹ nor need the court give deference to the finding of fact.^{n9.1}

[2] Injury Arising Out of Employment

This section discusses the workers' compensation law requirement that an injury arise out of employment and be proximately caused by the employment.ⁿ¹⁰ The term "arises out of employment" refers to the origin or cause of the injury.ⁿ¹¹ More particularly, it means "flowing from employment," so that an injury arises from employment if it occurs by reason of a condition or incident of the employment.ⁿ¹² Thus, the term "arise out of employment" generally refers to causal connection between the employment and the injury.ⁿ¹³

In order to meet the requirement that an injury arise out of employment, the employment must be a positive factor in influencing the course of the disease or accident producing the injury.ⁿ¹⁴ However, the employment need not be the sole cause of the injury.ⁿ¹⁵ The causal relation is sufficient as long as the employment is a contributing cause of the injury.ⁿ¹⁶ Thus, an injury or disease may be deemed to have been proximately caused by employment even though the personality of the employee was a major contributing factor.ⁿ¹⁷

Proximate causation in the context of workers' compensation law is broader than proximate causation as used in tort law.ⁿ¹⁸ Proximate cause is found, for example, if employment contributes to the cause of the injury because of "special exposure."ⁿ¹⁹

The place of injury and whether the employee is clearly within the course of employment may affect the issue of causation. A Supreme Court case has held that causation sufficient to bring an injury within the Workers' Compensation Act exists if employment brought the injured employee within the range of danger by requiring his or her presence on the premises of the employer at the time the peril struck.ⁿ²⁰ In *California Compensation & Fire Co. v. Workmen's Compensation Appeals Board*,ⁿ²¹ the Supreme Court stated that when an injury occurs on the employer's premises while the employee is in the course of his or her employment, the injury also arises out of the employment unless the connection is so remote from the employment that it is not an incident of it.

In *Transactron, Inc. v. Workers' Compensation Appeals Board*,ⁿ²² an employee was killed at work after her boyfriend followed her into the workplace, learned from a coemployee that the employee was in the restroom, proceeded to the restroom, and shot her. In denying workers' compensation coverage, the court held that the nature of the decedent's duties played no part in the assailant's intent to assault her and that the nature of her duties was not the proximate cause of her injury, for it merely provided a stage for the event. In *Murphy v. Workers' Compensation Appeals Board*,ⁿ²³ a case in which the employee was shot at work by her husband, the court found that her employment contributed to the injury in that the employer knew of the husband's plan to attack his wife at work and failed to warn the wife, and the wife's employment was a source of the husband's dissatisfaction with his wife. In a similar case, *California Compensation & Fire Co. v. Workmen's Compensation Appeals Board*,ⁿ²⁴ a woman's ex-husband devised an elaborate scheme to murder her by pretending to purchase a custom tablepad from his ex-wife's employer, because he knew his ex-wife would be sent out to his new apartment to take the necessary measurements. When she arrived at the apartment, the ex-husband murdered the woman and committed suicide. The Supreme Court held that the nature of the woman's work was a factor in her ex-husband's scheme and that, at the very least, it facilitated the assault and was a contributory cause of her death.ⁿ²⁵ In all three of these cases, the court suggested that the causation element was satisfied if there was some aspect of the employment that raised the level of the risk of harm to the employee. However, if a causal relationship between the employment and the injury exists, but it is remote, the injury is deemed outside the scope of workers' compensation.ⁿ²⁶ This reasoning is consistent with older case law that suggested that workers' compensation does not apply unless the employee was subjected to a special risk, due to the employment, which is beyond that suffered by the community at large.ⁿ²⁷

Effective January 1, 1998, every employer who is subject to the workers' compensation provisions of the Labor Code must give any employee who is a victim of a crime that occurred in the place of employment written notice of eligibility for workers' compensation for injuries, including psychiatric injuries, resulting from the crime.^{n27.1} The employer must provide this notice, either personally or by first-class mail, within one working day of the crime, or within one working day of the date the employer reasonably should have known of the crime.^{n27.2}

In *Western Airlines v. Workers' Compensation Appeals Board*,ⁿ²⁸ the court of appeal stated that there are three types of risks that can give rise to liability of an employer for an employee's injuries. The three risks are industrial risk, personal risk, and neutral risk. The analysis of these types of risks is often used in cases involving an assault by a third person on an employee. Whether a risk is personal depends on whether the risk was related solely to the employee's person and was without any connection to the employer's business.ⁿ²⁹ An industrial risk is one that is related to the

employment. If the risk is neither personal in this sense nor related to the employment, then the risk is considered neutral. Neutral risks include unknown risks.ⁿ³⁰ Thus, for example, in *Western Airlines*, during a layover, a flight attendant had met and gone out with a man who subsequently raped her. The court held that absent evidence that the man had intended to rape a flight attendant or harm a Western Airlines employee, his motive was strictly personal for purposes of workers' compensation law; therefore, the injury did not arise out of the employment.ⁿ³¹

[3] Injury Occurring in Course of Employment

"Course of employment" generally refers to the time, place, and circumstances of the injury.ⁿ³² For an injury to occur within the course of employment, the employee must be acting within the scope of his or her authority or assignment, at a time within the period of assignment, and at a place where he or she may reasonably be for that purpose.ⁿ³³

Although *Labor Code Section 3600* expressly requires as a condition of compensation that at the time of the injury the employee must be performing a service growing out of and incidental to his or her employment, case law holds that recovery of compensation is not conditional on the employee's rendering service to the employer at the time of the injury.ⁿ³⁴ If the injury to an employee results from a danger to which the employee is exposed as a part of the particular employment, the employee will be deemed within the course of employment.ⁿ³⁵ Thus, courts often phrase the issue as whether at the time of the injury the employee was involved in an activity that was an incident of employment.ⁿ³⁶ For example, a person attending night school at the encouragement of his or her employer has been held to be within the course of employment.ⁿ³⁷ Other courts phrase the issue as whether or not an act or activity is within the reasonable contemplation of employment.ⁿ³⁸

The status of an employee acting in the course of employment is not destroyed by the fact that he or she may be pursuing a dual purpose. If the employee is carrying out some duty or right in connection with employment, the fact that he or she combines it with a personal object does not take the employee outside the course of employment.ⁿ³⁹ The combination of a personal act performed outside of regular working hours and the performance of acts in furtherance of the employer's business does not defeat a finding that the employee was acting in the course of his or her employment.^{n39.1}

An employer may limit the scope of an employee's duties so that if he or she attempts to perform tasks that have been prohibited by the employer it will take the employee outside the scope of employment.ⁿ⁴⁰ Cases have distinguished between an unauthorized departure from the course of employment and the performance of a duty in the course of employment in an unauthorized manner.ⁿ⁴¹ An employee who is injured while performing his or her assigned duties in an unauthorized or prohibited manner does not step outside the scope of employment.ⁿ⁴²

Criminal conduct will not take an employee outside the course of employment if the employee is engaged at the time in performing a task for the employer.ⁿ⁴³ For example, in one case,ⁿ⁴⁴ a delivery man ran a red light while driving on company business. He was then pursued by police, an accident occurred, and the employee was injured. The employee was awarded compensation. The court distinguished between an unauthorized departure from the course of employment and the performance of duties in an unauthorized manner. The court observed that an employee's personal purpose at the time of injury is irrelevant so long as he or she is engaged generally in performing a task for the employer.ⁿ⁴⁵ However, if an employee engages in criminal conduct on the job without directly or indirectly serving the employer, even if only partially, the employee will be deemed to be acting outside the course of employment.ⁿ⁴⁶ An employee brought a claim for workers' compensation benefits for stress relating to accusations by the employer that he had forged customers' signatures on contracts. The court held that the key issue was whether or not the employee had actually committed the forgeries. If he had not, the psychiatric condition of the employee would have resulted from his legitimate work conduct, and the injury would have occurred within the course of employment. If he had committed the forgeries, he would not have been directly or indirectly serving his employer, and accordingly, the injury he sustained would not have been a consequence of his employment but incidental to his criminal conduct.ⁿ⁴⁷

The issue of whether an employee is within the course of employment often requires the application of the going and coming rule, which is discussed in [4], *below*.

[4] Going and Coming Rule

[a] General Rule

The course of employment normally commences when the employee arrives on the premises of the employer for the purposes of immediately commencing work and terminates when the employee ceases work and leaves the premises.ⁿ⁴⁸ One guide to interpreting the course of employment is the "going and coming rule," which precludes application of the Workers' Compensation Act to injuries suffered during the course of a local commute to a fixed place of business at fixed hours, in the absence of exceptional circumstances.ⁿ⁴⁹

As a general rule, the "course of employment" does not begin until an employee enters the employer's premises. Prior to entry, the rule normally precludes recovery of workers' compensation benefits; after entry, the injury is generally presumed compensable as arising in the course of employment.ⁿ⁵⁰ However, if the employee has arrived at work but is barred from entry, the going and coming rule does not apply; that is, the employee is deemed to have arrived at work and commenced the "course of employment."ⁿ⁵¹

For purposes of applying the going and coming rule, the employer's premises include the parking lot as well as plant or office space; and once the employee has reached the premises, employment is not interrupted by crossing public property while traveling from one part of the premises to another.ⁿ⁵² The scope of an employer's premises may depend on the nature of the job. For example, in the case of delivery personnel or traveling salespersons, it may include the whole of the delivery route or sales territory.ⁿ⁵³

[b] Exceptions

An employee will be deemed outside the course of employment if injured outside the boundaries of the employer's premises, unless one of the exceptions to the going and coming rule is satisfied.ⁿ⁵⁴ Under the "special risk" exception to the going and coming rule, if an employee, prior to entry on the work premises, suffers an injury from a special risk causally related to employment, the injury is compensable under workers' compensation law. The fact that an injury occurs in a public area and the danger is one to which the public at large is exposed does not preclude a finding of a causal relationship between the accident and employment if the danger is one to which the employee, by reason of and in connection with his or her employment, is subjected peculiarly or to an abnormal degree.ⁿ⁵⁵ In other words, the special-risk exception applies if (1) but for the employment the employee would not have been at the location where the injury occurred, and (2) the risk is either distinctive in nature or quantitatively greater than risks common to the public.ⁿ⁵⁶

The "special mission" exception to the going and coming rule provides that an injury suffered by an employee during his or her regular commute is compensable if the employee was also performing a special mission for the employer. The employee's conduct is special if it is "extraordinary in relation to routine duties, not outside the scope of employment."ⁿ⁵⁷ A special mission may occur when an employee makes a regular trip to work at a special timeⁿ⁵⁸ or makes an extra trip to work in addition to his or her ordinary commute.ⁿ⁵⁹ Although special missions are normally requested by the employer,ⁿ⁶⁰ it has been held that when an employee engages in a mission or errand that incidentally or indirectly contributes to the service and benefit of the employer, the special-mission exception to the going and coming rule still applies.ⁿ⁶¹ Automobile accidents that occur while the employee is commuting to work are normally outside the scope of employment. However, if it is an express or implied condition of employment that the employee bring a car to work for use on the job and the employee is involved in an accident while driving his or her car to work, then the accident occurred within the course of employment and the going and coming rule does not apply.ⁿ⁶² Furthermore, when an employer has come to expect that an employee will bring a vehicle to work for use on the job and

reimburses the employee for mileage, the employee's commute to work in the vehicle is within the course of employment.ⁿ⁶³

Although traveling between home and work is generally covered by the going and coming rule, if the employee's home becomes a second business-situs, injuries incurred while traveling between home and work are within the course of employment.ⁿ⁶⁴ However, the "home as a second job site" exception to the going and coming rule does not apply unless the employer requires that work be done at home as a condition of employment.ⁿ⁶⁵ It does not apply when the work is done at home merely for the convenience of the employee.ⁿ⁶⁶ Thus, white-collar professionals such as teachers, who often take work home rather than staying late at their offices, are outside the "home as a second job site" exception to the going and coming rule.ⁿ⁶⁷

An injury to an employee after the employee has concluded a business trip and continues on with personal travel does not come within "special mission" exception to the going and coming rule.^{n67.1}

[5] Time and Place of Injury

[a] Generally

As a general rule, an off-premises injury is within the course of employment if sustained while the employee is conducting those activities expressly or impliedly authorized by the employment contract.ⁿ⁶⁸ If the employee is combining his or her own business with that of the employer, or attending to both at substantially the same time, no inquiry will be made about which business he or she was actually engaged in at the time of the injury, unless it clearly appears that the employee could not have been directly or indirectly serving the employer.ⁿ⁶⁹ If the employment contract contemplates that the employee work solely on the premises of the employer, an injury elsewhere is ordinarily outside the coverage of workers' compensation unless a special connection with employment is shown.ⁿ⁷⁰ When an employment contract contemplates the rendition of service off the premises of the employer, workers' compensation coverage depends on whether the employee, at the time of the injury, is engaged in an anticipated activity within the period of his or her employment at a place he or she may reasonably be for that purpose.ⁿ⁷¹ If the employee's duties require the use of the streets or highways, for example, an injury sustained in connection with such use is compensable.ⁿ⁷²

An injury on the premises of the employer may be within the course of employment if, although it occurs before work has commenced or after work hours, the margin of time is a reasonable one and the employee is on the premises for a purpose contemplated by the employment or required by the employer.ⁿ⁷³

[b] Commercial Traveler Rule

Under the "commercial traveler" rule, an employee is regarded as acting within the course of employment during the entire period of travel on the employer's business, and his or her acts in traveling and procuring food and shelter are deemed incidents of employment.ⁿ⁷⁴ The rule does not embrace all the activities of a commercial traveler. Injuries sustained while pursuing purely personal activities are not covered.ⁿ⁷⁵ Nor does the "commercial traveler" rule apply to injuries incurred during business travel if the injuries arise from treatment for a preexisting, nonoccupational medical condition.^{n75.1} Nevertheless, the scope of the commercial traveler rule is broad and protects the employee continuously except during a distinct departure on a personal errand.ⁿ⁷⁶

[c] Personal Comfort Doctrine

Under the personal comfort doctrine, acts that are necessary to the employee's convenience, life, and comfort while at work, although strictly personal to the employee, are incidental to the employee's services; and an injury sustained in the performance of such acts is within the coverage of workers' compensation.ⁿ⁷⁷ Thus, injuries during work intermissions such as breaks or certain meal periods occurring on or near the employer's premises may be deemed to be in the course

of employment.ⁿ⁷⁸ However, if the employer has specifically prohibited the activity, the employee's injury while performing the act will not come within the personal comfort doctrine.^{n78.1} In *Mission Insurance Co. v. Workers' Compensation Appeals Board*,ⁿ⁷⁹ however, it was held that an employee who was injured off the employer's premises during lunch hour was not within the course of employment when she was not compensated during lunch hour, reimbursed for her expenses, or acting at the request of the employer. The rule now appears to be established that an employee injured off the employer's premises during a scheduled meal break for which he or she does not receive compensation is outside the course of employment.ⁿ⁸⁰

A court of appeal has held that a salaried employee was within the course of employment when she was injured during an "authorized but unscheduled" meal break.ⁿ⁸¹

The personal comfort doctrine is not strictly limited to injuries suffered on the employer's premises, and whether it applies depends on whether the acts of the employee are helpful to the employer and aid in efficient job performance. For example, a worker who arrived at work early and who was injured while putting some oil in his car while waiting for work premises to open was held to be within the personal convenience doctrine.ⁿ⁸²

The limit of the doctrine is reached when the acts of the employee are found to be departures effecting a temporary abandonment of employment.ⁿ⁸³ If an act is outside the reasonable contemplation of employment, it is outside the course of the employment.ⁿ⁸⁴

■ PRACTICE TIP--EMPLOYER'S PERSPECTIVE:

As telecommuting increases, employers should consider the additional risks assumed when employees work from their homes. That will put the home as the place of employment and, when an injury happens at home, disputes will arise under the personal comfort doctrine. *Commentary by John W. Miller.*

[d] Bunkhouse Rule

The "bunkhouse rule" is merely an extension of the rule that when an employee is injured on the employer's premises as contemplated by the employment contract, he or she is entitled to workers' compensation benefits for injuries received during reasonable and foreseeable use of the premises.ⁿ⁸⁵ The bunkhouse rule applies when an employment contract contemplates, or work necessity requires that, the employee live or board on the premises of the employer.ⁿ⁸⁶ One court has stated that injuries to employees in a "bunkhouse" are not per se compensable by workers' compensation. There must be some other employment connection or contribution before a bunkhouse injury is within the scope of workers' compensation coverage.ⁿ⁸⁷ If a third party assaults and injures an employee while the employee is in the bunkhouse, and the third party acted out of purely personal motives, such as racism, the injury is not covered by workers' compensation. If, however, the employee can show that there was some employment connection or contribution, then the injury is compensable.ⁿ⁸⁸ The "bunkhouse rule" may be inapplicable to a person living in employer-furnished quarters, if the person is expressly excluded from the definition of the term "employee" by statute. For example, the bunkhouse rule was inapplicable to an injured worker who worked as a cook at a ski resort and resided in apartments owned by her employer. Since the worker was injured while skiing on her day off, she was expressly precluded from recovering workers' compensation benefits under *Labor Code Section 3352(f)*.ⁿ⁸⁹

[e] Collecting Paycheck

An injury to an employee that occurs while the employee is on the premises of the employer for the purpose of picking up a paycheck is within the coverage of workers' compensation if it occurs during working hours or shortly thereafter but not when the employee has returned to work several hours after normal working hours solely for the purpose of picking up a paycheck.ⁿ⁹⁰ Although injuries sustained by an employee as he or she proceeds to a place specified by the employer for collecting a paycheck are normally within the coverage of the workers' compensation system, an employee is not acting within the course of employment when picking up a paycheck at a time and place specified by the

employee for his or her own convenience.ⁿ⁹¹

[6] Work-Related Social Activities

Under *Labor Code Section 3600(a)(9)*, injuries arising out of voluntary participation in an off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties are outside the application of the Workers' Compensation Act.ⁿ⁹² However, if the participation by the employee is expressly or impliedly required by the employer or is a "reasonable expectancy" of employment, then it is within the scope of workers' compensation law.ⁿ⁹³ The "reasonable expectancy" requirement of *Labor Code Section 3600(a)(9)* is identical to the "arising out of" and "in the course of" requirements of *Labor Code Section 3600(a), (a)(2)-(3)*.^{n93.1} The courts have established a two-prong test for determining whether an injury meets the requirements of *Labor Code Section 3600(a)(9)*. The employee must show (1) that he or she subjectively believed his or her participation in the activity was expected by the employer, and (2) that such a belief was objectively reasonable.ⁿ⁹⁴ General assertions that the employer expects an employee to stay in good physical condition and that the employer benefits from the employee's doing so are not sufficient for worker's compensation coverage.ⁿ⁹⁵

Legal Topics:

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

Workers' Compensation & SSDI
Compensability Course of Employment
General Overview
Workers' Compensation & SSDI
Compensability Injuries
General Overview
Workers' Compensation & SSDI
Coverage
General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 3600(a)*.

(n2)Footnote 2. *Lab. Code § 3600(a)(2)*.

(n3)Footnote 3. *Lab. Code § 3600(a)(3)*.

(n4)Footnote 4. *Maher v. Workers' Compensation Appeals Board* (1983) 33 Cal. 3d 729, 733-734, 190 Cal. Rptr. 904, 661 P.2d 1058 .

(n5)Footnote 5. *Maher v. Workers' Compensation Appeals Board* (1983) 33 Cal. 3d 729, 733-734 n.3, 190 Cal. Rptr. 904, 661 P.2d 1058 .

(n6)Footnote 6. *Maher v. Workers' Compensation Appeals Board* (1983) 33 Cal. 3d 729, 733, 190 Cal. Rptr. 904, 661 P.2d 1058 . For a comprehensive treatment of the history as well as the current status of the rules regarding the issue of whether an injury arises out of and in the course of employment, see Hanna, California Law of Employee Injuries and Workers' Compensation, Vol. 1, Ch. 4.

(n7)Footnote 7. See Hanna, California Law of Employee Injuries and Workers' Compensation, Vol. 1, Ch. 4, § 4.05[1].

(n8)Footnote 8. *Industrial Indemnity Exchange v. Industrial Accident Commission* (1945) 26 Cal. 2d 130, 136, 156 P.2d 926 .

(n9)Footnote 8.1. *Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal. App. 4th 346, 353, 115 Cal. Rptr. 2d 503 ; *Ezzy v. Workers' Compensation Appeals Board* (1983) 146 Cal. App. 3d 252, 259, 194 Cal. Rptr. 90 .

(n10)Footnote 9. *Ezzy v. Workers' Compensation Appeals Board* (1983) 146 Cal. App. 3d 252, 259, 194 Cal. Rptr. 90 .

(n11)Footnote 9.1. *Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal. App. 4th 346, 353, 115 Cal. Rptr. 2d 503 .

(n12)Footnote 10. *See Lab. Code § 3600; see also* discussion in [1], above, concerning the relationship between the "arising out of employment" requirement and the requirement of proximate causation.

(n13)Footnote 11. *Cooper v. Workers' Compensation Appeals Board* (1985) 173 Cal. App. 3d 44, 48-49, 218 Cal. Rptr. 783 (psychiatric injury resulting from misdiagnosis of asbestos disease arose out of employment, because but for exposure to asbestos at work, worker would not have been referred to medical examination); *Argonaut Insurance Co. v. Workmen's Compensation Appeals Board* (1967) 247 Cal. App. 2d 669, 677-678, 55 Cal. Rptr. 810 .

(n14)Footnote 12. *Employers Mutual Liability Insurance Co. v. Industrial Accident Commission* (1953) 41 Cal. 2d 676, 679, 263 P.2d 4 .

(n15)Footnote 13. *Rogers v. Workers' Compensation Appeals Board* (1985) 172 Cal. App. 3d 1195, 1200, 218 Cal. Rptr. 662 . *See Cal. State. Auto. Ass'n Inter-Ins. Bureau v. Workers' Compensation Appeals Board* (2006) 137 Cal. App. 4th 1040, 1043-1048, 40 Cal. Rptr. 3d 743 (unlicensed painter hired to paint homeowners' living and dining rooms and kitchen was not their employee for workers' compensation purposes, where painter had not worked at least 52 hours and earned at least \$ 100 during 90 days preceding date of injury, so that he was excluded from coverage under *Lab. Code § 3352(h)*).

(n16)Footnote 14. *Bingham v. Workmen's Compensation Appeals Board* (1968) 261 Cal. App. 2d 842, 848, 68 Cal. Rptr. 410 .

(n17)Footnote 15. *Guerra v Workers' Compensation Appeals Board* (1985) 168 Cal. App. 3d 195, 199-200, 214 Cal. Rptr. 58 .

(n18)Footnote 16. *Guerra v Workers' Compensation Appeals Board* (1985) 168 Cal. App. 3d 195, 199-200, 214 Cal. Rptr. 58 (self-inflicted burn injuries found to be proximately caused by employment, when depression resulting from prior work-related back injury was contributing factor in causing worker to inflict injuries on self); *State Comp. Insurance Fund v. Industrial Accident Commission* (1959) 176 Cal. App. 2d 10, 17-20, 1 Cal. Rptr. 73 (when worker had sustained injury to eye in industrial accident, subsequent injury to hand while using a power saw at home was proximately caused by employment because injury to eye contributed to second injury).

(n19)Footnote 17. *Bingham v. Workmen's Compensation Appeals Board* (1968) 261 Cal. App. 2d 842, 848-849, 68 Cal. Rptr. 410 .

(n20)Footnote 18. *State Compensation Insurance Fund v. Industrial Accident Commission* (1959) 176 Cal. App. 2d 10, 17-18, 1 Cal. Rptr. 73 ; *Cooper v. Workers' Compensation Appeals Board* (1985) 173 Cal. App. 3d 44, 48-49, 218 Cal. Rptr. 783 ; *Rodgers v. Workers' Compensation Appeals Board* (1985) 168 Cal. App. 3d 567, 574-575, 214 Cal. Rptr. 303 (employment as proximate cause of injury if causal connection exists between employment and injury). *See also Bailey v. Filco, Inc.* (1996) 48 Cal. App. 4th 1552, 1562, 56 Cal. Rptr. 2d 333 (workers' compensation cases not controlling precedent when liability is predicated upon respondeat superior principles).

(n21)Footnote 19. *Warner v. Industrial Accident Commission* (1935) 10 Cal. App. 2d 375, 376, 51 P.2d 897 ; *General Insurance Co. v. Workers' Compensation Appeals Board* (1976) 16 Cal. 3d 595, 600-601, 128 Cal. Rptr. 417, 546 P.2d 1361 .

(n22)Footnote 20. *Madin v. Industrial Accident Commission* (1956) 46 Cal. 2d 90, 94, 292 P.2d 892 .

(n23)Footnote 21. *California Compensation & Fire Co. v. Workmen's Compensation Appeals Board* (1968) 68 Cal. 2d 157, 160, 65 Cal. Rptr. 155, 436 P.2d 67 .

(n24)Footnote 22. *Transactron, Inc. v. Workers' Compensation Appeals Board* (1977) 68 Cal. App. 3d 233, 239, 137 Cal. Rptr. 142 .

(n25)Footnote 23. *Murphy v. Workers' Compensation Appeals Board* (1978) 86 Cal. App. 3d 996, 1000-1002, 150 Cal. Rptr. 561 .

(n26)Footnote 24. *California Compensation & Fire Co. v. Workmen's Compensation Appeals Board* (1968) 68 Cal. 2d 157, 160, 65 Cal. Rptr. 155, 436 P.2d 67 .

(n27)Footnote 25. *California Compensation & Fire Co. v. Workmen's Compensation Appeals Board* (1968) 68 Cal. 2d 157, 160, 65 Cal. Rptr. 155, 436 P.2d 67 .

(n28)Footnote 26. *See California Compensation & Fire Co. v. Workmen's Compensation Appeals Board* (1968) 68 Cal. 2d 157, 160-161, 65 Cal. Rptr. 155, 436 P.2d 67 .

(n29)Footnote 27. *See Warner v. Industrial Accident Commission* (1935) 10 Cal. App. 2d 375, 376, 51 P.2d 897 (holding that injury resulting from bad weather may be compensable if employee incurred additional exposure to bad weather as result of employment); *see also* discussion of the "special risk" exception to the "going and coming rule," discussed in [4], *below*.

(n30)Footnote 27.1. *Lab. Code* § 3553.

(n31)Footnote 27.2. *Lab. Code* § 3553.

(n32)Footnote 28. *Western Airlines v. Workers' Compensation Appeals Bd.* (1984) 155 Cal. App. 3d 366, 369, 202 Cal. Rptr. 74 .

(n33)Footnote 29. *Western Airlines v. Workers' Compensation Appeals Bd.* (1984) 155 Cal. App. 3d 366, 370, 202 Cal. Rptr. 74 .

(n34)Footnote 30. *Western Airlines v. Workers' Compensation Appeals Bd.* (1984) 155 Cal. App. 3d 366, 370, 202 Cal. Rptr. 74 .

(n35)Footnote 31. *Western Airlines v. Workers' Compensation Appeals Bd.* (1984) 155 Cal. App. 3d 366, 370, 202 Cal. Rptr. 74 .

(n36)Footnote 32. *Maher v. Workers' Compensation Appeals Bd.* (1983) 33 Cal. 3d 729, 733, 190 Cal. Rptr. 904, 661 P.2d 1058 .

(n37)Footnote 33. *Robbins v. Yellow Cab Co.* (1948) 85 Cal. App. 2d 811, 813, 193 P.2d 956 ; *see Maher v. Workers' Compensation Appeals Bd.* (1983) 33 Cal. 3d 729, 733-734, 190 Cal. Rptr. 904, 661 P.2d 1058 (causal connection between employment and injury required, but connection need not be sole cause as long as it is contributory cause; employee acts in course of employment when employee takes reasonable actions which the contract expressly or impliedly permits); *see also Mason v. Lake Dolores Group* (2004) 117 Cal. App. 4th 822, 832-835, 11 Cal. Rptr. 3d 914 (negligence action against employer by employee injured in unauthorized use of employer's water slide was not barred by workers' compensation exclusivity rule, because use of water slide was not reasonably contemplated by nor causally connected to his employment or his employment duties, he was not performing service growing out of and incidental to his employment at time he was injured, and he was not doing any reasonable things his employment contract expressly or impliedly permitted him to do); *Ralphs Grocery Co. v. Workers' Compensation Appeals Bd.* (1997) 58 Cal. App. 4th 647, 652, 68 Cal. Rptr. 2d 161 (1997) (injury resulting from employer's back-to-work telephone call to employee at employee's home is not in course and scope of employment).

(n38)Footnote 34. *Heaton v. Kerlan* (1946) 27 Cal. 2d 716, 720, 166 P.2d 857 (injury that flows from prior

employment-related injury within the course of employment despite fact that employee was not performing service at time of aggravation); *Bethlehem Steel Co. v. Industrial Accident Comm'n* (1945) 70 Cal. App. 2d 382, 388-389, 161 P.2d 59 .

(n39)Footnote 35. *California Casualty Indem. Exchange v. Industrial Acci. Com.* (1942) 21 Cal. 2d 461, 465-466, 132 P.2d 815 (employee injured on way to work in company-owned auto was within course of employment).

(n40)Footnote 36. *Mitchell v. Hizer* (1977) 73 Cal. App. 3d 499, 507-508, 140 Cal. Rptr. 790 .

(n41)Footnote 37. *Dimmig v. Workmen's Compensation Appeals Bd.* (1972) 6 Cal. 3d 860, 868-869, 101 Cal. Rptr. 105, 495 P.2d 433 .

(n42)Footnote 38. See *Employers' Liability Assurance Corp. v. Industrial Accident Comm'n* (1940) 37 Cal. App. 2d 567, 573, 99 P.2d 1089 ; *Satchell v. Industrial Accident Comm'n* (1949) 94 Cal. App. 2d 473, 477, 210 P.2d 867 (employee who drank poison thinking it was whiskey held within course of employment in situation where employer hadn't prevented employee's drinking at work though aware of it).

(n43)Footnote 39. *Mitchell v. Hizer* (1977) 73 Cal. App. 3d 499, 507, 140 Cal. Rptr. 790 .

(n44)Footnote 39.1. *Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal. App. 4th 346, 354, 115 Cal. Rptr. 2d 503 (fabric store employee who came to store on day off to sign condolence card and contribute money, who was injured assisting fellow employees by holding up falling shelf, was injured in course and scope of employment because she acted in furtherance of employer's business, did no more than reasonable employer would expect of responsible employee, and engaged in activity incidental to her employment, i.e., protecting employer's assets); see *Laing v. Occidental Life Ins. Co.* (1966) 244 Cal. App. 2d 811, 816-817, 53 Cal. Rptr. 681 (in determining whether plant manager who undertook assistance with repairs on plant premises was injured in course of employment, fact he was on his way to baseball game and had not planned to work on day of injury was immaterial, because he acted in capacity as employee for benefit of employer); *J.J. Newberry Co. v. Continental Cas. Co.* (1964) 229 Cal. App. 2d 728, 729, 731-732, 40 Cal. Rptr. 509 (store manager was injured in scope of his employment and in custodial capacity when he returned to store after hours to make personal phone call in violation of orders, investigated light in stockroom, and suffered attack by burglars); *Scott v. Pacific Coast Borax Co.* (1956) 140 Cal. App. 2d 173, 176, 179-182, 294 P.2d 1039 (gas station employee who returned to work after hours for personal reasons and was injured assisting coworker fix gas pump sustained injuries in course of employment).

(n45)Footnote 40. *San Francisco & S. R. Co. v. Industrial Acci. Com.* (1927) 201 Cal. 597, 599-600, 258 P. 86 ; *Auto Lite Battery Corp. v. Industrial Accident Comm'n* (1947) 77 Cal. App. 2d 629, 631, 176 P.2d 62 .

(n46)Footnote 41. *Pacific Telephone & Telegraph Co. v. Workers' Compensation Appeals Bd.* (1980) 112 Cal. App. 3d 241, 245, 169 Cal. Rptr. 285 .

(n47)Footnote 42. *Pacific Telephone & Telegraph Co. v. Workers' Compensation Appeals Bd.* (1980) 112 Cal. App. 3d 241, 245, 169 Cal. Rptr. 285 ; *Williams v. Workmen's Compensation Appeals Bd.* (1974) 41 Cal. App. 3d 937, 940-942, 116 Cal. Rptr. 607 ; *Auto Lite Battery Corp. v. Industrial Accident Comm'n* (1947) 77 Cal. App. 2d 629, 631-632, 176 P.2d 62 .

(n48)Footnote 43. See *Westbrooks v. Workers' Compensation Appeals Bd.* (1988) 203 Cal. App. 3d 249, 253, 252 Cal. Rptr. 26 (bus driver convicted of reckless driving while on assigned run for employer did not take him outside course of employment so as to deprive him of workers' compensation benefits for emotional injury sustained in near-accident resulting from reckless driving); *Williams v. Workmen's Compensation Appeals Board* (1974) 41 Cal. App. 3d 937, 940-942, 116 Cal. Rptr. 607 (employee on delivery mission injured after high-speed chase in which he was attempting to outrun police was within course of employment).

(n49)Footnote 44. *Williams v. Workmen's Compensation Appeals Board* (1974) 41 Cal. App. 3d 937, 940-942, 116 Cal. Rptr. 607 .

(n50)Footnote 45. *Williams v. Workmen's Comp. Appeals Board* (1974) 41 Cal. App. 3d 937, 942, 116 Cal. Rptr. 607 .

(n51)Footnote 46. *Pacific Telephone & Telegraph Co. v. Workers' Compensation Appeals Board* (1980) 112 Cal. App. 3d 241, 246-247, 169 Cal. Rptr. 285 .

(n52)Footnote 47. *Pacific Telephone & Telegraph Co. v. Workers' Compensation Appeals Board* (1980) 112 Cal. App. 3d 241, 246-247, 169 Cal. Rptr. 285 .

(n53)Footnote 48. *General Insurance Co. v. Workers' Compensation Appeals Board* (1976) 16 Cal. 3d 595, 600-601, 128 Cal. Rptr. 417, 546 P.2d 1361 ; *California Casualty Indemnity Exchange v. Industrial Accident Commission* (1943) 21 Cal. 2d 751, 754, 135 P.2d 158 ; *Judson Mfg. Co. v. Industrial Accident Commission* (1919) 181 Cal. 300, 302, 184 P. 1 ; but see *State Department of Institutions v. Industrial Accident Commission* (1941) 46 Cal. App. 2d 439, 441-442, 116 P.2d 79 (suggesting that employee remaining indefinitely on work premises after hours may be outside course of employment).

(n54)Footnote 49. *Hinojosa v. Workmen's Compensation Appeals Board* (1972) 8 Cal. 3d 150, 158-159, 104 Cal. Rptr. 456, 501 P.2d 1176 ; cf. *Church v. Arko* (1977) 75 Cal. App. 3d 291, 299-300, 142 Cal. Rptr. 92 (criticizing use of respondeat superior tort cases and workers' compensation cases interchangeably in deciding going and coming issues) and *Bailey v. Filco, Inc.* (1996) 48 Cal. App. 4th 1552, 1562, 56 Cal. Rptr. 2d 333 (workers' compensation cases not controlling precedent when liability is predicated upon respondeat superior principles) with *Harris v. Trojan Fireworks Co.* (1981) 120 Cal. App. 3d 157, 162-163, 174 Cal. Rptr. 452 (approving use of workers' compensation cases and tort cases interchangeably); see also *Santa Rosa Junior College v. Workers' Compensation Appeals Board* (1985) 40 Cal. 3d 345, 352, 220 Cal. Rptr. 94, 708 P.2d 673 (noting difficulties in applying going and coming rule); *Aetna Casualty & Surety Co. v. Workers' Compensation Appeals Board* (1986) 187 Cal. App. 3d 922, 927, 232 Cal. Rptr. 257 ; see also Lab. Code § 3600.8 (applying "going and coming" rule to employees who participate in alternative commute programs).

(n55)Footnote 50. See, e.g., *Pacific Indemnity Co. v. Industrial Accident Commission* (1946) 28 Cal. 2d 329, 336, 170 P.2d 18 .

(n56)Footnote 51. *Price v. Workers' Compensation Appeals Board* (1984) 37 Cal. 3d 559, 568-569, 209 Cal. Rptr. 674, 693 P.2d 254 .

(n57)Footnote 52. *Lewis v. Workers' Compensation Appeals Board* (1975) 15 Cal. 3d 559, 563, 125 Cal. Rptr. 353, 542 P.2d 225 .

(n58)Footnote 53. *Makins v. Industrial Accident Commission* (1926) 198 Cal. 698, 704, 247 P. 202 .

(n59)Footnote 54. *General Insurance Co. v. Workers' Compensation Appeals Board* (1976) 16 Cal. 3d 595, 598, 128 Cal. Rptr. 417, 546 P.2d 1361 ; *Freire v. Matson Navigation Co.* (1941) 19 Cal. 2d 8, 11-13, 118 P.2d 809 (although means of access to employment not on premises of employer, employee injured because of special risk created by using such access is within course of employment).

(n60)Footnote 55. *General Insurance Co. v. Workers' Compensation Appeals Board* (1976) 16 Cal. 3d 595, 600-601, 128 Cal. Rptr. 417, 546 P.2d 1361 ; *Lefebvre v. Workers' Compensation Appeals Board* (1980) 106 Cal. App. 3d 745, 749, 165 Cal. Rptr. 246 .

(n61)Footnote 56. *Parks v. Workers' Compensation Appeals Board* (1983) 33 Cal. 3d 585, 590, 190 Cal. Rptr.

158, 660 P.2d 382 (schoolteacher who was assaulted in her car just outside school premises while stalled in traffic blocked by school children was within special-risk exception); *see also Johnson v. Stratlaw, Inc.* (1990) 224 Cal. App. 3d 1156, 1162-1164, 274 Cal. Rptr. 363 (special risk exception applicable when minor employee died in automobile accident on way home from work after being required to work beyond statutorily prescribed hours for minors).

(n62)Footnote 57. *General Insurance Co. v. Workers' Compensation Appeals Board* (1976) 16 Cal. 3d 595, 601, 128 Cal. Rptr. 417, 546 P.2d 1361 .

(n63)Footnote 58. *Schreifer v. Industrial Accident Commission* (1964) 61 Cal. 2d 289, 295, 38 Cal. Rptr. 352, 391 P.2d 832 ; *L.A. Jewish Community Council v. Industrial Accident Commission* (1949) 94 Cal. App. 2d 65, 69, 209 P.2d 991 .

(n64)Footnote 59. *State Compensation Insurance Fund v. Industrial Accident Commission* (1928) 89 Cal. App. 197, 199-200, 264 P.514 .

(n65)Footnote 60. *See General Insurance Co. v. Workers' Compensation Appeals Board* (1976) 16 Cal. 3d 595, 601, 128 Cal. Rptr. 417, 546 P.2d 1361 .

(n66)Footnote 61. *Shell Oil Co. v. Industrial Accident Commission* (1962) 199 Cal. App. 2d 426, 428, 18 Cal. Rptr. 540 . *See City of Los Angeles v. Workers' Compensation Appeals Bd.* (2007) 157 Cal. App. 4th 78, 84-86, 68 Cal. Rptr. 3d 343 (workers' compensation judge erred in finding employee-accountant was in course of employment while away at convention for CPAs, where: employer did not require accountants to have CPA licenses and did not consider CPA license necessary to job; no points were gained toward hiring or promotion if accountant had CPA license; employer offered what it considered necessary training for its accountants; while some training offered by employer may have been credited toward CPA license, employer did not offer sufficient classes for CPA licensure; employer only motivated or encouraged CPA licensure as personal achievement by bonus salary, not as incentive to improve accountant's ability to do job; and employer derived no benefit from CPA license).

(n67)Footnote 62. *County of Tulare v. Workers' Compensation Appeals Board* (1985) 170 Cal. App. 3d 1247, 1250-1254, 216 Cal. Rptr. 885 .

(n68)Footnote 63. *County of Tulare v. Workers' Compensation Appeals Board* (1985) 170 Cal. App. 3d 1247, 1250-1253, 216 Cal. Rptr. 885 .

(n69)Footnote 64. *Wilson v. Workers' Compensation Appeals Board* (1976) 16 Cal. 3d 181, 184, 127 Cal. Rptr. 313, 545 P.2d 225 .

(n70)Footnote 65. *Santa Rosa Junior College v. Workers' Compensation Appeals Board* (1985) 40 Cal. 3d 345, 355-357, 220 Cal. Rptr. 94, 708 P.2d 673 .

(n71)Footnote 66. *Santa Rosa Junior College v. Workers' Compensation Appeals Board* (1985) 40 Cal. 3d 345, 355-357, 220 Cal. Rptr. 94, 708 P.2d 673 .

(n72)Footnote 67. *Santa Rosa Junior College v. Workers' Compensation Appeals Board* (1985) 40 Cal. 3d 345, 355-357, 220 Cal. Rptr. 94, 708 P.2d 673 .

(n73)Footnote 67.1. *See Fleetwood Enterprises, Inc. v. Workers' Comp. Appeals Bd.* (2005) 134 Cal. App. 4th 1316, 1321-1330, 37 Cal. Rptr. 3d 587 (injury in Italy to employee of recreational vehicle manufacturer was not compensable despite employee's and wife's continuing interest and vigilance with respect to recreational vehicle designs and elements that might be of use to employer; injury resulted from automobile accident that occurred after employee had finished business travel in Germany and Italy for employer and was traveling in Italy back to Germany with his wife; there was no evidence employer expected or required employee to continue photographing recreational vehicles

during personal travel, and fact that employer was aware of his plans and facilitated his travel arrangements was immaterial in absence of evidence that it did so because it expected employee to function as employee during personal portion of his trip or that it exercised any control over his route; although there was substantial evidence rental car involved in accident in Italy did have to be returned in Germany, where business trip began, and this was arrangement made by employer, there was no evidence arrangement was for particular benefit of employer).

(n74)Footnote 68. *Lockheed Aircraft Corp. v. Industrial Accident Commission* (1946) 28 Cal. 2d 756, 760, 172 P.2d 1 .

(n75)Footnote 69. *Lockheed Aircraft Corp. v. Industrial Accident Commission* (1946) 28 Cal. 2d 756, 758-759, 172 P.2d 1 .

(n76)Footnote 70. *Fireman's Fund Indem. Co. v. Industrial Acci. Com.* (1952) 39 Cal. 2d 529, 531-532, 247 P.2d 707 ; *Price v. Workers' Compensation Appeals Board* (1984) 37 Cal. 3d 559, 567-571, 209 Cal. Rptr. 674, 693 P.2d 254 (applying number of theories in holding that employee hurt outside of employer's premises was entitled to workers' compensation); *Safeway Stores, Inc. v. Workers' Compensation Appeals Board* (1980) 104 Cal. App. 3d 528, 535-538, 163 Cal. Rptr. 750 (workers' compensation covers employee off-premises during "special errand" performed at specific request of employer).

(n77)Footnote 71. *Reinert v. Industrial Accident Commission* (1956) 46 Cal. 2d 349, 355-357, 294 P.2d 713 .

(n78)Footnote 72. *Makins v. Industrial Accident Commission* (1926) 198 Cal. 698, 703-704, 247 P.202 .

(n79)Footnote 73. *Fireman's Fund Indemnity Co. v. Industrial Accident Commission* (1943) 61 Cal. App. 2d 335, 338, 143 P.2d 104 ; *Gardner v. Industrial Accident Commission* (1946) 73 Cal. App. 2d 361, 366, 166 P.2d 362 ; *Griffin v. Industrial Accident Commission* (1937) 19 Cal. App. 2d 727, 733, 66 P.2d 176 ; see discussion in [4], above.

(n80)Footnote 74. *Dalgleish v. Holt* (1952) 108 Cal. App. 2d 561, 566, 237 P.2d 553 . See *City of Los Angeles v. Workers' Compensation Appeals Bd.* (2007) 157 Cal. App. 4th 78, 83-84, 68 Cal. Rptr. 3d 343 (workers' compensation judge erred in finding employee-accountant was in course of employment while away at convention for CPAs, by giving undue weight to fact that employer encouraged taking CPA courses by paying bonus, where employer did not require employee or any accountants to have CPA license, traveling to attend the convention for CPA credit was not expressly or impliedly authorized by employment contract, employer did not reimburse for CPA coursework but did reimburse for continuing education of other professionals in its employ, and employer did not benefit from CPA licensure and provided training necessary for its accountants).

(n81)Footnote 75. *Dalgleish v. Holt* (1952) 108 Cal. App. 2d 561, 566, 237 P.2d 553 .

(n82)Footnote 75.1. *LaTourette v. W.C.A.B.* (1998) 17 Cal. 4th 644, 655-657, 72 Cal. Rptr. 2d 217, 951 P.2d 1184 (fatal bacterial infection developed during treatment for cardiac arrest occurring while on business trip did not arise out of employment).

(n83)Footnote 76. *IBM Corp. v. Workers' Compensation Appeals Board* (1978) 77 Cal. App. 3d 279, 282-283, 142 Cal. Rptr. 543 (holding that under required liberal construction of commercial traveler rule, employee injured while returning to temporary assignment base from visit to relatives was covered by commercial traveler rule).

(n84)Footnote 77. *Leffert v. Industrial Accident Commission* (1934) 219 Cal. 710, 714, 28 P.2d 911 ; *State Comp. Insurance Fund v. Workmen's Compensation Appeals Board* (1967) 67 Cal. 2d 925, 927-928, 64 Cal. Rptr. 323, 434 P.2d 619 (employee injured while swimming in nearby canal off employer's premises during work break held to be acting within course of employment); *Gutierrez v. Petoseed Co., Inc.* (1980) 103 Cal. App. 3d 766, 768-769, 163 Cal. Rptr. 313 (employee on lunch break on employer's premises); *Lizama v. Workmen's Compensation Appeals Board* (1974) 40 Cal. App. 3d 363, 369-370, 115 Cal. Rptr. 267 (employee injured on employer's premises while using

employer's tools for personal benefit after working hours held to be within course of employment); *Toohy v. Workmen's Compensation Appeals Board* (1973) 32 Cal. App. 3d 98, 102, 107 Cal. Rptr. 773 (employee injured when hit by car during beer break off employer's premises held to be within course of employment).

(n85)Footnote 78. *Gutierrez v. Petoseed Co., Inc.* (1980) 103 Cal. App. 3d 766, 768-769, 163 Cal. Rptr. 313 .

(n86)Footnote 78.1. *See Mason v. Lake Dolores Group* (2004) 117 Cal. App. 4th 822, 838-839, 11 Cal. Rptr. 3d 914 (employee's negligence action against employer for injury after park hours while using employer's water slide was not barred by workers' compensation exclusivity doctrine under personal comfort doctrine, because substantial evidence showed employer did not condone employee's use of slide but had expressly prohibited all its employees from using slides after park hours; it could not be inferred that use of slide was beneficial to employer or reasonably contemplated by employment, and jury could have reasonably concluded that use of slide was solely for employee's own personal benefit).

(n87)Footnote 79. *Mission Insurance Co. v. Workers' Compensation Appeals Board* (1978) 84 Cal. App. 3d 50, 57, 148 Cal. Rptr. 292 .

(n88)Footnote 80. *See Hinkle v. Workers' Compensation Appeals Board* (1985) 175 Cal. App. 3d 587, 590-592, 221 Cal. Rptr. 40 ; *County of Los Angeles v. Workers' Compensation Appeals Board* (1983) 145 Cal. App. 3d 418, 421-423, 193 Cal. Rptr. 374 ; *Rankin v. Workers' Comp. Appeals Bd.* (1971) 17 Cal. App. 3d 857, 860-861, 95 Cal. Rptr. 275 (employee who intended to and was authorized to work on lunch hour could receive compensation when injured on way to obtain food to eat while working).

(n89)Footnote 81. *Duncan v. Workers' Compensation Appeals Board* (1984) 150 Cal. App. 3d 117, 120-121, 197 Cal. Rptr. 474 ; *Wood Pontiac Cadillac v. Superior Court* (1992) 5 Cal. App. 4th 810, 812-814, 6 Cal. Rptr. 2d 924 (employee injured in traffic accident during authorized lunch break was barred from suing employer in tort by virtue of exclusive remedy rule, when she was paid on commission basis and continued to accrue commissions during her authorized lunch break); *McFadden v. Workers' Compensation Appeals Board* (1988) 203 Cal. App. 3d 279, 281-283, 249 Cal. Rptr. 778 (following *Duncan* and holding that outside salaried salesman was entitled to compensation benefits for injuries sustained when car in which he was riding was struck by uninsured motorist while he was returning to employer's office from off-premises lunch break with his supervisor and a coemployee at which business had been discussed because (1) on numerous occasions salesman had lunch at which business was discussed with his coemployees; (2) his supervisor frequently joined them for lunch; (3) he was authorized to take unscheduled lunch breaks; (4) he was salaried; and (5) his employer had never notified him that his salary did not cover his meal periods and was not apportioned over entire workday).

(n90)Footnote 82. *Price v. Workers' Compensation Appeals Board* (1984) 37 Cal. 3d 559, 568-569, 209 Cal. Rptr. 674, 693 P.2d 254 .

(n91)Footnote 83. *Duncan v. Workers' Compensation Appeals Board* (1984) 150 Cal. App. 3d 117, 120-121, 197 Cal. Rptr. 474 .

(n92)Footnote 84. *City of Los Angeles v. Workers' Compensation Appeals Board* (2007) 157 Cal. App. 4th 78, 87, 68 Cal. Rptr. 3d 343 (workers' compensation judge erred in finding employee-accountant was in course of employment while away at convention for CPAs, where employer did not require or recommend obtaining CPA license, did not reimburse for classes taken to obtain license, and offered necessary training for its accountants; and where less than 13 percent of accountants maintained CPA licenses so that CPA license was not contemplated by contract of employment, did not benefit employer by making employee perform his assigned tasks more effectively, and was appropriately labeled personal achievement bonus); *Employers' Liability Assurance Corp. v. Industrial Accident Comm'n* (1940) 37 Cal. App. 2d 567, 573, 99 P.2d 1089 ; *Pacific Indemnity Co. v. Industrial Accident Commission* (1938) 27 Cal. App. 2d 499, 503-504, 81 P.2d 572 (attending union meeting outside course of employment); *State Department of*

Institutions v. Industrial Accident Commission (1941) 46 Cal. App. 2d 439, 441-442, 116 P.2d 79 (employee returning to work from parking lot after hours as outside course of employment).

(n93)Footnote 85. *Argonaut Insurance Co. v. Workmen's Compensation Appeals Board (1967) 247 Cal. App. 2d 669, 677-678, 55 Cal. Rptr. 810*.

(n94)Footnote 86. *Rosen v. Industrial Accident Commission (1966) 239 Cal. App. 2d 748, 750-754, 49 Cal. Rptr. 706*; *Aubin v. Kaiser Steel Corp. (1960) 185 Cal. App. 2d 658, 661-663, 8 Cal. Rptr. 497*.

(n95)Footnote 87. *State Compensation Insurance Fund v. Workers' Compensation Appeals Board (1982) 133 Cal. App. 3d 643, 655, 184 Cal. Rptr. 111*.

(n96)Footnote 88. *State Compensation Insurance Fund v. Workers' Compensation Appeals Board (1982) 133 Cal. App. 3d 643, 655, 184 Cal. Rptr. 111*. See *Vaught v. State of California (2007) 157 Cal. App. 4th 1538, 1544-1549, 69 Cal. Rptr. 3d 605* (exclusivity rule barred tort action against State by park ranger, who was injured as result of state's failure to complete repairs on house in which he and his wife were living, which was offered to ranger and his wife as inducement to accept new position; he was injured in course of employment, because residence in house was part of his compensation package, he resided in the house out of work necessity, and he used portion of house as his office; injury arose out of employment, even though he was injured on his personal day off, while engaged in activity having nothing to do with his employment as park ranger, because injury occurred while he resided on his employer's premises while engaged in activity incidental to his employment).

(n97)Footnote 89. *Northstar at Tahoe v. Workers' Compensation Appeals Board (1996) 42 Cal. App. 4th 1481, 1485, 50 Cal. Rptr. 2d 475*.

(n98)Footnote 90. *Robbins v. Yellow Cab Co. (1948) 85 Cal. App. 2d 811, 814, 193 P.2d 956*; *Bethlehem Steel Co. v. Industrial Accident Comm'n (1945) 70 Cal. App. 2d 382, 388-389, 161 P.2d 59*.

(n99)Footnote 91. *Hinkle v. Workers' Compensation Appeals Board (1985) 175 Cal. App. 3d 587, 592, 221 Cal. Rptr. 40*, disapproved on other grounds, *Camper v. Workers' Compensation Appeals Bd. (1992) 3 Cal. 4th 679, 690* (injury sustained while employee returned from collecting paycheck at post office during lunch break not compensable).

(n100)Footnote 92. *Lab. Code § 3600(a)(9)*.

(n101)Footnote 93. *Lab. Code § 3600(a)(9)*; see also *Wright v. Beverly Fabrics, Inc. (2002) 95 Cal. App. 4th 346, 356, 115 Cal. Rptr. 2d 503*; *Ezzy v. Workers' Compensation Appeals Board (1983) 146 Cal. App. 3d 252, 258-259, 194 Cal. Rptr. 90*. For a full discussion, see Hanna, California Law of Employee Injuries and Workers' Compensation, Vol. 1, Ch. 4, § 4.25.

(n102)Footnote 93.1. *Mason v. Lake Dolores Group (2004) 117 Cal. App. 4th 822, 835-838, 11 Cal. Rptr. 3d 914* (employee's negligence action against employer came within *Lab. Code § 3600(a)(9)* because, regardless of whether employee was off-duty when he was injured, his use of employer's water slide was not reasonable expectancy of his employment or activity expressly or impliedly required by his employment, since employer had expressly prohibited use of water slide at the time employee was injured).

(n103)Footnote 94. *Wright v. Beverly Fabrics, Inc. (2002) 95 Cal. App. 4th 346, 356-357, 115 Cal. Rptr. 2d 503* (both elements satisfied); *Wilson v. Workers' Compensation Appeals Board (1987) 196 Cal. App. 3d 902, 907, 909, 239 Cal. Rptr. 719* (holding both requirements satisfied in case before the court); *Aetna Casualty & Surety Co. v. Workers' Compensation Appeals Board (1986) 187 Cal. App. 3d 922, 930-932, 232 Cal. Rptr. 257*; *Meyer v. Workers' Compensation Appeals Board (1984) 157 Cal. App. 3d 1036, 1042-1043, 204 Cal. Rptr. 74*; *Ezzy v. Workers' Compensation Appeals Board (1983) 146 Cal. App. 3d 252, 258-259, 194 Cal. Rptr. 90*; *Kidwell v. Workers' Compensation Appeals Board (1995) 33 Cal. App. 4th 1130, 1139, 39 Cal. Rptr. 2d 540* (highway patrol officer's belief

that practicing long jump while at home was reasonable expectancy of her employment was reasonable as matter of law, since long jump was required element of annual physical fitness test administered by employer).

(n104)Footnote 95. *City of Stockton v. Workers' Comp. Appeals Board* (2006) 135 Cal. App. 4th 1513, 1518-1527, 38 Cal. Rptr. 3d 474 (police officer who injured his leg while off duty, playing in pickup game of basketball at private facility, was not entitled to workers' compensation benefits, where evidence did not establish that officer believed that his employer expected him to participate in game of pickup basketball; rather, evidence showed only his belief that it was good idea for police officer to stay in good physical condition and his leap to conclusion that any physical activity in which officer chose to engage must have been covered by workers' compensation; and where even if there was evidence officer subjectively believed his employer expected him to play in pickup game of basketball, belief would not have been objectively reasonable).



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 3. Conditions of Workers' Compensation

1-20 California Employment Law § 20.23

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.23 Other Conditions of Compensation

[1] Intoxicated Employee

If an injury to an employee is caused by his or her intoxication by alcohol or by unlawful use of a controlled substance as defined in *Health and Safety Code Section 11007*, the conditions of workers' compensation are not satisfied,ⁿ¹ but the employee may pursue a tort action against his or her employer if one is available.ⁿ² Of course, recovery in tort may be limited by the fault attributable to the employee's intoxication under comparative fault principles.ⁿ³ If the employer served the alcohol, the employer's liability would also be limited by *Civil Code Section 1714(b), (c)* (consumption rather than furnishing of alcoholic beverages is the proximate cause of resulting injuries; social host not liable for furnishing alcoholic beverages) and *Business and Professions Code Section 25602(b)* (alcoholic beverage licensee not civilly liable for serving alcohol to intoxicated person), unless the employee is a minor who was obviously intoxicated.ⁿ⁴

[2] Physical Aggression by Employee

If an employee suffers an injury that arises out of an altercation in which the employee is the initial physical aggressor, the conditions of workers' compensation are not satisfied, but the employee remains free to pursue a tort action against his or her employer if one is available.ⁿ⁵

[3] Self-Inflicted Injury or Death

Intentionally self-inflicted injury or death takes an action outside the scope of workers' compensation law.ⁿ⁶ However, if the employee causes the self-injury by having acted rashly or impulsively, or even negligently or recklessly while in the course and scope of employment, the injury falls within the scope of workers' compensation.ⁿ⁷ Ordinarily, such conduct will preclude a tort recovery as well. In a rare case, however, a party may allege that a person's suicide is compensable in a wrongful death action if it resulted from the intentional infliction of emotional distress. In such a case, it should be noted that suicide may not be deemed self-inflicted if it results from an uncontrollable mental condition.ⁿ⁸

[4] Felonious Act by Employee

When the injury to the employee is caused by the commission of a felonious act by the injured employee, for which he or she has been convicted, workers' compensation benefits are not available.ⁿ⁹ As in the case of an injury arising from an altercation in which the injured employee is the initial physical aggressor,ⁿ¹⁰ it appears that the employee would be free to pursue a tort action against his or her employer.

[5] Employee Killed or Injured by Third Party

A workers' compensation claim may be filed if an employee is injured or killed by a third party in the course of employment. In such instances, no personal relationship or personal connection will be deemed to exist between the employee and the third party based only on a determination that the third party injured or killed the employee solely because of the third party's personal beliefs relating to his or her perception of the employee's protected characteristic.ⁿ¹¹

Legal Topics:

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

Workers' Compensation & SSDI
Compensability
Course of Employment
General Overview
Workers' Compensation & SSDI
Compensability
Injuries
General Overview
Workers' Compensation & SSDI
Coverage
General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 3600(a)(4)*.

(n2)Footnote 2. *Lab. Code § 3602(c)*.

(n3)Footnote 3. *See Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*. For discussion of comparative negligence generally, see Levy, Golden, & Sacks, California Torts, Ch. 4 (Matthew Bender).

(n4)Footnote 4. *See Bus. & Prof. Code § 25602.1* (alcoholic beverage licensee's liability for service to obviously intoxicated minor).

(n5)Footnote 5. *Lab. Code §§ 3600(a)(7), 3602(c); Martinez v. Workers' Compensation Appeals Board (1976) 15 Cal. 3d 982, 988, 127 Cal. Rptr. 150, 544 P.2d 1350* (one who first engages in physical conduct that reasonable person would perceive to be real, present, and apparent threat of physical harm is initial physical aggressor).

(n6)Footnote 6. *Lab. Code § 3600(a)(5), (6)*.

(n7)Footnote 7. *Smith v. Workers' Compensation Appeals Bd. (2000) 79 Cal. App. 4th 530, 539, 94 Cal. Rptr. 2d 186* (carelessness or contributory negligence of the injured does not break the causative connection unless such intervening conduct is the sole and exclusive cause of the injury).

(n8)Footnote 8. *Argonaut Insurance Co. v. Superior Court (1985) 164 Cal. App. 3d 320, 325, 210 Cal. Rptr. 417*.

(n9)Footnote 9. *Lab. Code § 3600(a)(8); see Westbrook v. Workers' Compensation Appeals Board (1988) 203 Cal. App. 3d 249, 253 n.4, 252 Cal. Rptr. 26*.

(n10)Footnote 10. *Lab. Code § 3600(a)(7)*. For discussion, *see [2], above*.

(n11)Footnote 11. *Lab. Code 3600(c)*.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 3. Conditions of Workers' Compensation

1-20 California Employment Law § 20.24

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.24 Claim for Compensation Filed After Notice of Termination

Except in the case of psychiatric injuries,ⁿ¹ if the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, but not including voluntary resignations,ⁿ² and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation is payable unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:ⁿ³

1. The employer has notice of the injuryⁿ⁴ prior to the notice of termination or layoff.
2. The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.
3. The date of injury, as specified in *Labor Code Section 5411* (applicable in all cases except occupational disease or cumulative injury cases), is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.
4. The date of injury, as specified in *Labor Code Section 5412* (applicable in occupational disease or cumulative injury cases), is subsequent to the date of the notice of termination or layoff.

A notice of termination or layoff that is not followed within 60 days by termination or layoff is not subject to the provisions described above, and these provisions do not apply until the employee receives a later notice of termination or layoff.ⁿ⁵ The issuance of frequent notices of termination or layoff to an employee is considered a bad faith personnel action and makes the provisions described in this section inapplicable to the employee.ⁿ⁶

Legal Topics:

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

Labor & Employment Law Collective Bargaining & Labor Relations Discipline, Layoff & Termination Workers'
 Compensation & SSDI Compensability General Overview Workers' Compensation & SSDI Coverage General Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 3208.3(e); § 20.05[1][b].*

(n2)Footnote 2. *CJS Co. v. Workers' Compensation Appeals Board (1999) 74 Cal. App. 4th 294, 297-298, 88 Cal. Rptr. 2d 109* (holding *Lab. Code § 3600(a)(10)* does not apply to employees who resign voluntarily, explaining that specific applications of statute--termination or layoff--involve only employer-initiated separations and distinguishing "voluntary layoff," an involuntary reduction in force, from voluntary resignation, an employee-initiated action, but expressing no opinion on application of statute to constructive firings).

(n3)Footnote 3. *See Lab. Code § 3600(a)(10).*

(n4)Footnote 4. *See Lab. Code § 5400 et seq.*

(n5)Footnote 5. *Lab. Code § 3600(a)(10).*

(n6)Footnote 6. *Lab. Code § 3600(a)(10).*



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 3. Conditions of Workers' Compensation

1-20 California Employment Law §§ 20.25 through 20.29

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

[Reserved]

§§ 20.25[Reserved]



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 4. Claims and Enforcement

1-20 California Employment Law § 20.30

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.30 Procedure for Obtaining Benefits

[1] Notice of Injury

The first step in obtaining workers' compensation benefits is to provide the employer with written notice of the injury. The employee, or someone on the employee's behalf, must sign the notice. If the injury caused the death of the employee, the notice must be signed by or on behalf of a dependent of the employee. The notice must be served on the employer within 30 days after the date of the injury.ⁿ¹

Generally, the employee (or the dependents of a deceased employee) cannot maintain a claim for benefits unless notice of the injury has been timely served on the employer.ⁿ² However, the failure to give notice will not bar the claim if the employer was not in fact misled or prejudiced by the failure.ⁿ³ For example, if the employer obtains, from any source, sufficient knowledge of the injury or claimed injury to afford an opportunity to investigate the facts, that knowledge is the equivalent of service of written notice. For this purpose, knowledge obtained by the employer's managing agent, superintendent, foreperson, or other person in authority is imputed to the employer.ⁿ⁴

[2] Adjustment of Claim

[a] Employer's Duty to Provide Claim Form, Notice of Eligibility, and Other Information

Within one working day of receiving notice or knowledge of an injury that results in lost time beyond the employee's work shift at the time of injury or that results in medical treatment beyond first aid [*see* [1], *above*], the employer must provide the employee (or the dependents of a deceased employee) with a claim form and a notice of potential eligibility for benefits.^{n4.1} The claim form and notice of eligibility must be delivered to the employee personally or by first-class mail.ⁿ⁵

For this purpose, "first aid" is any one-time treatment, and any follow up visit for the purpose of observation, of minor scratches, cuts, burns, splinters, or other minor industrial injury. "Minor industrial injury" does not include serious

exposure to a hazardous substance.n6

[b] Contents of Claim Form and Notice of Eligibility

The claim form must request all of the following information:n7

- The injured employee's name and address;
- The injured employee's social security number,
- The time and address where the injury occurred; and
- The nature of and part of the body affected by the injury.

The claim form must also prominently display the following statement:n8"Any person who makes or causes to be made any knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying workers' compensation benefits or payments is guilty of a felony."

Claim forms are available at district offices of the Employment Development Department and the Division of Workers' Compensation. However, use of the official forms is not mandatory. The employer may obtain forms from any other source.n9

Insofar as practicable, the notice of potential eligibility for benefits and the claim form should be a single document and instruct the injured employee to fully read the notice of potential eligibility. The notice must be easily understandable and available in both English and Spanish. The notice must include all of the following:n10

1. The procedure to be used to commence proceedings for the collection of compensation;
2. A description of the different types of workers' compensation benefits;
3. What happens to the claim form after it is filed;
4. The names of parties from whom the employee can obtain medical care for the injury;
5. The role and function of the primary treating physician;
6. The rights of an employee to select and change the treating physician pursuant to *Labor Code Sections 3550(e), 4600*;
7. Information on how an employee may get medical care while the claim is pending;
8. The protections against discrimination provided pursuant to *Labor Code Section 132a*; and
9. The following written statements:
 - A. You have a right to disagree with decisions affecting your claim;
 - B. You can obtain free information from an information and assistance officer of the state Division of Workers' Compensation, or you can hear recorded information and a list of local offices by calling (applicable information and assistance telephone number(s));

C. You can consult an attorney. Most attorneys offer one free consultation. If you decide to hire an attorney, his or her fee will be taken out of some of your benefits. For names of workers' compensation attorneys, call the State Bar of California at (telephone number of the State Bar of California's legal specialization program, or its equivalent).

Additional notice requirements are contained in the California Code of Regulations:¹¹ Under the regulations, within five working days of notice or knowledge of any injury, the employer must advise the employee of the compensation to which he or she may be entitled and the rights, benefits, and obligations under the workers' compensation law.¹² This advice must be in writing, in non-technical terms, available in both English and Spanish, and must include all of the following:¹³

- An explanation of an injured employee's rights to medical care and to select or change the treating physician;¹⁴
- An explanation of an injured employee's right to indemnity payments for disability or death, including information on the amount and frequency of those payments;
- An explanation of the nature and availability of vocation rehabilitation services;
- An explanation of the employee's protections against discrimination because of a work injury;
- An explanation of the procedures for claiming compensation, time limits for filing a claim, and methods to resolve disputes, including the employee's right to consult an Information and Assistance Officer or an attorney; and
- Where further information may be obtained, including an explanation of services available from an Information and Assistance Officer.

[c] Filing of Claim Form

The employee or his or her agent (or a deceased employee's dependent or the dependent's agent) must complete the claim form and file it with the employer. A claim form ordinarily is deemed filed when it is personally delivered to the employer or received by the employer by first-class or certified mail.¹⁵

The employer must provide a dated copy of the completed claim form to the employer's insurer and to the employee, dependent, or agent who filed the claim form.¹⁶

The claim form must be filed with the employer before the employee's entitlement to late payment supplements under *Labor Code 4650(d)*, or before the employee's request for a medical evaluation under *Labor Code Section 4060, 4061, or 4062*.¹⁷ The period within which proceedings may be commenced for the collection of the benefits is one year from any of the following:¹⁸

1. The date of injury;
2. The expiration of any period covered by payment under *Labor Code Section 4650 et seq.*; or
3. The last date on which any benefits provided for by *Labor Code Section 4600 et seq.* were furnished.

However, if the employer fails to comply with regulations requiring employers to notify employees of procedures for

making a workers' compensation claim, including the time limits for filing a claim,ⁿ¹⁹ the statute of limitations is tolled until the employee has that notice.ⁿ²⁰ For injuries occurring on or after January 1, 1994, filing the claim form with the employer tolls the time limitations for proceedings for the collection of the benefitsⁿ²¹ until the claim is denied by the employer or the injury becomes presumptively compensable by virtue of the employer's failure to deny liability.ⁿ²² For purposes of this tolling provision, a claim form is deemed filed when it is personally delivered to the employer or mailed to the employer by first-class or certified mail.ⁿ²³

[d] Employer's Response to Claim

If the employer does not reject liability within 90 days after the claim form is filed, the injury is presumed to be compensable.ⁿ²⁴ This presumption effectively shifts the burden of proof on the issue of compensability to the employer.ⁿ²⁵

The employer or its insurer is put to the burden of promptly investigating the claim and determining whether to contest liability only when the employee has filed the claim form. The investigation must be completed within 90 days of the claim form being filed.^{n25.1} An employer's breach of the duty to provide a claim form upon learning of an injury^{n25.2} does not trigger the 90-day period.^{n25.3}

An employer generally will be estopped to deny the 90-day period began running before the filing of a claim form only if each of the following is true:^{n25.4}

- (1) The employer, knowing the employee had suffered or was asserting an industrial injury, refused to provide a claim form, or misrepresented the availability of or the need for the employee to file a claim form.
- (2) The employee was actually misled into believing that no claim form was available or necessary and failed to file one for that reason.
- (3) Because of this reliance, the employee suffered some loss of benefits or setback as to the claim.

The employee need not show that the employer or the employer's agents consciously or deliberately set out to prevent or delay the employee's filing a claim.^{n25.5}

The presumption of compensability is rebuttable only by evidence discovered subsequent to the 90-day period.ⁿ²⁶ For this purpose, evidence that could have been discovered in the exercise of reasonable diligence during the 90-day period is treated as if it had been discovered during that period. Therefore, such evidence is ordinarily unavailable to rebut the presumption of compensability.ⁿ²⁷ This is true even if the employer paid benefits on the claim before denying liability subsequent to the 90-day rejection period.ⁿ²⁸

To reject liability within the 90-day period, the employer need not actually *notify* the employee of the rejection within that time period, so long as the claim itself was rejected within the 90 days.ⁿ²⁹

Within one working day after an employee files a claim form, the employer must authorize the provision of all treatment for the alleged injury and continue to provide the treatment until the date that liability for the claim is accepted or rejected. Until the date the claim is accepted or rejected, liability for medical treatment is limited to \$10,000.^{n29.1} The provision of treatment does not give rise to a presumption of liability on the employer's part.^{n29.2}

[3] Adjudication by Workers' Compensation Appeals Board

[a] Need for Adjudication by Board

In a typical case, the employer's liability to provide benefits is clear, benefits are provided to the employee, and a formal adjudication by the Workers' Compensation Appeals Board is not necessary. Board adjudication is usually necessary only if there is a dispute about the employer's liability or about the amount and nature of the benefits to which the employee is entitled.

Board proceedings are administrative hearings, usually held before workers' compensation judges, and are governed by the Labor Code³⁰ and administrative regulations.³¹ The person seeking adjudication by the Board is referred to as the "applicant," and the adverse party is the "defendant."³²

For detailed coverage of all aspects of Board proceedings, *see* Hanna, California Law of Employee Injuries and Workers' Compensation, Chapters 24 and 25 (Matthew Bender).

[b] Application for Adjudication by Board

To commence a proceeding before the Board to collect workers' compensation benefits, the employee (or the dependent of a deceased employee) must file an application for adjudication.³³ Although the written notice of injury and claim forms filed with the employer are prerequisites to commencing a Board proceeding, the application for adjudication is the pleading that establishes the jurisdiction of the Board and commences the proceeding.³⁴

The application must be in writing and must conform to forms prescribed by the Appeals Board in its rules of practice and procedure. The application must simply but clearly and completely delineate all relevant matters of agreement and all issues of disagreement within the jurisdiction of the Board. The application must also provide any additional information that the Board properly determine necessary to expedite its hearing and determination of the claim.³⁵

The application for adjudication may be filed in any of the following locations:³⁶

- In the county where the injured employee or dependent of a deceased employee resides on the date of filing.
- In the county where the injury allegedly occurred, or, in cumulative trauma and industrial disease claims, where the last alleged injurious exposure occurred.
- In the county where the employee's attorney maintains his or her principal place of business, if the employee is represented by an attorney.

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

If there is no local office in any of these counties, the application may be filed in the nearest office to satisfy the above requirements. If the application is filed in an office solely because it is in the county of the employee's attorney's principal place of business, the defendant may object within 30 days of notice of this selection and request that venue be lodged in another appropriate office. *Commentary by Robert Levin.*

■ PRACTICE TIP--EMPLOYERS' PERSPECTIVE:

While it is usually the employee who files the Application For Adjudication of Claim, there is a line on the form for other parties to use when filing the application. Those other parties might be a doctor supplying treatment, a group medical provider or even the employer or carrier. The line is called: "APPLICANT, IF OTHER THAN INJURED EMPLOYEE." *Commentary by John W. Miller.*

Along with the application, the applicant and his or her attorney must sign and file a statement that they have not

violated *Labor Code Section 139.3*(pertaining to improper medical referrals) and have not offered, delivered, received, or accepted any consideration as compensation or inducement for any referred examination or evaluation. The signatures on the statement must be made under penalty of perjury.n37

If the applicant is represented by an attorney or other representative, the Board will provide the attorney or representative with a conformed copy of the application, showing the date of filing and the case number. The applicant's attorney or representative must forthwith serve a copy of the conformed application on all other parties to the claim.n38

If the applicant is unrepresented, a copy of the conformed application will be served on all adverse parties by the Appeals Board.n39

[c] Answer

If the defendant disputes the claim, the defendant must file and serve an answer within 10 days after the application is served.n40

■ PRACTICE TIP--EMPLOYER'S PERSPECTIVE:

As a matter of practice, generally the time limit for filing an answer is not enforced as long as all parties and counsel are aware of the issues. In many instances, the issues are first put on a form or pleading at the time of the mandatory settlement conference, or first hearing. *Commentary by John W. Miller.*

The answer, like the application, must be in writing and must conform to forms prescribed by the Appeals Board in its rules of practice and procedure. The answer must simply but clearly and completely delineate all relevant matters of agreement and all issues of disagreement within the jurisdiction of the Board. The answer must also provide any additional information that the Board properly determines necessary to expedite its hearing and determination of the claim.n41

Along with the answer, the defendant and the defendant's attorney must sign and file a statement that they have not violated Labor Code Section 139.3and have not offered, delivered, received, or accepted any consideration as compensation or inducement for any referred examination or evaluation. The signatures on the statement must be made under penalty of perjury.n42

If the defendant fails to appear or answer, no default will be taken, but the Board will conduct a hearing as it deems proper.n43

[d] Hearing and Award

Unless the claim is settled by the parties,n44 a workers' compensation judge will conduct a hearingn45 and render an award.n46 The hearing will ordinarily take place within 75 days after a party has filed a declaration of readiness to proceed.n47 Findings and an award will be filed and served on the parties within 30 days after the case is submitted.n48 The findings and award must include a summary of evidence that itself includes a comprehensive and unbiased summary of each witness's testimony to be reviewable by the Board.n48.1 Within 60 days after the filing of the judge's findings and award, the Appeals Board may confirm, adopt, modify or set aside the findings or award. If it sets aside the judge's decision, the Board may, with or without further proceedings, and with or without notice, enter its order, findings, decision, or award based on the record in the case.n49

The award may fix and determine the total amount of compensation to be paid and specify the manner of payment, or it may fix and determine the weekly disability payment to be made and order payment during the continuance of disability.n50 If it is established that the applicant has suffered a compensable injury, but it is not proved that any disability has resulted, the judge may award a nominal disability indemnity if it appears that disability is likely to result

at a future time.ⁿ⁵¹

The Appeals Board has continuing jurisdiction over its awards. At any time, on notice and hearing, the Board may rescind, alter, or amend an award for good cause. This power includes the right to review, grant or regrant, diminish, increase, or terminate, within the limits prescribed by law, any compensation awarded, on the grounds that the disability of the person in whose favor the award was made has either recurred, increased, diminished, or terminated.ⁿ⁵² However, *Lab. Code* § 5804 sets an outer limit of five years for both the employer to challenge an award and for a claimant to reopen it.ⁿ⁵³

[e] Reconsideration by Workers' Compensation Appeals Board

Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the Appeals Board or a workers' compensation judge under any provision of the Workers' Compensation Act may petition the Appeals Board for reconsideration concerning to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration. The petition must be made within the time and in the manner specified in *Labor Code Section 5900 et seq.*ⁿ⁵⁴

A petition for reconsideration may be made within 20 days after the service of such an order, decision, or award, only if one of the following grounds exists:ⁿ⁵⁵

- That by the order, decision, or award made and filed by the Appeals Board or the workers' compensation judge, the Appeals Board acted without or in excess of its powers.
- That the order, decision, or award was procured by fraud.
- That the evidence does not justify the findings of fact.
- That the petitioner has discovered new evidence material to him or her which he or she could not with reasonable diligence have discovered and produced at the hearing.
- That the findings of fact do not support the order, decision, or award.

Additionally, at any time within 60 days after the filing of an order, decision, or award made by a workers' compensation judge and the accompanying report, the Appeals Board may, on its own motion, grant reconsideration.ⁿ⁵⁶

■ CONSULTANT'S COMMENT:

Evidentiary procedure under the Workers' Compensation Act is less formal than in civil trials. *Labor Code Section 5709*, for example, provides that no informality of procedure or use of evidence inadmissible under common law or statutory rules of evidence shall invalidate any decision. However, because compensation litigation involves adversary proceedings, the basic principles of due process of the law must be meticulously followed, and there must be consistency regarding the record, the findings and the decision.ⁿ⁵⁷ Thus, in *County of Sacramento v. Workers' Compensation Appeals Board*,ⁿ⁵⁸ the court of appeal concluded that a stipulation reached after a mandatory settlement conference regarding the scope of the issues presented for determination at trial was binding, absent good cause to set it aside, even though it was demonstrably unfavorable to the applicant. Good cause, not poor outcome, is the standard for determining whether to disregard a stipulation. *Commentary by Kirby Wilcox.*

When the workers' compensation judge amends an award before a petition for reconsideration is filed, the time for seeking reconsideration runs from the date of the original order when the amendment is clerical in nature. When the

amendment effects a substantial or material change in the award or involves the exercise of a judicial function or judicial discretion, the time runs from the date of the amended order.^{n58.1}

[4] Judicial Review

The California Constitution provides that all workers' compensation decisions are subject to review by the California appellate courts and authorizes the Legislature to fix and control the manner of such review.ⁿ⁵⁹ The Legislature has provided that any person affected by an order, decision, or award of the Appeals Board may, within the specified time limit, apply to the Supreme Court or to the court of appeal for the appellate district in which he or she resides for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original or reconsidered order, decision, or award.ⁿ⁶⁰ The application must be made within 45 days after a petition for reconsideration is denied or, if a petition is granted or reconsideration is had on the appeal board's own motion, within 45 days after the filing of the order, decision, or award following reconsideration.ⁿ⁶¹ In some instances, petitions under *Lab. Code* § 5950 are appropriate to challenge interim WCAB orders.ⁿ⁶² This 45-day time limitation is jurisdictional and is not extended by 5 days pursuant to the provisions of *Code of Civil Procedure Section 1013(a)* when notice of the Appeals Board's decision on reconsideration is served on the parties by mail.ⁿ⁶³

In considering a petition for a writ of review, the appellate court's authority is limited to determining whether the evidence, viewed in light of the entire record, supports the Appeals Board's decision. The appellate court may not reweigh the evidence or decide disputed questions of fact. However, the court is not bound to accept the Appeals Board's factual findings if these findings are unreasonable, illogical, improbable, or inequitable when viewed in light of the overall statutory compensation scheme. Moreover, the court is entitled to decide questions of statutory interpretation.ⁿ⁶⁴

Although the writ of review is the only procedure available for securing review, reversal, correction, or annulment of Appeals Board orders, decisions, or awards made and entered under the Workers' Compensation Act,ⁿ⁶⁵ other appellate procedures may be used for other purposes. For example, the workers' compensation law expressly provides that a writ of mandate shall lie from the Supreme Court or district courts of appeal "in all proper cases."ⁿ⁶⁶ A writ of mandate may be used to compel the performance of an act that the law specially enjoins.ⁿ⁶⁷ Although rarely used, a writ of mandate may be used, for example, to control abuse of the discretionary powers of an administrative agency such as the Appeals Board.ⁿ⁶⁸ However, if the Appeals Board fails to act in connection with a final decision, a writ of review is available and mandamus would not be necessary.

Legal Topics:

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

Workers' Compensation & SSDI Administrative Proceedings Claims General Overview Workers' Compensation & SSDI Benefit Determinations General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code* § 5400; *Lab. Code* §§ 5411, 5412 (date of injury defined).

(n2)Footnote 2. *Lab. Code* § 5400.

(n3)Footnote 3. *Lab. Code* § 5403; see *Honeywell v. Workers' Compensation Appeals Board* (2005) 35 Cal. 4th 24, 33, 24 Cal. Rptr. 3d 179, 105 P.3d 544 (employee bears initial burden of notifying employer of injury, unless notice is unnecessary because employer already knows of injury or claimed injury from other sources); *Beckstead v. Workers' Compensation Appeals Bd.* (1998) 60 Cal. App. 4th 787, 791, 71 Cal. Rptr. 2d 254 (inadequate notice by employee who, unrepresented by counsel, alleged specific rather than cumulative injury and misdated date of injury does not bar action when employers indisputably knew that employee suffered from cumulative injury and could show no prejudice).

(n4)Footnote 4. *Lab. Code § 5402(a)*.

(n5)Footnote 4.1. *See Honeywell v. Workers' Compensation Appeals Board (2005) 35 Cal. 4th 24, 33, 24 Cal. Rptr. 3d 179, 105 P.3d 544* (once worker gives employer notice of injury, employer bears burden of informing worker of possible compensation rights and providing claim form, but it is up to employee whether and when to initiate claim for compensation by filing prescribed form with employer).

(n6)Footnote 5. *Lab. Code § 5401(a)*.

(n7)Footnote 6. *Lab. Code § 5401(a)*; *see Lab. Code § 6302(i)* ("serious exposure" defined).

(n8)Footnote 7. *Lab. Code § 5401(a)*.

(n9)Footnote 8. *Lab. Code § 5401.7*.

(n10)Footnote 9. *Lab. Code § 5401(a)*.

(n11)Footnote 10. *Lab. Code § 5401(b)*.

(n12)Footnote 11. *8 Cal. Code Reg. § 9882*.

(n13)Footnote 12. *8 Cal. Code Reg. § 9882(a)*.

(n14)Footnote 13. *8 Cal. Code Reg. § 9882(b)*.

(n15)Footnote 14. *But see Tenet/Centinela Hospital Medical Center v. Rushing (2000) 80 Cal. App. 4th 1041, 1048, 95 Cal. Rptr. 2d 858* (under *8 Cal. Code Reg. § 9785*, injured worker could not unilaterally change primary treating physician after doctor declared injury permanent and stationary, released her to return to work, and prescribed no further doctor-related treatment and visits).

(n16)Footnote 15. *Lab. Code § 5401(c), (d)*.

(n17)Footnote 16. *Lab. Code § 5401(c)*.

(n18)Footnote 17. *Lab. Code § 5401(d)*.

(n19)Footnote 18. *Lab. Code § 5405*; *see Lab. Code § 5412* (defining date of injury).

(n20)Footnote 19. *See 8 Cal. Code Reg. § 9882*; [b], *above*.

(n21)Footnote 20. *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Board (2008) 163 Cal. App. 4th 853, 859-864, 77 Cal. Rptr. 3d 868* (statutory period was tolled by employer's failure to advise injured employee of his rights under workers' compensation law, and insurer failed to show that it carried its burden to prove worker had actual knowledge of his rights more than one year before he filed claim for benefits); *Galloway v. Workers' Compensation Appeals Bd. (1998) 63 Cal. App. 4th 880, 887-888, 74 Cal. Rptr. 2d 374* (claimant was prejudiced by failure to receive required notice of potential benefits and time limits in which to file claim and, thus, statute of limitations was tolled until claimant became aware of time limits).

(n22)Footnote 21. *See Lab. Code §§ 5405, 5406*.

(n23)Footnote 22. *Lab. Code § 5401(d)*; *see Lab. Code § 5402* (presumption of compensability if employer fails to deny liability within 90 days of filing).

(n24)Footnote 23. *Lab. Code § 5401(d)*.

(n25)Footnote 24. *Lab. Code § 5402(b)*.

(n26)Footnote 25. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd. (1995) 37 Cal. App. 4th 675, 683, 43 Cal. Rptr. 2d 660*.

(n27)Footnote 25.1. *Honeywell v. Workers' Compensation Appeals Board (2005) 35 Cal. 4th 24, 33, 24 Cal. Rptr. 3d 179, 105 P.3d 544*.

(n28)Footnote 25.2. *Lab. Code § 5401(a)*. For discussion of the employer's obligation to provide the claim form, see [a], *above*.

(n29)Footnote 25.3. *Honeywell v. Workers' Compensation Appeals Board (2005) 35 Cal. 4th 24, 35, 24 Cal. Rptr. 3d 179, 105 P.3d 544*.

(n30)Footnote 25.4. *Honeywell v. Workers' Compensation Appeals Board (2005) 35 Cal. 4th 24, 37, 24 Cal. Rptr. 3d 179, 105 P.3d 544*.

(n31)Footnote 25.5. *Honeywell v. Workers' Compensation Appeals Board (2005) 35 Cal. 4th 24, 37, 24 Cal. Rptr. 3d 179, 105 P.3d 544*.

(n32)Footnote 26. *Lab. Code § 5402(b)*.

(n33)Footnote 27. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd. (1995) 37 Cal. App. 4th 675, 684, 43 Cal. Rptr. 2d 660*; but see *James v. Workers' Compensation Appeals Bd. (1997) 55 Cal. App. 4th 1053, 1056-1057, 64 Cal. Rptr. 2d 392* (failure to reject liability within 90 days does not prevent employer from asserting, under *Lab. Code § 3208.3(d)*, that psychiatric injury is not compensable during first six months of employment).

(n34)Footnote 28. *Williams v. Workers' Comp. Appeals Bd. (1999) 74 Cal. App. 4th 1260, 1265-1266, 88 Cal. Rptr. 2d 798* (employer paid benefits for over three years before denying liability based on information available during 90-day rejection period; employer argued that application of section 5402 penalized it for paying immediate benefits; court held application of section 5402 penalized employer for not conducting investigation within 90-day period).

(n35)Footnote 29. *Rodriguez v. Workers' Compensation Appeals Bd. (1994) 30 Cal. App. 4th 1425, 1433, 35 Cal. Rptr. 2d 713* (noting that failure to provide timely notice may hamper efforts to prove that timely rejection was indeed made).

(n36)Footnote 29.1. *Lab. Code § 5402(c)*.

(n37)Footnote 29.2. *Lab. Code § 5402(d)*.

(n38)Footnote 30. *Lab. Code § 5300 et seq. See Lab. Code § 5310* (workers' compensation judges have "the powers, jurisdiction, and authority granted by law, by the order of appointment, and by the rules of the [Workers' Compensation Appeals Board].") *See also Allison v. Workers' Comp. Appeals Bd. (1999) 72 Cal. App. 4th 654, 664, 84 Cal. Rptr. 2d 915* (workers' compensation judges have authority to decide discovery disputes and, thus, to compel answers to deposition questions).

(n39)Footnote 31. *8 Cal. Code Reg. § 10300 et seq.*

(n40)Footnote 32. *Lab. Code § 5503*.

(n41)Footnote 33. *Lab. Code § 5500; Lab. Code § 5501* (application may be filed by any party in interest, his or her attorney, or other representative authorized in writing).

(n42)Footnote 34. *Lab. Code § 5500* (no application required if claim form was filed for injury occurring during on or after January 1, 1990, and before January 1, 1994).

(n43)Footnote 35. *Lab. Code § 5500*.

(n44)Footnote 36. *Lab. Code § 5501.5(a)*.

(n45)Footnote 37. *Lab. Code § 4906(g)*.

(n46)Footnote 38. *Lab. Code § 5501*.

(n47)Footnote 39. *Lab. Code § 5501*.

(n48)Footnote 40. *Lab. Code §§ 5500, 5505*.

(n49)Footnote 41. *Lab. Code § 5500*.

(n50)Footnote 42. *Lab. Code § 4906(g)*.

(n51)Footnote 43. *Lab. Code § 5506*.

(n52)Footnote 44. *See Lab. Code § 5502(e)* (mandatory settlement conference).

(n53)Footnote 45. *See Lab. Code §§ 5502, 5504, 5700 et seq.*

(n54)Footnote 46. *See Lab. Code § 5800 et seq.*

(n55)Footnote 47. *Lab. Code § 5502(e)*.

(n56)Footnote 48. *Lab. Code §§ 5313, 5800.5*.

(n57)Footnote 48.1. *See Sharareh v. Workers' Compensation Appeals Board* (2007) 156 Cal. App. 4th 189, 67 Cal. Rptr. 3d 147, 2007 Cal. App. LEXIS 1726, *4-*12 (certified for partial publication); because *Lab. Code § 5313* and 8 Cal. Code Reg. § 10566 unambiguously require WCJs to prepare findings and an order with a summary of evidence, and an arbitrator acting as WCJ assumes all responsibilities and duties of WCJ under *Lab. Code § 5272*, Board correctly held that arbitrator erred in failing to prepare summary of evidence.

(n58)Footnote 49. *Lab. Code § 5315*.

(n59)Footnote 50. *Lab. Code § 5801*.

(n60)Footnote 51. *Lab. Code § 5802*.

(n61)Footnote 52. *Lab. Code § 5803*; *see Barnes v. Workers' Compensation Appeals Bd.* (2000) 23 Cal. 4th 679, 687-690, 97 Cal. Rptr. 2d 638, 2 P.3d 1180 (continuing jurisdiction includes employer's right to challenge whether particular treatment is justified under award for industrial injury).

(n62)Footnote 53. *See Barnes v. Workers' Compensation Appeals Bd.* (2000) 23 Cal. 4th 679, 687-690, 97 Cal. Rptr. 2d 638, 2 P.3d 1180 .

(n63)Footnote 54. *Lab. Code § 5900(a)*.

(n64)Footnote 55. *Lab. Code § 5903*.

(n65)Footnote 56. *Lab. Code § 5900*.

(n66)Footnote 57. *See, e.g., Rucker v. Workers' Compensation Appeals Bd. (2000) 82 Cal. App. 4th 151, 157-158, 97 Cal. Rptr. 2d 852* (workers' compensation judge violated injured employee's due process rights by unilaterally enlarging the findings after motion for reconsideration, without affording opportunity to present evidence on additional findings).

(n67)Footnote 58. *County of Sacramento v. Workers' Compensation Appeals Bd. (2000) 77 Cal. App. 4th 1114, 1121, 92 Cal. Rptr. 2d 290*.

(n68)Footnote 58.1. *Nestle Ice Cream Co. v. Workers' Compensation Appeals Board (2007) 146 Cal. App. 4th 1104, 1108-1111, 53 Cal. Rptr. 3d 340* (where workers' compensation judge's amendment correcting names of parties in text and increasing rate of disability and vocational rehabilitation allowance effected substantial and material change in award and amounted to judicial act, rather than mere correction of clerical error, employer's petition for reconsideration filed 20 days after amended award was filed and served was timely).

(n69)Footnote 59. *Cal. Const., art. XIV, § 4*.

(n70)Footnote 60. *Lab. Code §§ 5810, 5950*.

(n71)Footnote 61. *Lab. Code § 5950*.

(n72)Footnote 62. *See Maranian v. Workers' Compensation Appeals Bd. (2000) 81 Cal. App. 4th 1068, 1079-1081, 97 Cal. Rptr. 2d 418* (statutory scheme and its objectives better served by permitting interim appeals of WCAB decisions resolving issues crucial to the employee's right to receive benefits).

(n73)Footnote 63. *Malloy v. Workers' Compensation Appeals Bd. (1991) 1 Cal. App. 4th 1658, 1660-1662, 2 Cal. Rptr. 2d 820*; *Southwest Airlines v. Workers' Compensation Appeals Bd. (1991) 234 Cal. App. 3d 1421, 1423-1431, 286 Cal. Rptr. 347*.

(n74)Footnote 64. *Western Growers Ins. Co. v. Workers' Compensation Appeals Bd. (1993) 16 Cal. App. 4th 227, 233, 20 Cal. Rptr. 2d 26*.

(n75)Footnote 65. *See Lab. Code §§ 5810, 5950, 5955*.

(n76)Footnote 66. *Lab. Code § 5955*.

(n77)Footnote 67. *Code Civ. Proc. § 1085*.

(n78)Footnote 68. *See Fidelity & Casualty Co. of New York v. Workers' Compensation Appeals Bd. (1980) 103 Cal. App. 3d 1001, 1009, 163 Cal. Rptr. 339*.



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 4. Claims and Enforcement

1-20 California Employment Law § 20.31

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§ 20.31 Penalty for Unjustified Delay in Payment of Benefits

[1] Generally

Labor Code Section 5814, which provides for a penalty for the employer's unjustified delay in the payment of benefits, has been applied to virtually all types of workers' compensation benefits, including temporary and permanent disability indemnity.ⁿ¹ Until June 1, 2004, *Labor Code Section 5814* provided that when payment of compensation was unreasonably delayed or refused, either before or after the issuance of an award, the full amount of the order, decision, or award was to be increased by ten percent. The section also provided that the delay or refusal constituted good cause under *Lab. Code § 5803* to rescind, alter, or amend the order, decision, or award for the purpose of making the increase provided for under section 5814. The section further provided that the question of delay and the reasonableness of the cause of the delay must be determined by the appeals board in accordance with the facts.ⁿ² Whether a delay is unreasonable is usually a question of fact, and a court must give deference to the appeals board's finding on the issue.ⁿ³ However, a court is not bound to accept the board's factual findings if they are unreasonable and do not withstand scrutiny in the light of the entire record. Nor is a court required to accept the board's factual findings if it determines that an inequitable result would occur when the entire record is examined for fairness, reasonableness, and proportionality in the overall scheme of the workers' compensation law and the purposes the law seeks to accomplish.^{n3.1}

Operative June 1, 2004, and applicable to all injuries without regard to whether the injury occurred before, on, or after June 1, 2004,^{n3.2} *Labor Code Section 5814* provides that when payment of compensation has been unreasonably delayed or refused, either before or after the issuance of an award, the amount of the payment unreasonably delayed or refused will be increased up to 25 percent or \$10,000, whichever is less.ⁿ⁴ The appeals board must use its discretion to accomplish a fair balance and substantial justice between the parties.^{n4.1} The payment of an increased award pursuant to these provisions must be reduced by any amount paid under *Lab. Code § 4650(d)* on the same unreasonably delayed or refused benefit payment.^{n4.2} If the employer discovers a potential violation before an employee claiming a penalty, the employer may pay a self-imposed penalty in the amount of 10 percent of the amount of the payment unreasonably delayed or refused, along with the amount of the payment delayed or refused, within 90 days of the date of the

discovery. This self-imposed penalty is in lieu of the 25 percent or \$10,000 penalty.^{n4.3} Upon the approval of a compromise and release, findings and awards, or stipulations and orders by the appeals board, it must be conclusively presumed that accrued claims for penalty have been resolved, regardless of whether a petition for penalty has been filed, unless the claim for penalty is expressly excluded by the terms of the order or award.^{n4.4} Upon the submission of any issue for determination at a regular trial hearing, it must be conclusively presumed that an accrued claim for penalty in connection with the benefit at issue was resolved, regardless of whether a petition for penalty has been filed, unless the issue of penalty is also submitted or is expressly excluded in the statement of issues being submitted.^{n4.5}

As a direct comparison, under former section 5814, increases in compensation were based on unreasonable delay in any part of the specie of benefit awarded, and computed at the rate of 10 percent of the specie of benefit awarded. New section 5814 provides that increases are based on the actual amount of the unreasonably delayed compensation, and are computed at the rate of up to 25 percent of that compensation, with a maximum of \$10,000.^{n4.6}

Former section 5814 became inoperative and unenforceable on June 1, 2004. New section 5814 became applicable to all injuries in then-pending cases. Although the bill which codified new section 5814 provided that the legislation applied prospectively to pending cases, new section 5814(h), which provides that new section 5814 applies to all injuries without regard to whether the injury occurred before, on, or after the operative date of new section 5814, was an exception to the bill's general rule of prospective application.^{n4.7}

The burden is on the employer to establish that a delay is reasonable.ⁿ⁵ Assessment of a penalty under section 5814 is mandatory if there is a finding of unreasonable delay.ⁿ⁶ However, no unreasonable delay in the provision of medical treatment may be found when the employer has authorized treatment in a timely manner and the only dispute concerns payment of a billing submitted by a physician or medical provider as provided in *Labor Code § 4603.2*.ⁿ⁷ The purpose of *Labor Code Section 5814* is to encourage employers to make prompt payments by making delay costly.ⁿ⁸ It is designed to safeguard employees' rights, not employers' rights.ⁿ⁹

The penalty must be applied to the full amount of the award for the class of compensation for which the payment was unreasonably delayed or refused, without deduction or credit for any timely preaward payments made by the employer.ⁿ¹⁰ Section 5814 makes no provision for any deductions or credits for payments made by the employer, including a deduction or credit for the employer's timely preaward payments.ⁿ¹¹ Moreover, the penalty for unreasonable delay pursuant to *Labor Code § 5814* should be assessed against all compensable medical benefits, including those paid prior to and in anticipation of an award, despite any settlement discharging claims.ⁿ¹² Multiple penalties were permitted under former *Labor Code Section 5814* for delay or non-payment of benefits only when the unreasonable delay or refusal of those benefits was attributable to separate and distinct acts by an employer, and the employee gave the employer prior notice of his or her intention to seek separate penalties for each act.ⁿ¹³ The California Supreme Court held, however, that an employer's unreasonable termination of pre-award temporary disability benefits did not become a separate and distinct act supporting an additional penalty each time a benefits check should have been paid subsequent to the termination, despite the fact that the employee gave the employer prior notice of her intent to seek multiple penalties.ⁿ¹⁴ The Supreme Court reasoned that until the Workers' Compensation Appeals Board made an award or another legally significant event occurred that established the employer's liability, the employer acted under a good faith belief that its conduct was justified. Thus, since the termination of pre-award temporary disability payments resulted from a single unreasonable act by the employer before an award was made, and no legally significant event establishing the employer's liability followed that act, *Labor Code Section 5814* authorized only one penalty.ⁿ¹⁵

Under new section 5814, compensation based on an agreed medical examiner opinion and a stipulation to benefits may result in multiple increases in compensation if compensation after both events is unreasonably delayed.^{n15.1}

Labor Code Section 5814 is both a remedial and a penalty statute. The purpose of the remedial aspect is to facilitate the injured employee's return to work as quickly as possible. The purpose of the penalty aspect is to compel the employer to comply with the law fully and promptly.ⁿ¹⁶ Accordingly, when penalties are assessed in the workers' compensation

setting, the California Supreme Court has cautioned that the appeals board "should proceed with a view toward achieving a fair balance between the right of the employee to prompt payment of compensation benefits, and the avoidance of the imposition upon the employer or [insurance] carrier of harsh and unreasonable penalties."¹⁷

In determining whether an employer's delay in payment is unreasonable under *Labor Code Section 5814*, the Court has distinguished between cases involving the employer's intentional refusal to pay (*see* [3], *below*) and those involving an inadvertent failure to pay (*see* [2], *below*).

Nothing in Section 5814 can be construed to create a civil cause of action.^{17.1} Further, notwithstanding any other provision of law, no action may be brought to recover penalties under Section 5814 more than two years from the date the payment of compensation was due.^{17.2}

[2] Employer's Inadvertent Failure to Pay

In *State Compensation Insurance Fund v. Workers' Compensation Appeals Board*,¹⁸ the Supreme Court held that "a reasonably short delay, attributable to human error cannot, standing alone, be considered unreasonable."¹⁹ In that case, a clerical error recording the employer's change of address for that of the employee led to a one-week delay in the employee's benefit check for her temporary disability payment.²⁰

The Court pointed out that its scope of review is limited to whether the board's decision "was unreasonable" and supported by "substantial evidence," while keeping "an eye on whether the Board's decision represents a fair balance between the interests of the employee and employer."²¹ With those standards in mind, the Court opined that if a reasonably short delay attributable to human error could be considered unreasonable, it would defeat the distinction between the penalty provided for in *Labor Code Section 5814*, which requires a heightened showing of unreasonableness, and the penalty provided for in Section 4650, which does not require such a showing and which has a lesser monetary sanction.²² The Court cited with approval a court of appeal case which held that a short delay caused by the realities of business cannot alone be considered unreasonable and that a different conclusion would convert the Section 5814 penalty into a strict liability penalty, which would be contrary to the Legislature's intentions.²³ The Court noted that the length of the delay, the size of the late payment, and whether the employer or insurer is adequately staffed for the anticipated work load were all factors for consideration.²⁴

The Court distinguished cases²⁵ that involved the employer's intentional refusal to pay, as opposed to an inadvertent failure to pay.²⁶ The Court, therefore, disregarded language in an earlier case to the effect that the only satisfactory excuse for delay in payment of benefits is genuine doubt from a legal or medical standpoint,²⁷ and held that that opinion was not intended to address the universe of potential factual circumstances which could give rise to a delay in payment, but only the discrete situation in which an employer intentionally refuses to pay.²⁸ Nevertheless, although a delay may be explainable, it is not necessarily reasonable.²⁹

Whether a given delay is unreasonable does not depend solely on the number of days the employer withheld payment, but rather on the totality of the circumstances. The reason for the employer's action or inaction plays an important role. Thus, in *County of Sacramento v. Workers' Compensation Appeals Bd.*,³⁰ the court applied the fair balance test and found that the appeals board erred in assessing a Section 5814 penalty for an eight-day delay in paying death benefits resulting from a clerical error. In *County of San Luis Obispo v. Workers' Compensation Appeals Board*,³¹ applying the fair balance test, the court reviewed the totality of circumstances and determined that a three-week delay in mailing a check for medical benefits was not unreasonable. Even though the employer could not explain the delay, uncontradicted evidence in the record gave rise to the inference that the delay was inadvertent. Specifically, the employer took prompt corrective action as soon as it became aware that the check was not mailed to the employee. There was no history of improper processing of benefit payments or evidence of institutional neglect, such as repeated mistakes or inadequate personnel or training. The parties' agreement did not contain a timetable for payment; and the record indicated the checks were not mailed to the employee on any particular date, but rather from four to five weeks

after each quarter ended. The employee also contributed to the delay by failing to notify his employer that the check had not arrived within the usual four to five weeks. Imposing a ten percent penalty would have resulted in a windfall to the employee, grossly disproportionate to the inadvertent delay, and would have upset the balance of fairness. Finally, the court applied the 60-day time limit in *Labor Code Section 4603.2*.ⁿ³²

[3] Employer's Intentional Refusal to Pay

In cases involving an intentional refusal to pay, the only satisfactory excuse for delay in payment of disability benefits, whether before or after an award, is genuine medical or legal doubt regarding liability for benefits.ⁿ³³ Although *Labor Code Section 5814* is denominated a penalty, it is to be interpreted liberally; thus, the employer has the burden of presenting substantial evidence on which such a finding of doubt may be based.ⁿ³⁴ Genuine doubt has been found when, for example, the employer refuses to pay the remainder of the benefits owed because it is entitled to a credit against such remainder.ⁿ³⁵

The fact that an employer is able to generate *some* conflicting medical evidence is not in itself sufficient to justify withholding of payments.ⁿ³⁶ The fact that an employer has waited until the expiration of the appeal period before making benefit payments is also not a sufficient justification for delay to avoid the penalty under Section 5814.ⁿ³⁷ Another case has held that an employer could not have reasonably entertained a genuine doubt regarding its obligation to allow an applicant to change her choice of treating physicians when several denial of writ cases and standard California texts on workers' compensation discussed an employee's right to select a treating physician.ⁿ³⁸

[4] Exemptions From Penalty

The Uninsured Employers Fund, also called the Uninsured Employers Benefits Trust Fund (UEBTF), is exempt from payment of the ten percent penalty under *Labor Code Section 5814* by virtue of *Labor Code Section 3716.2*, which provides that the Fund is not liable for any penalties, including penalties for its own unreasonable delay in paying benefits to an injured employee with whom it has stipulated to pay benefits.ⁿ³⁹ The limitation of liability specified by section 3716.2 also precludes the imposition of a sanction against the UEBTF that otherwise could be imposed under *Labor Code section 5813* against a party, the party's attorney, or both, to pay any reasonable expenses, including attorney fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay and to pay, as "additional sanctions," an amount not exceeding \$ 2,500 to the General Fund of the State Treasury.ⁿ⁴⁰

Legal Topics:

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

Workers' Compensation & SSDI Administrative Proceedings General Overview
Workers' Compensation & SSDI Administrative Proceedings Claims General Overview

FOOTNOTES:

(n1)Footnote 1. *Moulton v. Workers' Compensation Appeals Board* (2000) 84 Cal. App. 4th 837, 842, 101 Cal. Rptr. 2d 175 .

(n2)Footnote 2. Former *Lab. Code* § 5814.

(n3)Footnote 3. *County of San Luis Obispo v. Workers' Compensation Appeals Bd.* (2001) 92 Cal. App. 4th 869, 874, 112 Cal. Rptr. 2d 246 , citing *Kampner v. Workers' Comp. Appeals Bd.* (1978) 86 Cal. App. 3d 376, 150 Cal. Rptr. 222 .

(n4)Footnote 3.1. *County of San Luis Obispo v. Workers' Compensation Appeals Bd.* (2001) 92 Cal. App. 4th 869, 874, 112 Cal. Rptr. 2d 246 , citing *Chu v. Workers' Compensation Appeals Bd.* (1996) 49 Cal. App. 4th 1176, 1182 ;

see also *Henry v. Workers' Comp. Appeals Bd.* (1998) 68 Cal. App. 4th 981, 985 .

(n5)Footnote 3.2. See *McCarthy v. Workers' Comp. Appeals Board* (2006) 135 Cal. App. 4th 1230, 1234-1238, 37 Cal. Rptr. 3d 909 (new section 5814 applied to penalties imposed after June 1, 2004, even though they were imposed before January 1, 2005, which was date on which old § 5814 was repealed, where applicant was still litigating her legal claims when she petitioned WCAB for reconsideration of WCJ's findings in January 2005, and petitioned court of appeal for writ of review from WCAB's denial of her petition; in amendment of § 5814 providing that former § 5814 would become "inoperative" on June 1, 2004, and was "repealed" as of January 1, 2005, Legislature intended "inoperative" to mean "unenforceable" so that (1) in event new § 5814 was determined to be unconstitutional or otherwise unenforceable, former § 5814 could be reinstated without delay occasioned by introduction of new legislation, (2) delay in implementation of new § 5814 allowed injured workers and employers to conclude some matters under former § 5814, and (3) by delaying inoperative status of former § 5814 and operative status of new § 5814, Legislature provided additional period to avoid two-year statute of limitations created by new § 5814(g)), approving WCAB decision in *Abney v. Aera Energy, Liberty Mutual Ins. Co.* (2004) 69 Cal. Comp. Cases 1552 .

(n6)Footnote 4. See *McCarthy v. Workers' Comp. Appeals Board* (2006) 135 Cal. App. 4th 1230, 1232, 37 Cal. Rptr. 3d 909 (if former § 5814 applies, applicant's entire award of temporary disability benefits, past, present and future, is increased by 10 percent penalty; under new § 5814(a), penalty is assessed only against amount of payment delayed or refused).

(n7)Footnote 4.1. *Lab. Code § 5814(a).*

(n8)Footnote 4.2. *Lab. Code § 5814(d).*

(n9)Footnote 4.3. *Lab. Code § 5814(b).* See *New United Motors Manufacturing, Inc. v. Workers' Compensation Appeals Board* (2006) 141 Cal. App. 4th 1533, 1536-1540, 47 Cal. Rptr. 3d 200 (WCAB erred in imposing 25% penalty under *Lab. Code § 5814(a)* on employer who had already paid self-imposed 10% penalty under *Lab. Code § 5814(b)*; application of § 5814(b) is not limited to employer discovering potential violation before employee, but to employer discovering potential violation before employee claims penalty; employer unreasonably delayed payment for only 47 days and then made payments and included 10% self-imposed penalty after receiving notice of interruption in applicant's benefits).

(n10)Footnote 4.4. *Lab. Code § 5814(c).*

(n11)Footnote 4.5. *Lab. Code § 5814(c).*

(n12)Footnote 4.6. *Green v. Workers' Compensation Appeals Board* (2005) 127 Cal. App. 4th 1426, 1432 n.2, 26 Cal. Rptr. 3d 527 .

(n13)Footnote 4.7. *Green v. Workers' Compensation Appeals Board* (2005) 127 Cal. App. 4th 1426, 1437-1443, 26 Cal. Rptr. 3d 527 .

(n14)Footnote 5. *County of San Luis Obispo v. Workers' Compensation Appeals Bd.* (2001) 92 Cal. App. 4th 869, 874, 112 Cal. Rptr. 2d 246 , citing *Kerley v. Workers' Comp. Appeals Bd.* (1971) 4 Cal. 3d 223, 227, 93 Cal. Rptr. 192, 481 P.2d 200 .

(n15)Footnote 6. *County of San Luis Obispo v. Workers' Compensation Appeals Bd.* (2001) 92 Cal. App. 4th 869, 874, 112 Cal. Rptr. 2d 246 .

(n16)Footnote 7. *Lab. Code § 5814(e).*

(n17)Footnote 8. See *Jardine v. Workers' Compensation Appeals Bd.* (1984) 163 Cal. App. 3d 1, 8, 209 Cal.

Rptr. 139 .

(n18)Footnote 9. *See Moulton v. Workers' Compensation Appeals Board* (2000) 84 Cal. App. 4th 837, 841-842, 101 Cal. Rptr. 2d 175 (penalty for unreasonable delay in paying compensation is designed to help employee obtain promptly the cure or relief to which employee is entitled and to compel employer to provide cure or relief in timely fashion); *see also Jardine v. Workers' Compensation Appeals Bd.* (1984) 163 Cal. App. 3d 1, 8, 209 Cal. Rptr. 139 .

(n19)Footnote 10. *Rhiner v. Workers' Compensation Appeals Bd.* (1993) 4 Cal. 4th 1213, 1227-1228, 18 Cal. Rptr. 2d 129, 848 P.2d 244 ; *Gallamore v. Workers' Compensation Appeals Bd.* (1979) 23 Cal. 3d 815, 826, 153 Cal. Rptr. 590, 591 P.2d 1242 . *See Avalon Bay Foods v. Workers' Compensation Appeals Bd.* (1998) 18 Cal. 4th 1165, 1176-1177, 77 Cal. Rptr. 2d 552, 559, 959 P.2d 1228 (penalty for delay in payment of medical treatment transportation benefits applies to total amount of medical expenses under *Lab. Code* § 4600, but in this case insurer met 60-day reimbursement requirement so penalty did not apply); *Kopitske v. Workers' Comp. Appeals Bd.* (1999) 74 Cal. App. 4th 623, 633, 88 Cal. Rptr. 2d 216 (penalty for unreasonable delay in payment of injured employee's advance from her permanent disability is assessed against employee's total permanent disability, not against her vocational rehabilitation maintenance allowance, supplemented by the advance from her permanent disability). *See also State v. Workers' Compensation Appeals Bd.* (1996) 44 Cal. App. 4th 128, 146, 51 Cal. Rptr. 2d 606 (10 percent penalty imposed for unreasonable delay in payment of industrial disability leave to which injured state employee was entitled under *Gov. Code* § 19869 *et seq.*); *Soto v. Workers' Compensation Appeals Bd.* (1996) 46 Cal. App. 4th 1356, 1363, 54 Cal. Rptr. 2d 446 (penalty for employer's unreasonable delay in payment of interest on amount of stipulated award assessed against total award of benefits per class, including benefits paid prior to unreasonable failure to pay interest).

(n20)Footnote 11. *Rhiner v. Workers' Compensation Appeals Bd.* (1993) 4 Cal. 4th 1213, 1225-1227, 18 Cal. Rptr. 2d 129, 848 P.2d 244 (employer unreasonably refused to pay \$1,000 to \$2,000 cost of employee's psychotherapy; penalty was properly assessed against total award of medical benefits estimated in excess of \$250,000, which included preaward benefits that the employer had timely paid).

(n21)Footnote 12. *Neel v. Workers' Compensation Appeals Bd.* (1998) 67 Cal. App. 4th 847, 852, 79 Cal. Rptr. 2d 353 .

(n22)Footnote 13. *Gallamore v. Workers' Compensation Appeals Bd.* (1979) 23 Cal. 3d 815, 824, 153 Cal. Rptr. 590, 591 P.2d 1242 ; *Christian v. Workers' Comp. Appeals Bd.* (1997) 15 Cal. 4th 505, 516-517, 63 Cal. Rptr. 2d 336, 936 P.2d 115 (reaffirming holding in *Gallamore*); *see California Highway Patrol v. Workers' Compensation Appeals Board* (2001) 89 Cal. App. 4th 1201, 1206, 108 Cal. Rptr. 2d 118 (when employer or carrier makes late workers' compensation benefit payment and fails to include interest in payment, only single penalty may be imposed under *Lab. Code* § 5814); *Moulton v. Workers' Compensation Appeals Board* (2000) 84 Cal. App. 4th 837, 845, 101 Cal. Rptr. 2d 175 (employee entitled to two separate § 5814 penalties for separate and distinct acts by employer, assessed against all past, present and future temporary disability payments as increased by penalty for employer's failure to self-assess under *Lab. Code* § 4650(d): one for unreasonable delay in paying temporary disability benefits by making late and partial payment when full payment ordered, and one for failure to self-assess).

(n23)Footnote 14. *Christian v. Workers' Comp. Appeals Bd.* (1997) 15 Cal. 4th 505, 516-517, 63 Cal. Rptr. 2d 336, 936 P.2d 115 .

(n24)Footnote 15. *Christian v. Workers' Comp. Appeals Bd.* (1997) 15 Cal. 4th 505, 516-517, 63 Cal. Rptr. 2d 336, 936 P.2d 115 .

See also Lab. Code § 5814(a), effective June 1, 2004 (in any proceeding under section 5814, appeals board shall use its discretion to accomplish fair balance and substantial justice between parties).

(n25)Footnote 15.1. *Green v. Workers' Compensation Appeals Board* (2005) 127 Cal. App. 4th 1426, 1443-1445,

26 Cal. Rptr. 3d 527 .

(n26)Footnote 16. *DuBois v. Workers' Compensation Appeals Bd.* (1993) 5 Cal. 4th 382, 396, 20 Cal. Rptr. 2d 523, 853 P.2d 978 .

(n27)Footnote 17. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1998) 18 Cal. 4th 1209, 1215, 77 Cal. Rptr. 2d 528, 959 P.2d 1204 , quoting *Gallamore v. Workers' Compensation Appeals Bd.* (1979) 23 Cal. 3d 815, 828, 153 Cal. Rptr. 590, 591 P.2d 1242 . See *Neel v. Workers' Compensation Appeals Bd.* (1998) 67 Cal. App. 4th 847, 852, 79 Cal. Rptr. 2d 353 (although ten percent penalty on full class of medical benefits may have appeared harsh when amount delayed was only \$78.39, "an unreasonable delay or refusal in payment that is monetarily of little consequence to an employer or carrier may be disastrous to an injured worker struggling to obtain medical treatment and pay basic household expenses," quoting *Rhiner v. Workers' Compensation Appeals Bd.* (1993) 4 Cal. 4th 1213, 1226, 18 Cal. Rptr. 2d 129, 848 P.2d 244 . See also *Lab. Code § 5814(a)*, effective June 1, 2004 (in any proceeding under section 5814, appeals board shall use its discretion to accomplish fair balance and substantial justice between parties).

(n28)Footnote 17.1. *Lab. Code § 5814(f)*.

(n29)Footnote 17.2. *Lab. Code § 5814(g)*.

(n30)Footnote 18. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1998) 18 Cal. 4th 1209, 77 Cal. Rptr. 2d 528, 959 P.2d 1204 .

(n31)Footnote 19. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1998) 18 Cal. 4th 1209, 1216, 77 Cal. Rptr. 2d 528, 959 P.2d 1204 (one-week delay in temporary disability payments due to clerical error not "unreasonable").

(n32)Footnote 20. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1998) 18 Cal. 4th 1209, 1211-1212, 77 Cal. Rptr. 2d 528, 959 P.2d 1204 .

(n33)Footnote 21. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1998) 18 Cal. 4th 1209, 1215, 77 Cal. Rptr. 2d 528, 959 P.2d 1204 ; see *Lab. Code §§ 5814, 5952* ("The question of delay and the reasonableness of the cause therefor shall be determined by the appeals board in accordance with the facts"); review by appellate court is limited to whether Board's decision "was unreasonable" and is supported by "substantial evidence"; see also [1], above.

(n34)Footnote 22. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1998) 18 Cal. 4th 1209, 1216-1217, 77 Cal. Rptr. 2d 528, 959 P.2d 1204 .

(n35)Footnote 23. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1998) 18 Cal. 4th 1209, 1218-1219, 77 Cal. Rptr. 2d 528, 959 P.2d 1204 , citing *Kampner v. Workers' Compensation Appeals Bd.* (1978) 86 Cal. App. 3d 376, 380, 150 Cal. Rptr. 222 (26-day delay in benefits payments, partially as result of mismailing).

(n36)Footnote 24. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1998) 18 Cal. 4th 1209, 1219-1220, 77 Cal. Rptr. 2d 528, 959 P.2d 1204 . See, e.g., *County of Sacramento v. Workers' Compensation Appeals Bd.* (1999) 69 Cal. App. 4th 726, 732-733, 81 Cal. Rptr. 2d 780 (eight-day delay in payments due to clerical error does not constitute "unreasonable" delay subject to penalty pursuant to *Lab. Code § 5814* when it was due to mere innocent inadvertence).

(n37)Footnote 25. See discussion in [3], below.

(n38)Footnote 26. See *County of Sacramento v. Workers' Compensation Appeals Bd.* (1999) 69 Cal. App. 4th

726, 733, 81 Cal. Rptr. 2d 780 (examining case law and finding no cases in which mere inadvertence alone was held to be sufficient basis for finding delay "unreasonable"; instead, nature of inadvertence must be considered in light of all other relevant factors in determining whether delay was unreasonable).

(n39)Footnote 27. See *Kerley v. Workmen's Compensation Appeals Bd.* (1971) 4 Cal. 3d 223, 230, 93 Cal. Rptr. 192, 481 P.2d 200 and discussion in [3], below.

(n40)Footnote 28. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1998) 18 Cal. 4th 1209, 1220, 77 Cal. Rptr. 2d 528, 959 P.2d 1204 .

(n41)Footnote 29. *Waters v. Workers' Comp. Appeals Bd.* (2000) 80 Cal. App. 4th 652, 664-665, 95 Cal. Rptr. 2d 574 (although adjuster's inundating workload was largely responsible for seven-week delay, it was "institutional neglect," not caused by clerical error or inadvertence, and not contributed to by any action or omission of claimant, who diligently notified insurer of incorrect payments).

(n42)Footnote 30. *County of Sacramento v. Workers' Compensation Appeals Bd. (Souza)* (1999) 69 Cal. App. 4th 726, 733, 81 Cal. Rptr. 2d 780 .

(n43)Footnote 31. *County of San Luis Obispo v. Workers' Comp. Appeals Bd.* (2001) 92 Cal. App. 4th 869, 112 Cal. Rptr. 2d 246 .

(n44)Footnote 32. *County of San Luis Obispo v. Workers' Comp. Appeals Bd.* (2001) 92 Cal. App. 4th 869, 876-878, 112 Cal. Rptr. 2d 246 .

(n45)Footnote 33. *Kerley v. Workmen's Compensation Appeals Bd.* (1971) 4 Cal. 3d 223, 230, 93 Cal. Rptr. 192, 481 P.2d 200 .

(n46)Footnote 34. *Kerley v. Workmen's Compensation Appeals Bd.* (1971) 4 Cal. 3d 223, 227, 230, 93 Cal. Rptr. 192, 481 P.2d 200 ; *Johnson v. Workers' Compensation Appeals Bd.* (1985) 163 Cal. App. 3d 770, 774, 210 Cal. Rptr. 28 .

(n47)Footnote 35. *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1982) 130 Cal. App. 3d 933, 938, 182 Cal. Rptr. 171 .

(n48)Footnote 36. *Jardine v. Workers' Compensation Appeals Bd.* (1984) 163 Cal. App. 3d 1, 8-9, 209 Cal. Rptr. 139 .

(n49)Footnote 37. *Jensen v. Workers' Compensation Appeals Bd.* (1985) 170 Cal. App. 3d 244, 247-248, 216 Cal. Rptr. 33 (disapproved by *State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1998) 18 Cal. 4th 1209, 1220, 77 Cal. Rptr. 2d 528, 959 P.2d 1204 to extent that it suggests inadvertent delay is per se unreasonable).

(n50)Footnote 38. *Ralphs Grocery Co. v. Workers' Compensation Appeals Bd.* (1995) 38 Cal. App. 4th 820, 832, 45 Cal. Rptr. 2d 197 .

(n51)Footnote 39. *DuBois v. Workers' Compensation Appeals Board* (1993) 5 Cal. 4th 382, 398-399, 20 Cal. Rptr. 2d 523, 853 P.2d 978 ; *Duncan v. Workers' Comp. Appeals Board* (2008) 166 Cal. App. 4th 294, 297, 82 Cal. Rptr. 3d 664 .

(n52)Footnote 40. *Duncan v. Workers' Comp. Appeals Board* (2008) 166 Cal. App. 4th 294, 300-304, 82 Cal. Rptr. 3d 664 .



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 4. Claims and Enforcement

1-20 California Employment Law § 20.32

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.32 Increased Benefits for Discrimination Against Claimants

[1] General Rule

Labor Code Section 132a specifically prohibits an employer from discharging or threatening to discharge, or in any other manner discriminating against, any employee because the employee has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement.ⁿ¹ The California Supreme Court has held that Section 132a expresses a broad policy that employees who have sustained compensable industrial injuries not be discriminated against. Thus, the Court has held that an employer who discriminates against an injured employee may be guilty of a violation of Section 132a even if the employer has not violated any of the statute's specific prohibitions.^{n1.1}

To warrant an award pursuant to section 132a, the employee must establish at least a prima facie case of lost wages and benefits caused by the employer's discriminatory acts.ⁿ² The employee must establish discrimination by a preponderance of the evidence.^{n2.1} An employee's showing that he or she suffered an industrial injury and some detrimental consequences as a result is insufficient to establish a prima facie case of discrimination within the meaning of section 132a. An employee must show not only detriment, but also show that he or she was singled out for disadvantageous treatment because of his or her injury.^{n2.2} By prohibiting "discrimination" in section 132a, the Legislature prohibited the treatment of injured employees differently than other employees who were neither injured nor had filed claims, making them suffer disadvantages not visited on such other employees.^{n2.3} Once the employee presents a prima facie case of discrimination, the burden shifts to the employer to establish an affirmative defense.^{n2.4}

The Workers' Compensation Appeals Board has held en banc that when an injured employee's claim under *Lab. Code § 132a* is premised on the employer's termination of or refusal to provide group health plan benefits to the employee pursuant to the terms of an Employee Retirement Income Security Act of 1974 (ERISA)ⁿ³ plan, the claim relates to the ERISA plan and, therefore, is preempted by ERISA.ⁿ⁴

Labor Code Section 132a is not restricted in scope to injuries arising out of employment with the discriminating employer. As long as an employer-employee relationship exists at the time of the discriminatory act, Section 132a is applicable, even if the injury arose while the worker was employed by another employer.ⁿ⁵ Because the statute serves a remedial function by providing some compensation to an employee who suffers discrimination as a result of an industrial injury, it is to be liberally construed, as provided by *Labor Code Section 3202*.ⁿ⁶

An award of backpay under *Lab. Code § 132a* based on wrongful denial of reinstatement because of an industrial injury may include prejudgment interest on the lost wages.ⁿ⁷

In practice, the cases brought under Section 132a do not generally involve overt, admittedly intentional discrimination against industrially injured employees,ⁿ⁸ but rather the neutral application of the employer's internal procedures and rules in a manner that adversely affects such employees. For example, in the seminal case in this area, *Judson Steel Corp. v. Workers' Comp. Appeals Board*,ⁿ⁹ a worker who lost his seniority and was laid off as a result of a 15-month absence due to a compensable injury was held to be entitled to increased benefits under Section 132a. The employer had a general rule providing that seniority could be revoked in the event of a 12-month absence from work. However, the Court found that the actual practice of the employer and the union had been to extend an employee's seniority in cases of compensable injury. The employer's failure to make even an attempt to do so permitted the employee to be penalized solely because of the time lost from work caused by the injury.ⁿ¹⁰ In a subsequent case, the court found that a city's policy requiring an injured worker to use earned vacation time rather than sick leave to attend medical appointments needed to care for industrial injuries, while workers with non-industrial injuries could use their sick leave for such matters, constituted discrimination under Section 132a, because the city did not establish a reasonable, legitimate business purpose for the discriminatory policy.^{n10.1}

Labor Code Section 132a is not, however, the exclusive remedy for employees discriminated against as a result of work-related injuries. The FEHA and other common law remedies are available to employees subject to discrimination on the basis of work-related disabilities.ⁿ¹¹ However, the standards for establishing disability discrimination under the FEHA and under *Labor Code Section 132a* might well be different and, to the extent that the remedies overlap, equitable principles preclude double recovery for employees.ⁿ¹²

[2] Business Realities Test

In *Smith v. Workers' Compensation Appeals Board*,ⁿ¹³ the court of appeal stated that *Labor Code Section 132a* proscribes certain actions triggered by the industrial injury that work to the detriment of the employee, unless they are necessitated by the "realities of doing business." The court based its conclusion on dictum in *Judson Steel*, which stated that *Labor Code Section 132a* does not compel an employer to ignore the realities of doing business by reemploying unqualified employees or employees for whom positions are no longer available.ⁿ¹⁴ The court indicated that under a business realities test, the employer must show that the action taken was necessary and that it was directly linked to business realities.ⁿ¹⁵ The court stated that the burden of establishing that this standard was met is on the employer to prove an affirmative defense of business realities.ⁿ¹⁶

In one case, the court held that if the real reason the employer refused to allow the employee to return to work after an industrial injury was that there was no work available that she could perform without the risk of reinjury or further injury, the employer did not violate Section 132a.ⁿ¹⁷ On the other hand, the court said that if the employee could demonstrate that she could have returned to work and performed her job without risk of reinjury or further injury to herself, an inference of discrimination could be made.ⁿ¹⁸

In *Barns v. Workers' Comp. Appeals Board*,ⁿ¹⁹ the court of appeal held that an employer had failed to justify its refusal to assign an injured employee to light duty and its eventual termination of the employee based on the business realities test. The court found that although business realities may necessitate termination when an employer reasonably believes that an employee is permanently disabled from performing the job, a physician's opinion that the employee's

injury was likely to preclude him from resuming his preinjury duties could not give rise to such a reasonable belief when it was evident that the employee was continuing to improve and the injury had not stabilized.ⁿ²⁰ In addition, the court found that the employee's acceptance of rehabilitation benefits did not, by itself, constitute a business reality necessitating termination.ⁿ²¹ Finally, the court held that the combined effect of the physician's report, the employee's acceptance of rehabilitation benefits, the employee's reported interest in starting a new career, and the employer's payment of fringe benefits for the employee as long as he was on the payroll was insufficient to demonstrate a business necessity for the employee's termination.ⁿ²²

It is the employer's knowledge at the time it terminates an employee, not its knowledge at the time it returns the employee to work, that is relevant in determining whether an employer established reasonable business necessity. An employer may be justified in terminating an employee if at the time of termination the employer reasonably believes that returning the employee to his position would endanger the employee or others, even if the employee had previously returned to work.^{n22.1}

[3] Causation

In *Judson Steel*, the California Supreme Court found a causal link between the employee's industrially caused absences and his discharge because the employer did not follow its standard procedure for safeguarding absent employees' accumulated seniority.ⁿ²³ The employee showed that but for the industrially caused absences, he would not have been laid off; and this was a proper basis for the WCAB to infer discrimination.ⁿ²⁴ A court of appeal has stated that the reverse of this reasoning is also true. The court held that if the employee would have been terminated in any event under the employer's policy, for reasons having nothing to do with an industrial injury, it cannot be said that discrimination by the employer by application of the policy caused the termination, as required under *Labor Code Section 132a*.ⁿ²⁵

Legal Topics:

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

Labor & Employment Law
Discrimination
General Overview
Workers' Compensation & SSDI
Administrative Proceedings
Claims
General Overview
Workers' Compensation & SSDI
Benefit Determinations
General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 132a(1)*. See *Dept. of Rehabilitation v. Workers' Compensation Appeals Board* (2003) 30 Cal. 4th 1281, 1299, 135 Cal. Rptr. 2d 665, 70 P.3d 1076 .

(n2)Footnote 1.1. *Dept. of Rehabilitation v. Workers' Compensation Appeals Board* (2003) 30 Cal. 4th 1281, 1299, 135 Cal. Rptr. 2d 665, 70 P.3d 1076 ; *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal. 3d 658, 667, 150 Cal. Rptr. 250, 586 P.2d 564 , *disapproved on other grounds*, *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 454, 959 P.2d 752 .

(n3)Footnote 2. *Dept. of Rehabilitation v. Workers' Compensation Appeals Board* (2003) 30 Cal. 4th 1281, 1298, 135 Cal. Rptr. 2d 665, 70 P.3d 1076 ; *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal. App. 4th 1376, 1386, 28 Cal. Rptr. 2d 30 .

(n4)Footnote 2.1. *Dept. of Rehabilitation v. Workers' Compensation Appeals Board* (2003) 30 Cal. 4th 1281, 1298, 135 Cal. Rptr. 2d 665, 70 P.3d 1076 ; *Western Electric Co. v. Workers' Comp. Appeals Bd.* (1979) 99 Cal. App. 3d 629, 640, 160 Cal. Rptr. 436 .

(n5)Footnote 2.2. *Dept. of Rehabilitation v. Workers' Compensation Appeals Board* (2003) 30 Cal. 4th 1281, 1301, 135 Cal. Rptr. 2d 665, 70 P.3d 1076 ; *County of San Luis Obispo v. Workers' Compensation Appeals Board* (2005) 133 Cal. App. 4th 641, 34 Cal. Rptr. 3d 690, 2005 Cal. App. LEXIS 1637, *11 .

(n6)Footnote 2.3. *Dept. of Rehabilitation v. Workers' Compensation Appeals Board* (2003) 30 Cal. 4th 1281, 1300-1301, 135 Cal. Rptr. 2d 665, 70 P.3d 1076 (because employee did not allege that employer allowed other employees paid time off to seek medical care without resort to sick leave, employee failed to demonstrate he was victim of discrimination within meaning of section 132a).

(n7)Footnote 2.4. *Dept. of Rehabilitation v. Workers' Compensation Appeals Board* (2003) 30 Cal. 4th 1281, 1298, 1301 n.8, 135 Cal. Rptr. 2d 665, 70 P.3d 1076 (because employee failed to establish prima facie case of discrimination, Supreme Court did not address employer's contention that employer had legitimate business reason for requiring employee to use sick leave and vacation time when away from office seeing physician for treatment after industrial injury); *Barns v. Workers' Comp. Appeals Bd.* (1989) 216 Cal. App. 3d 524, 531, 266 Cal. Rptr. 503 .

(n8)Footnote 3. *See* 29 U.S.C. § 1001 *et seq.*.

(n9)Footnote 4. *Navarro v. Workers' Compensation Appeals Bd.* (2002) 67 Cal. Comp. Cas. 1364 .

(n10)Footnote 5. *See Fortner v. Safeway Stores, Inc.* (1991) 229 Cal. App.3d 542, 549-550, 280 Cal. Rptr. 409 (Lab. Code § 132a applied in case of store employee subject to discipline for wearing open-toed shoes for painful foot condition which arose during employment by employer's predecessor), *disapproved on other grounds*, *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 454, 959 P.2d 752 (Lab. Code § 132a is not exclusive remedy for discrimination based on work-related disability).

(n11)Footnote 6. *Judson Steel Corp. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 658, 668, 150 Cal. Rptr. 250, 586 P.2d 564 , *disapproved on other grounds*, *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 454, 959 P.2d 752 .

(n12)Footnote 7. *Currie v. Workers' Compensation Appeals Board* (2001) 24 Cal. 4th 1109, 104 Cal. Rptr. 2d 392, 17 P.3d 749 (applying Civ. Code § 3287(a) and holding that Lab. Code § 132a backpay is not subject to limitation on interest in implicit in Lab. Code § 5800).

(n13)Footnote 8. For an example of a case that does involve facts in which supervisor told employee it was against company policy to rehire anyone with a workers' compensation claim against the employer, *see Morehouse v. Workers' Compensation Appeals Board* (1984) 154 Cal. App. 3d 323, 326, 201 Cal. Rptr. 154 .

(n14)Footnote 9. *Judson Steel Corp. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 658, 150 Cal. Rptr. 250, 586 P.2d 564 , *disapproved on other grounds*, *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 454, 959 P.2d 752 .

(n15)Footnote 10. *See Judson Steel Corp. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 658, 665, 150 Cal. Rptr. 250, 586 P.2d 564 , *disapproved on other grounds*, *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 454, 959 P.2d 752 ; *see also Smith v. Workers' Compensation Appeals Bd.* (1984) 152 Cal. App. 3d 1104, 1109, 199 Cal. Rptr. 881 (case hinged on proper application of two-absence firing rule).

(n16)Footnote 10.1. *Andersen v. Workers' Compensation Appeals Board* (2007) 149 Cal. App. 4th 1369, 57 Cal. Rptr. 3d 839, 2007 Cal. App. LEXIS 606, *11-*19 .

(n17)Footnote 11. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1148, 77 Cal. Rptr. 2d 445, 448, 959 P.2d 752 .

(n18)Footnote 12. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1158, 77 Cal. Rptr. 2d 445, 454, 959 P.2d 752 .

(n19)Footnote 13. *Smith v. Workers' Compensation Appeals Bd.* (1984) 152 Cal. App. 3d 1104, 1109-1110, 199

Cal. Rptr. 881 .

(n20)Footnote 14. *Smith v. Workers' Compensation Appeals Bd. (1984) 152 Cal. App. 3d 1104, 1109, 199 Cal. Rptr. 881* , citing *Judson Steel Corp. v. Workers' Compensation Appeals Board (1978) 22 Cal. 3d 658, 667, 150 Cal. Rptr. 250, 586 P.2d 564 .*

(n21)Footnote 15. *See Smith v. Workers' Compensation Appeals Bd. (1984) 152 Cal. App. 3d 1104, 1109, 199 Cal. Rptr. 881 .*

(n22)Footnote 16. *Smith v. Workers' Compensation Appeals Bd. (1984) 152 Cal. App. 3d 1104, 1109, 199 Cal. Rptr. 881* ; *see Morehouse v. Workers' Compensation Appeals Board (1984) 154 Cal. App. 3d 323, 329, 201 Cal. Rptr. 154 .*

(n23)Footnote 17. *Western Electric Co. v. Workers' Compensation Appeals Bd. (1979) 99 Cal. App. 3d 629, 644-645, 160 Cal. Rptr. 436 . See, e.g., County of San Luis Obispo v. Workers' Compensation Appeals Board (2005) 133 Cal. App. 4th 641, 34 Cal. Rptr. 3d 690, 2005 Cal. App. LEXIS 1637, *12-*16 (county did meet its burden of showing reasonable business necessity).*

(n24)Footnote 18. *Western Electric Co. v. Workers' Compensation Appeals Bd. (1979) 99 Cal. App. 3d 629, 644-645, 160 Cal. Rptr. 436 .*

(n25)Footnote 19. *Barns v. Workers' Compensation Appeals Bd. (1989) 216 Cal. App. 3d 524, 266 Cal. Rptr. 503 .*

(n26)Footnote 20. *Barns v. Workers' Compensation Appeals Bd. (1989) 216 Cal. App. 3d 524, 536, 266 Cal. Rptr. 503 .*

(n27)Footnote 21. *Barns v. Workers' Compensation Appeals Bd. (1989) 216 Cal. App. 3d 524, 537, 266 Cal. Rptr. 503 .*

(n28)Footnote 22. *Barns v. Workers' Compensation Appeals Bd. (1989) 216 Cal. App. 3d 524, 533, 266 Cal. Rptr. 503 .*

(n29)Footnote 22.1. *County of San Luis Obispo v. Workers' Compensation Appeals Board (2005) 133 Cal. App. 4th 641, 34 Cal. Rptr. 3d 690, 2005 Cal. App. LEXIS 1637, *14 .*

(n30)Footnote 23. *Judson Steel Corp. v. Workers' Compensation Appeals Bd. (1978) 22 Cal. 3d 658, 665, 150 Cal. Rptr. 250, 586 P.2d 564 , disapproved on other grounds, City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 454, 959 P.2d 752 .*

(n31)Footnote 24. *Judson Steel Corp. v. Workers' Compensation Appeals Bd. (1978) 22 Cal. 3d 658, 665, 150 Cal. Rptr. 250, 586 P.2d 564 , disapproved on other grounds, City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 454, 959 P.2d 752 .*

(n32)Footnote 25. *Leamon v. Workers' Compensation Appeals Bd. (1987) 190 Cal. App. 3d 1409, 1416, 235 Cal. Rptr. 912 .*



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 4. Claims and Enforcement

1-20 California Employment Law § 20.33

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.33 Fraud Concerning Workers' Compensation Claims

[1] Prohibition

The Legislature has declared that workers' compensation fraud harms employers by contributing to increasingly high costs of workers' compensation insurance and self-insurance, and harms employees by undermining the perceived legitimacy of all workers' compensation claims. The Legislature has also declared its intent to prevent workers' compensation insurance fraud, thereby reducing costs, assisting in restoring confidence and faith in the workers' compensation system, and facilitating expedient and full compensation for employees injured at the workplace.n1

Insurance Code Section 1871.4 prohibits all of the following acts and conduct:n2

1. Making or causing to be made any knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying any compensation, as defined in *Labor Code Section 3207*;
2. Presenting or causing to be presented any knowingly false or fraudulent written or oral material statement in support of, or in opposition to, any claim for compensation for the purpose of obtaining or denying any compensation, as defined in *Labor Code Section 3207*;
3. Knowingly assisting, abetting, soliciting, or conspiring with any person who engages in an unlawful act under *Insurance Code Section 1871.4*;
4. Making or causing to be made any knowingly false or fraudulent statements with regard to entitlement to benefits with the intent to discourage an injured worker from claiming benefits or pursuing a claim;
5. Making or causing to be made any knowingly false or fraudulent material statement or material

representation for the purpose of obtaining or denying any of the benefits or reimbursement or for the purpose of discouraging an employer from claiming any of the benefits or reimbursement provided in the Return-to-Work Program established under *Labor Code Section 139.48*; and

6. Make or cause to be made any knowingly false or fraudulent material statement or material representation for the purpose of discouraging an employer from claiming any of the benefits or reimbursement provided in the Return-to-Work Program established under *Lab. Code § 139.48*.n3

For purposes of *Insurance Code Section 1871.4*, the term "statement" includes but is not limited to any notice, proof of injury, bill for services, payment for services, hospital or doctor records, X-rays, test results, medical-legal expense as defined in *Labor Code Section 4620*, and other evidence of loss, injury, expense, or payment.n4

It is also illegal for a firm, corporation, partnership, association, or any person acting in his or her individual capacity as a public or private employee, to solicit, accept, or refer any business to or from any individual or entity with the knowledge that, or with reckless disregard for whether, the individual or entity for or from whom the solicitation or referral is made, or the individual or entity who is solicited or referred, intends to violate *Penal Code Section 550* (general criminal statute regarding insurance fraud) or *Insurance Code Section 1871.4*.n5

The administrative director of the Division of Workers' Compensation must annually provide every employer, claims adjuster, third-party administrator, physician, and attorney who participates in the workers' compensation system a notice warning the recipient against committing workers' compensation fraud. The notice must specify the penalties applicable to committing workers' compensation fraud.n6

In *Leegin Creative Leather Products, Inc. v. Diaz*, n6.1 an employer brought a fraud action against an employee alleging the employee knowingly filed a fraudulent workers' compensation claim and that the employer's damages would be the increased workers' compensation insurance premiums it would be required to pay as a result of the claim. The appellate court upheld the trial court's granting of the employee's special motion to strike the employer's complaint,n6.2 on the ground that the employee had filed her workers' compensation claim in furtherance of her right of petition or free speech under the United States or California Constitution in connection with a public issuen6.3 and that the employer had no probability of prevailing on the merits of its complaint.n6.4 A cause of action for fraud requires the plaintiff to prove each of the following elements:n6.5

- A knowingly false misrepresentation by the defendant;
- Made with the intent to deceive or to induce reliance by the plaintiff;
- Justifiable reliance by the plaintiff;
- Resulting damages.

The employer could not establish either justifiable reliance or resulting damage. Because controlling law, as well as the insurer's policy, required the employer to forward the claim to the insurer, it could not have relied on any misrepresentations made by the employee. Any alleged damage claim was premature because the employee's workers' compensation claim had not yet been adjudicated. If it were found to be false, the employer would not suffer any damages.n6.6 Any expenses incurred by the employer because the employee was no longer working had nothing to do with whether her claim was false. Finally, the court observed that permitting an employer to bring a civil action for fraud against an employee while the workers' compensation proceeding was pending could have a chilling effect on an employee's exercise of the right to file a workers' compensation claim.

[2] Enforcement and Penalty for Violation

Insurance Code Section 1871.4 is enforced by the Department of Insurance's Fraud Division.ⁿ⁷ The exchange of information between insurers and district attorneys, the office of the Attorney General, the Department of Insurance, the Department of Industrial Relations, and licensing agencies is governed by the Workers' Compensation Insurance Fraud Reporting Act.ⁿ⁸

Violation of *Insurance Code Section 1871.4* (discussed in [1], *above*) is punishable by imprisonment in county jail for one year, or in the state prison, for two, three, or five years, or by a fine not exceeding \$150,000.00 or double the value of the fraud, whichever is greater, or by both imprisonment and fine.ⁿ⁹ Restitution must also be ordered, including restitution for any medical evaluation or treatment services obtained or provided.ⁿ¹⁰ The court must determine the amount of restitution and the person or persons to whom the restitution must be paid.ⁿ¹¹

Further, a conviction pursuant to *Insurance Code Section 1871.4* that materially affects the basis of an order, decision, or award of the Appeals Board is sufficient grounds for a reconsideration of that order, decision, or award.ⁿ¹² *Insurance Code Section 1871.4* may not be construed to preclude the applicability of any other provision of criminal law that applies or may apply to any transaction.ⁿ¹³

Finally, any person who is convicted of workers' compensation fraud under *Insurance Code Section 1871.4* is ineligible to receive or retain any compensation benefits if that compensation was owed or received as a result of a violation of Section 1871.4 for which the recipient of the compensation was convicted.ⁿ¹⁴ Civil penalties may also be imposed in addition to any other penalties that may be prescribed by law.ⁿ¹⁵

Legal Topics:

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

TortsBusiness TortsFraud & MisrepresentationGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsGeneral OverviewWorkers' Compensation & SSDIBenefit DeterminationsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Ins. Code § 1871(d), (e).*

(n2)Footnote 2. *Ins. Code § 1871.4(a). See, e.g., People v. Webb (1999) 74 Cal. App. 4th 688, 693-694, 88 Cal. Rptr. 2d 259* (appellant's false statements about his pain and his need for home-care attendant violated *Ins. Code § 1871.4(a)(1)*, even if court accepted appellant's premise that he did nothing more than state "exaggerated" opinion, as opinion may also support fraud liability when speaker knows facts not warranting that opinion).

(n3)Footnote 3. *Lab. Code § 139.48* became operative on July 1, 2004, and remains in effect until January 1, 2010, unless extended. *Lab. Code § 139.48(h), (i).*

(n4)Footnote 4. *Ins. Code § 1871.4(a).*

(n5)Footnote 5. *Penal Code § 549.*

(n6)Footnote 6. *Lab. Code § 3822.*

(n7)Footnote 6.1. *Leegin Creative Leather Products, Inc. v. Diaz (2005) 131 Cal. App. 4th 1517 .*

(n8)Footnote 6.2. *See Code Civ. Proc. § 425.16*, the so-called "anti-SLAPP statute" (strategic lawsuit against public participation).

(n9)Footnote 6.3. *Code Civ. Proc. § 425.16(e).*

(n10)Footnote 6.4. *Leegin Creative Leather Products, Inc. v. Diaz* (2005) 131 Cal. App. 4th 1517 .

(n11)Footnote 6.5. *Leegin Creative Leather Products, Inc. v. Diaz* (2005) 131 Cal. App. 4th 1517, 1524 ; *Wilkins v. National Broadcasting Co.* (1999) 71 Cal. App. 4th 1066, 1081, 84 Cal. Rptr. 2d 329 .

(n12)Footnote 6.6. *See Lab. Code § 3761(b), (d)* (when employer notifies insurer of facts suggesting fraudulent claim and Appeals Board determines employee is not entitled to compensation, insurer must reimburse employer for any premium paid solely due to inclusion of successfully challenged payments in calculation of employer's experience modification).

(n13)Footnote 7. *Ins. Code § 1872; see also Ins. Code §§ 1872.3* (powers of Fraud Division), *1872.83(a)* (Division required to forward names of fraud suspects licensed under Business and Professions Code to appropriate disciplinary body), *1872.95* (Medical Board, Board of Chiropractic Examiners, and State Bar must designate employees to investigate and report on possible fraudulent activities relating to workers' compensation).

(n14)Footnote 8. *See Ins. Code § 1877 et seq.*

(n15)Footnote 9. *Ins. Code § 1871.4(b); see also Ins. Code § 1871.4(c)* (enhancement for prior convictions).

(n16)Footnote 10. *Ins. Code § 1871.4(b).*

(n17)Footnote 11. *Ins. Code § 1871.4(b).*

(n18)Footnote 12. *Lab. Code § 5803.5. See Farmers Ins. Group of Companies/Truck Insurance Exchange v. Workers' Compensation Appeals Board* (2002) 104 Cal. App. 4th 684, 689-691, 128 Cal. Rptr. 2d 353 (after employee's conviction of fraud in receipt of workers' compensation medical benefits by obtaining special footwear, Workers' Compensation Appeals Board had jurisdiction to bar receipt of portion of benefit obtained by fraud, but employer had no right to credit against any type of benefit, including necessary medical benefits outside of reimbursement for special footwear, whether in whole or part).

(n19)Footnote 13. *Ins. Code § 1871.4(d).*

(n20)Footnote 14. *Ins. Code § 1871.5.*

(n21)Footnote 15. *See Lab. Code § 3820. See People ex rel. Monterey Mushrooms, Inc. v. Thompson* (2006) 136 Cal. App. 4th 24, 29-31, 38 Cal. Rptr. 3d 677 (exclusive remedy of workers' compensation did not bar action under *Ins. Code § 1871.7* for submitting fraudulent workers' compensation claims for compensation, proscribed by *Pen. Code § 550*, where application of *Ins. Code § 1871.7(b)* was clearly authorized as intended to cover fraudulent claims for workers' compensation benefits, and where express inclusion of workers' compensation claims in *Pen. Code § 550* demonstrated Legislature's intention to allow civil actions under *Ins. Code § 1871.7* arising from fraudulent acts made unlawful by *Pen. Code § 550*, notwithstanding applicability of the Workers' Compensation Act).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part A. WORKERS' COMPENSATION

Subpart 4. Claims and Enforcement

1-20 California Employment Law §§ 20.34 through 20.39

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

[Reserved]

§§ 20.34[Reserved]



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part B. ACTIONS BY AND AGAINST EMPLOYERS AND THIRD PARTIES

Subpart 1. Actions by Employee

1-20 California Employment Law § 20.40

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.40 Suits Against Uninsured Employers

[1] Two Available Remedies

[a] Civil Action

When an employer has failed to secure the payment of workers' compensation (that is, to obtain insurance or be self-insured) as required by the Workers' Compensation Act,ⁿ¹ any injured employee or his or her dependents may bring an action at law against the employer for damages as if the Workers' Compensation Act did not apply.ⁿ² In order for *Labor Code section 3706* to apply, the injured person must come within the definition of "employee" for workers' compensation purposes,^{n2.1} and the person employing the employee must be uninsured.^{n2.2} *Labor Code section 2750.5*, while not a part of the workers' compensation law, applies to workers' compensation law and creates a rebuttable presumption that a worker performing services for which a license is required is an employee and not an independent contractor,^{n2.3} and has been interpreted to provide that a person lacking the requisite license may not be an independent contractor.^{n2.4} Thus, for example, an unlicensed roofer who fell while working on his neighbor's house could sue his neighbor under *Labor Code section 3706*. Although the roofer may not have been his neighbor's employee for workers' compensation purposes because of *Labor Code section 3352(h)*,^{n2.5} section 3352(h) did not *ipso facto* preclude any employment relationship between the neighbor and the roofer. Rather, because the roofer was concededly unlicensed, *Labor Code section 2750.5* applied and created an employment relationship allowing the roofer to maintain an action in tort.^{n2.6}

It is no defense that the employer did not intentionally fail to secure payment.ⁿ³ The fact that an employer pays the employee's medical bills and wages during disability or otherwise compensates the employee does not bar a suit for damages when the employer was not properly secured prior to the injury.ⁿ⁴ Additionally, in a case of dual employment when one employer is insured and one is not, the injured employee (or his or her dependents) may obtain a workers' compensation award jointly and severally against both employers and still maintain an action at law against the uninsured employer.ⁿ⁵ However, the fact that the employer's insurance carrier refuses to pay compensation to an injured employee does not constitute a failure on the part of the employer to secure the payment of compensation unless

the injured employee was excluded from the policy.ⁿ⁶

Civil actions against uninsured employers are not only permitted, but the Labor Code contains special provisions that give an injured employee an advantage over the normal tort plaintiff. In a civil action against an uninsured employer, it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof is on the employer to rebut the presumption of negligence.ⁿ⁷ While this presumption may be sufficient to outweigh the evidence adduced to rebut it,ⁿ⁸ when the evidence clearly controverts the presumption, the employer is entitled to prevail.ⁿ⁹ However, an employee seeking damages from an uninsured employer has the same burden of proof as an employee seeking workers' compensation benefits: the employee bears the burden of proving the injury was sustained in the course of employment.^{n9.1}

Additionally, in a civil action against an uninsured employer, it is not a defense for the employer that the employee was guilty of contributory negligence or assumed the risk of the hazard complained of or that the injury was caused by the act of a fellow servant.ⁿ¹⁰ Therefore, comparative negligence is not available to offset the liability of the employer in proportion to the fault of the employee.ⁿ¹¹ Finally, in a civil action against an uninsured employer, the judgment must include reasonable attorney's fees.ⁿ¹² However, the judgment may not be increased, pursuant to *Labor Code Section 4554*, by ten percent for the employer's failure to insure because that section only provides for an increase in the amount of "compensation" awarded against an uninsured employer.ⁿ¹³

A civil action for negligence by an injured employee against an illegally uninsured employer pursuant to *Labor Code § 3706*, as a matter of law, is not based on the same cause of action as an application for compensation filed with the Board pursuant to *Labor Code §§ 3600 and 3715*. Thus, principles of res judicata and collateral estoppel did not bar an injured worker's pursuit of a workers' compensation remedy after the worker settled the civil action and then dismissed it with prejudice. The claims in the workers' compensation proceeding and the civil action asserted two distinct primary rights, *i.e.*, the statutory right to prompt, certain compensation for all work-related injuries regardless of fault, and the common law right to be free of the employer's negligence in maintaining the work environment. *Labor Code Sections 3706 and 3715* explicitly permit an injured employee to proceed against an uninsured employer in a workers' compensation proceeding and sue the employer in superior court for personal injury damages. Further, the settlement agreement on which the dismissal of the civil action was based was not submitted to the Workers' Compensation Appeals Board for approval as required by *Labor Code § 5001*. Absent Board approval, the agreement itself could not validly release or otherwise bar the claim for workers' compensation benefits, regardless of the parties' intent.^{n13.1}

In an action brought under *Labor Code section 3706*, an employer's liability is determined under rules of pleading and proof which differ significantly from those of a common law personal injury action. Thus, section 3706 creates a statutory cause of action for personal injuries subject to the three-year statute of limitations for an action upon a liability created by statute, other than a penalty or forfeiture.^{n13.2} Further, even if a one-year statute of limitations for a negligence action applies, the time for bringing the action is equitably tolled until there has been a final determination in the workers' compensation proceeding that the employer is uninsured. However, the tolling may end if the employer can show the plaintiff unreasonably delayed a final determination as to whether the employer was insured.^{n13.3}

The employee may also wish to file an application with the Workers' Compensation Appeals Board for compensation from the Uninsured Employers Benefits Trust Fund pursuant to *Labor Code Section 3716*.ⁿ¹⁴

[b] FORM--Complaint Against Employer Who Has Failed to Secure Compensation for Injured Employee

[i] Comment

The form set forth in [ii], *below*, is for use by an employee to obtain damages from an employer who has failed to secure compensation pursuant to the workers' compensation and insurance laws.ⁿ¹⁵ Such an action can be maintained only if the workers' compensation law is applicable to the employee.ⁿ¹⁶ An action may also be maintained by the

dependents of an employee who died from his or her injuries.ⁿ¹⁷ For discussion and forms for use in actions by an employee's dependents, see California Forms of Pleading and Practice, Volume 6, Ch. 66, "Death and Survival Actions" (Matthew Bender). An action under *Labor Code Section 3706* may be brought in addition to a claim brought before the Workers' Compensation Appeals Board.ⁿ¹⁸

In an action under *Labor Code Section 3706*, the complaint must allege (1) that an employer-employee relationship exists (Paragraphs 2 and 3), and (2) that the employer failed to carry workers' compensation insurance in violation of *Labor Code Section 3700* (Paragraph 11).ⁿ¹⁹ In addition, although there is a statutory presumption that the injury to the employee was a direct result of, and grew out of, the negligence of the employer, and the burden of proof is on the employer to rebut this presumption,ⁿ²⁰ the elements of negligence should be alleged because the presumption is a rule of evidence only, and it does not relieve the injured employee of the burden of pleading facts showing a cause of action based on negligence.ⁿ²¹ Therefore, the complaint alleges the following four elements of a cause of action for negligence:ⁿ²² (1) the existence of a duty of care owed by defendant to plaintiff, (2) breach of that duty by defendant, (3) damage to plaintiff, and (4) a causal relationship between the defendant's breach of duty and the damage suffered by plaintiff (Paragraphs 4-10).

[ii] Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[or other as appropriate]

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [name],	)	(BREACH OF STATUTORY OBLIGATION)
Defendant.	)	[Civ. Code § 3333; Lab. Code §§ 3706-3709]
	)	
	)	

Plaintiff alleges:

1. _____ [Allege capacity and residence of defendant, if venue allegation desired, e.g., Defendant is, and at all times mentioned in this complaint was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ [city], _____ County. (Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and therefore alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences alleged in this complaint, and that plaintiff's damages as alleged in this complaint were proximately caused by their conduct.)]

2. On or about _____ [date], at _____ [city], _____ County, California, plaintiff and defendant entered into _____ [a written or an oral] agreement for the employment of plaintiff by defendant _____ [describe general nature of work, e.g., to perform construction work for defendant's construction company]. The terms of the agreement were _____ [as follows: _____ (set out terms) or as stated in the copy of the employment agreement attached as

Exhibit A and made a part of this complaint].

3. Plaintiff subsequently entered into employment pursuant to the above-described agreement.

4. _____ [Allege specific duty of care imposed on employer by statute or regulation, if any.]

5. _____ [Allege facts relating to plaintiff's case showing defendant's duty of care in particular, e.g., At all times mentioned in this complaint, defendant owned, maintained, controlled, operated, and provided a certain _____ (specify, e.g., scaffolding) for use by employees, including plaintiff, in performing work].

6. _____ [Allege defendant's breach of duty of care, e.g., Defendant negligently maintained the _____ (specify, e.g., scaffolding) in a dangerous and unsafe condition, in that _____ (specify)].

7. _____ [Allege plaintiff's injury and causal relationship with defendant's breach of duty of care, e.g., On or about _____ [date], plaintiff was using the _____ (specify, e.g., scaffolding) for its intended purpose, namely _____ (specify), in the course and scope of plaintiff's employment, at _____ (place), and plaintiff was then and there injured, as more particularly alleged below, as a proximate result of _____ (specify, e.g., the scaffolding's breaking and causing plaintiff to fall two stories and strike the ground)].

8. As a proximate result of defendant's negligence, as alleged in this complaint, plaintiff was seriously [and permanently] injured in his/her health, strength, and activity, and sustained injury to his/her body and shock to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. As a result of such injuries, plaintiff has suffered general damages _____ [in an amount according to proof *or* in the sum of \$_____].

9. As a further proximate result of defendant's negligence, as alleged in this complaint, plaintiff has incurred [, and will continue to incur,] medical and related expenses _____ [in an amount according to proof *or* in the sum of \$_____].

10. [As a further proximate result of defendant's negligence, plaintiff was prevented from attending to his/her usual _____ (occupation *or* profession), and plaintiff lost earnings (in the sum of \$_____). Plaintiff is informed and believes and therefore alleges, that he/she will be prevented from attending to his/her usual _____ (occupation *or* profession) for an additional period in the future that he/she cannot now ascertain and will sustain further loss of earnings.]

11. [On [date], in a proceeding entitled _____ (specify), No. _____, the Workers' Compensation Appeals Board made and entered findings and conclusions determining that at the time of the injury suffered by plaintiff as alleged in this complaint, plaintiff and defendant were subject to the workers' compensation insurance and safety laws, and that] [D]efendant failed to secure the payment of compensation in one or more of the ways specified in *Labor Code Section 3700*.

12. A copy of this complaint _____ [has been *or* will be] given to the Uninsured Employers Fund by _____ [personal service *or* certified mail], and proof of such service _____ [is attached *or* will be filed].

WHEREFORE, plaintiff prays for judgment as follows:

1. For damages for pain and suffering [in the sum of \$_____];

2. For damages for past [and future] medical expenses [in the sum of \$_____];
3. For lost earnings, past and future [in the sum of \$_____ *or* according to proof];
4. For interest on the sum of \$_____ from and after, [*date of injury*];
5. For reasonable attorney's fees;
6. For costs of suit incurred; and
7. For such other and further relief as the court deems proper.

_____ [*signature*]

Attorney for Plaintiff

[*Add verification, if desired*
(see *Code Civ. Proc.* §§ 446, 2015.5).]

[c] Application to Workers' Compensation Appeals Board

In addition to bringing a civil action against an uninsured employer, any employee, except certain residential employees,ⁿ²³ may file an application with the Workers' Compensation Appeals Board, which determines the application as if the employer were insured.ⁿ²⁴ In the event that the board finds the injury was compensable and the employer fails to pay the compensation required, the employee may receive compensation from the Uninsured Employers Benefits Trust Fund under *Labor Code Section 3716*. For discussion of procedure, see Hanna, California Law of Employee Injuries and Workers' Compensation, Chapter 27, § 27, 10[6][a] (Matthew Bender).

[2] Prohibition Against Double Recovery

Although an injured employee may pursue two courses of action against his or her uninsured employer, double recovery is prohibited. If a judgment is obtained in a civil action, any compensation awarded, paid, or secured by the employer must be credited against the judgment.ⁿ²⁵ After a judgment in a civil action, an employer who has paid the attorney's fees fixed by the court is relieved of the obligation to pay workers' compensation benefits under *Labor Code Section 3716*.ⁿ²⁶

[3] Res Judicata Effect of Award

Because two separate remedies are authorized when an employee of an uninsured employer is injured within the coverage of workers' compensation,ⁿ²⁷ it should be noted that issues of collateral estoppel and res judicata may be invoked. For example, a decision of the Workers' Compensation Appeals Board determining that the employer was insured bars a claim in a later tort action that the employer was not insured.ⁿ²⁸

Legal Topics:

For related research and practice materials, see the following legal topics:
 Workers' Compensation & SSDI Administrative Proceedings Claims General Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 3700; Muffett v. Royster (1983) 147 Cal. App. 3d 289, 301, 195 Cal. Rptr. 73* (employer's improperly deducting insurance premiums from employee's pay constitutes failure to secure payment). For discussion of workers' compensation insurance requirements for employers generally, *see § 20.02*.

(n2)Footnote 2. *Lab. Code § 3706*.

(n3)Footnote 2.1. *See Lab. Code §§ 3351* (defining "employee" for purposes of workers' compensation), 3352 (excluding certain persons from § 3351 definitions of "employee," and thus excluding them from workers' compensation coverage), discussed at § 20.20[2][b], *above*.

(n4)Footnote 2.2. *See Lab. Code § 3706*.

(n5)Footnote 2.3. *See Lab. Code § 2750.5*, discussed at § 20.20[3][b][I], *above*.

(n6)Footnote 2.4. *See State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1985) 40 Cal. 3d 5, 15, 219 Cal. Rptr. 13, 706 P.2d 1146 ; Cedillo v. Workers' Comp. Appeals Bd. (2003) 106 Cal. App. 4th 227, 233, 130 Cal. Rptr. 2d 581* (presumption that person who employs unlicensed contractor is employer is conclusive).

(n7)Footnote 2.5. *See Lab. Code § 3352(h)*, excluding from definition of "employee" (for workers' compensation purposes) household workers working less than specified number of hours, depending on type of injury, discussed at § 20.20[2][b], *above*.

(n8)Footnote 2.6. *Mendoza v. Brodeur (2006) 142 Cal. App. 4th 72, 79-81, 47 Cal. Rptr. 3d 310*.

(n9)Footnote 3. *Hicks v. Ocean Shore Railroad, Inc. (1941) 18 Cal. 2d 773, 787, 117 P.2d 850*.

(n10)Footnote 4. *Coffin v. Bloodworth (1938) 28 Cal. App. 2d 522, 524, 82 P.2d 953*.

(n11)Footnote 5. *Strickland v. Foster (1985) 165 Cal. App. 3d 114, 118-119, 211 Cal. Rptr. 305*. *See also Hernandez v. Chavez Roofing, Inc. (1991) 235 Cal. App. 3d 1092, 1094-1095, 286 Cal. Rptr. 919* (although injured employee of unlicensed and uninsured subcontractor is covered by general contractor's workers' compensation insurance under *Lab. Code § 2750.5*, uninsured subcontractor may be liable in tort to injured employee under *Lab. Code § 3706*). For further discussion of dual employment, *see § 20.20[2][d]*.

(n12)Footnote 6. *Pecor v. Norton-Lilly Co. (1931) 111 Cal. App. 241, 243, 295 P. 582*.

(n13)Footnote 7. *Lab. Code § 3708*.

(n14)Footnote 8. *See Goss v. Fanoie (1952) 114 Cal. App. 2d 819, 824-825, 251 P.2d 337*.

(n15)Footnote 9. *See Peters v. California Building-Loan Association (1931) 116 Cal. App. 143, 149-150, 2 P.2d 439*.

(n16)Footnote 9.1. *Huang v. L.A. Haute (2003) 106 Cal. App. 4th 284, 286, 289-292, 130 Cal. Rptr. 2d 619* (trial court had discretion to conclude employee did not meet burden to prove injury arose from employment, impliedly declining to believe her testimony that she was injured during her employment, and instead crediting other evidence inferring her story was not true).

(n17)Footnote 10. *Lab. Code* § 3708 (providing in addition that named defenses may not be restored to employer by contract or regulation).

(n18)Footnote 11. *Logan v. Masters* (1981) 120 Cal. App. 3d 145, 147-148, 174 Cal. Rptr. 465 . For discussion of comparative negligence generally, *see* Levy, Golden, and Sacks, California Torts, vol. 1, ch. 4.

(n19)Footnote 12. *Lab. Code* § 3709.

(n20)Footnote 13. *Leung v. Chinese Six Companies* (1992) 2 Cal. App. 4th 801, 806-807, 3 Cal. Rptr. 2d 593 .

(n21)Footnote 13.1. *Le Parc Community Association v. Workers' Compensation Appeals Board* (2003) 110 Cal. App. 4th 1161, 1168-1175, 2 Cal. Rptr. 3d 408 . For discussion of *Lab. Code* § 5001, *see* § 62.05[5][c].

(n22)Footnote 13.2. *Valdez v. Himmelfarb* (2006) 144 Cal. App. 4th 1261, 1267-1270, 51 Cal. Rptr. 3d 195 . *See Code Civ. Proc.* § 338(a); *Hall v. Copco Pacific, Ltd.* (9th Cir. 1955) 224 F.2d 884, 885 (construing predecessor statute to *Lab. Code* § 3706 and holding that three-year statute of limitations for action upon liability created by statute applied); *Lewis v. Hinman-Ball & Bonner* (1957) 154 Cal. App. 2d 710, 714-715, 316 P.2d 673 (statute of limitations upon action under *Lab. Code* § 3706 appeared to be no more than three years). *See also Rideaux v. Torggrimson* (1939) 12 Cal. 2d 633, 636, 86 P.2d 826 (Legislature, by enacting predecessor to *Lab. Code* § 3706, provided statutory cause of action for personal injuries quite different from common law).

(n23)Footnote 13.3. *Valdez v. Himmelfarb* (2006) 144 Cal. App. 4th 1261, 1270-1275, 51 Cal. Rptr. 3d 195 (employer was not prejudiced by employee filing § 3706 action more than one year after learning employers were uninsured and almost two years after date of injury, where employer knew it was uninsured and had even greater incentive to initially gather evidence of fault because it could anticipate having to rebut presumption of negligence in civil action under *Lab. Code* § 3706). *See Elkins v. Derby* (1974) 12 Cal. 3d 410, 115 Cal. Rptr. 641, 525 P.2d 81 (one-year period for bringing personal injury action was tolled while plaintiff, acting in good faith, pursued his workers' compensation remedy [not arising under *Lab. Code* § 3706] against his employer).

(n24)Footnote 14. For discussion, *see* [c], *below*.

(n25)Footnote 15. *See Lab. Code* § 3706. For discussion, *see* [a], *above*.

(n26)Footnote 16. *See Lab. Code* § 3352 (persons excluded from coverage).

(n27)Footnote 17. *See Lab. Code* § 3706.

(n28)Footnote 18. *See Lab. Code* § 3715(a).

(n29)Footnote 19. *See Coleman v. Silverberg Plumbing Co.* (1968) 263 Cal. App. 2d 74, 79, 69 Cal. Rptr. 158 .

(n30)Footnote 20. *See Lab. Code* § 3708.

(n31)Footnote 21. *See Graybiel v. Consolidated Association, Ltd.* (1936) 16 Cal. App. 2d 20, 25-26, 28, 60 P.2d 164 .

(n32)Footnote 22. *See, e.g., Miglierini v. Havemann* (1966) 240 Cal. App. 2d 570, 572, 49 Cal. Rptr. 795 .

(n33)Footnote 23. *Lab. Code* § 3351(d).

(n34)Footnote 24. *Lab. Code* § 3715. *See Cal. State. Auto. Ass'n Inter-Ins. Bureau v. Workers' Compensation Appeals Board* (2006) 137 Cal. App. 4th 1040, 1043-1048, 40 Cal. Rptr. 3d 743 (*Lab. Code* § 3715 did not apply to impose liability on homeowners for injury to unlicensed painter hired to paint their living and dining rooms and kitchen,

where homeowners were not uninsured, but were covered by homeowners' insurance with workers' compensation coverage, and painter was excluded from coverage by *Lab. Code 3352(h)*).

(n35)Footnote 25. *Lab. Code § 3709*.

(n36)Footnote 26. *Lab. Code § 3709.5*.

(n37)Footnote 27. For discussion, *see* [1], *above*.

(n38)Footnote 28. *Goodman Bros. v. Superior Court* (1942) 51 Cal. App. 2d 297, 301-304, 124 P.2d 644 ; *see Rymer v. Hagler* (1989) 211 Cal. App. 3d 1171, 1177-1183, 260 Cal. Rptr. 76 .



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part B. ACTIONS BY AND AGAINST EMPLOYERS AND THIRD PARTIES

Subpart 1. Actions by Employee

1-20 California Employment Law § 20.41

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.41 Suits Against Insured Employers

[1] Dual Remedies

As long as the conditions of compensation exist, an injured employee is entitled to maintain an action for workers' compensation benefits.ⁿ¹ In addition, if an employer is liable in tort under one of the exceptions to the exclusive remedy rule,ⁿ² the employee is entitled to sue the employer in tort as well. Under the language of *Labor Code Section 3602(b)*, if one of the stated exceptions to the exclusive remedy provisions applies, the employee "may bring an action at law for damages against the employer, as if this division did not apply." These exceptions are discussed in § 20.12.

Prior to the 1982 amendments to *Labor Code Section 3602*, cases that established exceptions to the exclusive remedy doctrine held that the remedies were not mutually exclusive and that an injured worker was not forced to elect which one to pursue.ⁿ³ After the 1982 amendments, one case disallowed a tort action because the employee had accepted compensation under a workers' compensation settlement for mental and physical injuries caused by harassment and abusive behavior of the employee's supervisor.ⁿ⁴ The court stated in dictum that in the case of the exception to the exclusive remedy doctrine permitting an action against an employer who commits a physical assault on the employee,ⁿ⁵ or who ratifies an assault by an employee,ⁿ⁶ the issue of whether the workers' compensation benefits and tort damages are alternative or cumulative forms of relief remains essentially unsettled.ⁿ⁷ That case quoted with approval the language from a 1975 case that stated that until an award of workers' compensation benefits is made or a judgment in the civil action is recovered, the remedies may be treated as cumulative or at least alternative.ⁿ⁸ Another case, which involved an assault on the employee by a co-worker that was ratified by the employer, allowed a tort suit after plaintiff had received a workers' compensation award.ⁿ⁹ No award for intentional infliction of emotional distress was made by the WCAB, and in addition, the court stated that a setoff of the workers' compensation award against the tort award would protect against double recovery.ⁿ¹⁰

When an employee is entitled to sue an employer in tort, the employee must show some negligence on the employer's part in order to prevail.^{n10.1}

[2] FORM--Complaint by Employee for Aggravation of Work-Related Injury Against Employer for Fraudulent Concealment

[a] Comment

The form set forth in [b], *below*, is a complaint against an employer to recover damages for the aggravation of an injury or disease when the employer fraudulently concealed the injury from the employee.ⁿ¹¹ Such a cause of action is an exception to the exclusive remedy rule.ⁿ¹²

The form sets forth in pertinent part the following allegations: (1) that plaintiff employee was suffering from a work-related disease (Paragraphs 4 and 5), and that defendant employer fraudulently concealed the disease and its connection to the employment from the employee (Paragraphs 6 and 7);ⁿ¹³ (2) that such concealment aggravated the existing disease, causing specified damages to plaintiff employee (Paragraphs 9-11);ⁿ¹⁴ and (3) that defendant employer acted with malice, oppression, or fraud, entitling plaintiff employee to punitive damages (Paragraph 12).ⁿ¹⁵

[b] Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[or other as appropriate]

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR FRAUDU-
_____ [name],	)	LENT CONCEALMENT OF EMPLOYEE'S IN-
Defendant.	)	JURY
	)	[Civ. Code §§ 1710(3); 3333; Lab. Code §
	)	3602(b)(2)]

1. *[Capacity, residence of defendant, and optional fictitious name allegation. See Form in § 20.20[1][b][ii], Paragraph 1.]*

2. *[Employment contract. See Form in § 20.20[1] [b][ii], Paragraph 2.]*

3. Plaintiff entered into employment with defendant pursuant to the above-described agreement on or about [date] , and continued to be so employed until [date] .

4. *[Allege conditions of employment or occurrence of event that caused plaintiff's initial work-related injury, e.g., At all times mentioned in this complaint, defendant was engaged in the business of milling, manufacturing, and packaging asbestos. Plaintiff's employment contract required that he/she work in proximity to all aspects of defendant's business, and thus during the period of his/her employment, he/she was continuously exposed to asbestos].*

5. _____ *[Allege initial work-related injury, e.g., As a proximate result of being continuously exposed to asbestos, plaintiff developed pneumoconiosis, lung cancer, and other asbestos-related injuries].*

6. _____ *[Allege defendant's fraudulent concealment of plaintiff's condition and its cause, e.g., Defendant has known since _____ [date] , that long exposure to asbestos or the ingestion of that*

substance is dangerous to health, yet concealed this knowledge from plaintiff, advised him/her that it was safe to work in proximity to asbestos, and failed to provide protective devices to prevent plaintiff's exposure to asbestos. By _____ [date] , defendant learned that plaintiff was suffering from a pulmonary disease but failed to inform plaintiff that his/her illness was caused by exposure to asbestos or to take any measures to cure the disease or prevent plaintiff from further exposure to asbestos. Doctors retained by defendant were neither qualified nor supplied with adequate information regarding the risk of asbestos exposure. Defendant failed to advise these doctors of the development of pulmonary disease in plaintiff or of the fact that the disease was the result of the working conditions at plaintiff's place of employment].

7. _____ [Allege any further actions of fraudulent concealment, if appropriate, e.g., In addition to the foregoing acts designed to conceal from the plaintiff the nature and cause of his/her illness, defendant willfully failed to file a First Report of Occupational Injury or Illness with the State of California regarding plaintiff's injury, as required by law. Had this been done, and had the danger from asbestos had been revealed, plaintiff would have been able to take steps to protect himself/herself from additional injuries and illness caused by continuing exposure to asbestos].

8. Each of the acts and omissions described in Paragraphs 6 and 7 was done falsely and fraudulently by defendant, with the intent to induce plaintiff to continue to work in a dangerous environment. Plaintiff was ignorant of the risks involved and would not have continued to work in such an environment if he/she had known the facts.

9. As a proximate result of defendant's acts and omissions alleged in this complaint, plaintiff's condition, namely _____ [describe illness or injury], was seriously [and permanently] aggravated further thereby, injuring plaintiff in his/her health, strength, and activity, and causing further injury to his/her nervous system, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. Plaintiff has been damaged thereby [in the sum of \$_____].

10. As a further proximate result of defendant's acts and omissions alleged in this complaint, plaintiff has been required to expend money and incur obligations, and will continue to expend money and incur obligations, for medical services, X-rays, drugs, and sundries reasonably required in the treatment and relief of the injuries alleged in this complaint. Plaintiff has been damaged [in the sum of \$_____].

11. [As a further proximate result of defendant's negligence and fraud as alleged in this complaint, plaintiff was prevented from attending to his/her usual _____ (occupation or profession), and plaintiff lost earnings (in the sum of \$_____). Plaintiff is informed and believes and therefore alleges, that he/she will be prevented from attending to his/her usual _____ (occupa tion or profession) for an additional period in the future that he/she cannot now ascertain and will sustain further loss of earnings].

12. [The acts and omissions of defendant mentioned above were carried out with malice, oppression, and fraud, and in conscious disregard of the rights and safety of plaintiff and, therefore, warranting the assessment of punitive damages against defendant _____ (in the sum of \$_____ or in an amount appropriate to punish defendant and set an example for others)].

WHEREFORE, plaintiff prays for judgment as follows:

1. For damages for pain and suffering [in the sum of \$_____];
2. For damages for past and future medical expenses [in the sum of \$_____];
3. For lost earnings, past and future [in the sum of \$_____ or according to proof];
4. For punitive damages [in the sum of \$_____].

5. For interest on the sum of \$ _____ from and after _____, *[date of injury]*;
6. For costs of suit incurred; and
7. For such other and further relief as the court deems proper.

_____ *[signature]*

Attorney for Plaintiff

*[Add verification, if desired
(see Code Civ. Proc. §§ 446, 2015.5)].*

[3] FORM--Complaint for Damages for Willful Physical Assault by Employer

[a] Comment

The form set forth in [b], *below*, is a complaint against an employer to recover damages for a willful physical assault by the employer against the employee.ⁿ¹⁶ Such a cause of action is an exception to the exclusive remedy rule.ⁿ¹⁷

The form contains the necessary allegations comprising the elements of a cause of action for assault, including (1) an allegation demonstrating defendant employer's unlawful intent to inflict immediate injury on plaintiff (Paragraph 4); (2) an allegation that defendant had the apparent present ability to carry out that threat (Paragraph 4); (3) an allegation that plaintiff was physically harmed or put in fear of personal harm by the actions of defendant (Paragraph 5);ⁿ¹⁸ (4) an allegation that plaintiff was injured thereby (Paragraph 6);ⁿ¹⁹ and (5) allegations of damages incurred (Paragraphs 6-10).ⁿ²⁰

[b] Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[or other as appropriate]

_____ <i>[name],</i>	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR WILLFUL
_____ <i>[names],</i>	)	ASSAULT
Defendant.	)	<i>[Civ. Code § 3333; Lab. Code § 3602(b)(1)]</i>
	)	
	)	

1. *[Capacity, residence of defendant, and optional fictitious name allegation. See Form in § 20.20[1][b][ii], Paragraph 1].*

2. *[Employment contract. See Form in § 20.20[1][b][ii], Paragraph 2].*

3. Plaintiff entered into employment with defendant pursuant to the above-described agreement on or about *[date]* , and continued to be so employed until *[date]* .

4. On [date] , at [location], defendant willfully assaulted plaintiff by _____ [describe manner of assault].

5. [_____] (State any additional facts showing defendant's apparent ability to carry out the threat and additional facts showing reasons for plaintiff's fears, if a battery did not occur)].

6. By reason of these acts of defendant, plaintiff was _____ [physically harmed or placed in great fear for his/her life and physical well-being].

7. By reason of the wrongful and malicious acts of defendant, and of the fright caused plaintiff, plaintiff has suffered extreme and severe mental anguish and physical pain and has been injured in mind and body as follows:
_____ [describe], all to plaintiff's damage [in the sum of \$_____].

8. By reason of the wrongful acts of defendant, plaintiff has been required to expend money and incur obligations, and will continue to expend money and incur obligations, for medical services, X-rays, drugs, and sundries reasonably required in the treatment and relief of the injuries alleged in this complaint. Plaintiff has been damaged [in the sum of \$_____].

9. [By reason of the wrongful acts of defendant, plaintiff was also prevented from attending to his/her usual _____ (occupation or profession), and plaintiff lost earnings (in the sum of \$_____). Plaintiff is informed and believes and therefore alleges, that he/she will be prevented from attending to his/her usual _____ (occupation or profession) for an additional period in the future that he/she cannot now ascertain and will thereby sustain further loss of earnings].

10. [The acts of defendant mentioned above were carried out with malice, oppression, and fraud, _____ (with the intention of harming plaintiff or in conscious disregard of plaintiff's rights and safety), and, therefore, warrant the assessment of punitive damages against defendant (in the sum of \$_____ or in an amount appropriate to punish defendant and set an example for others)].

WHEREFORE, plaintiff prays for judgment as follows:

1. For damages for pain and suffering [in the sum of \$_____];
2. For damages for past and future medical expenses [in the sum of \$_____];
3. For lost earnings, past and future [in the sum of \$_____ or according to proof];
4. For punitive damages [in the sum of \$_____].
5. For interest on the sum of \$_____ from and after _____ [date of injury];
6. For costs of suit incurred; and
7. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff

[Add verification of complaint, if desired
(see Code Civ. Proc. §§ 446, 2015.5)].

[4] FORM--Affirmative Defense to Complaint Based on Exclusive Remedy Doctrine

[a] Comment

The form set forth in [b], *below*, is an affirmative defense to be used in the answer to a complaint against an employer in a civil action.ⁿ²¹ The basis of the defense is that the injury or death is exclusively compensable under the workers' compensation law.ⁿ²² If an employee's injury is within the scope of the workers' compensation laws, a court of law lacks authority to render judgment for damages against the employer.ⁿ²³ However, if a civil action is improperly brought, the employer generally has the burden of pleading and proving that the action is barred by workers' compensation law.ⁿ²⁴ If the employer fails to plead the issue, the defense is waivedⁿ²⁵ and the court has subject matter jurisdiction to enter a binding judgment.ⁿ²⁶

This defense is not for use in an answer to a civil complaint for damages for aggravation of a work-related injury, such as the one set forth in [2][b], *above*,ⁿ²⁷ or when the action falls within any of the other exceptions to the exclusive remedy doctrine.ⁿ²⁸ For discussion of the exclusive remedy doctrine generally, see §§ 20.10-20.12.

If the facts on which this defense is based appear on the face of the complaint, the objection may be made by a demurrer to the complaint.ⁿ²⁹

[b] Form

AS A [_____] (if more than one, specify number, e.g., FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [if more than one cause of action alleged, state TO THE _____ (specify, e.g., SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

At the time and place of plaintiff's alleged injury, plaintiff was an employee of defendant, was performing service growing out of and incidental to his/her employment, was acting within the course of his/her employment, and plaintiff's exclusive remedy is that provided by Workers' Compensation pursuant to *Labor Code sections 3201-6208*.

[5] Determining Forum With Jurisdiction

In many cases, because it is not clear whether the conditions of compensation apply, or it is not clear whether an exception to the exclusive remedy rule applies, it is not readily apparent which remedy or remedies will be allowed. It then is incumbent on the injured party to determine which remedy to pursue first. The civil courts and the workers' compensation board have concurrent jurisdiction to determine jurisdiction.ⁿ³⁰ Except in situations when the injured worker's remedies are not exclusive,ⁿ³¹ the tribunal assuming jurisdiction retains it to the exclusion of all other tribunals.ⁿ³²

Once the decision regarding which tribunal has jurisdiction over the case has been made, jurisdiction becomes exclusive, and the final determination regarding jurisdiction is res judicata before the other tribunal with regard to the same parties.ⁿ³³ A party may obtain an order preventing the second tribunal from acting pending determination by the first tribunal of the jurisdictional question.ⁿ³⁴

[6] FORM--Affirmative Defense Based on Lack of Jurisdiction Due to Pending Administrative Proceeding

[a] Comment

The form set forth in [b], *below*, is an affirmative defense that may be used in an employer's answer to an employee's

civil action for negligence against the employer. If the employee has already brought an administrative action under the workers' compensation laws, the employer may seek to have the civil action abated in court until the issue of the exclusive jurisdiction of the workers' compensation laws can be decided by the Workers' Compensation Appeals Board.ⁿ³⁵ It is also good practice for a party to bring a motion for an order preventing the second tribunal from acting pending determination of the jurisdictional question.ⁿ³⁶

[b] Form

1. The court has no jurisdiction to proceed with plaintiff's action, because on _____ [date], an application for compensation relating to the same subject matter as plaintiff's action, entitled _____ [specify], No. _____, was filed with the Workers' Compensation Appeals Board.

[7] Res Judicata and Collateral Estoppel

General principles of res judicata and collateral estoppel apply to workers' compensation proceedings.ⁿ³⁷ The Supreme Court, in *Busick v. Workmen's Compensation Appeals Board*,ⁿ³⁸ held that a proceeding for workers' compensation benefits was barred under principles of res judicata by a prior judgment in favor of the injured worker in a tort action based on the same incident. It has likewise been held that a prior judgment of the workers' compensation board precluded a tort action based on the same incident.ⁿ³⁹ In addition, a compromise settlement approved by the Workers' Compensation Appeals Board has the same force and effect as a judgment made after a full hearing and is entitled to full res judicata effect.ⁿ⁴⁰ However, to preclude an action the compromise settlement must necessarily include the determination that all of the claims released are compensable under the Workers' Compensation Act; if it does not do so, res judicata principles do not preclude relitigation of the issue.ⁿ⁴¹ The fact that the release sets forth the nature of the injury suffered does not, by itself, support the conclusion that all claims arising from that injury were covered by the settlement.ⁿ⁴²

These cases should not be construed too broadly. All were decided in the context of a situation in which the court held that the injured person had mutually exclusive remedies either because the injury arose out of the plaintiff's employment, in which case workers' compensation was the exclusive remedy, or because the injury did not arise out of the plaintiff's employment, in which case a tort action was the exclusive remedy.ⁿ⁴³ Thus, *Busick* should be distinguished from cases such as *Johns-Manville Products Corp. v. Superior Court*,ⁿ⁴⁴ in which the plaintiff was entitled under law to pursue either of two remedies.ⁿ⁴⁵

In cases where exclusive jurisdiction rests in either the civil courts or the Workers' Compensation Appeals Board, a decision regarding jurisdiction by one such tribunal is normally binding on all other tribunals.ⁿ⁴⁶ When a judgment is rendered for the defendant because the plaintiff has sought a remedy that is not available to him or her, that judgment does not bar an action in the proper tribunal for a proper remedy.ⁿ⁴⁷

[8] Statute of Limitations

The statute of limitations for bringing a civil personal injury action against an employer is two years from the accrual of the cause of action.ⁿ⁴⁸ The filing of a timely claim for workers' compensation effectively tolls the statute of limitations for the purposes of a later tort claim based on the same facts.ⁿ⁴⁹

However, the filing of a claim for workers' compensation does not toll an action against an employer for aggravation of an injury resulting from the employer's fraudulent concealment of the cause of the injury.ⁿ⁵⁰ Further, an untimely workers' compensation claim will not toll the statute of limitations for the later tort claim based on the same facts.ⁿ⁵¹

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI Administrative Proceedings Claims General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 3600*.

(n2)Footnote 2. *See Lab. Code §§ 3602, 4558 and discussions in § 20.12[1]-[2]*.

(n3)Footnote 3. *See Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 478-479, 165 Cal. Rptr. 858, 612 P.2d 948* (suggesting that when plaintiff has received an award of workers' compensation benefits, double recovery may be avoided by allowing for a setoff in a subsequent tort action); *see also Unruh v. Truck Insurance Exchange (1972) 7 Cal. 3d 616, 636-637, 102 Cal. Rptr. 815, 498 P.2d 1063* (noting that term "election of remedies" has been misused in workers' compensation cases); *Magliulo v. Superior Court (1975) 47 Cal. App. 3d 760, 780, 121 Cal. Rptr. 621* (stating that remedies are cumulative or at least alternative in situation where theories of recovery are not mutually exclusive).

(n4)Footnote 4. *Hollywood Refrigeration Sales Co. v. Superior Court (1985) 164 Cal. App. 3d 754, 759, 210 Cal. Rptr. 619*; *see also* discussion in [7], *below*.

(n5)Footnote 5. *See Lab. Code § 3602(b)(1)*.

(n6)Footnote 6. *See Iverson v. Atlas Pacific Engineering (1983) 143 Cal. App. 3d 219, 191 Cal. Rptr. 696*.

(n7)Footnote 7. *Hollywood Refrigeration Sales Co. v. Superior Court (1985) 164 Cal. App. 3d 754, 757-758, 210 Cal. Rptr. 619*.

(n8)Footnote 8. *Hollywood Refrigeration Sales Co. v. Superior Court (1985) 164 Cal. App. 3d 754, 757-758, 210 Cal. Rptr. 619* (quoting *Magliulo v. Superior Court (1975) 47 Cal. App. 3d 760, 121 Cal. Rptr. 621*).

(n9)Footnote 9. *Young v. Libbey-Owens Ford Co. (1985) 168 Cal. App. 3d 1037, 1041-1045, 214 Cal. Rptr. 400*.

(n10)Footnote 10. *Young v. Libbey-Owens Ford Co. (1985) 168 Cal. App. 3d 1037, 1041-1045, 214 Cal. Rptr. 400*.

(n11)Footnote 10.1. *Zaragoza v. Ibarra (2009) 174 Cal. App. 4th 1012, 1022-1023, 95 Cal. Rptr. 3d 264* (although *Labor Code § 3352(h)* operated to allow injured employee of unlicensed contractor to sue homeowner in ordinary negligence as distinct from strict liability, undisputed evidence revealed no negligence on homeowner's part, where employee was sole person who placed, adjusted, and climbed ladder before he fell, and there were no allegations that ladder was defective or that homeowner could have prevented accident).

(n12)Footnote 11. *See Lab. Code § 3602(b)(2); Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 477-479, 165 Cal. Rptr. 858, 612 P.2d 948*. For the standard jury instruction on the essential factual elements of a claim of the employer's fraudulent concealment of injury, *see* Judicial Council of California Civil Jury Instructions, CACI 2802 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form on fraudulent concealment of injury, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2801 (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n13)Footnote 12. *See Lab. Code § 3602(b)(2); Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 477-479, 165 Cal. Rptr. 858, 612 P.2d 948*.

(n14)Footnote 13. *Lab. Code § 3602(b)(2); Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d*

465, 469-479, 165 Cal. Rptr. 858, 612 P.2d 948 .

(n15)Footnote 14. *Lab. Code § 3602(b)(2); Johns-Manville Prod. Corp. v. Superior Court (1980) 27 Cal. 3d 465, 469-479, 165 Cal. Rptr. 858, 612 P.2d 948 .*

(n16)Footnote 15. *Civ. Code § 3294.*

(n17)Footnote 16. *See Lab. Code § 3602(b)(1).* For the standard jury instruction on the essential factual elements of a claim of willful assault by the employer, *see* Judicial Council of California Civil Jury Instructions, *CACI 2801* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form on the employer's willful physical assault, *see* Judicial Council of California Civil Jury Instructions, *CACI VF-2800*. (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n18)Footnote 17. *See Lab. Code § 3602(b)(1).*

(n19)Footnote 18. *See Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 6-7, 146 P.2d 57 .*

(n20)Footnote 19. *See Civ. Code § 3281.*

(n21)Footnote 20. *See Civ. Code §§ 3294 (punitive damages), 3333 (compensatory damages).*

(n22)Footnote 21. *See Code Civ. Proc. § 431.30(b).*

(n23)Footnote 22. *See Lab. Code §§ 3600 (conditions of compensation), 3602(a) (exclusiveness of remedy).* For the standard jury instruction on the employer's affirmative defense that the employee's injury was covered by workers' compensation, *see* Judicial Council of California Civil Jury Instructions, *CACI 2800* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n24)Footnote 23. *Baugh v. Rogers (1944) 24 Cal. 2d 200, 207, 148 P.2d 633 .*

(n25)Footnote 24. *Popejoy v. Hannon (1951) 37 Cal. 2d 159, 173-174, 231 P.2d 484 ; Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 224, 239 Cal. Rptr. 470 ; Iverson v. Atlas Pacific Engineering (1983) 143 Cal. App. 3d 219, 225, 191 Cal. Rptr. 696 ; see discussion in § 20.14.*

(n26)Footnote 25. *See Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 224, 239 Cal. Rptr. 470 .*

(n27)Footnote 26. *See Dorado v. Knudsen Corp. (1980) 103 Cal. App. 3d 605, 610-611, 163 Cal. Rptr. 477 .*

(n28)Footnote 27. *See Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 478-479, 165 Cal. Rptr. 858, 612 P.2d 948* (stating that in such case plaintiff is entitled under law to pursue either of two remedies and that employer is protected from double recovery by use of setoff).

(n29)Footnote 28. *See Lab. Code §§ 3602(b), 4558.*

(n30)Footnote 29. *See Code Civ. Proc. § 430.30(a).*

(n31)Footnote 30. *Busick v. Workers' Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386 .*

(n32)Footnote 31. *See Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 478-479, 165 Cal. Rptr. 858, 612 P.2d 948 .*

(n33)Footnote 32. *Busick v. Workers' Comp. Appeals Bd.* (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386 .

(n34)Footnote 33. *Busick v. Workers' Comp. Appeals Bd.* (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386 ; *Scott v. Industrial Accident Commission* (1956) 46 Cal. 2d 76, 81, 293 P.2d 18 .

(n35)Footnote 34. *Busick v. Workers' Comp. Appeals Bd.* (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386 ; *Taylor v. Superior Court* (1956) 47 Cal. 2d 148, 151, 301 P.2d 866 .

(n36)Footnote 35. *See Busick v. Workmen's Compensation Appeals Board* (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386 ; *Taylor v. Superior Court* (1956) 47 Cal. 2d 148, 151, 301 P.2d 866 . For discussion of jurisdiction generally, *see* [5], *above*.

(n37)Footnote 36. *See Busick v. Workmen's Compensation Appeals Board* (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386 ; *Taylor v. Superior Court* (1956) 47 Cal. 2d 148, 151, 301 P.2d 866 .

(n38)Footnote 37. *Clemente v. State of California* (1985) 40 Cal. 3d 202, 222, 219 Cal. Rptr. 445, 707 P.2d 818 ; *Dow Chemical Co. v. Workmen's Compensation Appeals Board* (1967) 67 Cal. 2d 483, 491, 62 Cal. Rptr. 757, 432 P.2d 365 ; *see Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal. App. 4th 1793, 1812, 30 Cal. Rptr. 2d 454 (res judicata precludes relitigation of claims that "were litigated, or could have been litigated, in a prior action. ... It does not apply to bar workers' compensation claims involving different injuries." (citations omitted)).

(n39)Footnote 38. *Busick v. Workmen's Compensation Appeals Board* (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386 .

(n40)Footnote 39. *Lake v. Lakewood Chiropractic Center* (1993) 20 Cal. App. 4th 47, 53, 24 Cal. Rptr. 2d 358 (WCAB decision awarding employee benefits for injury caused by free chiropractic adjustment provided by employer as a benefit of employment was entitled to res judicata effect for purposes of determining that injury arose out of and in course of employment and determining that employer's dual capacity arose prior to and at the time of her injury); *De Court v. Beckman Instruments, Inc.* (1973) 32 Cal. App. 3d 628, 635-636, 108 Cal. Rptr. 109 (workers' compensation action was not final for purposes of res judicata so as to bar action under Jones Act until expiration of five-year period during which award can be altered under *Lab. Code* §§ 5803-5805); *Sanchez v. City of Santa Ana* (9th Cir. 1990) 915 F.2d 424, 431-432 (workers' compensation award for emotional injuries bars injured employee's later claim for emotional distress against municipal employer in federal civil rights action under 42 U.S.C. § 1983).

(n41)Footnote 40. *Hollywood Refrigeration Sales Co. v. Superior Court* (1985) 164 Cal. App. 3d 754, 759, 210 Cal. Rptr. 619 .

(n42)Footnote 41. *Lopez v. Sikkema* (1991) 229 Cal. App. 3d 31, 40-44, 280 Cal. Rptr. 7 (compromise and release approved by WCAB, which did not clearly determine that all claims were compensable under workers' compensation law, did not preclude tort action based on employer's conduct outside compensation bargain; triable issue of fact remained regarding scope of release.).

(n43)Footnote 42. *Lopez v. Sikkema* (1991) 229 Cal. App. 3d 31, 44, 280 Cal. Rptr. 7 (triable issue of fact remained whether settlement was intended to cover claims for civil rights violation and intentional physical injury).

(n44)Footnote 43. *Busick v. Workmen's Compensation Appeals Board* (1972) 7 Cal. 3d 967, 973, 104 Cal. Rptr. 42, 500 P.2d 1386 .

(n45)Footnote 44. *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal. 3d 465, 478-479, 165 Cal. Rptr. 858, 612 P.2d 948 ; *see also Young v. Libbey-Owens Ford Co.* (1985) 168 Cal. App. 3d 1037, 1044-1045, 214 Cal. Rptr. 400 (following *Johns-Manville*).

(n46)Footnote 45. See *Unruh v. Truck Insurance Exchange* (1972) 7 Cal. 3d 616, 634, 102 Cal. Rptr. 815, 498 P.2d 1063 (suggesting that doctrine of res judicata did not bar employee who was awarded workers' compensation benefits from bringing subsequent tort action on ground that parties were not identical); *Magliulo v. Superior Court* (1975) 47 Cal. App. 3d 760, 780, 121 Cal. Rptr. 621 (at least until an award of workers' compensation benefits is made and satisfied, or until a judgment for civil damages is recovered, tort recovery does not preclude workers' compensation recovery or vice versa).

(n47)Footnote 46. *Busick v. Workmen's Compensation Appeals Board* (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386 .

(n48)Footnote 47. *Busick v. Workmen's Compensation Appeals Board* (1972) 7 Cal. 3d 967, 974, 104 Cal. Rptr. 42, 500 P.2d 1386 .

(n49)Footnote 48. *Code Civ. Proc.* § 335.1; *Idding v. North Bay Construction Co., Inc.* (1995) 39 Cal. App. 4th 1111, 1115, 46 Cal. Rptr. 2d 149 (applying relation back doctrine). For discussion of limitations periods in tort actions generally, see Levy, Golden, and Sacks, *California Torts*, Ch. 71, "Commencement, Prosecution, and Dismissal of Tort Actions," Part A (Matthew Bender).

(n50)Footnote 49. *Elkins v. Derby* (1974) 12 Cal. 3d 410, 420, 115 Cal. Rptr. 641, 525 P.2d 81 .

(n51)Footnote 50. *Aerojet General Corp. v. Superior Court* (1986) 177 Cal. App. 3d 950, 955-957, 223 Cal. Rptr. 249 .

(n52)Footnote 51. *Aguilera v. Heiman* (2009) 174 Cal. App. 4th 590, 595-602, 95 Cal. Rptr. 3d 18 (workers' compensation claim timely filed against unlicensed and uninsured employer did not toll statute of limitations in tort claim against property manager and homeowners' association, where injured worker did not join property manager and homeowners' association to workers' compensation claim until after statutory period had expired).



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part B. ACTIONS BY AND AGAINST EMPLOYERS AND THIRD PARTIES

Subpart 1. Actions by Employee

1-20 California Employment Law § 20.42

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.42 Suits Against Employer's Insurer

[1] General Rule

Labor Code Section 3850 protects insurance carriers from liability as third parties by defining "employer" to include the employer's workers' compensation carrier.ⁿ¹ Thus, the issue of whether an employer's insurance carrier is liable in tort for wrongful acts is to be determined by those rules that apply to employers.

An employee may bring an action against an insurer for aggravation of the employee's injuries in fraudulently concealing from the employee the existence of the injury and its cause; this result obtains because an insurer who acts in this manner has stepped outside the protections of the Labor Code and has acted in a capacity other than an insurer.ⁿ²

An insurance carrier cannot be sued in tort for negligent processing of a third-party claim.ⁿ³ Because the processing of a third-party claim in any industrial injury situation in which a third party is partly responsible is a fairly normal, routine incident for the compensation carrier, the transaction has been held to be work-related and part of the processing of the benefits claim; therefore, it is within the scope of the workers' compensation exclusive remedy.ⁿ⁴ A workers' compensation claimant may not sue the employer's insurance carrier for the insurer's alleged mishandling of its lien on the claimant's settlement with a third party tortfeasor by refusing to accept a reduction in its lien for attorney's fees. Under *Lab. Code* §§ 3860, 5300, the Workers' Compensation Appeals Board has exclusive jurisdiction over allocation of attorney's fees incurred in reaching a settlement with a third party.^{n4.1}

[2] Recovery for Extreme and Outrageous Conduct

Prior to the amendment of *Labor Code Section 3602*, which has extended the reach of the exclusive remedy rule, the California Supreme Court held in *Unruh v. Truck Insurance Exchange* ⁿ⁵ that when an employer's insurance carrier intentionally commits outrageous and extreme conduct totally unnecessary to and far beyond that of a normal investigation of an employee's claim, such conduct removes the carrier from the protection of the exclusive remedy rule. The continued vitality of *Unruh v. Truck Insurance Exchange* was recognized in *Marsh & McLennan, Inc. v. Superior*

Court, n6 in which the Court summarized its holding in *Unruh*, noted that subsequent court of appeal decisions have limited the liability of insurance carriers under *Unruh*, and, by way of dictum, confirmed the integrity of the analysis in that case as likewise limited. The Court concluded that a claims administrator, like an insurer, may be liable under *Unruh* when its actions are sufficiently extreme and outrageous.n7

Under the workers' compensation system, the failure of an employer's insurance carrier to pay benefits promptly in good faith is governed exclusively by the remedial provisions of *Labor Code Section 5814*, and a tort action against the carrier for breach of the implied covenant of good faith and fair dealing is, therefore, not permitted.n8 However, if the conduct of an employer's carrier goes beyond mere bad faith and reaches the level of extreme and outrageous conduct that would support an action for intentional infliction of emotional distress, a tort action may be available.n9 Bad-faith failure to pay a claim promptly does not, without more, reach the level necessary to support a tort claim against an employer's insurer.n10 Moreover, investigation of claims is an important function of workers' compensation insurance carriers, and reasonable surveillance techniques by such carriers is justified, even when it appears that surveillance might exacerbate a claimant's psychological or emotional problems.n11 However, when surveillance techniques by an insurance company amount to trespass, they are actionable.n12 Furthermore, an employer's compensation insurer and its independent claims administrators may be held liable to the injured worker, and to his or her spouse for loss of consortium, in a civil action for (1) fraud, if it is shown that the defendants intentionally and fraudulently denied the existence of a worker's compensation policy for the purpose of defeating the legitimate claims of the injured employee; and (2) intentional spoliation of evidence, if it is shown that they subsequently intentionally destroyed the evidence of their fraudulent denial.n13

However, any civil action against an independent claims administrator or adjuster hired by a self-insured employer for damages for unreasonable delay or refusal to pay compensation benefits is barred by the exclusive remedy provisions of the workers' compensation law.n14

Finally, insurance claim reports prepared for use in workers' compensation proceedings are not consumer reports within the meaning of the federal Fair Credit Reporting Act,n15 and failure to disclose the existence, contents, and use of the report to the worker as required by the act for consumer reportsn16 does not give rise to a civil action in favor of the worker for a violation of the act or invasion of privacy.n17

The essential elements of a prima facie case of intentional infliction of emotional distress are (1) outrageous conduct by the defendant; (2) an intention to cause, or a reckless disregard of the probability of causing, emotional distress; (3) the suffering of severe emotional distress by the plaintiff; and (4) actual and proximate causation of the plaintiff's emotional distress by the defendant's outrageous conduct.n18 For full discussion of the tort of intentional infliction of emotional distress and defenses thereto, *see* Levy, Golden, and Sacks, *California Torts*, Ch. 44.

[3] FORM--Complaint Against Employer's Insurer for Intentional Infliction of Emotional Distress

[a] Comment

The form set forth in [b], *below* is a complaint for damages by the employee against the employer's insurance carrier for intentional infliction of emotional distress based on the insurer's extreme and outrageous behavior toward the employee.n19

The complaint below makes the following allegations, which are essential to the cause of action for intentional infliction of emotional distress by the insurer: (1) an optional agency allegation (Paragraph 2); (2) allegations reciting the employment relationship between plaintiff and employer, the fact that defendant is the workers' compensation carrier for the employer, and the basis for the initial workers' compensation claim (Paragraphs 3-6); (3) outrageous conduct by the defendant insurer (Paragraph 7); (4) an intention to cause, or a reckless disregard of the probability of causing, emotional distress (Paragraph 8); (5) the suffering of severe emotional distress by the plaintiff (Paragraphs 9-11); (6)

actual and proximate causation of the plaintiff's emotional distress by the defendant's outrageous conduct (Paragraphs 9-11);n20 and (7) defendant's malicious, oppressive, or fraudulent behavior, which entitles plaintiff to an award of punitive damages (Optional Paragraph 12).n21

For full discussion of the tort of intentional infliction of emotional distress and related defenses, *see* Levy, Golden, and Sacks, California Torts, Ch. 44 (Matthew Bender).

[b] Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	_____ COMPLAINT FOR DAM-
_____ [names],	)	AGES
Defendants	)	(Intentional Infliction of Emotional Distress)
	)	[Civ. Code §§ 3294, 3333]
	)	

1. [Capacity, residence of defendant, and optional fictitious name allegation. See Form in § 20.20[1][b][ii], Paragraph I].

2. [Defendants _____ (names) at all times mentioned in this complaint were the agents and employees of their codefendants _____ (names) and in doing the things as alleged below were acting within the course and scope of such agency and the permission and consent of their codefendants].

3. On or about [date] , at _____ [city], _____ County, California, plaintiff entered into _____ [a written or an oral] agreement for the employment of plaintiff by _____ [defendant] _____ [name of employer] to _____ [describe general nature of work, e.g., perform construction work for _____ [name of employer]'s construction company].

4. Defendant _____ [name] is the workers' compensation insurer for _____ [name of employer].

5. On [date] , plaintiff was injured in the course and scope of his/her employment in the following manner: _____ [describe accident resulting in injury]. As a result of this injury, plaintiff incurred the following [temporary or permanent] injuries [resulting in (temporary or permanent) disability]: _____ [describe].

6. Plaintiff instituted a claim for workers' compensation benefits on [date] , with reference to the injuries set forth above.

7. _____ [Allege defendant's outrageous conduct, e.g., Defendant _____ (name of insurer) initiated an investigation of plaintiff's claim. In the course of the investigation, defendant and its agents maintained surveillance of plaintiff. On or about [date] , at _____ (city), California, _____ (name), an agent of defendant, rushed up to plaintiff in a public place in front of plaintiff and his/her family members and a large crowd of people and started shouting at plaintiff in a rude, violent, and insolent manner, as follows: _____ (specify defendant's statements, e.g., that plaintiff was a liar and a cheat and

that plaintiff had falsified his/her claim for workers' compensation benefits)].

8. _____ [*Allege intent to cause emotional distress, e.g., Defendant _____ (name)'s conduct was intentional, outrageous, and malicious and done for the purpose of causing plaintiff to suffer humiliation, anguish, and emotional and physical distress. Defendant _____ (name)'s conduct in confirming and ratifying that conduct was done with knowledge that plaintiff's emotional and physical distress would thereby increase, and was done with a wanton and reckless disregard of the consequences to plaintiff*].

9. As the proximate result of the acts mentioned above, plaintiff suffered severe humiliation, mental anguish, and emotional and physical distress [which has compounded plaintiff's initial injuries], and plaintiff has been injured in mind [and body] as follows: _____ [*describe*], all to plaintiff's damage [in the sum of \$_____].

10. As a further proximate result of the acts mentioned above, plaintiff was required to and did employ _____ [*specify, e.g., physicians, surgeons, and psychotherapists*] to examine, treat, and care for him/her and incurred additional medical expenses for hospital bills and other incidental medical expenses [in addition to the expenses and bills plaintiff incurred as a result of his/her initial injury] _____ [in the approximate amount of \$_____ *or* in an amount that has not yet been ascertained]. Plaintiff is informed and believes and therefore alleges that he/she will incur some additional medical expenses [the exact amount of which is presently unknown].

11. [By reason of the acts mentioned above, plaintiff was further prevented from attending to his/her usual _____ (occupation *or* profession) for a longer period of time than was caused by plaintiff's initial injury, and plaintiff lost earnings (in the sum of \$_____). Plaintiff is informed and believes and therefore alleges that he/she will be prevented from attending to his/her usual _____ (occupation *or* profession) for an additional period in the future that he/she cannot now ascertain and will sustain further loss of earnings].

12. [The acts mentioned above of defendants were willful, wanton, malicious, oppressive, and _____ (intended to harm plaintiff *or* carried out in conscious disregard of plaintiff's rights), justifying the assessment of punitive damages against defendant _____ (in the amount of \$_____ *or* in an amount appropriate to punish defendant and set an example for others)].

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages [in the sum of \$_____];
2. For medical and related expenses [_____ [in the sum of \$_____ *or* according to proof];
3. For lost earnings, past and future [in the sum of \$_____ *or* according to proof];
4. For punitive damages [in the sum of \$_____];
5. For costs of suit incurred; and
6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[Add verification, if desired
(see Code Civ. Proc. §§ 446, 2015.5).]

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDI Administrative Proceedings Claims General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 3850(b)*; see *Continental Casualty Co. v. Superior Court* (1987) 190 Cal. App. 3d 156, 159, 235 Cal. Rptr. 260 ; *Chase Chemical Co. v. Hartford Accident & Indemnity Co.* (1984) 159 Cal. App. 3d 229, 238, 205 Cal. Rptr. 469 .

(n2)Footnote 2. *Chase Chemical Co. v. Hartford Accident & Indemnity Co.* (1984) 159 Cal. App. 3d 229, 238, 205 Cal. Rptr. 469 ; see *Lab. Code § 3602(b)(2)*. For form of complaint for aggravation of injuries by fraudulent concealment of existence of injury, see § 20.41[2][b].

(n3)Footnote 3. *Continental Casualty Co. v. Superior Court* (1987) 190 Cal. App. 3d 156, 161, 235 Cal. Rptr. 260 .

(n4)Footnote 4. *Continental Casualty Co. v. Superior Court* (1987) 190 Cal. App. 3d 156, 161, 235 Cal. Rptr. 260 .

(n5)Footnote 4.1. *Hughes v. Argonaut Ins. Co.* (2001) 88 Cal. App. 4th 517, 105 Cal. Rptr. 2d 877 .

(n6)Footnote 5. *Unruh v. Truck Insurance Exchange* (1972) 7 Cal. 3d 616, 628-630, 102 Cal. Rptr. 815, 498 P.2d 1063 .

(n7)Footnote 6. *Marsh & McLennan, Inc. v. Superior Court* (1989) 49 Cal. 3d 1, 259 Cal. Rptr. 733, 774 P.2d 762 .

(n8)Footnote 7. *Marsh & McLennan, Inc. v. Superior Court* (1989) 49 Cal. 3d 1, 6-11, 259 Cal. Rptr. 733, 774 P.2d 762 ; see also *Jablonski v. Royal Globe Insurance Co.* (1988) 204 Cal. App. 3d 379, 385-394, 251 Cal. Rptr. 160 (following *Unruh* and holding that a compensation insurer and its independent claims administrators would be civilly liable to the injured employee and his spouse if the facts pleaded in the complaint showing extreme and outrageous conduct were to be established at trial).

(n9)Footnote 8. *Cervantes v. Great American Insurance Co.* (1983) 140 Cal. App. 3d 763, 768-770, 189 Cal. Rptr. 761 . See also *Lab. Code § 5814(f)* (nothing in Section 5814 may be construed to create civil cause of action).

(n10)Footnote 9. *Cervantes v. Great American Insurance Co.* (1983) 140 Cal. App. 3d 763, 774, 189 Cal. Rptr. 761 .

(n11)Footnote 10. *Santiago v. Employee Benefits Services* (1985) 168 Cal. App. 3d 898, 905, 214 Cal. Rptr. 679 (precluding action against self-insured employer's independent adjusting agency); *Argonaut Insurance Co. v. Superior Court* (1985) 164 Cal. App. 3d 320, 324, 210 Cal. Rptr. 417 .

(n12)Footnote 11. *Teague v. Home Insurance Co.* (1985) 168 Cal. App. 3d 1148, 1152-1153, 214 Cal. Rptr. 773 .

(n13)Footnote 12. *Teague v. Home Insurance Co.* (1985) 168 Cal. App. 3d 1148, 1153-1154, 214 Cal. Rptr. 773 .

(n14)Footnote 13. *Jablonski v. Royal Globe Insurance Co.* (1988) 204 Cal. App. 3d 379, 382, 388-394, 251 Cal. Rptr. 160 .

(n15)Footnote 14. See *Marsh & McLennan, Inc. v. Superior Court* (1989) 49 Cal. 3d 1, 4, 10, 259 Cal. Rptr. 733, 774 P.2d 762 (disapproving the contrary holding in *Dill v. Claims Admin. Services, Inc.* (1986) 178 Cal. App. 3d 1184, 1187-1188, 224 Cal. Rptr. 273). See also *Mitchell v. Scott Wetzel Services, Inc.* (1991) 227 Cal. App. 3d 1474, 1480-1481, 278 Cal. Rptr. 474 (action by injured employee against self-insured employer's claims administrator alleging perjury before the WCAB and misrepresentation regarding benefit checks and availability of a rental car was within exclusive jurisdiction of workers' compensation system).

(n16)Footnote 15. See 15 U.S.C. 1681 et seq.; see also discussion in Ch. 50, Pt. B.

(n17)Footnote 16. See 15 U.S.C. §§ 1681, 1681i, 1681n, 1681p, 1681q.

(n18)Footnote 17. See *Kemp v. County of Orange* (1989) 211 Cal. App. 3d 1422, 1425-1428, 260 Cal. Rptr. 131 .

(n19)Footnote 18. See *Davidson v. City of Westminster* (1982) 32 Cal. 3d 197, 209-210, 185 Cal. Rptr. 252, 649 P.2d 894 ; *Agarwal v. Johnson* (1979) 25 Cal. 3d 932, 949, 160 Cal. Rptr. 141, 603 P.2d 58 ; *Cervantez v. J.C. Penney Co.* (1979) 24 Cal. 3d 579, 587, 156 Cal. Rptr. 198, 595 P.2d 975 .

(n20)Footnote 19. See *Cervantes v. Great American Insurance Co.* (1983) 140 Cal. App. 3d 763, 774, 189 Cal. Rptr. 761 .

(n21)Footnote 20. *Davidson v. City of Westminster* (1982) 32 Cal. 3d 197, 209-210, 185 Cal. Rptr. 252, 649 P.2d 894 ; *Agarwal v. Johnson* (1979) 25 Cal. 3d 932, 949, 160 Cal. Rptr. 141, 603 P.2d 58 ; *Cervantez v. J.C. Penney Co.* (1979) 24 Cal. 3d 579, 587, 156 Cal. Rptr. 198, 595 P.2d 975 .

(n22)Footnote 21. See Civ. Code § 3294.



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part B. ACTIONS BY AND AGAINST EMPLOYERS AND THIRD PARTIES

Subpart 1. Actions by Employee

1-20 California Employment Law § 20.43

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.43 Suits Against Coemployees

[1] General Applicability of Exclusive Remedy Doctrine

[a] In General

When the conditions of compensation set forth in *Labor Code Section 3600* occur, the right to recover workers' compensation benefits is the sole remedy of an injured employee against a coemployee acting within the scope of his or her employment, except when the injury is caused by the willful and unprovoked physical act of aggression of the coemployee or by the intoxication of the coemployee.ⁿ¹ The requirement that the coemployee's act of aggression be unprovoked is consistent with the bar of compensation in *Lab. Code § 3600(a)(7)*, which bars recovery by an initial aggressor who first introduces physical violence into the confrontation, thus creating the risk of injury.ⁿ² An "unprovoked physical act of aggression" is unprovoked conduct intended to convey an actual, present, and apparent threat of bodily injury.ⁿ³

The harm to a plaintiff need not be physical before the exception becomes operative.ⁿ⁴ In order to come within the exception, however, the plaintiff must show that the coemployee specifically intended to injure him or her.ⁿ⁵ Plaintiffs may rely on circumstantial evidence to prove the intent to injure.ⁿ⁶ The trial court may properly instruct the jury that the plaintiff is required to prove that the coemployee acted with the intent to cause injury in order to establish that the coemployee had committed a "willful and unprovoked physical act of aggression" against the plaintiff under *Labor Code Section 3601(a)(1)*.ⁿ⁷ In *Torres v. Parkhouse Tire Service, Inc.*,ⁿ⁸ the California Supreme Court left open the question of whether a coemployee's mere intent to threaten physical injury, such as by pointing a gun in a threatening manner at an employee, causing the employee injury in a dive for safety, would be sufficient to bring the coemployee's conduct within the reach of *Labor Code Section 3601(a)(1)*. "Willful" assaults under *Labor Code Section 3601(a)(1)* do not include all common-law batteries, but only those that are specifically intended to injure.ⁿ⁹

If the employer condones what courts have described as "horseplay" among its employees, an employee who engages in it is acting within the scope of employment under *Labor Code Section 3601(a)* and is immune from suit, unless

exceptions apply.ⁿ¹⁰

In an appropriate case, an employee may be able to recover on a theory of intentional infliction of emotional distress based on the same facts.ⁿ¹¹ However, it appears that if the coemployee's conduct does not involve "a willful and physical act of aggression," placing it within the statutory exception, the exclusive remedy would bar an action for intentional infliction of emotional distress arising out of conduct that is a normal part of the employment relationship; such conduct includes demotions, promotions, criticism of work practices, or frictions in negotiations involving grievances.ⁿ¹²

Although a tort suit is authorized against an employee who injures another employee through willful and unprovoked physical aggression or intoxication, an employer may not be held vicariously liable for damages resulting from such injuries.ⁿ¹³ However, a cause of action against an employer may lie if the employer ratifies tortious conduct toward the injured employee by a coemployee.ⁿ¹⁴

Furthermore, injunctive relief is available to help prevent potential acts of violence against employees by current or former coemployees. In 1994, the Legislature passed the Workplace Violence Safety Act, which allows an employer to seek a temporary restraining order or injunction on behalf of an employee who has been the victim of workplace violence or any credible threat of workplace violence.ⁿ¹⁵

For the workers' compensation exclusive remedy doctrine to apply to bar a tort action against a purported co-employee, the defendant must be a co-employee. For example, in *Moehring v. Thomas*,^{n15.1} the plaintiff's decedent and the defendant did business together and were hired by a contractor to maintain fire roads. The plaintiff's decedent was killed by machinery operated by the defendant. The trial court concluded that defendant, who did not have a contractors' license, was an employee as a matter of law pursuant to *Labor Code Section 2750.5*, which creates a rebuttable presumption that a worker performing services for which a contractors' license is required is an employee rather than an independent contractor. Section 2750.5 further provides that a worker performing any activity for which a license is required must hold a valid contractors' license as a condition of having independent contractor status. However, *Business and Professions Code Section 7049* exempts from the contractors' license requirement any construction or maintenance work incidental to the clearing of land in rural districts for fire prevention purposes. Undisputed evidence established that the work performed by defendant was for fire prevention purposes in a rural district. Thus, according to the court of appeal, there was a question of fact under Section 2750.5 whether defendant was an employee or an independent contractor, and the trial court erred when it entered summary judgment in defendant's favor on the ground that he was a fellow employee as a matter of law and that workers' compensation was, therefore, the exclusive remedy.

[b] Special Employment

When an employer lends an employee to another employer and relinquishes to the borrowing employer some right of control over the employee's activities, a "special employment relationship" arises between the borrowing employer and the employee.^{n15.2} Once a special employment relationship is identified, two consequences ensue:^{n15.3}

- The special employer's liability for workers' compensation coverage to the employee.
- The special employer's and its other employees' immunity from a common law tort action flowing from the exclusivity of the compensation remedy embodied in *Labor Code section 3601*.

In determining whether a special employment relationship exists, the primary consideration is whether the special employer has the right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether or not the employer exercises that control.^{n15.4} The decision turns on the following factors:^{n15.5}

- Whether the borrowing employer's control over the employee and the work the employee is performing extends beyond mere suggestion of details or cooperation.
- Whether the employee is performing the borrowing employer's work.
- Whether there was an agreement, understanding, or meeting of the minds between the original and borrowing employer.
- Whether the employee acquiesced in the new work situation.
- Whether the original employer terminated its relationship with the employee.
- Whether the borrowing employer furnished the tools and place for performance.
- Whether the new employment was over a considerable length of time.
- Whether the borrowing employer had the right to fire the employee.
- Whether the borrowing employer had the obligation to pay the employee.

Circumstances tending to negate the existence of a special employment relationship include the following:^{15.6}

- The employee is not paid by and cannot be discharged by the borrowing employer.
- The employee is a skilled worker with substantial control over operational details.
- The employee is not engaged in the borrowing employer's usual business.
- The employee is employed for only a brief period of time.
- The employee uses using tools and equipment furnished by the lending employer.

Although the terms of a contract may specify that a special employer retains the right to control the details of an individual's work or purports to establish an employment relationship, the terminology used in an agreement is not conclusive, even in the absence of fraud or mistake. There still must be evidence to support the inference to be drawn from the contract terms.^{15.7}

Whether a special employment relationship exists generally is a question of fact.^{15.8} However, if neither the facts nor inferences are in conflict, the question is one of law that may be decided on summary judgment.^{15.9}

For example, in a tort action involving the entertainment industry, the workers' compensation exclusive remedy doctrine applied to bar the action by the injured employee, who was a stuntman, and his wife. The employee and his wife sued three individuals and their solely-owned corporations. The corporations were "loan-out" corporations, and the use of loan-out corporations was a common practice in the entertainment industry. When the individuals were hired by the producer to work on the production, they informed the producer they each had a loan-out corporation. Three-way contracts were entered into in which the loan-out corporations agreed to furnish the services of their owners and sole employees to the producer; the producer agreed to pay the loan-out corporations for the owners/employees' services; and the owners/employees agreed to the arrangement. The loan-out corporations themselves did not participate in any way in the production after the loan-out agreements were signed, except to receive payment for their owners/employees' services.^{15.10} In granting summary judgment to the individual defendants and their corporations, the trial court found,

and the Court of Appeal affirmed, that they were special employees of the production company of which the stuntman was also an employee. The employment agreements between the production company and each of the individual defendants expressly identified the individual defendants as "special employees," subject to both the benefits and limitations of the workers' compensation laws. Further, the evidence supported the production company's ultimate authority to control and direct each of the individual defendants' activities. Although the individual defendants received their paychecks from their respective loan-out corporations rather than from the production company, the undisputed evidence established the relationships with their loan-out corporations were administrative only, and existed solely for payment purposes. Although the length of their respective employments was relatively short, it was also standard practice in the entertainment industry to employ the person solely for the length of time his or her services were needed for the specific production.^{15.11} The undisputed evidence established that ultimate authority over the production, both substantive and aesthetic, belonged not to the individual defendants, but to the production company. Further, no reasonable inference could be drawn that each of the corporate defendants, *i.e.*, the loan-out companies, was engaged in a "project of mutual interest" with the production company, such that no transfer of control over the borrowed employee's activities occurred. Finally, the plaintiffs did not present any evidence from which a jury could infer the corporate defendants retained some control over their respective employees so that they could remain vicariously liable notwithstanding their employees' special employment relationship with the production company.^{15.12}

[2] Injuries Caused by Acts Outside Coemployee's Scope of Employment

The exclusive remedy provisions of *Labor Code Section 3601* apply only to tortious conduct of a coemployee that is within the scope of the tortfeasor's employment.¹⁶ Employees are thus not accorded as broad an exemption from civil liability as employers, because the phrase "scope of employment" expresses a more restrictive concept than the phrase "arising out of and in the course of employment."¹⁷ In *Saala v. McFarland*,¹⁸ the Supreme Court held that a worker who was struck by a car driven by a coemployee in the employer's parking lot after their shift had ended was entitled to pursue a civil action against the coemployee although the injured worker had already received workers' compensation benefits. It has been held that "scope of employment" for the purposes of workers' compensation law should be construed in at least as restrictive a manner as it is under the doctrine of respondeat superior.¹⁹ In addition, one court of appeal has held that plaintiff's claims for work-related disability discrimination under the FEHA and for emotional distress were not barred by the worker's compensation exclusive remedy provisions because "work-related injury discrimination" is not a normal risk of the compensation bargain.²⁰

Labor Code Section 3602, as amended in 1982, which sharply limited the application of the dual capacity doctrine with respect to employers,²¹ does not protect coemployees from civil liability. However, coemployees do enjoy the immunity created by *Labor Code Section 3601*, which expressly immunizes them for acts within the scope of their employment.²² The California Supreme Court has held that the 1982 amendment of Section 3601 confirms that there can be no judicially created exceptions to the immunity from civil liability granted to coemployees.²³ Thus, a physician who was employed by a professional football team to provide treatment to players injured in the course of their employment was held to be protected from a malpractice suit by the statutory immunity of Section 3601, because the physician was acting within the scope of his employment when he diagnosed and treated the plaintiff whose injury was proximately caused by his employment by the team.²⁴ However, if a coemployee provides medical services other than those contemplated by the employee's employment and in so doing is not acting for the employer, he or she no longer enjoys the immunity from suit provided by Section 3601 for acts that are in the scope of employment.²⁵

Legal Topics:

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

Workers' Compensation & SSDI Administrative Proceedings Claims General Overview Workers' Compensation & SSDI Remedies Under Other Laws General Overview Workers' Compensation & SSDI Remedies Under Other Laws Exclusivity General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 3601(a)*.

For the standard jury instruction for the coemployee's affirmative defense that the injury is covered by workers' compensation, *see* Judicial Council of California Civil Jury Instructions, CACI 2810 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction on the essential factual elements of a claim that the coemployee's assault was a willful and unprovoked physical act of aggression, *see* Judicial Council of California Civil Jury Instructions, CACI 2811. For the CACI special verdict form for a claim that of a coemployee's willful and unprovoked physical act of aggression, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2804. For the standard jury instruction on the essential factual elements of a claim that the injury was caused by the coemployee's intoxication, *see* Judicial Council of California Civil Jury Instructions, CACI 2812. For the CACI special verdict form for a claim of injury caused by coemployee's intoxication, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2805. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n2)Footnote 2. *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal. 4th 995, 1004-1005, 111 Cal. Rptr. 2d 564, 30 P.3d 57; for *Lab. Code § 3600(a)(7)*, *see* § 20.23[2]. *See, e.g., Jones v. Dept. of Corrections* (2007) 152 Cal. App. 4th 1367, 1383-1384, 62 Cal. Rptr. 3d 200 (former corrections officer's assault and battery claim against fellow officer were barred by workers' compensation exclusivity rule, because circumstances surrounding and injury resulting from altercation over wheelbarrow were not of sufficient gravity to come within exception).

(n3)Footnote 3. *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal. 4th 995, 1005, 111 Cal. Rptr. 2d 564, 30 P.3d 57.

(n4)Footnote 4. *Iverson v. Atlas Pacific Eng'g* (1983) 143 Cal. App. 3d 219, 225, 191 Cal. Rptr. 696, disapproved on other grounds, *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 718, 30 Cal. Rptr. 2d 18, 872 P.2d 559.

(n5)Footnote 5. *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal. 4th 995, 1001-1010, 111 Cal. Rptr. 2d 564, 30 P.3d 57 (by adding "willful," Legislature underscored need for intent to inflict injury or harm), approving *Soares v. City of Oakland* (1992) 9 Cal. App. 4th 1822, 1826-1829, 12 Cal. Rptr. 2d 405.

(n6)Footnote 6. *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal. 4th 995, 1009, 111 Cal. Rptr. 2d 564, 30 P.3d 57.

(n7)Footnote 7. *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal. 4th 995, 1001-1010, 111 Cal. Rptr. 2d 564, 30 P.3d 57.

(n8)Footnote 8. *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal. 4th 995, 1006 n.6, 111 Cal. Rptr. 2d 564, 30 P.3d 57.

(n9)Footnote 9. *See Soares v. City of Oakland* (1992) 9 Cal. App. 4th 1822, 1825-1831, 12 Cal. Rptr. 2d 405.

(n10)Footnote 10. *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal. 4th 995, 1006-1007, 111 Cal. Rptr. 2d 564, 30 P.3d 57; *Oliva v. Heath* (1995) 35 Cal. App. 4th 926, 933; but *see Pacific Employers Ins. Co. v. Industrial Acci. Com.* (1945) 26 Cal. 2d 286, 294, 158 P.2d 9 (nonparticipating employee's injury from coemployee's horseplay is compensable).

(n11)Footnote 11. *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1484-1493, 82 Cal. Rptr. 2d 359 (allowing FEHA and common law remedies for "work-related injury discrimination"); *Iverson v. Atlas Pacific Eng'g* (1983) 143 Cal. App. 3d 219, 230-231, 191 Cal. Rptr. 696 (allowing civil actions for assault, false imprisonment, and intentional infliction of emotional distress).

(n12)Footnote 12. See *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743, discussed in § 20.12[3].

(n13)Footnote 13. See *Lab. Code § 3601(b)*; *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal. 4th 995, 1002, 111 Cal. Rptr. 2d 564, 30 P.3d 57; *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1486-1487, 82 Cal. Rptr. 2d 359 (prohibiting imposition of civil liability on employer for employee's assault and battery against coemployee, rejecting plaintiff's argument that employer liability in these circumstances is based on doctrine of respondeat superior); cf. *Lab. Code § 3601(a)(1)* (authorizing suit for assault against coemployee, but not against employer); *Lab. Code § 3602(b)(1)* (addressing assault on employee by employer, not by coemployee).

(n14)Footnote 14. See *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1487, 82 Cal. Rptr. 2d 359 (acknowledging that if employer ratifies or joins in assault by one employee against coemployee, employer could be jointly liable with coemployee); *Iverson v. Atlas Pacific Eng'g* (1983) 143 Cal. App. 3d 219, 228, 191 Cal. Rptr. 696 (action against employer for assault, false imprisonment, and intentional infliction of emotional distress not barred by Lab. Code § 3601 when employer failed to criticize or take any action against coemployee after learning of his tortious conduct); *Meyer v. Graphic Arts Int'l Union* (1979) 88 Cal. App. 3d 176, 178-179, 151 Cal. Rptr. 597 (separate cause of action against employer exists when employer allegedly acted through agent in assaulting and raping plaintiff); cf. *Halliman v. Los Angeles Unified Sch. Dist.* (1984) 163 Cal. App. 3d 46, 50-52, 209 Cal. Rptr. 175 (school district not liable at common law for injuries suffered by teacher when student with history of assaultive behavior attacked him); *Roberts v. Pup'N' Taco Driveup* (1984) 160 Cal. App. 3d 278, 282-284, 206 Cal. Rptr. 533 (workers' compensation exclusive remedy when employer's conduct with regard to coemployee's tortious act was negligent rather than intentionally tortious).

(n15)Footnote 15. See *Code Civ. Proc. § 527.8*; See also § 21.71.

(n16)Footnote 15.1. *Moehring v. Thomas* (2005) 126 Cal. App. 4th 1515, 1521-1524, 25 Cal. Rptr. 3d 118.

(n17)Footnote 15.2. *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal. App. 4th 881, 889, 77 Cal. Rptr. 3d 313. See also *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 492, 162 Cal. Rptr. 320, 606 P.2d 355.

(n18)Footnote 15.3. *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal. App. 4th 881, 889, 77 Cal. Rptr. 3d 313; *Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal. App. 3d 575, 578, 239 Cal. Rptr. 578. See also *Kowalski v. Shell Oil Co.* (1979) 23 Cal. 3d 168, 175, 151 Cal. Rptr. 671, 588 P.2d 811.

(n19)Footnote 15.4. *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal. App. 4th 881, 888-889, 77 Cal. Rptr. 3d 313. See also *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 350, 256 Cal. Rptr. 543, 769 P.2d 399; *Kowalski v. Shell Oil Co.* (1979) 23 Cal. 3d 168, 175, 151 Cal. Rptr. 671, 588 P.2d 811.

(n20)Footnote 15.5. *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal. App. 4th 881, 889, 77 Cal. Rptr. 3d 313. See also *Riley v. Southwest Marine, Inc.* (1988) 203 Cal. App. 3d 1242, 1250, 250 Cal. Rptr. 718.

(n21)Footnote 15.6. *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal. App. 4th 881, 889, 77 Cal. Rptr. 3d 313. See also *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 492, 162 Cal. Rptr. 320, 606 P.2d 355.

(n22)Footnote 15.7. *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal. App. 4th 881, 889, 77 Cal. Rptr. 3d 313.

(n23)Footnote 15.8. *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal. App. 4th 881, 889, 77 Cal. Rptr. 3d 313. See also *Kowalski v. Shell Oil Co.* (1979) 23 Cal. 3d 168, 175, 151 Cal. Rptr. 671, 588 P.2d 811.

(n24)Footnote 15.9. *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal. App. 4th 881, 889, 77 Cal. Rptr. 3d 313; *Wedek v. Unocal Corp.* (1997) 59 Cal. App. 4th 848, 857, 69 Cal. Rptr. 2d 501; *Johnson v. Berkofsky-Barret Productions, Inc.* (1989) 211 Cal. App. 3d 1067, 1071, 260 Cal. Rptr. 67.

(n25)Footnote 15.10. *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal. App. 4th 881, 885-887, 77 Cal. Rptr. 3d 313 .

(n26)Footnote 15.11. *Compare Von Beltz v. Stuntman, Inc.* (1989) 207 Cal. App. 3d 1467, 255 Cal. Rptr. 755 (in action involving stuntwoman and question of special employment, there was conflicting evidence for jury to resolve).

(n27)Footnote 15.12. *Caso v. Nimrod Productions, Inc.* (2008) 163 Cal. App. 4th 881, 890-895, 77 Cal. Rptr. 3d 313 .

(n28)Footnote 16. *See Lagies v. Copley* (1980) 110 Cal. App. 3d 958, 969-970, 168 Cal. Rptr. 368 , *disapproved on other grounds*, *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal. 3d 711, 738 (in action for intentional infliction of emotional distress based on coemployees' treatment of plaintiff in job context, court found that plaintiff's complaint, which alleged that defendant's actions were committed outside scope of employment, stated valid cause of action).

(n29)Footnote 17. *Brittell v. Young* (1979) 90 Cal. App. 3d 400, 403, 153 Cal. Rptr. 387 .

(n30)Footnote 18. *Saala v. McFarland* (1965) 63 Cal. 2d 124, 45 Cal. Rptr. 144, 403 P.2d 400 .

(n31)Footnote 19. *Saala v. McFarland* (1965) 63 Cal. 2d 124, 130, 45 Cal. Rptr. 144, 403 P.2d 400 ; *Brittell v. Young* (1979) 90 Cal. App. 3d 400, 403, 153 Cal. Rptr. 387 . For discussion of respondeat superior generally, *see* ch. 30.

(n32)Footnote 20. *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1492-1493, 82 Cal. Rptr. 2d 359 .

(n33)Footnote 21. *See* discussion in § 20.12[1][d], [2][a], [b].

(n34)Footnote 22. *Hendy v. Losse* (1991) 54 Cal. 3d 723, 737-738, 1 Cal. Rptr. 2d 543, 819 P.2d 1 ; *see also Oliva v. Heath* (1995) 35 Cal. App. 4th 926, 933-934, 41 Cal. Rptr. 2d 613 (pranks and practical jokes condoned by employer are within coemployee's scope of employment under *Lab. Code* § 3601, making coemployee immune from negligence liability).

(n35)Footnote 23. *Hendy v. Losse* (1991) 54 Cal. 3d 723, 728-739, 1 Cal. Rptr. 2d 543, 819 P.2d 1 .

(n36)Footnote 24. *Hendy v. Losse* (1991) 54 Cal. 3d 723, 737-738, 1 Cal. Rptr. 2d 543, 819 P.2d 1 .

(n37)Footnote 25. *Hendy v. Losse* (1991) 54 Cal. 3d 723, 741, 1 Cal. Rptr. 2d 543, 819 P.2d 1 (disapproving the holding to the contrary in *Hoffman v. Rogers* (1972) 22 Cal. App. 3d 655, 99 Cal. Rptr. 455).



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part B. ACTIONS BY AND AGAINST EMPLOYERS AND THIRD PARTIES

Subpart 1. Actions by Employee

1-20 California Employment Law § 20.44

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§ 20.44 Suits Against Third Parties

[1] Generally

Workers' compensation law does not affect an employee's right of action in tort against third parties. An injured employee within the scope of the workers' compensation system maintains all rights of action against third parties.ⁿ¹ Although *Labor Code* § 3852 purports to preserve tort actions against any person other than the employer, it is clear that certain tort actions against coemployees are barred by the Workers' Compensation Act.ⁿ² In addition, *Labor Code* § 3850(b) qualifies *Labor Code* § 3852 by defining "employer" to include "insurer"; hence, the insurer, except to the extent that it engages in intentionally tortious conduct towards the employee, retains immunity from lawsuit as the alter ego of the employer.ⁿ³ An election of remedies is not required, and an injured employee may pursue both a workers' compensation claim against his or her employer and a tort action against a third party.ⁿ⁴ Actions against third-party tortfeasors are preserved, since the compensation system was not designed to extend immunity to strangers.ⁿ⁵ An employee's right of action against a third person is not barred by the fact that the employer of the injured employee was also at fault in causing the harm, or by the fact that the employee has recovered workers' compensation benefits for injuries arising out of the third party's tortious act.ⁿ⁶ For discussion of the effect of the employer's fault on the employee's recovery from a third party, see [4], *below*.

Both an employee and an employer may pursue an action against a third party.^{n6.1} When attorneys separately representing an employer and an employee each actively prosecute an action against a third party, the fee of the employee's attorney must come out of the employee's share of any recovery, either by judgment or by settlement. If the employee's share of the recovery is zero, the employee's attorney fees may not be paid from the amount recovered by judgment or settlement.^{n6.2}

Suits against third parties are available in a number of factual situations when a worker is injured on the jobsite. For example, if an employee has been injured on the job by a defective product manufactured by a party other than the employer, the employee may be able to recover from that party under a products liability theory. Note that if the

employer manufactured the product, workers' compensation is the exclusive remedy except in certain limited situations.ⁿ⁷ For discussion of products liability generally, *see* Cotchett and Cartwright, California Products Liability Actions (rev. ed.) (Matthew Bender).

In *Miller v. King*,ⁿ⁸ plaintiff slipped and fell at a restaurant where she was employed as a waitress. The restaurant was owned by a corporation, from which plaintiff received workers' compensation benefits. Plaintiff brought a third-party premises liability suit against the owners of the property where the restaurant was located, who also were majority shareowners in the corporation that owned the restaurant. The trial court granted defendants' motion for summary judgment on the ground that the action was barred by the exclusive remedy doctrine of workers' compensation, but the court of appeal reversed. The court of appeal noted that *Labor Code Section 3602(a)* makes workers' compensation an employee's exclusive remedy against his or her employer, even if the employer occupies another or dual capacity with respect to the employee.ⁿ⁹ The dual capacity provision ordinarily bars a premises liability action if the property on which the accident occurred is owned by the employer. However, the court held that the statute did not apply to the defendant property owners because plaintiff was not employed by them; she was employed by the corporation. The fact that the defendants owned stock in the corporation did not make them plaintiff's employers, since a corporation is an entity with a legal existence separate from that of its shareholders.ⁿ¹⁰

The relationship between a third-party owner and a corporate employer may shield that third party from tort liability under the appropriate circumstances, however. The court of appeal in *Doney v. TRW, Inc.*ⁿ¹¹ held that a parent corporation could not be liable in tort under theories of alter ego and vicarious liability for the actions of a subsidiary corporation when suit in tort against the subsidiary corporation is precluded by the exclusivity doctrine of the workers' compensation law. In *Doney*, the heirs of decedent employees of the subsidiary corporation had brought suit for negligence and premises liability against the parent and subsidiary corporations, but summary judgment was entered for the subsidiary employer based on the exclusive remedy provisions of the workers' compensation law.ⁿ¹² The court of appeal, relying on the reasoning of the California Supreme Court in *Privette v. Superior Court*,ⁿ¹³ concluded that allowing vicarious liability of a parent corporation under a theory of alter ego would result in greater liability for a non-negligent person (the parent corporation) than for a negligent person (the subsidiary employer), would give an unwarranted windfall to employees who work for corporations by exempting them from the limits of the workers' compensation law, and would, due to the unavailability of equitable indemnity, place an "onerous" burden on a party who is without fault for the injury.ⁿ¹⁴

Similarly, relying on the reasoning set forth in *Privette*, the court of appeal in *Orosco v. Sun-Diamond Corporation*ⁿ¹⁵ held that an injured employee cannot pursue a personal injury action against a non-negligent member of a joint venture or enterprise when another member of the joint venture negligently injures the employee and provides workers' compensation coverage. In so holding, the court reasoned that a joint venture sued for the negligence of one venturer is entitled to indemnity from the negligent venturer. The workers' compensation exclusive remedy doctrine would operate to prevent the joint venture from seeking such indemnity, and make unavailable a remedy to which the joint venture is legally entitled. Moreover, the court noted that the public policy regarding workers' compensation coverage favors uniform compensation for all injured employees, regardless of the structure or organization of the business that hires the particular employee.ⁿ¹⁶

In *Waste Management, Inc. v. Superior Court*,^{n16.1} the court held that the survivors of an employee killed by one of the employer's trucks while working as a mechanic could not state a cause of action against the employer's parent company based on allegations the parent controlled the budget of its subsidiary and prevented the subsidiary from replacing or repairing dangerous and improperly maintained trash trucks, including the one that killed the employee. A parent corporation is not liable for injuries of a subsidiary's employee in the absence of evidence establishing a duty owed by the parent corporation to the employee. The parent may owe a duty arising out of obligations independent of the parent-subsidiary relationship, but the survivors failed to allege any independent tort committed by the parent, because there were no allegations the parent assumed a duty to ensure the safety of the subsidiary's employees, or that the parent owned, operated, manufactured, sold or serviced the truck that killed the employee. Negligently controlling

or intentionally mismanaging a subsidiary's budget does not create a duty on the part of the parent corporation to ensure safety or prevent injuries to the subsidiary's employees. Alleging that the parent instructed the subsidiary not to repair or replace the trucks and affirmatively prevented the subsidiary from doing so by withholding funds did not allege a cause of action because the survivors did not plead that the parent exercised control of the subsidiary to a degree exceeding the control normally exercised by a parent corporation. On the other hand, if the parent completely and absolutely controlled the subsidiary, rendering the subsidiary incapable of repairing or replacing its own trucks, the corporations would be a single, indistinguishable economic entity, and the parent would be an employer entitled to the protection of the workers' compensation exclusive remedy.

For discussion of indemnity of third-party tortfeasors by negligent employers, *see* [4], *below*. For discussion of the employer's right to reimbursement of workers' compensation benefits paid against third-party tortfeasors, *see* § 20.50.

[2] Employees of Independent Contractor; Peculiar Risk Doctrine; Nondelegable Duty Doctrine

Employees of an independent contractor are not normally considered employees of the other party to the contract.ⁿ¹⁷ Thus, under the rule that an injured employee may sue any third person in tort, when an employee of an independent contractor is injured in the course of employment, the employee is entitled to sue the person who contracted with his or her employer for any wrongful acts committed by that person.ⁿ¹⁸

Generally, the hirer of an independent contractor is not vicariously liable to third parties for the torts of the contractor or that of the contractor's employees.ⁿ¹⁹ Thus, absent an exception to this rule, the independent contractor's employees may not sue the hirer of the contractor unless the hirer himself or herself was negligent or committed some other tortious act. One exception to the usual rule of nonliability for torts of independent contractors is the "peculiar risk doctrine." Under that doctrine, one who hires an independent contractor to do work that the hirer should recognize is likely to create a peculiar risk of physical harm to others unless special precautions are taken is vicariously liable to persons who are harmed as a result of the contractor's failure to exercise reasonable care to take such precautions.ⁿ²⁰

California courts formerly permitted the employees of an independent contractor to use the peculiar risk exception to hold a non-negligent hirer of an independent contractor liable for the negligence of contractor.ⁿ²¹ In *Privette v. Superior Court*,ⁿ²² the California Supreme Court overruled these cases and held that employees of an independent contractor hired to do dangerous work may not sue the hirer of their employer under the peculiar risk doctrine.ⁿ²³ The Court noted that when a property owner or other person who hires an independent contractor is held vicariously liable under the peculiar risk doctrine, he or she can normally seek equitable indemnity from the contractor, thus assuring that the ultimate responsibility is borne by the negligent contractor.ⁿ²⁴ But when the person injured is an employee of the contractor, the contractor is usually shielded from liability for indemnity by the workers' compensation law,ⁿ²⁵ thus undercutting part of the rationale for the peculiar risk doctrine.ⁿ²⁶ Furthermore, the Court concluded, the workers' compensation system generally serves the same function as the peculiar risk doctrine in these circumstances by ensuring that employees who are injured on the job will be compensated for that injury and by spreading the risk created by the performance of dangerous work among those who contract for and benefit from such work.ⁿ²⁷ Based on the holding in *Privette*, one court of appeal has further held that a landowner is not vicariously liable for the negligence of any simultaneously-working independent contractors for an injury caused to any employee of the contractors, even when the injury was caused through the negligence of a contractor who was not the injured employee's employer.ⁿ²⁸ The California Supreme Court's decision in *Privette*, abrogating the peculiar risk doctrine insofar as it allowed employees of independent contractor's to sue the hirer of the contractor, has been held to apply retroactively.ⁿ²⁹

In *Toland v. Sunland Housing Group, Inc.*,^{n29.1} the Supreme Court resolved conflicting Court of Appeal decisions regarding the scope of the *Privette* exception to the doctrine of peculiar risk.^{n29.2} The Court noted that in some cases, an independent contractor's employee had brought tort claims against the employer's hirer based on the hirer's direct liability for failing to provide special precautions in the contract or otherwise for peculiar risks arising from inherently dangerous work; this form of hirer liability is described as *direct liability* and derives from *Section 413 of the*

Restatement of Torts, Second. In other cases, the hirer does take the precautions but the contractor fails to exercise reasonable care in following the precautions; this hirer liability is called *vicarious liability* and derives from *Section 416 of the Restatement of Torts, Second*.^{n29.3} The *Toland* court found these distinctions to be "misleading" and held that "*Privette*... bars employees of a hired contractor who are injured by the contractor's negligence from seeking recovery against the hiring person, *irrespective* of whether recovery is sought under the theory of peculiar risk set forth in section 416 or section 413...".^{n29.4}

In *Camargo v. Tjaarda Dairy*,^{n29.5} the California Supreme Court held that the rationale of *Privette* and *Toland*, which involved tort liability under the peculiar risk doctrine, bars an employee of an independent contractor from bringing a negligent hiring action against the hirer of the contractor. In examining *Privette*, *Toland*, and the peculiar risk doctrine, the Court found that sound policy considerations supported the rationale that the hirer should not have to pay for injuries caused by the contractor's negligent performance because the workers' compensation system already covers the same injuries.^{n29.6}

In *Hooker v. Department of Transportation*,^{n29.7} the Court held that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at the worksite; but the hirer is liable to a contractor's employee insofar as the hirer's exercise of retained control affirmatively contributed to the employee's injuries.^{n29.8} Further, in *McKown v. Wal-Mart Stores, Inc.*,^{n29.9} the Court held that a hirer is liable to an employee of an independent contractor insofar as the hirer's provision of unsafe equipment affirmatively contributes to the employee's injury. The Court had previously left these questions open in *Camargo*.^{n29.10}

In *Ruiz v. Herman Weissker, Inc.*, the court held that the California Supreme Court's analyses in *Privette* and *Hooker* barred similar claims against the agent of the hirer of the subcontractor. Thus, a contract administrator for a utility's distribution line construction projects, which, pursuant to its contract with the utility, was responsible for reviewing plans to ensure proper planning and feasibility and for monitoring the construction work for safety and contract compliance, could not be held liable for the electrocution death of an employee of a subcontractor hired by the utility to replace old insulators on two of their transmission lines. Unlike the hirer in *Privette*, the contract administrator did not have a contractual relationship with the subcontractor and did not pay for the costs of providing the deceased employee's workers' compensation coverage. The contract administrator also did not directly benefit from the work the subcontractor was hired to do. Shifting the risk of injury to the contract administrator would not accomplish assurance of adequate compensation to the victim or provide a mechanism by which the ultimate responsibility for the injury would be borne by the person whose fault caused that injury or, failing that, by the person who benefitted from the work. In carrying out the subcontractor's contract with the utility, the deceased employee was engaged in work posing a special risk of harm, and his injuries arose out of work for which the subcontractor bore primary responsibility.^{n29.11} With regard to premises liability, assuming that the utility had a nondelegable duty to maintain the safety of its electric utility systems for the benefit of the employees of independent contractors hired to work on those systems, there is no authority to establish that the utility's attempt to delegate such a duty to an agent creates liability on the part of the agent.^{n29.12} With regard to liability for control over the work, the subcontractor was responsible for the work and for ensuring that the work was properly and safely performed and that it contractually assumed responsibility for the safety of its employees. Although the utility retained the ability to control safety conditions at the jobsite and hired the contract administrator to monitor those conditions, the contract administrator's failure to exercise control in the face of unsafe work practices by the subcontractor's crew was not actionable. Nor was its failure to institute particular safety measures at the jobsite actionable absent some evidence that either the contract administrator or the utility had agreed to implement such measures.^{n29.13} Finally, the fact that the utility had a duty under the California Code of Regulations and industry standards to have a rescue plan in the event of injury to someone who was working on an electric utility tower did not mean that the contract administrator also owed the deceased employee those duties.^{n29.14}

In *Bell v. Greg Agee Construction, Inc.*,^{n29.15} an employee of a subcontractor on a construction site sued the general contractor after a wall fell on him. The subcontractor's personnel had failed to properly brace the wall. At the time, the subcontractor was not carrying workers' compensation insurance, and the injured worker sued the general contractor. A

court of appeal concluded that *Privette* applied, and the fact that the injured worker's employer did not have workers' compensation insurance coverage did not affect the liability or lack thereof of the general contractor. The fundamental social policy of providing compensation to an injured employee was achieved by the worker's eligibility to seek compensation from the state's Uninsured Employers Fund, so that there was no justification to impose vicarious liability on the general contractor.

In *Grahn v. Tosco Corp.*,^{n29.16} a court of appeal concluded that the Supreme Court's decision in *Privette* does not abrogate California law to the effect that a hirer of an independent contractor may be held liable to the independent contractor's employee (who sustains work-related injuries that are also compensable by workers' compensation) for the hirer's own independent fault; *Privette* only abrogates a hirer's liability under theories grounded in principles of vicarious liability.^{n29.17} The plaintiff asserted three negligence theories against the work-site owner that hired the independent contractor: (1) the defendant was negligent in hiring the independent contractor to remove asbestos-containing materials without any indication that the contractor was licensed or qualified to engage in that work; (2) the defendant retained control over the details of the work performed by the independent contractor, which created a separate legal duty based on the negligent failure to exercise control or supervision; and (3) the defendant was negligent in the use and maintenance of its premises, which exposed others to an unreasonable risk of harm.^{n29.18} Upholding the first theory, the court held that negligent hiring is a theory of personal rather than vicarious liability, and it noted that California courts have consistently held that the duty of a hirer to employ a competent independent contractor runs to the employees of the negligently hired independent contractor, allowing them to file suit against the hirer for injuries sustained on the job.^{n29.19}

However, in *Camargo v. Tjaarda Dairy*, ^{n29.20} the California Supreme Court expressly disapproved this holding and held that an employee of an independent contractor may not sue the hirer of the contractor for negligent hiring. Next, the court found that substantial evidence existed to support a finding that the hirer defendant retained sufficient control over the safety aspects of the insulation tear-out to impose liability; however, the control instruction was erroneous because it allowed liability based on nothing more than a showing that the defendant retained ultimate control of its own property.^{n29.21} Finally, the court found that when the operative details of the work are not under the hirer's control, and the dangerous condition causing the injury is either created by the contractor or is the object of the contractor's work, the duty to protect the contractor's employees resides with the contractor, not the hirer; and this is true even though the hirer also generally controls the premises. In *Grahn*, the instruction on this point was erroneous because it improperly imputed liability to the hirer for danger created by the contractor.^{n29.22}

In *Tilley v. CZ Master Ass'n.*, ^{n29.23} a homeowners' association was not liable to a security guard provided to the homeowners' association by his employer for injuries he suffered as a result of an assault. The homeowners' association neither required nor expected its unarmed security personnel to confront potentially violent persons, or otherwise to place themselves in danger, and did nothing to alter the basic scope of its security guards' "observe and report" responsibilities. It thus could not be held liable for the consequences of the security guard's decision to take action beyond the scope of his duties. Moreover, the association owed its security guards no duty to restrict or curtail youth parties within its premises; but even assuming it had such a duty, its failure to take affirmative steps to restrict or control juvenile parties within its property, could not be construed as having affirmatively contributed to the security guard's injuries for purposes of the peculiar risk doctrine.^{n29.24} Even assuming the association were somehow responsible for requiring security guards to confront and attempt to detain violent wrongdoers, that task would be considered a normal part of the job for which the security guard's employer and the security guard was hired. As such, employees of the security guard's employer would have expressly assumed the risk of such a danger, and the association consequently had no duty to protect them from it.^{n29.24}

On the other hand, in *Barclay v. Jesse M. Lange Distributor, Inc.*, ^{n29.25} the court held that an injured employee of a subcontractor showed that the property owner could be liable for breach of its regulatory duty to provide fire extinguishers pursuant to the California Fire Code and reversed the judgment entered in favor of the property owner under *Privette*. The employee was injured when fuel storage tanks on the property exploded. The property owner had

contracted to have the tanks cleaned and removed. The injured employee was employed by a subcontractor hired to assist with the cleaning of the tanks before they were transported. The employee contended the property owner was liable for affirmatively contributing to the injury by its direct negligence in breach of nondelegable duties imposed by the 1998 California Fire Code, applicable to petroleum bulk plant facilities, that suitable portable fire extinguishers be located within specified distances of those portions of the facility where fires are likely to occur.^{n29.26} The court held that neither *Privette* nor its progeny addressed the theory of liability asserted by the injured employee, which was breach of regulatory duties. The court then held that an owner may be liable if its breach of regulatory duties affirmatively contributed to injury of a contractor's employee, regardless of whether it voluntarily retained control or actively participated in the project. For purposes of imposing liability for affirmatively contributing to a plaintiff's injuries, the affirmative contribution need not be active conduct, but may be in the form of an omission to act.^{n29.27}

Closely related to the "peculiar risk doctrine" is the doctrine of "nondelegable duties." Under this doctrine, when the law imposes a definite affirmative duty on one by reason of his or her relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons cannot escape liability for failure to perform the imposed duty by delegating it to an independent contractor.ⁿ³⁰

Although courts have allowed employees of an independent contractor to sue the hirer of the contractor under the nondelegable duties theory,ⁿ³¹ the continuing availability of the nondelegable duties exception to employees of an independent contractor seems questionable in light of *Privette*. The reasons given by the Court in *Privette* for holding the peculiar risk doctrine inapplicable to actions by the independent contractor's employees against the hirer of the contractor could be argued to be equally applicable to actions alleging breach of a nondelegable duty.

However, the court of appeal in *Felmlee v. Falcon Cable TV* ⁿ³² stated in dictum that the doctrine of nondelegable duties survives *Privette*. In *Felmlee*, a worker who was injured while repairing a cable television line sued the general contractor who hired his employer, an independent contractor, for breach of a nondelegable duty. The worker alleged that the general contractor had a duty to maintain safe working conditions. He further asserted that the doctrine of nondelegable duties was not abrogated by the California Supreme Court's decision in *Privette*. The court of appeal stated that *Privette* precludes actions only under the peculiar risk doctrine, but did not discuss, nor purport to abolish, actions under the doctrine of nondelegable duties. The court held, however, that the doctrine of nondelegable duties did not apply in this case because a general contractor has no duty to warn an employee of an independent contractor of obvious dangerous conditions.ⁿ³³

In *Kinsman v. Unocal Corp.*, ^{n33.1} discussing the *Privette* line of cases, premises liability, and nondelegable duties within the context of premises liability, the California Supreme Court held that a landowner that hires an independent contractor may be liable to the contractor's employee even if the landowner does not retain control over the work if all of the following conditions are present:^{n33.2}

- The landowner knew, or should have known, of a latent or concealed preexisting hazardous condition on its property;
- The contractor did not know and could not have reasonably discovered this hazardous condition; and
- The landowner failed to warn the contractor about this condition.

In *Kinsman*, the landowner employed an independent contractor to build and dismantle scaffolding used by other trades. The plaintiff was a carpenter employed by the independent contractor, and he was exposed to asbestos in the course of that work, which was a substantial factor contributing to the carpenter's development of mesothelioma. The landowner conceded that it was aware of the hazards of asbestos dust by the time the carpenter was working on the scaffolding on its premises, but claimed that the carpenter was not exposed to asbestos dust in a sufficient concentration to cause him harm. The independent contractor did not provide safety equipment to the carpenter, and there was no specific evidence

regarding whether it, or any other contractor working for the landowner, knew or should have known at the time the carpenter worked at the refinery that asbestos posed a safety hazard. After reviewing *Privette* and the cases following it, the California Supreme Court first opined that a useful way to view those cases was in terms of delegation. In *Privette* and its progeny, the courts concluded that, principally because of the availability of workers' compensation, the policy reasons for limiting delegation do not apply to the hirer's duty to provide the employees of an independent contractor with a safe working environment. Further, the policy in favor of delegation of responsibility and assignment of liability is so strong in this context that the Court has not allowed it to be circumvented on a negligent hiring theory. Nonetheless, when the hirer does not fully delegate the task of providing a safe working environment, but in some manner actively participates in how the job is done, and that participation affirmatively contributes to the employee's injury, the hirer may be liable in tort to the employee.^{n33.3} The Court then applied those principles to *Kinsman*, and found first that when there is a known safety hazard on a landowner's premises that can be addressed through reasonable safety precautions on the part of the independent contractor, a corollary of *Privette* and its progeny is that the hirer generally delegates the responsibility to take such precautions to the contractor, and is not liable to the contractor's employee if the contractor fails to do so.^{n33.4} However, if the hazard is concealed from the contractor, but known to the landowner, the landowner cannot effectively delegate to the contractor responsibility for the safety of its employees if it fails to disclose critical information needed to fulfill that responsibility, and therefore the landowner would be liable to the contractor's employee if the employee's injury is attributable to an undisclosed hazard.^{n33.5} The Court also held that while a landowner's duty generally includes a duty to inspect for concealed hazards, the responsibility for job safety delegated to independent contractors may and generally does include explicitly or implicitly a limited duty to inspect the premises as well. Thus, the principles enunciated in *Privette* suggest that the landowner would not be liable when the contractor has failed to engage in inspections of the premises implicitly or explicitly delegated to it.^{n33.6} The Court found no reason to distinguish conceptually between premises liability based on a hazardous substance that is concealed because it is invisible to the contractor and known only to the landowner and a hazardous substance that is visible but is known to be hazardous only to the landowner.^{n33.7} The Court also distinguished the holding in *Toland* regarding fraudulent concealment, because unlike *Kinsman*, *Toland* did not involve premises liability for latent hazards, and the court had no occasion to decide the precise conditions under which that liability would attach. In the premises liability situation, landowner liability is measured by a negligence standard, and a landowner would be liable not only when it deliberately withholds information but also when it negligently fails to discover or disclose latent hazards. Therefore, the element of fraudulent intent required in fraudulent concealment cases is not necessary for premises liability in these circumstances.^{n33.8} The Court then reiterated the rule that a landowner that does not retain control is not liable for an injury inflicted by an independent contractor or its employees on the employee of another independent contractor.^{n33.9} Finally, the Court held that the general premises liability instruction given to the jury was error. When the "dangerous or defective condition" can be remedied by taking reasonable safety precautions, the landowner who has delegated job safety to the independent contractor only has a duty to the employee if the condition is concealed. The general premises liability instruction did not make clear that the hazard must have been unknown and not reasonably ascertainable to the independent contractor that employed the carpenter and to other contractors working contemporaneously on the premises. Further, the failure to properly instruct the jury was prejudicial. Although the jury, in finding the landowner negligent under a premises liability theory, implicitly found that the landowner knew or should have known of the hazard of asbestos dust on its property, it made no finding about whether the independent contractor that employed the carpenter, or any other contractor working at the same time, knew or should have known of the hazard, and whether the landowner was or should have been aware that these contractors did not know of the hazard. A finding that these contractors knew that the dust was asbestos and hazardous to an employee, would, under the principles articulated in the *Privette* line of cases, including the opinion in *Kinsman*, completely relieve the landowner of liability for any resultant employee injury.^{n33.10}

For additional discussion of the peculiar risk doctrine and nondelegable duties, *see* Chapter 30.

[3] Effect of Employer's Fault on Employee's Recovery From Third-Party Tortfeasor

[a] Joint and Several Liability and Effect of Proposition 51

When the doctrine of comparative indemnity was adopted in the landmark case of *American Motorcycle Association v. Superior Court*,ⁿ³⁴ the doctrine of joint and several liability was not abolished.ⁿ³⁵ A third-party tortfeasor was therefore held liable for all of the injured employee's damages,ⁿ³⁶ notwithstanding the fact that *Labor Code Section 3864* precluded the third party from seeking indemnification from the concurrently negligent employer.ⁿ³⁷ However, the Fair Responsibility Act of 1986, Proposition 51, made significant changes in the doctrine of joint and several liability. The stated purpose of the initiative was to rectify the perceived injustices of the "deep pocket rule," under which a defendant whose fault was minimal was required to shoulder the entire liability when other more culpable tortfeasors were judgment-proof.ⁿ³⁸ Under present law, in actions for personal injury, property damage, or wrongful death based on principles of comparative fault, the liability of each defendant for *noneconomic damages* is several, only, and not joint.ⁿ³⁹ Each defendant is liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and judgments for noneconomic damages must be made separately.ⁿ⁴⁰ The California Supreme Court has held that even though an employer who is determined to be partially at fault for an employee's injury could not be a tort or indemnity defendant because of the workers' compensation system, Proposition 51 does not provide an exception for damages attributable to the fault of persons who are immune from civil liability.ⁿ⁴¹ As a result, a third-party defendant's liability for a plaintiff-employee's non-economic damages cannot exceed the third party's proportionate share of fault as compared with *all fault* responsible for the plaintiff's injuries (including that of the plaintiff's employer), not merely that of the defendants present in the lawsuit.ⁿ⁴²

The passage of Proposition 51 did not change the existing law regarding an intentional tortfeasor's potential liability for the entirety of the plaintiff's damages. Further, an employer may be vicariously liable for all of a plaintiff's noneconomic damages, even if the employer itself is only negligent, if one of its employees is an intentional tortfeasor.^{n42.1}

The rule of joint and several liability also has not been changed regarding compensable economic damages.ⁿ⁴³ Thus, the negligent third party will be liable to the injured employee for the full amount of plaintiff's economic damages, plus a portion of the plaintiff's noneconomic damages corresponding to the third-party defendant's proportionate share of the fault when compared with that of the employer and other tortfeasors who may have been responsible for the injury.ⁿ⁴⁴

"Economic damages" under the Fair Responsibility Act of 1986 means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.ⁿ⁴⁵ "Noneconomic damages" under the Fair Responsibility Act of 1986 means subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional stress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation.ⁿ⁴⁶

[b] Offset of Workers' Compensation Benefits Against Employee's Recovery

To prevent double recovery with respect to economic damages, any workers' compensation benefits paid by the negligent employer to the employee are deducted from the employee's recovery against the third party up to the amount of the employer's proportionate share of the damages.ⁿ⁴⁷ The amount of the deduction is limited to workers' compensation benefits paid as of the time of trial; no deduction is permitted for future benefits.ⁿ⁴⁸

The California Supreme Court has stated that a third-party tortfeasor is still entitled under Proposition 51 to a credit for workers' compensation benefits paid by the negligent employer, but the Court has not addressed the question of the proper calculation of the net judgment to be entered against the third party.ⁿ⁴⁹ However, several court of appeal cases have subsequently analyzed the proper allocation of workers' compensation benefits, *i.e.*, whether credit for workers' compensation benefits should be applied exclusively to reduce the balance of economic damages or should instead be allocated between economic and non-economic damages, after the effective date of Proposition 51.

In *Torres v. Xomox Corporation*,ⁿ⁵⁰ the court of appeal concluded that, under Proposition 51, workers' compensation credit should be apportioned according to the method used in *Espinoza v. Machonga* ⁿ⁵¹ for allocating the proceeds of a pre-arbitration settlement with one defendant between economic and non-economic damages eventually awarded against the other defendants.ⁿ⁵² Under this approach, workers' compensation benefits are to be allocated between economic and non-economic damages in the same proportions fixed for those damages by the trier of fact. The court of appeal held that the trial court correctly used the jury's finding on percentage of economic damages in calculating credit for workers' compensation benefits.ⁿ⁵³

The Court of Appeal in *Scalice v. Performance Cleaning Systems* ⁿ⁵⁴ also addressed the issue of the appropriate method of crediting workers' compensation benefits under Proposition 51. It concluded that the court of appeal in *Torres* properly allocated workers' compensation benefits using the *Espinoza* approach. In *Scalice*, the jury returned a verdict finding the employee to be 0 percent negligent, the employer 30 percent negligent, and the third-party defendant 70 percent negligent. In calculating the judgment and allocating credit for workers' compensation benefits, the trial court deducted the entire amount of workers' compensation benefits paid to the employee from that portion of the award allocated to economic damages. The court of appeal, however, determined that the trial court erred in its allocation of the workers' compensation benefits and held that workers' compensation benefits are not merely "economic damages" under Proposition 51, but rather should be viewed as the proceeds of a settlement imposed by the Legislature for claims arising out of and in the course of employment.ⁿ⁵⁵ The court of appeal said that, given the nature of workers' compensation benefits, the correct rule for allocating the credit for these benefits is the same rule used for apportioning settlement proceeds set forth in *Espinoza*, under which the economic portion of the settlement proceeds bears the same ratio to the total settlement as the trier of fact determines the economic damages bear to the total judgment.ⁿ⁵⁶

■ ILLUSTRATION:

Employee sustains an on-the-job injury as a result of the concurrent negligence of Employer and Third Party. Employee brings an action for damages against Third Party. Employer's workers' compensation carrier has paid \$162,008.53 in benefits to Employee before trial. After trial, the jury finds that Employee has sustained a total of \$677,000 in damages, with \$274,000 (40.473 percent of total damages) allocated to economic damages and \$403,000 to non-economic damages. The jury apportions fault as follows: (1) 30 percent to Employer, and (2) 70 percent to Third Party. The court would subtract from Employee's economic damages 40.473 percent of the total workers' compensation damages paid (\$65,569.71), leaving Employee with a judgment of \$208,430.29 in economic damages. The court would enter a separate judgment against Third Party for \$282,100.00, representing Third Party's proportionate share of Employer's non-economic damages.ⁿ⁵⁷

■ CONSULTANT'S COMMENT:

Often, an employee files both a workers' compensation claim and a court action against the same employer for redress of alleged unlawful conduct. Prior to the passage of the amendment of *Internal Revenue Code, section 104(c)* in 1996, it was common for employers to resolve all such outstanding claims by allocating a portion of the settlement proceeds to the workers' compensation action and a portion (typically characterized as emotional distress damages in whole or in significant part) to a separate settlement agreement. Since the passage of the amendment to Section 104(c), there is an emerging trend toward the use of workers' compensation compromise and release forms to settle all workers' compensation and non-workers' compensation claims brought by the same employee.

There are two reasons to be cautious about accepting this trend. First, a settlement payment that is disproportionately larger than the reasonable value of the workers' compensation claim may be rejected as a subterfuge to evade Section 104(c) if the settlement comes to the attention of the IRS. Second, the rules discussed in the text regarding offsets of workers' compensation recoveries against employee judgments in subsequent tort litigation suggests that workers' compensation settlements may not be

treated as non-economic damages in all instances. Thus, on occasion, when an employer is one of two or more defendants in a tort action and the employer compromises its differences with the employee by paying all settlement proceeds under a workers' compensation compromise and release, there is a chance that the jury in the ongoing court action may award both economic and non-economic damages against the remaining defendants. In that instance, a portion of any payments previously paid to the employee under the Workers' Compensation Actⁿ⁵⁸ is deemed an offset to the economic damage award. Whether the IRS would treat a similar portion of the compromise and release payment by the settling employer as economic damages is an open question that is too significant to dismiss out of hand. *Commentary by Kirby Wilcox*

The rule prohibiting an employee from receiving a double recovery does not bar the assignment of the employer's workers' compensation lien to the employee who, in asserting the lien in the action against the third party, does so in the capacity of an assignee of the employer or compensation insurer and not as a "plaintiff."ⁿ⁵⁹

[c] No Deduction for Benefits Paid Unless Employer Found to Be Negligent

An employee's recovery against the third party may not be reduced for workers' compensation benefits paid when there has been no finding of negligence on the part of plaintiff's employer.ⁿ⁶⁰ When the employer has not been negligent, the workers' compensation benefits do not constitute an impermissible double recovery, but rather a payment from a source wholly independent of the wrongdoer.ⁿ⁶¹ Furthermore, unless the third party has introduced evidence of negligence on the part of the employer, a dismissal by the employer of its claim for reimbursement of workers' compensation benefits in the third-party action only bars the employer from seeking reimbursement from the third party; such a dismissal does not act as an adjudication of employer negligence so as to authorize reduction of the employee's recovery by the amount of the workers' compensation benefits paid.ⁿ⁶²

[d] Joinder of Employer in Proceeding to Determine Offset

A third-party tortfeasor held liable for an employee's work-related injury is entitled to seek an offset based on the amount of workers' compensation benefits paid to the employee even if the employer has not joined as a party in the employee's action, filed a complaint in intervention, or sought to interpose a lien.ⁿ⁶³ The employer must be given notice of the offset claim, so that it may have an opportunity to litigate the issue of its alleged negligence.ⁿ⁶⁴

The courts of appeal are divided, however, over whether the employer may be *compelled* to participate as a party in a proceeding to determine the amount of the workers' compensation offset. In *City of Sacramento v. Superior Court*ⁿ⁶⁵ and *Del Monte Corp. v. Superior Court*,ⁿ⁶⁶ the Courts of Appeal for the Third and First Districts, respectively, held that a third-party tortfeasor may bring an employer who has provided workers' compensation benefits into an action by cross-complaint for declaratory relief for the purpose of facilitating proof of the employer's negligence and the proper amount of any offset against the plaintiff's damages. In a later case, *C.J.L. Construction, Inc. v. Universal Plumbing*,ⁿ⁶⁷ the Court of Appeal for the Second District reached the opposite conclusion, holding that unless the employer or its workers' compensation carrier intervenes in the employee's action to assert its right to reimbursement of benefits paid, the employer could not be required by means of declaratory relief to participate in the action. The court reasoned that one of the purposes of the workers' compensation law (i.e., to insulate employers from tort liability) would be contravened by permitting a third party to require the employer to incur the expense of participating in a civil action without its consent.ⁿ⁶⁸ The Court of Appeal for the Fourth District has also concluded that an employer cannot be compelled to be joined in the third-party action in order to facilitate determination of the amount of the workers' compensation offset.ⁿ⁶⁹

[4] Indemnification of Third Party by Employer

Under *Labor Code Section 3864*, if an action by an injured employee results in a judgment against a third-party

tortfeasor or a settlement by the tortfeasor, the employer is not liable for reimbursing the tortfeasor or holding the tortfeasor harmless, in the absence of a written agreement to do so executed prior to the injury.ⁿ⁷⁰ The main purpose of this statute is to eliminate an employer's liability under an equitable or implied indemnity theory when the employee is injured within the scope of employment because of the negligence or partial negligence of a third party.ⁿ⁷¹ Thus, under normal circumstances, when the tortious acts of both a third party and an employer combine to injure an employee, in the absence of an agreement otherwise, the third party is not permitted to bring an action for comparative indemnity against the employer. However, when the employer has stepped outside its protected role of employer, such as when the employer fraudulently conceals from an employee the existence of a work-related injury and the injury is thereby aggravated,ⁿ⁷² the employer is not protected by *Labor Code Section 3864* from an indemnity action by a third party.ⁿ⁷³

The Legislature enacted *Labor Code Section 3864* because the doctrine of implied indemnity imposed a greater burden on the employer than was contemplated under the workers' compensation system.ⁿ⁷⁴ Without this section, the employer's protection of a limit on the economic consequences of claims made under that system could be easily circumvented.ⁿ⁷⁵ A third-party's cross-complaint against an employer for indemnity is subject to demurrer unless it alleges the existence of a written indemnity agreement.ⁿ⁷⁶ Furthermore, a written agreement will not be effective to create an obligation on the part of the employer to indemnify the third-party tortfeasor unless it is signed by all parties before the injury occurs.ⁿ⁷⁷

When an employee has more than one employer, an employer held liable in tort to the employee may be considered a "third party" under *Labor Code Section 3864* with respect to the others. For example, the temporary employer of a worker injured because of an unguarded power press may not seek indemnity from the employment agency that placed the worker in the job. If the worker successfully meets the requisites for *Labor Code Section 4558* (exception to the exclusivity rule of workers' compensation for power press guard injuries),ⁿ⁷⁸ the employer will be considered a third party liable in tort to the employee, but will be barred by *Labor Code Section 3864* from seeking indemnity from the employment agency. If the employee cannot meet the requisites for *Labor Code Section 4558*, the civil action will be barred, and there will be nothing to support the indemnity action against the agency.ⁿ⁷⁹

Legal Topics:

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

Workers' Compensation & SSDI Administrative Proceedings General Overview
Workers' Compensation & SSDI Administrative Proceedings Claims General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 3852; see, e.g., Nichols v. Keller (1993) 15 Cal. App. 4th 1672, 19 Cal. Rptr. 2d 601* (injured worker entitled to pursue malpractice claim against his attorneys for failure to advise of possibility of filing third-party action and of applicable statute of limitations).

(n2)Footnote 2. *See Lab. Code § 3601*, discussed in § 20.43[1].

(n3)Footnote 3. *See Dill v. Claims Admin. Services, Inc. (1986) 178 Cal. App. 3d 1184, 1187-1188, 224 Cal. Rptr. 273* (employee's action against self-insured employer's independent claims administrator for its bad faith and intentional failure to pay workers' compensation benefits could proceed as claim against third party under *Lab. Code § 5852*).

(n4)Footnote 4. *Huber v. Henry J. Kaiser Co. (1945) 71 Cal. App. 2d 278, 284, 162 P.2d 693*.

(n5)Footnote 5. *Sanstad v. Industrial Accident Commission (1959) 171 Cal. App. 2d 32, 35, 339 P.2d 943*.

(n6)Footnote 6. *Finnegan v. Royal Realty Co. (1950) 35 Cal. 2d 409, 434-435, 218 P.2d 17*; *see also Galvis v.*

Petito (1993) 13 Cal. App. 4th 551, 556-564, 16 Cal. Rptr. 2d 560 (owner of motor vehicle is statutorily liable for injuries to employee caused by negligent operation of vehicle by coemployee, even though coemployee is immune from liability by virtue of *Lab. Code* § 3601).

(n7)Footnote 6.1. For discussion of employer's subrogation rights against third party, *see* § 20.50.

(n8)Footnote 6.2. *Draper v. Aceto* (2001) 26 Cal. 4th 1086, 1089, 113 Cal. Rptr. 2d 61, 33 P.3d 479 .

(n9)Footnote 7. *See Lab. Code* § 3602(a), (b)(3), discussed in § 20.12[1][d].

(n10)Footnote 8. *Miller v. King* (1993) 19 Cal. App. 4th 1732, 24 Cal. Rptr. 2d 284 .

(n11)Footnote 9. For discussion of dual capacity doctrine, *see* § 20.12[1][d].

(n12)Footnote 10. *Miller v. King* (1993) 19 Cal. App. 4th 1732, 1735, 24 Cal. Rptr. 2d 284 .

(n13)Footnote 11. *Doney v. TRW, Inc.* (1995) 33 Cal. App. 4th 245, 39 Cal. Rptr. 2d 292

(n14)Footnote 12. *Doney v. TRW, Inc.* (1995) 33 Cal. App. 4th 245, 248, 39 Cal. Rptr. 2d 292 .

(n15)Footnote 13. *See Privette v. Superior Court* (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721 ; *see also* discussion in [2], *below*.

(n16)Footnote 14. *Doney v. TRW, Inc.* (1995) 33 Cal. App. 4th 245, 251-252, 39 Cal. Rptr. 2d 292 .

(n17)Footnote 15. *Orosco v. Sun-Diamond Corp.* (1997) 51 Cal. App. 4th 1659, 1669-1670, 60 Cal. Rptr. 2d 179 .

(n18)Footnote 16. *Orosco v. Sun-Diamond Corp.* (1997) 51 Cal. App. 4th 1659, 1670, 60 Cal. Rptr. 2d 179 .

(n19)Footnote 16.1. *Waste Management, Inc. v. Superior Court* (2004) 119 Cal. App. 4th 105, 109-114, 13 Cal. Rptr. 3d 910 .

(n20)Footnote 17. *See State Compensation Ins. F. v. Industrial Accident Comm'n* (1941) 46 Cal. App. 2d 526, 529-530, 116 P.2d 173 *but see* *Diamond Drill Contracting Co. v. Industrial Accident Comm'n* (1926) 199 Cal. 694, 697-698, 250 P. 862 (special employment relationship may arise between employees of independent contractor and other party to contract when employees come under control of other party).

(n21)Footnote 18. *See Lab. Code* § 3852.

(n22)Footnote 19. *Privette v. Superior Court* (1993) 5 Cal. 4th 689, 693, 21 Cal. Rptr. 2d 72, 854 P.2d 721 ; *Torres v. Reardon* (1992) 3 Cal. App. 4th 831, 838, 5 Cal. Rptr. 2d 52 ; *see also* *Whitford v. Swinerton & Walberg Co.* (1995) 34 Cal. App. 4th 1054, 1060, 40 Cal. Rptr. 2d 688 ; *Owens v. Giannetta-Heinrich Construction Co.* (1994) 23 Cal. App. 4th 1662, 1667-1671, 29 Cal. Rptr. 2d 11 .

(n23)Footnote 20. *Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal. 3d 502, 509, 156 Cal. Rptr. 41, 595 P.2d 619 ; *Torres v. Reardon* (1992) 3 Cal. App. 4th 831, 839, 5 Cal. Rptr. 2d 52 .

(n24)Footnote 21. *See, e.g., Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal. 3d 502, 509, 156 Cal. Rptr. 41, 595 P.2d 619 ; *Woolen v. Aerojet General Corp.* (1962) 57 Cal. 2d 407, 410-411, 20 Cal. Rptr. 12, 369 P.2d 708 .

(n25)Footnote 22. *Privette v. Superior Court* (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721 .

(n26)Footnote 23. *Privette v. Superior Court* (1993) 5 Cal. 4th 689, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721 ; *see*

Whitford v. Swinerton & Walberg Co. (1995) 34 Cal. App. 4th 1054, 1060, 40 Cal. Rptr. 2d 688 ; *Owens v. Giannetta-Heinrich Construction Co.* (1994) 23 Cal. App. 4th 1662, 1667-1671, 29 Cal. Rptr. 2d 11 ; see also *Redfeather v. Chevron USA, Inc.* (1997) 57 Cal. App. 4th 702, 705-707, 67 Cal. Rptr. 2d 159 (corporation that hired independent contractor to close oil well is not liable to employee for personal injuries under *Privette*, notwithstanding that independent contractor agreed to indemnify corporation against that liability).

(n27)Footnote 24. *Privette v. Superior Court* (1993) 5 Cal. 4th 689, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721 .

(n28)Footnote 25. See *Lab. Code* § 3864; see also [4], below.

(n29)Footnote 26. *Privette v. Superior Court* (1993) 5 Cal. 4th 689, 701, 21 Cal. Rptr. 2d 72, 854 P.2d 721 .

(n30)Footnote 27. *Privette v. Superior Court* (1993) 5 Cal. 4th 689, 701, 21 Cal. Rptr. 2d 72, 854 P.2d 721 ; *Andreini v. Superior Court* (1998) 60 Cal. App. 4th 1415, 1424-1429, 71 Cal. Rptr. 2d 153 (after exhaustively reviewing *Privette* factors, court concluded that *Privette* exception to peculiar risk doctrine does not apply when contractor does not have workers' compensation insurance or is not otherwise self-insured).

(n31)Footnote 28. *Smith v. ACandS, Inc.* (1994) 31 Cal. App. 4th 77, 95, 37 Cal. Rptr. 2d 457 , disapproved to the extent it is inconsistent with *Camargo v. Tjaarda Dairy*, 25 Cal. 4th 1235, 1245 . (independent contractor employee's separate claim for negligent hiring survives legal narrowing of peculiar risk doctrine if properly supported by the evidence).

(n32)Footnote 29. *Whitford v. Swinerton & Walberg Co.* (1995) 34 Cal. App. 4th 1054, 1060, 40 Cal. Rptr. 2d 688 ; *Redfeather v. Chevron USA, Inc.* (1997) 57 Cal. App. 4th 702, 707-708, 67 Cal. Rptr. 2d 159 (under *Privette*, corporation that hired independent contractor to close oil well is not liable to contractor's employee for personal injuries, notwithstanding independent contractor's agreement to indemnify corporation against that liability).

(n33)Footnote 29.1. *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal. 4th 253, 74 Cal. Rptr. 2d 878, 955 P.2d 504 .

(n34)Footnote 29.2. *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal. 4th 253, 265-268, 74 Cal. Rptr. 2d 878, 955 P.2d 504 .

(n35)Footnote 29.3. *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal. 4th 253, 262-264, 74 Cal. Rptr. 2d 878, 955 P.2d 504 .

(n36)Footnote 29.4. *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal. 4th 253, 267, 74 Cal. Rptr. 2d 878, 955 P.2d 504 .

(n37)Footnote 29.5. *Camargo v. Tjaarda Dairy* (2001) 25 Cal. 4th 1235, 108 Cal. Rptr. 2d 617, 25 P.3d 1096 ; see *Restatement Second of Torts* § 411.

(n38)Footnote 29.6. *Camargo v. Tjaarda Dairy* (2001) 25 Cal. 4th 1235, 1241-1245, 108 Cal. Rptr. 2d 617, 25 P.3d 1096 .

(n39)Footnote 29.7. *Hooker v. California Dept. of Transportation* (2002) 27 Cal. 4th 198, 202, 115 Cal. Rptr. 2d 853, 38 P.3d 1081 .

(n40)Footnote 29.8. See also *Padilla v. Pomona College* (2008) 166 Cal. App. 4th 661, 668-671, 82 Cal. Rptr. 3d 869 (college and general contractor were not liable for injuries to employee of subcontractor, where, although ultimately only defendants had ability to physically turn off pipe once accident occurred, this control did not rise to level of control necessary to impose liability, and defendants delegated control of safety measures to plaintiff's employer); *Madden v. Summit View, Inc.* (2008) 165 Cal. App. 4th 1267, 1275-1281, 81 Cal. Rptr. 3d 601 (in action by electrician, who was

employee of subcontractor, against general contractor based on injuries suffered in fall, trial court properly granted general contractor summary judgment, where general contractor had no control over methods and supplied none of materials that electrician's employer used for its electrical work at site; where electrician produced virtually no evidence that general contractor retained control over general safety conditions site; where there was no evidence general contractor contributed to absence of guardrail along open side of patio, which allegedly caused electrician's injuries, because there was no evidence general contractor or its agents directed that no guardrailing or other protection against falls be placed along raised patio or that it acted in any way to prevent such railing from being installed, and absence of guardrail was open and obvious to all contractors who worked at site; and where there was no evidence general contractor or its agents directed electrician to perform his work in manner that was especially dangerous due to absence of railing); *Millard v. Biosources, Inc.* (2007) 156 Cal. App. 4th 1338, 1346-1352, 68 Cal. Rptr. 3d 177 (summary judgment in favor of general contractor in action based on injuries suffered by employee of heating and air conditioning subcontractor was proper, where employee did not submit evidence sufficient to raise triable issue of fact that general contractor affirmatively contributed to his injuries, general contractor did not control means and methods of employee's work, and none of general contractor's personnel were at worksite when employee fell; where employee could not introduce amendment to safety statute to support presumption of negligence under doctrine of negligence per se, because general contractor did not owe employee duty of care and employee did not allege in his complaint that doctrine of negligence per se applied); *Lopez v. C.G.M. Development, Inc.* (2002) 101 Cal. App. 4th 430, 437-446, 124 Cal. Rptr. 2d 227 (property owner was entitled to summary judgment in action by contractor's employee for injuries sustained on work site because, although employee can sue contractor in tort based on contractor's failure to have workers' compensation insurance, equity and public policy would not be served by penalizing property owner for contractor's wrongdoing in failing to procure insurance; and even if architectural plans were defective, employee did not offer any evidence owner knew or should have known about defect or prepared the plans with respect to framing of roof on which employee worked and was injured); *Ray v. Silverado Constructors* (2002) 98 Cal. App. 4th 1120, 1125-1129, 120 Cal. Rptr. 2d 251 (representative of deceased employee of independent contractor who sued owner and general contractor for negligence in failing to close road during high winds blowing weighty construction materials off bridge onto the roadway below, hitting plaintiff's decedent in head and killing him, framed cause of action based on direct liability, not vicarious liability, and it was error to grant summary judgment on basis that *Privette/Toland* rationale precluded action as matter of law).

(n41)Footnote 29.9. *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal. 4th 219, 115 Cal. Rptr. 2d 868, 38 P.3d 1094 .

(n42)Footnote 29.10. *McKown v. Wal-Mart Stores, Inc.* (2002) 27 Cal. 4th 219, 222 n.2, 115 Cal. Rptr. 2d 868, 38 P.3d 1094 .

(n43)Footnote 29.11. *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal. App. 4th 52, 59-63, 29 Cal. Rptr. 3d 641 .

(n44)Footnote 29.12. *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal. App. 4th 52, 63-65, 29 Cal. Rptr. 3d 641 (Lab. Code § 6400 did not establish that contract administrator had nondelegable duty to protect employee from his employer's negligence, Pub. Util. Code §§ 702 and 2106 and PUC General Order 95, rule 31.1 addressed only obligations and liability of utility, and Civ. Code § 2343 only made agent liable for affirmative misfeasance, and did not render agent liable to third parties for failure to perform duties owed to principal).

(n45)Footnote 29.13. *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal. App. 4th 52, 65-67, 29 Cal. Rptr. 3d 641 .

(n46)Footnote 29.14. *Ruiz v. Herman Weissker, Inc.* (2005) 130 Cal. App. 4th 52, 67, 29 Cal. Rptr. 3d 641 .

(n47)Footnote 29.15. *Bell v. Greg Agee Construction, Inc.* (2004) 125 Cal. App. 4th 453, 466-468, 23 Cal. Rptr. 3d 33 .

(n48)Footnote 29.16. *Grahn v. Tosco Corp.* (1997) 58 Cal. App. 4th 1373, 68 Cal. Rptr. 2d 806 , disapproved to

the extent it is inconsistent with *Camargo v. Tjaarda Dairy* (2001) 25 Cal. 4th 1235, 1245 and *Hooker v. Dept. of Transportation* (2002) 27 Cal. 4th 198, 214, 115 Cal. Rptr. 2d 853, 38 P.3d 1081 .

(n49)Footnote 29.17. *Grahn v. Tosco Corp.* (1997) 58 Cal. App. 4th 1373, 1379-1380, 1384-1385, 68 Cal. Rptr. 2d 806 , disapproved to the extent it is inconsistent with *Camargo v. Tjaarda Dairy* (2001) 25 Cal. 4th 1235, 1245 and *Hooker v. Dept. of Transportation* (2002) 27 Cal. 4th 198, 214, 115 Cal. Rptr. 2d 853, 38 P.3d 1081 (appellate court reversed because of significant instructional errors, particularly with regard to defining standards applicable to determining when hirer who is also in control of premises where work occurs can be found liable).

(n50)Footnote 29.18. *Grahn v. Tosco Corp.* (1997) 58 Cal. App. 4th 1373, 1380-1381, 68 Cal. Rptr. 2d 806 , disapproved to the extent it is inconsistent with *Camargo v. Tjaarda Dairy* (2001) 25 Cal. 4th 1235, 1245 and *Hooker v. Dept. of Transportation* (2002) 27 Cal. 4th 198, 214, 115 Cal. Rptr. 2d 853, 38 P.3d 1081 .

(n51)Footnote 29.19. *Grahn v. Tosco Corp.* (1997) 58 Cal. App. 4th 1373, 1390-1392, 68 Cal. Rptr. 2d 806 , disapproved to the extent it is inconsistent with *Camargo v. Tjaarda Dairy* (2001) 25 Cal. 4th 1235, 1245 . and *Hooker v. Dept. of Transportation* (2002) 27 Cal. 4th 198, 214, 115 Cal. Rptr. 2d 853, 38 P.3d 1081 ; see, e.g., *Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal. App. 4th 544, 549, 5 Cal. Rptr. 2d 674 ; *Gettemy v. Star House Movers* (1964) 225 Cal. App. 2d 636, 643-644, 37 Cal. Rptr. 441 , disapproved to the extent it is inconsistent with *Camargo v. Tjaarda Dairy* (2001) 25 Cal. 4th 1235, 1245 .

(n52)Footnote 29.20. *Camargo v. Tjaarda Dairy* (2001) 25 Cal. 4th 1235, 1243-1245, 108 Cal. Rptr. 2d 617, 25 P.3d 1096 .

(n53)Footnote 29.21. *Grahn v. Tosco Corp.* (1997) 58 Cal. App. 4th 1373, 1393-1394, 68 Cal. Rptr. 2d 806 , disapproved to the extent it is inconsistent with *Camargo v. Tjaarda Dairy* (2001) 25 Cal. 4th 1235, 1245 and *Hooker v. Dept. of Transportation* (2002) 27 Cal. 4th 198, 214, 115 Cal. Rptr. 2d 853, 38 P.3d 1081 . See *Holman v. State of Cal.* (1975) 53 Cal. App. 3d 317, 336, 124 Cal. Rptr. 773 , disapproved to the extent it is inconsistent with *Camargo v. Tjaarda Dairy* (2001) 25 Cal. 4th 1235, 1245 .

(n54)Footnote 29.22. *Grahn v. Tosco Corp.* (1997) 58 Cal. App. 4th 1373, 1397-1401, 68 Cal. Rptr. 2d 806 , disapproved to the extent it is inconsistent with *Camargo v. Tjaarda Dairy*, *Camargo v. Tjaarda Dairy*, 25 Cal. 4th 1235, 1245 and *Hooker v. Dept. of Transportation* (2002) 27 Cal. 4th 198, 214, 115 Cal. Rptr. 2d 853, 38 P.3d 1081 ; see *Lopez v. University Partners* (1997) 54 Cal. App. 4th 1117, 1129 n.7, 63 Cal. Rptr. 2d 359 (no cause of action for premises liability when dangerous condition that injured plaintiff, independent contractor's employee, did not exist until independent contractor itself created it by negligently performing excavation contract); see also *Dauer v. Aerojet General Corp.* (1964) 224 Cal. App. 2d 175, 177-182, 36 Cal. Rptr. 356 .

(n55)Footnote 29.23. *Tilley v. CZ Master Assn.* (2005) 131 Cal. App. 4th 464 .

(n56)Footnote 29.24. *Tilley v. CZ Master Assn.* (2005) 131 Cal. App. 4th 464, 479-489 .

(n57)Footnote 29.24. *Tilley v. CZ Master Assn.* (2005) 131 Cal. App. 4th 464, 489-490 .

(n58)Footnote 29.25. *Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal. App. 4th 281, 28 Cal. Rptr. 3d 242 .

(n59)Footnote 29.26. See 24 Cal. Code Regs. § 7904.4.9.2.

(n60)Footnote 29.27. *Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal. App. 4th 281, 290-301, 28 Cal. Rptr. 3d 242 , citing *Park v. Burlington Northern Santa Fe Railway Co.* (2003) 108 Cal. App. 4th 595, 133 Cal. Rptr.

2d 757 .

(n61)Footnote 30. *Van Arsdale v. Hollinger* (1968) 68 Cal. 2d 245, 251, 253, 255, 66 Cal. Rptr. 20, 437 P.2d 508 .

(n62)Footnote 31. *See, e.g., Van Arsdale v. Hollinger* (1968) 68 Cal. 2d 245, 254, 256, 66 Cal. Rptr. 20, 437 P.2d 508 .

(n63)Footnote 32. *Felmlee v. Falcon Cable TV* (1995) 36 Cal. App. 4th 1032, 1038-1040, 43 Cal. Rptr. 2d 158 .

(n64)Footnote 33. *Felmlee v. Falcon Cable TV* (1995) 36 Cal. App. 4th 1032, 1040, 43 Cal. Rptr. 2d 158 .

(n65)Footnote 33.1. *Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659 .

(n66)Footnote 33.2. *Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659 .

(n67)Footnote 33.3. *Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659 .

(n68)Footnote 33.4. *Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659 .

(n69)Footnote 33.5. *Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659 .

(n70)Footnote 33.6. *Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659 .

(n71)Footnote 33.7. *Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659 .

(n72)Footnote 33.8. *Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659 .

(n73)Footnote 33.9. *Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659 .

(n74)Footnote 33.10. *Kinsman v. Unocal Corp.* (2005) 37 Cal. 4th 659 .

(n75)Footnote 34. *American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 .

(n76)Footnote 35. *See American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal. 3d 578, 583, 590, 146 Cal. Rptr. 182, 578 P.2d 899 ; *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 842, 150 Cal. Rptr. 888, 587 P.2d 684 ; *Arbaugh v. Procter & Gamble Mfg. Co.* (1978) 80 Cal. App. 3d 500, 507-508, 145 Cal. Rptr. 608 .

(n77)Footnote 36. *See Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 842, 150 Cal. Rptr. 888, 587 P.2d 684 ; *Arbaugh v. Procter & Gamble Mfg. Co.* (1978) 80 Cal. App. 3d 500, 507-508, 145 Cal. Rptr. 608 .

(n78)Footnote 37. *Arbaugh v. Procter & Gamble Mfg. Co.* (1978) 80 Cal. App. 3d 500, 507-508, 145 Cal. Rptr. 608 . For discussion of third-party indemnity, *see* [4], *below*.

(n79)Footnote 38. *See Civ. Code* § 1431.1.

(n80)Footnote 39. *Civ. Code* § 1431.2(a).

(n81)Footnote 40. *Civ. Code* § 1431.2(a).

(n82)Footnote 41. *DaFonte v. Up-Right, Inc.* (1992) 2 Cal. 4th 593, 601, 7 Cal. Rptr. 2d 238, 828 P.2d 140 .

(n83)Footnote 42. *DaFonte v. Up-Right, Inc.* (1992) 2 Cal. 4th 593, 604, 7 Cal. Rptr. 2d 238, 828 P.2d 140 .

(n84)Footnote 42.1. *Thomas v. Duggins Construction Co.* (2006) 139 Cal. App. 4th 1105, 1110-1113, 44 Cal. Rptr. 3d 66 (trial court properly refused to apportion plaintiffs' noneconomic damages between defendant, which was company that sold scissor lift to their employer, and employer after lift collapsed and injured them, despite finding that defendant and employer were each 40 percent responsible for injuries, while two of defendant's employees were 10 percent responsible each; although defendant's liability in negligence would have otherwise entitled it to apportionment of plaintiffs' noneconomic damages, its vicarious liability for intentional tort by one of its employees was not subject to reduction, even though jury concluded that employee's intentional misconduct constituted only a 10 percent contributing factor to plaintiffs' injuries).

(n85)Footnote 43. See *DaFonte v. Up-Right, Inc.* (1992) 2 Cal. 4th 593, 600, 7 Cal. Rptr. 2d 238, 828 P.2d 140 ; *Engle v. Endlich* (1992) 9 Cal. App. 4th 1152, 1160, 12 Cal. Rptr. 2d 145 ; Civ. Code §§ 1431, 1431.2(a).

(n86)Footnote 44. See *Engle v. Endlich* (1992) 9 Cal. App. 4th 1152, 1159-1160, 12 Cal. Rptr. 2d 145 (third-party tortfeasor is liable for all of employee's economic damages including portion that represents extent to which Lab. Code § 3864 insulates negligent employer from comparative responsibility it would otherwise incur, but that with enactment of Proposition 51, third party may no longer be held jointly liable for all of employee's noneconomic damages). See also *Poire v. C.J. Peck/Jones Brothers Construction Corp.* (1995) 39 Cal. App. 4th 1832, 1841, 46 Cal. Rptr. 2d 631 (non-settling defendant entitled to setoff from plaintiff's award of economic damages in amount of settlements paid prior to trial by other defendants, despite jury's finding that settling defendants had no fault for plaintiff's injuries).

(n87)Footnote 45. Civ. Code § 1431.2(b)(1).

(n88)Footnote 46. Civ. Code § 1431.2(b)(2).

(n89)Footnote 47. See *Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal. 3d 502, 509, 156 Cal. Rptr. 41, 595 P.2d 619 ; *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 842, 150 Cal. Rptr. 888, 587 P.2d 684 ; see also *Jarvis v. Southern Pac. Transportation Co.* (1983) 142 Cal. App. 3d 246, 258, 191 Cal. Rptr. 29 ; *Kemerer v. Challenge Milk Co.* (1980) 105 Cal. App. 3d 334, 340, 164 Cal. Rptr. 397 .

(n90)Footnote 48. *Curtis v. State of California ex rel. Dept. of Transportation* (1982) 128 Cal. App. 3d 668, 681-682, 683, 180 Cal. Rptr. 843 .

(n91)Footnote 49. *DaFonte v. Up-Right, Inc.* (1992) 2 Cal. 4th 593, 604-605 & n.7, 7 Cal. Rptr. 2d 238, 828 P.2d 140 (remanding issue to court of appeal).

(n92)Footnote 50. *Torres v. Xomox Corp.* (1996) 49 Cal. App. 4th 1, 56 Cal. Rptr. 2d 455 .

(n93)Footnote 51. See *Espinoza v. Machonga* (1992) 9 Cal. App. 4th 268, 11 Cal. Rptr. 2d 498 .

(n94)Footnote 52. See *Torres v. Xomox Corp.* (1996) 49 Cal. App. 4th 1, 37, 56 Cal. Rptr. 2d 455 .

(n95)Footnote 53. See *Torres v. Xomox Corp.* (1996) 49 Cal. App. 4th 1, 37, 56 Cal. Rptr. 2d 455 .

(n96)Footnote 54. *Scalice v. Performance Cleaning Sys.* (1996) 50 Cal. App. 4th 221, 57 Cal. Rptr. 2d 711 .

(n97)Footnote 55. See *Scalice v. Performance Cleaning Sys.* (1996) 50 Cal. App. 4th 221, 232, 239, 57 Cal. Rptr. 2d 711 .

(n98)Footnote 56. See *Scalice v. Performance Cleaning Sys.* (1996) 50 Cal. App. 4th 221, 239, 57 Cal. Rptr. 2d 711 .

(n99)Footnote 57. See *Scalice v. Performance Cleaning Sys.* (1996) 50 Cal. App. 4th 221, 238, 57 Cal. Rptr. 2d 711 ; see also *Poire v. C.L. Peck/Jones Bros. Constr. Corp* (1995) 39 Cal. App. 4th 1832, 1841, 46 Cal. Rptr. 2d 631 (non-settling defendant entitled to setoff from plaintiff's award of economic damages in amount of settlements paid prior to trial by other defendants, despite jury's finding that settling defendants had no fault for plaintiff's injuries).

(n100)Footnote 58. *Lab. Code § 3201 et seq.*

(n101)Footnote 59. *Engle v. Endlich* (1992) 9 Cal. App. 4th 1152, 1164-1165, 12 Cal. Rptr. 2d 145 .

(n102)Footnote 60. See *De Cruz v. Reid* (1968) 69 Cal. 2d 217, 222-227, 70 Cal. Rptr. 550, 444 P.2d 342 ; *Curtis v. State of California ex rel. Dept. of Transportation* (1982) 128 Cal. App. 3d 668, 681-682, 683, 180 Cal. Rptr. 843 .

(n103)Footnote 61. See *De Cruz v. Reid* (1968) 69 Cal. 2d 217, 226-227, 70 Cal. Rptr. 550, 444 P.2d 342 ; *Curtis v. State of California ex rel. Dept. of Transportation* (1982) 128 Cal. App. 3d 668, 683, 180 Cal. Rptr. 843 . For discussion of the effect of payments from collateral sources on plaintiff's recovery in a tort action, see Levy, Golden, and Sacks, California Torts, Ch. 53 (Matthew Bender).

(n104)Footnote 62. See *Curtis v. State of California ex rel. Dept. of Transportation* (1982) 128 Cal. App. 3d 668, 681-682, 683, 180 Cal. Rptr. 843 .

(n105)Footnote 63. *Engle v. Endlich* (1992) 9 Cal. App. 4th 1152, 1161-1162, 12 Cal. Rptr. 2d 145 ; see *DaFonte v. Up-Right, Inc.* (1992) 2 Cal. 4th 593, 604 n.6, 7 Cal. Rptr. 2d 238, 828 P.2d 140 .

(n106)Footnote 64. See *Aetna Casualty & Surety Co. v. Superior Court* (1993) 20 Cal. App. 4th 1502, 1508-1509, 25 Cal. Rptr. 2d 301 (finding that plaintiff's counsel had satisfied notice requirement by letter to workers' compensation carrier prior to judicial approval of settlement); *Brandon v. Santa Rita Technology, Inc.* (1972) 25 Cal. App. 3d 838, 846, 102 Cal. Rptr. 225 .

(n107)Footnote 65. *City of Sacramento v. Superior Court* (1962) 205 Cal. App. 2d 398, 405, 23 Cal. Rptr. 43 .

(n108)Footnote 66. *Del Monte Corp. v. Superior Court* (1982) 127 Cal. App. 3d 1049, 1053-1055, 179 Cal. Rptr. 855 .

(n109)Footnote 67. *C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal. App. 4th 376, 22 Cal. Rptr. 2d 360 .

(n110)Footnote 68. *C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal. App. 4th 376, 387, 391, 22 Cal. Rptr. 2d 360 .

(n111)Footnote 69. *Difko Admin. (US) Inc. v. Superior Court* (1994) 24 Cal. App. 4th 126, 134-135, 29 Cal. Rptr. 2d 291 .

(n112)Footnote 70. See *Lab. Code § 3864.*

(n113)Footnote 71. See *Pacific Gas & Elec. Co. v. Morse* (1970) 6 Cal. App. 3d 707, 711, 86 Cal. Rptr. 7 (coemployee protected from indemnity actions in same manner as employer).

(n114)Footnote 72. See *Lab. Code § 3602(b)(2)*, discussed in § 20.12[1][b].

(n115)Footnote 73. *Chase Chemical Co. v. Hartford Accident & Indemnity Co.* (1984) 159 Cal. App. 3d 229, 238, 205 Cal. Rptr. 469 .

(n116)Footnote 74. *Up-Right, Inc. v. Van Erickson* (1992) 5 Cal. App. 4th 579, 582, 7 Cal. Rptr. 2d 34 .

(n117)Footnote 75. *Up-Right, Inc. v. Van Erickson* (1992) 5 Cal. App. 4th 579, 582, 7 Cal. Rptr. 2d 34 .

(n118)Footnote 76. *See Up-Right, Inc. v. Van Erickson* (1992) 5 Cal. App. 4th 579, 582-584, 7 Cal. Rptr. 2d 34 (also holding that even assuming the allegations of the third-party's cross-complaint were sufficient to show that the employer had engaged in criminal conduct by violating the child labor laws, such criminal conduct did not render workers' compensation inapplicable, and consequently, there was no basis for excusing the third-party from the requirement of a written indemnity agreement under *Lab. Code* § 3864).

(n119)Footnote 77. *Hansen Mechanical, Inc. v. Superior Court of Los Angeles County* (1995) 40 Cal. App. 4th 722, 731-732, 47 Cal. Rptr. 2d 47 ; *Nielsen Construction Co. v. International Iron Products* (1993) 18 Cal. App. 4th 863, 869, 22 Cal. Rptr. 2d 497 (signature by employer alone not sufficient). *See also Robert E. Blake, Inc. v. Excel Environmental* (9th Cir. 1997) 104 F.3d 1158, 1162 (general contractor's indemnity claim against subcontractor for injuries to subcontractor's employee barred when indemnification clause never signed by subcontractor, thus rendering it ineffective).

(n120)Footnote 78. *See* discussion in § 20.12[1][e].

(n121)Footnote 79. *Watters Associates v. Superior Court* (1991) 227 Cal. App. 3d 1341, 1344, 278 Cal. Rptr. 417 .



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part B. ACTIONS BY AND AGAINST EMPLOYERS AND THIRD PARTIES

Subpart 1. Actions by Employee

1-20 California Employment Law §§ 20.45 through 20.49

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

[Reserved]

§§ 20.45[Reserved]



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

CHAPTER 20 Liability for Work-Related Injuries

Part B. ACTIONS BY AND AGAINST EMPLOYERS AND THIRD PARTIES

Subpart 2. Actions by Employer and by Third Parties

1-20 California Employment Law § 20.50

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.50 Employer's Right of Subrogation

[1] When Employer Has Not Been Negligent

If an employer has not been negligent, the employer is entitled to complete reimbursement of the amount of compensation benefits paid from a third-party tortfeasor who was at fault in causing the employee's injuries, to the extent of the third party's proportional responsibility for those injuries.ⁿ¹ The injured employee's own negligence may not be imputed to an otherwise nonnegligent employer for the purpose of reducing the amount of the employer's reimbursement.ⁿ² The rationale for not imputing the employee's negligence to the employer is that to do so would result in the third party's liability for the employee's injuries being reduced twice as a result of the employee's negligence--once to reduce the employee's recovery against the third party and again to reduce the employer's reimbursement--contrary to the principles of comparative fault.ⁿ³

The subrogation statutes also allow employers subrogation rights whenever, and to whatever extent, an employee suffers a subsequent tortious injury that increases the employer's liability for compensation, whether or not the subsequent injury is industrial or nonindustrial.ⁿ⁴

[2] When Employer Has Been Negligent

[a] Case Law Before Adoption of Comparative Fault

As the courts have noted,ⁿ⁵ the statutory provisions of the Workers' Compensation Act do not, on their face, impose any substantive limitation on the employer's right to either reimbursement of benefits paid or a credit against future benefits when the employer's negligence was a contributing cause of the employee's injury.ⁿ⁶ Nevertheless, case law has imposed such limitations.ⁿ⁷ Thus, prior to its adoption of comparative negligence, the California Supreme Court had held in *Witt v. Jackson* ⁿ⁸ that a concurrently negligent employer could not recover reimbursement for compensation payments made to an injured employee, either by asserting a lien against a judgment recovered by the employee or by bringing an action directly against the third-party tortfeasor. However, the Court also held that the

amount of workers' compensation benefits received by the employee had to be deducted from the damages recovered by the employee against the third party, to prevent a double recovery.ⁿ⁹ In a subsequent case, *Roe v. Workmen's Compensation Appeals Board*,ⁿ¹⁰ the Court followed the rationale of the *Witt* case and held that (1) a concurrently negligent employer was not entitled to claim the amount of the employee's settlement or judgment against the third-party tortfeasor as a credit against its liability for future workers' compensation benefits,ⁿ¹¹ and (2) the employee was entitled to have the issue of the employer's negligence adjudicated before the Workers' Compensation Appeals Board, if the issue had not already been adjudicated in the third-party action.ⁿ¹² As the Court noted in a later case, the effect of the *Witt* and *Roe* decisions was to establish the principle that to the extent allowed by the employer's limited statutory liability, the employer and the third party should share liability as would ordinary concurrent tortfeasors.ⁿ¹³

[b] Effect of Comparative Negligence

In *Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board*,ⁿ¹⁴ the Supreme Court noted that the development and application of comparative negligence principles had undermined the conceptual basis of the rules set out in the *Witt* and *Roe* cases, discussed in [a], *above*, by altering the liability of ordinary joint tortfeasors.ⁿ¹⁵ Observing that the Court's decision in *American Motorcycle Association v. Superior Court*ⁿ¹⁶ had modified California's common-law equitable indemnity doctrine to permit comparative indemnity between multiple tortfeasors, the Court further stated:

As *Witt* and *Roe* interpreted the reimbursement and credit provisions of the Labor Code in light of the advent of contribution, so we must now interpret them to reflect the advent of comparative responsibility among joint tortfeasors. Applying the principle that the employer and third party should, to the extent consistent with the employer's statutory immunity from tort liability, share the burden of the employee's recovery as joint tortfeasors, we conclude that the concurrently negligent employer should receive either credit or reimbursement for the amount by which his compensation liability exceeds his proportional share of the injured employee's recovery.ⁿ¹⁷

[c] Reimbursement of Workers' Compensation Benefits Previously Paid

As noted in [b], *above*, the "all or nothing" approach taken in *Witt v. Jackson*,ⁿ¹⁸ which held that a concurrently negligent employer was entirely precluded from recovering reimbursement of workers' compensation benefits, has been abrogated by the adoption of comparative fault principles.ⁿ¹⁹ The courts now hold that the negligent employer is entitled to reimbursement for workers' compensation benefits paid, but only to the extent that such benefits exceed the proportionate share of the employee's total recovery that is attributable to the employer's negligence.ⁿ²⁰

No reported appellate decision has discussed the extent to which the enactment of Proposition 51, discussed in § 20.44[3][a], affects the current rule. It is therefore not clear whether the amount of workers' compensation benefits paid must exceed the employer's proportionate share of the *entire amount* of plaintiff's damages before reimbursement is permitted, or whether the benefits paid need only exceed the employer's proportionate share of the plaintiff's *economic damages*.

Assuming that the benefits paid must exceed the plaintiff's *total damages*, both economic and non-economic, as was the case prior to the enactment of Proposition 51, the following hypothetical illustrates the application of the rule regarding reimbursement of benefits:

■ ILLUSTRATION:

Employer and Third Party are each found by the jury to be 50 percent negligent in causing Employee \$340,000 in damages. Prior to trial, Employer had paid Employee \$44,836.17 in workers' compensation benefits. Since this is less than 50 percent of Employee's total damages (\$170,000), Employer is not entitled to reimbursement for any of the benefits paid.ⁿ²¹

The negligent employer's right to reimbursement for workers' compensation benefits paid is limited to the amount by which those benefits exceed its proportional share of the employee's actual tort damages, notwithstanding the fact that the employee has independently settled the third-party action for an amount less than his or her actual damages.ⁿ²²

■ **ILLUSTRATION:**

Employee settles his suit against Third Party for \$30,000. Employer's suit in intervention against Third Party for reimbursement of \$22,538 in workers' compensation benefits paid to Employee proceeds to trial. At trial, the jury determines that Employee's total economic damages would have been \$150,000 had the case proceeded to trial and apportions fault as follows: (1) 5 percent to Employee, (2) 15 percent to Third Party, and (3) 80 percent to Employer. Because the amount of benefits paid was less than Employer's proportionate share of damages (80 percent of \$150,000 equals \$120,000), Employer is not entitled to reimbursement.ⁿ²³

For further discussion of the effect of an employee's settlement with a third-party tortfeasor on the employer's right to reimbursement of workers' compensation benefits paid, *see* Levy, Golden & Sacks, California Torts, Chapter 10 (Matthew Bender). For discussion of the employer's right to reimbursement generally, *see* [4][a], *below*.

[3] Reserved

[4] Employer's Right to Reimbursement or Credit Against Liability for Future Workers' Compensation Benefits

[a] Generally

The employer may recover worker's compensation benefits it has become obligated to pay or has paid by (1) bringing an action directly against the tortfeasor,^{n23.1} (2) joining as a party plaintiff or intervening in an action brought by the employee,^{n23.2} or (3) allowing the employee to prosecute the action and then applying a first lien against the resulting judgment or settlement.^{n23.3} Prior to the employer's reimbursement, the court is required to determine the parties' entitlement to reasonable attorney's fees and other litigation expenses.^{n23.4} When a third party settlement includes the employer's reimbursable benefits, the employer's right of reimbursement takes first and full priority after the payment of litigation expenses and attorney's fees, when appropriate.^{n23.5} The employer's reimbursement right, however, may be subject to certain exceptions. For example, when a settlement is in satisfaction of both the employee's claims and independent claims, such as claims for loss of consortium brought separately by the plaintiff's spouse, the court must first ascertain the damages to which each plaintiff is entitled and then apportion the settlement.^{n23.6} In addition, in allocating the proceeds of an employee's settlement with a third party tortfeasor under *Lab. Code* § 3860(e), when both the employer's attorney and the employee's attorney have been active in reaching the settlement, fees awarded to the employer's attorney and the employer's pro rata share of other litigation costs are deducted from the amount paid to the employer out of the settlement proceeds as reimbursement for its worker's compensation expenses.^{n23.7}

The Workers' Compensation Appeals Board is also empowered and required to allow, as a credit to the employer to be applied against its liability for compensation, the amount of any recovery by the employee for his or her injury, either by settlement or after judgment, that has not previously been applied to the payment of expenses or attorneys' fees, pursuant to the provisions of *Labor Code Sections* 3856, 3858, and 3860, or to reimburse the employer.ⁿ²⁴ The amount of the credit will be calculated by deducting from the employee's gross settlement in the third-party action the legal fees and costs and the actual amount received by the employer in satisfaction of its lien claim.ⁿ²⁵ However a credit will not be allowed for the amount of damages attributable to the employer's negligence,ⁿ²⁶ and the employer's right to a credit in the compensation proceedings is subject to the comparative negligence doctrine, as discussed in [b], *below*.

[b] Effect of Employer's Negligence

In *Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board*,ⁿ²⁷ discussed in [2][b], above, the California Supreme Court held that when the issue of an employer's concurrent negligence arises in the context of the employer's claim for credit against future compensation benefits based on the employee's settlement with the third party, the Workers' Compensation Appeals Board must determine the appropriate contribution of the employer, since the employee's settlement recovery does not represent a judicial determination of tort damages.ⁿ²⁸ Specifically, the Board must determine (1) the degree of fault of the employer, and (2) the total damages to which the employee is entitled.ⁿ²⁹ (Of course, the Board would not make these determinations if the issues of the employer's negligence and the employee's damages have previously been adjudicated in the employee's tort action against the third party or the employer's action for reimbursement, since the Board would be bound by the court's determinations under the doctrine of collateral estoppel.)ⁿ³⁰ The employer would then be denied credit until the ratio of its contribution to the employee's damages corresponds to its proportional share of fault.ⁿ³¹ The rule that a negligent employer will be permitted a credit only after it has paid benefits equal to its proportional share of the employee's total damages applies regardless of whether the third party's liability is based on negligence or strict liability in tort.ⁿ³²

No reported appellate decision has discussed the extent to which the enactment of Proposition 51, discussed in § 20.44[3][a], affects the above rules. It is therefore not clear whether the amount of workers' compensation benefits paid must equal the employer's proportionate share of the *entire amount* of employee's damages before the employer may claim a credit against future compensation liability, or whether the benefits paid need only equal the employer's proportionate share of the employee's *economic damages*.

Assuming that the benefits paid must exceed the plaintiff's *total damages*, both economic and non-economic, as was the case prior to the enactment of Proposition 51, the following hypothetical illustrates the application of the rule regarding the employer's credit against liability for future benefits:

■ **ILLUSTRATION:**

Employee receives \$20,000 in workers' compensation benefits. Employee then sues Third Party, settles the suit without Employer's consent, and actually receives out of the settlement \$25,000. Employee then seeks further workers' compensation benefits. Employer claims a credit in the amount of the \$25,000 settlement. If the Workers' Compensation Appeals Board determines that Employer is free of negligence, then Employer is entitled to the full \$25,000 credit against future payments. If Employer is found to be 50 percent negligent and the total damages incurred by Employee are \$100,000, then Employer would have to contribute an additional \$30,000 (to make up the difference between the \$20,000 it already paid and \$50,000, which is Employer's proportionate share based on its degree of fault) before it could claim any credit against liability for future benefits.ⁿ³³

In *Associated Construction*,ⁿ³⁴ the Supreme Court did not decide how the *employee's* negligence, if established, would affect the proportional contribution of the employer.ⁿ³⁵ In *Rodgers v. Workers' Compensation Appeals Bd.*,ⁿ³⁶ however, the Court stated that the employee's negligence should not be imputed to the employer in this context, and upheld the WCAB's decision that the employer did not have to pay benefits equal to the proportion of tort damages attributable to the employee's fault before obtaining its statutory credit. The employer had only to pay compensation benefits equal to its own proportional share of the employee's tort damages.ⁿ³⁷

[5] Limitation on Employer's Right to Reimbursement or Credit When Third-Party Tortfeasor Is Medical Practitioner

Civil Code Section 3333.1 abrogates the collateral source rule in medical malpractice actions.ⁿ³⁸ It provides that (1) in an action against a health care provider for personal injuries based on professional negligence, the defendant, if he or she so elects, may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to, among other things, any workers' compensation act;ⁿ³⁹ and (2) no source of collateral benefits introduced pursuant to *Civil Code Section 3333.1(a)* shall recover any amount against the plaintiff nor shall it be

subrogated to the rights of the plaintiff against a defendant health care provider.ⁿ⁴⁰ The employer's right to reimbursement under *Labor Code Section 3852* for compensation benefits paid from amounts recovered by the worker in an action against a third-party medical practitioner is therefore barred by *Civil Code Section 3333.1*.ⁿ⁴¹ Moreover, *Civil Code Section 3333.1* overrides the employer's right under *Labor Code Sections 3858* and *3861* to a credit of any such recovery against its liability for future workers' compensation benefits when the employee settles, rather than tries, his or her medical malpractice action, and the settlement excludes workers' compensation benefits.ⁿ⁴²

[6] Methods of Obtaining Reimbursement Independent Action, Intervention, or Lien

If a third party is partly or wholly responsible for the injury that is the basis of the employee's workers' compensation claim, the statutes provide three methods by which the employer may seek reimbursement for benefits provided to the injured employee:

1. The employer may bring an action directly against the third party to recover the amount of any benefits that the employee has paid or become obligated to pay.ⁿ⁴³
2. The employer may, at any time before trial on the facts, join as party plaintiff in an action brought by the employee against the third party.ⁿ⁴⁴
3. The employer may, after the employee has recovered a judgment against the third party, apply for a first lien on the amount of the judgment, less expenses and attorney's fees incurred by the employee in prosecuting the action.ⁿ⁴⁵

The employer may not, however, recover from the third-party tortfeasor increased workers' compensation insurance premiums and resulting lost profits.ⁿ⁴⁶

In addition, if the employee has obtained a recovery, by settlement or judgment, against the third party for his or her injury, the employer may receive a credit toward its future liability for compensation equal to the amount of the employee's recovery that has not previously been applied to the payment of litigation expenses or attorney's fees (pursuant to specified sections of the workers' compensation law) nor previously applied to reimbursement of the employer.ⁿ⁴⁷

Final decision of the action to be taken by the employer depends on such factors as the amount of the special damages for medical and other items of expense and liability, the attitude of the respective parties, their willingness to protect the claim for reimbursement of compensation benefits, the probability of securing judgment, and the likelihood of its ultimate satisfaction. Other pertinent considerations include (1) the question of attorney's fees payable to the employee's attorney if the employer proceeds by way of lien,ⁿ⁴⁸ (2) the possibility of the employee's suit being compromised after prolonged negotiation in which the interest of employee and employer will conflict, and (3) the advisability of the subrogee being represented by its own counsel.

When the employer intervenes in the employee's third-party action, the employer's status is akin to that of a subrogee, and thus the employer's right to recover the amount of workers' compensation benefits paid to the employee derives from and does not extend beyond the employee's tort remedy against the third party.ⁿ⁴⁹ Although the employer and employee are entitled to verdicts and judgments setting forth their respective rights, the damages must be segregated between them to prevent a double recovery against the third party.ⁿ⁵⁰ The employer may recover the amount of compensation benefits paid, but the amount of its judgment may not exceed the total amount of tort damages suffered by the employee.ⁿ⁵¹ The employee is entitled to have the jury determine his or her total tort damages, but may only recover a net judgment for the difference, if any, between the total tort damages and the workers' compensation benefits received.ⁿ⁵²

If either the employee or the employer brings an action against a third person, the employee or employer immediately must give to the other a copy of the complaint by personal service or certified mail. Proof of service must be filed in the action.^{n52.1}

No release or settlement of a third-party claim as to either the employee or the employer is valid without the written consent of both. However, an employee may settle and release any claim the employee has against a third party without the consent of the employer. The settlement or release is subject to the employer's right to proceed to recover compensation paid in accordance with *Labor Code* § 3852.^{n52.2} No release or settlement, with or without suit, is valid or binding as to any party to it without notice to both the employer and the employee, with opportunity for the employer to recover the amount of workers' compensation the employer has paid or become obligated to pay and any special damages to which the employer may be entitled under *Labor Code* § 3852, and opportunity for the employee to recover all damages the employee has suffered.^{n52.3} An alleged tortfeasor who, prior to settlement with the employer, is or reasonably should be aware of the possibility of the employee's claim for damages, settles with the employer does so at the peril of being sued by the employee, if the employer failed to carry out its statutory notice and consent duties to the employee.^{n52.4}

[7] FORM--Independent Action or Complaint in Intervention by Employer's Insurer in Employee's Suit Against Third Party

[a] Comment

[i] Use of Form

The form set forth in [b], *below*, is a complaint brought by an employer's workers' compensation carrier against a third party who has injured an employee who was covered by workers' compensation insurance. The form may be used in either an independent action or as a complaint in intervention.ⁿ⁵³ If an independent action is filed, it must be consolidated for trial with the employee's action.ⁿ⁵⁴

[ii] Filing and Statute of Limitations

If an independent action is brought, the action must be filed within the two-year limitation period set forth in *Code of Civil Procedure Section 335.1*, and the period begins to run on the date of the employee's injury.ⁿ⁵⁵ A complaint in intervention may be brought at any time before trial on the facts.ⁿ⁵⁶ If the employee's action is filed within the two-year time limit,ⁿ⁵⁷ the filing inures to the benefit of the employer and the insurance carrier with regard to the filing of an action in intervention, and the complaint in intervention will also be considered timely filed.ⁿ⁵⁸ In addition to filing the complaint, the employer must give a copy of the complaint to the employee by personal service or certified mail and file proof of such service.ⁿ⁵⁹

Under *Labor Code Section 3853*, an employer has an unconditional right to intervene in the employee's third-party action at any time before a trial on the facts, and, as a result, when the employer makes a pretrial motion to be joined as a party, the employer has, as a matter of law, satisfied the "upon timely application" requirement of *Code of Civil Procedure Section 387*, which governs intervention in general.ⁿ⁶⁰ Thus, for example, one appellate court held that the trial court erred in refusing an employer's pretrial request to intervene in an employee's action, even though the employee and the third party had settled, because there still remained for trial the insurance carrier's complaint to recover the amount of compensation benefits it had paid to the employee.ⁿ⁶¹

[iii] Allegations

Whether the employer or insurance carrier are bringing an independent action or a complaint in intervention, they must set forth the elements of a prima facie case.ⁿ⁶² The complaint therefore contains the following allegations that give the parties the right to subrogation:ⁿ⁶³ (1) that the insurance carrier was authorized to carry workers' compensation

insurance for the employer, if applicable (Optional Paragraph 1); (2) that the injured employee worked for employer (Paragraph 2); (3) that the employee incurred injuries in the course of his or her employment that were proximately caused by the negligence of the third-party defendant(s) (Paragraphs 5-8); and (4) that because of those injuries caused by third-party defendant(s), employer or insurance carrier has had to pay workers' compensation benefits and other payments to employee in the past (Paragraph 9) and will continue to have to do so in the future (Paragraph 10), for which the insurer or employer should be subrogated.

[b] Form Independent Action or Complaint in Intervention by Employer's Insurer in Employee's Suit Against Third Party

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[or other as appropriate]

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	_____ [COMPLAINT FOR DAM-
_____ [name], Defendant[,]	)	AGES or COMPLAINT IN INTERVENTION]
[_____ (name),	)	(Reimbursement of Workers' Compensation Bene-
Intervenor].	)	fits)
	)	[Lab. Code §§ 3852, 3853(; Code Civ. Proc. § 387)]
	)	

_____ [Plaintiff or Intervenor] alleges:

1. At all times mentioned in this complaint, _____ [plaintiff or intervenor] was, and now is, _____ [specify form of business organization, e.g., a corporation organized and existing under and by virtue of the laws of the State of California], authorized to write workers' compensation insurance. At all times relevant to this complaint, _____ (plaintiff or intervenor) insured _____ (name of employer) against liability to its employees for compensation benefits under the Workers' Compensation Act of the State of California].

2. At all times mentioned in this complaint, _____ [name of employer][, _____ (plaintiff or intervenor) in this suit,] was the employer of _____ [name of employee].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and therefore alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences alleged in this complaint, and that plaintiff's damages as alleged in this complaint were proximately caused by their conduct.)]

4. _____ [Allege status and identity of any known defendants.]

5. On [date] , while _____ [name of employee] was _____ [description of employee's activities at time of injury, e.g., driving a truck belonging to _____ (name of employer), making a delivery for _____ (name of employer)], he/she sustained injuries that arose out of and occurred in the course of his/her employment.

6. At that time, defendant [s, and each of them] so negligently _____ [describe acts or omissions, e.g., owned, operated, drove, and maintained a certain _____ (describe vehicle)] as to cause

_____ [describe accident, e.g., a collision with the truck driven by _____ (name of employee)].

7. As a proximate result of the negligence of defendant [s, and each of them], _____ [name of employee] sustained severe bodily injuries. [Injuries may be specified.]

8. As a further proximate result of the negligence of defendant[s, and each of them,] _____ [name of employee] has incurred [, and will continue to incur,] medical and related expenses in an amount according to proof.

9. As a further proximate result of the negligence of defendant[s, and each of them,] and of the resulting injuries sustained by _____ [name of employee], _____ [plaintiff or intervenor] has been obligated to pay the following workers' compensation benefits to _____ [name of employee]:

(1) Temporary disability benefits in the amount of \$_____;

(2) Permanent disability benefits in the amount of \$_____;

(3) Medical benefits in the amount of \$_____.

10. _____ [Plaintiff or Intervenor] is informed and believes, and on such information and belief alleges, that it will be required to pay further disability benefits and sums for medical care and treatment for an indefinite time in the future, and _____ [plaintiff or intervenor] prays that when the total amount of such expenditures are ascertained, this complaint [in intervention] may be amended accordingly.

WHEREFORE, _____ [plaintiff or intervenor] prays judgment against defendant [s, and each of them], for the following:

1. Reimbursement of workers' compensation benefits paid to _____ [name of employee] in the amount of \$_____;

2. Future disability benefits and costs of medical care and treatment according to proof; and

3. Such other and further relief as the court may deem proper.

_____ [signature]

Attorney for _____

[Plaintiff or Intervenor]

[Verification, if desired
(see Code Civ. Proc. §§ 446, 2015.5).]

[8] FORM--Notice of Motion for Lien on Employee's Recovery Against Third Party

[a] Comment

The form set forth in [b], *below*, is a notice of motion for an order allowing a lien against a third-party recovery by judgment or settlement. Such a lien for the amount of the expenditure for compensation benefits is authorized by *Labor*

Code Section 3856 after the payment of expenses and attorney's fees to the employee from the third-party judgment.ⁿ⁶⁴ Apparently, the filing of a lien claim does not preclude intervention in the employee's action against the third party.ⁿ⁶⁵ The declaration in support of the motion, which is set forth in [9] [b], *below*, should accompany the notice of motion. A party filing a notice of motion must serve and file with it a supporting memorandum.ⁿ⁶⁶ The absence of the memorandum may be construed by the court as an admission that the motion is not meritorious and may cause its denial.ⁿ⁶⁷

An employer's lien for workers' compensation benefits must be satisfied out of the judgment recovered by the employee against the third-party tortfeasor, and not out of the verdict. If the employer elects to abstain from participating in the third-party action and to claim a lien on the judgment, in arriving at a verdict, the jury in that action is not concerned with the rights of the employer. The verdict and the judgment may, therefore, properly refer only to the plaintiff-employee and to the third-party tortfeasor.ⁿ⁶⁸ The amount of the workers' compensation lien is required to be taken in partial satisfaction of the judgment against the third party after it is entered. It is error to offset the amount of the compensation lien against the verdict.ⁿ⁶⁹

An employer's workers' compensation lien claim may not exceed the amount of damages the employee recovers from the third-party tortfeasor. In general, the employer may recover the amount of workers' compensation benefits paid, but the amount of the employer's judgment may not exceed the total amount of tort damages suffered by the employee. The employee is entitled to have the jury determine his or her total tort damages, but may recover only a net judgment for the difference between the tort damages and the workers' compensation benefits received.ⁿ⁷⁰

An employer is not entitled to reimbursement under *Labor Code Section 3856(c)* if it begins as a party plaintiff, but later chooses to abstain and file for a lien on the judgment prior to trial. *Labor Code Section 3865(c)* only applies if the action is prosecuted both by the employee and the employer. If the employer remains a formal party to the proceedings, its right to reimbursement must be expressly set forth in both the verdict and in the judgment obtained by the employee against the third party. This is not necessary, however, if its interests are protected by a lien on the judgment.ⁿ⁷¹

If the employer has filed a lien claim on any judgment, recovery, or settlement in the injured employee's third-party action, and subsequently sells the lien to the third party, the workers' compensation benefits paid to the employee represent a lien as to the third party and not a right to reimbursement under *Labor Code Section 3856(c)*. If the third-party tortfeasor purchases the employer's compensation lien, it steps into the shoes of the employer and gains no greater rights than those originally owned by the employer. Until a judgment is entered, the third party merely holds an expectancy, and if the employee fails to obtain a judgment in his or her favor, the lien simply "evaporates."ⁿ⁷²

[b] Form Notice of Motion for Lien on Employee's Recovery Against Third Party

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[or other as appropriate]

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION FOR ORDER ALLOWING
_____ [name(s)],	)	LIEN AGAINST THIRD-PARTY JUDGMENT
Defendant(s).	)	[<i>Lab. Code § 3856(b)</i>]
	)	Date: _____
	)	Time: _____
	)	Location: _____

1-20 California Employment Law § 20.50

) Action Filed: _____
) Hearing Judge: _____
) [Trial Date: _____]

To _____ [name of employee] and to _____ [name], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on [date] , at _____ .M., or as soon thereafter as the matter can be heard, in [_____ (Department or Division _____ of] this court, located at _____ [street address], _____ [city], California, lien claimant _____ [name of insurance carrier or self-insured employer] will move this court for an order allowing it a first lien for workers' compensation benefits _____ [paid or which may be paid] to plaintiff _____ [name of employee] against _____ [the proceeds of the settlement entered into between plaintiff _____ (name of employee) and defendant or the amount of _____ (the judgment rendered in this action on [date] , or any judgment that may be rendered in this action) in favor of plaintiff].

The motion will be based on this notice, all the pleadings and other papers and proceedings in this action, on the Memorandum of Points and Authorities, and the _____ [affidavit(s) or declaration(s)] of _____ [name(s)], served and filed with this motion, and on such evidence as may be presented at the hearing of the motion.

Dated: _____ [signature]

Attorney for

_____ [name]

Lien Claimant

[9] FORM--Declaration in Support of Motion for Order Allowing Lien Against Employee's Recovery from Third Party

[a] Comment

The form set forth in [b], *below*, is a declaration in support of a motion for an order allowing a lien against an employee's recovery from a third party. It should be accompanied by the notice of motion set forth in [8][b], *above*.

The declaration should set forth the following facts: (1) that the lien claimant is the employer or workers' compensation insurance carrier (Paragraph 2);ⁿ⁷³ (2) that workers' compensation insurance was provided for employees of the employer, and that the employee was injured and brought an action against the third party (Paragraph 3); (3) that the employer or insurance carrier has paid benefits and other payments to the employee for the injuries proximately caused by the third party (Paragraphs 4 and 5).ⁿ⁷⁴

[b] Form Declaration in Support of Motion for Order Allowing Lien Against Employee's Recovery from Third Party

SUPERIOR COURT OF CALIFORNIA,
 COUNTY OF _____

[or other as appropriate]

	)	
	)	NO. _____
	)	DECLARATION OF _____ [name]
_____ [name],	)	IN SUPPORT OF MOTION FOR ORDER ALLOW-
Plaintiff,	)	ING LIEN AGAINST THIRD-PARTY JUDGMENT
vs.	)	[Lab. Code § 3856(b)]
_____ [name(s)], Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Date Filed: _____
	)	Hearing Judge: _____
	)	[Trial Date: _____]

I, _____ [name], declare:

1. I am _____ [identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of California and the attorney of record for the lien claimant, _____ [name of employer or insurance carrier]].

2. At all times mentioned in this declaration, lien claimant _____ [name of employer or insurance carrier] was a _____ [specify capacity, e.g., corporation organized and doing business under the laws of the State of California (as a general workers' compensation insurance company)].

3. _____ [Name of employer] provided a policy of workers' compensation insurance for its employees from _____ [name of carrier] to provide benefits to employees who sustained injuries arising out of and occurring in the course of their employment. On _____, [date of injury], plaintiff _____ [name of employee] was an employee of _____ [name of employer], and he/she sustained injuries that arose out of and occurred in the course of his/her employment. Those injuries are the same ones for which plaintiff _____ [name of employee] seeks damages in the complaint filed in this action.

4. As a proximate result of the injuries sustained by _____ [name of employee], lien claimant, _____ [name of employer or insurance carrier], has been obligated to pay, and has paid, the following benefits to that employee:

(1) Temporary disability benefits in the amount of \$ _____;

(2) Permanent disability benefits in the amount of \$ _____;

(3) Medical benefits in the amount of \$ _____.

5. In addition to the total amount of workers' compensation benefits paid to the employee, lien claimant has sustained the following special damages: _____ [specify any salary, wage, pension, or other amount paid in lieu of compensation benefits].

WHEREFORE, lien claimant prays for the allowance of a first lien in the amount of \$ _____ against the balance of a _____ [judgment or settlement] in favor of plaintiff after the court has ordered

payment of plaintiff's litigation expenses and attorney's fees.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. [*date and place*]

_____ [*signature*]

Attorney for Lien Claimant

Legal Topics:

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

Workers' Compensation & SSDI Administrative Proceedings General Overview Workers' Compensation & SSDI Administrative Proceedings Claims General Overview Workers' Compensation & SSDI Third Party Actions Subrogation

FOOTNOTES:

(n1)Footnote 1. *Kemerer v. Challenge Milk Co. (1980) 105 Cal. App. 3d 334, 338, 164 Cal. Rptr. 397 .*

(n2)Footnote 2. *Jarvis v. Southern Pac. Transportation Co. (1983) 142 Cal. App. 3d 246, 258, 191 Cal. Rptr. 29 ; Kemerer v. Challenge Milk Co. (1980) 105 Cal. App. 3d 334, 338, 164 Cal. Rptr. 397 .*

(n3)Footnote 3. *See Kemerer v. Challenge Milk Co. (1980) 105 Cal. App. 3d 334, 338-339, 164 Cal. Rptr. 397 . Accord, Jarvis v. Southern Pac. Transportation Co. (1983) 142 Cal. App. 3d 246, 258, 191 Cal. Rptr. 29 .*

(n4)Footnote 4. *Abdala v. Aziz (1992) 3 Cal. App. 4th 369, 375, 4 Cal. Rptr. 2d 130 .*

(n5)Footnote 5. *See, e.g., Roe v. Workers' Comp. Appeals Bd. (1974) 12 Cal. 3d 884, 889-890, 117 Cal. Rptr. 683, 528 P.2d 771 .*

(n6)Footnote 6. *See, e.g., Lab. Code §§ 3602, 3852, 3853, 3856.*

(n7)Footnote 7. *See, e.g., Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd. (1978) 22 Cal. 3d 829, 834, 843, 150 Cal. Rptr. 888, 587 P.2d 684 ; Roe v. Workers' Comp. Appeals Bd. (1974) 12 Cal. 3d 884, 890, 117 Cal. Rptr. 683, 528 P.2d 771 ; Witt v. Jackson (1961) 57 Cal. 2d 57, 72, 17 Cal. Rptr. 369, 366 P.2d 641 .*

(n8)Footnote 8. *Witt v. Jackson (1961) 57 Cal. 2d 57, 72, 73, 17 Cal. Rptr. 369, 366 P.2d 641 .*

(n9)Footnote 9. *Witt v. Jackson (1961) 57 Cal. 2d 57, 73, 17 Cal. Rptr. 369, 366 P.2d 641 .*

(n10)Footnote 10. *Roe v. Workers' Comp. Appeals Bd. (1974) 12 Cal. 3d 884, 117 Cal. Rptr. 683, 528 P.2d 771 .*

(n11)Footnote 11. *Roe v. Workers' Comp. Appeals Bd. (1974) 12 Cal. 3d 884, 888-890, 117 Cal. Rptr. 683, 528 P.2d 771 .*

(n12)Footnote 12. *Roe v. Workers' Comp. Appeals Bd. (1974) 12 Cal. 3d 884, 890-892, 117 Cal. Rptr. 683, 528 P.2d 771 .*

(n13)Footnote 13. *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd. (1978) 22 Cal. 3d 829, 841-842, 150 Cal. Rptr. 888, 587 P.2d 684 .*

(n14)Footnote 14. *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd. (1978) 22 Cal. 3d*

829, 150 Cal. Rptr. 888, 587 P.2d 684 .

(n15)Footnote 15. *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 842, 150 Cal. Rptr. 888, 587 P.2d 684 .

(n16)Footnote 16. *American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 .

(n17)Footnote 17. *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 842, 150 Cal. Rptr. 888, 587 P.2d 684 ; *see also* *Arbaugh v. Procter & Gamble Manufacturing Co.* (1978) 80 Cal. App. 3d 500, 508-509, 145 Cal. Rptr. 608 .

(n18)Footnote 18. *Witt v. Jackson* (1961) 57 Cal. 2d 57, 72, 73, 17 Cal. Rptr. 369, 366 P.2d 641 .

(n19)Footnote 19. *See* *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 840-842, 150 Cal. Rptr. 888, 587 P.2d 684 ; *Arbaugh v. Procter & Gamble Mfg. Co.* (1978) 80 Cal. App. 3d 500, 508, 145 Cal. Rptr. 608 .

(n20)Footnote 20. *Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal. 3d 502, 509, 156 Cal. Rptr. 41, 595 P.2d 619 ; *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 842, 150 Cal. Rptr. 888, 587 P.2d 684 ; *Engle v Endlich* (1992) 9 Cal. App. 4th 1152, 1162-1163, 12 Cal. Rptr. 2d 145 ; *Jarvis v. Southern Pac. Transp. Co.* (1983) 142 Cal. App. 3d 246, 257-258, 191 Cal. Rptr. 29 ; *Johnson v. Cayman Dev. Co.* (1980) 108 Cal. App. 3d 977, 981-982, 167 Cal. Rptr. 29 ; *Kramer v. Cedu Found., Inc.* (1979) 93 Cal. App. 3d 1, 6-9, 155 Cal. Rptr. 552 ; *Arbaugh v. Procter & Gamble Mfg. Co.* (1978) 80 Cal. App. 3d 500, 508, 145 Cal. Rptr. 608 .

(n21)Footnote 21. *See* *Arbaugh v. Procter & Gamble Mfg. Co.* (1978) 80 Cal. App. 3d 500, 509, 145 Cal. Rptr. 608 (decided prior to enactment of Proposition 51); *see also* *Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal. 3d 502, 509, 156 Cal. Rptr. 41, 595 P.2d 619 (employer not entitled to reimbursement of \$1,679 in workers' compensation benefits paid when its proportionate responsibility for plaintiff's total recovery against third party was \$16,605).

(n22)Footnote 22. *See* *Johnson v. Cayman Dev. Co.* (1980) 108 Cal. App. 3d 977, 980, 983-984, 167 Cal. Rptr. 29 .

(n23)Footnote 23. *Cf.* *Johnson v. Cayman Dev. Co.* (1980) 108 Cal. App. 3d 977, 982-984, 167 Cal. Rptr. 29 (decided prior to enactment of Proposition 51).

(n24)Footnote 23.1. *Lab. Code* § 3852.

(n25)Footnote 23.2. *Lab. Code* § 3853.

(n26)Footnote 23.3. *Lab. Code* § 3856(b); *Gapusan v. Jay* (1998) 66 Cal. App. 4th 734, 739, 78 Cal. Rptr. 2d 250 .

(n27)Footnote 23.4. *Lab. Code* § 3860(c)-(f). *See* *Manriquez v. Adams* (2003) 108 Cal. App. 4th 340, 133 Cal. Rptr. 2d 449, 2003 Cal. App. LEXIS 635, *2, *5-*13 (trial court erred in awarding employee attorney fees calculated by reference to settlement fund valued to include full amount of employer's lien, rather than actual benefit received by employer, but appellate court was unable to determine whether trial court also erred in ruling that employee's counsel alone effected settlement and was therefore entitled to attorney fees with respect to both benefit he obtained for his client and benefit conferred on employer).

(n28)Footnote 23.5. *Lab. Code* § 3860(b); *Gapusan v. Jay* (1998) 66 Cal. App. 4th 734, 741-742, 78 Cal. Rptr. 2d 250 (rejecting plaintiff's assertion that "subject to" in *Lab. Code* § 3860(b) may be interpreted to give court discretion to equitably apportion inadequate settlement funds: "The implicit purpose of section 3860 is to prioritize payments when

settlement funds are insufficient to satisfy all claims."

(n29)Footnote 23.6. *Gapusan v. Jay* (1998) 66 Cal. App. 4th 734, 743, 78 Cal. Rptr. 2d 250 .

(n30)Footnote 23.7. *Summers v. Newman* (1999) 20 Cal. 4th 1021, 1024, 86 Cal. Rptr. 2d 303, 978 P.2d 1225 (relying on *Quinn v. State of California* (1975) 15 Cal. 3d 162, 124 Cal. Rptr. 1, 539 P.2d 761 , construing Lab. Code § 3856 which governs distribution of proceeds of judgment obtained against third party tortfeasor, in resolving ambiguity in Lab. Code § 3860, which does not expressly require or prohibit deduction for employer's share of litigation expenses from employer's reimbursable compensation costs when both employer's and employee's attorneys have helped achieve settlement). *but see* *Luque v. Herrera* (2000) 81 Cal. App. 4th 558, 562, 96 Cal. Rptr. 2d 853 (employee's attorney entitled to attorney fee for obtaining settlement for policy limits in third party tortfeasor suit, even though employer participated in litigation and employer's claim exceeds settlement fund).

(n31)Footnote 24. *See* Lab. Code § 3861. *See also* *Baur v. Workers' Compensation Appeals Bd.* (2009) 176 Cal. App. 4th 1260, 1264-1267, 98 Cal. Rptr. 3d 493 (applying Labor Code § 3861 credit to settlement or judgment paid by California Insurance Guarantee Association (CIGA) required employee to pay for future medical costs with money received from CIGA for another purpose, but this did not violate governing Insurance Code provisions and was compelled by plain language of § 3861 mandating credit against "any recovery"); *State Comp. Ins. Fund v. Workers' Compensation Appeals Bd.* (1997) 53 Cal. App. 4th 579, 585-586, 61 Cal. Rptr. 2d 794 (workers' compensation attorney's fees are considered "compensation" under Labor Code § 3861 and are subject to statutory credit for third-party recovery).

(n32)Footnote 25. *See* *Herr v. Workers' Compensation Appeals Bd.* (1979) 98 Cal. App. 3d 321, 329, 159 Cal. Rptr. 435 ; *see also* *Griffith v. Workers' Compensation Appeals Bd.* (1989) 209 Cal. App. 3d 1260, 1263-1264, 257 Cal. Rptr. 813 (discussing proper manner of raising issue of attorney's fees and costs incurred in third-party action, under Lab. Code § 3860(f), in proceeding before Appeals Board for credit of settlement amount against compensation liability when fees and costs have not previously been set by court or Appeals Board).

(n33)Footnote 26. *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 843, 150 Cal. Rptr. 888, 587 P.2d 684 .

(n34)Footnote 27. *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 150 Cal. Rptr. 888, 587 P.2d 684 .

(n35)Footnote 28. *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 843, 150 Cal. Rptr. 888, 587 P.2d 684 .

(n36)Footnote 29. *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 843, 150 Cal. Rptr. 888, 587 P.2d 684 .

(n37)Footnote 30. *Anderson-Cottonwood Disposal Serv. v. Workers' Compensation Appeals Bd.* (1982) 135 Cal. App. 3d 326, 332, 185 Cal. Rptr. 336 .

(n38)Footnote 31. *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 843, 150 Cal. Rptr. 888, 587 P.2d 684 .

(n39)Footnote 32. *Anderson-Cottonwood Disposal Serv. v. Workers' Compensation Appeals Bd.* (1982) 135 Cal. App. 3d 326, 330-331, 185 Cal. Rptr. 336 (relying on *Daly v. Gen. Motors Corp.* (1978) 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162). For a discussion of the effect of comparative negligence principles on strict products liability actions, *see* Cotchett and Cartwright, *California Products Liability Actions* (rev. ed.), ch. 8 (Matthew Bender).

(n40)Footnote 33. *See* *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal.

3d 829, 843 n.10, 150 Cal. Rptr. 888, 587 P.2d 684 .

(n41)Footnote 34. *Associated Constr. & Eng'g Co. v. Workers' Compensation Appeals Bd.* (1978) 22 Cal. 3d 829, 150 Cal. Rptr. 888, 587 P.2d 684 .

(n42)Footnote 35. *See Rodgers v. Workers' Compensation Appeals Bd.* (1984) 36 Cal. 3d 330, 337, 204 Cal. Rptr. 403, 682 P.2d 1068 .

(n43)Footnote 36. *Rodgers v. Workers' Compensation Appeals Bd.* (1984) 36 Cal. 3d 330, 204 Cal. Rptr. 403, 682 P.2d 1068 .

(n44)Footnote 37. *Rodgers v. Workers' Compensation Appeals Bd.* (1984) 36 Cal. 3d 330, 337-338, 204 Cal. Rptr. 403, 682 P.2d 1068 .

(n45)Footnote 38. *Graham v. Workers' Compensation Appeals Bd.* (1989) 210 Cal. App. 3d 499, 501, 504, 258 Cal. Rptr. 376 .

(n46)Footnote 39. *Civ. Code* § 3333.1(a).

(n47)Footnote 40. *Civ. Code* § 3333.1(b).

(n48)Footnote 41. *Graham v. Workers' Compensation Appeals Bd.* (1989) 210 Cal. App. 3d 499, 505-506, 258 Cal. Rptr. 376 (quoting from *Miller v. Sciaroni* (1985) 172 Cal. App. 3d 306, 310-312, 218 Cal. Rptr. 219).

(n49)Footnote 42. *Graham v. Workers' Compensation Appeals Bd.* (1989) 210 Cal. App. 3d 499, 501, 506-508, 258 Cal. Rptr. 376 .

(n50)Footnote 43. *See Lab. Code* § 3852. *See also Employers Mutal Liability Ins. Co. v. Tutor-Saliva Corp.* (1998) 17 Cal. 4th 632, 641-642, 71 Cal. Rptr. 2d 851, 951 P.2d 420 (whether third party is entitled to contractual attorney's fees from insurer when third party defeats claim for reimbursement does not depend on whether employee would have been entitled, but rather on terms of contract between insured employer and third party; thus, subcontractor-employer's insurance carrier was subrogated to subcontractor's contractual liability to pay attorney's fees to general contractor, who moved against insurer for attorney's fees incurred since insurer's filing complaint in intervention under *Lab. Code* § 3852, 3853). For form of complaint for independent action against third party, *see* [7][b], *below*.

(n51)Footnote 44. *See Lab. Code* § 3853. For form of complaint in intervention against third party, *see* [7][b], *below*.

(n52)Footnote 45. *See Lab. Code* § 3856(b). For form of application for lien on employee's recovery against third party, *see* [7][b], *below*. The employee's right to have expenses and attorney's fees paid out of the judgment does not depend on whether such items have been included in the judgment as taxable costs of suit. *See Phelps v. Stostad* (1997) 16 Cal. 4th 23, 30-34, 65 Cal. Rptr. 2d 360, 939 P.2d 760 (*Code Civ. Proc.* § 1141.21(a), which denies recovery of costs of suit by employee who rejects arbitration award and elects de novo trial but fails to obtain more favorable award, does not affect allocation of judgment proceeds between employee and employer under *Lab. Code* § 3856(b).

(n53)Footnote 46. *Fischl v. Paller & Goldstein* (1991) 231 Cal. App. 3d 1299, 1304-1305, 282 Cal. Rptr. 802 .

(n54)Footnote 47. *See Lab. Code* § 3861. *See also State Compensation Ins. Fund v. Workers' Compensation Appeals Bd.* (1997) 53 Cal. App. 4th 579, 585-586, 61 Cal. Rptr. 2d 794 (workers' compensation attorney's fees are considered "compensation" under *Labor Code* § 3861 and are subject to a statutory credit for third-party recovery). For discussion, *see* [4], *above*.

(n55)Footnote 48. *See Lab. Code § 3856(b)* (when employer files only lien claim, and not independent action or complaint in intervention, employee's attorney is entitled to fee based on recovery made for employer).

(n56)Footnote 49. *Demkowski v. Lee* (1991) 233 Cal. App. 3d 1251, 1258, 284 Cal. Rptr. 919 .

(n57)Footnote 50. *Demkowski v. Lee* (1991) 233 Cal. App. 3d 1251, 1258, 284 Cal. Rptr. 919 .

(n58)Footnote 51. *Demkowski v. Lee* (1991) 233 Cal. App. 3d 1251, 1258, 284 Cal. Rptr. 919 .

(n59)Footnote 52. *Demkowski v. Lee* (1991) 233 Cal. App. 3d 1251, 1258-1258, 284 Cal. Rptr. 919 (use of special verdict form to segregate types of damage as between employee and employer).

(n60)Footnote 52.1. *Lab. Code § 3853. See McKinnon v. Otis Elevator Co.* (2007) 149 Cal. App. 4th 1125, 57 Cal. Rptr. 3d 723, 2007 Cal. App. LEXIS 596, *7-*11 (employer's letter to injured employee asking if employee was pursuing third-party action and stating that it had filed lawsuit did not satisfy notice requirements, where it did not serve, either personally or by certified mail, its subrogation complaint on employee and did not mention that there was subrogation complaint or lawsuit, and where it suggested employee could pursue independent third-party action, but said nothing about mandatory consolidation of action required by *Lab. Code § 3853*).

(n61)Footnote 52.2. *Lab. Code § 3859.*

(n62)Footnote 52.3. *Lab. Code § 3860(a).*

(n63)Footnote 52.4. *McKinnon v. Otis Elevator Co.* (2007) 149 Cal. App. 4th 1125, 57 Cal. Rptr. 3d 723, 2007 Cal. App. LEXIS 596, *10-*23 (where employer failed to adequately notify employee of its subrogation complaint against third party, failed to obtain employee's consent to settlement of lawsuit and failed to notify employee of settlement in way that would have allowed employee opportunity to recover all damages she suffered, and third party, prior to settlement, was or reasonably should have been aware of possibility of employee's claim for damages, given that employer's negligence-based subrogation complaint against third party specified all identifying and factual details of employee's accident and injury involving third party's elevator, settlement and dismissal of employer's subrogation lawsuit against third party did not bar employee's lawsuit against third party).

(n64)Footnote 53. *See Lab. Code §§ 3852, 3853*, which authorize such actions.

(n65)Footnote 54. *Lab. Code § 3853.*

(n66)Footnote 55. *County of San Diego v. Sanfax Corp.* (1977) 19 Cal. 3d 862, 868-869, 140 Cal. Rptr. 638, 568 P.2d 363 .

(n67)Footnote 56. *Code Civ. Proc. § 387; Lab. Code § 3853; but see Wagner v. Rios* (1992) 4 Cal. App. 4th 608, 611-612, 5 Cal. Rptr. 2d 731 (complaint in intervention was properly dismissed pursuant to *Code Civ. Proc. § 583.410* for delay in prosecution because during four years since complaint was filed insurer only participated in single deposition, exchanged unspecified number of interrogatories, did not participate in settlement discussions or pursue arbitration, consented to drop its case from civil active list, and failed thereafter to file at-issue memorandum or otherwise prosecute its case).

(n68)Footnote 57. *See Code Civ. Proc. § 335.1.*

(n69)Footnote 58. *Harrison v. Englebrick* (1967) 254 Cal. App. 2d 871, 874, 62 Cal. Rptr. 831 .

(n70)Footnote 59. *Lab. Code § 3853; see Code Civ. Proc. § 387.*

(n71)Footnote 60. *Mar v. Sakti Internat. Corp.* (1992) 9 Cal. App. 4th 1780, 1784-1785, 12 Cal. Rptr. 2d 388 .

(n72)Footnote 61. *Mar v. Sakti Internat. Corp.* (1992) 9 Cal. App. 4th 1780, 1785, 12 Cal. Rptr. 2d 388 .

(n73)Footnote 62. *See Polk v. Garcia & Maggini Co.* (1934) 137 Cal. App. 406, 408, 30 P.2d 615 .

(n74)Footnote 63. *See Lab. Code §§ 3850-3864.*

(n75)Footnote 64. *See Lab. Code § 3856(b).*

(n76)Footnote 65. *See Hanna, California Law of Employee Injuries and Workers' Compensation, Vol. 1, § 11.42 (Matthew Bender).*

(n77)Footnote 66. *See Cal. Rules of Ct., Rule 3.1113(a).*

(n78)Footnote 67. *See Cal. Rules of Ct., Rule 3.1113(a).*

(n79)Footnote 68. *See Manthey v. San Luis Rey Downs Enterprises, Inc.* (1993) 16 Cal. App. 4th 782, 788-789, 20 Cal. Rptr. 2d 265 .

(n80)Footnote 69. *See Manthey v. San Luis Rey Downs Enters., Inc.* (1993) 16 Cal. App. 4th 782, 789, 20 Cal. Rptr. 2d 265 .

(n81)Footnote 70. *See Crampton v. Takegoshi* (1993) 17 Cal. App. 4th 308, 320, 21 Cal. Rptr. 2d 284 .

(n82)Footnote 71. *See Manthey v. San Luis Rey Downs Enterprises, Inc.* (1993) 16 Cal. App. 4th 782, 787-788, 20 Cal. Rptr. 2d 265 .

(n83)Footnote 72. *See Manthey v. San Luis Rey Downs Enterprises, Inc.* (1993) 16 Cal. App. 4th 782, 786-787, 20 Cal. Rptr. 2d 265 .

(n84)Footnote 73. *Lab. Code § 3856(b); see Lab. Code § 3850(b)* ("employer" includes insurer for purposes of subrogation of employer); *Tate v. Superior Court* (1963) 213 Cal. App. 2d 238, 244, 28 Cal. Rptr. 548 .

(n85)Footnote 74. *Lab. Code §§ 3852, 3856(b).*



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 CHAPTER 20 Liability for Work-Related Injuries
 Part B. ACTIONS BY AND AGAINST EMPLOYERS AND THIRD PARTIES
 Subpart 2. Actions by Employer and by Third Parties

1-20 California Employment Law § 20.51

AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

§ 20.51 Recovery by Relatives and Heirs of Employee

[1] Rights of Heirs and Relatives to Disability and Death Benefits

[a] Right to Disability Benefits Accrued and Unpaid

Because an employee's rights belong to the employee personally, liability for disability indemnity ceases with the injured employee's death except in regard to liability then accrued and unpaid.ⁿ¹ Accordingly, the decedent's relatives and heirs who are not dependents have no claim to compensation except for any accrued but unpaid disability benefits.ⁿ² Such accrued benefits, not including Subsequent Injuries Fund benefits,ⁿ³ are payable first to dependents, or if there are no dependents, to the employee's personal representative, or, if there is no administration, to the heirs or other persons entitled thereto without administration.ⁿ⁴ The mere fact that an award for disability benefits has not been made prior to the employee's death does not prevent recovery by dependents or heirs of benefits that would have accrued and become payable at the date of death; thus, the dependents may themselves seek such an award.ⁿ⁵

■ PRACTICE TIP--EMPLOYER'S PERSPECTIVE:

From the defendant's standpoint, whether discussing accrued benefits after the death of the employee, or death benefits, the employer needs finality of the decision. It is vital to join all potential beneficiaries, children and all others who might be able to receive some of the money, and let the WCAB determine the division. *Commentary by John W. Miller.*

[b] Death Benefits

When an injury causes death, either with or without disability, the employer is liable for a death benefit and burial expenses, in addition to any other benefits provided by the compensation statute.ⁿ⁶ The burial expenses are payable even if the employee leaves no dependents.ⁿ⁷ However, the employee's death is compensable only if it is proximately caused by an injury arising out of and in the course of employment,ⁿ⁸ but not when it results from an unreasonable refusal of treatment.ⁿ⁹ Moreover, only certain relatives or household members who are able to establish total or partial

dependency are entitled to death benefits.ⁿ¹⁰ A mere promise of future support is not a sufficient basis for a dependency finding, unless circumstances indicate a bona fide assumption of responsibility for support without an opportunity to make contributions prior to the injury.ⁿ¹¹ Thus, for example, in a case in which a sister claimed partial dependent benefits because of her brother's promise to help support her, the court held that the uncontradicted evidence showed that the deceased brother had made no contributions to her support, and no past dependency could be established.ⁿ¹²

The amount payable as a death benefit, which depends on the number of dependents and whether they were total or partial dependents, is set forth in *Labor Code Section 4702*, and the manner of its allocation is governed by *Labor Code Section 4703*. In addition to payment of the amount specified in *Labor Code Section 4702*, and notwithstanding the maximum limitations specified in *Labor Code Sections 4702* and *4703*, in the case of one or more totally dependent minor children, payment of death benefits shall continue until the youngest child attains age 18; payment shall be in the same manner and amount as temporary total disability indemnity which would have been paid to the employee, except that no payment shall be made at a weekly rate of less than \$224.ⁿ¹³

Liability for death benefits terminates with the last dependent's death except for benefits accrued and unpaid. Payment of such accrued benefits may be made on the appeals board's order to the dependent's heirs, or if there are none, to the employee's heirs without administration.ⁿ¹⁴

When a fatal industrial injury is suffered by an employee who leaves no person surviving him or her entitled to a dependency death benefit, the employer must pay to the Department of Industrial Relations a sum equal to the total dependency death benefit that would be payable to a surviving dependent spouse with no dependent minor children.ⁿ¹⁵ Payment must be made to the department in a lump sum.ⁿ¹⁶ When the employee leaves surviving a partial dependent or partial dependents, partial benefits are paid to them, but the department is not entitled to any balance.ⁿ¹⁷

■ PRACTICE TIP--EMPLOYER'S PERSPECTIVE:

The employer, and insurance carrier, would prefer there be at least a partial dependent than no dependent. A partial dependent receives four times the amount of annual support provided by the deceased injured worker, up to a certain maximum, per *Labor Code Section 4702(a)(4)(A)*.^{n17.1} This is considerably less money than if there are no surviving dependents. With no surviving dependents, the employer has to pay a sum equal to the amount that would be payable to a surviving spouse, with no dependent minor children, in one lump sum (not in periodic payments as would be payable in the case of a partial dependent), to the Department of Industrial Relations.ⁿ¹⁸ *Commentary by John W. Miller.*

Labor Code Section 4702(a)(6)(B), which provides that when a worker without dependents suffers a fatal injury during the course and scope of employment, the employer must pay \$ 250,000 to the deceased worker's estate as a workers' compensation death benefit, is unconstitutional because the constitutional enabling provision^{n18.1} does not identify estates as a class of beneficiaries entitled to workers' compensation death benefits.^{n18.2}

For a detailed discussion of dependency and death benefits, *see* Hanna, California Law of Employee Injuries and Workers' Compensation, Volume 1, Ch. 9 (Matthew Bender).

[2] Effect of Exclusive Remedy Doctrine on Tort Actions by Employee's Relatives and Heirs

Wrongful death actions are treated in the same manner as the underlying injury causing death.ⁿ¹⁹ Thus, if a tortious act causing death falls within the exclusive remedy provisions of workers' compensation law, an action for wrongful death will be barred, even if the parties suffering damages as a result of the "wrongful death" are not entitled to benefits under workers' compensation law because they were not dependents of the deceased worker.ⁿ²⁰

Loss of consortium actions against an employer are barred when they are based on an injury to an employee that is

within the exclusive coverage of workers' compensation.ⁿ²¹

Similarly, actions by a nonemployee for infliction of emotional distress that are based on a tortious act of an employer towards an employee are not permitted as long as the harm to the employee is within the exclusive jurisdiction of the Workers' Compensation Act.ⁿ²²

Also, if an employer's negligent conduct toward a pregnant employee causes an injury to the fetus that is derivative of the employee's injury, workers' compensation may be the exclusive remedy available to the fetus. However, if the fetus suffers a separate injury that is not derivative of the employee's injury, a separate civil suit against the employer is not barred.ⁿ²³ For further discussion of the derivative-injury rule, *see* § 20.10[2].

Legal Topics:

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

Labor & Employment Law Disability & Unemployment Insurance Disability Benefits General Overview Labor & Employment Law Disability & Unemployment Insurance Disability Benefits Claim Procedures Workers' Compensation & SSDI Administrative Proceedings Claims General Overview Workers' Compensation & SSDI Benefit Determinations General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code* § 4700.

(n2)Footnote 2. *See Lab. Code* § 4700.

(n3)Footnote 3. *State of California v. Industrial Acci. Com.* (1957) 151 Cal. App. 2d 147, 149-150, 311 P.2d 42 .

(n4)Footnote 4. *Lab. Code* § 4700.

(n5)Footnote 5. *Fogarty v. Dep't of Indus. Relations* (1928) 206 Cal. 102, 104, 273 P. 791 ; *State of California v. Industrial Acci. Com.* (1957) 151 Cal. App. 2d 147, 149, 311 P.2d 42 .

(n6)Footnote 6. *Lab. Code* § 4701. *See Transbay Container Terminal v. United States Dep't of Labor Benefits Review Bd.* (9th Cir. 1998) 141 F.3d 907, 912-913 (employer not entitled to offsetting credit against payments under Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 903(3)(e) for penalties it paid claimant as compensation for delay in payment of death benefits received under California Workers' Compensation Act when penalties paid were reimbursement for delay, not compensation for death).

(n7)Footnote 7. *Lab. Code* § 4701.

(n8)Footnote 8. *Lab. Code* § 3600(a). For discussion, see § 20.22.

(n9)Footnote 9. *Lab. Code* § 4056.

(n10)Footnote 10. *Lab. Code* § 4701; *Granell v. Indus. Accident Comm'n* (1944) 25 Cal. 2d 209, 211-214, 153 P.2d 358 .

(n11)Footnote 11. *Wings West Airlines v. Workers' Compensation Appeals Bd.* (1986) 187 Cal. App. 3d 1047, 1052, 232 Cal. Rptr. 343 .

(n12)Footnote 12. *Wings West Airlines v. Workers' Compensation Appeals Bd.* (1986) 187 Cal. App. 3d 1047, 1053, 1054, 232 Cal. Rptr. 343 .

(n13)Footnote 13. *Lab. Code* § 4703.5; *State Comp. Ins. Fund v. Workers' Compensation Appeals Bd.* (1993) 19

Cal. App. 4th 1645, 1650-1651, 24 Cal. Rptr. 2d 67 ("totally dependent minor children," as used in *Lab. Code § 4703.5*, includes all minor dependent members of decedent's household, including grandchildren).

(n14)Footnote 14. *See Lab. Code § 4706.*

(n15)Footnote 15. *Lab. Code § 4706.5(a); Atlantic Richfield, Co. v. Workers' Compensation Appeals Bd. (1982) 31 Cal. 3d 715, 726-727, 182 Cal. Rptr. 778, 644 P.2d 1257 .*

(n16)Footnote 16. *Lab. Code § 4706.5(d).*

(n17)Footnote 17. *Atlantic Richfield, Co. v. Workers' Compensation Appeals Bd. (1982) 31 Cal. 3d 715, 726-727, 182 Cal. Rptr. 778, 644 P.2d 1257 .*

(n18)Footnote 17.1. For injuries occurring on or after January 1, 2006, a partial dependent will receive eight times the amount of annual support, up to a specified maximum. *Lab. Code § 4702(a)(4)(B).*

(n19)Footnote 18. *Lab. Code § 4706.5*

(n20)Footnote 18.1. *Cal. Const., art. XIV, § 4.*

(n21)Footnote 18.2. *Six Flags, Inc. v. Workers' Comp. Appeals Bd. (2006) 145 Cal. App. 4th 91, 95-107, 51 Cal. Rptr. 3d 377 .*

(n22)Footnote 19. *See Lab. Code §§ 3600-3602.*

(n23)Footnote 20. *See Soil Eng'g Constr., Inc. v. Superior Court (1982) 136 Cal. App. 3d 329, 332-333, 186 Cal. Rptr. 209 ; see also Lab. Code §§ 4700-4709 governing availability of death benefits.*

(n24)Footnote 21. *Santiago v. Employee Benefits Services (1985) 168 Cal. App. 3d 898, 906, 214 Cal. Rptr. 679 ; Casaccia v. Green Valley Disposal Co. (1976) 62 Cal. App. 3d 610, 612, 133 Cal. Rptr. 295 .*

(n25)Footnote 22. *See Williams v. Schwartz (1976) 61 Cal. App. 3d 628, 632-634, 131 Cal. Rptr. 200 .*

(n26)Footnote 23. *See Snyder v. Michael's Stores, Inc. (1997) 16 Cal. 4th 991, 998-1002, 68 Cal. Rptr. 2d 476, 945 P.2d 781 (disapproving Bell v. Macy's California (1989) 212 Cal. App. 3d 1442, 261 Cal. Rptr. 447 , which held as matter of law that all fetal injuries are derivative of mother's injuries).*



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CHAPTER 20 Liability for Work-Related Injuries

Part B. ACTIONS BY AND AGAINST EMPLOYERS AND THIRD PARTIES

Subpart 2. Actions by Employer and by Third Parties

1-20 California Employment Law §§ 20.52 through 20.59

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[Reserved]

§§ 20.52[Reserved]



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AUTHOR: By Judy B. Freeman, J.D., Edward Baskauskas, J.D.

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Legal Topics:

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

Workers' Compensation & SSDI Administrative Proceedings General Overview
Workers' Compensation & SSDI Administrative Proceedings Claims General Overview
Workers' Compensation & SSDI Benefit Determinations General Overview



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Legal Topics:

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

Workers' Compensation & SSDI Administrative Proceedings General Overview Workers' Compensation &
SSDI Administrative Proceedings Claims General Overview Workers' Compensation & SSDI Benefit
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Legal Topics:

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

Workers' Compensation & SSDI Administrative Proceedings General Overview
 Workers' Compensation & SSDI Administrative Proceedings Claims General Overview
 Workers' Compensation & SSDI Benefit Determinations General Overview



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation

2-21 California Employment Law 21.syn

AUTHOR: By Suzanne P. Marria, J.D.

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FOOTNOTES:

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation

2-21 California Employment Law Scope

AUTHOR: By Suzanne P. Marria, J.D.

Scope

By Suzanne P. Marria, J.D. n SCOPE*

This chapter discusses regulation of safety and health in the workplace, with an emphasis on the California Occupational Safety and Health Act. The chapter discusses the interrelationship between federal and state occupational safety and health laws, provides an overview of California's occupational safety and health laws, and discusses general employer duties and employee rights under those laws. The chapter provides detailed treatment of administrative enforcement of California workplace safety laws by the Division of Occupational Safety and Health, including the assessment of civil penalties by the Division, as well as appeal proceedings before the Occupational Safety and Health Appeals Board. Procedures for obtaining prejob permits for certain types of hazardous work and for obtaining temporary and permanent variances from occupational safety and health standards are also discussed. Finally, the chapter discusses potential criminal and civil liability for violations of occupational safety and health laws.

For discussion of employer liability for work-related injuries, including an overview of the workers' compensation system, see Chapter 20.

FOOTNOTES:

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part A. OVERVIEW

2-21 California Employment Law § 21.01

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.01 Federal Occupational Safety and Health Act of 1970

[1] Historical Background

The Occupational Safety and Health Act of 1970¹ created a comprehensive national system of laws and regulations intended to assure safe and healthful working conditions for every working person and to reduce occupational illnesses, injuries, and fatalities.

Prior to its passage, a maze of state and federal laws regulated occupational safety and health. By the end of the nineteenth century, 21 states had some type of legislation governing specific industries or hazards. At the federal level, beginning in 1936, employees of contractors having federal contracts for supplies, materials, or services in excess of a specified amount were protected under the Walsh-Healey Public Contracts Act.² The federal Coal Mine Safety and Health Act of 1952³ protected certain coal miners. The Longshore and Harbor Workers' Compensation Act⁴ was amended in 1958 to allow the Secretary of Labor to develop and enforce safety standards in the longshoring industry. Workers employed on U.S. public works projects were covered pursuant to the Contract Work Hours and Safety Standards Act of 1962.⁵ Employees of federal maintenance and service contractors were protected by the McNamara-O'Hara Service Contract Act.⁶ The National Foundation of the Arts and the Humanities Act of 1965 was amended to extend the protections of the Walsh-Healey Public Contracts Act to persons employed under grants administered by the foundation.⁷ Miners in mineral mines were protected initially by the Metal and Nonmetallic Mine Safety Act⁸ until jurisdiction was shifted with passage of the Federal Mine Safety and Health Act of 1977.⁹

Federal jurisdiction over occupational safety and health was a volatile issue for many years. Organized labor first called for federal occupational safety and health laws in 1878. Industry-supported private sector organizations such as the National Fire Protection Association, the National Safety Council, and the American Society of Safety Engineers began developing "consensus standards" in an effort to provide some uniformity in standards. But many states failed or refused to adhere to such standards.

During World War II and in the postwar years, federal agencies charged with occupational safety and health

enforcement entered into informal agreements with some states to allow the state to carry out federal agency inspection responsibilities. However, complaints from organized labor about lax and inconsistent enforcement and notable discrepancies between state regulations and national consensus standards led the Department of Labor to cancel many of these agreements. Moreover, attempts by the Secretary of Labor to extend and assert federal jurisdiction over occupational safety and health met growing resistance from the states and vigorous opposition from some segments of the business community.

The rising occupational injury and illness rates of the postwar years, and the Farmington Mine disaster of 1968, in which 78 miners in West Virginia were killed, each contributed to changing the political atmosphere sufficiently to permit enactment of the Occupational Safety and Health Act of 1970.

[2] Purposes, Structure, and Scope of the Act

The purposes of the Occupational Safety and Health Act of 1970 include the following:

1. Encouraging the efforts of employers and employees to reduce occupational safety and health hazards at places of employment and to develop programs that provide for safe and healthful working conditions;ⁿ¹⁰
2. Building on the advances made through employer and employee initiatives to provide safe and healthful working conditions,ⁿ¹¹ and encouraging joint labor-management efforts to reduce injuries and disease arising out of employment;ⁿ¹²
3. Authorizing the Secretary of Labor to set mandatory standards for all businesses affecting interstate commerce;ⁿ¹³
4. Providing for an effective enforcement program, which includes an express prohibition against giving advance notice of any inspection;ⁿ¹⁴
5. Providing for research in the field of occupational safety and health, including the psychological factors involved;ⁿ¹⁵
6. Providing for medical criteria that will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of work experience;ⁿ¹⁶
7. Exploring ways to discover latent diseases, establishing causal connections between diseases and work conditions, and conducting other research relating to health problems in recognition of the different problems presented by occupational health standards as compared to safety;ⁿ¹⁷
8. Providing for training programs to increase the number and competence of personnel engaged in the field of occupational safety and health;ⁿ¹⁸
9. Encouraging the states to assume the fullest responsibility for the administration and enforcement of state occupational safety and health laws and providing grants to the states to assist the state, among other things, in identifying state needs, in developing plans in accordance with the act, and in improving the administration and enforcement of state plans;ⁿ¹⁹
10. Providing for appropriate reporting procedures that will achieve the objectives of the act and accurately describe the nature of occupational safety and health problems;ⁿ²⁰

11. Recognizing the separate but dependent responsibilities and rights of employers and employees with respect to achieving safe and healthful working conditions;ⁿ²¹ and

12. Creating an independent body, the Occupational Safety and Health Review Commission, to adjudicate matters arising from enforcement activity under the act.ⁿ²²

The system created by the Occupational Safety and Health Act of 1970 comprises seven major functions:

1. Rulemaking, which includes the development and adoption of new safety and health standards;ⁿ²³
2. Enforcement, which includes conducting inspections and investigations,ⁿ²⁴ securing injunctions in the event of imminent dangers,ⁿ²⁵ issuing citations,ⁿ²⁶ assessing penalties,ⁿ²⁷ verifying employer compliance with reporting and recordkeeping requirements, and granting or denying temporary and permanent variances from safety and health standards;ⁿ²⁸
3. Adjudicating appeals from citations, notices of civil penalty,ⁿ²⁹ and variance decisions;
4. Providing research services through the Department of Health and Human Services;ⁿ³⁰ and the National Institute for Occupational Safety and Health (NIOSH);ⁿ³¹
5. Providing educationⁿ³² and training;ⁿ³³
6. Statistical compilation and analysis of occupational injury and illness data;ⁿ³⁴ and
7. Evaluating, certifying, monitoring, and assisting state occupational safety and health programs, i.e., state plans.ⁿ³⁵

[3] Federal OSHA Enforcement Agencies

[a] Occupational Safety and Health Administration (OSHA)

The various duties and responsibilities of the Secretary of Labor under the Occupational Safety and Health Act have been delegated to the Assistant Secretary for Occupational Safety and Health. The Assistant Secretary, who is appointed by the President, with the advice and consent of the Senate, directs the operations of the Occupational Safety and Health Administration (OSHA).ⁿ³⁶ OSHA enforcement is organized into regional offices, which dispatch compliance safety officers and industrial hygienists to do inspections and house additional staff, including a Regional Attorney, who litigates appeals.

OSHA inspectors, acting on behalf of the Secretary of Labor, are authorized to conduct inspections and investigations,ⁿ³⁷ subpoena witnesses and the production of evidence,ⁿ³⁸ issue written citations,ⁿ³⁹ recommend that a temporary restraining order be obtained to protect employees from the hazard of an imminent danger,ⁿ⁴⁰ specify time for abating hazardsⁿ⁴¹ and assess proposed penalties for violations.ⁿ⁴²

The Secretary may also appoint advisory committees to assist in the development or amendment of occupational safety and health standards;ⁿ⁴³ adopt, modify, or revoke occupational safety or health standards, after complying with specified requirements for public notice and comment;ⁿ⁴⁴ review and grant temporaryⁿ⁴⁵ and permanentⁿ⁴⁶ variances from mandatory standards; adopt emergency standards to protect employees from grave dangers;ⁿ⁴⁷ and prescribe the use of warning labels,ⁿ⁴⁸ suitable personal protective equipment and controls,ⁿ⁴⁹ exposure monitoring, and medical exams.ⁿ⁵⁰

[b] Occupational Safety and Health Review Commission (OSHRC)

The Occupational Safety and Health Review Commission (OSHRC) is responsible for hearing appeals from citations, notices of penalty, and notices of failure to abate issued to employers for violations of standards.ⁿ⁵¹ The OSHRC is composed of three members, appointed by the President with the advice and consent of the Senate, who serve six-year terms.ⁿ⁵² The Chairperson, appointed by the President, appoints hearing examiners to conduct administrative appeal hearings.ⁿ⁵³ Proceedings before the OSHRC are conducted in accordance with the Federal Rules of Civil Procedureⁿ⁵⁴ and the OSHRC's rules of procedure.ⁿ⁵⁵ The hearing examiner's decision becomes a final order of the OSHRC within 30 days of the date of issuance, unless a party to the proceeding has properly petitioned for rehearing by the OSHRC or the OSHRC has granted reconsideration on its own motion.ⁿ⁵⁶ Judicial review of an OSHRC decision may be petitioned in the U.S. Court of Appeals within 60 days after the OSHRC's decision is issued. The commencement of proceedings does not automatically stay the OSHRC's order in the matter.ⁿ⁵⁷ The OSHRC's findings of fact, if supported by substantial evidence in the record taken as a whole, are conclusive,ⁿ⁵⁸ although the court may order additional evidence to be taken. The OSHRC's order in a matter becomes final within 60 days of service if no petition for review has been filed and may be enforced, on petition, by order of the Court of Appeals.ⁿ⁵⁹

[c] National Institute for Occupational Safety and Health (NIOSH)

The National Institute for Occupational Safety and Health was created by the Occupational Safety and Health Act of 1970 as an institute within the Department of Health and Human Services, responsible for performing the research, education, and training functions of the Secretary of Health and Human Services under Sections 669 and 670 of the act.ⁿ⁶⁰ In addition, NIOSH has the express authority to develop and establish recommended occupational safety and health standards.ⁿ⁶¹

The Director of NIOSH, appointed by the Secretary of HHS for a six-year term,ⁿ⁶² is authorized to conduct research and experimental programs to develop criteria for new occupational safety and health standards and to recommend standards on the basis of such research.ⁿ⁶³ The Director must report annually to the Secretary of HHS, the President, and Congress on NIOSH's activities.ⁿ⁶⁴

Within the Institute, an Office of Mine Safety and Health has been established to enhance the development of new mine safety technology and technological applications and to expedite the commercial availability and implementation of technology in mining environments.^{n64.1}

[d] Department of Justice

Cases involving potential specified criminal violations of the actⁿ⁶⁵ are referred to the Department of Justice for prosecution.

[e] Statistics

The Secretary of Labor in consultation with the Secretary of Health and Human Services is required to develop and maintain an effective program for collecting, compiling, and analyzing occupational safety and health statistics.ⁿ⁶⁶ Specifically, the Secretary is required to compile accurate statistics on work injuries and illnesses, including all disabling, serious, or significant injuries and illnesses, whether or not lost time is involved, which may result in first aid but do not require medical treatment or involve loss of consciousness, restriction of work motion, or transfer to another job.ⁿ⁶⁷ In performing these functions, OSHA may grant up to 50 percent of a state's total cost for compiling occupational safety and health statistics.ⁿ⁶⁸ Statistical data used in this activity is compiled from the reports employers are required to file by Section 8(c)ⁿ⁶⁹ of the act.

[4] Jurisdiction and Coverage

The Occupational Safety and Health Act of 1970 applies to employment within any workplace in a state, on Wake Island, the Outer Continental Shelf Lands, Johnston Island, and the Canal Zone.ⁿ⁷⁰ The term "state" includes the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands.ⁿ⁷¹

Employees expressly excluded from coverage under the act include the following:

1. Employees for whom other federal agencies exercise statutory authority to prescribe and enforce occupational safety and health standards.ⁿ⁷² Mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction. Furthermore, another federal agency's minimal exercise of some authority over certain conditions does not result in complete preemption of OSHA jurisdiction. OSHA is only preempted if the working conditions at issue are the particular ones with respect to which another federal agency has regulated, and if the regulations affect occupational safety or health.^{n72.1}
2. Employees for whom state agencies acting under Section 2021 of Title 42 exercise statutory authority over occupational safety and health standards.ⁿ⁷³
3. Persons who fail to meet the definition of an employee.

Although federal, state, and local governments are expressly excluded from the definition of an employer under the act,ⁿ⁷⁴ the provisions of the act are extended to federal employees by Section 19(a),ⁿ⁷⁵ which requires every federal agency to establish and maintain an effective and comprehensive occupational safety and health program consistent with the standards developed by OSHA. Furthermore, as a condition of obtaining approval of a state occupational safety and health program for private-sector workplaces, a state must demonstrate that public agency employees will be protected by an equally effective and comprehensive state occupational safety and health program.ⁿ⁷⁶ States in which only federal OSHA asserts jurisdiction over private-sector occupational safety and health may seek approval for a state plan covering occupational safety and health for state and local agency employees.ⁿ⁷⁷

[4A] Federal Preemption in Absence of State Plan

OSHA preempts any state regulation of an occupational safety or health issue with respect to which a federal standard has been established, unless a state plan^{n77.1} has been submitted and approved.^{n77.2} By enacting OSHA, Congress sought to promote occupational safety and health, as well as avoid duplicative, and possibly counterproductive, regulation. The scope of this preemption therefore includes nonconflicting state laws designed to promote worker safety, if they interfere with the methods by which the federal statute was designed to reach that goal.^{n77.3}

The issue of preemption can arise even if the state, such as California, has an approved plan. For example, a law enacted outside the scope of Cal/OSHA, designed for some purpose other than the control of worker safety or health, such as pollution control, may be subject to preemption if its practical effect encroaches on the goals of federal OSHA.^{n77.4}

A state law whose declared purpose is different than, or in addition to the promotion of worker safety and health, is a "dual impact" law^{n77.5} in this context, and is not necessarily saved from preemption by virtue of serving multiple objectives. In determining the preemptive effect of OSHA on a dual impact law, courts must evaluate at what point the state regulation sufficiently interferes with federal regulation so as to be deemed preempted.^{n77.6} In the absence of approval of a state plan, OSHA preempts all state law that constitutes, in a direct, clear, and substantial way, regulation of worker health and safety.^{n77.7} On the other hand, state laws of general applicability (e.g., those governing traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike would generally not be preempted. If a state wishes to enact a dual impact law that regulates an occupational safety or health issue for which a federal standard is in effect, the state must submit a plan for approval.^{n77.8}

Consequently, for example, a state licensing law governing hazardous waste operations is preempted by OSHA to the extent that it establishes occupational safety and health standards for those who work with hazardous waste.^{n77.9}

[5] State Plans

Any state seeking to assume responsibility for occupational safety and health matters must submit a state plan for developing standards and enforcement procedures.ⁿ⁷⁸ Although one of the stated purposes of the act is to encourage states to assume the fullest responsibility over the administration and enforcement of occupational safety and health,ⁿ⁷⁹ Congress conditioned any withdrawal of federal jurisdiction over occupational safety and health "issues"ⁿ⁸⁰ on the requirement that the state first demonstrate that its proposed state plan standards, program resources, and procedures are "at least as effective as" corresponding federal regulations on such issues.ⁿ⁸¹

Obtaining approval of a state OSHA plan is a multi-stage endeavor. If the written plan submitted conforms to the criteria set out in the act,ⁿ⁸² and the Secretary is satisfied that the state standards will be at least as effective as federal standards, the plan will be approved.ⁿ⁸³

However, even if the plan does not meet all the requirements of Title 29 *Code of Federal Regulations Section 1902.3* at the time of submission, the Secretary may grant a provisional approval by finding the state plan to be a "developmental" plan. To find the plan developmental, the Secretary must find a "reasonable expectation" that the state will take specified necessary steps within three years of the date of initial operation to meet the Section 1902.3 criteria.ⁿ⁸⁴ However, before granting final approval, the Secretary must evaluate the state plan operation for at least one year after all developmental steps have been completed.

On proof of completion of all the required steps identified with the developmental plan stage, the Assistant Secretary may certify completion of the developmental steps and publish the certification in the Federal Register.ⁿ⁸⁵ Publication of the notice of certification in the Federal Register automatically initiates the next phase of gaining final plan approval. Throughout the developmental stage, federal OSHA monitors actual state plan performance.ⁿ⁸⁶

The last stage is to obtain an "affirmative section 18(e) determination," or final plan approval. The factors used to reach an affirmative Section 18(e) determination are set forth in Title 29 *Code of Federal Regulations Section 1902.37*. Once the plan receives final plan approval, federal OSHA formally withdraws from exercising federal jurisdiction over standards, inspections, citations, penalties, appeals, abatement, and imminent dangers within the state.ⁿ⁸⁷ However, even after final plan approval, federal OSHA continues to retain federal jurisdiction in order to monitor state plan operations to ensure that state standards continue to be at least as effective as federal standards and to enforce the anti-discrimination provisions of the federal act.ⁿ⁸⁸

Conversely, federal OSHA may reach a negative determination and continue to retain federal jurisdiction over occupational safety and health if the Assistant Secretary finds that some part or all of the actual state plan operations fail to warrant a Section 18(e) approval. The state may be given a reasonable time to meet the plan criteria.ⁿ⁸⁹ A negative determination may lead to withdrawal of all or part of the plan approval.ⁿ⁹⁰

State plans must file plan supplements with the Secretary of Labor for any plan modification that may have an impact on the effectiveness of the state program.ⁿ⁹¹ A state may request an advisory opinion for a preliminary determination of the impact of a proposed plan change.

The procedures used to monitor state plan activity during the developmental stage and after final Section 18(e) approval are set out in Title 29 *United States Code Section 667(f)* and Title 29 *Code of Federal Regulations Sections 1954.1 through 1954.22*.

During the period of concurrent jurisdiction, that is, from the time of initial approval until final approval is actually

given, the Assistant Secretary has discretionary authority to exercise federal jurisdiction on occupational safety and health issues contained in the state plan.ⁿ⁹² A state that has met all of the guidelines set out in Title 29 *Code of Federal Regulations Section 1954.3(b)* is considered "operational." Accordingly, federal enforcement will be reduced to a monitoring function only, and the state will conduct all enforcement activity.ⁿ⁹³

Legal Topics:

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

Labor & Employment Law Occupational Safety & Health General Overview Workers' Compensation & SSDI Remedies Under Other Laws Occupational Safety & Health Act

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 651 *et seq.* Also called the "Williams-Steiger Occupational Safety and Health Act of 1970." Pub. L. No. 91-596.

(n2)Footnote 2. 41 U.S.C. § 35 *et seq.*

(n3)Footnote 3. Former 30 U.S.C. § 471 *et seq.*

(n4)Footnote 4. 33 U.S.C. §§ 901, 941.

(n5)Footnote 5. 40 U.S.C. § 327 *et seq.*

(n6)Footnote 6. 41 U.S.C. § 351 *et seq.*

(n7)Footnote 7. 20 U.S.C. § 954(a), (n).

(n8)Footnote 8. Former 30 U.S.C. § 721 *et seq.* (repealed 1977).

(n9)Footnote 9. 30 U.S.C. § 801 *et seq.* See *Stillwater Mining Co. v. Fed. Mine Safety & Health Review Comm'n* (9th Cir. 1998) 142 F.3d 1179, 1184 (FMSHA imposes "a kind of strict liability on employers to ensure worker safety," citing cases from other circuits).

(n10)Footnote 10. 29 U.S.C. § 651(b)(1).

(n11)Footnote 11. 29 U.S.C. § 651(b)(4).

(n12)Footnote 12. 29 U.S.C. § 651(b)(13).

(n13)Footnote 13. 29 U.S.C. § 651(b)(3), (9).

(n14)Footnote 14. 29 U.S.C. § 651(b)(10).

(n15)Footnote 15. 29 U.S.C. § 651(b)(5).

(n16)Footnote 16. 29 U.S.C. § 651(b)(7).

(n17)Footnote 17. 29 U.S.C. § 651(b)(6).

(n18)Footnote 18. 29 U.S.C. § 651(b)(8).

(n19)Footnote 19. 29 U.S.C. § 651(b)(11); *see also* discussion of state plans in [5], *below*.

(n20)Footnote 20. 29 U.S.C. § 651(b)(12).

(n21)Footnote 21. 29 U.S.C. § 651(b)(2).

(n22)Footnote 22. 29 U.S.C. § 651(b)(3).

(n23)Footnote 23. 29 U.S.C. § 655; 29 C.F.R. §§ 1911.1 *et seq.* (standards development); 29 U.S.C. § 656(a), (b); 29 C.F.R. §§ 1912.1 *et seq.* (establishing advisory committees to assist in standards development).

(n24)Footnote 24. 29 U.S.C. § 657(a)-(f); 29 C.F.R. §§ 1903.1 *et seq.*

(n25)Footnote 25. 29 U.S.C. § 662.

(n26)Footnote 26. 29 U.S.C. § 658; 29 C.F.R. §§ 1903.1 *et seq.*

(n27)Footnote 27. 29 U.S.C. §§ 659(a), (b), 666; 29 C.F.R. § 1903.15.

(n28)Footnote 28. 29 U.S.C. § 655(d); 29 C.F.R. §§ 1905.1 *et seq.*

(n29)Footnote 29. 29 U.S.C. § 661 (Occupational Safety and Health Review Commission (OSHRC) structure and powers); 29 C.F.R. § 2200.1 *et seq.* (OSHRC rules of procedure); 29 U.S.C. § 659; 29 C.F.R. §§ 1903.17-1903.19 (employer appeals; notice of contest); 29 C.F.R. § 2204 (rules implementing Equal Access to Justice Act).

(n30)Footnote 30. 29 U.S.C. § 669(a); 42 C.F.R. § 85a.1 *et seq.* (authority of Health and Human Services to conduct inspections); 42 C.F.R. § 85.1 *et seq.* (Health Hazard Evaluations (HHE's)); 42 C.F.R. § 87.1 *et seq.* (grant policies and procedures).

(n31)Footnote 31. 29 U.S.C. § 671; 42 C.F.R. §§ 80, 85, 86, 87.

(n32)Footnote 32. 29 U.S.C. §§ 670(a), (c), 669(d).

(n33)Footnote 33. 29 U.S.C. § 670; 29 C.F.R. § 1949 (OSHA Training Institute); 42 C.F.R. §§ 80, 86, 87 (assistance with tuition for training).

(n34)Footnote 34. 29 U.S.C. § 673; 29 C.F.R. § 1904.1.

(n35)Footnote 35. *See* 29 U.S.C. § 667; 29 C.F.R. § 1902.1 *et seq.* (procedures for approval, rejection, and certification of state plans); 29 C.F.R. §§ 1952.1 *et seq.* (list of approved state plans), 1953.1 *et seq.* (procedures for reviewing changes to approved state plans), 1954.1 *et seq.* (procedures for monitoring approved state plans), 1955.1 *et seq.* (procedures for withdrawal of approval of state plans), 1956.1 *et seq.* (procedures for approval of state plans applying to state and local government employees, where no private-sector state plan exists); 29 U.S.C. § 672 (grants to the states for state plan activity); 29 C.F.R. §§ 1950.1 *et seq.* (state plan developmental training grants), 1951.1 *et seq.* (grants for implementing approved state plans); OSHA State Plan Policies and Procedures Manual, issued by OSHA Instruction STP 2.22A, May 14, 1986; *see also* discussion in [5], *below*, and in § 21.02[1][g].

(n36)Footnote 36. *See* 29 U.S.C. § 553.

(n37)Footnote 37. 29 U.S.C. § 657(a).

(n38)Footnote 38. 29 U.S.C. § 657(b).

(n39)Footnote 39. 29 U.S.C. § 658(a).

(n40)Footnote 40. 29 U.S.C. § 662(c).

(n41)Footnote 41. 29 U.S.C. § 658(a).

(n42)Footnote 42. *29 U.S.C. § 666.*

(n43)Footnote 43. *29 U.S.C. § 655(b)(1).*

(n44)Footnote 44. *29 U.S.C. § 655(b)(2)-(5).*

(n45)Footnote 45. *29 U.S.C. § 655(b)(6).*

(n46)Footnote 46. *29 U.S.C. § 655(d).*

(n47)Footnote 47. *29 U.S.C. § 655(c).*

(n48)Footnote 48. *29 U.S.C. § 655(b)(7).*

(n49)Footnote 49. *29 U.S.C. § 655(b)(7).*

(n50)Footnote 50. *29 U.S.C. § 655(b)(7).*

(n51)Footnote 51. *29 U.S.C. § 661.*

(n52)Footnote 52. *29 U.S.C. § 661(a), (b).*

(n53)Footnote 53. *29 U.S.C. § 661(e), (j).*

(n54)Footnote 54. *29 U.S.C. § 661(g).*

(n55)Footnote 55. *29 C.F.R. § 2200.1 et seq.*

(n56)Footnote 56. *29 U.S.C. § 661(j).*

(n57)Footnote 57. *29 U.S.C. § 660(a).*

(n58)Footnote 58. *29 U.S.C. § 660(a).*

(n59)Footnote 59. *29 U.S.C. § 660(b).*

(n60)Footnote 60. *See 29 U.S.C. § 671(a).*

(n61)Footnote 61. *29 U.S.C. § 671(c)(1).*

(n62)Footnote 62. *29 U.S.C. § 671(b).*

(n63)Footnote 63. *29 U.S.C. § 671(d).*

(n64)Footnote 64. *29 U.S.C. § 671(f).*

(n65)Footnote 64.1. *See 29 U.S.C. § 671(h).*

(n66)Footnote 65. *See 29 U.S.C. § 666(e)* (willful violation of OSHA standard or order that caused an employee's death), (f) (giving advance notice of an inspection), (g) (knowingly making false statement, representation, or certification in any application, record, report, plan or other document filed or required to be maintained); *see also 18 U.S.C. § 1114* (killing a Department of Labor representative in the course of conducting an investigation, inspection, or other law enforcement activity).

(n67)Footnote 66. *29 U.S.C. § 673(a).*

(n68)Footnote 67. 29 U.S.C. § 673(a).

(n69)Footnote 68. 29 U.S.C. § 673(c).

(n70)Footnote 69. 29 U.S.C. § 657(c).

(n71)Footnote 70. 29 U.S.C. § 653(a). *See Chao v. Mallard Bay Drilling, Inc.* (2002) 534 U.S. 235, 122 S. Ct. 738, 151 L. Ed. 2d 659, 668-669 (oil rig was "workplace" within meaning of Act because vessel was located within Louisiana, and nothing in § 653(a) attaches significance to fact that barge was anchored in navigable waters).

(n72)Footnote 71. 29 U.S.C. § 652(7).

(n73)Footnote 72. 29 U.S.C. § 653(b)(1).

(n74)Footnote 72.1. *Chao v. Mallard Bay Drilling, Inc.* (2002) 534 U.S. 235, 122 S. Ct. 738, 151 L. Ed. 2d 659, 666-668 (OSHA's regulations pre-empted with respect to inspected vessels, because Coast Guard has broad statutory authority to regulate occupational health and safety of workers aboard inspected vessels; however, general marine safety regulations do not address occupational safety and health concerns faced by inland drilling operations on uninspected vessels and do not preempt OSHA's authority; although Guard's regulation of specific working conditions on certain types of uninspected vessels would preempt OSHA regulations covering those particular working conditions and vessels, no specific regulations addressing types of risk and vessel at issue in this case were identified).

(n75)Footnote 73. 29 U.S.C. § 653(b)(1).

(n76)Footnote 74. *See* 29 U.S.C. § 652(5).

(n77)Footnote 75. 29 U.S.C. § 668(a).

(n78)Footnote 76. 29 U.S.C. § 667(c)(6).

(n79)Footnote 77. *See* 29 C.F.R. §§ 1956.1 *et seq.*

(n80)Footnote 77.1. 29 U.S.C. § 667(b); *see* discussion in [5], *below*.

(n81)Footnote 77.2. *Gade v. National Solid Wastes* (1992) 505 U.S. 88, 95, 112 S. Ct. 2374, 120 L. Ed. 2d 73, 91 .

(n82)Footnote 77.3. *Gade v. National Solid Wastes* (1992) 505 U.S. 88, 103, 112 S. Ct. 2374, 120 L. Ed. 2d 73, 87 .

(n83)Footnote 77.4. *See Gade v. National Solid Wastes* (1992) 505 U.S. 88, 105-106, 112 S. Ct. 2374, 120 L. Ed. 2d 73, 87 (Illinois law governing hazardous waste operations preempted).

(n84)Footnote 77.5. *See Gade v. National Solid Wastes* (1992) 505 U.S. 88, 106, 112 S. Ct. 2374, 120 L. Ed. 2d 73, 88 .

(n85)Footnote 77.6. *Gade v. National Solid Wastes* (1992) 505 U.S. 88, 106-107, 112 S. Ct. 2374, 120 L. Ed. 2d 73, 89-90 .

(n86)Footnote 77.7. *Gade v. National Solid Wastes* (1992) 505 U.S. 88, 112 S. Ct. 2374, 120 L. Ed. 2d 73, 90 .

(n87)Footnote 77.8. *Gade v. National Solid Wastes* (1992) 505 U.S. 88, 108, 112 S. Ct. 2374, 120 L. Ed. 2d 73, 90 .

(n88)Footnote 77.9. *Gade v. National Solid Wastes* (1992) 505 U.S. 88, 108-109, 112 S. Ct. 2374, 120 L. Ed. 2d 73, 91 (involving Illinois law).

(n89)Footnote 78. 29 U.S.C. § 667(b).

(n90)Footnote 79. See 29 U.S.C. § 651(b)(11).

(n91)Footnote 80. Federal OSHA regulations define "issue" to mean "an industrial, occupational or hazard grouping which is at least as comprehensive as a corresponding grouping contained in (i) one or more sections in subparts B or R of Part 1910 of this chapter [the federal safety orders], or (ii) one or more of the remaining subparts of section 1910." 29 C.F.R. § 1902.2(c)(1).

(n92)Footnote 81. 29 U.S.C. § 667(c).

(n93)Footnote 82. See 29 U.S.C. § 667; see also 29 C.F.R. § 1902.3.

(n94)Footnote 83. 29 C.F.R. § 1902.2(a).

(n95)Footnote 84. 29 C.F.R. § 1902.2(b).

(n96)Footnote 85. 29 C.F.R. § 1902.34.

(n97)Footnote 86. See 29 C.F.R. §§ 1954.1-1954.22.

(n98)Footnote 87. See 29 C.F.R. §§ 1902.32(c), 1902.42(c).

(n99)Footnote 88. See 29 U.S.C. § 660(c).

(n100)Footnote 89. 29 C.F.R. § 1902.46(d).

(n101)Footnote 90. 29 C.F.R. § 1902.46(c); see also 29 C.F.R. §§ 1902.47 (procedures for reconsideration or revocation of affirmative § 18(e) determination), 1955 (procedures for withdrawal of approval of state plans).

(n102)Footnote 91. 29 C.F.R. § 1953.

(n103)Footnote 92. 29 C.F.R. § 1954.3(a)(1).

(n104)Footnote 93. 29 C.F.R. § 1954.3(b).



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part A. OVERVIEW

2-21 California Employment Law § 21.02

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.02 California Occupational Safety and Health Law

[1] California Occupational Safety and Health Act of 1973

[a] Historical Background

California has a long history of protective occupational safety legislation. In 1911, a voluntary workers' compensation law¹ passed, and the California Constitution was amended to include a section providing for a workers' compensation system.²

The Workmen's Compensation, Insurance and Safety Act of 1913³ expanded worker protections by making the workers' compensation system mandatory and by vesting an Industrial Accident Commission (IAC) with jurisdiction over all places of employment. The IAC had the authority to make and enforce reasonable safety standards and orders and to prescribe the use of reasonable safety devices.⁴ The duties imposed on employers under the act were similar to those that exist under current law.⁵ Employers were required to comply with the standards and orders of the IAC.⁶ The IAC had the authority to summarily investigate places of employment,⁷ to investigate the causes of disabling and fatal occupational injuries,⁸ and to issue orders to take corrective action for unsafe conditions.⁹ Failure to comply with the IAC's orders¹⁰ or hampering an investigation¹¹ was a misdemeanor.

In 1917, major revisions to the law were enacted by the Workmen's Compensation, Insurance and Safety Act of 1917,¹² although most of the safety provisions of the act of 1913 were reenacted. Further, *Article XX, Section 21 of the California Constitution* was again amended to expressly vest the Legislature with plenary power to create and enforce a "complete system of workmen's compensation," which system included "full provision for securing safety in places of employment" as one of its four essential elements.¹³

The provisions of the 1917 act were codified in Division V ("Safety in Employment") of the California Labor Code, which was enacted in 1937.¹⁴ The IAC administered the Division of Industrial Accidents and Safety, one of five divisions within the Department of Industrial Relations. The Labor Code of 1937 also expanded the IAC's powers by authorizing the IAC to seek injunctive relief from the superior court to prohibit the use or operation of machines or

equipment that constituted a serious menace to the lives or safety of workers¹⁵ and by extending its jurisdiction to safety on railroads,¹⁶ buildings,¹⁷ mines,¹⁸ and ships and vessels.¹⁹

The provisions of the Labor Code governing worker safety and workers compensation were reorganized in 1945. Under the act of 1945,²⁰ the Department of Industrial Relations consisted of eight divisions, including a Division of Industrial Accidents, which administered the workers compensation system, and a separate Division of Industrial Safety, which had direct responsibility for administering and enforcing the occupational safety provisions of the Labor Code. The safety orders of the division were codified in Title 8 of the California Administrative Code,²¹ but prior to passage of the federal Occupational Safety and Health Act of 1970, the division's orders were enforced primarily through voluntary compliance. No system of citations and penalties existed.²² Employers were prohibited from discharging workers for refusal to work in a place where a safety order *violation* constituted a real and apparent hazard.²³

In 1963, the Labor Code was amended to provide that an employer could be sentenced for up to one year in county jail or a fine of up to \$5,000 when the death of an employee was due to the employer's gross negligence in failing to provide a safe workplace.²⁴

To preserve state jurisdiction over occupational safety and health issues in California following enactment of the federal Occupational Safety and Health Act of 1970, a state occupational safety and health plan was filed with the Secretary of Labor on September 27, 1972, pursuant to the federal act and related regulations.²⁵ The state also requested a federal grant to fund approximately 50% of the cost of the state program pursuant to the act.²⁶

Several major events helped create the political environment that led to passage of the California Occupational Safety and Health Act of 1973. In addition to impetus created by the federal Occupational Safety and Health Act of 1970, two industrial catastrophes in California, the Sylmar Tunnel disaster of June 24, 1971, and the Arroyo Seco Bridge collapse of October 16, 1972, focused legislative and public concern on the adequacy of existing state occupational safety and health laws and procedures.

At the Sylmar Tunnel disaster, 17 men were killed by a gas explosion in an underground tunnel excavation within days of an inspection by the Division of Industrial Safety mining unit. Legislative hearings into the incident revealed serious problems in the management and enforcement procedures of the Division. The legislative investigations led to passage of the Tom Carrell Memorial Tunnel and Mine Safety Act of 1972.²⁷

A second Assembly Select Committee on Industrial Safety convened hearings in January 1972 into the enforcement policies of the Division of Industrial Safety and whether the mandate of the Labor Code sections governing occupational safety and health was being accomplished. The Committee issued preliminary findings in 1972, which enumerated a myriad of problems with administration, enforcement activity, inadequate personnel and program funding in the division.

On October 16, 1972, a freeway bridge under construction at Arroyo Seco in Pasadena collapsed, causing 6 deaths and 31 injuries.

In January 1973, Assembly Bill 150, the California Occupational Safety and Health Act of 1973, was introduced by Assembly member Fenton, who had participated in both sets of hearings. The bill proposed numerous changes to the law and administrative apparatus governing occupational safety and health, due in part to problems revealed during the legislative hearings of 1972 and 1973.

The Secretary of Labor granted initial approval of California's state plan on May 1, 1973.²⁸

In September 1973, the California Legislature passed, and the governor signed, the California Occupational Safety and

Health Act of 1973, which took effect as emergency legislation on October 1, 1973.

The Secretary of Labor determined, effective September 30, 1975, that the California occupational safety and health program was "operational" and therefore withdrew its jurisdiction over private-sector places of employment.ⁿ²⁹

On August 12, 1977, the Secretary of Labor certified, pursuant to Title 29 *Code of Federal Regulations Part 1902.34*, that the California program had successfully completed the developmental phase of its state plan certification.ⁿ³⁰

[b] Purposes of the Act

The California Occupational Safety and Health Act of 1973 was enacted "for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training, and enforcement in the field of occupational safety and health."ⁿ³¹

The Legislature incorporated the act into Division V of the Labor Code by exercise of unlimited plenary powers granted under the California Constitution to create and enforce a complete system of workers' compensation, which system shall expressly include "full provision for securing safety in places of employment."ⁿ³² Moreover, the provisions of Division 5 of the Labor Code, which includes the California Occupational Safety and Health Act of 1973, "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."ⁿ³³

[c] Structure of the Act

The California statutory scheme for occupational safety and health is set out in Division 5 of the Labor Code.ⁿ³⁴ Division 5 consists of nine parts, including the California Occupational Safety and Health Act of 1973 and various safety statutes that preceded its passage.

Part 1 of Division 5ⁿ³⁵ contains nine chapters that govern the jurisdiction, powers, and duties of the Division of Occupational Safety and Health, the division's education and research responsibilities, the duties of employers and employees under the act, criminal sanctions under the act, procedures governing the award of temporary variances and permits for ultrahazardous work, and provisions governing appeals from citations and civil penalties imposed by the division.

The remaining eleven parts of Division 5 comprise the statutes applying to safety in specific industries or for specific hazards, including railroads,ⁿ³⁶ buildings,ⁿ³⁷ mining industries,ⁿ³⁸ ships and vessels,ⁿ³⁹ tanks and boilers,ⁿ⁴⁰ volatile flammable liquids,ⁿ⁴¹ refinery and chemical plants,^{n41.1} amusement rides,ⁿ⁴² tunnel and mine safety,ⁿ⁴³ carcinogens,ⁿ⁴⁴ and commercial establishments, including working warehouses.^{n44.1}

[d] Occupational Safety and Health Standards

Administrative regulations that supplement the Cal/OSHA statutory scheme are codified in Title 8 of the California Code of Regulations.

Chapter 3.ⁿ⁴⁵ consists of regulations of the Director of Industrial Relations on matters including definitions under the California Occupational Safety and Health Act of 1973; advance notice of Cal/OSHA inspections; procedures for issuing Cal/OSHA citations, notices, and orders; procedures for calculating the amount of proposed civil penalties; and guidelines for hazardous substances information and training; as well as Cal/OSHA regulations on the employer's duty to provide information to employees, permit application procedures, registration requirements for work involving asbestos, reporting requirements for occupational safety and health illnesses and injuries, and inspection and licensing

fee schedules.

The rules of practice and procedure during appeal hearings before the Occupational Safety and Health Appeals Board are found at Chapter 3.3.n46

The rules of procedure for variance hearings held before the Occupational Safety and Health Standards Board are contained in Chapter 3.5.n47

Specific occupational safety and health standards, also commonly called safety and health orders, are codified in Chapter 4.n48 The standards are organized into 21 subchapters, by type of hazard or industry. The largest subchapter is the General Industry Safety Orders (GISO). These specific safety standards are detailed, highly technical, and voluminous, and detailed coverage of them is beyond the scope of this chapter. Employers and their counsel should, however, become familiar with any standards that may apply to their particular type of business.

[e] Administrative Interpretations

Currently, there are 12 Administrative Interpretations issued by the Chief of the Division of Occupational Safety and Health, which provide Cal/OSHA personnel with guidance on the division's interpretation on specific occupational safety and health hazards or issues.

Administrative Interpretations are part of the division's policy and procedures manual, or may be obtained upon request of the Chief of the Division. Sections of the manual are cited in appropriate places in this chapter.

[f] Policies and Procedures

The Cal/OSHA Policy and Procedures Manual provides compliance personnel, i.e., compliance safety engineers (CSE's) and industrial hygienists (IH's) with detailed instructions on the procedures for carrying out the duties of the division, including conducting inspections, issuing citations and orders, calculating penalties, and other enforcement tasks.

The Policy and Procedures Manual is available for purchase from the Chief of the Division by request. Sections of the manual are cited in appropriate places in this chapter.

[g] Disengagement and Reassertion of Jurisdiction

"Disengagement" was the term used by the governor and the Director of the Department of Industrial Relations to describe the attempt to return jurisdiction for occupational safety and health at private-sector places of employment to the federal government.

On January 8, 1987, Governor George Deukmejian submitted a proposed budget for 1987-1988, which provided no funding for private-sector occupational safety and health enforcement activity by the division. A budget summary comment indicated that the elimination of state funding for the Cal/OSHA program was the result of a decision to return exclusive control over occupational safety and health enforcement in the private sector to federal jurisdiction. The governor then notified the U.S. Secretary of Labor on February 6, 1987, that California sought to withdraw its approved state plan and terminate its federal matching grant, and would cease private-sector OSHA enforcement effective June 30, 1987. In July, the governor used the power of the executive branch to veto any line item in the proposed state budget to reduce the appropriation of funds to the Department of Industrial Relations by \$7 million, expressly for the purpose of terminating private-sector OSHA enforcement by the state of California.

The majority of division enforcement personnel transferred to other jobs or were laid off, and over 21 division offices

throughout the state were closed.

Because of the announced cessation of any state OSHA enforcement activity in the private sector, the federal Occupational Safety and Health Administration (OSHA) assumed provisional concurrent jurisdiction and primary responsibility for private-sector OSHA enforcement in July 1987. During the time federal OSHA was primarily responsible for private-sector enforcement, there were at most seven federal OSHA offices in the state.

In October 1987, the California Court of Appeal for the Third Appellate District held that the governor improperly exercised the line item veto authority, and found the veto to be ineffective.ⁿ⁴⁹ The California Supreme Court granted a petition for review of the decision on January 21, 1988.

A ballot initiative, Proposition 97, sponsored by the California Federation of Labor, was approved by the voters in the November 1988 election. It amended *Labor Code Section 50.7* to provide, "The state plan [for occupational safety and health] shall be consistent with the provisions of state law governing occupational safety and health, including, but not limited to, Chapter 6 (commencing with Section 140) and Chapter 6.5 (commencing with Section 148) of Division 1, and Division 5 (commencing with Section 6300), of this [Labor] code." The proposition also directed the Legislature to restore the state funding to the Cal/OSHA program. The California Supreme Court subsequently dismissed the appeal of the court of appeal decision, on the grounds that it was moot because of the passage of Proposition 97.

With the passage of Proposition 97, the federal OSHA executed a memorandum of understanding that provided that effective May 1, 1989, concurrent jurisdiction would continue, but the division would resume responsibility for private-sector accident investigations, response to complaints and follow-up inspections involving serious violations, while the federal OSHA program would conduct targeted inspections in specific industries. Concurrent jurisdiction would continue until the Secretary of Labor determined that the state OSHA program in California was again fully operational.

[2] Related California Laws

[a] Occupational Carcinogens Control Act of 1976

The Occupational Carcinogens Control Act of 1976, originally enacted as part of the Health and Safety Code,ⁿ⁵⁰ regulates the use of carcinogens whenever there is a substantial probability that an employee will be exposed or is actually exposed to a carcinogen in the course of employment.ⁿ⁵¹

The legislative intent of the act is that "the state exercise strong leadership in preventing employees, employers, and other persons from being exposed to carcinogens" and that standards be developed by the California Occupational Safety and Health Standards Board for the use of any substance for which there is a "preponderance of evidence of carcinogenicity," even if no federal occupational safety and health standard regulating such a substance has been developed.ⁿ⁵²

The act applies to the "use" of any "carcinogen" that may result in an employee exposure. "Use" of a carcinogen includes the manufacture, industrial use, or formation of a carcinogen due to a chemical reaction;ⁿ⁵³ and the sale or other transfer,ⁿ⁵⁴ the storage or disposal,ⁿ⁵⁵ the utilization for research,ⁿ⁵⁶ and the transport of any carcinogen.ⁿ⁵⁷

The term "carcinogen" includes specific cancer-causing substances, and compounds, mixtures, or products containing any such substance, enumerated in *Labor Code Section 9004(a)*; asbestos, including chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite;ⁿ⁵⁸ vinyl chloride;ⁿ⁵⁹ and "any other substance for which standards are adopted and in effect due to cancer-causing properties and any compound, mixture, or product containing such a substance, except as specifically exempted from the standards."ⁿ⁶⁰

The provisions of the act apply whenever an employee is "involved in the use of a carcinogen" as part of his or her employment and whenever there is a substantial probability an employee may be exposed as a result of his or her employer's use of a carcinogen.ⁿ⁶¹

The Occupational Safety and Health Standards Board is responsible for adopting standards for carcinogens that are at least as restrictive as the federal requirements for use of carcinogens adopted pursuant to the Occupational Safety and Health Act of 1970. Within six months of the effective date of any new federal carcinogen standard, or amendment to an existing carcinogen standard, the Standards Board must amend the California carcinogen standards to be at least as restrictive as the federal standard.ⁿ⁶² However, the Standards Board may exempt uses of carcinogens that it determines, by a preponderance of evidence, present no substantial threat to employee health.ⁿ⁶³

The Division of Occupational Safety and Health is responsible for enforcing carcinogen standards;ⁿ⁶⁴ determining the necessity for carcinogen standards and proposing new standards to the Standards Board for adoption;ⁿ⁶⁵ receiving employer reports of carcinogen use or incidents of potentially hazardous employee exposures to carcinogens and forwarding such reports to employee collective bargaining and other representatives;ⁿ⁶⁶ creating an inspection priority system and conducting inspections of workplaces for which occupational uses of a carcinogen have been reported pursuant to *Labor Code Section 9030*;ⁿ⁶⁷ making every effort to determine the identity of carcinogen users; and notifying, informing, and educating such users, employers, employees and the public, by a variety of mass communication means, about the requirements of the Occupational Carcinogens Control Act of 1976.ⁿ⁶⁸ The act also provides that the Division of Occupational Safety and Health and the California Department of Health Services shall have concurrent jurisdiction with any federal agency to protect affected employees of interstate carriers while working in California.ⁿ⁶⁹

On finding, in the course of an inspection, a carcinogen use that is in violation of any occupational safety or health standard, the division must immediately notify the employer and affected employees.ⁿ⁷⁰ The division inspector must also determine whether the condition constitutes an imminent hazard to employees, and, if necessary, will issue an order prohibiting further exposure to, use of, or entry into the area of use until the condition is made safe and required safeguards or safety devices have been provided to employees.ⁿ⁷¹

Any employer whose operation involves a carcinogen use within the scope of the act must comply with applicable regulations in Article 110 (Regulated Carcinogens) of Chapter 4 of Title 8 of the California Code of Regulations.ⁿ⁷² file a written report with the division about any carcinogen use or "incident which results in the release of a potentially hazardous amount of a carcinogen into any area where employees may be exposed,"ⁿ⁷³ and provide for medical examinations of affected employees as required by any applicable occupational carcinogen standard.ⁿ⁷⁴ The employer must also post a copy of each reported use of a carcinogen or exposure incident in a location that is conspicuous to affected employees.ⁿ⁷⁵

The act provides for a range of civil penalties for violations of the standards and orders governing the use of a carcinogen.ⁿ⁷⁶ Violations of the carcinogen use standards and orders may also result in criminal prosecution.ⁿ⁷⁷

Any employer or employee may request the assistance of the Cal/OSHA Consultation Unit regarding the use of a carcinogen.ⁿ⁷⁸

[b] Tom Carrell Memorial Tunnel and Mine Safety Act of 1972

The Tom Carrell Memorial Tunnel and Mine Safety Act of 1972ⁿ⁷⁹ regulates the occupational safety and health of workers employed at tunnel construction sites and mines. Its provisions are enforced by a separate unit of safety engineers within the Division of Occupational Safety and Health, known as the Mining and Tunneling Unit, who are trained to inspect mine operations and tunnel construction.ⁿ⁸⁰ The division must also make available at least one industrial hygienist and one chemist, as well as the resources of a laboratory for analysis of dust, gas, vapors, soil, or

other materials, to assist the Mining and Tunneling Unit in the performance of their duties.ⁿ⁸¹ The division is required to maintain sufficient manpower to conduct four annual inspections of underground mines, one annual inspection of surface mines or quarries, and six annual inspections of tunnels under construction in the state.ⁿ⁸² However, the division's jurisdiction to inspect a mine is held in abeyance as long as the U.S. Mine Safety and Health Administration (MSHA) actively exercises occupational safety and health jurisdiction at the mine.ⁿ⁸³

"Tunnel" is defined as "an underground passageway, excavated by men and equipment working below the earth's surface, that provides a subterranean route along which men, equipment, or substances can move,"ⁿ⁸⁴ and includes excavation, construction, alteration, repairing, renovating, or demolishing any tunnel.ⁿ⁸⁵ Tunnel work covered under the compressed air safety orders and manhole construction is exempted from coverage under this act.ⁿ⁸⁶ Projects involving substantial modification of any *completed* tunnel owned or operated by a public utility is covered under the act, whereas work involving the normal operation, maintenance, or repair of such a *completed* tunnel is exempt from coverage.ⁿ⁸⁷

Safety regulations governing employment during the excavation, construction, alteration, repair, renovation, or demolition of tunnels are codified in the Tunnel Safety Orders.ⁿ⁸⁸

"Mine" is defined as any excavation or opening above or below ground used for removal of ore, minerals, gravel, sand, rock, or other materials intended for manufacturing or sale, and includes quarries and open pit operations, except for gravel pits or other pits where material is removed by a contractor or other person for personal use and not for sale to others.ⁿ⁸⁹ Mines that produce less than \$5,000 in ore, minerals, sand, rock, or other materials during the preceding calendar year; mines operated exclusively by persons with a proprietary interest in the mine; and mines in which the only remuneration for those working is a share of the profits of the mine are excluded from coverage under the act.ⁿ⁹⁰

Detailed regulations that govern safety in employment at mining operations are codified in the Mine Safety Orders.ⁿ⁹¹

Before any initial mining operation or construction commences at a mine or tunnel, the project operator must notify the Division of Occupational Safety and Health and the mine or tunnel owner, and a prejob safety conference shall be held with a division representative, the tunnel or mine owner, the project employer, if different, and employees.ⁿ⁹²

Tunnels and mines are classified on the basis of the degree of hazard into one of four types: nongassy (i.e., little likelihood of encountering gas during construction);ⁿ⁹³ potentially gassy (i.e., there exists a possibility gas will be encountered);ⁿ⁹⁴ gassy (i.e., likely that gas will be encountered);ⁿ⁹⁵ and extrahazardous (i.e., where the Division of Occupational Safety and Health finds there is a serious danger to the employees, and gas or vapors exist or where tests show, with normal ventilation, a concentration of hydrocarbon petroleum vapors in excess of 20 percent of the lower explosive limit within 3 inches of the roof, face, floor, or walls of any open workings.ⁿ⁹⁶

The employer must ensure that all personnel at any tunnel or underground mine, whether working above or below ground, are informed of the division's classification for that job and that a notice of the classification and any special orders, rules, or regulations to be used in the construction, remodeling, demolition, or operation of the tunnel or mine are prominently posted at the site.ⁿ⁹⁷

Tunnel and mine classification must, whenever possible, be made prior to any request for bids on public works projects.ⁿ⁹⁸ The division may reclassify mines and tunnels whenever conditions warrant; however, it is not required to reclassify any tunnel or mine that is shut down seasonally and returned to operation within six months of the shutdown date.ⁿ⁹⁹

General safety and health provisions in Chapter 1 of the act, which apply to all tunnel and mine operations within the scope of the act, require the following:

2-21 California Employment Law § 21.02

1. The employer at any tunnel or mine operation must develop an emergency rescue plan, which includes a current map of the tunnel or underground mine, and provide a copy of the plan to every employee at the project, to the Division of Occupational Safety and Health, and to local fire and rescue units;n100
2. The employer must train on-site rescue crews, the size and number of which crews is determined by the number of employees at the mine or tunnel;n101
3. Rescue crews must be familiar with all emergency equipment necessary to rescue or search for employees in the event of an accident or explosion and hold monthly rescue practices while the underground mine or tunnel is under construction or being operated;n102
4. For any tunnel or underground mine that is classified as gassy or extrahazardous, at least one rescue crew must be maintained above ground and within 30 minutes' travel of the site;n103
5. A safety representative, qualified to recognize hazardous conditions and certified by the Division of Occupational Safety and Health, must be designated by the employer for each tunnel or underground mine, and the safety representative must be responsible for directing required safety programs and have the authority to correct unsafe conditions and practices;n104
6. An operating underground-to-surface telephone or other communication system must be provided for any tunnel or underground mine with more than five employees underground at one time;n105 and
7. Access shafts used for normal entrance and exit from any underground mine or tunnel must be constructed of fireproof material or otherwise made fireproof.n106

In addition, before the start of each shift at any tunnel or underground mine classified as potentially gassy, the employer must ensure that tests for gas or vapors are made.n107 Whenever the tests reveal any concentration of gas greater than 10% of the lower explosive limit, the Division of Occupational Safety and Health must be notified immediately.n108

Only those persons who have passed an examination administered by, and who have become certified by, the Division of Occupational Safety and Health may serve as a safety representative or perform the duties of a gas tester in any tunnel or underground mine.n109 The requirements for the certification and licensing of gas testers and safety representatives that are adopted by the Occupational Safety and Health Standards Board preempt local government rules, regulations, and laws on certification and licensing.n110

Chapter 2 of the act contains specific procedures and conditions applicable to any tunnel or underground mine classified as gassy or extrahazardous.n111 These statutes require, among other things, preshift and hourly gas or vapor testing,n112 maintenance of a log of testing results,n113 and maintenance of a probe hole whenever work approaches a geological formation in which there is a likelihood of encountering gas or water.n114 The statutes also specify the following: conditions warranting the issuance of a work shutdown order;n115 immediate cessation of work and removal of all employees after any ignition of gas or vapor in a tunnel or underground mine;n116 mandatory removal of all employees whenever the gas level in any tunnel or underground mine reaches 20% of its lower explosive limit;n117 requirements for "kill buttons" for all electrical equipment and for the resumption of work after power has been shut off;n118 requirements for fire extinguishers,n119 ventilation systems,n120 air composition,n121 air sampling;n122 and automatic and continuous gas and vapor testing monitors at any extrahazardous tunnel or underground mine where excavation occurs by mechanical means.n123

Inspectors of the Division of Occupational Safety and Health may set a permissible gas or vapor concentration level below the level specified in existing regulations and orders whenever the inspector considers such action necessary to make the operation safe for employees.n124

Chapter 3 of the act limits the use of explosives at any underground mine or tunnel to persons licensed by the division,ⁿ¹²⁵ and specifies the following: the testing requirements for obtaining the "explosive blaster's license" required by *Labor Code Section 7990*;ⁿ¹²⁶ the conditions for suspension ofⁿ¹²⁷ and revocation ofⁿ¹²⁸ such a license; and the amount of fees charged for conducting examinations of and certifying gas testers and safety representatives.ⁿ¹²⁹

Violation of any regulation, rule, order, or special order that is a condition of certification is a misdemeanor when the violation causes an employee death or injury.ⁿ¹³⁰

All safety equipment and testing devices required to make employment in tunnels or underground mines safe must be acceptable to the Division of Occupational Safety and Health and either approved by the U.S. Bureau of Mines or acceptable to other authorities recognized by the Division.ⁿ¹³¹ In addition, testing devices must automatically sound an alarm and activate flashing red signals visible to employees underground whenever gas or vapor concentrations exceed permissible levels.ⁿ¹³²

[c] Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65)

The Safe Drinking Water and Toxic Enforcement Act of 1986ⁿ¹³³ was enacted as the result of the passage of a ballot initiative, Proposition 65, approved by the electorate in the November 4, 1986, general election.

The act required the governor, on or before March 1, 1987, to publish a listⁿ¹³⁴ of chemicals known to cause cancer or reproductive toxicity, including at a minimum those substances already included on the Director's List of Hazardous Substances pursuant to *Labor Code Section 6382(b)(1)* (substances listed by the International Agency for Research on Cancer (IARC) as human or animal carcinogens)ⁿ¹³⁵ and *Labor Code Section 6382(d)* (any substance within the scope of the federal Hazard Communication Standard).ⁿ¹³⁶ The act also required the governor to publish a separate list of chemicals that "are required by state or federal law to have been tested for potential to cause cancer or reproductive toxicity," but that have not yet been adequately tested.ⁿ¹³⁷ Both lists must be revised and republished annually.ⁿ¹³⁸

Among other things, the act provides that no person shall in the course of doing business "knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning" to the individual.ⁿ¹³⁹

A chemical is "known to the state to cause cancer or reproductive toxicity" if, in the opinion of the state's qualified experts, it is clearly shown, through scientifically valid testing to cause cancer or reproductive toxicity, or if an authoritative body recognized by the state's experts has formally identified it as causing cancer or reproductive toxicity, or if any state or federal agency has formally required the chemical to be labeled or identified as causing cancer or as a reproductive toxin.ⁿ¹⁴⁰

The provisions of Proposition 65 do not apply to persons employing fewer than 10 employees or to any public employer.ⁿ¹⁴¹

Violations of the discharge and warning provisions of the act may be enjoined,ⁿ¹⁴² or result in civil penalties of up to \$2,500 per day per violation, in addition to any other penalty established by law.ⁿ¹⁴³ Actions for injunctive relief or to assess civil penalties may be filed by the Attorney General, district attorney, or a city attorney.ⁿ¹⁴⁴ Such actions may also be filed by any person acting in the public interest, if the person has given notice of the alleged violation to prosecutors in whose jurisdiction the violation occurred, and to the alleged violator, and if no prosecutor has commenced and diligently prosecuted an action against the violation within 60 days after the notice was given.ⁿ¹⁴⁵

The governor designated the California Health and Welfare Agency as the lead agency responsible for implementing the

provisions of Proposition 65. It adopted regulations to govern the warnings required by the act.ⁿ¹⁴⁶ Section 12601(c) of Title 22 of the California Code of Regulations provides that warnings that "include the methods of transmission and the warning messages" specified in Section 12601(c) for occupational exposures shall be deemed "clear and reasonable." Occupational exposure is defined as "an exposure, in the workplace of the employer causing the exposure, to any employee."ⁿ¹⁴⁷ To calculate the level of a workplace exposure to a carcinogen, the regulations provide that it shall be assumed that "the exposed worker inhales ten cubic meters of workplace air per eight-hour day, forty hours per week, fifty weeks per year over a forty-year period."ⁿ¹⁴⁸

In July 1989, the California Occupational Safety and Health Standards Board refused to adopt regulations in the California State Plan for Occupational Safety and Health that would be consistent with the "clear and reasonable warning" requirement of *Health and Safety Code Section 25249.6*, on the grounds that Proposition 65 was not a state law governing occupational safety and health and to do so might create undue burdens on interstate commerce. In a mandate proceeding initiated by various labor organizations and environmental groups challenging the board's action, the Court of Appeal for the First Appellate District held that Proposition 65 is a state law governing occupational safety and health and ordered the board to adopt and incorporate into the state Cal/OSHA plan occupational safety and health standards that provide for the protections of Proposition 65 applicable to the workplace. The court also ordered the board to file amendments to the Cal/OSHA plan with the Secretary of Labor for approval, pursuant to Sections 667(b) and 667(c) of Title 29 of the United States Code.ⁿ¹⁴⁹ In reaching its conclusion, the court noted that by incorporating the provisions of Proposition 65 into the state OSHA plan, an additional 66 carcinogens and 18 reproductive toxins would be regulated.ⁿ¹⁵⁰

[d] Hazardous Substances Information and Training Act

The Hazardous Substances Information and Training Act (HSIT) was enacted in 1980, because of the Legislature's findings, among other things, that employers and employees in California have a right and a need to know the properties and potential hazards of substances to which they may be exposed, in order to reduce the incidence and cost of occupational disease.ⁿ¹⁵¹ The Legislature also recognized that employers do not always have available adequate data on the contents and properties of specific hazardous substances in order to provide information and training to employees and provide a safe and healthful workplace.ⁿ¹⁵² In passing the Act, the Legislature declared the intention "to ensure the transmission of necessary information to employees regarding the properties and potential hazards of hazardous substances in the workplace."ⁿ¹⁵³

The provisions of the Hazardous Substances Information and Training Act apply to all employers who use hazardous substances in California, suppliers, i.e., to any person who sells a hazardous substance to an employer in California, and to manufacturers who produce or sell hazardous substances in the state.ⁿ¹⁵⁴

The act applies whenever a hazardous substance, identified on the list of hazardous substances prepared by the Director of Industrial Relations, is present in the workplace in such a manner that employees may be exposed under normal work operations or in a reasonably foreseeable emergency resulting from workplace operations. Such emergencies may include, for example, spills, fires, explosions, equipment failure, container ruptures, or equipment control failures that cause a release of the hazardous substance into the workplace.ⁿ¹⁵⁵ Exposure is defined as "any situation arising from work operation where an employee may ingest, inhale, absorb through the skin or eyes, or otherwise come into contact with a hazardous substance," unless there is "no valid and substantial evidence that any adverse acute or chronic risk to human health may occur" from the nature of the contact.ⁿ¹⁵⁶

The act initially required the Director of Industrial Relations to establish a list of hazardous substances,ⁿ¹⁵⁷ which must be reviewed and revised at least biennially.ⁿ¹⁵⁸ The initial list was approved by the Occupational Safety and Health Standards Board and codified at *Title 8 California Code of Regulations Section 339*. Similarly, all subsequent proposed amendments must be reviewed and approved, after opportunity for public comment by affected employers and employees, by the Standards Board.ⁿ¹⁵⁹

The list, commonly known as the Director's List of Hazardous Substances, incorporates substances found to be hazardous by other recognized agencies, including, for example, human and animal carcinogens listed by the International Agency for Research on Cancer, substances designated by the Environmental Protection Agency under the Clean Water Act of 1977ⁿ¹⁶⁰ or the Clean Air Act,ⁿ¹⁶¹ airborne chemical contaminants listed in *Title 8 California Code of Regulations Section 5155*, substances designated as restricted materials pursuant to *Food and Agriculture Code Section 14004.5*, substances for which the Division of Occupational Safety and Health has issued an information alert from the repository of data on toxic materials and harmful physical agents,ⁿ¹⁶² and any substance within the scope of the federal Hazard Communication Standard.ⁿ¹⁶³

Inclusion of a substance on the list triggers the requirements of the Hazardous Substances Information and Training Act and the California Hazard Communication Standard, found at *Title 8 California Code of Regulations Section 5194*.ⁿ¹⁶⁴ However, omission from the list does not release the employer from any other duty to safeguard employees, or release the manufacturer, producer, or maker of a hazardous substance from any duty that exists under other provisions of law to warn ultimate users.ⁿ¹⁶⁵

The act exempts (1) hazardous substances that are contained in products intended for personal consumption by employees in the workplace, contained in consumer products packaged for distribution to and use by the general public or found outside of the repair work and processing areas of retail food sale and other retail trade establishments;ⁿ¹⁶⁶ (2) impurities that develop as intermediate materials during chemical processing and to which employee exposure is unlikely;ⁿ¹⁶⁷ and (3) hazardous substances used in a laboratory under the direct supervision of a technically qualified individual, as long as the laboratory employer complies with other requirements for labeling and providing employees with information about such substances.ⁿ¹⁶⁸

Manufacturers of hazardous substances are required by the act to prepare and provide a material safety data sheet (MSDS) containing current, accurate, and complete information on each topic required by *Labor Code Section 6391*, to direct purchasers of the substance.ⁿ¹⁶⁹ The manufacturer has a duty to revise the MSDS on a timely basis, whenever new information is available that would affect the contents of the MSDS and, in any event, annually.ⁿ¹⁷⁰ Whenever new information indicates a significant increased risk or the need for more protective measures than previously disclosed on the MSDS, the manufacturer must provide the new information to all persons who made direct purchases from the manufacturer within the past year.ⁿ¹⁷¹ The manufacturer is also required to provide the Department of Industrial Relations with a copy of the MSDS for each hazardous substance it manufactures.ⁿ¹⁷² Provision of a federal MSDS or equivalent constitutes prima facie proof of compliance with *Labor Code section 6390*.ⁿ¹⁷³

The manufacturer of a hazardous substance or producer of a mixture containing a hazardous substance is also required to provide a MSDS to the employer, on request.ⁿ¹⁷⁴

The MSDS and other information required by *Labor Code Section 6390* may be supplied for the entire product mixture, rather than for each hazardous substance in the mixture, as long as specified conditions are met.ⁿ¹⁷⁵

Provisions governing the protection of trade secrets are set forth in *Labor Code Section 6396*, in *Title 8 California Code of Regulations Section 5194(i)*, and in Appendix D to Section 5194.

Persons, other than manufacturers, who sell a mixture or hazardous substance must provide direct purchasers, at the time of sale, with a copy of the most recent MSDS or its equivalent.ⁿ¹⁷⁶ Such persons may be relieved of the duty to provide such information if the conditions in *Labor Code Section 6397(c)* are met.

A manufacturer may be relieved of the duty to provide an MSDS if the manufacturer has a record of having already provided the most recent version of the MSDS to the specific purchaser, if the product is labelled in accordance with the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), or if the product was sold at retail

and incidentally sold to an employer in the same form, concentration, amount, and mixture as it is sold to consumers, and to the seller's knowledge, will not result in significantly greater employee exposure than consumer exposure.ⁿ¹⁷⁷

The HSIT Act expressly prohibits any person from discharging or in any manner discriminating against any employee because the employee filed a complaint, instituted, caused, or testified at any proceeding related to provisions of the act, or exercised any right provided under the act.ⁿ¹⁷⁸

Under the California Hazard Communication Standard,ⁿ¹⁷⁹ a manufacturer or importer of a hazardous substance must evaluate the hazards of substances produced and imported.ⁿ¹⁸⁰ The employer is not required to independently evaluate the hazards of such substances, unless the employer chooses not to rely on the manufacturer's evaluation.ⁿ¹⁸¹

The employer is required to provide employees with information and training about hazardous substances in the workplace by means of a written hazard communication program, labeling, other warnings, and MSDS's.ⁿ¹⁸²

The requirements for the employer's written hazard communication program are contained in Section 5194(e), labeling and other warning requirements are found in Section 5194(f), and the requirements for MSDS's are in Section 5194(g).ⁿ¹⁸³ Employers can find a hazard communication checklist in the Cal/OSHA Policies and Procedures manual.^{n183.1}

The employer must maintain MSDS's for each hazardous substance at a workplace and make the MSDS's readily accessible to employees during each work shift.ⁿ¹⁸⁴ MSDS's must be made available by the employer, upon request, to employee-designated representatives, the Chief of the Division, NIOSH, and the employee's physician.ⁿ¹⁸⁵ If the information on a MSDS is not complete or current or no MSDS is available when requested, the employer must request such information in writing from the manufacturer or importer of the substance within prescribed time limits.ⁿ¹⁸⁶

The employer must provide employees with information and training about hazardous substances at the time of initial work assignment and whenever a new hazard is introduced into the work area.ⁿ¹⁸⁷ At a minimum, the information and training must include the requirements of Section 5194; the work operations involving hazardous substances; the location and availability of the written hazard communication program; methods used to detect the release of a hazardous substance; the physical and health hazards posed by such substances in the workplace and the protections, procedures, and devices that may be used for protection from such substances; and the detailed provisions of the hazard communication program, including how to read labels and MSDS's and how to obtain and use such information.ⁿ¹⁸⁸

The employer must inform employees of their right to personally receive information about hazardous substances to which they may be exposed, the right for their physician or collective bargaining agent to receive such information, and of the prohibitions against discharge or discriminatory treatment of an employee because the employee exercised rights under the Hazardous Substances Information and Training Act.ⁿ¹⁸⁹ The employer may adopt reasonable procedures for acting on workers' requests for MSDS's, so as to avoid interruption of normal work operations.ⁿ¹⁹⁰

The employer must provide employees with timely notice of any new or revised MSDS's that are received.ⁿ¹⁹¹

[e] Disciplinary Actions Against Building Contractors

Violation of any safety provision contained in Division 5 of the Labor Code or Title 8 of the California Code of Regulations that results in death or serious injury to an employee constitutes cause for disciplinary action against a contractor by the Contractors' State License Board.ⁿ¹⁹²

[f] Occupational Disease and Lead Poisoning Prevention Programs

The State Department of Health Services has been directed to establish and maintain occupational disease and

occupational lead poisoning prevention programs.ⁿ¹⁹³ These programs involve research, collection of data, training of employers and employees, and drafting of recommendations for preventing occupational disease and occupational lead poisoning.ⁿ¹⁹⁴ The Department of Health Services is required to coordinate with the Department of Industrial Relations and any other departments or agencies to avoid program and service duplication in these areas.ⁿ¹⁹⁵ The Department of Health Services may adopt regulations to implement the occupational lead poisoning program.ⁿ¹⁹⁶

[3] Overview of Administrative Enforcement Structure

[a] Department of Industrial Relations

The Department of Industrial Relations (DIR) is the designated state agency responsible for administering the California occupational safety and health program.ⁿ¹⁹⁷ The department is headed by the Director of Industrial Relations, a cabinet-level secretary, who is appointed by the governor, with the advice and consent of the senate, and serves at the pleasure of the governor.ⁿ¹⁹⁸

The Division of Occupational Safety and Healthⁿ¹⁹⁹ is one of six divisions within the DIR.ⁿ²⁰⁰

[b] Division of Occupational Safety and Health

[i] General Organization and Structure

The Division of Occupational Safety and Health (the Division), the successor of the Division of Industrial Safety, is responsible for carrying out the enforcement, education, and research activities of the Cal/OSHA program.ⁿ²⁰¹ The headquarters office of the Division is currently located in San Francisco.

The Division is headed by a chief, who is appointed by the governor and serves at the pleasure of the Director of Industrial Relations.ⁿ²⁰² In addition, two deputy chiefs are appointed by the governor and serve at the pleasure of the Director of Industrial Relations.ⁿ²⁰³ The Deputy Chief of Field Operations supervises the regional, district, and field offices throughout the state, which dispatch Cal/OSHA inspectors. The Deputy Chief of Health and Technical Services supervises the industrial health activities of the program, including the MSDS/Employee Right to Know Unit, the Special Studies Unit, the Calibration Laboratory, the Research and Standards Unit, the Radiation Unit, the Medical Unit,ⁿ²⁰⁴ and the Hazard Evaluation Service and Information System (HESIS). The Division also has a Legal Unit; Bureau of Investigations;ⁿ²⁰⁵ separate sections for Mining and Tunneling, Pressure Vessels, and Elevators; an Aerial Passenger Tramways Unit; an Amusement Ride Unit; an External Education Officer; and various administrative and personnel offices.

Cal/OSHA inspections are conducted by compliance safety engineers (CSE's) or industrial hygienists (IH's).

The state is divided into four regions containing regional and district offices. Cal/OSHA inspectors are supervised by District Managers, who report to a Regional Manager, who in turn reports to the deputy chiefs and the Chief of the Division.

[ii] Bureau of Investigations (BOI)

The Bureau of Investigations (BOI), a unit within the Division, is responsible for directing investigations into industrial accidents in order to determine whether sufficient evidence exists to prosecute an employer criminally or file a civil action under the Business and Professions Code.

The BOI must investigate cases involving a violation of any standard, order, or special order or of *Health and Safety Code Section 25910*, and in which there is a fatality, catastrophe (serious injury to five or more employees), or a request for prosecution by a Division representative.ⁿ²⁰⁶ These are considered "mandatory" investigations.

The BOI also must review Cal/OSHA inspection reports involving any serious violation,ⁿ²⁰⁷ serious injury to one to four employees, or a serious exposure,ⁿ²⁰⁸ and may investigate cases in which it has reason to believe criminal violations may have occurred.ⁿ²⁰⁹

For each "mandatory" case in which there was a serious injury or death, the Bureau is required to refer the results of its investigation to the appropriate prosecutor, e.g., district attorney, city attorney, or Attorney General, unless it has determined there is insufficient evidence of a violation of the law.ⁿ²¹⁰ If the Bureau determines there is legally insufficient evidence of a violation of the law, it must notify the appropriate prosecuting authority if the prosecuting authority requests notice.^{n210.1} On the request of a county district attorney, the Department may develop a protocol for referring cases that may involve criminal conduct to the appropriate prosecuting authority in lieu of or in cooperation with an investigation by the Bureau. The protocol must provide for the voluntary acceptance of referrals after a review of the case by the prosecuting authority. In cases accepted for investigation by the prosecuting authority, the protocol must provide for cooperation between the prosecuting authority, the Division, and the Bureau. When the prosecuting authority declines a referral, the Bureau must comply with *Lab. Code § 6315(a)-(h)*.ⁿ²¹¹

The Division is required to provide the Bureau with all initial accident reports,ⁿ²¹² inspection reports for any inspection involving a serious violation and a fatality,ⁿ²¹³ the reports the BOI is required to review by *Labor Code Section 6315(a)*,ⁿ²¹⁴ and any other documents the Division possesses that the Bureau requests for its review or investigations.ⁿ²¹⁵

The Bureau's statutory authority includes the right of access to all places of employment necessary to its investigations,ⁿ²¹⁶ the right to collect any evidence or samples deemed necessary to its investigations,ⁿ²¹⁷ all powers given Division inspectors under *Labor Code Section 6314*,ⁿ²¹⁸ and the right to communicate with prosecutors at any time it deems appropriate.ⁿ²¹⁹ It is the only entity within the Division that is authorized to conduct criminal investigations and to refer the results of such investigations to a prosecutor.ⁿ²²⁰

By February 15 of each year, the BOI must file a report with the Division, to be forwarded to the Director of Industrial Relations, which summarizes its investigatory activities and resources during the prior year and the status and disposition of cases referred for prosecution. The required contents of the Bureau's annual report are set out in *Labor Code Section 6315.3*.

The Bureau "shall be staffed by as many attorneys and investigators as are necessary to carry out the purposes" of the California Occupational Safety and Health Actⁿ²²¹ and must be supervised by an attorney.ⁿ²²²

[iii] Medical Unit

The Medical Unit in the Division assists the Division with information about the biological, ergonomic, and other health effects of various occupational injuries and exposures. One or more physicians and nurse practitioners are available to consult on workplace inspections, help plan special studies on the effects of a targeted occupational hazard, and provide medical opinion testimony for appeal hearings.

[iv] Publications and Films

In fulfillment of its obligation to provide information regarding occupational safety and health programs, methods, techniques, and devices,ⁿ²²³ the Division provides publications free of charge and has a selection of short 16mm films that may be checked out. Publications generally consist of small pamphlets which contain the actual text of a regulation governing a particular hazard (e.g., noise control, airborne contaminants, respiratory protection programs, trenches and excavations, toxics and carcinogens, employee access to medical records), summarize hazards specific to particular industries or workplaces (e.g., construction safety, electrical safety, farm labor safety) or describe the structure of

Cal/OSHA and related occupational safety and health programs and offices. In the past, the Division has provided multiple copies of such information to the public free of charge on request. Additional fact sheets and information may be available through the Hazard Evaluation System and Information Service (HESIS).ⁿ²²⁴

Films may also be checked out free of charge, although the borrower is responsible for return postage. A list of available films may be requested from the Division's public information office.

[v] Hazard Evaluation System and Information Service

The Hazard Evaluation System and Information Service (HESIS) was created as a joint venture of the California Department of Health Services and Cal/OSHA to provide workers, employers, and medical providers with practical information about health hazards from exposure to chemical and physical agents in the workplace. HESIS provides information by telephone and in free publications. Publications include "Health Hazard Summaries," which include "Fact Sheets" (four- to six-page summaries) on the health effects of and safe ways to use common workplace chemicals, "Hazard Alerts," which summarize the danger posed by new or previously unrecognized hazards and safe work practices for such hazards, and booklets providing a more comprehensive discussion on various topics. These types of publications are written for use by persons without formal scientific or medical training, and in some cases are available in languages other than English. HESIS also provides health professionals with scientific and technical documentation and medical guidelines, including advisory protocols for diagnosing and managing industrial poisonings.

[vi] Consultation Services

The Division is required to provide a full range of occupational safety and health consulting services to any employer or employee group on request.ⁿ²²⁵ Consultation Services is specifically required to assist in the development of the employee injury and illness prevention program required by *Labor Code Section 6401.7*.ⁿ²²⁶ Consultation Services also must give the highest priority to development of these programs for businesses with fewer than 250 employees in industries identified in the regional plans developed to identify the employers in the most hazardous industries.ⁿ²²⁷ Consultation Services also is required to offer a program for identifying categories of occupational health and safety hazards that cause the greatest number and most preventable injuries and illnesses, and the places of employment where they occur. This program includes a component for reducing work-related repetitive motion injuries.ⁿ²²⁸

Consultation Services has several offices throughout the state and the staff include experienced safety engineers and industrial hygienists. Their services are generally free of charge.

Consultation offers employers the opportunity to have a trained professional conduct an on-site walkaround survey at no cost to the employer. The consultant will identify unsafe and hazardous conditions that are in violation of existing occupational safety and health laws and regulations and make specific recommendations on methods of abatement. Consultation Services will not issue any citations or penalties for such violative conditions. The consultant will provide the employer with a written report of his or her findings and make recommendations on safe guards, practices, procedures, and methods of correcting such conditions and protecting employees. If appropriate, a follow-up visit will be made to assure that the required corrections have been made.

The consultation unit and staff are separate and distinct from the enforcement personnel and operations of the Division. If an employer requests the assistance of Consultation Services pursuant to *Labor Code Section 6354*, the Division is barred from issuing a citation or initiating a criminal prosecution under *Labor Code Section 6423* for a violative condition observed by the consultant.ⁿ²²⁹ However, if the consultant observes a condition that constitutes an imminent hazard or danger, an order prohibiting use will be issued pursuant to *Labor Code Section 6325*, and the employer will not be liable for prosecution under *Labor Code Section 6423*, or for civil citations and penalties as a result of the imminent hazard, unless the employer violates the order prohibiting use or otherwise violates the provisions of *Labor Code Section 6326*.ⁿ²³⁰ If an employer fails or refuses to eliminate or control an unsafe or hazardous condition that

constitutes a serious hazard, according to the plan and time limits agreed on by the employer and the consultant, the on-going serious violation would be referred to the enforcement unit for action. Such referrals are rare.

For full discussion of enforcement procedures, see §§ 21.40-21.46.

[c] Occupational Safety and Health Standards Board

[i] Structure and Functions

The Occupational Safety and Health Standards Board, commonly referred to as the "Standards Board," is an independent body within the Department of Industrial Relations that has the exclusive authority to adopt occupational safety and health standards in California;ⁿ²³¹ to grant permanent variances from any such standard, order, or special order;ⁿ²³² and to resolve appeals from temporary variances granted or denied by the Division.ⁿ²³³

The Board consists of seven members, appointed by the governor,ⁿ²³⁴ who serve four-year terms that expire on a staggered basis.ⁿ²³⁵ Two members must be from the field of management, two from labor, one from the field of occupational health, one from the field of occupational safety, and one member from the general public.ⁿ²³⁶ A chairperson is appointed by and serves at the pleasure of the governor.ⁿ²³⁷ An affirmative vote by at least four members of the Board is required to adopt, amend, or repeal any occupational safety or health standard or order.ⁿ²³⁸

The Board meets at least monthly, and the meetings are rotated throughout the state at locations selected by the chairperson.ⁿ²³⁹ The Board must provide written notice of and a proposed agenda for all meetings to any person who files a written request for such notice.ⁿ²⁴⁰ All Board meetings are open and public.ⁿ²⁴¹ However, the Board refuses to hear public comment during the business portion of its meetings and meets in camera when necessary to discuss items such as pending litigation. The business portion of the meeting is used to take final action to adopt or amend occupational safety and health orders previously reviewed, to discuss and resolve variance and other petitions, and to discuss other items pertaining to Board functions.

During each of its meetings, the Board must provide time to receive proposals from any interested person for new or revised standards, orders, or other items concerning occupational safety and health. The Board's decision on any such proposal must be reported within six months.ⁿ²⁴²

[ii] Standard-Setting

New occupational safety and health standards are developed by the Standards Board as a result of enactment of new federal standards, public petitions requesting a new standard or amendment to existing standards, and requests and recommendations from other governmental agencies or officials for a new standard or change to existing standards.

The Standards Board must adopt standards that are *at least as effective* as federal OSHA standards on all issues for which a federal standard has been promulgated under Section 6 of the Occupational Safety and Health Act of 1970 within six months after the effective date of the federal OSHA standard.ⁿ²⁴³ However, the Board also may adopt standards that are more protective than federal standards and standards regulating hazards not covered by federal OSHA. The Board also must adopt standards that apply to products distributed or used in interstate commerce when required by compelling local conditions, provided that those standards do not unduly burden interstate commerce.ⁿ²⁴⁴

A standard or amendment to a standard that is substantially the same as a federal standard (i.e., identical except for editorial and format differences regarding other states) is not subject to *Government Code section 11346 et seq.* and *Government Code section 11349 et seq.*ⁿ²⁴⁵ If a federal standard is promulgated and within six months no state standard is adopted that is at least as effective, certain provisions apply, unless the adoption of the state standard is imminent.ⁿ²⁴⁶ Under those provisions, if there is no existing state standard governing the same issue, the federal

standard is deemed to be adopted by the Board;ⁿ²⁴⁷ and if a state standard is in effect when a federal standard is promulgated covering the same issue, the Board may adopt the federal standard (or a portion of it), provided that the federal standard is at least as effective as the corresponding state standard.ⁿ²⁴⁸ A standard adopted under these provisions is effective when filed with the Secretary of State, unless otherwise provided, but does not take effect before the corresponding federal standard; and it remains in effect for six months unless readopted for another six months or superseded.ⁿ²⁴⁹

Any new or amended occupational safety or health standard or order adopted pursuant to *Labor Code Section 142.3* must (1) prescribe the use of labels or other appropriate warnings needed to apprise workers of all hazards to which they may be exposed, state relevant symptoms and appropriate emergency treatment, and specify proper conditions and precautions for safe use or exposure; (2) where appropriate, prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards, as well as provide for employee exposure monitoring or measuring at such locations and intervals as are necessary for protection of employees; and (3) where appropriate, prescribe the type and frequency of medical examinations or other tests,ⁿ²⁵⁰ which must be made available by an employer at no cost to employees who are exposed to such hazards, in order to determine whether the health of such employees is adversely affected by such exposures.ⁿ²⁵¹

In adopting, amending, or repealing any occupational safety or health standards or orders, the Board procedures must conform with the notice and rule-making procedures set out in the Administrative Procedures Act,ⁿ²⁵² except as expressly modified by the provisions of the Labor Code governing the Board.ⁿ²⁵³ In some instances, the Board may establish an advisory committee, composed of Board staff, with legal or technical expertise on an issue, and interested members of the public, to review and draft a proposed new standard or amendment to an existing standard. Advisory committee meetings are generally open to the public. Proposals submitted to and discussed by such a committee are viewed as advisory only and are not necessarily incorporated into the final standard submitted for final public comment and Board action. Parties dissatisfied with the proposed standard submitted for adoption may appear at the hearings held for public comment.ⁿ²⁵⁴

Before adopting any proposed standard or regulation, the Board must provide public notice of the proposed standard and the time and place for public comment.ⁿ²⁵⁵ The notice must include a summary of the reasons for the proposed standard; the full text of the proposed standard with references to applicable federal OSHA standards; information regarding how it will affect existing standards; its effect, if any, on the public; the expected cost or savings to the state, local agencies, and school districts; the impact on housing costs, small business, private persons, or entities; its impact on federal funding; and whether it constitutes a "state-mandated cost" requiring state reimbursement to local government;ⁿ²⁵⁶ and other statutorily mandated information.ⁿ²⁵⁷ Comments made at the public hearing on a proposed standard are included in the record of the rule-making proceeding.ⁿ²⁵⁸ The Board may defer adoption in light of the public comment, incorporate changes in light of the public comment (as long as such changes are not so substantive as to require new notice of such amendments),ⁿ²⁵⁹ or decline any amendments and adopt the standard as proposed.

The Board may adopt emergency standards, when necessary.ⁿ²⁶⁰ Emergency regulations, based on any emergency temporary federal OSHA standard published in the Federal Register, are deemed to be effective at least until 120 days after a permanent standard is promulgated by the Secretary of Labor for the federal OSHA program.ⁿ²⁶¹

[iii] OSHA Standards Affecting Building Standards

The Occupational Safety and Health Standards Board, by an affirmative vote of at least four members, may adopt, amend, or repeal occupational safety and health standards and orders. The board is the only agency in California authorized to adopt occupational safety and health standards.ⁿ²⁶² The board must adopt standards at least as effective as the federal standards for all issues for which federal standards have been promulgatedⁿ²⁶³ within six months of the promulgation date of the federal standards.ⁿ²⁶⁴ No standard or amendment to a standard adopted by the board that is substantially the same as a federal standard is subject to *Gov. Code § 11346 et seq.*, governing public participation in

rulemaking, or § 11349 et seq., governing review of proposed regulations.ⁿ²⁶⁵ If a federal standard is promulgated and no state standard that is at least as effective as the federal standard is adopted by the board within six months of the date of promulgation of the federal standard, the following apply unless adoption of the state standard is imminent:ⁿ²⁶⁶

1. If there is no existing state standard covering the same issues, the federal standard is deemed to be a standard adopted by the Board and enforceable by the Division pursuant to *Lab. Code Section 6317*. This standard is not subject to *Gov. Code §§ 11346 et seq. or 11349 et seq.*.
2. If a state standard is in effect at the time a federal standard is promulgated covering the same issue or issues, the Board may adopt the federal standard, or a portion of it, as a standard enforceable by the Division pursuant to *Lab. Code § 6317*, provided, however, if a federal standard or portion of it is adopted which replaces an existing state standard or portion thereof, the federal standard is as effective as the state standard or portion. No adoption of or amendment to any federal standard, or portion thereof will be subject to *Gov. Code §§ 11346 et seq. or 11349 et seq.*.
3. Any state standard adopted as described above will become effective at the time it is filed with the Secretary of State, unless otherwise provided, but will not take effect before the effective date of the equivalent federal standard and will remain in effect for six months unless readopted by the Board for an additional six months or superseded by a standard adopted by the Board pursuant to *Lab. Code § 142.3(a)(2)*.
4. Any standard adopted as described above must be published in Title 8 of the California Code of Regulations in a manner similar to any other standards adopted pursuant to *Lab. Code § 142.3(a)(1), (2)*.

The State Building Standards Commission must codify and publish in a semiannual supplement to the California Building Standards Code, or in a more frequent supplement if required by federal law, all occupational safety and health standards that would otherwise meet the definition of a building standard described in *Health & Safety Code § 18909* adopted by the Board in the State Building Standards Code without reimbursement from the Board. These occupational safety and health standards may also be published by the Occupational Safety and Health Standards Board in other provisions in Title 8 of the California Code of Regulations prior to publication in the California Building Standards Code if that other publication includes an appropriate identification of occupational safety and health standards contained in the other publication.ⁿ²⁶⁷

Any occupational safety or health standard or order promulgated under *Lab. Code § 142.3* must prescribe the use of labels or other appropriate forms of warning necessary to ensure that employees are apprised of all hazards to which they are exposed, relevant symptoms, appropriate emergency treatment, and proper conditions and precautions for safe use or exposure. Where appropriate, these standards or orders must also prescribe suitable protective equipment and control or technological procedures to be used in connection with these hazards and provide for monitoring or measuring employee exposure at such locations and intervals as may be necessary for the protection of employees.

In addition, where appropriate, the occupational safety or health standard or order must prescribe the type and frequency of medical examinations or other tests which will be made available by the employer, or at his or her cost, to employees exposed to such hazards in order to most effectively determine whether the health of the employee is adversely affected by this exposure.ⁿ²⁶⁸ The results of these examinations or tests will be furnished only to the Division of Occupational Safety and Health, the State Department of Health Services, any other authorized state agency, the employer, the employee, and, at the request of the employee, to his or her physician.ⁿ²⁶⁹

■ CONSULTANT'S COMMENT:

There is a potential link between *Lab. Code § 142.3* and *Lab. Code § 3602(b)(2)*, which provides a cause of action for fraudulent concealment resulting in the aggravation of alleged work-related injuries. It is

important that an employer's safety manager pay close attention to the dangers posed by certain chemicals and adopt procedures for alerting appropriate safety or medical personnel of workplace injuries that may be the result of certain chemical exposures. *Commentary by Kirby Wilcox.*

[iv] Permanent and Temporary Variances

The Standards Board may grant an employer's request for a permanent variance from an entire or any portion of an occupational safety and health standard, order, or special order after investigation and, if appropriate, a hearing.ⁿ²⁷⁰ On application by an employer, employees, or the Division, or on its own motion, the Board also may modify or revoke a permanent variance.ⁿ²⁷¹

Permanent variances are discussed in more detail in § 21.48[2].

Temporary variances may be granted by the Division of Occupational Safety and Health.ⁿ²⁷² Any employer or other person adversely affected by the granting or denial of a temporary variance by the Division may appeal to the Standards Board within 15 working days from receipt of notice of the variance approval or denial.ⁿ²⁷³ The 15-day period for appeal may be extended by the Board for good cause.ⁿ²⁷⁴ The decision of the Standards Board is binding on the Director of the Department of Industrial Relations and the Division with respect to the parties to the appeal, although the Director may seek judicial review of any such decision even if the Director did not participate in the appeal.ⁿ²⁷⁵ The decision of the Standards Board is final except for rehearing or judicial review.ⁿ²⁷⁶

Temporary variances are discussed more fully in § 21.48 [1].

[d] Occupational Safety and Health Appeals Board

The Occupational Safety and Health Appeals Board (OSHAB) is an independent body within the Department of Industrial Relations that adjudicates employer appeals from citations issued by the Division for alleged violations of occupational safety and health standards, orders, and special orders.ⁿ²⁷⁷

The OSHAB consists of three members--one from the field of management, one from labor, and one general public member from neither labor nor management--who are appointed by the governor subject to approval of the senate.ⁿ²⁷⁸ OSHAB members serve on a full-time basisⁿ²⁷⁹ for four-year terms and until a successor has been appointed and confirmed.ⁿ²⁸⁰ The Chairperson of the OSHAB is selected by and serves at the pleasure of the governor.ⁿ²⁸¹ The Chairperson may select an Executive Officer to supervise OSHAB staff and to act as a deputy OSHAB member, when necessary.ⁿ²⁸²

All decisions and orders of the OSHAB must be writtenⁿ²⁸³ and are final, unless reconsideration or judicial review is granted.ⁿ²⁸⁴ An employer or employee appeal from a citation, civil penalty, order, or abatement period granted by the Division is first heard and decided by an administrative law judge of the OSHAB.ⁿ²⁸⁵ Any party aggrieved by the decision may petition for reconsideration by the OSHAB. OSHAB decisions after reconsideration require a majority.ⁿ²⁸⁶ The decisions of the OSHAB are binding on the Director of Industrial Relations and the Division with reference to the parties to the appeal, but the Director may seek judicial review even if the Director neither appeared nor participated in the appeal hearing.ⁿ²⁸⁷

The OSHAB, acting as a whole, has adopted and may repeal or amend rules of practice and procedure governing the administrative hearings and reconsideration process of the Board.ⁿ²⁸⁸

Any person affected by an order or decision of the OSHAB may seek judicial review of the OSHAB's decisions and orders by filing a petition for writ of mandate in the superior court of the county in which he or she resides, within 30 days of the OSHAB's denial of a petition for reconsideration or of the OSHAB's decision after reconsideration.ⁿ²⁸⁹

Filing a petition for writ of mandate does not automatically stay or suspend any decision or order of the OSHAB; however, the superior court may order such relief.ⁿ²⁹⁰

The OSHAB may award reasonable costs, including attorney's, consultant's, and witness's fees, not to exceed \$5,000 in aggregate, to any employer who appeals a citation issued by the Division for an alleged violation of an occupational safety or health standard, rule, order, or regulation if (1) the employer prevails in the appeal or the citation is withdrawn; and (2) the OSHAB finds that the Division's action or conduct in issuing the citation was arbitrary or capricious.ⁿ²⁹¹

The OSHAB has expressed the view that it is not constrained to follow precedent decisions of the Occupational Safety and Health Review Commission, which adjudicates appeals under the federal OSH Act, in view of the sovereignty and preeminence of the California Occupational Safety and Health Act as interpreted by California courts.ⁿ²⁹²

Appeal proceedings are discussed fully in § 21.45.

Legal Topics:

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

Labor & Employment Law Occupational Safety & Health General Overview Workers' Compensation & SSDI Remedies Under Other Laws General Overview Workers' Compensation & SSDI Remedies Under Other Laws Occupational Safety & Health Act

FOOTNOTES:

(n1)Footnote 1. *See* Stats. 1911, ch. 399.

(n2)Footnote 2. *See Cal. Const., art. XX, § 21.*

(n3)Footnote 3. Stats. 1913, ch. 176, § 1.

(n4)Footnote 4. Stats. 1913, ch. 176, §§ 51-72.

(n5)Footnote 5. The act provided, among other things, that "Every employer shall furnish employment which shall be safe for the employees therein ... and shall furnish and use such safety devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably adequate to render such employment ... safe, and shall do every other thing reasonably necessary to protect the life and safety of such employees." Stats. 1913, ch. 176, § 52.

(n6)Footnote 6. Stats. 1913, ch. 176, § 62.

(n7)Footnote 7. Stats. 1913, ch. 176, § 61.

(n8)Footnote 8. Stats. 1913, ch. 176, § 72.

(n9)Footnote 9. Stats. 1913, ch. 176, § 59.

(n10)Footnote 10. Stats. 1913, ch. 176, § 67.

(n11)Footnote 11. Stats. 1913, ch. 176, § 72.

(n12)Footnote 12. Stats. 1917, ch. 586, § 1 et seq.

(n13)Footnote 13. *See* Hunter, *The California Occupational Safety and Health Act: An Overview*, 50 L. A. Bar Bull. 304 (1975) (quoting *Amendments to Constitution and Proposed Statutes With Argument Respecting the Same to Be Submitted to the Electors of the State of California at the General Election on Tuesday, November 5, 1918*, at 56

(1918)).

(n14)Footnote 14. Stats. 1937, ch. 90.

(n15)Footnote 15. Stats. 1937, ch. 90, § 6508.

(n16)Footnote 16. Stats. 1937, ch. 90, §§ 6800-6952.

(n17)Footnote 17. Stats. 1937, ch. 90, §§ 7100-7319.

(n18)Footnote 18. Stats. 1937, ch. 90, §§ 7400-7501.

(n19)Footnote 19. Stats. 1937, ch. 90 §§ 7600, 7601.

(n20)Footnote 20. Stats. 1945, ch. 1431.

(n21)Footnote 21. Later renamed California Code of Regulations.

(n22)Footnote 22. Hunter, *The California Occupational Safety and Health Act: An Overview*, 50 L.A. Bar Bull. 304 (1975).

(n23)Footnote 23. Stats. 1949, ch. 1060, § 1 (former *Lab. Code* § 6604).

(n24)Footnote 24. Stats. 1963, ch. 1083, § 1 (former *Lab. Code* § 6416, repealed by Stats. 1973, ch. 993, § 93). For discussion of criminal sanctions currently applicable, see §§ 21.60-21.68.

(n25)Footnote 25. See 29 U.S.C. § 667(b); 29 C.F.R. § 1902; 38 Fed. Reg. 10717 (1973) .

(n26)Footnote 26. See 29 U.S.C. § 672(d).

(n27)Footnote 27. *Lab. Code* § 7950 et seq.

(n28)Footnote 28. 38 Fed. Reg. 10719 .

(n29)Footnote 29. 41 Fed. Reg. 1905 (Jan. 13, 1976) .

(n30)Footnote 30. 42 Fed. Reg. 41858 .

(n31)Footnote 31. *Lab. Code* § 6300.

(n32)Footnote 32. *Cal. Const.*, art. XIV, § 4; see also *Lab. Code* § 3201.

(n33)Footnote 33. *Lab. Code* § 3202.

(n34)Footnote 34. *Lab. Code* § 6300 et seq.

(n35)Footnote 35. *Lab. Code* §§ 6300-6711.

(n36)Footnote 36. *Lab. Code* § 6800 et seq.

(n37)Footnote 37. *Lab. Code* § 7100 et seq.

(n38)Footnote 38. *Lab. Code* § 7400 et seq.

(n39)Footnote 39. *Lab. Code* § 7600 et seq.

- (n40)Footnote 40. *Lab. Code § 7620 et seq.*
- (n41)Footnote 41. *Lab. Code § 7800 et seq.*
- (n42)Footnote 41.1. *See Lab. Code § 7850 et seq.*
- (n43)Footnote 42. *Lab. Code § 7900 et seq.*
- (n44)Footnote 43. *Lab. Code § 7950 et seq.*
- (n45)Footnote 44. *Lab. Code § 9000 et seq.*; *see* discussion in [2][a], *below*.
- (n46)Footnote 44.1. *Lab. Code § 9100 et seq.*
- (n47)Footnote 45. *8 Cal. Code Reg. § 330 et seq.*
- (n48)Footnote 46. *8 Cal. Code Reg. § 345 et seq.*
- (n49)Footnote 47. *8 Cal. Code Reg. § 401 et seq.*
- (n50)Footnote 48. *8 Cal. Code Reg. § 450 et seq.*
- (n51)Footnote 49. *Ixta v. Rinaldi* (Cal. Ct. App., Oct. 27, 1987) Case No. C002805.
- (n52)Footnote 50. Former *Health & Safety Code § 24200 et seq.*
- (n53)Footnote 51. *Lab. Code § 9000 et seq.*
- (n54)Footnote 52. *Lab. Code § 9020(b).*
- (n55)Footnote 53. *Lab. Code § 9009(a).*
- (n56)Footnote 54. *Lab. Code § 9009(b).*
- (n57)Footnote 55. *Lab. Code § 9009(c).*
- (n58)Footnote 56. *Lab. Code § 9009(d).*
- (n59)Footnote 57. *Lab. Code § 9009(e).*
- (n60)Footnote 58. *Lab. Code § 9004(b).*
- (n61)Footnote 59. *Lab. Code § 9004(c).*
- (n62)Footnote 60. *Lab. Code § 9004(d).*
- (n63)Footnote 61. *Lab. Code § 9003.*
- (n64)Footnote 62. *Lab. Code § 9020(a).*
- (n65)Footnote 63. *Lab. Code § 9015.*
- (n66)Footnote 64. *Lab. Code § 9022.*
- (n67)Footnote 65. *Lab. Code § 9020(b).*

(n68)Footnote 66. *Lab. Code § 9031.*

(n69)Footnote 67. *Lab. Code § 9050.*

(n70)Footnote 68. *Lab. Code § 9032.*

(n71)Footnote 69. *Lab. Code § 9009.*

(n72)Footnote 70. *Lab. Code § 9051.*

(n73)Footnote 71. *Lab. Code §§ 6325, 6325.5 (friable asbestos).*

(n74)Footnote 72. *8 Cal. Code Reg. § 5200 et seq.*

(n75)Footnote 73. *Lab. Code § 9030.*

(n76)Footnote 74. *Lab. Code § 9040.*

(n77)Footnote 75. *Lab. Code § 9031.*

(n78)Footnote 76. *See Lab. Code § 9060.*

(n79)Footnote 77. *See Lab. Code § 9060.*

(n80)Footnote 78. *Lab. Code § 9052.*

(n81)Footnote 79. *Lab. Code § 7950 et seq.*

(n82)Footnote 80. *Lab. Code § 7952.*

(n83)Footnote 81. *Lab. Code § 7954.*

(n84)Footnote 82. *Lab. Code § 7953.*

(n85)Footnote 83. *See Troy Gold Industries, Ltd. v. Occupational Safety & Health Appeals Bd. (1986) 187 Cal. App. 3d 379, 389, 231 Cal. Rptr. 861 .*

(n86)Footnote 84. *Lab. Code § 7951(b).*

(n87)Footnote 85. *Lab. Code § 7951(a).*

(n88)Footnote 86. *Lab. Code § 7951(a).*

(n89)Footnote 87. *Lab. Code § 8004.*

(n90)Footnote 88. *See 8 Cal. Code Reg. § 8400 et seq.*

(n91)Footnote 89. *Lab. Code § 7951(c).*

(n92)Footnote 90. *Lab. Code § 7951(c).*

(n93)Footnote 91. *See 8 Cal. Code Reg. § 6950 et seq.*

(n94)Footnote 92. *Lab. Code § 7955.*

(n95)Footnote 93. *Lab. Code* § 7955(a).

(n96)Footnote 94. *Lab. Code* § 7955(b).

(n97)Footnote 95. *Lab. Code* § 7955(c).

(n98)Footnote 96. *Lab. Code* § 7955(d).

(n99)Footnote 97. *Lab. Code* § 7956.

(n100)Footnote 98. *Lab. Code* § 7955.

(n101)Footnote 99. *Lab. Code* § 7955.

(n102)Footnote 100. *Lab. Code* § 7957.

(n103)Footnote 101. *Lab. Code* § 7958.

(n104)Footnote 102. *Lab. Code* § 7959.

(n105)Footnote 103. *Lab. Code* § 7959.

(n106)Footnote 104. *Lab. Code* § 7962.

(n107)Footnote 105. *Lab. Code* § 7963.

(n108)Footnote 106. *Lab. Code* § 7964.

(n109)Footnote 107. *Lab. Code* § 7960.

(n110)Footnote 108. *Lab. Code* § 7960.

(n111)Footnote 109. *Lab. Code* § 7999.

(n112)Footnote 110. *Lab. Code* § 8000.

(n113)Footnote 111. *Lab. Code* §§ 7965-7985.

(n114)Footnote 112. *Lab. Code* §§ 7965, 7966, 7977.

(n115)Footnote 113. *Lab. Code* §§ 7966, 7977.

(n116)Footnote 114. *Lab. Code* §§ 7966, 7977.

(n117)Footnote 115. *Lab. Code* §§ 7968, 7977.

(n118)Footnote 116. *Lab. Code* §§ 7971, 7977.

(n119)Footnote 117. *Lab. Code* §§ 7972, 7977.

(n120)Footnote 118. *Lab. Code* §§ 7975, 7977.

(n121)Footnote 119. *Lab. Code* § 7976.

(n122)Footnote 120. *Lab. Code* §§ 7974, 7983.

(n123)Footnote 121. *Lab. Code* § 7979.

(n124)Footnote 122. *Lab. Code* § 7982.

(n125)Footnote 123. *Lab. Code* § 7984.

(n126)Footnote 124. *Lab. Code* § 7985.

(n127)Footnote 125. *Lab. Code* § 7990.

(n128)Footnote 126. *Lab. Code* §§ 7991, 7992.

(n129)Footnote 127. *Lab. Code* § 7993.

(n130)Footnote 128. *Lab. Code* §§ 7994, 7995.

(n131)Footnote 129. *Lab. Code* § 8001.

(n132)Footnote 130. *Lab. Code* § 8003.

(n133)Footnote 131. *Lab. Code* §§ 7996, 7985.

(n134)Footnote 132. *Lab. Code* § 7985.

(n135)Footnote 133. *Health & Safety Code* §§ 25249.5-25249.13.

(n136)Footnote 134. Commonly referred to as the "Governor's List."

(n137)Footnote 135. *See* discussion in [d], *below*.

(n138)Footnote 136. *Health & Safety Code* § 25249.8(a); *see* 8 *Cal. Code Reg.* § 339 (Governor's List); *see also* 29 *C.F.R.* § 1910.1200 (federal Hazard Communication Standard).

(n139)Footnote 137. *Health & Safety Code* § 25249.8(c).

(n140)Footnote 138. *Health & Safety Code* § 25249.8(a), (c).

(n141)Footnote 139. *Health & Safety Code* § 25249.6. The warning requirement in *Health & Safety Code* § 25249.6 does not apply to an exposure for which federal law governs warning in a manner that preempts state authority; an exposure that takes place less than twelve months after the chemical is listed in accordance with the act; or an exposure that is either shown to pose no significant risk, assuming lifetime exposure at that level for known cancer-causing substances, or no observable effect, assuming exposure at 1,000 times that level for known reproductive toxins. *See Health & Safety Code* § 25249.10.

(n142)Footnote 140. *Health & Safety Code* § 25249.8(b).

(n143)Footnote 141. *Health & Safety Code* § 25249.11.

(n144)Footnote 142. *Health & Safety Code* § 25249.7(a).

(n145)Footnote 143. *Health & Safety Code* § 25249.7(b).

(n146)Footnote 144. *Health & Safety Code* § 25249.7(c).

(n147)Footnote 145. *See Health & Safety Code* § 25249.7(d).

(n148)Footnote 146. 22 Cal. Code Reg. § 12601 et seq.

(n149)Footnote 147. 22 Cal. Code Reg. § 12601(c).

(n150)Footnote 148. 22 Cal. Code Reg. § 12721(d)(3).

(n151)Footnote 149. *California Lab. Federation v. Occupational Safety & Health Stds. Bd.* (1990) 221 Cal. App. 3d 1547, 1559, 271 Cal. Rptr. 310 .

(n152)Footnote 150. *See California Lab. Federation v. Occupational Safety & Health Stds. Bd.* (1990) 221 Cal. App. 3d 1547, 1558, 271 Cal. Rptr. 310 .

(n153)Footnote 151. *Lab. Code* § 6361(a)(2).

(n154)Footnote 152. *Lab. Code* § 6361(a)(3).

(n155)Footnote 153. *Lab. Code* § 6361(b).

(n156)Footnote 154. *Lab. Code* § 6362.

(n157)Footnote 155. *Lab. Code* § 6362; 8 Cal. Code Reg. § 337.

(n158)Footnote 156. *Lab. Code* § 6370.

(n159)Footnote 157. *Lab. Code* § 6380.

(n160)Footnote 158. *Lab. Code* § 6382.

(n161)Footnote 159. *Lab. Code* § 6380.5.

(n162)Footnote 160. 33 U.S.C. § 1251 et seq.

(n163)Footnote 161. 42 U.S.C. § 7401 et seq.

(n164)Footnote 162. *See Lab. Code* § 147.2.

(n165)Footnote 163. *Lab. Code* § 6382; *see* 29 C.F.R. § 1910.1200 (federal Hazard Communication Standard).

(n166)Footnote 164. 8 Cal. Code Reg. § 5194(b)(2).

(n167)Footnote 165. *Lab. Code* § 6381.

(n168)Footnote 166. *Lab. Code* § 6385.

(n169)Footnote 167. *Lab. Code* § 6384.

(n170)Footnote 168. *Lab. Code* § 6386.

(n171)Footnote 169. *Lab. Code* § 6390.

(n172)Footnote 170. *Lab. Code* § 6390.

(n173)Footnote 171. *Lab. Code* § 6390.

(n174)Footnote 172. *Lab. Code* § 6394.

(n175)Footnote 173. *See Lab. Code § 6392.*

(n176)Footnote 174. *Lab. Code § 6399.*

(n177)Footnote 175. *See Lab. Code § 6395(a).*

(n178)Footnote 176. *Lab. Code § 6397.*

(n179)Footnote 177. *Lab. Code § 6393.*

(n180)Footnote 178. *Lab. Code § 6399.7.*

(n181)Footnote 179. *8 Cal. Code Reg. § 5194.*

(n182)Footnote 180. *8 Cal. Code Reg. § 5194(d)(1).*

(n183)Footnote 181. *8 Cal. Code Reg. § 5194(d)(1).*

(n184)Footnote 182. *8 Cal. Code Reg. § 5194(b)(1).*

(n185)Footnote 183. *8 Cal. Code Reg. § 5194; see also 8 Cal. Code Reg. § 3204 (retention of records).*

(n186)Footnote 183.1. *See Cal/OSHA Policies & Procedures C-43, Attachment (7/01/95).*

(n187)Footnote 184. *8 Cal. Code Reg. § 5194(g)(8).*

(n188)Footnote 185. *8 Cal. Code Reg. § 5194(g)(10).*

(n189)Footnote 186. *8 Cal. Code Reg. § 5194(g)(11); Lab. Code § 6399.*

(n190)Footnote 187. *8 Cal. Code Reg. § 5194(h)(1).*

(n191)Footnote 188. *8 Cal. Code Reg. § 5194(h)(2).*

(n192)Footnote 189. *8 Cal. Code Reg. § 5194(h)(2)(G).*

(n193)Footnote 190. *Lab. Code § 6399.*

(n194)Footnote 191. *8 Cal. Code Reg. § 5194(h)(3).*

(n195)Footnote 192. *Bus. & Prof. Code § 7109.5; see also Lab. Code § 6652 (Division of Occupational Safety and Health required to provide board with certified copy of notice of civil penalty if contractor-employer fails to pay penalty within 60 days after penalty becomes final).*

(n196)Footnote 193. *See Health & Safety Code §§ 105175(a), 105185(b).*

(n197)Footnote 194. *See Health & Safety Code §§ 105175(a), 105185(b).*

(n198)Footnote 195. *Health & Safety Code §§ 105180, 105185(b).*

(n199)Footnote 196. *See Health & Safety Code § 105185(c).*

(n200)Footnote 197. *Lab. Code § 50.7.*

(n201)Footnote 198. *See Lab. Code § 51.*

- (n202)Footnote 199. *See* discussion in [b], *below*.
- (n203)Footnote 200. *Lab. Code* § 56.
- (n204)Footnote 201. *Lab. Code* § 60.5.
- (n205)Footnote 202. *See Lab. Code* § 57.
- (n206)Footnote 203. *Lab. Code* § 57.1(b).
- (n207)Footnote 204. *See* discussion in [iii], *below*.
- (n208)Footnote 205. *See* discussion in [ii], *below*.
- (n209)Footnote 206. *Lab. Code* § 6315; 8 *Cal. Code Reg.* § 344.52.
- (n210)Footnote 207. A serious violation is defined at *Lab. Code* § 6432 and.
- (n211)Footnote 208. Serious exposure is defined at *Lab. Code* § 6432.
- (n212)Footnote 209. *Lab. Code* § 6315.
- (n213)Footnote 210. *Lab. Code* § 6315(g).
- (n214)Footnote 210.1. *Lab. Code* § 6315(g).
- (n215)Footnote 211. *Lab. Code* § 6315(i).
- (n216)Footnote 212. *Lab. Code* § 6315(b)(1).
- (n217)Footnote 213. *Lab. Code* § 6315(b)(2).
- (n218)Footnote 214. *Lab. Code* § 6315(b)(2)
- (n219)Footnote 215. *Lab. Code* § 6315(b)(3).
- (n220)Footnote 216. *Lab. Code* § 6315(e).
- (n221)Footnote 217. *Lab. Code* § 6315(e).
- (n222)Footnote 218. *Lab. Code* § 6315(e); *see* discussion in § 21.40[2].
- (n223)Footnote 219. *Lab. Code* § 6315(h).
- (n224)Footnote 220. 8 *Cal. Code Reg.* § 344.51.
- (n225)Footnote 221. *Lab. Code* § 6315(d).
- (n226)Footnote 222. *Lab. Code* § 6315(c).
- (n227)Footnote 223. *See Lab. Code* § 6351.
- (n228)Footnote 224. *See* discussion in [v], *below*.
- (n229)Footnote 225. *Lab. Code* § 6354.

(n230)Footnote 226. *Lab. Code* § 6354(b). For discussion of injury and illness prevention plans, *see* § 21.12.

(n231)Footnote 227. *Lab. Code* § 6354(b); *see Lab. Code* § 6314.1(a),(b) (requiring Division to identify employers in high-hazard industries with highest incidence of preventable occupational injuries and illnesses and workers' compensation losses).

(n232)Footnote 228. *Lab. Code* § 6354(a).

(n233)Footnote 229. *Lab. Code* § 6355.

(n234)Footnote 230. *Lab. Code* § 6355.

(n235)Footnote 231. *Lab. Code* § 142.3(a); *see* discussion in [ii], *below*.

(n236)Footnote 232. *Lab. Code* § 143; 8 *Cal. Code Reg.* § 401 *et seq.*; *see* discussion in § 21.48[2].

(n237)Footnote 233. *Lab. Code* § 6457; 8 *Cal. Code Reg.* § 401 *et seq.*; *see* discussion in § 21.48[1][c].

(n238)Footnote 234. *Lab. Code* § 140(a).

(n239)Footnote 235. *Lab. Code* § 141(a).

(n240)Footnote 236. *Lab. Code* § 140(a).

(n241)Footnote 237. *Lab. Code* § 140(c).

(n242)Footnote 238. *Lab. Code* § 142.3(a)(1).

(n243)Footnote 239. *Lab. Code* § 142.1.

(n244)Footnote 240. *Lab. Code* § 142.1.

(n245)Footnote 241. *Lab. Code* § 142.1.

(n246)Footnote 242. *Lab. Code* § 142.2.

(n247)Footnote 243. 29 *U.S.C.* § 655; *Lab. Code* § 142.3(a)(2).

(n248)Footnote 244. *Lab. Code* § 142.3(a)(2).

(n249)Footnote 245. *See Lab. Code* § 142.3(a)(4); *Gov. Code* § 11349 *et seq.* (review of regulations).

(n250)Footnote 246. *See Lab. Code* § 142.3(a)(4).

(n251)Footnote 247. *See Lab. Code* § 142.3(a)(4)(A).

(n252)Footnote 248. *See Lab. Code* § 142.3(a)(4)(B).

(n253)Footnote 249. *See Lab. Code* § 142.3(a)(4)(C); *Lab. Code* § 142.3(a)(2) (adoption of standards applicable to superseding standard).

(n254)Footnote 250. The results of any such exam or test may only be furnished to the Division, the California Department of Health Services, any other authorized state agency, the employer, the employee, and, at the employee's request, to his or her physician. *Lab. Code* § 142.3(e).

(n255)Footnote 251. *Lab. Code § 142.3(d)*.

(n256)Footnote 252. *See Gov. Code § 11346 et seq.*

(n257)Footnote 253. *Lab. Code § 142.4(a)*.

(n258)Footnote 254. *See Gov. Code §§ 11346.5(a)(16), 11346.8.*

(n259)Footnote 255. *See Gov. Code §§ 11346.4, 11346.5.*

(n260)Footnote 256. *See generally Gov. Code § 17500 et seq.*

(n261)Footnote 257. *See Gov. Code §§ 11346.5(a), 11346.9.*

(n262)Footnote 258. *See Gov. Code § 11347.3(a)(8)*.

(n263)Footnote 259. *See Gov. Code § 11346.8(c)*.

(n264)Footnote 260. *See Gov. Code § 11346.1.*

(n265)Footnote 261. *Lab. Code § 142.4.*

(n266)Footnote 262. *Lab. Code § 142.3(a)(1)*.

(n267)Footnote 263. *See Section 6 of the Occupational Safety and Health Act of 1970 (P.L. 91-596).*

(n268)Footnote 264. *Lab. Code § 142.3(a)(2)*.

(n269)Footnote 265. *Lab. Code § 142.3(a)(3)*. For these purposes, "substantially the same" means identical to the federal standard with the exception of editorial and format differences needed to conform to other state laws and standards.

(n270)Footnote 266. *Lab. Code 142.3(a)(4)*.

(n271)Footnote 267. *Lab. Code § 142.3(b)*.

(n272)Footnote 268. *Lab. Code § 142.3(c)*.

(n273)Footnote 269. *Lab. Code § 142.3(d)*.

(n274)Footnote 270. *See Lab. Code §§ 143-143.2; 8 Cal. Code Reg. § 401 et seq.*

(n275)Footnote 271. *Lab. Code § 143(d)*.

(n276)Footnote 272. *Lab. Code § 6452; see generally Lab. Code §§ 6450-6457.*

(n277)Footnote 273. *Lab. Code § 6455.*

(n278)Footnote 274. *Lab. Code § 6455; 8 Cal. Code Reg. § 404.1.*

(n279)Footnote 275. *Lab. Code § 6456.*

(n280)Footnote 276. *Lab. Code § 6457.*

(n281)Footnote 277. *See Lab. Code §§ 148 et seq., 6600 et seq.*

(n282)Footnote 278. *Lab. Code § 148(a).*

(n283)Footnote 279. *See Lab. Code § 148(a).*

(n284)Footnote 280. *Lab. Code § 148.1.*

(n285)Footnote 281. *Lab. Code § 148(c).*

(n286)Footnote 282. *See Lab. Code §§ 148.2, 149.*

(n287)Footnote 283. *Lab. Code § 148.4.*

(n288)Footnote 284. *Lab. Code §§ 148.5, 6626-6633.*

(n289)Footnote 285. *See Lab. Code § 6600 et seq.*

(n290)Footnote 286. *Lab. Code § 148.9.*

(n291)Footnote 287. *Lab. Code § 148.6.*

(n292)Footnote 288. *Lab. Code § 148.7; see 8 Cal. Code Reg. § 345 et seq.*

(n293)Footnote 289. *Lab. Code § 6627.*

(n294)Footnote 290. *Lab. Code § 6633.*

(n295)Footnote 291. *Lab. Code § 149.5; 8 Cal. Code Reg. §§ 395-397.*

(n296)Footnote 292. *Kaiser Steel Corporation (Mar. 5, 1981) Cal. OSHAB Docket No. 78-1161 (decision after reconsideration).*



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
 CHAPTER 21 Occupational Safety and Health Regulation
 Part A. OVERVIEW

2-21 California Employment Law § 21.03

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.03 Jurisdiction and Coverage

[1] Division Powers and Authority

[a] Scope of Jurisdiction

The Division of Occupational Safety and Health (the Division) has "power, jurisdiction, and supervision over every employment and place of employment in [California], which is necessary to adequately enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment."¹

"Place of employment" is defined as "any place, and the premises appurtenant thereto, where employment is carried on, except a place the health and safety jurisdiction over which is vested by law in, and actively exercised by, any state or federal agency other than the division."² The intent of this definition is to set out a jurisdictional test that focuses on both the authority to regulate and the exercise of that authority.³

The California Supreme Court has interpreted the phrase "vested by law" to refer to agency jurisdiction that is specifically and statutorily mandated to protect the health and safety of workers,⁴ and has held that the phrase "active exercise" of jurisdiction "requires, at the very least, the promulgation of a body of rules directly addressing the health and safety" of workers.⁵

Under the Labor Code, the Division also has express statutory authority to enforce occupational safety and health laws and standards over certain specified hazardous types and places of employment.⁶

[b] Exceptions

While the scope of the Division's authority under the Labor Code is given a broad and liberal interpretation in order to provide for safety of employees⁷ and to minimize any potential gap in coverage,⁸ there are some limitations to the

Division's jurisdiction over workplaces in California. For example, the Division does not have jurisdiction over mines in California as long as the U.S. Mine Safety and Health Administration (MSHA) actively exercises jurisdiction over employee occupational safety and health at mines.ⁿ⁹

Jurisdiction over private contractors working on federal installations is resolved on a case-by-case basis. Where the federal agency has claimed exclusive federal jurisdiction over private contractors working on federal installations and has challenged state jurisdiction or refused entry to the Division, the Division may, as a matter of policy, recognize federal jurisdiction until the jurisdictional issue is resolved.ⁿ¹⁰

The Division has jurisdiction over railroad employees in offices and shops devoted to the construction, maintenance, or repair of railroad equipment, and all other railroad employees,ⁿ¹¹ as long as no other federal or state agency is actively exercising occupational safety jurisdiction;ⁿ¹² over rail rapid transit systems, electric interurban railroads, or street railroads;ⁿ¹³ and over employees of all other public utilities as defined in the Public Utilities Actⁿ¹⁴ unless the Public Utility Commission finds that Division enforcement actions unduly and prejudicially interfere with the construction or operation of any public utility.ⁿ¹⁵

The Division recognizes exclusive federal jurisdiction over the following *places of employment* and will refer complaints and accident reports for such places to federal OSHA:ⁿ¹⁶

1. Maritime activities on the navigable waters of the United States,ⁿ¹⁷ including the following:
 - a. Longshore operations on all vessels from the shoreside of the means of access to said vessels;
 - b. Marine vessel construction operations (from the means of access on the shore);
 - c. All afloat marine shipbuilding and repair from the foot of the gangway;
 - d. All shipbuilding and repair in graving docks or dry docks;
 - e. All ship repairing done on marine railways or similar conveyances used to haul vessels out of the water;
 - f. All floating fuel operations;
 - g. All afloat dredging and pile driving and similar operations;
 - h. All diving from vessels afloat on the navigable waters;
 - i. All offshore drilling rigs operating outside the three-mile continental limit;
2. Employment with the U.S. Army National Guard or U.S. Air National Guard; and
3. Employment at the following National Parks and Monuments:
 - a. Cabrillo National Monument;
 - b. Sequoia/Kings Canyon National Park; and
 - c. Yosemite National Park.

The Division also recognizes federal OSHA jurisdiction over the following *employees and matters*: n18

1. Federal employees;n19
2. Complaints filed pursuant to the following:
 - a. The anti-discrimination provisions of the federal OSH Act;n20
 - b. Section 405 of the Surface Transportation Assistance Act;n21
 - c. Section 211 of the Asbestos Hazard Emergency Response Act;n22 and
 - d. Section 7 of the International Safe Container Act.n23
3. Enforcement of federal OSHA temporary emergency and new permanent standards, until such time as California adopts equivalent standards;
4. Federal OSHA field sanitation standards for farmworkers until California standards are amended;
5. Federal hazardous waste and federal OSHA air contaminant standards that are more stringent than California standards;
6. Manufacture of explosives under contract to the U.S. Department of Defense in accordance with DOD explosives safety requirements and surveillance;n24 and
7. Inspections and investigations conducted in order to monitor the California state OSHA plan, pursuant to the requirements of the federal OSHA.n25

[c] Concurrent Jurisdiction

[i] Concurrent Federal-State Jurisdiction

The Division recognizes concurrent federal and state jurisdiction over occupational safety and health matters involving (1) private contractors on federal installationsn26 and (2) employment at Golden Gate National Recreation Area and Lassen Volcanic National Park.n27

Following the resumption of state jurisdiction over private-sector occupational safety and health, the Division and the federal OSHA administration executed a memorandum of understanding that allows federal OSHA, among other things, to conduct regularly scheduled inspections in selected industries in the private sector.

[ii] Master Agreements Governing California Interagency Enforcement Activity

The Division has executed Master Agreements with the California Department of Food and Agriculture (CDFA) and the California Department of Housing and Community Development (DHCD) regarding each agency's enforcement responsibilities.

Under the Master Agreement between the Division and the CDFA, the Division is responsible for enforcement related to pesticide exposures during manufacturing, formulating, storage, and distribution; the CDFA and the local county agricultural commissioner are responsible for investigating pesticide exposures during application and exposures during

field re-entry; and fumigation activity is subject to concurrent jurisdiction of all three agencies.ⁿ²⁸ Some pesticide applicators are deemed exempt from Cal/OSHA regulations governing pesticides. The Division also enforces the provisions of *Health and Safety Code Section 105200*, which requires a treating physician to report any pesticide poisoning incident.

The Master Agreement executed between the Division and the Department of Housing and Community Development sets out procedures for assuring safe and healthful housing for workers living in labor camps. DOSH enforces the requirements of *Title 8 California Code of Regulations Section 3350*, which requires every employer who operates a labor camp to obtain and have available a valid housing permit issued by the Department of Housing and Community Development or by any other authorized local governmental body. Under the Master Agreement, the Division refers any observations or complaints about hazardous conditions to the DHCD.

The Division also shares concurrent jurisdiction with various other state agencies even where no master agreement has been executed.ⁿ²⁹

[d] Preemption

Under the federal Occupational Safety and Health Act of 1970, a state is preempted from regulating occupational safety and health matters covered by federal OSHA standards unless the state has a federally approved state OSHA plan. The California Supreme Court has observed that the state plan scheme embodied in the federal act "merely removes federal preemption so that the state may exercise its own sovereign powers over occupational safety and health."ⁿ³⁰ A state with an approved state plan may establish more stringent standards than those adopted by federal OSHA and may extend the jurisdiction of the state OSHA enforcement agency beyond the scope of jurisdiction held by federal OSHA.ⁿ³¹

The California Supreme Court has held that the Division is not preempted from exercising jurisdiction over occupational safety and health matters involving airline ground maintenance operations.ⁿ³² The OSHAB has ruled that the Division is not preempted from exercising its jurisdiction by federal laws and regulations governing motor-carrier safety,ⁿ³³ or by the Federal Motor Vehicle Safety Standard No. 207.ⁿ³⁴ Furthermore, the OSHAB has held that the Division's jurisdiction to determine who must pay for required personal protective safety clothing and equipment is not preempted by the National Labor Relations Act.ⁿ³⁵

[2] Employment Relationship

[a] Employee

Employee exposure to a hazardous condition is a threshold issue in the appeal of any citation, order, special order and civil penalty issued by the Division. Even if a hazardous condition exists at a place of employment, failure to establish employee exposure by a preponderance of evidence will result in dismissal of any citation issued.ⁿ³⁶

"Employee" is defined in the California Occupational Safety and Health Act as "every person who is required or directed by any employer, to engage in any employment, or to go to work or be at any time in any place of employment."ⁿ³⁷ Operative January 1, 2004,ⁿ³⁸ "employee" also includes volunteer firefighters, who are covered by *Labor Code Section 3200*, pursuant to *Labor Code Section 3361*.ⁿ³⁹ State prisoners engaged in correctional industry are deemed to be employees, except for the purposes of appealing citations, orders, special orders, and penalties.ⁿ⁴⁰

There is a rebuttable presumption that a worker performing work for which a contractor's license is required under *Business and Professions Code Section 7000 et seq.* or performing services for a person required to obtain such a license is an employee, rather than an independent contractor.ⁿ⁴¹

The OSHAB has held that neither a partner of the cited employern⁴² nor a working employer who is a sole proprietorn⁴³ is an "employee" under the California Occupational Safety and Health Act.

The status of family members performing services for relatives is decided on a case-by-case basis.n⁴⁴

[b] Employer

[i] General Definition

The term "employer" under the act includes (1) the state of California and every state agency; (2) each county, city, and district, and all public and quasi-public corporations and public agencies therein; (3) every person, including any public service corporation, that has any natural person in service; and (4) the legal representative of any deceased employer.n⁴⁵

[ii] Special-Employer Doctrine

By exercising complete control over the work activities of an employee, a third party may create a "special employer" relationship with that person, which imposes the same duties on the special employer as are imposed on a primary or general employer under the Labor Code.n⁴⁶ For example, in *Optical Coating Laboratory, Inc.*, n⁴⁷ a journeyman electrician, employed and continuously paid by Jervan Electric, was "hired out" for four to six months to work at Optical Coating. Although the written contract between Jervan and Optical stated that the electrician was an employee of Jervan, the employee wore a Jervan badge while working for Optical, and Optical could not fire the employee, the OSHAB found that Optical exercised complete control over the journeyman's work activities at Optical and that Optical provided the only meaningful supervision of his work. Accordingly, the OSHAB found Optical to be a special employer, properly cited for a safety order violation, and Jervan to be the general employer. Similarly, an employer who leased a crane from a crane service, which also supplied the crane operator and oiler, was properly cited as a special employer because the crane operator and oiler worked under the leasing employer's direction and control.n⁴⁸

However, the general/special-employer relationship is decided on a case-by-case basis.n⁴⁹ Thus, an entity leasing equipment from another entity will not be deemed a special employer of persons supplied to operate the equipment unless the former entity also maintains direction and control over the operator.n⁵⁰

[iii] Temporary Labor--The Primary/Secondary-Employer Doctrine

A "primary employer" is an employer whose principal business is to supply contract employees to another employer (the "secondary" employer) for a fee. A primary employer is not responsible for a safety violation due to the exposure of a contract employee if (1) the contract employee performs work assignments wholly at the secondary employer's establishment or work sites; (2) while performing assigned work, the contract employee is supervised solely by the secondary employer or the secondary employer's management personnel; (3) the primary employer is barred by contract or by the secondary employer's policy from access to the work sites, except to maintain time records of contract employees or for purposes unrelated to the supervision of work; and (4) the primary employer maintains an accident prevention program and contracts out only employees who have been trained in the work to be performed for the secondary employer and in the hazards peculiar to such work.n⁵¹

However, a primary employer must "determine with particularity the work which a contract employee will be called upon to perform" for a secondary employer, properly train each employee in general safe work practices and hazards unique to each such job assignment, and if personal protective equipment is required to do the work safely, either furnish such protective equipment or ensure that such equipment is in fact provided by the secondary employer at no cost to the contract employee. The primary employer is also responsible for instructing contract employees in the proper use of necessary personal protective equipment, for informing employees of their right to refuse to do work assigned by the secondary employer that the employee reasonably believes to be dangerous until the danger is abated, and for

informing employees that a reasonable refusal will not result in sanctions by the primary employer.ⁿ⁵²

[iv] Multi-Employer Worksites

Each employer has a nondelegable duty to protect employees and to provide a safe and healthful place of employment.ⁿ⁵³ Even when a hazard is caused by another employer at a worksite, a citation against an employer will be upheld if employees of the cited employer were exposed to such a hazard.ⁿ⁵⁴ Agreements between employers pertaining to responsibility for safety at a worksite do not alter the duties of an employer under the California Occupational Safety and Health Act.ⁿ⁵⁵

Regulations promulgated under Cal/OSHA provide that on multi-employer worksites, construction and non-construction, citations may be issued only to the following categories of employers when the Division has evidence an employee was exposed to a hazard in violation of any requirement enforceable by the Division:^{n55.1}

- The employer whose employees were exposed to the hazard (the exposing employer);
- The employer who actually created the hazard (the creating employer);
- The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite--*i.e.*, the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer);
- The employer who had the responsibility for actually correcting the hazard (the correcting employer).

[v] Person Performing Services for Which License is Required (and Employees of That Person)

The Labor Code provides a rebuttable presumption that a person who performs services for which a license is required is an employee rather than an independent contractor.^{n55.2} The effect of that presumption could be to make the hirer of an unlicensed contractor the employer of an employee of the unlicensed contractor for OSHA purposes. In *Cortez v. Abich*,^{n55.3} which was superseded by grant of review in December of 2009, homeowners hired an unlicensed contractor to remodel their home, including replacing the roof. An employee of the contractor was injured and sued the homeowners. The court found that although the homeowners were not his employer for workers' compensation purposes, the homeowners were the employee's employer with respect to potential tort liability.^{n55.4}

[c] Employment

Employment is defined as "the carrying on of any trade, enterprise, project, industry, business, occupation or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire except household domestic service."ⁿ⁵⁶ Operative January 1, 2004,ⁿ⁵⁷ "employment" for these purposes also includes volunteer firefighting, when covered by *Labor Code Section 3200 et seq.*, pursuant to *Labor Code Section 3361*.ⁿ⁵⁸

OSHA statutes do not define "household domestic service," and its legislative history offers no further guidance as to the meaning of that term.ⁿ⁵⁹ The California Supreme Court has held that "household domestic service" likely refers to the performance of tasks in and outside a private residence and implies duties that are personal to the homeowner.ⁿ⁶⁰ A task requiring a license does not always fall outside of OSHA's "household domestic service" exclusion.ⁿ⁶¹ In deciding whether OSHA applies or whether the "household domestic service" exception applies, the focus of the inquiry is on the status of the hirer.ⁿ⁶² Historically, OSHA regulations have been directed at commercial activities.ⁿ⁶³

Legal Topics:

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

Labor & Employment Law Occupational Safety & Health General Overview Labor & Employment Law Occupational Safety & Health Administrative Proceedings General Overview Labor & Employment Law Occupational Safety & Health Administrative Proceedings Jurisdiction Workers' Compensation & SSDI Remedies Under Other Laws General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6307*.

(n2)Footnote 2. *Lab. Code § 6303(a)*.

(n3)Footnote 3. *United Airlines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal. 3d 762, 776, 187 Cal. Rptr. 387, 654 P.2d 157 .

(n4)Footnote 4. *United Airlines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal. 3d 762, 770-771, 187 Cal. Rptr. 387, 654 P.2d 157 .

(n5)Footnote 5. *United Airlines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal. 3d 762, 776, 187 Cal. Rptr. 387, 654 P.2d 157 . In applying these tests, the Court in *United Airlines* found the Division, not the Federal Aviation Administration, had jurisdiction over airline ground maintenance personnel even though Federal OSHA does not have such jurisdiction and despite FAA regulations that require airline maintenance manuals to address safety in the work performed by flight and ground operations personnel.

(n6)Footnote 6. *See, e.g., Lab. Code §§ 6702* (mobile internal combustion engines used inside buildings), 7110 (floors and walls of buildings under construction), 7158 (scaffolding work in buildings under construction), 7204 (construction elevators), 7267 (work on structural steel framed buildings), 7332 (window-cleaning safety devices for buildings over three stories).

(n7)Footnote 7. *United Airlines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal. 3d 762, 767, 771, 187 Cal. Rptr. 387, 654 P.2d 157 .

(n8)Footnote 8. *United Airlines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal. 3d 762, 771, 187 Cal. Rptr. 387, 654 P.2d 157 .

(n9)Footnote 9. *Troy Gold Industries, Ltd. v. Occupational Safety & Health Appeals Bd.* (1986) 187 Cal. App. 3d 379, 383, 231 Cal. Rptr. 861 . However, the court in *Troy Gold Industries* noted that the Division's jurisdiction over mines, pursuant to *Lab. Code §§ 6303(a)*, 7952, 7953, was merely "held in abeyance" until MSHA no longer actively exercises jurisdiction and that pursuant to *Lab. Code § 6303(b)*, the Division retains its jurisdiction over the "employment" of mining. *See Troy Gold Industries, Ltd. v. Occupational Safety & Health Appeals Bd.* (1986) 187 Cal. App. 3d 379, 389-390, 231 Cal. Rptr. 861 ; *see also* Teledyne Tungsten (Nov. 19, 1987) Cal. OSHAB Docket Nos. 84-974, 84-975 (decision after reconsideration).

(n10)Footnote 10. *See* federal OSHA Instruction STP 2.14 (Oct. 30, 1978), contained in Program Directive 77-6 (Nov. 11, 1977) (state retains jurisdiction for areas occupied by federal facilities when land not ceded to federal government, but when state Legislature has ceded property to federal government, if refused entry by federal agency, state may initiate suit to assert jurisdiction or notify federal OSHA that state OSHA jurisdiction is waived.).

(n11)Footnote 11. *See Lab. Code § 6800(a)*.

(n12)Footnote 12. *cf.* Atchison, Topeka and Santa Fe Railway Co. (March 17, 1988) Cal. OSHAB Docket Nos.

86-1700--86-1703 (decision after reconsideration; Cal/OSHA reporting requirements preempted by Federal Railroad Administration reporting requirements for shop employees); *Atchison, T. & S. F. Ry. Co. v. Division of Industrial Safety* (1976) 64 Cal. App. 3d 188, 193, 134 Cal. Rptr. 274 (Division without authority to issue order requiring safety training program for nonshop employees); *Division of Industrial Safety v. Municipal Court* (1976) 61 Cal. App. 3d 696, 703, 132 Cal. Rptr. 573 (inspection warrant to conduct noise survey of railroad yard properly quashed when yard not operated by shop employees but as part of long-line network).

(n13)Footnote 13. *Lab. Code § 6800(b)*.

(n14)Footnote 14. *Lab. Code § 6800(c)*.

(n15)Footnote 15. *See Lab. Code §§ 6801, 6802*.

(n16)Footnote 16. *See Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-11J*.

(n17)Footnote 17. Navigable waters are defined in the Division's manual as those deep and wide enough to afford ship passage to the ocean.

(n18)Footnote 18. *See Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-11J*.

(n19)Footnote 19. *See Lab. Code § 6303(a); 29 U.S.C. § 668(a)*.

(n20)Footnote 20. *See 29 U.S.C. § 660(c)*.

(n21)Footnote 21. *See 49 U.S.C. app. §§ 2301, 2305*.

(n22)Footnote 22. *See 15 U.S.C. §§ 2641, 2651*.

(n23)Footnote 23. *See 46 U.S.C. app. §§ 1501, 1506*.

(n24)Footnote 24. The Division policy is to apply this exception only to activities otherwise covered by 8 Cal. Code Reg. §§ 5319-5331, but the Division may enforce all other applicable California safety and health standards to operations unrelated to the manufacture of explosives at such manufacturing plants.

(n25)Footnote 25. *See 29 U.S.C. § 667(f)*.

(n26)Footnote 26. *See Fred A. Arnold, Inc.* (July 26, 1977) Cal. OSHAB Docket Nos. 76-175, 76-176 (decision after reconsideration; employer not exempt from furnishing safe and healthful work at federal military base); *General Production Service of California, Inc.* (Jan. 28, 1981) Cal. OSHAB Docket Nos. 79-153, 79-154 (decision after reconsideration; Division jurisdiction over places of employment at Elk Hills Oil Reserve on federal property); *Dalton Construction Co.* (June 21, 1984) Cal. OSHAB Docket No. 83-723 (decision after reconsideration; Division has jurisdiction to inspect private contractors at Hamilton Air Force Base).

(n27)Footnote 27. *See Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-11J*.

(n28)Footnote 28. *but see Abel Lopez dba King City Labor Supply & Salinar Marketing Cooperative, Inc.* (Aug. 28, 1986) Cal. OSHAB Docket Nos. 80-1143, 80-1144, 80-1291, 80-1293 (decision after reconsideration; Division jurisdiction over employees working in or about pesticide-treated fields upheld because of failure of CDFA to exercise enforcement actively).

(n29)Footnote 29. *See, e.g., Sequoia Rock Company* (April 28, 1983) Cal. OSHAB Docket No. 76-1083 (decision after reconsideration; Division has concurrent jurisdiction with California Highway Patrol (CHP) over hazards to employees in motor vehicles that are "places of employment"); *Red's Express* (Mar. 7, 1985) Cal. OSHAB Docket No.

81-1256 (decision after reconsideration; employer failed to show active exercise by CHP over truck regulation in *Veh. Code* § 34500).

(n30)Footnote 30. *United Airlines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal. 3d 762, 772, 187 Cal. Rptr. 387, 654 P.2d 157 ; *see also* 29 U.S.C. §§ 651(b)(11), 667.

(n31)Footnote 31. *United Airlines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal. 3d 762, 772-773, 187 Cal. Rptr. 387, 654 P.2d 157 .

(n32)Footnote 32. *United Airlines, Inc. v. Occupational Safety & Health Appeals Bd.* (1982) 32 Cal. 3d 762, 778, 187 Cal. Rptr. 387, 654 P.2d 157 .

(n33)Footnote 33. Red's Express (Mar. 7, 1985) Cal. OSHAB Docket No. 81-1256 (decision after reconsideration).

(n34)Footnote 34. Lee Way Motor Freight, Inc. (Jan. 17, 1986) Cal. OSHAB Docket No. 82-067 (decision after reconsideration).

(n35)Footnote 35. Kaiser Steel Corporation (Mar. 5, 1981) Cal. OSHAB Docket No. 78-1161 (decision after reconsideration).

(n36)Footnote 36. Wickes Forest Industries (Oct. 31, 1984) Cal. OSHAB Docket No. 79-1269 (decision after reconsideration); Easyco (Oct. 26, 1984), Cal. OSHAB Docket Nos. 83-387, 83-388, 83-390 (decision after reconsideration).

(n37)Footnote 37. *Lab. Code* § 6304.1(a). For definition of "employer," *see* [b], *below*. For definition of "employment," *see* [c], *below*.

(n38)Footnote 38. *See Lab. Code* § 6304.1(c).

(n39)Footnote 39. *Lab. Code* § 6304.1(b).

(n40)Footnote 40. *See Lab. Code* §§ 6304.2, 6304.4.

(n41)Footnote 41. *Lab. Code* § 2750.5. For further discussion of this statutory presumption, *see* ch. 20.

(n42)Footnote 42. *Larry v. Thompson Co.* (Feb. 10, 1975) Cal. OSHAB Docket No. 74-276 (decision after reconsideration).

(n43)Footnote 43. *Lou Perini Plastering* (June 21, 1984) Cal. OSHAB Docket No. 80-185 (decision after reconsideration).

(n44)Footnote 44. *See Rosasco George* (Nov. 20, 1978) Cal. OSHAB Docket No. 77-814 (decision after reconsideration; no employer-employee relationship found between grandfather and grandson painting house).

(n45)Footnote 45. *See Lab. Code* § 6304 (incorporating definition of "employer" in *Lab. Code* § 3300).

(n46)Footnote 46. *Optical Coating Laboratory, Inc.* (Sept. 28, 1984) Cal. OSHAB Docket No. 82-1093 (decision after reconsideration).

(n47)Footnote 47. *Optical Coating Laboratory, Inc.* (Sept. 28, 1984) Cal. OSHAB Docket No. 82-1093 (decision after reconsideration).

(n48)Footnote 48. *C.L. Peck Contractor* (Oct. 17, 1985) Cal. OSHAB Docket No. 80-844 (decision after reconsideration).

(n49)Footnote 49. *See* Optical Coating Laboratory, Inc. (Sept. 28, 1984) Cal. OSHAB Docket No. 82-1093 (decision after reconsideration).

(n50)Footnote 50. *See* M.B.R. Construction, Inc. (Oct. 6, 1987) Cal. OSHAB Docket No. 86-1658 (decision after reconsideration); *see also* Industrial Asphalt (Oct. 17, 1980) Cal. OSHAB Docket No. 79-571 (decision after reconsideration; defense of lack of supervisorial control by general employer rejected when evidence established that it was foreseeable that the leased employee would operate a roller compactor on a grade exceeding 15% while under the direction of the employer leasing such services).

(n51)Footnote 51. Petroleum Maintenance Co. (May 1, 1985) Cal. OSHAB Docket Nos. 81-594, 81-596, 81-597, 81-598, 81-599 (decision after reconsideration).

(n52)Footnote 52. Petroleum Maintenance Co. (May 1, 1985) Cal. OSHAB Docket Nos. 81-594, 81-596, 81-597, 81-598, 81-599 (decision after reconsideration); *see also* Department of Transportation (Nov. 24, 1981) Cal. OSHAB Docket Nos. 81-017, 81-018 (decision after reconsideration); Manpower, Inc. (Jan. 8, 1981) Cal. OSHAB Docket No. 78-533 (decision after reconsideration); Cal-Cut Pipe & Supply Co. (Aug. 26, 1980) Cal. OSHAB Docket No. 76-955 (decision after reconsideration).

(n53)Footnote 53. *See Lab. Code § 6400*; Cal-Cut Pipe & Supply Co. (Aug. 26, 1980) Cal. OSHAB Docket No. 76-955 (decision after reconsideration).

(n54)Footnote 54. Guy F. Atkinson Co. (Mar. 31, 1981) Cal. OSHAB Docket Nos. 76-360, 76-361 (decision after reconsideration); Superior Roofing Co. (May 29, 1981) Cal. OSHAB Docket Nos. 76-1124-76-1126 (decision after reconsideration); J & C Construction Co. (Apr. 7, 1986) Cal. OSHAB Docket No. 84-1188 (decision after reconsideration; exposure to uncovered floor opening created by another employer at construction site); Novo-Rados Constructors (Apr. 28, 1983) Cal. OSHAB Docket Nos. 78-135-78-137, 78-265 (decision after reconsideration; properly installed guardrail removed by subcontractor, resulting in exposure of employer's employees); Diablo Valley Paving, Inc. (Feb. 26, 1981) Cal. OSHAB Docket Nos. 80-214, 80-215 (decision after reconsideration); McCarthy & Spiessman, Inc. (Sep. 28, 1984) Cal. OSHAB Docket No. 83-568 (decision after reconsideration; back-up alarm); Department of Transportation (Nov. 24, 1981) Cal. OSHAB Docket Nos. 81-017, 81-018 (decision after reconsideration; citation for failure to report use of a carcinogen upheld when employees were exposed to asbestos caused by another employer's salvage activity at worksite).

(n55)Footnote 55. Moran Construction Co. (Jan. 28, 1975) Cal. OSHAB Docket No. 74-381 (decision after reconsideration).

(n56)Footnote 55.1. 8 *Cal. Code Reg. § 336.10*. *See also Lab. Code § 6400(b)*.

(n57)Footnote 55.2. *Lab. Code § 2750.5*.

(n58)Footnote 55.3. *Cortez v. Abich* (2009) 177 *Cal. App. 4th* 261, 265-266, 98 *Cal. Rptr. 3d* 830, *superseded by grant of review, depublished by*, 2009 Cal. LEXIS 12822 (2009).

(n59)Footnote 55.4. *See also Rosas v. Dishong* (1998) 67 *Cal. App. 4th* 815, 822-824, 79 *Cal. Rptr. 2d* 339 (homeowners were not employers for workers' compensation purposes of worker hired to trim tree branch hanging over their house, which required license; but *Labor Code § 2750.5* made homeowners his employer as matter of law, because worker had not worked requisite hours required by *Labor Code § 3352(h)*, which was intended to provide potential tort remedy to unlicensed workers not otherwise covered by workers' compensation laws). For discussion of effect of OSHA in civil personal injury litigation, *see § 21.70, below*.

(n60)Footnote 56. *Lab. Code § 6303(b)*.

(n61)Footnote 57. *See Lab. Code § 6303(d).*

(n62)Footnote 58. *Lab. Code § 6303(c).*

(n63)Footnote 59. *Cortez v. Abich (2009) 177 Cal. App. 4th 261, 267, 98 Cal. Rptr. 3d 830 , superseded by grant of review, depublished by, 2009 Cal. LEXIS 12822 (2009).*

(n64)Footnote 60. *Fernandez v. Lawson (2003) 31 Cal. 4th 31, 37, 1 Cal. Rptr. 3d 422, 71 P.3d 779 .*

(n65)Footnote 61. *Fernandez v. Lawson (2003) 31 Cal. 4th 31, 38, 1 Cal. Rptr. 3d 422, 71 P.3d 779* (OSHA did not apply to tree trimming work for which homeowner hired unlicensed worker); *Cortez v. Abich (2009) 177 Cal. App. 4th 261, 267-269, 98 Cal. Rptr. 3d 830 , superseded by grant of review, depublished by, 2009 Cal. LEXIS 12822 (2009)* (OSHA did not apply to homeowners who hired unlicensed contractor to do home remodel).

(n66)Footnote 62. *Cortez v. Abich (2009) 177 Cal. App. 4th 261, 267, 98 Cal. Rptr. 3d 830 , superseded by grant of review, depublished by, 2009 Cal. LEXIS 12822 (2009).*

(n67)Footnote 63. *See Rosas v. Dishong (1998) 67 Cal. App. 4th 815, 826, 79 Cal. Rptr. 2d 339 .*



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part A. OVERVIEW

2-21 California Employment Law §§ 21.04 through 21.09

AUTHOR: By Suzanne P. Marria, J.D.

[Reserved]

§§ 21.04[Reserved]



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part B. EMPLOYERS' DUTIES

2-21 California Employment Law § 21.10

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.10 General Duties Regarding Employee Safety and Health

Under the California Occupational Safety and Health Act, the employer has the primary responsibility for worker safety in California.ⁿ¹ The Act provides generally that every employer in California must furnish employment and a place of employment that are safe and healthful for employees at that place of employment.ⁿ² Furthermore, no employer may require or permit any employee to go or be in any employment or place of employment that is not safe and healthful.ⁿ³

Employers are further prohibited from occupying or maintaining any place of employment that is not safe and healthful.ⁿ⁴ The Act also provides that no employer, owner, or lessee of any real property shall construct or cause to be constructed any place of employment that is not safe and healthful.ⁿ⁵

The terms "safe," "safety," and "health," as used in the California Occupational Safety and Health Act, mean "such freedom from danger to the life, safety, or health of employees as the nature of the employment reasonably permits."ⁿ⁶

The employer's duty under the Act to provide employment and a place of employment that is safe and healthful is a non-delegable duty.ⁿ⁷ Thus, an employer's reliance on a union to train dispatched employees is no defense to a citation for a safety violation under the Act.ⁿ⁸

The Act also imposes a duty on both employers and employees to comply with occupational safety and health standards, with *Health and Safety Code Section 25910*, and with all rules, regulations, and order pursuant to Division 5 of the Labor Code that are applicable to his or her own actions and conduct.ⁿ⁹

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Bendix Forest Products Corp. v. Division of Occupational Saf. & Health* (1979) 25 Cal. 3d 465, 470-471, 158 Cal. Rptr. 882, 600 P.2d 1339 .

(n2)Footnote 2. *Lab. Code* § 6400.

(n3)Footnote 3. *Lab. Code* § 6402.

(n4)Footnote 4. *Lab. Code* § 6404.

(n5)Footnote 5. *Lab. Code* § 6405.

(n6)Footnote 6. *Lab. Code* § 6306(a).

(n7)Footnote 7. *Guy F. Atkinson Co.* (Mar. 31, 1981) Cal. OSHAB Docket Nos. 76-360, 76-361 (decision after reconsideration).

(n8)Footnote 8. *Crescent Wharf and Warehouse Co.* (Dec. 13, 1978) Cal. OSHAB Docket Nos. 78-602, 78-603 (decision after reconsideration).

(n9)Footnote 9. *Lab. Code* § 6407.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part B. EMPLOYERS' DUTIES

2-21 California Employment Law § 21.11

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.11 Duty to Furnish Safety Procedures, Safety Equipment, and Protective Devices

The employer has a duty to furnish necessary safety devices, safeguards, and safe work procedures. Specifically, the Act provides that "[e]very employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees."¹ The Act provides that "safety device" and "safeguard" shall be given "broad interpretation so as to include any practicable method of mitigating or preventing a specific danger, including the danger of exposure to potentially injurious levels of ionizing radiation or potentially injurious quantities of radioactive materials."²

The duty to "furnish" safety devices³ means the employer must provide necessary safety devices and equipment at the employer's expense.⁴ Although the question of whether employees may waive or trade the right to have the employer provide and pay for necessary personal protective safety equipment has been raised by employers in several cases, neither the California Supreme Court nor the OSHAB has decided the issue.⁵

When specific types of personal protective equipment is required, such equipment must be the proper type for the nature of the employee exposure and of such design, strength, and quality as to eliminate, preclude, or mitigate the hazard, and must meet standards that are at least equivalent to the standards recommended by the American National Standards Institute (ANSI) or other standards acceptable to the Division.⁶ The employer also is responsible for assuring that each employee is properly trained and uses such equipment in accordance with the manufacturer's instructions.⁷

Specific types of personal protective equipment required, depending on the nature of the work involved, include head protection,⁸ eye and face protection,⁹ body protection,¹⁰ hand protection,¹¹ foot protection,¹² respirators,¹³ and safety belts and lanyards.¹⁴

■ CONSULTANT'S COMMENT:

The duty to furnish safety devices frequently enmeshes employers in the related issue of employee

refusal to use or wear mandated equipment. For example, an employer having a duty to provide face masks to those who perform certain job duties may encounter an employee whose facial hair prevents a proper seal around the perimeter of the mask. While such an employer legally has the right to require that the employee trim his facial hair or be subject to transfer or termination, the analysis is seldom so simple. If there are other workers in the same job classification, the employer must be careful that its lawful exercise of its right to require the use of safety devices is not mistaken for (1) alleged unlawful race discrimination (e.g., because close cropping of facial hair can cause pseudofolliculitis in black men, a requirement that they shave closely in order to wear a respirator may raise issues of disparate impact under equal employment laws);ⁿ¹⁵ or (2) retaliation for earlier protected conduct by the employee, such as union activity, whistleblowing, or filing a worker's compensation claim.ⁿ¹⁶ In short, employers must carefully analyze all of the circumstances surrounding a refusal or inability to properly wear safety devices before concluding that the employee is subject to discipline. *Commentary by Kirby Wilcox.*

A primary employer that leases employees to secondary employers is responsible for establishing, implementing and maintaining an effective injury prevention program for employees leased to a secondary employer.ⁿ¹⁷

Legal Topics:

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

Labor & Employment Law Occupational Safety & Health Administrative Proceedings General Overview Labor & Employment Law Occupational Safety & Health Duties & Rights Workers' Compensation & SSDI Remedies Under Other Laws General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6401; see Lab. Code § 6403.*

(n2)Footnote 2. *Lab. Code § 6306(b).*

(n3)Footnote 3. *See Lab. Code § 6401.*

(n4)Footnote 4. *Bendix Forest Products Corp. v. Division of Occupational Saf. & Health* (1979) 25 Cal. 3d 465, 473, 158 Cal. Rptr. 882, 600 P.2d 1339 (upholding special order requiring employer to pay for and provide gloves or mittens to workers removing lumber from drag chain; *see also* *Oakland Police Officers Association v. City of Oakland* (1973) 30 Cal. App. 3d 96, 100-101, 106 Cal. Rptr. 134 (service revolvers held to be a safety device under *Lab. Code § 6401*, which city must provide at no cost to city police officers); *Southern California Edison* (Aug. 26, 1985) Cal. OSHAB Docket No. 81-663 (decision after reconsideration; requiring employer to provide and pay for hand protection as required by order to take special action, and rejecting employer's contention that union waived employees' rights by withdrawing proposal requiring employer to pay for gloves from collective bargaining demands).

(n5)Footnote 5. *See Bendix Forest Products Corp. v. Division of Occupational Saf. & Health* (1979) 25 Cal. 3d 465, 472 n.7, 158 Cal. Rptr. 882, 600 P.2d 1339 ; *Southern California Edison* (Aug. 26, 1985) Cal. OSHAB Docket No. 81-663 (decision after reconsideration).

(n6)Footnote 6. *8 Cal. Code Reg. § 3380(a).*

(n7)Footnote 7. *8 Cal. Code Reg. § 3380(c).*

(n8)Footnote 8. *See 8 Cal. Code Reg. § 3381.*

(n9)Footnote 9. *See 8 Cal. Code Reg. § 3382.*

(n10)Footnote 10. *See 8 Cal. Code Reg. § 3383.*

(n11)Footnote 11. *See* 8 Cal. Code Reg. § 3384.

(n12)Footnote 12. *See* 8 Cal. Code Reg. § 3385.

(n13)Footnote 13. *See* 8 Cal. Code Reg. § 5144.

(n14)Footnote 14. *See* 8 Cal. Code Reg. §§ 1669, 1670, 3388; *see also* *Lusardi Construction Co. v. California Occupational Safety & Health Appeals Bd.* (1991) 1 Cal. App. 4th 639, 2 Cal. Rptr. 2d 297 (8 Cal. Code Reg. § 1710, prescribing tie-off requirements for skeleton steel structures, rather than 8 Cal. Code Reg. § 1670, prescribing requirements for work that exposes employees to falling in excess of certain distance, is more specific safety order governing carpenter's 24-foot fall from skeleton steel structure while setting wooden trusses).

(n15)Footnote 15. *See generally* discussion in ch. 41.

(n16)Footnote 16. *See generally* discussion in chs. 20, 41, 60.

(n17)Footnote 17. *Sully-Miller Contracting Co. v. California Occupational Safety & Health Appeals Bd.* (2006) 138 Cal. App. 4th 684, 41 Cal. Rptr. 3d 742. *See also* *In re* Optical Coating Laboratory, Inc., OSHA App. Bd., Sept. 28, 1984, No. 82-R1D5-1093; *In re* Petroleum Maintenance Company, OSHA App. Bd., May 1, 1985, No. 81-R4D1-594-599; *In re* Manpower, OSHA App. Bd., May 14, 2001, No. 98-R4D5-4158. For discussion of injury and illness prevention programs, *see* § 21.12, *below*.



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CHAPTER 21 Occupational Safety and Health Regulation
Part B. EMPLOYERS' DUTIES

2-21 California Employment Law § 21.12

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.12 Duty to Implement and Maintain Injury and Illness Prevention Program

[1] General Requirements

Every employer is required to establish, implement, and maintain an effective injury and illness prevention program.ⁿ¹ⁿ² The program must be written and include at least the following elements:ⁿ³

1. Identification of the person or persons responsible for implementing the employer's program;
2. A system for identifying and evaluating workplace hazards, including scheduled periodic inspections to identify unsafe conditions and work practices;ⁿ⁴
3. Methods and procedures for correcting unsafe or unhealthy conditions and work practices in a timely manner;ⁿ⁵
4. An occupational safety and health training program designed to instruct employees in general safe and healthy work practices and to provide specific instruction on hazards specific to each employee's job assignment;ⁿ⁶
5. A system for communicating with employees about occupational health and safety matters, including provisions that encourage employees to report hazards without fear of reprisal; and
6. A system for ensuring that employees comply with safe and healthy work practices, which may include disciplinary action.

The employer's injury and illness prevention program must cover all of the employer's employees and all other workers who the employer controls or directs and directly supervises on the job to the extent that these workers are exposed to worksite and job assignment specific hazards.ⁿ⁷ The program must include training applicable to the work for which an

employee is leased to a secondary employer, and to the monitoring of the secondary employer to ensure that the safety program is implemented.^{n7.1} The primary employer is also required to instruct its employees to refuse to operate machinery for the secondary employer that does not have required safety equipment.^{n7.2} This provision does not affect the obligations of a contractor or other employer that controls or directs and directly supervises its own employees on the job.ⁿ⁸ If a contractor supplies its employee to a state agency employer on a temporary basis, the state agency may assess a fee on the contractor to reimburse the state agency for the additional costs, if any, of including the contract employee in the state agency's injury prevention program.ⁿ⁹

Pursuant to statutory mandate,ⁿ¹⁰ the Standards Board has adopted regulations setting forth the employer's duties regarding injury prevention programs.ⁿ¹¹ In so doing, the Standards Board amended existing safety orders governing effective injury and illness prevention programs in the various industry groups in Title 8 of the California Code of Regulations to make the provisions of *Title 8 California Code of Regulations Section 3203*, a benchmark. Whereas previously there were slight variations in requirements for safety training programs among the various industry groups,ⁿ¹² the specific industry orders now all require compliance with Section 3203 as well as imposing additional requirements specific to a given industry. If an industry work group found in Title 8 has no specific safety order addressing employee safety and training, the requirements of Section 3203 in the General Industry Safety Orders will apply.

Under legislation effective January 1, 1994, certain employers with fewer than 20 employees are not subject to the full recordkeeping requirements.^{n12.1} For discussion of these exemptions, see [5], *below*.

[1A] Workplace Security Component

On August 15, 1994, the Division of Occupational Safety and Health (DOSH) issued a document entitled *Cal/OSHA Guidelines for Workplace Security*. On September 4, 1994, the DOSH issued a *Model Injury and Illness Prevention Program for Workplace Security*, which was supplemented in March 1995. Together, these documents identify the types of workplace security measures that the DOSH will expect employers to undertake, but leave a number of questions open.

With respect to the *Guidelines for Workplace Security*, the DOSH has classified violent and potentially violent conduct into three types of "violence events." In the first type of violence events, the perpetrator has no legitimate relationship to the workplace and usually enters the workplace to commit a robbery or other violent act. In the second type of violence events, the perpetrator is either a recipient or the object of a service provided by the affected workplace. For example, the perpetrator may be a current or former client, patient, customer, passenger, criminal suspect, or prisoner. In the third type of violence events, the perpetrator has an employment-related involvement with the workplace. For example, the perpetrator could be a current or former employee, a current or former spouse of an employee, or some other person having a dispute with an employee.

The *Guidelines* further specify that employers must develop a workplace security component to their injury and illness prevention programs that includes the following elements:

- (1) A system for ensuring that employees comply with safe and healthy work practices;
- (2) A system for communicating with employees about workplace security hazards;
- (3) Procedures for identifying workplace security hazards;
- (4) Procedures for investigating injury or illness resulting from workplace violence;
- (5) Practices for correcting unsafe conditions; and

(6) Training and instruction on how to recognize workplace security hazards.

The Guidelines also provide information regarding the recording and reporting of workplace violence, the investigation by the DOSH of complaints about workplace security hazards, and the investigation by DOSH of workplace assaults involving death or serious injury.

The Model Injury and Illness Prevention Program for Workplace Security (Model IIPP) is intended to serve as a template for all employers and all categories of workplace violence events. Because of the wide variation in the types of employers and the categories of workplace violence, however, the Model IIPP may not be adequate for a particular employer "as is," and the DOSH so acknowledges by stating that the model "may not match your establishment's exact needs."^{12.2}

The March 1995 addition to the Model IIPP provides a list of factors that have been shown to contribute to the risk of violence at work. These factors are:

1. Exchange of money on the premises;
2. Employees working alone at night or in the early morning;
3. Availability of valued items such as money and jewelry on the premises;
4. Employment that involves guarding money or valuable property or possessions;
5. Employment which consists of performing public safety functions;
6. Employment which involves working with patients, clients, customers or students known or suspected to have a history of violence;
7. Employees who have a history of assaults or who exhibit belligerent, intimidating or threatening behavior to others.

This document further identifies occupations or workplaces at particular risk to the three major types of violence, but reminds employers that they may be subject to any of the three types of violence.^{12.3}

For discussion of the availability of injunctive relief to prevent workplace violence, see § 21.71.

■ **CONSULTANT'S COMMENT:**

Despite the desire of Cal/OSHA to assist employers with regard to workplace security issues, a number of questions remain. For example, the Guidelines do not contain criteria for determining whether a particular employer is governed by the rules for Category I, II, or III violence events or the rules for more than one of these categories. Furthermore, the Guidelines encourage, but do not require, employers to report to Cal/OSHA the occurrence of injuries, illnesses, and deaths caused by Penal Code violations. Whether an employer should do so involves difficult judgments that will depend upon the circumstances of each case. In addition, the Model IIPP arguably could be construed as reciting contractual obligations of the employer. Therefore, it is incumbent upon each employer to carefully scrutinize the workplace security components of its own injury and illness prevention plan to make sure that representations in the plan are consistent with (1) the Guidelines; (2) the obligation to develop a workplace security program; and (3) the precise nature of the employer's business. Finally, while the Guidelines and Model IIPP leave many implementation issues to the employer's discretion, employers should be mindful that Cal/OSHA

investigators likely will start their analyses of compliance matters with reference to the Guidelines and Model IIPP as written. *Commentary by Kirby Wilcox*

[2] Grandfather Provision

An employer with a written injury and illness program in place on July 1, 1991, that complies with the pre-January 1, 1991 requirements of Section 3203, is exempt from certain requirements of the amended Section 3203, as discussed more fully below.ⁿ¹³

Prior to its amendment in 1991, Section 3203 required an employer to inaugurate and maintain an "accident prevention program," which included, but was not limited to, a training program that instructed employees on general safe work practices and included specific instructions on hazards unique to each employee's job assignmentⁿ¹⁴ and a practice of conducting scheduled periodic self inspections to identify and correct unsafe conditions and work practices.ⁿ¹⁵

[3] Substantial Compliance

As allowed under *Labor Code Section 6401.7*,ⁿ¹⁶ the Standards Board's regulation provides for criteria under which an employer may be found in "substantial compliance" with specific portions of its requirements regarding injury prevention programs. For example, as further discussed in [4], *below*, an employer who elects to use a labor/management health and safety committee as a method for communicating to employees about occupational safety and health matters will be deemed to be in substantial compliance with *Title 8 California Code of Regulations Section 3203(a)(3)* (requiring a system for communicating with affected employees about safety and health matters) if the committee meets specified requirements.ⁿ¹⁷ The regulation also suggests other methods of substantial compliance with the communication system requirement.ⁿ¹⁸ In addition, the regulation suggests methods of substantial compliance with the requirement that employers establish a system to ensure employee compliance with safe and healthy work practices.ⁿ¹⁹

[4] Readily Understandable Communication System

The employer injury and illness prevention program must include a system for communicating with employees "in a form readily understandable by all affected employees" on matters relating to occupational safety and health.ⁿ²⁰ Such a communications system must include methods for encouraging employees to inform the employer of worksite hazards "without fear of reprisal."ⁿ²¹ Employers having fewer than ten employees are permitted to comply by orally communicating with and instructing employees on general safe work practices and hazards unique to employees' job assignments.ⁿ²² Substantial compliance by other employers with the communication requirement may be achieved by a combination of alternatives, including meetings, training programs, posting written communications, an anonymous worksite hazard notification system, and labor/management safety and health committees.ⁿ²³

A labor/management safety and health committee will constitute substantial compliance with the communication system requirement in *Labor Code Section 6401.7(a)(5)* and *Title 8 California Code of Regulations Section 3203(a)(3)*, if the committee (1) meets regularly, but not less than quarterly; (2) prepares and makes available to affected employees and to the Division, on request, written records of safety and health issues discussed by the committee; (3) reviews results of the periodic scheduled worksite inspections; (4) reviews accident investigations, reports of occupational injury, illness, and hazardous substance exposure incidents, and, where appropriate, submits suggestions to management for prevention of future incidents; (5) reviews investigations of hazardous conditions brought to any committee member's attention and, if necessary, conducts its own inspection and investigation to assist in remedial solutions; (6) makes recommendations to assist in evaluating employee safety suggestions; and (7) when requested by the Division, verifies abatement action taken by an employer in response to a citation.ⁿ²⁴ The safety committee's meeting records must be maintained for at least one year.^{n24.1}

No employee or employee organization shall be liable for any act or omission in connection with a health and safety committee.n25

[5] Recordkeeping Requirements

[a] General Requirements

Except for those employers not subject to the general reporting requirements (see discussion in [b], *below*), an employer is required to keep appropriate records of the steps taken to implement and maintain the injury and illness program.n26 At a minimum, such records must include records of scheduled periodic inspections, which identify the persons who conducted each inspection, the unsafe conditions and practices found, and the corrective action taken.n27 The employer must maintain these records for one year, except employers with fewer than ten employees may elect to maintain periodic inspection records only until the hazard found is corrected.n28

Employers must also maintain for one year documentation of the safety and health training required by *Title 8 California Code of Regulations Section 3203(a)(7)*, for each employee, indicating the name or identity of the employee, training dates, types of training, and trainer's name.n29 Training records of workers employed less than one year need not be retained as long as the employer provides such records to the employee on termination of employment.n30 Employers with fewer than ten employees may substantially comply with the training documentation requirement by maintaining a log of instructions provided to the employee regarding hazards unique to that employee's job assignment when he or she is first hired or assigned new duties.n31

[b] Employers Exempt From General Recordkeeping Requirements

The recordkeeping requirements set forth in *Labor Code Section 6401.7(d)*, discussed in [a], *above*, do not apply with respect to any county, city, city and county, or district, or any public or quasi-public corporation or public agency therein, including any public entity, other than a state agency, that is a member of, or created by, a joint powers agreement.n32

Under legislation effective January 1, 1994, the Board is required to adopt a lesser standard applicable to employers with fewer than 20 employees, which employers are either (1) not on a designated list of high hazard industries, and have a workers' compensation experience modification rate of 1.1 or less, or (2) on a designated list of low hazard industries.n33 This standard is to set forth the employer's duties consistent with the requirements specified in *Labor Code Section 6401.7(a)-(c)*, except that the standard must require written documentation only to the extent of documenting the person or persons responsible for implementing the program,n34 keeping a record of periodic inspections,n35 and keeping a record of employee training.n36 Beyond these specific requirements, the standard will not require the employer to meet the recordkeeping requirements of *Labor Code Section 6401.7(d)*.n37 The Standards Board has not yet adopted such a standard.n37.1

Beginning January 1, 1994, an employer in the construction industry who is required to be licensed under *Business and Professions Code Section 7000 et seq.* may use records relating to employee training provided to the employer in connection with an occupational safety and health training program approved by the division to comply with the requirements of *Labor Code Section 6401.7(a)*, and is only required to keep records of those steps taken to implement and maintain the program with respect to hazards specific to an employee's job duties.n38

[6] Enforcement of Program

The employer's injury and illness prevention program must include a system for ensuring that employees comply with safe and healthy work practices.n39 *Title 8 California Code of Regulations Section 3203(a)(2)*, suggests various combinations of education and training, positive incentives, and disciplinary procedures that may constitute substantial compliance with this requirement.n40

Failure to enforce workplace safety and health rules and regulations may preclude an employer from prevailing in the "independent employee act" defense. For discussion, see § 21.46[7].

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & RightsWorkers' Compensation & SSDIRemedies Under Other LawsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6401.7(a)*; 8 *Cal. Code Reg. § 3203*; see 8 *Cal. Code Reg. §§ 1509(a), 6507, 6760(a), 8350, 8406*.

(n2)Footnote 2. [Reserved]

(n3)Footnote 3. *Lab. Code § 6401.7(a)*.

(n4)Footnote 4. See discussion in § 21.13.

(n5)Footnote 5. See discussion in § 21.13.

(n6)Footnote 6. See discussion in § 21.14.

(n7)Footnote 7. *Lab. Code § 6401.7(h)*.

(n8)Footnote 7.1. *Sully-Miller Contracting Co. v. California Occupational Safety & Health Appeals Bd. (2006) 138 Cal. App. 4th 684, 41 Cal. Rptr. 3d 742*.

(n9)Footnote 7.2. *Sully-Miller Contracting Co. v. California Occupational Safety and Health Appeals Bd. (2006) 138 Cal. App. 4th 684, 41 Cal. Rptr. 3d 742, 2006 Cal. App. LEXIS 526, *30-31* (asphalt paving contractor, as primary employer, should have instructed roller operator, as its employee leased to paving contractor that was secondary employer, to refuse to operate roller for secondary employer without operable seat belt).

(n10)Footnote 8. *Lab. Code § 6401.7(h)*.

(n11)Footnote 9. *Lab. Code § 6401.7(i)*.

(n12)Footnote 10. See *Lab. Code § 6401.7(e)(1)*.

(n13)Footnote 11. See 8 *Cal. Code Reg. § 3203*.

(n14)Footnote 12. See, e.g., 8 *Cal. Code Reg. §§ 1509* (construction), 6507-6509 (petroleum-drilling and production), 6760-6762 (petroleum-production and handling), 8350 (shipbuilding), 8406 (tunnels), prior to 1991 amendments.

(n15)Footnote 12.1. See *Lab. Code § 6401.7(e)(2)-(4)*.

(n16)Footnote 12.2. Cal/OSHA has also promulgated "Guidelines for Security and Safety of Health Care and Community Service Workers" to help employers in the health care and community service industries implement an effective workplace security component in their Injury and Illness Prevention Program. This document is available from Cal/OSHA.

(n17)Footnote 12.3. *See* Cal/OSHA Model Injury & Illness Prevention Program for Workplace Security (March 1995).

(n18)Footnote 13. *See* 8 Cal. Code Reg. § 3203(a)(4)(A), (7)(A) (self inspections; employee training and instruction).

(n19)Footnote 14. *See* 8 Cal. Code Reg. § 3203(a)(1), prior to 1991 amendment.

(n20)Footnote 15. *See* 8 Cal. Code Reg. § 3202(a)(2), prior to 1991 amendment.

(n21)Footnote 16. *See* Lab. Code § 6401.7(e), (f).

(n22)Footnote 17. *See* Lab. Code § 6401.7(f); 8 Cal. Code Reg. § 3203(c).

(n23)Footnote 18. *See* 8 Cal. Code Reg. § 3203(a)(3); *see also* discussion in [4], *below*.

(n24)Footnote 19. *See* 8 Cal. Code Reg. § 3203(a)(2) (methods of substantial compliance include recognition of employees who follow safe and healthy practices, training and retraining programs, and disciplinary actions).

(n25)Footnote 20. 8 Cal. Code Reg. § 3203(a)(3); *see* Lab. Code § 6401.7(a)(5).

(n26)Footnote 21. Lab. Code § 6401.7(a)(5); 8 Cal. Code Reg. § 3203(a)(3).

(n27)Footnote 22. 8 Cal. Code Reg. § 3203(a)(3).

(n28)Footnote 23. 8 Cal. Code Reg. § 3202(a)(3).

(n29)Footnote 24. Lab. Code § 6401.7(f); 8 Cal. Code Reg. § 3203(c).

(n30)Footnote 24.1. *See* 8 Cal. Code Reg. § 3202(c)(2).

(n31)Footnote 25. Lab. Code § 6401.7(g).

(n32)Footnote 26. Lab. Code § 6401.7(d).

(n33)Footnote 27. 8 Cal. Code Reg. § 3203(b)(1).

(n34)Footnote 28. 8 Cal. Code Reg. § 3203(b)(1).

(n35)Footnote 29. 8 Cal. Code Reg. § 3203(b)(2).

(n36)Footnote 30. 8 Cal. Code Reg. § 3203(b)(2).

(n37)Footnote 31. 8 Cal. Code Reg. § 3203(b)(2).

(n38)Footnote 32. Lab. Code § 6401.7(k), 8 Cal. Code Reg. § 3203(b)(2), Exception No. 3.

(n39)Footnote 33. Lab. Code § 6401.7(e)(2).

(n40)Footnote 34. *See* Lab. Code § 6401.7(a)(1).

(n41)Footnote 35. *See* Lab. Code § 6401.7(a)(2).

(n42)Footnote 36. *See* Lab. Code § 6401.7(a)(4).

(n43)Footnote 37. *Lab. Code § 6401.7(e)(2); see also Lab. Code § 6401.7(e)(3)-(4)* (requiring establishment of lists of high hazard industries and low hazard industries).

(n44)Footnote 37.1. *See 8 Cal. Code Reg. § 3203(b)(2)*, Exception # 3.

(n45)Footnote 38. *Lab. Code § 6401.7(d)*.

(n46)Footnote 39. *Lab. Code § 6401.7(a)(6); 8 Cal. Code Reg. § 3203(a)(2)*.

(n47)Footnote 40. *8 Cal. Code Reg. § 3203(a)(2)*.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part B. EMPLOYERS' DUTIES

2-21 California Employment Law § 21.13

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.13 Duty to Conduct Self-Inspections, Correct Conditions, and Investigate Injuries and Illnesses

[1] Self-Inspections and Correction of Unsafe Conditions

Every employer is required to conduct scheduled periodic work place inspections to identify and evaluate unsafe conditions and work practices,ⁿ¹ and to correct unsafe and unhealthy conditions and work practices "in a timely manner based on the severity of the hazard."ⁿ² Correction of unsafe practices detected during periodic inspections is an integral part of a safety program.ⁿ³

The scheduled periodic inspections must generally be conducted when the employer's injury and illness prevention program is first established;ⁿ⁴ whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety or health hazard;ⁿ⁵ and whenever the employer is made aware of a new or previously unrecognized hazard.ⁿ⁶

An employer may not shift the burden of inspecting the work place to an insurer.ⁿ⁷

Correction of unsafe or unhealthy conditions, work practices, and work procedures must be made in a "timely manner based on the severity of the hazard"ⁿ⁸ whenever such conditions, practices, or procedures are observed or discovered.ⁿ⁹ The employer's program also must have an "imminent hazard" procedure, i.e. a procedure for removing all personnel, except those necessary to correct an imminent hazard that cannot immediately be abated without endangering employees and/or property.ⁿ¹⁰ Employees assigned to remove an imminent hazard must be provided with necessary safeguards.ⁿ¹¹

[2] Investigation of Occupational Injuries and Illnesses

Whether or not the employer has a labor/management safety and health committee, the injury and illness prevention program must include a procedure for investigating occupational injury and illness at the workplace.ⁿ¹² Compliance with this requirement also may help the employer fulfill other duties and thereby avoid liability for failure to timely report occupational injuries or illnesses to the Divisionⁿ¹³ and failure to inform employees injured in the course of

employment of their right to workers compensation benefits.ⁿ¹⁴

Legal Topics:

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

Labor & Employment Law Occupational Safety & Health General Overview Labor & Employment Law Occupational Safety & Health Administrative Proceedings General Overview Labor & Employment Law Occupational Safety & Health Duties & Rights Workers' Compensation & SSDI Remedies Under Other Laws General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6401.7(a)(2)*; 8 *Cal. Code Reg. § 3203(a)(4)*.

(n2)Footnote 2. *Lab. Code § 6401.7(b)*; 8 *Cal. Code Reg. § 3203(a)(6)*; *see Lab. Code § 6401.7(a)(3)*.

(n3)Footnote 3. Contadina Foods, Inc. (Dec. 8, 1976) Cal. OSHAB Docket No. 86-894 (decision after reconsideration).

(n4)Footnote 4. 8 *Cal. Code Reg. § 3203(a)(4)(A)*. However, employers with a written injury and illness program in place on July 1, 1991, that complies with the pre-July 1, 1991 version of 8 *Cal. Code Reg. § 3203* are exempt from this requirement.

(n5)Footnote 5. 8 *Cal. Code Reg. § 3203(a)(4)(B)*.

(n6)Footnote 6. 8 *Cal. Code Reg. § 3203(a)(4)(C)*.

(n7)Footnote 7. P.E. Dolan Lumber & Hardware Co. (Dec. 30, 1977) Cal. OSHAB Docket No. 77-797 (ALJ decision).

(n8)Footnote 8. *Lab. Code § 6401.7(b)*; 8 *Cal. Code Reg. § 3203(a)(6)*.

(n9)Footnote 9. 8 *Cal. Code Reg. § 3203(a)(6)(A)*.

(n10)Footnote 10. 8 *Cal. Code Reg. § 3203(a)(6)(B)*.

(n11)Footnote 11. 8 *Cal. Code Reg. § 3203(a)(6)(B)*.

(n12)Footnote 12. 8 *Cal. Code Reg. § 3203(a)(5)*; *see Lab. Code § 6401.7(f)*.

(n13)Footnote 13. *See Lab. Code § 6409.1*; *Penal Code § 387*; 8 *Cal. Code Reg. §§ 340.2, 14001*; *see also* discussion in § 21.18[1].

(n14)Footnote 14. *See Lab. Code § 5402(a)*; *Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Board* (2000) 80 *Cal. App. 4th* 1023, 1034-1035, 95 *Cal. Rptr. 2d* 847; *see also* discussion in § 20.30[1]



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
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2-21 California Employment Law § 21.14

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.14 Duty to Train Employees

The employer must train all employees in general safe and healthy work practices and must provide specific instruction on hazards specific to each employee's job assignment.ⁿ¹ Such training must be provided in all of the following situations:ⁿ²

1. An illness and injury prevention program is initiated;ⁿ³
2. A new employee is hired;
3. An employee receives a new job assignment for which training has not previously been received;
4. New substances, processes, procedures, or equipment are introduced into the workplace; and
5. The employer receives notification about a new or previously unrecognized hazard.

However, beginning January 1, 1994, an employer in the construction industry who is required to be licensed under *Business and Professions Code Section 7000 et seq.* may use employee training provided to the employer's employees under a construction industry occupational safety and health training program approved by the division to comply with the requirements of *Labor Code Section 6401.7(a)* relating to employee training, and shall only be required to provide training on hazards specific to an employee's job duties.^{n3.1}

Supervisors must be trained to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.ⁿ⁴ In the construction industry, the employer also must hold periodic meetings of supervisory personnel to discuss safety problems and job site accidentsⁿ⁵ and "supervisory employees" must conduct "toolbox" or "tailgate" safety meetings with their work crews at least every ten working days to emphasize safety.ⁿ⁶ Training supervisors to recognize safety and health hazards in the workplace may be particularly important in light of the Corporate Criminal Liability Act, which imposes criminal penalties for employers and managers who fail to

warn affected employees in writing of "serious concealed dangers," as defined, and to report such dangers to the Division, within a specified period of time.ⁿ⁷ For discussion of the Act, see § 21.67.

In addition, various safety orders include specific training requirements for specific hazards.ⁿ⁸

Prior to its amendment in 1991, *Title 8 California Code of Regulations Section 3203*, set forth requirements for accident prevention programs. Pre-1991 OSHAB decisions interpreting this section provided some guidance regarding the training elements of an effective injury prevention program. Those decisions required that the employer's safety training be in sufficient detail for the employee to understand the task to be done and the predictable hazards to be avoided,ⁿ⁹ and the hazard of not following safety procedures.ⁿ¹⁰ If necessary, training must be bilingual in order to ensure that non-English-speaking employees understand.ⁿ¹¹ The OSHAB has rejected asserted defenses that training was unnecessary because the hazard was obvious.ⁿ¹²

Legal Topics:

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

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FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6401.7(a)(4); see 8 Cal. Code Reg. § 3203(a)(7).*

(n2)Footnote 2. *See 8 Cal. Code Reg. § 3203(a)(7); Lab. Code § 6401.7(c).*

(n3)Footnote 3. *See* discussion in § 21.12. Employers having a written injury and illness program in place on July 1, 1991, that complies with the pre-July 1, 1991, version of *8 Cal. Code Reg. § 3203* are exempt. *See 8 Cal. Code Reg. § 3203(a)(7)(A).*

(n4)Footnote 3.1. *Lab. Code § 6401.7(c).*

(n5)Footnote 4. *8 Cal. Code Reg. § 3203(a)(7)(F).*

(n6)Footnote 5. *8 Cal. Code Reg. § 1509(d).*

(n7)Footnote 6. *8 Cal. Code Reg. § 1509(e).*

(n8)Footnote 7. *See Penal Code § 387.*

(n9)Footnote 8. *See, e.g., 8 Cal. Code Reg. §§ 3220(e) (workplace emergency action plan), 3221(d) (fire prevention program), 5099 (excessive noise and hearing conservation), 5144(c)(1)(H) (respiratory equipment training), 5157(g) (training prior to entry into a "confined space"), 5194(h) (hazard communication program training), 5208(j)(7) (asbestos exposure), 5190(i) (cotton dust), 5209(e)(5) (carcinogens), 5210(j) (vinyl chloride), 5211(t) (coke oven emissions), 5216(l) (lead).*

(n10)Footnote 9. *Machado Dusters, Inc. (Sep. 17, 1980) Cal. OSHAB Docket No. 80-499 (ALJ decision).*

(n11)Footnote 10. *Douglas Aircraft Co. (June 21, 1979) Cal. OSHAB Docket No. 78-1567 (ALJ decision).*

(n12)Footnote 11. *Office Space, Inc. (May 28, 1980) Cal. OSHAB Docket Nos. 80-281, 80-282 (ALJ decision).*

(n13)Footnote 12. *See, e.g., Procter & Gamble Manufacturing Co. (June 20, 1979) Cal. OSHAB Docket No. 78-1551 (ALJ decision).*



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2-21 California Employment Law § 21.15

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.15 Duty to Monitor for Hazardous Exposures

Whenever it is reasonable to expect that employees may be exposed to concentrations of airborne contaminants in excess of levels permitted by *Title 8 California Code of Regulations Section 5155(c)*, the employer must monitor (or cause to have monitored) the work environment so that exposures to employees can be measured or calculated.ⁿ¹ If exposures to airborne contaminants are found or are expected to exceed allowable levels, the employer must institute measures to control such exposures, including engineering controls (including proper exhaust ventilation systems),ⁿ² administrative controls (such as work process and job assignment procedures that limit or eliminate exposure),ⁿ³ and a respirator protection program as described in *Title 8 California Code of Regulations Section 5144*.ⁿ⁴

Similarly, an employer must monitor conditions to limit or prevent employee exposure to confined spaces,ⁿ⁵ noise,ⁿ⁶ cotton dust,ⁿ⁷ asbestos,ⁿ⁸ vinyl chloride,ⁿ⁹ lead,ⁿ¹⁰ and coke oven emissions.ⁿ¹¹ Safety orders relating to other specific hazards may contain specific measurement or monitoring requirements.

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsCitations & InspectionsLabor & Employment LawOccupational Safety & HealthDuties & RightsWorkers' Compensation & SSDIRemedies Under Other LawsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *8 Cal. Code Reg. § 5155(e)(1)*.

(n2)Footnote 2. *See 8 Cal. Code Reg. §§ 5142, 5143*.

(n3)Footnote 3. *See 8 Cal. Code Reg. §§ 5140, 5141(b)*.

(n4)Footnote 4. *8 Cal. Code Reg. § 5155(e)(2); see 8 Cal. Code Reg. § 5141.*

(n5)Footnote 5. *See 8 Cal. Code Reg. § 5158(c).*

(n6)Footnote 6. *See 8 Cal. Code Reg. § 5097(b).*

(n7)Footnote 7. *See 8 Cal. Code Reg. § 5190(d).*

(n8)Footnote 8. *See 8 Cal. Code Reg. § 5208(d).*

(n9)Footnote 9. *See 8 Cal. Code Reg. § 5210(d).*

(n10)Footnote 10. *See 8 Cal. Code Reg. § 5216(d).*

(n11)Footnote 11. *See 8 Cal. Code Reg. § 5211(e).*



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part B. EMPLOYERS' DUTIES

2-21 California Employment Law § 21.16

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.16 Duties Regarding Employee Medical Examinations and Medical Surveillance Programs

Employers are required to provide medical examinations for affected employees at no cost to the employee if the employer uses carcinogens.ⁿ¹

When employees are exposed to certain kinds of hazards, the employer may be required to establish a medical surveillance program, which may include annual medical examinations and periodic medical follow-up, if recommended by the physician, consisting of physical examinations, blood tests, and any other laboratory test the examining physician deems necessary. Medical surveillance programs or medical examinations are required for exposures to various hazardous substances and conditions, including ethylene oxide,ⁿ² ethylene dibromide (EDB),ⁿ³ formaldehyde,ⁿ⁴ DBCP,ⁿ⁵ lead,ⁿ⁶ vinyl chloride,ⁿ⁷ coke oven emissions,ⁿ⁸ carcinogens,ⁿ⁹ asbestos,ⁿ¹⁰ cotton dust,ⁿ¹¹ airborne contaminants,ⁿ¹² and excessive noise.ⁿ¹³

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & RightsWorkers' Compensation & SSDIRemedies Under Other LawsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 9040.*

(n2)Footnote 2. *See 8 Cal. Code Reg. § 5220(i).*

(n3)Footnote 3. *See 8 Cal. Code Reg. § 5219(m).*

(n4)Footnote 4. *See 8 Cal. Code Reg. § 5217(l).*

(n5)Footnote 5. *See* 8 Cal. Code Reg. § 5212(m).

(n6)Footnote 6. *See* 8 Cal. Code Reg. § 5216(j).

(n7)Footnote 7. *See* 8 Cal. Code Reg. § 5210(k).

(n8)Footnote 8. *See* 8 Cal. Code Reg. § 5211(s).

(n9)Footnote 9. *See* Lab. Code § 9040; 8 Cal. Code Reg. § 5209(g).

(n10)Footnote 10. *See* 8 Cal. Code Reg. § 5208(l).

(n11)Footnote 11. *See* 8 Cal. Code Reg. § 5190(h).

(n12)Footnote 12. *See* 8 Cal. Code Reg. § 5155(f).

(n13)Footnote 13. *See* 8 Cal. Code Reg. § 5097(c).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part B. EMPLOYERS' DUTIES

2-21 California Employment Law § 21.17

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.17 Duty to Inform Employees

[1] Information Concerning Exposure to Hazardous Substances

[a] Notification Requirements

Whenever any employee has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels exceeding prescribed applicable standards, the employer must promptly notify the employee in writing of the fact that the employee has been exposed and of the corrective action being taken by the employer.ⁿ¹ The employer also must furnish any employee exposed to a hazardous substance with the information contained in the Material Safety Data Sheet (MSDS)ⁿ² for the substance, or with equivalent information, either in a written form or through training programs.ⁿ³ Employees must be informed of their rights to obtain MSDS information as provided by the Hazardous Substances Information and Training Act.ⁿ⁴ For discussion of MSDS's and other provisions of the Act, see § 21.02[2][d].

The employer must inform every newly hired employee and every employee exposed to any toxic substance or harmful physical agent, at least annually, about the procedures for obtaining access to employee exposure and medical records within the employer's possession or control.ⁿ⁵ Access must be provided to all employee exposure and medical records, and analyses of such data, for employees exposed to toxic substances or harmful physical agents, whether or not the records are related to a particular occupational safety or health standard. Such records must be provided whether made or maintained in-house or on a contract (fee-for-service) basis.ⁿ⁶

The request for access may be made by an "employee," including any current or former employee, the legal representative of any deceased or legally incapacitated employee, any employee being transferred to work where there will be exposure, or the designated representative of any employee, including any individual or organization to whom the employee has given written authorization to exercise the right of access. Recognized or certified collective bargaining agents are deemed designated representatives, but must have the employee's prior written consent for access to an employee's medical records.ⁿ⁷

Access is defined as the "right and opportunity to examine and copy."ⁿ⁸ Access must be provided in a reasonable time, place, and manner, but in no event later than 15 days after the request unless, after proper notice to the requestor and the Division, an extension of time is granted for good cause by the Chief of the Division.ⁿ⁹ If a copy of a record is requested, the employer must either (1) provide a copy without cost, (2) provide access to photocopying equipment without cost, or (3) loan the record to the requestor for a reasonable time to enable a copy to be made.ⁿ¹⁰ After a copy of a given record has been provided to the employee without cost, the employer may charge a reasonable, non-discriminatory administrative cost, including search and copying expenses but excluding any overhead expenses, for additional copies of the same record.ⁿ¹¹

Relevant employee exposure records that must be provided include (1) records of the requesting employee's past or present exposure to toxic substances or harmful physical agents, (2) in the absence of such directly relevant records, exposure records of other employees with past or present job duties or working conditions related to or similar to those of the employee, and (3) exposure records pertaining to workplaces or working conditions to which the employee is being assigned or transferred.ⁿ¹² The categories of exposure records include environmental (workplace) monitoring or measuring data, biological monitoring data, material safety data sheets, and, in the absence of those records, any other record that would reveal the identity (chemical, common, or trade name) of a toxic substance or harmful physical agent.ⁿ¹³ Specified limitations may be observed while providing access to employee medical recordsⁿ¹⁴ and analyses using employee exposure or medical records.ⁿ¹⁵

[b] Protection of Trade Secrets From Disclosure

[i] Disclosure to Employees, Employee Representatives, or Health Professionals

When a health professional, employee, or designated employee representative requests employee exposure or medical records pursuant to of *Title 8 California Code of Regulations Section 3204*, the employer may delete from the records any trade secret data that discloses manufacturing processes or discloses the percentage of a chemical substance in a mixture, as long as the health professional, employee, or designated representative is notified that such information has been deleted.ⁿ¹⁶ Whenever the deletion of trade secret information substantially impairs evaluation of the place where or the time when employee exposure to a toxic substance or harmful physical agent occurred, the employer must provide alternative information that is sufficient to permit the requesting party to identify where and when the exposure occurred.ⁿ¹⁷

The employer may withhold the specific chemical identity, including the chemical name and other specific identification of a toxic substance, from a record subject to disclosure, provided that (1) evidence is included to support the employer's claim that the withheld information is a trade secret; (2) all other available information of the properties and effects of the toxic substance is disclosed; (3) the employer informs the requesting party that the specific chemical identity is being withheld as a trade secret; and (4) the specific chemical identity is made available to health professionals, employees, and designated representatives whenever otherwise required by Section 3204 (e.g., in the case of a medical emergency or sufficient need for disclosure is shown, as discussed below).ⁿ¹⁸

If a treating physician or nurse determines that a medical emergency exists and that the specific chemical identity of a toxic substance is necessary for emergency or first-aid treatment, the employer must immediately disclose the specific chemical identity of a trade secret chemical to the treating physician or nurse, regardless of the existence of any written statement of need or any confidentiality agreement.ⁿ¹⁹ The employer, however, may later require a written statement of need and a confidentiality agreement, as described below, as soon as circumstances permit.ⁿ²⁰

In nonemergency situations, an employer must disclose the identity of a specific chemical substance that may otherwise be withheld as a trade secret to a health professional, employee, or designated employee representative, on request if the request meets the following requirements:ⁿ²¹

1. The request is in writing;
2. The request describes with reasonable detail one or more of the following occupational health needs for the information:
 - a. To assess the hazards of the chemicals to which employees will be exposed;
 - b. To conduct or assess sampling of the workplace atmosphere to determine employee exposure levels;
 - c. To conduct pre-assignment or periodic medical surveillance of exposed employees;
 - d. To provide medical treatment to exposed employees;
 - e. To select or assess appropriate personal protective equipment for exposed employees;
 - f. To design or assess engineering controls or other protective measures for exposed employees; or
 - g. To conduct studies to determine the health effects of exposure;ⁿ²²
3. The request explains in detail why the disclosure of the specific chemical identity is essential and why the disclosure of the following information, in lieu of disclosure of the chemical identity, would not enable the health professional, employee, or designated representative to provide the occupational health services described in Paragraph 2, *above*:
 - a. The properties and effects of the chemical;
 - b. Measures for controlling worker's exposure to the chemical;
 - c. Methods of monitoring and analyzing worker's exposure to the chemical; and
 - d. Methods of diagnosing and treating harmful exposures to the chemical.
4. The request includes a description of procedures to be used to maintain the confidentiality of any disclosed information; and
5. The health professional, employee, or designated representative agree in a written confidentiality agreementⁿ²³ that the health professional, employee, or designated representative will not use the trade secret information for any purpose other than the health needs asserted and will agree not to release the information under any circumstances other than to the Division, as provided by *Title 8 California Code of Regulations Section 3204(f)(9)*, except as otherwise authorized by the terms of the agreement or by the employer.

Whenever a health professional, employee, or designated employee representative who has received trade secret information decides that there is a need to disclose such information to the Division, the employer who provided the information must be informed by the health professional, employee, or designated representative prior to or at the same time that the disclosure is made to the Division.ⁿ²⁴

If the employer denies the written request for disclosure of a specific chemical identity, the employer's denial must be in

writing and must be provided to the requesting health professional, employee, or designated representative within 30 days after the request.ⁿ²⁵ The denial must include evidence to support the employer's claim that the specific chemical identity is a trade secret, state the specific reasons why the request is being denied, and explain in detail how alternative information may satisfy the specific medical or occupational need without revealing the specific chemical identity.ⁿ²⁶

On the employer's denial, the requesting health professional, employee, or designated representative may refer the request and the employer's written denial of the request to the Division for consideration.ⁿ²⁷ On receipt of such a referral, the Division must consider the evidence and determine whether (1) the employer has supported the claim that the specific chemical identity is a trade secret, (2) the requesting party has supported the claim that there is a medical or occupational health need for the information, and (3) the requesting party has demonstrated adequate means to protect the confidentiality of the chemical identity.ⁿ²⁸ The Division may issue a citation to the employer for failing to disclose the chemical identity if the Division determines that the specific chemical identity requested in a nonemergency situation is not a bona fide trade secret, or that it is a trade secret but that the requesting party has a legitimate medical or occupational need for the information and has executed a written confidentiality agreement with adequate means for complying with the agreement.ⁿ²⁹

The Chief of the Division may issue an order or impose additional limitations or conditions governing disclosure of the requested chemical information in order to assure that the occupational health needs are met without undue risk of harm to the employer, if the employer demonstrates to the Division that the execution of the confidentiality agreement would not provide sufficient protection against the potential harm from unauthorized disclosure of a specific chemical identity trade secret.ⁿ³⁰

[ii] Disclosure to Division

The employer must disclose to the Division any information that *Title 8 California Code of Regulations Section 3204*, requires the employer make available, notwithstanding the employer's claim of a trade secret.ⁿ³¹ Any claim of trade secret must be made no later than the time information is provided to the Division in order that the Division may make its determination regarding the trade secret status of the substance and implement any necessary protections.ⁿ³²

Nothing in Section 3204 requires the employer to disclose the process or "percentage of mixture" information that constitutes a trade secret.ⁿ³³

[2] Other Notification Requirements

The employer is also required to post (1) general information regarding employee protections and obligations under the California Occupational Safety and Health Act;ⁿ³⁴ and (2) employer citations.ⁿ³⁵

Employers are required to provide information regarding the employee's right to personally observe, or have a representative observe, monitoring or measuring of employee exposure to hazardous substances.ⁿ³⁶ The employer must notify employees of the time, date, and place of monitoring prior to its commencement, whenever such employee exposure testing is required.ⁿ³⁷

In addition to the above provisions, the California Corporate Criminal Liability Act provides criminal penalties for corporate employers and their managers who fail to warn affected employees in writing within a specified period of time of any "serious concealed danger," as defined in the Act, that may exist in the workplace.ⁿ³⁸ For discussion of the Act, see § 21.67.

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & RightsWorkers' Compensation & SSDIRemedies Under Other LawsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6408(e)*; 8 *Cal. Code Reg. § 340.2*.

(n2)Footnote 2. *See* discussion in § 21.02[2][d].

(n3)Footnote 3. *Lab. Code § 6398(b)*; 8 *Cal. Code Reg. § 5194*.

(n4)Footnote 4. *Lab. Code § 6398(c)*; 8 *Cal. Code Reg. § 5194*.

(n5)Footnote 5. 8 *Cal. Code Reg. § 3204(g)*; *see Lab. Code § 6408(d)*.

(n6)Footnote 6. 8 *Cal. Code Reg. § 3204(b)(1)-(3)*.

(n7)Footnote 7. 8 *Cal. Code Reg. § 3204(c)(3), (4)*.

(n8)Footnote 8. 8 *Cal. Code Reg. § 3204(c)(1)*.

(n9)Footnote 9. 8 *Cal. Code Reg. § 3204(e)(1)(A)*.

(n10)Footnote 10. 8 *Cal. Code Reg. § 3204(e)(1)(C)*.

(n11)Footnote 11. 8 *Cal. Code Reg. § 3204(e)(1)(E)*.

(n12)Footnote 12. 8 *Cal. Code Reg. § 3204(e)(2)(A)*.

(n13)Footnote 13. *See* 8 *Cal. Code Reg. § 3204(c)(5)*.

(n14)Footnote 14. 8 *Cal. Code Reg. § 3204(e)(2)(B)*.

(n15)Footnote 15. 8 *Cal. Code Reg. § 3204(e)(2)(C)*.

(n16)Footnote 16. 8 *Cal. Code Reg. § 3204(f)(1)*. A "trade secret," in this context, means any confidential formula, pattern, process, device, or information (or compilation of information) that is used in an employer's business and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. 8 *Cal. Code Reg. § 3204(c)(14)*.

(n17)Footnote 17. 8 *Cal. Code Reg. § 3204(f)(1)*.

(n18)Footnote 18. 8 *Cal. Code Reg. § 3204(f)(2)*.

(n19)Footnote 19. 8 *Cal. Code Reg. § 3204(f)(3)*.

(n20)Footnote 20. 8 *Cal. Code Reg. § 3204(f)(3)*.

(n21)Footnote 21. 8 *Cal. Code Reg. § 3204(f)(4)*.

(n22)Footnote 22. 8 *Cal. Code Reg. § 3204(f)(4)(B)*.

(n23)Footnote 23. Such confidentiality agreements may restrict the use of information to the health purposes listed

in the written statement of need and provide for legal remedies for breach of the agreement, including a stipulation for a reasonable "pre-estimate of likely damages." Such agreements may not, however, include any requirement for posting of a penalty bond. 8 *Cal. Code Reg.* § 3204(f)(5). Nothing in 8 *Cal. Code Reg.* § 3204 precludes either the requesting party or the employer from pursuing any noncontractual remedies allowed by law. 8 *Cal. Code Reg.* § 3204(f)(6).

(n24)Footnote 24. 8 *Cal. Code Reg.* § 3204(f)(7).

(n25)Footnote 25. 8 *Cal. Code Reg.* § 3204(f)(8)(A), (B).

(n26)Footnote 26. 8 *Cal. Code Reg.* § 3204(f)(8)(C)-(E).

(n27)Footnote 27. 8 *Cal. Code Reg.* § 3204(f)(9).

(n28)Footnote 28. 8 *Cal. Code Reg.* § 3204(f)(10).

(n29)Footnote 29. 8 *Cal. Code Reg.* § 3204(f)(11)(A).

(n30)Footnote 30. 8 *Cal. Code Reg.* § 3204(f)(11)(B).

(n31)Footnote 31. 8 *Cal. Code Reg.* § 3204(f)(12).

(n32)Footnote 32. 8 *Cal. Code Reg.* § 3204(f)(12).

(n33)Footnote 33. 8 *Cal. Code Reg.* § 3204(f)(13).

(n34)Footnote 34. *See Lab. Code* § 6408(a); 8 *Cal. Code Reg.* § 340 (posting of Cal/OSHA notice).

(n35)Footnote 35. *Lab. Code* § 6408(b); *see* discussion in §§ 21.22, 21.42[1][b].

(n36)Footnote 36. *Lab. Code* § 6408(c); 8 *Cal. Code Reg.* § 340.1; *see* discussion in § 21.33[2].

(n37)Footnote 37. 8 *Cal. Code Reg.* § 340.1.

(n38)Footnote 38. *See Penal Code* § 387.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part B. EMPLOYERS' DUTIES

2-21 California Employment Law § 21.18

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.18 Employers' Reporting Duties

[1] Employer Reports to Division of Occupational Safety and Health

Whenever an employee sustains any serious injury or illness or death at a place of employment or in connection with any employment, the employer must report the incident immediately by telephone or telegraph to the nearest office of the Division.ⁿ¹ The report must be made whether or not employment caused the injury, illness, or death. Immediately means as soon as practicable, and no longer than 8 hours, after the employer would have known of the injury, illness, or death through diligent inquiry.ⁿ² If the employer can demonstrate that exigent circumstances exist, this time frame may be extended up to, but not beyond, 24 hours.ⁿ³ Serious injury or illness is defined as any injury or illness occurring in a place of employment or in connection with any employment that requires in-patient hospitalization in excess of 24 hours for other than medical observation or in which an employee suffers the loss of any member of the body or any serious degree of permanent disfigurement. The definition excludes any injury or illness or death caused by the commission of a Penal Code violation (except violation of *Penal Code Section 385*, concerning unlawful work near high voltage equipment) or an accident on a public street or highway.ⁿ⁴ The information to be reported is set forth in *Title 8 California Code of Regulations Section 342*.

Any state, county, or local fire or police agency called to an accident involving an employee who sustained a serious injury or illness or who died must notify the nearest Division office by telephone immediately.ⁿ⁵ Thereafter, the Division must immediately notify the appropriate prosecuting authority of the accident.ⁿ⁶

In addition to the above provisions, the California Corporate Criminal Liability Act provides criminal penalties for corporate employers and their managers who fail to inform the Division in writing within a specified period of time of any "serious concealed danger," as defined in the Act, that may exist in the workplace.ⁿ⁷ For discussion of the Act, see § 21.67.

[2] Employer Reports to Division of Labor Statistics and Research

Every employer must file a written report of every employee occupational injury or illness that results in lost time

beyond the date of the injury or illness or that requires medical treatment beyond first aid.ⁿ⁸ For this purpose, "occupational illness" is defined as any abnormal condition or disorder caused by exposure to environmental factors associated with employment, including acute and chronic illnesses or diseases that may be caused by inhalation, absorption, ingestion, or direct contact.ⁿ⁹ Lost time means absence from work for a full day or shift beyond the date of the injury or illness.ⁿ¹⁰ Reportable injuries and illnesses include those which arose, or are alleged to have arisen out of and in the course of employment.ⁿ¹¹ Treatment administered for pesticide poisoning or a condition suspected as pesticide poisoning shall in no case be deemed to be first aid treatment for purposes of the notice requirement.ⁿ¹²

The report must be made within five days after the employer obtains knowledge of the injury or illness.ⁿ¹³ If the employer is insured for workers' compensation, the report must be filed with the employer's insurer within the five-day period,ⁿ¹⁴ and the insurer must forward the report to DLSR immediately on receipt.ⁿ¹⁵ Self-insured employers, the state of California, or the insurers of insured employers must file the report with the DLSR directly within the five-day limit.ⁿ¹⁶ The report must be made on DLSR form 5020 or by means of approved compatible computer media.ⁿ¹⁷

The employer report to the DLSR is not subject to public inspection and may not be made public.ⁿ¹⁸ The report is not admissible as evidence in any adversary proceeding before the Workers' Compensation Appeals Board.ⁿ¹⁹

Reporting requirements for injuries and illnesses sustained by state prisoners are governed by *Labor Code Sections 6413 through 6413.2*.ⁿ²⁰

[3] Doctor's First Report

Every physician who attends an injured employee must file a complete report of every occupational injury or illness with the employer, or if the employer is insured, with the employer's insurer, within five days of the physician's initial examination. The employer or insurer must then file the completed report with DLSR within five days of receipt of the doctor's report.ⁿ²¹ If any treatment, including first aid, is given for pesticide or suspected pesticide poisoning, the physician must also file the report directly with DLSR within five days after initial treatment.ⁿ²² The physician's report required to be filed with the DLSR in cases involving suspected pesticide poisoning need not include the affidavit otherwise required, and the report must also be filed with the local health officer within 24 hours of the initial examination, by facsimile transmission or other means. If the treatment is for pesticide poisoning or suspected pesticide poisoning, the physician will not be compensated for the initial diagnosis and treatment unless the report is filed with the employer, or if insured, with the employer's insurer, and includes or is accompanied by a signed affidavit certifying that a copy of the report was filed with the local health officer as required by this statute.ⁿ²³ If able to do so, the injured employee is required to complete a portion of the doctor's first report describing how the injury or illness occurred before it is filed with the employer, insurer, or DLSR. However, the inability or failure of the employee to complete the form will not affect the employee's rights under the Labor Code and is no excuse for any delay in filing the form.ⁿ²⁴ The report must be filed on DLSR form 5021 or by compatible approved computer media.ⁿ²⁵

For purposes of the reporting requirement, the term "physician" includes physicians or surgeons holding M.D. or D.O. degrees, psychologists, optometrists, dentists, podiatrists, and chiropractors licensed in California.ⁿ²⁶

[4] Employer's Report of Carcinogen Use

Every employer whose operations involve the use of any carcinogen, including asbestos and vinyl chloride, must file a written report with the Division regarding the use of a carcinogen or any incident resulting in the release of a potentially hazardous amount of a carcinogen into any area where employees may be exposed.ⁿ²⁷ The employer must report the planned use of asbestos or asbestos-containing products prior to commencement of any new operation or process.ⁿ²⁸ The requirements and time for reporting the use or release of other carcinogens is specified in the general order governing carcinogensⁿ²⁹ or in the order in Title 8 of the California Code of Regulations that governs the particular carcinogen in question.ⁿ³⁰

The employer must also post a copy of each such carcinogen use report in the location or locations where the carcinogen is used, which must be conspicuous to employees.ⁿ³¹

The Division must forward a copy of each employer carcinogen use report to any bargaining representative, and other representative known to the Division, of affected employees.ⁿ³²

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & RightsWorkers' Compensation & SSDIRemedies Under Other LawsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6409.1(b)*; *8 Cal. Code Reg. § 342(a)*.

(n2)Footnote 2. *8 Cal. Code Reg § 342(a)*.

(n3)Footnote 3. *See Lab. Code § 342(a)*.

(n4)Footnote 4. *8 Cal. Code Reg. § 330(h)*.

(n5)Footnote 5. *Lab. Code § 6409.2*; *8 Cal. Code Reg. § 342(b)*.

(n6)Footnote 6. *Lab. Code § 6409.2*.

(n7)Footnote 7. *See Penal Code § 387*.

(n8)Footnote 8. *Lab. Code § 6409.1(a)*; *8 Cal. Code Reg. § 14001(a)*.

(n9)Footnote 9. *See Lab. Code § 6409.1(a)* (incorporating definition of "occupational illness" in *Lab. Code § 6409(b)*); *8 Cal. Code Reg. § 14000*.

(n10)Footnote 10. *8 Cal. Code Reg. § 14001(a)*.

(n11)Footnote 11. *Lab. Code § 6409.1(a)*.

(n12)Footnote 12. *Lab. Code § 6409.3*.

(n13)Footnote 13. *Lab. Code § 6409.1(a)*.

(n14)Footnote 14. *8 Cal. Code Reg. § 14001(d)*.

(n15)Footnote 15. *See Lab. Code § 6409.1(a)*; *8 Cal. Code Reg. § 14002*.

(n16)Footnote 16. *8 Cal. Code Reg. § 14001(c)*; *see Lab. Code § 6409.1(a)*.

(n17)Footnote 17. *8 Cal. Code Reg. § 14001(b)*; *see Lab. Code §§ 6409.1(a), 6410*.

(n18)Footnote 18. *Lab. Code § 6412*.

(n19)Footnote 19. *Lab. Code § 6412*.

(n20)Footnote 20. *See also* 8 Cal. Code Reg. §§ 14900-14920.

(n21)Footnote 21. *Lab. Code* § 6409(a); 8 Cal. Code Reg. § 14003.

(n22)Footnote 22. *Lab. Code* § 6409(a); 8 Cal. Code Reg. § 14003(b).

(n23)Footnote 23. *See Lab. Code* § 6409(a).

(n24)Footnote 24. *Lab. Code* § 6409(a).

(n25)Footnote 25. 8 Cal. Code Reg. § 14003(c); *see Lab. Code* §§ 6409(a), 6410.

(n26)Footnote 26. *See Lab. Code* § 6409(a) (incorporating definition of "physician" in *Lab. Code* § 3209.3).

(n27)Footnote 27. *Lab. Code* § 9030.

(n28)Footnote 28. 8 Cal. Code Reg. § 341.6.

(n29)Footnote 29. *See* 8 Cal. Code Reg. § 5203.

(n30)Footnote 30. *See* 8 Cal. Code Reg. § 5200 *et seq.*

(n31)Footnote 31. *Lab. Code* § 9031.

(n32)Footnote 32. *Lab. Code* § 9031.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part B. EMPLOYERS' DUTIES

2-21 California Employment Law § 21.19

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.19 Recordkeeping Requirements

[1] Log of Work-Related Injuries and Illnesses (Forms 300, 300A, 301)

[i] Employers Required to Report

Effective January 1, 2002,ⁿ¹ many California employers covered by Cal/OSHAⁿ² must comply with new recordkeeping regulations for work-related fatalities, injuries and illnesses.ⁿ³ The applicability of the new regulations to any particular employer will depend upon its size and industry type, among other factors.

The partial exemption for size provides that if an employer has had ten or fewer employees at all times during the last calendar year, the employer need not keep Cal/OSHA injury and illness records unless OSHA or the BLS informs the employer in writing to keep records under the provisions of 8 *Cal. Code Reg. §§ 14300.41 or 14300.42*.ⁿ⁴ Conversely, if an employer has had more than ten employees at any time during the last calendar year, the employer must keep Cal/OSHA injury and illness records unless the employer is classified as a partially exempt industry under 8 *Cal. Code Reg. § 14300.2*.ⁿ⁵ The partial exemption for size is based on the number of employees in the entire company.ⁿ⁶ Size is determined by the employer's peak employment during the last calendar year.ⁿ⁷

The partial exemption for industry type provides that a public or private sector employer (all of whose establishments are classified in the retail, service, finance, insurance or real estate industries listed in Table 1 in Appendix A of 8 *Cal. Code Reg. § 14300 et seq.*) need not keep Cal/OSHA injury and illness records required by 8 *Cal. Code Reg. § 14300 et seq.* unless the government asks the employer to keep the records under 8 *Cal. Code Reg. §§ 14300.41 or 14300.42*.ⁿ⁸ If one or more establishments are classified in a non-exempt industry, the employer must keep Cal/OSHA injury and illness records required by 8 *Cal. Code Reg. § 14301 et seq.* for all such establishments except those partially exempted because of size under 8 *Cal. Code Reg. § 14300.1*.ⁿ⁹ The partial industry classification exemption applies to individual establishments. If a company has several establishments engaged in different classes of activities, some of the company's establishments may be required to keep records, while others may be exempt.ⁿ¹⁰ An employer with multiple establishments must keep a separate Cal/OSHA Form 300 for each establishment expected to be in operation for one year or longer.ⁿ¹¹ In California, establishments in the motion picture production and allied services are required to

record injuries and illnesses, even though federal law does not require these establishments to keep such records.ⁿ¹²

Employers whose employees' occupational injuries and illnesses are required to be recorded under the Federal Mine Safety and Health Act of 1977 are not required to comply with the recordkeeping requirements of *8 Cal. Code Reg. § 14300 et seq.* to the extent compliance would duplicate the information reported, so long as an employer provides access to the records required by *30 C.F.R. § 50.20 et seq.* to authorized representatives of the official California mine safety agency.ⁿ¹³

However, all employers must continue to file reports of occupational injuries and illnesses with the Division of Labor Statistics and Research, as required by *8 Cal. Code Reg. § 14000 et seq.*, and to immediately report to the Division of Occupational Safety and Health any workplace incident that results in serious injury or illness, or death, as required by *8 Cal. Code Reg. § 342*.ⁿ¹⁴

Recording a work-related injury, illness, or fatality does not mean that the employer or employee was at fault, that an employer violated a Cal/OSHA regulation, or that an employee is eligible for workers' compensation or other benefits.ⁿ¹⁵

[ii] What Must Be Recorded

Covered employers must maintain records of all fatalities, injuries, and illnesses that are:ⁿ¹⁶

- Work-related.ⁿ¹⁷
- New cases.ⁿ¹⁸
- Meet one or more of the general recording criteria of *8 Cal. Code Reg. § 14300.7* or the application to specific cases set forth in *8 Cal. Code Reg. §§ 14300.8-14300.12*.

An employer must consider an injury or illness to meet the general recording criteria and therefore to be recordable, if it results in any of the following:ⁿ¹⁹

- Death.
- Days away from work.
- Restricted work or transfer to another job.
- Medical treatment beyond first aid.
- Loss of consciousness.

An employer must also find a case meets the general recording criteria if it involves a significant injury or illness diagnosed by a physician or other licensed health care professional, even if it does not result in death, days away from work, restricted work or job transfer, medical treatment beyond first aid, or loss of consciousness.ⁿ²⁰ The following all have specific recording requirements:

- Needlestick and other sharps injuries.ⁿ²¹
- Cases involving medical removal under Cal/OSHA standards.ⁿ²²

- Cases involving occupational hearing loss.n23
- Work-related tuberculosis cases.n24
- Cases involving work-related musculoskeletal disorders.n25

[iii] Required Forms

An employer must use the following Cal/OSHA or equivalentn26 forms for recordable injuries and illnesses:n27

- Form 300: Log of Work-Related Injuries and Illnesses.
- Form 300A: Summary of Work-Related Injuries and Illnesses.n28
- Form 301: Injury and Illness Incident Report.

The employer may keep the records on computer if the computer can produce equivalent forms when they are needed, as described under 8 *Cal. Code Reg. §§ 14300.35, 14300.40*.n29

Records created by an employer to comply with another government agency's injury and illness recordkeeping requirements are considered to meet OSHA's recordkeeping requirements if OSHA accepts the other agency's records under a memorandum of understanding with that agency, or if the other agency's records contain the same information as 8 *Cal. Code Reg. § 14300 et seq.* require the employer to record.n30

[iv] When Employer Must Report

An employer must enter each recordable injury or illness on Forms 300 (Rev. 4/2004) and 301 within seven calendar days of receiving information that a recordable injury or illness has occurred.n31

[v] Privacy Concerns

If an employer has a "privacy concern case," as described in 8 *Cal. Code Reg. § 14300.29(b)(7)*, the employer may not enter the employee's name on the Cal/OSHA Form 300. Instead, the employer should enter "privacy case" in the space normally used for the employee's name. This procedure serves to protect the privacy of the injured or ill employee when another employee, a former employee, or an authorized employee representative is provided access to Form 300 (under 8 *Cal. Code Reg. § 14300.35(b)(2)*). The employer, however, must keep a separate, confidential list of the case numbers and employee names for all privacy concern cases to update the cases and provide the information to the government if asked to do so.n32 Only the following qualify as privacy concern cases:n33

- An injury or illness to an intimate body part or the reproductive system.
- An injury or illness resulting from a sexual assault.
- Mental illness.
- HIV infection, hepatitis, or tuberculosis.
- Needlestick injuries and cuts from sharp objects that are contaminated with another person's blood or other potentially infectious material.n34

- Other illnesses if the employee independently and voluntarily requests that his or her name not be entered on the log.

This is a complete list of all injuries and illnesses considered privacy concern cases.ⁿ³⁵

If an employer has a reasonable basis for believing that information describing a privacy concern case may be personally identifiable even though the employee's name is not listed, the employer may use discretion in describing the injury or illness on both forms 300 and 301. The employer must enter enough information to identify the cause of the incident and the general severity of the injury or illness, but need not include details of an intimate or private nature. For example, a sexual assault case could be described as "injury from assault," or an injury to a reproductive organ could be described as "lower abdominal injury."ⁿ³⁶

If an employer decides to voluntarily disclose the forms to persons other than government representatives, employees, former employees or authorized representatives as required by 8 *Cal. Code Reg. §§ 14300.35, 14300.40*, the employer must remove or hide the employees' names and other personally identifying information, unless the disclosure is:ⁿ³⁷

- To an auditor or consultant hired by the employer to evaluate the safety and health program;
- Necessary for processing a claim for workers' compensation or other insurance benefits; or
- To a public health authority or law enforcement agency for uses and disclosures for which consent, an authorization, or opportunity to agree or object is not required under Department of Health and Human Services Standards for Privacy of Individually Identifiable Health Information.ⁿ³⁸

[vi] Injuries or Illnesses Which Must Be Recorded

Covered employers must record on Form 300 recordable injuries and illnesses of all employees on the payroll, whether they are labor, executive, hourly, salaried, part-time, seasonal, or migrant workers. Covered employers also must record the injuries and illnesses of employees not on the payroll if they are supervised on a day-to-day basis,ⁿ³⁹ including employees from a temporary help service, employee leasing service, or personnel supply service,ⁿ⁴⁰ or a contractor's employees supervised by the employer rather than the contractor.ⁿ⁴¹ If the establishment is organized as a sole proprietorship or partnership, the owner or partners are not considered employees for recordkeeping purposes.ⁿ⁴²

[vii] Annual Requirements

At the end of each calendar year, covered employers must do each of the following:ⁿ⁴³

- Review Form 300 to verify that the entries are complete and accurate, and correct any deficiencies identified.
- Create an annual summary of injuries and illnesses recorded on Form 300 using Form 300A.ⁿ⁴⁴
- Certify the annual summary.ⁿ⁴⁵
- Post the annual summary.ⁿ⁴⁶

An employer required to keep Form 200 in 2001, was required to post a 2001 annual summary of Form 200 occupational injuries and illnesses for each establishment.ⁿ⁴⁷

Each year, OSHA or its designee sends injury and illness survey forms to employers in certain industries. Employers

that receive survey forms must complete and furnish them to OSHA or OSHA's designee, as stated on the forms, even if they are otherwise exempt from the recording obligations of 8 *Cal. Code Reg.* §§ 14300.1-14300.3.ⁿ⁴⁸

[viii] Retention

Covered employers must retain the Cal/OSHA forms for five years following the end of the calendar year to which the records pertain.ⁿ⁴⁹ Covered employers also must update Form 300 during the five-year retention period to include newly discovered recordable injuries or illnesses and to show any changes that have occurred in the classification of previously recorded injuries and illnesses.ⁿ⁵⁰

The employer must save copies of Forms 200ⁿ⁵¹ and supplementary recordsⁿ⁵² for each occupational injury or illness for five years following the year to which they relate and must continue to provide access to the data as though they were Forms 300 and 301. The employer is not required to update old 200 forms and supplementary records.ⁿ⁵³

[ix] Employees' Rights

Employees and their representatives must be involved in the recordkeeping system in the following ways:ⁿ⁵⁴

- The employer must inform each employee of how he or she is to report an injury or illness.
- The employer must provide employees limited access to injury and illness records.

An employer may not discriminate against an employee for reporting a work-related fatality, injury, or illness.ⁿ⁵⁵

[x] Variances from Recordkeeping Rule

A private employer wishing to keep records in a different manner from the manner prescribed by 8 *Cal. Code Reg.* § 14300 *et seq.* may submit a variance petition to the Assistant Secretary of Labor for Occupational Safety and Health by showing that the employer's recordkeeping system does each of the following:ⁿ⁵⁶

- Collects the same information as required by 8 *Cal. Code Reg.* § 14300 *et seq.*
- Meets the purposes of the Cal/OSHA Act.ⁿ⁵⁷
- Does not interfere with the administration of the Act.

[xi] Providing Records to Government Representatives

Generally, when an authorized government representative requests the records the employer keeps under 8 *Cal. Code Reg.* § 14300 *et seq.*, the employer must provide access to the original documents within four business hours as well as, if requested, one set of copies free of charge.ⁿ⁵⁸ Government representatives authorized to receive the records are the following:ⁿ⁵⁹

- A representative of the Chief of the Division of Occupational Safety and Health, or of Director of the Department of Health Services.
- A representative of the Secretary of the U.S. Department of Labor conducting an inspection or investigation under OSHA.
- A representative of the Secretary of the U.S. Department of Health and Human Services (including the National Institute for Occupational Safety and Health - NIOSH) conducting an investigation under

OSHA.

An employer that receives a Survey of Occupational Injuries and Illnesses Form from the Bureau of Labor Statistics (BLS), or a BLS designee, must promptly complete and return it following the instructions contained on the survey form, even if the employer is exempt from keeping injury and illness records under one or more of the provisions of 8 *Cal. Code Reg. §§ 14300.1-14300.3*.ⁿ⁶⁰

[2] Supplementary Records

Every employer, except small employers excluded by former *Title 8 California Code of Regulations Section 14314*, was required to maintain supplementary records for each employee occupational injury or illness that occurred at that establishment.ⁿ⁶¹ Supplementary records could consist of DLSR Form 5020 (Employer's Report of Occupational Injury or Illness) or the insurer's equivalent report or an equivalent form such as the Federal OSHA form 101 or an internal report, such as a supervisor's report containing the information required in the OSHA Form 101.ⁿ⁶²

[3] Annual Summary of Occupational Injuries and Illnesses

Under the now-repealed regulations, every employer was required to post an annual summary of occupational injuries and illnesses for each establishment, consisting of a copy of the year's totals from the Cal/OSHA Log 200. The Cal/OSHA Log 200 or Federal OSHA Form 200 must be used to present the summary. If no injuries or illnesses have occurred during the year, zeros must be entered for the totals. The annual summary must be posted in a conspicuous place or where notices to employees are customarily posted. The time for posting and certification requirements for the summary are described in of *Title 8 California Code of Regulations Section 14305*.

OSHA adopted new recordkeeping and posting requirements effective January 1, 2002. However, an employer required to keep Form 200 in 2001, was required to post a 2001 annual summary from Form 200 of occupational injuries and illnesses for each establishment.ⁿ⁶³ For annual requirements under the regulations now in effect, see § 21.19[1][vii], *above*.

[4] Retention of Records

The Cal/OSHA Log 200, supplementary records, and annual summary discussed in [1]-[3], *above*, were required to be retained by the employer in each establishment for five years following the end of the year to which they related.ⁿ⁶⁴ OSHA has adopted new recordkeeping and retention requirements effective January 1, 2002. However, employers must save copies of Forms 200 and supplementary records for each occupational injury or illness for five years following the year to which they relate and continue to provide access to the data as though these forms were the 300 and 301 forms.ⁿ⁶⁵ Employers are not required to update old 200 forms and supplementary records.ⁿ⁶⁶

[5] Access to Records

The employer was required to provide the Cal/OSHA Log 200, supplementary records, and annual summary for inspection and copying on request to representatives of the State of California, the Secretary of Labor, and any representative of the Secretary of Health and Human Services to enable such representatives to carry out their respective statutory duties.ⁿ⁶⁷ The employer was also required to provide the Log 200 and summary of recordable occupational injuries and illnesses to any employee, former employee, and any representative of such employees for examination and copying.ⁿ⁶⁸

[6] Written Injury and Illness Prevention Program

The employer must implement and maintain a written injury and illness prevention program as described in *Labor Code Section 6401.7(a)*. The employer is further required to keep appropriate records of the steps taken to implement and

maintain the program.ⁿ⁶⁹ For further discussion of recordkeeping requirements regarding injury and illness prevention programs, see § 21.12[5].

[7] Written Hazard Communication Program

Every employer must develop and implement a written hazard communication program which, at a minimum, describes how the employer will comply with the requirements for proper hazardous substance container labelling and hazard warning signs or systems,ⁿ⁷⁰ for obtaining and maintaining material safety data sheets (MSDS's) for all hazardous substances in the workplace,ⁿ⁷¹ and for providing information to employees and conducting employee hazardous substance training.ⁿ⁷² The written program must also include a list of the hazardous substances known to be present in the workplace using an identity that is referenced on the appropriate MSDSⁿ⁷³ and a description of the methods the employer will use to inform employees of the hazards of performing non-routine tasks and of handling the hazard of substances in unlabeled pipes in the work area.ⁿ⁷⁴ The program also must describe the methods the employer will use to inform employers sharing the same work area of hazardous substances and appropriate protective measures.ⁿ⁷⁵ The written hazard communication program must be made available upon request to employees, their designated representatives, NIOSH, and the Chief of the Division within the time limits allowed under *Title 8 California Code of Regulations Section 3204(e)*.ⁿ⁷⁶

[8] Retention of Material Safety Data Sheets (MSDS's)

Every employer is required to keep copies of all required material safety data sheets (MSDS's) for each hazardous substance in the workplace and to ensure that MSDS's are readily accessible during each work shift to employees when they are in their work areas.ⁿ⁷⁷ Employers engaged in construction that have employees who do not primarily report to a single work establishment or who do not report to a fixed work place on a regular basis may comply by making any part of the contents of an MSDS available on request by telephone, radio, or other means in a timely and reasonably manner, and thereafter, if requested, by making the MSDS available as soon as possible.ⁿ⁷⁸

An employer must, within 7 working days of noting any missing information on an MSDS, send written inquiry to the manufacturer or importer of the hazardous substance, requesting a complete MSDS be provided.ⁿ⁷⁹ Within 15 days of receipt of a complete MSDS, the employer must notify the requestor of its availability.ⁿ⁸⁰

[9] Retention Period for Employee Exposure and Medical Records

Unless a specific occupational safety or health standard provides for a different period of time, employers must preserve and retain employee medical records for the duration of employment plus 30 years, although health claim forms and first-aid treatment forms kept separately from the medical records need not be retained.ⁿ⁸¹

Unless otherwise expressly provided, employers must preserve and retain employee exposure records for 30 years, except background data to environmental monitoring (e.g., lab reports and worksheets) may be discarded after 1 year as long as the sampling results, the collection methodology (sampling plan), a description of the analytical and mathematical methods used, and a summary of other background data relevant to interpretation of results are retained for 30 years.ⁿ⁸²

MSDS's must be retained as required by *Title 8 California Code of Regulations Section 5194*; however, where MSDS's are destroyed, the employer must keep a record for 30 years of the identity (chemical name) of the substance or agent, where it was used, and when it was used.ⁿ⁸³ Other records regarding the identity of a toxic substance of harmful physical agent need not be kept as long as some record of the identity (chemical name) of the substance or agent, where it was used, and when it was used is retained for at least 30 years.ⁿ⁸⁴

Analyses using employee exposure or medical records must be preserved and maintained for at least 30 years.ⁿ⁸⁵

Chest X-rays must be preserved in their original state, although other records may be retained in any manner that preserves the record in a retrievable state.ⁿ⁸⁶

Legal Topics:

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

Labor & Employment Law Occupational Safety & Health General Overview Labor & Employment Law Occupational Safety & Health Administrative Proceedings General Overview Labor & Employment Law Occupational Safety & Health Duties & Rights Labor & Employment Law Wage & Hour Laws Recordkeeping Requirements Workers' Compensation & SSDI Remedies Under Other Laws General Overview

FOOTNOTES:

(n1)Footnote 1.

Note: Effective January 1, 2002, OSHA issued a revised rule to improve the system employers use to track and record workplace injuries and illnesses. California regulations for compliance with the new requirements are the responsibility of the Division of Occupational Safety and Health on behalf of the Division of Labor Statistics and Research. Formal adoption of the new federal occupational injury and illness recordkeeping requirements was expected in mid-January 2002. However, all California employers are required to begin recording injuries and illness according to the provisions of the new federal regulation on 1 January 2002. This section presents the proposed California regulations, as of January 1, 2002, or their effective date, whichever is later. *8 Cal. Code Reg. § 14300.48*.

(n2)Footnote 2. All employers covered by the California Occupational Safety and Health Act are covered by the provisions of *8 Cal. Code Reg. § 14300 et seq.* However, because of the partial exemptions provided by Sections 14300.1 and 14300.2, many employers need not keep OSHA injury and illness records unless they are asked in writing to do so by OSHA, the Bureau of Labor Statistics (BLS), or a state agency operating under the authority of OSHA or the BLS. For example, employers with 10 or fewer employees and establishments in certain industry classifications listed in Section 14300.2, Appendix A, are partially exempt from keeping Cal/OSHA injury and illness records. Note 2 to *8 Cal. Code Reg. § 14300*.

(n3)Footnote 3. *8 Cal. Code Reg. § 14300*.

(n4)Footnote 4. *8 Cal. Code Reg. § 14300.1(a)(1)*.

(n5)Footnote 5. *8 Cal. Code Reg. § 14301(a)(2)*.

(n6)Footnote 6. *8 Cal. Code Reg. § 14301(b)(1)*.

(n7)Footnote 7. *8 Cal. Code Reg. § 14301(b)(2)*.

(n8)Footnote 8. *8 Cal. Code Reg. § 14300.2(a)(1)*. This exemption applies only to types of establishments in the retail, service, finance, insurance or real estate industries listed in Table 1. *8 Cal. Code Reg. § 14300.2(b)(1)*.

(n9)Footnote 9. *8 Cal. Code Reg. § 14300.2(a)(2)*.

(n10)Footnote 10. *8 Cal. Code Reg. § 14300.2(b)(2)*. The Standard Industrial Classification (SIC) code is determined by using the Standard Industrial Classification Manual, Executive Office of the President, Office of Management and Budget. An employer can contact the nearest office of the Division of Occupational Safety and Health for help in determining the SIC code or view the SIC Manual at www.osha.gov.

(n11)Footnote 11. *8 Cal. Code Reg. § 14300.30*.

(n12)Footnote 12. Note to 8 *Cal. Code Reg. § 14300.2*.

(n13)Footnote 13. 8 *Cal. Code Reg. § 14300.47*.

(n14)Footnote 14. 8 *Cal. Code Reg. §§ 14300(a)(1), 14300.2(a)(1)*.

(n15)Footnote 15.

Note 1 to 8 *Cal. Code Reg. § 14300*.

(n16)Footnote 16. 8 *Cal. Code Reg. § 14300.4(a)*.

(n17)Footnote 17. See 8 *Cal. Code Reg. § 14300.5*. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in 8 *Cal. Code Reg. § 14300.5(b)(2)* specifically applies.

(n18)Footnote 18. See 8 *Cal. Code Reg. § 14300.6*.

(n19)Footnote 19. 8 *Cal. Code Reg. § 14300.7*.

(n20)Footnote 20. 8 *Cal. Code Reg. § 14300.7*.

(n21)Footnote 21. 8 *Cal. Code Reg. § 14300.8*.

(n22)Footnote 22. 8 *Cal. Code Reg. § 14300.9*.

(n23)Footnote 23. 8 *Cal. Code Reg. § 14300.10*.

(n24)Footnote 24. 8 *Cal. Code Reg. § 14300.11*.

(n25)Footnote 25. 8 *Cal. Code Reg. § 14300.12*.

(n26)Footnote 26. An equivalent form is one that has the same information, is readable and understandable to a person not familiar with it, and is completed using the same instructions as the Cal/OSHA form it replaces. 8 *Cal. Code Reg. § 14300.29(b)(4)*. Appendices D-F to 8 *Cal. Code Reg. § 14300 et seq.* provide elements for development of equivalent forms consistent with Section 14300.29(b)(4) requirements.

(n27)Footnote 27. 8 *Cal. Code Reg. § 14300.29. see* Appendices A-C to 8 *Cal. Code Reg. § 14300 et seq.* for samples of the Cal/OSHA forms.

(n28)Footnote 28. Appendix G to 8 *Cal. Code Reg. § 14300 et seq.* is a worksheet to assist in completing the Cal/OSHA Form 300A.

(n29)Footnote 29. 8 *Cal. Code Reg. § 14300.29(b)(5)*.

(n30)Footnote 30. 8 *Cal. Code Reg. § 14300.3*. An employer may contact the nearest office of the Division of Occupational Safety and Health for help in determining whether the records meet these requirements. 8 *Cal. Code Reg. § 14300.3*

(n31)Footnote 31. 8 *Cal. Code Reg. § 14300.29(b)(3)*.

(n32)Footnote 32. 8 *Cal. Code Reg. § 14300.29(b)(6)*.

(n33)Footnote 33. 8 *Cal. Code Reg. § 14300.29(b)(7), (8)*.

(n34)Footnote 34. *See* 8 Cal. Code Reg. § 14300.8 for definitions.

(n35)Footnote 35. 8 Cal. Code Reg. § 14300.29(b)(8).

(n36)Footnote 36. 8 Cal. Code Reg. § 14300.29(b)(9).

(n37)Footnote 37. 8 Cal. Code Reg. § 14300.29(b)(10).

(n38)Footnote 38. 45 C.F.R. § 164.512.

(n39)Footnote 39. 8 Cal. Code Reg. § 14300.31(a).

(n40)Footnote 40. 8 Cal. Code Reg. § 14300.31(b)(2).

(n41)Footnote 41. 8 Cal. Code Reg. § 14300.31(b)(3).

(n42)Footnote 42. 8 Cal. Code Reg. § 14300.31(a).

(n43)Footnote 43. 8 Cal. Code Reg. § 14300.32(a).

(n44)Footnote 44. For instructions on how to complete the annual survey, *see* 8 Cal. Code Reg. § 14300.32(b)(2).

(n45)Footnote 45. *See* 8 Cal. Code Reg. § 14300.32(b)(3).

(n46)Footnote 46. *See* 8 Cal. Code Reg. § 14300.32(b)(5)-(8).

(n47)Footnote 47. 8 Cal. Code Reg. § 14300.43(a).

(n48)Footnote 48. 8 Cal. Code Reg. § 14300.41.

(n49)Footnote 49. 8 Cal. Code Reg. § 14300.33(a).

(n50)Footnote 50. 8 Cal. Code Reg. § 14300.33(b)(1).

(n51)Footnote 51. *See* § 21.19[1][4].

(n52)Footnote 52. *See* § 21.19[2].

(n53)Footnote 53. 8 Cal. Code Reg. § 14300.44.

(n54)Footnote 54. 8 Cal. Code Reg. § 14300.35(a).

(n55)Footnote 55. *Lab. Code* §§ 6310, 6311; 8 Cal. Code Reg. § 14300.36.

(n56)Footnote 56. 8 Cal. Code Reg. § 14300.38(a). For details of what to include in the petition and procedure for the variance request, *see* 8 Cal. Code Reg. § 14300.38(b).

(n57)Footnote 57. *See* § 21.02[1][b].

(n58)Footnote 58. 8 Cal. Code Reg. § 14300.40(a).

(n59)Footnote 59. 8 Cal. Code Reg. § 14300(b)(1).

(n60)Footnote 60. 8 Cal. Code Reg. § 14300.42.

(n61)Footnote 61. Former 8 *Cal. Code Reg.* § 14304.

(n62)Footnote 62. Former 8 *Cal. Code Reg.* § 14304.

(n63)Footnote 63. 8 *Cal. Code Reg.* § 14300.43(a). For posting requirements for the 2001 summary, *see* 8 *Cal. Code Reg.* § 14300.43(b).

(n64)Footnote 64. Former 8 *Cal. Code Reg.* § 14307.

(n65)Footnote 65. 8 *Cal. Code Reg.* § 14300.44; for forms 300 and 301 generally, *see* § 21.19[1][iii]; for access requirements, *see* 8 *Cal. Code Reg.* §§ 14300.35, 14300.40.

(n66)Footnote 66. 8 *Cal. Code Reg.* § 14300.44.

(n67)Footnote 67. 8 *Cal. Code Reg.* § 14308(a).

(n68)Footnote 68. 8 *Cal. Code Reg.* § 14308(b).

(n69)Footnote 69. *Lab. Code* § 6401.7(d); 8 *Cal. Code Reg.* § 3203(b).

(n70)Footnote 70. 8 *Cal. Code Reg.* § 5194(f).

(n71)Footnote 71. 8 *Cal. Code Reg.* § 5194(g).

(n72)Footnote 72. 8 *Cal. Code Reg.* § 5194(e)(1),(h).

(n73)Footnote 73. 8 *Cal. Code Reg.* § 5194(e)(1)(A).

(n74)Footnote 74. 8 *Cal. Code Reg.* § 5194(e)(1)(B).

(n75)Footnote 75. 8 *Cal. Code Reg.* § 5194(e)(2).

(n76)Footnote 76. 8 *Cal. Code Reg.* § 5194(e)(3).

(n77)Footnote 77. 8 *Cal. Code Reg.* § 5194(g)(8).

(n78)Footnote 78. 8 *Cal. Code Reg.* § 5194(g)(8).

(n79)Footnote 79. 8 *Cal. Code Reg.* § 5194(g)(11)(A).

(n80)Footnote 80. 8 *Cal. Code Reg.* § 5194(g)(11)(C).

(n81)Footnote 81. 8 *Cal. Code Reg.* § 3204(d)(1)(A).

(n82)Footnote 82. 8 *Cal. Code Reg.* § 3204(d)(1)(B)(1).

(n83)Footnote 83. 8 *Cal. Code Reg.* § 3204(d)(1)(B)(2).

(n84)Footnote 84. 8 *Cal. Code Reg.* § 3204(d)(1)(B)(3).

(n85)Footnote 85. 8 *Cal. Code Reg.* § 3204(d)(1)(C).

(n86)Footnote 86. 8 *Cal. Code Reg.* § 3204(d)(2).



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part B. EMPLOYERS' DUTIES

2-21 California Employment Law § 21.20

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.20 Duty to Refrain From Employee Retaliation or Discrimination

An employer is prohibited from retaliating or in any manner discriminating against an employee for filing safety complaints with the employer, the employee's representative, the Division, and certain other governmental agencies, or for participating in certain other activities that are protected under the Cal/OSHA statute.ⁿ¹ An employer is also prohibited from laying off or discharging an employee for refusing to perform work when the performance of such work would violate the Labor Code, or any occupational safety or health standard or order, if the violation would create a real and apparent hazard to the employee or to his or her fellow employees.ⁿ² For full discussion of these prohibitions and of employee remedies for violation of the anti-retaliation provisions, see § 21.49.

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment

LawDiscriminationRetaliationGeneral OverviewLabor & Employment LawOccupational Safety & HealthGeneral

OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & Rights

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 6310.*

(n2)Footnote 2. *Lab. Code § 6311.*



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part B. EMPLOYERS' DUTIES

2-21 California Employment Law § 21.21

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.21 Duty to Obtain Necessary Permits for Hazardous Work

Any employer engaged in a type of work that by its nature is deemed to involve substantial risk of injury is required to obtain a permit from the Division of Occupational Safety and Health prior to beginning any work, practice, method, operation or process of employment involving such work.ⁿ¹

The types of employment requiring pre-job permits include (1) construction of trenches or excavations that are five feet or deeper and into which a person must descend;ⁿ² (2) construction of any building, structure, falsework, or scaffolding more than three stories high or the equivalent height;ⁿ³ (3) demolition of any building, structure, falsework, or scaffold more than three stories high or the equivalent height;ⁿ⁴ (4) the underground use of diesel engines in work in mines and tunnels;ⁿ⁵ and (5) effective Jan. 1, 2000, motion picture, television, or theater stages or sets, if there has occurred within any one prior calendar year in any combination at separate locations three serious injuries, fatalities, or serious violations related to the construction or demolition of sets more than 36 feet in height for the motion picture, television, and theatrical production industry.ⁿ⁶

In addition, any employer or contractor engaged in asbestos-related work, as defined in *Labor Code Section 6501.8*, which involves 100 square feet or more of surface area of asbestos-containing material must register with the Division prior to the start of such work.ⁿ⁷ The Division will grant registration after the employer or contractor demonstrates that the conditions, practices, means, methods, operations, or processes used or proposed to be used will provide a safe and healthful place of employment.ⁿ⁸

The requirements for permits and registration for asbestos-related work are discussed in detail in § 21.47[2].

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety &

HealthDuties & Rights

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code §§ 6500, 6501.*

(n2)Footnote 2. *Lab. Code § 6500(a).*

(n3)Footnote 3. *Lab. Code § 6500(b).*

(n4)Footnote 4. *Lab. Code § 6500(c).*

(n5)Footnote 5. *Lab. Code § 6500(d).*

(n6)Footnote 6. *Lab. Code § 6500(b).*

(n7)Footnote 7. *Lab. Code § 6501.5.*

(n8)Footnote 8. *Lab. Code § 6501.5.*



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part B. EMPLOYERS' DUTIES

2-21 California Employment Law § 21.22

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.22 Duty to Post Citations and Other Information Required by Division

There are a number of requirements throughout the Labor Code and Title 8 of the California Code of Regulations for posting information regarding citations, orders, appeals, etc., relating to occupational safety and health matters in order to inform employees. Among these are the requirement that the employer prominently post each citation, special order, or order to take special action issued by the Division for at least 3 working days, or until the unsafe condition is abated, if longer, at or near the place of the violation;ⁿ¹ and the requirement that the employer post the notice prepared by the Division that contains the address and phone number of the nearest Division office and explains the employees' right to report unsafe working conditions and request an inspection by the Division, the right to receive information regarding hazardous substances, the right to refuse to work under conditions that endanger an employee's life or health, and other posting, notice, and general information that the Division deems necessary.ⁿ²

Also, after the Division has verified abatement of a serious violation or order, the employer must post the notice of abatement prepared by the Division for three working days.ⁿ³ In all other cases of abatement of a serious violation, the employer must post the employer's signed statement confirming abatement which was sent to the Division pursuant to *Labor Code Section 6320*.ⁿ⁴

For discussion of abatement, see § 21.44[1].

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsCitations & InspectionsLabor & Employment LawOccupational Safety & HealthDuties & Rights

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 6318(a)*.

(n2)Footnote 2. *See Lab. Code § 6328.*

(n3)Footnote 3. *Lab. Code § 6318(b).*

(n4)Footnote 4. *Lab. Code § 6318(b).*



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part B. EMPLOYERS' DUTIES

2-21 California Employment Law §§ 21.23 through 21.29

AUTHOR: By Suzanne P. Marria, J.D.

[Reserved]

§§ 21.23[Reserved]



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part C. EMPLOYEE RIGHTS

2-21 California Employment Law § 21.30

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.30 Filing Complaints About Hazardous Conditions

Any employee, either directly or through his or her representative, or other person may make an oral or written complaint to the Division about any condition regarding the employment or place of employment that the employee or person believes to be unsafe, unhealthy, or in violation of California Occupational Safety and Health laws or regulations.ⁿ¹ For discussion of the Division's procedures regarding investigation of complaints and the complainant's rights, *see* § 21.40[3].

An employer is prohibited from discharging or in any manner discriminating against an employee because he or she has made an oral or written complaint about safety violations to the employer, the employee's representative, the Division, or any other governmental agency with statutory authority for assisting the Division regarding matters relating to employee safety or health.ⁿ² For full discussion of the prohibition against retaliation and remedies for its violation, *see* § 21.49.

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Labor & Employment Law Occupational Safety & Health General Overview Labor & Employment Law Occupational Safety & Health Administrative Proceedings General Overview Labor & Employment Law Occupational Safety & Health Duties & Rights

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code* § 6309.

(n2)Footnote 2. *See Lab. Code* § 6310(a).



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Part C. EMPLOYEE RIGHTS

2-21 California Employment Law § 21.31

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.31 Refusal of Unsafe Work

Labor Code Section 6311 prohibits an employer from laying off or discharging an employee for refusing to perform work if (1) the performance of such work would violate any provision of the Labor Code, including *Labor Code Section 6400*,ⁿ¹ or any occupational safety and health standard or order; and (2) the violation would create a real and apparent hazard to the employee or other employees. For further discussion of this prohibition and remedies for its violation, *see § 21.49*.

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & Rights

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6400(a)*, the general duty clause of the California Occupational Safety and Health Act, provides, "Every employer shall furnish employment and a place of employment that are safe and healthful for the employees therein." For further discussion, *see § 21.10*.



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2-21 California Employment Law § 21.32

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.32 Hazard Training

The employer's duty to provide, and the employee's right to receive, training about the hazards connected with assigned work is contained in general injury and illness prevention program laws and regulations, as well as Labor Code sections and regulations governing specific types of hazards. In addition, the employer's general duties to provide a safe and healthful employment and place of employmentⁿ¹ and to provide necessary safety devices, safeguards, and safe work proceduresⁿ² provide another statutory basis for requiring employee hazard training.ⁿ³

Labor Code Section 6401.7 requires all California employers to establish, implement, and maintain an effective employee injury and illness prevention program. More specific requirements for compliance with *Labor Code Section 6401.7* are set out in *Title 8 California Code of Regulations Section 3203*. A major component of injury and illness prevention programs is a training program regarding general safe and healthy work practices and well as specific training on any hazards that are specific to an employee's job assignment.ⁿ⁴ For discussion of injury and illness prevention programs generally, *see § 21.12*. For discussion of the training elements of such programs, *see § 21.14*.

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & Rights

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 6400.*

(n2)Footnote 2. *See Lab. Code § 6401.*

(n3)Footnote 3. *See discussion of employer's general duties in §§ 21.10 and 21.11.*

(n4)Footnote 4. *See Lab. Code § 6401.7(a)(4), (c); 8 Cal. Code Reg. § 3203(a)(7).*



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CHAPTER 21 Occupational Safety and Health Regulation
Part C. EMPLOYEE RIGHTS

2-21 California Employment Law § 21.33

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.33 Information Rights

[1] Information About Presence of or Exposure to Hazardous Substances

Employers are required to notify each employee who has been or is being exposed to toxic materials or harmful physical agents if the concentration or level of exposure exceeds the levels allowed by any applicable safety or health standard, order, or special order.ⁿ¹ The employer also must inform the employee of any corrective action taken in regard to the hazardous exposure.ⁿ² In addition, the employer must provide employees or their representatives access to accurate records of employee exposures to potentially toxic materials or harmful physical agents.ⁿ³ For further further discussion of rules relating to disclosure of information about exposure to hazardous substances, see § 21.17[1].

Under the Hazardous Substances Information and Training Act,ⁿ⁴ the Director of Industrial Relations is required to establish and maintain a list of hazardous substances that in some forms and concentrations may pose potential acute and chronic health hazards to employees.ⁿ⁵ The Director's list is published in *Title 8 California Code of Regulations Section 339*. Employers must comply with certain information and training requirements if a substance on the list is "present" in the workplace.ⁿ⁶ These requirements are set forth in *Title 8 California Code of Regulations Section 5194*. For further discussion of the requirements of the Act, see § 21.02[2][d].

The Standards Board's regulations also require every employer to develop and maintain a written hazard communication program for employees.ⁿ⁷ For discussion of the requirements of such programs, see § 21.19[7].

[2] Observation of Workplace Monitoring and Receipt of Results from Monitoring

Employees or their representatives must be given the opportunity to observe workplace hazard monitoring or measuring of employee exposure to hazards whenever an employer is required to conduct such monitoring or tests in order to determine employee exposure to hazards.ⁿ⁸ The employer must notify affected employees or their representatives of the time, date, and place of employee monitoring, testing, or measuring prior to the date it occurs.ⁿ⁹

In addition, the employer must provide affected employees or their representatives access to the records and reports of

the results of such testing, monitoring, or measuring when carried out in compliance with any standard or regulation adopted by the Standards Board.ⁿ¹⁰

[3] Access to Employer Injury and Illness Log

Under now-repealed regulations, the employer was required to provide access to the employer's log and summary of all recordable occupational injuries and illnesses upon request to any employee, former employee and their representatives for examination and copying at reasonable times and in a reasonable manner.ⁿ¹¹ For further discussion of new requirements for the log and employee access to the log, see § 21.19[1].

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & RightsWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 6408(e); 8 Cal. Code Reg. § 340.2.*

(n2)Footnote 2. *See Lab. Code § 6408(e); 8 Cal. Code Reg. § 340.2.*

(n3)Footnote 3. *See Lab. Code § 6408(d).*

(n4)Footnote 4. *Lab. Code § 6360 et seq.*

(n5)Footnote 5. *See Lab. Code §§ 6361(a)(1), 6380.*

(n6)Footnote 6. *See Lab. Code § 6398; see also Lab. Code § 6383(a)* (defining when hazardous substance is deemed to be present in workplace).

(n7)Footnote 7. *See 8 Cal. Code Reg. § 5194(e).*

(n8)Footnote 8. *Lab. Code § 6408(c); 8 Cal. Code Reg. § 340.1(a).*

(n9)Footnote 9. *8 Cal. Code Reg. § 340.1(a).*

(n10)Footnote 10. *8 Cal. Code Reg. § 340.1(b); Lab. Code § 142.3.*

(n11)Footnote 11. *Former 8 Cal. Code Reg. § 14308(b).*



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CHAPTER 21 Occupational Safety and Health Regulation
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2-21 California Employment Law § 21.34

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.34 Medical Examinations and Records

Employers are required to provide medical examinations for affected employees at no cost to the employee if the employer uses carcinogens.ⁿ¹ In the case of employee exposure to specific carcinogens, the employer must establish and maintain a medical surveillance program, as discussed in § 21.16. For discussion of access to employee exposure records, including medical records, see § 21.17[1][a].

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & RightsWorkers' Compensation & SSDIBenefit DeterminationsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code* § 9040.



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2-21 California Employment Law § 21.35

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.35 Participation in Cal/OSHA Inspections

In any investigation or inspection conducted by the Division at a worksite, employees have the right to have a representative authorized by the employees accompany the Cal/OSHA inspector throughout the inspection.ⁿ¹ If no authorized employee representative exists at the place of employment, the Cal/OSHA inspector must consult with a reasonable number of employees about occupational health and safety matters at the work site.ⁿ² Any employee or authorized employee representative has the right to discuss occupational safety and health problems or violations privately with the Cal/OSHA inspector during the course of the investigation or inspection.ⁿ³

The employer must allow any employee or designated employee representative who participates in the walkaround inspection to participate with full pay.ⁿ⁴ Refusal of an employer to pay the employee representatives accompanying a second inspection team on a work site walkaround inspection is discriminatory per se and in violation of *Labor Code Section 6310*.ⁿ⁵

For full discussion of Cal/OSHA inspection procedures, including employee participation, see § 21.41[1].

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsCitations & InspectionsLabor & Employment LawOccupational Safety & HealthCompliance & DefensesLabor & Employment LawOccupational Safety & HealthDuties & Rights

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6314(d)*.

(n2)Footnote 2. *Lab. Code § 6314(d)*.

(n3)Footnote 3. *Lab. Code § 6314(d)*.

(n4)Footnote 4. *Division of Labor Standards Enforcement v. Texaco, Inc.* (1983) 152 Cal. App. 3d Supp. 1, 6 , 199 Cal. Rptr. 561 .

(n5)Footnote 5. *See Division of Labor Standards Enforcement v. Texaco, Inc.* (1983) 152 Cal. App. 3d Supp. 1 . For discussion of prohibition against discrimination and retaliation, *see* § 21.49.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part C. EMPLOYEE RIGHTS

2-21 California Employment Law § 21.36

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.36 Participation in Cal/OSHA Proceedings

[1] Appeal Hearings

Employees and their authorized representatives have the right to appeal the reasonableness of the abatement period allowed by the Division.ⁿ¹ In addition, employees (or their representatives) may apply for party status in any appeal by an employer from a citation or other order, and the OSHAB may grant party status to an employee for good cause shown.ⁿ² For discussion of party status in appeal proceedings, see § 21.45[2],[8].

The employer must notify affected employees and their authorized representatives of any appeal in the manner specified in the OSHAB's regulations.ⁿ³ For discussion of notice requirements pertaining to appeals, see § 21.45[7].

An employer is prohibited from retaliating against an employee for participating in such proceedings.ⁿ⁴ For discussion of this prohibition, see § 21.49.

[2] Permit Safety Conferences

Whenever the employer engages in hazardous work that requires a pre-job permit from the Division,ⁿ⁵ the Division must decide whether a safety conference is necessary prior to approval of the permit.ⁿ⁶ When a safety conference is required, the safety conference must include representatives of employees, as well as the employer and the contractor.ⁿ⁷ For full discussion of requirements and procedures relating to permits, see § 21.47.

[3] Variance Hearings

If an employer applies for a temporary variance from the Division or a permanent variance from the Standards Board, the Division or Standards Board may grant a variance only after employees and their representatives have been given notice of the application and an opportunity to be heard.ⁿ⁸ For full discussion of procedures pertaining to variances, see § 21.48.

Legal Topics:

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

Administrative LawJudicial ReviewGeneral OverviewLabor & Employment LawOccupational Safety & HealthGeneral
OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor
& Employment LawOccupational Safety & HealthCompliance & Defenses

FOOTNOTES:

(n1)Footnote 1. 8 *Cal. Code Reg.* § 361(c); see *Lab. Code* §§ 6601, 6601.5, 6602.

(n2)Footnote 2. See 8 *Cal. Code Reg.* § 354(b).

(n3)Footnote 3. See 8 *Cal. Code Reg.* §§ 353, 356, 356.1, 356.2.

(n4)Footnote 4. See *Lab. Code* § 6310(a)(2).

(n5)Footnote 5. See *Lab. Code* § 6500; see also discussion in § 21.47[1][a].

(n6)Footnote 6. See *Lab. Code* § 6502.

(n7)Footnote 7. See *Lab. Code* § 6503.

(n8)Footnote 8. See *Lab. Code* §§ 143.1, 6450(b).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part C. EMPLOYEE RIGHTS

2-21 California Employment Law §§ 21.37through 21.39

AUTHOR: By Suzanne P. Marria, J.D.

[Reserved]

§§ 21.37[Reserved]



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part D. ADMINISTRATIVE ENFORCEMENT PROCEDURES

2-21 California Employment Law § 21.40

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.40 Division Powers and Authority

[1] Scope of Division Powers

The Division of Occupational Safety and Health (the Division) has statutory authority to administer and enforce occupational safety and health laws, standards, and ordersⁿ¹ in California. Under *Labor Code Section 6307*, the Division has "the power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary to adequately enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of the life, safety, and health of every employee in such employment or place of employment."

To enforce occupational safety and health standards and orders, the Division has specific statutory authority to do the following:

1. Declare and prescribe safety devices, safeguards, and other means or methods of protection, in order to make employment and places of employment safe, as required by law or by lawful order;ⁿ²
2. Enforce *Health and Safety Code Section 25910*, as well as standards and orders adopted by the Occupational Safety and Health Standards Board, regarding the installation, use, maintenance, and operation of reasonable uniform safety devices, safeguards, and other means or methods of protection, as necessary to carry out laws and lawful standards or special orders relating to protecting the lives and safety of employees;ⁿ³ and
3. "Require the performance of any other act which the protection of the life and safety of the employees in employments and places of employment reasonably demands."ⁿ⁴

The Division's authority under *Labor Code Section 6308*, when construed in light of other sections, such as *Labor Code Section 6306*, has been found to be broad,ⁿ⁵ and these sections "make clear that the terms of the legislation are to be

given a liberal interpretation for the purpose of achieving a safe working environment."n6

In general, the Division exercises its enforcement powers through accident investigations and workplace inspections.n7 If unsafe or hazardous conditions are found, the Division will issue to the employer a citation and notice of civil penalty,n8 an order prohibiting use,n9 a special order,n10 an order to take special action,n11 or a notice in lieu of citation;n12 initiate injunction proceedings;n13 or revoke or suspend permits issued by the Division.n14

Each of these actions is discussed more fully in § 21.42.

[2] Investigation of Occupational Accidents and Fatalities

[a] General Requirements and Procedures

The Division is required to investigate the causes of any employment accident that is fatal to one or more employees, or causes serious injury or illnessn15 or involves a "serious exposure."n16 However, the Division need not investigate the accident if it determines that such an investigation is unnecessary, and if it summarizes the facts supporting its determination and explains how the determination was made.n17 The Division may not conduct an accident investigation, for example, if it determines that it has no jurisdiction to conduct an investigation, or the cause of the fatality or serious injury, illness, or exposure was natural and not occupational, such as a pre-existing non-occupational medical condition, or if the accident did not involve any violation of any occupational safety or health law, standard, or order.n18

The Division may, in its discretion, investigate the causes of any other industrial accident or occupational illness and must issue any orders necessary to eliminate the causes of the accident or illness and to prevent its reoccurrence.n19 The orders issued by the Division in the course of such an investigation are not admissible as evidence in any action for damages or in any proceeding for compensation, based on or arising out of any injury or death caused by the accident or illness.n20

The Division is notified of occupational accidents, injuries, and illnesses by the reports employers are required to make to the Division within 24 hours of any serious injury, illness, or deathn21 and by reports from the responding state, county, or local police or fire agency.n22

The initial accident report information is compiled on a form called Cal/OSHA Form 4A. Division field offices are required to contact the Bureau of Investigations and the Deputy Chief for Field Operations immediately, day or night, on receipt of a report of an occupational fatality or serious injury or illness, and the Division Regional Manager if such a fatality or serious injury or illness occurs during working hours.n23

After completing an accident investigation, the Division compliance safety engineer or industrial hygienist will complete two forms, Cal/OSHA Form 4 (Accident Investigation Report) and Cal/OSHA Form 1 (Occupational Safety and Health Report), which is used to record the Division's findings from any work site inspection.

[b] Bureau of Investigations--Criminal Investigations and Referrals

Although Division compliance personnel, such as a compliance safety engineer or industrial hygienist, may initially investigate any occupational accident involving a fatality or serious injury, illness, or exposure,n24 the Bureau of Investigations (BOI) within the Division is responsible for directing accident investigations involving violations of occupational safety or health standards, orders, or special orders, or violations of *Health and Safety Code Section 25910*, in which there is an employee death, serious injury to five or more employees, or a request for prosecution by a Division representative.n25

The primary function of the BOI is to conduct criminal investigations.ⁿ²⁶ It is required to be staffed by "as many attorneys and investigators as are necessary" to carry out its functions.ⁿ²⁷ BOI investigative staff members have a right of access to all places of employment necessary to conduct investigations. They also have the right to "collect any evidence or samples they deem necessary to an investigation" and have all the powers granted the Division under *Labor Code Section 6314*.ⁿ²⁸ The BOI is expressly responsible by statute for preparing cases for criminal prosecutionⁿ²⁹ and must refer the results of its investigation to the appropriate prosecutor (i.e., city attorney, district attorney, or Attorney General) in any case that involves an employee fatality or serious injury to five or more employees, unless the BOI determines there is insufficient evidence of a violation of the law.ⁿ³⁰

The BOI also must review all inspection reports by Division compliance safety engineers and industrial hygienists that involve a serious violationⁿ³¹ where there have been serious injuries to one to four employees or a serious exposure.ⁿ³² Generally, this is done by reviewing Cal/OSHA Form 4A (Preliminary Report of Industrial Accident) or Cal/OSHA Form 4 (Accident Investigation Report). The BOI may further investigate those cases if it finds that criminal violations may have occurred.ⁿ³³

The BOI is authorized to communicate with a prosecutor any time the BOI deems it appropriate.ⁿ³⁴ Only BOI personnel are authorized to refer cases for criminal prosecution.ⁿ³⁵

For additional discussion of criminal prosecution for violations of Cal/OSHA law, *see* §§ 21.60-21.68.

[c] Referrals to State Contractors Licensing Board

The Division is required to transmit to the Registrar of Contractors copies of any reports of investigations of employment accidents that resulted in an employee fatality or serious injury, illness, or exposure involving a contractor licensed pursuant to the Contractors License Law.ⁿ³⁶ The Division may also transmit, either at its own discretion or on request by the Registrar of Contractors, investigation reports for any other kinds of industrial accidents.ⁿ³⁷

[d] Pesticide Exposure Reports

On receiving a report of an employee illness or injury involving a pesticide exposure, the Division will determine whether the County Health Department was notified of the incident by the treating doctor.ⁿ³⁸ Medical treatment for pesticide poisoning or a condition suspected to be pesticide poisoning is never considered to be mere first aid, for which no report is necessary.ⁿ³⁹ If the report to the Division, whether by the employer or responding police or fire agencies, was not made within the required 24-hour period, the incident will be assigned to a Division compliance safety engineer or industrial hygienist for investigation.ⁿ⁴⁰ The case will also be investigated if the Division learns that the County Health Department was not properly notified of the pesticide exposure.ⁿ⁴¹ Many pesticide exposure reports are received by the Division after the county agricultural commissioner or Department of Food and Agriculture has already investigated the incident. If the Division discovers that the examining physician failed to report the pesticide exposure to the Division, as required by *Labor Code Section 6409(a)*, the Division will issue a citation and civil penalty to the treating physician.ⁿ⁴²

[3] Investigation of Complaints

The Division has express statutory authority to summarily investigate any employment or place of employment whenever it is informed by any means or has reason to believe that such employment or work site is unsafe or injurious to the welfare of any employee.ⁿ⁴³ In addition, the Division is required to "maintain the capability to receive and act upon complaints at all times."ⁿ⁴⁴

Anyone can file a complaint with the Division alleging an unsafe or hazardous condition to which employees are exposed. However, on receipt of a complaint regarding any unsafe employment or place of employment received from

an employee, employee representative, including, but not limited to, an attorney, health or safety professional, union representative, or representative of a government agency, or the employer whose employee is directly involved in an unsafe place of employment, the Division must investigate as soon as possible, and no later than three working days after the complaint is received if the complaint alleges a serious violation, or 14 calendar days if the complaint alleges a non-serious violation.ⁿ⁴⁵ The Division must attempt to determine the period of time in the future that the complainant believes the unsafe working condition may continue to exist, and must allocate inspection resources so as to respond first to those situations in which time is of the essence.^{n45.1} When a complaint charging a serious violation is received from a state or local prosecutor, the Division must summarily investigate the employment or place of employment within 24 hours of receipt of the complaint.^{n45.2} A "serious violation," for this purpose, is defined as a complaint that alleges that "there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use in a place of employment."ⁿ⁴⁶

If the Division determines, from the facts stated in a complaint, that it is intended to "willfully harass" an employer or "is without any reasonable basis," it is not required to investigate within the time periods stated above.ⁿ⁴⁷

The name of any person submitting a complaint to the Division must be kept confidential by the Division, unless the complainant requests otherwise.ⁿ⁴⁸

The Division classifies complaints as "formal" and "informal." "Formal" complaints are those received from an employee, employee representative, or employer of an employee directly involved in an unsafe place of employment.ⁿ⁴⁹ All other complaints are considered "informal," including complaints from ex-employees or anonymous complaints.ⁿ⁵⁰ In cases involving "informal" complaints that allege non-serious violations, the Division may decide not to conduct an on-site inspection, but instead notify the employer of the complaint, the alleged violations, the safety or health regulations violated, and the corrective action to be taken.ⁿ⁵¹ The employer is requested to post the Division's letter and all subsequent correspondence on the matter, and is given a specified number of days to notify the Division in writing of the corrective action taken.ⁿ⁵²

The Division is required to keep complete and accurate records of all complaints received, whether oral or written, and if the identity of the complainant is known, the Division must inform the complainant of any action taken on the complaint and the reasons for such action within 14 calendar days of taking an action.ⁿ⁵³ Division records must include the dates on which any action is taken on a complaint, or the reasons for taking no action.ⁿ⁵⁴ The Division must annually compile and release on its Web site data pertaining to complaints received and citations issued.^{n54.1}

The Division must furnish the employee or the representative of employees requesting the review a written statement of the reasons for the Division's final disposition of the case.

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsRulemakingWorkers' Compensation & SSDIAdministrative ProceedingsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. Order is defined at 8 *Cal. Code Reg. § 330(e)*; *see also Lab. Code § 6308*.

(n2)Footnote 2. *Lab. Code § 6308(a)*.

(n3)Footnote 3. *Lab. Code § 6308(b)*.

(n4)Footnote 4. *Lab. Code § 6308(c)*.

(n5)Footnote 5. *Bendix Forest Products Corp. v. Division of Occupational Saf. & Health (1979) 25 Cal. 3d 465, 470, 158 Cal. Rptr. 882, 600 P.2d 1339*.

(n6)Footnote 6. *Carmona v. Division of Industrial Safety (1975) 13 Cal. 3d 303, 313, 118 Cal. Rptr. 473, 530 P.2d 161*.

(n7)Footnote 7. *See Lab. Code §§ 6309, 6313, 6314, 6317, 6320*.

(n8)Footnote 8. *See Lab. Code § 6317; 8 Cal. Code Reg. § 344.50*.

(n9)Footnote 9. *See Lab. Code §§ 6325, 6327; 8 Cal. Code Reg. § 344.50*.

(n10)Footnote 10. *See Lab. Code §§ 6305(b), 6308(c); 8 Cal. Code Reg. § 344.50*.

(n11)Footnote 11. *See Lab. Code § 6308(c); 8 Cal. Code Reg. § 344.50*.

(n12)Footnote 12. *See Lab. Code § 6317; 8 Cal. Code Reg. § 332.1*.

(n13)Footnote 13. *See Lab. Code §§ 6323, 6324, 6510; 8 Cal. Code Reg. § 344.50*.

(n14)Footnote 14. *See Lab. Code § 6505; 8 Cal. Code Reg. § 344.50*.

(n15)Footnote 15. "Serious injury or illness" is defined as "any injury or illness occurring in a place of employment or in connection with any employment which requires in-patient hospitalization for a period in excess of 24 hours for other than medical observation, or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of *Section 385 of the Penal Code*, or an accident on a public street or highway." *Lab. Code § 6302(h); 8 Cal. Code Reg. § 330(h)*. *Penal Code § 385(b)* makes it a misdemeanor to place, operate, erect, or move, either personally or through an employee or agent, any tools, machinery, equipment, materials, buildings, or structures within six feet of a high voltage overhead conductor. *Penal Code § 385(c)* makes it a misdemeanor to own, operate, or employ any person to operate cranes, derricks, or various other specified machines unless they contain a durable sign warning against operation within six feet of an high voltage line.

(n16)Footnote 16. *Lab. Code § 6313(a)*. "Serious exposure" is defined as "any exposure of an employee to a hazardous substance when the exposure occurs as a result of an incident, accident, emergency, or exposure over time and is in a degree or amount sufficient to create a substantial probability that death or serious physical harm in the future could result from the exposure." *Lab. Code § 6302(i)*.

(n17)Footnote 17. *Lab. Code § 6313(a)*.

(n18)Footnote 18. *See Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-4A*.

(n19)Footnote 19. *Lab. Code § 6313(b)*.

(n20)Footnote 20. *Lab. Code § 6313(b)*. A similar limitation under prior employee safety laws was construed to make only specific orders or recommendations made in connection with a specific action inadmissible, not general occupational safety or health standards and orders. *See Atherley v. MacDonald, Young & Nelson (1956) 142 Cal. App. 2d 575, 584, 298 P.2d 700*; *see also Lab. Code § 6304.5*. For further discussion, *see § 21.70*.

(n21)Footnote 21. *See Lab. Code § 6409.1(b); 8 Cal. Code Reg. § 342(a); see also discussion in § 21.18[1]*.

(n22)Footnote 22. *See Lab. Code § 6409.2; 8 Cal. Code Reg. § 342(b).*

(n23)Footnote 23. *See Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-4A.*

(n24)Footnote 24. *See generally Lab. Code § 6313; 8 Cal. Code Reg. § 344.50.*

(n25)Footnote 25. *Lab. Code § 6315(a); 8 Cal. Code Reg. §§ 344.51, 344.52.*

(n26)Footnote 26. *8 Cal. Code Reg. § 344.51; see Lab. Code § 6315(a).*

(n27)Footnote 27. *Lab. Code § 6315(d).*

(n28)Footnote 28. *Lab. Code § 6315(e).*

(n29)Footnote 29. *Lab. Code § 6315(a).*

(n30)Footnote 30. *See Lab. Code § 6315(a), (g).*

(n31)Footnote 31. A "serious violation" is deemed to exist if there is a substantial probability that death or physical harm could result from a violation, including, but not limited to, circumstances in which there is a substantial probability that either of the following could result in death or great bodily injury: (1) an exposure exceeding an established permissible exposure limit, or (2) the existence of one or more practices, means, methods, operations, or processes that have been adopted or are in use in the place of employment. *Lab. Code § 6432(a)*. However, a serious violation will not be deemed to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable discretion, know of the presence of the violation. *Lab. Code § 6432(b)*.

(n32)Footnote 32. *Lab. Code § 6315(a).*

(n33)Footnote 33. *See Lab. Code § 6315(a).*

(n34)Footnote 34. *Lab. Code § 6315(h).*

(n35)Footnote 35. *8 Cal. Code Reg. §§ 344.50, 344.51.*

(n36)Footnote 36. *Lab. Code § 6313.5; see Bus. & Prof. Code § 7000 et seq. (contractors' licensing law).*

(n37)Footnote 37. *Lab. Code § 6313.5.*

(n38)Footnote 38. *Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-4A.*

(n39)Footnote 39. *See Lab. Code § 6409.3.*

(n40)Footnote 40. *Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-4A.*

(n41)Footnote 41. *Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-4A.*

(n42)Footnote 42. *Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-4A.*

(n43)Footnote 43. *Lab. Code § 6309.*

(n44)Footnote 44. *Lab. Code § 6309.*

(n45)Footnote 45. *Lab. Code § 6309.*

(n46)Footnote 45.1. *Lab. Code § 6309.*

(n47)Footnote 45.2. *Lab. Code § 6309.*

(n48)Footnote 46. *Lab. Code § 6309.*

(n49)Footnote 47. *Lab. Code § 6309.*

(n50)Footnote 48. *Lab. Code § 6309.*

(n51)Footnote 49. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-7.

(n52)Footnote 50. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-7.

(n53)Footnote 51. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-7.

(n54)Footnote 52. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-7.

(n55)Footnote 53. *Lab. Code § 6309.*

(n56)Footnote 54. *Lab. Code § 6309.*

(n57)Footnote 54.1. *Lab. Code § 6309.*



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part D. ADMINISTRATIVE ENFORCEMENT PROCEDURES

2-21 California Employment Law § 21.41

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.41 Inspections

[1] Overview of Inspection Procedures

The Division conducts inspectionsⁿ¹ as a result of reported industrial accidents;ⁿ² complaints of unsafe conditions;ⁿ³ follow-up inspections to verify abatement of serious violations, special orders, or orders to take special action;ⁿ⁴ establishes procedures for ensuring that the highest hazardous employers in the most hazardous industries are inspected on a priority basis;ⁿ⁵ "permit" follow-up inspections;ⁿ⁶ asbestos-related work registration follow-up inspections;ⁿ⁷ carcinogen use follow-up inspections;ⁿ⁸ follow-up inspections on an employer's report of corrective action taken in response to a Division notice of a non-serious complaint;ⁿ⁹ and other scheduled periodic safety and health inspections in various industries, based on selection from the Division's Safety Data Base.ⁿ¹⁰

In addition, the Division may expand the scope of any inspection whenever it determines that a more complete inspection is warranted to carry out its duties under the California Occupational Safety and Health Act.ⁿ¹¹

An inspection normally consists of an opening conference, walkaround inspection, and closing conference. The opening conference is normally held with both management and employee representatives present, and the Division inspector will identify him or herself, explain the nature and scope of the inspection, the confidentiality requirements regarding the complainant, employee rights under the Labor Code, the Cal/OSHA program, the basis for citations and civil penalties, and inspection and walkaround procedures. He or she will also review employer's existing safety and health program and practices, practices and procedures governing material safety data sheets and employee access to such information, and the employer's injury and illness recordkeeping system.ⁿ¹² The employer will also be informed that photographs may be taken in the course of the inspection, and discuss the measures that would be taken to prevent disclosure of any trade secrets or classified information that might be revealed in the course of the inspection.ⁿ¹³ Finally, the inspector will ask whether any conditions on the site require the use of personal protective equipment in the course of the inspection.ⁿ¹⁴ In the case of inspections at multi-employer worksites, the Division will initially attempt to contact the highest-level supervisor on site of the general or controlling employer, as well as provide reasonable time for subcontractors on the site to send representatives to the opening conference, walkaround, and closing

conference.n15

In the course of any inspection, the Division inspector has the authority, among other things, to do the following:

1. Obtain any statistics, information, or physical materials in the possession of the employer that are directly related to the purpose of the investigation or inspection;n16
2. Conduct any tests necessary to the investigation or inspection;n17
3. Take photographs, which are considered confidential and not subject to disclosure even under the California Public Records Act;n18
4. Discuss safety and health violations or problems privately with any employee, employer, or employee representative;n19
5. Consult with a reasonable number of employees on health and safety matters;n20 and
6. Issue and post an order to preserve physical materials or an accident site.n21

At the end of the opening conference, the inspector will begin the walkaround inspection. Both a management and an employee representative may accompany the inspector on company time during the walkaround inspection.n22 Refusal of an employer to allow an employee representative to participate in the walkaround on paid time is per se discriminatory in violation of *Labor Code Sections 6310(a) and (b)*.n23

If the Division inspector is unable to complete the inspection in the same day, an exit conference will be held, at which the inspector explains the status of the inspection, the violations observed, and interim corrective measures to be taken to remove those hazards. A second on-site visit to complete the inspection will be held subsequently.

On finishing a worksite inspection, the Division inspector will hold a closing conference. At the closing conference, the inspector will discuss the conditions observed, including any violations; issue any enforcement actions resulting from this inspection and explain the differences among them (i.e., citation, notice in lieu of citation, special order, order to take special action); discuss methods of correcting or abating the violations or hazardous conditions and set abatement dates for completing such corrections; explain that civil penalties may be assessed and the basis for computing such penalties, and inform the employer that additional penalties may be assessed for failure to abate or for repeated or willful future violations; discuss variance procedures; describe Division follow-up procedures; evaluate the employer's safety program; discuss the Labor Code sections that prohibit employee discrimination and discharge;n24 and explain the employer's rights to appeal.n25

The Division inspector will also explain the employer's right to request an informal conference with the Division District Manager within 10 working days of receipt of the enforcement documents.n26 The purpose of the informal conference is to review and clarify any citations or orders issued, the calculation of civil penalties, and the abatement periods. The District Manager may amend the citations, amount of civil penalties, or abatement period to correct errors.n27

The request for an informal conference does not stay or extend the 15-working day period for filing an appeal from a citation or civil penalty with the Occupational Safety and Health Appeals Board (OSHAB).n28 If no appeal has been filed at the time the Division issues any amended citation, order or notice of civil penalty, the documents will be forwarded to the employer. If a timely appeal has been filed, however, the Division will forward the amended documents to the OSHAB, explaining the reasons for the amendments and requesting OSHAB approval of the amendments.n29

[2] Advance Notice of Inspections

Any person who gives advance notice of a Cal/OSHA inspection, without authorization from the Chief of the Division or his or her designee, is guilty of a misdemeanor, punishable by a fine of up to \$1000 or by imprisonment for up to six months, or both.ⁿ³⁰

The authorization to give advance notice of a Cal/OSHA inspection or investigation is seldom given. Only the Chief of the Division, or the Chief's designee in his or her absence, may authorize advance notice.ⁿ³¹ Advance notice of an inspection or investigation resulting from an employee complaint is never authorized except in the case of an apparent imminent danger to employees.ⁿ³² In all other cases, advance notice is justified only when it is authorized by the Chief of the Division, or the Chief's designee, on finding that either (1) an apparent imminent danger exists that requires prompt abatement;ⁿ³³ or (2) to conduct an effective inspection, advance notice is required to assure availability of essential personnel or access to the site, equipment or work process.ⁿ³⁴ Advance notice may also be given if, in the judgment of the Chief of the Division or his or her designee, advance notice is advantageous to achieve a thorough inspection.ⁿ³⁵

Advance notice may not exceed 24 hours prior to a scheduled inspection, except in unusual circumstances, where an imminent danger exists or where practical considerations mandate a longer period.ⁿ³⁶

Any employer receiving advance notice of an inspection is required to promptly notify the employee representative, if any, about the advance notice and pending inspection.ⁿ³⁷ The employer is also required to make any arrangements necessary at the work site to allow the inspection to proceed on schedule, as planned.ⁿ³⁸

[3] Division's Right of Entry and Inspection Warrants

The Division inspectors and investigators have the statutory right, on presenting appropriate credential to an employer, of "free access to any place of employment to investigate and inspect during regular working hours, and at other reasonable times when necessary for the protection of safety and health, and within reasonable limits and in a reasonable manner."ⁿ³⁹ If permission to enter and inspect is refused by an employer, the Division may obtain an inspection warrant, pursuant to *Code of Civil Procedure Section 1822.50 et seq.*ⁿ⁴⁰

Code of Civil Procedure Section 1822.52, which sets forth the general standard for determining cause for issuing an administrative "inspection" warrant, provides that cause is deemed to exist if *either* reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, *or* there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle. With respect to Cal/OSHA warrants, *Labor Code Section 6314(b)* provides that cause for issuing the inspection warrant is deemed to exist (1) if there has been an industrial accident, injury, or illness reported; (2) if the Division has received a complaint that violations of occupational safety and health standards exist at a place of employment; or (3) if the place of employment has been selected by the Division for inspection on the basis of "specific neutral criteria contained in a general administrative plan for the enforcement" of the California Occupational Safety and Health Act.ⁿ⁴¹

The courts have indicated, however, that the above statutory standards of cause, at least insofar as they permit issuance of a warrant without a specific showing that a violation is likely to be found on the particular premises, are unconstitutional. In *Salwasser Manufacturing Co. v. Municipal Court (Salwasser I)*,ⁿ⁴² the court of appeal held that the standard of cause for "administrative" inspection warrants set forth in *Code of Civil Procedure Section 1822.52* does not apply to inspection warrants obtained by the Division.ⁿ⁴³ The court held that because of the potential criminal charges that may result from violation of occupational safety and health standards under the California Occupational Safety and Health Act, federal and California constitutional protections against unreasonable search and seizure and the constitutional right to privacy require the Division to show "probable cause" that safety violations currently exist on the

employer's premises to support its request for an inspection warrant.ⁿ⁴⁴ In *Salwasser I*, a warrant obtained to conduct a routine periodic inspection of the employer's plant, on the basis of the incidence of injuries there reported in the Division's Safety Database, was found to authorize an unreasonable intrusion into the employer's privacy because the affidavit supporting the warrant failed to allege sufficient facts to show probable cause to believe that a safety violation currently existed at the employer's premises.ⁿ⁴⁵

Subsequently, in *Salwasser Manufacturing Co. v. Occupational Saf. & Health Appeals Bd. (Salwasser II)*,ⁿ⁴⁶ the same court of appeal held that although the Division is required under *Salwasser I* to make a showing of "probable cause," the Division need not satisfy the probable cause requirements of the Penal Code applicable to criminal proceedings, which require a specific description of the alleged criminal activity and independent corroboration of the complainant's statements.ⁿ⁴⁷ The court in *Salwasser II* adopted a lesser probable cause test applied by the federal courts in the context of federal OSHA warrants, which requires a showing of specific evidence sufficient to support a reasonable suspicion of a violation.ⁿ⁴⁸ If the warrant application is based on an employee complaint, the Division's affidavit must indicate the substance of the complaint and must provide some basis for believing that the complaint was actually made, that the complainant was sincere in his or her assertion that a violation exists, and that he or she had some plausible basis for entering a complaint.ⁿ⁴⁹

■ CONSULTANT'S COMMENT:

Many California employers have adopted the policy that they will never permit a Cal-OSHA inspector on their premises without a valid search warrant. Such policies frequently are the result of interpretations of *Salwasser II* that are legally correct but practically suspect. That is, while employers have the legal right to demand warrants for all inspections, employers should exercise discretion in deciding whether to permit warrantless inspections of a serious or ongoing safety problem. If it is clear that the court will issue the warrant, forcing Cal-OSHA to go to court may only serve to anger the inspector involved. A more cooperative approach may be advisable in some cases. *Commentary by Kirby Wilcox.*

[4] Subpoenas, Depositions, and Statements Under Oath

In order to carry out its enforcement duties, the Division is statutorily authorized to issue subpoenas and subpoenas duces tecum; to compel the attendance of witnesses and the production of books, papers, records, and physical materials; to administer oaths and examine witnesses under oath; to take verification or proof of written materials; and to take affidavits and depositions.ⁿ⁵⁰

[5] Order Preserving Evidence

During any investigation of an industrial accident or occupational illness conducted by the division pursuant to the provisions of *Labor Code Section 6313*, the chief or his or her authorized representative may issue an order to preserve physical materials or the accident site as they were at the time the accident or illness occurred if, in the opinion of the division, it is necessary to do so in order to determine the cause or causes of the accident or illness, and the evidence is in potential danger of being removed, altered, or tampered with. Under these circumstances, the division's order must be issued in a manner that will avoid, to the extent possible, any interference with normal business operations.ⁿ⁵¹ The Division will prepare a conspicuous notice stating that an order to preserve has been issued. The notice must be posted by the employer in the area or on the article to be preserved.ⁿ⁵²

The scope of an order preserving the site is limited to the immediate area and machines, devices, apparatus, or equipment directly associated with the accident or illness.ⁿ⁵³ The order will remain effective until the Division gains access to the site or until a court orders otherwise.ⁿ⁵⁴

Any person who knowingly violates an order to preserve a site issued by the Division is punishable by a fine of up to \$5,000.ⁿ⁵⁵

[6] Injury Prevention Program Evaluation

Every inspection conducted by the Division must include an evaluation of the employer's injury and illness prevention program.ⁿ⁵⁶ The criteria used to evaluate the program will be the substantial compliance criteria developed by the Occupational Safety and Health Standards Board, pursuant to the requirements of *Labor Code Section 6401.7*.ⁿ⁵⁷ The evaluation must include interviews "with a sample of employees," and the members of any employer-employee occupational safety and health committee.ⁿ⁵⁸

If the inspection pertains to work for which a permit is required under *Labor Code Section 6500* and for which a permit has been issued pursuant to *Labor Code Section 6502*, the employee injury and illness prevention program evaluation will be limited to implementation of the plan approved by the Division in issuing the permit.ⁿ⁵⁹

Prior to completing any inspection, the Division is also required to notify the employer of the services available from the Department of Industrial Relations to assist the employer in establishing, maintaining, improving, and evaluating the employer's injury and illness prevention program.ⁿ⁶⁰

Whenever a citation is issued to a self-insured employer for a willful or repeat serious violation of the requirements of *Labor Code Section 6401.7* (effective injury and illness prevention program), and the citation becomes final, the Division must notify the Director of Industrial Relations of this fact so that a hearing may be held to determine whether good cause exists to revoke the employer's certificate of consent to self-insure.ⁿ⁶¹

[7] Reinspections

Whenever the Division issues a citation for a serious violation, a special order, or an order to take special action, and at the end of the inspection, the order has not been complied with or the violation has not been abated, the Division must conduct a reinspection as set forth in *Labor Code Section 6320*. For further discussion of reinspections, see § 21.44[2].

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsCitations & Inspections

FOOTNOTES:

(n1)Footnote 1. "Inspection" is defined at 8 *Cal. Code Reg.* § 330(c).

(n2)Footnote 2. See *Lab. Code* §§ 6313, 6314.5(b)(2). For discussion, see §§ 21.18[1], 21.40[2].

(n3)Footnote 3. See *Lab. Code* §§ 6309, 6314.5(b)(1); see also discussion in § 21.40[3].

(n4)Footnote 4. See *Lab. Code* §§ 6314.5(b)(5), 6320. For discussion of abatement, see § 21.44. For discussion of reinspections, see [7], below.

(n5)Footnote 5. See *Lab. Code* §§ 6314.1(a), 6314.5(b)(4). For discussion, see § 21.02[2][d].

(n6)Footnote 6. See *Lab. Code* §§ 6314.5(b)(3), 6500 et seq.

(n7)Footnote 7. See *Lab. Code* §§ 6314.5(b)(3), 6501.5.

(n8)Footnote 8. See *Lab. Code* §§ 6314.5(b)(3), 9030 et seq.

(n9)Footnote 9. See Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-7.

(n10)Footnote 10. *See Lab. Code §§ 6307, 6314; Salwasser Manufacturing Co. v. Municipal Court (1979) 94 Cal. App. 3d 223, 227, 156 Cal. Rptr. 292* (Division's authority to conduct periodic routine inspections).

(n11)Footnote 11. *See Lab. Code § 6314.5(c); but see* discussion of inspection warrants in [3], *below*.

(n12)Footnote 12. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-14.

(n13)Footnote 13. *See Lab. Code § 6322* (Division's obligation to maintain confidentiality of trade secrets and other confidential information obtained by Division in course of inspection or investigation). For discussion of provisions relating to preservation of trade secrets during proceedings before the Occupational Safety and Health Appeals Board, *see § 21.45[18][e]*.

(n14)Footnote 14. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-14.

(n15)Footnote 15. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-14.

(n16)Footnote 16. *Lab. Code § 6314(a)*.

(n17)Footnote 17. *Lab. Code § 6314(a)*.

(n18)Footnote 18. *Lab. Code § 6314(a); see also Lab. Code § 6322* (Division's obligation to preserve confidentiality).

(n19)Footnote 19. *Lab. Code § 6314(d)*.

(n20)Footnote 20. *See Lab. Code § 6314(d)*. The Division inspector must do this if there is no authorized employee representative.

(n21)Footnote 21. *See Lab. Code § 6314(e)*.

(n22)Footnote 22. *Lab. Code § 6314(d)*.

(n23)Footnote 23. *Division of Labor Standards Enforcement v. Texaco, Inc. (1983) 152 Cal. App. 3d Supp. 1 ; see also* discussion in § 21.35.

(n24)Footnote 24. *See Lab. Code §§ 6310, 6311; see also* discussion in § 21.49.

(n25)Footnote 25. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-15.

(n26)Footnote 26. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-20; *see Lab. Code § 6308.5*.

(n27)Footnote 27. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-20.

(n28)Footnote 28. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-20; *see Lab. Code § 6600* (time for appeal); *see also* discussion in § 21.45[3].

(n29)Footnote 29. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-20.

(n30)Footnote 30. *Lab. Code § 6321; 8 Cal. Code Reg. § 331*.

(n31)Footnote 31. *Lab. Code § 6321*.

(n32)Footnote 32. *Lab. Code § 6321; 8 Cal. Code Reg. § 331.1(b)*.

(n33)Footnote 33. 8 Cal. Code Reg. § 331.1(a)(1).

(n34)Footnote 34. 8 Cal. Code Reg. § 331.1(a)(2).

(n35)Footnote 35. 8 Cal. Code Reg. § 331.1(a)(3).

(n36)Footnote 36. 8 Cal. Code Reg. § 331.2.

(n37)Footnote 37. 8 Cal. Code Reg. § 331.3.

(n38)Footnote 38. 8 Cal. Code Reg. § 331.4.

(n39)Footnote 39. Lab. Code § 6314(a).

(n40)Footnote 40. Lab. Code § 6314(b).

(n41)Footnote 41. Lab. Code § 6314(b).

(n42)Footnote 42. *Salwasser Manufacturing Co. v. Municipal Court* (1979) 94 Cal. App. 3d 223, 156 Cal. Rptr. 292 .

(n43)Footnote 43. *Salwasser Manufacturing Co. v. Municipal Court* (1979) 94 Cal. App. 3d 223, 231-232, 156 Cal. Rptr. 292 .

(n44)Footnote 44. *Salwasser Manufacturing Co. v. Municipal Court* (1979) 94 Cal. App. 3d 223, 231-234, 156 Cal. Rptr. 292 . In reaching its conclusion, the court in *Salwasser I* discussed and distinguished *Marshall v. Barlow's, Inc.* (1978) 436 U.S. 307, 320-321, 98 S. Ct. 1816, 56 L. Ed. 2d 305 , and *Camara v. Municipal Court* (1967) 387 U.S. 523, 538, 87 S. Ct. 1727, 18 L. Ed. 2d 930 , which had held that for the purposes of an administrative search, probable cause justifying the issuance of an inspection warrant may be based *either* on specific evidence of an existing violation or on a showing that "reasonable legislative or administrative standards for conducting an inspection" were satisfied in regard to a particular establishment.

(n45)Footnote 45. *Salwasser Manufacturing Co. v. Municipal Court* (1979) 94 Cal. App. 3d 223, 225-226, 234, 156 Cal. Rptr. 292 .

(n46)Footnote 46. *Salwasser Manufacturing Co. v. Occupational Saf. & Health Appeals Bd.* (1989) 214 Cal. App. 3d 625, 262 Cal. Rptr. 836 .

(n47)Footnote 47. *See Salwasser Manufacturing Co. v. Occupational Saf. & Health Appeals Bd.* (1989) 214 Cal. App. 3d 625, 629-630, 262 Cal. Rptr. 836 .

(n48)Footnote 48. *Salwasser Manufacturing Co. v. Occupational Saf. & Health Appeals Bd.* (1989) 214 Cal. App. 3d 625, 630-631, 262 Cal. Rptr. 836 .

(n49)Footnote 49. *Salwasser Manufacturing Co. v. Occupational Saf. & Health Appeals Bd.* (1989) 214 Cal. App. 3d 625, 631, 262 Cal. Rptr. 836 .

(n50)Footnote 50. Lab. Code § 6314(c).

(n51)Footnote 51. Lab. Code § 6314(e). Before January 1, 1994, an order to preserve the worksite could be issued only if the employer refused entry to the inspector or investigator during the investigation.

(n52)Footnote 52. Lab. Code § 6314(e).

(n53)Footnote 53. *Lab. Code § 6314(e)*.

(n54)Footnote 54. *Lab. Code § 6314(e)*.

(n55)Footnote 55. *Lab. Code § 6314(e)*.

(n56)Footnote 56. *Lab. Code § 6314.5(a)*. For discussion of injury and illness prevention programs, *see § 21.12*.

(n57)Footnote 57. *Lab. Code § 6314.5(a)*.

(n58)Footnote 58. *Lab. Code § 6314.5(a)*.

(n59)Footnote 59. *Lab. Code § 6314.5(a)*.

(n60)Footnote 60. *Lab. Code § 6314.5(a)*.

(n61)Footnote 61. *Lab. Code § 6319(f)*.



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part D. ADMINISTRATIVE ENFORCEMENT PROCEDURES

2-21 California Employment Law § 21.42

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.42 Citations and Orders

[1] Citations

[a] Issuance

The Division will issue a citation to an employer whenever the Division determines in the course of an inspection or investigation that an employer has violated (1) any standard, rule, order,ⁿ¹ or regulation adopted by the Standards Board pursuant to Chapter 6 of Division 1 of the Labor Code;ⁿ² (2) any standard, rule, order, or regulation established by the Division of Occupational Safety and Health, pursuant to Part 1 of Division 5 of the Labor Code;ⁿ³ or (3) *Health and Safety Code Section 25910*.ⁿ⁴

Labor Code Section 6317 requires that the Division issue citations to employers with "reasonable promptness." No citation may be issued by the Division more than six months after the occurrence of the violation.ⁿ⁵

Citations may be issued by the Division representative at the time of the inspection and served personally on the employer or employer's representative, or subsequently issued and served by certified mail, return receipt requested.ⁿ⁶ Generally, the citation will be issued with a Cal/OSHA Form 160 (Employer's Report of Corrected Conditions of Alleged General and Regulatory Violations) or, when a serious violation is issued, a Cal/OSHA Form 161 (Signed Statement of Abatement of Alleged Serious Violation).ⁿ⁷ The employer is required to complete the appropriate abatement form, indicating the nature of the abatement taken, and return it to the issuing Division office on or before the date specified on the form. Failure to return the Signed Statement of Abatement of Alleged Serious Violation within 10 working days after the end of the period for abatement for a serious violation may result in additional civil penalties and enforcement action.ⁿ⁸

Notice of a proposed civil penalty for the alleged violation will either be issued and served on the employer concurrently with the citation, or mailed by certified mail within a reasonable time.ⁿ⁹

A copy of any citation issued to a farm labor contractor also will be forwarded by the Division to the Senior Deputy

Labor Commissioner of the Division of Labor Standards Enforcement of the Department of Industrial Relations.ⁿ¹⁰

If the Division subsequently decides to amend a citation, an amended Cal/OSHA Form 2A will be issued and served on the employer, with a clear description of the nature of the amendment.ⁿ¹¹ A citation may be amended to correct errors, correct the type of violation designated, or extend the abatement date.ⁿ¹²

Failure by the employer to notify the Occupational Safety and Health Appeals Board (OSHAB), within 15 working days of receipt of the citation, of the employer's intention to appeal or contest any part of a citation will cause the citation to become a final order of the OSHAB, not subject to judicial or agency review.ⁿ¹³ For discussion of appeal procedures, see § 21.45.

[b] Form and Content

By statute, citations issued to an employer must be in writing; describe the nature of the violation with particularity; refer to the code section, standard, rule, regulation, or order allegedly violated; and state a reasonable time for abatement (correction) of the alleged violation.ⁿ¹⁴

The citation is written on Cal/OSHA Form 2A. In addition to including the statutorily required information, the citation form identifies the employer, sets forth the employer's address and the location of the worksite inspected, and indicates the number of instances of violations found and the types of violations (i.e., serious, willful, repeat, general, regulatory, etc.).ⁿ¹⁵ The citation form also notifies the employer of the employer's duty to post the citation at or near the location of each alleged violation until it is corrected or for at least 3 working days, whichever is longer;ⁿ¹⁶ that civil penalties may be assessed as a result of the violation;ⁿ¹⁷ that the employer has 15 working days after receipt of the citation to file a notice of intention to appeal with the OSHAB;ⁿ¹⁸ and that failure to abate an unsafe condition within the time allowed for abatement may result in additional civil penalties.ⁿ¹⁹

[2] Classification of Violations

[a] Generally

The Labor Code and California Code of Regulations classify violations of the Occupational Safety and Health Act, and rules, orders, and standards promulgated thereunder, into various categories for purposes of penalty assessmentsⁿ²⁰ and for various other regulatory purposes.ⁿ²¹ The definitions of the different classes of violations are set forth in [b] through [f], *below*.

[b] Willful Violation

A willful violation is defined as one in which "evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition."ⁿ²²

[c] Repeat Violation

A repeat violation is defined as one "where the employer has corrected, or indicated correction of an earlier violation, for which a citation was issued, and upon a later inspection is found to have committed the same violation again within a period of three years immediately preceding the latter violation."ⁿ²³ For the purpose of considering whether a violation is a repeat violation, a repeat citation issued to employers having fixed establishments, such as factories, terminals, or stores, is limited to the particular cited establishment. For employers engaged in businesses having no fixed establishments, such as construction, painting, or excavation businesses, a repeat violation is based on prior violations cited within the same region of the Division.ⁿ²⁴

[d] Serious Violation

A serious violation is deemed to exist if "there is a substantial probability that death or serious physical harm could result from a violation, including, but not limited to, circumstances in which there is a substantial probability that either of the following could result in death or great bodily injury: (1) an exposure exceeding an established permissible exposure limit, or (2) the existence of one or more practices, means, methods, operations, or processes that have been adopted or are in use in the place of employment.n25 However, a serious violation will not be deemed to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable discretion, know of the presence of the violation.n25.1 In this context, "substantial probability" refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result if an accident or exposure does occur as a result of the violation.n26

In cases involving carcinogens, a serious violation is a violation of any standard, order, or special order respecting the use of a carcinogen, as defined in *Title 8 California Code of Regulations Section 330(f)*.n27 However, the violation will not be considered serious if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation or can demonstrate that the Division should have determined that the violation was minor and resulted in no substantial health hazard.n28

[e] General Violation

A general violation is one that "is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees."n29

The Division does not have the burden to prove lack of reasonable diligence as an essential element of the Division's prima facie case in order to establish a general violation of Cal/OSHA. When the Division alleges a serious violation, *Labor Code § 6432* authorizes the employer to assert reasonable diligence as an affirmative defense. Although no parallel provision addresses employer diligence in the context of a general violation, there is no reason why the Division should have a heavier burden in proving a general violation than proving a serious violation.n29.1

[f] Regulatory Violation

A regulatory violation is other than one defined as serious or general that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute.n30 For example, failures to obtain a permit, post citations or posters, keep required records, or report industrial accidents are classified as regulatory violations.n31

[3] Notice in Lieu of Citation

A notice in lieu of citation may be issued whenever the Division finds a violation during an investigation or inspection if the following conditions are met:n32

1. The violation either (a) does not have a direct relationship to the health or safety of an employee, or (b) has a direct, but not immediate, relationship to the health or safety of employee, and is of a general or regulatory nature;
2. The employer agrees to abate the violative condition within a reasonable time determined by the Division and agrees not to appeal the notice in lieu of citation; and
3. The number of first instance violations issued to the employer, whether general or regulatory in nature, is less than ten.

No notice in lieu of citation may be issued if the violations are serious, repeated, willful, or arise from a failure to abate.ⁿ³³ A notice in lieu of citation will have the same effect as a citation for the purpose of establishing repeat violations or a failure to abate.ⁿ³⁴

The employer's agreement to abate the condition and not to appeal the notice is evidenced by the employer's signature on the notice itself.ⁿ³⁵

[4] Types of Orders

[a] Temporary Restraining Orders

If the Division finds that the condition of any employment or place of employment, or the operation of any machine, device, apparatus, or equipment, constitutes a serious menace to the lives or safety of persons, the Division may apply to the superior court of the county in which such a place of employment, machine, device, apparatus, or equipment is situated for an injunction restraining the use or operation of the place or equipment until the condition is corrected.ⁿ³⁶

The Division's application will provide prima facie evidence for immediate issuance of such an injunction if it is supported by an affidavit showing the place of employment, machine, device, apparatus, or equipment is being operated in violation of a safety order or standard, or in violation of *Health and Safety Code Section 25910*, and that such use or operation constitutes a menace to the life or safety of any person employed thereabout.ⁿ³⁷ A copy of the applicable standard or order must be attached to the Division's application.ⁿ³⁸ The Division is not required to post a bond on applying for the injunction.ⁿ³⁹

[b] Orders Prohibiting Use

[i] Issuance, Posting, and Effect

Whenever the Division finds any place of employment, machine, device, apparatus or equipment, or part thereof, is in a dangerous condition, is not properly guarded, or is dangerously placed, such that it constitutes an imminent hazard to employees, the Division may issue an order prohibiting use, which prohibits entry into or use of the area or equipment.ⁿ⁴⁰ The scope of an order prohibiting use is limited to the immediate area of the imminent hazard.ⁿ⁴¹

In addition, if the Division has reasonable cause to believe that any workplace contains friable asbestos, and if there appears to be inadequate protection for employees at that workplace to the hazards of airborne asbestos fibers, the Division may issue an order prohibiting use.ⁿ⁴²

The Division inspector will affix a "yellow tag," usually a orange-yellow diamond-shaped notice, to the hazardous equipment or area, which notifies persons in the vicinity that an order prohibiting use or entry has been issued.ⁿ⁴³ Only a Division representative may remove the "yellow tag," and the tag will be removed only after the Division has determined that the place of employment, machine, device, apparatus, or equipment has been made safe and any required safeguards or safety devices have been provided.ⁿ⁴⁴

Entry into or use of the area or equipment while the "yellow tag" is effective is permitted only with the Division's knowledge and permission and solely for the purpose of eliminating the dangerous condition.ⁿ⁴⁵

Any person who, after the "yellow tag" or other notice of an order prohibiting use is attached, enters the place of employment, or uses or operates the place of employment, machine, device, apparatus, or equipment subject to the order before it has been made safe and before the required safeguards or safety devices have been supplied, or who defaces, destroys, or removes the "yellow tag" or other notice, is guilty of a misdemeanor, punishable by a fine of up to \$1,000 or one year in the county jail, or both.ⁿ⁴⁶

[ii] Hearing to Contest Validity

Once a Division representative has issued an order prohibiting use, the employer may contest the order and must be granted a hearing by the Division, on request, to review the validity of the order.ⁿ⁴⁷ This hearing must be held within 24 hours after the employer's request.ⁿ⁴⁸ As with other Division enforcement actions, employees or their designated representatives are entitled to attend the employer's hearing on the order prohibiting use.ⁿ⁴⁹ The employer is responsible for informing employees of the right to participate, although as a courtesy the Division will attempt to contact any known employee representative on-site.ⁿ⁵⁰

The District Manager presides as the hearing officer, and the hearing is recorded either by tape recorder or court reporter.ⁿ⁵¹ The issue at the hearing is the validity of the order prohibiting use.ⁿ⁵² The Division presents evidence to establish the conditions justifying issuance of the order, the order issued, and proof of service of the order on the employer, either by personal service or return receipt requested mail.ⁿ⁵³ The employer is given the opportunity to cross-examine witnesses and call witnesses on the employer's behalf.ⁿ⁵⁴ The presiding hearing officer makes findings on the record as to the validity of the order prohibiting use based on all admissible evidence.ⁿ⁵⁵ Copies of the hearing record are provided to interested parties on request.ⁿ⁵⁶

[c] Special Orders

A special order is an order written by the Chief of the Division, or his or her representative, to correct an unsafe condition, device, or place of employment that poses a threat to the health or safety of an employee and which cannot be made safe under existing standards or orders of the Occupational Safety and Health Standards Board.ⁿ⁵⁷ Special orders have the same effect as any other standard or order of the Standards Board, but apply only to the employment or place of employment described in the special order.ⁿ⁵⁸ A special order may be written with an order prohibiting use to address an imminent hazard for which there is no existing standard.ⁿ⁵⁹

A special order is written on Cal/OSHA Form 2B and is generally served on the employer by certified mail, return receipt requested.ⁿ⁶⁰

The employer has 15 working days from the date of receipt of the special order to notify the OSHAB of its intention to appeal any action or provision of the order.ⁿ⁶¹ The Special Order becomes a final order of the OSHAB, not subject to judicial or agency review, if no notice contesting the order is filed with the OSHAB within the 15-day time limit.ⁿ⁶² For discussion of appeal procedures, see § 21.45.

While a special order is like an order to correct rather than a citation for a violation, and therefore does not generally carry a civil penalty,ⁿ⁶³ failure to correct the unsafe condition described in the order within the period stated for abatement will result in the issuance of a citation and civil penalty for violation of the Special Order and failure to abate.ⁿ⁶⁴ The Division conducts follow-up inspections for each special order it issues.ⁿ⁶⁵

[d] Order to Take Special Action

An order to take special action refers to "any order written by the Chief or his or her authorized representative which requires the employer to comply with applicable provisions of Division 5 of the California Labor Code, or with specific standards, orders or regulations of the Standards Board whose enforcement upon the employer are at the discretion of the Division."ⁿ⁶⁶

In general, an order to take special action is issued when an unsafe condition can be made safe under an existing safety standard or regulation, but the standard does not set out the necessary means of compliance or the employer's duty to take such action arises only after the Division orders specific action. For example, requiring an employer to provide and pay for necessary personal protective clothing in a specific type of employment, pursuant to *Title 8 California Code of*

*Regulations Section 3383*ⁿ⁶⁷ would be a proper subject for an order to take special action. In contrast, a special order is written to correct an unsafe condition that cannot be made safe under existing standards and orders.ⁿ⁶⁸

An order to take special action is written on Cal/OSHA Form 2E and normally is served on the employer by certified mail, return receipt requested. No civil penalty is assessed on issuance of an order to take special action, unless the employer fails to comply with the order within the period specified for compliance. In such cases, the Division will issue a citation for violation of the order to take special action and assess a civil penalty as appropriate.ⁿ⁶⁹

The employer has 15 working days from the date of receipt of the order to take special action to notify the OSHAB of its intention to contest any part of the order,ⁿ⁷⁰ and failure to do so within the allotted time will allow the order to become a final order of the OSHAB, not subject to judicial or agency review.ⁿ⁷¹ For discussion of appeal procedures, see § 21.45.

[5] Information Memorandum

An information memorandum will be issued by a Division inspector to direct the employer's attention to a condition that has the potential of becoming hazardous to the safety and health of employees.ⁿ⁷² An information memorandum is usually issued in the field on Cal/OSHA Form 2D during an inspection or investigation, and carries no civil penalty.ⁿ⁷³ Whether or not to conduct a follow-up inspection is within the Division's discretion.ⁿ⁷⁴

[6] Notice of No Violation

If, after conducting an inspection or investigation, the Division finds no violation, it will issue a notice of no violation to the employer, which must be posted for three working days.ⁿ⁷⁵

Legal Topics:

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

Labor & Employment Law Occupational Safety & Health General Overview Labor & Employment Law Occupational Safety & Health Administrative Proceedings Citations & Inspections

FOOTNOTES:

(n1)Footnote 1. *See* 8 Cal. Code Reg. § 330(e) (definition of "order").

(n2)Footnote 2. *Lab. Code* § 140 *et seq.*

(n3)Footnote 3. *Lab. Code* § 6300 *et seq.*

(n4)Footnote 4. *Lab. Code* § 6317.

(n5)Footnote 5. *Lab. Code* § 6317.

(n6)Footnote 6. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-2A; *see also* *Lab. Code* §§ 6317, 6319(a).

(n7)Footnote 7. *See also* *Lab. Code* § 6320(b) (Division must require employer to submit signed statement under penalty of perjury of abatement of serious violation, if not abated at time of violation).

(n8)Footnote 8. *See* *Lab. Code* § 6320(b); *see also* discussion in §§ 21.43[3][g], 21.44[1].

(n9)Footnote 9. 8 Cal. Code Reg. § 333; *see* *Lab. Code* § 6317; *see also* discussion in § 21.43[1].

(n10)Footnote 10. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-2A.

(n11)Footnote 11. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-2A.

(n12)Footnote 12. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-2A.

(n13)Footnote 13. *See Lab. Code §§ 6319(a),(b), 6600, 6601; 8 Cal. Code Reg. § 333.*

(n14)Footnote 14. *Lab. Code § 6317.*

(n15)Footnote 15. *See 8 Cal. Code Reg. § 332; see also discussion in [2], below.*

(n16)Footnote 16. *See Lab. Code § 6318(a); see also discussion in § 21.22.*

(n17)Footnote 17. *See Lab. Code §§ 6317, 6427-6435; see also discussion in § 21.43.*

(n18)Footnote 18. *See Lab. Code § 6319(a); see also discussion in § 21.45[3].*

(n19)Footnote 19. *See Lab. Code § 6430; see also discussion in §§ 21.42[3][g], 21.44[1].*

(n20)Footnote 20. *See discussion in § 21.43.*

(n21)Footnote 21. *See generally Lab. Code §§ 6427-6432; 8 Cal. Code Reg. § 334.*

(n22)Footnote 22. *8 Cal. Code Reg. § 334(e); Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Board (2000) 80 Cal. App. 4th 1023, 1034-1035, 95 Cal. Rptr. 2d 847 .*

(n23)Footnote 23. *8 Cal. Code Reg. § 334(d).*

(n24)Footnote 24. *8 Cal. Code Reg. § 334(d).*

(n25)Footnote 25. *Lab. Code § 6432(a).*

(n26)Footnote 25.1. *Lab. Code § 6432(b).*

(n27)Footnote 26. *Lab. Code § 6432(c).*

(n28)Footnote 27. *8 Cal. Code Reg. § 334(c)(4). 8 Cal. Code Reg. § 330(f) defines "carcinogens" as including any of several listed cancer-causing substances for which standards have been adopted, as well as any other, non-listed substance for which standards are adopted and in effect due to cancer-causing properties, and any compound, mixture, or product containing such a substance, except as specifically exempted from such standards.*

(n29)Footnote 28. *8 Cal. Code Reg. § 334(c)(2).*

(n30)Footnote 29. *8 Cal. Code Reg. § 334(b).*

(n31)Footnote 29.1. *Overaa Construction v. California Occupational Safety & Health Appeals Board (2007) 147 Cal. App. 4th 235, 246-249, 54 Cal. Rptr. 3d 154 .*

(n32)Footnote 30. *8 Cal. Code Reg § 334(a).*

(n33)Footnote 31. *8 Cal. Code Reg § 334(a).*

(n34)Footnote 32. *Lab. Code § 6317; 8 Cal. Code Reg. § 332.I.*

(n35)Footnote 33. *Lab. Code § 6317; see 8 Cal. Code Reg. § 332.1(a).*

(n36)Footnote 34. *See Lab. Code § 6317.*

(n37)Footnote 35. *See Lab. Code § 6317; 8 Cal. Code Reg. § 332.1(b).*

(n38)Footnote 36. *Lab. Code § 6323.*

(n39)Footnote 37. *Lab. Code § 6324.*

(n40)Footnote 38. *Lab. Code § 6324.*

(n41)Footnote 39. *Lab. Code § 6324.*

(n42)Footnote 40. *See Lab. Code § 6325.*

(n43)Footnote 41. *See Lab. Code § 6325.*

(n44)Footnote 42. *Lab. Code § 6325.5.*

(n45)Footnote 43. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-8; *see Lab. Code § 6325* (Division required to post "conspicuous notice" of order prohibiting use).

(n46)Footnote 44. *Lab. Code § 6325.*

(n47)Footnote 45. *See Lab. Code § 6325.*

(n48)Footnote 46. *Lab. Code § 6326.*

(n49)Footnote 47. *Lab. Code § 6327.*

(n50)Footnote 48. *Lab. Code § 6327.*

(n51)Footnote 49. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-8.

(n52)Footnote 50. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-8.

(n53)Footnote 51. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-8.

(n54)Footnote 52. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-8.

(n55)Footnote 53. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-8.

(n56)Footnote 54. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-8.

(n57)Footnote 55. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-8.

(n58)Footnote 56. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-8.

(n59)Footnote 57. *Lab. Code § 6305(b); see 8 Cal. Code Reg. § 332.2.*

(n60)Footnote 58. *Lab. Code § 6305(b).*

(n61)Footnote 59. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-2B; *see Lab. Code §§ 6305(b), 6308, 6325.*

(n62)Footnote 60. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-2B.

(n63)Footnote 61. *Lab. Code § 6600.5*.

(n64)Footnote 62. *Lab. Code § 6601.5*.

(n65)Footnote 63. *cf. Lab. Code § 6317* (Division may impose civil penalty with citation for violation).

(n66)Footnote 64. *See Lab. Code §§ 6317, 6430*.

(n67)Footnote 65. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-2B; *see Lab. Code § 6320(a)(1)*.

(n68)Footnote 66. *8 Cal. Code Reg. § 330(g)*; *see 8 Cal. Code Reg. § 332.3*; *see also Lab. Code § 6308* (Division's general authority to issue orders relating to employee health and safety).

(n69)Footnote 67. *8 Cal. Code Reg. § 3383(a)* provides that "[b]ody protection may be required for employees whose work exposes parts of their body, not otherwise protected as required by other orders in this article, to hazardous or flying substances or objects."

(n70)Footnote 68. *See Lab. Code § 6305*; *8 Cal. Code Reg. § 332.2*; *see also* discussion in [c], *above*.

(n71)Footnote 69. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-2E.

(n72)Footnote 70. *Lab. Code § 6600.5*.

(n73)Footnote 71. *Lab. Code § 6601.5*.

(n74)Footnote 72. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-2D; *see also Lab. Code §§ 6307, 6308* (Division's general authority and jurisdiction over employee health and safety).

(n75)Footnote 73. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-2D.

(n76)Footnote 74. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-2D.

(n77)Footnote 75. *Lab. Code § 6318(a)*; *8 Cal. Code Reg. § 332.4*.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part D. ADMINISTRATIVE ENFORCEMENT PROCEDURES

2-21 California Employment Law § 21.43

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.43 Civil Penalties

[1] Basis and Procedure for Assessing

The Division is authorized to impose civil penalties against an employer for all violations of any standard, rule, order, or regulation found in the course of an inspection or investigation.ⁿ¹ However, assessment of a penalty may be precluded by statute under some circumstances. For discussion of these circumstances, see [1A], *below*.

The Division must serve the employer by certified mail with a notice of proposed penalty, either at the time that the citations are served or within reasonable time after the date the violation occurred.ⁿ²

The employer may appeal the amount of proposed civil penalties by filing a notice of intention to contest the penalty with the OSHAB within 15 working days after receipt of the notice of proposed civil penalty.ⁿ³ If the employer fails to file a notice of intention to contest the penalty within that time, the notice of proposed civil penalty will become a final order of the OSHAB, not subject to judicial or agency review.ⁿ⁴ For discussion of appeal procedures, see § 21.45.

[1A] Circumstances in Which Penalty Is Not Assessed

No civil penalty shall be assessed against any new employer in the state for a violation of any standard developed pursuant to *Labor Code Section 6401.7(a)* for a period of one year after the date the new employer establishes a business in the state, if the employer has made a good faith effort to comply with any standard developed pursuant to Section 6401.7(a).^{n4.1} However, this provision does not apply if the employer is found to have committed a serious, willful, or repeated violation of that standard, or fails to abate the violation and is assessed a penalty pursuant to *Labor Code Section 6430*.^{n4.2}

An employer who adopts and implements the Model Injury and Illness Prevention Program for Non-High-Hazard Employment, to be prepared by the division,^{n4.3} will not be assessed a civil penalty for the first citation for a violation of the provisions of *Labor Code Section 6401.7*, issued after the employer's adoption and implementation of the model program.^{n4.4}

[2] Factors Used to Assess Civil Penalties

[a] Overview of Factors

The Labor Code provides a maximum penalty for each of the different types of violationsⁿ⁵ and directs the Division to promulgate regulations governing the determination of the amount of the penalty in particular cases.ⁿ⁶ The Code requires the Division to consider the following four factors in determining the appropriate amount of the penalty in a particular case:ⁿ⁷

1. The size of the business of the employer being charged;
2. The gravity of the violation;
3. The good faith of the employer, including timely abatement; and
4. The employer's history of previous violations.

Pursuant to this directive, the Division has promulgated regulations setting forth precise criteria for evaluating each of these factors in particular cases.ⁿ⁸ These criteria are discussed in [b] through [e], *below*. For discussion of the precise effect of these factors on the calculation of the penalty, see [3], *below*.

Based on the evidence in a given case, the Division has the authority to make adjustments to the character of a violation and the corresponding civil penalty.ⁿ⁹ However, whenever a serious injury, illness, exposure, or death is caused by any serious, willful, or repeated violation, or by a failure to correct a serious violation within the specified abatement period, the Division may not reduce the civil penalty for any reason except the size of the business of the employer cited.ⁿ¹⁰

Furthermore, if an employer who was cited for a serious violation fails to return to the Division, within 10 working days of the abatement date, a statement signed under penalty of perjury explaining the abatement measures completed as required by the citation, the Division must revoke any adjustments to the amount of civil penalty based on abatement of the violation.ⁿ¹¹ In addition, the employer will be assessed penalties for failure to abate retroactively to the abatement date, unless the employer provides sufficient evidence to establish that the violation was abated before that date.ⁿ¹² Penalties for failure to abate are calculated on a daily basis, pursuant to *Labor Code Section 6430*.ⁿ¹³

[b] Gravity of Violation

The Division determines the gravity of a general or serious violationⁿ¹⁴ from its findings and evidence obtained during the inspection or investigation, from its files and records, and other records of governmental agencies pertaining to occupational injury, illness, or disease. The degree of gravity is determined by assessing and evaluating three criteria: severity, extent, and likelihood.ⁿ¹⁵

"Severity" is defined as either the degree of discomfort, temporary disability, and time loss from normal activity (including work) that an employee is likely to suffer, if the violation pertains to employee illness or disease, or if the violation does not pertain to employee illness or disease (i.e., pertains to injury), the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation.ⁿ¹⁶ Based on these criteria, the Division ranks a particular general violation as having "Low," "Medium," or "High" severity.ⁿ¹⁷ General violations are rated as having High severity if they result in the loss of more than one day from regular work or normal activity, or if they require more than 24 hours of hospitalization.ⁿ¹⁸ The severity of a serious violation is always considered to be High.ⁿ¹⁹

The criteria for determining the "extent" of the violation also depend on whether or not the violation pertains to

employee illness or disease. If the violation does pertain to illness or disease, the extent is rated "Low," "Medium," or "High," depending on the number of employees exposed. Extent is rated as Low if 1 to 5 employees are exposed, Medium if 6 to 25 employees are exposed, and High if 26 or more employees are exposed.ⁿ²⁰ If the violation does not pertain to illness or disease, extent is based on the degree to which a safety order is violated and is related to the ratio of the number of violations of a certain order to the number of possibilities for violation on the premises or site. Extent is rated as Low if it involves an isolated violation of the safety standard or less than 15% of the units are in violation, Medium if an occasional violation occurs or 15-50% of the units are in violation, and High if numerous violations of the safety standard occur or more than 50% of the units are in violation.ⁿ²¹

"Likelihood" refers to the probability that injury, illness, or disease will occur as a result of the violation, and is based on (1) the number of employees exposed to the hazard created by the violation, and (2) the extent to which the violation has in the past resulted in injury, illness, or disease to employees of the firm or the industry in general, as shown by experience, available statistics, or records. Depending on these criteria, likelihood is rated as "Low," "Medium," or "High."ⁿ²²

[c] Size of Employer's Business

For purposes of adjusting penalties based on the size of the employer's business,ⁿ²³ the Division divides employers into five size classifications, depending on the number of individuals employed at the time of the inspection or investigation: (1) 10 or fewer employees; (2) 11 to 25 employees; (3) 26 to 60 employees; (4) 61 to 100 employees; (5) more than 100 employees.ⁿ²⁴

[d] Employer's Good Faith

The adjustment for the employer's "good faith"ⁿ²⁵ is based on the quality and extent of the employer's safety program, including the employer's awareness of Cal/OSHA and indications of the employer's desire to comply with the Act as demonstrated by the employer's accomplishments in this regard. An employer's good faith is rated as "Good" if the employer has an effective safety program, "Fair" if the employer has an average safety program, and "Poor" if the employer has no effective safety program.ⁿ²⁶

[e] History of Previous Violations

The employer's history of previous violationsⁿ²⁷ is determined by evaluating the Division's records of the employer's previous violations. The employer's history will be rated as Good if no serious, repeat, or willful violations and less than one general or regulatory violation per 100 employees has occurred at the establishment within the past 3 years; Fair if no serious, repeat, or willful violations and less than 20 general or regulatory violations per 100 employees have occurred at the establishment within the past 3 years; and Poor if one (or more) serious, repeat, or willful violation or more than 20 general or regulatory violations per 100 employees have occurred at the establishment within the past 3 years.ⁿ²⁸

[3] Calculating Amount of Civil Penalty

[a] Overview of Penalty Calculations

The Division has promulgated regulations setting forth a detailed formula for calculating the amount of the civil penalty in a given case. These guidelines are set forth in *Title 8 California Code of Regulations Section 336*. Under the Division's guidelines, the base penalty is determined by the type of violation involved (i.e., regulatory, general, or serious).ⁿ²⁹ The base penalty is then generally adjusted based on the Division's evaluation, pursuant to its guidelines,ⁿ³⁰ of the four factors discussed in [2], *above*,ⁿ³¹ subject to the statutory maximum amounts.ⁿ³² If the violation is a repeat or willful violation, the penalty amount is increased,ⁿ³³ up to the statutory maximum.ⁿ³⁴ Additional penalties are imposed for failure to abate a regulatory, general, or serious violation.ⁿ³⁵

The criteria for calculating different types of penalties are further discussed in [b] through [i], *below*.

Amounts of civil penalties are rounded down to the next whole dollar during the calculation stages, and final figures are adjusted downward to the next lower five dollar value.^{n35.1}

[b] Nonserious (General) Violations

The statutory maximum proposed penalty for a nonserious or "general" violationⁿ³⁶ is \$7,000 per violation.ⁿ³⁷

The base penalty of a general violation is determined by its severity, as determined by the criteria discussed in [2][b], *above*.ⁿ³⁸ The base penalty is \$1,000 if the severity is rated Low, \$1,500 if the severity is rated Medium, and \$2,000 if the severity is rated High.ⁿ³⁹

This base penalty is then adjusted for "extent" of the violationⁿ⁴⁰ by subtracting 25% of the base penalty if the extent is rated Low, making no adjustment if the extent is rated Medium, or adding 25% of the base penalty if the extent is High.ⁿ⁴¹ Next, the penalty is adjusted for the "likelihood" factor,ⁿ⁴² by further reducing the penalty by 25% if likelihood is rated Low, making no adjustment if likelihood is rated Medium, and adding 25% if likelihood is rated High.ⁿ⁴³ The resulting figure is referred to as the "gravity-based penalty."ⁿ⁴⁴

The Division may make further adjustments to the gravity-based penalty of a general violation based on the size of the employer's business, the employer's good faith, and the employer's history of previous violations, as determined under the criteria discussed in [2][c]-[e], *above*.ⁿ⁴⁵ⁿ⁴⁶ 40% of the gravity-based penalty is subtracted if the employer has 10 or fewer employees; 30% if the employer has 11-25 employees; 20% if the employer has 26-60 employees; 10% if the employer has 61-100 employees; and no adjustment is made if the employer has over 100 employees.ⁿ⁴⁷ If the Division inspector rates the employer's good faith as Good, 30% of the gravity-based penalty is subtracted; if the employer's good faith is rated as Fair, 15% of the gravity-based penalty is subtracted; and no adjustment is made if the employer's good faith rating is Poor.ⁿ⁴⁸ The Division inspector also evaluates the history of previous violations by the employer, and 10% of the gravity-based penalty is subtracted if the employer's history is Good, 5% is subtracted if the history is Fair, and no adjustment is made if the history is Poor.ⁿ⁴⁹

After making the above calculations, the resulting penalty is called the adjusted penalty.ⁿ⁵⁰ The Division may allow an additional "abatement credit" adjustment. If, at the time a citation was issued, the employer was making a good-faith effort to abate the alleged violation pursuant to a written recommendation of a Cal/OSHA consultant from the Consultation Service, the Division may waive all penalties assessed for a general violation.ⁿ⁵¹

Even if the employer does not qualify for a penalty reduction for good-faith abatement based on the recommendations of a Cal/OSHA consultant, the employer will be given an additional 50% reduction of the adjusted penalty amount for a general violation on the presumption that the employer will correct the cited violations by the abatement date.ⁿ⁵² Failure to abate in accordance with this presumption subjects the employer to further penalties.^{n52.1} With respect to general violations, this abatement credit is not available for repeated or willful violations.^{n52.2} The resulting penalty amount is called the proposed penalty.ⁿ⁵³

■ ILLUSTRATION

Employer is cited for a general violation for one instance of the exposure of 5 employees at a company of 60 employees to a machine that lacks a certain required safety device. No actual injury occurred as a result of the violation. The Division rates the severity of the violation as Medium, since the type of injury that would most likely result from the violation would most likely require medical attention, but not more than 24 hours of hospitalization.ⁿ⁵⁴ The Division further finds that "likelihood" is Moderate, that Employer has an average safety program (and hence a "good faith" rating of Fair),ⁿ⁵⁵ and rates its

history of previous violations as Good. The base penalty, based on the severity rating of Medium, would be \$1,500.ⁿ⁵⁶ Since the violation was an isolated one, the "extent" rating would be Low,ⁿ⁵⁷ so 25% of the base penalty, or \$375, would be subtracted, leaving a penalty of \$1,125.ⁿ⁵⁸ Next, the penalty is adjusted for likelihood. Since the violation is rated Medium on this factor, no adjustment is made, and the gravity-based penalty would be \$1,125.ⁿ⁵⁹ Next, the gravity-based penalty would be adjusted based on the size of Employer's business. Since Employer has 60 employees, 20% of the gravity-based penalty, or \$225, would be subtracted, leaving a balance of \$900.ⁿ⁶⁰ Since Employer's "good faith" rating is Fair, an additional 15% of the gravity-based penalty, or \$168, would be subtracted, leaving a balance of \$732.ⁿ⁶¹ Employer would receive a further reduction of 10% of the gravity-based penalty, or \$112, for its previous history rating of Good.ⁿ⁶² Employer's adjusted penalty would therefore be \$620. The adjusted penalty will further be reduced by 50%, based on the presumption that the employer will abate the violation by the date set forth in the citation, resulting in a proposed penalty of \$310.ⁿ⁶³ (Note that calculations are rounded off, as discussed in [a], *above*.)ⁿ⁶⁴

[c] Serious Violations

The statutory maximum penalty for a serious violationⁿ⁶⁵ is \$25,000 per violation.ⁿ⁶⁶ Because of the extreme gravity of a serious violation, the Division's guidelines for calculating the amount of the penalty start with a base penalty of \$5,000.ⁿ⁶⁷ In general, this base amount is adjusted for extent and likelihood,ⁿ⁶⁸ to obtain the "gravity-based" penalty, which is then subject to further adjustments.ⁿ⁶⁹

However, certain violations are subject to penalties with set amounts, specific maximum amounts, or adjustment limitations. An employer who violates any Cal/OSHA standard, order, or special order respecting the use of a carcinogen, which is determined to be a serious violation, will be assessed a total nonadjustable civil penalty of \$2,000 for each violation.ⁿ⁷⁰ If the employer commits a serious violation resulting in death or serious injury, illness, or exposure to a hazardous substance,ⁿ⁷¹ the maximum penalty is \$7,000, which may not be reduced, except with respect to the factor of business size.ⁿ⁷² Any person owning or having custody, management, or operation of an elevator who operates or permits the operation of the elevator in a condition that is dangerous to life or the safety of any person, or who operates or permits the operation of the elevator in violation of any Order Prohibiting Use issued by the Division, may be assessed a maximum civil penalty of \$2,000.ⁿ⁷³ Any employer who commits a serious violationⁿ⁷⁴ of any tower crane standard, order, or special order will be assessed a penalty of \$2,000, which is not adjustable.ⁿ⁷⁵

Subject to the exceptions noted *above*, the base penalty may be adjusted for "extent" and "likelihood" in the same manner as a general violationⁿ⁷⁶ to yield the gravity-based penalty.ⁿ⁷⁷ The gravity-based penalty may then be reduced for the size of the employer's business, the employer's good faith, and the employer's history of previous violations in the same manner as a general violation,ⁿ⁷⁸ except that employers who do not have operative injury prevention programs will receive no adjustment for their good faith or for their history of previous violations.ⁿ⁷⁹ The resulting penalty is the adjusted penalty.ⁿ⁸⁰

If, at the time of citation, an employer was making a good-faith effort to abate the alleged violation pursuant to written recommendations of the Cal/OSHA Consultation Service, all adjustable penalties for serious violations may be reduced by 50%.ⁿ⁸¹ Noncompliance with abatement requirements, in contradiction to an employer's statement of compliance, results in a recomputed penalty, which is not adjustable under *Title 8 California Code of Regulations Section 336(d)* except with respect to the factor of business size.ⁿ⁸²

In addition, an abatement credit of 50% is given on the presumption that the employer will correct the violations by the abatement date, resulting in a "proposed penalty."ⁿ⁸³ Failure to abate in accordance with this presumption subjects the employer to further penalties.ⁿ⁸⁴ This abatement credit is not available for (1) repeated or willful violations; (2) serious violations with "high" ratings for extent and likelihood; (3) serious violations involving the use of a carcinogen; or (4) serious violations causing death, or serious injury, illness, or exposure to hazardous substances.ⁿ⁸⁵

[d] Regulatory Violations

In general, the maximum statutory civil penalty for regulatory violationsⁿ⁸⁶ involving posting, reporting, or recordkeeping requirements is \$7,000 per violation.ⁿ⁸⁷ Except as discussed below, a minimum proposed penalty of \$500 is assessed against the employer, which may be increased or decreased based on the employer's size, good faith, and history of previous violations,ⁿ⁸⁸ as discussed in [b], *above*. However, no abatement credit may be given for regulatory violations.ⁿ⁸⁹

If the regulatory violation involves a carcinogen standard, other than failure to report use of a carcinogen, the base penalty is \$1000, and no abatement credit may be given.ⁿ⁹⁰ However, the penalty may be adjusted for the employer's size, good faith, and history of previous violations,ⁿ⁹¹ as discussed in [b], *above*. The minimum proposed civil penalty for failure to report use of a carcinogenⁿ⁹² is \$2,500, which may be adjusted for business size, good faith, and history, but is not subject to an abatement credit.ⁿ⁹³

Any employer who violates the permit requirements regarding excavations, trenches, construction, demolition, and underground diesel-engine use,ⁿ⁹⁴ or the registration requirements regarding asbestos-related work,ⁿ⁹⁵ will be assessed a minimum proposed civil penalty of \$1,250, which may be adjusted for business size, good faith, and history, but is not subject to abatement credit.ⁿ⁹⁶ The minimum penalty for violation of these requirements is \$250.ⁿ⁹⁷

Failure to obtain or post a valid elevator permit carries a penalty of up to \$1,000.ⁿ⁹⁸

Any employer who fails to timely report an employee's injury, illness or death in violation of 8 *Cal. Code Reg. § 342(a)* will be assessed a minimum proposed penalty of \$5,000.^{n98.1}

[e] Willful Violations

If a violation is characterized as willful, as defined in *Title 8 California Code of Regulations Section 334(e)*,ⁿ⁹⁹ the penalty is enhanced in an amount based on its initial characterization (i.e., as general, serious, or regulatory).ⁿ¹⁰⁰

For a willful general or willful regulatory violation, the proposed penalty amount is multiplied by five.ⁿ¹⁰¹ For a serious violation that is also willful, the proposed penalty is multiplied by ten.ⁿ¹⁰²

The statutory maximum total penalty for a willful violation is \$70,000 per violation; the minimum penalty is \$5,000.ⁿ¹⁰³

■ ILLUSTRATION

Assume the same facts as those set forth in [b], *above*, except that the Division finds that the violation was willful. The proposed penalty of \$310 would be multiplied by five, resulting in a penalty of \$1,550. However, since this is less than the statutory minimum, the amount of the penalty would be \$5,000.ⁿ¹⁰⁴

[f] Repeat Violations

The proposed penalty for a regulatory, general, or serious violation, not involving use of a carcinogen, is doubled for the first repeat violation, quadrupled for the second repeat violation, and increased tenfold for the third repeat violation.ⁿ¹⁰⁵ The statutory maximum penalty is \$70,000 for a repeat violation; the minimum penalty is \$5,000 for each such violation.ⁿ¹⁰⁶ Moreover, employers who are repeat violators will not receive any adjustment of the penalty based on the employer's good faith or the employer's history of previous violations.ⁿ¹⁰⁷

A repeat regulatory violation concerning reporting requirements for carcinogens carries a penalty of \$5,000 for the first repeat violation, \$10,000 for the second repeat violation, and \$20,000 for the third repeat violation.ⁿ¹⁰⁸ A repeat

serious violation concerning use of a carcinogen carries a penalty of \$10,000 for the first repeat violation, \$20,000 for the second repeat violation, and \$40,000 for the third repeat.ⁿ¹⁰⁹ Penalties for repeat regulatory and repeat serious violations involving carcinogens are not subject to adjustment.ⁿ¹¹⁰

With regard to a violation resulting in death, or serious injury, illness, or exposure to a hazardous substance,ⁿ¹¹¹ the computation of the proposed penalty for a repeated violation is not subject to reduction, except for the factor of business size.ⁿ¹¹²

[g] Penalties for Failure to Abate Violations

An employer who fails to correct or abate a violation within the time allowed by the Division for such abatement will be assessed a civil penalty of up to \$15,000 for each day during which the violation or failure to abate continues.ⁿ¹¹³

Notwithstanding the above limitation, if the Division finds on reinspection that an employer who submitted a signed statement affirming compliance with the abatement terms pursuant to *Lab. Code § 6320*ⁿ¹¹⁴ has not abated the violation, any adjustment to the civil penalty based on the abatement will be rescinded and the additional civil penalty assessed for failure to abate will not be adjusted for the good faith of the employer or for the employer's history of previous violations.ⁿ¹¹⁵

In addition, regardless of the limitation in *Labor Code § 6430(a)*, any employer who submits a signed statement affirming compliance with the abatement terms pursuant to *Lab. Code § 6320(b)*ⁿ¹¹⁶ and is found by the Division not to have abated the violation, is guilty of a public offense punishable by imprisonment in the county jail for a term not exceeding one year, or by a fine not exceeding \$30,000 (or, if the defendant is a corporation or limited liability company, by a fine not exceeding \$300,000), or by both the applicable fine and imprisonment.ⁿ¹¹⁷ In determining the amount of the fine, the court will consider "all relevant circumstances," including but not limited to, the nature, circumstance, extent, and gravity of the violation, any prior history of violations, the defendant's ability to pay, and any other matters that the interests of justice require.ⁿ¹¹⁸ Moreover, nothing in *Labor Code § 6430* will be construed to prevent prosecution under any other law that may apply.ⁿ¹¹⁹

The amount of the abatement credit will be assessed as part of the failure to abate. For serious violations, this amount cannot exceed the remainder of \$7,000 less the initial proposed penalty.ⁿ¹²⁰

In addition, a penalty is assessed based on the initial gravity-based penalty for each calendar day that the violation continues unabated after expiration of the abatement period. The gravity-based penalty is reduced by the reevaluated adjustment factors, subject to limitations regarding a high degree of gravity or employer negligence.ⁿ¹²¹ The adjustment factors of business size, good faith, and history are determined by evaluation of the circumstances at the time of the subsequent inspection when the failure to abate is discovered. The maximum daily additional penalty for failure to abate is \$15,000.ⁿ¹²²

Except when the gravity of the violation is high and exposure to employees is continuous, or when the employer has exhibited a high degree of negligence in failing to correct the violation, the daily penalty for failure to abate a regulatory or general violation may be further reduced up to 90 percent for the first 120 days the violation continues, and up to 50 percent thereafter if the violation does not bear a direct relationship on employee health and safety. The daily penalty for a serious violation may be reduced up to 50 percent when gravity is low, and the history and good faith factors are both "good."ⁿ¹²³

In the case of multiple instances of a violation, if on inspection some instances are abated and others are not, the daily penalty is calculated in proportion to the extent that the violation has been abated.ⁿ¹²⁴

If the employer fails to abate a serious violation and the Division has determined that the failure to abate caused death,

or serious injury, illness, or exposure to a hazardous substance,n125 the penalty is not adjustable under the provisions related to failure to abate, but the penalty may be adjusted based on the factor of size.n126 If the employer fails to abate a serious violation of a crane standard, order, or special order, and the Division has determined that the failure to abate caused death or serious injury,n127 the penalty, which is not adjustable, is \$14,000 for each calendar day.n128

If it is determined after reinspection, that the employer has not complied with the abatement requirements of the Division, and the employer has previously submitted a statement affirming compliance, the recomputed penalty is not adjustable, except based on the factor of business size.n129

[h] Multiple Violations Arising Out of Single Hazard

When the Division issues multiple citations for multiple violations created by a single hazard, the Division has the discretion to depart from the usual criteria to mitigate the cumulative effect of the penalties.n130 The discretion to mitigate is not available if the penalty was assessed for a serious, willful, or repeated violation; or for failure to abate a serious violation determined to have caused death, or serious injury, illness, or exposure to a hazardous substance.n131 It is inapplicable to a regulatory, general, or serious violation if the employer does not have an operative injury prevention program.n132

[i] Permit Violations

An employer in violation of the permit requirements in *Labor Code Section 6500*n133 may be assessed the appropriate civil penalty for a regulatory, general, serious, repeat, willful, or failure-to-abate violation.n134

[j] Failure to File Required Reports

Any employer or physician who fails to comply with the employee illness or injury reporting requirements in *Labor Code Sections 6409(a)* (doctor's first report), 6409.1 (employer's report), 6409.2 (responding police or fire agency report), 6409.3 (report of treatment for pesticide poisoning), 6410 (form, contents, and detail of required reports) may be assessed a civil penalty of not less than \$50 nor more than \$200 by the Director of Industrial Relations.n135 The assessments may be contested in the manner provided in *Labor Code Section 3725* (procedure for contesting penalties assessed for violation of workers' compensation insurance requirements).n136 Penalties assessed for failure to comply with these reporting requirements are deposited in the General Fund.n137

[k] Violations Involving Cranes

If the employer commits a serious, repeated, or willful repeated violation of a crane standard, order, or special order, and the Division has determined that the violation caused death or serious injury,n138 the penalty is \$140,000, which is not adjustable.n139

[4] Civil Penalties Assessed Against Government Employers

Civil or administrative penalties assessed against a school district, community college district, California State University, the University of California, or other specified educational entities must be deposited in the Workplace Health and Safety Revolving Fundn140 and refunded or used to assist schools in establishing effective occupational injury and illness programs.n141

[5] Enforcement of Civil Penalties

After the expiration of the time for appealing the civil penalty,n142 if the employer does not appeal, the Department of Industrial Relations may file with the clerk of the superior court in any county (1) a certified copy of the citation and notice of civil penalty, (2) the Department's certification that the penalty remains unpaid, and (3) the Division's proof of

service of the above items on the employer.ⁿ¹⁴³ If the employer has appealed, the Department may, after exhaustion of all review procedures,ⁿ¹⁴⁴ file with the clerk items (1) and (2) *above*, plus a certified copy of the OSHAB's order, findings, or decision, and proof of service on the employer at the address shown on the OSHAB's official address record.ⁿ¹⁴⁵

Immediately on the Department's filing of a notice of civil penalty and the other items described above, the clerk of the superior court must enter judgment for the State of California against the employer for the amount of the civil penalty, plus interest due for each day from the date of issuance of the notice of civil penalty that the penalty remains unpaid.ⁿ¹⁴⁶ The clerk may not charge a fee for this service.ⁿ¹⁴⁷ The Department must serve the notice of entry of judgment on the employer, as provided in Code of Civil Procedure Section 554.6.ⁿ¹⁴⁸

The judgment entered against the employer bears the same rate of interest and has the same effect as other judgments.ⁿ¹⁴⁹ The judgment is given the same preference as is allowed by *Government Code Section 7170* for other judgments rendered for tax claims.ⁿ¹⁵⁰

Notwithstanding *Code of Civil Procedure Section 340* (the general limitations period for penalties and forfeitures), an action to collect a Cal/OSHA civil penalty must be commenced no later than three years from the date that the notice of civil penalty becomes final.ⁿ¹⁵¹

[6] Notice of Penalty to Contractors' State License Board

The Division must provide the Contractors' State License Board with a certified copy of the notice of civil penalty if (1) the employer served with a notice of civil penalty is, or is believed to be, a state-licensed building contractor; (2) the notice of civil penalty has become a final order under *Labor Code Section 6601*ⁿ¹⁵² or review procedures have been exhausted;ⁿ¹⁵³ and (3) the employer has failed to pay the civil penalty for a period of 60 days following the employer's receipt of the notice of civil penalty.ⁿ¹⁵⁴ Failure to pay a civil penalty results in automatic suspension of the contractor's license by operation of law.ⁿ¹⁵⁵

When the employer has paid the civil penalty referred to in the certified copy of the notice of civil penalty that was provided to the License Board, including any interest owed on the penalty, the Division must provide the employer with a written confirmation or receipt stating that the employer has paid the amount owed.ⁿ¹⁵⁶ The employer may then seek reinstatement of his or her contractor's license.ⁿ¹⁵⁷

Legal Topics:

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

Civil Procedure Remedies General Overview Labor & Employment Law Occupational Safety & Health General Overview Labor & Employment Law Occupational Safety & Health Administrative Proceedings General Overview Labor & Employment Law Occupational Safety & Health Civil Liability

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 6317.*

(n2)Footnote 2. *8 Cal. Code Reg. § 333.*

(n3)Footnote 3. *Lab. Code §§ 6319(b), 6600; see 8 Cal. Code Reg. § 333.*

(n4)Footnote 4. *Lab. Code § 6601; 8 Cal. Code Reg. § 333.*

(n5)Footnote 4.1. *Lab. Code § 6319.3(a), (b), 8 Cal. Code Reg. § 336(d)(10).*

(n6)Footnote 4.2. *Lab. Code* § 6319.3(b), 8 *Cal. Code Reg.* § 336(e)(11).

(n7)Footnote 4.3. The division was required to prepare the model program pursuant to legislation operative January 1, 1994. *Lab. Code* § 6401.7(j)(1).

(n8)Footnote 4.4. *Lab. Code* § 6401.7(j)(1).

(n9)Footnote 5. *See Lab. Code* §§ 6427-6435; *see also* discussion in [3], *below*.

(n10)Footnote 6. *See Lab. Code* § 6319(c), (d).

(n11)Footnote 7. *See Lab. Code* § 6319(c).

(n12)Footnote 8. *See 8 Cal. Code Reg.* § 335.

(n13)Footnote 9. *Lab. Code* § 6319(g).

(n14)Footnote 10. *Lab. Code* § 6319(d).

(n15)Footnote 11. *Lab. Code* § 6320(b).

(n16)Footnote 12. *Lab. Code* § 6320(b).

(n17)Footnote 13. *See* discussion in [3][g], *below*.

(n18)Footnote 14. *See Lab. Code* § 6319(c)(2).

(n19)Footnote 15. 8 *Cal. Code Reg.* § 335(a).

(n20)Footnote 16. 8 *Cal. Code Reg.* § 335(a)(1).

(n21)Footnote 17. *See 8 Cal. Code Reg.* § 335(a)(1)(A).

(n22)Footnote 18. 8 *Cal. Code Reg.* § 335(a)(1)(A).

(n23)Footnote 19. 8 *Cal. Code Reg.* § 335(a)(1)(B).

(n24)Footnote 20. 8 *Cal. Code Reg.* § 335(a)(2)(i).

(n25)Footnote 21. 8 *Cal. Code Reg.* § 335(a)(2)(ii).

(n26)Footnote 22. 8 *Cal. Code Reg.* § 335(a)(3).

(n27)Footnote 23. *See Lab. Code* § 6319(c)(1).

(n28)Footnote 24. 8 *Cal. Code Reg.* § 335(b).

(n29)Footnote 25. *See Lab. Code* § 6319(c)(3).

(n30)Footnote 26. 8 *Cal. Code Reg.* § 335(c).

(n31)Footnote 27. *See Lab. Code* § 6319(c)(4).

(n32)Footnote 28. 8 *Cal. Code Reg.* § 335(d).

- (n33)Footnote 29. *See* discussion in § 21.42[2].
- (n34)Footnote 30. *See Lab. Code* § 6319(c), (d); *8 Cal. Code Reg.* § 335.
- (n35)Footnote 31. *See 8 Cal. Code Reg.* § 336(a)-(e).
- (n36)Footnote 32. *See Lab. Code* §§ 6427, 6428.
- (n37)Footnote 33. *See 8 Cal. Code Reg.* § 336(g), (h).
- (n38)Footnote 34. *See Lab. Code* § 6429.
- (n39)Footnote 35. *See 8 Cal. Code Reg.* § 336(f); *Lab. Code* § 6430.
- (n40)Footnote 35.1. *8 Cal. Code Reg.* § 336(j).
- (n41)Footnote 36. For definition, *see* § 21.42[2][e].
- (n42)Footnote 37. *Lab. Code* § 6427.
- (n43)Footnote 38. *See 8 Cal. Code Reg.* § 335(a)(1)(A).
- (n44)Footnote 39. *8 Cal. Code Reg.* § 336(b).
- (n45)Footnote 40. *See 8 Cal. Code Reg.* § 335(a)(2), discussed in [2][b], *above*.
- (n46)Footnote 41. *8 Cal. Code Reg.* § 336(b).
- (n47)Footnote 42. *See 8 Cal. Code Reg.* § 335(a)(3) (likelihood that injury, illness, or disease will occur because of violation).
- (n48)Footnote 43. *8 Cal. Code Reg.* § 336(b).
- (n49)Footnote 44. *8 Cal. Code Reg.* § 336(b).
- (n50)Footnote 45. *See Lab. Code* § 6319(c)(1), (3), (4); *8 Cal. Code Reg.* §§ 335(b)-(d), 336(d).
- (n51)Footnote 46. [Reserved]
- (n52)Footnote 47. *8 Cal. Code Reg.* § 336(d)(1).
- (n53)Footnote 48. *8 Cal. Code Reg.* § 336(d)(2).
- (n54)Footnote 49. *8 Cal. Code Reg.* § 336(d)(3).
- (n55)Footnote 50. *8 Cal. Code Reg.* § 336(d).
- (n56)Footnote 51. *8 Cal. Code Reg.* § 336(d)(4)(A).
- (n57)Footnote 52. *See 8 Cal. Code Reg.* § 336(e).
- (n58)Footnote 52.1. *See 8 Cal. Code Reg.* § 336(f), discussed in [g], *below*.
- (n59)Footnote 52.2. *8 Cal. Code Reg.* § 336(e).

- (n60)Footnote 53. *8 Cal. Code Reg. § 336(e)*.
- (n61)Footnote 54. *See 8 Cal. Code Reg. § 335(a)(1)(A)*.
- (n62)Footnote 55. *See 8 Cal. Code Reg. § 335(c)*.
- (n63)Footnote 56. *8 Cal. Code Reg. § 336(b)*.
- (n64)Footnote 57. *See 8 Cal. Code Reg. § 335(a)(2)*.
- (n65)Footnote 58. *8 Cal. Code Reg. § 336(b)*.
- (n66)Footnote 59. *See 8 Cal. Code Reg. § 336(b)*.
- (n67)Footnote 60. *8 Cal. Code Reg. § 336(d)(1)*.
- (n68)Footnote 61. *See 8 Cal. Code Reg. § 336(d)(2)*.
- (n69)Footnote 62. *See 8 Cal. Code Reg. § 336(d)(3)*.
- (n70)Footnote 63. *8 Cal. Code Reg. § 336(e)*.
- (n71)Footnote 64. *See 8 Cal. Code Reg. § 336(j)*.
- (n72)Footnote 65. For definition, *see § 21.42[2][d]*.
- (n73)Footnote 66. *Lab. Code § 6428*.
- (n74)Footnote 67. *8 Cal. Code Reg. § 336(c)(1)*. The severity factor for a serious violation is always rated High. *8 Cal. Code Reg. § 335(a)(1)(B)*.
- (n75)Footnote 68. *See 8 Cal. Code Reg. § 336(c)(1)*, discussed *below*.
- (n76)Footnote 69. *See 8 Cal. Code Reg. § 336(d), (e)*, discussed *below*.
- (n77)Footnote 70. *8 Cal. Code Reg. § 316(c)(2); see 8 Cal. Code Reg. § 336(d)(5), (e)(3); see also Lab. Code § 9060(b)*.
- (n78)Footnote 71. *See Lab. Code § 6302*.
- (n79)Footnote 72. *8 Cal. Code Reg. § 316(c)(2); see 8 Cal. Code Reg. § 336(d)(1), (7), (e)(4), (f)(3)*.
- (n80)Footnote 73. *8 Cal. Code Reg. § 336(c)(4)*.
- (n81)Footnote 74. *See 8 Cal. Code Reg. § 334(c)(1)*.
- (n82)Footnote 75. *8 Cal. Code Reg. § 336(c)(5)*.
- (n83)Footnote 76. *See discussion in [b], above*.
- (n84)Footnote 77. *See 8 Cal. Code Reg. § 336(c)(1)*.
- (n85)Footnote 78. *See Lab. Code § 6319(c)(1), (3), (4); 8 Cal. Code Reg. § 336(d)(1)-(3)*, discussed in [b], *above*.
- (n86)Footnote 79. *Lab. Code § 6428; see 8 Cal. Code Reg. § 336(d)(8)*, (limiting adjustment to "size" under these

circumstances).

(n87)Footnote 80. *8 Cal. Code Reg. § 336(d)*.

(n88)Footnote 81. *8 Cal. Code Reg. § 336(d)(4)(B)*.

(n89)Footnote 82. *8 Cal. Code Reg. § 336(d)(9)*.

(n90)Footnote 83. *8 Cal. Code Reg. § 336(e)*.

(n91)Footnote 84. *See 8 Cal. Code Reg. § 336(f)*, discussed in [g], *below*.

(n92)Footnote 85. *8 Cal. Code Reg. § 336(e)*; *see Lab. Code § 6302* (hazardous substances).

(n93)Footnote 86. For definition, *see § 21.42[2][f]*.

(n94)Footnote 87. *Lab. Code § 6431*; *8 Cal. Code Reg. § 336(a)(1)*; *but see 8 Cal. Code Reg. § 336(a)(5)*, regarding elevators, discussed *below*.

(n95)Footnote 88. *See 8 Cal. Code Reg. § 336(a)(1), (d)(1)-(3)*.

(n96)Footnote 89. *8 Cal. Code Reg. § 336(a)(1)*.

(n97)Footnote 90. *8 Cal. Code Reg. § 336(a)(2)*.

(n98)Footnote 91. *See 8 Cal. Code Reg. § 336(a)(2), (d)(1)-(3)*.

(n99)Footnote 92. *See 8 Cal. Code Reg. § 330(f)* (definition).

(n100)Footnote 93. *8 Cal. Code Reg. § 336(a)(3)*; *Lab. Code § 9060(a)*.

(n101)Footnote 94. *See 8 Cal. Code Reg. § 341 et seq.*

(n102)Footnote 95. *8 Cal. Code Reg. § 341.6 et seq.*

(n103)Footnote 96. *8 Cal. Code Reg. § 336(a)(4)*.

(n104)Footnote 97. *8 Cal. Code Reg. § 336(d)(6)*.

(n105)Footnote 98. *8 Cal. Code Reg. § 336(a)(5)*.

(n106)Footnote 98.1. *8 Cal. Code Reg. § 336(a)(6)*.

(n107)Footnote 99. *See discussion in § 21.42[2][b]*.

(n108)Footnote 100. *See 8 Cal. Code Reg. § 336(h)*.

(n109)Footnote 101. *8 Cal. Code Reg. § 336(h)*.

(n110)Footnote 102. *8 Cal. Code Reg. § 336(h)*.

(n111)Footnote 103. *Lab. Code § 6429*; *8 Cal. Code Reg. § 336(h)*.

(n112)Footnote 104. *See Lab. Code § 6429*; *see 8 Cal. Code Reg. § 336(h)*.

(n113)Footnote 105. 8 *Cal. Code Reg.* § 336(g)(1).

(n114)Footnote 106. *Lab. Code* § 6429.

(n115)Footnote 107. *Lab. Code* § 6429(b); *see Lab. Code* § 6319(c) (adjustments).

(n116)Footnote 108. 8 *Cal. Code Reg.* § 336(g)(2)(A); *see Lab. Code* § 9060(c).

(n117)Footnote 109. 8 *Cal. Code Reg.* § 336(g)(2)(B); *see Lab. Code* § 9060(d).

(n118)Footnote 110. 8 *Cal. Code Reg.* § 336(g)(2).

(n119)Footnote 111. *See Lab. Code* § 6302.

(n120)Footnote 112. 8 *Cal. Code Reg.* § 336(g)(3); *see 8 Cal. Code Reg.* § 336(d)(1).

(n121)Footnote 113. *Lab. Code* § 6430(a).

(n122)Footnote 114. *See § 21.44[1]*.

(n123)Footnote 115. *Lab. Code* § 6430(b); *see Lab. Code* § 6319(c)(3), (4) (adjustments).

(n124)Footnote 116. *See § 21.44[1]*.

(n125)Footnote 117. *Lab. Code* § 6430(c).

(n126)Footnote 118. *See Lab. Code* § 6430(c).

(n127)Footnote 119. *Lab. Code* § 6430(c).

(n128)Footnote 120. 8 *Cal. Code Reg.* § 336(f).

(n129)Footnote 121. 8 *Cal. Code Reg.* § 336(f); *see 8 Cal. Code Reg.* § 336(f)(1) (limitations).

(n130)Footnote 122. 8 *Cal. Code Reg.* § 336(f).

(n131)Footnote 123. 8 *Cal. Code Reg.* § 336(f)(1).

(n132)Footnote 124. 8 *Cal. Code Reg.* § 336(f)(2).

(n133)Footnote 125. *See Lab. Code* § 6302(i).

(n134)Footnote 126. 8 *Cal. Code Reg.* § 336(f)(3); *see 8 Cal. Code Reg.* § 336(d)(1).

(n135)Footnote 127. *See Lab. Code* § 6302.

(n136)Footnote 128. 8 *Cal. Code Reg.* § 336(f)(4).

(n137)Footnote 129. 8 *Cal. Code Reg.* § 336(f)(5); *see 8 Cal. Code Reg.* § 336(d)(1).

(n138)Footnote 130. 8 *Cal. Code Reg.* § 336(k).

(n139)Footnote 131. 8 *Cal. Code Reg.* § 336(k)(1); *see Lab. Code* § 6302(k)(1) (regarding hazardous substance).

(n140)Footnote 132. 8 *Cal. Code Reg.* § 336(k)(1); *see Lab. Code* § 6401.7 (regarding injury prevention program).

(n141)Footnote 133. *See* discussion in § 21.47.

(n142)Footnote 134. *Lab. Code* § 6435(a).

(n143)Footnote 135. *Lab. Code* § 6413.5.

(n144)Footnote 136. *Lab. Code* § 6413.5.

(n145)Footnote 137. *Lab. Code* § 6413.5.

(n146)Footnote 138. *See Lab. Code* § 6302.

(n147)Footnote 139. 8 *Cal. Code Reg.* § 336(i).

(n148)Footnote 140. *See Lab. Code* § 78.

(n149)Footnote 141. *See Lab. Code* § 6434; *see also Lab. Code* § 78.

(n150)Footnote 142. *See* discussion in [1], *above*, and in § 21.45[3].

(n151)Footnote 143. *Lab. Code* § 6650(a).

(n152)Footnote 144. *See* discussion in § 21.45.

(n153)Footnote 145. *See Lab. Code* § 6650(b).

(n154)Footnote 146. *See Lab. Code* § 6650(c).

(n155)Footnote 147. *See Lab. Code* § 6650(f).

(n156)Footnote 148. *Lab. Code* § 6650(d).

(n157)Footnote 149. *Lab. Code* § 6650(e).

(n158)Footnote 150. *Lab. Code* § 6650(e).

(n159)Footnote 151. *Lab. Code* § 6651(a). By amendment effective January 1, 1994, the three-year limitations period also applies to an action to collect a fee or penalty fee under *Lab. Code* § 6300 *et seq.* but *see Lab. Code* § 6651(b) (amendment applies only to penalty assessments or fees for which the three-year period has not expired on January 1, 1994).

(n160)Footnote 152. *See* discussion in [1], *above*, and in § 21.45[3].

(n161)Footnote 153. *See* discussion in § 21.45.

(n162)Footnote 154. *See Lab. Code* § 6652(a), (b).

(n163)Footnote 155. *See Bus. & Prof. Code* § 7090.1.

(n164)Footnote 156. *Lab. Code* § 6652(c).

(n165)Footnote 157. *See Bus. & Prof. Code* § 7090.1.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part D. ADMINISTRATIVE ENFORCEMENT PROCEDURES

2-21 California Employment Law § 21.44

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.44 Abatement of Violations and Reinspections

[1] Abatement

Each citation or notice in lieu of citation issued by the Division specifies a time for abatement (correction) of the violation or hazardous condition described.ⁿ¹ The period for abatement begins running at the time the citation or notice is either personally delivered to the employer, the date the citation or notice is received by certified mail by the employer, or the date the certified mail is returned to the post office for lack of signature by the employer.ⁿ²

Failure to abate a violation within the time allowed will result in the assessment of additional civil penalties for failure to abate,ⁿ³ and any abatement credit given at the time the initial citation and civil penalty was issued, which credit reduced the amount of the proposed penalty,ⁿ⁴ will be rescinded and assessed as part of the additional penalty for failure to abate.ⁿ⁵

If a serious citation was issued and the violation was not corrected at the time of the Division's inspection, the Division will send the employer a Cal/OSHA Form 161, which requires the employer to complete a declaration under penalty of perjury describing the measures taken to abate each serious violation.ⁿ⁶ The declaration must be returned to the Division within 10 working days after the abatement date for the serious citation, or the Division will revoke any abatement credit given in calculating the initial civil penalty and notify the employer that additional civil penalties, retroactive to the original abatement date, will be assessed unless the employer provides proof of abatement prior to the abatement date.ⁿ⁷

If the employer has filed a timely appeal from a citation, order, or notice of civil penalty and the OSHAB has docketed the appeal, the abatement changes and abatement dates are stayed until the appeal is withdrawn or finally resolved by the OSHAB.ⁿ⁸ For the purposes of assessing penalties for failure to abate, the abatement period begins to run on the date that the appeal is withdrawn or the date that a final disposition by the OSHAB is made, if the appeal was initiated by the employer in good faith and not solely for delay or avoidance of a penalty.ⁿ⁹

[2] Reinspection

If the violation was not immediately abated at the time of the Division's initial inspection, the Division is required to reinspect the workplace in all cases involving (1) a serious violation of the requirements for implementing and maintaining an effective illness and injury prevention program, as defined in *Labor Code Section 6401.7*; (2) a special order or order to take special action, or a serious violation of such an order; (3) a serious repeat or serious willful violation; or (4) a serious violation with an abatement period of less than six days.ⁿ¹⁰ In the above cases, the reinspection must be conducted at the end of the period fixed for compliance with the order or abatement of the violation, or within 30 days thereafter.ⁿ¹¹

The Division is also required to reinspect in at least 20% of all other inspections or investigations that resulted in issuance of a citation for a serious violation and that are not otherwise scheduled for reinspection.ⁿ¹² The cases in which such reinspections are conducted are randomly selected, and the reinspections must be conducted at the end of the period fixed for abatement or within a reasonable time thereafter.ⁿ¹³

If an employer who was issued a citation for a serious violation fails to return the declaration under penalty of perjury of abatement measures takenⁿ¹⁴ to the Division within 10 working days after the end of the abatement period, the Division must reinspect within 45 days following the end of the abatement period, unless the Division has other evidence of abatement of the violation.ⁿ¹⁵ If the Division determines on reinspection that an employer did not abate a violation as falsely claimed in the employer's previously submitted declaration under penalty of perjury, additional civil penalties will be assessed.ⁿ¹⁶

Legal Topics:

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

Labor & Employment Law Occupational Safety & Health General Overview Labor & Employment Law Occupational Safety & Health Administrative Proceedings Citations & Inspections

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6317*; *8 Cal. Code Reg. § 332(c)*.

(n2)Footnote 2. *Lab. Code § 6317*.

(n3)Footnote 3. *See* discussion in *§ 21.43[3][g]*.

(n4)Footnote 4. *See* discussion in *§ 21.43[3][a]*.

(n5)Footnote 5. *Lab. Code § 6430*; *8 Cal. Code Reg. § 336(f)*.

(n6)Footnote 6. *Lab. Code § 6320(b)*.

(n7)Footnote 7. *Lab. Code § 6320(b)*.

(n8)Footnote 8. *8 Cal. Code Reg. § 360*.

(n9)Footnote 9. *8 Cal. Code Reg. § 360*.

(n10)Footnote 10. *Lab. Code § 6320(a)(1)*.

(n11)Footnote 11. *Lab. Code § 6320(a)(1)*.

(n12)Footnote 12. *Lab. Code § 6320(a)(2)*.

(n13)Footnote 13. *Lab. Code § 6320(a)(2)*.

(n14)Footnote 14. *See* discussion in [1], *above*.

(n15)Footnote 15. *Lab. Code* § 6320(*b*).

(n16)Footnote 16. *See Lab. Code* § 6430(*b*); 8 *Cal. Code Reg.* § 336(*f*)(4).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part D. ADMINISTRATIVE ENFORCEMENT PROCEDURES

2-21 California Employment Law § 21.45

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.45 Administrative Appeals

[1] Governing Rules

Appeals of citations, orders, proposed penalties, and other actions taken by the Division are heard by the Occupational Safety and Health Appeals Board (OSHAB).ⁿ¹ The OSHAB is authorized to promulgate rules of practice and procedure pertaining to appeals of any matter within its jurisdiction.ⁿ² The rules of practice and procedure adopted by the OSHAB must be consistent with the provisions of *Government Code Sections 11435.05 et seq., 11507, 11507.6, 11507.7, 11513, 11514, 11515, and 11516*.ⁿ³ The OSHAB's rules of practice and procedure are set forth in *Title 8 California Code of Regulations Section 345 et seq.* Statutory provisions pertaining to appeals of Division actions are set forth in *Labor Code Section 6600 et seq.*

[2] Who May Appeal

Any employer served with a citation, notice in lieu of citation, notice of proposed civil penalty, special order or order to take special action ("action order"), or any other person obligated to the employer pursuant to *Labor Code Section 6319(b)* ("an obligor") may appeal to the OSHAB.ⁿ⁴ An "obligor" is a person other than the employer who is obligated to an employer to repair any machine, device, apparatus, or equipment and to pay any penalties assessed against the employer.ⁿ⁵

An employee or authorized employee representative may appeal only the reasonableness of the period of time fixed by the Division for correction (abatement) of the alleged violation, allowed in a citation, special order, or order to take special action.ⁿ⁶ The employee appeal may be filed either with the Division or with the OSHAB.ⁿ⁷

[3] Timeliness of Appeal

An appeal by an employer must be filed within 15 working daysⁿ⁸ of the employer's receipt of the Division's action.ⁿ⁹

An employee appeal must be filed within 15 working days after the *Division's issuance* of its action.ⁿ¹⁰

The OSHAB may extend the 15-day period for each type of appeal for good cause shown.ⁿ¹¹

Except as otherwise provided,ⁿ¹¹ 1.1 an appeal is deemed filed on the date that a communication indicating a desire to appeal an action by the Division is delivered to, mailed to, or received by the OSHAB in Sacramento, whichever is earlier.ⁿ¹²

If no appeal is filed with the OSHAB by an employer, obligor, or employee within these time limits, the division's action becomes a final order of the OSHAB, not subject to review by any court or agency.ⁿ¹³

[4] Form of Appeal

Regardless of the type of appeal being filed, the party appealing need only initially indicate a desire to appeal or contest a Division action; no particular format is necessary to commence the appeal.ⁿ¹⁴ However, communications to the Division of Occupational Safety & Health indicating a desire to appeal are not deemed filed with the Appeals Board and do not initiate the appeal,^{n14.1} and if the appeal is not initially filed on the OSHAB's official form, the Board will require the person appealing to file a completed appeal formⁿ¹⁵ within 10 days after the Board acknowledges the party's desire to appeal.ⁿ¹⁶ The forms are furnished by the Board and are available at any office of the Division.ⁿ¹⁷

Failure to file the appropriate appeal form constitutes grounds for dismissal of the appeal.ⁿ¹⁸

[5] Issues on Appeal

The issues on appeal are limited to those arising from the Division's action that is the subject of the docketed appeal, subject to the following limitations:ⁿ¹⁹

- If the action appealed from is a citation, the employer must specify on the appeal form which one or more of the issues it is raising in its appeal;
- The existence of the violation alleged in the underlying citation;
- The classification of the violation;
- The abatement period;
- The reasonableness of the changes required to abate the violation; or
- Only the reasonableness of the proposed penalty.

If the appeal contests only the reasonableness of the proposed penalty, the issues on appeal are limited to the classification of the violation and the reasonableness of the proposed penalty, unless a timely motion under *8 Cal. Code Reg. § 371* (prehearing motions) is granted to amend the appeal to contest the existence of the violation, the abatement period, or the reasonableness of the changes required to abate the violation.ⁿ²⁰ⁿ²¹

An appeal from a repeat violationⁿ²² does not put into issue the prior citation or notice, whether the prior citation or notice was established by a failure to appeal or by entry of a final disposition after appeal.ⁿ²³

If a timely appeal is filed from a notice of failure to correct an alleged violation and of additional civil penalty, the OSHAB must hear and decide the underlying citation or notice, even if no timely appeal was filed from the citation or notice, if the employer files a motion in accordance with *Title 8 California Code of Regulations Section 371*,

demonstrating good cause for not having appealed the underlying citation.ⁿ²⁴

[6] Effect of Filing Appeal; Stay of Violation Abatement Requirements

Once proper notice of the intent to appeal has been filed, the OSHAB must provide the opportunity for a hearing and thereafter issue a decision, based on findings of fact, affirming, modifying, or vacating the Division's Action, or directing other relief as appropriate.ⁿ²⁵

All abatement periods and changes required by the Division are stayed on the filing of a docketed appeal with the OSHAB and remain stayed until withdrawal of the appeal or final disposition by the OSHAB.ⁿ²⁶

[7] Notifying Employees and Labor Organizations of Appeal

An employer must notify affected employeesⁿ²⁷ of any docketed appeal by serving or posting a copy of the docketed Notice of Contest (Appeal) form and a Participation Notice.ⁿ²⁸ Appeals from citations issued under *Health and Safety Code Section 2950* are excepted from the service and posting requirements.ⁿ²⁹ Proof of such service or posting must be filed by the employer with the issuing office of the Division no later than the second working day following such service or posting.ⁿ³⁰

For discussion of rules regarding service of documents and proof of service generally, *see* [9][c] and [d], *below*.

If notice is given by posting, the posting must be maintained until commencement of the hearing or disposition of the proceeding, whichever occurs first.ⁿ³¹

If the affected employees are represented by an "authorized employee representative,"ⁿ³² the employer must serve the copies of the Notice of Contest (Appeal) and Participation Notice on the authorized employee representative.ⁿ³³ If any affected employees are not represented, the employer must post copies of both the Notice of Contest (Appeal) and Participation Notice at or near the alleged violation site, so as to be easily read, or, if posting at such a site is not practicable, in a conspicuous place where the documents will be readily observable by employees, or at a location to which employees report each day, or at a location from which employees operate to carry out their duties.ⁿ³⁴

The contents of the Participation Notice must conform to the provisions of *Title 8 California Code of Regulations Section 356(c)* or *(d)*.

When an employee appeal is filed by an employee, the Appeals Board will forward a copy of the docketed appeal to the employer, who must post a copy of both the docketed appeal and a Participation Notice.ⁿ³⁵ However, if there are other employees represented by an authorized employee representative, on receipt of the docketed appeal, the employee who filed the appeal must serve a copy of the appeal, a Participation Notice, and the Division's statement regarding the reasonableness of the abatement periodⁿ³⁶ on the authorized employee representative.ⁿ³⁷ If an authorized employee representative files an appeal, the representative must file copies on any other authorized employee representatives of affected employees.ⁿ³⁸

[8] Party Status and Intervention

Aside from the party filing the appeal, party status is automatically conferred on the Division, whether or not it appears or participates in a proceeding.ⁿ³⁹ Furthermore, whenever an employee appeals the reasonableness of the abatement period, the cited employer is deemed a party to the proceeding.ⁿ⁴⁰

Affected employees, or their authorized representatives, or obligors who wish to participate as a party in an appeal filed by another person must file a motion for party status prior to the beginning of a hearing, which may be granted on a

showing of good cause.ⁿ⁴¹

Parties are entitled to service of all notices and documents, and may participate fully in the proceedings. When a person's motion for party status is granted, each previous party to the proceeding must serve on the new party, within ten days of the order granting party status, copies of all documents previously filed with the OSHAB that have not previously been served on the new party.ⁿ⁴² Service must be in the manner prescribed in 8 *Cal. Code Reg.* § 355(c), and proof of service meeting the requirements of 8 *Cal. Code Reg.* § 355(e) must be filed with the OSHAB.^{n42.1}

A person who is not a party may move to participate as an intervenor at any time.ⁿ⁴³ However, this participation is limited to the terms prescribed in the order of the OSHAB.ⁿ⁴⁴ A person granted intervenor status is entitled to service of all documents and notices to which parties are entitled and to participate in hearings and prehearing conferences to the extent consistent with the terms prescribed in the order of the OSHAB granting intervention.^{n44.1} A motion to participate as an intervenor must state the interest of the moving party in the proceeding, how that interest is similar to that of a party, and how participation will assist in the determination of the issues before the OSHAB, and that intervention will not unnecessarily delay the proceeding.ⁿ⁴⁵

[9] General Rules Regarding Filing, Service, and Format of Documents

[a] Computation of Time Limits

In computing the time by which a right may be exercised or an act is to be performed in a proceeding before the OSHAB, the first day is excluded and the last day is counted. If the last day is not a working day, the time is extended to the next working day.ⁿ⁴⁶

Where service of any document is made by mail, and a right may be exercised or act must be done within a given number of days after service by mail, the time to exercise such rights or do such acts is extended 5 days, if the place of address is within California, or 10 days if outside of California but within the United States.ⁿ⁴⁷ However, these extensions following service by mail do not apply to extend the time for filing an Employee Appeal or an employer or obligor Notice of Contest (Appeal),ⁿ⁴⁸ as discussed in [3], *above*.

[b] Late Filing of Documents

Unless otherwise specified in the Labor Code, the OSHAB (or Administrative Law Judge appointed by the OSHAB) may extend the time for filing any document, or may permit a late filing, on a showing of good cause.ⁿ⁴⁹ A request to file a late appeal must be accompanied by a declaration that any facts in the request are based on the declarant's personal knowledge.

[c] Service of Documents

Unless otherwise required, service of any document in a proceeding before the OSHAB may be made by personal delivery or by depositing the document in any post office, mailbox, mail chute, or like facility regularly maintained by the United States Postal Service, sealed, properly addressed, with first class postage prepaid; by depositing with a carrier guaranteeing overnight delivery; or by facsimile (FAX) machine.ⁿ⁵⁰ Service is complete at the time of personal delivery or mailing.ⁿ⁵¹ Unless otherwise indicated by proof of service, the mailing date is presumed to be the postmark date appearing on the envelope if first-class postage was prepaid and the envelope was properly addressed, or on the date of delivery to a common carrier promising overnight delivery, as shown on the carrier's receipt.ⁿ⁵²

Service to a party or intervenor who has appeared through a representative must be made on the representative.ⁿ⁵³ Service to employees who are represented by an authorized employee representative is made by serving that representative.ⁿ⁵⁴ Notice to employees who are not represented by an authorized employee representative is made by posting the document in the manner described in [7], *above*.ⁿ⁵⁵

[d] Proof of Service

Proof of service must be filed with the original of the document served.ⁿ⁵⁶ Proof of service may consist of any of the following:ⁿ⁵⁷

- An affidavit or declaration of service by personal delivery, mail, overnight courier or fax.
- A written statement endorsed on the document served and signed by the party making the statement.
- A letter of transmittal.

If service is made by posting the document, proof or certification of such posting must be filed with the issuing office of the Division no later than the second working day following the posting.ⁿ⁵⁸

Proof of service by the OSHAB may be made by an endorsement on the document served, stating the fact of service on the persons listed on the official address record on the date of service. The endorsement must also state whether service was made personally, by mail, overnight courier, or FAX, contain the signature of the person making the service, and set forth the date of service.ⁿ⁵⁹

The OSHAB must maintain in each proceeding an official address record containing the names and addresses of all parties and intervenors and their representatives, agents, or attorneys of record. Documents sent by OSHAB to the official address of record for the employer that are returned or undeliverable may result in dismissal of the appeal if OSHAB is unable to effectively communicate with the employer.ⁿ⁶⁰ Any change or substitution in the name and address of any party or intervenor or its representative must be promptly communicated in writing, and in no case more than 30 days after the change, to OSHAB's Sacramento office. The written communication also must be served on all parties and intervenors. Failure to communicate changes or substitutions promptly in writing by the employer may result in dismissal of the appeal if OSHAB is unable to effectively communicate with the employer.^{n60.1}

[e] Ex Parte Communications

The only communications permitted between a person and the OSHAB members or Administrative Law Judges of the OSHAB regarding a proceeding are:ⁿ⁶¹ (1) written communications, with copies contemporaneously served by the communicator on all parties to a proceeding in accordance with *Title 8 California Code of Regulations Sections 355(c)* and *355(e)*;ⁿ⁶² (2) oral communications, with advance notice given by the communicator to all parties to a proceeding and adequate opportunity afforded to all parties to participate in the communication;ⁿ⁶³ (3) oral or written requests for information related solely to the status of a proceeding or the procedures of the OSHAB;ⁿ⁶⁴ (4) oral or written communications agreed to by all parties to a proceeding, made on an ex parte basis;ⁿ⁶⁵ (5) oral or written communications proposing settlement or agreement for disposition of any or all issues in a proceeding;ⁿ⁶⁶ and (6) oral or written communications concerning a proceeding, if made more than 30 days after service by the OSHAB of a final order or decision in that proceeding.ⁿ⁶⁷

[f] Pre-hearing Motions

All motions and requests for action relating to any pending proceeding must be directed to the OSHAB, contain the title and docket or petition number of the proceeding in the caption, and present a clear and plain statement of the relief sought and the grounds for such relief.ⁿ⁶⁸ The motion or request must be signed by the filing party or the party's representative, and a copy must be served on all parties as discussed in [c], *above*.ⁿ⁶⁹ Proof of service must be filed with the OSHAB.ⁿ⁷⁰

Any party served with a motion or request has 10 working days from the date of service to file an answer. A copy of the

answer must be served on all other parties,ⁿ⁷¹ and proof of service must be filed with the OSHAB.ⁿ⁷²

[10] Administrative Law Judge

[a] Appointment and Powers of Administrative Law Judge

Pursuant to its statutory authority,ⁿ⁷³ the OSHAB generally assigns appeals to an administrative law judge (ALJ) for initial hearing, order, and decision.ⁿ⁷⁴

Once appointed to a proceeding, the ALJ has the powers, jurisdiction, and authority granted by law, by the order of appointment, and by the rules of the OSHAB.ⁿ⁷⁵ Specifically, the ALJ has the authority to do all of the following:ⁿ⁷⁶

- Hold hearings and ascertain facts for the information of the Appeals Board.
- Hold prehearing conferences.
- Hold settlement conferences.
- Issue subpoenas and subpoenas duces tecum for the attendance of a person and the production of testimony, books, documents, or other things.
- Compel the attendance of a person residing anywhere in the state.
- Certify official acts.
- Regulate the course of a hearing.
- Grant withdrawals, dispositions or amendments.
- Order continuances.
- Approve stipulations voluntarily entered into by the parties.
- Administer oaths and affirmations.
- Rule on objections, privileges, defenses, and the receipt of relevant and material evidence.
- Call and examine a party or witness and introduce into the hearing record documentary or other evidence.
- Request a party at any time to state the respective position or supporting theory concerning any fact or issue in the proceeding.
- Extend the submittal date of any proceeding.
- Hear and determine all issues of fact and law presented.
- Issue interlocutory and final orders, findings, and decisions as may be necessary for the full adjudication of the matter.

- Take other action during the pendency of a proceeding to regulate the course of a prehearing, hearing, or settlement conference, that is deemed appropriate by the Administrative Law Judge to further the purposes of the California Occupational Safety and Health Act.

Final orders, findings, and decisions issued by an ALJ are deemed to be the orders, findings, and decisions of the OSHAB, unless the Board grants reconsideration.ⁿ⁷⁷

[b] Objections to Assigned Administrative Law Judge

The name of the ALJ to be assigned to a given proceeding is available on request at the time the proceeding is noticed for hearing.ⁿ⁷⁸ A party may object to the assigned ALJ on any of the grounds specified in *Code of Civil Procedure Section 641*.ⁿ⁷⁹ The objecting party must file a motion to disqualify the assigned ALJ, together with a supporting affidavit or declaration, with the ALJ or the OSHAB at least five working days before the scheduled hearing.ⁿ⁸⁰ The OSHAB must rule on a motion to disqualify before the hearing may commence.ⁿ⁸¹

[c] Transfer of Proceedings

If no oral testimony has commenced, the Board may transfer a proceeding to another ALJ for hearing.ⁿ⁸² If an ALJ is unable to complete the hearing process due to death, extended absence, or disqualification, a proceeding may also be reassigned to another ALJ for trial de novo, unless the parties stipulate to waive a trial de novo and to continue proceedings with the newly assigned ALJ.ⁿ⁸³ The OSHAB also has the power to remove a proceeding previously assigned to an ALJ to itself.ⁿ⁸⁴

[11] Merger and Consolidation of Appeals

Any number of separate proceedings involving the same employer may be consolidated for hearing and decision by the OSHAB.ⁿ⁸⁵

Proceedings involving different employers may be consolidated for hearing and decision by the OSHAB, on the motion of any party or on the OSHAB's own motion, if the facts and circumstances of the different cases are similar and if consolidation will result in conservation of time and expense.ⁿ⁸⁶ Any party may object to consolidation in writing within 10 days of the date of service of the order of consolidation.ⁿ⁸⁷ The OSHAB may sever consolidated proceedings for good cause.ⁿ⁸⁸

[12] Withdrawal and Reinstatement of Appeal

Any appeal by an employer, an obligor, or an employee may be withdrawn by written request or by oral motion on the hearing record, at any time before a decision is issued.ⁿ⁸⁹ The OSHAB will grant such a withdrawal by order or decision, which will be served on all parties.ⁿ⁹⁰

An appeal that has been dismissed after a motion to withdraw has been granted will be reinstated by the OSHAB if the employer, obligor, or employee files a written motion stating sufficient facts to show that the withdrawal resulted from misinformation from the Division or the OSHAB, or from fraud or coercion.ⁿ⁹¹ The motion to reinstate the appeal must be filed within 60 days after service of the order of dismissal.ⁿ⁹² In the case of fraud, the date for a motion to reinstate runs from the date the fraud is discovered if the fraud could not have been suspected or discovered with the exercise of reasonable diligence.ⁿ⁹³

[13] Withdrawal of Division Action

The Division may withdraw its action by written motion at any time or by oral motion on the hearing record.ⁿ⁹⁴ If the motion is made prior to the hearing, the Division must serve its motion to withdraw on each party and any authorized

employee representative representing an affected employee, if known.ⁿ⁹⁵ On a showing of good cause, the OSHAB must grant the Division's motion to withdraw by issuing an order or decision, which the OSHAB will serve on all parties and which the employer must post for 15 working days at or near the site of the alleged violation or in a conspicuous place where it will be readily observable by employees.ⁿ⁹⁶

[14] Disposition of Appeal by Motion

The OSHAB may, on a showing of good cause, dispose of the issues on appeal by granting a written motion of the parties made at any time or an oral motion of the parties made on the hearing record or in the prehearing conference.ⁿ⁹⁷ The OSHAB's disposition of a matter is accomplished by an order or decision of the OSHAB, served on all parties.ⁿ⁹⁸ The order or decision must be posted by the employer for 15 working days in the manner described in [7], above.ⁿ⁹⁹ⁿ¹⁰⁰⁻¹¹⁰

[15] Discovery

[a] Access to Documents and Evidence and Disclosure of Witnesses

Once a proceeding has been initiated and prior to the hearing, all parties have the right, on written request made to any other party, to inspect and copy any of the following items in the possession or custody or under the control of the other party:

1. Party or witness statements relating to the subject matter of the proceeding;ⁿ¹¹¹
2. All writings or other things that the party then proposes to offer into evidence;ⁿ¹¹²
3. Any other relevant writing or thing that would be admissible into evidence;ⁿ¹¹³ and
4. Division or party inspection and investigative reports pertaining to the subject matter of the proceeding, to the extent that such reports (a) contain names and addresses of witnesses or persons having personal knowledge of the acts, omissions, or events that are the basis of the proceeding; (b) reflect matters perceived by the Division in the course of its investigation, inspection, or survey; or (c) contain or include by attachment any statements or writings described in Paragraphs 1-3, above, or summaries thereof.ⁿ¹¹⁴

"Statements," for purposes of access to documents and evidence, includes written statements by the person that are signed or otherwise authenticated; stenographic, mechanical, electrical, or other recordings or transcripts of oral statements; and written reports or summaries of oral statements.ⁿ¹¹⁵

Notwithstanding the above, the identity of a person who has submitted a complaint regarding an unsafe condition to the Division and who has not authorized disclosure of his or her identity is exempt from disclosure.ⁿ¹¹⁶ Privileged writings and things and attorney work product are also exempt from the above disclosure requirements,ⁿ¹¹⁷ but any party claiming privilege from disclosure must serve the requesting party with a written statement stating those matters claimed to be privileged and the reasons why they are privileged.ⁿ¹¹⁸

Unless other arrangements are made, the party requesting the writings must pay for the copying.ⁿ¹¹⁹

On written request to another party, any party is entitled to obtain, before the hearing, the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called at the hearing. Only the identity of the person who submitted a complaint regarding the unsafe condition of an employment or place of employment need not be disclosed, unless that person requests otherwise.ⁿ¹²⁰ A request for a list of witnesses to be

called may be satisfied only by the service of a list of witnesses.n120.1

[b] Compelling Discovery

If a party served with a proper request for discovery pursuant to *Title 8 California Code of Regulations Section 372* (witness disclosure) or 372.1 (access to documents)n121 fails to comply with the request, the requesting party may serve a motion to compel with the Administrative Law Judge of the OSHAB, if the OSHAB is hearing the case.n122 The motion must conform to the requirements of *Government Code Section 11507.7* and must state facts showing that the party failed or refused to comply with Section 372 or 372.1, a description of the matters sought to be discovered, the reasons why such matter is discoverable under the OSHAB's rules, that the party has made a reasonable and good faith attempt to contact the respondent for an informal resolution, and the grounds for the opposing party's refusal, so far as known.n123 The motion must be served and filed within 15 days after a party first evidenced a refusal or failure to comply with the discovery request, or within 30 days after request for compliance was made and remained unanswered, or within an approved stipulated time, whichever period is longer.n124n125

The Administrative Law Judge (ALJ) or the OSHAB shall hold the hearing on the motion within 15 days, or later upon its own motion for good cause. Respondent shall have the right to serve and file a written answer or response, in compliance with Sections 371(a) and (b), before or at the time of hearing. The hearing may be conducted by telephone or other approved electronic means. With the approval of the ALJ or the OSHAB, the parties may stipulate to waive a hearing, provided the stipulation states a date by which respondent shall file its response and that the order on the motion shall issue within 30 days of the date the motion was filed.n126

Special procedures obtain if the respondent asserts the matter is not discoverable under Section 372.1(a)-(d) or is privileged against disclosure under (f).n127 Absent stipulation to the contrary, the ALJ or the OSHAB shall issue a written order on the motion no later than 15 days after the hearing. The order shall not become effective until 10 days after the order is served except for an order denying the motion in its entirety, which is effective on the date it is served.n128

[c] Subpoenas, Subpoenas Duces Tecum, and Depositions

Prior to commencement of a hearing, the OSHAB will issue a subpoena or subpoena duces tecum to compel attendance of a person or production of a document or other thing at the hearing at the request of any party. After the hearing has commenced, issuance of a subpoena or subpoena duces tecum is discretionary.n129

An application for a subpoena duces tecum must conform to the requirements of *Code of Civil Procedure sections 1985-1985.4* (pertaining to subpoenas in civil actions) and must be in the form of an affidavit or declaration under penalty of perjury that (1) shows good cause for production of the document or thing sought; (2) specifies exactly the document or thing sought; (3) explains the materiality of the document or thing sought to the issues in the proceeding; (4) demonstrates that the item sought is within the possession or control of the witness; and (5) indicates whether personal attendance of the witness or custodian of record is required, and, if not, whether compliance with *Evidence Code Section 1560 et seq.* (custodian's production of business records by mail or personal delivery) is permitted.n130

The OSHAB rules regarding service of subpoenas and subpoenas duces tecum and witness fees are explained in *Title 8 California Code of Regulations Sections 372.2(b) and (c)* and 382. Only witnesses who are residents of California at the time of service must attend.n131 However, if requested by a party, OSHAB shall attempt, when possible, to have a like agency in another state take the deposition of a witness.n131.1 Any party who subpoenas a peace officer, as listed in *Government Code Section 68097*, must tender \$150 with the subpoena for each day the officer is required to remain in attendance. In addition, the party must reimburse to the officer's public entity employer, the full cost of the officer's salary, other compensation, and travel expenses for each day the officer's attendance is required.n132

On timely motion of any party or witness, or on its own motion, after notice to the parties and an opportunity to be heard and upon a showing of good cause, the OSHAB may quash or modify any subpoena or subpoena duces tecum, or direct compliance with it on new terms or conditions.ⁿ¹³³ The OSHAB also may make any other order as is appropriate to protect a party or witness from oppressive or unreasonable demands.ⁿ¹³⁴

The OSHAB or a party to the proceeding may require the deposition of a party or witness to be taken.ⁿ¹³⁵ The OSHAB may issue a subpoena or subpoena duces tecum at the request of any party to require attendance at the deposition.ⁿ¹³⁶ Applications for such subpoenas must conform with *Code of Civil Procedure Section 1985*.ⁿ¹³⁷ Detailed rules regarding out-of-state depositions, witness fees, mileage, expenses, requirements for notice, and the Board's power to limit the scope of examination or the location of the deposition are set out in *Title 8 California Code of Regulations Section 372.3*. Depositions in OSHAB proceedings are noticed, taken, filed, and used in the manner prescribed in the Code of Civil Procedure for depositions in civil actions.ⁿ¹³⁸

Failure or refusal to comply with any subpoena or subpoena duces tecum issued by the OSHAB provides grounds for any party to petition to the OSHAB for judicial enforcement. The petition must be verified and set forth facts showing that proper service and notice was given and that the subpoenaed party failed or refused to comply.ⁿ¹³⁹ The OSHAB will petition the superior court in the county in which the hearing is pending for an order compelling compliance once it determines that judicial enforcement is appropriate.ⁿ¹⁴⁰

For full discussion of rules regarding subpoenas and depositions in civil actions, see California Forms of Pleading and Practice *Depositions and Discovery* and *Subpoena*, and DeMeo, California deposition and discovery practice.

[d] Evidence by Affidavit or Declaration

Evidence in the form of a sworn affidavit or declaration may be entered into evidence at a hearing if all parties are given proper advance notice and an opportunity to object. At least ten days prior to a hearing or continued hearing, any party wishing to use such evidence must mail or deliver to opposing parties a copy of the affidavit or declaration that the proponent proposes to introduce into evidence.ⁿ¹⁴¹ A notice form, as specifically prescribed in *Title 8 California Code of Regulations Section 372.4(b)*, must be attached.ⁿ¹⁴²

Within seven days after the mailing or delivery of such an affidavit or declaration, an opposing party may mail or deliver to the proponent a request to cross-examine the affiant or declarant. If the opposing party fails to do so, the right to cross-examine the affiant or declarant is deemed waived and the affidavit or declaration, on being entered into evidence, will be given the same effect as if the affiant or declarant had testified orally at the hearing.ⁿ¹⁴³ If the opposing party requests and is not afforded an opportunity to cross-examine the affiant or declarant, the affidavit or declaration may be introduced into evidence, but will only be given the same effect as other hearsay evidence.ⁿ¹⁴⁴

[16] Contempt

The superior court for the county in which the OSHAB proceedings are pending has jurisdiction to punish any contempt that may arise from proceedings before the Board.ⁿ¹⁴⁵ The ALJ or OSHAB must certify to the superior court the facts of the conduct alleged to constitute contempt.ⁿ¹⁴⁶ Disobedience or resistance to any lawful order, refusal to respond to a subpoena or subpoena duces tecum, refusal to swear or affirm as a witness, refusal to be examined as a witness, misconduct at or near a hearing so as to obstruct the proceedings may all be punishable as contempt.ⁿ¹⁴⁷

[17] Pre-hearing Conferences and Statements

The OSHAB may notice and order a prehearing conference at any time before a hearing, on the motion of any party or on its own motion, in order to simplify issues, expedite proceedings, and allow affected employees an opportunity to participate meaningfully in the appeal proceedings.ⁿ¹⁴⁸ Each party must be prepared to do each of the following:ⁿ¹⁴⁹

- Discuss the issues.
- Stipulate to any factual or legal issue about which there is no dispute.
- Stipulate to the identification and admissibility of documentary evidence.
- Comply with any request for discovery.ⁿ¹⁵⁰
- Report on discovery status when the administrative law judge has compelled discovery prior to the prehearing.
- Do other things as may aid in the disposition of the proceeding.

Prehearing statements of position or trial briefs may be filed by any party at any time before a hearing on any issue to be decided.ⁿ¹⁵¹

The failure of a party or its representative to prepare for and participate in the pre-hearing conference is grounds for the imposition of sanctions, inferences or other orders, then or during the hearing, as the Appeals Board deems appropriate. These sanctions may include striking or excluding evidence offered by the non-complying party on that dispute, or precluding that party from contesting the position or information on that issue provided by the complying party.^{n151.1}

[18] Hearing

[a] Time and Place of Hearing

The OSHAB sets the time and place of the hearing and notifies the parties. The employer must serve a copy of the notice of hearing on the authorized employee representative, if any, and notify any unrepresented affected employees by posting the notice immediately on receipt from the OSHAB.ⁿ¹⁵²

Neither the Labor Code nor the OSHAB's regulations specify any particular time limit within which the hearing must be held after commencement of the proceedings. The Board's regulations do provide that appeals shall be heard "promptly," and that appeals relating to special orders, orders to take special action, the reasonableness of the abatement period, and expedited proceedings have priority over other proceedings.ⁿ¹⁵³ The OSHAB may order an expedited proceeding on the motion of any party or on its own motion.ⁿ¹⁵⁴ All parties must be notified of such an order and will be expected to do all things necessary to complete the proceeding "in the minimum time consistent with fairness."ⁿ¹⁵⁵ Time limits for filing a motion to compel discovery, or for responsive filings,^{n155.1} may be shortened as necessary to accommodate the expedited date for disposition of the case.^{n155.2}

The OSHAB's regulations provide that the OSHAB "must" set the place of hearing at a location as near as practicable to the place of employment where the violation is alleged to have occurred.ⁿ¹⁵⁶ In one case, a court of appeal held that it was neither a denial of due process nor an abuse of discretion to deny a motion for change of venue and require an employer filing an appeal to present the appeal case at a location that was 64 miles from the employer's place of business, absent a showing that the place of hearing was selected arbitrarily or with an improper motive, and absent proof of any harmful consequences to the employer from holding the hearing away from the city in which the employer's business was located.ⁿ¹⁵⁷

[b] Conduct of the Hearing

Hearings before the OSHAB are informal.ⁿ¹⁵⁸ⁿ¹⁵⁹ Often the only persons attending are the ALJ, who records the

proceedings on a tape recorder, the parties and their representatives, the Division representative and inspector or investigator, and any witnesses called by the parties to testify.

The Appeals Board will define the issues, control the manner of taking evidence, and explain the order in which evidence will be received.ⁿ¹⁶⁰ Each party has the right to call and examine witnesses, introduce exhibits, question opposing witnesses on any matter relevant to the issues even if not covered in direct examination, impeach any witness regardless of who called the witness, and rebut opposing evidence.ⁿ¹⁶¹ The OSHAB may also call and examine any party or witness and may, on its own motion, admit any relevant and material evidence.ⁿ¹⁶² A party may be called to testify under cross-examination by any other party even if the party did not first testify on his or her own behalf.ⁿ¹⁶³

[c] Representation

A party may appear in person or through a representative, who is not required to be an attorney at law.ⁿ¹⁶⁴ The representative is deemed to control all matters regarding the interest of the party in the proceeding.ⁿ¹⁶⁵ An employee represented by an authorized employee representative (i.e., a labor organization) may appear through that representative.ⁿ¹⁶⁶

A representative may withdraw from representation by filing a written notice of withdrawal, with proof of service of the notice on all parties, with the OSHAB.ⁿ¹⁶⁷ⁿ¹⁶⁸

[d] Rules of Evidence and Hearsay

Hearings before the OSHAB are not strictly governed by the technical rules of evidence.ⁿ¹⁶⁹ Informality in OSHAB proceedings and the manner of taking evidence will not invalidate the OSHAB's orders, decisions, and findings.ⁿ¹⁷⁰ Any relevant evidence is admissible if it is the sort of evidence on which responsible people would rely in the conduct of serious affairs, regardless of any common law or statutory rule of evidence that might make such evidence inadmissible over objection in civil actions.ⁿ¹⁷¹

Hearsay evidence may be used to supplement or explain other evidence but is not sufficient in itself to support a finding, unless it would be admissible over objection in a civil action.ⁿ¹⁷² The rules of privilege apply to the extent they are otherwise required by statute.ⁿ¹⁷³ Unduly repetitious and irrelevant evidence must be excluded.ⁿ¹⁷⁴ OSHAB may exclude evidence if its probative value is substantially outweighed by undue consumption of time.^{n174.1}

[e] Trade Secrets and Confidential Evidence

All information reported to or obtained by the Division in the course of an inspection, investigation, or proceeding that contains or might reveal a trade secret, as defined in Title 18 *United States Code Section 1905*, or other information deemed confidential, pursuant to the California Public Records Act,ⁿ¹⁷⁵ is treated as confidential.ⁿ¹⁷⁶ This includes hearing exhibits that might reveal trade secrets or confidential information.ⁿ¹⁷⁷ Photographs taken by the Division in the course of an inspection or investigation will also be considered confidential.ⁿ¹⁷⁸ The Director of the Department of Industrial Relations, the OSHAB, the Standards Board, and the courts are each empowered to issue appropriate orders to protect the confidentiality of trade secrets or other confidential information.ⁿ¹⁷⁹

The OSHAB may exclude any person or witness, except any party, the party's representative, and the Division's inspector, investigator, and representative, from the hearing room during testimony that will reveal the substance of any trade secret or other confidential information.ⁿ¹⁸⁰

[f] Exclusion of Witnesses

On motion by any party, the OSHAB may exclude from the hearing room any witness not under examination at the time of the motion, except for any party, the party's representative, and the Division's representative, inspectors, or

investigators.ⁿ¹⁸¹ The Board may also exclude persons from the room when testimony will reveal the substance of a trade secret or other confidential information, as discussed in [e], *above*.

[g] Official Notice

Official notice may be taken either before or after submission of a matter for decision of any generally accepted technical or scientific matter within the field of occupational safety and health, and of any determination, ruling, order, finding and decision required by law to be made by the OSHAB, the Division, or the Standards Board.ⁿ¹⁸² In addition, the OSHAB must take official notice of matters set forth in *Evidence Code Section 451*ⁿ¹⁸³ and may take official notice of matters set forth in *Evidence Code Section 452*.ⁿ¹⁸⁴

Each party must be given notice of a request or decision to take official notice and be given reasonable opportunity, on request, to present information relevant to the propriety of taking official notice and the tenor of the matter to be noticed.ⁿ¹⁸⁵

[h] Interpreters

Hearings must be conducted in English.ⁿ¹⁸⁶ However, any party whose English comprehension or speaking ability is not proficient or who requests an interpreter must be provided with an approved interpreter during the hearing. A request for an interpreter must be made no later than 10 working days prior to the date the interpreter is needed.ⁿ¹⁸⁷

The cost of providing an interpreter for a party must be paid by the party requesting the interpreter unless the OSHAB directs otherwise due to financial hardship of the requesting party.ⁿ¹⁸⁸

Any party calling any other witness to testify who is not proficient in English must provide an approved interpreter at the hearing. If the party calling for the witness is unable to provide an interpreter of its own, it may request that OSHAB do so.ⁿ¹⁸⁹ Language assistance includes oral interpretation or written translation of a language other than English into English or of English into another language,ⁿ¹⁹⁰ and provision of sign interpreters for deaf or hard-of-hearing parties or persons.

Approved interpreters include those who have already been tested and approved by the California State Personnel Board and whose proficiency and knowledge of the terminology and procedures used in proceedings before the OSHAB has been determined by the OSHAB to be satisfactory.ⁿ¹⁹¹ The OSHAB may qualify and appoint other interpreters if interpreters on the approved list cannot be present during a hearing or if no interpreter is on an approved list for the particular language required.ⁿ¹⁹²

Before appointment of an interpreter, any party and the OSHAB may conduct a brief examination of the interpreter to determine whether the candidate has the necessary qualifications, understands and can explain the terms and procedures used in OSHAB proceedings in both English and the language to be translated, and has no interest or conflict of interest in the proceeding.ⁿ¹⁹³

Any interpreter appointed must disclose to the OSHAB and to all parties any actual or apparent conflict of interest in the proceeding. A conflict of interest includes any condition which interferes with the objectivity of the interpreter, and may exist if the interpreter is acquainted with or related to a party or witness, or otherwise has an interest in the outcome of the proceeding.ⁿ¹⁹⁴

The OSHAB may disqualify an interpreter if it appears the interpreter cannot understand and interpret the terms and procedures used in the hearing; if the interpreter has engaged in conduct creating the appearance of bias, prejudice, or partiality; or if the interpreter has disclosed privileged or confidential communications.ⁿ¹⁹⁵

[i] Effect of Failure to Appear

If, after service of notice of a hearing, consolidated hearing, or continuance, a party fails to appear at the hearing, either in person or through a representative, the OSHAB may (1) take the proceeding off calendar; (2) after notice, dismiss the proceeding; or (3) receive evidence from any party that appears.ⁿ¹⁹⁶ In cases in which the burden is on the employer to establish the OSHAB action sought, the OSHAB may act without taking evidence if the employer fails to appear.ⁿ¹⁹⁷ The employer is entitled, however, to make a showing by way of mitigation following a failure to appear.ⁿ¹⁹⁸ The OSHAB may reinstate any proceeding on a showing of good cause based on facts sufficient to establish a reasonable basis for the failure to appear.ⁿ¹⁹⁹ⁿ²⁰⁰⁻²⁰³

[j] Reserved**[k] Briefs**

A motion to submit a written post-hearing brief must be made before the close of a hearing. Approval is discretionary and will be granted only if the ALJ or the OSHAB finds written argument will be productive and will not unreasonably delay disposition of the case.ⁿ²⁰⁴ If approval is granted, the brief must be filed within 15 working days from the date of the hearing, and answers by opposing parties must be filed within 10 working days from service of the brief.ⁿ²⁰⁵ These filing periods may be extended or reduced by the ALJ or the OSHAB for good cause.ⁿ²⁰⁶ Service of the argument and answer on all parties must comply with *Title 8 California Code of Regulations Section 355(d)*, and proof of service must be filed with the ALJ or the OSHAB.ⁿ²⁰⁷ An original brief must be filed with the OSHAB in Sacramento, with a copy provided to the ALJ assigned to the hearing.^{n207.1}

[19] Decisions and Proposed Decisions

A proceeding is submitted at the close of the hearing, unless otherwise ordered by the OSHAB.ⁿ²⁰⁸ The ALJ or OSHAB may, however, extend the submission date.ⁿ²⁰⁹ The ALJ or OSHAB (whichever conducted the hearing) must summarize the evidence received and relied upon, make findings on all facts involved in the appeal, and file an order or decision with the reasons or grounds on which the order or decision is made within 30 days after the submission date.ⁿ²¹⁰ In the decision, the ALJ (or Commission) has the authority to affirm a citation for a safety violation but to designate the violation as a de minimis one, *i.e.*, holding that the Act was not violated even if an employer, as a purely technical or literal matter, violated a safety standard.^{n210.1}

Every order or decision must be in writing,ⁿ²¹¹ and must be signed and dated by the ALJ or by the members of the OSHAB who decided the matter.ⁿ²¹² A copy of the order or decision must be served on all parties with a statement informing the parties of the right to petition the OSHAB for reconsideration of the order or decision within 30 days after the date of service of the order or decision.ⁿ²¹³ For discussion of reconsideration, *see* [20], *below*.

If an ALJ was assigned to hear a matter and prepare a proposed order or decision, pursuant to *Labor Code Section 6604(b)*, the ALJ will prepare a proposed order or decision for adoption by the OSHAB.ⁿ²¹⁴ The proposed order or decision is a public record.ⁿ²¹⁵ The OSHAB may confirm, adopt, modify, or set aside the proposed order or decision, and may, with or without further proceedings and with or without notice, enter its order, findings, or decision based on the entire record.ⁿ²¹⁶ The OSHAB also may order that additional evidence be taken and may reassign the case to the same or a different ALJ to take such additional evidence, or make take such additional evidence itself.ⁿ²¹⁷ Any action by the OSHAB on such a proposed order or decision must be taken within 30 days after the case is submitted.ⁿ²¹⁸

[20] Reconsideration**[a] Right to Petition for Reconsideration and Time for Filing**

Any party aggrieved directly or indirectly by a final order or decision of an ALJ or the OSHAB may petition for reconsideration within 30 days after service of the order or decision.ⁿ²¹⁹ The petition must be filed at the OSHAB in Sacramento and is considered filed on the date mailed or delivered to the OSHAB.ⁿ²²⁰ In the alternative, the OSHAB may order reconsideration on its own motion at any time within the 30 days after an order or decision has been filed by an ALJ.ⁿ²²¹

If, during the 30-day period following the filing of an order or decision by an ALJ or by the OSHAB, no petition for reconsideration has been filed with the OSHAB and the OSHAB has failed to order reconsideration on its own motion, the decision or order becomes final and is not subject to agency or judicial review.ⁿ²²²

[b] Grounds for Reconsideration

A petition for reconsideration must be based on one or more of the following grounds:ⁿ²²³

1. That the order or decision issued by the OSHAB or ALJ exceeded the OSHAB's powers;
2. That the order or decision was procured by fraud;
3. That the evidence received does not justify the findings of fact;
4. That the petitioner has discovered new material evidence that the petitioner could not, with reasonable diligence, have discovered and produced at hearing; or
5. That the findings of fact do not support the order or decision.

[c] Contents, Format, and Service of Petition

A petition for reconsideration must be signed by the filing party, or the party's representative, and must be verified, unless the petitioning party is one of the public agencies exempt from verification requirements under *Code of Civil Procedure Section 446*.ⁿ²²⁴

The petition must state specifically and in full detail the grounds on which the petitioner asserts that the decision or order is unlawful or unjust, and set forth every issue to be considered by the OSHAB.ⁿ²²⁵ The petition must also contain a general statement of the evidence and law the petitioner is relying on in support of the petition.ⁿ²²⁶ A petition for reconsideration that alleges only the statutory grounds for reconsiderationⁿ²²⁷ without specific references to the record and principles of law will be denied as a skeletal petition.ⁿ²²⁸

Only those matters raised in a petition for reconsideration will be considered by the OSHAB, and the petitioner is deemed to have finally waived all objections, irregularities, and illegalities concerning the proceeding except those raised in the petition for reconsideration.ⁿ²²⁹

A copy of the petition must be served on the other parties in the manner provided by *Title 8 California Code of Regulations Section 355(d)*.ⁿ²³⁰

[d] Effect of Filing Petition for Reconsideration on Decision or Order

By statute, the filing of a petition for reconsideration suspends the order or decision at issue, as it applies to parties to the petition, for 10 days unless otherwise ordered by the OSHAB.ⁿ²³¹ During the pendency of a reconsideration proceeding, the OSHAB may stay, suspend, or postpone the order or decision pending an order, findings, or decision after reconsideration.ⁿ²³²

[e] Time for Appeals Board Action on Petition

A petition for reconsideration will be deemed denied, thereby commencing the period for judicial review,ⁿ²³³ if the OSHAB takes no action on it within 45 days from the date of filing.ⁿ²³⁴ For good cause shown, the OSHAB may extend, for up to 15 days, the time within which it may act on a petition for reconsideration.ⁿ²³⁵

[f] Answer

Any party may file an answer to a petition for reconsideration or an order of reconsideration within 30 days after service of the petition or order.ⁿ²³⁶ The answer must be signed by the filing party or the party's representative and must be verified, unless filed by an agency that is exempt from verification under *Code of Civil Procedure Section 446*.ⁿ²³⁷

[g] Supplemental Petition or Answer; Request for Hearing Record

After a petition for reconsideration or an answer to such a petition is timely filed, the OSHAB has the discretion to grant a motion to file supplemental petitions or answers.ⁿ²³⁸ⁿ²³⁹⁻²⁴⁰

Opposing parties have 30 days from the date of service of the supplemental petition to file a supplemental answer.ⁿ²⁴¹

[h] Appeals Board Powers on Reconsideration

On reconsideration, the OSHAB may, with or without further proceedings and with or without notice, affirm, rescind, alter, or amend the order or decision made by the ALJ or by the OSHAB itself, based on the evidence previously submitted in the case, without taking any further evidence.ⁿ²⁴²

Alternatively, the OSHAB may grant reconsideration and order that additional evidence be submitted for consideration or taken at a further hearing.ⁿ²⁴³ If further evidence is taken at a hearing, the 30-day time limit for filing of an order or decision after a case is submittedⁿ²⁴⁴ does not apply.ⁿ²⁴⁵ The issues at the further hearing are limited to those set forth in the OSHAB's order for the hearing.ⁿ²⁴⁶ If additional evidence is taken, after consideration of all the facts, the OSHAB may affirm, alter, rescind, or amend the original order or decision.ⁿ²⁴⁷ An order or decision by the OSHAB after reconsideration has been granted, which affirms, rescinds, alters, or amends the original order or decision will not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless specifically ordered by the OSHAB.ⁿ²⁴⁸

Any decision by the OSHAB granting or denying reconsideration, or affirming, rescinding, altering, or amending the original findings, order, or decision following reconsideration must be made by the OSHAB, rather than an ALJ, and must be written and signed by a majority of the Board members assigned to the reconsideration.ⁿ²⁴⁹ The decision must state the evidence relied on and specify in detail the reasons for the Board's decision.ⁿ²⁵⁰

The OSHAB's decision is binding on the Director of Industrial Relations and on the Division with respect to the parties involved in the appeal.ⁿ²⁵¹

[21] Employer's Recovery of Costs**[a] Right to Recover Costs Generally**

The OSHAB may award the employer "reasonable costs" to a maximum of \$5,000 in the aggregate if (1) the employer appeals a citation that resulted from an inspection or investigation conducted on or after January 1, 1980, and the citation was issued for a violation of any occupational safety or health standard, rule, order, or regulation, established pursuant to Chapter 6 of Division 1 of the Labor Code;ⁿ²⁵² (2) either the employer prevails in the appeal or the Division withdraws the citation after the employer's appeal has been accepted by the OSHAB;ⁿ²⁵³ and (3) the OSHAB

finds that issuance of the citation was the result of arbitrary or capricious action or conduct by the Division.n254

[b] Recoverable Costs

Reasonable costs that may be recovered include costs necessarily incurred by the employer in preparing for and pursuing an appeal of a citation, and may include attorney's fees, consultant's fees, witness' fees and mileage, costs of discovery, costs of depositions, and costs of service of process if such costs were necessary disbursements for preparing and proceeding with a hearing on the citation.n255

[c] When Citation Is Deemed "Withdrawn"

A citation will be deemed withdrawn when the employer has filed an appeal in accordance with the requirements of *Title 8 California Code of Regulations Section 359*, the OSHAB has acknowledged jurisdiction of the appeal, and thereafter the OSHAB grants the Division's motion or petition to withdraw the citation.n256

[d] When Employer Is Deemed to Have "Prevailed"

The employer will be deemed to have prevailed in an appeal when the employer's appeal is upheld on either an item of a citation or a total citation.n257 An employer will not be found to have prevailed in an appeal for the purposes of a petition for costs if the employer appealed the existence of the violation and the OSHAB affirms the violation but amends the classification of the violation or reduces the amount of proposed civil penalty.n258

[e] Petition Procedures

Procedures for recovery of costs are governed by OSHAB regulations adopted pursuant to statutory authority.n259 To initiate the procedure for recovery of costs, an employer must file a verified petition with a supporting memorandum of cost items within 60 days after the filing of the OSHAB's final decision to either grant the employer's appeal or to grant a Division motion or petition to withdraw the citation.n260

A "final decision" for the purposes of a cost petition is defined as a decision or order of an ALJ or of the OSHAB that has not been stayed for from which no petition for reconsideration has been filed or no reconsideration has been granted on the OSHAB's own motion within the time permitted by law.n261 If reconsideration was granted,n262 a decision or order is final 30 days after the decision after reconsideration is issued, unless a writ of mandate has been filed.n263 A decision or order that was the subject of a writ of mandate is final after a judgment has been entered and no appeal is pending in the courts.n264

The petition is deemed filed on the date it is delivered or mailed to the OSHAB in Sacramento.n265

The petition must specifically state the grounds for the petition, and describe in detail the particular items of the citation for which costs are being sought.n266 The petition must be verified in the manner provided for verified pleadings in courts of record.n267

The OSHAB must assign a petition number upon receipt of a petition for costs and serve a copy of the petition on the Division.n268 The Division has 30 days from the date of service of the petition to file a response with the OSHAB.n269

[f] Burden of Proof

The employer has the burden of proving by a preponderance of the evidence that issuance of the citation was the result of arbitrary or capricious action or conduct by the Division.n270

The OSHAB has found that employers have failed to establish arbitrary or capricious action by the Division when

citations were ultimately set aside by the court of appeal on jurisdictional grounds,ⁿ²⁷¹ when the employer contended that citations were issued for violations found in a location that was beyond the scope of an inspection warrant,ⁿ²⁷² and when circumstantial evidence existed that established that the petitioner was a special employer of employees exposed to a hazard.ⁿ²⁷³ An OSHAB finding after reconsideration that the employer had no liability under either an employee exposure or access theory is not sufficient in itself to establish arbitrary or capricious conduct by the Division, even where the investigation techniques are shown to be less than complete.ⁿ²⁷⁴

[g] Action on Petition

On review of a petition for costs and any response filed by the Division, the OSHAB must exercise one of the following three options:ⁿ²⁷⁵

1. Summarily dismiss the petition if the OSHAB finds that no grounds are stated for the petition or that the petition lacks sufficient facts to establish arbitrary or capricious action or conduct by the Division;
2. Grant the petition by a cost order and award costs, if the OSHAB finds arbitrary or capricious conduct or action has been established; or
3. Set the matter for a hearingⁿ²⁷⁶ if the OSHAB finds that a factual dispute exists.

[h] Hearing Procedures

If the OSHAB sets the matter for hearing, the parties must be given at least 15 days' notice of the hearing.ⁿ²⁷⁷

The parties must complete discovery and be fully prepared and ready to proceed at the time of the hearing.ⁿ²⁷⁸ Ten days before the scheduled hearing, the employer may file a supplemental memorandum of costs setting out claimed disbursements.ⁿ²⁷⁹ Each party is responsible for requesting and paying for the cost of obtaining any necessary prior hearing record, in advance of the scheduled cost hearing, if the party's proof will require consideration of the prior hearing record.ⁿ²⁸⁰

Cost hearings are conducted in accord with the OSHAB rules for other administrative hearings.ⁿ²⁸¹

The OSHAB's cost decision must be filed in accordance with the provisions of *Title 8 California Code of Regulations Section 385*ⁿ²⁸² discussed in [19], *above*. A copy of the decision with a summary of evidence and reasons for decision must be mailed or served on each party or his or her representative with a statement explaining the right to petition for reconsideration within 30 days after service of the cost decision.ⁿ²⁸³

[i] Reconsideration

The employer may petition for reconsideration from any order denying the petition for costs within 30 days after issuance of the order.ⁿ²⁸⁴ Either the employer or the Division, or both, may petition for reconsideration from any order granting the petition for costs within 30 days after service of the order.ⁿ²⁸⁵

All petitions for reconsideration and answers to such petitions must be filed in accordance with the requirements of the general OSHAB rules of procedure regarding reconsideration.ⁿ²⁸⁶ For discussion of reconsideration procedures, see [20], *above*.

[22] Judicial Review of Appeals Board Decisions

[a] Procedure for Filing Writ of Mandate

Any person affected by an order or decision of the OSHAB may seek a writ of mandate in the superior court for the county in which he or she resides, in order to challenge the lawfulness of the original order or decision or of any decision or order after reconsideration.ⁿ²⁸⁷ However, the Labor Code requires that the party exhaust the reconsideration remedyⁿ²⁸⁸ prior to seeking judicial review. In other words, judicial review is not available unless (1) the OSHAB granted the party's petition for reconsideration, or ordered reconsideration on its own motion, and issued its own order affirming or setting aside the original order of the Board or ALJ; or (2) the party seeking review petitioned for reconsideration, and reconsideration was denied (or no action was taken by the Board within 45 days from the date of filing and service of the petition, so that the petition is deemed denied).ⁿ²⁸⁹ However, the Director of Industrial Relations has the right to seek judicial review of an OSHAB decision, irrespective of whether or not he or she appeared or participated in the appeal to the Board or its ALJ.ⁿ²⁹⁰

A petition for a writ of mandate must be filed within 30 days after a petition for reconsideration is denied, or, if the petition for reconsideration was granted or the OSHAB granted reconsideration on its own motion, within 30 days after the decision or order after reconsideration has been filed.ⁿ²⁹¹

The writ of mandate must be made returnable at a time and place specified by court order and must direct the OSHAB to certify its record in the case to the court within the time set forth in the order.ⁿ²⁹² Judicial review is based on the record certified to the court by the OSHAB, and no new or additional evidence may be introduced to the court for consideration in its review.ⁿ²⁹³

The general provisions of the Code of Civil Procedure relating to writs of mandaten²⁹⁴ will, to the extent applicable, govern proceedings for a writ of mandate from an OSHAB decision or order.ⁿ²⁹⁵ For a full discussion of mandate proceedings for review of administrative decisions,ⁿ²⁹⁶ see California Forms of Pleading and Practice, *Public Administrative Law*, Part IV. For general discussion of mandate proceedings, see California Forms of Pleading and Practice, *Mandate and Prohibition*.

A copy of every pleading filed while seeking a writ of mandate must be served on the OSHAB and on every other party who entered an appearance in the action before the OSHAB and whose interest is adverse to the party filing the pleading.ⁿ²⁹⁷

[b] No Automatic Stay

The filing of a petition for writ of mandate does not automatically stay or suspend the operation of any rule, order, or decision of the OSHAB being reviewed.ⁿ²⁹⁸ The reviewing court may, however, stay or suspend the operation of an order or decision, in whole or in part, on any terms the court may order.ⁿ²⁹⁹

[c] Scope of Judicial Review

Judicial review will extend only to the extent necessary to determine, based on the entire record as certified by the OSHAB, whether (1) the OSHAB acted without or in excess of its powers, (2) the order or decision was procured by fraud, (3) the order or decision was unreasonable, (4) the order or decision was not supported by substantial evidence, or (5) the OSHAB's findings of fact support the decision or order being reviewed.ⁿ³⁰⁰ The reviewing court has no jurisdiction to hold a trial de novo, to take additional evidence, or to exercise its independent judgment on the evidence in the record.ⁿ³⁰¹

The findings and conclusions of the OSHAB on questions of fact are conclusive and final and not subject to judicial review.ⁿ³⁰² Questions of fact include ultimate facts and the findings and conclusions of the OSHAB.ⁿ³⁰³

The OSHAB and any party to the proceeding or action before the OSHAB have the right to appear in any proceeding for a writ of mandate.ⁿ³⁰⁴

On hearing the matter, the reviewing court may enter judgment either affirming or annulling the order or decision of the OSHAB, or may remand the matter to the OSHAB for further proceedings.n305

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 148 et seq.* (establishment and authority of OSHAB); *Lab. Code § 6600 et seq.* (OSHAB appeal procedures); *see also* discussion in § 21.02[3][d].

(n2)Footnote 2. *Lab. Code § 148.7; see Lab. Code § 6603(a).*

(n3)Footnote 3. *Lab. Code § 6603(a).*

(n4)Footnote 4. *Lab. Code §§ 6600, 6600.5; 8 Cal. Code Reg. §§ 361, 361.2.*

(n5)Footnote 5. *Lab. Code § 6319(b); 8 Cal. Code Reg. § 347(r).*

(n6)Footnote 6. *See 8 Cal. Code Reg. § 361.1(a); see also Lab. Code § 6602.*

(n7)Footnote 7. *8 Cal. Code Reg. § 361.1(b).*

(n8)Footnote 8. "Working day" is defined as any day that is not Saturday, Sunday, or state-recognized holiday pursuant to *Gov. Code §§ 6700 and 6701. 8 Cal. Code Reg. § 347(z).*

(n9)Footnote 9. *Lab. Code §§ 6600, 6600.5; 8 Cal. Code Reg. § 361(a).* "Division's action," in this context, refers to any citation, notice, special order, order to take special action, notification of penalty, notification of failure to abate alleged violation and of additional civil penalty, or notification of failure to return a signed statement of abatement issued by the Division pursuant to *Lab. Code § 6300 et seq.* or *Health & Safety Code § 2950*, which by statute may be appealed to the OSHAB. *8 Cal. Code Reg. § 347(i); see Lab. Code §§ 6600, 6600.5.*

(n10)Footnote 10. *8 Cal. Code Reg. § 361.1(a); see Lab. Code § 6602.*

(n11)Footnote 11. *Lab. Code §§ 6601, 6601.5; 8 Cal. Code Reg. §§ 359(b), 361(a), 361.1(a).*

(n12)Footnote 11.1. *See 8 Cal. Code Reg. § 361(b).*

(n13)Footnote 12. *8 Cal. Code Reg. § 359(a).*

(n14)Footnote 13. *Lab. Code §§ 6601, 6601.5.*

(n15)Footnote 14. *See 8 Cal. Code Reg. § 359(a).*

(n16)Footnote 14.1. *8 Cal. Code Reg. § 359(a).*

(n17)Footnote 15. *See 8 Cal. Code Reg. § 359.1(a).*

(n18)Footnote 16. *8 Cal. Code Reg. § 359.1(b).*

(n19)Footnote 17. *8 Cal. Code Reg. § 359.1(c).*

(n20)Footnote 18. *8 Cal. Code Reg. § 359.1(b).*

(n21)Footnote 19. *8 Cal. Code Reg. § 361.3(a); see Lab. Code §§ 6600, 6600.5* (times for appeal; matters reviewable).

(n22)Footnote 20. *8 Cal. Code Reg. § 361.3(a).*

(n23)Footnote 21. [Reserved]

(n24)Footnote 22. *See* definition in § 21.42[2][c].

(n25)Footnote 23. *See 8 Cal. Code Reg. § 361.3(b).*

(n26)Footnote 24. *8 Cal. Code Reg. § 361.3(c).*

(n27)Footnote 25. *Lab. Code § 6602.*

(n28)Footnote 26. *8 Cal. Code Reg. § 362.*

(n29)Footnote 27. "Affected employee" is defined as any employee of a cited employer who is exposed to the alleged hazard described in the citation as a result of his or her assigned duties. *8 Cal. Code Reg. § 347(b).*

(n30)Footnote 28. *See 8 Cal. Code Reg. §§ 356, 356.1.*

(n31)Footnote 29. *8 Cal. Code Reg. § 356.1(d).*

(n32)Footnote 30. *8 Cal. Code Reg. § 356.1(c).*

(n33)Footnote 31. *8 Cal. Code Reg. § 356(a).*

(n34)Footnote 32. An authorized employee representative is defined as a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees, or an employee organization formally acknowledged by a public agency as an employee organization that represents affected public agency employees. *8 Cal. Code Reg. § 347(d).*

(n35)Footnote 33. *8 Cal. Code Reg. § 356(b)(1).*

(n36)Footnote 34. *8 Cal. Code Reg. § 356(a).*

(n37)Footnote 35. *8 Cal. Code Reg. § 356.2(a), (b).*

(n38)Footnote 36. *See 8 Cal. Code Reg. § 362.*

(n39)Footnote 37. *8 Cal. Code Reg. § 356.2(c).*

(n40)Footnote 38. *8 Cal. Code Reg. § 356.2(d).*

(n41)Footnote 39. *8 Cal. Code Reg. § 354(a).*

(n42)Footnote 40. *8 Cal. Code Reg. § 354(d).*

(n43)Footnote 41. *8 Cal. Code Reg. § 354(b), (e).*

(n44)Footnote 42. *8 Cal. Code Reg. § 354(h).*

(n45)Footnote 42.1. *8 Cal. Code Reg. § 354(h); see [c], below.*

(n46)Footnote 43. *See 8 Cal. Code Reg. § 354.1(a).*

(n47)Footnote 44. *8 Cal. Code Reg. § 354.1(a).*

(n48)Footnote 44.1. *8 Cal. Code Reg. § 354.1(c).*

(n49)Footnote 45. *8 Cal. Code Reg. § 354.1(b).*

(n50)Footnote 46. *8 Cal. Code Reg. § 348(a).*

(n51)Footnote 47. *8 Cal. Code Reg. § 348(c).*

(n52)Footnote 48. *8 Cal. Code Reg. § 348(c).*

(n53)Footnote 49. *8 Cal. Code Reg. § 359(b); see also 8 Cal. Code Reg. §§ 361, 361.1(a).*

(n54)Footnote 50. *8 Cal. Code Reg. § 355(d); see 8 Cal. Code Reg. § 355(i), (j) (requirements for service by fax).*

(n55)Footnote 51. *8 Cal. Code Reg. § 355(e).*

(n56)Footnote 52. *8 Cal. Code Reg. § 348(b).*

(n57)Footnote 53. *8 Cal. Code Reg. § 355(c).*

(n58)Footnote 54. *8 Cal. Code Reg. § 356(b)(1).*

(n59)Footnote 55. *See 8 Cal. Code Reg. § 356(a).*

(n60)Footnote 56. *See 8 Cal. Code Reg. § 355(f).*

(n61)Footnote 57. *8 Cal. Code Reg. § 355(f).*

(n62)Footnote 58. *8 Cal. Code Reg. § 355(h).*

(n63)Footnote 59. *8 Cal. Code Reg. § 355(g).*

(n64)Footnote 60. *8 Cal. Code Reg. § 355(a).*

(n65)Footnote 60.1. *8 Cal. Code Reg. § 355(b).*

(n66)Footnote 61. *8 Cal. Code Reg. § 352.*

(n67)Footnote 62. *8 Cal. Code Reg. § 352(b)(1).* Note: Former *8 Cal. Code Reg. § 355(c)* and *(e)* have been relettered as *8 Cal. Code Reg. § 355(d)* and *(f)*, respectively. *8 Cal. Code Reg. § 352(b)(1)* has not yet been amended to reflect that change.

(n68)Footnote 63. *8 Cal. Code Reg. § 352(b)(2).*

(n69)Footnote 64. *8 Cal. Code Reg. § 352(b)(3).*

(n70)Footnote 65. *8 Cal. Code Reg. § 352(b)(4).*

(n71)Footnote 66. *8 Cal. Code Reg. § 352(b)(5).*

(n72)Footnote 67. 8 Cal. Code Reg. § 352(b)(6).

(n73)Footnote 68. 8 Cal. Code Reg. § 371(a).

(n74)Footnote 69. 8 Cal. Code Reg. § 371(b).

(n75)Footnote 70. 8 Cal. Code Reg. 371(b); see discussion in [d], above.

(n76)Footnote 71. See 8 Cal. Code Reg. § 352(a).

(n77)Footnote 72. 8 Cal. Code Reg. § 371(c).

(n78)Footnote 73. See Lab. Code §§ 6604, 6605.

(n79)Footnote 74. See 8 Cal. Code Reg. § 375.1(a), (b).

(n80)Footnote 75. Lab. Code § 6605.

(n81)Footnote 76. 8 Cal. Code Reg. § 347.1(a).

(n82)Footnote 77. 8 Cal. Code Reg. § 350.1(a).

(n83)Footnote 78. 8 Cal. Code Reg. § 375.2(a).

(n84)Footnote 79. Lab. Code § 6606; 8 Cal. Code Reg. § 375.2(b). Code Civ. Proc. § 641 sets forth grounds for objection to the appointment of a referee in a civil action. The grounds generally relate to lack of qualifications, pre-existing relationship with one of the parties, previous knowledge of or involvement in the case, direct interest in the outcome or subject of the action, preconceived opinion about the merits of the case, or bias for or against a party.

(n85)Footnote 80. 8 Cal. Code Reg. § 375.2(b).

(n86)Footnote 81. 8 Cal. Code Reg. § 375.2(b); see Lab. Code § 6606.

(n87)Footnote 82. 8 Cal. Code Reg. § 375.1(c).

(n88)Footnote 83. 8 Cal. Code Reg. § 375.1(c).

(n89)Footnote 84. See Lab. Code § 6605.

(n90)Footnote 85. 8 Cal. Code Reg. § 363(a).

(n91)Footnote 86. 8 Cal. Code Reg. § 363(b).

(n92)Footnote 87. 8 Cal. Code Reg. § 363(b).

(n93)Footnote 88. 8 Cal. Code Reg. § 363(c).

(n94)Footnote 89. 8 Cal. Code Reg. § 364(a).

(n95)Footnote 90. 8 Cal. Code Reg. § 364(a).

(n96)Footnote 91. 8 Cal. Code Reg. § 364(b).

(n97)Footnote 92. 8 Cal. Code Reg. § 364(b).

(n98)Footnote 93. 8 *Cal. Code Reg.* § 364(b).

(n99)Footnote 94. 8 *Cal. Code Reg.* § 364.1(a).

(n100)Footnote 95. 8 *Cal. Code Reg.* § 364.1(b).

(n101)Footnote 96. 8 *Cal. Code Reg.* § 364.1(c), (d); *see* 8 *Cal. Code Reg.* § 356(a) (posting of notices generally); *see also* discussion in [7], *above*.

(n102)Footnote 97. 8 *Cal. Code Reg.* § 364.2(a).

(n103)Footnote 98. 8 *Cal. Code Reg.* § 364.2(c).

(n104)Footnote 99. 8 *Cal. Code Reg.* § 364.2(d); *see* 8 *Cal. Code Reg.* § 356(a).

(n105)Footnote 100-110. [Reserved]

(n106)Footnote 111. 8 *Cal. Code Reg.* § 372.1(a).

(n107)Footnote 112. 8 *Cal. Code Reg.* § 372.1(b).

(n108)Footnote 113. 8 *Cal. Code Reg.* § 372.1(c).

(n109)Footnote 114. 8 *Cal. Code Reg.* § 372.1(d).

(n110)Footnote 115. 8 *Cal. Code Reg.* § 372.1(e).

(n111)Footnote 116. 8 *Cal. Code Reg.* § 372.1(f).

(n112)Footnote 117. 8 *Cal. Code Reg.* § 372.1(f).

(n113)Footnote 118. 8 *Cal. Code Reg.* § 372.1(h).

(n114)Footnote 119. 8 *Cal. Code Reg.* § 372.1(g).

(n115)Footnote 120. 8 *Cal. Code Reg.* § 372.

(n116)Footnote 120.1. 8 *Cal. Code Reg.* § 372.

(n117)Footnote 121. *See* discussion in [a], *above*.

(n118)Footnote 122. 8 *Cal. Code Reg.* § 372.6(a).

(n119)Footnote 123. 8 *Cal. Code Reg.* § 372.6(a).

(n120)Footnote 124. 8 *Cal. Code Reg.* § 372.6(b).

(n121)Footnote 125. [Reserved]

(n122)Footnote 126. 8 *Cal. Code Reg.* § 372.6(c).

(n123)Footnote 127. *See* 8 *Cal. Code Reg.* § 372.6(d).

(n124)Footnote 128. 8 *Cal. Code Reg.* § 372.6(e).

(n125)Footnote 129. 8 *Cal. Code Reg.* § 372.2(a).

(n126)Footnote 130. 8 *Cal. Code Reg.* § 372.2(a)(2).

(n127)Footnote 131. 8 *Cal. Code Reg.* § 372.2(d).

(n128)Footnote 131.1. 8 *Cal. Code Reg.* § 372.3(c).

(n129)Footnote 132. 8 *Cal. Code Reg.* § 382(b).

(n130)Footnote 133. 8 *Cal. Code Reg.* § 372.2(e).

(n131)Footnote 134. 8 *Cal. Code Reg.* § 372.2(f).

(n132)Footnote 135. *See Lab. Code* § 6613; 8 *Cal. Code Reg.* § 372.3(a).

(n133)Footnote 136. *See Lab. Code* § 6613; 8 *Cal. Code Reg.* § 372.3(a).

(n134)Footnote 137. 8 *Cal. Code Reg.* § 372.3(a).

(n135)Footnote 138. *See 8 Cal. Code Reg.* § 372.3(e); *Lab. Code* § 6613; *see also Code Civ. Proc.* § 2016 *et seq.* (*Code Civ. Proc.* § 2016.010 *et seq.* operative July 1, 2005) (procedures regarding depositions and discovery in civil actions).

(n136)Footnote 139. *See 8 Cal. Code Reg.* § 372.5(a).

(n137)Footnote 140. 8 *Cal. Code Reg.* § 372.5(b).

(n138)Footnote 141. 8 *Cal. Code Reg.* § 372.4(a).

(n139)Footnote 142. 8 *Cal. Code Reg.* § 372.4(a).

(n140)Footnote 143. 8 *Cal. Code Reg.* § 372.4(a).

(n141)Footnote 144. 8 *Cal. Code Reg.* § 372.4(a).

(n142)Footnote 145. *See Lab. Code* § 6603(b); *Gov. Code* § 11455.20; 8 *Cal. Code Reg.* § 381.

(n143)Footnote 146. *See Gov. Code* § 11455.20; 8 *Cal. Code Reg.* § 381.

(n144)Footnote 147. *See 8 Cal. Code Reg.* § 381.

(n145)Footnote 148. 8 *Cal. Code Reg.* § 374(a).

(n146)Footnote 149. 8 *Cal. Code Reg.* § 374(b).

(n147)Footnote 150. *See discussion in [15], above.*

(n148)Footnote 151. 8 *Cal. Code Reg.* § 374.1.

(n149)Footnote 151.1. 8 *Cal. Code Reg.* § 374(c).

(n150)Footnote 152. 8 *Cal. Code Reg.* § 356(a), (b); *see discussion in [7], [9][c], [d], above.*

(n151)Footnote 153. 8 *Cal. Code Reg.* § 376(a), (b).

(n152)Footnote 154. 8 *Cal. Code Reg.* § 373.

(n153)Footnote 155. 8 *Cal. Code Reg.* § 373.

(n154)Footnote 155.1. *See* 8 *Cal. Code Reg.* § 372.6 (proceedings to compel discovery); *see also* [15][b], *above*.

(n155)Footnote 155.2. 8 *Cal. Code Reg.* § 373.

(n156)Footnote 156. 8 *Cal. Code Reg.* § 376(d).

(n157)Footnote 157. *See Keller Industries, Inc. v. Occupational Safety and Health Appeals Bd.* (1981) 124 *Cal. App. 3d* 469, 474-477, 177 *Cal. Rptr.* 136 .

(n158)Footnote 158. *See Lab. Code* § 6612.

(n159)Footnote 159. [Reserved]

(n160)Footnote 160. 8 *Cal. Code Reg.* § 376.1(d).

(n161)Footnote 161. 8 *Cal. Code Reg.* § 376.1(b).

(n162)Footnote 162. 8 *Cal. Code Reg.* § 376.1(c).

(n163)Footnote 163. 8 *Cal. Code Reg.* § 376.1(b).

(n164)Footnote 164. 8 *Cal. Code Reg.* § 378(a).

(n165)Footnote 165. 8 *Cal. Code Reg.* § 378(b).

(n166)Footnote 166. 8 *Cal. Code Reg.* § 378(c).

(n167)Footnote 167. 8 *Cal. Code Reg.* § 378(d).

(n168)Footnote 168. [Reserved]

(n169)Footnote 169. *See* 8 *Cal. Code Reg.* § 376.2.

(n170)Footnote 170. *Lab. Code* § 6612.

(n171)Footnote 171. 8 *Cal. Code Reg.* § 376.2; *see Lab. Code* § 6612; *see also Lab. Code* § 6603(a); *Gov. Code* § 11513(c).

(n172)Footnote 172. 8 *Cal. Code Reg.* § 376.2; *see Gov. Code* § 11513(c).

(n173)Footnote 173. 8 *Cal. Code Reg.* § 376.2; *see Gov. Code* § 11513(c).

(n174)Footnote 174. 8 *Cal. Code Reg.* § 376.2; *see Gov. Code* § 11513(c).

(n175)Footnote 174.1. 8 *Cal. Code Reg.* § 376.2.

(n176)Footnote 175. *Gov. Code* § 6250 *et seq.*

(n177)Footnote 176. *Lab. Code* § 6322; *see* 8 *Cal. Code Reg.* § 376.6(a).

(n178)Footnote 177. *See* 8 *Cal. Code Reg.* § 376.6(a).

(n179)Footnote 178. 8 *Cal. Code Reg.* § 376.6(a).

(n180)Footnote 179. *Lab. Code* § 6322; *see* 8 *Cal. Code Reg.* § 376.6(b).

(n181)Footnote 180. 8 *Cal. Code Reg.* § 376.6(c).

(n182)Footnote 181. 8 *Cal. Code Reg.* § 379.

(n183)Footnote 182. 8 *Cal. Code Reg.* § 376.3(a).

(n184)Footnote 183. 8 *Cal. Code Reg.* § 376.3(b).

(n185)Footnote 184. 8 *Cal. Code Reg.* § 376.3(c).

(n186)Footnote 185. 8 *Cal. Code Reg.* § 376.3(d).

(n187)Footnote 186. 8 *Cal. Code Reg.* § 376.5(a).

(n188)Footnote 187. 8 *Cal. Code Reg.* § 376.5(b).

(n189)Footnote 188. 8 *Cal. Code Reg.* § 376.5(b).

(n190)Footnote 189. 8 *Cal. Code Reg.* § 376.5(c).

(n191)Footnote 190. 8 *Cal. Code Reg.* § 376.5(d).

(n192)Footnote 191. 8 *Cal. Code Reg.* § 376.5(e).

(n193)Footnote 192. 8 *Cal. Code Reg.* § 376.5(f).

(n194)Footnote 193. 8 *Cal. Code Reg.* § 376.5(g).

(n195)Footnote 194. 8 *Cal. Code Reg.* § 376.5(g).

(n196)Footnote 195. 8 *Cal. Code Reg.* § 376.5(h).

(n197)Footnote 196. 8 *Cal. Code Reg.* § 383(a); *see Lab. Code* § 6611(a).

(n198)Footnote 197. *Lab. Code* § 6611(a).

(n199)Footnote 198. *Lab. Code* § 6611(a).

(n200)Footnote 199. 8 *Cal. Code Reg.* § 383(b); *see Lab. Code* § 6611(b).

(n201)Footnote 200-203. [Reserved]

(n202)Footnote 204. 8 *Cal. Code Reg.* § 380.

(n203)Footnote 205. 8 *Cal. Code Reg.* § 380.

(n204)Footnote 206. 8 *Cal. Code Reg.* § 380.

(n205)Footnote 207. 8 *Cal. Code Reg.* § 380. For discussion of service and proof of service, *see* [9][c], [d], *above*.

Note: Former 8 *Cal. Code Reg.* § 355(c) was relettered as 8 *Cal. Code Reg.* § 355(d). 8 *Cal. Code Reg.* § 380 has not yet been amended to reflect that change.

(n206)Footnote 207.1. 8 *Cal. Code Reg.* § 380.

(N207)Footnote 208. 8 *Cal. Code Reg.* § 385(a).

(n208)Footnote 209. 8 *Cal. Code Reg.* § 385(a).

(n209)Footnote 210. *Lab. Code* § 6608; 8 *Cal. Code Reg.* § 385(a).

(n210)Footnote 210.1. *Chao v. Symms Fruit Ranch Inc.* (9th Cir. 2001) 242 F.3d 894, 898 .

(n211)Footnote 211. *See Lab. Code* § 148.4.

(n212)Footnote 212. 8 *Cal. Code Reg.* § 385(b).

(n213)Footnote 213. 8 *Cal. Code Reg.* § 385(c); *see Lab. Code* § 6608.

(n214)Footnote 214. 8 *Cal. Code Reg.* § 384(a).

(n215)Footnote 215. 8 *Cal. Code Reg.* § 384(a).

(n216)Footnote 216. 8 *Cal. Code Reg.* § 384(a); *see Lab. Code* § 6609.

(n217)Footnote 217. 8 *Cal. Code Reg.* § 384(a).

(n218)Footnote 218. 8 *Cal. Code Reg.* § 384(b).

(n219)Footnote 219. *Lab. Code* § 6614(a); 8 *Cal. Code Reg.* § 390(a); *see Lab. Code* § 6626.

(n220)Footnote 220. 8 *Cal. Code Reg.* § 390(a).

(n221)Footnote 221. *Lab. Code* § 6614(b); 8 *Cal. Code Reg.* § 390.2(a); *see also Lab. Code* § 6626 (OSHAB may reconsider its own decisions on its own motion within same period of time).

(n222)Footnote 222. 8 *Cal. Code Reg.* § 390.3(a); *see Lab. Code* §§ 6614, 6615.

(n223)Footnote 223. *Lab. Code* § 6617; 8 *Cal. Code Reg.* § 390.1(a).

(n224)Footnote 224. 8 *Cal. Code Reg.* § 390(c); *see Lab. Code* § 6616.

(n225)Footnote 225. *Lab. Code* § 6616; 8 *Cal. Code Reg.* § 391(a).

(n226)Footnote 226. *Lab. Code* § 6616.

(n227)Footnote 227. *See* discussion in [b], *above*.

(n228)Footnote 228. 8 *Cal. Code Reg.* § 391(a).

(n229)Footnote 229. *Lab. Code* § 6618; 8 *Cal. Code Reg.* § 391(a).

(n230)Footnote 230. 8 *Cal. Code Reg.* § 392; *see Lab. Code* § 6619. For discussion of service of documents, *see* [9][c], *above*. Note: Former 8 *Cal. Code Reg.* § 355(c) was relettered as 8 *Cal. Code Reg.* § 355(d). 8 *Cal. Code Reg.* § 380 has not yet been amended to reflect that change.

(n231)Footnote 231. *Lab. Code* § 6625.

(n232)Footnote 232. *Lab. Code* § 6625; 8 *Cal. Code Reg.* § 390.9.

(n233)Footnote 233. *See Lab. Code* § 6627; *see also* discussion in [22][a], *below*.

(n234)Footnote 234. *Lab. Code* § 6624.

(n235)Footnote 235. *Lab. Code* § 6624.

(n236)Footnote 236. *Lab. Code* § 6619; 8 *Cal. Code Reg.* §§ 390(b), 390.2(b).

(n237)Footnote 237. 8 *Cal. Code Reg.* §§ 390(c), 390.2(c); *see Lab. Code* § 6619.

(n238)Footnote 238. 8 *Cal. Code Reg.* § 392.3(a).

(n239)Footnote 239-240. [Reserved]

(n240)Footnote 241. 8 *Cal. Code Reg.* § 392.3(b).

(n241)Footnote 242. *See Lab. Code* §§ 6620, 6621; 8 *Cal. Code Reg.* § 390.1(b)(1),(c).

(n242)Footnote 243. *Lab. Code* § 6620; 8 *Cal. Code Reg.* §§ 390.1(b)(2), 393(g), 394.

(n243)Footnote 244. *See 8 Cal. Code Reg.* § 385(a); *see also* discussion in [19], *above*.

(N244)Footnote 245. 8 *Cal. Code Reg.* § 394(c).

(n245)Footnote 246. 8 *Cal. Code Reg.* § 394(b).

(n246)Footnote 247. *Lab. Code* § 6622.

(n247)Footnote 248. *Lab. Code* § 6622.

(n248)Footnote 249. *Lab. Code* § 6623; *see Lab. Code* §§ 148.5, 148.9.

(n249)Footnote 250. *Lab. Code* § 6623.

(n250)Footnote 251. *Lab. Code* § 148.6.

(n251)Footnote 252. *Lab. Code* § 140 *et seq.*

(n252)Footnote 253. *See 8 Cal. Code Reg.* § 396(b) (definition of "citation is withdrawn"); *see also* discussion in [13], *above*.

(n253)Footnote 254. *Lab. Code* § 149.5; 8 *Cal. Code Reg.* § 397(a).

(n254)Footnote 255. 8 *Cal. Code Reg.* § 396(e); *see Lab. Code* § 149.5.

(n255)Footnote 256. 8 *Cal. Code Reg.* § 396(b). For discussion of withdrawal of Division actions, *see* [13], *above*.

(n256)Footnote 257. 8 *Cal. Code Reg.* § 396(d).

(n257)Footnote 258. 8 *Cal. Code Reg.* § 396(d).

(n258)Footnote 259. *See Lab. Code* § 149.5; 8 *Cal. Code Reg.* §§ 395-397.

(n259)Footnote 260. 8 *Cal. Code Reg.* § 397(b)(1).

(n260)Footnote 261. 8 *Cal. Code Reg.* § 396(c).

(n261)Footnote 262. For discussion of reconsideration, *see* [20], *above*.

(n262)Footnote 263. 8 *Cal. Code Reg.* § 396(c). For discussion of judicial review by mandate, *see* [22], *below*.

(n263)Footnote 264. 8 *Cal. Code Reg.* § 396(c).

(n264)Footnote 265. 8 *Cal. Code Reg.* § 397(b)(1).

(n265)Footnote 266. 8 *Cal. Code Reg.* § 397(b)(1).

(n266)Footnote 267. 8 *Cal. Code Reg.* § 397(b)(1).

(n267)Footnote 268. 8 *Cal. Code Reg.* § 397(b)(2).

(n268)Footnote 269. 8 *Cal. Code Reg.* § 397(b)(2).

(n269)Footnote 270. 8 *Cal. Code Reg.* §§ 396(a), 397(a).

(n270)Footnote 271. *See* Troy Gold Industries, Ltd. (Dec. 14, 1987) Cal. OSHAB Petition No. P87-001/2/9 (decision after reconsideration).

(n271)Footnote 272. *See* Bragg Crane Service, Inc. (June 29, 1984) Cal. OSHAB Petition No. P80-001/34/3 (decision after reconsideration).

(n272)Footnote 273. *See* W.M. Lyles (Oct. 1, 1987) Cal. OSHAB Petition No. P85-009/2/5 (decision after reconsideration).

(n273)Footnote 274. *See* Rudolph & Sletten, Inc. (Nov. 4, 1981) Cal. OSHAB Petition No. P81-001/1/1 (decision after reconsideration).

(n274)Footnote 275. 8 *Cal. Code Reg.* § 397(b)(3).

(n275)Footnote 276. *See* discussion in [h], *below*.

(n276)Footnote 277. 8 *Cal. Code Reg.* § 397(b)(3)(C).

(n277)Footnote 278. 8 *Cal. Code Reg.* § 397(b)(4).

(n278)Footnote 279. 8 *Cal. Code Reg.* § 397(b)(4).

(n279)Footnote 280. 8 *Cal. Code Reg.* § 397(b)(4).

(n280)Footnote 281. 8 *Cal. Code Reg.* § 397(b)(5); *see* discussion in [18], *above*.

(n281)Footnote 282. 8 *Cal. Code Reg.* § 397(b)(6).

(n282)Footnote 283. 8 *Cal. Code Reg.* § 397(b)(6); *see* discussion in [i], *below*.

(n283)Footnote 284. 8 *Cal. Code Reg.* § 397(b)(3)(A).

(n284)Footnote 285. 8 *Cal. Code Reg.* § 397(b)(3)(B).

(n285)Footnote 286. *8 Cal. Code Reg. § 397(b)(3)(A),(B),(6); see 8 Cal. Code Reg. § 389 et seq.* (rules governing reconsideration).

(n286)Footnote 287. *Lab. Code § 6627.*

(n287)Footnote 288. *See* discussion in [20], *above*.

(n288)Footnote 289. *See Lab. Code §§ 6615, 6624, 6627.*

(n289)Footnote 290. *Lab. Code § 148.6.*

(n290)Footnote 291. *Lab. Code § 6627.*

(n291)Footnote 292. *Lab. Code § 6628.*

(n292)Footnote 293. *Lab. Code § 6628.*

(n293)Footnote 294. *See Code Civ. Proc. § 1084 et seq.*

(n294)Footnote 295. *Lab. Code § 6631.*

(n295)Footnote 296. *See Code Civ. Proc. § 1094.5.*

(n296)Footnote 297. *Lab. Code § 6631.*

(n297)Footnote 298. *Lab. Code § 6633.*

(n298)Footnote 299. *Lab. Code § 6633.*

(n299)Footnote 300. *Lab. Code § 6629.*

(n300)Footnote 301. *Lab. Code § 6629.*

(n301)Footnote 302. *Lab. Code § 6630.*

(n302)Footnote 303. *Lab. Code § 6630.*

(n303)Footnote 304. *Lab. Code § 6630.*

(n304)Footnote 305. *Lab. Code § 6630.*



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part D. ADMINISTRATIVE ENFORCEMENT PROCEDURES

2-21 California Employment Law § 21.46

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.46 Employer Defenses to Citations

[1] Burden of Proof

The Division has the burden of proof to establish by a preponderance of evidencen1 employee exposure,n2 each element of the cited safety or health order allegedly violated,n3 that the employer was give proper notice of the citation (i.e., service of the citation and notice of civil penalty),n4 and each element of the characterization (willful, repeat, serious, general, etc.) of the citation,n5 as well as the basis for calculating the amount of civil penalty.n6

[2] Employment and Employee Exposure

Employment and employee exposure are threshold issues in the appeal of any citation and civil penalty. The Division must establish by a preponderance of evidence that an employee of the cited employer was exposed to an unsafe or unhealthy condition in violation of the cited safety order or standard.n7

The Division's failure to establish that an employee of the cited employer was exposed to the hazardous condition will result in dismissal of the citation.n8 Therefore, a citation will be dismissed if the evidence establishes that the only person exposed to the alleged hazard was a sole proprietor, i.e., a working employer,n9 or if the evidence supports finding a familial, such as grandfather-grandson relationship, instead of an employment relationship, when the alleged violation occurred.n10

Assuming that an employer-employee relationship existed, failure to establish that an employee was actually exposed also will result in dismissal of the citation, even if the Division proves that a hazardous condition existed in the workplace.n11 Some evidence must establish that an employee of the cited employer came within the zone of danger while performing work related duties, pursuing personal activities during work, or employing normal means of ingress and egress to the employee's work station.n12

The employer is liable for any violation to which his or her employees are exposed, even if such a violation has been created by a third party.n13

[3] Service

In determining whether personal service of a citation was adequate,ⁿ¹⁴ the issue is whether the form of service is reasonably calculated to bring the citation to the attention of someone in authority for conducting the employer's business affairs.ⁿ¹⁵

[4] Statute of Limitations

A citation must be issued with "reasonable promptness," and no citation or notice may be issued by the Division of Occupational Safety and Health for a given violation after six months since the occurrence of the violation.ⁿ¹⁶

In one case, a court of appeal found a citation issued two months after inspection of an accident site to be timely. The court held that a citation issued within six months after an inspection is deemed to be issued with reasonable promptness, unless the employer can establish prejudice by the delay.ⁿ¹⁷

The Division may amend a citation more than six months after the alleged violation as long as the original and amended citations relate to the same general set of facts and provided that the employer is not prejudiced or misled by the amendment.ⁿ¹⁸ However, if such an amendment is made more than six months after the existence of the alleged violation, and the elements of the violation alleged in the amended citation differ from those set forth in the original citation, the amendment will be barred by the six-month limit in *Labor Code Section 6317*.ⁿ¹⁹

The statute of limitations for a citation issued for violation of an order to take action runs from the date that the employer failed to comply with the order, not the date of the inspection that resulted in the order.ⁿ²⁰

[5] Particularity and Specificity

Any citation issued by the Division must be written, describe with "particularity" the nature of the violation, and specify the Labor Code section or occupational safety or health standard, rule, regulation, or order allegedly violated.ⁿ²¹ However, even if the Division incorrectly specifies the safety order alleged to have been violated, a citation may be upheld if the citation described employee exposure to a hazard with sufficient "certainty" or "particularity" to enable the employer to prepare a defense.ⁿ²²

If two safety orders, one general and one specific, refer to the same hazardous condition and are inconsistent with each other, the Division must cite the more specific safety order in the citation.ⁿ²³

Special industry safety orders on a specific subject have priority over inconsistent general industry safety orders on the same subject.ⁿ²⁴

[6] Unforeseeable Isolated Employee Act

A citation may be dismissed if the evidence establishes the violation was due to an unforeseeable employee act. However, the employer will not prevail in such a defense if there is any evidence that (1) the employer knew or should have known of the potential danger to employees from the hazardous condition; (2) the employer failed to exercise adequate supervision to assure safety; (3) the employer failed to ensure employee compliance with its safety rules; or (4) the violation was foreseeable.ⁿ²⁵

[7] Independent Employee Action

Closely related to the "unforeseeable employee act" discussed in [6], *above*, defense is the "independent employee action" defense. A citation will be dismissed if an employer can prove all of the following elements of the independent employee action defense, by a preponderance of the evidence:ⁿ²⁶

1. The exposed employee was experienced in the job being performed;
2. The employer has a well-devised safety program that includes training employees in matters of safety with respect to their particular job assignments;
3. The employer effectively enforces the safety program;
4. The employer has an enforced policy of sanctions against employees who violate the safety program;
and
5. The employee caused a safety infraction that he or she knew was contrary to the employer's safety requirements.

However, the independent employee action defense may not be applied to the acts of foremen or supervisors.ⁿ²⁷

[8] Vagueness

A safety or health regulation found to be vague, ambiguous, and overbroad will not be enforceable.ⁿ²⁸

A safety order will not be found void and unenforceable for "uncertainty" if any reasonable and practical construction can be given to the language of the safety order that gives fair warning of the violative conduct or the condition that is prohibited.ⁿ²⁹ Safety orders will generally be construed to give specific meaning to terms that might otherwise be viewed as unconstitutionally vague.ⁿ³⁰ Whether or not a given safety order is unconstitutionally vague will be determined in the context of the particular conduct to which the safety order is being applied.ⁿ³¹

[9] Advisory Versus Mandatory Standards

The use of "may" in a safety order will establish that the requirements of the order are permissive, rather than mandatory.ⁿ³² A permissive safety or health order will not sustain a citation for violation of the order.ⁿ³³

[10] Miscellaneous Unsuccessful Defenses

Industry practice is not a defense to a citation.ⁿ³⁴

An employer's good faith attempt to provide a safe workplace is not a defense to a citation,ⁿ³⁵ although it may support some reduction of the civil penalty.ⁿ³⁶

The added expense of making the workplace safe is no defense to a violation.ⁿ³⁷

The fact that the Division conducted its inspection in an unsafe manner is also no defense to a citation.ⁿ³⁸

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsCitations & InspectionsLabor & Employment LawOccupational Safety & HealthDuties & Rights

FOOTNOTES:

(n1)Footnote 1. *See* Howard J. White, Inc. (June 16, 1983) Cal. OSHAB Docket Nos. 78-741, 78-742 (decision after

reconsideration).

(n2)Footnote 2. *See* Rossi Construction Co. (May 9, 1986) Cal. OSHAB Docket No. 83-568 (decision after reconsideration); Wickes Forest Industries (Oct. 31, 1984) Cal. OSHAB Docket No. 79-1269, p. 2 (decision after reconsideration); Easyco (Oct. 26, 1984) Cal. OSHAB Docket Nos. 83-387, 83-388, 83-390, p. 3 (decision after reconsideration); McCarthy & Spiessman, Inc. (Sept. 28, 1984) Cal. OSHAB Docket No. 83-568 (decision after reconsideration).

(n3)Footnote 3. *See* John J. Lessman and Son, Inc. dba ABC Plumbing, Heating and Cooling (Jan. 9, 1985) Cal. OSHAB Docket No. 79-1330, pp. 3-4 (decision after reconsideration); Contri Construction Co. (Mar. 31, 1983) Cal. OSHAB Docket No. 76-921 (decision after reconsideration).

(n4)Footnote 4. *See* Kaweah Construction Co. (Mar. 5, 1987) Cal. OSHAB Docket Nos. 87-9005, 87-9006 (decision after reconsideration); Duran's Body Shop (Oct. 30, 1985) Cal. OSHAB Docket No. 82-369 (decision after reconsideration); Channel Constructors, Inc. (Sept. 25, 1982) Cal. OSHAB Docket Nos. 77-028, 77-137 (decision after reconsideration); Abbett Electric Corp. (Dec. 30, 1981) Cal. OSHAB Docket No. 79-1449, pp. 2-3 (decision after reconsideration); North Bay Construction, Inc. (Dec. 30, 1981) Cal. OSHAB Docket No. 80-1489, pp. 3-4 (decision after reconsideration).

(n5)Footnote 5. *See* Gordon H. Ball, Inc. (June 30, 1981) Cal. OSHAB Docket No. 75-086 (decision after reconsideration); Electric Motor Shop, Inc. (Dec. 15, 1980) Cal. OSHAB Docket Nos. 77-571, 77-769--77-771, 77-773 (decision after reconsideration); J.F. Shea Co. (Mar. 27, 1980) Cal. OSHAB Docket Nos. 75-1244, 75-1245 (decision after reconsideration); John Jackson Masonry (Sept. 21, 1977) Cal. OSHAB Docket No. 76-1211 (decision after reconsideration).

(n6)Footnote 6. *See* Townsend & Schmidt Masonry (Aug. 26, 1980) Cal. OSHAB Docket No. 78-1049 (decision after reconsideration); Limberg Construction (Feb. 21, 1980) Cal. OSHAB Docket No. 78-433 (decision after reconsideration).

(n7)Footnote 7. *See* Wickes Forest Industries (Oct. 31, 1984) Cal. OSHAB Docket No. 79-1269, p. 2 (decision after reconsideration); Easyco (Oct. 26, 1984) Cal. OSHAB Docket Nos. 83-387, 83-388, 83-390, p. 3 (decision after reconsideration); Rudolph & Sletten, Inc. (Mar. 5, 1981) Cal. OSHAB Docket No. 80-602 (decision after reconsideration); *see also* discussion in § 21.03[2].

(n8)Footnote 8. Easyco (Oct. 26, 1984) Cal. OSHAB Docket Nos. 83-387, 83-388, 83-390, p. 3 (decision after reconsideration).

(n9)Footnote 9. Lou Perini Plastering (June 21, 1984) Cal. OSHAB Docket No. 80-185, p. 3 (decision after reconsideration).

(n10)Footnote 10. Rosasco George (Nov. 20, 1978) Cal. OSHAB Docket No. 77-814 (decision after reconsideration).

(n11)Footnote 11. Wickes Forest Industries (Oct. 31, 1984) Cal. OSHAB Docket No. 79-1269, p. 2 (decision after reconsideration).

(n12)Footnote 12. Golden West Homes (Nov. 19, 1984) Cal. OSHAB Docket No. 78-1095, pp. 5-6 (decision after reconsideration); Bethlehem Steel Corp. (May 21, 1981) Cal. OSHAB Docket No. 76-552, p. 7 (decision after reconsideration); Roof Structures, Inc. (June 30, 1981) Cal. OSHAB Docket Nos. 78-478--78-480, p. 3 (decision after reconsideration).

(n13)Footnote 13. Novo-Rados Enterprises (May 29, 1981) Cal. OSHAB Docket Nos. 75-1170--75-1173,

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75-1175, p. 10 (decision after reconsideration); Department of Transportation (Nov. 24, 1981) Cal. OSHAB Docket Nos. 81-017, 81-018, p. 5 (decision after reconsideration).

(n14)Footnote 14. *See* § 21.42 [1] for discussion of service requirements.

(n15)Footnote 15. *See* Abbett Electric Corp. (Dec. 30, 1981) Cal. OSHAB Docket No. 79-1449, pp. 2-3 (decision after reconsideration); North Bay Construction, Inc. (Dec. 30, 1981) Cal. OSHAB Docket No. 80-1489, pp. 3-4 (decision after reconsideration).

(n16)Footnote 16. *See Lab. Code* § 6317; *see also* discussion in § 21.42[1][a].

(n17)Footnote 17. *Vial v. California Occupational Saf. & Health Appeals Bd.* (1977) 75 Cal. App. 3d 997, 1002, 1005, 142 Cal. Rptr. 549 ; *see* Novo Rados Enterprises (Feb. 23, 1983) Cal. OSHAB Docket Nos. 76-305, 76-378, 76-379, 76-418, p. 7 (decision after reconsideration); Granite Construction Co. (June 29, 1981) Cal. OSHAB Docket No. 80-911 (decision after reconsideration; 71-day delay in issuance of citation), pp. 2-3.

(n18)Footnote 18. Western Roofing Service (Apr. 23, 1981) Cal. OSHAB Docket No. 75-029, p. 3 (decision after reconsideration); *see* E & G Contractors, Inc. (Mar. 27, 1987) Cal. OSHAB Docket Nos. 81-825--81-827 (decision after reconsideration; Division motion to amend citation to reclassify violation from serious to willful/serious and to increase the proposed penalty from \$1,000 to \$3,000 two years after violation allegedly occurred held not barred by statute of limitations because no prejudice to employer was shown).

(n19)Footnote 19. Rudolph & Sletten, Inc. (Sept. 28, 1984) Cal. OSHAB Docket No. 78-1578, p. 3 (decision after reconsideration).

(n20)Footnote 20. Southern California Edison (Aug. 26, 1985) Cal. OSHAB Docket No. 81-663 (decision after reconsideration).

(n21)Footnote 21. *Lab. Code* § 6317; *see also* discussion in § 21.42[1][b].

(n22)Footnote 22. Star-Kist, Inc. (Oct. 16, 1987) Cal. OSHAB Docket No. 83-782 (decision after reconsideration); Sheedy Drayage (Dec. 24, 1986) Cal. OSHAB Docket No. 84-518, pp. 2-4 (decision after reconsideration); John J. Lessman and Son, Inc. dba ABC Plumbing, Heating and Cooling (Jan. 9, 1985) Cal. OSHAB Docket No. 79-1330, pp. 3-4 (decision after reconsideration); Certified Grocers of California, Ltd. (Oct. 27, 1982) Cal. OSHAB Docket No. 78-607, p. 3 (decision after reconsideration); *see* Novo-Rados Constructors, (Apr. 28, 1983) Cal. OSHAB Docket Nos. 78-135--78-137, 78-265, pp. 2-3 (decision after reconsideration; citation of section number without noting source as Title 8 of the California Code of Regulations was adequate where citation described alleged violation well enough for employer to prepare spirited defense).

(n23)Footnote 23. Carver Construction Co. (Mar. 27, 1980) Cal. OSHAB Docket No. 77-378, citing Egger & Ghio Company, Inc. (May 1, 1978) Cal. OSHAB Docket No. 77-281, pp. 3-4 (decision after reconsideration).

(n24)Footnote 24. C.L. Peck Contractor & Henry C. Beck Co. (Oct. 28, 1976) Cal. OSHAB Docket Nos. 75-508, 75-572, p. 2 (decision after reconsideration; construction industry safety orders versus general industry safety orders).

(n25)Footnote 25. *See Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal. App. 3d 1041, 1045, 191 Cal. Rptr. 336 ; *see Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd.* (1981) 123 Cal. App. 3d 641, 650, 176 Cal. Rptr. 734 (experienced electrician with supervisory duties and familiarity with employer's enforced safety program electrocuted while installing utility pole less than 10 feet from high-voltage lines despite written instructions to install 15 feet from line); *but see* Macco Constructors, Inc. (Oct. 2, 1987) Cal. OSHAB Docket No. 83-147, p. 3 (decision after reconsideration; defense does not apply to actions of foreman).

(n26)Footnote 26. Mercury Service, Inc. (Oct. 16, 1980) Cal OSHAB Docket No. 77-1133 (decision after reconsideration).

(n27)Footnote 27. *Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal. App. 3d 1232, 1240-1243, 213 Cal. Rptr. 806 ; Western Pipeline (Sept. 28, 1981) Cal. OSHAB Docket No. 80-1426, p. 2 (decision after reconsideration); Cutter Laboratories (Feb. 24, 1982) Cal. OSHAB Docket No. 81-440, p. 2 (decision after reconsideration).

(n28)Footnote 28. Bethlehem Steel Corp. (Jan. 27, 1976) Cal. OSHAB Docket No. 75-207 (decision after reconsideration).

(n29)Footnote 29. Ryerson Concrete, Inc. dba Hank's Truck Service (Feb. 26, 1981) Cal. OSHAB Docket No. 79-1571, pp. 2-3 (decision after reconsideration).

(n30)Footnote 30. Novo-Rados Enterprises (May 29, 1981) Cal. OSHAB Docket Nos. 75-1170--75-1173, 75-1175, p. 7 (decision after reconsideration).

(n31)Footnote 31. Southern California Roofing Co. (Oct. 30, 1981) Cal. OSHAB Docket Nos. 77-169, 77-170, p. 2 (decision after reconsideration).

(n32)Footnote 32. Kaiser Steel Corporation (June 21, 1982) Cal. OSHAB Docket No. 75-548, etc., pp. 20-21 (decision after reconsideration).

(n33)Footnote 33. *See* San Leandro Boat Works (July, 24, 1978) Cal. OSHAB Docket No. 76-1218, p. 2 (decision after reconsideration).

(n34)Footnote 34. Procon, Inc. (Apr. 10, 1985) Cal. OSHAB Docket Nos. 80-101, 80-102, p. 3 (decision after reconsideration); McKee Electric Co. (May 29, 1981) Cal. OSHAB Docket No. 81-001, p. 2 (denial of petition for reconsideration); Novo-Rados Enterprises (May 29, 1981) Cal. OSHAB Docket Nos. 75-1170, 75-1172, 75-1173, 75-1175, pp. 7-8 n.6 (decision after reconsideration).

(n35)Footnote 35. McGuire & Hester (Sept. 13, 1978) Cal. OSHAB Docket Nos. 77-428, 77-429, pp. 2-3 (decision after reconsideration).

(n36)Footnote 36. *See Lab. Code § 6319(c)(3); see also* discussion in § 21.43[2][d], [3][b].

(n37)Footnote 37. Virgin Roof Co. (May 8, 1978) Cal. OSHAB Docket No. 78-044, p. 4 (ALJ decision).

(n38)Footnote 38. Stanley F. Yelich, Inc. (Apr. 26, 1979) Cal. OSHAB Docket Nos. 79-160, 79-161, p. 4 (ALJ decision).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part D. ADMINISTRATIVE ENFORCEMENT PROCEDURES

2-21 California Employment Law § 21.47

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.47 Permits

[1] General Permits for Work Involving Substantial Risk of Injury

[a] Types of Work Requiring a Permit

Prior to the start of work involving certain types or places of employment that are considered, by their nature, to involve a substantial risk of injury, the employer must obtain a permit from the Division.ⁿ¹ The purpose of a permit is to provide notice to the Division that an employer will undertake permit-required activity and to allow the Division an effective means of ensuring that the proposed permit-required activity will be performed safely.^{n1.1} There are two types of permits: project permits and annual permits.^{n1.2} The types and places of employment requiring a pre-job permit are the following:ⁿ²

1. Construction of trenches or excavations that are five feet or deeper and into which a person is required to descend;
2. Construction of any building, structure,ⁿ³ scaffolding, or falsework that is more than three stories high or the equivalent height;ⁿ⁴
3. Demolition of any building or structure, or the dismantling of any scaffolding or falsework, that is more than three stories high or the equivalent height;
4. Underground use of diesel engines in work in mines and tunnels; and
5. Motion picture, television, or theater stages or sets, if there has occurred within any one prior calendar year in any combination at separate locations three serious injuries, fatalities, or serious violations related to the construction or demolition of sets more than 36 feet in height for the motion picture, television, and theatrical production industry (effective January 1, 2000).

A project permit authorizes an employer to conduct permit-required activity at the specific locations named in the permit.n4.1 Work on permit-required activities on a project subject to project permit requirements may not begin until a project permit has been issued for the project.n4.2 Only one project permit is required per project as long as the permit holder continues to act in the role of project administrator,n4.3 even though the project may have more than one employer fitting the description of a project administrator.n4.4 The following types of work activities are subject to the project permit requirement:

- To erect, raise or lower, or dismantle a fixed tower crane.n4.5
- To engage in the underground use of a diesel engine in any mine or tunnel.n4.6
- To conduct the demolition or dismantling of any building or structure more than 36 feet in height.n4.7
- To conduct specific activities on a structure intended to be more than 36 feet high when completed.n4.8

An annual permit allows a qualifying employer to conduct specified permit-required activity at any jobsite for a period of one year.n4.9 To conduct the following activities, the employer must hold an annual or project permit (and may apply for either):

1. Construction of trenches or excavations 5 feet or deeper into which any person is required to descend.n4.10
2. Erection and placement of scaffolding, vertical shoring, or falsework intended to be more than 36 feet high when completed.n4.11

Special registration and permit requirements apply to asbestos-related work,n5 as discussed in [2], *below*.

[b] Exemptions From Permit Requirements

The permit requirements of *Labor Code Section 6500* and *Title 8 California Code of Regulations Section 341*, do not apply to the following:

1. Governmental bodies, including the United States of America, its officers or agencies, State of California, counties, cities, cities and counties, and districts;n6
2. Any public utility that is subject to the jurisdiction of the Public Utilities Commission;n7
3. Construction of trenches or excavations for the purpose of doing emergency repair work to underground facilities;n8
4. Construction or final use of excavations or trenches if no person will be required to descend into the trench or excavation;n9
5. Excavation for the construction of graves, as defined in *Health and Safety Code Section 7014*;n10 and
6. Excavation for the construction of swimming pools.n11

The construction of motion picture, television, or theater stages and sets does not require a permit unless the conditions

specified in *Lab. Code § 6500(b)* have occurred.^{n11.1} For these purposes, stages and sets include, without limitation, scenery, props, backdrops, flats, greenbeds, and grids.^{n11.2}

[c] Permit Applications

Before commencing any type of work described in [a], *above*, the employer must apply to the Division for a permit.ⁿ¹² Project and annual permit application forms may be obtained from any Division office.ⁿ¹³ The information required in permit applications is specified in *Title 8 of the California Code of Regulations, Section 341.1(b)*. All applications must contain specified information,ⁿ¹⁴ and be accompanied by the required permit fee.ⁿ¹⁵ Additional information is required with project permit applications,^{n15.1} with applications for permits for underground use of diesel engines in mines and tunnels,^{n15.2} and with applications for the erecting, climbing, and dismantling of fixed tower cranes.^{n15.3}

An annual permit may be issued on the applicant's demonstration that it has an adequate safety program developed for the work activity to be covered by the permit, subject to specified conditions and any additional conditions specified by the Division. The permit expires one year later, and the permit must display the expiration date.^{n15.4} The issuance of annual permits is subject to the following conditions:^{n15.5}

- The work is performed by the entity named in the permit.
- The permit holder notifies the Division district office with jurisdiction over the site of the project at least 24 hours before the activity which is the subject of the notification. Notification must be given by mail, personal delivery, fax transmission or electronic mail, and provide the location of the project and the date and time the work activity is to commence.

An annual permit may be renewed by mail.^{n15.6}

Project permit applications are submitted to the Division district office that has jurisdiction over the site of the project to be covered by the permit.^{n15.7} Annual permit applications are submitted to the Division district office where the employer's California headquarters is located. If the employer has no California headquarters, the application is submitted to the Division's headquarters.^{n15.8} Permit applications for the use of diesel engines in mines and tunnels are submitted to the nearest office of the Division's Mining and Tunneling Unit.^{n15.9}

[d] Pre-Job Inspections, Hearings, and Safety Conferences

Prior to issuing a permit, the Division may conduct any investigation or hearing it deems necessary for purposes of issuing the permit, and may require a pre-job safety conference.ⁿ¹⁶ The pre-job safety conference is held at the Division's offices or at a designated place convenient for the attending parties, and is open to the permit applicant, representatives of the owner, contracting agencies, and employees and their representatives.ⁿ¹⁷ When scheduling a conference, the Division must make a reasonable effort to accommodate the scheduling needs of the applicant, furnish the applicant with a recommended checklist of information and documentation to bring to the safety conference, and clearly inform the applicant which parties are required to attend.ⁿ¹⁸

The permit applicant is responsible for notifying all attending parties of the safety conference a reasonable time before the conference is held, and for providing proof of such notification at the safety conference.ⁿ¹⁹ The purpose of the conference is to discuss the applicant's safety program and the means, methods, devices, processes, practices, conditions or operations the applicant intends to use to provide employment and a place of employment that are safe and healthful.ⁿ²⁰ⁿ²¹⁻²²

[e] [Reserved]

[f] Permit Posting

An employer issued a permit must post a copy of the permit at or near each place of employment. If such posting is impracticable at an excavation site, the permit must be available at all times at the site or, in the case of a mobile unit, at the employer's head office in the district.ⁿ²³

[g] Denial or Revocation of the Permit

[i] Division's Authority to Deny or Revoke Permit

The Division must deny a permit if, based on available facts, it concludes the employer failed to show that conditions, means, practices, methods, operations, or processes used or to be used will provide a safe and healthful place of employment.ⁿ²⁴ The Division may consider the employer's prior occupational safety and health history in making its determination.ⁿ²⁵ The Division must notify the employer immediately in writing of the denial of the permit, specifying the reasons for the denial, and send a copy of the notice to the Director of Industrial Relations.ⁿ²⁶

The Division may also revoke or suspend a permit for good cause and after notice and an opportunity for the employer to be heard.ⁿ²⁷ Notice of revocation or suspension must be in writing and served on the employer at least 24 hours before the hearing.ⁿ²⁸ The notice must be served by personal delivery or certified mail to the employer's address as shown on the permit application form.ⁿ²⁹ The notice must specify the reason for the revocation or suspension.ⁿ³⁰

The hearing on the revocation or suspension is held at the Division district or field office. The district manager or his or her designee presides at the meeting. Affected employees or their representatives are entitled to attend the hearing, and the employer must notify employees or their representatives a reasonable time before the hearing.ⁿ³¹ At the hearing, the Division must establish good cause for revocation or suspension of the permit. Good cause is established if the Division shows that the employer has failed to comply with the requirements for the issuance of the permit, and that continuance of the project under the circumstances would constitute a hazard to employees.ⁿ³²

[ii] Appeal of Permit Denial or Revocation to Director of Industrial Relations

An employer who has been denied a permit or whose permit has been revoked or suspended may appeal the decision to the Director of Industrial Relations.ⁿ³³ Filing such an appeal does not automatically stay a permit revocation or suspension.ⁿ³⁴ However, the employer may apply to the Director for an order staying the revocation or suspension pending the appeal after providing proper notice to the Division and an opportunity for the Division to respond.ⁿ³⁵

The Director will hold a hearing at a designated place within two working days after the employer's appeal.ⁿ³⁶ The hearing is open to employees and their representatives, and the employer is responsible for notifying employees and employee representatives of the time and place for the hearing.ⁿ³⁷ The employer has the burden of proving that it is qualified for the denied permitⁿ³⁸ or that the Division lacked good cause for revoking or suspending the permit.ⁿ³⁹

A decision will be issued by the Director after the hearing, and the decision is final unless rehearing by the Director is sought within 10 days of the Director's decision or further judicial review is granted.ⁿ⁴⁰

[h] Permit Fees

The Division charges a fee for the issuance of a permit to cover the costs involved in investigating and issuing the permit.ⁿ⁴¹ The amount of the fee is specified in *Title 8 California Code of Regulations Section 341.3*.

[i] Criminal and Civil Penalties and Injunctive Relief for Permit Violations

Any person, or agent or officer of a person, who violates the permit requirements of the Labor Code is guilty of a misdemeanor.ⁿ⁴² An employer who violates the permit requirements may also be assessed a civil penalty,ⁿ⁴³ as

discussed in § 21.43[3][i].

Furthermore, if the Division finds, after an inspection or investigation, that an employer is engaging in work for which a permit is required, but lacks a valid permit, the Division may apply to the superior court for the county in which the work is being done for an injunction restraining that activity.ⁿ⁴⁴ The application, if supported by an affidavit showing that the employer is engaging in an activity that requires a permit, but lacks a permit, provides a prima facie showing warranting immediate issuance of a temporary restraining order, at the court's discretion.ⁿ⁴⁵ The Division is not required to furnish a bond for issuance of such a restraining order.ⁿ⁴⁶

[2] Registration Requirements for Asbestos-Related Work

[A] Types of Work and Entities Subject to Registration Requirements

Any employer or contractor who will be engaged in asbestos-related work that involves 100 square feet or moreⁿ⁴⁷ of surface area of asbestos-containing material must register with the Division before the start of work.ⁿ⁴⁸ For purposes of the registration requirement, "asbestos-related work" is defined as any activity that, by disturbing asbestos-containing construction materials, may release asbestos fibers into the air and that is not related to the manufacture of asbestos, the mining or excavation of asbestos-bearing ore or materials, or the installation or repair of automotive materials containing asbestos.ⁿ⁴⁹ However, "asbestos-related work" does not include the installation, repair, maintenance, or nondestructive removal of asbestos cement pipe used outside of buildings, if the installation, repair, maintenance, or nondestructive removal of asbestos cement pipe does not result in asbestos exposure to employees in excess of the action level determined in accordance with *Title 8 California Code of Regulations sections 1529 and 5208*, and if the employees and supervisors involved in the operation have received training through a task-specific training program, approved pursuant to *Labor Code section 9021.9*, with written certification of completion of that training by the training entity responsible for the training.^{n49.1} "Asbestos-containing construction materials" are any manufactured construction materials that contain more than one tenth of one percent asbestos by weight.ⁿ⁵⁰ "Asbestos" means "fibrous forms of various hydrated minerals, including chrysolite (fibrous serpentine), crocidolite (fibrous riebeckite), amosite (fibrous cummingtonite-grunerite), fibrous tremolite, fibrous actinolite, and fibrous anthophyllite."ⁿ⁵¹

In contrast to the permit requirements discussed in [1], *above*, no entity is exempt from the registration requirement for asbestos-related work, and state and local public entities are required to apply for registration.ⁿ⁵²

[b] Duty to Determine Presence of Asbestos and Related Penalties

The owner of a commercial or industrial building or structure, employer, or contractor who engages in, or contracts for, asbestos-related work must make a good-faith effort to determine if asbestos is present before the work is begun.ⁿ⁵³ The contractor or employer must first inquire of the owner if asbestos is present in any building or structure built before 1978.ⁿ⁵⁴

Any person who owns a commercial or industrial building or structure, any employer who does or contracts for asbestos-related work, any contractor, public agency, or any employee acting for any of the foregoing, who contracts for or begins asbestos-related work in any commercial or industrial building or structure built before 1978 without first determining if asbestos-containing material is present is subject to one of the following penalties:ⁿ⁵⁵

1. For a knowing or negligent violation, a fine of up to \$5,000 or imprisonment in the county jail for up to six months, or both;
2. For a willful violation that results in death, serious injury or illness, or serious exposure, a fine of up to \$10,000 or imprisonment in the county jail for up to one year, or both;

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3. For a second or subsequent conviction of a willful violation under Paragraph 2, a fine of up to \$20,000 or imprisonment in the county jail for up to one year, or both;
4. A civil penalty of up to \$2,000 per violation, imposed pursuant to the procedures set forth in *Labor Code Sections 6317, 6318, and 6319*;n56 and
5. For a willful or repeat violation, a civil penalty of up to \$20,000 per violation.

The owner, contractor, employer, public agency, or agent thereof may successfully defend against an action for violation of these Labor Code provisions if he or she establishes by a preponderance of the evidence that he or she made a reasonable effort to determine whether asbestos was present.n57

If the presence of asbestos is not disclosed to the contractor and, after commencing work, the contractor encounters material on the site that he or she reasonably believes to be asbestos or other hazardous substance, and the asbestos or other hazardous substance has not been rendered harmless, the contractor must immediately cease work on the area affected and report the condition to the owner, or the owner's representative or architect, in writing.n58

[c] Application for Registration and Fees

An employer or contractor required to register for asbestos-related work must complete a registration application form and submit it to the Division.n59 Registration application forms may be obtained from the Division's headquarter offices in San Francisco.n60 The application form requires the employer to provide, under penalty of perjury, specified information relating to the employer's compliance with contractor certification, employee health and workers' compensation insurance, and employee training requirements, as well as proof that the employer has knowledge of applicable safety and health standards and will comply with such standards and all other lawful orders of the Division; that the conditions, practices, means, methods, operations, or processes used will provide a safe and healthful place of employment; and that the employer is proficient in and has the necessary equipment to safely perform asbestos-related work.n61 Within 15 business days after receiving an application for registration, the Division must inform the applicant in writing either that the form is complete and accepted for filing or that the form is deficient, in which case the Division must specify what information or documentation is required to complete the application.n62 Within 30 business days after the date of filing of a complete application, the Division must inform the applicant in writing of its decision regarding the application.n63

The applicant must pay an application or renewal fee to the Division before the issuance or renewal of a registration.n64

[d] Posting and Notification of Asbestos-Related Work

The employer must post a sign readable at 20 feet at the location where any asbestos-related work requiring registration is to be done, stating "Danger--Asbestos. Cancer and Lung Hazard. Keep Out."n65 Before the job begins, the employer must provide a copy of the registration to the prime contractor or other employers at the site and post a copy of the registration on site next to the Cal/OSHA poster.n66

[e] Pre-Job Safety Conference

Regardless of the amount of asbestos to be handled, the employer must conduct a safety conference with representatives of the owner or contracting agency, the contractor, the employer, employees, and employee representatives prior to the start of work on any asbestos-handling job that is subject to the registration requirements.n67 The conference must include a discussion of the employer's safety program and the means, methods, devices, processes, practices, conditions, or operations that the employer intends to use to provide a safe and healthful place of employment.n68

[f] Notice Requirements Regarding Multiple Jobs, Phases of Work, or Locations

Whenever the employer will be conducting separate jobs or phases of asbestos-related work requiring registration, or where the work process may differ or is performed at noncontiguous locations, the employer must notify the Division of the following information:ⁿ⁶⁹

1. The address of the job;
2. The precise physical location of the job at that address;
3. The projected starting and completion dates;
4. The name of the certified supervisor who has sufficient experience and authority and who will be responsible for the asbestos-related work activity;
5. The name of a qualified person who will be responsible for conducting air sampling, calibration of air sampling equipment, evaluation of sampling results, and respiratory fit testing and evaluation of such tests; and
6. A description of the type of work to be performed, the work practices that will be used, and the potential for exposure.

The above notification must be made in writing prior to the commencement of work, except that the employer may notify the Division by telephone or orally (with subsequent written confirmation within 24 hours) if the circumstances require immediate abatement action.ⁿ⁷⁰ Changes in the information provided to the Division must be reported to the Division at or before the time of the change, and any change reported orally or by telephone must be confirmed in writing within 24 hours after the change.ⁿ⁷¹

[g] Denial or Revocation of Registration

The Division may deny issuance of, or suspend or revoke, a registration for asbestos-related work on grounds and according to procedures that are virtually identical to those for denying or revoking other permits for hazardous work, as discussed in [1][g], *above*.ⁿ⁷² As in the case of other permits, a denial, suspension, or revocation of registration for asbestos-related work may be appealed to the Director of Industrial Relations.ⁿ⁷³

[h] Separate Contract Requirement

Apart from the registration requirements, all asbestos-related workⁿ⁷⁴ or hazardous substance removalⁿ⁷⁵ must be performed pursuant to a contract that is separate from that for all other work to be performed, unless the presence of asbestos or hazardous substances has been disclosed in the bid or contract documents.ⁿ⁷⁶

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & Rights

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6500; see Lab. Code § 6501.*

(n2)Footnote 1.1. *8 Cal. Code Reg. § 341(a)(2).*

(n3)Footnote 1.2. 8 *Cal. Code Reg.* § 341(a)(3). For requirements for issuance of project and annual permits, *see* [c], *below*.

(n4)Footnote 2. *Lab. Code* § 6500

(n5)Footnote 3. A "structure" means any creation by human activity of a piece of work, formation, or series of parts joined together, including but not necessarily limited to billboards, bridges, buildings, chimneys, dams, elevated highways, falsework, outdoor signs, powerhouses, scaffolding, silos, smokestacks, tanks or tank towers, or transmission or communication towers. 8 *Cal. Code Reg.* § 341(b)(10).

(n6)Footnote 4. [Reserved]

(n7)Footnote 4.1. 8 *Cal. Code Reg.* § 341(b)(9).

(n8)Footnote 4.2. 8 *Cal. Code Reg.* § 341(c)(1)(A).

(n9)Footnote 4.3. *See* 8 *Cal. Code Reg.* §§ 341(b)(8) ("project administrator" defined as person or entity with overall onsite responsibility for planning, quality, management, or completion of project involving erection or demolition of structure, with examples including general contractors, prime contractors, owner/builders, joint ventures, and construction managers); 341.1(f) (issuance of project permits for projects other than erection of tower cranes); 341.1(g) (issuance of project permits for fixed tower cranes).

(n10)Footnote 4.4. 8 *Cal. Code Reg.* § 341(c)(1)(B).

(n11)Footnote 4.5. 8 *Cal. Code Reg.* § 341(d)(1).

(n12)Footnote 4.6. 8 *Cal. Code Reg.* § 341(d)(2). The permit must be obtained prior to placing the engine in the mine or tunnel. 8 *Cal. Code Reg.* § 341(d)(2).

(n13)Footnote 4.7. 8 *Cal. Code Reg.* § 341(d)(3) (project administrator must hold project permit; all other employers directly engaging in demolition or dismantling activity must hold annual permit).

(n14)Footnote 4.8. 8 *Cal. Code* § 341(d)(4) (project administrator must hold project permit; all other employers directly engaging in these activities must hold annual permit).

(n15)Footnote 4.9. 8 *Cal. Code Reg.* § 341(b)(1).

(n16)Footnote 4.10. 8 *Cal. Code Reg.* § 341(d)(5)(A) (for these purposes, "descend" means to enter any part of trench or excavation once excavation has attained depth of 5 feet or more).

(n17)Footnote 4.11. 8 *Cal. Code Reg.* § 341(d)(5)(B).

(n18)Footnote 5. *See Lab. Code* §§ 6501.5-6501.9, 6503.5, 6505.5, 6509.5.

(n19)Footnote 6. *Lab. Code* § 6508; 8 *Cal. Code Reg.* § 341(e)(1).

(n20)Footnote 7. *Lab. Code* § 6508; 8 *Cal. Code Reg.* § 341(e)(2).

(n21)Footnote 8. 8 *Cal. Code Reg.* § 341(e)(3).

(n22)Footnote 9. 8 *Cal. Code Reg.* § 341(e)(4).

(n23)Footnote 10. 8 *Cal. Code Reg.* § 341(e)(5).

(n24)Footnote 11. 8 Cal. Code Reg. § 341(e)(6).

(n25)Footnote 11.1. See [a], above.

(n26)Footnote 11.2. 8 Cal. Code Reg. § 341(e)(6).

(n27)Footnote 12. See Lab. Code § 6501; 8 Cal. Code Reg. § 341.1.

(n28)Footnote 13. 8 Cal. Code Reg. § 341.1(a). Permit application forms for the underground use of diesel engines are available at all offices of the Division's Mining and Tunneling Unit.

(n29)Footnote 14. 8 Cal. Code Reg. § 341.1(b)(1).

(n30)Footnote 15. 8 Cal. Code Reg. § 341.1(b)(1)(E). Permit application fees are specified in 8 Cal. Code Reg. § 341.3.

(n31)Footnote 15.1. 8 Cal. Code Reg. § 341.1(b)(2).

(n32)Footnote 15.2. 8 Cal. Code Reg. § 341.1(c)(1).

(n33)Footnote 15.3. 8 Cal. Code Reg. § 341.1(c)(2).

(n34)Footnote 15.4. 8 Cal. Code Reg. § 341.1(h)(1). During the first year following October 29, 2006 (the effective date of 8 Cal. Code Reg. § 341 et seq. as amended in 2006), the Division may issue annual permits for longer than one year in order to stagger the expiration dates.

(n35)Footnote 15.5. 8 Cal. Code Reg. § 341.1(h)(2).

(n36)Footnote 15.6. 8 Cal. Code Reg. § 341.1(h)(3).

(n37)Footnote 15.7. 8 Cal. Code Reg. § 341.1(a)(1).

(n38)Footnote 15.8. 8 Cal. Code Reg. § 341.1(a)(2).

(n39)Footnote 15.9. 8 Cal. Code Reg. § 341.1(a)(3).

(n40)Footnote 16. Lab. Code § 6502; 8 Cal. Code Reg. § 341.1(d)(1).

(n41)Footnote 17. 8 Cal. Code Reg. § 341.1(d)(3).

(n42)Footnote 18. 8 Cal. Code Reg. § 341.1(d)(2).

(n43)Footnote 19. 8 Cal. Code Reg. § 341.1(d)(3).

(n44)Footnote 20. 8 Cal. Code Reg. § 341.1(d)(1).

(n45)Footnote 21-22. Reserved.

(n46)Footnote 23. 8 Cal. Code Reg. § 341.4; see Lab. Code §§ 6408(a), 6504.

(n47)Footnote 24. 8 Cal. Code Reg. § 341.2(a); see Lab. Code § 6502.

(n48)Footnote 25. 8 Cal. Code Reg. § 341.2(a).

(n49)Footnote 26. 8 Cal. Code Reg. § 341.2(a).

- (n50)Footnote 27. *Lab. Code* § 6505; 8 *Cal. Code Reg.* § 341.5(a).
- (n51)Footnote 28. 8 *Cal. Code Reg.* § 341.5(b).
- (n52)Footnote 29. 8 *Cal. Code Reg.* § 341.5(b).
- (n53)Footnote 30. 8 *Cal. Code Reg.* § 341.5(b).
- (n54)Footnote 31. 8 *Cal. Code Reg.* § 341.5(c).
- (n55)Footnote 32. 8 *Cal. Code Reg.* § 341.5(d).
- (n56)Footnote 33. *Lab. Code* § 6506(a); 8 *Cal. Code Reg.* §§ 341.2(b), 341.5(d).
- (n57)Footnote 34. *Lab. Code* § 6506(b); 8 *Cal. Code Reg.* § 341.5(d).
- (n58)Footnote 35. *Lab. Code* § 6506(b); see 8 *Cal. Code Reg.* § 341.5(d).
- (n59)Footnote 36. 8 *Cal. Code Reg.* §§ 341.2(b), 341.5(d).
- (n60)Footnote 37. 8 *Cal. Code Reg.* §§ 341.2(b), 341.5(d).
- (n61)Footnote 38. 8 *Cal. Code Reg.* § 341.2(b).
- (n62)Footnote 39. 8 *Cal. Code Reg.* § 341.5(d).
- (n63)Footnote 40. 8 *Cal. Code Reg.* §§ 341.2(c), 341.5(d).
- (n64)Footnote 41. See *Lab. Code* § 6507; 8 *Cal. Code Reg.* § 341.3.
- (n65)Footnote 42. *Lab. Code* § 6509.
- (n66)Footnote 43. See *Lab. Code* § 6511.
- (n67)Footnote 44. *Lab. Code* § 6510(a).
- (n68)Footnote 45. *Lab. Code* § 6510(b).
- (n69)Footnote 46. *Lab. Code* § 6510(b).
- (n70)Footnote 47. See 8 *Cal. Code Reg.* § 341.6(e) (computation of area).
- (n71)Footnote 48. *Lab. Code* § 6501.5; 8 *Cal. Code Reg.* §§ 341.6(a), 341.7(a).
- (n72)Footnote 49. *Lab. Code* § 6501.8(a); 8 *Cal. Code Reg.* § 341.6(b).
- (n73)Footnote 49.1. See *Lab. Code* § 6501.8(c).
- (n74)Footnote 50. *Lab. Code* § 6501.8(b); 8 *Cal. Code Reg.* § 341.6(c).
- (n75)Footnote 51. *Lab. Code* § 6501.7; 8 *Cal. Code Reg.* § 341.6(d).
- (n76)Footnote 52. See *Lab. Code* § 6508.5.
- (n77)Footnote 53. *Lab. Code* § 6501.9.

(n78)Footnote 54. *Lab. Code § 6501.9.*

(n79)Footnote 55. *Lab. Code § 6505.5(b).*

(n80)Footnote 56. For discussion of procedures regarding civil penalties, *see § 21.43.*

(n81)Footnote 57. *Lab. Code § 6505.5(c).*

(n82)Footnote 58. *Health & Safety Code § 25914.2(c).*

(n83)Footnote 59. *See 8 Cal. Code Reg. § 341.7(a),(b).*

(n84)Footnote 60. *See 8 Cal. Code Reg. § 341.7(a).*

(n85)Footnote 61. *See 8 Cal. Code Reg. § 341.7(b); Lab. Code § 6501.5(a).*

(n86)Footnote 62. *8 Cal. Code Reg. § 341.8(a).*

(n87)Footnote 63. *8 Cal. Code Reg. § 341.8(b).*

(n88)Footnote 64. *See 8 Cal. Code Reg. § 341.12.*

(n89)Footnote 65. *Lab. Code § 6501.5(c); 8 Cal. Code Reg. § 341.10(a).*

(n90)Footnote 66. *Lab. Code § 6501.5(d); 8 Cal. Code Reg. § 341.10(b).*

(n91)Footnote 67. *Lab. Code § 6503.5; 8 Cal. Code Reg. § 341.11.*

(n92)Footnote 68. *Lab. Code § 6503.5; 8 Cal. Code Reg. § 341.11.*

(n93)Footnote 69. *8 Cal. Code Reg. § 341.9(a); see Lab. Code § 6501.5(b).*

(n94)Footnote 70. *8 Cal. Code Reg. § 341.9(a); see Lab. Code § 6501.5(b).*

(n95)Footnote 71. *8 Cal. Code Reg. § 341.9(a).*

(n96)Footnote 72. *See Lab. Code §§ 6501.5, 6505.5(a); 8 Cal. Code Reg. §§ 341.13(a), 341.14.*

(n97)Footnote 73. *See 8 Cal. Code Reg. §§ 341.13(b),(c), 341.14(d).*

(n98)Footnote 74. In this context, "asbestos-related work" refers to such work, as defined in *Lab. Code § 6501.8* (discussed in [a], *above*), that involves 100-square feet or more of surface area of asbestos-containing material and is such that it requires that the contractor who performs the work to be certified in accordance with *Bus. & Prof. Code § 7058.5. Health & Safety Code § 25914.1(b).*

(n99)Footnote 75. *See Health & Safety Code § 25914.1(c); Bus. & Prof. Code § 7058.7* (definition of "hazardous substance removal").

(n100)Footnote 76. *Health & Safety Code § 25914.2(a),(b).*



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California Employment Law

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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part D. ADMINISTRATIVE ENFORCEMENT PROCEDURES

2-21 California Employment Law § 21.48

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.48 Variances

[1] Temporary Variances

[a] Grounds for Issuance of Temporary Variance and Limitations

An employer may apply to the Division for a temporary variance from any occupational safety or health standard or order.ⁿ¹ A temporary variance is an order granting the employer limited authority for a temporary period to protect his or her employees from an occupational safety or health hazard by a method other than that required by an existing occupational safety or health standard or order.ⁿ²

There are two principal types of temporary variances--a temporary variance from compliance with a new standard by the effective date of the standard, as permitted by *Labor Code Section 6450*, and a temporary "experimental" variance.ⁿ³ The first type of variance may be granted if the employer complies with application requirementsⁿ⁴ and establishes all of the following:ⁿ⁵

1. The employer is unable to comply with a standard by its effective date because of the unavailability of professional or technical personnel or of materials and equipment needed to comply with the standard, or because necessary construction or alteration of facilities cannot be completed by the effective date;
2. The employer is taking all available steps to safeguard its employees against the hazards covered by the standard; and
3. The employer has an effective program for complying with the standard as quickly as possible.

The experimental temporary variance is one that is approved by the Director of Industrial Relations and is designed to demonstrate or validate a new or improved technique for safeguarding worker health or safety.ⁿ⁶

The Division may also grant a temporary variance if the employer has developed a new process or installed new

machinery that is in violation of an *existing* standard and the employer needs additional time to bring the process or equipment into compliance with the applicable standard, or when an employer has purchased a plant or establishment and finds there are conditions that violate existing occupational safety and health standards and that will require additional time to bring the workplace into compliance.ⁿ⁷

No temporary variance may be granted for a hazardous condition that was already the subject of a citation.ⁿ⁸

A temporary variance under *Labor Code Section 6450* will be granted only for the time necessary for the employer to comply with the standard, up to a maximum of one year.ⁿ⁹ The temporary variance may be extended twice for up to a six-month period, providing the application for an extension or renewal is filed before the expiration date of the existing variance and all other requirements for a temporary variance have been met.ⁿ¹⁰

A temporary variance issued under Section 6450 must prescribe the practices, means, methods, operations and processes that the employer must adopt and use while the variance is in effect and must state in detail the employer's program for complying with the order.ⁿ¹¹

[b] Application for Temporary Variance

To obtain a temporary variance under *Labor Code Section 6450*, the employer must file an application with the Division that contains all of the following:ⁿ¹²

1. A specification of the standard or portion thereof from which the employer seeks a variance;
2. A representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that the employer is unable to comply with the standard or portion thereof, and a detailed statement of the reasons why;
3. A statement of the steps that the employer has taken and will take to protect employees against the hazard covered by the standard, with specific dates;
4. A statement regarding when the employer expects to be able to comply with the standard and what steps have been and will be taken, on specific dates, to comply with the standard; and
5. A certification that the employer has informed its employees of the application for a variance, as described below.

The employer must inform employees of the application by providing a copy of the application to the employees' authorized representative, and by posting, at the places where employee notices are normally posted, a statement summarizing the application, informing employees of their right to petition the Division for a hearing on the application,ⁿ¹³ and specifying where a copy of the full application may be examined.ⁿ¹⁴ The manner by which employees were notified must be specified in the employer's certification contained in the application.ⁿ¹⁵

The application may be filed with the nearest district office of the Division.ⁿ¹⁶

The Division may issue an interim temporary variance if the application for the temporary variance demonstrates that the workplace will be safe for employees pending a hearing on the application.ⁿ¹⁷

[c] Hearing on Temporary Variance Application and Appeals to Standards Board

The Labor Code indicates that the Division must afford affected employees an opportunity for a hearing before granting

a temporary variance.ⁿ¹⁸ However, the Division has not issued any regulations providing for a hearing before a temporary variance is granted.ⁿ¹⁹ However, any employer or other person adversely affected by the granting or denial of a temporary variance may appeal the Division's decision by filing an appeal with the Occupational Safety and Health Standards Board (Standards Board) within 15 working days after receipt of the notice granting or denying the temporary variance.ⁿ²⁰ The period for appealing may be extended by the Standards Board for good cause.ⁿ²¹

The appeal must be in writing and contain (1) the appellant's name and address; (2) the address of the place of employment involved; (3) a specific description of the variance involved, the occupational safety or health standard applicable, and the grounds on which the variance was granted or denied; and (4) a statement of facts showing that the appellant is either the employer or another person adversely affected by the grant or denial of the variance.ⁿ²²

Employers who appeal the granting or denial must comply with the notice and posting requirements for notice of hearings on applications for permanent variances.ⁿ²³ Employees or authorized representatives who appeal must notify the employer of the appeal by providing a copy of the appeal to the employer for posting.ⁿ²⁴ An authorized employee representative who appeals the granting or denial of a temporary variance is responsible for serving any other authorized employee representative whose members are affected employees.ⁿ²⁵

Affected employees and/or an authorized employee representative may elect to participate as parties to the appeal at any time prior to commencement of the appeal hearing and, for good cause shown, may be granted party status at a later time.ⁿ²⁶ The Division is deemed a party, entitled to notice and service of all documents, at all variance proceedings regardless of whether or not the Division appears or participates in the hearing.ⁿ²⁷

If the variance appeal fails to state the ground on which it is based, the Standards Board will notify the appellant that the appeal does not comply with the Standards Board's rules and will allow the appellant 15 days to file an amended appeal.ⁿ²⁸ Failure to amend a defective appeal within 15 days to conform with the requirements of *Title 8 California Code of Regulations Section 412*, will result in dismissal of the appeal.ⁿ²⁹

The Standards Board will promptly refer appeals from temporary variances filed with it in proper form to the Division for evaluation.ⁿ³⁰ The Standards Board will schedule hearings on appeals so that the Division's evaluation report will be available for presentation at the hearing.ⁿ³¹

Appeals from temporary variances are given scheduling priority over other variance applications.ⁿ³² The rules of procedure for temporary variance appeal hearings are the same as the rules of procedure for permanent variance hearings.ⁿ³³

The decision of the Standards Board on a temporary variance appeal is required to be in writing and is final, unless the Board grants a request for rehearing,ⁿ³⁴ or judicial review is granted.ⁿ³⁵

[2] Permanent Variances

[a] Grounds for Issuance of Permanent Variance

A permanent variance from any occupational safety and health standard, order, or special order may be granted only by the Occupational Safety and Health Standards Board.ⁿ³⁶ The Standards Board may grant a permanent variance on determining, after investigation if appropriate and a hearing, that the employer seeking the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed for use will provide employment and a place of employment that is as safe and healthful to employees as if the employer had complied with the applicable standard or order.ⁿ³⁷ The Standards Board also may grant an "experimental" variance to allow an employer to participate in an experiment approved by the Director of Industrial Relations designed to demonstrate or validate new and improved techniques to safeguard the health or safety of

workers.n38

[b] Application for Permanent Variance

Any employern39 desiring a permanent variance must file an application for a variance with the Standards Board.n40 The application must be in writing and be submitted under penalty of perjury.n41 Six copies must be submitted, and the application must include the following:n42

1. The employer's name and address;
2. The address(es) where the variance will be in effect;
3. A description of the conditions, practices, means, methods, operations, or processes used or proposed to be used by the employer to provide health and safety equal or superior to that provided by the regulations;
4. A statement showing how those conditions, practices, means, methods, operations, or processes would provide health and safety equal or superior to that provided by the regulation from which the variance is sought;n43
5. A certification that the employer will comply with the notification and posting requirementsn44 described in [d], *below*.
6. A specification of the regulation from which the permanent variance is sought, including the appropriate subsections if applicable;
7. A statement regarding whether an appeal has been filed or is pending with the OSHAB relating to the same safety order, including the OSHAB docket number;
8. An estimate of the number of witnesses to be called by the employer at the hearing and the amount of time the employer will require to present its case; and
9. Six copies of any photographs, blueprints, or other illustrative material submitted to document or clarify the application.

The Standards Board will not docket or consider an application that does not comply with the above requirements, but will notify the applicant of the defects and allow 60 days to amend the application.n45 Failure to file an amended application within the 60 day period will be deemed to be an automatic denial (without prejudice) of the application.n46

[c] Referral to Division for Evaluation

The Standards Board will promptly refer applications filed with it in proper form to the Division for evaluation.n47 The Division must issue its evaluation within 60 days.n48 The Standards Board will schedule hearings so that the Division's evaluation report will be available for presentation at the hearing.n49

[d] Notice and Posting Requirements

The notification and posting requirements regarding variance proceedings and temporary variance appealsn50 are satisfied as follows:

(a) Notification to a party who has appeared through a representative must be made through the representative. Notification to an authorized employee representative is in addition to providing notice to the affected employees.ⁿ⁵¹

(b) Unless otherwise ordered, notification may be provided by postage-prepaid first class mail or by personal delivery. Notification is deemed effective at the time of mailing or personal delivery.ⁿ⁵²

(c) Proof of notification or posting by parties may be made by any of the following means:ⁿ⁵³

(1) Affidavit of service;

(2) Written statement endorsed on the document served and signed by the party making the statement; or

(3) Letter of transmittal.

(d) Proof of notification or posting must be submitted to the Board no later than the second working day following the posting or notification.ⁿ⁵⁴

Employers must post a copy of the following documents at the places where notices to employees are usually posted (Conveyance owners, in lieu of posting, must immediately provide copies of these documents to the building maintenance provider and to the maintenance provider for the conveyance):ⁿ⁵⁵

(1) The docketed variance application or temporary variance appeal, or a statement giving a summary of the application or appeal that specifies where a copy may be examined. This posting must occur immediately upon the employer's receipt of the notice indicating that the variance application or appeal has been docketed.

(2) A notice contained in the application, or provided as a separate document but posted simultaneously with the application, informing affected employees of their right to:

(A) party status and to participate in the variance proceedings;

(B) inspect and copy all pleadings at a reasonable time; and

(C) petition the Standards Board for a hearing.

(3) A copy of the notice of hearing, which must be posted immediately on its receipt.

However, if the variance or appeal pertains to an elevator, escalator or other conveyance covered by the elevator safety orders that is in a building under construction or otherwise unoccupied, and neither a maintenance provider for the conveyance nor a building maintenance provider has been retained or designated, the conveyance owner must attest to these facts in its application. If a conveyance maintenance and/or building maintenance provider is retained or designated after the variance or appeal is requested, but before a hearing is held, the conveyance owner must immediately comply with *8 Cal. Code Reg. § 411.3* and inform the Board, in writing, of the actions taken to comply.ⁿ⁵⁶

In addition, employers must provide any authorized employee representative with the following documents immediately upon their receipt:ⁿ⁵⁷

(1) A copy of the docketed variance application or temporary variance appeal;

(2) A copy of the notice set forth in 8 *Cal. Code Reg. § 411.3(a)(2)*, described *above*;

(3) A copy of the notice of hearing.

When posting is required, the posting must be maintained until the commencement of the hearing or until earlier disposition of the variance request or appeal.ⁿ⁵⁸

[e] [Reserved]

[f] Hearings

[i] Overview of Hearing Procedures

The Standards Board must conduct a hearing on any properly filed application for a permanent variance.ⁿ⁵⁹

Although hearings are conducted in accordance with the Standards Board's rules of procedure,ⁿ⁶⁰ permanent variance application hearings are generally very informal. The key issue to be decided by the Standards Board at such a hearing is whether the employer has established by a preponderance of evidence that the proposed alternate means, method, operation, practice, condition or process will provide employees with a place of employment that is as safe and healthful as that which would exist if the employer complied with the safety regulation, order, or standard from which the variance is sought.ⁿ⁶¹ The employer's proposed alternate method of compliance will be reviewed by both a representative of the Divisionⁿ⁶² and a qualified member of the Standards Board staff.ⁿ⁶³ These personnel from the Division and the Standards Board often attend the variance application hearing and may provide suggestions regarding alterations to an employer's proposal to make it conform to acceptable safety and health standards.

[ii] Time and Place of Hearing

Applications for hearing are scheduled "as soon as practicable" after receipt.ⁿ⁶⁴ The Standards Board may set the time and place of hearing at its principal office or at another location designated by the Board that is more convenient for the applicant.ⁿ⁶⁵ If, however, because of distance involved or other reasons, it is impractical for parties and their witnesses to appear at the same place of hearing, a video conference hearing may be scheduled.ⁿ⁶⁶ⁿ⁶⁷

[iii] Hearing Officer and Panel

The chairperson may appoint a hearing panel consisting of one or more members of the Standards Board to hear the evidence and prepare a proposed decision for adoption by the full Standards Board.ⁿ⁶⁸ However, at the request of any two members of the Board, a variance proceeding may be heard by the full Standards Board.ⁿ⁶⁹ In addition, any party may request that the variance proceeding be heard by the full Standards Board rather than a hearing panel. Any such request must be accompanied by a showing of good cause and may be granted or denied at the discretion of the chairperson.ⁿ⁷⁰

Permanent variance application hearings are presided over by a hearing officer, appointed from the staff of either the Standards Board or the OSHAB.ⁿ⁷¹ The hearing officer presides at the hearing, rules on the admission and exclusion of evidence, and advises the Board or hearing panel on matters of law.ⁿ⁷² The Board or hearing panel exercises all other powers relating to the conduct of the hearing, but may delegate any or all of those powers to the hearing officer.ⁿ⁷³ When the hearing officer alone hears a matter, the hearing officer exercises all powers relating to the conduct of the hearing.^{n73.1}

Any party may request disqualification of a hearing officer or a Standards Board member by filing an affidavit, at least ten working days prior to the scheduled hearing date, stating with particularity the grounds upon which it is claimed that

a fair and impartial hearing cannot be accorded.ⁿ⁷⁴ If the request for disqualification relates to a Standards Board member, the other members of the Standards Board will determine the issue of disqualification. If the request concerns the hearing officer, the matter will be determined by the Standards Board.ⁿ⁷⁵ In addition, a hearing officer or Standards Board member must voluntarily disqualify himself or herself whenever he or she cannot afford a fair and impartial hearing.ⁿ⁷⁶

[iv] Prehearing Requests for Action

All requests for action by the Standards Board relating to any proceeding pending before the Board must be made in writing and directed to the hearing officer assigned to the matter, or to the executive officer if a hearing officer has not been assigned. Each written request must contain the variance docket number and indicate the type of relief sought. If a hearing officer has been assigned, the hearing officer may resolve the requests without the Board's involvement.ⁿ⁷⁷

[v] Prehearing Conferences and Agreements

At any time before a hearing, the Standards Board or the hearing officer may, on its own initiative, or at the request of a party, direct the parties or their representatives to exchange information or participate in a pre-hearing conference for the purpose of considering matters intended to simplify the issues or expedite the proceedings. If a hearing officer has been assigned, the hearing officer may resolve the requests without the Board's involvement.ⁿ⁷⁸ The Standards Board or the hearing officer may issue a prehearing order that includes the agreements reached by the parties. The order will be served on all parties and is a part of the record.ⁿ⁷⁹

[vi] Witnesses and Subpoenas

Each party is responsible for arranging for the presence of his or her witnesses.ⁿ⁸⁰ The Board or a hearing officer may issue a subpoena on the Board's or hearing officer's own motion.^{n80.1} A subpoena compelling the attendance of a witness must be issued by the hearing officer on request and a showing of the need for the witness' attendance.ⁿ⁸¹

To compel the production of books, papers, correspondence, memoranda, or other records at the hearing, a party may apply to the hearing officer for a subpoena duces tecum by filing an affidavit with the hearing officer that does each of the following:ⁿ⁸²

- Gives the name and address of the person to be subpoenaed;
- Describes the matters or things desired to be produced;
- Shows their materiality to the issues involved in the proceeding; and
- States that, to the best of the applicant's knowledge, the witness has such matters or things in his/her possession or under his/her control.

If the hearing officer finds the affidavit is complete and supports the application for the subpoena duces tecum, the hearing officer must issue the subpoena.^{n82.1} Each party must arrange for the service of all subpoenas, including subpoenas duces tecum, issued to the party. A copy of the affidavit for subpoenas duces tecum must be served with the subpoena.ⁿ⁸³

Subpoenas not complied with may be enforced by petitioning the Standards Board for judicial enforcement.ⁿ⁸⁴ A petition for judicial enforcement must be verified and state that due notice of the time and place of compliance with the subpoena had been given, and that the subpoenaed individual failed and refused to comply or has refused to answer questions propounded to him or her.ⁿ⁸⁵ If the Standard Board determines that judicial enforcement is appropriate, the

Board will petition the superior court in the county in which the hearing is pending for an order compelling compliance with the subpoena.n86

Witnesses subpoenaed to a hearing are entitled to fees and mileage as allowed by *Government Code Sections 11450.40* and *68093*.n87

[vii] Rules of Evidence

The hearing need not be conducted according to the technical rules of evidence.n88 Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule of evidence that would make such evidence inadmissible over objection in a civil action.n89 Hearsay evidence may be used to supplement or explain other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action.n90 Irrelevant and unduly repetitious evidence must be excluded, and the rules of privilege are applicable to the extent that they must, by statute, be recognized at the hearing.n91

[viii] Confidential Evidence

Any exhibit or evidence that might reveal a trade secret as defined in *Civil Code section 3426.1* will be considered confidential. The Board must take appropriate action within its control to protect the confidentiality of trade secrets.n92

[ix] Representation at Hearing

Employers must attend the variance hearing, either in person or through a representative. The representative does not need to be an attorney-at-law.n93 Affected employees who are represented by an authorized employee representative may appear through the authorized employee representative.n94

A representative of a party is deemed to control all matters respecting the interest of the party in the proceeding.n95 The Standards Board or hearing officer may refuse to allow any person to represent a party in any hearing when the person engages in unethical conduct or intentionally fails to observe the provisions of the California Code of Regulations, proper instructions or orders of the Standards Board or the rules for conducting hearings.n96

Withdrawal of appearance of a representative may be effected by filing a written notice of withdrawal with the Standards Board.n97

[x] Conduct of Hearing

All testimony must be taken under oath, affirmation, or penalty of perjury.n98 The hearing must be conducted in English, although parties may call witnesses who are not proficient in English as long as the party has arranged for an interpreter acceptable to the Standards Board.n99 A party may provide its own interpreter, if the hearing officer approves the interpreter as proficient in the English language and the language in which the witness will testify.n100 The interpreter may not have any involvement in the issues of the case prior to the hearing.n100.1 The hearing officer may order the costs of the interpreter to be paid by the Standards Board.n101 The hearing officer must approve any person whose name appears on the current list of interpreters published by the State Personnel Board.n102

Each party has the right to do each of the following:n103

- Call and examine parties and witnesses;
- Introduce exhibits;

- Question opposing witnesses and parties on any matter relevant to the issues even though that matter was not covered in the direct examination;
- Impeach any witness regardless of which party first called him/her to testify; and
- Rebut the evidence against him/her.

The Standards Board members and hearing officer may question any party or witness and admit any relevant and material evidence.n104

The hearing officer must control the taking of evidence in the manner best suited to ascertain the facts and safeguard the rights of the parties.n105 The hearing officer must explain the issues and the order of receiving evidence before taking evidence in the hearing.n106

[xi] Official and Judicial Notice

Official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the field of occupational safety and health, and of any determinations, rulings, orders, findings, and decisions required by law to be made by the Division, the OSHAB, and the Standards Board.n107 The Standards Board must take judicial notice of matters that must be noticed by a court under *Evidence Code Sections 451 and 452*.n108

Each party must be given reasonable opportunity to present information relevant to the propriety of taking official notice and of the tenor of the matters to be noticed.n109

[xii] Exclusion of Witnesses During Hearing

On a demonstration of good cause by any party, the Standards Board, in its discretion, may exclude from the hearing room any witnesses not under examination at that time. However, a party to the proceeding and the party's counsel or representative cannot be excluded.n110

[xiii] [Reserved]

[xiv] Continuances

The Standards Board may continue a hearing to another time or place on its own motion or may order further hearing on a matter at any time before issuing its decision. Written notice of the time and place of the continued hearing must be in accordance with *8 Cal. Code Reg. § 411.2*.n111

A party may request a continuance or further hearing. However, the Standards Board's policy disfavors those requests and will grant them only on a clear showing of good cause. The parties are expected to submit for decision all matters in controversy and all necessary evidence at a single hearing.n112

[xv] Failure to Appear

When it appears on record that a party was served with notice of hearing, but the party failed to appear at the hearing, either in person or by representative, the Standards Board may do the following:n113

- Take the proceeding off calendar.

- After notice, dismiss the proceeding.
- Hear the evidence from any party that attends the hearing and, after notice, make such decision as is just and proper.

The Board may reinstate a proceeding at its discretion, if a non-appearing employer submits to the Board, in writing, a reasonable explanation for the employer's failure to appear at the hearing.ⁿ¹¹⁴ The employer must submit the explanation within ten days after the Board's service of the notification of intent to dismiss.ⁿ¹¹⁵

[xvi] Decisions; Actions on Proposed Decisions

A variance hearing may be held before the Standards Board itself, a hearing panel or a hearing officer. If a proceeding is heard before the Board itself or a hearing panel, the hearing officer, if requested, must assist and advise them. When a proceeding is heard before the Board itself, no member of the Board who did not hear the evidence may vote on the decision.ⁿ¹¹⁶

If a proceeding is heard by a hearing panel or a hearing officer, the panel or hearing officer must prepare a proposed decision in such form that the Board may adopt it as the decision in the proceeding. The proposed decision is a public record, and a copy of the proposed decision must be served by the Board on each party.ⁿ¹¹⁷ The Board may adopt the proposed decision or decide the case itself.ⁿ¹¹⁸ If the Board does not adopt the proposed decision, the Board itself may decide the case on the record, with or without taking additional evidence, or refer the case to a hearing panel or hearing officer to take additional evidence.ⁿ¹¹⁹ If the case is assigned to a hearing panel or hearing officer, the panel or officer must prepare a proposed decision based on the additional evidence and the record of the prior hearing. A copy of the proposed decision will be furnished to each party.ⁿ¹²⁰ If the case is heard by the Board itself, and the Board chooses to take additional evidence, the parties must be afforded the opportunity to present oral or written argument before the Board itself.^{n120.1} If additional oral evidence is introduced before the Board itself, no Board member may vote unless the member heard the additional oral evidence.^{n120.2}

The decision must be in writing and contain findings of fact and reasons for the decision, and a copy of the decision must be served or mailed to each party.ⁿ¹²¹ After a decision has been mailed or served, it may only be changed to correct clerical errors, in which case a corrected decision or proposed decision must be prepared and mailed and served on all parties.ⁿ¹²²

[xvii] Rehearing

A petition for rehearing may be filed by any party within 20 days after service of the decision.ⁿ¹²³ Failure to file a petition for re-hearing within twenty days constitutes valid grounds for denying the petition.^{n123.1}

Grounds for rehearing are limited to the following:ⁿ¹²⁴

1. The Standards Board acted without or in excess of its power;
2. The decision is not supported by substantial evidence; or
3. The decision was contrary to law.

The petition for rehearing must state in detail the factual or legal basis for granting the petition.ⁿ¹²⁵ The petition will be denied if it only states the permissible grounds for re-hearing contained in 8 *Cal. Code Reg. § 427*, unsupported by specific references to the record and an explanation of the petitioner's position.ⁿ¹²⁶

The Board will serve copies of the petition on all parties and interveners who joined in the proceeding at the time the petition is filed with the Board.ⁿ¹²⁷

If the petition is submitted to the Board in a timely fashion, the Board may do any of the following:ⁿ¹²⁸

- (1) Grant the petition;
- (2) Affirm the Board's initial decision on the variance;
- (3) Take no action on the petition, in which case it is deemed denied 30 days after receipt by the Board;
or
- (4) Deny the petition and explain its basis for doing so.

If the Board takes no action, the Board must notify the Employer of the denial after the 30 days have passed.ⁿ¹²⁹ If the re-hearing is granted, the Board may review the petition itself or refer it to a hearing panel or hearing officer.ⁿ¹³⁰ The re-hearing may be based on the existing record, or the Board, hearing panel or hearing officer that hears the matter may request that additional testimony and/or written evidence be submitted.ⁿ¹³¹ If further hearing is ordered, the Board must issue a notice of hearing, and the employer must comply with the notification requirements in *8 Cal. Code Reg. §§ 411.2(a)(3) and (b)(3)*.ⁿ¹³² If the decision is to be based on the existing record, the Board may decide the matter without notice and without affording the parties further opportunity to testify or submit information.ⁿ¹³³ A decision after rehearing must be in writing and contain findings of fact and the reasons for the decision.ⁿ¹³⁴

[g] Modification or Revocation of Variance

The Standards Board may modify or revoke a permanent variance at any time on application by an employer, employees, or the Division, or on its own motion, in the manner prescribed for issuance of a permanent variance.ⁿ¹³⁵

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & Rights

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6450(a)*.

(n2)Footnote 2. *See generally Lab. Code §§ 6450-6452*.

(n3)Footnote 3. *See Lab. Code § 6452*.

(n4)Footnote 4. *See Lab. Code § 6451; see also* discussion in [b], *below*.

(n5)Footnote 5. *Lab. Code § 6450(a)*.

(n6)Footnote 6. *Lab. Code § 6452*.

(n7)Footnote 7. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-18.

(n8)Footnote 8. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-18.

(n9)Footnote 9. *Lab. Code § 6450(b)*.

(n10)Footnote 10. *Lab. Code § 6450(b)*.

(n11)Footnote 11. *Lab. Code § 6450(b)*.

(n12)Footnote 12. *Lab. Code § 6451*; *see Lab. Code § 6450(a)*.

(n13)Footnote 13. *See Lab. Code § 6450(b)*; *see also* discussion in [c], *below*.

(n14)Footnote 14. *Lab. Code § 6451(e)*.

(n15)Footnote 15. *Lab. Code § 6451(e)*.

(n16)Footnote 16. Div. of Occupational Safety & Health, Policy & Procedure Manual, No. C-18.

(n17)Footnote 17. *Lab. Code § 6450(b)*.

(n18)Footnote 18. *See Lab. Code §§ 6450(b), 6451(e)*.

(n19)Footnote 19. The Division has authority under *Lab. Code § 6454* to promulgate rules and regulations relating to the granting or denial of temporary variances, but has not done so.

(n20)Footnote 20. *Lab. Code § 6455*; *8 Cal. Code Reg. § 412(a)*.

(n21)Footnote 21. *Lab. Code § 6455*.

(n22)Footnote 22. *8 Cal. Code Reg. § 412(b)*.

(n23)Footnote 23. *See 8 Cal. Code Reg. §§ 411.2, 411.3*; *see also* discussion in [2][d], *below*.

(n24)Footnote 24. *8 Cal. Code Reg. § 412.2(a)*; *see 8 Cal. Code Reg. 411.3*, discussed in [2][d], *below*.

(n25)Footnote 25. *8 Cal. Code Reg. § 412.2(b)*.

(n26)Footnote 26. *8 Cal. Code Reg. § 406(a)*.

(n27)Footnote 27. *8 Cal. Code Reg. § 406(b)*.

(n28)Footnote 28. *8 Cal. Code Reg. § 412.1*.

(n29)Footnote 29. *8 Cal. Code Reg. § 412.1*.

(n30)Footnote 30. *8 Cal. Code Reg. § 415(a)*.

(n31)Footnote 31. *8 Cal. Code Reg. § 415(b)*.

(n32)Footnote 32. *8 Cal. Code Reg. § 421(a)*.

(n33)Footnote 33. *See 8 Cal. Code Reg. § 403 et seq.*; *see also* discussion in [2][f], *below*.

(n34)Footnote 34. *See 8 Cal. Code Reg. §§ 427-427.4* (procedure for rehearing by Standards Board); *see also* discussion in [2][f][xvi],[xvii], *below*.

(n35)Footnote 35. *Lab. Code § 6457*.

(n36)Footnote 36. *See Lab. Code § 143.*

(n37)Footnote 37. *Lab. Code § 143(b).*

(n38)Footnote 38. *Lab. Code § 143(c).*

(n39)Footnote 39. *See 8 Cal. Code Reg. § 403(n)* for the definition of employer for these purposes.

(n40)Footnote 40. *8 Cal. Code Reg. § 411(a); see Lab. Code § 143(a).*

(n41)Footnote 41. *8 Cal. Code Reg. § 411(a).*

(n42)Footnote 42. *8 Cal. Code Reg. § 411(b).*

(n43)Footnote 43. *See Lab. Code § 143(a),(b).*

(n44)Footnote 44. *See 8 Cal. Code Reg. §§ 411.2, 411.3.*

(n45)Footnote 45. *8 Cal. Code Reg. § 411.1.*

(n46)Footnote 46. *8 Cal. Code Reg. § 411.1.*

(n47)Footnote 47. *8 Cal. Code Reg. § 415(a).*

(n48)Footnote 48. *Lab. Code § 147.*

(n49)Footnote 49. *8 Cal. Code Reg. § 415(b).*

(n50)Footnote 50. *See 8 Cal. Code Reg. §§ 411.3, 412.2; for temporary variance appeals, see [1][c], above.*

(n51)Footnote 51. *8 Cal. Code Reg. § 411.2(a).*

(n52)Footnote 52. *8 Cal. Code Reg. § 411.2(b).*

(n53)Footnote 53. *8 Cal. Code Reg. § 411.2(c).*

(n54)Footnote 54. *8 Cal. Code Reg. § 411.2(d).*

(n55)Footnote 55. *8 Cal. Code Reg. § 411.3(a).*

(n56)Footnote 56. *8 Cal. Code Reg. § 411.3(a).*

(n57)Footnote 57. *8 Cal. Code Reg. § 411.3(b).*

(n58)Footnote 58. *8 Cal. Code Reg. § 411.3(c).*

(n59)Footnote 59. *Lab. Code § 143.1.*

(n60)Footnote 60. *See 8 Cal. Code Reg. § 421 et seq.; see also Lab. Code § 143.2* (Standards Board's authority to promulgate rules of practice and procedure pertaining to hearings on applications for permanent variances).

(n61)Footnote 61. *See Lab. Code § 143(b).*

(n62)Footnote 62. *See 8 Cal. Code Reg. § 415(b).*

- (n63)Footnote 63. *See Lab. Code § 143(b).*
- (n64)Footnote 64. *8 Cal. Code Reg. § 421(b).*
- (n65)Footnote 65. *8 Cal. Code Reg. § 421(c).*
- (n66)Footnote 66. *8 Cal. Code Reg. § 421(d).*
- (n67)Footnote 67. [Reserved]
- (n68)Footnote 68. *See 8 Cal. Code Reg. § 417(a).*
- (n69)Footnote 69. *8 Cal. Code Reg. § 417(b).*
- (n70)Footnote 70. *8 Cal. Code Reg. § 417.1(a).*
- (n71)Footnote 71. *See 8 Cal. Code Reg. §§ 405, 405.1(a).*
- (n72)Footnote 72. *8 Cal. Code Reg. § 405.1(b).*
- (n73)Footnote 73. *8 Cal. Code Reg. § 405.1(b).*
- (n74)Footnote 73.1. *8 Cal. Code Reg. § 405.1(b).*
- (n75)Footnote 74. *8 Cal. Code Reg. § 417.1(b)(1).*
- (n76)Footnote 75. *8 Cal. Code Reg. § 417.1(b)(3).*
- (n77)Footnote 76. *8 Cal. Code Reg. § 405.1(c).*
- (n78)Footnote 77. *8 Cal. Code Reg. § 418.*
- (n79)Footnote 78. *8 Cal. Code Reg. § 420(a).*
- (n80)Footnote 79. *8 Cal. Code Reg. § 420(b).*
- (n81)Footnote 80. *8 Cal. Code Reg. § 422(a).*
- (n82)Footnote 80.1. *8 Cal. Code Reg. § 422(b).*
- (n83)Footnote 81. *8 Cal. Code Reg. § 422(c).*
- (n84)Footnote 82. *8 Cal. Code Reg. § 422(d).*
- (n85)Footnote 82.1. *8 Cal. Code Reg. § 422(e).*
- (n86)Footnote 83. *8 Cal. Code Reg. § 422(f).*
- (n87)Footnote 84. *8 Cal. Code Reg. § 425(a).*
- (n88)Footnote 85. *8 Cal. Code Reg. § 425(a).*
- (n89)Footnote 86. *8 Cal. Code Reg. § 425(b).*
- (n90)Footnote 87. *8 Cal. Code Reg. § 425.1.*

(n91)Footnote 88. 8 *Cal. Code Reg.* § 424; *see Lab. Code* § 146.

(n92)Footnote 89. 8 *Cal. Code Reg.* § 424; *see Lab. Code* § 146; *Gov. Code* § 11513(c).

(n93)Footnote 90. 8 *Cal. Code Reg.* § 424; *see Lab. Code* § 146; *Gov. Code* § 11513(c).

(n94)Footnote 91. 8 *Cal. Code Reg.* § 424; *see Lab. Code* § 146; *Gov. Code* § 11513(c).

(n95)Footnote 92. 8 *Cal. Code Reg.* § 422.1(a).

(n96)Footnote 93. 8 *Cal. Code Reg.* § 424.3(a).

(n97)Footnote 94. 8 *Cal. Code Reg.* § 424.3(c).

(n98)Footnote 95. 8 *Cal. Code Reg.* § 424.3(b).

(n99)Footnote 96. 8 *Cal. Code Reg.* § 424.3(e); *see 8 Cal. Code Reg.* § 421 *et seq.* (rules for conduct of hearings).

(n100)Footnote 97. 8 *Cal. Code Reg.* § 424.3(d).

(n101)Footnote 98. 8 *Cal. Code Reg.* § 423(a).

(n102)Footnote 99. *See 8 Cal. Code Reg.* § 423(e).

(n103)Footnote 100. 8 *Cal. Code Reg.* § 423(e).

(n104)Footnote 100.1. 8 *Cal. Code Reg.* § 423(e).

(n105)Footnote 101. 8 *Cal. Code Reg.* § 423(f).

(n106)Footnote 102. 8 *Cal. Code Reg.* § 423(e).

(n107)Footnote 103. 8 *Cal. Code Reg.* § 422(b).

(n108)Footnote 104. 8 *Cal. Code Reg.* § 423(c).

(n109)Footnote 105. 8 *Cal. Code Reg.* § 423(d).

(n110)Footnote 106. 8 *Cal. Code Reg.* § 423(d).

(n111)Footnote 107. 8 *Cal. Code Reg.* § 424.1(a).

(n112)Footnote 108. 8 *Cal. Code Reg.* § 424.1(b).

(n113)Footnote 109. 8 *Cal. Code Reg.* § 424.1(c).

(n114)Footnote 110. 8 *Cal. Code Reg.* § 424.4.

(n115)Footnote 111. 8 *Cal. Code Reg.* § 424.2(a).

(n116)Footnote 112. 8 *Cal. Code Reg.* § 424.2(b).

(n117)Footnote 113. 8 *Cal. Code Reg.* § 425.2(a).

(n118)Footnote 114. 8 *Cal. Code Reg.* § 425.2(b).

- (n119)Footnote 115. 8 *Cal. Code Reg.* § 425.2(b).
- (n120)Footnote 116. 8 *Cal. Code Reg.* § 426(a).
- (n121)Footnote 117. 8 *Cal. Code Reg.* § 426(b).
- (n122)Footnote 118. 8 *Cal. Code Reg.* § 426(b).
- (n123)Footnote 119. 8 *Cal. Code Reg.* § 426(c).
- (n124)Footnote 120. 8 *Cal. Code Reg.* § 426(c)(1).
- (n125)Footnote 120.1. 8 *Cal. Code Reg.* § 426(c)(2).
- (n126)Footnote 120.2. 8 *Cal. Code Reg.* § 426(c)(2).
- (n127)Footnote 121. 8 *Cal. Code Reg.* § 426.1(a).
- (n128)Footnote 122. 8 *Cal. Code Reg.* § 426.1(c).
- (n129)Footnote 123. 8 *Cal. Code Reg.* § 427(a).
- (n130)Footnote 123.1. 8 *Cal. Code Reg.* § 427(b).
- (n131)Footnote 124. 8 *Cal. Code Reg.* § 427(a).
- (n132)Footnote 125. 8 *Cal. Code Reg.* § 427.1(a).
- (n133)Footnote 126. 8 *Cal. Code Reg.* § 427.1(b).
- (n134)Footnote 127. 8 *Cal. Code Reg.* § 427.2.
- (n135)Footnote 128. 8 *Cal. Code Reg.* § 427.3(a).
- (n136)Footnote 129. 8 *Cal. Code Reg.* § 427.3(b).
- (n137)Footnote 130. 8 *Cal. Code Reg.* § 427.3(c).
- (n138)Footnote 131. 8 *Cal. Code Reg.* § 427.3(d).
- (n139)Footnote 132. 8 *Cal. Code Reg.* § 427.3(d)(1).
- (n140)Footnote 133. 8 *Cal. Code Reg.* § 427.3(d)(2).
- (n141)Footnote 134. *See* 8 *Cal. Code Reg.* §§ 426.1, 427.4.
- (n142)Footnote 135. *Lab. Code* § 143(d).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part D. ADMINISTRATIVE ENFORCEMENT PROCEDURES

2-21 California Employment Law § 21.49

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.49 Retaliation Against Employees

[1] Types of Retaliation Prohibited

[a] Safety Complaints and Participation in Cal/OSHA Proceedings

It is unlawful for any person to discharge or in any manner discriminate against any employee because the employee has done any of the following:

1. Made any oral or written complaint to (a) the Division; (b) any other governmental agency with statutory responsibility for, or assisting the Division with reference to, employee safety or health; (c) the employee's employer; or (d) the employee's representative;n1
2. Instituted or caused to be instituted any proceeding relating to the employee's rights under the Occupational Safety and Health Act or the Hazardous Substances Information and Training Act; or testified, or is about to testify, in such a proceeding;n2
3. Exercised any rights on behalf of himself or herself or others under the Occupational Safety and Health Act or the Hazardous Substances Information and Training Act;n3 or
4. Participated in an occupational health and safety committee established pursuant to *Labor Code Section 6401.7* (injury and illness prevention programs).n4

Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms or conditions of his or her employment by the employer because the employee has made a bona fide complaint to the entities listed above about unsafe working conditions or work practices in his or her employment or place of employment, or because the employee has participated in an employer-employee occupational safety and health committee, is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.n5 Furthermore, it is a misdemeanor for any employer to willfully refuse to rehire, promote, or otherwise

restore such an employee or former employee who has been found to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law.ⁿ⁶

The above provisions have been construed to mean that an employee is protected against discharge or discrimination for complaining in good faith about working conditions or practices that he or she reasonably believes to be unsafe, whether or not there exists at the time of complaint an OSHA standard or order that is being violated.ⁿ⁷ An employer also may not retaliate against an employee because the employer fears the employee will make a complaint.^{n7.1}

[b] Refusal of Unsafe Work

It also is unlawful to lay off or discharge an employee for refusing to perform work when the performance of such work would violate the Labor Code, or any occupational safety or health standard or order, if the violation would create a real and apparent hazard to the employee or to his or her fellow employees.ⁿ⁸ Any employee laid off, discharged, or otherwise not paid in violation of this prohibition is entitled to bring an action for wages for the time the employee is without work as a result of the layoff or discharge.ⁿ⁹

[2] Remedies for Retaliation

An employee who believes that he or she has been discharged or otherwise discriminated against in violation of the provisions discussed in [1], *above*, may file a complaint against the Labor Commissioner under the procedures set out in *Labor Code Section 98.7*.ⁿ¹⁰ For discussion of proceedings before the Labor Commissioner under *Labor Code Section 98.7*, see Chapter 5, Part A, Subpart 5.

The administrative remedy for retaliation provided by *Labor Code Section 6312* has been held not to be exclusive and therefore does not preempt a common-law wrongful discharge action based on the types of retaliation prohibited by the statute.ⁿ¹¹ Further, an arbitration decision under a collective bargaining agreement (CBA) does not have preclusive effect in a civil suit for retaliatory discharge under *Labor Code section 6310(b)* unless both of the following are true:ⁿ¹²

- The CBA clearly and unmistakably provided for binding arbitration of the employee's statutory claim under the Labor Code.
- The arbitration was conducted in a manner that allowed for a full litigation and fair adjudication of the Labor Code claim.

For discussion of civil actions for wrongful termination, see Chapters 60-61.

Legal Topics:

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

Labor & Employment Law
 Discrimination
 Retaliation
 General Overview
 Labor & Employment Law
 Occupational Safety & Health
 General Overview
 Labor & Employment Law
 Occupational Safety & Health
 Administrative Proceedings
 General Overview
 Labor & Employment Law
 Occupational Safety & Health
 Duties & Rights

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6310(a)(1)*.

(n2)Footnote 2. *See Lab. Code §§ 6310(a)(2), 6399.7*.

(n3)Footnote 3. *See Lab. Code §§ 6310(a)(2), 6399.7*.

(n4)Footnote 4. *Lab. Code § 6310(a)(3)*.

(n5)Footnote 5. *Lab. Code § 6310(b)*.

(n6)Footnote 6. *Lab. Code § 6310(b)*.

(n7)Footnote 7. *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 299-300, 188 Cal. Rptr. 159* .

(n8)Footnote 7.1. *Lujan v. Minagar (2004) 124 Cal. App. 4th 1040, 1044-1046, 21 Cal. Rptr. 3d 861* (employer could not fire employee she feared would make OSHA complaint).

(n9)Footnote 8. *Lab. Code § 6311*.

(n10)Footnote 9. *Lab. Code § 6311*.

(n11)Footnote 10. *Lab. Code § 6312*.

(n12)Footnote 11. *See Cabesuela v. Browning-Ferris Indus. of California, Inc. (1998) 68 Cal. App. 4th 101, 109-110, 80 Cal. Rptr. 2d 60* (agreeing with *Hentzel* that *Lab. Code § 6312* does not constitute exclusive remedy for action brought pursuant to *Lab. Code § 6310*, but rather is merely cumulative, and finding plaintiff could state cause of action for tortious discharge based on violation of *Lab. Code § 6310*); *Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 449, 262 Cal. Rptr. 798* ; *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 300-304, 188 Cal. Rptr. 159* . For further discussion, *see § 60.04[2][e]*.

(n13)Footnote 12. *Taylor v. Lockheed Martin Corp. (2003) 113 Cal. App. 4th 380, 384-387, 6 Cal. Rptr. 3d 358* (trial court erroneously granted summary judgment in favor of employer after determining employee's claim under § 6310 was collaterally estopped by labor arbitrator's decision that employee was terminated for good cause, because CBA was never presented to court and there was no evidence it clearly and unmistakably provided for arbitration of employee's statutory claim).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
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2-21 California Employment Law §§ 21.50 through 21.59

AUTHOR: By Suzanne P. Marria, J.D.

[Reserved]

§§ 21.50[Reserved]



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
 CHAPTER 21 Occupational Safety and Health Regulation
 Part E. CRIMINAL PENALTIES AND CIVIL LIABILITY

2-21 California Employment Law § 21.60

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.60 Overview of Criminal Penalties for Violations of the California Occupational Safety and Health Act

In addition to the civil penalties discussed in Part D, *above*, various provisions of the Labor Code and Penal Code provide for criminal prosecution of employers and, in some cases, directors, management officials, and supervisory employees, for violations of occupational safety and health laws and standards. These provisions are discussed in subsequent sections of this part.

Within the Division, the Bureau of Investigations is solely responsible for directing and conducting investigations to determine whether sufficient evidence exists to refer a case to a city attorney, a district attorney, or the Attorney General for criminal prosecution.ⁿ¹ Specifically, the Bureau must investigate any accident involving violations of a standard, order, special order, or *Health and Safety Code Section 25910* (relating to asbestos) in which there is a serious injury to five or more employees, a death, or a request for prosecution by a Division representative, to determine whether criminal prosecution is appropriate.ⁿ²

All occupational safety and health standards, orders, rules, regulations, findings, and decisions of the Division are admissible as evidence in any criminal prosecution for violation of the California Occupational Safety and Health Act and are presumed to be reasonable and lawful and "to fix a reasonable and proper standard and requirement of safety," unless prior to the institution of the prosecution for such a violation a proceeding for hearing on a special order are instituted.ⁿ³

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthCivil LiabilityLabor & Employment LawOccupational Safety & HealthCriminal Penalties

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 6315; 8 Cal. Code Reg. § 344.51; see also* discussion in § 21.02[3][b][ii].

(n2)Footnote 2. *Lab. Code § 6315(a); 8 Cal. Code Reg. § 344.51.*

(n3)Footnote 3. *Lab. Code § 6315.5. Lab. Code § 6315.5* also provides an exception to admissibility and presumption of lawfulness if a petition regarding the challenged standard or rule has been filed under *Gov. Code § 11426* prior to the institution of the prosecution. However, former *Gov. Code § 11426* was repealed by Stats. 1979, ch. 567, § 2, operative July 1, 1980.



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2-21 California Employment Law § 21.61

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.61 Willful Violation Causing Employee Death or Permanent or Prolonged Impairment

Labor Code Section 6425 provides criminal penalties for any employer, and any employee having direction, management, control, or custody of any employment, place of employment, or of any other employee, who willfullyⁿ¹ violates any occupational safety or health standard, order, or special order, or *Health and Safety Code Section 25910* (prohibited acts relating to asbestos), if the violation causes death to any employee, or causes permanent or prolonged impairment to the body of any employee. A person convicted under *Labor Code Section 6425* may be punished by a fine, or imprisonment, or both.ⁿ² The court must consider "all relevant circumstances," including but not limited to, the nature, circumstances, extent, and gravity of the violation, any prior history of violations, the defendant's ability to pay, and any other matters that the interests of justice require in determining the amount of fine to be imposed.ⁿ³

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewWorkers' Compensation & SSDICoverageGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 6425(e)* ("willfully" defined).

(n2)Footnote 2. *See Lab. Code § 6425(a)-(d)*.

(n3)Footnote 3. *See Lab. Code § 6425(d)*.



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2-21 California Employment Law § 21.62

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.62 Manslaughter

In addition to prosecution under *Labor Code Section 6425*, an employer whose safety violations cause the death of an employee may be prosecuted for manslaughter under *Penal Code Section 192*.ⁿ¹ *Penal Code Section 192* defines manslaughter as the unlawful killing of a human being without malice.ⁿ² Manslaughter includes voluntary, involuntary, and vehicular manslaughter.ⁿ³ For further discussion of manslaughter, see Erwin, Millman, Monroe, Sevilla & Tarlow, *california criminal defense practice*, Chapter 142.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesHomicideInvoluntary ManslaughterGeneral OverviewCriminal Law & ProcedureCriminal OffensesHomicideVoluntary ManslaughterGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthCriminal Penalties

FOOTNOTES:

(n1)Footnote 1. See *Lab. Code § 6425* (nothing in *Lab. Code § 6425* prohibits a prosecution under *Penal Code § 192*).

(n2)Footnote 2. *Penal Code § 192*.

(n3)Footnote 3. See *Penal Code § 192(a)* (voluntary manslaughter defined), (b) (involuntary manslaughter defined), (c) (vehicular manslaughter defined).



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2-21 California Employment Law § 21.63

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.63 Negligent, Knowing, or Repeat Violations, and Failures to Abate

Labor Code Section 6423 provides that every employer and every officer, management official, or supervisor having direction, management, control, or custody of any employment, place of employment, or of any other employee, who does any of the following is guilty of a misdemeanor:

1. Knowingly or negligently violates any standard, order, or special order, or any provision or part of Division 5 of the Labor Code,ⁿ¹ if the violation is a serious violation as defined in *Lab. Code § 6432*;ⁿ²
2. Repeatedly violates any standard, order, or special order, or provision or part of Division 5 of the Labor Code, if the repeated violation creates a real and apparent hazard to employees;ⁿ³
3. Knowingly fails to report a death to the Division as required by *Lab. Code § 6409.1(b)*;ⁿ⁴
4. Fails or refuses to comply, after notification and expiration of any abatement period, with any standard, order, special order, or provision or part of Division 5 of the Labor Code, if the failure or refusal creates a real and apparent hazard to employees;ⁿ⁵ or
5. Directly or indirectly, knowingly induces another to commit any of the above acts.ⁿ⁶

Violation of *Lab. Code § 6423(a)(1)* is punishable by imprisonment in the county jail for a period not to exceed six months, or by a fine not to exceed five thousand dollars or by both imprisonment and fine.ⁿ⁷ Violation of *Lab. Code § 6423(a)(3)* is punishable by imprisonment in county jail for up to one year, or by a fine not to exceed \$15,000, or by both imprisonment and fine. If the violator is a corporation or a limited liability company, the fine may not exceed \$150,000.ⁿ⁸ Violation of *Lab. Code § 6423(a)(2), (4), or (5)* is punishable by imprisonment in a county jail for a term not exceeding one year, or by a fine not exceeding fifteen thousand dollars, or by both imprisonment and fine. If the defendant is a corporation or a limited liability company, the fine may not exceed one hundred fifty thousand dollars.ⁿ⁹ The court must consider "all relevant circumstances," including but not limited to, the nature, circumstances, extent, and

gravity of the violation, any prior history of violations, the defendant's ability to pay, and any other matters required by the interests of justice in determining the amount of fine to be imposed.ⁿ¹⁰

The above criminal penalties do not apply "where another penalty is specifically provided."ⁿ¹¹ However, the civil penalties assessed by the Division pursuant to *Labor Code Sections 6427 through 6431*ⁿ¹² do not constitute "other penalties" for the purposes of *Labor Code Section 6423*.ⁿ¹³

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthCivil LiabilityTortsNegligenceGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6300 et seq.*

(n2)Footnote 2. *Lab. Code § 6432(a)(1)*. For definition of "serious violation," *see* discussion in § 21.42[2][d].

(n3)Footnote 3. *Lab. Code § 6423(a)(2)*.

(n4)Footnote 4. *Lab. Code § 6423(a)(3)*.

(n5)Footnote 5. *Lab. Code § 6423(a)(4)*.

(n6)Footnote 6. *Lab. Code § 6423(a)(5)*.

(n7)Footnote 7. *Lab. Code § 6423(b)*.

(n8)Footnote 8. *Lab. Code § 6423(c)*.

(n9)Footnote 9. *Lab. Code § 6423(d)*.

(n10)Footnote 10. *See Lab. Code § 6423(e)*.

(n11)Footnote 11. *Lab. Code § 6423(a)*.

(n12)Footnote 12. *See* discussion in § 21.43.

(n13)Footnote 13. *Lab. Code § 6433*.



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2-21 California Employment Law § 21.64

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.64 False Statements and Representations

Any person who knowingly makes a false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under Division 5 of the Labor Code may, on conviction, be punished by a fine not exceeding \$70,000 or by imprisonment of up to 6 months, or both.ⁿ¹

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthCivil LiabilityTortsIntentional TortsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6426.*



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2-21 California Employment Law § 21.65

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.65 Failure to Determine Presence of Asbestos-Containing Materials

As previously discussed in § 21.47[2][b], *Labor Code Section 6505.5* provides civil and criminal penalties for any person who owns a commercial or industrial building or structure, any employer who engages in or contracts for asbestos-related work, any contractor, public agency, or any employee acting for any of the foregoing, who contracts for, or who begins, asbestos-related work in any commercial or industrial building or structure built prior to 1978 without first determining if asbestos-containing material is present.ⁿ¹

Any civil or criminal complaint regarding a violation of *Labor Code Section 6505.5* may be filed by the Attorney General, any district attorney, or any city attorney in the court of any county with jurisdiction over the contractor or employer.ⁿ² The civil or criminal penalty assessed will be paid to the office of the prosecutor that brings the complaint, unless the case was referred for prosecution by the Division or some other governmental unit, in which case the civil or criminal penalty will be divided equally between the offices of the prosecutor and of the referring agency.ⁿ³

Legal Topics:

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

Labor & Employment Law Occupational Safety & Health General Overview Labor & Employment Law Occupational Safety & Health Civil Liability Torts Strict Liability Abnormally Dangerous Activities General Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 6505.5(b).*

(n2)Footnote 2. *Lab. Code § 6436.*

(n3)Footnote 3. *Lab. Code § 6436.*



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2-21 California Employment Law § 21.66

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.66 Willful Refusal to Rehire, Promote, or Restore Employee After Unlawful Discrimination

Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee, who exercised any right under *Labor Code Section 6310* (e.g., by making a bona fide complaint about unsafe or unhealthful working conditions),ⁿ¹ and who has been found to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing, is guilty of a misdemeanor.ⁿ²

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationGeneral Overview

FOOTNOTES:

(n1)Footnote 1. For discussion, *see* § 21.49.

(n2)Footnote 2. *Lab. Code § 6310(b)*.



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2-21 California Employment Law § 21.67

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.67 Corporate Criminal Liability Act of 1989

[1] Overview of Prohibited Conduct and Penalties

The Corporate Criminal Liability Act of 1989,ⁿ¹ codified in *Penal Code Section 387*, allows criminal prosecution of any corporation or limited liability company and certain persons with management authority and actual authority for safety who have actual knowledge of a serious concealed danger and who knowingly fail to notify, within 15 days after acquiring such actual knowledge, both the Division of Occupational Safety and Health and any affected employees of the danger.

The Act provides that any corporation, limited liability company, or person who is a managerⁿ² with respect to a product,ⁿ³ facility, equipment, process, place of employment, or business practice, may be found guilty of a public offense, if the corporation or person does all of the following:ⁿ⁴

1. Has "actual knowledge"ⁿ⁵ of a "serious concealed danger"ⁿ⁶ that is subject to regulatory authority of an appropriate agencyⁿ⁷ and is associated with that product or a component of that product or business practice; and
2. Knowingly fails during the period ending 15 days after the actual knowledge is acquired, or immediately if there is an imminent risk of great bodily harm or death, to do both of the following:
 - a. Inform the Division of the danger in writing, unless the corporation, limited liability company, or manager has actual knowledge that the Division has already been so informed (except as discussed in [6], *below*); and
 - b. Warn its affected employees in writing, unless the corporation, limited liability company, or manager has actual knowledge that the employees have been so warned.

The obligation to warn affected employees requires that the employer "give sufficient description of the serious concealed danger to all individuals working for or in the business entity who are likely to be subject to the serious concealed danger in the course of that work to make those individuals aware of that danger."⁸

Violations of *Penal Code Section 387* are punishable by imprisonment in the county jail for up to 1 year, or by a fine not exceeding \$10,000, or both; or by imprisonment in state prison for 16 months, 2 years, or 3 years, or by fine not exceeding \$25,000, or both.⁹ If the defendant is a corporation, a fine of up to \$1,000,000 may be imposed.¹⁰

[2] "Manager" Defined

As discussed in [1], *above*, the criminal penalties of *Penal Code Section 387* apply to corporations, to limited liability companies, and to any person who is a "manager" with respect to a product, facility, equipment, process, place of employment, or business practice.¹¹ For this purpose, a "manager" is defined as a person having both (1) "[m]anagement authority in or as a business entity"; and (2) "significant responsibility for any aspect of a business which includes actual authority for the safety of a product or business practice or for the conduct of research or testing in connection with a product or business practice."¹²

[3] "Actual Knowledge" Defined

Although *Penal Code Section 387* purports to limit criminal penalties to cases in which the corporation, limited liability company, or manager has "actual knowledge" of a serious concealed danger,¹³ the statute defines "actual knowledge" as having "information that would convince a reasonable person in the circumstances in which the manager is situated that the serious concealed danger exists."¹⁴ Thus, the statute in effect appears to apply a "constructive knowledge" standard; that is, the corporation, limited liability company, or manager may apparently be prosecuted and convicted under *Penal Code Section 387* if a reasonable person would have recognized the danger, even if the defendant did not in fact recognize the existence of the danger.

[4] "Serious Concealed Danger" and Related Terms Defined

For purposes of *Penal Code Section 387*, "serious concealed danger," when used in regard to a product or business practice, means "that the normal or reasonably foreseeable use of, or the exposure of an individual to, the product or business practice creates a substantial probability of death, great bodily harm, or serious exposure to an individual, and the danger is not readily apparent to an individual who is likely to be exposed."¹⁵ "Great bodily harm" is defined as "a significant or substantial physical harm."¹⁶ "Serious exposure" is defined as "any exposure to a hazardous substance, when the exposure occurs as a result of an incident or exposure over time and to a degree or in an amount sufficient to create a substantial probability that death or great bodily harm in the future would result from the exposure."¹⁷

[5] "Appropriate Government Agency" Defined

"Appropriate government agency," as used in *Penal Code Section 387*, means an agency on the following list that has regulatory authority over the product or business practice and serious concealed dangers of the sort discovered:¹⁸

1. The Division of Occupational Safety and Health in the Department of Industrial Relations;
2. The State Department of Health Services;
3. The Department of Agriculture;
4. County departments of health;
5. The United States Food and Drug Administration;

6. The United States Environmental Protection Agency;
7. The National Highway Traffic Safety Administration;
8. The Federal Occupational Safety and Health Administration;
9. The Nuclear Regulatory Commission;
10. The Consumer Product Safety Commission;
11. The Federal Aviation Administration; and
12. The Federal Mine Safety and Health Review Commission.

If the concealed danger reported by a corporation or manager is regulated by some agency other than the Division of Occupational Safety and Health, the Division must notify the appropriate governmental agency of the hazard by telephone within 24 hours of receipt of the information and promptly forward any written notification the Division has received.ⁿ¹⁹

[6] Exceptions to Reporting Requirement

If the hazard has been abated within the time allowed for reporting such a hazard to the Division, the requirement to disclose the hazard does not apply unless disclosure is required by the regulations of the appropriate regulatory agency for such a hazard.ⁿ²⁰

No penalties apply even if the Division has not been notified if the corporation, limited liability company, or manager reasonably and in good faith believed that he or she was complying with the notification requirements of Penal Code Section 387 by notifying another governmental agency among those listed in *Penal Code Section 387(b)(8)*.ⁿ²¹

[7] Prohibition Against Use of Notification in Criminal Prosecution Against Manager

Notification received pursuant to *Penal Code Section 387* may not be used against any manager in any criminal case, except a prosecution for perjury or for giving a false statement.ⁿ²²

Legal Topics:

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

Business & Corporate LawCorporationsGeneral OverviewCriminal Law & ProcedureCriminal OffensesGeneral OverviewLabor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthCriminal PenaltiesLabor & Employment LawOccupational Safety & HealthDuties & Rights

FOOTNOTES:

(n1)Footnote 1. *See* Stats. 1990, ch. 1616, § 1.

(n2)Footnote 2. *See* discussion in [2], *below*.

(n3)Footnote 3. *See Penal Code § 387(b)(2)* (definition of "product").

(n4)Footnote 4. *Penal Code § 387(a)*.

(n5)Footnote 5. *See* discussion in [3], *below*.

(n6)Footnote 6. *See* discussion in [4], *below*.

(n7)Footnote 7. *See* discussion in [5], *below*.

(n8)Footnote 8. *Penal Code* § 387(b)(7).

(n9)Footnote 9. *Penal Code* § 387(a).

(n10)Footnote 10. *See Penal Code* § 387(a).

(n11)Footnote 11. *See Penal Code* § 387(a).

(n12)Footnote 12. *Penal Code* § 387(b)(1).

(n13)Footnote 13. *See Penal Code* § 387(a)(1).

(n14)Footnote 14. *Penal Code* § 387(b)(3).

(n15)Footnote 15. *Penal Code* § 387(b)(4).

(n16)Footnote 16. *Penal Code* § 387(b)(5).

(n17)Footnote 17. *Penal Code* § 387(b)(6).

(n18)Footnote 18. *Penal Code* § 387(b)(8).

(n19)Footnote 19. *Penal Code* § 387(a)(2)(A).

(n20)Footnote 20. *Penal Code* § 387(a)(2).

(n21)Footnote 21. *Penal Code* § 387(a)(2). For list of agencies, *see* [5], *above*.

(n22)Footnote 22. *Penal Code* § 387(c).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part E. CRIMINAL PENALTIES AND CIVIL LIABILITY

2-21 California Employment Law § 21.68

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.68 Other Criminal Offenses Related to Occupational Safety and Health

Other statutes providing criminal penalties for violations relating to occupational safety and health include the following:

1. *Labor Code Section 6509* (violation of permit and registration requirements of *Labor Code Section 6500* for inherently hazardous and asbestos-related work);
2. *Labor Code Section 6908* (violation of statutes regarding operation personnel working on railroads);
3. *Labor Code Section 6951* (violation of statute relating to engine cab overhangs);
4. *Labor Code Section 6952* (operating railroad without required handrails and footboards in engine cab);
5. *Labor Code Section 6956* (common carrier in violation of safety glass requirements);
6. *Labor Code Section 7155* (violation of scaffolding requirements in *Labor Code Sections 7151 through 7154*);
7. *Labor Code Section 7156* (improper scaffold use for cleaning, repair, painting, construction, or alteration on buildings, and interference with inspection of scaffolding by Division);
8. *Labor Code Section 7205* (violation of construction elevator provisions in *Labor Code Sections 7200 through 7204*);
9. *Labor Code Section 7266* (proceeding with work on structural steel framed buildings without proper planking or nets);

10. *Labor Code Section 7302* (operation of conveyance without proper permit);
11. *Labor Code Section 7328* (window cleaning without required safety equipment);
12. *Labor Code Section 7330* (failure to provide and maintain required safety devices for window cleaning);
13. *Labor Code Section 7342* (operation of aerial passenger tramway without permit);
14. *Labor Code Section 7501* (failure or refusal to install or maintain required telephone equipment in mines more than 500 feet deep);
15. *Labor Code Section 7608* (violation of ship loading and unloading provisions in *Labor Code Sections 7600 through 7611*);
16. *Labor Code Section 7750* (operation of tank or boiler without required permit);
17. *Labor Code Sections 7770 and 7771* (negligent or willful mismanagement of steam boiler, steam engine, or other steam-generating apparatus);
18. *Labor Code Section 7915* (failure to comply with requirements for amusement ride safety as provided in *Labor Code Sections 7900 through 7915*);
19. *Labor Code Section 8003* (violations of laws and regulations relating to licensing for gas testing and use of explosives in tunnels and mines); and
20. *Penal Code Section 385* (violations relating to certain operations in close proximity to high voltage overhead conductors).

Legal Topics:

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

Criminal Law & Procedure
Criminal Offenses
Miscellaneous Offenses
General Overview
Labor & Employment
Law
Occupational Safety & Health
General Overview
Labor & Employment Law
Occupational Safety & Health
Duties & Rights



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2-21 California Employment Law § 21.69

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.69 Statutory Civil Actions for "Unfair Competition"

Business and Professions Code Section 17200 et seq. authorizes civil actions for equitable relief and, in some cases, civil penalties against any individual, corporation, firm, partnership, joint stock company, association, or other organization of personsⁿ¹ that engages, is engaged, or proposes to engage in "unfair competition."ⁿ² "Unfair competition," as used in these statutes, includes any "unlawful, unfair or fraudulent business act or practice."ⁿ³ Courts have interpreted this phrase as broadly encompassing "anything that can properly be called a business practice and that at the same time is forbidden by law."ⁿ⁴ Thus, it appears that any business act or practice that violates any state or federal statute or administrative regulation (such as an occupational safety and health statute or standard) may potentially be the basis for an action for unfair competition.

As interpreted by California courts, an "unfair" business practice need not deceive anyoneⁿ⁵ or harm any competitorⁿ⁶ to be actionable. However, with the passage of Proposition 64, effective January 1, 2005, it is the intent of the voters of California in amending *Business and Professions Code Sections 17203, 17204, 17206, 17535, and 17536* to prohibit private attorneys from filing lawsuits for unfair competition when they have no client who has been injured in fact under the standing requirements of the United States Constitution.^{n6.1} Furthermore, cases have indicated that the plaintiff need not prove knowledge of the unfair business practice or intent on the part of the defendant.ⁿ⁷

An action for any relief pursuant to *Business and Professions Code section 17200 et seq.* may be brought by the Attorney General, any district attorney, or certain city attorneys and county counsel,ⁿ⁸ in the name of the People of the State of California on their own complaint or on the complaint of any board, officer, person, corporation, or association.ⁿ⁹ An action may also be brought by any person who has suffered injury in fact and has lost money or property as a result of such unfair competition.ⁿ¹⁰

In such an action, in addition to enjoining the act of unfair competition, the court may make any orders or judgments, including the appointment of a receiver, that may be necessary to prevent the use or employment of any practice that constitutes unfair competition, or may grant restitution to persons deprived of money or property by unfair competition.ⁿ¹¹ However, a person may pursue representative claims for relief on behalf of others only if the claimant

meets the standing requirements of *Business and Professions Code Section 17204* (requiring actual injury in fact and the loss of money or property as the result of the alleged unfair competition) and complies with *Code of Civil Procedure Section 382* (joinder as defendant of one who should be joined as plaintiff but will not consent). These limitations do not apply to unfair competition claims by the Attorney General, or any district attorney, county counsel, city attorney or city prosecutor.ⁿ¹¹ 1.1 The prohibition of *Civil Code Section 3369* against the use of specific or preventative relief to enforce a penalty, forfeiture, or penal law does not apply to actions to enjoin unfair competition.ⁿ¹²

In addition, a person who commits an act of unfair competition may be assessed a civil penalty of up to \$2,500 per violation in actions prosecuted by the Attorney General, a district attorney, a county counsel, or a city attorney or prosecutor.ⁿ¹³ The court must impose a civil penalty for each violation and assess the amount based on relevant circumstances, such as the nature and seriousness of the misconduct and the number of violations.ⁿ¹⁴ Additional civil penalties of up to \$2,500 per violation may be assessed for violations perpetrated against senior citizens or disabled persons.ⁿ¹⁵ A person who intentionally violates the terms of an injunction against unfair competition may be held liable for a civil penalty of up to \$6,000 per violation.ⁿ¹⁶ The civil penalty collected is paid to General Fund, the county treasury, and/or the city treasury, depending on which prosecuting agency brought the action.ⁿ¹⁷ These funds are for exclusive use by the Attorney General, district attorney, county counsel, or city attorney for the enforcement of consumer protection laws.^{n17.1} Reasonable expenses of local boards or agencies that assisted with the investigation and prosecution of the action may be awarded out of the civil penalty.ⁿ¹⁸

The remedies and penalties allowed provided under *Business and Professions Code Section 17200 et seq.* are cumulative to each other and to those available under all other laws of the State of California.ⁿ¹⁹

Attorney's fees will not be awarded to the successful party in such an action.ⁿ²⁰ Damages may not be awarded under the unfair competition law, but restitution may be ordered.ⁿ²¹

An action under the *Business and Professions Code Section 17200 et seq.* must be brought within four years after the cause of action accrued.ⁿ²²

For additional discussion of actions under *Business and Professions Code Section 17200 et seq.*, see California Forms of Pleading and Practice, *Unfair Competition* (Matthew Bender).

Legal Topics:

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

Labor & Employment Law Occupational Safety & Health General Overview Labor & Employment Law Occupational Safety & Health Civil Liability Torts Business Torts Unfair Business Practices General Overview

FOOTNOTES:

(n1)Footnote 1. See *Bus. & Prof. Code § 17201*.

(n2)Footnote 2. See *Bus. & Prof. Code §§ 17203, 17204, 17206*.

(n3)Footnote 3. *Bus. & Prof. Code § 17200*.

(n4)Footnote 4. *People v. McKale* (1979) 25 Cal. 3d 626, 632, 159 Cal. Rptr. 811, 602 P.2d 731 ; *Barquis v. Merchants Collection Assn.* (1972) 7 Cal. 3d 94, 111, 101 Cal. Rptr. 745, 496 P.2d 817 .

(n5)Footnote 5. See *Motors, Inc. v. Times Mirror Co.* (1980) 102 Cal. App. 3d 735, 740 n.2, 162 Cal. Rptr. 543 .

(n6)Footnote 6. *Barquis v. Merchants Collection Assn.* (1972) 7 Cal. 3d 94, 111, 101 Cal. Rptr. 745, 496 P.2d 817 .

(n7)Footnote 6.1. Proposition 64, approved by California voters on November 2, 2004, § 1(e).

(n8)Footnote 7. *See People v. Superior Court (Olson) (1979) 96 Cal. App. 3d 181, 195, 157 Cal. Rptr. 628* (case involving false advertising).

(n9)Footnote 8. A city attorney of a city having a population exceeding 750,000, or a city attorney in any city and county may prosecute such as action. With the consent of the district attorney, a city prosecutor in any city having a full-time city prosecutor also may bring such an action. A county counsel may be authorized by agreement with the district attorney to bring such an action if the action involves violation of a county ordinance. *See Bus. & Prof. Code § 17204*.

(n10)Footnote 9. *Bus. & Prof. Code § 17204*.

(n11)Footnote 10. *Bus. & Prof. Code § 17204*. Former *Bus. & Prof. Code § 17204* allowed any person to file an action acting for the interests of the general public. Effective January 1, 2005, with the passage of Proposition 64 on November 2, 2004, an individual may no longer file and prosecute unfair competition actions on behalf of the general public. *See also* Proposition 64, approved by California voters on November 2, 2004, § 1(f) (intent of California voters in enacting Proposition 64 that only Attorney General and local public officials be authorized to file and prosecute actions on behalf of general public).

(n12)Footnote 11. *See Bus. & Prof. Code § 17203*.

(n13)Footnote 11.1. *Bus. & Prof. Code § 17203*.

(n14)Footnote 12. *See Bus. & Prof. Code § 17202*.

(n15)Footnote 13. *Bus. & Prof. Code § 17206(a)*.

(n16)Footnote 14. *See Bus. & Prof. Code § 17206(b)*.

(n17)Footnote 15. *See Bus. & Prof. Code § 17206.1*.

(n18)Footnote 16. *See Bus. & Prof. Code § 17207(a), (b)*.

(n19)Footnote 17. *See Bus. & Prof. Code §§ 17206(c), 17207(c)*.

(n20)Footnote 17.1. *Bus. & Prof. Code § 17206(c)*.

(n21)Footnote 18. *Bus. & Prof. Code § 17206(e)*.

(n22)Footnote 19. *Bus. & Prof. Code § 17205*.

(n23)Footnote 20. *Pachmayr Gun Wks., Inc. v. Olin Mathieson Chem. Corp., etc. (9th Cir. 1974) 502 F.2d 802, 809-813*.

(n24)Footnote 21. *Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal. 4th 163, 173-174, 96 Cal. Rptr. 2d 518, 999 P.2d 706*; *see also Industrial Indemnity Co. v. Superior Court (1989) 209 Cal. App. 3d 1093, 1095-1097, 257 Cal. Rptr. 655* (private plaintiff could not recover damages in action under *Bus. & Prof. Code § 17200 et seq.* alleging unfair and unlawful insurance practices); *Czechowski v. Tandy Corp. (N.D. Cal. 1990) 731 F. Supp. 406, 410* (punitive damages not allowed).

(n25)Footnote 22. *Bus. & Prof. Code § 17208*.



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2-21 California Employment Law § 21.70

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.70 Effect of Occupational Safety and Health Act and Standards in Civil Personal Injury Litigation

The Legislature has expressed its intent that the provisions of Division 5 of the Labor Code (Safety in Employment),ⁿ¹ and the occupational safety and health standards and orders promulgated under the Labor Code, be applicable only to proceedings brought against employers to maintain and enforce employee safety.ⁿ² As amended in 1999, *Labor Code Section 6304.5* expressly provides that neither the issuance of, nor the failure to issue, a citation by the Division of Occupational Health and Safety has any application to and may not be considered or admitted into evidence in any personal injury or wrongful death action, except in actions between an employee and his or her employer. Section 6304.5 further provides that *Evidence Code Sections 452 and 669* apply to the Cal-OSHA Act and to occupational safety and health standards adopted under it in the same manner as any other statute, ordinance, or regulation. The testimony of employees of the Division of Occupational Health and Safety is not admissible as expert opinion or with respect to the application of occupational safety and health standards.

In *Elsner v. Uveges*,ⁿ³ the California Supreme Court held that under the 1999 amendments to Section 6304.5, Cal-OSHA provisions may be used to establish standards and duties of care in negligence actions against private third parties. However, because *Elsner* involved a preamendment accident, use of Cal-OSHA provisions to establish the standard of care and to shift the burden of proof to defendant was an impermissible retroactive application of the 1999 amendment, which error was not harmless.^{n3.1} Any orders issued by the Division in the course of investigating an industrial accident or occupational illness are not admissible as evidence in any action for damages, or in any proceeding for compensation, based on or arising out of any injury or death caused by the accident or illness.ⁿ⁴

In a civil action, if the defendant violated an applicable OSHA regulation, the defendant would be deemed negligent as a matter of law and barred from asserting assumption of the risk or contributory negligence defenses.^{n4.1} But the defendant will not be liable if the OSHA regulation does not apply to that defendant. Thus, for example, OSHA regulations did not apply to homeowners sued by the injured employee of an unlicensed contractor performing a remodel on their home,^{n4.2} or to a homeowner who hired a tree trimmer who did not possess the appropriate license.^{n4.3} In deciding whether OSHA applies, the focus of the inquiry is on the status of the hirer, and historically, OSHA regulations have been directed at commercial activities.

Although the occupational safety and health laws and standards would, theoretically, be admissible in personal injury litigation against an employee's own employer,ⁿ⁵ most such personal injury actions are precluded by the exclusive remedy doctrine of the workers' compensation law.ⁿ⁶ For discussion of the exclusive remedy doctrine, *see* Chapter 20.

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthCivil LiabilityLabor & Employment LawOccupational Safety & HealthDuties & RightsTortsBusiness TortsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6300 et seq.*

(n2)Footnote 2. *Lab. Code § 6304.5.*

(n3)Footnote 3. *Elsner v. Uveges (2005) 34 Cal. 4th 915, 926-936, 22 Cal. Rptr. 3d 530, 102 P.3d 915 .*

(n4)Footnote 3.1. *Elsner v. Uveges (2005) 34 Cal. 4th 915, 936-940, 22 Cal. Rptr. 3d 530, 102 P.3d 915 .*

(n5)Footnote 4. *Lab. Code § 6313(b).*

(n6)Footnote 4.1. *Cortez v. Abich (2009) 177 Cal. App. 4th 261, 267, 98 Cal. Rptr. 3d 830 , superseded by grant of review, depublished by, 2009 Cal. LEXIS 12822 (2009). See Lab. Code § 2801.*

(n7)Footnote 4.2. *Cortez v. Abich (2009) 177 Cal. App. 4th 261, 267-269, 98 Cal. Rptr. 3d 830, superseded by grant of review, depublished by, 2009 Cal. LEXIS 12822 (2009) (OSHA regulation requiring employers to provide safe workplace did not apply to homeowners who hired contractor and workers to remodel personal residence).*

(n8)Footnote 4.3. *Fernandez v. Lawson (2003) 31 Cal. 4th 31, 35-38, 1 Cal. Rptr. 3d 422, 71 P.3d 779 (OSHA did not apply to noncommercial tree trimming performed at private home under Labor Code § 6303(b), "household domestic service" exception to duty to provide safe workplace). For discussion of Labor Code § 6303(b), see § 21.03[2][c], above.*

(n9)Footnote 5. *See Lab. Code § 6304.5.*

(n10)Footnote 6. *See Lab. Code §§ 3600, 3602.*



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2-21 California Employment Law § 21.71

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.71 Injunctive Relief to Prevent Workplace Violence

[1] Basis of Relief

Under *Code of Civil Procedure Section 527.8*, any employer whose employee has suffered unlawful violence or a credible threat of violence from any individual, which can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an injunction on behalf of the employee and, at the discretion of the court, any number of other employees at the workplace (and, if appropriate, other employees at other workplaces of the employer).ⁿ¹

"Unlawful violence" for the purposes of this section is any assault or battery, or stalking as prohibited in *Penal Code Section 646.9*, but does not include lawful acts of self-defense or defense of others.ⁿ² "Credible threat of violence" is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or for the safety of that person's immediate family, and serves no legitimate purpose.ⁿ³ "Course of conduct" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including (1) following or stalking an employee to or from the place of work; (2) entering the workplace; (3) following an employee during hours of employment; (4) making telephone calls to an employee; or (5) sending correspondence to an employee, by any means including, but not limited to, the use of the public or private mails, interoffice mail, fax, or computer e-mail.ⁿ⁴

Nothing in *Code of Civil Procedure Section 527.8* may be construed to permit a court to issue a temporary restraining order or injunction prohibiting speech or other activities that are constitutionally protected, or otherwise protected by *Code of Civil Procedure Section 527.3* (regarding labor disputes) or any other provision of law.ⁿ⁵

[2] Definitions of "Employer" and "Employee" for Purposes of Relief

For the purposes of *Code of Civil Procedure Section 527.8*, the terms "employer" and "employee" mean persons defined in *Labor Code Section 350*. The term "employer" also includes a federal agency, the state, a state agency, a city, county, or district, and a private, public, or quasi-public corporation, or any public agency thereof or therein. The term

"employee" also includes the members of boards of directors of private, public, and quasi-public corporations and elected and appointed public officers. For these purposes only, the term "employee" also includes a volunteer or independent contractor who performs services for the employer at the employer's worksite.ⁿ⁶

[3] Obtaining Temporary Restraining Order

On filing a petition for an injunction under *Code of Civil Procedure Section 527.8*, the plaintiff may obtain a temporary restraining order in accordance with *Code of Civil Procedure Section 527(a)* if the plaintiff also files an affidavit that, to the satisfaction of the court, shows reasonable proof that an employee has suffered unlawful violence or a credible threat of violence by the defendant, and that great or irreparable harm would result to an employee.ⁿ⁷ To meet the latter requirement, plaintiff must show to the satisfaction of the court that it is likely that harm will occur from future unlawful violence in the absence of a temporary restraining order.ⁿ⁸ In the court's discretion, on a showing of good cause, a temporary restraining order may include other named family or household members who reside with the employee. A temporary restraining order granted under section 527.8 may remain in effect, at the court's discretion, for a period not to exceed 15 days, unless otherwise modified or terminated by the court.ⁿ⁹

There is no filing fee for a petition alleging that a person has inflicted or threatened violence against an employee of the petitioner, or stalked the employee, or acted or spoken in any other manner that has placed the employee in reasonable fear of violence, and seeking protective or restraining orders or injunctions restraining stalking or future violence or threats of violence, in any action brought pursuant to *Code Civ. Proc. § 527.8*. There is no fee for a subpoena filed in connection with a petition alleging these acts or for filing a response to a petition alleging these acts.^{n9.1}

Unless otherwise ordered, the party seeking a temporary restraining order under *Code of Civil Procedure Section 527.8(e)* need not submit a supporting memorandum.ⁿ¹⁰ For a blank copy, suitable for reproduction, of the Judicial Council form of Petition for Injunction Prohibiting Harassment of Employee (Form WH-100), which includes an application for temporary restraining orders, see California Forms of Pleading and Practice, *Judicial Council Forms*, vol. II, pt. F (Matthew Bender). Blank copies are also available from the court clerk.

[4] Procedure on Petition for Injunction

[a] Filing of Petition and Service on Defendant

On filing of a petition for an injunction under *Code of Civil Procedure Section 527.8*, the defendant must be personally served with a copy of the petition, temporary restraining order, if any, and notice of hearing of the petition.ⁿ¹¹ The defendant must also be personally served with blank forms of the mandatory Judicial Council form for Response (form WV-110)^{n11.1} and Proof of Service of Completed Response (form WV-131).^{n11.2} Service must be made at least five days before the hearing. The court may, for good cause, on motion of the plaintiff or on its own motion, shorten the time for service on the defendant.ⁿ¹² Service must be made in the manner provided by law for personal service of summons in civil actions.ⁿ¹³

The Judicial Council has made available "Instructions for Petitions to Prohibit Workplace Violence," Judicial Council Form WV-150, to help litigants in these actions, especially employers and defendants representing themselves. The Instructions include filled-in examples of the Petition and Order to Show Cause and Temporary Restraining Order.

To petition for an injunction restraining actual or threatened workplace violence, the employer must use the Judicial Council petition form adopted for mandatory use, WV-100, Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee [Petition].

The temporary restraining order and notice of the hearing are combined in the Judicial Council-approved form of Order to Show Cause and Temporary Restraining Order (Workplace Violence), Form WV-120. The Judicial Council has also

approved a form of Proof of Personal Service (Form WV-130) for use in these proceedings. For blank copies of these forms that are suitable for reproduction, see California Forms of Pleading and Practice, *Judicial Council Forms*, vol. II, pt. F (Matthew Bender). Blank copies are also available from the court clerk.

[b] Response by Defendant

In reply to the petition, the defendant may file a response that explains, excuses, justifies, or denies the alleged unlawful violence or credible threats of violence, or may file a cross-complaint under *Code of Civil Procedure Section 527.8*.ⁿ¹⁴ A response must be filed and delivered to plaintiff or to plaintiff's attorney no later than 48 hours before the hearing on the petition.^{n14.1}

There is no fee for the response to a petition alleging that a person has inflicted or threatened violence against an employee of the petitioner, or stalked the employee, or acted or spoken in any other manner that has placed the employee in reasonable fear of violence.ⁿ¹⁵

The Judicial Council has adopted a form of Response to Petition for Injunction Prohibiting Harassment of Employee (Form WV-110), which defendants are required to use in responding to the petition. The employer must have a blank copy of the form served on the defendant when the petition, temporary restraining order and notice of hearing are served.^{n15.1} For a blank copy of this form suitable for reproduction, see California Forms of Pleading and Practice, *Judicial Council Forms*, vol. II, pt. F (Matthew Bender). Blank copies are also available from the court clerk.

[c] Scheduling of Hearing

On the filing of a petition for injunction under *Code of Civil Procedure Section 527.8*, a hearing must be set in accordance with the requirements of *Code of Civil Procedure Section 527.8(f)*.ⁿ¹⁶ The hearing must be held within 15 days of the filing of the petition.ⁿ¹⁷

[d] Conduct of Hearing and Issuance of Injunction

At the hearing, the judge is required to receive any testimony that is relevant, and may make an independent inquiry. Moreover, if the defendant is a current employee of the entity requesting the injunction, the judge must receive evidence concerning the employer's decision to retain, terminate, or otherwise discipline the defendant. If the judge finds by clear and convincing evidence not only that defendant engaged in unlawful violence or made credible threats of violence, but also that great or irreparable harm would result to an employee if a prohibitory injunction were not issued, due to the reasonable probability that unlawful violence will occur in the future, thenⁿ¹⁸ an injunction will be issued prohibiting further unlawful violence or threats of violence. An injunction issued pursuant to *Code of Civil Procedure Section 527.8* may not have a duration of more than three years. At any time within the three months before the expiration of the injunction, the plaintiff may apply for a renewal of the injunction by filing a new petition for an injunction under *Code of Civil Procedure Section 527.8*.ⁿ¹⁹

The Judicial Council has approved a form of Order After Hearing on Petition for Injunction Prohibiting Harassment of Employee (Form WV-140).ⁿ²⁰ For a blank copy of this form suitable for reproduction, see California Forms of Pleading and Practice, *Judicial Council Forms*, vol. II, pt. F (Matthew Bender). Blank copies are also available from the court clerk.

[5] Notification to Law Enforcement Agencies

The court must order the plaintiff or the attorney for the plaintiff to deliver a copy of each temporary restraining order or injunction, or modification or termination, granted under *Code of Civil Procedure Section 527.8*, by the close of the business day on which the order was granted, to the law enforcement agencies within the court's discretion as are requested by the plaintiff. Each appropriate law enforcement agency must make available information as to the

existence and current status of these orders to law enforcement officers responding to the scene of reported unlawful violence or a credible threat of violence.n21

At the request of the plaintiff, an order issued under *Code Civ. Proc.* § 527.8 must be served on the defendant, regardless of whether the defendant has been taken into custody, by any law enforcement officer who is present at the scene of reported unlawful violence or a credible threat of violence involving the parties to the proceedings. The plaintiff must provide the officer with an endorsed copy of the order and proof of service that the officer completes and sends to the issuing court.n21.1 Upon receiving information at the scene of an incident of unlawful violence or a credible threat of violence that a protective order has been issued under *Code Civ. Proc.* § 527.8, or that a person who has been taken into custody is the subject of an order, if the plaintiff or the protected person cannot produce an endorsed copy of the order, a law enforcement officer must immediately attempt to verify the existence of the order.n21.2 If the law enforcement officer determines that a protective order has been issued but not served, the officer will immediately notify the defendant of the terms of the order and obtain the defendant's address. At that time, the law enforcement officer will also enforce the order, but may not arrest or take the defendant into custody for acts in violation of the order that were committed prior to the verbal notice of the terms and conditions of the order. The law enforcement officer's verbal notice of the terms of the order constitutes service of the order and sufficient notice for the purposes of *Code Civ. Proc.* § 527.8 and *Pen. Code* §§ 273.6 and 12021(g). The plaintiff must mail an endorsed copy of the order to the defendant's mailing address provided to the law enforcement officer within one business day of the reported incident of unlawful violence or a credible threat of violence at which a verbal notice of the terms of the order was provided by a law enforcement officer.n21.3

Information on any temporary restraining order or injunction relating to harassment or domestic violence issued by a court pursuant to this section will be transmitted to the Department of Justice in accordance with *Fam. Code* § 6380(b).n21.4

[6] Penalties for Violation

Any intentional disobedience of any temporary restraining order or injunction granted under *Code of Civil Procedure Section 527.8* is punishable pursuant to *Penal Code Section 273.6*.n22

[7] No Effect on Employer's Duty Regarding Safe Workplace

Nothing in *Code of Civil Procedure Section 527.8* may be construed as expanding, diminishing, altering, or modifying the duty, if any, of an employer to provide a safe workplace for employees and other persons.n23 For general discussion of the employer's duty to provide a safe workplace, see § 21.10. For a discussion of Cal/OSHA guidelines regarding workplace security and the prevention of workplace violence, see § 21.12[1A].

[8] Prohibition of Firearm Ownership

A person subject to a protective order issued under *Code of Civil Procedure Section 527.8* may not own, possess, purchase, receive, or attempt to purchase or receive a firearm while the protective order is in effect.n24 The court must order a person subject to a protective order to relinquish any firearms he or she owns or possesses pursuant to *Code of Civil Procedure Section 527.9*.n25 Every person who owns, possesses, purchases or receives, or attempts to purchase or receive a firearm while the protective order is in effect is punishable pursuant to *Penal Code Section 12021(g)*.n26

[9] Subsequent Actions

Petitions under the Workplace Violence Safety Act do not provide a basis for malicious prosecution actions, even if the petitioner is unsuccessful.n27

Legal Topics:

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

Civil Procedure Remedies Injunctions General Overview Labor & Employment Law Occupational Safety & Health General Overview Labor & Employment Law Workplace Violence

FOOTNOTES:

(n1)Footnote 1. *Code Civ. Proc.* § 527.8(a).

(n2)Footnote 2. *Code Civ. Proc.* § 527.8(b)(1).

(n3)Footnote 3. *Code Civ. Proc.* § 527.8(b)(2).

(n4)Footnote 4. *Code Civ. Proc.* § 527.8(b)(3).

(n5)Footnote 5. *Code Civ. Proc.* § 527.8(c). *See also City of Los Angeles v. Animal Defense League* (2006) 135 Cal. App. 4th 606, 614-627, 37 Cal. Rptr. 3d 632 (under anti-SLAPP statute [*Code Civ. Proc.* § 425.16], trial court erred in denying special motions to strike petitions sought under *Code Civ. Proc.* § 527.8 on behalf of two city employees against animal rights activist and association, where city's petitions were not enforcement actions within meaning of § 425.16(d) and were subject to special motion to strike; where city's petitions for injunctive relief arose from acts in furtherance of activist's and association's rights of petition or free speech under United States and California Constitutions in connection with public issue; and where city failed to demonstrate probability it would prevail on its petitions under § 527.8).

(n6)Footnote 6. *Code Civ. Proc.* § 527.8(d).

(n7)Footnote 7. *Code Civ. Proc.* § 527.8(e).

(n8)Footnote 8. *See Code Civ. Proc.* § 527.8(a), (e).

(n9)Footnote 9. *Code Civ. Proc.* § 527.8(e).

(n10)Footnote 9.1. *Code Civ. Proc.* § 527.8(p).

(n11)Footnote 10. Cal. Rules of Ct., Rule 3.1152(b). *See Code Civ. Proc.* § 527.8(m)-(n) (temporary restraining order issued pursuant to *Code Civ. Proc.* § 527.8 must be issued on forms adopted by Judicial Council and approved by Department of Justice pursuant to *Fam. Code* § 6380(i); however, fact that an order issued by a court pursuant to section 527.8 was not issued on forms adopted by the Judicial Council and approved by the Department of Justice does not, in and of itself, make the order unenforceable).

(n12)Footnote 11. *Code Civ. Proc.* § 527.8(h); *see* Cal. Rules of Ct., Rule 3.1152(c).

(n13)Footnote 11.1. *See* [b], *below*.

(n14)Footnote 11.2. *See* "Instructions for Petitions to Prohibit Workplace Violence," Judicial Council Form WV-150, p. 3.

(n15)Footnote 12. *Code Civ. Proc.* § 527.8(h).

(n16)Footnote 13. Cal. Rules of Ct., Rule 3.1152(c); *see, e.g., Code Civ. Proc.* §§ 415.10, 415.20 (personal service of summons in civil actions). For discussion of general rules regarding personal service of summons in civil actions, *see* California Forms of Pleading and Practice, ch. 518, *Service of Summons and Papers*, pt. II (Matthew Bender).

(n17)Footnote 14. *Code Civ. Proc.* § 527.8(f).

(n18)Footnote 14.1. Cal. Rules of Ct., Rule 3.1152(d).

(n19)Footnote 15. *Code Civ. Proc.* § 527.8(p).

(n20)Footnote 15.1. See "Instructions for Petitions to Prohibit Workplace Violence," Judicial Council Form WV-150, p. 3.

(n21)Footnote 16. Cal. Rules of Ct., Rule 3.1152(a).

(n22)Footnote 17. *Code Civ. Proc.* § 527.8(f).

(n23)Footnote 18. *Scripps Health v. Marin* (1999) 72 Cal. App. 4th 324, 335, 85 Cal. Rptr. 2d 86 (injunction violated public policy by being imposed under factual circumstances which did not establish threat of future harm to plaintiff's employees); see *Code Civ. Proc.* § 527.8(a), (f).

(n24)Footnote 19. *Code Civ. Proc.* § 527.8(f).

(n25)Footnote 20. See *Code Civ. Proc.* § 527.8(m)-(n) (injunction issued pursuant to *Code Civ. Proc.* § 527.8 must be issued on forms adopted by Judicial Council and approved by Department of Justice pursuant to *Fam. Code* § 6380(i); however, fact that an order issued by a court pursuant to this section was not issued on forms adopted by the Judicial Council and approved by the Department of Justice shall not, in and of itself, make the order unenforceable).

(n26)Footnote 21. *Code Civ. Proc.* § 527.8(i)(1).

(n27)Footnote 21.1. *Code Civ. Proc.* § 527.8(i)(2).

(n28)Footnote 21.2. *Code Civ. Proc.* § 527.8(i)(3).

(n29)Footnote 21.3. *Code Civ. Proc.* § 527.8(i)(4).

(n30)Footnote 21.4. *Code Civ. Proc.* § 527.8(o)

(n31)Footnote 22. *Code Civ. Proc.* § 527.8(k); see *Penal Code* § 273.6 (punishment for violations of orders).

(n32)Footnote 23. *Code Civ. Proc.* § 527.8(l).

(n33)Footnote 24. *Code Civ. Proc.* § 527.8(j)(1).

(n34)Footnote 25. *Code Civ. Proc.* § 527.8(j)(2).

(n35)Footnote 26. *Code Civ. Proc.* § 527.8(j)(3).

(n36)Footnote 27. *Robinzine v. Vicory* (2006) 143 Cal. App. 4th 1416, 1421-1424, 50 Cal. Rptr. 3d 65 ; see also *Siam v. Kizilbash* (2005) 130 Cal. App. 4th 1563, 31 Cal. Rptr. 3d 368 (cause of action for malicious prosecution could not be predicated on unsuccessful civil harassment petition under *Code Civ. Proc.* § 527.6, even where defendant obtained TRO on alleged misrepresentation to court).



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part E. CRIMINAL PENALTIES AND CIVIL LIABILITY

2-21 California Employment Law §§ 21.72 through 21.79

AUTHOR: By Suzanne P. Marria, J.D.

[Reserved]

§§ 21.72[Reserved]



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part F. REGULATION OF SPECIFIC HAZARDS

2-21 California Employment Law § 21.80

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.80 Introduction

Apart from the general safety laws described previously in this chapter, Title 8 of the California Code of Regulations contains safety rules relating to specific industries and types of hazards. These regulations are voluminous and highly technical, and space limitations preclude any detailed discussion of these regulations in this chapter. This part describes the regulations relating to airborne contaminants and confined spaces, which are applicable to a broad range of employers and are frequently the subject of citations.ⁿ¹ In addition, this part contains a list of hazards and industries for which there are specific Cal/OSHA safety regulations.ⁿ² Employers and their counsel should become familiar with the specific regulations applicable to the particular types of operations that they conduct.

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & RightsLabor & Employment LawOccupational Safety & HealthIndustry Standards

FOOTNOTES:

(n1)Footnote 1. *See* discussion in §§ 21.81, 21.82.

(n2)Footnote 2. *See* § 21.83.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part F. REGULATION OF SPECIFIC HAZARDS

2-21 California Employment Law § 21.81

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.81 Airborne Contaminants

[1] Overview of Regulations

Employee exposure to airborne contaminants is regulated primarily by *Title 8 California Code of Regulations Section 5155*. Section 5155 contains a table (Table AC-1) that lists several hundred hazardous airborne contaminants, with notations designating those substances that are readily absorbed through the skin. The list also indicates the common name of each listed hazardous substance and the maximum allowable exposures to each such substance as measured by the permissible exposure limit (PEL),ⁿ¹ ceiling limit,ⁿ² and short-term exposure limit (STEL).ⁿ³ Appendix A to Section 5155 sets forth an algebraic formula for calculating the eight-hour time-weighted average (TWA) exposure to a particular substance.

In addition to limiting employee exposure to such substances,ⁿ⁴ Section 5155 requires the employer to:

1. Conduct work environment monitoring in the workplace whenever it is reasonable to suspect that employees may be exposed to concentrations of such contaminants in excess of the levels permitted in Section 5155;ⁿ⁵
2. Take any necessary measures to control harmful exposures to such substances, in compliance with *Title 8 California Code of Regulations Section 5141*, whenever exposures to airborne contaminants exceed or are expected to exceed allowable levels;ⁿ⁶
3. If required by the Division, institute a medical surveillance program approved by the Division to monitor and maintain employee health;ⁿ⁷ and
4. Record and maintain all monitoring results in accordance with the requirements of *Title 8 California Code of Regulations Section 3204* (maintenance of employee exposure records).ⁿ⁸

In addition, the employer must provide and require employees to use appropriate protective clothing to skin absorption of any hazardous substance that is easily absorbed into the bloodstream through the skin, mucous membranes, or the eye, as indicated by the designation "S" in the list of hazardous substances.ⁿ⁹

[2] Ceiling Limits

The ceiling limit is the maximum concentration of an airborne contaminant to which any employee ever may be exposed at any time.ⁿ¹⁰ The employer must control employee exposures to ensure that the ceiling limit for a given substance, as specified in Table AC-1 of Section 5155, is not exceeded at any time.ⁿ¹¹

[3] Permissible Exposure Limits

The permissible exposure limit (PEL) is the maximum permitted eight-hour time-weighted average concentration (TWA) of an airborne contaminant.ⁿ¹² The TWA is an employee's exposure to an airborne contaminant during an eight-hour workday, as calculated or measured according to a formula set out in Appendix A to Section 5155.

Employee exposure to an airborne contaminant in a single workday, as measured by the TWA, must not exceed the PEL specified for that substance in Table AC-1 of Section 5155.ⁿ¹³

A special formula applies in cases where an employee is exposed to two or more toxic substances during the course of a workday.ⁿ¹⁴

[4] Short-Term Exposure Limits

The short-term exposure limit (STEL) is a 15-minute time weighted average exposure that is not to be exceeded at any time during a workday even if the 8-hour time weighted average (TWA) is below the PEL.ⁿ¹⁵ For some substances, an averaging period other than 15-minute intervals may be specified in Table AC-1 of Section 5155. The employer must ensure that employee exposure is sufficiently controlled so that it will not exceed the STEL for the substance listed in Table AC-1 at any time during the workday.ⁿ¹⁶

In the case of substances with no ceiling limit or STEL, the employer must control employee exposure so as to prevent exposure to concentrations in excess of the PEL and to prevent harmful effects resulting from short-term exposure, including narcosis, significant eye irritation, skin irritation, irritation to the respiratory tract, and chronic or irreversible tissue change.ⁿ¹⁷

[5] Methods of Controlling Employee Exposure to Airborne Contaminants

As noted in [1], *above*, whenever exposures to airborne contaminants exceed or are expected to exceed allowable levels, the employer must take any necessary measures to control harmful exposures to the substances, in compliance with *Title 8 California Code of Regulations Section 5141*.ⁿ¹⁸

Under Section 5141, an employer must control employee exposure to harmful dusts, vapors, fumes, mists, and gases by implementing "engineering controls," "administrative controls," or providing each affected employee with a respirator that is appropriate for the expected exposure.ⁿ¹⁹ Whenever feasible, the employer must prevent harmful employee exposure to such substances by means of "engineering controls," rather than by use of either of the other methods.ⁿ²⁰ Engineering controls consist of mechanical ventilation systems (such as those described in *Title 8 California Code of Regulations Sections 5142 and 5143*), substitution of a less hazardous material or process, or isolation or enclosure of the hazard-producing operations or machinery.ⁿ²¹

If engineering controls are not feasible or do not ensure full compliance, the employer may protect employees by use of "administrative controls,"ⁿ²² which refers to the limitation of exposure by adjusting work schedules.ⁿ²³

Respirators, used in accordance with *Title 8 California Code of Regulations Section 5144*, may be used to protect employees (1) during the time necessary to install or implement feasible engineering controls, (2) when feasible engineering controls and administrative controls fail to achieve full compliance,ⁿ²⁴ and (3) in emergencies.ⁿ²⁵

Detailed regulations regarding engineering and administrative controls for particular types of hazardous exposure are set out in *Title 8 California Code of Regulations Section 5145 et seq.*

[6] Respiratory Protection Programs

[a] Respiratory Protection In General

An employer must provide respirators when it is necessary to protect the health of the employee.ⁿ²⁶ The employer must provide respirators which are suitable for the purpose intended,ⁿ²⁷ and must establish and implement procedures for their proper use.ⁿ²⁸ In addition, the employer must establish and maintain a respiratory protection program.ⁿ²⁹

Because using a respirator may place a physiological burden on employees, the employer must provide a medical evaluation to determine the employee's ability to use a respirator before the employee is fit tested or required to use the respirator.ⁿ³⁰ When respirators are used, the employer must provide for their cleaning and disinfecting, storage, inspection, and repair.ⁿ³¹

[b] Respiratory Protection for M. Tuberculosis

Former *8 Cal. Code Reg. Section 5147*, which applied specifically to m. tuberculosis, was repealed on October 18, 2004. The regulations in *8 Cal. Code Reg. § 5144*, Respiratory Protection, discussed in [a], *above*, apply to m. tuberculosis.ⁿ³²

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthDuties & RightsWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* discussion in [4], *below*.

(n2)Footnote 2. *See* discussion in [2], *below*.

(n3)Footnote 3. *See* discussion in [4], *below*.

(n4)Footnote 4. *See* *8 Cal. Code Reg. § 5155(c)*.

(n5)Footnote 5. *8 Cal. Code Reg. § 5155(e)(1)*.

(n6)Footnote 6. *8 Cal. Code Reg. § 5155(e)(2)*; *see* discussion in [5], *below*.

(n7)Footnote 7. *8 Cal. Code Reg. § 5155(f)*.

(n8)Footnote 8. *See* discussion in §§ 21.17[1][a], 21.19[9].

(n9)Footnote 9. *See* *8 Cal. Code Reg. § 5155(d)*; *see also* discussion in § 21.11 (employer's general duty to provide protective equipment).

- (n10)Footnote 10. *8 Cal. Code Reg. § 5155(b)*.
- (n11)Footnote 11. *8 Cal. Code Reg. § 5155(c)(3)*.
- (n12)Footnote 12. *8 Cal. Code Reg. § 5155(b)*.
- (n13)Footnote 13. *8 Cal. Code Reg. § 5155(c)(1)(A)*.
- (n14)Footnote 14. *See 8 Cal. Code Reg. § 5155(c)(1)(B) & app. B.*
- (n15)Footnote 15. *8 Cal. Code Reg. § 5155(b)*.
- (n16)Footnote 16. *8 Cal. Code Reg. § 5155(c)(2)(A)*.
- (n17)Footnote 17. *8 Cal. Code Reg. § 5155(c)(2)(B)*.
- (n18)Footnote 18. *8 Cal. Code Reg. § 5155(e)(2)*.
- (n19)Footnote 19. *See 8 Cal. Code Reg. § 5141*.
- (n20)Footnote 20. *8 Cal. Code Reg. § 5141(a)*.
- (n21)Footnote 21. *8 Cal. Code Reg. § 5140*.
- (n22)Footnote 22. *8 Cal. Code Reg. § 5141(b)*.
- (n23)Footnote 23. *See 8 Cal. Code Reg. § 5140*.
- (n24)Footnote 24. *See discussion in [6], below*.
- (n25)Footnote 25. *8 Cal. Code Reg. § 5141(c)*.
- (n26)Footnote 26. *8 Cal. Code Reg. § 5144(a)(2)*.
- (n27)Footnote 27. *8 Cal. Code Reg. § 5144(a)(2); see 8 Cal. Code Reg. § 5144(d)* (selection of respirators).
- (n28)Footnote 28. *8 Cal. Code Reg. § 5144(g)*.
- (n29)Footnote 29. *8 Cal. Code Reg. § 5144(a)(2); see 8 Cal. Code Reg. § 5144(c)* (requirements for respiratory protection program); *8 Cal. Code Reg. § 5144(l)* (program evaluation); *8 Cal. Code Reg. § 5144(m)* (recordkeeping).
- (n30)Footnote 30. *8 Cal. Code Reg. § 5144(e); see 8 Cal. Code Reg. § 5144(f)* (fit testing).
- (n31)Footnote 31. *8 Cal. Code Reg. § 5144(h)*.
- (n32)Footnote 32. Former *8 Cal. Code Reg. § 5147*, repealed October 18, 2004.



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part F. REGULATION OF SPECIFIC HAZARDS

2-21 California Employment Law § 21.81A

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.81A Workplace Smoking

[1] Statewide Interest in Workplace Smoking

[a] Smoking Prohibited in Covered Places of Employment

The California Legislature has declared that regulation of smoking in the workplace is a matter of statewide interest and concern.ⁿ¹ To address that concern, *Labor Code Section 6404.5* was enacted in 1994, and amended in 1996 and 2006, and is intended to prohibit the smoking of tobacco products in all ("100 percent of") enclosed places of employment in this state, as covered by the statute.ⁿ² The statute broadly provides that no employer may knowingly or intentionally permit, and no person may engage in, the smoking of tobacco products in an enclosed space at a place of employment.ⁿ³ Section 6404.5 defines "enclosed spaces" for these purposes to include lobbies, lounges, waiting areas, elevators, stairwells, and restrooms that are a structural part of the building and not specifically otherwise excluded from the definition of "places of employment" by the statute itself.ⁿ⁴ For discussion of these exclusions, see [3], *below*.

[b] Extent of Permissible Local Regulation of Workplace Smoking

The Legislature intended that the prohibition of smoking in enclosed places of employment eliminates the need of local governments to enact workplace smoking restrictions within their respective jurisdictions, and also eliminates the confusion and hardship that can result from enactment or enforcement of disparate local workplace smoking restrictions.ⁿ⁵ Therefore, local regulation of smoking of tobacco products in enclosed places of employment is suspended only for as long as, and to the extent that the 100 percent smoking prohibition of *Labor Code Section 6404.5* remains in effect. If that section is repealed or modified by subsequent legislative or judicial action so that the 100 percent smoking prohibition no longer applies to all enclosed places of employment in California, local governments will have the full right and authority to enforce previously enacted, and enact and enforce new, restrictions on the smoking of tobacco products in enclosed places of employment within their jurisdictions, including a complete ban on smoking.ⁿ⁶

The statute also provides that, notwithstanding any other provision of *Labor Code Section 6404.5*, it is the intent of the

Legislature that any area not defined as a "place of employment" under *Labor Code § 6404.5(d)* (discussed in [3], *below*), or in which the smoking of tobacco products is not regulated pursuant to *Labor Code Section 6404.5(e)* (providing that employers need not provide reasonable accommodation to smokers, or to provide breakrooms for smokers or nonsmokers), is subject to local regulation of smoking of tobacco products.ⁿ⁷

[2] Employer's Compliance

[a] Employer Cannot Knowingly or Intentionally Permit Smoking

No employer may knowingly or intentionally permit the smoking of tobacco products in an enclosed space at a place of employment.ⁿ⁸ The reasonable steps an employer may take to prevent smoking by nonemployees and preclude a finding that the employer acted knowingly or intentionally are discussed in [b], *below*; the statutory exclusions from the definition of "places of employment" are discussed in [3], *below*.

[b] Reasonable Steps to Prevent Smoking by Nonemployee

For purposes of *Labor Code Section 6404.5*, an employer who permits any nonemployee access to his or her place of employment on a regular basis has not acted knowingly or intentionally if he or she has taken the following reasonable steps to prevent smoking by a nonemployee:ⁿ⁹

1. Posted clear and prominent signs, as follows:

- a. Where smoking is prohibited throughout the building or structure, a sign stating "No smoking" must be posted at each entrance to the building or structure;
- b. Where smoking is permitted in designated areas of the building or structure, a sign stating "Smoking is prohibited except in designated areas" must be posted at each entrance to the building or structure; and

2. Has requested, when appropriate, that a nonemployee who is smoking refrain from smoking in the enclosed workplace.

For purposes of *Labor Code Section 6404.5(c)*, "reasonable steps" does not include (1) the physical ejection of a nonemployee from the place of employment, or (2) any requirement for making a request to a nonemployee to refrain from smoking, under circumstances involving a risk of physical harm to the employer or any employee.ⁿ¹⁰

[3] Exclusions From "Place of Employment"

For purposes of *Labor Code Section 6404.5*, "place of employment" does not include any of the following:ⁿ¹¹

- 1. Sixty-five percent of the guest room accommodations in a hotel, motel, or similar transient lodging establishment;
- 2. Areas of the lobby in a hotel, motel, or other similar transient lodging establishment designated for smoking by the establishment. An establishment may permit smoking in a designated lobby area that does not exceed 25 percent of the total floor area of the lobby or, if the total area of the lobby is 2,000 square feet or less, that does not exceed 50 percent of the total floor area of the lobby;ⁿ¹²
- 3. Meeting and banquet rooms in a hotel, motel, other transient lodging establishment similar to a hotel or motel, restaurant, or public convention center, except while food or beverage functions are taking place, including setup, service, and cleanup activities, or when the room is being used for exhibit

purposes; at times when smoking is not permitted in a meeting or banquet room pursuant to this paragraph, the establishment may permit smoking in corridors and prefunction areas adjacent to and serving the meeting or banquet room if no employee is stationed in that corridor or area on other than a passing basis;

4. Retail or wholesale tobacco shops and private smokers' lounges;n13

5. Cabs of motortrucks, as defined in *Vehicle Code Section 410*, or truck tractors, as defined in *Vehicle Code Section 655*, if no nonsmoking employees are present;

6. Warehouse facilities;n14

7. Gaming clubs, in which smoking is permitted by *Labor Code Section 6404.5(f)*, discussed *below*;n15

8. Bars and taverns, in which smoking is permitted by *Labor Code Section 6404.5(f)*, discussed *below*;n16

9. Theatrical production sites, if smoking is an integral part of the story in the theatrical production;

10. Medical research or treatment sites, if smoking is integral to the research and treatment being conducted;

11. Private residences, except for private residences licensed as family day care homes, during the hours of operation as family day care homes and in those areas where children are present;

12. Patient smoking areas in long-term health care facilities, as defined in *Health and Safety Code Section 1418*;

13. Breakrooms designated by employers for smoking, provided that all of the following conditions are met:

a. Air from the smoking room must be exhausted directly to the outside by an exhaust fan; air from the smoking room may not be recirculated to other parts of the building;

b. The employer must comply with any ventilation standard or other standard utilizing appropriate technology, including, but not limited to, mechanical, electronic, and biotechnical systems, adopted by the Occupational Safety and Health Standards Board or the federal Environmental Protection Agency; if both adopt inconsistent standards, the ventilation standards of the Occupational Safety and Health Standards Board shall be no less stringent than the standards adopted by the federal Environmental Protection Agency;

c. The smoking room must be located in a nonwork area where no one, as part of his or her work responsibilities, is required to enter;n17 and

d. There are sufficient nonsmoking breakrooms to accommodate nonsmokers;

14. Employers with a total of five or fewer employees, either full-time or part-time, may permit smoking if all of the following conditions are met:

a. The smoking area is not accessible to minors;

- b. All employees who enter the smoking area consent to permit smoking; no one, as part of his or her work responsibilities, may be required to work in an area where smoking is permitted;
- c. Air from the smoking area must be exhausted directly to the outside by an exhaust fan; air from the smoking area may not be recirculated to other parts of the building; and
- d. The employer must comply with any ventilation standard or other standard utilizing appropriate technology, including, but not limited to, mechanical, electronic, and biotechnical systems, adopted by the Occupational Safety and Health Standards Board or the federal Environmental Protection Agency; if both adopt inconsistent standards, the ventilation standards of the Occupational Safety and Health Standards Board shall be no less stringent than the standards adopted by the federal Environmental Protection Agency.

Labor Code Section 6404.5(d)(14), permitting small employers to allow smoking if all employees in the smoking area consent, may not be construed to (1) supersede or render inapplicable any condition or limitation on smoking areas made applicable to specific types of business establishments by any other paragraph of *Labor Code Section 6404.5(d)*, or (2) apply in lieu of any otherwise applicable paragraph of *Labor Code Section 6404.5(d)* that has become inoperative.ⁿ¹⁸ An employer who is determined by the Division to have used coercion to obtain an employee's consent to smoking by other employees under *Labor Code Section 6404.5(d)(14)* or who has required an employee to work in the smoking area shall be subject to the penalty provisions of *Labor Code Section 6427*.ⁿ¹⁹

The provisions of *Labor Code Section 6404.5(d)(13)* and *(14)* are not to be construed to require employers to provide reasonable accommodation to smokers, or to provide breakrooms for smokers or nonsmokers.ⁿ²⁰

[4] Penalties

Any violation of the prohibition set forth in *Labor Code Section 6404.5(b)* is an infraction punishable by a fine not to exceed one hundred dollars (\$100) for a first violation, two hundred dollars (\$200) for a second violation within one year, and five hundred dollars (\$500) for a third and for each subsequent violation within one year. This penalty is to be enforced by local law enforcement agencies including, but not limited to, local health departments, as determined by the local governing body.ⁿ²¹

[5] Complaints to Division of Occupational Safety and Health

Notwithstanding *Labor Code Section 6309*, the Division of Occupational Safety and Health is not required to respond to any complaint regarding the smoking of tobacco products in an enclosed space at a place of employment, unless the employer has been found guilty pursuant to *Labor Code Section 6404.5(j)* of a third violation of *Labor Code Section 6404.5(b)* within the previous year.ⁿ²²

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthCompliance & DefensesLabor & Employment LawOccupational Safety & HealthDuties & RightsWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 6404.5(a)*.

(n2)Footnote 2. *Lab. Code § 6404.5(a).*

(n3)Footnote 3. *Lab. Code § 6404.5(b).*

(n4)Footnote 4. *Lab. Code § 6404.5(b); see Lab. Code § 6404.5(d).*

(n5)Footnote 5. *Lab. Code § 6404.5(a), (g).*

(n6)Footnote 6. *Lab. Code § 6404.5(i).*

(n7)Footnote 7. *Lab. Code § 6404.5(a), (i).*

(n8)Footnote 8. *Lab. Code § 6404.5(b).*

(n9)Footnote 9. *Lab. Code § 6404.5(c).*

(n10)Footnote 10. *Lab. Code § 6404.5(c).*

(n11)Footnote 11. *Lab. Code § 6404.5(d).*

(n12)Footnote 12. For purposes of this paragraph, "lobby" means the common public area of an establishment in which registration and other similar or related transactions, or both, are conducted and in which the establishment's guests and members of the public typically congregate. *Lab. Code § 6404.5(d)(2).*

(n13)Footnote 13. For purposes of this paragraph: (1) "Private smokers' lounge" means any enclosed area in or attached to a retail or wholesale tobacco shop that is dedicated to the use of tobacco products, including, but not limited to, cigars and pipes. (2) "Retail or wholesale tobacco shop" means any business establishment the main purpose of which is the sale of tobacco products, including, but not limited to, cigars, pipe tobacco, and smoking accessories. *Lab. Code § 6404.5(d)(4).*

(n14)Footnote 14. For purposes of this paragraph, "warehouse facility" means a warehouse facility with more than 100,000 square feet of total floor space, and 20 or fewer full-time employees working at the facility, but does not include any area within such a facility that is utilized as office space. *Lab. Code § 6404.5(d)(6).*

(n15)Footnote 15. For purposes of this paragraph, "gaming club" means any gaming club as defined in former *Bus. & Prof. Code § 19802* or bingo facility as defined in *Penal Code § 326.5* that restricts access to minors under 18 years of age. *Lab. Code § 6404.5(d)(7).*

(n16)Footnote 16. For purposes of this paragraph, "bar" or "tavern" means a facility primarily devoted to the serving of alcoholic beverages for consumption by guests on the premises, in which the serving of food is incidental. "Bar or tavern" includes those facilities located within a hotel, motel, or other similar transient occupancy establishment. However, when located within a building in conjunction with another use, including a restaurant, "bar" or "tavern" includes only those areas used primarily for the sale and service of alcoholic beverages. "Bar" or "tavern" does not include the dining areas of a restaurant, regardless of whether alcoholic beverages are served therein. *Lab. Code § 6404.5(d)(7).*

(n17)Footnote 17. For purposes of this paragraph, "work responsibilities" does not include any custodial or maintenance work carried out in the breakroom when it is unoccupied. *Lab. Code § 6404.5(d)(13)(C).*

(n18)Footnote 18. *Lab. Code § 6404.5(d)(14).*

(n19)Footnote 19. *Lab. Code § 6404.5(d)(14)(B).*

(n20)Footnote 20. *Lab. Code § 6404.5(e).*

(n21)Footnote 21. *Lab. Code § 6404.5(j).*

(n22)Footnote 22. *Lab. Code § 6404.5(k).*



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
 CHAPTER 21 Occupational Safety and Health Regulation
 Part F. REGULATION OF SPECIFIC HAZARDS

2-21 California Employment Law § 21.82

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.82 Confined Spaces

Cal/OSHA regulations provide two separate sets of safety requirements for confined spaces. Confined space regulations for construction operations, agricultural operations, marine terminal operations, telecommunication manholes and unvented vaults, and grain handling facilities are set forth in *Title 8, California Code of Regulations, Section 5158*; all other confined space operations are governed by *Title 8, California Code of Regulations, Section 5157*.ⁿ¹

Generally, for purposes of these regulations, a confined space is one that has limited means of entry and exit and contains a potential for dangerous conditions to develop (such as fire, explosion, toxic gases, etc.).ⁿ² A confined space condition may exist or develop in locations such as silos, tanks, vats, vessels, tankers, boilers, compartments, ducts, sewers, pipelines, vaults, bins, tubs, and pits that an employee may be assigned to clean, inspect, repair, or construct.ⁿ³ A confined space hazard is particularly dangerous because the confined space condition may not be readily apparent to the senses, i.e., may not be visible or emit any detectable odor, and therefore must be anticipated by the employer and employees. Too often an employee may be overcome or asphyxiated by a confined space hazard, and rescuers without proper respiratory equipment and confined space procedures often are overcome and killed as well.

Before any employee is permitted to enter a confined space, the employer must develop and implement written, understandable operating and rescue procedures that must be provided to employees and used for employee training.ⁿ⁴ In addition, the employer must develop pre-entry procedures, in accordance with *Title 8 California Code of Regulations Section 5157* or *5158*, which may include a requirement that employees obtain a permit before entering a hazardous confined space.

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral OverviewLabor & Employment LawOccupational Safety & HealthCompliance & DefensesLabor & Employment LawOccupational Safety & HealthDuties & Rights

FOOTNOTES:

(n1)Footnote 1. *8 Cal. Code Reg. § 5156(b).*

(n2)Footnote 2. *See 8 Cal. Code Reg. §§ 5157(b), 5158(b)(1).*

(n3)Footnote 3. *See 8 Cal. Code Reg. §§ 5156(a), 5157(b).*

(n4)Footnote 4. *See 8 Cal. Code Reg. §§ 5157, 5158.*



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part F. REGULATION OF SPECIFIC HAZARDS

2-21 California Employment Law § 21.83

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.83 Repetitive Motion Injury

[1] Scope and Application

Cal/OSHA regulations require an employer to institute a program designed to minimize repetitive motion injuries (RMIs) whenever two or more of its employees performing the same repetitive task have reported RMIs within a 12-month period, provided that the "triggering" RMIs are predominately work-related, the employees incurring the RMIs were performing a job, process, or operation of identical work activity and have been objectively diagnosed as having musculoskeletal injuries by a licensed physician.¹

[2] Program Designed to Minimize RMIs

The program to minimize RMIs must consist of each the following:²

- (1) An evaluation of each job process and operation of identical work activity for exposures that have caused RMIs.
- (2) Correction, or minimization to the extent feasible, of exposures. In controlling exposures causing RMIs, the employer must consider engineering controls such as work station redesign, adjustable fixtures and tool redesign, and administrative controls, such as job rotation, work pacing and work breaks.
- (3) Employee training, including explanations of exposures associated with RMIs, symptoms and consequences of RMIs, importance of reporting RMIs, and methods used to minimize RMIs.

[3] Satisfaction of Employer's Obligation

The employer is deemed to have satisfied its obligation to institute a program to minimize RMIs if it implements the three measures identified in the previous section, unless there is a measure known but not taken by the employer that is substantially certain to cause a greater reduction in RMIs without imposing additional unreasonable costs.³

Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthAdministrative ProceedingsGeneral OverviewLabor & Employment LawOccupational Safety & HealthCompliance & DefensesLabor & Employment LawOccupational Safety & HealthDuties & Rights

FOOTNOTES:

(n1)Footnote 1. 8 *Cal. Code Reg. § 5110(a), (b); see Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75 *Cal. App. 4th* 1315, 1325-1326, 90 *Cal. Rptr. 2d* 54 .

(n2)Footnote 2. 8 *Cal. Code Reg. § 5110(b)*.

(n3)Footnote 3. 8 *Cal. Code Reg. § 5110(c)*.



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Part F. REGULATION OF SPECIFIC HAZARDS

2-21 California Employment Law § 21.84

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.84 APPENDIX--Topical List of Safety Orders and Related Statutes

[1] Aerial Passenger Tramways

Aerial passenger tramway safety. *Lab. Code § 7340 et seq.*; *8 Cal. Code Reg. § 3150 et seq.*

[2] Boilers, Tanks, and Pressure Vessels

Boilers and fired pressure vessels. *Lab. Code § 7620 et seq.*; *8 Cal. Code Reg. § 750 et seq.*

Unfired pressure vessels (tanks). *Lab. Code § 7620 et seq.*; *8 Cal. Code Reg. § 450 et seq.*

[3] Construction

General provisions and definitions. *8 Cal. Code Reg. § 1502 et seq.*

Access and egress to construction site. *8 Cal. Code Reg. §§ 1629, 1630*

Bins, bunkers, hoppers, and material storage. *8 Cal. Code Reg. §§ 1548, 1549*

Construction elevators. *Lab. Code § 7200 et seq.*

Demolition. *8 Cal. Code Reg. § 1734 et seq.*

Dusts, fumes, mists, vapors, and gases. *8 Cal. Code Reg. § 1528 et seq.*

Electrical requirements for construction work. *8 Cal. Code Reg. § 1760*

Erection and construction procedures. *Lab. Code § 7250 et seq.; 8 Cal. Code Reg. § 1709 et seq.*

Excavations, trenches, and earthwork. *Lab. Code §§ 6705-6707; 8 Cal. Code Reg. § 1539 et seq.*

Explosives on construction sites. *Lab. Code § 6710*

Fire protection and prevention. *8 Cal. Code Reg. § 1920 et seq.*

Floors, roofs, walls, openings. *Lab. Code § 7100 et seq.; 8 Cal. Code Reg. §§ 1632, 1633, 1635*

Haulage and earth-moving. *8 Cal. Code Reg. § 1590 et seq.*

Helicopter operations. *8 Cal. Code Reg. § 1900 et seq.*

Hoists. *8 Cal. Code Reg. § 1604 et seq.*

Ladders. *8 Cal. Code Reg. § 1675 et seq.*

Miscellaneous construction tools and equipment. *8 Cal. Code Reg. § 1693 et seq.*

Nonionizing radiation. *8 Cal. Code Reg. § 1801*

Oxygen, acetylene, and fuel gas. *8 Cal. Code Reg. § 1740 et seq.*

Pile driving. *8 Cal. Code Reg. §§ 1600, 1601*

Powder-actuated tools. *8 Cal. Code Reg. § 1684 et seq.*

Railings, ramps, runways, stairwells, and stairs. *8 Cal. Code Reg. § 1620 et seq.*

Rock drilling. *8 Cal. Code Reg. § 1538*

Roofing operations and equipment. *8 Cal. Code Reg. § 1723 et seq.*

Safety belts and nets. *8 Cal. Code Reg. § 1669 et seq.*

Scaffolding. *Lab. Code § 7150 et seq.; 8 Cal. Code Reg. § 1635.1 et seq.*

Vehicles, traffic control, flaggers, barricades, and warning signs at construction sites. *8 Cal. Code Reg. §§ 1597-1599*

Water, construction work over or near. *8 Cal. Code Reg. §§ 1602, 1603*

[4] Cranes and Hoisting Equipment

Cranes, derricks, boom-type excavators, and other hoisting equipment. *Lab. Code §§ 6704, 7370 et seq.; 8 Cal. Code Reg. § 4884 et seq.*

[5] Diving Operations

Diving operations generally. *8 Cal. Code Reg. § 6050 et seq.*

Commercial diving operations. *8 Cal. Code Reg. § 6059 et seq.*

[6] Electrical Safety

High-voltage electrical safety. *8 Cal. Code Reg. § 2700 et seq.*

Low-voltage electrical safety. *8 Cal. Code Reg. § 2300 et seq.*

[7] Elevators

Elevator safety. *Lab. Code § 7300 et seq.; 8 Cal. Code Reg. § 3000 et seq.*

[7A] Ergonomics

Repetitive motion injury. *8 Cal. Code Reg. § 5110*

[8] General Machinery and Equipment**[a] General Machine Safety**

Power transmission equipment, prime movers, machines, and machine parts. *8 Cal. Code Reg. § 3940 et seq.*

Compressed gas and air equipment. *8 Cal. Code Reg. § 4649 et seq.*

[b] Points of Operation and Other Hazardous Parts of Machinery

Scope and general definitions. *8 Cal. Code Reg. § 4184 et seq.*

Chemical industry machines. *8 Cal. Code Reg. § 4565 et seq.*

Compaction equipment. *8 Cal. Code Reg. § 4350 et seq.*

Cotton gins and seed cotton processing machines. *8 Cal. Code Reg. § 4640 et seq.*

Die-casting machines. *8 Cal. Code Reg. § 4261 et seq.*

Food and tobacco machinery. *8 Cal. Code Reg. § 4530 et seq.*

Laundry and dry cleaning equipment. *8 Cal. Code Reg. § 4480 et seq.*

Leather and composition goods machines. *8 Cal. Code Reg. § 4510 et seq.*

Metalworking machines. 8 Cal. Code Reg. § 4226 *et seq.*

Paper converting and printing machines. 8 Cal. Code Reg. § 4431 *et seq.*

Plastic processing machinery. 8 Cal. Code Reg. §§ 4600, 4601

Power-operated presses. 8 Cal. Code Reg. § 4189 *et seq.*

Pulp, paper, and paperboard mills. 8 Cal. Code Reg. § 4401 *et seq.*

Refuse and trash collection equipment. 8 Cal. Code Reg. § 4342 *et seq.*

Rubber and composition working machines. 8 Cal. Code Reg. § 4580 *et seq.*

Stone, clay, and glass working machines. 8 Cal. Code Reg. §§ 4625, 4626

Textile machinery. 8 Cal. Code Reg. § 4456 *et seq.*

Woodworking machines and equipment. 8 Cal. Code Reg. § 4296 *et seq.*

[9] General Physical Conditions and Structures

General provisions. 8 Cal. Code Reg. § 3200 *et seq.*

Definitions. 8 Cal. Code Reg. § 3207

Access, work space, and work areas. 8 Cal. Code Reg. § 3270 *et seq.*

Powered platforms for exterior building maintenance. 8 Cal. Code Reg. § 3293 *et seq.*

Special design requirements. 8 Cal. Code Reg. § 3241 *et seq.*

Standard specifications for places of employment. 8 Cal. Code Reg. § 3209 *et seq.*

Window cleaning. *Lab. Code* § 7325 *et seq.*; 8 Cal. Code Reg. § 3281 *et seq.*

[10] General Plant Equipment and Special Operations

Abrasive wheels. 8 Cal. Code Reg. § 3575 *et seq.*

Agricultural operations. 8 Cal. Code Reg. § 3436 *et seq.*

Automotive lifts. 8 Cal. Code Reg. § 3541 *et seq.*

Electric welding. 8 Cal. Code Reg. § 4850 *et seq.*

Engines and compressors. *Lab. Code* §§ 6701-6703; 8 Cal. Code Reg. § 3511 *et seq.*

Gas systems for welding and cutting. 8 Cal. Code Reg. § 4794 *et seq.*

Hand and portable powered tools and equipment. 8 Cal. Code Reg. § 3555 et seq.

Marine terminal operations. Lab. Code § 7600 et seq.; 8 Cal. Code Reg. § 3459 et seq.

Tree work, maintenance, or removal. 8 Cal. Code Reg. § 3420 et seq.

Vats, pans, bins, bunkers, hoppers, and similar containers and vessels. 8 Cal. Code Reg. § 3480 et seq.

[11] General Safe Practices and Personal Protection

Fire protection. 8 Cal. Code Reg. § 6150 et seq.

Labor camps. 8 Cal. Code Reg. § 3350

Miscellaneous safe practices. 8 Cal. Code Reg. § 3300 et seq.

Noise exposure and protection. 8 Cal. Code Reg. § 5095 et seq.

Personal protective clothing and equipment for firefighters. 8 Cal. Code Reg. § 3401 et seq.

Personal safety devices and safeguards. 8 Cal. Code Reg. § 3380 et seq.

Sanitation. Lab. Code § 6712; 8 Cal. Code Reg. § 3360 et seq.

[12] Hazardous Materials and Substances

Confined space hazards. 8 Cal. Code Reg. § 5156 et seq.

Dusts, fumes, mists, vapors, and gases. 8 Cal. Code Reg. § 5139 et seq.

Explosives and pyrotechnics. Lab. Code §§ 6710, 6712; 8 Cal. Code Reg. § 5327 et seq.

Flammable liquids, gases, and vapors. Lab. Code § 7800 et seq.; 8 Cal. Code Reg. § 5415 et seq.

Fumigation. 8 Cal. Code Reg. § 5221 et seq.

Labeling of substances. 8 Cal. Code Reg. § 5226 et seq.

Other hazardous substances and processes. 8 Cal. Code Reg. § 5160 et seq.

Radiation and radioactivity. 8 Cal. Code Reg. § 5075 et seq.

Regulated carcinogens. 8 Cal. Code Reg. § 5200 et seq.

[13] Logging and Sawmill Operations

Logging and sawmill safety orders. 8 Cal. Code Reg. § 6248 et seq.

[14] Mining and Tunneling Operations

Mine and tunnel safety. *Lab. Code §§ 7500, 7950 et seq.*; *8 Cal. Code Reg. §§ 6950 et seq., 8400 et seq.*

[15] Mobile Equipment and Auxiliaries

Amusement rides. *Lab. Code § 7900 et seq.*; *8 Cal. Code Reg. § 3900 et seq.*

Elevating work platforms and aerial devices. *8 Cal. Code Reg. § 3636 et seq.*

Industrial railroads. *8 Cal. Code Reg. § 3730 et seq.*

Industrial trucks, tractors, haulage vehicles, and earth-moving equipment. *8 Cal. Code Reg. § 3649 et seq.*

Mobile ladder stands and scaffolds (towers). *8 Cal. Code Reg. § 3620 et seq.*

Transportation of employees and materials. *8 Cal. Code Reg. § 3700 et seq.*

Gantry trucks (straddle carriers). *8 Cal. Code Reg. § 3801 et seq.*

[16] Petroleum Operations

Drilling and production. *8 Cal. Code Reg. § 6500 et seq.*

Refining, transportation, and handling. *Lab. Code § 7850 et seq.*; *8 Cal. Code Reg. § 6750 et seq.*

[17] Railroad Operations

Jurisdiction of Division and Public Utilities Commission. *Lab. Code §§ 6800-6802.*

Operation personnel. *Lab. Code § 6900 et seq.*

Safety devices and trains. *Lab. Code § 6950 et seq.*

[18] Ship Building, Repairing, and Breaking

Ship building, repairing, and breaking safety. *8 Cal. Code Reg. § 8345 et seq.*

[19] Telecommunications Operations

Telecommunications safety. *8 Cal. Code Reg. § 8600 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawOccupational Safety & HealthGeneral Overview



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part F. REGULATION OF SPECIFIC HAZARDS

2-21 California Employment Law §§ 21.85 through 21.89

AUTHOR: By Suzanne P. Marria, J.D.

[Reserved]

§§ 21.85[Reserved]



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
CHAPTER 21 Occupational Safety and Health Regulation
Part G. BIBLIOGRAPHY

2-21 California Employment Law § 21.90

AUTHOR: By Suzanne P. Marria, J.D.

§ 21.90 Legal Texts

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Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral Overview



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES
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2-21 California Employment Law § 21.91

AUTHOR: By Suzanne P. Marria, J.D.

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Legal Topics:

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

Labor & Employment LawOccupational Safety & HealthGeneral Overview



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DIVISION II EMPLOYEE ILLNESSES AND INJURIES

Chapters 22 - 29 RESERVED

2-22 - 29 California Employment Law Chapters 22 - 29

RESERVED

Chapters 22 - 29 RESERVED



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES

CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees

2-30 California Employment Law 30.syn

AUTHOR: By Mary Vail, J.D.

§ 30.syn Synopsis to Chapter 30: Employers' Tort Liability to Third Parties for Conduct of Employees

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§ 30.02 Employer's Own Negligence or Fault as Basis for Liability

[1] Conduct Authorized, Directed, or Ratified by Employer

[a] Authorization or Direction

[b] Ratification

[2] Negligent Hiring or Retention of Unsuitable Employee

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[5] Negligent Entrustment

[6] Employer as Internet Provider

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[3] Employees and Agents Distinguished

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[5] Borrowed Employees: Special and Dual Employments

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[d] Commercial Traveler Rule

[e] Premises Line Rule

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[4] Collateral Negligence

§ 30.11 Respondeat Superior and Proposition 51

§§ 30.12 through 30.19 [Reserved]

§ 30.20 Legal Texts

§ 30.21 Encyclopedias

§ 30.22 Law Reviews and Periodicals

By Mary Vail, J.D.n*

FOOTNOTES:

(n1)Footnote *. Ms. Vail is a consultant on employee rights, labor law, and sex discrimination in Oakland, California.

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California Employment Law

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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES

CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees

2-30 California Employment Law Scope

AUTHOR: By Mary Vail, J.D.

Scope

By Mary Vail, J.D.n* SCOPE

This chapter discusses an employer's tort liability to third parties (that is, persons other than the employer or its employees) based on the conduct of its employees. The chapter discusses tort theories involving fault on the part of the employer (such as authorization or ratification, negligent hiring or retention, and negligent supervision or training), as well as vicarious liability under the doctrine of respondeat superior. The chapter also discusses the rules governing whether an individual will be deemed an employee or an independent contractor for purposes of imposing tort liability on an alleged employer. Finally, the chapter covers employer defenses to third-party actions and indemnity issues.

For discussion of contractual liability of employers for transactions entered into by employees with third parties, see Chapter 31. For discussion of liability of employers (and coemployees) for work-related injuries sustained by employees, see Chapter 20.

For forms for use in actions by third parties against employers for damages caused by employees, see California Forms of Pleading and Practice, Chapter 248, *Employer's Liability for Employee's Torts* (Matthew Bender).

For discussion of the liability of public entity employers and their employees to third parties based on the acts or omissions of public employees, see Levy, Golden & Sacks, *California Torts*, Chapter 60 (Matthew Bender).

FOOTNOTES:

(n2)Footnote *. Ms. Vail is a consultant on employee rights, labor law, and sex discrimination in Oakland, California.

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California Employment Law

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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees
Part A. TEXT

2-30 California Employment Law § 30.01

AUTHOR: By Mary Vail, J.D.

§ 30.01 Theories of Direct and Vicarious Employer Liability

An employer may be liable in tort to third persons for the conduct of employees on either of two bases. First, an employer is liable if the employer's own conduct constitutes a tort. For example, an employer may have been negligent in its selection, training, or supervision of employees and agents, or in its promulgation of work rules and business procedures that created a risk of harm to others.ⁿ¹ Tortious conduct engaged in by employees in response to employer direction or prior authorization is another form of liability deemed to originate from the employer's own conduct.ⁿ² Similarly, tortious conduct of an employee followed by ratification of that conduct by the employer makes the employee's act the employer's own, and liability imposed for ratified acts is properly considered direct rather than vicarious.ⁿ³

Second, even if the employer is not directly at fault, the employer may be vicariously liable under the doctrine of respondeat superior for the torts of his or her employees or agents committed within the scope of the employment or agency.ⁿ⁴

Direct liability and vicarious liability under the doctrine of respondeat superior are not mutually exclusive. Depending on the facts in a particular case, the third-party plaintiff may be able to recover under either or both theories.ⁿ⁵ However, if liability is predicated on respondeat superior, a determination of the nonliability of the employee exonerates the employer also.ⁿ⁶ In contrast, an employer may be directly liable if its own conduct is actionable, even if vicarious liability is precluded by the nonliability of the employee.ⁿ⁷

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployer LiabilityGeneral OverviewTortsVicarious LiabilityGeneral
OverviewTortsVicarious LiabilityEmployersGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See, e.g., Underwriters Ins. Co. v. Purdie* (1983) 145 Cal. App. 3d 57, 69, 193 Cal. Rptr. 248 (negligent hiring); *see also* discussion in § 30.02[2], [3].

(n2)Footnote 2. *See, e.g., Jameson v. Gavett* (1937) 22 Cal. App. 2d 646, 651-652, 71 P.2d 937 ; *see also* discussion in § 30.02[1][a].

(n3)Footnote 3. *See, e.g., Alhino v. Starr* (1980) 112 Cal. App. 3d 158, 174-175, 169 Cal. Rptr. 136 ; *see also* discussion in § 30.02[1][b].

(n4)Footnote 4. *See, e.g., Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal. 3d 962, 967, 227 Cal. Rptr. 106, 719 P.2d 676 ; *Inter Mountain Mortgage, Inc. v. Sulimen* (2000) 78 Cal. App. 4th 1434, 1439-1440, 93 Cal. Rptr. 2d 790 ; *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal. App. 3d 608, 617-618, 124 Cal. Rptr. 143 . For discussion of vicarious liability generally, *see* § 30.03. For discussion of when an employee's acts are within the scope of employment, *see* § 30.05.

(n5)Footnote 5. *See Srithong v. Total Investment Co.* (1994) 23 Cal. App. 4th 721, 726-728, 28 Cal. Rptr. 2d 672 (hirer of independent contractor may be both directly and vicariously liable); *see also Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 950-951, 171 Cal. Rptr. 95 .

(n6)Footnote 6. *Korens v. R.W. Zukin Corp.* (1989) 212 Cal. App. 3d 1054, 1062, 261 Cal. Rptr. 137 .

(n7)Footnote 7. *Lehmuth v. Long Beach Unified Sch. Dist.* (1960) 53 Cal. 2d 544, 2 Cal. Rptr. 279, 348 P.2d 887 ; *see* discussion in § 30.02[1][a].



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees
Part A. TEXT

2-30 California Employment Law § 30.02

AUTHOR: By Mary Vail, J.D.

§ 30.02 Employer's Own Negligence or Fault as Basis for Liability

[1] Conduct Authorized, Directed, or Ratified by Employer

[a] Authorization or Direction

An employer's negligent exercise of its authority to direct its enterprise and employees can generate liability for the employer based on the employer's own fault.ⁿ¹ For example, particular employer policies or procedures may be insufficient or inadequate or otherwise represent a danger to third persons. In such a case, the employer may be directly liable for injuries caused by the policy or procedure, whether or not a particular employee is negligent in its implementation.ⁿ²

In *Coffee v. McDonnell-Douglas*,ⁿ³ an employee doctor relied on inadequate employer procedures regarding blood test results in authorizing the employment of a man who had a significant disability. The jury absolved the doctor, but found the employer to be directly liable.ⁿ⁴ In *McGuigan v. Southern Pacific*,ⁿ⁵ the employer misrepresented the employee's job responsibilities in obtaining a doctor's termination of sick leave. The court found that whether or not the doctor was an employee was irrelevant because the employer was directly liable because of its incorrect description of the duties of the job.^{n5.1}

An employer may also be directly liable if the employee is following the express directions of the employer.^{n5.2} In *Jensen v. Southern Pacific*,^{n5.3} a train was being operated by an employee engineer at a speed and according to a schedule determined by the employer railroad when it struck a motor vehicle. Under these circumstances, the jury could absolve the engineer of liability, thereby precluding the imposition of vicarious liability on the railroad, without exonerating the railroad for its own negligence.^{n5.4}

[b] Ratification

An employer's ratification of employee conduct can be viewed as a postconduct authorization of the employee's acts. By ratifying an employee's previously committed torts, the employer makes the employee's tortious conduct the employer's

own conduct.ⁿ⁶ If an employee's tort, negligent or intentional, is ratified by the employer *and* is committed within the course and scope of employee's employment, the employer is subject to both direct and vicarious liability.ⁿ⁷

Furthermore, employer ratification of an employee's intentional torts may potentially render the employer liable for punitive damages.ⁿ⁸ However, counsel should note that, although (as discussed below) retention of an employee may support a finding of ratification of the employee's acts for the purposes of imposing liability for compensatory damages, it may not be sufficient by itself to impose punitive damages on the employer.ⁿ⁹ For discussion of the recovery of punitive damages from employers based on the conduct of employees, see § 30.07.

Various forms of employer conduct, including retention of the tortfeasor in employment, may constitute direct and circumstantial evidence of ratification. In one case,ⁿ¹⁰ for example, plaintiff had a series of verbal policy disputes with defendant union's staff business agents. The agents threatened plaintiff at the union hall, and subsequently assaulted plaintiff away from the union premises. Plaintiff reported the assault to union officials, unsuccessfully pursued internal union grievance procedures, and subsequently commenced a civil suit against the union. Following the commencement of plaintiff's civil action, plaintiff had difficulty obtaining job referrals through the union hiring hall, and his principal witness in the civil action was himself assaulted and then expelled from the union. Throughout the proceedings, the business agents who had assaulted plaintiff remained in the defendant union's employ. The court of appeal held that by retaining a wrongdoer in service with full knowledge of the employee's wrongful conduct, the employer ratified the employee's torts.ⁿ¹¹ Moreover, ratification was also shown by the union's inactive pursuit of plaintiff's internal grievance, reduced job referrals to plaintiff, and the assault and expulsion from the union of plaintiff's witness.ⁿ¹²

Other cases have also relied on the employer's retention of the tortfeasor in its employ, despite knowledge of the tortious conduct, to support a finding that the employer ratified the conduct.^{n12.1} On the other hand, even if the employer retains the tortfeasor in its employ, the employer may behave in such a way as to make clear it did not ratify the tortious conduct.ⁿ¹³

In *Plancarte v. Guardsmark*, ^{n13.1} the court found that the employer's payment of the employee's attorney fees in a action by a third party against the employer and employee based on the employee's conduct did not logically constitute the employer's ratification of the employee's allegedly wrongful acts. If the employee could show his acts were not tortious, no liability would attach to the employer at all, under the respondeat superior doctrine or for negligent hiring/supervision. It was therefore in the employer's interest that the employee have adequate and reliable representation. If the employee were not individually represented, there could be a greater likelihood of poor self-representation or default, making the employer's defense of the case significantly more difficult. The fact that the employer pursued and ultimately prevailed on an alternate defense theory, *i.e.*, nonliability under respondeat superior for an employee's sexual assault, did not restrict it from having all available defenses well advocated. Additionally, *Labor Code Section 2802* required the employer to indemnify the employee for all the employee necessarily expended or lost in direct consequence of the discharge of his duties, which obligated the employer to pay any judgment entered against the employee for conduct arising out of the employment and to defend the employee when sued by a third person for such conduct.^{n13.2} Acts necessary for an employee's comfort and health while at work, including using the bathroom during a workshift, during which the allegedly tortious conduct occurred, even though personal and not direct acts of service to the employer, did not take the employee outside the scope of the employment. Although the nature of the employee's conduct against the third party as alleged in her complaint placed it outside the scope of his employment, there was no certainty the third party would succeed in proving her allegations. Given the reasonable possibility that a jury could find that the employee's conduct toward the third party while performing acts for his personal comfort during the course of his employment was not tortious, the employer could understandably elect to provide him a defense rather than await the outcome of the trial.^{n13.3} Finally, the employee denied any wrongful acts to the employer and, insofar as he pled *nolo contendere* to a criminal charge, did not admit wrongful acts via a guilty plea. The employer also suspended the employee immediately after the incident and terminated him after the criminal conviction, which militated against ratification of the acts he allegedly committed.^{n13.4}

[2] Negligent Hiring or Retention of Unsuitable Employee

An employer can be liable to a third party for the employer's negligence in hiring or retaining an employee who is incompetent or unfit if the employee tortiously injures the third party.ⁿ¹⁴ Liability under this theory requires more than just the existence of an employer-employee relationship. In the case of negligent hiring, the employee must, prior to the hiring, have had reason to believe that an undue risk of harm to others would exist because of the employment.ⁿ¹⁵

In *Underwriters Ins. Co. v. Purdie*,ⁿ¹⁶ defendant's employee shot a third party following a verbal argument. The third party commenced his action against defendant on a negligent hiring/negligent supervision theory, and alleged, among other things, that the employer knew before hiring the employee that the employee was unfit for any public contact job because of his vicious and violent character. In a declaratory relief action brought by the defendant's liability insurer, the court of appeal held that the third party had stated a cause of action against the defendant-employer that was covered by the insurance policy, based on the negligent hiring theory.^{n16.1}

On the other hand, in *Flores v. AutoZone West, Inc.*,^{n16.2} the appellate court upheld the grant of summary judgment to the employer on the plaintiff's claim that the employer was liable for negligently hiring an employee with a juvenile record to work in a position in which he interacted with customers, which resulted in the employee's hitting the plaintiff, who was a customer, in the head with a metal pipe. Although the employee had a prior juvenile delinquency record, the employer had no legal duty to conduct the sort of thorough background checks, or administer the sort of personality screening tests, that might have yielded the information about his violent nature. Further, the confidentiality of juvenile records is protected by law,ⁿ¹⁷ and recognizing a duty on the part of an employer to uncover those records would be inconsistent with that confidentiality policy. There were also no triable issues of fact relating to whether the employer was negligent in retaining the employee despite his record of prior discipline, because the employee had only one incident of misconduct toward a customer prior to the incident at issue, which occurred fully three years earlier than the instant altercation, and there was no evidence of violence. While an employer might reasonably choose to terminate an employee who was rude to even one customer, it did not follow that an employer necessarily acted unreasonably if it chose not to do so. Finally, there were no triable issues of fact that the employer was negligent in its training of the employee, because there was no reasonable basis to conclude that the employee's act of criminally assaulting a customer was the result of the employer's failure to make clear that such conduct would not be considered an acceptable employee act.

For the plaintiff to prevail on a negligent hiring or retention theory, he or she must establish that the employer knew or should have known of the employee's unsuitable characteristics before the employee injured the third party.^{n17.1} For example, in *Golden West Broadcasters, Inc. v. Superior Court*,ⁿ¹⁸ plaintiff alleged that defendant's broadcast technician, who had assaulted plaintiff in a bar, had "violent propensities" of which defendant was aware. In support of its summary judgment motion, defendant presented declarations from the employee's supervisor stating that the employee was "efficient and hardworking" and had not demonstrated any propensity towards fighting or excessive drinking of alcoholic beverages. Plaintiff abandoned the negligent hiring theory on appeal, but the court indicated that bare allegations based on plaintiff's own experience with the tortfeasor will not establish the employer's knowledge, a prerequisite to liability based on negligence in hiring.ⁿ¹⁹ An employer is liable when it knew or should have known that hiring that employee posed a particular risk of harm and that harm occurred.^{n19.1}

Once the employer-employee relationship ends, the employer no longer has a duty of care to third parties for conduct of a former employee occurring after the end of the employer-employee relationship. For example, an employer does not owe a plaintiff a duty of care in a negligent hiring and retention action for an injury or other harm inflicted by a former employee on the plaintiff, even though the employee initially met the plaintiff while employed by the employer.^{n19.2}

An employer concerned with limiting its direct liability under the negligent hiring cause of action should exercise care in designing employee selection procedures, and then take reasonable steps to be sure to adhere to the proscribed procedures. Although an employer must exercise care in employee selection and retention, the employer must also be

careful not to devise and apply selection standards that violate an employee's or job applicant's privacy rights, that discriminate on the basis of race, color, sex, or other prohibited bases, or that cause overbroad inquiry into a job applicant's background. For discussion of prohibitions on discrimination against job applicants and employees generally, see Chapters 40-44. For discussion of job applicants' and employees' rights to privacy in the employment context, *see* Chapters 50-51.

The negligent hiring theory of liability applies to the selection of independent contractors, as well as to the hiring of employees.²⁰ For discussion of the potential liability of the hirer of an independent contractor, see § 30.10.

■ CONSULTANT'S COMMENT:

The *Capital Cities* case^{20.1} presents a number of issues for employment law practitioners. The facts describe extreme conduct by an employee of Capital Cities. There can be a tendency under such circumstances to focus upon a means to find a remedy for the perceived wrong rather than upon a means to craft an analytical rule that is true to the letter and spirit of the legal authorities from which the rule is derived. Here, it is possible that no reviewing court would have reached a different conclusion--that Doe was an applicant for employment and that Capital Cities was liable for the sexually harassing conduct of its casting director. In this instance, however, it is arguable that the appellate panel fashioned far broader rules of liability than were strictly necessary or justified.

For example, in holding that Doe was an applicant, the panel cited to an already broad definition found in the regulations under the FEHA and stated that "[a]n applicant is any individual who otherwise indicates a specific desire to an employer ... to be considered for employment." The opinion makes no mention of a variety of lawful restrictions that employers may place on the application process which yield a narrower definition of "applicant." These lawful restrictions include, among others: (1) minimum age rules for minors who are not permitted to work near certain types of machinery; (2) time limits that obligate applicants to make applications only on certain days of the week or only during certain hours of the day; and (3) reasonable skill requirements, such as accounting skills for an accounting position. Again, Doe may have been an applicant to Capital Cities even under a definition of greatly heightened specificity. However, it is confusing (and contrary to considerable authority) to depict every unsolicited request for employment as an "application."

In addition, in holding that the casting director (Marshall) was an "agent" of Capital Cities, the appellate panel has greatly confused an already complicated area of FEHA law. Simply stated, the FEHA imposes strict liability upon employers for the harassing conduct of its "agents or supervisors." Presumably, if the two words "agent" and "supervisor" had identical meanings, the statute would contain a needless redundancy. It is more likely (and more appropriate from the perspective of statutory interpretation) that "agent" and "supervisor" have different meanings. Rather than struggle with this issue, however, the *Doe* opinion makes a critical assumption:

If the Act confers protection to "applicants," as it does, it is obvious that the counterpart to the position of supervisor must be the person to whom application for employment is made. Prior to employment the applicant has no "supervisor" so that logically, under the Act, the "agent" of the employer is the one designated to receive and process applications.

Despite the logic that the appellate court believed it had followed, this statement is clearly incorrect. The FEHA does not say, for example, that harassment by a "supervisor" is actionable only if the harasser is the "supervisor" of the aggrieved party. There is strict liability if an employee is harassed by *any* supervisor. The FEHA treats "supervisor" as a status, not as a person who must have some sort of work relationship to the harassee.

Thus, in *Doe*, the election not to focus upon Marshall's status as a "supervisor" of Capital Cities and to instead focus upon his status as an "agent" creates at least two significant analytical problems. First, Marshall may have satisfied the definition of "supervisor," thus obviating the need to break new ground on the definition of "agent." The opinion, however, provides no facts as to authority that Marshall held at Capital Cities and readers can only speculate. Second, the definition of "agent" in *Doe* now suggests that anyone who engages in harassment of applicants can impose strict liability on his or her employer so long as that person "acts for and in place of the principal for the purpose of bringing him into legal relations with third parties." The unanswered questions that flow from this standard, however, are many and disturbing: Who are such persons? All recruiting personnel? Only recruiting personnel who have the authority to make hiring decisions? All recruiting personnel who have the authority to make *or recommend* hiring decisions? Is there now strict liability for "agent-applicant" harassment but no strict liability for "agent-agent" harassment where the two agents are co-workers? *Doe* did not clearly have to open this Pandora's box and it is unfortunate that it did so. *Commentary by Kirby Wilcox.*

In *Delfino v. Agilent Technologies, Inc.*, n20.2 plaintiffs alleged that the employer was liable for negligent retention/negligent supervision because the employer allegedly knew that an employee was using its computer to accomplish his cyberthreats to plaintiffs, it refused to terminate his employment, and it failed to take measures to prevent their recurrence. The court however, applied the seven factors of *Rowland v. Christian*, n20.3 to find that the plaintiffs failed to establish that the employer owed them a legal duty. Plaintiffs had no business relationship with the employer, and there was no evidence the employee's cyberthreats directed toward plaintiffs arose out of or were in any way connected with his employment. Plaintiffs admitted that they sought no treatment for their alleged emotional injuries. There was little evidence the employer's conduct had any closeness to plaintiffs' alleged injuries, because, at most, the employer supplied the employee with an office computer by which its employee, unbeknownst to the employer, accessed his personal Internet account and sent threatening messages. There was no moral blame in the employer's conduct evidenced by the record. There was no significant policy of preventing future harm that would result from a finding of duty; a finding of duty might have a significant chilling effect on Internet free speech and encourage extreme employer oversight of employee activities, and the burden imposed on the employer would be enormous. However, assuming the existence of a duty, there was no evidence that the employer breached a duty of care with respect to the supervision or retention of Moore as an employee. The employer had no knowledge of the content of any threatening e-mails or postings before receiving an arrest affidavit for the employee, and the employer did not learn that the employee had used its computer systems to access his personal Internet account to send threatening messages until the day the employer placed the employee on administrative leave, leading to his ultimate termination a few days later. The employer's internal investigations prompted by the FBI's initial inquiry and conducted after the employee's 2003 arrest did not yield information that the employee had used the employer's computer system to send inappropriate messages over the Internet. Even assuming the employer knew or should have known that the employee had allegedly used its computers to send threatening e-mails and postings over the Internet and took no measures to prevent a recurrence of the threats, there was no evidence the employee in fact used the employer's system after that point to threaten plaintiffs, so any negligent supervision/retention was not the cause of plaintiffs' claimed injuries.

[3] Negligent Hiring, Training, or Supervision of Employee

Liability for negligent hiring, training, and supervision is based on the reasoning that if an enterprise hires individuals with characteristics which pose a danger to customers or other employees, the enterprise should bear the loss caused by its incompetent or unfit employees.ⁿ²¹ There is little California authority concerning an employer's potential liability based on negligent hiring, training, or supervision of employees. In an older case,ⁿ²² the employer kept a gun at his liquor store out of fear of crime, and apparently informed his employees of the gun's location. One of defendant's employees shot the plaintiff with this gun. There was no evidence of training or cautionary directives to defendant's employees concerning the gun, and the plaintiff commenced his action on multiple causes of action including "negligent supervision."ⁿ²³ The negligent supervision cause of action was not, however, expressly addressed by the court of appeal.ⁿ²⁴

More recently, in *Baptist v. Robinson*,^{n24.1} the court addressed the liability of a winery for injuries to a motorcycle rider caused by an employee's negligence in failing to secure an agricultural bin owned by the winery that fell off a truck owned and driven by employee on his way to pick up grapes to make wine for himself. The plaintiff alleged that the winery was directly negligent on the basis of the winery's failure to instruct its employees on safe methods of securing those bins in an open truck. However, on its motion for summary judgment, the winery showed that the specific type of bin the employee used was not intended to be used to transport harvested grapes, and that transporting grapes by means of those bins in pickup trucks was not a typical or common aspect of the employment duties at the winery. Thus, it was not reasonably foreseeable that someone would be harmed by that type of bin being used in a way it was not intended to be used. Therefore there was no duty of care on the winery's part to prevent harm by providing training to its employees in safe methods of securing those bins for transportation in open trucks.

Some out-of-state and secondary authorities indicate that an employer with inadequate training and supervision programs is subject to direct liability to third parties whose injuries are caused by such employer fault.ⁿ²⁵ An employer is liable when it knew, or should have known that hiring that employee posed a particular risk of harm and that harm occurred.ⁿ²⁶

In cases in which the employee was an off-duty police officer, some out-of-state courts have found police departments liable for the employee's acts of violence against members of the general public. The departments were held liable in cases in which the employees' acts were made possible by the use of the officers' service revolvers, which they were required to carry at all times.ⁿ²⁷ However, a California court recently found a drunk off-duty police officer not liable for the shooting of his wife utilizing a gun he had purchased as a cadet at the police academy.ⁿ²⁸ Noting that there is no California case imposing liability for negligent hiring or supervision in favor of an employee's family, the court explained that failing to require a connection between the employment and the injured party would result in the employer becoming an insurer of the safety of every person with whom its employees come into contact, regardless of their relationship to the employer. The court concluded that although there may be such a connection between an officer required to be armed at all times and members of the public, there is no such relationship between an officer not required to be armed and his or her family.ⁿ²⁹

[4] Negligent Misrepresentation Regarding Risk of Harm

The California Supreme Court recently held that three former employers were potentially liable in tort to a third party who had been harmed by the former employee.ⁿ³⁰ The basis of the former employers' liability was their unconditional praise of the former employee in their letters of recommendation, notwithstanding their alleged knowledge of sexual misconduct complaints against the employee.ⁿ³¹ In finding potential liability, the Court relied upon Sections 310 and 311 of the Restatement Second of Torts, which pertain to liability for physical harm caused by the intentional conduct of an actor who makes a misrepresentation that he or she knows, or should know, is likely to induce action involving an unreasonable risk of physical harm.ⁿ³² The Court concluded by emphasizing that writers of letters of recommendation owe both prospective employers and third persons a duty not to misrepresent facts about a former employee if the misrepresentations would present "a substantial, foreseeable risk of physical injury to the prospective employer or third persons."ⁿ³³ However, the Court pointed out that absent physical injury or some special relationship between the parties, no such duty of care extends to third persons for misrepresentations in letters of recommendation.ⁿ³⁴

1. An employer normally is under no duty to disclose information regarding the credentials or character of a former employee. Therefore, "no comment" letters that reveal only dates of employment and positions held are generally permissible.
2. However, a writer of a letter of recommendation owes a duty to prospective employers and third persons not to misrepresent the facts in describing the qualifications and character of a former employee, if making these recommendations would present a substantial, foreseeable risk of physical injury to the

prospective employer or third persons. *Commentary by Kirby Wilcox.*

■ CONSULTANT'S COMMENT:

The *Randi W.* n35 case would appear to stand for at least the following propositions:

1. An employer normally is under no duty to disclose information regarding the credentials or character of a former employee. Therefore, "no comment" letters that reveal only dates of employment and positions held are generally permissible.
2. However, a writer of a letter of recommendation owes a duty to prospective employers and third persons not to misrepresent the facts in describing the qualifications and character of a former employee, if making these recommendations would present a substantial, foreseeable risk of physical injury to the prospective employer or third persons. *Commentary by Kirby Wilcox.*

[5] Negligent Entrustment

In *Jen-Weld, Inc. v. Superior Court*, n36 the court analyzed the potential for an employer to be liable to a third party for injuries caused by an employee through negligent entrustment of a vehicle or other instrumentality. In *Jen-Weld*, the employer made a pretrial admission of respondeat superior liability for any employee negligence in the allegedly wrongful death of plaintiffs' decedent. The court held that the employer was entitled to summary adjudication, because negligent entrustment should not be considered to be a separate independent tort, but rather a theory of vicarious liability.ⁿ³⁷ Once the employer admittedly becomes vicariously liable for the negligent acts of the employee, there is no remaining basis at a future trial to attempt to prove negligence of the employer itself, such as through knowledge of the employee's prior accidents, because the subject liability has already been adequately and completely established, and because only the single injury claimed should be compensated.ⁿ³⁸

The elements of a cause of action for negligent entrustment of a vehicle are as follows:ⁿ³⁹

- The driver was negligent in operating the vehicle.
- The defendant was an owner of the vehicle operated by the driver.
- The owner knew, or should have known, that the driver was incompetent or unfit to drive the vehicle.
- The owner permitted the driver to use the vehicle.
- The driver's incompetence or unfitness to drive was a substantial factor in causing harm to the injured party.

Negligent entrustment evidence of the employee's prior accidents may not be presented against the employer when the employer has admitted to vicarious liability for the employee's conduct.ⁿ⁴⁰

[6] Employer as Internet Provider

In *Delfino v. Agilent Technologies, Inc.*, n41 an employee sent anonymous messages from work by e-mails over the Internet and made postings on Internet sites threatening plaintiffs. Plaintiffs sued the employee and his employer for both intentional and negligent infliction of emotional distress. The Court of Appeal found that the employer was immune under the Communications Decency Act as the provider of an interactive computer service.ⁿ⁴² There are three

essential elements a defendant must establish to claim § 230 immunity:ⁿ⁴³

- The defendant was a provider or user of an interactive computer service;
- The cause of action treated the defendant as a publisher or speaker of information;
- The information at issue was provided by another information content provider.

In *Delfino*, the employer was immune under the CDA because it qualified as a provider or user of an interactive computer service. The employer provided its employees with Internet access through the company's internal computer system. The employer met the definition of "provider or user of an interactive computer service" because it provided or enabled computer access by multiple users, its employees, to a computer server through proxy servers that were the primary means by which thousands of its employees in the United States accessed the Internet.ⁿ⁴⁴ The causes of action treated the employer as a publisher or speaker of information by alleging that the employer knew that the employee was sending threatening messages, and that he was using the employer's computer system to send them. While many of the cases addressing CDA immunity involved claims for defamation, immunity under § 230 is not so limited and extends to the causes of action alleged for other torts, including infliction of emotional distress.ⁿ⁴⁵ The information at issue was provided by another information content provider, *i.e.*, the employee who authored the offensive e-mails and postings.ⁿ⁴⁶

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewTortsVicarious LiabilityGeneral
OverviewTortsVicarious LiabilityEmployersGeneral Overview

FOOTNOTES:

(n1)Footnote 1. See *Coffee v. McDonnell-Douglas Corp.* (1972) 8 Cal. 3d 551, 555-559, 105 Cal. Rptr. 358, 503 P.2d 1366 ; *McGuigan v. Southern Pac. Co.* (1952) 112 Cal. App. 2d 704, 715, 247 P.2d 415 ; *Jameson v. Gavett* (1937) 22 Cal. App. 2d 646, 651, 71 P.2d 937 .

(n2)Footnote 2. See *Coffee v. McDonnell-Douglas Corp.* (1972) 8 Cal. 3d 551, 560-562, 105 Cal. Rptr. 358, 503 P.2d 1366 ; *McGuigan v. Southern Pac. Co.* (1952) 112 Cal. App. 2d 704, 715, 247 P.2d 415 .

(n3)Footnote 3. *Coffee v. McDonnell-Douglas Corp.* (1972) 8 Cal. 3d 551, 105 Cal. Rptr. 358, 503 P.2d 1366 .

(n4)Footnote 4. *Coffee v. McDonnell-Douglas Corp.* (1972) 8 Cal. 3d 551, 560-562, 105 Cal. Rptr. 358, 503 P.2d 1366 .

(n5)Footnote 5. *McGuigan v. Southern Pac. Co.* (1952) 112 Cal. App. 2d 704, 247 P.2d 415 .

(n6)Footnote 5.1. *McGuigan v. Southern Pac. Co.* (1952) 112 Cal. App. 2d 704, 715, 247 P.2d 415 .

(n7)Footnote 5.2. See *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 Cal. App. 3d 793, 800, 274 Cal. Rptr. 139 (if employee acts under direction of employer, then employer participates in act, and employer liability is based on employer's own fault); see also *Jensen v. Southern Pacific Co.* (1954) 129 Cal. App. 2d 67, 70-71, 276 P.2d 703 .

(n8)Footnote 5.3. *Jensen v. Southern Pacific Co.* (1954) 129 Cal. App. 2d 67, 276 P.2d 703 .

(n9)Footnote 5.4. *Jensen v. Southern Pacific Co.* (1954) 129 Cal. App. 2d 67, 70-71, 276 P.2d 703 .

(n10)Footnote 6. *See Alhino v. Starr* (1980) 112 Cal. App. 3d 158, 174-175, 169 Cal. Rptr. 136 ; *Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal. App. 3d 908 ; *Jameson v. Gavett* (1937) 22 Cal. App. 2d 646, 651-652, 71 P.2d 937 . For the standard jury instruction on employer ratification of an employee's conduct, *see* Judicial Council of California Civil Jury Instructions, CACI 3710 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of CACI standard jury instructions generally, *see* § 61.05.

(n11)Footnote 7. *See Jameson v. Gavett* (1937) 22 Cal. App. 2d 646, 650-652, 71 P.2d 937 . For discussion of vicarious liability of employers for the acts of employees, *see* § 30.03; for discussion of scope of employment issues, *see* § 30.05.

(n12)Footnote 8. *See Civ. Code* § 3294(b); *Alhino v. Starr* (1980) 112 Cal. App. 3d 158, 172-174, 169 Cal. Rptr. 136 ; *Clark Equipment Co. v. Wheat* (1979) 92 Cal. App. 3d 503, 524, 154 Cal. Rptr. 874 ; *Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal. App. 3d 908, 914, 93 Cal. Rptr. 639 .

(n13)Footnote 9. *See Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal. App. 3d 908 .

(n14)Footnote 10. *Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal. App. 3d 908 .

(n15)Footnote 11. *Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal. App. 3d 908 .

(n16)Footnote 12. *Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal. App. 3d 908 .

(n17)Footnote 12.1. *See Alhino v. Starr* (1980) 112 Cal. App. 3d 158, 173-174, 169 Cal. Rptr. 136 (employer's retention of employee after employer learned of employee's misrepresentations, and defense of employee in lawsuit based on those misrepresentations, as sufficient evidence of ratification); *Clark Equipment Co. v. Wheat* (1979) 92 Cal. App. 3d 503, 524, 154 Cal. Rptr. 874 (employer's retention of attorney, with no change in authority, after employer learned of attorney's improper collection techniques and abuse of process, constituted ratification of the conduct, and supported an award of punitive damages against employer).

(n18)Footnote 13. *See, e.g., Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal. App. 4th 790, 810-811, 52 Cal. Rptr. 3d 376 (employer did not ratify employee's actions of sending threatening e-mails and making threatening postings on Internet by not terminating employee during FBI investigation, where at time of initial investigation, employer had no knowledge of substance of any e-mail or posting by employee that was being investigated; employer was not provided with details about FBI's investigation; FBI told employer it was not planning to arrest employee, employee was not threat to anyone, and employer need not be concerned about him; employer conducted its own investigation, but did not discover evidence that employee used its computer systems to send threatening e-mails or Internet postings; and employee told employer he had not used its computer systems to send threatening e-mails or other messages; once employer learned content of e-mails and postings and employee admitted he sent communications through employer's computer systems that could be interpreted as threat, employer placed employee on administrative leave immediately and terminated him eight days later); *Baptist v. Robinson* (2006) 143 Cal. App. 4th 151, 49 Cal. Rptr. 3d 153, 2006 Cal. App. LEXIS 1454, *37-*39 (winery owner was not liable through ratification for injuries to motorcycle rider caused by employee's negligence in failing to secure agricultural bin owned by winery that fell off truck owned and driven by employee on his way to pick up grapes to make wine for himself, despite promoting employee after incident; there was no showing that employee's personal winemaking activities constituted form of misconduct that employer later ratified).

(n19)Footnote 13.1. *Plancarte v. Guardsmark* (2004) 118 Cal. App. 4th 640, 647, 13 Cal. Rptr. 3d 315 .

(n20)Footnote 13.2. *Jacobus v. Krambo Corp.* (2000) 78 Cal. App. 4th 1096, 1100, 93 Cal. Rptr. 2d 425 ; *Douglas v. Los Angeles Herald-Examiner* (1975) 50 Cal. App. 3d 449, 461 123 Cal. Rptr. 683 . For discussion of *Lab. Code* § 2802, *see* § 30.09[3].

(n21)Footnote 13.3. *Plancarte v. Guardsmark* (2004) 118 Cal. App. 4th 640, 647-648, 13 Cal. Rptr. 3d 315 .

(n22)Footnote 13.4. *Plancarte v. Guardsmark* (2004) 118 Cal. App. 4th 640, 650, 13 Cal. Rptr. 3d 315 .

(n23)Footnote 14. See *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal. App. 4th 1133, 1139 ; *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal. App. 4th 828, 836, 10 Cal. Rptr. 2d 748 ; see also *Underwriters Ins. Co. v. Purdie* (1983) 145 Cal. App. 3d 57, 69, 193 Cal. Rptr. 248 (citing Rest. 2d Agency § 213).

(n24)Footnote 15. See *Underwriters Ins. Co. v. Purdie* (1983) 145 Cal. App. 3d 57, 69, 193 Cal. Rptr. 248 (quoting from Rest. 2d Agency § 213, comment d).

(n25)Footnote 16. *Underwriters Ins. Co. v. Purdie* (1983) 145 Cal. App. 3d 57, 60-62, 193 Cal. Rptr. 248 .

(n26)Footnote 16.1. *Underwriters Ins. Co. v. Purdie* (1983) 145 Cal. App. 3d 57, 69-71, 193 Cal. Rptr. 248 .

(n27)Footnote 16.2. *Flores v. AutoZone West, Inc.* (2008) 161 Cal. App. 4th 373, 384-386, 74 Cal. Rptr. 3d 178 .

(n28)Footnote 17. See *Welf. & Inst. Code* §§ 827-828.

(n29)Footnote 17.1. See *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal. App. 4th 828, 836-837, 10 Cal. Rptr. 2d 748 (employer can be liable for injury caused by particular risk or hazard presented by employee of which it was aware).

(n30)Footnote 18. *Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 171 Cal. Rptr. 95 .

(n31)Footnote 19. See *Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 954, 171 Cal. Rptr. 95 .

(n32)Footnote 19.1. See *Doe v. Capital Cities* (1996) 58 Cal. Rptr. 2d 122 (allegation that employer knew that employee would use his position of authority to extract or coerce sexual favors was not knowledge that he would drug and then attack potential employee so that negligent hiring not sufficiently alleged).

(n33)Footnote 19.2. See *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal. App. 4th 1133, 1140-1146 (employer was not liable for murder of customer who was shot by former employee, with whom customer had relationship, even though former employee met her as consequence of his employment, where murder occurred two years after his employment was terminated). See also Rest. Third Agency § 7.05, com. c, illus. 5 (when actor's tort follows termination of actor's employment, tort and employment may not be causally related for purposes of liability for negligent hiring and/or retention).

(n34)Footnote 20. See *Grahn v. Tosco Corp.* (1997) 58 Cal. App. 4th 1373, 1379-1380, 1384-1385, 68 Cal. Rptr. 2d 806 (case reversed because of significant instructional errors; see § 20.44[2] for further discussion), *disapproved* to the extent it is inconsistent with *Camargo v. Tjaarda Dairy* (2001) 25 Cal. 4th 1235, 1245 and *Hooker v. Dept. of Transportation* (2002) 27 Cal. 4th 198, 214, 115 Cal. Rptr. 2d 853, 38 P.3d 1081 ; see also *Holman v. State of California* (1975) 53 Cal. App. 3d 317, 335-336, 124 Cal. Rptr. 773 (citing *Risley v. Lenwell* (1954) 129 Cal. App. 2d 608, 622-625, 277 P.2d 897 , and Rest. 2d Torts § 411).

(n35)Footnote 20.1. *Doe v. Capital Cities* (1996) 58 Cal. Rptr. 2d 122 .

(n36)Footnote 20.2. *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal. App. 4th 790, 815-818, 52 Cal. Rptr. 3d 376 .

(n37)Footnote 20.3. *Rowland v. Christian* (1968) 69 Cal.2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561 .

(n38)Footnote 21. *Mendoza v. City of Los Angeles* (1998) 66 Cal. App. 4th 1333, 1339-1340, 78 Cal. Rptr. 2d 525 ; see North, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability* (1977) 53 Chicago-Kent L. Rev. 717, 719.

(n39)Footnote 22. *Underwriters Ins. Co. v. Purdie* (1983) 145 Cal. App. 3d 57, 193 Cal. Rptr. 248 .

(n40)Footnote 23. See *Underwriters Ins. Co. v. Purdie* (1983) 145 Cal. App. 3d 57, 62, 193 Cal. Rptr. 248 .

(n41)Footnote 24. Defendant employer and its insurer disputed the insurer's obligation to pay under a liability insurance policy that excluded coverage for liability based on the insured's use of firearms. The appellate court held that the policy covered the action notwithstanding the firearm exclusion, because the employer's negligence in hiring and retaining the employee was a basis of liability independent of the employee's use of the firearm. see *Underwriters Ins. Co v. Purdie* (1983) 145 Cal. App. 3d 57, 71, 193 Cal. Rptr. 248 .

(n42)Footnote 24.1. *Baptist v. Robinson* (2006) 143 Cal. App. 4th 151, 49 Cal. Rptr. 3d 153, 2006 Cal. App. LEXIS 1454, *39-*42 .

(n43)Footnote 25. See Restatement (Second) of Agency § 213; *Cutter v. Town of Farmington (N.H. 1985)* 126 N.H. 836, 498 A.2d 316, 319-321 (liability based on municipality's failure to train police officers concerning application of handcuffs and use of weapons).

(n44)Footnote 26. *Doe v. Capital Cities* (1996) 50 Cal. App. 4th 1038, 58 Cal. Rptr. 2d 122 (allegation that employer knew that employee would use his position of authority to extract or coerce sexual favors was not knowledge that he would drug and then attack potential employee so that negligent hiring not sufficiently alleged).

(n45)Footnote 27. See *Mendoza v. City of Los Angeles* (1998) 66 Cal. App. 4th 1333, 1340, 78 Cal. Rptr. 2d 525 (collecting cases).

(n46)Footnote 28. *Mendoza v. City of Los Angeles* (1998) 66 Cal. App. 4th 1333, 1341, 78 Cal. Rptr. 2d 525 .

(n47)Footnote 29. *Mendoza v. City of Los Angeles* (1998) 66 Cal. App. 4th 1333, 1341, 78 Cal. Rptr. 2d 525 .

(n48)Footnote 30. *Randi W. v. Muroc Joint Unified Sch. Dist.* (1997) 14 Cal. 4th 1066, 1081, 60 Cal. Rptr. 2d 263, 929 P.2d 582 .

(n49)Footnote 31. See *Randi W. v. Muroc Joint Unified Sch. Dist.* (1997) 14 Cal. 4th 1066, 1070, 60 Cal. Rptr. 2d 263, 929 P.2d 582 .

(n50)Footnote 32. See *Randi W. v. Muroc Joint Unified Sch. Dist.* (1997) 14 Cal. 4th 1066, 1081, 60 Cal. Rptr. 2d 263, 929 P.2d 582 .

(n51)Footnote 33. See *Randi W. v. Muroc Joint Unified Sch. Dist.* (1997) 14 Cal. 4th 1066, 1081, 60 Cal. Rptr. 2d 263, 929 P.2d 582 .

(n52)Footnote 34. See *Randi W. v. Muroc Joint Unified Sch. Dist.* (1997) 14 Cal. 4th 1066, 1081, 60 Cal. Rptr. 2d 263, 929 P.2d 582 .

(n53)Footnote 35. *Randi W. v. Muroc Joint Unified Sch. Dist.* (1997) 14 Cal. 4th 1066, 60 Cal. Rptr. 2d 263, 929 P.2d 582 .

(n54)Footnote 36. *Jen-Weld, Inc. v. Superior Court* (2005) 131 Cal. App. 4th 853 .

(n55)Footnote 37. *Jen-Weld, Inc. v. Superior Court* (2005) 131 Cal. App. 4th 853 .

(n56)Footnote 38. *Jen-Weld, Inc. v. Superior Court* (2005) 131 Cal. App. 4th 853 .

(n57)Footnote 39. *Jen-Weld, Inc. v. Superior Court* (2005) 131 Cal. App. 4th 853. *see* CACI 724.

(n58)Footnote 40. *Armenta v. Churchill* (1954) 42 Cal. 2d 448, 267 P.2d 303 . *see Jen-Weld, Inc. v. Superior Court* (2005) 131 Cal. App. 4th 853 (California Supreme Court's views on evidentiary problems presented in *Armenta*, evidence of employee's prior accidents, were clearly meant to be binding on lower courts faced with parallel fact situations, and noting disagreement with *Syah*); *see also Evid. Code* § 1104 (excluding evidence of employee's prior accidents when employer assumes vicarious liability for employee's negligence). *But see Syah v. Johnson* (1966) 247 Cal. App. 2d 534, 543-545, 55 Cal. Rptr. 741 (evidence simultaneously presented as to employee's prior accidents and employer's alleged negligent entrustment of vehicle).

(n59)Footnote 41. *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal. App. 4th 790, 52 Cal. Rptr. 3d 376 .

(n60)Footnote 42. 47 U.S.C. § 230(c)(1) (no provider or user of interactive computer service may be treated as publisher or speaker of information provided by another information content provider), (e)(3) (no cause of action may be brought and no liability imposed under any state or local law inconsistent with § 230). *See Zeran v. America Online, Inc.* (4th Cir. 1997) 129 F.3d 327, 331-334 , *cert. den.* (1998) 524 U.S. 937, 118 S. Ct. 2341 141 L. Ed. 2d 712 ((230(c)(1) conferred broad immunity applicable to all interactive computer service providers, irrespective of whether they were publishers or distributors of alleged defamatory matter authored by information content provider); *Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 57-58, 146 P.3d 510 (Zeran properly construed § 230(c)(1) as affording broad immunity to any provider or user of interactive computer service, irrespective of whether provider or user may have been viewed under traditional defamation law as publisher or distributor, *i.e.*, secondary publisher, of allegedly defamatory statement). *See also Carafano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119 ; *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018 , *cert. den.* (2004) 541 U.S. 1085, 124 S. Ct. 2812, 159 L. Ed. 2d 246 ; *Green v. America Online (AOL)* (3d Cir. 2003) 318 F.3d 465 ; *Ben Ezra, Weinstein, & Co. v. America Online Inc.* (10th Cir. 2000) 206 F.3d 980 ; *Gentry v. eBay, Inc.* (2002) 99 Cal. App. 4th 816, 121 Cal. Rptr. 2d 703 ; *Kathleen R. v. City of Livermore* (2001) 87 Cal. App. 4th 684, 104 Cal. Rptr. 2d 772 .

(n61)Footnote 43. *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal. App. 4th 790, 805, 52 Cal. Rptr. 3d 376 ;, *Gentry v. eBay, Inc.* (2002) 99 Cal. App. 4th 816, 830, 121 Cal. Rptr. 2d 703 .

(n62)Footnote 44. *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal. App. 4th 790, 805-806, 52 Cal. Rptr. 3d 376 .

(n63)Footnote 45. *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal. App. 4th 790, 806-807, 52 Cal. Rptr. 3d 376 . *See Carafano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119 (invasion of privacy, misappropriation of right of publicity and negligence); *Kathleen R. v. City of Livermore* (2001) 87 Cal. App. 4th 684, 104 Cal. Rptr. 2d 772 (nuisance and premises liability; defense not limited to tort claims for damages and applied to taxpayer actions and suits for declaratory and injunctive relief); *Doe v. America Online, Inc.* (Fla. 2001) 783 So. 2d 1010 (negligent failure to control third party's illegal postings); *Donato v. Moldow* (2005) 374 N.J. Super. 475, 486-488, 865 A.2d 711, 718 (intentional infliction of emotional distress).

(n64)Footnote 46. *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal. App. 4th 790, 807, 52 Cal. Rptr. 3d 376 .



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
 CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees
 Part A. TEXT

2-30 California Employment Law § 30.03

AUTHOR: By Mary Vail, J.D.

§ 30.03 Vicarious Liability of Employer Based on Respondeat Superior

[1] Generally

The doctrine of respondeat superior, literally "let the master answer," provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency.ⁿ¹ *Civil Code Section 2338*, which provides that a principal is responsible to third persons for its agent's negligence, including wrongful acts, in the transaction of the agency's business, has long been held to reflect the common law doctrine of respondeat superior.^{n1.1} The rationale for the doctrine is that because the use of employees or agents benefits the employer or principal, the torts of employees or agents are imputed back to their hirers for purposes of assigning liability. The liability is "vicarious" because the employer or principal is held liable even if the employer or principal has not personally engaged in wrongful conduct.ⁿ²

Respondeat superior applies to public and private employers, alike.ⁿ³ However, a public employer is not responsible for the acts of public employees performed outside the scope of their employment. Thus, for example, in *Hoblitzell v. City of Ione*,^{n3.1} the plaintiff failed to present a genuine issue of material fact as to a city's liability for the acts of a law enforcement officer and a building inspector. The employees were acting outside the city's jurisdiction, they were wearing civilian clothing, and they were acting for personal reasons, substantially deviating from their employment duties for the city. It made no difference that the building inspector identified himself as a building inspector from the city or used an unmarked city car, because the purported misconduct did not arise from the employer's enterprise but for personal reasons. The police officer was not in uniform or on duty, was in civilian clothes, and did not use his official authority in any fashion. He claimed to be a building inspector from the city, and he was not acting within the scope of his employment.^{n3.2}

Similarly, in *de Villers v. County of San Diego*,^{n3.3} a county could not be liable for the death of the husband of a county employee who took toxic materials from her employer to kill her husband, because she was not acting within the course and scope of her employment when she killed him. The county also could not be liable for negligent hiring and supervision by failing to discover the employee's history of drug use and her criminal record. There was no evidence

supporting a conclusion that any county employee had undertaken a special protective relationship toward the husband. Moreover, the evidence appears undisputed that no one--including the husband or other family members--had actual knowledge that the employee posed a threat to her husband. Further, plaintiffs could not state a claim for direct liability based on a public entity's allegedly negligent hiring and supervision practices.

The fact that an employee may have been present at the workplace and performing regular employment functions before or after engaging in the conduct that injured the plaintiff does not transform an employee's personal conduct into actions for which the employer may be held vicariously liable.^{n3.4}

There must be some evidence linking the employee's activities causing injury to a third person to the employment to impose liability on the employer under *respondeat superior*.^{n3.5}

[2] Bases for Imposing Respondeat Superior Liability

Although earlier authorities sought to justify the respondeat superior doctrine on such theories as "control" by the master of the servant, the master's "privilege" in being permitted to employ another, the third party's innocence in comparison to the master's selection of the servant, or the master's "deep pocket" to pay for the loss, the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees are placed on the employer as a cost of doing business. The rule of respondeat superior is based in part on the rationale that, between the employer who has voluntarily engaged in an enterprise that may pose some risk of harm to others and the injured third party, fairness supports requiring the employer to bear the loss.ⁿ⁴ Courts have also justified the rule on the ground that the employer is better able to absorb the losses, and distribute them, through prices, rates, or liability insurance, to the public.ⁿ⁵ California courts have long recognized that an employer's responsibility for the torts of its employees extends beyond its actual or possible control of the servant to injuries that are the "risks of the enterprise."ⁿ⁶

Recent California Supreme Court decisions have articulated three reasons for applying the doctrine of respondeat superior: (1) to prevent recurrence of tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefited from the enterprise that gave rise to the injury.ⁿ⁷ The court has given great weight to these policy factors in determining whether to attach vicarious liability in different situations.ⁿ⁸

A plaintiff must establish an employment relationship between the tortfeasor and the defendant (which requires an element of right of control over the tortfeasor's conduct), and prove that the tort was committed within the scope of the tortfeasor's employment, in order to recover from the employer.ⁿ⁹ For discussion of rules governing the determination of whether an employment relationship exists, *see* § 30.04. For discussion of the criteria for determining the scope of employment, *see* § 30.05.

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewTortsVicarious LiabilityGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See, e.g., Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal. 3d 962, 967, 227 Cal. Rptr. 106, 719 P.2d 676 ; *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal. App. 3d 608, 617-618, 124 Cal. Rptr. 143 ; *see also Garton v. Title Ins. & Trust Co.* (1980) 106 Cal. App. 3d 365, 165 Cal. Rptr. 449 (discussing applicability of vicarious liability principles to tortfeasors working for several employers in varying capacities).

For the standard introductory jury instruction on respondeat superior, *see* Judicial Council of California Civil Jury Instructions, CACI 3700 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction on the essential factual elements of a claim of tort liability asserted against a principal for the acts of the agent, *see* Judicial Council of California Civil Jury Instructions, CACI 3701 (Matthew Bender). For the CACI special verdict form on vicarious liability for negligence, *see* Judicial Council of California Civil Jury Instructions, CACI VF-3700 (Matthew Bender). For the standard jury instruction on respondeat superior when the legal agency relationship is not disputed, *see* Judicial Council of California Civil Jury Instructions, CACI 3703 (Matthew Bender). For discussion of the CACI standard jury instructions generally, *see* § 61.05. For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n2)Footnote 1.1. *Depew v. Crocodile Enters., Inc.* (1998) 63 Cal. App. 4th 480, 486, 73 Cal. Rptr. 2d 673 (citing cases); *see* Civ. Code § 2338.

(n3)Footnote 2. *See Roberts v. Craig* (1954) 124 Cal. App. 2d 202, 208, 268 P.2d 500 .

(n4)Footnote 3. *See Gov. Code § 815.2(a); Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341 . For the standard jury instruction on the scope of employment in the context of a police officer's misuse of authority, *see* Judicial Council of California Civil Jury Instructions, CACI 3721 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n5)Footnote 3.1. *Hoblitzell v. City of Ione* (2003) 110 Cal. App. 4th 675, 682-687, 2 Cal. Rptr. 3d 8 .

(n6)Footnote 3.2. *See also Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal. App. 4th 790, 811-814, 52 Cal. Rptr. 3d 376 (employee's sending of threatening e-mails and making threatening postings on Internet through employer's computer systems was plainly outside scope of his employment, where injury he inflicted was out of personal malice, not engendered by employment, messages of hate were not outgrowth of his employment, and using employer's computer system to log on to private Internet account to send messages was never part of his job duties).

(n7)Footnote 3.3. *de Villers v. County of San Diego* (2007) 156 Cal. App. 4th 238, 67 Cal. Rptr. 3d 253, 2007 Cal. App. LEXIS 1730, *11-*31 .

(n8)Footnote 3.4. *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal. App. 4th 790, 814, 52 Cal. Rptr. 3d 376 .

(n9)Footnote 3.5. *See Miller v. American Greetings Corp.* (2008) 161 Cal. App. 4th 1055, 2008 Cal. App. LEXIS 489, *8-*19 (plaintiffs' evidence did not permit reasonable trier of fact to conclude that employee hit plaintiff with his pickup truck while on his cell phone with coworker, where employee testified in his deposition that on morning of accident he had taken day off work and was on personal errand and admitted running into plaintiff after taking his eyes off road to check address, and plaintiffs had no evidence to contradict him).

(n10)Footnote 4. *See Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal. 3d 956, 959-960, 88 Cal. Rptr. 188, 471 P.2d 988 .

(n11)Footnote 5. *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal. 3d 956, 959-960, 88 Cal. Rptr. 188, 471 P.2d 988 .

(n12)Footnote 6. *See Hinman v. Westinghouse Electric Co.* (1970) 2 Cal. 3d 956, 960, 88 Cal. Rptr. 188, 471 P.2d 988 (citing *Carr v. Wm. C. Crowell Co.* (1946) 28 Cal. 2d 652, 655-656, 171 P.2d 5 , among other cases).

(n13)Footnote 7. *Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341 ; *Miller v. Stouffer* (1992) 9 Cal. App. 4th 70, 77, 11 Cal. Rptr. 2d 454 ; *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal. 3d 962, 967, 227 Cal. Rptr. 106, 719 P.2d 676 .

(n14)Footnote 8. *See Lisa M. v. Henry Mayo Newhall Memorial Hosp.* (1995) 12 Cal. 4th 291, 304-305, 48 Cal. Rptr. 2d 510, 907 P.2d 358 (hospital not liable for sexual assault by medical technician); *Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 214-216, 285 Cal. Rptr. 99, 814 P.2d 1341 (city liable for sexual assault by on-duty police officer); *John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal. 3d 438, 447-452, 256 Cal. Rptr. 766, 769 P.2d 948 (school district not liable for sexual assault by teacher); *see also* discussion in § 30.06.

(n15)Footnote 9. *See, e.g., Lisa M. v. Henry Mayo Newhall Memorial Hosp.* (1995) 12 Cal. 4th 291, 304-305, 48 Cal. Rptr. 2d 510, 907 P.2d 358; *Alma W. v. Oakland Unified Sch. Dist.* (1981) 123 Cal. App. 3d 133, 139, 176 Cal. Rptr. 287; *Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 955, 171 Cal. Rptr. 95



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees
Part A. TEXT

2-30 California Employment Law § 30.04

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§ 30.04 Who Is an Employee for Purposes of Employer Liability

[1] Generally

An employee is one who is subject to his or her employer's right of control with respect to any act, labor, or work to be done in the course and scope of the employment.ⁿ¹ The term "servant" is synonymous with the term "employee."ⁿ²

Evidence that a person who hires another withholds income taxes or social security taxes, pays unemployment taxes, or carries workers' compensation insurance, may support a finding of an employment relationship.ⁿ³ However, the converse is of no significance in establishing a nonemployment relationship. An employer cannot change the status of an employee to one of independent contractor by illegally requiring the employee to assume the burdens that the law imposes directly on the employer.^{n3.1}

It is not necessary that the employer be a business enterprise in order for respondeat superior liability to attach. The purposes behind the doctrine are served by extending liability to employers in nonbusiness situations, in part, because of the availability of insurance to such persons to spread and absorb the costs of injury.^{n3.2} Similarly, although most employees work for monetary compensation, such as salaries, hourly wages, or commissions, monetary compensation is not an essential element of an employer-employee relationship.ⁿ⁴ An employment relationship may exist between spousesⁿ⁵ or between parent and child.ⁿ⁶

If a person is performing work and labor for another, a prima facie showing of an employer-employee relationship is established, and the person is presumed to be an employee in the absence of evidence to the contrary.ⁿ⁷ Additionally, *Labor Code Section 2750.5*, which provides a rebuttable presumption that a worker providing services for which a license is required is an employee rather than an independent contractor, and denying independent contractor status to a person who does not have a license required for his or her work, applies to tort cases as well as workers' compensation cases.ⁿ⁸

For discussion of the right to control as a criterion for the existence of an employment relationship, see [2], *below*. For

discussion of the distinctions between employment relationships and agency relationships, see [3], *below*. For discussion of the distinctions between employment relationships and independent contractor relationships, see [4], *below*.

[2] Employer's Right of Control

Whether or not an employer-employee relationship exists between the defendant and the tortfeasor is normally a question of fact, and the key factor in determining whether that type of relationship exists is whether the employer has the *right* to exercise control over the employee, regardless of whether or not that potential control is actually exercised with respect to all of the employee's duties.ⁿ⁹ If the defendant has such a right of control over the tortfeasor, an employment relationship exists even if control was not being exercised at the time of plaintiff's injury.ⁿ¹⁰ The right to discharge an employee at will without cause is evidence of the employer's right to control.ⁿ¹¹

The control must encompass both the means and manner of performance of the work. If control pertains only to the result of the work and not to the means by which it is accomplished, the relationship is of independent contractor rather than employee.ⁿ¹²

[3] Employees and Agents Distinguished

An agent is one who represents another in dealings with third parties.ⁿ¹³ An agency may be specific (that is, created for a particular act or transaction) or general.ⁿ¹⁴

A single individual may be both an employee and an agent, but the terms "employee" and "agent" are not synonymous.ⁿ¹⁵ An agent can be distinguished from an employee in that an agent works both for and in the place of the principal.ⁿ¹⁶ In other words, an agent is distinguished from an employee by the agent's "representative" powers and "derivative authority."ⁿ¹⁷

For discussion of an employer's contractual liability under agency principles for transactions entered into by employees with third persons, see Chapter 31.

[4] Employees and Independent Contractors Distinguished

[a] Generally

Although employers and principals are subject to vicarious liability under the doctrine of respondeat superior for the torts of their employees and agents, the general rule is that a person who employs an independent contractor will not be vicariously liable for the torts of his or her independent contractor.ⁿ¹⁸ However, there are many exceptions to this general rule of nonliability. For discussion of the application of respondeat superior liability for conduct of independent contractors, see § 30.10.

The question of whether an individual is an employee or independent contractor is a question of fact if dependent on the resolution of disputed evidence or inferences. If the evidence is undisputed and if only one inference may be drawn from the facts, the question becomes one of law.ⁿ¹⁹

The categories of employee and independent contractor are mutually exclusive; an individual cannot be both an employee and an independent contractor, depending on the nature of the function by the individual at a given time.^{n19.1} In determining whether an individual is an employee or an independent contractor, the most important factor is the right of control.ⁿ²⁰ An employee is hired to perform specified work, with the employer controlling the means and manner of the performance of the work. In contrast, the hirer of an independent contractor retains control only over the result of the work, not over the means by which the work is accomplished.ⁿ²¹ A worker's adherence to a federally-dictated work protocol arguably supports his or her status as an independent contractor, rather than as an employee.^{n21.1}

In determining the extent of control, it is important to differentiate between general rights of supervision and review for the purpose of determining a contractor's progress, which are normally exercised by the hirer, and the immediate, detailed supervision that an employer normally exercises with respect to an employee. Reservation or exercise of the former type of rights alone with regard to one performing labor or services is not likely to cause that person to be characterized as an employee.n22

While the presence of complete or absolute control will support a finding that the relationship is one of employment, the converse is not necessarily true, that the lack of absolute control means there is not an employment relationship. It does not follow that because there is a certain amount of freedom inherent in the work done that one becomes an independent contractor.n22.1

In addition to the extent of control, other factors to be taken into consideration in determining whether one is an employee or an independent contractor are (1) whether or not the one performing the services is engaged in a distinct occupation or business; (2) whether, in the locality, the kind of occupation or business is one in which the work is usually done under the direction of a principal or by a specialist without supervision; (3) the skill required in the particular occupation or business; (4) whether the principal or worker supplies the instrumentalities, tools, and place of work; (5) the length of time for which the services are to be performed; (6) the method of payment, whether based on time or by the job; (7) whether or not the work is part of the regular business of the alleged principal; and (8) whether or not the parties believe that they are creating an employment relationship.n22.2

■ CONSULTANT'S COMMENT:

Practitioners should become familiar with *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, n22.3 in which the California Supreme Court broadened the definition of employee under the Workers' Compensation Actn22.4 and, in dicta, a number of other acts as well. In *Borello*, the Court not only focused on the "right of control" test, which conforms to traditional independent contractor-employee analysis, but also focused on the "public purposes" of the Workers' Compensation Act (as distinguished from the "private interests" of the workers).n22.5 Without defining the full import of the dichotomy, the Court indicated that its analysis might have application to independent contractor-employee determinations under the Agricultural Labor Relations Act,n22.6 wage and hour law, the Fair Employment and Housing Act,n22.7 and Cal OSHA.n22.8 *Commentary by Kirby Wilcox.*

Although not necessarily controlling, standards under workers' compensation, unemployment insurance, and other statutes can all be considered by the courts as "useful" when a court is determining the tortfeasor's employment status in a third-party tort claim lodged against the tortfeasor's alleged employer.n23 Ultimately, the determination must be made in the context of the purpose behind the particular application of vicarious liability at issue in the case.n23.1

For discussion of the definition of "employee" as distinguished from "independent contractor" under wage and hour, workers' compensation, Cal OSHA, equal employment opportunity, and unemployment insurance statutes, see Chapters 1, 20, 21, 40, and 80, respectively. For discussion of the applicability of workers compensation authority in determining scope of employment issues in tort cases, see § 30.05[3].

Although it is the agreement of the parties that determines the status as independent contractor or employee, the fact that the agreement designates the relationship of the parties as that of independent contractors is not in itself controlling.n24 The parties' characterization will be ignored if they, by their conduct, act like employer and employee. Indeed, the attempt to conceal employment by formal documents purporting to create other relationships have led the courts to disregard the terms whenever the acts and declarations of the parties are inconsistent with the labels.n24.1

[b] Building Contractors

Labor Code Section 2750.5 provides that there is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required under *Business and Professions Code Section 7000 et seq.*, governing building contractors, or who is performing such services for a person who is required to obtain such a license, is an employee rather than an independent contractor. The statute further provides that proof of independent contractor status, which may rebut the presumption, includes satisfactory proof of the following:

1. The individual has the right to control and discretion in the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for;ⁿ²⁵
2. The individual is customarily engaged in an independently established business;ⁿ²⁶ and
3. The individual's independent contractor status is bona fide and not a subterfuge.ⁿ²⁷

Labor Code Section 2750.5 further provides that a bona fide independent contractor status is evidenced by the presence of the following cumulative factors:ⁿ²⁸

1. Substantial investment other than personal services in the business;
2. Holding out that one is in business for oneself;
3. Bargaining for a contract to complete a specific project for compensation by project rather than by time;
4. Control over the time and place the work is performed;
5. Supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees;
6. Hiring employees;
7. Performing work that is not ordinarily in the course of the principal's business;
8. Performing work that requires a particular skill;
9. Holding a license pursuant to the Business and Professions Code; and
10. The parties intending that the work relationship is of an independent contractor status or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

In *Foss v. Anthony Industries*, ⁿ²⁹ the court of appeal held that the history and terminology of *Labor Code Section 2750.5* indicated that the statute was intended to apply to third-party tort claims as well as workers' compensation proceedings.ⁿ³⁰ The court also concluded that the statute codified the general tort standard for independent contractor status, and that Labor Code provisions concerning employment status have long been cited by California courts in tort cases involving injuries to third parties.ⁿ³¹

In *Ramirez v. Nelson*, ^{n31.1} the family of a deceased employee of an unlicensed contractor sued the homeowners after his death by electrocution while trimming trees on their property as a result of the contact between his polesaw and a high voltage overhead line. The family identified a statute, *Penal Code section 385(b)*, making it a misdemeanor for any

person, either personally or through an employee, to move any tool or equipment within six feet of a high voltage overhead line, and argued the decedent was the homeowners' employee by operation of law under *Labor Code section 2750.5*, so that the homeowners were vicariously liable for any breach of the duty of care embodied in section 385(b) in their capacity as the decedent's employers, giving rise to a presumption of negligence. The California Supreme Court found that the question whether an unlicensed contractor's worker must be deemed a homeowner-hirer's employee under *Labor Code section 2750.5* for purposes of tort liability is neither an easy nor settled one. The Court in *State Compensation Ins. Fund* n31.2 construed the penultimate paragraph of section 2750.5 to mean that contractors injured on the job, who prove to be unlicensed, cannot be independent contractors in the eyes of the law, and are instead deemed employees of the party who hired them by operation of law. But that holding was reached in the specific context of determining whether, for policy reasons, an unlicensed contractor hired to remodel a homeowner's house, who became injured on the job, should be deemed the homeowner's employee at law for purposes of rendering him eligible for workers' compensation benefits under the homeowner's insurance policy. The homeowner's potential exposure to tort liability for the contractor's injuries was neither in issue nor considered in *State Compensation Ins. Fund*. Nor was a homeowner's liability for injury to a worker in an unlicensed contractor's work crew considered.n31.3 However, the Court declined to address whether an unlicensed contractor or his or her worker, when injured on the job, becomes the employee of the homeowner who hired the contractor, under *Labor Code section 2750.5*, for purposes of tort liability in *Ramirez*, because the Court concluded that the homeowners neither had nor breached any statutory duty of care owed to the deceased worker under section 385(b) in the first instance. Since section 385(b) would not support a negligence *per se* theory of liability on these facts within the meaning of *Evidence Code section 669*, the question of whether the decedent was the homeowners' employee under section 2705.5 was moot.n31.4

Under *Labor Code section 2705.5*, the presumption of employee status can be rebutted only as to persons who hold a valid contractor's license; the presumption cannot be rebutted as to persons who do not hold a valid contractor's license.n31.5 However, notwithstanding the conclusive presumption established by the second to last paragraph of section 2750.5, one who misrepresents himself or herself as a licensed contractor is estopped from asserting that the unlicensed status makes him or her an employee under the statute.n31.6 In the absence of a representation by the contractor that he or she is licensed, there can be no estoppel.n31.7 Whether a party's conduct estops it from taking a particular legal position usually, though not always, involves a factual determination.n31.8 The burden is on the hirer to prove that the worker is estopped from claiming employee status.n31.9

One court has stated that it is difficult to create a hard and fast rule for every situation in which the status of a contractor's license changes over a period of time. On one end of the spectrum, the worker affirmatively lies when asked if he or she is licensed, commences work, and shortly thereafter is injured. In the absence of extenuating circumstances, the unlicensed worker in this setting is estopped from claiming employee status.n31.10 On the other end of the spectrum, the hirer fails to inquire and the worker makes no representation about his licensing or her status. In order to effect the mandatory language of the penultimate paragraph of section 2750.5, the unlicensed worker cannot be estopped, and is deemed an employee.n31.11 In the gray part of the spectrum, the worker initially accurately informs the hirer that he or she is licensed but over time his or her license expires or is revoked, the worker says nothing, and the employer makes no further inquiry. In this situation, estoppel is a factual question to be resolved by the trier of fact.n31.12 Relevant factors include the following:n31.13

- The nature of the worker's initial disclosure and the hirer's initial inquiry.
- The length of time the license was valid and how long since it had lapsed.
- The parties' expectations.
- The nature and length of the relationship between worker and hirer.
- Custom and practice in the industry.

It may be reasonable for a hirer to assume a worker remains licensed when the valid license was presented a few weeks before the start of work. It may be unreasonable to require written proof on a weekly or monthly basis on a long project. On the other hand, oral representation of valid license status, though reasonable to accept at the time, may require further investigation, even written proof, later on depending on the circumstances.ⁿ³¹.¹⁴

[5] Borrowed Employees: Special and Dual Employments

When one employer (the "general" employer) lends an employee to another employer and relinquishes its right of control over the employee's activities to the borrowing employer, a "special employment" relationship is created between the borrowed employee and the borrowing employer.ⁿ³² For the duration of the special employment relationship, the special or borrowing employer is solely liable in tort under the doctrine of respondeat superior for the special employee's job-related torts.ⁿ³³

A special employment relationship may be negated, and the general employer remains liable, by proof that the general employer has not relinquished its right to control the employee.ⁿ³⁴ Courts have held that evidence of the following factors tends to negate the existence of a special employment:ⁿ³⁵

1. The employee is not paid by and cannot be discharged by the borrowing employer.
2. The employee is skilled and has substantial control over the operational details of his or her work.
3. The employee is not engaged in the borrowing employer's usual business.
4. The employee is borrowed for only a brief period of time.
5. The employee continues to use tools and equipment furnished by the lending employer while working for the borrowing employer.

If *both* the borrowing and lending employers share control of an employee's work, a "dual employment" arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts committed within the scope of the employment.ⁿ³⁶

For example, in *Societa per Azioni de Navigazione Italia v. City of Los Angeles*,ⁿ³⁷ the defendant city provided staff harbor pilots to shipmasters entering the city harbor on a voluntary basis and under contracts providing that the loaned staff harbor pilots would be exclusively the shipowner's employees while in the shipowner's service. While plaintiff's ship was being piloted by a staff harbor pilot, a collision occurred, which resulted in damage to the ship, the city's dock, and a third party's loading facilities. The trial court found the pilot to be the sole employee of the city, that the city was 75 percent negligent, and that the plaintiff's shipmaster and crew were 25 percent negligent.

The California Supreme Court reversed. The Court held that the trial court erred as a matter of law in finding that the city was the pilot's sole employer at the time of the accident because, under federal maritime law, a shipowner exercises sufficient control over a voluntarily hired pilot to render him or her an employee of the shipowner.ⁿ³⁸ However, the Court also held that the existence of an employment relationship between the shipowner and the pilot did not necessarily sever the respondeat superior nexus between the pilot and the city.ⁿ³⁹ The Court noted that a dual employment may exist, rendering both the lending and borrowing employer liable for the employee's torts.ⁿ⁴⁰ The Court further stated that when, as in this case, the employee performs work of interest to both the general and the special employer, there is a presumption that the employee also remains in his or her general employment, and that the general employer can avoid liability only if it proves that it relinquished "authoritative direction and control" of the employee to the borrowing employer.ⁿ⁴¹ The Court observed that, in this case, the city selected and trained staff harbor

pilots, assigned pilots to particular ships, regulated the manner in which pilot's performed their duties, and retained the power to suspend or terminate the pilot's employment, and that the shipmaster had only advisory powers concerning the pilot's navigational decisions.ⁿ⁴² As the city failed to establish such a total relinquishment of direction and control, the Court concluded that the pilot was an employee of both the city and the shipowner at the time of the accident and that both employers were jointly and severally liable to third parties for the pilot's negligence.ⁿ⁴³

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewTortsVicarious LiabilityGeneral OverviewTortsVicarious LiabilityEmployersScope of EmploymentGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253 ; see also Lab. Code § 2750* ("contract of employment" defined). For the standard jury instruction on respondeat superior when the legal agency relationship is not disputed, *see* Judicial Council of California Civil Jury Instructions, CACI 3703 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction on respondeat superior when the existence of "employee" status is disputed, *see* Judicial Council of California Civil Jury Instructions, CACI 3704 (Matthew Bender), or when the existence of an "agency" relationship is disputed, *see* Judicial Council of California Civil Jury Instructions, CACI 3705 (Matthew Bender). For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n2)Footnote 2. *Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253 .*

(n3)Footnote 3. *See Corrigan v. Cox (1967) 254 Cal. App. 2d 919, 924, 62 Cal. Rptr. 733 .*

(n4)Footnote 3.1. *Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 877, 269 Cal. Rptr. 647 .*

(n5)Footnote 3.2. *Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 80-81, 11 Cal. Rptr. 2d 454* (homeowner liable for negligence of housekeeper).

(n6)Footnote 4. *See Eye v. Kafer, Inc. (1962) 202 Cal. App. 2d 449, 453, 20 Cal. Rptr. 841 .*

(n7)Footnote 5. *See Workman v. City of San Diego (1968) 267 Cal. App. 2d 36, 39, 72 Cal. Rptr. 509 .*

(n8)Footnote 6. *See Hughes v. Quackenbush (1934) 1 Cal. App. 2d 349, 357, 37 P.2d 99 .*

(n9)Footnote 7. *Pierson v. Holly Sugar Corp. (1951) 107 Cal. App. 2d 298, 301, 237 P.2d 28 .*

(n10)Footnote 8. *Foss v. Anthony Industries (1983) 139 Cal. App. 3d 794, 797-799, 189 Cal. Rptr. 31 .*

(n11)Footnote 9. *City of Los Angeles v. Vaughn (1961) 55 Cal. 2d 198, 201, 10 Cal. Rptr. 457, 358 P.2d 913 ; see Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 946-947, 88 Cal. Rptr. 175, 471 P.2d 975 .*

(n12)Footnote 10. *See Eye v. Kafer, Inc. (1962) 202 Cal. App. 2d 449, 453, 20 Cal. Rptr. 841* (defendant bar owner held liable for assault on patron by temporary employee).

(n13)Footnote 11. *City of Los Angeles v. Vaughn (1961) 55 Cal. 2d 198, 201, 10 Cal. Rptr. 457, 358 P.2d 913 ; Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 875, 269 Cal. Rptr. 647 .*

(n14)Footnote 12. *See Societa per Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446, 458, 183 Cal. Rptr. 51, 645 P.2d 102 ; see also Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943,*

946-947, 88 Cal. Rptr. 175, 471 P.2d 975 (freelance television writers held to be employees for unemployment insurance purposes).

(n15)Footnote 13. *Civ. Code* § 2295; see *Store of Happiness v. Carmona & Allen* (1957) 152 Cal. App. 2d 266, 269, 312 P.2d 1104 .

(n16)Footnote 14. See *Civ. Code* § 2297.

(n17)Footnote 15. *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253 .

(n18)Footnote 16. *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 205-206, 30 Cal. Rptr. 253 .

(n19)Footnote 17. *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 206, 30 Cal. Rptr. 253 .

(n20)Footnote 18. *Schmidlin v. Alta Planing Mill Co.* (1915) 170 Cal. 589, 591, 150 P. 983 ; see also *People v. Palma* (1995) 40 Cal. App. 4th 1559, 1566, 48 Cal. Rptr. 2d 334 ; *Anderson v. Chancellor Western Oil Dev. Corp.* (1975) 53 Cal. App. 3d 235, 239, 125 Cal. Rptr. 640 .

(n21)Footnote 19. *Millsap v. Federal Express Corp.* (1991) 227 Cal. App. 3d 425, 431, 277 Cal. Rptr. 807 ; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 608-609 n.6, 262 Cal. Rptr. 842 ; see *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 349, 256 Cal. Rptr. 543, 769 P.2d 399 (workers' compensation case).

(n22)Footnote 19.1. *Briggs v. Lawrence* (1991) 230 Cal. App. 3d 605, 614-615, 281 Cal. Rptr. 578 (but finding it conceivable that one individual could serve in both capacities if, say, a clerical employee agreed, for a separate consideration, to paint the employer's building on weekends).

(n23)Footnote 20. *Flores v. Brown* (1952) 39 Cal. 2d 622, 628, 248 P.2d 922 ; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal. App. 3d 864, 875, 269 Cal. Rptr. 647 (characterizing all other factors as secondary elements); see discussion in [2], above.

(n24)Footnote 21. *Millsap v. Federal Express Corp.* (1991) 227 Cal. App. 3d 425, 431, 277 Cal. Rptr. 807 ; see *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal. 3d 446, 458, 183 Cal. Rptr. 51, 645 P.2d 102 .

(n25)Footnote 21.1. *Southwest Research Institute v. Unemployment Insurance Appeals Board* (2000) 81 Cal. App. 4th 705, 709-710, 96 Cal. Rptr. 2d 769 .

(n26)Footnote 22. *McDonald v. Shell Oil Co.* (1955) 44 Cal. 2d 785, 790, 285 P.2d 902 .

(n27)Footnote 22.1. *Briggs v. Lawrence* (1991) 230 Cal. App. 3d 605, 614, 281 Cal. Rptr. 578 .

(n28)Footnote 22.2. *Malloy v. Fong* (1951) 37 Cal. 2d 356, 370-372, 232 P.2d 241 ; *Briggs v. Lawrence* (1991) 230 Cal. App. 3d 605, 614-615, 281 Cal. Rptr. 578 ; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal. App. 3d 864, 874, 269 Cal. Rptr. 647 ; Restatement (Second) of Agency, § 220.

(n29)Footnote 22.3. *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399 .

(n30)Footnote 22.4. *Lab. Code* § 3201 et seq.

(n31)Footnote 22.5. See *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 354-355, 256 Cal. Rptr. 543, 769 P.2d 399 .

(n32)Footnote 22.6. *Lab. Code § 1140 et seq.*

(n33)Footnote 22.7. *Gov. Code § 12900 et seq.*

(n34)Footnote 22.8. *Lab. Code § 6300 et seq.*

(n35)Footnote 23. *See Fleming v. Foothill-Montrose Ledger (1977) 71 Cal. App. 3d 681, 688-689, 139 Cal. Rptr. 579 (news carrier-vendor held to be independent contractor).*

(n36)Footnote 23.1. *See Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 608-609 n.6, 262 Cal. Rptr. 842 (expressing "grave doubts" as to whether staff doctors are independent contractors with hospital for purposes of sexual harrassment cause of action under Fair Employment and Housing Act, Gov. Code § 12900 et seq.); see also Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 878 n.10, 269 Cal. Rptr. 647 (placing respondeat superior liability on pizza franchisee for torts of driver while making delivery is consistent with rationale behind doctrine, that business enterprise should be liable for risks inherent in, or created by, operation of enterprise).*

(n37)Footnote 24. *Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 877, 269 Cal. Rptr. 647 ; Anderson v. Badger (1948) 84 Cal. App. 2d 736, 742-743, 191 P.2d 768 .*

(n38)Footnote 24.1. *Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 877, 269 Cal. Rptr. 647 .*

(n39)Footnote 25. *Lab. Code § 2750.5(a).*

(n40)Footnote 26. *Lab. Code § 2750.5(b).*

(n41)Footnote 27. *Lab. Code § 2750.5(c).*

(n42)Footnote 28. *Lab. Code § 2750.5(c).*

(n43)Footnote 29. *Foss v. Anthony Industries (1983) 139 Cal. App. 3d 794, 189 Cal. Rptr. 31 .*

(n44)Footnote 30. *Foss v. Anthony Industries (1983) 139 Cal. App. 3d 794, 797-799, 189 Cal. Rptr. 31 .*

(n45)Footnote 31. *Foss v. Anthony Industries (1983) 139 Cal. App. 3d 794, 798, 189 Cal. Rptr. 31 ; see also Review of Selected 1978 California Legislation, 10 Pac. L.J. 247, 347-349 (1979).*

(n46)Footnote 31.1. 0v. *Nelson (2008) 44 Cal. 4th 908, 80 Cal. Rptr. 3d 728, 188 P.3d 659 .*

(n47)Footnote 31.2. *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1985) 40 Cal. 3d 5, 15, 219 Cal. Rptr. 13, 706 P.2d 1146 .*

(n48)Footnote 31.3. *Ramirez v. Nelson (2008) 44 Cal. 4th 908, 917, 80 Cal. Rptr. 3d 728, 188 P.3d 659 .*

(n49)Footnote 31.4. *Ramirez v. Nelson (2008) 44 Cal. 4th 908, 917, 80 Cal. Rptr. 3d 728, 188 P.3d 659 .*

(n50)Footnote 31.5. *Chin v. Namvar (2008) 166 Cal. App. 4th 994, 1003-1004, 83 Cal. Rptr. 3d 294 . See Mendoza v. Brodeur (2006) 142 Cal. App. 4th 72, 77, 47 Cal. Rptr. 3d 310 (presumption that a person who hires an unlicensed contractor is an employer is conclusive.)*

(n51)Footnote 31.6. *Chin v. Namvar (2008) 166 Cal. App. 4th 994, 1004, 83 Cal. Rptr. 3d 294 ; Rinaldi v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 217, 223, 244 Cal. Rptr. 637 .*

(n52)Footnote 31.7. *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (Meier)* (1985) 40 Cal. 3d 5, 16, 219 Cal. Rptr. 13, 706 P.2d 1146 ; *Chin v. Namvar* (2008) 166 Cal. App. 4th 994, 1004-1005, 83 Cal. Rptr. 3d 294 . See also *Travelers Ins. Co. v. Workers' Comp. Appeals Bd.* (1983) 147 Cal. App. 3d 1033, 1038, 195 Cal. Rptr. 564 .

(n53)Footnote 31.8. *Chin v. Namvar* (2008) 166 Cal. App. 4th 994, 1006, 83 Cal. Rptr. 3d 294 .

(n54)Footnote 31.9. *Chin v. Namvar* (2008) 166 Cal. App. 4th 994, 1007, 83 Cal. Rptr. 3d 294 .

(n55)Footnote 31.10. *Chin v. Namvar* (2008) 166 Cal. App. 4th 994, 1006, 83 Cal. Rptr. 3d 294 .

(n56)Footnote 31.11. *Chin v. Namvar* (2008) 166 Cal. App. 4th 994, 1006, 83 Cal. Rptr. 3d 294 .

(n57)Footnote 31.12. *Chin v. Namvar* (2008) 166 Cal. App. 4th 994, 1004-1009, 83 Cal. Rptr. 3d 294 .

(n58)Footnote 31.13. *Chin v. Namvar* (2008) 166 Cal. App. 4th 994, 1007-1008, 83 Cal. Rptr. 3d 294 (evidence was sufficient to support finding that worker was in fact independent contractor and was estopped from denying otherwise, where defendants knew he was at one time licensed and he failed to disclose to them that license had since lapsed, and where trial court reasonably could have found that defendants understandably relied on him to their detriment).

(n59)Footnote 31.14. *Chin v. Namvar* (2008) 166 Cal. App. 4th 994, 1007, 83 Cal. Rptr. 3d 294 .

(n60)Footnote 32. *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 492, 162 Cal. Rptr. 320, 606 P.2d 355 .

(n61)Footnote 33. *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal. 3d 446, 456, 183 Cal. Rptr. 51, 645 P.2d 102 ; *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 492, 162 Cal. Rptr. 320, 606 P.2d 355 .

(n62)Footnote 34. See *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 492, 162 Cal. Rptr. 320, 606 P.2d 355 . For the standard jury instruction on respondeat superior when the general employer and/or special employer denies responsibility, see Judicial Council of California Civil Jury Instructions, CACI 3706 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction on joint responsibility in a special employment, see Judicial Council of California Civil Jury Instructions, CACI 3707 (Matthew Bender). For discussion of the CACI standard jury instructions generally, see § 61.05.

(n63)Footnote 35. See *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 492, 162 Cal. Rptr. 320, 606 P.2d 355 ; see also *Von Beltz v. Stuntman, Inc.* (1989) 207 Cal. App. 3d 1467, 1487, 255 Cal. Rptr. 755 .

(n64)Footnote 36. *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal. 3d 446, 460, 183 Cal. Rptr. 51, 645 P.2d 102 ; *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486, 494-495, 162 Cal. Rptr. 320, 606 P.2d 355 ; see, e.g., *Stevens v. Roman Catholic Bishop of Fresno* (1975) 49 Cal. App. 3d 877, 889-891, 123 Cal. Rptr. 171 (priest was dual employee of both local and regional church authorities).

(n65)Footnote 37. *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal. 3d 446, 459, 183 Cal. Rptr. 51, 645 P.2d 102 .

(n66)Footnote 38. See *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal. 3d 446 .

(n67)Footnote 39. *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal. 3d 446 .

(n68)Footnote 40. *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal. 3d 446 .

(n69)Footnote 41. See *Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal. 3d 446 .

(n70)Footnote 42. *See Societa per Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446 .*

(n71)Footnote 43. *Societa per Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446 .*



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California Employment Law

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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees
Part A. TEXT

2-30 California Employment Law § 30.05

AUTHOR: By Mary Vail, J.D.

§ 30.05 Employee Conduct Within the Scope of Employment

[1] Generally

Under the doctrine of respondeat superior, an employer is vicariously liable for the torts of his or her employees if those torts are committed within the scope of the tortfeasor's employment.ⁿ¹ The third-party plaintiff has the burden of proving that the employee's tort occurred within the scope of employment.ⁿ² Whether an employee's tort occurred within the scope of his or her employment is generally a question of fact, but when the facts are undisputed and no conflicting inferences can be drawn from the facts presented, resolution of scope of employment issues then becomes a question of law.ⁿ³ Summary judgment may be granted on the basis of the employee's uncontroverted declaration that he or she was acting in the course of employment unless the opposing party asserts at least some theory to the contrary.^{n3.1}

The various tests that courts have applied in determining whether or not specific conduct is within the scope of employment are discussed in [2], *below*. The persuasive effect of workers' compensation precedent on scope of employment determinations is discussed in [3], *below*. Time and place issues, including the "going and coming rule" and the liability of employers for employee torts committed during social functions sponsored by the employer and during off-duty and break time, are discussed in [4], *below*. The effect of the fact that the employee was acting for his or her own personal business at the time of the tort on the scope of employment determination is discussed in [5], *below*. The consequences of an employee's violation of the employer's rules or instructions on the vicarious liability of the employer is discussed in [6], *below*. Finally, the implications of the employee's use of the employer's facilities and/or instrumentalities in the commission of the tort are discussed in [7], *below*.

[2] Tests Applied to Determine Whether Conduct Was Within Scope of Employment

Courts have utilized various tests to determine whether or not specific conduct by an employee is within the scope of his or her employment. Older cases focused on the relationship between the employee's conduct and the duties of his or her employment. For example, in *Jameson v. Gavett*,ⁿ⁴ the scope of employment test was articulated as follows:ⁿ⁵

1. What are the employee's express duties and was the employee doing them at the time of the tort?
2. Did the tort occur while the employee was pursuing the employer's business interests?
3. Did the employee have express or implied employer authority to do the acts causing plaintiff's injuries?

Under this test, if the answer to any of these questions was affirmative, the employee's conduct was deemed to be within the scope of employment and the employer was liable for plaintiff's injuries.ⁿ⁶

More recently, courts have followed a different approach, especially in cases involving an employee's intentional torts. California no longer follows the traditional rule that conduct is within the scope of employment only if motivated, in whole or in part, by a desire to serve the employer's interest,^{n6.1} and liability is also not precluded by an employer's rule against the tortious conduct.ⁿ⁷ However, the California Supreme Court has made clear that respondeat superior liability for intentional torts requires a showing that the tort had a causal nexus to the employee's work.^{n7.1}

It is not entirely clear what effect these rules concerning the requisite nexus between intentional tortious conduct and the employee's work will have in the context of nonintentional torts. In many cases involving negligent conduct, the determination of the nexus between the conduct and the duties of employment has been viewed as only one part of the test. Even if the conduct is deemed to lie outside the scope of employment under the "nexus" test, the employer may nevertheless be liable if the conduct is "foreseeable," meaning that it is not so unusual or startling that it would seem unfair to include the resultant loss among the other costs of the employer's business.ⁿ⁸ The inquiry should be whether the risk is one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer.^{n8.1} In short, the trend is toward application of a dual test, under which a tort is deemed to be committed within the scope of employment if either (1) the employee's act or conduct was "foreseeable" in the above sense, or (2) the employee's act or conduct was required by or incident to his or her duties, regardless of whether it could be foreseen by the employer.ⁿ⁹

In determining whether or not an employee's tort was incidental to his or her job duties, courts have held that an employee's duties, and the purpose of his or her employment, are broadly construed.ⁿ¹⁰ A corollary to this principle is that, even if an employee was engaged in a specific activity or function that he or she was not hired to perform, the employee may still be found to be within the scope of employment if the activity in question is related to the employment or provides an indirect benefit to the employer.ⁿ¹¹

[3] Applicability of Workers' Compensation Cases in Defining Scope of Employment

Under workers' compensation law, an applicant for benefits must establish that the applicant's injury arose out of and in the course of the employment.ⁿ¹² This rule is discussed at length in Chapter 20.

California courts have held that, because of the similarity in terminology between the tests applied to determine whether respondeat superior liability exists and those applied to determine whether an injury is covered by workers' compensation, and because of the fact that both laws cover the allocation of risks from workplace injuries, consideration of workers' compensation case authority is appropriate in tort cases involving the doctrine of respondeat superior, not only in determining threshold scope of employment issues, but also in the application of corollary rules and exceptions to the scope of employment rule.ⁿ¹³ The courts have also held, however, that although workers' compensation case authority is "useful," "helpful," or "illuminating," it is not controlling in tort cases because of the differences in the purposes and policies behind the workers' compensation law and the doctrine of respondeat superior.ⁿ¹⁴ The workers' compensation law is a protective statute intended to provide limited benefits for work-related injuries to employees, regardless of fault, and contains a statutory mandate in favor of liberal interpretation for the purpose of awarding such benefits.ⁿ¹⁵ The tort doctrine of respondeat superior, by contrast, imposes vicarious liability on employers for injuries

to third parties caused *by* employees.ⁿ¹⁶ Furthermore, tort awards are intended to provide complete indemnification to the injured person for losses proximately caused by tortious conduct, as contrasted with the more limited awards available under the workers' compensation law.ⁿ¹⁷ Thus, an employee who suffers an injury that is compensable under workers' compensation law, because it "arose out of and occurred in the course of employment," may not necessarily be held to have "acted within the scope of employment" for purposes of the doctrine of respondeat superior.ⁿ¹⁸

[4] Time and Place Issues

[a] Going and Coming Rule

[i] Generally

The "going and coming rule" is applied by courts to determine whether torts committed while an employee is commuting or traveling constitute employee conduct within the scope of employment. Under the going and coming rule, an employee is outside the scope of employment while commuting to and from work.ⁿ¹⁹ Thus, an employer ordinarily will not be liable under the doctrine of respondeat superior for torts committed by an employee while he or she is commuting to and from work.ⁿ²⁰ The going and coming rule also generally applies to an employee when he or she is traveling to or from lunch (or other meal periods), even if the employee is driving a vehicle owned by the employer, unless he or she is also performing an errand for the employer.ⁿ²¹

Numerous exceptions to the rule, discussed in [ii]-[vii], *below*, have limited the application of the rule to other situations. Generally, an exception to the going and coming rule will be found when the employer derives some incidental benefit from the employee's trip.^{n21.1}

[ii] Exception--Special Errand Rule

When an employee pursues the employer's business during his or her commute time, the going and coming rule will not apply, and the employee will be held to be within the scope of employment during his or her entire commute period.ⁿ²² One court stated the exception as follows:

If the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, but is coming from home or returning to it on a special errand either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons.ⁿ²³

The special errand rule applies both to employees who regularly perform work for their employer during commute periods, and to employees who only occasionally do so.ⁿ²⁴

Just as the going and coming rule applies to employees while commuting and during lunch hour break travel, the special errand rule applies whether the employer errands are performed during commute periods or during the employee's lunch period.ⁿ²⁵

The special errand rule can apply to a wide variety of employment or employment-related activities. Such activities include tasks such as transporting or retrieving employer tools and equipment,ⁿ²⁶ traveling to and from a service call when the employee is "on call" at home for the employer's business,ⁿ²⁷ attending an out-of-town business conference,^{n27.1} and going to and from employer-sponsored social events when the social event confers a direct or indirect business benefit on the employer and the employer expects or requires the employee to attend.ⁿ²⁸ Attendance at nonrequired but employer-compensated college classes is not a special errand,^{n28.1} nor is driving a fellow employee to a park-and-ride lot after work.^{n28.2}

An employee's attendance at an out-of-town business conference may be considered a special errand under the special errand doctrine. When an employee intends to drive home from the errand, the errand is not concluded simply because the employee drives his or her regular commute route, but rather, the errand is concluded when the employee returns home or deviates from the errand for personal reasons.^{n28.3}

Even if the special-errand exception to the going-and-coming rule is found to be applicable, the employee may yet be found to be outside of the scope of employment if, at the time of the injury, the employee has completely abandoned the employer's business for personal reasons. To constitute an abandonment, however, the deviation or departure from the employer's business to pursue a personal errand must be substantial and complete. A mere deviation for personal reasons is insufficient. An employee who is pursuing a business errand and a personal objective simultaneously is still acting within the scope of employment.ⁿ²⁹

Whether there has been a deviation so material as to constitute a complete departure by the employee from the course of employment is usually a question of fact. However, if the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of employment as a matter of law.ⁿ³⁰ Similarly, a court may find as a matter of law that a deviation is insufficiently material to relieve the employer of respondeat superior liability.^{n30.1}

In making the determination, a variety of relevant circumstances should be considered and weighed. These factors may include (1) the intent of the employee; (2) the nature, time, and place of the employee's conduct; (3) the work that the employee was hired to do; (4) the incidental acts that the employer should reasonably have expected the employee to do; (5) the amount of freedom allowed the employee in performing his or her duties; and (6) the amount of time consumed in the personal activity.^{n30.2}

One court has cast the question as whether the employee's deviation was both minor and foreseeable.^{n30.3} In *Lazar v. Thermal Equipment Corp.*,ⁿ³¹ the employee injured the plaintiff while the employee was driving to a store on a personal errand. Pursuing that errand also required the employee to deviate from the most direct route between employer's main office and employee's residence. The employee-tortfeasor was a project engineer who was frequently called at home in the evenings to "trouble shoot" and drive to the employer's worksites. He traveled frequently from his home to both the employer's main office and various work locations, sometimes using a company car, and was required to transport employer equipment in either his own or a company vehicle. He was both required to use his own vehicle for company business and authorized to use company vehicles for personal business.ⁿ³² The court of appeal held that these employment arrangements were of mutual interest to the employee and employer, and that the employer was therefore liable to plaintiff because the employee's "deviation" in stopping to shop was both minor and foreseeable.ⁿ³³

[iii] Exception--When Travel Inherent in Job Duties

The going and coming rule was primarily intended to apply to employees with a single, fixed work location, whose job duties do not include driving.ⁿ³⁴ Courts have held that an employee whose regular job duties require frequent field work, customer contact, or travel between various locations of the employer are not subject to automatic application of the going and coming rule.ⁿ³⁵

Lazar v. Thermal Equipment Corp. ⁿ³⁶ provides an example of the going and coming rule's inapplicability when employee travel is an inherent and frequent element of the employee's job duties. In that case, the court's holding that the employer could be held liable for the negligence of the employee was based on the facts that the employee-tortfeasor ran errands for the employer during commute hours on a regular basis, was "on call" at home to handle business emergencies in the evening and on weekends, and traveled between the employer's various work locations during daytime work hours.ⁿ³⁷

In *Ducey v. Argo Sales Co.*, ⁿ³⁸ a housecleaner traveled from home to one or more employer properties each day, but

was not required to use her automobile or to transport employer equipment between her job locations. The employee was killed and plaintiffs were seriously injured in an accident that occurred while the employee was commuting home at the end of her workday. The California Supreme Court held that the going and coming rule applied to preclude employer liability, because travel by personal auto was not inherent in employee's job and because, at the time of her death, she was not performing any special errand for her employer.ⁿ³⁹

[iv] Exception--When Employer Pays for Employee Commute Time

The going and coming rule may be inapplicable in some instances when the employer compensates the employee for his or her work time. In *Hinman v. Westinghouse Elec. Co.*,ⁿ⁴⁰ the employee and employer agreed that the employee's commute time would be paid work time. While the employee was driving home from work, he was involved in an accident that resulted in injury to a third party. The California Supreme Court held that when the commute period is made part of the employee's paid workday, the employee remains within the scope of employment during commute periods, and the employer is therefore liable for its employee's torts as long as the employee was using the commute portion of his or her paid workday for its designated purpose.ⁿ⁴¹ The Court supported the result of employer liability on the rationale that the employer had chosen to compensate its employees for their commute time because the arrangement also benefitted the employer by geographically expanding the size of employer's employee selection pool.ⁿ⁴²

The Court in *Hinman* expressly reserved the question of whether the mere payment of travel expenses, without additional payment for the employee's travel time, reflects a sufficient benefit for the employer so that the employer should bear responsibility to innocent third parties for the risks inherent in the travel.ⁿ⁴³ The Court did cite a workers' compensation case that had suggested that the payment of travel expenses must be a substantial inducement to accept the employment, and the place of employment must be an extensive distance from the employee's home, for the going and coming rule to be held inapplicable.ⁿ⁴⁴

The issue left open by the Supreme Court in *Hinman* was addressed in the earlier case of *Harris v. Oro-Dam Constructors*.ⁿ⁴⁵ In *Harris*, the employer had paid its employees who lived over 15 miles from their worksite a travel allowance pursuant to an agreement between the employer and its employees' labor organization. At trial, the jury had exonerated the employer because its employee had completed his workday at the time of the accident with plaintiff. On appeal, the plaintiff argued that when the employer pays an employee's commute or travel expenses, the employee's commute periods should be deemed within the scope of employment as a matter of law. The court of appeal stated that the obtaining of such a benefit in the collective bargaining process, standing alone, cannot automatically make commuting employees within the scope of employment in a tort action.ⁿ⁴⁶ In reaching this conclusion, the court also relied on the facts that the employer did not control employee commute methods, did not require employees to use their personal vehicles for travel to and from work, and did not pay employees their hourly wage for commute time.ⁿ⁴⁷ The court also concluded that, unless the employer controlled the employee's travel in some way, the employer did not benefit from the employee's commute, and therefore could not be held liable for the employee's torts committed during the commute.ⁿ⁴⁸

Subsequent cases have also addressed the issue left open in *Hinman*. These courts have refused to impose liability on an employer based solely on the payment of a travel allowance.^{n48.1} The fact that the payment of a travel allowance may bring an employee within the scope of employment for purposes of workers' compensation law does not require that the employer also be subject to respondeat superior liability under tort law. The tests, though similar, are not identical; and the benefit to the employer provided by an allowance has been held insufficient to impose vicarious liability under respondeat superior principles.^{n48.2}

[v] Exception--When Employer Requires Use of Employee Vehicle

When an employee is required to drive his or her own vehicle to work so that the vehicle will be available for use for

the employer's business during the workday, motor vehicle accidents during the regular business hours and while the employee is commuting between his or her home and the job site are considered foreseeable and inherent risks of the employer's enterprise. Therefore, accidents that occur on the way to or from work are within the scope of employment.ⁿ⁴⁹ Workers' compensation cases have also held that if the employer requires employees to furnish a vehicle on the job, the going and coming rule will not apply, at least when there is no evidence that at the time of the accident the employee was not driving directly to or from work.ⁿ⁵⁰

The required-vehicle exception to the going and coming rule has typically been applied when an employer requires the use of a vehicle as an integral part of performing the job at disparate locations throughout the course of work hours.^{n50.1} It does not apply to impose liability on an employer for the conduct of the employee during time that he or she is not actually performing the job, such as during a break between shifts.^{n50.2}

[vi] Exception--When Use of Car Gives Some Incidental Benefit to Employer

A related concept is the exception recognized when the employer derives some incidental benefit from the employee's use of the vehicle.^{n50.3} Thus in a recent case, the court of appeal found that an accident that occurred en route to work was outside the coming and going rule because the employee was on call for emergencies, carried his employer's equipment and supplies and because he would sometimes go from his home to a jobsite.^{n50.4} In *Singh* the court noted that it is irrelevant who owns the vehicle, whether the employee receives reimbursement for its use, and whether the employee performs a personal errand while driving home.^{n50.5}

[vii] Exception--Special Risk Rule

The special risk exception to the going and coming rule has typically been applied in workers' compensation cases when the employee suffers an injury from a special risk causally related to employment. That exception applies if (1) the employee would not have been at the location where the injury occurred but for the employment; and (2) the risk is distinctive in nature or greater than risks common to the public.^{n50.6} Although noting important distinctions between the workers' compensation cases and respondeat superior law, the court of appeal, in *Depew v. Crocodile Enterprises, Inc.*, assumed that the special risk exception does apply for purposes of respondeat superior.^{n50.7}

In *Depew*, an employee who fell asleep at the wheel while driving home from work after working extra hours killed a third party. The court of appeal held that, even assuming the special risk exception applies, this case did not fall within that exception because there was an insufficient causal nexus between the employment and the third party's death.^{n50.8} The court explained that the causation standard in the respondeat superior context requires more than "but for" causation. The applicable standard is whether the incident leading to injury was an outgrowth of the employment, inherent in the employment, or foreseeable from the employee's duties.^{n50.9} In this case, neither the nature of the employee's job nor the hours he worked made it predictable that he would fall asleep at the wheel and cause a fatal car accident. In addition, to the extent that the employee was too tired to drive home without causing a fatal accident, his condition was neither an outgrowth of his employment nor inherent in the working environment. Furthermore, such extreme fatigue was not typical of or broadly incidental to operating a restaurant.^{n50.10}

On the other hand, in *Bussard v. Minimed, Inc.*, ^{n50.11} the court held that the special risk exception applied when an employee was involved in an automobile accident with a third party while driving home after suffering pesticide exposure at work. That an employee might not be fit to drive after breathing lingering pesticide fumes for several hours was not such a startling or unusual event that a car accident on her commute home was unforeseeable. The accident occurred after the employee decided to drive home even though her supervisors asked about her ability to drive and offered her medical assistance. She insisted she was fine and declined their help. Her decision to drive home gave the employer an opening to raise the going-and-coming rule; the rule did not apply because her decision was a fortuity that did not obscure the third party's central claim that her job had contributed to the accident. Foreseeability of a risk arising from or connected to work requires no more than a causal connection between a work-related event and the employee's

subsequent act causing injury.n50.12

[b] Social Functions

Because most employees are not hired for the purpose of attendance at or participation in social events, when an employee is involved in tortious activity while going to, attending, or commuting home from a social event, obvious scope of employment issues are raised. California appellate courts have held that attendance at social events, although not part of an employee's normal job duties, may in some instances come under the "special errand" exception to the going and coming rule.n51 For a social event to qualify as a special errand, the event must be related to the employee's employment and provide an intended direct or indirect benefit to the employer.n52 Whether or not a particular social event is within the scope of employment is generally a question of fact.n53

In *Boynton v. McKales*, n54 plaintiff was injured by an employee who was returning home from a company banquet. The employee was intoxicated at the time of the accident, and had pleaded guilty to driving while intoxicated in related criminal proceedings. Evidence was presented at trial that service pins were presented at the banquet, that the banquet benefitted the employer by promoting its sales program and continuity of employment, that supervisors attended the event, and that the event was an annual and official company function. The court of appeal affirmed the trial court's finding that the employer was liable to plaintiff, holding that the evidence supported the inference that the event was to the benefit of the employer.n55

In *Robbins v. Hewlett-Packard Co.*, n56 the employee was en route home from an employer-sponsored annual summer picnic when he caused a traffic accident, resulting in the death of plaintiff's spouse and child. At trial in plaintiff's action for wrongful death, evidence was presented indicating that the picnic provided a benefit to the employer in the form of increased employee morale, but that attendance at the picnic was voluntary, devoid of educational or awards presentations, and bore no relationship to an attending employee's continued employment, performance evaluation, or promotional opportunities.n57 The court of appeal affirmed a trial court judgment in favor of the employer-defendant, holding that the evidence of indirect employer benefit was insufficient to form the basis of respondeat superior liability for the social event in question.n58

While *Robbins* and *Boynton* involved planned and formally scheduled social events, informal social activity at the workplace can also raise the potential for employer liability. Employers have been held liable to injured employees or third parties when after-hours socializing and the furnishing of alcohol occurs with the express or implied permission of the employer, and accidents or workplace physical altercations occur. Especially when the employees are encouraged to remain near the jobsite so that the employer may more readily recall them to work, the foreseeability of fights and other injuries resulting from drinking may support the imposition of liability on the employer when injuries do occur.n59

However, a plaintiff must show more than employee drinking on the employer's premises. In one case, an off-duty employee injured plaintiff in an auto accident that occurred while the employee was driving home from the employer's premises. The plaintiff sought damages from the employer on three theories: respondeat superior; that employer was liable to plaintiff under *Business and Professions Code section 25602* for furnishing liquor to a person (the tortfeasor) whom employer knew was an alcoholic; and that by permitting consumption of alcohol on its premises, employer had violated its statutory duty under *Labor Code section 6400* to provide its employees with a safe workplace. The court of appeal first held that the tortfeasor had not been acting within the scope of his employment for respondeat superior purposes. The court based this conclusion on the evidence that showed that the tortfeasor was off-duty on the evening of the accident, was on the employer's premises that evening for wholly personal reasons, and was supplied with liquor by a second off-duty employee.n60 The court also held that the employer's failure to stop the consumption of alcohol on its premises could not constitute the "furnishing" of alcohol to the tortfeasor within the meaning of *Business and Professions Code section 25602*.n61 Lastly, the appellate court held that plaintiff could not prevail on the basis of *Labor Code Section 6400*, because plaintiff had failed to establish that he was in a class of persons intended to be protected from harm under that statute.n62 The appellate court in *Calrow* also held that plaintiff had failed to establish or offer

proof that the defendant employer had made drinking at its facilities a customary incident of employment.ⁿ⁶³ This portion of the court's ruling was significant because plaintiff had attempted to support his claims by citing workers' compensation case authorityⁿ⁶⁴ holding that employers supporting a high level of on-the-job socializing and furnishing of alcohol at social events, or who had clearly and repeatedly furnished alcohol at employment-related functions to employees it knew to be alcoholics, could be found to have brought the drinking within the scope of the employment. The court held that plaintiff had not made the requisite showing of employer participation, and that in any event the workers' compensation case involved the finding that the employer was estopped to raise a defense of voluntary intoxication, which was not pertinent to the third-party personal injury action.ⁿ⁶⁵

[c] Off-Duty and Break Time

Generally, the going-and-coming rule encompasses the time that an employee takes away from work for meals. Under the "lunch-break" rule, the employer is not vicariously liable for the negligence of an employee who is not in the service of his or her employer while taking time away from work for meals.^{n65.1} However, in some instances, an employee may be found to be acting within the scope of employment for purposes of respondeat superior even during the employee's lunch hour or off-duty hours.ⁿ⁶⁶

In *Gipson v. Davis Realty Co.*,ⁿ⁶⁷ the employee combined his lunch break with auto travel to a potential real estate listing for his employer. The accident occurred before the employee reached either his lunch site or the property listing site. The court of appeal held that when the employee combines his or her break time with accomplishment of employer business, that employee remains within the scope of employment for the duration of the relevant break period.ⁿ⁶⁸ The court stated that an employee on a lunch break or off-duty period who combines his or her break with work for the employer should be on the same footing as a commuting employee who performs a special errand for the employer while en route between the job and the employee's residence.ⁿ⁶⁹ The employee will remain within the scope of employment in both situations until reaching his or her home or office destination unless the employee totally departs from the purposes of his or her multipurpose mission.ⁿ⁷⁰ⁿ⁷¹ The *Gipson* court indicated that, although activities during a pure break will be outside the scope of employment, once break time is devoted in any measure to accomplishment of employer business, the employer can be liable to the plaintiff under the special errand exception to the going and coming rule.ⁿ⁷²

Employer liability for the torts of employees may also apply, under appropriate circumstances, to conduct occurring during employees' off-duty hours. The California Supreme Court has held that employees who are off-duty at home, but also "on call" for employer business are acting within the scope of employment while going to, performing, and returning home from a service call for the employer.ⁿ⁷³ A public entity may be vicariously liable for the conduct of an off-duty law enforcement officer in the course of making an arrest.^{n73.1}

However, an employee who has been furnished with a company vehicle and is on call while at home does not bring 24-hour employer liability regardless of the nature of the employee's activities at the time of the accident.^{n73.2} The focus is strictly on the employee's purpose at the time of the injury-producing accident, and there is no employer liability if the employee's use of the vehicle at that time was purely personal.^{n73.3}

Respondeat superior liability may arise for conduct committed by an employee on the work premises, but after work hours have ended. The employer may be liable if the employee's presence is endorsed by the express or implied permission of the employer, and the employer either receives a benefit from the employee's presence or the employee's presence is a customary incident of the employment relationship.^{n73.4} However, an off-duty employee who travels to his or her employer's premises for his or her own purposes, and in the course of doing so commits a tort, will generally not expose his or her employer to liability to plaintiff under the doctrine of respondeat superior.^{n73.5} Further, an employer will not be liable under the doctrine of respondeat superior for injury caused by an employee while driving on off-duty time to and from a location in order to comply with a condition required for employment, such as getting fingerprinted, when the employee has discretion to decide when, where and how to satisfy the condition.^{n73.6}

As with scope-of-employment questions generally, the determination of whether a tort committed during an employee's off-duty time is within the scope of employment is ordinarily a question of fact.^{n73.7} However, it becomes a question of law if the undisputed facts will not support an inference that the employee was acting within the scope of employment.^{n73.8}

[d] Commercial Traveler Rule

The commercial traveler rule in workers' compensation provides that during the period an employee travels on the employer's business, the employee is within the course of employment, which includes the activities of obtaining food and shelter.^{n73.9} By contrast, if an employee commits the tort while engaged in purely private purposes, the private conduct is outside the scope of employment and cannot form the basis for an employer's respondeat superior liability.^{n75.10}

For example, in *Sunderland v. Lockheed Martin Aeronautical Systems Support Co.*,^{n75.11} an employee on a travel assignment for his employer collided with plaintiffs' car at a fast-food establishment. On the day the accident occurred, the employee had finished work in the middle of the day and left the work site. Much later, driving his own vehicle, the employee stopped at a fast food restaurant, where the collision with plaintiffs' vehicle occurred. At that time, the purpose of the employee's driving and activity was personal in nature and not related to his employment or to his employer. The employee would have been covered for workers' compensation purposes under the commercial traveler rule. However, because he was not acting within the scope of his employment when the accident occurred, his activity could not form the basis for vicariously imposing liability on his employer. Although the employer paid the employee an additional 10 percent above his salary during his travel assignment and a per diem amount for housing and incidental expenses including transportation, the payment of a travel allowance did not reflect a sufficient benefit to the employer for it to bear responsibility for plaintiffs' injuries. The benefit of the employee's activity to the employer's enterprise, and the employer's right to control that activity, were relevant factors in determining whether the activity came within the scope of employment. The employee performed no services for the employer after leaving the workplace, and drove to the fast food restaurant for his own benefit. His visit to the fast-food establishment was not for the benefit of the employer, which exercised no control over his choice of transportation generally or his movements at the time he collided with plaintiffs' vehicle. The fact that the employer required the employee to be on call 24 hours a day, seven days a week while on the travel assignment did not alter the fact that the purpose of his trip to the fast-food establishment to buy food was a purely private and personal activity, which was a substantial personal deviation from his employment duties sufficient to make it unfair to hold the employer vicariously liable.

[e] Premises Line Rule

Under workers' compensation law, for purposes of applying the going-and-coming rule, the employment relationship begins when the employee enters the employer's premises. Injuries sustained in close proximity to the employer's premises may arise out of the employment, especially when the accident occurs in the parking lot used by employees or on public property immediately adjacent to the workplace. Thus, for purposes of workers' compensation, the course of employment includes a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done.^{n75.12}

However, the premises rule does not apply in civil tort cases involving the going-and-coming rule for purposes of respondeat superior. The risks associated with an employee's commute to and from work generally are not, absent special circumstances recognized by the exceptions to the going-and-coming rule, inherent in, typical of, or created by their work.ⁿ⁷⁴ For example, in *Hartline v. Kaiser Foundation Hospitals*,ⁿ⁷⁵ the trial court did not err in granting the employer's motion for summary adjudication of plaintiff's vicarious liability cause of action. As a matter of law, the employee, who was employed as a physical therapist, was not acting within the scope of her employment when she hit plaintiff and his dog with her car on her way into the employer's parking lot before her working hours began. The fact

that the accident occurred on the employer's premises, *i.e.*, the driveway to the parking lot, or on public property immediately adjacent to the premises, did not change the character of the accident to a risk foreseeably related to the employee's particular employment or to the necessary operation of the employer's business.

[5] Employee Personal Business Departures From the Scope of Employment

An on-duty employee who commits a tort in the pursuit of purely personal objectives will generally be found to have departed from the scope of employment.ⁿ⁷⁶ However, if the gist of an employee's personally-motivated activity is incidental in nature, aimed at employee convenience or comfort, and the tort occurs while the employee is also engaged in work for the employer, the employee is generally held not to have departed from the scope of employment.ⁿ⁷⁷

The employee's objectives or purposes for engaging in the activity causing the tort, rather than whether or not the tort occurred during working hours or involved any use of the employer's facilities, is the determinative factor. If an employee is pursuing purely personal ends, the employer will generally not be vicariously liable to plaintiff even though the employee is on duty at the time of the accident, while an off-duty or commuting employee-tortfeasor who is pursuing employer objectives or performing work assignments at the time of the accident will generally expose the employer to vicarious liability.ⁿ⁷⁸

[6] Effect of Employee Violation of Employer's Rules or Instructions

Respondeat superior liability does not depend on the employee's specific authority to perform the act that results in the third-party plaintiff's injury. Even without such authority, if the employee acts within the scope of employment, his or her employer is vicariously liable to plaintiff.ⁿ⁷⁹ Even if the employee's conduct is contrary to the employer's instructions, this fact alone will not take the employee outside the scope of employment for purposes of respondeat superior liability.ⁿ⁸⁰

For example, in *Perez v. Van Groningen & Sons, Inc.*,ⁿ⁸¹ plaintiff rode with his uncle, the employee, on a tractor while the employee was performing his normal task of disking a field. The employer had maintained a "no rider" rule because of the potential danger. Plaintiff fell off the tractor into the disking attachment, and was severely injured. Plaintiff sued the employer on a respondeat superior theory, and sought an instruction that the employee was acting within the scope of his employment as a matter of law. The trial court refused, and instead submitted the issue of scope of employment to the jury as a factual question. The trial court found for defendant, and plaintiff appealed.

The California Supreme Court reversed, concluding that the trial court should have determined that the employee was acting within the scope of his employment as a matter of law.ⁿ⁸² The Court held that, as long as it was clear that at the time of the injury the employee was following the employer's instructions regarding the task to be performed, the fact that the employer had not authorized the employee to take a passenger was immaterial.ⁿ⁸³ The Court also rejected the employer's contention that the employee's negligence should not be imputed to the employer because the unauthorized act did not benefit the employer. The Court noted that an employer can be liable for its employee's unauthorized *intentional* torts committed within the scope of employment, despite lack of benefit to the employer.ⁿ⁸⁴ Although the employer anticipated the risk of injury inherent in carrying a passenger on a tractor and sought to minimize the risk with its no passenger rule, the Court held that an employer cannot avoid liability by ordering its employees to act carefully.ⁿ⁸⁵ The law imposes the risk of injury arising out of the employment on the employer as a cost attendant to doing business, and because it was undisputed that the employee was performing a task within the scope of the employment at the time of the injury, the issue of the scope of employment should have been determined as a matter of law.ⁿ⁸⁶

In an earlier case, it was held that acts of employee insubordination were insufficient to sever the employee's employment relationship or to take him outside the scope of employment. The employee, a bus driver, reported for work intoxicated, ignored the orders of a company supervisor not to take his bus onto his route, and drove the bus into

plaintiff's vehicle. The court of appeal held that the employer could not avoid liability to plaintiff by arguments that tortfeasor terminated his employment by reporting for work intoxicated and was in any event outside of his scope of employment by driving the bus in violation of employer orders.ⁿ⁸⁷

[7] Employee's Use of Instrumentalities and Facilities of Employer

An employee who commits a tort using employer property while pursuing purely personal, nonemployment-related ends is generally found to be outside the scope of employment.ⁿ⁸⁸ Therefore, when plaintiff sues an employer on a respondeat superior theory based solely on the facts that tortfeasor was defendant's employee, and that the employee was on duty at the time of plaintiff's injury or was driving the employer's vehicle at the time of the accident, the employer is likely to prevail on the ground that the employee was not acting in the scope of his or her employment. In order to establish the employer's vicarious liability when the tort was accomplished through the use of the employer's facilities or instrumentalities, the plaintiff must also show that the employee was acting in a manner relating to his or her employment rather than solely for his or her personal ends.ⁿ⁸⁹ However, even if the employee was acting for his or her personal ends, the employer will be held liable if the deviation from the employer's business is insubstantial and foreseeable.ⁿ⁹⁰ For further discussion of issues involving the scope of employment when the employee is engaged in personal activities, see [5], *above*.

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral OverviewTortsVicarious LiabilityEmployersScope of EmploymentGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 296, 48 Cal. Rptr. 2d 510, 907 P.2d 358 ; *Munyon v. Ole's, Inc.* (1982) 136 Cal. App. 3d 697, 701, 186 Cal. Rptr. 424 . For the standard jury instructions on the scope of employment, *see* Judicial Council of California Civil Jury Instructions, CACI 3720 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions; on the employer's liability for the employee's unauthorized acts, *see* Judicial Council of California Civil Jury Instructions, CACI 3722 (Matthew Bender); and on the employer's liability when the employee's acts substantially deviate from the scope of employment, *see* Judicial Council of California Civil Jury Instructions, CACI 3723 (Matthew Bender). For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n2)Footnote 2. *Ducey v. Argo Sales Co.* (1979) 25 Cal. 3d 707, 721, 159 Cal. Rptr. 835, 602 P.2d 755 ; *Jeffrey E. v. Central Baptist Church* (1988) 197 Cal. App. 3d 718, 722, 243 Cal. Rptr. 128 ; *Munyon v. Ole's, Inc.* (1982) 136 Cal. App. 3d 697, 701, 186 Cal. Rptr. 424 .

(n3)Footnote 3. *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 299, 48 Cal. Rptr. 2d 510, 907 P.2d 358 ; *Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 213, 285 Cal. Rptr. 99, 814 P.2d 1341 ; *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal. 3d 956, 963, 88 Cal. Rptr. 188, 471 P.2d 988 ; *see also* *Maria D. v. Westec Residential Security, Inc.* (2000) 85 Cal. App. 4th 125, 140, 102 Cal. Rptr. 2d 326 (as matter of law, residential security company could not be held liable under respondeat superior doctrine for alleged rape by employee-security guard, because alleged rape was not within scope of security guard's employment).

(n4)Footnote 3.1. *See* *Golden West Baseball Co. v. Talley* (1991) 232 Cal. App. 3d 1294, 1305, 284 Cal. Rptr. 53 .

(n5)Footnote 4. *Jameson v. Gavett* (1937) 22 Cal. App. 2d 646, 71 P.2d 937 .

(n6)Footnote 5. *Jameson v. Gavett* (1937) 22 Cal. App. 2d 646, 650-651, 71 P.2d 937 .

(n7)Footnote 6. *Jameson v. Gavett* (1937) 22 Cal. App. 2d 646, 650-651, 71 P.2d 937 ; see also *Coats v. Construction & Gen. Laborers Local No. 185* (1971) 15 Cal. App. 3d 908, 913, 93 Cal. Rptr. 639 (employee acting within scope of employment if employee's conduct was authorized by employer, arose out of employee's performance of services for the employer or was for employer's benefit, or was incidental to the employee's work).

(n8)Footnote 6.1. See *Lisa M. v. Henry Mayo Newhall Memorial Hosp.* (1995) 12 Cal. 4th 291, 297, 48 Cal. Rptr. 2d 510, 907 P.2d 358 (citing *Carr v. Wm. C. Crowell Co.* (1946) 28 Cal. 2d 652, 654, 171 P.2d 5).

(n9)Footnote 7. See *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal. 3d 962, 969, 227 Cal. Rptr. 106, 719 P.2d 676 ; see *Bailey v. Filco, Inc.* (1996) 48 Cal. App. 4th 1552, 1560, 56 Cal. Rptr. 2d 333 .

(n10)Footnote 7.1. See *Lisa M. v. Henry Mayo Newhall Memorial Hosp.* (1995) 12 Cal. 4th 291, 297, 48 Cal. Rptr. 2d 510, 907 P.2d 358 . For discussion of employer liability for intentional torts, see § 30.06.

(n11)Footnote 8. *Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341 ; *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal. 3d 962, 968, 227 Cal. Rptr. 106, 719 P.2d 676 ; *Alma W. v. Oakland Unified Sch. Dist.* (1981) 123 Cal. App. 3d 133, 141-142, 176 Cal. Rptr. 287 ; *Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 958, 171 Cal. Rptr. 95 ; see *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal. App. 3d 608, 619, 124 Cal. Rptr. 143 .

(n12)Footnote 8.1. *Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341 (police officer who raped women whom he stopped for traffic violation acted within scope of employment because, although act was uncommon, it was "broadly incidental" to enterprise of law enforcement).

(n13)Footnote 9. *Jeffrey E. v. Central Baptist Church* (1988) 197 Cal. App. 3d 718, 722, 243 Cal. Rptr. 128 ; *Alma W. v. Oakland Unified Sch. Dist.* (1981) 123 Cal. App. 3d 133, 141-142, 176 Cal. Rptr. 287 ; *Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 956-957, 171 Cal. Rptr. 95 .

(n14)Footnote 10. *Lazar v. Thermal Equip. Corp.* (1983) 148 Cal. App. 3d 458, 465, 195 Cal. Rptr. 890 ; *Alma W. v. Oakland Unified Sch. Dist.* (1981) 123 Cal. App. 3d 133, 139, 176 Cal. Rptr. 287 . see *O'Hara v. Teamsters Union Local #856* (9th Cir. 1998) 151 F.3d 1152, 1158 ("Such a broad definition of 'within the scope of employment' ensures that third parties injured by an employee have a remedy against a party that is more likely to be able to pay a judgment--i.e., employers--under the theory of respondeat superior.").

(n15)Footnote 11. *Robbins v. Hewlett-Packard Corp.* (1972) 26 Cal. App. 3d 489, 494, 103 Cal. Rptr. 184 . For discussion of the "special errand rule," and the effect on employer's liability of torts occurring during social events, see [4], below.

(n16)Footnote 12. See *Lab. Code § 3600(a)*; *Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 958-959, 171 Cal. Rptr. 95 ; *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal. App. 3d 803, 807, 99 Cal. Rptr. 666 .

(n17)Footnote 13. See *Depew v. Crocodile Enters., Inc.* (1998) 63 Cal. App. 4th 480, 487, 73 Cal. Rptr. 2d 673 (applying special risk exception to going and coming rule from workers' compensation cases for purposes of respondeat superior); *Alma W. v. Oakland Unified Sch. Dist.* (1981) 123 Cal. App. 3d 133, 143, 176 Cal. Rptr. 287 (risk allocation); *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal. App. 3d 803, 807, 99 Cal. Rptr. 666 (coming and going rule and exceptions to it in the tort field have strongly parallel rules and exceptions in the workers' compensation system). See also *Tryer v. Ojai Valley Sch.* (1992) 9 Cal. App. 4th 1476, 1482, 12 Cal. Rptr. 2d 114 (trial court did not err by refusing to consider workers' compensation cases, because finding of no liability was supported by both workers' compensation and tort cases).

(n18)Footnote 14. See *Bailey v. Filco, Inc.* (1996) 48 Cal. App. 4th 1552, 1560, 56 Cal. Rptr. 2d 333 ; *Anderson*

v. Pacific Gas & Elec. Co. (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534 ; *Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 958-959, 171 Cal. Rptr. 95 ; see also *Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal. App. 4th 1053, 1057, 103 Cal. Rptr. 2d 790 (concept of "scope of employment" for purpose of determining respondeat superior liability in tort is more restrictive than phrase "arising out of and in the course of employment" used in workers' compensation); *Munyon v. Ole's, Inc.* (1982) 136 Cal. App. 3d 697, 702, 186 Cal. Rptr. 424 ; *Alma W. v. Oakland Unified Sch. Dist.* (1981) 123 Cal. App. 3d 133, 143, 176 Cal. Rptr. 287 ; *Castro v. State of California* (1977) 70 Cal. App. 3d 156, 159, 138 Cal. Rptr. 572 .

(n19)Footnote 15. See *Blackman v. Great American First Sav. Bank* (1991) 233 Cal. App. 3d 598, 604-605, 284 Cal. Rptr. 491 ; *Munyon v. Ole's, Inc.* (1982) 136 Cal. App. 3d 697, 702, 186 Cal. Rptr. 424 ; *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal. App. 3d 803, 807-808, 99 Cal. Rptr. 666 .

(n20)Footnote 16. See *Munyon v. Ole's, Inc.* (1982) 136 Cal. App. 3d 697, 702, 186 Cal. Rptr. 424 ; *Castro v. State of California* (1977) 70 Cal. App. 3d 156, 159, 138 Cal. Rptr. 572 .

(n21)Footnote 17. See *Munyon v. Ole's, Inc.* (1982) 136 Cal. App. 3d 697, 702, 186 Cal. Rptr. 424 .

(n22)Footnote 18. See *Munyon v. Ole's, Inc.* (1982) 136 Cal. App. 3d 697, 703, 186 Cal. Rptr. 424 ; see also *Anderson v. Pacific Gas & Elec. Co.* (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534 (travel allowance brings commuting within coverage under workers' compensation law, but not within scope of employment under tort law); *Castro v. State of California* (1977) 70 Cal. App. 3d 156, 159-160, 138 Cal. Rptr. 572 (person who is employee for purposes of workers' compensation law may be regarded as nonemployee for purposes of imposing vicarious liability under doctrine of respondeat superior).

(n23)Footnote 19. *Ducey v. Argo Sales Co.* (1979) 25 Cal. 3d 707, 722, 159 Cal. Rptr. 835, 602 P.2d 755 ; *Blackman v. Great Am. First Sav. Bank* (1991) 233 Cal. App. 3d 598, 602, 284 Cal. Rptr. 491 ; *Munyon v. Ole's, Inc.* (1982) 136 Cal. App. 3d 697, 703, 186 Cal. Rptr. 424 ; *Castro v. State of California* (1977) 70 Cal. App. 3d 156, 161, 138 Cal. Rptr. 572 ; *Robbins v. Hewlett-Packard Corp.* (1972) 26 Cal. App. 3d 489, 493-494, 103 Cal. Rptr. 184 ; *Harris v. Oro-Dam Constructors* (1969) 269 Cal. App. 2d 911, 912, 75 Cal. Rptr. 544 .

(n24)Footnote 20. See *Ducey v. Argo Sales Co.* (1979) 25 Cal. 3d 707, 722-723, 159 Cal. Rptr. 835, 602 P.2d 755 ; *Robbins v. Hewlett-Packard Corp.* (1972) 26 Cal. App. 3d 489, 493-494, 103 Cal. Rptr. 184 . For the standard jury instruction on the going-and-coming rule, see Judicial Council of California Civil Jury Instructions, CACI 3724 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, see § 61.05.

(n25)Footnote 21. *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253 . For discussion of the "special errand rule," see [ii], below. For discussion of whether meal periods or other work breaks are within scope of employment, see [c], below.

(n26)Footnote 21.1. *Depew v. Crocodile Enters., Inc.* (1998) 63 Cal. App. 4th 480, 486-487, 73 Cal. Rptr. 2d 673 (quoting *Anderson v. Pacific Gas & Elec. Co.* (1993) 14 Cal. App. 4th 254, 258).

(n27)Footnote 22. *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 210, 30 Cal. Rptr. 253 ; *Boynton v. McKales* (1956) 139 Cal. App. 2d 777, 789, 294 P.2d 733 .

(n28)Footnote 23. *Boynton v. McKales* (1956) 139 Cal. App. 2d 777, 789, 294 P.2d 733 .

(n29)Footnote 24. *Boynton v. McKales* (1956) 139 Cal. App. 2d 777, 789, 294 P.2d 733 .

(n30)Footnote 25. See *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 209-210, 30 Cal. Rptr. 253 .

(n31)Footnote 26. See *Tarasco v. Moyers* (1947) 81 Cal. App. 2d 804, 809-810, 185 P.2d 86 .

(n32)Footnote 27. See *Robinson v. George* (1940) 16 Cal. 2d 238, 245, 105 P.2d 914 .

(n33)Footnote 27.1. See *Jeewarat v. Warner Bros. Entertainment Inc.* (2009) 177 Cal. App. 4th 427, 436-438, 98 Cal. Rptr. 3d 837 .

(n34)Footnote 28. See *Munyon v. Ole's Inc.* (1982) 136 Cal. App. 3d 697, 703, 186 Cal. Rptr. 424 ; *Boynton v. McKales* (1956) 139 Cal. App. 2d 777, 789-791, 294 P.2d 733 . For further discussion of an employer's liability for torts committed while the employee is engaged in a social function, see [b], below.

(n35)Footnote 28.1. See *Blackman v. Great Am. First Sav. Bank* (1991) 233 Cal. App. 3d 598, 602, 284 Cal. Rptr. 491 .

(n36)Footnote 28.2. See *Anderson v. Pacific Gas & Elec. Co.* (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534 .

(n37)Footnote 28.3. *Jeewarat v. Warner Bros. Entertainment Inc.* (2009) 177 Cal. App. 4th 427, 433-439, 98 Cal. Rptr. 3d 837 (because employer failed to show employee was not acting within course and scope of his employment when employee was involved in traffic accident on his way home from 3-day business conference, even though accident occurred on his regular commute route, trial court improperly granted employer summary judgment).

(n38)Footnote 29. *Felix v. Asai* (1987) 192 Cal. App. 3d 926, 932, 237 Cal. Rptr. 718 ; see *O'Connor v. McDonald's Restaurants* (1990) 220 Cal. App. 3d 25, 29 n.4, 269 Cal. Rptr. 101 .

(n39)Footnote 30. *Loper v. Morrison* (1944) 23 Cal. 2d 600, 605, 145 P.2d 1 ; *O'Connor v. McDonald's Restaurants* (1990) 220 Cal. App. 3d 25, 30, 269 Cal. Rptr. 101 .

(n40)Footnote 30.1. See *Lazar v. Thermal Equip. Corp.* (1983) 148 Cal. App. 3d 458, 462-467, 195 Cal. Rptr. 890 (court granted judgment notwithstanding verdict, finding employee within scope of employment).

(n41)Footnote 30.2. *Loper v. Morrison* (1944) 23 Cal. 2d 600, 605-606, 145 P.2d 1 ; *O'Connor v. McDonald's Restaurants* (1990) 220 Cal. App. 3d 25, 30, 269 Cal. Rptr. 101 ; *Felix v. Asai* (1987) 192 Cal. App. 3d 926, 932-933, 237 Cal. Rptr. 718 .

(n42)Footnote 30.3. See *Lazar v. Thermal Equip. Corp.* (1983) 148 Cal. App. 3d 458, 462-467, 195 Cal. Rptr. 890 .

(n43)Footnote 31. *Lazar v. Thermal Equip. Corp.* (1983) 148 Cal. App. 3d 458, 195 Cal. Rptr. 890 .

(n44)Footnote 32. *Lazar v. Thermal Equip. Corp.* (1983) 148 Cal. App. 3d 458, 461, 195 Cal. Rptr. 890 .

(n45)Footnote 33. *Lazar v. Thermal Equip. Corp.* (1983) 148 Cal. App. 3d 458, 465-466, 195 Cal. Rptr. 890 .

(n46)Footnote 34. See *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal. App. 3d 803, 809, 99 Cal. Rptr. 666 ; *Harris v. Oro-Dam Constructors* (1969) 269 Cal. App. 2d 911, 916-917, 75 Cal. Rptr. 544 .

(n47)Footnote 35. See *Richards v. Metropolitan Life Ins. Co.* (1941) 19 Cal. 2d 236, 120 P.2d 650 (insurance salesperson held not within going and coming rule as a matter of law, reversing nonsuit granted to employer-defendant at trial).

(n48)Footnote 36. *Lazar v. Thermal Equip. Corp.* (1983) 148 Cal. App. 3d 458, 195 Cal. Rptr. 890 .

(n49)Footnote 37. *Lazar v. Thermal Equip. Corp.* (1983) 148 Cal. App. 3d 458, 460-461, 195 Cal. Rptr. 890 ; see also *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal. App. 3d 803, 806, 99 Cal. Rptr. 666 (employee was required to perform service duties daily, meet customers at their offices, and appear daily at employer's main office for office work and staff meetings, and in addition frequently performed job assignments during commute hours and/or ran special errands for employer while commuting; employee held within the scope of employment).

(n50)Footnote 38. *Ducey v. Argo Sales Co.* (1979) 25 Cal. 3d 707, 159 Cal. Rptr. 835, 602 P.2d 755 .

(n51)Footnote 39. *Ducey v. Argo Sales Co.* (1979) 25 Cal. 3d 707, 722-723, 159 Cal. Rptr. 835, 602 P.2d 755 .

(n52)Footnote 40. *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal. 3d 956, 88 Cal. Rptr. 188, 471 P.2d 988 .

(n53)Footnote 41. *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal. 3d 956, 962, 88 Cal. Rptr. 188, 471 P.2d 988 .

(n54)Footnote 42. *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal. 3d 956, 962, 88 Cal. Rptr. 188, 471 P.2d 988 .

(n55)Footnote 43. *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal. 3d 956, 962-963, 88 Cal. Rptr. 188, 471 P.2d 988 .

(n56)Footnote 44. See *Zenith Nat. Ins. Co. v. Workmen's Compensation Appeals Bd.* (1967) 66 Cal. 2d 944, 947-948, 59 Cal. Rptr. 622, 428 P.2d 606 (payment of \$10 per day to induce employee to commute 130 miles sufficient to hold injury during commute within scope of employment for purposes of workers' compensation benefits).

(n57)Footnote 45. *Harris v. Oro-Dam Constructors* (1969) 269 Cal. App. 2d 911, 75 Cal. Rptr. 544 .

(n58)Footnote 46. *Harris v. Oro-Dam Constructors* (1969) 269 Cal. App. 2d 911, 917, 75 Cal. Rptr. 544 .

(n59)Footnote 47. *Harris v. Oro-Dam Constructors* (1969) 269 Cal. App. 2d 911, 917-918, 75 Cal. Rptr. 544 .

(n60)Footnote 48. *Harris v. Oro-Dam Constructors* (1969) 269 Cal. App. 2d 911, 917-918, 75 Cal. Rptr. 544 .

(n61)Footnote 48.1. See *Anderson v. Pacific Gas & Elec. Co.* (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534 ; see also *Caldwell v. A.R.B., Inc.* (1986) 176 Cal. App. 3d 1028, 1041, 222 Cal. Rptr. 494 .

(n62)Footnote 48.2. See *Anderson v. Pacific Gas & Elec. Co.* (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534 ; see also *Caldwell v. A.R.B., Inc.* (1986) 176 Cal. App. 3d 1028, 1041, 222 Cal. Rptr. 494 . For discussion of the similarities and differences between the analyses used in workers' compensation and respondeat superior situations, see [3], above.

(n63)Footnote 49. See *State Farm Mut. Auto. Ins. Co. v. Haight* (1988) 205 Cal. App. 3d 223, 242, 252 Cal. Rptr. 162 ; see also *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal. App. 3d 803, 810, 99 Cal. Rptr. 666 . For the standard jury instruction on the vehicle-use exception to the going-and-coming rule, see Judicial Council of California Civil Jury Instructions, CACI 3725 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, see § 61.05.

(n64)Footnote 50. *Smith v. Workmen's Compensation Appeals Bd.* (1968) 69 Cal. 2d 814, 816-820, 73 Cal. Rptr. 253, 447 P.2d 365 ; see *Huntsinger v. Glass Containers Corp.* (1972) 22 Cal. App. 3d 803, 807, 99 Cal. Rptr. 666 . For discussion of the applicability of workers' compensation precedent to respondeat superior situations, see [3], above.

(n65)Footnote 50.1. See *Tryer v. Ojai Valley Sch.* (1992) 9 Cal. App. 4th 1476, 1481-1482, 12 Cal. Rptr. 2d 114 (citing cases).

(n66)Footnote 50.2. *See Tryer v. Ojai Valley Sch.* (1992) 9 Cal. App. 4th 1476, 1481-1483, 12 Cal. Rptr. 2d 114 (employee was required to drive between two sites during each of two shifts, but accident occurred while employee was returning for afternoon shift after lunch break).

(n67)Footnote 50.3. *See Huntsinger v. Glass Containers Corp.* (1972) 22 Cal. App. 3d 803, 811, 99 Cal. Rptr. 666 .

(n68)Footnote 50.4. *See Singh v. Bd. of Retirement* (1996) 41 Cal. App. 4th 1180, 1186, 49 Cal. Rptr. 2d 220 .

(n69)Footnote 50.5. *See Singh v. Board of Retirement* (1996) 41 Cal. App. 4th 1180, 1187 .

(n70)Footnote 50.6. *Depew v. Crocodile Enters., Inc.* (1998) 63 Cal. App. 4th 480, 487, 73 Cal. Rptr. 2d 673 ; *see* § 20.22[4][b].

(n71)Footnote 50.7. *Depew v. Crocodile Enters., Inc.* (1998) 63 Cal. App. 4th 480, 488, 73 Cal. Rptr. 2d 673 ; *see Caldwell v. A.R.B., Inc.* (1986) 176 Cal. App. 3d 1028, 1035-1036, 222 Cal. Rptr. 494 (assuming, without deciding, that special risk exception applies to third party claims against employer).

(n72)Footnote 50.8. *Depew v. Crocodile Enters., Inc.* (1998) 63 Cal. App. 4th 480, 489, 73 Cal. Rptr. 2d 673 .

(n73)Footnote 50.9. *Depew v. Crocodile Enters., Inc.* (1998) 63 Cal. App. 4th 480, 488-489, 73 Cal. Rptr. 2d 673 .

(n74)Footnote 50.10. *Depew v. Crocodile Enters., Inc.* (1998) 63 Cal. App. 4th 480, 490, 73 Cal. Rptr. 2d 673 (citing cases recognizing necessity of causal nexus between employer's work and injury that occurs); *see* § 30.05[2].

(n75)Footnote 50.11. *Bussard v. Minimed, Inc.* (2003) 105 Cal. App. 4th 798, 129 Cal. Rptr. 2d 675 .

(n76)Footnote 50.12. *Bussard v. Minimed, Inc.* (2003) 105 Cal. App. 4th 798, 803-807, 129 Cal. Rptr. 2d 675 .

(n77)Footnote 51. *See Robbins v. Hewlett-Packard Corp.* (1972) 26 Cal. App. 3d 489, 494, 103 Cal. Rptr. 184 ; *Boynton v. McKales* (1956) 139 Cal. App. 2d 777, 789, 294 P.2d 733 .

(n78)Footnote 52. *Robbins v. Hewlett-Packard Corp.* (1972) 26 Cal. App. 3d 489, 494, 103 Cal. Rptr. 184 . For the standard jury instruction on social or recreational activities as within the scope of employment, *see* Judicial Council of California Civil Jury Instructions, CACI 3726 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n79)Footnote 53. *Boynton v. McKales* (1956) 139 Cal. App. 2d 777, 790, 294 P.2d 733 .

(n80)Footnote 54. *Boynton v. McKales* (1956) 139 Cal. App. 2d 777, 294 P.2d 733 .

(n81)Footnote 55. *Boynton v. McKales* (1956) 139 Cal. App. 2d 777, 790-791, 294 P.2d 733 .

(n82)Footnote 56. *Robbins v. Hewlett-Packard Corp.* (1972) 26 Cal. App. 3d 489, 103 Cal. Rptr. 184 .

(n83)Footnote 57. *Robbins v. Hewlett-Packard Corp.* (1972) 26 Cal. App. 3d 489, 491-492, 103 Cal. Rptr. 184 .

(n84)Footnote 58. *Robbins v. Hewlett-Packard Corp.* (1972) 26 Cal. App. 3d 489, 494-495, 103 Cal. Rptr. 184 .

(n85)Footnote 59. *See Rodgers v. Kemper Constr. Co.* (1975) 50 Cal. App. 3d 608, 619-621, 124 Cal. Rptr. 143 .

(n86)Footnote 60. *Calrow v. Appliance Industries, Inc.* (1975) 49 Cal. App. 3d 556, 561, 564, 122 Cal. Rptr. 636

- (n87)Footnote 61. *Calrow v. Appliance Industries, Inc.* (1975) 49 Cal. App. 3d 556, 569, 122 Cal. Rptr. 636 .
- (n88)Footnote 62. *Calrow v. Appliance Industries, Inc.* (1975) 49 Cal. App. 3d 556, 571, 122 Cal. Rptr. 636 .
- (n89)Footnote 63. *Calrow v. Appliance Industries, Inc.* (1975) 49 Cal. App. 3d 556, 571, 122 Cal. Rptr. 636 .
- (n90)Footnote 64. *Tate v. Industrial Acci. Com.* (1953) 120 Cal. App. 2d 657, 665, 261 P.2d 759 .
- (n91)Footnote 65. *Calrow v. Appliance Industries, Inc.* (1975) 49 Cal. App. 3d 556, 572-573, 122 Cal. Rptr. 636 .
- (n92)Footnote 65.1. *Peccolo v. City of Los Angeles* (1937) 8 Cal. 2d 532, 539, 66 P.2d 651 ; *Tryer v. Ojai Valley School* (1992) 9 Cal. App. 4th 1476, 1482, 12 Cal. Rptr. 2d 114 .
- (n93)Footnote 66. *See Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 209-210, 30 Cal. Rptr. 253 .
- (n94)Footnote 67. *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 30 Cal. Rptr. 253 .
- (n95)Footnote 68. *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 212, 30 Cal. Rptr. 253 .
- (n96)Footnote 69. *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 210-211, 30 Cal. Rptr. 253 .
- (n97)Footnote 70. *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 213, 30 Cal. Rptr. 253 .
- (n98)Footnote 71. [Reserved]
- (n99)Footnote 72. *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 210-212, 30 Cal. Rptr. 253 .
- (n100)Footnote 73. *Robinson v. George* (1940) 16 Cal. 2d 238, 245, 105 P.2d 914 .
- (n101)Footnote 73.1. *Inouye v. County of Los Angeles* (1994) 30 Cal. App. 4th 278 . 282-284. 35 Cal. Rptr. 2d 367 ; *but cf. Henriksen v. City of Rialto* (1993) 20 Cal. App. 4th 1612, 1617-1622, 25 Cal. Rptr. 2d 308 (city not liable for negligent handling of service revolver by off duty officer not then engaged in any law enforcement activity).
- (n102)Footnote 73.2. *Le Elder v. Rice* (1994) 21 Cal. App. 4th 1604, 1609-1610, 26 Cal. Rptr. 2d 749 .
- (n103)Footnote 73.3. *Le Elder v. Rice* (1994) 21 Cal. App. 4th 1604, 1609-1610, 26 Cal. Rptr. 2d 749 (involving employee' use of company vehicle for personal errand from and back to home); *but see Lazar v. Thermal Equipment Corp.* (1983) 148 Cal. App. 3d 458, 462-467, 195 Cal. Rptr. 890 (involving employee on way home from work in company vehicle, which was for his use for emergency after-hour calls; court determined that employee's purpose at time of accident was "minor deviation" rather than "substantial departure" from employer's business based on foreseeability).
- (n104)Footnote 73.4. *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal. App. 3d 608, 620, 124 Cal. Rptr 143 (employer liable for assault committed by employee who remained on job site after hours to drink and socialize).
- (n105)Footnote 73.5. *Munyon v. Ole's, Inc.* (1982) 136 Cal. App. 3d 697, 700-701, 706, 186 Cal. Rptr. 424 ; *Calrow v. Appliance Industries, Inc.* (1975) 49 Cal. App. 3d 556, 570-571, 122 Cal. Rptr. 636 .
- (n106)Footnote 73.6. *Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal. App. 4th 1053, 1058-1059, 103 Cal. Rptr. 2d 790 (school district not liable for injury to motorcyclist caused by off-duty employee returning from complying with state-mandated fingerprinting, where employee had discretion to decide when, where and how to satisfy mandate, no other job-related activities were involved, and task not performed during working

hours).

(n107)Footnote 73.7. *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253 .

(n108)Footnote 73.8. *Henriksen v. City of Rialto* (1993) 20 Cal. App. 4th 1612, 1617, 25 Cal. Rptr. 2d 308 ; see also *Le Elder v. Rice* (1994) 21 Cal. App. 4th 1604, 1608, 26 Cal. Rptr. 2d 749 .

(n109)Footnote 73.9. *Sunderland v. Lockheed Martin Aeronautical Systems Support Co.* (2005) 130 Cal. App. 4th 1, 5, 29 Cal. Rptr. 3d 665 . For discussion of the commercial traveler rule, see § 20.22[5][b], above.

(n110)Footnote 75.10. *Sunderland v. Lockheed Martin Aeronautical Systems Support Co.* (2005) 130 Cal. App. 4th 1, 5, 29 Cal. Rptr. 3d 665 .

(n111)Footnote 75.11. *Sunderland v. Lockheed Martin Aeronautical Systems Support Co.* (2005) 130 Cal. App. 4th 1, 8-12, 29 Cal. Rptr. 3d 665 .

(n112)Footnote 75.12. *Santa Rosa Junior College v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 345, 353 n.11, 220 Cal. Rptr. 94, 708 P.2d 673 . For discussion, see § 20.22[4], above.

(n113)Footnote 74. *Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal. App. 4th 458.

(n114)Footnote 75. *Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal. App. 4th 458 .

(n115)Footnote 76. See *Jeffrey E. v. Central Baptist Church* (1988) 197 Cal. App. 3d 718, 721, 243 Cal. Rptr. 128 ; *Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal. App. 3d 133, 140, 176 Cal. Rptr. 287 (employers will not be held vicariously liable for employee torts simply because the tort occurs on employer premises and on tortfeasors work shift, when employee acts are motivated by personal concerns and conduct is unrelated to employee's employment); see also *Baptist v. Robinson* (2006) 143 Cal. App. 4th 151, 49 Cal. Rptr. 3d 153, 2006 Cal. App. LEXIS 1454, *12-*37 (winery owner was not vicariously liable for injuries to motorcycle rider caused by employee's negligence in failing to secure agricultural bin owned by winery that fell off truck owned and driven by employee on his way to pick up grapes to make wine for himself; employee was not engaged in enterprise undertaken by employer, was not on special errand for employer but was on personal errand for his own benefit on his own time, and was not attending to his own business and employer's business at same time; there was no showing his personal winemaking was reasonably related to his employment duties or that it was foreseeable he would be hauling grapes to winery for employment-related purpose; although experience making his own wine helped him to develop his skills, this was not type of tangible benefit providing nexus necessary to bring his conduct at time of accident within course and scope of his employment); *Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 957, 171 Cal. Rptr. 95 (personal quarrel and assault unrelated to employment or employment-related dispute does not result in employer's vicarious liability, even though employee is on duty or on employer-reimbursed travel or meal time).

(n116)Footnote 77. See *Lazar v. Thermal Equipment Corp.* (1983) 148 Cal. App. 3d 458, 466, 195 Cal. Rptr. 890 ; *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253 ; see also *State Farm Mut. Auto. Ins. Co. v. Haight* (1988) 205 Cal. App. 3d 223, 242-243, 252 Cal. Rptr. 162 .

(n117)Footnote 78. *Gipson v. Davis Realty Co.* (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253 ; see also *Lazar v. Thermal Equipment Corp.* (1983) 148 Cal. App. 3d 458, 462-463, 466, 195 Cal. Rptr. 890 .

(n118)Footnote 79. *Foss v. Anthony Industries* (1983) 139 Cal. App. 3d 794, 801-802, 189 Cal. Rptr. 31 (citing *De Mirjian v. Ideal Heating Corp.* (1954) 129 Cal. App. 2d 758, 765, 278 P.2d 114).

(n119)Footnote 80. *Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341 ; *Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal. 3d 962, 968-971, 227 Cal. Rptr. 106, 719 P.2d 676 ; *Foss v.*

Anthony Industries (1983) 139 Cal. App. 3d 794, 802, 189 Cal. Rptr. 31 .

(n120)Footnote 81. *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 227 Cal. Rptr. 106, 719 P.2d 676 .*

(n121)Footnote 82. *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 970-971, 227 Cal. Rptr. 106, 719 P.2d 676 .*

(n122)Footnote 83. *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 969, 227 Cal. Rptr. 106, 719 P.2d 676 .*

(n123)Footnote 84. *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 969, 227 Cal. Rptr. 106, 719 P.2d 676 (citing Carr v. Wm. C. Crowell Co. (1946) 28 Cal. 2d 652, 654-656, 171 P.2d 5).*

(n124)Footnote 85. *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 970, 227 Cal. Rptr. 106, 719 P.2d 676 .*

(n125)Footnote 86. *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 970-971, 227 Cal. Rptr. 106, 719 P.2d 676 .*

(n126)Footnote 87. *Ingle. v. Bay Cities Transit Co. (1945) 72 Cal. App. 2d 283, 287, 164 P.2d 508 (also holding that the decision in the case was compelled by the employer's failure to prove that the foreman's job duties included authority to give the driver directions or to terminate his employment on behalf of the company).*

(n127)Footnote 88. *See Alma W. v. Oakland Unified School Dist. (1981) 123 Cal. App. 3d 133, 140, 176 Cal. Rptr. 287 (employee committing sexual assault during work hours on employer's premises as outside scope of employment; employer not vicariously liable to plaintiff).*

(n128)Footnote 89. *See Alma W. v. Oakland Unified School Dist. (1981) 123 Cal. App. 3d 133, 140, 176 Cal. Rptr. 287 .*

(n129)Footnote 90. *See Lazar v. Thermal Equipment Corp. (1983) 148 Cal. App. 3d 458, 465-467, 195 Cal. Rptr. 890 (employer gave employee company vehicle to facilitate the employee's performance of "on call" work in the evenings and errands for employer during commute; employee's trip to store on way home held foreseeable and insubstantial deviation, and employer held vicariously liable).*



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California Employment Law

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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees
Part A. TEXT

2-30 California Employment Law § 30.06

AUTHOR: By Mary Vail, J.D.

§ 30.06 Employer Liability for Intentional Torts

[1] Generally

Generally, an employer will be held vicariously liable for employee torts committed within the scope of employment, regardless of whether the employee's conduct is characterized as negligent or as intentionally tortious.ⁿ¹ However, in the case of intentional torts, courts have closely scrutinized a number of factors, including the employee's job duties, the time, place, and manner of the tort's commission, the genesis of any dispute leading to the conduct, the motive or purpose of the employee's conduct, the nature of the employer's business and the risks associated with it, and the public policy supporting respondeat superior, in determining whether or not the employee's act was committed within the scope of employment.ⁿ²

In two cases in which plaintiffs attempted to hold employers vicariously liable for sexual misconduct committed by employees,ⁿ³ the California Supreme Court has clarified the showing that must be made to establish vicarious liability. In both cases, the Court examined whether the tortious conduct had a causal nexus to the employee's work; in the absence of such a causal link, vicarious liability is not imposed on the employer.ⁿ⁴ To establish the requisite link, "but for" causation is insufficient; that the employment brought tortfeasor and victim together in time and place is not enough.^{n4.1} Instead, an additional showing must be made, which has been described in varied language: the incident leading to injury must be an "outgrowth" of the employment; the risk of tortious injury must be "inherent in the working environment" or "typical of or broadly incidental to the enterprise [the employer] has undertaken."^{n4.2} Although the Court applied the traditional "foreseeability" analysis, it emphasized that the inquiry is made in the context of the particular enterprise. In addition, it is not an inquiry of statistical frequency, but rather of a relationship between the work involved and the type of tort committed; the employment must be such as predictably to create the risk employees will commit intentional torts of the type for which liability is sought.^{n4.3}

An employer may be vicariously liable for all of a plaintiff's noneconomic damages, even if the employer itself is only negligent, if one of its employees is an intentional tortfeasor.^{n4.4}

As in the case of a nonintentional tort, in order to prevail in an action seeking to impose vicarious liability on the employer for an employee's intentional tort, the plaintiff must first establish the existence of an employer-employee relationship between the tortfeasor and the person or entity alleged to be vicariously liable.ⁿ⁵ For discussion of the factors involved in establishing such a relationship, see § 30.04.

[2] Specific Torts

[a] Assault and Battery

In determining whether an assault or battery was committed within the scope of employment, the courts have generally focused on two factors: (1) the nature of the employee's duties, and (2) the source of any dispute that led to the assault or battery.

If the employee's job duties involve the possibility of force being used against others, the employer may be held vicariously liable for the employee's wrongful or excessive use of force in carrying out his or her duties.ⁿ⁶ For example, an employer who operates a bar or saloon may be vicariously liable for the excessive use of force by a "bouncer" in ejecting a patron from the employer's premises.ⁿ⁷

Even if the employee's job duties do not require or contemplate the use of force, a battery may be held to be committed within the scope of employment if it arose out of a dispute that was work-related or that arose out of the performance of the employee's job duties.ⁿ⁸ However, an employee who commits an assault or battery while working will not be deemed to be acting within the scope of employment if the conduct is the result of personal malice not engendered by the employment.ⁿ⁹

Numerous recent cases have considered whether a sexual assault committed by an employee can be within the scope of employment. In *John R. v. Oakland Unified School Dist.*,ⁿ¹⁰ the California Supreme Court held that a sexual assault committed by a public school teacher is not within the scope of employment because the act is in no way incident to any duties that a teacher is engaged to perform and may not be fairly said to be a foreseeable risk inherent in the teacher's activities.ⁿ¹¹ In *Lisa M. v. Henry Mayo Newhall Memorial Hospital*,^{n11.1} the Court reached the same conclusion in a case involving a sexual assault made by a medical technician during an examination of a patient, holding that the technician's reasons for committing the assault did not derive from any events or conditions of his employment, and were not provoked by anything that occurred during the examination, and so could not be the basis for respondeat superior liability.^{n11.2} Courts of appeal have reached the same conclusion in several different situations.ⁿ¹²

In *John R.*, the Court rejected the view that the inherent authority that a teacher exercises over his or her students should make the employer liable for acts done during the exercise of that authority. Instead, the Court found that the public policies behind the doctrine of respondeat superior (incentive for accident prevention, assurance of compensation for victims, and distribution of loss)^{n12.1} were not advanced by holding school districts liable for sexual assault by teachers.^{n12.2}

However, in *Mary M. v. City of Los Angeles*,^{n12.3} the Court reached the opposite conclusion in the case of a sexual assault by an on-duty police officer following a traffic stop. The Court observed that a police officer who detains an individual is acting as the official representative of the state, with all of its coercive power. Inherent in that power is the potential for abuse.^{n12.4} In view of the considerable power and authority that police officers possess, it is neither startling nor unexpected that, on occasion, an officer will misuse that authority by engaging in assaultive conduct. The risk of such tortious conduct is broadly incidental to the enterprise of law enforcement, and thus, liability for such acts may be imposed on the employing public entity.^{n12.5} The Court found that imposition of liability would encourage the employer to take preventive measures and would provide compensation for victims of police misconduct, and that the cost resulting from the misuse of police power should be borne by the community at large because of the substantial benefits that the community derives from the lawful exercise of police power.^{n12.6}

Subsequent decisions have limited *Mary M.* to its facts, noting the unique position of trust held by on-duty police officers.^{n12.7} For example, in *Maria D. v. Westec Residential Security, Inc.*,^{n12.8} the Court of Appeal found that the plaintiff failed to raise a triable issue as to whether a security guard's sexual assault on a member of the public was within the scope of the security guard's employment. The court noted that the Supreme Court had specifically distinguished the facts in *Mary M.*, which involved a police officer, from cases involving private security guards, who do not act as official representatives of the state and whose authority is different from and far less than that conferred on law enforcement officers.^{n12.9} In *Maria D.*, the court noted that even though the security guards in that case projected the authority of police officers by: patrolling communities in marked vehicles, wearing uniforms and carrying firearms, having their employer's authorization to make arrests of private persons, and to use deadly force in certain circumstances, their projected authority served the employer's profit-making purposes. Nevertheless, the guards' actual authority was not comparable to that of police officers, either in degree or kind; and it was the police officers' actual authority and power that led the Supreme Court in *Mary M.* to conclude that the police officer's sexual assault could be found to be within the scope of his employment.^{n12.10}

■ PRACTICE TIP:

In *Maria D.*, the court noted that the employer had extensive written policies covering the conduct at issue, *i.e.*, prohibiting sexual assault and specifying the manner in which the guard was to come into contact with the plaintiff, which the guard violated. The court stated specifically that it was not addressing a situation in which a security services provider has no policies, or none that address the manner in which a guard comes into contact with a member of the public, and noted that different respondeat superior considerations may be present in that case. The court also stated that in *Maria D.*, the parties raised no issue of a possible scenario in which written policies were in place, but not enforced.
Commentary by Kirby Wilcox.

In addition to limiting *Mary M.* to its facts, one court of appeal has questioned the continued viability of *Mary M.*^{n12.11} In *M.P. v. City of Sacramento*,^{n12.12} the court rejected the efforts of the victims of sexual assaults by firefighters to apply *Mary M.* to the facts of that case. The court concluded that the holding in *Mary M.* (that a public employer of a police officer may be vicariously liable for a sex crime committed by the officer against a person detained by the officer while on duty) is, at best, limited to those acts by an on-duty police officer and does not extend to any other form of employment, including firefighting. Thus, as a matter of law, the alleged sexual assaults by firefighters in *M.P.* was not conduct within the scope of the firefighters' employment and could not support a finding that the city that employed them was vicariously liable for the harm.

[b] Sexual Harassment

Employer liability for sexual harassment by its employees is addressed by statute. First, under the Fair Employment and Housing Act (FEHA), harassment of an employee, of an applicant, or of a person providing services under a contract by another employee, other than an agent or supervisor, is unlawful if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.ⁿ¹³ This language has been construed as imposing a rule of strict employer liability for harassing conduct by a supervisor. The fact that the employer may have a rule prohibiting such conduct is of no import. The employer is liable regardless of any reasonable steps it may have taken to prevent such conduct and regardless of whether or not it was aware that the harassment was taking place.ⁿ¹⁴ However, for an employer to be found *vicariously* liable for sexual harassment committed by an employee, the causal nexus between the employee's job duties and the tortious conduct (discussed in [1] and [2][a], *above*, must be shown.ⁿ¹⁵ The FEHA prohibition against sexual harassment includes acts of nonemployees when the employer or its agents or supervisors knew or should have known of the conduct and has failed to take immediate and appropriate corrective action.^{n15.1}

Second, a provision of the Unruh Act (*Civil Code Section 51.9*) prohibits sexual harassment by professional and other

service providers against the recipients of services. The statutory definition of occupations that qualify as service providers is sufficiently broad enough to cover all branches of medicine, banking, law, retailing, and transportation, to name only a few examples. Furthermore, even though Section 51.9 only expressly creates a cause of action by the service recipient against the individual who provided the service, the doctrine of respondeat superior is sufficiently broad to permit a Section 51.9 action against the employer of an employee who is alleged to have engaged in sexual harassment in the context of a service relationship.^{n15.2}

For full discussion of employer liability for sexual harassment of employees, *see* Chapter 41, Part D.

[c] Other Intentional Torts

Employers have been found liable under respondeat superior for an employee's fraud,ⁿ¹⁶ intentional infliction of emotional distress,ⁿ¹⁷ malicious prosecution,ⁿ¹⁸ inducement of breach of contract,ⁿ¹⁹ defamation,ⁿ²⁰ and false imprisonment.ⁿ²¹

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewTortsIntentional TortsGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 956-957, 171 Cal. Rptr. 95 ; *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal. App. 3d 608, 621, 124 Cal. Rptr. 143 .

(n2)Footnote 2. *See, e.g., Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 298-306, 48 Cal. Rptr. 2d 510, 907 P.2d 358 (involving sexual molestation); *John R. v. Oakland Unified School Dist.* (1989) 48 Cal. 3d 438, 451-452 (involving sexual molestation); *Inter Mountain Mortgage, Inc. v. Sulimen* (2000) 78 Cal. App. 4th 1434, 1441-1442, 93 Cal. Rptr. 2d 790 ; *Jeffrey E. v. Central Baptist Church* (1988) 197 Cal. App. 3d 718, 722-724 (involving sexual molestation); *Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 956-958 (involving battery). For discussion of the application of these principles to specific causes of action, *see* [2], *below*.

(n3)Footnote 3. *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 48 Cal. Rptr. 2d 510, 907 P.2d 358 ; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal. 4th 992, 47 Cal. Rptr. 2d 478, 906 P.2d 440 ; *see also Maria D. v. Westec Residential Security, Inc.* (2000) 85 Cal. App. 4th 125, 135-140, 102 Cal. Rptr. 2d 326 .

(n4)Footnote 4. *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 297, 48 Cal. Rptr. 2d 510, 907 P.2d 358 ; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal. 4th 992, 1006, 47 Cal. Rptr. 2d 478, 906 P.2d 440 .

(n5)Footnote 4.1. *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 298, 48 Cal. Rptr. 2d 510, 907 P.2d 358 .

(n6)Footnote 4.2. *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 298, 48 Cal. Rptr. 2d 510, 907 P.2d 358 .

(n7)Footnote 4.3. *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 302, 48 Cal. Rptr. 2d 510, 907 P.2d 358 .

(n8)Footnote 4.4. *Thomas v. Duggins Construction Co.* (2006) 139 Cal. App. 4th 1105, 1110-1113, 44 Cal. Rptr.

3d 66 (trial court properly refused to apportion plaintiffs' noneconomic damages between defendant (which was company that sold scissor lift to their employer) and employer after lift collapsed and injured them, despite finding that defendant and employer were each 40 percent responsible for injuries, while two of defendant's employees were each 10 percent responsible; passage of Proposition 51 did not change existing law regarding intentional tortfeasor's potential liability for entirety of the plaintiff's damages, and, although defendant's liability in negligence would have otherwise entitled it to apportionment of plaintiffs' noneconomic damages under Proposition 51, its vicarious liability for intentional tort by one of its employees was not subject to reduction, even though jury concluded that employee's intentional misconduct constituted only a 10 percent contributing factor to plaintiffs' injuries).

(n9)Footnote 5. *See Garton v. Title Ins. & Trust Co.* (1980) 106 Cal. App. 3d 365, 375, 165 Cal. Rptr. 449 .

(n10)Footnote 6. *See Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 957, 171 Cal. Rptr. 95 ; *Monty v. Orlandi* (1959) 169 Cal. App. 2d 620, 624, 337 P.2d 861 ; *Haworth v. Elliott* (1944) 67 Cal. App. 2d 77, 81, 153 P.2d 804 ; *see also Jameson v. Gavett* (1937) 22 Cal. App. 2d 646, 649, 651, 71 P.2d 937 (employer who encouraged workmen to expel trespassers held vicariously liable to trespasser-plaintiff; although security and trespasser control were not within tortfeasor's express job duties, employer encouraged employees to perform such tasks and tortfeasor acted in prosecution of employer's business when he assaulted plaintiff).

(n11)Footnote 7. *See, e.g., Johnson v. Monson* (1920) 183 Cal. 149, 151, 190 P. 635 ; *Haworth v. Elliott* (1944) 67 Cal. App. 2d 77, 81-82, 153 P.2d 804 .

(n12)Footnote 8. *See, e.g., Fields v. Sanders* (1947) 29 Cal. 2d 834, 841-842, 180 P.2d 684 (employee truck driver assaulted another person during dispute over traffic mishap); *Carr v. Wm. C. Crowell Co.* (1946) 28 Cal. 2d 652, 657, 171 P.2d 5 (employer vicariously liable for employee throwing hammer at employee of another contractor after dispute relating to manner in which employee was doing his job); *Flores v. AutoZone West, Inc.* (2008) 161 Cal. App. 4th 373, 379-384, 74 Cal. Rptr. 3d 178 (summary judgment in favor of employer in action by customer resulting from employee hitting customer with metal pipe was error, where employee's physical eruption, stemming from his interaction with customer, was predictable risk of retail employment, and jury could reasonably conclude customer's "personal" remark to employee, which employer contended was immediate cause of his violent act, was merely last phase of quarrel that began when customer first made noise intended to get employee's attention and assistance with his intended purchase of motor oil); *Rodgers v. Kemper Constr. Co.* (1975) 50 Cal. App. 3d 608, 621-624, 124 Cal. Rptr. 143 (battery on jobsite after hours arose in part because of dispute over rights and duties of employees); *Stansell v. Safeway Stores, Inc.* (1941) 44 Cal. App. 2d 822, 113 P.2d 264 (dispute between store employee and customer over customer's order is foreseeable, and therefore within scope of employment); *Hiroshima v. Pacific Gas & Elec. Co.* (1936) 18 Cal. App. 2d 24, 27-32, 63 P.2d 340 (dispute over collection by employee of employer's bill).

(n13)Footnote 9. *See, e.g., Kephart v. Genuity, Inc.* (2006) 136 Cal. App. 4th 280, 289-297, 38 Cal. Rptr. 3d 845 (employer was not liable for employee's acts of road rage, resulting in an accident involving another vehicle that caused injury, where it was virtually inconceivable that reasonable jury would have found employee's conduct to have been mere negligence; had this been criminal prosecution, there was sufficient evidence to support charge of assault with a deadly weapon; where special errand rule did not apply, even though employee was ultimately going to airport for business trip; considering together both time and place of road rage incident, jury reasonably could conclude connection between incident and employment was tenuous; and where jury reasonably could conclude employee deliberately caused crash by intentionally forcing other car off roadway and his conduct was willful, malicious, and even criminal, and nothing in evidence suggested attack on plaintiffs was somehow motivated by intent to serve employer's interests). *Golden West Broadcasters, Inc. v. Superior Court* (1981) 114 Cal. App. 3d 947, 957-958, 171 Cal. Rptr. 95 (broadcast employee who engaged in fistfight not related to employment while off duty and drinking in bar was not acting within scope of employment, even though employment brought employee to area and employer furnished employee with company car and per diem payment); *Monty v. Orlandi* (1959) 169 Cal. App. 2d 620, 624, 337 P.2d 861 (ejecting disorderly patrons was within bartender's scope of employment, but when bartender ejected his wife over personal dispute and injured bystander, employer was not vicariously liable for bystander's injuries); *see also Lisa M. v. Henry*

Mayo Newhall Memorial Hospital (1995) 12 Cal. 4th 291, 297-298, 48 Cal. Rptr. 2d 510, 907 P.2d 358 (requiring causal connection between employment duties and tort for imposition of vicarious liability for intentional torts generally).

(n14)Footnote 10. *John R. v. Oakland Unified School Dist.* (1989) 48 Cal. 3d 438, 256 Cal. Rptr. 766, 769 P.2d 948 .

(n15)Footnote 11. *John R. v. Oakland Unified School Dist.* (1989) 48 Cal. 3d 438, 447-452, 256 Cal. Rptr. 766, 769 P.2d 948 (molestation of 14-year-old student participating in school-approved program conducted at teacher's residence).

(n16)Footnote 11.1. *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 48 Cal. Rptr. 2d 510, 907 P.2d 358 .

(n17)Footnote 11.2. *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 306, 48 Cal. Rptr. 2d 510, 907 P.2d 358 .

(n18)Footnote 12. See *Maria D. v. Westec Residential Security, Inc.* (2000) 85 Cal. App. 4th 125, 145-149, 102 Cal. Rptr. 2d 326 (alleged rape of member of public driving on public road by residential security guard who allegedly stopped and detained her for drunken driving and then raped her); *Debbie Reynolds Prof. Rehearsal Studios v. Superior Court* (1994) 25 Cal. App. 4th 222, 226-229, 30 Cal. Rptr. 2d 514 (sexual assault on minor dance student by instructor in trailer provided by employer); *Kimberly M. v. Los Angeles Unified School Dist.* (1989) 215 Cal. App. 3d 545, 547-549, 263 Cal. Rptr. 612 (molestation of five-year-old student by teacher on school premises); *Jeffrey E. v. Central Baptist Church* (1988) 197 Cal. App. 3d 718, 722-724, 243 Cal. Rptr. 128 (molestation of child by volunteer Sunday school teacher during church-sponsored home visitation); *Rita M. v. Roman Catholic Archbishop* (1986) 187 Cal. App. 3d 1453, 1461, 232 Cal. Rptr. 685 (molestation of 16-year-old parishoner by priests); *Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal. App. 3d 133, 139-144, 176 Cal. Rptr. 287 (molestation of student by janitor on school premises while janitor was on duty).

(n19)Footnote 12.1. See discussion in § 30.03[2].

(n20)Footnote 12.2. *John R. v. Oakland Unified School Dist.* (1989) 48 Cal. 3d 438, 447-452, 256 Cal. Rptr. 766, 769 P.2d 948 ; see *Kimberly M. v. Los Angeles Unified School Dist.* (1989) 215 Cal. App. 3d 545, 547-549, 263 Cal. Rptr. 612 (following *John R.*; refusing to find any distinction based on youth of victim or whether molestation was on or off employer's premises).

(n21)Footnote 12.3. *Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 285 Cal. Rptr. 99, 814 P.2d 1341 .

(n22)Footnote 12.4. *Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 216-217, 285 Cal. Rptr. 99, 814 P.2d 1341 .

(n23)Footnote 12.5. *Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 217-218, 285 Cal. Rptr. 99, 814 P.2d 1341 ; accord, *White v. County of Orange* (1985) 166 Cal. App. 3d 566, 571-572, 212 Cal. Rptr. 493 ; cf. *Thorn v. City of Glendale* (1994) 28 Cal. App. 4th 1379, 1382, 1384, 35 Cal. Rptr. 2d 1 (refusing to extend rule of *Mary M.* to city fire marshall who allegedly committed arson while on premises under color of authority to conduct fire inspection).

(n24)Footnote 12.6. *Mary M. v. City of Los Angeles* (1991) 54 Cal. 3d 202, 214-216, 285 Cal. Rptr. 99, 814 P.2d 1341 .

(n25)Footnote 12.7. *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 303-304, 48 Cal. Rptr. 2d 510, 907 P.2d 358 ; *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal. 4th 992, 1012-1013, 47 Cal. Rptr. 2d 478, 906 P.2d 440 ; *Maria D. v. Westec Residential Security, Inc.* (2000) 85 Cal. App. 4th 125, 146 .

(n26)Footnote 12.8. *Maria D. v. Westec Residential Security, Inc.* (2000) 85 Cal. App. 4th 125 .

(n27)Footnote 12.9. *Maria D. v. Westec Residential Security, Inc.* (2000) 85 Cal. App. 4th 125, 146 .

(n28)Footnote 12.10. *Maria D. v. Westec Residential Security, Inc.* (2000) 85 Cal. App. 4th 125, 148 .

(n29)Footnote 12.11. *See M.P. v. City of Sacramento* (2009) 177 Cal. App. 4th 121, 124, 98 Cal. Rptr. 3d 812 ("It is questionable whether the holding in *Mary M.* is still viable... . The Chief Justice of California has described it as an 'aberrant holding' that was 'wrongly decided' and should be 'overrule[d]' "), citing *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal. 4th 992, 1020, 47 Cal. Rptr. 2d 478, 906 P.2d 440 (conc. opn. of George, J.).

(n30)Footnote 12.12. *M.P. v. City of Sacramento* (2009) 177 Cal. App. 4th 121, 128-134, 98 Cal. Rptr. 3d 812 .

(n31)Footnote 13. *Gov. Code § 12940(j)(1)*.

(n32)Footnote 14. *See Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal. App. 4th 397, 414-417, 27 Cal. Rptr. 2d 457 .

(n33)Footnote 15. *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal. 4th 992, 1019-1020, 47 Cal. Rptr. 2d 478, 906 P.2d 440 .

(n34)Footnote 15.1. *Gov. Code § 12940(j)(1)*.

(n35)Footnote 15.2. For the standard jury instruction on the essential factual elements in a claim for sexual harassment under *Civ. Code § 51.9*, *see* Judicial Council of California Civil Jury Instructions, CACI 3024 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction on the civil penalty applicable to an action under *Civ. Code § 51.9*, *see* Judicial Council of California Civil Jury Instructions, CACI 3027 (Matthew Bender). For the CACI special verdict form on a claim for sexual harassment under *Civ. Code § 51.9*, *see* Judicial Council of California Civil Jury Instructions, CACI VF-3014 (Matthew Bender). For discussion of the CACI standard jury instructions generally, *see § 61.05*. For discussion of the CACI special verdict forms generally, *see § 61.06*.

(n36)Footnote 16. *See Alhino v. Starr* (1980) 112 Cal. App. 3d 158, 173-174, 169 Cal. Rptr. 136 .

(n37)Footnote 17. *See Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 618, 262 Cal. Rptr. 842 (hostile work environment that constitutes sexual harassment in violation of FEHA, *Gov. Code § 12900 et seq.*, also constitutes intentional infliction of emotional distress).

(n38)Footnote 18. *See Shoopman v. Pacific Greyhound Lines* (1959) 169 Cal. App. 2d 848, 856, 338 P.2d 3 ; *but see Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal. App. 4th 1320, 1329-1332, 105 Cal. Rptr. 2d 320 (amusement park was properly found not liable for malicious prosecution based on initiation of criminal prosecution of plaintiff, even though plaintiff was later acquitted of charge, where, based on undisputed facts, it was objectively reasonable to suspect that plaintiff's actions in following male juveniles and videotaping their bodies in secretive manner, which clearly disturbed and upset boys who complained to park personnel, were criminal, negating essential element of malicious prosecution claim, i.e., lack of probable cause; question of whether park employees conducted sufficient or adequate investigation and fact that park employee was uncertain of precise crime plaintiff may have committed were legally irrelevant to probable cause determination).

(n39)Footnote 19. *See Pratt v. Local 683, Film Technicians* (1968) 260 Cal. App. 2d 545, 563, 67 Cal. Rptr. 483 .

(n40)Footnote 20. *See Di Giorgio Fruit Corp. v. AFL & CIO* (1963) 215 Cal. App. 2d 560, 576, 30 Cal. Rptr. 350 .

(n41)Footnote 21. *See Hanna v. Raphael Weill & Co.* (1949) 90 Cal. App. 2d 461, 463-464, 203 P.2d 564 ; *see also Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal. App. 4th 1320, 1333-1336, 105 Cal. Rptr. 2d 320 (nonsuit improperly granted to amusement park in false imprisonment action based on *Pen. Code* § 490.6(c) defense that probable cause and reasonable conduct under all the circumstances is defense to civil action resulting from detention or arrest by amusement park employee; evidence did not support conclusion that park security personnel acted reasonably under all of the circumstances).



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California Employment Law

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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
 CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees
 Part A. TEXT

2-30 California Employment Law § 30.07

AUTHOR: By Mary Vail, J.D.

§ 30.07 Employer Liability for Punitive Damages Under Civil Code Section 3294

[1] General Requirements for Employer Liability

While the purpose of compensatory damages is to indemnify plaintiff for losses caused by another's tortious conduct,ⁿ¹ the purpose of punitive or exemplary damages is to punish the defendant and to deter the recurrence of similar conduct by the defendant or others.ⁿ²

As reflected by the text of *Civil Code Section 3294*, liability for punitive damages is based on the defendant's having been found guilty of oppression, fraud, or malice.ⁿ³ Although an employer may be held *vicariously* liable (that is, without having personally committed any tort) for *compensatory* damages caused by an employee's torts committed within the scope of employment,ⁿ⁴ courts have traditionally been reluctant to impose *punitive* damages on an employer on the basis of an employee's conduct when there is no evidence of the employer's own participation in the tort.ⁿ⁵ Under *Civil Code Section 3294*, an employer may not be held liable for punitive damages based on acts of an employee unless the employer (1) had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard for the rights or safety of others; (2) authorized or ratified the employee's wrongful conduct for which the punitive damages are awarded;ⁿ⁶ or (3) was personally guilty of oppression, fraud, or malice.ⁿ⁷ Unless one of the above criteria are satisfied, an employer cannot be liable for punitive damages based solely on the conduct of its employee, no matter how malicious or oppressive its employee's conduct may have been.ⁿ⁸ However, if the employee is determined to be acting under the direction of the employer, then the employer participates in the act, and the employer's liability is based not on the acts of the employee, but on its own separate culpability. In such a case, punitive damages may be awarded against the employer even if none are assessed against the employee.ⁿ⁹ Additional requirements imposed by *Civil Code Section 3294(b)* when the employer is a corporation are discussed in [2], *below*.

[2] Additional Requirements for Holding Corporate Employers Liable for Punitive Damages

When punitive damages are sought against a corporate employer, the third-party plaintiff must prove that an officer, director, or "managing agent" of the corporation (1) had advance knowledge of the unfitness of the employee and acted with the requisite conscious disregard for the rights or safety of others, (2) authorized or ratified the employee's conduct,

or (3) personally committed an act of oppression, fraud, or malice.ⁿ¹⁰

In *White v. Ultramar, Inc.*,ⁿ¹¹ the California Supreme Court construed the meaning of the term "managing agent" under *Civ. Code § 3294(b)*. The Court variously defined the responsibilities of a managing agent to include:

- "Substantial independent authority and judgment over decisions that ultimately determine corporate policy[;]"ⁿ¹²
- "Substantial discretionary authority over decisions that ultimately determine corporate policy[;]"ⁿ¹³ and
- "Substantial discretionary authority over significant aspects of a corporation's business."ⁿ¹⁴

Accordingly, liability turns not on the employee's managerial classification or title, but on the extent of his or her decision-making discretion.ⁿ¹⁵ Thus, supervisors who have no discretionary authority over decisions that ultimately determine corporate policy are not considered managing agents even though they may have the ability to hire or fire other employees. In order to demonstrate that an employee is a true managing agent under *Civ. Code § 3294(b)*, a plaintiff seeking punitive damages must show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business.ⁿ¹⁶

■ CONSULTANT'S COMMENT:

In *White v. Ultramar*,ⁿ¹⁷ the Court twice made reference to the recent United States Supreme Court decision in *Kolstad* ⁿ¹⁸ for the proposition that punitive damages should not be awarded in a manner that discourages compliance with EEO law. In this regard, Footnote 2 raises, but does not decide, the question whether an employer may avoid liability for punitive damages if it adopts and implements in good faith a policy that forbids retaliation against employees who testify at unemployment insurance hearings.ⁿ¹⁹ *White*, in short, is strong dictum in favor of the adoption of *general* nonretaliation policies--or the amendment of existing nondiscrimination policies to include clear nonretaliation clauses. Such employment rules may serve as a basis for an affirmative defense to punitive damages liability. *Commentary by Kirby Wilcox.*

The *White* Court approved the holding in *Egan v. Mutual of Omaha Ins. Co.*,ⁿ²⁰ in which the California Supreme Court held that the critical inquiry in determining whether a corporate employee's position is sufficient to impose liability for punitive damages on the corporation is not whether the employee is in a high-level policy-making position, but rather, the degree of discretion the employee possesses to make decisions that will ultimately determine corporate policy. The *Egan* Court concluded that when an employee can act with little or no supervision in an area in which tort liability may result, the employee possesses sufficient discretion to impute the employee's actions to the corporate employer for the purpose of awarding punitive damages.ⁿ²¹ The *Egan* Court also noted that managerial capacity is not determined by title, and that an employer cannot insulate itself from punitive damage liability by giving an employee a nonmanagerial title while permitting that employee to make crucial policy decisions.ⁿ²²

In another, the California Supreme Court clarified that a corporate employer cannot be held liable for punitive damages based on an act of malice, oppression, or fraud committed by a managerial employee unless the managerial employee committed that act within the scope of employment. The employer cannot be held liable for punitive damages based on conduct by a managerial employee that is wholly unrelated to the employer's business or to the employee's duties.ⁿ²³

The standard applicable to a corporation has been found to apply as well to an unincorporated association.ⁿ²⁴

[3] What Constitutes Authorization or Ratification

As noted in [1], *above*, an employer may be held liable for punitive damages if it authorizes or ratifies the employee's act of malice, oppression, or fraud.ⁿ²⁵ Authorization and ratification are questions of fact that may be proved by any circumstantial or direct evidence demonstrating adoption or approval of the employee's actions by the corporation's managerial agent.ⁿ²⁶

Authorization or direction (employer action taken prior to the tortious act) of an employee's tortious conduct can be given in the form of written or oral consent or encouragement.ⁿ²⁷

Ratification can be established by showing that the employer was advised, after the fact, of the employee's tortious conduct, and implicitly or expressly approved of the conduct with such knowledge.ⁿ²⁸ An employer's retention of the tortfeasor in employment, after the employer is advised of the employee's wrongful conduct, can also be utilized by plaintiff to establish ratification.ⁿ²⁹

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Civ. Code § 3333; Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 576, 136 Cal. Rptr. 751 ; see generally* Levy, Golden, and Sacks, California Torts, ch. 50, pt. A.

(n2)Footnote 2. *See Civ. Code § 3294(a); Neal v. Farmers Ins. Exchange (1978) 21 Cal. 3d 910, 928 n.13, 148 Cal. Rptr. 389, 582 P.2d 980 ; see generally* Levy, Golden, and Sacks, California Torts, ch. 54.

(n3)Footnote 3. *See Civ. Code § 3294(a).*

(n4)Footnote 4. *See generally* discussion in § 30.03.

(n5)Footnote 5. *See, e.g., Ebaugh v. Rabkin (1972) 22 Cal. App. 3d 891, 895, 99 Cal. Rptr. 706* (no employer liability for punitive damages absent direction or ratification of wrongful act). For the standard jury instruction admonishing the jury not to include punitive damages in its damage award, *see* Judicial Council of California Civil Jury Instructions, CACI 3924 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n6)Footnote 6. For discussion of what constitutes authorization or ratification, *see* [3], *below*.

(n7)Footnote 7. *Civ. Code § 3294(b)*. For the standard jury instructions on an award of punitive damages against an employer or principal for the conduct of a specific agent or employee, *see* Judicial Council of California Civil Jury Instructions, CACI 3943 et seq. (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict forms for punitive damages, *see* Judicial Council of California Civil Jury Instructions, CACI VF-3900 et seq. (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n8)Footnote 8. *See Foley v. Martin (1904) 142 Cal. 256, 262, 75 P. 842 ; Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 690, 117 Cal. Rptr. 146 (disapproved on other grounds, Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822). See also Flores v. AutoZone West, Inc. (2008) 161 Cal. App. 4th 373, 386, 74 Cal. Rptr. 3d 178* (trial court did not err in summarily adjudicating customer's claim for punitive damages against employer of employee who hit customer in head with metal pipe, where evidence was insufficient as matter of law to demonstrate employer had advance notice that employee was unfit or employed him with conscious disregard of the rights or safety of others, and where there was no evidence that employer ratified employee's violent treatment of customers, since employee was

promptly fired after incident in this case).

(n9)Footnote 9. *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 Cal. App. 3d 793, 800-802, 274 Cal. Rptr. 139 .

(n10)Footnote 10. *Civ. Code* § 3294(b); see *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal. App. 4th 397, 420-421, 27 Cal. Rptr. 2d 457 (noting that ratification need not be shown if conduct is of officer, director, or managing agent, and criticizing BAJI No. 14.73.1). For the standard jury instructions on punitive damage awards involving corporate defendants, see Judicial Council of California Civil Jury Instructions, CACI 3948 et seq. (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, see § 61.05.

(n11)Footnote 11. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 88 Cal. Rptr. 2d 19, 981 P.2d 944 .

(n12)Footnote 12. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 573, 88 Cal. Rptr. 2d 19, 981 P.2d 944 .

(n13)Footnote 13. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 573, 88 Cal. Rptr. 2d 19, 981 P.2d 944 .

(n14)Footnote 14. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 577, 88 Cal. Rptr. 2d 19, 981 P.2d 944 .

(n15)Footnote 15. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 577, 88 Cal. Rptr. 2d 19, 981 P.2d 944 ; *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal. App. 4th 397, 421-422, 27 Cal. Rptr. 2d 457 (plaintiff not entitled to punitive damages in sexual harassment action because there was no evidence that her manager had substantial discretion in his decisionmaking capabilities, even though he was company administrator who had direct authority over plaintiff's employment responsibilities).

(n16)Footnote 16. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 577, 88 Cal. Rptr. 2d 19, 981 P.2d 944 (manager who terminated plaintiff was managing agent under *Civ. Code* § 3294(b), whose conduct could make defendant corporation liable for punitive damages because she "exercised substantial discretionary authority over vital aspects of [defendant's] business" including managing eight retail stores and making significant decisions affecting both store and company policy).

(n17)Footnote 17. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 88 Cal. Rptr. 2d 19, 981 P.2d 944

(n18)Footnote 18. *Kolstad v. ADA* (1999) 527 U.S. 526, 119 S. Ct. 2118, 144 L.Ed. 2d 494, 512 .

(n19)Footnote 19. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 568 n.2, 88 Cal. Rptr. 2d 19, 981 P.2d 944 .

(n20)Footnote 20. *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal. 3d 809 .

(n21)Footnote 21. See *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal. 3d 809, 822-823 .

(n22)Footnote 22. *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal. 3d 809, 822-823 .

(n23)Footnote 23. See *College Hospital, Inc. v. Superior Court* (1994) 8 Cal. 4th 704, 722-724, 34 Cal. Rptr. 2d 898, 882 P.2d 894 .

(n24)Footnote 24. *J.R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union, Local 890* (1989) 208 Cal. App. 3d 430 (labor union).

(n25)Footnote 25. See *Civ. Code* § 3294(b).

(n26)Footnote 26. *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 Cal. App. 3d 793, 801, 274

Cal. Rptr. 139; *Hartman v. Shell Oil Co.* (1977) 68 *Cal. App. 3d* 240, 249-250, 137 *Cal. Rptr. 244*; see *Storage Services v. Oosterbaan* (1989) 214 *Cal. App. 3d* 498, 516, 262 *Cal. Rptr. 689* (ratification or approval inferred from employer's (1) close supervision of employee, (2) familiarity with transaction, (3) awareness of meetings between parties, and (4) subsequent discussions with employee about acts giving rise to tort).

(n27)Footnote 27. See *Jameson v. Gavett* (1937) 22 *Cal. App. 2d* 646, 650, 71 *P.2d* 937 (employer encouraged and gave oral express and implied consent to his employees' use of any means, including physical force, to deter trespassing or to remove trespassers from employer's business premises).

(n28)Footnote 28. *Alhino v. Starr* (1980) 112 *Cal. App. 3d* 158, 173-174, 169 *Cal. Rptr. 136* (employer was advised by its employee of employee's irregular conduct in representing plaintiff-real estate seller; employer let transaction proceed nonetheless); see *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 *Cal. App. 3d* 793, 800-802, 274 *Cal. Rptr. 139*.

(n29)Footnote 29. See *Clark Equipment Co. v. Wheat* (1979) 92 *Cal. App. 3d* 503, 524, 154 *Cal. Rptr. 874* (defendant hired collection counsel to pursue action against plaintiff; after employer was advised that attorney was misusing court procedures and pursuing legal remedies against party no longer liable for the debt, employer did not discharge attorney or take any steps to limit attorney's discretion or latitude to act; court held that ratification of conduct had been established); *Coats v. Constr. & Gen. Laborers Local No. 185* (1971) 15 *Cal. App. 3d* 908, 914, 93 *Cal. Rptr. 639* (union staff business agent retained after business agent's assaults on members of union became known to employer; employer's argument on appeal that retention of the tortfeasor was compelled because of tortfeasor's special or irreplaceable skills rejected by appellate court).



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California Employment Law

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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees
Part A. TEXT

2-30 California Employment Law § 30.08

AUTHOR: By Mary Vail, J.D.

§ 30.08 Defenses to Respondeat Superior Actions

[1] Generally

Because vicarious liability is based on the tortious conduct of another, liability will not attach if the other person is absolved from liability.ⁿ¹ In all actions based on a theory of respondeat superior, if the employee is found not to be at fault, the employer will not be held liable for the employee's conduct.ⁿ² Thus, even in a case in which a default judgment was entered against an employer sued only on a theory of respondeat superior, the employer was exonerated of all liability because the employee was subsequently found to have been free from fault.ⁿ³

However, it is not necessary to name or join any specific employees as defendants. The plaintiff's inability to identify which employee committed the wrongful act is not fatal to the employer's liability if the evidence establishes that some employee, in the scope of employment, committed the wrongful act. Even if the plaintiff names a particular employee and the judgment is for that employee, a judgment against the employer is valid if the evidence supports the conclusion that other unnamed employees committed the acts.^{n3.1}

The employer may raise defenses such as comparative negligence,^{n3.2} assumption of the risk, privilege on the part of the active tortfeasor, statute of limitations,^{n3.3} and any other defense going to the merits of the cause of action.ⁿ⁴ However, the employer may not raise certain defenses that would negate the right to recover against the particular employee-tortfeasor, such as infancy and bankruptcy, but that do not relate to the merits of the cause of action.ⁿ⁵

[2] Collateral Estoppel

A prior judgment in favor of an employee bars an action against his or her employer if the employer's liability could only be predicated on a theory of respondeat superior.ⁿ⁶ The rule is the same whether the actions are separate or the employer and employee are joined in the same action.ⁿ⁷

In one case, a court of appeal held that a dismissal of the person who was allegedly the active tortfeasor from the action with prejudice has the same effect as an adjudication on the merits that the alleged tortfeasor was not at fault; therefore,

a finding of vicarious liability is precluded by the doctrine of collateral estoppel.ⁿ⁸

The employer may also take advantage of any prior judgment against the employee as an upper limit of damages for which it may be held liable in a separate subsequent action against the employer based on the doctrine of respondeat superior. Thus, even if a default judgment is entered against the employee, the employer is entitled to prevent the injured third party from relitigating the issue of damages.ⁿ⁹ However, if the employer so wishes, it may relitigate the issue of damages.ⁿ¹⁰

[3] Firefighter's Rule

The "firefighter's rule" precludes a firefighter from recovering damages from the person whose negligence contributed to the fire that caused the firefighter's injuries.ⁿ¹¹ The rule applies as well to police.ⁿ¹² There is an exception to the firefighter's rule holding a person responsible for the results of that person's willful acts causing injury to a peace officer employed by a public entity, and for any injury occasioned to that person by the want of ordinary care or skill in the management of the person's property or person, in any of the following situations:ⁿ¹³

- (1) The conduct causing the injury occurs after the person knows or should have known of the presence of the peace officer.
- (2) The conduct causing injury violates a statute, ordinance, or regulation, and the conduct causing injury was itself not the event that precipitated either the response or presence of the peace officer, firefighter, or emergency medical personnel.
- (3) The conduct causing the injury was intended to injure the peace officer, firefighter, or emergency medical personnel.
- (4) The conduct causing the injury is arson as defined in *Penal Code section 451*.

The firefighter's rule also does not apply to conduct other than that which necessitated the summoning of the police officer, or independent acts of misconduct committed after the officer arrived at the scene.ⁿ¹⁴

In *Yamaguchi v. Harnsmut*,ⁿ¹⁵ the court of appeal considered an employer's liability for the actions of a restaurant employee, a cook, in injuring a police officer called to the premises to intervene into an altercation between the cook and his assistant. After the cook stabbed the assistant and the police were summoned, the cook threw a pot of hot oil at the officer and the officer suffered injuries. The court first found that the cook would be subject to the exception to the firefighter's rule, because he willfully or negligently caused the police officer's resulting injuries and he threw the oil after he knew or should have known the police were present.^{n15.1}

The court then found that whether the cook's actions were within the scope of his employment was a question of fact, and it was the police officer's burden as plaintiff to prove that the cook's acts were within the scope of his employment. A reasonable trier of fact could find that a cook's use of a knife and hot oil to attack his assistant in the kitchen after work-related disputes, and the injuries to persons attempting to quell the disputes, were actions "broadly incidental" to the operation of a restaurant, so that there was some basis for concluding that the cook's injurious conduct was within the scope of his employment for purposes of respondeat superior. However, the court of appeal could not say that the evidence was so compelling that no reasonable juror could reach the opposite conclusion, or at least decide that the officer had failed to meet the requisite burden of proof. The court's conclusion, that the trial court erred in ruling that as a matter of law the cook's conduct was within the scope of his employment for purposes of respondeat superior, was based on the following:ⁿ¹⁶

- It was not undisputed the assault occurred as the result of, and during, a dispute at work.ⁿ¹⁷ The

evidence was that the cook and the assistant had argued about work in the past, which could give rise to an inference that the stabbing was due to a work conflict, but it did not compel such an inference because it was undisputed there was no work-related argument between them on the morning of the stabbing.

- While the employee and victim had no apparent association outside their respective employment, they had known one another for 16 months, during which time a personal grudge might have arisen.ⁿ¹⁸

- The cook did not testify, so there was no direct evidence of his state of mind at the time of the attack.ⁿ¹⁹

- The court could not say that the cook's conduct or the risk it posed was foreseeable as a matter of law, or that every restaurant owner should be vicariously liable for every assault perpetrated by restaurant employees merely because the restaurant has a kitchen. The critical question was whether the act causing the officer's injury, *i.e.*, throwing hot oil in the officer's direction, was foreseeable, not whether it was foreseeable that restaurant employees' disagreements might erupt into a physical altercation. A reasonable juror could conclude that the throwing of the oil was so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the restaurant owners' business.

- It was unclear whether imposing vicarious liability in this context would be consistent with the public policies behind the doctrine of respondeat superior: preventing recurrence of the tortious conduct; giving greater assurance of compensation for the victim; and ensuring that the victim's losses will be equitably borne by those who benefit from the enterprise giving rise to the injury.ⁿ²⁰

In *Yamaguchi*, because the court vacated the judgment on the ground that the trial court erred in not presenting to the jury the issue of whether the cook's conduct occurred in the scope of his employment, the court did not address whether the firefighter's rule precludes the restaurant owners' liability.ⁿ²¹

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewTortsNegligenceDefensesGeneral

OverviewTortsVicarious LiabilityGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Campbell v. Security Pac. Nat. Bank* (1976) 62 Cal. App. 3d 379, 386, 133 Cal. Rptr. 77 .

(n2)Footnote 2. *See Davis v. Pine Mountain Lbr. Co.* (1969) 273 Cal. App. 2d 218, 227, 77 Cal. Rptr. 825 .

(n3)Footnote 3. *Plott v. York* (1939) 33 Cal. App. 2d 460, 463-464, 91 P.2d 924 .

(n4)Footnote 3.1. *Perez v. City of Huntington Beach* (1992) 7 Cal. App. 4th 817, 820-821, 9 Cal. Rptr. 2d 258 (defense judgments for four police officers upheld because plaintiff could not identify which one of them battered him; judgment against employer city affirmed because evidence supported court's finding that at least one of them did).

(n5)Footnote 3.2. For the standard jury instruction on the affirmative defense of the plaintiff's agent's contributory negligence, *see* Judicial Council of California Civil Jury Instructions, CACI 3702 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n6)Footnote 3.3. *See Boyer v. Jensen* (2005) 129 Cal. App. 4th 62, 69-71, 28 Cal. Rptr. 3d 124 (employer's

motion for judgment on pleadings was properly granted, where allegation against employer of respondeat superior liability was time-barred under former *Code Civ. Proc.* § 340(c), and employee's filing of complaint, waiving statute of limitations defense for himself by asserting claim, did not waive defense for employer because employer was not sued within the bounds of any arguably applicable limitations period).

(n7)Footnote 4. See *Ecker v. Raging Waters Group, Inc.* (2001) 87 Cal. App. 4th 1320, 1333-1336, 105 Cal. Rptr. 2d 320 (although amusement park could raise *Pen. Code* § 490.6(c) defense that probable cause and conduct which is reasonable under all the circumstances defeats civil action resulting from detention or arrest by amusement park employee, granting nonsuit in action for false imprisonment, negligent infliction of emotional distress, and negligent training and/or supervision based on *Pen. Code* § 490.6(c) was improper because evidence did not support conclusion that park security personnel acted reasonably under all of the circumstances); see also *Freeman v. Churchill* (1947) 30 Cal. 2d 453, 461, 183 P.2d 4; *Atchison, T. & S. F. R. Co. v. Superior Oil Co.* (1966) 243 Cal. App. 2d 289, 297, 52 Cal. Rptr. 53 (both cases decided prior to advent of comparative fault and holding that contributory negligence of plaintiff was defense available to employer); *Plott v. York* (1939) 33 Cal. App. 2d 460, 463, 91 P.2d 924. For a discussion of comparative negligence and assumption of the risk, see Levy, Golden, and Sacks, California Torts, ch. 4.

(n8)Footnote 5. See *Plott v. York* (1939) 33 Cal. App. 2d 460, 463, 91 P.2d 924; see also Restatement (Second) of Agency § 217(b)(ii) (employer may be liable under respondeat superior when employee has immunity from civil liability).

(n9)Footnote 6. *Ponce v. Tractor Supply Co.* (1972) 29 Cal. App. 3d 500, 505, 105 Cal. Rptr. 628; *Davison v. Diamond Match Co.* (1935) 10 Cal. App. 2d 218, 222-224, 51 P.2d 452.

(n10)Footnote 7. *Freeman v. Churchill* (1947) 30 Cal. 2d 453, 461, 183 P.2d 4.

(n11)Footnote 8. *Campbell v. Security Pac. Nat. Bank* (1976) 62 Cal. App. 3d 379, 385-386, 133 Cal. Rptr. 77.

(n12)Footnote 9. *Ponce v. Tractor Supply Co.* (1972) 29 Cal. App. 3d 500, 505-506, 105 Cal. Rptr. 628.

(n13)Footnote 10. *Ponce v. Tractor Supply Co.* (1972) 29 Cal. App. 3d 500, 506-507, 105 Cal. Rptr. 628.

(n14)Footnote 11. *Calatayud v. State of California* (1998) 18 Cal. 4th 1057, 1061, 77 Cal. Rptr. 2d 202, 959 P.2d 360.

(n15)Footnote 12. *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal. 4th 532, 538, 34 Cal. Rptr. 2d 630, 882 P.2d 347.

(n16)Footnote 13. *Civil Code* section 1714.9(a).

(n17)Footnote 14. *Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal. 4th 532, 538, 34 Cal. Rptr. 2d 630, 882 P.2d 347; see *Yamaguchi v. Harnsmut* (2003) 106 Cal. App. 4th 472, 481 n.5, 130 Cal. Rptr. 2d 706 (employee's throwing of hot oil at police officer called to intervene in altercation between employees was different act than employee's original stabbing of another employee which prompted summoning of police, but it was not independent of conduct prompting call to police).

(n18)Footnote 15. *Yamaguchi v. Harnsmut* (2003) 106 Cal. App. 4th 472, 130 Cal. Rptr. 2d 706.

(n19)Footnote 15.1. *Yamaguchi v. Harnsmut* (2003) 106 Cal. App. 4th 472, 480-481, 130 Cal. Rptr. 2d 706.

(n20)Footnote 16. *Yamaguchi v. Harnsmut* (2003) 106 Cal. App. 4th 472, 481-487, 130 Cal. Rptr. 2d 706.

(n21)Footnote 17. Compare *Carr v. Wm. C. Crowell Co.* (1946) 28 Cal. 2d 652, 171 P.2d 5 (undisputed that

assault occurred as result of, and during, dispute at work).

(n22)Footnote 18. *Compare Carr v. Wm. C. Crowell Co. (1946) 28 Cal. 2d 652, 171 P.2d 5* (employee had never seen his victim before day preceding incident and had never even conversed with him before dispute, precluding any inference of personal grudge).

(n23)Footnote 19. *Compare Carr v. Wm. C. Crowell Co. (1946) 28 Cal. 2d 652, 171 P.2d 5* (employee and victim both testified).

(n24)Footnote 20. *See Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341* .

(n25)Footnote 21. *Yamaguchi v. Harnsmut (2003) 106 Cal. App. 4th 472, 487 n.9, 130 Cal. Rptr. 2d 706* .



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
 CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees
 Part A. TEXT

2-30 California Employment Law § 30.09

AUTHOR: By Mary Vail, J.D.

§ 30.09 Indemnity Issues

[1] Employer's Right to Indemnity When Employer Is Vicariously Liable

A party who is liable solely under principles of vicarious liability generally has a right to indemnity from the person who was actually at fault.ⁿ¹ Thus, an employer who is subjected to liability on the grounds of respondeat superior may look to the tortfeasor-employee for indemnity for any liability it might incur as a result of the employee's tort.ⁿ² Total indemnity from the employee to the employer is appropriate on the ground that, under principles of comparative indemnity, the tortfeasor-employee is 100 percent responsible for the damage and the vicariously liable employer is 0 percent responsible.ⁿ³

A vicariously liable employer's indemnity rights may be defeated by a good-faith settlement entered into between the employee and the injured party.ⁿ⁴ However, the interests of the employer in asserting that its liability is only vicarious may be protected by participation in the hearing on the good faith of the settlement. If the settlement does not require the culpable employee to bear his or her fair share of the loss, the court may find that the settlement is not in good faith, and as a consequence, the settlement will not bar the vicariously liable employer from pursuing its indemnity claim against the employee.ⁿ⁵

Although in making the good-faith determination a trial court must consider and protect the interests of a nonsettling employer who is only vicariously liable, it need not require dismissal of the employer. A vicariously liable tortfeasor may be left to bear some portion of the plaintiff's loss, even in situations in which the trier of fact might have concluded that the equities supported a total shift of loss had the indemnity claim gone to trial. Departure from a precise allocation of loss is the price that a nonsettling defendant bears to promote the settlement of litigation.ⁿ⁶ Further, if the actively negligent employee has insufficient financial resources to wholly compensate the plaintiff, the vicariously liable employer may be expected to make up the difference.ⁿ⁷

For a complete discussion of indemnity and the effects of a good-faith settlement on a nonsettling defendant's right to indemnity, *see* Levy, Golden, and Sacks, California Torts, Chapter 74.

[2] Employer's Right to Indemnity if Employer is Also Directly Liable

If an employer has been actively at fault and is directly liable for a tort for which an employee is also directly liable, normal principles of comparative indemnity apply.ⁿ⁸ The comparison would be made between the negligence of the employer and that of the employee, for example, by comparing the relative culpability of the employer's negligent hiring or training with the employee's tortious conduct. The employer would then be directly liable for its own comparative share, and vicariously liable for the employee's share.ⁿ⁹ The employer might then be entitled to indemnity from the employee for any amount paid in satisfaction of its vicarious liability, but not its direct liability.

For a complete discussion of comparative indemnity, *see* Levy, Golden, and Sacks, California Torts, Chapter 74.

[3] Employee's Right to Indemnity

[a] In General

Labor Code Section 2802 provides that an employer must indemnify an employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his or her duties, or of obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.^{n9.1} *Labor Code Section 2804* expressly prohibits the waiver of the rights afforded by § 2802.^{n9.2}

The Division of Labor Standards Enforcement (DLSE) enforces and administers California's labor laws, including *Lab. Code § 2802*.^{n9.3} The California Supreme Court has held that all of the DLSE's interpretive policies contained in its 1989 operations and procedures manual were void because they had not been promulgated in compliance with the Administrative Procedure Act,^{n9.4} and that insofar as the void regulations reflected the DLSE's statutory interpretations, those interpretations were entitled to no deference.^{n9.5} However, a court may adopt a DLSE statutory interpretation embodied in a void regulation if the court independently determines that the interpretation is correct.^{n9.6} The DLSE's interpretation of *Labor Code Section 2802*, as applied to employees' automobile expenses, was incorporated into a void regulation. Courts will review relevant DLSE policy statements and DLSE advice and opinion letters as evidence of the DLSE's interpretation of *Labor Code Sections 2802* and *2804*, recognizing that its interpretation is entitled to no deference, but also that the court may adopt the DLSE's interpretation if the court independently determines that it is correct.ⁿ¹⁰

The elements of a cause of action, as delineated by the statutory language, are:^{n10.1}

- The employee made expenditures or incurred losses;
- The expenditures or losses were incurred in direct consequence of the employee's discharge of his or her duties, or obedience to the directions of the employer;
- The expenditures or losses were necessary.

The second element is met if the conduct defended against was within the course and scope of employment.^{n10.2} All awards made by a court or the DLSE carry interest from the date on which the expenditure or loss was incurred.ⁿ¹¹ Necessary expenditures and losses include all reasonable costs, including attorney's fees incurred in enforcing the rights granted by *Labor Code Section 2802*.ⁿ¹²

The Labor Code does not expressly define "employee" for purposes of section 2802. Therefore, the common law test of employment applies.^{n12.1} The essence of the test is the "control of details," *i.e.*, whether the principal has the right to control the manner and means by which the worker accomplishes the work. There are a number of additional factors in the modern equation, including the following:^{n12.2}

- Whether the worker is engaged in a distinct occupation or business.
- Whether, considering the kind of occupation and locality, the work is usually done under the principal's direction or by a specialist without supervision.
- The skill required.
- Whether the principal or worker supplies the instrumentalities, tools, and place of work.
- The length of time for which the services are to be performed.
- The method of payment, whether by time or by job.
- Whether the work is part of the principal's regular business.
- Whether the parties believe they are creating an employer-employee relationship.

The parties' label is not dispositive, and will be ignored if their actual conduct establishes a different relationship.^{n12.3} The determination is one of fact and must be affirmed if supported by substantial evidence.^{n12.4}

Thus, for example, in *Estrada v. FedEx Ground Package System, Inc.*, ^{n12.5} the trial court properly found that drivers were employees rather than independent contractors for the purposes of *Labor Code Section 2802(a)*. Although the agreement said that the manner and means to satisfy the objectives of the contract were within the discretion of the drivers and the employer did not have the authority to impose any term or condition to the contrary, the evidence showed that the employer discharged drivers at will and that the employer's control over every detail of the drivers' performance supported the trial court's conclusion. Many standard employee benefits were provided, and the drivers worked full time, with regular schedules and regular routes. The terminal managers were the drivers' immediate supervisors and could unilaterally reconfigure the drivers' routes without regard to the drivers' resulting loss of income. The customers were the employer's customers, not the drivers' customers. The employer had discretion to reject a driver's helper, temporary replacement, or proposed assignee.

There are very few California decisions that discuss *Labor Code Section 2802* in the indemnification context.^{n12.6} Some courts that have considered it have held that in order to be acting in "discharge of [his or her] duties" the employee must have acted "within the course and scope of ... employment" *and* the action against the employee must be "unfounded."ⁿ¹³ One court, however, has found that application of section 2802 does not require that the underlying action be unfounded.^{n13.1} An employee's conduct is within the scope of employment unless it is "so unusual or startling that it would be unfair to include the loss as a cost of the employer's doing business."^{n13.2} However, an employee who has acted within the scope of employment, but has not met the other requirement ("unfounded" claims) is not entitled to indemnification under the statute, according to some courts. As the Ninth Circuit observed in *O'Hara v. Teamsters Union Local 856*,^{n13.3} a contrary rule that held employers liable whenever an employee simply acted within California's broad definition of "scope of employment" (*see* § 30.50, *below*), would result in indemnification in many cases in which the employee is proven to have acted illegally or in a grossly negligent fashion. "Simply put, California's policy decision to broadly construe 'within the scope of employment' to create a friendly environment for third-party plaintiffs does not require employers to indemnify employees for costs incurred in defending well-founded claims levied against them by those third parties."^{n13.4}

■ CONSULTANT'S COMMENT:

In *Jacobus v. Krambo Corp.*,^{n13.5} the appellate panel reaches two primary conclusions. One is not surprising. The second is disturbing.

First, the panel holds that *Labor Code Section 2802* does not allow for recovery of fees. In the words of the opinion, "We decline to read into the statutory phrase 'all that the employee necessarily expends or loses in direct consequence of the discharge of his duties as such' a specific provision allowing recovery of attorneys fees to enforce its indemnification provisions."n13.6 This holding is in line with the majority of federal and state opinions finding that a prevailing party is not entitled to recover attorneys fees absent an express contract or statutory mandate.

Second, however, the panel finds that the phrase "in direct consequence of the discharge of his duties" encompasses conduct that "does not benefit the employer, even though the act is willful or malicious, and even though the act may violate the employer's direct orders or policies."n13.7 Thus, "[T]he mutual exchange of sexual materials between [a male coworker] and [a female coworker] was broadly incidental to their employment and [the male coworker] was entitled to indemnification of his legal costs incurred in successfully defending [the female coworker's] sexual harassment action."n13.8

At a time when most employers are going to great lengths to rid the workplace of all forms of improper harassment, it is a giant leap backwards to offer an employee reimbursement for the expenses incurred defending his or her "willful" and "malicious" harassing conduct that may be in violation of the employer's "direct orders or policies." In short, according to the First Appellate District, conduct in direct violation of employer policy may nonetheless be "in direct discharge" of an employee's duties. Other appellate districts, over time, are likely to disagree. *Commentary by Kirby Wilcox.*

In *Boyer v. Jensen*, n13.9 an employee was sued on a cross-complaint for personal injuries resulting from an automobile accident. The cross-complainant, after the statute of limitations had clearly expired, added the employer as a defendant.n13.10 During the pendency of the proceedings, the employee had filed for bankruptcy protection, obtained an automatic stay, and the bankruptcy court issued a discharge. The employee then moved to dismiss and the employer moved for judgment on the pleadings based on the statute of limitations. The trial court granted the motions. On appeal, the cross-complainant argued that her claim against the employee should not have been dismissed because bankruptcy discharge did not prevent litigation against the debtor from going forward when the claimant ultimately intended to obtain recovery from a third party, by which the cross-complainant meant the employer and/or its insurer. The appellate court held that *Labor Code Section 2802* creates no rights between employees sued by an injured third party and the employer's insurance company.n13.11 Reviewing federal bankruptcy authorities, the court found that a party should not be able to continue an action against a debtor in order to reach a third party unless it is necessary to join the debtor in order to establish liability against the third party, and that there is no reason to impose the potential burden of litigation on a discharged debtor unless his or her presence is truly essential.n13.12 The court then held that when an injured party seeks to recover from the employer on a respondeat superior theory, despite the employee's dismissal due to the bankruptcy, the injured party may continue the action against the employer with the expectation that the employer will pursue its rights against its own insurer if necessary. However, the fact that in this case, the cross-complainant had a statute of limitations problem precluding suit against the employer did not justify creating an expanded exception to bankruptcy discharge law.n13.13

In *Cassady v. Morgan, Lewis & Brockius LLP*, n13.14 an attorney performed legal services for a client for many years, and during that time practiced law with several firms in a variety of capacities. Years later, the client sued the attorney and law firms and attorneys with whom the attorney had been affiliated for a variety of claims including professional negligence, premised on numerous aspects of the attorney's and other entities' representation over a multi-year period. One firm provided a defense for several other attorneys, but not for Cassady. After incurring legal fees for his defense, Cassady sought indemnity from the firm under *Labor Code § 2802*. The court held that there was no dispute that the attorney's representation of the client while at the firm was within the scope of his employment. Thus, the court had to determine the application of § 2802 when the defense costs arose from the attorney's alleged conduct spanning a period during which he was employed by several different successive employers. The court found that the plain language of §

2802 made clear that the firm was responsible for indemnifying the attorney, if at all, only for defense costs arising from aspects of the attorney's representation of the client undertaken during the period he was employed by the firm. Defense costs arising from his conduct when he was practicing law elsewhere did not meet the statutory criteria, because they could not have been incurred in direct consequence of the discharge of duties for the firm. On the other hand, when the attorney incurred fees on an issue common to defense of the client's claims arising both from periods he was and was not employed by the firm, indemnity would be proper. The attorney bore the burden of apportioning defense fees among the several employers during the period. One of the elements of the § 2802 claim was that the costs of defense of the client's malpractice action were incurred in direct consequence of the attorney's discharge of his duties for the firm. Thus, the attorney was required to show that the conduct defended against was within the course and scope of his employment with the firm.

In situations in which the employee and employer are both at fault, normal principles of comparative indemnity apply.ⁿ¹⁴ For a complete discussion of comparative indemnity, see Levy, Golden, and Sacks, *California Torts*, Ch. 74 (Matthew Bender).

To satisfy its statutory reimbursement obligation, an employer may separately reimburse employees for their actual expenses.ⁿ¹⁵ In reimbursing employees for their actual expenses, the employer may consider not only the actual expenses that the employee incurred, but also whether each of those expenses was necessary, which in turn depends on the reasonableness of the employee's choices.ⁿ¹⁶ For example, an employee's choice of automobile significantly affects the costs incurred. Calculation of automobile expense reimbursement using the actual expenses method requires detailed recordkeeping by the employee and complex allocation calculations, and the exercise of judgment by the employer, the employee, and officials charged with enforcement of § 2802, to determine whether the expenses incurred were reasonable and therefore necessary. Because of the onerous burdens that the actual expense method imposes on both employer and employee, few employers use this method to determine reimbursement for work-required use of employees' own automobiles.ⁿ¹⁷

An employer may also use the mileage reimbursement method to determine the amount of reimbursement due under § 2802 for work-required use of an employee's own automobile. The employee need only keep a record of the number of miles driven to perform job duties. The employee submits that information to the employer, who then multiplies the work-required miles driven by a predetermined amount that approximates the per-mile cost of owning and operating an automobile. As indicated in DLSE opinion letters and policy statements, the IRS has calculated an automobile mileage rate for federal income tax purposes, based on national average expenses for fuel, maintenance, repair, depreciation, and insurance. The IRS mileage rate is widely used and accepted by private business employers for calculating reimbursable employee automobile expenses. *Labor Code Section 2802* permits use of the IRS mileage rate to calculate automobile expense reimbursement under the mileage reimbursement method.ⁿ¹⁸ A mileage rate used in the mileage reimbursement method is merely an approximation of actual expenses, so the mileage reimbursement method is inherently less accurate than the actual expense method. *Lab. Code Section 2802* requires the employer to fully reimburse the employee for all expenses actually and necessarily incurred. Thus, if an employer uses the mileage reimbursement method, the employee must be permitted to challenge the resulting reimbursement payment. If the employee can show that the reimbursement amount that the employer has paid is less than the actual expenses that the employee has necessarily incurred for work-required automobile use as calculated using the actual expense method, the employer must make up the difference.ⁿ¹⁹ The mileage rate may also be a subject of negotiation and agreement between employer and employee; however, under *Lab. Code § 2804*, any agreement made by the employee is null and void insofar as it waives the employee's rights to full expense reimbursement under § 2802. Therefore, an agreement concerning a mileage reimbursement rate does not relieve the employer of the statutory obligation to provide complete reimbursement or preclude an employee from challenging the sufficiency of a reimbursement payment calculated using the agreed mileage rate.ⁿ²⁰

The employer may also use a lump-sum payment. Under this method, the employee need not submit any information to the employer about work-required miles driven or automobile expenses incurred. The employer merely pays a fixed

amount for automobile expense reimbursement. The fixed amount may take various forms and have various labels, including per diem, car allowance, and gas stipend. The amount is generally based on the employer's understanding of the employee's job duties, including the number of miles that the employee typically or routinely must drive to perform those duties.ⁿ²¹ *Labor Code Section 2802* does not prohibit an employer's use of a lump-sum method to reimburse employees for work-required automobile expenses, provided that the amount paid is sufficient to provide full reimbursement for actual expenses necessarily incurred. An employee may challenge the amount of a lump-sum payment as insufficient under § 2802 by comparing the payment with the amount that would be payable under either the actual expense method or the mileage reimbursement method. If the comparison reveals that the lump sum is inadequate, the employer must make up the difference. An employer and an employee may agree on a particular lump sum to be paid as automobile reimbursement, but under *Lab. Code § 2804*, the existence of an agreement between an employer or employee regarding a lump-sum reimbursement payment does not relieve the employer of the statutory obligation to pay full reimbursement or bar an employee challenge to a lump-sum payment as insufficient under § 2802 to provide full reimbursement.ⁿ²² An employer's decision to use a lump-sum method rather than a mileage reimbursement system may have income tax consequences, affecting whether the resulting payments are exempt from withholding requirementsⁿ²³ and, ultimately, the extent to which they are taxable as income or instead treated as deductible business expenses. However, § 2802 does not require an employer to use a reimbursement method that is congruent with any tax law or has any particular tax consequence. Any tax consequences that result from the employer's choice of reimbursement method should be considered in determining whether a particular payment provides the full measure of reimbursement that § 2802 requires.ⁿ²⁴ The employer is not required to segregate the lump sum from other compensation, but may pay the lump sum in the form of an increase to the employee's base salary or commissions.ⁿ²⁵

Because wages and expense reimbursement are conceptually distinct and subject to different statutory and sometimes contractual constraints, an employer may not combine the payments for both in a way that would seriously hamper or effectively preclude enforcement of the various statutory and contractual obligations. The employer must provide some apportionment method or formula to identify the amount of the combined employee compensation payment intended to provide expense reimbursement. Using that method or formula, the employee, and officials charged with enforcement of state and federal wage laws, can readily determine whether the employer has discharged all of its legal obligations as to both wages and business expense reimbursement.ⁿ²⁶ An employer that chooses to link expense reimbursement to employee performance by providing automobile expense reimbursement through an increase in commission rates runs a risk that the employee may earn less commission income than the employer anticipated, so that the increase in the commission rate may be insufficient to provide full reimbursement for the automobile expenses that the employee necessarily incurred. If that happens, the employer's full reimbursement obligation under § 2802 will require it to make up the difference.ⁿ²⁷ In providing the documentation required by *Lab. Code § 226(a)*, employers that provide business expense reimbursement to employees through increases in base salary or commission rates should separately identify the amounts that represent payment for labor performed and the amounts that represent reimbursement for business expenses.ⁿ²⁸ Thus, an employer may satisfy its statutory business expense reimbursement obligation under *Lab. Code § 2802* by paying employees enhanced compensation in the form of increases in base salary or commission rates, provided the employer establishes some means to identify the portion of overall compensation that is intended as expense reimbursement, and provided also that the amounts so identified are sufficient to fully reimburse the employees for all expenses actually and necessarily incurred.ⁿ²⁹

[b] Waiver of Right to Indemnity

Labor Code section 2804 voids any agreement to waive the protections of *Labor Code section 2802* as against public policy. *Labor Code section 2804* provides that any contract or agreement, express or implied, made by an employee to waive the benefits of *Labor Code section 2800 et seq.* is null and void, and *Labor Code section 2800 et seq.* will not deprive an employee or the employee's personal representative of any right or remedy to which the employee is entitled under the laws of California. Courts have interpreted *Labor Code section 2804* to apply to *Labor Code section 2802*, making all contracts that waive an employee's right to indemnification null and void.ⁿ³⁰ Thus, indemnity rights are nonwaivable, and any contract that purports to waive an employee's indemnity right would be contrary to the law and

therefore unlawful to that extent.ⁿ³¹

In *Edwards v. Arthur Andersen LLP*,ⁿ³² the California Supreme Court held that a contract provision releasing "any and all" claims against an employer did not encompass nonwaivable statutory protections, such as the employee indemnity protection of *Labor Code section 2802* and, accordingly, was not void under *Labor Code section 2804*. The employee worked for a large accounting firm, which was being investigated by the federal government at the time of his separation from employment. At that time, he was asked to execute a broad general release in the firm's favor, which, *inter alia*, provided that he was required to release and discharge the firm from the following:

[A]ny and all actions, causes of action, claims, demands, debts, damages, costs, losses, penalties, attorneys' fees, obligations, judgments, expenses, compensation or liabilities of any nature whatsoever, in law or equity, whether known or unknown, contingent or otherwise, that Employee now has, may have ever had in the past or may have in the future against any of the Released Parties by reason of any act, omission, transaction, occurrence, conduct, circumstance, condition, harm, matter, cause, or thing that has occurred from the beginning of time up to and including the date hereof, including, without limitation, claims that in any way arise from or out of, are based upon or relate to Employee's employment by, association with or compensation from [the firm] or any of its affiliated firms, except for claims (i) arising out of [the firm's] obligations set forth in this agreement or (ii) for any accrued and unpaid salary or other employee benefit or compensation owing to Employee as of the date hereof."

The Court found that the agreement did not expressly reference indemnity rights and refused to read it as encompassing a waiver of the employee's indemnity rights, because giving it such a reading was consistent with the tenets of contractual interpretation to make the contract lawful, valid and capable of being carried into effect. Thus, the Court interpreted it such that it did not violate *Labor Code section 2804*. The Court also found that releasing "any and all" claims did not implicate the employee's nonwaivable right to indemnity, because the employer was aware that under *Labor Code section 2804*, such rights are statutorily nonwaivable so that such an exception was legally unnecessary.ⁿ³³

Legal Topics:

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

Labor & Employment Law
Employer Liability
General Overview
Torts
Vicarious Liability
General Overview
Torts
Vicarious Liability
Employers
Indemnity

FOOTNOTES:

(n1)Footnote 1. See *Privette v. Superior Court* (1993) 5 Cal. 4th 689, 695, 21 Cal. Rptr. 2d 72, 854 P.2d 721 ; see also *Popejoy v. Hannon* (1951) 37 Cal. 2d 159, 173, 231 P.2d 484 ; *Atchison, T. & S. F. R. Co. v. Superior Oil Co.* (1966) 243 Cal. App. 2d 289, 299, 52 Cal. Rptr. 53 ; *Herrero v. Atkinson* (1964) 227 Cal. App. 2d 69, 77, 38 Cal. Rptr. 490 ; see also *Code Civ. Proc.* § 876(b).

(n2)Footnote 2. See *Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal. 2d 423, 428, 296 P.2d 801 ; but see *Lab. Code § 2802*; *Holt v. Booth* (1991) 1 Cal. App. 4th 1074, 1080 n.6, 2 Cal. Rptr. 2d 727 (dicta in footnote suggesting that statute may require vicariously liable employer to indemnify negligent employee for liability to third party arising from conduct within scope of employment).

(n3)Footnote 3. See *E.L. White, Inc. v. City of Huntington Beach* (1982) 138 Cal. App. 3d 366, 373-377, 187 Cal. Rptr. 879 (cited with approval in *Far West Financial Corp. v. D & S Co.* (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399).

(n4)Footnote 4. *Far West Fin. Corp. v. D & S Co.* (1988) 46 Cal. 3d 796, 817, 251 Cal. Rptr. 202, 760 P.2d 399 ; see *Code Civ. Proc.* § 877.6.

(n5)Footnote 5. *Far West Fin. Corp. v. D & S Co.* (1988) 46 Cal. 3d 796, 815-816, 251 Cal. Rptr. 202, 760 P.2d 399 .

(n6)Footnote 6. *Far West Fin. Corp. v. D & S Co.* (1988) 46 Cal. 3d 796, 816-817, 251 Cal. Rptr. 202, 760 P.2d 399 .

(n7)Footnote 7. *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal. App. 3d 864, 869-870, 269 Cal. Rptr. 647 .

(n8)Footnote 8. *See American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 . For the standard jury instruction on comparative fault between and among tortfeasors for purposes of indemnity, *see* Judicial Council of California Civil Jury Instructions, CACI 3800 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n9)Footnote 9. *See Srithong v. Total Inv. Co.* (1994) 23 Cal. App. 4th 721, 726-728, 28 Cal. Rptr. 2d 672 ; *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal. App. 4th 1847, 1854, 12 Cal. Rptr. 2d 411 ; *see also Miller v. Stouffer* (1992) 9 Cal. App. 4th 70, 84, 11 Cal. Rptr. 2d. 454

(n10)Footnote 9.1. *Lab. Code* § 2802(a).

(n11)Footnote 9.2. *Lab. Code* § 2804. *See Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 561, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n12)Footnote 9.3. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 563, 67 Cal. Rptr. 3d 468, 169 P.3d 889 . *See also Reynolds v. Bement* (2005) 36 Cal. 4th 1075, 1084, 32 Cal. Rptr. 3d 483, 116 P.3d 1162 ; *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 581, 94 Cal. Rptr. 2d 3, 995 P.2d 139 . For discussion of enforcement powers of DLSE generally, *see* § 1.05[3][a].

(n13)Footnote 9.4. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 572, 59 Cal. Rptr. 2d 186, 927 P.2d 296 . *See Gov. Code* § 11340 *et seq.* For discussion, *see* § 1.05[3][c].

(n14)Footnote 9.5. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 576-577, 59 Cal. Rptr. 2d 186, 927 P.2d 296 .

(n15)Footnote 9.6. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 577, 59 Cal. Rptr. 2d 186, 927 P.2d 296 .

(n16)Footnote 10. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 563, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n17)Footnote 10.1. *Cassady v. Morgan, Lewis & Brockius LLP* (2006) 145 Cal. App. 4th 220, 230, 51 Cal. Rptr. 3d 527 .

(n18)Footnote 10.2. *Cassady v. Morgan, Lewis & Brockius LLP* (2006) 145 Cal. App. 4th 220, 230-231, 51 Cal. Rptr. 3d 527 ; *Jacobus v. Krambo Corp.* (2000) 78 Cal. App. 4th 1096, 1100, 93 Cal. Rptr. 2d 425 .

(n19)Footnote 11. *Lab. Code* § 2802(b).

(n20)Footnote 12. *Lab. Code* § 2802(c).

(n21)Footnote 12.1. *Reynolds v. Bement* (2005) 36 Cal. 4th 1075, 1087, 32 Cal. Rptr. 3d 483, 116 P.3d 1162 ; *Estrada v. FedEx Ground Package Syst., Inc.* (2007) 154 Cal. App. 4th 1, 10, 64 Cal. Rptr. 3d 327 .

(n22)Footnote 12.2. *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 350-351, 256 Cal. Rptr. 543, 769 P.2d 399; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal. 3d 943, 949, 88 Cal. Rptr. 175, 471 P.2d 975; *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal. 2d 33, 43-44, 168 P.2d 686; *Estrada v. FedEx Ground Package Syst., Inc.* (2007) 154 Cal. App. 4th 1, 10, 64 Cal. Rptr. 3d 327; *Air Couriers Int'l. v. Employment Development Dept.* (2007) 150 Cal. App. 4th 923, 933, 59 Cal. Rptr. 3d 37; *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal. App. 4th 1046, 1064-1065, 48 Cal. Rptr. 3d 563.

(n23)Footnote 12.3. *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 349, 256 Cal. Rptr. 543, 769 P.2d 399; *Estrada v. FedEx Ground Package Syst., Inc.* (2007) 154 Cal. App. 4th 1, 10-11, 64 Cal. Rptr. 3d 327; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal. App. 3d 864, 877-878, 269 Cal. Rptr. 647.

(n24)Footnote 12.4. *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 349, 256 Cal. Rptr. 543, 769 P.2d 399; *Estrada v. FedEx Ground Package Syst., Inc.* (2007) 154 Cal. App. 4th 1, 11, 64 Cal. Rptr. 3d 327; *Air Couriers Int'l. v. Employment Development Dept.* (2007) 150 Cal. App. 4th 923, 937, 59 Cal. Rptr. 3d 37; *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd.* (1991) 235 Cal. App. 3d 1363, 1367, 1373, 1 Cal. Rptr. 2d 64; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal. App. 3d 864, 877, 269 Cal. Rptr. 647.

(n25)Footnote 12.5. *Estrada v. FedEx Ground Package Syst., Inc.* (2007) 154 Cal. App. 4th 1, 11-13, 64 Cal. Rptr. 3d 327.

(n26)Footnote 12.6. *See Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 562, 67 Cal. Rptr. 3d 468, 169 P.3d 889 (relatively few appellate decisions have construed or applied *Lab. Code* § 2802).

(n27)Footnote 13. *O'Hara v. Teamsters Union Local 856* (9th Cir. 1998) 151 F.3d 1152, 1158 (quoting *Devereaux v. Latham & Watkins* (1995) 32 Cal. App. 4th 1571, 1583, 38 Cal. Rptr. 2d 849, quoting *Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal. App. 4th 168, 177, 32 Cal. Rptr. 2d 574 (italics in original); *but see Jacobus v. Krambo Corp.* (2000) 78 Cal. App. 4th 1096, 1106, 93 Cal. Rptr. 2d 425 (expressly disagrees with *O'Hara* because of established principle that prevailing party not entitled to recover attorney fees in the absence of specific contract or statute, and § 2802 is not specific provision allowing recovery of attorney fees to enforce its indemnification provisions); *see Grissom v. Vons Companies, Inc.* (1991) 1 Cal. App. 4th 52, 57-59, 1 Cal. Rptr. 2d 808 (indemnification of employee for expenses or losses necessarily incurred in discharge of employee's duty within meaning of *Lab. Code* § 2802 is question of fact, requiring inquiry into what is reasonable under circumstances, and, in this case, allowing plaintiff to amend his complaint to state cause of action for independent counsel); *Douglas v. Los Angeles Herald-Examiner* (1975) 50 Cal. App. 3d 449, 461, 123 Cal. Rptr. 683 (requiring indemnification under *Lab. Code* § 2802 by employer of newspaper reporter required to defend suit against third party exclusively because of acts performed for or at employer's direction); *cf. Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal. 2d 423, 428, 296 P.2d 801 (employer entitled to indemnity on being held vicariously liable under respondeat superior for employee's authorized negligence), discussed in [1], *above*.

(n28)Footnote 13.1. *Jacobus v. Krambo Corp.* (2000) 78 Cal. App. 4th 1096, 1101, 93 Cal. Rptr. 2d 425, 429.

(n29)Footnote 13.2. *O'Hara v. Teamsters Union Local 856* (9th Cir. 1998) 151 F.3d 1152, 1158 n.1 (quoting *Devereaux v. Latham & Watkins* (1995) 32 Cal. App. 4th 1571, 1583, 38 Cal. Rptr. 2d 849 and citing examples).

(n30)Footnote 13.3. *See O'Hara v. Teamsters Union Local 856* (9th Cir. 1998) 151 F.3d 1152.

(n31)Footnote 13.4. *See O'Hara v. Teamsters Union Local 856* (9th Cir. 1998) 151 F.3d 1152, 1158.

(n32)Footnote 13.5. *Jacobus v. Krambo Corp.* (2000) 78 Cal. App. 4th 1096, 93 Cal. Rptr. 2d 425, 429.

(n33)Footnote 13.6. *See Jacobus v. Krambo Corp.* (2000) 78 Cal. App. 4th 1096, 1106, 93 Cal. Rptr. 2d 425, 429 .

(n34)Footnote 13.7. *See Jacobus v. Krambo Corp.* (2000) 78 Cal. App. 4th 1096, 1102, 1106, 93 Cal. Rptr. 2d 425, 429 .

(n35)Footnote 13.8. *See Jacobus v. Krambo Corp.* (2000) 78 Cal. App. 4th 1096, 1104, 93 Cal. Rptr. 2d 425, 429 .

(n36)Footnote 13.9. *Boyer v. Jensen* (2005) 129 Cal. App. 4th 62, 28 Cal. Rptr. 3d 124 .

(n37)Footnote 13.10. For discussion of the statute of limitations as a defense to a respondeat superior action, *see* § 3.08[1], *above*.

(n38)Footnote 13.11. *Boyer v. Jensen* (2005) 129 Cal. App. 4th 62, 71-75, 28 Cal. Rptr. 3d 124 . *see Republic Indemnity Co. v. Schofield* (1995) 47 Cal. App. 4th 220, 226-227, 54 Cal. Rptr. 2d 637 .

(n39)Footnote 13.12. *Boyer v. Jensen* (2005) 129 Cal. App. 4th 62, 75-77, 28 Cal. Rptr. 3d 124 .

(n40)Footnote 13.13. *Boyer v. Jensen* (2005) 129 Cal. App. 4th 62, 77-79, 28 Cal. Rptr. 3d 124 .

(n41)Footnote 13.14. *Cassady v. Morgan, Lewis & Brockius LLP* (2006) 145 Cal. App. 4th 220, 230-239, 51 Cal. Rptr. 3d 527 .

(n42)Footnote 14. *See American Motorcycle Assn. v. Superior Court of Los Angeles County* (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 ; *see also* discussion in [2], *above*.

(n43)Footnote 15. *See, e.g., Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 568, 67 Cal. Rptr. 3d 468, 169 P.3d 889 (to reimburse employees for use of their automobiles, employer could use actual expense method, by calculating automobile expenses employees actually and necessarily incurred and separately paying employees that amount).

(n44)Footnote 16. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 568, 67 Cal. Rptr. 3d 468, 169 P.3d 889 . *See Grissom v. Vons Companies, Inc.* (1991) 1 Cal. App. 4th 52, 58, 1 Cal. Rptr. 2d 808 (under § 2802, ascertaining necessary expenditure will require inquiry into what was reasonable under circumstances).

(n45)Footnote 17. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 568-569, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n46)Footnote 18. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 569, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n47)Footnote 19. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 569, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n48)Footnote 20. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 569-570, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n49)Footnote 21. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 570, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n50)Footnote 22. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 570-571, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n51)Footnote 23. *See, e.g., Shotgun Delivery, Inc. v. U.S.* (9th Cir. 2001) 269 F.3d 969, 972-973 .

(n52)Footnote 24. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 571, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n53)Footnote 25. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 572-573, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n54)Footnote 26. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 572-573, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n55)Footnote 27. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 573, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n56)Footnote 28. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 574 n.6, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n57)Footnote 29. *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4th 554, 570-574, 67 Cal. Rptr. 3d 468, 169 P.3d 889 .

(n58)Footnote 30. *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, 951, 81 Cal. Rptr. 3d 282, 189 P.3d 285 . *See Liberio v. Vidal* (1966) 240 Cal. App. 2d 273, 276, fn. 1, 49 Cal. Rptr. 520 .

(n59)Footnote 31. *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, 951-952, 81 Cal. Rptr. 3d 282, 189 P.3d 285 .

(n60)Footnote 32. *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, 81 Cal. Rptr. 3d 282, 189 P.3d 285 . To view California Supreme Court briefs available on Lexis.com, go to 2006 CA S. Ct. Briefs 47190A .

(n61)Footnote 33. *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, 951-955, 81 Cal. Rptr. 3d 282, 189 P.3d 285 .



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California Employment Law

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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees
Part A. TEXT

2-30 California Employment Law § 30.10

AUTHOR: By Mary Vail, J.D.

§ 30.10 Liability for Actions of Independent Contractors

[1] General Rule of Nonliability

As noted previously,ⁿ¹ the general rule is that a person who employs an independent contractor, as distinguished from an employee, is not liable for the torts of the contractor or the torts of the employees of the contractor.ⁿ² However, as discussed in [2], *below*, there are many exceptions to the rule.ⁿ³

For discussion of the definition of an independent contractor, and the distinction between employees and independent contractors, see § 30.04[4].

[2] Exceptions to Rule of Nonliability

[a] Generally

A person may not insulate himself or herself from liability to others in all cases by the employment of an independent contractor.ⁿ⁴ Courts have articulated a number of theories, summarized below, under which a person may be held vicariously liable for the torts of an independent contractor.

In addition, an employer may be liable for the acts of an independent contractor in the same way that an employer may be directly liable for the acts of an employee as discussed in § 30.02. For example, the employer may be liable for the acts of an independent contractor pursuant to orders or directions negligently given by the employer.ⁿ⁵ The employer may also be liable for negligent selection of an independent contractor,ⁿ⁶ for negligent failure to inspect the work of a contractor,ⁿ⁷ or for negligently exercising retained control over work entrusted to the contractor.^{n7.1}

The determination that a defendant is not vicariously liable for the acts of an independent contractor may be made on summary judgment as a matter of law for failure to allege any facts or identify any relevant policy considerations that would warrant imposition of vicarious liability.^{n7.2}

[b] Peculiar Risk Doctrine**[i] Rule of Liability and Rationale**

The "peculiar risk" doctrine, as stated by the Restatement (Second) of Torts, Section 416, has been adopted in California.ⁿ⁸ That section provides as follows:

One who employs an independent contractor to do work that the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others, unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractors to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.ⁿ⁹

The peculiar risk doctrine applies only for the benefit of injured third parties. It imposes no liability on the hirer for injuries to the independent contractor.^{n9.1}

It has been stated that peculiar risk is not exclusively a form of vicarious liability, and that it may arise as a form of direct liability if the person who hires an independent contractor (1) fails to provide in the contract that the contractor must take special precautions, or (2) fails to exercise reasonable care to provide in some other manner for the taking of such precautions.^{n9.2} However the California Supreme Court, in a footnote, seemed to reject any differentiation of the peculiar risk doctrine as imposing either direct or vicarious liability based on the presence or absence of one of these factors. The Court stated that the conclusion that peculiar risk is a form of vicarious liability is unaffected by the characterization of the doctrine as "direct" liability in situation when the person hiring an independent contractor fails to provide in the contract that the contractor must take special precautions. Thus, the Court said, peculiar risk liability is normally premised on the broader rule of vicarious liability for the contractor's negligence.ⁿ¹⁰ What facts might take the doctrine out of the "normal" situation and impose direct liability on the hirer remains to be determined.ⁿ¹¹

[ii] No Vicarious Liability to Employee of Independent Contractor

California courts formerly permitted an employee of an independent contractor to use the peculiar risk exception to hold a nonnegligent hirer of an independent contractor vicariously liable for the negligence of the employer-contractor.ⁿ¹² However, in *Privette v. Superior Court*,ⁿ¹³ the California Supreme Court overruled these cases and held that employees of an independent contractor hired to do dangerous work may not recover from the nonnegligent hirer of their employer under the peculiar risk doctrine; workers' compensation is the exclusive remedy for these employees.ⁿ¹⁴

In *Toland v. Sunland Housing Group, Inc.*,ⁿ¹⁵ the Supreme Court held that "*Privette*...bars employees of a hired contractor who are injured by the contractor's negligence from seeking recovery against the hiring person, *irrespective* of whether recovery is sought under the theory of peculiar risk set forth in Section 416 [direct liability] or Section 413 [vicarious liability] of the Restatement Second of Torts."ⁿ¹⁶

The *Privette* decision has been applied retroactively.ⁿ¹⁷ The limitation of *Privette* also has been extended to the situation in which the negligence of one independent contractor injures the employee of another. In this situation as well, the hirer has no vicarious liability to the injured employee.ⁿ¹⁸

For further discussion of the exclusive remedy doctrine, see Chapter 20.

[iii] What Constitutes Peculiar Risk

A peculiar risk is something other than the ordinary and customary dangers that may arise in the course of the work or of normal human activity.ⁿ¹⁹ It is a risk that is peculiar to the work to be done that arises from the character of the work or from the place where the work is to be done, against which a reasonable person would recognize the necessity of

taking special precautions.ⁿ²⁰

A peculiar risk does not mean that the risk must be one that is abnormal to the type of work done, or that it is an abnormally great risk, but rather refers to a special, recognizable danger arising out of the work itself.ⁿ²¹

Factors that are important in determining whether a particular danger is recognizable as a "special" danger include (1) the foreseeability of the specific risk or set of risks arising in connection with the work as planned, (2) whether the risk is "intimately connected with the work" or "accidental," (3) the degree of risk, and (4) the possibility of anticipating and prescribing definite precautions to avert the anticipated risk or risks.ⁿ²² Examples of cases involving peculiar risks of harm in the absence of special precautions includeⁿ²³ the risk of a cave-in from a nine-foot deep trench on a construction site when there is an indication of the likelihood of danger absent proper shoring,ⁿ²⁴ and the risk of explosion while painting the inside of a tank with volatile paint.ⁿ²⁵

The fact that a special risk is foreseeable justifies the imposition of liability.ⁿ²⁶ As a general rule, the foreseeability of special risks is determined at the time that the parties enter into the contract.ⁿ²⁷ However, liability may be imposed on an employer who at the time of entering into the contract had no reason to anticipate that conditions requiring special precautions would arise, if such conditions subsequently arise of which the employer knows or should know.ⁿ²⁸

In order for the peculiar risk doctrine to apply, there must be some direct link between the risk and the dangerous event or condition that results in injury. A foreseeable course of conduct is not a peculiar risk absent some evidence linking that course of conduct with some specific and special harm, against which the hirer should guard.ⁿ²⁹

The fact that the employer does not know, or that a reasonable person would not know, that the independent contractor has not taken special precautions, or is not planning to take them, does not preclude liability.ⁿ³⁰ However, the possibility of routine negligence in the performance of work cannot provide a basis for liability under the peculiar risk doctrine.ⁿ³¹ While the hirer of an independent contractor might always foresee that the contractor may in some way be negligent toward third persons, the doctrine has no reference to such a general anticipation.ⁿ³² Thus, a contractor's use of defective equipment or misuse of equipment is not within the peculiar risk doctrine.ⁿ³³ For example, if a contractor is hired to transport goods, the hirer would have no liability for the contractor's failure to inspect the brakes or for negligent driving. But if the goods are logs weighing several tons, the hirer is liable for the contractor's failure to take special precautions to secure the logs to the truck.ⁿ³⁴

[iv] No Immunity for Hirer's Own Negligent Selection, Control, and Supervision of Independent Contractor

The Supreme Court's decision in *Privette* does not shield a hirer of an independent contractor from liability to the independent contractor's employee who sustains work-related injuries caused by the hirer's own independent fault. This is true even if the employee's injuries are also compensable by workers' compensation.ⁿ³⁵

[c] Inherently Dangerous Activities

One who employs an independent contractor to perform work that is inherently dangerous is liable for the negligence on the part of the independent contractor (or servants of the independent contractor) in the improper performance of the work or for their negligent failure to take necessary precautions.ⁿ³⁶

[d] Nondelegable Duty

A person who hires an independent contractor is liable for the misconduct of the contractor in regard to a duty of the hirer that is deemed "nondelegable."ⁿ³⁷ Thus, when the law imposes a definite affirmative duty on one by reason of his or her relationship with others, whether as an owner or proprietor of landⁿ³⁸ or chattels or in some other capacity, such a person cannot escape liability for a failure to perform the duty thus imposed by entrusting it to an independent

contractor.ⁿ³⁹

A nondelegable duty may be imposed by statute, by charter, or by common law.ⁿ⁴⁰ For example, certain statutory safety provisions such as those found in the Vehicle Code create duties that may not be delegated, so that the owner of a vehicle is liable for the harm caused by the negligence of his or her mechanic in servicing a vehicle, even though the mechanic is an independent contractor.ⁿ⁴¹ A nondelegable duty imposed by statute depends on statutory language and legislative purpose.ⁿ⁴²

A nondelegable duty may also be created by ordinances, regulations, or other public safety rules and orders. However, the duty imposed must involve specific safeguards; a general requirement that a safe workplace must be provided is insufficient to create a nondelegable duty.ⁿ⁴³ For example, billboard owners had a nondelegable duty to comply with a billboard safety regulation,^{n43.1} and the employee of an independent contractor who was injured in a fall from the billboard raised a genuine issue of material fact as to whether they breached that duty.^{n43.2}

A nondelegable duty may also be created by contract. A promisor may not escape liability to the promisee by delegating performance of a contractual obligation to an independent contractor. However, under this exception, no liability is incurred with regard to a nonparty to the contract who is injured by the independent contractor.ⁿ⁴⁴

"Nondelegable duties" may also be imposed in connection with an activity done under license of public authority.ⁿ⁴⁵ Thus, cases have stated that one carrying on an activity that can be lawfully carried on only under a franchise granted by public authority and that involves an unreasonable risk of harm to others is subject to liability for personal injury caused by the negligence of a contractor employed to do work in carrying on the activity.ⁿ⁴⁶ This rule imposes liability on common carriers operating under a public franchise for the acts of independent-contractor drivers,ⁿ⁴⁷ and it has also been applied to nonfranchised highway contract carriers.ⁿ⁴⁸

It has been held that the rule that the hirer of an independent contractor is not vicariously liable for injuries to the contractor's employees under the peculiar risk doctrineⁿ⁴⁹ is not a limitation under the nondelegable duty rule.ⁿ⁵⁰

[e] Vicarious Liability for Nuisance or Trespass

The employer of an independent contractor may be held liable for injuries resulting from acts of the contractor that constitute a nuisance if the employer had knowledge of or should have known of the nuisance.ⁿ⁵¹

[3] Intentional Torts

As a general rule, the vicarious liability of an employer for the torts of an independent contractor does not extend to intentional torts committed by the contractor.ⁿ⁵² However, in those instances in which the independent contractor is also deemed the agent of the employer, the employer may be liable for the agent's intentional torts.ⁿ⁵³

[4] Collateral Negligence

Under the collateral negligence doctrine, an employer of an independent contractor is not liable for acts of the contractor or the contractor's employees that are deemed "collateral."ⁿ⁵⁴ Under this doctrine, an employer of an independent contractor is not liable for harm caused by the contractor if (1) the contractor's negligence consists solely of the improper manner in which he or she does the work, (2) the negligence creates a risk of harm that is not inherent in or normal to the work, and (3) the employer had no reason to contemplate the contractor's negligence when the contract was made and the employer was not otherwise negligent.ⁿ⁵⁵ The negligence for which the employer of an independent contractor is liable must be of a type that is intimately connected with the work authorized and that is reasonably likely from its nature. Negligence in the doing of ordinary acts, that are not necessarily incidental, but only accidentally connected with the work, does not fall within the policy of the law that imposes the extraordinary liability on the

employer.n56

The doctrine of collateral negligence is based on the premise that, when harm results from a risk other than the one that makes the employer liable for the acts of the independent contractor, the reason for applying vicarious liability no longer applies. Thus, when an independent contractor is hired to take down a heavy sign, while the employer would be liable for harm caused in lowering the sign to the ground, he or she is not liable for harm caused after the sign has been lowered.n57

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewTortsVicarious LiabilityGeneral OverviewTortsVicarious LiabilityIndependent ContractorsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 30.04[4].

(n2)Footnote 2. *Torres v. Reardon* (1992) 3 Cal. App. 4th 831, 838, 5 Cal. Rptr. 2d 52 ; *Anderson v. Chancellor Western Oil Dev. Corp.* (1975) 53 Cal. App. 3d 235, 239, 125 Cal. Rptr. 640 ; *see* *Matthews v. Sears Roebuck & Co.* (1953) 116 Cal. App. 2d 96, 97, 253 P.2d 43 (employer of independent contractor hired to install carpet as not liable for tort of contractor in negligently leaving carpet on sidewalk, causing injury to person who fell over carpet).

(n3)Footnote 3. *See* *Van Arsdale v. Hollinger* (1968) 68 Cal. 2d 245, 252-253, 66 Cal. Rptr. 20, 437 P.2d 508 .

(n4)Footnote 4. *Anderson v. Chancellor Western Oil Dev. Corp.* (1975) 53 Cal. App. 3d 235, 239, 125 Cal. Rptr. 640 .

(n5)Footnote 5. *See* *Widman v. Rossmoor Sanitation, Inc.* (1971) 19 Cal. App. 3d 734, 743, 97 Cal. Rptr. 52 .

(n6)Footnote 6. *See* *Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal. App. 4th 544, 549, 5 Cal. Rptr. 2d 674 ; *Golden v. Conway* (1976) 55 Cal. App. 3d 948, 957, 128 Cal. Rptr. 69 .

(n7)Footnote 7. *See* *McCordic v. Crawford* (1943) 23 Cal. 2d 1, 6-7, 142 P.2d 7 .

(n8)Footnote 7.1. *See* *Johnson v. Tosco Corp.* (1991) 1 Cal. App. 4th 123, 137-140, 1 Cal. Rptr. 2d 747 ; *Villafana v. Camco Pacific Construction Co.* (2001) 91 Cal. App. 4th 189, 197-198, 110 Cal. Rptr. 2d 170 (imposition of liability on general contractor not allowed for mere failure to exercise power to compel subcontractor to adopt safer procedures); *Yanez v. U.S.* (9th Cir. 1995) 63 F.3d 870, 874-875 ; *see also* Restatement 2d Torts § 414.

(n9)Footnote 7.2. *Weiss v. Chevron, U. S. A., Inc.* (1988) 204 Cal. App. 3d 1094, 1100, 251 Cal. Rptr. 727 (oil company's supply of products to service station insufficient to impose vicarious liability for acts of station's employee).

(n10)Footnote 8. *See* *Torres v. Reardon* (1992) 3 Cal. App. 4th 831, 839, 5 Cal. Rptr. 2d 52 ; *Johnson v. Tosco Corp.* (1991) 1 Cal. App. 4th 123, 132, 1 Cal. Rptr. 2d 747 ; *LaCount v. Hensel Phelps Constr. Co.* (1978) 79 Cal. App. 3d 754, 763, 145 Cal. Rptr. 244 . For the standard jury instruction on the peculiar risk doctrine, *see* Judicial Council of California Civil Jury Instructions, CACI 3708 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n11)Footnote 9. Restatement (Second) of Torts § 416. A closely related provision, Restatement (Second) of Torts § 413, imposes direct liability on an employer for failing to provide for appropriate precautions in the agreement with the independent contractor. Furthermore, the substance of Restatement (Second) of Torts § 416 is practically duplicated

by Restatement (Second) of Torts § 427. *see Henderson Brothers Stores, Inc. v. Smiley (1981) 120 Cal. App. 3d 903, 912 n.4, 174 Cal. Rptr. 875.*

(n12)Footnote 9.1. *Torres v. Reardon (1992) 3 Cal. App. 4th 831, 839-841, 5 Cal. Rptr. 2d 52.*

(n13)Footnote 9.2. *See Owens v. Giannetta-Heinrich Construction Co. (1994) 23 Cal. App. 4th 1662, 1667, 29 Cal. Rptr. 2d 11* (dicta citing Restatement of Torts 2d, § 413).

(n14)Footnote 10. *See Privette v. Superior Court (1993) 5 Cal. 4th 689, 695 n.2, 21 Cal. Rptr. 2d 72, 854 P.2d 721.*

(n15)Footnote 11. *See Owens v. Giannetta-Heinrich Construction Co. (1994) 23 Cal. App. 4th 1662, 1667 n.4, 1668, 29 Cal. Rptr. 2d 11* (emphasizing word "normally" in concluding that Supreme Court intended its holding in *Privette*, discussed in [ii], *below*, to apply only in situations in which third-party liability is vicarious rather than direct); *cf. Yanez v. United States (9th Cir. 1995) 63 F.3d 870, 873* (refusing to characterize negligent failure to supervise as within any possible exception to rule of *Privette*); *see also [a], above.*

(n16)Footnote 12. *See, e.g., Aceves v. Regal Pale Brewing Co. (1979) 24 Cal. 3d 502, 508-509, 156 Cal. Rptr. 41, 595 P.2d 619; Woolen v. Aerojet General Corp. (1962) 57 Cal. 2d 407, 410-411, 20 Cal. Rptr. 12, 369 P.2d 708.*

(n17)Footnote 13. *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721.*

(n18)Footnote 14. *Privette v. Superior Court (1993) 5 Cal. 4th 689, 696-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721; Andreini v. Superior Court (1998) 60 Cal. App. 4th 1415, 1424-1429, 71 Cal. Rptr. 2d 153* (after exhaustively reviewing *Privette* factors, court concluded that *Privette* exception to peculiar risk doctrine does not apply when contractor does not have workers' compensation insurance or is not otherwise self-insured); *Redfeather v. Chevron USA, Inc. (1997) 57 Cal. App. 4th 702, 707-708, 67 Cal. Rptr. 2d 159* (corporation that hired independent contractor to close oil well is not liable to employee for personal injuries under *Privette*, notwithstanding independent contractor's agreement to indemnify corporation against that liability).

(n19)Footnote 15. *Toland v. Sunland Housing Group, Inc. (1998) 18 Cal. 4th 253, 74 Cal. Rptr. 2d 878, 955 P.2d 504.*

(n20)Footnote 16. *Toland v. Sunland Housing Group, Inc. (1998) 18 Cal. 4th 253, 74 Cal. Rptr. 2d 878, 955 P.2d 504.* For a complete discussion *see § 20.44[2], above.*

(n21)Footnote 17. *See Whitford v. Swinerton & Walberg Co. (1995) 34 Cal. App. 4th 1054, 1059-1060, 40 Cal. Rptr. 2d 688; Smith v. ACandS, Inc. (1994) 31 Cal. App. 4th 77, 94-95, 37 Cal. Rptr. 2d 457; Owens v. Giannetta-Heinrich Construction Co. (1994) 23 Cal. App. 4th 1662, 1669-1671, 29 Cal. Rptr. 2d 11.*

(n22)Footnote 18. *Smith v. ACandS, Inc. (1994) 31 Cal. App. 4th 77, 95-97, 37 Cal. Rptr. 2d 457.*

(n23)Footnote 19. *Griesel v. Dart Industries, Inc. (1979) 23 Cal. 3d 578, 586, 153 Cal. Rptr. 213, 591 P.2d 503; Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 132, 1 Cal. Rptr. 2d 747.*

(n24)Footnote 20. *Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 132, 1 Cal. Rptr. 2d 747.*

(n25)Footnote 21. *Aceves v. Regal Pale Brewing Co. (1979) 24 Cal. 3d 502, 509, 156 Cal. Rptr. 41, 595 P.2d 619* (in determining whether danger is recognizable, hirer's knowledge and experience in field of work to be done are relevant); *Henderson Bros. Stores, Inc. v. Smiley (1981) 120 Cal. App. 3d 903, 915-916, 174 Cal. Rptr. 875* (quoting from Restatement (Second) of Torts § 413, comment b).

(n26)Footnote 22. *Henderson Brothers Stores, Inc. v. Smiley (1981) 120 Cal. App. 3d 903, 916-917, 174 Cal.*

Rptr. 875 .

(n27)Footnote 23. See *Henderson Brothers Stores, Inc. v. Smiley* (1981) 120 Cal. App. 3d 903, 911 n.3, 174 Cal. *Rptr.* 875 (containing long list of examples).

(n28)Footnote 24. See *Griesel v. Dart Indus., Inc.* (1979) 23 Cal. 3d 578, 586-587, 153 Cal. *Rptr.* 213, 591 P.2d 503 .

(n29)Footnote 25. See *Woolen v. Aerojet General Corp.* (1962) 57 Cal. 2d 407, 410, 20 Cal. *Rptr.* 12, 369 P.2d 708 , *overruled on other grounds*, *Privette v. Superior Court* (1993) 5 Cal. 4th 689, 702, 21 Cal. *Rptr.* 2d 72, 854 P.2d 721 .

(n30)Footnote 26. *Holman v. State of California* (1975) 53 Cal. App. 3d 317, 330, 124 Cal. *Rptr.* 773 .

(n31)Footnote 27. See *McDonald v. City of Oakland* (1967) 255 Cal. App. 2d 816, 823, 63 Cal. *Rptr.* 593 .

(n32)Footnote 28. *Mackey v. Campbell Construction Co.* (1980) 101 Cal. App. 3d 774, 784, 162 Cal. *Rptr.* 64 .

(n33)Footnote 29. *Jordy v. County of Humboldt* (1992) 11 Cal. App. 4th 735, 746-747, 14 Cal. *Rptr.* 2d 553 (risk that foster child would attempt to run away from foster home is not basis for holding agency that placed foster child is liable for injury to foster child during operation of off-road vehicle).

(n34)Footnote 30. *McDonald v. City of Oakland* (1967) 255 Cal. App. 2d 816, 823, 63 Cal. *Rptr.* 593 .

(n35)Footnote 31. *Johnson v. Tosco Corp.* (1991) 1 Cal. App. 4th 123, 132-133, 1 Cal. *Rptr.* 2d 747 ; *Hughes v. Atlantic Pacific Construction Co.* (1987) 194 Cal. App. 3d 987, 1000, 240 Cal. *Rptr.* 200 .

(n36)Footnote 32. *Johnson v. Tosco Corp.* (1991) 1 Cal. App. 4th 123, 133, 1 Cal. *Rptr.* 2d 747 .

(n37)Footnote 33. *Johnson v. Tosco Corp.* (1991) 1 Cal. App. 4th 123, 133, 1 Cal. *Rptr.* 2d 747 (defective scaffolding on job site not peculiar risk); see *Stark v. Weeks Real Estate* (1979) 94 Cal. App. 3d 965, 972, 156 Cal. *Rptr.* 701 (misuse of hand-held saw).

(n38)Footnote 34. *Holman v. State of California* (1975) 53 Cal. App. 3d 317, 327-328, 124 Cal. *Rptr.* 773 (citing examples from Restatement (Second) of Torts, § 416, comment d).

(n39)Footnote 35. *Grahn v. Tosco Corp.* (1997) 58 Cal. App. 4th 1373, 1379-1380, 1384-1385, 68 Cal. *Rptr.* 2d 806 (case reversed because of significant instructional errors; see § 20.44[2] for further discussion), *disapproved* to the extent it is inconsistent with *Camargo v. Tjaarda Dairy* (2001) 25 Cal. 4th 1235, 1245 and *Hooker v. Dept. of Transportation* (2002) 27 Cal. 4th 198, 214, 115 Cal. *Rptr.* 2d 853, 38 P.3d 1081 .

(n40)Footnote 36. *Wilson v. Rancho Sespe* (1962) 207 Cal. App. 2d 10, 20, 24 Cal. *Rptr.* 296 (blasting operations); *Snyder v. Southern Cal. Edison Co.* (1955) 44 Cal. 2d 793, 800-801, 285 P.2d 912 .

(n41)Footnote 37. *Dow v. Holly Manufacturing Co.* (1958) 49 Cal. 2d 720, 728, 321 P.2d 736 (duty of a general contractor to construct building safely may not be delegated).

(n42)Footnote 38. See *Snyder v. Southern Cal. Edison Co.* (1955) 44 Cal. 2d 793, 797, 285 P.2d 912 (possessor of land as liable for negligence of independent contractor in building or maintaining structures on premises); *Golden v. Conway* (1976) 55 Cal. App. 3d 948, 958, 128 Cal. *Rptr.* 69 (landlord may be vicariously liable for negligent installation of heater by independent contractor).

(n43)Footnote 39. *Van Arsdale v. Hollinger* (1968) 68 Cal. 2d 245, 251, 66 Cal. *Rptr.* 20, 437 P.2d 508 .

- (n44)Footnote 40. *Van Arsdale v. Hollinger* (1968) 68 Cal. 2d 245, 251, 66 Cal. Rptr. 20, 437 P.2d 508 .
- (n45)Footnote 41. *Maloney v. Rath* (1968) 69 Cal. 2d 442, 446-448, 71 Cal. Rptr. 897, 445 P.2d 513 .
- (n46)Footnote 42. *Jordy v. County of Humboldt* (1992) 11 Cal. App. 4th 735, 745-747, 14 Cal. Rptr. 2d 553 (refusing to impose liability on county for acts of foster parents; construing Welf. & Inst. Code § 202).
- (n47)Footnote 43. *Felmler v. Falcon Cable TV* (1995) 36 Cal. App. 4th 1032, 1038-1039, 43 Cal. Rptr. 2d 158 .
- (n48)Footnote 43.1. 8 Cal. Code Reg. § 3416.
- (n49)Footnote 43.2. *Evard v. Southern California Edison* (2007) 153 Cal. App. 4th 137, 144-148, 62 Cal. Rptr. 3d 479 .
- (n50)Footnote 44. *Millsap v. Federal Express Corp.* (1991) 227 Cal. App. 3d 425, 433, 277 Cal. Rptr. 807 .
- (n51)Footnote 45. See *Anderson v. Chancellor Western Oil Dev. Corp.* (1975) 53 Cal. App. 3d 235, 239, 125 Cal. Rptr. 640 .
- (n52)Footnote 46. *Millsap v. Federal Express Corp.* (1991) 227 Cal. App. 3d 425, 433-434, 277 Cal. Rptr. 807 ; *Klein v. Leatherman* (1969) 270 Cal. App. 2d 792, 794-796, 76 Cal. Rptr. 190 ; see Restatement (Second) of Torts, § 428.
- (n53)Footnote 47. See *Eli v. Murphy* (1952) 39 Cal. 2d 598, 599-600, 248 P.2d 756 ; *Serna v. Pettey Leach Trucking, Inc.* (2003) 110 Cal. App. 4th 1475, 1486-1488 (poultry exemption in 49 U.S.C. § 13506(a)(6)(B) did not mean carrier was not regulated or not subject to authority of Surface Transportation Board); *Gamboa v. Conti Trucking, Inc.* (1993) 19 Cal. App. 4th 663, 666, 23 Cal. Rptr. 2d 564 .
- (n54)Footnote 48. See *Gamboa v. Conti Trucking, Inc.* (1993) 19 Cal. App. 4th 663, 666, 23 Cal. Rptr. 2d 564 ; *Klein v. Leatherman* (1969) 270 Cal. App. 2d 792, 794-796, 76 Cal. Rptr. 190 ; cf. *Gaskill v. Calaveras Cement Co.* (1951) 226 P.2d 633 (no liability based on nondelegable duty as between two contract carriers that stood on equal footing with regard to Public Utilities Commission regulation).
- (n55)Footnote 49. *Privette v. Superior Court* (1993) 5 Cal. 4th 689, 692, 21 Cal. Rptr. 2d 72, 854 P.2d 721 , discussed in [b], above.
- (n56)Footnote 50. *Felmler v. Falcon Cable TV* (1995) 36 Cal. App. 4th 1032, 1037-1038, 43 Cal. Rptr. 2d 158 .
- (n57)Footnote 51. *Henderson Brothers Stores, Inc. v. Smiley* (1981) 120 Cal. App. 3d 903, 909 n.2, 174 Cal. Rptr. 875 ; see Restatement (Second) of Torts, § 427B.
- (n58)Footnote 52. *Campbell v. Security Pac. Nat. Bank* (1976) 62 Cal. App. 3d 379, 386-387, 133 Cal. Rptr. 77 .
- (n59)Footnote 53. See *Draper v. Hellman Com. T. & S. Bank* (1928) 203 Cal. 26, 38-39, 263 P. 240 ; *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal. App. 3d 654, 661-663, 109 Cal. Rptr. 269 .
- (n60)Footnote 54. See *Van Arsdale v. Hollinger* (1968) 68 Cal. 2d 245, 252, 66 Cal. Rptr. 20, 437 P.2d 508 .
- (n61)Footnote 55. See *LaCount v. Hensel Phelps Constr. Co.* (1978) 79 Cal. App. 3d 754, 764-765, 145 Cal. Rptr. 244 .
- (n62)Footnote 56. *Snyder v. Southern Cal. Edison Co.* (1955) 44 Cal. 2d 793, 801, 285 P.2d 912 .
- (n63)Footnote 57. *Smith v. Lucky Stores* (1976) 61 Cal. App. 3d 826, 829-831, 132 Cal. Rptr. 628 .



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California Employment Law

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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees
Part A. TEXT

2-30 California Employment Law § 30.11

AUTHOR: By Mary Vail, J.D.

§ 30.11 Respondeat Superior and Proposition 51

Proposition 51, the so-called "Deep Pockets" initiative passed by the voters in June 1986, limits the doctrine of joint and several liability. Under Proposition 51, in any action for personal injury, property damage, or wrongful death based on principles of comparative fault, the liability of each defendant for "noneconomic damages" is several only and not joint. Thus, each defendant is liable only for the percentage of the plaintiff's noneconomic damages that corresponds to the defendant's comparative share of fault.ⁿ¹ Noneconomic damages are subjective nonmonetary losses, such as general damages for pain and suffering.ⁿ²

Proposition 51, however, does not eliminate liability for noneconomic damages of a defendant whose liability is vicarious only under respondeat superior (and who, therefore, is technically without fault). The vicariously liable employer stands in the shoes of the employee for purposes of determining the employer's comparative share of fault and noneconomic damages. If there are no other tortfeasors, the employer and employee remain jointly and severally liable for 100 percent of the plaintiff's damages, including noneconomic damages. If there are other tortfeasors, then the employer is liable only for the proportion of the plaintiff's noneconomic damages that corresponds to the employee's percentage of comparative fault.ⁿ³

For more detailed discussion of Proposition 51, see Levy, Golden, and Sacks, California Torts, Chapter 74 (Matthew Bender).

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Civ. Code § 1431.2(a)*. For the standard jury instruction on economic and noneconomic damages, *see* Judicial Council of California Civil Jury Instructions, CACI 3902 et seq. (Matthew Bender), also available in

LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n2)Footnote 2. *See Civ. Code* § 1431.2(b)(2).

(n3)Footnote 3. *Miller v. Stouffer* (1992) 9 Cal. App. 4th 70, 81-86, 11 Cal. Rptr. 2d 454 ; *see also* *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal. App. 4th 1847, 1854, 12 Cal. Rptr. 2d 411 (Proposition 51 does not apply to defendant vehicle owner who is vicariously liable under *Veh. Code* § 17150 for driver's negligence).



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES

CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees

Part A. TEXT

2-30 California Employment Law §§ 30.12 through 30.19

AUTHOR: By Mary Vail, J.D.

[Reserved]

§§ 30.12[Reserved]



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
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2-30 California Employment Law § 30.20

AUTHOR: By Mary Vail, J.D.

§ 30.20 Legal Texts

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Levy, Golden, and Sacks, California Torts

Ch. 8, "Vicarious Liability."

Ch. 20, "Motor Vehicles," Part B.

Ch. 74, "Comparative Indemnity and Related Remedies."

Lareau, Labor and Employment Law, Ch. 270, *Employer Liability for Acts of Employees* (Matthew Bender).

Witkin, Summary of California Law (9th ed. 1987), Vol. 2, "Agency and Employment," §§ 115-143, Vol. 5 "Torts," §§ 997-1047.

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview



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2-30 California Employment Law § 30.21

AUTHOR: By Mary Vail, J.D.

§ 30.21 Encyclopedias

3 Cal. Jur. 3d, "Agency," §§ 131-134.

29 Cal. Jur. 3d, "Employer and Employee," §§ 91-117.

38 Cal. Jur. 3d, "Independent Contractors," §§ 1-28.

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
CHAPTER 30 Employers' Tort Liability to Third Parties for Conduct of Employees
Part B. BIBLIOGRAPHY

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AUTHOR: By Mary Vail, J.D.

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Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview



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California Employment Law

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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES

CHAPTER 31 Employer's Liability to Third Parties for Contracts Entered Into by Employees

2-31 California Employment Law 31.syn

AUTHOR: By James Buyoucos, J.D.

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By James Buyoucos, J.D.n*

FOOTNOTES:

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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES

CHAPTER 31 Employer's Liability to Third Parties for Contracts Entered Into by Employees

2-31 California Employment Law Scope

AUTHOR: By James Buyoucos, J.D.

Scope

By James Buyoucos, J.D.n* SCOPE

This chapter discusses an employer's liability for contracts entered into by its employees with third parties pursuant to actual or ostensible authority given by the employer. The chapter also discusses liability for unauthorized contracts that are subsequently ratified by the employer. The employee's right to indemnity from the employer is also discussed, as well as the employee's liability to the third party.

The tort liability of employers for the acts of employees is discussed in Chapter 30.

FOOTNOTES:

(n2)Footnote *. Publisher's Editorial Staff.



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
CHAPTER 31 Employer's Liability to Third Parties for Contracts Entered Into by Employees
Part A. TEXT

2-31 California Employment Law § 31.01

AUTHOR: By James Buyoucos, J.D.

§ 31.01 Overview

The issue of whether an employer is bound by a contract with a third party entered into by an employee on behalf of the employer is determined by the law of agency. An agency is a relationship in which one person represents another in dealings with a third party.ⁿ¹ In California, the law of agency is set forth in *Civil Code Section 2295 et seq.* and cases interpreting those provisions.

As previously discussed,ⁿ² an employee is a person engaged to do something for the benefit of the employer or a third person.ⁿ³ An employee is subject to the control and direction of his or her employer in regard to any act, labor, or work to be done in the course and scope of his employment.ⁿ⁴ An agent is one who represents another, called the principal, in dealings with third persons.ⁿ⁵ While one may be both an employee and an agent, the terms are not synonymous. Although both employment and agency relationships involve the idea of service for another, an agent works not only *for*, but *in the place of*, his or her principal in transactions with third persons.ⁿ⁶ An agent for a particular act or transaction is called a special agent; all other agents are general agents.ⁿ⁷

An agency may be either actual or ostensible.ⁿ⁸ If the agent is an employee of the principal, the agency is actual.ⁿ⁹ An agency is ostensible if the principal intentionally, or by want of ordinary care, causes a third person to believe that one who is not employed by the principal is the principal's agent.ⁿ¹⁰ Because an employee is, by statute, deemed to be an actual agent, this chapter does not further consider the doctrine of ostensible agency. However, an actual employee-agent may have either actual or ostensible *authority*. Actual authority is that which the principal intentionally confers on the agent, or intentionally, or by want of ordinary care, allows the *agent* to believe that he or she possesses.ⁿ¹¹ Ostensible authority is that which the principal, intentionally or by want of ordinary care, allows a *third person* to believe the agent possesses.ⁿ¹² If an agency relationship is established, the principal is bound for the acts of the agent that are within the scope of the agent's actual or ostensible authority.ⁿ¹³

Thus, for the purposes of determining the contractual liability of an employer for contracts entered into by one of its employees, the mere fact that an employee is the employer's actual agent is not determinative. The determinative issue is whether the employee was authorized by the employer to represent it in the particular transaction in issue (or if a

substitute for actual authorization, such as ostensible authority or ratification, is present). An employer is bound by a contract entered into by an employee on its behalf in four situations:

1. If the employer has conferred actual authority on the employee to enter into the contract on its behalf;ⁿ¹⁴
2. If the employee appears to have the ostensible authority to enter into the contract due to the employer's representations or conduct toward the third party;ⁿ¹⁵
3. If the employer has subsequently ratified an unauthorized contract;ⁿ¹⁶ or
4. If the employer employs a person who, with the employer's consent, enters into a contract on the behalf of the employer in the employee's own name (the "undisclosed principal" theory).ⁿ¹⁷

The extent of the authority of an agent is ordinarily a question of fact.ⁿ¹⁸ In resolving it, the trier of fact may draw inferences from the conduct of the parties.ⁿ¹⁹ Thus, an agent's authority may be proved by circumstantial evidence.ⁿ²⁰

The burden of proving the scope of an agent's authority, rests on the party seeking to charge the principal with the representations of the agent.ⁿ²¹ Mere surmise as to the authority of an agent is insufficient to impose liability on the principal.ⁿ²²

In the discussion that follows, unless otherwise indicated, the terms "employee" and "agent" are used interchangeably to refer to an employee acting on behalf of the employer in transactions with third parties. The terms "employer" and "principal" are likewise used interchangeably to refer to the person or entity being represented by the employee-agent.

1. Informing all employees (especially sales personnel and those in positions to commit the employer's assets), in writing if possible, that they may make no contractual commitments except those for which they are given express authority.
2. Including clauses in all preprinted contract forms which (a) clearly identify the types of persons whom the employer has authorized to sign such contracts; and (b) clearly state that the contract is invalid if not signed by authorized personnel;
3. Periodically reviewing the contract-signing procedures that the employer has implemented to ensure compliance with their terms; and
4. Acting quickly, with the aid of legal counsel, to address any evidence that an employee may have acted beyond the scope of his or her authority to enter into a contractual relationship that the employer does not wish to continue.

■ CONSULTANT'S COMMENT:

The ability of an agent to contract for a principal, whether the agent acts with actual or ostensible authority, is of special significance for employers. That is, because issues of actual or ostensible authority are frequently fact-intensive, employers should recognize that the existence of an employer-employee relationship with an individual may be a critical element in a third party's argument that the relationship is also one of principal and agent. Employers, therefore, are advised to take steps to ensure that their employees do not act as agents for any transactions except those for which the agency is intended. Such steps should include at least the following:

1. Informing all employees (especially sales personnel and those in positions to commit the employer's assets), in writing if possible, that they may make no contractual commitments except those for which they are given express authority.
2. Including clauses in all preprinted contract forms which (a) clearly identify the types of persons whom the employer has authorized to sign such contracts; and (b) clearly state that the contract is invalid if not signed by authorized personnel;
3. Periodically reviewing the contract-signing procedures that the employer has implemented to ensure compliance with their terms; and
4. Acting quickly, with the aid of legal counsel, to address any evidence that an employee may have acted beyond the scope of his or her authority to enter into a contractual relationship that the employer does not wish to continue.

These steps cannot provide complete protection from the effects of an unintended agency, but, without the implementation of such minimum guidelines, an employer may find itself to be not only a party to a number of unwanted contracts, but also to have no firm basis for disciplining the employees who have made those contracts. *Commentary by Kirby Wilcox.*

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewLabor & Employment LawEmployer LiabilityThird Party InsurersTortsVicarious LiabilityEmployersGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Civ. Code* § 2295.

(n2)Footnote 2. *See* discussion in ch. 30.

(n3)Footnote 3. *See Lab. Code* § 2750.

(n4)Footnote 4. *Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253 .*

(n5)Footnote 5. *Civ. Code* § 2295.

(n6)Footnote 6. *Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253 .*

(n7)Footnote 7. *Civ. Code* § 2297.

(n8)Footnote 8. *Civ. Code* § 2298.

(n9)Footnote 9. *See Civ. Code* § 2299.

(n10)Footnote 10. *Civ. Code* § 2300. For the standard jury instruction on ostensible agency, *see* Judicial Council of California Civil Jury Instructions, CACI 3709 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n11)Footnote 11. *Civ. Code* § 2316.

(n12)Footnote 12. *Civ. Code* § 2317.

(n13)Footnote 13. *See Civ. Code* § 2330.

(n14)Footnote 14. *See* discussion in § 31.02.

(n15)Footnote 15. *See* discussion in § 31.03.

(n16)Footnote 16. *See* discussion in § 31.04.

(n17)Footnote 17. *See* discussion in § 31.05.

(n18)Footnote 18. *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal. App. 3d 767, 780, 278 Cal. Rptr. 228 .

(n19)Footnote 19. *Rubens v. Texam Oil Corp.* (1965) 239 Cal. App. 2d 78, 82, 48 Cal. Rptr. 411 .

(n20)Footnote 20. *Tomerlin v. Canadian Indemnity Co.* (1964) 61 Cal. 2d 638, 644, 39 Cal. Rptr. 731, 394 P.2d 571 ; *Whittaker v. Otto* (1961) 188 Cal. App. 2d 619, 622-623, 10 Cal. Rptr. 689 .

(n21)Footnote 21. *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal. App. 3d 767, 780, 278 Cal. Rptr. 228 .

(n22)Footnote 22. *Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal. App. 3d 767, 782, 278 Cal. Rptr. 228 .



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
CHAPTER 31 Employer's Liability to Third Parties for Contracts Entered Into by Employees
Part A. TEXT

2-31 California Employment Law § 31.02

AUTHOR: By James Buyoucos, J.D.

§ 31.02 Contracts Made Under Actual Authority

[1] Creating or Conferring Actual Authority

Actual authority is such as a principal intentionally confers on the agent, or intentionally, or by want of ordinary care, allows the agent to believe that he or she possesses.ⁿ¹ Actual authority may be conferred by precedent authorization or subsequent ratification.ⁿ² An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.ⁿ³ Consideration is not necessary to make an authority binding on the principal.ⁿ⁴

Actual authority may be implied from the conduct of the parties. It arises as a consequence of conduct of the principal that causes the *agent* (as opposed to the third party) to reasonably believe that the principal consents to the agent's execution of an act on behalf of the principal.ⁿ⁵ If the agent does not, in fact, believe that he or she has the authority to bind the principal, then there can be no actual authority.ⁿ⁶ Even if the agent does believe that he or she has the authority, the belief must be engendered by the conduct of the principal. Otherwise, the agent would have the power to bind the principal to any contract within the general scope of the agent's duties, however detrimental to the principal's interests the contract might be.ⁿ⁷

A principal's silence in the face of an agent's assertion of authority may reasonably cause the agent to believe that he or she possesses actual authority with regard to the matter at issue.ⁿ⁸ Similarly, the principal's silence to the agent's conduct over a period of time allows the agent to assume that he or she has the authority and approval of the principal to so act.ⁿ⁹ⁿ¹⁰

[2] Scope of Actual Authority

[a] Generally

Actual authority is the authority that the principal intentionally confers on the agent, or that the principal intentionally or by want of ordinary care allows the agent to believe that he or she possesses.ⁿ¹² Thus, an agent has actual authority to

bind the principal to all types of contracts within the scope of the agency as expressed by the parties.ⁿ¹³ In addition, as discussed in [b], *below*, an agent's actual authority is supplemented by statute.ⁿ¹⁴

An authority expressed in general terms, however broad, does not authorize an agent to do any of the following: (1) act in the agent's own name, unless it is the usual course of business to do so; (2) define the scope of the agency; or (3) violate any duty to which a trustee is subject pursuant to *Probate Code Sections 16002, 16004, 16005, or 16009*.ⁿ¹⁵ Nor can an agent have authority, either actual or ostensible, to do an act that is, and is known or suspected to be by the person with whom he or she deals, a fraud on the principal.ⁿ¹⁶

In determining the scope of an agent's authority, when the authority is given partly in general terms and partly in specific terms, the general authority gives no higher powers than those specifically mentioned.ⁿ¹⁷

[b] Statutory and Implied Actual Authority

Civil Code Section 2318 provides that every agent has such actual authority as is defined in *Civil Code Section 2295 et seq.*, unless specially deprived thereof by the principal, and even then has that authority ostensibly, except as to persons who have actual or constructive knowledge of the restriction on the agent's authority.ⁿ¹⁸

Under *Civil Code Section 2319*, an agent has authority to do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of the agency.ⁿ¹⁹ Thus, an agent has implied authority to use any means that are incidental to and reasonably proper in the performance of an assigned task.ⁿ²⁰ When acting in furtherance of the purposes of the agency, this implied authority includes the power to enter into contracts to accomplish the purposes of the agency.ⁿ²¹

An agent has the power to disobey instructions in dealing with the subject of the agency, when it is clearly for the interest of the principal that the instructions be disobeyed, and there is not time to communicate with the principal.ⁿ²²

An agent also has authority to make representations to third persons about facts on which the right to use the authority depends and that are either not known to the third party to whom the representations are made or not discoverable by that party by the use of reasonable diligence.ⁿ²³ However, an agent is not authorized to make representations about the terms of his or her authority.ⁿ²⁴

Unless specifically forbidden by the principal, an agent may delegate his or her powers to another person (1) to perform a purely mechanical act; (2) to perform an act that the agent cannot perform personally, but that can lawfully be performed by the subagent; or (3) when such powers are customarily delegated according to "the usage of the place."ⁿ²⁵ Of course, an agent's powers may also be delegated to a subagent when authorized by the principal.ⁿ²⁶

[c] Authority of Corporate Officers

A corporation can act only through its agents.ⁿ²⁷ Corporate officers, as agents of the corporation, derive their actual authority from the corporate bylaws or from the actions or apparent acquiescence of the corporate board of directors.ⁿ²⁸ Any contract or conveyance made in the name of the corporation that is authorized or ratified by the board of directors or is done within the the scope of the authority, actual or apparent, conferred by the board or within the agency or power of the officer executing the contract binds the corporation, whether the contract is executed or executory.ⁿ²⁹ In addition, any written contract between a corporation and a third person, when signed by the chairman of the board, the president, or any vice president and the secretary, an assistant secretary, the chief financial officer, or any assistant treasurer of the corporation is not invalidated as to the corporation by any lack of authority of the signing officers in the absence of actual knowledge on the part of the other party to the contract that the officers lacked authority to execute the contract.ⁿ³⁰

Corporate officers have implied power to execute certain types of contracts depending on the nature of their office. For example, the president of the corporation may execute contracts to carry on the ordinary business of the corporation,ⁿ³¹ but may not normally alienate the real property of the corporation.ⁿ³² The secretary of a corporation has no right to assign or transfer assets of the corporation without authority from the board of directors.ⁿ³³

[d] Equal Dignities Rule

[i] Generally

An agency relationship conferring actual authority on the agent to enter into a contract may ordinarily be created informally, without writing and without consideration.ⁿ³⁴ However, the equal dignities rule provides that an agent's authority to enter into a contract that is required by law to be in writing can only be given by an instrument in writing.ⁿ³⁵ Thus, an agent's authority to enter into agreements falling within the statute of frauds, such as contracts that cannot be performed within one year of their making,ⁿ³⁶ contracts for the sale of realty,ⁿ³⁷ or contracts for the sale of goods over \$500,ⁿ³⁸ must be in writing.ⁿ³⁹ For example, in *McGirr v. Gulf Oil Corp.*,ⁿ⁴⁰ the sales representative of an oil company entered into an agreement with the plaintiff for a five-year lease of one of the company's service stations. The court held that because leases of real property for over one year must be in writing,ⁿ⁴¹ the agent needed written authority to bind the principal, and because the sales representative did not have written authority, the plaintiff could not enforce the contract.ⁿ⁴²

The equal dignities rule is not applicable when a writing is required by the terms of the contract rather than by law. In *Ripani v. Liberty Loan Corp.*,ⁿ⁴³ the court held that a written lease providing that exercise of an option to extend the lease for two years must be in writing could be exercised by an agent with only an oral authorization. The lease was written as required by *Civil Code Section 1624(c)* (requiring writing for lease longer than one year), but the lease itself, not the statute of frauds, required a written exercise of the option. Therefore, the agent who exercised the option was not entering into a contract required by law to be in writing and was not required by *Civil Code Section 2309* to have a written authorization.ⁿ⁴⁴

For a discussion of the application of the equal dignities rule when the authority of the agent to bind a principal is based on a theory of ostensible authority, see § 31.03[1][c].

[ii] Exceptions

No written authorization is required when the agent is not given any discretionary power but is authorized only to perform a mechanical task for the principal, such as the signing of the contract.ⁿ⁴⁵ Written authorization is also unnecessary when an agent is an executive officer of a corporation and acts on behalf of the corporation.ⁿ⁴⁶

[iii] Estoppel to Assert Rule

A principal may be estopped from asserting the equal dignities rule as a defense if his or her own conduct lulls the third party into believing that the agent has written authority to enter the contract or has no need for written authority.ⁿ⁴⁷ For example, a principal who referred all inquiries regarding contract negotiations to his agent without notifying third parties of any limitations on the agent's authority was held estopped from asserting the equal dignities rule as a defense to an action for breach of a contract entered into by the agent.ⁿ⁴⁸ However, a principal is not estopped from asserting the equal dignities rule because the *agent* has led a third party to believe that he or she has authority to contract on behalf of the principal.ⁿ⁴⁹

Estoppel to assert the equal dignities rule should not be confused with estoppel to rely on the statute of frauds.ⁿ⁵⁰ A contract may be required by law to be in writing under *Civil Code Section 1624*, yet may be enforced without a writing because of one party's change of position in reliance on the other party's representations.ⁿ⁵¹ Thus, an agent who negotiates with a third party a contract that would ordinarily require a writing, but who has represented to the third party

that no writing will be required, may be estopped from using the statute of frauds as a defense in an action for breach of contract. But a finding that the contract is enforceable notwithstanding the statute of frauds (for example, because of an estoppel to rely on the statute of frauds) does not dispense with the requirement under *Civil Code Section 2309* that the agent's authority to enter into the contract be in writing, unless the third party also relied on the principal's express or implied representations regarding the agent's authority. The principal will be estopped from asserting Section 2309 as a defense only if his or her own conduct lulls the third party into believing that the agent has written authority or that written authority is not needed.ⁿ⁵²

Legal Topics:

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

Labor & Employment Law
Employer Liability
Contract Liability
General Overview
Labor & Employment Law
Employer Liability
Contract Liability
Third Party Liability
Torts
Vicarious Liability
General Overview

FOOTNOTES:

(n1)Footnote 1. *Civ. Code* § 2316.

(n2)Footnote 2. *Civ. Code* § 2307; see discussion in § 31.04 (ratification).

(n3)Footnote 3. *Civ. Code* § 2309; see discussion in [2] [d], *below* (equal dignities rule).

(n4)Footnote 4. *Civ. Code* § 2308.

(n5)Footnote 5. *Tomerlin v. Canadian Indemnity Co.* (1964) 61 Cal. 2d 638, 643, 39 Cal. Rptr. 731, 394 P.2d 571 ; *Frank Pisano & Associates v. Taggart* (1972) 29 Cal. App. 3d 1, 15, 105 Cal. Rptr. 414 .

(n6)Footnote 6. See *Columbia Outfitting Co. v. Freeman* (1950) 36 Cal. 2d 216, 218-219, 223 P.2d 21 .

(n7)Footnote 7. *South Sacramento Drayage Co. v. Campbell Soup Co.* (1963) 220 Cal. App. 2d 851, 856-857 .

(n8)Footnote 8. See *Tomerlin v. Canadian Indemnity Co.* (1964) 61 Cal. 2d 638, 644, 39 Cal. Rptr. 731, 394 P.2d 571 .

(n9)Footnote 9. *Vertex Inv. Co. v. Schwabacher* (1943) 57 Cal. App. 2d 406, 418, 134 P.2d 891 , cert. denied, 320 U.S. 754 .

(n10)Footnote 10. [Reserved]

(n11)Footnote 12. See *Civ. Code* § 2316.

(n12)Footnote 13. See *Civ. Code* § 2330.

(n13)Footnote 14. See *Civ. Code* § 2318.

(n14)Footnote 15. *Civ. Code* § 2322.

(n15)Footnote 16. *Civ. Code* § 2306.

(n16)Footnote 17. *Civ. Code* § 2321.

(n17)Footnote 18. For a discussion of ostensible authority, see § 31.03.

(n18)Footnote 19. *Civ. Code* § 2319(1); see *Garber v. Prudential Ins. Co.* (1962) 203 Cal. App. 2d 693, 701, 22 Cal. Rptr. 123 .

(n19)Footnote 20. *Garber v. Prudential Ins. Co.* (1962) 203 Cal. App. 2d 693, 701, 22 Cal. Rptr. 123 .

(n20)Footnote 21. *See Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal. 3d 699, 705-709, 131 Cal. Rptr. 882, 552 P.2d 1178 .

(n21)Footnote 22. *Civ. Code* § 2320.

(n22)Footnote 23. *See Civ. Code* § 2319(2).

(n23)Footnote 24. *See Civ. Code* § 2319(2).

(n24)Footnote 25. *See Civ. Code* § 2349(1)-(3).

(n25)Footnote 26. *See Civ. Code* § 2349(4).

(n26)Footnote 27. *Herring v. Fisher* (1952) 110 Cal. App. 2d 322, 330, 242 P.2d 963 .

(n27)Footnote 28. *Padgham v. Inyo Marble Co.* (1931) 116 Cal. App. 328, 331, 2 P.2d 531 .

(n28)Footnote 29. *Corp. Code* § 208(b).

(n29)Footnote 30. *See Corp. Code* § 313.

(n30)Footnote 31. *Herring v. Fisher* (1952) 110 Cal. App. 2d 322, 330, 242 P.2d 963 .

(n31)Footnote 32. *Butler v. Solano Land Co.* (1920) 46 Cal. App. 171, 174, 188 P 1019 .

(n32)Footnote 33. *Gilbert v. Miller* (1924) 68 Cal. App. 40, 42, 228 P. 662 .

(n33)Footnote 34. *See Civ. Code* §§ 2308, 2309, discussed in [1], above.

(n34)Footnote 35. *See Civ. Code* § 2309.

(n35)Footnote 36. *See Civ. Code* § 1624(a)(1).

(n36)Footnote 37. *See Civ. Code* § 1624(a)(3) (further providing that agent's authority to bind principal as to sale of real property or lease of property for longer than one year must be in writing subscribed by party to be charged).

(n37)Footnote 38. *See Com. Code* § 2201(1).

(n38)Footnote 39. *Civ. Code* § 2309.

(n39)Footnote 40. *McGirr v. Gulf Oil Corp.* (1974) 41 Cal. App. 3d 246, 249-251, 115 Cal. Rptr. 902 .

(n40)Footnote 41. *See Civ. Code* § 1624(c).

(n41)Footnote 42. *McGirr v. Gulf Oil Corp.* (1974) 41 Cal. App. 3d 246, 254-256, 115 Cal. Rptr. 902 .

(n42)Footnote 43. *Ripani v. Liberty Loan Corp.* (1979) 95 Cal. App. 3d 603, 610, 157 Cal. Rptr. 272 .

(n43)Footnote 44. *Ripani v. Liberty Loan Corp.* (1979) 95 Cal. App. 3d 603, 609-610, 157 Cal. Rptr. 272 .

(n44)Footnote 45. *Ellis v. Mihelis* (1963) 60 Cal. 2d 206, 214, 32 Cal. Rptr. 415, 384 P.2d 7 .

(n45)Footnote 46. *Jeppi v. Brockman Holding Co.* (1949) 34 Cal. 2d 11, 17-18, 206 P.2d 847 ; *see also*

discussion in [c], *above*.

(n46)Footnote 47. *Kerner v. Hughes Tool Co.* (1976) 56 Cal. App. 3d 924, 934, 128 Cal. Rptr. 839 (estoppel found); *see also* *McGirr v. Gulf Oil Corp.* (1974) 41 Cal. App. 3d 246, 258, 115 Cal. Rptr. 902 (survey of prior case law; no estoppel found).

(n47)Footnote 48. *Kerner v. Hughes Tool Co.* (1976) 56 Cal. App. 3d 924, 934-935, 128 Cal. Rptr. 839 .

(n48)Footnote 49. *McGirr v. Gulf Oil Corp.* (1974) 41 Cal. App. 3d 246, 254-255, 258, 115 Cal. Rptr. 902 .

(n49)Footnote 50. *See* Civ. Code § 1624.

(n50)Footnote 51. *See* *Monarco v. Lo Greco* (1950) 35 Cal. 2d 621, 625-626, 220 P.2d 737 .

(n51)Footnote 52. *McGirr v. Gulf Oil Corp.* (1974) 41 Cal. App. 3d 246, 254-258, 115 Cal. Rptr. 902 .



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
CHAPTER 31 Employer's Liability to Third Parties for Contracts Entered Into by Employees
Part A. TEXT

2-31 California Employment Law § 31.03

AUTHOR: By James Buyoucos, J.D.

§ 31.03 Contracts Made Under Ostensible Authority

[1] Creating Ostensible Authority

Ostensible authority (or apparent authority) is authority that a principal, intentionally or by want of ordinary care, causes or allows a third person to believe that an agent possesses.ⁿ¹ An agent may have both ostensible and actual authorityⁿ² if the principal both causes the agent to believe that he or she has the authority and causes the third party to believe that the agent has the authority.ⁿ³ Also, an actual agent, such as an employee, may have ostensible authority even if he or she has no actual authority to represent the principal with regard to the transaction at issue.ⁿ⁴

Ostensible authority arises as a result of conduct of the principal that causes a third party reasonably to believe that the agent possesses the authority to act on the principal's behalf. Ostensible authority must be based on acts or declarations of the principal and not on the conduct or representation of the alleged agent.ⁿ⁵ Ostensible authority may be established by proof that the principal has approved prior similar acts of the agent.ⁿ⁶

It is not necessary that the principal be in direct contact with the third party. The manifestation of the principal may be to the community at large, for example, by appointing the agent to a particular position within a corporation.ⁿ⁷

[2] Requirement of Good-Faith Reliance

A principal is bound by the acts of an agent under a merely ostensible authority only to third parties who, in good faith and without want of ordinary care, have incurred a liability or parted with value in reliance on the agent's authority.ⁿ⁸ Liability of the principal for an agent's conduct under ostensible authority rests on the doctrine of estoppel. Its essential elements are representations (or conduct) by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from the reliance.ⁿ⁹

The third party's belief in the agent's authority must be a reasonable one. The belief must be generated by some act or neglect of the principal, and the third party in relying on the agent's ostensible authority must not be guilty of negligence.ⁿ¹⁰

In the absence of any conduct on the part of either principal or agent warranting inquiry, the third party is entitled to rely on ostensible authority and is not bound by undisclosed limitations.ⁿ¹¹ However, if the conduct of the principal warrants further inquiry, the third party acts at its peril in assuming authority and not ascertaining the nature and extent of the authority.ⁿ¹²

The general rule is that one who is ignorant or inexperienced with regard to matters concerning which representations are made may rely on statements of material fact made by an agent that are essentially connected with the substance of the transaction. The agent must, however, know of the third party's ignorance or inexperience and must also be aware that reliance is being placed on the representations and that the facts are not, and cannot be expected to be, within the third party's knowledge.ⁿ¹³ Negligence on the part of a third party in failing to discover that a particular statement of an agent is false is not a defense if the misrepresentation was intentional rather than negligent. Even in the case of a mere negligent misrepresentation, a third party will be denied recovery from the principal only if his or her conduct is manifestly unreasonable in the light of his or her own intelligence or information.ⁿ¹⁴

If the third party commences an investigation, the failure to discover the truth may be excused by the agent's superior knowledge of the facts, the difficulty in ascertaining all of the facts, or the third party's incompetence to judge the facts without expert assistance. The fact that the third party may have relied to some extent on independent advice does not bar recovery. Even if he or she discovers some suspicious circumstances, reliance is reasonable if the agent allays the doubts with further assurances.ⁿ¹⁵

[3] Fraud of Agent

A principal who puts an employee or other agent in a position that enables the agent, while apparently acting within his or her authority, to commit a fraud on third persons, is subject to liability to the third persons for the fraud. The principal is liable even though he or she is entirely innocent and has received no benefit from the transaction. The principal is not relieved from liability by the fact that the agent acts entirely for his or her own purposes unless the defrauded party has notice. Liability is based on the fact that the agent's position facilitates the consummation of the fraud, in that from the point of fact of the third person, the transaction seems regular on its face, and the agent appears to be acting in the ordinary course of the business confided to him or her.ⁿ¹⁶

[4] Applicability of Equal Dignities Rule

As discussed previously,ⁿ¹⁷ *Civil Code Section 2309*, which codifies the equal dignities rule, provides that an oral authorization is sufficient for any purpose except that an authority to enter into a contract that is required by law to be in writing can only be given by an instrument in writing. The extent to which the equal dignities rule applies to situations in which an employee or agent acts under ostensible authority is not entirely clear under California law.

Marr v. Postal Union Life Ins. Co. ⁿ¹⁸ involved a contract for the sale of real property between a seller and a company that purported to be acting on its own behalf, but was in fact acting as agent for another company (an "undisclosed principal").ⁿ¹⁹ The court held that when a third party deals with such an agent and fully performs his or her part of the contract, the undisclosed principal is estopped from relying on the agent's lack of written authority as a defense to an action by the third party to enforce the contract.ⁿ²⁰ Since the doctrine of ostensible authority is similarly based on the principal's estoppel to deny the ostensible agent's authority,ⁿ²¹ the equal dignities rule is arguably inapplicable as a defense to an action for enforcement of a contract entered into by an employee with ostensible authority. However, in *McGirr v. Gulf Oil Corp.*,ⁿ²² the court applied the equal dignities rule to bar enforcement of a contract notwithstanding its holding that the employee had ostensible authority to enter into the agreement on behalf of the employer. This apparent split of authority remains unresolved.

[5] Statutory Ostensible Authority

Civil Code Section 2318 provides that every agent has statutory authority as defined by *Civil Code Section 2295 et seq.*ⁿ²³ unless specifically deprived of such authority by the principal, and even then has that authority ostensibly, except as to persons who have actual or constructive knowledge of the restriction on the agent's authority. Thus, when a principal has limited an agent's actual authority, the agent nonetheless has ostensible authority to do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of the agency, unless the third party has knowledge of the limitation.ⁿ²⁴ For example, when a general agent has actual authority to buy, a secret limitation on the price that the agent is authorized to pay is not binding on a third person who has acted in good faith and with reasonable prudence and when the price fixed is not unusual.ⁿ²⁵

Legal Topics:

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

Labor & Employment Law Employer Liability Contract Liability General Overview Torts Vicarious Liability General Overview

FOOTNOTES:

(n1)Footnote 1. *Civ. Code § 2317*.

(n2)Footnote 2. For discussion of actual authority, *see § 31.02*.

(n3)Footnote 3. *See, e.g., Tomerlin v. Canadian Indemnity Co. (1964) 61 Cal. 2d 638, 644, 39 Cal. Rptr. 731, 394 P.2d 571*.

(n4)Footnote 4. *See Myers v. Stephens (1965) 233 Cal. App. 2d 104, 115-116, 43 Cal. Rptr. 420* (assuming *arguendo* that agent had no actual authority, evidence supported ostensible authority).

(n5)Footnote 5. *Petersen v. Securities Settlement Corp. (1991) 226 Cal. App. 3d 1445, 1452, 277 Cal. Rptr. 468*; *see Freitas v. Marsh (1945) 70 Cal. App. 2d 711, 713-714, 161 P.2d 565*.

(n6)Footnote 6. *United States Credit Bureau, Inc. v. Cheney (1965) 235 Cal. App. 2d 357, 360, 45 Cal. Rptr. 525*.

(n7)Footnote 7. *Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 102, 79 Cal. Rptr. 816*.

(n8)Footnote 8. *Civ. Code § 2334*.

(n9)Footnote 9. *Kelley v. R.F. Jones Co. (1969) 272 Cal. App. 2d 113, 121, 77 Cal. Rptr. 170*.

(n10)Footnote 10. *Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 399-400, 118 Cal. Rptr. 772, 530 P.2d 1084*.

(n11)Footnote 11. *Myers v. Stephens (1965) 233 Cal. App. 2d 104, 115, 43 Cal. Rptr. 420*.

(n12)Footnote 12. *United States Credit Bureau, Inc. v. Cheney (1965) 235 Cal. App. 2d 357, 361, 45 Cal. Rptr. 525*; *see People v. Surety Ins. Co. (1982) 136 Cal. App. 3d 556, 562, 186 Cal. Rptr. 385*.

(n13)Footnote 13. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 966, 72 Cal. Rptr. 722*.

(n14)Footnote 14. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 964-965, 72 Cal. Rptr. 722*.

(n15)Footnote 15. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 966, 72 Cal. Rptr. 722*.

(n16)Footnote 16. *Hartong v. Partake, Inc.* (1968) 266 Cal. App. 2d 942, 960, 72 Cal. Rptr. 722 .

(n17)Footnote 17. See discussion in § 31.02[2][d].

(n18)Footnote 18. *Marr v. Postal Union Life Ins. Co.* (1940) 40 Cal. App. 2d 673, 105 P.2d 649 .

(n19)Footnote 19. See discussion in § 31.05.

(n20)Footnote 20. See *Marr v. Postal Union Life Ins. Co.* (1940) 40 Cal. App. 2d 673, 679, 105 P.2d 649 .

(n21)Footnote 21. See *Kelley v. R. F. Jones Co.* (1969) 272 Cal. App. 2d 113, 120-121, 77 Cal. Rptr. 170 .

(n22)Footnote 22. *McGirr v. Gulf Oil Corp.* (1974) 41 Cal. App. 3d 246, 252, 115 Cal. Rptr. 902 .

(n23)Footnote 23. For a discussion of the statutory authority of agents, see § 31.02[2][b].

(n24)Footnote 24. See *Civ. Code* §§ 2318, 2319, discussed in § 31.02[2][b].

(n25)Footnote 25. *Leavens v. Pinkham & McKevitt* (1912) 164 Cal. 242, 246-249, 128 P. 399 .



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES
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 Part A. TEXT

2-31 California Employment Law § 31.04

AUTHOR: By James Buyoucos, J.D.

§ 31.04 Ratified Contracts

[1] Generally

Even if the employee lacks actual or ostensible authority at the time he or she enters into a transaction with a third party, the employer may nevertheless be bound by the employee's act if the employer subsequently ratifies the transaction.ⁿ¹ However, the act must have been undertaken by the employee on behalf of the employer. An act of a purported agent not acting on behalf of the principal cannot be ratified.ⁿ² Thus, ratification is normally found in situations in which an employee-agent was purporting to act on behalf of the employer, but exceeded the scope of his or her authority.ⁿ³

A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act.ⁿ⁴ For example, a lessor who has granted a lease to one party cannot later attempt to ratify a previous, unauthorized lease, because no power to lease the property existed once the subsequent lease was executed.ⁿ⁵

A third party who enters into a contract with an agent lacking authority to consummate such a contract may repudiate the contract prior to its ratification by the principal.ⁿ⁶ Furthermore, an unauthorized act cannot be made valid retroactively to the prejudice of third persons without their consent.ⁿ⁷ For example, one court held that an agent's unauthorized cancellation of an insurance policy could not be ratified to the prejudice of the beneficiaries of the policy.ⁿ⁸

[2] Form and Manner of Ratification

A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or when an oral authorization would suffice, by accepting or retaining the benefit of the act with notice thereof.ⁿ⁹ Thus, when a written authorization would have been required by *Civil Code Section 2309*, the equal dignities rule, the unauthorized act of an agent may be ratified only by an instrument in writing.ⁿ¹⁰ For a discussion of the equal dignities rule and exceptions to the rule, see § 31.02[2][d].

When a written authorization would not have been required by *Civil Code Section 2309*, the unauthorized act of an

agent in entering into a contract on behalf of a principal may be ratified either expressly or by implication from the principal's conduct.ⁿ¹¹ Ratification most clearly occurs when the principal accepts benefits under the agreement.ⁿ¹² For example, ratification has been found when a principal retained the benefits of an unauthorized transaction and knew or should have known of the source of the benefit.ⁿ¹³

A principal is not bound by ratification unless he or she acts with knowledge of all the material facts involved in the unauthorized transaction, particularly with knowledge of the acts of the person who assumed to act as the principal's agent. The notice necessary for ratification includes not only knowledge of the agent's acts, but also the legal effect of those acts.ⁿ¹⁴ However, if the principal's ignorance of the facts arises from a failure to investigate when a reasonable person would do so, ratification may be found despite a lack of full knowledge.ⁿ¹⁵

Ratification will not be found unless the principal's act of ratification was voluntary, and even voluntary conduct will not constitute ratification if the principal cannot rescind the transaction or merely acts to minimize losses from the agent's acts.ⁿ¹⁶ Thus, ratification may not be premised on retention of benefits of the agent's act if the principal had no option to reject or return the benefits. For example, in *Pacific Bone etc. Co. v. Bleakmore*,ⁿ¹⁷ a purported agent had made an unauthorized purchase of fertilizer from a third party and spread it on the land of the defendant. The court held that the defendant had not ratified the contract under a theory of retention of benefits since he did not know of the transaction until the fertilizer had been spread, and by that time it was impossible to return the fertilizer.ⁿ¹⁸

[3] Effect of Partial Ratification

Ratification of part of an indivisible transaction is a ratification of the entire transaction.ⁿ¹⁹ This rule precludes a principal from ratifying the beneficial parts of the agent's unauthorized transaction while disavowing the burdens of the same transaction.ⁿ²⁰ Similarly, when separate transactions are closely related, as when one would not have been agreed to without the other, a ratification of one will constitute a ratification of all.ⁿ²¹

[4] Rescission of Ratification

A ratification may be rescinded only if it is made with imperfect knowledge of the material facts of the transaction ratified, or made without the consent required for a binding contract.ⁿ²² A principal who has deliberately remained ignorant of material facts, however, may be precluded from rescinding on the basis of imperfect knowledge.ⁿ²³

Legal Topics:

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

Contracts Law Contract Conditions & Provisions General Overview Labor & Employment Law Employer Liability General Overview Labor & Employment Law Employer Liability Contract Liability General Overview

FOOTNOTES:

(n1)Footnote 1. *See Civ. Code § 2307*. For the standard jury instruction on employer ratification of an employee's conduct, *see* Judicial Council of California Civil Jury Instructions, CACI 3710 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of CACI standard jury instructions generally, *see § 61.05*.

(n2)Footnote 2. *Jacks v. Taylor (1917) 34 Cal. App. 95, 97-98, 166 P. 858*.

(n3)Footnote 3. *See Jacks v. Taylor (1917) 34 Cal. App. 95, 97, 166 P. 858*.

(n4)Footnote 4. *Civ. Code § 2312; see Los Angeles Dredging Co. v. Long Beach (1930) 210 Cal. 348, 359, 291 P. 839* (when municipality's power to award contract is limited by requirement that competitive bidding process determine contract award, bidding requirement cannot be avoided by unauthorized award of contract without bidding

and later ratification of the contract).

(n5)Footnote 5. *Borderre v. Den* (1895) 106 Cal. 594, 600, 39 P. 946 .

(n6)Footnote 6. *See Waratah Oil Co. v. Reward Oil Co.* (1914) 23 Cal. App. 638, 643, 139 P. 91 ; Restatement (Second) of Agency § 89.

(n7)Footnote 7. *Civ. Code* § 2313.

(n8)Footnote 8. *Hooker v. American Indemnity Co.* (1936) 12 Cal. App. 2d 116, 123, 54 P.2d 1128 .

(n9)Footnote 9. *Civ. Code* § 2310.

(n10)Footnote 10. *See Civ. Code* § 2310; *Moore v. Hoar* (1938) 27 Cal. App. 2d 269, 280, 81 P.2d 226 .

(n11)Footnote 11. *Rakestraw v. Rodrigues* (1972) 8 Cal. 3d 67, 73, 104 Cal. Rptr. 57, 500 P.2d 1401 ; *Union Trust and Realty Co. v. Best* (1911) 160 Cal. 263, 267, 116 P. 737 .

(n12)Footnote 12. *See Reusche v. California Pac. Title Ins. Co.* (1965) 231 Cal. App. 2d 731, 737, 42 Cal. Rptr. 262 .

(n13)Footnote 13. *Reusche v. California Pac. Title Ins. Co.* (1965) 231 Cal. App. 2d 731, 737, 42 Cal. Rptr. 262 .

(n14)Footnote 14. *See Bate v. Marsteller* (1959) 175 Cal. App. 2d 573, 582-583, 346 P.2d 903 ; *Estate of Fletcher* (1940) 36 Cal. App. 2d 567, 573, 97 P.2d 1039 .

(n15)Footnote 15. *Reusche v. California Pac. Title Ins. Co.* (1965) 231 Cal. App. 2d 731, 737, 42 Cal. Rptr. 262 ; *Volandri v. Hlobil* (1959) 170 Cal. App. 2d 656, 659, 339 P.2d 218 .

(n16)Footnote 16. *Rakestraw v. Rodrigues* (1972) 8 Cal. 3d 67, 73, 104 Cal. Rptr. 57, 500 P.2d 1401 ; *Pacific Vinegar etc. Works v. Smith* (1907) 152 Cal 507, 511-512, 93 P. 85 ; *Pacific Bone etc. Co. v. Bleakmore* (1927) 81 Cal. App. 659, 664, 254 P. 618 .

(n17)Footnote 17. *Pacific Bone etc. Co. v. Bleakmore* (1927) 81 Cal. App. 659, 664, 254 P. 618 .

(n18)Footnote 18. *Pacific Bone etc. Co. v. Bleakmore* (1927) 81 Cal. App. 659, 664, 254 P. 618 .

(n19)Footnote 19. *Civ. Code* § 2311.

(n20)Footnote 20. *Navrides v. Zurich Ins. Co.* (1971) 5 Cal. 3d 698, 704, 97 Cal. Rptr. 309, 488 P.2d 637 ; *Price v. McConnell* (1960) 184 Cal. App. 2d 660, 666, 7 Cal. Rptr. 695 .

(n21)Footnote 21. *Vanciel v. Kumle* (1945) 26 Cal. 2d 732, 735, 160 P.2d 802 .

(n22)Footnote 22. *See Civ. Code* § 2314; *see also Civ. Code* §§ 1565-1590 (governing consent to contract).

(n23)Footnote 23. *Hutchinson Co. v. Gould* (1919) 180 Cal. 356, 358, 181 P. 651 .



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Part A. TEXT

2-31 California Employment Law § 31.05

AUTHOR: By James Buyoucos, J.D.

§ 31.05 Undisclosed Principal

[1] Generally

A contract made by an agent for an undisclosed principal is, for most purposes, the contract of the principal. Unless excluded by the terms of the agreement made by the agent, the undisclosed principal may claim the benefits of the contract and may sue and be sued in his or her own name.ⁿ¹ Similarly, the undisclosed principal, when discovered, is normally liable on the contract.^{n1.1} Furthermore, the principal may be bound by the contracts of the agent even if the agent exceeds the scope of his or her actual authority.ⁿ²

An actual agency must have existed for the undisclosed principal to be held liable.ⁿ³ Furthermore, the principal is not bound if exclusive credit is given to the agent and the agent and the third party both intend that no resort shall be had by or against the principal.ⁿ⁴ In addition, if the third party relies on the skill, solvency, or other personal attribute of the agent in entering into the contract, the principal is not a party to the contract and has no rights or liabilities under it.ⁿ⁵

In addition to being bound by the contract, an undisclosed principal is also entitled to the rights derived from the contract and may enforce it against the third party.ⁿ⁶ However, a third party who has entered into a contract with the agent, without knowing or having reason to believe that the agent acted as such in the transaction, may set off against any claim of the principal arising out of the transaction all claims that he or she might have set off against the agent before notice of the agency.ⁿ⁷

[2] When Third Party Must Elect Whether to Hold Principal or Agent Liable

When a third party has contracted with an agent without knowledge of the principal's existence, and later learns of the agency relationship, the third party must elect to proceed against either the agent or the undisclosed principal.ⁿ⁸ The election is not required, however, until the plaintiff has obtained sufficient knowledge regarding the status of the alleged principal to enable him to make an intelligent election.ⁿ⁹ Thus, when it is unclear whether the agent was indeed acting on the behalf of the principal, such as when the principal contends that the agent lacked authority to act for the principal, the third party is not required to make an election until the court has ruled whether or not the principal can be

bound by the agent's acts.ⁿ¹⁰ A judgment obtained against the agent without knowledge of the identity of the principal or the existence of the agency does not preclude a later action against the undisclosed principal.ⁿ¹¹

Legal Topics:

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

Business & Corporate Law Agency Relationships Disclosure Undisclosed Principal Labor & Employment Law Employer Liability Contract Liability General Overview

FOOTNOTES:

(n1)Footnote 1. *American Builder's Assn. v. Au-Yang* (1990) 226 Cal. App. 3d 170, 176, 276 Cal. Rptr. 262 .

(n2)Footnote 1.1. *Standard Oil Co. of Cal. v. Doneux* (1961) 192 Cal. App. 2d 608, 611, 13 Cal. Rptr. 749 ; see Civ. Code § 2330.

(n3)Footnote 2. *Marr v. Postal Union Life Ins. Co.* (1940) 40 Cal. App. 2d 673, 679-680, 105 P.2d 649 .

(n4)Footnote 3. *Associated Creditors' Agency v. Davis* (1975) 13 Cal. 3d 374, 385, 118 Cal. Rptr. 772, 530 P.2d 1084 .

(n5)Footnote 4. *Walton v. Davis* (1913) 22 Cal. App. 456, 459-460, 134 P. 795 .

(n6)Footnote 5. *Walton v. Davis* (1913) 22 Cal. App. 456, 459-460, 134 P. 795 .

(n7)Footnote 6. See Civ. Code § 2330; *Schader v. White* (1916) 173 Cal. 441, 445, 160 P. 557 .

(n8)Footnote 7. Civ. Code § 2336.

(n9)Footnote 8. *Standard Oil Co. of Cal. v. Doneux* (1961) 192 Cal. App. 2d 608, 611, 13 Cal. Rptr. 749 ; *Klinger v. Modesto Fruit Co., Inc.* (1930) 107 Cal. App. 97, 100, 290 P. 127 .

(n10)Footnote 9. *Standard Oil Co. of Cal. v. Doneux* (1961) 192 Cal. App. 2d 608, 612, 13 Cal. Rptr. 749 (quoting *McEwen v. Taylor* (1951) 106 Cal. App. 2d 25, 29-30, 234 P.2d 754).

(n11)Footnote 10. See *Standard Oil Co. of Cal. v. Doneux* (1961) 192 Cal. App. 2d 608, 612-614, 13 Cal. Rptr. 749 .

(n12)Footnote 11. See *Standard Oil Co. of Cal. v. Doneux* (1961) 192 Cal. App. 2d 608, 613, 13 Cal. Rptr. 749 ; Rest. 2d Agency § 210.



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Part A. TEXT

2-31 California Employment Law § 31.06

AUTHOR: By James Buyoucos, J.D.

§ 31.06 Liability of Employer for Contracts in Excess of Employee's Authority

When an agent exceeds his or her authority, the principal is liable for the agent's authorized acts only so far as they can be plainly separated from the unauthorized acts.ⁿ¹ However, if the principal ratifies the unauthorized transaction prior to repudiation by the third party,ⁿ² the third party may not complain that the agent exceeded his or her authority and is bound by a contract in excess of the agent's authority if the principal wishes to enforce the contract.ⁿ³

If the principal wishes to avoid the contract, the principal must repudiate the contract once he or she has knowledge of the terms of the contract and return all benefits conferred by the third party.ⁿ⁴ The principal may not split a transaction into separate parts and take the benefits without the burdens.ⁿ⁵

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewLabor & Employment LawEmployer LiabilityContract LiabilityGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Civ. Code* § 2333.

(n2)Footnote 2. *See Waratah Oil Co. v. Reward Oil Co. (1914) 23 Cal. App. 638, 643, 139 P. 91* ; Rest. 2d Agency § 89; *see also* discussion in § 31.04[1].

(n3)Footnote 3. *See Boteler v. Conway (1936) 13 Cal. App. 2d 79, 83, 56 P.2d 587* .

(n4)Footnote 4. *See J. A. Eck Co. v. Coachella Valley O. G. Assn. (1929) 102 Cal. App. 1, 8-9, 282 P. 408* .

(n5)Footnote 5. *See Gift v. Ahrnke (1951) 107 Cal. App. 2d 614, 623, 237 P.2d 706* ; *see also* discussion of partial ratification in § 31.04 [3].



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Part A. TEXT

2-31 California Employment Law § 31.07

AUTHOR: By James Buyoucos, J.D.

§ 31.07 Liability of Employee-Agent to Third Party

[1] Breach of Warranty of Authority

One who assumes to act as an agent thereby warrants, to all who deal with him or her as an agent, that the authority to act as such actually exists.ⁿ¹ In an action for breach of the warranty of authority against an agent, the third party must allege and prove that the agent acted in excess of his or her authority and that the third person was ignorant of the true limits of the agent's authority and acted on the basis of representations, either express or implied, that the agent was acting pursuant to his or her authority.ⁿ² The measure of damages in an action for breach of a warranty of an agent's authority is the amount that could have been recovered and collected from the agent's principal had the warranty been complied with, and the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against his or her principal.ⁿ³

[2] Employee-Agent Liable as Principal

One who assumes to act as an agent is responsible to third persons as a principal for contracts made on behalf of a principal in the course of the agency if (1) with the agent's consent, credit is given to him or her personally in a transaction,ⁿ⁴ or (2) the agent enters into a written contract in the principal's name without believing in good faith that he or she has authority to do so.ⁿ⁵ In addition, an agent for an undisclosed principal who enters into a contract without disclosing the principal at the time of the contract is liable as a party to the contract.ⁿ⁶ In order for an agent to avoid personal liability on a contract negotiated in the principal's behalf, the agent must disclose not only that he is an agent but also the identity of the principal.ⁿ⁷

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewLabor & Employment LawEmployer LiabilityContract LiabilityThird Party Liability

FOOTNOTES:

(n1)Footnote 1. *Civ. Code* § 2342.

(n2)Footnote 2. *See Yoakum v. Tarver* (1967) 256 Cal. App. 2d 202, 206-207, 64 Cal. Rptr. 7 ; *Cheda v. Grandi* (1950) 97 Cal. App. 2d 513, 518-519, 218 P.2d 97 .

(n3)Footnote 3. *See Civ. Code* § 3318.

(n4)Footnote 4. *Civ. Code* § 2343(1).

(n5)Footnote 5. *Civ. Code* § 2343(2).

(n6)Footnote 6. *Coover v. Cox* (1928) 95 Cal. App. 1, 4, 272 P. 343 . For a discussion of the liability of an undisclosed principal, see § 31.05.

(n7)Footnote 7. *W. W. Leasing Unlimited v. Commercial Standard Title Ins. Co.* (1983) 149 Cal. App. 3d 792, 795-796, 197 Cal. Rptr. 118 .



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Part A. TEXT

2-31 California Employment Law § 31.08

AUTHOR: By James Buyoucos, J.D.

§ 31.08 Employee-Agent's Right to Indemnification From Employer

An agent who becomes personally liable for the performance of a contract that was undertaken for the principal may hold the principal liable for indemnity for damages sustained because of the principal's breach of the contract.ⁿ¹ To hold the principal liable for indemnity, the agent must have been pursuing the instructions of the principal and thus acting within the scope of his or her actual authority.ⁿ² However, if the principal knows that the agent has misapprehended the scope of his or her authority, the principal may be liable for indemnity even though the agent exceeds his or her authority.ⁿ³

A cause of action for indemnity arises only when the agent has actually satisfied the obligation to the third person.ⁿ⁴

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewLabor & Employment LawEmployer LiabilityContract LiabilityIndemnityLabor & Employment LawEmployer LiabilityContract LiabilityThird Party Liability

FOOTNOTES:

(n1)Footnote 1. *Sunset-Sternau Food Co. v. Bonzi* (1964) 60 Cal. 2d 834, 837, 36 Cal. Rptr. 741, 389 P.2d 133 (principal liable to agent for indemnity even though principal was not liable to third party on contract because equal dignities rule was not satisfied); *see also* Lab. Code § 2802 (employer must indemnify employee for amounts that employee necessarily expends or loses in direct consequence of discharge of his or her duties, or of obedience to employer's directions).

(n2)Footnote 2. *See Rimington v. General Accident Group of Ins. Cos.* (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40 .

(n3)Footnote 3. *See Towle v. Norbest Turkey Growers Association* (9th Cir. [Cal.] 1960) 275 F.2d 196, 201-202 .

(n4)Footnote 4. *Sunset-Sternau Food Co. v. Bonzi* (1964) 60 Cal. 2d 834, 843, 36 Cal. Rptr. 741, 389 P.2d 133 ;
see Civ. Code § 2778(2).



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES

CHAPTER 31 Employer's Liability to Third Parties for Contracts Entered Into by Employees

Part A. TEXT

2-31 California Employment Law §§ 31.09through 31.19

AUTHOR: By James Buyoucos, J.D.

[Reserved]

§§ 31.09[Reserved]



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Part B. BIBLIOGRAPHY

2-31 California Employment Law § 31.20

AUTHOR: By James Buyoucos, J.D.

§ 31.20 Legal Texts

California Forms of Pleading and Practice

"Principal and Agent."

"Statute of Frauds."

California Points and Authorities

"Principal and Agent."

"Statute of Frauds."

Witkin, Summary of California Law (9th ed. 1987), Vol. 1, "Agency and Employment," §§ 75-109.

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewLabor & Employment LawEmployer LiabilityContract
LiabilityGeneral Overview



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DIVISION III EMPLOYER LIABILITY TO THIRD PARTIES FOR CONDUCT OF EMPLOYEES

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Part B. BIBLIOGRAPHY

2-31 California Employment Law § 31.21

AUTHOR: By James Buyoucos, J.D.

§ 31.21 Encyclopedias

3 Cal. Jur. 3d, "Agency," §§ 34-86, 121-128, 142-150.

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewLabor & Employment LawEmployer LiabilityContract
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Part B. BIBLIOGRAPHY

2-31 California Employment Law § 31.22

AUTHOR: By James Buyoucos, J.D.

§ 31.22 Law Reviews and Periodicals

Comment, "The Power of an Agent To Bind His Principal--California and the Restatement," *22 Cal. L. Rev.* 392 (1934).

Note, "An Agent's Authority to Bind a Principal to Arbitration," *65 Cal. L. Rev.* 355 (1977).

Legal Topics:

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

Labor & Employment LawEmployer LiabilityGeneral OverviewLabor & Employment LawEmployer LiabilityContract LiabilityGeneral Overview



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws

2-40 California Employment Law 40.syn

AUTHOR: By David M. Youngsmith, J.D.

§ 40.syn Synopsis to Chapter 40: Overview of Equal Employment Opportunity Laws

§ 40.01 Availability of Multiple Remedies

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[1] Discriminatory Agreements

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§ 40.10 California Fair Employment and Housing Act

2-40 California Employment Law 40.syn

- [1] Governing Law and Scope of Coverage
- [2] Enforcement and Remedies
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§ 40.11 California Equal Pay Act

- [1] Governing Law and Scope of Coverage
- [2] Enforcement and Remedies
- [3] Employers Covered and Exempted
- [4] Employees Covered and Exempted
- [5] Prohibited Employment Practices
- [6] Defenses

§ 40.12 Unruh/Ralph Acts, Public Access of Disabled Persons, and Prohibited Business Transactions

- [1] The Unruh Civil Rights Act
- [2] The Ralph Civil Rights Act and the Bane Civil Rights Act
- [3] Public Access of Disabled Persons
- [4] Prohibited Business Transactions

§ 40.13 Government Code Section 11135--Prohibition Against Discrimination in State-Funded Program or Activities

- [1] Governing Law and Scope of Coverage
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- [3] Employers Covered and Exempted
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[2] California Constitution

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[2] Effect on State Law

[3] Enforcement and Remedies

[4] Employers Covered and Exempted

[a] Generally

[b] Industry Affecting Commerce

[c] Labor Unions

[5] Employees Covered and Exempted

[6] Prohibited Bases of Discrimination

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[8] Defenses

[9] Anti-SLAPP Motions

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[1] Governing Law and Scope of Coverage

[2] Enforcement and Remedies

[3] Employers Covered and Exempted

[4] Employees Covered and Exempted

[5] Prohibited Employment Practices

[6] Defenses

§ 40.22 Equal Pay Act of 1963

[1] Governing Law and Scope of Coverage

[2] Enforcement and Remedies

[3] Employers and Employees Covered and Exempted

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§ 40.22A Americans With Disabilities Act of 1990

[1] Governing Law and Scope of Coverage

[2] Enforcement and Remedies

[3] Employers Covered and Exempted

[4] Employees Covered and Exempted

[5] Prohibited Employment Practices

[6] Defenses

[7] Individual Liability

§ 40.23 Rehabilitation Act of 1973

[.5] Section 501--Discrimination Against Disabled in Federal Employment Decisions

[1] Section 503--Employers With Federal Contracts

[a] Governing Law and Scope of Coverage

[b] Enforcement and Remedies

[c] Employers Covered and Exempted

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[d] Employees Covered and Exempted

[e] Prohibited Employment Practices

[f] Defenses

[2] Section 504--Employers Who Receive Financial Assistance From Federal Government

[a] Governing Law and Scope of Coverage

[b] Enforcement and Remedies

[c] Employers Covered and Exempted

[d] Employees Covered and Exempted

[e] Prohibited Employment Practices

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§ 40.24 Vietnam Era Veterans Readjustment Assistance Act of 1974 and Uniformed Services Employment and Reemployment Rights Act of 1994

[1] Governing Law and Scope of Coverage

[2] Enforcement and Remedies

[3] Employers Covered and Exempted

[4] Employees Covered and Exempted

[5] Prohibited Employment Practices

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§ 40.25 Civil Rights Act of 1866 (Title 42 United States Code Section 1981)

[1] Governing Law and Scope of Coverage

[2] Enforcement and Remedies

[3] Employers Covered and Exempted

[4] Employees Covered

[5] Prohibited Bases of Discrimination

[6] Defenses

§ 40.26 Civil Rights Act of 1871 (Title 42 United States Code Section 1983)

2-40 California Employment Law 40.syn

[1] Governing Law and Scope of Coverage

[2] "Color of Law" Requirement

[3] Enforcement and Remedies

[4] Employers Covered and Exempted

[5] Employees Covered and Exempted

[6] Prohibited Bases of Discrimination

[7] Prohibited Employment Practices

[8] Defenses

[9] Anti-SLAPP Motions

§ 40.27 Executive Order 11246: Prohibition Against Discrimination by Government Contractors

[1] Governing Law and Scope of Coverage

[2] Enforcement

[3] Employers Covered and Exempted

[4] Employees Covered and Exempted

[5] Prohibited or Required Employment Practices

[6] Defenses

§ 40.28 Executive Order 11141: Prohibition Against Age Discrimination by Federal Contractors

[1] Scope of Coverage

[2] Enforcement and Remedies

[3] Employers Covered and Exempted

[4] Employees Covered and Exempted

[5] Prohibited or Required Employment Practices

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§ 40.29 Title VI of Civil Rights Act of 1964

[1] Governing Law and Scope of Coverage

[2] Enforcement and Remedies

[3] Employers Covered and Exempted

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[5] Prohibited Bases of Discrimination

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§ 40.30 Uniform Guidelines Relating to Tests and Employee Selection Procedures

[1] Purpose and Application

[2] Scope of Coverage and Substantive Requirements

[3] Enforcement

[4] Employers and Employees Covered and Exempted

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[1A] Civil Rights Act of 1991

[2] United States Constitution

[2A] Immigration Reform and Control Act

[2B] Family and Medical Leave Act of 1993

[3] Education Amendments of 1972 (Title IX)

[4] Revenue Sharing Act

§§ 40.32 through 40.39 [Reserved]

§ 40.40 Legal Texts

§ 40.41 Encyclopedias

§ 40.42 Legal Periodicals

By David M. Youngsmith, J.D.n*

FOOTNOTES:

(n1)Footnote *. Publisher's Editorial Staff.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws

2-40 California Employment Law Scope

AUTHOR: By David M. Youngsmith, J.D.

Scope

By David M. Youngsmith, J.D.n* SCOPE

This chapter provides an overview of the scope and applicability of California and federal equal employment opportunity laws. For each statutory scheme, the chapter discusses the employers and employees covered, provides an overview of the bases of discrimination and general types of conduct prohibited, and briefly describes the available enforcement mechanisms. Statutory provisions that are limited to public employers are beyond the scope of this chapter.

For a detailed discussion of the substantive requirements of various equal employment opportunity laws, *see* Chapter 41. For a complete discussion of administrative enforcement of equal employment opportunity laws, *see* Chapter 42. For a full discussion of judicial remedies under such laws, *see* Chapter 43. For discussion of affirmative action requirements and enforcement of those requirements, *see* Chapter 44. Laws barring discrimination on the basis of protected *activities*, as distinguished from protected characteristics, are discussed in Chapter 60.

FOOTNOTES:

(n2)Footnote *. Publisher's Editorial Staff.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part A. GENERAL PRINCIPLES

2-40 California Employment Law § 40.01

AUTHOR: By David M. Youngsmith, J.D.

§ 40.01 Availability of Multiple Remedies

Several statutory and regulatory schemes bar employment discrimination based on specified characteristics, such as race, national origin, religion, sex, or age. The California Fair Employment and Housing Act (FEHA)ⁿ¹ and Title VII of the Civil Rights Act of 1964 (Title VII)ⁿ² are the principal antidiscrimination statutes, but there are many other federal and state sources of equal employment opportunity rights. Other federal sources include the Age Discrimination in Employment Act of 1967,ⁿ³ the Americans With Disabilities Act of 1990 (ADA),ⁿ⁴ the Equal Pay Act of 1963,ⁿ⁵ Sections 503 and 504 of the Rehabilitation Act of 1973,ⁿ⁶ the Vietnam Era Veterans Readjustment Assistance Act of 1974,ⁿ⁷ the Civil Rights Act of 1866,ⁿ⁸ the Civil Rights Act of 1871,ⁿ⁹ Executive Order Numbers 11141ⁿ¹⁰ and 11246,ⁿ¹¹ Title VI of the Civil Rights Act of 1964 (Title VI),ⁿ¹² and federal agency uniform guidelines on employment tests and other employee selection procedures.ⁿ¹³ Other state sources include the California Equal Pay Act,ⁿ¹⁴ the Unruh and Ralph Civil Rights Acts,ⁿ¹⁵ *Government Code Section 11135*,ⁿ¹⁶ and regulations promulgated by the California Fair Employment and Housing Commission, interpreting these statutes.ⁿ¹⁷

■ CONSULTANT'S COMMENT:

These laws evidence a legislative intent to create a set of "parallel or overlapping" state and federal remedies.ⁿ¹⁸ Although Congress intended that Title VII serve as a comprehensive statutory enforcement scheme to eliminate employment discrimination, Title VII was intended to supplement rather than supplant other remedies.ⁿ¹⁹ In particular, Congress made clear that Title VII was intended to coexist with compatible state law rights and remedies. Title VII's administrative enforcement mechanism is intended to be coordinated with state enforcement proceedings.ⁿ²⁰ Title VII specifically provides that "[n]othing in this subchapter shall be deemed to exempt or relieve any person from liability, duty, penalty or punishment provided by any present or future law of any State or political subdivision of a State" other than a law that requires or permits acts that are unlawful under Title VII.ⁿ²¹ Furthermore, Title XI of the Civil Rights Act, which applies to all titles of the act, including Title VII, provides that "[n]othing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any title operates to the exclusion of State laws on the same subject matter."ⁿ²²

The FEHA and Title VII provide parallel and overlapping remedies.ⁿ²³ Pursuant to its authority under Title VII,ⁿ²⁴ the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing Title VII, has certified the Department of Fair Employment and Housing (DFEH), the state agency charged with enforcing the FEHA, as an agency whose findings and resolutions in cases the EEOC will usually accept.ⁿ²⁵

The multiplicity of remedies means that a plaintiff often has the choice between a state or federal forum, and sometimes between an administrative or judicial forum. Care must be exercised in the choice of forum with respect, for example, to time limitations, availability of jury trial, remedial opportunities, and expense considerations.ⁿ²⁶ Federal causes of action and pendent state claims may be brought in a single federal action. Defendants often seek dismissal of state causes of action pleaded in a complaint in federal court. *Commentary by Bill Lann Lee.*

Legal Topics:

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

Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission Exhaustion of Remedies General Overview

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12900 et seq.*; see discussion in § 40.10.

(n2)Footnote 2. *42 U.S.C. § 2000e et seq.*; see discussion in § 40.20.

(n3)Footnote 3. *29 U.S.C. § 621 et seq.*; see discussion in § 40.21.

(n4)Footnote 4. *42 U.S.C. § 12101 et seq.*; see discussion in § 40.22A.

(n5)Footnote 5. *29 U.S.C. § 206(d)*; see discussion in § 40.22.

(n6)Footnote 6. *29 U.S.C. § 701 et seq.*; see discussion in § 40.23.

(n7)Footnote 7. *38 U.S.C. § 2011 et seq.*; see discussion in § 40.24.

(n8)Footnote 8. *42 U.S.C. § 1981*; see discussion in § 40.25.

(n9)Footnote 9. *42 U.S.C. § 1983*; see discussion in § 40.26.

(n10)Footnote 10. Exec. Order No. 11141, *29 Fed. Reg. 2477 (1964)*; see discussion in § 40.28.

(n11)Footnote 11. Exec. Order No. 11246, *30 Fed. Reg. 12319 (1965)*; see discussion in § 40.27.

(n12)Footnote 12. See *42 U.S.C. § 2000d et seq.*; see discussion in § 40.29.

(n13)Footnote 13. See *29 C.F.R.*, pt. 1607; see discussion in § 40.30; see also *Easton v. Crossland Mortg. Corp.* (9th Cir. 1997) *114 F.3d* 979, 982 (federal court lacks jurisdiction over action referencing federal theories but failing to seek federal remedies).

(n14)Footnote 14. *Lab. Code § 1197.5*; see discussion in § 40.11.

(n15)Footnote 15. *Civ. Code §§ 51, 51.7, 52*; see discussion in § 40.12.

(n16)Footnote 16. *See* discussion in § 40.13.

(n17)Footnote 17. *See* 2 Cal. Code Reg. § 7285.0 *et seq.*

(n18)Footnote 18. *See* *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 47, 94 S. Ct. 1011, 39 L. Ed. 2d 147 .

(n19)Footnote 19. *See* *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 459, 95 S. Ct. 1716, 44 L. Ed. 2d 295 ; *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 48-49, 94 S. Ct. 1011, 39 L. Ed. 2d 147 .

(n20)Footnote 20. *See* 42 U.S.C. § 2000e-5; *EEOC v. Commercial Office Products Co.* (1988) 486 U.S. 107, 121-123, 108 S. Ct. 1666, 100 L. Ed. 2d 96 .

(n21)Footnote 21. 42 U.S.C. § 2000e-7.

(n22)Footnote 22. 42 U.S.C. § 2000h-4; *see* *California Federal S. & L. Ass'n v. Guerra* (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613, 624 ; *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 48, 94 S. Ct. 1011, 39 L. Ed. 2d 147 ; *See also* § 40.02[2].

(n23)Footnote 23. *See* *Price v. Civil Serv. Com.* (1980) 26 Cal. 3d 257, 271, 161 Cal. Rptr. 475, 604 P.2d 1365 ("Although the wording of these ... provisions varies in some respects, each of these sections provides in essence that no person shall be discriminated against in employment opportunities on the basis of his race, color, creed, sex, or national origin").

(n24)Footnote 24. *See* 42 U.S.C. § 2000e-5(b).

(n25)Footnote 25. *See* 29 C.F.R. §§ 1601.75, 1601.80.

(n26)Footnote 26. *See generally* discussion in ch. 42, pt. A.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part A. GENERAL PRINCIPLES

2-40 California Employment Law § 40.02

AUTHOR: By David M. Youngsmith, J.D.

§ 40.02 Standards of Construction Applicable When More Than One Law Addresses Same Subject

[1] Effect of State Laws With Broader Protections

California equal employment opportunity laws are often broader in scope than their federal counterparts, and thus employers may be liable for employment discrimination under California law even if they are not liable under a particular federal law. For example, although the FEHA and Title VII prohibit many of the same types of discrimination, the FEHA extends its prohibitions to discrimination based on age, marital status, sexual orientation, disability, and medical condition, which are not covered by Title VII.ⁿ¹ Another example of the broader reach of California law is that the FEHA generally covers employers who have five or more employees,ⁿ² while Title VII covers only employers who have at least 15 employees.ⁿ³ Accordingly, a California employer with 10 employees who engages in sex discrimination will not be liable under Title VII, but will be liable under the FEHA.^{n3.1}

In instances in which federal equal employment opportunity law is broader than state law, the converse is true, and employers must comply with the stricter federal standards.ⁿ⁴

Even when state and federal provisions have the same scope, state provisions may afford more expansive rights to employees or, correlatively, impose more onerous duties on employers. An example is the special FEHA provision requiring employers to provide leave and reinstatement to employees disabled by pregnancy,ⁿ⁵ which has no counterpart in Title VII's prohibition of sex discrimination based on pregnancy.ⁿ⁶ Another example is found in the disability-discrimination provisions of the FEHA,^{n6.1} which go beyond what is prohibited by the Americans with Disabilities Act.^{n6.2} Title VII also contains several exemptions that are absent from the FEHA, such as the exemptions for bona fide seniority or merit systemsⁿ⁷ and bona fide private membership clubs.ⁿ⁸

[2] Preemption of State Antidiscrimination Law by Federal Statutes

[a] Federal Antidiscrimination Statutes

Under the United States Constitution, federal laws are the "supreme [l]aw of the [l]and,"ⁿ⁹ and any state law, however

clearly within a state's acknowledged power, that interferes with or is contrary to federal law is void.ⁿ¹⁰ In *California Federal S. & L. Assn. v. Guerra*,ⁿ¹¹ the United States Supreme Court explained that federal laws may supersede state laws in three separate situations: (1) when Congress enacts a statute that explicitly preempts state law; (2) when a federal scheme is so comprehensive as to create a reasonable inference that Congress intended to "occupy the field," leaving no room for supplementary state regulation; or (3) when state law actually conflicts with federal law.

In general, the federal equal employment opportunity laws discussed in this chapter supplement, rather than supersede, California equal employment opportunity laws under the standards set forth in *Guerra*. For example, Title VII of the Civil Rights Act of 1964 (Title VII)ⁿ¹² expressly preserves state equal employment opportunity laws, as long as they do not require or permit any act that violates Title VII.ⁿ¹³ Similarly, a preemption provision in Title XI of the act expressly provides that the act does not "occupy the field" in which it operates; nor does it invalidate state law, unless the state law is inconsistent with the act.ⁿ¹⁴

The ADA provides that it does not preempt state and local public health laws regarding food handling that are designed to protect the public health from individuals who pose a significant risk to the health or safety of others.ⁿ¹⁵

States may extend their equal employment opportunity laws to areas not covered by Title VII,ⁿ¹⁶ as long as such laws are not "inconsistent" with Title VII.ⁿ¹⁷ For example, the FEHAⁿ¹⁸ prohibits employment discrimination by private clubs,ⁿ¹⁹ which are specifically exempted under Title VII.ⁿ²⁰ The FEHA provision, however, has been held not to be "inconsistent" with Title VII, because it does not hinder the objective of the federal scheme to eliminate employment discrimination.ⁿ²¹ In short, state equal employment opportunity laws may prohibit practices that are not prohibited by Title VII, but may not authorize practices that would violate Title VII.

Generally, the FEHA is also not preempted by federal employment relations statutes, such as the Railway Labor Act (RLA),ⁿ²² that do not purport to cover discrimination claims and do not expressly preempt federal or state equal employment opportunity statutes.ⁿ²³ However, to the extent that discrimination issues are subject to collective bargaining and arbitration, the FEHA may be preempted.ⁿ²⁴ For a discussion of the effect of antidiscrimination provisions in collective bargaining agreements, *see* § 90.10.

The California Supreme Court has held that a provision of the federal National Bank Act that empowers the board of directors of a national bank to dismiss bank officers "at pleasure" has been impliedly amended by Title VII and the ADEA. The court also held that the same provision preempts the FEHA to the extent the FEHA conflicts with Title VII and the ADEA, but does not preempt the FEHA to the extent the FEHA does not conflict with Title VII and the ADEA.ⁿ²⁵

A court of appeal has held that preemption of FEHA claims by the federal National Bank Act depends on whether the employee is an "officer" of the bank. Often, a plaintiff employee will assert that his or her position as an "officer" was not vested with any of the duties or responsibilities normally associated with the position. To obtain summary judgment on preemption grounds under the National Bank Act in such circumstances, the bank must show that the employee was an "officer" using the criteria set forth in *Wells Fargo Bank v. Superior Court*.^{n25.1}

[b] Other Federal Statutes

The Employee Retirement Income Security Act (ERISA) can preempt a FEHA claim for age discrimination when the FEHA claim relates to an employee benefit plan. ERISA contains a broad preemption provision stating that ERISA supersedes state laws insofar as they relate to any employee benefit plan described in ERISA and not exempt under ERISA.^{n25.2} ERISA also provides that its general preemption provision cannot be construed to alter, amend, modify, invalidate, impair, or supersede any federal law.^{n25.3}

This latter provision applied in *Shaw v. Delta Air Lines, Inc.*^{n25.4} There, the United States Supreme Court held that

ERISA § 514(d) saved from preemption a state anti-discrimination law that related to an employee benefit plan under *ERISA* § 514(a). The Court recognized that Title VII provides for a comprehensive joint state/federal enforcement scheme in which states and the federal government enact valid anti-discrimination laws and work together to enforce them.^{n25.5} The Court held that preemption of a state anti-discrimination law would impair Title VII to the extent that the state law provided a means of enforcing Title VII's commands. As long as the state anti-discrimination law did not prohibit something that Title VII allowed, preempting the state law would have frustrated the goal of encouraging joint state/ federal enforcement of Title VII and thus impaired federal law. The Court expressed concern that if *ERISA* were interpreted to entirely preempt state anti-discrimination laws as they relate to employee benefit plans, states would be unable to prohibit or grant relief for discrimination in *ERISA* plans and an employee's only remedies for discrimination prohibited by Title VII in *ERISA* plans would be federal ones.^{n25.6} The Court also noted that Title VII does not prevent states from extending their nondiscrimination laws to areas not covered by Title VII. However, enforcement of Title VII does not depend on those extensions of state law.^{n25.7}

In *Hurlic v. So. Cal. Gas Opinion Co.*,^{n25.8} the Ninth Circuit held that *ERISA* did preempt a FEHA age discrimination claim that related to an employee benefits plan. The court found that like Title VII, the federal Age Discrimination in Employment Act (ADEA)^{n25.9} provides for a joint state/federal enforcement scheme that is nearly identical to that provided in Title VII.^{n25.10} But the FEHA does not merely parallel the ADEA, even though both statutes contain broad prohibitions against age discrimination.^{n25.11} Unlike the FEHA, the ADEA contains specific provisions relating to pension plans.^{n25.12} and ADEA § 4(i)(1)(A) mirrors *ERISA* § 204(b)(1)(H)(i), the section which formed the basis for the age discrimination claim. The two provisions were enacted together,^{n25.13} and Congress made clear they should be interpreted to have an identical meaning.^{n25.14} In *Hurlic*, the Ninth Circuit held that the employee benefits plan did not violate *ERISA* § 204(b)(1)(H)(i). Thus, it followed that the plan did not violate ADEA § 4(i)(1)(A). Although the age-discrimination FEHA claim was not identical to the *ERISA* claim, the difference between them did not save the FEHA claim from preemption. Plaintiffs sought to invalidate the specific "wear-away" provision under FEHA, a broad, general anti-age discrimination provision, which they would not have been allowed to do under the ADEA. The court found that because the FEHA prohibited practices that would be lawful under the ADEA, the FEHA claim was preempted.

[3] Effect of FEHA on State Common-Law and Local Government Remedies

The FEHA does not preempt other state laws, including the common law, that prohibit or restrict employment discrimination,ⁿ²⁶ unless those provisions provide less protection than that afforded by the FEHA to the enumerated classes of persons covered under the FEHA.ⁿ²⁷ Furthermore, although an employee must exhaust the FEHA administrative remedy before bringing a civil action under the FEHA or seeking any remedies provided by the FEHA,ⁿ²⁸ exhaustion of the FEHA administrative remedy is not required before filing a civil action for damages alleging nonstatutory causes of action.ⁿ²⁹

Thus, for example, the California Supreme Court has held that *Article I, Section 8, of the California Constitution*, which provides that no person may be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin,ⁿ³⁰ sets forth a fundamental public policy against employment discrimination on any of those grounds and may be the basis for a tort cause of action for wrongful termination in violation of public policy, independent of the FEHA.ⁿ³¹ As another example, a court of appeal has held that conduct constituting sexual harassment may also constitute the outrageous behavior element of a tort cause of action for intentional infliction of emotional distress.ⁿ³² However, the California Supreme Court has held that an employee not covered by the FEHA because his or her employer does not regularly employ five or more employeesⁿ³³ cannot maintain a tort action for wrongful termination in violation of public policy tort based on the FEHA's policy against age discrimination.ⁿ³⁴ For discussion of common-law causes of action for wrongful termination and related causes of action, see Chapters 60 and 63.

The FEHA does preempt local ordinances relating to employment discrimination. A provision of the FEHA expressly

declares "the intention of the Legislature to occupy the field of regulation of discrimination in employment ... encompassed by the provisions of [the FEHA], exclusive of all other laws banning discrimination in employment ... by any city, city and county, county, or other political subdivision of the state."³⁵

[4] Effect of Workers' Compensation Act on State Antidiscrimination Law

Several court of appeal decisions have indicated that the exclusive remedy provisions of the Workers' Compensation Act³⁶ do not bar a civil action for damages under the FEHA for discrimination in employment based on age, race, sex, or religion, or for retaliation for opposition to discrimination or harassment.³⁷ Similarly, at least one panel of the Court of Appeal has held that a claim for emotional distress arising out of employment is not barred when the distress was caused by an employer's illegal discriminatory practices.³⁸ More recently, the California Supreme Court held that *Labor Code Section 132a* does not provide an exclusive remedy and does not preclude an industrially-injured employee from pursuing FEHA and common law wrongful discharge remedies based on allegations of disability discrimination. In addition, disability discrimination can form the basis of a common law wrongful discharge claim.³⁹

One Ninth Circuit case discussed 1992 amendments to the FEHA that incorporated provisions of the ADA but that deleted a provision during the drafting stage that would have provided that the FEHA's provisions were not to be superseded by workers' compensation law. The court found this significant since the Legislature could have included an explicit provision exempting FEHA claims from workers' compensation exclusivity but declined to do so. The court thus found that the workers' compensation exclusive remedy provisions preempt work-related disability discrimination claims, but it remanded on the issue of whether the disability involved in that case was actually work-related.⁴⁰ However, no reported appellate decision has discussed the 1993 amendments to *Government Code Section 12993(a)*. Prior to its amendment, that section stated that nothing in the FEHA should be deemed to repeal any California law relating to discrimination because of physical disability (or other enumerated bases). The amendment added the phrase, "unless those provisions provide less protection to the enumerated classes of persons under this part." Thus, the amended version of this statute could be interpreted as stating that the FEHA supersedes provisions of other state laws that have a narrower remedy than the FEHA's antidiscrimination provisions. Furthermore, a federal district court held that the exclusive remedy provisions of California workers' compensation law are preempted by the federal Americans With Disabilities Act (ADA)⁴¹ to the extent that the California law purports to limit the potential remedies available under the ADA to a worker disabled by an on-the-job injury.⁴² For discussion of the ADA's coverage, *see* § 40.22A.

For complete discussion of the exclusive remedy doctrine under workers' compensation law, *see* Chapter 20.

[5] Effect of Railway Labor Act on State and Federal Antidiscrimination Law

A state antidiscrimination law prohibiting handicap discrimination may be preempted by the Railway Labor Act ("RLA")⁴³ if resolution of the suit depends on analysis of the labor contract.⁴⁴ However, recent case law has narrowed the scope of RLA preemption by limiting it to minor disputes grounded in the collective bargaining agreement (CBA).⁴⁵ Thus, claims involving obligations that exist independently of a CBA are not preempted. To determine whether to apply RLA preemption, the Ninth Circuit has held⁴⁶ that courts should apply the preemption test used in cases under the Labor Management Relations Act (LMRA).⁴⁷ That test asks:

1. Does the CBA contain provisions that govern the actions giving rise to the state claim?
2. Is the state statute "sufficiently clear" so that the claim can be evaluated without consideration of overlapping provisions in the CBA?
3. Has the state shown an intent not to allow the statute to be altered or removed by private contract?

State law is preempted under this test only if the answer to the first question is "yes," and the answer to either the

second or third is "no."n48

Applying the three-prong preemption test to the facts of a disability discrimination claim, the Ninth Circuit in *Espinal v. Northwest Airlines* n49 found that (1) the CBA did not govern actions giving rise to disability discrimination claims because it did not provide a framework either for challenging determinations that an employee was not physically fit, or for accommodating disabled workers; (2) the Fair Employment and Housing Actn50 has sufficiently clear statutory standards and regulations, so that the claim could be evaluated without considering the provisions in the CBA; and (3) the state had shown its intent not to allow its prohibitions to be altered by private contract. The court therefore concluded that the disability discrimination claims at issue were not preempted by the RLA.n51

Because the RLA and Title VII are both federal statutes, one Ninth Circuit panel held that the RLA cannot "preempt" Title VII.n52 However, even applying a similar analysis of the issue in terms of whether the RLA's mandatory arbitration mechanism precluded an independent action under Title VII, the court found that the RLA did not bar the Title VII action since the dispute was not a "minor" one.n53 The court stated that under the "major/minor" dispute analysis, there was no doubt that Title VII rights exist independent of a CBA. In addition, the court said that the CBA at issue did not expressly reference Title VII rights, but merely contained a nondiscrimination rule that provided that CBA provisions were to be applied in compliance with state and federal laws.n54 Further, the court stated that employees may not be forced to arbitrate Title VII claims unless they have knowingly agreed to submit to arbitration.n55

Similarly, ADA claims are not preempted by the RLA. In *Saridakis v. United Airlines*,n56 the Ninth Circuit addressed the intersection of the ADA and the RLA. Although the preemption doctrine does not necessarily govern questions related to the compatibility of two or more federal laws, courts must determine whether Congress intended the RLA's mandatory arbitration scheme to preclude a claim under the ADA. As under Title VII, ADA rights exist independently of any employment rights granted by a CBA. Even when the CBA contains an anti-discrimination clause and provides a dispute resolution mechanism, the CBA does not necessarily define the rights that exist under the ADA. Therefore, the claim cannot be "conclusively resolved" by interpreting the ADA. Rather, the merit of an ADA claim ultimately depends upon the application of ADA standards, not the dispute resolution mechanism in the CBA. Thus, a dispute under the ADA is not minor, and an independent suit to resolve the dispute is not precluded by the RLA.n57

■ CONSULTANT'S COMMENT:

Despite the ruling in *Saridakis*,n58 practitioners should not conclude that the provisions of a CBA are always irrelevant to the interpretation of an employee's rights under the ADA or the FEHA. On the contrary, an increasing number of collectively bargained contracts are attempting to define thoughtfully and carefully the rights of disabled employees within unique work settings by establishing the accommodations that are reasonable under prescribed circumstances. While courts may not always conclude that collectively bargained assessments of reasonable accommodation are dispositive, practitioners should not conclude that such collectively bargained assessments will be accorded no weight at all. Therefore, it would appear likely that, over time, the *Saridakis* rule will be tempered by judicial acknowledgment that courts are not the best evaluators of reasonable accommodation in every instance and that some definitions of reasonable accommodation reached through collective bargaining may be viewed as fairly determined. *Commentary by Kirby Wilcox.*

Legal Topics:

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

Labor & Employment LawU.S. Equal Employment Opportunity CommissionGeneral OverviewLabor & Employment LawU.S. Equal Employment Opportunity CommissionEnforcementGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Compare Gov. Code §§ 12940(a), 12943, 12945, with 42 U.S.C. § 2000e-2(a)-(d); see* discussions in

§§ 40.10 and 40.20[6][a]. Age and disability discrimination, however, are not left unprotected by the federal equal employment opportunity laws. The Age Discrimination in Employment Act (29 U.S.C. § 621 *et seq.*) prohibits age discrimination, and the Americans With Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.*), §§ 503 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 *et seq.*), and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (38 U.S.C. § 2011 *et seq.*), proscribe disability discrimination. *see* discussions in §§ 40.21, 40.22A, 40.23, 40.24.

(n2)Footnote 2. *See Gov. Code § 12926(d); 2 Cal. Code Reg. § 7286.5(a).*

(n3)Footnote 3. *See 42 U.S.C. § 2000e(b).*

(n4)Footnote 3.1. However, an employer is liable for harassment under the FEHA even if the employer only has one employee. *Gov. Code § 12940(j)(4)(A).*

(n5)Footnote 4. *See Duke v. University of Texas at El Paso (5th Cir. 1982) 663 F.2d 522, 527 .*

(n6)Footnote 5. *See Gov. Code § 12945(a).*

(n7)Footnote 6. *See California Federal Sav. & Loan Ass'n v. Guerra (1987) 479 U.S. 272, 274-277, 107 S. Ct. 683, 93 L. Ed. 2d 613 .*

(n8)Footnote 6.1. *Gov. Code 12926(h), (i) and (k).*

(n9)Footnote 6.2. *U.S.C. § 12101 et seq.*

(n10)Footnote 7. *See 42 U.S.C. § 2000e-2(h).*

(n11)Footnote 8. *See 42 U.S.C. § 2000e(b)(2); Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 17-18, 231 Cal. Rptr. 769 .*

(n12)Footnote 9. *See U.S. Const., art. VI, § 2.*

(n13)Footnote 10. *Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 10, 95 Cal. Rptr. 329, 485 P.2d 529 .*

(n14)Footnote 11. *See California Federal Sav. & Loan Ass'n v. Guerra (1987) 479 U.S. 272, 280-281, 107 S. Ct. 683, 93 L. Ed. 2d 613 .*

(n15)Footnote 12. *42 U.S.C. § 2000e et seq.*

(n16)Footnote 13. *See 42 U.S.C. § 2000e-7; see also 29 U.S.C. § 633(b) (Age Discrimination in Employment Act preserves state agency jurisdiction and defers federal action pending opportunity for investigation of state claims based on state age discrimination laws).*

(n17)Footnote 14. *See 42 U.S.C. § 2000h-4.*

(n18)Footnote 15. *42 U.S.C. § 12113(e).*

(n19)Footnote 16. *See California Federal Sav. & Loan Ass'n v. Guerra (1987) 479 U.S. 272, 281-284, 107 S. Ct. 683, 93 L. Ed. 2d 613 ; cf. Shaw v. Delta Air Lines, Inc. (1983) 463 U.S. 85, 103-104, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (no ERISA preemption of state antidiscrimination laws that are consistent with Title VII).*

(n20)Footnote 17. *See California Federal Sav. & Loan Ass'n v. Guerra (1987) 479 U.S. 272, 281-284, 107 S. Ct. 683, 93 L. Ed. 2d 613 ; Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 17, 231 Cal. Rptr. 769 .*

(n21)Footnote 18. *See Gov. Code § 12900 et seq.*

(n22)Footnote 19. *See Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 9, 231 Cal. Rptr. 769 ; 2 Cal. Code Reg. § 7286.5(a)(6); see also discussion in § 40.10[3].*

(n23)Footnote 20. *See 42 U.S.C. § 2000e(b); see also discussion in § 40.20[4][a].*

(n24)Footnote 21. *See Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 17, 231 Cal. Rptr. 769 .*

(n25)Footnote 22. *45 U.S.C. § 151 et seq.*

(n26)Footnote 23. *See Evans v. Southern Pac. Transp. Co. (1989) 213 Cal. App. 3d 1378, 1385-1387, 262 Cal. Rptr. 416 .*

(n27)Footnote 24. *See Evans v. Southern Pac. Transp. Co. (1989) 213 Cal. App. 3d 1378, 1385-1387, 262 Cal. Rptr. 416 .*

(n28)Footnote 25. *See Peatros v. Bank of America (2000) 22 Cal. 4th 147, 168-169, 172-173, 91 Cal. Rptr. 2d 659, 990 P.2d 539 ; see 12 U.S.C. § 24, para. 5; see also Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082, 1104, 282 Cal. Rptr. 841, 811 P.2d 1025 (defining bank "officer" within meaning of § 24; declining to decide whether § 24 preempts state-law causes of action for age discrimination).*

(n29)Footnote 25.1. *Ramanathan v. Bank of America (2007) 155 Cal. App. 4th 1017, 1024-1031 (bank failed to show vice president was officer subject to at--pleasure provisions of 12 U.S.C. § 24 (Fifth), where fact that board gave vice president his title was not sufficient to bring him within National Bank Act, regardless of his actual position within bank or his job duties, and vice president's unrefuted assertions regarding limited, nonbanking nature of his duties and responsibilities as computer programming consultant raised issues of material fact as to whether he qualified as officer).*

(n30)Footnote 25.2. *29 U.S.C. § 1144(a).*

(n31)Footnote 25.3. *29 U.S.C. § 1144(d).*

(n32)Footnote 25.4. *Shaw v. Delta Air Lines, Inc. (1983) 463 U.S. 85, 101-106, 103 S. Ct. 2890, 77 L. Ed. 2d 490 .*

(n33)Footnote 25.5. *Shaw v. Delta Air Lines, Inc. (1983) 463 U.S. 85, 101-102, 103 S. Ct. 2890, 77 L. Ed. 2d 490 .*

(n34)Footnote 25.6. *Shaw v. Delta Air Lines, Inc. (1983) 463 U.S. 85, 102, 103 S. Ct. 2890, 77 L. Ed. 2d 490 .*

(n35)Footnote 25.7. *Shaw v. Delta Air Lines, Inc. (1983) 463 U.S. 85, 102, 103 S. Ct. 2890, 77 L. Ed. 2d 490 .*

(n36)Footnote 25.8. *Hurlic v. So. Cal. Gas Opinion Co. (9th Cir. 2008) 539 F.3d 1024, 1035-1037 .*

(n37)Footnote 25.9. *29 U.S.C. § 621 et seq.*

(n38)Footnote 25.10. *Compare 29 U.S.C. § 633(b) with 42 U.S.C. § 2000e-5(c).*

(n39)Footnote 25.11. *Compare 29 U.S.C. § 623(a) with Gov. Code §§ 12940, 12941.*

(n40)Footnote 25.12. *See 29 U.S.C. § 623(i).*

(n41)Footnote 25.13. *See 99 Pub. L. 509, 100 Stat. 1874.*

(n42)Footnote 25.14. H.R. Rep. No. 99-1012, at 378-79 (1986) (Conf. Rep.).

(n43)Footnote 26. See *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 73-82, 276 Cal. Rptr. 130, 801 P.2d 373 ; see Gov. Code § 12993(a).

(n44)Footnote 27. Gov. Code § 12993(a); see *Ruiz v. California Department of Corrections* (2000) 77 Cal. App. 4th 891, 897-898, 92 Cal. Rptr. 2d 139 (state employees are entitled to seek review of their claims either through FEHA by DFEH or Civil Service Act by State Personnel Board; the FEHA was meant to supplement, not supplant or be supplanted by, existing antidiscrimination remedies, in order to give employees maximum opportunity to vindicate their civil rights against discrimination).

(n45)Footnote 28. See generally discussion in chs. 42 and 43.

(n46)Footnote 29. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n47)Footnote 30. See discussion in § 40.14[2].

(n48)Footnote 31. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 89-91, 276 Cal. Rptr. 130, 801 P.2d 373 ; see *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 230-233, 116 Cal. Rptr. 2d 770 ; *Blom v. N.G.K. Spark Plugs (U.S.A.), Inc.* (1992) 3 Cal. App. 4th 382, 386-388, 4 Cal. Rptr. 2d 139 .

(n49)Footnote 32. *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 618, 622, 262 Cal. Rptr. 842 ; see generally Levy, Golden, & Sacks, California torts, ch. 44 (Matthew Bender).

(n50)Footnote 33. See Gov. Code § 12926(d); See also § 40.10[3].

(n51)Footnote 34. *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 124-125, 32 Cal. Rptr. 2d 275, 876 P.2d 1074 ; see also *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 227-230, 116 Cal. Rptr. 2d 770 (tort action for wrongful termination in violation of public policy, based on FEHA's policy against race and sex discrimination and retaliation by nonprofit, religious entity exempt from FEHA).

(n52)Footnote 35. Gov. Code § 12993(c); see *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 78, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n53)Footnote 36. See Lab. Code §§ 3600, 3602.

(n54)Footnote 37. See *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 347, 21 Cal. Rptr. 2d 292 ; *Flait v. North American Watch Corp.* (1992) 3 Cal. App. 4th 467, 480, 4 Cal. Rptr. 2d 522 (retaliation for efforts to prevent sexual harassment); *Goldman v. Wilsey Foods, Inc.* (1989) 216 Cal. App. 3d 1085, 1095-1096, 265 Cal. Rptr. 294 (religious discrimination); *Meninga v. Raley's, Inc.* (1989) 216 Cal. App. 3d 79, 91, 264 Cal. Rptr. 319 (sex discrimination); *Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1286-1287, 261 Cal. Rptr. 204 (age and race discrimination); *Jones v. Los Angeles Community College Dist.* (1988) 198 Cal. App. 3d 794, 804, 807-808, 244 Cal. Rptr. 37 (race discrimination).

(n55)Footnote 38. *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 351, 21 Cal. Rptr. 2d 292 .

(n56)Footnote 39. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1161, 77 Cal. Rptr. 2d 445, 959 P.2d 752 . For further discussion, see § 43.01[14][c.1] and ch. 60.

(n57)Footnote 40. *Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514, 1529-1530 .

(n58)Footnote 41. 42 U.S.C. § 12101 et seq.

(n59)Footnote 42. *See Wood v. County of Alameda (N.D. Cal. 1995) 875 F. Supp. 659, 665 .*

(n60)Footnote 43. *45 U.S.C. § 151 et seq.*

(n61)Footnote 44. *Croston v. Burlington N. R.R. Co. (9th Cir. 1993) 999 F.2d 381, 387-389* (involving Montana antidiscrimination law).

(n62)Footnote 45. *See Hawaiian Airlines, Inc. v. Norris (1994) 512 U.S. 246, 114 S. Ct. 2239, 2251, 129 L. Ed. 2d 203 .*

(n63)Footnote 46. *Espinal v. Northwest Airlines (9th Cir. 1996) 90 F.3d 1452, 1456-1457 .*

(n64)Footnote 47. *29 U.S.C. § 185(a).*

(n65)Footnote 48. *See Jimeno v. Mobil Oil Corp. (9th Cir. 1995) 66 F.3d 1514, 1523 ; See also § 60.09[1][b]* regarding LMRA preemption of wrongful termination claims.

(n66)Footnote 49. *Espinal v. Northwest Airlines (9th Cir. 1996) 90 F.3d 1452, 1457-1458 .*

(n67)Footnote 50. *Gov. Code § 12900 et seq.*

(n68)Footnote 51. *See Espinal v. Northwest Airlines (9th Cir. 1996) 90 F.3d 1452, 1457-1458* (RLA does not preempt claim under FEHA); *see also Jimeno v. Mobil Oil Corp. (9th Cir. 1995) 66 F.3d 1514, 1521* (FEHA claim for disability discrimination not preempted).

(n69)Footnote 52. *See Felt v. Atchison, Topeka & Santa Fe Ry. Co. (9th Cir. 1995) 60 F.3d 1416, 1418-1419 .*

(n70)Footnote 53. *See Felt v. Atchison, Topeka & Santa Fe Ry. Co. (9th Cir. 1995) 60 F.3d 1416, 1419-1420 .*

(n71)Footnote 54. *See Felt v. Atchison, Topeka & Santa Fe Ry. Co. (9th Cir. 1995) 60 F.3d 1416, 1419-1420 .*

(n72)Footnote 55. *See Felt v. Atchison, Topeka & Santa Fe Ry. Co. (9th Cir. 1995) 60 F.3d 1416, 1420 ; see Prudential Ins. Co. of Am. v. Lai (9th Cir. 1994) 42 F.3d 1299, 1304-1305 , cert. denied, 516 U.S. 812 (1995)* (knowing waiver requirement is apparent from text and legislative history of Title VII); *but see Brookwood v. Bank of Am., NT & SA (1996) 45 Cal. App. 4th 1667, 1673-1674, 53 Cal. Rptr. 2d 515* (criticizing *Prudential* rule requiring "knowing" agreement to arbitrate); *see also Renteria v. Prudential Ins. Co. of Am. (9th Cir. 1997) 113 F.3d 1104, 1106-1107* (upholding *Prudential's* knowing agreement and waiver requirement for arbitration; inclusion of language, "as may be amended from time to time" does not effect adequate notice of arbitration agreement that fails to identify types of disputes subject to arbitration). For discussion of effect of individual arbitration agreements, *see § 90.20.*

(n73)Footnote 56. *Saridakis v. United Airlines (9th Cir. 1999) 166 F.3d 1272 .*

(n74)Footnote 57. *See Saridakis v. United Airlines (9th Cir. 1999) 166 F.3d 1272, 1276-1277 .*

(n75)Footnote 58. *Saridakis v. United Airlines (9th Cir. 1999) 166 F.3d 1272, 1276-1277 .*



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part A. GENERAL PRINCIPLES

2-40 California Employment Law § 40.03

AUTHOR: By David M. Youngsmith, J.D.

§ 40.03 Effect of Collective Bargaining Agreements

[1] Discriminatory Agreements

Although discrimination by labor unions is beyond the scope of this publication,ⁿ¹ discrimination by employers may often be the result of union actions, such as when a union is responsible for a discriminatory collective bargaining agreement. Labor unions cannot lawfully bargain for the establishment of discriminatory practices.ⁿ² Title VII expressly prohibits a union from causing or attempting to cause an employer to discriminate in a collective bargaining agreement.ⁿ³ In addition, a union may be liable under Title VII if it acquiesces or joins in an employer's discriminatory practices.ⁿ⁴ Thus, in negotiating and administering a collective bargaining agreement, a union is obliged to protect all those it represents and may not consent to provisions or take positions that discriminate against some of its members.ⁿ⁵

[2] Antidiscrimination Provisions and Preemption

In *Emporium Capwell Co. v. Community Org.*,ⁿ⁶ the United States Supreme Court declared that "the elimination of discrimination and its vestiges is an appropriate subject of bargaining, and an employer may have no objection to incorporating into a collective agreement the substance of his [or her] obligation not to discriminate in personnel decisions." Antidiscrimination provisions contained in collective bargaining agreements may be enforced through contractual grievance procedures,ⁿ⁷ but resort to such remedies does not waive or preclude an employee's Title VII cause of action.ⁿ⁸ Furthermore, Section 301(a) of the federal Labor Management Relations Act (Section 301),ⁿ⁹ which provides federal-court jurisdiction over controversies involving collective bargaining agreements, does not preempt FEHA claims that do not depend on the meaning of such agreements.ⁿ¹⁰ For example, the Ninth Circuit Court of Appeals has held that a FEHA disability discrimination claim was not preempted by Section 301 even though it was filed by an employee who was covered by a collective bargaining agreement containing a general antidiscrimination provision.ⁿ¹¹ The court explained that an employee's right to be free from handicap discrimination is defined and enforced under the FEHA without reference to the terms of any collective bargaining agreement, and consequently the FEHA claim was independent of the agreement covering the employee.ⁿ¹² Even if a court is required to "refer" to a collective bargaining agreement, a FEHA claim will not be preempted because preemption is only appropriate if the agreement must be interpreted, and "reference" and "interpret" are not equivalent terms.ⁿ¹³

If, however, specific issues related to a discrimination claim are properly covered by a collective bargaining agreement, a FEHA action may be preempted by the applicable federal employment relations statute. For example, liability for disability discrimination under the FEHA depends in part on whether a disability interferes with job performance.ⁿ¹⁴ One California court, in determining whether the federal Railway Labor Act (RLA)ⁿ¹⁵ preempted a railroad employee's FEHA disability discrimination claim, observed that parties may agree to arbitrate the question of interference with job duties.ⁿ¹⁶ If an employee's lack of fitness to perform his or her duties is made arbitrable under the parties' collective bargaining agreement, the FEHA action would be preempted by the RLA to the extent that the action raised an issue determinable solely under procedures established by the RLA.ⁿ¹⁷

One Ninth Circuit panel likewise held that state-law claims relating to wrongful termination under Nevada state law were preempted by Section 301 since evaluation of the reasonableness of the employer's behavior from the point of view of the CBA provision on just cause termination was required.ⁿ¹⁸

For additional discussion of federal labor law preemption, *see* Chapter 60.

Legal Topics:

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

Labor & Employment Law
Collective Bargaining & Labor Relations
General Overview
Labor & Employment Law
U.S. Equal Employment Opportunity Commission
General Overview

FOOTNOTES:

(n1)Footnote 1. Discrimination by labor unions is expressly prohibited by various state and federal equal employment opportunity laws. *See, e.g., Gov. Code § 12940(b)* (FEHA); *29 U.S.C. §§ 206(d)(2) (EPA), 623(c) (ADEA); 42 U.S.C. § 2000e-2(c)* (Title VII). Such discrimination may also violate the union's "duty fairly to represent all ... [union] employees." *See Vaca v. Sipes* (1967) 386 U.S. 171, 177, 190, 87 S. Ct. 903, 17 L. Ed. 2d 842 (Labor Management Relations Act; breach of duty occurs when union conduct is arbitrary, *discriminatory*, or in bad faith); *Steele v. Louisville & N. R. Co.* (1944) 323 U.S. 192, 203, 65 S. Ct. 226, 89 L. Ed. 173 (Railway Labor Act; breach of duty occurs when collective bargaining agreement designed to restrict employment opportunities and seniority of African-American firemen).

(n2)Footnote 2. *Emporium Capwell Co. v. Community Org.* (1975) 420 U.S. 50, 70, 95 S. Ct. 977, 43 L. Ed. 2d 12 .

(n3)Footnote 3. *See 42 U.S.C. § 2000e-2(c)(3).*

(n4)Footnote 4. *See Bonilla v. Oakland Scavenger Co.* (9th Cir. 1982) 697 F.2d 1297, 1304 , *cert. denied*, 467 U.S. 1251 (1984) .

(n5)Footnote 5. *Macklin v. Spector Freight Sys., Inc.* (D.C. Cir. 1973) 478 F.2d 979, 989 ; *see also Kaplan v. Int'l Alliance of Theatrical and Stage Employees* (9th Cir. 1975) 525 F.2d 1354, 1360 (union liable for collective bargaining agreement that perpetuates past discrimination).

(n6)Footnote 6. *See Emporium Capwell Co. v. Community Org.* (1975) 420 U.S. 50, 69, 95 S. Ct. 977, 43 L. Ed. 2d 12 .

(n7)Footnote 7. *See Emporium Capwell Co. v. Community Org.* (1975) 420 U.S. 50, 66-67, 95 S. Ct. 977, 43 L. Ed. 2d 12 .

(n8)Footnote 8. *See Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 52, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (employee may pursue both grievance procedure under collective bargaining agreement and Title VII action).

(n9)Footnote 9. 29 U.S.C. § 185(a).

(n10)Footnote 10. See *Jackson v. Southern Cal. Gas Co.* (9th Cir. 1989) 881 F.2d 638, 644 ; *Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514, 1517-1518 ; see also *Detabali v. St. Luke's Hospital* (9th Cir. 2007) 482 F.3d 1199, 2007 U.S. App. LEXIS 8620 (district court erred in finding that FEHA discrimination and retaliation claims were preempted by § 301 of LMRA, where viability of FEHA claims depended on whether nurse was legitimately terminated for refusing to work outside of her cluster; in order to make that determination, court would have to refer to cluster provision of collective bargaining agreement, but because there was no dispute over meaning of terms within agreement, resolution of central issue, whether employer discriminated against nurse in applying agreement, did not depend on interpretation of collective bargaining agreement); *Lingle v. Norge Div., Magic Chef* (1988) 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410, 418-418 (state-law claim preempted by § 301 if resolution of claim depends on meaning of collective bargaining agreement); *Teamsters Union v. Lucas Flour Co.* (1962) 369 U.S. 95, 103-104, 82 S. Ct. 571, 7 L. Ed. 2d 593 (§ 301 requires resort to federal rules of law in order to ensure uniform interpretation of collective bargaining agreements).

(n11)Footnote 11. See *Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514, 1517-1518 ; see also *Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514, 1522-1528 (three-prong test for LMRA preemption not met since CBA did not establish comprehensive framework for determining fitness to work or reasonable accommodation, FEHA standard on reasonable accommodation of disabled employees was clear, and state intended that FEHA disability discrimination prohibitions not be altered by private contract); *Gov. Code § 12940(a)*. For discussion of disability and handicap discrimination, see ch. 41, pts. B and D.

(n12)Footnote 12. See *Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514, 1517 ; see also *Ramirez v. Fox Television Station, Inc.* (9th Cir. 1993) 998 F.2d 743, 748 (national origin discrimination); *Cook v. Lindsay Olive Growers* (9th Cir. 1990) 911 F.2d 233, 240 (religious discrimination); *Chmiel v. Beverly Wilshire Hotel Co.* (9th Cir. 1989) 873 F.2d 1283, 1286-1287 (age discrimination).

(n13)Footnote 13. *Ramirez v. Fox Television Station, Inc.* (9th Cir. 1993) 998 F.2d 743, 748-749 .

(n14)Footnote 14. See *Gov. Code § 12940(a)(1)*; ch. 41, pt. B.

(n15)Footnote 15. See 45 U.S.C. § 151 et seq.

(n16)Footnote 16. See *Evans v. Southern Pac. Transp. Co.* (1989) 213 Cal. App. 3d 1378, 1385-1387, 262 Cal. Rptr. 416 (relying on *McCall v. Chesapeake & Ohio Ry. Co.* (6th Cir. 1988) 844 F.2d 294, 302-303 ; *Stephens v. Norfolk and W. Ry. Co.* (6th Cir. 1986) 792 F.2d 576, 581) .

(n17)Footnote 17. See *Evans v. Southern Pac. Transp. Co.* (1989) 213 Cal. App. 3d 1378, 1386, 262 Cal. Rptr. 416 .

(n18)Footnote 18. *Herman v. United Broth. of Carpenters* (9th Cir. 1995) 60 F.3d 1375, 1385 .



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part A. GENERAL PRINCIPLES

2-40 California Employment Law §§ 40.04 through 40.09

AUTHOR: By David M. Youngsmith, J.D.

[Reserved]

§§ 40.04[Reserved]



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part B. STATE LAW

2-40 California Employment Law § 40.10

AUTHOR: By David M. Youngsmith, J.D.

§ 40.10 California Fair Employment and Housing Act

[1] Governing Law and Scope of Coverage

The primary California statute prohibiting employment discrimination is the Fair Employment and Housing Act (FEHA), which is set forth in *Government Code Section 12900 et seq.* The FEHA applies to California employers,ⁿ¹ labor organizations,ⁿ² apprenticeship and training programs,ⁿ³ employment agencies,ⁿ⁴ and anyone who aids or abets in employment discrimination.ⁿ⁵ It proscribes employment discrimination, and any limitation, specification, harassment, or retaliation on the basis of several enumerated protected characteristics,ⁿ⁶ and also requires reasonable steps to prevent discrimination and harassment.ⁿ⁷

Administrative regulations promulgated by the Fair Employment and Housing Commission (FEHC),ⁿ⁸ which are contained in Title 2 of the California Code of Regulations,ⁿ⁹ establish comprehensive rules applicable to employment discrimination under the FEHA.ⁿ¹⁰ The regulations also interpret, implement, and supplement the enforcement and hearing procedures of the FEHAⁿ¹¹ and the Administrative Procedure Act.ⁿ¹² The Administrative Adjudication *Bill of Rights*^{n12.1} and the rules for judicial review in *Government Code Section 11523* also apply to the Commission.^{n12.2}

In construing the FEHA, the FEHC and the California courts have often turned to federal Title VII authority to interpret analogous provisions in the FEHA, although they do not always follow precedent.ⁿ¹³

[2] Enforcement and Remedies

Two administrative bodies enforce the FEHA:ⁿ¹⁴ the Department of Fair Employment and Housing (DFEH)ⁿ¹⁵ and the Fair Employment and Housing Commission (FEHC).ⁿ¹⁶ The DFEH is the "prosecutorial" body, which has power to create rules and regulations to carry out its functions and duties,ⁿ¹⁷ investigate employment discrimination complaints,ⁿ¹⁸ conduct discovery and various investigative measures,ⁿ¹⁹ accuse and prosecute employment discrimination,ⁿ²⁰ and publish the results of its investigations.ⁿ²¹ The FEHC is the "adjudicative" body, which has power to issue regulations interpreting the FEHA,ⁿ²² hold hearings on DFEH discrimination accusations,ⁿ²³ and decide the issues raised in the accusations.ⁿ²⁴ The FEHC also has the power to conduct mediations at the request of the

DFEH at any time after a complaint is filed.^{n24.1} The DFEH may withdraw a request for mediation at any time to pursue an investigation.^{n24.2} If the FEHC finds that employment discrimination exists, it must order the respondent to cease and desist and may take certain other remedial action.ⁿ²⁵ For a detailed discussion relating to the powers, functions, and procedures of the DFEH and FEHC, *see* Chapter 42, Part B.

Individual employees or applicants may also enforce their rights under the FEHA by filing a civil action in court if the DFEH decides not to issue an accusation, or does not issue an accusation within 150 days after the filing of a discrimination complaint with the DFEH.ⁿ²⁶ The prevailing party in such an action may receive reasonable attorney's fees, costs,ⁿ²⁷ and all relief generally available in noncontractual actions, including punitive damages.ⁿ²⁸ Private civil actions under the FEHA are discussed in Chapter 43, Part A.

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

The FEHA offers complainants an inexpensive administrative remedy. Counsel, however, should assist complainants in framing their charges with an eye toward further (judicial) proceedings, if they should prove necessary. The administrative procedure permits the employer to make an early assessment of a potential lawsuit and an opportunity to resolve the matter early without further exposure. *Commentary by Bill Lann Lee.*

[3] Employers Covered and Exempted

Except as discussed below, the FEHA applies to all California employers and their agents,ⁿ²⁹ including the state, any political or civil subdivision of the state, cities,ⁿ³⁰ and nonprofit corporations or associations.ⁿ³¹ To be covered by the FEHA,ⁿ³² private employers must regularly employ five or more persons, except when a discrimination claim involves harassment. In that case, employers regularly employing one or more persons or regularly receiving the services of one or more persons providing services pursuant to a contract or their agent are covered.ⁿ³³ The state of California and other public entities are not subject to the five-employee requirement.ⁿ³⁴ With respect to whether an employer "regularly employs" the required number of employees, the number of employees on the payroll, including part-time employees, is determinative, not the number of employees working on any particular day.ⁿ³⁵

An individual employed by a temporary agency and assigned to work on the premises of the agency's client has "dual employers." Both the agency and the client are employers.^{n35.1} Thus, for example, in *Mathieu v. Norrell Corp.*,^{n35.2} the plaintiff alleged sexual harassment by a coworker at the company in which she was placed by a temporary agency. She was paid by the temporary agency that assigned her to work at a client, and she was required to report to the agency if, for example, she were to miss a day of work. Accordingly, the agency was properly considered her general employer and the client her special employer, and she could look to both for redress.^{n35.3}

Notwithstanding any other FEHA provision, a rebuttable presumption exists that the "employer"ⁿ³⁶ includes any person or entity identified as the employer on the employee's federal Form W-2 (Wage and Tax Statement).ⁿ³⁷

Factors to be taken into account in assessing whether an entity is an employer under the FEHA include:^{n37.1}

- Payment of salary or other employment benefits and social security taxes.
- Ownership of the equipment necessary to performance of the job.
- The location where the work is performed.
- The entity's obligation to train the employee.
- The authority of the entity to hire, transfer, promote, discipline or discharge the employee.

- The authority to establish work schedules and assignments.
- The entity's discretion to determine the amount of compensation earned by the employee.
- The skill required of the work performed and the extent to which it is done under the direction of a supervisor.
- Whether the work is part of the entity's regular business operations.
- The skill required in the particular occupation.
- The duration of the relationship of the parties.
- The duration of the plaintiff's employment.

Of these factors, the extent of the defendant's right to control the means and manner of the workers' performance is the most important. In all cases, an employer must be an individual or entity who extends a certain degree of control over the plaintiff.^{n37.2} Further, the absence of direct or indirect remuneration from the entity to the plaintiff, while not controlling, is at least strong evidence that an employment relationship does not exist.^{n37.3}

The state cannot be held liable as an employer under the FEHA based on the promulgation of regulations affecting employment.^{n37.4}

As discussed in [1], *above*, the FEHA also applies to apprenticeship training programs or other training programs leading to employment,ⁿ³⁸ and employment agencies.ⁿ³⁹ An "employment agency" includes any person who undertakes, for compensation, to procure employees or opportunities to work.ⁿ⁴⁰ In addition, the FEHA covers labor organizations,ⁿ⁴¹ although discussion of such organizations is not within the scope of this chapter.

The FEHA does not cover religious organizations that are not organized for private profit,ⁿ⁴² unless they operate unrelated businesses that regularly employ five or more persons and are subject to state or federal income tax.ⁿ⁴³ Before recent amendments to the FEHA, which expanded coverage to include nonprofit religious corporations and associations in certain circumstances,ⁿ⁴⁴ nonprofit religious organizations were exempt from the anti-discrimination provisions of the FEHA *regardless* of the nature of the alleged discrimination.ⁿ⁴⁵ Further, the establishment and *free exercise clauses of the First Amendment* bar judicial review of employment disputes between religious organizations and their ministerial employees;ⁿ⁴⁶ the ministerial exception of Title VIIⁿ⁴⁷ applies with equal force to FEHA cases.ⁿ⁴⁸

Notwithstanding *Government Code Section 12926(d)*, and except as otherwise provided in *Government Code Section 12926.2(d)*, the term "employer" covers a religious corporation or association with respect to persons employed to perform duties, other than religious duties, at a health care facility that is not restricted to adherents of the religion that established the association or corporation.ⁿ⁴⁹ "Religious duties" are duties of employment connected with carrying on the religious activities of a religious corporation or association.ⁿ⁵⁰ However, "employer" does not include a religious corporation with respect to either the employment, including promotion, of an individual of a particular religion, or the application of the employer's religious doctrines, tenets, or teachings, in any work connected with the provision of health care.ⁿ⁵¹ Nor does "employer" cover a nonprofit public benefit corporation formed to provide health care on behalf of a religious organizationⁿ⁵² with respect to the employment, including promotion, of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care.ⁿ⁵³ A nonprofit public benefit corporation formed by or affiliated with a particular religion and operating an educational institution as its sole or primary activity may restrict employment, including promotion, in any or all employment categories to

individuals of a particular religion; but it is subject to the FEHA in all other respects, including, but not limited to, prohibitions against discrimination that are unlawful employment practices under the FEHA.n54

An employee of an entity subject to regulation by *Government Code Section 12940(j)* is personally liable for any prohibited harassment that is perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.n54.1

The FEHA does not apply to employment within a federal enclave. A federal enclave is land over which the federal government exercises legislative jurisdiction. Federal power over these enclaves emanates from *article I, section 8, clause 17 of the United States Constitution*, which gives Congress the power to exercise exclusive legislative authority over all places purchased by the consent of the legislature of the state in which those places are located, for the erection of forts, magazines, arsenals, dockyards and other needful buildings, including federal prisons. State law in effect at the time of the cession not inconsistent with federal law continues to apply within the enclave unless it is abrogated by Congress. State law that did not exist at the time of cession will also extend to the enclave when the state regulation has been expressly permitted by Congress.n54.2 The federal enclave doctrine will not leave an employee without a remedy for discrimination claims, because federal antidiscrimination law applies to claims arising on federal enclaves.n54.3 The federal enclave doctrine applies even if the challenged employment decision is made at a location that is not a federal enclave, if the employment occurs on the federal enclave.n55

[3A] Aiders and Abettors of Discrimination

It is an unlawful employment practice for any person to aid, abet, incite, compel, or coerce the doing of any acts forbidden by the Fair Employment and Housing Act or to attempt to do so.n55.1 The FEHA does not provide a definition of aiding and abetting.n55.2 Under the common law, liability may be imposed on one who aids and abets the commission of an intentional tort under either of the following circumstances:n55.3

- If the person knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act.
- If the person gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.

Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting.n55.4

The "aid and abet" language of *Government Code section 12940(i)* makes it unlawful, for example, for third parties such as customers or suppliers to induce or coerce prohibited discrimination or harassment.n55.5

Liability for aiding and abetting a discriminatory employment practice under the FEHA is imposed by *Government Code section 12940(i)* only on a "person."n55.6 The term "person" is defined in *Government Code section 12925(d)* to include individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries. Further, the discrimination provisions of the FEHA apply only to employers, and individuals who do not qualify as employers may not be sued under the FEHA for alleged discriminatory acts.n55.7

In *Vernon v. State of California*, n55.8 the court held that liability could not be imposed on the State under the aiding and abetting provisions of the FEHA based on the promulgation of regulations governing employment for several reasons. The State was not the plaintiff's employer and could not be liable to him for unlawful discrimination. Nor was the State a person as defined in *Government Code section 12940(i)*, because although explicitly designated as a potential "employer" in *Government Code section 12926(d)*, it is not listed as a "person." The most reasonable interpretation of the statutory scheme is that if the Legislature had intended to include public agencies in the definition

of parties who may be liable as persons under *Government Code section 12925(d)*, it would have expressly done so.^{n55.9} The court also found that the complaint did not contain allegations that the State aided and abetted the plaintiff's employer in effectuating discriminatory employment practices. Nothing in the pleading asserted that the State and the employer acted jointly to implement the new respiratory protection policy, only that the State enacted and demanded enforcement of the CAL-OSHA regulations. As a result the employer implemented a new policy that prohibited employees with visible facial hair from testing or using SCBA respirators. In fact, according to the pleading the employer opposed the CAL-OSHA regulations. The complaint alleged a discriminatory practice caused by two separate entities acting independently, not assisting one another.^{n55.10}

[4] Employees Covered and Exempted

With the exceptions noted below, the FEHA applies to all California employees and applicants for employment,ⁿ⁵⁶ including persons compensated by temporary-service agencies.ⁿ⁵⁷ The FEHA itself does not contain a precise definition of "employee." However, the regulations define "employee" for the purposes of the FEHA as an individual under the direction and control of an employer, under any appointment or contract of hire or apprenticeship, express or implied, oral or written.^{n57.1} The regulations include within the definition of employee the common law requirement that the employer exercise direction and control over the person's work. The existence of the right of control is often tested by determining whether, if instructions were given, they would have to be obeyed and whether there was a right to terminate the service at any time.^{n57.2}

An individual compensated by a temporary service agency for work to be performed for an employer contracting with the temporary service agency may be considered an employee of the contracting employer for the terms, conditions and privileges of employment under the control of that employer. That individual is an employee of the temporary service agency with regard to the terms, conditions and privileges of employment under the control of the temporary service agency.^{n57.3} Thus, the employment relationship for FEHA purposes is tied directly to the amount of control exercised over the employee.^{n57.4} Nothing in the regulations mandates that the contract of employment be direct.^{n57.5}

In order to be an employee, an individual need not be compensated directly by the employer. A contracting employer acts as an "employer" for purposes of applying state and federal anti-discrimination laws.^{n57.6}

There is no magic formula for determining whether the requisite employment relationship exists. When a statute fails to define the term "employee," courts routinely look at the common law definition for guidance, focusing on the amount of control the employer exercises over the employee.^{n57.7} The prevailing view is to consider the totality of the circumstances, reflecting upon the nature of the work relationship between the parties, and placing emphasis on the control exercised by the employer over the employees' performance of employment duties.^{n57.8}

In *Bradley v. Dept. of Corrections & Rehabilitation*,^{n57.9} a social worker who was hired from a registry to work in a state prison was found to be a special employee of the state for purposes of the FEHA. The FEHA expressly identifies the state as an employer for purposes of its protections.^{n57.10} The Department regularly hired registry employees as a common practice to meet its staffing needs throughout the state prison system, as evidenced by its contract with the registry. Excluding from the protection of the FEHA a large number of people working daily in the state prison system (and presumably in other state agencies) would be inconsistent with the legislative intent to expand FEHA protection to the largest number of individuals possible, including those who traditionally would be excluded from the employment relationship because they exercise complete control of the services provided, and contrary to statutory language stating that the FEHA applies to the state as an employer. Further, the Department's own sexual harassment policy indicated that it applied to individuals who provided contract services to the Department. The fact that the Department's contract with the registry provided that the social worker was an agent or employee of the registry, and not an employee of the state, did not preclude coverage under the FEHA, because the contract also granted all control of the employment relationship to the Department, not the registry. The Department's control precluded a finding that she was an independent contractor or a person providing services pursuant to a contract as defined by the FEHA.^{n57.11} The

language of the governing contract was one factor to be considered in determining the nature of the employment relationship, but it was not controlling.ⁿ⁵⁷ 12 The FEHA does not apply to persons employed by a parent, spouse, or child; nor does it apply to persons employed under a special license in a nonprofit sheltered workshop or rehabilitation facility.ⁿ⁵⁸ The FEHA also does not apply to independent contractors as defined in *Labor Code Section 3353*, governing workers' compensation.ⁿ⁵⁹ Under this provision, an "independent contractor" is any person who renders service for compensation for a specified result. The contractor is under the control of a principal regarding only the result of the work, and not regarding the means by which the result is accomplished.ⁿ⁶⁰ Nevertheless, in the context of harassment, the prohibition extends to persons providing services pursuant to a contract,ⁿ⁶¹ that is, a person meeting all the following criteria:ⁿ⁶²

- The person has the right to control the performance under the contract for services and discretion as to the manner of performance.
- The person is customarily engaged in an independently established business.
- The person has control over the time and place of performance, supplies tools and instrument used in the work, and performs work that requires a particular skill not ordinarily used in the course of the employer's work.

For further discussion of the definition of "independent contractor" under workers' compensation law, *see* Chapter 20. In addition, the FEHA does not apply to nonresidents when the wrongful conduct occurred outside of California.ⁿ⁶³

The FEHA does not apply to employment disputes between religious organizations and their ministerial employees. Further, the establishment and *free exercise clauses of the First Amendment* bar judicial review of these employment disputes.ⁿ⁶⁴

The FEHA does not apply to a student-athlete who is not a school employee.ⁿ⁶⁵ The FEHA also does not apply to an uncompensated volunteer.^{n65.1}

[5] Prohibited Bases of Discrimination

The FEHA prohibits employment discrimination based on the following:ⁿ⁶⁶

1. Race;
2. Color;
3. Ancestry;
4. National Origin;
5. Religious creed;ⁿ⁶⁷
6. Sex and sexual orientation;ⁿ⁶⁸
7. Marital status;ⁿ⁶⁹
8. Pregnancy, child birth or related medical conditions;ⁿ⁷⁰
9. Physical and mental disability;ⁿ⁷¹

10. Medical condition;ⁿ⁷²

11. Age, with respect to persons who are 40 years of age or older.ⁿ⁷³

For a detailed discussion relating to specific prohibited bases of discrimination, *see* Chapter 41, Part B.

[6] Prohibited Employment Practices

The FEHA broadly prohibits discrimination in hiring, selection for training leading to hiring, and discharges, as well as discrimination in compensation or other terms and conditions of employment based on the classifications listed in [5], *above*.ⁿ⁷⁴ The prohibition includes discriminatory tests and other selection procedures.ⁿ⁷⁵ Other unlawful practices include publishing items or making non-job-related inquiries that express such discrimination.ⁿ⁷⁶ The FEHA also prohibits a policy limiting or prohibiting the use of any language at the workplace unless the restriction is justified by business necessity.ⁿ⁷⁷

■ CONSULTANT'S COMMENT:

Government Code Section 12951 makes language policies more difficult to adopt and to maintain. A threshold question is: What is a language policy? Set aside the easy cases involving written policies and consider the more common and difficult circumstance in which an employer long has orally encouraged employees to speak English when conducting company business on work time. Is such oral encouragement a policy? The answer now depends upon whether the employer intends to punish violations. If it does not intend to do so, it does not appear that the statute requires the creation of a written language policy. If it intends to administer discipline, the employer must create a written policy that meets the statutory requirements. *Commentary by Kirby Wilcox.*

The FEHA prohibits retaliation against an employee for opposing discriminatory practices, filing a complaint, or testifying or assisting in any FEHA proceeding.ⁿ⁷⁸ The FEHA also prohibits the harassment of employees, applicants, or persons providing services pursuant to a contract in a protected class,ⁿ⁷⁹ as well as discrimination because an employee's religious beliefs conflict with an employment requirement, unless the employer makes reasonable efforts to accommodate those beliefs.ⁿ⁸⁰ The FEHA prohibits an employer from failing to reasonably accommodate the known physical or mental disability of an applicant or employee, unless the employer can demonstrate that the accommodation would produce undue hardship to the operation of its business.ⁿ⁸¹ The FEHA also prohibits an employer from neglecting to engage in a timely, good-faith, interactive process with an employee or applicant with a known physical or mental disability or medical condition to determine effective reasonable accommodations, if any, to an employee or applicant requesting them.ⁿ⁸² Finally, the FEHA prohibits employers from subjecting any employee, applicant, or other person to a test for the presence of a genetic characteristic.ⁿ⁸³ For detailed discussion of prohibited discriminatory practices, *see* Chapter 41, Parts A, C, D, and F.

[7] Defenses

The FEHA and the regulations interpreting it afford employers certain limited defenses against claims of discrimination, which are discussed in detail in Chapter 41, Part E. These include specific defenses that relate to particular classifications such as physical or mental disability,ⁿ⁸⁴ certain medical conditions,ⁿ⁸⁵ marital status,ⁿ⁸⁶ race and color,ⁿ⁸⁷ religious creed,ⁿ⁸⁸ age,ⁿ⁸⁹ and sex.ⁿ⁹⁰ The FEHA also specifies defenses that relate to types of employment *practices*, rather than protected classifications. These include the concepts of "bona fide occupational qualification,"ⁿ⁹¹ business necessity,ⁿ⁹² job-relatedness,ⁿ⁹³ security regulations,ⁿ⁹⁴ bona fide voluntary affirmative action plans,ⁿ⁹⁵ and requirements of the law.ⁿ⁹⁶

Legal Topics:

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

Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview Public Health & Welfare Law Housing & Public Buildings General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. *See Gov. Code § 12940(a), (d)-(h), (j)-(o).*

(n2)Footnote 2. *See Gov. Code § 12940(b), (g), (h), (j), (k).*

(n3)Footnote 3. *Gov. Code § 12940(c), (j)-(l).*

(n4)Footnote 4. *See Gov. Code § 12940(d)-(h), (j), (k).*

(n5)Footnote 5. *Gov. Code § 12940(i); 2 Cal. Code Reg. § 7287.7.*

(n6)Footnote 6. *See Gov. Code §§ 12940, 12945; see also [5], [6], below.*

(n7)Footnote 7. *See Gov. Code § 12940(j), (k).*

(n8)Footnote 8. *See Gov. Code § 12935(a); 2 Cal. Code Reg. §§ 7285.4, 7286.4; see also [2], below.*

(n9)Footnote 9. *See 2 Cal. Code Reg. § 7285.0 et seq.*

(n10)Footnote 10. *See 2 Cal. Code Reg. §§ 7289.4-7289.5 (national origin and ancestry), 7290.6-7291.2 (sex), 7292.0-7292.6 (marital status), 7293.0-7293.4 (religion), 7293.5-7294.2 (disability), 7295.0-7296.4 (age).*

(n11)Footnote 11. *See Gov. Code §§ 12960-12976; see also [2], below.*

(n12)Footnote 12. *2 Cal. Code Reg. § 7400; see Gov. Code § 11500 et seq.; see also Gov. Code § 12972(a) (Commission conducts all actions and procedures in accordance with its procedural regulations); Gov. Code § 12972(b)(1) (if Commission does not have procedural regulation on issue, Commission must rely on pertinent provisions of Administrative Procedure Act, commencing with Gov. Code § 11370).*

(n13)Footnote 12.1. *Gov. Code § 11425.10 et seq..*

(n14)Footnote 12.2. *Gov. Code § 12972(b)(2).*

(n15)Footnote 13. *See, e.g., Price v. Civil Service Com. (1980) 26 Cal. 3d 257, 270-277, 161 Cal. Rptr. 475, 604 P.2d 1365; City and County of San Francisco v. Fair Employment & Housing Com. (1987) 191 Cal. App. 3d 976, 985, 236 Cal. Rptr. 716; but cf. Johnson Controls, Inc. v. Fair Employment & Housing Com. (1990) 218 Cal. App. 3d 517, 540, 267 Cal. Rptr. 158 (FEHC is not bound to consider or follow federal precedent construing Title VII); Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 606, 262 Cal. Rptr. 842 (noting that when Title VII precedent does not appear sound, or conflicts with essential purpose of FEHA, FEHC does not rely on it).*

(n16)Footnote 14. *See State Personnel Bd. v. Fair Employment & Housing Com. (1985) 39 Cal. 3d 422, 428-429, 217 Cal. Rptr. 16, 703 P.2d 354 (overview of respective roles of DFEH and FEHC).*

(n17)Footnote 15. *See Gov. Code §§ 12901, 12930-12933.*

(n18)Footnote 16. *Gov. Code §§ 12903, 12935.*

(n19)Footnote 17. *See Gov. Code § 12930(e).*

(n20)Footnote 18. *See Gov. Code § 12930(f).*

(n21)Footnote 19. *See Gov. Code § 12930(g).*

(n22)Footnote 20. *See Gov. Code §§ 12930(h), 12965, 12972(b).*

(n23)Footnote 21. *See Gov. Code § 12930(i).*

(n24)Footnote 22. *Gov. Code § 12935(a); 2 Cal. Code Reg. §§ 7285.4, 7286.4; see [1], above.*

(n25)Footnote 23. *See Gov. Code §§ 12935(b), (f), 12967.*

(n26)Footnote 24. *See Gov. Code §§ 12935(b), (f), 12967-12972; 2 Cal. Code Reg. §§ 7285.5, 7285.6.*

(n27)Footnote 24.1. *Gov. Code § 12935(c). See Gov. Code §§ 12960, 12961, 12980.*

(n28)Footnote 24.2. *Gov. Code § 12935(c).*

(n29)Footnote 25. *See Gov. Code § 12970(a)-(d).*

(n30)Footnote 26. *See Gov. Code § 12965(b).*

(n31)Footnote 27. *Gov. Code § 12965(b)* (attorney's fees and costs are not available if action filed by public agency or public official acting in official capacity).

(n32)Footnote 28. *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal. 3d 211, 213, 216, 185 Cal. Rptr. 270, 649 P.2d 912 ; *Monge v. Superior Court* (1986) 176 Cal. App. 3d 503, 509, 222 Cal. Rptr. 64 .

(n33)Footnote 29. *See Gov. Code §§ 12925(d)* (individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries), *12926(d); 2 Cal. Code Reg. § 7286.5(a); see also DFEH v. Rosenberg* (1990) FEHC Dec. No. 90-09, p. 10 (in considering whether person is "employer" in agency sense, FEHC looks to degree which person significantly affects access to employment); *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 19 (same; FEHC does not look to whether person is "employer" or "agent" in conventional sense).

(n34)Footnote 30. *Gov. Code § 12926(d); 2 Cal. Code Reg. § 7286.5(a)(4).*

(n35)Footnote 31. *See 2 Cal. Code Reg. § 7286.5(a)(6); see also Bohemian Club v. Fair Employment & Housing Comm'n* (1986) 187 Cal. App. 3d 1, 9, 231 Cal. Rptr. 769 (FEHA applies to social and nonreligious nonprofit organizations).

(n36)Footnote 32. *Gov. Code § 12926(d); 2 Cal. Code Reg. § 7286.5(a).*

(n37)Footnote 33. *See Gov. Code § 12940(j); DFEH v. Rosenberg* (1990) FEHC Dec. No. 90-09, p. 6.

(n38)Footnote 34. *2 Cal. Code Reg. § 7286.5(a)(4).*

(n39)Footnote 35. *Robinson v. Fair Employment & Housing Comm'n* (1992) 2 Cal. 4th 226, 234-243, 5 Cal. Rptr. 2d 782, 825 P.2d 767 .

(n40)Footnote 35.1. *Mathieu v. Norrell Corp.* (2004) 115 Cal. App. 4th 1174, 1183-1184, 10 Cal. Rptr. 3d 52 (dual employers where both employment agency and client company had right to exercise certain powers of control over employee). *See Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174, 151 Cal. Rptr. 671, 588 P.2d 811 (possibility of dual employment is well recognized in case law, and where employer sends employee to do work for

another person, and both have right to exercise powers of control over employee, employee may be held to have two employers, *i.e.*, original or general employer and second or special employer); *Riley v. Southwest Marine, Inc.* (1988) 203 Cal. App. 3d 1242, 1247-1248, 250 Cal. Rptr. 718 (when employer lends employee to another employer and relinquishes to borrowing employer all right of control over employee's activities, two-employer situation is created). For discussion of dual employment in the workers' compensation context, *see* § 20.20[2][d].

(n41)Footnote 35.2. *Mathieu v. Norrell Corp.* (2004) 115 Cal. App. 4th 1174, 10 Cal. Rptr. 3d 52 .

(n42)Footnote 35.3. *Mathieu v. Norrell Corp.* (2004) 115 Cal. App. 4th 1174, 1183-1184, 10 Cal. Rptr. 3d 52 .

(n43)Footnote 36. *See Gov. Code § 12926(d)* (definition).

(n44)Footnote 37. *Gov. Code § 12928.*

(n45)Footnote 37.1. *Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 125, 10 Cal. Rptr. 3d 121 . *See Community for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 751-752, 109 S. Ct. 2166, 104 L. Ed. 2d 811 ; *Broussard v. L.H. Bossier, Inc.* (5th Cir. 1986) 789 F.2d 1158, 1159 ; *Spirides v. Reinhardt* (D.C. Cir. 1979) 613 F.2d 826, 832, 198 U.S. App. D.C. 93 ; *Hatcher v. Augustus* (E.D.N.Y. 1997) 956 F. Supp. 387, 390 ; *Goudeau v. Dental Health Servs. (M.D.La. 1995)* 901 F. Supp. 1139, 1142 ; *Jeffries v. Deloitte Touche Tohmatsu Intern. (E.D.Pa. 1995)* 893 F. Supp. 455, 458-459 ; *Ali v. L.A. Focus Publication* (2003) 112 Cal. App. 4th 1477, 1485, 5 Cal. Rptr. 3d 791 .

(n46)Footnote 37.2. *Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 126, 10 Cal. Rptr. 3d 121 , citing *Lee v. Mobile County Com'n (S.D.Ala. 1995)* 954 F. Supp. 1540, 1546 , *aff'd without op.*, 103 F.3d 148 ; *Deal v. State Farm County Mut. Ins. Co. of Texas* (5th Cir. 1993) 5 F.3d 117, 118-119 ; *Fields v. Hallsville Independent School Dist.* (5th Cir. 1990) 906 F.2d 1017, 1019 ; *Bampoe v. Coach Stores, Inc. (S.D.N.Y. 2000)* 93 F. Supp. 2d 360, 369-370 ; *E.E.O.C. v. Fawn Vendors, Inc. (S.D.Tex. 1996)* 965 F. Supp. 909, 911 ; *Goudeau v. Dental Health Servs. (M.D.La. 1995)* 901 F. Supp. 1139, 1142 ; *Magnuson v. Peak Technical Services, Inc. (E.D.Va. 1992)* 808 F. Supp. 500, 507 .

(n47)Footnote 37.3. *Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 126, 10 Cal. Rptr. 3d 121 , citing *York v. Ass'n of the Bar* (2d Cir. 2002) 286 F.3d 122, 125-126 ; *Pietras v. Board of Fire Comrs of Farmingville* (2d Cir. 1999) 180 F.3d 468, 473 ; *O'Connor v. Davis* (2d Cir. 1997) 126 F.3d 112, 115-116 ; *Scaglione v. Chappaqua Central School Dist. (S.D.N.Y. 2002)* 209 F. Supp. 2d 311, 314-315 ; *Ali v. L.A. Focus Publication* (2003) 112 Cal. App. 4th 1477, 1486, 5 Cal. Rptr. 3d 791 .

(n48)Footnote 37.4. *See Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 121-131, 10 Cal. Rptr. 3d 121 (state was not liable to firefighter under FEHA for allegedly discriminatory adoption and enforcement of employment regulations governing use of respirators by employees with facial hair).

(n49)Footnote 38. *Gov. Code § 12940(c).*

(n50)Footnote 39. *Gov. Code § 12940(d); 2 Cal. Code Reg. § 7286.5(c).* *but see Alch v. Superior Court* (2004) 122 Cal. App. 4th 339, 396-400, 19 Cal. Rptr. 3d 29 (television screenwriters could not sue talent agencies for age discrimination in violation of FEHA, because FEHA did not create direct liability for age discrimination by employment agencies until passage of amendments effective January 1, 2003, and amendments as they apply to employment agencies in *Gov. Code § 12940(d)* do not apply retroactively).

(n51)Footnote 40. *Gov. Code § 12926(e).*

(n52)Footnote 41. *See Gov. Code §§ 12926(g)* ("labor organization" defined), 12940(b); *2 Cal. Code Reg. § 7286.5(d).*

(n53)Footnote 42. *See Gov. Code § 12926(d); 2 Cal. Code Reg. § 7286.5(a)(5); see also McKeon v. Mercy*

Healthcare Sacramento (1998) 19 Cal. 4th 321, 324-325, 79 Cal. Rptr. 2d 319, 965 P.2d 1189 (religious entity exemption includes religious entities organized under Nonprofit Public Benefit Corporation Law); *DFEH v. Bohemian Club* (1988) FEHC Dec. No. 88-01, pp. 12-15 (1988-1989 CEB FEHC Decisions) (holding that nonprofit organization must be religious to be exempt from FEHA); *see also Arriaga v. Loma Linda University* (1992) 10 Cal. App. 4th 1556 (nonprofit religious corporation excluded from FEHA coverage even if it receives state funds).

(n54)Footnote 43. 2 Cal. Code Reg. § 7286.5(a)(5) (nonprofit religious organization exempt from federal and state income tax is presumed not to be employer); *McKeon v. Mercy Healthcare Sacramento* (1998) 19 Cal. 4th 321, 331, 79 Cal. Rptr. 2d 319, 965 P.2d 1189 (in evaluating religious nature of religious entity organized under Nonprofit Public Benefit Corporation Law and claiming exemption from FEHA, Court noted that entity was exempt from federal and state taxation).

(n55)Footnote 44. *See Gov. Code § 12926.2(c).*

(n56)Footnote 45. *See Kelly v. Methodist Hospital of Southern California* (2000) 22 Cal. 4th 1108, 1116-1117, 95 Cal. Rptr. 2d 514, 997 P.2d 1169 ; *see Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 227-230, 116 Cal. Rptr. 2d 770 .

(n57)Footnote 46. *Schmoll v. Chapman Univ.* (1999) 70 Cal. App. 4th 1434, 1438-1444, 83 Cal. Rptr. 2d 426 .

(n58)Footnote 47. *See McClure v. Salvation Army* (5th Cir. 1972) 460 F.2d 553, 560 (Salvation Army (church) terminated plaintiff's commission as an officer (minister)); *see also Scharon v. St. Luke's Episcopal Presbyterian Hosp.* (8th Cir. 1991) 929 F.2d 360, 362 (ministerial exception extends to church-related institutions that have "substantial religious character"); *See also § 40.10[3].*

(n59)Footnote 48. *Schmoll v. Chapman Univ.* (1999) 70 Cal. App. 4th 1434, 1438-1444, 83 Cal. Rptr. 2d 426 ; *see E.E.O.C. v. Pacific Press Pub. Ass'n* (9th Cir. 1982) 676 F.2d 1272, 1278 (First Amendment not implicated when religious institution makes employment decision about employee whose duties do not go to heart of church's function in manner of minister or seminary teacher, such as dispute between church publishing house and editorial secretary).

(n60)Footnote 49. *Gov. Code § 12926.2(c).* For the definition of "religious corporation," *see Gov. Code § 12926.2(a).*

(n61)Footnote 50. *Gov. Code § 12926.2(b).*

(n62)Footnote 51. *Gov. Code § 12926.2(d).*

(n63)Footnote 52. *See Corp. Code § 5110 et seq.*

(n64)Footnote 53. *Gov. Code § 12926.2(e).*

(n65)Footnote 54. *Gov. Code § 12926.2(f).*

(n66)Footnote 54.1. *Gov. Code § 12940(j)(3).*

(n67)Footnote 54.2. *Lockhart v. MVM, Inc.* (2009) 175 Cal. App. 4th 1452, 1455-1458, 97 Cal. Rptr. 3d 206 (claims under FEHA by former employee of federal contractor operating federal prison on land federal government had purchased from state was properly dismissed under federal enclave doctrine, where neither FEHA nor predecessor statutes existed at time of sale of land to federal government and no congressional action since sale authorized state FEHA claims against employers operating on federal enclaves within California); *Taylor v. Lockheed Martin Corp.* (2000) 78 Cal. App. 4th 472, 478, 481-482, 92 Cal. Rptr. 2d 873 .

(n68)Footnote 54.3. *Lockhart v. MVM, Inc.* (2009) 175 Cal. App. 4th 1452, 1458 n.5, 97 Cal. Rptr. 3d 206 ;

Taylor v. Lockheed Martin Corp. (2000) 78 Cal. App. 4th 472, 92 Cal. Rptr. 2d 873 .

(n69)Footnote 55. *Lockhart v. MVM, Inc.* (2009) 175 Cal. App. 4th 1452, 1458-1460, 97 Cal. Rptr. 3d 206 (although termination was decided and implemented at site admittedly not on federal enclave and employee was informed of her termination at her home, which also was not on federal enclave, summary judgment for employer was proper, where she was employee of federal contractor operating on federal enclave and her employment claims were governed by enclave's law, not law where termination decision was made).

(n70)Footnote 55.1. *Gov. Code § 12940(i)*.

(n71)Footnote 55.2. *Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 131, 10 Cal. Rptr. 3d 121 .

(n72)Footnote 55.3. *Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 131, 10 Cal. Rptr. 3d 121 ; *Fiol v. Doellstedt* (1996) 50 Cal. App. 4th 1318, 1323-1324, 58 Cal. Rptr. 2d 308 .

(n73)Footnote 55.4. *Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 131, 10 Cal. Rptr. 3d 121 ; *Fiol v. Doellstedt* (1996) 50 Cal. App. 4th 1318, 1323-1324, 58 Cal. Rptr. 2d 308 .

(n74)Footnote 55.5. *Reno v. Baird* (1998) 18 Cal. 4th 640, 655, 76 Cal. Rptr. 2d 499, 957 P.2d 1333 .

(n75)Footnote 55.6. *Matthews v. Superior Court* (1995) 34 Cal. App.4th 598, 603-604, 40 Cal. Rptr. 2d 350 .

(n76)Footnote 55.7. *Reno v. Baird* (1998) 18 Cal. 4th 640, 660, 663, 76 Cal. Rptr. 2d 499, 957 P.2d 1333 . *See LeVine v. Weis* (2001) 90 Cal. App. 4th 201, 212-213, 108 Cal. Rptr. 2d 562 (FEHA draws distinction between harassment and discrimination; while employer and any person is prohibited from harassing employee, only employer is prohibited from engaging in improper discrimination); *see also Walrath v. Sprinkel* (2002) 99 Cal. App. 4th 1237, 1241, 121 Cal. Rptr. 2d 806 .

(n77)Footnote 55.8. *Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 10 Cal. Rptr. 3d 121 .

(n78)Footnote 55.9. *Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 132-133, 10 Cal. Rptr. 3d 121 . *See also Trinkle v. California State Lottery* (1999) 71 Cal. App. 4th 1198, 1203, 84 Cal. Rptr. 2d 496 (state is not "person" within meaning of Unfair Competition Law).

(n79)Footnote 55.10. *Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 133, 10 Cal. Rptr. 3d 121 .

(n80)Footnote 56. *See Gov. Code § 12940(a)* (discrimination in employment, hiring, or selection for training leading to employment prohibited); *see also 2 Cal. Code Reg. §§ 7286.5(b)* ("employee" defined), *(h)* ("applicant" defined), 7287.3 (discrimination in considering employment applications prohibited); *see Cassista v. Community Foods, Inc.* (1993) 5 Cal. 4th 1050, 1052-1055, 22 Cal. Rptr. 2d 287, 856 P.2d 1143 (FEHA protects job applicants from retaliation).

(n81)Footnote 57. *See 2 Cal. Code Reg. § 7286.5(b)(5)*.

(n82)Footnote 57.1. *2 Cal. Code Regs. § 7286.5(b)*.

(n83)Footnote 57.2. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1625, 71 Cal. Rptr. 3d 222 .

(n84)Footnote 57.3. *2 Cal. Code Regs. § 7286.5(b)(5)*.

(n85)Footnote 57.4. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1625-1626, 71 Cal. Rptr. 3d 222 .

(n86)Footnote 57.5. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1625, 71 Cal. Rptr. 3d 222 . See *Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 123, 10 Cal. Rptr. 3d 121 (FEHA requires some connection with employment relationship, but connection need not be direct).

(n87)Footnote 57.6. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1626, 71 Cal. Rptr. 3d 222 . See *Mathieu v. Norrell Corp.* (2004) 115 Cal. App. 4th 1174, 1184, 10 Cal. Rptr. 3d 52 .

(n88)Footnote 57.7. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1626, 71 Cal. Rptr. 3d 222 . See *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal. 4th 491, 500-501, 9 Cal. Rptr. 3d 857, 84 P.3d 966 (under statute that expressly excluded independent contractors but did not define "employee," under common law definition, employees supplied by labor contractor to public agency participating in state retirement plan were participants in state plan).

(n89)Footnote 57.8. *Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 124-125, 10 Cal. Rptr. 3d 121 ; *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1626, 71 Cal. Rptr. 3d 222 .

(n90)Footnote 57.9. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 71 Cal. Rptr. 3d 222 .

(n91)Footnote 57.10. *Gov. Code § 12940(j)(4)(A)*. For discussion of covered employers, see [3], above.

(n92)Footnote 57.11. See *Gov. Code § 12940(j)(5)*.

(n93)Footnote 57.12. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1627, 71 Cal. Rptr. 3d 222 . See *Metropolitan Water Dist. v. Superior Court* (2004) 32 Cal. 4th 491, 508, 9 Cal. Rptr. 3d 857, 84 P.3d 966 (replacing established common law test for employment with complete deference to parties' characterization of relationship is improper, especially when issue is one of statutory interpretation); *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal. 3d 943, 951, 88 Cal. Rptr. 175, 471 P.2d 975 (contractual terms not conclusive; key is right to control); *Vernon v. State of California* (2004) 116 Cal. App. 4th 114, 124-125, 10 Cal. Rptr. 3d 121 (no one factor is decisive in determining nature of employment relationship under FEHA).

(n94)Footnote 58. See *Gov. Code § 12926(c)*; 2 Cal. Code Reg. § 7286.5(b)(2), (3).

(n95)Footnote 59. 2 Cal. Code Reg. § 7286.5(b)(1); see *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal. App. 3d 590, 618, 622, 262 Cal. Rptr. 842 ; but see *Sada v. Robert F. Kennedy Medical Ctr.* (1997) 56 Cal. App. 4th 138, 144, 157-160, 65 Cal. Rptr. 2d 112 (fact that plaintiff is independent contractor is irrelevant when plaintiff brings FEHA retaliation claim as job applicant).

(n96)Footnote 60. *Lab. Code § 3353*.

(n97)Footnote 61. *Gov. Code § 12940(j)(1), (4)*.

(n98)Footnote 62. *Gov. Code § 12940(j)(5)*. See *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1624, 71 Cal. Rptr. 3d 222 (as matter of law, social worker did not fall within statutory definition of one providing services pursuant to contract nor was she independent contractor covered by FEHA, where she had no control over means by which she provided her services and was not hired to produce end product or for special skills beyond those normally provided by employer's employees, she was told when and where to report to work and what her job duties would be, she was not compensated for specific result but for her time working alongside facility staff, and she was not customarily engaged in independently established business of providing services to inmates).

(n99)Footnote 63. See *Campbell v. Arco Marine, Inc.* (1996) 42 Cal. App. 4th 1850, 1857-1858, 50 Cal. Rptr. 2d 626 .

(n100)Footnote 64. *Schmoll v. Chapman Univ.* (1999) 70 Cal. App. 4th 1434, 1438-1444, 83 Cal. Rptr. 2d 426 . For further discussion, see [3], above, and § 41.106.

(n101)Footnote 65. *Shephard v. Loyola Marymount University* (2002) 102 Cal. App. 4th 837, 842-847, 125 Cal. Rptr. 2d 829 .

(n102)Footnote 65.1. *Mendoza v. Town of Ross* (2005) 128 Cal. App. 4th 625, 27 Cal. Rptr. 3d 452, 2005 Cal. App. LEXIS 612, *8-*22 (community service officer who volunteered at school was not employee of town for purposes of FEHA, where his service was not result of appointment by town, was not governed by an express or implied contract and was not an apprenticeship; moreover, the absence of any remuneration prevented him from attaining "employee" status under the FEHA).

(n103)Footnote 66. *Gov. Code §§ 12940(a), 12943, 12945.*

(n104)Footnote 67. See *Gov. Code § 12926(o)* ("religious creed" defined); *2 Cal. Code Reg. § 7293.1* (establishing "religious creed" discrimination).

(n105)Footnote 68. See *Gov. Code § 12926(p)* ("sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, and person's gender, as defined in *Pen. Code § 422.56(q)* ("sexual orientation" means heterosexuality, homosexuality, and bisexuality); see also *2 Cal. Code Reg. § 7290.7* ("sex" and "sex stereotype" defined).

(n106)Footnote 69. See *2 Cal. Code Reg. § 7292.1* ("marital status" defined).

(n107)Footnote 70. See *2 Cal. Code Reg. § 7291.2* ("pregnancy, childbirth, or related medical conditions" defined).

(n108)Footnote 71. See *Gov. Code § 12926(i)* ("mental disability" defined), (k) ("physical disability" defined).

(n109)Footnote 72. See *Gov. Code § 12926(h)* ("medical condition" defined; term includes "genetic characteristics").

(n110)Footnote 73. See *Gov. Code § 12926(b)* ("age" defined).

(n111)Footnote 74. *Gov. Code § 12940(a)*; *2 Cal. Code Reg. §§ 7287.1-7287.9.*

(n112)Footnote 75. See *2 Cal. Code Reg. § 7287.4* (adopting federal uniform guidelines on employee testing and other employee-selection procedures); *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 986-987, 236 Cal. Rptr. 716 (applying uniform guidelines); see also *Harris v. Civil Serv. Comm'n* (1998) 65 Cal. App. 4th 1356, 1368-1369, 77 Cal. Rptr. 2d 366 (commission has no legal duty to adopt, use, or validate tests when undisputed evidence showed dramatic disparate impact (almost one-half) far below invalidity threshold of four-fifths rule). For discussion of scope of federal uniform guidelines, see § 40.30.

(n113)Footnote 76. See *Gov. Code § 12940(d).*

(n114)Footnote 77. *Gov. Code § 12951.*

(n115)Footnote 78. *Gov. Code § 12940(h)*; *2 Cal. Code Reg. § 7287.8*. The FEHA also prohibits retaliation for reporting potential neglect or abuse pursuant to *Penal Code § 11161.8*. See *Gov. Code § 12940(e)*. *Penal Code § 11161.8* applies to persons or entities, and their employees, that manage hospitals and receive patients from health or community care facilities.

(n116)Footnote 79. *Gov. Code § 12940(j).*

(n117)Footnote 80. *See Gov. Code § 12940(l).*

(n118)Footnote 81. *See Gov. Code § 12940(m); see also Gov. Code § 12926(n)* ("reasonable accommodation" defined), *(s)* ("undue hardship" defined).

(n119)Footnote 82. *Gov. Code § 12940(n)*; for a discussion of accommodation of disabilities generally, *see § 41.51.*

(n120)Footnote 83. *Gov. Code § 12940(o).*

(n121)Footnote 84. *See Gov. Code §§ 12926(i), (k), 12940(a)(1), (k); 2 Cal. Code Reg. § 7293.8.*

(n122)Footnote 85. *See Gov. Code § 12940(a)(2).*

(n123)Footnote 86. *See Gov. Code §§ 12940(a)(3), 12993(b); 2 Cal. Code Reg. § 7292.3.*

(n124)Footnote 87. *See 2 Cal. Code Reg. § 7289.4.*

(n125)Footnote 88. *See Gov. Code § 12940(l); 2 Cal. Code Reg. § 7293.2.*

(n126)Footnote 89. *See Gov. Code § 12940(a)(5); 2 Cal. Code Reg. § 7295.3.*

(n127)Footnote 90. *See Gov. Code §§ 12940(a)(4), 12993(b); 2 Cal. Code Reg. § 7290.8.*

(n128)Footnote 91. *See Gov. Code § 12940; 2 Cal. Code Reg. § 7286.7(a).*

(n129)Footnote 92. *See 2 Cal. Code Reg. § 7286.7(b).*

(n130)Footnote 93. *See 2 Cal. Code Reg. § 7286.7(c).*

(n131)Footnote 94. *Gov. Code § 12940; 2 Cal. Code Reg. § 7286.7(d).*

(n132)Footnote 95. *2 Cal. Code Reg. § 7286.7(e).*

(n133)Footnote 96. *See 2 Cal. Code Reg. § 7286.7(f).*



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part B. STATE LAW

2-40 California Employment Law § 40.11

AUTHOR: By David M. Youngsmith, J.D.

§ 40.11 California Equal Pay Act

[1] Governing Law and Scope of Coverage

The California Equal Pay Actⁿ¹ prohibits wage discrimination based solely on sex. The act is not a part of the FEHA;ⁿ² it is included in the wage-and-hour provisions of the Labor Code. The act codifies the principle that an employee is entitled to equal pay for equal work without regard to gender, on jobs requiring equal skill, effort, and responsibility, and performed under similar working conditions.ⁿ³

For further discussion of the substantive provisions of the California Equal Pay Act, *see* Chapter 41, Part D. For a detailed discussion relating to sex as a prohibited basis for discrimination generally, *see* Chapter 41, Part B.

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

Alternative remedies to the California Equal Pay Act include the federal Equal Pay Act,ⁿ⁴ the FEHA,ⁿ⁵ and Title VII.ⁿ⁶ The strengths and weaknesses of each remedial scheme, as applied to a particular employee's claim, should be assessed before a choice is made. *Commentary by Bill Lann Lee.*

[2] Enforcement and Remedies

The act is enforced by the Division of Labor Standards Enforcement (DLSE) of the Department of Industrial Relations.ⁿ⁷ The DLSE must investigate complaints filed under the act by an employeeⁿ⁸ and may commence and prosecute civil actions on behalf of the employee, or an affected group of employees, to recover unpaid wages and liquidated damages.ⁿ⁹

An aggrieved employee may also file a civil action to recover back wages, interest, costs, and attorney's fees,ⁿ¹⁰ without exhausting any administrative remedies.ⁿ¹¹ However, if an aggrieved employee consents to administrative action, that employee waives his or her private cause of action unless the Department of Industrial Relations or the DLSE dismisses the employee's complaint without prejudice.ⁿ¹² The employee may intervene in an action brought by the DLSE, or may commence an independent action, if the DLSE does not resolve the employee's claim within 180

days after the date the complaint was filed.ⁿ¹³ For a detailed discussion relating to judicial actions by private parties under the California Equal Pay Act, *see* Chapter 43, Part A.

An employer who violates the act is liable for unpaid wages and interest, together with liquidated damages (additional amount equal to wages and interest deprived) and costs.ⁿ¹⁴ An employee who prevails in a private action is entitled to attorney's fees.ⁿ¹⁵ An employer who willfully violates the act may also be subject to criminal sanctions.ⁿ¹⁶

[3] Employers Covered and Exempted

The California Equal Pay Act, unlike the FEHA,ⁿ¹⁷ contains no requirement that an employer have a minimum number of employees to be covered by its provisions. The act has been applied to both publicⁿ¹⁸ and privateⁿ¹⁹ employers. Thus, the act applies to all California employers, without exception.

[4] Employees Covered and Exempted

The California Equal Pay Act applies to individuals employed in any occupation, trade, or industry, except for individuals employed as outside salespersons, whether compensation is measured by time, piece, or otherwise.ⁿ²⁰ For discussion of the definition of outside salespersons, *see* Chapter 2.

[5] Prohibited Employment Practices

The California Equal Pay Act prohibits an employer from paying a wage rate less than the rate paid to employees of the opposite sex in the same establishment for equal work on jobs that require the same skill, effort, and responsibility, and which are performed under similar working conditions.ⁿ²¹ For a detailed discussion of employment practices prohibited by the California Equal Pay Act, *see* Chapter 41, Parts B and D.

[6] Defenses

The California Equal Pay Act permits wage differentials based on seniority or merit systems, systems that measure earnings by quantity or quality of production, or on bona fide factors other than sex.ⁿ²² For a detailed discussion of defenses under the California Equal Pay Act, *see* Chapter 41, Part E.

Legal Topics:

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

Labor & Employment LawEqual PayGeneral OverviewLabor & Employment LawEqual PayEqual Pay ActGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 1197.5.*

(n2)Footnote 2. *See Gov. Code § 12900 et seq.*, discussed in § 40.10.

(n3)Footnote 3. *See Jones v. Tracy Sch. Dist.* (1980) 27 Cal. 3d 99, 104, 165 Cal. Rptr. 100, 611 P.2d 441 ; *Lab. Code § 1197.5(a).*

(n4)Footnote 4. *See 29 U.S.C. § 206(d)*, discussed in § 40.22.

(n5)Footnote 5. *See Gov. Code § 12900 et seq.*, discussed in § 40.10.

(n6)Footnote 6. *See 42 U.S.C. § 2000e et seq.*, discussed in § 40.20.

(n7)Footnote 7. *Lab. Code § 1197.5(c); see Lab. Code § 79* (creation of Division of Labor Standards Enforcement within Department of Industrial Relations).

(n8)Footnote 8. *See Lab. Code § 1197.5(e)* (investigation procedure is same as for discrimination complaints under *Lab. Code § 98.7(b)*).

(n9)Footnote 9. *Lab. Code § 1197.5(e), (f)*.

(n10)Footnote 10. *Lab. Code § 1197.5(g)*.

(n11)Footnote 11. *Bass v. Great Western Sav. & Loan Assn. (1976) 58 Cal. App. 3d 770, 773, 130 Cal. Rptr. 123* .

(n12)Footnote 12. *Lab. Code § 1197.5(f)*.

(n13)Footnote 13. *Lab. Code § 1197.5(f)*.

(n14)Footnote 14. *Lab. Code § 1197.5(b), (c), (f), (g)*.

(n15)Footnote 15. *Lab. Code § 1197.5(g); see Jones v. Tracy Sch. Dist. (1980) 27 Cal. 3d 99, 118-122, 165 Cal. Rptr. 100, 109-111, 611 P.2d 441* (award of attorney's fees mandatory).

(n16)Footnote 16. *See Lab. Code § 1199.5*.

(n17)Footnote 17. *See Gov. Code § 12926(d)* (private employers must employ five or more employees for FEHA to apply).

(n18)Footnote 18. *See Jones v. Tracy Sch. Dist. (1980) 27 Cal. 3d 99, 165 Cal. Rptr. 100, 611 P.2d 441* .

(n19)Footnote 19. *See Bass v. Great Western Sav. & Loan Assn. (1976) 58 Cal. App. 3d 770, 130 Cal. Rptr. 123* .

(n20)Footnote 20. *See Lab. Code § 1171* (defining scope of *Lab. Code §§ 1178.5-1199.5*, relating to wages, hours, and working conditions).

(n21)Footnote 21. *Lab. Code § 1197.5(a)*.

(n22)Footnote 22. *Lab. Code § 1197.5(a)*.



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part B. STATE LAW

2-40 California Employment Law § 40.12

AUTHOR: By David M. Youngsmith, J.D.

§ 40.12 Unruh/Ralph Acts, Public Access of Disabled Persons, and Prohibited Business Transactions

[1] The Unruh Civil Rights Act

The Unruh Civil Rights Act (Unruh Act)ⁿ¹ guarantees equal accommodations, advantages, facilities, privileges, or services in all business establishments to "all persons," regardless of sex, race, color, religion, ancestry, national origin, disability or medical condition. The Unruh Act does not merely prohibit exclusionary practices; it requires equal treatment,ⁿ² and it applies to "all business establishments of every kind whatsoever,"ⁿ³ except for "truly private" relationships that take place outside "public view."ⁿ⁴ However, nothing in the Unruh Act may be construed to require any construction, alteration, repair, or modification to a structure that is not otherwise required by other laws.ⁿ⁵

Despite the broad language of this statute, both the FEHC and the courts have indicated that the Unruh Act does not apply to the employment relationship or to claims of employment discrimination.ⁿ⁶ Although claims under the act may be filed with the DFEH,ⁿ⁷ as well as in court,ⁿ⁸ such claims typically arise outside the employment relationship, and involve issues such as housing discrimination against children and families,ⁿ⁹ or refusals to do business with homosexualsⁿ¹⁰ and persons of unconventional appearance or dress.ⁿ¹¹

■ CONSULTANT'S COMMENT:

In light of the express language of the Unruh Act and the FEHA, the holding that the Unruh Act doesn't apply to employment discrimination is somewhat surprising. The FEHA expressly provides that the denial of rights created by the Unruh Act is unlawful under the FEHA,ⁿ¹² and that the FEHA is not intended to limit the application of the Unruh Act.ⁿ¹³ Thus, the two statutes might have been interpreted to make the Unruh Act an alternative remedy for claims of employment discrimination. However, the California Supreme Court's decision in *Alcorn v. Anbro Engineering, Inc.*,ⁿ¹⁴ which was based on the former Fair Employment Practices Act and predated the enactment of *Government Code Section 12948* (making violations of the Unruh Act unlawful under the FEHA), has been consistently reaffirmed in subsequent cases under the FEHA, and the FEHC itself has declined to extend the reach of the Unruh Act to the employment relationship.ⁿ¹⁵ Thus, the operative intent of the FEHA appears to be to "occupy the field of regulation of discrimination in employment ... encompassed by the provisions of [the

FEHA]"ⁿ¹⁶ and to make the Unruh Act the basis for discrimination claims in *other* business relationships and public accommodations. *Commentary by Erica B. Grubb.*

However, a claim under the Unruh Act that originally arises out of an employment relationship context but is not against the employer may be cognizable under the Unruh Act. For example, in *Alch v. Superior Court*,^{n16.1} television screenwriters sued both employers, *i.e.*, networks and studios, for age discrimination, alleging they could not obtain television-writing opportunities with the networks and studios because of their age. They also sued talent agencies for age discrimination under the Unruh Act. The court held that no employer-employee relationship existed between the screenwriters and the talent agencies. However, because the agencies were business establishments providing a service to their clients, and the Unruh Act on its face forbids them from discriminating in the provision of that service, the screenwriters could assert a claim of age discrimination against the agencies under the Unruh Act.

Relief under the Unruh Act is available when the plaintiff is in a relationship with the offending business establishment similar to that of the customer in the customer-proprietor relationship that the Act and its predecessors have most commonly covered.^{n16.2} One court has held that a physician may assert an Unruh Act claim against the hospital where he treated patients, because the physician did not have the type of employment relationship with the hospital that would have foreclosed relief.^{n16.3}

[2] The Ralph Civil Rights Act and the Bane Civil Rights Act

Because Civil Code section 51.7, also known as the Ralph Civil Rights Act, and section 52.1, also known as the Tom Bane Civil Rights Act, were not enacted as part of the Unruh Civil Rights Act, there is no bar to asserting a violation of those statutory protections against discriminatory violence and intimidation^{n16.4} and against denial of civil rights by means of threats and intimidation^{n16.5} as a separate cause of action in an action arising out of the employment relationship.^{n16.6]}

The Ralph Civil Rights Actⁿ¹⁷ guarantees all persons in California the right to be free from violence, or intimidation by threat of violence, because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation,ⁿ¹⁸ age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics.ⁿ¹⁹ Like the list of protected characteristics in the Unruh Act, the bases of discrimination in the Ralph Act are illustrative rather than restrictive.ⁿ²⁰

As with the Unruh Act, it is an unlawful practice under the FEHA to deny Ralph Act rights,ⁿ²¹ and the DFEH is empowered to investigate complaints alleging Ralph Act violations.ⁿ²² Ralph Act violations are not normally associated with employment discrimination, but violations may occur in that context. For example, in a given factual setting, an employee subject to sexual harassment might also have been subject to violence or threats of violence.

The Tom Bane Civil Rights Act^{n22.1} was enacted in the 1980s, with the goal of deterring violence based on racial, ethnic, religious, or other minority status.^{n22.2} The Act permits the government to bring an action to enjoin crimes of hate violence when they are threatened and to seek substantial civil penalties of \$25,000 in favor of each individual whose rights have been violated.ⁿ²³ The Act also permits individuals to bring an action for damages against someone who "interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion" with the exercise of that individual's rights.ⁿ²⁴

At least one other court has upheld the application of the Ralph Act in the context of an employment action. In *Winarto v. Toshiba America Electronics Components, Inc.*,ⁿ²⁵ the Ninth Circuit held that, because substantial evidence supported the jury's verdict in favor of a former employee's cause of action based on *Civil Code Sections 51.7, 52, and 52.1*, the district court erred in vacating that verdict.ⁿ²⁶ The evidence established that a fellow employee had committed and threatened to commit violent acts against the plaintiff. The court found that a reasonable jury could have found that the wrongdoer employee was motivated in his violence by gender or national origin animus and that he had targeted the

plaintiff, at least partly because she spoke with an accent and was the only woman in his work group. The court also marginally considered the liability of the plaintiff's supervisor and employer.ⁿ²⁷ The court found that as a matter of law, the supervisor could be liable for "aiding, inciting, or conspiring in the denial" of plaintiff's rights under Section 51.7.ⁿ²⁸ The court then held that it followed that the employer could be liable for the acts of its agent. Finally, the court held that the record supported the jury's finding that the supervisor and the employer aided the employee in depriving the plaintiff of her rights under the Ralph Act. The court also allowed for the possibility that punitive damages could be awarded if the record showed that an officer, director, or managing agent of the employer ratified or authorized wrongful conduct.ⁿ²⁹

Like the Unruh Act, the Ralph Act may be enforced by private civil actionⁿ³⁰ and, under some circumstances, by the Attorney General or any district or city attorney.ⁿ³¹ However, nothing in the Ralph Act may be construed to require any construction, alteration, repair, or modification to a structure that is not otherwise required by other laws.ⁿ³²

[3] Public Access of Disabled Persons

It is also an unlawful practice under the FEHAⁿ³³ for a person to deny or to aid, incite, or conspire in the denial of the rights created by *Civil Code Sections 54, 54.1, and 54.2*, relating to the rights of disabled persons or persons with medical conditions to full and equal access to all public accommodations.ⁿ³⁴ Presumably, the same arguments supporting the holdings that the proscriptions of section 51 of the Unruh Actⁿ³⁵ do not apply to employment discrimination cases would also apply to violation of the prohibition against denying equal access to public accommodations to disabled persons. If so, violations of *Civil Code Sections 54, 54.1, and 54.2* would not provide grounds for a cause of action in an employment discrimination action.ⁿ³⁶

[4] Prohibited Business Transactions

It is also an unlawful business practice under the FEHAⁿ³⁷ for a business establishment to discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person, firm, organization, or other business entity in California because of the race, creed, religion, color, national origin, sex, disability or medical condition of the person or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers. Similarly, it is an unlawful business practice to take any of the above actions based on the perception that the person has one or more of these characteristics, or because the person is associated with a person who has (or is perceived to have) any of these characteristics.ⁿ³⁸ The FEHC is authorized to receive, investigate, and conciliate complaints alleging violations of this prohibition.ⁿ³⁹

Legal Topics:

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

Civil Rights Law Civil Rights Acts General Overview Labor & Employment Law General Overview

FOOTNOTES:

(n1)Footnote 1. *Civ. Code* § 51.

(n2)Footnote 2. *See Koire v. Metro Car Wash* (1985) 40 Cal. 3d 24, 29, 30, 219 Cal. Rptr. 133, 707 P.2d 195 (prohibiting sex-based price discounts).

(n3)Footnote 3. *Civ. Code* § 51; *see O'Connor v. Village Green Owners Ass'n* (1983) 33 Cal. 3d 790, 795, 191 Cal. Rptr. 320, 662 P.2d 427 ("business" is "often synonymous with calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain").

(n4)Footnote 4. *See Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal. 3d 72, 84 n.14, 219 Cal. Rptr. 150, 707 P.2d 212 (dictum; "continuous, personal, and social" relationships); *Curran v. Mount Diablo Council of the Boy*

Scouts (1998) 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (Boy Scouts do not constitute business establishment); see also *Board of Dirs. v. Rotary Club of Duarte* (1987) 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474, 484 (factors to determine whether association is "truly private" include size, purpose, selectivity, and whether others are excluded from critical aspects of relationship).

(n5)Footnote 5. *Civ. Code* § 51.

(n6)Footnote 6. See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal. 3d 493, 497-498, 86 Cal. Rptr. 88, 468 P.2d 216 ; *Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal. 3d 72, 83 n.12, 219 Cal. Rptr. 150, 707 P.2d 212 (dictum); *People v. Levinson* (1984) 155 Cal. App. 3d Supp. 13, 19 , 203 Cal. Rptr. 426 (dictum); *Bass v. County of Butte* (9th Cir. 2006) 458 F.3d 978, 980-983 (California courts have historically rejected attempts by plaintiffs to expand scope of Unruh Act to include employment claims, and amendment to Unruh Act in 1992 did not expand scope of Act to include employment discrimination); *Jurado v. Eleven-Fifty Corp.* (C.D. Cal. 1985) 630 F. Supp. 569, 573 , *aff'd*, 813 F.2d 1406 (9th Cir. 1987) ; *DFEH v. Children's Hosp. & Health Ctr.* (1987) FEHC Dec. No. 87-24, at 8-9.

(n7)Footnote 7. See *Civ. Code* § 52(f); see also *Gov. Code* § 12948 (violation of Unruh Act constitutes violation of FEHA).

(n8)Footnote 8. See *Civ. Code* § 52(a) (private action by aggrieved individual); see also *Civ. Code* § 52(c), (d) (actions for "conduct of resistance" to full enjoyment of Unruh Act rights).

(n9)Footnote 9. See, e.g., *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal. 3d 721, 725, 732, 180 Cal. Rptr. 496, 640 P.2d 115 .

(n10)Footnote 10. See *Rolon v. Kulwitzky* (1984) 153 Cal. App. 3d 289, 291, 200 Cal. Rptr. 217 .

(n11)Footnote 11. See *In re Cox* (1970) 3 Cal. 3d 205, 217-218, 90 Cal. Rptr. 24, 474 P.2d 992 (characteristics protected by Unruh Act are "illustrative" rather than exclusive).

(n12)Footnote 12. See *Gov. Code* § 12948.

(n13)Footnote 13. See *Gov. Code* § 12993(c).

(n14)Footnote 14. *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal. 3d 493, 497-498, 86 Cal. Rptr. 88, 468 P.2d 216 .

(n15)Footnote 15. See *Department of Fair Employment and Housing v. Children's Hosp. and Health Ctr.* (1987) FEHC Dec. No. 87-24, at 8-9.

(n16)Footnote 16. See *Gov. Code* § 12993(c).

(n17)Footnote 16.1. *Alch v. Superior Court* (2004) 122 Cal. App. 4th 339, 391-396, 19 Cal. Rptr. 3d 29 .

(n18)Footnote 16.2. *Strother v. Southern California Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859, 874 .

(n19)Footnote 16.3. *Payne v. Anaheim Memorial Hospital* (2005) 130 Cal. App. 4th 729, 30 Cal. Rptr. 3d 230 (2005) . Compare *Johnson v. Riverside Healthcare System, LP* (9th Cir. 2008) 534 F.3d 1116, 1124-1127 (physician's claims under Unruh Act against hospital at which he treated patients were foreclosed by fact that his relationship with hospital was materially indistinguishable from that of employee and not similar to that of customer in customer-proprietor relationship, where, unlike situation in *Payne*, hospital compensated physician and controlled manner of his practice).

(n20)Footnote 16.4. *Civ. Code* § 51.7.

(n21)Footnote 16.5. *Civ. Code* § 52.1.

(n22)Footnote 16.6. *Stamps v. Superior Court* (2006) 136 Cal. App. 4th 1441, 1445-1459, 39 Cal. Rptr. 3d 706 (former African-American employee of mining company could allege wrongful termination in violation of public policy, retaliation in violation of public policy, and violation of *Civ. Code* §§ 51.7, 52.1).

(n23)Footnote 17. *Civ. Code* § 51.7, 52.

(n24)Footnote 18. *See Civ. Code* § 51.7(b) ("sexual orientation" means heterosexuality, homosexuality, or bisexuality).

(n25)Footnote 19. *Civ. Code* § 51.7(a).

(n26)Footnote 20. *Civ. Code* § 51.7(a).

(n27)Footnote 21. *See Gov. Code* § 12948.

(n28)Footnote 22. *See Gov. Code* § 12930(f)(2); *see also Civ. Code* § 52(f) (person aggrieved by Ralph Act violation permitted to file DFEH complaint pursuant to *Gov. Code* § 12948).

(n29)Footnote 22.1. *Civ. Code* § 52.1.

(n30)Footnote 22.2. *Stamps v. Superior Court* (2006) 136 Cal. App. 4th 1441 .

(n31)Footnote 23. *Civ. Code* § 52.1.

(n32)Footnote 24. *Civ. Code* § 52.1.

(n33)Footnote 25. *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276 .

(n34)Footnote 26. *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1288-1290 .

(n35)Footnote 27. *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1290 n.16 .

(n36)Footnote 28. *Civ. Code* § 52(b).

(n37)Footnote 29. *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1292 , citing *Civ. Code* § 3294.

(n38)Footnote 30. *See Civ. Code* § 52(b); *see also Civ. Code* § 52.2 (action under *Civ. Code* § 52 or 54.3 may be brought in small claims court if damages sought do not exceed jurisdictional limits stated in *Code Civ. Proc.* §§ 116.220, 116.221). For the standard jury instruction on the essential factual elements in a civil action brought under the Ralph Act, *see* Judicial Council of California Civil Jury Instructions, CACI 3032 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form on a claim under the Ralph Act, *see* Judicial Council of California Civil Jury Instructions, CACI VF-3013 (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n39)Footnote 31. *See Civ. Code* § 52(c), (d).

(n40)Footnote 32. *Civ. Code* § 52(g).

(n41)Footnote 33. *Gov. Code* § 12940 *et seq.*

(n42)Footnote 34. *See Gov. Code* § 12948.

(n43)Footnote 35. *Civ. Code* § 51.

(n44)Footnote 36. *See Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal. 3d 493, 497-498, 86 Cal. Rptr. 88, 468 P.2d 216 ; *Bass v. County of Butte* (9th Cir. 2006) 458 F.3d 978, 980-983 (amendment to Disabled Persons Act in 1996 did not expand scope of act to include employment discrimination); *see also* [1] and [2], *above*.

(n45)Footnote 37. *Gov. Code* § 12940 *et seq.*

(n46)Footnote 38. *Gov. Code* § 12948; *Civ. Code* § 51.5.

(n47)Footnote 39. *Gov. Code* § 12930(f)(2).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part B. STATE LAW

2-40 California Employment Law § 40.13

AUTHOR: By David M. Youngsmith, J.D.

§ 40.13 Government Code Section 11135--Prohibition Against Discrimination in State-Funded Program or Activities

[1] Governing Law and Scope of Coverage

Under *Government Code Section 11135*, employers undertaking programs or activities that are funded directly by the state, and employers that receive any financial assistance from the state, may not unlawfully deny benefits or discriminate on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation color, or physical or mental disability.ⁿ¹ As used in Section 11135, the prohibition of discrimination based on race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability includes a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.^{n1.1}

The Secretary of the Health and Welfare Agency, together with the FEHC, have established regulations determining what persons are protected by *Government Code Sections 11135-11139.5*, and what practices are discriminatory.ⁿ² In addition, the FEHC regulations interpreting and applying the FEHAⁿ³ are incorporated by reference into the Health and Welfare Agency's regulations. Thus, any act or omission contrary to the FEHA regulations is also a violation of the regulations implementing *Government Code Section 11135*.ⁿ⁴ For a discussion of the FEHC regulations, see § 40.10.

Pursuant to *Government Code Section 11135(b)*, with respect to discrimination on the basis of disability, state-funded programs and activities must meet the protections and prohibitions contained in Section 202 of the Americans With Disabilities Actⁿ⁵ and its rules and regulations,ⁿ⁶ unless California law provides greater protection, in which case, the stronger law applies.ⁿ⁷ The applicable ADA provision prohibits the discrimination against, or the exclusion of any qualified individual with a disability from participating in or obtaining the benefits of the services, programs, or activities of a public entity.ⁿ⁸ As used in *Government Code section 11135*, "disability" means any mental or physical disability as defined in *Government Code section 12926*.ⁿ⁹ State governmental entities, including the California State University,^{n9.1} must comply with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973ⁿ¹⁰ and regulations implementing that Act.ⁿ¹¹ in developing, procuring, maintaining, or using electronic or information

technology, indirectly or through the use of state funds by other entities. Any entity that contracts with a state or local entity subject to *Government Code Section 11135* for the provision of electronic or information technology or the provision of related services must agree to respond to and resolve any complaint brought to its attention regarding accessibility of its products or services.ⁿ¹²

A "program or activity" is any project, action, or procedure undertaken directly by recipients of state support,ⁿ¹³ or indirectly by recipients through others by contracts, arrangements, or agreements, with respect to the public generally, or with respect to any private or public entity.ⁿ¹⁴ *Government Code Sections 11135 to 11139.5* apply to employment discrimination, because the "provision of employment" is a "program or activity."ⁿ¹⁵ In sharp contrast, the Ninth Circuit, while acknowledging a split among the circuit courts, holds that Title II of the ADA, discussed above, does not apply to employment.ⁿ¹⁶

A program or activity is "funded directly by the state" if there is any payment, transfer, or allocation of state funds to any recipient.ⁿ¹⁷ "State financial assistance" means any grant, entitlement, loan, cooperative agreement, contract, or any other arrangement by which a state agency provides, or makes otherwise available, aid to recipients in the following forms:ⁿ¹⁸

1. Funds;
2. Services of state personnel; or
3. Real or personal property, or any interest in or use of such property.

An "interest in or use of" real or personal property includes transfers or leases for less than fair market value, or for reduced consideration. It also includes proceeds from a subsequent transfer or lease if the state share of the property's fair market value is not returned to the state.ⁿ¹⁹

State contractors and subcontractors for public works, goods, or services also must comply with the nondiscrimination and contract compliance provisions of the FEHA.ⁿ²⁰ However, the FEHA requires that the rules and regulations promulgated under the FEHA must be coordinated with *Government Code Sections 11135-11139.5* and the Health and Welfare Agency's implementing regulations.ⁿ²¹ As a practical matter, the various rules and regulations are internally consistent.

[2] Enforcement and Remedies

Recipients of state funds must submit compliance reports to the state agency administering the funded program or activity.ⁿ²² Failure to comply with reporting requirements constitutes noncompliance with the recipient's obligation under *Government Code Sections 11135 to 11139.5* and grounds for sanctions by the responsible agency.ⁿ²³

Any person, including an interested third party, may file a discrimination complaint with the administering agency.ⁿ²⁴ However, if a complaint alleges employment discrimination only, the FEHC and DFEH have exclusive investigative and adjudicative authority.ⁿ²⁵ If a complaint alleges both employment discrimination and discrimination in other areas covered under *Government Code Sections 11135 to 11139.5*,ⁿ²⁶ the DFEH and FEHC must proceed according to their own statutory authority with respect to the employment discrimination. The administering agency must proceed against the other types of discrimination alleged.ⁿ²⁷ In fact, separate complaints must be filed with the DFEH and the state agency.ⁿ²⁸ For a general discussion of enforcement procedures and remedies under the FEHA, *see* § 40.10[2]. For a detailed discussion relating to the powers and functions of the DFEH and FEHC, *see* Chapter 42, Part B.

Although the FEHC's exclusive authority to fashion remedies for employment discrimination is not limited by *Government Code Sections 11135 to 11139.5* or the Health and Welfare Agency's implementing regulations, the

administering agency must determine from the FEHC's findings of fact the appropriate action to take.ⁿ²⁹ Thus, if the FEHC determines that a violation has occurred, the administering agency must, among other things, curtail state funding in whole or in part.ⁿ³⁰ Also, the recipient must take such remedial action as the administering agency deems necessary to overcome the effects of the violation.ⁿ³¹

Individuals may also seek judicial review of agency decisions under *Government Code Sections 11135-11139.5*.ⁿ³² However, since the DFEH and the FEHC have exclusive authority over employment discrimination, the FEHA procedure for seeking judicial review is presumably the one that must be used for such claims.ⁿ³³ For a general discussion of FEHA enforcement, *see* § 40.10[2]. Administrative proceedings before the FEHC are discussed in detail in Chapter 42, Part B.

At least one California court of appeal decision has held that there is no private right to bring a civil action under *Government Code Section 11135*.ⁿ³⁴

[3] Employers Covered and Exempted

As discussed in [1][a], *above*, *Government Code Sections 11135 to 11139.5* apply to all recipients of state funds or financial assistance.ⁿ³⁵ However, the Health and Welfare Agency's implementing regulations define a "recipient" as any contractor, local agency, or person who regularly employs five or more persons, and who receives state support in an amount in excess of \$10,000 in the aggregate per state fiscal year, or in an amount in excess of \$1,000 per transaction. The support may come through grants, contracts, or otherwise, directly or through another recipient.ⁿ³⁶

A "contractor" is a person or local agency that receives state support under contract or subcontract, including prime contractors and subcontractors at any tier.ⁿ³⁷ A "local agency" is a public district, public corporation, authority, agency, board, commission, county, city, city and county, school district, or other public entity.ⁿ³⁸ A "person" is any individual, proprietorship, firm, partnership, joint venture, syndicate, corporation, association, committee, legal representative, trustee, trustee in bankruptcy, receiver, and any other organization or group of persons acting in concert.ⁿ³⁹

Government Code Sections 11135-11139.5 do not apply to employers who do not receive state support,ⁿ⁴⁰ to employers who do not regularly employ five or more persons,ⁿ⁴¹ or to state agencies.ⁿ⁴² However, state agencies may look to the Health and Welfare Agency's implementing regulations for guidance in the administration of their programs and activities.ⁿ⁴³

[4] Employees Covered and Exempted

Government Code Section 11135 broadly declares that "no person" in California may be subject to unlawful discrimination under any state-supported program or activity.ⁿ⁴⁴ Thus, *any* person who receives, applies for, or is unlawfully deterred from receiving or applying for, the benefits of, or employment under, a program or activity that receives state support is an "ultimate beneficiary" of *Government Code Sections 11135-11139.5*.ⁿ⁴⁵ However, state employees are not covered by *Government Code sections 11135 to 11139.5*, because state agencies are not "recipients" of state support.ⁿ⁴⁶

[5] Prohibited Employment Practices

Employers who receive state support may not unlawfully discriminate on the basis of any protected characteristic listed in [1][a], *above*, in any state-funded program or activity.ⁿ⁴⁷ Unlawful discriminatory practices include the following:ⁿ⁴⁸

1. Denying the opportunity to participate in, or benefit from, an aid, benefit,ⁿ⁴⁹ or service;

2. Affording the opportunity to participate in, or benefit from, an aid, benefit, or service;
3. Providing an aid, benefit, or service that is not as effective in affording an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement;
4. Providing different or separate aid, benefits, or services to a person, or to any class of persons, than is provided to others, or to provide aid, benefits, or services at a different time, unless that action is clearly necessary to provide those persons with an equal opportunity to receive as truly effective aid, benefits, or services as those provided to others;
5. Aiding or perpetuating discrimination by transferring state support to another recipient that discriminates in providing aid, benefit, or service;
6. Excluding a person from participation as a member of a planning or advisory board;ⁿ⁵⁰
7. Otherwise limiting a person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service resulting from a program or activity;ⁿ⁵¹
8. Denying the opportunity to participate in "programs or activities [that] are not separate or different, despite the existence of permissibly separate or different programs or activities";

■ **CONSULTANT'S COMMENT:**

This language is somewhat unclear, and no reported cases have interpreted it. The likely intent is to preserve state-funded training programs or other activities that are designed to benefit particular groups (such as welfare recipients or certain handicapped individuals), without authorizing discriminatory or exclusionary policies in state-funded programs or activities that are not targeted in such ways.
Commentary by Erica B. Grubb.

9. Utilizing criteria or methods of administration that (1) have the purpose or effect of discrimination on the basis of a protected classification; (2) have the purpose or effect of defeating or substantially impairing the objectives of a recipient's program with respect to a person belonging to a protected classification; or (3) perpetuate discrimination by another recipient on the basis of a protected classification; or
10. Making or permitting the selection of facility sites or locations that have the purpose or effect of (1) excluding from, denying the benefits of, or otherwise discriminating under, any program or activity, or (2) defeating or substantially impairing the objectives of a recipient's program with respect to a person belonging to a protected classification.

[6] Defenses

As discussed in [3][a] and [4][a] above, *Government Code sections 11135 to 11139.5* do not apply to state agencies or employers who regularly employ fewer than five employees.ⁿ⁵² The Health and Welfare implementing regulations also contain exemptions and exceptions. Thus, the proscription against discrimination based on religion does not apply to the religious activities of nonprofit religious corporations or organizations.ⁿ⁵³ Also, it is not a discriminatory practice for a recipient to take an otherwise prohibited actionⁿ⁵⁴ that is based on a factor other than age, even if that action has a disproportionate effect on a protected age group. However, the other factor must bear a direct and substantial relationship to the normal operation of the program or activity, or to the achievement of a statutory objective.ⁿ⁵⁵

Substantive defenses to employment discrimination in general are discussed in detail in Chapter 41, Part E.

Legal Topics:

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

Labor & Employment Law Discrimination General Overview Labor & Employment Law Discrimination Disability Discrimination General Overview

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 11135(a)*; *22 Cal. Code Reg. § 98100*; *see 22 Cal. Code Reg. §§ 98006-98008* (duration of obligation depends on type of state support). *See also Gov. Code § 11135(e)*, defining "sex" and "sexual orientation" as used in § 11135 as having the same meanings as those terms are defined in *Gov. Code § 12925(p),(q)*.

(n2)Footnote 1.1. *Gov. Code § 11135(f)*.

(n3)Footnote 2. *See Gov. Code § 11139.5*; *22 Cal. Code Reg. § 98000 et seq.*; *see also Gov. Code §§ 11138* (state agencies that enter into public service contracts exceeding \$100,000 per year required to adopt their own rules and regulations to carry out purpose of *Gov. Code §§ 11135-11139.5*), *11340 et seq.* (standards for adopting agency regulations); *22 Cal. Code Reg. §§ 98302* (requirements for adopting agency regulations), *98304* (process for adopting agency regulations), *98305* (review of agency regulations).

(n4)Footnote 3. *See 2 Cal. Code Reg. § 7285.0 et seq.*

(n5)Footnote 4. *See 22 Cal. Code Reg. § 98400.*

(n6)Footnote 5. *See 42 U.S.C. § 12131 et seq.*

(n7)Footnote 6. *See 28 C.F.R. § 35.101 et seq.*

(n8)Footnote 7. For general discussion of state and federal laws that may contemporaneously apply to employers who discriminate against disabled employees or applicants, *see ch. 41, pt. B.*

(n9)Footnote 8. *42 U.S.C. § 12132.*

(n10)Footnote 9. *Gov. Code § 11135(c)(1)*; for the definition of "disability" under *Gov. Code § 12926*, *see § 41.32[2][c]*.

(n11)Footnote 9.1. *See Gov. Code § 11135(c)(2)*.

(n12)Footnote 10. *29 U.S.C. § 794d*. For discussion of the federal Rehabilitation Act, *see § 40.23*.

(n13)Footnote 11. *Gov. Code § 11135(d)(2)*. *See Part 1194 of Title 36 of the Federal Code of Regulations.*

(n14)Footnote 12. *Gov. Code § 11135(d)(3)*.

(n15)Footnote 13. *See discussion in [3], below.*

(n16)Footnote 14. *22 Cal. Code Reg. § 98010.*

(n17)Footnote 15. *See 22 Cal. Code Reg. § 98010* ("program or activity" also includes provision of goods; procurement of goods or services; provision of education, training, health, welfare, rehabilitation, housing, or other services; provision of cash or loan assistance; provision of facilities for furnishing services, financial aid, or other benefits); *see also 22 Cal. Code Reg. §§ 98410-98413* (discriminatory practices relating to employment and other areas

covered by *Gov. Code §§ 11135-11139.5*).

(n18)Footnote 16. *Zimmerman v. State of Oregon Dep't of Justice* (9th Cir. 1999) 170 F.3d 1169 (finding that Congress unambiguously expressed its intent that Title II not apply to employment, Ninth Circuit rejected Attorney General regulation (28 C.F.R. § 35.140(a)) stating that Title II applies to employment; court noted that most cases to contrary have presumed application of Title II to employment without analysis).

(n19)Footnote 17. *22 Cal. Code Reg. § 98010*.

(n20)Footnote 18. *22 Cal. Code Reg. § 98010*.

(n21)Footnote 19. *22 Cal. Code Reg. § 98010*.

(n22)Footnote 20. *See Gov. Code § 12990*.

(n23)Footnote 21. *See Gov. Code § 12990(d)(5)*.

(n24)Footnote 22. *See 22 Cal. Code Reg. §§ 98310-98314*.

(n25)Footnote 23. *See 22 Cal. Code Reg. §§ 98314, 98370* (state agency enforcement powers).

(n26)Footnote 24. *See 22 Cal. Code Reg. § 98343; see also 22 Cal. Code Reg. §§ 98344, 98345* (complaint procedure).

(n27)Footnote 25. *See 22 Cal. Code Reg. § 98410*.

(n28)Footnote 26. *See 22 Cal. Code Reg. § 98010*.

(n29)Footnote 27. *See 22 Cal. Code Reg. §§ 98411, 98412* (administering state agency as solely responsible for discriminatory practices that do not relate to employment).

(n30)Footnote 28. *22 Cal. Code Reg. § 98413*.

(n31)Footnote 29. *See 22 Cal. Code Reg. § 98410*.

(n32)Footnote 30. *See Gov. Code § 11137; see also 22 Cal. Code Reg. § 98370* (termination or suspension of support, debarment from or ineligibility for future support, probationary or conditional support, referral to Attorney General or other law enforcement agencies).

(n33)Footnote 31. *See 22 Cal. Code Reg. §§ 98110* (mandatory remedial action), *98111* (permissive remedial action).

(n34)Footnote 32. *See 22 Cal. Code Reg. § 98002* (rights under *Gov. Code §§ 11135-11139.5* enforceable by *Code Civ. Proc. § 1094.5* administrative mandamus).

(n35)Footnote 33. *See Gov. Code § 12965(b)*.

(n36)Footnote 34. *Arriaga v. Loma Linda University* (1992) 10 Cal. App. 4th 1556 ; *contra*, Greater Los Angeles Council on Deafness v. Zolin (9th Cir. 1987) 812 F.2d 1103, 1113-1114 (holding private right of action is available under *Gov. Code § 11135*).

(n37)Footnote 35. *See Gov. Code § 11135; 22 Cal. Code Reg. §§ 98100, 98101; see also People v. Levinson* (1984) 155 Cal. App. 3d Supp. 13, 18 , 203 Cal. Rptr. 426 (*Gov. Code § 11135* applies to those charged with effectuating programs or activities that receive, directly or indirectly, state support).

(n38)Footnote 36. *See* 22 Cal. Code Reg. § 98010.

(n39)Footnote 37. 22 Cal. Code Reg. § 98010.

(n40)Footnote 38. 22 Cal. Code Reg. § 98010.

(n41)Footnote 39. 22 Cal. Code Reg. § 98010.

(n42)Footnote 40. *See* discussion in [1], above.

(n43)Footnote 41. *See* 22 Cal. Code Reg. § 98010.

(n44)Footnote 42. *See* 22 Cal. Code Reg. § 98010. A "state agency" is an administrative subdivision or instrumentality of the state government, including, but not limited to, agencies, departments, offices, commissions, boards, bureaus, and divisions, that has the statutory or constitutional authority to provide state support to any person. 22 Cal. Code Reg. § 98010.

(n45)Footnote 43. 22 Cal. Code Reg. § 98010.

(n46)Footnote 44. Gov. Code § 11135; *see* discussion in [1], above.

(n47)Footnote 45. *See* 22 Cal. Code Reg. § 98010.

(n48)Footnote 46. *See* 22 Cal. Code Reg. § 98010; *see* discussion in [3], above.

(n49)Footnote 47. *See* Gov. Code § 11135; 22 Cal. Code Reg. § 98101.

(n50)Footnote 48. *See* 22 Cal. Code Reg. §§ 98101, 98102(a) (enumeration in 22 Cal. Code Reg. § 98101 does not limit general prohibition against discrimination); *see also* 22 Cal. Code Reg. §§ 98200-98263 (discriminatory practices relating to specific groups protected by Gov. Code §§ 11135-11139.5).

(n51)Footnote 49. *See* 22 Cal. Code Reg. § 98010 ("benefit" is anything contributing to an improvement in condition, including, but not limited to, aid or services provided as result of state support).

(n52)Footnote 50. It is also a discriminatory practice to fail to make reasonable efforts to achieve a representative board, but this requirement is not deemed to impose adherence to a quota system. 22 Cal. Code Reg. § 98101(f).

(n53)Footnote 51. *See* 22 Cal. Code Reg. § 98010; *see* discussion in [1], above.

(n54)Footnote 52. *See* 22 Cal. Code Reg. § 98010.

(n55)Footnote 53. *See* 22 Cal. Code Reg. § 98222.

(n56)Footnote 54. *See* discussion in [5][a], above.

(n57)Footnote 55. 22 Cal. Code Reg. § 98234.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part B. STATE LAW

2-40 California Employment Law § 40.14

AUTHOR: By David M. Youngsmith, J.D.

§ 40.14 Miscellaneous State Provisions

[1] Generally

The foregoing sections cover the major California laws that prohibit employment discrimination based on personal characteristics such as an individual's race, religion, ancestry, age, or sex. Other state laws covering this type of discrimination are briefly described in [2] through [5], *below*.

In addition, as of January 1, 2004, AB 2900 incorporates all of the protected categories under the FEHA into various provisions of the Education Code, Government Code, Labor Code, Military and Veterans Code, Public Utilities Code, Unemployment Insurance Code, and Welfare and Institutions Code. These provisions formerly prohibited discrimination on the basis of race, color, religion, and sex; they did not prohibit discrimination on all of the grounds prohibited by the FEHA, including national origin, ancestry, gender, sexual orientation, marital status, physical and mental disability, and medical condition.

Many other state provisions prohibit "discrimination" against an employee who engages in certain protected activities. These types of provisions are outlined in Chapter 60. For example, the state wage and hour laws forbid discrimination or retaliation against employees who file claims with the Labor Commissioner or who otherwise participate in such proceedings.ⁿ¹

[2] California Constitution

The due process and *equal protection clauses* of *California Constitution, Article I, Section 7*, apply to state and local government employees.

California Constitution Article I, Section 8, provides that a person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin. This provision is a restraint on the law-making power of the state, and legislative enactments contrary to it are void.ⁿ² Some courts have interpreted "business, vocation, or profession" to designate a particular type of gainful activity as opposed to

a particular job at a particular location.ⁿ³ The constitutional provision does not prohibit *regulation* of an occupation that excludes a protected classification from a particular position under certain justifiable circumstances; it only forbids a *prohibition* from the pursuit of that occupation by the classification.ⁿ⁴

More recently, the California Supreme Court has held that *California Constitution, Article I, Section 8*, besides restraining the state's lawmaking power, also sets forth a fundamental public policy against employment discrimination on the basis of sex, race, color, creed, or national or ethnic origin. Thus, the Court held, Article I, Section 8, may serve as the basis for a tort cause of action against a private employer for wrongful termination in violation of public policy, independent of the FEHA.ⁿ⁵ For discussion of tort causes of action for wrongful termination in violation of public policy, *see* Chapter 60.

California Constitution Article I, Section 31, provides that the state may not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting, thus prohibiting racial discrimination.^{n5.1} "Racial discrimination," however, is not defined in Section 31 of Article I, and the lack of a legal definition for that term has led to confusion and conflict over implementation of Section 31 of Article I.^{n5.2} *Government Code Section 8315(a)* now defines "racial discrimination" or "discrimination on the basis of race" for the purposes of Section 31 of Article I as having the same meaning as "racial discrimination" as defined and used in paragraphs 1 and 4 of Article 1 of Part I of the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted by the United Nations General Assembly and signed by the United States.^{n5.3} The Convention defines "racial discrimination" to mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Further, special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms will not be deemed racial discrimination, provided that they do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they will not be continued after the objectives for which they were taken have been achieved.^{n5.4}

As a signatory to the Convention, the federal government has an international obligation to pursue a policy to eliminate all forms of racial discrimination as provided in the Convention.^{n5.5} To allow the state to assist the federal government in fulfilling that obligation, the following provisions must be used to interpret and implement *California Constitution Article I, Section 31*:^{n5.6}

- (1) Section 31 of Article I, except as to the prohibition of granting preferential treatment, cannot be interpreted as granting an individual a private cause of action to challenge any special measures undertaken for the purpose of securing adequate advancement of those racial groups requiring protection pursuant to the Convention. Special measures cannot be interpreted as preferential treatment.
- (2) Section 31 of Article I cannot be construed as requiring the government to prove racial discrimination before undertaking special measures for the purpose of securing adequate advancement of those racial minority groups needing that protection pursuant to the Convention.

[3] Public Works Projects

A contractor may not discriminate in the employment of persons on public works on any basis listed in *Government Code Section 12940(a)*, as those bases are defined in *Government Code Sections 12926 and 12926.1*.ⁿ⁶ Also, employers and labor unions may not refuse to accept otherwise qualified employees as apprentices on public works projects on any basis listed in *Government Code Section 12940(a)*, as those bases are defined in *Government Code Sections 12926 and 12926.1*, except as provided by *Labor Code section 3077*.ⁿ⁷

The body awarding a public works contract must take cognizance of violations of the public works lawsⁿ⁸ committed in the execution of such a contract.ⁿ⁹ Unlawful discrimination is subject to all the penalties imposed for a violation of the public works laws,ⁿ¹⁰ including forfeiture of payment after an investigation by the DLSE.ⁿ¹¹

[4] Business Transactions

An addition to the Cartwright Act,ⁿ¹² California's antitrust law, prohibits any exclusions from business transactions based on written policies requiring discrimination on the basis of sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation, or because a person conducts business in a particular location.ⁿ¹³ Violation of this provision of the Cartwright Act is a "conspiracy against trade."ⁿ¹⁴

There are no cases construing the "conspiracy against trade" statute in an employment context. However, when the California Legislature enacted the statute, it expressly recognized that the California constitutional prohibition against disqualifying a person from entering or pursuing a business, profession, vocation, *or employment* because of membership in a protected classification was undermined by certain on-going practices in the business and commercial world.ⁿ¹⁵ Furthermore, one court construing the "conspiracy against trade" statute relied on *O'Connor v. Village Green Owners' Assn.*,ⁿ¹⁶ which defined the term "business" as it is used in the Unruh Civil Rights Act; that is, the term encompasses every aspect of employment and is often synonymous with "*calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain.*"ⁿ¹⁷ Since the "conspiracy against trade" statute applies to "business transactions," the statute may arguably apply to claims of employment discrimination by private employers.

[5] Employment Assistance for Workers With Disabilities

The governor is required to authorize the secretary of the Labor and Workforce Development Agency, in collaboration with the secretary of the California Health and Human Services Agency, to make available the expertise of state employees and programs to support the employment-related needs of individuals with disabilities. Using existing resources, the agencies must develop a sustainable, comprehensive strategy to do all of the following:ⁿ¹⁸

1. Bring adults with disabilities into gainful employment at a rate as close as possible to that of the general adult population;
2. Support the goals of equality of opportunity, full participation, independent living, and economic self-sufficiency for these individuals;
3. Ensure that state government is a model employer of individuals with disabilities; and
4. Support state coordination with, and participation in, benefits planning training and information dissemination projects supported by private foundations and federal grants.

There are specific provisions in the Unemployment Insurance Code for employment assistance, such as outreach and skills assessment, for workers with disabilities.ⁿ¹⁹

[6] Unfair Competition Law

The Unfair Competition Law (UCL)ⁿ²⁰ defines unfair competition as including any unlawful, unfair or fraudulent business act or practice.ⁿ²¹ The FEHAⁿ²² makes it an unlawful employment practice for an employer to engage in age discrimination.ⁿ²³ An employer that practices age discrimination has an unfair competitive advantage over employers who comply with the FEHA because older workers frequently are more highly compensated than their younger colleagues. Further, the UCL's remedies are cumulative to the remedies available under the FEHA.ⁿ²⁴ Therefore,

injunctive relief under the UCL is an appropriate remedy when a business engages in an unlawful practice of discriminating against older workers.²⁵

Legal Topics:

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

Labor & Employment Law Discrimination General Overview Labor & Employment Law Wage & Hour Laws General Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 98.6; see also* discussion in ch. 5.

(n2)Footnote 2. *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal. 3d 1, 8, 95 Cal. Rptr. 329, 485 P.2d 529 .

(n3)Footnote 3. *See Long v. State Personnel Bd.* (1974) 41 Cal. App. 3d 1000, 1007, 116 Cal. Rptr. 562 .

(n4)Footnote 4. *See Long v. State Personnel Bd.* (1974) 41 Cal. App. 3d 1000, 1007, 116 Cal. Rptr. 562 (no constitutional violation when female Methodist minister was denied a position in a Youth Authority facility given a "male only" certification by State Personnel Board).

(n5)Footnote 5. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 89-91, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n6)Footnote 5.1. *See, e.g., C&C Construction Co. v. Sacramento Municipal Utility District* (2004) 122 Cal. App. 4th 284, 298-312, 18 Cal. Rptr. 3d 715 (municipal utility district impermissibly discriminated on basis of race in some of its public contracting activities under *Cal. Const. Art. I § 31*, where utility district failed to proffer substantial evidence that its race-based discrimination was necessary to maintain federal funding).

(n7)Footnote 5.2. 2003 Cal. Stats. Ch. 211 § 1(a), (b).

(n8)Footnote 5.3. 2003 Cal. Stats. Ch. 211 § 1(c).

(n9)Footnote 5.4. *Gov. Code § 8315(b)*, citing the International Convention on the Elimination of All Forms of Racial Discrimination, Part I, Article 1, paragraphs 1 and 4.

(n10)Footnote 5.5. *See Gov. Code § 8315(d)*.

(n11)Footnote 5.6. *Gov. Code § 8315(c)*.

(n12)Footnote 6. *Lab. Code § 1735; see also Lab. Code §§ 1720* ("public works" defined), *1720.2* ("public works" includes construction work done under private contract), *1720.3* ("public works" includes hauling of refuse); *but see Lab. Code § 1720.4* ("public works" do not include certain projects involving work performed entirely by volunteer labor). For discussion of wage and hour provisions relating to public works contracts, *see* Ch. 1. For discussion of the prohibited bases for discrimination under *Gov. Code § 12940*, *see § 40.10[5]*.

(n13)Footnote 7. *Lab. Code § 1777.6; see Lab. Code § 1777.5* (requirements for employing apprentices on public works). *Lab. Code § 3077* requires apprentices to be at least 16 years of age. For discussion of the prohibited bases for discrimination under *Gov. Code § 12940*, *see § 40.10[5]*.

(n14)Footnote 8. *See Lab. Code §§ 1720-1861*.

(n15)Footnote 9. *See Lab. Code § 1726*.

(n16)Footnote 10. *Lab. Code § 1735*.

(n17)Footnote 11. *See Lab. Code §§ 1727-1734.*

(n18)Footnote 12. *See Bus. & Prof. Code § 16700 et seq.*

(n19)Footnote 13. *Bus. & Prof. Code § 16721; see also Civ. Code §§ 51.5, 51.8 (Unruh Act; discrimination in business transactions and granting of franchises prohibited); see § 40.12[1].*

(n20)Footnote 14. *See Bus. & Prof. Code § 16721(c).*

(n21)Footnote 15. *See Bus. & Prof. Code § 16721.*

(n22)Footnote 16. *O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 191 Cal. Rptr. 320, 662 P.2d 427 .*

(n23)Footnote 17. *O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 795, 191 Cal. Rptr. 320, 662 P.2d 427 (emphasis added); see also Pines v. Tomson (1984) 160 Cal. App. 3d 370, 385, 206 Cal. Rptr. 866 ; for a discussion relating to the Unruh Civil Rights Act, see § 40.12.*

(n24)Footnote 18. *Gov. Code § 12803.6(a).*

(n25)Footnote 19. *See Unempl. Ins. Code § 18000 et seq..*

(n26)Footnote 20. *Bus. & Prof. Code § 17200 et seq..*

(n27)Footnote 21. *Bus. & Prof. Code § 17200.*

(n28)Footnote 22. *Gov. Code § 12900 et seq..*

(n29)Footnote 23. *Gov. Code § 12940(a).*

(n30)Footnote 24. *Bus. & Prof. Code § 17205.*

(n31)Footnote 25. *Herr v. Nestle U.S.A., Inc. (2003) 109 Cal. App. 4th 779, 781, 789-790, 135 Cal. Rptr. 2d 477 .*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part B. STATE LAW

2-40 California Employment Law §§ 40.15through 40.19

AUTHOR: By David M. Youngsmith, J.D.

[Reserved]

§§ 40.15[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.20

AUTHOR: By David M. Youngsmith, J.D.

§ 40.20 Title VII of Civil Rights Act of 1964

[1] Governing Law and Scope of Coverage

Title VII of Civil Rights Act of 1964 (Title VII)ⁿ¹ is the foremost federal law governing employment discrimination. Title VII prohibits unlawful employment discriminationⁿ² by public and private employers,ⁿ³ employment agencies,ⁿ⁴ labor organizations,ⁿ⁵ and training programsⁿ⁶ on the basis of several specified protected classifications.ⁿ⁷ Employment discrimination by federal employers is prohibited by a separate provision in Title VII.ⁿ⁸

Specific bases of discrimination and prohibited employer practices are described in [6] and [7], *below*.

The Equal Employment Opportunity Commission (EEOC), a federal agency created to prevent unlawful employment practices,ⁿ⁹ has promulgated procedural regulationsⁿ¹⁰ and substantive "guidelines"ⁿ¹¹ to assist in the enforcement of Title VII.

For further discussion relating to the purpose, scope, and application of the guidelines, *see* § 40.30. For a detailed discussion relating to the substantive requirements of the guidelines, *see* Chapter 41, Part C.

[2] Effect on State Law

Title VII does not exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future state or local law, unless the law requires or permits an act that would be unlawful under Title VII.ⁿ¹² As discussed in § 40.02[2], Title VII explicitly does not preempt state law, or "occupy the field" of employment discrimination; Title VII preempts state law only to the extent that state law permits practices that are prohibited by the federal law.ⁿ¹³ In fact, as discussed in [3] *below*, when state or local law prohibits an employment practice, federal enforcement of Title VII must be deferred until state or local officials, under state or local law, have an opportunity to remedy the practice alleged.ⁿ¹⁴

For additional discussion relating to federal preemption of state employment discrimination laws, *see* § 40.02[2]. For a

discussion of the FEHA, the primary California statute prohibiting employment discrimination, *see* § 40.10.

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

Title VII is the chief federal alternative to the FEHA,ⁿ¹⁵ the primary state employment discrimination statute.ⁿ¹⁶ Both Title VII and the FEHA have administrative and judicial enforcement mechanisms.ⁿ¹⁷ Complainants may file administrative charges under both statutes. Charges may be "cross-filed" with both the EEOC and the DFEH, a procedure by which charges filed with either agency are deemed filed with the other as well, if the complainant wishes. Cross-filing preserves both federal Title VII and state FEHA claims. Employers or other respondents, however, need not respond separately, because a cross-filed charge is investigated by only one agency. Under a "work sharing" agreement between the EEOC and the DFEH, charges originally filed with either agency are usually investigated by the agency that receives the original charge. For full discussion of administrative procedures under both the FEHA and Title VII, *see* Chapter 42. *Commentary by Bill Lann Lee.*

[3] Enforcement and Remedies

Title VII is enforced by the Equal Employment Opportunity Commission (EEOC),ⁿ¹⁸ which is empowered to prevent unlawful employment practices under the substantive provisions of Title VII.ⁿ¹⁹ Written discrimination "charges" are filed with the EEOC by aggrieved persons, by third parties on behalf of aggrieved persons, or by EEOC members.ⁿ²⁰ However, because the types of employment discrimination prohibited by Title VII are also unlawful in California under the FEHAⁿ²¹ and *Government Code Section 11135*,ⁿ²² which are enforced by the DFEH and FEHC,ⁿ²³ discrimination charges may not be filed with the EEOC until 60 days after state proceedings are commenced, unless the state proceedings are terminated.ⁿ²⁴ Under a work-sharing agreement between the DFEH and the EEOC, complaints that are within the jurisdiction of both agencies may be first processed by the agency with which the complaint is originally filed.ⁿ²⁵ If a charge is filed by one of the five EEOC commissioners (a "commissioner's charge"), the EEOC must notify the appropriate state agency and allow the agency at least 60 days to act.ⁿ²⁶ For a detailed discussion relating to the authority and structure of the EEOC, the procedure for filing EEOC charges, and deferral to state agencies, *see* Chapter 42, Part C.

The EEOC must investigate discrimination charges,ⁿ²⁷ and if the EEOC determines that there is reasonable cause to believe that a discrimination charge is true,ⁿ²⁸ it must attempt to eliminate the alleged employment discrimination by informal methods of conference, conciliation,ⁿ²⁹ and persuasion.ⁿ³⁰ The EEOC may seek temporary or preliminary relief pending final disposition of discrimination charges.ⁿ³¹ If there is no reasonable cause to believe that the discrimination charge is true, the EEOC must dismiss the charge.ⁿ³² For further discussion relating to EEOC investigations, conciliation, and civil actions, *see* Chapter 42, Part C.

If the EEOC is unable to obtain a conciliation agreement,ⁿ³³ the EEOC may bring a civil action against a private employer.ⁿ³⁴ The aggrieved person has the right to intervene in the action.ⁿ³⁵ The EEOC may also bring a civil action against a private employer in federal court if it has reasonable cause to believe that there is a pattern or practice of discrimination.ⁿ³⁶ For a detailed discussion relating to class action or "pattern or practice" discrimination claims, *see* Chapter 41, Part A.

An aggrieved person may also bring a civil action against an employer named in an EEOC discrimination charge if a "right-to-sue" letter is issued by the EEOC. A right-to-sue letter may be issued if (1) the aggrieved person requests the letter 180 days or later after submission of the charge and the administrative processing is incomplete, or prior to 180 days if the EEOC determines that it will be unable to complete administrative processing within the 180-day period; (2) the EEOC finds reasonable cause but is unable to obtain voluntary compliance; or (3) the EEOC dismisses the charge.ⁿ³⁷ For a detailed discussion relating to judicial actions by private parties under Title VII, *see* Chapter 43, Part B.

A court finding that unlawful employment practices exist may enjoin such practices and order appropriate affirmative action, including, but not limited to, reinstatement or hiring (with or without back pay).ⁿ³⁸ In addition, compensatory and punitive damages, up to a statutory maximum, are available in Title VII civil actions involving intentional discrimination.ⁿ³⁹ The court may also, in its discretion, award attorney's fees (including expert fees) to the prevailing party, as long as that party is not the EEOC or the United States.ⁿ⁴⁰ For a detailed discussion relating to relief available in civil actions under Title VII, *see* Chapter 43, Part B.

[4] Employers Covered and Exempted

[a] Generally

Covered "employers" are persons engaged in an industry that affects commerce and who have 15 or more employees for each working day in 20 or more weeks of the current or preceding year.ⁿ⁴¹ A "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions,^{n41.0.1} partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy cases under Title 11 of the United States Code, or receivers.^{n41.1}

The numerical qualification in Title VII's definition of "employer" does not affect federal-court subject-matter jurisdiction over a claim under Title VII. Rather, it delineates a substantive ingredient of a Title VII claim for relief and is thus an element of plaintiff's claim for relief.ⁿ⁴²

Two or more employers may be considered "joint employers" under Title VII if both employers control the terms and conditions of employment of the employee.^{n42.1} In determining joint employment, courts consider the following factors:^{n42.2}

- The nature and degree of control of the workers.
- The degree of supervision, direct or indirect, of the work.
- The power to determine the pay rates or the methods of payment of the workers.
- The right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers.
- Preparation of payroll and payment of wages.
- The alleged employee's opportunity for profit or loss depending upon the alleged employee's managerial skill.
- The alleged employee's investment in equipment or materials required for the task or the employee's employment of helpers.
- Whether the service rendered requires a special skill.
- The degree of permanence of the working relationship.
- Whether the service rendered is an integral part of the alleged employer's business.
- Ownership of property or facilities where work occurred.
- Whether responsibility under the contracts between a labor contractor and an employer passes from

one labor contractor to another without material changes.

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

In the context of the National Labor Relations Act,^{n42.3} the basis of a finding of joint employers is that one employer, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer. The joint employer concept recognizes that the business entities are in fact separate but share or co-determine matters governing the essential terms and conditions of employment.^{n42.4}

In *Equal Employment Opportunity Commission v. Pacific Maritime Association*, ^{n42.5} the Ninth Circuit held that a nonprofit association of stevedoring and shipping companies that performs organizational tasks on behalf of its members, negotiates collective bargaining agreements, operates a dispatch hall jointly with the union and provides payroll service for member companies, was not a joint employer with one of its members in a sexual harassment action brought by an employee of one of its members. The court found that the association did not supervise the longshore workers, had no power to hire or fire them, had no power to discipline them, and did not supervise the work sites of its member-employers, which was within the sole province of the member-employers. Further, the association did not own the member employer.^{n42.6}

Because Title VII primarily governs relations between employees and employers, it does not cover relations between employees and third parties.ⁿ⁴³ However, the term "employer" in Title VII includes employers' agents.ⁿ⁴⁴ Thus, an employer may be subject to agency liability for the discriminatory programs of third parties if the employer affirmatively and actively participates in such a program, and has some control over the terms of the program.ⁿ⁴⁵ For example, entering into contracts governing the terms of such a program, administering such a program, and mandatory employee participation in such a program may be sufficient to establish employer liability.ⁿ⁴⁶

Title VII also prohibits unlawful discrimination by "employment agencies,"ⁿ⁴⁷ which are defined as any person regularly undertaking, with or without compensation, to procure employees for an employer, or to procure for employees opportunities to work for an employer.ⁿ⁴⁸ Title VII also applies to labor organizations,ⁿ⁴⁹ although discussion of employment agencies and labor organizations is beyond the scope of this chapter.

Employers who have fewer than 15 employees for each working day in 20 or more weeks of the current or preceding year are not covered by Title VII.ⁿ⁵⁰ For purposes of making this determination, the United States Supreme Court has declared that an employer "has" an employee on any day on which the employer maintains an employment relationship with that person, without regard to whether the employee actually worked or received compensation.ⁿ⁵¹ Thus, according to the Court, an individual is counted as an employee for each working day between the time employment begins and ends. However, individuals who depart employment in the middle of a workweek do not count toward the fifteen-employee minimum for that week.ⁿ⁵²

Title VII expressly does not apply to an employer with respect to the employment of aliens outside any state.ⁿ⁵³ Note, however, that United States citizens employed in a foreign country are covered "employees" and thus Title VII applies to them.ⁿ⁵⁴

Title VII also does not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with carrying on the organization's activities.ⁿ⁵⁵ It has been held that the sincere religious beliefs of a secular corporation's owners and operators are not enough in themselves to make the corporation "religious" for Title VII purposes.ⁿ⁵⁶

In addition, Title VII excludes the following from the definition of "employer":ⁿ⁵⁷

1. The United States;
2. Corporations wholly owned by the United States;
3. Indian tribes;ⁿ⁵⁸
4. Departments or agencies of the District of Columbia subject by statute to procedures of the competitive service;ⁿ⁵⁹ and
5. Bona fide private membership clubs that are exempt from taxation.ⁿ⁶⁰

[b] Industry Affecting Commerce

As discussed in *[a]*, *above*, Title VII applies only to employers engaged in industry affecting commerce.ⁿ⁶¹ "Commerce" means trade, traffic, commerce, transportation, transmission, or communication (1) among the several states; (2) between a state and any place outside the state; (3) within the District of Columbia or a possession of the United States; or (4) between points in the same state but through a point outside the state.ⁿ⁶² An employer engaged in "industry affecting commerce" is one that is engaged in any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act,ⁿ⁶³ and further includes any governmental industry, business, or activity.ⁿ⁶⁴ The fact that an employer is a tax-exempt, charitable organization does not preclude it from being deemed an employer engaged in an "industry affecting commerce."ⁿ⁶⁵

In *Polish Nat'l Alliance v. National Labor Rel. Bd.*,ⁿ⁶⁶ a case construing the power of Congress to regulate commerce under the National Labor Relations Act,ⁿ⁶⁷ the United States Supreme Court declared that Congress regulates not only commerce, but also matters that affect, interrupt, or promote interstate commerce.ⁿ⁶⁸ The Court said that "Congress ... explicitly regulate[s] not merely transactions or goods in interstate commerce[,] but activities which in isolation might be deemed to be merely local[,] but in the interlacings of business across state lines adversely affect such commerce."ⁿ⁶⁹ The Court added that whether practices are deemed to affect interstate commerce is not determined by confining judgment to the quantitative effect of particular activities, but by the total incidence of similar activities that, if left unchecked, may become far-reaching in their harm to interstate commerce.ⁿ⁷⁰

The Title VII "affecting commerce" requirement is generally very liberally construed. Thus, the requirement is satisfied if a defendant uses items that have moved through interstate commerce at some point, or serves persons from out of state, or engages in activity that, even if purely local, would alter the relationships of an interstate market.ⁿ⁷¹

[c] Labor Unions

Section 703(c)(1) of Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for a labor organization to discriminate against any individual because of race, color, religion, sex, or national origin.^{n71.1} Thus, a union violates Title VII if it deliberately declines to pursue a member's claim because of the member's gender.^{n71.2}

The standard burden-shifting framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*,^{n71.3} applies to a Title VII action against a union.^{n71.4} Adapting the *McDonnell Douglas* criteria to a § 703(c)(1) action, a union member can make a prima facie claim of discrimination by introducing evidence that the member was singled out and treated less favorably than others similarly situated on account of race or any other criterion impermissible under the statute.^{n71.5} If the member succeeds in establishing a prima facie case of discrimination against the union, the burden of production shifts to the union to articulate a legitimate, nondiscriminatory reason for the less favorable treatment.^{n71.6} The union must provide reasons for its actions which, if believed by the trier of fact, support a finding that unlawful discrimination was not the cause of the action of which the member complains.^{n71.7} Once the union produces sufficient evidence to satisfy this burden, the *McDonnell Douglas* framework, with its presumptions and burdens, disappears,^{n71.8} and the member retains the ultimate burden of persuading the trier of fact that he or she has been the victim of intentional discrimination.^{n71.9}

In the context of a union member's action against the union under Title VII, the *McDonnell Douglas* test may be stated as requiring the union member to show the following:^{n71.10}

1. The employer violated the collective bargaining agreement with respect to the employee.
2. The union breached its duty of fair representation by allowing the breach to go unrepaired.
3. The union member was singled out and treated less favorably than others similarly situated on account of race or any other criterion impermissible under Title VII.

The trier of fact may infer the ultimate fact of intentional discrimination from the member's prima facie case and disbelief of the union's explanation for the action.^{n71.11} However, a trier of fact is not required to infer discrimination even if the union's proffered explanation is unpersuasive.^{n71.12}

A union member bringing a discrimination action against a union under Title VII may prove the union's discriminatory motive through circumstantial evidence alone.^{n71.13} Evidence that one or more similarly situated individuals outside of the protected class received more favorable treatment can constitute sufficient evidence of discrimination for a Title VII union-member plaintiff to prevail.^{n71.14}

In *Beck v. United Food and Commercial Workers Union*,^{n71.15} a union member proved intentional discrimination by her union in failing to represent her based on her prima facie case. The employer violated the collective bargaining agreement in terminating the plaintiff without just cause. The union then failed to repair the breach of the collective bargaining agreement by not filing a grievance, despite the plaintiff's request and the union representative's knowledge that the employer intended to terminate the plaintiff. There was evidence to show that the union's failure to repair the breach was due to a discriminatory motivation based on plaintiff's sex. There was evidence that for men, the union was an aggressive advocate, but for women like the plaintiff and another woman, the union effectively accepted the employer's decisions instead of taking their claims to arbitration, and the same union representatives failed to provide the same quality of representation for the plaintiff as for similarly situated males. There also was evidence that at least one male employee who received more favorable treatment than the plaintiff was similarly situated in all material respects to her. There also was evidence of the union's handling of the grievance of another female member, which strengthened the inference that the union intentionally discriminated on the basis of sex in handling the grievances of female members. The Ninth Circuit found that the plaintiff's evidence was comparative in nature, rather than statistical, and that, as a matter of law, the evidence was not an insufficient basis for the district court's conclusion that the union

had intentionally discriminated against the plaintiff, even though the comparative evidence was based on only three individuals in addition to the plaintiff.

[5] Employees Covered and Exempted

Title VII defines an "employee" simply as an individual employed by an employer;ⁿ⁷² if an employer is covered by Title VII,ⁿ⁷³ so are its employees. However, Title VII coverage is not limited to current employees. By its terms Title VII also applies to applicants for employment,ⁿ⁷⁴ and to former employees.ⁿ⁷⁵

Title VII coverage also extends to some "individuals" who are not applicants or current or former employees.ⁿ⁷⁶ For example, in *Sibley Memorial Hospital v. Wilson*,ⁿ⁷⁷ the United States Court of Appeals for the District of Columbia held that a male private duty nurse employed through a local registry by patients in private hospitals could maintain a Title VII action against a private hospital that refused to allow him to report to a patient because he was a male, despite the absence of an employment relationship between the nurse and the hospital.ⁿ⁷⁸ The court stated that "[t]o permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities *with another employer*, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited."ⁿ⁷⁹

The *Sibley* court noted that there are no substantive provisions in Title VII that restrict the meaning of the term "individual" to an employee of an employer.ⁿ⁸⁰ The court opined that there is no good reason to confine the meaning of "individual" to include only former employees and applicants for employment.ⁿ⁸¹ It also emphasized that the enforcement provisions of Title VII use the term "person claiming to be aggrieved"ⁿ⁸² rather than "employees."ⁿ⁸³ The court explained that the former term "can certainly be taken as comprehending individuals who do not stand in a direct employment relationship with an employer," and because Title VII thus purports to provide remedies for a class broader than "direct" employees, there is a strong indication that Title VII proscriptions reach beyond the immediate employment relationship.ⁿ⁸⁴

The Ninth Circuit Court of Appeals appears to agree with the *Sibley* analysis.ⁿ⁸⁵ The Ninth Circuit in *Gomez v. Alexian Bros. Hosp. of San Jose*,ⁿ⁸⁶ and *Lutcher v. Musicians Union Local 47*,ⁿ⁸⁷ suggested that Title VII may apply, for example, when an employer subject to Title VII interferes with an individual's employment with *another* employer,ⁿ⁸⁸ even though the individual is not an applicant, employee, or former employee of the interfering employer.

Title VII does not apply if the only relationship between the complainant and the person charged with discrimination is that of independent contractor.ⁿ⁸⁹ Some cases have applied a common-law test for distinguishing between employees and independent contractors for purposes of Title VII.ⁿ⁹⁰ Under the common-law test, an individual is an employee, rather than an independent contractor, if the person for whom work is being done reserves (1) the right to control the result accomplished, and (2) the details and means by which that result is accomplished.ⁿ⁹¹ However, most courts and the EEOC have abandoned the common-law test as too narrow for analyzing employee status under the equal employment laws.ⁿ⁹² In any event, the determination of whether a relationship is one of employment or independent contractual affiliation requires a fact-specific inquiry that relies on the economic realities of the situation.ⁿ⁹³

■ CONSULTANT'S COMMENT:

The decision in *Adcock* ⁿ⁹⁴ should not be viewed as precedent for the argument that independent contractors may bring discrimination claims under Title VII. On the contrary, *Adcock* follows a traditional Title VII analysis. It involves an alleged hiring claim by a plaintiff who believed that the defendant had denied her employment as an employee. The defendant countered that the plaintiff had sought to become a franchise car dealer and that the denial of her application barred her only from an independent contractor relationship, a status not covered under Title VII. The Ninth Circuit agreed with the defendant, relying primarily upon the terms of the proposed franchise agreement. In finding a predominance of factors indicating the formation of an independent contractor relationship, the court

concluded that the defendant had not barred the plaintiff from employment on the basis of her sex.
Commentary by Kirby Wilcox.

For discussion of common-law rules relating to independent contractors, *see* Ch. 30.

■ CONSULTANT'S COMMENT:

The "hybrid" test of independent contractor status focuses less on the label given by an employer, and more on the specific facts of a particular arrangement. The hybrid test examines the following eleven factors: (1) the kind of occupation, with reference to whether the work is usually done under the direction of a supervisor, or is done by a specialist without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the work place; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated--whether by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.ⁿ⁹⁵ The hybrid test is refined enough to preserve a true independent contractor relationship,ⁿ⁹⁶ but the fact-intensive nature of the inquiry makes it difficult to predict whether a given independent contractor relationship will be upheld as such. Employers should be aware that the labels they choose will be subject to close scrutiny and that if an individual is found to be an employee rather than an independent contractor, liability under Title VII or other equal employment laws may follow. *Commentary by Erica B. Grubb.*

Certain employees are expressly or presumptively excluded from Title VII coverage. Thus, aliens employed outside the United States and its territories, and individuals performing work in connection with the activities of religious corporations, associations, educational institutions, or societies are not covered by Title VII.ⁿ⁹⁷ However, with respect to employment in a foreign country, the term "employee" includes an individual who is a citizen of the United States.ⁿ⁹⁸

Also, individuals elected to public office in any state or political subdivision, and individuals selected by an elected official to serve on official's staff, or appointed as a policy-maker or advisor, are not considered "employees" under Title VII.ⁿ⁹⁹ Uniformed, active-duty members of the military also are excluded from the coverage of Title VII.ⁿ¹⁰⁰

[6] Prohibited Bases of Discrimination

Title VII prohibits employment discrimination based on the following classifications:ⁿ¹⁰¹

1. Race;
2. Color;
3. Religion;ⁿ¹⁰²
4. Sex;ⁿ¹⁰³ or
5. National origin.ⁿ¹⁰⁴

The proscription against sex discrimination includes pregnancy, childbirth, or related medical conditions,ⁿ¹⁰⁵ as well as discrimination against married women.ⁿ¹⁰⁶

A detailed discussion relating to specific prohibited bases of discrimination is contained in Chapter 41, Part B.

[7] Prohibited Employment Practices

Title VII prohibits discriminatory failure or refusal to hire or refer for employment, discriminatory discharge, and other discriminatory acts with respect to compensation, terms, conditions, or privileges of employment,ⁿ¹⁰⁷ as well as limitations, segregation, classifications, referrals, or other acts that deprive employees and other individuals of employment opportunities, or adversely affect their employment status.ⁿ¹⁰⁸ Also, employers, labor organizations, or joint labor-management committees controlling apprenticeship or other training or retraining, including on-the-job training programs, may not unlawfully discriminate in admission to, or employment in, such programs.ⁿ¹⁰⁹ Moreover, retaliation for opposition to employment discrimination is unlawful,ⁿ¹¹⁰ and notices or advertising indicating preference, limitation, specification, or discrimination based on a protected classification is prohibited, unless the notice or advertising reflects a bona fide occupational qualification.ⁿ¹¹¹

For a detailed discussion relating to prohibited discriminatory practices, *see* Chapter 41, Parts C, D, and F.

[8] Defenses

It is not unlawful to discriminate on the basis of religion, sex, or national origin under circumstances in which such a classification is a "bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise."ⁿ¹¹² Also, employers may apply different standards of compensation, or different terms, conditions, or privileges of employment, pursuant to a bona fide seniority or merit system, or a system that measures quality or quantity of production, or apply such different standards or conditions to employees who work in different locations, as long as such differences are not the result of an intention to discriminate based on a protected classification.ⁿ¹¹³ Employers may also use professionally developed ability tests, provided the tests are not designed, intended, or used to discriminate on the basis of a protected classification.ⁿ¹¹⁴

■ CONSULTANT'S COMMENT:

All of these statutory defenses have been narrowly interpreted by the courts, and therefore employers should not take comfort in the expansive language of the statute. As a practical matter, the bona fide occupational-qualification defense insulates only classifications that go to the essence of a "job" (such as wet nurses, sperm donors, or actors/actresses), the bona fide seniority defense insulates seniority systems that are not intentionally discriminatory, and the bona fide ability-testing defenses insulate only tests that do not have an adverse impact on any protected classifications. These defenses are fully discussed in Chapter 41. *Commentary by Erica B. Grubb.*

Employers may defend against claims of religious discrimination by demonstrating that they cannot reasonably accommodate an individual's religious observance or practice without undue hardship on the conduct of the employer's business.ⁿ¹¹⁵ Also, it is not unlawful discrimination for educational institutions to employ individuals of a particular religion if the institution is, in whole or substantial part, owned, supported, controlled, or managed by a particular religion, or by a particular religious corporation, association, or society, or if the curriculum is directed toward the propagation of a particular religion.ⁿ¹¹⁶ It is also not unlawful to discriminate against Communists,ⁿ¹¹⁷ or individuals who have not fulfilled requirements imposed in the interest of national security.ⁿ¹¹⁸

An employer is not liable under Title VII if he or she acted in good faith, in conformity with, and in reliance on, any written interpretation of opinion of the EEOC.ⁿ¹¹⁹ It is also not unlawful for an employer to differentiate on the basis of sex in determining the amount of wages or compensation paid or to be paid to employees if the differentiation is authorized by the federal Equal Pay Act.ⁿ¹²⁰ Differentiations authorized by the federal Equal Pay Act are discussed in § 40.22[6].

Substantive defenses to employment discrimination are discussed in detail in Chapter 41, Part E.

[9] Anti-SLAPP Motions

A federal civil rights claim brought in a California state court is subject to a special motion under *Code Civ. Proc.* § 425.16 to strike a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution, in connection with a public issue.ⁿ¹²¹ When a defendant makes a threshold showing that a cause of action arises from speech or conduct protected under § 425.16, the burden shifts to the plaintiff to show a probability of prevailing on the merits at trial.ⁿ¹²² The plaintiff must show the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment at trial.ⁿ¹²³

Legal Topics:

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

Labor & Employment Law Wage & Hour Laws General Overview Labor & Employment Law Wage & Hour Laws Statutory Application Title VII of the Civil Rights Act of 1964

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. §§ 2000e-2000e-17.

(n2)Footnote 2. *See* 42 U.S.C. § 2000e-2(a)-(d) ("unlawful employment practices" prohibited).

(n3)Footnote 3. *See* 42 U.S.C. §§ 2000e(b), 2000e-2(a); the term "employer" in Title VII includes employers' agents (42 U.S.C. § 2000e(b)); *see Los Angeles, Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 718 n.33, 98 S. Ct. 1370, 55 L. Ed. 2d 657; *Morgan v. Safeway Stores, Inc.* (9th Cir. 1989) 884 F.2d 1211, 1214; *see also* discussion in [4] below.

(n4)Footnote 4. *See* 42 U.S.C. § 2000e-2(b); *see also* discussion in [4], below.

(n5)Footnote 5. *See* 42 U.S.C. § 2000e-2(c).

(n6)Footnote 6. *See* 42 U.S.C. § 2000e-2(d); *see also* discussion in [7], below.

(n7)Footnote 7. 42 U.S.C. § 2000e-2.

(n8)Footnote 8. *See* 42 U.S.C. § 2000e-16.

(n9)Footnote 9. *See* 42 U.S.C. §§ 2000e-4, 2000e-5.

(n10)Footnote 10. *See* 42 U.S.C. § 2000e-12(a); 29 C.F.R. §§ 1601.1 *et seq.*

(n11)Footnote 11. *See* 29 C.F.R. §§ 1604.1-1604.11 (guidelines on sex discrimination), 1605.1-1605.3 (guidelines on religious discrimination), 1606.1-1606.8 (guidelines on national origin discrimination), 1607.1-1607.18 (uniform guidelines on employee selection procedure).

(n12)Footnote 12. 42 U.S.C. § 2000e-7; *see California Federal Sav. & Loan Ass'n v. Guerra* (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613, 629-630 fn. 29. ("permit" under 42 U.S.C. § 2000e-7 means to sanction expressly; thus, state laws that are silent on a particular practice do not "require" or "permit" it and therefore are not preempted).

(n13)Footnote 13. *See California Federal Sav. & Loan Ass'n v. Guerra* (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613, 623. (FEHA provision requiring employers to provide leave and reinstatement to pregnant employees

(see *Gov. Code* § 12945(a)) is not preempted by Title VII).

(n14)Footnote 14. *See* 42 U.S.C. § 2000e-5(c); *California Federal Sav. & Loan Ass'n v. Guerra* (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613, 625 fn. 13 .

(n15)Footnote 15. *See* *Gov. Code* §§ 12900-12996.

(n16)Footnote 16. *See* discussion in § 40.10.

(n17)Footnote 17. *See* discussion in [3], below.

(n18)Footnote 18. *See* 42 U.S.C. § 2000e-4 (creation, membership, and powers of EEOC).

(n19)Footnote 19. 42 U.S.C. § 2000e-5(a); *see* 42 U.S.C. §§ 2000e-2 (unlawful employment practices), 2000e-3 (retaliation).

(n20)Footnote 20. 42 U.S.C. § 2000e-5(a); 29 C.F.R. §§ 1601.7-1601.9, 1601.11, 1601.12.

(n21)Footnote 21. *See* discussion in § 40.10.

(n22)Footnote 22. *See* discussion in § 40.13.

(n23)Footnote 23. *See* § 40.10[2].

(n24)Footnote 24. *See* 42 U.S.C. § 2000e-5(c); 29 C.F.R. § 1601.13; *New York Gaslight Club, Inc. v. Carey* (1980) 447 U.S. 54, 65, 100 S. Ct. 2024, 64 L. Ed. 2d 723 (Title VII proceedings before EEOC and federal courts supplement available state remedies for employment discrimination); *see also* 29 C.F.R. §§ 1601.70-1601.80 (procedures for designating state and local fair employment practice agencies as "deferral agencies" under 42 U.S.C. § 2000e-5(c)). The DFEH is a certified "deferral" or "FEP agency." *See* 29 C.F.R. § 1601.80.

(n25)Footnote 25. *See* EEOC Compliance Manual (CCH) § 5.4.

(n26)Footnote 26. *See* 42 U.S.C. § 2000e-5(d).

(n27)Footnote 27. *See* 42 U.S.C. §§ 2000e-5(b), 2000e-8 (investigations), 2000e-9 (29 U.S.C. § 161, governing investigatory powers of National Labor Relations Board, applies to EEOC investigations and hearings); 29 C.F.R. §§ 1601.15-1601.17.

(n28)Footnote 28. *See* 29 C.F.R. § 1601.21 (procedure and authority for reasonable-cause determination); *see also* 29 C.F.R. § 1601.20 (EEOC empowered to encourage parties to settle prior to issuance of reasonable-cause determination).

(n29)Footnote 29. *See* 29 C.F.R. § 1601.24 (procedure and authority for conciliation).

(n30)Footnote 30. 42 U.S.C. § 2000e-5(b); *see* *Edwards v. North American Rockwell Corp.* (C. D. Cal. 1968) 291 F. Supp. 199, 203 (primary purpose in setting up EEOC is to establish method of eliminating unlawful employment practices through conference, conciliation, and persuasion without necessity of instituting civil actions).

(n31)Footnote 31. *See* 42 U.S.C. § 2000e-5(f)(2); 29 C.F.R. § 1601.23; *see also* *Wagner v. Taylor* (D.C. Cir. 1987) 836 F.2d 566, 572-574 (42 U.S.C. § 2000e-5(f)(2) does not foreclose individual claimants from seeking interim injunctive relief to preserve status quo and to prevent retaliation while administrative process is advancing).

(n32)Footnote 32. 42 U.S.C. § 2000e-5(b); *see* 29 C.F.R. § 1601.18.

(n33)Footnote 33. *See* 29 C.F.R. § 1601.25 (notice requirement when EEOC is unable to obtain conciliation).

(n34)Footnote 34. *See* 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.27.

(n35)Footnote 35. 42 U.S.C. § 2000e-5(f)(1).

(n36)Footnote 36. *See* 42 U.S.C. § 2000e-6(a), (c)-(e); *see also* 42 U.S.C. § 2000e-6(b) (exclusive jurisdiction of federal courts).

(n37)Footnote 37. *See* 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28 (notice of right to sue); *see* 42 U.S.C. § 2000e-5(a) (EEOC required to dismiss charge if it determines there is no reasonable cause to believe charge is true); *see also* 42 U.S.C. § 2000e-5(f)(3) (exclusive jurisdiction of federal courts).

(n38)Footnote 38. *See* 42 U.S.C. § 2000e-5(g); *see also* *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 421, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (courts have only limited discretion to deny back pay to prevailing Title VII plaintiffs).

(n39)Footnote 39. *See* 42 U.S.C. § 1981a; *see* *Pavon v. Swift Transp. Co.* (9th Cir. 1999) 192 F.3d 902 (Title VII's damage cap does not limit damages under theories such as 42 U.S.C. § 1981 and state common law claims; excess damages over statutory maximum could be attributed to non-Title VII claims).

(n40)Footnote 40. *See* 42 U.S.C. § 2000e-5(k).

(n41)Footnote 41. *See* 42 U.S.C. § 2000e(b); *Goldman v. Wilsey Foods, Inc.* (1989) 216 Cal. App. 3d 1085, 1096, 265 Cal. Rptr. 294 (Title VII allegation that employer is corporation regularly employing five or more persons was subject to demurrer); *Childs v. Local 18, Intern. Broth. of Elec. Wkrs.* (9th Cir. 1983) 719 F.2d 1379, 1382 (using four-prong test to determine whether two employing entities constitute single employer under 42 U.S.C. § 2000e(b)); *see also* *Kang v. U. Lim America, Inc.* (9th Cir. 2002) 296 F.3d 810, 814-816 (using *Childs* test to determine that Title VII applied to two companies employing American and Mexican workers, respectively, in Tijuana shared facilities was integrated enterprise; fact that some employees of integrated enterprise were not covered by federal antidiscrimination law did not preclude counting them as employees for purpose of determining Title VII coverage); *Morgan v. Safeway Stores, Inc.* (9th Cir. 1989) 884 F.2d 1211, 1213 (using *Childs* test to determine that employer and credit union should not be consolidated for Title VII purposes).

(n42)Footnote 41.0.1. *See* [c], *below*.

(n43)Footnote 41.1. 42 U.S.C. § 2000e(a).

(n44)Footnote 42. *Arbaugh v. Y & H Corp.* (2006) 126 S. Ct. 1235 .

(n45)Footnote 42.1. *EEOC v. Pac. Mar. Ass'n* (9th Cir. 2003) 351 F.3d 1270, 1275 . *See* *Swallows v. Barnes & Noble Book Stores, Inc.* (6th Cir. 1997) 128 F.3d 990, 993 n.4 , citing *NLRB v. Browning-Ferris Indus. of Pa.* (3d Cir. 1982) 691 F.2d 1117, 1123 ; *Wynn v. NBC* (C.D. Cal. 2002) 234 F. Supp. 2d 1067, 1093 .

(n46)Footnote 42.2. *EEOC v. Pac. Mar. Ass'n* (9th Cir. 2003) 351 F.3d 1270, 1275-1276 ; *see* 29 C.F.R. § 500.20(h)(4)(ii) (regulation implementing Migrant and Seasonal Agricultural Workers Protection Act, listing factors to consider in determining whether entity or person is joint employer; list is not exhaustive); *Bonnette v. California Health and Welfare Agency* (9th Cir. 1983) 704 F.2d 1465 ("economic reality" test). *See also* *Clackamas Gastroenterology Assocs. v. Wells* (2003) 538 U.S. 440, 123 S. Ct. 1673, 1680, 155 L. Ed. 2d 615 (six factors relevant to whether shareholder-director is employee for purposes of federal antidiscrimination statutes, quoting EEOC Compliance Manual § 605:0009, discussed at § 40.22A[3]).

(n47)Footnote 42.3. 29 U.S.C. § 151 *et seq.*

(n48)Footnote 42.4. *EEOC v. Pac. Mar. Ass'n* (9th Cir. 2003) 351 F.3d 1270, 1276-1277 .

(n49)Footnote 42.5. *EEOC v. Pac. Mar. Ass'n* (9th Cir. 2003) 351 F.3d 1270 .

(n50)Footnote 42.6. *EEOC v. Pac. Mar. Ass'n* (9th Cir. 2003) 351 F.3d 1270, 1277 .

(n51)Footnote 43. *Los Angeles, Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 718 n.33, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (pension fund contributions); *EEOC v. Pac. Mar. Ass'n* (9th Cir. 2003) 351 F.3d 1270, 1274 (non-profit association of stevedoring and shipping companies that performs organizational tasks on behalf of its members, negotiates collective bargaining agreement, operates dispatch hall jointly with union and provides payroll service for member companies is not employer for Title VII purposes of longshore worker, where association does not supervise longshore workers, has no power to hire or fire or discipline them, and does not supervise work sites of its member-employers, which is within sole province of member-employer); *Anderson v. Pacific Maritime Association* (9th Cir. 2003) 336 F.3d 924 , (non-profit association of stevedoring and shipping companies that employed plaintiffs, which was bargaining agent for plaintiffs' employers with plaintiffs' union, where association did not exercise control over work environment plaintiffs claimed was hostile, and association's purported failure to remedy situation did not amount to interference with plaintiffs' employment relationship with their employers); *Morgan v. Safeway Stores, Inc.* (9th Cir. 1989) 884 F.2d 1211, 1214 (credit union).

(n52)Footnote 44. *See* 42 U.S.C. § 2000e(b); *Los Angeles, Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 718 n.33, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (employer cannot avoid liability by delegating discriminatory programs to third parties); *Morgan v. Safeway Stores, Inc.* (9th Cir. 1989) 884 F.2d 1211, 1214 (same).

(n53)Footnote 45. *See* *Morgan v. Safeway Stores, Inc.* (9th Cir. 1989) 884 F.2d 1211, 1214-1215 (holding employer not liable for discriminatory insurance program offered by its credit union because employer did not specify program terms, did not require its employees to secure insurance, did not establish any conditions for receiving credit union benefits, and did not develop program terms in coordination with credit union).

(n54)Footnote 46. *See* *Morgan v. Safeway Stores, Inc.* (9th Cir. 1989) 884 F.2d 1211, 1214-1215 .

(n55)Footnote 47. *See* 42 U.S.C. § 2000e-2(b).

(n56)Footnote 48. 42 U.S.C. § 2000e(c); *see* *Brush v. San Francisco Newspaper Printing Company* (N.D. Cal. 1970) 315 F. Supp. 577, 580 , *aff'd*, 469 F.2d 89 (9th Cir. 1972) , *cert. denied*, 410 U.S. 943 (employment agency "regularly undertaking" to procure employees or employment opportunities is one that is engaged to significant degree in that kind of activity as its profession or business).

(n57)Footnote 49. *See* 42 U.S.C. §§ 2000e(c) ("labor organization" defined), 2000e-2(c).

(n58)Footnote 50. *See* 42 U.S.C. § 2000e(b).

(n59)Footnote 51. *See* *Walters v. Metropolitan Educ. Enters.* (1997) 519 U.S. 202, 117 S. Ct. 660, 136 L. Ed. 2d 644 .

(n60)Footnote 52. *See* *Walters v. Metropolitan Educ. Enters.* (1997) 519 U.S. 202, 117 S. Ct. 660, 136 L. Ed. 2d 644 .

(n61)Footnote 53. 42 U.S.C. § 2000e-1(a).

(n62)Footnote 54. *See* 42 U.S.C. § 2000e(f); *see also* [5], *below*. Employers are exempt from liability under Title VII, however, if compliance at a workplace located outside the United States would violate the laws of the country in which workplace is located. *See* 42 U.S.C. § 2000e-1(b),(c). For further discussion, *see* ch. 41, pt. E.

(n63)Footnote 55. 42 U.S.C. § 2000e-1(a). Under the religious exemption in 42 U.S.C. § 2000e-1(a), religious institutions or organizations may base relevant hiring decisions on religious preferences, but they may not make such decisions based on race, sex, or national origin. *Rayburn v. General Conf. of Seventh-Day Adventists* (4th Cir. 1985) 772 F.2d 1164, 1166 ; *E.E.O.C. v. Pacific Press Pub. Ass'n* (9th Cir. 1982) 676 F.2d 1272, 1277 . For further discussion, *see* ch. 41, pt. E.

(n64)Footnote 56. *See E.E.O.C. v. Townley Eng'g & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 619 . For a full discussion of the religious exemption as a substantive defense, *see* ch. 41, pt. F.

(n65)Footnote 57. 42 U.S.C. § 2000e(b).

(n66)Footnote 58. *Dawavendewa v. Salt River Project Agricultural Improvement & Power District* (9th Cir. 2001) 276 F.3d 1150, 1159 n.9 (pursuant to 42 U.S.C. § 2000e(b), Indian tribes are specifically exempt from requirements of Title VII); *Pink v. Modoc Indian Health Project, Inc.* (9th Cir. 1998) 157 F.3d 1185, 1188-1189 (nonprofit organization incorporated by two recognized Indian tribes is "tribe" for purposes of Title VII exemption; Indian corporation did not waive its immunity by performing services off reservation).

(n67)Footnote 59. *See* 5 U.S.C. § 2102 ("competitive service" defined).

(n68)Footnote 60. *See* 26 U.S.C. § 501(c) (list of tax-exempt organizations).

(n69)Footnote 61. *See* 42 U.S.C. § 2000e(b).

(n70)Footnote 62. 42 U.S.C. § 2000e(g); *see* 42 U.S.C. § 2000e(i) ("state" includes any state of the United States, District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, Canal Zone, and Outer Continental Shelf lands defined in Outer Continental Shelf Lands Act).

(n71)Footnote 63. *See* 29 U.S.C. § 401 *et seq.* The definitions of "industry affecting commerce" under Title VII and the Labor-Management Reporting and Disclosure Act are identical, and the latter specifies that the term includes any activity within the meaning of the Labor Management Relations Act (*see* 29 U.S.C. § 141 *et seq.*) or the Railway Labor Act (*see* 45 U.S.C. § 151 *et seq.*). *See* 29 U.S.C. § 402(c). The definition of "industry affecting commerce" in the Labor Management Relations Act is also essentially identical to Title VII. *See* 29 U.S.C. § 142(1). However, there is no definition of the term in the Railway Labor Act.

(n72)Footnote 64. 42 U.S.C. § 2000e(h).

(n73)Footnote 65. *Martin v. United Way of Erie County* (3d Cir. 1987) 829 F.2d 445, 447-449 .

(n74)Footnote 66. *Polish Nat'l Alliance v. National Labor Rel. Bd.* (1944) 322 U.S. 643, 88 L. Ed. 1509 .

(n75)Footnote 67. *See* 29 U.S.C. §§ 151-168; *see also E.E.O.C. v. California Teachers Ass'n* (N.D. Cal. 1982) 534 F. Supp. 209, 218 (Title VII and National Labor Relations Act are closely related, and contain similar definitions of "commerce" and "industry affecting commerce").

(n76)Footnote 68. *Polish Nat'l Alliance v. National Labor Rel. Bd.* (1944) 322 U.S. 643, 647, 88 L. Ed. 1509 .

(n77)Footnote 69. *Polish Nat'l Alliance v. National Labor Rel. Bd.* (1944) 322 U.S. 643, 648, 88 L. Ed. 1509 .

(n78)Footnote 70. *Polish Nat'l Alliance v. National Labor Rel. Bd.* (1944) 322 U.S. 643, 648, 88 L. Ed. 1509 ; *see also Martin v. United Way of Erie County* (3d Cir. 1987) 829 F.2d 445, 449-450 (applying *Polish Nat'l Alliance* and other cases in determining whether charitable organization is engaged in industry that affects commerce within meaning of Title VII and ADEA).

(n79)Footnote 71. *E.E.O.C. v. Ratliff* (9th Cir. 1990) 906 F.2d 1314, 1316 .

(n80)Footnote 71.1. 42 U.S.C. § 2000e-2(c)(1).

(n81)Footnote 71.2. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 882 . See *Pejic v. Hughes Helicopters* (9th Cir. 1988) Inc. 840 F.2d 667, 671-674 .

(n82)Footnote 71.3. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) . For discussion of the *McDonnell Douglas* burden-shifting test in disparate treatment cases generally, see § 41.11, and in disparate impact cases generally, see § 41.20.

(n83)Footnote 71.4. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 882 . See *Pejic v. Hughes Helicopters, Inc., Inc.* (9th Cir. 1988) 840 F.2d 667, 674 .

(n84)Footnote 71.5. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 882-883 . See *Pejic v. Hughes Helicopters, Inc.* (9th Cir. 1988) 840 F.2d 667, 674 ; *Gay v. Waiters' & Dairy Lunchmen's Union* (9th Cir. 1982) 694 F.2d 531, 537 .

(n85)Footnote 71.6. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 883 . See *Pejic v. Hughes Helicopters, Inc.* (9th Cir. 1988) 840 F.2d 667, 674 .

(n86)Footnote 71.7. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 883 . See *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 507, 113 S. Ct. 2742, 125 L. Ed. 2d 407 .

(n87)Footnote 71.8. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 883 . See *Reeves v. Sanderson Plumbing Prods., Inc.* (2000) 530 U.S. 133, 142-143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 ; *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 510, 113 S. Ct. 2742, 125 L. Ed. 2d 407 .

(n88)Footnote 71.9. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 883 . See *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 508, 113 S. Ct. 2742, 125 L. Ed. 2d 407 .

(n89)Footnote 71.10. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 884 . See also *Goodman v. Lukens Steel Co.* (1987) 482 U.S. 656, 107 S. Ct. 2617, 96 L. Ed. 2d 572 (Title VII plaintiff need not show union had negative animus toward protected class) ; *Gay v. Waiters' & Dairy Lunchmen's Union* (9th Cir. 1982) 694 F.2d 531, 537 ; *Bugg v. Int'l Union of Allied Indus. Workers of Am.*, 674 F.2d 595 (7th Cir. 1982) ; *EEOC v. Reynolds Metals Co.* (E.D. Va. 2002) 212 F. Supp. 2d 530, 539-40 .

(n90)Footnote 71.11. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 883 . See *Reeves v. Sanderson Plumbing Prods., Inc.* (2000) 530 U.S. 133, 147, 120 S. Ct. 2097, 147 L. Ed. 2d 105 ; *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 .

(n91)Footnote 71.12. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 883 . See *Reeves v. Sanderson Plumbing Prods., Inc.* (2000) 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 ; *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 524, 113 S. Ct. 2742, 125 L. Ed. 2d 407 .

(n92)Footnote 71.13. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 883 . See *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 100, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003) ; *USPS Bd. of Governors v. Aikens* (1983) 460 U.S. 711, 716, 103 S. Ct. 1478, 75 L. Ed. 2d 403 ; *Cornwell v. Electra Cent. Credit Union* (9th Cir. 2006) 439 F.3d 1018, 1030 .

(n93)Footnote 71.14. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 883-884 . See, e.g., *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 282, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (plaintiff can establish Title VII violation based on evidence that two white employees were discharged for their

alleged participation in misappropriation of cargo but fellow nonwhite employee was not).

(n94)Footnote 71.15. *Beck v. United Food and Commercial Workers Union* (9th Cir. 2007) 506 F.3d 874, 884-885 .

(n95)Footnote 72. *See* 42 U.S.C. § 2000e(f); *see also* *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1517 n.10 (assuming without deciding that undocumented alien workers were "individuals" entitled to Title VII protections).

(n96)Footnote 73. *See* [4], *above*.

(n97)Footnote 74. *See* 42 U.S.C. § 2000e-2(a)(1) (unlawful employment practice includes failure or refusal to *hire* based on protected classification), (2) (unlawful employment practice includes limiting, segregating, or classifying employees or *applicants for employment*).

(n98)Footnote 75. *See* *Robinson v. Shell Oil Co.* (1997) 519 U.S. 337, 341-342, 117 S. Ct. 843, 136 L. Ed. 2d 808 (former employee may sue for postemployment retaliation); *Hackett v. McGuire Bros., Inc.* (3d Cir. 1971) 445 F.2d 442, 446 .

(n99)Footnote 76. *See* *Sibley Memorial Hosp. v. Wilson* (D.C. Cir. 1973) 488 F.2d 1338, 1341 ; *see also* *Hishon v. King & Spalding* (1984) 467 U.S. 69, 74 n.5, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (reserving question whether Title VII applies to partners in law firm).

(n100)Footnote 77. *Sibley Memorial Hosp. v. Wilson* (D.C. Cir. 1973) 488 F.2d 1338 .

(n101)Footnote 78. *See* *Sibley Memorial Hosp. v. Wilson* (D.C. Cir. 1973) 488 F.2d 1338, 1339 .

(n102)Footnote 79. *Sibley Memorial Hosp. v. Wilson* (D.C. Cir. 1973) 488 F.2d 1338, 1341 ; *see also* *Baker v. McNeil Island Corrections Ctr.* (9th Cir. 1988) 859 F.2d 124, 128 (noting that pursuant to EEOC's notice of policy statement, Title VII applies to work-release prisoners in their relationship with prison; prison is third party with ability to control or interfere with prisoner's employment opportunities).

(n103)Footnote 80. *See* *Sibley Memorial Hosp. v. Wilson* (D.C. Cir. 1973) 488 F.2d 1338, 1341 .

(n104)Footnote 81. *See* *Sibley Memorial Hosp. v. Wilson* (D.C. Cir. 1973) 488 F.2d 1338, 1341 .

(n105)Footnote 82. *See* 42 U.S.C. § 2000e-5(b).

(n106)Footnote 83. *See* *Sibley Memorial Hosp. v. Wilson* (D.C. Cir. 1973) 488 F.2d 1338, 1341 .

(n107)Footnote 84. *See* *Sibley Memorial Hosp. v. Wilson* (D.C. Cir. 1973) 488 F.2d 1338, 1341 .

(n108)Footnote 85. *See* *Gomez v. Alexian Bros. Hosp. of San Jose* (9th Cir. 1983) 698 F.2d 1019, 1021 ; *Lutcher v. Musicians Union Local 47* (9th Cir 1980) 633 F.2d 880, 883 .

(n109)Footnote 86. *Gomez v. Alexian Bros. Hosp. of San Jose* (9th Cir. 1983) 698 F.2d 1019 .

(n110)Footnote 87. *Lutcher v. Musicians Union Local 47* (9th Cir 1980) 633 F.2d 880, 883 .

(n111)Footnote 88. *See* *Gomez v. Alexian Bros. Hosp. of San Jose* (9th Cir. 1983) 698 F.2d 1019, 1021 ; *Lutcher v. Musicians Union Local 47* (9th Cir 1980) 633 F.2d 880, 883 n.3 ; *but see* *Mitchell v. Frank R. Howard Memorial Hosp.* (9th Cir. 1988) 853 F.2d 762, 767 (physician's allegations that hospital interfered with his relationships with patients failed to state *Lutcher* Title VII claim because patient-physician relationship is not one of employer-employee).

(n112)Footnote 89. *Adcock v. Chrysler Corp.* (9th Cir.1999) 166 F.3d 1290, 1292 ; *Lutcher v. Musicians Union Local 47* (9th Cir. 1980) 633 F.2d 880, 883 .

(n113)Footnote 90. *See Smith v. Dutra Trucking Co.* (N.D. Cal. 1976) 410 F. Supp. 513, 515-516 , *aff'd*, 580 F.2d 1054 (9th Cir. 1978) (no indication that Congress intended to construe "employee" in any manner other than in accordance with common-law agency principles).

(n114)Footnote 91. *Smith v. Dutra Trucking Co.* (N.D. Cal. 1976) 410 F. Supp. 513, 516 , *aff'd*, 580 F.2d 1054 (9th Cir. 1978) ; *see also E.E.O.C. v. Zippo Mfg. Co.* (3d Cir. 1983) 713 F.2d 32, 36 (decided under ADEA).

(n115)Footnote 92. *See, e.g., E.E.O.C. v. Zippo Mfg. Co.* (3d Cir. 1983) 713 F.2d 32, 36 ; *Spirides v. Reinhardt* (D.C. Cir. 1979) 613 F.2d 826, 831-832 ; EEOC Policy Statement on Title VII Coverage of Independent Contractors and Independent Businesses (Sept. 4, 1987) (both endorsing a hybrid test of employee status, which is based on both the common-law test and a more liberal "economic realities" test); *but see Adcock v. Chrysler Corp.* (9th Cir. 1999) 166 F.3d 1290, 1292 n.3 (common law agency approach essentially indistinguishable from multi-factor approach).

(n116)Footnote 93. *Adcock v. Chrysler Corp.* (9th Cir. 1999) 166 F.3d 1290, 1292, 1292 n.3 (overwhelming majority of factors established car dealership franchise agreement as contract not employment relationship subject to Title VII; court applied *Lutcher* multi-factor approach because precise question was whether agreement would constitute employment relationship rather than definition of employee).

(n117)Footnote 94. *Adcock v. Chrysler Corp.* (9th Cir. 1999) 166 F.3d 1290 .

(n118)Footnote 95. *See Spirides v. Reinhardt* (D.C. Cir. 1979) 613 F.2d 826, 831-832 ; *see also Mitchell v. Frank R. Howard Memorial Hosp.* (9th Cir. 1988) 853 F.2d 762, 766 .

(n119)Footnote 96. *See, e.g., Lutcher v. Musicians Union Local 47* (9th Cir. 1980) 633 F.2d 880, 883 (upholding independent contractor status of musician who performed concerts for school district but was responsible for employing, equipping, transporting, and controlling the members of his group).

(n120)Footnote 97. *See 42 U.S.C. § 2000e-1(a)*; *see [4], above*. The statutory exclusion of religious organization employees only applies to discrimination based on religious preference. Such employees are protected from discrimination based on race, sex, or national origin. *See Rayburn v. General Conf. of Seventh-Day Adventists* (4th Cir. 1985) 772 F.2d 1164, 1166 ; *E.E.O.C. v. Pacific Press Pub. Ass'n* (9th Cir. 1982) 676 F.2d 1272, 1277 . For further discussion, *see ch. 41, pt. E*.

(n121)Footnote 98. *See 42 U.S.C. § 2000e(f)*; *but see 42 U.S.C. § 2000e-1(b),(c)* (under certain circumstances, employer not liable under Title VII if compliance would violate laws of foreign country where workplace is located), discussed in *ch. 41, pt. E*.

(n122)Footnote 99. *42 U.S.C. § 2000e(f)*. However, employees subject to state civil service laws are not included in this exemption. *42 U.S.C. § 2000e(f)*.

(n123)Footnote 100. *See Hodge v. Dalton* (9th Cir. 1997) 107 F.3d 705 , *cert. denied*, 139 L. Ed. 2d 25 (1997) .

(n124)Footnote 101. *See 42 U.S.C. §§ 2000e-2(a)-(d)*.

(n125)Footnote 102. *See 42 U.S.C. § 2000e(j)* ("religion" defined as including all aspects of religious observance and practice, as well as belief); *see also 29 C.F.R. §§ 1605.1-1605.3* (guidelines on religious discrimination).

(n126)Footnote 103. *See 29 C.F.R. §§ 1604.1-1604.11* (guidelines on sex discrimination).

(n127)Footnote 104. *See 29 C.F.R. §§ 1606.1-1606.8* (guidelines on national origin discrimination).

(n128)Footnote 105. 42 U.S.C. § 2000e(k) (Pregnancy Discrimination Act).

(n129)Footnote 106. See 29 C.F.R. § 1604.4(a).

(n130)Footnote 107. See *Hishon v. King & Spalding* (1984) 467 U.S. 69, 77, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (benefit denied need not be employment; it need only be a term, condition, or privilege of employment).

(n131)Footnote 108. 42 U.S.C. 2000e-2(a)-(c); see *Gomez v. Alexian Bros. Hosp. of San Jose* (9th Cir. 1983) 698 F.2d 1019, 1021 (employer covered by Title VII prohibited from discriminatorily interfering with individual's employment opportunities with another employer); *Sibley Memorial Hosp. v. Wilson* (D.C. Cir. 1973) 488 F.2d 1338, 1341 (same); see also [5], above.

(n132)Footnote 109. See 42 U.S.C. § 2000e-2(d).

(n133)Footnote 110. 42 U.S.C. § 2000e-3(a).

(n134)Footnote 111. 42 U.S.C. § 2000e-3(b); see 29 C.F.R. § 1604.5 (sex discrimination); see also [8], below.

(n135)Footnote 112. See 42 U.S.C. § 2000e-2(e); 29 C.F.R. §§ 1604.2(a) (EEOC interprets exception narrowly with respect to sex discrimination), 1606.4 (same; national origin); see also *Dothard v. Rawlinson* (1977) 433 U.S. 321, 334, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (sex discrimination; BFOQ exception meant to be extremely narrow); see also 42 U.S.C. § 2000e-3(b) (bona fide occupational qualification defense with respect to discriminatory advertising).

(n136)Footnote 113. See 42 U.S.C. § 2000e-2(h). See also *Lorance v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, 908, 109 S. Ct. 2261, 104 L. Ed. 2d 961 (42 U.S.C. § 2000e-2(h) not regarded as defense, but as provision that delineates which employment practices relating to seniority systems are illegal and thereby prohibited, and which are not); See also ch. 41, pt. E.

(n137)Footnote 114. 42 U.S.C. § 2000e-2(h).

(n138)Footnote 115. 42 U.S.C. § 2000e(j); see 29 C.F.R. § 1605.2 (clarification of "reasonable accommodation" requirement).

(n139)Footnote 116. 42 U.S.C. § 2000e-2(e).

(n140)Footnote 117. See 42 U.S.C. § 2000e-2(f).

(n141)Footnote 118. See 42 U.S.C. § 2000e-2(g); 29 C.F.R. § 1606.3 (national origin).

(n142)Footnote 119. See 42 U.S.C. § 2000e-12(b).

(n143)Footnote 120. 42 U.S.C. § 2000e-2(h); see 29 U.S.C. § 206(d) (Equal Pay Act).

(n144)Footnote 121. *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387, 1392 n.4, 53 Cal. Rptr. 3d 647 ; *Bradbury v. Superior Court* (1996) 49 Cal. App. 4th 1108, 1117-1118, 57 Cal. Rptr. 2d 207 . For discussion of *Vergos*, see § 40.26[9].

(n145)Footnote 122. Code Civ. Proc. § 425.16(b); *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 88, 124 Cal. Rptr. 2d 530, 52 P.3d 703 . See *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387, 1400-1404, 53 Cal. Rptr. 3d 647 (because defendant was employee, she was not liable to plaintiff under title VII).

(n146)Footnote 123. *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 93, 124 Cal. Rptr. 2d 530, 52 P.3d 703 .



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.21

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§ 40.21 Age Discrimination in Employment Act of 1967

[1] Governing Law and Scope of Coverage

The Age Discrimination in Employment Act (ADEA)ⁿ¹ prohibits employment discrimination based on age with respect to individuals who are at least 40 years old.ⁿ²

The substantive provisions of the ADEA are similar to the substantive provisions in Title VII.ⁿ³ Like Title VII, the ADEA prohibits discrimination by employers,ⁿ⁴ employment agencies,ⁿ⁵ and labor organizationsⁿ⁶ and apprenticeship programs.ⁿ⁷ Age discrimination by federal employers is prohibited by a separate provision in the ADEA.ⁿ⁸

Specific prohibited employment practices are discussed in [5], *below*.

The ADEA provides that the EEOC may issue such rules and regulations as it may consider necessary or appropriate to carry out the ADEA.ⁿ⁹ Accordingly, the EEOC has promulgated federal regulations interpreting and implementing the ADEA.ⁿ¹⁰

[2] Enforcement and Remedies

The EEOC enforces the ADEA pursuant to different procedures than those that govern Title VII. By statute, the EEOC investigates claims, promulgates recordkeeping requirements, and enforces the ADEA in accordance with the powers, remedies, and procedures provided in the Fair Labor Standards Act (FLSA).ⁿ¹¹ The ADEA also provides that any act prohibited by the ADEA is deemed a prohibited act under the FLSA.ⁿ¹² For full discussion of the enforcement provisions of the FLSA, *see* Chapter 5.

An EEOC investigation under the ADEA is initiated by a "charge" filed with the EEOC alleging age discrimination.ⁿ¹³ When the EEOC receives the charge, it must promptly notify all persons named as prospective defendants, and it must investigate and promptly seek to eliminate any unlawful practices by informal methods of conciliation.ⁿ¹⁴ A notice regarding conciliation is not a Notice of Dismissal and Termination for purposes of bringing a civil action.^{n14.1} A civil

action may be brought under the ADEA by either the EEOCⁿ¹⁵ or an aggrieved individual,ⁿ¹⁶ but an individual may not bring a civil action until 60 days after filing an EEOC charge.ⁿ¹⁷ Also, the individual's private right of action terminates on commencement of an EEOC civil action.ⁿ¹⁸

Before the EEOC institutes a civil action, it must attempt to eliminate the alleged discrimination and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference, and persuasion.ⁿ¹⁹ For further discussion relating to EEOC investigations, conciliation, and civil actions, *see* Chapter 42, Part C.

Employers who violate the ADEA may be compelled to employ, reinstate, or promote an aggrieved individual, or may be liable for monetary damages.ⁿ²⁰ If the violation is "willful," the employer may be liable for liquidated damages amounting to twice the actual damages.ⁿ²¹ Employers may also be liable for reasonable attorney's fees and costs.ⁿ²² However, according to the weight of case authority, exemplary, punitive, and compensatory damages are not recoverable.ⁿ²³ Federal courts do have jurisdiction to issue injunctions against ADEA violations.ⁿ²⁴ For a detailed discussion relating to relief available in civil actions under the ADEA, *see* Chapter 43, Part B.

Employers who forcibly resist, oppose, impede, intimidate, or interfere with an EEOC representative engaged in the performance of its duties under the ADEA may also be subject to criminal penalties.ⁿ²⁵

The ADEA, as amended by Title II of the Older Workers Benefit Protection Act of 1990 (OWBPA)ⁿ²⁶ generally provides that an individual may waive any right or claim under the ADEA if the waiver is knowingly and voluntarily made.ⁿ²⁷ For example, to qualify as "knowing and voluntary," a waiver included in an agreement between an employer and its employees must, among other things, be written in a manner calculated to be understood by the average employee eligible to participate in the agreement.^{n27.1} Specifically, an individual may agree to waive ADEA rights in settlement of a charge filed with the Equal Employment Opportunity Commission (EEOC), or an action filed in court by the individual or the individual's representative.ⁿ²⁸ The OWBPA provides that the individual must be given a reasonable period of time within which to consider the settlement agreement,ⁿ²⁹ and lists several other specified minimum requirements for a knowingly and voluntarily made waiver.ⁿ³⁰ However, no waiver agreement may affect the EEOC's rights and responsibilities to enforce the ADEA. In addition, no waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the EEOC.ⁿ³¹

For a detailed discussion relating to the minimum requirements for a knowingly and voluntarily made waiver, *see* ch. 41, pt. D.

[3] Employers Covered and Exempted

The ADEA applies to all employers, public or private, who affect commerce and have more than 20 employees.ⁿ³² The ADEA defines "employers" as persons engaged in an industry that affects commerce and who have 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.ⁿ³³ Agents of "employers," states and their political subdivisions, and state and interstate agencies are also "employers."ⁿ³⁴ The definition of "person" includes one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, or any organized groups of persons.ⁿ³⁵ The definitions of the terms "commerce" and "industry affecting commerce" in the ADEA are essentially identical to the same terms under Title VII.ⁿ³⁶ For a detailed discussion of those terms, *see* § 40.20[4][b].

The ADEA also applies to employers that control corporations incorporated in a foreign country who unlawfully discriminate on the basis of age.ⁿ³⁷ The determination of whether an employer controls a foreign corporation is based on the (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control of the employer and the corporation.ⁿ³⁸

As discussed in [1], *above*, employment agencies are also covered by the ADEA. An "employment agency" covered by the ADEA is any person, or that person's agent, who regularly undertakes, with or without compensation, to procure employees for an employer,ⁿ³⁹ whether or not the employer is covered.ⁿ⁴⁰ The ADEA also applies to all apprenticeship programs, including those created or maintained by joint labor-management organizations.ⁿ⁴¹

Further, pension trust funds established or maintained by employers and unions together are covered by the ADEA.ⁿ⁴² The ADEA bars "an employer, an employment agency, a labor organization, or any combination thereof" from establishing or maintaining an employee pension plan that, in the context of a defined benefit plan, requires or permits the cessation of an employee's benefit accrual or a reduced rate of benefit accrual based on age.ⁿ⁴³ In a case of first impression, the Ninth Circuit construed this language to cover pension trust funds established or maintained by employers and unions together.ⁿ⁴⁴

A plaintiff can sue a labor union in its capacity as an employer, but the statutory definition of employer must be satisfied rather than the definition of a labor organization,ⁿ⁴⁵ which is also subject to suit under the ADEA, but under a different standard.ⁿ⁴⁶ In addition, when counting the number of employees employed by a local union for purposes of meeting the definition of employer under the ADEA, the plaintiff cannot aggregate the number of employees employed by the local union with those of the international union without demonstrating that the operations of those entities are sufficiently intertwined.ⁿ⁴⁷ The topic of bringing suit against a union in its capacity as a union under the ADEA is beyond the scope of this chapter.

■ CONSULTANT'S COMMENT:

Herman v. United Brotherhood of Carpenters, Local 971, ⁿ⁴⁸ contains important holdings for union employers and at least one important holding for employers generally.

Local 971 summarily discharged Jeanne Herman on one day's notice after 36 years of employment. Ms. Herman was 68 years old and disabled from childhood polio. She filed a collective bargaining grievance which the union pursued through a portion of the contractually mandated grievance processing stages and then abandoned. Ms. Herman brought claims for breach of contract, age discrimination, disability discrimination under the Rehabilitation Act of 1973, and variety of state law claims. Despite appealing facts, Ms. Herman fared poorly in court.

The Ninth Circuit held that she could maintain her contract action without exhaustion of the collectively bargained grievance process, because Local 971 had breached its duty of fair representation. The circuit panel, however, dismissed each of the remaining claims. The age claim failed, because the employer (Local 971) had fewer than 20 employees. Thus, even though the Local had certain obligations to its membership that were not dependent upon the size of its workforce, its duties as an employer were directly linked to the 20-person threshold. The Rehabilitation Act claim failed because Local 971 received no federal financial assistance. It received NLRA certification (which was held akin to a "license"), it fell under federal regulation of apprenticeship programs and Davis-Bacon regulation of wages, and it received the benefit of occasional FMCS mediation. None of these activities, however, were deemed an equivalent of financial assistance. Finally, Ms. Herman's state-law claims failed for reasons specific to Nevada law.

Of all these rulings, the one most likely to be relevant to larger, private employers is the reaffirmation that federal licensure and federal regulation are not certain to qualify as surrogates for federal financial assistance. *Herman* thus follows *Jacobson v. Delta Airlines, Inc.* ⁿ⁴⁹ This conclusion may appear to have little relevance in light of the greater breadth of the ADA than the ADEA, but defense practitioners are well aware of the difficulties of summary judgment when a plaintiff has multiple causes of action based on the same facts (e.g., both ADA and Rehabilitation Act claims). When it is possible to remove at least one overlapping cause of action based upon a jurisdictional defect, discovery and trial will be that

much more manageable. It is, therefore, important that the Circuit panel adhered to precedent to confined the jurisdictional trigger for Rehabilitation Act coverage. *Commentary by Kirby Wilcox.*

[4] Employees Covered and Exempted

An "employee" under the ADEA is an individual employed by an employer.ⁿ⁵⁰ The foregoing definition is virtually identical to the definition of "employee" under Title VII,ⁿ⁵¹ and since the ADEA and Title VII have a similar purpose--to eliminate discrimination in various forms--cases construing the definitional provisions of one are persuasive authority when interpreting the other.ⁿ⁵²

Essentially, the ADEA applies to all employees and applicants for employment,ⁿ⁵³ including United States citizens employed by such a covered employer in a workplace in a foreign country.ⁿ⁵⁴ ADEA coverage is not limited to rank-and-file "employees," but may also apply to stockholders, officers, and directors who are also "employees."ⁿ⁵⁵

Members of the boards of directors of nonprofit organizations will not be considered employees within the meaning of the ADA unless they satisfy the criteria for a traditional employer-employee relationship.^{n55.1} In determining whether directors are employees, the court will use the factors delineated by the United States Supreme Court in *Clackamas Gastroenterology Associates, P.C. v. Wells*:^{n55.2}

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work.
- Whether and, if so, to what extent the organization supervises the individual's work.
- Whether the individual reports to someone higher in the organization.
- Whether and, if so, to what extent the individual is able to influence the organization.
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts.
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Thus, the members of the board of directors of a nonprofit organization that operated a cable access television station were not employees, because the nonprofit did not hire or fire the directors; the nonprofit did not supervise or regulate the directors' work; the directors did not report to someone higher in the organization in any traditional way; because of their advisory and supervisory function, the directors were in a position to influence the nonprofit; the directors considered themselves volunteers, not employees, and there was no evidence to contradict this or suggest the nonprofit intended otherwise; and whether the directors shared in the profits, losses, and liabilities of the organization was not appropriate to the non-profit setting.^{n55.3} Similarly, independent volunteer producers for the same nonprofit were not employees, because there was no evidence of a traditional employer-employee relationship or master-servant relationship between the nonprofit and the producers.^{n55.4}

There are express statutory and regulatory exemptions to employee coverage under the ADEA. For example, persons elected to public office in any state or state political subdivision, and their personal staff, appointees, and advisors are exempted from the ADEA definition of "employees";ⁿ⁵⁶ however, civil service employees are not covered by this exemption.ⁿ⁵⁷ There are also limited exceptions relating to firefighters and law enforcement officers.ⁿ⁵⁸ Under certain circumstances, the ADEA does not prohibit compulsory retirement of bona fide executives and high policymakers at age 65.ⁿ⁵⁹

The ADEA provides that the EEOC may establish such reasonable exemptions to and from the ADEA as it may find necessary and proper in the public interest.ⁿ⁶⁰

The ADEA also does not apply to individuals properly classified as partners.ⁿ⁶¹ Also, independent contractors are not "employees" under the ADEA and thus are not covered.ⁿ⁶²

Although the ADEA, unlike Title VII,ⁿ⁶³ contains no express provision regarding religious institutions, constitutional issues may arise when the ADEA is applied to the ecclesiastical policies of such institutions. Thus, one court has held that an ADEA claim against a church for denying a minister a promotion to pastorship because of his age violated the *Free Exercise Clause of the First Amendment to the United States Constitution*.ⁿ⁶⁴

[5] Prohibited Employment Practices

Like Title VII, the ADEA prohibits discriminatory failure or refusal to hire or refer for employment, discriminatory discharge, and other discriminatory acts, with respect to compensation, terms, conditions, or privileges of employment, because of age.ⁿ⁶⁵ It is also unlawful to limit, segregate, or classify an individual over 40 years in any way that would deprive the individual of employment opportunities because of his or her age or otherwise adversely affect his or her status as an employee.ⁿ⁶⁶ In addition, the ADEA prohibits reducing an employee's wage rate in an effort to comply with the ADEA.ⁿ⁶⁷ The ADEA also prohibits age discrimination in help-wanted notices or advertisementsⁿ⁶⁸ and employment applications.ⁿ⁶⁹ Furthermore, retaliation against any individual because of that individual's opposition to unlawful discrimination, or because the individual made a charge, testified, assisted, or participated in an ADEA investigation, proceeding, or litigation, is also prohibited under both the ADEA private-sector provision,ⁿ⁷⁰ and the ADEA federal-sector provision,^{n70.1} which allows federal employees to sue under the ADEA, even though it does not contain the same explicit protection against retaliation as the private-sector provisions of the ADEA,^{n70.2}

The ADEA prohibits not only age discrimination against persons age 40 or older in favor of persons younger than 40,ⁿ⁷¹ but also discrimination between individuals protected by the ADEA.ⁿ⁷² For example, if two individuals over 40 years of age apply for the same job, an employer may be liable for selecting the younger one on the basis of age.ⁿ⁷³

Although bona fide seniority systems and employee benefit plans are not unlawful,ⁿ⁷⁴ they may not excuse the failure to hire, or require or permit the involuntary retirement of, anyone age 40 or older because of age.ⁿ⁷⁵ However, the firing of an employee for the purpose of preventing a pension from vesting, or for some other reason that is correlated with age but is based on years of service as distinct from age, does not violate the ADEA.ⁿ⁷⁶

The ADEA prohibits employers, employment agencies, labor organizations, and any combination from establishing or maintaining an employee pension plan that, in the context of a defined benefit plan, requires or permits the cessation of an employee's benefit accrual or a reduced rate of benefit accrual based on age.ⁿ⁷⁷

For a detailed discussion relating to prohibited discriminatory practices, *see* Chapter 41, Parts C, D, and F.

[6] Defenses

Practices that are otherwise prohibited by the ADEA are not unlawful when age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business.ⁿ⁷⁸ Also, such actions may be based on reasonable factors other than age.ⁿ⁷⁹ It is also not unlawful to observe the terms of a bona fide seniority system, or any bona fide employee benefit plan established, modified, or otherwise affected on or after October 16, 1990, in which age-based distinctions are made because of specified cost justifications,ⁿ⁸⁰ or that is a voluntary early retirement incentive plan consistent with the ADEA's purposes.ⁿ⁸¹ Bona fide employee benefit plans established before October 16, 1990 (and not thereafter modified or otherwise affected) are lawful as long as they are not a subterfuge to evade the purposes of the ADEA.ⁿ⁸² Such systems or plans may not unlawfully discriminate in hiring or force the retirement of

anyone protected by the ADEA.ⁿ⁸³

Based on *Eleventh Amendment* immunity, states cannot be compelled to submit to the jurisdiction of the federal courts in actions under the ADEA.ⁿ⁸⁴ However, a state may waive its *Eleventh Amendment* immunity on a case-by-case basis by failing to assert the defense and thereby subject itself to suit under the ADEA.ⁿ⁸⁵ If an otherwise prohibited employment practice involves an employee in a workplace in a foreign country, and compliance with the ADEA would cause the employer, or a corporation controlled by the employer, to violate the foreign country's laws, the practice is not unlawful under the ADEA.ⁿ⁸⁶ Also, the ADEA does not apply to practices by corporations incorporated in foreign countries that are not controlled by an American employer.ⁿ⁸⁷ Although an Indian tribe does not enjoy sovereign immunity in ADEA suits brought by the federal government,ⁿ⁸⁸ the ADEA does not apply to Indian tribes.ⁿ⁸⁹

Substantive defenses to employment discrimination are discussed in detail in Chapter 41, Part F.

Legal Topics:

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

Labor & Employment Law Discrimination Age Discrimination General Overview Labor & Employment Law Discrimination Age Discrimination Coverage & Definitions General Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. §§ 621-634.

(n2)Footnote 2. See 29 U.S.C. §§ 623, 631(a).

(n3)Footnote 3. Compare, e.g., 29 U.S.C. § 623 with 42 U.S.C. § 2000e-2; see *Gregory v. Ashcroft* (1991) 501 U.S.452, 111 S. Ct. 2395, 115 L. Ed. 2d 410, 428 (appointed state judges); *Monce v. City of San Diego* (9th Cir. 1990) 895 F.2d 560, 561 (complementary provisions of Title VII and ADEA are construed consistently); *Aronsen v. Crown Zellerbach* (9th Cir. 1981) 662 F.2d 584, 589, cert. denied, 459 U.S. 1200 (1983) (provisions of Title VII, and cases construing them, may be used to interpret ADEA); see also discussion in § 40.20.

(n4)Footnote 4. See 29 U.S.C. § 623(a).

(n5)Footnote 5. See 29 U.S.C. § 623(b).

(n6)Footnote 6. See 29 U.S.C. § 623(c).

(n7)Footnote 7. 29 C.F.R. § 1625.21.

(n8)Footnote 8. See 29 U.S.C. § 633a(a).

(n9)Footnote 9. See 29 U.S.C. § 628.

(n10)Footnote 10. See 29 C.F.R. §§ 1625.1-1627.17.

(n11)Footnote 11. 29 U.S.C. § 626(a), (b); 29 C.F.R. §§ 1626.4, 1626.15; see also 29 U.S.C. §§ 209, 211, 216(b)-(d), 217 (investigations, inspections, records, homework regulations, and remedies under FLSA).

(n12)Footnote 12. See 29 U.S.C. § 626(b); see also 29 U.S.C. § 215 (prohibited acts under FLSA).

(n13)Footnote 13. See 29 U.S.C. § 626(d); 29 C.F.R. §§ 1626.5-1626.8.

(n14)Footnote 14. See 29 U.S.C. § 626(d); 29 C.F.R. §§ 1626.11, 1626.12.

(n15)Footnote 14.1. *See* 29 C.F.R. §§ 1626.12, 1626.17.

(n16)Footnote 15. *See* 29 U.S.C. § 626(a), (b); 29 C.F.R. § 1626.15(d); *see also* 29 U.S.C. § 216(c) (FLSA); *E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1504 .

(n17)Footnote 16. *See* 29 U.S.C. § 626(c); 29 C.F.R. § 1626.15(d); *see also* 29 U.S.C. § 216(b) (individual and class private right of action under FLSA); *see also* *E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1504-1505 (both ADEA and FLSA authorize private litigation for age discrimination). For a discussion of ADEA class actions, *see* ch. 43, pt. B.

(n18)Footnote 17. *See* 29 U.S.C. § 626(d); 29 C.F.R. § 1626.7(a).

(n19)Footnote 18. *See* 29 U.S.C. § 626(c); *see also* *E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1505 & n.4, 1506 & n.6, 1508 ("commencement" means filing of complaint; due process does not require EEOC to notify claimants that they have lost their right to bring private actions).

(n20)Footnote 19. 29 U.S.C. § 626(b); 29 C.F.R. §§ 1626.12, 1626.15(b) (conciliation commences when EEOC has reasonable basis to conclude that an ADEA violation has occurred or will occur).

(n21)Footnote 20. *See* 29 U.S.C. § 626(b); *see also* 29 U.S.C. § 216(b) (FLSA).

(n22)Footnote 21. 29 U.S.C. § 626(b); *see also* 29 U.S.C. § 216(b) (FLSA). For a discussion of the difference between intentional and "willful" for purposes of the ADEA, *see* Chapter 43, Part B.

(n23)Footnote 22. *See* 29 U.S.C. § 216(b).

(n24)Footnote 23. *Naton v. Bank of California* (9th Cir. [Cal.] 1981) 649 F.2d 691, 699 .

(n25)Footnote 24. *See* 29 U.S.C. § 217; *see also* 29 U.S.C. § 626(b) (ADEA enforced in accordance with 29 U.S.C. § 217; courts have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate purposes of ADEA); *see also* *EEOC v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1505 .

(n26)Footnote 25. *See* 29 U.S.C. § 629.

(n27)Footnote 26. *See* Pub. L. No. 101-433m §§ 201-202.

(n28)Footnote 27. *See* 29 U.S.C. § 626(f)(1).

(n29)Footnote 27.1. 29 U.S.C. § 626(f)(1)(A). *See also* *Syverson v. Int'l Bus. Machines Corp.* (9th Cir. 2006) 461 F.3d 1147, 2006 U.S. App. LEXIS 22504, *7-*39 (waiver form used by employer in connection with severance benefit package for reduction in force did not satisfy "manner calculated" requirement of OWBPA).

(n30)Footnote 28. *See* 29 U.S.C. § 626(f)(2).

(n31)Footnote 29. *See* 29 U.S.C. § 626(f)(2)(B).

(n32)Footnote 30. *See* 29 U.S.C. § 626(f)(1)(A)-(E), (2)(A).

(n33)Footnote 31. *See* 29 U.S.C. § 626(f)(4).

(n34)Footnote 32. *See* *Action Alliance of Senior Citizens v. Heckler* (D.C. Cir. 1986) 789 F.2d 931, 934 fn. 1 (dictum; distinguishing Age Discrimination Act, 42 U.S.C. §§ 6101-6107, which prohibits age discrimination with regard to any type of benefit in federally assisted programs, from ADEA).

(n35)Footnote 33. 29 U.S.C. § 630(b).

(n36)Footnote 34. See 29 U.S.C. § 630(b); see also *EEOC v. Wyoming* (1983) 460 U.S. 226, 243, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (extension of ADEA to state and local governments is constitutional); *E.E.O.C. v. County of Los Angeles* (9th Cir. 1983) 706 F.2d 1039, 1040, cert. denied, 464 U.S. 1073 (1984) (same); but see *Kimel v. Florida Bd. of Regents* (2000) 528 U.S. 62, 85-87, 120 S. Ct. 631, 145 L. Ed. 2d 522 (ADEA's purported abrogation of states' sovereign immunity is invalid).

(n37)Footnote 35. 29 U.S.C. § 630(a).

(n38)Footnote 36. Compare 29 U.S.C. § 630(g), (h), with 42 U.S.C. § 2000e(g), (h) ("industry affecting commerce" under Title VII includes any governmental industry, business, or activity).

(n39)Footnote 37. See 29 U.S.C. § 623(h)(1).

(n40)Footnote 38. 29 U.S.C. § 623(h)(3).

(n41)Footnote 39. 29 U.S.C. § 630(c).

(n42)Footnote 40. See 29 C.F.R. § 1625.3(a).

(n43)Footnote 41. 29 C.F.R. § 1625.21.

(n44)Footnote 42. *Lee v. California Butchers' Pension Trust Fund* (9th Cir. 1998) 154 F.3d 1075, 1078-1079.

(n45)Footnote 43. 29 U.S.C. § 623(i)(1).

(n46)Footnote 44. *Lee v. California Butchers' Pension Trust Fund* (9th Cir. 1998) 154 F.3d 1075, 1078-1079 (identifying similar holdings under Title VII and ADA).

(n47)Footnote 45. See 29 U.S.C. § 630(d).

(n48)Footnote 46. See *Herman v. United Broth. of Carpenters* (9th Cir. 1995) 60 F.3d 1375, 1384-1385.

(n49)Footnote 47. See *Herman v. United Broth. of Carpenters* (9th Cir. 1995) 60 F.3d 1375, 1385.

(n50)Footnote 48. *Herman v. United Broth. of Carpenters* (9th Cir. 1995) 60 F.3d 1375.

(n51)Footnote 49. *Jacobson v. Delta Airlines, Inc.* (9th Cir. 1984) 742 F.2d 1202.

(n52)Footnote 50. 29 U.S.C. § 630(f).

(n53)Footnote 51. See § 40.20[5].

(n54)Footnote 52. See *Hyland v. New Haven Radiology Assoc., P.C.* (2d Cir. 1986) 794 F.2d 793, 796.

(n55)Footnote 53. See *Hyland v. New Haven Radiology Assoc., P.C.* (2d Cir. 1986) 794 F.2d 793, 796.

(n56)Footnote 54. See 29 U.S.C. § 630(f).

(n57)Footnote 55. *Hyland v. New Haven Radiology Assoc., P.C.* (2d Cir. 1986) 794 F.2d 793, 797.

(n58)Footnote 55.1. See *Fichman v. Media Center* (9th Cir. 2008) 512 F.3d 1157, 1160-1161.

(n59)Footnote 55.2. *Clackamas Gastroenterology Associates, P.C. v. Wells* (2003) 538 U.S. 440, 449-450, 123 S.

Ct. 1673, 155 L. Ed. 2d 615 .

(n60)Footnote 55.3. *Fichman v. Media Center* (9th Cir. 2008) 512 F.3d 1157, 1160-1161 .

(n61)Footnote 55.4. *Fichman v. Media Center* (9th Cir. 2008) 512 F.3d 1157, 1161-1162 (nonprofit did not have power to hire or fire producers and did not supervise them in traditional employer-employee manner, and producers were not paid salary nor were they entitled to employee benefits).

(n62)Footnote 56. *See* 29 U.S.C. § 630(f); *Monce v. City of San Diego* (9th Cir. 1990) 895 F.2d 560, 561 (deputy city attorney).

(n63)Footnote 57. *See* 29 U.S.C. § 630(f).

(n64)Footnote 58. *See* 29 U.S.C. § 623(j); *see* [6], *below*.

(n65)Footnote 59. *See* 29 U.S.C. § 631(c) (employee must be executive for two years, and must be entitled to retirement benefits equaling, in aggregate, \$44,000); 29 C.F.R. §§ 1625.12, 1627.17 (calculating amount of qualifying retirement benefits); *see also* 29 C.F.R. § 541.1 ("bona fide executive" defined). Individuals in a "high policymaking position" have little or no line authority, but their position and responsibility are such that they play a significant role in the development and implementation of corporate policy and effectively recommend the implementation of policy. *See* 29 C.F.R. § 1625.12(e).

(n66)Footnote 60. *See* 29 U.S.C. § 628.

(n67)Footnote 61. *Hyland v. New Haven Radiology Assoc., P.C.* (2d Cir. 1986) 794 F.2d 793, 797 ("partner" status characterized by business ownership and management).

(n68)Footnote 62. *See* *E.E.O.C. v. Zippo Mfg. Co.* (3d Cir. 1983) 713 F.2d 32, 35, 38 . For a further discussion relating to independent contractors, *see* § 40.20[5].

(n69)Footnote 63. *See* 42 U.S.C. § 2000e-1(a); *see also* discussion in .

(n70)Footnote 64. *See* *Minker v. United Methodist Church* (D.C. Cir. 1990) 894 F.2d 1354, 1356-1358 .

(n71)Footnote 65. 29 U.S.C. § 623(a)-(c); *see* [1], *above*.

(n72)Footnote 66. 29 U.S.C. § 623(a), (b).

(n73)Footnote 67. 29 U.S.C. § 623(a)(3).

(n74)Footnote 68. *See* 29 U.S.C. § 623(e); 29 C.F.R. § 1625.4.

(n75)Footnote 69. *See* 29 U.S.C. § 623(e); 29 C.F.R. § 1625.5.

(n76)Footnote 70. *See* 29 U.S.C. § 623(d).

(n77)Footnote 70.1. 29 U.S.C. § 633a(a).

(n78)Footnote 70.2. *Gomez-Perez v. Potter* (2008) 128 S. Ct. 1931, 2008 U.S. LEXIS 4518, *10-*32 .

(n79)Footnote 71. *See* 29 U.S.C. § 621 (purpose of ADEA).

(n80)Footnote 72. *See* 29 C.F.R. § 1625.2(a).

(n81)Footnote 73. *See* 29 C.F.R. § 1625.2(a). But the converse is not true. An employer does not violate the ADEA by favoring an older employee over a younger employee, even if both are over age 40. *General Dynamics Land Sys., Inc. v. Cline*, 124 S. Ct. 1236 (2004) .

(n82)Footnote 74. *See* [6], *below*.

(n83)Footnote 75. *See* 29 U.S.C. § 623(f)(2)(B).

(n84)Footnote 76. *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 611-612, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 347-348 .

(n85)Footnote 77. 29 U.S.C. § 623(i)(1); *Lee v. California Butchers' Pension Trust Fund* (9th Cir. 1998) 154 F.3d 1075, 1078-1079 (ADEA covers pension trust funds established or maintained by employers and unions together).

(n86)Footnote 78. *See* 29 U.S.C. § 623(f)(1); 29 C.F.R. § 1625.6; *Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400, 412-417, 105 S. Ct. 2743, 86 L. Ed. 2d 321 (defense is narrowly construed).

(n87)Footnote 79. *See* 29 U.S.C. § 623(f)(1); 29 C.F.R. § 1625.7.

(n88)Footnote 80. *See* 29 U.S.C. § 623(f)(2)(B)(i); 29 C.F.R. § 1625.10(a)(1); *See also* ch. 41, pt. E.

(n89)Footnote 81. *See* 29 U.S.C. § 623(f)(2)(B)(ii); *See also* ch. 41, pt. E.

(n90)Footnote 82. *See* former 29 U.S.C. § 623(f)(2); 29 C.F.R. §§ 1625.7-1625.10; *United Air Lines, Inc. v. McMann* (1977) 434 U.S. 192, 203 ("subterfuge" under ADEA as scheme, plan, stratagem, or artifice of evasion); *Marshall v. Hawaiian Tel. Co.* (9th Cir. 1978) 575 F.2d 763, 766 ("bona fide" plan defined).

(n91)Footnote 83. *See* [5], *above*.

(n92)Footnote 84. *See* *Kimel v. Florida Bd. of Regents* (2000) 528 U.S. 62, 85-87, 120 S. Ct. 631, 145 L. Ed. 2d 522 (ADEA's purported abrogation of states' sovereign immunity is invalid).

(n93)Footnote 85. *Katz v. Regents of the University of California* (9th Cir. 2000) 229 F.3d 831, 834 .

(n94)Footnote 86. 29 U.S.C. § 623(f)(1).

(n95)Footnote 87. *See* 29 U.S.C. § 623(h)(2).

(n96)Footnote 88. *E.E.O.C. v. Karuk Tribe Housing Authority* (9th Cir. 2001) 260 F.3d 1071, 1075 .

(n97)Footnote 89. *E.E.O.C. v. Karuk Tribe Housing Authority* (9th Cir. 2001) 260 F.3d 1071, 1078-1082 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.22

AUTHOR: By David M. Youngsmith, J.D.

§ 40.22 Equal Pay Act of 1963

[1] Governing Law and Scope of Coverage

The federal Equal Pay Act (EPA),ⁿ¹ which is part of the Fair Labor Standards Act (FLSA),ⁿ² prohibits wage discrimination by employersⁿ³ and labor organizationsⁿ⁴ on the basis of sex. Since the EPA is a part of the FLSA, it covers the same employees and employers as the FLSA, except as discussed in [4], *below*.ⁿ⁵ For a full discussion of the scope and applicability of the FLSA, *see* Chapters 1, 2, and 3. For a discussion of remedies under the FLSA, *see* Chapter 5.

The EPA was enacted to overcome the outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.ⁿ⁶ However, although passage of the EPA was motivated by concern for the weaker bargaining position of women, it expressly applies to both sexes.ⁿ⁷

The EEOC has promulgated regulations governing administration of the EPA.ⁿ⁸ Among other things, the regulations provide that if the jurisdictional prerequisites of both the EPA and Title VII are satisfied, any violation of the EPA is also a violation of Title VII.ⁿ⁹

The EPA is very similar to the California Equal Pay Act.ⁿ¹⁰ Compliance with one law does not, however, excuse noncompliance with the other.ⁿ¹¹

[2] Enforcement and Remedies

The EPA is enforced by the EEOC,ⁿ¹² but unlike the enforcement scheme of Title VII, EEOC administrative procedures need not be exhausted before the aggrieved individual may bring an EPA claim in court.ⁿ¹³ Generally, the EEOC may (1) investigate and gather data;ⁿ¹⁴ (2) enter and inspect establishments and records, make transcriptions of records, and interview individuals;ⁿ¹⁵ (3) advise employers regarding any changes necessary or desirable to comply with the EPA; (4) subpoena witnesses and order production of documents and other evidence;ⁿ¹⁶ (5) supervise the payment of amount owing to any aggrieved individual under the EPA;ⁿ¹⁷ and (6) initiate and conduct litigation.ⁿ¹⁸

The basic remedy under the EPA is the recovery of unpaid wages,ⁿ¹⁹ which may be recovered through the FLSA enforcement provisions in the same manner as that provided for the recovery of unpaid minimum wages and overtime compensation.ⁿ²⁰ Thus, an employer may be liable for back pay plus liquidated damages and attorney's fees.ⁿ²¹ Courts also have the power to enjoin EPA violations,ⁿ²² and to impose criminal penalties for willful violations.ⁿ²³

For a detailed discussion relating to FLSA enforcement procedures, *see* Chapter 5. For further discussion of EPA remedies, *see* Chapter 43, Part B.

[3] Employers and Employees Covered and Exempted

The EPA applies to employers that have employees subject to the FLSA.ⁿ²⁴ For full discussion of employer and employee coverage under the FLSA, *see* Chapter 1. For discussion of exemptions from the FLSA, *see* Chapters 2 and 3.

Although the EPA is part of the FLSA, there is one express difference with respect to employee coverage. Executive, administrative, and professional employees are covered by the EPA,ⁿ²⁵ whereas they are exempt from general FLSA coverage.ⁿ²⁶ For a detailed discussion of the executive, administrative, and professional employees exemption under the FLSA, *see* Chapter 2.

[4] Prohibited Employment Practices

The EPA prohibits wage differentials based on sex for jobs requiring equal skill, effort, and responsibility, and that are performed under similar working conditions.ⁿ²⁷ In essence, it requires equal pay for equal work.ⁿ²⁸ However, employers may not reduce the wage rate of any employee in order to comply with the EPA.ⁿ²⁹ For a detailed discussion relating to prohibited compensation practices based on sex, *see* Chapter 41, Parts B and D.

[5] Defenses

The EPA does not prohibit differentials based on (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) any factor other than sex.ⁿ³⁰ However, differentials based on "head of household" status,ⁿ³¹ employment costs,ⁿ³² and collective bargaining agreementsⁿ³³ are not defenses to the EPA.

Substantive defenses to employment discrimination are discussed in detail in Chapter 41, Part F.

Legal Topics:

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

Labor & Employment LawEqual PayEqual Pay ActGeneral OverviewLabor & Employment LawEqual PayEqual Pay ActBurdens of ProofLabor & Employment LawEqual PayRemedies

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 206(d).

(n2)Footnote 2. *See* 29 U.S.C. § 201 *et seq.*; *see also* 29 C.F.R. § 1620.1(a).

(n3)Footnote 3. *See* 29 U.S.C. § 206(d)(1).

(n4)Footnote 4. *See* 29 U.S.C. § 206(d)(2).

(n5)Footnote 5. *See* 29 C.F.R. § 1620.1(a).

(n6)Footnote 6. *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L. Ed. 2d 1 .

(n7)Footnote 7. *See* 29 C.F.R. § 1620.1(c).

(n8)Footnote 8. *See* 29 C.F.R. § 1620.1 *et seq.*

(n9)Footnote 9. *See* 29 C.F.R. § 1620.27(a). However, since the protections afforded by Title VII are broader than those under the EPA, an employment practice that is not a violation of the EPA may nevertheless be a violation of Title VII. *See County of Washington v. Gunther* (1981) 452 U.S. 161, 166-181, 101 S. Ct. 2242, 68 L. Ed. 2d 751 ; 29 C.F.R. § 1620.27(a). For discussion of Title VII, *see* § 40.20.

(n10)Footnote 10. *See Lab. Code* § 1197.5; *See also* § 40.11.

(n11)Footnote 11. *See* 29 C.F.R. § 1620.28.

(n12)Footnote 12. *See* 29 U.S.C. §§ 204(d)(1), (f), 209, 211(a), (b), (c), 216(b), (c), 217; *see also* 29 C.F.R. § 1620.30. The foregoing statutes actually vest general administrative and enforcement authority under the FLSA in the Secretary of Labor, the Administrator of the Wage and Hour Division of the Department of Labor, and the Civil Service Commission. However, under the President's Reorganization Plan of 1978, authority to enforce the EPA was transferred to the EEOC. *See also E.E.O.C. v. First Citizens Bank of Billings* (9th Cir. 1985) 758 F.2d 397, 399-400 (enforcement power granted to EEOC by Reorg. Plan No. 1 of 1978 as ratified and affirmed by Congress in subsequent enactment).

(n13)Footnote 13. *See* 29 U.S.C. § 216(b) (any employee is entitled to maintain action for violation of 29 U.S.C. §§ 206 and 207); *Ososky v. Wick* (D.C. Cir. 1983) 704 F.2d 1264, 1265 .

(n14)Footnote 14. *See* 29 U.S.C. § 211; 29 C.F.R. § 1620.30(a).

(n15)Footnote 15. *See* 29 U.S.C. § 211; 29 C.F.R. § 1620.30; *see also* 29 C.F.R. § 1620.31 (issuance of subpoenas).

(n16)Footnote 16. *See* 29 U.S.C. § 209; 29 C.F.R. § 1620.30(a); *see also* 29 C.F.R. § 1620.31 (issuance of subpoenas).

(n17)Footnote 17. *See* 29 U.S.C. § 216(c); 29 C.F.R. § 1620.30(a).

(n18)Footnote 18. *See* 29 U.S.C. § 216(c); 29 C.F.R. § 1620.30(a).

(n19)Footnote 19. *See* 29 U.S.C. § 206(d)(3); 29 C.F.R. § 1620.33(a).

(n20)Footnote 20. *See* 29 U.S.C. §§ 206(d)(3), 216(b); 29 C.F.R. § 1620.33(b).

(n21)Footnote 21. 29 C.F.R. § 1620.33(b); *see E.E.O.C. v. First Citizens Bank of Billings* (9th Cir. 1985) 758 F.2d 397, 401, 403 ; *see also* 29 U.S.C. §§ 216(b), (c), 260.

(n22)Footnote 22. *See* 29 C.F.R. § 1620.33(b), (d) (violation of EPA as unlawful under 29 U.S.C. § 215(a)(2)); *see also* 29 U.S.C. § 217.

(n23)Footnote 23. *See* 29 C.F.R. § 1620.33(c), (d) (violation of EPA as unlawful under 29 U.S.C. § 215(a)(2)); *E.E.O.C. v. First Citizens Bank of Billings* (9th Cir. 1985) 758 F.2d 397, 401 ("willful" violation defined); *see also* 29 U.S.C. § 216(a).

(n24)Footnote 24. *See* 29 U.S.C. § 206(d)(1).

(n25)Footnote 25. *See* 29 C.F.R. § 1620.1(a)(1).

(n26)Footnote 26. *See* 29 U.S.C. § 213(a)(1).

(n27)Footnote 27. *See* 29 U.S.C. § 206(d)(1); 29 C.F.R. §§ 1620.13-1620.19.

(n28)Footnote 28. *See* *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L. Ed. 2d 1 ; *see also* *County of Washington v. Gunther* (1981) 452 U.S. 161, 101 S. Ct. 2242, 68 L. Ed. 2d 751 .

(n29)Footnote 29. *See* 29 U.S.C. § 206(d)(1); 29 C.F.R. § 1620.25.

(n30)Footnote 30. *See* 29 U.S.C. § 206(d)(1); *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (EPA exceptions are affirmative defenses on which employer has burden of proof).

(n31)Footnote 31. *See* 29 C.F.R. § 1620.21; *E.E.O.C. v. Fremont Christian Sch.* (N.D. Cal. 1984) 609 F. Supp. 344, 351 , *aff'd*, 781 F.2d 1362 (9th Cir. 1986) (limitation of health insurance benefits to "heads of households" as presumptive violation of EPA).

(n32)Footnote 32. *See* 29 C.F.R. § 1620.22.

(n33)Footnote 33. *See* 29 C.F.R. § 1620.23. For a discussion relating to the effect of collective bargaining agreements on equal employment opportunity laws, generally, *see* § 40.02.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.22A

AUTHOR: By David M. Youngsmith, J.D.

§ 40.22A Americans With Disabilities Act of 1990

[1] Governing Law and Scope of Coverage

Title I of the Americans With Disabilities Act of 1990 (ADA),ⁿ¹ prohibits employment discrimination against disabled persons by employers, employment agencies, labor organizations, and joint labor-management committees.ⁿ² Additional remedial provisions relevant to employment discrimination are contained in Title V of the ADA.ⁿ³ Except as otherwise provided, the ADA does not apply a lesser standard than the standards applied under the Rehabilitation Act of 1973 or the regulations promulgated under that statute.ⁿ⁴ Furthermore, it does not invalidate or limit other laws, including the FEHA,ⁿ⁵ which provide greater or equal protection of the rights of disabled people.ⁿ⁶ Nothing in the ADA or the amendments to the ADA effective January 1, 2009, provides the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.^{n6.1} Further, an employer need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of "disability" under the ADA solely as being regarded as disabled.^{n6.2} Nothing in the ADA alters the standards for determining eligibility for benefits under state worker's compensation laws or under state and federal disability benefit programs.^{n6.3}

The EEOC has promulgated regulations interpreting the employment discrimination provisions of the ADA.^{n6.4} The authority to issue regulations granted to the EEOC under the ADA includes the authority to issue regulations implementing the definitions of "disability"^{n6.5} and the definitions in 42 U.S.C. § 12103, consistent with the ADA Amendments Act of 2008.ⁿ⁷ However, the persuasive authority of the EEOC regulations is less than clear.^{n7.1} The EEOC also has issued detailed enforcement guidance on various issues involving the ADA.^{n7.2} The ADA is not retroactive and does not apply to actions taken prior to its effective date of July 26, 1992.^{n7.3} The EEOC must coordinate its actions with other agencies that enforce the Rehabilitation Act of 1973 in order to avoid duplication of effort and inconsistent or conflicting standards for the same requirements under the ADA and the Rehabilitation Act.ⁿ⁸

Title II of the ADA,^{n8.1} which covers the provision of services by government entities, does not apply to employment.^{n8.2} It also does not apply to the provision of post-employment fringe benefits.^{n8.3}

[2] Enforcement and Remedies

The ADA adopts the same remedies and enforcement procedures as those provided under Title VII.ⁿ⁹ These include EEOC investigation of discrimination charges; informal methods of conference, conciliation, and persuasion; and civil actions seeking equitable remedies, including injunctive relief, reinstatement with or without back pay, and front pay.^{n9.1} For further discussions of Title VII enforcement and remedies, *see* § 40.20[3], Chapter 42, Part C, and Chapter 43, Part B.

To successfully seek injunctive relief for a violation of the ADA, an employee must have standing to seek the type of injunctive relief sought in the complaint. To have standing to bring a claim for injunctive relief, a plaintiff must show that he or she has (1) suffered an injury that (2) was caused by the defendant and (3) is likely to be redressed by the relief the employee seeks.ⁿ¹⁰

In *Equal Employment Opportunity Commission v. Waffle House*,^{n10.1} the United States Supreme Court held that an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an ADA enforcement action.^{n10.2}

Attorney's fees, including reasonable costs, are also available, in the EEOC's or court's discretion, to the prevailing party in an ADA action.^{n10.3} Attorney's fees should be awarded to a prevailing defendant only if the plaintiff's action was frivolous, unreasonable, or without foundation.^{n10.4} The same test applies to an award of costs to a prevailing defendant under the ADA.^{n10.5} Although the United States government may not be awarded attorney's fees, it may be liable for them.ⁿ¹¹

[3] Employers Covered and Exempted

An "employer" covered by the ADA is a person with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.ⁿ¹² The ADA applies only to employers engaged in an "industry affecting commerce."ⁿ¹³ The terms "person" and "industry affecting commerce," as they are used in the ADA, have the same meaning as they do under Title VII.ⁿ¹⁴ For discussion of the Title VII definitions of these terms, *see* § 40.20[4].

The ADA does not apply to the United States or corporations wholly owned by the United States, to Indian tribes, or to bona fide private membership clubs.ⁿ¹⁵ States are, however, subject to ADA actions.ⁿ¹⁶ The ADA also applies to employment agencies, labor organizations, and joint labor-management committees.ⁿ¹⁷ These entities are the same as those defined and covered by Title VII and discussed in § 40.20[4][a].ⁿ¹⁸

[4] Employees Covered and Exempted

Like Title VII, the ADA defines an "employee" as an individual employed by an employer.ⁿ¹⁹ With respect to employment in a foreign country, the term "employee" includes an individual who is a citizen of the United States.ⁿ²⁰

Specifically, the ADA protects every "qualified individual," which means "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."ⁿ²¹ Generally, the ADA provides that the EEOC and courts must consider the employer's determination as to what the "essential functions" of a job are.ⁿ²²

Under the ADA, a "disabled" employee is one who (1) has a physical or mental impairment that substantially limits one or more of his or her major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.ⁿ²³ For these purposes, "major life activities" include, but are not limited to, caring for oneself, performing

manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, and the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.^{n23.1} For a more detailed discussion of "disability" under the ADA, *see* Chapter 41, Part B. For further discussion of this term under the Rehabilitation Act, *see* § 40.23[1][d], [2][d] and Chapter 41, Part B.

The ADA expressly provides that a qualified individual with a disability does not include an individual who is currently engaging in the illegal use of drugs, when an employer acts on the basis of such use.ⁿ²⁴ However, the ADA does not exclude a qualified individual who:ⁿ²⁵

1. Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer using drugs;
2. Is participating in a supervised rehabilitation program and is no longer using drugs; or
3. Is erroneously regarded as using drugs.

Homosexuals, bisexuals, transvestites, and individuals with certain specified sexual and behavioral disorders, including compulsive gambling, kleptomania, pyromania, and psychoactive substance use disorders resulting from current illegal use of drugs, are expressly not covered by the ADA.ⁿ²⁶ For further discussion, *see* Chapter 41, Parts B, C, and D.

[5] Prohibited Employment Practices

The ADA generally prohibits disability discrimination in job application procedures, hiring, advancement, discharge, compensation, job training, and other terms, conditions, and privileges of employment.ⁿ²⁷ Specifically, an employer is prohibited from discriminating on the basis of disability against a qualified individual with a disability with regard to: (1) recruitment, advertising, and job application procedures; (2) hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring; (3) rates of pay of any other form of compensation and changes in compensation; (4) job assignments, job classifications, organizational structures, position description, lines of progression, and seniority lists; (5) leaves of absence, sick leave, or any other leave; (6) fringe benefits available by virtue of employment, whether or not administered by the employer; (7) selection and financial support for training, including apprenticeships, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training; (8) activities sponsored by an employer, including social and recreational programs; and (9) any other term, condition, or privilege of employment.ⁿ²⁸

The ADA also prohibits retaliation for opposing any unlawful practice under the ADA or for making a charge, testifying, assisting or participating in an ADA investigation, proceeding, or hearing.ⁿ²⁹ An employer may also not coerce, intimidate, threaten, or interfere with any person's ADA rights.ⁿ³⁰ Nor may an employer participate in an arrangement with another entity (e.g., an employment agency) that effectively discriminates against a disabled person.ⁿ³¹

The ADA also prohibits preemployment medical examinations and inquiries made to determine whether a job applicant is disabled or as to the nature or severity of a disability. An employer may, however, inquire into the ability of an applicant to perform job-related functions,ⁿ³² and, under specified conditions, may require a medical examination after an employment offer has been made.ⁿ³³ For detailed discussions relating to preemployment inquiries and medical examinations, *see* Chapter 41, Part C.

The ADA also requires employers to reasonably accommodate disabled persons,ⁿ³⁴ if they are able to perform the essential functions of the position with or without such accommodation,^{n34.1} unless the accommodation would cause

an employer undue hardship.ⁿ³⁵ Employers also may not discriminate on the basis of being required to make such an accommodation.ⁿ³⁶

For a comprehensive discussion relating to physical handicap accommodation generally, *see* Chapter 41, Part D.

The ADA does not prohibit a covered employer from adopting reasonable policies, including drug testing, to determine whether an employee is participating in or has successfully completed a drug rehabilitation program (as discussed in [4], *above*) and whether or not the employee is currently engaging in drug use.ⁿ³⁷ It is also not unlawful to prohibit the use of illegal drugs and alcohol in the workplace, and to hold drug users and alcoholics to the same standards as other employees.ⁿ³⁸ For further discussion of EEO considerations relating to drug testing and drug abuse rules, *see* Chapter 41, Parts C and D.

[6] Defenses

The standard defenses of job-relatedness and business necessity are available under the ADA.ⁿ³⁹ In addition, an employer may require that an individual not pose a direct threat to the individual's own health or to the health or safety of others in the workplace.ⁿ⁴⁰ However, an employer may not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.^{n40.1}

Also, religious entities may give employment preference to individuals of a particular religion, and may require that all applicants and employees conform to the religious tenets of the entity,ⁿ⁴¹ although they may not discriminate against a qualified individual because of a disability, when that person satisfies the religious criteria.ⁿ⁴²

States may assert *Eleventh Amendment* immunity to bar suits by state employees in federal court to recover money damages based on the state's failure to comply with the ADA.^{n42.1} The decision to extend sovereign immunity to a public entity turns on whether the entity is to be treated as an arm of the state partaking of the state's *Eleventh Amendment* immunity, or is to be treated as a municipal corporation or other political subdivision to which the *Eleventh Amendment* does not extend.^{n42.2} The Ninth Circuit employs a five-factor test to determine whether an entity is an arm of the state.^{n42.3}

Furthermore, as discussed in [5], *above*, an employer's undue hardship is a defense to a charge of failure to accommodate.ⁿ⁴³

Also, an employer may lawfully refuse to assign an individual with specified infectious and communicable diseases to a job involving food handling if reasonable accommodation will not eliminate the problem.ⁿ⁴⁴

For a complete discussion of substantive equal employment opportunity defenses, *see* Chapter 41, Part F.

[7] Individual Liability

Individual defendants cannot be held personally liable for violations of Title I of the ADA. In *Walsh v. Nevada Dept. of Human Resources*,ⁿ⁴⁵ the Ninth Circuit, which had not addressed the issue before, held that because Title I of the ADA adopts a definition of "employer" and a remedial scheme identical to Title VII of the Civil Rights Act of 1964,ⁿ⁴⁶ the bar on suits against individual defendants articulated in *Miller v. Maxwell's International, Inc.*ⁿ⁴⁷ also applies to suits brought under Title I of the ADA.ⁿ⁴⁸

Legal Topics:

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

Civil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActGeneral OverviewCivil Rights

LawProtection of Disabled PersonsAmericans With Disabilities ActScopeLabor & Employment LawGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *42 U.S.C. § 12101 et seq.*

(n2)Footnote 2. *See 42 U.S.C. §§ 12111(2), 12112; 29 C.F.R. § 1630.2(b).* For a discussion of "disabled persons," *see [4], below.*

(n3)Footnote 3. *See 42 U.S.C. § 12201 et seq.*

(n4)Footnote 4. *42 U.S.C. § 12201(a); 29 C.F.R. § 1630.1(c)(1); see 29 U.S.C. § 701 et seq.* (Rehabilitation Act of 1973); *See also § 40.23.*

(n5)Footnote 5. *See § 40.10.*

(n6)Footnote 6. *See 42 U.S.C. § 12201(b); 29 C.F.R. § 1630.1(c)(2).*

(n7)Footnote 6.1. *42 U.S.C. § 12201(g).* *See* P.L. 110-325.

(n8)Footnote 6.2. *42 U.S.C. § 12201(h).* For the definition of "disability," *see 42 U.S.C. § 12102(1).*

(n9)Footnote 6.3. *42 U.S.C. § 12201(e).*

(n10)Footnote 6.4. *See 29 C.F.R., pts. 1601, 1630; see also 42 U.S.C. § 12116* (statutory authority for regulations).

(n11)Footnote 6.5. *See 42 U.S.C. § 12102(1), (4)* (including rules of construction).

(n12)Footnote 7. *42 U.S.C. § 12206.* *See* P.L. 110-325.

(n13)Footnote 7.1. *Toyota Motor Mfg., Ky., Inc. v. Williams* (2002) 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615, 629 , *overruled by statute on other grounds* [*see* P.L. 110-325, §§ 1, 2] (assuming without deciding that regulations are reasonable because parties have done so, but declining to decide what level of deference, if any, they warrant).

(n14)Footnote 7.2. *See* EEOC Compliance Manual (CCH) § 902.

(n15)Footnote 7.3. *Brown v. General Tel. Co. of Cal.* (9th Cir. 1997) 108 F.3d 208, 209 .

(n16)Footnote 8. *42 U.S.C. § 12117(b).*

(n17)Footnote 8.1. *42 U.S.C. § 12131 et seq.*

(n18)Footnote 8.2. *Zimmerman v. State of Oregon Dep't of Justice* (9th Cir. 1999) 170 F.3d 1169 (ADA claims concerning employment discrimination may not be asserted under Title II, but lie only under Title I, which covers employers).

(n19)Footnote 8.3. *See Brown v. City of Los Angeles* (9th Cir. 2008) 521 F.3d 1238, 2008 U.S. App. LEXIS 7650, *4.*5 .

(n20)Footnote 9. *42 U.S.C. § 12117(a); see 29 C.F.R. § 1601.1 et seq.* (EEOC procedural regulations).

(n21)Footnote 9.1. *See 42 U.S.C. §§ 2000e-4-2000e-6, 2000e-8-2000e-9; see also 42 U.S.C. § 12213* (encouraging

use of alternative means of dispute resolution to resolve disputes arising under ADA).

(n22)Footnote 10. *See Walsh v. Nev. Dep't. of Human Res.* (9th Cir. 2006) 471 F.3d 1033, 1036-1037 (former employee lacked standing to bring claim for injunctive relief to force defendant to adopt and enforce lawful policies regarding discrimination based on disability under ADA, where although employee asserted that defendant discriminated against her due to her disability, she was no longer employee of defendant and there was no indication she had any interest in returning to work for defendant, so she would not stand to benefit from injunction requiring anti-discriminatory policies she requested at her former place of work).

(n23)Footnote 10.1. *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755, 767-768 .

(n24)Footnote 10.2. For discussion of the effect of arbitration agreements on employment discrimination actions generally, *see* Ch. 90.

(n25)Footnote 10.3. 42 U.S.C. § 12205.

(n26)Footnote 10.4. *Summers v. A. Teichert & Son, Inc.* (9th Cir. 1997) 127 F.3d 1150, 1154 , quoting *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 .

(n27)Footnote 10.5. *Brown v. Lucky Stores, Inc.* (9th Cir. 2001) 246 F.3d 1182, 1190 (remanded to trial court to explain why it denied costs to the prevailing defendants).

(n28)Footnote 11. 42 U.S.C. § 12205.

(n29)Footnote 12. 42 U.S.C. § 12111(5)(A); 29 C.F.R. § 1630.2(e)(1); *see Clackamas Gastroenterology Assocs., P.C. v. Wells* (2003) 538 U.S. 440, 123 S. Ct. 1673, 155 L. Ed. 2d 615 (four physicians actively engaged in medical practice as shareholders and directors of professional medical corporation could not be counted as "employees" for purposes of ADA coverage; common-law element of control is principal guidepost that should be followed); 2 Equal Employment Opportunity Commission, Compliance Manual §§ 605:0008-605:00010 (2000) (listing 16 factors relevant to whether employer controls means and manner of worker's performance and six factors to be considered in answering whether individual acts independently and participates in managing organization, or whether individual is subject to organization's control); *see also Le Bourgeois v. Fireplace Mfrs., Inc.* (1998) 68 Cal. App. 4th 1049, 80 Cal. Rptr. 2d 660 (supervisory personnel cannot be held individually liable for discrimination under ADA).

(n30)Footnote 13. 42 U.S.C. § 12111(5)(A); 29 C.F.R. § 1630.2(e)(1).

(n31)Footnote 14. 42 U.S.C. § 12111(7); 29 C.F.R. § 1630.2(c).

(n32)Footnote 15. 42 U.S.C. § 12111(5)(B); 29 C.F.R. § 1630.2(e)(2).

(n33)Footnote 16. 42 U.S.C. § 12202.

(n34)Footnote 17. *See* 42 U.S.C. § 12111(2); 29 C.F.R. § 1630.2(b).

(n35)Footnote 18. *See* 42 U.S.C. § 12111(7); 29 C.F.R. § 1630.2(c).

(n36)Footnote 19. 42 U.S.C. § 12111(4); 29 C.F.R. § 1630.2(f). For discussion relating to "employers" covered by the ADA, *see* [3], *above*; *See also* § 40.20[5] for a discussion of "employees" covered by Title VII.

(n37)Footnote 20. 42 U.S.C. § 12111(4). However, an employer may be exempt from liability under the ADA with respect to actions taken in a foreign workplace if compliance with the ADA would violate the laws of the country where the workplace is located. *See* 42 U.S.C. § 12112(c). For discussion, *see* ch. 41, pt. E.

(n38)Footnote 21. 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

(n39)Footnote 22. See 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(n). For further discussion, see ch. 41, pt. B.

(n40)Footnote 23. 42 U.S.C. § 12102(1); 29 C.F.R. § 1630.2(q).

(n41)Footnote 23.1. 42 U.S.C. § 12102(2), added effective January 1, 2009.

(n42)Footnote 24. See 42 U.S.C. §§ 12114(a), 12211(a); see also 29 C.F.R. § 1630.3(a).

(n43)Footnote 25. 42 U.S.C. §§ 12114(b), 12211(b); 29 C.F.R. § 1630.3(b).

(n44)Footnote 26. See 42 U.S.C. §§ 12209, 12212; 29 C.F.R. § 1630.3(d), (e).

(n45)Footnote 27. 42 U.S.C. § 12112(a); see 42 U.S.C. § 12112(b), 29 C.F.R. §§ 1630.5-1630.13 (defining "discriminate").

(n46)Footnote 28. 29 C.F.R. § 1630.4.

(n47)Footnote 29. 42 U.S.C. § 12203(a); 29 C.F.R. § 1630.12(a); see *Barnett v. United States Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1121, petition for cert. filed 2-1-2001 (court applied framework used in Title VII retaliation claims to ADA retaliation claims).

(n48)Footnote 30. 42 U.S.C. § 12203(b); 29 C.F.R. § 1630.12(b).

(n49)Footnote 31. 42 U.S.C. § 12112(b)(2); 29 C.F.R. § 1630.6.

(n50)Footnote 32. 42 U.S.C. § 12112(d)(2)(B); 29 C.F.R. § 1630.14(a).

(n51)Footnote 33. See 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b).

(n52)Footnote 34. See 42 U.S.C. §§ 12111(9), 12112(b)(5)(A); 29 C.F.R. §§ 1630.2(o), 1630.9(a).

(n53)Footnote 34.1. 42 U.S.C. § 12111(8); see *Sutton v. United Air Lines, Inc.* (1999) 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450, 450, 459, overruled by statute on other grounds [see P.L. 110-325, §§ 1, 2].

(n54)Footnote 35. See 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.15(d).

(n55)Footnote 36. 42 U.S.C. § 12112(b)(5)(B); 29 C.F.R. § 1630.9(b).

(n56)Footnote 37. 42 U.S.C. § 12114(b); 29 C.F.R. § 1630.3(c).

(n57)Footnote 38. See 42 U.S.C. § 12114(d)(1)-(4); 29 C.F.R. § 1630.16(b).

(n58)Footnote 39. See 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b)(1).

(n59)Footnote 40. 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2). See *Chevron U.S.A., Inc. v. Echazabal* (2002) 536 U.S. 73, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (upholding 29 C.F.R. § 1630.15(b)(2) and reversing Ninth Circuit's holding in *Echazabal v. Chevron U.S.A., Inc.* (9th Cir. 2000) 226 F.3d 1063 that regulation was in excess of EEOC's rulemaking authority). *Echazabal v. Chevron USA, Inc.* (9th Cir. 2003) 336 F.3d 1023, 1027-1035 (material issues of fact remained as to whether employer had met requirements for assertion of defense that employee posed direct threat to his own health so that district court erred in granting employer summary judgment).

(n60)Footnote 40.1. 42 U.S.C. § 12113(c).

(n61)Footnote 41. *42 U.S.C. § 12113(d); 29 C.F.R. § 1630.16(a).*

(n62)Footnote 42. *29 C.F.R. § 1630.16(a).*

(n63)Footnote 42.1. *Board of Trustees of the University of Alabama v. Garrett (2001) 531 U.S. 356, 368-369, 121 S. Ct. 955, 148 L. Ed. 2d 866, 880 ; Walsh v. Nev. Dep't. of Human Resources (9th Cir. 2006) 471 F.3d 1033, 1036* (trial court properly granted judgment on pleadings because State of Nevada was immune from liability for money damages under ADA).

(n64)Footnote 42.2. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle (1977) 429 U.S. 274, 280, 97 S. Ct. 568, 50 L. Ed. 2d 471 .*

(n65)Footnote 42.3. *Belanger v. Madera Unified School District (9th Cir. 1992) 963 F.2d 248, 250-251 ; Mitchell v. Los Angeles Community College District (9th Cir. 1988) 861 F.2d 198, 201 . See, e.g., Beentjes v. Placer County Air Pollution Control Dist. (9th Cir. 2005) 397 F.3d 775* (under five-factor test, county air pollution control district not entitled to *Eleventh Amendment* immunity in former employee's action under ADA).

(n66)Footnote 43. *See 42 U.S.C. § 12111(10); 29 C.F.R. § 1630.15(d); see also 42 U.S.C. § 12112(b)(5).*

(n67)Footnote 44. *See 42 U.S.C. § 12113(e); 29 C.F.R. § 1630.16(e).* For further discussion, *see* ch. 41, pts. B and E.

(n68)Footnote 45. *Walsh v. Nev. Dep't. of Human Resources (9th Cir. 2006) 471 F.3d 1033, 1037-1038 .*

(n69)Footnote 46. *42 U.S.C. § 2000e et seq.*, discussed at § 40.20, above.

(n70)Footnote 47. *Miller v. Maxwell's International, Inc. 991 F.2d 583 (9th Cir. 1993) .*

(n71)Footnote 48. *See also Koslow v. Commonwealth of Pennsylvania (3d Cir. 2002) 302 F.3d 161, 177 ; Sullivan v. River Valley Sch. Dist. (6th Cir. 1999) 197 F.3d 804, 808 n.1 ; Butler v. City of Prairie Village (10th Cir. 1999) 172 F.3d 736, 744 ; Mason v. Stallings (11th Cir. 1996) 82 F.3d 1007, 1009 ; EEOC v. AIC Sec. Investigations, Ltd. (7th Cir. 1995) 55 F.3d 1276, 1279-80 ; Ostrach v. Regents of the Univ. of California (E.D. Cal. 1997) 957 F. Supp. 196, 200 .*



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.23

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§ 40.23 Rehabilitation Act of 1973

[.5] Section 501--Discrimination Against Disabled in Federal Employment Decisions

Section 501 of the Rehabilitation Act of 1973ⁿ¹ announces a federal government policy to prevent discrimination against the disabled in employment decisions, and expressly encourages federal government employers to employ individuals with disabilities.^{n1.1}

Section 501 substantive standards are similar to those under the Americans With Disabilities Act (ADA).^{n1.2} For complaints filed under section 501, the Rehabilitation Act borrows the remedies, procedures, and rights from Title VII of the Civil Rights Act of 1964.^{n1.3} Title VII waives sovereign immunity by permitting actions for compensatory damages brought by federal employees and applicants for federal employment.^{n1.4}

An individual can state a claim against the federal government or an agency of the federal government only if that individual is a federal employee.^{n1.5} The Rehabilitation Act does not define who is a federal employee for purposes of section 501.^{n1.6} While the multi-factor common law hybrid test to determine whether an individual is an employee or an independent contractor is ill suited for these purposes, the hybrid common law test of an employment relationship used in Title VII cases can be used to determine whether an individual is a federal employee for purposes of section 501.^{n1.7} Section 501 applies to the Departments of the Army, the Navy, and the Air Force,^{n1.8} but it does not apply to uniformed military personnel.^{n1.9}

[1] Section 503--Employers With Federal Contracts

[a] Governing Law and Scope of Coverage

The Rehabilitation Act of 1973^{n1.10} was enacted (1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through comprehensive and coordinated state-of-the-art programs in vocational rehabilitation; independent living centers and services; research; training; demonstration projects; and the guarantee of equal opportunity; and (2) to ensure that the

federal government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with severe disabilities, and in assisting states and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.ⁿ² Section 503 of the Actⁿ³ requires a clause in federal government contracts and subcontracts in excess of \$10,000 requiring the contractor to take affirmative action to employ and advance qualified individuals with disabilities.ⁿ⁴ Section 503 is implemented by regulations promulgated by the Department of Labor.ⁿ⁵

[b] Enforcement and Remedies

The Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) enforces Section 503.ⁿ⁶ If any individual with a disability believes that Section 503 was violated, he or she may file a complaint with the OFCCP.ⁿ⁷ The OFCCP must then promptly investigate the complaint and take warranted actions,ⁿ⁸ such as notifying the complainant if there is no violation,ⁿ⁹ or attempting informal conciliation, persuasion, and corrective programs,ⁿ¹⁰ as well as holding a formal hearing,ⁿ¹¹ if there is a violation.ⁿ¹² OFCCP enforcement procedures are further discussed in Chapter 44, Part C.

The OFCCP must develop procedures to ensure that administrative complaints filed under Section 503 and the Americans with Disabilities Act of 1990 (ADA)^{n12.1} are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under Section 503 and the ADA.^{n12.2}

The OFCCP may seek judicial remedies to enforce Section 503, including appropriate injunctive relief,ⁿ¹³ but there is no private right of action.ⁿ¹⁴ Other remedies for noncompliance include withholding progress payments pending corrective action,ⁿ¹⁵ canceling or terminating the contract in whole or in part,ⁿ¹⁶ and debarring contractors from receiving future contracts.ⁿ¹⁷ The prevailing party in a judicial proceeding to enforce or charge a violation of Section 503 may receive reasonable attorney's fees as part of the costs.ⁿ¹⁸

[c] Employers Covered and Exempted

Section 503 applies to federal contractors.ⁿ¹⁹ A "contractor" is a prime contractor or subcontractor.ⁿ²⁰ A "prime contractor" is any person who holds a federal contract covered by Section 503 as discussed in *[a]*, *above*.ⁿ²¹ A "subcontractor" is a person holding a covered subcontract.ⁿ²² A "person" is any natural person, corporation, partnership or joint venture, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government.ⁿ²³ Section 503 is not applicable to any agency, instrumentality, or subdivision of any state or local government that does not participate in work on or under the contract or subcontract.ⁿ²⁴

[d] Employees Covered and Exempted

Section 503 applies to qualified individuals with disabilities.ⁿ²⁵ By its terms, Section 503 applies to disabled applicants for employment as well as disabled employees. Under Section 503, federal contractors must take affirmative action to both "employ" and "advance in employment" qualified disabled individuals.ⁿ²⁶

The term "individual with a disability" means any person who (1) has a physical or mental impairment that substantially limits one or more of that person's major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.ⁿ²⁷ An individual with a disability is "substantially limited" if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of the disability.ⁿ²⁸ "Qualified disabled individuals" are disabled individuals who are capable of performing a particular job, with reasonable accommodation to his or her handicap.ⁿ²⁹

The term "individual with a disability" does not include an individual who is currently engaging in the illegal use of

drugs, when an employer acts on the basis of such use.ⁿ³⁰ However, the Rehabilitation Act does cover the following persons:^{n30.1}

1. An individual who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
2. An individual who is participating in a supervised rehabilitation program and is no longer engaging in such use; or
3. An individual who is erroneously regarded as engaging in such use, but is not engaging in such use.

The term "individual with a disability" also does not include the following:

1. An individual who is an alcoholic whose current use of alcohol prevents that individual from performing the duties of the job in question or whose employment, because of his or her current alcohol abuse, would constitute a direct threat to property or to the safety of others;^{n30.2}
2. An individual who has a currently contagious disease or infection and who, because of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, because of the disease or infection, is unable to perform the duties of the job;ⁿ³¹
3. An individual on the basis of homosexuality or bisexuality;^{n31.1}
4. An individual on the basis of transvestism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;^{n31.2}
5. An individual on the basis of compulsive gambling, kleptomania, or pyromania;^{n31.3} or
6. An individual on the basis of psychoactive substance use disorders resulting from current illegal use of drugs.^{n31.4}

[e] Prohibited Employment Practices

Section 503 prohibits employment discrimination against qualified individuals with disabilitiesⁿ³² and requires affirmative action to employ and advance such individuals.ⁿ³³ Section 503 applies to all employment practices, including, but not limited to, hiring, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.ⁿ³⁴

A contractor or subcontractor must also make a reasonable accommodation to the physical and mental limitations of an employee or applicant, unless the contractor or subcontractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's or subcontractor's business.ⁿ³⁵ In addition, if an employer offers employment or promotions to individuals with disabilities, the contractor or subcontractor may not reduce the amount of compensation offered because of any disability income, pension, or other benefit the applicant or employee receives from another source.ⁿ³⁶

The standards used to determine whether Section 503 has been violated in a complaint alleging nonaffirmative action employment discrimination are the standards applied under Title I of the ADA^{n36.1} and the provisions of Sections 501-504 and 510 of the ADA,^{n36.2} as such sections relate to employment.^{n36.3}

For discussion of the requirements of OFCCP affirmative action programs, see Chapter 44, Part C.

[f] Defenses

The affirmative action clause requirements of Section 503 may be waived by the OFCCP under certain circumstances.ⁿ³⁷ Thus, the OFCCP may waive the requirements for work performed outside the United States by employees who were not recruited within the United States.ⁿ³⁸ Also, on request by a contractor or subcontractor, the OFCCP may waive the requirements with respect to any of a prime contractor's facilities that are in all respects separate and distinct from activities related to the performance of the contract or subcontract.ⁿ³⁹ In addition, the requirements may be waived for any contract or subcontract when the OFCCP deems that special circumstances in the national interest so require.ⁿ⁴⁰ Waivers may also be granted to groups or categories of contracts or subcontracts of the same type when it is (1) in the national interest, (2) found to be impracticable to act on each request individually, and (3) a substantial contribution to convenience in administration of the act.ⁿ⁴¹ The OFCCP *must* waive the requirements when the head of a contracting agency determines that a contract or subcontract is essential to the national security, and that its award without complying with the requirements is necessary to the national security.ⁿ⁴²

[2] Section 504--Employers Who Receive Financial Assistance From Federal Government

[a] Governing Law and Scope of Coverage

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against otherwise qualified individuals with disabilities by (1) programs or activities receiving federal financial assistance, and (2) programs or activities conducted by executive agencies or the United States Postal Service.ⁿ⁴³ Each federal agency providing federal financial assistance promulgates its own regulations to administer Section 504,ⁿ⁴⁴ but the Department of Justice, which coordinates all agency implementation of Section 504,ⁿ⁴⁵ has adopted regulations promulgated by the Department of Health and Human Services,ⁿ⁴⁶ the agency formerly responsible for coordinating agency implementation.ⁿ⁴⁷

[b] Enforcement and Remedies

As discussed in [a], *above*, each federal agency providing federal assistance enforces Section 504,ⁿ⁴⁸ although the Department of Justice coordinates implementation and enforcement.ⁿ⁴⁹ The Rehabilitation Act provides that the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 (Title VI)ⁿ⁵⁰ are available to anyone aggrieved by a violation of Section 504.ⁿ⁵¹ Accordingly, the Department of Justice requires that each agency's procedures for enforcement of Section 504 include (1) the enforcement and hearing procedures that the agency has adopted pursuant to Title VI, and (2) a requirement that recipients of federal assistance sign assurances of compliance with Section 504.ⁿ⁵² For a discussion relating to enforcement and remedies under Title VI, see § 40.29[2].

An aggrieved individual also has a private right of action under Section 504,ⁿ⁵³ and the Ninth Circuit Court of Appeals has held that exhaustion of administrative remedies is not required.ⁿ⁵⁴

[c] Employers Covered and Exempted

Section 504 applies to employers receiving federal financial assistance or involved in programs or activities conducted by any executive agency or the United States Postal Service.ⁿ⁵⁵ The Civil Rights Restoration Act of 1987ⁿ⁵⁶ amended Section 504 to clarify that the term "program or activity" means *all* of the operations of an entity receiving federal financial assistance,ⁿ⁵⁷ thus overturning a previous decision of the Supreme Court that had adopted a more narrow construction of the statute.ⁿ⁵⁸ A "recipient" of federal financial assistance is the following:ⁿ⁵⁹

1. Any state or its political subdivision;

2. Any instrumentality of a state or political subdivision;
3. Any public or private agency, institution, organization, or other entity; or
4. Any person to whom federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee, but excluding the ultimate beneficiary of the assistance.

The "program or activity" language of section 504 has constitutional significance, because it limits section 504's reach so that it does not encompass all the activities of the state, ensuring Congress acted within its Spending Clause power when it conditioned the receipt of Section 504 funds on a waiver of sovereign immunity.^{n59.1} Whether a particular state entity is a program or activity receiving federal financial assistance within the meaning of section 504 can be answered only after considering the provisions of state law that define the agency's character.^{n59.2}

For purposes of section 504, federal financial assistance can be direct or indirect.^{n59.3} Entities that receive federal assistance through an intermediary are recipients under section 504, but entities that only benefit economically from federal assistance are not.^{n59.4}

Section 504's reach encompasses a department or agency receiving federal funds in only those periods during which the funds are accepted.^{n59.5}

Section 504 expressly applies to "any program or activity" receiving federal assistanceⁿ⁶⁰ and thus is not limited to programs that receive federal aid for the primary purpose of promoting employment.ⁿ⁶¹

One Ninth Circuit case has held that Section 504 does not apply to a labor union, being sued as an employer, that does not receive federal financial assistance other than that received via (1) NLRB certification, (2) federal assistance for apprenticeship programs, (3) federal wage regulation under the Davis-Bacon Act,^{n61.1} and (4) union access to federal mediation services.^{n61.2}

[d] Employees Covered and Exempted

Section 504 applies to otherwise qualified individuals with disabilities.ⁿ⁶² The definition of an "individual with disabilities" is the same as the one used under Section 503, discussed in [1][d], above. ⁿ⁶³ An "otherwise qualified" individual is one who is able to meet all of a job's requirements in spite of his or her disabilities.ⁿ⁶⁴ Thus, an individual must be able to perform the essential functions of the job.ⁿ⁶⁵

As under Section 503, individuals who, because of current alcohol or drug abuse, cannot perform the duties of the job in question, or who would constitute a direct threat to property or safety of others are not "individuals with disabilities" under Section 504.ⁿ⁶⁶

[e] Prohibited Employment Practices

Section 504 prohibits unlawful exclusion from, denial of the benefits of, or discrimination under federally financed programs or activities, or programs or activities conducted by any executive agency or the United States Postal Service.ⁿ⁶⁷ Section 504 also bars recipient programs or activities from limiting, segregating, or classifying applicants or employees in any way that adversely affects their opportunities or status because of disability.ⁿ⁶⁸ The prohibition against discrimination applies to the following:ⁿ⁶⁹

1. Recruitment, advertising, and the processing of employment applications;
2. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return

from layoff, and rehiring;

3. Rates of pay or any other form of compensation and changes in compensation;
4. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
5. Leaves of absence, sick leave, or any other leave;
6. Fringe benefits available by virtue of employment, whether or not administered by the recipient;
7. Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
8. Employer sponsored activities, including social or recreational programs; and
9. Any other term, condition, or privilege of employment.

An employee may state a claim under the Rehabilitation Act for being "regarded as" disabled as well. In order to state a "regarded as" claim, a plaintiff must establish that the employer believed that the plaintiff has an impairment and provide evidence that the employer subjectively believed that the plaintiff was substantially limited in a major life activity. If the plaintiff does not have direct evidence of the employer's subjective belief that the plaintiff was substantially limited in a major life activity, the plaintiff must further provide evidence that the impairment imputed to the plaintiff was, objectively, a substantially limiting impairment.^{n69.1} An employee also may state a claim for discrimination on the basis of having a record of impairment.^{n69.2}

Recipients also may not participate in a contractual or other relationship with employment and referral agencies, labor unions, and organizations providing or administering employee fringe benefits or training and apprenticeship programs if the relationship has the effect of subjecting qualified applicants or employees with disabilities to unlawful discrimination.ⁿ⁷⁰ Furthermore, recipients may not use discriminatory employment tests or criteria,ⁿ⁷¹ conduct preemployment medical examinations, or make preemployment inquiries about whether an applicant is disabled or about the nature of the disability,ⁿ⁷² except when the recipient is correcting past discrimination, taking steps to increase the participation of disabled individuals, or taking affirmative action.ⁿ⁷³

Recipients also must make reasonable accommodation to the known physical or mental limitations of qualified disabled applicants or employees.ⁿ⁷⁴ They also must ensure that employment tests are adapted for use by persons who have disabilities that impair sensory, manual, or speaking skills.ⁿ⁷⁵ For discussion relating to employer accommodation of disabled individuals, see Chapter 41, Part D.

The standards used to determine whether Section 504 has been violated in a complaint alleging nonaffirmative action employment discrimination are the standards applied under Title I of the ADA of 1990ⁿ⁷⁶ and the provisions of Sections 501-504 and 510 of the ADA,ⁿ⁷⁷ as such sections relate to employment.ⁿ⁷⁸

[f] Defenses

A recipient need not make reasonable accommodation for handicapped applicants or employees if the accommodation would impose an undue hardship on the operation of its program.ⁿ⁷⁹

By accepting federal Rehabilitation Act funds, a state waives the *Eleventh Amendment* sovereign immunity defense.ⁿ⁸⁰

Legal Topics:

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

Civil Rights LawProtection of Disabled PersonsRehabilitation ActGeneral OverviewCivil Rights LawProtection of Disabled PersonsRehabilitation ActScopeLabor & Employment LawGeneral Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 791.

(n2)Footnote 1.1. *Lopez v. Johnson* (9th Cir. 2003) 333 F.3d 959, 961 (per curiam); see *Buckingham v. United States* (9th Cir. 1993) 998 F.2d 735, 739 (duty on federal employers goes beyond mere nondiscrimination, and regulations promulgated under section 501 emphasize affirmative obligation to accommodate).

(n3)Footnote 1.2. *Lopez v. Johnson* (9th Cir. 2003) 333 F.3d 959, 961 (per curiam). See 29 U.S.C. § 791(g); for discussion of the ADA, see § 40.22A.

(n4)Footnote 1.3. *Lopez v. Johnson* (9th Cir. 2003) 333 F.3d 959, 961 (per curiam); see 29 U.S.C. § 794a(a)(1); for discussion of Title VII, see § 40.20.

(n5)Footnote 1.4. *Lopez v. Johnson* (9th Cir. 2003) 333 F.3d 959, 961 (per curiam); see 42 U.S.C. § 2000e-16(c).

(n6)Footnote 1.5. See *Lopez v. Johnson* (9th Cir. 2003) 333 F.3d 959, 961-964 (per curiam) (individual could not state claim under section 501 based on denial of parking space against Secretary of Navy because he was employee of private contractor working within Navy-controlled premises, not federal employee, and Navy did not retain any control over terms and conditions of his work).

(n7)Footnote 1.6. *Lopez v. Johnson* (9th Cir. 2003) 333 F.3d 959, 961 (per curiam).

(n8)Footnote 1.7. See *Lopez v. Johnson* (9th Cir. 2003) 333 F.3d 959, 962-964 (per curiam); *Redd v. Summers* (D.C. Cir. 2000) 232 F.3d 933, 344 U.S. App. D.C. 44 (in lawsuit for discriminatory termination under section 501 by obese woman employed by private contractor to provide tours at Treasury Department, common law hybrid test applied, placing greatest emphasis on whether Treasury had right to control and direct plaintiff's work as to result to be achieved and as to details by which result was achieved, and concluding that plaintiff was not federal employee). See, e.g., *Lutcher v. Musicians Union Local 47* (9th Cir. 1980) 633 F.2d 880, 883-884 (applying multi-factor common law hybrid test for Title VII purposes to determine whether professional musician performing concerts for school district under contract was employee of school district or independent contractor). For discussion of the Title VII test, see § 40.20[5].

(n9)Footnote 1.8. 29 C.F.R. § 1614.103(b)(1).

(n10)Footnote 1.9. 29 C.F.R. § 1614.103(d)(1). See *Bledsoe v. Webb* (9th Cir. 1988) 839 F.2d 1357, 1359 (addressing Title VII claim by civilian employee of Navy as justiciable, as opposed to claims by uniformed military personnel); *Gonzalez v. Dep't of Army* (9th Cir. 1983) 718 F.2d 926, 928 (distinguishing between civilian employees of Army and enlisted personnel).

(n11)Footnote 1.10. 29 U.S.C. § 701 et seq.

(n12)Footnote 2. 29 U.S.C. § 701(b).

(n13)Footnote 3. 29 U.S.C. § 793.

(n14)Footnote 4. See 29 U.S.C. § 793(a); 29 C.F.R. § 60-741.1.

(n15)Footnote 5. *See* 41 C.F.R. § 60-741.1 *et seq.* Section 503 actually provides that the President shall promulgate implementing regulations. *See* 29 U.S.C. § 793(a). However, the President delegated that authority to the Secretary of Labor pursuant to Exec. Order No. 11758. *See* Exec. Order No. 11758.

(n16)Footnote 6. *See* 29 U.S.C. § 793(b); 41 C.F.R. § 60-741.25.

(n17)Footnote 7. *See* 29 U.S.C. § 793(b); 41 C.F.R. §§ 60-741.25, 60-741.26 (complaint procedures and investigations).

(n18)Footnote 8. 29 U.S.C. § 793(b).

(n19)Footnote 9. *See* 41 C.F.R. § 60-741.26(g)(1).

(n20)Footnote 10. *See* 41 C.F.R. §§ 60-741.26(g)(2), 60-741.28(a).

(n21)Footnote 11. *See* 41 C.F.R. §§ 60-741(g)(3), 60-741.29.

(n22)Footnote 12. *See* 41 C.F.R. § 60-741.27.

(n23)Footnote 12.1. 42 U.S.C. § 12101 *et seq.* For discussion of ADA complaint procedures, *see* ch. 42, pt. C.

(n24)Footnote 12.2. 29 U.S.C. § 793(e).

(n25)Footnote 13. *See* 41 C.F.R. § 60-741.28(b).

(n26)Footnote 14. *Meyerson v. State of Ariz.* (9th Cir. 1983) 709 F.2d 1235, 1238, *vacated and remanded on different grounds* 465 U.S. 1095 (1984).

(n27)Footnote 15. *See* 41 C.F.R. § 60-741.28(c).

(n28)Footnote 16. *See* 41 C.F.R. § 60-741.28(d).

(n29)Footnote 17. *See* 41 C.F.R. § 60-741.28(e).

(n30)Footnote 18. 29 U.S.C. § 794a(b).

(n31)Footnote 19. *See* 29 U.S.C. § 793(a).

(n32)Footnote 20. *See* 41 C.F.R. § 60-741.2.

(n33)Footnote 21. *See* 41 C.F.R. § 60-741.2. For enforcement purposes, a contractor also includes any person who *has held* a covered contract. *See* 41 C.F.R. § 60-741.2.

(n34)Footnote 22. *See* 41 C.F.R. § 60-741.2. For enforcement purposes, a subcontractor also includes any person who *has held* a covered subcontract. *See* 41 C.F.R. § 60-741.2.

(n35)Footnote 23. *See* 41 C.F.R. § 60-741.2.

(n36)Footnote 24. *See* 41 C.F.R. § 60-741.3(a)(4).

(n37)Footnote 25. 29 U.S.C. § 793(a).

(n38)Footnote 26. 29 U.S.C. § 793(a).

(n39)Footnote 27. 29 U.S.C. § 706(8)(B); 41 C.F.R. § 60-741.2; *see* 29 U.S.C. § 793(a) (incorporating 29 U.S.C. §

706(8) definition by reference).

(n40)Footnote 28. *41 C.F.R. § 60-741.2.*

(n41)Footnote 29. *41 C.F.R. § 60-741.2.*

(n42)Footnote 30. *29 U.S.C. § 706(8)(C)(i); see ch. 41, pts. B, C, and D.*

(n43)Footnote 30.1. *29 U.S.C. § 706(8)(C)(ii).*

(n44)Footnote 30.2. *29 U.S.C. § 706(8)(C)(v); see ch. 41, pts. B, C, and D.*

(n45)Footnote 31. *29 U.S.C. § 706(8)(D).*

(n46)Footnote 31.1. *29 U.S.C. § 706(8)(E).*

(n47)Footnote 31.2. *29 U.S.C. § 706(8)(F)(i).*

(n48)Footnote 31.3. *29 U.S.C. § 706(8)(F)(ii).*

(n49)Footnote 31.4. *29 U.S.C. § 706(8)(F)(iii).*

(n50)Footnote 32. *See 29 U.S.C. § 793(a); 41 C.F.R. §§ 60-741.1, 60-741.4 (affirmative action clause requires statement that contractor or subcontractor will not discriminate); see also discussion in [a] and [d], above.*

(n51)Footnote 33. *See 29 U.S.C. § 793(a); 41 C.F.R. §§ 60-741.1, 60-741.4; see also 41 C.F.R. § 60-741.5 (contractor or subcontractor must prepare and maintain written affirmative action program if contract or subcontract is for \$50,000 or more and contractor or subcontractor has at least 50 employees).*

(n52)Footnote 34. *41 C.F.R. § 60-741.6(a).*

(n53)Footnote 35. *41 C.F.R. § 60-741.6(d); see discussion in [f], below.*

(n54)Footnote 36. *41 C.F.R. § 60-741.6(e).*

(n55)Footnote 36.1. *See 42 U.S.C. § 12111 et seq. For further discussion, see ch. 41, pts. B, D, and G.*

(n56)Footnote 36.2. *42 U.S.C. §§ 12201-12204 and 12211.*

(n57)Footnote 36.3. *29 U.S.C. § 793(d)*

(n58)Footnote 37. *See 29 U.S.C. § 793(c); see discussion in [a], above.*

(n59)Footnote 38. *41 C.F.R. § 60-741.3(a)(3).*

(n60)Footnote 39. *See 41 C.F.R. § 60-741.3(a)(5).*

(n61)Footnote 40. *See 41 C.F.R. § 60-741.3(b)(1).*

(n62)Footnote 41. *See 41 C.F.R. § 60-741.3(b)(1).*

(n63)Footnote 42. *See 41 C.F.R. § 60-741.3(b)(2).*

(n64)Footnote 43. *See 29 U.S.C. § 794(a).*

(n65)Footnote 44. *See* 29 U.S.C. § 794(a); *see also* 7 C.F.R. § 15b.1 *et seq.* (Department of Agriculture); 10 C.F.R. §§ 4.101 *et seq.* (Nuclear Regulatory Commission), 1040.61 *et seq.* (Department of Energy); 11 C.F.R. § 6.101 *et seq.* (Federal Election Commission); 13 C.F.R. § 113.1 *et seq.* (Small Business Administration); 14 C.F.R. § 1251.100 *et seq.* (NASA); 15 C.F.R. § 8b.1 *et seq.* (Department of Commerce); 18 C.F.R. § 1307.1 *et seq.* (Tennessee Valley Authority); 22 C.F.R. §§ 142.1 *et seq.* (Department of State), 217.1 *et seq.* (Agency for International Development); 28 C.F.R. §§ 41.1 *et seq.*, 42.501 *et seq.* (Department of Justice); 29 C.F.R. § 32.1 *et seq.* (Department of Labor); 32 C.F.R. § 56.1 *et seq.* (Department of Defense); 34 C.F.R. § 104.1 *et seq.* (Department of Education); 38 C.F.R. § 18.1 *et seq.* (Veterans Administration); 40 C.F.R. § 7.10 *et seq.* (Environmental Protection Agency); 43 C.F.R. § 17.1 *et seq.* (Department of Interior); 45 C.F.R. §§ 84.1 *et seq.* (Department of Health and Human Services), 605.0 *et seq.* (National Science Foundation), 1151.1 *et seq.* (National Endowment for Arts), 1170.1 *et seq.* (National Endowment for Humanities), 1232.1 *et seq.* (ACTION); 49 C.F.R. § 27.1 *et seq.* (Department of Transportation).

(n66)Footnote 45. *See* Exec. Order No. 12250.

(n67)Footnote 46. *See* 45 C.F.R. § 84.1 *et seq.*

(n68)Footnote 47. *See* *CONRAIL v. Darrone* (1984) 465 U.S. 624, 634 n.14, 104 S. Ct. 1248, 79 L. Ed. 2d 568 .

(n69)Footnote 48. *See* 29 U.S.C. § 794(a).

(n70)Footnote 49. *See* Exec. Order No. 12250; *see also* 28 C.F.R. § 41.1 *et seq.* (implementation of Exec. Order No. 12250).

(n71)Footnote 50. *See* 42 U.S.C. § 2000d *et seq.*

(n72)Footnote 51. *See* 29 U.S.C. § 794a(a)(2); *CONRAIL v. Darrone* (1984) 465 U.S. 624, 630-631, 637, 104 S. Ct. 1248, 79 L. Ed. 2d 568 .

(n73)Footnote 52. 28 C.F.R. § 41.5(a).

(n74)Footnote 53. *See* *CONRAIL v. Darrone* (1984) 465 U.S. 624, 630 n.7, 104 S. Ct. 1248, 79 L. Ed. 2d 568 .

(n75)Footnote 54. *See* *Kling v. County of Los Angeles* (9th Cir. 1980) 633 F.2d 876, 879 , *reh. denied* 106 S. Ct. 873 (handicapped person denied admission to school; Section 504 administrative remedies inadequate); *see also* *Cannon v. University of Chicago* (1979) 441 U.S. 677, 706-707 n.41, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (Title IX, which contains enforcement provision identical to enforcement provision in Title VI, does not require exhaustion of administrative remedies); *but see* *Doe v. Colautti* (E.D. Pa. 1978) 454 F. Supp. 621, 630 , *aff'd*, 592 F.2d 704 (3d Cir. 1979) (requiring exhaustion of administrative remedies).

(n76)Footnote 55. *See* 29 U.S.C. § 794(a).

(n77)Footnote 56. *See* Pub. L. No. 100-259.

(n78)Footnote 57. *See* 29 U.S.C. § 794(b).

(n79)Footnote 58. *See* *Grove City College v. Bell* (1984) 465 U.S. 555, 571-574, 104 S. Ct. 1211, 79 L. Ed. 2d 516 . *See also* *Consolidated Rail Corp. v. Darrone* (1984) 465 U.S. 624, 635-36, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (narrowly construing "program or activity" to reach only specific parts of recipient's operation directly benefiting from federal assistance).

(n80)Footnote 59. *See* 28 C.F.R. § 41.3(d). "Federal financial assistance" is any grant, loan, contract (other than a procurement contract or a contract of insurance or guarantee), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of (1) funds; (2) services of federal personnel; or (3) real or personal

property or any interest in or use of such property including (a) transfers of leases for less than fair market value or for reduced consideration, and (b) proceeds from a subsequent transfer or lease if the federal share of its fair market value is not returned to the federal government. *See* 28 C.F.R. § 41.3(e).

(n81)Footnote 59.1. *Sharer v. Oregon* (9th Cir. 2009) 581 F.3d 1176, 2009 U.S. App. LEXIS 20856, *4 ; *Lovell v. Chandler* (9th Cir. 2002) 303 F.3d 1039, 1051 . *See also* *Jim C. v. United States* (8th Cir. 2000) 235 F.3d 1079, 1081 (en banc) (section 504 does not violate Spending Clause because State and its instrumentalities can avoid section 504's waiver requirement on piecemeal basis, by simply accepting federal funds for some departments and declining them for others).

(n82)Footnote 59.2. *Sharer v. Oregon* (9th Cir. 2009) 581 F.3d 1176, 2009 U.S. App. LEXIS 20856, *5-*11 (although state's judicial branch of government received federal financial assistance, and under state constitutional and statutory regime governing state public defender services, it, together with state's courts and their administrative apparatus, comprised uniform "judicial department" under state constitution, state justice department could not be considered unitary department or agency for section 504 purposes, where state statutes drew distinction between state's "judicial department," referring to judicial branch of government in its entirety, and "Judicial Department," referring to predominant administrative agency within judicial branch, and units within judicial department had distinct funding sources and administration). *See Regents of Univ. of Cal. v. Doe* (1977) 519 U.S. 425, 429 n.5, 117 S. Ct. 900, 137 L. Ed. 2d 55 (discussing whether agency is arm of state for *Eleventh Amendment* sovereign immunity purposes); *Haybarger v. Lawrence County Adult Prob. & Parole* (3d Cir. 2008) 551 F.3d 193, 201 (though not dispositive, state's characterization of entity under state law is significant in determining whether entity is "program or activity" under section 504).

(n83)Footnote 59.3. *Sharer v. Oregon* (9th Cir. 2009) 581 F.3d 1176, 2009 U.S. App. LEXIS 20856, *12 ; *Herman v. United Bhd. of Carpenters* (9th Cir. 1995) 60 F.3d 1375, 1381 .

(n84)Footnote 59.4. *NCAA v. Smith* (1999) 525 U.S. 459, 466 n.3, 468, 119 S. Ct. 924, 142 L. Ed. 2d 929 (NCAA's acceptance of dues from colleges receiving federal funding did not render NCAA liable under Title IX; scope of federal funding requirements of several other federal antidiscrimination measures, including section 504, defined in nearly identical terms to Title IX requirement); *Sharer v. Oregon* (9th Cir. 2009) 581 F.3d 1176, 2009 U.S. App. LEXIS 20856, *12-*14 (no evidence that Judicial Department financed state public defender service's provision of transcripts with federal funds earmarked for that purpose, and under statutory framework operative during relevant period, costs of indigent defendants' transcripts were paid by the state from funds for that purpose).

(n85)Footnote 59.5. *Sharer v. Oregon* (9th Cir. 2009) 581 F.3d 1176, 2009 U.S. App. LEXIS 20856, *12 (circumstances of employee's hiring in 1997 were irrelevant to whether she could bring section 504 claim based on discrimination that allegedly occurred in 2003). *See also Garcia v. SUNY Health Scis. Ctr.* (2d Cir. 2001) 280 F.3d 98, 113 n.2 .

(n86)Footnote 60. *See* 29 U.S.C. § 794(a) (emphasis added).

(n87)Footnote 61. *See CONRAIL v. Darrone* (1984) 465 U.S. 624, 632-634, 637, 104 S. Ct. 1248, 79 L. Ed. 2d 568 .

(n88)Footnote 61.1. 40 U.S.C. § 276a.

(n89)Footnote 61.2. *Herman v. United Broth. of Carpenters* (9th Cir. 1995) 60 F.3d 1375, 1381-1383 .

(n90)Footnote 62. *See* 29 U.S.C. § 794(a); *see* discussion in [a], above.

(n91)Footnote 63. *See* 29 U.S.C. § 706(8) ("individual with a disability" defined); *see also* 29 U.S.C. § 794(a) (incorporating 29 U.S.C. § 706(8) by reference); 28 C.F.R. § 41.31.

(n92)Footnote 64. *See Southeastern Community College v. Davis* (1979) 442 U.S. 397, 406, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (refusal to admit individual with hearing disability to nursing program did not violate Section 504); *Thornhill v. Marsh* (9th Cir. 1989) 866 F.2d 1182, 1183-1184 (employee was "otherwise qualified" because he could meet job requirements despite congenital spine deformity).

(n93)Footnote 65. *School Board of Nassau County v. Arline* (1987) 480 U.S. 273, 287 n.17, 107 S. Ct. 1123, 94 L. Ed. 2d 307 .

(n94)Footnote 66. *See 29 U.S.C. § 706(8)(C); Gonzalez v. State Personnel Bd.* (1995) 33 Cal. App. 4th 422, 434-436, 39 Cal. Rptr. 2d 282 (alcoholic employee who engages in egregious misconduct is not "otherwise qualified" as a matter of law); *see also* discussion in [1][d], above.

(n95)Footnote 67. *See 29 U.S.C. § 794(a); 28 C.F.R. § 41.52(a).*

(n96)Footnote 68. *28 C.F.R. § 41.52(b).*

(n97)Footnote 69. *28 C.F.R. § 41.52(c).*

(n98)Footnote 69.1. *Walton v. United States Marshals Service* (9th Cir. 2007) 476 F.3d 723, 728-731 (employee failed to raise genuine issue of material fact that employer regarded her as disabled with respect to major life activities of hearing, working, and localizing sound). *See Thornton v. McClatchy Newspapers, Inc.* (9th Cir. 2001) 261 F.3d 789, 798 (affirming district court's judgment for defendant on plaintiff's "regarded as" claim, because there was no specific evidence that employer viewed her as substantially limited and employee's restrictions did not rise to level of substantial limitation).

(n99)Footnote 69.2. *Walton v. United States Marshals Service* (9th Cir. 2007) 476 F.3d 723, 732 (a doctor's two reports regarding hearing test results constituting medical record of having only one functioning ear and being unable to localize sound failed to raise genuine issue of material fact that impairment was substantially limiting impairment, and any record of impairment did not meet requirements of 29 C.F.R. § 1630.2(k)).

(n100)Footnote 70. *See 28 C.F.R. § 41.52(d).*

(n101)Footnote 71. *See 28 C.F.R. § 41.54.*

(n102)Footnote 72. *See 28 C.F.R. § 41.55.*

(n103)Footnote 73. *See 28 C.F.R. § 42.513.*

(n104)Footnote 74. *See 28 C.F.R. § 41.53; see [f], below.*

(n105)Footnote 75. *See 28 C.F.R. § 41.54.*

(n106)Footnote 76. *42 U.S.C. § 12111 et seq.* For further discussion, *see* ch. 41, pts. B, D, and G.

(n107)Footnote 77. *42 U.S.C. §§ 12201-12204 and 12211.*

(n108)Footnote 78. *29 U.S.C. § 794(d).*

(n109)Footnote 79. *See 28 C.F.R. § 41.53.*

(n110)Footnote 80. *Douglas v. Cal. Dep't of Youth Auth.* (9th Cir. 2001) 271 F.3d 812, 819-821 , *amended on other grounds*, 271 F.3d 910 (9th Cir. 2001) ; *Clark v. State of California* (9th Cir. 1997) 123 F.3d 1267, 1271 .



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.24

AUTHOR: By David M. Youngsmith, J.D.

§ 40.24 Vietnam Era Veterans Readjustment Assistance Act of 1974 and Uniformed Services Employment and Reemployment Rights Act of 1994

[1] Governing Law and Scope of Coverage

Two federal statutes protect veterans of the armed forces against employment discrimination. The Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA)ⁿ¹ requires federal contractors and subcontractors (*see [3], below*) who receive \$10,000ⁿ² or more for the procurement of personal property and nonpersonal services (including construction) to take affirmative action to employ and advance specified veterans.ⁿ³

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)ⁿ⁴, formerly the Veterans' Reemployment Rights Act,ⁿ⁵ provides generally for employment and reemployment of, and nondiscrimination against, persons returning to their jobs after service in the uniformed services. "Uniformed service" means the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in wartime or a national emergency.ⁿ⁶ The USERRA provides that once a person is reemployed, he or she cannot be discharged except for cause for one year after the date of reemployment if the person served more than 180 days, or for 180 days after the date of reemployment if the person served more than 30 but less than 181 days.ⁿ⁷

A person reemployed under the USERRA also is entitled to (1) seniority and other rights and benefits that he or she had on the date of commencement of the service;ⁿ⁸ (2) coverage under employer health plans;ⁿ⁹ and (3) accrual of credit for up to five years on employee pension plans.ⁿ¹⁰

USERRA supersedes any state law contract, agreement, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA.^{n10.1} Thus, for example, because USERRA directs that its provisions may not be eliminated by a contract, the release of rights in a severance agreement obtained from a captain in the United States Marine Corps Reserves, terminating his employment on the day he returned from duty, could not be enforced to

the extent the severance agreement dealt with the claims of termination based on plaintiff's membership in the military or his military service.^{n10.2}

[2] Enforcement and Remedies

The affirmative action provisions of the VEVRAA are enforced by the OFCCP,ⁿ¹¹ under the same procedures as those applicable to Section 503 of the Rehabilitation Act of 1973.ⁿ¹² The remedies and penalties for violation of VEVRAA, like Section 503, include injunctions,ⁿ¹³ withholding of progress payments,ⁿ¹⁴ termination of the contract,ⁿ¹⁵ and debarment.ⁿ¹⁶ For a discussion relating to OFCCP enforcement procedures and remedies under Section 503, see § 40.23[1][b]. OFCCP enforcement procedures are discussed in detail in Chapter 44, Part C.

Administrative enforcement of USERRA's provisions is available through the Secretary of Labor, who must provide assistance to any person with respect to complaints of violation of their employment or reemployment rights under USERRA.ⁿ¹⁷ The Secretary investigates complaints filed and gives technical assistance when requested to complainants and employers.ⁿ¹⁸ If after investigating, the Secretary determines that USERRA's provisions have been violated, the Secretary must make reasonable efforts to ensure compliance.ⁿ¹⁹ If the Secretary's efforts to ensure compliance are unsuccessful, the Secretary notifies the complainant of the results of the investigation and the complainant's right to request that the Secretary transfer the complaint to the Attorney General for processing of an action in federal district court. Not later than 60 days after the Secretary receives such a request with respect to a complaint, the Secretary must refer the complaint to the Attorney General.ⁿ²⁰ Not later than 60 days after the Attorney General receives a referral, the Attorney General must decide whether to appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and notify the person in writing of the decision.^{n20.1} Alternatively, a person may commence a district court action on his or her own behalf instead of applying for relief from the Secretary of Labor or the Attorney General, or a person may do so if the Attorney General has refused to represent the person with regard to the complaint.ⁿ²¹ Employers, prospective employers, and other entities cannot initiate actions under USERRA.ⁿ²²

The inability of the Secretary or the Attorney General to comply with deadlines applicable to them does not affect the authority of the Attorney General to represent and file an action or submit a complaint on behalf of a person, and does not affect the right of a person to commence an action. It also does not constitute a defense, including a statute of limitations period, that an employer may raise in an action filed by the Attorney General or the person.^{n22.1} There is no limitations period for a complaint or claim to be filed with the Secretary or a federal or state court.^{n22.2}

In a private USERRA action, the employee first has the burden of showing, by a preponderance of the evidence, that his or her protected status based on service in the uniformed services was a substantial or motivating factor in the adverse employment action. The employer's discriminatory motivation may be reasonably inferred from a variety of factors, including the following:ⁿ²³

- Proximity in time between the employee's military activity and the adverse employment action;
- Inconsistencies between proffered reason and other actions of the employer;
- An employer's expressed hostility toward members protected by the statute together with knowledge of the employee's military activity; and
- Disparate treatment of certain employees compared to other employees with similar work records or offenses.

To be considered "service in the uniformed services," the performance of duty must be "under competent authority."ⁿ²⁴ The employer may then avoid liability only by showing, as an affirmative defense, that the employer would have taken

the same action without regard to the employee's protected status.ⁿ²⁵

The district court can require a party to comply with the provisions of the USERRA, award compensation for loss of wages or benefits, and award liquidated damages for willful failure to comply.ⁿ²⁶ The court must use, in any case in which the court determines it is appropriate, its fully equity powers, including injunctions, temporary restraining orders, and contempt orders to vindicate a person's USERRA rights.ⁿ²⁷ No fees or court costs may be taxed against any person claiming rights under USERRA,ⁿ²⁸ but a person who prevails in a suit on his or her own behalf with the use of private counsel may receive reasonable attorney's fees, expert witness fees, and other litigation expenses, plus prejudgment interest.ⁿ²⁹

USERRA does not create a cause of action against state employee-supervisors.^{n29.1}

For additional discussion of civil actions under the USERRA, *see* Chapter 43, Part B.

[3] Employers Covered and Exempted

The affirmative action provisions of the VEVRAA apply to federal "contractors,"ⁿ³⁰ or persons holding contracts or subcontracts covered by the act as discussed in [1], *above*. The types of contractors (i.e. "prime contractors" and "subcontractors")ⁿ³¹ subject to the act are the same as those subject to section 503, as discussed in § 40.23[1][c].

USERRA broadly defines an "employer" as including a person or entity that pays salary or wages for work performed or or that has control over employment opportunities, including a person or entity to whom the employer has delegated the performance of employment-related responsibilities.ⁿ³² "Employer" also includes the state and federal governments, persons or entities who discriminatorily denied initial employment in violation of USERRA, and successors in interest.ⁿ³³

USERRA has been amended to confer jurisdiction only on state courts in private suits against state employers.ⁿ³⁴ There is federal jurisdiction over an action against a state or a private employer commenced by the United States.^{n34.1} Because Congress' intent to limit USERRA suits against state employers to state courts is unmistakable, federal jurisdiction cannot continue under the general federal question jurisdictional statute.ⁿ³⁵

[4] Employees Covered and Exempted

The affirmative action provisions of the VEVRAA apply to "qualified special disabled veterans" and "veterans of the Vietnam era."ⁿ³⁶ A "special disabled veteran" is (1) one who is entitled to compensation (or who, but for the receipt of military pay, would be entitled to compensation) under laws administered by the Veteran's Administration for a disability (a) rated at 30 percent or more, or (b) rated at 10 or 20 percent in the case of a veteran who, as determined under Title 38 *United States Code Section 3106*, has a serious disability,ⁿ³⁷ or (2) one who was discharged or released from active duty because of a service-connected disability.ⁿ³⁸ A "qualified" special disabled veteran is one who is capable of performing a particular job, with reasonable accommodation to his or her disability.ⁿ³⁹ Effective Nov. 7, 2003, the affirmative action provisions of the VEVRAA apply to "qualified covered veterans."ⁿ⁴⁰ A *covered veteran* is one of any of the following:ⁿ⁴¹

1. Disabled veterans;
2. Veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized;
3. Veterans who, while serving on active duty in the Armed Forces, participated in a U.S. military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No.

12985 (61 Fed. Reg. 1209); and

4. Recently separated veterans.

Under VEVRAA, *qualified*, with respect to an employment position, means having the ability to perform the essential functions of the position with or without reasonable accommodation for an individual with a disability.ⁿ⁴² For a discussion relating to employer accommodation of handicaps, *see* Chapter 41, Part D.

A *veteran of the Vietnam era* is a person who (1) served on active duty for a period of more than 180 days, any part of which occurred between August 5, 1964, and May 7, 1975, and was discharged or released from duty with other than a dishonorable discharge, or (2) was discharged or released from active duty because of a service-connected disability if any part of the active duty occurred between August 5, 1964, and May 7, 1975.ⁿ⁴³

USERRA defines an *employee* as "any person employed by an employer."ⁿ⁴⁴ As noted above, it also specifies that its provisions regarding reemployment rights apply to any person whose absence from a position of employment is necessitated because of service in the uniformed service.ⁿ⁴⁵ The USERRA also applies to persons in the uniformed service who are denied initial employment.ⁿ⁴⁶ Because of the broad definition of "employer," one commentator has argued that the USERRA may apply to independent contractors and their employees.ⁿ⁴⁷

A person's entitlement to benefits under USERRA terminates if he or she is separated from uniformed service with a dishonorable or bad conduct discharge or under other than honorable conditions or is dismissed or dropped from the rolls under Title 10 United States Code Section 1161(a) or (b).ⁿ⁴⁸

[5] Prohibited Employment Practices

The nondiscrimination and affirmative action provisions of the VEVRAA are the same as the requirements and prohibitions of Section 503 of the Rehabilitation Act.ⁿ⁴⁹ For a detailed discussion relating to those practices and prohibitions, *see* § 40.23[1][e].

USERRA prohibits employers from denying to a member, or applicant to be a member, of the uniformed services the right to initial employment, reemployment, retention in employment, promotion, or any benefit of employment because of any relationship or obligation arising from that membership.ⁿ⁵⁰ A person is not entitled to reemployment benefits unless that person's absence from employment is necessitated by service in the uniformed services.ⁿ⁵¹ USERRA also prohibits employers from retaliating for any actions taken by a person to enforce protections afforded by USERRA.ⁿ⁵²

A violation of USERRA occurs when membership, application for membership, service, application for service, or obligation to serve in the uniformed services is a motivating factor in the employer's action, unless the employer can prove the action would have been taken in the absence of the membership, application for membership, service, application for service, or obligation to serve.ⁿ⁵³

[6] Defenses

The defenses to the affirmative action provisions of the VEVRAA are similar to the Section 503 defenses. Thus, there is no liability under the VEVRAA if persons denied reemployment are not "qualified special disabled veterans" or "veterans of the Vietnam era."ⁿ⁵⁴ Effective Nov. 7, 2003, VEVRAA applies to "qualified covered veterans."ⁿ⁵⁵ For a detailed discussion relating to Section 503 defenses and waivers, *see* § 40.23[1][f].

An employer is not required to reemploy a person under USERRA if: (1) the employer's circumstances have so changed as to make such reemployment impossible or unreasonable; (2) it would impose an undue hardship on the employer to comply with certain specified duties regarding the accommodation or training of persons who were disabled or whose

disabilities were aggravated by service and who could no longer perform certain duties as specified in Title 38 *United States Code Section 4313(a)(3), (4), and (b)(2)(B)*; or (3) the employment from which the person left to serve in the uniformed services was for a brief, nonrecurrent period and there was no reasonable expectation that such employment would continue indefinitely or for a significant period.ⁿ⁵⁶

In addition, a person submitting an application for reemployment under the USERRA must provide certain documentation establishing the timeliness of the person's application, that the person has not exceeded specified service limitations, and the person's entitlement to benefits was not terminated by a dishonorable discharge following military service of 31 days or more.ⁿ⁵⁷ Although failure to provide such documentation because it is unavailable or nonexistent does not initially entitle the employer to not comply with the reemployment requirements of the USERRA, if after reemployment, documentation becomes available that establishes that the person does not meet one or more of those requirements, the employer may terminate the person.ⁿ⁵⁸

In a private action against an employer for discrimination based on the person's military status, the employer may avoid liability only by showing, as an affirmative defense, that the employer would have taken the same action without regard to the employee's protected status.ⁿ⁵⁹ The burden of proof is on the employer.ⁿ⁶⁰

Legal Topics:

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

Labor & Employment LawGeneral OverviewMilitary & Veterans LawVeteransBenefitsVietnam Era Veterans
Readjustment Assistance ActPensions & Benefits LawEqual ProtectionVeterans

FOOTNOTES:

(n1)Footnote 1. 38 U.S.C. § 4211 *et seq.*

(n2)Footnote 2. With respect to contracts entered into on or after Nov. 7, 2003, the amount increases to \$100,000. *See* P.L. 107-288, § 2(b)(3).

(n3)Footnote 3. *See* 38 U.S.C. § 4212(a); 41 C.F.R. § 60-250.1; *see also* [4], *below*.

(n4)Footnote 4. 38 U.S.C. § 4301 *et seq.* The Veterans' Employment and Training Service ("VETS") has issued rules implementing the Uniformed Services Employment and Reemployment Rights Act of 1994. *See* 20 C.F.R. Part 1002. VETS also has developed an Internet-based system to allow USERRA claimants to officially submit a claim via the VETS Website using an electronic version of the claim form. *See* <http://www.dol.gov/elaws/userra.htm>.

(n5)Footnote 5. Former 38 U.S.C. § 2021 *et seq.*

(n6)Footnote 6. 38 U.S.C. § 4303(16).

(n7)Footnote 7. 38 U.S.C. § 4316(c).

(n8)Footnote 8. 38 U.S.C. § 4316(a).

(n9)Footnote 9. 38 U.S.C. § 4317.

(n10)Footnote 10. 38 U.S.C. § 4318.

(n11)Footnote 10.1. 38 U.S.C. § 4302(b).

(n12)Footnote 10.2. *Perez v. Uline* (2007) 157 Cal. App. 4th 953, 957-958, 68 Cal. Rptr. 3d 872 .

(n13)Footnote 11. *See* 38 U.S.C. § 4212(b) (aggrieved veteran entitled to file complaint with Secretary of Labor,

who must promptly investigate and take appropriate action); *see also* *Clementson v. Donovan* (D. 1985) 608 F. Supp. 152, 154 (enforcement is delegated by Secretary of Labor to OFCCP).

(n14)Footnote 12. *See* 29 U.S.C. § 701 *et seq.*; *see also* 29 U.S.C. § 793(b) (individuals aggrieved under Section 503 entitled to file complaint with OFCCP, which must promptly investigate and take warranted actions); compare 41 C.F.R. §§ 60-250.20-60-250.32 (Vietnam Era Veterans Readjustment Assistance Act enforcement regulations) with 41 C.F.R. §§ 60-741.20-60-741.32 (Rehabilitation Act enforcement regulations).

(n15)Footnote 13. *See* 41 C.F.R. § 60-250.28(a).

(n16)Footnote 14. *See* 41 C.F.R. § 60-250.28(c).

(n17)Footnote 15. *See* 41 C.F.R. § 60-250.28(d).

(n18)Footnote 16. *See* 41 C.F.R. § 60-250.28(e).

(n19)Footnote 17. *See* 38 U.S.C. § 4321.

(n20)Footnote 18. 38 U.S.C. § 4322(a), (c).

(n21)Footnote 19. 38 U.S.C. § 4322(d).

(n22)Footnote 20. 38 U.S.C. § 4323(a)(1).

(n23)Footnote 20.1. 38 U.S.C. § 4323(a)(2).

(n24)Footnote 21. 38 U.S.C. § 4323(a)(3).

(n25)Footnote 22. *See* 38 U.S.C. § 4323(f).

(n26)Footnote 22.1. 38 U.S.C. § 4327(a).

(n27)Footnote 22.2. 38 U.S.C. § 4327(b).

(n28)Footnote 23. *Leisek v. Brightwood Corp.* (9th Cir. 2002) 278 F.3d 895, 899-900 (evidence supported inference that employee's military status was motivating factor in employer's decision to terminate his employment due to its concern regarding significant number of absences from work that employee's participation in National Guard program required).

(n29)Footnote 24. 38 U.S.C. § 4303(13); *see* *Leisek v. Brightwood Corp.* (9th Cir. 2002) 278 F.3d 895, 899-900 (employee not acting under National Guard orders, or under any other "competent authority," when he traveled rather than returning to work; employer's policy made unexcused absences ground for termination of employment so that unexcused absences would have been legitimate basis for decision to terminate his employment; however, court was required to examine whether record supported inference that employer was also motivated by employee's Guard status in terminating his employment).

(n30)Footnote 25. *See* *Leisek v. Brightwood Corp.* (9th Cir. 2002) 278 F.3d 895, 899-900 ; for discussion of affirmative defenses, *see* [6], *below*.

(n31)Footnote 26. 38 U.S.C. § 4323(d).

(n32)Footnote 27. 38 U.S.C. § 4323(e).

(n33)Footnote 28. 38 U.S.C. § 4323(h).

(n34)Footnote 29. 38 U.S.C. § 4323(h).

(n35)Footnote 29.1. *Townsend v. Univ.of Alaska (9th Cir. 2008) 543 F.3d 478, 2008 U.S. App. LEXIS 18974, *14-*20* (structure of USERRA and its legislative history made plain that Congress did not intend to create either express or implied cause of action against state supervisors).

(n36)Footnote 30. *See 38 U.S.C. § 4212(a).*

(n37)Footnote 31. *See 41 C.F.R. § 60-250.2; see Partridge v. Reich (9th Cir. 1998) 141 F.3d 920, 923-925* (no basis for VEVRAA coverage based on grant agreements between federal government and county fire department, contract between federal government and county that did not involve fire department, and grant between FEMA and state and county even though agreement mentioned fire department as organization to provide rescue services).

(n38)Footnote 32. 38 U.S.C. § 4303(4)(A)(i).

(n39)Footnote 33. 38 U.S.C. § 4303(4)(A)(ii)-(v).

(n40)Footnote 34. 38 U.S.C. § 4323(b); Pub. L. 105-368 (Nov. 11, 1998); *see* Pub L. 105-368, § 211(b)(1) (amendment made expressly applicable to pending cases); *Townsend v. University of Alaska (9th Cir. 2008) 543 F.3d 478, 2008 U.S. App. LEXIS 18974, *6-*14*.

(n41)Footnote 34.1. 38 U.S.C. § 4323(b)(1).

(n42)Footnote 35. *Townsend v. Univ. of Alaska (9th Cir. 2008) 343 F.3d 478, 2008 U.S. App. LEXIS 18974, *6-*14* (Congress intended that actions brought by individuals against a state be commenced in state court).

(n43)Footnote 36. *See 38 U.S.C. § 4212(a).* The OFCCP regulations state that the affirmative action provisions of the act apply to "qualified disabled veterans" as opposed to "qualified special disabled veterans." *See 41 C.F.R. § 60-250.1.* Those terms have slightly different meanings under the act. *See 38 U.S.C. § 4211(1), (3).*

(n44)Footnote 37. *See 38 U.S.C. § 3106(a)* (Veteran's Administration Administrator as required to provide initial eligibility and feasibility evaluation for veteran with service-connected disability who applies for vocational rehabilitation benefits).

(n45)Footnote 38. 38 U.S.C. § 4211(1).

(n46)Footnote 39. *See 41 C.F.R. § 60-250.2.*

(n47)Footnote 40. 38 U.S.C. § 4212(a). *See* P.L. 107-288 § 2(b)(3).

(n48)Footnote 41. 38 U.S.C. § 4212(a)(3)(A).

(n49)Footnote 42. 38 U.S.C. § 4212(a)(3)(B).

(n50)Footnote 43. 41 C.F.R. § 60-250.2; *see 38 U.S.C. § 4211(2), (4).*

(n51)Footnote 44. 38 U.S.C. § 4303(3).

(n52)Footnote 45. 38 U.S.C. § 4312(a); *see* discussion in [1], above, for definition of "uniformed service."

(n53)Footnote 46. 38 U.S.C. § 4311(a).

(n54)Footnote 47. *See Klein & Pappas, The Return from Uniformed Service, New York Law Journal* (Dec. 5, 1994) 3, p. 3.

(n55)Footnote 48. 38 U.S.C. § 4304.

(n56)Footnote 49. See 38 U.S.C. § 4212(a); 41 C.F.R. §§ 60-250.4-60-250.5.

(n57)Footnote 50. See 38 U.S.C. § 4311(a).

(n58)Footnote 51. 38 U.S.C. § 4312(a); see *Leisek v. Brightwood Corp.* (9th Cir. 2002) 278 F.3d 895, 901 (employee who attended National Guard event without orders to do so, so that his absence while attending the event not necessitated by his service, not entitled to reemployment benefits).

(n59)Footnote 52. See 38 U.S.C. § 4311(c)(2). See *Wallace v. City of San Diego* (9th Cir. 2006) 460 F.3d 1181, 1188-1195 (in action under USERRA for constructive discharge by former police officer, to extent district court concluded that employer's actions taken prior to time officer submitted his application for reemployment could not as matter of law be retaliatory, it was incorrect; officer had repeatedly exercised his right to reemployment on several occasions, and evidence suggested officer's relationship with his superiors was strained at least in part due to his military service, permitting inference the adverse employment actions were taken because of his exercise of rights protected by USERRA; that officer resigned almost immediately following civilian's threat to bring false charges of discrimination against him did not preclude finding of constructive discharge, because, although threatened charges might have been groundless and not survived investigation, there was evidence to support conclusion that department had history of taking disciplinary action against officer for pretextual reasons and without investigation).

(n60)Footnote 53. 38 U.S.C. § 4311(c)(1); compare *Monroe v. Standard Oil Co.* (1981) 452 U.S. 549 (interpreting VEVRAA, USERRA's predecessor, to require that employee's military status be sole motivation, rather than motivating factor, for employer's action).

(n61)Footnote 54. See 38 U.S.C. § 4212(a).

(n62)Footnote 55. See § 40.24[4], above.

(n63)Footnote 56. 38 U.S.C. § 4312(d)(1).

(n64)Footnote 57. 38 U.S.C. § 4312(f)(1).

(n65)Footnote 58. 38 U.S.C. § 4312(f)(3)(A).

(n66)Footnote 59. *Leisek v. Brightwood Corp.* (9th Cir. 2002) 278 F.3d 895, 899 .

(n67)Footnote 60. *Leisek v. Brightwood Corp.* (9th Cir. 2002) 278 F.3d 895, 900 .



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.25

AUTHOR: By David M. Youngsmith, J.D.

§ 40.25 Civil Rights Act of 1866 (Title 42 United States Code Section 1981)

[1] Governing Law and Scope of Coverage

Among other things, Title 42 *United States Code Section 1981*, originally enacted as part of the Civil Rights Act of 1866, guarantees all persons in the United States the same right as white persons to make and enforce contracts,ⁿ¹ including contracts of employment.ⁿ² As used in Section 1981, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.ⁿ³

The definition of "make and enforce contracts" was added by the Civil Rights Act of 1991.ⁿ⁴ The purpose of this provision was to overrule *Patterson v. McLean Credit Union*,ⁿ⁵ in which the United State Supreme Court had narrowly limited the application of Section 1981 to racially discriminatory conduct involving the formation of new contracts and their enforcement.ⁿ⁶ Thus, the Court in *Patterson* had held that employment discrimination was not actionable under Section 1981 unless it involved a discriminatory refusal to enter into an employment contract (e.g., discrimination in hiring) or a discriminatory impairment of the ability to enforce contractual rights. Under the holding in *Patterson*, discriminatory conduct relating to the terms and conditions of continuing employment, such as racial harassment, was not actionable.ⁿ⁷ The Court also held that discriminatory denial of promotional opportunities was not actionable under Section 1981 unless the promotion "rises to the level of an opportunity for a new and distinct" employer-employee relationship.ⁿ⁸ Furthermore, *Patterson* left in doubt the question of whether discriminatory discharge was actionable under Section 1981.ⁿ⁹ In light of the Civil Rights Act of 1991, it now appears clear that racial discrimination in hiring and discharge, and in all other "benefits, privileges, terms, and conditions" of employment is actionable under *Section 1981*.ⁿ¹⁰ Section 1981 also encompasses a claim of retaliation against a person who has complained about a violation of another person's contract-related right.^{n10.1}

To state a claim under *Section 1981*, there must be a contractual relationship between the plaintiff and the defendant. A plaintiff who lacks any rights under an existing contractual relationship with a defendant, and who has not been prevented from entering into such a contractual relationship, may not bring suit under 42 U.S.C. § 1981. *Section 1981*

offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship.^{n10.2}

Section 1981 requires proof of intentional discrimination.ⁿ¹¹ If an employment discrimination claim is not based on a disparate impact theory, it is intentional discrimination.ⁿ¹² In analyzing employment-related claims under Section 1981, courts apply the same legal principles as those applicable in a Title VII disparate treatment case.^{n12.1} Typically, courts apply the burden-shifting framework established in *McDonnell Douglas*.^{n12.2} However, courts also have held that although the *McDonnell Douglas* burden shifting framework is a useful tool to assist at the summary judgment stage, nothing compels the parties to invoke the *McDonnell Douglas* presumption.^{n12.3} When responding to a summary judgment motion, plaintiff may proceed by using the *McDonnell Douglas* framework, or may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the employer.^{n12.4} When the plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created, even if the evidence is not substantial.^{n12.5}

In the Ninth Circuit, a claim that the employer was aware of the racial harassment an employee faced from coworkers and failed to take steps to address it, thereby creating a hostile work environment, is cognizable under Section 1981.^{n12.6} By not basing a Section 1981 claim on disparate impact and by proving each of the following, a plaintiff will make out a claim of racial harassment under Section 1981:ⁿ¹³

- The employee was subjected to verbal or physical conduct of a harassing nature because of race;
- The conduct was unwelcome; and
- The conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

The plaintiff is not required to prove that white employees were not subject to similar harassment.ⁿ¹⁴

In considering whether the discriminatory conduct was "severe or pervasive," courts look to all the circumstances, including the following:^{n14.1}

- The frequency of the discriminatory conduct.
- The severity of the discriminatory conduct.
- Whether the discriminatory conduct is physically threatening or humiliating, or a mere offensive utterance.
- Whether the discriminatory conduct unreasonably interferes with an employee's work performance.

An isolated incident of harassment by a coworker will rarely, if ever, give rise to a reasonable fear that the harassment has become a permanent feature of the employment relationship.^{n14.2}

Discriminatory conduct directed at an individual other than the plaintiff may be relevant to a plaintiff's hostile work environment claim in certain circumstances.^{n14.3}

Although Section 1981 and Title VII of the Civil Rights Act of 1964ⁿ¹⁵ both prohibit certain types of racial discrimination in employment, they are not coextensive in their coverage. The two laws are separate, distinct, and independent avenues of relief.ⁿ¹⁶ However, hostile work environment claims under Title VII contain the same elements

as a § 1981 hostile work environment claim so that the legal principles guiding a court in a Title VII dispute apply with equal force in a § 1981 action.ⁿ¹⁶ For an overview of the protection afforded by Title VII, see § 40.20.

[2] Enforcement and Remedies

Unlike the more recently enacted employment discrimination laws,ⁿ¹⁷ there are no administrative enforcement procedures for Title 42 *United States Code Section 1981*.ⁿ¹⁸ Aggrieved individuals may enforce *Section 1981* in federal or state court.ⁿ¹⁹ Such individuals are entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages.ⁿ²⁰ They may also be entitled to recover attorney's fees.ⁿ²¹

[3] Employers Covered and Exempted

In *Runyan v. McCrary*,ⁿ²² involving private schools that excluded qualified children from admission on the basis of race, the United States Supreme Court held that Title 42 *United States Code Section 1981* applies to private acts of discrimination.ⁿ²³ The Court relied, in part, on its decision in *Johnson v. Railway Express Agency*,ⁿ²⁴ which held that since *Section 1981* relates primarily to racial discrimination in the making and enforcement of contracts,ⁿ²⁵ it affords a federal remedy against racial discrimination in private employment.ⁿ²⁶ The Court reaffirmed *Runyan* in *Patterson v. McLean Credit Union*.ⁿ²⁷ Pursuant to the Civil Rights Act of 1991,ⁿ²⁸ *Section 1981* now expressly provides that the rights protected by that section are protected against impairment by nongovernmental discrimination.ⁿ²⁹

Section 1981 also applies to state and local public employers,ⁿ³⁰ but does not apply to federal employers because the federal employment provision in Title VIIⁿ³¹ is the exclusive judicial remedy for claims of discrimination in federal employment.ⁿ³²

[4] Employees Covered

Section 1981 expressly applies to "[a]ll persons within the jurisdiction of the United States."ⁿ³³

[5] Prohibited Bases of Discrimination

Title 42 *United States Code Section 1981* prohibits employment discrimination on the basis of race,ⁿ³⁴ but does not apply to sex, age, or religious discrimination.ⁿ³⁵ Race discrimination has been held to involve distinctions based solely on ancestry or ethnic characteristics,ⁿ³⁶ as well as claims by white persons for reverse discrimination.ⁿ³⁷

Although some courts have held that an individual may assert a *Section 1981* claim based on national origin,ⁿ³⁸ most have held that claims based *solely* on national origin are not covered by *Section 1981*.ⁿ³⁹ However, race has been defined broadly to cover immigrant ethnic groups.ⁿ⁴⁰ If there is a racial component to a national origin claim, and racial discrimination is also alleged, *Section 1981* apparently does apply.ⁿ⁴¹ Thus, in *Saint Francis College v. Al-Khazraji*,ⁿ⁴² the United States Supreme Court held that a United States citizen born in Iraq may be protected from racial discrimination under *Section 1981* if he could prove that he was subjected to intentional discrimination because he was an Arab, rather than solely because of the place or nation of his origin.

[6] Defenses

Employers may defeat claims under Title 42 *United States Code Section 1981* by articulating a legitimate business reason for an alleged unlawful employment practice.ⁿ⁴³ Also, public officials who violate *Section 1981* in executing their duties in a way that they in good faith believe the law to require may have a legitimate defense.ⁿ⁴⁴

A mixed-motive defense to liability is available for a retaliation claim brought under *Section 1981*. If the mixed-motive defense to retaliation is proven as an undisputed fact, it can provide a basis for summary judgment.ⁿ⁴⁵

For discussion of substantive defenses to discrimination claims, *see* Chapter 41, Part E.

Legal Topics:

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

Civil Rights Law Civil Rights Acts General Overview Labor & Employment Law General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 1981(a).

(n2)Footnote 2. *See Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (42 U.S.C. § 1981 affords federal remedy against discrimination in private employment on basis of race).

(n3)Footnote 3. 42 U.S.C. § 1981(b).

(n4)Footnote 4. *See* Pub. L. No. 102-166, § 101(2).

(n5)Footnote 5. *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 ; *see* Pub. L. No. 101-166, § 3(1),(4) (purposes of Civil Rights Act of 1991).

(n6)Footnote 6. *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 176-178, 105 L. Ed. 2d 132, 109 S. Ct. 2363 . The Supreme Court has subsequently held that the provision of the Civil Rights Act of 1991 overturning the *Patterson* holding may not be applied retroactively to cases pending at the time of enactment of that legislation. *Rivers v. Roadway Express* (1994) 511 U.S. 298, 303-309, 114 S. Ct. 1510, 128 L. Ed. 2d 274 .

(n7)Footnote 7. *See Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 177-182, 105 L. Ed. 2d 132, 109 S. Ct. 2363 .

(n8)Footnote 8. *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 185, 105 L. Ed. 2d 132, 109 S. Ct. 2363 .

(n9)Footnote 9. *Compare Courtney v. Canyon Television & Appliance Rental* (9th Cir. 1990) 899 F.2d 845, 849 (42 U.S.C. § 1981 not applicable to discriminatory termination) *with Hicks v. Brown Group, Inc.* (8th Cir. 1992) 982 F.2d 295 (42 U.S.C. § 1981 is applicable to discriminatory termination).

(n10)Footnote 10. *See* 42 U.S.C. § 1981(a), (b).

(n11)Footnote 10.1. *CBOCS West, Inc. v. Humphries* (2008) 128 S. Ct. 1951, 2008 U.S. LEXIS 4516, *7-*26 .

(n12)Footnote 10.2. *Domino's Pizza, Inc. v. McDonald* (2006) 126 S. Ct. 1246, 1249-1252, 163 L. Ed. 2d 1069 (plaintiff could not sue in individual capacity under § 1981, when injury was to corporation of which he was shareholder and contracting officer).

(n13)Footnote 11. *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 806 (but "intentional" need not be included in jury instructions).

(n14)Footnote 12. *Kolstad v. Am. Dental Ass'n* (1999) 527 U.S. 526, 534, 119 S. Ct. 2118, 144 L. Ed. 2d 494 ; *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 806 .

(n15)Footnote 12.1. *Metoyer v. Chassman* (9th Cir. 2007) 504 F.3d 919, 2007 U.S. App. LEXIS 22750, *24 ; *Fonseca v. Sysco Food Servs. of Ariz. Inc.* (9th Cir. 2004) 374 F.3d 840, 850 .

(n16)Footnote 12.2. *See Fonseca v. Sysco Food Servs. of Ariz. Inc.* (9th Cir. 2004) 374 F.3d 840, 850 . For discussion of the *McDonnell Douglas* burden-shifting framework, *see* § 41.11[1].

(n17)Footnote 12.3. *Metoyer v. Chassman* (9th Cir. 2007) 504 F.3d 919, 2007 U.S. App. LEXIS 22750, *24 ; *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1122 .

(n18)Footnote 12.4. *Metoyer v. Chassman* (9th Cir. 2007) 504 F.3d 919, 2007 U.S. App. LEXIS 22750, *24-*25 ; *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1122 .

(n19)Footnote 12.5. *Metoyer v. Chassman* (9th Cir. 2007) 504 F.3d 919, 2007 U.S. App. LEXIS 22750, *25, *43-*49 (district court erred in granting summary judgment, because African-American plaintiff presented both direct and circumstantial evidence demonstrating that management harbored discriminatory animus toward African-Americans); *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1221 . *See also* *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 889 (on summary judgment, requisite degree of proof necessary to establish prima facie case is minimal and does not even need to rise to level of preponderance of evidence).

(n20)Footnote 12.6. *Johnson v. Riverside Healthcare System* (9th Cir. 2008) 534 F.3d 1116, 1122 .

(n21)Footnote 13. *Johnson v. Riverside Healthcare System* (9th Cir. 2008) 534 F.3d 1116, 1122-1124 (physician's complaint sufficiently alleged cause of action for racial harassment under § 1981, where complaint included at least three allegations that were relevant to claim he was subjected to a hostile work environment because of his race); *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 806-807 (jury instructions adequately included these elements and mirrored Ninth Circuit model civil jury instruction for disparate treatment under Title VII, which is analogous for instant purposes), citing *Pavon v. Swift Transp. Co., Inc.* (9th Cir. 1999) 192 F.3d 902, 908 .

(n22)Footnote 14. *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 807 .

(n23)Footnote 14.1. *Johnson v. Riverside Healthcare System* (9th Cir. 2008) 534 F.3d 1116, 1122 ; *Kortan v. Cal. Youth Auth.* (9th Cir. 2000) 217 F.3d 1104, 1110 .

(n24)Footnote 14.2. *Johnson v. Riverside Healthcare System* (9th Cir. 2008) 534 F.3d 1116, 1123 ; *Brooks v. City of San Mateo* (9th Cir. 1999) 229 F.3d 917, 924 .

(n25)Footnote 14.3. *Johnson v. Riverside Healthcare System, LP* (9th Cir. 2008) 534 F.3d 1116, 1123 . *See* *Monteiro v. Tempe Union High Sch. Dist.* (9th Cir. 1998) 158 F.3d 1022, 1033-1034 .

(n26)Footnote 15. *See* 42 U.S.C. § 2000e et seq.

(n27)Footnote 16. *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 ; *see* *Miller v. Fairchild Indus., Inc.* (9th Cir. 1989) 885 F.2d 498, 503 ; (42 U.S.C. § 1981 provides independent but overlapping federal remedey for race discrimination in employment); *Ellis v. Naval Air Rework Facility (N.D. Cal. 1975)* 404 F. Supp. 377, 380 (Title VII does not preempt 42 U.S.C. § 1981; Title VII and 42 U.S.C. § 1981 as independent and supplemental grounds for jurisdiction).

(n28)Footnote 16.1. *Johnson v. Riverside Healthcare System* (9th Cir. 2008) 534 F.3d 1116, 1122 n.3 .

(n29)Footnote 17. *See, e.g.,* 42 U.S.C. § 2000e-4 (Title VII enforced by EEOC); *See also* § 40.20[3][a].

(n30)Footnote 18. *See* *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (assistance in investigation, conciliation, counsel, and waiver of court costs are unavailable under specific terms of 42 U.S.C. § 1981).

(n31)Footnote 19. *See* 28 U.S.C. § 1343(a)(4) (federal courts have jurisdiction of civil action commenced by any person under any civil rights laws enacted by Congress); *DeHorney v. Bank of America Nat. Trust and Sav. Ass'n* (9th Cir. 1989) 879 F.2d 459, 463 (state and federal courts have concurrent jurisdiction over 42 U.S.C. § 1981 cases). Originally, the Civil Rights Act provided for exclusive federal jurisdiction. *see* Act of Apr. 9, 1866, § 3, 14 Stat. 27.

That limitation was deleted, and 28 U.S.C. § 1343(a)(4) provides for original, but not exclusive, jurisdiction.

(n32)Footnote 20. *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 .

(n33)Footnote 21. *See* 42 U.S.C. § 1988(b), (c). For discussion, *see* § 43.14[6][h].

(n34)Footnote 22. *Runyon v. McCrary* (1976) 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 .

(n35)Footnote 23. *Runyon v. McCrary* (1976) 427 U.S. 160, 175, 96 S. Ct. 2586, 49 L. Ed. 2d 415 .

(n36)Footnote 24. *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 .

(n37)Footnote 25. *See* [1], above.

(n38)Footnote 26. *See* *Runyon v. McCrary* (1976) 427 U.S. 160, 172, 96 S. Ct. 2586, 49 L. Ed. 2d 415 ; *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 .

(n39)Footnote 27. *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 171-175, 109 S. Ct. 2363, 105 L. Ed. 2d 132 , *superseded on other grounds by statute* by amendment of 42 U.S.C. § 1981 (*see* 105 Stat. 1071).

(n40)Footnote 28. *See* Pub. L. No. 102-166, § 101(2).

(n41)Footnote 29. 42 U.S.C. § 1981(c).

(n42)Footnote 30. *See* *Sethy v. Alameda County Water Dist.* (9th Cir. 1976) 545 F.2d 1157, 1160 ; 42 U.S.C. § 1981(c) (statute applies to impairment of rights "under color of State law").

(n43)Footnote 31. *See* 42 U.S.C. § 2000e-16; *see* *West v. Gibson* (1999) 527 U.S. 212, 119 S. Ct. 1906, 144 L. Ed. 2d 196, 204 (EEOC has authority to require federal agencies to pay compensatory damages when they discriminate in violation of Title VII).

(n44)Footnote 32. *See* *Brown v. GSA* (1976) 425 U.S. 820, 835, 96 S. Ct. 1961, 48 L. Ed. 2d 402 ; *see also* *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1975) 404 F. Supp. 377, 380 (although Title VII has express waiver to sovereign immunity (*see* 42 U.S.C. § 2000e-16(c)), 42 U.S.C. § 1981 has no such waiver).

(n45)Footnote 33. *See* 42 U.S.C. § 1981(a).

(n46)Footnote 34. *See* *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 .

(n47)Footnote 35. *See* *Runyon v. McCrary* (1976) 427 U.S. 160, 167, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (dictum); *see also* *League of Academic Women v. Regents of Univ. of Cal.* (N.D. Cal. 1972) 343 F. Supp. 636, 639 (42 U.S.C. § 1981 not applicable to sex discrimination).

(n48)Footnote 36. *See* *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582 ; *Fonseca v. Sysco Food Services of Arizona, Inc.* (9th Cir. 2004) 374 F.3d 840, 850 .

(n49)Footnote 37. *See* *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 279, 96 S. Ct. 2574, 49 L. Ed. 2d 493 .

(n50)Footnote 38. *See* *Ortiz v. Bank of America* (E.D. Cal. 1982) 547 F. Supp. 550, 568 , *aff'd*, 824 F.2d 692 (1987) .

(n51)Footnote 39. *See Gradillas v. Hughes Aircraft Co.* (D. Ariz. 1975) 407 F. Supp. 865, 867 .

(n52)Footnote 40. *Fonseca v. Sysco Food Services of Arizona, Inc.* (9th Cir. 2004) 374 F.3d 840, 850 .

(n53)Footnote 41. *See Gonzalez v. Stanford Applied Eng'g* (9th Cir. 1979) 597 F.2d 1298, 1300 (national origin claim by Mexican-American amended to include claim that discrimination was based on dark skin is racial discrimination claim covered by 42 U.S.C. § 1981).

(n54)Footnote 42. *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582 .

(n55)Footnote 43. *See Johnson v. Bunny Bread Co.* (8th Cir. 1981) 646 F.2d 1250, 1254 .

(n56)Footnote 44. *See Faraca v. Clements* (5th Cir. 1975) 506 F.2d 956, 960 .

(n57)Footnote 45. *Metoyer v. Chassman* (9th Cir. 2007) 504 F.3d 919, 2007 U.S. App. LEXIS 22750, *26-*36, *49-*53 (employer did not present sufficient evidence to support summary judgment based on mixed-motive defense, where facts of plaintiff's misconduct were undisputed, but employer's contention that it would have made the same decision to terminate her employment was undermined by plaintiff's declaration that other persons engaged in similar questionable practices and faced no disciplinary consequences).



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.26

AUTHOR: By David M. Youngsmith, J.D.

§ 40.26 Civil Rights Act of 1871 (Title 42 United States Code Section 1983)

[1] Governing Law and Scope of Coverage

Title 42 *United States Code Section 1983* is derived from the Civil Rights Act of 1871, which was passed to enforce the *Fourteenth Amendment of the United States Constitution*.ⁿ¹ Section 1983 prohibits "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by any person acting "under color of any statute, ordinance, regulation, custom, or usage of any [s]tate[,], or [t]erritory[,], or the District of Columbia,"ⁿ² and thus generally applies only to public employment or employment involving state action.ⁿ³ Unlike Section 1981,ⁿ⁴ Section 1983 creates no substantive statutory rights.ⁿ⁵ Rather, it is a vehicle for the enforcement of "rights, privileges, or immunities secured by the [United States] Constitution and laws."ⁿ⁶ For example, it may be used to assert employment discrimination in violation of constitutional guarantees.ⁿ⁷ However, although *Section 1983* may be used to enforce rights under some federal "laws,"ⁿ⁸ courts have held that *Section 1983* may not be used to enforce Title VII and the ADEA, because those statutes contain their own exclusive remedies.ⁿ⁹ Title VII and the ADEA do not, however, preempt Section 1983 when an aggrieved employee bases his or her claim on *specific constitutional violations*,ⁿ¹⁰ even if the same facts would also suggest a violation of those statutes.ⁿ¹¹

A plaintiff alleging an adverse employment actionⁿ¹² in violation of *First Amendment* rights must show that the protected conduct was a "substantial" or "motivating" factor of the employer's action. The burden then shifts to the employer to demonstrate that it would have taken the same actions even in the absence of the protected conduct.ⁿ¹³

To establish an equal protection violation, the employee must show the defendants were motivated by a racially discriminatory purpose.ⁿ¹⁴

For purposes of an action under § 1983, an employee suffers a constructive discharge when a reasonable person in the employee's position would have felt that he or she was forced to quit because of intolerable and discriminatory working conditions. An employee's decision to retire or resign can constitute a constructive discharge for purposes of a § 1983 action when an employee alleges the resignation was due to intolerable working conditions.^{n14.1} A retirement or

resignation may be involuntary and constitute a deprivation of property for purposes of a due process claim in the absence of intolerable working conditions. An employee may demonstrate that the decision to resign or retire was involuntary under circumstances not involving intolerable or discriminatory working conditions, such as the coercion inherent in the choice between retirement and a complete deprivation of income.^{n14.2} Under a coercion theory, the employee has the burden to come forward with sufficient evidence to demonstrate that a reasonable person in the employee's position would feel he or she had no choice but to resign or retire.^{n14.3} In evaluating claims of coercion, the court determines voluntariness by an objective standard, rather than by the employee's purely subjective evaluation; rejects cases in which the employee did have a choice, even if between comparatively unpleasant alternatives; and considers additional case-specific factors that cut against a finding of coercion, such as whether the employee was given an alternative to resignation or retirement, understood the choice, had a reasonable time in which to decide, or could select the timing of the retirement or resignation.^{n14.4}

Because *Section 1983* normally applies only to employment discrimination by public employers, it is covered only briefly in this chapter. For a detailed analysis of *Section 1983* as it relates to employment discrimination, *see* Larson, Employment Discrimination, Chapter 2, § 7.32. For full discussion of civil rights actions under *Section 1983*, *see* Cook and Sobieski, Civil Rights Actions.

[2] "Color of Law" Requirement

In *Adickes v. S. H. Kress & Co.*,ⁿ¹⁵ the United States Supreme Court held that *Section 1983* requires two elements: (1) deprivation of a right secured by the United States Constitution and laws; and (2) action under color of any statute, ordinance, regulation, custom, or usage of any state or territory. The Court stated that the second element requires a plaintiff to show that the defendant acted "under color of law."ⁿ¹⁶ In *Blair v. City of Pomona*,ⁿ¹⁷ the Ninth Circuit found that acts by police officers against a fellow officer who had blown the whistle on department corrupt practices, such as blocking the plaintiff's mother with a police cruiser, cutting off his radio communications, failing to provide him with backup, failing to provide him with a guard after a death threat, and removing him from his position as head of his unit to a subordinate position under an unfriendly head, were acts under color of law.ⁿ¹⁸ The court noted that other acts by fellow police officers including insults to the plaintiff, spitting on his locker, trashing his uniform, theft of his equipment, drinks poured on his car, and insults and threats to his family could be acts under color of law if the evidence showed that the acts were departmental custom, to punish the officer for informing against fellow officers.ⁿ¹⁹

The "color of law" requirement may be satisfied by direct involvement of state officials,ⁿ²⁰ but private employers do not act under the "color of law" unless their infringement of employment rights is "fairly attributable to the state."ⁿ²¹ Receipt of public funds does not transform the acts of a private employer into state acts.ⁿ²² Also, state regulation does not suffice unless it compels or influences employer action.ⁿ²³ Finally, a public function performed by a private employer is not under the "color of law" unless it is "traditionally the *exclusive* prerogative of the [s]tate."ⁿ²⁴

[3] Enforcement and Remedies

Title 42 *United States Code Section 1983* may be enforced in federal court.ⁿ²⁵ State courts also have concurrent jurisdiction to enforce *section 1983*.ⁿ²⁶ However, states are not subject to suit in federal court under *section 1983* because the *Eleventh Amendment to the United States Constitution* grants them sovereign immunity.ⁿ²⁷

Section 1983 provides that "persons" who violate the statute will "be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."ⁿ²⁸ Thus, an employer who acts under color of law and who satisfies the definition of "person,"ⁿ²⁹ faces liability for monetary, declaratory, or injunctive relief if a violation of *section 1983* is established.ⁿ³⁰ However, in any action brought against a judicial officer for an act taken or omission in that officer's judicial capacity, injunctive relief may not be granted unless a declaratory decree was violated or declaratory relief was unavailable.ⁿ³¹

[4] Employers Covered and Exempted

Section 1983 applies to "persons,"ⁿ³² including "municipalities" or local government entities.ⁿ³³ *Section 1983* also applies to local government officials.ⁿ³⁴ Although state officials are subject to *section 1983* in their individual capacities,ⁿ³⁵ neither the state itself nor its officials acting in their official capacities are "persons" within the meaning of *section 1983*.ⁿ³⁶ Also, *section 1983* does not apply to federal officials, because they do not act "under color" of any state or territorial law.ⁿ³⁷

[5] Employees Covered and Exempted

Section 1983 applies to persons who are "citizen[s] of the United States or other person[s] within the jurisdiction [of the United States],"ⁿ³⁸ and who are either public employees or employees of private employers acting under the "color of law."ⁿ³⁹

[6] Prohibited Bases of Discrimination

Title 42 *United States Code Section 1983* prohibits discrimination based on race,ⁿ⁴⁰ national origin,ⁿ⁴¹ religion,ⁿ⁴² and sex.ⁿ⁴³

[7] Prohibited Employment Practices

Section 1983 prohibits employers from depriving employees of the "rights, privileges, or immunities secured by the [United States] Constitution and laws."ⁿ⁴⁴ As discussed in [1], *above*, *section 1983* enforces the *Fourteenth Amendment of the United States Constitution*, including the *equal protection clause*, and thus it prohibits the denial of equal employment opportunities by persons authorized to act for the state.ⁿ⁴⁵

[8] Defenses

Private employers are not liable under *section 1983* if they do not act under the "color of law" as discussed in [2], *above*.ⁿ⁴⁶ Also, as discussed in [4], *above*, state governments are protected by sovereign immunity under the *Eleventh Amendment of the United States Constitution*.ⁿ⁴⁷ Government officials also have absolute immunity regarding legislativeⁿ⁴⁸ and judicialⁿ⁴⁹ functions. Government officials may also have "qualified" immunity if they take "good faith" actions within the scope of their authority.ⁿ⁵⁰

[9] Anti-SLAPP Motions

A federal civil rights claim brought in a California state court is subject to a special motion under *Code Civ. Proc. § 425.16* to strike a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution, in connection with a public issue.ⁿ⁵¹

Thus, for example, in an action under 42 U.S.C. § 1983 and Title VII, a manager's statements and communicative conduct in handling sexual harassment grievances filed by a subordinate were protected by § 425.16, because they were connected with an issue under review by an official proceeding authorized by law, and furthered the right to petition of plaintiff and similarly-situated employees. The case involved *Code Civ. Proc. § 425.16(e)(2)*, covering statements or writings made in connection with an issue under review in an official proceeding authorized by law. *Section 425.16(e)(2)* did not require the defendant to show a public issue or issue of public interest; all that mattered was that the *First Amendment* activity took place in an official proceeding or was made in connection with an issue being reviewed by an official proceeding.ⁿ⁵² The manager reviewed the grievances pursuant to a manual established by the Regents of the University of California, which is a constitutional entity having quasi-judicial powers,ⁿ⁵³ whose policies and procedures have the force and effect of statute.ⁿ⁵⁴ Statutory hearing procedures qualify as official proceedings authorized by law for § 425.16 purposes.ⁿ⁵⁵ The manager acted in furtherance of the right to petition within the

meaning of § 425.16, even though it was not her own right to petition at stake. Section 425.16 does not require that a defendant moving to strike demonstrate that the protected statements or writings were made on defendant's own behalf rather than, for example, on behalf of its clients or the general public.ⁿ⁵⁶ Finally, the subordinate failed to show a probability of prevailing on the civil rights claim so as to avoid the striking of the claim under § 425.16.ⁿ⁵⁷

Legal Topics:

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

Civil Rights Law Section 1983 Actions General Overview Labor & Employment Law General Overview

FOOTNOTES:

(n1)Footnote 1. *See* Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13; *see also* *Sischo-Nownejad v. Merced Community College Dist.* (9th Cir. 1991) 934 F.2d 1104, 1112 .

(n2)Footnote 2. 42 U.S.C. § 1983; *see* *Goldman v. Wilsey Foods, Inc.* (1989) 216 Cal. App. 3d 1085, 1096, 265 Cal. Rptr. 294 (failure to plead that employer acted under "color of law" constitutes failure to state 42 U.S.C. § 1983 cause of action).

(n3)Footnote 3. *See* discussion in [2], *below*.

(n4)Footnote 4. *See* discussion in § 40.25.

(n5)Footnote 5. *See* *Irby v. Sullivan* (5th Cir. 1984) 737 F.2d 1418, 1427 .

(n6)Footnote 6. *See* *Irby v. Sullivan* (5th Cir. 1984) 737 F.2d 1418, 1427 ; *see also* 42 U.S.C. § 1983.

(n7)Footnote 7. *See* *Hollister v. Tuttle* (9th Cir. 2000) 210 F.3d 1033, 1035 (public college professor's allegation that institution retaliated against him for his open opposition to its pro-feminist educational policy states cognizable claim under section 1983); *Lutcher v. Musicians Union Local 47* (9th Cir 1980) 633 F.2d 880, 885 (U.S. Const., Amend. I); *Poolaw v. City of Anadarko* (10th Cir. 1981) 660 F.2d 459, 462 , (U.S. Const., Amend. XIV).

(n8)Footnote 8. *See, e.g.,* *Maine v. Thiboutot* (1980) 448 U.S. 1, 4-5, 100 S. Ct. 2502, 65 L. Ed. 2d 555 (Social Security Act as enforceable under 42 U.S.C. § 1983).

(n9)Footnote 9. *See* *Ahlmeier v. Nev. Sys. of Higher Educ.* (9th Cir. 2009) 555 F.3d 1051, 1055-1060 (because ADEA provides comprehensive remedial scheme, it should be read as precluding § 1983 actions in area of age discrimination in employment). *See also* *Briggs v. Potter*, 463 F.3d 507, 517 (6th Cir. 2006) ; *Lafleur v. Tex. Dep't. of Health* (5th Cir. 1997) 126 F.3d 758, 760 ; *Chennareddy v. Bowsher* (D.C. Cir. 1991) 935 F.2d 315, 318, 290 U.S. App. D.C. 149 ; *Zombro v. Baltimore City Police Dep't.* (4th Cir. 1989) 868 F.2d 1364, 1369 . For a discussion of enforcement and remedies under Title VII and the ADEA, *see* §§ 40.20[2][a] and 40.21[2][a], respectively.

(n10)Footnote 10. *See* *Roberts v. College of the Desert* (9th Cir. 1988) 870 F.2d 1411, 1414-1415 (42 U.S.C. § 1983 and Title VII); *Ratliff v. City of Milwaukee* (7th Cir. 1986) 795 F.2d 612, 623-624 (42 U.S.C. §§ 1983, 1985 and Title VII).

(n11)Footnote 11. *See* *Ratliff v. City of Milwaukee* (7th Cir. 1986) 795 F.2d 612, 624 (42 U.S.C. §§ 1983, 1985 and Title VII); *accord, Zombro v. Baltimore City Police Dep't* (4th Cir. 1989) 868 F.2d 1364, 1367 (plaintiff alleged age discrimination under 42 U.S.C. § 1983, and asserted that he need not establish liberty or property interest; thus 42 U.S.C. § 1983, *standing alone*, preempted by comprehensive ADEA).

(n12)Footnote 12. *Note:* In *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 126 S. Ct. 2405, 165 L. Ed. 2d 345 , discussed at § 41.130[1A], *below*, the United States Supreme Court held that the scope of the

anti-retaliation provision in Title VII of the Civil Rights Act of 1964 extends beyond workplace-related or employment-related retaliatory acts and harm, so that an employee need only allege and prove "adverse action" rather than "adverse employment action" under Title VII's anti-retaliation provision. No court has yet held that 42 U.S.C. § 1983 and the anti-retaliation provision of Title VII are to be construed coextensively, so case law requiring "adverse employment action" under § 1983 still appears to be good law.

(n13)Footnote 13. *Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3d 802, 807-811 (there was sufficient evidence to create genuine issue of material fact as to whether municipal court administrator's refusal to acquiesce in human resource director's allegedly retaliatory treatment of African American employee was expressive conduct on matter of public concern); *Strahan v. Kirkland* (9th Cir. 2002) 287 F.3d 821, 825-827 (law enforcement officer did not present sufficient evidence of employer's concern about employee's motorcycle-group affiliation from which jury could infer that association, protected by *First Amendment*, was substantial factor in demotion and transfer).

(n14)Footnote 14. *Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3d 802, 812 (although there was evidence public employer retaliated against plaintiff for opposing retaliation against African American whom employee recommended for promotion, there was insufficient evidence that retaliation against either employee was motivated by racial animus); *Maynard v. City of San Jose* (9th Cir. 1994) 37 F.3d 1396, 1404 ; *Stones v. Los Angeles Community College Dist.* (9th Cir. 1986) 796 F.2d 270, 275 .

(n15)Footnote 14.1. *Knappenberger v. City of Phoenix* (9th Cir. 2009) 566 F.3d 936, 940 (former police officer's complaint failed to allege facts amounting to this type of constructive discharge). See *Huskey v. City of San Jose* (9th Cir. 2000) 204 F.3d 893, 900-901 . Cf. *Wallace v. City of San Diego* (9th Cir. 2007) 479 F.3d 616, 626 (articulating this standard for constructive discharge for purposes of Uniformed Services Employment and Reemployment Rights Act); *Watson v. Nationwide Ins. Co.* (9th Cir. 1987) 823 F.2d 360, 361 (same under Title VII).

(n16)Footnote 14.2. *Knappenberger v. City of Phoenix* (9th Cir. 2009) 566 F.3d 936, 940-941 (district court's ruling that former police officer who retired could not establish he was deprived of liberty or property interest because he did not allege he retired after facing "intolerable and discriminatory working conditions" was too limited). See *Kalvinskas v. California Institute of Technology* (9th Cir. 1996) 96 F.3d 1305, 1308 (retirement of long-time employee was involuntary under ADEA, where employee was effectively given choice between retiring and receiving his pension or remaining employed but having disability benefits he was receiving reduced to nothing, and reasonable person in his position would have felt he had no choice but to retire); *Lojek v. Thomas* (9th Cir. 1983) 716 F.2d 675, 683 (suggesting employee coerced into resigning could demonstrate he left his employment involuntarily). See also *Leheny v. City of Pittsburgh* (3d Cir. 1999) 183 F.3d 220, 227-228 ; *Stone v. Univ. of Md. Med. Sys. Corp.* (4th Cir. 1988) 855 F.2d 167, 173 ; *Angarita v. St. Louis County* (8th Cir. 1992) 981 F.2d 1537, 1544 ; *Parker v. Bd. of Regents* (10th Cir. 1992) 981 F.2d 1159, 1162 ; *Hargray v. City of Hallandale* (11th Cir. 1995) 57 F.3d 1560, 1568 (per curiam). Cf. *Pennsylvania State Police v. Suders* (2004) 542 U.S. 129, 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (constructive discharge concept was originally developed by National Labor Relations Board to address situations in which employers coerced employees to resign).

(n17)Footnote 14.3. *Knappenberger v. City of Phoenix* (9th Cir. 2009) 566 F.3d 936, 941-942 . See *Kalvinskas v. California Institute of Technology* (9th Cir. 1996) 96 F.3d 1305, 1308 .

(n18)Footnote 14.4. *Knappenberger v. City of Phoenix* (9th Cir. 2009) 566 F.3d 936, 941-942 (former police officer did not allege facts that, if taken as true, would have met his burden of showing involuntary retirement, where his complaint alleged merely that he anticipated he would be terminated and he resigned in order to retain his lifetime health insurance; where employer did not request his resignation or retirement or tell him he would be terminated, he was required to make on-the-spot decision, and he could and did choose date of his retirement; and where he did not even allege that termination would have been inevitable). See, e.g., *Hargray v. City of Hallandale* (11th Cir. 1995) 57 F.3d 1560, 1568-1570 ; *Angarita v. St. Louis County* (8th Cir. 1992) 981 F.2d 1537, 1544 .

(n19)Footnote 15. *Adickes v. S. H. Kress & Co.* (1970) 398 U.S. 144, 150, 90 S. Ct. 1598, 26 L. Ed. 2d 142 .

(n20)Footnote 16. *Adickes v. S. H. Kress & Co.* (1970) 398 U.S. 144, 150, 90 S. Ct. 1598, 26 L. Ed. 2d 142 .

(n21)Footnote 17. *Blair v. City of Pamona* (9th Cir. 2000) 223 F.3d 1074 .

(n22)Footnote 18. *Blair v. City of Pamona* (9th Cir. 2000) 223 F.3d 1074, 1080 .

(n23)Footnote 19. *Blair v. City of Pamona* (9th Cir. 2000) 223 F.3d 1074, 1080 .

(n24)Footnote 20. *Adickes v. S. H. Kress & Co.* (1970) 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 .

(n25)Footnote 21. *See Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 838, 102 S. Ct. 2764, 73 L. Ed. 2d 418 ; *see also Martin v. Pacific Northwest Bell Tel. Co.* (9th Cir. 1971) 441 F.2d 1116, 1118 (state required to be involved with activity that caused injury).

(n26)Footnote 22. *See Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 840, 102 S. Ct. 2764, 73 L. Ed. 2d 418 ; *see also Ivey v. Board of Regents of University of Alaska* (9th Cir. 1982) 673 F.2d 266, 268 (showing of direct connection between state action and alleged discrimination).

(n27)Footnote 23. *See Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 841, 102 S. Ct. 2764, 73 L. Ed. 2d 418 ; *see also Martin v. Pacific Northwest Bell Tel. Co.* (9th Cir. 1971) 441 F.2d 1116, 1118 (fact that private corporation enjoys economic monopoly that is protected and regulated by state does not necessarily bring its every act within purview of 42 U.S.C. § 1983).

(n28)Footnote 24. *See Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 841, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (emphasis in original).

(n29)Footnote 25. *See 28 U.S.C. § 1343(4).*

(n30)Footnote 26. *See Brown v. Pitchess* (1975) 13 Cal. 3d 518, 521-523, 119 Cal. Rptr. 204, 531 P.2d 772 (nonemployment claim by county jail inmates). For the standard jury instruction to be used in state court for the essential factual elements of a cause of action for violation of 42 U.S.C. § 1983, *see* Judicial Council of California Civil Jury Instructions, CACI 3000 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the CACI special verdict form for a claim of violation of federal civil rights under 42 U.S.C. § 1983, *see* Judicial Council of California Civil Jury Instructions, CACI VF-3000 (Matthew Bender). For the standard jury instruction on municipal liability under 42 U.S.C. § 1983, *see* Judicial Council of California Civil Jury Instructions, CACI 3007 (Matthew Bender). For the CACI special verdict form on municipal liability under 42 U.S.C. § 1983, *see* Judicial Council of California Civil Jury Instructions, CACI VF-3005 (Matthew Bender). For the standard jury instruction defining "official policy" under 42 U.S.C. § 1983, *see* Judicial Council of California Civil Jury Instructions, CACI 3008 (Matthew Bender). For the standard jury instruction on the essential factual elements of a cause of action under 42 U.S.C. § 1983 for failure to train, *see* Judicial Council of California Civil Jury Instructions, CACI 3009 (Matthew Bender). For the CACI special verdict form on public entity liability under 42 U.S.C. § 1983 for failure to train, *see* Judicial Council of California Civil Jury Instructions, CACI VF-3006 (Matthew Bender). For discussion of the CACI standard jury instructions generally, *see* § 61.05. For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n31)Footnote 27. *See Quern v. Jordan* (1979) 440 U.S. 332, 341, 99 S. Ct. 1139, 59 L. Ed. 2d 358 ; *Alabama v. Pugh* (1978) 438 U.S. 781, 782, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 . Furthermore, as noted in [4], below, the U.S. Supreme Court has held that neither states nor state officials acting in their official capacities are "persons" within the meaning of the statute. *See Will v. Michigan Dep't of State Police* (1989) 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45, 58 .

(n32)Footnote 28. 42 U.S.C. § 1983.

(n33)Footnote 29. See discussion in [4], below.

(n34)Footnote 30. See *Monell v. Dep't of Soc. Servs.* (1978) 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 ; see also *Carey v. Phipps* (1978) 435 U.S. 247, 259, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (compensatory damages available when injury and causation proven).

(n35)Footnote 31. 42 U.S.C. § 1983.

(n36)Footnote 32. See 42 U.S.C. § 1983.

(n37)Footnote 33. See *Monell v. Dep't of Soc. Servs.* (1978) 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 . See also *Harman v. City and County of San Francisco* (2006) 136 Cal. App. 4th 1279 (under *Monell*, city was liable to white male for racial discrimination in violation of 42 U.S.C. § 1983 for one personnel decision affecting him, where there was sufficient evidence that the personnel decision not to appoint male to desired position arose from execution of city's official policy or custom).

(n38)Footnote 34. *Monell v. Dep't of Soc. Servs.* (1978) 436 U.S. 658, 690 fn. 55, 98 S. Ct. 2018, 56 L. Ed. 2d 611 ; but see *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1230 (official must be responsible for establishing government policy with respect to challenged employment activity).

(n39)Footnote 35. See *Kentucky v. Graham* (1985) 473 U.S. 159, 165-166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 .

(n40)Footnote 36. *Will v. Michigan Dep't of State Police* (1989) 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45, 58 .

(n41)Footnote 37. See *Wheeldin v. Wheeler* (1963) 373 U.S. 647, 650 fn. 2, 83 S. Ct. 1441, 10 L. Ed. 2d 605 . For a discussion of the "color of law" requirement, see [2], above.

(n42)Footnote 38. 42 U.S.C. § 1983.

(n43)Footnote 39. See 42 U.S.C. § 1983; see also discussion in [2] and [4], above.

(n44)Footnote 40. See *Scott v. University of Delaware* (D. Del. 1974) 385 F. Supp. 937, 945 .

(n45)Footnote 41. See *Puntolillo v. New Hampshire Racing Commission* (D. N.H. 1975) 390 F. Supp. 231, 236 .

(n46)Footnote 42. See *Martin v. Pacific Northwest Bell Telephone Company* (9th Cir. 1971) 441 F.2d 1116, 1118 .

(n47)Footnote 43. See *Weise v. Syracuse University* (2d Cir. 1975) 522 F.2d 397 .

(n48)Footnote 44. 42 U.S.C. § 1983.

(n49)Footnote 45. See *Sischo-Nownejad v. Merced Community College Dist.* (9th Cir. 1991) 934 F.2d 1104, 1112 ; see also *Larson*, employment discrimination, ch. 10, *Other Procedural Matters*, § 52.10 (Matthew Bender).

(n50)Footnote 46. See 42 U.S.C. § 1983.

(n51)Footnote 47. See *Quern v. Jordan* (1979) 440 U.S. 332, 341, 99 S. Ct. 1139, 59 L. Ed. 2d 358 ; *Alabama v. Pugh* (1978) 438 U.S. 781, 782, 98 S. Ct. 3057, 57 L. Ed. 2d 1114 .

(n52)Footnote 48. See *Lake Country Estates v. Tahoe Planning Agcy.* (1979) 440 U.S. 391, 404-405, 99 S. Ct.

1171, 59 L. Ed. 2d 401 (immunity equally applicable to federal, state, and regional legislators).

(n53)Footnote 49. See *Forrester v. White* (7th Cir. 1986) 792 F.2d 647, 651 .

(n54)Footnote 50. See *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 815-816, 102 S. Ct. 2727, 73 L. Ed. 2d 396 . See, e.g., *Robinson v. York* (9th Cir. 2009) 566 F.3d 817, 2009 U.S. App. LEXIS 8844, *5-*18 (in action by county police sergeant against county and several officers under 42 U.S.C. § 1983 alleging he was denied promotion in violation of his *First* and *Fourteenth Amendment* rights because he reported misconduct within his department, trial court properly denied defendants qualified immunity, where at time defendants acted, both constitutional protection of employee speech and *First Amendment* cause of action for retaliation against protected speech were clearly established and potentially applicable to defendants' conduct); *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1067-1076 (district court properly partially denied defendants qualified immunity for deputy district attorney's claim of retaliation in violation of 42 U.S.C. § 1983, based on alleged adverse employment actions resulting from his participation in task force and interview his attorney gave to press; deputy district attorney had personal *First Amendment* interest in attorney's speech and his allegations demonstrated that his *First Amendment* rights were violated; existing case law was sufficient to put defendants on notice of common sense conclusion that government could not retaliate against public employee for speech spoken by employee's lawyer on employee's behalf).

(n55)Footnote 51. *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387, 1392 n.4, 53 Cal. Rptr. 3d 647 ; *Bradbury v. Superior Court* (1996) 49 Cal. App. 4th 1108, 1117-1118, 57 Cal. Rptr. 2d 207 .

(n56)Footnote 52. *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387, 1395, 53 Cal. Rptr. 3d 647 . See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1116-1117, 1123, 81 Cal. Rptr. 2d 471, 969 P.2d 564 .

(n57)Footnote 53. Cal. Const., art. IX, § 9; *Campbell v. Regents of University of California* (2005) 35 Cal. 4th 311, 319-321, 25 Cal. Rptr. 3d 320, 106 P.3d 976 .

(n58)Footnote 54. *Kim v. Regents of University of California* (2000) 80 Cal. App. 4th 160, 165, 95 Cal. Rptr. 2d 10 .

(n59)Footnote 55. *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387, 1396, 53 Cal. Rptr. 3d 647 .

(n60)Footnote 56. *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387, 1399, 53 Cal. Rptr. 3d 647 . See also *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1116, 1123, 81 Cal. Rptr. 2d 471, 969 P.2d 564 (§ 425.16 applied to nonprofit provider of tenant counseling services); *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal. App. 4th 713, 718, 728, 77 Cal. Rptr. 2d 1 (§ 425.16 protected independent environmental consultant, hired by county, who prepared environmental impact report for required public hearings concerning potential development of projects); *Dowling v. Zimmerman* (2001) 85 Cal. App. 4th 1400, 1418-1420 . 103 Cal. Rptr. 2d 174 (§ 425.16 protected attorney who furthered petition rights of client).

(n61)Footnote 57. *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387, 1400-1404, 53 Cal. Rptr. 3d 647 (there was no probability of subordinate prevailing on the merits, because manager showed her actions were legitimate, and subordinate failed to show by admissible evidence that she did anything wrong).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.27

AUTHOR: By David M. Youngsmith, J.D.

§ 40.27 Executive Order 11246: Prohibition Against Discrimination by Government Contractors

[1] Governing Law and Scope of Coverage

Executive Order 11246ⁿ¹ prohibits employment discrimination based on race, color, national origin, religion, and sex, by federal contractors and contractors performing under federally assisted construction contracts.ⁿ² Federal regulations promulgated by the OFCCPⁿ³ implement the provisions of Executive Order 11246.

[2] Enforcement

The OFCCP enforces Executive Order 11246.ⁿ⁴ The OFCCP investigates the employment practices of federal contractors to ensure compliance with Executive Order 11246.ⁿ⁵ If it finds a violation, the OFCCP must make reasonable efforts to secure compliance through conciliation and persuasion.ⁿ⁶

The OFCCP may also receive and investigate complaints by employees or prospective employees.ⁿ⁷ The OFCCP may refer appropriate complaints to the EEOC for processing under Title VII rather than processing under Executive Order 11246.ⁿ⁸ If a complaint investigation indicates a violation of Executive Order 11246, the OFCCP must attempt an informal resolution through conciliation.ⁿ⁹ If informal conciliation is not possible, the OFCCP may hold administrative hearings to enforce Executive Order 11246.ⁿ¹⁰ If there is a substantial or material violation, the OFCCP may refer the matter to the Department of Justice, and the Attorney General may bring a civil action in federal court.ⁿ¹¹ The Attorney General may also, subject to approval by the OFCCP, independently initiate investigations, attempt informal resolutions, and bring suit in federal court if he or she has reason to believe Executive Order 11246 was violated.ⁿ¹²

The OFCCP may bring administrative enforcement proceedings to enjoin any violation, seek appropriate relief, including back pay, and impose appropriate sanctions or penalties.ⁿ¹³ The sanctions and penalties include publication of the names of violators,ⁿ¹⁴ cancellation, termination, or suspension of contracts,ⁿ¹⁵ and debarment of contractors from entering into further contracts.ⁿ¹⁶ If the matter is referred to the Department of Justice, it may seek injunctive and additional appropriate relief, including back pay.ⁿ¹⁷ For additional discussion of OFCCP complaint procedure, see Chapter 44, Part C.

Executive Order 11246 does not appear to afford a complainant a private right of action.

■ PRACTICE TIP:

Pursuant to a memorandum of understanding,ⁿ¹⁸ the OFCCP and EEOC have agreed that charges received by the OFCCP within the jurisdiction of the EEOC shall be deemed filed jointly with the EEOC and deemed filed with the EEOC when received by the OFCCP. Generally, the OFCCP's practice is to refer to the EEOC charges concerning individual cases of discrimination and to retain for investigation charges concerning discrimination of a systematic or class-wide nature. *Commentary by Bill Lann Lee.*

[3] Employers Covered and Exempted

Executive Order 11246 applies to federal contractors and "applicants" (defined below) performing under federally assisted construction contracts.ⁿ¹⁹ It also applies to labor unions, employment agencies, and training or apprenticeship programs referring or providing workers to federal contractors.ⁿ²⁰ Federal "contracts" and "contractors" are defined by the OFCCP regulations,ⁿ²¹ and Executive Order 11246 coverage is the same as coverage by section 503 of the Rehabilitation Act of 1973.ⁿ²² For discussion of contracts and contractors covered under section 503, *see* § 40.23[1][c].

An "applicant" is an applicant for federal assistance involving a construction contract, or another participant in a program involving a construction contract as determined by regulation of an administering agency.ⁿ²³ The term also includes applicants after they become recipients of federal assistance.ⁿ²⁴

A "construction contract" or "construction work" is any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property, including facilities providing utility services.ⁿ²⁵ "Construction work" also means the supervision, inspection, and other onsite functions incidental to actual construction.ⁿ²⁶ A "federally assisted construction contract" is any contract for construction work that is (1) paid for in whole or in part with funds obtained from the federal government, or borrowed on the credit of the government pursuant to any federal program involving a grant, contract, loan, insurance, or guarantee, or (2) undertaken pursuant to any federal program involving a grant, contract, loan, insurance, or guarantee, or any modification approved by the government for a grant, contract, loan, insurance, or guarantee, under which the applicant itself participates in the construction work.ⁿ²⁷

Executive Order 11246 does not apply to contractors hiring persons outside the United States for work to be performed outside the United States.ⁿ²⁸ It also does not apply to any state or local government, agency, instrumentality, or subdivision that contracts with the federal government when the state or other entity does not participate in work under the contract.ⁿ²⁹ Also, schools, colleges, universities, or other educational institutions do not violate Executive Order 11246 when they hire employees of a particular religion if the institution is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religious corporation, association, or society, or if the curriculum of the institution is directed toward the propagation of a particular religion.ⁿ³⁰ Section 202 of Executive Order 11246 does not apply to a government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in the Order.^{n30.1}

[4] Employees Covered and Exempted

Executive Order 11246 applies to all persons employed or seeking employment with federal contractors and applicants performing under federally assisted construction contracts.ⁿ³¹

[5] Prohibited or Required Employment Practices

Executive Order 11246 prohibits unlawful discrimination with respect to employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.ⁿ³² Contractors must also ensure that employee facilities do not segregate on the basis of a protected classification.ⁿ³³ Furthermore, contractors and applicants must ensure that no person intimidates, threatens, coerces, or discriminates against any individual in order to interfere with enforcement of Executive Order 11246 or any other equal employment opportunity law.ⁿ³⁴

Executive Order 11246 requires every federal contract and construction contract to include a clause stating that the contractor agrees not to discriminate, and agrees to take affirmative action to prevent discrimination.ⁿ³⁵ Written affirmative action plans must be developed by any contractor with 50 or more employees that (1) has a contract of \$50,000 or more; or (2) has government bills of lading that in any 12-month period total, or can reasonably be expected to total, \$50,000; or (3) serves as a depository of government funds in any amount; or (4) is a financial institution that is an issuing and paying agent for United States savings bonds and savings notes in any amount.ⁿ³⁶ For discussion of OFCCP affirmative action plans in general, see Chapter 44, Part C.

With respect to sex discrimination, the OFCCP guidelines require contractors to recruit employees of both sexes for all jobs.ⁿ³⁷ Advertisements for employment must not express a sexual preference.ⁿ³⁸ Written employment policies must expressly indicate that sex discrimination will not occur.ⁿ³⁹ Qualified employees of both sexes must have equal opportunity to any available job,ⁿ⁴⁰ and sexual distinctions may not be made relating to employment opportunities, wages, hours, or other conditions of employment.ⁿ⁴¹ Sexual distinctions based on marriage or young children are also prohibited.ⁿ⁴² Contractors must assure appropriate physical facilities to both sexes and may not refuse to hire anyone because of a lack of such facilities,ⁿ⁴³ nor may they rely on state "protective" laws to deny female employees the right to any job.ⁿ⁴⁴ Also, contractors may not penalize women for taking pregnancy leaves of absence.ⁿ⁴⁵ They may not specify any differences based on sex relating to mandatory or optional retirement age,ⁿ⁴⁶ seniority systems, and wage schedules,ⁿ⁴⁷ and they may not restrict one sex to certain job classifications.ⁿ⁴⁸

[6] Defenses

Express exemptions under the OFCCP regulations provide defenses for noncompliance with Executive Order 11246. Thus, contracts not exceeding \$10,000, other than government bills of lading and contracts with depositories of federal funds or with financial institutions that are issuing and paying agents for United States savings bonds and savings notes, are exempt from the requirements of the equal opportunity clause discussed in [5], above.ⁿ⁴⁹ Also, the equal opportunity clause is not required in contracts for indefinite quantities if the purchaser has reason to believe that the order will not exceed \$10,000.ⁿ⁵⁰ Contracts also need not include the equal opportunity clause with respect to work performed outside the United States by employees who were not recruited within the United States.ⁿ⁵¹

The OFCCP may exempt any federal agency or person from requiring the equal opportunity clause when the OFCCP deems that special circumstances in the national interest so require.ⁿ⁵² The OFCCP may also exempt contractor facilities that it finds to be in all respects separate and distinct from activities related to the performance of a federal contract, provided that the exemption will not interfere with or impede the effectuation of Executive Order 11246.ⁿ⁵³ Also, the OFCCP regulations do not apply to any federal contract whenever the head of the contracting federal agency determines that the contract is essential to the national security, and that its award without complying with the regulations is necessary to the national security.ⁿ⁵⁴

Preferences for employment of Indians living on or near Indian reservations is not a violation of Executive Order 11246, as long as there is no religious, sex, or tribal affiliation discrimination.ⁿ⁵⁵

Several OFCCP guidelines allow various sexual distinctions if sex is a bona fide occupational qualification,ⁿ⁵⁶ or if construction of physical facilities for both sexes would be unreasonable because of excessive expense or lack of

space.n57

Substantive defenses to employment discrimination are discussed in detail in Chapter 41, Part E.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law Discrimination General Overview

FOOTNOTES:

(n1)Footnote 1. Exec. Order No. 11246, *30 Fed. Reg. 12319 (1965)* .

(n2)Footnote 2. *See* Exec. Order No. 11246, §§ 202, 301; *30 Fed. Reg. 12319 (1965)* ; *see also* discussion in [5], *below*.

(n3)Footnote 3. *See* Exec. Order No. 11246, § 201; *30 Fed. Reg. 12319 (1965)* ; *41 C.F.R. §§ 60-1.1-60-1.47*; *see also 41 C.F.R. §§ 60-20.1-60-20.6* (OFCCP guidelines regarding sex discrimination).

(n4)Footnote 4. *See* Exec. Order No. 11246, §§ 201, 205; *30 Fed. Reg. 12319 (1965)* ; *41 C.F.R. §§ 60-1.20-60-1.34*. Executive Order 11246 actually provides that it will be enforced by the Secretary of Labor. However, the Secretary has delegated administrative and enforcement duties to the Director of the OFCCP. *See 41 C.F.R. § 60-1.2*.

(n5)Footnote 5. *See* Exec. Order No. 11246, § 206(a); *30 Fed. Reg. 12319 (1965)* ; *see also 41 C.F.R. § 60-1.20* (compliance reviews).

(n6)Footnote 6. *See 41 C.F.R. § 60-1.20(b)*.

(n7)Footnote 7. *See* Exec. Order No. 11246, § 206(b); *30 Fed. Reg. 12319 (1965)* ; *41 C.F.R. §§ 60-1.21-60-1.23* (complaint procedures), 60-1.24 (complaint investigations by OFCCP).

(n8)Footnote 8. *See* Exec. Order No. 11246, § 209(a)(3); *30 Fed. Reg. 12319 (1965)* ; *41 C.F.R. § 60-1.24(a)*.

(n9)Footnote 9. *See* Exec. Order No. 11246, § 209(b); *30 Fed. Reg. 12319 (1965)* ; *41 C.F.R. § 60-1.24(c)(2)*; *see also 41 C.F.R. § 60-1.33* (conciliation agreements required to be in writing).

(n10)Footnote 10. *See* Exec. Order No. 11246, § 208; *30 Fed. Reg. 12319 (1965)* ; *41 C.F.R. § 60-1.26(a), (c)* (enforcement proceedings procedures). Administrative hearings are *required* before a federal contractor can be debarred from further contracts. Exec. Order No. 11246; *30 Fed. Reg. 12319 (1965)* ; *41 C.F.R. § 60-1.26(a)(2)*.

(n11)Footnote 11. *See* Exec. Order No. 11246, § 209(a)(2); *30 Fed. Reg. 12319 (1965)* ; *41 C.F.R. § 60-1.26(a)(2), (e)*. The Attorney General first investigates the complaint and may attempt informal conciliation. *41 C.F.R. § 60-1.26(e)(1)-(3)*.

(n12)Footnote 12. *See 41 C.F.R. § 60-1.26(f)*.

(n13)Footnote 13. *See 41 C.F.R. § 60-1.26(a)(2)*; *see also 41 C.F.R. § 60-1.27* (sanctions are required to be exercised only by or with approval of OFCCP; referrals to Department of Justice or EEOC to be made by OFCCP).

(n14)Footnote 14. *See* Exec. Order No. 11246, § 209(a)(1), *30 Fed. Reg. 12319 (1965)*; *see also 41 C.F.R. § 60-1.30* (OFCCP required to distribute contract ineligibility list to all executive departments and agencies).

(n15)Footnote 15. *See* Exec. Order No. 11246, § 209(a)(5), *30 Fed. Reg. 12319 (1965)*.

(n16)Footnote 16. *See* Exec. Order No. 11246, § 209(a)(6), 30 Fed. Reg. 12319 (1965).

(n17)Footnote 17. *See* 41 C.F.R. § 60-1.26(a)(2).

(n18)Footnote 18. *See* 46 Fed. Reg. 7435 (effective Jan. 23, 1981).

(n19)Footnote 19. *See* 41 C.F.R. § 60-1.1.

(n20)Footnote 20. *See* Exec. Order No. 11246, § 207, 30 Fed. Reg. 12319 (1965); 41 C.F.R. § 60-1.9; *see also* 41 C.F.R. § 60-20.6(b), (c) (OFCCP sex discrimination guidelines relating to training programs).

(n21)Footnote 21. *See* 41 C.F.R. § 60-1.3.

(n22)Footnote 22. *See* 41 U.S.C. § 793(a).

(n23)Footnote 23. *See* Exec. Order No. 11246, § 302(c), 30 Fed. Reg. 12319 (1965); 41 C.F.R. § 60-1.3; 41 C.F.R. § 60-1.3 also defines "Internet applicant."

(n24)Footnote 24. *See* Exec. Order No. 11246, § 302(c), 30 Fed. Reg. 12319 (1965); 41 C.F.R. § 60-1.3.

(n25)Footnote 25. *See* Exec. Order No. 11246, § 302(a), 30 Fed. Reg. 12319 (1965); 41 C.F.R. § 60-1.2.

(n26)Footnote 26. *See* 41 C.F.R. § 60-1.3.

(n27)Footnote 27. *See* 41 C.F.R. § 60-1.3.

(n28)Footnote 28. *See* 41 C.F.R. § 60-1.10; *see* discussion in [6], below.

(n29)Footnote 29. *See* 41 C.F.R. § 60-1.5(a)(4).

(n30)Footnote 30. *See* 41 C.F.R. § 60-1.5(a)(6) (directed at religiously oriented church-related colleges and universities).

(n31)Footnote 30.1. 41 C.F.R. § 60-1.5(a)(5).

(n32)Footnote 31. *See* Exec. Order No. 11246, § 202, 30 Fed. Reg. 12319 (1965); 41 C.F.R. § 60-1.1; *see also* discussion in [3], above.

(n33)Footnote 32. *See* Exec. Order No. 11246, § 202, 30 Fed. Reg. 12319 (1965); *see also* 41 C.F.R. § 60-1.41 (requirements for solicitations or advertisements for employees).

(n34)Footnote 33. *See* 41 C.F.R. § 60-1.8(a); *see also* 41 C.F.R. § 60-20.2(e) (OFCCP sex discrimination guidelines relating to appropriate facilities).

(n35)Footnote 34. *See* 41 C.F.R. § 60-1.32.

(n36)Footnote 35. *See* Exec. Order No. 11246, §§ 202 (federal contractors), 301 (applicants performing under federally assisted construction contracts), 30 Fed. Reg. 12319 (1965); 41 C.F.R. § 60-1.4 (equal opportunity clauses); *see also* 41 C.F.R. § 60-20.6 (OFCCP sex discrimination affirmative action programs).

(n37)Footnote 36. *See* 41 C.F.R. § 60-1.40; *see also* 41 C.F.R. §§ 60-2.1-60-2.32 (procedures relating to affirmative action programs).

(n38)Footnote 37. *See* 41 C.F.R. § 60-20.2(a).

- (n39)Footnote 38. *See* 41 C.F.R. § 60-20.2(b).
- (n40)Footnote 39. *See* 41 C.F.R. § 60-20.3(a).
- (n41)Footnote 40. *See* 41 C.F.R. § 60-20.3(b).
- (n42)Footnote 41. *See* 41 C.F.R. § 60-20.3(c).
- (n43)Footnote 42. *See* 41 C.F.R. § 60-20.3(d).
- (n44)Footnote 43. *See* 41 C.F.R. § 60-20.3(e).
- (n45)Footnote 44. *See* 41 C.F.R. § 60-20.3(f).
- (n46)Footnote 45. *See* 41 C.F.R. § 60-20.3(g).
- (n47)Footnote 46. *See* 41 C.F.R. § 60-20.3(h).
- (n48)Footnote 47. *See* 41 C.F.R. §§ 60-20.4, 60-20.5(a).
- (n49)Footnote 48. *See* 41 C.F.R. § 60-20.5(b).
- (n50)Footnote 49. 41 C.F.R. § 60-1.5(a)(1).
- (n51)Footnote 50. *See* 41 C.F.R. § 60-1.5(a)(2).
- (n52)Footnote 51. *See* 41 C.F.R. § 60-1.5(a)(3); *see also* discussion in [3], above.
- (n53)Footnote 52. *See* 41 C.F.R. § 60-1.5(b)(1).
- (n54)Footnote 53. *See* 41 C.F.R. § 60-1.5(b)(2).
- (n55)Footnote 54. *See* 41 C.F.R. § 60-1.5(c).
- (n56)Footnote 55. *See* 41 C.F.R. § 60-1.5(a)(7).
- (n57)Footnote 56. *See* 41 C.F.R. §§ 60-20.2(a), (b), 60-20.3(b), (f)(2).
- (n58)Footnote 57. *See* 41 C.F.R. § 60-20.3(e).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.28

AUTHOR: By David M. Youngsmith, J.D.

§ 40.28 Executive Order 11141: Prohibition Against Age Discrimination by Federal Contractors

[1] Scope of Coverage

Executive Order 11141ⁿ¹ prohibits age discrimination by federal contractors. Unlike the ADEA,ⁿ² Executive Order 11141 sets no specific minimum age limit with respect to its applicability.ⁿ³

Executive Order 11141 is essentially a policy statement that age discrimination is inconsistent with the social and economic objectives of society, and that the federal government should provide leadership in encouraging and hastening the acceptance of the principle of equal employment opportunity for older persons.ⁿ⁴ Although the federal government has adopted the foregoing principle as an express policy with respect to employees of federal contractors,ⁿ⁵ the OFCCP has promulgated no regulations to implement Executive Order 11141.ⁿ⁶

[2] Enforcement and Remedies

Executive Order 11141 contains no enforcement provisions, although it does state that the head of each department and agency must enunciate the policy of Executive Order 11141.ⁿ⁷ Also, the OFCCP has promulgated no regulations enforcing Executive Order 11141. According to one commentator, the Justice Department views Executive Order 11141 as a statement of policy only, and all charges and complaints are referred to the EEOC for processing under the ADEA.ⁿ⁸ There is no private right of action based on Executive Order 11141.ⁿ⁹

For a discussion of EEOC enforcement procedures, see Chapter 42, Part C.

[3] Employers Covered and Exempted

Executive Order 11141 applies to federal contractors, subcontractors, and persons acting on their behalf.ⁿ¹⁰

[4] Employees Covered and Exempted

Executive Order 11141 applies to "persons employed by contractors and subcontractors engaged in the performance of [f]ederal contracts."¹¹

[5] Prohibited or Required Employment Practices

Under Executive Order 11141, federal contractors may not discriminate on the basis of age in connection with the employment, advancement, or discharge of employees, or with the terms, conditions, or privileges of their employment.¹² Also, contractors or persons acting on their behalf may not specify a maximum age limit in solicitations or advertisements for employees to work on federal contracts.¹³

[6] Defenses

Federal contractors may discriminate because of age on the basis of a bona fide occupational qualification, retirement plan, or statutory requirement.¹⁴

Legal Topics:

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

Civil Rights Law
Protection of Disabled Persons
Americans With Disabilities Act
General Overview
Civil Rights Law
Protection of Disabled Persons
Americans With Disabilities Act
Scope
Labor & Employment Law
Discrimination
General Overview

FOOTNOTES:

(n1)Footnote 1. Exec. Order No. 11141, *29 Fed. Reg. 2477 (1964)* .

(n2)Footnote 2. *See 29 U.S.C. §§ 621-634.*

(n3)Footnote 3. *See 29 U.S.C. § 631(a)* (ADEA applicable only to individuals who are at least 40 years of age); *see also* discussion in § 40.21[a].

(n4)Footnote 4. *See* Exec. Order No. 11141, *29 Fed. Reg. 2477 (1964)* .

(n5)Footnote 5. *See* Exec. Order No. 11141, *29 Fed. Reg. 2477 (1964)* .

(n6)Footnote 6. *See* Schlei and Grossman, *Employment Discrimination Law* (2d ed. 1983), Ch. 14, "Age," p. 482 fn. 1.

(n7)Footnote 7. *See* Exec. Order No. 11141, *29 Fed. Reg. 2477 (1964)* .

(n8)Footnote 8. *See* Schlei and Grossman, *Employment Discrimination Law* (2d ed. 1983), Ch. 14, "Age," p. 482 fn. 1.

(n9)Footnote 9. *See Kodish v. United Airlines, Inc.* (D. Colo. 1979) 463 F. Supp. 1245, 1251, *aff'd*, 628 F.2d 1301, 1303 (10th Cir. [Colo.] 1980) .

(n10)Footnote 10. *See* Exec. Order No. 11141, *29 Fed. Reg. 2477 (1964)* .

(n11)Footnote 11. *See* Exec. Order No. 11141, *29 Fed. Reg. 2477 (1964)* .

(n12)Footnote 12. *See* Exec. Order No. 11141, *29 Fed. Reg. 2477 (1964)* .

(n13)Footnote 13. *See* Exec. Order No. 11141, *29 Fed. Reg. 2477 (1964)* .

(n14)Footnote 14. *See* Exec. Order No. 11141, 29 *Fed. Reg.* 2477 (1964) .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.29

AUTHOR: By David M. Youngsmith, J.D.

§ 40.29 Title VI of Civil Rights Act of 1964

[1] Governing Law and Scope of Coverage

Title VI of the Civil Rights Act of 1964 (Title VI)ⁿ¹ proscribes unlawful discrimination by programs or activities receiving federal financial assistance.ⁿ² However, Title VI may not be used to attack employment discrimination unless a primary objective of the federal financial assistance is to provide employment.ⁿ³ Each federal agency empowered to extend federal financial assistance implements its own rules and regulations under Title VI.ⁿ⁴ The Department of Justice and the EEOC coordinate the implementation and enforcement of Title VI,ⁿ⁵ and both agencies have promulgated identical regulations setting forth procedures for filing and investigating Title VI employment discrimination complaints.ⁿ⁶

[2] Enforcement and Remedies

Title VI is enforced by each individual agency that extends federal financial assistanceⁿ⁷ and by the EEOC.ⁿ⁸ A complaint regarding employment discrimination must initially be filed with the appropriate agency.ⁿ⁹ The agency must then notify the federal assistance recipient that a complaint has been received.ⁿ¹⁰ The agency determines whether it has jurisdiction over the complaint,ⁿ¹¹ and whether the EEOC may have jurisdiction under Title VII or the Equal Pay Act of 1963.ⁿ¹² Complaints over which the agency does not have jurisdiction, but over which the EEOC may have jurisdiction, must be transferred to the EEOC.ⁿ¹³

Aggrieved individuals may also file "joint complaints," which are complaints covered by Title VII or the Equal Pay Act of 1963, as well as by Title VI, Title IX of the Education Amendments of 1972,ⁿ¹⁴ or the Revenue Sharing Act.ⁿ¹⁵ Joint complaints may be transferred to the EEOC.ⁿ¹⁶ All joint complaints alleging employment discrimination only must be transferred to the EEOC, but special circumstances may warrant an investigation by the agency providing the financial assistance.ⁿ¹⁷ If there are special circumstances, the agency must determine whether the complainant filed a similar charge with the EEOC.ⁿ¹⁸ If so, the agency may investigate if the EEOC agrees to defer its investigation pending the agency investigation.ⁿ¹⁹ If the complainant does not file a similar charge with the EEOC, the agency may investigate if special circumstances so warrant.ⁿ²⁰

Joint complaints alleging a "pattern or practice" of employment discrimination may not be referred to the EEOC unless special circumstances warrant transfer.ⁿ²¹ Also, absent special circumstances, a joint complaint alleging discrimination in employment and other practices should be handled by the agency providing the financial assistance.ⁿ²² However, if a similar charge is filed with the EEOC, the EEOC and the agency must coordinate their activities, and the EEOC will ordinarily defer its investigation pending the agency investigation.ⁿ²³

Complaints received or transferred to the EEOC under Title VI are deemed "charges."ⁿ²⁴ If the EEOC investigates a joint complaint and determines that there is reasonable cause to believe Title VII has been violated, it must attempt to resolve the complaint by informal methods of conference, conciliation, and persuasion.ⁿ²⁵ If those methods fail, the EEOC must (1) so notify the recipient,ⁿ²⁶ (2) transmit a copy of its investigative file to the referring agency, together with its determination and notice of failure of conciliation, (3) determine whether it will sue under Title VII, and (4) either issue a notice of right to sue under Title VII,ⁿ²⁷ or, if the recipient is a government, government entity, or political subdivision, refer the matter to the Attorney General for possible civil action.ⁿ²⁸ For more detailed discussion relating to EEOC and Attorney General enforcement procedures under Title VII, see § 40.20[2][a] and Chapter 42, Part C.

When an agency receives a transmittal of the EEOC's reasonable-cause determination, it must determine whether the recipient has violated any applicable civil rights provisions that the agency has a responsibility to enforce.ⁿ²⁹ If a violation did occur, the agency must so notify the complainant and the recipient of federal financial assistance, and must determine whether further efforts to secure voluntary compliance are warranted.ⁿ³⁰ However, if further efforts are not warranted, or if further efforts fail, the agency must initiate appropriate enforcement proceedings under its own regulations.ⁿ³¹

Title VI requires a hearing and finding of noncompliance by the agency.ⁿ³² If such a finding is made, an agency may terminate assistance, or refuse to grant or continue it.ⁿ³³ The agency may also secure compliance "by any other means authorized by law."ⁿ³⁴

There is also an implied private right of action under Title VI.ⁿ³⁵ However, there is no private right of action when the claim is solely based on disparate impact.^{n35.1} Further, unless discrimination is intentional, compensatory relief is not available,ⁿ³⁶ and no Title VI private action includes the right to recover back pay or other monetary losses.ⁿ³⁷ A private plaintiff may recover only injunctive or declaratory relief for unintentional violations of Title VI.ⁿ³⁸

Private actions brought under Title VI are subject to California's two-year statute of limitations for personal injury actions.^{n38.1}

[3] Employers Covered and Exempted

Title VI applies to "any program or activity receiving [f]ederal financial assistance."ⁿ³⁹ The Civil Rights Restoration Act of 1987ⁿ⁴⁰ amended Title VI to clarify that the term "program or activity" means *all* of the operations of an entity receiving federal financial assistance,ⁿ⁴¹ thus overturning a previous decision of the Supreme Court that had adopted a more narrow construction of the statute.ⁿ⁴² "Recipients" are defined in the Department of Justice regulations as any state, or instrumentality or political subdivision of a state, any public or private agency, institution, organization, or other entity, or any individual, in any state, to whom federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assignee, or transferee of the program.ⁿ⁴³ The ultimate beneficiary of such a program is not a "recipient."ⁿ⁴⁴

[4] Employees Covered and Exempted

Title VI applies to employees of programs or activities receiving federal financial assistance.ⁿ⁴⁵

[5] Prohibited Bases of Discrimination

Title VI prohibits discrimination based on race, color, or national origin.ⁿ⁴⁶

[6] Prohibited Employment Practices

Under Title VI, "recipients" of federal funds may not exclude any person from participation in, deny the benefits of, or discriminate under any federally assisted program or activity directed towards providing employment on the basis of race, color, or national origin.ⁿ⁴⁷ Furthermore, agencies extending federal financial assistance must refrain from discriminatory practices and also must police the operations of, and prevent discrimination by, "recipients" of federal funds.ⁿ⁴⁸

Legal Topics:

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

Labor & Employment Law
Discrimination
Title VII of the Civil Rights Act of 1964
General Overview
Labor & Employment Law
Discrimination
Title VII of the Civil Rights Act of 1964
Coverage & Definitions
General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. §§ 2000d-2000d-4.

(n2)Footnote 2. *See* 42 U.S.C. § 2000d. For discussion relating to specific bases of discrimination, see [5], below.

(n3)Footnote 3. *See* 42 U.S.C. § 2000d-3; *see also* *Temengil v. Trust Territory of Pacific Islands* (9th Cir. 1989) 881 F.2d 647, 653 .

(n4)Footnote 4. *See* 42 U.S.C. § 2000d-1; *see also* 7 C.F.R. §§ 15.1-15.143 (Department of Agriculture); 10 C.F.R. §§ 1040.1-1040.14 (Department of Energy); 15 C.F.R. §§ 8.1-8.15 (Department of Commerce); 22 C.F.R. §§ 141.1-141.12 (Department of State); 24 C.F.R. §§ 1.1-1.12 (Department of Housing and Urban Development); 28 C.F.R. §§ 42.1-42.112 (Department of Justice); 29 C.F.R. §§ 31.1-31.12 (Department of Labor); 32 C.F.R. § 195.1 *et seq.* (Department of Defense); 34 C.F.R. §§ 100.1-100.13 (Department of Education); 43 C.F.R. §§ 17.1-17.12 (Department of Interior); 45 C.F.R. §§ 80.1-80.13 (Department of Health and Human Services); 49 C.F.R. §§ 21.1-21.23 (Department of Transportation).

(n5)Footnote 5. *See* Exec. Order No. 12250, 45 Fed. Reg. 72995 (1980) ; Exec. Order No. 12067, 43 Fed. Reg. 28967 (1978) .

(n6)Footnote 6. *See* 28 C.F.R. §§ 42.601-42.613; 29 C.F.R. §§ 1691.1-1691.13.

(n7)Footnote 7. *See* 42 U.S.C. § 2000d-1; 28 C.F.R. §§ 42.605, 42.610 (agency processing of employment discrimination complaints); 29 C.F.R. § 1691.5, 1691.10 (same); *see* discussion in [1], above.

(n8)Footnote 8. *See* 28 C.F.R. §§ 42.605-42.609; 29 C.F.R. §§ 1691.5-1691.9.

(n9)Footnote 9. *See* 28 C.F.R. § 42.605; 29 C.F.R. § 1691.5.

(n10)Footnote 10. *See* 28 C.F.R. § 42.605; 29 C.F.R. § 1691.5; *see also* 42 U.S.C. § 2000d-1 (department or agency must notify appropriate person of violation of implementing regulations).

(n11)Footnote 11. *See* 28 C.F.R. § 42.605(b)(i); 29 C.F.R. § 1691.5(b)(1).

(n12)Footnote 12. *See* 28 C.F.R. § 42.605(b)(ii); 29 C.F.R. § 1691.5(b)(2). For discussions relating to employment discrimination under Title VII and the Equal Pay Act of 1963, respectively, see §§ 40.20 and 40.22.

(n13)Footnote 13. *See* 28 C.F.R. § 42.605(c).

(n14)Footnote 14. *See* 20 U.S.C. §§ 1681-1683; *see also* discussion in § 40.31[3].

(n15)Footnote 15. *See* 28 C.F.R. § 42.613(f); 29 C.F.R. § 1691.13(f); *see also* 31 U.S.C. §§ 6701-6724 (Revenue Sharing Act); discussion in § 40.31 [4]. The Revenue Sharing Act was repealed effective October 18, 1986, by the Consolidated Omnibus Budget Reconciliation Act of 1985. *See* Pub. Law 99-272, § 14001(a)(1), 100 Stat. 82 (1986). However, the act's prohibition against discrimination continues in effect. *see* 52 Fed. Reg. 16323 (1987) .

(n16)Footnote 16. *See* 28 C.F.R. § 42.605(d); 29 C.F.R. § 1691.5(d).

(n17)Footnote 17. *See* 28 C.F.R. § 42.605(e); 29 C.F.R. § 1691.5(e).

(n18)Footnote 18. *See* 28 C.F.R. § 42.605(e); 29 C.F.R. § 1691.5(e).

(n19)Footnote 19. *See* 28 C.F.R. § 42.605(e)(i); 29 C.F.R. § 1691.5(e)(1).

(n20)Footnote 20. *See* 28 C.F.R. § 42.605(e)(ii); 29 C.F.R. § 1691.5(e)(2).

(n21)Footnote 21. *See* 28 C.F.R. § 42.605(f); 29 C.F.R. § 1691.5(f). For a discussion relating to "pattern or practice" employment discrimination, see Ch. 41, Part A.

(n22)Footnote 22. *See* 28 C.F.R. § 42.605(g); 29 C.F.R. § 1691.5(g).

(n23)Footnote 23. *See* 28 C.F.R. § 42.605(g); 29 C.F.R. § 1691.5(g).

(n24)Footnote 24. *See* 28 C.F.R. § 42.606(a) (EEOC Title VI complaint procedures); 29 C.F.R. § 1691.6(a) (same); *see also* discussion in § 40.20[2][a].

(n25)Footnote 25. *See* 28 C.F.R. § 42.609(a); 29 C.F.R. § 1691.9(a).

(n26)Footnote 26. *See* 29 C.F.R. § 1601.25.

(n27)Footnote 27. *See* 29 C.F.R. § 1601.28 (notice of right to sue under Title VII).

(n28)Footnote 28. *See* 28 C.F.R. § 42.609(b); 29 C.F.R. § 1691.9(b); *see also* 29 C.F.R. § 1601.29 (referral to Attorney General under Title VII).

(n29)Footnote 29. *See* 28 C.F.R. § 42.610(a); 29 C.F.R. § 1691.10(a).

(n30)Footnote 30. *See* 28 C.F.R. § 42.610(b); 29 C.F.R. § 1691.10(b); *see also* 42 U.S.C. § 2000d-1 (notice of failure to comply with Title VI and determination that compliance cannot be secured by voluntary means is required before enforcement actions may be taken).

(n31)Footnote 31. *See* 28 C.F.R. § 42.610(b); 29 C.F.R. § 1691.10(b).

(n32)Footnote 32. *See* 42 U.S.C. § 2000d-1.

(n33)Footnote 33. *See* 42 U.S.C. § 2000d-1.

(n34)Footnote 34. *See* 42 U.S.C. § 2000d-1.

(n35)Footnote 35. *See* *Guardians Ass'n v. Civil Service Comm'n* (1983) 463 U.S. 582, 593-597, 103 S. Ct. 3221, 77 L. Ed. 2d 866 .

(n36)Footnote 35.1. *See Alexander v. Sandoval* (2001) 532 U.S. 275, 285-286, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (nonemployment case alleging disparate impact of state regulations requiring that drivers' license examinations be conducted only in English).

(n37)Footnote 36. *See Guardians Ass'n v. Civil Service Comm'n* (1983) 463 U.S. 582, 584, 602-603, 103 S. Ct. 3221, 77 L. Ed. 2d 866 .

(n38)Footnote 37. *See Drayden v. Needville Independent School Dist.* (5th Cir. 1981) 642 F.2d 129, 133 .

(n39)Footnote 38. *See Guardians Ass'n v. Civil Service Comm'n* (1983) 463 U.S. 582, 584, 602-603, 103 S. Ct. 3221, 77 L. Ed. 2d 866 .

(n40)Footnote 38.1. *See Taylor v. Regents of Univ. of Cal.* (9th Cir. 1993) 993 F.2d 710, 712 ; *see Code Civ. Proc.* § 335.1.

(n41)Footnote 39. *See 42 U.S.C. § 2000d.*

(n42)Footnote 40. *See Pub. Law* 100-259.

(n43)Footnote 41. *See 42 U.S.C. § 2000d-4a.*

(n44)Footnote 42. *See Grove City College v. Bell* (1984) 465 U.S. 555, 571-574, 104 S. Ct. 1211, 79 L. Ed. 2d 516 .

(n45)Footnote 43. *See 28 C.F.R. § 42.613(g); see also 28 C.F.R. § 42.613(e)* ("federal financial assistance" defined).

(n46)Footnote 44. *28 C.F.R. § 42.613(g).*

(n47)Footnote 45. *See 42 U.S.C. § 2000d.*

(n48)Footnote 46. *See 42 U.S.C. § 2000d.*

(n49)Footnote 47. *See 42 U.S.C. §§ 2000d, 2000d-3.*

(n50)Footnote 48. *See NAACP, Western Region v. Brennan* (D.D.C. 1973) 360 F. Supp. 1006, 1012 ; *see also* discussion in [2], above.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.30

AUTHOR: By David M. Youngsmith, J.D.

§ 40.30 Uniform Guidelines Relating to Tests and Employee Selection Procedures

[1] Purpose and Application

The EEOC, the Office of Personnel Management (formerly the Civil Service Commission), the Department of Labor, and the Department of Justice have jointly adopted uniform guidelinesⁿ¹ that incorporate a single set of principles relating to tests and other employment selection procedures.ⁿ² The guidelines are designed to assist in compliance with the requirements of federal law prohibiting employment discriminationⁿ³ and are used by the EEOC in enforcing Title VII and by the OFCCP in enforcing Executive Order 11246.ⁿ⁴ They are designed to provide a framework for determining the proper use of tests and other selection procedures.ⁿ⁵

Although the guidelines are "entitled to great deference,"ⁿ⁶ they are not administrative regulations promulgated pursuant to formal procedures established by Congress,ⁿ⁷ and thus are accorded less weight than administrative regulations that Congress has declared have the force of law, or that may themselves supply the basis for the imposition of liability.ⁿ⁸

The guidelines derive from administrative guidelines of the EEOC and the OFCCP, and from the holding of the Supreme Court that Title VII prohibits not only overt discrimination, but also "practices that are fair in form, but discriminatory in operation."ⁿ⁹ The approach of the guidelines is commonly known as "disparate-impact analysis," as distinguished from "disparate-treatment analysis" used to ferret out intentional or overt discrimination. For discussion of the distinction between disparate-treatment and disparate-impact analysis, see Chapter 41, Part A.

The guidelines have been adopted by the FEHC as an authoritative construction of the FEHA.ⁿ¹⁰ For discussion of the FEHA, see § 40.10.

[2] Scope of Coverage and Substantive Requirements

The guidelines apply to various equal employment opportunity laws, particularly Title VII and Executive Order 11246.ⁿ¹¹ They apply to tests and other selection procedures that are used as a basis for any employment decision,

including hiring, promotion, demotion, membership, referral, retention, licensing and certification, and selection for training or transfer.ⁿ¹²

The guidelines do not apply to responsibilities under the ADEA,ⁿ¹³ or Sections 503 and 504ⁿ¹⁴ of the Rehabilitation Act of 1973.ⁿ¹⁵

For a detailed discussion relating to the substantive requirements of the guidelines, see Chapter 41, Part C.

[3] Enforcement

The EEOC, the OFCCP, the Office of Personnel Management, and various federal agency employers rely on the guidelines in their enforcement of Title VII and Executive Order 11246.ⁿ¹⁶ For a discussion relating to the enforcement duties of the foregoing agencies, see §§ 40.20[3] and 40.27[2].

[4] Employers and Employees Covered and Exempted

The guidelines apply to employers, labor organizations, employment agencies, and other entities subject to Title VII, Executive Order 11246, or other federal equal employment opportunity laws.ⁿ¹⁷ An "employer" under the guidelines includes state and local governments covered by Title VII, any federal agency subject to the federal employment provision of Title VII, and any federal contractor or subcontractor or federally assisted construction contractor or subcontractor covered by Executive Order 11246.ⁿ¹⁸ For discussion of employers covered by Title VII and Executive Order 11246, respectively, see §§ 40.20 [4] and 40.27[3].

Since the guidelines are used to enforce Title VII, Executive Order 11246, and other equal employment opportunity laws,ⁿ¹⁹ they apply to employees and other individuals, such as applicants for employment, who are covered by those laws. For a discussion relating to employees covered and exempted by Title VII and Executive Order 11246, respectively, see §§ 40.20 [5] and 40.27[4].

Legal Topics:

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

Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 C.F.R. §§ 1607.1-1607.18 (EEOC). The guidelines are also set forth in 28 C.F.R. § 50.14 (Department of Justice) and 41 C.F.R. §§ 60-3.1-60-3.18 (OFCCP). *See also* 5 C.F.R. § 300.103(c) (Office of Personnel Management regulations; incorporating guidelines by reference).

(n2)Footnote 2. *See* 29 C.F.R. §§ 1607.1A, 1607.1B.

(n3)Footnote 3. *See* 29 C.F.R. § 1607.1B.

(n4)Footnote 4. *See* 29 C.F.R. § 1607.2A.

(n5)Footnote 5. 29 C.F.R. § 1607.1B.

(n6)Footnote 6. *See Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (predecessor guidelines constitute administrative interpretation of Title VII); *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 434, 91 S. Ct. 849, 28 L. Ed. 2d 158; *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1483 *ret'd to panel* 827 F.2d 439, *rev'd on other grounds*, 490 U.S. 642 (1989) (when guidelines are consistent with statutory language and legislative history, they are entitled to great deference and can be treated as expressing the will of Congress); *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 664, *cert. denied* 450 U.S. 919; *see also*

Vinson v. Taylor (D.C. Cir. 1985) 753 F.2d 141, 148 fn. 60, *aff'd*, 477 U.S. 57 (1986) (sex discrimination guidelines in 29 C.F.R. §§ 1604.1-1604.11 are also entitled to great deference); *Berg v. Richmond Unified School Dist.* (9th Cir. 1975) 528 F.2d 1208, 1213 (same).

(n7)Footnote 7. *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 431, 95 S. Ct. 2362, 45 L. Ed. 2d 280 .

(n8)Footnote 8. *General Electric Co. v. Gilbert* (1976) 429 U.S. 125, 140-141 n.20, 50 L. Ed. 2d 343, 97 S. Ct. 401 (explaining that although EEOC does have authority to issue procedural regulations, guidelines are not procedural in nature or effect); *see Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 664 (compliance with guidelines is not mandatory); *but see Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1281, *cert. denied*, 455 U.S. 1021 (employer who disregards guidelines is required to articulate some cogent reason for doing so, and generally bears a heavier than usual burden of proving job-relatedness).

(n9)Footnote 9. *See Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158; *see also* background information and general overview preceding 29 C.F.R. Part 1607.

(n10)Footnote 10. *See 2 Cal. Code Reg. § 7287.4.*

(n11)Footnote 11. 29 C.F.R. § 1607.2A. For discussion relating to coverage of Title VII and Exec. Order No. 11246, *see* §§ 40.20 and 40.27.

(n12)Footnote 12. *See 29 C.F.R. §§ 1607.1-1607.2B.*

(n13)Footnote 13. *See* discussion in § 40.21.

(n14)Footnote 14. *See* discussion in § 40.23.

(n15)Footnote 15. *See 29 C.F.R. § 1607.2C.*

(n16)Footnote 16. *See 29 C.F.R. § 1607.2A.*

(n17)Footnote 17. *See 29 C.F.R. § 1607.2D; see also 29 C.F.R. §§ 1607.16H ("employment agency" covered by Title VII), 1607.16N ("labor organization" covered by Title VII).*

(n18)Footnote 18. *See 29 C.F.R. § 1607.16G; see also 29 C.F.R. § 1607.1A* (same principles are applied to federal government as are applied to other employers).

(n19)Footnote 19. *See 29 C.F.R. § 1607.2A; see* discussion in [2], *above*.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law § 40.31

AUTHOR: By David M. Youngsmith, J.D.

§ 40.31 Miscellaneous Federal Provisions

[1] Generally

Although the foregoing sections discuss the principal federal equal employment opportunity laws, other laws may be used to attack employment discrimination. Subsections [2] through [4], *below*, briefly discuss the most important of those sources. For a more thorough analysis, see Larson, employment discrimination, Chapter 2 (Matthew Bender).

[1A] Civil Rights Act of 1991

The Civil Rights Act of 1991 ("CRA")ⁿ¹ amended several of the federal civil rights laws discussed in this Part, including Title VII, the ADA, the ADEA, and Section 1981, to make significant changes in the law regarding employment discrimination. It also overruled a number of Supreme Court decisions that were seen as limiting plaintiffs' rights under the federal antidiscrimination laws. The major changes involved the addition of remedies against intentional discrimination and harassment in the workplace, the overruling of the proof burdens enunciated in *Wards Cove Packing Co. v. Atonio* ⁿ² for disparate impact cases, and the reinstitution of those standards set forth in *Griggs v. Duke Power Co.* ⁿ³ The CRA also made the following important changes, among others:

1. The implicit overruling of *Patterson v. McLean Credit Union*, ⁿ⁴ by expanding the right to bring suit under Section 1981 beyond the making and enforcing of contracts to include the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship;"ⁿ⁵
2. The authorization of compensatory and punitive damages (with an upper cap) under Title VII and the ADA for intentional discrimination;ⁿ⁶
3. The overruling of *Price Waterhouse v. Hopkins*, ⁿ⁷ by changing the standard of proof in mixed motive cases;ⁿ⁸

4. The allowance of jury trials for parties seeking compensatory or punitive damages;n9
5. The prohibition of "race norming," i.e., adjusting employment test scores based on the race or other protected characteristic of the test taker in order to raise minority scores;n10
6. The prohibition of late challenges to consent decrees by parties who had actual notice of and reasonable opportunity to object at the time of the judgment or order;n11
7. The extraterritorial application of Title VII to U.S. citizens working abroad,n12 implicitly overruling *EEOC v. Arabian American Oil Co.*;n13
8. The expansion of the right to challenge discriminatory seniority systems;n14 and
9. The inclusion of expert fees as a part of attorney's fees in employment discrimination cases,n15 implicitly overruling *West Va. Univ. Hospitals v. Casey*. n16

The United States Supreme Court has held that certain provisions of the Civil Rights Act of 1991 do not apply retroactively to cases pending at the time that the CRA was enacted.n17 The Court held in one case that the expanded damages provisions enacted by the CRA, as well as the provision for the right to jury trial in Title VII cases, do not apply retroactively to cases pending at the time of enactment.n18 In a companion case, the Court held that the CRA's repudiation of *Patterson* and expansion of rights under Title 42, *United States Code, Section 1981* to include the right to enforce an established employment contract were not applicable to cases that were pending at the time of the CRA's enactment.n19 However, the Court emphasized that each provision of the CRA should be addressed separately with regard to the issue of retroactivity in light of the ordinary judicial principles concerning the application of new statutes to pending cases and preenactment conduct.n20

The Ninth Circuit Court of Appeals has ruled that the CRA provision overruling *Price Waterhouse v. Hopkins* n20.1 cannot be applied retroactively.n20.2 Nor may the statute of limitations provision of the CRA be applied retroactively to revive a plaintiff's claim that would otherwise be barred under the old statutory scheme.n20.3

[2] United States Constitution

Besides being a basis for congressional enactment of various equal employment opportunity laws, the United States Constitution is a direct source of equal employment opportunity rights against public employers. The most widely invoked constitutional provisions are the due process and *equal protection clauses* of the Fifth and *Fourteenth Amendments*.n20.4 but since both require "state action,"n21 they provide no remedy against discrimination by purely private employers.

[2A] Immigration Reform and Control Act

The Immigration Reform and Control Act of 1986 (IRCA),n22 which generally legalizes specified long-time resident aliens and sanctions employers for hiring illegal aliens,n23 also prohibits employment discrimination against any individual (other than an "unauthorized alien")n24 because of that individual's national origin or, if he or she is a "protected individual," because of his or her citizenship status.n25 A "protected individual" is a United States citizen or national,n26 or an alien who is a lawful permanent resident, a temporary resident under the IRCA's legalization provisions,n27 a refugee,n28 a special agricultural worker,n29 or an individual who has been granted asylum.n30 The IRCA also prohibits intimidation, threats, coercion, or retaliation against any individual (1) in order to interfere with any rights or privileges secured under the statute's antidiscrimination provisions, or (2) because the individual intends to file or has filed a discrimination charge or complaint, or has testified, assisted, or participated in any manner in a discrimination investigation, proceeding, or hearing.n31

The IRCA's antidiscrimination provisions apply to employers with four or more employees.ⁿ³² They do not apply to national origin discrimination that is also covered by Title VII of the Civil Rights Act of 1964.ⁿ³³ Nor do they apply to citizenship discrimination that (1) is required in order to comply with a federal, state, or local law, regulation, or executive order; or (2) the Attorney General determines to be essential for an employer to do business with a federal, state, or local government agency or department.ⁿ³⁴

The Department of Justice enforces the IRCA antidiscrimination provisions, and has promulgated regulations to implement those provisions.ⁿ³⁵ Specifically, the IRCA and the regulations set forth procedures for filing discrimination charges with the Justice Department's Special Counsel for Immigration-Related Unfair Employment Practices,ⁿ³⁶ investigating charges,ⁿ³⁷ filing discrimination complaints with and holding hearings before an administrative law judge,ⁿ³⁸ and issuing discrimination determinations.ⁿ³⁹ Remedies under IRCA include requiring employers to hire aggrieved individuals, with or without back pay,ⁿ⁴⁰ and specified civil penalties.ⁿ⁴¹ In addition, the prevailing party in an administrative discrimination proceeding may be entitled to attorney's fees.ⁿ⁴²

Administrative determinations are subject to review and enforcement by the United States court of appeals,ⁿ⁴³ and thereafter by writ of certiorari in the United States Supreme Court.ⁿ⁴⁴ If no appeal is taken, the Special Counsel (or, if the Special Counsel fails to act, the individual filing the charge) may petition the United States district court to enforce the administrative law judge's order.ⁿ⁴⁵ The prevailing party in any of these judicial proceedings may be entitled to receive attorney's fees.ⁿ⁴⁶

For a comprehensive discussion of the IRCA's antidiscrimination provisions and procedures for enforcing them, see Gordon and Mailman, *Immigration Law and Procedure*, Chapter 7 (Matthew Bender).

[2B] Family and Medical Leave Act of 1993

The Family and Medical Leave Act of 1993 (FMLA)ⁿ⁴⁷ requires covered employers to provide eligible employees with unpaid family care leave for specified purposes, including the birth or adoption of a child of the employee, or the serious health condition of the employee or specified members of his or her family.ⁿ⁴⁸ The FMLA became effective for most private employers on August 5, 1993.ⁿ⁴⁹ For full discussion of the FMLA, see Chapter 41, Part D.

The Department of Labor's Wage and Hour Division enforces the FMLAⁿ⁵⁰ and promulgates implementing regulations.ⁿ⁵¹ An employee may bring a civil action to recover damages caused by an employer's failure to provide leave as required by the FMLA.ⁿ⁵²

[3] Education Amendments of 1972 (Title IX)

Title IX of the Education Amendments of 1972 (Title IX)ⁿ⁵³ prohibit sex discrimination in federally assisted education programs.ⁿ⁵⁴ The substantive and procedural provisions of Title IX are similar to Title VI of the Civil Rights Act of 1964,ⁿ⁵⁵ except that Title IX is limited to sex discrimination in federally funded educational programs,ⁿ⁵⁶ whereas Title VI prohibits discrimination based on race, color, or national origin in any federally funded program or activity.ⁿ⁵⁷ Initially, the courts held that Title IX applied only to students or beneficiaries of federal funds,ⁿ⁵⁸ but in *North Haven Board of Education v. Bell*,ⁿ⁵⁹ the United States Supreme Court held that Title IX also proscribes employment discrimination in federally funded educational programs.

The Court in *North Haven* also held that Title IX applies only to the specific program receiving federal funds, and thus does not prohibit all discriminatory practices of a funded institution.ⁿ⁶⁰ In response, Congress enacted the Civil Rights Restoration Act of 1987,ⁿ⁶¹ which amended Title IX to provide that "program or activity" refers to an entire educational institution any part of which receives federal financial assistance,ⁿ⁶² thus overturning the *North Haven* decision.

Title IX contains an enforcement provision that is identical to the enforcement provision in Title VI discussed in § 40.29 [2]. Thus, Title IX is enforced by each individual agency that extends federal financial assistance,ⁿ⁶³ and by the EEOC.ⁿ⁶⁴ The Department of Justice and the EEOC coordinate enforcement of Title IX,ⁿ⁶⁵ and enforcement regulations promulgated jointly by those agencies are discussed in detail in § 40.29[2].

[4] Revenue Sharing Act

The now-repealed Revenue Sharing Act,ⁿ⁶⁶ which provided for state and local governments to share funds collected from the federal income tax,ⁿ⁶⁷ contained a provision that prohibited discrimination based on sex, race, color, or national origin in any state or local government program or activity receiving a payment under the act.ⁿ⁶⁸ The act also incorporated the prohibitions set forth in the ADEA (age discrimination) and Section 504 of the Rehabilitation Act of 1973 (disability discrimination).ⁿ⁶⁹ The Revenue Sharing Act was repealed in 1986,ⁿ⁷⁰ but the nondiscrimination obligations of the act remain in effect.ⁿ⁷¹ The nondiscrimination requirements of the act are enforced by the Office of Revenue Sharing in the Department of the Treasury, and the Department of Justice.ⁿ⁷²

Legal Topics:

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

Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission Enforcement General Overview

FOOTNOTES:

(n1)Footnote 1. Pub. L. No. 102-166.

(n2)Footnote 2. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642 ; see discussion in ch. 41, pt. A.

(n3)Footnote 3. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n4)Footnote 4. *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 176-177, 105 L. Ed. 2d 132, 109 S. Ct. 2363 .

(n5)Footnote 5. See 42 U.S.C. § 1981(b); see also discussion in § 40.25[1].

(n6)Footnote 6. See 42 U.S.C. § 1981a; see also discussion in §§ 40.20[3], 40.22A [2]; ch. 43, pt. B.

(n7)Footnote 7. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 234-235, 104 L. Ed. 2d 268, 109 S. Ct. 1775 ; see discussion in ch. 41, pt. A.

(n8)Footnote 8. See 42 U.S.C. § 2000e-2(m).

(n9)Footnote 9. See 42 U.S.C. § 1981a(c)(1); see also discussion in ch. 43, pt. B.

(n10)Footnote 10. See 42 U.S.C. § 2000e-2(l) ; see also discussion in ch. 41, pt. C.

(n11)Footnote 11. See 42 U.S.C. § 2000e-2(n); see also discussion in ch. 44, pt. A.

(n12)Footnote 12. See 42 U.S.C. § 2000e(f); see also discussion in § 40.20[4][a]; ch. 41, pt. E.

(n13)Footnote 13. *E.E.O.C. v. Arabian American Oil Co.* (1991) 499 U.S. 244, 246-248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 .

(n14)Footnote 14. See 42 U.S.C. § 2000e-5(e)(2); see also discussion in ch. 41, pt. D; ch. 42, pt. C.

(n15)Footnote 15. *See* 42 U.S.C. § 2000e-5(k); *see also* discussion in ch. 43, pt. B.

(n16)Footnote 16. *West Va. Univ. Hosps. v. Casey* (1991) 499 U.S. 83, 102, 113 L. Ed. 2d 68, 111 S. Ct. 1138 .

(n17)Footnote 17. *See Rivers v. Roadway Express* (1994) 511 U.S. 298, 303-309, 114 S. Ct. 1510, 128 L. Ed. 2d 274 ; *Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 257-263, 280-286, 114 S. Ct. 1483, 128 L. Ed. 2d 229 .

(n18)Footnote 18. *Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 257-263, 280-286, 114 S. Ct. 1483, 128 L. Ed. 2d 229 ; *Yamaguchi v. United States Dep't of the Air Force* (9th Cir. [Haw.] 1997) 109 F.3d 1475, 1481 (jury trial and damages provisions of CRA are not retroactive); *see also McGinnis v. Kentucky Fried Chicken of California* (9th Cir. 1994) 51 F.3d 805, 807-808 (declining to apply punitive damages provision of CRA retroactively to allegedly discriminatory conduct occurring before CRA passed); *Chenault v. U.S. Postal Serv.* (9th Cir. 1994) 37 F.3d 535, 538 (damages provision of CRA not to be applied retroactively).

(n19)Footnote 19. *Rivers v. Roadway Express* (1994) 511 U.S. 298, 303-309, 114 S. Ct. 1510, 128 L. Ed. 2d 274 .

(n20)Footnote 20. *Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 273-280, 114 S. Ct. 1483, 128 L. Ed. 2d 229 .

(n21)Footnote 20.1. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 234-235, 104 L. Ed. 2d 268, 109 S. Ct. 1775 .

(n22)Footnote 20.2. *Chenault v. U.S. Postal Serv.* (9th Cir. 1994) 37 F.3d 535, 538-539 .

(n23)Footnote 20.3. *Chenault v. U.S. Postal Serv.* (9th Cir. 1994) 37 F.3d 535, 538-539 .

(n24)Footnote 20.4. *U.S. Const., amends. V, XIV § 1*; *see, e.g., Gregory v. Ashcroft* (1991) 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410, 430-432 .

(n25)Footnote 21. *See Rendell-Baker v. Kohn* (1982) 457 U.S. 830, 837, 102 S. Ct. 2764, 73 L. Ed. 2d 418 ; *see also* discussion in § 40.26[2].

(n26)Footnote 22. Pub. L. No. 99-603.

(n27)Footnote 23. *See* 8 U.S.C. §§ 1255a, 1324a(a), (e)(4)(A).

(n28)Footnote 24. An "unauthorized alien" is an alien who is not, at the time of prospective employment, either (1) an alien lawfully admitted to the United States for permanent residence, or (2) authorized to be employed by the Immigration and Nationality Act (8 U.S.C. § 1101 *et seq.*) or by the Attorney General. *See* 8 U.S.C. § 1324a(h).

(n29)Footnote 25. 8 U.S.C. § 1324b(a)(1); 28 C.F.R. § 44.200(a). The IRCA contains "sunset" provisions that would have repealed its sanctions and antidiscrimination provisions if the Comptroller General had found, by a specified date, that the IRCA caused widespread discrimination. *See* 8 U.S.C. §§ 1324a(l), 1324b(k)(1). In addition, the IRCA's antidiscrimination provisions contain separate "sunset" sections that would have been triggered by a Comptroller General's finding that the IRCA did *not* cause significant discrimination. *See* 8 U.S.C. § 1324b(k)(2). In fact, a 1990 Comptroller General's report did find that the IRCA causes widespread discrimination. *see* U.S. General Accounting Office (now the U.S. Government Accountability Office), Pub. No. GAO 166D-90-62, Immigration Reform, Employers Sanctions and the Question of Discrimination (March 1990). However, the IRCA's sanctions provisions were not repealed; instead, a task force required by the IRCA reviewed the report and recommended adding civil penalty and retaliation provisions, which were in fact added by the Immigration Act of 1990. *See* 8 U.S.C. § 1324a(k) (requiring review of Comptroller General Report by executive task force); *Administrative Task Force Recommends Measures to Reduce Discrimination*, 67 Interpreter Releases 1085 (Oct. 1, 1990); *see also* 8 U.S.C. §

1324b(a)(5) (prohibiting retaliation), *(g)(2)(B)(iv)* (civil penalties); Pub. L. No. 101-649 (Immigration Act of 1990). Because the Comptroller General found that there *is* widespread discrimination, the IRCA's antidiscrimination "sunset" provisions were not triggered, and are obsolete. *See also Robison Fruit Ranch, Inc. v. United States* (9th Cir. 1998) 147 F.3d 798, 800-802 (construing IRCA before 1996 amendments adding express discrimination requirement; 8 U.S.C. § 1324b(a)(6)'s document abuse prohibition against requiring more or different documentation required finding of discrimination but not actual damages; requesting specific documents permitted when those documents are routinely produced during employment process).

(n30)Footnote 26. 8 U.S.C. § 1324b(a)(3)(A); *see U.S. v. Todd Corp.* (9th Cir. 1990) 900 F.2d 164, 165 (construing IRCA prior to amendment by Immigration Act of 1990; Congress was concerned about discrimination against "foreign looking and sounding" U.S. citizens).

(n31)Footnote 27. *See* 8 U.S.C. § 1255a.

(n32)Footnote 28. *See* 8 U.S.C. § 1157.

(n33)Footnote 29. *See* 8 U.S.C. §§ 1160, 1161.

(n34)Footnote 30. *See* 8 U.S.C. § 1324b(a)(3)(B); 28 C.F.R. § 44.101(c); *see also* 8 U.S.C. § 1158 (asylum); *cf. U.S. v. Todd Corp.* (9th Cir. 1990) 900 F.2d 164, 165 (construing IRCA prior to amendment by Immigration Act of 1990, which prohibited discrimination against "intending citizens," rather than "protected individuals").

(n35)Footnote 31. 8 U.S.C. § 1324b(a)(5); 28 C.F.R. § 44.201.

(n36)Footnote 32. 8 U.S.C. § 1324b(a)(2)(A).

(n37)Footnote 33. 8 U.S.C. § 1324b(a)(2)(B); *see* 42 U.S.C. § 2000e *et seq.* (Title VII); *See also* § 40.20. For a general discussion of national origin discrimination prohibited by Title VII, *see* ch. 41, pt. B.

(n38)Footnote 34. 8 U.S.C. § 1324b(a)(2)(C).

(n39)Footnote 35. *See* 28 C.F.R. § 44.100 *et seq.*

(n40)Footnote 36. *See* 8 U.S.C. § 1324b(b), (c); 28 C.F.R. §§ 44.300, 44.301.

(n41)Footnote 37. *See* 8 U.S.C. § 1324b(d)(1); 28 C.F.R. § 44.302.

(n42)Footnote 38. *See* 8 U.S.C. § 1324b(d)(2), (3), (e), (f).

(n43)Footnote 39. *See* 8 U.S.C. § 1324b(g); 28 C.F.R. § 44.303.

(n44)Footnote 40. *See* 8 U.S.C. § 1324b(g)(2)(B)(iii), (C).

(n45)Footnote 41. *See* 8 U.S.C. § 1324b(g)(2)(B)(iv).

(n46)Footnote 42. *See* 8 U.S.C. § 1324b(h).

(n47)Footnote 43. *See* 8 U.S.C. § 1324b(i)(1), (j)(3); *Robison Fruit Ranch, Inc. v. United States* (9th Cir. 1998) 147 F.3d 798, 802 (construing IRCA before 1996 amendments; ALJ's statutory interpretation not entitled to deference when congressional intent is clear or when agency has not consistently interpreted statute); *U.S. v. Todd Corp.* (9th Cir. 1990) 900 F.2d 164, 165.

(n48)Footnote 44. *See* 8 U.S.C. § 1324b(i).

(n49)Footnote 45. *See* 8 U.S.C. § 1324b(j)(1), (2).

(n50)Footnote 46. *See* 8 U.S.C. § 1324b(j)(4).

(n51)Footnote 47. Pub. L. No. 103-3, codified at 29 U.S.C. § 2601 *et seq.*

(n52)Footnote 48. *See* 29 U.S.C. § 2612.

(n53)Footnote 49. *See* Pub. L. No. 103-3, § 405(b).

(n54)Footnote 50. *See* 29 U.S.C. §§ 2611(10), 2617(b).

(n55)Footnote 51. *See* 29 U.S.C. § 2654; 29 C.F.R. pt. 825.

(n56)Footnote 52. *See* 29 U.S.C. § 2617(a).

(n57)Footnote 53. *See* 20 U.S.C. § 1681 *et seq.*

(n58)Footnote 54. *See* 20 U.S.C. § 1681.

(n59)Footnote 55. *See* 42 U.S.C. § 2000d *et seq.*; *See also* § 40.29.

(n60)Footnote 56. *See* 20 U.S.C. § 1681.

(n61)Footnote 57. *See* 42 U.S.C. § 2000d.

(n62)Footnote 58. *See* *Islesboro Sch. Comm. v. Califano* (1st Cir. 1979) 593 F.2d 424, 426 .

(n63)Footnote 59. *North Haven Bd. of Educ. v. Bell* (1982) 456 U.S. 512, 520, 530, 535, 102 S. Ct. 1912, 72 L. Ed. 2d 299 .

(n64)Footnote 60. *North Haven Bd. of Educ. v. Bell* (1982) 456 U.S. 512, 536-537, 102 S. Ct. 1912, 72 L. Ed. 2d 299 ; *see* *Grove City College v. Bell* (1984) 465 U.S. 555, 571-574, 104 S. Ct. 1211, 79 L. Ed. 2d 516 .

(n65)Footnote 61. *See* Pub. L. No. 100-259.

(n66)Footnote 62. *See* 20 U.S.C. § 1687.

(n67)Footnote 63. *See* 20 U.S.C. § 1682.

(n68)Footnote 64. *See* 28 C.F.R. §§ 42.601-42.613; 29 C.F.R. §§ 1691.1-1691.13; *see* § 40.29[1] and [2].

(n69)Footnote 65. *See* Exec. Order No. 12250, 45 Fed. Reg. 72995 (1980) ; Exec. Order No. 12067, 43 Fed. Reg. 28967 (1978) ; *see* § 40.29[1].

(n70)Footnote 66. *See* former 31 U.S.C. § 6701 *et seq.*

(n71)Footnote 67. *See* former 31 U.S.C. § 6702.

(n72)Footnote 68. *See* former 31 U.S.C. § 6716(a).

(n73)Footnote 69. *See* former 31 U.S.C. § 6716(b); *see also* 29 U.S.C. § 623 (prohibitions under ADEA); Pub. L. No. 794(a) (prohibitions under Section 504).

(n74)Footnote 70. *See* Pub. L. No. 99-272, § 14001(a)(1), 100 Stat. 82 (1986) (Consolidated Omnibus Budget

Reconciliation Act of 1985).

(n75)Footnote 71. *See 52 Fed. Reg. 16323 (1987) ; see also Pub. L. No. 99-272, § 14001(a)(5), 100 Stat. 82 (1986) (recipient governments continue to be subject to terms of Revenue Sharing Act despite repeal).*

(n76)Footnote 72. *See 52 Fed. Reg. 16323 (1987) .*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 40 Overview of Equal Employment Opportunity Laws
Part C. FEDERAL LAW

2-40 California Employment Law §§ 40.32 through 40.39

AUTHOR: By David M. Youngsmith, J.D.

[Reserved]

§§ 40.32[Reserved]



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Part D. BIBLIOGRAPHY

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Employment Law Discrimination Title VII of the Civil Rights Act of 1964 General Overview Labor & Employment
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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws

2-41 California Employment Law 41.syn

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.syn Synopsis to Chapter 41: Substantive Requirements Under Equal Employment Opportunity Laws

§ 41.01 Overview of Discrimination Actions

§ 41.02 Applicable Laws

[1] Title VII of Civil Rights Act of 1964

[2] Age Discrimination in Employment Act (ADEA)

[3] Americans With Disabilities Act of 1990 (ADA)

[4] Sections 503 and 504 of the Rehabilitation Act--Substantive Provisions

[5] Title 42, United States Code Section 1981

[6] Fair Employment and Housing Act (FEHA)

§ 41.03 Federal and State Discrimination Laws Applied

§ 41.04 Interrelationship of Federal and State Antidiscrimination Laws

§§ 41.05 through 41.09 [Reserved]

§ 41.10 Definition and Application

§ 41.11 Proof

[1] Individual Actions

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FOOTNOTES:

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws

2-41 California Employment Law Scope

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

Scope

By Christine Curtis, J.D.,^{n*} Lori A. M. Middlehurst, J.D.,^{n**} and Elizabeth W. Mandel, J.D.^{n***} SCOPE

This chapter discusses substantive requirements imposed on employers under state and federal equal employment opportunity laws. Part A discusses the two basic models for establishing liability under equal employment opportunity laws--disparate treatment and disparate impact. Part B discusses the different bases of discrimination prohibited under the various equal employment opportunity statutes. Part C discusses requirements and limitations imposed on employers with regard to recruiting and hiring of employees. Part D discusses the application of equal employment opportunity law to various post-hiring policies, such as compensation, promotion, termination, retirement, and other terms, conditions, and privileges of employment. Part E discusses workplace harassment. Part F discusses substantive defenses to charges of unlawful employment discrimination. Part G discusses the prohibition against retaliation for an employee's opposition to unlawful discriminatory practices or for an employee's participation in administrative or judicial proceedings under the equal employment opportunity laws. Finally, Part H discusses posting and recordkeeping requirements under the equal employment opportunity laws.

For an overview of the scope and coverage of the different equal employment opportunity laws, *see* Chapter 40. For discussion of administrative enforcement of those laws, *see* Chapter 42. For discussion of and forms for use in civil actions under the equal employment opportunity laws, *see* Chapter 43. For discussion of affirmative action plans, *see* Chapter 44. For a discussion of employer obligations and employee rights pertaining to leaves of absence, *see* Chapter 8.

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART A. GENERAL THEORIES FOR PROVING DISCRIMINATION UNDER EQUAL EMPLOYMENT
OPPORTUNITY LAWS
Subpart A. Introduction

2-41 California Employment Law § 41.01

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.01 Overview of Discrimination Actions

To establish that an employer is liable for violating a particular equal employment opportunity law, an individual must demonstrate, first, that the employer is subject to the law, and second, that the individual was adversely affected in his or her employment as a result of discrimination based on a classification protected by the law, such as race, sex, religion, or age. This means an employer's conduct, either intentionally or in its effect, discriminated on one of the enumerated bases. Discriminatory employer conduct resulting from intentional acts is referred to as disparate treatment; conduct which may not intentionally discriminate but has a discriminatory effect is referred to as disparate impact.ⁿ¹

Legal Topics:

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

Labor & Employment Law
Discrimination
General Overview
Labor & Employment Law
U.S. Equal Employment
Opportunity Commission
General Overview

FOOTNOTES:

(n1)Footnote 1. See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII; prima facie showing of discrimination); *O'Connor v. Consolidated Coin Caterers Corporation* (1996) 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (ADEA, upholding McDonnell Douglas framework); *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884 (FEHA; same). *Gonzales v. Metpath, Inc.* (1989) 214 Cal. App. 3d 422, 426, 262 Cal. Rptr. 654 (FEHA; The term "discrimination" simply means the making of distinctions... . Notwithstanding the term's current connotation of racism, an employer is not forbidden from perceiving the difference between a good employee and an incompetent one, or a good employee and a better one); see also *Los Angeles County Dept. of Parks & Recreation v. Civil Service Com.* (1992) 8 Cal. App. 4th 273, 281, 283, 10 Cal. Rptr. 2d 150; *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 199-202, 48 Cal. Rptr. 2d 448 (California application of McDonnell Douglas and *Mixon* and the shifting burden of proof to FEHA

claims).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART A. GENERAL THEORIES FOR PROVING DISCRIMINATION UNDER EQUAL EMPLOYMENT
OPPORTUNITY LAWS
Subpart A. Introduction

2-41 California Employment Law § 41.02

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§ 41.02 Applicable Laws

[1] Title VII of Civil Rights Act of 1964

Title VII¹ provides that it is an unlawful employment practice for an employer to do the following:

1. Fail or refuse to hire, or to discharge, any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of that individual's race, color, national origin, religion, or sex; or
2. Limit, segregate, or classify his or her employees in any way that would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his or her status as an employee, because of the individual's race, color, religion, sex, or national origin.

For full discussion of the scope and application of Title VII, *see* § 40.20.

[2] Age Discrimination in Employment Act (ADEA)

The ADEA² protects individuals who are at least 40 years old. It provides that it is unlawful for an employer to do the following:³

1. Fail or refuse to hire, or to discharge, any individual, or otherwise discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of the individual's age;
2. Limit, segregate, or classify his or her employees in any way that would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect the individual's status as an

employee, because of the individual's age; or

3. Reduce the wage rate of any employee in order to comply with the ADEA.

For detailed discussion regarding the scope and application of the ADEA, *see* § 40.21.

[3] Americans With Disabilities Act of 1990 (ADA)

The ADAn⁴ provides generally that no covered entity may discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. Among other things, unlawful "discrimination" includes limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee because of his or her disability.n⁵

For a full discussion of the scope and application of the ADA, *see* § 40.22A.

[4] Sections 503 and 504 of the Rehabilitation Act--Substantive Provisions

Section 503 of the federal Rehabilitation Actn⁶ is an affirmative action law. It provides that any contract in excess of \$10,000 for the procurement of personal property and nonpersonal services (including construction) that a federal department or agency enters into must contain a provision requiring the contracting party, in carrying out the contract, to take affirmative action to employ and advance qualified individuals with disabilities.

Section 504 is a nondiscrimination law. It provides that no otherwise qualified individual with a disability in the United States may, solely because of his or her disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance, or under any program or activity conducted by any federal executive agency or by the United States Postal Service.n⁷

For detailed discussion of the scope and application of Sections 503 and 504, *see* § 40.23.

[5] Title 42, United States Code Section 1981

Title 42 U.S.C., *Section 1981(a)* provides that all persons within the jurisdiction of the United States must have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to receive the full and equal benefit of the laws and proceedings for the security of persons and property as is enjoyed by white citizens, and also must be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. For a detailed discussion relating to the scope and application of Section 1981, *see* § 40.25.

For purposes of Section 1981, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.n⁸

[6] Fair Employment and Housing Act (FEHA)

The FEHAn⁹ provides that it is an unlawful employment practice for an employer to do the following:

1. Refuse to hire or employ any person, or refuse to select the person for a training program leading to employment, because of race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, age, or sexual orientation; or
2. Bar or discharge any person from employment, or from a training program leading to employment,

because of race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, age, or sexual orientation; or

3. Discriminate against any person in compensation or in terms, conditions, or privileges of employment, because of race, color, ancestry, national origin, religious creed, sex, sexual orientation, marital status, age, physical or mental disability, or medical condition.

The FEHA also provides that nothing in FEHA prohibits an employer from refusing to employ an individual who is at least 40 years age because of his or her age if the law compels or provides for that refusal.ⁿ¹⁰ Promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.ⁿ¹¹ Under the FEHA, is an unlawful employment practice to harass an employee, applicant, or person providing services pursuant to a contractⁿ¹² for employment because of race, color, ancestry, national origin, religious creed, sex, sexual orientation, marital status, age, physical or mental disability, or medical condition.ⁿ¹³ Because the FEHA treats harassment in a separate provision, there is no reason to construe the FEHA's prohibition against discrimination broadly to include harassment.^{n13.1} The FEHA's discrimination provision addresses only explicit changes in the "terms, conditions, or privileges of employment,"^{n13.2} *i.e.*, changes involving some official action taken by the employer.^{n13.3} In the case of an institutional or corporate employer, the institution or corporation itself must have taken some official action with respect to the employee, such as hiring, firing, failing to promote, adverse job assignment, significant change in compensation or benefits, or official disciplinary action.^{n13.4} By contrast, harassment often does not involve any official exercise of delegated power on behalf of the employer.^{n13.5} Courts have employed the concept of delegable authority as a test to distinguish conduct actionable as discrimination from conduct actionable as harassment. The exercise of personnel management authority properly delegated by an employer to a supervisory employee might result in discrimination, but not in harassment.^{n13.6} The statute also directs employers, labor organizations, employment agencies, apprenticeship training programs, or any training program leading to employment, to take all reasonable steps necessary to prevent discrimination and harassment from occurring.ⁿ¹⁴ Employers and other covered entities must also explore reasonable alternative means of accommodating religious beliefs or observances when selecting hires and trainees and when making termination decisions.ⁿ¹⁵ For a detailed discussion relating to the scope and application of the FEHA, *see* § 40.10.

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationActionable DiscriminationLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. § 2000e-2(a).

(n2)Footnote 2. *See* 29 U.S.C. § 631(a).

(n3)Footnote 3. 29 U.S.C. § 623(a).

(n4)Footnote 4. 42 U.S.C. § 12112(a).

(n5)Footnote 5. 42 U.S.C. § 12112(b)(1).

(n6)Footnote 6. 29 U.S.C. § 793(a).

(n7)Footnote 7. 29 U.S.C. § 794(a).

(n8)Footnote 8. *42 U.S.C. § 1981(b)*.

(n9)Footnote 9. *Gov. Code § 12940(a)*.

(n10)Footnote 10. *Cal. Gov. Code § 12926(b)*.

(n11)Footnote 11. *Gov. Code § 12940(a)(5)*.

(n12)Footnote 12. *See Gov. Code § 12940(j)(5)* (definition).

(n13)Footnote 13. *Gov. Code § 12940(j)*.

(n14)Footnote 13.1. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *32 .

(n15)Footnote 13.2. *Gov. Code § 12940(a)*.

(n16)Footnote 13.3. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *32 ; *Reno v. Baird* (1998) 18 Cal. 4th 640, 645-647 76 Cal. Rptr. 2d 499, 957 P.2d 1333 .

(n17)Footnote 13.4. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *32-*33 .

(n18)Footnote 13.5. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *33 .

(n19)Footnote 13.6. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *33 ; *Reno v. Baird* (1998) 18 Cal. 4th 640, 645-647 76 Cal. Rptr. 2d 499, 957 P.2d 1333 . For discussion of harassment under the FEHA, *see* § 41.80[1][a], *below*.

(n20)Footnote 14. *Gov. Code 12940(k)*. *See also California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal. App. 4th 1004, 1024-1025, 18 Cal. Rptr. 3d 906 (employer failed to take all reasonable steps necessary to prevent religious discrimination, where instead of investigating employee's complaint of discrimination, employer retaliated; where management committee was primarily concerned with workplace safety, and employer had not developed complaint or grievance procedure relating to discrimination and had no policy addressing religious accommodation).

(n21)Footnote 15. *Gov. Code 12940(l)*.



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Subpart A. Introduction

2-41 California Employment Law § 41.03

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§ 41.03 Federal and State Discrimination Laws Applied

Under Title VII of the Civil Rights Act of 1964 (Title VII)ⁿ¹ and the California Fair Employment and Housing Act (FEHA),ⁿ² an individual may rely on two separate theories to establish unlawful discrimination--disparate treatment and disparate impact.

Disparate treatment occurs when an individual is treated differently because of membership in a protected class. Disparate impact involves a facially neutral employment policy or practice that in fact falls more harshly on one protected class than on another without sufficient business justification.

The United States Supreme Court articulated the disparate treatment and disparate impact theories in the landmark cases of *McDonnell Douglas Corp. v. Green* ⁿ³ (disparate treatment) and *Griggs v. Duke Power Co.*, ⁿ⁴ (disparate impact); many decisions have since developed and refined these theories.ⁿ⁵

For discussion of disparate treatment and disparate impact (*see* §§ 41.10-41.21). For discussion of the various protected classifications, *see* Part B of this chapter (§§ 41.30-41.36). For a complete discussion of the scope of the various equal employment opportunity laws, *see* Chapter 40.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationActionable DiscriminationLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. § 2000e et seq.

(n2)Footnote 2. *Gov. Code § 12900 et seq.*

(n3)Footnote 3. *McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .*

(n4)Footnote 4. *Griggs v. Duke Power Co. (1971) 401 U.S. 424, 430-435, 91 S. Ct. 849, 28 L. Ed. 2d 158*
(codified by Congress in 1991 legislation).

(n5)Footnote 5. *See Teamsters v. United States (1977) 431 U.S. 324, 335-336 & n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) .*



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2-41 California Employment Law § 41.04

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§ 41.04 Interrelationship of Federal and State Antidiscrimination Laws

California courts have applied the theories used to prove Title VII cases when deciding actions brought under the Fair Employment and Housing Act (FEHA),ⁿ¹ usually following federal authority even though it is not binding on state courts,ⁿ² since California and federal equal employment opportunity statutes are analogous. The federal law provides a minimum or floor for state activity. It does not preempt state law if state law is not in conflict.ⁿ³ Title VII specifically states that it shall not exempt or relieve anyone from liability from compliance with state law unless the conduct in question would be unlawful under Title VII.ⁿ⁴

The decision and subsequent fate of *General Electric Co. v. Gilbert* ⁿ⁵ illustrates the primacy of this rule. In *Gilbert*, the Supreme Court held that an employer disability plan which excluded pregnant workers' disabilities did not contravene the purpose of Title VII, which is to prohibit discrimination based on sex. Rejecting the reasoning of *Gilbert*, Congress amended Title VII to expressly include pregnancy discrimination in the definition of sex discrimination.ⁿ⁶ California then went one step further and required employers to grant a leave to employees disabled by pregnancy, even if employees disabled by other conditions are not entitled to a leave.^{n6.1} The California law was challenged as sex discrimination under Title VII, but it was upheld by the United States Supreme Court, which held that in amending Title VII to overrule *Gilbert*, Congress did not mean to prohibit more favorable treatment of pregnancy, but intended to enhance employment opportunities for women.^{n6.2}

State equal opportunity law can offer greater, not less, protection than federal law.ⁿ⁷

For a discussion of the application of the disparate treatment and disparate impact theories to specific employment practices, see Part C (§§ 41.40-41.47) and Part D (§§ 41.50-41.70), *below*.

Legal Topics:

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

Labor & Employment Law Discrimination General Overview Labor & Employment Law Discrimination Disability
Discrimination Federal & State Interrelationships Labor & Employment Law Discrimination Gender & Sex
Discrimination Federal & State Interrelationships

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12900 et seq.*

(n2)Footnote 2. *See Price v. Civil Service Com. (1980) 26 Cal. 3d 257, 276, 161 Cal. Rptr. 475, 604 P.2d 1365 .*
cf. Johnson Controls, Inc. v. Fair Employment & Housing Com. (1990) 218 Cal. App. 3d 517, 540, 267 Cal. Rptr. 158
(FEHC is not bound to consider or follow federal precedent construing Title VII); *Fisher v. San Pedro Peninsula Hosp.*
(1989) 214 Cal. App. 3d 590, 606, 262 Cal. Rptr. 842 .

(n3)Footnote 3. *California Federal S. & L. Ass'n v. Guerra (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613*
.

(n4)Footnote 4. *See 42 U.S.C. § 2000e-7.*

(n5)Footnote 5. *General Electric Co. v. Gilbert (1976) 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 .*

(n6)Footnote 6. *See California Federal S. & L. Ass'n v. Guerra (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 .*

(n7)Footnote 6.1. *Gov. Code § 12945(b)(2).*

(n8)Footnote 6.2. *California Federal Savings & Loan Ass'n v. Guerra (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 .*

(n9)Footnote 7. *See, e.g., Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 606, 262 Cal. Rptr. 842 ; Yurick v. Superior Court (1989) 209 Cal. App. 3d 1116, 1121, 257 Cal. Rptr. 665 ; Mixon v. Fair Employment & Housing Com. (1987) 192 Cal. App. 3d 1306, 1316, 237 Cal. Rptr. 884, (California courts rely on federal law to interpret analogous state law) ; City and County of San Francisco v. Fair Employment & Housing Com. (1987) 191 Cal. App. 3d 976, 985-986, 236 Cal. Rptr. 716 (applicability of Title VII analysis to resolve issues arising under FEHA); see also Green v. Rancho Santa Margarita Mortgage Co. (1994) 28 Cal. App. 4th 686, 33 Cal. Rptr. 2d 706 .*



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2-41 California Employment Law §§ 41.05 through 41.09

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[Reserved]

§§ 41.05[Reserved]



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Subpart B. Disparate Treatment

2-41 California Employment Law § 41.10

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§ 41.10 Definition and Application

Disparate treatment occurs when an employer treats some employees less favorably than others because of their race, color, national origin, religion, sex, national origin, or other protected characteristic.ⁿ¹ For example, in *Teamsters v. United States*,ⁿ² the United States Supreme Court found an employer and a nationwide labor union liable for a deliberate violation of Title VII of the Civil Rights Act of 1964 (Title VII)ⁿ³ when qualified minority applicants "had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered or hired on the same basis [as] whites."ⁿ⁴

The courts have applied the theory to a broad range of employment practices, including hiring,ⁿ⁵ firing,ⁿ⁶ promotion,ⁿ⁷ denial of tenure,ⁿ⁸ wage disparity,ⁿ⁹ layoff,ⁿ¹⁰ height and weight policy,ⁿ¹¹ and segregation.ⁿ¹²

Although most disparate treatment theory cases have been brought under Title VII,ⁿ¹³ the disparate treatment theory also applies to cases arising under the California Fair Employment and Housing Act (FEHA),ⁿ¹⁴ the Age Discrimination in Employment Act of 1967 (ADEA),ⁿ¹⁵ and the Civil Rights Acts of 1866ⁿ¹⁶ and 1871.ⁿ¹⁷

Legal Topics:

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

Labor & Employment LawDiscriminationDisparate TreatmentGeneral OverviewLabor & Employment LawDiscriminationDisparate TreatmentCoverage & DefinitionsLabor & Employment LawDiscriminationDisparate TreatmentProofGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Teamsters v. United States* (1977) 431 U.S. 324, 335-336, n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) ; *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884

(FEHA) .

(n2)Footnote 2. *Teamsters v. United States* (1977) 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) .

(n3)Footnote 3. 42 U.S.C. §§ 2000e-2000e-17.

(n4)Footnote 4. *Teamsters v. United States* (1977) 431 U.S. 324, 337-338, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) .

(n5)Footnote 5. *See Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 575-576, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (Title VII) .

(n6)Footnote 6. *See Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 259-260, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII) ; *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal. App. 3d 1306, 1317-1319, 237 Cal. Rptr. 884(FEHA) .

(n7)Footnote 7. *See U.S. Postal Service Bd. of Govs. v. Aikens* (1983) 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (Title VII) ; *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1122-1124 (Title VII; race) .

(n8)Footnote 8. *See Lynn v. Regents of the Univ. of California* (9th Cir. 1981) 656 F.2d 1337, 1339-1345 (Title VII).

(n9)Footnote 9. *See Uviedo v. Steves Sash & Door Co.* (5th Cir. 1984) 738 F.2d 1425, 1431 , modified, 753 F.2d 369 (5th Cir. 1985) (Title VII).

(n10)Footnote 10. *See Nellis v. Sunshine Dairy* (D. Or. 1979) 21 Fair Empl. Prac. Cas. (BNA) 327, 329-331 .

(n11)Footnote 11. *See Frank v. United Airlines, Inc.*, (9th Cir. 2000) 216 F.3d 845, 854 (weight maximums of male female flight attendants corresponded to large-frame MetLife's tables, but to medium-frame tables for female attendants).

(n12)Footnote 12. *See United States v. Jacksonville Terminal Co.* (5th Cir. 1971) 451 F.2d 418, 458 (Title VII).

(n13)Footnote 13. *See, e.g., McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (plaintiff alleging refusal to rehire after layoff in violation of 42 U.S.C. § 2000e-2(a)(1), 42 U.S.C. § 2000e-3(a); *Warren v. City of Carlsbad* (9th Cir. 1995) 58 F.3d 439 , cert. denied, 516 U.S. 1171 (1996) ; *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475 ; *Brazil v. United States Dep't of the Navy* (9th Cir. 1995) 66 F.3d 193 , cert. denied, 517 U.S. 1103 (1996) .

(n14)Footnote 14. *Gov. Code § 12940 et seq.; see, e.g., Mixon v. Fair Employment & Housing Comm'n.* (1987) 192 Cal. App. 3d 1306, 1316-1317, 237 Cal. Rptr. 884 ; *Ibarbia v. Regents of Univ. of Cal.* (1987) 191 Cal. App. 3d 1318, 1327, 1328, 237 Cal. Rptr. 92 ; *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 199-202, 48 Cal. Rptr. 2d 448 ; *Strother v. Southern Cal. Permanente Med. Group* (9th Cir. 1996) 79 F.3d 859 (claims brought under FEHA).

(n15)Footnote 15. 29 U.S.C. §§ 621-634; *see, e.g., O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 (fact that employee who was discharged at age 56 was replaced by 40 year old worker also covered under ADEA, did not bar claim of disparate treatment on basis of age); *Enlow v. Salem-Keizer Yellow Cab Co.* (9th Cir. 2004) 371 F.3d 645, 649-650 ; *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1421-1423 ; *Merrick v. Farmers Ins. Group* (9th Cir. 1990) 892 F.2d 1434, 1436 ; *Mundy v. Household Fin. Corp.* (9th Cir. 1989) 885 F.2d 542, 545-546 ; *Williams v. Edward Apffels Coffee Co.* (9th Cir. 1986) 792 F.2d 1482, 1484 (case decided under ADEA); *O'Day v. McDonnell Douglas Helicopter Co.* (9th Cir. 1996) 79 F.3d 756 .

(n16)Footnote 16. *See, e.g.*, Civil Rights Act of 1866, 14 Stat. 27; *London v. Coopers & Lybrand* (9th Cir. 1981) 644 F.2d 811, 818 (guarantees of 42 U.S.C. § 1981 and Title VII as coextensive); *Tagupa v. Board of Directors* (9th Cir. [Haw.] 1980) 633 F.2d 1309, 1312 .

(n17)Footnote 17. *See, e.g.*, Congressional legislation, in 1991, reversed limits on the scope of § 1981 created in *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 186-188, 109 S. Ct. 2363, 105 L. Ed. 2d 132 . *See Stender v. Lucky Stores* (N.D. Cal.1992) 780 F. Supp. 1302, 1305-1306 ; *Estate of Reynolds v. Martin* (9th Cir. 1993) 985 F.2d 470 ; *Washington v. Garrett* (9th Cir. 1993) 10 F.3d 1421 ; *Rodriguez v. General Motors Corp.* (9th Cir. 1990) 904 F.2d 531, 532 .



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2-41 California Employment Law § 41.11

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.11 Proof

[1] Individual Actions

[a] Discriminatory Intent Must Be Shown

An individual alleging disparate treatment must demonstrate intentional discrimination.ⁿ¹ Intent is established under Title VII when an employer chooses a particular policy because of, not merely in spite of, its effect on members of a protected class.ⁿ² However, actionable disparate treatment does not require a malevolent motive. The beneficence of an employer's motive does not undermine a finding of unlawful disparate treatment.ⁿ³ Conversely, however, mere awareness of adverse consequences to a protected group is insufficient to prove intent required for disparate treatment liability. For example, in *AFSCME v. State of Washington* ⁿ⁴ the Ninth Circuit held that payment of wages according to prevailing market rates will not by itself support an inference of intentional discrimination, even if the market reflects a historical pattern of lower wages to positions staffed predominantly by members of a protected class. Disparate treatment under Title I of the ADA means that an individual was treated differently on the basis of his or her disability.ⁿ⁵

"Intent" for disparate treatment purposes should not be confused with "willfulness," which is required for "liquidated" (double) damages under some equal employment opportunity laws, such as the ADEA.ⁿ⁶ In *Trans World Airlines, Inc. v. Thurston*, ⁿ⁷ the United States Supreme Court declared that a violation of the ADEA is "willful" if an employer "knew or showed reckless disregard *for the matter of whether its conduct was prohibited by the ADEA*."ⁿ⁸ Thus, "willfulness" is established by showing a disregard for the law and an indifference to its requirements,ⁿ⁹ rather than a discriminatory motive in regard to an individual's protected status.ⁿ¹⁰

The evidence presented to show discriminatory intent need not necessarily be contemporaneous with or causally related to the allegedly discriminatory decision. For example, evidence of discrimination transpiring at any stage of the university's hiring process is admissible if it would tend to show that discriminatory motive affected the hiring

committee's final decision.n10.1 On the other hand, the evidence must show a nexus between the allegedly discriminatory acts and subsequent employment decisions.n10.2

In *Ash v. Tyson Foods, Inc.*,n10.3 the United States Supreme Court held that although a word such as "boy" will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. In *Ash*, there was evidence that the employer's plant manager, who made the hiring decisions that plaintiffs challenged as based on race, had referred on some occasions to each of the plaintiffs as "boy." The Supreme Court held that insofar as the Court of Appeals held that modifiers or qualifications were necessary in all instances to render the disputed term probative of bias, the court's decision was erroneous.n10.4

Although the pivotal issue in disparate treatment cases is whether a particular individual was discriminated against and why,n10.5 remarks by the decision-maker reflecting a general intent to discriminate against members of the same protected group as the plaintiff provide substantial evidence of a discriminatory animus toward the plaintiff.n10.6

The Ninth Circuit has found that under Title VII, evidence that the same actor both hired and terminated plaintiff raises an inference that puts an enhanced burden on a plaintiff attempting to rebut the employer's articulated business reason for an adverse employment action.n10.7 In *Harvey v. Sybase*, n10.8 the Court of Appeal concluded that "same actor" evidence is entitled to no special weight. The court found that same actor evidence often will generate an inference of nondiscrimination, and the factors that influence the strength of the inference are:n10.9

- The nature of the benefit(s) conferred and the adverse employment action taken by the actor.
- The length of time between the positive and negative actions taken.
- The existence and nature of any motivating factors for the adverse action that arose after the benefit was conferred.

The existence of same actor evidence in an employment discrimination case does not change the standard for reviewing the denial of a motion for JNOV or alter the meaning of the term "substantial evidence" contained in that standard.n10.10

[b] Prima Facie Proof--Federal Test (*McDonnell Douglas*)

The most compelling proof of liability under a disparate treatment theory would be direct evidence of discriminatory intent, such as an express admissionn11 or policyn12 excluding members of a protected class from certain jobs or employment privileges. Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption. For example, direct evidence that a cab driver's employment was terminated because the employer's insurance policy did not cover drivers older than seventy years of age was sufficient to support an inference that by terminating the employment after purchasing the policy, the employer adopted a practice of intentionally discriminating against employees over seventy years of age.n12.1 Further, racist or sexist statements constitute direct evidence of discrimination.n12.2

1. Statements by a decision maker with respect to the individual who is the subject of the challenged decision;
2. Statements by a decision maker with respect an individual who is not the subject of the challenged decision, but from which the plaintiff seeks to infer discrimination;n12.3
3. Statements by someone other than the decision maker who nevertheless provided input into the

challenged decision; and

4. Statements by someone other than the decision maker who provided no input into the challenged decision.

■ **CONSULTANT'S COMMENT:**

When analyzing alleged racist or sexist statements, it is important to determine whether the statements have a direct or tenuous link to the decision that the plaintiff has challenged. Consider the following hierarchy from most to least direct:

1. Statements by a decision maker with respect to the individual who is the subject of the challenged decision;

2. Statements by a decision maker with respect an individual who is not the subject of the challenged decision, but from which the plaintiff seeks to infer discrimination;

3. Statements by someone other than the decision maker who nevertheless provided input into the challenged decision; and

4. Statements by someone other than the decision maker who provided no input into the challenged decision.

After placing the alleged racist or sexist comment into its proper context (with respect to its direct or tenuous bearing upon the challenged decision), it is also important to consider the age of the statement and its character (e.g., offensive per se or boorish). Only then is it possible to determine whether the alleged statement is direct evidence of discrimination, inferential evidence of discrimination or neither. *Commentary by Kirby Wilcox.*

However, in most cases, a plaintiff will be unable to produce such evidence,ⁿ¹³ and discriminatory intent must be proved by circumstantial evidence,ⁿ¹⁴ such as a comparison of treatment between members of a protected class and majority class members.ⁿ¹⁵

In recognition of these problems, the United States Supreme Court designed a test in *McDonnell Douglas Corp. v. Green* ⁿ¹⁶ to aid in establishing discriminatory intent when only circumstantial evidence is available.ⁿ¹⁷ If direct evidence is available, the *McDonnell Douglas* test is inapplicable.ⁿ¹⁸ Plaintiff is not required to prove he or she was qualified for the position as part of his or her prima facie case.^{n18.1}

McDonnell Douglas establishes the order and allocation of proof in most private, nonclass, disparate treatment cases. It should be noted that the *McDonnell Douglas* framework is meant only as a burden-shifting tool and is not a subject on which the jury should be instructed.^{n18.2} Further, although the *McDonnell Douglas* burden shifting framework is a useful tool to assist plaintiffs at the summary judgment stage so that they may reach trial, nothing compels the parties to invoke the *McDonnell Douglas* presumption. When responding to the employer's summary judgment motion, the plaintiff may proceed by using the *McDonnell Douglas* framework or may produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated the employer.^{n18.3} In the context of summary judgment, Title VII does not require a disparate treatment plaintiff relying on circumstantial evidence to produce more, or better, evidence than a plaintiff who relies on direct evidence.^{n18.4} Under the *McDonnell Douglas* test, a plaintiff must carry the burden of establishing, by a preponderance of the evidence,ⁿ¹⁹ a prima facie case of employment discrimination by showing (1) that he or she is a member of a protected class;ⁿ²⁰ (2) that he or she applied and was qualified for a job (or other employment opportunity or benefit) for which an employer was seeking

applicants;^{n20.1} (3) that, despite the plaintiff's qualifications, he or she was rejected or suffered some other adverse employment action;^{n20.2} and (4) that, after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons with the plaintiff's qualifications (or provide the benefit to other such persons).ⁿ²¹ With regard to Step 2, a plaintiff may not take inconsistent positions as to whether he or she was actually qualified for the job. For example, in one case,^{n21.1} the doctrine of judicial estoppel precluded a plaintiff who received workers' compensation benefits from bringing an employment discrimination action against her employer on the ground that sworn statements she had previously made asserting her inability to work in order to obtain workers' compensation benefits were inconsistent with her later assertion in her civil discrimination action of her ability to perform her job satisfactorily. Step (3) does not require that a plaintiff establish that he or she was rejected because of his or her protected status. The plaintiff must only show the threshold factor that he or she was rejected despite his or her qualifications. The latter showing raises an inference of disparate treatment, while the former would require actual proof of the ultimate question to be decided.ⁿ²² However, a plaintiff need not show, as part of the prima facie case, that similarly-situated employees outside the protected class received the employment terms and conditions sought by the plaintiff.^{n22.1} On the other hand, the plaintiff must show an adverse employment action.^{n22.2} The courts define adverse employment action broadly.^{n22.3} Courts recognize an adverse employment action when an employer's action negatively affects its employee's compensation.^{n22.4} A warning letter or negative review also can be considered an adverse employment action.^{n22.5} However, purely subjective detriment is not sufficient to establish an adverse employment action.

■ CONSULTANT'S COMMENT:

The *Rissetto* case is an important addition to EEO law. The plaintiff took the position before the Worker's Compensation Appeals Board that she was temporarily totally disabled from work. During the period that the plaintiff claimed that disability, she also claimed that she was a victim of age discrimination. Prima facie proof of age discrimination by an existing employee, however, requires that the he or she establish satisfactory job performance. The Ninth Circuit held that the plaintiff in this case could not claim total disability in one forum and satisfactory performance in another. In so doing, the Circuit Panel invoked the doctrine of judicial estoppel -- a doctrine which permits a court to bar a litigant from taking incompatible positions in separate actions involving the same opponent. Although the formulation of the doctrine takes different forms in different circuits, the Ninth Circuit in this instance appears to have stated the following rule:

A federal judge has the discretion (irrespective of state law regarding the doctrine of judicial estoppel) to bar a plaintiff who has prevailed by judgment or settlement against a defendant in a prior civil or administrative proceeding from seeking to secure a judgment against the same defendant in a subsequent federal civil action by resort to a theory of recovery which is incompatible with the theory upon which the plaintiff prevailed in the first proceeding.

The utility of this doctrine cannot be overstated. It is not at all uncommon for an employee to claim disability status under the Worker's Compensation Act or State Disability Insurance Act and to simultaneously claim satisfactory performance in a discrimination suit against the same employer. In the Ninth Circuit, at least, the opportunities for such lawsuits to proceed to conclusion are now greatly diminished. *Commentary by Kirby Wilcox*

■ CONSULTANT'S COMMENT:

Warren v. City of Carlsbad, ⁿ²³ provides instructive commentary on the burden of proof necessary to obtain summary judgment in an EEO case. Citing *Wallis v. J.R. Simplot Co.*, ⁿ²⁴ the panel stated that "the mere existence of a prima facie case, based on the minimum evidence necessary to raise a McDonnell Douglas presumption, does not preclude summary judgment." However, citing *Lindahl v. Air France*, ⁿ²⁵ the panel made it clear that "the plaintiff [who has established a prima facie case] need produce very little evidence of discriminatory motive to raise a genuine issue of fact as to pretext. In fact,

any indication of discriminatory motive may suffice to raise a question that can only be resolved by the factfinder." Yet, the panel stressed that a plaintiff cannot defeat summary judgment through "generalizations." "He must produce evidence of facts that either directly show a discriminatory motive or show that the [employer's] explanation [for its actions] is not credible." In the *Warren* case, the plaintiff presented testimony on credibility which precluded summary judgment, but it is important to note that the burden of defeating an employer's motion with "direct evidence" of discriminatory motive or evidence that the employer's defenses are "not credible" is not a burden that a plaintiff can assume that he or she will meet. Where an employer has dealt with a plaintiff according to fair and regular procedures (oral or written) and assertions of misconduct are unsupported or buttressed by attenuated facts, summary judgment remains a viable device for limiting or foreclosing weak EEO claims. *Commentary by Kirby Wilcox.*

Generally, evidence offered to satisfy the *McDonnell Douglas* test gives rise to an inference of unlawful discrimination; that is, a prima facie case establishes an inference of discrimination that the defendant must rebut.ⁿ²⁶ Several courts have held that the requisite degree of proof to establish a prima facie case is minimal since the plaintiff is only required to raise an inference that the discriminatory misconduct occurred.ⁿ²⁷ Further, cases have held that when a plaintiff establishes a prima facie inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, the plaintiff will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reasons for its employment decision.^{n27.1}

An employee's own statement of having performed at a level equal to that of other employees is relevant at the prima facie stage, even if it would be insufficient by itself to raise a genuine issue of material fact.^{n27.2}

Statistical evidence may substantiate the inference, even if it is not directly probative of any particular element,ⁿ²⁸ as long as it shows a "stark pattern of discrimination [that is] unexplainable on [other] grounds."ⁿ²⁹ For example, statistical evidence may establish a general discriminatory pattern in hiring and promotion practices,ⁿ³⁰ which creates an inference of discriminatory intent with respect to the individual employment decision at issue.ⁿ³¹ However, there is some debate about whether statistical evidence alone is sufficient to establish a prima facie case of disparate treatment.ⁿ³²

When the sample size is small, the court may make no statistical inference of intentional discrimination.^{n32.1} The utility of statistics in disparate treatment cases depends on all of the surrounding facts and circumstances. Statistical evidence derived from an extremely small universe has little predictive value and must be disregarded. The problem with a small number is that slight changes in the data can drastically alter the result.^{n32.2}

Inferences drawn from statistical proof are strongest when they are substantiated by other evidence in the case which brings "the cold numbers convincingly to life."ⁿ³³ The relevance and usefulness of statistical data depends upon all of the surrounding facts and circumstances.ⁿ³⁴ For example, in *Aragon v. Republic Silver State Disposal, Inc.*,^{n34.1} the fact that three of four casual employees singled out for layoff were white was insufficient to raise an inference of racial discrimination. The statistical evidence constituted too small a sample size to support a statistical inference of intentional discrimination. Further, the statistical evidence presented no stark pattern of racial discrimination, nor did it account for possible nondiscriminatory variables, such as job performance.^{n34.2}

■ CONSULTANT'S COMMENT:

Statistics are not a substitute for analysis. While it is true that gross disparities based upon large sample sizes may alone be sufficient to raise an inference of discrimination, such disparities rarely present themselves in litigation. Typically, statistics are just one aspect of a plaintiff's prima facie case or a defendant's legitimate nondiscriminatory reason for its challenged decision. And courts are increasingly aware that statistics are a reflection of the impact of past decisions, but do not explain the causes for those decisions.

Thus, bare statistical disparities rarely prove anything by themselves. Only if statistical proof includes large sets of relevant data and robust explanatory variables or corroborative evidence of discrimination or non-discrimination can a court make a fair assessment of a plaintiff's claim of discriminatory treatment or impact. Small sample sizes present the most glaring example of statistical slight-of-hand. A layoff comprised of 75% of the group that has brought a lawsuit gives an impression of overwhelming disparity. When one learns that the layoff encompassed just four individuals, three of whom were members of the same racial group, the disparity immediately becomes unimpressive and, according to *Aragon*, n34.3 irrelevant without more. Any change in the layoff list by even one individual moves the percentage 25%. Small samples are simply too unstable to provide any explanatory power. *Commentary by Kirby Wilcox.*

One Ninth Circuit panel held that a plaintiff had not made out a prima facie case of discriminatory termination under the ADEA when he did not specify the person outside the protected age group who took his place by name, age, or inferior qualifications.ⁿ³⁵ The court found that the vagueness of the allegation did not raise a material issue of fact as to whether he had been replaced by a person outside the protected class. The court also rejected the plaintiff's attempt to show that because he worked in a number of projects and positions that were eventually subject to cutbacks and layoffs there was an inference of "subterfuge" based on age discrimination, finding that the plaintiff had failed to present sufficient evidence of such subterfuge.ⁿ³⁶

■ CONSULTANT'S COMMENT:

Ritter v. Hughes Aircraft Co. n37 is a reminder that the *McDonnell Douglas* model of proof is just one way to prove a disparate treatment case under Title VII or the ADEA. A plaintiff can elect not to use the three-step procedure articulated in *McDonnell Douglas* and instead elect to use direct, statistical, or circumstantial evidence of discriminatory conduct. Mr. Ritter was unable to establish a violation of the ADEA on any basis, but it is significant to note that the court gave him several pathways to follow. The limited practice pointer here is that, in the analysis of potential ADEA liability, it is not enough for an employer to defend itself by saying: (a) "He or she was not replaced"; or (b) "He or she was replaced, but not by a younger employee." Liability may exist without regard to replacement, if the requisite animus can be established without the need for drawing inferences under the *McDonnell Douglas* burden-shifting scheme. *Commentary by Kirby Wilcox.*

In *O'Connor v. Consolidated Coin Caterers Corporation*, the United States Supreme Court permitted the application of the *McDonnell Douglas* standards to the prima facie proof required in an ADEA case. The Court noted that it had never had occasion to decide whether that application is correct, but assumed its application in light of the fact that the parties did not contest it.ⁿ³⁸ The Court said, "In *McDonnell Douglas*, we 'established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory-treatment cases.' [Cites] We held that a plaintiff alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964... could establish a prima facie case by showing '(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the] complainant's qualifications' Once the plaintiff had met this initial burden, the burden of production shifts to the employer 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' " The *O'Connor* court held that while there needs to be a logical connection between each element of the prima facie case and the illegal discrimination, it is not necessary that plaintiff prove he or she was displaced by someone under 40 years of age.ⁿ³⁹

In *Hersant v. Department of Social Services*,^{n39.1} a California court of appeal applied the *McDonnell Douglas* standards to prima facie and rebuttal proof required in a FEHA age discrimination case. Noting that it is impossible to establish an exact, all-inclusive statement of the elements of a prima facie age discrimination case, the court found that the employee met the burden by showing that (1) the employee was 40 years of age or older; (2) an adverse employment

action was taken against the employee; (3) the employee was satisfactorily performing the job when the adverse action was taken; and (4) the employee was replaced by a significantly younger person.^{n39.2} The court held that the general requirement that the employee offer circumstantial evidence sufficient to raise a reasonable inference of age discrimination is not an onerous one.^{n39.3}

In *Trop v. Sony Pictures Entertainment, Inc.*,^{n39.4} a California appellate court applied the *McDonnell Douglas* standards to a sex discrimination action under the FEHA to find that plaintiff had not made out a prima facie case of discrimination based on pregnancy. The court found first that the plaintiff failed to show that plaintiff's boss, who was responsible for her termination, knew that she was pregnant at the time he made the decision to terminate her employment.^{n39.5} The court then held that even assuming plaintiff's evidence could be construed as supporting a finding that her boss knew of her pregnancy, the boss presented a nondiscriminatory basis for firing plaintiff based on poor job performance, and plaintiff did not present credible evidence to overcome the nondiscriminatory reason for the firing. The court rejected plaintiff's argument that she presented direct evidence of discrimination, which would have rendered the *McDonnell Douglas* test inapplicable.^{n39.6}

Once a prima facie case is established, the employer has the burden of articulating some legitimate, nondiscriminatory reason for its action.ⁿ⁴⁰ In *Caldwell v. Paramount Unified School Dist.*,ⁿ⁴¹ the court explained that under *McDonnell Douglas*, there is no rigid standard for establishing a prima facie case, as proof will vary according to the facts of the particular case. The adequacy of the proof is a question of law for the trial court, not a question of fact for the jury. "If the employee establishes a prima facie case, the employer must offer a legitimate reason for his actions." ⁿ⁴² Once the employer has rebutted the prima facie case by producing a nondiscriminatory reason for its employment decision, which will support a summary judgment for the employer, "the *McDonnell/Burdine* presumption 'drops from the case,' " and the factfinder must decide on all of the evidence before it whether defendant intentionally discriminated against plaintiff. "In short, the trier of fact decides whether it believes the employer's explanation of its actions or the employee's."ⁿ⁴³... That is to say, once the defendant has succeeded in carrying its burden of production, the *McDonnell Douglas* framework--with its presumptions and burdens--is no longer relevant ."ⁿ⁴⁴

Thus the construct of the shifting burdens enunciated in *McDonnell Douglas* is an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the fact-finding process.ⁿ⁴⁵ If the employer meets that burden, the aggrieved individual must have a fair opportunity to show that the employer's stated reason was in fact a pretext for discrimination.ⁿ⁴⁶ For discussion relating to rebuttal and proof of pretext, see [c] and [d], *below*.

[c] Rebuttal of Prima Facie Proof(*McDonnell Douglas/Burdine*)

In *Texas Dep't of Community Affairs v. Burdine*,ⁿ⁴⁷ the United States Supreme Court explained that a *McDonnell Douglas* prima facie case establishes a rebuttable presumption of unlawful discrimination.ⁿ⁴⁸ The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action.ⁿ⁴⁹ When the employer moves for summary judgment, the employer bears the initial burden of demonstrating that at least one of the elements of plaintiff's employment discrimination claim is without merit.^{n49.1} Yet, the ultimate burden of persuading the trier of fact that the employer discriminated remains at all times with the plaintiff.ⁿ⁵⁰ Thus, the employer's burden is one of "production" of evidence. It is sufficient if the employer raises a genuine issue of fact about whether the employer discriminated against the aggrieved individual.ⁿ⁵¹ The employer may satisfy this burden by clearly setting forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.ⁿ⁵² For example, in one FEHA sex discrimination case, an employer sustained its burden by offering declarations that an employee was denied promotion based on neutral nondiscriminatory criteria, together with transcripts of the employee's deposition testimony stating that the individuals who evaluated her did not act in sexually discriminatory manner when they voted not to recommend her for promotion.ⁿ⁵³ However, the Ninth Circuit has held that an employer cannot avoid liability for discrimination on the ground that its employment criteria are neutral on the surface if the evidence establishes that the employer implemented a discriminatory scheme in such a manner as to give the appearance of neutrality.ⁿ⁵⁴

Evidence of the employer's having filled a particular position with a member of plaintiff's protected class is properly evidence that can rebut an inference of discrimination; but it is not evidence essential to the plaintiff's prima facie case. However, even as rebuttal evidence it will not necessarily be dispositive. Thus, in one case, proof that the employer filled two of five positions with applicants from plaintiffs' protected class did not impede plaintiffs' ability to raise an inference of discrimination with regard to the three other positions, although it might have had some relevance to the employer's motive.^{n54.1}

■ CONSULTANT'S COMMENT:

It is possible to read too much into that portion of the *Lyons* ^{n54.2} opinion which holds that the plaintiff may be able to raise an inference of discrimination with respect to three out of the five placements in question that the employer assigned to non-African-Americans. The Ninth Circuit was careful to explain that the promotion of protected group members into target positions is relevant to an employer's motive. Thus, barring evidence of the kind that plaintiff offered in *Lyons* to successfully impugn that motive, an employer can still secure summary judgment in a case involving multiple challenged promotions by showing that its advancement of protected group members to some--but not every one--of those positions was consonant with their qualifications and availability. *Commentary by Kirby Wilcox.*

The employer may also show statistically that its work force is racially balanced or that it contains a disproportionately high percentage of minority employees.ⁿ⁵⁵ However, statistical evidence that an employer has a good nondiscrimination record for the period *after* a discrimination claim is filed is irrelevant to the merits of the initial claim.ⁿ⁵⁶

In *Reeves v. Sanderson Plumbing Products, Inc.*,^{n56.1} the Supreme Court held that a plaintiff's prima facie case of discrimination as defined in *McDonnell Douglas Corp.*, combined with sufficient evidence for a reasonable fact finder to find that the employer's asserted justification is false, may be adequate to sustain a finding of liability for intentional discrimination under ADEA. According to the Court, "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive."^{n56.2} In the appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is covering up a discriminatory purpose.^{n56.3} The Court noted that, "[O]nce the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."^{n56.4}

In *St. Mary's Honor Center v. Hicks*, ⁿ⁵⁷ the Supreme Court held that because the defendant's rebuttal burden under Title VII is one of producing evidence and because the burden of proof remains at all times with the plaintiff, the defendant's failure to persuade the factfinder that its proffered nondiscriminatory reason was the true reason for its action does not necessarily entitle plaintiff to judgment as a matter of law.ⁿ⁵⁸ According to the Court, once the defendant meets its burden of *production*, the presumption of discrimination raised by the prima facie case under *McDonnell Douglas* is no longer relevant, and plaintiff retains the burden of proving intentional discrimination. Although the trier of fact is permitted to infer intentional discrimination from its disbelief of the defendant's proffered reasons, together with the elements of the prima facie case, it is not *compelled* to do so.ⁿ⁵⁹ In *St. Mary's*, for example, the district court disbelieved the defendant employer's explanation for plaintiff's discharge (plaintiff's alleged frequent and increasingly severe violations of the employer's regulations), but ultimately ruled in favor of the employer because it found that although plaintiff had succeeded in proving the existence of a "crusade" to terminate him, he had failed to prove that the crusade was racially rather than personally motivated. The Supreme Court held that the district court was not required to find for the plaintiff under these circumstances.ⁿ⁶⁰

In one case decided subsequent to *St. Mary's*, a Ninth Circuit panel applied the *St. Mary's* standard to hold that when a plaintiff presents a prima facie case and then raises a genuine factual issue regarding the authenticity of the employer's proffered reason for its action, summary judgment for the defendant is inappropriate.ⁿ⁶¹ However, another Ninth

Circuit panel has held that if the plaintiff presents only a minimal prima facie case and does not supply additional evidence to refute the employer's proffered explanation, summary judgment for the defendant-employer may be appropriate.ⁿ⁶²

Where an employer takes action against an employee because it believes the employee breached or violated the employer's rules or standards, it does not matter, for purposes of establishing the employer's initial burden of proof, whether plaintiff actually did commit the violation or breach, as long as the employer honestly believed plaintiff did.^{n62.1}

[d] Proving Pretext or "Mixed Motive"

The Supreme Court in *McDonnell Douglas* and *Burdine* stated that once the employer meets its burden of production, the employee must have an opportunity to prove, by a preponderance of the evidence, that the employer's "legitimate" reasons were not its true reasons, but were a pretext for discrimination.ⁿ⁶³ For example, an employer may not use an employee's alleged deficiencies on the job as a pretext for race discrimination.ⁿ⁶⁴

Once a plaintiff has established a prima facie case, he or she need produce very little evidence of discriminatory motive to raise a genuine issue of fact as to pretext.ⁿ⁶⁵ However, to avoid summary judgment after the defendant offers evidence of a nondiscriminatory reason for the adverse action, the plaintiff must offer substantial evidence that the defendant's reason was untrue or pretextual, that the defendant acted with discriminatory animus, or a combination, to a degree that a reasonable trier of fact could conclude that the defendant engaged in intentional discrimination.^{n65.1} In *Hersant v. Department of Social Services*, the court analysed the requisite showing to avoid summary judgment in relation to the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*.^{n65.2} In the context of a motion for summary judgment, courts and commentators considering the *Hicks* opinion have come to varying conclusions: some have concluded that an employee's prima facie case, even in the face of an employer's showing of a non-age based reason for the adverse action, is alone sufficient to avoid summary judgment; others have concluded that *Hicks* requires the employee, once the employer has offered a nondiscriminatory reason, to show both that the reason is false and that the true reason for the adverse action was a discriminatory animus. However, the *Hersant* court adopted the predominant view:^{n65.3} an employee cannot simply show that the employer's decision was wrong or mistaken because the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent. The employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find unworthy of credence and infer that the employer did not act for the asserted non-discriminatory reasons.^{n65.4} While the plaintiff can demonstrate pretext by showing shifting, conflicting, and retracted justifications for adverse treatment, pretext is not shown if an employer simply supplements its explanation and there has been no retraction of any of its reasons and none of its reasons are inconsistent or conflicting.^{n65.5} In any event, in considering a motion for summary judgment, the trial court must draw all reasonable inferences in favor of the nonmoving party and must not substitute its judgment concerning the weight of the evidence for the jury's.^{n65.6}

In the context of a trial, once the employer succeeds in carrying its burden of production, the *McDonnell Douglas* framework, including the presumption of discrimination, disappears. The burden shifts back to the plaintiff to prove that the employer's proffered justification is mere pretext.^{n65.7} Although the *McDonnell Douglas* presumption shifts the burden of production to the defendant, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.^{n65.8} Only when the employer fails to rebut the presumption must the court enter judgment for the plaintiff because no issue of fact remains.^{n65.9}

The employee may show pretext either directly by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is not believable.ⁿ⁶⁶ Statistical evidence relating to employment policy and practice may be used to prove pretext.^{n66.1} A showing that the employer treated similarly situated employees outside the plaintiff's protected class more favorably would be probative

of pretext.ⁿ⁶⁷ In *Godwin v. Hunt Wesson, Inc.*,^{n67.1} the Ninth Circuit addressed the apparently differing standards discussed above: (1) production of "very little evidence" beyond the prima facie case to rebut the defendant's showing and (2) production of "specific, substantial evidence" of pretext.^{n67.2} The court reconciled the two standards, which depend on the nature of the plaintiff's evidence. When a plaintiff offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial. "Direct evidence" is evidence that, if believed, proves the fact of discriminatory animus without inference or presumption.^{n67.3} When direct evidence is unavailable and the plaintiff must rely on circumstantial evidence (that is, evidence tending to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable), that evidence of "pretense" must be "specific" and "substantial" to create a triable issue with respect to whether the employer intended to discriminate on an impermissible basis.^{n67.4}

■ COMMENTARY:

Godwin highlights a serious tension in the decisions from the Ninth Circuit regarding the proof that a plaintiff must offer at the pretext phase to defeat an employer's offer of legitimate, nondiscriminatory reasons for its challenged conduct. *Godwin* concludes that a plaintiff's required degree of proof varies with the type of evidence presented to challenge the employer's rebuttal. If the plaintiff offers direct evidence of discrimination, the required showing is met, even if the evidence is not substantial. If the plaintiff offers circumstantial evidence of discrimination, the required showing is met only if the evidence is "specific," "substantial," and tends to show that the employer's motives are inconsistent or unbelievable.

Unfortunately, *Godwin*, despite an attempt to do so, does not help practitioners identify the dividing line between direct and circumstantial evidence. Ninth Circuit precedent on this issue is not just unclear—it is irreconcilably conflicting. In *Godwin*, for example, we learn that the plaintiff may classify as direct evidence of discrimination an event pertaining to a coworker who received a sexually explicit prank "gift" from an unknown sender at a sales meeting that the plaintiff did not attend. We also learn that the president of the defendant, who was not among those who made the challenged decisions, uttered an unspecified number of further unspecified "derogatory" comments about women "at meetings." However, we have gathered from many other Ninth Circuit decisions that comments and actions made by nondecisionmakers outside the presence of the plaintiff are just "stray" and immaterial.

Under these circumstances, it is predictable that counsel for plaintiffs and defendants will be forced to litigate with "labels"—depicting evidence as "direct" or "circumstantial." It is equally predictable that the trial courts will be forced to rely more on instinct than past case law to draw the necessary line because the case law offers no clear guidance. It would be helpful to have an en banc opinion on the subject, but it is unlikely that any are forthcoming soon. *Commentary by Kirby Wilcox.*

Qualifications evidence may suffice, at least in some circumstances, to show pretext.^{n67.5} In *Ash v. Tyson Foods, Inc.*,^{n67.6} the United States Supreme Court held that the Court of Appeals erred in articulating the standard for determining whether asserted nondiscriminatory reasons for the employer's hiring decisions were pretextual. Plaintiffs had introduced evidence that their qualifications were superior to those of the successful applicants. The Court of Appeals, in finding the qualification evidence insufficient, found that pretext can be established by comparing qualifications only when "the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face."^{n67.7} Federal courts have articulated various other standards: that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question,"^{n67.8} that qualifications evidence standing alone may establish pretext when the plaintiff's qualifications are clearly superior to those of the selected job applicant,^{n67.9} or that the factfinder may infer pretext if a reasonable employer would have found the plaintiff to be significantly better qualified for the job.^{n67.10} In *Ash*, the Court of Appeals itself qualified its statement by suggesting that superior qualifications may be probative of pretext when combined with other evidence.^{n67.11} The Court, although rejecting the

"slap you in the face" standard, declined to define more precisely what standard should govern pretext claims based on superior qualifications, or to hold that the plaintiffs' evidence necessarily showed pretext.^{n67.12}

In *Guz v. Bechtel National, Inc.*,^{n67.13} the California Supreme Court found that defendant's explanation of nondiscriminatory reasons for terminating plaintiff was credible on its face.^{n67.14} Plaintiff thus had the burden to *rebut* the facially dispositive showing by providing evidence that nonetheless raised a rational inference that intentional discrimination occurred. The Court found that the plaintiff had failed to do so.^{n67.15}

Generally, the court must give the employee a fair opportunity to refute the employer's stated reasons for an adverse employment action.ⁿ⁶⁸ For example, in one case, an employer's reasons were legitimate, but they were inconsistent. Thus, the inconsistencies required a credibility judgment by the trier of fact, and a summary judgment based on the employer's reasons was held to be inappropriate.ⁿ⁶⁹ In another case, a plaintiff effectively refuted her own pretext argument by testifying at a deposition that she did not feel that she was terminated because of her physical limitation. The court of appeal upheld a summary judgment for defendant on plaintiff's physical disability discrimination cause of action because plaintiff's deposition testimony negated her argument that the employer's stated reason for the plaintiff's termination was a pretext to mask the illegal motive of disability discrimination.ⁿ⁷⁰ Generally, however, if an employer shows as a matter of law that there was a proper basis for an adverse employment action, and no substantial responsive evidence is presented to show the untruth of the employer's justification or to establish a pretext, summary judgment for the employer is appropriate.ⁿ⁷¹

In *Wallis v. J.R. Simplot Co.*,ⁿ⁷² the Ninth Circuit explained that an earlier decision in which it had held that summary judgment for the employer was not appropriate after the plaintiff had made out a prima facie caseⁿ⁷³ must be read as simply standing for the proposition that in deciding whether an issue of fact has been created about the credibility of the employer's nondiscriminatory reasons, the district court must look at the evidence supporting the prima facie case, as well as the other evidence offered by the plaintiff to rebut the employer's proffered reasons.ⁿ⁷⁴ Thus, the Ninth Circuit stated that the mere existence of a prima facie case based on only the minimum necessary to create a presumption of discrimination does not preclude summary judgment for the employer.ⁿ⁷⁵ The Ninth Circuit held that to withstand a defense summary judgment motion, a plaintiff must produce some evidence to permit the factfinder to find the employer's proffered legitimate reasons pretextual, even if the plaintiff has established a minimal prima facie case.ⁿ⁷⁶ Additionally, some courts have held that an employer's proffering of two rationales for discharging an employee that were not inconsistent with each other, e.g., inadequate job performance *and* a legitimate reduction in force, did not succeed in establishing pretext sufficient to avoid summary judgment.ⁿ⁷⁷

As discussed in [c], *above*, even if the trier of fact disbelieves defendant's proffered reasons, plaintiff is not necessarily entitled to judgment as a matter of law. The trier of fact is *permitted* to infer discrimination in those circumstances, but is not required to do so; plaintiff retains the ultimate burden of proving intentional discrimination.ⁿ⁷⁸ If, however, a plaintiff establishes a prima facie case of discrimination and presents sufficient evidence for a reasonable fact finder to find that the employer's asserted justification for its actions is false, a finding of liability for intentional discrimination is appropriate.^{n78.1}

An employee is not required to pursue any particular means of demonstrating pretext.ⁿ⁷⁹ Thus, in *Patterson v. McLean Credit Union*,ⁿ⁸⁰ the United States Supreme Court held that it was error for a trial court to instruct a jury that an African-American employee could carry her burden of persuasion only by showing that she was in fact better qualified than the white employee who got the job.ⁿ⁸¹ Although the employee may prove pretext by so demonstrating, there were other ways to do so. For example, the employee could present evidence of the employer's past conduct, including instances of alleged racial harassment and failure to train the employee for the job in question.ⁿ⁸² An employer's shifting rationales for an adverse employment decision may also give rise to an inference of pretext.^{n82.1} Direct evidence of a supervisor's discriminatory animus can constitute direct evidence of pretext, and may, in combination with other evidence, allow a jury to find pretext.^{n82.2} Testimony by other employees also may be relevant. Although subjective evaluations of an employee's skills may differ for a variety of reasons, specific positive evaluations of

performance, both by coworkers and other managers, may critically undermine the credibility of an official evaluation in a manner relevant to determining the existence of pretext.^{n82.3}

Stray remarks by supervisors or fellow employees, on which the employer did not act or which were not communicated to a decision maker, are insufficient to establish pretext.^{n82.4} However, an agent's biased remarks against an employee because of, for example, the employee's gender are admissible to show an employer's discriminatory animus if the agent was involved in the employment decision.ⁿ⁸³

A plaintiff's subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations.^{n83.1} Plaintiff's evidence must relate to the motivation of the decision makers to prove, by nonspeculative evidence, an actual causal link between prohibited motivation and termination.^{n83.2}

Proof of pretext also does not require the employee to show that the employer would have in any event taken discriminatory adverse action, without regard to the employee's alleged deficiencies. Rather, the employee need only show that membership in a protected classification was a "but for" cause of the action.^{n83.3}

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

In most *McDonnell Douglas* cases, the key inquiry is one of pretext because neither the prima facie showing nor the employer's articulation burden is onerous. Because of the limitations of the prima facie case showing, the plaintiff should investigate and, if appropriate, plead and prove the case under direct evidence or "pattern or practice" disparate treatment or disparate impact. An individual case may be proved by demonstrating the existence of a broadly applicable discriminatory practice that affects the plaintiff. *Commentary by Bill Lann Lee.*

In *Coghlan v. American Seafood Co. LLC*, ^{n83.4} the Ninth Circuit found that the plaintiff failed to satisfy the enhanced burden the same actor inference imposes on a plaintiff attempting to rebut the employer's articulated business reason for an adverse employment action. Under the same-actor inference, when the same actor is responsible for both hiring and firing a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory action. The inference is based on the principle that an employer's initial willingness to hire the employee-plaintiff is strong evidence that the employer is not biased against the protected class to which the employee belongs.^{n83.5} In *Coghlan*, the man who made all of the challenged employment decisions was the same man who earlier made favorable employment decisions for plaintiff. The court found that the logic of the same-actor inference applied to cases such as *Coghlan*, in which the plaintiff was not actually fired, but merely offered a less desirable job assignment.^{n83.6} The court distinguished cases not involving hiring and firing in which the same-actor inference would be inappropriate. For example, if a plaintiff were alleging that the employer systematically excluded members of a certain class from upper-management positions, the mere fact that the employer was willing to hire members of that class for lower-level positions would not prove otherwise.^{n83.7} The same-actor inference applies when the favorable and unfavorable employment actions take place within a short period of time. In *Coghlan*, three years elapsed between the actions. The court held that the length of time would be significant only had plaintiff proffered evidence suggesting that the person who took both the favorable and unfavorable actions developed a bias against Norwegians during that period, but he did not. Moreover, the person took favorable action toward plaintiff during the period and only one year before the earliest adverse employment decision.

On the other hand, in *EEOC v. Boeing Co.*, ^{n83.7.1} the EEOC was able to overcome the same actor inference to show that the employer's articulated business reasons were pretextual and that a jury could have concluded that an employee was laid off based on her sex. The same actors who made an adverse employment decision against the employee had twice given her scores high enough to avoid vulnerability to discharge. While recent positive employment decisions made by the same actors who later make an adverse employment decision against an employee may give rise to an inference that no discrimination took place,^{n83.7.2} the inference was weaker in this case. Although a termination is rarely motivated by bias when initiated by the same actors who recently selected the same employee for the job or

promotion in the first place, the logic differs when applied to less overtly "positive" employment decisions, such as refraining from firing an employee at the earliest opportunity or giving an employee a lukewarm evaluation, rather than a poor one. A supervisor who hires or promotes an employee affirmatively forwards the employee's career; this affirmative enhancement of the employee's career prospects is strong circumstantial evidence of a lack of bias on the supervisor's part. In contrast, when a supervisor discharges an employee (whom the supervisor did not affirmatively hire or promote) by lowering the employee's scores over time, rather than by firing her precipitously, there is no such strong circumstantial evidence of lack of bias. A strong inference also was inappropriate, because none of the male employees the supervisors ranked lower than the female employee ultimately suffered as a result, and none was laid off. Further, given that a jury could find the evidence suggested the female employee's reduction-in-force scores were not credible, a jury could infer that she suffered discrimination notwithstanding any inference arising from her supervisors' prior employment decisions.

In *Nazir v. United Airlines, Inc.*, n83.7.3 the court found that no California case or statute creates a same actor presumption under the FEHA, but that there is a same actor inference. Thus, when the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive.n83.7.4 Although same actor evidence will often generate an inference of nondiscrimination, the effect is not an *a priori* determination divorced from its factual context. The evidence is not placed into a special category, and does not have undue importance attached to it, because that could undermine the right to a jury trial by improperly easing the burden on employers in summary judgment.n83.7.5 In *Nazir*, the same actor evidence did not help the employer on summary adjudication, because from the time of his promotion, plaintiff had complained to his supervisor about the way he was being treated, and, more significantly, complained about his supervisor to world headquarters. Further, there was a triable issue of fact as to pretext based on the employer's investigation into allegations of harassment by plaintiff for which his employment was terminated, given the employer's failure to interview witnesses for potentially exculpatory information and other evidence to support a reasonable inference for plaintiff.

"An unlawful employment practice" encompasses any situation in which a protected characteristic was "a motivating factor" in an unlawful employment action, even if there were other motives. These cases are sometimes labeled *mixed-motive cases*. If the employee succeeds in proving that a protected characteristic was one of several factors motivating the employment action, an employer cannot avoid liability altogether. However, the employer may assert an affirmative defense to bar certain types of relief by showing its use of a protected characteristic was not the "but for" cause for the challenged decision.

The inquiry in any mixed motive case is whether the plaintiff has shown, by a preponderance of evidence, that race, color, religion, sex, or national origin was a motivating factor in an employment practice, thus violating Title VII.n83.8 The proof that a prohibited characteristic was a "motivating factor" may be either direct or circumstantial.n83.9 Plaintiff does not face any special evidentiary rule or hurdle in a Title VII mixed-motive case.n83.10 However, the employer can escape damages and orders of reinstatement, hiring, promotion and the like, but not attorney's fees or declaratory or injunctive relief, by proving the absence of "but for" causation as an affirmative defense.n84

A good example of a mixed motive case is *Price Waterhouse v. Hopkins*, n85 a Title VII case involving a female employee whose candidacy for partnership was held for reconsideration based on evaluations that not only criticized her interpersonal skills (a permissible consideration), but also contained comments resulting from sex stereotyping (an impermissible consideration).n86 Finding that the employee proved that her employer relied on the stereotyped comments,n87 the United States Supreme Court held that when an employee proves that gender played a motivating part in an employment decision, the employer may avoid liability only by proving, by a preponderance of the evidence, that it would have made the same decision even if it had not taken the employee's gender into account.n88 According to a later Ninth Circuit decision, consideration of a discriminatory factor does not automatically result in a Title VII violation; a court must make a specific finding as to whether the employer would have made the same decision without consideration of the illegitimate factor.n89

However, subsequent to *Price Waterhouse*, Title VII was amended by the Civil Rights Act of 1991 to provide that, except as otherwise provided in Title VII, an unlawful employment practice is established when the complaining party demonstrates that race, color, national origin, religion, or sex, was a motivating factor for any employment practice, even though other factors also motivated the practice.ⁿ⁹⁰ Thus, the fact that an employer might have made the same decision in any case, based on lawful considerations, is no longer a complete defense.

In the aftermath of *Price Waterhouse* and the subsequent passage of the Civil Rights Act of 1991, in *Desert Palace, Inc. v. Costa*,^{n90.1} a unanimous United States Supreme Court held that a plaintiff need not present direct evidence of discrimination to obtain a mixed-motive instruction under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991.^{n90.2} After the passage of the 1991 Act, the Circuit Courts of Appeals divided over the question of whether a plaintiff must prove by direct evidence that an impermissible consideration was a "motivating factor" in an adverse employment action.^{n90.3} In *Costa*, the plaintiff presented evidence that she was the only female warehouse worker and heavy equipment operator employed by the employer and the only woman in her local Teamsters bargaining unit. Her evidence also showed she had experienced problems with management and her co-workers leading to disciplinary sanctions, denial of privileges, suspension, and ultimately termination. The employer finally terminated her after she had a physical altercation with a male Teamsters member, who had a clean disciplinary record and received only a 5-day suspension. At trial, the employee presented evidence that she was singled out for "intense stalking" by one of her supervisors, subjected to harsher discipline than men for the same conduct, and received less favorable treatment than men in the assignment of overtime. She alleged gender discrimination and a claim that supervisors had repeatedly "stacked" her disciplinary record and "frequently used or tolerated" sex-based slurs against her.^{n90.4} The district court gave the jury a mixed-motive instruction that if it found the plaintiff's sex a motivating factor in the employer's treatment of her, she was entitled to its verdict, even if it found the employer's conduct was also motivated by a lawful reason. Furthermore, if the jury found the employer's treatment of plaintiff was motivated by both gender and lawful reasons, it was to find that she was entitled to damages, unless the employer proved by a preponderance of the evidence that the employer would have treated her similarly even if her gender had played no role in the employment decision.^{n90.5} The Supreme Court held that to obtain a mixed-motive jury instruction, a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that race, color, religion, sex, or national origin was a motivating factor for an adverse employment practice. The Court found that the Ninth Circuit had correctly concluded that the district court did not abuse its discretion in giving a mixed-motive instruction to the jury.^{n90.6}

■ CONSULTANT'S COMMENT:

The Ninth Circuit's opinion in *Costa*ⁿ⁹¹ provides one of the few analyses of mixed-motive theory in Title VII discrimination cases. A claim is considered a mixed-motive case if a plaintiff is able to show direct evidence of discrimination--that is, that the employer "knowingly [gave] substantial weight to an impermissible criterion," even if that criterion is only one of the factors considered.^{n91.1} The court may then analyze the claim under the *Price Waterhouse* framework, which requires the employer to prove "by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's [protected characteristic] into account."^{n91.2} The principal value of *Costa* is its discussion of the quantum of evidence a plaintiff must offer to prove that his or her protected status was a "motivating factor"^{n91.3} in an adverse employment action and thereby take advantage of the *Price Waterhouse* analysis. The court held that anecdotal evidence simply demonstrating disparate treatment in the application of disciplinary standards and working conditions is not sufficient. Thus, in *Costa*, a female supervisor's use of the term "bitch" did not constitute direct evidence of discrimination, based on evidence that there was personal animosity between the plaintiff and the female supervisor and that the supervisor's aggressive management style offended other warehouse employees, both male and female. A plaintiff must offer something more--evidence directly reflecting the alleged discriminatory animus. *Commentary by Kirby Wilcox.*

The Civil Rights Act of 1991 provides that if the employer can demonstrate that it would have taken the same action in the absence of the impermissible motivating factor, the court may grant only declaratory relief, injunctive relief (other than hiring, admission, promotion, or reinstatement), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under Title 42 *United States Code Section 2000e-2(m)*.^{n91.4} The court may not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment of back pay.^{n91.5}

FEHA actions can be mixed-motive cases.ⁿ⁹² For example, in *Harris v. City of Santa Monica*,^{n92.1} although the trial court erred in refusing to give the jury the mixed-motive instruction requested by the employer,^{n92.2} the court did not err in refusing to grant the employer judgment notwithstanding the jury verdict in favor of the employee, because there was substantial evidence to support the verdict.^{n92.3} The lack of a form instruction for a mixed motive defense in the Judicial Council's California Civil Jury Instructions (CACI) does not undermine the viability of the defense; instead it is a likely recognition by the drafters of CACI that the law involving the mixed-motive defense is not stable and clear, but instead arguably in flux.^{n92.4}

For full discussion of remedies for violations of Title VII, *see* Chapter 43, Part B.

[e] Fair Employment and Housing Commission Test

Although some California courts have used the test in *McDonnell Douglas Corp. v. Green* ⁿ⁹³ in litigation under the FEHA,ⁿ⁹⁴ the Fair Employment and Housing Commission (FEHC) no longer uses it.ⁿ⁹⁵ Formerly, the FEHC followed a modified version of the *McDonnell Douglas* test, requiring a plaintiff to establish by a preponderance of the evidence that (1) the individual is within the group of people for whose benefit the FEHA was enacted; (2) the individual suffered an adverse employment decision; and (3) a causal connection exists between the individual's protected status and the adverse action.ⁿ⁹⁶

The primary difference between the former FEHC test and the *McDonnell Douglas* test was the FEHC requirement that a plaintiff show a causal connection between his or her protected status and an adverse employment decision.ⁿ⁹⁷ The causal connection was proved (1) by showing an inference of discrimination, as in *McDonnell Douglas*; (2) by showing actual bias against the individual's group; or (3) by other competent evidence.ⁿ⁹⁸ Thus, the *McDonnell Douglas* test was just one way of raising an inference of discrimination.ⁿ⁹⁹

It now appears, however, that the FEHC will not rely on *McDonnell Douglas* at all for administrative proceedings under the FEHA. In *Department of Fair Employment and Housing v. Church's Fried Chicken*, ⁿ¹⁰⁰ the FEHC rejected the *McDonnell Douglas* framework and held that discrimination is established if a preponderance of *all the evidence* demonstrates a causal connection between an individual's protected status and adverse employer action; it need not be shown that such status was the sole or even the dominant cause of adverse treatment.ⁿ¹⁰¹

The FEHC criticized the *McDonnell Douglas* framework as "unnecessary and artificial" because FEHC procedural and evidentiary requirements differ from those that apply to FEHA litigation. The FEHC explained that the prima facie step may produce unfair results by forcing a plaintiff to prove the elements of a specific formula, failure of any one of which would be fatal.ⁿ¹⁰² The FEHC also explained that the pretext stage requires the plaintiff to show that an employer's nondiscriminatory reason played *no* role in an adverse action; however, because employers take adverse employment actions for multiple reasons, both discriminatory and nondiscriminatory, such a showing may be difficult to make.ⁿ¹⁰³ The FEHC therefore reduced its own test to simply "whether a preponderance of *all the evidence* demonstrates that an adverse employment action was caused[,] at least in part[,] by a discriminatory motive."ⁿ¹⁰⁴ The Ninth Circuit has held that the *Church's* test is not the appropriate standard for California courts and that the *Church's* standard is limited to cases before the FEHC.ⁿ¹⁰⁵

■ PRACTICE TIP:

The approach of the FEHC is consistent with the *McDonnell Douglas* decision itself, in which the Court noted that the *McDonnell Douglas* evidentiary standards were characterized as not exclusive, and that other evidentiary methods could be used when circumstances required. *Commentary by Bill Lann Lee*.

[2] Class-Wide or "Pattern or Practice" Discrimination Claims

[a] Generally

"Pattern or practice" claims involve circumstances in which "discrimination [is] the [employer's] standard operating procedure--the regular rather than the unusual practice."ⁿ¹⁰⁶ Such claims involve class-wide discrimination because they involve an allegation that an employer's actions constitute a pattern of conduct in which the employer has intentionally discriminated against the plaintiff's protected class.ⁿ¹⁰⁷ Intent to discriminate may be inferred from a statistical showing of disparity between protected class members and comparably qualified members of the majority group.ⁿ¹⁰⁸

"Pattern or practice" claims may be brought by private plaintiffs as a class action,ⁿ¹⁰⁹ or by the EEOC if it has reasonable cause to believe that there is a "pattern or practice of resistance to the full enjoyment of any of the rights secured" by Title VII.ⁿ¹¹⁰ Most courts characterize "pattern or practice" claims as a type of disparate treatment claim because the ultimate issue is whether intentional discrimination existed,ⁿ¹¹¹ but they also have similarities to actions based on disparate impact.ⁿ¹¹² In fact, plaintiffs in "pattern or practice" actions typically assert both disparate treatment and disparate impact claims.ⁿ¹¹³ Although the allocations of proof differ in disparate treatment and disparate impact claims,ⁿ¹¹⁴ "pattern or practice" claims create "an important point of convergence" between the two theories.ⁿ¹¹⁵ Both "pattern or practice" and disparate impact analyses attack employment practices that have a systematic adverse effect on members of a protected class,ⁿ¹¹⁶ and both claims involve a showing of disparity between the minority and majority groups in an employer's workforce.ⁿ¹¹⁷ For a detailed discussion relating to disparate impact actions, *see* §§ 41.21 and 41.22.

[b] Prima Facie Proof

The prima facie case in *McDonnell Douglas Corp. v. Green*,ⁿ¹¹⁸ which expressly applies to "private, non-class-action[s],"ⁿ¹¹⁹ is not appropriate in "pattern or practice" actions. In *Teamsters v. United States*,ⁿ¹²⁰ a leading "pattern or practice" case, the United States Supreme Court rejected an employer's assertion that the *McDonnell Douglas* test must always be used.ⁿ¹²¹ The Court observed that *McDonnell Douglas* did not purport to create an inflexible formulation.ⁿ¹²² It noted that "[t]he facts necessarily will vary in Title VII cases, and the specification [in *McDonnell Douglas*] of the prima facie proof required ... is not necessarily applicable in every respect to differing factual situations."ⁿ¹²³

The *Teamsters* Court stressed that the importance of *McDonnell Douglas* is not in its specification of discrete elements of proof, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference of illegal discrimination.ⁿ¹²⁴ The plaintiff's initial burden in "pattern or practice" actions is to demonstrate, by a preponderance of the evidence, a regular procedure or policy of unlawful discrimination.ⁿ¹²⁵ This may be done by showing a disparity between the position of members of a protected class and the position of comparably qualified majority group members.ⁿ¹²⁶ It is not necessary to show that each person in the plaintiff class was a victim of the employer's discriminatory policy, as it would be if the *McDonnell Douglas* elements were applied.ⁿ¹²⁷ Rather, the existence of a discriminatory hiring pattern and practice establishes a prima facie case of discrimination against individual class members.ⁿ¹²⁸

Evidence of disparity in "pattern or practice" actions often turns on statistical evidence comparing the representation of a protected class in an employer's workforce with its representation in the general population.ⁿ¹²⁹ Such evidence is an important source of proof in "pattern or practice" actions,ⁿ¹³⁰ and when "gross statistical disparities can be shown, they

alone may in a proper case constitute prima facie proof of a pattern of [sic] practice of discrimination."¹³¹ More often than not, however, statistical evidence is bolstered with anecdotal evidence relating specific instances of discrimination. Testimony regarding personal experiences tends to bring the "cold numbers convincingly to life."¹³² For a discussion relating to the use of statistical data in disparate impact cases, *see* § 41.21[3].

[c] Rebuttal of Prima Facie Proof

If the plaintiff establishes a prima facie case in a pattern or practice action,¹³³ the burden shifts to the employer to rebut the showing.¹³⁴ The rebuttal must be designed to meet the plaintiff's prima facie case,¹³⁵ and accordingly the sequential pattern of proof in *McDonnell Douglas Corp. v. Green* ¹³⁶ (i.e., employee prima facie case, employer rebuttal, employee proof of pretext), is ill-suited to "pattern or practice" actions. In *Vuyanich v. Republic Nat. Bank of Dallas*, ¹³⁷ one federal district court declared that in complex class actions using statistical proof and counterproof, the *McDonnell Douglas* sequence is "about as relevant as a minuet is to a thermonuclear battle."¹³⁸ The court explained that the *McDonnell Douglas* sequence "contemplates an initial thrust by a plaintiff, a parry by a defendant, followed by a traditional fight with the burden on the challenger."¹³⁹ The sequence is appropriate when a plaintiff "has only the evidentiary strength for the first thrust or is unable to anticipate the nature of the parry."¹⁴⁰ However, the sequence "works poorly, if at all, when a plaintiff class loads overwhelming force into its opening shot."¹⁴¹

In an exhaustive analysis in *Segar v. Smith*, ¹⁴² the Court of Appeals for the District of Columbia identified and explained two paths that an employer rebuttal may follow in "pattern or practice" actions. First, an employer may demonstrate that the plaintiff's proof is either inaccurate or statistically insignificant.¹⁴³ Thus, an employer may show that an alleged disparity does not exist, or may challenge the integrity of the plaintiff's statistical data and the significance of the results shown. The employer may use alternative statistical analyses to refute the plaintiff's evidence.¹⁴⁴ The employer's proof must at least raise a genuine issue of material fact concerning the accuracy of the plaintiff's proof,¹⁴⁵ but its burden does not end there. The evidence must cast sufficient doubt on the plaintiff's proof to cause the trier of fact to conclude that the plaintiff has not proved discrimination by a preponderance of the evidence.¹⁴⁶

It is usually not enough, however, to merely point to possible flaws in the plaintiff's statistics, such as the omission of various factors in an employment decision.¹⁴⁷ Although some factors, such as differences in education, work experience, or job level, may be so essential that their omission may defeat a statistical inference of discrimination,¹⁴⁸ a defendant will generally not succeed by simply alleging that some factors were omitted without showing that had they been included, they would have eliminated disparities established by the statistics.¹⁴⁹ For example, in one Title VII sex discrimination case, the Ninth Circuit Court of Appeals held that the defendant did not rebut a statistical inference of discrimination by simply contending that the analyses did not "adequately account for differences in job interest among men and women."¹⁵⁰

Second, the employer may attempt to provide a nondiscriminatory explanation for an apparently discriminatory result.¹⁵¹ The strength of the evidence sufficient to meet the employer's burden of explanation is much higher than the strength of the evidence sufficient in individual actions.¹⁵² As discussed in [b], above, the plaintiff will typically use statistical evidence showing pervasive disparities and eliminating most, if not all, potential nondiscriminatory explanations.¹⁵³ The employer does not have the burden of persuasion on rebuttal, but its explanation must cast sufficient doubt on the plaintiff's proof to permit the trier of fact to decline to draw an inference of discrimination.¹⁵⁴ A "bare articulation of a legitimate nondiscriminatory explanation," although sufficient to rebut individual claims of disparate treatment,¹⁵⁵ is not enough in "pattern or practice" actions.¹⁵⁶

[d] Proving Pretext

At least one court has suggested that the sequence of proof in "pattern or practice" actions effectively collapses the prima facie and pretext stages of individual disparate treatment actions.¹⁵⁷ As discussed in [1][c], above, the *ultimate*

burden of persuasion remains at all times with the plaintiff,ⁿ¹⁵⁸ notwithstanding any sequence of proof. In "pattern or practice" actions, the plaintiff's initial proof of discrimination may be sufficient to meet that ultimate burden if the employer's rebuttal attempts are inadequate.ⁿ¹⁵⁹ Thus, in *Teamsters v. United States*,ⁿ¹⁶⁰ the United States Supreme Court declared that if an employer's rebuttal fails, a trial court may conclude that a violation has occurred "[w]ithout any further evidence from the [g]overnment."ⁿ¹⁶¹ However, this does not necessarily *require* a plaintiff to rely on its initial proof. The plaintiff is free to--and if the employer's rebuttal is sufficiently strong may have to--introduce evidence to discredit the rebuttal.ⁿ¹⁶²

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

A pattern or practice disparate treatment case usually can be presented with a disparate impact case. Because the prima facie case in either analysis is similar, if not identical, plaintiff does not need to prepare substantially more evidence using both theories. *Commentary by Bill Lann Lee.*

Evidence that the employer's claimed reason is false, such as that it conflicts with other evidence, or appears to have been contrived after the fact, will tend to suggest that the employer seeks to conceal the real reason for its actions, and this in turn may support an inference that the real reason was unlawful. This does not mean that the fact finder can examine the employer's stated reasons and impose liability solely because they are found wanting. But it can take account of manifest weaknesses in the cited reasons in considering whether those reasons constituted the real motive for the employer's actions, or have instead been asserted to mask a more sinister reality.ⁿ¹⁶³

Legal Topics:

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

Labor & Employment Law Discrimination Actionable Discrimination Labor & Employment Law Discrimination Disparate Treatment Proof General Overview Labor & Employment Law Discrimination Disparate Treatment Proof Circumstantial & Direct Evidence

FOOTNOTES:

(n1)Footnote 1. 1991 Congressional legislation, Pub. L. No. 104-66, 105 Stat. 1071 overruled *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1488, *ret'd to panel*, 827 F.2d 439, *rev'd on other grounds*, 490 U.S. 642 (1989); *Estate of Reynolds v. Martin* (9th Cir. 1993) 985 F.2d 470; *Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 335-336, & n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII; proof of discriminatory motive is critical); *Mixon v. Fair Employment & Hous. Comm'n.* (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884 (FEHA); *Foster v. Arcata Assocs., Inc.* (9th Cir. 1985) 772 F.2d 1453, 1460 (proof varies considerably according to the situation). See *Enlow v. Salem-Keizer Yellow Cab Co.* (9th Cir. 2004) 371 F.3d 645, 651-653 (taxi cab company presented sufficient evidence to demonstrate that its temporary discharge of 73-year-old driver was without discriminatory intent and was solely to avoid losing its business license based on fact all of its employees were not covered by automobile liability insurance; driver failed to present evidence that cab company acted pursuant to explicit facially discriminatory company practice to fire taxi cab drivers over seventy years of age, where company demonstrated its intent to protect his employment rights by successfully obtaining temporary employment for him with another cab company and obtaining insurance company's tentative agreement to waive age-based exclusion of coverage if driver would submit to physical examination and offered to reemploy him, both of which he rejected, presenting genuine issue of material fact regarding whether company could demonstrate at trial that its employment decision fell within exception to ADEA for bona fide occupational qualification or where differentiation based on reasonable factors other than age); *Frank v. County of Los Angeles* (2007) 149 Cal. App. 4th 805, 57 Cal. Rptr. 3d 430, 2007 Cal. App. LEXIS 530, *34-*59 (FEHA; in action by county police officers alleging race discrimination based on disparities with pay received by sheriff's deputies, there was no evidence from which jury could reasonably infer county police officers were paid less than sheriff's deputies because of intentional racial discrimination; although county was aware that majority of county police officers were members of racial minority while majority of deputies were Caucasian, there was no evidence to indicate county was aware that gross disparities in wages and benefits between county police and

sheriff's deputies were associated with race; salary surveys showed that all county police were underpaid whatever their race; evidence of pay disparity between county police officers and sheriff's deputies did not demonstrate requisite racial animus because conclusion that duties of sheriff's deputies and county police officers were comparable was not supported by reliable statistical evidence; there was no evidence sheriff's department personnel disparaged county police on basis of race; and there was no evidence county did not follow its own procedures in determining classification and salary).

(n2)Footnote 2. *AFSCME v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1405 (Title VII); see *Teamsters v. United States* (1977) 431 U.S. 324, 335-336 & n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (disparate treatment occurs when employer treats some employees less favorably than others "because of" membership in protected class); cf. *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (equal protection claim of sex discrimination in civil service hiring requires more onerous proof of intent than Title VII claim of disparate treatment); *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475 (proof of employer's sexual harassment of other female employees admissible).

(n3)Footnote 3. See *Int'l Union, United Auto., etc. v. Johnson Controls* (1991) 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158, 173 (Title VII; defendant's asserted reason for sex-based exclusion from hazardous jobs was to protect women's unconceived offspring).

(n4)Footnote 4. *AFSCME v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1405, rehearing granted followed by settlement prior to rehearing.

(n5)Footnote 5. See 42 U.S.C. § 12101 et seq.; 29 C.F.R. § 1630.15(a).

(n6)Footnote 6. See 29 U.S.C. § 626(b).

(n7)Footnote 7. *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523.

(n8)Footnote 8. *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 126, 105 S. Ct. 613, 83 L. Ed. 2d 523 (emphasis added).

(n9)Footnote 9. See *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 127, 105 S. Ct. 613, 83 L. Ed. 2d 523.

(n10)Footnote 10. See also *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 350-351 (upholding and reiterating *Thurston* standard).

(n11)Footnote 10.1. *Lam v. University of Hawaii* (9th Cir. 1998) 164 F.3d 1186, 1188 (court considered itself bound by law of case; previous decision did not limit evidence to comments made during final stages of hiring process).

(n12)Footnote 10.2. *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 640 (plaintiff offered no direct evidence of discriminatory intent, where he offered evidence of remarks by coworker, not decisionmaker, and no evidence of discriminatory remarks by decisionmaker, and failed to show nexus between discriminatory remarks and subsequent employment decisions, because decisionmaker conducted her own thorough investigation and plaintiff presented no evidence that discriminatory animus motivated decision; to extent coworker's remarks and decisionmaker's knowledge of prior conflicts between coworkers constituted circumstantial evidence of discriminatory intent, evidence was insufficient to make out prima facie case).

(n13)Footnote 10.3. *Ash v. Tyson Foods, Inc.* (2006) 126 S. Ct. 1195, 163 L. Ed. 2d 1053.

(n14)Footnote 10.4. *Ash v. Tyson Foods, Inc.* (2006) 126 S. Ct. 1195, 1197, 163 L. Ed. 2d 1053.

(n15)Footnote 10.5. See *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal. App. 4th 1735, 1756, 52 Cal.

Rptr. 2d 620 .

(n16)Footnote 10.6. *Cordova v. State Farm Ins. Companies* (9th Cir. 1997) 124 F.3d 1145, 1149 ; *Harvey v. Sybase, Inc.* (2008) 161 Cal. App. 4th 1547, 76 Cal. Rptr. 3d 54, 2008 Cal. App. LEXIS 580, *20-*21 (number of statements demonstrating discriminatory animus in termination of plaintiff's employment supported jury verdict in favor of plaintiff, including remark by senior manager to chief operating officer that chief operating officer relayed to employee who terminated plaintiff, and which chief operating officer understood to mean that plaintiff's department had "diversity problems," as well as comments by employee who terminated plaintiff that she understood remark to her as directive to increase proportion of White males in department and discharge was designed to help accomplish this goal). See *Chuang v. University of California Davis* (9th Cir. 2000) 225 F.3d 1115, 1128 ; *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1221 .

(n17)Footnote 10.7. See *Coghlan v. American Seafoods Co. LLC* (9th Cir. 2005) 413 F.3d 1090, 1096-1100 ; *Bradley v. Harcourt, Brace & Co.*, (9th Cir. 1996) 104 F.3d 267, 270-271 . See also *Hartsel v. Keys* (9th Cir. 1996) 87 F.3d 795, 804 n.9 (applying same-actor inference where decision-maker had not hired plaintiff, but had previously promoted her). For discussion of the "same actor" inference under Title VII, see [d], below.

(n18)Footnote 10.8. *Harvey v. Sybase, Inc.* (2008) 161 Cal. App. 4th 1547, 76 Cal. Rptr. 3d 54, 2008 Cal. App. LEXIS 580, *21-*27 .

(n19)Footnote 10.9. *Harvey v. Sybase, Inc.* (2008) 161 Cal. App. 4th 1547, 76 Cal. Rptr. 3d 54, 2008 Cal. App. LEXIS 580, *24-*25 .

(n20)Footnote 10.10. *Harvey v. Sybase, Inc.* (2008) 161 Cal. App. 4th 1547, 76 Cal. Rptr. 3d 54, 2008 Cal. App. LEXIS 580, *25-*26 . See also *West v. Bechtel Corp.* (2002) 96 Cal. App. 4th 966, 980, 117 Cal. Rptr. 2d 647 .

(n21)Footnote 11. See *Chuang v. University of California Davis* (9th Cir. 2000) 225 F.3d 1115, 1128-1129 (direct evidence of pretext need not be specific and substantial; bigoted insults by persons in positions to make hiring and firing decisions is sufficient); *Rosenfeld v. Southern Pacific Co.* (9th Cir. 1971) 444 F.2d 1219, 1223 (Title VII; woman denied employment assignment on ground that women, considered generically, are not physically or biologically suited for assignment); cf. *Fragante v. City and County of Honolulu* (9th Cir. 1989) 888 F.2d 591, 595-596 (Title VII; assuming without deciding that plaintiff established prima facie case of discrimination with direct evidence that he was not hired because of his accent).

(n22)Footnote 12. See *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (age-based disqualification of airline captains as violating ADEA).

(n23)Footnote 12.1. *Enlow v. Salem-Keizer Yellow Cab. Co.* (9th Cir. 2004) 371 F.3d 645, 649-651 .

(n24)Footnote 12.2. *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 662 (more favorable treatment of white employees was *circumstantial*, not *direct* evidence). See also *Fonseca v. Sysco Food Services of Arizona, Inc.* (9th Cir. 2004) 374 F.3d 840, 848-849 (evidence of the following was sufficient to establish prima facie case: that supervisor pretended not to understand and mocked Hispanic employee's accent within one month of two incidents of disparate treatment, *i.e.*, discriminatory suspension and passing over employee for overtime opportunity in favor of white employee and refusing to pay employee even though supervisor had immediately arranged to compensate two white employees who came to him with exact same complaint one week earlier, and another supervisor's comment about accent similarly related to allegedly discriminatory treatment because earlier in same year supervisor disparaged accent and supervisor was most likely supervisor who skipped employee on seniority list and gave overtime to white employee instead and supervisor skipped employee again later that year).

(n25)Footnote 12.3. See, *e.g.*, *EEOC v. Boeing Co.* (9th Cir. 2009) 577 F.3d 1044, 1050 (frequent demeaning and derogatory comments by supervisor about women, along with supervisor's interactions with female employee over

course of her employment, were sufficient to create inference of discriminatory motive even though comments were not directed specifically at employee or made in regard to decisions about her employment, because comments are more severe than ambivalent stray remarks, and sufficient to establish prima facie case).

(n26)Footnote 13. See *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 662 ("particularly because employers now know better, direct evidence of employment discrimination is rare"); *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884 (FEHA, to allocate the burden and order of presentation of proof to achieve a fair determination of the elusive factual question of intentional discrimination, citing *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 259-260, 101 S. Ct. 1089, 67 L. Ed. 2d 207).

(n27)Footnote 14. See *U.S. Postal Service Bd. of Govs. v. Aikens* (1983) 460 U.S. 711, 714, n.3, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (Title VII; plaintiff entitled to prove case by direct or circumstantial evidence); *Cucuzza v. City of Santa Clara* (2002) 104 Cal. App. 4th 1031, 1038, 128 Cal. Rptr. 2d 660 (proof of employer's reasons for adverse action often depends on inferences rather than direct evidence; material, triable controversy not established if inference not reasonable, and inference is reasonable only if it implies unlawful motive was more likely than employer's proffered explanation); *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 199-202, 48 Cal. Rptr. 2d 448 ("[W]e offer this advice to those practicing employment law. If you hope to prevail in your discrimination claim, or choose to defend an employment discrimination case, solely on the basis of the other party's failure to satisfy one of the elements of *McDonnell Douglas's* intermediate burdens (that is, the plaintiff's prima facie case or the defendant's legitimate nondiscriminatory reasons), you must seek a determination from the trial court, by means of any of the vehicles at a litigant's disposal, that you are entitled to judgment as a matter of law. If you do not do so, and the case is submitted to the trier of fact, the intermediate burdens set forth in *McDonnell Douglas* will fall away, and the fact finder will have only to decide the ultimate issue of whether the employer's discriminatory intent was a motivating factor in the adverse employment decision.").

(n28)Footnote 15. See, e.g., *Leong v. Potter* (9th Cir. 2003) 347 F.3d 1117, 1124 (Title VII; terminated Postal Service employee failed to provide evidence that similarly situated employees were treated more favorably by not being terminated, because, although other employees committed serious violations involving obscenity and/or physical abuse, terminated employee was subject to "Last Chance Agreement" negotiated as alternative to termination after earlier, serious violations of Postal Service rules and comparators were not, and because none had amassed record of misconduct comparable to terminated employee's); *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 663 (mere fact that three of the four individuals laid off were white does not require conclusion that employer discriminated on basis of race; to establish discrimination, court would have had to infer that "race played invidious role in decision"); *Slack v. Havens* (9th Cir. 1975) 522 F.2d 1091, 1095 (trial court finding of discrimination reasonable when black employees were fired for refusing to do work from which similarly-situated white employee was excused).

(n29)Footnote 16. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n30)Footnote 17. See *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523, 533 (ADEA; test simply designed to assure that plaintiff has day in court despite unavailability of direct evidence); Larson, Employment Discrimination, ch. 10, § 50.10 (Matthew Bender); see also *Norris v. City and County of San Francisco* (9th Cir. 1990) 900 F.2d 1326, 1329, 1332 (Title VII; vacating and remanding because district court's findings did not specifically address burden and allocation of proof set forth in *McDonnell Douglas* and *Texas Dept. of Community Affairs v. Burdine* and therefore court could not determine whether district court properly applied law to facts).

(n31)Footnote 18. *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523, 533 (ADEA) ; see *Schnidrig v. Columbia Machine, Inc.* (9th Cir. 1996) 80 F.3d 1406, 1409-1410 (prima facie case established by direct evidence of discriminatory motives in the form of statements and notes); *Lowe v. Monrovia* (9th

Cir. 1985) 775 F.2d 998, 1006-1007, amended 784 F.2d 1407 (1986) (prima facie case of disparate treatment established by direct evidence without satisfying *McDonnell Douglas* test).

(n32)Footnote 18.1. See *Schnidrig v. Columbia Machine, Inc.* (9th Cir. 1996) 80 F.3d 1406, 1410 .

(n33)Footnote 18.2. See *Costa v. Desert Palace, Inc.* (9th Cir. 2002) 299 F.3d 838, 855-856 (question of whether to invoke *McDonnell Douglas* presumption involves summary judgment rather than jury instructions and is unrelated to number of possible motives for challenged action); *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal. App. 4th 1735, 1758-1759, 52 Cal. Rptr. 2d 620 ; *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 199-202, 48 Cal. Rptr. 2d 448 .

(n34)Footnote 18.3. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1122 (Title VII) . See *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 640 (Title VII; for prima facie case, plaintiff must offer evidence giving rise to inference of unlawful discrimination either through *McDonnell Douglas* framework or with direct or circumstantial evidence of discriminatory intent).

(n35)Footnote 18.4. *Cornwell v. Electra Cent. Credit Union* (9th Cir. 2006) 439 F.3d 1018, 1027-1036 (employee's evidence of race discrimination was sufficient to create genuine issue of material fact regarding motives for his demotion under either *Godwin* standard, which would require "specific" and "substantial" circumstantial evidence of pretext, or *McGinest* standard, which would not, where employee offered circumstantial evidence from which reasonable jury could conclude that employer demoted him because he is African-American, and where employee offered "specific" and "substantial" evidence that employer's explanation for demotion was pretext for race discrimination; however, employee did not produce evidence sufficient to create genuine issue of material fact of whether employer fired him because he is African-American or that employer illegally retaliated against him). See *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 100, 123 S. Ct. 2148, 156 L. Ed. 2d 84 ; *McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1124 .

(n36)Footnote 19. See *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 252-253, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII) ; *Sischo-Nownejad v. Merced Community College Dist.* (9th Cir. 1991) 934 F.2d 1104, 1113 (the amount of evidence that must be produced in order to create a prima facie case is very little); *Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1406 ; (reh'g granted followed by settlement prior to reh'g).

(n37)Footnote 20. See *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 659 (Title VII; race discrimination); *Diaz v. American Tel. & Tel.* (9th Cir. 1985) 752 F.2d 1356, 1359 (Title VII; national origin discrimination); *Sutton v. Atlantic Richfield Co.* (9th Cir. 1981) 646 F.2d 407, 411 (ADEA; age discrimination); *Blizard v. Fielding* (1st Cir. 1978) 572 F.2d 13, 15 (Title VII; sex discrimination); *Chavez v. Tempe U. High Sch. Dist. No. 213* (9th Cir. 1977) 565 F.2d 1087, 1091 (Title VII; national origin discrimination); see also *Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1406 (reh'g granted followed by settlement prior to reh'g) (Title VII; sex discrimination); but see *Robinson v. Adams* (9th Cir. 1987) 830 F.2d 128, 129 (Title VII; employer must know that job applicant is member of protected class; thus, "[a]n employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant's race").

(n38)Footnote 20.1. See *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, 1113-1115 (failure to produce evidence of qualification will typically prevent plaintiff from satisfying either second or the fourth prong of *McDonnell Douglas* test, but plaintiffs presented sufficient circumstantial evidence from which trier of fact could reasonably infer they possessed minimum qualifications for positions sought).

(n39)Footnote 20.2. See, e.g., *Davis v. Team Electric Co.* (9th Cir. 2008) 520 F.3d 1080, 2008 U.S. App. LEXIS 6476, *15-*19 (female electrician established adverse employment action sufficient for prima facie case, where employer did not deny that in aggregate she was given disproportionate amount of dangerous and strenuous work

compared to male co-workers, and where she alleged that all of her male co-workers on site were invited to meetings from which she was excluded; that even after she was allowed to attend meetings, she was, unlike male employees, prohibited from entering trailer to take breaks, or to talk with project superintendent about work matters; and that she was sometimes ignored by supervisors when she would attempt to communicate with them via radio; employer's conduct was not mere ostracism, because there was evidence that restriction prevented her from discussing work matters with her supervisor and her ability to work was similarly hampered by alleged fact she was sometimes ignored by supervisors when she called in over radio; however, allegations she was given inferior quality vest, gloves, and other equipment did not establish adverse employment actions, where she provided no evidence vest and gloves affected her work conditions or that other workers were given better equipment); *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 660 ("being laid off from one's position certainly constitutes adverse employment action").

(n40)Footnote 21. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668. See, e.g., *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 660 (in context of layoff, plaintiff need not show he or she was replaced by member of different race, but must show that layoff occurred under circumstances giving rise to inference of discrimination, such as employer's continuing need for plaintiff's skills and services demonstrated by continued performance of plaintiff's various duties or showing of more favorable treatment of others not in plaintiff's protected class).

(n41)Footnote 21.1. *Risetto v. Plumbers and Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 601, 605-606.

(n42)Footnote 22. See *Warren v. City of Carlsbad* (9th Cir. 1995) 58 F.3d 439, 442.

(n43)Footnote 22.1. See *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal. App. 4th 1735, 1754, 52 Cal. Rptr. 2d 620.

(n44)Footnote 22.2. *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, 1118 (mediocre evaluations without any meaningful change in work assignments, in form of either relieving plaintiff of responsibilities or saddling him with additional burdensome tasks, did not constitute adverse employment action); *Hammond v. County of Los Angeles* (2008) 160 Cal. App. 4th 1579, 1599 (FEHA; substantially reducing or eliminating nursing instructor's classroom teaching assignments was adverse employment action, where it impaired her ability to perform job for which she was hired and relegated her to some undefined, but lesser, status other than that of full-time classroom instructor). Cf. *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 126 S. Ct. 2405, 165 L. Ed. 2d 345 (scope of anti-retaliation provision of Title VII extends beyond workplace-related or employment-related retaliatory acts and harm, so employee need only allege and prove "adverse action" rather than "adverse employment action" under Title VII's anti-retaliation provision), discussed at § 41.130[1A], below.

(n45)Footnote 22.3. *Fonseca v. Sysco Food Services of Arizona, Inc.* (9th Cir. 2004) 374 F.3d 840, 847; *Ray v. Henderson* (9th Cir. 2000) 217 F.3d 1234, 1241; see also *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 928 (collecting cases).

(n46)Footnote 22.4. *Fonseca v. Sysco Food Services of Arizona, Inc.* (9th Cir. 2004) 374 F.3d 840, 847-848 (Hispanic employee presented sufficient evidence of adverse employment action to overcome employer's summary judgment motion, where in less than one year period, there were between ten and thirteen times when supervisor called at least one white employee to work overtime that should have been assigned to Hispanic employee, because he had seniority and there was evidence of only one occasion on which white employees were similarly passed over; where, when white employee was passed over, supervisor immediately arranged for white employees to be paid, but when Hispanic employee was wrongly denied overtime opportunity, employee had to file grievance and was never paid for successful grievances within 48 hours as required by CBA, while white employees were routinely compensated in next paychecks); *Little v. Windermere Relocation, Inc.* (9th Cir. 2004) 301 F.3d 958, 970 (reduction in base monthly pay was adverse employment action even though with commission and bonuses it might have equaled same net pay); cf. *University of Hawai'i Prof'l Assembly v. Cayetano* (9th Cir. 1999) 183 F.3d 1096, 1105-1106 (receiving pay even

couple of days late can seriously affect employee's financial situation and constitutes substantial impairment under federal constitutional contracts clause).

(n47)Footnote 22.5. *Fonseca v. Sysco Food Services of Arizona, Inc.* (9th Cir. 2004) 374 F.3d 840, 848 (warning letter issued to Hispanic employee accidentally dropping pallet of food someone else improperly loaded was evidence of adverse employment action, where employer publicized all discipline to all employees, and at least two white employees caused similar or worse damage to warehouse goods, but did not receive any sort of discipline); *Yartzoff v. Thomas* (9th Cir. 1987) 809 F.2d 1371, 1376 (transfers of job duties and undeserved performance ratings, if proven, would constitute adverse employment decisions).

(n48)Footnote 23. *Warren v. City of Carlsbad* (9th Cir. 1995) 58 F.3d 439 .

(n49)Footnote 24. *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 890 .

(n50)Footnote 25. *Lindahl v. Air France* (9th Cir. 1991) 930 F.2d 1434, 1437 .

(n51)Footnote 26. *See Diaz v. American Tel. & Tel.* (9th Cir. 1985) 752 F.2d 1356, 1359, 1361 (Title VII) ; *see also Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1420 & n.1 (ADEA; burden of establishing prima facie case only requires production of evidence that "suggests" that employment decision was based on age); *but see Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703, 705 (ADEA; statistical evidence was insufficient to connect termination with pattern of discrimination, and allegedly discriminatory comments were not sufficiently tied to termination to create inference of discrimination); *Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal. App. 3d 517, 545, 267 Cal. Rptr. 158 (FEHA; refusing to adopt analysis that holds that "overt, facial discrimination" creates only a presumption of discrimination).

(n52)Footnote 27. *See, e.g., Coghlan v. American Seafoods Co. LLC* (9th Cir. 2005) 413 F.3d 1090, 1094 (requisite degree of proof necessary to establish prima facie case on summary judgment is minimal and does not even need to rise to level of preponderance of evidence; fisherman who belonged to protected class of non-Norwegian-born workers, presented evidence to meet burden, where he had previously served as master of two of employer's vessels and was offered important position of mate on another vessel, he was twice not appointed as relief master of vessel, he was removed as mate of vessel and was not appointed master of another vessel, and people chosen instead were Norwegian-born and outside protected class); *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 659-660 (white plaintiff presented enough evidence to establish prima facie case of racial discrimination, and district court erred in granting summary judgment to employer at prima facie stage of burden-shifting analysis); *Chuang v. University of California Davis* (9th Cir. 2000) 225 F.3d 1115, 1124 (record supports finding of illegal discrimination and warrants resolution by trial); *Cordova v. State Farm Ins. Cos.* (9th Cir. 1997) 124 F.3d 1145, 1148-1150 (requisite degree of proof to establish prima facie case for Title VII on summary judgment is minimal and does not need to rise to level of preponderance of evidence); *Messick v. Horizon Industries Inc.* (9th Cir. 1995) 62 F.3d 1227, 1229 ; *Warren v. City of Carlsbad* (9th Cir. 1995) 58 F.3d 439, 442 ; *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 889 ; *Schmidrig v. Columbia Mach., Inc.* (9th Cir. 1996) 80 F.3d 1406, 1410 ; *but see Ritter v. Hughes Aircraft Co.* (9th Cir. 1995) 58 F.3d 454, 457 (vagueness of evidence did not support prima facie case); *Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703, 705 (ADEA; statistical evidence was insufficient to connect termination with pattern of discrimination, and allegedly discriminatory comments were not sufficiently tied to termination to create inference of discrimination).

(n53)Footnote 27.1. *Cordova v. State Farm Ins. Cos.* (9th Cir. 1997) 124 F.3d 1145, 1150 quoting *Sischo-Nownejad v. Merced Community College Dist.* (9th Cir. 1991) 934 F.2d 1104, 1111 (emphasis in original); *see also Chuang v. University of California Davis* (9th Cir. 2000) 225 F.3d 1115, 1127 (evidence constituting prima facie case was sufficiently strong to raise genuine issue of material fact).

(n54)Footnote 27.2. *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 660 .

(n55)Footnote 28. *See Diaz v. American Tel. & Tel.* (9th Cir. 1985) 752 F.2d 1356, 1362-1363 (Title VII); *Cook v. Boorstin* (D.C. Cir. 1985) 763 F.2d 1462, 1468 .

(n56)Footnote 29. *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1423 (ADEA); *Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703 ; *Palmer v. United States* (9th Cir. 1986) 794 F.2d 534, 537 .

(n57)Footnote 30. *Diaz v. American Tel. & Tel.* (9th Cir. 1985) 752 F.2d 1356, 1363 (Title VII); *Mangold v. California Public Utils. Comm'n* (9th Cir. 1995) 67 F.3d 1470 .

(n58)Footnote 31. *Diaz v. American Tel. & Tel.* (9th Cir. 1985) 752 F.2d 1356, 1363 (Title VII).

(n59)Footnote 32. *Compare, e.g., Diaz v. American Tel. & Tel.* (9th Cir. 1985) 752 F.2d 1356, 1363 (Title VII; statistical evidence alone as sufficient) with *Gay v. Waiters' and Dairy Lunchmen's Union* (9th Cir. 1982) 694 F.2d 531, 552-553 (Title VII; statistical evidence alone rarely sufficient); *Laborde v. Regents of University of California* (9th Cir. 1982) 686 F.2d 715, 718 (Title VII; statistical evidence relevant, though not necessarily sufficient, in establishing prima facie case).

(n60)Footnote 32.1. *See, e.g., Gibbs v. Consolidated Services* (2003) 111 Cal. App. 4th 794, 801, 4 Cal. Rptr. 3d 187 (that employer terminated only three former employees, all of whom were over 40, had virtually no significance in itself, where given variety of factors involved in termination decisions, statistical sample was too small to support inference of discrimination).

(n61)Footnote 32.2. *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 663 (although three of four casuals singled out for layoff were white, sample size was too small); *Sengupta v. Morrison-Knudsen Co.* (9th Cir. 1986) 804 F.2d 1072, 1075 (fact that four of five employees laid off (out of 28 total) were African American too small sample).

(n62)Footnote 33. *Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 339, 97 S. Ct. 1843, 1856, 52 L. Ed. 2d 396 (statistical data is bolstered by anecdotal data).

(n63)Footnote 34. *Hazelwood School Dist. v. United States* (1977) 433 U.S. 299, 312, 97 S. Ct. 2736, 2744, 53 L. Ed. 2d 768 .

(n64)Footnote 34.1. *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654 .

(n65)Footnote 34.2. *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 663 .

(n66)Footnote 34.3. *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 663 .

(n67)Footnote 35. *Ritter v. Hughes Aircraft Co.* (9th Cir. 1995) 58 F.3d 454, 457 .

(n68)Footnote 36. *Ritter v. Hughes Aircraft Co.* (9th Cir. 1995) 58 F.3d 454, 457 .

(n69)Footnote 37. *Ritter v. Hughes Aircraft Co.* (9th Cir. 1995) 58 F.3d 454 .

(n70)Footnote 38. *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308, 116 S. Ct. 1307, 1309-1310, 134 L. Ed. 2d 433 .

(n71)Footnote 39. *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308, 116 S. Ct. 1307, 1309-1310, 134 L. Ed. 2d 433 .

(n72)Footnote 39.1. *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1002, 67 Cal. Rptr. 2d 483 .

(n73)Footnote 39.2. *See also* *Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 355, 100 Cal. Rptr. 2d 352, 8 P.3d 1089; *Gibbs v. Consolidated Services* (2003) 111 Cal. App. 4th 794, 799, 4 Cal. Rptr. 3d 187 (prima facie case of age discrimination requires evidence plaintiff is over 40, was performing satisfactorily and was discharged under circumstances giving rise to inference of unlawful discrimination, *i.e.*, others not over 40 were retained or plaintiff's job was filled by someone of comparable skill not over 40).

(n74)Footnote 39.3. *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1002-1003, 1006, 67 Cal. Rptr. 2d 483 (replacement employee, although over 40, was seven years younger than plaintiff, which could reasonably be described as significant). *See also* *Gibbs v. Consolidated Services* (2003) 111 Cal. App. 4th 794, 799-801, 4 Cal. Rptr. 3d 187 (although plaintiff was over 40 when he was discharged, there was no evidence giving rise to inference of unlawful age discrimination, where employer had legitimate, nondiscriminatory reason for terminating plaintiff's employment based on restructuring of plaintiff's former position leading to increase in job responsibilities for which plaintiff was not qualified; stray remarks about plaintiff's age did not establish discrimination because opinion that plaintiff was too old to drive played no role in decision to terminate him from position of operations supervisor).

(n75)Footnote 39.4. *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal. App. 4th 1133, 1144-1150, 29 Cal. Rptr. 3d 144 .

(n76)Footnote 39.5. *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal. App. 4th 1133, 1145-1146, 29 Cal. Rptr. 3d 144 .

(n77)Footnote 39.6. *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal. App. 4th 1133, 1146-1150, 29 Cal. Rptr. 3d 144 .

(n78)Footnote 40. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 505-506, 113 S. Ct. 2742, 125 L. Ed. 2d 407; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668; *see* *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 661-662 (seasonal downturn in trash volume and poor job performance leading to layoff constituted legitimate, nondiscriminatory reason for terminating employment); *see also* *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1002, 1006, 67 Cal. Rptr. 2d 483 (if employer fails to offer legitimate non-age based rationale for adverse action, employee prevails).

(n79)Footnote 41. *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 199-202, 48 Cal. Rptr. 2d 448 .

(n80)Footnote 42. *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 201, 48 Cal. Rptr. 2d 448 (citing *Clark v. Claremont University Center* (1992) 6 Cal. App. 4th 639, 662-664, 8 Cal. Rptr. 2d 151).

(n81)Footnote 43. *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 201, 48 Cal. Rptr. 2d 448 (citing *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1319, 237 Cal. Rptr. 884).

(n82)Footnote 44. *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 201, 48 Cal. Rptr. 2d 448 (citing *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 113 S. Ct. 2742, 2749, 125 L. Ed. 2d 407, 418 .

(n83)Footnote 45. *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 202, 48 Cal. Rptr. 2d 448 .

(n84)Footnote 46. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n85)Footnote 47. *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 .

(n86)Footnote 48. *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII) ; see *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1318, 237 Cal. Rptr. 884 (FEHA) .

(n87)Footnote 49. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1003, 67 Cal. Rptr. 2d 483 .

(n88)Footnote 49.1. *King v. United Parcel Service, Inc.* (2007) 152 Cal. App. 4th 426, 432-433, 60 Cal. Rptr. 3d 359 ; *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal. App. 4th 1510, 1518-1519, 27 Cal. Rptr. 3d 826 .

(n89)Footnote 50. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407, 416 ; *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 ; but see *Valdez v. City of Los Angeles* (1991) 231 Cal. App. 3d 1043, 1051, 282 Cal. Rptr. 726 (FEHA; on defendant's motion for summary judgment, as contrasted to trial, defendant cannot rely on plaintiff's failure to produce evidence establishing prima facie case of discrimination; defendant must present evidence negating disparate treatment claim or establishing undisputed legitimate, nondiscriminatory basis for employment action); and *University of Southern California v. Superior Court* (1990) 222 Cal. App. 3d 1028, 1036, 272 Cal. Rptr. 264 (FEHA claim evaluated under federal law interpreting Title VII; although burden ultimately rests with plaintiff, in case of defendant's motion for summary judgment or summary issue adjudication, burden rests with moving party to negate plaintiff's right to prevail on particular issue). See, e.g., *Cucuzza v. City of Santa Clara* (2002) 104 Cal. App. 4th 1031, 1043-1046, 128 Cal. Rptr. 2d 660 (plaintiff did not produce substantial responsive evidence to employer's evidence articulating legitimate business reasons for allegedly adverse actions taken to demonstrate material triable controversy, because employer presented evidence showing that supervisor implemented procedures that reduced frequency with which jobs formerly done by plaintiff needed to be done or reassigned certain duties for purposes of efficiency, and moved plaintiff's work area out of his office because Director of Human Resources had recommended he do so to have privacy for meetings and confidential records; in choosing male over plaintiff for specific position, employer used neutral method of evaluating candidates and chose man over female plaintiff for reasons unrelated to gender).

(n90)Footnote 51. See *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 ; see also *Rodriguez v. General Motors Corp.* (9th Cir. 1990) 904 F.2d 531, 533 (42 U.S.C. § 1981; to "articulate" means to produce evidence, not "to express an argument"); *Hammond v. County of Los Angeles* (2008) 160 Cal. App. 4th 1579, 1600 (FEHA; because employer did not submit evidence of neutral, nondiscriminatory reason for substantially reducing plaintiff's workload, but instead denied that any such substantial reduction took place, it failed to satisfy its burden to show neutral, nondiscriminatory reason under *McDonnell Douglas* test); *Begnal v. Canfield & Associates, Inc.* (2000) 78 Cal. App. 4th 66, 76, 92 Cal. Rptr. 2d 611 (evidence that terminated employee was replaced by older person did not conclusively establish absence of age discrimination, but certainly weighed against inference).

(n91)Footnote 52. See *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 255, 101 S. Ct. 1089, 67 L. Ed. 2d 207 ; see *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 641 (assuming plaintiff could present prima facie case, person making adverse employment decision proffered legitimate, nondiscriminatory reason for her decision to transfer plaintiff to field position and issue warning letter, i.e., plaintiff disobeyed direct order from his supervisor); *Leong v. Potter* (9th Cir. 2003) 347 F.3d 1117, 1124 (Postal Service offered legitimate, nondiscriminatory reason for terminating employee, i.e., that on several occasions employee violated Last Chance Agreement, negotiated as alternative to termination after earlier, serious violations of Postal Service rules); *Villanueva v. City of Colton* (2008) 160 Cal. App. 4th 1188, 1195-1196, 73 Cal. Rptr. 3d 343 (employer provided competent, admissible evidence of legitimate, nondiscriminatory reasons for suspending Hispanic employee after alarm incident and, as result of anticipated multimillion dollar budget shortfall, in eliminating his position as part of its reduction in force, where evidence was uncontroverted that employee was negligent in addressing issues presented by alarm incident, justifying his brief suspension, and where law is settled that employer's depressed economic condition can be good cause for discharging employee); *Hicks v. KNTV Television, Inc.* (2008) 160 Cal. App. 4th 994, 73 Cal. Rptr. 3d 240 (employer presented evidence of nondiscriminatory reason for not renewing contract of white television news

anchor, who was replaced by African-American man, based on his on-air performance, where fact that supervisor's assessment was based on subjective criteria did not by itself demonstrative pretext, there was no discriminatory pattern of hiring minorities to replace white anchors, and there was no evidence of pressure to hire minorities or that defendants' asserted reason for not renewing contract was false; further, plaintiff's cumulative evidence did not raise triable issue of fact as to racial discrimination). *But see Norris v. City and County of San Francisco* (9th Cir. 1990) 900 F.2d 1326, 1329, 1331 (Title VII; employer may not proffer data acquired *after* time adverse decision was made to articulate hypothetical nondiscriminatory reason for decision). The purpose of the employer's articulation of a legitimate nondiscriminatory reason is not only to rebut the plaintiff's prima facie case, but also to "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 255-256, 101 S. Ct. 1089, 67 L. Ed. 2d 207; see also discussion of pretext in [d], *below*.

(n92)Footnote 53. See *University of Southern California v. Superior Court* (1990) 222 Cal. App. 3d 1028, 1036, 272 Cal. Rptr. 264 (defendant's motion for summary adjudication).

(n93)Footnote 54. *E.E.O.C. v. Farmer Bros. Co.* (9th Cir. 1994) 31 F.3d 891, 899-900 .

(n94)Footnote 54.1. *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, 1117 .

(n95)Footnote 54.2. *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092 .

(n96)Footnote 55. See *Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 575-576, 98 S. Ct. 2943, 57 L. Ed. 2d 957 .

(n97)Footnote 56. See *Gonzales v. Police Dep't, City of San Jose* (9th Cir. 1990) 901 F.2d 758, 761-762 (Title VII). An exception may exist if an employer seeks to use post-claim figures to explain the significance or effect of pre-claim data. *Gonzales v. Police Dept., City of San Jose* (9th Cir. 1990) 901 F.2d 758, 762 n.3 (Title VII).

(n98)Footnote 56.1. *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 120 S. Ct. 2097, 2111-2112, 147 L. Ed. 2d 105 .

(n99)Footnote 56.2. *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 120 S. Ct. 2097, 2108, 147 L. Ed. 2d 105 .

(n100)Footnote 56.3. *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 120 S. Ct. 2097, 2108, 147 L. Ed. 2d 105 .

(n101)Footnote 56.4. *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 120 S. Ct. 2097, 2108-2109, 147 L. Ed. 2d 105 .

(n102)Footnote 57. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 .

(n103)Footnote 58. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407, 416-419 .

(n104)Footnote 59. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407, 418-419 .

(n105)Footnote 60. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407, 414-415, 417-419 .

(n106)Footnote 61. *Washington v. Garrett* (9th Cir. 1993) 10 F.3d 1421, 1433 .

(n107)Footnote 62. *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 890 ; *see also Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 202-203, 48 Cal. Rptr. 2d 448 (The construct of the shifting burden of proof is used by the court to order the evidence; it is used as an analytical tool by the trial court judge to assure that meritless claims do not proceed to trial and that an employer does not escape liability if its reason is merely pretextual. Merely articulating a non-discriminatory reason is not sufficient. The shifting burdens are amenable to pretrial proceedings, such as summary judgment.).

(n108)Footnote 62.1. *King v. United Parcel Service, Inc.* (2007) 152 Cal. App. 4th 426, 433, 60 Cal. Rptr. 3d 359 (employer's evidence that decision makers entertained honest belief that plaintiff had either personally falsified timecard of driver he supervised in violation of employer's policies or directed driver to do so was sufficient to meet employer's burden.).

(n109)Footnote 63. *See Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253, 255-256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII) (The rationale of the shifting burden of proof helps the judge determine whether the litigants have created an issue of fact to be decided by a jury. Allocation of burdens and creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual questions of intentional discrimination); *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII) ; *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 202, 48 Cal. Rptr. 2d 448 (FEHA) ; *Lowe v. Monrovia* (9th Cir. 1985) 775 F.2d 998, 1005 , *as amended* (9th Cir. 1986) 784 F.2d 1407 .

(n110)Footnote 64. *See McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 281-282, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (Title VII and 42 U.S.C. § 1981); *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII) .

(n111)Footnote 65. *See Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, 1116 (plaintiffs' evidence discrediting employer's proffered legitimate reason was substantial and specific, showing employer subverted established procedures for assigning temporary details to prevent African-American employees from obtaining experience at positions above GS-12 level, just as plaintiffs alleged employer had subverted established promotion procedures in 1996 for same unlawful purpose); *Warren v. City of Carlsbad* (9th Cir. 1995) 58 F.3d 439, 442 ; *Lindahl v. Air France* (9th Cir. 1991) 930 F.2d 1434, 1437-1438 ; *see also Messick v. Horizon Indus. Inc.* (9th Cir. 1995) 62 F.3d 1227, 1229-1231 (examination of evidence presented gave rise to genuine issue of material fact that employer's reasons for firing plaintiff were pretextual); *but see Ritter v. Hughes Aircraft Co.* (9th Cir. 1995) 58 F.3d 454, 457 (plaintiff provided insufficient evidence to raise genuine issue of material fact that employer's proffered reasons for its actions were pretextual).

(n112)Footnote 65.1. *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1003-1005, 67 Cal. Rptr. 2d 483 ; *but see Fonseca v. Sysco Food Services of Arizona, Inc.* (9th Cir. 2004) 374 F.3d 840, 850 (disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting prima facie case, if evidence raises genuine issue of material fact regarding truth of employer's proffered reasons); *Raad v. Fairbanks N. Star Borough* (9th Cir. 2003) 323 F.3d 1185, 1193 (disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting prima facie case, if evidence raises genuine issue of material fact regarding truth of employer's proffered reasons). *See Davis v. Team Electric Co.* (9th Cir. 2008) 520 F.3d 1080, 2008 U.S. App. LEXIS 6476, *20-*28 (female electrician offered specific and substantial circumstantial evidence of pretext, where she established genuine factual issue with regard to employer's motive in assigning her disproportionate amount of dangerous and strenuous work); *Surrell v. Cal. Water Service Co.* (9th Cir. 2008) 518 F.3d 1097, 1106-1107 (African-American employee failed to show employer's articulated reason for promoting younger white woman over her to position of office manager, *i.e.*, that she was more qualified, was pretextual, where, while district court should have considered plaintiff's testimony that she had never seen any black people promoted to office management positions, without more, general statement was insufficient for trier of fact to conclude that employer's articulated reason was pretextual, and five years of management experience of woman who was promoted significantly distinguished her from plaintiff as most-qualified candidate for management position;

employer also produced non-discriminatory reason for not cross-training plaintiff and for cross-training white employee, where white employee had already done portion of job that she learned on her own and required less training than plaintiff, and employer's time for training was limited because it was in process of converting to new computer system and taking over new billing account); *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1122-1124 (after employer claimed its failure to promote African-American plaintiff to position was due to hiring freeze, employer's presentation of absence of any documentation confirming that company hiring freeze was in place during relevant time period was sufficient to raise genuine factual dispute as to whether asserted reason was pretextual; additionally, employer's permissive response to harassing actions undertaken by coworkers and supervisors, combined with absence of black supervisors and managers in workplace, was circumstantial evidence of pretext); *see also* *Hammond v. County of Los Angeles* (2008) 160 Cal. App. 4th 1579, 1600 (FEHA; even though employer did not satisfy its burden under *McDonnell Douglas* test to rebut presumption of race discrimination, plaintiff supplied requisite evidence of racial animus through testimony about supervisor's "Ebonics" comment and plaintiff's testimony that supervisor made derogatory remarks about other African-American coworkers, constituting independent evidence of racial animus, and through plaintiff's testimony that she was only African-American among four instructors in unit and supervisor asked plaintiff to "demote," took away her teaching assignments, gave those assignments to other instructors who were not African-American, and monitored plaintiff's classroom performance but not performance of instructors who were not African-American; finally, department's investigation of plaintiff's allegations about supervisor's conduct toward her and other employees concluded plaintiff's allegations were "founded"); *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal. App. 4th 33, 44-46, 90 Cal. Rptr. 2d 15 (employer denied summary judgment because genuine issue of material fact existed in employer's claim that employee was terminated for 'blowing up' at supervisor and plaintiff's claim that immediately following his termination, a co-worker who had not been previously scheduled appeared and took plaintiff's place, as if termination had been preplanned). *but see* *Raad v. Fairbanks N. Star Borough* (9th Cir. 2003) 323 F.3d 1185, 1193 (disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting prima facie case, if evidence raises genuine issue of material fact regarding truth of employer's proffered reasons).

(n113)Footnote 65.2. *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1003-1004, 67 Cal. Rptr. 2d 483 ; *see* *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 505-511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 . *Compare* *Barber v. Rancho Mortgage & Inv. Corp.* (1994) 26 Cal. App. 4th 1819, 1835, 32 Cal. Rptr. 2d 906 (suggestion that employee's prima facie case of discrimination is alone sufficient to avoid summary judgment, and need not present evidence to rebut employer's claimed non-discriminatory motivation) *with* *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal. App. 4th 1718, 1735, 35 Cal. Rptr. 2d 181 (requiring discharged employee, to avert summary judgment, to produce "substantial responsive evidence" that employer's showing was untrue or pretextual).

(n114)Footnote 65.3. *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1003-1005, 67 Cal. Rptr. 2d 483 .

(n115)Footnote 65.4. *Villanueva v. City of Colton* (2008) 160 Cal. App. 4th 1188, 1195-1198, 73 Cal. Rptr. 3d 343 (employee could not show pretext where every piece of evidence on which he relied was excluded by trial court and employee did not challenge evidentiary rulings on appeal); *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1005, 1008-1009, 67 Cal. Rptr. 2d 483 (rebuttal evidence that stated motives were invalid did not constitute substantial responsive evidence; triable issues as to whether employer's actions were reasonable and well considered cannot permit trier of fact to reasonably conclude that stated reasons were implausible, inconsistent, or baseless); *Horn v. Cushman & Wakefield W., Inc.* (1999) 72 Cal. App. 4th 798, 810-813, 85 Cal. Rptr. 2d 459 (plaintiff failed to offer substantial evidence of pretext or discriminatory animus because job was actually altered in employer's restructuring; focus of actual job duties rather than position description controls); *see* *Sheridan v. E.I. DuPont de Nemours and Co.* (3d Cir. 1996) 100 F.3d 1061, 1072 , *cert. denied*, 521 U.S. 1129 (1997) .

(n116)Footnote 65.5. *Villiarimo v. Aloha Island Air, Inc.* (9th Cir. 2002) 281 F.3d 1054, 1063 ; *see* *Nidds v. Schindler Elevator Corp.* (9th Cir. 1997) 113 F.3d 912, 918 (holding in context of retaliation that presence of shifting or different justifications for adverse action not sufficient to defeat summary judgment when justifications are not

incompatible).

(n117)Footnote 65.6. *Raad v. Fairbanks N. Star Borough* (9th Cir. 2003) 323 F.3d 1185, 1192-1195 .

(n118)Footnote 65.7. *Perez v. County of Santa Clara* (2003) 111 Cal. App. 4th 671, 676, 3 Cal. Rptr. 3d 867 , citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 356, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 .

(n119)Footnote 65.8. *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 507, 113 S. Ct. 2742, 125 L. Ed. 2d 407 , quoting *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 ; *Perez v. County of Santa Clara* (2003) 111 Cal. App. 4th 671, 675-677, 3 Cal Rptr. 3d 867 (although plaintiff initially presented sufficient evidence of race and national origin discrimination to establish prima facie case with respect to delay in promotion and denial of four-fifths position, court's findings were not sufficient to compel verdict in plaintiff's favor, but only shifted burden to employer, which rebutted each instance of alleged discrimination by producing evidence of legitimate nondiscriminatory reasons for its actions and establishing reasons by clear and convincing evidence).

(n120)Footnote 65.9. *Green v. County of Santa Clara* (2003) 111 Cal. App. 4th 671, 677, 3 Cal. Rptr. 3d 867 .

(n121)Footnote 66. *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII) ; *Raad v. Fairbanks N. Star Borough* (9th Cir. 2003) 323 F.3d 1185, 1194 ; *Merrick v. Farmers Ins. Group* (9th Cir. 1990) 892 F.2d 1434, 1437 (ADEA) ; *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1318-1319, 237 Cal. Rptr. 884 (FEHA) ; *see also Norris v. City and County of San Francisco* (9th Cir. 1990) 900 F.2d 1326, 1330 (Title VII; district court should separately evaluate the specific rationale offered for each employment decision when the employer has repeatedly rejected an employee).

(n122)Footnote 66.1. *See McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 805, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; *Diaz v. American Tel. & Tel.* (9th Cir. 1985) 752 F.2d 1356, 1363 ; *See also* § 41.21[2].

(n123)Footnote 67. *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 641-642 (plaintiff failed to show coworkers were similarly situated, where one coworker was not involved in same type of offense as plaintiff and her position was supervisory one with much greater responsibility, and where although plaintiff and another coworker held same level position, other coworker did not engage in problematic conduct of comparable seriousness because he did not know he was disobeying direct order from supervisor).

(n124)Footnote 67.1. *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217 .

(n125)Footnote 67.2. *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1220-1221 .

(n126)Footnote 67.3. *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1221 (direct evidence included statement that supervisor did not want to deal with another female, presentation of sex-related gift, and exclusionary company-sponsored trips).

(n127)Footnote 67.4. *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 642 ; *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1222 (plaintiff offered substantial evidence of unreliability of employer's proffered reasons when all evidence supporting those reasons came from statements, depositions, and declarations prepared during the litigation (after employment decision was made), and they were inconsistent with contemporaneous reasons for selection of male applicant); *see also Raad v. Fairbanks N. Star Borough* (9th Cir. 2003) 323 F.3d 1185, 1192-1195 (at summary judgment stage, court was compelled by standard of review to infer from distinct difference between plaintiff's qualifications for full-time teaching position and qualifications of person who received job, that plaintiff had demonstrated genuine factual dispute as to whether school district's proffered reasons were pretextual, given statement's that plaintiff was denied position due to her accent). *Bergene v. Salt River Agricultural Improvement and Power District* (9th Cir. 2001) 272 F.3d 1136, 1143 (plaintiff presented specific and substantial circumstantial

evidence, raising genuine issue of material fact, that employer's purported reason for promoting male coworker was pretext for discrimination on basis of sex; decision maker changed selection criteria after plaintiff applied, thus allowing male to qualify and eliminating plaintiff's competitive advantage; plaintiff referred to as "Mommy" in workplace, indicating she was singled out on the basis of sex; and, apart from human resources personnel, there were no women supervisors during plaintiff's tenure).

(n128)Footnote 67.5. See *Ash v. Tyson Foods, Inc.* (2006) 126 S. Ct. 1195, 1197-1198, 163 L. Ed. 2d 1053; *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 187-188, 109 S. Ct. 2363, 105 L. Ed. 2d 132, superseded on other grounds by 42 U.S.C. § 1981(b); *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 259, 101 S. Ct. 1089, 67 L. Ed. 2d 207. Cf. *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (plaintiff's prima facie case, combined with sufficient evidence to find that employer's asserted justification is false, may permit trier of fact to conclude employer unlawfully discriminated).

(n129)Footnote 67.6. *Ash v. Tyson Foods, Inc.* (2006) 126 S. Ct. 1195, 163 L. Ed. 2d 1053.

(n130)Footnote 67.7. *Ash v. Tyson Foods, Inc.* (2006) 126 S. Ct. 1195, 1197, 163 L. Ed. 2d 1053.

(n131)Footnote 67.8. *Cooper v. Southern Co.* (11th Cir. 2004) 390 F.3d 695, 732 (internal quotation marks omitted).

(n132)Footnote 67.9. *Raad v. Fairbanks North Star Borough School Dist.* (9th Cir. 2003) 323 F.3d 1185, 1194.

(n133)Footnote 67.10. *Aka v. Washington Hospital Center* (D.C. Cir. 1998) 156 F.3d 1284, 1294, 332 U.S. App. D.C. 256 (en banc).

(n134)Footnote 67.11. *Ash v. Tyson Foods, Inc.* (11th Cir. 2005) 129 Fed. Appx. 529, 533.

(n135)Footnote 67.12. *Ash v. Tyson Foods, Inc.* (2006) 126 S. Ct. 1195, 1198, 163 L. Ed. 2d 1053.

(n136)Footnote 67.13. *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 100 Cal. Rptr. 2d 352, 8 P.3d 1089.

(n137)Footnote 67.14. *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 357, 100 Cal. Rptr. 2d 352, 8 P.3d 1089.

(n138)Footnote 67.15. *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 357-358, 100 Cal. Rptr. 2d 352, 8 P.3d 1089.

(n139)Footnote 68. See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII); *Rodriguez v. General Motors Corp.* (9th Cir. 1990) 904 F.2d 531, 533 (42 U.S.C. § 1981). Cf. *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 126 S. Ct. 2405, 165 L. Ed. 2d 345 (scope of anti-retaliation provision of Title VII extends beyond workplace-related or employment-related retaliatory acts and harm, so employee need only allege and prove "adverse action" rather than "adverse employment action" under Title VII's anti-retaliation provision), discussed at § 41.130[1A], below.

(n140)Footnote 69. *Rodriguez v. General Motors Corp.* (9th Cir. 1990) 904 F.2d 531, 533 (42 U.S.C. § 1981); see *Washington v. Garrett* (9th Cir. 1993) 10 F.3d 1421, 1434 (employer's simultaneous offering of two distinct and arguably inconsistent reasons for discharging employee gives rise to genuine issue of fact regarding existence of pretext); *Payne v. Norwest Corp.* (9th Cir. 1997) 113 F.3d 1079, 1080 (multiple inconsistent reasons for termination raise genuine issue of fact regarding pretext); see also *Messick v. Horizon Indus. Inc.* (9th Cir. 1995) 62 F.3d 1227, 1229-1231 (material issues of fact existed regarding whether plaintiff performed his job satisfactorily and whether employer's proffered reasons for discharging him were pretextual). but see *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 661 (although fundamentally different justifications for employer's action can give

rise to genuine issue of fact on issue of pretext because they suggest possibility that neither reason was true reason; employer's reasons were not inconsistent, and court would not infer pretext from simple fact employer had two different, although consistent, reasons for laying plaintiff off).

(n141)Footnote 70. *See Walker v. Blue Cross of Cal.* (1992) 4 Cal. App. 4th 985, 998, 6 Cal. Rptr. 2d 184 (FEHA) .

(n142)Footnote 71. *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 890 (Title VII) ; *University of S. Cal. v. Superior Court* (1990) 222 Cal. App. 3d 1028, 1039-1040, 272 Cal. Rptr. 264 (FEHA claim evaluated under federal law interpreting Title VII; nature of shifting burden of proof in *McDonnell Douglas* and *Burdine* does not preclude summary judgment for defendant).

(n143)Footnote 72. *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885 .

(n144)Footnote 73. *See Sischo-Nownejad v. Merced Community College Dist.* (9th Cir. 1991) 934 F.2d 1104, 1112 .

(n145)Footnote 74. *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 890 .

(n146)Footnote 75. *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 890 .

(n147)Footnote 76. *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 890 ; *see also Ritter v. Hughes Aircraft Co.* (9th Cir. 1995) 58 F.3d 454, 458 ; *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1480 (evidence of behavior toward others of same class admissible to prove motive pretext; trial court's exclusion of evidence of employer's harassment of other women employees in quid pro quo sexual harassment case was error).

(n148)Footnote 77. *See Ritter v. Hughes Aircraft Co.* (9th Cir. 1995) 58 F.3d 454, 458 .

(n149)Footnote 78. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407, 416-419 ; *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1002-1003, 1006, 67 Cal. Rptr. 2d 483 .

(n150)Footnote 78.1. *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133, 120 S. Ct. 2097, 2111-2112, 147 L. Ed. 2d 105 .

(n151)Footnote 79. *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 187-188, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (altered by 1991 legislation).

(n152)Footnote 80. *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (42 U.S.C. § 1981) (altered by 1991 Civil Rights legislation).

(n153)Footnote 81. *See Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 186, 189, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (42 U.S.C. § 1981) (altered by 1991 legislation).

(n154)Footnote 82. *See Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 187-188, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (42 U.S.C. § 1981) (altered by 1991 legislation).

(n155)Footnote 82.1. *Norris v. City and County of San Francisco* (9th Cir. 1990) 900 F.2d 1326, 1331 (Title VII).

(n156)Footnote 82.2. *EEOC v. Boeing Co.* (9th Cir. 2009) 577 F.3d 1044, 1050-1051 (from supervisor's sexist comments, although they did not refer specifically to female employee, jury might have reasonably inferred that supervisor's decision to transfer employee, rather than male coworker about whom she complained, to new position where her job was less secure, may have resulted from improper motivations, including discriminatory intent, retaliatory

intent, or both, and there was additional specific and substantial circumstantial evidence on which jury could rely to support conclusion transfer might have been discriminatory; there was also sufficient evidence from which jury could find that employee's later poor reduction-in-force evaluation scores, which led to her termination, were pretextual).

(n157)Footnote 82.3. *EEOC v. Boeing Co.* (9th Cir. 2009) 577 F.3d 1044, 1051, 1052-1053 . See also *Abuan v. Level 3 Communications, Inc.* (10th Cir. 2003) 353 F.3d 1158 (co-workers' assessments of plaintiff's work should be considered because they can be probative of pretext).

(n158)Footnote 82.4. *Mondero v. Salt River Project* (9th Cir. 2005) 400 F.3d 1207, 1213 (female employee failed to present evidence that employer declined to repeat experimental program for her because decision makers were influenced or even aware of alleged gender bias of some of its agents, where employee failed to show that alleged comments by foremen related in any way to decision not to repeat experimental program for her). See *Nidds v. Schindler Elevator Corp.* (9th Cir. 1996) 113 F.3d 912, 919 (comment by supervisor that he intended to get rid of all "old timers" was insufficient to create genuine issue of material fact, because comment was not tied directly to layoff).

(n159)Footnote 83. *Godwin v. Hunt Wesson, Inc.* (9th Cir. 1998) 150 F.3d 1217, 1221 .

(n160)Footnote 83.1. *King v. United Parcel Service, Inc.* (2007) 152 Cal. App. 4th 426, 433, 60 Cal. Rptr. 3d 359 (FEHA) ; see also *Villiarimo v. Aloha Island Air, Inc.* (9th Cir. 2002) 281 F.3d 1054, 1063 (Title VII) .

(n161)Footnote 83.2. *Saelzler v. Advanced Group 400* (2001) 25 Cal. 4th 763, 774, 107 Cal. Rptr. 2d 617, 23 P.3d 1143 ; *King v. United Parcel Service, Inc.* (2007) 152 Cal. App. 4th 426, 433-434, 60 Cal. Rptr. 3d 359 .

(n162)Footnote 83.3. See *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 282 n.10, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (Title VII and 42 U.S.C. § 1981); accord, *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII; employer may justifiably refuse to hire one who has engaged in unlawful, disruptive acts against it, but only if criterion is applied alike to members of all races).

(n163)Footnote 83.4. *Coghlan v. American Seafood Co. LLC* (9th Cir. 2005) 413 F.3d 1090, 1096-1100 .

(n164)Footnote 83.5. *Bradley v. Harcourt, Brace & Co.,* (9th Cir. 1996) 104 F.3d 267, 270-271 .

(n165)Footnote 83.6. See *Hartsel v. Keys* (9th Cir. 1996) 87 F.3d 795, 804 n.9 (applying same-actor inference where decisionmaker had not hired plaintiff, but had previously promoted her).

(n166)Footnote 83.7. *Coghlan v. Am. Seafoods Co. LLC* (9th Cir. 2005) 413 F.3d 1090, 1096 n.9 .

(n167)Footnote 83.7.1. *EEOC v. Boeing Co.* (9th Cir. 2009) 577 F.3d 1044, 1051-1053 .

(n168)Footnote 83.7.2. *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1288 .

(n169)Footnote 83.7.3. *Nazir v. United Airlines, Inc.* (2009) 178 Cal. App. 4th 243, 271-286 .

(n170)Footnote 83.7.4. *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal. App. 4th 798, 809, 85 Cal. Rptr. 2d 459 .

(n171)Footnote 83.7.5. See *Waldron v. SL Industries, Inc.* (3d Cir. 1995) 56 F.3d 491, 496, fn. 6 (fact that same actor conferred employment benefit on employee before discharging employee is simply evidence and should be treated like any other piece of proof).

(n172)Footnote 83.8. *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84, 95-96 .

(n173)Footnote 83.9. *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84, 92-96 .

(n174)Footnote 83.10. *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84, 93-95 (Congress did not impose special or heightened evidentiary burden on plaintiff in Title VII case in which discriminatory animus may have constituted one of two or more reasons for employer's challenged actions, citing 42 U.S.C. § 2000e-2(m)).

(n175)Footnote 84. 42 U.S.C. § 2000e-2(m); see *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84, 93 .

(n176)Footnote 85. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 .

(n177)Footnote 86. See *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 234-235, 109 S. Ct. 1775, 104 L. Ed. 2d 268 .

(n178)Footnote 87. See *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 251, 256-257, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (partially superseded by 1991 legislation); see also *O'Day v. McDonnell Douglas Helicopter Co.* (9th Cir. 1996) 79 F.3d 756, 764 (applying the rules for mixed motive cases to after-acquired evidence cases and holding that after acquired evidence will not immunize the employer from liability although it may affect damages).

(n179)Footnote 88. See *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 258, 260, 261, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (affected by 1991 legislation); A plurality of the Court in *Price Waterhouse* explained that gender plays a motivating part in an employment decision if, at the moment of the decision, one of the reasons for the decision is that the applicant or employee is a woman. See *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 250, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (Brennan, Marshall, Blackmun, Stevens, JJ.) (partially superseded by 1991 legislation); see *Odima v. Westin Tucson Hotel Co.* (9th Cir. 1993) 991 F.2d 595, 601 .

(n180)Footnote 89. See *Odima v. Westin Tucson Hotel Co.* (9th Cir. 1993) 991 F.2d 595, 601 , appeal after remand (9th Cir. 1995) 53 F.3d 1484 .

(n181)Footnote 90. See 42 U.S.C. § 2000e-2(m), as added by Pub. L. No. 102-166, § 107.

(n182)Footnote 90.1. *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84, 93-95 .

(n183)Footnote 90.2. *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84, 93-95 . See also *Galdamez v. Potter* (9th Cir. 2005) 415 F.3d 1015, 1020-1021 (evidence in record supported mixed motive instruction, asking jury whether plaintiff's national origin was *a* motivating factor, not *the* motivating factor, in employer's decision to take adverse action).

(n184)Footnote 90.3. See 42 U.S.C. 2000e-2(m); see also *Mohr v. Dustrol, Inc.* (8th Cir. 2002) 306 F.3d 636, 640-641 ; *Fernandes v. Costa Bros. Masonry, Inc.* (1st Cir. 1999) 199 F.3d 572, 580 ; *Trotter v. Board of Trustees of Univ. of Ala.* (11th Cir. 1996) 91 F.3d 1449, 1453-1454 ; *Fuller v. Phipps* (4th Cir. 1995) 67 F.3d 1137, 1142 (all holding direct evidence is required to establish liability under section 2000e-2(m)). Compare *Costa v. Desert Palace, Inc.* (9th Cir. 2000) 238 F.3d 1056 (plaintiff may establish mixed motive by resort to circumstantial evidence).

(n185)Footnote 90.4. *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 96, 123 S. Ct. 2148, 156 L. Ed. 2d 84 .

(n186)Footnote 90.5. *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84, 92-93 .

(n187)Footnote 90.6. *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84, 95-96 .

(n188)Footnote 91. *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 .

(n189)Footnote 91.1. See *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 261-262, 109 S. Ct. 1775, 104 L. Ed. 2d 268 .

(n190)Footnote 91.2. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 258, 109 S. Ct. 1775, 104 L. Ed. 2d 268 .

(n191)Footnote 91.3. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 258, 104 L. Ed. 2d 268, 109 S. Ct. 1775 .

(n192)Footnote 91.4. *See* 42 U.S.C. § 2000e-5(g)(2)(B).

(n193)Footnote 91.5. *See* 42 U.S.C. § 2000e-5(g)(2)(B).

(n194)Footnote 92. *See* *Harris v. City of Santa Monica* (2010) 2010 Cal. App. LEXIS 135; *Grand-Burton v. Covenant Care, Inc.* (2002) 99 Cal. App. 4th 1361, 1379, 122 Cal. Rptr. 2d 204, BAJI No. 12.26 ("If you find that the employer's action ... was actually motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision."). *But see* CACI 2500 (employer is liable if discriminatory factor was motivating reason or factor for adverse employment action).

(n195)Footnote 92.1. *Harris v. City of Santa Monica* (2010) 2010 Cal. App. LEXIS 135.

(n196)Footnote 92.2. BAJI No. 12.26.

(n197)Footnote 92.3. *Harris v. City of Santa Monica* (2010) 2010 Cal. App. LEXIS 135 .

(n198)Footnote 92.4. *Harris v. City of Santa Monica* (2010) 2010 Cal. App. LEXIS 135 . *See, e.g., Gross v. FBL Financial Services, Inc.* (2009) 557 U.S. --, 129 S. Ct. 2343, 2349, 174 L. Ed. 2d 119 (defense is subject to criticism for its workability but continues to be available in employment discrimination cases other than those based on age discrimination).

(n199)Footnote 93. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; *see* discussion in [b], *above*.

(n200)Footnote 94. *See, e.g., Clark v. Claremont University Center* (1992) 6 Cal. App. 4th 639, 662-664, 8 Cal. Rptr. 2d 151 ; *University of Southern California v. Superior Court* (1990) 222 Cal. App. 3d 1028, 1035, 272 Cal. Rptr. 264 ; *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884 .

(n201)Footnote 95. *See* *DFEH v. Church's Fried Chicken* (1990) FEHC Dec. No. 90-11, at 11-17. (The FEHC has modified and reissued its precedential decision in *DFEH v. Church's Fried Chicken*, cited in fns. 95 and 100-104, although the FEHC's analysis regarding disparate treatment was unaffected by the modification; the new cite is *DFEH v. Church's Fried Chicken* (1990) FEHC Dec. No. 90-11.).

(n202)Footnote 96. *DFEH v. Ambylou Enterprises, Inc.* (1982) FEHC Dec. No. 82-06, at 5; *see also Williams v. Edward Appfels Coffee Co.* (9th Cir. 1986) 792 F.2d 1482, 1487 ; *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 199-202, 48 Cal. Rptr. 2d 448 (applying *McDonnell Douglas* test under FEHA and finding there is no rigid standard, since proof will vary according to the facts of the particular case); *Strother v. S. Cal. Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859 (discussion of prima facie case of retaliation under the FEHA); *Clark v. Claremont University Center* (1992) 6 Cal. App. 4th 639, 8 Cal. Rptr. 2d 151 .

(n203)Footnote 97. *See Ibarbia v. Regents of University of California* (1987) 191 Cal. App. 3d 1318, 1328, 237 Cal. Rptr. 92 .

(n204)Footnote 98. *Ibarbia v. Regents of University of California* (1987) 191 Cal. App. 3d 1318, 1328, 237 Cal. Rptr. 92 .

(n205)Footnote 99. *See Ibarbia v. Regents of University of California* (1987) 191 Cal. App. 3d 1318, 1328, 237

Cal. Rptr. 92 .

(n206)Footnote 100. Department of Fair Employment and Housing v. Church's Fried Chicken (1987) FEHC Dec. No. 87-18. (The FEHC has modified and reissued its precedential decision in *DFEH v. Church's Fried Chicken*, cited in fns. 95 and 100-104, although the FEHC's analysis regarding disparate treatment was unaffected by the modification; the new cite is *DFEH v. Church's Fried Chicken* (1990) FEHC Dec. No. 90-11.)

(n207)Footnote 101. Department of Fair Employment and Housing v. Church's Fried Chicken (1987) FEHC Dec. No. 87-18, at 10, 12. (The FEHC has modified and reissued its precedential decision in *DFEH v. Church's Fried Chicken*, cited in fns. 95 and 100-104, although the FEHC's analysis regarding disparate treatment was unaffected by the modification; the new cite is *DFEH v. Church's Fried Chicken* (1990) FEHC Dec. No. 90-11.) *See also* *DFEH v. General Dynamics, Inc.* (1990) FEHC Dec. 90-08, p. 8; *DFEH v. Ca. State University--Sacramento* (1988) FEHC Dec. No. 88-08, p. 16; *DFEH v. Aluminum Precision Products, Inc.* (1988) FEHC Dec. No. 88-05, p. 5; *see also* *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1425 (discrimination claim fails under test in *Church's Fried Chicken* when there is no evidence to suggest that age was factor in discharge decisions); *Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1290, 261 Cal. Rptr. 204 (citing *Church's Fried Chicken*; applicability of *McDonnell Douglas* test in FEHA disparate treatment cases is unsettled).

(n208)Footnote 102. Department of Fair Employment and Housing v. Church's Fried Chicken (1987) FEHC Dec. No. 87-18, at 14. For example, an individual would not prevail, even if discrimination exists, if he or she could not prove that his or her performance was entirely satisfactory. *See* Department of Fair Employment and Housing v. Church's Fried Chicken (1987) FEHC Dec. No. 87-18, at 15 n.5. (The FEHC has modified and reissued its precedential decision in *DFEH v. Church's Fried Chicken*, cited in fns. 95 and 100-104, although the FEHC's analysis regarding disparate treatment was unaffected by the modification; the new cite is *DFEH v. Church's Fried Chicken* (1990) FEHC Dec. No. 90-11.)

(n209)Footnote 103. *See* Department of Fair Employment and Housing v. Church's Fried Chicken (1987) FEHC Dec. No. 87-18, at 15-16. (The FEHC has modified and reissued its precedential decision in *DFEH v. Church's Fried Chicken*, cited in fns. 95 and 100-104, although the FEHC's analysis regarding disparate treatment was unaffected by the modification; the new cite is *DFEH v. Church's Fried Chicken* (1990) FEHC Dec. No. 90-11.)

(n210)Footnote 104. Department of Fair Employment and Housing v. Church's Fried Chicken (1987) FEHC Dec. No. 87-18, at 16-17 (emphasis added). (The FEHC has modified and reissued its precedential decision in *DFEH v. Church's Fried Chicken*, cited in fns. 95 and 100-104, although the FEHC's analysis regarding disparate treatment was unaffected by the modification; the new cite is *DFEH v. Church's Fried Chicken* (1990) FEHC Dec. No. 90-11.)

(n211)Footnote 105. *Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703, 704 .

(n212)Footnote 106. *Teamsters v. United States* (1977) 431 U.S. 324, 336, 97 S. Ct. 1843, 52 L. Ed 2d 396 (Title VII) .

(n213)Footnote 107. *See* Schlei and Grossman, Employment Discrimination Law, (2d ed. 1983) Ch. 36, "Proof."

(n214)Footnote 108. *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1265-1266 , cert. denied, 471 U.S. 1115 (1985) (Title VII); *see* *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1480 (Title VII); *see also* discussion in [b], below.

(n215)Footnote 109. *See, e.g.,* *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1479 , *ret'd to panel*, 827 F.2d 439 , *rev'd on other grounds*, 104 L. Ed. 2d 733 (1989) ("pattern or practice" class action by private individuals); *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1266, 1267 , cert. denied, 471 U.S. 1115 (1985) ("pattern or practice" action by individual plaintiffs and association; later certified as class).

(n216)Footnote 110. See 42 U.S.C. § 2000e-6(a); *Teamsters v. United States* (1977) 431 U.S. 324, 360, 97 S. Ct. 1843, 52 L. Ed 2d 396 (Title VII) .

(n217)Footnote 111. See *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1266 , cert. denied, 471 U.S. 1115 (1985) (Title VII); see also *Teamsters v. United States* (1977) 431 U.S. 324, 335 fn. 15, 97 S. Ct. 1843, 52 L. Ed 2d 396 (Title VII) .

(n218)Footnote 112. See *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1266, 1267 , cert. denied, 471 U.S. 1115 (1985) (Title VII).

(n219)Footnote 113. See, e.g., *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1479, 1480 , ret'd to panel, 827 F.2d 439 , rev'd on other grounds, 104 L. Ed. 2d 733 (1989) .

(n220)Footnote 114. See discussion in [1], above, and § 41.21.

(n221)Footnote 115. See *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1266, 1267 , cert. denied, 471 U.S. 1115 (1985) (Title VII).

(N222)Footnote 116. See *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1266, 1267 , cert. denied, 471 U.S. 1115 (1985) (Title VII).

(n223)Footnote 117. See *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1266, 1267 , cert. denied, 471 U.S. 1115 (1985) (Title VII).

(n224)Footnote 118. See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII) ; see discussion in [1][a], above.

(n225)Footnote 119. See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 800, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII; emphasis added) .

(n226)Footnote 120. *Teamsters v. United States* (1977) 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII)

(n227)Footnote 121. See *Teamsters v. United States* (1977) 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) .

(n228)Footnote 122. See *Teamsters v. United States* (1977) 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) .

(n229)Footnote 123. See *Teamsters v. United States* (1977) 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396 ; see also *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802 fn. 13, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII) .

(n230)Footnote 124. See *Teamsters v. United States* (1977) 431 U.S. 324, 336, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) ; see also *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1267 , cert. denied, 471 U.S. 1115 (1985) (Title VII).

(n231)Footnote 125. *Teamsters v. United States* (1977) 431 U.S. 324, 336, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII); see *Mundy v. Household Finance Corp.* (9th Cir. 1989) 885 F.2d 542, 546 (ADEA; in large corporation with branch offices throughout country, discharge of seven older employees over two and one half year period alone does not establish pattern or practice of discrimination); see discussion in [a], above.

(n232)Footnote 126. *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1267 , cert. denied,

471 U.S. 1115 (1985) (Title VII).

(n233)Footnote 127. See *Teamsters v. United States* (1977) 431 U.S. 324, 360, 97 S. Ct. 1843, 52 L. Ed.2d 396 (Title VII) ; see also *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747, 772, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (trial court erred when it placed burden on each individual member of class to prove that he or she was qualified for job sought and that vacancy was available).

(n234)Footnote 128. See *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747, 772, 96 S. Ct. 1251, 47 L. Ed. 2d 444 .

(n235)Footnote 129. See, e.g., *E.E.O.C. v. General Telephone Co. of Northwest* (9th Cir. 1989) 885 F.2d 575, 577 (Title VII; "regression analyses"). see Larson, Employment Discrimination, Ch. 10, "Other Procedural Matters," § 50.85(b); Schlei and Grossman, Employment Discrimination Law (2d ed. 1983) Ch. 36, "Proof."

(n236)Footnote 130. See *Hazelwood School District v. United States* (1977) 433 U.S. 299, 307, 97 S. Ct. 2736, 53 L. Ed. 2d 768 (Title VII) ; *Teamsters v. United States* (1977) 431 U.S. 324, 339, 97 S. Ct. 1843, 52 L. Ed 2d 396 (Title VII) .

(n237)Footnote 131. *Hazelwood School District v. United States* (1977) 433 U.S. 299, 307-308, 97 S. Ct. 2736, 53 L. Ed. 2d 768 (Title VII) .

(n238)Footnote 132. See *Teamsters v. United States* (1977) 431 U.S. 324, 338, 339, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) ; *E.E.O.C. v. General Telephone Co. of Northwest* (9th Cir. 1989) 885 F.2d 575, 577, 579 (Title VII).

(n239)Footnote 133. See discussion in [b], above.

(n240)Footnote 134. See *Teamsters v. United States* (1977) 431 U.S. 324, 360, 97 S. Ct. 1843, 52 L. Ed.2d 396 (Title VII) .

(n241)Footnote 135. *Teamsters v. United States* (1977) 431 U.S. 324, 360 fn. 46, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) ; see discussion in [b], above.

(n242)Footnote 136. See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 800, 802, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII) ; see discussion in § 40.02[2][a][ii].

(n243)Footnote 137. *Vuyanich v. Republic Nat. Bank of Dallas* (N.D. Tex. 1981) 521 F. Supp. 656 , vacated on other grounds, 723 F.2d 1195 (5th Cir. [Tex.] 1984) (Title VII).

(n244)Footnote 138. See *Vuyanich v. Republic Nat. Bank of Dallas* (N.D. Tex. 1981) 521 F. Supp. 656, 661 , vacated on other grounds, 723 F.2d 1195 (5th Cir. [Tex.] 1984) (Title VII).

(n245)Footnote 139. *Vuyanich v. Republic Nat. Bank of Dallas* (N.D. Tex. 1981) 521 F. Supp. 656, 661 , vacated on other grounds, 723 F.2d 1195 (5th Cir. [Tex.] 1984) (Title VII;).

(n246)Footnote 140. *Vuyanich v. Republic Nat. Bank of Dallas* (N.D. Tex. 1981) 521 F. Supp. 656, 661 , vacated on other grounds, 723 F.2d 1195 (5th Cir. [Tex.] 1984) (Title VII).

(n247)Footnote 141. *Vuyanich v. Republic Nat. Bank of Dallas* (N.D. Tex. 1981) 521 F. Supp. 656, 661 , vacated on other grounds, 723 F.2d 1195 (5th Cir. [Tex.] 1984) (Title VII).

(n248)Footnote 142. *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249 , cert. denied, 471 U.S. 1115 (1985) (Title VII).

(n249)Footnote 143. See *Teamsters v. United States* (1977) 431 U.S. 324, 360, 97 S. Ct. 1843, 52 L. Ed.2d 396 (Title VII) ; *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1268 , cert. denied, 471 U.S. 1115 (1985) (Title VII).

(n250)Footnote 144. See *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1268 , cert. denied, 471 U.S. 1115 (1985) (Title VII).

(n251)Footnote 145. *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1268 , cert. denied, 471 U.S. 1115 (1985) (Title VII).

(n252)Footnote 146. *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1268 , cert. denied, 471 U.S. 1115 (1985) (Title VII).

(n253)Footnote 147. *E.E.O.C. v. General Telephone Co. of Northwest* (9th Cir. 1989) 885 F.2d 575, 579, 581 , cert. denied, (1990) 498 U.S. 950, 111 S. Ct. 370 (Title VII) .

(n254)Footnote 148. *E.E.O.C. v. General Telephone Co. of Northwest* (9th Cir. 1989) 885 F.2d 575, 580 n.7 (Title VII); *Bazemore v. Friday* (1986) 478 U.S. 385, 400 n.10, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (Title VII) ; (there may be some analyses so incomplete as to be inadmissible as relevant).

(n255)Footnote 149. *E.E.O.C. v. General Telephone Co. of Northwest* (9th Cir. 1989) 885 F.2d 575, 579-581, 583 (Title VII); *Bazemore v. Friday* (1986) 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (Title VII) ; (statistical analysis that includes less than all measurable variables may serve to prove plaintiff's case).

(n256)Footnote 150. *E.E.O.C. v. General Telephone Co. of Northwest* (9th Cir. 1989) 885 F.2d 575, 579-581, 583 (Title VII).

(n257)Footnote 151. *Teamsters v. United States* (1977) 431 U.S. 324, 360 fn. 46, 97 S. Ct. 1843, 52 L. Ed 2d 396 (Title VII) ; see also *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1266, 1268 , cert. denied, 471 U.S. 1115 (1985) (Title VII).

(n258)Footnote 152. See *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1269-1270 , cert. denied, 471 U.S. 1115 (1985) .

(n259)Footnote 153. See *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1269 , cert. denied, 471 U.S. 1115 (1985) .

(n260)Footnote 154. See *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1269 , cert. denied, 471 U.S. 1115 (1985) .

(n261)Footnote 155. See *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 ; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; see discussion in [1][c], above.

(n262)Footnote 156. See *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1269 , cert. denied, 471 U.S. 1115 (1985) .

(n263)Footnote 157. See *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1270 fn. 15 , cert. denied, 471 U.S. 1115 (1985) .

(n264)Footnote 158. *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 .

(n265)Footnote 159. See *Vuyanich v. Republic Nat. Bank of Dallas* (N.D. Tex. 1981) 521 F. Supp. 656, 662 , vacated on other grounds, 723 F.2d 1195 (5th Cir. [Tex.] 1984); see also *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 255 fn. 10, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (plaintiff's initial evidence, combined with effective cross-examination of employer, possibly sufficient to discredit employer's rebuttal); *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1269-1270 , cert. denied, 471 U.S. 1115 (1985) .

(n266)Footnote 160. *Teamsters v. United States* (1977) 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n267)Footnote 161. *Teamsters v. United States* (1977) 431 U.S. 324, 361, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (emphasis added); *Romero v. Am. Pres. Lines, Ltd.* (1st. Dist. 1995) 38 Cal. App. 4th 1199, 1202 (summary judgment was entered for the employer as there was no competent evidence to support the claims of alleged race, sex, or age discrimination but rather the employer decision was based on the superior qualifications of others.

(n268)Footnote 162. *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1270 fn. 15 , cert. denied, 471 U.S. 1115 (1985) .

(n269)Footnote 163. *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal. App. 4th 686, 715, 81 Cal. Rptr. 3d 406 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART A. GENERAL THEORIES FOR PROVING DISCRIMINATION UNDER EQUAL EMPLOYMENT
OPPORTUNITY LAWS
Subpart B. Disparate Treatment

2-41 California Employment Law §§ 41.12 through 41.19

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

[Reserved]

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Subpart C. Disparate Impact

2-41 California Employment Law § 41.20

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§ 41.20 Definition and Application

[1] Generally

The disparate impact theory applies to employment practices and criteria that are facially neutral in their treatment of different groups, but in fact fall more harshly on one group than another and cannot be justified by business necessity.ⁿ¹ Title VII as originally enacted did not include an express prohibition of policies or practices that produce a disparate impact.^{n1.1} The theory was first articulated by the United States Supreme Court in *Griggs v. Duke Power Co.*,ⁿ² which declared that Title VII "proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation."ⁿ³

Twenty years after *Griggs*, the Civil Rights Act of 1991 amended Title VII to codify the prohibition on disparate-impact discrimination.^{n3.1} Under the disparate-impact statute, a plaintiff establishes a prima facie violation by showing that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.^{n3.2} An employer may defend against liability by demonstrating that the practice is job-related for the position in question and consistent with business necessity.^{n3.3} If the employer meets that burden, the plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs.^{n3.4}

Although plaintiff in a disparate impact case must show that the challenged practice adversely affects a protected *group* of which plaintiff is a member,ⁿ⁴ an individual member of the affected group may bring an individual claim based on this theory.ⁿ⁵ Thus, in one case, a black employment applicant alleged that she was not hired because a city's employment policy had a disparate impact on blacks as a class.ⁿ⁶ The applicant's claim did not succeed, but only because the Ninth Circuit Court of Appeals agreed with the district court that the applicant failed to produce evidence sufficient to establish a prima facie case of disparate impact.ⁿ⁷ Although individual claimants may rely on the disparate impact theory,ⁿ⁸ it generally does not apply to "ad hoc" or isolated application of employment criteria to individuals

when a protected class is not affected.

The Ninth Circuit Court of Appeals has stated that the theory may be used only in cases involving *class-wide application* of employment criteria.ⁿ⁹ For example, in one case, the court held that a plaintiff must show the effect of employment criteria on an employer's *work force*.ⁿ¹⁰ The court held that an African-American employment applicant failed to show that a job requirement had a significant discriminatory impact on African-Americans as a class, observing that, although only a small proportion of the employer's employees were African-American, there was no evidence that the requirement was used to choose among applicants for positions other than the one sought by the plaintiff.ⁿ¹¹ In another case, the court rejected an employee's disparate impact claim because there was no evidence that her employer applied the disputed promotion criteria to anyone but her. The court concluded that the claim was one of discriminatory treatment.ⁿ¹²

In *Ricci v. DeStefano*,^{n12.1} the United States Supreme Court held that race-based action like refusing to certify the results of a promotional examination that appears to have a disparate impact on racial minorities is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute. In *Ricci*, a city administered promotional examinations for firefighters for the positions of captain and lieutenant. The city then refused to certify the results when they showed that white candidates had outperformed minority candidates. Some firefighters threatened a discrimination lawsuit if the city made promotions based on the tests, even though other firefighters threatened a discrimination lawsuit if the city, relying on the statistical racial disparity, ignored the test results and denied promotions to the candidates who had performed well. The Court began with the premise that the city's actions violated the disparate-treatment prohibition of Title VII absent some valid defense, because the city chose not to certify the examination results because of the statistical disparity based on race, *i.e.*, how minority candidates had performed when compared to white candidates.^{n12.2} Without some other justification, this express, race-based decisionmaking violated Title VII's command that employers cannot take adverse employment actions because of an individual's race.^{n12.3} The Court then considered whether the city's purpose to avoid disparate-impact liability excused what otherwise would be prohibited disparate-treatment discrimination. The Court found that if the city could not rescore a test based on the candidates' race,^{n12.4} it followed *a fortiori* that it could not take the greater step of discarding the test altogether to achieve a more desirable racial distribution of promotion-eligible candidates, absent a strong basis in evidence that the test was deficient and discarding the results was necessary to avoid violating the disparate-impact provision. The Court also found that restricting an employer's ability to discard test results and thereby discriminate against qualified candidates on the basis of their race also was in keeping with Title VII's express protection of bona fide promotional examinations.^{n12.5} Thus, the Court adopted the strong-basis-in-evidence standard as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII. The Court then found that the city failed to meet that standard. Even if the city was motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination, the record made clear there was no support for the conclusion that the city had an objective, strong basis in evidence to find the tests inadequate, with some consequent disparate-impact liability in violation of Title VII.^{n12.6}

[2] Statutes Subject to Disparate Impact Theory

The disparate impact theory may be used to establish liability under most equal employment opportunity laws, including Title VII,ⁿ¹³ the federal Equal Pay Act,ⁿ¹⁴ the ADA,ⁿ¹⁵ the ADEA,^{n15.1} and the FEHA.ⁿ¹⁶ The ADA expressly incorporates the disparate impact theory, providing that an employer may not use standards, criteria, or methods of administration that have the *effect* of disability discrimination or that *perpetuate* discrimination against others who are subject to common administrative control.ⁿ¹⁷ However, the disparate impact theory may not be used to establish discrimination in actions brought under the Civil Rights Acts of 1866 and 1871,ⁿ¹⁸ or the *Fifth Amendment*ⁿ¹⁹ and the *Equal Protection Clause of the Fourteenth Amendment to the United States Constitution*.ⁿ²⁰ⁿ²¹⁻²⁶

There are two substantive Title VII equal employment opportunity sections, providing respectively that an employer

may not unlawfully (1) "fail or refuse to hire or to discharge ... or otherwise to *discriminate* ... with respect to ... compensation, terms, conditions, or privileges of employment,"ⁿ²⁷ or (2) "limit, segregate, or classify ... employees or applicants ... in any way [that] would *deprive or tend to deprive* any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee."ⁿ²⁸ *Griggs* was decided under the latter section,ⁿ²⁹ but in light of the textual differences between the two sections, there is some question as to whether the disparate impact theory may be applied to cases involving the former section.ⁿ³⁰ The United States Supreme Court has expressly reserved judgment on the question.ⁿ³¹

The Ninth Circuit Court of Appeals, in *Garcia v. Spun Steak Co.*,ⁿ³² has held that there is no reason to restrict disparate impact claims to cases relating to the denial of employment opportunities because the Supreme Court has stated that Title 42 *United States Code Section 2000e-2(a)(1)* is to be construed broadly.ⁿ³³ Thus, the Ninth Circuit has held that a disparate impact claim may be based on a challenge to a practice or policy that has a significant adverse impact on the "terms, conditions, or privileges" of the employment of a protected group.ⁿ³⁴ Other courts have long assumed that either disparate treatment or disparate impact analyses may be "applied to a particular set of facts" without deciding what Title VII section a particular claim was brought under.ⁿ³⁵

[3] Employment Practices Subject to Disparate Impact Theory

The disparate impact theory most clearly applies to cases that challenge specific, clearly delineated employment practices, used at a single point in the job selection process.ⁿ³⁶ Such "objective" employment practices include education and intelligence tests,ⁿ³⁷ grooming rules,ⁿ³⁸ minimum height requirements,ⁿ³⁹ prior military service, training, and work experience,ⁿ⁴⁰ and shareholder preference plans.ⁿ⁴¹ For a detailed discussion of specific pre-employment practices, *see* §§ 41.40-41.46.

Until 1988, there was a conflict in the federal courts over whether disparate impact analysis may be applied to "subjective" employment practices, such as the use of separate hiring channels for different types of employees, "word-of-mouth" recruitment, nepotism, and rehiring policiesⁿ⁴² that lack the well-defined criteria of specific "objective" practices.ⁿ⁴³ However, in *Watson v. Ft. Worth Bank & Trust*,ⁿ⁴⁴ the United States Supreme Court conclusively resolved the conflict by holding that subjective employment practices may be challenged under the disparate impact theory in appropriate cases.ⁿ⁴⁵ The Court perceived that *Griggs v. Duke Power Co.*ⁿ⁴⁶ and succeeding cases could largely be nullified if disparate impact analysis applied only to objective employment practices.ⁿ⁴⁷ The Court explained that employer practices that combine both "objective" and "subjective" criteria generally must be considered subjective in nature. For example, if the employer in *Griggs* had consistently preferred applicants with high school diplomas and passing scores on the employer's general aptitude test, the selection system could nonetheless have been considered "subjective" if it also included brief interviews with candidates. The Court reasoned accordingly that if an employer refrained from making objective criteria absolutely determinative, it would remain free to give such tests almost as much weight as it chooses without risking a disparate impact challenge. Announcing a rule that allowed employers so easily to insulate themselves from liability under *Griggs* might effectively abolish disparate impact analysis.ⁿ⁴⁸

The *Watson* Court also determined that disparate impact is in principle no less applicable to subjective employment criteria than to objective criteria. The Court explained that in either case, a facially neutral employment practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices.ⁿ⁴⁹

The Court recognized that "validity studies," such as those which determine whether *objective* criteria predict actual job performance, may be impracticable for analyzing the legality of subjective criteria,ⁿ⁵⁰ and a plurality of the Court expressed concern that extending the disparate impact theory to subjective practices could increase the risk that employers will adopt unlawful quotas or engage in preferential treatment.ⁿ⁵¹ However, these members of the Court also expressed the view that employers will often find it easier to produce evidence of a "manifest relationship" between subjective criteria and the job in question because "[i]t is self-evident that many jobs, for example those involving

managerial responsibilities, require personal qualities that have never been considered amenable" to objective criteria.ⁿ⁵² The plurality explained that in evaluating job-relatedness, "it must be borne in mind that '[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.' "ⁿ⁵³

The employer who fails to articulate and apply objective employment practices may "reinforce prejudices, unconscious or not," which Title VII disapproves as a basis for employment.ⁿ⁵⁴

Legal Topics:

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

Labor & Employment Law
Discrimination
Disparate Impact
General Overview
Labor & Employment Law
Discrimination
Disparate Impact
Coverage & Definitions

FOOTNOTES:

(n1)Footnote 1. *Teamsters v. United States* (1977) 431 U.S. 324, 335 fn. 15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) . For a discussion and examples of discriminatory employment criteria, see [3], below.

(n2)Footnote 1.1. *Ricci v. DeStefano* (2009) 129 S. Ct. 2658, 2672, 174 L. Ed. 2d 490 .

(n3)Footnote 2. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (Title VII) .

(n4)Footnote 3. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 (Title VII) .

(n5)Footnote 3.1. *Ricci v. DeStefano* (2009) 129 S. Ct. 2658, 2673, 174 L. Ed. 2d 490 . See 105 Stats. 1071.

(n6)Footnote 3.2. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

(n7)Footnote 3.3. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

(n8)Footnote 3.4. 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C).

(n9)Footnote 4. See *Peters v. Lieuallen* (9th Cir. 1984) 746 F.2d 1390, 1392 (facially neutral system having significantly discriminatory impact on group protected by Title VII); *Yartsoff v. Oregon, Employment Div. of Dep't of Human Resources* (9th Cir. 1984) 745 F.2d 557, 559 (ADEA; employment practices having substantially disproportionate exclusionary impact on protected group).

(n10)Footnote 5. See *Teamsters v. United States* (1977) 431 U.S. 324, 335 fn. 15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII; either disparate impact theory or disparate treatment theory applicable to particular set of facts); see also *Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827, 839-841 (plurality opinion explaining burdens of proof that apply to both theories of objective and subjective proof. The first task is to identify the specific employment practice challenged, then there must be establishment of the disparate impact on a protected group, and finally there must be a demonstration that the disparity is the causal result of one or more employment practices); *Albamarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (Title VII; observing that complaining party or class must make out prima facie case of disparate impact).

(n11)Footnote 6. See *Lowe v. Monrovia* (9th Cir. 1985) 775 F.2d 998, 1004 (Title VII), amended 784 F.2d 1407 (1986) .

(n12)Footnote 7. See *Lowe v. Monrovia* (9th Cir. 1985) 775 F.2d 998, 1004 (Title VII), amended 784 F.2d 1407 (1986) .

(n13)Footnote 8. See, e.g., *Connecticut v. Teal* (1982) 457 U.S. 440, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (four

black employees sued under disparate impact theory, claiming discriminatory promotion practices); *Hung Ping Wang v. Hoffman* (9th Cir. 1982) 694 F.2d 1146 (upholding plaintiff's right to bring disparate impact claim based on promotion selection process).

(n14)Footnote 9. See *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1121 (plaintiff establishes prima facie case of disparate impact by showing significant disparate impact on protected class caused by specific, identified employment practice or selection criterion).

(n15)Footnote 10. *Peters v. Lieuallen* (9th Cir. 1984) 746 F.2d 1390, 1392 (Title VII).

(n16)Footnote 11. See *Peters v. Lieuallen* (9th Cir. 1984) 746 F.2d 1390, 1392 (Title VII).

(n17)Footnote 12. See *Yartzoff v. Or., Emp. Div., State of* (9th Cir. 1984) 745 F.2d 557, 559 (ADEA).

(n18)Footnote 12.1. *Ricci v. DeStefano* (2009) 129 S. Ct. 2658, 2673-2681, 174 L. Ed. 2d 490 .

(n19)Footnote 12.2. *Ricci v. DeStefano* (2009) 129 S. Ct. 2658, 2673, 174 L. Ed. 2d 490 .

(n20)Footnote 12.3. See 42 U.S.C. § 2000e-2(a)(1).

(n21)Footnote 12.4. See 42 U.S.C. § 2000e-2(l).

(n22)Footnote 12.5. See 42 U.S.C. § 2000e-2(h) (giving and acting upon results of any professionally developed ability test does not violate Title VII provided test, its administration or action upon results is not designed, intended or used to discriminate because of race). Cf. *AT&T Corp. v. Hulteen* (2009) 129 S. Ct. 1962, 173 L. Ed. 2d 898 .

(n23)Footnote 12.6. *Ricci v. DeStefano* (2009) 129 S. Ct. 2658, 2677-2681, 174 L. Ed. 2d 490 .

(n24)Footnote 13. See 42 U.S.C. § 2000e-2(k); *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 425-426, 430-432, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n25)Footnote 14. See *Laffey v. Northwest Airlines, Inc.* (D.C. Cir. 1984) 740 F.2d 1071 .

(n26)Footnote 15. See 42 U.S.C. § 12101 et seq.; see also appendix to 29 C.F.R. § 1630.15(b), (c); *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 855-856 .

(n27)Footnote 15.1. *Smith v. City of Jackson, Mississippi* (2005) 125 S. Ct. 1536, 161 L. Ed. 2d 410 (claim can be stated under ADEA by alleging disparate impact of employment policy on employees over age of 40).

(n28)Footnote 16. See *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 985-986, 236 Cal. Rptr. 716 .

(n29)Footnote 17. 42 U.S.C. § 12112(b)(3).

(n30)Footnote 18. See *General Bldg. Contractors v. Pennsylvania* (1982) 458 U.S. 375, 390-391, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (disparate impact not applicable under 42 U.S.C. § 1981); *Washington v. Davis* (1976) 426 U.S. 229, 247-248, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (disparate impact not applicable under 42 U.S.C. § 1981); *Griffin v. Breckenridge* (1971) 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (disparate impact not applicable under 42 U.S.C. § 1985); *Buck v. Board of Elections of City of New York* (2d Cir. 1976) 536 F.2d 522, 524 (same); cf. *Sischo-Nownejad v. Merced Community College Dist.* (9th Cir. 1991) 934 F.2d 1104, 1112 (42 U.S.C. § 1983 requires proof of intent to discriminate). but see *Paige v. State of California* (9th Cir. 2002) 291 F.3d 1141, 1144-1150 (disparate impact analysis of relevant pool for statistical comparison in § 1983 class action alleging race discrimination in California Highway Patrol promotional process had discriminatory impact on non-white officers in violation of Title

VII).

(n31)Footnote 19. *Washington v. Davis* (1976) 426 U.S. 229, 247-248, 96 S. Ct. 2040, 48 L. Ed. 2d 597 .

(n32)Footnote 20. *Personnel Administrator of Mass. v. Feeney* (1979) 442 U.S. 256, 272, 99 S. Ct. 2282, 60 L. Ed. 2d 870 .

(n33)Footnote 21-26. [Reserved]

(n34)Footnote 27. *See* 42 U.S.C. § 2000e-2(a)(1) (emphasis added); *see also* discussion in § 41.02[1].

(n35)Footnote 28. *See* 42 U.S.C. § 2000e-2(a)(2) (emphasis added); *see also* discussion in § 41.02[1].

(n36)Footnote 29. *See Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 426, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n37)Footnote 30. *See, e.g., Colby v. J.C. Penney Co., Inc.* (7th Cir. 1987) 811 F.2d 1119, 1126-1127 (considering argument that language "to discriminate" in 42 U.S.C. § 2000e-2(a)(1) requires proof of intentional discrimination, while "tend to deprive" language in 42 U.S.C. § 2000e-2(a)(2) allows proof of disparate impact).

(n38)Footnote 31. *See Nashville Gas Co. v. Satty* (1977) 434 U.S. 136, 144, 98 S. Ct. 347, 54 L. Ed. 2d 356 (declining to decide whether, when confronted by facially neutral plan, it is necessary to prove intent to establish prima facie violation of 42 U.S.C. § 2000e-2(a)(1)).

(n39)Footnote 32. *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480, 1485 .

(n40)Footnote 33. *See Meritor Sav. Bank v. Vinson* (1985) 477 U.S. 57, 64, 106 S. Ct. 2399 , 91 L. Ed. 2d. 2d 49.

(n41)Footnote 34. *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480, 1485-1486 ; *see also Wambheim v. J.C. Penney Co., Inc.* (9th Cir. 1983) 705 F.2d 1492, 1494 (holding without explanation that disparate impact theory is appropriate to case alleging discrimination in terms, conditions, and privileges of employment).

(n42)Footnote 35. *See E.E.O.C. v. J.C. Penney Co., Inc.* (6th Cir. 1988) 843 F.2d 249, 251-252 ; *Colby v. J.C. Penney Co., Inc.* (7th Cir. 1987) 811 F.2d 1119, 1126-1127 ; *see also Teamsters v. United States* (1977) 431 U.S. 324, 335-336 & n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n43)Footnote 36. *See Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1405-1406 (Title VII); *Zahorik v. Cornell University* (2d Cir. 1984) 729 F.2d 85, 95 ; *but see Green v. USX Corp.* (3d Cir. 1988) 843 F.2d 1511, 1521-1525 (analysis of multicomponent challenge to hiring system under disparate impact theory held proper).

(n44)Footnote 37. *See Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n45)Footnote 38. *See EEOC v. Trailways, Inc.* (D. Colo. 1981) 530 F. Supp. 54 .

(n46)Footnote 39. *See Boyd v. Ozark Air Lines, Inc.* (E.D. Mo. 1976) 419 F. Supp. 1061 , *aff'd*, 568 F.2d 50 (8th Cir. 1977) .

(n47)Footnote 40. *See Bailey v. Southeastern Area Joint Apprenticeship Committee* (N.D. 1983) 561 F. Supp. 895 .

(n48)Footnote 41. *See Bonilla v. Oakland Scavenger Co.* (9th Cir. 1982) 697 F.2d 1297, 1303-1304 , *cert. denied*, 467 U.S. 1251 (1984) .

(n49)Footnote 42. *See Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1479 (en banc),

ret'd to panel 827 F.2d 439 , *rev'd on other grounds*, 490 U.S. 642 (1989) .

(n50)Footnote 43. *Compare, e.g., Hung Ping Wang v. Hoffman* (9th Cir. 1982) 694 F.2d 1146, 1148-1149 (application of disparate impact theory to "subjective" practices) with *Heagney v. University of Washington* (9th Cir. 1981) 642 F.2d 1157, 1163 (disparate impact analysis inappropriate if not applied to "well-defined objective employment practices"); *see also Zahorik v. Cornell University* (2d Cir. 1984) 729 F.2d 85, 95-96 (Title VII; disparate impact theory applied to "subjective criteria"); *Page v. U.S. Industries, Inc.* (5th Cir. 1984) 726 F.2d 1038, 1045-1046 (disparate impact theory may be applied to "subjective criteria"); *Grant v. Bethlehem Steel Corp.* (2d Cir. 1980) 635 F.2d 1007, 1017-1020 , *cert. denied*, 452 U.S. 940 (1981) (Title VII; same); *Bunch v. Bullard* (5th Cir. 1986) 795 F.2d 384, 394 (Title VII; "subjective" practices fitting within disparate treatment analysis, rather than disparate impact analysis); *E.E.O.C. v. Federal Reserve Bank of Richmond* (4th Cir. 1983) 698 F.2d 633, 639 , *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank of Richmond* (1984) 467 U.S. 867, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (Title VII; disparate treatment not applicable when there is no "objective standard, applied evenly and automatically"); *Pope v. City of Hickory, N.C.* (4th Cir. 1982) 679 F.2d 20, 22 (Title VII; disparate impact as applicable only to "specific procedure").

(n51)Footnote 44. *Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827 .

(n52)Footnote 45. *See Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 991, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII) .

(n53)Footnote 46. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n54)Footnote 47. *See Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 989-990, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII) .

(n55)Footnote 48. *See Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 990, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII) .

(n56)Footnote 49. *See Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 990, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII) .

(n57)Footnote 50. *See Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 1006-1007, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII) . For a detailed discussion relating to validity studies, *see* discussion in § 41.45[2].

(n58)Footnote 51. *See Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 991-993, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII; opinion of O'Connor, J.; Rehnquist, C.J., White, Scalia, JJ., concurring).

(n59)Footnote 52. *See Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 999, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII; opinion of O'Connor, J.; Rehnquist, C.J., White, Scalia, JJ., concurring). For discussion relating to the "manifest relationship" standard, *see* [4], *below*.

(n60)Footnote 53. *See Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 999, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII; O'Connor, J.; Rehnquist, C.J., White, Scalia, JJ., concurring; quoting *Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 578, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (Title VII)) .

(n61)Footnote 54. *E.E.O.C. v. Rath Packing Co.* (8th Cir. 1986) 787 F.2d 318, 328 , *cert. denied*, (1986) 479 U.S. 910 (quoting *Stewart v. General Motors Corp.* (7th Cir. 1976) 542 F.2d 445).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART A. GENERAL THEORIES FOR PROVING DISCRIMINATION UNDER EQUAL EMPLOYMENT
OPPORTUNITY LAWS
Subpart C. Disparate Impact

2-41 California Employment Law § 41.21

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§ 41.21 Proof: Establishing Liability Under Disparate Impact Theory

[1] Discriminatory Intent Need Not Be Shown

Unlike the disparate treatment theory,ⁿ¹ the disparate impact theory does not require proof of discriminatory intent.ⁿ² In *Griggs v. Duke Power Co.*,ⁿ³ the United States Supreme Court explained that Title VII is directed to the *consequences* of employment practices, not simply the motivation.ⁿ⁴ Title VII requires "the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."ⁿ⁵ Thus, "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."ⁿ⁶

[2] Order and Burden of Proof

Under Title VII, as amended by the Civil Rights Act of 1991,ⁿ⁷ a complaining partyⁿ⁸ may establish an unlawful employment practice based on disparate impact in one of two ways:

1. The complaining party demonstrates that a respondentⁿ⁹ uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin (as further discussed in [3], *below*), or age,^{n9.1} and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity (as further discussed in [4], *below*);ⁿ¹⁰ or
2. The complaining party demonstrates that there is an alternative employment practice with less adverse impact (as further discussed in [5], *below*).ⁿ¹¹

"Demonstrate," for the above purposes, means meeting the burdens of production of evidence *and* persuasion.ⁿ¹²

Similar rules regarding proof of disparate impact and business necessity apply under the ADA,ⁿ¹³ the ADEA,ⁿ¹⁴ and the FEHA.ⁿ¹⁵

[3] Establishing Prima Facie Case of "Significant" Adverse Impact

[a] Generally

A plaintiff must initially establish a prima facie case by showing that an employment practice has a "significant adverse impact" on a protected classification.ⁿ¹⁶ This showing appears to be less exacting than the "gross disparity" showing required under the disparate treatment/pattern and practice theory.ⁿ¹⁷ Although the meaning of "significant" adverse impact does vary depending on the facts of a case and the courts that apply the standard,ⁿ¹⁸ the statistical showing need not rise to the level of "gross disparity."ⁿ¹⁹ Whether plaintiff is qualified for a specific position is not relevant to the issue of disparate impact.ⁿ²⁰

Disparate impact is not proved merely because all members of a disadvantaged subgroup are also members of a protected group. The mere fact that each person affected by a practice or policy is also a member of a protected group does not establish a disparate impact.^{n20.1} Thus, for example, in *Carter v. CB Richard Ellis, Inc.*,^{n20.2} a woman over the age of 40, who had attained the job title of administrative manager, sued her employer based on the employer's reorganization, which significantly changed the job description of administrative managers, resulting in a demotion and reduction in salary. All of the people affected by the reorganization were women and most were over 40 years old. The court found that plaintiff failed to establish a prima facie case of disparate impact discrimination because her data set was incomplete. Plaintiff offered no evidence regarding the gender or age composition of all of the employer's 10,000 employees; the evidence was entirely about the effect of the reorganization on the administrative managers, which is not a group protected by law. Even more fundamentally, plaintiff did not present evidence of the total impact on women or those over 40.

A plaintiff must actually prove discriminatory impact, rather than merely an inference of discriminatory impact.ⁿ²¹ The plaintiff need not prove discrimination with "scientific certainty," but must prove the charge by a preponderance of the evidence.^{n21.1}

A plaintiff may use reliable statistical data to show adverse impact.ⁿ²² In a proper case, statistical data alone may be adequate to prove causation.ⁿ²³ However, the statistical disparities must be sufficiently substantial to raise an inference of causation.ⁿ²⁴ The probative value of any statistical comparison is limited by a small available sample.ⁿ²⁵ The first step in a statistical analysis is to identify the base population for comparison. Generally, the appropriate population is the applicant pool or relevant labor market from which the positions at issue are filled.ⁿ²⁶ The composition of the applicant pool or relevant labor market is then compared to the composition of the successful applicants.ⁿ²⁷ In using statistical data, the law does not require the near-impossible standard of eliminating all possible nondiscriminatory factors.ⁿ²⁸

The primary statistical comparison used in cases challenging objective selection devicesⁿ²⁹ is "pass-fail" rate data. Such data compares the percentage of the protected class members who "pass" with the success rate for majority group members.ⁿ³⁰

Statistical comparisons are also probative in cases challenging overall hiring procedures that include both objective and subjective devices.ⁿ³¹ The statistical evidence in such cases, as in pattern or practice disparate treatment cases,ⁿ³² usually compares a protected class representation in the *work force* with its representation in a relevant pool. Generally, the proper comparison is between the composition of "at-issue" jobs (i.e., those that are alleged to involve discrimination) and the composition of the qualified population in the relevant labor market.ⁿ³³ If labor market statistics are difficult or impossible to obtain, however, other statistics--such as measures indicating the composition of

otherwise qualified *applicants*--are equally probative.ⁿ³⁴

In *Wards Cove Packing Co. v. Atonio*,ⁿ³⁵ plaintiffs brought a Title VII action against a cannery, alleging that the cannery's hiring practices had a disparate impact on racial minorities, resulting in a disproportionately low percentage of nonwhites being hired for higher paid office jobs. In support of their disparate impact claim, plaintiffs relied, in part, on a statistical comparison between the percentage of unskilled cannery workers who were nonwhite and the percentage of skilled office workers who were nonwhite. The United States Supreme Court held that plaintiffs' statistical comparison did not establish a prima facie case of disparate impact.ⁿ³⁶ The Court explained that, with respect to "at-issue" skilled jobs, the cannery's unskilled work force did not reflect the pool of *qualified* job applicants or the *qualified* population of the labor market for the skilled jobs.ⁿ³⁷

Under Title VII, the plaintiff must generally prove that a particular challenged employment practice causes a disparate impact on a protected group.ⁿ³⁸ For example, the nonadverse results of ultimate promotion decisions cannot refute a prima facie case of disparate impact at a dispositive interview selection stage.ⁿ³⁹ However, if the plaintiff can demonstrate to the court that the elements of the employer's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.ⁿ⁴⁰ This provision, which was added by the Civil Rights Act of 1991,ⁿ⁴¹ relaxes the rule set forth in *Wards Cove*, in which the Court had held that the plaintiff must demonstrate in all cases that application of a specific or particular employment practice or practices created the disparate impact and that disparate impact may not be proved by showing that the employer's practices created a disparate impact "at the bottom line."ⁿ⁴²

For discussions of various statistical methods used to measure disparity, *see* [b] and [c], *below*.

[b] Federal Uniform Guidelines

One measure of "significant adverse impact" derives from the Uniform Guidelines on Employment Selection Proceduresⁿ⁴³ adopted by the EEOC, the Departments of Labor and Justice and the federal Civil Service Commission.ⁿ⁴⁴ Under the guidelines, a selection rate for any race, sex, or ethnic group that is less than 80 percent of the rate for the group with the highest rate will generally be regarded by the federal enforcement agencies as evidence of adverse impact.ⁿ⁴⁵ For example, if 50 percent of the applicants of one race, sex, or ethnic group passes a preemployment test while only 40 percent of another such group passes, there is no evidence of adverse impact because the pass rate for the latter group is 80 percent of the pass rate for the former group.

The "80 percent rule" is a "rule of thumb" because a smaller difference (for example, a 90 percent selection rate) may constitute a significant adverse impact if the difference is significant in both statistical and practical terms, or if an employer's actions disproportionately discourage applicants who belong to a particular protected group.ⁿ⁴⁶ Conversely, greater differences (*e.g.*, a 70 percent selection rate) may not constitute significant adverse impact when they are based on small numbers and are not statistically significant, or if special recruiting or other programs cause the pool of candidates belonging to a protected class to be atypical of the normal pool of applicants from that group.ⁿ⁴⁷ According to the Ninth Circuit, a combination of small sample size and small success rate may call into question the statistical significance of a violation of the "80 percent rule."ⁿ⁴⁸

As discussed in Chapter 40, the guidelines are not legally binding on federal courts because they are not formal regulations with the force of law.ⁿ⁴⁹ Nevertheless, the guidelines are entitled to "great deference,"ⁿ⁵⁰ and the "80 percent rule," although criticized by some courts and commentators,ⁿ⁵¹ is widely used in Title VII litigation. In California, the guidelines have been adopted by the Fair Employment and Housing Commission (FEHC),ⁿ⁵² and therefore govern the determination of adverse impact in cases brought under the FEHA.ⁿ⁵³ For a detailed discussion relating to the purpose and application of the EEOC guidelines, *see* Chapter 40.

The guidelines also provide that if an employer's selection process in its entirety does not have an adverse impact,

federal enforcement agencies will not take enforcement action against any component of the process that has an adverse impact.ⁿ⁵⁴ This appears to be inconsistent with the United States Supreme Court decision in *Connecticut v. Teal*,ⁿ⁵⁵ which held that nondiscriminatory "bottom-line" results of employer practices do not preclude a Title VII challenge if a discriminatory component of that process denies protected individuals employment opportunities at any stage.ⁿ⁵⁶ However, the *Teal* Court explained that the "bottom-line" concept in the guidelines only applies to the initiation of agency enforcement action, and does not address the underlying question of law. Individuals who are denied employment opportunities because of a particular component in a procedure that, as a whole, has no adverse impact, retain the right to proceed through the appropriate agencies and into federal court.ⁿ⁵⁷

[c] Other Statistical Methods

Another measure of "significant adverse impact" derives from the statistical concept of "standard deviation" enunciated by the United States Supreme Court in *Castaneda v. Partida*,ⁿ⁵⁸ an equal protection jury selection case, which a number of federal courts have applied to measure the significance of statistical disparities in an employer's workforce.ⁿ⁵⁹

The "standard deviation" test involves a comparison between the actual rate of selection in a work force and an expected rate of selection. If the difference between the two rates is greater than two or three "standard deviations," a statistician would not consider the difference to be random, and would infer discrimination.ⁿ⁶⁰ For example, if there are 5000 qualified applicants in a pool, comprised of 3000 majority group members and 2000 minority group members, the expected rate of selection for 500 employment positions would be 300 majority group members and 200 minority group members. If, however, only 100 minority group members are hired, there is a deviation of 100 from the expected rate of selection. A "standard deviation" is defined in *Castaneda* as the square root of the product of the total number in the sample (500) times the probability of selecting a minority group member (40%) times the probability of selecting a majority group member (60%).ⁿ⁶¹ Therefore, in the foregoing example, a "standard deviation" is the square root of 120, which is approximately 10.95. Thus, the difference of 100 in the actual selection is approximately nine standard deviations, and the employment practice would be deemed to have a significant adverse impact.ⁿ⁶² In *Clady v. County of Los Angeles*,ⁿ⁶³ the Ninth Circuit Court of Appeals, citing *Contreras v. City of Los Angeles*ⁿ⁶⁴ and *Craig v. County of Los Angeles*ⁿ⁶⁵ with approval, declared that "[w]ithout endorsing either [the Uniform Guidelines or the standard deviation] method, this circuit analyzes whether [a] statistical disparity is 'substantial' or 'significant' in a given case."ⁿ⁶⁶ Both *Contreras* and *Craig* relied on simple percentage comparisons to determine the significance of a particular discriminatory impact. Thus, in *Craig*, the court of appeals held that statistics showing that 33 percent of the protected class members who took a required written examination failed, while only 13 percent of the majority class members failed, were sufficient to establish a significant adverse impact.ⁿ⁶⁷ By contrast, in *Contreras*, although statistical evidence showed that 55 percent of the majority class members passed a required written examination while only 29.4 percent of the protected class members passed, the figures "were not statistically significant when tested at a 0.05 level of significance" because the sample on which the statistics were based was too small.ⁿ⁶⁸ The court held that judges may accept some statistical inferences and reject others based on their perception of the oral and documentary evidence.ⁿ⁶⁹

In another Ninth Circuit case, involving a "pattern or practice" of sex discrimination,ⁿ⁷⁰ the court relied on a "regression analysis," which isolates the influence of a particular independent variable (e.g., sex) on a dependent variable (e.g., salary). The analysis uses an algebraic formula to express the influence of the independent variable on the average level of the dependent variable.ⁿ⁷¹

From the foregoing cases, it seems that the Ninth Circuit Court of Appeals will determine "significant" adverse impact on a case-by-case basis, without applying any set formula.

[4] Establishing "Job-Relatedness" and "Business Necessity"

Under Title VII, as amended by the Civil Rights Act of 1991, if a plaintiff establishes that an employment practice has a "significant" adverse impact on a protected class,ⁿ⁷² the employer must either refute the plaintiff's evidence and demonstrate that the employment practice does not have a disparate impactⁿ⁷³ or demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity."ⁿ⁷⁴ "Demonstrate," for the above purposes, means meeting the burdens of production of evidence *and* persuasion.ⁿ⁷⁵ This definition, which was added by the Civil Rights Act of 1991,ⁿ⁷⁶ was intended to overrule the U.S. Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*,ⁿ⁷⁷ in which the Court had held that the employer had only the burden of producing evidence regarding a business justification for the challenged employment practice and that the burden of persuasion remained at all times with the plaintiff.ⁿ⁷⁸

Similarly, under the FEHA, the burden of persuasion regarding business necessity appears to be on the defendant employer.ⁿ⁷⁹ "Business necessity" is also set forth as a "defense" under the ADA, but the ADA does not clearly set forth the burden of proof regarding that defense.ⁿ⁸⁰

Title VII does not contain express definitions of "business necessity" or "job related," but one of the express purposes of the Civil Rights Act of 1991 was to codify the concepts of "business necessity" and "job related" enunciated by the U.S. Supreme Court in *Griggs v. Duke Power Co.*,ⁿ⁸¹ and in other Supreme Court decisions prior to *Wards Cove*.ⁿ⁸² In *Wards Cove*, the Court had indicated that an employment practice with a disparate impact was justified under Title VII if it merely "serve[d], in a significant way, the legitimate employment goals of the employer."ⁿ⁸³ Furthermore, the *Wards Cove* Court held that although "an insubstantial justification ... will not suffice, ... there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business...".ⁿ⁸⁴ However, under the Civil Rights Act of 1991, the *Wards Cove* standard is no longer applicable, and the standard for justifying an employment practice will instead be governed by *Griggs* and other pre-*Wards Cove* decisions.

Under the *Griggs* "business necessity" test, any given employment requirement must have "a manifest relationship to the employment in question."ⁿ⁸⁵ *Griggs* engendered some confusion about what is required by "business necessity," but in the Ninth Circuit, the essence of "business necessity" has been "job-relatedness."ⁿ⁸⁶ However, the United States Supreme Court has consistently used the "manifest relationship" standard in cases in which the Court has implicitly approved employment practices that *are neither required by nor necessary to* the employer's legitimate interests.ⁿ⁸⁷

Under the "manifest relationship" standard, "business necessity/job-relatedness" means that an employment practice predicts, or significantly correlates with, important methods of work behavior that comprise, or are relevant to, the job.ⁿ⁸⁸ Thus, a disparate impact is tolerable only if it is an "incidental product" of a selection device that genuinely predicts or significantly correlates with successful job performance.ⁿ⁸⁹ The greater the adverse impact, the higher the correlation with job performance required to justify the practice.ⁿ⁹⁰

The employer must show that a test or other selection device actually measures skills, knowledge, or ability required for successful performance of a particular job.ⁿ⁹¹ For example, the requirement of a certain number of years of experience on the job may not necessarily bear a "manifest relationship" to the job,ⁿ⁹² nor would an employer's administrative convenience be sufficient in itself to justify an adverse impact.ⁿ⁹³ In addition, it is not enough simply to identify some other facially nondiscriminatory factor that correlates with the alleged disparate impact. For example, an employer does not escape the obligation to validate by offering evidence that a disparity between men and women on a promotion exam is attributable to the fact that on average women have fewer years of experience and are more likely to be first-time test-takers than men. Rather, the employer must show that the exam is a realistic measure of job performance.ⁿ⁹⁴

The process involved in establishing "business necessity/job-relatedness" is called "validation."ⁿ⁹⁵ Statistical analysis is critical to "validation," and several professionally acceptable techniques may be used.ⁿ⁹⁶ For example, the federal Uniform Guidelinesⁿ⁹⁷ provide detailed technical standards for validity studies.ⁿ⁹⁸ *Clady v. County of Los Angeles*ⁿ⁹⁹ involved a method ("criterion-related validation") that seeks a significant positive correlation between success on a

test and success on some measure of job performance.ⁿ¹⁰⁰ The method measures the degree of correlation with a statistical concept called a "correlation coefficient."ⁿ¹⁰¹ Although the federal Uniform Guidelines state that no minimum correlation coefficient applies to all employment situations,ⁿ¹⁰² the Ninth Circuit Court of Appeals has relied on a standard of the American Psychological Association (APA) Division of Organizational and Industrial Psychology (Division 14), which does attempt to establish such guidelines.ⁿ¹⁰³ Under the APA guide, correlation coefficients range from -1.0 (perfect negative correlation) to +1.0 (perfect positive correlation). The guide provides that a +0.20 correlation between a single employment test and a measure of job performance is often high enough to be useful; that such correlations rarely exceed +0.50; that a correlation of +0.40 is ordinarily very good; and that most personnel research workers are usually pleased with a correlation of +0.30.ⁿ¹⁰⁴

For additional discussion of validation of employee selection procedures and tests, *see* § 41.45[2]. For further discussion relating to "business necessity" as a defense, *see* § 41.95.

[5] Establishing "Pretext" or Alternative With Less Adverse Impact

Under Title VII, as amended by the Civil Rights Act of 1991, disparate impact is also established if "the complaining party makes the demonstration described in Title 42 *United States Code Section 2000e-2(k)(1)(C)* with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice."ⁿ¹⁰⁵ Title 42 *United States Code Section 2000e-2(k)(1)(C)* provides that "[t]he demonstration referred to ... shall be in accordance with the law as it existed on June 4, 1989 [the day before *Wards Cove* was decided], with respect to the concept of 'alternative employment practice.' "

Under prior law, if the employer meets the "manifest relationship" standard,ⁿ¹⁰⁶ a plaintiff may still prevail if he or she shows that a test or selection criterion was used as a pretext for discrimination.ⁿ¹⁰⁷ Alternatively, a plaintiff may show that a practice allegedly based on legitimate business reasons was not a business necessity by establishing that alternative tests or selection devices exist that would have comparable business utility and less adverse impact.ⁿ¹⁰⁸ Factors such as the cost or other burdens of proposed alternatives are relevant in determining whether the alternatives are equally as effective as a challenged practice.ⁿ¹⁰⁹ The plaintiff has the burden of persuasion that there is a less discriminatory alternative.ⁿ¹¹⁰

■ CONSULTANT'S COMMENT:

It is not clear whether an employer may rely on cost considerations to defend against a plaintiff's contentions regarding the suitability of alternative employment practices under the Civil Rights Act of 1991. Employers can be expected to rely on cases such as *Clady v. County of Los Angeles* ⁿ¹¹¹ and *Chrisner v. Complete Auto Transit, Inc.* ⁿ¹¹² Employees likely will cite to *Los Angeles Dept. of W & P v. Manhart*. ⁿ¹¹³ *Commentary by Kirby Wilcox.*

Legal Topics:

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

Labor & Employment Law Discrimination Disparate Impact General Overview Labor & Employment Law Discrimination Disparate Impact Coverage & Definitions Labor & Employment Law Discrimination Disparate Impact Proof General Overview Labor & Employment Law Discrimination Disparate Impact Proof Burdens of Proof

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 41.11[1][a].

(n2)Footnote 2. *See Teamsters v. United States* (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) ; *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 (Title VII) ; *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1291(ADEA) ; *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1427 , cert. denied, 475 U.S. 1109 (1986) (Title VII); *City and County of San Francisco v. Fair*

Employment & Housing Com. (1987) 191 Cal. App. 3d 976, 985, 236 Cal. Rptr. 716 (FEHA) .

(n3)Footnote 3. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n4)Footnote 4. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n5)Footnote 5. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n6)Footnote 6. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n7)Footnote 7. *See* Pub. L. No. 102-166, §§ 104, 105.

(n8)Footnote 8. The term "complaining party" under Title VII means the EEOC, the Attorney General, or a person who may bring an action or proceeding under Title VII. 42 U.S.C. § 2000e(l) .

(n9)Footnote 9. The term "respondent" under Title VII means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to 42 U.S.C. § 2000e-16. 42 U.S.C. § 2000e(n).

(n10)Footnote 9.1. *See Pottenger v. Potlatch Corp.* (9th Cir. 2003) 329 F.3d 740, 749 (statistical analysis of RIF tended to show at least some relationship between age and termination); *Katz v. Regents of the Univ. of Cal.* (9th Cir. 2000) 229 F.3d 831, 835 .

(n11)Footnote 10. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

(n12)Footnote 11. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

(n13)Footnote 12. 42 U.S.C. § 2000e(m).

(n14)Footnote 13. *See* 42 U.S.C. §§ 12112(b)(1)-(3), (6), 12113(a).

(n15)Footnote 14. *See generally* *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1424 (ADEA); *but see* *Markham v. Geller* (1981) 451 U.S. 945, 947, 101 S. Ct. 2028, 68 L. Ed. 2d 332 (Rehnquist, J., dissenting from denial of certiorari; arguing that disparate impact analysis is inapplicable to ADEA cases).

(n16)Footnote 15. *See City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 989, 236 Cal. Rptr. 716 ; *see also* 2 Cal. Code Reg. § 7286.7(b) (FEHC regulations).

(n17)Footnote 16. *See* 42 U.S.C. § 2000e-2(k)(1)(A), (B); *Connecticut v. Teal* (1982) 457 U.S. 440, 446, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (Title VII) ; *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (Title VII) ; *see also* *Pottenger v. Potlatch Corp.* (9th Cir. 2003) 329 F.3d 740, 749-750 (statistical analysis of RIF tended to show at least some relationship between age and termination, but individual's disparate impact claim failed because he was not terminated as part of RIF); *Paige v. State of California* (9th Cir. 2002) 291 F.3d 1141, 1144-1145 (§ 1983); *Katz v. Regents of the University of California* (9th Cir. 2000) 229 F.3d 831, 835 .

(n18)Footnote 17. *See Hazelwood School District v. United States* (1977) 433 U.S. 299, 307-308, 97 S. Ct. 2736, 53 L. Ed. 2d 768 (Title VII) .

(n19)Footnote 18. *See* *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1424 (ADEA; "significance" or "substantiality" of numerical disparities is judged on case-by-case basis); *see also* discussion in [b] and [c], *below*.

(n20)Footnote 19. *See Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1278 , *cert. denied*, 471 U.S. 1115 (1985) (Title VII); *see also* *City and County of San Francisco v. Fair Employment & Housing*

Com. (1987) 191 Cal. App. 3d 976, 987, 236 Cal. Rptr. 716 (FEHA; statistics showing significant disparity alone may constitute prima facie proof of discrimination under disparate impact theory). In *Segar*, the Court of Appeals for the District of Columbia explained that the "gross disparity" standard applies when a plaintiff relies on "population/workforce" comparisons and lacks any other evidence. *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1278, cert. denied, 471 U.S. 1115 (1985) (Title VII); for a discussion of "population/workforce" statistical comparisons, see § 41.11[2]. The "gross disparity" rule is appropriate for such comparisons because they are not "finely tuned," and yield only rough evidence of discrimination. *Segar v. Smith* (D.C. Cir. 1984) 238 U.S. App. D.C. 103, 738 F.2d 1249, 1278, cert. denied, 471 U.S. 1115 (1985) (Title VII). However, the "pass/fail" statistics generally used in disparate impact claims are more "finely tuned," and thus, may create a prima facie case of discrimination if they establish a "significantly" disproportionate selection rate.

(n21)Footnote 20. *Foss v. Thompson* (9th Cir. 2001) 242 F.3d 1131, 1134 (Title VII).

(n22)Footnote 20.1. *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal. App. 4th 1313, 1324. See also *Katz v. Regents of University of California* (9th Cir. 2000) 229 F.3d 831 (early retirement offered to participants in one public retirement plan and not another was not age discrimination, where taking into account total population of employees only 27 percent were adversely affected, which statistical evidence was insufficient to raise inference that disparate impact fell on employees by virtue of their membership in protected age group, and where factor that determined employees' eligibility to participate in favored plan was not employee's age, but whether employee was member of preferred plan); *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1424 (elimination of duplicative vice presidents in special assets division following bank merger was not prima facie evidence of disparate impact discrimination, even though older persons were terminated at higher rate than younger persons); *Beale v. GTE California* (C.D. Cal. 1996) 999 F. Supp. 1312, 1323 (prima facie case of disparate impact age and gender discrimination not proved where entire category of workers known as frame maintainers was eliminated, even though 97 percent were women and 98 percent were over 40, because, inter alia, plaintiff failed to provide data about gender and age of employees remaining after reduction in force); *Frank v. County of Los Angeles* (2007) 149 Cal. App. 4th 805, 57 Cal. Rptr. 3d 430, 2007 Cal. App. LEXIS 530, *21-*34 (FEHA; evidence that all county police officers, 70 percent of whom were minority, were paid less and received fewer benefits than sheriff's deputies, 70 percent of whom were Caucasian, did not establish basis for disparate impact claim, where county's policies were to pay class members, Caucasian and minority alike, less because they were members of county police rather than sheriff's deputies, and plaintiffs presented no evidence that county established policies that worked as barrier or deterrent to minority application to and hiring by sheriff).

(n23)Footnote 20.2. *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal. App. 4th 1313, 1324-1326.

(n24)Footnote 21. *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1421 (ADEA).

(n25)Footnote 21.1. *Paige v. State of California* (9th Cir. 2002) 291 F.3d 1141, 1145 n.4 (§ 1983).

(n26)Footnote 22. See *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1427, cert. denied, 475 U.S. 1109 (1986) (Title VII); see also *Katz v. Regents of the University of California* (9th Cir. 2000) 229 F.3d 831, 836 (ADEA; statistical evidence insufficient to raise inference that disparate impact fell on employees by virtue of membership in protected group); *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1424 (ADEA; statistical evidence must be substantial enough to raise inference of causation). See also *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1224 (Title VII; prima facie case of disparate impact does not require statistical evidence to be uncontroverted).

(n27)Footnote 23. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 650, 109 S. Ct. 2115, 104 L. Ed. 2d 733.

(n28)Footnote 24. *Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 995, 108 S. Ct. 2777, 101 L. Ed. 2d

827 ; *Paige v. State of California* (9th Cir. 2002) 291 F.3d 1141, 1145 (§ 1983); *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1122 ; *see also* *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1428-1429 .

(n29)Footnote 25. *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1123 (sample involving six female applicants in pool of 38 likely applicants too small to produce statistically significant results); *see* *Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 996-997, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (statistical evidence may not be probative if based on small or incomplete data set); *Contreras v. County of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1272-1273 (discounting probative value of statistical sample consisting of 57 test takers, 17 of whom belonged in plaintiffs' protected class); *Morita v. Southern Cal. Permanente Med. Group* (9th Cir. 1976) 541 F.2d 217, 219-220 (statistical evidence derived from extremely small universe has little predictive value and must be disregarded; finding 8-case sample too small), quoting *Harper v. Trans World Airlines, Inc.* (8th Cir. 1975) 525 F.2d 409, 412 .

(n30)Footnote 26. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 650, 109 S. Ct. 2115, 104 L. Ed. 2d 733 ; *Paige v. State of California* (9th Cir. 2002) 291 F.3d 1141, 1144-1147 (in class action challenging promotional practices of Highway Patrol as racially discriminatory, internal applicant pool was proper comparative group for disparate impact analysis); *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174, 1186-1187 (in action challenging compensation and promotion practices of employer which filled higher management by internal promotions, potential applicant pool--and thus appropriate comparison pool for promotions to upper and middle management jobs--was current employees in lower management positions).

(n31)Footnote 27. *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1123 (in context of promotions, appropriate comparison is between composition of candidates seeking promotion and composition of those actually promoted); *see* *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 650-651, 109 S. Ct. 2115, 104 L. Ed. 2d 733 ; *Hazelwood Sch. Dist. v. United States* (1977) 433 U.S. 299, 308, 97 S. Ct. 2736, 53 L. Ed. 2d 768 (appropriate comparison was between racial composition of qualified public school teachers in relevant labor market and racial composition of school's teaching staff).

(n32)Footnote 28. *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174, 1186 ; *see* *Bazemore v. Friday* (1986) 478 U.S. 385, 400, 106 S. Ct. 3000, 92 L. Ed. 2d 315 .

(n33)Footnote 29. *See* discussion in § 41.20[3], *above*.

(n34)Footnote 30. *See* Larson, Employment Discrimination, ch. 10, § 50.85(a); Schlei and Grossman, Employment Discrimination Law, ch. 36 (BNA 2d ed. 1983).

(n35)Footnote 31. *See* *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 650, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (Title VII) ; *see also* discussion in § 41.20[3], *above*.

(n36)Footnote 32. *See* discussion in § 41.11[2].

(n37)Footnote 33. *Foss v. Thompson* (9th Cir. 2001) 242 F.3d 1131, 1134 (Title VII; male plaintiff failed to establish prima facie case of disparate impact of nursing degree requirement on males because plaintiff's showing left to conjecture whether among pool of individuals qualified for position, gender disparity resulting from nursing degree requirement would be sufficiently significant to support prima facie case).

(n38)Footnote 34. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 650-651, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (Title VII) .

(n39)Footnote 35. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 .

(n40)Footnote 36. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 651-655, 109 S. Ct. 2115, 104 L. Ed. 2d 733 .

(n41)Footnote 37. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 651, 109 S. Ct. 2115, 104 L. Ed. 2d 733 .

(n42)Footnote 38. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i), (B)(i); *see also* *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 656-657, 109 S. Ct. 2115, 104 L. Ed. 2d 733 . *See, e.g.,* *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1122, 1124-1125 (district court erroneously focused on final results of promotion process, where plaintiffs challenged intermediate stage that functioned as pass or fail barrier to further consideration; further, plaintiffs failed to identify specific employment practice that disproportionately excluded female applicants because of gender).

(n43)Footnote 39. *See* *Connecticut v. Teal* (1982) 457 U.S. 440, 452, 102 S. Ct. 2525, 2533, 73 L. Ed. 2d 130 ; *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1122 .

(n44)Footnote 40. 42 U.S.C. § 2000e-2(k)(1)(B)(i); *see* *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1122-1123 (results of two rounds of interviews at selection stage for promotion could not be analytically separated for purposes of disparate impact analysis; although interview stage as a whole functioned as pass/fail barrier to further consideration for promotion, there was no such barrier between two screening rounds, and failure to be selected in first round did not foreclose consideration for interview in second round).

(n45)Footnote 41. *See* Pub. L. No. 102-166, § 105(a) added as 42 U.S.C. § 2000e-2(k).

(n46)Footnote 42. *See* *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 656-657, 109 S. Ct. 2115, 104 L. Ed. 2d 733 . It has been held that the Civil Rights Act of 1991 does not apply retroactively to the *Wards Cove* case itself, even though this holding in *Wards Cove* was effectively reversed by the Civil Rights Act of 1991. *See* *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1993) 10 F.3d 1485, 1496 .

(n47)Footnote 43. 29 C.F.R. §§ 1607.1-1607.18.

(n48)Footnote 44. *See* *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1428 (Title VII); 43 Fed. Reg. 38, 291, 38, 294 (1978) (introducing and enacting Uniform Guidelines).

(n49)Footnote 45. 29 C.F.R. § 1607.4(D). *See, e.g.,* *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1123 (Title VII; no disparate impact shown where selection rate for female applicants to be interviewed was 33 percent (2 of 6) and rate for male applicants was 41 percent (13 of 32), so that rate of selection for women was 81 percent of rate of interview for men); *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1225 (Title VII; two promotion tests violated "80 percent rule" because pass rate for women on first test was only 66 percent of men's (with 53 percent promotion rate) and on second test was only 67 percent of men's (with 66 percent promotion rate)).

(n50)Footnote 46. 29 C.F.R. § 1607.4(D); *see* *Watson v. Forth Worth Bank & Trust* (1988) 487 U.S. 977, 995-996, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (80 percent (also referred to as four-fifths rule) is mere rule of thumb rather than mechanical substitute for requisite case-by-case determination); *see also* *Harris v. Civil Serv. Comm'n* (1998) 65 Cal. App. 4th 1356, 1368-1369, 77 Cal. Rptr. 2d 366 (commission has no legal duty to adopt, use, or validate tests when undisputed evidence showed dramatic disparate impact (almost one-half) far below invalidity threshold of four-fifths rule).

(n51)Footnote 47. 29 C.F.R. § 1607.4(D).

(n52)Footnote 48. *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1226 (Title VII).

(n53)Footnote 49. *See* *General Elec. Co. v. Gilbert* (1976) 429 U.S. 125, 141-142, 97 S. Ct. 401, 50 L. Ed. 2d 343 (Title VII) ; *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1428 (Title VII) ; *see also* *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1225 (Title VII).

(n54)Footnote 50. *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 431, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (Title VII) ; *Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1281 (Title VII) ; *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 664 (Title VII).

(n55)Footnote 51. *See Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1428 ,cert. denied, 475 U.S. 1109 (1986) ; *Shoben, Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 *Harv. L. Rev.* 793, 805-811 (1978) (rule criticized because it does not account for samples of varying size). *but see Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1225 (Title VII; acknowledging that court has criticized "80 percent rule," but while guidelines are not dispositive, they are instructive).

(n56)Footnote 52. *See 2 Cal. Code Reg. § 7287.4.*

(n57)Footnote 53. *See City and County of San Francisco v. Fair Employment & Hous. Comm'n* (1987) 191 Cal. App. 3d 976, 986 n.8, 236 Cal. Rptr. 716(FEHA) ; *Harris v. Civil Serv. Comm'n* (1998) 65 Cal. App. 4th 1356, 1368-1369, 77 Cal. Rptr. 2d 366 (commission has no legal duty to adopt, use, or validate tests when undisputed evidence showed dramatic disparate impact (almost one-half) far below invalidity threshold of four-fifths rule); *see also Gov. Code § 12935(a)(1)* (FEHC as authorized to interpret FEHA by adopting "suitable rules, regulations, and standards").

(n58)Footnote 54. *29 C.F.R. § 1607.4(C).*

(n59)Footnote 55. *Connecticut v. Teal* (1982) 457 U.S. 440, 102 S. Ct. 2525, 73 L. Ed. 2d 130 .

(n60)Footnote 56. *See Connecticut v. Teal* (1982) 457 U.S. 440, 448, 451, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (invalidating written examination that had discriminatory impact on African-American employees, although result of entire hiring process reflected no adverse impact); *Harris v. Civil Serv. Comm'n* (1998) 65 Cal. App. 4th 1356, 1370, 77 Cal. Rptr. 2d 366 ("bottom line" evidence of one group's adequate representation does not excuse employment practice that has disparate impact on group; court cannot compel validation study through administrative mandate for benefit of one protected group when agency has properly exercised discretion to cancel employment test shown to have disparate impact on another protected group); *see also 42 U.S.C. § 2000e-2(a)(2)* (employers prohibited from limiting or classifying employees or applicants in any way that denies employment opportunities).

(n61)Footnote 57. *See Connecticut v. Teal* (1982) 457 U.S. 440, 453 n.12, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (Title VII) .

(n62)Footnote 58. *Castaneda v. Partida* (1977) 430 U.S. 482 n.17, 496, 97 S. Ct. 1272, 51 L. Ed. 2d 498 .

(n63)Footnote 59. *See, e.g., Rivera v. City of Wichita Falls* (5th Cir. 1982) 665 F.2d 531, 536 n.7 ; *Guardians Ass'n of New York City v. Civil Serv.* (2d Cir. 1980) 630 F.2d 79, 86-87 .

(n64)Footnote 60. *Hazelwood Sch. Dist. v. United States* (1977) 433 U.S. 299, 308 n.14, 97 S. Ct. 2736, 53 L. Ed. 2d 768 (Title VII) .

(n65)Footnote 61. *Castaneda v. Partida* (1977) 430 U.S. 482, 496 n.17, 97 S. Ct. 1272, 51 L. Ed. 2d 498 .

(n66)Footnote 62. *See Larson, Employment Discrimination*, ch. 10, § 50.86(b).

(n67)Footnote 63. *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421 (Title VII).

(n68)Footnote 64. *Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267 (Title VII).

(n69)Footnote 65. *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659 (Title VII).

(n70)Footnote 66. *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1428-1429 (Title VII).

(n71)Footnote 67. *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659 , cert. denied, 450 U.S. 919 (1981) (Title VII).

(n72)Footnote 68. *Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1272-1273 , cert. denied, 455 U.S. 1021 (1982) (Title VII). The *Contreras* court explained that the existence of a 0.05 level of significance means that the disparate results of the written test would be the product of chance only one time in 20. *Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1273 n.3 , cert. denied, 455 U.S. 1021 (1982) (Title VII). The federal Uniform Guidelines use the 0.05 significance threshold in determining the probative value of statistical test validation studies. See 29 C.F.R. § 1607.14B(5).

(n73)Footnote 69. *Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1273 , cert. denied, 455 U.S. 1021 (1982) (Title VII).

(n74)Footnote 70. See discussion in § 41.11[2].

(n75)Footnote 71. See *E.E.O.C. v. General Telephone Co. of Northwest* (9th Cir. 1989) 885 F.2d 575, 577 & n.3 (Title VII).

(n76)Footnote 72. See discussion in [3], above.

(n77)Footnote 73. See 42 U.S.C. § 2000e-2(k)(1)(B)(ii).

(n78)Footnote 74. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

(n79)Footnote 75. 42 U.S.C. § 2000e(m).

(n80)Footnote 76. See Pub. L. No. 102-166, § 104; 42 U.S.C. § 2000e-2(k)-(n).

(n81)Footnote 77. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 . However, it has been held that the Civil Rights Act of 1991 does not apply retroactively to the *Wards Cove* case itself, even though this holding in *Wards Cove* was effectively reversed by the Civil Rights Act of 1991. See *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1993) 10 F.3d 1485, 1496 .

(n82)Footnote 78. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 659-660, 109 S. Ct. 2115, 104 L. Ed. 2d 733 .

(n83)Footnote 79. See *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 989, 236 Cal. Rptr. 716 ; 2 Cal. Code Reg. § 7286.7(b) (FEHC regulations).

(n84)Footnote 80. See 42 U.S.C. § 12113(a) ("business necessity" is express defense to disability discrimination under ADA). For discussion of the ADA, see §§ 41.02[3], 41.32; for "business necessity," see § 41.95.

(n85)Footnote 81. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n86)Footnote 82. Pub. L. No. 102-166, § 3(2); see also Pub. L. No. 102-166, § 2(2) (congressional finding that *Wards Cove* decision had weakened the scope and effectiveness of federal civil rights protections).

(n87)Footnote 83. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 659, 109 S. Ct. 2115, 104 L. Ed. 2d 733 .

(n88)Footnote 84. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 659, 109 S. Ct. 2115, 104 L. Ed. 2d

733 . However, it has been held that the Civil Rights Act of 1991 does not apply retroactively to the *Wards Cove* case itself, even though this holding in *Wards Cove* was effectively reversed by the Civil Rights Act of 1991. *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1993) 10 F.3d 1485, 1496 .

(n89)Footnote 85. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 (Title VII) .

(n90)Footnote 86. *See Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1276, 1278 , *cert. denied*, 455 U.S. 1021 (1982) (Title VII; "job related" and "business necessity" as interchangeable terms representing same standard); *see also* 42 U.S.C. § 12113(a) ("business necessity" as shown by "job-relatedness" under ADA); *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425 (Title VII; employer's burden as proving "job-relatedness"); *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1424 (ADEA); *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1430 , *cert. denied*, 475 U.S. 1109 (1986) (Title VII; burden as on employer to prove job-relatedness). It seems that the confusion was created by a footnote in *Dothard v. Rawlinson* (1977) 433 U.S. 321, 331 n.14, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (Title VII) , in which the United States Supreme Court stated that a discriminatory employment practice that is "necessary to safe and efficient job performance" would survive a Title VII challenge. Some courts interpreted this as an additional requirement for job-relatedness, thus making the employer's burden more severe; *see, e.g., E.E.O.C. v. Rath Packing Co.* (8th Cir. 1986) 787 F.2d 318, 327 n.10, 331-333 (Title VII); *Blake v. City of Los Angeles* (9th Cir. 1979) 595 F.2d 1367, 1376 , *cert. denied*, 446 U.S. 928 (1980) (Title VII). However, in *Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1279 , *cert. denied*, 455 U.S. 1021(1982) (Title VII), the Ninth Circuit Court of Appeals construed the *Dothard* footnote as unnecessary because the text of the Supreme Court's opinion relied on the broader "manifest relationship" standard. *See Dothard v. Rawlinson* (1977) 433 U.S. 321, 329, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (Title VII) .

(n91)Footnote 87. *See New York City Transit Authority v. Beazer* (1979) 440 U.S. 568, 587, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (Title VII; "manifest relationship" demonstrated when goals of safety and efficiency are significantly served by--even if they do not require--employer's rule against hiring methadone users).

(n92)Footnote 88. *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1430 , *cert. denied*, 475 U.S. 1109 (1986) (Title VII); *Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1280 , *cert. denied*, 455 U.S. 1021 (1982) (Title VII); *see City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 989-990, 236 Cal. Rptr. 716 (FEHA) .

(n93)Footnote 89. *Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1277 , *cert. denied*, 455 U.S. 1021 (1982) (Title VII); *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 986, 236 Cal. Rptr. 716 (FEHA) .

(n94)Footnote 90. *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1432 , *cert. denied*, 475 U.S. 1109 (1986) (Title VII); *Guardians Ass'n of New York City v. Civil Serv.* (2d Cir. 1980) 630 F.2d 79, 105-106 , *cert. denied*, 452 U.S. 940 (1981) (Title VII).

(n95)Footnote 91. *See Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1427-1428 , *cert. denied*, 475 U.S. 1109 (1986) (Title VII).

(n96)Footnote 92. *See Lewis v. Bloomsburg Mills, Inc.* (4th Cir. 1985) 773 F.2d 561, 569-571 (Title VII) .

(n97)Footnote 93. *See City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 990, 236 Cal. Rptr. 716(FEHA) ; *Blake v. City of Los Angeles* (9th Cir. 1979) 595 F.2d 1367, 1376 , *cert. denied*, 446 U.S. 928 (1980) (Title VII).

(n98)Footnote 94. *See Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1227-1228 (Title VII).

(n99)Footnote 95. *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 662 , cert. denied, 450 U.S. 919 (Title VII) .

(n100)Footnote 96. See *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1430 , cert. denied, 475 U.S. 1109 (1986) (Title VII); *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 664 , cert. denied, 450 U.S. 919 (1981) (Title VII).

(n101)Footnote 97. See discussion in [3][c], above.

(n102)Footnote 98. See 29 C.F.R. § 1607.14.

(n103)Footnote 99. *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421 , cert. denied, 475 U.S. 1109 (1986) (Title VII).

(n104)Footnote 100. See *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1431-1432 , cert. denied, 475 U.S. 1109 (1986) (Title VII).

(n105)Footnote 101. See Schlei and Grossman, Employment Discrimination Law, ch. 4 (BNA 2d ed. 1983).

(n106)Footnote 102. 29 C.F.R. § 1607.14B(6).

(n107)Footnote 103. See *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1431-1432 , cert. denied, 475 U.S. 1109 (1986) (Title VII).

(n108)Footnote 104. See Schlei and Grossman, Employment Discrimination Law ch. 4 (BNA 2d ed. 1983).

(n109)Footnote 105. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

(n110)Footnote 106. See discussion in [4], above.

(n111)Footnote 107. *Connecticut v. Teal* (1982) 457 U.S. 440, 447, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (Title VII) ; *Albamarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (Title VII) .

(n112)Footnote 108. See *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1428 , cert. denied, 475 U.S. 1109 (1986) (Title VII); see also *Albamarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (Title VII) ; *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1424 (ADEA) .

(n113)Footnote 109. See *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 660, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (Title VII) ; *Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 998, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII) ; *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1432 , cert. denied, 475 U.S. 1109 (1986) ; *Chrisner v. Complete Auto Trans., Inc.* (6th Cir. 1981) 645 F.2d 1251, 1263 .

(n114)Footnote 110. See 42 U.S.C. §§ 2000e(m), 2000e-2(k)(1)(A)(ii); *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 660, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (Title VII) ; *Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1285 , cert. denied, 455 U.S. 1021 (1982) (Title VII).

(n115)Footnote 111. *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421 .

(n116)Footnote 112. *Chrisner v. Complete Auto Trans, Inc.* (6th Cir. 1981) 645 F.2d 1251 .

(n117)Footnote 113. *Los Angeles, Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 657 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART A. GENERAL THEORIES FOR PROVING DISCRIMINATION UNDER EQUAL EMPLOYMENT
OPPORTUNITY LAWS
Subpart C. Disparate Impact

2-41 California Employment Law §§ 41.22 through 41.29

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

[Reserved]

§§ 41.22[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART B. PROHIBITED BASES OF DISCRIMINATION

2-41 California Employment Law § 41.30

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§ 41.30 Introduction

California and federal equal employment opportunity laws prohibit discrimination based on race, color, sex, national origin or ancestry, religion, age, marital status, physical or mental disability, handicap, and medical condition. This part discusses the definitions and scope of the foregoing classifications and the equal employment opportunity laws that apply to them. For discussions relating to specific preemployment and employment practices that are unlawfully based on those classifications, and the defenses available for such practices, *see* Parts C, D, E, and F of this chapter.

This part focuses on the following bases of discrimination: age (§ 41.31), disability and medical condition (§ 41.32), national origin (§ 41.33), race and "color" (§ 41.34), religion (§ 41.35), and sex (§ 41.36). The principal governing statutes examined are Title VII of the Civil Rights Act of 1964 (Title VII)ⁿ¹ (race, color, religion, sex, or national origin), the California Fair Employment and Housing Act (FEHA)ⁿ² (race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age), the Age Discrimination in Employment Act (ADEA)ⁿ³ (age), Americans With Disabilities Act of 1990 (ADA)ⁿ⁴ (disability), Sections 503 and 504 of the Rehabilitation Act of 1973ⁿ⁵ (handicap), and Title 42 *United States Code Section 1981* (race). For a general overview of the various federal and California equal employment opportunity laws, *see* Chapter 40.

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment LawDiscriminationGender & Sex DiscriminationGeneral Overview

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. § 2000e et seq.

(n2)Footnote 2. Gov. Code § 12900 et seq.

(n3)Footnote 3. 29 *U.S.C.* § 621 *et seq.*

(n4)Footnote 4. 42 *U.S.C.* § 12101 *et seq.*

(n5)Footnote 5. 29 *U.S.C.* § 701 *et seq.*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART B. PROHIBITED BASES OF DISCRIMINATION

2-41 California Employment Law § 41.31

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.31 Age Discrimination

[1] Governing Law

The federal Age Discrimination in Employment Act (ADEA)ⁿ¹ and the California Fair Employment and Housing Act (FEHA)ⁿ² are the principal statutes that prohibit employment discrimination on the basis of age.ⁿ³ The ADEA and the FEHA apply to public as well as private employers.ⁿ⁴ In addition, due process and equal protection provisions of the *Fifth Amendment* and *Fourteenth Amendment* to the United States Constitution may provide some protection to employees when the requisite "state action" is present,ⁿ⁵ but because age is not a "suspect" classification under constitutional law, such challenges are rarely successful.ⁿ⁶

Other authorities also proscribe age discrimination. For example, Executive Order No. 11141 prohibits age discrimination by federal contractors,ⁿ⁷ and *California Government Code Section 11135* prohibits age discrimination by state-funded programs and activities.ⁿ⁸ An action under the Unfair Competition Law^{n8.1} for injunctive relief is appropriate when a business engages in an unlawful practice under the FEHA^{n8.2} of discriminating against older workers.^{n8.3}

For a general discussion relating to the scope and application of these and other state and federal equal employment opportunity laws and regulations, *see* Chapter 40.

Because Title VII is materially different with respect to the relevant burden of persuasion, decisions under Title VII do not control a court's construction of the ADEA.^{n8.4}

[2] Scope of Protection

Both the ADEA and FEHA protect individuals who are 40 years of age or older.ⁿ⁹ Thus, individuals who are less than 40 years old are not protected from age discrimination at all,ⁿ¹⁰ a phenomenon which produces some seemingly anomalous results. For example, one case challenged, under both the ADEA and the *Equal Protection Clause* of the *Fourteenth Amendment* to the United States Constitution, a state statute that prohibited hiring police officers over 29

years old.ⁿ¹¹ The court found the statute to be valid under the Constitution, but invalid under the ADEA, insofar as it affected individuals over the age of 40.ⁿ¹²

Nothing in FEHA prohibits an employer from refusing to employ an individual based on age if the law compels or provides for that refusal. Further, promotions within the existing staff, hiring or promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices.ⁿ¹³

In *Esberg v. Union Oil Co.*,ⁿ¹⁴ the California Supreme Court upheld the Court of Appeal's conclusion that the FEHA's prohibition against age discrimination in employment extended to hiring, discharging, suspension, and demotion, but not to the furnishing of employee benefits, such as educational assistance.ⁿ¹⁵ Former *Gov. Code § 12941*, the specific FEHA provision addressing age discrimination in employment, made it an unlawful employment practice for an employer to refuse to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age, except in cases in which the law compelled or provided for such action. At the same time, the Court noted, although the relevant version of *Gov. Code § 12940* prohibited discrimination in the terms, conditions, or privileges of employment on various other bases, it did not prohibit discrimination on the basis of age.ⁿ¹⁶ Based on the unambiguous language of the relevant FEHA provisions, the Court concluded that the FEHA did not prohibit age discrimination in the furnishing of employee benefits.ⁿ¹⁷

Effective January 1, 2003, the California Legislature acted to reject the holding in *Esberg*. The Legislature repealed former *Gov. Code § 12941* and amended *Gov. Code § 12940* to prohibit age discrimination in employment, without distinguishing age from other bases of discrimination. The Legislature expressly stated its intent to construe and clarify the meaning and effect of existing law and to reject the interpretation given to the law in *Esberg*.ⁿ¹⁸

To prove age discrimination under a disparate treatment theory, the plaintiff must show that his or her age actually played a role in the employer's decision-making process and had a determinative influence on the outcome.ⁿ¹⁹ In evaluating age discrimination claims, courts employ the familiar framework developed in *McDonnell Douglas Corp. v. Green*,ⁿ²⁰ requiring plaintiff to make out a prima facie case of discrimination,ⁿ²¹ then shifting the burden to defendant to articulate a legitimate reason for the employment action, and then shifting the burden back to the plaintiff to show that the employer's articulated reason is a pretext for discrimination.

Under the *McDonnell Douglas* three-part test, if the employer produces substantial evidence of a legitimate, nondiscriminatory reason for the adverse employment action, the presumption of discrimination created by the prima facie case drops out of the picture and the burden shifts back to the employee to prove intentional discrimination. If the employer has met its burden by showing a legitimate reason for its conduct, the employee must demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory animus, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action. The plaintiff may establish pretext either directly, by persuading the court that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is unworthy of credence. With direct evidence of pretext, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial. The plaintiff is required to produce very little direct evidence of the employer's discriminatory intent to move past summary judgment. The same evidence can be used both to set forth a prima facie case of discrimination, and to demonstrate the existence of a triable issue of fact on the issue of pretext.ⁿ²²

In *Pottenger v. Potlatch Corp.*,ⁿ²³ the plaintiff made out a prima facie case by showing that he was 60 years old; his most recent performance review was not outstanding, but indicated that he was meeting the requirements of the job; he was discharged; and he was replaced by a substantially younger employee (43 years old) with equal or inferior qualifications. The employer in turn articulated a legitimate, nondiscriminatory reason for terminating him, *i.e.*, based

on loss of profits over the preceding several years, it had a lack of confidence that he could make the hard decisions necessary to turn around his division. However, the plaintiff failed to raise a genuine issue of material fact as to whether the employer's articulated reason was pretextual.ⁿ²⁴ When there is direct evidence of discriminatory motivation based on age, any burden-shifting analysis using the *McDonnell Douglas* test is unnecessary.ⁿ²⁵ In *Hammond v. County of Los Angeles*,ⁿ²⁶ plaintiff established a triable issue of fact as to age discrimination with direct evidence of discriminatory motivation based on plaintiff's age. Plaintiff testified that her supervisor requested that she "demote," wanted younger instructors in the classroom, and hired younger instructors to teach classes formerly taught by plaintiff. This testimony raised a triable issue of fact as to whether there was an adverse employment action that was motivated, at least in part, by plaintiff's age. Plaintiff associated these comments directly with the reduction of her teaching assignments. The employer did not defend the reduction in plaintiff's teaching assignments by showing an age-neutral motive for that action, such as poor performance. Instead, the employer maintained that plaintiff's teaching assignments were not substantially reduced, but there was evidence from the employer's own records contradicting its assertion.

Unlike under Title VII, under the ADEA a plaintiff cannot prove age discrimination by showing that age was a motivating factor for a discriminatory employment practice, even though other factors also motivated the practice. Thus, the burden of persuasion never shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA, because there can be no mixed-motives claims under the ADEA. Congress amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision.^{n26.1} However, when it amended Title VII, Congress did not likewise amend the ADEA, even though it contemporaneously amended the ADEA in several other ways.^{n26.2} Further, the text of the ADEA does not authorize a mixed-motives age discrimination claim. To establish a disparate-treatment claim under the plain language of the ADEA, a plaintiff has the burden of proving that age was the "but-for" cause of the employer's adverse decision. Hence, the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.^{n26.3}

Adopting the disparate impact theory of proof for cases under the ADEA, the United States Supreme Court in *Smith v. City of Jackson*ⁿ²⁷ concluded that plaintiffs with ADEA claims can, under certain circumstances, prevail without showing that the employer adopted a challenged rule or practice with a discriminatory intent.ⁿ²⁸ The scope of disparate-impact liability under ADEA is narrower than under Title VII. *Wards Cove Packing Co. v. Antonio*,ⁿ²⁹ which narrowly construed the employer's exposure to liability by requiring plaintiffs to demonstrate a close nexus between a specific practice and an alleged statistical disparity, and which Congress legislatively overruled with the Civil Rights Act of 1991 with respect to Title VII,ⁿ³⁰ remains the operative legal standard for ADEA disparate impact claims.ⁿ³¹ Further, employers have a defense under the ADEA which they do not have under Title VII, which prohibits challenges to employer rules based on "reasonable factors other than age." An employer's policy or practice thus need not be a business necessity to survive scrutiny under the ADEA; it need only be a reasonable judgment aimed at a purpose other than age.ⁿ³² In *Smith*, the Court concluded that the plaintiffs had not met and could not meet their burden of showing an actionable adverse impact. They had not identified any specific text, requirement or practice by the employer having an adverse impact on older workers. Further, it was clear from the record that the employer's action was based on reasonable factors other than age, including reliance on seniority and rank.ⁿ³³

■ PRACTICE TIP:

The *Smith* case may not have a large impact in California. Effective January 1, 2003, the Fair Employment & Housing Act (FEHA) was amended to prohibit age discrimination in employment without distinguishing age from other bases of discrimination.ⁿ³⁴ Thus, in California, older workers could already prove a violation of FEHA by proving age-discriminatory acts having a disparate impact, in the same way as workers alleging any other prohibited form of employment discrimination. Unlike the federal ADEA and Title VII, the scope of protection for age discrimination under California law is equal to that available for any other prohibited form of discrimination under the FEHA.

In age discrimination actions, the McDonnell Douglas test is inapplicable when the plaintiff presents direct evidence of discrimination.ⁿ³⁵ Direct evidence is evidence which, if believed, proves the fact of discriminatory animus without inference or presumption. Comments demonstrating discriminatory animus may be found to be direct evidence if there is evidence of a causal relationship between the comments and the adverse job action at issue.ⁿ³⁶ For example, in *DeJung v. Superior Court*,ⁿ³⁷ the trial court erred in granting summary judgment to the employer. If a jury believed that the presiding judge and chair of the court's executive committee, who was involved in the hiring process for a full-time court commissioner made comments regarding wanting to hire someone younger than plaintiff, which were attributed to him by plaintiff and a witness, his statements would plainly have qualified as direct evidence of discriminatory animus. But proof of discriminatory animus does not end the analysis of a discrimination claim. There also must be evidence of a causal relationship between the animus and the adverse employment action. In *DeJung*, plaintiff was not required to demonstrate that every individual who participated in the failure to hire him shared discriminatory animus in order to defeat the summary judgment motion. Showing that a significant participant in an employment decision exhibited discriminatory animus in connection with that decision was enough to raise an inference that the employment decision itself was discriminatory, even absent evidence that others in the process harbored such animus.

Age discrimination laws generally protect older individuals from discrimination in favor of younger individuals.ⁿ³⁸ On the other hand, the ADEA does not prohibit an employer from discriminating *in favor of* a 50 year old at the expense of a 30 year old because the latter is expressly not covered by the ADEA.ⁿ³⁹ The same is true even if the younger employee is also over age 40.ⁿ⁴⁰ By comparison, such "reverse" discrimination in the context of race would be prohibited by Title VII because "its terms are not limited to discrimination against members of any particular race."ⁿ⁴¹ Age discrimination is not disproved merely because the favored employee is himself or herself age 40 or older. In *O'Connor v. Consolidated Coin Caterers Corp.*,ⁿ⁴² a fired worker of 56 years of age challenged his employer for firing him and replacing him with a 40-year-old worker. The employer sought shelter in the ADEA on the ground that plaintiff's replacement was also protected. The Court held this was illogical, reasoning that the statutory language means only that those who can sue must be within the covered class of 40 or older. The Court went on to observe that it is irrelevant that one person in the protected class has lost out to another, if he or she lost out because of age; and there is no greater inference of age discrimination if a worker is replaced by a 39 year old rather than by a 40 year old. The Court found a substantial age difference to be a more reliable indicator of discrimination than a technical application of the statute.ⁿ⁴³ EEOC regulations also prohibit age discrimination even if the favored employee is age 40 or older.ⁿ⁴⁴

In *Mangold v. California Public Utilities Comm'n*,ⁿ⁴⁵ workers under 40 years old were promoted over older workers on the basis of allegedly subjective interview tests based in part on experience unique to the younger workers. The older workers also claimed that the employer gave high-profile job tasks exclusively to the younger workers. The Ninth Circuit held that plaintiffs were not precluded from trying to prove both disparate treatment and disparate impact under the ADEA and FEHA.ⁿ⁴⁶

While discrimination on the basis of pension status can sometimes be unlawful under the ADEA, in particular when pension status serves as a proxy for age discrimination, the ADEA does not necessarily prohibit an employer from firing an individual for the purpose of preventing a pension from vesting or for some other reason which may be correlated with age but is based on years of service as distinct from age.ⁿ⁴⁷ According to the U.S. Supreme Court, when an employer's decision is wholly motivated by factors other than age, such as the prevention of pension-vesting, the problem of inaccurate and stigmatizing stereotypes of older workers disappears.ⁿ⁴⁸

Following Supreme Court precedent, the Ninth Circuit Court of Appeals has ruled that an employer may refuse to hire an individual because he or she is "overqualified" when that term is defined objectively, and not used as a proxy for age. In *E.E.O.C. v. Insurance Co. of North America*,ⁿ⁴⁹ the court affirmed summary judgment for an employer who had rejected an applicant as "overqualified" because the employer had demonstrated that the reasons it perceived overqualification to be a problem were objective and not age-related.ⁿ⁵⁰

A discharge is not on the ground of age within the meaning of FEHA's prohibition of age discrimination unless age is a motivating factor in the decision; and an employer is entitled to judgment as a matter of law if the record conclusively reveals another, nondiscriminatory reason for the employer's decision.ⁿ⁵¹

General types of activity covered by age discrimination claims include the duration of employment; performance reviews and promotion; physical ability to perform the job; elimination of the position by reduction in force or merger of the company; replacement with a younger worker; seniority, retirement benefits, and severance plans.ⁿ⁵²

Evidence justifying the employment termination which the employer acquires after the employee's discharge will not defeat a claim for age discrimination or justify the employer's impermissible discriminatory conduct. An after-acquired fact will not defeat the discrimination claim, but rather merely applies to determination of the appropriate remedy.ⁿ⁵³

For discussion of age discrimination issues relating to retirement plans, *see* § 41.67. For discussion of age discrimination issues relating to employment interviews, *see* § 41.44[2][a]. For discussion of age discrimination issues involving seniority systems, *see* § 41.68[3]. For discussion of age as a bona fide occupational qualification, *see* § 41.94[2]. For discussion of other defenses relating to charges of age discrimination, *see* § 41.104.

Legal Topics:

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

Labor & Employment Law
Discrimination
Age Discrimination
General Overview
Labor & Employment Law
Discrimination
Age Discrimination
Coverage & Definitions
General Overview
Labor & Employment Law
Discrimination
Age Discrimination
Federal & State Interrelationships

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 621 *et seq.*

(n2)Footnote 2. *Gov. Code* § 12900 *et seq.*

(n3)Footnote 3. *See* 29 U.S.C. § 623 (ADEA); *Gov. Code* §§ 12940, 12942 (FEHA).

(n4)Footnote 4. *See* 29 U.S.C. §§ 630(b), 633a(a) (ADEA); *Gov. Code* § 12926(d) (FEHA).

(n5)Footnote 5. *See* discussion in ch. 40, pt. C.

(n6)Footnote 6. *See Massachusetts Bd. of Retirement v. Murgia* (1976) 427 U.S. 307, 312-313, 96 S. Ct. 2562, 49 L. Ed. 2d 520 .

(n7)Footnote 7. *See* Exec. Order No. 11141, 29 Fed. Reg. 2477 (1964) , reprinted in 5 U.S.C.A § 3301 (West 1977).

(n8)Footnote 8. *See Gov. Code* § 11135; *see also Lab. Code* § 1777.6 (prohibition against refusing to accept otherwise qualified employees as apprentices on public works projects based on various protected classifications, including age).

(n9)Footnote 8.1. *Bus. & Prof. Code* § 17200 *et seq.*

(n10)Footnote 8.2. *Gov. Code* § 12900 *et seq.*

(n11)Footnote 8.3. *See Herr v. Nestle U.S.A., Inc.* (2003) 109 Cal. App. 4th 779, 781, 789-790, 135 Cal. Rptr. 2d 477 .

(n12)Footnote 8.4. *Gross v. FBL Fin. Servs.* (2009) 129 S. Ct. 2343, 2348, 174 L. Ed. 2d 119 .

(n13)Footnote 9. *See* 29 U.S.C. § 631(a) (ADEA); *Gov. Code* § 12940(a) (FEHA); *see also* *Gov. Code* § 12926(b) (FEHA; "age" refers to chronological age of any individual who has reached his or her 40th birthday).

(n14)Footnote 10. *See* *Gen. Dynamics Land Sys. v. Cline* (2004) 124 S. Ct. 1236, 1240, 1249 (text, structure, purpose, and history of ADEA, along with its relationship to other federal statutes, show that ADEA does not prohibit employer from favoring older employee over younger one); *Henn v. National Geographic Soc.* (7th Cir. 1987) 819 F.2d 824, 827 (ADEA).

(n15)Footnote 11. *See* *Hahn v. City of Buffalo* (2d Cir. 1985) 770 F.2d 12 .

(n16)Footnote 12. *See* *Hahn v. City of Buffalo* (2d Cir. 1985) 770 F.2d 12, 14 ; *see also* *Doyle v. Suffolk County* (2d Cir. 1986) 786 F.2d 523, 525 .

(n17)Footnote 13. *Gov. Code* § 12940(a)(5).

(n18)Footnote 14. *Esberg v. Union Oil Co.* (2002) 28 Cal. 4th 262, 121 Cal. Rptr. 2d 203, 47 P.3d 1069 .

(n19)Footnote 15. *Esberg v. Union Oil Co.* (2002) 28 Cal. 4th 262, 264-271, 121 Cal. Rptr. 2d 203, 47 P.3d 1069 ; *see* *Esberg v. Union Oil Co.* (2001) 87 Cal. App. 4th 378, 104 Cal. Rptr. 2d 477 .

(n20)Footnote 16. *Esberg v. Union Oil Co.* (2002) 28 Cal. 4th 262, 267-268, 121 Cal. Rptr. 2d 203, 47 P.3d 1069 .

(n21)Footnote 17. *Esberg v. Union Oil Co.* (2002) 28 Cal. 4th 262, 269, 121 Cal. Rptr. 2d 203, 47 P.3d 1069 .

(n22)Footnote 18. Stats. 2002, Ch. 525 § 4.

(n23)Footnote 19. *Kentucky Retirement System v. Equal Employment Opportunity Commission* (2008) 128 S. Ct. 2361, 2366, 171 L. Ed. 2d 322 ; *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610, 113 S. Ct. 1701, 123 L. Ed. 2d 338 ; *Pottenger v. Potlatch Corp.* (9th Cir. 2003) 329 F.3d 740, 745 . *See* *Reeves v. Sanderson Plumbing Prods., Inc.* (2000) 530 U.S. 133, 141, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (quoting *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610, 113 S. Ct. 1701, 123 L. Ed. 2d 338).

(n24)Footnote 20. *Pottenger v. Potlatch Corp.* (9th Cir. 2003) 329 F.3d 740, 745 ; *see* *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 . *See also* *DeJung v. Superior Court* (2008) 169 Cal. App. 4th 533, 549, 87 Cal. Rptr. 3d 99 (FEHA; when plaintiff proffers circumstantial evidence, California courts apply *McDonnell Douglas* three-stage burden-shifting test for trying claims of employment discrimination, including age discrimination, based on theory of disparate treatment). For discussion of the *McDonnell Douglas* test generally, *see* § 41.11[1], *above*.

(n25)Footnote 21. *See, e.g., Whitman v. Mineta* (9th Cir. 2008) 541 F.3d 929, 932 (claim for employment discrimination based on promotion of younger employee did not set forth prima facie case of age discrimination, where employee failed to demonstrate that he was either qualified or eligible for contested position by failing to show he possessed requisite knowledge and experience to compete for computer specialist position similar to that obtained by younger employee).

(n26)Footnote 22. *DeJung v. Superior Court* (2008) 169 Cal. App. 4th 533, 553-554, 87 Cal. Rptr. 3d 99 (FEHA; plaintiff presented ample evidence, both direct and circumstantial, that employer's allegedly legitimate reasons were pretextual, where evidence established existence of a triable issue of fact regarding employer's motivation for not hiring 64-year-old plaintiff, and raised issue of fact regarding whether employer's proffered explanation--that 43-year-old selected was best qualified for position--was pretextual).

(n27)Footnote 23. *Pottenger v. Potlatch Corp.* (9th Cir. 2003) 329 F.3d 740 .

(n28)Footnote 24. *Pottenger v. Potlatch Corp.* (9th Cir. 2003) 329 F.3d 740, 745-747 (remarks including "old management team," an "old business model," and "deadwood" did not show discriminatory motive). *See also* *Diaz v. Eagle Produce Limited Partnership* (9th Cir. 2008) 2008 U.S. App. LEXIS 7261, *10-*34 (in ADEA action by farmworkers laid off in seasonal slowdown, one worker failed to create triable issue of fact as to whether his job performance was satisfactory and thus failed to establish prima facie case of age discrimination; three others provided evidence of satisfactory job performance and accumulation of circumstantial evidence that, taken together, could lead reasonable juror to draw inference of age discrimination, employer did not provide facially legitimate explanation for one worker's discharge in stating that discharge was part of reduction in force necessitated by seasonal slowdown in agricultural activity so that summary judgment was inappropriate with regard to him, but employer's explanations for discharges of other two were facially legitimate, and they failed to create genuine issue as to credibility of explanations).

(n29)Footnote 25. *Hammond v. County of Los Angeles* (2008) 160 Cal. App. 4th 1579, 1601 . *See also* *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal. App. 4th 1133, 1144, 29 Cal. Rptr. 3d 144 .

(n30)Footnote 26. *Hammond v. County of Los Angeles* (2008) 160 Cal. App. 4th 1579, 1601-1602 .

(n31)Footnote 26.1. *See* 42 U.S.C. §§ 2000e-2(m) (providing that unlawful employment practice is established when complaining party demonstrates that race, color, religion, sex, or national origin was motivating factor for employment practice, even though other factors also motivated the practice; 2000e-5(g)(2)(B) (restricting remedies available to plaintiffs proving violations of § 2000e-2(m)).

(n32)Footnote 26.2. *See* Civil Rights Act of 1991, §§ 115, 105 Stat. 1079; § 302, at 1088.

(n33)Footnote 26.3. *Gross v. FBL Fin. Servs.* (2009) 129 S. Ct. 2343, 2348-2352, 174 L. Ed. 2d 119 .

(n34)Footnote 27. *Smith v. City of Jackson* (2005) 125 S. Ct. 1536, 161 L. Ed. 2d 410 .

(n35)Footnote 28. *Smith v. City of Jackson* (2005) 125 S. Ct. 1536, 161 L. Ed. 2d 410, 417-421 .

(n36)Footnote 29. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 .

(n37)Footnote 30. For discussion of the Civil Rights Act of 1991 and the overruling of *Wards Cove*, *see* § 40.31[1A].

(n38)Footnote 31. *Smith v. City of Jackson* (2005) 125 S. Ct. 1536, 161 L. Ed. 2d 410, 421-422 .

(n39)Footnote 32. *Smith v. City of Jackson* (2005) 125 S. Ct. 1536, 161 L. Ed. 2d 410, 422 .

(n40)Footnote 33. *Smith v. City of Jackson* (2005) 125 S. Ct. 1536, 161 L. Ed. 2d 410, 422-423 .

(n41)Footnote 34. *See* Gov. Code § 12940(a).

(n42)Footnote 35. *DeJung v. Superior Court* (2008) 169 Cal. App. 4th 533, 550, 87 Cal. Rptr. 3d 99 ; *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal. App. 4th 1133, 1144, 29 Cal. Rptr. 3d 144 . *See also* *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 .

(n43)Footnote 36. *DeJung v. Superior Court* (2008) 169 Cal. App. 4th 533, 550, 87 Cal. Rptr. 3d 99 ; *Trop v. Sony Pictures Entertainment, Inc.* (2005) 129 Cal. App. 4th 1133, 1146-1149, 29 Cal. Rptr. 3d 144 .

(n44)Footnote 37. *DeJung v. Superior Court* (2008) 169 Cal. App. 4th 533, 549-554, 87 Cal. Rptr. 3d 99 .

(n45)Footnote 38. *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308, 116 S. Ct. 1307, 1309-1310, 134 L. Ed. 2d 433 (ADEA); *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1002-1004, 67 Cal. Rptr. 2d 483 (FEHA) .

(n46)Footnote 39. *See* 29 U.S.C. § 621 (purpose of ADEA); *Gov. Code* § 12920 (FEHA policy statement).

(n47)Footnote 40. *Gen. Dynamics Land Sys., Inc. v. Cline* (2004) 124 S. Ct. 1236 .

(n48)Footnote 41. *See McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 279-280, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (white employees charged with misappropriating property dismissed, but similarly charged African-American employee not dismissed).

(n49)Footnote 42. *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308, 116 S. Ct. 1307, 1309-1310, 134 L. Ed. 2d 433 .

(n50)Footnote 43. *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308, 116 S. Ct. 1307, 1309-1310, 134 L. Ed. 2d 433 ; *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1002-1003, 1006, 67 Cal. Rptr. 2d 483 (replacement employee, although over 40, was seven years younger than plaintiff, a differential that could reasonably be described as significant).

(n51)Footnote 44. *See* 29 C.F.R. § 1625.2(a).

(n52)Footnote 45. *Mangold v. California Pub. Utils. Comm'n* (9th Cir. 1995) 67 F.3d 1470 .

(n53)Footnote 46. *Mangold v. California Pub. Utils. Comm'n* (9th Cir. 1995) 67 F.3d 1470, 1476 ; *see E.E.O.C. v. Local 350, Plumbers and Pipefitters* (9th Cir. 1993) 998 F.2d 641, 648 fn.2 (disparate impact has been interpreted as applicable to age discrimination); *Palmer v. United States* (9th Cir. 1986) 794 F.2d 534, 536 (plaintiff alleging age discrimination may proceed under either of two theories: disparate treatment or disparate impact); *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (sets forth parameters of disparate treatment in age discrimination context).

(n54)Footnote 47. *Kentucky Retirement System v. Equal Employment Opportunity Commission* (2008) 128 S. Ct. 2361, 2367, 171 L. Ed. 2d 322 ; *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 347-348 .

(n55)Footnote 48. *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 347-348 . *See also Kentucky Retirement System v. Equal Employment Opportunity Commission* (2008) 128 S. Ct. 2361, 2367-2371, 171 L. Ed. 2d 322 (retirement plan that lawfully made age, in part, a condition of pension eligibility and treated workers differently in light of their pension status did not violate ADEA, where differences in treatment were not actually motivated by age).

(n56)Footnote 49. *E.E.O.C. v Insurance Co. of North America* (9th Cir. 1995) 49 F.3d 1418 .

(n57)Footnote 50. *E.E.O.C. v Insurance Co. of North America* (9th Cir. 1995) 49 F.3d 1418, 1420-1421 .

(n58)Footnote 51. *West v. Bechtel Corp.* (2002) 96 Cal. App. 4th 966, 117 Cal. Rptr. 2d 647, 656-657 (where principal is foreign sovereign able to compel employee's discharge and is not bound by antidiscrimination laws in its dealings with employee, employer as sovereign's agent is not liable for sovereign's discriminatory intent; no evidence that employer itself was motivated to terminate employment because of age); *see Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal. App. 4th 189, 198, 48 Cal. Rptr. 2d 448 ; BAJI Nos. 12.01, 12.01.1.

(n59)Footnote 52. The employer must prove that the employee cannot perform the job, that such performance would endanger the employee and others, and that accommodation would cause undue hardship for the employer. *see*

discussion of Substantive Defenses, Part F.

(n60)Footnote 53. *O'Day v. McDonnell Douglas Helicopter Co.* (9th Cir. 1996) 79 F.3d 756, 759 (employer cannot avoid liability under the ADEA by using after acquired evidence to provide legitimate reason for discharge; evidence only affects remedy, such as back pay; proving that same decision was justified is not same as proving that same decision would have been made); *see also Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal. App. 4th 189, 199-202, 48 Cal. Rptr. 2d 448 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART B. PROHIBITED BASES OF DISCRIMINATION

2-41 California Employment Law § 41.32

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§ 41.32 Disability and Medical Condition Discrimination

[1] Governing Law

The federal Americans With Disabilities Act of 1990 (ADA)ⁿ¹ and the California Fair Employment and Housing Act (FEHA)ⁿ² are the principal statutes that prohibit discrimination against individuals with disabilities. The federal Rehabilitation Act of 1973,ⁿ³ which applies only to federal contractorsⁿ⁴ and recipients of federal funds,ⁿ⁵ also prohibits disability discrimination. Federal contractors are also subject to the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA),ⁿ⁶ which protects disabled veterans.ⁿ⁷ However, Title VII furnishes no protection from discrimination against disabled individuals. For a general discussion relating to the scope and application of these federal equal employment opportunity laws, *see* Chapter 40, Part C.

The FEHA also prohibits employment discrimination based on medical condition.ⁿ⁸ In addition, specific California statutes prohibit discrimination against the disabled by state-funded programs or activities,ⁿ⁹ and public works projects.ⁿ¹⁰ The Cartwright Act (California antitrust law) also proscribes discrimination on the basis of disability and medical condition.^{n10.1} For discussion regarding the scope and application of these California equal employment opportunity laws, *see* Chapter 40, Part B.

[2] Scope of Protection

[a] Americans With Disabilities Act

The ADA prohibits employment discrimination by a covered entity against a "qualified individual on the basis of disability".ⁿ¹

The ADA proscribes discrimination in job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.ⁿ¹² Unlawful "discrimination" includes, among other things, limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee because of his or her disability.ⁿ¹³ This

includes an employer's participation in a contractual or other arrangement or relationship (including a relationship with a labor union) that has the effect of subjecting a qualified applicant or employee with a disability to prohibited discrimination.^{n13.1} However, employers may prefer some physical attributes over others, such as height or medical conditions that do not rise to the level of a substantial impairment; accordingly, they may establish physical criteria for certain jobs.^{n13.2}

A "qualified individual" is an individual who, with or without reasonable accommodation,ⁿ¹⁴ can perform the essential functions of the employment position that the individual holds or desires.^{n14.1} The plaintiff bears the burden of proving that he or she is "qualified."ⁿ¹⁵ Essential functions in this context are defined as the fundamental job duties of the employment position the individual with a disability holds or desires. They do not include the marginal functions of the position. Functions are considered essential for the following nonexclusive reasons: (1) the position exists for the purpose of performing that function; (2) the number of available employees who share that function is limited; and (3) the function is highly specialized.^{n15.1}

To establish a prima facie case of discrimination under the ADA, a plaintiff must demonstrate each of the following:^{n15.2}

1. The plaintiff is disabled within the meaning of the ADA;
2. The plaintiff is a qualified individual able to perform the essential functions of the job; and
3. The plaintiff's employer terminated or refused to rehire him or her because of the disability.

Qualification for a position is a two-step inquiry. The court first examines whether the individual satisfies the "requisite skill, experience, education and other job-related requirements" of the position. The court then considers whether the individual "can perform the essential functions of such position" with or without a reasonable accommodation.^{n15.3}

A plaintiff bears the burden of demonstrating that he or she can perform the essential functions of the job with or without reasonable accommodation.^{n15.4} However, an employer who disputes the plaintiff's claim that plaintiff can perform the essential functions has the burden of producing evidence establishing those functions.^{n15.5} In cases alleging individual or pattern-and-practice disparate treatment, a burden-shifting protocol is employed, *i.e.*, the plaintiff must make out a prima facie case of discrimination, the employer must present evidence of a legitimate business purpose for the challenged action, and the plaintiff is given the opportunity to show that the employer's proffered business justification is a pretext for discrimination.^{n15.6} However, in a case involving an employer's facially discriminatory policy, the burden-shifting protocol is unnecessary, because the employer has already admitted that it discriminated on a proscribed basis.^{n15.7}

Evidence of whether a particular function is essential includes the following nonexclusive considerations:^{n15.8}

- The employer's judgment regarding which functions are essential.^{n15.9}
- Written job descriptions prepared before advertising or interviewing applicants for the job.^{n15.10}
- The amount of time spent performing the function.
- The consequences of not requiring the incumbent to perform the function.
- The terms of a collective bargaining agreement.
- The work experience of past incumbents in similar jobs.

- The current work experience of incumbents in similar jobs.

A plaintiff who is totally disabled and unable to perform the essential functions of the job is not a "qualified individual with a disability."^{15.11} Thus, a plaintiff who applies for state disability benefits or workers' compensation benefits based on his or her own sworn statements and/or physician certification establishing total disability may be precluded from asserting that he or she is a qualified individual with a disability under the ADA for purposes of establishing a claim of discrimination or failure to accommodate.^{15.12} However, the EEOC has stated that representations about the ability to work made in the course of applying for disability benefits do not necessarily bar an ADA claim, because the standards for determining whether a person is disabled for purposes of obtaining such benefits may be fundamentally different from ADA standards for determining whether someone is a "qualified individual with a disability."^{15.13} Under the ADA Amendments Act of 2008,^{15.14} the ADA now specifically provides that nothing in the ADA alters the standards for determining eligibility for benefits under state workers' compensation laws or under state and federal disability benefit programs.^{15.15}

Discrimination under the ADA includes the employer's use of qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, unless the standard, test or other selection criteria, as used by the employer, is shown to be job-related for the position in question and consistent with business necessity.^{15.16} However, an employer may not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the employer, is shown to be job-related for the position in question and consistent with business necessity.^{15.17} EEOC regulations define "qualifications standards" as "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements that an individual must meet in order to be eligible for the position held or desired."^{15.18} When an employer asserts a blanket safety-based qualification standard beyond the essential job function, which is not mandated by law and which screens out or tends to screen out an individual with a disability, the employer, not the employee, bears the burden of showing the higher qualification standard is job-related and consistent with business necessity, and that performance cannot be achieved through reasonable accommodation.^{15.19} When a plaintiff challenges a categorical qualification standard, the plaintiff does not have the burden of establishing that *that* qualification standard excludes qualified individuals with disabilities. Rather, to establish statutory standing, the plaintiff has the burden of establishing that he or she meets other qualifications, unrelated to the challenged standard. In addition, the plaintiff has the burden to prove that the challenged qualification standard screens out or tends to screen out an individual with a disability or a class of individuals with disabilities.¹⁶ The burden then shifts to the employer to establish the business necessity defense.^{16.1}

In the ADA Amendments Act of 2008,¹⁷ Congress made findings regarding the purpose of the ADA and how that purpose has not been fulfilled based on the interpretation of various facets of the ADA by the United States Supreme Court (regarding who is a qualified individual under the ADA):¹⁸

- (1) In enacting the ADA, Congress intended that it provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and provide broad coverage.
- (2) In enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.
- (3) While Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled.

- (4) The holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*ⁿ¹⁹ and its companion casesⁿ²⁰ have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.
- (5) The holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,ⁿ²¹ further narrowed the broad scope of protection intended to be afforded by the ADA.
- (6) As a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.
- (7) In particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, interpreted the term "substantially limits" to require a greater degree of limitation than was intended by Congress.
- (8) The current EEOC ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard.

Thus, the ADA Amendments Act of 2008, effective January 1, 2009, was enacted to do all of the followingⁿ²²:

- (1) Carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA.
- (2) Reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.* and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures.
- (3) Reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.* with regard to coverage under the third prong, *i.e.*, the "regarded as having a disability" prong of the definition of disability, and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*,ⁿ²³ which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973.
- (4) Reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."
- (5) Convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.
- (6) Express Congress' expectation that the EEOC will revise the portion of its current regulations that

defines the term "substantially limits" as "significantly restricted" to be consistent with the ADA Amendments Act of 2008, including the amendments made by the Act.

It is unclear whether the ADAAA, which became effective January 1, 2009, applies retroactively.^{n23.1}

In *Rohr v. Salt River Project Agricultural Improvement and Power District*,^{n23.2} although the Ninth Circuit found that it did not need to consider whether to apply the Americans With Disabilities Act Amendments Act of 2008 retroactively, because plaintiff's evidence was sufficient to withstand summary judgment based on the pre-amended ADA, the court nevertheless briefly discussed the ADAAA because it shed light on Congress's original intent when it enacted the ADA.^{n23.3} The court found that the ADAAA explicitly rejected several Supreme Court decisions that defined "disability" more narrowly than many of the ADA's original Congressional proponents had intended.^{n23.4} Under the ADAAA, beginning in January 2009, "disability" was to be broadly construed and coverage to apply to the maximum extent permitted by the ADA and the ADAAA.^{n23.5} The ADAAA explained that while, in enacting the ADA, Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation was not fulfilled. Further, the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*,^{n23.6} and its companion cases narrowed the broad scope of protection intended to be afforded by the ADA, eliminating protection for many individuals whom Congress intended to protect.^{n23.7}

A "disability" under the ADA is defined as any of the following:ⁿ²⁴

- (1) A physical or mental impairment that substantially limits one or more of an individual's major life activities.
- (2) A record of such an impairment.
- (3) Being regarded as having such an impairment.

This definition of disability in the ADA must be construed in favor of broad coverage of individuals under the ADA, to the maximum extent permitted by the terms of the ADA.ⁿ²⁵

"Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.ⁿ²⁶ It also includes any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.ⁿ²⁷ Examples of emotional or mental illnesses include major depression, bipolar disorder, anxiety disorders, schizophrenia, and personality disorders.ⁿ²⁸ However, personality traits or behaviors, such as irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments, although they may be linked to mental impairments.ⁿ²⁹

In the ADA Amendments Act of 2008, Congress provided definitions for "major life activities" and other terms that were previously not defined in the Act. Under the ADA, effective January 1, 2009, "major life activities" include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.ⁿ³⁰ For these purposes, a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.ⁿ³¹

In a case brought under the public accommodation section of the ADAⁿ³² prior to the enactment of the ADA Amendments Act of 2008, the Supreme Court held that reproduction is also a "major life activity."ⁿ³³ The Ninth

Circuit also found in decisions before the ADA Amendments of 2008 that sleeping, engaging in sexual relations and interacting with others were major life activities within the scope of the ADA,ⁿ³⁴ and that broadly speaking, eating is a major life activity within the scope of the ADA.ⁿ³⁵ However, eating specific types of foods, or eating specific amounts of food, might or might not be a major life activity. In *Fraser v. Goodale*,ⁿ³⁶ decided before the ADA Amendments Act of 2008, the Ninth Circuit found that the type of eating a brittle diabetic alleged was a major life activity and fell within activities that are of central importance to most people's daily lives. The plaintiff had alleged that not only must she not eat certain foods, but also she must carefully assess her blood sugar before putting anything into her mouth. Thus, she argued that the physical activity of eating in general was impaired, and the court agreed that it was a major life activity under the ADA.ⁿ³⁷

In a case decided before the ADA Amendments Act of 2008, the Supreme Court held that HIV infection, from the moment of infection, is a significant impairment under the ADA.ⁿ³⁸ However, temporary, nonchronic impairments of short duration with little or no long-term or permanent impact are usually not found to be disabilities under the ADA.ⁿ³⁹ Thus, in a case decided before the ADA Amendments Act of 2008, the Ninth Circuit held that a temporary psychological impairment related to an employee's cancer did not qualify as a disability under the ADA.ⁿ⁴⁰

The term "substantially limits" in the definition of disability must be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.ⁿ⁴¹ An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.ⁿ⁴² An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.ⁿ⁴³

Under EEOC regulations promulgated before the ADA Amendments Act of 2008, an impairment "substantially" limited a disabled person's ability to work if it significantly restricted his or her ability to perform either a class of jobs or a broad range of jobs in various classes, as compared to the average person having comparable training, skills, and abilities.ⁿ⁴⁴ The inability to perform a single, particular job did not constitute a substantial limitation in this context.ⁿ⁴⁵ However, Congress has found that the current EEOC ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard,ⁿ⁴⁶ and has expressed its expectation that the EEOC will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with the ADA Amendments Act of 2008, including the amendments made by the Act.ⁿ⁴⁷ In a case decided before the ADA Amendments Act of 2008 took effect, the Ninth Circuit held that under the regulations, the employee's testimony alone regarding the significance of the impairment is sufficient to create a genuine issue of material fact at the summary judgment stage, and plaintiff need not present comparative or medical evidence to establish a genuine issue of material fact regarding impairment of a major life activity.ⁿ⁴⁸

The regulations also provide that whether someone is substantially limited in a major life activity is to be examined using such factors as:ⁿ⁴⁹

- The nature and severity of the impairment.
- The duration or expected duration of the impairment.
- The permanent or long-term impact, or the expected permanent or long-term impact of, or resulting from, the impairment.

Congress did not address this aspect of the regulations in the ADA Amendments Act of 2008.

Under the ADA as amended by the ADA Amendments Act of 2008, the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures such as the following:ⁿ⁵⁰

- Medication.
- Medical supplies, equipment, or appliances.
- Low-vision devices, which do not include ordinary eyeglasses or contact lenses.ⁿ⁵¹
- Prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices.
- Mobility devices.
- Oxygen therapy equipment and supplies.
- The use of assistive technology.
- Reasonable accommodations or auxiliary aids or services.ⁿ⁵²
- Learned behavioral or adaptive neurological modifications.

The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses will be considered in determining whether an impairment substantially limits a major life activity.ⁿ⁵³ The term "ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error.ⁿ⁵⁴

An individual has a record of impairment if he or she has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.ⁿ⁵⁵

An individual meets the requirement of "being regarded as having such an impairment"ⁿ⁵⁶ if the individual establishes that he or she has been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity.ⁿ⁵⁷ However, this does not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.ⁿ⁵⁸ An individual is regarded as having an impairment if he or she either has no impairment; has an impairment that does not substantially limit major life activities, but is treated by an employer as having a substantially limiting impairment; or has an impairment that substantially limits major life activities only as the result of the attitudes of others.ⁿ⁵⁹

Ninth Circuit precedent does not require comparative or medical evidence to establish a genuine issue of material fact regarding the impairment of a major life activity at the summary judgment stage. Rather, precedent supports the principle that a plaintiff's testimony may suffice to establish a genuine issue of material fact.ⁿ⁶⁰

Actionable disability discrimination under the ADA need not necessarily be directed at a disabled individual personally; thus, an employer may not exclude or deny equal job benefits to another person because he or she associates or has a relationship with a disabled person protected by the ADA.ⁿ⁶¹

Once plaintiff has presented a prima facie case of disability discrimination under the ADA, the employer is afforded the opportunity to demonstrate a legitimate, non-discriminatory reason for the adverse employment action taken.^{n61.1} Should the employer succeed, the employee is then given the opportunity to show by specific, substantial evidence that the employer's explanation was a pretext by demonstrating that the proffered reason was not the true reason for the employment decision, and persuading the court that the employee has been the victim of intentional discrimination. The employee may do this either directly by persuading the court that a discriminatory reason more likely motivated the

employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.^{n61.2}

[b] Sections 503 and 504 of the Rehabilitation Act

Section 503 prohibits discrimination by federal contractors against individuals with disabilities, and requires the contractors to take affirmative action to employ "qualified individuals with disabilities." It applies to contractors in any contract with a federal department or agency in excess of \$10,000 for the procurement of personal property and nonpersonal services (including construction).ⁿ⁶² Section 504 prohibits discrimination against "otherwise qualified individuals" with disabilities by programs or activities that are conducted by federal agencies, or that receive federal funds.ⁿ⁶³

An "individual with disabilities" refers to a person who (1) has a physical or mental impairment that substantially limits one or more of the person's major life activities, (2) has a record of the impairment, and (3) is regarded as having such an impairment.ⁿ⁶⁴ A "physical or mental impairment" is defined by federal regulation as (1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. "Physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic,ⁿ⁶⁵ visual, speech, and hearing impairments, cerebral palsy, epilepsy,ⁿ⁶⁶ muscular dystrophy, multiple sclerosis, cancer, heart disease,ⁿ⁶⁷ diabetes,ⁿ⁶⁸ mental retardation, emotional illness, and drug addiction and alcoholism.ⁿ⁶⁹ Other disorders not specifically enumerated, such as dyslexia,ⁿ⁷⁰ and even unusual sensitivity to tobacco smoke,ⁿ⁷¹ have also been recognized as "disabilities" for federal equal employment opportunity purposes.

A person is "substantially limited" if he or she is likely to experience difficulty in securing, retaining, or advancing in employment because of a disability.ⁿ⁷² "Major life activities" are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.ⁿ⁷³ There is no authority describing air travel as a major life activity under the Rehabilitation Act. There is authority denying a plaintiff relief under the Americans With Disabilities Act on grounds that travel is not a major life activity.^{n73.1} Even if the court were to recognize travel as a major life activity under the Rehabilitation Act, the employee would have to show that he or she is either unable to travel, or that the condition, manner, or duration under which he or she can travel is significantly restricted as compared to that of an average person.^{n73.2} However, Sections 503 and 504 do not encompass characteristics that simply make an individual incapable of performing specific tasksⁿ⁷⁴ or temporary conditions that have no permanent effect on a person's health.ⁿ⁷⁵

To have a record of an impairment that substantially limits a major life activity means to have a history of or to have been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.^{n75.1}

A person is regarded as being disabled if (1) a covered entity mistakenly believes a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities.^{n75.2}

The general definition of an "individual with a disability" includes an individual who has a currently contagious disease or infection *unless* that disease or infection makes the person a direct threat to the health or safety of other individuals, or renders the person unable to perform the duties of the job.ⁿ⁷⁶ For further discussion of contagious diseases as disabilities, *see* [3][b], *below*.

A "qualified handicapped individual" refers to a person who is able to perform a particular job, with reasonable accommodation to his or her disability.ⁿ⁷⁷

An "otherwise qualified individual with handicaps," a term unique to Section 504, has been construed by the United States Supreme Court to mean one who is able to meet all of a program's requirements *in spite of* his or her disability.ⁿ⁷⁸

[c] Fair Employment and Housing Act (FEHA)

The FEHA prohibits employment discrimination against individuals with physical disabilities, mental disabilities, or medical conditions, as specified.ⁿ⁷⁹ The FEHA provides protections against disability discrimination independent from those in the ADA.^{n79.1} Although the ADA provides a floor of protection, California law has always, even before passage of the ADA, afforded additional protections.^{n79.2} California law contains broad definitions of "physical disability," "mental disability," and "medical condition," and the Legislature intends that the definitions of physical and mental disability be construed so that job applicants and employees are protected from discrimination due to actual or perceived physical or mental impairment that is disabling, potentially disabling, or perceived to be disabling or potentially disabling.^{n79.3}

The FEHA defines "physical disability" as including, but not limited to, all of the following:ⁿ⁸⁰

1. Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (a) affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; and (b) limits a major life activity;
2. Any other health impairment not described in Paragraph (1) that requires special education or related services;
3. Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in Paragraph (1) or (2);
4. Being regarded or treated by the employer or other covered entity as having, or having had, any physical condition that makes achievement of a major life activity difficult;^{n80.1} or
5. Being regarded or treated by the employer or other covered entity covered as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in paragraph (1) or (2).

"Physical disability" does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.^{n80.2}

The FEHA defines "mental disability" as any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities that limit a major life activity.ⁿ⁸¹ The "regarded as" having a disability language in the FEHA applies only to those suffering certain specified physical disabilities or to those who have a condition with no present disabling effect but which may become a physical disability, and thus does not apply to mental disabilities.ⁿ⁸² California courts have split over whether a mental disability for FEHA purposes requires that the mental disability substantially limit a major life activity, as required by the ADA.ⁿ⁸³

Effective January 1, 2001, the Legislature added *Gov. Code § 12926.1(c)*, which provides that the Legislature has

determined that the definitions of "physical disability" and "mental disability" under California law require a "limitation" upon a major life activity, but not a "substantial limitation" as required by the ADA, which is intended to result in broader coverage under California law than under federal law.ⁿ⁸⁴

The California Supreme Court has concluded that the Legislature intended not to make a retroactive change, but only to clarify the degree of limitation required to be physically disabled under the FEHA. When the Legislature amended the FEHA in 1992, it defined physical disability as a physiological condition that "limits" major life activities. In 2000, the Legislature retained the "limits" language and clarified in express terms that a physical disability under the FEHA does not require the federal test's substantial limitation of a major life activity. According to the Court, before and after 2000, the FEHA's test was "limits," not "substantially limits".ⁿ⁸⁵ The Court found it unnecessary to decide whether the 2001 statute should be applied retroactively to cases predating its passage, since the same definition of physical disability would pertain in either case.^{n85.1}

Under the new statute the following definitions for both mental and physical disabilities apply: "Limits" are to be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.ⁿ⁸⁶ The term "major life activities" is to be broadly construed and includes physical, mental, and social activities and working.ⁿ⁸⁷ A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.ⁿ⁸⁸ Pain alone does not always constitute or establish a disability.^{n88.1}

The FEHA list of "disabilities" is not restrictive; "physical disability" includes *all* physical conditions.ⁿ⁸⁹ⁿ⁹⁰ Under the FEHA, physical handicap is that which makes achievement "unusually difficult."ⁿ⁹¹ Disability discrimination is established by showing that an employment practice denies, in whole or in part, an employment benefit to an individual because he or she is an individual with a disability."ⁿ⁹²

Thus, any condition of the body, major or minor, that has a disabling effect is a "physical disability" under the FEHA.ⁿ⁹³ For example, one court of appeal has held that employees who were hypersensitive to tobacco smoke were "physically handicapped" because they suffered from respiratory disorders, and exposure to tobacco smoke substantially limited their ability to breathe. The court was mindful that tobacco smoke may be merely an "environmental limitation" to people who do not suffer severe respiratory disorders, but declared that someone who does suffer from such disorders and whose ability to breathe is severely limited by tobacco smoke is "physically disabled" within the meaning of the FEHA.ⁿ⁹⁴

However, according to the California Supreme Court, a qualifying physical disability under the FEHA, whether or not the cause of action arose before or after the 1992 amendments to *Government Code Section 12926*, must be caused by an actual or perceived physiological disorder affecting one or more of the basic bodily systems and limiting a major life activity.ⁿ⁹⁵ Thus, in *Cassista v. Community Foods, Inc.*,ⁿ⁹⁶ the Court found that a 300-pound woman denied a position at a health food store collective ostensibly because of her weight could not bring an action based on physical disability discrimination, because she had not shown that her obesity was caused by a systemic physical condition, and in fact had alleged that despite her weight, she was healthy and fit.

The FEHA prohibits discrimination not only against presently disabled individuals, but also against those with physical conditions that may disable them in the future.ⁿ⁹⁷ The California Supreme Court has applied this principle to high blood pressure.ⁿ⁹⁸ Similarly, a court of appeal has held that a person who contracts AIDS is protected by the FEHA, even if he or she is not presently disabled.ⁿ⁹⁹ Evidence that an employee had nondisabling symptoms during employment does not support an inference that the employer discriminated against the employee because of a potential disability; something more is needed. For example, an applicant for employment was unable to prove disability discrimination based on the employer's refusal to hire him due to its alleged belief that the applicant's high blood pressure exposed the applicant to a greater than normal risk of disability or death.^{n99.1}

In addition, the FEHA specifies that when the ADA definition of "disability" will provide greater protection to disabled individuals than that provided by the FEHA, then that broader protection is deemed incorporated by reference into the FEHA and prevails over any conflicting provisions of the definitions in *Government Code Section 12926(i)* and (k).ⁿ¹⁰⁰ The FEHA does not deem the unlawful use of controlled substances or other drugs in and of itself to constitute a physical or mental disability pursuant to the FEHA.ⁿ¹⁰¹ⁿ¹⁰² Under the ADA, homosexuality and bisexuality are not considered disabilities.ⁿ¹⁰³ Also excluded from the ADA definition of disability are (1) transvestism and other specified sexual "behavior disorders," (2) compulsive gambling, (3) kleptomania, (4) pyromania, and (5) psychoactive substance use disorders resulting from current illegal use of drugs.ⁿ¹⁰⁴

Because health insurance distinctions that apply equally to all cannot be discriminatory, a distinction that has a greater adverse impact on disabled individuals who require a particular form of treatment but not other disabled persons does not discriminate on the basis of disability within the meaning of the ADA or the FEHA. Thus, for example, an employer who provided healthcare insurance coverage for infertility, but not for individuals who experienced types of infertility that were treatable only through IVF, a particularly expensive form of treatment, did not discriminate on the basis of disability.^{n104.1}

Like the ADA, the first essential element under a disability discrimination claim under the FEHA is either that the plaintiff is disabled or is regarded as disabled.ⁿ¹⁰⁵ Plaintiff has the burden of proving the disability or perception of disability.ⁿ¹⁰⁶ Thus, for example, a trial court properly precluded a former employee from claiming that he had a qualifying actual physical disability, based on his clear, unequivocal, uncontroverted testimony that he did not have a disability. The employee's testimony had the conclusive effect of a judicial admission that his physical condition did not render difficult the achievement of any major life activity. The fact that his injury was considered "permanent and stationary" for workers' compensation purposes did not require that the issue of "actual" disability go to the jury.^{n106.1} However, the trial court, based on the employer's factual admissions, was obligated to determine that the employer had regarded him as disabled as a matter of law.^{n106.2} But an employer regarding an employee as disabled is not enough to give rise to a FEHA claim; an employer must make any employment decision based on the perceived disability.^{n106.3}

An employer does not have to accept an employee's subjective belief that the employee is disabled. The employer may rely on medical information in that respect.^{n106.4}

Plaintiff also has the burden of proving that the employer was aware of plaintiff's disability or medical condition at the time it took the challenged employment action.ⁿ¹⁰⁷ An employer knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those facts.^{n107.1} An employee's leave of absence to undergo treatment or a doctor's recommendation that the employee be granted leave is a request for an accommodation that shows the employer's knowledge. Thus, for example, a former employee met the burden of showing that the employer was aware of his medical condition at the time it terminated his employment. The employee showed that a work status report from his chiropractor, which the employer received prior to the termination, advised the employer that the employee was unable to perform his regular job duties and specifically recommended a leave of absence.^{n107.2}

Under the FEHA, as under the ADA, a plaintiff must show that he or she is a qualified individual under the FEHA. Thus, plaintiff must show that he or she can perform the essential functions of the job with or without reasonable accommodation.^{n107.3} When an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the "qualified individual with a disability" requirement by showing he or she can perform the essential functions of the vacant position with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee.^{n107.4}

The FEHA also prohibits an employer from failing to reasonably accommodate the known disability of an applicant or employee.ⁿ¹⁰⁸ The elements of a failure to accommodate claim are similar to those of a discrimination claim under

Gov. Code § 12940(a), except that the plaintiff proves that he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought, rather than those of the existing position. The plaintiff also need not show that his or her disability resulted in an adverse employment action because the failure to accommodate is itself a violation of the statute.ⁿ¹⁰⁹ An employer cannot prevail on summary judgment on a claim of failure to reasonably accommodate unless the employer establishes one of the following through undisputed facts:ⁿ¹¹⁰

1. Reasonable accommodation was offered and refused.
2. There was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation.
3. The employer did everything in its power to find a reasonable accommodation, but the informal, interactive process broke down because the employee failed to engage in discussions in good faith.

However, an employer need not accommodate the individual if it can demonstrate that the accommodation would produce an undue hardship on the operation of its business.ⁿ¹¹¹ In addition, an employer is excused from refusing to hire or discharging a disabled employee if the employee, because of his or her disability, is unable to perform his or her essential duties, even with reasonable accommodation, or if the employee is unable to perform those duties without endangering his or her own health or safety or that of others.ⁿ¹¹² For further discussion of undue hardship, *see* § 41.52[4][a] and of reasonable accommodation, *see* § 41.51. For further discussion of employee's inability to perform job or danger to health and safety, *see* § 41.97.

In contrast to federal law, the FEHA also prohibits discrimination based on "medical condition."ⁿ¹¹³ "Medical condition" is defined to include (1) genetic characteristics and (2) any health impairment related to or associated with a diagnosis of cancer when competent medical evidence demonstrates that the cancer victim has been rehabilitated or cured.ⁿ¹¹⁴

To be actionable under FEHA, an employment action taken on the basis of an employee's disability or medical condition must be adverse. Thus, for example, denying a fire captain his desired assignment to platoon duty and limiting him to special duty assignments after he lost his leg in a work-related accident, which offered him positions with comparable pay and promotion opportunities, was not an adverse employment action under FEHA's disability discrimination prohibition.ⁿ¹¹⁵

Proof in a FEHA action follows the same structure as other employment discrimination cases: (1) the employee presents a prima facie case; (2) if the employee successfully presents a prima facie case, the employer is given the opportunity to present a legitimate, nondiscriminatory reason for the action taken; and (3) if the employer successfully presents a legitimate, nondiscriminatory reason for the discharge, the employee is given the opportunity to present evidence showing that the employer's articulated reason for the employment action was a pretext for discrimination.ⁿ¹¹⁶ⁿ¹¹⁷⁻¹²¹

[3] Issues Relating to Specific "Disabilities"

[a] Alcoholism and Drug Abuse

Neither the ADA nor the Rehabilitation Act expressly define alcoholism or drug addiction as covered "disabilities" (although a Justice Department regulation implementing Section 504 of the Rehabilitation Act does).ⁿ¹²² Those statutes do, however, *imply* that drug addiction is a covered disability since they protect abusers who are being or have been rehabilitated, and who no longer use illegal drugs.ⁿ¹²³ By contrast, an individual who is *currently* engaging in the illegal use of drugs is not "disabled" within the meaning of either statute,ⁿ¹²⁴ and psychoactive substance use disorders

resulting from current illegal drug use are not "disabilities" under either Act.ⁿ¹²⁵ For example, in *Collings v. Longview Fibre Company*,ⁿ¹²⁶ a Ninth Circuit panel held that employees who claimed they were discharged because of their alleged drug addiction disability were actually fired for their drug-related *misconduct* at the workplace, rather than because of any disability. The court also held that the employees were not covered under the ADA because of the exception for currently engaging in illegal drug use. The court explained that the term is not intended to be limited to the use of drugs on the day of the adverse employment action or immediately preceding it, but rather to the use of drugs that has occurred recently enough to indicate that the employee was actively engaging in such conduct.ⁿ¹²⁷ In *Brown v. Lucky Stores, Inc.*,ⁿ¹²⁸ the Ninth Circuit found that the plaintiff did not present any evidence that she was terminated because of her status as an alcoholic, as is required to prove an ADA claim. Rather, the evidence showed that the employer terminated her pursuant to its general policy that three consecutive unexcused absences from work warrant termination. The court also held that the plaintiff was not entitled to the "safe harbor" protection of the ADA, which protects employees who have successfully completed a rehabilitation program or have otherwise been successfully rehabilitated and are no longer engaging in the illegal use of drugs,ⁿ¹²⁹ even though she had participated in a rehabilitation program. Mere participation in a rehabilitation program is not enough to trigger the "safe harbor" protections. Refraining from illegal use of drugs also is essential, and plaintiff's continuing use of drugs and alcohol was clearly an ongoing problem, as demonstrated by her incarceration for driving while intoxicated and possession of methamphetamine. Because she had not refrained from the use of drugs and alcohol for a sufficient length of time, she was not entitled to the "safe harbor" protections.

In *Raytheon Co. v. Hernandez*,ⁿ¹³⁰ the United States Supreme Court reversed the Ninth Circuit, holding that the Ninth Circuit improperly determined that the employer's unwritten policy not to rehire employees who left the company for violating personal conduct rules had a disparate impact on recovering drug addicts, when the proper issue was whether the employer engaged in disparate treatment in refusing to rehire the employee because of his disability.

The Ninth Circuit held that the policy contravened the ADA, at least as applied to employees lawfully forced to resign for illegal drug use but who have since been rehabilitated. The employee was forced to resign because he tested positive for and admitted cocaine use and his workplace behavior violated company rules. He later applied to be rehired, with references as to his rehabilitation from substance abuse. His application was rejected under the company policy against rehiring employees terminated for workplace misconduct. The employee who rejected his application testified that she did not know he was a former drug addict when she made the decision and did not see anything that would constitute a record of addiction.

The Supreme Court vacated the Ninth Circuit's opinion because it found that the Ninth Circuit, while ostensibly evaluating whether the employer had proffered a legitimate, nondiscriminatory reason for failing to rehire the former employee, sufficient to rebut his *prima facie* showing of disparate treatment, held that a neutral no-rehire policy could never suffice when the employee was terminated for illegal drug use, because that policy has a disparate impact on recovering drug addicts. Thus, the Ninth Circuit erred by conflating the analytical framework for disparate-impact and disparate-treatment claims. Had the Ninth Circuit correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA. The only remaining question would be whether the employee could produce sufficient evidence from which a jury could conclude that the employer's stated reason for rejecting him was a pretext for discrimination under the ADA. On remand, the Ninth Circuit held that viewing the record in the light most favorable to the employee, it gave rise to a genuine issue of material fact as to whether the decision not to re-hire him was based on his status as an alcoholic, and that a reasonable juror could find that, despite the testimony of the employee who rejected him to the contrary, she was aware of the fact that the employee had been a substance-abuser and based her decision not to rehire him on that ground. Further, a finder of fact could reasonably infer that his history of addiction, not an oral policy, actually motivated the decision not to re-hire him.ⁿ¹³¹

■ CONSULTANT'S COMMENT:

Collings v. Longview Fibre Company ⁿ¹³² answers the question whether the Americans with

Disabilities Act prohibits the termination of employees who previously used, possessed or sold drugs on company property, but who are "drug-free" at the time they are terminated.

The facts may be briefly stated. Longview retained an undercover investigator to investigate rumors that its manufacturing plant employees engaged in drug activities on the job. The investigator worked undercover for six months, and reported on the employees' drug activities. The Company thereafter interviewed and took statements from eighteen of its employees, most of whom admitted that they or other employees had used, possessed, or sold drugs on the job. As a result of this investigation, the Company terminated seventeen of the eighteen employees it interviewed for violation of its strictly-enforced drug policy.

Eight of these terminated employees sued Longview for, among other things, violation of Title I of the ADA. Seven of these employees claimed that, while they had drug abuse problems in the past, they either had or would soon complete rehabilitation programs, and that they were "drug-free" at the time of their discharges. The eighth employee denied drug use and claimed that he was erroneously perceived as engaging in drug use. Accordingly, all of the employees claimed that they were "qualified individuals with disabilities" under the ADA, and that Longview violated the Act by terminating their employment.

The Ninth Circuit Court of Appeals rejected the employees' claim for three basic reasons. First, the Ninth Circuit distinguished between terminating employees because of misconduct, and terminating of employees because of their disabilities. The Court reasoned that, while the latter is prohibited by the ADA, the former is not. In particular, it explained that "[a]lcoholics and drug addicts are not exempt from reasonable rules of conduct, such as prohibitions against the possession or use of alcohol or drugs in the workplace," and that "employers must be allowed to terminate their employees on account of misconduct irrespective of whether the employee is [disabled]." The Court further explained that Longview believed its employees had engaged in drug-related misconduct, and did not terminate their employment because of their purported disabilities. Accordingly, the employees could not make out a violation of the ADA.

Second, the Court rejected the notion that employees can invoke the ADA's protection merely by claiming to be "drug-free" on the day of their termination. The ADA protects only "qualified individuals with disabilities." According to the Court, this term can include "individuals who have successfully completed or are participating in a supervised drug rehabilitation program and are no longer using illegal drugs, as well as individuals who are erroneously regarded as using drugs when in fact they are not." The Court further recognized, however, that the ADA exempts from coverage individuals who are "currently engaging in the illegal use of drugs when the employer acts on the basis of such use." In this case, the Court found that Longview's employees were "currently engaging" in the use of illegal drugs even though they claimed to be "drug-free" when they were terminated. The Court cited to the EEOC's regulations interpreting Title I of the ADA, and explained that " 'currently engaging' is not intended to be limited to the use of drugs on the day, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct Therefore, the fact that [the employees] may have been drug-free on the day of their discharge is not dispositive. Their own admissions of drug involvement during the weeks and months prior to their discharge indicated that they were recently involved in drug-related misconduct." (Emphasis added.)

Third, the Court held that the ADA did not prohibit Longview from terminating an employee who denied engaging in drug-related activities. It explained that the Company terminated its employees because it concluded that its employees had violated a "justified occupational standard" prohibiting alcohol- and drug-related misconduct. The court reasoned that termination of an employee "on the basis of those

isolated, specific incidents is not the equivalent of perceiving that [the employee] suffered from a disability and was fired solely because of that perceived condition." *Commentary by Kirby Wilcox.*

Similarly, alcoholism is not a "disability" under the Rehabilitation Act if the current use of alcohol prevents an alcoholic from performing his or her job duties or threatens the property or safety of others.ⁿ¹³³

Under the ADA and the Rehabilitation Act, a "drug" is a controlled substance, as defined in the Controlled Substances Act.ⁿ¹³⁴ An "illegal use of drugs" is the use of drugs that are unlawful under that statute. It does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other federal law.ⁿ¹³⁵

Alcoholism and narcotics addiction are not "mental disabilities" or "physical disabilities" under the FEHA.ⁿ¹³⁶ However, provisions of the California Labor Codeⁿ¹³⁷ require all California employers with 25 or more employees to reasonably accommodate any employee who wishes to enter and participate in a drug or alcohol rehabilitation program if it is not "an undue hardship" to do so.ⁿ¹³⁸ The Labor Code does not prohibit an employer from refusing to hire, or from discharging, an employee who is unable to perform his or her duties, or cannot perform them without endangering the health or safety of the employer or others;ⁿ¹³⁹ nor does it require an employer to provide time off with pay, unless the employee chooses to use accrued sick leave.ⁿ¹⁴⁰ For further discussion of the Labor Code provisions regarding alcohol and drug rehabilitation, *see* Chapter 50, Part D.

[b] Contagious Diseases

In general, contagious diseases constitute "disabilities" under federal and state law. The ADA does not expressly so provide, but in *School Board of Nassau County v. Arline*,ⁿ¹⁴¹ the United States Supreme Court determined that an employee suffering from tuberculosis was a disabled person under Section 504 of the Rehabilitation Act because she had a "physical impairment" that was a "physiological disorder or condition ... affecting [her] ... respiratory [system]."ⁿ¹⁴² The Court also explained that since the impairment was serious enough to require hospitalization, it was more than sufficient to establish that one or more of the employee's major life activities were substantially limited.ⁿ¹⁴³ The hospitalization also established a record of impairment, as required by Section 504.ⁿ¹⁴⁴ Presumably, cases will construe the ADA similarly since the ADA expressly provides that it does not apply a lesser standard than the Rehabilitation Act or the regulations promulgated thereunder.ⁿ¹⁴⁵ However, the ADA does provide that employers may deny jobs to food handlers with specified infectious and communicable diseases if reasonable accommodation is not possible.ⁿ¹⁴⁶ For further discussion, *see* § 41.97.

Although *Arline* held that a contagious disease can satisfy the definition of "handicap" under Section 504, the case was remanded for a determination of whether the plaintiff met the "otherwise qualified" requirement of Section 504. In particular, the Court held that, on remand, the trial court must determine, based on medical evidence about the nature, severity, and duration of the risk of contagion, the following questions: (1) whether the plaintiff would infect others with her disease, and (2) whether the employer could reasonably accommodate her.ⁿ¹⁴⁷

The Court specifically declined to answer the question of whether a person with AIDS "could be considered, solely on the basis of contagiousness, a person with a disability as defined by [Section 504]."ⁿ¹⁴⁸ However, in 1988, subsequent to *Arline*, Congress amended the Rehabilitation Act to provide that the term "individual with a disability" does not include an individual who has a currently contagious disease or infection *if*, because of such disease or infection, the individual (1) would constitute a direct threat to the health or safety of other individuals, or (2) is unable to perform the duties of the job.ⁿ¹⁴⁹

[c] HIV and AIDS Status

In *Chalk v. U.S. Dist. Court Cent. Dist. of California*,ⁿ¹⁵⁰ a teacher suffering from AIDS was relieved of his teaching

duties and given an administrative position with no reduction of salary or benefits. Alleging that the school district had violated Section 504, the teacher sought to enjoin the district from preventing his return to teaching.ⁿ¹⁵¹ In determining whether a preliminary injunction should issue, the Ninth Circuit Court of Appeals had to evaluate, among other things, whether there was a probability of success on the merits. Relying on *Arline*, the court preliminarily concluded that AIDS is a contagious disease protected by Section 504.ⁿ¹⁵² and held that the teacher had demonstrated a strong probability of success on the merits.ⁿ¹⁵³ The Ninth Circuit Court of Appeals has held that HIV infection and AIDS are disabilities within the meaning of the Rehabilitation Act,ⁿ¹⁵⁴ but held that denial of certain positions, such as food handling, did not violate the Rehabilitation Act.ⁿ¹⁵⁵ Also, whether a particular requested accommodation is a reasonable one, can be a question of fact.ⁿ¹⁵⁶

In *Bragdon v. Abbott*, a case brought under the public accommodation section of the ADA,ⁿ¹⁵⁷ the United States Supreme Court held that HIV-infected persons, even if asymptomatic, are significantly impaired in a major life activity.ⁿ¹⁵⁸ Although the plaintiff in *Bragdon* claimed an impairment of only one major life activity (reproduction), the Court noted that the pervasive course of HIV disease has an impact on many sorts of major life activities.ⁿ¹⁵⁹

Since the FEHA specifies that it includes protection for individuals having a disease that affects their immunological system,ⁿ¹⁶⁰ individuals who have AIDS or who are HIV-positive are protected under the FEHA.ⁿ¹⁶¹ Prior to the amendment to the FEHA making that specific inclusion, one California court of appeal had held that AIDS is a protected handicap under the FEHA, and found that there was no evidence to support an employer's assertion that the employee who had contracted AIDS posed a danger to the health or safety of other employees.ⁿ¹⁶² Additionally, under *Government Code Section 12965*, any city, county, or district attorney with an enforcement unit established by local ordinance on or before March 1, 1991, for the purpose of prosecuting AIDS/HIV discrimination claims may bring a civil action under the FEHA against an employer on behalf of any person claiming to be aggrieved due to AIDS/HIV discrimination.ⁿ¹⁶³

The three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* ^{n163.1} for trying claims of discrimination based on a theory of disparate treatment applies to discrimination claims made under the FEHA,^{n163.2} and specifically to individual claims of disparate treatment disability discrimination under FEHA based on AIDS or HIV-positive status.^{n163.3} The plaintiff has the initial burden of establishing a prima facie case of discrimination. To meet this burden, the plaintiff must, at a minimum, show the employer took actions from which, if unexplained, it can be inferred that it is more likely than not that such actions were based on a prohibited discriminatory criterion. A prima facie case generally means the plaintiff must provide evidence of each of the following:^{n163.4}

- 1) Plaintiff was a member of a protected class.
- 2) Plaintiff was qualified for the position he or she sought or was performing competently in the position held.
- 3) Plaintiff suffered an adverse employment action, such as termination, demotion, or denial of an available job.
- 4) Some other circumstance suggests a discriminatory motive.

If the plaintiff establishes a prima facie case, a presumption of discrimination arises, and the burden shifts to the employer to rebut the presumption by producing admissible evidence sufficient to raise a genuine issue of material fact the employer took its actions for a legitimate, nondiscriminatory reason.^{n163.5} If the employer meets that burden, the presumption of discrimination disappears, and the plaintiff must challenge the employer's proffered reasons as pretexts for discrimination or offer other evidence of a discriminatory motive.^{n163.6} A defendant employer's motion for summary judgment slightly modifies the order of these *McDonnell Douglas* showings. If the motion for summary

judgment relies in whole or in part on a showing of nondiscriminatory reasons for the discharge, the employer satisfies its burden as moving party if it presents evidence of nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination.^{n163.7} To defeat the motion, the employee must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred.^{n163.8} For example, in *Scotch v. Art Institute of California*, ^{n163.9} the employer met its initial burden of presenting evidence of a nondiscriminatory reason for placing an instructor who was HIV positive on a part-time status that would have permitted a trier of fact to find, more likely than not, the stated reasons were the basis for placing him on part-time status. However, the instructor failed to present evidence showing he suffered a physical disability within the meaning of the FEHA, he was otherwise qualified for his job, and he suffered an adverse employment action because of the physical disability. He did establish that he was HIV positive and therefore had a physical disability under the FEHA and that he suffered an adverse employment decision in the decision to place him on part-time status. However, he failed to present evidence creating triable issues as to whether he was otherwise qualified for the job and whether he suffered an adverse employment action because of the physical disability, *i.e.*, whether the employer's stated reason for reducing his course assignments, *i.e.*, that he did not have a master's degree, was a pretext, because he failed to show a causal link between his revelation he was HIV positive and the decision to implement the master's degree requirement.

■ CONSULTANT'S COMMENT:

Although the clarification of the Rehabilitation Act's applicability to persons with contagious diseases came in the form of a statutory amendment, it qualifies rather than supplants the general definition of "individual with a disability." Moreover, its formulation is very similar to the *Arline* standard. The United States Department of Justice has concluded in a memorandum that the new statutory formulation leads to results that are "substantively identical" to the standard set forth in *Arline*, ⁿ¹⁶⁴ which represents a dramatic about-face from the Justice Department's previous position on discrimination against individuals with contagious diseases like AIDS. The Justice Department's memorandum concludes that an HIV *carrier* who is not currently impaired may be protected if his or her ability to work is substantially limited by the negative reactions of others. The author of the memorandum stated at a news conference, "We believe that *Arline* means you cannot use contagion as a way of removing a person from a job. The whole point of the Act is to make sure that people are considered on their qualities on a person-by-person basis. ..." ⁿ¹⁶⁵ *Commentary by Erica B. Grubb*.

[d] Homosexuality and Bisexuality, Sexual Practices, and Compulsive Behavior Disorders

Homosexuality and bisexuality are not "impairments" and therefore are not "disabilities" under the ADA or the Rehabilitation Act.ⁿ¹⁶⁶

The term "disability" under the ADA and Rehabilitation Act also does not include any of the following:ⁿ¹⁶⁷

1. Transvestism,ⁿ¹⁶⁸ transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders; or
2. Compulsive gambling, kleptomania, or pyromania.

The FEHA also excludes the conditions listed above from disability discrimination coverage.ⁿ¹⁶⁹ However, the FEHA also bars discrimination and harassment based on sexual orientation, which is defined to include heterosexuality, homosexuality, and bisexuality, as an unlawful practice.ⁿ¹⁷⁰

[e] Obesity

As noted in § 41.32[2][c], obesity is not a protected physical disability under the FEHA unless it can be shown that the

condition is caused by an actual or perceived physiological disorder affecting one or more of the basic bodily systems and limiting a major life activity.ⁿ¹⁷¹ The Court made a distinction between obesity caused by a specific medical condition beyond the individual's control, which is a protected disability under the court's holding, and obesity as a condition of choice, i.e., the voluntary action or inaction of the individual, which is not a covered disability.ⁿ¹⁷²

Similarly, with regard to the category of perceived disability, i.e., where an employer regards an individual as disabled because of overweight, the California Supreme Court decision in *Cassista* requires that the individual must also be regarded as having an underlying physiological disorder within the meaning of the FEHA, even if it is not in fact disabling.ⁿ¹⁷³

[f] Uncorrected and Monocular Vision

Under the ADA Amendments Act of 2008, effective January 1, 2009,ⁿ¹⁷⁴ Congress clarified that an employer may not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.ⁿ¹⁷⁵ⁿ¹⁷⁶

In a case decided prior to the ADA Amendments Act of 2008, the Ninth Circuit found that for an individual with monocular vision to show that the impairment is a substantial limitation on the major life activity of seeing, the impairment must prevent or severely restrict use of the individual's eyesight compared with the way unimpaired individuals normally use their eyesight in daily life.ⁿ¹⁷⁷ The same standard applies to whether an individual is "regarded as" having an impairment that substantially limits the major life activity of seeing, i.e., the employer must regard the vision impairment as substantially limiting the overall ability to see for daily living.ⁿ¹⁷⁸

Under the FEHA, monocular vision is a physical disability.ⁿ¹⁷⁹ Monocularity qualifies as a physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one of the body systems listed in the first prong of FEHA's definition of physical disability.ⁿ¹⁸⁰ In *EEOC v. United Parcel Service, Inc.*, the Ninth Circuit found that UPS employees with monocular vision were limited in the major life activity of seeing and in the major life activity of working and thus were individuals with a disability under the FEHA.ⁿ¹⁸¹ However, the court also found that UPS satisfied the safety-of-others defense under the FEHA.ⁿ¹⁸²

[g] Diabetes

Under the ADA, diabetes is a "physical impairment" because it affects the digestive, hemic and endocrine systems, and eating is a "major life activity."ⁿ¹⁸³ Once an impairment is found, the issue is whether the individual's diabetes substantially limits the individual's activity of eating, which is an individualized inquiry.ⁿ¹⁸⁴

For example, in *Rohr v. Salt River Project Agricultural Improvement and Power District*,ⁿ¹⁸⁵ the district court erred in concluding that plaintiff's diabetes did not substantially limit his activity of eating. Plaintiff was an insulin-dependent type 2 diabetic. To determine whether he was substantially limited in his eating, the appellate court compared the condition, manner or duration under which plaintiff could eat as compared to the condition, manner or duration under which the average person in the general population could eat.ⁿ¹⁸⁶ The fact that plaintiff simply differed from the average person in how he performed a major life activity was "patently insufficient" for a substantial limitation.ⁿ¹⁸⁷ Rather, in deciding whether the impairment was substantially limiting, the court considered the nature and severity of the plaintiff's impairment, the duration or expected duration of the impairment, and the permanent or long term impact of the impairment.ⁿ¹⁸⁸ The court considered not only whether the symptoms of plaintiff's diabetes substantially limited one of his major life activities, but also whether his efforts to mitigate the disease constituted a substantial limitation, considering the effectiveness, side effects and burdens of his mitigating measures.ⁿ¹⁸⁹

The court concluded that plaintiff raised a genuine issue of material fact as to whether his diabetes substantially limited

his life activity of eating. The record was replete with statements by plaintiff and his doctors that to manage his disease plaintiff was required to strictly monitor what and when he ate. Plaintiff stated that these restrictions constrain him every day, whether it was a workday, a weekend or a holiday. He could not eat large meals or skip meals, and had to eat a snack every few hours. He had to schedule each day's blood tests, medications and food intake. He sometimes became weak and dizzy without warning, and only when he ate something did the sensations quickly subside. If he failed to follow his diet regimen for more than a meal or two, his blood sugar rose to a level that aggravated his disease. Plaintiff and his wife no longer scheduled frequent trips during vacation time, because it was increasingly difficult for him to follow his diet during travel. His dietary regimen was consistent with that recommended by the American Diabetes Association for type 2 diabetics, who must carefully plan their meals because it is important for them to eat at the same time every day and ensure that they have the same proportion of fats, proteins and carbohydrates. The complications of type 2 diabetes require immediate care and, if left untreated, can cause seizures and coma; they include high blood sugar (hyperglycemia), low blood sugar (hypoglycemia), increased ketones (which cause loss of appetite, nausea, vomiting, fever and stomach pain), heart and blood vessel disease, nerve damage, kidney damage, eye damage, foot damage, skin and mouth conditions, osteoporosis and Alzheimer's disease.ⁿ¹⁹⁰ For people like plaintiff, who had to treat their diabetes with insulin, the failure to take insulin will result in severe problems and eventually death.ⁿ¹⁹¹ Further, insulin injections themselves can be dangerous. For plaintiff, it was difficult to determine how much insulin to take, as the necessary amount varied depending on the food and activity level. Generally, food raises blood glucose levels while exercise and insulin reduce them. But other factors play a role, such as mental stress, illness and injury. To obtain the appropriate balance, plaintiff had to test his blood glucose levels through a finger stick test numerous times a day, and adjust insulin, food and activity level according to the results. If daily insulin injections alone more or less stabilized his blood sugar levels, such that any limitation imposed on his diet would have been minor, then his major life activity of eating might not have been substantially limited.ⁿ¹⁹² However, plaintiff alleged substantial limitations on his eating in spite of his medicine and insulin. He had to snack regularly, plan his daily schedule around his diet, avoid skipping meals and eat immediately when he felt dizzy or light-headed. The general population does not have to snack on something every few hours to regulate sugar intake; moreover, the general population is not medically required to plan daily schedules around a dietary regimen. Straying from a diet for more than one or two meals is not a cause for medical concern for most people, and skipping a meal, or eating a large one, does not expose them to the risk of fainting. For plaintiff, the effort required to control his diet was itself substantially limiting. Thus, plaintiff raised a genuine issue of material fact as to whether he was significantly restricted as to the condition, manner or duration in which he could eat, compared to the general population, and a genuine issue of fact existed as to whether he had a disability.

Although the court found it unnecessary to determine if the ADAAA applied retroactively, because the plaintiff presented sufficient evidence under the pre-ADAAA ADA to withstand summary judgment, the court opined that the ADAAA clarified Congress's intent with respect to the term "disability" in three major ways that could affect whether ADA protections are extended to persons with diabetes:ⁿ¹⁹³

- The ADAAA makes clear that eating is a major life activity under the ADA.ⁿ¹⁹⁴
- The ADAAA states that the standard articulated in *Toyota*,ⁿ¹⁹⁵ that "substantially limits" meant "prevents or severely restricts" created an inappropriately high level of limitation necessary to obtain coverage under the ADA. In this respect, Congress decided that the pre-ADAAA EEOC regulations, which defined the term "substantially limits" as "significantly restricted," required a greater degree of limitation than Congress intended in passing the ADA in 1990, and instructed the EEOC to revise its definition.ⁿ¹⁹⁶
- The ADAAA rejects the requirement enunciated in *Sutton* ⁿ¹⁹⁷ that whether an impairment substantially limits a major life activity is to be determined with reference to mitigating measures.ⁿ¹⁹⁸ The ADAAA makes explicit that the "substantially limits" inquiry must be made without regard to the ameliorative effects of mitigating measures such as medication, medical supplies, equipment, or appliances; use of assistive technology; reasonable accommodations or auxiliary aids or services; or

learned behavioral or adaptive neurological modifications.ⁿ¹⁹⁹ Impairments are to be evaluated in their unmitigated state, so that, for example, diabetes will be assessed in terms of its limitations on major life activities when the diabetic does not take insulin injections or medicine and does not require behavioral adaptations such as a strict diet.ⁿ²⁰⁰

The American Diabetes Association has heralded the ADAAA as making clear that Congress intends for people with conditions such as diabetes to be covered by the law and protected from discrimination on the basis of their diabetes.ⁿ²⁰¹

Legal Topics:

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

Labor & Employment Law
Discrimination
Age Discrimination
General Overview
Labor & Employment Law
Discrimination
Age Discrimination
Federal & State Interrelationships

FOOTNOTES:

(n1)Footnote 1. *42 U.S.C. § 12101 et seq.*

(n2)Footnote 2. *Gov. Code § 12900 et seq.*

(n3)Footnote 3. *29 U.S.C. § 701 et seq.*

(n4)Footnote 4. *See 29 U.S.C. § 793 (Section 503).*

(n5)Footnote 5. *See 29 U.S.C. § 794 (Section 504).*

(n6)Footnote 6. *See 38 U.S.C. § 4211 et seq.*

(n7)Footnote 7. *See 38 U.S.C. § 4212.*

(n8)Footnote 8. *Gov. Code § 12940(a); see Gov. Code § 12926(h) ("medical condition" defined).*

(n9)Footnote 9. *See Gov. Code § 11135.*

(n10)Footnote 10. *See Lab. Code § 1735.*

(n11)Footnote 10.1. *See Bus. & Prof. Code § 16721.* For discussion of the Cartwright Act, see § 40.14[4].

(n12)Footnote 11. *See 42 U.S.C. § 12112; 29 C.F.R. § 1630.4; see also Ventura County Ry. Co. v. Hadley Auto Transport (1995) 38 Cal. App. 4th 878, 881, 45 Cal. Rptr. 2d 362 (party entitled to sue is person injured, and not person causing injury; thus, railroad whose train disabled driver in collision could not recover payments to driver from driver's employer, under ADA; Congress did not intend to give tortfeasor substantial rights to mitigate damages).*

(n13)Footnote 12. *42 U.S.C. § 12112(a).*

(n14)Footnote 13. *42 U.S.C. § 12112(b)(1).*

(n15)Footnote 13.1. *42 U.S.C. § 12112(b)(2); see Cripe v. City of San Jose (9th Cir. 2001) 261 F.3d 877, 892 (city's contract with police union, which had effect of subjecting plaintiff officers with injuries to discrimination by imposing impermissible qualification standards that screened out disabled officers, could not survive under ADA because no exception applied).*

(n16)Footnote 13.2. *Sutton v. United Air Lines (1999) 527 U.S. 471, 490-493, 119 S. Ct. 2139, 144 L. Ed. 2d 450*

, overruled by statute on other grounds [see P.L. 110-325, §§ 1, 2]; see § 41.42[2][m.1].

(n17)Footnote 14. See § 41.51 of the text; *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1135-1136 (if leave of absence would reasonably accommodate disability and permit returning employee to perform essential functions of job, employee is otherwise qualified under ADA).

(n18)Footnote 14.1. 42 U.S.C. § 12111(8); see *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 863-864 (employee presented sufficient evidence to withstand employer's motion for summary judgment, where diabetes did not prevent plaintiff from performing bulk of his job, which was mostly office work; although it did prevent him from participating in out-of-town and overnight field assignments to repair outages, parties disputed whether field assignments were essential function of his job, and employer's own medical staff stated he was physically able to perform essential functions of his job with accommodations as outlined); *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1087-1090 (although employee failed to show he was qualified for position without reasonable accommodation, because there was no evidence that his epileptic seizures were under control at time of his termination, there was genuine issue of material fact as to whether he was qualified with reasonable accommodation, where employee requested accommodation through temporary change in duties, reassignment to new position or use of accumulated sick leave or medical leave without pay); *Kaplan v. City of North Las Vegas* (9th Cir. 2003) 323 F.3d 1226, 1231 (because deputy marshal after injury needed accommodation to perform essential job functions at time of termination, court was required to determine whether he was entitled to reasonable accommodation to help him perform essential functions of peace officer position); *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1111 ("qualified individual with a disability" includes individuals who could perform essential functions of reassignment position, with or without reasonable accommodation, even if they cannot perform essential functions of their current positions); *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1246-1247 (error to base total disability determination on condition during medical leave without considering reasonableness of extended leave as accommodation); see also *Braunling v. Countrywide Home Loans, Inc.* (9th Cir. 2000) 220 F.3d 1154, 1157-1158 (plaintiff, not qualified for job as senior underwriting supervisor, failed to demonstrate that her reduced performance was attributable to defendant's failure to transfer her away from her supervisor, which was her suggested accommodation).

(n19)Footnote 15. *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1087; *Hutton v. Elf Atochem North America, Inc.* (9th Cir. 2001) 273 F.3d 884, 892.

(n20)Footnote 15.1. 29 C.F.R. § 1630.2(n)(1), (2).

(n21)Footnote 15.2. *Hernandez v. Hughes Missile Sys. Co.* (9th Cir. 2002) 298 F.3d 1030, 1033; *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1246. See also *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 988-996 (because district court did not analyze whether named plaintiff and class members were qualified individuals capable of performing essential function of safely driving package car in framework of employer's use of federal qualification standard (nor did it directly undertake qualified individual inquiry), Ninth Circuit remanded for employees to prove they are qualified and for analysis of reasonable accommodation).

(n22)Footnote 15.3. *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 990. See 29 C.F.R. § 1630.2(m); 42 U.S.C. § 12111(8). See also *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1135; *EEOC v. Convergys Customer Management Group, Inc.* (8th Cir. 2007) 491 F.3d 790, 794-95; *Branham v. Snow* (7th Cir. 2004) 392 F.3d 896, 904.

(n23)Footnote 15.4. *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 990; *Kennedy v. Applause, Inc.* (9th Cir. 1996) 90 F.3d 1477, 1481.

(n24)Footnote 15.5. *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 990. See 42 U.S.C. § 12111(8) (directing fact finders to consider, among other things, employer's judgment as to what functions of job are

essential and job descriptions prepared before advertising or interviewing applicants; 29 C.F.R. § 1630.2(n)(3)(iii), (iv), (vi), (vii) (directing fact finders to consider amount of time spent on job performing function, consequences of not requiring applicant or employee to perform function, and work experience of current and former employees). *See also* EEOC v. Wal-Mart (8th Cir. 2007) 477 F.3d 561, 568 .

(n25)Footnote 15.6. *See, e.g., McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 800-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (individual disparate-treatment case); *Int'l Bhd. of Teamsters* (1977) 431 U.S. 324, 334-36, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (pattern-or-practice disparate-treatment case).

(n26)Footnote 15.7. *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 988 (burden-shifting protocol was unnecessary, where hearing standard at issue was facially discriminatory qualification standard because it focused directly on individual's disabling or potentially disabling condition and fact that employer made employment decision based on disability in form of hearing impairment was not in dispute); *McGregor v. AMTRAK* (9th Cir. 1999) 187 F.3d 1113, 1116 policy requiring employees to be 100% healed or fully healed after injury was facially discriminatory and constituted per se violation of ADA). *See Monette v. Elec. Data Sys. Corp.* (6th Cir. 1996) 90 F.3d 1173, 1182-83 (noting that when a defendant admits to taking account of disability status, *McDonnell Douglas* burden-shifting framework is unnecessary). For discussion of the *McDonnell Douglas* burden-shifting framework generally, see § 41.11, *above*.

(n27)Footnote 15.8. 29 C.F.R. § 1630.2(n)(3). *See Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 887-889 (factual dispute existed regarding whether ability to make forcible arrest is essential job function of specialized-assignment positions that police officers with injuries sought opportunity to fill, notwithstanding job descriptions defendant police department prepared); *Kees v. Wallenstein* (9th Cir. 1998) 161 F.3d 1196, 1199 (considering 29 C.F.R. § 1630.2(n) factors, inmate contact is essential job function of correctional officer position).

(n28)Footnote 15.9. 42 U.S.C. § 12111(8); *Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 887 .

(n29)Footnote 15.10. 42 U.S.C. § 12111(8); *see Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 887 (job description not conclusive; employer may not turn every condition of employment it elects to adopt into essential job function merely by including it in job description); *Echazabal v. Chevron USA, Inc.* (9th Cir. 2000) 226 F.3d 1063, 1071 (same).

(n30)Footnote 15.11. *See Kennedy v. Applause, Inc.* (9th Cir. 1996) 90 F.3d 1477, 1481 .

(n31)Footnote 15.12. *See Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1246 (court erred in holding that applying for SDI benefits precluded claim that plaintiff was qualified individual with a disability within meaning of ADA; leave from which employee makes SDI application may itself be reasonable accommodation that cannot be terminated without proper justification); *Johnson v. State of Oregon* (9th Cir. 1998) 141 F.3d 1361, 1367-1368 (rejecting *per se* rule barring claimants from pursuing ADA claims after seeking or obtaining disability benefits); *Kennedy v. Applause, Inc.* (9th Cir. 1996) 90 F.3d 1477, 1481 . *See also* § 41.51[2][a][v].

(n32)Footnote 15.13. *See* EEOC Compliance Manual (CCH) § 902 (Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act).

(n33)Footnote 15.14. P.L. 110-325 § 6.

(n34)Footnote 15.15. 42 U.S.C. § 12201(e).

(n35)Footnote 15.16. 42 U.S.C. § 12112(b)(6). For discussion of job-relatedness and business necessity, *see* § 41.95.

(n36)Footnote 15.17. *42 U.S.C. § 12113(c)*. See *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 862-863 (district court erred in granting summary judgment in favor of employer by concluding that plaintiff was not qualified for his position because he did not obtain required certification; certification test screened out plaintiff due to his high blood pressure, which was complication of his diabetes, but genuine issue of fact existed as to whether employer could have provided reasonable accommodations to enable plaintiff to complete test; employer also failed to show necessity of particular breathilator test and failed to show certification test was related to plaintiff's job).

(n37)Footnote 15.18. *29 C.F.R. § 1630.2(q)*.

(n38)Footnote 15.19. *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 974, 992-993. See *42 U.S.C. § 12113(a)*.

(n39)Footnote 16. See *42 U.S.C. § 12112(b)(6)*.

(n40)Footnote 16.1. For discussion of the business necessity defense under ADA, see § 41.95, below.

(n41)Footnote 17. See P.L. 110-325.

(n42)Footnote 18. P.L. 1103-25 § 2(a).

(n43)Footnote 19. *Sutton v. United Air Lines* (1999) 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 .

(n44)Footnote 20. See *Albertson's, Inc. v. Kirkingburg* (1999) 527 U.S. 555, 119 S. Ct. 2162, 144 L. Ed. 2d 518 ; *Murphy v. United Parcel Service, Inc.* (1999) 527 U.S. 516, 119 S. Ct. 2133, 144 L. Ed. 2d 484 .

(n45)Footnote 21. *Toyota Motor Mfg., Ky., Inc. v. Williams* (2002) 534 U.S. 184, 122 S. Ct. 681, 692, 151 L. Ed. 2d 615 .

(n46)Footnote 22. P.L. 1103-25 § 2(b).

(n47)Footnote 23. *School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 .

(n48)Footnote 23.1. See *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 853, 860-861 (although ADAAA, if applicable, would have provided additional support for plaintiff's claims, even under pre-ADAAA case law, plaintiff provided sufficient evidence that he was "qualified individual" with "disability" under ADA to survive summary judgment, so Ninth Circuit did not need to decide whether ADAAA applied retroactively).

(n49)Footnote 23.2. *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 861-862 .

(n50)Footnote 23.3. *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 860-861 .

(n51)Footnote 23.4. See H.R. Rep. No. 110-730, at 5 (2008) (H. Comm. on Educ. & Labor).

(n52)Footnote 23.5. 122 Stat. at 3553.

(n53)Footnote 23.6. *Sutton v. United Air Lines, Inc.* (1999) 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 .

(n54)Footnote 23.7. 122 Stat. at 3553.

(n55)Footnote 24. *42 U.S.C. § 12102(1)*. See also *Deppe v. United Airlines, Inc.* (9th Cir. 2000) 217 F.3d 1262,

1266 (triable issue existed as to whether defendant viewed plaintiff as suffering from medical condition that substantially limited his ability to work); *Holihan v. Lucky Stores, Inc.* (9th Cir. 1996) 87 F.3d 362, 366-367 (triable issue existed as to whether employer viewed plaintiff as suffering from mental condition that substantially limited his ability to work).

(n56)Footnote 25. 42 U.S.C. § 12102(4)(A).

(n57)Footnote 26. See 45 C.F.R. § 84.3(j)(2)(i) ("physical impairment" is any physiological condition affecting neurological, musculoskeletal, respiratory, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, endocrine, or special sense organs). See, e.g., *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032, 1038 (diabetes is physical impairment under ADA because it is physical condition affecting digestive, hemic, and endocrine systems); 24 C.F.R. § 9.103; 28 C.F.R. §§ 41.31(b)(1), 35.104; 29 C.F.R. § 34.2 (EEOC regulations specifically including diabetes in definition of physical impairment).

(n58)Footnote 27. See 29 C.F.R. § 1630.2(h); see also EEOC Compliance Manual (CCH) § 902.2; EEOC Compliance Manual (CCH) § 902 (Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities). See *Josephs v. Pac. Bell* (9th Cir. 2005) 432 F.3d 1006, 1015-1017 (employee asserted that employer violated ADA by regarding former employee as suffering from mental illness that might result in future acts of violence; while California court's determination of legal insanity did not necessarily mean that employee suffered from mental impairment covered by ADA, jury had ample evidence to support its finding that employer regarded employee as having mental impairment covered by ADA and employer viewed employee as having mental disability that substantially limited him in major life activity of working).

(n59)Footnote 28. See EEOC Compliance Manual (CCH) § 902(Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities).

(n60)Footnote 29. See EEOC Compliance Manual (CCH) § 902; EEOC Compliance Manual (CCH) § 902.2 (Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities).

(n61)Footnote 30. 42 U.S.C. § 12102(2)(A). See also 29 C.F.R. § 1630.2(i); EEOC Compliance Manual (CCH) § 902.3 (Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities); *Head v. Glacier Northwest, Inc.* (9th Cir. 2005) 413 F.3d 1053, 1061-1062 (holding reading to be major life activity prior to enactment of ADA Amendments Act of 2008).

(n62)Footnote 31. 42 U.S.C. § 12102(2)(B).

(n63)Footnote 32. 42 U.S.C. § 302.

(n64)Footnote 33. *Bragdon v. Abbott* (1998) 524 U.S. 624, 118 S. Ct. 2196, 141 L. Ed. 2d 540 .

(n65)Footnote 34. See *McAlindin v. County of San Diego* (9th Cir. 1999) 192 F.3d 1226, 1234-1235 , as amended, (2000) 201 F.3d 1211 .

(n66)Footnote 35. *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032, 1039-1040 . See also *Lawson v. CSX Transp., Inc.* (7th Cir. 2001) 245 F.3d 916, 924 (diabetes); *Forest City Daly Hous., Inc. v. Town of N. Hempstead* (2d Cir. 1999) 175 F.3d 144, 151 (dicta in case involving assisted living facility); *Land v. Baptist Med. Ctr.* (8th Cir. 1999) 164 F.3d 423, 424 (peanut allergy).

(n67)Footnote 36. *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032 .

(n68)Footnote 37. *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032, 1039-1040 . See also *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 858 (under ADA, diabetes is

"physical impairment" because it affects digestive, hemic and endocrine systems, and eating is "major life activity"). For discussion of diabetes as a specific disability, *see* § 41.32[3][g], *below*.

(n69)Footnote 38. *Bragdon v. Abbott* (1998) 524 U.S. 624, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (asymptomatic HIV-infected persons covered under ADA).

(n70)Footnote 39. *See* 29 C.F.R. Pt. 1630 App., 1630.2(j); *see also* EEOC Compliance Manual (CCH) § 902.4; EEOC Compliance Manual (CCH) § 902 (Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities).

(n71)Footnote 40. *Sanders v. Saw Arneson Prods., Inc.* (9th Cir. 1996) 91 F.3d 1351, 1354 .

(n72)Footnote 41. 42 U.S.C. § 12102(4)(B). *See* P.L. 110-325 § 2 (findings and purposes of ADA Amendments Act of 2008).

(n73)Footnote 42. 42 U.S.C. § 12102(4)(C).

(n74)Footnote 43. 42 U.S.C. § 12102(4)(D).

(n75)Footnote 44. *See* 29 C.F.R. § 1630.2(j)(1).

(n76)Footnote 45. *See* 29 C.F.R. § 1630.2(j)(3)(i).

(n77)Footnote 46. P.L. 110-325 § 1(8).

(n78)Footnote 47. P.L. 110-325 § 2(6).

(n79)Footnote 48. *Gribben v. United Parcel Service* (9th Cir. 2008) 528 F.3d 1166, 1170-1171 (sufficient evidence in record at summary judgment proceeding established genuine issue of material fact as to whether employee's impairment was substantial and limited his ability to perform regular daily activities including breathing, thinking and physical activities in temperatures of 90 degrees or more); *Head v. Glacier Nw., Inc.* (9th Cir. 2005) 413 F.3d 1053, 1058 .

(n80)Footnote 49. 29 C.F.R. § 1630.2(j)(2).

(n81)Footnote 50. 42 U.S.C. § 12102(4)(E)(i).

(n82)Footnote 51. *See* 42 U.S.C. § 12102(4)(E)(iii) ("low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image).

(n83)Footnote 52. *See* 42 U.S.C. § 12103(1) (defining "auxiliary aids or services").

(n84)Footnote 53. 42 U.S.C. § 12102(4)(E)(ii).

(n85)Footnote 54. 42 U.S.C. § 12102(4)(E)(iii).

(n86)Footnote 55. *See* 29 C.F.R. § 1630.2(k).

(n87)Footnote 56. *See* 42 U.S.C. § 12102(1)(C).

(n88)Footnote 57. 42 U.S.C. § 12102(3)(A).

(n89)Footnote 58. 42 U.S.C. § 12102(3)(B).

(n90)Footnote 59. *See* 29 C.F.R. § 1630.2(l); *see also* EEOC Compliance Manual (CCH) § 902.8; *Johnson v. Paradise Valley Unified School District* (9th Cir. 2001) 251 F.3d 1222, 1230 (trial court abused discretion in granting employer judgment as matter of law and alternatively granting new trial on former employee's "regarded as" disabled claim, because jury's verdict in employee's favor was not against weight of evidence).

(n91)Footnote 60. *Head v. Glacier Northwest, Inc.* (9th Cir. 2005) 413 F.3d 1053, 1058-1062 (plaintiff, through his own statements, alleged sufficient evidence to demonstrate genuine issue of material fact regarding substantial impairment in major life activities of sleeping, interacting with others, thinking, and reading). *See also* *McAlindin v. County of San Diego* (9th Cir. 1999) 192 F.3d 1226, 1235-1236 ; *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032, 1041-1042 , *cert. denied*, 541 U.S. 937, 124 S. Ct. 1663, 158 L. Ed. 2d 358 (2004) .

(n92)Footnote 61. *See* 42 U.S.C. § 12112(b)(4).

(n93)Footnote 61.1. *See* *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1083-1085 (in action by employee suffering from epilepsy against employer under ADA based on termination of employment, there was genuine issue of material fact as to whether employer demonstrated legitimate, non-discriminatory reason for termination).

(n94)Footnote 61.2. *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1085-1086 (summary judgment record was replete with evidence suggesting that employee's "misconduct" was pretext for discrimination on basis of disability); *Snead v. Metropolitan Prop. & Cas. Ins. Co.* (9th Cir.) 237 F.3d 1080, 1087 , *cert. denied*, 534 U.S. 888, 122 S. Ct. 201, 151 L. Ed. 2d 142 (2001) .

(n95)Footnote 62. *See* 29 U.S.C. § 793(a); *see* § 41.02[4].

(n96)Footnote 63. *See* 29 U.S.C. § 794(a), (b) (emphasis added); *see also* § 41.02[4]. Section 504 applies to an entire institution or entity receiving federal funds, not just the particular program or activity that receives them. *See* 29 U.S.C. § 794(b). For discussion of Sections 503 and 504 of the Rehabilitation Act generally, including employers and employees covered and exempted, *see* § 40.23.

(n97)Footnote 64. *See* 28 C.F.R. § 41.31(a) (Section 504 implementing regulation); 41 C.F.R. § 60-741.2 (Section 503 implementing regulation); *see* 29 U.S.C. §§ 793(a) (Section 503; incorporating 29 U.S.C. § 794(a) (Section 504 definition by reference); *see also* 28 C.F.R. § 41.31(b)(3) (Section 504 implementing regulation; "has record of impairment" defined).

(n98)Footnote 65. *See* *Daubert v. United States Postal Serv.* (10th Cir. 1984) 733 F.2d 1367, 1370-1372 (Section 504).

(n99)Footnote 66. *See* *Reynolds v. Brock* (9th Cir. 1987) 815 F.2d 571, 573 (Section 504).

(n100)Footnote 67. *See* *Treadwell v. Alexander* (11th Cir. 1983) 707 F.2d 473, 475 (Section 504).

(n101)Footnote 68. *See* *Bentivegna v. United States Dep't of Labor* (9th Cir. 1982) 694 F.2d 619, 621 (Section 504).

(n102)Footnote 69. 28 C.F.R. § 41.31(b)(1) (Section 504 implementing regulation). *See* *Coons v. Sec'y of the United States Dep't of the Treasury* (9th Cir. 2004) 383 F.3d 879, 885 (physician's letter stating that employee suffered from physical and mental impairments including abdominal distress affecting his digestive system, palpitations, heart pounding, and chest pain affecting his cardiovascular system, and depression and panic disorder as emotional or mental illnesses created genuine issue of material fact regarding whether employee had impairment under Rehabilitation Act).

(n103)Footnote 70. *See* *Stutts v. Freeman* (11th Cir. 1983) 694 F.2d 666, 668 (Section 504).

(n104)Footnote 71. *Vickers v. Veterans Administration* (W.D. Wash. 1982) 549 F. Supp. 85, 86-87 (Section 504).

(n105)Footnote 72. 41 C.F.R. § 60-741.2 (Section 503 implementing regulation).

(n106)Footnote 73. 28 C.F.R. § 41.31(b)(2) (Section 504 implementing regulation).

(n107)Footnote 73.1. *Coons v. Sec'y of the United States Dep't of the Treasury* (9th Cir. 2004) 383 F.3d 879, 885. See *Reeves v. Johnson Controls, World Servs., Inc.* (2d Cir. 1998) 140 F.3d 144, 152-153 (everyday mobility, defined by plaintiff as, among other things, going to unfamiliar places that would involve staying overnight, was not major life activity). For discussion of the Americans With Disabilities Act generally, see [a], above.

(n108)Footnote 73.2. *Coons v. Sec'y of the United States Dep't of the Treasury* (9th Cir. 2004) 383 F.3d 879, 885 (summary judgment for employer appropriate where employee did not argue that he could not travel because of his impairments, but only that he could not travel extensively, and where employee did not present evidence that condition, manner, or duration under which he can travel was restricted in any way other than not to travel extensively).

(n109)Footnote 74. See, e.g., *Jasany v. United States Postal Serv.* (6th Cir. 1985) 755 F.2d 1244, 1248-1250 (Section 504; strabismus ("crossed eyes") that prevented mail clerk from operating mail sorter, although "physical impairment," did not "substantially limit" major life activity).

(n110)Footnote 75. See *Stevens v. Stubbs* (N.D. Ga. 1983) 576 F. Supp. 1409, 1414-1415 ("undisclosed transitory illness" requiring employee to take periods of sick leave).

(n111)Footnote 75.1. 29 C.F.R. § 1630.2(k); see also 42 U.S.C. § 12102(1)(B). See *Coons v. Sec'y of the United States Dep't of the Treasury* (9th Cir. 2004) 383 F.3d 879, 886 (employee did not provide evidence of history of impairment substantially limiting major life activity, where his only evidence was letter from his doctor which stated employee suffered from various physical and mental impairments and received treatment for some impairments, but there was no allegation that any treated impairments substantially limited any major life activity).

(n112)Footnote 75.2. *Coons v. Sec'y of the United States Dep't of the Treasury* (9th Cir. 2004) 383 F.3d 879, 886 (employee presented no evidence that employer regarded him as having physical impairment limiting any major life activities, where employee pointed only to letter from his supervisor suggesting only that if employee was disabled as he claimed to be, he could be able to obtain disability benefits, but did not state supervisor considered employee to be eligible for benefits or disabled in any way). See also 29 C.F.R. § 1630.2(l)(1).

(n113)Footnote 76. See 41 C.F.R. 60-741.3(c); see also *School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 280-286, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (fact that individual has contagious disease does not in itself prevent him or her from being considered "handicapped" for purposes of Section 504; contagious nature of disease is relevant to determination of whether individual is "otherwise qualified").

(n114)Footnote 77. See 28 C.F.R. § 41.32(Section 504 implementing regulation); 41 C.F.R. § 60-741.2(t) (Section 503 implementing regulation); see also discussion in ch. 40, pt. C.

(n115)Footnote 78. See *Southeastern Community College v. Davis* (1979) 442 U.S. 397, 406, 99 S. Ct. 2361, 60 L. Ed. 2d 980; see also *Thornhill v. Marsh* (9th Cir. 1989) 866 F.2d 1182, 1183-1184.

(n116)Footnote 79. Gov. Code § 12940(a); see Gov. Code § 12926(h) ("medical condition" defined), (i) ("mental disability" defined), (k) ("physical disability" defined). For the standard jury instruction on the essential factual elements of an action under FEHA for disparate treatment disability discrimination, see *Judicial Council of California Civil Jury Instructions, CACI 2540* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of CACI jury instructions generally, see § 61.05. For the CACI special verdict form for a claim of disparate treatment disability discrimination, see *Judicial Council of California Civil Jury Instructions, CACI VF-2508* (Matthew Bender). For discussion of CACI special verdict forms, see § 61.06.

(n117)Footnote 79.1. *See Bagatti v. Department of Rehabilitation* (2002) 97 Cal. App. 4th 344, 361-362, 118 Cal. Rptr. 2d 443 (although federal regulation may be useful to guide construction of FEHA if state statute or interpretive state regulation is modeled on ADA, interpretive statement of EEOC based on ADA statutes that differ in important material respects from applicable FEHA statute does not apply).

(n118)Footnote 79.2. *Gov. Code § 12926.1(a), (d)(1)*.

(n119)Footnote 79.3. *Gov. Code § 12926.1(b); see also Gov. Code § 12926.1(d)(3)* (notwithstanding any interpretation of law in *Cassista v. Community Foods* (1993) 5 Cal. 4th 1050, 22 Cal. Rptr. 2d 287, 856 P.2d 1143 , Legislature intends to provide protection when individual is erroneously or mistakenly believed to have any physical or mental condition limiting a major life activity).

(n120)Footnote 80. *Gov. Code § 12926(k). See Gov. Code § 12926.1(c)* (physical disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis and heart disease).

(n121)Footnote 80.1. *But see Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 260, 102 Cal. Rptr. 2d 55 (employer merely regarding employee as disabled without more does not give rise to ADA claim; employer must make employment decision based on disability).

(n122)Footnote 80.2. *Gov. Code § 12926(k)(6)*.

(n123)Footnote 81. *Gov. Code § 12926(i). See Gov. Code § 12926.1(c)* ("mental disabilities" include, but are not limited to, chronic or episodic conditions such as clinical depression and bipolar disorder); *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 258-259, 102 Cal. Rptr. 2d 55 (post-traumatic stress disorder can meet statutory definition of mental disability under FEHA).

(n124)Footnote 82. *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 259, 102 Cal. Rptr. 2d 55 , disapproved to extent case holds or suggests federal law's substantial limitation test applies to claims of physical disability brought under FEHA in *Colmenares v. Braemar Country Club* (2003) 29 Cal. 4th 1019, 1031 .

(n125)Footnote 83. *Compare Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 257, 102 Cal. Rptr. 2d 55 (mental disability need only limit, not substantially limit, major life activity); *Pensinger v. Bowsmith* (1988) 60 Cal. App. 4th 709, 719-720, 70 Cal. Rptr. 2d 531 (plain language of statute does not require impairment of major life activity) with *Muller v. Automobile Club of S. Cal.* (1998) 61 Cal. App. 4th 431, 442-443, 71 Cal. Rptr. 2d 573 (legislature intended to conform California's employment discrimination laws to ADA and uniformly define mental disability as impairment that substantially limits major life activity), disapproved to extent case holds or suggests federal law's substantial limitation test applies to claims of physical disability brought under FEHA in *Colmenares v. Braemar Country Club* (2003) 29 Cal. 4th 1019, 1031 .

(n126)Footnote 84. *See also Gov. Code § 12926.1(d)(2)* (notwithstanding any interpretation of law in *Cassista v. Community Foods* (1993) 5 Cal. 4th 1050, 22 Cal. Rptr. 2d 287, 856 P.2d 1143 , Legislature intends to require "limitation" rather than "substantial limitation" of major life activity").

(n127)Footnote 85. *Colmenares v. Braemar Country Club* (2003) 29 Cal. 4th 1019, 1029-1031, 130 Cal. Rptr. 2d 662, 63 P.3d 220 .

(n128)Footnote 85.1. *Colmenares v. Braemar Country Club* (2003) 29 Cal. 4th 1019, 1028, 130 Cal. Rptr. 2d 662, 63 P.3d 220 .

(n129)Footnote 86. *Gov. Code § 12926(k)(1)(B)(i); see also Gov. Code § 12926.1(c)* (under California law, whether condition limits major life activity must be determined without respect to any mitigating measures, unless

mitigating measure itself limits a major life activity, regardless of ADA).

(n130)Footnote 87. *Gov. Code § 12926(k)(1)(B)(iii)*; *see also Gov. Code § 12926.1(c)* ("working" is major life activity regardless of whether actual or perceived working limitation implicates particular employment or class or broad range of employments).

(n131)Footnote 88. *Gov. Code § 12926(k)(1)(B)(ii)*. *See, e.g., Arteaga v. Brink's, Inc.* (2008) 163 Cal. App. 4th 327, 345-349, 77 Cal. Rptr. 3d 654 (FEHA claim alleging disability discrimination failed as matter of law on ground that employee's symptoms did not make it difficult for him to achieve life activity of working, where symptoms did not make performance of his job duties difficult as compared to his unimpaired state or to normal or average baseline).

(n132)Footnote 88.1. *Arteaga v. Brink's, Inc.* (2008) 163 Cal. App. 4th 327, 348, 77 Cal. Rptr. 3d 654 .

(n133)Footnote 89. *American Nat'l Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal. 3d 603, 607, 186 Cal. Rptr. 345, 651 P.2d 1151 ; *see, e.g., Nicolini v. County of Tuolumne* (1987) 190 Cal. App. 3d 619, 633-636, 235 Cal. Rptr. 559 (migraine headaches).

(n134)Footnote 90. [Reserved]

(n135)Footnote 91. *Angell v. Peterson Tractor, Inc.* (1994) 21 Cal. App. 4th 981, 987, 26 Cal. Rptr. 2d 541 , *disapproved on other grounds, City of Moorpark* (1998) 18 Cal. 4th 1143, 77 Cal. Rptr 2d 445, 959 P.2d 752 .

(n136)Footnote 92. *2 Cal. Code Regs. § 7293.7*; *see also Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514, 1520 .

(n137)Footnote 93. *See e.g., Bagatti v. Department of Rehabilitation* (2002) 97 Cal. App. 4th 344, 350, 118 Cal. Rptr. 2d 443 (complaint alleging that severe polio made plaintiff unable to walk long distances, although job duties required her to transport herself long distances within work site and to travel to and from work site, rendered her substantially impaired in necessary work-site mobility and sufficiently pleaded physiological condition affecting musculoskeletal system which limited plaintiff's major life activity within the meaning of *Gov. Code § 12926(k)*); *see also American Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n* (1982) 32 Cal. 3d 603, 607, 186 Cal. Rptr. 345, 651 P.2d 1151 (quoting Webster's New Internat. Dict., p. 1027 (3d ed. 1961) "handicap" is "disadvantage that makes achievement unusually difficult").

(n138)Footnote 94. *County of Fresno v. Fair Employment & Hous. Comm'n* (1991) 226 Cal. App. 3d 1541, 1549-1550, 277 Cal. Rptr. 557 (hypersensitivity to smoke is disability under FEHA, applying *American National Ins. Co.* and *2 Cal. Code Reg. § 7293.6(a)-(f)*).

(n139)Footnote 95. *Cassista v. Community Foods, Inc.* (1993) 5 Cal. 4th 1050, 1061, 22 Cal. Rptr. 2d 287, 856 P.2d 1143 (obesity found not to meet definition of "physical disability").

(n140)Footnote 96. *Cassista v. Community Foods, Inc.* (1993) 5 Cal. 4th 1050, 1061, 22 Cal. Rptr. 2d 287, 856 P.2d 1143 .

(n141)Footnote 97. *See Gov. Code § 12926(k)(4)*; *American Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n* (1982) 32 Cal. 3d 603, 607, 186 Cal. Rptr. 345, 651 P.2d 1151 ; *DFEH v. Ca. State University--Sacramento* (1988) FEHC Dec. No. 88-08, p. 17; *DFEH v. Aluminum Precision Prods., Inc.* (1988) FEHC Dec. No. 88-05, p. 5; *see also Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514, 1520 .

(n142)Footnote 98. *See American Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n* (1982) 32 Cal. 3d 603, 607, 186 Cal. Rptr. 345, 651 P.2d 1151 .

(n143)Footnote 99. *Raytheon Co. v. California Fair Employment & Hous. Comm'n* (1989) 212 Cal. App. 3d

1242, 1249, 261 Cal. Rptr. 197 (stating concern for sufficient time to have elapsed to ascertain if an impairment; one year's diagnosis of HIV insufficient to show impairment so as to come under statute); *see also Doe v. Kohn Nast and Graf PC (E.D. Pa. 1994) 862 F. Supp. 1310* . For further discussion of AIDS as a "physical handicap," *see* [3][c], *below*.

(n144)Footnote 99.1. *Arteaga v. Brink's, Inc. (2008) 163 Cal. App. 4th 327, 350-351, 77 Cal. Rptr. 3d 654* (employee failed to prove disability discrimination, where there was no evidence employer thought employee's pain or numbness created greater than normal risk of injury, disability, or death, or that employer had doubts about employee's future health). *See MacPhail v. Court of Appeal (1985) 39 Cal. 3d 454, 456-457 & n.3, 217 Cal. Rptr. 36, 703 P.2d 374* (applicant could pursue disability discrimination claim where employer refused to hire him, believing that applicant's spinal anomaly presented higher than average risk of back injury); *American Nat'l Ins. Co. v. Fair Employment & Hous. Commn. (1982) 32 Cal. 3d 603, 610, 186 Cal. Rptr. 345, 651 P.2d 1151* .

(n145)Footnote 100. *Gov. Code § 12926(l)*.

(n146)Footnote 101. *Gov. Code § 12926(i), (k); see* [3][a], *below*.

(n147)Footnote 102. [Reserved]

(n148)Footnote 103. *42 U.S.C. § 12212(a)*. Nevertheless, the FEHA separately defines discrimination based on sexual orientation, which is defined to include heterosexuality, homosexuality, and bisexuality, as an unlawful practice (*Gov. Code § 12926(j), (q)*).

(n149)Footnote 104. *42 U.S.C. § 12212(b); see* [3][d], *below*.

(n150)Footnote 104.1. *Knight v. Hayward Unif. Sch. Dist. (2005) 132 Cal. App. 4th 121, 130-134, 33 Cal. Rptr. 3d 287*

(n151)Footnote 105. *Diffey v. Riverside County Sheriff's Dept. (2000) 84 Cal. App. 4th 1031, 1035, 101 Cal. Rptr. 2d 353* , citing BAJI 12.12.

(n152)Footnote 106. *Diffey v. Riverside County Sheriff's Dept. (2000) 84 Cal. App. 4th 1031, 1035, 101 Cal. Rptr. 2d 353* (record contained no evidence that potential employer regarded color blindness of candidate for position of deputy sheriff as disability rather than valid job requirement).

(n153)Footnote 106.1. *Gelfo v. Lockheed Martin Corp. (2006) 140 Cal. App. 4th 34, 46-48, 43 Cal. Rptr. 3d 874* .

(n154)Footnote 106.2. *Gelfo v. Lockheed Martin Corp. (2006) 140 Cal. App. 4th 34, 48-50, 43 Cal. Rptr. 3d 874* (error caused submission of issue to jury, which was compounded when court modified Judicial Council Jury Instruction (CACI) No. 2540 and verdict form in confusing and erroneous way).

(n155)Footnote 106.3. *Jensen v. Wells Fargo Bank (2000) 85 Cal. App. 4th 245, 260, 102 Cal. Rptr. 2d 55* . *See Gelfo v. Lockheed Martin Corp. (2006) 140 Cal. App. 4th 34, 54-62, 43 Cal. Rptr. 3d 874* (employer's failure to explore and offer reasonable accommodation to employee it regarded as disabled).

(n156)Footnote 106.4. *Arteaga v. Brink's, Inc. (2008) 163 Cal. App. 4th 327, 347, 77 Cal. Rptr. 3d 654* .

(n157)Footnote 107. *See, e.g., Avila v. Continental Airlines, Inc. (2008) 165 Cal. App. 4th 1237, 1246-1252, 82 Cal. Rptr. 3d 440* (plaintiff could not prove discriminatory intent under FEHA based on disability, because he could not show that employees who made decision to discharge him knew of his disability).

(n158)Footnote 107.1. *Schmidt v. Safeway Inc. (D. Or. 1994) 864 F. Supp. 991, 997* ; *Faust v. California Portland Cement Co. (2007) 150 Cal. App. 4th 864, 887, 58 Cal. Rptr. 3d 729* .

(n159)Footnote 107.2. *Faust v. California Portland Cement Co. (2007) 150 Cal. App. 4th 864, 886-887, 58 Cal. Rptr. 3d 729*.

(n160)Footnote 107.3. *Green v. State of California (2007) 42 Cal. 4th 254, 260-267, 64 Cal. Rptr. 3d 390, 165 P.3d 118*. See also CACI No. 2540 (Judicial Council of California Civil Jury Instructions, including capacity to perform essential duties of job as one element of proof for disability discrimination claim under *Gov. Code § 12940(a)*).

(n161)Footnote 107.4. *Nadaf-Rahrov v. Neiman Marcus Group, Inc. (2008) 166 Cal. App. 4th 952, 971, 965, 83 Cal. Rptr. 3d 190* (employee raised triable issue of fact that she was unlawfully discharged because of her disability, where she presented evidence that employer could have but did not provide her with reasonable accommodation, *i.e.*, reassignment to vacant position, that would have allowed her to continue working with company).

(n162)Footnote 108. *Gov. Code § 12940(m)*; see *Wilson v. County of Orange (2009) 169 Cal. App. 4th 1185, 1192-1195, 87 Cal. Rptr. 3d 439* (substantial evidence supported jury's conclusion that employer provided plaintiff reasonable accommodation for her medical condition and engaged in good faith interactive process to arrive at accommodation, where employer engaged in process aimed at trying to accommodate plaintiff and plaintiff got exactly what she wanted, albeit after series of temporary accommodations); *Pensinger v. Bowsmith (1988) 60 Cal. App. 4th 709, 722-723, 70 Cal. Rptr. 2d 531* (employer must have actual knowledge of disability; employer's knowledge of employee's difficulty in reading and writing insufficient when employee diagnosed with learning disorder 18 months after termination).

(n163)Footnote 109. *Jensen v. Wells Fargo Bank (2000) 85 Cal. App. 4th 245, 256, 102 Cal. Rptr. 2d 55*.

(n164)Footnote 110. *Jensen v. Wells Fargo Bank (2000) 85 Cal. App. 4th 245, 263, 102 Cal. Rptr. 2d 55*; for discussion of the interactive process under the ADA, see *§ 41.51[2][a][iii]*.

(n165)Footnote 111. *Gov. Code § 12940(m)*.

(n166)Footnote 112. *Gov. Code § 12940(a)(1)*; *Haggard v. Kimberly Quality Care, Inc. (1995) 39 Cal. App. 4th 508, 515, 524-525, 46 Cal. Rptr. 2d 16* (disability law does not shield employee from termination for cause).

(n167)Footnote 113. See *Gov. Code § 12940(a)*.

(n168)Footnote 114. *Gov. Code § 12926(h)* (defining "medical condition" and "genetic characteristics" under FEHA).

(n169)Footnote 115. *Malais v. Los Angeles City Fire Dept. (2007) 150 Cal. App. 4th 350, 355-358, 58 Cal. Rptr. 3d 444*.

(n170)Footnote 116. See, *e.g.*, *Arteaga v. Brink's, Inc. (2008) 163 Cal. App. 4th 327, 344-355, 77 Cal. Rptr. 3d 654* (although employee failed to present prima facie case of disability discrimination, assuming he had established prima facie case, employer made strong showing of legitimate, nondiscriminatory reason for his discharge, *i.e.* that management lost confidence in him, which, given nature of employer's business, was legitimate, nondiscriminatory reason for discharge; and employee's attempt to demonstrate pretext failed, because although he was terminated soon after disclosing his "physical disability," timing, by itself, failed to raise dispute as to company's true motivation given that employer raised questions about employee's performance before he disclosed his symptoms and subsequent termination was based on those performance issues). For discussion of the *McDonnell Douglas* framework for proof in disparate treatment employment discrimination actions generally, see *§ 41.11, above*.

(n171)Footnote 117-121. [Reserved]

(n172)Footnote 122. See *29 U.S.C. § 794 (Section 504)*; *28 C.F.R. § 41.31(b)(1)* (defining alcoholism and drug

addiction as "physical or mental impairments"); *but cf.* *Traynor v. Turnage* (1988) 485 U.S. 535, 108 S. Ct. 1372, 99 L. Ed. 2d 618 (upholding VA regulation relating to extension of educational benefits, which defined alcoholism as "willful misconduct" for purpose of denying such extensions; rejecting arguments that regulation conflicted with Section 504).

(n173)Footnote 123. *See* 29 U.S.C. § 705(20)(C) (Rehabilitation Act); 42 U.S.C. §§ 12114(b), 12211(b) (ADA); 29 C.F.R. § 1630.3(b) (ADA implementing regulation); *See also* ch. 40, pt. C.

(n174)Footnote 124. *See* 29 U.S.C. § 705(20)(C) (Rehabilitation Act); 42 U.S.C. §§ 12114(a), 12211(a) (ADA); *see also* 29 C.F.R. § 1630.3(a) (ADA implementing regulation); *see also* EEOC Compliance Manual (CCH) § 902.6.

(n175)Footnote 125. *See* 29 U.S.C. § 705(20)(C); 42 U.S.C. § 12212(b); *see also* 29 C.F.R. § 1630.3(d)(3); EEOC Compliance Manual (CCH) § 902.6.

(n176)Footnote 126. *Collings v. Longview Fibre Co.* (9th Cir. 1995) 63 F.3d 828, 832-833, *cert. denied*, 516 U.S. 1048 (1996).

(n177)Footnote 127. *See Collings v. Longview Fibre Co.* (9th Cir. 1995) 63 F.3d 828, 832-833, *cert. denied*, 516 U.S. 1048 (1996) (citing regulatory definition under 29 C.F.R. § 1630.3 App).

(n178)Footnote 128. *Brown v. Lucky Stores, Inc.* (9th Cir. 2001) 246 F.3d 1182.

(n179)Footnote 129. 42 U.S.C. § 12114(b)(1).

(n180)Footnote 130. *Raytheon Co. v. Hernandez* (2003) 540 U.S. 44, 124 S. Ct. 513, 157 L. Ed. 2d 357.

(n181)Footnote 131. *Hernandez v. Hughes Missile Systems Co.* (9th Cir. 2004) 362 F.3d 564, 568-570.

(n182)Footnote 132. *Collings v. Longview Fibre Co.* (9th Cir. 1995) 63 F.3d 828, *cert. denied*, 516 U.S. 1048 (1996).

(n183)Footnote 133. *See* 29 U.S.C. § 705(20)(C); *see Gonzalez v. State Personnel Bd.* (1995) 33 Cal. App. 4th 422, 434-436, 39 Cal. Rptr. 2d 282 (alcoholic employee is not entitled to protection under the Rehabilitation Act when he engages in egregious misconduct).

(n184)Footnote 134. *See* 29 U.S.C. § 705(20)(C) (Rehabilitation Act); 42 U.S.C. §§ 12111(6), 12211(d); 29 C.F.R. § 1630.3(a)(1) (ADA); *see* 21 U.S.C. § 801 *et seq.* (Controlled Substances Act).

(n185)Footnote 135. *See* 42 U.S.C. §§ 12111(6), 12211(d); (ADA 29 C.F.R. § 1630.3(a)(2)); *see* 21 U.S.C. § 812 (schedules of controlled substances).

(n186)Footnote 136. *See Gov. Code* § 12926(i), (k) (mental or physical disability does not include unlawful use of controlled substances or other drugs in and of itself); 2 Cal. Code Reg. § 7293.6(a)(4).

(n187)Footnote 137. *See Lab. Code* §§ 1025-1028.

(n188)Footnote 138. *Lab. Code* § 1025.

(n189)Footnote 139. *Lab. Code* § 1025.

(n190)Footnote 140. *Lab. Code* § 1027.

(n191)Footnote 141. *School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307.

(n192)Footnote 142. See *School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 281, 107 S. Ct. 1123, 94 L. Ed. 2d 307 ; 28 C.F.R. § 41.31(b)(1) (Section 504 implementing regulation); see also [2][b], above.

(n193)Footnote 143. See *School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 281, 107 S. Ct. 1123, 94 L. Ed. 2d 307 ; 29 U.S.C. § 706(8)(B).

(n194)Footnote 144. See *School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 281, 107 S. Ct. 1123, 94 L. Ed. 2d 307 ; 29 U.S.C. § 705(20)(B).

(n195)Footnote 145. See 42 U.S.C. § 12201(a); See also ch. 40, pt. C.

(n196)Footnote 146. See 42 U.S.C. § 12113(e).

(n197)Footnote 147. *School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 287-289, 107 S. Ct. 1123, 94 L. Ed. 2d 307 .

(n198)Footnote 148. *School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 282 n.7, 107 S. Ct. 1123, 94 L. Ed. 2d 307 .

(n199)Footnote 149. 29 U.S.C. § 705(20)(C).

(n200)Footnote 150. *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.* (9th Cir. 1988) 840 F.2d 701 .

(n201)Footnote 151. See *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.* (9th Cir. 1988) 840 F.2d 701, 703 .

(n202)Footnote 152. See *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.* (9th Cir. 1988) 840 F.2d 701, 704 .

(n203)Footnote 153. See *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.* (9th Cir. 1988) 840 F.2d 701, 709 .

(n204)Footnote 154. *Gates v. Rowland* (9th Cir. 1994) 39 F.3d 1439 .

(n205)Footnote 155. *Gates v. Rowland* (9th Cir. 1994) 39 F.3d 1439, 1446 .

(n206)Footnote 156. See *Buckingham v. United States* (9th Cir. 1993) 998 F.2d 735, 739-741 (requested transfer in order to have access to better medical treatment, notwithstanding memorandum of understanding governing transfers).

(n207)Footnote 157. 42 U.S.C. § 12182.

(n208)Footnote 158. *Bragdon v. Abbott* (1998) 524 U.S. 624, 630-643, 118 S. Ct. 2196, 141 L. Ed. 2d 540 .

(n209)Footnote 159. *Bragdon v. Abbott* (1998) 524 U.S. 624, 630-643, 118 S. Ct. 2196, 141 L. Ed. 2d 540 .

(n210)Footnote 160. See *Gov. Code* § 12926(k)(1)(A).

(n211)Footnote 161. See also *Gov. Code* § 12926.1(c) ("physical disabilities" as defined under FEHA include HIV/AIDS).

(n212)Footnote 162. See *Raytheon Co. v. Fair Employment & Hous. Comm'n* (1989) 212 Cal. App. 3d 1242, 1250, 1252, 261 Cal. Rptr. 197 ; *Chalk v. U.S. Dist. Court Cent. Dist. of California* (9th Cir. 1988) 840 F.2d 701, 710-711 (HIV positive teacher cannot be refused the right to return to his classroom) ; *Citizens for Uniform Laws v. County of Contra Costa* (1991) 233 Cal. App. 3d 1468, 1475, 285 Cal. Rptr. 456 (upholding coverage of AIDS under FEHA).

(n213)Footnote 163. *Gov. Code § 12965(b)*.

(n214)Footnote 163.1. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 . For discussion of the *McDonnell Douglas* test, see § 41.11[1], above.

(n215)Footnote 163.2. See *Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 334, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 .

(n216)Footnote 163.3. See *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1004, 93 Cal. Rptr. 3d 338 .

(n217)Footnote 163.4. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1004, 93 Cal. Rptr. 3d 338 .

(n218)Footnote 163.5. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1004, 93 Cal. Rptr. 3d 338 .

(n219)Footnote 163.6. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1004, 93 Cal. Rptr. 3d 338 .

(n220)Footnote 163.7. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1005, 93 Cal. Rptr. 3d 338 .

(n221)Footnote 163.8. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1005, 93 Cal. Rptr. 3d 338 .

(n222)Footnote 163.9. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1005-1009, 93 Cal. Rptr. 3d 338 .

(n223)Footnote 164. See *U.S. Dep't of Justice Memorandum on Application of Rehabilitation Act's Section 504 to HIV-Infected Persons*, Daily Lab. Rep. (BNA) 195:D-1 (Oct. 7, 1988).

(n224)Footnote 165. See 1988 Daily Lab. Rep. (BNA) 195:A-10 (Oct. 7, 1988).

(n225)Footnote 166. 42 U.S.C. § 12212(a); 29 C.F.R. § 1630.3(e) (ADA); 29 U.S.C. § 705(20)(E) (Rehabilitation Act).

(n226)Footnote 167. 42 U.S.C. § 12212(b); 29 C.F.R. § 1630.3(d) (ADA); 29 U.S.C. § 705(20)(F) (Rehabilitation Act).

(n227)Footnote 168. See also 42 U.S.C. § 12209 ("disabled" or "disability" does not apply to individual solely because that individual is transvestite).

(n228)Footnote 169. See *Gov. Code § 12926(i), (k)*.

(n229)Footnote 170. *Gov. Code §§ 12926(j), (q), 12940(a)*.

(n230)Footnote 171. *Cassista v. Community Foods, Inc.* (1993) 5 Cal. 4th 1050, 1061, 22 Cal. Rptr. 2d 287, 856 P.2d 1143 (obesity found not to meet definition of "physical disability").

(n231)Footnote 172. *Cassista v. Community Foods, Inc.* (1993) 5 Cal. 4th 1050, 1064-1065, 22 Cal. Rptr. 2d 287, 856 P.2d 1143 (obesity found not to meet definition of "physical disability").

(n232)Footnote 173. *Cassista v. Community Foods, Inc.* (1993) 5 Cal. 4th 1050, 1065-1066, 22 Cal. Rptr. 2d

287, 856 P.2d 1143 (obesity found not to meet definition of "physical disability").

(n233)Footnote 174. See P.L. 110-325.

(n234)Footnote 175. 42 U.S.C. § 12113(c), effective January 1, 2009.

(n235)Footnote 176. [Reserved]

(n236)Footnote 177. *EEOC v. UPS* (9th Cir. 2002) 306 F.3d 794, 801-803 (two monocular individuals who, despite not having fully compensated for loss of near-field vision, did not have impairment substantially limiting major life activity of seeing; impairment did not prevent normal eyesight as used in daily life, such as driving (including for employer), reading, using tools, and playing sports).

(n237)Footnote 178. *EEOC v. UPS* (9th Cir. 2002) 306 F.3d 794, 803-806 .

(n238)Footnote 179. *EEOC v. UPS* (9th Cir. 2005) 424 F.3d 1060, 1068-1074 .

(n239)Footnote 180. *EEOC v. UPS* (9th Cir. 2005) 424 F.3d 1060, 1069 n.5 ; see Govt. Code § 12926(k)(1)(A).

(n240)Footnote 181. *EEOC v. UPS* (9th Cir. 2005) 424 F.3d 1060, 1070-1074 .

(n241)Footnote 182. *EEOC v. UPS* (9th Cir. 2005) 424 F.3d 1060, 1074-1077 . For discussion of the safety-of-others defense under the FEHA, see § 41.97, below.

(n242)Footnote 183. *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 858 ; *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032, 1038-40 .

(n243)Footnote 184. *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 858 .

(n244)Footnote 185. *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 858-862 .

(n245)Footnote 186. *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 858 . See also *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032, 1040 .

(n246)Footnote 187. *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 858 , quoting *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032, 1040 .

(n247)Footnote 188. *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 858 . See also *Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032, 1038 .

(n248)Footnote 189. *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 859 .

(n249)Footnote 190. *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 859 n.6 . See American Diabetes Association website, www.diabetes.org.

(n250)Footnote 191. *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 860 . See American Diabetes Association Position Statement: Insulin Administration, Diabetes Care 27:S106-107 (2004).

(n251)Footnote 192. See, e.g., *Ingles v. Neiman Marcus Group*, 974 F. Supp. 996, 1001-1002 (S.D. Tex. 1997) (diabetic plaintiff who was merely required to maintain normal, good, healthy diet was not substantially limited;

plaintiff's condition was substantially controlled with oral medication, and he did not have to take insulin).

(n252)Footnote 193. *Rohr v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2009) 555 F.3d 850, 861-862 .

(n253)Footnote 194. 122 Stat. at 3555.

(n254)Footnote 195. *Toyota Motor Mfg., Ky., Inc. v. Williams* (2002) 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 .

(n255)Footnote 196. 122 Stat. at 3554.

(n256)Footnote 197. *Sutton v. United Air Lines* (1999) 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 .

(n257)Footnote 198. 122 Stat. at 3554.

(n258)Footnote 199. 122 Stat. at 3556.

(n259)Footnote 200. See H.R. Rep. No. 110-730, at 8.

(n260)Footnote 201. American Diabetes Association, Americans with Disabilities Act Amendments Act and Diabetes, www.diabetes.org/advocacy-and-legalresources/discrimination/employment/americans-withdisabilities-act-amendments-act-and-diabetes.jsp#5.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART B. PROHIBITED BASES OF DISCRIMINATION

2-41 California Employment Law § 41.33

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.33 National Origin Discrimination

[1] Governing Law

Title VII is the main source of federal protection against national origin discrimination in employment,ⁿ¹ but such discrimination is also prohibited by Executive Order No. 11246 (E.O. 11246) (federal contractors),ⁿ² Title VI of the Civil Rights Act of 1964 (Title VI),ⁿ³ the still-operative discrimination provisions of the former Revenue Sharing Act (state and local governments sharing federal income tax funds),ⁿ⁴ and possibly Title 42 *United States Code Section 1981* (Section 1981).ⁿ⁵ Also, if there is "state action," the *equal protection clause of the Fourteenth Amendment to the United States Constitution* prohibits national origin discrimination,ⁿ⁶ as do the provisions of the Civil Rights Act of 1871, codified in Title 42 *United States Code Section 1983*.

The FEHA is the primary California statute prohibiting national origin discrimination,ⁿ⁷ but the California Constitution,ⁿ⁸ the California public works laws,ⁿ⁹ and the Cartwright Act (California antitrust law)ⁿ¹⁰ also proscribe such discrimination.ⁿ¹¹ Furthermore, *Government Code Section 11135* (state-funded programs or activities) prohibits discrimination based on national origin.

For a general discussion of the scope and application of these and other equal employment opportunity laws, see Chapter 40.

[2] Scope of Protection

[a] Generally

Under Title VII, the terms "national origin" or "ancestry" refer to the country where a person was born, or, more broadly, the country from which that person's ancestors came,ⁿ¹² including countries that no longer exist.ⁿ¹³ EEOC Guidelines define "national origin discrimination" as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestors' place of origin.ⁿ¹⁴ National origin is not limited by existing political divisions or the current political status of the nation in question. Discrimination relating to an

individual's ancestors' place of origin violates Title VII, including discrimination based on tribal membership.¹⁵

To prevail on a claim of disparate treatment based on national origin, the plaintiff must show:¹⁶

1. He or she belonged to a protected class;
2. He or she was qualified for the job;
3. He or she was subjected to an adverse employment action;^{16.1} and
4. Similarly situated employees not in the protected class received more favorable treatment.

EEOC guidelines also provide that "national origin discrimination" includes but is not limited to the denial of an equal employment opportunity because an individual has the physical, cultural, or linguistic characteristics of a national origin group.¹⁷ Thus, the EEOC has extended protection beyond individuals who come from a particular place of origin. The EEOC investigates unlawful employment practices grounded in national origin considerations such as the following:¹⁸

1. Marriage to, or association with, persons of a national origin group;
2. Membership in, or association with, an organization identified with, or seeking to promote, the interests of national origin groups;
3. Attendance or participation in schools, churches, temples, or mosques generally used by persons of a national origin group; and
4. Association of an individual's name, or a spouse's name, with a national origin group.

Under the FEHA, the elements of a claim for national origin discrimination in violation of *Government Code section 12940(a)* are:^{18.1}

- The employee's membership in a classification protected by the statute, *i.e.*, national origin.
- Discriminatory animus on the part of the employer toward members of that classification.
- An action by the employer adverse to the employee's interests.
- A causal link between the discriminatory animus and the adverse action.
- Damage to the employee.
- A causal link between the adverse action and the damage.

In *Mamou v. Trendwest Resorts, Inc.*, ^{18.2} an employee of Syrian heritage, who was a naturalized citizen, presented a prima facie case of national origin discrimination under the FEHA sufficient to withstand summary judgment. He presented evidence that a manager referred to "all those fucking rag heads," whom he pledged to "get rid of," and that another manager alluded to "busting up" and "getting rid of" the "Syrian regime" and the "Arab regime." There was also ample evidence to support the inference that the employer's articulated reason for terminating the employee's employment, *i.e.*, that he was stealing from the employer, was false. The employer never rested on a single coherent explanation for its firing of employee, and several, if not all, of its explanations were questionable. In its official form

memorializing the discharge, the precise nature of the asserted misconduct and the policy it supposedly violated remained in serious doubt, and to the extent it could be identified, appeared heavily controverted.^{n18.3} Finally, the employer's claim that the employee was fired by management officers, not by supervisors who could have been found to have acted out of impermissible motives, did not support the grant of summary judgment. The reasonable inference from the evidence was that the supervisors consulted with upper management to be sure it was comfortable with their decision to fire him, and the supervisor could have been understood to believe that when he met with the employee, he was vested with authority not to fire him if the supervisor so decided.^{n18.4}

In *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.*, ^{n18.5} summary adjudication was improperly granted to the employer on the employee's claim of national origin and ethnicity discrimination in the employer's failure to accommodate her disability while accommodating the disabilities of other employees not of the same protected class. The employee made a prima facie case, because it was undisputed that the employee was Middle Eastern (Iranian) and her termination was an adverse employment action. She presented evidence that two other employees with disabilities were accommodated by reassignment to other positions and the employer did not dispute her characterization of them as non-Middle Eastern. The employer provided a nondiscriminatory reason for the termination, but did not address the alleged disparate treatment of the employee and the non-Middle Eastern employees. The court assumed for purposes of argument that the employer satisfied its burden to produce evidence of a legitimate nondiscriminatory reason for the termination, and then found that the employee successfully rebutted that showing with evidence of the employer's discriminatory treatment of other Middle Eastern employees by submitting two sworn declarations by employees describing such treatment. Although the link between those employees' experiences and the termination was tenuous, very little evidence of discriminatory intent was necessary to defeat summary judgment.

One California court of appeal has held that an employee who was not personally discriminated against because of his national origin but who was retaliated against for objecting to instituting policies that discriminated against other employees on the basis of national origin had properly alleged a cause of action for wrongful termination in violation of public policy action pursuant to *Rojo v. Kliner* ⁿ¹⁹ and the California Constitution,ⁿ²⁰ which provides that a person may not be disqualified from pursuing employment because of several enumerated factors, including national origin.ⁿ²¹ For discussion of actions for wrongful termination in violation of public policy, see Chapter 60.

[b] Ancestry or Ethnic Discrimination as "Racial" Discrimination Under Section 1981

Title 42, *United States Code Section 1981* (Section 1981) provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and extractions of every kind, and to no other"ⁿ²² Although Section 1981 does not cover sex or religious discrimination,ⁿ²³ some courts have allowed Section 1981 "national origin" claims for discrimination against Hispanics.ⁿ²⁴ The success of such claims, however, appears to depend on how the issue is framed in the pleadings.

In one case a Mexican-American employee claimed that he was discharged for alleged theft, while "Anglo employees" who admitted thefts were subject only to suspension.ⁿ²⁵ Noting that Section 1981 does not mention race, national origin, or alienage, the Tenth Circuit Court of Appeals held that the employee stated a Section 1981 claim because the employee alleged that his "group"--Mexican Americans--did not receive the same rights and benefits that were accorded to white citizens--"Anglos."ⁿ²⁶ The court explained that prejudice is usage or image based on all the mistaken concepts of "race,"ⁿ²⁷ and if "white citizens" means a race, then persons who are discriminated against because they are perceived to be different from "white citizens" are within the scope of Section 1981.ⁿ²⁸

In *Gonzalez v. Stanford Applied Engineering*, ⁿ²⁹ the Ninth Circuit Court of Appeals allowed a Section 1981 claim by a Mexican-American based on an affidavit that plaintiff's discrimination claim was "based on national origin which includes the fact that my skin is brown."ⁿ³⁰ The court held that the employee's affidavit thus sufficiently claimed *race*

discrimination.ⁿ³¹ It noted that a substantial portion of the Mexican population is a mixture of the Caucasian (Spanish) and native American races, and concluded that prejudice towards Mexican-Americans having a skin color not characteristically Caucasian must be tantamount to racial prejudice under Section 1981.ⁿ³²

The United States Supreme Court has suggested that "ethnic or ancestry" discrimination claims may be pleaded under Section 1981 in some circumstances. In *Saint Francis College v. Al-Khazraji*,ⁿ³³ the Court construed Section 1981 to protect "identifiable classes of persons who are subject to intentional discrimination solely because of their ancestry or ethnic characteristics."ⁿ³⁴ The Court rejected an employer's contention that the plaintiff, a United States citizen born in Iraq, was a Caucasian who could not allege race discrimination under Section 1981.ⁿ³⁵ The Court explained that the concept of "race" is different today from what it was when Section 1981 was enacted, and that all those who might be deemed Caucasian today were not thought to be Caucasian in the late 1800's.ⁿ³⁶ Relying on dictionary and encyclopedic sources, the Court concluded that Arabs, northern Europeans, and certain other ethnic groups are not to be considered a single race for the purposes of Section 1981.ⁿ³⁷

The Court concluded that although Section 1981, "at a minimum," reaches discrimination on the basis of genetically belonging to an ethnically and physiognomically distinctive subgrouping of homo sapiens, a distinctive physiognomy (i.e., physical characteristic) is not essential.ⁿ³⁸ The Court added, however, that the plaintiff would have to prove that he was subjected to intentional discrimination because he was born an Arab, *rather than solely because of his place or nation of birth*, or his religion.ⁿ³⁹ Also, in his concurring opinion, Justice Brennan pointed out that the line between discrimination based on "ancestry or ethnic characteristics" and discrimination based on "place or nation of origin" is "not a bright one."ⁿ⁴⁰ Justice Brennan noted that often the two are identical as a factual matter, and that "national origin" claims are treated as "ancestry or ethnicity" claims in some circumstances.ⁿ⁴¹ Justice Brennan accordingly read the majority decision in *Al Khazraji* to mean that discrimination based on *birthplace alone* is insufficient to state a claim under Section 1981.ⁿ⁴²

■ PRACTICE TIP:

Because Section 1981 cases are often brought in conjunction with Title VII claims, it is prudent to file Title VII administrative charges on the basis of race *and* national origin for Hispanic and other complainants who may seek to file an ancestry-related race claim under Section 1981. *Commentary by Bill Lann Lee.*

[c] Citizenship, Lawful Permanent Residency, and Work Authorization Requirements Distinguished

In *Espinoza v. Farah Mfg. Co.*,ⁿ⁴³ the United States Supreme Court held that "nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage."ⁿ⁴⁴ The Court concluded that Congress did not intend the term "national origin" to embrace citizenship requirements for employment.ⁿ⁴⁵ Thus, an employer who requires employees to be United States citizens, or refuses to hire noncitizens, does not violate Title VII.ⁿ⁴⁶ However, employers may not discriminate against aliens because of race, color, national origin, religion, or sex,ⁿ⁴⁷ and an employer may not use a citizenship requirement as a pretext for "national origin" discrimination.ⁿ⁴⁸

Nevertheless, it is permissible to deny employment opportunities to illegal aliens or aliens who are not authorized to work in the United States. In fact, the Immigration Reform and Control Act of 1986 (IRCA)ⁿ⁴⁹ makes it unlawful for employers to knowingly hire, recruit, or refer for a fee, unauthorized aliens, or to continue to employ a person who is or becomes an unauthorized alien.ⁿ⁵⁰ "Unauthorized aliens" are aliens who, with respect to employment at a particular time, are not at that time either (1) lawfully admitted for permanent residence, or (2) authorized to be so employed by the Immigration and Nationality Actⁿ⁵¹ or by the United States Attorney General.ⁿ⁵²

However, if an alien is not "unauthorized," an employer may not discriminate based on that individual's national

origin.ⁿ⁵³ Furthermore, an employer may not discriminate because of the citizenship status of an alien who is a United States citizen or national, lawful permanent resident, temporary resident, refugee, or has been granted asylum.ⁿ⁵⁴ An employer may, however, prefer to hire, recruit, or refer an individual who is a United States citizen or national over another individual who is an alien if the two individuals are equally qualified.ⁿ⁵⁵

Congress enacted the IRCA's anti-discrimination provisions because it was concerned that the statute's sanctions provisions would cause extensive employment discrimination against Hispanic Americans and other minorities.ⁿ⁵⁶ The IRCA anti-discrimination provisions "dovetail" with, rather than supplant, Title VII, particularly since Title VII does not cover alienage or citizenship status.ⁿ⁵⁷ In fact, the IRCA expressly provides that its anti-discrimination provisions do not apply to national origin discrimination that is also covered by Title VII.ⁿ⁵⁸

For a general discussion of the scope and application of the IRCA's anti-discrimination provisions, *see* Chapter 40, Part C. For a comprehensive discussion of those provisions and the procedures for enforcing them, *see* Gordon and Mailman, *Immigration Law and Procedure*, Chapter 7.

■ CONSULTANT'S COMMENT:

The interplay between IRCA and Title VII is complicated, but the Department of Justice, which enforces IRCA, and the EEOC, which enforces Title VII, have attempted to clarify and coordinate their enforcement policies.ⁿ⁵⁹ The EEOC has clearly warned employers *not* to rely on IRCA to discriminate against "foreign looking" applicants, and has construed IRCA to be consistent with Title VII's national origin guidelines.ⁿ⁶⁰ Thus, if an employer's citizenship requirement has the purpose or effect of discriminating on the basis of national origin, it will be unlawful under both equal employment opportunity law and the immigration law. *Commentary by Erica B. Grubb.*

The United States Supreme Court held in *Hoffman Plastic Compounds v. NLRB* ^{n60.1} that the National Labor Relations Board could not award back pay in an unfair labor practice case where the employer terminated an undocumented alien for supporting a union-organizing campaign. Noting *Hoffman*, the Ninth Circuit Court of Appeals ruled that while under Title VII an employer may not discriminate against an undocumented alien, it is unclear whether *Hoffman* precludes an award of back pay. Nevertheless, the Ninth Circuit upheld a lower court's refusal to allow discovery of plaintiffs' work status in a Title VII case, holding that it was not relevant to plaintiffs' claims of job discrimination.^{n60.2}

In California, all protections, rights, and remedies available under state law (except any reinstatement remedy prohibited by federal law) are available to all individuals who have applied for employment, or who are now or previously have been employed, in this state. The protections apply regardless of the applicants'/employees' immigration status.ⁿ⁶¹ For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability. In proceedings or discovery undertaken to enforce state laws, no inquiry is permitted into a person's immigration status, except when the person seeking to make the inquiry has shown by clear and convincing evidence the inquiry is necessary to comply with federal immigration law.ⁿ⁶²

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationNational Origin DiscriminationGeneral OverviewLabor & Employment LawDiscriminationNational Origin DiscriminationCoverage & Definitions

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-2.

(n2)Footnote 2. Exec. Order No. 11246, *30 Fed. Reg. 12319 (1965)*, reprinted in *42 U.S.C.A. § 2000e (West 1981)*.

(n3)Footnote 3. *See 42 U.S.C. § 2000d et seq.*

(n4)Footnote 4. *See former 31 U.S.C. § 6701 et seq.*

(n5)Footnote 5. *See Saint Francis College v. Al-Khazraji (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582*; *42 U.S.C. §§ 1981, 1982*; *see also [2][b], below.*

(n6)Footnote 6. *See Hernandez v. Texas (1954) 347 U.S. 475, 479, 74 S. Ct. 667* (exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin).

(n7)Footnote 7. *See Gov. Code § 12940.*

(n8)Footnote 8. *See Cal. Const., art. I, § 8.*

(n9)Footnote 9. *See Lab. Code §§ 1735, 1777.6.*

(n10)Footnote 10. *See Bus. & Prof. Code § 16721.*

(n11)Footnote 11. However, the Unruh Civil Rights Act, *Calif. Civil Code § 51* might not apply. *See Mathis v. Pacific Gas & Elec. Co. (9th Cir. 1996) 75 F.3d 498, 505* (jurisdiction of Unruh Act limited to establishments generally open to the public and do not cover a utility).

(n12)Footnote 12. *See Espinoza v. Farah Mfg. Co. (1973) 414 U.S. 86, 88, 89, 94 S. Ct. 334, 38 L. Ed. 2d 287* ("national origin" and "ancestry" synonymous).

(n13)Footnote 13. *See Pejic v. Hughes Helicopters, Inc. (9th Cir. 1988) 840 F.2d 667, 673*.

(n14)Footnote 14. *29 C.F.R. § 1606.1.*

(n15)Footnote 15. *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist. (9th Cir. 1998) 154 F.3d 1117, 1120-1124* (Indian Preferences Exemption does not permit employment preferences based on tribal affiliation).

(n16)Footnote 16. *Kang v. U. Lim America, Inc. (9th Cir. 2002) 296 F.3d 810, 818-819*. For discussion of disparate treatment generally, *see 41.10 et seq.*

(n17)Footnote 16.1. If the claim is retaliation rather than direct discrimination, the adverse action need not be workplace-related or employment-related, only adverse. *See Burlington Northern & Santa Fe Railway Co. v. White (2006) 126 S. Ct. 2405, 165 L. Ed. 2d 345* (scope of anti-retaliation provision of Title VII extends beyond workplace-related or employment-related retaliatory acts and harm, so employee need only allege and prove "adverse action" rather than "adverse employment action" under Title VII's anti-retaliation provision), discussed at *§ 41.130[1A]*, *below.*

(n18)Footnote 17. *29 C.F.R. § 1606.1*; *see Raad v. Fairbanks N. Star Borough (9th Cir. 2003) 323 F.3d 1185, 1195* (summary judgment record contained evidence that plaintiff's accent did not impair her performance as teacher and therefore was not job-related; evidence included recommendations by graduate school instructors, requests for her as substitute by other teachers employed by district, and district's own continued employment of her as substitute, so it would be reasonable for finder of fact to infer district used her accent as pretext to deny her full-time position because of national origin); *but see Fragante v. City and County of Honolulu (9th Cir. 1989) 888 F.2d 591, 596, cert. denied, 494 U.S. 1081 (1990)* (adverse employment decision may be predicated on individual's accent when accent interferes

materially with job performance).

(n19)Footnote 18. *See* 29 C.F.R. § 1606.1.

(n20)Footnote 18.1. *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal. App. 4th 686, 713, 81 Cal. Rptr. 3d 406 . *See also* *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal. App. 4th 952, 991, 83 Cal. Rptr. 3d 190 (in national origin and ethnicity discrimination action, plaintiff has initial burden to show membership in protected class, plaintiff suffered adverse employment action, and similarly-situated persons who were not members of protected class did not suffer same adverse employment action; burden shifts to employer to provide legitimate nondiscriminatory reason why employee was treated differently; once employer provides reason, employee must show nondiscriminatory reason put forth by employer was mere pretext and true reason for adverse employment action was discriminatory intent).

(n21)Footnote 18.2. *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal. App. 4th 686, 714-715, 81 Cal. Rptr. 3d 406 .

(n22)Footnote 18.3. *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal. App. 4th 686, 715-723, 81 Cal. Rptr. 3d 406 .

(n23)Footnote 18.4. *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal. App. 4th 686, 723-727, 81 Cal. Rptr. 3d 406 .

(n24)Footnote 18.5. *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal. App. 4th 952, 991-993, 83 Cal. Rptr. 3d 190 .

(n25)Footnote 19. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 90, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n26)Footnote 20. *See* Cal. Const., art. I, § 8.

(n27)Footnote 21. *Blom v. N.G.K. Spark Plugs (U.S.A.), Inc.* (1992) 3 Cal. App. 4th 382, 386-388, 4 Cal. Rptr. 2d 139 .

(n28)Footnote 22. *See* *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (42 U.S.C. § 1981 as affording federal remedy against discrimination in private employment); *see* 42 U.S.C. § 1981(a); *See also* § 40.10[2][e].

(n29)Footnote 23. *See* *Runyon v. McCrary* (1976) 427 U.S. 160, 167, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (42 U.S.C. § 1981 as not addressed to sex or religious discrimination).

(n30)Footnote 24. *See* *Manzanares v. Safeway Stores, Inc.* (10th Cir. [Colo.] 1979) 593 F.2d 968, 970-972 ; *Ortiz v. Bank of America* (E.D. Cal. 1982) 547 F. Supp. 550, 568 .

(n31)Footnote 25. *See* *Manzanares v. Safeway Stores, Inc.* (10th Cir. [Colo.] 1979) 593 F.2d 968, 969 .

(n32)Footnote 26. *See* *Manzanares v. Safeway Stores, Inc.* (10th Cir. [Colo.] 1979) 593 F.2d 968, 970.

(n33)Footnote 27. *See* *Manzanares v. Safeway Stores, Inc.* (10th Cir. [Colo.] 1979) 593 F.2d 968, 971.

(n34)Footnote 28. *See* *Manzanares v. Safeway Stores, Inc.* (10th Cir. [Colo.] 1979) 593 F.2d 968, 971.

(n35)Footnote 29. *Gonzalez v. Stanford Applied Eng'g* (9th Cir. 1979) 597 F.2d 1298 .

(n36)Footnote 30. *See* *Gonzalez v. Stanford Applied Eng'g* (9th Cir. 1979) 597 F.2d 1298, 1300 (emphasis added).

(n37)Footnote 31. See *Gonzalez v. Stanford Applied Eng'g* (9th Cir. 1979) 597 F.2d 1298, 1300 .

(n38)Footnote 32. See *Gonzalez v. Stanford Applied Eng'g* (9th Cir. 1979) 597 F.2d 1298, 1300 .

(n39)Footnote 33. *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 107 S. Ct. 2022, 95 L. Ed. 2d 582 .

(n40)Footnote 34. *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582, 592 (emphasis added).

(n41)Footnote 35. See *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 610, 107 S. Ct. 2022, 95 L. Ed. 2d 582, 589 .

(n42)Footnote 36. See *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 610-611, 107 S. Ct. 2022, 95 L. Ed. 2d 582, 590 .

(n43)Footnote 37. See *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 611, 612, 107 S. Ct. 2022, 95 L. Ed. 2d 582, 590-591 .

(n44)Footnote 38. See *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582, 592 .

(n45)Footnote 39. See *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582, 592 .

(n46)Footnote 40. See *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 614, 107 S. Ct. 2022, 95 L. Ed. 2d 582, 592 (Brennan, J., concurring).

(n47)Footnote 41. See *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 614, 107 S. Ct. 2022, 95 L. Ed. 2d 582 , (Brennan, J., concurring; relying on *Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 88, 89, 94 S. Ct. 334, 38 L. Ed. 2d 287); 29 C.F.R. § 1606.1.

(n48)Footnote 42. *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 614, 107 S. Ct. 2022, 95 L. Ed. 2d 582 , (Brennan, J., concurring).

(n49)Footnote 43. See *Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 94 S. Ct. 334, 38 L. Ed. 2d 287 .

(n50)Footnote 44. *Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 95, 94 S. Ct. 334, 38 L. Ed. 2d 287 ; see also *Mahdavi v. Fair Employment Practice Comm'n* (1977) 67 Cal. App. 3d 326, 336-337 , 136 Cal. Rptr. 421.

(n51)Footnote 45. See *Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 89-90, 94 S. Ct. 334, 38 L. Ed. 2d 287 .

(n52)Footnote 46. See *Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 92-96, 94 S. Ct. 334, 38 L. Ed. 2d 287 .

(n53)Footnote 47. *Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 95, 94 S. Ct. 334, 38 L. Ed. 2d 287 . See *Equal Employment Opportunity Comm'n v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1516 n.10 (assuming without deciding that undocumented alien workers are entitled to Title VII protections).

(n54)Footnote 48. See *Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 92, 94 S. Ct. 334, 38 L. Ed. 2d 287 ; see also 29 C.F.R. § 1606.5; 2 Cal. Code Reg. § 7289.5(f).

(n55)Footnote 49. Pub. L. No. 99-603.

(n56)Footnote 50. See 8 U.S.C. § 1324a(a).

(n57)Footnote 51. 8 U.S.C. § 1101 *et seq.*

(n58)Footnote 52. *See* 8 U.S.C. § 1324a(h)(3).

(n59)Footnote 53. 8 U.S.C. § 1324b(a)(1)(A).

(n60)Footnote 54. *See* 8 U.S.C. § 1324b(a)(1)(B), (3)(B); *U.S. v. Todd Corp.* (9th Cir. 1990) 900 F.2d 164, 165 (Congress was concerned about discrimination against documented aliens and "foreign looking and sounding" U.S. citizens); *see Robison Fruit Ranch, Inc. v. United States* (9th Cir. 1998) 147 F.3d 798, 800-802 (construing IRCA before 1996 amendments adding express discrimination requirement, court concluded that 8 U.S.C. § 1324b(a)(6)'s document abuse prohibition required finding of discrimination; requesting specific documents permitted when those documents are routinely produced during employment process).

(n61)Footnote 55. 8 U.S.C. § 1324b(a)(4).

(n62)Footnote 56. *See* H.R. Rep. No. 682, 99th Cong., 2d Sess. 68 (1986); *see also United States v. Todd Corp.* (9th Cir. 1990) 900 F.2d 164, 167. In fact, a 1990 Comptroller General's report found that the IRCA does cause widespread discrimination. *see* U.S. General Accounting Office (now the U.S. Government Accountability Office), Pub. No. GAO 166D-90-62, Immigration Reform, Employers Sanctions and the Question of Discrimination (March 1990). As a result, the Immigration Act of 1990 added civil penalty and retaliation provisions to the IRCA. *See* 8 U.S.C. § 1324b(a)(5) (prohibiting retaliation), (g)(2)(B)(iv) (civil penalties); Pub. L. No. 101-649 (Immigration Act of 1990).

(n63)Footnote 57. *See* H.R. Rep. No. 682, 99th Cong., 2d Sess. 68 (1986).

(n64)Footnote 58. 8 U.S.C. § 1324b(a)(2)(B), (b)(2).

(n65)Footnote 59. *See EEOC Policy Statement on Relationship of Title VII of 1964 Civil Rights Act and 1986 Immigration Reform and Control Act*, 1987 Daily Lab. Rep. (BNA) 39:D-1 (March 2, 1987).

(n66)Footnote 60. *See EEOC Policy Statement on Relationship of Title VII of 1964 Civil Rights Act and 1986 Immigration Reform and Control Act*, 1987 Daily Lab. Rep. (BNA) 39:D-1 (March 2, 1987).

(n67)Footnote 60.1. (2000) 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271.

(n68)Footnote 60.2. *Rivera v. NIBCO, Inc.* (9th Cir. 2004) 364 F.3d 1057, *cert. denied*, 2005 U.S. LEXIS 2264 (Mar. 7, 2005).

(n69)Footnote 61. *Civ. Code* § 3339(a); *Gov. Code* § 7285(a); *Health & Safety Code* § 24000(a); *Lab. Code* § 1171.5(a).

(n70)Footnote 62. *Civ. Code* § 3339(b); *Gov. Code* § 7285(b); *Health & Safety Code* § 24000(b); *Lab. Code* § 1171.5(b).



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART B. PROHIBITED BASES OF DISCRIMINATION

2-41 California Employment Law § 41.34

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.34 Race and Color Discrimination

[1] Governing Law

Title VII and the FEHA prohibit employment discrimination based on race or color.ⁿ¹ Other federal and California laws proscribing race discrimination in employment include Title 42 *United States Code Section 1981*,ⁿ² and Title 42 *United States Code Section 1983* (applying to public employers),ⁿ³ Executive Order No. 11246 (federal contractors),ⁿ⁴ Title VI,ⁿ⁵ the still-operative antidiscrimination provisions of the former Revenue Sharing Act (state and local governments sharing federal income tax funds),ⁿ⁶ the California Constitution,ⁿ⁷ and possibly the Cartwright Act (California antitrust law).ⁿ⁸ *Government Code Section 11135* (state-funded programs or activities) prohibits discrimination based on race. For discussion relating to the scope and application of equal employment opportunity laws in general, *see* Chapter 40.

[2] Scope of Protection

[a] Race Discrimination

There is no definition of "race" in either Title VII or the FEHA, and there are few cases construing the term for equal employment opportunity purposes.ⁿ⁹ One commentator has suggested that because the language of Title VII broadly covers "color," "national origin," and "religion," as well as "race," everyone is likely to fall within at least one category, and thus the definition of "race" has generated no problems relating to scope of protection.ⁿ¹⁰

The United States Supreme Court has addressed the meaning of "race" in the context of Title 42 *United States Code Section 1981*.ⁿ¹¹ In *Saint Francis College v. Al-Khazraji*,ⁿ¹² the Court explained that the understanding of "race" now differs from when Section 1981 was enacted.ⁿ¹³ The Court noted that the common popular understanding of three major human races--Caucasoid, Mongoloid, and Negroid--has been criticized as arbitrary.ⁿ¹⁴ Relying on legislative history and diverse dictionary and encyclopedic sources, the Court concluded that "racial discrimination" involves identifiable classes of persons subject to discrimination solely because of their ancestry or ethnic characteristics.ⁿ¹⁵ A California court of appeal, following the Supreme Court's reasoning in *Al-Khazraji*, has also held that an allegation that a person was subject to discrimination based on membership in a group perceived to be distinct from whites, and not

based on birthplace only, is sufficient to raise a claim for racial discrimination under the FEHA.ⁿ¹⁶

Protection against race discrimination is not limited to minority groups. Title VII prohibits discriminatory preference "for any group, *minority or majority*,"ⁿ¹⁷ and thus bars race discrimination against white persons as well as African-American persons.ⁿ¹⁸ White persons are also protected under Section 1981.ⁿ¹⁹

Federal and state laws also prohibit discriminatory employment practices based on an individual's association with people of a particular race.ⁿ²⁰ As one court explained, a plaintiff need not specifically allege that he or she has been discriminated against because of *his or her* own race.ⁿ²¹ If a white plaintiff alleges that he or she suffered discrimination because he or she, as a white person, associated with an African-American person, the plaintiff's race was as much a factor in the discriminatory practice as that of his or her friend.ⁿ²² Thus, when a plaintiff claims discrimination based on an interracial marriage or association, he or she alleges, by definition, that he or she has been discriminated against because of *his or her* race.ⁿ²³

According to one California court, an employee required to work in a racist work environment who does not personally experience discrimination may nevertheless have a claim for constructive wrongful termination in violation of public policy.ⁿ²⁴

The Ninth Circuit has held that "race-labelling," i.e., the use of derogatory terms to indicate minorities or things relating to minorities in the workplace, may have an adverse impact on minorities or may create a hostile work environment if the labelling is sufficiently severe as to alter the terms and conditions of employment.ⁿ²⁵

In *El-Hakem v. BJY, Inc.*,^{n25.1} the Ninth Circuit held that § 1981 can be violated by the use of a name that is not a racial epithet, because names are often a proxy for race and ethnicity. The employer addressed an employee of Arabic heritage with a non-Arabic name, to which the employee objected repeatedly. The court found the conduct frequent or pervasive enough to create a hostile work environment, and the discriminatory intent was clear from the record.

[b] "Color" Discrimination

Although "color" is a discrete prohibited basis of discrimination under both Title VII and the FEHA,ⁿ²⁶ it is rarely treated separately from "race." In one case, however, the EEOC did find unlawful discrimination based on "color" when an employer gave preference to a "light-complexioned" black applicant with "Caucasian features" over another black applicant who had a "dark complexion" and "Negroid features."ⁿ²⁷

Legal Topics:

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

Labor & Employment Law Discrimination Racial Discrimination General Overview Labor & Employment Law Discrimination Racial Discrimination Coverage & Definitions Labor & Employment Law Discrimination Racial Discrimination Employment Practices General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-2; *Gov. Code* § 12940.

(n2)Footnote 2. *See Runyon v. McCrary* (1976) 427 U.S. 160, 168, 174-175, 96 S. Ct. 2586, 49 L. Ed. 2d 415 .

(n3)Footnote 3. *See Scott v. University of Delaware* (D. Del. 1974) 385 F. Supp. 937, 945 .

(n4)Footnote 4. Exec. Order No. 11246, 30 Fed. Reg. 12, 319 (1965) , reprinted in 42 U.S.C.A. § 2000e (West 1981).

(n5)Footnote 5. *See* 42 U.S.C. § 2000d.

(n6)Footnote 6. *See* former 31 U.S.C. §§ 6701-6724.

(n7)Footnote 7. *See* Cal. Const., art. I, § 8.

(n8)Footnote 8. *See* Bus. & Prof. Code § 16721.

(n9)Footnote 9. *See, e.g., United States v. Flagler County Sch. Dist.* (5th Cir. 1972) 457 F.2d 1402, 1403 (rejecting argument by school superintendent that desegregation order was vague and uncertain because it contained no definition of the term "Negro"; holding that since school district had no difficulty identifying Negroes for segregation purposes, they can be identified with similar ease for desegregation purposes).

(n10)Footnote 10. *See* Larson, Employment Discrimination, ch. 49 (Matthew Bender).

(n11)Footnote 11. For discussion relating to the substantive provisions of 42 U.S.C. § 1981, *see* § 41.02[5].

(n12)Footnote 12. *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 107 S. Ct. 2022, 95 L. Ed. 2d 582 .

(n13)Footnote 13. *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 610, 107 S. Ct. 2022, 95 L. Ed. 2d 582 .

(n14)Footnote 14. *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 610 n.4, 107 S. Ct. 2022, 95 L. Ed. 2d 582 .

(n15)Footnote 15. *See Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 612-613, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (groups such as Arabs, Jews, and Germans are not to be considered single race).

(n16)Footnote 16. *See Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal. App. 4th 846, 858, 31 Cal. Rptr. 2d 617 (East Indian plaintiff) .

(n17)Footnote 17. *See Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 (emphasis added).

(n18)Footnote 18. *See McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 280, 96 S. Ct. 2574, 49 L. Ed. 2d 493 ; *Aragon v. Republic Silver State Disposal, Inc.* (9th Cir. 2002) 292 F.3d 654, 659 ; *Hicks v. ABT Assoc., Inc.* (3rd Cir. 1978) 572 F.2d 960, 967 ; *Detroit Police Officers Ass'n. v. Young* (DC Mich. 1978) 446 F. Supp. 979, 1004 , *rev'd on other grounds*, 608 F.2d 671 (1979) .

(n19)Footnote 19. *See McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 286-287, 96 S. Ct. 2574, 49 L. Ed. 2d 493 .

(n20)Footnote 20. *See Parr v. Woodmen of the World Life Ins. Co.* (11th Cir. 1986) 791 F.2d 888, 891 (Title VII) ; *see also* 2 Cal. Code Reg. § 7287.9 (FEHA interpretative regulation).

(n21)Footnote 21. *See Parr v. Woodmen of the World Life Ins. Co.* (11th Cir. 1986) 791 F.2d 888, 892 . *But compare Cato v. US* (9th Cir. 1995) 70 F.3d 1103, 1109 (general enslavement of black race of African-American descent and subsequent discrimination did not give specific plaintiff standing; a generalized, class-based grievance affords no basis for a claim; particular conduct aimed at a particular person is necessary to proceed).

(n22)Footnote 22. *See Parr v. Woodmen of the World Life Ins. Co.* (11th Cir. 1986) 791 F.2d 888, 891 .

(n23)Footnote 23. *See Parr v. Woodmen of the World Life Ins. Co.* (11th Cir. 1986) 791 F.2d 888, 892 .

(n24)Footnote 24. *Carmichael v. Alfano Temporary Personnel* (1991) 233 Cal. App. 3d 1126, 1132, 285 Cal. Rptr. 143 (tort cause of action for wrongful termination in violation of public policy based on sex and race discrimination); *Strother v. Southern Cal. Permanente Med. Group* (9th Cir. 1996) 79 F.3d 859, 865-866 (employment discrimination on the basis of race violates public policy, citing *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 69, 276 Cal. Rptr. 130, 801 P.2d 373 (discussion of public policy as to other bases of discrimination)); *Badih v. Myers* (1995) 36 Cal. App. 4th 1289, 1293-1295, 43 Cal. Rptr. 2d 229 ; See also ch. 40, pt. A, and ch. 60, pt. A.

(n25)Footnote 25. *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1993) 10 F.3d 1485, 1503-1504 (Title VII) ; see also *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295, 297 (Title VII; standard for hostile work environment in sexual harassment cases).

(n26)Footnote 25.1. *El-Hakem v. BJY, Inc.* (9th Cir. 2005) 415 F.3d 1068, 1073-1074 .

(n27)Footnote 26. See 42 U.S.C. § 2000e-2(a) (Title VII); Gov. Code § 12940(a) (FEHA).

(n28)Footnote 27. See EEOC Dec. No. 72-0454 (1971).



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART B. PROHIBITED BASES OF DISCRIMINATION

2-41 California Employment Law § 41.35

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§ 41.35 Religious Discrimination

[1] Governing Law

Both Title VII and the FEHA prohibit employment discrimination based on religion.ⁿ¹ In *Rains v. Criterion Systems, Inc.*,ⁿ² the Ninth Circuit held that a Title VII religious claim can be raised as part of a state claim, without transforming the case into a federal question necessitating federal jurisdiction. In *Rains*, Title VII was mentioned, but the complainant had not filed a Title VII claim. The court reasoned that Title VII does not completely preempt a state law claim; rather, it preempts only inconsistent state law.ⁿ³

Religious discrimination is also unlawful under Title 42, *United States Code Section 1983* (applicable to public employers), Executive Order No. 11246 (federal contractors),ⁿ⁴ the California Constitution,ⁿ⁵ *Government Code Section 11135* (state-funded programs or activities), the California public works laws,ⁿ⁶ and possibly the Cartwright Act (California antitrust law).ⁿ⁷ However, *42 U.S.C. § Section 1981* does not apply to claims of religious discrimination.^{n7.1}

For a discussion of an employer's duty to make reasonable accommodations, *see § 41.52*. For general discussion of the scope and application of these and other equal employment opportunity laws, *see* Chapter 40.

[2] Scope of Protection

[a] Generally

It is unlawful to discriminate on the basis of religion in hiring, firing, compensation, and the terms, conditions, and privileges of employment.ⁿ⁸ In addition, both Title VII and the FEHA impose an affirmative duty on the employer to accommodate an individual's religious beliefs or observances.ⁿ⁹ For full discussion relating to employer accommodation of religious beliefs and observances, *see § 41.52*.

Under Title VII, the term "religion" includes all aspects of religious observance and practice, as well as belief.ⁿ¹⁰ Most

cases do not involve the question of whether a practice or belief is religious or not.ⁿ¹¹ However, in those rare cases in which the issue does arise, the EEOC interprets "religious practices" as including moral or ethical beliefs about what is right and wrong that are sincerely held with the strength of traditional religious views.ⁿ¹² Even if no religious group espouses such beliefs, or the religious group to which the individual professes to belong does not accept those beliefs, the belief may still be a religious belief of the employee or prospective employee.ⁿ¹³

The EEOC definition expressly relies on the "religious belief" standard developed in *Welsh v. United States*,ⁿ¹⁴ and *United States v. Seeger*,ⁿ¹⁵ in which the United States Supreme Court determined whether an individual's beliefs were "religious" for conscientious objector purposes under the Universal Military and Training Service Act.ⁿ¹⁶ In *Seeger*, the Court defined "religious belief" as "a sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the [conscientious objector] exemption."ⁿ¹⁷ At least one court has held that Title VII protects atheistic beliefs.ⁿ¹⁸

Title VII requires "sincerity" of religious beliefs, and although that question is often not at issue,ⁿ¹⁹ an analysis of "sincerity" is sometimes necessary.ⁿ²⁰ The Second Circuit Court of Appeals has found such an analysis necessary to differentiate between beliefs held as a matter of conscience and those that are motivated by deception and fraud.ⁿ²¹ The court articulated several factors that indicate insincerity. For example, an adherent may act in a manner inconsistent with his or her belief, or he or she may materially gain by fraudulently hiding secular interests behind a veil of religious doctrine. The court also suggested that the size and history of a religion is relevant to the determination.ⁿ²²

Courts use a two-part analysis in analyzing Title VII religious discrimination cases.ⁿ²³ First, an employee alleging religious discrimination under Title VII must establish a prima facie case by proving that (1) he or she had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) the employee informed his or her employer of the belief and conflict; and (3) the employer threatened the employee with, or subjected him or her to, discriminatory treatment, such as discharge, because of his or her inability to fulfill the job requirements.ⁿ²⁴ After the prima facie case is established, the burden shifts to the employer to show that it negotiated with the employee in an effort reasonably to accommodate the employee's religious beliefs. If the negotiations do not produce a proposal by the employer that would eliminate the conflict, the employer must either accept the employee's proposal or demonstrate that it would cause undue hardship if it were to do so.ⁿ²⁵

A. Prima Facie Case. The employee must establish that:

1. He or she has a bona fide religious belief, the practice of which conflicts with an employment duty;
2. He or she has informed the employer of the belief and conflict;
3. The employer has threatened or subjected him or her to discriminatory treatment ... because of his or her inability to fulfill the requirements of the job.

B. Reasonable Accommodation and Undue Hardship. If the employee establishes a prima facie case:

1. The employer must establish that it has negotiated with the employee in an effort reasonably to accommodate the employee's religious beliefs;
2. Where the negotiations do not produce a proposal by the employer that would eliminate the religious conflict, the employer must either:
 - a. Accept the employee's proposal; or
 - b. Demonstrate that it would cause undue hardship.

- i. Undue hardship on the employer:
 - a) Involves hardship on the conduct of the business; and
 - b) Occurs when an accommodation would result in more than a de minimis cost to the employer.
 - ii. Undue hardship on coworkers:
 - a) Involves hardship to the rights of other employees; and
 - b) Occurs when an accommodation would result in a significant, discriminatory impact upon those rights. ("Discriminatory" is defined as "preferential" to the plaintiff.)
3. Only if the employer can show that no accommodation would be possible (meaning "feasible") without undue hardship is it excused from taking the necessary steps to accommodate the employee's religious beliefs.
- a. Hypothetical hardship is not sufficient.
 - b. Actual hardship established through the implementation of alternative accommodations is preferable. (The employer is on stronger ground when it has attempted various methods of accommodation and can show hardships that actually have resulted.)
 - c. Feasible accommodations that would not cause undue hardship (absent preferential treatment of the plaintiff under a collective bargaining agreement or policy that permits employees to avoid working on days that the accommodation would require) include:
 - i. Schedule changes, voluntary shift trades, or a combination of both; and
 - ii. Temporary accommodation and transfer.

■ **CONSULTANT'S COMMENT:**

The *Opuku Boateng* case²⁶ referenced in the text is significant for a number of reasons, but two stand out.

First, the opinion describes its analysis of Title VII discrimination claims as falling into two parts, but the evaluation process actually set forth is far more complicated. According to the panel, a case of religious discrimination triggers at least a dozen separate inquiries:

A. *Prima Facie* Case. The employee must establish that:

- 1. He or she has a bona fide religious belief, the practice of which conflicts with an employment duty;
- 2. He or she has informed the employer of the belief and conflict;
- 3. The employer has threatened or subjected him or her to discriminatory treatment ... because of his or her inability to fulfill the requirements of the job.

B. Reasonable Accommodation and Undue Hardship. If the employee establishes a prima facie case:

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 - a. Accept the employee's proposal; or
 - b. Demonstrate that it would cause undue hardship.
 - i. Undue hardship on the employer:
 - a) Involves hardship on the conduct of the business; and
 - b) Occurs when an accommodation would result in more than a de minimis cost to the employer.
 - ii. Undue hardship on coworkers:
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3. Only if the employer can show that no accommodation would be possible (meaning "feasible") without undue hardship is it excused from taking the necessary steps to accommodate the employee's religious beliefs.
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 - c. Feasible accommodations that would not cause undue hardship (absent preferential treatment of the plaintiff under a collective bargaining agreement or policy that permits employees to avoid working on days that the accommodation would require) include:
 - i. Schedule changes, voluntary shift trades, or a combination of both; and
 - ii. Temporary accommodation and transfer.

Second, the Ninth Circuit all but eliminated the use of employee polls to determine whether coworkers would find a proposed accommodation unacceptable. The panel acknowledged that a poll could be admitted over a hearsay objection, so long as "it is material and more probative on the issue than other evidence, and it has guarantees of trustworthiness." By itself, this is welcome news, because employers have wondered what standards the Ninth Circuit would apply to the admissibility of polls in civil rights litigation. However, a poll which reveals coworker unhappiness with a proposed accommodation is of no import, unless that unhappiness can be linked to the loss of some right and consequent preferential treatment of the plaintiff. In short, the "morale" defense would appear to be dead. If the employer can achieve an accommodation without preferential treatment of the plaintiff and without more than de

minimis cost, the reactions of other employees to the accommodation are immaterial. *Commentary by Kirby Wilcox.*

The FEHA provides that "religious belief or observance" includes, but is not limited to, observance such as a Sabbath or other religious holy day or days, and reasonable time necessary for travel before and after a religious observance.ⁿ²⁷ "Religious creed," as it is used in the FEHA, includes any traditionally recognized religion, as well as beliefs, observances, or practices that an individual sincerely holds, and that occupy in his or her life a place of importance parallel to that of traditionally recognized religions.ⁿ²⁸ A belief in a supreme being is not required.ⁿ²⁹ However, to secure FEHA protection, the beliefs, observances, or practices must occupy a place of importance in the person's life parallel to that of traditionally recognized religions. The test is objective.^{n29.1} The following are guidelines for determining what constitutes a religion by considering whether beliefs, observances, or practices parallel those of traditionally recognized religions:^{n29.2}

- A religion addresses fundamental and ultimate questions having to do with deep and imponderable matters.
- A religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching.
- A religion often can be recognized by the presence of certain formal and external signs.

The elements of a religious creed discrimination claim are the following:^{n29.3}

- The plaintiff had a bona fide religious belief.
- The employer was aware of that belief.
- The belief conflicted with an employment requirement.

Once the employee establishes a prima facie case with sufficient evidence, the burden shifts to the employer to establish that it initiated good faith efforts to accommodate or that no accommodation was possible without producing undue hardship.^{n29.4}

[b] Issues Relating to Particular Observances, Practices, and Beliefs

One appellate court has construed the Title VII definition of "religion" discussed in [a], above, to encompass *all* forms and aspects of religion, however eccentric, except those that cannot be, in practice and with honest effort, reconciled with a businesslike operation.^{n29.5} Specific protected practices include wearing beards,ⁿ³⁰ nonpayment of union dues,ⁿ³¹ refusal to distribute draft registration materials,ⁿ³² participation in a spouse's religious conversion ceremony,ⁿ³³ use of the drug peyote,ⁿ³⁴ and attendance at a religious convention.^{n34.1}

■ CONSULTANT'S COMMENT:

Most religious discrimination cases depend heavily on the particular facts of the alleged discrimination and turn on three issues: (1) whether the employee has a sincere belief; (2) whether the employer has taken reasonable steps to accommodate that belief; and (3) whether accommodation would constitute an undue hardship on the conduct of the employer's business. On the latter points, the Supreme Court has narrowly construed the employer's duty to accommodate to such an extent that costs that are more than "de minimis" automatically constitute undue hardship.ⁿ³⁵ The Supreme Court also has ruled that when an employer and an employee each propose a form of reasonable accommodation, the employer does not have to accept the employee's proposal, even when it would not cause undue hardship to the employer's

business.ⁿ³⁶ Thus, despite the broad scope of the ban against religious discrimination and the apparent deference to eccentric individual beliefs, the case law in fact acknowledges and protects management prerogatives.ⁿ³⁷ *Commentary by Erica B. Grubb.*

In *Peterson v. Hewlett-Packard Co.*,^{n37.1} an employee who characterized himself as a "devout Christian," posted on his work cubicle passages from the Bible relating to homosexuality in response to the employer's displaying of "diversity posters," including posters showing the photograph of a gay employee, a description of the gay employee's personal interests, and the slogan "Diversity is Our Strength." The employee admitted that he posted the passages to be "hurtful" so that his gay and lesbian co-workers would read the passages, repent, and be saved. The employer ordered the employee to remove the Bible passages under its harassment policy. The employee offered to take down the passages if the employer removed the posters, which the employer did not accept. The employer terminated him for insubordination when he then refused to remove the scriptural passages. The Ninth Circuit concluded that the trial court properly granted the employer's summary judgment motion in the employee's Title VII and state law action based on religious discrimination, because the employee's evidence did not meet the threshold for defeating summary judgment in disparate treatment cases. Viewing the record in the light most favorable to the employee, it was evident that he was not discharged because of his religious beliefs, but because he violated the company's harassment policy by attempting to generate a hostile and intolerant work environment and because he was insubordinate in repeatedly disregarding the company's instructions to remove the demeaning and degrading postings from his cubicle. The court found that company managers did not harass the employee to convince him to change his religious beliefs, but, rather, acknowledged the sincerity of his beliefs and insisted that he need not change them and explained the diversity program to him and asked him to treat his co-workers with respect and not violate the company's harassment policy, which was uniformly applied to all employees. The disciplinary proceedings and subsequent termination did not constitute disparate treatment as compared to the employees who hung the diversity posters and were communicating the employer's views as they were directed to do by management. Nor was there disparate treatment as compared to employees who posted religious and secular messages and symbols in their work spaces, or as compared to a network group of homosexual employees the employee permitted to organize in the workplace and advertise in the company's email and its newsletter. The terminated employee failed to present any evidence that either of these groups intended to be hurtful to or critical of any other employees or otherwise to violate the company's harassment policy.

Similarly, in *Bodett v. CoxCom, Inc.*,^{n37.2} the trial court properly granted summary judgment to the former employer on the employee's claim of religious discrimination based on disparate treatment. The employment was terminated based on statements made by the employee, an evangelical Christian, to a supervisee about the supervisee's homosexuality. Using the *McDonnell Douglas* analysis or framework, the court found that although the employee showed membership in a protected class, that she was performing in a satisfactory manner, and that she suffered an adverse employment action, she did not show through comparators that any similarly situated individual outside her protected category was treated more favorably or other circumstances surrounding her termination that demonstrated a bias or animus against her religion giving rise to an inference of discrimination, and therefore failed to make a prima facie case. However, the court assumed the employee had made a prima facie case, and concluded that based on the employee's admissions of having made the statements, the employer showed a legitimate non-discriminatory reason for terminating her, *i.e.*, that the employee had violated the employer's anti-harassment policy. Because the employee was unable to counter the employer's production with persuasive evidence that the employer did not honestly believe its proffered reasons for termination, the employee failed to demonstrate a triable issue of fact with regard to pretext.

In *Tiano v. Dillard Dep't Stores, Inc.*,ⁿ³⁸ the employee filed a Title VII religious discrimination action alleging that the former employer failed to reasonably accommodate the employee's religious beliefs when the employer terminated her for going on a pilgrimage during its busy holiday season. Although as a general rule employees do not have an inflexible duty to reschedule their religious ceremonies, when an employee maintains that religious beliefs require attendance at a particular pilgrimage, the employee must prove that a temporal mandate is part of the bona fide religious belief. To hold the contrary would require the employer to accommodate the employee's personal time preferences, and Title VII does not protect secular preferences.ⁿ³⁹ The Ninth Circuit concluded that the employee's testimony that she

was called by God to attend a particular scheduled pilgrimage to Medjugorje, without more, was insufficient to establish a prima facie case of religious discrimination and did not reach the issues of reasonable accommodation and undue hardship.ⁿ⁴⁰

■ **COMMENTARY:**

Tiano concerns a narrow fact pattern, but it is a helpful precedent. The first prong of a prima facie case of religious discrimination requires that a plaintiff prove that he or she had a bona fide religious belief, "the practice of which conflicted with an employment duty." In most cases, the phrase in quotes is not an issue, because the religious practice at issue typically includes a "temporal" element--e.g., the need to observe a particular religious event on a particular day or series of days. In *Tiano*, however, the plaintiff wanted to go on a pilgrimage which she could have undertaken at any time. There was no religious mandate that it occur on the days that she elected to absent herself from the workplace. Therefore, she failed to meet her prima facie burden and was appropriately terminated. Employers should be careful how they use the *Tiano* decision, but they are free to inquire as to the factors that make a particular absence for a religious purpose essential on the day or days that the employee has requested.
Commentary by Kirby Wilcox.

On the other hand, in *Cal. Fair Employment & Housing Comm. v. Gemini Aluminum Corp.*,^{n40.1} an employee made out a prima facie case by alleging that he sought to attend a specific religious convention and the employer made no attempt to accommodate him. To the extent the dates were in conflict with the employer's needs, rescheduling would have been an appropriate subject to raise in an attempt by the employer to accommodate the belief or observance. But the employer's outright denial precluded any attempt at accommodation. Substantial evidence also supported the FEHC's finding that the employer was aware of the employee's belief and its conflict with an employment requirement. Notice to the employer does not require a complex explanation. The employee needs only to cite a religious connection. Since a prima facie case was established, the burden shifted to the employer to establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship. The employer did not assert hardship, and the employer failed to initiate an effort to accommodate the employee's religious belief.

An individual's religious beliefs must be accommodated even where it means making an exception to a rule which is reasonably applied to other individuals with different beliefs.^{n40.2}

Although "religion" does not require formal organization or "written form,"ⁿ⁴¹ some extreme personal beliefs or tenets may not be protected by equal employment opportunity law. For example, one court rejected an employee's claim that he suffered discrimination based on his "personal religious creed" that a cat food contributed to his well-being and work performance.ⁿ⁴² The court relied in part on *United States v. Seeger*,ⁿ⁴³ discussed in [a], *above*, which construed the term "religious training and belief" as it is used in the Universal Military and Training Service Act as excluding a merely personal moral code that is "in no way related to a Supreme Being."ⁿ⁴⁴ It thus held that the employee's "personal religious creed" was "a mere personal preference and, therefore ... beyond the parameters of the concept of religion as protected ... by [Title VII]."ⁿ⁴⁵

Some asserted religious beliefs have been held to be actually political or social in nature and thus not protected. For example, one court refused to extend Title VII protection to an employee alleging religious discrimination based on his membership in the Ku Klux Klan.ⁿ⁴⁶ The court explained that the ideology of the organization "takes on ... a narrow, temporal and political character inconsistent with the meaning of 'religion' as used in [Title VII]."ⁿ⁴⁷

In *Friedman v. So. Cal. Permanente Medical Group*,^{n47.1} the court of appeal found that plaintiff's veganism was not a religious creed within the meaning of the FEHA, but rather was a personal philosophy and a way of life.^{n47.2} The court based its holding on the following:^{n47.3}

- There was no allegation or judicially noticeable evidence plaintiff's belief system addressed

fundamental or ultimate questions. Rather, plaintiff alleged a moral and ethical creed limited to the single subject of highly valuing animal life and ordering one's life based on that perspective.

- While plaintiff's belief system governed his behavior in wide-ranging respects, including the food he eats, the clothes he wears, and the products he uses, it was not sufficiently comprehensive in nature.

- Though not determinative, no formal or external signs of a religion were present. There were no teachers or leaders; services or ceremonies; structure or organization; orders of worship or articles of faith; or holidays.

[c] Notice to Employer of Conflict

One Ninth Circuit opinion has discussed the requirement that the employee give notice to the employer concerning the employee's religious conflict with his or her employment.ⁿ⁴⁸ In *Heller v. EBB Auto Co.*,ⁿ⁴⁹ a Ninth Circuit panel observed that a sensible approach would require that the employee give only enough information about his or her religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements. According to the court, any greater notice requirement would permit an employer to delve into the religious practices of an employee in order to determine whether religion mandated the employee's adherence. The court found that neither courts nor employers may make such an inquiry.ⁿ⁵⁰

[d] Exemption for Religious Educational Institutions

Under certain circumstances, religious educational institutions may be exempt from the prohibition against religious discrimination under Title VII. There are three exemptions available to religious educational institutions. One exemption provides that the equal employment provisions of Title VII do not apply to employment by a "religious ... educational institution" of individuals of a particular religion to carry on its activities.ⁿ⁵¹ To meet the requirements of this exemption, the religious characteristics of the school must be weighed against its secular characteristics to show that the school is *primarily* religious rather than secular, and not merely affiliated with a religious organization.ⁿ⁵² In one case, for example, the Ninth Circuit examined a school's ownership and affiliation, purpose, faculty, student body, student activities, and curriculum and determined that the general picture of the school reflected a primarily secular, rather than primarily religious, orientation and thus did not fall within the exemption under Title 42, *United States Code, Section 2000e-1*.ⁿ⁵³

Title VII also provides a religious curriculum exemption for religious schools, which provides that "it shall not be an unlawful employment practice for a school ... to hire and employ employees of a particular religion ... if the curriculum of such school ... is directed toward the propagation of a particular religion."ⁿ⁵⁴ Although the statute does not define the terms "curriculum" or "propagate," the Ninth Circuit has defined "propagate" to mean the spreading or instilling of particular religious values, and "curriculum" to mean coursework and required school activities.ⁿ⁵⁵ Applying these definitions in one case, the Ninth Circuit made a fact-based inquiry into the extent to which a school's curriculum reflected an effort to spread and inculcate particular religious beliefs. The court characterized the school's curriculum as being more an effort to teach comparative religion and good moral values as part of a general tradition than an effort to propagate its religious tenets, and thus concluded that the curriculum exemption did not apply.ⁿ⁵⁶

In addition to the two specific exemptions discussed above, Title VII provides that it is not an unlawful employment practice for an employer to hire and employ an individual on the basis of his or her religion in those instances in which religion is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business.ⁿ⁵⁷ For discussion of the BFOQ defense with regard to religion, *see* § 41.94[1][b].

[e] Exemption for Nonprofit Religious Corporations

The FEHA generally exempts nonprofit religious entities from its ban on work-related discrimination by excluding from the definition of employer "a religious association or corporation not organized for profit."ⁿ⁵⁸ Specifically, nonprofit religious entities are not subject to the FEHA's ban against discrimination based on religious creed.ⁿ⁵⁹ Before recent FEHA amendments that expanded coverage to nonprofit religious corporations and associations in certain circumstances,ⁿ⁶⁰ nonprofit religious organizations were exempt from the anti-discrimination provisions of the FEHA regardless of the nature of the alleged discrimination.ⁿ⁶¹

[f] Reverse Religious Discrimination

An employee may allege a violation of Title VII's prohibition of religious discrimination by alleging that the employee was discriminated against because he or she is *not* a member of a particular religion. For example, in *Noyes v. Kelly Services*,ⁿ⁶² an employee alleged that a supervisory employee favored and promoted members of the same religion to which the supervisory employee belonged, and that the employee was passed over for promotion because she did not adhere to that religion. The Ninth Circuit found that the *McDonnell Douglas* burden-shifting regime applied to her claim, and that the employee made out a prima facie case of reverse religious discrimination.ⁿ⁶³ The court then found that the employer articulated a legitimate, nondiscriminatory reason for not promoting her.ⁿ⁶⁴ However, the court found that the employee met her burden, for summary judgment purposes, of showing that the employer's reasons were a pretext for discrimination.ⁿ⁶⁵

Legal Topics:

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

Labor & Employment Law Discrimination Religious Discrimination General Overview Labor & Employment Law Discrimination Religious Discrimination Coverage & Definitions General Overview Labor & Employment Law Discrimination Religious Discrimination Employment Practices General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-2(a) (Title VII); *Gov. Code* § 12940(a)-(d), (j), (l) (FEHA).

(n2)Footnote 2. *Rains v. Criterion Sys., Inc.* (9th Cir. 1996) 80 F.3d 339 .

(n3)Footnote 3. *See Rains v. Criterion Sys., Inc.* (9th Cir. 1996) 80 F.3d 339, 345 (citing *California Federal S. & L. v. Guerra* (1987) 479 US 272).

(n4)Footnote 4. Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965) .

(n5)Footnote 5. *See Cal. Const., art. I, § 8. See also Rains v. Criterion Sys., Inc.* (9th Cir. 1996) 80 F.3d 339, 346 (referring to California Constitutional basis for decision).

(n6)Footnote 6. *See Lab. Code* §§ 1735, 1777.6.

(n7)Footnote 7. *See Bus. & Prof. Code* § 16721.

(n8)Footnote 7.1. *Noyes v. Kelly Services* (9th Cir. 2007) 488 F.3d 1163, 1167 n.3 ; *Shah v. Mt. Zion Hospital & Medical Center* (9th Cir. 1981) 642 F.2d 268, 272 & n.4.

(n9)Footnote 8. *See* 42 U.S.C. § 2000e-2(a) (Title VII); *Gov. Code* § 12940(a) (FEHA); *see* § 40.10[2][b].

(n10)Footnote 9. *See* 42 U.S.C. § 2000e(l) (Title VII); *Gov. Code* § 12940(l) (FEHA); *see* [e], *below*.

(n11)Footnote 10. *See* 42 U.S.C. § 2000e(j).

(n12)Footnote 11. *See* 29 C.F.R. § 1605.1.

(n13)Footnote 12. *See* 29 C.F.R. § 1605.1.

(n14)Footnote 13. *See* 29 C.F.R. § 1605.1; *see also* *Frazee v. Employment Security Dep't* (1989) 489 U.S. 829, 834-835, 109 S. Ct. 1514, 103 L. Ed. 2d 914 (denial of unemployment benefits because refusal to work on Sunday was not based on tenets of particular religious organization violated *Establishment Clause of First Amendment* to United States Constitution).

(n15)Footnote 14. *Welsh v. United States* (1970) 398 U.S. 333, 90 S. Ct. 1792, 26 L. Ed. 2d 308 .

(n16)Footnote 15. *United States v. Seeger* (1965) 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 .

(n17)Footnote 16. *See* 29 C.F.R. § 1605.1; *see also* 50 U.S.C. § 456(j) (exempting conscientious objectors from combatant training and service); *but see* *Yott v. North Am. Rockwell Corp.* (9th Cir. 1974) 501 F.2d 398, 400 (refusing to hold that conscientious objector cases are similar, since no law requires plaintiff to work for employer that discharged plaintiff).

(n18)Footnote 17. *See* *United States v. Seeger* (1965) 380 U.S. 163, 176, 85 S. Ct. 850, 13 L. Ed. 2d 733 .

(n19)Footnote 18. *See* *Young v. Southwestern Savings and Loan Ass'n* (5th Cir. 1975) 509 F.2d 140, 144 ; *see also* *E.E.O.C. v. Townley Eng'g & Mfg. Co. (D. Ariz. 1987)* 675 F. Supp. 566, 568 , *aff'd in part*, 859 F.2d 610 (9th Cir. 1988) (employer must accommodate employee's religious beliefs *or lack thereof*).

(n20)Footnote 19. *See, e.g.,* *Dewey v. Reynolds Metals Co.* (6th Cir. [Mich.] 1970) 429 F.2d 324, 335 , *aff'd*, 402 U.S. 689 (1971) (parties stipulated regarding sincerity); *Ali v. Southeast Neighborhood House (D.D.C. 1981)* 519 F. Supp. 489, 490 (sincerity was undisputed).

(n21)Footnote 20. *See* *Philbrook v. Ansonia Bd. of Educ.* (2d Cir. [Conn.] 1985) 757 F.2d 476, 481-482 , *aff'd*, 479 U.S. 60 (1986) .

(n22)Footnote 21. *See* *Philbrook v. Ansonia Bd. of Educ.* (2d Cir. [Conn.] 1985) 757 F.2d 476, 482 , *aff'd*, 479 U.S. 60 (1986) .

(n23)Footnote 22. *See* *Philbrook v. Ansonia Bd. of Educ.* (2d Cir. [Conn.] 1985) 757 F.2d 476, 482 , *aff'd*, 479 U.S. 60 (1986) ; *Roby v. United States Dep't of Navy* (9th Cir. 1996) 76 F.3d 1052, 1055, 1056-1057 (service member who pled conscientious objector status could not be discharged on that basis having enlisted voluntarily; also, Navy rules and decisions supersede Title VII).

(n24)Footnote 23. *See* *Opuku-Boateng v. California* (9th Cir. 1996) 95 F.3d 1461, 1467 .

(n25)Footnote 24. *Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433, 1438 .

(n26)Footnote 25. *See* *Opuku-Boateng v. California* (9th Cir. 1996) 95 F.3d 1461, 1467 ; *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1512 .

(n27)Footnote 26. *Opuku-Boateng v. California* (9th Cir. 1996) 95 F.3d 1461 .

(n28)Footnote 27. *Gov. Code* § 12940(l).

(n29)Footnote 28. 2 *Cal. Code Reg.* § 7293.1; *see* *Friedman v. So. Cal. Permanente Medical Group* (2002) 102 Cal. App. 4th 39, 67, 125 Cal. Rptr. 2d 663 (significant difference between EEOC's administrative construction of "religion" and definition of "religious creed" in section 7293.1; section 7293.1 mandates less expansive construction of "religion." EEOC definition includes "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views;" regulation 7293.1 defines "religious creed" as "beliefs, observances, or

practices individual sincerely holds and which occupy in his or her life place of importance parallel to that of traditionally recognized religions").

(n30)Footnote 29. *Friedman v. So. Cal. Permanente Medical Group* (2002) 102 Cal. App. 4th 39, 49, 125 Cal. Rptr. 2d 663 .

(n31)Footnote 29.1. *Friedman v. So. Cal. Permanente Medical Group* (2002) 102 Cal. App. 4th 39, 64, 125 Cal. Rptr. 2d 663 .

(n32)Footnote 29.2. *Friedman v. So. Cal. Permanente Medical Group* (2002) 102 Cal. App. 4th 39, 67, 125 Cal. Rptr. 2d 663 .

(n33)Footnote 29.3. *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal. App. 4th 1004, 1011, 18 Cal. Rptr. 3d 906 ; *Friedman v. So. Cal. Permanente Medical Group* (2002) 102 Cal. App. 4th 39, 45, 125 Cal. Rptr. 2d 663 ; *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal. App. 4th 345, 370, 58 Cal. Rptr. 2d 747 .

(n34)Footnote 29.4. *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal. App. 4th 1004, 1011, 18 Cal. Rptr. 3d 906 ; *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal. App. 4th 345, 370, 58 Cal. Rptr. 2d 747 .

(n35)Footnote 29.5. *Cooper v. General Dynamics, Convair, Etc.* (5th Cir. 1976) 533 F.2d 163, 168-169 .

(n36)Footnote 30. *See Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 1984) 734 F.2d 1382, 1383 .

(n37)Footnote 31. *See Intern. Ass'n of Machinists v. Boeing Co.* (9th Cir. [Wash.] 1987) 833 F.2d 165, 168 ; *McDaniel v. Essex International, Inc.* (6th Cir. [Mich.] 1982) 696 F.2d 34 , 38; *Anderson v. General Dynamics Convair, Etc.* (9th Cir. 1978) 589 F.2d 397, 401-402 ; *Cooper v. General Dynamics, Convair, Etc.* (5th Cir. 1976) 533 F.2d 163, 165-169 ; *see also* 29 U.S.C. § 169(National Labor Relations Act; employees with traditional religious beliefs against joining unions not required to join as condition of employment, but collective bargaining agreement may require payment of equivalent of union dues and initiation fees to nonprofit organization).

(n38)Footnote 32. *See American Postal Workers Union v. Postmaster General* (9th Cir. 1986) 781 F.2d 772, 776 .

(n39)Footnote 33. *Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433, 1438-1439 .

(n40)Footnote 34. *See Toledo v. Nobel-Sysco, Inc.* (D.N.M. 1986) 651 F. Supp. 483 , *rev'd on other grounds*, 892 F.2d 1481 (10th Cir. 1989) .

(n41)Footnote 34.1. *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal. App. 4th 1004, 1011, 18 Cal. Rptr. 3d 906 .

(n42)Footnote 35. *See Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 84, 97 S. Ct. 2264, 53 L. Ed. 2d 113 .

(n43)Footnote 36. *See Ansonia Board of Education v. Philbrook* (1986) 479 U.S. 60, 68-69, 107 S. Ct. 367, 93 L. Ed. 2d 305 .

(n44)Footnote 37. For further discussion of the duty to accommodate religious beliefs, *see* § 41.52.

(n45)Footnote 37.1. *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, 602-605 .

(n46)Footnote 37.2. *Bodett v. CoxCom, Inc.* (9th Cir. 2004) 366 F.3d 736, 742-746 .

(n47)Footnote 38. *Tiano v. Dillard Dep't Stores, Inc.* (9th Cir. 1998) 139 F.3d 679 .

(n48)Footnote 39. *Tiano v. Dillard Dep't Stores, Inc.* (9th Cir. 1998) 139 F.3d 679, 682 (employer had vacation policy barring leave between October and December, its busy holiday season).

(n49)Footnote 40. *Tiano v. Dillard Dep't Stores, Inc.* (9th Cir. 1998) 139 F.3d 679, 681-682 (whether or not plaintiff established prima facie case is reviewed de novo; underlying facts are reviewed for clear error; district court's finding of temporal mandate was clearly erroneous).

(n50)Footnote 40.1. *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal. App. 4th 1004, 10111016, 18 Cal. Rptr. 3d 906 .

(n51)Footnote 40.2. *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal. App. 4th 1004, 1017, 18 Cal. Rptr. 3d 906 . See also *Best v. California Apprenticeship Council* (1984) 161 Cal. App. 3d 626, 636, 207 Cal. Rptr. 863 ; *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal. App. 4th 345, 373, 58 Cal. Rptr. 2d 747 (California's anti-discrimination statutes demonstrate California's intent not to allow its laws to be circumvented by private contracts).

(n52)Footnote 41. See *Brown v. Dade Christian Schools, Inc.* (5th Cir. 1977) 556 F.2d 310 .

(n53)Footnote 42. See *Brown v. Pena* (S.D. Fla. 1977) 441 F. Supp. 1382, 1384-1385 .

(n54)Footnote 43. *United States v. Seeger* (1965) 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 .

(n55)Footnote 44. See *Brown v. Pena* (S.D. Fla. 1977) 441 F. Supp. 1382, 1384-1385 , *aff'd*, 589 F.2d 1113 (5th Cir. 1979) .

(n56)Footnote 45. See *Brown v. Pena* (S.D. Fla. 1977) 441 F. Supp. 1382, 1385 , *aff'd*, 589 F.2d 1113 (5th Cir. 1979) .

(n57)Footnote 46. See *Bellamy v. Mason's Stores, Inc.* (E.D. Va. 1973) 368 F. Supp. 1025, 1026 , *aff'd*, 508 F.2d 504 (1974) .

(n58)Footnote 47. *Bellamy v. Mason's Stores, Inc.* (E.D. Va. 1973) 368 F. Supp. 1025, 1026 , *aff'd*, 508 F.2d 504 (1974) ; see also *Brown v. Dade Christian Schools, Inc.* (5th Cir. 1977) 556 F.2d 310, 311-312 , (42 U.S.C. § 1981; private school's discriminatory policy based on members' sincere religious belief that racial socialization would lead to interracial marriage is social policy rather than free exercise of "religion," and therefore not protected by U.S. Const., *amend. I*).

(n59)Footnote 47.1. *Friedman v. So. Cal. Permanente Medical Group* (2002) 102 Cal. App. 4th 39, 125 Cal. Rptr. 2d 663 .

(n60)Footnote 47.2. *Friedman v. So. Cal. Permanente Medical Group* (2002) 102 Cal. App. 4th 39, 43-69, 125 Cal. Rptr. 2d 663 .

(n61)Footnote 47.3. *Friedman v. So. Cal. Permanente Medical Group* (2002) 102 Cal. App. 4th 39, 68-69, 125 Cal. Rptr. 2d 663 .

(n62)Footnote 48. See *Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433, 1439 .

(n63)Footnote 49. *Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433, 1439 .

(n64)Footnote 50. *Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433, 1439 .

(n65)Footnote 51. *See* 42 U.S.C. § 2000e-1; *See also* ch. 40, pt. C.

(n66)Footnote 52. *See EEOC v. Kamehameha Sch./Bishop Estate* (9th Cir. 1993) 990 F.2d 458, 460 ; *E.E.O.C. v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 613 .

(n67)Footnote 53. *EEOC v. Kamehameha Sch./Bishop Estate* (9th Cir. 1993) 990 F.2d 458, 460-464 .

(n68)Footnote 54. 42 U.S.C. § 2000e-2(e)(2).

(n69)Footnote 55. *EEOC v. Kamehameha Sch./Bishop Estate* (9th Cir. 1993) 990 F.2d 458, 464 .

(n70)Footnote 56. *EEOC v. Kamehameha Sch./Bishop Estate* (9th Cir. 1993) 990 F.2d 458, 464-465 .

(n71)Footnote 57. 42 U.S.C. § 2000e-2(e).

(n72)Footnote 58. *Gov. Code* § 12926(d); *but see* *Gov. Code* § 12926.2, discussed at § 40.10[3], making FEHA applicable to certain religious corporations or associations that operate health care facilities open to adherents of other religions and to certain nonprofit public benefit religious corporations operating educational institutions; *Gov. Code* § 12940(j)(4)(B), prohibiting harassment by religious corporations and associations covered by *Gov. Code* § 12926.2.

(n73)Footnote 59. *See* *Gov. Code* § 12926(d); *see also* *McKeon v. Mercury Healthcare Sacramento* (1998) 19 Cal. 4th 321, 325, 79 Cal. Rptr. 2d 319, 965 P.2d 1189 (religious entity exemption includes religious entities organized under Nonprofit Public Benefit Corporation Law). For further discussion of employers and employees covered by FEHA, *see* § 40.10[4].

(n74)Footnote 60. *See* *Gov. Code* § 12926.2(c), discussed at § 40.10[3].

(n75)Footnote 61. *See* *Kelly v. Methodist Hospital of Southern California* (2000) 22 Cal. 4th 1108, 1116-1117, 95 Cal. Rptr. 2d 514, 997 P.2d 1169 ; *see* *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 227-230, 116 Cal. Rptr. 2d 770 .

(n76)Footnote 62. *Noyes v. Kelly Services* (9th Cir. 2007) 488 F.3d 1163 .

(n77)Footnote 63. *Noyes v. Kelly Services* (9th Cir. 2007) 488 F.3d 1163, 1168-1169 .

(n78)Footnote 64. *Noyes v. Kelly Services* (9th Cir. 2007) 488 F.3d 1163, 1169 .

(n79)Footnote 65. *Noyes v. Kelly Services* (9th Cir. 2007) 488 F.3d 1163, 1169-1173 (once district court concluded that employee raised triable question that promotion decision was not consistent with employer's stated reasons, question of whether real reason for promotion decision was unlawful discrimination should have gone to jury).



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART B. PROHIBITED BASES OF DISCRIMINATION

2-41 California Employment Law § 41.36

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§ 41.36 Sex Discrimination

[1] Governing Law

Title VII and the FEHA prohibit sex discrimination in employment.ⁿ¹ Other laws prohibiting sex discrimination include the federal Equal Pay Act,ⁿ² Title 42 *United States Code*, Section 1983 (applicable to public employers), Executive Order 11246 (federal contractors),ⁿ³ Title IX of the Education Amendments of 1972 (federally assisted education programs),ⁿ⁴ the still-operative antidiscrimination provisions of the former Revenue Sharing Act (state and local governments sharing federal income tax funds),ⁿ⁵ the California Equal Pay Act,ⁿ⁶ *Government Code Section 11135* (state-funded programs or activities),ⁿ⁷ the Cartwright Act (California antitrust law),ⁿ⁸ the California public works laws,ⁿ⁹ and the California Constitution (applicable to public employers).ⁿ¹⁰ Sex discrimination involving "state action" may also be actionable under the due process and equal protection provisions of the *Fifth Amendment* and *Fourteenth Amendment to the United States Constitution*.ⁿ¹¹

In *Badih v. Myers*,ⁿ¹² the court held that an employee can bring a tort action for wrongful termination in violation of the public policy against sex discrimination articulated in the *California Constitution*, art. I, § 8.

Title VII may or may not bar other causes of action. In *Brock v. U.S.*,ⁿ¹³ the court held that Title VII does not bar a tort claim under the Federal Tort Claims Act (FTCA) based on a supervisor's rape of an employee, since the act was a highly personal violation involving more than sex discrimination; however Title VII did bar a tort claim under the FTCA based on retaliation against the employee by her coworker, because that was only a form of employment discrimination.

For a general discussion relating to the scope and application of these and other equal employment opportunity laws, see Chapter 40.

[2] Scope of Protection

[a] Generally

[i] Discrimination Based Solely on Sex

The Ninth Circuit Court of Appeals has stated that the manifest purpose of Title VII with respect to "sex discrimination" is to ensure that men and women are treated equally.ⁿ¹⁴ "Sex discrimination" is a distinction based on gender,ⁿ¹⁵ and male as well as female employees are protected.ⁿ¹⁶ Title VII also prohibits employment decisions that reflect gender-based stereotyping.ⁿ¹⁷ Thus, in *Price Waterhouse v. Hopkins*,ⁿ¹⁸ involving an employer who delayed a female employee's promotion based in part on evaluation comments describing her as "macho," and advising her to "take a course in charm school,"ⁿ¹⁹ the United States Supreme Court declared that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."ⁿ²⁰ The Court observed that in prohibiting sex discrimination, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."ⁿ²¹ In *Nichols v. Azteca Restaurant Enterprises, Inc.*,ⁿ²² following *Price Waterhouse*, the Ninth Circuit found that a man can ground a claim of gender discrimination on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.ⁿ²³

Congress partially overruled *Price Waterhouse* by enacting the Civil Rights Act of 1991.ⁿ²⁴ The act allows the employer to limit the employee's remedy, rather than defeat liability outright, by showing that it would have reached the same decision absent the discriminatory purpose.ⁿ²⁵ Congress implicitly approved *Price Waterhouse* in part by leaving the opinion undisturbed to the extent it held the employer to a preponderance of the evidence standard.ⁿ²⁶ Taken together, *Price Waterhouse* and the Civil Rights Act of 1991 stand for the proposition that an employer may limit the employee's remedy if it shows by a preponderance of evidence it would have made the same decision in the absence of an illegal motive.

Like all claims of disparate treatment brought under Title VII, the three-part *McDonnell Douglas* burden-shifting test applies to claims of sex discrimination.ⁿ²⁷ Thus, a plaintiff alleging disparate treatment based on sex must first establish a prima facie case of discrimination. The specific showing the plaintiff must make is as follows:ⁿ²⁸

- Plaintiff belongs to a protected class.
- Plaintiff was qualified for the position.
- Plaintiff was subject to an adverse employment action.
- Similarly situated individuals outside plaintiff's protected class were treated more favorably.ⁿ²⁹

Subjective criteria should not be considered in determining whether a plaintiff is "qualified" for purposes of establishing a prima facie case of sex discrimination under *McDonnell Douglas*. The qualifications most appropriately considered at the first step of the *McDonnell Douglas* analysis are those to which objective criteria can be applied.ⁿ³⁰

Under *McDonnell Douglas*, once the plaintiff presents a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions.ⁿ³¹

If the employer meets its burden of articulating a legitimate, nondiscriminatory reason for its actions, plaintiff then has the burden of showing that the employer's articulated reasons were a pretext for discrimination, either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.ⁿ³² At the summary judgment stage, the plaintiff must demonstrate only that there is a genuine dispute of material fact regarding pretext. The amount of evidence required to do so is minimal. A disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting the prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons.ⁿ³³

The FEHA defines "sex" as including, but not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth and a person's gender, as defined in *Pen. Code* § 422.56.ⁿ³⁴ Nothing in the FEHA relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer must allow an employee to appear or dress consistently with the employee's gender identity.ⁿ³⁵

Sex discrimination claims may also be supported by evidence of sexual harassment, if the harassment is based on hostility towards women and the evidence of harassment is used to establish that such hostility was a basis for the discriminatory acts.ⁿ³⁶

For discussion of sex discrimination issues relating to compensation, *see* § 41.56. For discussion of sex discrimination issues relating to retirement plans and other fringe benefits, *see* §§ 41.61[3] and 41.67[3]. For discussion of the prohibition against sexual harassment, *see* § 41.81.

[ii] Discrimination Based on "Sex Plus"

Title VII also prohibits employment discrimination based on sex plus another characteristic such as family responsibilities.ⁿ³⁷ For example, in *Phillips v. Martin Marietta Corp.*,ⁿ³⁸ an employer declined to hire women with pre-school-age children, although it did hire men with pre-school-age children.ⁿ³⁹ The plaintiff filed a Title VII action alleging sex discrimination, and the trial court granted summary judgment for the employer, in part because 70 to 75 percent of the applicants, and 75 to 80 percent of those hired, were women.ⁿ⁴⁰ However, the United States Supreme Court held that Title VII prohibited one hiring policy for women and another for men in cases in which both have pre-school-age children.ⁿ⁴¹

[iii] Discrimination Based on Sex-Related Traits

As discussed previously,ⁿ⁴² under the "disparate impact" theory of employment discrimination, an employer may in some instances violate Title VII or the FEHA by adopting facially neutral employment practices and criteria that in fact fall more harshly on one sex than another.ⁿ⁴³ Thus, unlawful sex discrimination may result from employment policies that make distinctions based on traits exclusively or predominantly possessed by one sex. For example, minimum height and weight requirements that reflect predominantly male characteristics may constitute sex discrimination,ⁿ⁴⁴ as may physical agility tests that are not job-related.ⁿ⁴⁵

[b] Marital Status

Although no federal statute prohibits discrimination based on marital status, EEOC guidelines prohibit rules that forbid or restrict the employment of married women that are not applicable to married men.ⁿ⁴⁶ Even if such a rule is not directed against all females, but only against married females, so long as sex is a factor in the application of such a rule, it constitutes "sex discrimination."ⁿ⁴⁷

Marital status is one of the protected classifications expressly enumerated in the FEHA.ⁿ⁴⁸ FEHC regulations define "marital status" as "an individual's state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state."ⁿ⁴⁹ These cases involve working for the same employer, usually in the same department, where there is a reporting or task conflict of interest and possible effect on other workers.

In *Chen v. County of Orange*,ⁿ⁵⁰ the court considered what types of conduct constitute marital status discrimination. Conduct that treats unmarried people differently than married people, such as the refusal to rent to unmarried couples, a refusal to hire unwed mothers because they are unwed, a refusal to hire single people because they are single, or the granting of maternity leave to married teachers only, constitutes marital status discrimination.ⁿ⁵¹ On the other hand,

courts have disagreed in the general area of antinepotism rules, *i.e.*, what an employer can or should do when co-workers are married to one another. n52 "Conduit" cases, *i.e.*, those in which the plaintiff is the object of adverse action because of something about his or her spouse independent of whether the spouse works for the same employer, can be divided into two categories: (1) those in which the animus directed against the plaintiff's spouse is itself unlawful,n53 and (2) those in which the animus is not unlawful, which have universally rejected marital status discrimination claims.n54

In *Chen*, n55 the marital discrimination claim fell into the *political animus* category. There was no hint that the employer took any adverse employment action because of her spouse's race. The employer's action was the result of plaintiff's relationship (whether married or not) with a particular man who was allegedly on the "outs" with the then-management. The court declined to formulate generalized rules about whether California's marital status discrimination statute should be construed broadly--as distinct from crediting its plain meaning--or whether the statute might implicate the identity of one's spouse. The court held only that in the context presented in *Chen*, *i.e.*, political repercussions from a relationship within the office, the statute is not implicated even if broadly construed. The court then held that a regulation providing that marital status discrimination can be established by showing denial of an employment benefit by reason of the employment (or lack of employment) of the applicant's or employee's spouse,n56 did not support an *identity theory* of marital status discrimination; and even if it did so, the nature of the *identity* targeted by the regulation does not encompass political disfavor.n57 Finally, the court noted in passing that there is a wholly different theory in the political animus area that lies beyond the fringe of marital status discrimination and implicates the *First Amendment*. That is, where actions against spouses are directed at a particular person because of some attribute of that person that is political, freedom of association may be infringed.n58

Employment discrimination based on marital status may also violate the *equal protection clause* of the California Constitution if there is "state action."n59 The Cartwright Act (California antitrust law) also proscribes discrimination on the basis of marital status.n60

[c] Pregnancy

"Sex discrimination" under Title VII, as amended by the Pregnancy Discrimination Act (PDA),n61 "includes discrimination because of or on the basis of pregnancy, childbirth, or related medical conditions."n62 Accordingly, employers must treat women affected by those conditions "the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work"n63

Also, if "state action" is involved, pregnancy discrimination may violate the *due process clause of the Fourteenth Amendment to the United States Constitution*.n64 Thus, school board rules requiring pregnant female teachers to take maternity leave were held to be unconstitutional because they created a conclusive presumption that every pregnant teacher was physically incapable of continuing her duties.n65

The FEHA defines the term "sex" as including pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.n66 In addition, FEHC regulations expressly provide that such discrimination constitutes "sex discrimination" under the FEHA.n67

An employee who claims pregnancy discrimination must first make a *prima facie* case, consisting of evidence that she was within the class protected from discrimination and was performing her job competently, but was terminated, plus some other circumstance suggesting discriminatory motive.n68 This raises a presumption of discrimination, shifting to the employer the burden of producing evidence to establish a genuine issue that the termination was made for a legitimate, nondiscriminatory reason.n69 If the employer does so, the presumption disappears, but the employee, who retains the overall burden of persuasion, may then seek to show discriminatory motive, by evidence that the employer's proffered reason was false and a pretext, and any other evidence of discriminatory motive.n70 However, an employer's motion for summary judgment slightly modifies the order of these showings. If the motion for summary judgment

relies in whole or in part on a showing of nondiscriminatory reasons for a discharge, the employer satisfies its burden as moving party if it presents evidence of nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination.ⁿ⁷¹ To defeat the motion, the employee must adduce or point to evidence raising a triable issue, which would permit a trier of fact to find by a preponderance that intentional discrimination occurred.ⁿ⁷²

Pregnancy discrimination is also a form of sex discrimination under *California Constitution, article I, § 8*.ⁿ⁷³ In addition to the FEHA's general prohibition against sex discrimination,ⁿ⁷⁴ the statute provides special protections for employees with those conditions.ⁿ⁷⁵ However, this provision of the FEHA, often referred to as the California Pregnancy Discrimination Act (PDA),ⁿ⁷⁶ does not apply to all medical conditions involving a woman's reproductive organs.ⁿ⁷⁷ Specifically the California PDA does not apply to hysterectomies that are not directly related to pregnancy or childbirth.ⁿ⁷⁸

■ CONSULTANT'S COMMENT:

The decision in *Williams* ⁿ⁷⁹ now provides California precedent for a proposition that was clear under federal common law interpretations of Title VII. Both Title VII and *Government Code Section 12945* pertain to discrimination based upon pregnancy, childbirth, and medical conditions that are related to pregnancy and to childbirth. Facially, neither statute squarely addresses medical conditions that pertain generally to a woman's reproductive system. While federal courts have limited the application of Title VII to employment discrimination linked directly to pregnancy, the termination of a pregnancy, or to childbirth, California lacked precedent. The conformity now bars a California plaintiff from arguing that she may bring a FEHA claim simply because she has suffered an adverse employment action related to a reproductive medical condition generally. There must be a causal relationship between an adverse action and a protected status. *Commentary by Kirby Wilcox.*

The former version of *Government Code Section 12945* provided that except for the FEHA requirement that employers allow reasonable pregnancy leave,ⁿ⁸⁰ and that they reasonably accommodate pregnant employees by temporarily transferring them to less strenuous or hazardous positions when so requested,ⁿ⁸¹ the FEHA pregnancy discrimination provision was not applicable to employers who were subject to Title VII.ⁿ⁸² *Government Code Section 12945* now provides that it cannot be construed to affect any other provision of law relating to sex discrimination or pregnancy, or in any way to diminish the coverage of pregnancy, childbirth, or medical conditions related to pregnancy or childbirth under any other provisions of the FEHA, including *Government Code Section 12940(a)*.ⁿ⁸³ However, the former rule did not give Title VII employers license to offer pregnant employees less disability leave than it offers all other similarly situated temporarily disabled employees. Such a policy would constitute sex discrimination under *Government Code Section 12940(a)*, which does apply to Title VII employers.ⁿ⁸⁴ In *Spaziano v. Lucky Stores, Inc.*, the plaintiff sued her former employer for discrimination under the FEHA because, under the collective bargaining agreement, the employer did not provide as much leave to pregnant employees as it did to occupationally-disabled employees. The collective bargaining agreement, however, provided pregnant employees with more leave than required by the FEHA. The court held that a company leave policy giving less disability leave to all workers disabled from nonindustrial causes, including pregnancy, than it gives to workers disabled from industrial causes, does not discriminate under the FEHA. Rather, such a two-tiered policy only incidentally affects pregnant employees as part of the larger group of individuals who have suffered nonwork-related injuries.ⁿ⁸⁵

■ CONSULTANT'S COMMENT:

The decision in *Spaziano* ⁿ⁸⁶ turns on a single determination--that the distinction between an industrial injury and a nonindustrial injury has nothing to do with sex or pregnancy. Therefore, an employer may provide more leave time for employees disabled by industrial injuries than by nonindustrial injuries (including pregnancy) without violating the FEHA. The conclusion is not surprising. Nonetheless, the panel could have given an expansive reading to the concept of "similarly situated employees" and held that all employees disabled by any injury were entitled to the same leave. Indeed, under federal law,

there is a circuit split. In *Urbano v. Continental Airlines, Inc.*,ⁿ⁸⁷ the court held that treating a pregnant employee no differently than employees disabled by nonindustrial injuries was not unlawful under Title VII, even though the plaintiff received less favorable treatment (with respect to light duty assignments) than employees disabled by industrial injuries. In *Ensley-Gaines v. Runyon* ⁿ⁸⁸ the court held, under similar facts, that pregnant workers must receive the same benefits "as other persons not so affected but similar in their ability or inability to work," and that industrially injured employees were similar to employees disabled by pregnancy in their "ability or inability to work."ⁿ⁸⁹ Thus, practitioners should be careful to check the status of federal case law before citing federal precedent as consistent or inconsistent with California law on this issue. *Commentary by Kirby Wilcox.*

Formerly, federal courts disagreed whether under Title VII, a "fetal protection" policy prohibiting the employment of *fertile* (as opposed to pregnant) women in jobs that expose them to toxic materials, thereby allegedly endangering their unborn children, is facially discriminatory.ⁿ⁹⁰ The United States Supreme Court settled the issue in *Auto Workers v. Johnson Controls*, ⁿ⁹¹ holding that such a policy is sex discrimination forbidden under Title VII, unless the employer can establish that sex is a bona fide occupational qualification (BFOQ). The Court relied in part on the PDA, explaining that because the policy in *Johnson Controls* excluded women "capable of bearing children," the employer "classifie[d] on the basis of potential for pregnancy." The Court concluded that thus, under the PDA, such a classification constitutes explicit sex discrimination for Title VII purposes.ⁿ⁹²

A California court of appeal has held that the same "fetal protection" policy analyzed in *Johnson Controls* is unlawful "sex discrimination" under the FEHA,ⁿ⁹³ and is not protected by the BFOQ defense.ⁿ⁹⁴

In addition, the FEHA prohibits requiring an employee to be sterilized as a condition of employment.ⁿ⁹⁵ Also, it has been held that a "fetal protection" policy is a "plain invitation" to sterilization, even if the employer counsels against such action.ⁿ⁹⁶

Harassment based on pregnancy, childbirth, or related medical conditions also constitutes sexual harassment, which is prohibited pursuant to *Government Code Section 12940(j)(1)*.ⁿ⁹⁷ For further discussion of sexual harassment, *see* § 41.81.

For further discussion of "fetal protection" policies, *see* § 41.60. For discussion of the BFOQ and "business necessity" defenses, *see* §§ 41.94 and 41.95. For discussion of the legal effect of pregnancy and pregnancy discrimination on retirement or pension plans and benefits, *see* § 41.67[3].

[d] Sexual Orientation

Under Title VII "sex discrimination" does not include discrimination based on sexual orientation.ⁿ⁹⁸ In *Holloway v. Arthur Andersen & Co.*, ⁿ⁹⁹ an employee challenged her termination on the grounds that it was impermissibly based on her sex transformation.ⁿ¹⁰⁰ The Ninth Circuit Court of Appeals determined that the Title VII sex discrimination provisions were intended to place women on equal footing with men,ⁿ¹⁰¹ and noted that efforts to amend the Civil Rights Act to prohibit "sexual preference" discrimination had been unsuccessful.ⁿ¹⁰² It thus refused to expand the application of Title VII in the absence of Congressional mandate.ⁿ¹⁰³ In *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, ⁿ¹⁰⁴ the Ninth Circuit Court of Appeals relied on *Holloway* to hold that the Title VII sex discrimination prohibition did not encompass homosexuality.ⁿ¹⁰⁵

The FEHA expressly prohibits discrimination and harassment based on sexual orientation, which is defined to include heterosexuality, homosexuality, and bisexuality.ⁿ¹⁰⁶ The California Supreme Court had previously reached a result similar to the Ninth Circuit's Title VII holding in *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, ⁿ¹⁰⁷ in response to an argument that discrimination against homosexuals was "sex discrimination" within the meaning of the former California Fair Employment Practices Act (FEPA),ⁿ¹⁰⁸ the FEHA's predecessor.ⁿ¹⁰⁹ Relying on Title VII and federal

cases holding that the "sex discrimination" prohibition of Title VII does not encompass discrimination based on sexual orientation or homosexuality.ⁿ¹¹⁰ The Court declared that the California Legislature, in proscribing "sex discrimination," did not contemplate discrimination against homosexuals.ⁿ¹¹¹

California courts have held that sexual conduct by a person of the same gender as the victim may constitute sexual harassment within the meaning of the FEHA.ⁿ¹¹²

Sexual orientation discrimination is prohibited by *Gov. Code § 11135*, which prohibits discrimination in state-funded programs and activities.ⁿ¹¹³ The Cartwright Act (California antitrust law) also proscribes discrimination on the basis of sexual orientation.ⁿ¹¹⁴ Sexual orientation discrimination may also be prohibited by the California Constitution if discrimination is the result of "state action."ⁿ¹¹⁵ *California Constitution, article I, § 7(a)* provides that "[a] person may not be deprived of life, liberty, or property without due process of law[,] or denied equal protection of the laws." In *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*,ⁿ¹¹⁶ plaintiffs alleged that a public utility employer practiced employment discrimination against homosexuals in the hiring, firing, and promotion of employees, and therefore violated the equal protection guarantee of the California Constitution by arbitrarily denying qualified homosexuals employment opportunities afforded other individuals, and in addition violated a specific Labor Code.ⁿ¹¹⁷ The California Supreme Court observed that the state may not exclude homosexuals as a class from employment opportunities without a showing that an individual's homosexuality renders him or her unfit for the job from which he or she has been excluded.ⁿ¹¹⁸ Employment discrimination based on sexual orientation and involving "state action" may also be prohibited by the *equal protection clause of the Fourteenth Amendment to the United States Constitution*.

Legal Topics:

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

Labor & Employment Law Discrimination Gender & Sex Discrimination General Overview Labor & Employment Law Discrimination Gender & Sex Discrimination Coverage & Definitions General Overview Labor & Employment Law Discrimination Gender & Sex Discrimination Employment Practices General Overview

FOOTNOTES:

(n1)Footnote 1. *See 42 U.S.C. § 2000e-2(a)-(d)* (Title VII); *Gov. Code § 12940(a)-(d), (j)* (FEHA).

(n2)Footnote 2. *See 29 U.S.C. § 206(d)*.

(n3)Footnote 3. Exec. Order No. 11246, *30 Fed. Reg. 12319 (1965)*.

(n4)Footnote 4. *See 20 U.S.C. § 1681*.

(n5)Footnote 5. *See former 31 U.S.C. § 6716(a)*.

(n6)Footnote 6. *See Lab. Code § 1197.5*.

(n7)Footnote 7. *Gov. Code § 11135(a)*. *See also Gov. Code § 11135(e)*, defining "sex" for these purposes as defined in *Gov. Code § 12926(p)*.

(n8)Footnote 8. *See Bus. & Prof. Code § 16721*.

(n9)Footnote 9. *See Lab. Code §§ 1735, 1777.6*.

(n10)Footnote 10. *See Cal. Const., art. I, § 8*.

(n11)Footnote 11. *See, e.g., Forrester v. White (1988) 484 U.S. 219, 220-221, 108 S. Ct. 538, 98 L. Ed. 2d 555 (U.S. Const., amend. XIV; equal protection); Davis v. Passman (1979) 442 U.S. 228, 235-236, 99 S. Ct. 2264, 60 L.*

Ed. 2d 846 (U.S. Const., amend. V; due process).

(n12)Footnote 12. *Badih v. Myers* (1995) 36 Cal. App. 4th 1289, 1293-1295, 43 Cal. Rptr. 2d 229 ; see also *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 230-233, 116 Cal. Rptr. 2d 770 .

(n13)Footnote 13. *Brock v. U.S.* (9th Cir. 1995) 64 F.3d 1421 .

(n14)Footnote 14. See *Holloway v. Arthur Andersen & Co.* (9th Cir. 1977) 566 F.2d 659, 663 .

(n15)Footnote 15. See *De Cintio v. Westchester County Medical Center* (2d Cir. 1986) 807 F.2d 304, 306-307 (Title VII/Equal Pay Act of 1963); *De Santis v. Pacific Tel. & Tel. Co.* (9th Cir. 1979) 608 F.2d 327, 329330 (Title VII); see also 2 Cal. Code Reg. § 7290.7(a) (FEHC regulations construing "sex discrimination" prohibited by FEHA; "sex" as meaning applicant's or employee's gender).

(n16)Footnote 16. See *Newport News Shipbldg. & Dry Dock v. EEOC* (1983) 462 U.S. 669, 682, 103 S. Ct. 2622, 77 L. Ed. 2d 89 .

(n17)Footnote 17. See *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 250-251, 109 S. Ct. 1775, 104 L. Ed. 2d 268 ; *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 874 .

(n18)Footnote 18. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 .

(n19)Footnote 19. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 235, 109 S. Ct. 1775, 104 L. Ed. 2d 268 .

(n20)Footnote 20. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 251, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 288 .

(n21)Footnote 21. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 251, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 288 .

(n22)Footnote 22. *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864 .

(n23)Footnote 23. *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 874-875 (verbal abuse directed at man reflecting belief that he did not act as man should act, attacking him for having feminine mannerisms, deriding him for not having sexual intercourse with waitress-friend, referring to him as "she" or "her," and vulgar name-calling cast in female terms was verbal abuse because of sex).

(n24)Footnote 24. 42 U.S.C.A. § 1981 et seq.

(n25)Footnote 25. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

(n26)Footnote 26. See H.R. Reg. No. 102-40(2), 102 Cong., 2d Sess. 45, n.39 (1991).

(n27)Footnote 27. *Nicholson v. Hyannis Air Service, Inc.* (9th Cir. 2009) 580 F.3d 1116, 2009 U.S. App. LEXIS 20020, *11 . For discussion of *McDonnell Douglas* burden-shifting and proof requirements generally, see § 41.11[1], above.

(n28)Footnote 28. *Nicholson v. Hyannis Air Service, Inc.* (9th Cir. 2009) 580 F.3d 1116, 2009 U.S. App. LEXIS 20020, *11 ; *Chuang v. Univ. of Cal. Davis Bd. of Trustees* (9th Cir. 2000) 225 F.3d 1115, 1123 . For discussion of prima facie case generally, see § 41.11[1][b], above.

(n29)Footnote 29. See, e.g., *Nicholson v. Hyannis Air Service, Inc.* (9th Cir. 2009) 580 F.3d 1116, 2009 U.S. App. LEXIS 20020, *17-*21 (female pilot presented sufficient evidence that similarly situated male pilots who were given

retraining, which she did not receive, were treated more favorably, where plaintiff showed they were similarly situated, despite differences in nature of alleged skill deficiencies, because both types of skills involved deficiencies that could be addressed through retraining, as employer's own practices demonstrated, and deficiencies in both posed real risk of safety if unaddressed; and where, construing evidence in plaintiff's favor, there was qualitative difference in treatment of plaintiff and male pilots).

(n30)Footnote 30. *See, e.g., Nicholson v. Hyannis Air Service, Inc.* (9th Cir. 2009) 580 F.3d 1116, 2009 U.S. App. LEXIS 20020, *11-*17 (female pilot presented sufficient evidence that she was qualified to fly particular type of plane and particular route, where her cooperation and communication skills, which led to her removal, were subjective qualification that could not be considered in evaluating her qualifications at first step of *McDonnell Douglas* analysis); *Lynn v. Regents of Univ. of Cal.*, 656 F.2d 1337, 1345 n.8 (9th Cir. 1981) (in action by university professor alleging sex discrimination in denial of tenure, for purposes of prima facie case, professor's qualifications had to be determined by objectively measurable criteria such as level of education, years of teaching experience, in general and at particular institution, and publication of scholarly materials, rather than subjective criterion of allegedly deficient scholarship).

(n31)Footnote 31. *Nicholson v. Hyannis Air Service, Inc.* (9th Cir. 2009) 580 F.3d 1116, 2009 U.S. App. LEXIS 20020, *21-*22 (employer met its burden of articulating legitimate, nondiscriminatory reason for removing female pilot from flying specific type of airplanes and specific route by presenting substantial evidence of deficiencies in her cooperation and communication skills, including testimony of her co-pilots and supervisors, their letters to disciplinary panel, and original and revised action forms). For discussion of the employer's burden under *McDonnell Douglas* generally, *see* § 41.11[1][c], *above*.

(n32)Footnote 32. *Nicholson v. Hyannis Air Service, Inc.* (9th Cir. 2009) 580 F.3d 1116, 2009 U.S. App. LEXIS 20020, *22. For discussion of the employee's burden under *McDonnell Douglas* at the pretext stage generally, *see* § 41.11[1][d], *above*.

(n33)Footnote 33. *Nicholson v. Hyannis Air Service, Inc.* (9th Cir. 2009) 580 F.3d 1116, 2009 U.S. App. LEXIS 20020, *22-*27 (female pilot met her minimal burden of showing pretext sufficient to survive summary judgment, where irregularities in employer's disciplinary proceedings provided some evidence it had discriminatory motive, where employer's knowledge of rumors about sexual relationships of plaintiff and co-workers provided additional evidence that employer wanted to remove her as object of sexual competition discord from pilot group; and where evidence introduced by plaintiff to establish her prima facie case also provided evidence of pretext, because employer's failure to treat plaintiff in same manner it treated similarly deficient male pilots provided some evidence that employer disciplined her because of her sex and not because of her alleged deficiencies).

(n34)Footnote 34. *Gov. Code* § 12926(p). For purposes of the FEHA, the reference in the *Pen. Code* § 422.56 definition to the "victim" means the employee or applicant and the reference to the "defendant" means the employer or other covered entity or person subject to applicable prohibitions under the FEHA. *Gov. Code* § 12926(p).

(n35)Footnote 35. *Gov. Code* § 12949.

(n36)Footnote 36. *See E.E.O.C. v. Farmer Bros. Co.* (9th Cir. 1994) 31 F.3d 891, 897-898 ; *see also Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1482 (proof of employer's or supervisor's sexually harassing behavior toward other women employees can be introduced to prove employer's motive for disparate treatment discrimination); *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 876-878 ; *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 1463-1464 , *cert. denied*, 513 U.S. 1082 (1995) ; *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1514-1516 .

(n37)Footnote 37. *See Phillips v. Martin Marietta Corp.* (1971) 400 U.S. 542, 544, 91 S. Ct. 496, 27 L. Ed. 2d 613 .

(n38)Footnote 38. *Phillips v. Martin Marietta Corp.* (1971) 400 U.S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613 .

(n39)Footnote 39. *See Phillips v. Martin Marietta Corp.* (1971) 400 U.S. 542, 543, 91 S. Ct. 496, 27 L. Ed. 2d 613 .

(n40)Footnote 40. *See Phillips v. Martin Marietta Corp.* (1971) 400 U.S. 542, 543, 91 S. Ct. 496, 27 L. Ed. 2d 613 .

(n41)Footnote 41. *See Phillips v. Martin Marietta Corp.* (1971) 400 U.S. 542, 544, 91 S. Ct. 496, 27 L. Ed. 2d 613 .

(n42)Footnote 42. *See* discussion in §§ 41.20 and 41.21.

(n43)Footnote 43. *See Teamsters v. United States* (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) .

(n44)Footnote 44. *See, e.g., Dothard v. Rawlinson* (1977) 433 U.S. 321, 331, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (Title VII; requirement of minimum height of 5 feet 2 inches and minimum weight of 120 pounds for prison guards has discriminatory impact on women guards because requirement excludes 41 percent of women but only one percent of men); *See also* § 41.32[2][i].

(n45)Footnote 45. *See Berkman v. New York* (E.D.N.Y. 1982) 536 F. Supp. 177 (physical agility tests for firefighters), *aff'd* 705 F.2d 584 (2d Cir. 1983) .

(n46)Footnote 46. *See* 29 C.F.R. § 1604.4(a).

(n47)Footnote 47. *See* 29 C.F.R. § 1604.4(b).

(n48)Footnote 48. *See* Gov. Code § 12940(a).

(n49)Footnote 49. 2 Cal. Code Reg. § 7292.1(a); *see* DFEH v. Community Hospital of San Gabriel (1986) FEHC Dec. 86-08.

(n50)Footnote 50. *Chen v. County of Orange* (2002) 96 Cal. App. 4th 926, 930-948, 116 Cal. Rptr. 2d 786 .

(n51)Footnote 51. *Chen v. County of Orange* (2002) 96 Cal. App. 4th 926, 930-948, 116 Cal. Rptr. 2d 786 ; *see* *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal. 4th 1143, 1155, 51 Cal. Rptr. 2d 700, 913 P.2d 909 ; *Cybyse v. Independent School District No. 196* (Minn. 1984) 347 N.W.2d 256, 261, fn. 4 ; *State Division of Human Rights v. Village of Spencerport* (N.Y. App. Div. 1980) 78 A.D.2d 50, 434 N.Y.S.2d 52, 52-54, 1980 N.Y. App. Div. LEXIS 13406 . *See Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 742-743, 14 Cal. Rptr. 3d 643 (university's admission that one reason professor's contract was not renewed was school could not have two married professors making up entire graduate department, was antinepotism rule, and there was nothing about two professors working in same department which so overarchingly implicated problems of supervision, safety, security or morale that court could say summary judgment for university on claim of marital status discrimination under FEHA was appropriate; however, there was no marital discrimination claim to degree professors claimed they were discharged because of unreasonable perception of having affair prior to their marriage, where there was no evidence university cared whether its professors were married, single, or divorced, as long as they were not perceived by its students to be committing adultery or fornication).

(n52)Footnote 52. *See Ross v. Stouffer Hotel Company* (Hawaii 1994) 76 Haw. 454, 879 P.2d 1037, 1041 ; *Kraft, Inc. v. State* (Minn. 1979) 284 N.W.2d 386 ; *Thompson v. Board of Trustees, School District No. 12* (Mont. 1981) 192 Mont. 266, 627 P.2d 1229 ; *Washington Water Power Co. v. State Human Rights Comm'n* (Wash. 1978) 91 Wash. 2d 62, 586 P.2d 1149 (all striking down antinepotism policies on ground they penalized status of marriage); *but see Muller v. BP Exploration (Alaska) Inc.* (Alaska 1996) 923 P.2d 783 ; *Boaden v. Department of Law Enforcement* (Ill. 1996)

171 Ill. 2d 230, 215 Ill. Dec. 664, 664 N.E.2d 61 ; *Miller v. C.A. Muer Corporation* (Mich. 1984) 420 Mich. 355, 362 N.W.2d 650 ; *In re Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Board* (N.Y. 1980) 51 N.Y.2d 506, 434 N.Y.S.2d 961, 415 N.E.2d 950 ; *Townshend v. Board of Education* (W. Va. 1990) 183 W. Va. 418, 396 S.E.2d 185 (upholding varieties of antinepotism rules because marital status is independent of identity of one's spouse).

(n53)Footnote 53. *See, e.g., Bryant v. Automatic Data Processing* (Mich. App. 1986) 151 Mich. App. 424, 390 N.W.2d 732 (white woman married to black man was denied permanent position as secretary for corporation because she was white woman married to black man).

(n54)Footnote 54. *See, e.g., State Division of Human Rights v. Village of Spencerport* (N.Y. App. Div. 1980) 78 A.D.2d 50, 434 N.Y.S.2d 52, 54 (part-time secretary to town mayor, married to unpopular tax assessor who had been fired because he had raised assessments on remodeled properties, did not have marital status discrimination because discharge was political retaliation, and absent some other reason to make political retaliation unlawful, discharging her for unpopularity of her husband did not contravene marital status discrimination statutes); *Bammert v. Labor and Industry Review Commission* (Wis. App. 1999) 606 N.W.2d 620 (store employee fired when her husband, police sergeant, participated in arrest of her employer's wife did not have marital status discrimination claim because underlying purpose of outlawing marital status discrimination is to prevent discrimination against classes of people and not to protect status of being married to particular person); *Donato v. AT & T* (Fla. 2000) 767 So. 2d 1146, 1147-1148 (employee of large company fired when his wife, former employee of same company, sued company for sex discrimination did not have marital status discrimination claim because no protection of specific identity or actions of individual's spouse).

(n55)Footnote 55. *Chen v. County of Orange* (2002) 96 Cal. App. 4th 926, 944, 116 Cal. Rptr. 2d 786 .

(n56)Footnote 56. 2 Cal. Code Reg. § 7292.2(c).

(n57)Footnote 57. *Chen v. County of Orange* (2002) 96 Cal. App. 4th 926, 947, 116 Cal. Rptr. 2d 786 .

(n58)Footnote 58. *Chen v. County of Orange* (2002) 96 Cal. App. 4th 926, 947-948, 116 Cal. Rptr. 2d 786 ; *see Adler v. Pataki* (2d. Cir. 1999) 185 F.3d 35 (firing high-ranking state in-house counsel because his wife sued state Attorney General's office claiming she was fired because she was Republican burdened plaintiff's *First Amendment* right of intimate association); *Adkins v. Board of Education of Magoffin County* (6th Cir. 1993) 982 F.2d 952 (claim by high school secretary, whose husband was the school principal, that superintendent both fired her for refusing to snitch on a teacher whom the superintendent wanted fired and demoted her husband demoted to health teacher was of infringement of constitutional right of privacy and association).

(n59)Footnote 59. *See Hinman v. Department of Personnel Admin.* (1985) 167 Cal. App. 3d 516, 526, 213 Cal. Rptr. 410 (denial of dental benefits to unmarried partners of state employees not unconstitutional); *Cal. Const., art. I, § 7(a)*.

(n60)Footnote 60. *See Bus. & Prof. Code § 16721*. For discussion of the Cartwright Act, *see § 40.14[4]*.

(n61)Footnote 61. 42 U.S.C. § 2000e(k).

(n62)Footnote 62. *See Newport News Shipbldg. & Dry Dock v. EEOC* (1983) 462 U.S. 669, 684, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (PDA makes clear that, for Title VII purposes, pregnancy discrimination is, on its face, sex discrimination); 29 C.F.R. § 1604.10(a) (sex discrimination guideline; pregnancy discrimination is prima facie violation of Title VII). *See also Palmer v. Pioneer Inn Associates, Ltd.* (9th Cir. 2003) 338 F.3d 981, 984-985 (plaintiff presented sufficient direct evidence to survive summary judgment on all three of her claims of employment discrimination based on pregnancy by testifying that her supervisor told her his supervisor overturned hiring her because she was pregnant, and was not going to allow her to work because she was pregnant; direct evidence was sufficient to raise a material question of disputed fact as to whether employer discriminated against her).

(n63)Footnote 63. 42 U.S.C. § 2000e(k); see *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1511-1512 (pregnancy discrimination as defined by PDA violates letter and spirit of Title VII even if there is no "tangible loss" of an "economic nature").

(n64)Footnote 64. See *Cleveland Bd. of Educ. v. LaFleur* (1974) 414 U.S. 632, 643, 646-647, 94 S. Ct. 791, 39 L. Ed. 2d 52 .

(n65)Footnote 65. See *Cleveland Bd. of Educ. v. LaFleur* (1974) 414 U.S. 632, 643, 644, 646-647, 94 S. Ct. 791, 39 L. Ed. 2d 52 .

(n66)Footnote 66. Gov. Code § 12926(p).

(n67)Footnote 67. 2 Cal. Code Reg. § 7291.2(b), (c), (d); see *DFEH v. J.E. Robinson, D.D.S.* (1989) FEHC Dec. No. 89-02, pp. 9-10.

(n68)Footnote 68. *Kelly v. Stamps.com Inc.* (2005) 135 Cal. App. 4th 1088, 1097, 38 Cal. Rptr. 3d 240 . See *Guz v. Bechtel National Inc.* (2000) 24 Cal. 4th 317, 354-355, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 ; *Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties* (2009) 173 Cal. App. 4th 740, 93 Cal. Rptr. 3d 198, 2009 Cal. App. LEXIS 648, *30 (in action for alleged pregnancy discrimination, former employee presented evidence of prima facie case that she was fired for impermissible reason, where she was pregnant and thus member of protected class, she was performing her job competently, she suffered adverse employment action in termination of her employment, and evidence suggested discriminatory motive for adverse employment action because supervisor's supervisor indicated at her deposition that pregnant employee posed safety concerns to herself and her clients). For discussion of proof under a disparate treatment theory generally, see § 41.11.

(n69)Footnote 69. *Kelly v. Stamps.com Inc.* (2005) 135 Cal. App. 4th 1088, 1097, 38 Cal. Rptr. 3d 240 . See *Guz v. Bechtel National Inc.* (2000) 24 Cal. 4th 317, 355-356, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 ; *Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties* (2009) 173 Cal. App. 4th 740, 93 Cal. Rptr. 3d 198, 2009 Cal. App. LEXIS 648, *29-*30 (in action for alleged pregnancy discrimination, employer presented evidence that although plaintiff claimed in her time/billing records to have worked at client's home for four or four and one-half hours one afternoon/evening, caregiver who worked 5:00 p.m. to 11:00 p.m. shift at home on that day told supervisor that plaintiff was not at home during that shift, supporting nondiscriminatory reason given by employer for firing plaintiff, i.e., that plaintiff had falsified time records, which, on its face was sufficient to support summary judgment in favor of employer).

(n70)Footnote 70. *Kelly v. Stamps.com Inc.* (2005) 135 Cal. App. 4th 1088, 1097, 38 Cal. Rptr. 3d 240 . See *Guz v. Bechtel National Inc.* (2000) 24 Cal. 4th 317, 356, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 ; *Sasco Electric v. Fair Employment & Housing Commission* (2009) 176 Cal. App. 4th 532, 542-543, 97 Cal. Rptr. 3d 482 (substantial evidences support FEHC's finding of causal connection between former employee's pregnancy and employer's decision to end her employment, where supervisor specifically told employee she would not have lost her job if she had not been pregnant and admitted he chose to lay her off in part because he was concerned about her being cavalier about working on yacht too long when she was pregnant, he told his wife that employee's pregnancy was one reason he let her go, and he and his wife told fellow employee they let her go because Mexico trip was unsafe for a pregnant woman; and where substantial evidence supported FEHC's finding that employer's reason for laying her off instead of male co-worker was that she could not dock yacht and he could was pretextual, including substantial evidence she could have docked yacht had she been required to do so and supervisor's failure to even attempt to recall her when he needed contract deckhand for Mexico trip or replacement deckhand); *Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties* (2009) 173 Cal. App. 4th 740, 93 Cal. Rptr. 3d 198, 2009 Cal. App. LEXIS 648, *30-*60 (although several matters by themselves did not constitute substantial evidence that employer's stated reason for firing former employee was pretextual or that employer acted with a discriminatory animus when it fired her, those matters taken together did constitute sufficient evidence to demonstrate triable issue of fact with respect to employee's

contention that her pregnancy was true cause of decision to fire her; "me too" declarations from other former pregnant employees, which plaintiff included in her opposition to employer's motion for summary judgment, constituted substantial evidence sufficient to raise triable issue of material fact as to why employer fired her).

(n71)Footnote 71. *Kelly v. Stamps.com Inc.* (2005) 135 Cal. App. 4th 1088, 1097-1098, 38 Cal. Rptr. 3d 240. See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 850-851, 107 Cal. Rptr. 2d 841, 24 P.3d 493; *Guz v. Bechtel National Inc.* (2000) 24 Cal. 4th 317, 357, 100 Cal. Rptr. 2d 352, 8 P.3d 1089.

(n72)Footnote 72. *Kelly v. Stamps.com Inc.* (2005) 135 Cal. App. 4th 1088, 1098-1102, 38 Cal. Rptr. 3d 240 (employer's articulation of legitimate, nondiscriminatory reason for termination of pregnant employee because of economically induced restructuring and reduction in force was sufficient to shift to employee burden of showing triable issue of its falsity, with respect to her, and ultimately of discriminatory motive instead; employee presented triable issue that reasons employer gave for her termination were false, and tendered evidence of pregnancy-discriminatory motive on employer's part). See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 850-851, 107 Cal. Rptr. 2d 841, 24 P.3d 493; *Guz v. Bechtel National Inc.* (2000) 24 Cal. 4th 317, 357, 100 Cal. Rptr. 2d 352, 8 P.3d 1089.

(n73)Footnote 73. *Badih v. Myers* (1995) 36 Cal. App. 4th 1289, 1295, 43 Cal. Rptr. 2d 229.

(n74)Footnote 74. Gov. Code § 12940(a).

(n75)Footnote 75. Gov. Code § 12945; see *Carr v. Barnabey's Hotel Corp.* (1994) 23 Cal. App. 4th 14, 17, 28 Cal. Rptr. 2d 127.

(n76)Footnote 76. Gov. Code § 12945(a) is modeled after the federal Pregnancy Discrimination Act. See 42 U.S.C. § 2000e(k). Federal courts have generally limited the federal PDA to employment discrimination based on pregnancy, the termination of a pregnancy, or childbirth. See *Williams v. MacFrugal's Bargains Close-Outs, Inc.* (1998) 67 Cal. App. 4th 479, 483, 79 Cal. Rptr. 2d 98.

(n77)Footnote 77. *Williams v. MacFrugal's Bargains Close-Outs, Inc.* (1998) 67 Cal. App. 4th 479, 482, 79 Cal. Rptr. 2d 98 (PDA is remedial statute to be liberally construed).

(n78)Footnote 78. *Williams v. MacFrugal's Bargains Close-Outs, Inc.* (1998) 67 Cal. App. 4th 479, 481-485, 79 Cal. Rptr. 2d 98 (diagnostic hysterectomy is not covered by PDA because it is not medical condition directly related to pregnancy; court implied that result might differ if hysterectomy was performed because it related to miscarriage or other pregnancy-related problem).

(n79)Footnote 79. *Williams v. MacFrugal's Bargains Close-Outs, Inc.* (1998) 67 Cal. App. 4th 479, 79 Cal. Rptr. 2d 98.

(n80)Footnote 80. See former Gov. Code § 12945(b)(2); now see Gov. Code § 12945(a). For complete discussion of pregnancy leave, see Ch. 8.

(n81)Footnote 81. See former Gov. Code § 12945(c), (e); now see Gov. Code § 12945(b)(3). For complete discussion of pregnancy leave, see Ch. 8.

(n82)Footnote 82. Former Gov. Code § 12945(e). See also *Spaziano v. Lucky Stores, Inc.* (1999) 69 Cal. App. 4th 106, 111, 81 Cal. Rptr. 2d 378. For complete discussion relating to scope and application of Title VII, see Ch. 40, Pt. C.

(n83)Footnote 83. Gov. Code § 12945(c).

(n84)Footnote 84. *Spaziano v. Lucky Stores, Inc.* (1999) 69 Cal. App. 4th 106, 111-112, 81 Cal. Rptr. 2d 378 (noting federal circuit split on whether employees disabled by pregnancy may be treated differently than other disabled

employees).

(n85)Footnote 85. *Spaziano v. Lucky Stores, Inc.* (1999) 69 Cal. App. 4th 106, 111-112, 81 Cal. Rptr. 2d 378 (court also rejected argument that policy was discriminatory because pregnancy could never qualify as industrial injury; employee would be entitled to longer leave under two-tier policy if pregnancy-related disability arose out of course of employment and qualified the employee to receive workers' compensation benefits).

(n86)Footnote 86. *Spaziano v. Lucky Stores, Inc.* (1999) 69 Cal. App. 4th 106, 81 Cal. Rptr. 2d 378 .

(n87)Footnote 87. *Urbano v. Continental Airlines, Inc.* (5th Cir. 1998) 138 F. 3d 204, 206 .

(n88)Footnote 88. *Ensley-Gaines v. Runyon* (6th Cir. 1996) 100 F. 3d 1220 .

(n89)Footnote 89. *Ensley-Gaines v. Runyon* (6th Cir. 1996) 100 F. 3d 1220, 1223-1224 .

(n90)Footnote 90. Cf. *International Union, UAW v. Johnson Controls* (7th Cir. 1989) 886 F.2d 871, 884-901 , *rev'd sub nom. Auto. Workers v. Johnson Controls* (1991) 499 U.S. 187, 197-198, 111 S. Ct. 1196, 113 L. Ed. 2d 158 ("fetal protection" policy was facially neutral and therefore subject to "business necessity" defense); *Hayes v. Shelby Memorial Hosp.* (11th Cir. 1984) 726 F.2d 1543 (analyzing policy under disparate treatment and disparate impact theory); *Wright v. Olin Corp.* (4th Cir. 1982) 697 F.2d 1172 (analyzing policy under disparate impact theory subject to business necessity defense) with *Grant v. General Motors Corp.* (6th Cir. 1990) 908 F.2d 1303 ("fetal protection" policies amount to overt discrimination that may be justified only by BFOQ).

(n91)Footnote 91. *Auto Workers v. Johnson Controls* (1991) 499 U.S. 187, 201, 111 S. Ct. 1196, 113 L. Ed. 2d 158, 174 .

(n92)Footnote 92. *Auto Workers v. Johnson Controls* (1991) 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158, 173 ; see also *Armstrong v. Flowers Hosp. Inc.* (11th Cir. 1994) 33 F.3d 1308, 1314-1315 (hospital not required by the federal Pregnancy Disability Act to accommodate nurse requesting shift change to avoid an AIDS patient; plaintiff had not proven disparate impact on pregnant women, that refusing to treat a patient was inappropriate grounds for termination of a nurse, or that treating AIDS patient constituted adverse impact on a nurse).

(n93)Footnote 93. *Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n* (1990) 218 Cal. App. 3d 517, 533-539, 267 Cal. Rptr. 158 (policy that had effect of denying production work to all women of child bearing capacity violated Gov. Code § 12940); see 2 Cal. Code Reg. § 7291.0(c) (unlawful to refuse to hire female because she is of childbearing age).

(n94)Footnote 94. *Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n* (1990) 218 Cal. App. 3d 517, 542-546, 267 Cal. Rptr. 158 .

(n95)Footnote 95. Gov. Code § 12945.5.

(n96)Footnote 96. *Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n* (1990) 218 Cal. App. 3d 517, 533-539, 267 Cal. Rptr. 158 .

(n97)Footnote 97. Gov. Code § 12940(j)(4)(C).

(n98)Footnote 98. See *De Santis v. Pacific Tel. & Tel. Co.* (9th Cir. 1979) 608 F.2d 327, 329-330 (Title VII; homosexuality); *Holloway v. Arthur Andersen & Co.* (9th Cir. 1977) 566 F.2d 659, 662 (Title VII; sex change).

(n99)Footnote 99. *Holloway v. Arthur Andersen & Co.* (9th Cir. 1977) 566 F.2d 659 .

(n100)Footnote 100. See *Holloway v. Arthur Andersen & Co.* (9th Cir. 1977) 566 F.2d 659, 661 .

(n101)Footnote 101. See *Holloway v. Arthur Andersen & Co.* (9th Cir. 1977) 566 F.2d 659, 662-663 (declaring that manifest purpose of Title VII prohibition against sex discrimination in employment is to ensure that men and women are treated equally); cf. 2 Cal. Code Reg. § 7290.6(b) (purpose of FEHA was to correct inequities between treatment of male and female employees).

(n102)Footnote 102. See *Holloway v. Arthur Andersen & Co.* (9th Cir. 1977) 566 F.2d 659, 662 .

(n103)Footnote 103. See *Holloway v. Arthur Andersen & Co.* (9th Cir. 1977) 566 F.2d 659, 662-663 .

(n104)Footnote 104. *DeSantis v. Pacific Tel. & Tel. Co., Inc.* (9th Cir. 1979) 608 F.2d 327 .

(n105)Footnote 105. See *DeSantis v. Pacific Tel. & Tel. Co., Inc.* (9th Cir. 1979) 608 F.2d 327, 329-330 .

(n106)Footnote 106. Gov. Code §§ 12926(q), 12940(a), (j). Under California law, the FEHA occupies the field of employment discrimination and preempts local ordinances prohibiting sexual orientation discrimination in employment. *Delaney v. Superior Fast Freight* (1993) 14 Cal. App. 4th 590, 596-598, 18 Cal. Rptr. 2d 33 ; see Gov. Code § 12993(c); See also ch. 40, pt. A.

(n107)Footnote 107. *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 156 Cal. Rptr. 14, 595 P.2d 592 .

(n108)Footnote 108. See former Lab. Code § 1410 et seq.

(n109)Footnote 109. See *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 490, 156 Cal. Rptr. 14, 595 P.2d 592 .

(n110)Footnote 110. See, e.g., *Voyles v. Ralph K. Davies Med. Ctr.* (N.D. Ga. 1975) 403 F. Supp. 456, 457 , *aff'd*, 570 F.2d 354 (9th Cir. 1978) ; *Smith v. Liberty Mut. Ins. Co.* (5th Cir. 1978) 569 F.2d 325 .

(n111)Footnote 111. See *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 490-491, 156 Cal. Rptr. 14, 595 P.2d 592 ; see also 2 Cal. Code Reg. § 7290.7(a) ("sex" under FEHA means applicant's or employee's gender).

(n112)Footnote 112. See *Matthews v. Superior Court* (1995) 34 Cal. App. 4th 598, 603, 40 Cal. Rptr. 2d 350 ; *Mogilefsky v. Superior Court* (1993) 20 Cal. App. 4th 1409, 1416, 26 Cal. Rptr. 2d 116 .

(n113)Footnote 113. Gov. Code § 11135(a). See Gov. Code § 11135(e), defining "sexual orientation" for these purposes as defined in Gov. Code § 12926(q).

(n114)Footnote 114. See Bus. & Prof. Code § 16721. For discussion of the Cartwright Act, see § 40.14[4].

(n115)Footnote 115. See *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 467-469, 156 Cal. Rptr. 14, 595 P.2d 592 (finding California public utility more akin to governmental entity than to purely private employer).

(n116)Footnote 116. *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 156 Cal. Rptr. 14, 595 P.2d 592 .

(n117)Footnote 117. See *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 464, 467 referring to Labor Code § 1102 which prohibits discrimination in employment or opportunity for employment based on sexual orientation; *Leibert v. Transworld Sys., Inc.* (1995) 32 Cal. App. 4th 1693, 1702-1704, 39 Cal. Rptr. 2d 65 (violations of Lab. Code §§ 1101, 1102, and 1102.1 constitute fundamental public policy basis for wrongful termination on ground of sexual orientation); see also *Murray v. Oceanside Unified School District* (2000) 79 Cal. App. 4th 1338,

1358, 95 Cal. Rptr. 2d 28 (Lab. Code § 1102.1 prohibited harassment as well as discrimination because harassment constituted different treatment in aspect of employment).

(n118)Footnote 118. See *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 467, 156 Cal. Rptr. 14, 595 P.2d 592 . The Labor Code provisions, not FEHA, were held a basis for state statutory redress for sexual orientation discrimination.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART B. PROHIBITED BASES OF DISCRIMINATION

2-41 California Employment Law § 41.37

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.37 Genetic Information Discrimination

Under the Genetic Information Nondiscrimination Act of 2008 (GINA),ⁿ¹ which became effective November 21, 2009, it is an unlawful employment practice for an employer to do either of the following with regard to genetic information:ⁿ²

- Fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee.
- Limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.

It is also an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or a family member of the employee except in the following circumstances.ⁿ³ In the following cases, the information may not be used in violation of *42 U.S.C. § 2000ff-1(a)* or treated or disclosed in a manner that violates *42 U.S.C. § 2000ff-5*.ⁿ⁴

- The employer inadvertently requests or requires family medical history of the employee or family member of the employee.
- The employer offers health or genetic services and individually identifiable genetic information provided in connection with those services is not disclosed to the employer except in aggregate terms that do not disclose the identity of specific employees.
- The employer requests or requires family medical history from the employee to comply with the certification provisions of the Family and Medical Leave Actⁿ⁵ or certification requirements under state

family and medical leave laws.n6

- The employer purchases commercially and publicly available documents, including newspapers, magazines, periodicals, and books, but not including medical databases or court records, that include family medical history.
- The information is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, but only under specified conditions, including that the genetic monitoring is required by federal or state law.
- The employer conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification and requests or requires genetic information of the employer's employees, but only to the extent that genetic information is used for analysis of DNA identification markers for quality control to detect sample contamination.

Similar prohibitions apply to employment agencies,n7 labor organizations.n8 and training programs.n9

Under the GINA, genetic information includes genetic information of a fetus carried by a covered pregnant woman and genetic information of an embryo legally held by a covered individual or family member.n10

If an employer, employment agency, labor organization, or joint labor-management committee possesses genetic information about an employee or member, it must maintain the information on separate forms and in separate medical files and treat it as a confidential medical record of the employee or member. An employer, employment agency, labor organization, or joint labor-management committee will be considered to be in compliance with the maintenance of information requirements with respect to genetic information it maintains and treats as a confidential medical record under the Americans With Disabilities Act.n11

An employer, employment agency, labor organization, or joint labor-management committee may not disclose genetic information concerning an employee or member except under the following circumstances:n12

- To the employee or member of a labor organization, or family member if the family member is receiving the genetic services, at the written request of the employee or member of the organization.
- To an occupational or other health researcher if the research is conducted in compliance with specified regulations and protections.n13
- In response to a court order, except as specified.
- To government officials investigating compliance with the GINA if the information is relevant to the investigation.
- To the extent the disclosure is made in connection with the employee's compliance with the certification provisions of the Family and Medical Leave Actn14 or certification requirements under state family and medical leave laws.n15
- To a federal, state, or local public health agency only with regard to specific information concerning a contagious disease that presents an imminent hazard of death or life-threatening illness, and the employee whose family members are the subject of a disclosure is notified of the disclosure.

The GINA does not prohibit an entity covered under regulations promulgated by the Secretary of Health and Human

Services under the Social Security Actⁿ¹⁶ and the Health Insurance Portability and Accountability Actⁿ¹⁷ from any use or disclosure of health information authorized for the under those regulations or affect the authority of the Secretary to modify the regulations.ⁿ¹⁸

It is not a violation of GINA for an employer, employment agency, labor organization, or joint labor-management committee to use, acquire, or disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee or member, including a manifested disease, disorder, or pathological condition that has or may have a genetic basis.ⁿ¹⁹

For employees covered by Title VII, the powers, procedures, and remedies provided in the Civil Rights Act of 1964ⁿ²⁰ to the Equal Employment Opportunity Commission, the Attorney General, or any person, alleging a violation of title VII are the powers, procedures, and remedies the GINA provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of the GINA.ⁿ²¹ Awards of costs and attorney's fees are governed by 42 U.S.C. § 1988.ⁿ²² Damages are governed by 42 U.S.C. § 1981a, including the limitations in 42 U.S.C. § 1981a(b)(3).ⁿ²³ There are similar provisions for employees covered by the Government Employee Rights Act of 1991,ⁿ²⁴ the Congressional Accountability Act of 1995,ⁿ²⁵ other specified federal employees,ⁿ²⁶ and employees covered by *section 717 of the Civil Rights Act of 1964*.ⁿ²⁷

The GINA also protects against retaliation against an individual because the individual opposes any act or practice made unlawful by the GINA or because the individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the GINA. The remedies and procedures otherwise provided for under the GINA are available to aggrieved individuals with respect to retaliation.ⁿ²⁸

Notwithstanding any other provision of the GINA, "disparate impact," as used in Title VIIⁿ²⁹ on the basis of genetic information does not establish a cause of action under the GINA.ⁿ³⁰ However, starting in May 2014, the Genetic Nondiscrimination Study Commission will review the developing science of genetics and to make recommendations to Congress regarding whether to provide a disparate impact cause of action under the GINA.ⁿ³¹

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. 2000ff *et seq.*

(n2)Footnote 2. 42 U.S.C. § 2000ff-1(a).

(n3)Footnote 3. 42 U.S.C. § 2000ff-1(b).

(n4)Footnote 4. 42 U.S.C. § 2000ff-1(c).

(n5)Footnote 5. *See* 29 U.S.C. § 2613, discussed at § 8.26.

(n6)Footnote 6. *See* Gov. Code § 12945.2(j), (k), discussed at § 8.26.

(n7)Footnote 7. *See* 42 U.S.C. § 2000ff-2.

(n8)Footnote 8. *See* 42 U.S.C. § 2000ff-3.

(n9)Footnote 9. 42 U.S.C. § 2000ff-3.

(n10)Footnote 10. 42 U.S.C. § 2000ff-8(b).

(n11)Footnote 11. 42 U.S.C. § 2000ff-5(a). *See* 42 U.S.C. 12112(d)(3)(B), discussed at § 41.46[1][a], below.

(n12)Footnote 12. 42 U.S.C. § 2000ff-5(b).

- (n13)Footnote 13. *See* 45 C.F.R. Part 46.
- (n14)Footnote 14. *See* 29 U.S.C. 2613, discussed at § 8.26.
- (n15)Footnote 15. *See* Gov. Code § 12945.2(j), (k), discussed at § 8.26.
- (n16)Footnote 16. *See* 42 U.S.C. § 1320d et seq.
- (n17)Footnote 17. *See* 42 U.S.C. § 1320d-2 note.
- (n18)Footnote 18. 42 U.S.C. § 2000ff-5(c).
- (n19)Footnote 19. 42 U.S.C. § 2000ff-9.
- (n20)Footnote 20. *See* 42 U.S.C. § 2000e-4 et seq.
- (n21)Footnote 21. 42 U.S.C. § 2000ff-6(a)(1).
- (n22)Footnote 22. 42 U.S.C. § 2000ff-6(a)(2).
- (n23)Footnote 23. 42 U.S.C. § 2000ff-6(a)(3).
- (n24)Footnote 24. 42 U.S.C. § 2000ff-6(b); *see* 42 U.S.C. § 2000e-16b, 16c.
- (n25)Footnote 25. 42 U.S.C. § 2000ff-6(c); *see* 2 U.S.C. § 1301 et seq.
- (n26)Footnote 26. 42 U.S.C. § 2000ff-6(d); *see* 3 U.S.C. § 401 et seq.
- (n27)Footnote 27. 42 U.S.C. § 2000ff-6(e); *see* 42 U.S.C. 2000e-16.
- (n28)Footnote 28. 42 U.S.C. § 2000ff-6(f).
- (n29)Footnote 29. *See* 42 U.S.C. § 2000e-2(k).
- (n30)Footnote 30. 42 U.S.C. § 2000ff-7(a).
- (n31)Footnote 31. 42 U.S.C. § 2000ff-7(b)-(f).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART B. PROHIBITED BASES OF DISCRIMINATION

2-41 California Employment Law §§ 41.38 through 41.39

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[Reserved]

§§ 41.38[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART C. PREEMPLOYMENT PRACTICES

2-41 California Employment Law § 41.40

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.40 Introduction

Equal employment opportunity law requires employers to select or reject prospective employees in a nondiscriminatory manner. Title VII of Civil Rights Act of 1964 (Title VII),ⁿ¹ the Age Discrimination in Employment Act (ADEA),ⁿ² and the California Fair Employment and Housing Act (FEHA)ⁿ³ expressly provide that it is an unlawful employment practice to fail or refuse to hire or employ any individual based on membership in a protected classification.ⁿ⁴ Similarly, the Americans With Disabilities Act (ADA)ⁿ⁵ prohibits disability discrimination with respect to job application procedures and hiring.ⁿ⁶ This part discusses limitations imposed by equal employment opportunity laws with respect to selection procedures and criteria. It also details potential liability for discrimination in preemployment advertisement and recruitment, applications and interviews, and preemployment testing.ⁿ⁷

Legal Topics:

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

Civil Rights Law Contractual Relations & Housing Fair Housing Rights General Overview Labor & Employment Law Discrimination Age Discrimination General Overview Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 General Overview Labor & Employment Law Preemployment Practices

FOOTNOTES:

(n1)Footnote 1. *42 U.S.C. § 2000e et seq.*

(n2)Footnote 2. *29 U.S.C. § 621 et seq.*

(n3)Footnote 3. *Gov. Code § 12900 et seq.*

(n4)Footnote 4. *See 42 U.S.C. § 2000e-2(a)(1)* (Title VII; race, color, religion, sex, national origin); *29 U.S.C. § 631(a)* (ADEA; age over 40 years); *Gov. Code § 12940(a)* (FEHA; race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, sexual orientation, age over 40 years).

(n5)Footnote 5. *42 U.S.C. § 12101 et seq.*

(n6)Footnote 6. *42 U.S.C. § 12112(a).*

(n7)Footnote 7. For a discussion of the various classifications protected from employment discrimination, *see* Part B (§§ 41.30-41.36); for a complete discussion relating to the scope of application of the various equal employment opportunity laws, *see* ch. 40.



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PART C. PREEMPLOYMENT PRACTICES

2-41 California Employment Law § 41.41

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.41 Employee Selection Procedures

The EEOC Uniform Guidelines on Employee Selection Proceduresⁿ¹ define an employee selection procedure as any measure, combination of measures, or procedure used as a basis for any employment decision, including hiring.ⁿ² Selection procedures include the full range of assessment techniques from traditional paper-and-pencil tests, training programs, probationary periods, and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.ⁿ³

Under the EEOC guidelines, the use of any selection procedure which has an adverse impact on the hiring of members of any protected group is discriminatory, unless (1) the procedure was validated in accordance with the guidelines;ⁿ⁴ (2) an employer chooses a lawful, job-related alternative;ⁿ⁵ or (3) validity studies cannot or need not be performed, and the employer uses a procedure that is as job-related as possible and that minimizes adverse impact.ⁿ⁶ California Fair Employment and Housing Commission (FEHC) regulations expressly adopt the EEOC guidelinesⁿ⁷ and further prohibit any selection policy or practice which has an adverse impact on employment opportunities of individuals protected by the FEHA unless the policy or practice is job-related.ⁿ⁸ A policy or practice is "job-related" under the FEHC regulations if it is "sufficiently related to an essential function of the job in question to warrant its use."ⁿ⁹

Legal Topics:

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

Labor & Employment Law
Preemployment Practices
Labor & Employment Law
U.S. Equal Employment Opportunity Commission
General Overview
Labor & Employment Law
U.S. Equal Employment Opportunity Commission
Enforcement
General Overview

FOOTNOTES:

(n1)Footnote 1. See 29 C.F.R. pt. 1607; for a discussion relating to the general scope and application of the EEOC guidelines, see ch. 40, pt. C.

(n2)Footnote 2. See 29 C.F.R. § 1607.2(B).

(n3)Footnote 3. *29 C.F.R. § 1607.16(Q)*.

(n4)Footnote 4. *See 29 C.F.R. § 1607.3(A)*.

(n5)Footnote 5. *See 29 C.F.R. §§ 1607.3(A), 1607.6(A)* (use of selection procedures that have not been validated; use of alternative to eliminate adverse impact).

(n6)Footnote 6. *See 29 C.F.R. §§ 1607.3(A), 1607.6(B)* (use of selection procedures that have not been validated; when informal or unscored procedures are used).

(n7)Footnote 7. *See 2 Cal. Code Reg. § 7287.4(a)*.

(n8)Footnote 8. *See 2 Cal. Code Reg. § 7287.4(a); see also 2 Cal. Code Reg. §§ 7287.3(a)* (prohibiting discrimination in recruitment, except when utilized for affirmative action purposes); *7287.3(b)* (limiting pre-employment inquiries); *7287.3(c)(1), (2), and (3)* (prohibiting employers and other entities from discriminating when they provide, accept, and consider employment applications; prohibiting requirements that applicants provide photographs; and forbidding the coding or separation of application forms); and *7287.3(d)* (requiring personal interviews to be free of discrimination, and subjecting entire interview process to review for adverse impact).

(n9)Footnote 9. *See 2 Cal. Code Reg. § 7287.4(e)*. For additional discussion of "job-relatedness," *see §§ 41.24[4] and 41.95*.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
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PART C. PREEMPLOYMENT PRACTICES

2-41 California Employment Law § 41.42

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.42 Employee Selection Criteria

[1] Generally

Employers use the selection procedures mentioned in §§ 41.41-41.42 to measure applicants' qualifications against established criteria. Employers have the right to establish selection criteria to ensure that prospective employees meet certain job qualifications,ⁿ¹ and have discretion to choose among equally qualified candidates. However, employers may not base hiring decisions on unlawful criteria.ⁿ² Thus, criteria and standards that are components of the selection process may not operate as "built-in headwinds" for protected class members, and may not be unrelated to actual job capability.ⁿ³

Employee selection criteria may be either "objective,"ⁿ⁴ such as test scores or height and weight requirements, or "subjective,"ⁿ⁵ such as "attitude" or supervisory ability, which cannot be measured or quantified, but are instead judged by an employer's impression. Particular "objective" and "subjective" employee selection criteria, are detailed in [2] and [3], *below*. For a discussion of the application of "disparate impact" analysis to "objective" versus "subjective" criteria, *see* §§ 41.20-41.21.

[2] Objective Criteria

[a] Generally

"Objective" selection criteria are specific, clearly delineated, quantitative, objectively verified, and mechanically applied.ⁿ⁶ In the vast majority of cases, such criteria are facially neutral in that they apply equally to all applicants. However, if such criteria have a "disparate impact" on a protected group (that is, they fall more harshly on one group of applicants than on another),ⁿ⁷ they are unlawful unless the employer has a valid defense, such as "business necessity."ⁿ⁸

The subsections below set forth examples of common objective criteria which have been subject to judicial scrutiny.

■ CONSULTANT'S COMMENT:

Note that objective criteria may be subjectively evaluated, in which case their discretionary character makes them essentially subjective criteria. Also, objective criteria may be combined with subjective criteria as well as other objective criteria since few employment decisions are made on the basis of one criterion alone. *Commentary by Bill Lann Lee.*

[b] Arrest and Criminal Record

Disqualification for employment based on past criminal behavior can violate Title VII when the disqualifying criterion has a disproportionate impact on a protected class and has a tenuous or insubstantial relation to job qualifications.ⁿ⁹ The Ninth Circuit has held that facially neutral employment questionnaires that require each applicant to reveal his or her arrest record may violate Title VII if they operate to bar employment of black applicants in a greater proportion than white applicants.ⁿ¹⁰ Similarly, with respect to criminal convictions, the FEHC has determined that, in order for a conviction to be disqualifying, there must be a direct relationship between the offense committed and the responsibilities of the employment sought.ⁿ¹¹ In making its determination, the FEHC relied on the reasoning of the Eighth Circuit Court of Appeals in *Green v. Missouri Pacific Railroad Company*.ⁿ¹² In that case, the Eighth Circuit stated that it could not "conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed." The court added that "this is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society."ⁿ¹³ Further, the FEHC, in promulgating its regulations, has recognized the discriminatory effect of disqualification based on criminal and arrest records.ⁿ¹⁴ However, an employer has the right to *consider* criminal convictions as they relate to the nature of a job.ⁿ¹⁵

The California Labor Code further prohibits public and private employers from using, as a factor in determining any condition of employment including hiring, (1) any record of arrest or detention that did not result in conviction, or (2) any record regarding a referral to and participation in any pretrial or posttrial diversion program.ⁿ¹⁶ For discussion concerning impermissible inquiries in employment applications and preemployment interviews relating to arrest and conviction records, *see* § 41.44[2][c].

[c] Citizenship Requirements

Federal immigration law prohibits discrimination against an applicant who is *legally* permitted to work in the United States because of the applicant's national origin or citizenship status.ⁿ¹⁷ However, employers have the right to prefer equally qualified citizens over non-citizensⁿ¹⁸ and may require a certain citizenship status as a condition of employment in order to comply with law, regulation or executive order, government contract or when the Attorney General has determined that the required citizenship status is essential to do business with an agency or department of a Federal, State, or local government.ⁿ¹⁹

Citizenship requirements which have the purpose or effect of discriminating on the basis of national origin, also may violate Title VII.ⁿ²⁰

FEHC regulations also provide that citizenship requirements which have the purpose or effect of discriminating on the basis of national origin or ancestry are unlawful unless pursuant to a permissible defense.ⁿ²¹

[d] Client Preferences

Hiring decisions based on client preferences are generally disallowed if they are discriminatory. The EEOC employee selection guidelines prohibit the discriminatory refusal to hire an individual because of the preferences of coworkers, the employer, clients or customers except where it is necessary "for the purpose of authenticity or genuineness ... e.g., an actor or actress."ⁿ²² Similarly, federal courts have found that claims that customers prefer male employees because of

cultural biasesⁿ²³ or stereotypical expectationsⁿ²⁴ do not justify discrimination based on sex.ⁿ²⁵ The FEHA regulations state that a hiring decision based on customer preference for employees of one sex is a "situation which will not justify the application of [a] BFOQ defense."ⁿ²⁶ A California court of appeal expressly followed these regulations in striking down the refusal of a private men's club to hire women, based on its members' expressed preferences.ⁿ²⁷ While the court of appeal recognized that client privacy rights might be a BFOQ, it did not find that club members' privacy rights encompassed a "legally protectable right to use unenclosed bathroom or shower facilities" when enclosed facilities were available.ⁿ²⁸

[e] Credit History and Other Financial Condition

Selection criteria based on the financial circumstances of applicants may have an adverse impact on individuals protected by Title VII and the FEHA.ⁿ²⁹ Hence, selection practices such as checking credit references and reports,ⁿ³⁰ screening for wage garnishments,ⁿ³¹ and bankruptcy.ⁿ³²ⁿ³³

In addition to equal employment considerations, Bankruptcy Code Section 532 prohibits discrimination in employment decisions based solely on an individual's bankruptcy history, insolvency, or association with individuals who have filed for bankruptcy or are insolvent.ⁿ³⁴ The burden of demonstrating that the adverse employment decision was solely because of the bankruptcy falls on the employee.ⁿ³⁵ In addition to equal employment opportunity considerations, federal and California privacy laws restrict an employer's inquiry into an employee's financial condition. For discussion, *see* Chapter 50.

[f] Drug and Alcohol Use

Individuals who (1) are rehabilitated drug users; (2) are currently participating in a supervised drug rehabilitation program and are no longer using drugs; or (3) are erroneously believed to be illegal drug users, are protected by the ADA against discriminatory hiring practices.ⁿ³⁶ Further, the Rehabilitation Act of 1973 also protects former drug users.ⁿ³⁷ Because neither the ADA nor the Rehabilitation Act of 1973 protects employees or applicants who are currently engaging in the illegal use of drugs, however, employers may base hiring decisions on such useⁿ³⁸ and may adopt or administer reasonable hiring policies or procedures, including but not limited to drug testing,ⁿ³⁹ designed to ensure that such individuals do not use illegal drugs.ⁿ⁴⁰ Alcoholism is also protected as a disability. However, employers may prohibit the use and abuse of alcohol in the workplace.ⁿ⁴¹ Employers may hold an alcoholic applicant to the same qualification standard as other applicants.ⁿ⁴² Nor does the Rehabilitation Act immunize an alcoholic from termination based on drunken misconduct.ⁿ⁴³ The provisions of the FEHA mirror the ADA with regard to alcoholics and recovered drug addicts and also expressly exclude the unlawful current use of controlled substances or other drugs from the definitions of mental and physical disability.ⁿ⁴⁴ Casual past drug use is insufficient to qualify as a disability entitled to protection under these disability laws.ⁿ⁴⁵ Accordingly, employers would be able to base employment decisions on disclosures of past use. However, employers may not base employment decisions on disclosures of arrests or convictions.ⁿ⁴⁶ It has been argued that consideration of past drug *use* is unlawful under Title VII because of its disparate impact on certain minority applicants.ⁿ⁴⁷ Despite this argument, the Fifth Circuit Court of Appeals upheld a hiring requirement that police applicants not have "recent or excessive marijuana usage," holding that job-relatedness had been established, "[p]articularly in light of the responsibility and discretion in the position of police officer, as well as the compelling interest in enforcing existent criminal laws ...".ⁿ⁴⁸

However, in 1991, Title VII by the Civil Rights Act of 1991ⁿ⁴⁹ was amended to provide that, notwithstanding any other provision of Title VII, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in Schedules I and II of the Controlled Substances Act,ⁿ⁵⁰ other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of federal law, shall be considered an unlawful employment practice under Title VII only if the rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.ⁿ⁵¹

For discussion of other legal principles that may affect an employer's use of drug testing, *see* Chapter 50. For a discussion relating to drug addiction as a disability protected by federal equal employment opportunity law, *see* § 41.32[3][a].

[g] Education

Educational criteria, such as high school diploma requirements, are unlawful if they disproportionately exclude members of a protected classification unless the criteria "bear a demonstrable relationship to successful performance of the jobs for which [they are] used."ⁿ⁵² For example, in *Griggs v. Duke Power Co.*,ⁿ⁵³ the United States Supreme Court invalidated an employer's high school diploma and minimum intelligence test score criteria that virtually excluded black employees from all but the lowest-paying jobs. The employer argued that the diploma criterion "generally would improve the overall quality of the workforce."ⁿ⁵⁴ However, because of a significant disparity in the proportion of black versus white high school graduates in the state population,ⁿ⁵⁵ the requirement operated to disqualify black applicants at a substantially higher rate than white applicants.ⁿ⁵⁶ The Court held that the requirement did not bear a demonstrable relationship to successful job performance because employees without diplomas who were hired before the requirement was adopted continued to perform satisfactorily.ⁿ⁵⁷ Thus, the facts of the case demonstrated the inadequacy of using diplomas or degrees as fixed measures of capability.ⁿ⁵⁸ The Court declared that "[d]iplomas ... are useful servants, but Congress has mandated the common sense proposition that they are not to become the masters of reality."ⁿ⁵⁹

Courts have invalidated educational requirements in cases involving skilled and unskilled laborers; blue-collar positions such as work on an assembly-line; and transportation, maintenance, clerical, and skilled craft and trade jobs.ⁿ⁶⁰ By contrast, courts have upheld educational requirements for jobs involving professional positions or an unusual degree of risk or public responsibility, such as police officer,ⁿ⁶¹ correction officer,ⁿ⁶² flight officer,ⁿ⁶³ and certain "white-collar" supervisory positions.ⁿ⁶⁴

The EEOC guidelines point out that educational requirements which deny employment to an applicant because of his or her foreign education or which require a foreign education or training may be discriminatory on the basis of national origin.ⁿ⁶⁵

[h] English Fluency

The EEOC employee selection guidelinesⁿ⁶⁶ establish that denying employment opportunities because of an individual's foreign accent or inability to communicate well in English may constitute national origin discrimination in some instances.ⁿ⁶⁷ English fluency requirements are not unlawful, however, if they have no disparate impact.ⁿ⁶⁸ Even if fluency requirements have an adverse impact, they are not unlawful if they are job-related and satisfy the business necessity test discussed in § 41.21[4].ⁿ⁶⁹

English fluency requirements should be distinguished from "English-only" rules that forbid incumbent employees from speaking any language other than English. Both the EEOC and FEHC presume that English-only rules will have an adverse impact on protected groups,ⁿ⁷⁰ and therefore are prohibited unless justified by business necessity.ⁿ⁷¹ However, the Ninth Circuit has declined to adopt the EEOC guidelines, opining that absent *proof*, English only rules do not have an adverse impact on protected groups.ⁿ⁷² Such rules are discussed in detail in § 41.59.

[i] Experience

[i] Generally

Experience requirements may have a disparate impact on protected classifications. For example, one court found that a requirement for truck-driving experience had a disparate impact on female applicants because females were grossly

under represented in the trucking industry when the requirement was implemented.ⁿ⁷³ Another court held that a plaintiff challenging a requirement for flight officer experience established a prima facie case of disparate impact merely by showing that an airline employed a "minuscule number of black flight officers."ⁿ⁷⁴

Generally, it is more likely that a minimum experience requirement will be upheld if the job requires a high degree of skill, or if there is a safety risk in hiring an unqualified applicant.ⁿ⁷⁵ Even if experience requirements have an adverse impact, they are lawful if business necessity or job-relatedness is shown.ⁿ⁷⁶ As with education requirements discussed in [f], *above*, the business necessity defense entails consideration of the demands of the particular job.ⁿ⁷⁷

Under the EEOC employee selection guidelines, job-relatedness means that the content of the experience requirement must be representative of important aspects of performance on the job for which applicants are to be evaluated.ⁿ⁷⁸ To satisfy this test of job-relatedness, there should be a positive relationship between the content of the experience and the content of the job for which the experience is required. The critical consideration is the resemblance between the *specific* behaviors, products, knowledge, skills, or abilities in the experience and the *specific* behaviors, products, knowledge, skills, or abilities required on the job, whether or not there is a close resemblance between the experience as a whole and the job as a whole.ⁿ⁷⁹

For a discussion relating to validity studies as they relate to preemployment testing, *see* § 41.45[2]. For a general discussion of business necessity as a defense, *see* § 41.95.

[ii] FEHA Regulations

Under FEHC regulations, employers may prefer employees who have superior qualifications and training.ⁿ⁸⁰ However, employers who consider prior work experience in the selection of an employee must also consider prior unpaid or volunteer work experience.ⁿ⁸¹

[iii] Maximum Experience Qualifications

It has been argued that maximum experience requirements adversely affect older workers and hence violate the ADEA.ⁿ⁸² However, the Ninth Circuit allows employers to use "overqualification" as a basis for rejection of applicants as long as that term is defined objectively and the basis for rejection is not a pretext for age discrimination.ⁿ⁸³ One California district court found that a school district with strict financial constraints could reject more qualified applicants because the experience level of those teachers would mandate they receive a salary that was not within budget.ⁿ⁸⁴

[j] Family or Marital Status and Responsibilities

Discrimination based on marital status is prohibited by the FEHA.ⁿ⁸⁵ This prohibition also forbids discrimination because an applicant is living with a member of the opposite sex without being married to that person.ⁿ⁸⁶ Under Title VII, hiring decisions based on marital status may constitute unlawful discrimination if a protected group is adversely affected.ⁿ⁸⁷ Furthermore, selection criteria based on real or perceived family *responsibilities* may also unlawfully discriminate on the basis of sex.ⁿ⁸⁸ Thus, in *Phillips v. Martin Marietta Corp.*,ⁿ⁸⁹ the United States Supreme Court held that Title VII invalidated a hiring policy in which an employer did not accept applications from women with pre-school-age children, while it did accept applications from men with pre-school-age children.ⁿ⁹⁰ The Court suggested, however, that the existence of conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for a bona fide occupational qualification (BFOQ) defense.ⁿ⁹¹

Pursuant to the ADA regulations, an employer may not discriminate against a qualified applicant because of that applicant's familial relationship with an individual with a disability.ⁿ⁹² Thus an employer may not discriminate because

it believes that existence of family member with a disability will affect employment of applicant.ⁿ⁹³

Both the FEHA and Title VII prohibit employers from making hiring decisions based on the pregnancy of the applicant.ⁿ⁹⁴ The Supreme Court has extended this prohibition to employment decisions based on a woman's fertility.ⁿ⁹⁵ The Court struck down a policy which prohibited pregnant or fertile women from being placed in jobs which exposed them to lead.ⁿ⁹⁶ The California Court of Appeal came to the same conclusion in a similar challenge to the same employer's policy under the FEHA.ⁿ⁹⁷ The California Court of Appeals based its decision, in part, on an FEHC regulation, which provides that is unlawful to refuse to hire a female because she is of childbearing age.ⁿ⁹⁸ For a discussion relating to discrimination based on sex plus another characteristic, such as family responsibilities, *see* § 41.36[2][a][ii].

[k] Height and Weight Restrictions

Height and weight restrictions which are imposed only on one sex are violative of Title VII.ⁿ⁹⁹ However, even height and weight restrictions which are applied uniformly often have an adverse impact on a protected group and must therefore satisfy the business necessity test discussed in § 41.21[4].ⁿ¹⁰⁰ For example, in *Dothard v. Rawlinson*,ⁿ¹⁰¹ the United States Supreme Court found a prima facie case of sex discrimination in a statutory height and weight restriction relating to prison guards that would exclude over 41 percent of the nation's female population while excluding less than one percent of the male population.ⁿ¹⁰² The burden then shifted to the employer to show that the restrictions were necessary for safe and efficient job performance,ⁿ¹⁰³ but the employer merely asserted that strength is essential to performance and that the height and weight restrictions were related to strength.ⁿ¹⁰⁴ The employer produced no evidence correlating the restrictions with the strength required for good job performance.ⁿ¹⁰⁵ Accordingly, the Court invalidated the height and weight requirements, noting that the employer's purpose could be achieved by adopting and validating a test that measured strength directly.ⁿ¹⁰⁶

In *Blake v. City of Los Angeles*,ⁿ¹⁰⁷ a minimum height restriction for police officers excluded 87 percent of all women, but only 20 percent of all men.ⁿ¹⁰⁸ The Ninth Circuit Court of Appeals found a prima facie case of disproportionate impact against women,ⁿ¹⁰⁹ and held that the employer failed to demonstrate that the height restriction satisfied the "business necessity" standards articulated in *Dothard* and other applicable sources.ⁿ¹¹⁰ For a detailed discussion relating to "business necessity" standards, *see* §§ 41.21[4] and 41.95

In *Frank v. United Airlines, Inc.*,^{n110.1} the defendant's weight maximums for its female flight attendants generally corresponded to the medium frame category of MetLife's Height and Weight Tables. By contrast, the maximums for the male flight attendants generally corresponded to MetLife's large frame category.^{n110.2} Because of this programmatic difference in the treatment of women and men, the Ninth Circuit concluded that the defendant's weight policy between 1980 and 1994 was facially discriminatory.^{n110.3}

Although most height and weight restriction cases involve sex discrimination, such requirements may also disproportionately exclude applicants based on national origin.ⁿ¹¹¹ Thus, in *Davis v. County of Los Angeles*,ⁿ¹¹² the Ninth Circuit Court of Appeals determined that a minimum height restriction for firefighters had a discriminatory impact on Mexican-American applicants because 41 percent of the applicants were excluded by the restriction.ⁿ¹¹³ The court invalidated the restriction because the fire department failed to demonstrate that it was manifestly related to employment.ⁿ¹¹⁴ A federal District Court in California held that a similar height restriction discriminated against Asians and Latins.ⁿ¹¹⁵

FEHC regulations interpreting the FEHA prohibit the use of discriminatory height and weight restrictions unless pursuant to permissible defense,ⁿ¹¹⁶ and they specifically bar the use of height or weight standards that discriminate against one sex or the other.ⁿ¹¹⁷ Furthermore, the use of separate height and/or separate weight standards for males and females also may be unlawful.ⁿ¹¹⁸ Thus, under the FEHA, "[e]mployee height and weight limitations may be prescribed by an employer where there is a rational basis for such limitations, as shown by supportive analytical factual

data rather than stereotypical generalizations."n119

[l] "No-Spouse" Rules

Employment policies which prohibit the hiring of spouses, so called "no spouse" rules, violate Title VII when they have an adverse impact on one sex, unless they are job related.n120 For example, one employer's rule against hiring an applicant when the applicant's spouse was already employed in the same plant had a substantial discriminatory impact on women because 71 of the last 74 people disqualified under the rule were women.n121 However, the court found the rule to be job-related because it improved the work environment, and because it did not penalize women on the basis of their environmental or genetic background.n122

Although the FEHA expressly prohibits discrimination on the basis of marital status,n123 it does not proscribe all "no-spouse" rules. Nothing in the FEHA relating to marital status discrimination affects the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with rules and regulations adopted by the FEHC.n124 FEHC regulations provide that an employer may refuse, for business reasons of supervision, safety, security, or morale, to place (1) one spouse under the direct supervision of the other spouse, or (2) both spouses in the same department, division, or facility if the work involves potential conflicts of interest or other hazards greater for married couples than for other persons.n125 However, the employer must demonstrate that the hazards are specific to the particular spouses and circumstances involved.n126 The simple fact that the spouses will be working together or the possibility that one will be promoted over the other is not enough to justify the marital status discrimination.n127 For a discussion regarding "no-spouse" rules as they relate to current employees, *see* § 41.65.

[m] Personal Appearance

[i] Grooming and General Appearance

Hiring decisions which are based on an applicant's personal appearance can be based on either immutable characteristics, those that the applicant cannot change, or on characteristics that he or she can change. Employers are given more latitude with respect to setting rules and standards regarding characteristics which are not immutable, even if those requirements are applied differently to men and women.n128

However, some characteristics such as facial hair, which would appear to be changeable by an applicant may become immutable because of their close association with a protected class. For instance, compliance with no beard policies has been shown to exclude African-Americans from employment because of a painful skin condition that affects them in high percentages and can only be alleviated by growing a beard.n129 Such policies are subject to a business necessity defense. Hence, where a no-beard policy was based on safety reasons, specifically that the presence of a beard prevented compliance with OSHA requirements for a tight seal gas mask, it was upheld despite being discriminatory.n130

[ii] Characteristics Resulting From Physiological Disorder

The ADA does not prohibit discrimination on the basis of physical *characteristics*, as opposed to physical impairments. It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of physiological disorder.n131 The California Supreme Court adopted this distinction in a case brought under the FEHA when an applicant claimed she was discriminated against because of her weight.n132 In that case, the employer was found to have based its decision not to hire plaintiff on the fact that she was significantly overweight and she claimed discrimination based on disability or perceived disability within the meaning of the FEHA.n133 The Court rejected her claim based on her failure to show that her obesity resulted from a physical

condition affecting one or more bodily systems.ⁿ¹³⁴ However, this decision does not preclude an individual from making a case of disability discrimination under the FEHA, if he or she can provide evidence of a "physiological, systemic basis for the condition."ⁿ¹³⁵ Accordingly, it would appear that an employer could not discriminate, for example, against an obese person, whose obesity was caused by diabetes, or an emaciated person whose weight loss was caused by cancer or AIDS.ⁿ¹³⁶ And where such condition exists, at least one court has rejected the employer's argument that plaintiff's voluntary conduct which may have contributed to the condition does not preclude protection under the ADA.ⁿ¹³⁷ The FEHA regulations defer to employers on matters of physical appearance, grooming and dress standards except when the employer's standards discriminate against a protected class and significantly burdens the individual in his or her employment.ⁿ¹³⁸ However, the FEHA regulations specifically prohibit employers from requiring that applicants submit photographs with their applications, unless pursuant to a permissible defense.ⁿ¹³⁹

[iii] Height and Weight Restrictions

For a discussion of height and weight requirements *see* [k], *above*.

[m.1] Physical Limitations

Although the ADA prohibits discrimination against qualified individuals who are able to perform the essential functions of the position, with or without reasonable accommodation,^{n139.1} the Supreme Court has held that employers may, in some circumstances, prefer certain physical characteristics for certain positions. For example, in *Sutton v. United Air Lines*,^{n139.2} the employer required that applicants for its global pilot position have *uncorrected* visual acuity of 20/100 or better. Because their *corrected* vision was 20/20 or better, plaintiffs alleged that this policy caused the employer to mistakenly regard them as substantially limited in the life activity of working. However, the Court held that because the employer only excluded plaintiffs from eligibility for a single position, and not a broad class of jobs, the physical preferences were permissible under the ADA.^{n139.3}

[n] Veteran Status

Hiring preferences for veterans have a disparate impact on women because of the overwhelming preponderance of men in the armed forces.ⁿ¹⁴⁰ Nonetheless Title VII expressly sanctions statutory veteran preferences.ⁿ¹⁴¹ Title VII does not, however, sanction nonstatutory preferences adopted voluntarily by private employers.ⁿ¹⁴² In one case involving a private employer in the State of Washington, the Ninth Circuit Court of Appeals held that Title VII did not allow the employer to apply a veterans' preference even though the employer was encouraged by a federal agency to adopt it.ⁿ¹⁴³ The court stated that such encouragement did not convert the preference into an act of Congress.ⁿ¹⁴⁴

California has enacted several veterans' preference statutes. For example, the FEHA provides that its provisions do not affect an employer's right to use veteran status as a factor in employee selection, or to give special consideration to Vietnam era veterans.ⁿ¹⁴⁵

One such statute was challenged as discriminatory in federal district court, which found that, absent discriminatory intent by the legislature, it was not invalid.ⁿ¹⁴⁶ The courts have not yet addressed the question whether employers may consider selection criteria based on military discharges. However, the EEOC, relying on *Gregory v. Litton Systems, Inc.*,ⁿ¹⁴⁷ which invalidated the use of *arrest* records in hiring decisions because of the disproportionate impact on a particular race,ⁿ¹⁴⁸ held that an honorable discharge requirement violates Title VII if it has a disparate impact on minority applicants and cannot be justified by business necessity.ⁿ¹⁴⁹ Military discharges are either administratively issued (i.e. honorable, general, and undesirable discharges) or imposed by sentence of a court martial (i.e., bad conduct and dishonorable discharges). Honorable, general, and undesirable discharges, which do not involve an adjudication, should be analogized to an *arrest* for Title VII purposes. Dishonorable discharges, which are adjudicated, should accordingly be analogized to a *conviction*.ⁿ¹⁵⁰ For a discussion relating to the consideration of arrest and conviction records, *see* [b], *above*.

[3] Subjective Criteria

"Subjective" employee selection criteria lack the "well-defined" characteristics of specific objective criteria like those discussed in [2], above.ⁿ¹⁵¹ They are not "precise and formal,"ⁿ¹⁵² and are often characterized by a "lack of objective job qualifications" for particular job classifications.ⁿ¹⁵³ For example, subjective selection decisions may be based on such criteria as personality attributes,ⁿ¹⁵⁴ stable employment history, interview success, professional reputation, and the ability to "get along with people."ⁿ¹⁵⁵ A supervisor's subjective opinion as to which applicants are "the best for the job" may also be at least a partial basis of selection decisions.ⁿ¹⁵⁶

The use of subjective criteria is not per se illegal.ⁿ¹⁵⁷ Such criteria may be essential, particularly in "upper-level" or "white-collar" positions that may require "different variables an employer [may] reasonable consider."ⁿ¹⁵⁸ Indeed, many jobs may require personal qualities that are not amenable to standardized testing or other objective criteria.ⁿ¹⁵⁹ However, subjective criteria may raise claims of "disparate treatment" since they may be "ready mechanisms for discrimination ... because they mask the influence of impermissible ... bias in making hiring decisions."ⁿ¹⁶⁰ Moreover, to the extent that subjective criteria reflect "subconscious stereotypes and prejudices," and thus have "precisely the same effects as a system pervaded by impermissible intentional discrimination," they may be unlawful under the "disparate impact" theory of liability.ⁿ¹⁶¹ For a detailed discussion relating to the "disparate treatment" and "disparate impact" theories of liability, see §§ 41.10, 41.11, 41.20, and 41.21.

■ CONSULTANT'S COMMENT:

Few employers have ever attempted to validate subjective criteria. Therefore, it is premature to assert that such criteria cannot ever be validated. In many cases, subjective procedures, if scored, may be susceptible to standard validation techniques. *Commentary by Bill Lann Lee.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law
Preemployment Practices

FOOTNOTES:

(n1)Footnote 1. See *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 430, 434, 91 S. Ct. 849, 28 L. Ed. 2d 158, (Congress did not intend Title VII to guarantee job to every person regardless of qualifications; Title VII expressly protects employer's right to insist that any prospective employee must meet applicable job requirements); *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 259, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII was not intended to diminish traditional management prerogatives); and *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1050-1051, 264 Cal. Rptr. 194 (subject to Title VII, 42 U.S.C. § 1981, ADEA, FEHA, and other statutory restrictions, private employer has considerable discretion in setting job-related standards).

(n2)Footnote 2. See *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 259, 101 S. Ct. 1089, 67 L. Ed. 2d 207; see also, 42 U.S.C. § 12112(b)(6) (ADA; prohibiting use of standards, tests, or other selection criteria that screen out disabled persons, unless standards, tests or criteria are shown to be job-related and consistent with business necessity).

(n3)Footnote 3. See *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158.

(n4)Footnote 4. See *Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1405-1406 (Title VII); *Zahorik v. Cornell University* (2d Cir. 1984) 729 F.2d 85, 95 (Title VII).

(n5)Footnote 5. See *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1479, *ret'd to panel*, 827 F.2d 439, *rev'd on other grounds*, 490 U.S. 642 (1989) (Title VII).

(n6)Footnote 6. *See* *Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1405-1406 (Title VII) ; *Zahorik v. Cornell University* (2d Cir. 1984) 729 F.2d 85, 95 (Title VII) ; *see also* discussion in §§ 41.20-41.21.

(n7)Footnote 7. *See Teamsters v. United States* (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) ; *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 430-433, 91 S. Ct. 849, 28 L. Ed. 2d 158 ; *cf.* 29 C.F.R. § 1607.3A (use of any selection procedure that has adverse impact on hiring of members of any race, sex, or ethnic group as considered to be discriminatory).

(n8)Footnote 8. *See Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 . For a detailed discussion relating to the "disparate impact" theory of liability, *see* §§ 41.20-41.21. For a detailed discussion relating to substantive equal employment opportunity defenses generally, *see* Part F (§§ 41.90-41.111).

(n9)Footnote 9. *See Green v. Missouri Pacific Railroad Company* (8th Cir. 1975) 523 F.2d 1290, 1296-1297.

(n10)Footnote 10. *See Gregory v. Litton Systems, Inc.* (9th Cir. 1972) 472 F.2d 631, 632 , *aff'd as mod.* (9th Cir. 1972) 472 F.2d 631 (relying on statistics showing that blacks were arrested with greater frequency than whites).

(n11)Footnote 11. *See DFEH v. Housing Authorities of City and County of Fresno* (1979) FEHC Dec No. 80-20, p.14 (commission found discrimination where convictions considered were over ten years old and there was no direct relationship between offenses committed and position sought by applicant).

(n12)Footnote 12. *Green v Missouri Pacific Railroad Company* (8th Cir. 1975) 523 F.2d 1290.

(n13)Footnote 13. *Green v. Missouri Pacific Railroad Company* (8th Cir. 1975) 523 F.2d 1290, 1298 (Title VII).

(n14)Footnote 14. *See*, 2 Cal. Code Reg. § 7287.4(d)(1) (prohibition on inquiry into criminal records including arrest or detention which does not result in conviction, expunged convictions and certain misdemeanor convictions).

(n15)Footnote 15. *See, e.g., Carter v. Gallagher* (8th Cir. 1971) 452 F.2d 315, 326 , *cert. denied*, 406 U.S. 950 (1972) (rule giving fair consideration to bearing of conviction on applicant's fitness for fire fighter job appropriate); *see also Hetherington v. State Personnel Bd.* (1978) 82 Cal. App. 3d 582, 594, 147 Cal. Rptr. 300 (standards sustained when employer shows that criminal conduct bears relationship to duties of particular occupation).

(n16)Footnote 16. *See Lab. Code § 432.7(a)*. Employers may use such information relating to applicants for, or persons already employed in, peace officer, Justice Department, or other criminal agency positions. *See Lab. Code § 432.7(e)*. This provision is further discussed in Chapter 50.

(n17)Footnote 17. *See* Immigration Act of 1990, 8 U.S.C. § 1324b(a)(1)(A) (national origin) and 8 U.S.C. § 1324b(a)(1)(B) (citizenship status of "protected" individuals, e.g., aliens admitted for permanent residence or granted refugee or asylum status); *see* 8 U.S.C. § 1324b(a)(3). For a complete analysis of the requirements placed on employers to verify all employees' legal permission to work in the United States and the prohibition of discrimination arising out employer verification requirements, *see* 1 Gordon, Mailman and Yale-Loehr, Immigration Law and Procedure, ch. 7 (Matthew Bender).

(n18)Footnote 18. 8 U.S.C. section 1324b(a)(4).

(n19)Footnote 19. 8 U.S.C. section 1324b(a)(2)(C).

(n20)Footnote 20. *See Espinoza v. Farah Mfg. Co.* (1973) 414 U.S. 86, 96, 94 S. Ct. 334, 38 L. Ed. 2d 287 *ret'd to panel*, 827 F.2d 439 , *rev'd on other grounds*, 490 U.S. 642 (1989) (Title VII). *See also* EEOC Guidelines, 29 C.F.R. § 1606.5. For a detailed discussion of the interaction of the anti-discrimination provisions of the Immigration Act of 1990 and Title VII *see* 1 Gordon, Mailman and Yale-Loehr, Immigration Law and Procedure, ch. 7 (Matthew Bender).

(n21)Footnote 21. *See 2 Cal. Code Reg. § 7289.5(f).*

(n22)Footnote 22. *See 29 U.S.C. § 1604.2(a)(1)(iii)* (general prohibition on sex discrimination due to preferences); and *29 U.S.C. § 1604.2(a)(2)* (genuineness is a BFOQ).

(n23)Footnote 23. *See Fernandez v. Wynn Oil Co. (9th Cir. 1981) 653 F.2d 1273, 1277* (court rejected employer's claim that maleness was a BFOQ for doing business in South America because of cultural biases); *see also Lam v. University of Hawaii (9th Cir. 1994) 40 F.3d 1551, 1560, fn.13* (remark by employer that job should be given to man because of Japanese cultural prejudices found to be evidence of discrimination, since existence of third party preferences does not justify discriminatory hiring practices).

(n24)Footnote 24. *See Gerdorn v. Continental Airlines, Inc. (9th Cir. 1982) 692 F.2d 602, 609* (rejecting possibility of customer preference for female attendants as BFOQ).

(n25)Footnote 25. *Compare Ward v. Westland Plastics, Inc. (9th Cir., 1980) 651 F.2d 1266, 1267* (employer's acquiescence to request by female client that women employees not attend luncheon because she wished to be the only woman in attendance was not a violation of Title VII because it was an isolated last minute request and acquiescence was "required to achieve a legitimate business goal").

(n26)Footnote 26. *See 2 Cal Code Reg. § 7290.8.*

(N27)Footnote 27. *See Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 21, 231 Cal. Rptr. 769 .*

(n28)Footnote 28. *See Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 23, 231 Cal. Rptr. 769 . But cf. County of Alameda v. Fair Employment & Housing Com. (1984) 153 Cal. App. 3d 499, 505-506, 200 Cal. Rptr. 381* (under facts presented, privacy of prisoners was a BFOQ for hiring only male cooks).

(n29)Footnote 29. *See Johnson v. Pike Corporation of America (C.D. Cal. 1971) 332 F. Supp. 490, 494* (court recognized that minority groups' representation in the lower end of the economic scale was disproportionate, that they were more frequently in debt and more likely to be subject to "questionable credit practices").

(n30)Footnote 30. *See EEOC Decision No. 72-1176* (February 28, 1972) (bank violated Title VII by basing hiring decision on credit references since policy had disproportionate impact on minority group members who were three times as likely to fall below poverty level).

(n31)Footnote 31. *See Keenan v. American Cast Iron Pipe Co. (11th Cir. 1983) 707 F.2d 1274, 1276* (Title VII; trial court committed reversible error in refusing to consider entire garnishment policy for purpose of prima facie case); *Johnson v. Pike Corp. of Am. (C.D. Cal. 1971) 332 F. Supp. 490, 494* (Title VII; employer rule authorizing discharge of employees whose wages are garnished discriminated against minority group members).

(n32)Footnote 32. *See Bell v. Citizens Fidelity Bank & Trust Co. (6th Cir. 1980) 636 F.2d 1119* (remanding to determine whether bank's practice of discharging employees who file for bankruptcy had discriminatory impact on blacks); *but cf. Marshall v District of Columbia (D.C. Cir. 1975) 559 F.2d 726, 727* (regulation barring hiring of bankrupts as police officers not racially motivated).

(n33)Footnote 33. [Reserved]

(n34)Footnote 34. *See 11 U.S.C. § 525(b).*

(n35)Footnote 35. *See Laracuenta v Chase Manhattan Bank (1st Cir. 1989) 891 F.2d 17, 21-24* (court, relying greatly on the "solely because" language of the statute, found that bankruptcy status was not the sole motive behind employee's firing).

(n36)Footnote 36. 42 U.S.C. § 12114(b)(ADA).

(n37)Footnote 37. See 29 U.S.C. § 705(20)(C)(ii) (Rehabilitation Act); see also *Davis v. Bucher* (E.D. Pa. 1978) 451 F. Supp. 791 (employer policy against hiring former drug users was a violation of the Rehabilitation Act).

(n38)Footnote 38. See 29 U.S.C. § 705(20)(C)(i) (Rehabilitation Act); 42 U.S.C. § 12114(a) (ADA); See also ch. 40, pt. C.

(n39)Footnote 39. See § 41.46[2].

(n40)Footnote 40. See 29 U.S.C. § 705(20)(C)(ii) (Rehabilitation Act); 42 U.S.C. § 12114(b) (ADA); See also ch. 40, pt. C.

(n41)Footnote 41. See 42 U.S.C. § 12114(c)(1)(ADA); see also 29 U.S.C. § 705(20)(C)(v) (Rehabilitation Act).

(n42)Footnote 42. See 42 U.S.C. § 12114(c)(4)(ADA); see also 29 U.S.C. § 705(20)(C)(v) (Rehabilitation Act); see also *Crewe v U.S. Office of Personnel Management* (8th Cir. 1987) 834 F.2d 140, 143 (OPM rejection of alcoholic applicant with history of failed rehabilitation attempts was not a violation of the Rehabilitation Act because applicant did not demonstrate availability of reasonable accommodation).

(n43)Footnote 43. See *Newland v. Dalton* (9th Cir. 1996) 81 F.3d 904, 906 (civilian Navy employee who fired assault rifle inside bar during drunken rampage was terminated for misconduct, not in retribution for alcoholism).

(n44)Footnote 44. See Gov. Code § 12926(i) (definition of mental disability) and Gov. Code § 12926(k) (definition of physical disability).

(n45)Footnote 45. See *Hartman v City of Petaluma* (N.D. Cal. 1994) 841 F. Supp. 946, 949 (no ADA violation found for failure to hire individual who admitted to prior casual use); see also *EEOC Compliance Manual (CCH)* § 902 (application of the definition of "disability").

(n46)Footnote 46. See Labor Code § 432.8(employers are prohibited from considering misdemeanor marijuana arrests or convictions in making hiring decisions).

(n47)Footnote 47. See *New York Transit Auth. v Beazer* (1979) 440 U.S. 568, 99 S.Ct 1355, 59 L. Ed. 2d 587 (plaintiffs argued but failed to show adverse impact of Transit Authority's policy prohibiting hire of methadone users and failed to overcome job relatedness of policy).

(n48)Footnote 48. *Davis v. City of Dallas* (5th Cir. 1985) 777 F.2d 205, 223-225, cert. denied, 476 U.S. 1116 (1986).

(n49)Footnote 49. See Pub. L. No. 102-166, § 105(a).

(n50)Footnote 50. See 21 U.S.C. § 802(6) (controlled substances do not include alcoholic beverages or tobacco).

(n51)Footnote 51. 42 U.S.C. § 2000e-2(k)(3). There are no cases which discuss the effect of this amendment on claims of discriminatory hiring practices.

(n52)Footnote 52. See *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158.

(n53)Footnote 53. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158.

(n54)Footnote 54. See *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158.

(n55)Footnote 55. See *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 430 n.6, 91 S. Ct. 849, 28 L. Ed. 2d 158

(relying on 1960 North Carolina census showing 34% of white males were high school graduates, as opposed to 12% of black males).

(n56)Footnote 56. See *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 426, 430, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n57)Footnote 57. See *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 427, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n58)Footnote 58. See *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 433, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n59)Footnote 59. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 433, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n60)Footnote 60. See, e.g., *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (Title VII; labor) ; *Carpenter v. Stephen F. Austin State University* (5th Cir. 1983) 706 F.2d 608 (Title VII; service/maintenance and clerical); *Donnell v. General Motors Corp.* (8th Cir. 1978) 576 F.2d 1292 (Title VII; skilled trade).

(n61)Footnote 61. See *Davis v. Dallas* (5th Cir. 1985) 777 F.2d 205, 211 , cert. denied, 476 U.S. 1116 (1986) (Title VII); see also *Aguilera v. Cook County Police & Corrections Merit Bd.* (7th Cir. 1985) 760 F.2d 844, 848 , cert. denied, 474 U.S. 907 (1985) (Title VII; suggesting that there is presumption in civil rights cases that high school education is appropriate requirement for police officers); *Castro v. Beecher* (1st Cir. 1972) 459 F.2d 725, 735 (Title VII).

(n62)Footnote 62. *Aguilera v. Cook Cty. Police and Corr. Merit Bd.* (7th Cir. 1985) 760 F.2d 844, 848 , cert. denied, 474 U.S. 907 (Title VII) .

(n63)Footnote 63. See *Spurlock v. United Airlines, Inc.* (10th Cir. 1972) 475 F.2d 216, 219 (Title VII).

(n64)Footnote 64. See *Hawkins v. Anheuser-Busch, Inc.* (8th Cir. 1983) 697 F.2d 810, 815-816 (Title VII; position of "trade returns supervisor" at brewery).

(n65)Footnote 65. 29 C.F.R. § 1606.6(b)(2).

(n66)Footnote 66. See 29 C.F.R. §§ 1606.1-1606.8.

(n67)Footnote 67. See 29 C.F.R. § 1606.6(b)(1). See also *Odima v. Westin Tucson Hotel* (9th Cir. 1995) 53 F.3d 1484, 1491 (rejection of Nigerian applicant because of "heavy accent" was pretext for race and nationality discrimination). For general discussion of national origin discrimination, see § 41.33.

(n68)Footnote 68. See *Garcia v. Rush-Presbyterian, Etc.* (7th Cir. 1981) 660 F.2d 1217, 1222 (Title VII; English fluency requirement had no adverse impact because plaintiffs made no showing that Latinos were excluded from workforce at greater rate than persons of other national origins); *Vasquez v. McAllen Bag & Supply Co.* (5th Cir. 1981) 660 F.2d 686, 688 (42 U.S.C. § 1981).

(n69)Footnote 69. See *Garcia v. Rush-Presbyterian, Etc.* (7th Cir. 1981) 660 F.2d 1217, 1222 (Title VII); *Vasquez v. McAllen Bag & Supply Co.* (5th Cir. 1981) 660 F.2d 686, 688 (42 U.S.C. § 1981).

(n70)Footnote 70. See 29 C.F.R. § 1606.7(a)

(n71)Footnote 71. See 29 C.F.R. § 1606.7(b); see also 2 Cal. Code Reg. § 7289.5(d).

(n72)Footnote 72. See *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480 1488 (remanded case for

determination of whether one or more employees with limited proficiency in English were adversely impacted).

(n73)Footnote 73. *See Chrisner v. Complete Auto Trans., Inc.* (6th Cir. 1981) 645 F.2d 1251, 1258 (Title VII).

(n74)Footnote 74. *Spurlock v. United Airlines, Inc.* (10th Cir. 1972) 475 F.2d 216, 218 (Title VII).

(n75)Footnote 75. *See Chrisner v. Complete Auto Trans., Inc.* (6th Cir. 1981) 645 F.2d 1251, 1262 (Title VII); *Spurlock v. United Airlines, Inc.* (10th Cir. 1972) 475 F.2d 216, 219 (Title VII).

(n76)Footnote 76. *See Spurlock v. United Airlines, Inc.* (10th Cir. 1972) 475 F.2d 216, 218 (Title VII).

(n77)Footnote 77. *Chrisner v. Complete Auto Trans., Inc.* (6th Cir. 1981) 645 F.2d 1251, 1258 (Title VII).

(n78)Footnote 78. *See* 29 C.F.R. § 1607.5B.

(n79)Footnote 79. 29 C.F.R. § 1607.14C(6).

(n80)Footnote 80. *See* 2 Cal. Code Reg. § 7295.7 (prohibition set out in section regarding affording applicants over 40 equal opportunities).

(n81)Footnote 81. *See* 2 Cal. Code Reg. § 7291.0(d) (subsection concerning equal opportunities for women).

(n82)Footnote 82. *See Geller v. Markham* (2d Cir. 1980) 635 F.2d 1027, 1030, 1034, cert. denied, 451 U.S. 945 (1981).

(n83)Footnote 83. *See E.E.O.C. v Insurance Co. of North America* (9th Cir. 1995) 49 F.3d 1418 (employer could legitimately prefer less experienced candidates, because of concern that more qualified candidate would spend too much time on file); *see also Teamsters v. United States* (1977) 431 U.S. 324, 325, n. 15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (facially neutral policy is discriminatory if not justified by business necessity).

(n84)Footnote 84. *See United States EEOC v. Newport Mesa Unified Sch. Dist.* (C.D.Cal 1995) 893 F. Supp. 927 (policy of preferring less years of experience not a violation of ADEA when financial constraints were the reason for policy). *But cf. Geller v. Markham* (2d Cir. 1980) 635 F.2d 1027, 1033, cert. denied, 451 U.S. 945 (1981) (The court concluded that the plaintiff, a 55-year-old applicant with considerable teaching experience, had established disparate impact by proving that she was subjected to a facially neutral policy that disproportionately disadvantaged her as a member of a protected class and rejected the school board's cost justification under governing EEOC regulations) and 29 C.F.R. § 1625.7(f).

(n85)Footnote 85. *Gov. Code* § 12940(a) (FEHA; marital status is protected classification). *See also* discussion of "no-spouse rules" in section [I].

(n86)Footnote 86. *See DFEH v. Boy Scouts of America* (1981) FEHC 81-15 *see also Smith v. Fair Employment & Housing Com.* (1996) 12 Cal. 4th 1143, 1160, 51 Cal. Rptr. 2d 700, 913 P.2d 909 (affirming protected status of unmarried cohabiting couple under FEHA [housing case]).

(n87)Footnote 87. *See* 29 C.F.R. § 1604.4(a) (rule that forbids or restricts employment of married women and that is not applicable to married men constitutes sex discrimination under Title VII).

(n88)Footnote 88. *See Phillips v. Martin Marietta Corp.* (1971) 400 U.S. 542, 544, 91 S. Ct. 496, 27 L. Ed. 2d 613.

(n89)Footnote 89. *Phillips v. Martin Marietta Corp.* (1971) 400 U.S. 542, 91 S. Ct. 496, 27 L. Ed. 2d 613.

(n90)Footnote 90. See *Phillips v. Martin Marietta Corp.* (1971) 400 U.S. 542, 544, 91 S. Ct. 496, 27 L. Ed. 2d 613 .

(n91)Footnote 91. See *Phillips v. Martin Marietta Corp.* (1971) 400 U.S. 542, 544, 91 S. Ct. 496, 27 L. Ed. 2d 613 .

(n92)Footnote 92. See 29 C.F.R. § 1630.8 and illustrative example in 29 C.F.R. App. § 1630.8.

(n93)Footnote 93. See 29 C.F.R. § 1630.8 and illustrative example in 29 C.F.R. App. § 1630.8.

(n94)Footnote 94. See 42 U.S.C. § 2000e(k) (Title VII: discrimination based on pregnancy is a form of sex discrimination); *Gov. Code* § 12945(FEHA; employment discrimination based on pregnancy is prohibited) and 2 *Cal. Code Reg.* § 7291.2(b), (c), (d) (pregnancy discrimination constitutes sex discrimination under FEHA); see also discussion in § 41.36[2][c].

(n95)Footnote 95. See *Int'l Union, United Auto., etc. v. Johnson Controls* (1991) 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 .

(n96)Footnote 96. See *Int'l Union, United Auto., etc. v. Johnson Controls* (1991) 499 U.S. 187 ; 111 S.Ct 1196, 113 L. Ed. 2d 158

(n97)Footnote 97. See *Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal. App. 3d 517, 267 Cal. Rptr. 158

(n98)Footnote 98. See *Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal. App. 3d 517, 267 Cal. Rptr. 158 (basing its holding on 2 *Cal Code Reg.* § 7291.0(c)).

(n99)Footnote 99. See *Gerom v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602, 609 (weight restriction on females only, imposed because of competitive strategy of employer to have more attractive flight attendants, was violation of Title VII).

(n100)Footnote 100. Cf. 29 C.F.R. § 1607.4C (height and weight restrictions must be individually evaluated by user if court decisions and administrative interpretations hold them to be not job-related in same or similar circumstances).

(n101)Footnote 101. *Dothard v. Rawlinson* (1977) 433 U.S. 321, 97 S. Ct. 2720, 53 L. Ed. 2d 786 .

(n102)Footnote 102. See *Dothard v. Rawlinson* (1977) 433 U.S. 321, 329-331, 97 S. Ct. 2720, 53 L. Ed. 2d 786 ; see also *Hardy v. Stumpf* (1974) 37 Cal. App. 3d 958, 964, 112 Cal. Rptr. 739 (U.S. Const., Amend. XIV; Cal. Const., Art. I, §§ 11, 21; Cal. Const., Art. XX; height and weight requirement for police officers are discriminatory classification if statistics show that standards imposed in fact exclude virtually all women).

(n103)Footnote 103. *Dothard v. Rawlinson* (1977) 433 U.S. 321, 97 S. Ct. 2720, 53 L. Ed. 2d 786 ; for a discussion relating to this standard, see § 41.21[4].

(n104)Footnote 104. See *Dothard v. Rawlinson* (1977) 433 U.S. 321, 331, 97 S. Ct. 2720, 53 L. Ed. 2d 786 .

(n105)Footnote 105. See *Dothard v. Rawlinson* (1977) 433 U.S. 321, 331, 97 S. Ct. 2720, 53 L. Ed. 2d 786 .

(n106)Footnote 106. See *Dothard v. Rawlinson* (1977) 433 U.S. 321, 332, 97 S. Ct. 2720, 53 L. Ed. 2d 786 .

(n107)Footnote 107. *Blake v. City of Los Angeles* (9th Cir. 1979) 595 F.2d 1367 (Title VII).

(n108)Footnote 108. *See Blake v. City of Los Angeles* (9th Cir. 1979) 595 F.2d 1367, 1374 (Title VII).

(n109)Footnote 109. *See Blake v. City of Los Angeles* (9th Cir. 1979) 595 F.2d 1367, 1375 (Title VII).

(n110)Footnote 110. *See Blake v. City of Los Angeles* (9th Cir. 1979) 595 F.2d 1367, 1378-1382 (Title VII); *see also Washington v. Davis* (1976) 426 U.S. 229, 247 fn. 13, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (U.S. Const., Amend. XIV); *Albamarle Paper Co. v. Moody* (1975) 422 U.S. 405, 431, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (Title VII) ; 29 C.F.R. §§ 1607.5-1607.15 (EEOC employee selection guidelines relating to minimum standards for professional validation studies).

(n111)Footnote 110.1. *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845 .

(n112)Footnote 110.2. *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 854 .

(n113)Footnote 110.3. *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 854 .

(n114)Footnote 111. *Cf. 29 C.F.R. § 1606.6(a)(2)* (because height and weight requirements tend to exclude certain individuals on national origin basis, employers are expected to evaluate procedures for adverse impact).

(n115)Footnote 112. *Davis v. County of Los Angeles* (9th Cir. 1977) 566 F.2d 1334 , *vacated and remanded on other grounds*, 440 U.S. 625 (1979) (Title VII).

(n116)Footnote 113. *See Davis v. County of Los Angeles* (9th Cir. 1977) 566 F.2d 1334, 1341 , *vacated and remanded on other grounds*, 440 U.S. 625 (1979) (Title VII).

(n117)Footnote 114. *See Davis v. County of Los Angeles* (9th Cir. 1977) 566 F.2d 1334, 1342 , *vacated and remanded on other grounds*, 440 U.S. 625 (1979) (Title VII); *see also Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 666-668 , *cert. denied*, 450 U.S. 919 (Title VII; evidence inadequate to prove that minimum height restriction which eliminated 41 percent of Mexican-American males and 74 percent of Mexican-American females was manifestly related to employment by sheriff's department).

(n118)Footnote 115. *See Officers for Justice v. Civil Serv. Com'n, San Fran.* (N.D. Cal. 1975) 395 F. Supp. 378, 380-381 .

(n119)Footnote 116. *See 2 Cal. Code Reg. §§ 7287.4(d)(2), (3).*

(n120)Footnote 117. *See 2 Cal. Code Reg. § 7291.0(b)(1).*

(n121)Footnote 118. *See 2 Cal. Code Reg. § 7291.0(b)(1).*

(n122)Footnote 119. *McMillen v. Civil Service Com.* (1992) 6 Cal. App. 4th 125, 130, 8 Cal. Rptr. 2d 548 .

(n123)Footnote 120. *See Yuhas v. Libbey-Owens-Ford Co.* (7th Cir. 1977) 562 F.2d 496, 498 , *cert. denied*, 435 U.S. 934 (1978) ; *see also 29 C.F.R. § 1604.4(a); see discussion in § 41.36[2][b].*

(n124)Footnote 121. *See Yuhas v. Libbey-Owens-Ford Co.* (7th Cir. 1977) 562 F.2d 496, 498 , *cert. denied*, 435 U.S. 934 (1978) .

(n125)Footnote 122. *See Yuhas v. Libbey-Owens-Ford Co.* (7th Cir. 1977) 562 F.2d 496, 500 , *cert. denied*, 435 U.S. 934 (1978) .

(n126)Footnote 123. *See Gov. Code § 12940(a); see also discussion in § 41.36[2][b].*

(n127)Footnote 124. *See Gov. Code § 12940(a)(3); see also DFEH Insurance America Sales Agency* (1988) FEHC

Dec. No. 88-07, pp. 5-6(emphasizing that assumptions authorized by *Gov. C. § 12940(a)(3)* are strictly limited to "same department defense").

(n128)Footnote 125. *2 Cal. Code Reg. § 7292.5(a)*.

(n129)Footnote 126. *See DFEH v. City of Simi Valley* (1983) FEHC Dec. No. 83-21, p. 19.

(n130)Footnote 127. *See DFEH v. Insurance America Sales Agency* (1988) FEHC Dec. No. 88-07 (Commission found incentive for spouses in the same department to pool sales to achieve volume bonuses was sufficient to justify rule).

(n131)Footnote 128. *See Baker v. California Land Title Company* (9th Cir. 1974) 507 F.2d 895, 898, *cert. denied*, 422 U.S. 1046 (1975) (hair length standards for men only upheld); *see also DiSantis v. Pacific Tel. & Tel. Co.* (9th Cir. 1979) 608 F.2d 327, 332 (prohibition on the wearing of earrings by men not discriminatory).

(n132)Footnote 129. *See Richardson v. Quik Trip Corp.* (S.D. Iowa 1984) 591 F. Supp. 1151, 1155 (Court relied on scientific studies indicating that between 45 to 83 percent of all black males who shave may be excluded from employment because of a skin condition which makes compliance with a no-beard rule insufferable, while less than one percent of white males are so hindered); *see also EEOC v. Trailways, Inc.* (D. Colo. 1981) 530 F. Supp. 54, 59; *but see Equal Employment Opportunity v. Greyhound Lines* (3d Cir. 1980) 635 F.2d 188, 192, 193 (no-beard policy does not violate Title VII without proof that it has disproportionate impact on employer's workforce).

(n133)Footnote 130. *See Fitzpatrick v. City of Atlanta* (11th Cir. 1993) 2 F.3d 1112 (claim that no-beard policy discriminated against African Americans on the basis of race under Title VII and disability under section 504 of the Rehabilitation Act of 1973 was defeated based on business necessity of safety and plaintiffs' failure to demonstrate availability of reasonable accommodation); *see also Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 1984) 734 F.2d 1382 (no-beard policy discriminated against Sikh Muslims based on religious tenet that forbade cutting hair, but court ruled in favor of company which had offered reasonable accommodation).

(n134)Footnote 131. *See 29 C.F.R. 1630 App. § 1630.2(h)*; *see also EEOC Compliance Manual (CCH) § 902.2*.

(n135)Footnote 132. *See Cassista v. Community Foods, Inc.* (1993) 5 Cal. 4th 1050, 1064, 22 Cal. Rptr. 2d 287, 856 P.2d 1143

(n136)Footnote 133. *See Cassista v. Community Foods, Inc.* (1993) 5 Cal. 4th 1050, 22 Cal. Rptr. 2d 287, 856 P.2d 1143

(n137)Footnote 134. *See Cassista v. Community Foods, Inc.* (1993) 5 Cal. 4th 1050, 1066, 22 Cal. Rptr. 2d 287, 856 P.2d 1143. While this case was pending, the City of Santa Cruz enacted a statute barring "physical characteristics" discrimination. *See Santa Cruz Ordinance 92-11* (April 28, 1992).

(n138)Footnote 135. *See Cassista v. Community Foods, Inc.* (1993) 5 Cal. 4th 1050, 1065, 22 Cal. Rptr. 2d 287, 856 P.2d 1143.

(n139)Footnote 136. *See EEOC Compliance Manual (CCH) § 902* (definition of the term "disability").

(n140)Footnote 137. *See Cook v. Department of Mental Health, Retardation, & Hosps.* (1993) 10 F.3d 17, 24 (employer assumed obese applicant incapable of performing work, thus bringing applicant within purview of ADA because "regarded as" disabled).

(n141)Footnote 138. *See 2 Cal. Code Reg. § 7287.6*.

(n142)Footnote 139. *2 Cal. Code Reg. § 7287.3(c)(2)*.

(n143)Footnote 139.1. *42 U.S.C. § 12111(8)-(9).*

(n144)Footnote 139.2. *Sutton v. United Air Lines, Inc. (1999) 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 , overruled by statute on other grounds [see P.L. 110-325, §§ 1, 2].*

(n145)Footnote 139.3. *Sutton v. United Air Lines, Inc. (1999) 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 , overruled by statute on other grounds [see P.L. 110-325, §§ 1, 2].*

(n146)Footnote 140. *See, e.g., Personnel Administrator of Mass. v. Feeney (1979) 442 U.S. 256, 270, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (U.S. Const., Amend. XIV; 98 percent of veterans in Massachusetts were male while only 1.8 percent were female); Brown v. Puget Sound Elec. App. & Train. Trust (9th Cir. 1984) 732 F.2d 726, 731 , cert. denied, 469 U.S. 1108 (Title VII; 21.5 percent of all males and only 0.4 percent of all females in area covered by apprenticeship program were veterans).*

(n147)Footnote 141. *See 42 U.S.C. § 2000e-11.*

(n148)Footnote 142. *Brown v. Puget Sound Elec. App. & Train. Trust (9th Cir. 1984) 732 F.2d 726, 730 , cert. denied, 469 U.S. 1108 .*

(n149)Footnote 143. *See Brown v. Puget Sound Elec. App. & Train. Trust (9th Cir. 1984) 732 F.2d 726, 730 , cert. denied, 469 U.S. 1108 (Title VII) .*

(n150)Footnote 144. *See Brown v. Puget Sound Elec. App. & Train. Trust (9th Cir. 1984) 732 F.2d 726, 731 , cert. denied, 469 U.S. 1108 (Title VII) .*

(n151)Footnote 145. *Gov. Code § 12940(a)(4); see also Gov. Code § 7280.3 (state will reimburse employers for one-half of the wages paid to previously unemployed Vietnam War veterans for the first eighteen months of employment); Lab. Code § 3076.5(veterans are given ten points credit in apprenticeship selection process).*

(n152)Footnote 146. *See Bannerman v. Department of Youth Authority (C.D. Cal 1977) 436 F. Supp 1273, 1280 (Court relied on standards for finding discrimination (i.e. examination of legislative intent) expressed in Washington v. Davis (1976) 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 , to find no discrimination in veteran preference statute).*

(n153)Footnote 147. *Gregory v. Litton Systems, Inc. (9th Cir. 1972) 472 F.2d 631 .*

(n154)Footnote 148. *See Gregory v. Litton Systems, Inc. (9th Cir. 1972) 472 F.2d 631, 632 .*

(n155)Footnote 149. *See EEOC Dec. No. 74-25.*

(n156)Footnote 150. *See Schlei and Grossman, Employment Discrimination Law (2d ed. 1983) Ch. 5, "Nonscored Objective Criteria."*

(n157)Footnote 151. *See Heagney v. University of Washington (9th Cir. 1981) 642 F.2d 1157, 1163 (Title VII).*

(n158)Footnote 152. *See Watson v. Ft. Worth Bank & Trust (1988) 487 U.S. 977, 982, 108 S. Ct. 2777, 101 L. Ed. 2d 827 .*

(n159)Footnote 153. *See Atonio v. Wards Cove Packing Co., Inc. (9th Cir. 1987) 810 F.2d 1477, 1479 , ret'd to panel, 827 F.2d 439 , rev'd on other grounds, 490 U.S. 642 (1989) (Title VII).*

(n160)Footnote 154. *See Nanty v. Barrows Co. (9th Cir. 1981) 660 F.2d 1327, 1334 (applicants could be required to be neat, articulate, and personable).*

(n161)Footnote 155. See *Frausto v. Legal Aid Soc. of San Diego, Inc.* (9th Cir. 1977) 563 F.2d 1324, 1328 .

(n162)Footnote 156. See *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1479 , *ret'd to panel*, 827 F.2d 439 , *rev'd on other grounds*, 490 U.S. 642 (1989) (Title VII).

(n163)Footnote 157. *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1481 , *ret'd to panel*, 827 F.2d 439 , *rev'd on other grounds*, 490 U.S. 642 (1989) (Title VII); *Heagney v. University of Washington* (9th Cir. 1981) 642 F.2d 1157, 1163 (Title VII).

(n164)Footnote 158. See Schlei and Grossman, *Employment Discrimination Law* (2d ed. 1983) Ch. 6, "Subjective Criteria"; see also *Rogers v. International Paper Co.* (8th Cir. [Ark.] 1975) 510 F.2d 1340, 1345 , vacated and remanded on other grounds 423 U.S. 809 (1975) (Title VII; decisions about hiring and promotion in supervisory and managerial jobs as not realistically made using objective standards alone).

(n165)Footnote 159. See *Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 990-991, 108 S. Ct. 2777, 101 L. Ed. 2d 827 .

(n166)Footnote 160. See *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 827 F.2d 439, 445-446 , *rev'd on other grounds*, 490 U.S. 642 (1989) (Title VII).

(n167)Footnote 161. See *Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S.977, 108 S. Ct. 2777, 101 L. Ed. 2d 827 ; see also *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1482 , *ret'd to panel*, 827 F.2d 439 , *rev'd on other grounds*, 490 U.S. 642 (1989) (Title VII).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART C. PREEMPLOYMENT PRACTICES

2-41 California Employment Law § 41.43

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.43 Advertising and Other Recruiting Methods

[1] Advertising

[a] Gender

Title VII, the ADEA, and the FEHA proscribe employment advertisements that indicate any preference, limitation, specification, or discrimination based on a protected classification, except when the classification is a bona fide occupational qualification (BFOQ).ⁿ¹ According to the EEOC guidelines on sex discrimination, it is a violation of Title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification (BFOQ) for the particular job involved.ⁿ² Similarly, FEHC regulations provide that it is unlawful for any publication or other media to separate listings of job openings into "male" and "female" classifications,ⁿ³ that it is unlawful to advertise or publicize an employment benefit in any way which discourages or is designed to discourage disabled applicants,ⁿ⁴ and that employers may not express a preference in any advertising medium for applicants under 40 or a limitation against age 40 or older.ⁿ⁵ Discriminatory advertising is not limited to segregated formats. Terms and phrases within individual advertisements may also violate Title VII or other equal employment opportunity laws. For example, sexually referent terms, such as stewardess, hostess, fireman, which imply that the employee will be of a particular sex, may form the basis of a discrimination claim. The 1990 EEOC Policy Guide on Sex-Referent Language in Job Advertisementsⁿ⁶ states that "the use of sex-referent language ... is suspect but not a per se violation of Title VII."ⁿ⁷ Therefore, according to this guide, there is no violation of Title VII where sex-referent language is used in conjunction with language clearly indicating that sex-based preference is not intended.ⁿ⁸ However, simply stating that the employer is an "Equal Opportunity Employer" in conjunction with sex-referent language is not sufficient to overcome this suspicion.ⁿ⁹ In *Hailes v. United Air Lines*,ⁿ¹⁰ the court concluded that the advertisement violated Title VII because the employer used the term "stewardesses" as well as an unlawful format.ⁿ¹¹ The *Hailes* court further explained that Title VII prohibits the types of advertisement that, by their expression of preference for one sex, effectively inhibit members of the opposite sex from seeking employment.ⁿ¹² The court suggested that "the very appearance at an employer's offices of one who ... read [a] discriminatory ad but nevertheless continued to seek the job, would demonstrate that the reader was not deterred by [the] unlawful practice and therefore not aggrieved."ⁿ¹³ Although the court rejected the employer's contention that a plaintiff cannot be

aggrieved by an advertisement unless he or she actually *applies*, it did, however, refuse to rule that a mere casual reader may sue. The court declared that a person must show (1) he or she has a real, present interest in the type of employment advertised, and (2) he or she was effectively deterred from applying for the employment.ⁿ¹⁴ In *Hailes*, the male plaintiff established such deterrence by showing that he had previously responded to a similar "Help wanted--Female" advertisement, and had been refused because of his sex.ⁿ¹⁵ The court concluded that the plaintiff in the instant case reasonably believed that any job application would have been futile.ⁿ¹⁶

[b] Age

Advertisements expressing a preference for applicants of a certain age may violate the ADEA. The federal regulations interpreting the ADEA state that when help-wanted notices or advertisements contain terms and phrases such as "age 25 to 35," "college student," "recent college graduate," "boy," "girl," or other terms of a similar nature, the term or phrase deters the employment of older persons and is a violation of the ADEA, unless an exception applies.ⁿ¹⁷

Further, the EEOC has issued a guide for employers with respect to job advertising under the ADEA.ⁿ¹⁸ In this guide, the EEOC discusses language which was found violative by the Fourth Circuit in *Hodgson v. Approved Personnel Service, Inc.*ⁿ¹⁹ and provides examples of other phrases which may constitute age discrimination.ⁿ²⁰ For example, the phrase "applicant must be young, energetic" discriminates against older workersⁿ²¹ and the phrase "retired persons preferred" discriminates against persons over forty who are not yet of retirement age.ⁿ²² However, simply encouraging persons of a protected age to apply in an age neutral advertisement would not be a violation.ⁿ²³

[c] Liability of Advertising Media

In *Brush v. San Francisco Newspaper Printing Company*,ⁿ²⁴ the United States District Court for the Northern District of California concluded that since newspapers do not regularly undertake to procure employees or employment as their profession or business, they are not liable as employment agencies under Title VII for listing employment advertisements under separate "Men" and "Women" headings.ⁿ²⁵

■ CONSULTANT'S COMMENT:

Shortly after the *Brush* litigation concluded, the newspaper industry virtually abandoned sex-segregated classified advertising, thereby eliminating this issue from the equal employment opportunity arena.
Commentary by Erica B. Grubb.

[2] Channeling

"Channeling" is the use of separate hiring channels for different job categories,ⁿ²⁶ and it may be discriminatory if it has the purpose or effect of excluding protected categories of individuals. For example, in *Domingo v. New England Fish Co.*,ⁿ²⁷ an Alaskan employer recruited most of its unskilled employees from a Filipino-dominated union and from Alaskan native villages. Employees for administrative and skilled positions were recruited from out-of-state by "word of mouth."ⁿ²⁸ The superintendents, foremen, and captains who did the recruiting for the (higher-paying) administrative and skilled jobs were predominantly white, and they hired predominantly white employees.ⁿ²⁹ The Ninth Circuit found that such practices could have a discriminatory impact.ⁿ³⁰ The court has also inferred intentional discrimination from the use of racial labels for certain job categories,ⁿ³¹ combined with specific acts of discrimination.ⁿ³²

[3] Nepotism

Nepotism is the practice of giving preference to relatives,ⁿ³³ and may be discriminatory if protected classification members are adversely affected. In particular, nepotistic practices that freeze the discriminatory status quo are unlawful.ⁿ³⁴ For example, in *Atonio v. Wards Cove Packing Co., Inc.*, evidence showed that of 349 nepotistic hires, 332 were white and 17 were minorities.ⁿ³⁵ The Ninth Circuit Court of Appeals held that the qualifications of the relatives hired under the policy did not refute a prima facie case of disparate impact because the employer must prove

that the nepotistic policy itself is justified by business necessity.ⁿ³⁶ An interest in protecting and providing for family members does not meet that burden because "nepotistic concerns cannot supersede the nation's paramount goal of equal economic opportunity for all."ⁿ³⁷

[4] Referrals

[a] Fair Employment and Housing Act

The FEHA does not expressly prohibit discriminatory referrals, although it does generally prohibit unlawful discrimination by labor unions,ⁿ³⁸ and prohibits discriminatory advertising by employment agencies.ⁿ³⁹ Further, discriminatory referrals at the behest of an employer would be prohibited under the aiding and abetting language of the FEHA.ⁿ⁴⁰

Employers may, however, participate in established recruitment programs with high schools, colleges, universities, and trade schools or use temporary hiring programs directed at youth even though these programs provide disproportionately few applicants over forty as long as the employers using these programs do not rely on them, exclusively, for their source of applicants.ⁿ⁴¹

[b] Federal Prohibitions: Title VII, ADA, and ADEA

Title VII and the ADEA, however, expressly provide that it is unlawful for employment agencies and labor unions to fail or refuse to refer any individual for employment because of the individual's membership in a protected classification.ⁿ⁴² In theory, therefore, employment referral systems that effectively deprive qualified protected individuals of equal employment opportunities are unlawful unless they satisfy the business necessity test discussed in § 41.21[4]. However, if such a referral system is part of a bona fide seniority system, it is lawful under Title VII even if it has the effect of locking minorities into inferior job categories which they occupy as a result of earlier discriminatory practices.ⁿ⁴³ Because many formal referral systems are part of collectively bargained seniority systems, they will be unlawful only if implemented or maintained for the *purpose* of discriminating, *not* merely if they have an adverse impact.

The ADA also prohibits discriminatory referrals, and defines employment agencies and labor unions as "covered entities" subject to the ADA's general proscription against disability discrimination.ⁿ⁴⁴ Furthermore, an *employer* unlawfully discriminates if it participates in a contractual or other arrangement or relationship that has the effect of subjecting a qualified disabled applicant or employee to unlawful disability discrimination. The ADA expressly states that such a relationship includes one with an employment or referral agency, or a labor union.ⁿ⁴⁵

[5] Word of Mouth

"Word-of-mouth" recruiting occurs when incumbent employees inform their friends and relatives about job vacancies,ⁿ⁴⁶ and if it has an adverse impact on a protected group, it will be unlawful unless it satisfies the business necessity test discussed in § 41.21[4].ⁿ⁴⁷ For example, in *United States v. Georgia Power Company*,ⁿ⁴⁸ only 7.2 percent of a company's labor force was black, although blacks constituted a much larger percentage of the available labor force.ⁿ⁴⁹ The Fifth Circuit Court of Appeals declared that since most of the company's incumbent employees were white, word-of-mouth hiring tended to isolate blacks from the "web of information" that flowed around opportunities at the company.ⁿ⁵⁰ The court found no business necessity for the employer's reliance on word-of-mouth recruiting, and required the employer to take "affirmative steps reasonably calculated to encourage black employment[,] and to break through the ... circumscribed web of information."ⁿ⁵¹ However, the Seventh Circuit found word of mouth recruitment which was "passive" and resulted in continuation of a Korean workforce was not evidence of discriminatory intent in a disparate treatment context.ⁿ⁵²

Legal Topics:

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

Labor & Employment Law
 Discrimination
 Age Discrimination
 General Overview
 Labor & Employment Law
 Discrimination
 Title VII of the Civil Rights Act of 1964
 General Overview
 Labor & Employment Law
 Preemployment Practices

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-3(b) (Title VII); 29 U.S.C. § 623(e) (ADEA); *Gov. Code* § 12940(d) (FEHA).

(n2)Footnote 2. *See* 29 C.F.R. § 1604.5; *see also* 29 C.F.R. §§ 1604.2(a)(1) (labels such as "Men's jobs" and "Women's jobs" as tending to deny employment opportunities unnecessarily to one sex or other), 1625.4(a)(violation of ADEA for help wanted notices or advertisements to contain age-related labels).

(n3)Footnote 3. 2 *Cal. Code Reg.* § 7290.9(a)(2).

(n4)Footnote 4. 2 *Cal Code Reg.* § 7294.0(a)(2).

(n5)Footnote 5. 2 *Cal. Code Reg.* § 7295.4(a)(2).

(n6)Footnote 6. *See* EEOC Compliance Manual (CCH) § 632 (policy guide on sex-referent language in employment opportunity advertising and recruitment).

(n7)Footnote 7. *See* EEOC Compliance Manual (CCH) § 632 (policy guide on sex-referent language in employment opportunity advertising and recruitment).

(n8)Footnote 8. *See* EEOC Compliance Manual (CCH) § 632 (policy guide on sex-referent language in employment opportunity advertising and recruitment).

(n9)Footnote 9. *See* EEOC Compliance Manual (CCH) § 632 (policy guide on sex-referent language in employment opportunity advertising and recruitment).

(n10)Footnote 10. *Hailes v. United Air Lines* (5th Cir. 1972) 464 F.2d 1006 .

(n11)Footnote 11. *See Hailes v. United Air Lines* (5th Cir. 1972) 464 F.2d 1006, 1009 . *See also Banks v. Heun-Norwood* (8th Cir. 1977) 566 F.2d 1073, 1074-1076 (the phrase "young man with a college degree" in an advertisement violated Title VII).

(n12)Footnote 12. *Hailes v. United Air Lines* (5th Cir. 1972) 464 F.2d 1006, 1008 .

(n13)Footnote 13. *Hailes v. United Air Lines* (5th Cir. 1972) 464 F.2d 1006, 1008 .

(n14)Footnote 14. *See Hailes v. United Air Lines* (5th Cir. 1972) 464 F.2d 1006, 1008 .

(n15)Footnote 15. *See Hailes v. United Air Lines* (5th Cir. 1972) 464 F.2d 1006, 1008 .

(n16)Footnote 16. *See Hailes v. United Air Lines* (5th Cir. 1972) 464 F.2d 1006, 1008 .

(n17)Footnote 17. *See* 29 C.F.R. § 1625.4(a).

(n18)Footnote 18. *See* EEOC Compliance Manual (CCH) § 801, P 6522 (job advertising and pre-employment inquiries under the Age Discrimination In Employment Act (ADEA)).

(n19)Footnote 19. *See, Hodgson v. Approved Personnel Service, Inc.* (4th Cir. 1975) 529 F.2d 760), 766; *see also* EEOC Compliance Manual (CCH) § 801, P 6522 (job advertising and pre-employment inquiries under the Age

Discrimination In Employment Act (ADEA)).

(n20)Footnote 20. *See EEOC Compliance Manual (CCH) § 801*, P 6522 (job advertising and pre-employment inquiries under the Age Discrimination In Employment Act (ADEA)).

(n21)Footnote 21. *See EEOC Compliance Manual (CCH) § 801*, P 6522 (job advertising and pre-employment inquiries under the Age Discrimination In Employment Act (ADEA)).

(n22)Footnote 22. *See EEOC Compliance Manual (CCH) § 801*, P 6522 (job advertising and pre-employment inquiries under the Age Discrimination In Employment Act (ADEA)).

(n23)Footnote 23. *See EEOC Compliance Manual (CCH) § 801*, P 6522 (job advertising and pre-employment inquiries under the Age Discrimination In Employment Act (ADEA)).

(n24)Footnote 24. *Brush v. San Francisco Newspaper Printing Company (N.D. Cal. 1970) 315 F. Supp. 577*, *aff'd*, 469 F.2d 89 (9th Cir. 1972), *cert. denied*, 410 U.S. 943.

(n25)Footnote 25. *See Brush v. San Francisco Newspaper Printing Company (N.D. Cal. 1970) 315 F. Supp. 577*, 580-582, *aff'd*, 469 F.2d 89 (9th Cir. 1972), *cert. denied*, 410 U.S. 943; *see* 42 U.S.C. § 2000e(c) ("employment agency" defined), 42 U.S.C. § 2000e-3(b) (Title VII applies to employment agencies).

(n26)Footnote 26. *See Domingo v. New England Fish Co. (9th Cir. 1984) 727 F.2d 1429, 1435* (Title VII).

(n27)Footnote 27. *Domingo v. New England Fish Co. (9th Cir. 1984) 727 F.2d 1429* (Title VII).

(n28)Footnote 28. *See Domingo v. New England Fish Co. (9th Cir. 1984) 727 F.2d 1429, 1436* (Title VII).

(n29)Footnote 29. *Domingo v. New England Fish Co. (9th Cir. 1984) 727 F.2d 1429, 1436* (Title VII); *see also Antonio v. Wards Cove Packing Co., Inc. (9th Cir. 1987) 827 F.2d 439, 446*, *rev'd on other grounds*, 490 U.S. 642 (1989) (Title VII).

(n30)Footnote 30. *Atonio v. Wards Cove Packing Co., Inc. (9th Cir. 1987) 827 F.2d 439, 446*, *rev'd on other grounds*, 490 U.S. 642 (1989) (Title VII). *but see Antonio v. Wards Cove Packing Company, Inc. (9th Cir. 2001) 275 F.3d 797, 801-802* (trial court properly concluded separate hiring channels did not have discriminatory impact because plaintiffs had no evidence that any lack of information was caused by their hire from a primarily nonwhite union).

(n31)Footnote 31. *See, e.g., Antonio v. Wards Cove Packing Co., Inc. (9th Cir. 1987) 827 F.2d 439, 447*, *rev'd on other grounds*, 490 U.S. 642 (1989) (Title VII). (Title VII; "Filipinos" as working with the "Iron Chink" before retiring to the "Flip bunkhouse"). *but see Antonio v. Wards Cove Packing Company, Inc. (9th Cir. 2001) 275 F.3d 797, 802* (trial court properly concluded race labeling did not cause significant discriminatory impact; although references to "Filipino," "Alaska Native," and "Eskimo," were frequent, inappropriate, and offensive, class members themselves made such references, and no class member testified that he was offended, that it interfered with his work performance, or that he was ridiculed, insulted, or physically threatened or humiliated by comments or deterred from applying for an at-issue job).

(n32)Footnote 32. *See Domingo v. New England Fish Co. (9th Cir. 1984) 727 F.2d 1429, 1436* (Title VII).

(n33)Footnote 33. *Atonio v. Wards Cove Packing Co., Inc. (9th Cir. 1987) 827 F.2d 439, 445*, *rev'd on other grounds*, 490 U.S. 642 (1989) (Title VII).

(n34)Footnote 34. *Bonilla v. Oakland Scavenger Co. (9th Cir. 1982) 697 F.2d 1297, 1303*, *cert. denied*, 467 U.S. 1251 (1984) (Title VII); *Atonio v. Wards Cove Packing Co., Inc. (9th Cir. 1987) 827 F.2d 439, 445*, *rev'd on other grounds*, 490 U.S. 642 (1989) (Title VII; nepotism necessarily has an adverse impact on nonwhites when those hiring

are white).

(n35)Footnote 35. *See Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 827 F.2d 439, 445 , rev'd on other grounds, 490 U.S. 642 (1989) (Title VII).

(n36)Footnote 36. *See Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 827 F.2d 439, 445 , rev'd on other grounds, 490 U.S. 642 (1989) (Title VII).

(n37)Footnote 37. *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 827 F.2d 439, 445 , rev'd on other grounds, 490 U.S. 642 (1989) (Title VII); *Bonilla v. Oakland Scavenger Co.* (9th Cir. 1982) 697 F.2d 1297, 1303 , cert. denied, 467 U.S. 1251 (1984) .

(n38)Footnote 38. *See Gov. Code § 12940(b)*; *see generally* ch. 40, pt. B.

(n39)Footnote 39. *See Gov. Code § 12940(d)*; *see also* discussion in [1][a], *above*.

(n40)Footnote 40. *See Gov. Code § 12940(i)*. (it is illegal for "any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or attempt to do so"). *See, e.g., Alch v. Superior Court* (2004) 122 Cal. App. 4th 339, 389, 390, 19 Cal. Rptr. 3d 29 (complaints of age discrimination under FEHA by television screenwriters against talent agencies clearly alleged agencies knew employers were engaged in systemic age discrimination and gave substantial assistance or encouragement to employers by virtue of their own referral practices, screening out older writers in favor of younger ones).

(n41)Footnote 41. *See 2 Cal. Code Reg. § 7295.4(a)(1)*

(n42)Footnote 42. *See 29 U.S.C. § 623(b), (c)(2)* (ADEA); *42 U.S.C. § 2000e-2(b), (c)(2)* (Title VII).

(n43)Footnote 43. *See Teamsters v. United States* (1977) 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (42 U.S.C. § 2000e-2(h) protects bona fide seniority system even if it has effect of locking minorities into inferior categories).

(n44)Footnote 44. *See 42 U.S.C. §§ 12111(2), 12112(a)*; *see generally* ch. 40, pt. C.

(n45)Footnote 45. *42 U.S.C. § 12112(b)(2)*.

(n46)Footnote 46. *See Larson, Employment Discrimination*, ch. 16, § 82.10.

(n47)Footnote 47. *See, e.g., Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 827 F.2d 439, 447 , rev'd on other grounds, 490 U.S. 642 (1989) (courts have long recognized that word-of-mouth recruiting is discriminatory because of its tendency to perpetuate all-white composition of work force).

(n48)Footnote 48. *United States v. Georgia Power Company* (5th Cir. 1973) 474 F.2d 906 (Title VII).

(n49)Footnote 49. *See United States v. Georgia Power Company* (5th Cir. 1973) 474 F.2d 906, 925 (Title VII).

(n50)Footnote 50. *See United States v. Georgia Power Company* (5th Cir. 1973) 474 F.2d 906, 925 (Title VII).

(n51)Footnote 51. *See United States v. Georgia Power Company* (5th Cir. 1973) 474 F.2d 906, 925-926 (Title VII; suggesting employment advertisements in newspapers and periodicals accessible to black communities, and public notice that employer is equal opportunity employer).

(n52)Footnote 52. *See EEOC v. Consolidated Service* (7th Cir. 1993) 989 F.2d 233, 236 (since word of mouth advertising was the most efficient method of hiring (and since it was adopted because it was the most efficient),

resulting homogenous workforce the same national origin as employer was not evidence of intentional discrimination).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART C. PREEMPLOYMENT PRACTICES

2-41 California Employment Law § 41.44

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.44 Preemployment Inquiries in Employment Applications and Interviews

[1] Generally

Preemployment inquiries that attempt to identify protected characteristics such as race, religion, sex, sexual orientation, political affiliation, disability, national origin, and age have strong potential for discrimination. No express provision in any federal equal employment opportunity law expressly prohibits such inquiries, but the FEHA prohibits any non-job-related inquiry, either verbal or through use of an application form, which expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, or any intent to make any such limitation, specification, or discrimination.ⁿ¹ Furthermore, both federal and state regulations place express limitations on such inquiries as they relate to specific protected classifications.ⁿ²

Preemployment inquiries generally arise in employment applicationsⁿ³ and preemployment interviews.ⁿ⁴ FEHC regulations provide that when employers or other entities covered by the FEHA provide, accept, and consider application forms in the normal course of business, they may not discriminate on a basis enumerated in the FEHA.ⁿ⁵ Application forms may not require photographs,ⁿ⁶ and may not be separated, coded, or otherwise treated so as to identify individuals on a basis enumerated in the FEHA, unless pursuant to a permissible defense or for record keeping or statistical purposes.ⁿ⁷ Personal interviews also must be free from discrimination,ⁿ⁸ and the entire interview process is subject to review for adverse impact on individuals protected by the FEHA.ⁿ⁹

Inquiries relating to facially neutral criteria such as education, experience, height, weight, veteran status and military discharge, and financial status, are not impermissible per se. As discussed in § 41.42[2], such criteria are limited by the "disparate impact" theory of liability and the "job-relatedness" requirement. However, because some common inquiries (such as "date of birth") elicit information directly related to protected classifications, they are very closely scrutinized by state and federal regulatory agencies. EEOC and FEHC regulations, as well as regulations promulgated by various other administrative agencies, expressly govern the use of several common preemployment inquiries, and the following sections discuss issues relating to those inquiries.

■ PRACTICE TIP:

Employers should analyze selection devices such as applications and interview procedures to eliminate unnecessary inquiries that may expose the employer to liability. Inquiries necessary for purposes other than selection may be made after an individual is hired. *Commentary by Bill Lann Lee.*

[2] Issues Relating to Specific Inquiries**[a] Age**

EEOC regulations interpreting the ADEA state that a request for information such as "Date of Birth" or "Age" on an employment application form does not, in itself, violate the ADEA.¹⁰ However, a request that an applicant state his or her age may tend to deter older applicants or otherwise indicate discrimination based on age, and therefore the EEOC will closely scrutinize any application with such a request to assure that it serves a permissible purpose.¹¹ The regulations provide that the employer should inform the applicant that the purpose of the inquiry is not one proscribed by the ADEA.¹² Thus, the application form may contain language to the following effect: "The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years of age."¹³ However, such assurances may be made to the applicant by other means.¹⁴

FEHC regulations provide that preemployment inquiries that would result in the direct or indirect identification of persons on the basis of age are unlawful.¹⁵ However, such inquiries are not unlawful when made for the purpose of applicable reporting requirements or to maintain applicant flow data, provided that the inquiries are made in a manner consistent with FEHC requirements for personnel record keeping.¹⁶ For a discussion relating to employer posting and recordkeeping requirements, *see* Part H (§§ 41.140-41.141).

■ AUTHOR'S COMMENT:

Age information appears in a variety of documentation involved in the hiring process. For instance, age must be disclosed on benefits forms and I-9 verification forms. To avoid claims of discrimination, this information should only be sought after an offer is made and should be maintained separately from the employee's personnel file. *Commentary by Lori A.M. Middlehurst*

[b] Citizenship

All employers must inquire regarding the legal right of applicants to work in the United States.¹⁷ This is true, whether the applicant is a U.S. citizen or a foreigner. In conjunction with this required inquiry, the employer must complete, within three days of hiring, an I-9 form, certifying that the employer has been presented with documentation verifying the identity of the applicant and employment eligibility.¹⁸ While completion of the I-9 form is mandatory, it need not be completed prior to interviewing the candidate. Employers may not discriminate against applicants based on the information contained therein, nor may they require any particular type of documentation, as long as the documents required are on the approved list provided by the INS on the reverse of the I-9 form.¹⁹ Sections 41.33 and 41.42 discuss national origin and citizenship discrimination.

■ AUTHOR'S COMMENT:

Since the employer has three days to complete the form, the employer can avoid potential discrimination claims by eliminating the inquiry regarding right to work from the application and interview process. Rather, the employer should inform all applicants that all offers of employment are contingent on presentation of proof of legal right to work, and fill out the I-9 form after the offer has been made. *Commentary by Lori A.M. Middlehurst*

[c] Criminal Records

California law generally prohibits public and private employers from asking employment applicants, verbally or in

writing, to disclose (1) information concerning an arrest or detention which did not result in conviction, or (2) information concerning a referral to and participation in any pretrial or posttrial diversion program.ⁿ²⁰ For a general discussion relating to statutory limitations on employers with respect to collecting arrest records, *see* Chapter 50, Part B.

There is no express provision in the FEHA relating to consideration of criminal records, but FEHC regulations declare that except as otherwise provided by law,ⁿ²¹ it is unlawful for an employer or other entity covered by the FEHA to inquire or seek information regarding any applicant concerning the following:ⁿ²²

1. Any arrest or detention that did not result in conviction;
2. Any conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated;ⁿ²³
3. Any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed;ⁿ²⁴ or
4. Any arrest for which a pretrial diversion program has been successfully completed.ⁿ²⁵

No federal statute precludes consideration of criminal records, but inquiries relating to arrests not leading to conviction may violate Title VII if such inquiries have a disparate impact on members of a protected classification.ⁿ²⁶ Moreover, although inquiries relating to convictions are permissible under Title VII, sweeping disqualifications based solely on information elicited by such inquiries may be unlawful.ⁿ²⁷

[d] Marital Status

FEHC regulations provide that it is unlawful to ask an applicant to disclose his or her marital status as a part of a preemployment inquiry unless pursuant to a permissible defense.ⁿ²⁸ Inquiries requesting maiden names are impermissible.ⁿ²⁹ However, employers may ask whether applicants have ever used another name if such an inquiry is for business reasons other than ascertainment of marital status. For example, an employer may ask for other names to enable it to check an applicant's past work record.ⁿ³⁰ It is also lawful to ask an applicant to state whether he or she has a spouse who is presently employed by the employer, but this information may not be used as a basis for an employment decision, except as discussed in § 41.42[2][j].ⁿ³¹

[e] Membership in Organizations and Participation in Activities

Inquiries regarding an applicant's membership in organizations and non-work activities can lead to claims of discrimination. While nothing in Title VII or the FEHA specifically prohibits such inquiries, membership in certain groups can disclose protected status.ⁿ³² On the other hand, the regulations adopted by the FEHC, specifically require employers to consider volunteer work.ⁿ³³

The ADA extends its prohibition on discrimination to individuals who are regarded as disabled, *or associated with* disabled persons.ⁿ³⁴ Accordingly, inquiry into such associations such as cancer-survivors groups or AIDS support groups, might disclose protected status. The FEHA prohibits discrimination against individuals because of their sexual orientation.^{n34.1} Accordingly, inquiry into membership in groups affiliated with gays or lesbians could disclose protected status. *Labor Code section 1101* guarantees employees' rights to political freedom. Employers shall not "make, adopt, or enforce any rule, regulation or policy... controlling or directing, or tending to control or direct the political activities or affiliations of employees." While this statute does not refer to applicants, inquiry into political activity in the interview phase, could be construed as tending to control or direct the employee's political affiliation in the future.

[f] Physical or Mental Condition or Disability

The ADA proscription against disability discrimination expressly applies to preemployment medical inquiries.ⁿ³⁵ Thus, an employer may not ask a job applicant whether he or she is an individual with a disability or inquire as to the nature or severity of the applicant's disability.ⁿ³⁶ An employer may, however, inquire into the ability of an applicant to perform job-related functions.ⁿ³⁷ The interpretive guidelines to the ADA explain that an employer may inquire regarding an applicant's ability to perform both essential and marginal functions of the job, but may not refuse to hire an applicant because disability prevents the applicant from performing marginal functions.ⁿ³⁸ The employer may not inquire regarding the nature or severity of a known disability but may ask the applicant to describe or demonstrate how he or she would do the job functions with or without reasonable accommodation.ⁿ³⁹ However, if a known disability will not interfere with or prevent performance of a job related function, the employer may only require the applicant to demonstrate or describe how he or she would do the function if the employer requires all applicants to do so.ⁿ⁴⁰ Nevertheless, the Supreme Court has held that an employer may refuse to employ an otherwise qualified individual who fails to meet physical standards set by regulatory agencies, such as the Department of Transportation.^{n40.1}

The EEOC provides employers with further guidance in a recent publication entitled "Enforcement Guidance on Pre-Employment Inquiries under the ADA."ⁿ⁴¹ This publication sets forth particular questions which may or may not be asked at the pre-employment stage. The EEOC explains its prohibition on disability-related questions as a prohibition on questions which are "*likely to elicit* information about a disability."ⁿ⁴² Therefore, it is not violative of the ADA for an employer to ask about

1. The applicant's ability to meet attendance requirements;
2. Certifications and licenses;
3. Arrest or conviction records;
4. Current illegal drug use;
5. Prior illegal drug use (except to the extent the answer elicited would show prior drug addiction);
6. Drinking habits (except if likely to elicit information regarding alcoholism); and
7. Whether the applicant would self-identify as a person with a disability for the purposes of the employer's affirmative action program (but the questionnaire must state that its use is solely for affirmative action efforts, and assure the applicant that the response will be kept confidential and distinct from information on the application form).ⁿ⁴³

An employer may not inquire into the following:

1. The applicant's need for a reasonable accommodation to do the job (except if the disability is obvious or disclosed by the applicant);
2. The applicant's ability to perform major life activities (except where required for a particular job function);
3. The applicant's worker's compensation history; and
4. The applicant's legal drug use (except in the context of a positive drug screen, to validate or provide an explanation for the results).ⁿ⁴⁴

Likewise, Department of Justice coordinating regulations for Section 504 of the Rehabilitation Act of 1973 (Section 504)ⁿ⁴⁵ prohibit employers who receive federal funds from making preemployment inquiries as to whether an applicant is a disabled person or as to the nature or severity of a disability.ⁿ⁴⁶ An employer recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.ⁿ⁴⁷ Furthermore, if the employer recipient is taking (1) remedial action to overcome the effects of past discrimination;ⁿ⁴⁸ (2) voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity;ⁿ⁴⁹ or (3) affirmative action pursuant to Section 503 of the Rehabilitation Act,ⁿ⁵⁰ the recipient may invite employment applicants to indicate whether and to what extent they are disabled, provided:

1. The recipient states clearly on any written questionnaire used for that purpose, or makes clear orally if no written questionnaire is used, that the information is intended for use solely in connection with its remedial action obligations or its voluntary efforts; and
2. The recipient states clearly that the information is voluntary, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with the regulations.ⁿ⁵¹

For a discussion relating to the scope and application of federal equal employment opportunity laws and regulations governing disability discrimination, *see* Chapter 40, Part C and § 41.32.

According to the FEHC, it is unlawful to ask general questions on physical condition in an application form or preemployment questionnaire, or in the course of the selection process.ⁿ⁵² Examples of prohibited inquiries are:

1. "Do you have any particular disabilities?"ⁿ⁵³
2. "Have you ever been treated for any of the following diseases or conditions?"ⁿ⁵⁴
3. "Are you now receiving or have you ever received Workers Compensation?"ⁿ⁵⁵

It is lawful to inquire about an applicant's medical history if, and only if, the inquiry is directly related and pertinent to the position in question, or is directly related to a determination of whether the applicant would endanger his or her health and safety or the health or safety of others.ⁿ⁵⁶ It is also lawful under the ADA for an employer to ask a former employee with a known disability to provide a medical release before re-employment.^{n56.1} In *Harris*, prior to hiring an employee who earlier had requested an accommodation for, and later left employment because of, carpal tunnel syndrome, asking for a medical release was not an illegal pre-offer medical inquiry.^{n56.2}

[g] Pregnancy and Family Responsibilities

Under FEHC regulations, an employer may not ask questions regarding childbearing, pregnancy, birth control, or familial responsibilities unless they relate to specific and relevant working conditions of the job in question.ⁿ⁵⁷

Under the ADA, inquiries regarding the need to care for family members with a disability would also be prohibited.ⁿ⁵⁸

[h] Religion

According to the EEOC guidelines relating to religious discrimination,ⁿ⁵⁹ preselection inquiries that determine an applicant's availability may have an exclusionary effect on the employment opportunities of persons with certain religious practices.ⁿ⁶⁰ Therefore, the use of such inquiries will violate Title VII unless the employer can show that the inquiry (1) did not have an exclusionary effect on the employees or prospective employees needing accommodation for

the same religious practices; and (2) was otherwise justified by business necessity.ⁿ⁶¹

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures that serve this interest and that would have a lesser exclusionary effect on persons whose religious practices need accommodation. For example, the employer may state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise able to work those hours. Then, after a position is offered, but before the applicant is hired, the employer may inquire into the need for a religious accommodation and may determine, according to the principles of the EEOC guidelines,ⁿ⁶² whether an accommodation is possible.ⁿ⁶³

The EEOC will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (1) prior to an offer of employment, the employer makes an inquiry into an applicant's availability without having a business necessity justification; and (2) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.ⁿ⁶⁴

For a discussion relating to the duty to accommodate religious practices under Title VII, generally, *see* § 41.52[2].

FEHC regulations provide that preemployment inquiries regarding an applicant's availability to work on weekends or evenings may not be used as a pretext for ascertaining his or her religious creed, nor may such inquiry be used to avoid the requirement of reasonable accommodation.ⁿ⁶⁵ However, inquiries as to the availability for work on weekends or evenings are permissible when reasonably related to the normal business requirements of the job.ⁿ⁶⁶

In *Sutton v. Providence St. Joseph Medical Center*,ⁿ⁶⁷ plaintiff, citing religious beliefs, would not provide his social security number on preemployment forms, and defendant refused to hire him. The court found that the employer was not liable for discrimination on the basis of religion under Title VII because accommodating plaintiff's religious beliefs would have required the employer to violate federal law.ⁿ⁶⁸

[i] Sex

The EEOC guidelines on sex discrimination provide that a preemployment inquiry may ask "Male ... , Female ... "; or "Mr. Mrs. Miss," provided that the inquiry is made in good faith for a nondiscriminatory purpose.ⁿ⁶⁹ The guidelines also state that any inquiry in connection with prospective employment that expresses, directly or indirectly, any limitation, specification, or discrimination based on sex is unlawful unless based on a bona fide occupational qualification (BFOQ).ⁿ⁷⁰

FEHC regulations prohibit inquiries about gender on an application form or preemployment questionnaire unless pursuant to a permissible defense or for record keeping purposes.ⁿ⁷¹ However, after an individual is hired, the employer may record the employee's sex for nondiscriminatory personnel purposes.ⁿ⁷²

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law
Preemployment Practices

FOOTNOTES:

(n1)Footnote 1. *Gov. Code* § 12940(d); 2 *Cal. Code Reg.* § 7287.3(b)(1).

(n2)Footnote 2. *See* discussion in [2], *below*.

(n3)Footnote 3. *See 29 C.F.R. § 1625.5* (According to the EEOC regulations, the term "employment applications" refers to all written inquiries about employment, or promotion including, but not limited to, resumes or other summaries of the applicant's background. It relates not only to written preemployment inquiries, but to inquiries by employees concerning terms, conditions, or privileges of employment.)

(n4)Footnote 4. *See Odima v. Westin Tucson Hotel (9th Cir. 1995) 53 F.3d 1484, 1494* (Title VII; remarks made to applicant in the course of interview process, regarding his national origin and race, were properly considered by the lower court and contributed to finding of race and national origin discrimination).

(n5)Footnote 5. *2 Cal. Code Reg. § 7287.3(c)(1)*.

(n6)Footnote 6. *See 2 Cal. Code Reg. § 7287.3(c)(2)*.

(n7)Footnote 7. *2 Cal. Code Reg. § 7287.3(c)(3)*.

(n8)Footnote 8. *See 2 Cal. Code Reg. § 7287.3(d)*.

(n9)Footnote 9. *See 2 Cal. Code Reg. § 7287.3(d)*.

(n10)Footnote 10. *29 C.F.R. § 1625.5*.

(n11)Footnote 11. *See 29 C.F.R. § 1625.5*.

(n12)Footnote 12. *See 29 C.F.R. § 1625.5*.

(n13)Footnote 13. *29 C.F.R. § 1625.5*.

(n14)Footnote 14. *See 29 C.F.R. § 1625.5*.

(n15)Footnote 15. *See 2 Cal. Code Reg. § 7295.5(a)* (incorporating by reference *2 Cal. Code Reg. § 7287.3(b)*, which generally prohibits preemployment inquiries that discriminate on a basis enumerated in the FEHA).

(n16)Footnote 16. *See 2 Cal. Code Reg. § 7295.5(a); see also 2 Cal. Code Reg. § 7287.0* (record keeping).

(n17)Footnote 17. *See 8 U.S.C. § 1324b(a)*.

(n18)Footnote 18. *See 8 U.S.C. § 1324b(a); 8 C.F.R. § 274a.2*.

(n19)Footnote 19. *See 8 C.F.R. § 1324b(a)(6)*.

(n20)Footnote 20. *See Lab. Code § 432.7(a)*. However, health facilities may ask (1) applicants for positions with regular access to patients to disclose an arrest for a sex offense for which registration as a sex offender may be required under *Penal Code § 290*, and (2) applicants for positions with access to drugs and medication to disclose an arrest for any drug-related offense under any statute specified in *Health & Safety Code § 11590*.

(n21)Footnote 21. *See, e.g., 12 U.S.C. § 1829* (FDIC insured bank not permitted to employ person convicted of offense involving dishonesty or breach of trust); *Lab. Code § 432.7(e)* (*Lab. Code § 432.7* does not apply to persons already employed or seeking employment as peace officers or for positions in Department of Justice or other criminal agencies).

(n22)Footnote 22. *2 Cal. Code Reg. § 7287.4(d)(1)*.

(n23)Footnote 23. *See e.g., Penal Code §§ 851.7, 1203.45* (sealing of minor's misdemeanor record); *Welf. & Inst. Code § 389* (sealing of minor's dependency record).

(n24)Footnote 24. *See Penal Code § 1203.4.*

(n25)Footnote 25. *See Penal Code §§ 1000.4, 1001.5.*

(n26)Footnote 26. *See Gregory v. Litton Systems, Inc. (9th Cir. 1972) 472 F.2d 631, 632 ; See also § 41.42[2][b].*

(n27)Footnote 27. *See Green v. Missouri P. R. Co. (8th Cir. 1975) 523 F.2d 1290, 1296-1297 ; See also § 41.42[2][b].*

(n28)Footnote 28. *2 Cal. Code Reg. § 7292.4(a).*

(n29)Footnote 29. *2 Cal. Code Reg. § 7292.4(a).*

(n30)Footnote 30. *See 2 Cal. Code Reg. § 7292.4(b).*

(n31)Footnote 31. *See 2 Cal. Code Reg. § 7292.4(c).*

(n32)Footnote 32. *See DFEH v. Nursefinders of Oakland, Inc. (1985) FEHC 83-14, p. 30 (knowledge of applicant's race could be inferred from resume that detailed volunteer award from "Negro Business and Professional Women's Association").*

(n33)Footnote 33. *2 Cal. Code Reg. § 7291.0(d).*

(n34)Footnote 34. *See 42 U.S.C. § 12102(1)(C) (disability definition includes being regarded as disabled) and 42 U.S.C. § 12112(b)(4) (may not discriminate against individuals because of association with a person with a know disability).*

(n35)Footnote 34.1. *Gov. Code § 12940(a).*

(n36)Footnote 35. *42 U.S.C. § 12112(d)(1); 29 C.F.R. § 1630.13(a).*

(n37)Footnote 36. *42 U.S.C. § 12112(d)(2)(A); 29 C.F.R. § 1630.13(a).*

(n38)Footnote 37. *42 U.S.C. § 12112(d)(2)(B); 29 C.F.R. § 1630.14(a).*

(n39)Footnote 38. *29 C.F.R. App. § 1630.13(a).*

(n40)Footnote 39. *29 C.F.R. App. § 1630.14(a).*

(n41)Footnote 40. *29 C.F.R. App. § 1630.14(a).*

(n42)Footnote 40.1. *Albertson's, Inc. v. Kirkingburg (1999) 527 U.S. 555, 119 S. Ct. 2162, 144 L. Ed. 2d 518, 537 , overruled by statute on other grounds [see P.L. 110-325, §§ 1, 2].*

(n43)Footnote 41. *See EEOC Compliance Manual (CCH) § 902, P 6903 (guidance on preemployment inquiries and medical examinations).*

(n44)Footnote 42. *See EEOC Compliance Manual (CCH) § 902, P 6903 (guidance on preemployment inquiries and medical examinations).*

(n45)Footnote 43. *EEOC Compliance Manual (CCH) § 902, P 6903 (guidance on preemployment inquiries and medical examinations).*

(n46)Footnote 44. *See EEOC Compliance Manual (CCH) § 902, P 6903 (guidance on preemployment inquiries*

and medical examinations).

(n47)Footnote 45. *See* 29 U.S.C. § 794.

(n48)Footnote 46. *See* 28 C.F.R. § 41.55.

(n49)Footnote 47. 28 C.F.R. § 42.513(a). 28 C.F.R. § 42.501 *et seq.* is promulgated by the Department of Justice to implement Section 504 with respect to employers receiving funds from the Department of Justice. *See* 28 C.F.R. §§ 42.501, 42.502. By contrast, 28 C.F.R. § 41.1 *et seq.* is promulgated by the Department of Justice to implement Section 504 with respect to *any* federal department or agency empowered to extend federal financial assistance. *See* 28 C.F.R. § 42.2. The requirements of 28 C.F.R. § 42.513 were incorporated into 28 C.F.R. § 41.55 by reference. *See* 28 C.F.R. § 41.55.

(n50)Footnote 48. *See* 28 C.F.R. § 42.505(a).

(n51)Footnote 49. *See* 28 C.F.R. § 42.505(b).

(n52)Footnote 50. *See* 29 U.S.C. § 793.

(n53)Footnote 51. *See* 28 C.F.R. § 42.513(b).

(n54)Footnote 52. 2 Cal. Code Reg. § 7294.0(b)(2).

(n55)Footnote 53. 2 Cal. Code Reg. § 7294.0(b)(2)(A).

(n56)Footnote 54. 2 Cal. Code Reg. § 7294.0(b)(2)(B).

(n57)Footnote 55. 2 Cal. Code Reg. § 7294.0(b)(2)(C).

(n58)Footnote 56. 2 Cal. Code Reg. § 7294.0(b)(3); *see also* 2 Cal. Code Reg. § 7287.3(b)(1).

(n59)Footnote 56.1. *Harris v. Harris & Hart, Inc.* (9th Cir. 2000) 206 F.3d 838, 844-845 .

(n60)Footnote 56.2. *Harris v. Harris & Hart, Inc.* (9th Cir. 2000) 206 F.3d 838, 844-845 .

(n61)Footnote 57. 2 Cal. Code Reg. § 7290.9(b)(3).

(n62)Footnote 58. *See* 29 C.F.R. App. § 1630.8.

(n63)Footnote 59. *See* 29 C.F.R. §§ 1605.1-1605.3.

(n64)Footnote 60. 29 C.F.R. § 1605.3(b)(2).

(n65)Footnote 61. *See* 29 C.F.R. § 1605.3(b)(2).

(n66)Footnote 62. *See* 29 C.F.R. § 1605.2; *see* § 41.52[2][b].

(n67)Footnote 63. 29 C.F.R. § 1605.3(b)(2).

(n68)Footnote 64. 29 C.F.R. § 1605.3(b).

(n69)Footnote 65. 2 Cal. Code Reg. § 7293.4.

(n70)Footnote 66. 2 Cal. Code Reg. § 7293.4.

(n71)Footnote 67. *Sutton v. Providence St. Joseph Medical Center* (9th Cir. 1999) 192 F.3d 826 .

(n72)Footnote 68. *See Sutton v. Providence St. Joseph Medical Center* (9th Cir. 1999) 192 F.3d 826, 831, 844 (employer also found not to have violated plaintiff's rights under Religious Freedom Restoration Act (42 U.S.C. § 2000bb et seq.), Privacy Act (5 U.S.C. § 552a), the Paperwork Reduction Act (44 U.S.C. § 3512) and *First Amendment*).

(n73)Footnote 69. 29 C.F.R. § 1604.7.

(n74)Footnote 70. 29 C.F.R. § 1604.7.

(n75)Footnote 71. *See* 2 Cal. Code Reg. § 7290.9(b)(2).

(n76)Footnote 72. 2 Cal. Code Reg. § 7290.9(b)(2).



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART C. PREEMPLOYMENT PRACTICES

2-41 California Employment Law § 41.45

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.45 Preemployment Testing

[1] Generally

[a] Title VII, the ADA, and the FEHA

It is not an unlawful employment practice under Title VII for an employer to give and to act on the results of any professionally developed ability test, provided that neither the test, its administration, nor action on the results, is designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.ⁿ¹ In *Albemarle Paper Co. v. Moody*, ⁿ² the United States Supreme Court reiterated the rule articulated in *Griggs v. Duke Power Co.*, ⁿ³ that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer shows that any given requirement has a manifest relationship to the employment in question.ⁿ⁴

Any race-based action regarding tests, including discarding promotional test results that appear to discriminate against racial minorities, is impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute.^{n4.1}

The EEOC considers employee selection procedures, including employment tests,ⁿ⁵ to be discriminatory if they have an adverse impact on protected individuals unless the procedures are validated in accordance with the EEOC employee selection guidelines,ⁿ⁶ or unless the guidelines on nonvalidated selection procedures are followed.ⁿ⁷ For a discussion of the various techniques used to determine adverse impact, including the "four-fifths rule" set forth in the guidelines,ⁿ⁸ see § 41.21[3].

The EEOC guidelines suggest that if two or more tests or selection procedures serve the user's legitimate interest in efficient and trustworthy workmanship, and have substantially equal validity for a given purpose, the user should use the test or other selection procedure that has the lesser adverse impact. Accordingly, part of any validity study should be an investigation of suitable alternative tests or other selection procedures, and suitable alternative methods of using the tests or selection procedures that have as little adverse impact as possible. If an employer has made a reasonable effort to become aware of the alternative tests or procedures, and has demonstrated validity, the employer may continue using

the test or other selection procedure until such time as it should reasonably be reviewed for currency. Whenever the employer becomes aware of evidence of an alternative test or selection procedure with less adverse impact, and there is substantial evidence of its validity for the same job in similar circumstances, the employer should investigate it to determine the appropriateness of using or validating it in accordance with the guidelines.ⁿ⁹

The FEHC has adopted the EEOC guidelines,ⁿ¹⁰ and accordingly any preemployment test that does not comply with the guidelines may also be unlawful under the FEHA. Furthermore, FEHC regulations expressly provide that any test or selection procedure that has an adverse impact on employment opportunities of individuals who are protected by the FEHA is unlawful unless the policy or practice is job-related.ⁿ¹¹ A policy is "job-related" if it is "sufficiently related to an essential function of the job in question to warrant its use."ⁿ¹²

The ADA prohibits an employer from using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, unless the employer shows that the test, as used by the employer, is job-related for the position in question and is consistent with business necessity.ⁿ¹³ Qualification standards include the skill, experience, education, and physical, medical, and safety requirements established by an employer as eligibility criteria for a position.ⁿ¹⁴ Accordingly, the employer must select and administer employment tests in the most effective manner to ensure that, when the test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, the test's results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of the employee or applicant (except when those skills are the factors that the test purports to measure).ⁿ¹⁵

[b] Other Sources of Protection

Discriminatory preemployment tests are also unlawful under other equal employment opportunity sources. For example, the Department of Justice coordinating regulations for Section 504 of the Rehabilitation Act of 1973 (Section 504)ⁿ¹⁶ provide that employers who receive federal funds may not use tests that discriminate against disabled persons, and must ensure that employment tests are adapted for use by persons who have disabilities that impair sensory, manual, or speaking skills.ⁿ¹⁷ The Office of Federal Contract Compliance (OFCCP) has adopted Uniform Guidelines on Employee Selection Proceduresⁿ¹⁸ under Executive Order 11246, which prohibits unlawful employment discrimination by federal contractors and contractors performing under federally assisted construction contracts,ⁿ¹⁹ that are virtually identical to the EEOC guidelines discussed in [a], *above*, and [2][b], *below*.

For a discussion relating to the scope and application of these and other federal equal employment opportunity sources, *see* Chapter 40, Part C.

[2] Validity Studies

[a] General Principles

The *Albemarle/Griggs* rule discussed in [1], *above*, requires an employer to show that a challenged test is job-related.ⁿ²⁰ This process is generally referred to as "validation."ⁿ²¹ In *Craig v. County of Los Angeles*,ⁿ²² the Ninth Circuit Court of Appeals explained that validation involves three distinct steps: (1) the employer must first specify the particular trait or characteristic that the test or other selection device is being used to identify; (2) the employer must then determine that that particular trait or characteristic is an important element of work behavior; and (3) the employer must demonstrate, by "professionally acceptable methods," that the test or other selection device is "predictive of or significantly correlated" with the element of work behavior identified.ⁿ²³

Although formal "validation studies" showing job-relatedness are not always required (or even possible),ⁿ²⁴ they are the most effective means of satisfying the heavy burden of demonstrating job-relatedness.ⁿ²⁵ A number of validation

techniques are professionally acceptable.ⁿ²⁶ The American Psychological Association (APA) in its Standards for Educational and Psychological Tests and Manuals (1966) accepts three basic methods of validation: (1) "empirical" or "criterion" validity; (2) "construct" validity; and (3) "content" validity.ⁿ²⁷ These techniques have been adopted by the EEOC in its guidelines.ⁿ²⁸

■ CONSULTANT'S COMMENT:

The literature discussing validation and testing could fill a small library, and any employer who seeks to validate a test or selection device will have to consult with an industrial psychologist or other expert in validation techniques. However, although the concepts are esoteric and complex, it is possible to describe them in fairly simple language.ⁿ²⁹

"Validity" is the extent to which a test accurately measures what it is used to measure; "validation" refers to the techniques for ascertaining that extent.ⁿ³⁰ A test is never wholly valid or invalid, and a test that is valid for one use may be invalid for another.

Tests have three basic uses. The first is to determine the test-taker's *present knowledge* of the specific skill contained in the test.ⁿ³¹ For example, an employer might give a math test to measure a prospective bank teller's knowledge of addition and subtraction.

The second type of test use is to *predict* the test-taker's future performance, or estimate his or her present knowledge of some skill that differs from the test's content.ⁿ³² For example, an employer might give a driving test to predict a prospective school bus driver's future performance and safety on the job, or to estimate his or her present ability to handle such tasks.

The third type of test use is to measure some hypothetical "construct," like mathematical aptitude or the ability to grasp the structure of language.ⁿ³³ This type of test includes so called "integrity" testing, used by some employers to measure an applicant's honesty, is this type of test.ⁿ³⁴

Three general types of test validation also exist, which correspond roughly to the three types of test uses.

"Content validation" applies to the first type of test use. The technique seeks to determine (objectively) whether the content of the test accurately measures the broader subject matter that the test is supposed to measure. In the employment context, the test itself must closely approximate the tasks to be performed on the job.ⁿ³⁵ For example, a math test is likely to have content validity for a bookkeeping job, but not for a secretarial job; a typing test is likely to have content validity for a secretarial job, but not for a bookkeeping job.

"Criterion validation" applies to the second type of test use, which typifies most employment testing. This technique correlates the test score with some other objective measure (criterion) of job performance. In the employment context, the employer must identify some measurable criterion that it considers a predictor of job performance, such as units produced per hour, and there must be a significant positive correlation between success on the test and success on that criterion of job performance.ⁿ³⁶

"Construct validation" applies to the third type of test use. This technique correlates a test score with some other identified trait, like leadership or the aptitude for languages, which is a theoretical "construct" rather than an objective criterion of job performance.ⁿ³⁷

Aside from this primer, and the basic legal principles set forth in the text, further detailed discussion of

validation is beyond the scope of this treatise. Any employer who wants to rely on an employment test should ideally consult an industrial psychologist--or question the test-designer--in depth *before* beginning to rely upon the test. Any employer who finds itself embroiled in a validation dispute in the context of an employment discrimination case should find an industrial psychologist/expert witness immediately. *Commentary by Erica B. Grubb.*

Although the validity of a test or selection procedure will usually depend on positive correlation with *actual job performance*, validity may be measured by correlation with performance in job training. In *Washington v. Davis*,ⁿ³⁸ black police applicants challenged a test to measure verbal and communicative skills under the *Fifth Amendment to the United States Constitution*, Title 42 *United States Code*, section 1981, and a District of Columbia statute. The applicants contended that the test bore no relationship to job performance and excluded a disproportionately high number of black applicants.ⁿ³⁹ The district court found that the test related to the requirements of a police recruit training program, and that the lack of correlation with actual job performance did not invalidate the test.ⁿ⁴⁰ The United States Supreme Court stated that "training program validation *may* itself be sufficient to validate a [test] which impacts heavily on a protected group."ⁿ⁴¹ The Court conceded "[t]he advisability of the police recruit training course informing the recruit *about his [or her] upcoming job*, acquainting him [or her] with its demands, and attempting to impart a modicum of required skills ...".ⁿ⁴² The Court concluded that some minimum verbal and communicative skill was very useful, if not essential, to satisfactory progress in training.ⁿ⁴³

In *Craig v. County of Los Angeles*,ⁿ⁴⁴ the Ninth Circuit Court of Appeals expressed concern that the *Washington v. Davis* Court upheld a test that was validated without reference to job performance, and held that the skill, characteristic, or ability that a test purports to measure must be important to the requirements of the job.ⁿ⁴⁵ The *Craig* court avoided a potential conflict with *Washington v. Davis* by noting that the United States Supreme Court "not unjustifiably assumed that [verbal and communicative skills] were relevant to actual job performance."ⁿ⁴⁶ Thus, the court in *Craig* declared that an employer may show the requisite relationship by demonstrating that the test correlates significantly with important elements of training performance *and* that those elements of training performance are important to actual job performance.ⁿ⁴⁷

[b] EEOC Guidelines

As discussed in Chapter 40, Part C, the EEOC promulgated its guidelines on employee selection procedures to provide a framework for determining the proper use of employee selection procedures,ⁿ⁴⁸ including testing.ⁿ⁴⁹ Compliance with the EEOC guidelines is not absolutely necessary, but satisfactory validation may be more difficult when the guidelines have not been followed.ⁿ⁵⁰ In any event, the guidelines do not require a user to conduct validity studies of tests or other selection procedures *when no adverse impact results*.ⁿ⁵¹

The EEOC guidelines provide that test users may rely on (1) criterion-related validity studies, (2) content validity studies, or (3) construct validity studies, in accordance with technical standards set forth by the guidelines.ⁿ⁵² Validity studies in general should be based on a review of information about the job for which a test or other selection procedure is to be used. The review should generally include a job analysis. However, if a criterion-related study is used, certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context.ⁿ⁵³ Any method of job analysis may be used if it provides the information required for the specific validation strategy used.ⁿ⁵⁴

Evidence that may be sufficient to support the use of a test or other selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the test or other selection procedure on a ranking basis. Thus, if a user decides to use a test or other selection procedure on a ranking basis, and that method has a greater adverse impact than pass/fail use, the user should have sufficient evidence of validity to support the use on a ranking basis.ⁿ⁵⁵

If cutoff scores are used, they should be reasonable and consistent with normal expectations of proficiency within the

work force.ⁿ⁵⁶ If applicants are ranked on the basis of properly validated selection procedures, but only the highest-scoring applicants are likely to be selected, the degree of adverse impact should be considered.ⁿ⁵⁷

If job progression is relatively automatic, validation studies may consider that the applicants are being evaluated for a job or jobs at the higher level. However, when job progression is not so automatic, or the time span is such that higher level jobs or employees' potential may be expected to change significantly, validation studies should consider that applicants are being evaluated for a job at or near the entry level. A "reasonable period of time" varies for different jobs and employment situations, but will seldom be more than five years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate under the following circumstances:ⁿ⁵⁸

1. If the majority of those remaining employed do not progress to the higher level job;
2. If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or
3. If the selection procedures measure knowledge, skills, or abilities required for advancement that would be expected to develop principally from the training or experience of the job.

Employers may continue to use a test or other selection procedure that is not currently validated if: (1) the user has substantial evidence of validity available, and (2) the user has in progress, when technically feasible, a study that is designed to produce the additional evidence required by the guidelines within a reasonable time. If such a study is not technically feasible, the user should follow the provision in the guidelines relating to situations in which validity studies cannot be performed.ⁿ⁵⁹

If a test or selection procedure is validated in accordance with the EEOC guidelines for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review.ⁿ⁶⁰

[c] Use of Nonvalidated Tests

There are circumstances in which a user cannot or need not use the EEOC validation techniques. For example, an employer may use informal or unscored procedures, or validation techniques may not be technically feasible.ⁿ⁶¹ Such nonvalidated tests or other selection procedures must, however, be as job-related as possible and should minimize or eliminate adverse impact.ⁿ⁶²

When an informal or unscored test or selection procedure has an adverse impact, the employer must either justify its continued use, or attempt to eliminate the adverse impact by modifying the test or procedure to one that is a formal, scored, or quantified measure or combination of measures that can then be validated in accordance with the EEOC guidelines.ⁿ⁶³ If a formal and scored test or procedure has an adverse impact, the employer should follow EEOC validation techniques if technically feasible. When the user cannot or need not follow the EEOC validation techniques, the user should either modify the test or procedure to eliminate adverse impact or otherwise justify continued use of the test or procedure.ⁿ⁶⁴

■ PRACTICE TIP:

Scoring an unscored selection procedure permits the procedure to be validated in most cases. In the rare case in which a procedure cannot be validated under any circumstances, the procedure can still be analyzed under the pattern or practice "disparate treatment" theory of liability discussed in §§ 41.11 and 41.21. *Commentary by Bill Lann Lee.*

[d] Use of Other Validity Studies

In general, validity studies are unique to the particular test in the context of the particular job for which the test is used. However, under certain circumstances, validity studies conducted by other users or conducted by test publishers or distributors, and described in test manuals may support an employer's reliance on a test.ⁿ⁶⁵

For example, criterion-related validity studies conducted by one test user, or described in test manuals and professional literature are acceptable when the following requirements are met:ⁿ⁶⁶

1. Evidence from the available studies meeting EEOC technical standards clearly demonstrates that the test or selection procedure is valid;ⁿ⁶⁷
2. The incumbents in the user's job and the incumbents in the job or group of jobs on which the validity study was conducted perform substantially the same major work behavior, as shown by the appropriate job analysis both on the job or group of jobs on which the validity study was performed and on the job for which the test or selection procedure is to be used; and
3. The studies include a study of test fairness for each race, sex, and ethnic group that constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question.

If the studies under consideration satisfy 1 and 2, *above*, but do not contain an investigation of test fairness as required by 3, *above*, and the "borrowing" user cannot conduct an internal study of fairness, the borrowing user may continue to rely on the test until studies conducted elsewhere (which meet the requirements of the EEOC guidelines) show test unfairness, or until it becomes technically feasible to conduct and act on an internal study of test fairness.

If a validity study covers more than one unit within an organization but satisfies the EEOC technical standards requirements,ⁿ⁶⁸ evidence of validity specific to each unit will not be required unless certain variables exist that are likely to affect validity significantly.ⁿ⁶⁹ In the latter circumstance, the user must conduct an internal validity study or comply with the procedures for the use of nonvalidated tests as discussed in [c], *above*. ⁿ⁷⁰

[3] Discriminatory Adjustment of Test Scores

Title VII, as amended by the Civil Rights Act of 1991,ⁿ⁷¹ prohibits an employer or other covered entity, in connection with the selection or referral of applicants or candidates for employment or promotion, from adjusting the scores of, using different cutoff scores for, or otherwise altering the results of, employment-related tests on the basis of race, color, religion, sex, or national origin.ⁿ⁷²

■ PRACTICE TIP:

Employers that use tests scored by independent testing entities are best advised to contact such entities, ask whether their test scores are adjusted in any way on the basis of race, color, religion, sex, or national origin, and request a response in writing. *Commentary by Kirby Wilcox.*

Legal Topics:

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

Labor & Employment Law
Discrimination
Title VII of the Civil Rights Act of 1964
General Overview
Labor & Employment Law
Preemployment Practices

FOOTNOTES:

(n1)Footnote 1. *See 42 U.S.C. § 2000e-2(h).*

(n2)Footnote 2. *Albemarle Paper Co. v. Moody (1975) 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280 .*

(n3)Footnote 3. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431-432, 436, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n4)Footnote 4. *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 ; *see Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431-432, 436, 91 S. Ct. 849, 28 L. Ed. 2d 158 . For a discussion of the "manifest relationship" standard, *see* § 41.21[4].

(n5)Footnote 4.1. *Ricci v. DeStefano* (2009) 129 S. Ct. 2658, 2672-2681, 174 L. Ed. 2d 490 (because city could not meet this threshold standard, discarding tests violated Title VII). For discussion of the disparate impact theory, *see* § 41.20, *above*.

(n6)Footnote 5. *See* 29 C.F.R. § 1607.2(B) (EEOC employee selection guidelines as applying to tests and other selection procedures).

(n7)Footnote 6. *See* [2][b], *below*.

(n8)Footnote 7. *See* 29 C.F.R. §§ 1607.6A; *see also* 29 C.F.R. §§ 1605.3(a) (EEOC guidelines relating to religious discrimination; scheduling tests or other selection procedures), 1606.6 (EEOC guidelines relating to national origin discrimination; selection procedures). For a discussion relating to nonvalidated selection procedures, *see* [2][c], *below*.

(n9)Footnote 8. *See* 29 C.F.R. § 1607.4D.

(n10)Footnote 9. 29 C.F.R. § 1607.3B.

(n11)Footnote 10. *See* 2 Cal. Code Reg. § 7287.4(a).

(n12)Footnote 11. *See* 2 Cal. Code Reg. § 7287.4(a). *See also Harris v. Civil Service Com.* (1998) 65 Cal. App. 4th 1356, 1368 (commission has no legal duty to adopt, use, or validate tests when undisputed evidence showed dramatic disparate impact (almost one-half) far below invalidity threshold of four-fifths rule); *DFEH v. City and County of San Francisco* (1982) FHEC 82-11, pp. 49-53 (Commission rejected written promotional exam since it was shown to discriminate against African-Americans, because disproportionately low number of African-Americans passed exam and it was not shown to be job-related).

(n13)Footnote 12. *See* 2 Cal. Code Reg. § 7287.4(e). For a discussion relating to "job-relatedness," *see* §§ 41.21[4] and 41.95.

(n14)Footnote 13. 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.10. For detailed discussions of "job-relatedness" and "business necessity," *see* §§ 41.21[4] and 41.95.

(n15)Footnote 14. 29 C.F.R. § 1630.2(q).

(n16)Footnote 15. 42 U.S.C. § 12112(b)(7); 29 C.F.R. § 1630.11.

(n17)Footnote 16. *See* 29 U.S.C. § 794.

(n18)Footnote 17. 28 C.F.R. § 41.54.

(n19)Footnote 18. *See* 41 C.F.R. §§ 60-3.1-60-3.18.

(n20)Footnote 19. Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965) .

(n21)Footnote 20. *See Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 662 .

(n22)Footnote 21. *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 662 (Title VII).

(n23)Footnote 22. *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659 (Title VII).

(n24)Footnote 23. *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659 (Title VII).

(n25)Footnote 24. See *Watson v. Fort Worth Bank & Trust* (1988) 487 U.S. 977, 998, 108 S. Ct. 2777, 101 L. Ed. 2d 827; see, e.g., *New York City Transit Authority v. Beazer* (1979) 440 U.S. 568, 587 n.31, 99 S. Ct. 1355, 59 L. Ed. 2d 587 (Title VII) (recognized legitimate employment goals of safety and efficiency as sufficient showing); see also *Harris v. Civil Service Com.* (1998) 65 Cal. App. 4th 1356 (court cannot compel validation study through administrative mandate for benefit of one protected group when agency has properly exercised discretion to cancel employment test shown to have disparate impact on another protected group).

(n26)Footnote 25. See (Title VII).

(n27)Footnote 26. *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 664 .

(n28)Footnote 27. *Washington v. Davis* (1976) 426 U.S. 229, 247 n.13, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (U.S. Const., Amend. V; 42 U.S.C. § 1981).

(n29)Footnote 28. See 29 C.F.R. §§ 1607.5, 1607.14.

(n30)Footnote 29. Nontechnical descriptions of the basic validation techniques may be found in the APA's Standards for Educational and Psychological Tests and Manuals (1966). A later (1974) version of the same standards, on which the EEOC Guidelines rely, is highly technical. In addition, the EEOC has published a series of questions and answers, which are intended to "clarify and provide a common interpretation of the Uniform Guidelines." see 44 Fed. Reg. 11996 (March 2, 1979) .

(n31)Footnote 30. Cf. *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 662 , cert. denied, 450 U.S. 919 ("validation" is process by which employer shows that test is job-related).

(n32)Footnote 31. See Larson, Employment Discrimination, Ch. 15, "Testing," § 77.10.

(n33)Footnote 32. See Larson, Employment Discrimination, Ch. 15, "Testing," § 77.10.

(n34)Footnote 33. See Larson, Employment Discrimination, Ch. 15, "Testing," § 77.10 ("construct" validation measures intangible qualities).

(n35)Footnote 34. See U.S. Congress, Office of Technology Assessment, "The Use of Integrity Tests for Pre-Employment Screening," OTA-SET-442 (Washington, DC: U.S. Government Printing Office, September 1990) (the Office undertook this analysis due to estimates that 5000 to 6000 employers were using such tests in an attempt to measure honesty of Applicants so to reduce loss from theft).

(n36)Footnote 35. See 29 C.F.R. § 1607.5B; see also *Washington v. Davis* (1976) 426 U.S. 229, 247 fn. 13, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (U.S. Const., Amend. V; 42 U.S.C. § 1981; "content validity" demonstrated by tests whose content closely approximates tasks to be performed on job by applicant).

(n37)Footnote 36. See 29 C.F.R. § 1607.5B; see also *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 431, 95 S. Ct. 2362, 45 L. Ed. 2d 280; *Washington v. Davis* (1976) 426 U.S. 229, 247 fn. 13, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (U.S. Const., Amend. V; 42 U.S.C. § 1981; "empirical" or "criterion" validity as demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and criteria so identified); *Guardians Ass'n of New York City v. Civil Serv.* (2d Cir. 1980) 630 F.2d 79, 92 fn. 11 (Title VII; same).

(n38)Footnote 37. See 29 C.F.R. § 1607.5C; *Washington v. Davis* (1976) 426 U.S. 229, 247 fn. 13, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (U.S. Const., Amend. V; 42 U.S.C. § 1981).

(n39)Footnote 38. *Washington v. Davis* (1976) 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 .

(n40)Footnote 39. *See Washington v. Davis* (1976) 426 U.S. 229, 233-235, 96 S. Ct. 2040, 48 L. Ed. 2d 597 .

(n41)Footnote 40. *See Washington v. Davis* (1976) 426 U.S. 229, 235-236, 96 S. Ct. 2040, 48 L. Ed. 2d 597 .

(n42)Footnote 41. *Washington v. Davis* (1976) 426 U.S. 229, 250-251, 96 S. Ct. 2040, 48 L. Ed. 2d 597 .

(n43)Footnote 42. *Washington v. Davis* (1976) 426 U.S. 229, 250, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (emphasis added).

(n44)Footnote 43. *Washington v. Davis* (1976) 426 U.S. 229, 250, 96 S. Ct. 2040, 48 L. Ed. 2d 597 .

(n45)Footnote 44. *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659 , cert. denied, 450 U.S. 919 (Title VII) .

(n46)Footnote 45. *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 663 , cert. denied, 450 U.S. 919 (Title VII) .

(n47)Footnote 46. *Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 663 , cert. denied, 450 U.S. 919 (Title VII) .

(n48)Footnote 47. *See Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 663 , cert. denied, 450 U.S. 919 (Title VII) .

(n49)Footnote 48. *See* 29 C.F.R. § 1607.1B.

(n50)Footnote 49. *See* 29 C.F.R. § 1607.16Q.

(n51)Footnote 50. *See Craig v. County of Los Angeles* (9th Cir. 1980) 626 F.2d 659, 664 , cert. denied, 450 U.S. 919 (Title VII) ; *see also* 2 Cal. Code Reg. § 7287.4(a) (FEHA implementing regulation, adopting EEOC guidelines).

(n52)Footnote 51. *See* 29 C.F.R. § 1607.1B; *see discussion in* [a], above.

(n53)Footnote 52. 29 C.F.R. § 1607.5A; *see* 29 C.F.R. § 1607.14 (technical standards for validity studies); *see also discussion in* [a], above.

(n54)Footnote 53. *See* 29 C.F.R. §§ 1607.14A, 1607.14B(3).

(n55)Footnote 54. 29 C.F.R. § 1607.14A.

(n56)Footnote 55. *See* 29 C.F.R. § 1607.5G; *see also* 29 C.F.R. § 1607.3B (validity study as including investigation of suitable alternative selection procedures and suitable alternative methods of using test or procedure which have as little adverse impact as possible).

(n57)Footnote 56. 29 C.F.R. § 1607.5H; *see Guardians Ass'n of New York City v. Civil Serv.* (2d Cir. 1980) 630 F.2d 79, 105 (Title VII; cutoff scores must be related to job performance).

(n58)Footnote 57. 29 C.F.R. § 1607.5H.

(n59)Footnote 58. 29 C.F.R. § 1607.5I.

(n60)Footnote 59. 29 C.F.R. § 1607.5J; *see* 29 C.F.R. § 1607.6B (when validity studies cannot or need not be performed). If the study does not demonstrate validity, 29 C.F.R. § 1607.5J does not provide a defense, nor does it

relieve the user of any obligations under federal law. 29 C.F.R. § 1607.5J.

(n61)Footnote 60. 29 C.F.R. § 1607.5K; *see* discussion in [a], *above*.

(n62)Footnote 61. *See* 29 C.F.R. § 1607.16U ("technical feasibility" defined).

(n63)Footnote 62. 29 C.F.R. § 1607.6B.

(n64)Footnote 63. *See* 29 C.F.R. § 1607.6B(1).

(n65)Footnote 64. *See* 29 C.F.R. § 1607.6B(2).

(n66)Footnote 65. *See* 29 C.F.R. § 1607.7A.

(n67)Footnote 66. 29 C.F.R. § 1607.7B.

(n68)Footnote 67. *See* 29 C.F.R. § 1607.14B; *see also* discussion in [b], *above*.

(n69)Footnote 68. *See* 29 C.F.R. § 1607.14B.

(n70)Footnote 69. 29 C.F.R. § 1607.7C.

(n71)Footnote 70. *See* 29 C.F.R. § 1607.7D.

(n72)Footnote 71. *See* Pub. L. No. 102-166, § 106.

(n73)Footnote 72. 42 U.S.C. § 2000e-2(l).



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART C. PREEMPLOYMENT PRACTICES

2-41 California Employment Law § 41.46

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.46 Preemployment Medical Examinations

[1] Tests for Functional Limitations

Requirements that applicants submit to a medical or physical examination as a condition of employment are most likely to affect those who are disabled or over the age of 40. Because age, disability, and disability discrimination are prohibited by federal and state equal employment opportunity laws, these requirements may be unlawful if they have a discriminatory adverse impact.ⁿ¹ The FEHA also prohibits medical or psychological examinations or inquiries except to determine whether the applicant or employee can perform job-related functions.ⁿ² For a general discussion relating to the scope and application of state and federal equal employment opportunity laws relating to age and disability discrimination, *see* Chapter 40, Parts B and C.

[a] Federal Law

The ADA forbids medical examinations prior to the time an offer of employment is made.ⁿ³ The EEOC's Enforcement Guidance on Pre-Employment Inquiries under the ADAⁿ⁴ defines medical tests as "a procedure or test that seeks information about an individual's physical or mental impairments or health."ⁿ⁵ To determine if a test is medical, the EEOC suggests asking the following:

1. Is it administered by a health care professional or under the direction of a health care professional?
2. Are the results interpreted by a health care professional or under the direction of a health care professional?
3. Is it designed to reveal a mental or physical impairment?
4. Is the employer trying to determine the applicant's mental or physical impairment?
5. Is it invasive (for example does it involve drawing blood, urine or breath)?

6. Does it measure an applicant's performance of a task or does it measure a physiological response to a task?

7. Is it normally given in a medical setting?

8. Is medical equipment used?ⁿ⁶

Therefore, under the ADA, employers may: give physical agility or fitness tests, provided the ability to do the test and not the physiological response to the test is being measured; require a physical clearance prior to giving a test and ask the applicant to assume liability for any injuries incurred during the test; give psychological, polygraph, or vision exams, provided these are not medical, do not elicit medical information and do not require medical information for administration.ⁿ⁷ After an employment offer is made and prior to commencement of employment, an employer may condition an employment offer on the results of a test, if the employer subjects all entering employees to the exam and if it collects and maintains the exam information separately, treats it confidentially, and uses it only in accordance with the ADA.ⁿ⁸ The employer may make an appropriate exception to confidentiality to (1) inform supervisors of any necessary restrictions or accommodations, (2) inform first aid and safety personnel if a disability might require emergency treatment, and (3) comply with government investigations of compliance with the ADA.ⁿ⁹ According to EEOC regulations, preemployment medical examinations that meet these criteria need not be job-related and consistent with business necessity.ⁿ¹⁰ However, if certain criteria are used to screen out a disabled employee as a result of an examination or inquiry, those exclusionary criteria must be job-related and consistent with business necessity, and the employee's inability to perform essential job functions must be incurable by the employer's reasonable accommodation.ⁿ¹¹

A test to determine the illegal use of drugs is not considered a medical examination under the ADA, and is therefore not subject to the foregoing rules.ⁿ¹² However, there is not similar exclusion for testing for the presence of alcohol.ⁿ¹³ For further discussion of preemployment drug testing, *see* [2], *below*, and ch. 50, pt. D.

Federal regulations promulgated by the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) to implement Section 503 of the Rehabilitation Act of 1973ⁿ¹⁴ require federal contractors to ensure that all physical or mental job qualification requirements that tend to screen out qualified disabled individualsⁿ¹⁵ are job-related or needed for the safe performance of the job.ⁿ¹⁶ Contractors may conduct comprehensive medical examinations prior to employment provided that the results of the examination are used only in accordance with OFCCP requirements. Thus, whenever a contractor conducts such an examination, any information received must be kept confidential, except that:ⁿ¹⁷

1. Supervisors and managers may be informed regarding restrictions on the work or duties of disabled individuals and regarding accommodations;
2. First aid and safety personnel may be informed, when and to the extent Appropriate, if the condition might require emergency treatment; and
3. Government officials investigating compliance with Section 503 must be informed.

In addition, regulations promulgated by the Department of Justice, which coordinates implementation of Section 504 of the Rehabilitation Act,ⁿ¹⁸ provide that employers who receive federal funds may not conduct preemployment medical examinations as to whether an applicant is disabled, or as to the nature or severity of a disability, except when the employer is correcting past discrimination, taking steps to increase the participation of disabled individuals, or taking affirmative action.ⁿ¹⁹

[b] California Law

Except as expressly permitted by the FEHA, an employer or employment agency may not require a job applicant or employee to take a medical or psychological examination, or respond to a medical or psychological inquiry; nor may the employer or agency inquire whether an applicant has a mental or physical disability or medical condition, or inquire regarding the nature or severity of a physical or mental disability or medical condition.ⁿ²⁰ However, an employer or employment agency may do the following:

1. Inquire into an applicant's ability to perform job-related functions and respond to an applicant's request for reasonable accommodation;ⁿ²¹
2. Require a medical or psychological examination or make a medical or psychological inquiry of an applicant after making an employment offer but before employment duties commence, provided the examination or inquiry is job-related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry;ⁿ²²
3. Require any examinations or inquiries it can show to be job-related and consistent with business necessity, and conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at the work site.ⁿ²³

In addition, FEHC regulations relating to specific prohibited bases of discrimination contain detailed provisions governing medical examinations. FEHC regulations relating to physical disability discrimination allow an employer to condition an offer of employment on the results of a preemployment medical examination in order to determine fitness for the job in question, if the following conditions are satisfied:ⁿ²⁴

1. All entering employees in similar positions are subjected to such an examination;
2. If the results of such an examination would result in disqualification, an applicant or employee may submit independent medical opinions for consideration before final determination on disqualification is made;ⁿ²⁵
3. The results are maintained on separate forms and afforded confidentiality as medical records, except that (a) supervisors and managers may be informed of restrictions on the work or duties of physically disabled individuals and necessary accommodations; and (b) first aid and safety personnel may be informed, when appropriate, that the condition may require emergency treatment.

At least one California court has construed medical examinations permissible under FEHC regulations to include preemployment drug tests, which it held an employer could reasonably determine are directly related to job fitness.ⁿ²⁶

FEHC regulations relating to age discrimination provide that it is not a violation of the regulations for an employer to require an applicant who is over 40 years old to undergo physical or medical examinations to determine whether or not the applicant meets the job-related physical or medical standards for the position sought, so long as such examinations are uniformly and equally required of all applicants for the position, regardless of their age.ⁿ²⁷ However, a requirement that an applicant over age 40 meet physical or medical examination standards that are higher than those standards applied to applicants for the same job who are below the age of 40 constitutes age discrimination under the FEHA.ⁿ²⁸

For a discussion relating to potential constitutional and privacy issues raised by medical or physical examination requirements, *see* Chapter 50, Part D.

[2] Drug Tests

Drug tests usually do not present discrimination issues, except to the extent that they, like all employment tests, must be applied uniformly.ⁿ²⁹ Consequently, most equal employment opportunity laws do not specifically address drug testing. The ADA expressly takes a neutral stance on the blanket testing of job applicants: it provides that it may not be construed to encourage, prohibit, or authorize drug testing or making employment decisions based on the results of drug tests.ⁿ³⁰ Although it takes a similar position with respect to Department of Transportation applicants, the ADA recognizes that employers regulated by the department may lawfully test applicants for safety-sensitive duties.ⁿ³¹

Preemployment testing has, however, raised constitutional privacy issues. In *Loder v. City of Glendale*,ⁿ³² the California Supreme Court considered a city-imposed, employment-related drug testing program under which all individuals who were conditionally offered new positions with the city (both newly hired persons and current city employees approved for promotion to a new position) were required to undergo urinalysis testing for a variety of illegal drugs and alcohol as part of a preplacement medical examination that the city traditionally conducted before hiring or promotion. The drug testing requirement applied to all of the city's employment positions, and was imposed without regard to whether the city had any basis for suspecting that a particular applicant for employment or promotion is currently abusing drugs or alcohol. The *Loder* Court concluded that, as to applicants for employment, the drug testing program did not violate California's Confidentiality of Medical Information Act,ⁿ³³ the ADA, the FEHA, or any other California statute.ⁿ³⁴ The *Loder* Court further held that a drug screening program, administered in reasonable fashion as part of lawful preemployment medical examination required of every job applicant, is constitutionally permissible under the *Fourth Amendment of the United States Constitution*. However, the Court held that the program violates the *Fourth Amendment of the United States Constitution*, insofar as it imposes the drug testing requirement on every current employee who applies for and is offered a promotion, without regard to the nature of the position sought.ⁿ³⁵ Finally, the *Loder* court concluded that the drug screening program, as applied to job applicants, did not violate *Article I, Section 1 of the California Constitution*, which creates a right to privacy, testing applicants who were forewarned of the testing and gave their consent, and when the testing was part of a complete physical examination with safeguards that assured control of the sample and reliability of the test results.ⁿ³⁶

For further discussion of potential constitutional and privacy issues raised by drug testing, *see* Chapter 50, Part D.

■ PRACTICE TIP:

Current illegal drug use is not a "disability" protected by applicable equal employment opportunity laws.ⁿ³⁷ Furthermore, Title VII provides that notwithstanding any other provision of Title VII, a rule barring the employment of an individual who currently and knowingly uses or possesses illegal drugs is considered an unlawful employment practice under Title VII only if the rule is adopted or applied with an *intent* to discriminate because of race, color, religion, sex, or national origin.ⁿ³⁸ *Commentary by David M. Youngsmith and Steven J. Revell.*

Legal Topics:

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

Healthcare Law
Business Administration & Organization
General Overview
Labor & Employment
Law
Discrimination
Title VII of the Civil Rights Act of 1964
General Overview
Labor & Employment
Law
Preemployment Practices

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. § 631(a) (ADEA; age), 29 U.S.C. § 793 (§ 503 of Rehabilitation Act of 1973; disability), 29 U.S.C. § 794 (§ 504 of Rehabilitation Act of 1973; same); 42 U.S.C. § 12101 *et seq.* (ADA; disability); *Gov. Code* §§ 12940(a) (FEHA; disability, medical condition, age); *see also* discussion in § 41.21[3].

(n2)Footnote 2. *Gov. Code* § 12940(e), (f); *see* discussion in [b], *below*.

(n3)Footnote 3. *See* 42 U.S.C. § 12112(d).

(n4)Footnote 4. *See* EEOC Compliance Manual (CCH) § 902, P 6903 (guidance on preemployment inquiries and medical examinations).

(n5)Footnote 5. *See* EEOC Compliance Manual (CCH) § 902, P 6903 (guidance on preemployment inquiries and medical examinations).

(n6)Footnote 6. *See* EEOC Compliance Manual (CCH) §§ 902, 6903 (guidance on preemployment inquiries and medical examinations).

(n7)Footnote 7. *See* EEOC Compliance Manual (CCH) § 902, P 6903 (guidance on preemployment inquiries and medical examinations). *But cf.*, Privacy concerns and other federal and state laws may also limit testing. For instance, *Labor Code* § 432.2 and 29 U.S.C. § 2001-2009 place restrictions on the use of polygraphs. *See also* chapter 50 regarding employee privacy rights.

(n8)Footnote 8. 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b).

(n9)Footnote 9. 42 U.S.C. § 12112(d)(3)(B); 29 C.F.R. § 1630.14(b)(1)(i)-(iii).

(n10)Footnote 10. 29 C.F.R. § 1630.14(b)(3); *see* 42 U.S.C. § 12113(a) (defense that allegedly discriminatory conduct is job-related and consistent with business necessity). For discussion of this defense, *see* § 41.95[2]. For discussion of medical examinations of current employees, *see* § 41.63.

(n11)Footnote 11. 29 C.F.R. § 1630.14(b)(3).

(n12)Footnote 12. 42 U.S.C. § 12114(d)(1); 29 C.F.R. § 1630.14(c).

(n13)Footnote 13. *See* EEOC Compliance Manual (CCH) § 902, P 6903 (guidance on preemployment inquiries and medical examinations).

(n14)Footnote 14. *See* 29 U.S.C. § 793.

(n15)Footnote 15. *See* 41 C.F.R. §§ 60-741.2(n)-(u), 60-741.3.

(n16)Footnote 16. *See* 41 C.F.R. § 60-741.21.

(n17)Footnote 17. *See* 41 C.F.R. § 60-741.23(d)(1).

(n18)Footnote 18. *See* 29 U.S.C. § 794(a); Exec. Order No. 12250; *see also* discussion in ch. 40, pt. C.

(n19)Footnote 19. *See* 28 C.F.R. §§ 41.55, 42.513.

(n20)Footnote 20. *Gov. Code* § 12940(e)(1), (f)(1).

(n21)Footnote 21. *Gov. Code* § 12940(e)(2).

(n22)Footnote 22. *Gov. Code* § 12940(e)(3).

(n23)Footnote 23. *Gov. Code* § 12940(f)(2).

(n24)Footnote 24. 2 *Cal. Code Reg.* § 7294.0(d).

(n25)Footnote 25. *But see* DFEH v. General Dynamics, Inc. (1990) FEHC Dec. 90-08, p. 12 (employer has no

independent duty to notify applicant that he or she has right to submit independent medical opinion prior to final decision on disqualification).

(n26)Footnote 26. *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1053, 264 Cal. Rptr. 194 .

(n27)Footnote 27. 2 Cal. Code Reg. § 7295.6(a).

(n28)Footnote 28. See 2 Cal. Code Reg. § 7295.6(c).

(n29)Footnote 29. See *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1053 & n.13, 264 Cal. Rptr. 194 (construing 2 Cal. Code Reg. § 7294.0(b)(3), (d); drug testing is a permissible inquiry relating to applicant's present physical condition or medical history, as long as all applicants in similar positions are subject to same exam).

(n30)Footnote 30. 42 U.S.C. § 12114(d)(2); 29 C.F.R. § 51630.16(c)(1). The ADA does expressly allow drug testing of *current* employees who are former drug abusers. See 42 U.S.C. §§ 12114(b); see also discussion in § 41.55[2].

(n31)Footnote 31. 42 U.S.C. § 12114(e); see also 29 C.F.R. § 1630.16(Cc(2) and discussion in § 41.55[2].

(n32)Footnote 32. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n33)Footnote 33. Civ. Code, § 56 *et seq.*

(n34)Footnote 34. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 860-864, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n35)Footnote 35. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 864-888, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 (reasonableness of testing current employees for promotion turns on nature and duties of position in question).

(n36)Footnote 36. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 887-898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 ; see *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal. 4th 1, 20, 34-39, 26 Cal. Rptr. 2d 834, 865 P.2d 633 (in-depth analysis of scope and proper application of state constitutional privacy clause).

(n37)Footnote 37. See 29 U.S.C. § 706(8)(C)(i) (Rehabilitation Act); 42 U.S.C. §§ 12114(a), 12211(a) (ADA); 2 Cal. Code Reg. § 7293.6(a)(4) (FEHC regulation implementing FEHA; "disability" does not include alcoholism or narcotics addiction); see also discussion in § 41.42[f].

(n38)Footnote 38. See 42 U.S.C. § 2000e-2(k)(3).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART C. PREEMPLOYMENT PRACTICES

2-41 California Employment Law § 41.47

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.47 Affirmative Action

Affirmative action refers to actions undertaken by employers to overcome the effects of past discrimination and under representation of minority groups and women. Affirmative action plans may be implemented by employers because they are ordered to do so by court order, because they are mandated by state or federal contract or because they have been implemented voluntarily. This section focuses on voluntary affirmative action plans. For a detailed discussion of affirmative action *see* chapter 44.

Neither Title VII nor the FEHA require employers to take affirmative action to hire individuals who are members of protected classifications.ⁿ¹

Similarly, neither the ADA nor section 504 of the Rehabilitation Act of 1973 require or even consider affirmative action.

However, the EEOC encourages employers to adopt voluntary affirmative action plans to remedy past inequities,ⁿ² and the EEOC has promulgated guidelines governing such the adoption of such plans.ⁿ³ FEHC regulations also provide that voluntary affirmative action is an effective means of eliminating employment discrimination, and the regulations expressly adopt the EEOC guidelines.ⁿ⁴

An employer may consider an applicant's membership in a protected class "pursuant to an affirmative action plan that presents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women." Therefore, in *Johnson v. Transportation Agency, Santa Clara*,ⁿ⁵ the Supreme Court determined that where an employer uses sex as a factor in making hiring decisions, there is no violation of Title VII, so long as the employer's affirmative action plan does not "unnecessarily trammel" the rights of other employees or create an absolute bar to their advancement.ⁿ⁶ Further, the Ninth Circuit recently determined that hiring decisions in an institutional setting which are consistent with a well established plan are not discriminatory, even if the decision maker did not actually rely on the affirmative action plan.ⁿ⁷ Other federal equal employment opportunity laws, such as Section 503 of the Rehabilitation Act of 1973,ⁿ⁸ the Vietnam Era Veterans Readjustment Assistance Act of 1974,ⁿ⁹

and Executive Order 11246,ⁿ¹⁰ expressly require certain employers which contract with the federal government to adopt affirmative action plans.ⁿ¹¹

■ **CONSULTANT'S COMMENT:**

Enhanced recruiting of minorities or women through is a relatively noncontroversial means to achieve affirmative action hiring. Such efforts are often appropriate to broaden the pool of applicants beyond the traditional sources utilized by an employer who is underutilizing minorities or women. *Commentary by Bill Lann Lee.*

Legal Topics:

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative ActionComplianceLabor & Employment LawDiscriminationPublic ContractsAffirmative Action

FOOTNOTES:

(n1)Footnote 1. *Cf.* 42 U.S.C. § 2000e-2(j) (Title VII; employer not *required* to grant preferential treatment to protected classification members); *see also* *Washington v. Elec. Joint Apprenticeship & Tr. Com.* (7th Cir. 1988) 845 F.2d 710, 713 , (Title VII; noncompliance with affirmative action plan is not racial discrimination).

(n2)Footnote 2. *See* 29 C.F.R. § 1608.1(a).

(n3)Footnote 3. *See* 29 C.F.R. §§ 1608.1-1608.12.

(n4)Footnote 4. *See* 2 Cal. Code Reg. § 7286.8.

(n5)Footnote 5. *Johnson v. Transportation Agency, Santa Clara County* (1986) 480 U.S. 616, 642, 107 S. Ct. 1442, 94 L. Ed. 2d 615 .

(n6)Footnote 6. *Johnson v. Transportation Agency, Santa Clara County* (1986) 480 U.S. 616, 630, 107 S. Ct. 1442, 94 L. Ed. 2d 615 .

(n7)Footnote 7. *See Gilligan v. Dept. of Labor* (9th Cir. 1996) 81 F.3d 835, 839 .

(n8)Footnote 8. *See* 29 U.S.C. § 793(a); *see also* 41 C.F.R. § 60-741.1.

(n9)Footnote 9. *See* 38 U.S.C. § 4212(a); *see also* 41 C.F.R. § 60-250.1.

(n10)Footnote 10. *See* Exec. Order No. 11246, § 202, 30 Fed. Reg. 12319 (1965).

(n11)Footnote 11. *But see* *Adarand Constructors, Inc. v. Peña* (1995) 515 U.S. 200, 115 S. Ct. 2097, 2112-13, 132 L. Ed. 2d 158 (federal affirmative action programs are unconstitutional unless demonstrated to be both necessary to remedy identified past discrimination and narrowly tailored to achieve that goal). The *Adarand* decision may result in changes to existing affirmative action guidelines. For a full discussion of affirmative action, *see* ch. 44.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART C. PREEMPLOYMENT PRACTICES

2-41 California Employment Law §§ 41.48 through 41.49

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[Reserved]

§§ 41.48[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.50

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

**§ 41.50 Equal Opportunity Employment Practices and Violations,
Generally**

Title VII, the FEHA, the ADEA, and the ADA provide that it is unlawful to discharge an employee, or to discriminate against an employee with respect to "compensation, terms, conditions, or privileges of employment," because of that person's membership in a protected classification.ⁿ¹ Neither federal nor state equal employment opportunity law contains a precise definition of that broadly inclusive term, but FEHC regulations interpreting the FEHA specify fringe benefits, including healthcare insurance,^{n1.1} harassment, physical appearance, grooming, dress standards, reasonable discipline, and seniority as matters involving "terms, conditions, and privileges of employment."ⁿ² Under the FEHA, courts are required to consider collectively all alleged discriminatory acts.^{n2.1}

Opportunities for work and promotion and layoff policies have been considered to be among the "terms, conditions, and privileges of employment" by one court considering the issue under Title VII.ⁿ³ As a harbinger of recognition of "hostile environment" cases,ⁿ⁴ the Fifth Circuit Court of Appeals declared that "terms, conditions, and privileges of employment" is an expansive concept that also sweeps within its protective ambit the practice of creating a working environment heavily charged with unlawful discrimination.ⁿ⁵

The ADEA provides that the phrase "compensation, terms, conditions, or privileges of employment" as used in the ADEA encompasses all employee benefits, including benefits provided pursuant to a bona fide employee benefit plan.ⁿ⁶ This part discusses both the effect of these prohibitions on incumbent employeesⁿ⁷ and the employer's duty to accommodate employees' disabilities and religious beliefs.ⁿ⁸ For a discussion of the various classifications protected from employment discrimination, *see* Part B (§§ 41.30-41.36). For a discussion of impermissible harassment, *see* Part E (§§ 41.80-41.82). For a complete discussion relating to the scope of application of the various state and federal equal employment opportunity laws, *see* Chapter 40.

Legal Topics:

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

Labor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment
 LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisparate
 TreatmentStatutory ApplicationAmericans With Disabilities ActLabor & Employment LawDiscriminationTitle VII of
 the Civil Rights Act of 1964General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. § 623(a)(1) (ADEA; age); 42 U.S.C. §§ 2000e-2(a)(1) (Title VII; race, color, religion, sex, national origin), 12112(a) (ADA; disability); *Gov. Code* § 12940(a) (FEHA; race, religious creed, color, national origin, ancestry, physical and mental disability, medical condition, marital status, sex, age).

(n2)Footnote 1.1. *Knight v. Hayward Unif. Sch. Dist.* (2005) 132 Cal. App. 4th 121, 128, 33 Cal. Rptr. 3d 287 .

(n3)Footnote 2. *See* 2 Cal. Code Reg. § 7278.6.

(n4)Footnote 2.1. *Horsford v. Board of Trustees of California State Univ.* (2005) 132 Cal. App. 4th 359, 373-374 (taken together, actions taken against each plaintiff clearly were substantial and detrimental).

(n5)Footnote 3. *See United Trans. U. Loc. No. 974 v. Norfolk & W. Ry.* (4th Cir. 1975) 532 F.2d 336, 340 , *cert. denied*, 425 U.S. 934 (1976).

(n6)Footnote 4. *See* Part E, *below*.

(n7)Footnote 5. *Rogers v. Equal Employment Opportunity Com'n* (5th Cir. 1971) 454 F.2d 234, 238 , (Title VII).

(n8)Footnote 6. 29 U.S.C. § 630(1).

(n9)Footnote 7. *See* Part B, § 41.44[2], for a discussion of these prohibitions on applicants.

(n10)Footnote 8. *See* 29 U.S.C. §§ 793(a) (Section 503 of Rehabilitation Act of 1973), 794(Section 504 of Rehabilitation Act of 1973); 42 U.S.C. §§ 2000e(j) (Title VII), 12112(b)(5) (ADA); *Gov. Code* § 12940(l), (m) (FEHA); *see also* 28 C.F.R. § 41.53 (Section 504 coordinating regulation); 41 C.F.R. § 60-741.6(d) (Section 503 implementing regulation); *Gov. Code* § 12926(n) (definition of "reasonable accommodation" under FEHA).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.51

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.51 Accommodation of Disabilities

[1] Generally

Disabled individuals, like members of any other disfavored classification, may be subject to discrimination resulting from both bias (intentional discrimination) and facially neutral employment standards.ⁿ¹ These barriers may be analyzed respectively under the "disparate treatment" and "disparate impact" theories of liability discussed in §§ 41.10-41.11 and §§ 41.20-41.21, respectively.

There are, however, two additional barriers unique to disabled individuals that must also be considered in disability discrimination cases. These are: (1) surmountable impairment barriers; and (2) insurmountable impairment barriers.ⁿ² "Surmountable impairment barriers" can be fully overcome by reasonable accommodation of an individual's disability,ⁿ³ and as discussed in [2]-[5], *below*, an employer must reasonably accommodate a qualified disabled individual by removing such barriers if the employer can do so without undue hardship.ⁿ⁴ "Insurmountable impairment barriers" prevent a disabled individual from fulfilling the essential requirements of the job,ⁿ⁵ even with reasonable accommodation. By definition and regulation, such an individual is not "qualified" for the job,ⁿ⁶ and is not protected by equal employment opportunity laws proscribing disability discrimination.

[2] Duty to Accommodate Under Federal Law

[a] Americans With Disabilities Act

[i] Statutory and Regulatory Provisions

The ADA provides that unlawful "discrimination" includes (1) failing to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee or applicant with a disability,ⁿ⁷ unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its business, or (2) denying employment opportunities to such a person because of the need to provide such reasonable accommodations.^{n7.1} The ADA does not preempt state or local laws that provide greater or equal protection for the

rights of individuals with disabilities under the ADA.ⁿ⁸ On the other hand, an employer need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability under the ADA solely as being regarded as disabled.^{n8.1}

The employee has the burden of showing the existence of a reasonable accommodation that would have enabled the employee to perform the essential functions of an available job.^{n8.2} To avoid summary judgment, however, the employee need only show that an accommodation seems reasonable on its face.ⁿ⁹

The fact that an accommodation would provide a *preference*, *i.e.*, that it would permit a disabled worker to violate a rule others must obey, does not, in and of itself, automatically show that the accommodation is not *reasonable*.^{n9.1} On the other hand, *reasonable* is not synonymous with *effective*; a demand for an effective accommodation could prove unreasonable because of its impact on fellow employees rather than on business operations, *e.g.*, because it will lead to dismissals, relocations, or modification of employee benefits to which an employer, looking at the matter from the perspective of the business itself, may be relatively indifferent.^{n9.2} A plaintiff/employee need only show that an accommodation seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.^{n9.3}

EEOC regulations specify the following categories of "reasonable accommodation" as follows:ⁿ¹⁰

1. Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or
2. Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
3. Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

A "reasonable accommodation" may include but is not limited to (1) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (2) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials, or policies, provision of qualified readers or interpreters, and other similar accommodations.ⁿ¹¹ However, reassignment may not be used to segregate employees with disabilities by forcing reassignments to undesirable positions or designated offices or facilities.^{n11.1} In considering reassignment as reasonable accommodation, an employer must consider contemporaneously available positions and those that will become available within a reasonable period.^{n11.2}

The ADA does not require an employer to exempt an employee from performing essential functions or to reallocate essential functions to other employees.^{n11.3}

Reasonable accommodation may also include the use of accumulated sick leave or unpaid medical leave if it does not pose an undue hardship on the employer.^{n11.4}

Additionally, the EEOC has specified selected types of reasonable accommodation that may be effective for individuals with psychiatric disabilities, including:ⁿ¹²

1. Permitting the use of accrued paid leave or providing additional unpaid leave (including leaves of absence, occasional leave, or part-time scheduling) for treatment or recovery related to a disability;ⁿ¹³

2. For individuals who have disability-related limitations in concentration, physical changes to the workplace, such as room dividers, partitions, or other soundproofing or visual barriers between work spaces, moving an individual away from noisy machinery, reducing other workplace noise, permitting an individual to wear headphones to block out noisy distractions, or permitting access to a tape recorder for reviewing events such as training sessions or meetings;
3. Modifying workplace policies, such as allowing a disabled individual who has difficulty concentrating to take detailed notes during client presentations, even though company policy discourages note-taking during such sessions;
4. Adjusting supervisory methods, such as by communicating assignments, instructions or training in a medium that is most effective for a particular individual, arranging for additional training or modified training materials, or modifying the level of supervision or structure; or
5. Providing a temporary job coach to assist in training a person with a disability.

An employer is not excused from these accommodation requirements because of any failure to receive technical assistance authorized by the ADA.ⁿ¹⁴

A qualified individual with a disability is not required to accept any accommodation, aid, service, opportunity, or benefit, but an individual who rejects any of these items that is necessary for the performance of the essential functions of the position, is not considered a qualified individual with a disability under the ADA.ⁿ¹⁵

For a detailed discussion of the scope and meaning of the terms "disabled" and "qualified" under the ADA, *see* Part B, § 41.32. For a discussion of undue hardship, *see* [4], *below*. For a general discussion relating to the scope and application of the ADA, *see* Chapter 40, Part C and § 41.32.

[ii] Accommodation of Known Disabilities

An employer's duty to make reasonable accommodations does not arise if the employer is unaware of the limitation of the "otherwise qualified."ⁿ¹⁶ Thus, an employer is not expected to "read [the employee's] mind and know he secretly wanted a particular accommodation."ⁿ¹⁷ On the other hand, the employer's duty to provide reasonable accommodation arises when it learns of the underlying facts, and "[t]he employee need not mention the ADA or even the term 'accommodation.'" ⁿ¹⁸

In *Summers v. A. Teichert & Son, Inc.*,ⁿ¹⁹ the plaintiff truck driver returned to work, after being unable to work for more than a year following a work-related accident, and informed the employer that he could perform any job other than construction work and off-road driving. The plaintiff worked sporadically until reinjuring his back; he informed the dispatcher specifically that he could not drive a water truck. Following this incident, the plaintiff was not called into work or told of available work; the plaintiff did not tell the employer that he was able to work, or go to the yard seeking work. The employer mailed the plaintiff a disability form but never heard from the plaintiff. On these facts, the Ninth Circuit granted summary judgment to the employer, holding that the plaintiff failed to raise a triable issue of fact as to whether his lack of work resulted from the employer's failure to reasonably accommodate the plaintiff's purported disability: the plaintiff did not ask to drive a different vehicle, and did not contact the employer at all; the employer did not require the plaintiff to drive a water truck to continue employment, and no evidence suggested that the employer refused to permit the plaintiff to drive any vehicle that he was physically able to drive. Further, no evidence suggested that the employer treated the plaintiff any differently than other similarly situated drivers.ⁿ²⁰

■ CONSULTANT'S COMMENT:

The *Summers* case is an important ADA case because it effectively holds that proof of "equal treatment"

can suffice as proof of reasonable accommodation. During a sixteen-month period, plaintiff, a truck driver, received no work from Teichert. The facts demonstrated, however, that drivers holding plaintiff's status under the Teamsters agreement typically received their work assignments through personal initiative--appearing at the work site and requesting driving opportunities. Plaintiff, however, made no call or visit to the job site during the time frame in question. Thus, plaintiff could identify no disparity in his treatment by comparison to the treatment of similarly-situated employees. His only empirical evidence consisted of proof that those other similarly-situated drivers worked more hours during the disputed time frame. The Ninth Circuit, however, correctly pointed out that any disparity in hours was directly related to a disparity in attempts to seek work--plaintiff had sought none. In short, the duty to reasonably accommodate is not always a duty to offer different or special work opportunities. It may, as in *Summers*, entail only a duty to treat an employee no differently than his or her peers. *Commentary by Kirby Wilcox.*

However, the United States Supreme Court has held that an employer need not accommodate an employee's request for a particular job, if he or she is generally qualified to perform the essential functions of a broader category of similar positions.ⁿ²¹

In *Kaplan v. City of North Las Vegas*, ^{n21.1} the Ninth Circuit considered, for the first time, whether a person regarded by the employer as having a disability is entitled to accommodation under the ADA and concluded that "regarded as" disabled plaintiffs are not entitled to reasonable accommodations.^{n21.2}

[iii] Determining Reasonable Accommodations

The Ninth Circuit requires employers and employees, when necessary, to engage in an interactive process to identify and implement appropriate reasonable accommodations.ⁿ²² The employer's obligation to engage in the interactive process extends beyond a first attempt at accommodation and continues when the employee asks for a different accommodation or the employer is aware that the initial accommodation is failing and further accommodation is needed.ⁿ²³ The interactive process is triggered either by a request for accommodation by the disabled employeeⁿ²⁴ or the employer's recognition of the need for an accommodation. The employee should inform the employer of the need for an adjustment due to a medical condition using "plain English," and need not mention the ADA or use the phrase "reasonable accommodation."ⁿ²⁵ In some circumstances, the employee need not even request accommodation; the employer should initiate the process without being asked if each of the following is true:ⁿ²⁶

1. The employer knows the employee has a disability.
2. experiencing problems at the workplace because of the disability.
3. The employer knows or has reason to know that the disability prevents the employee from requesting a reasonable accommodation.

Employers should follow the following four informal steps when engaging in the interactive process:^{n26.1}

1. Identify barriers to equal opportunity caused by the disability, including identifying and distinguishing between essential and nonessential job tasks and aspects of the work environment of the relevant position(s).
2. Identify possible accommodations.
3. Assess the reasonableness of each accommodation in terms of effectiveness and equal opportunity.

4. Implement the accommodation which is most appropriate for the employee and the employer and which does not impose an undue hardship on the employer's operation, or permit the employee to provide his or her own accommodation if it does not impose an undue hardship.

The expressed choice of the employee must be given primary consideration unless there is another effective accommodation that would provide a meaningful equal employment opportunity.n26.2

The interactive process requires communication and good-faith exploration of possible accommodations between employers and employees. Both sides must communicate directly and exchange essential information, and neither side can delay or obstruct the process.n26.3

1. Meet personally with the affected employee.
2. Request medical information about the condition and its functional limitations.
3. Ask the employee what accommodations he or she is seeking.
4. Record in writing the steps taken to evaluate the employee's request.
5. Offer and discuss available alternatives when the request is unduly burdensome.

■ **PRACTICE TIP:**

To demonstrate good faith, employers can point to cooperative behavior promoting identification of an appropriate accommodation. Employers should do the following:n26.4

1. Meet personally with the affected employee.
2. Request medical information about the condition and its functional limitations.
3. Ask the employee what accommodations he or she is seeking.
4. Record in writing the steps taken to evaluate the employee's request.
5. Offer and discuss available alternatives when the request is unduly burdensome.

Employers must analyze job functions to establish the essential and nonessential job tasks. To identify barriers to job performance, employers must consult and cooperate with disabled employees so both parties discover the precise limitations and most effective types of accommodations. Evaluation of proposed accommodations requires further dialogue and assessment of the effectiveness of each accommodation to enable the employee to successfully perform the job.n26.5

Employers who fail to engage in the interactive process in good faith are liable for the remedies imposed by the ADA, including injunctive relief to insure compliance with the good faith requirement and to require reasonable accommodation, when a reasonable accommodation would otherwise have been possible, i.e., when the jury can reasonably conclude that the employee would have been able to perform the job with accommodations.n26.6 An employer cannot prevail at summary judgment if there is a genuine dispute as to whether the employer engaged in good faith in the process, even if the employer shows that no reasonable accommodation would have been available.n26.7

An employer may decide not to participate in the interactive process because the employer believes that no reasonable accommodation is possible. The employer then bears the burden of persuasion as to whether this should be excused by proving the negative, *i.e.*, that no reasonable accommodation was available, throughout any ensuing litigation.^{n26.8}

The determination of whether a proposed accommodation is reasonable, including whether it imposes an undue hardship on the employer, requires a fact-specific, individualized inquiry.ⁿ²⁷ A policy requiring that an employee be "100 percent healed" (or "fully healed") before returning to work is a *per se* violation of the ADA because it permits employers to substitute a determination of whether an employee is 100 percent healed for the required individual assessment of an employee's ability to perform the essential functions of a job, with or without accommodation.ⁿ²⁸ In the summary judgment context, courts should weigh the risks and alternatives, including potential hardships to the employer, to determine whether a genuine issue of material fact exists as to the reasonableness of the accommodation.ⁿ²⁹

The EEOC's Interpretive Guidance to Title I of the ADA delineates a four step procedure for the employer to determine a reasonable accommodation once a qualified individual with a disability has requested a reasonable accommodation:

1. Analyze the particular job involved and determine its purpose and essential functions;
2. Consult with the individual to ascertain the precise job-related limitations imposed by the disability and how those limitations could be overcome with a reasonable accommodation;
3. In consultation with the individual, identify potential accommodations and assess the effectiveness of each;
4. Consider the preference of the individual and select and implement the accommodation most appropriate for both the employee and the employer.ⁿ³⁰

Thus, the accommodation must relate to essential, not marginal, job functions.ⁿ³¹ However, reasonable accommodation does not require that an employer eliminate or reassign essential job functions.ⁿ³²

Absent contrary medical evidence, a court will give great weight to the opinions of employee's treating physician.ⁿ³³ If the employer has already changed the employee's position to one of light duty, the accommodation must relate to the employee's current position and not the position he or she held prior to the light duty assignment.ⁿ³⁴

[iv] Illustrative Particular Accommodations

Courts generally regard employees' requests to use earned leave time as reasonable accommodations.ⁿ³⁵ However, reasonable accommodation does not require the employer to grant indefinite leave.ⁿ³⁶ The reasonableness of employee requests to work at home is usually a question of the impact on essential job functions.ⁿ³⁷

Unpaid medical leave, including an extended medical leave or an extension of an existing leave period, may also be a reasonable accommodation if it does not pose an undue hardship on the employer.ⁿ³⁸ The ADA does not require the employee to show that a leave of absence is certain or even likely to be successful to prove it is a reasonable accommodation.^{n38.1} However, the requirement to grant a leave when there are plausible reasons to believe it would accommodate an employee's disability cannot be repeatedly invoked, permitting an unqualified employee to avoid termination by requesting a leave of absence each time the employee is about to be fired. The fact that a prior leave was granted and was unsuccessful may be a relevant consideration in determining whether additional leave would be a reasonable accommodation.^{n38.2}

■ CONSULTANT'S COMMENT:

Beware of terminating employees who are on disability leave. Be especially concerned when the employer has a defined period of disability leave and the employee has not yet reached the maximum permitted absence. In *Nunes v. Wal-Mart Stores, Inc.*,^{n38.3} Wal-Mart had a one-year disability leave policy but terminated the plaintiff in the eighth month of her absence. Although the opinion deals with issues of judicial estoppel (declining to find a bar in the earlier submission of an SDI application) and direct threat to others (finding no substantial evidence to support the employer's affirmative defense), the most important comments pertain to the issue of reasonable accommodation. The circuit panel concluded that a leave of absence can be a form of reasonable accommodation. Thus, the plaintiff was entitled to proceed to trial to prove that her leave was the reasonable accommodation that Wal-Mart was required to provide for her disability and that the company had no reasonable basis for refusing to continue that accommodation. *Commentary by Kirby Wilcox.*

For example, in *Hanson v. Lucky Stores*,ⁿ³⁹ the trial court granted summary judgment in the plaintiff's FEHA wrongful termination case because the plaintiff failed to show that the employer's reasons for discharge were untrue or pretextual. The plaintiff was injured on the job and, although the collective bargaining agreement provided for nine months, was granted a total of sixteen months of leave to recover. The plaintiff remained medically unable to perform his former job on a full time basis. The employer offered an alternative, part-time position (with a commensurate decrease in pay and benefits), which the employee rejected. The employee requested several accommodations, including a hand brace, shift change, ergonomic knives, and changing the employee's hand dominance. The appellate court affirmed, holding that a finite leave can be a reasonable accommodation under the FEHA, provided that it is likely that the employee will be able to perform his or her duties after the leave. The employer also offered another reasonable accommodation, a part-time job in the only other position for which the employee was qualified. The court concluded that the employer's accommodations were reasonable and effective, and that the employee's requested accommodations were not reasonable and their effectiveness not supported by the evidence. The employer satisfied its obligation to accommodate and was not required to select either the best accommodation or the one suggested by the employee.ⁿ⁴⁰

■ CONSULTANT'S COMMENT:

The *Hanson* ⁿ⁴¹ case squares federal and state disability law in several significant respects. First, how much leave must an employer grant an employee under FEHA in order to improve his or her medical condition? *Hanson* provides a partial answer. "As long as a reasonable accommodation available to the employer could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt that accommodation"ⁿ⁴² However, "[r]easonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected."ⁿ⁴³ Thus, *Hanson* holds that "a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties." If that likelihood does not exist, the leave is not required.

Second, how much of an effort must an employer undertake to find and make known to an employee the existence of other job opportunities? *Hanson* answers by indicating that "an employer who knows of the disability of an employee has an affirmative duty to make known to the employee other suitable job opportunities with the employer and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship."ⁿ⁴⁴ However, "[t]he employer is not obligated to choose the best accommodation or the accommodation the employee seeks."ⁿ⁴⁵ Rather, "the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide."ⁿ⁴⁶ Furthermore, "[t]he ADA and its regulations do not... create an independent liability for the employer for failing to engage in ritualized discussions with the employee to find a reasonable accommodation."ⁿ⁴⁷ In the words of the *Hanson* panel, "[w]e see no reason why this employer should be subjected to liability for failing to engage in the interactive process where the employee was reasonably accommodated." *Commentary by Kirby Wilcox.*

Working at home can be a reasonable accommodation when the essential functions of the position can be performed at home, and a work-at-home arrangement would not cause undue hardship for the employer.^{n47.1} A work-at-home accommodation may not be denied due to a disciplinary record based on tardiness and absenteeism that may have been due to the disability sought to be accommodated.ⁿ⁴⁸

The ADA does not require employers to violate the seniority rights of other employees under a collective bargaining agreement (CBA) to accommodate a disabled employee.^{n48.1}

Indeed, an employee's proposed accommodation is per se unreasonable if it so conflicts with a bona fide seniority system established under a CBA.ⁿ⁴⁹ A "bona fide seniority system" is one that is created for legitimate purposes rather than for discrimination.ⁿ⁵⁰ Where the conflict is not direct or pertains to the seniority rights of the plaintiff alone, the per se rule does not apply.ⁿ⁵¹

The court must determine whether the requested accommodation actually conflicts with the provisions of an existing collective bargaining agreement. For example, in *Morton v. United Parcel Service, Inc.*,ⁿ⁵² a severely hearing impaired United Parcel Service (UPS) employee applied for a position as a "package car driver." Most drivers had fixed routes, which were assigned pursuant to a seniority-based bidding process under the terms of UPS's collective bargaining agreement with the Teamsters Union. Further, federal Department of Transportation certification was required for drivers of vehicles weighing over 10,000 pounds. However, UPS had a policy of hiring only drivers certified by the federal Department of Transportation, even for its vehicles for which DOT certification was not required. The employee's hearing impairment precluded her from securing a DOT certification. She then requested that UPS hire her only to drive swing routes, rather than fixed routes, in vehicles for which a DOT certification was not required. The Ninth Circuit held that the district court erred in finding that her request implicated the seniority provisions of the collective bargaining agreement. The collective bargaining agreement required UPS to make any new full-time route available via the seniority-based bidding process, but did not limit UPS's authority with respect to assigning vehicles. Because swing drivers had no entitlement to choose among swing driving assignments according to seniority, an accommodation by structuring swing-driving assignments to ensure she could drive a non-DOT vehicle would not violate the collective bargaining agreement.ⁿ⁵³

When there is a potential conflict between the interests of a disabled worker who seeks assignment to a particular position as a reasonable accommodation, and the interests of other workers with superior rights to bid for the job under an employer's seniority system, *i.e.*, a system unilaterally imposed by management, the seniority system will prevail in most cases.ⁿ⁵⁴ The ADA does not require proof on a case-by-case basis that a seniority system should prevail, because it would not be reasonable in the run of cases that the assignment to a disabled worker trump the rules of a seniority system.ⁿ⁵⁵ Ordinarily, if the employer presents evidence that a requested accommodation conflicts with the rules of a seniority system, it thereby shows that the accommodation is not reasonable. Such a showing will entitle an employer to summary judgment, unless the plaintiff presents evidence of special circumstances that make a seniority rule exception "reasonable" in the particular case.ⁿ⁵⁶ The plaintiff bears the burden of showing special circumstances that make an exception from the seniority system reasonable in the particular case. The plaintiff must explain why an exception to the employer's seniority policy in the particular case can constitute a reasonable accommodation, even though in the ordinary run of cases it would not. The plaintiff might show, for example, that the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed, so that one more departure to accommodate an individual with a disability will not be likely to make a difference. Or the plaintiff might show that the system already contains exceptions, so that, in the circumstances, one further exception is unlikely to matter.ⁿ⁵⁷ Such a showing by the plaintiff will defeat the employer's demand for summary judgment.ⁿ⁵⁸

[v] Judicial Estoppel in Federal Courts

The doctrine of judicial estoppel prohibits litigants from taking incompatible positions in separate actions involving the same opponent.ⁿ⁵⁹ When an ADA suit is filed in federal court, federal law, including the application of the doctrine of judicial estoppel, applies. Under federal law, no per se rule based on the doctrine of judicial estoppel bars ADA claims after a claimant has applied for and received disability benefits.ⁿ⁶⁰

In *Cleveland v. Policy Management Systems, Inc.* ⁿ⁶¹ plaintiff suffered a stroke that damaged her concentration, memory, and language skills. She applied for SSDI, stating that she was "disabled" and "unable to work." When her condition improved, she returned to work. The Social Security Administration learned of her return to work after three months and denied her SSDI application. Three days later, she was fired. She then asked the SSA to reconsider her application for benefits. She stated that she continued to be disabled, that she had returned to work for three months, but could no longer do her job because of her condition. Her request for reconsideration was denied, but one year later the SSA awarded her SSDI benefits retroactive to the day of her stroke.

The week before her SSDI award, Cleveland brought a lawsuit against her employer under the ADA, claiming that it had terminated her employment without reasonably accommodating her disability. The district court granted the employer's motion for summary judgment without evaluating plaintiff's reasonable accommodation claim on the merits. The court found that Cleveland was estopped from proving that she could perform her job because she had applied for and received SSDI benefits. The Fifth Circuit affirmed.

Finding no inherent conflict in plaintiff's application for disability benefits and the ADA action, the Supreme Court vacated the judgment and remanded for further proceedings consistent with its opinion. The Court opined that despite the appearance of conflict between applying for disability benefits at the same time as the employee brings an ADA action, the two can coexist without conflict. The Court pointed out that the definitions of a "qualified individual" under the ADA and an individual qualified to receive disability benefits are sufficiently distinct.ⁿ⁶² A "qualified individual" under the ADA includes a disabled person who can perform the essential functions of his or her job with reasonable accommodation, whereas a determination of whether a person is qualified to receive SSDI benefits does not take into account reasonable accommodation. Thus, a person who can show that he or she could perform his or her job with reasonable accommodation for purposes of the ADA could also show, for purposes of a SSDI application, that he or she could not perform the job without such accommodation.ⁿ⁶³

However, the Court conceded that at times an earlier SSDI claim could genuinely conflict with an ADA claim. For that reason, the Court insisted that an ADA plaintiff must explain the apparent contradiction between the two claims.ⁿ⁶⁴

■ CONSULTANT'S COMMENT:

Cleveland addresses a major issue under the ADA--and, by extension, under the FEHA.ⁿ⁶⁵ The issue is whether a plaintiff who claims total disability under the SSDI system is judicially estopped from pursuing an ADA claim. The Court holds that, under such circumstances, an employer is not entitled to a complete bar to the ADA claim nor to an evidentiary presumption that the plaintiff must overcome to proceed. Nonetheless, the Court concluded that the plaintiff must be able to explain any factual contradictions that arise in the comparison of his or her SSDI application documents and his or her ADA complaint in order to survive summary judgment. According to the Court, "an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of an earlier SSDI total disability claim. He or she must proffer a sufficient explanation." He or she must explain the contradiction or attempt to resolve the disparity.

The practical implications of *Cleveland* are twofold. First, the doctrine of judicial estoppel provides no automatic legal bar to an ADA claim following an application for total disability benefits. Second, the doctrine of judicial estoppel will bar an ADA claim following an application for total disability benefits if the plaintiff cannot meet his or her burden of proof to explain the inconsistencies in his or her claims for relief in two separate forums. In short, the Supreme Court took the middle course by not granting

either employees or employers an automatic win. California courts, which have developed their own independent common law for the judicial estoppel doctrine, are likely to follow suit. *Commentary by Kirby Wilcox.*

In *Johnson v. State of Oregon*,ⁿ⁶⁶ an earlier Ninth Circuit case, the employer terminated the plaintiff after concluding that the requested accommodations to facilitate working with carpal tunnel syndrome were unreasonable. The plaintiff's subsequent application for social security benefits was denied for lack of disability, but the plaintiff was eligible for and received long-term disability payments. The plaintiff then filed an ADA claim against the former employer in federal court seeking, among other things, reinstatement with accommodation for her disability. The Ninth Circuit joined the majority of other circuits in rejecting the per se application of the judicial estoppel doctrine in cases in which the ADA claim follows a claim for disability benefits: neither the application for nor the receipt of disability benefits *automatically* bars a claimant from establishing that he or she is a qualified person with a disability under the ADA. First, due to differing definitions of disability used by various agencies for different purposes, an individual might qualify for disability benefits and meet the ADA definition of a qualified person with a disability because that person can work with reasonable accommodation. For example, the ADA requires a highly fact-specific analysis of whether a particular disabled person can perform a certain job with or without accommodation. In contrast, the Social Security Act determines whether an individual is disabled and unable to work through a generalized assessment but does not consider an individual's ability to work with accommodation. Second, a per se rule would contravene the purposes of the ADA by forcing plaintiffs to choose between enforcing their rights under the ADA and seeking immediate subsistence benefits, both of which should be independent rights.ⁿ⁶⁷ Finally, the court noted that because judicial estoppel is an equitable doctrine, invoked at the court's discretion and driven by the specific facts of the case, a per se rule barring claimants from pursuing ADA claims after seeking or obtaining disability benefits would run counter to the doctrine itself.ⁿ⁶⁸

Nonetheless, a plaintiff's prior representations on benefits applications are relevant to and constitute useful evidence in evaluating ADA claims. In clear-cut cases, representations on applications may warrant judicial estoppel of ADA claims, such as when a party's position is "tantamount to a knowing misrepresentation to or even fraud on the court." However, if incompatible positions are not based on chicanery, but rather on inadvertence or mistake, judicial estoppel does not apply.ⁿ⁶⁹ For example, an individual's statement that he or she is "unable to work" when requesting disability benefits may be more readily construed as an assertion that the disabled employee is eligible for disability benefits than as an "unconditional representation" that the individual is completely disabled for all work-related purposes. As such, the prior statement on the disability application does not automatically bar an ADA suit under the doctrine of judicial estoppel.ⁿ⁷⁰

In *Fredenburg v. Contra Costa County Dep't of Health Services*,ⁿ⁷¹ the employer concluded that the employee could not perform her job and placed her on unpaid leave. The employee sought and received state disability insurance benefits until the state concluded that her disability had abated. Ultimately, she filed suit under the ADA claiming that she was able to perform her job. Rejecting the district court's conclusion that the employee was judicially estopped from asserting the ADA claim because of representations made while applying for state disability, the Ninth Circuit concluded that (1) the employee had not denied any previous representations, (2) the court was not misled, and (3) therefore the *Johnson* requisites for judicial estoppel were not met.ⁿ⁷² The employee was also subject to different definitions of disability for the purposes of state disability benefits and the ADA. However, because the employee did not meet her burden of showing a reasonable accommodation that would permit her to perform her job, the district court did not err in disregarding the fact that the state's definition of disability, unlike the ADA's, takes no account of accommodation.ⁿ⁷³ The Ninth Circuit concluded that, although the doctrine of judicial estoppel imposed no bar to the plaintiff's ADA claim, she was not entitled to receive disability benefits and simultaneously recover back pay for the period of claimed ADA disability.ⁿ⁷⁴

[vi] Judicial Estoppel in State Courts

The doctrine of judicial estoppel (sometimes referred to as the doctrine of preclusion of inconsistent opinions) prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or an earlier proceeding. The doctrine serves a clear purpose in protecting the integrity of the judicial process; judicial estoppel is especially appropriate when a party takes inconsistent positions in separate proceedings.ⁿ⁷⁵ The doctrine of judicial estoppel has had particular significance in cases involving the Americans with Disabilities Actⁿ⁷⁶ because, absent its application, some claimants would successfully recover workers' compensation benefits based on total disability and then bring separate civil lawsuits against their employers for discrimination for failure to make reasonable accommodation.ⁿ⁷⁷

Although recognized in California, courts had not previously established a clear set of principles for applying the doctrine.ⁿ⁷⁸ In *Jackson v. County of Los Angeles*, the court enunciated principles for the proper application of the doctrine: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (that is, the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.ⁿ⁷⁹

The distinction between judicial estoppel and collateral estoppel is clear. Judicial estoppel prevents a party from taking inconsistent positions whether or not they have been the subject of a final judgment. Judicial estoppel deprives a party only of the right to assert a particular position and is designed to maintain the purity and integrity of the judicial process. In contrast, collateral estoppel concerns the conservation of judicial resources and bars a party from relitigating an issue of ultimate fact that a court has already adjudicated; it deals with the finality of judgment on factual matters that were fully considered and decided.ⁿ⁸⁰

Judicial estoppel is also distinct from the doctrine of equitable estoppel. A party may invoke equitable estoppel to prevent the opposition from changing positions if (1) the party was an adverse party in the prior proceeding; (2) the party detrimentally relied on the opponent's prior inconsistent position; (3) the party would be prejudiced if a court permitted the opponent to change positions. Thus, equitable estoppel requires privity, reliance, and prejudice because the doctrine focuses on the relationship between the parties in a specific case. Conversely, judicial estoppel focuses on the relationship between the litigant and the judicial system and is designed to protect the integrity of the judicial system; none of the elements of equitable estoppel is or should be required under the judicial estoppel doctrine.ⁿ⁸¹

California judicial estoppel applies in California courts. Because of the interest in judicial integrity that underlies the doctrine of judicial estoppel, it is the interests of the second court that are uniquely implicated and threatened by the incompatible position. Thus, when the issue arises in California courts, California principles of judicial estoppel apply, even when the claim is under federal law.ⁿ⁸²

In *Jackson v. County of Los Angeles*, the court had to determine whether a plaintiff, a former policeman, could proceed with an ADA claim after receiving total disability based on the work restriction of a stress-free work environment. Looking to federal precedent for guidance, the court concluded that the stipulations in the workers' compensation proceeding precluded a viable ADA action.ⁿ⁸³ The *Jackson* court acknowledged that the term "disability," as used in determining income eligibility under workers' compensation programs, is not necessarily used in the same manner in the ADA; despite this distinction, findings in administrative proceedings may judicially estop an employee from pursuing an ADA claim.ⁿ⁸⁴ Thus, finding the requirements of judicial estoppel met, the court concluded that as a matter of law, the plaintiff could not establish that he was a qualified individual with a disability. The two positions were totally inconsistent in that the plaintiff could not have a stress-free work environment and perform the essential functions of a police officer.ⁿ⁸⁵ The court distinguished *Prilliman*, an FEHA case, because the two positions taken in *Jackson* were totally inconsistent, whereas the positions in *Prilliman* were not clearly inconsistent.ⁿ⁸⁶

In *Drain v. Betz Labs., Inc.*,ⁿ⁸⁷ the plaintiff applied for long-term disability benefits stating that he was unable to perform all of his duties and submitted a physician's report stating that he was disabled from "any occupation." The

employer then terminated the plaintiff pursuant to company policy, because the plaintiff could not return to work after a six-month disability leave. The plaintiff thereafter filed a claim for racial harassment and wrongful termination. The Court of Appeals analyzed the claim, although plead as racial discrimination, as analogous to an ADA claim because the employee sought relief for the employer's failure to accommodate his disability as the employer had done with white employees. In this instance, the court gave great weight to the employee's prior assertion of total disability and barred the suit for racial harassment and wrongful termination under the judicial estoppel doctrine.ⁿ⁸⁸ The *Drain* court distinguished *Prilliman* ⁿ⁸⁹ and *Bell*, ⁿ⁹⁰ FEHA cases, because unlike those cases, the *Drain* plaintiff sought and obtained recovery based on a total inability to perform any of his job functions or any other occupation.ⁿ⁹¹

■ PRACTICE TIP:

Because the critical factor in determining whether the doctrine of judicial estoppel applies to a particular case relates directly to the nature of statements made in other proceedings, plaintiff's counsel should always carefully examine the contents of any written assertions made by a potential client (or his or her physician) in benefit applications.

■ CONSULTANT'S COMMENT:

Practitioners should note that the law regarding the judicial estoppel doctrine is not developing entirely symmetrically under state and federal law. Care should be exercised when citing to federal precedent in a state court action and vice versa. *Commentary by Kirby Wilcox.*

[b] Section 503 of the Rehabilitation Act

Section 503 of the Rehabilitation Act of 1973 (Section 503) requires federal contractors to "take affirmative action to employ and advance ... qualified individuals with disabilities ...".ⁿ⁹² According to Office of Federal Contract Compliance Programs (OFCCP) implementing regulations construing the Section 503 affirmative action obligation, federal contractors are required, among other things, to reasonably accommodate an employee's physical and mental limitations, unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the contractor's business. In determining the extent of a contractor's accommodation obligations, the following factors, among others, may be considered: (1) business necessity; and (2) financial cost and expenses. For a discussion relating to the scope and application of Section 503, *see* Chapter 40, Part C and § 41.32[2][b].

[c] Section 504 of the Rehabilitation Act

[i] Generally

Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits discrimination against any "otherwise qualified individual with disabilities" by employers who receive federal funds,ⁿ⁹³ does not contain an express affirmative action requirement. According to the United States Supreme Court, Section 504 only requires "the absence of discrimination."ⁿ⁹⁴ Nevertheless, if an individual cannot perform the job in question because of his or her disability, the individual's employer must reasonably accommodate the individual's limitations to enable him or her to perform the job, as long as the accommodation does not impose an undue hardship on the employer.ⁿ⁹⁵ For a discussion relating to the scope and application of Section 504, *see* Chapter 40, Part C and § 41.32[2][b].

Many of the regulations promulgated by individual agencies to implement Section 504 define "reasonable accommodation."ⁿ⁹⁶ Thus, the Department of Health and Human Services (HHS) implementing regulations provide that "reasonable accommodation" may include (1) making facilities readily accessible to and usable by disabled persons; and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.ⁿ⁹⁷ Appendix A to the HHS regulations explains that job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities that are accessible to and usable by disabled persons.ⁿ⁹⁸

[ii] Affirmative Action Not Required

Although Section 504 coordinating and implementing regulations mandate an "affirmative duty" to attempt reasonable accommodation,ⁿ⁹⁹ courts have held that recipients are not required to undertake "affirmative action" to accommodate disabled individuals. In *Southeastern Community College v. Davis*,ⁿ¹⁰⁰ the United States Supreme Court held that neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation.ⁿ¹⁰¹ The *Davis* respondent was a disabled student who was denied entry into the nursing program at a state community college that received federal funds from the former Department of Health, Education, and Welfare (HEW).ⁿ¹⁰² Relying on an HEW Section 504 implementing regulation that required recipients to modify academic requirements to accommodate disabled students,ⁿ¹⁰³ the respondent argued that Section 504 compelled the college to undertake affirmative action to accommodate her.ⁿ¹⁰⁴ However, the Court declared that "[t]he language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps." Thus, it observed that Sections 501 (employment by federal government)ⁿ¹⁰⁵ and 503 expressly require affirmative action, but Section 504 does not.ⁿ¹⁰⁶ The Court added that a comparison of Sections 501, 503, and 504 demonstrated that "Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so."ⁿ¹⁰⁷

[iii] Reasonable Accommodation Is Minimum Requirement

At first glance, the *Davis* holding might be construed as precluding a Section 504 reasonable accommodation requirement. However, according to the Ninth Circuit Court of Appeals in *Students of Cal. School for the Blind v. Honig*,ⁿ¹⁰⁸ *Davis* did not so hold.ⁿ¹⁰⁹ The Supreme Court's concern in *Davis* was that curricular changes necessary to accommodate the respondent would have involved a "fundamental alteration in the nature of [the nursing program that was] far more than the 'modification' the [HEW] regulation requir[ed]."ⁿ¹¹⁰ The Supreme Court explained that "[i]f [the HEW] regulations were to require substantial adjustments in existing programs *beyond those necessary to eliminate discrimination against otherwise qualified individuals* ... they would constitute an unauthorized extension of the obligations imposed" by Section 504.ⁿ¹¹¹ The *Honig* court interpreted the foregoing language as requiring, at a minimum, reasonable accommodation.ⁿ¹¹²

The Ninth Circuit's decision in *Honig* appears to be supported by the later Supreme Court decision in *Alexander v. Choate*,ⁿ¹¹³ a nonemployment Section 504 case, in which the United States Supreme Court explained that under *Davis* a recipient of federal funds need not be required to make "fundamental" or "substantial" modifications to accommodate the disabled, but may be required to make "reasonable" ones.ⁿ¹¹⁴ The Court added in a footnote that it is clear from the context of *Davis* that the "affirmative action" proscribed in that case referred to those changes, adjustments, or modifications to existing programs that would be substantial, or that would constitute fundamental alterations in the nature of a program, "rather than to those changes that would be reasonable accommodations."ⁿ¹¹⁵

In a case involving an action under both Sections 501 and 504 against the Post Office for refusal to transfer the employee to an area where he could obtain better medical treatment for AIDS, the Ninth Circuit found that the duty to accommodate may require the employer to transfer the disabled employee to a location where the employee can obtain better medical treatment for his or her disability.ⁿ¹¹⁶ The court also stated that even if a disabled employee can perform all job functions, the employer may be required to reasonably accommodate the employee to allow him or her to enjoy the privileges and benefits of employment equal to those enjoyed by nondisabled employees or to pursue therapy or treatment for the disability.ⁿ¹¹⁷ According to the court, this may require employers to alter existing policies or procedures to accommodate the needs of disabled employees in ways that the employer would not do for nondisabled employees, but only if such accommodation is reasonable and does not otherwise result in undue hardship for the employer.ⁿ¹¹⁸

[3] Duty to Accommodate Under the FEHA

[a] Reasonable Accommodation Required

The FEHA requires employers to reasonably accommodate the known physical or mental disabilities of any applicant or employee unless the employer can demonstrate that such an accommodation would result in undue hardship to the operation of the business.ⁿ¹¹⁹ The FEHA requires an employer to accommodate only a known physical disability.^{n119.1} The employee bears the burden of giving the employer notice of his or her disability.^{n119.2}

"Reasonable accommodation" is defined in the FEHA and its implementing regulations only by way of example.^{n119.3} This definition is virtually identical to the ADA's statutory definition of "reasonable accommodation, which is also by way of example.^{n119.4} The FEHA defines "reasonable accommodation" as either of the following:^{n119.4.1}

- Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.
- Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examination, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

For example, an employer is obligated to reassign a disabled employee to another position within the company only if there is an existing, vacant position for which the employee is qualified.^{n119.4.2} The employer is not required to create a new position to accommodate a disabled employee.^{n119.4.3}

The elements of a failure to accommodate claim are the following:^{n119.4.4}

- Plaintiff has a disability under the FEHA.
- Plaintiff is qualified to perform the essential functions of the position.
- The employer failed to reasonably accommodate plaintiff's disability.^{n119.4.5}

However, unlike the ADA, the FEHA in its accommodation provision does not contain language requiring that an employee be a "qualified individual with a disability" able to perform the essential functions of the job.^{n119.5} The FEHA accommodation requirement applies to "an applicant or employee."^{n119.6} California courts of appeal disagree as to whether the FEHA requires reasonable accommodation without the employee being a qualified individual with a disability who is able to perform the essential functions of the job. In *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.*,^{n119.7} the court disagreed with the earlier decision in *Bagatti v. Dept. of Rehabilitation*,ⁿ¹²⁰ in which the court had relied on the differences in statutory language between the FEHA and the ADA to conclude that the FEHA does not require that reasonable accommodation for disability be made only where the person is a qualified individual able to perform the essential functions of the job. In *Jensen v. Wells Fargo Bank*,^{n120.1} the court had held that a plaintiff suing for failure to accommodate under former *Government Code section 12940(k)*, which was the predecessor to the current section 12940(m), must establish he or she is a qualified individual able to perform the essential functions of the job. In *Nadaf-Rahrov*, the court concluded that "reasonable accommodation" in the FEHA means a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired. Similarly, an employer's duty to engage in an interactive process to identify a reasonable accommodation extends only to accommodations that would enable the employee to perform the essential functions of the position. Thus, an employer is liable under section 12940(m) for failing to accommodate an employee only if the work environment could have been modified or adjusted in a manner that would have enabled the employee to perform the essential functions of the job. The burden of proving ability to perform the essential functions of a job with accommodation is on the plaintiff.^{n120.2}

The FEHA does not require an employer to accommodate an employee by allowing the use of illegal drugs, including medical marijuana. Although the use of medical marijuana is legal under California law under the Compassionate Use Act of 1996,^{n120.3} no state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law^{n120.4}, even for medical users.^{n120.5} California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the Compassionate Use Act suggested the voters intended the measure to address the respective rights and obligations of employers and employees. The Compassionate Use Act does not create a broad right to use marijuana without hindrance or inconvenience, enforceable against private parties such as employers. Further, legislation enacted after the Compassionate Use Act, which provides that nothing in the Compassionate Use Act requires accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment,ⁿ¹²¹ negates any expectation that the immunity to criminal liability for possessing marijuana granted in the Compassionate Use Act gives medical users a civilly enforceable right to possess the drug at work or in custody.^{n121.1}

A single failure to accommodate, even in the context of a larger pattern of successful accommodation, can serve as the basis for finding a failure to accommodate.^{n121.1.1}

The employer cannot prevail on summary judgment on a claim of failure to reasonably accommodate unless it establishes one of the following through undisputed facts:^{n121.2}

- Reasonable accommodation was offered and refused.
- There simply was no vacant position within the employer's organization for which the disabled employee was qualified and which the disabled employee was capable of performing with or without accommodation.
- The employer did everything in its power to find a reasonable accommodation, but the informal interactive process broke down because the employee failed to engage in discussions in good faith.

The FEHA does not link the failure to make reasonable accommodation to discrimination in the terms and conditions of employment, as does the ADA. Thus, the FEHA does not limit the right to assert the duty of reasonable accommodation to instances in which an adverse employment action is taken against the employee.ⁿ¹²² Thus, under the express provisions of the FEHA, the employer's failure to reasonably accommodate a disabled individual is a violation of the statute in and of itself.^{n122.1}

A claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue;^{n122.2} however, each necessarily implicates the other.^{n122.3} For example, the purpose of the interactive process is to determine what accommodation is required. Once a reasonable accommodation has been granted as a result of that process, the employer has a duty to provide that reasonable accommodation.^{n122.4} Further, after a reasonable accommodation has been granted, the interactive process does not continue to apply in a failure to accommodate context.^{n122.5}

An employer who reassigns an employee to a temporary light-duty position to accommodate the employee's injury does not have an affirmative obligation under the FEHA to make that temporary light-duty assignment available indefinitely once the employee's temporary disability becomes permanent. The duty to provide reasonable accommodation for a disabled employee does not obligate the employer to convert a temporary light-duty position into a permanent one when doing so would, in effect, create a new position.ⁿ¹²³

Holding a job open for a disabled employee who needs time to recuperate or heal is a form of reasonable

accommodation and may be all that is required when it appears likely that the employee will be able to return to an existing position at some time in the foreseeable future.^{123.1} However, engaging in the interactive process may require the employer to do more than simply hold the employee's job open.^{123.2}

"Undue hardship" means an action that requires significant difficulty or expense when considered in light of the following factors:¹²⁴

- The nature and cost of the accommodation required;
- The overall financial resources of the facilities involved in providing the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or other impact of these accommodations on the operation of the facility;
- The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities;
- The type of operations, including the composition, structure, and functions of the workforce of the entity;
- The geographic separateness, administrative, or fiscal relationship of the facility or facilities.

A plaintiff need not initially plead or produce evidence showing that the accommodation would not impose an undue hardship on the employer. The burden is on the employer to make a showing of undue hardship.¹²⁵

According to the court of appeal in *County of Fresno v. Fair Employment & Housing Com.*,¹²⁶ which held that hypersensitivity to tobacco smoke is a "physical handicap" (as defined under the FEHA prior to its 1992 amendments to the definitions of "physical handicap" and "reasonable accommodation"), an employee establishes a prima facie case of failure to accommodate by proving both that he or she is disabled under the FEHA¹²⁷ and that the employer has failed to accommodate the disability. That accomplished, the burden then shifts to the employer to produce evidence demonstrating it has not discriminated, such as establishing that the accommodation would impose an undue hardship on its operations.^{127.1} If the employer so rebuts the prima facie case, the employee must have a fair opportunity to prove the reason given for failing to accommodate is, in fact, a pretext for prohibited disability discrimination.¹²⁸

In *County of Fresno*, the FEHC argued that even if an employer takes appropriate accommodation measures, they are "reasonable" only if they (1) are successful, (2) are individually tailored to meet the needs of the disabled employee, and (3) preserve the disabled employee's employment status.¹²⁹ The *Fresno* court did not expressly pass on that proposition, but it did hold that the FEHC did not abuse its discretion in finding a failure to reasonably accommodate because all the measures the employer took either were unsuccessful, or were not taken specifically to accommodate the affected employees, or violated the FEHA by depriving the affected employees of employment privileges.¹³⁰ Those measures included air filtration machines, separating the affected employees from smokers, pressuring smokers not to smoke in the employees' presence, offering the employees alternate positions, "permitting" one of them to take medical leave, creating a task force and subcommittee to study smoking on the job and to make recommendations, and implementing a county-wide ordinance prohibiting smoking except in designated places.¹³¹

An employer or other entity covered by the FEHA may not deny an employment benefit because of the prospective need to make reasonable accommodation to a disabled individual.

[b] Affirmative Action Required

[i] Employer's Obligations

An employer who knows of an employee's disability has an affirmative duty to inform that employee of other suitable job opportunities with the employer and to determine whether the employee is interested in and qualified for those positions. These affirmative duties arise only when:^{n131.1}

- The employer can satisfy these duties without undue hardship;^{n131.2}
- The employer provides similar assistance to other disabled or nondisabled employees; or
- The employer has a policy of offering such assistance or benefit to any other employees.

The FEHA requires an employer to engage in a timely, good faith, interactive process with the employee to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by a disabled employee.^{n131.3} The employer must engage in this interactive process with an employee who is not actually disabled if the employer regards the employee as disabled.ⁿ¹³²

It is the employee's burden to initiate the process, unless the disability and resulting limitations are obvious.^{n132.0.1} No magic words are necessary; the obligation arises once the employer becomes aware of the need to consider an accommodation. Each party must participate in good faith, undertake reasonable efforts to communicate the party's concerns, and make available to the other information that is available or more accessible to one party.^{n132.1} Once the interactive process is initiated, the employer's obligation to engage in the process in good faith is continuous.^{n132.1.1}

An employer must explore various accommodations even if the employee has not requested any. An employer who rejects the employee's proposed accommodations and offers no effective alternative fails to engage in good faith in the mandatory interactive process.^{n132.2}

Government Code section 12940(n) imposes liability only if a reasonable accommodation was possible. Thus, a reasonable accommodation must have been available before an employer can be held liable for failing to engage in the good faith interactive process. The simple failure to engage in a good faith interactive process alone does not give rise to liability.^{n132.3} The burden of proving the availability of a reasonable accommodation rests on the employee.^{n132.4}

The fact that an employer took some steps to work with an employee to identify reasonable accommodations does not absolve the employer of liability under section 12940(n). If the employer is responsible for a later breakdown in the process, it may be held liable.^{n132.5}

Although an employer's good faith during the interactive process may support an inference that its decision not to provide accommodations was also made in good faith, the fact that the employer may ultimately be found not to be liable for failure to accommodate an disabled employee does not automatically mean the employer engaged in the interactive process in good faith.^{n132.6}

An employee may file a civil action based on the employer's failure to engage in the interactive process.^{n132.7} The employer's failure to engage in a good faith interactive process to determine an effective accommodation, once one is requested, is a violation of the FEHA in and of itself.ⁿ¹³³ Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith.^{n133.1} While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other.^{n133.2}

Ordinarily, a disabled employee may not require an employer to communicate directly with the employee's attorney, because the interactive process contemplates that the employee and employer will communicate directly with each other to exchange information about job skills and job openings.^{n133.3} In *Claudio v. Regents of the University of California*

.n133.4 however, the employer itself created unusual circumstances because of which the Court of Appeal could not say that it was unreasonable for the employee to request that the employer to communicate with his attorney. The employee, who worked at a veterinary school, contracted leptospirosis, a disease humans can contract from animals, and became physically disabled. After the employee went on medical leave, stopped working and moved to another state, the employer informed him on four occasions that he had been fired, which created the unusual circumstance of allowing the employee to request that the employer communicate with the employee's attorney rather than directly with the employee. The court also found that the employer's employment specialist did not act reasonably in unilaterally determining she did not have to communicate with the employee's attorney simply because the attorney worked for a firm that specialized in workers' compensation law. Thus, the court concluded that a triable issue of fact existed with respect to whether the employer violated its duty to engage in the interactive process required by the FEHA.n133.5

[ii] Employee Not Required to Request Accommodation

The employer's affirmative duty to investigate whether or not the employer can reasonably accommodate a disabled employee is not dependent on the disabled employee's prior request for some specific accommodation.n134 In *Prilliman v. United Airlines, Inc.*, n135 two pilots diagnosed with AIDS were grounded for medical disability based on FAA regulations. At that time, one pilot had serious medical problems; the other was functioning well when grounded and for more than a year afterwards. Neither pilot requested an alternative job position with the airline, and both applied for and received disability benefits. The trial court found that the airline had no duty of reasonable accommodation under FEHA, since the pilots had not requested any such accommodation. The Court of Appeal affirmed the judgment in favor of the airline and against the more severely disabled pilot, concluding that summary judgment was properly granted because the airline had no duty to reasonably accommodate the employee who would have been incapable of performing any alternative job position. However, the court reversed the judgment against the second pilot and directed the trial court on remand to deny the motion for summary judgment as to that plaintiff. As to the second pilot, who was functioning well within normal limits as to intellectual ability and motor skills more than a year after being grounded, a triable issue of fact existed as to whether the airline fulfilled its duty of providing reasonable accommodation. The court concluded that the pilot's failure to request a specific accommodation was irrelevant to a determination of reasonable accommodation under FEHA.n136

On the other hand, it is an employee's responsibility to understand his or her own physical or mental condition well enough to present the employer at the earliest opportunity with a concise list of restrictions that must be met to accommodate the employee.n136.1

[c] Disability Coverage Does Not Preempt Claim

The fact that a disabled employee receives a disability benefit from the employer and government social security benefits does not dispose of the issue whether or not the employer violated FEHA by failing to make known other suitable job opportunities.n137 In *Prilliman v. United Airlines, Inc.*, n138 the employee received benefits because he had been permanently grounded. Inasmuch as his position in the subsequent FEHA lawsuit was not *clearly inconsistent* with the position taken when applying for disability benefits, the principles of judicial estoppel did not apply. In response to the employer's effort to apply federal estoppel principles, the *Prilliman* court concluded that state law on judicial estoppel applies when the case is filed in state court, and further noted that judicial estoppel is not uniformly defined or applied by the federal courts.n139 For further discussion of judicial estoppel, *see* [e], *below*.

[d] Workers' Compensation Preemption

Whether an employee whose disability is caused by a work-related injury is entitled to the remedies provided under the FEHA is an unsettled question. Although *Lab. Code § 132a* purports to provide the exclusive, albeit limited, remedy for discrimination based upon a work related injury, the FEHA n140 specifies, "Nothing contained in this part shall be deemed to repeal ... any other law of this state relating to discrimination because of ... physical disability, mental

disability ... unless those provisions provide less protection to the enumerated classes of persons covered under this part."

In *Wood v. County of Alameda*,ⁿ¹⁴¹ the court held that the exclusive remedy provisions of the state Workers Compensation Act (*Lab. Code § 3200 et seq.*) must be denied effect to the extent they are incompatible with or conflict with the remedial provisions of the ADA.ⁿ¹⁴²

California state courts held that *Labor Code Section 132a* preempts actions for discrimination based on work-related injuries.ⁿ¹⁴³ This view was supported by the Ninth Circuit in *Jimeno v. Mobil Oil Corp.*ⁿ¹⁴⁴ However, in *City of Moorpark v. Superior Court*,ⁿ¹⁴⁵ the California Supreme Court held that *Labor Code Section 132a* did not provide an exclusive remedy and did not preclude an employee from pursuing FEHA claims in court.ⁿ¹⁴⁶

[e] Judicial Estoppel

The doctrine of judicial estoppel precludes litigants from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or an earlier proceeding.ⁿ¹⁴⁷ Judicial estoppel will be invoked when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (that is, the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.ⁿ¹⁴⁸

In the context of the FEHA, the scope and application of the doctrine of judicial estoppel is governed by California law.ⁿ¹⁴⁹ Judicial estoppel is not an invariable per se rule precluding a subsequent FEHA suit because of the plaintiff's previous application for disability benefits. Rather, judicial estoppel is an issue of fact, to be decided according to the particular evidence and circumstances of each case.ⁿ¹⁵⁰

Judicial estoppel is invoked only after a very high and rigorous threshold is cleared.ⁿ¹⁵¹ Under California law, judicial estoppel will be applied against a party only when that party has taken positions or made statements that are "totally inconsistent,"ⁿ¹⁵² or so irreconcilable that one position necessarily excludes the other.ⁿ¹⁵³

In *Bell v. Wells Fargo Bank*, the court had to determine whether the plaintiff could proceed with an FEHA claim after receiving state and federal disability benefits, or whether the suit was barred by judicial estoppel because of certain statements made in the application for disability benefits. The plaintiff, a former bank examiner diagnosed with HIV, had to quit and go on disability when the employer eliminated a one-day-per-week telecommuting accommodation. The employee brought suit alleging employment discrimination under the FEHA. The employer argued that statements made in connection with the plaintiff's disability applications, to the effect that sickness rendered him unable to perform his "regular and customary work," judicially estopped the plaintiff from taking an allegedly inconsistent position in the FEHA suit. However, the court noted that the meaning of these statements could not be determined without knowing what the plaintiff meant by regular and customary work, *i.e.*, the job before or after the employer changed the accommodation. Under the facts of the case, the plaintiff clearly viewed himself as disabled and incapable of performing customary duties solely because the employer disturbed the status quo. The statements made by the plaintiff at different times about the nature and extent of the disability were reconcilable; statements in the disability application were not inherently and totally inconsistent with the litigation position that the plaintiff could have continued working had the accommodation remained in place. Thus, the positions taken by the plaintiff were not mutually exclusive and did not necessarily exclude the subsequent litigation posture.ⁿ¹⁵⁴

For further discussion of judicial estoppel, including distinctions between judicial and collateral or equitable estoppel, see § 41.51[2][a][v][B].

[4] Undue Hardship

[a] Federal Law

As discussed in [2], *above*, employers need not reasonably accommodate disabled individuals if the accommodation would impose undue hardship.ⁿ¹⁵⁵ The question of undue hardship arises only when an accommodation is necessary to enable a disabled person to perform a job's essential functions and the proposed accommodation is reasonable. In those cases, the next question is whether that accommodation would create an undue hardship for the employer. The question does not arise if the plaintiffs do not seek an accommodation, reasonable or otherwise.ⁿ¹⁵⁶ Undue hardship analysis is thus a fact-intensive inquiry, which is rarely suitable for resolution on summary judgment.ⁿ¹⁵⁷

The burden of showing undue hardship is on the employer.ⁿ¹⁵⁸ Once the employer presents credible evidence that indicates accommodation would not reasonably be possible, the plaintiff has the burden of coming forward with evidence concerning his or her individual capabilities and suggestions for accommodations to rebut the employer's evidence.ⁿ¹⁵⁹

The ADA defines "undue hardship" as an action requiring significant difficulty or expense, when considered in light of the following factors:

1. The nature and cost of the accommodation needed,ⁿ¹⁶⁰ taking into consideration the availability of tax credits and deductions, and outside funding;ⁿ¹⁶¹
2. The overall financial resources of the facility or facilities involved in providing reasonable accommodation; the number of persons employed at the facility; the effect on expenses and resources, or the impact otherwise of the accommodation on the operation of the facility;ⁿ¹⁶²
3. The overall financial resources of the employer; the overall size of the employer's business with respect to the number of its employees; the number, type, and location of its facilities;ⁿ¹⁶³
4. The type of operation or operations of the employer, including the composition, structure, and functions of the employer's workforce; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer;ⁿ¹⁶⁴ and
5. The impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.ⁿ¹⁶⁵

In practice, the application of these factors appears to be easier to recite than to apply. For example, in theory, costs may only be considered an undue hardship at the level of substantial risk or disruption. However, one court has applied a balancing method and rejected an employee's request for lowering a kitchen sink at the cost of \$160 as an undue hardship.ⁿ¹⁶⁶

Courts have also differed on whether requiring the employer to provide assistance constitutes an undue hardship.ⁿ¹⁶⁷ with the inquiry generally focusing on whether the assistance is required for essential or marginal job duties.

Many of the implementing regulations promulgated by the individual funding agencies governed by Section 504 enumerate some factors that may be considered in determining whether an accommodation would impose undue hardship under the Rehabilitation Act of 1973. For example, Department of Health and Human Services (HHS) and Department of Justice implementing regulations provide that the factors include:ⁿ¹⁶⁸

1. The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

2. The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

3. The nature and cost of the accommodation needed.

According to Appendix A to the HHS regulations, the weight given to each of the foregoing factors will vary depending on the facts of a particular situation. For example, a small day-care center may not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district may be required to make available a teacher's aid to a blind applicant for a teaching job. Further, it may be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.¹⁶⁹

[b] Fair Employment and Housing Act

The FEHA also excuses employers from reasonable accommodation if accommodation imposes an undue hardship.¹⁷⁰ The burden is on the employer to produce evidence of undue hardship.¹⁷¹

The FEHA defines "undue hardship" to mean an action requiring significant difficulty or expense, when considered in light of all of the following factors:¹⁷²

1. The nature and cost of the accommodation needed;
2. The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations on the operation of the facility;
3. The overall financial resources of the covered entity, the overall size of the business or a covered entity with respect to the number of employees, and the number, type, and location of its facilities;
4. The type of operations, including the composition, structure, and functions of the workforce of the entity; and
5. The geographic separateness, administrative, or fiscal relationship of the facility or facilities.

In addition, employers are not liable for refusing to hire or for discharging an employee with a physical or mental disability or medical condition if the employee is unable to perform his or her "essential functions" with reasonable accommodations or cannot perform them without endangering the health or safety of him or herself or others even with reasonable accommodation.¹⁷³ For discussion of employee's inability to perform job or danger to health or safety as a defense to a claim of disability discrimination, *see* § 41.97.

[5] Temporary Disability Due to Pregnancy

[a] Duty to Reasonably Accommodate Employee by Transferring to Less Strenuous Duties

The FEHA provides that employers who have a policy, practice, or collective bargaining agreement authorizing or requiring the transfer of temporarily disabled employees to less strenuous or hazardous positions are required¹⁷⁴ to also transfer temporarily disabled pregnant employees to less strenuous or hazardous positions for the duration of the disability if the employee so requests.¹⁷⁵ It also provides that if the employer does not have such a policy, practice, or collective bargaining agreement provision, it is required to transfer a pregnant employee to a less strenuous or

hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, and the transfer can be reasonably accommodated.ⁿ¹⁷⁶ Further, employers may not refuse to provide reasonable accommodation for an employee for conditions related to pregnancy, childbirth, or related medical conditions, if requested by the employee with the advice of her health care provider.ⁿ¹⁷⁷

[b] Transfer Excused Under Certain Circumstances

Employers are not required to meet the transfer requirements of *Government Code Section 12945(b)(3)*, discussed in [a], *above*, by creating additional employment that would not otherwise have been created, nor by discharging any employee, transferring any employee with more seniority, or promoting any employee who is not qualified to perform the job.ⁿ¹⁷⁸

In *Armstrong v. Flowers Hosp., Inc.*,ⁿ¹⁷⁹ an employer did not have to accommodate a pregnant nurse by transferring her from a work assignment caring for an AIDS patient. The court found no evidence that plaintiff was at greater risk than a non-pregnant person performing the same duties. Hence, her request for transfer did not fall within the pregnancy-related reasons for change to a less strenuous position for the duration of pregnancy.ⁿ¹⁸⁰

Legal Topics:

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

Labor & Employment Law
Discrimination
Disability Discrimination
General Overview
Labor & Employment Law
Discrimination
Disability Discrimination
Coverage & Definitions
General Overview

FOOTNOTES:

(n1)Footnote 1. See *Prewitt v. United States Postal Serv.* (5th Cir. 1981) 662 F.2d 292, 305 n.19 (construing Section 501 of Rehabilitation act of 1973, governing employment of handicapped individuals in federal government); *Nelson v. Thornburgh* (E.D. Pa. 1983) 567 F. Supp. 369, 378, *aff'd without op.*, 732 F.2d 146 (3d Cir. 1984).

(n2)Footnote 2. See *Prewitt v. United States Postal Serv.* (5th Cir. 1981) 662 F.2d 292, 305 n.19 (construing Section 501 of Rehabilitation act of 1973, governing employment of handicapped individuals in federal government); *Nelson v. Thornburgh* (E.D. Pa. 1983) 567 F. Supp. 369, 378, *aff'd without opinion*.

(n3)Footnote 3. See *Nelson v. Thornburgh* (E.D. Pa. 1983) 567 F. Supp. 369, 378, *aff'd without op.*, 732 F.2d 146 (3d Cir. 1984).

(n4)Footnote 4. See 29 U.S.C. §§ 793(a) (Section 503 of Rehabilitation Act of 1973), 794(a) (Section 504 of Rehabilitation Act of 1973); 28 C.F.R. § 41.53 (Section 504 coordinating regulation); 41 C.F.R. § 60-741.6(d) (Section 503 implementing regulation); 2 Cal. Code Reg. § 7293.9 (FEHC regulation implementing FEHA). For a discussion relating to "undue hardship" generally, see [4], *below*.

(n5)Footnote 5. See *Nelson v. Thornburgh* (E.D. Pa. 1983) 567 F. Supp. 369, 378, *aff'd without op.*, 732 F.2d 146 (3d Cir. 1984).

(n6)Footnote 6. See 28 C.F.R. § 41.32 (Section 504 implementing regulation); 41 C.F.R. § 60-741.2 (Section 503 implementing regulation); 29 C.F.R. § 1630.2(m); see also 2 Cal. Code Reg. § 7293.8(b) (FEHA interpretative regulation; demonstration that handicapped individual cannot perform essential functions of job, after reasonable accommodation made, as permissible defense); see discussion in ch. 40, pt. C.

(n7)Footnote 7. See § 41.32[2][a].

(n8)Footnote 7.1. 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.9(a), (b).

(n9)Footnote 8. *See* 42 U.S.C. § 12201(b); for further discussion of accommodations required under the FEHA, *see* [3], *below*.

(n10)Footnote 8.1. 42 U.S.C. § 12201(h). For the definition of disability, *see* 42 U.S.C. § 12102(1).

(n11)Footnote 8.2. *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1088 ; *see* *Zukle v. Regents of University of California* (9th Cir. 1999) 166 F.3d 1041, 1046.

(n12)Footnote 9. *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 401-402, 122 S. Ct. 1516, 152 L. Ed. 2d 589 ; *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1088 .

(n13)Footnote 9.1. *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589, 600-601 .

(n14)Footnote 9.2. *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589, 601-602 .

(n15)Footnote 9.3. *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589, 602-603, 19-20 .

(n16)Footnote 10. 29 C.F.R. § 1630.2(o)(1); *see* Burstein, *What is "Reasonable Accommodation" Under the Americans With Disabilities Act?* 38(5) Prac. Law. 63 (1992).

(n17)Footnote 11. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2); *see* *Willis v. Pacific Maritime Ass'n* (9th Cir. 2001) 236 F.3d 1160, 1165 , amended on denial of rehearing en banc 244 F.3d 675 (reassignment to vacant position as reasonable accommodation under ADA requires that an existing position be vacant; employers need not create new position or bump employee to create vacancy); *see also* [iv], *below*.

(n18)Footnote 11.1. 29 C.F.R. § 1630.2(o); *see* *Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 893-894 (assigning injured police officers who were unable to perform beat-patrol job to undesirable jobs and degrading conditions, to which able-bodied officers are not subjected, and who were denied rights afforded their able-bodied co-workers, including right to wear police uniform, did not comply with ADA's mandate).

(n19)Footnote 11.2. *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1089-1090 .

(n20)Footnote 11.3. *See* 29 C.F.R. Part 1630, App. (employer may restructure job by reallocating or redistributing nonessential, marginal job functions); *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1088-1090 (employer was not required to restructure position by exempting employee suffering from epilepsy from essential duty of operating heavy machinery, so that employee failed to show job restructuring was available option).

(n21)Footnote 11.4. *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1090 (genuine issue of material fact as to whether employee suffering from epilepsy could reasonably have been accommodated by his request for accumulated sick leave or unpaid medical leave sufficient to permit transition to new medication); *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1246 .

(n22)Footnote 12. *See* EEOC Compliance Manual (CCH) § 902(Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities).

(n23)Footnote 13. *See* *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1247 (extended medical leave for pregnancy complications may be reasonable accommodation).

(n24)Footnote 14. *See* 29 C.F.R. § 1630.9(c).

(n25)Footnote 15. 29 C.F.R. § 1630.9(d).

(n26)Footnote 16. See 29 C.F.R., Pt. 1630, App. § 1630.9; see also *Brundage v. Hahn* (1997) 57 Cal. App. 4th 228, 236-237, 66 Cal. Rptr. 2d 830 (employee who was absent from job for six weeks and never informed employer of mental disability until after termination was terminated for abandonment and not discrimination based on disability); but see *Bagatti v. Department of Rehabilitation* (2002) 97 Cal. App. 4th 344, 361, 118 Cal. Rptr. 2d 443 (disagreeing with *Jensen* to extent court adopted interpretive EEOC statement to define reasonable accommodation under FEHA).

(n27)Footnote 17. *Schmidt v. Safeway, Inc.* (D. Or. 1994) 864 F. Supp. 991, 997 .

(n28)Footnote 18. *Schmidt v. Safeway, Inc.* (D. Or. 1994) 864 F. Supp. 991, 997 ; see EEOC Compliance Manual (CCH) § 902(Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities). But cf. *Hedberg v. Indiana Bell Tel. Co., Inc.* (7th Cir. 1995) 47 F.3d 928, 932-934 (employer must know of disability, and knowledge of disability cannot be inferred from knowledge of symptoms caused by disability, such as tardiness and apparent laziness); *Hamm v. Runyon* (7th Cir. 1995) 51 F.3d 721, 725 (tardiness not an obvious symptom of arthritis).

(n29)Footnote 19. *Summers v. A. Teichert & Son, Inc.* (1997) 127 F.3d 1150 .

(n30)Footnote 20. *Summers v. A. Teichert & Son, Inc.* (1997) 127 F.3d 1150, 1153-1154 (disparity in work hours related to disparity in attempts to secure work; attorney fee award to prevailing party only when losing party's action is frivolous, unreasonable, or without foundation).

(n31)Footnote 21. *Albertson's, Inc. v. Kirkingburg* (1999) 527 U.S. 555, 119 S. Ct. 2162, 144 L. Ed. 2d 518, 527 , overruled by statute on other grounds [see P.L. 110-325, §§ 1, 2] (plaintiff generally employable as a mechanic notwithstanding limitation imposed by driving particular type of vehicle on interstate highway); *Sutton v. United Air Lines* (1999) 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450, 469 , overruled by statute on other grounds [see P.L. 110-325, §§ 1, 2] (plaintiffs not protected by ADA if precluded from working as global airline pilots since they were employable as pilots on other routes); see *Real v. City of Compton* (1999) 73 Cal. App. 4th 1407, 1418-1421, 87 Cal. Rptr. 2d 531 (because evidence showed only that employer believed former police officer was not able to be patrol officer, rather than incapable of performing broad class of jobs, plaintiff was not perceived as substantially limited in a major life activity). For further discussion of determining whether plaintiff is "a qualified individual with a disability," see § 41.32[2][a].

(n32)Footnote 21.1. *Kaplan v. City of North Las Vegas* (9th Cir. 2003) 323 F.3d 1226 .

(n33)Footnote 21.2. *Kaplan v. City of North Las Vegas* (9th Cir. 2003) 323 F.3d 1226, 1231-1232 (because deputy marshal was not actually disabled, but was regarded as disabled based on misdiagnosis, employer did not have duty to accommodate him). See *Weber v. Strippit, Inc.* (8th Cir. 1999) 186 F.3d 907, 916-17 ("regarded as" disabled plaintiffs are not entitled to reasonable accommodation); *Workman v. Frito-Lay, Inc.* (6th Cir. 1999) 165 F.3d 460, 467 (same); *Newberry v. E. Texas State Univ.* (5th Cir. 1998) 161 F.3d 276, 280 (same); *Deane v. Pocono Med. Ctr.* (3d Cir. 1998) 142 F.3d 138, 148 n.12 (en banc) (declining to rule on issue but noting argument that employers are not required to provide reasonable accommodation for perceived disabilities has "considerable force"). but see *Katz v. City Metal Co., Inc.* (1st Cir. 1996) 87 F.3d 26, 33 (allowing "regarded as" plaintiff to proceed, concluding that whether plaintiff could have performed his job with reasonable accommodation was jury issue and assuming that "regarded as" plaintiffs are entitled to reasonable accommodation without providing analysis); *Jacques v. DiMarzio, Inc.* (E.D.N.Y. 2002) 200 F. Supp. 2d 151, 163 (recognizing that Second Circuit Court of Appeals has yet to decide issue, but concluding employers have duty to accommodate in "regarded as" cases).

(n34)Footnote 22. *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1111-1114 , citing S. Rep No. 101-116, at 34 (1989), 29 C.F.R. Pt. 1630, App. § 1630.9 EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compliance Manual (CCH), § 902, No. 915.002 (March 1, 1999), at 5440; see also *Zivkovic v. So. Cal. Edison Co.* (9th Cir. 2002) 302 F.3d 1080, 1088-1090 (district court's

failure to determine whether employer engaged in interactive process in light of contravening evidence from applicant precluded appellate court from reviewing court's legal conclusions on issue and required remand); *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1137-1139 (employer's rejection of employee's work-at-home request and its failure to explore with employee possibility of other accommodations once it was aware that flexible start time was not working as accommodation constituted violation of its duty regarding mandatory interactive process). Effective January 1, 2001, the California Legislature affirmed the importance of the interactive process in determining a reasonable accommodation as articulated by the EEOC in its interpretive guidance of the ADA. *Gov. Code* § 12926.1(e).

(n35)Footnote 23. *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1138 .

(n36)Footnote 24. *See Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1138-1139 (medical transcriptionist requested work-at-home arrangement as accommodation).

(n37)Footnote 25. *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1112 , citing EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, *EEOC Compliance Manual (CCH)*, § 902, No. 915.002 (March 1, 1999), at 5459; *see Brown v. Lucky Stores, Inc.* (9th Cir. 2001) 246 F.3d 1182, 1188 (employer had no affirmative obligation to provide accommodation because record did not show employee was unable to request accommodation or that employer knew or had reason to know employee had disability preventing her from making request).

(n38)Footnote 26. *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1112 , citing EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, *EEOC Compliance Manual (CCH)*, § 902, No. 915.002 (March 1, 1999), at 5459.

(n39)Footnote 26.1. *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1114 , citing S. Rep. No. 101-116, at 35 (1989); H. R. Rep. No. 101-485, pt. 2, at 66 (1990).

(n40)Footnote 26.2. *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1114 , citing S. Rep. No. 101-116, at 35 (1989); H. R. Rep. No. 101-485, pt. 2, at 66 (1990).

(n41)Footnote 26.3. *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1137 ; *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1114-1115 *See, e.g., Allen v. Pacific Bell* (9th Cir. 2003) 348 F.3d 1113, 1114-1115 (because employee was requested to submit additional medical evidence to modify his doctor's prior report, but failed to do so, employer did not have duty under ADA or California law to engage in further interactive processes with respect to Services Technician position in absence of such information; employee lost rights to additional accommodation by failing to take keyboard test to qualify for positions to which he matched in job search process thus failing to cooperate in job-search process).

(n42)Footnote 26.4. *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1115 , citing *Taylor v. Phoenixville School Dist.* (3d Cir. 1999) 184 F.3d 296, 317 .

(n43)Footnote 26.5. *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1115 .

(n44)Footnote 26.6. *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1137-1139 ; *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1115-1116 & n.7.

(n45)Footnote 26.7. *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1116 (summary judgment for employer not appropriate because employee triggered interactive process obligation by communicating to his employer his desire to accommodation based on his disability and identified possible accommodations, but employer appeared not to have seriously considered employee's suggestions, and employer did not seek to have dialogue with employee, thus failing to engage in interactive process in good faith, and because triable issue of fact existed as to whether reasonable

accommodation without undue hardship to employer was possible).

(n46)Footnote 26.8. *Morton v. United Parcel Service, Inc.* (9th Cir. 2001) 272 F.3d 1249, 1256 & n.7, cert. denied, overruled on other grounds in *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 995-998 (given difficulty of proving negative, it is not likely employer will be able to establish on summary judgment absence of material issue of disputed fact as to question of accommodation). See *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1088 (because employer did not engage in interactive process, summary judgment would have been available only if reasonable finder of fact could conclude in any event there would have been no reasonable accommodation available).

(n47)Footnote 27. *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1247 ; *Barnett v. U.S. Air, Inc.* (9th Cir. 1998) 157 F.3d 744, 748 , amended and superseded on other grounds, 196 F.3d 979 (reasonableness of accommodation depends on circumstances of each case).

(n48)Footnote 28. *McGregor v. AMTRAK* (9th Cir. 1999) 187 F.3d 1113, 1116 .

(n49)Footnote 29. *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1247 (plaintiff raised genuine issue of material fact as to whether extended medical leave for pregnancy complications was reasonable).

(n50)Footnote 30. See 29 C.F.R., Pt. 1630, App. § 1630.9.

(n51)Footnote 31. See *Overton v. Reilly* (7th Cir. 1992) 977 F.2d 1190, 1194-1195 (employer need not accommodate severely depressed chemist's request to communicate with public by mail only, because public contact comprised only 5 percent of job duties); see also *Brundage v. Hahn* (1997) 57 Cal. App. 4th 228, 239-240, 66 Cal. Rptr. 2d 830 (when employee was absent from job for six weeks and never informed employer of mental disability until after termination, reinstatement is not reasonable accommodation; reasonable accommodation does not include excusing failure to control controllable disability or giving employee second chance to control disability in future).

(n52)Footnote 32. *Barnett v. U.S. Air, Inc.* (9th Cir. 1998) 157 F.3d 744, 751 , amended and superseded on other grounds, 196 F.3d 979 (employer need not create new position to reasonably accommodate disabled employee).

(n53)Footnote 33. See *D'Amico v. New York State Bd. of Law Examiners* (W.D.N.Y 1993) 813 F. Supp. 217, 223 .

(n54)Footnote 34. See *Tuck v. Health Servs. of Tenn.* (6th Cir. 1993) 7 F.3d 465, 469 (nurse with lifting and bending restrictions on light duty should not have been terminated unless unable to perform light duty position).

(n55)Footnote 35. See ch. 8 for a complete discussion of the use of leave for employee illness.

(n56)Footnote 36. See *Myers v. Hose* (4th Cir. 1995) 50 F.3d 278, 283 .

(n57)Footnote 37. See *Langon v. Department of Health and Human Servs.* (D.C. Cir. 1992) 959 F.2d 1053, 1058 (reasonable accommodation for clerical employee) (Rehabilitation Act); but cf. *Vande Zande v. Wisconsin Dep't of Admin.* (7th Cir. 1995) 44 F.3d 538, 544-545 (employer not obliged to permit unsupervised work of disabled employee).

(n58)Footnote 38. *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1135-1136 ; *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1247 (if medical leave is reasonable accommodation, inability to work during leave period does not render plaintiff unqualified under ADA).

(n59)Footnote 38.1. *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1136 .

(n60)Footnote 38.2. *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1136 n.13 , citing *Kimbrow v. Atlantic Richfield Co.* (9th Cir.) 889 F.2d 869 , cert. denied, 498 U.S. 814 (1990) .

(n61)Footnote 38.3. *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243 .

(n62)Footnote 39. *Hanson v. Lucky Stores* (1999) 74 Cal. App. 4th 215, 87 Cal. Rptr. 2d 487 .

(n63)Footnote 40. *Hanson v. Lucky Stores* (1999) 74 Cal. App. 4th 215, 225-229, 87 Cal. Rptr. 2d 487 (plaintiff failed to meet burden of showing that employer's proffered reason for termination was untrue or pretextual).

(n64)Footnote 41. *Hanson v. Lucky Stores* (1999) 74 Cal. App. 4th 215, 225-229, 87 Cal. Rptr. 2d 487 .

(n65)Footnote 42. Citing *Kimbrow v. Atlantic Richfield Co.* (9th Cir. 1989) 889 F.2d 869, 879 .

(n66)Footnote 43. Citing *Gantt v. Wilson Sporting Goods Co.* (6th Cir. 1998) 143 F.3d 1042, 1047 .

(n67)Footnote 44. Citing *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal. App. 4th 935, 950-951 .

(n68)Footnote 45. Citing *Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal. App. 4th 345, 370 .

(n69)Footnote 46. Citing *Ansonia Board of Education v. Philbrook* (1986) 479 U.S. 60, 68-69 .

(n70)Footnote 47. Citing *Barnett v. U.S. Air, Inc.* (9th Cir. 1998) 157 F.3d 744, 752-753 , amended and superseded on other grounds, 196 F.3d 979 .

(n71)Footnote 47.1. *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1136 (for medical transcriptionist, physical attendance at office was not essential job duty because employer permitted some of its transcriptionists to work at home), citing EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, FEP (BNA) 405:7601, at 7626 (March 1, 1999); *see also* *Langon v. Department of Health and Human Servs.* (D.C. Cir. 1992) 959 F.2d 1053, 1060-1061 (employer must consider requested accommodation of working at home); *but see* *Vande Zande v. Wisconsin Dep't of Admin.* (7th Cir. 1995) 44 F.3d 538, 544-545 (employer not required to allow disabled workers to work at home except in extraordinary circumstances).

(n72)Footnote 48. *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1137 .

(n73)Footnote 48.1. *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589 .

(n74)Footnote 49. *Willis v. Pacific Maritime Ass'n* (9th Cir. 2001) 236 F.3d 1160, 1164-1166 , amended on denial of rehearing en banc, 244 F.3d 675 (Ninth Circuit joins majority in holding that accommodation that requires violation of bona fide seniority system in CBA is per se unreasonable rather than factor to be weighed on case-by-case basis); *see* *Lujan v. Pacific Maritime Ass'n* (9th Cir. 1999) 165 F.3d 738, 738-739 (if proposed accommodation interferes with bona fide seniority system, accommodation is unreasonable as matter of law).

(n75)Footnote 50. *Willis v. Pacific Maritime Ass'n* (9th Cir. 2001) 236 F.3d 1160, 1166-1168 , amended on denial of rehearing en banc, 244 F.3d 675 (plaintiffs' estoppel argument failed due to lack of sufficient evidence that employers' association and union deviated from seniority system).

(n76)Footnote 51. *Willis v. Pacific Maritime Ass'n* (9th Cir. 2001) 236 F.3d 1160, 1166 , amended on denial of rehearing en banc, 244 F.3d 675 .

(n77)Footnote 52. *Morton v. United Parcel Service, Inc.* (9th Cir. 2001) 272 F.3d 1249, 1253-1254 , cert. denied, overruled on other grounds in *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 995-998 .

(n78)Footnote 53. *Morton v. United Parcel Service, Inc.* (9th Cir. 2001) 272 F.3d 1249, 1253-1254 , cert. denied, overruled on other grounds in *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 995-998 .

(n79)Footnote 54. *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589, 598 .

(n80)Footnote 55. *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589, 603 .

(n81)Footnote 56. *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589, 598, 607 .

(n82)Footnote 57. *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589, 607 .

(n83)Footnote 58. *US Airways, Inc. v. Barnett* (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589, 598 .

(n84)Footnote 59. *Rissetto v. Plumbers and Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 601, 605-606 (temporary total disability for worker's compensation purposes and age discrimination requiring satisfactory job performance in employment discrimination suit); *Johnson v. State of Oregon* (9th Cir. 1998) 141 F.3d 1361, 1368 (rejecting per se rule, which bars claimants from pursuing ADA claims after seeking or obtaining disability benefits; judicial estoppel is equitable doctrine, invoked at the court's discretion and driven by specific facts of case). For further discussion of *Rissetto*, see § 41.11[1][b].

(n85)Footnote 60. *Johnson v. State of Oregon* (9th Cir. 1998) 141 F.3d 1361, 1364, 1366-1368 ; *Lujan v. Pacific Maritime Ass'n* (9th Cir. 1999) 165 F.3d 738, 740-741 (application for and receipt of disability benefits does not automatically estop claimant from establishing that he or she is qualified individual with disability); *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1246 (application for SDI benefits does not preclude claim that applicant is qualified individual under ADA).

(n86)Footnote 61. *Cleveland v. Policy Management Systems, Inc.* (1999) 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966 .

(n87)Footnote 62. *Cleveland v. Policy Management Systems, Inc.* (1999) 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966, 976-977 ; see 42 U.S.C. § 423(a)(1), (d)(2)(A); 42 U.S.C. §§ 12101(a)(7)(8), 12112(a), 12111(8).

(n88)Footnote 63. *Cleveland v. Policy Management Systems, Inc.* (1999) 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966, 976-977 .

(n89)Footnote 64. *Cleveland v. Policy Management Systems, Inc.* (1999) 526 U.S. 795, 119 S. Ct. 1597, 143 L. Ed. 2d 966, 976-977 .

(n90)Footnote 65. *Cal. Gov. Code* § 12940 et seq.

(n91)Footnote 66. *Johnson v. State of Oregon* (9th Cir. 1998) 141 F.3d 1361 .

(n92)Footnote 67. *Johnson v. State of Oregon* (9th Cir. 1998) 141 F.3d 1361, 1366-1368 (per se rule would force plaintiffs to abandon their ADA rights for immediate survival); *Norris v. Sysco Corp.* (9th Cir. 1999) 191 F.3d 1043, 1048-1049 (given likely serious financial constraints faced by ill or injured employee, may be inequitable to force choice between disability benefits and ADA suit that might not be resolved for years).

(n93)Footnote 68. *Johnson v. State of Oregon* (9th Cir. 1998) 141 F.3d 1361, 1368 .

(n94)Footnote 69. *Johnson v. State of Oregon* (9th Cir. 1998) 141 F.3d 1361, 1369 (judicial estoppel may apply when particular representations are so inconsistent that they amount to an affront to court).

(n95)Footnote 70. *Lujan v. Pacific Maritime Ass'n* (9th Cir. 1999) 165 F.3d 738, 740-741 .

(n96)Footnote 71. *Fredenburg v. Contra Costa County Dep't of Health Services* (9th Cir. 1999) 172 F.3d 1176 .

(n97)Footnote 72. *Fredenburg v. Contra Costa County Dep't of Health Services* (9th Cir.1999) 172 F.3d 1176, 1179-1181 (court noted that plaintiff took inconsistent positions, but so did employer and state; plaintiff's certification of disability is not inconsistent with ability to return to work for ADA purposes); *see also Johnson v. State of Oregon* (9th Cir. 1998) 141 F.3d 1361, 1366-1368 .

(n98)Footnote 73. *Fredenburg v. Contra Costa County Dep't of Health Services* (9th Cir. 1999) 172 F.3d 1176, 1180 (tangential allusion that employee might function better with different supervisor without identifying vacant position or how transfer would enable performance of essential job functions is insufficient).

(n99)Footnote 74. *Fredenburg v. Contra Costa County Dep't of Health Services* (9th Cir. 1999) 172 F.3d 1176, 1181 (although plaintiff is not forced to make untenable choice between disability benefits and ADA claim, double recovery is not permitted).

(n100)Footnote 75. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 181, 70 Cal. Rptr. 2d 96 (policies behind preclusion of inconsistent opinions are general considerations of orderly administration of justice and regard for dignity of judicial proceedings).

(n101)Footnote 76. 42 U.S.C. § 12101 *et seq.*

(n102)Footnote 77. *Drain v. Betz Labs., Inc.* (1999) 69 Cal. App. 4th 950, 956, 81 Cal. Rptr. 2d 864 .

(n103)Footnote 78. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 181, 70 Cal. Rptr. 2d 96 .

(n104)Footnote 79. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 183, 188 n.11, 70 Cal. Rptr. 2d 96 (court took no position on application of judicial estoppel to assertions of law, but noted that the majority of federal decisions apply doctrine to legal assertions); *see Coleman v. Southern Pac. Co.* (1956) 141 Cal. App. 2d 121, 128, 296 P.2d 386 ; *see also Rissetto v. Plumbers and Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 604-605 (federal principles of judicial estoppel barred age discrimination claim under FEHA because worker had received workers' compensation benefits for temporary total disability).

(n105)Footnote 80. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 182, 70 Cal. Rptr. 2d 96 . For a discussion of collateral estoppel in the context of the law governing the particular action, *see generally*, ch. 43.

(n106)Footnote 81. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 183, 70 Cal. Rptr. 2d 96 .

(n107)Footnote 82. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 184, 70 Cal. Rptr. 2d 96 (ADA claim) ; *see Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 959-960, 62 Cal. Rptr. 2d 142(California courts may look to federal precedent for guidance) ; *see also Rissetto v. Plumbers and Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 604-605 (federal principles determine judicial estoppel in federal court).

(n108)Footnote 83. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 184, 70 Cal. Rptr. 2d 96 (Stipulations with Request for Award stated that parties mutually agreed that work restriction required environment free from emotional stress and strain and no heavy work); *see Dush v. Appleton Elec. Co.* (8th Cir. 1997) 124 F.3d 957, 961-965 (although federal decisional law is mixed, court concluded that findings in previous workers' compensation proceeding precluded ADA suit; workers' compensation proceeding found total disability and specifically rejected as a reasonable accommodation light duty on a long term sustained basis; *see also Cheatwood v. Roanoke Indus. (N.D. Ala. 1995) 891 F. Supp. 1528, 1538* (workers' compensation action determined that plaintiff was physically unable to perform essential job functions even with accommodation)).

(n109)Footnote 84. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 187, 70 Cal. Rptr. 2d 96 ; *see EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person Is a "Qualified Individual with a Disability" Under the Americans with Disabilities Act of 1990*, in

Avoiding Workplace litigation.

(n110)Footnote 85. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 189-191, 70 Cal. Rptr. 2d 96 .

(n111)Footnote 86. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 184, 70 Cal. Rptr. 2d 96 ; see *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal. App. 4th 935, 943-944, 963, 62 Cal. Rptr. 2d 142 . For further discussion of *Prilliman*, see [3][b], below.

(n112)Footnote 87. *Drain v. Betz Labs., Inc.* (1999) 69 Cal. App. 4th 950, 81 Cal. Rptr. 2d 864 .

(n113)Footnote 88. *Drain v. Betz Labs., Inc.* (1999) 69 Cal. App. 4th 950, 956-960, 81 Cal. Rptr. 2d 864 (lack of factual findings in referee's approval of compromise and release not fatal to judicial estoppel argument).

(n114)Footnote 89. *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal. App. 4th 935, 62 Cal. Rptr. 2d 142 .

(n115)Footnote 90. *Bell v. Wells Fargo Bank, N.A.* (1997) 62 Cal. App. 4th 1382 73 Cal. Rptr. 2d 354 .

(n116)Footnote 91. *Drain v. Betz Labs., Inc.* (1999) 69 Cal. App. 4th 950, 959-960, 81 Cal. Rptr. 2d 864 (unlike *Prilliman* plaintiff, Drain did not seek disability benefits based on inability to perform specific job function; unlike *Bell* plaintiff, Drain's disability application was not susceptible of varying interpretations). For further discussion of *Prilliman*, see [3][b], below; for further discussion of *Bell*, see [3][e], below.

(n117)Footnote 92. See 29 U.S.C. § 793(a); See also ch. 40, pt. C, and ch. 44, pt. C.

(n118)Footnote 93. See 29 U.S.C. § 794(a).

(n119)Footnote 94. See *Smith v. Robinson* (1984) 468 U.S. 992; *Prewitt v. United States Postal Serv.* (5th Cir. 1981) 662 F.2d 292, 306 (Section 504 as requiring only nondiscrimination).

(n120)Footnote 95. See *School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 287 n.17, 107 S. Ct. 1123, 94 L. Ed. 2d 307 ; *Lucero v. Hart* (9th Cir. 1990) 915 F.2d 1367, 1372 ; see also 28 C.F.R. § 41.53 (Department of Justice coordinating regulation); 45 C.F.R. § 84.3(l) (Department of Health and Human Services regulation). For a discussion of "undue hardship," see [4], below.

(n121)Footnote 96. Although the Department of Justice regulations in 28 C.F.R. § 41.1 et seq. coordinate implementation of Section 504, each federal agency providing federal financial assistance promulgates its own regulations to administer Section 504. See 29 U.S.C. § 794(a); See also ch. 40, pt. C.

(n122)Footnote 97. See 45 C.F.R. § 84.12(b).

(n123)Footnote 98. Appendix to 45 C.F.R. pt. 84.

(n124)Footnote 99. See *Reynolds v. Brock* (9th Cir. 1987) 815 F.2d 571, 575 .

(n125)Footnote 100. *Southeastern Community College v. Davis* (1979) 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed. 2d 980 .

(n126)Footnote 101. *Southeastern Community College v. Davis* (1979) 442 U.S. 397, 411, 99 S. Ct. 2361, 60 L. Ed. 2d 980 .

(n127)Footnote 102. See *Southeastern Community College v. Davis* (1979) 442 U.S. 397, 400-402, 99 S. Ct. 2361, 60 L. Ed. 2d 980 .

(n128)Footnote 103. See 45 C.F.R. § 84.44(a). The HEW has been replaced by the Department of Health and

Human Services, which has adopted implementing regulations that are identical to the former HEW regulations. *See* 45 C.F.R. §§ 84.1-84.55.

(n129)Footnote 104. *See Southeastern Community College v. Davis* (1979) 442 U.S. 397, 407-408, 99 S. Ct. 2361, 60 L. Ed. 2d 980 .

(n130)Footnote 105. 29 U.S.C. § 791.

(n131)Footnote 106. *See Southeastern Community College v. Davis* (1979) 442 U.S. 397, 410, 99 S. Ct. 2361, 60 L. Ed. 2d 980 .

(n132)Footnote 107. *Southeastern Community College v. Davis* (1979) 442 U.S. 397, 411, 99 S. Ct. 2361, 60 L. Ed. 2d 980 .

(n133)Footnote 108. *See Students of Cal. Sch. for the Blind v. Honig* (9th Cir. 1984) 736 F.2d 538 .

(n134)Footnote 109. *See Students of Cal. Sch. for the Blind v. Honig* (9th Cir. 1984) 736 F.2d 538, 546 .

(n135)Footnote 110. *See Southeastern Community College v. Davis* (1979) 442 U.S. 397, 409-410, 99 S. Ct. 2361, 60 L. Ed. 2d 980 ; *see also* 45 C.F.R. § 84.44(a).

(n136)Footnote 111. *See Southeastern Community College v. Davis* (1979) 442 U.S. 397, 410, 99 S. Ct. 2361, 60 L. Ed. 2d 980 (emphasis added); *see also Students of Cal. School for the Blind v. Honig* (9th Cir. 1984) 736 F.2d 538, 546-547 .

(n137)Footnote 112. *See Students of Cal. Sch. for the Blind v. Honig* (9th Cir. 1984) 736 F.2d 538, 547 ; *see also School Bd. of Nassau County v. Arline* (1987) 480 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307, 321 n.17 (court as required to consider whether any "reasonable accommodation" would enable handicapped person to perform essential functions of job).

(n138)Footnote 113. *Alexander v. Choate* (1985) 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 .

(n139)Footnote 114. *Alexander v. Choate* (1985) 469 U.S. 287, 300, 105 S. Ct. 712, 83 L. Ed. 2d 661 .

(n140)Footnote 115. *See Alexander v. Choate* (1985) 469 U.S. 287, 300 n.20, 105 S. Ct. 712, 83 L. Ed. 2d 661 .

(n141)Footnote 116. *See Buckingham v. United States* (9th Cir. 1993) 998 F.2d 735, 740 .

(n142)Footnote 117. *See Buckingham v. United States* (9th Cir. 1993) 998 F.2d 735, 740 .

(n143)Footnote 118. *See Buckingham v. United States* (9th Cir. 1993) 998 F.2d 735, 740-741 .

(n144)Footnote 119. *See Gov. Code § 12940(m)*. For the standard jury instruction on the essential factual elements of a claim of the employer's failure to reasonably accommodate a disability under FEHA, *see Judicial Council of California Civil Jury Instructions, CACI 2541 (Matthew Bender)*, also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction defining "reasonable accommodation," *see Judicial Council of California Civil Jury Instructions, CACI 2542 (Matthew Bender)*. For discussion of CACI jury instructions generally, *see* § 61.05. For the CACI special verdict form for reasonable accommodation, *see Judicial Council of California Civil Jury Instructions, CACI VF-2509 (Matthew Bender)*. For discussion of CACI special verdict forms generally, *see* § 61.06.

(n145)Footnote 119.1. *Gov. Code § 12940(m)*. *See also* 2 Cal. Code Regs. § 7293.9.

2-41 California Employment Law § 41.51

(n146)Footnote 119.2. *Avila v. Continental Airlines* (2008) 165 Cal. App. 4th 1237, 1252-1253, 82 Cal. Rptr. 3d 440 (trial court properly granted employer summary judgment on claim that employer refused to accommodate plaintiff's disability, where plaintiff did not make employer aware of his disability or physical limitations it caused, such that employer was on notice that plaintiff required accommodation).

(n147)Footnote 119.3. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1010, 93 Cal. Rptr. 3d 338 ; *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal. App. 4th 952, 973, 83 Cal. Rptr. 3d 190 ; *Bagatti v. Department of Rehabilitation* (2002) 97 Cal. App. 4th 344, 354-356, 118 Cal. Rptr. 2d 443 . See Gov. Code § 12926(n); 2 Cal. Code Regs. § 7293.9(a).

(n148)Footnote 119.4. *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal. App. 4th 952, 973, 83 Cal. Rptr. 3d 190 . See 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2). For discussion of the employer's duty to accommodate under the ADA, see discussion in [2][a][ii], above.

(n149)Footnote 119.4.1. Gov. Code § 12926(n); 2 Cal. Code Reg. § 7293.9. See *Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 947-948, 62 Cal. Rptr. 2d 142 (reasonable accommodation is interpreted flexibly). See also *Bagatti v. Department of Rehabilitation* (2002) 97 Cal. App. 4th 344, 361-362, 118 Cal. Rptr. 2d 443 (plaintiff adequately pled request for accommodation of her disability by pleading that severe polio had made her disabled and unable to walk long distances or to transport herself from her car to her work station, and that she requested that her employer provide motorized transportation from parked car to work station, motorized transportation within work site, and hand railings or chairs along hallways of job site); *Spitzer v. Good Guys, Inc.* (2000) 80 Cal. App. 4th 1376, 1386-1389, 96 Cal. Rptr. 2d 236 (triable issues of fact existed as to whether defendant fulfilled its duty to reasonably accommodate plaintiff); *Schmidt v. Safeway, Inc.* (D. Ore. 1994) 864 F. Supp. 991, 997 (reasonableness of accommodation is ordinarily issue for jury).

(n150)Footnote 119.4.2. *Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, 828 ; *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal. App. 4th 215, 227, 87 Cal. Rptr. 2d 487 .

(n151)Footnote 119.4.3. *Watkins v. Ameripride Services* (9th Cir. 2004) 375 F.3d 821, 828 (employer that allowed employee to do special deliveries at his former rate of pay for two months, left his former job open for one year to allow employee to reclaim position after surgery, and offered employee job that he could perform despite his disability, which he declined, satisfied its obligation to reasonably accommodate disability).

(n152)Footnote 119.4.4. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1010, 93 Cal. Rptr. 3d 338 ; *Wilson v. County of Orange* (2009) 169 Cal. App. 4th 1185, 1192, 87 Cal. Rptr. 3d 439 .

(n153)Footnote 119.4.5. See *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1009-1012, 93 Cal. Rptr. 3d 338 (employee's proposed accommodation of giving him priority in assignment of course sections to enable him to maintain his full-time employment status and keep his medical benefits was not reasonable, where it was not modification or adjustment to workplace necessary to enable him to perform essential functions of his position; accommodation offered by employer of time to complete master's degree program and replacement of time spent working on a master's degree for professional development requirements did not guarantee employee immediate full-time employment, but was modification or adjustment to workplace that would have enabled him to perform essential functions of job held or desired).

(n154)Footnote 119.5. 42 U.S.C. § 12111.

(n155)Footnote 119.6. Gov. Code § 12940(m).

(n156)Footnote 119.7. *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal. App. 4th 952, 973-980, 83 Cal. Rptr. 3d 190 .

(n157)Footnote 120. *Bagatti v. Department of Rehabilitation* (2002) 97 Cal. App. 4th 344, 360-361 & fn. 4, 118 Cal. Rptr. 2d 443 .

(n158)Footnote 120.1. *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 256, 102 Cal. Rptr. 2d 55 . See also *Brundage v. Hahn* (1997) 57 Cal. App. 4th 228, 235, 239, 66 Cal. Rptr. 2d 830 (construing former § 12940(k) in light of EEOC interpretive guidance, which implies employee must be able to perform essential functions of job to be entitled to accommodation).

(n159)Footnote 120.2. *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal. App. 4th 952, 977-980, 83 Cal. Rptr. 3d 190 (on employer's motion for summary adjudication, plaintiff presented triable issue of fact about whether she was able to perform essential functions of available vacant position with employer with or without accommodation, so that there was triable issue about whether employer failed to reasonably accommodate her by reassigning her to such position).

(n160)Footnote 120.3. *Health & Saf. Code § 11362.5.*

(n161)Footnote 120.4. *21 U.S.C. §§ 812, 844(a).*

(n162)Footnote 120.5. See *Gonzales v. Raich* (2005) 545 U.S. 1, 26-29, 125 S. Ct. 2195, 162 L. Ed. 2d 1 ; *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 491-495, 121 S. Ct. 1711, 149 L. Ed. 2d 722 .

(n163)Footnote 121. *Health & Saf. Code § 11362.785(a).*

(n164)Footnote 121.1. *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal. 4th 920, 925-931, 70 Cal. Rptr. 3d 382, 174 P.3d 200 .

(n165)Footnote 121.1.1. See, e.g., *A.M. v. Albertson's, LLC* (2009) 178 Cal. App. 4th 455, 464-466 (employer's single failure to make reasonable accommodation even during long period of accommodation had tragic consequences for employee who was not accommodated, and to extent single failure to accommodate could have been trivial within context of a larger pattern of accommodation, jury found it substantial, not trivial).

(n166)Footnote 121.2. *King v. United Parcel Service, Inc.* (2007) 152 Cal. App. 4th 426, 442-444, 60 Cal. Rptr. 3d 359 (former employee did not sustain his burden of demonstrating genuine issue of material fact as to whether he engaged in interactive process in good faith, given his failure to get additional clarification from his doctor to specifically restrict his hours and to communicate his limitations to his supervisors and to produce clear and unambiguous doctor's orders restricting hours he could work); *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 263, 102 Cal. Rptr. 2d 55 .

(n167)Footnote 122. *King v. United Parcel Service, Inc.* (2007) 152 Cal. App. 4th 426, 442, 60 Cal. Rptr. 3d 359 (employer's failure to provide reasonable accommodation is violation of FEHA, even in absence of adverse employment action); *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 55-61, 43 Cal. Rptr. 3d 874 ; *Bagatti v. Department of Rehabilitation* (2002) 97 Cal. App. 4th 344, 361-362, 118 Cal. Rptr. 2d 443 ; see *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 260, 102 Cal. Rptr. 2d 55 .

(n168)Footnote 122.1. *King v. United Parcel Service, Inc.* (2007) 152 Cal. App. 4th 426, 442, 60 Cal. Rptr. 3d 359 (employer's failure to provide reasonable accommodation is violation of FEHA even in absence of adverse employment action); *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 54, 43 Cal. Rptr. 3d 874 ; *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 256, 102 Cal. Rptr. 2d 55 .

(n169)Footnote 122.2. *A.M. v. Albertson's, LLC* (2009) 178 Cal. App. 4th 455, 463-464 (failure to accommodate and failure to engage in interactive process are separate, independent claims involving different proof of facts);

Wysinger v. Automobile Club of So. Cal. (2007) 157 Cal. App. 4th 413, 424-426, 69 Cal. Rptr. 3d 1 (jury verdicts finding employer not liable for failure to make reasonable accommodation but finding employer liable for failure to engage in interactive process were not inconsistent, because they involved separate causes of action and proof of different facts).

(n170)Footnote 122.3. *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 54, 43 Cal. Rptr. 3d 874 . For discussion of duty to engage in interactive dialogue, see [b][i], below.

(n171)Footnote 122.4. *A.M. v. Albertson's, LLC* (2009) 178 Cal. App. 4th 455, 464 . See Gov. Code § 12940(m).

(n172)Footnote 122.5. *A.M. v. Albertson's, LLC* (2009) 178 Cal. App. 4th 455, 464 .

(n173)Footnote 123. *Raine v. City of Burbank* (2006) 135 Cal. App. 4th 1215, 1222-1228, 37 Cal. Rptr. 3d 899 (employer that had reassigned patrol officer to temporary light-duty position at front desk after he tore his meniscus while on duty was not obligated to maintain officer in that position after being advised by officer's personal physician that disability was permanent and he would never be able to perform essential functions of patrol officer, where there was no vacant position to accommodate officer and accommodation actually sought would have required creation of new sworn-officer position).

(n174)Footnote 123.1. *Claudio v. Regents of the University of California* (2005) 134 Cal. App. 4th 224, 244, 35 Cal. Rptr. 3d 837 ; *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 263, 102 Cal. Rptr. 2d 55 .

(n175)Footnote 123.2. See *Claudio v. Regents of the University of California* (2005) 134 Cal. App. 4th 224, 247-49, 35 Cal. Rptr. 3d 837 (employer refused to discuss interactive process with former employee's attorney; ordinarily, an employee cannot require the interactive process to proceed through his or her attorney, but the facts here permit it). For discussion of interactive process, see [b][I], below.

(n176)Footnote 124. Gov. Code § 12926(s); *Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 947-948, 62 Cal. Rptr. 2d 142 ; see 2 Cal. Code Reg. § 7293.9(b).

(n177)Footnote 125. *Bagatti v. Department of Rehabilitation* (2002) 97 Cal. App. 4th 344, 361-362, 118 Cal. Rptr. 2d 443 ; *County of Fresno v. Fair Employment & Housing Com.* (1991) 226 Cal. App. 3d 1541, 1553, 277 Cal. Rptr. 557 .

(n178)Footnote 126. *County of Fresno v. Fair Employment & Housing Com.* (1991) 226 Cal. App. 3d 1541, 1550, 277 Cal. Rptr. 557 .

(n179)Footnote 127. See 2 Cal. Code Reg. §§ 7293.6(i), 7293.7; See also § 41.12[2][c].

(n180)Footnote 127.1. *County of Fresno v. Fair Employment & Housing Com.* (1991) 226 Cal. App. 3d 1541, 1553, 277 Cal. Rptr. 557 .

(n181)Footnote 128. *County of Fresno v. Fair Employment & Housing Com.* (1991) 226 Cal. App. 3d 1541, 1553, 277 Cal. Rptr. 557 (applying evidentiary framework in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668).

(n182)Footnote 129. See *County of Fresno v. Fair Employment & Housing Com.* (1991) 226 Cal. App. 3d 1541, 1551, 277 Cal. Rptr. 557 .

(n183)Footnote 130. See *County of Fresno v. Fair Employment & Housing Com.* (1991) 226 Cal. App. 3d 1541, 1555-1556, 277 Cal. Rptr. 557 .

(n184)Footnote 131. See *County of Fresno v. Fair Employment & Housing Com.* (1991) 226 Cal. App. 3d 1541,

1555-1556, 277 Cal. Rptr. 557 .

(n185)Footnote 131.1. *Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 950-951, 62 Cal. Rptr. 2d 142 (because FEHA and its interpretative regulations were modeled on Federal Rehabilitation Act of 1973 and ADA, decisions interpreting those laws may be useful in deciding cases under FEHA).

(n186)Footnote 131.2. See [a], above.

(n187)Footnote 131.3. *Gov. Code § 12940(n)*.

(n188)Footnote 132. *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 61-63, 43 Cal. Rptr. 3d 874 .

(n189)Footnote 132.0.1. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1013, 1014, 93 Cal. Rptr. 3d 338 (evidence was sufficient to show employee initiated interactive process, where, although it was disputed whether employee told employer's director of human resources his condition did not affect his job performance or ability to perform his job, employee presented undisputed evidence he told human resources director he needed to avoid stress and she told his supervisors that he had health condition).

(n190)Footnote 132.1. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1014-1015, 93 Cal. Rptr. 3d 338 (employer failed to engage in interactive process, where, although employee expressed satisfaction with employer's response and did not request any further accommodation, reasonable jury could have found employer should have initiated second meeting with employee before deciding to reduce number of course sections assigned to him and effectively changing his employment status to part time, and that employer, rather than employee, had burden of initiating second meeting because employer uniquely had knowledge that would affect his employment status); *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 62 n.22, 43 Cal. Rptr. 3d 874 .

(n191)Footnote 132.1.1. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1013, 93 Cal. Rptr. 3d 338 .

(n192)Footnote 132.2. *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 426, 69 Cal. Rptr. 3d 1 (jury properly found employer liable for failure to engage in interactive process in good faith, where employee testified that employer did not offer any specific accommodation even after his doctor wrote to company on his behalf).

(n193)Footnote 132.3. *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal. App. 4th 952, 980-984, 83 Cal. Rptr. 3d 190 . But see *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal. App. 4th 413, 425, 69 Cal. Rptr. 3d 1 (FEHA, unlike ADA, imposes liability on employers for failing to engage in interactive process regardless of whether reasonable accommodation was possible); *Claudio v. Regents of University of California* (2005) 134 Cal. App. 4th 224, 245, 248, 35 Cal. Rptr. 3d 837 (holding that since triable issue existed concerning employer's failure to participate in interactive process, judgment could not be affirmed on the ground that no alternative jobs were available).

(n194)Footnote 132.4. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1015-1019, 93 Cal. Rptr. 3d 338 (after complete discovery in litigation process, employee could not show that reasonable accommodation directed to limitations created by his disability was available during time period interactive process should have occurred); *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal. App. 4th 952, 984-989, 83 Cal. Rptr. 3d 190 (reasonable jury could find that employer caused breakdown in interactive process by refusing to provide information about available positions that might have assisted employee in preparing list of her work-related medical restrictions, and that employer's demand for medical release before it would reengage in interactive process was unreasonable, because medical doctor might not want to release severely disabled patient for unspecified work without knowing exact demands of job patient would be expected to do; jury could also find it was unreasonable for employer to determine unilaterally that employee was unable to perform any available vacant position in company with or without accommodation and that her condition was not going to improve in near future; jury could also find that employer's

decision to terminate employee without advance warning or further discussion was unreasonable and caused breakdown in interactive process).

(n195)Footnote 132.5. *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal. App. 4th 952, 987, 83 Cal. Rptr. 3d 190. See *Spitzer v. Good Guys, Inc.* (2000) 80 Cal. App. 4th 1376, 1388, 1390, 96 Cal. Rptr. 2d 236 (where triable issue existed whether employer knew initial accommodation was ineffective, employer could be liable for failing to provide further accommodation); *Fjellestad v. Pizza Hut of America, Inc.* (8th Cir. 1999) 188 F.3d 944, 952-953 & n. 6 (there was factual dispute about whether employer engaged in good faith interactive process even though employer provided some accommodations).

(n196)Footnote 132.6. See *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 426, 69 Cal. Rptr. 3d 1 (jury verdict finding employer not liable for failure to accommodate disabled employee did not mean jurors found employer acted in good faith on interactive process claim, where jury could find employer liable for failure to engage in interactive process in good faith because employer obstructed process to determine reasonable accommodation).

(n197)Footnote 132.7. *Claudio v. Regents of the University of California* (2005) 134 Cal. App. 4th 224, 243, 35 Cal. Rptr. 3d 837; see Gov. Code § 12965. See also *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 424-426, 69 Cal. Rptr. 3d 1 (failure to engage in interactive process is separate FEHA violation independent of employer's failure to provide reasonable disability accommodation, which is also FEHA violation).

(n198)Footnote 133. *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 54, 43 Cal. Rptr. 3d 874; *Claudio v. Regents of University of California* (2005) 134 Cal. App. 4th 224, 243 [35 Cal. Rptr. 3d 837].

(n199)Footnote 133.1. *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 62 n.22, 43 Cal. Rptr. 3d 874.

(n200)Footnote 133.2. *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 54, 43 Cal. Rptr. 3d 874.

(n201)Footnote 133.3. *Claudio v. Regents of the University of California* (2005) 134 Cal. App. 4th 224, 247, 35 Cal. Rptr. 3d 837.

(n202)Footnote 133.4. *Claudio v. Regents of the University of California* (2005) 134 Cal. App. 4th 224, 35 Cal. Rptr. 3d 837.

(n203)Footnote 133.5. *Claudio v. Regents of the University of California* (2005) 134 Cal. App. 4th 224, 244-249, 35 Cal. Rptr. 3d 837.

(n204)Footnote 134. *Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 954, 62 Cal. Rptr. 2d 142 (employer does not satisfy reasonable accommodation requirements by offering employee insured disability leave).

(n205)Footnote 135. *Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 62 Cal. Rptr. 2d 142.

(n206)Footnote 136. *Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 954, 62 Cal. Rptr. 2d 142. But see *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 54, 43 Cal. Rptr. 3d 874 (two principles underlie cause of action for failure to provide a reasonable accommodation: (1) employee must request accommodation [citing *Prilliman*]; (2) parties must engage in interactive process regarding requested accommodation and, if process fails, responsibility for failure rests with party who failed to participate in good faith; for discussion of interactive process, see [b][i], above).

(n207)Footnote 136.1. *Claudio v. Regents of the University of California* (2005) 134 Cal. App. 4th 224, 244, 35 Cal. Rptr. 3d 837; *Jensen v. Wells Fargo Bank* (2000) 85 Cal. App. 4th 245, 266, 102 Cal. Rptr. 2d 55.

(n208)Footnote 137. *Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 956-958, 62 Cal. Rptr. 2d 142 ; see [b], above.

(n209)Footnote 138. *Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 62 Cal. Rptr. 2d 142 .

(n210)Footnote 139. *Prilliman v. United Airlines, Inc.* (1997) 53 Cal. App. 4th 935, 956-962, 62 Cal. Rptr. 2d 142 ; but see *Rissetto v. Plumbers and Steamfitters Local 343* (9th Cir. 1996) 94 F.3d 597, 604-605 (federal principles of judicial estoppel barred subsequent age discrimination claim under FEHA because worker had received workers' compensation benefits for temporary total disability and took inconsistent positions).

(n211)Footnote 140. See *Gov. Code § 12993(a)*.

(n212)Footnote 141. *Wood v. County of Alameda* (N.D. Cal. 1995) 875 F. Supp. 659 .

(n213)Footnote 142. *Wood v. County of Alameda* (N.D. Cal. 1995) 875 F. Supp. 659, 664-665 .

(n214)Footnote 143. See *Langridge v. Oakland Unified School Dist.* (1994) 25 Cal. App. 4th 664, 667, 31 Cal. Rptr. 2d 34 .

(n215)Footnote 144. *Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514, 1528-1530 (the Legislature could have, but failed to have, included explicit statements exempting FEHA claims from workers compensation exclusivity provisions).

(n216)Footnote 145. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n217)Footnote 146. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1154, 77 Cal. Rptr. 2d 445, 959 P.2d 752 ; see discussion in § 43.01[14][c.1].

(n218)Footnote 147. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 181, 70 Cal. Rptr. 2d 96 (establishing principles for proper application of judicial estoppel in ADA context); see *Bell v. Wells Fargo Bank* (1998) 62 Cal. App. 4th 1382, 1387-1388, 73 Cal. Rptr. 2d 354 .

(n219)Footnote 148. *Jackson v. County of Los Angeles* (1997) 60 Cal. App. 4th 171, 183, 188 n. 11, 70 Cal. Rptr. 2d 96 . see § 41.51[2][a][v][B].

(n220)Footnote 149. *Bell v. Wells Fargo Bank* (1998) 62 Cal. App. 4th 1382, 1385, 73 Cal. Rptr. 2d 354 ; *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal. App. 4th 935, 956-960, 62 Cal. Rptr. 2d 142 .

(n221)Footnote 150. *Bell v. Wells Fargo Bank* (1998) 62 Cal. App. 4th 1382, 1387-1388, 73 Cal. Rptr. 2d 354 .

(n222)Footnote 151. *Bell v. Wells Fargo Bank* (1998) 62 Cal. App. 4th 1382, 1387, 73 Cal. Rptr. 2d 354 .

(n223)Footnote 152. *Bell v. Wells Fargo Bank* (1998) 62 Cal. App. 4th 1382, 1387, 73 Cal. Rptr. 2d 354 (citing *Jackson*).

(n224)Footnote 153. *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal. App. 4th 935, 960, 62 Cal. Rptr. 2d 142 .

(n225)Footnote 154. *Bell v. Wells Fargo Bank* (1998) 62 Cal. App. 4th 1382, 1387-1388, 73 Cal. Rptr. 2d 354 ; see *Swanks v. Washington Metro. Area Transit Auth.* (D.C. Cir. 1997) 116 F.3d 582, 584-586 (in the ADA context, disability determinations take account of reasonable accommodation although Social Security Act does not).

(n226)Footnote 155. See 42 U.S.C. § 12112(b)(5); 29 C.F.R. § 1630.15(d) (ADA); 28 C.F.R. § 41.53 (coordinating

regulation for Section 504 of Rehabilitation Act of 1973); 41 C.F.R. § 60-741 (implementing regulation for Section 503 of Rehabilitation Act of 1973).

(n227)Footnote 156. *Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 885 .

(n228)Footnote 157. *Morton v. United Parcel Service, Inc.* (9th Cir. 2001) 272 F.3d 1249, 1256-1257 , cert. denied, overruled on other grounds in *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 995-998 .

(n229)Footnote 158. *Morton v. United Parcel Service, Inc.* (9th Cir. 2001) 272 F.3d 1249, 1257 , cert. denied, overruled on other grounds in *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 995-998 *Barnett v. U.S. Air, Inc.* (9th Cir. 2000) 228 F.3d 1105, 1113 ; see also *Nelson v. Thornburgh* (E.D. Pa. 1983) 567 F. Supp. 369, 379 , aff'd, 732 F.2d 146 (3d Cir. 1984) ; *Prewitt v. United States Postal Serv.* (5th Cir. 1981) 662 F.2d 292, 308 (construing Section 501 of Rehabilitation Act of 1973, governing employment of handicapped individuals in federal government).

(n230)Footnote 159. *Prewitt v. United States Postal Serv.* (5th Cir. 1981) 662 F.2d 292, 308 (construing Section 501 of Rehabilitation Act of 1973, governing employment of handicapped individuals in federal government).

(n231)Footnote 160. 42 U.S.C. § 12111(10)(B)(i).

(n232)Footnote 161. 29 C.F.R. § 1630.2(p)(i).

(N233)Footnote 162. 42 U.S.C. § 12111(10)(B)(ii); 29 C.F.R. § 1630.2(p)(2)(ii).

(n234)Footnote 163. 42 U.S.C. § 12111(10)(B)(iii); 29 C.F.R. § 1630.2(p)(2)(iii).

(n235)Footnote 164. 42 U.S.C. § 12111(10)(B)(iv); 29 C.F.R. § 1630.2(p)(2)(iv).

(n236)Footnote 165. 29 C.F.R. § 1630.2(p)(2)(v).

(n237)Footnote 166. See *Vande Zande v. Wisconsin Dep't of Admin.* (7th Cir. 1995) 44 F.3d 538, 546 .

(n238)Footnote 167. Cf. *Ricks v. Xerox Corp.* (D. Kan. 1995) 877 F. Supp. 1468, 1477 , aff'd, 96 F.3d 1453 (10th Cir. 1996) (employer not required to hire a full-time helper) and *Hogue v. MQS Inspection, Inc.* (D. Colo. 1995) 875 F. Supp 714, 721-722 (not undue hardship to provide helper or to reassign marginal job duties of supervisor whose leg and ankle injuries precluded on-site inspections).

(n239)Footnote 168. 28 C.F.R. § 42.511(c); 45 C.F.R. § 84.12(c).

(n240)Footnote 169. Appendix A to 45 C.F.R. pt. 84.

(n241)Footnote 170. *Gov. Code* § 12940(m); see *Gov. Code* § 12926(s) (definition of "undue hardship"). For the standard jury instruction for the affirmative defense that proposed accommodations would cause the employer undue hardship, see *Judicial Council of California Civil Jury Instructions, CACI 2545 (Matthew Bender)*, also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of CACI jury instructions generally, see § 61.05. For the CACI special verdict form for the affirmative defense of undue hardship, see *Judicial Council of California Civil Jury Instructions, CACI VF-2510 (Matthew Bender)*. For discussion of CACI special verdict forms generally, see § 61.06.

(n242)Footnote 171. See *Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514, 1519 (construing 2 Cal. Code Reg. § 7293.9).

(n243)Footnote 172. *Gov. Code* § 12926(s).

(n244)Footnote 173. *See Gov. Code § 12940(a)(1), (2); see also Gov. Code § 12926(f)* (definition of "essential" functions). *See Sharpe v. American Tel. & Tel. Co.* (9th Cir. 1995) 66 F.3d 1045 , where plaintiff, an epileptic, asserted he could not handle a job transfer to a more stressful position. The employer initially transferred him and he had some seizures. The company assisted him to seek other employment within the company, considered him for positions for which he was not the most qualified candidate, and ultimately offered him his old position back, accommodations by taking affirmative steps to secure employment for him. Under the State of Washington law, interpreted in accordance with Title VII accommodation standards, the employer did not fail to reasonably accommodate.

(n245)Footnote 174. [Reserved]

(n246)Footnote 175. *See Gov. Code § 12945(b)(2)*; for a discussion of leaves of absence for pregnancy disability, *see ch. 8*.

(n247)Footnote 176. *See Gov. Code § 12945(b)(3)*. Prior to the 1992 amendment to *Gov. Code § 12945* (*see Stats. 1992, ch. 907* (effective January 1, 1993)), employers subject to Title VII, i.e., those employing 15 or more employees, were not required to reasonably accommodate temporarily disabled pregnant employees by transferring them to less strenuous or hazardous positions, whereas smaller employers of 5 to 15 employees who were subject to the FEHA but not Title VII were required to do so. *See DFEH v. Save Mart* (1992) FEHC Dec. No. 92-01, p. 7. Thus, application of *Gov. Code § 12945(b)(3)* to employers subject to both the FEHA and Title VII rectifies that anomaly.

(n248)Footnote 177. *Gov. Code § 12945(b)(1)*.

(n249)Footnote 178. *See Gov. Code § 12945(b)(3)*.

(n250)Footnote 179. *Armstrong v. Flowers Hosp., Inc.* (11th Cir. 1994) 33 F.3d 1308 .

(n251)Footnote 180. *See Armstrong v. Flowers Hosp., Inc.* (11th Cir. 1994) 33 F.3d 1308, 1314-1317 .



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.52

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§ 41.52 Accommodation of Religious Beliefs and Practices

[1] Generally

As discussed in § 41.35, Title VII and the FEHA protect employees and applicants from discharge, failure or refusal to hire, and other adverse discriminatory actions because of their religious beliefs.ⁿ¹ In addition, however, Title VII and the FEHA require an employer to accommodate an individual's religious beliefs and practices, unless such accommodation would impose an undue hardship on the employer.ⁿ² Thus, an employer must provide a means through which an employee may eliminate his or her religious conflict while preserving his or her employment status.ⁿ³ The term "religion" may include moral or ethical beliefs concerning right and wrong which are sincerely held with the strength of traditional religious view.ⁿ⁴ A plaintiff who fails to raise a reasonable inference of disparate treatment on account of religion^{n4.1} may nonetheless show that the employer violated its affirmative duty under Title VII to reasonably accommodate employees' religious beliefs.^{n4.2}

A plaintiff may establish a prima facie case of failure to accommodate by pleading and proving that (1) he or she has a bona fide religious belief;ⁿ⁵ (2) he or she informed the employer of the belief and that it conflicted with his or her employment responsibilities; and (3) an adverse employment action^{n5.1} (such as discharge) was taken against plaintiff because of plaintiff's observance of that belief.ⁿ⁶ The burden then shifts to the employer to show that it made good faith efforts to accommodate the employee's religious beliefs.ⁿ⁷ The employer meets its obligation when it reasonably accommodates the employee's belief,ⁿ⁸ but if the employer's efforts are unsuccessful, the employer must also demonstrate that it was unable to reasonably accommodate without undue hardship.ⁿ⁹

[2] Duty to Accommodate Under Title VII

[a] Scope of Duty

An accommodation obligation was added to Title VII when that statute was amended by the Employment Opportunity Act of 1972ⁿ¹⁰ to define the term "religion," as it is used in Title VII, to include all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he or she is unable to reasonably accommodate to an

employee's or prospective employee's religious observance or practice without undue hardship.ⁿ¹¹

The EEOC guidelines on religious discrimination provide that under the foregoing definition, failure to reasonably accommodate is an unlawful employment practice, unless accommodation imposes undue hardship.ⁿ¹² Generally, an undue hardship is posed by an accommodation that would entail "more than a de minimis cost and have an effect on the conduct of the business."ⁿ¹³

The obligation arises after an employee or prospective employee notifies an employer or labor organization of his or her need for religious accommodation. Refusal to accommodate is justified only when the employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation.ⁿ¹⁴ However, once an employer has provided a reasonable system for accommodation, it need not show that each alternative accommodation would result in undue hardship.ⁿ¹⁵

The burden is on the employer to undertake initial steps toward accommodation.ⁿ¹⁶ Furthermore, the employer must attempt accommodation *before* taking any adverse action against an employee.ⁿ¹⁷ An aggrieved employee is under no burden to propose specific means of accommodation,ⁿ¹⁸ but the employee does have a duty to cooperate with the measures suggested by his or her employer,ⁿ¹⁹ even if the accommodation is not the least costly alternative for the employee.ⁿ²⁰ The employee's concomitant duty to cooperate arises only *after* the employer has made its suggestions of possible accommodations.ⁿ²¹ If the employer does not make an effort to accommodate the employee prior to taking adverse action against the employee, the employee's duty of cooperation does not arise.ⁿ²²

Generally, if both the employee and the employer propose a reasonable accommodation, the employer is not required to accept the employee's proposal.ⁿ²³ However, if the employer's proposal does not eliminate the employee's religious conflict, or if the employer does not make any proposal, the employer must either accept the employee's proposal or demonstrate that the proposal would constitute an undue hardship.ⁿ²⁴ In one case,ⁿ²⁵ the plaintiff suggested both a different scheduling arrangement or voluntary trading of shifts with other employees to avoid working on his Sabbath. The Ninth Circuit held the employer liable on the grounds that it failed to prove that the plaintiff's suggestions were infeasible or would overburden the other employees and it did not even attempt the suggested accommodations on a trial basis.

When there is more than one method of accommodation available that would not cause undue hardship, the EEOC will determine whether the accommodation offered is reasonable by examining the following:ⁿ²⁶

1. The alternatives for accommodation considered by the employer; and
2. The alternatives for accommodation, if any, actually offered to the individual requiring accommodation.

Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, EEOC guidelines provide that when there is more than one means of accommodation that would not cause undue hardship, the employer must offer the alternative that least disadvantages the individual with respect to his or her employment opportunities.^{n26.1} However, the Supreme Court has held that this requirement is "inconsistent with the plain meaning of [Title VII]" to the extent that it requires an employer to accept *any* alternative favored by the employee, short of undue hardship.ⁿ²⁷

[b] Work Schedule Conflicts

According to the EEOC, employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules.ⁿ²⁸ Thus, the guidelines provide the following illustrations

of accommodation alternatives that should be considered by employers: (1) voluntary substitutes and "swaps";ⁿ²⁹ (2) flexible scheduling;ⁿ³⁰ and (3) lateral transfer and change of job assignments.ⁿ³¹

In many instances courts have found an accommodation of permission to use paid or unpaid leave to be sufficient.ⁿ³²

[c] Union Membership Conflicts

The National Labor Relations Act (NLRA) sanctions "security agreements" under which a collective bargaining agreement between an employer and a union requires every employee to pay union dues regardless of whether he or she actually joins the union, and failure to pay dues may result in discharge.ⁿ³³ The EEOC guidelines provide that when an employee's religious practices do not permit compliance with such agreements, the labor organization should accommodate the employee by not requiring the employee to join the organization, and by permitting him or her to donate a sum equivalent to dues to a charitable organization.ⁿ³⁴ In *Yott v. North American Rockwell Corp.*,ⁿ³⁵ the Ninth Circuit Court of Appeals held that an employer and a union made a good faith effort to accommodate such an employee's beliefs when they offered to permit the employee to substitute payment to a charity, including his own church, for payment of union dues.ⁿ³⁶ In another case, the Ninth Circuit concluded that an employer and union had failed to reasonably accommodate an employee's religious beliefs when the employer and union attempted to require the employee to pay the equivalent amount to a union fund for charitable purposes, rather than permit the employee to pay the equivalent amount to a charity of his own choice.ⁿ³⁷

Title VII is not preempted by applicable collective bargaining agreements. In *Felt v. Atchinson, Topeka, & Santa Fe Railway Co.*,ⁿ³⁸ the court held that a religious scheduling accommodation was not a minor matter to be arbitrated under the collective bargaining agreement. The *Felt* court stated that absent plaintiff's knowing agreement to forego Title VII's comprehensive statutory rights and remedies, he or she cannot be compelled to arbitrate Title VII claims under a collective bargaining agreement which states only that its work rules will comply with federal laws and without regard to religion.ⁿ³⁹

[d] Personal Appearance Conflicts

In some cases, employer rules regarding personal appearance may collide with an employee's religious beliefs or practices. For example, in *Bhatia v. Chevron U.S.A., Inc.*,ⁿ⁴⁰ an employee whose duties involved potential exposure to toxic gas was suspended from his job without pay because he would not comply with a safety policy prohibiting beards that prevented an air-tight face seal while using respirators.ⁿ⁴¹ The Ninth Circuit Court of Appeals held that the employee established a prima facie case of religious discrimination by proving that he had a bona fide belief that shaving his beard would be contrary to the Sikh religion, that he informed his employer of his belief, and that the employer thereafter removed him from his machinist job.ⁿ⁴² The court concluded, however, that the employer attempted good faith reasonable accommodation because it suspended the employee without pay (while other employees who refused to shave were discharged), actively sought an alternative job for the employee by offering him four different positions, and promised to restore the employee to his machinist job if a respirator were developed that he could safely use.ⁿ⁴³

[3] Duty to Accommodate Under the FEHA

It is an unlawful employment practice under the FEHA for an employer to refuse to hire or employ a person; refuse to select a person for a training program leading to employment; bar or discharge a person from employment or from a training program leading to employment; or discriminate against a person in compensation, or in terms, conditions, or privileges of employment because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer demonstrates that it has explored any reasonable alternative means of accommodating the religious belief or observance, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the employer's business.ⁿ⁴⁴

Reasonable alternatives include the possibilities of excusing the person from those duties which conflict with his or her religious belief or observance, or permitting those duties to be performed either at another time or by another person.ⁿ⁴⁵ FEHC regulations provide that reasonable accommodation may include, but is not limited to, job restructuring, job reassignment, modification of work practices, or allowing time off in an amount equal to the amount of nonregularly scheduled time that the employee has worked in order to avoid a conflict with his or her religious observances.ⁿ⁴⁶ FEHC regulations also set forth the following specific rules regarding religious accommodation:ⁿ⁴⁷

1. Scheduled times for interviews, examinations, and other functions related to employment opportunities must reasonably accommodate religious practices.
2. Dress standards or requirements for personal appearance must be flexible enough to take into account religious practices.
3. An employer or union may not require union membership from any employee whose religious creed prohibits such membership. An employee's religious creed must be reasonably accommodated with respect to union dues.

[4] Undue Hardship

[a] Title VII

Once it is established that an employer has failed to accommodate religious beliefs, the employer may avoid liability under Title VII only by establishing that he or she was unable to reasonably accommodate without undue hardship to the conduct of his or her business.ⁿ⁴⁸ The burden of proving undue hardship is on the employer.ⁿ⁴⁹

"Undue hardship" contemplates "a gain-seeking employer exclusively concerned with preserving and promoting its economic efficiency."ⁿ⁵⁰ There must be proof of actual imposition on co-workers or disruption of the work routine; merely conceivable or hypothetical hardships are insufficient.ⁿ⁵¹ Thus, in one case the Ninth Circuit Court of Appeals held that the alleged "spiritual hardship" an employer would suffer by excusing an employee from attending mandatory religious services did not rise to the required level of hardship because the employer could not link the alleged "spiritual hardship" to an adverse impact on the conduct of the employer's business.ⁿ⁵² Another court has held that the risks of increased liability created by hiring an applicant who used peyote for religious purposes only a few times a year were too speculative to qualify as an undue hardship, particularly since requiring the applicant to take a day off after each peyote ceremony would virtually eliminate the risk that the drug's influence would cause an accident.ⁿ⁵³ If an accommodation would require the employer to violate federal law, such an accommodation presents an undue hardship.^{n53.1}

In *Trans World Airlines, Inc. v. Hardison*,ⁿ⁵⁴ a plaintiff employee whose religion prohibited working Saturdays argued that an employer would suffer no undue hardship if the employer accommodated his religious beliefs by replacing him with supervisors, qualified personnel from other departments, or other available employees through the payment of premium wages for overtime compensation.ⁿ⁵⁵ However, the United States Supreme Court explained that the foregoing alternatives would involve costs to the employer, either in the form of lost efficiency in other jobs or higher wages, and declared that accommodation requiring the employer to bear more than a *de minimus* cost constituted an undue hardship.ⁿ⁵⁶

According to the EEOC, it will determine what constitutes "more than a *de minimus* cost" with due regard to the identifiable cost in relation to the size and operating cost of an employer, and the number of individuals who would in fact require a particular accommodation.ⁿ⁵⁷ The EEOC interprets *Hardison* to mean that costs similar to the regular payment of premium wages to substitutes would constitute undue hardship. However, the EEOC presumes that the

infrequent payment of premium wages for a substitute, or the payment of premium wages while a more permanent accommodation is being sought, is a cost that an employer can be required to bear as a means of providing a reasonable accommodation. The EEOC also presumes that, generally, the payment of administrative costs necessary for providing accommodation will not constitute more than a de minimus cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.ⁿ⁵⁸

Accommodation of an employee's religious practices constitutes undue hardship if it requires a variance from a bona fide seniority system and if the variance would deny another employee his or her job or shift preference guaranteed by that system.ⁿ⁵⁹

The plaintiff in *Hardison* was subject to a seniority system contained in a collective-bargaining agreement and implemented by a union steward through a system of bidding for particular shift assignments as they became available.ⁿ⁶⁰ The plaintiff argued that the Title VII accommodation obligation takes precedence, but the Court disagreed, stating that although neither a collective bargaining agreement nor a seniority system may be employed to violate Title VII, the duty to accommodate does not require an employer to act inconsistently with an otherwise valid agreement.ⁿ⁶¹ The Court explained that if the seniority system were circumvented by relieving the plaintiff of Saturday work and ordering a senior employee to replace him, the employer would have denied the senior employee his or her shift preference, and would also have deprived the senior employee of his or her contractual rights under the collective-bargaining agreement.ⁿ⁶² Using a "reverse discrimination" rationale, the Court also explained that because no other employee volunteered to relieve the plaintiff on Saturdays, the employer would have had to deprive another employee of his or her shift preference at least in part because he or she did not adhere to a religion that observed the Saturday Sabbath. The Court declared that Title VII does not contemplate such unequal treatment.ⁿ⁶³

The EEOC guidelines provide that arrangements for voluntary substitutes and swaps do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system. Furthermore, employers and unions may include arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.ⁿ⁶⁴

Accommodation of an employee's religious practices constitutes undue hardship for the employer if it would inhibit the employer's efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success, or if accommodation would result in discrimination against the accommodated employee's co-workers or deprive them of contractual or other statutory rights. Title VII also does not require an employer to accommodate an employee's desire to impose his or her religious beliefs on his or her coworkers.^{n64.1} On the other hand, accommodating an employee's religious beliefs does not create undue hardship for an employer merely because an employee's co-workers find his or her conduct irritating or unwelcome.^{n64.2}

[b] Fair Employment and Housing Act

Employers may also be excused from the FEHA duty of religious accommodation if accommodation imposes an undue hardship.ⁿ⁶⁵ FEHC regulations provide that in determining whether a particular accommodation would impose an undue hardship on an employer's operation, the factors that may be considered include, but are not limited to:ⁿ⁶⁶

1. The size of the relevant establishment or facility with respect to the number of employees, the size of budget, and other such matters;
2. The overall size of the employer with respect to the number of employees, number and type of facilities, and size of budget;
3. The nature of the establishment's or facility's operation, including the composition and structure of the workforce or membership;

4. The nature of the employer's operation, including the composition and structure of the workforce;
5. The nature and cost of the accommodation involved;
6. Reasonable notice to the employer of the need for accommodation; and
7. Any available reasonable alternative means of accommodation.

Legal Topics:

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

Labor & Employment Law Discrimination Accommodation Labor & Employment Law Discrimination Racial Discrimination Coverage & Definitions Labor & Employment Law Discrimination Religious Discrimination General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-2(a)(1) (Title VII); *Gov. Code* § 12940(a)-(d), (j) (FEHA).

(n2)Footnote 2. *See* 42 U.S.C. § 2000e(l) (Title VII); *Gov. Code* § 12940(j) (FEHA); *see also* [2] through [4], *below*.

(n3)Footnote 3. *Hudson v. Western Airlines, Inc.* (9th Cir. 1988) 851 F.2d 261, 266 (Title VII); *see also* *Ansonia Bd. of Educ. v. Philbrook* (1986) 479 U.S. 60, 68-69, 107 S. Ct. 367, 93 L. Ed. 2d 305 (employer must provide reasonable religious accommodation unless it would cause employer undue hardship, but employer is not required to provide accommodation of employee's choice).

(n4)Footnote 4. *See* *Frazer v. Illinois Dep't of Employment Sec.* (1989) 489 U.S. 829, 834, 109 S. Ct. 1514, 103 L. Ed. 2d 914

(n5)Footnote 4.1. *See* § 41.35.

(n6)Footnote 4.2. *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 97 S. Ct. 2264, 53 L. Ed. 2d 113 ; *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, 606 ; *Chalmers v. Tulon Co. of Richmond* (4th Cir. 1996) 101 F.3d 1012, 1017-1018 .

(n7)Footnote 5. For a discussion relating to the "sincerity" of religious beliefs for equal employment opportunity purposes, *see* § 41.35.

(n8)Footnote 5.1. If the claim is retaliation rather than direct discrimination, the adverse action need not be workplace-related or employment-related, only adverse. *See* *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (scope of anti-retaliation provision of Title VII extends beyond workplace-related or employment-related retaliatory acts and harm, so employee need only allege and prove "adverse action" rather than "adverse employment action" under Title VII's anti-retaliation provision), discussed at § 41.130[1A], *below*.

(n9)Footnote 6. *See* *Bodett v. CoxCom, Inc.* (9th Cir. 2004) 366 F.3d 736, 743 (Title VII) ; *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, 606 (Title VII); *EEOC v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1512 ; *Proctor v. Consol. Freightways Corp. of Delaware* (9th Cir. 1986) 795 F.2d 1472, 1475 (Title VII); *see also* *Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 1984) 734 F.2d 1382, 1383 (Title VII); *Anderson v. General Dynamics Convair, Etc.* (9th Cir. 1978) 589 F.2d 397, 401 (Title VII).

(n10)Footnote 7. *See* *Bodett v. CoxCom, Inc.* (9th Cir. 2004) 366 F.3d 736, 744-745 (Title VII) ; *EEOC v.*

Hacienda Hotel (9th Cir. 1989) 881 F.2d 1504, 1512 ; *Proctor v. Consol. Freightways Corp. of Delaware* (9th Cir. 1986) 795 F.2d 1472, 1475 (Title VII); *Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 1984) 734 F.2d 1382, 1383 (Title VII); *Anderson v. General Dynamics Convair, Etc.* (9th Cir. 1978) 589 F.2d 397, 401 (Title VII).

(n11)Footnote 8. See *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, 606 (Title VII; burden shifts to employer to show it initiated good faith efforts to reasonably accommodate employee's religious practices); *Ansonia Bd. of Educ. v. Philbrook* (1986) 479 U.S. 60, 68-69, 107 S. Ct. 367, 93 L. Ed. 2d 305, 315 (employer as not required to show that employee's alternative accommodations would result in undue hardship).

(n12)Footnote 9. *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, 606 (Title VII); *Proctor v. Consol. Freightways Corp. of Delaware* (9th Cir. 1986) 795 F.2d 1472, 1475 (Title VII); *Brener v. Diagnostic Center Hosp.* (5th Cir. 1982) 671 F.2d 141, 144 (Title VII); 42 U.S.C. § 2000e(j); see also *Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 1984) 734 F.2d 1382, 1383 (Title VII); *Anderson v. General Dynamics Convair, Etc.* (9th Cir. 1978) 589 F.2d 397, 401 (Title VII). For a discussion relating to "undue hardship" generally, see [4], below.

(n13)Footnote 10. See Pub. L. No. 92-261.

(n14)Footnote 11. 42 U.S.C. § 2000e(j); see *Toledo v. Nobel-Sysco, Inc.* (10th Cir. 1989) 892 F.2d 1481, 1487 (construing 42 U.S.C. § 2000e(j) to define religion as any practice, belief, or observance which employer can reasonably accommodate without undue hardship).

(n15)Footnote 12. See 29 C.F.R. § 1605.2(b); see also *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 74, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (intent and effect of Title VII definition is to make it unlawful practice for employer not to make reasonable accommodations in absence of undue hardship). For a discussion of "undue hardship," see [4], below.

(n16)Footnote 13. See *Opuku-Boateng v. California* (9th Cir. 1996) 95 F.3d 1461, 1468 , cert. denied, 520 U.S. 1228 (1997) ; *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 74, 97 S. Ct. 2264, 53 L. Ed. 2d 113 ; for a complete discussion of undue hardship in making an accommodation, see [4], below.

(n17)Footnote 14. See 29 C.F.R. § 1605.2(c)(1); *Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433, 1440 ; *Toledo v. Nobel-Sysco, Inc.* (10th Cir. 1989) 892 F.2d 1481, 1489-1490 (employer may prevail without making efforts to accommodate if it shows no accommodation could have been made without undue hardship). One commentator suggests that the phrase "each available alternative method" in 29 C.F.R. § 1605.2(c)(1) means alternatives either suggested by the plaintiff or patently obvious.

(n18)Footnote 15. See *Ansonia Bd. of Educ. v. Philbrook* (1986) 479 U.S. 60, 68, 107 S. Ct. 367, 93 L. Ed. 2d 305 ; *Hudson v. Western Airlines, Inc.* (9th Cir. 1988) 851 F.2d 261, 266 .

(n19)Footnote 16. See *Opuku-Boateng v. California* (9th Cir. 1996) 95 F.3d 1461, 1468 , cert. denied, 520 U.S. 1228 (1997) ; *Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433, 1440 ; *EEOC v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1512 ; *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 615 ; *Proctor v. Consol. Freightways Corp. of Delaware* (9th Cir. 1986) 795 F.2d 1472, 1475 .

(n20)Footnote 17. See *Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433, 1440 ; *Toledo v. Nobel-Sysco, Inc.* (10th Cir. 1989) 892 F.2d 1481, 1487-1488 (settlement offers made by employer during administrative proceedings were not reasonable accommodation that cured discriminatory conduct).

(n21)Footnote 18. See *Brener v. Diagnostic Center Hosp.* (5th Cir. 1982) 671 F.2d 141, 145 ; cf. *Anderson v. General Dynamics Convair, Etc.* (9th Cir. 1978) 589 F.2d 397, 401 (employer as not permitted to excuse failure to accommodate by pointing to deficiencies in plaintiff's suggested accommodation).

(n22)Footnote 19. *Brener v. Diagnostic Center Hosp.* (5th Cir. 1982) 671 F.2d 141, 145 ; *Yott v. North American Rockwell Corp.* (9th Cir. 1979) 602 F.2d 904, 908 ; *Sharpe v. American Tel. & Tel. Co.* (9th Cir. 1995) 66 F.3d 1045 ; *but see Toledo v. Nobel-Sysco, Inc.* (10th Cir. 1989) 892 F.2d 1481, 1488-1489 (since duty to cooperate is triggered by employer's initial efforts to accommodate, there was no duty to cooperate with settlement offers that did not constitute accommodation attempts); *Smith v. Pyro Min. Co.* (6th Cir. 1987) 827 F.2d 1081, 1085, 1086-1088 (employee not required to cooperate with accommodation attempt that required him to seek his own replacement for working on Sunday, when employee sincerely believed working on Sunday was morally wrong and that inducing another to work was sin).

(n23)Footnote 20. *See Pinsker v. Joint Dist. Number 28J* (10th Cir. 1984) 735 F.2d 388, 390-391 .

(n24)Footnote 21. *Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433, 1440-1441 .

(n25)Footnote 22. *Heller v. EBB Auto Co.* (9th Cir. 1993) 8 F.3d 1433 .

(n26)Footnote 23. *See Ansonia Bd. of Educ. v. Philbrook* (1986) 479 U.S. 60, 68, 107 S. Ct. 367, 93 L. Ed. 2d 305 .

(n27)Footnote 24. *See Opuku-Boateng v. California* (9th Cir. 1996) 95 F.3d 1461, 1467 , *cert. denied*, 520 U.S. 1228 (1997) ; *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 615 ; *see EEOC v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1512 .

(n28)Footnote 25. *See Opuku-Boateng v. California* (9th Cir. 1996) 95 F.3d 1461, 1467 , *cert. denied*, 520 U.S. 1228 (1997) .

(n29)Footnote 26. *See 29 C.F.R. § 1605.2(c)(2)*; for a discussion relating to "undue hardship" generally, *see* [4], *below*.

(n30)Footnote 26.1. *29 C.F.R. § 1605.2(c)(2)*.

(n31)Footnote 27. *Ansonia Board of Education v. Philbrook* (1986) 479 U.S. 60, 69 n.6, 107 S. Ct. 367, 93 L. Ed. 2d 305 .

(n32)Footnote 28. *29 C.F.R. § 1605.2(d)(1)*; *see also Hudson v. Western Airlines, Inc.* (9th Cir. 1988) 851 F.2d 261, 266 (discussing EEOC guidelines). *See EEOC v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504 (Seventh Day Adventists were not permitted to take Saturdays off; at minimum, employer was required to negotiate with employee to attempt to accommodate religious belief and practice).

(n33)Footnote 29. *See 29 C.F.R. § 1605.2(d)(1)(i)*.

(n34)Footnote 30. *See 29 C.F.R. § 1605.2(d)(1)(ii)*.

(n35)Footnote 31. *See 29 C.F.R. § 1605.2(d)(1)(iii)*.

(n36)Footnote 32. *See Ansonia Board of Education v. Philbrook* (1986) 479 U.S. 60, 65, 107 S. Ct. 367, 93 L. Ed. 2d 305 ; *Pinsker v. Joint Dist. Number 28J* (10th Cir. 1984) 735 F.2d 388, 391 .

(n37)Footnote 33. *See N.L.R.B. v. Hershey Foods Corporation* (9th Cir. 1975) 513 F.2d 1083, 1085-1086 ; 29 U.S.C. § 158(a)(3).

(n38)Footnote 34. *29 C.F.R. § 1605.2(d)(2)*.

(n39)Footnote 35. *Yott v. North American Rockwell Corp.* (9th Cir. 1979) 602 F.2d 904 , *cert. denied*, 445 U.S.

928 (1980) .

(n40)Footnote 36. *See Yott v. North American Rockwell Corp.* (9th Cir. 1979) 602 F.2d 904, 907 , cert. denied, 445 U.S. 928 (1980) .

(n41)Footnote 37. *See Anderson v. General Dynamics Convair, Etc.* (9th Cir. 1978) 589 F.2d 397, 401 .

(n42)Footnote 38. *Felt v. Atchison, Topeka & Santa Fe Railway Co.* (9th Cir. 1995) 60 F.3d 1416 .

(n43)Footnote 39. *See Felt v. Atchison, Topeka & Santa Fe Railway Co.* (9th Cir. 1995) 60 F.3d 1416, 1420 (Seventh Day Adventist required to work Saturdays).

(n44)Footnote 40. *Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 1984) 734 F.2d 1382 .

(n45)Footnote 41. *See Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 1984) 734 F.2d 1382, 1383 .

(n46)Footnote 42. *Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 1984) 734 F.2d 1382, 1383 .

(n47)Footnote 43. *Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 1984) 734 F.2d 1382, 1383 .

(n48)Footnote 44. *Gov. Code § 12940(l)*; *see also 2 Cal. Code Reg. § 7293.3* (FEHA interpretative regulation); *cf. Best v. California Apprenticeship Council* (1984) 161 Cal. App. 3d 626, 634, 207 Cal. Rptr. 863 (decided prior to enactment of *Gov. Code § 12940(l)*; construing *Gov. Code § 12940(c)*, which prohibits discrimination in training selection based on, among other things, religious creed, as requiring religious accommodation). For discussion relating to "undue hardship," *see* [4], *below*.

For the standard jury instruction on the essential elements of a claim of the employer's failure to accommodate in a cause of action for religious creed discrimination, *see* Judicial Council of California Civil Jury Instructions, CACI 2560(Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for the failure to accommodate, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2511(Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n49)Footnote 45. *See Gov. Code § 12940(l)*.

(n50)Footnote 46. *2 Cal. Code Reg. § 7293.3(a)*; *see Cook v. Lindsay Olive Growers* (9th Cir. 1990) 911 F.2d 233, 241 (allowing lateral transfers or changes of job assignments constitutes reasonable accommodation under FEHA).

(n51)Footnote 47. *2 Cal. Code Reg. § 7293.3(c)*.

(n52)Footnote 48. *See 42 U.S.C. § 2000e(j)*.

(n53)Footnote 49. *See Bhatia v. Chevron U.S.A., Inc.* (9th Cir. 1984) 734 F.2d 1382, 1383 ; *Brener v. Diagnostic Center Hospital* (5th Cir. 1982) 671 F.2d 141, 144 ; *Anderson v General Dynamics Convair, Etc.* (9th Cir. 1978) 589 F.2d 397, 401 ; *see also* discussion in [1] and [3], *above*.

(n54)Footnote 50. *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 616 .

(n55)Footnote 51. *See EEOC v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 615 .

(n56)Footnote 52. *See E.E.O.C. v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 615-616 .

(n57)Footnote 53. *See Toledo v. Nobel-Sysco, Inc.* (10th Cir. 1989) 892 F.2d 1481, 1492 .

(n58)Footnote 53.1. *See Sutton v. Providence St. Joseph Medical Center* (9th Cir. 1999) 192 F.3d 826, 831 (as condition of employment, employer could require provision of social security number by prospective employee without liability for discrimination on basis of religion, even though such provision violated prospective employees' religious beliefs).

(n59)Footnote 54. *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 97 S. Ct. 2264, 53 L. Ed. 2d 113 .

(n60)Footnote 55. *See Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 84, 97 S. Ct. 2264, 53 L. Ed. 2d 113 .

(n61)Footnote 56. *See Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 84, 97 S. Ct. 2264, 53 L. Ed. 2d 113 ; *see also* 29 C.F.R. § 1605.2(e)(1); *but see Anderson v. General Dynamics Convair, Etc.* (9th Cir. 1978) 589 F.2d 397, 402 (undue hardship as meaning something greater than hardship).

(n62)Footnote 57. 29 C.F.R. § 1605.2(e) (emphasis in original).

(n63)Footnote 58. 29 C.F.R. § 1605.2(e)(1).

(n64)Footnote 59. 29 C.F.R. § 1605.2(e)(2).

(n65)Footnote 60. *See Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 67, 97 S. Ct. 2264, 53 L. Ed. 2d 113 .

(n66)Footnote 61. *See Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 79, 97 S. Ct. 2264, 53 L. Ed. 2d 113 .

(n67)Footnote 62. *See Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 80, 97 S. Ct. 2264, 53 L. Ed. 2d 113 .

(n68)Footnote 63. *See Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 81, 97 S. Ct. 2264, 53 L. Ed. 2d 113 .

(n69)Footnote 64. 29 C.F.R. § 1605.2(e)(2).

(n70)Footnote 64.1. *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, 607 (employee's two options for proposed accommodation, *i.e.*, that he be allowed to post anti-gay messages and company's "gay" posters promoting diversity remain, or that company remove posters and he would then remove anti-gay messages, would have imposed undue hardship on employer; first accommodation would have compelled company to permit employee to post messages intended to demean and harass his co-workers, and second accommodation would have forced company to exclude sexual orientation from its workplace diversity program).

(n71)Footnote 64.2. *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, 607 .

(n72)Footnote 65. *See Gov. Code § 12940(l)*; *see also* discussion in [1] and [3], *above*. For the standard jury instruction for the affirmative defense to a claim of religious discrimination under FEHA that the employer's failure to accommodate was justified because of undue hardship, *see Judicial Council of California Civil Jury Instructions, CACI 2561 (Matthew Bender)*, also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the standard jury instructions generally, *see § 61.05*. For the CACI special verdict form for the affirmative defense of undue hardship, *see Judicial Council of California Civil Jury Instructions, CACI VF-2512(Matthew Bender)*. For discussion of the CACI special verdict forms generally, *see § 61.06*.

(n73)Footnote 66. *See 2 Cal. Code Reg. § 7293.3(b)*.



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2-41 California Employment Law § 41.53

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.53 Alcoholism and Drug Abuse Rules and Tests

[1] Adverse Employment Decisions Based on Drug and Alcohol Use

Because employment discrimination based upon drug addiction is apparently protected by both the ADA and the Rehabilitation Act of 1973, provided a former abuser is being or has been rehabilitated and no longer uses illegal drugs,ⁿ¹ employer practices or rules that discriminate based on past addiction may be unlawful. However employment rules prohibiting current drug or alcohol are permissible so long as they are uniformly applied, since current alcoholism and drug addiction are not protected by either the ADA or the Rehabilitation Act.ⁿ² In fact, the ADA expressly provides that employers may prohibit the illegal use of drugs and alcohol in the workplace and may require employees to conform with the Drug-Free Workplace Act of 1988,ⁿ³ which sets forth drug-free workplace requirements for federal contractors and recipients of federal funds. The ADA permits employers to hold employees who are alcoholics or users of illegal drugs to the same work standards as other employees, even if unsatisfactory performance is related to drug use or alcoholism.ⁿ⁴ It also authorizes the departments of Defense and Transportation and the Nuclear Regulatory Commission to require employees in industries regulated by those departments to comply with existing federal regulations that establish standards regarding alcohol and drug use.ⁿ⁵

In *Collings v. Longview Fibre Co.*,ⁿ⁶ the Ninth Circuit held that an employer may discharge employees who violate company rules either by buying, selling, or using marijuana at the workplace, or by returning to work under its influence. Rejecting the employees' claim that the ADA prevented their discharge, the court stated, "The term 'qualified individual with a disability' does not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."ⁿ⁷

An employee may also be terminated for misconduct occurring as the result of alcohol use. Under the Rehabilitation Act, one can be fired for misconduct while being intoxicated on duty, rather than for an alcoholism handicap.ⁿ⁸ In *Newland v. Dalton*,ⁿ⁹ a civilian Navy employee, an alcoholic, was terminated for having fired an assault rifle in a bar during his off hours. The court held the employee was properly terminated for misconduct and not because of his alcoholism.

[2] Drug Testing

The ADA also allows employers to adopt reasonable policies, including drug testing, to determine whether an employee is participating in or has successfully completed a drug rehabilitation program and whether or not the employee is currently engaging in drug use.ⁿ¹⁰ With respect to blanket drug testing, however, the ADA is neutral, stating that it does not encourage, prohibit, or authorize such testing or making employment decisions based on the results of such tests.ⁿ¹¹ The ADA takes a similar position on the testing of transportation employees, declaring that the ADA may not be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the Department of Transportation's jurisdiction to (1) test their employees in positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and (2) remove employees who test positive for illegal use of drugs and on-duty impairment by alcohol from safety-sensitive duties.ⁿ¹²

Title VII, as amended by the Civil Rights Act of 1991,ⁿ¹³ provides that, notwithstanding any other provision of Title VII, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in Schedules I and II of the Controlled Substances Act,ⁿ¹⁴ other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of federal law, shall be considered an unlawful employment practice under Title VII only if the rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.ⁿ¹⁵

For discussion of potential constitutional and privacy issues raised by drug testing, *see* Chapter 50, Part D. For a discussion of preemployment drug testing, *see* § 41.46[2]. For further discussion relating to the status of drug abuse in the equal employment opportunity context, *see* §§ 41.32[3][a] and 41.53.

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationRehabilitation Act

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. §§ 706(8)(C)(ii), 794 (Rehabilitation Act); 42 U.S.C. §§ 12114(b), 12211(b); 29 C.F.R. § 1630.3(b) (ADA); *see also* discussion in § 41.32.

(n2)Footnote 2. *See* 29 U.S.C. § 706(8)(C)(i), (v) (Rehabilitation Act); 42 U.S.C. §§ 12114(a), 12211(a); 29 C.F.R. § 1630.16(b)(1)(ADA).

(n3)Footnote 3. *See* 42 U.S.C. § 12114(c)(3); 41 U.S.C. § 701 *et seq.*; 29 C.F.R. § 1630.16(b)(2).

(n4)Footnote 4. 42 U.S.C. § 12114(c)(4); 29 C.F.R. § 1630.16(b)(4).

(n5)Footnote 5. 42 U.S.C. § 12114(c)(5), (e); 29 C.F.R. § 1630.16(b)(5), (6).

(n6)Footnote 6. *Collings v. Longview Fibre Co.* (9th Cir. 1995) 63 F.3d 828 .

(n7)Footnote 7. *See Collings v. Longview Fibre Co.* (9th Cir. 1995) 63 F.3d 828, 831-833 .

(n8)Footnote 8. *Little v. FBI* (4th Cir. 1993) 1 F.3d 255, 259 .

(n9)Footnote 9. *Newland v. Dalton* (9th Cir. 1996) 81 F.3d 904, 906 .

(n10)Footnote 10. 42 U.S.C. §§ 12114(b), 12211(b); 29 C.F.R. § 1630.3(c).

(n11)Footnote 11. 42 U.S.C. § 12114(d)(2); 29 C.F.R. § 1630.16(c)(1); see 42 U.S.C. § 12211(b).

(n12)Footnote 12. 42 U.S.C. § 12114(e); 29 C.F.R. § 1630.16(c)(2); accord, *Skinner v. Railway Labor Executives' Ass'n* (1989) 489 U.S. 602, 633, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (private railroads may constitutionally test, in conformity with 49 C.F.R. §§ 219.201, 209.203(a), 219.301(b), (c) (federal safety regulations), employees who are involved in major accidents and who are "reasonably suspected" of being under influence of alcohol); see also *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 678-679, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (United States Customs Service may constitutionally test employees who carry firearms or seek transfer or promotion to drug enforcement jobs).

(n13)Footnote 13. See Pub. L. No. 102-166, § 105(a).

(n14)Footnote 14. See 21 U.S.C. § 802(6).

(n15)Footnote 15. 42 U.S.C. § 2000e-2(k)(3).



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2-41 California Employment Law § 41.54

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.54 Appearance, Grooming, and Dress Standards

As discussed in detail in § 41.42[2][m], grooming and appearance rules are frequently upheld as lawful under Title VII.ⁿ¹ However, grooming and appearance rules that are based on immutable characteristics related to an employee's sex, race, color, religion, or national origin may be unlawful.

In *Gerdomb v. Continental Airlines, Inc.*,ⁿ² the plaintiff, a "flight hostess," was suspended and eventually terminated because her weight exceeded the maximum permitted by her employer.ⁿ³ When the plaintiff was employed, the flight hostess position was filled exclusively by women, and no similar weight program was enforced for the "director of passenger service" (DPS) position, an exclusively male position that supervised and assisted flight hostesses.ⁿ⁴ Preliminarily, the Ninth Circuit Court of Appeals rejected the employer's argument that the weight restrictions were simply a "grooming" requirement outside the purview of Title VII.ⁿ⁵ The court noted that permissible grooming rules are those that do not significantly deprive either sex of employment opportunities, and which are even-handedly applied to employees of both sexes.ⁿ⁶ The court observed that, on the other hand, Title VII is held to be violated when special appearance rules are imposed on members of only one sex.ⁿ⁷

After concluding that the employer could not avoid Title VII scrutiny, the *Gerdomb* court applied the "disparate treatment" theory of liability.ⁿ⁸ Noting that the weight program was *designed* to apply only to females, and thus was facially discriminatory, the court concluded that a prima facie case of discrimination was established.ⁿ⁹ The employer attempted to justify the weight program by contending that thin female hostesses were central to its business image.ⁿ¹⁰ However, the court rejected that justification, holding that the employer could not state a legitimate nondiscriminatory reason to rebut the plaintiff's prima facie case because its justification was not neutral--it was discriminatory on its face.ⁿ¹¹ The court explained that the justification merely declared the employer's determination to impose the weight requirement on employees because they are females. It added that because the employer did not argue that only thin females could perform the job, it did not have a bona fide occupational qualification (BFOQ) defense.ⁿ¹²

In *Frank v. United Airlines, Inc.*,ⁿ¹³ the Ninth Circuit held that if an employment policy regarding appearance standards imposes unequal burdens on men and women, it will be considered disparate treatment that must be justified

as a BFOQ to be enforceable.ⁿ¹⁴ The defendant chose weight maximums for its female flight attendants that generally corresponded to the medium frame category of MetLife's Height and Weight Tables. By contrast, the maximums for the male flight attendants generally corresponded to MetLife's large frame category. This discrepancy was held to be discriminatory.ⁿ¹⁵

Although an employer's appearance standards, including makeup requirements, may be the subject of a Title VII claim for sexual stereotyping, grooming standards that appropriately differentiate between the genders are not facially discriminatory.^{n15.1}

FEHC regulations provide that it is lawful for an employer or other entity covered by the FEHA to impose on an employee physical appearance, grooming, or dress standards. However, if such a standard discriminates on a basis enumerated in the FEHA,ⁿ¹⁶ and if it also significantly burdens the individual in his or her employment, it is unlawful.ⁿ¹⁷

Government Code Section 12947.5 makes it an unlawful employment practice under the FEHA for an employer to prohibit an employee from wearing pants on account of the sex of the employee.ⁿ¹⁸ However, employers may require employees in a particular occupation to wear a uniform or a costume while the employee is portraying a specific character or dramatic role.ⁿ¹⁹ Furthermore, the FEHC may exempt an employer from the requirements of *Government Code Section 12947.5* for good cause shown.ⁿ²⁰ The FEHC is required to adopt standards and procedures for granting such exemptions.ⁿ²¹

For a further discussion of appearance, grooming and dress standards, *see* § 41.42[2][m].

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

FOOTNOTES:

(n1)Footnote 1. *See Willingham v. Macon Telegraph Publishing Co.* (5th Cir. 1975) 507 F.2d 1084, 1091, 1092 ; *see also Baker v. California Land Title Company* (9th Cir. 1974) 507 F.2d 895, 897 .

(n2)Footnote 2. *Gerdorn v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602 .

(n3)Footnote 3. *See Gerdorn v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602, 603 .

(n4)Footnote 4. *See Gerdorn v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602, 604, 605 .

(n5)Footnote 5. *Gerdorn v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602, 605 , *cert. dismissed*, 460 U.S. 1074 (1983) ; *see Baker v. California Land Title Company* (9th Cir. 1974) 507 F.2d 895, 898 .

(n6)Footnote 6. *See Gerdorn v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602, 606 .

(n7)Footnote 7. *See Gerdorn v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602, 606 ; *see also Carrol v. Talman Federal S. & L. Ass'n of Chicago* (7th Cir. 1979) 604 F.2d 1028, 1032-1033 ; *Allen v. Lovejoy* (6th Cir. 1977) 553 F.2d 522, 524 .

(n8)Footnote 8. *See Gerdorn v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602, 608 ; *see also McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n9)Footnote 9. *See Gerdorn v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602, 608 .

(n10)Footnote 10. *See Gerdom v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602, 605, 609 .

(n11)Footnote 11. *See Gerdom v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602, 605, 609 .

(n12)Footnote 12. *See Gerdom v. Continental Airlines, Inc.* (9th Cir. 1982) 692 F.2d 602, 605, 609 . For a discussion relating to the BFOQ defense, *see* § 41.94.

(n13)Footnote 13. *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845 .

(n14)Footnote 14. *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 854-855 .

(n15)Footnote 15. *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 854 .

(n16)Footnote 15.1. *Jespersen v. Harrah's Operating Co.* (9th Cir. 2006) 444 F.3d 1104, 2006 U.S. App. LEXIS 9307, *10-*25 (en banc) (policy requiring female bartenders to wear makeup did not itself establish prima facie case of discriminatory intent that had to be justified as bona fide occupational qualification, where requirement was part of appearance policy that applied to both male and female bartenders, and, while policy contained sex-differentiated requirements, none on its face placed greater burden on one gender than other).

(n17)Footnote 16. *See Gov. Code § 12940(a)* (race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, age, or sexual orientation). For a discussion relating to specific prohibited bases for discrimination, *see* pt. B (§§ 41.30-41.36).

(n18)Footnote 17. *2 Cal. Code Reg. § 7287.6(c)*.

(n19)Footnote 18. *Gov. Code § 12947.5(a)*.

(n20)Footnote 19. *Gov. Code § 12947.5(b),(c)*.

(n21)Footnote 20. *Gov. Code § 12947.5(d)*.

(n22)Footnote 21. *Gov. Code § 12947.5(d)*.



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2-41 California Employment Law § 41.55

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.55 Bankruptcy and Garnishment Rules

Although it has never been expressly decided, adverse employment practices based on an employee's bankruptcy may be unlawful under equal employment opportunity law if those practices have an adverse impact on protected classification members.ⁿ¹ Furthermore, federal bankruptcy law prohibits employment discrimination by private employers on the basis of bankruptcy.ⁿ²

With respect to garnishment, *Johnson v. Pike Corporation of America*,ⁿ³ a leading case decided by the district court for the Central District of California, held that a rule authorizing the discharge of employees whose wages were garnished discriminated against minority employees because the rule subjected a disproportionate percentage of those employees to discharge.ⁿ⁴ The *Johnson* rationale may also apply to disciplinary actions short of discharge, such as reprimands.ⁿ⁵

One case implied that considerable inconvenience and expense to the employer, bad community relations, and evidence of irresponsibility are factors that may justify a discriminatory garnishment rule.ⁿ⁶ Another court suggested that the contention that a garnishment rule is permissible because it "fosters employee productivity" should be proven.ⁿ⁷

Apart from equal employment opportunity laws, both federal and state consumer protection laws prohibit an employer from discharging an employee because of garnishment of wages relating to a single indebtedness.ⁿ⁸ For discussion of these provisions, see Chapter 4, Part B, and Chapter 60.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement &
ExecutionGarnishmentsLabor & Employment LawDiscriminationGeneral OverviewLabor & Employment
LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

FOOTNOTES:

(n1)Footnote 1. *See Bell v. Citizens Fidelity Bank & Trust* (6th Cir. 1980) 636 F.2d 1119 (decided under 42 U.S.C. §§ 1981, 1982; remanding to determine whether bank's practice of discharging employees who file for bankruptcy had discriminatory impact on African-Americans). *but see In Re Russell* (9th Cir. 1996) 76 F.3d 242, 245 (individual Black debtors were collaterally estopped from challenging validity of bank loans on ground of race discrimination because discrimination defense should have been raised in state court in response to bank's action on the loans).

(n2)Footnote 2. *See 11 U.S.C. § 525(b)*; *See also* ch. 60. *but see In re Majewski* (9th Cir. 2002) 310 F.3d 653, 654 (statute does not protect persons who have not yet filed for bankruptcy, so no protection for debtor who was fired after announcing he would file, but had not yet filed).

(n3)Footnote 3. *Johnson v. Pike Corp. of Am.* (C.D. Cal. 1971) 332 F. Supp. 490 (Title VII) .

(n4)Footnote 4. *See Johnson v. Pike Corp. of Am.* (C.D. Cal. 1971) 332 F. Supp. 490, 494 (Title VII) ; *see also Wallace v. Debron Corp.* (8th Cir. 1974) 494 F.2d 674, 675 (Title VII) .

(n5)Footnote 5. *See Keenan v. American Cast Iron Pipe Co.* (11th Cir. 1983) 707 F.2d 1274, 1276 (Title VII; remanded for determination in regard to whether employer policy actually had discriminatory effect).

(n6)Footnote 6. *See Friend v. Leidinger* (4th Cir. 1978) 588 F.2d 61, 64 (Title VII) .

(n7)Footnote 7. *See Wallace v. Debron Corp.* (8th Cir. 1974) 494 F.2d 674, 677 .

(n8)Footnote 8. *See 15 U.S.C. § 1674; Lab. Code § 2929.*



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.56

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§ 41.56 Compensation

[1] Generally

The federal Equal Pay Act of 1963 (EPA)ⁿ¹ and the California Equal Pay Actⁿ² are the primary sources of protection against sex discrimination with respect to compensation. However, discrimination in compensation because of sex, as well as other protected characteristics, is also prohibited by several other state and federal equal employment opportunity sources, including Title VII and the FEHA.ⁿ³ For a detailed discussion relating to the scope and coverage of these statutes, *see* Chapter 40.

[2] Federal Equal Pay Act of 1963

[a] Scope of Protection

The EPA provides that no employer having employees subject to any provisions of the Fair Labor Standards Act (FLSA)ⁿ⁴ may discriminate, within any establishment in which those employees are employed, between employees on the basis of sex by paying wages to employees in that establishment at a rate less than the rate at which the employer pays wages to employees of the opposite sex in the establishment for equal work on jobs that require equal skill, effort, and responsibility, and that are performed under similar working conditions, except when payment is made pursuant to (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex.ⁿ⁵ The foregoing exceptions are discussed in [4], *below*. For a discussion relating to the scope and application of the EPA generally, *see* Chapter 40, Part C.

The EPA requires equal pay for equal work.ⁿ⁶ The EPA applies if an employer knowingly allows an employee to perform the equal work at a lesser wage than is paid to employees of the opposite sex, even if the employer does not formally assign such work to that employee.ⁿ⁷

The EEOC has adopted regulations interpreting the EPA,ⁿ⁸ and courts have held that these guidelines, like the EEOC selection procedure guidelines,ⁿ⁹ are entitled to great deference.ⁿ¹⁰ According to the EEOC guidelines, the term

"wages" under the EPA includes all payments made to (or on behalf of) an employee for remuneration for employment.ⁿ¹¹ It includes all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name.ⁿ¹² "Fringe benefits" are also deemed to be remuneration for employment.ⁿ¹³

The EEOC regulations define a wage "rate" as the standard or measure by which an employee's wage is determined.ⁿ¹⁴ The term is considered to encompass all rates of wages whether calculated on time, commission, piece, job incentive, profit sharing, bonus, or other basis. The term also includes the rate at which overtime compensation or other special remuneration is paid as well as the rate at which straight time compensation for ordinary work is paid. It further includes the rate at which a draw, advance, or guarantee is paid against a commission settlement.ⁿ¹⁵ When a higher wage rate is paid to one gender than the other for the performance of equal work, the higher rate serves as a wage standard.ⁿ¹⁶

Under the EPA, an employer who is paying an unlawful wage rate differential may not, in order to comply with the EPA, reduce the wage rate of any employee.ⁿ¹⁷ Thus, when a prohibited sex-based wage differential has been proved, an employer can come into compliance only by raising the wage rate of the lower-paid sex. Moreover, an employer may not attempt to cure a violation of the EPA by hiring or transferring employees to perform the previously lower-paid job at the lower rate. Similarly, the departure of the higher-paid sex from positions in which a violation occurred, leaving only members of the lower-paid sex being paid equally among themselves, does not cure an EPA violation.ⁿ¹⁸

It has been held that application of the EPA to a religious organization or institution does not violate the *Free Exercise Clause of the First Amendment to the United States Constitution*, particularly when application does not interfere with the organization's or institution's beliefs.ⁿ¹⁹ In a 1990 policy guideline, the EEOC concluded that under the EPA a religious organization or institution may not pay women less than men even if such a policy is pursuant to its religious beliefs.ⁿ²⁰

[b] "Equal Work"

[i] Burden of Proof

In a case brought under the EPA, the burden of proof shifts between the plaintiff-employee and the defendant-employer.ⁿ²¹ A plaintiff in an EPA case need not prove discriminatory intent.ⁿ²² The plaintiff only has the burden of proving, by a preponderance of the evidence,ⁿ²³ that he or she did not receive equal pay for equal work.ⁿ²⁴ A plaintiff does not have to show that his or her job is equal to all, or even most, comparable jobs. All that is required is a showing that the work performed by plaintiff is equal to that performed by *some* members of the opposite sex in comparable jobs, but that plaintiff is not compensated equally.ⁿ²⁵ Thus, one court held that plaintiff sewing machine operators carried their burden of proof by establishing that their jobs were substantially similar to the jobs of some higher-paid bookbinder machine operators.ⁿ²⁶

Once the plaintiff establishes a prima facie case, the burden shifts to the defendant to establish that the pay discrepancy is based on a factor other than sex.ⁿ²⁷ After the employer meets that burden, an employee may nevertheless prevail by showing that the employer's proffered nondiscriminatory reason is a pretext for discrimination.ⁿ²⁸

[ii] Substantial Identity Standard

The equal work standard does not require jobs to be identical, only that they be substantially equal.ⁿ²⁹

The Ninth Circuit uses a two-step "substantially equal" analysis: first, the plaintiff must establish that the jobs being compared have a common core of tasks, that is, whether a significant portion of the two jobs is identical; second, the

court must then determine whether any additional tasks, "incumbent on one job but not the other, make the two jobs 'substantially different.' "n30 Actual job performance and content--not job titles, classifications, or descriptions--is determinative as to whether jobs are substantially equal.n31 The Ninth Circuit has also held that job skills may be analyzed with regard to factors such as differences in supply and demand, job responsibilities, working conditions, performance, experience, and the marketplace value of the skills of a particular individual.n32 Furthermore, it is the overall job, not its individual segments, that must form the basis of comparison, and, because job duties vary so widely, each suit must be determined on a case-by-case basis.n33 This inquiry is limited to a comparison of the jobs in question, and does not involve a comparison of the individuals who hold those jobs.n34

The EEOC regulations provide that in determining whether employees are performing equal work within the meaning of the EPA, it is necessary to consider the degree of any difference in the jobs under comparison in terms of skill, effort, and responsibility.n35 Insubstantial or minor differences in the degree or amount of skill, effort, or responsibility required for job performance do not render the equal pay standard inapplicable.n36 On the other hand, substantial differences, such as those customarily associated with differences in wage levels when the jobs are performed by persons of one sex only, will ordinarily demonstrate an inequality between the jobs justifying differences in pay. The EEOC also publishes notices on sex discrimination regarding specific types of jobs that may provide additional guidance.n37

However, differences in skill, effort, or responsibility that might be sufficient to justify a finding that two jobs are not equal within the meaning of the EPA if the greater skill, effort, or responsibility has been required of the higher-paid sex, do not justify such a finding when the greater skill, effort, or responsibility is required of the lower-paid sex.n38 For example, when employees of opposite sexes are employed in jobs in which the duties they are required to perform and the working conditions are substantially the same, except that an employee of one sex is required to perform some duty or duties involving a higher skill that an employee of the other sex is not required to perform, the fact that the duties are different in this respect is insufficient to remove the jobs from the application of the equal pay standard if it also appears that the employer is paying a lower wage rate to the employee performing the additional duties notwithstanding the additional skill that they involve.n39

The EEOC regulations contain several examples of differences in job duties that the EEOC considers to be insufficient to show that the jobs do not involve equal work within the meaning of the EPA. For example, the amounts of time that employees spend in the performance of different duties is not determinative. Also, the performance of jobs on different machines or equipment do not make jobs unequal,n40 and if the difference in skill or effort required for the operation of such equipment is inconsequential, payment of a higher wage rate to one sex because of the difference in machines or equipment would constitute a prohibited wage differential. Similarly, jobs performed in different departments or locations are not necessarily unequal.n41

[c] Jobs Requiring Equal Skill, Effort, and Responsibility

[i] "Equal Skill" Defined

Under the EEOC regulations, if the amount or degree of skill required for job performance is substantially greater than that required to perform another job, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Skill includes consideration of such factors as experience, training, education, and ability.n42 However, it must be measured in terms of the performance requirements of the job.n43 In other words, it is the skill required by the comparative jobs that is determinative, not the skill possessed by employees engaged in those jobs.n44 For example, in *Hein v. Oregon College of Educ.*, n45 the Ninth Circuit Court of Appeals held that a district court erred when it found that a female teacher and a male teacher performed substantially equal jobs because the plaintiff's skills were equal to or greater than those of the male teacher.n46 The court stated that a prima facie case is not made by showing that employees of the opposite sex possess equivalent skills. It explained that the EPA explicitly applies to jobs that require equal skills, not to employees that possess equal skills.n47

If an employee must have essentially the same skill in order to perform either of two jobs, the jobs will qualify under the EPA as jobs requiring equal skill, even though the employee in one of the jobs may not exercise the required skill as frequently or during as much of his or her working time as the employee in the other job. However, possession of a skill not needed to meet the requirements of a job cannot be considered in making a determination regarding equality of skill. The efficiency of the employee's performance in the job is also not in itself an appropriate factor to consider in evaluating skill.ⁿ⁴⁸

[ii] "Equal Effort" Defined

The EEOC regulations provide that if substantial differences exist in the amount or degree of effort required to be expended in the performance of jobs, the equal pay standard cannot apply even though the jobs may be equal in all other respects. Effort is concerned with the measurement of the physical or mental exertion needed for the performance of a job. Job factors that cause mental fatigue and stress, as well as those that alleviate fatigue, must be considered in determining the effort required by the job.ⁿ⁴⁹ For example, in *Gunther v. County of Washington*,ⁿ⁵⁰ the Ninth Circuit Court of Appeals upheld a district court's finding that the jobs of jail matron and correction officer were not substantially equal because clerical work required by matrons, together with the difference between the two jobs in prisoner-guard ratio, made the jobs qualitatively different.ⁿ⁵¹ The court observed that although both jobs entailed guarding prisoners, correction officers guarded many more prisoners than matrons.ⁿ⁵² Furthermore, because the jail matrons had fewer prisoners to guard, they performed clerical work for as much as 50 percent of their time, and such work entailed substantially less effort and responsibility than guarding prisoners.ⁿ⁵³

"Effort" encompasses the total requirements of a job.ⁿ⁵⁴ Thus, according to the Second Circuit Court of Appeals, so long as the ultimate degree of exertion remains comparable, the mere fact that two jobs call for effort different in kind will not render them unequal so as to justify wage differentials.ⁿ⁵⁵ For example, in a job with both male and female employees, an employer may not pay a higher wage rate to a male employee who occasionally lifts heavy items, but not to a female employee who expends an equal degree of effort occasionally performing tasks requiring greater dexterity. The difference in the kind of effort required of the employees does not make their effort unequal in any respect that would justify a wage differential, when such differences are not ordinarily considered as a factor in setting wage levels.ⁿ⁵⁶

Effort expended in additional tasks assigned to employees of a particular sex is also not necessarily sufficient to justify a pay differential.ⁿ⁵⁷ The Second Circuit Court of Appeals explains that such additional effort is insufficient under the EPA if the effort does not consume a significant total amount of all the employees' time; or if employees of the opposite sex also perform duties that require additional effort; or if third persons who perform the additional tasks as their primary job are paid less than the employees in question.ⁿ⁵⁸

A wage rate differential based on differences in the degree or amount of effort required for performance of jobs must be applied uniformly to men and women. For example, if all women and some men performing a particular type of job never perform heavy lifting, but some men do, payment of a higher wage rate to *all* of the men would constitute a prohibited wage rate differential if the equal pay provisions otherwise apply.ⁿ⁵⁹

[iii] "Equal Responsibility" Defined

The EEOC regulations define responsibility as being concerned with the degree of accountability required in the performance of a job, with emphasis on the importance of the job obligation.ⁿ⁶⁰ Differences in the degree of responsibility required in the performance of otherwise equal jobs cover a wide variety of situations. Accordingly, the EEOC regulations provide several illustrations that may suggest the nature and degree of differences in responsibility that will constitute unequal work.ⁿ⁶¹ For example, an employee in a group performing jobs equal in other respects may sometimes be required to assume supervisory duties for reasons such as the absence of the regular supervisor. Payment

of a higher wage rate to that employee would not violate the EPA if it is based on the additional responsibility, and if there are no sexual distinctions in paying the higher rate.ⁿ⁶²

Minor differences in responsibility do not make the equal pay standard inapplicable.ⁿ⁶³ In *E.E.O.C. v. Maricopa Cty. Community College Dist.*,ⁿ⁶⁴ the Ninth Circuit Court of Appeals agreed with a district court finding that a female plaintiff, a student loan clerk, performed work substantially equal to work performed by higher-paid male financial aid assistants at other colleges.ⁿ⁶⁵ The plaintiff's employer contended that because the plaintiff did not have the general authority to make financial aid awards, she did not have the same responsibility as the financial assistants, and thus her work was not substantially similar to their work.ⁿ⁶⁶ The court rejected the employer's contention, stating that although it was clear that the plaintiff lacked certain authority, the stipulated facts never established that the male financial assistants had any greater responsibility. The court refused to find that the district court erred in failing to infer greater responsibility, and added that even if there were additional responsibility, it could not conclude that it was anything more than minimal.ⁿ⁶⁷

In a later case, the Ninth Circuit held that greater responsibility, and thus the need for greater pay, may be shown by a greater ability to generate revenue for the employer. In that case, the court found that a university men's basketball coach had greater responsibility than the women's basketball coach because the men's team generated 90 times the revenue of the women's team, demonstrating the greater pressure on the men's coach to win and to promote the team.ⁿ⁶⁸

[d] Jobs Performed Under Similar Working Conditions

The EEOC regulations provide that in determining whether jobs are performed under similar working conditions, a practical judgment is required in light of whether the differences in working conditions are the kind customarily taken into consideration in setting wage levels. The mere fact that jobs are in different departments of an establishment will not necessarily mean that the jobs are performed under dissimilar working conditions.ⁿ⁶⁹

The term "similar working conditions" encompasses the following two subfactors: (1) "surroundings," which measure the elements, such as toxic chemicals or fumes,ⁿ⁷⁰ regularly encountered by a worker, and their intensity and frequency; and (2) "hazards," which take into account the physical hazards regularly encountered,ⁿ⁷¹ their frequency and the severity of injury they can cause.ⁿ⁷² The phrase "working conditions" does not encompass shift differentials.ⁿ⁷³

According to the EEOC regulations, employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar working conditions. However, if working conditions for a job are substantially different from those required for the performance of other jobs, the equal pay principle does not apply. On the other hand, slight or inconsequential differences in working conditions that are not usually taken into consideration by employers or in collective bargaining in setting wage rates would not justify a differential in pay.ⁿ⁷⁴

[e] Male Comparators

To establish a prima facie case of wage discrimination, a plaintiff must show not only that she was paid lower wages than a male comparator for equal work, but that she selected the proper comparator. A plaintiff cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females.^{n74.1}

[3] California Equal Pay Act

The California Equal Pay Act specifies that no employer may pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the

performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except when the payment is made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.ⁿ⁷⁵ The California Equal Pay Act, which codifies the principle that an employee is entitled to equal pay for equal work without regard to gender,ⁿ⁷⁶ is substantively almost identical to the federal EPA, discussed in [2], above.^{n76.1} However, unlike the EPA, no administrative regulations have been issued to interpret the California Equal Pay Act.

There is little case authority construing California's Equal Pay Act.^{n76.2} However, since California courts often rely on federal law to interpret analogous state law,^{n76.3} federal cases construing the EPA may be used to construe the California Equal Pay Act.ⁿ⁷⁷

The three-stage burden-shifting test used to establish sex discrimination under the federal Equal Pay Act applies to the trial of an action under section 1197.5.^{n77.1} The burden-shifting test requires that the plaintiff show that the employer pays workers of one sex more than workers of the opposite sex for equal work.^{n77.2} The employer then has the burden of showing that one of the exceptions listed in section 1197.5 is applicable.^{n77.3} The employee may show that the employer's stated reasons are pretextual.^{n77.4} Thus, in *Green v. Par Pools, Inc.*,^{n77.5} the plaintiff, who alleged unequal pay solely under the California Equal Pay Act, alleged a prima facie case under section 1197.5 by showing that a newly hired male was paid \$ 900 a week while she was only paid \$ 500 a week, that her replacement was paid slightly more than \$ 600 per week, and that their jobs were identical.^{n77.6} However, the employer established an affirmative defense of the statutory catchall exception for a pay differential based on any bona fide factor other than sex,^{n77.7} based the newly hired male's more extensive prior work experience.^{n77.8} The plaintiff then had an opportunity to demonstrate that the employer's stated reasons were pretextual but she failed to do so, which entitled the trial court to reject her Equal Pay Act claims.^{n77.9} For a discussion relating to the scope and application of the California Equal Pay Act generally, see Chapter 40, Part B.

[4] Equal Pay Act Exceptions

[a] Generally

Both the federal EPAⁿ⁷⁸ and the California Equal Pay Actⁿ⁷⁹ establish four exceptions--three specific and one a catchall provision--by which different payment to employees of opposite sexes may be made pursuant to (1) seniority systems; (2) merit systems; (3) systems that measure earnings by quantity or quality of production; and (4) differentials based on any other factor other than sex.ⁿ⁸⁰ Once a plaintiff has carried his or her burden of showing that employees of one sex are paid more than employees of the opposite sex for equal work,ⁿ⁸¹ the burden shifts to the employer to show, by a preponderance of the evidence,ⁿ⁸² that the differential is justified under one of the exceptions.ⁿ⁸³ Thus, the EPA exceptions are affirmative defenses.ⁿ⁸⁴

[b] Seniority Systems, Merit Systems, and Systems Measuring Earnings by Quantity or Quality of Production

As noted above, employers may pay employees of one sex at wage rates different from those paid to employees of the opposite sex if the differential is based on a bona fide seniority or merit system.ⁿ⁸⁵ Thus, for example, the seniority exception permits a male employee with 20 years seniority to receive a higher wage than a female with two years seniority.ⁿ⁸⁶ Under the merit exception, employees rendering outstanding service, measured in comparison with other employees performing the same job, may also receive higher wages.ⁿ⁸⁷

The EPA apparently does not require "formal" seniority or merit systems,ⁿ⁸⁸ but any such system must be administered systematically and objectively.ⁿ⁸⁹ For example, a merit system may be established by showing "an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria."ⁿ⁹⁰ There should also be a showing of a "means or order ... of advancement or reward for merit."ⁿ⁹¹ Systems based on subjective

criteria, such as "gut feelings," are insufficient.ⁿ⁹²

According to one commentator, under the exception for systems measuring earnings by quantity or quality of production,ⁿ⁹³ an employer must show the existence of a bona fide incentive system based on either the amount of work produced or the quality of the work produced. The Sixth Circuit Court of Appeals has explained that the "quantity" test refers to equal dollar per unit compensation rates. Thus, there is no discrimination if two employees receive the same pay rate, but one receives more total compensation because he or she produces more.ⁿ⁹⁴

[c] Differentials Based on Any Factor Other Than Sex

The "factor other than sex" exceptionⁿ⁹⁵ is intended to be a broad general exception. A primary purpose of this and the exceptions discussed in [b], above, is to permit employers to utilize bona fide gender-neutral job evaluation and classification systems.ⁿ⁹⁶ Thus, compensation systems that determine salaries on the basis of job duties and responsibilities, educational attainments, and experience, which are related to the responsibilities and duties that employees must perform in their jobs, are permissible.ⁿ⁹⁷ Salary differentials that result from applying these objective criteria do not violate the EPA.ⁿ⁹⁸ Furthermore, proper job reclassification within the framework of a permissible wage classification system also qualify under the "factor other than sex" exception.ⁿ⁹⁹

There is some dispute as to the scope of the "factor other than sex" exception. Some courts have held that the exception is limited to factors traditionally included in job-evaluation schemes.ⁿ¹⁰⁰ The Ninth Circuit Court of Appeals has held that although a concern about job-evaluation systems served as the impetus for the exception, its broad language indicates that it is not limited to that concern.ⁿ¹⁰¹ Under the Ninth Circuit view, any acceptable nonpretextual business reason for a compensation differential is permissible, even if it results in a wage differential between male and female employees.ⁿ¹⁰² Another court has held that the "factor other than sex" exception need not be related to the requirements of the particular position in question, or that it be business-related. Instead, the question is simply whether the factor is discriminatorily applied or causes a discriminatory effect. The factor must also be bona fide in that it is used and applied in good faith.ⁿ¹⁰³

Economic benefits to an employer have been found to be a legitimate business reason justifying a wage differential for equal work.ⁿ¹⁰⁴ In *Hodgson v. Robert Hall Clothes, Inc.*,ⁿ¹⁰⁵ sales personnel employed in the men's department of a retail clothing store (who were exclusively men) were paid more than sales personnel employed in the women's department (who were exclusively women). The men's department showed a larger dollar volume in gross sales, and a greater gross profit, because the merchandise in the men's department was of higher price and better quality than the merchandise in the women's department.ⁿ¹⁰⁶ The Third Circuit Court of Appeals found that the wage differential was permissible because the commodities the saleswomen sold could not bear the same selling costs as the commodities sold in the men's department.ⁿ¹⁰⁷ In another case, however, the Sixth Circuit Court of Appeals held that an employer could not avail itself of the *Robert Hall* "economic benefit" rule when its women employees provided more profit than their male counterparts, and there was no difference in the product sold by male and female employees.ⁿ¹⁰⁸

Temporary assignments based on "anticipatory need and interim use,"ⁿ¹⁰⁹ bona fide training programs,ⁿ¹¹⁰ shift differentials,ⁿ¹¹¹ traditional industry practice,ⁿ¹¹² wartime veteran status,ⁿ¹¹³ and prior salaryⁿ¹¹⁴ are other examples that may be included in the factors other than sex exception. Wage differentials based on claimed differences between the average cost of employing workers of one sex and the average cost of employing workers of the opposite sex do not, however, qualify under the "factor other than sex" exception.ⁿ¹¹⁵ Also, differentials based on collective bargaining agreements are not permissible.ⁿ¹¹⁶ According to an EEOC policy guideline, wage differentials based on religious beliefs are not protected by the "factor other than sex" exception.ⁿ¹¹⁷

[5] Title VII

[a] Scope of Protection

As mentioned in § 41.50, unlawful discrimination with respect to compensation is also prohibited by Title VII.ⁿ¹¹⁸ Thus, employers may not create job classifications whereby different wages are paid to one group solely because of considerations of religion, race, color, national origin, or sex.ⁿ¹¹⁹

In Title VII cases in which a plaintiff claims that he or she was denied equal pay for equal work because of his or her sex, the EPA and Title VII are construed harmoniously, and the same "substantial identity" standard is applied in determining whether the work is "equal."ⁿ¹²⁰ For discussion of "substantial identity" standard under the EPA, *see* [2][b][ii], *above*.

A few reported Title VII cases involve plaintiffs who claimed they were compensated discriminatorily although they did not claim that they were denied equal pay for equal work.ⁿ¹²¹ For example, in one case an employer paid the same wages to any male that worked within a job classification predominantly filled by females, but the employer allegedly used a system that set wage rates lower for any classification that was predominantly female.ⁿ¹²²

In *County of Washington v. Gunther*,ⁿ¹²³ the United States Supreme Court held that the prohibition of sex-based wage discrimination in Title VII is not restricted to claims of equal pay for equal work.ⁿ¹²⁴ The Court rejected the employer's argument that claims not arising from "equal work" are precluded because the Bennett Amendment to Title VII, which allows employers to differentiate on the basis of sex in determining the payment of wages or compensation if the differentiation is authorized by the EPA,ⁿ¹²⁵ restricts Title VII sex-based discrimination claims to those that could also be brought under the EPA.ⁿ¹²⁶ The Court held that the language of the Bennett Amendment suggests an intention to incorporate only the EPA affirmative defenses (i.e., seniority systems, merit systems, systems that measure earnings by quantity or quality of production, differentials based on any other factor other than sex) into Title VII.ⁿ¹²⁷

The Ninth Circuit Court of Appeals has held that the Title VII proscription against wage discrimination based on sex does not violate the Free Exercise or Free *Establishment Clauses of the First Amendment to the United States Constitution* when applied to religious organizations or institutions, particularly when such application has no significant impact on the exercise of religious beliefs.ⁿ¹²⁸ In a 1990 policy guideline, the EEOC concluded that under Title VII, a religious organization or institution may not pay women less than men even if such a policy is pursuant to its religious beliefs.ⁿ¹²⁹

[b] Proof

There is some confusion as to the proper analysis for Title VII sex-based wage discrimination claims. The United States Supreme Court in *Gunther* reserved judgment on the issue,ⁿ¹³⁰ and subsequent cases have come to their own conclusions. For example, in *Kouba v. Allstate Ins. Co.*,ⁿ¹³¹ an "equal pay for equal work" case, the Ninth Circuit Court of Appeals rejected an employer's contention that standard Title VII rules govern the allocation of evidentiary burdens in such cases.ⁿ¹³² The employer argued that under the reasoning of *Texas Dept. of Community Affairs v. Burdine*,ⁿ¹³³ a Title VII plaintiff alleging sex discrimination bears the burden of persuasion at all times as to all issues, and thus has the burden of showing that wage differentials do not result from a "factor other than sex."ⁿ¹³⁴ Relying on *Gunther*,ⁿ¹³⁵ the court in *Kouba* explained that very different principles govern the structure, including burdens of proof, of "standard" Title VII litigation and the structure of Title VII litigation implicating the "factor other than sex" exception to a wage discrimination claim.ⁿ¹³⁶ The court thus held that under both Title VII and the EPA, the employer bears the burden of showing that a wage differential resulted from a "factor other than sex."ⁿ¹³⁷

By contrast, the Seventh Circuit Court of Appeals has rejected the *Kouba* analysis, holding that the plaintiff in Title VII sex-based wage discrimination actions bears the same burden as in "standard" Title VII actions; that is, the plaintiff bears the ultimate burden of persuasion at all times.ⁿ¹³⁸ The court explained that the impact of the Bennett Amendment to Title VII,ⁿ¹³⁹ which incorporates the federal Equal Pay Act's (EPA) affirmative defenses,ⁿ¹⁴⁰ likely is limited to Title VII actions in which an employer asserts a legitimate and nondiscriminatory reason that happens to also cause a

disparate impact, in which case the amendment would simply preclude liability.ⁿ¹⁴¹ Distinguishing *Price Waterhouse v. Hopkins*,ⁿ¹⁴² a "standard" Title VII sex discrimination case which holds that the burden of proof shifts to the employer when it has been established that sex was a motivating factor in a challenged action, the court noted that an EPA prima facie case does not implicate sex to the same degree as a Title VII "mixed motive" or BFOQ case, so there is no justification to shift the burden to the employer in Title VII sex-based wage discrimination cases.ⁿ¹⁴³ Thus, the court declared that although the Bennett Amendment incorporated the EPA's defenses into Title VII, it did not incorporate its burden of proof scheme. Title VII does not share the EPA's unique history; therefore, although the EPA's defenses must be treated similarly in substantive terms under both Title VII and the EPA, they may be treated differently for burden of proof purposes.ⁿ¹⁴⁴

[6] Comparable Worth

In light of the holding in *County of Washington v. Gunther*,ⁿ¹⁴⁵ that Title VII sex-based wage discrimination claims are not restricted to those that can also be brought under the EPA (that is, claims of a denial of equal pay for equal work),ⁿ¹⁴⁶ plaintiffs otherwise unable to show that compared jobs are "substantially equal" under the EPAⁿ¹⁴⁷ may attempt to establish Title VII liability using a "comparable worth" theory.ⁿ¹⁴⁸ That theory postulates that sex-based wage discrimination exists if employees in job classifications occupied primarily by one sex are paid less than employees in job classifications filled primarily by the other sex, if the jobs are of "equal value" to the employer, although otherwise dissimilar.ⁿ¹⁴⁹ The feasibility of comparable worth as an approach to employee compensation is a matter of debate.ⁿ¹⁵⁰

In *Am. Fed. of S., C., & Mun. Emp. v. State of Wash.*,ⁿ¹⁵¹ the State of Washington required state employee salaries to reflect prevailing market rates. However, relying on the results of a study finding a twenty-percent wage disparity between state jobs held mostly by women and state jobs of comparable worth held mostly by men, the state enacted legislation providing for a comparable worth compensation scheme to take effect over a ten-year period.ⁿ¹⁵² Plaintiff union, representing a class of state employees, alleged sex-based wage discrimination based, in essence, on the state's failure to immediately adopt and implement a comparable worth compensation program.ⁿ¹⁵³ However, the Ninth Circuit Court of Appeals held that initial reliance on a free market system in which employees in male-dominated jobs are compensated at a higher rate than employees in dissimilar female-oriented jobs is not in and of itself a violation of Title VII, notwithstanding a study that deems the positions to be of comparable worth.ⁿ¹⁵⁴

The Ninth Circuit in *Am. Fed.* first concluded that the case did not involve an employment practice that may be analyzed under the disparate impact model of proof, because the state's decision to base compensation on prevailing market rates involved the assessment of a number of complex factors not easily ascertainable and too multifaceted to be appropriate for such analysis.ⁿ¹⁵⁵ The court then held that there was no liability under the disparate treatment theory of liability, because payment of wages according to prevailing market rates does not by itself support an inference of intentional discrimination, even if the market reflects a historical pattern of lower wages to positions staffed predominantly by members of a protected class.ⁿ¹⁵⁶ The court explained that the state did not create the market disparity, and although the legislature may have the discretion to enact a comparable worth plan, Title VII does not obligate it to eliminate an economic inequality it did not create.ⁿ¹⁵⁷

■ AUTHOR'S COMMENT:

However, the Ninth Circuit granted rehearing en banc. Plaintiffs appealed on the basis that, as one of the largest employers in the state, the State of Washington skewed the prevailing wage rate by its discriminatory practices. Plaintiffs further argued that because there was no free market-place establishment of wages, it was improper to allow the employer to benefit from its own unlawful, discriminatory practices. The case settled prior to the rehearing, thus leaving some question as to the Ninth Circuit's future response to this issue. *Commentary by Christine Curtis.*

Legal Topics:

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

Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 General Overview Labor & Employment Law Equal Pay General Overview Labor & Employment Law Equal Pay Equal Pay Act General Overview

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 206(d).

(n2)Footnote 2. *Lab. Code* § 1197.5.

(n3)Footnote 3. *See* 42 U.S.C. § 2000e-2(a)(1) (Title VII); *Gov. Code* § 12940(a) (FEHA); *see also* 29 U.S.C. §§ 623(a)(1) (ADEA), 793, 794 (Sections 503 and 504 of Rehabilitation Act of 1973); Exec. Order No. 11246, 30 *Fed. Reg.* 12319 (1965) .

(n4)Footnote 4. *See* 29 U.S.C. §§ 201-219. For discussion of coverage of the FLSA, *see* Chapters 1, 2, and 3.

(n5)Footnote 5. 29 U.S.C. § 206(d)(1).

(n6)Footnote 6. *See* *Gunther v. County of Washington* (9th Cir. [Or.] 1979) 623 F.2d 1303, 1309 , *aff'd on other grounds*, 452 U.S. 161 (1981) ; *see also* *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (EPA as requiring that "equal work will be rewarded by equal wages") .

(n7)Footnote 7. *See* 29 C.F.R. § 1620.13(a).

(n8)Footnote 8. *See* 29 C.F.R. §§ 1620.1-1620.34.

(n9)Footnote 9. *See* §§ 41.41, 41.45[2][b]; *see also* Chapter 40, Part C.

(n10)Footnote 10. *See* *Hein v. Oregon College of Educ.* (9th Cir. [Or.] 1983) 718 F.2d 910, 914 (quoting former 29 C.F.R. § 800.125, Interpretative Bulletin of Department of Labor; *now see* 29 C.F.R. § 1620.15(a)).

(n11)Footnote 11. 29 C.F.R. § 1620.10.

(n12)Footnote 12. 29 C.F.R. § 1620.10.

(n13)Footnote 13. *See* 29 C.F.R. § 1620.10; *see, e.g.,* *Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 1079, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 (retirement benefits, and employer contributions that maintain them, as form of compensation); *Los Angeles, Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 712 n.23, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (same).

(n14)Footnote 14. *See* 29 C.F.R. § 1620.12(a).

(n15)Footnote 15. 29 C.F.R. § 1620.12(a).

(n16)Footnote 16. 29 C.F.R. § 1620.12(b).

(n17)Footnote 17. *See* 29 U.S.C. § 206(d)(1).

(n18)Footnote 18. *See* 29 C.F.R. § 1620.25.

(n19)Footnote 19. *See* *EEOC v. Fremont Christian School* (9th Cir. 1986) 781 F.2d 1362, 1368 .

(n20)Footnote 20. EEOC Compliance Manual (CCH) § 605, P 2166.

(n21)Footnote 21. *Stanley v. University of S. California* (9th Cir. 1999) 178 F.3d 1069, 1073-1075 , *cert. denied*,

145 L. Ed. 2d 413 (1999) .

(n22)Footnote 22. See *Maxwell v. City of Tucson* (9th Cir. [Ariz.] 1986) 803 F.2d 444, 446 .

(n23)Footnote 23. *Grove v. Frostburg Nat. Bank* (D. Md. 1982) 549 F. Supp. 922, 933 .

(n24)Footnote 24. See *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L. Ed. 2d 1 ; *Gunther v. County of Washington* (9th Cir. [Or.] 1979) 623 F.2d 1303, 1309 , *aff'd on other grounds*, 452 U.S. 161 (1981) .

(n25)Footnote 25. See *Thompson v. Sawyer* (D.C. Cir. 1982) 678 F.2d 257, 275 ; see also *Stanley v. University of S. California* (9th Cir. 1999) 178 F.3d 1069, 1074 , *cert. denied*, 145 L. Ed. 2d 413 (1999) (prima facie case is limited to comparing jobs in question).

(n26)Footnote 26. See *Thompson v. Sawyer* (D.C. Cir. 1982) 678 F.2d 257, 275-276 .

(n27)Footnote 27. *Stanley v. University of S. California* (9th Cir. 1999) 178 F.3d 1069, 1074, 1076-1077 , *cert. denied*, 145 L. Ed. 2d 413 (1999) (determination that employer based pay differential on factor other than sex resolved FEHA, Title IX, and California constitutional claims based on same facts); see [4], *below*.

(n28)Footnote 28. *Stanley v. University of S. California* (9th Cir. 1999) 178 F.3d 1069, 1074 , *cert. denied*, 145 L. Ed. 2d 413 (1999) .

(n29)Footnote 29. See 29 C.F.R. § 1620.13(a); see also *Stanley v. University of S. California* (9th Cir. 1999) 178 F.3d 1069, 1074 , *cert. denied*, 145 L. Ed. 2d 413 (1999) ; *Shultz v. Wheaton Glass Comp.* (3d Cir. 1970) 421 F.2d 259, 265 (EPA; Title VII) .

(n30)Footnote 30. *Stanley v. University of S. California* (9th Cir. 1999) 178 F.3d 1069, 1074 , *cert. denied*, 145 L. Ed. 2d 413 (Ninth Circuit joins Fourth and Seventh Circuits in adopting this approach in EPA cases; affirming summary judgment on non-gender factor, court did not decide second, disputed issue).

(n31)Footnote 31. See *Gunther v. County of Washington* (9th Cir. [Or.] 1979) 623 F.2d 1303, 1309 , *aff'd on other grounds*, 452 U.S. 161 (1981) (EPA); see also 29 U.S.C. § 206(d)(1), discussed in [a], *above*. See also *Fallon v. State of Ill.* (7th Cir. 1989) 882 F.2d 1206, 1208 .

(n32)Footnote 32. *Stanley v. University of S. California* (9th Cir. 1994) 13 F.3d 1313, 1321-1322 .

(n33)Footnote 33. *Gunther v. County of Washington* (9th Cir. [Or.] 1979) 623 F.2d 1303, 1309 , *aff'd on other grounds*, 452 U.S. 161 (1981) (EPA).

(n34)Footnote 34. *Stanley v. University of S. California* (9th Cir. 1999) 178 F.3d 1069, 1074 , *cert. denied*, 145 L. Ed. 2d 413 .

(n35)Footnote 35. See 29 C.F.R. § 1620.14(c); see also *Gunther v. County of Washington* (9th Cir. [Or.] 1979) 623 F.2d 1303, 1309 , *aff'd on other grounds*, 452 U.S. 161 (1981) (skill, efforts, and responsibility required in performance of jobs as required to be substantially equal); 29 U.S.C. § 206(d)(1).

(n36)Footnote 36. 29 C.F.R. § 1620.14(a); see *Hein v. Oregon College of Educ.* (9th Cir. [Or.] 1983) 718 F.2d 910, 914.

(n37)Footnote 37. See, e.g., EEOC Notice No. 915.002 (compensation of sports coaches in educational institutions).

(n38)Footnote 38. 29 C.F.R. § 1620.14(a).

(n39)Footnote 39. See 29 C.F.R. § 1620.14(b).

(n40)Footnote 40. See *Thompson v. Sawyer* (D.C. Cir. 1982) 678 F.2d 257, 273 .

(n41)Footnote 41. See 29 C.F.R. § 1620.14(c). See *Fallon v. State of Ill.* (7th Cir. 1989) 882 F.2d 1206, 1209 ("itinerant work" required to be performed by male employees outside office was virtually same as work performed by males and females inside office; travel did not override conclusion that work was substantially identical).

(n42)Footnote 42. See *Spaulding v. University of Washington* (9th Cir. [Wash.] 1984) 740 F.2d 686, 698 , *overruled on other grounds*, *Antonio v. Wards Cove Packing Co.* (9th Cir. 1987) 810 F.2d 1477 (Title VII, EPA) quoting former 29 C.F.R. § 800.125, Interpretative Bulletin of Department of Labor; now see 29 C.F.R. § 1620.15(a)), *cert. denied*, 469 U.S. 1036 (1984) .

(n43)Footnote 43. See 29 C.F.R. § 1620.15(a).

(n44)Footnote 44. See *Hein v. Oregon College of Educ.* (9th Cir. [Or.] 1983) 718 F.2d 910, 914

(n45)Footnote 45. See *Hein v. Oregon College of Educ.* (9th Cir. [Or.] 1983) 718 F.2d 910.

(n46)Footnote 46. See *Hein v. Oregon College of Educ.* (9th Cir. [Or.] 1983) 718 F.2d 910, 914.

(n47)Footnote 47. See *Hein v. Oregon College of Educ.* (9th Cir. [Or.] 1983) 718 F.2d 910, 914 ; 29 U.S.C. § 206(d)(1) (equal wages for "equal work on jobs that require equal skill, effort, and responsibility" [emphasis added]).

(n48)Footnote 48. 29 C.F.R. § 1620.15(a); see also 29 C.F.R. § 1620.15(b) (illustration of "equal skill" principle).

(n49)Footnote 49. 29 C.F.R. § 1620.16(a).

(n50)Footnote 50. *Gunther v. County of Washington* (9th Cir. [Or.] 1979) 623 F.2d 1303 , *aff'd on other grounds*, 452 U.S. 161 (1981).

(n51)Footnote 51. See *Gunther v. County of Washington* (9th Cir. [Or.] 1979) 623 F.2d 1303 , *aff'd on other grounds*, 452 U.S. 161 (1981).

(n52)Footnote 52. See *Gunther v. County of Washington* (9th Cir. [Or.] 1979) 623 F.2d 1303, 1309-1310 , *aff'd on other grounds*, 452 U.S. 161 (1981).

(n53)Footnote 53. See *Gunther v. County of Washington* (9th Cir. [Or.] 1979) 623 F.2d 1303, 1310 , *aff'd on other grounds*, 452 U.S. 161 (1981).

(n54)Footnote 54. 29 C.F.R. § 1620.16(a).

(n55)Footnote 55. *Usery v. Columbia University* (2d Cir. 1977) 568 F.2d 953, 959 ; see also 29 C.F.R. § 1620.16(a).

(n56)Footnote 56. See 29 C.F.R. § 1620.16(b); see also *Thompson v. Sawyer* (D.C. Cir. 1982) 678 F.2d 257, 275 .

(n57)Footnote 57. See *Usery v. Columbia University* (2d Cir. 1977) 568 F.2d 953, 959 .

(n58)Footnote 58. *Usery v. Columbia University* (2d Cir. 1977) 568 F.2d 953, 959 ; see also 29 C.F.R. § 1620.20.

(n59)Footnote 59. 29 C.F.R. § 1620.16(b).

(n60)Footnote 60. 29 C.F.R. § 1620.17(a); see *Hein v. Oregon College of Educ.* (9th Cir. [Or.] 1983) 718 F.2d 910, 915 (construing former 29 C.F.R. § 800.129, Interpretative Bulletin of Department of Labor; now see 29 C.F.R. § 1620.17(a)).

(n61)Footnote 61. See 29 C.F.R. § 1620.17(a).

(n62)Footnote 62. See 29 C.F.R. § 1620.17(b)(1). The EEOC regulations contain several other examples illustrating that considerable additional responsibility may justify higher wage rates, but minor additional responsibilities may not. See 29 C.F.R. § 1620.17(b)(2), (3).

(n63)Footnote 63. *EEOC v. Maricopa Cty. Community College Dist.* (9th Cir. 1984) 736 F.2d 510, 514 (EPA; relying on a former 29 C.F.R. § 800.122, Department of Labor Interpretative Bulletin; now see 29 C.F.R. § 1620.17(b)(2), (3)).

(n64)Footnote 64. *E.E.O.C. v. Maricopa Cty. Community College Dist.* (9th Cir. 1984) 736 F.2d 510 (EPA).

(n65)Footnote 65. See *E.E.O.C. v. Maricopa Cty. Community College Dist.* (9th Cir. 1984) 736 F.2d 510 (EPA).

(n66)Footnote 66. See *E.E.O.C. v. Maricopa Cty. Community College Dist.* (9th Cir. 1984) 736 F.2d 510, 514 (EPA).

(n67)Footnote 67. See *E.E.O.C. v. Maricopa Cty. Community College Dist.* (9th Cir. 1984) 736 F.2d 510 (EPA) . See also *Fallon v. State of Ill.* (7th Cir. 1989) 882 F.2d 1206, 1209 (to argue that any difference in supervisory responsibility renders job unequal is manifestly incorrect as matter of law).

(n68)Footnote 68. *Stanley v. University of Southern California* (9th Cir. 1994) 13 F.3d 1313, 1322-1323 .

(n69)Footnote 69. 29 C.F.R. § 1620.18(a).

(n70)Footnote 70. See also *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (wet, heat, cold, dust, grease, noises, etc.).

(n71)Footnote 71. See *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (bruises, cuts, heavy lifting, fumes, slippery floors, machines, chemicals, gases, bodily injuries, etc.).

(n72)Footnote 72. See 29 C.F.R. § 1620.18(a); see also *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 202, 94 S. Ct. 2223, 41 L. Ed. 2d 1 .

(n73)Footnote 73. 29 C.F.R. § 1620.18(a); see *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 202, 94 S. Ct. 2223, 41 L. Ed. 2d 1 .

(n74)Footnote 74. See 29 C.F.R. § 1620.18(b).

(n75)Footnote 74.1. *Hall v. County of Los Angeles* (2007) 148 Cal. App. 4th 318, 324-325, 55 Cal. Rptr. 3d 732 (because undisputed evidence established that, at any given time, plaintiff's employer and county counsel both employed substantial number of women and within employer, women were paid same as men, there was no basis for use of male county counsel lawyer as comparator and EPA claim failed as matter of law); *Arthur v. College of St. Benedict* (D. Minn. 2001) 174 F. Supp. 2d 968, 976 . See *Hofmister v. Mississippi State Dep't. of Health* (S.D. Miss. 1999) 53 F. Supp. 2d 884, 891 (legislative history of EPA shows that differences in pay between groups or categories of employees that contain both men and women within each group or category are not covered by EPA).

(n76)Footnote 75. Lab. Code § 1197.5(a).

(n77)Footnote 76. See *Jones v. Tracy School Dist.* (1980) 27 Cal. 3d 99, 104, 165 Cal. Rptr. 100, 611 P.2d 441 .

(n78)Footnote 76.1. *Green v. Par Pools, Inc.* (2003) 111 Cal. App. 4th 620, 623, 3 Cal. Rptr. 3d 844 .

(n79)Footnote 76.2. See *Jones v. Tracy School Dist.* (1980) 27 Cal. 3d 99, 165 Cal. Rptr. 100, 611 P.2d 441 ; *Green v. Par Pools, Inc.* (2003) 111 Cal. App. 4th 620, 3 Cal. Rptr. 3d 844 ; *Bass v. Great Western Sav. & Loan Assn.* (1976) 58 Cal. App. 3d 770, 130 Cal. Rptr. 123 .

(n80)Footnote 76.3. See *Jones v. Tracy School Dist.* (1980) 27 Cal. 3d 99, 106, 165 Cal. Rptr. 100, 611 P.2d 441 (comparing FLSA statute of limitations to California Equal Pay Act provision); *Hall v. County of Los Angeles* (2007) 148 Cal. App. 4th 318, 326 n.6, 55 Cal. Rptr. 3d 732 (because FEHA has federal counterpart in Title VII of federal Civil Rights Act of 1964 [42 U.S.C. § 2000e et seq.] and antidiscrimination objectives and public policy purpose of two laws are same, California's courts routinely rely on federal decisions to interpret analogous parts of FEHA); *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal. App. 3d 1306, 1316, 237 Cal. Rptr. 884 (applying legal analysis of Title VII developed by federal cases to FEHA).

(n81)Footnote 77. *Green v. Par Pools, Inc.* (2003) 111 Cal. App. 4th 620, 623, 3 Cal. Rptr. 3d 844 .

(n82)Footnote 77.1. See *Hall v. County of Los Angeles* (2007) 148 Cal. App. 4th 318, 326-327, 55 Cal. Rptr. 3d 732 (to establish prima facie case of disparate treatment under California Equal Pay Act, plaintiff was required to show membership in protected class, qualification for position at issue, adverse employment action, and at least inference of intentional discrimination from facts showing that employer chose particular policy because of its effect on members of protected class (not just that employer was aware that given policy would lead to adverse consequences for given group); to establish prima facie case of disparate impact, plaintiff was required to show that, regardless of employer's motive, facially neutral practice or policy bearing no relationship to job requirements had disproportionate adverse effect on members of protected class).

(n83)Footnote 77.2. See *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196, 94 S. Ct. 2223, 41 L. Ed. 2d 1 . See also *Hall v. County of Los Angeles* (2007) 148 Cal. App. 4th 318, 327, 55 Cal. Rptr. 3d 732 (plaintiff did not establish prima facie case of disparate treatment or disparate impact under California Equal Pay Act, where she did not present any evidence to show that county created organization of independent contractors because of its effect on female lawyers or even that county was aware that use of independent contractors would lead to adverse consequences for female lawyers, or any evidence that creation of organization had disproportionate adverse effect on women).

(n84)Footnote 77.3. For exceptions listed in *Lab. Code § 1197.5*, see § 41.56[4], below. See *Hall v. County of Los Angeles* (2007) 148 Cal. App. 4th 318, 327, 55 Cal. Rptr. 3d 732 (assuming for sake of argument that plaintiff made required showing, it was met with county's undisputed evidence of legitimate and gender-neutral business reason for formation of organization of independent contractors, i.e., cost savings).

(n85)Footnote 77.4. *Green v. Par Pools, Inc.* (2003) 111 Cal. App. 4th 620, 626, 3 Cal. Rptr. 3d 844 . See *Hall v. County of Los Angeles* (2007) 148 Cal. App. 4th 318, 327, 55 Cal. Rptr. 3d 732 (there was no evidence of pretext, where, although plaintiff's expert opined (based on statistical analysis) that disparity in hiring between women into organization of independent contractors versus county counsel was so significant it could only be explained by external factors (i.e., bias), there was no evidence that organization's lawyers--male or female--were precluded from applying to county counsel for posted positions; it was undisputed that female lawyers did not face any barriers in applying for positions with county counsel, and there was no evidence to suggest organization's contract or compensation decisions were result of gender bias).

(n86)Footnote 77.5. *Green v. Par Pools, Inc.* (2003) 111 Cal. App. 4th 620, 3 Cal. Rptr. 3d 844 .

(n87)Footnote 77.6. *Green v. Par Pools, Inc.* (2003) 111 Cal. App. 4th 620, 628-629, 3 Cal. Rptr. 3d 844 .

(n88)Footnote 77.7. *Lab. Code § 1197.5(a); see § 41.56[4][c], below.*

(n89)Footnote 77.8. *Green v. Par Pools, Inc. (2003) 111 Cal. App. 4th 620, 629-632, 3 Cal. Rptr. 3d 844 .*

(n90)Footnote 77.9. *Green v. Par Pools, Inc. (2003) 111 Cal. App. 4th 620, 632, 3 Cal. Rptr. 3d 844 .*

(n91)Footnote 78. *See 29 U.S.C. § 206(d); see also discussion in [2], above.*

(n92)Footnote 79. *See Lab. Code § 1197.5.*

(n93)Footnote 80. *See Corning Glass Works v. Brennan (1974) 417 U.S. 188, 196, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (EPA) ; 29 U.S.C. § 206(d)(1); Green v. Par Pools, Inc. (2003) 111 Cal. App. 4th 620, 623, 3 Cal. Rptr. 3d 844 ; Lab. Code § 1197.5(a).*

(n94)Footnote 81. *See discussion in [2][b], above.*

(n95)Footnote 82. *Grove v. Frostburg Nat. Bank (D. Md. 1982) 549 F. Supp. 922, 933 .*

(n96)Footnote 83. *Corning Glass Works v. Brennan (1974) 417 U.S. 188, 196, 94 S. Ct. 2223, 41 L. Ed. 2d 1 (EPA) . Fallon v. State of Ill. (7th Cir. 1989) 882 F.2d 1206, 1211 .*

(n97)Footnote 84. *See Fallon v. State of Ill. (7th Cir. 1989) 882 F.2d 1206, 1211 .*

(n98)Footnote 85. *See 29 U.S.C. § 206(d); Lab. Code § 1197.5(a).*

(n99)Footnote 86. *See Corning Glass Works v. Brennan (1974) 417 U.S. 188, 204, 94 S. Ct. 2223, 41 L. Ed. 2d 1 ; see also Brennan v. Victoria Bank and Trust Company (5th Cir. 1974) 493 F.2d 896, 901 (standard annual longevity raise caused disparate wages among those with differing lengths of service).*

(n100)Footnote 87. *See Brennan v. Victoria Bank and Trust Company (5th Cir. 1974) 493 F.2d 896, 901 .*

(n101)Footnote 88. *See E.E.O.C. v. Whittin Mach. Works, Inc. (4th Cir. 1983) 699 F.2d 688, 688-689 ; cf. Brennan v. Victoria Bank and Trust Company (5th Cir. 1974) 493 F.2d 896, 901 ; Hodgson v. Brookhaven General Hospital (5th Cir. 1970) 436 F.2d 719, 726 .*

(n102)Footnote 89. *Brennan v. Victoria Bank and Trust Company (5th Cir. 1974) 493 F.2d 896, 901 ; Hodgson v. Brookhaven General Hospital (5th Cir. 1970) 436 F.2d 719, 726 .*

(n103)Footnote 90. *Maxwell v. City of Tucson (9th Cir. [Ariz.] 1986) 803 F.2d 444, 447 ; see also Grove v. Frostburg Nat. Bank (D. Md. 1982) 549 F. Supp. 922, 934 .*

(n104)Footnote 91. *See Maxwell v. City of Tucson (9th Cir. [Ariz.] 1986) 803 F.2d 444, 447 ; Morgado v. Birmingham-Jefferson Cty. Civ. Defense (11th Cir. 1983) 706 F.2d 1184, 1188 , cert. denied, 464 U.S. 1045 (1984) .*

(n105)Footnote 92. *See Grove v. Frostburg Nat. Bank (D. Md. 1982) 549 F. Supp. 922, 934 .*

(n106)Footnote 93. *See 29 U.S.C. § 206(d); Lab. Code § 1197.5(a).*

(n107)Footnote 94. *Bence v. Detroit Health Corp. (6th Cir. 1983) 712 F.2d 1024, 1029 .*

(n108)Footnote 95. *See 29 U.S.C. § 206(d); Lab. Code § 1197.5(a).*

(n109)Footnote 96. *See Maxwell v. City of Tucson (9th Cir. [Ariz.] 1986) 803 F.2d 444, 447 ; E.E.O.C. v. Maricopa Cty. Community College Dist. (9th Cir. 1984) 736 F.2d 510, 514 . See also Fallon v. State of Ill. (7th Cir.*

1989) 882 F.2d 1206, 1211 ("factor other than sex" defense prevents courts and administrative agencies from substituting their judgment for employer's judgment and avoids unnecessary disruption of bona fide job evaluation systems).

(n110)Footnote 97. *Strecker v. Grand Forks Cty. Soc. Serv. Bd.* (8th Cir. 1980) 640 F.2d 96, 100 ; see *Stanley v. University of S. California* (9th Cir. 1999) 178 F.3d 1069, 1073-1074 , cert. denied, 145 L. Ed. 2d 413 (1999) (pay differential based on something other than sex when higher paid employee had substantially more and diverse experience).

(n111)Footnote 98. *Strecker v. Grand Forks Cty. Soc. Serv. Bd.* (8th Cir. 1980) 640 F.2d 96, 101 ; see *Stanley v. University of S. California* (9th Cir. 1999) 178 F.3d 1069, 1073-1074 , cert. denied, 145 L. Ed. 2d 413 . See also *Green v. Par Pools, Inc.* (2003) 111 Cal. App. 4th 620, 629-632, 3 Cal. Rptr. 3d 844 (under Lab. Code § 1197.5(a), more extensive prior work experience of male justified higher salary than female's for performing identical job).

(n112)Footnote 99. See *Maxwell v. City of Tucson* (9th Cir. [Ariz.] 1986) 803 F.2d 444, 447 ; see, e.g., *Strecker v. Grand Forks Cty. Soc. Serv. Bd.* (8th Cir. 1980) 640 F.2d 96, 103 .

(n113)Footnote 100. See, e.g., *Schulte v. Wilson Indus., Inc.* (S.D. Tex. 1982) 547 F. Supp. 324, 339 fn. 16 .

(n114)Footnote 101. See *Kouba v. Allstate Ins. Co.* (9th Cir. [Cal.] 1982) 691 F.2d 873, 877 ; see also *Bence v. Detroit Health Corp.* (6th Cir. 1983) 712 F.2d 1024, 1029 (legislative history of EPA as suggesting that Congress intended exception to include factors other than traditional job evaluation criteria).

(n115)Footnote 102. See *Kouba v. Allstate Ins. Co.* (9th Cir. [Cal.] 1982) 691 F.2d 873, 876-877 ; cf. *Hodgson v. Robert Hall Clothes, Inc.* (3d Cir. 1973) 473 F.2d 589, 594 ("legitimate business reason"). cf. *E.E.O.C. v. J.C. Penney Co., Inc.* (6th Cir. 1988) 843 F.2d 249, 253 ("legitimate business reason" standard is appropriate benchmark against which to measure "factor other than sex" defense).

(n116)Footnote 103. *Fallon v. State of Ill.* (7th Cir. 1989) 882 F.2d 1206, 1211 .

(n117)Footnote 104. See *Hodgson v. Robert Hall Clothes, Inc.* (3d Cir. 1973) 473 F.2d 589, 594-595 . See also *Hall v. County of Los Angeles* (2007) 148 Cal. App. 4th 318, 325-326, 55 Cal. Rptr. 3d 732 (summary judgment for employer on Equal Pay Act claim was proper where undisputed evidence established that wage disparity between organization formed to provide lawyers when needed as independent contractors and employees of county counsel was based on acceptable business reason; county counsel's use of independent contractors was authorized by county's charter as gender-neutral cost-saving measure, and contract with organization was intended to be an economical and cost effective way to provide supplemental legal services).

(n118)Footnote 105. *Hodgson v. Robert Hall Clothes, Inc.* (3d Cir. 1973) 473 F.2d 589 .

(n119)Footnote 106. See *Hodgson v. Robert Hall Clothes, Inc.* (3d Cir. 1973) 473 F.2d 589, 590-591 .

(n120)Footnote 107. *Hodgson v. Robert Hall Clothes, Inc.* (3d Cir. 1973) 473 F.2d 589, 595 .

(n121)Footnote 108. *Bence v. Detroit Health Corp.* (6th Cir. 1983) 712 F.2d 1024, 1031 .

(n122)Footnote 109. See *Campbell v. Von Hoffman Press, Inc.* (W.D. Mo. 1980) 483 F. Supp. 218, 222-224 , aff'd, 632 F.2d 69 (8th Cir. 1980) .

(n123)Footnote 110. See *Saltzman v. Fullerton Metals Co.* (7th Cir. 1981) 661 F.2d 647, 652 .

(n124)Footnote 111. See *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 204, 94 S. Ct. 2223, 41 L. Ed. 2d 1 .

(n125)Footnote 112. See *Thompson v. Sawyer* (D.C. Cir. 1982) 678 F.2d 257, 276-277 (traditional industry practice revealing "continuing fealty to sexual discrimination," however, does not shield employers from EPA violation).

(n126)Footnote 113. See *Fallon v. State of Ill.* (7th Cir. 1989) 882 F.2d 1206, 1211-1212 (federal EPA challenge to pay differential between male Veteran Service Officer job and female Veteran Service Officer Associate job in state Department of Veterans Affairs).

(n127)Footnote 114. See *Kouba v. Allstate Ins. Co.* (9th Cir. [Cal.] 1982) 691 F.2d 873, 878.

(n128)Footnote 115. See 29 C.F.R. § 1620.22; see also *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 204, 94 S. Ct. 2223, 41 L. Ed. 2d 1 .

(n129)Footnote 116. See 29 C.F.R. § 1620.23.

(n130)Footnote 117. EEOC Compliance Manual (CCH) § 605, P 2166; see *E.E.O.C. v. Fremont Christian School* (9th Cir. 1986) 781 F.2d 1362, 1367 (health insurance compensation program applying only to male "head of household" was not protected by "factor other than sex" exception). For a general discussion relating to "head of household" rules, see § 41.61[3][c].

(n131)Footnote 118. See 42 U.S.C. § 2000e-2(a)(1), (h).

(n132)Footnote 119. *International U. of Elec. v. Westinghouse Elec.* (3d Cir. [N.J.] 1980) 631 F.2d 1094, 1097 , cert. denied, 452 U.S. 967 (1981) .

(n133)Footnote 120. See *Di Salvo v. Chamber of Commerce, Etc.* (8th Cir. 1978) 568 F.2d 593, 596 ; *Orr v. Frank R. MacNeill & Son, Inc.* (5th Cir. 1975) 511 F.2d 166, 170-171 ; cf. *Gunther v. County of Washington* (9th Cir. [Or.] 1979) 623 F.2d 1303, 1311 , *aff'd on other grounds*, 452 U.S. 161 (1981) ; see also 29 C.F.R. § 1620.27(a) (in situations in which jurisdictional prerequisites of both EPA and Title VII are satisfied, any violation of EPA is also a violation of Title VII). but see *Fallon v. State of Ill.* (7th Cir. 1989) 882 F.2d 1206, 1218 (finding of EPA liability, without more, will not lead automatically to liability under Title VII; declining to give deference to 29 C.F.R. § 1620.27(a)).

(n134)Footnote 121. See, e.g., *International U. of Elec. v. Westinghouse Elec.* (3d Cir. 1980) 631 F.2d 1094, 1096 ; *Gunther v. County of Washington* (9th Cir. [Or.] 1979) 623 F.2d 1303, 1311 , *aff'd on other grounds*, 452 U.S. 161 (1981) .

(n135)Footnote 122. See *International U. of Elec. v. Westinghouse Elec.* (3d Cir. 1980) 631 F.2d 1094, 1096 , cert. denied, 452 U.S. 967 (1981) .

(n136)Footnote 123. *County of Washington v. Gunther* (1981) 452 U.S. 161, 101 S. Ct. 2242, 68 L. Ed. 2d 751 .

(n137)Footnote 124. See *County of Washington v. Gunther* (1981) 452 U.S. 161, 168, 178-180, 101 S. Ct. 2242, 68 L. Ed. 2d 751 ; see also 29 C.F.R. § 1620.27(a) (Title VII covers types of wage discrimination not actionable under the EPA; therefore employer practices that are not violations of EPA may nevertheless be violations of Title VII).

(n138)Footnote 125. See 42 U.S.C. § 2000e-2(h).

(n139)Footnote 126. See *County of Washington v. Gunther* (1981) 452 U.S. 161, 168, 101 S. Ct. 2242, 68 L. Ed. 2d 751 .

(n140)Footnote 127. See *County of Washington v. Gunther* (1981) 452 U.S. 161, 168, 171, 101 S. Ct. 2242, 68 L. Ed. 2d 751 ; see also 29 C.F.R. § 1604.8(b) (EEOC sex discrimination guideline; EPA defenses as proper in Title VII

sex-based wage discrimination proceedings).

(n141)Footnote 128. *See E.E.O.C. v. Pacific Press Pub. Ass'n* (9th Cir. 1982) 676 F.2d 1272, 1279, 1281-1282 ; *see also E.E.O.C. v. Fremont Christian School* (9th Cir. 1986) 781 F.2d 1362, 1368, 1369-1370 .

(n142)Footnote 129. EEOC Compliance Manual (CCH) § 605, P 2166.

(n143)Footnote 130. *See County of Washington v. Gunther* (1981) 452 U.S. 161, 168, 170-171, 181, 101 S. Ct. 2242, 68 L. Ed. 2d 751 (acknowledging that incorporation of "factor other than sex" exception could have significant consequences for Title VII litigation).

(n144)Footnote 131. *Kouba v. Allstate Ins. Co.* (9th Cir. [Cal.] 1982) 691 F.2d 873.

(n145)Footnote 132. *Kouba v. Allstate Ins. Co.* (9th Cir. [Cal.] 1982) 691 F.2d 873, 875.

(n146)Footnote 133. *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 .

(n147)Footnote 134. *See Kouba v. Allstate Ins. Co.* (9th Cir. [Cal.] 1982) 691 F.2d 873, 875; 29 U.S.C. § 206(d)(1) . As discussed in § 41.11, under the "disparate treatment" theory of liability, an employer need only articulate some legitimate, nondiscriminatory reason for the employer's action in order to rebut a presumption of unlawful discrimination. *See Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253-255, 101 S. Ct. 1089, 67 L. Ed. 2d 207 ; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 . However, as discussed in [4] [a], *above*, the burden under the EPA is on the employer to show that a wage differential is justified under one of the exceptions, including the "factor other than sex" exception. *See Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196, 94 S. Ct. 2223, 41 L. Ed. 2d 1 .

(n148)Footnote 135. *See County of Washington v. Gunther* (1981) 452 U.S. 161, 170-171, 181, 101 S. Ct. 2242, 68 L. Ed. 2d 751 .

(n149)Footnote 136. *See Kouba v. Allstate Ins. Co.* (9th Cir. [Cal.] 1982) 691 F.2d 873, 875.

(n150)Footnote 137. *Kouba v. Allstate Ins. Co.* (9th Cir. [Cal.] 1982) 691 F.2d 873, 875.

(n151)Footnote 138. *See Fallon v. State of Ill.* (7th Cir. 1989) 882 F.2d 1206, 1212-1218 .

(n152)Footnote 139. *See 42 U.S.C. § 2000e-2(h).*

(n153)Footnote 140. *See County of Washington v. Gunther* (1981) 452 U.S. 161, 168, 171, 101 S. Ct. 2242, 68 L. Ed. 2d 751 ; *see also* discussion in [a], *above*.

(n154)Footnote 141. *See Fallon v. State of Ill.* (7th Cir. 1989) 882 F.2d 1206, 1215 .

(n155)Footnote 142. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 258-261, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (concurring opinion); *see § 41.11[1][d]*.

(n156)Footnote 143. *See Fallon v. State of Ill.* (7th Cir. 1989) 882 F.2d 1206, 1216 .

(n157)Footnote 144. *See Fallon v. State of Ill.* (7th Cir. 1989) 882 F.2d 1206, 1216 .

(n158)Footnote 145. *County of Washington v. Gunther* (1981) 452 U.S. 161, 101 S. Ct. 2242, 68 L. Ed. 2d 751 .

(n159)Footnote 146. *See County of Washington v. Gunther* (1981) 452 U.S. 161, 168, 178-180, 101 S. Ct. 2242, 68 L. Ed. 2d 751 ; *see* discussion in [5][a], *above*.

(n160)Footnote 147. *See Shultz v. Wheaton Glass Company* (3d Cir. [N.J.] 1970) 421 F.2d 259, 265 , cert. denied, 398 U.S. 905 (EPA; Title VII) ; see § 41.56[2].

(n161)Footnote 148. The *Gunther* Court emphasized, however, that the case before it did not involve "comparable worth." *See County of Washington v. Gunther* (1981) 452 U.S. 161, 166, 101 S. Ct. 2242, 68 L. Ed. 2d 751 .

(n162)Footnote 149. *Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1404 (Title VII).

(n163)Footnote 150. *See Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1408 (Title VII).

(n164)Footnote 151. *Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1403 (Title VII).

(n165)Footnote 152. *See Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1403 (Title VII).

(n166)Footnote 153. *See Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1403-1404 (Title VII).

(n167)Footnote 154. *See Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1408 (Title VII) .

(n168)Footnote 155. *See Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1405-1406 (Title VII; disparate impact theory as confined to cases that challenge specific, clearly delineated employment practices applied to single point in job selection process); *but see Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 990-991, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII; subjective employment practices as subject to disparate impact theory in appropriate cases); *See also* § 41.20[3].

(n169)Footnote 156. *See Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1406-1407 ; see discussion in §§ 41.10-41.11.

(n170)Footnote 157. *See Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1406-1407 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.57

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.57 Demotion

Cases arising out of failure to promote may involve workplace discontent, such as employer concerns about job performance or loyalty, or unlawful discrimination, such as age, gender, or race.

In *Addy v. Bliss & Glennon*,ⁿ¹ the plaintiff was not considered for a position she regarded as a promotion. Her supervisor informed her it was not a promotion because the position paid less than the position she held, and furthermore someone else had been hired. Addy, an Asian, then filed an EEOC charge of race and sex discrimination. Sometime later, her flex time schedule was discontinued and Addy filed a second EEOC charge. Thereafter, her work was scrutinized unfavorably; she was offered the choices of termination, demotion with pay cut, or resignation with severance pay. She asserted that those alternatives were retaliation in response to her having filed grievances with the EEOC. Defendant responded with evidence of poor performance. The court upheld summary judgment for the employer because although Addy's complaints to the EEOC were protected activity, she failed to establish a causal connection between her termination and filing the charges.ⁿ²

Although, as a general rule, an at will employee may be demoted, as well as discharged without cause, it is nevertheless impermissible to base such employment decisions on unlawful discrimination.ⁿ³ In *Strother v. Southern California Permanente Medical Group*,ⁿ⁴ plaintiff remained a partner in her medical group but alleged, among other things, that because of her race and sex she had been denied promotions. The Ninth Circuit held that her claims for denial of promotions did not pass muster under the standard applicable for employment decisions occurring prior to enactment of the Civil Rights Act of 1991,ⁿ⁵ but implied that a different result might obtain for similar claims arising after passage of the act.ⁿ⁶ In *Girard v. Rubin*,ⁿ⁷ plaintiff did not file demotion charges with the EEOC within the relevant time period because he was unaware that he was no longer being considered. Because the employer (IRS) failed to so inform him, the court found that the statute of limitations to file a grievance with the EEOC had been tolled and that IRS procedure cannot limit the EEOC jurisdiction to enforce the law.

Legal Topics:

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

Labor & Employment LawDiscriminationRacial DiscriminationEmployment PracticesGeneral OverviewLabor & Employment LawDiscriminationRacial DiscriminationEmployment PracticesDemotions & Promotions

FOOTNOTES:

(n1)Footnote 1. *Addy v. Bliss & Glennon* (1996) 44 Cal. App. 4th 205, 217-218, 51 Cal. Rptr. 2d 642 .

(n2)Footnote 2. *See Addy v. Bliss & Glennon* (1996) 44 Cal. App. 4th 205, 216-218, 51 Cal. Rptr. 2d 642 .

(n3)Footnote 3. *See, Sennello v. Reserve Life Ins. Co.* (S.D. Fla. 1987) 667 F. Supp. 1498 , *aff'd*, 872 F.2d 393 (age discrimination suit under FEHA); *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal. App. 4th 359 (FEHA; even though police officer remained on payroll and eventually returned to active status at his original rank and salary, removal from highly desirable position as investigative officer and placement on administrative leave constituted adverse employment actions; because transfer and suspension resulted from racial animus, they were actionable); *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal. App. 3d 1394, 1399-1401, 245 Cal. Rptr. 606 , *disapproved on other grounds*, *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 575 n.4, 88 Cal. Rptr. 2d 19, 981 P.2d 944 (age discrimination suit under FEHA based on indirect evidence of discrimination).

(n4)Footnote 4. *Strother v. Southern Cal. Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859, 875 .

(n5)Footnote 5. 42 U.S.C. 2000e-2(k)(2).

(n6)Footnote 6. *See Strother v. Southern Cal. Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859, 876 .

(n7)Footnote 7. *Girard v. Rubin* (9th Cir. 1995) 62 F.3d 1244 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.58

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§ 41.58 Discharge

[1] Federal Law

Title VII and the ADEA are the primary federal equal employment opportunity statutes that proscribe discharges based on membership in a protected classification,ⁿ¹ although there are several other federal sources that provide similar protection.ⁿ²

In *O'Connor v. Consolidated Coin Caterers Corporation*,ⁿ³ a 56 year old male challenged his discharge alleging it violated the ADEA. His employer defended the employment decision on the ground that the replacement employee was 40 years of age and a member of a protected class. The Supreme Court rejected defendant's defense, noting that the ADEA protects an employee because of his or her age, and not because of having "lost out to another person in the protected class."ⁿ⁴ The Court cautioned against requiring an ADEA plaintiff to prove his or her prima facie case of discriminatory discharge by showing the replacement is not a protected class member. Rather, the Court stated, "[T]he fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class."ⁿ⁵

In *EEOC v. Hacienda Hotel*,ⁿ⁶ plaintiffs, hotel maids, sought relief under Title VII because their employer had a policy of terminating pregnant employees. The Ninth Circuit Court of Appeals agreed, finding the employer's policy violated the Pregnancy Discrimination Act of Title VII.ⁿ⁷

There are several other federal sources that provide similar protection against discharge.ⁿ⁸ For example, under the ADA, a claim of unlawful discharge requires a showing that the employer terminated the employee because of the employee's disability.^{n8.1} Courts recognize a distinction between termination of employment because of misconduct and termination of employment because of a disability.^{n8.2} Generally, however, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination.^{n8.3} The ADA's explicit authorization for discharge on the basis of alcoholism and illegal drug use^{n8.4} is an exception.^{n8.5} The link between the disability and termination is particularly strong when the employer has failed to accommodate a known disability and eventually

discharges an employee for performance inadequacies resulting from the disability.ⁿ⁹

[2] California Law

The FEHA also prohibits such unlawfully discriminatory discharges.ⁿ¹⁰ In general, the FEHA does not preempt other state laws, including the state constitution and common law, that prohibit or restrict employment discrimination, unless those provisions provide less protection than that afforded by the FEHA to the enumerated classes of persons covered under the FEHA.ⁿ¹¹ Therefore, relief from a discriminatory discharge may be available under common-law wrongful termination doctrines.ⁿ¹²

The California Supreme Court has held that *Labor Code Section 132a* does not provide an exclusive remedy and does not preclude an industrially injured employee from pursuing FEHA and common law wrongful discharge remedies based on allegations of disability discrimination. In addition, disability discrimination can form the basis of a common law wrongful discharge claim.ⁿ¹³ However, in *Jimeno v. Mobil Oil Corp.*,ⁿ¹⁴ the Ninth Circuit held that the Workers Compensation Act does preempt disability discrimination claims under the FEHA.ⁿ¹⁵ However the court held that Jimeno could proceed under both the Workers Compensation Act and the FEHA because his impairment pre-dated his work injury.ⁿ¹⁶

For a general discussion relating to wrongful discharge actions based on other grounds, *see* Division VI (Chapters 60-63). For a discussion relating to the scope and application of the foregoing and other federal and California equal employment opportunity laws generally, *see* Chapter 40, Parts B and C.

[3] Scope of Protection

Although employers may discharge employees for violating work rules,ⁿ¹⁷ punitive action must not differentiate on the basis of any classification protected by equal employment opportunity law.ⁿ¹⁸ Most discrimination cases involving discipline and discharge involve "disparate treatment," and accordingly the *McDonnell Douglas Corp. v. Green* ⁿ¹⁹ order and allocation of proof discussed in § 41.11[1] may usually be followed with some modifications.ⁿ²⁰ For example, one court relied on the *McDonnell Douglas* test to conclude that there was an inference of racial discrimination when a plaintiff established (1) that he was a member of a racial minority; (2) that he was qualified for the job he was performing; (3) that he was satisfying the normal requirements in his work; (4) that he was discharged; and (5) that after his discharge his employer assigned white employees to perform the same work.ⁿ²¹

Some discharge cases involve a reduction in work force due to business conditions.ⁿ²² Depending on the facts, these cases may be analyzed under either, or both, the "disparate treatment" and "disparate impact" theories of liability. For example, in one ADEA case, plaintiff employees alleged their employer (1) refused to retain them during a reduction because of their age (disparate treatment), and (2) selected employees to be terminated based on subjective determinations by department heads (disparate impact).ⁿ²³ Some courts have required that one of the elements of prima facie "disparate treatment" in workforce reduction cases is that the plaintiff was replaced by someone who is not a member of the plaintiff's class and who had equal or inferior qualifications.ⁿ²⁴ This rule has now been placed in doubt by the United States Supreme Court, which has held actions for discrimination do not require the replacement worker be someone outside a protected class of employees.ⁿ²⁵ In any case, it has been held that a plaintiff's failure to establish this element "is not necessarily fatal" to his or her claim.ⁿ²⁶ The plaintiff may show instead that the discharge occurred under circumstances giving rise to an inference of discrimination. No such inference may be drawn, however, if the plaintiff's position and duties are completely eliminated. The plaintiff must show that the employer had some "continuing need for [the plaintiff's] skills and services in that his [or her] various duties were still being performed ...".ⁿ²⁷ However, an employee may be able to prevail in an action for age discrimination when an employer claims the termination was justified by a reduction in force if the employee can show that a significant portion of his or her duties was transferred prior to termination under circumstances indicating that age was a determining factor in the termination decision.ⁿ²⁸

If discipline or discharge involves a specific offense, evidence that the employee was otherwise qualified for the job does not create an inference of discrimination,ⁿ²⁹ and therefore a literal application of the *McDonnell Douglas* elements may not be appropriate. However, as discussed in § 41.11[2][b], the importance of *McDonnell Douglas* is not in its specification of the discrete elements of proof required, but in its recognition of the general principle that *a plaintiff must carry the initial burden* of offering evidence adequate to create an inference of illegal discrimination.ⁿ³⁰ Thus, the Fifth Circuit Court of Appeals has developed a rule for cases involving specific offenses, under which a discharged employee who is a member of a protected classification may establish a prima facie case of unlawful discrimination by showing simply that he or she was discharged and that a person who did not belong to the same protected classification was retained under apparently similar circumstances.ⁿ³¹ If such a prima facie case is established, the burden shifts to the employer to demonstrate a legitimate nondiscriminatory reason for its action.ⁿ³² If the employer articulates such a reason, the employee must prove, by a preponderance of the evidence, that an employer's articulated reason for the discharge was a pretext for discrimination.ⁿ³³ However some cases seem to require proof that the plaintiff was discharged and other employees were retained under "similar circumstances" as part of the pretext stage, rather than as part of plaintiff's prima facie case.ⁿ³⁴

[4] Constructive Discharge

In some cases, a plaintiff who in fact resigned, rather than be discharged, may attempt to establish that he or she was "constructively" discharged for purposes of the equal employment opportunity laws.^{n34.1} Some conflict exists in the case law concerning the standard for determining when an employee has been constructively discharged under Title VII and other federal laws. For example, some courts, relying on the doctrine developed in National Labor Relations Act (NLRA) cases,ⁿ³⁵ hold that constructive discharge exists when an employer deliberately renders an employee's working conditions intolerable, thus forcing a resignation.ⁿ³⁶ Other courts, including the Ninth Circuit Court of Appeals, focus on the reasonableness of the *employee's* decision to resign, rather than the employer's intent, and hold that the proper determination is whether a reasonable person in the plaintiff's position would have felt that he or she was forced to quit because of intolerable and discriminatory working conditions.ⁿ³⁷ To establish a constructive discharge, a plaintiff must show some aggravating factors, such as a continuous pattern of discriminatory treatment.^{n37.1}

In *Pennsylvania State Police v. Suders*,^{n37.2} the United States Supreme Court held in the context of a sexual harassment case, that to establish constructive discharge in addition to sexual harassment, the plaintiff must make a further showing, *i.e.*, that the abusive working environment became so intolerable that the resignation qualified as a fitting response. An employer may defend against the claim by showing both (1) that it installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) the plaintiff unreasonably failed to avail herself or himself of that employer-provided preventive or remedial apparatus. The affirmative defense is not available, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing the plaintiff's employment status or situation, such as a humiliating demotion, an extreme cut in pay, or a transfer to a position in which the plaintiff would face unbearable working conditions.^{n37.3}

In *Satterwhite v. Smith*,ⁿ³⁸ a black plaintiff was consistently refused promotion, thereby preventing him from gaining access to training and advancement opportunities. Moreover, white employees were regularly promoted ahead of the plaintiff, and he was sometimes embarrassed and humiliated when he was required to train recent promotees. The plaintiff was also relegated to performing dull tasks that offered virtually no hope of securing the advancement opportunities that white employees enjoyed.ⁿ³⁹ The Ninth Circuit Court of Appeals declined to follow the rule, followed by some federal courts,ⁿ⁴⁰ requiring proof of an employer's intention to cause intolerable working conditions. The court explained that the rule focuses on the employer's subjective intent, rather than on the reasonable employee's perspective, and is out of step with both the weight of authority and the law of the Ninth Circuit.ⁿ⁴¹ The court added that the plaintiff faced very poor working conditions. It agreed with the trial court that in light of the facts, as well as the atmosphere of occasional racial insults that all black employees working for the employer suffered, the plaintiff's working conditions were intolerable and discriminatory.ⁿ⁴²

In *Schnidrig v. Columbia Machine, Inc.*,ⁿ⁴³ plaintiff was hired at age 50 as production manager and promoted to vice president within a year. Ten years later the president resigned and Schnidrig was asked to run the company during the search for a new president. Schnidrig applied, but several members of the board of directors expressed an interest in finding someone 45-50 years of age and agreed to hire from among candidates selected by an outside recruiter the board had retained. Although Schnidrig resubmitted his application, he was not hired. He sued for age discrimination under the ADEA and alleged he had been constructively discharged. Although the Ninth Circuit denied summary judgment to the employer on plaintiff's ADEA claim, it agreed with the trial court that Schnidrig had not been constructively discharged, noting that plaintiff had not been demoted, had received no pay cut, and had neither been disciplined nor forced to resign.ⁿ⁴⁴

Constructive discharge in the equal employment opportunity context often involves discriminatory harassment (i.e., harassment based on national origin, race, sex, etc.). For example, an employee may be forced to resign because of "hostile environment" sexual harassment.ⁿ⁴⁵ In such cases, the EEOC's position, as set forth in a 1990 policy guideline, comports with the *Satterwhite v. Smith* ⁿ⁴⁶"reasonable employee" standard. However, the EEOC based its position in part on the fact that specific intent is not as likely to be present in "hostile environment" cases.ⁿ⁴⁷ Whether the EEOC will apply the "reasonable employee" standard in other constructive discharge contexts is not clear.

The California Supreme Court has held, in the context of California common-law wrongful termination actions, that a constructive discharge requires that the plaintiff show that a reasonable person faced with alleged intolerable working conditions or employer actions would have had no reasonable alternative except to quit and that the employer had actual, rather than merely constructive, knowledge of the intolerable conditions.ⁿ⁴⁸ The Court also held that a constructive discharge in violation of a fundamental public policy gives rise to a tort action in favor of the terminated employee.ⁿ⁴⁹

As recognized by the court in *Turner v. Anheuser-Busch, Inc.*, the doctrine of constructive discharge evolved to prevent employers from forcing one from a job by making it so unpleasant that the employee leaves, and then claiming that the person voluntarily left and cannot sue for wrongful discharge or other claims involving employer-initiated terminations of employment.ⁿ⁵⁰ For a further discussion of constructive discharge under California wrongful termination law, *see* Chapter 60.

In FEHA administrative proceedings involving alleged sexual harassment, the FEHC has held that an employee is constructively discharged when an employer, because of an employee's sex, takes actions that make the employee's working conditions so intolerable that the employee is forced to quit. The FEHC has held that the employer must have intended to cause the result. The complainant may prove this intent by demonstrating either a conscious purpose on the part of the employer or that the employer knew or should have known that its actions were likely to cause the employee's departure. To decide whether the employer should have known that the employee was likely to quit, the FEHC will look to whether the employee's working conditions were such that a reasonable person in the employee's circumstances would have quit.ⁿ⁵¹

Whatever rule is relied on, most courts agree that there is a "general reluctance to predicate a finding of constructive discharge [on] the *fact* of discrimination."ⁿ⁵² There must be "aggravating factors," such as a "continuous pattern of discriminatory treatment."ⁿ⁵³ As an example, *Satterwhite* suggests that a court may find a constructive discharge when the employer's act of discrimination consisted of continually subjecting its employee to racial insults.ⁿ⁵⁴ In another case, a California court of appeal held that a trier of fact could conclude that a continuous pattern of discriminatory examinations, deprivation of training assignments, denial of opportune assignments, and other similar conduct were aggravating factors to support a claim of constructive discharge.ⁿ⁵⁵

Under California state law, the length of time since the onset of intolerable working conditions is merely one of many factors determining the intolerability of the employment conditions.ⁿ⁵⁶ The California Supreme Court has specifically

rejected the suggestion in an earlier court of appeal decision⁵⁷ that the statute of limitations is an outer limit beyond which an employee cannot remain on the job and still claim constructive discharge.⁵⁸

Legal Topics:

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

Labor & Employment Law
 Discrimination
 Age Discrimination
 General Overview
 Labor & Employment
 Law
 Discrimination
 Age Discrimination
 Employment Practices
 Discharges & Failures to Hire
 Labor & Employment
 Law
 Discrimination
 Title VII of the Civil Rights Act of 1964
 General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-2(a)(1); 29 U.S.C. § 623(a)(1).

(n2)Footnote 2. *See e.g.*, 29 U.S.C. § 793(a) (Section 503 of Rehabilitation Act of 1973); 29 U.S.C. § 794 (Section 504 of Rehabilitation Act of 1973); 28 C.F.R. § 41.52(c) (Section 504 coordination regulation); 41 C.F.R. § 60-741.1 (Section 503 implementing regulation); Exec. Order No. 11141, 29 Fed. Reg. 2477 (1964) ; Exec. Order No. 11246, § 202, 30 Fed. Reg. 12319 (1965); *see also* 42 U.S.C. § 1981(a), (b) (protecting against racial discrimination in "termination of contracts"; 29 C.F.R. § 1630.4(b) (ADA implementing regulation).

(n3)Footnote 3. *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433 .

(n4)Footnote 4. *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433, 438 (Court assumed without deciding application of Title VII *McDonnell Douglas* evidentiary framework to ADEA cases).

(n5)Footnote 5. *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 US 308, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433, 438-439 .

(n6)Footnote 6. *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504 . *See Vigars v. Valley Christian Ctr. of Dublin, Cal.* (N.D. Cal. 1992) 805 F. Supp. 802 , where the court held that under the Title VII prohibition against discrimination on the basis of sex, including pregnancy, an employer was precluded from firing a woman because she became pregnant out of wedlock, violating its religious principles.

(n7)Footnote 7. *See E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1511-1512 .

(n8)Footnote 8. *See, e.g.*, 42 U.S.C. §§ 12111-12117 (Americans with Disabilities Act), 29 U.S.C. §§ 793(a) (Section 503 of Rehabilitation act of 1973), 794 (Section 504 of Rehabilitation act of 1973); 28 C.F.R. § 41.52(c) (Section 504 coordination regulation); 41 C.F.R. § 60-741.1 (Section 503 implementing regulation); Exec. Order No. 11141, 29 Fed. Reg. 2477 (1964) ; Exec. Order No. 11246, § 202, 30 Fed. Reg. 12319 (1965). *See also* 42 U.S.C. § 1981(a), (b) (protecting against racial discrimination in "termination of contracts"); 29 C.F.R. § 1630.4(b) (ADA implementing regulation).

(n9)Footnote 8.1. *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1139-1140 .

(n10)Footnote 8.2. *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1084 ; *Collings v. Longview Fibre Co.* (9th Cir. 1995) 63 F.3d 828, 832 .

(n11)Footnote 8.3. *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1084 (summary judgment for employer was improper where employer's explanation for discharge as based on employee's "misconduct" because of his epilepsy failed as matter of law to qualify as legitimate, nondiscriminatory explanation for discharge); *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1139-40 .

(n12)Footnote 8.4. *See* 42 U.S.C. § 12114(c)(4).

(n13)Footnote 8.5. *Dark v. Curry County* (9th Cir. 2006) 451 F.3d 1078, 1084 ; *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1139 n.18 .

(n14)Footnote 9. *Humphrey v. Memorial Hospitals Ass'n* (9th Cir. 2001) 239 F.3d 1128, 1139-1140

(n15)Footnote 10. *See* Gov. Code § 12940(a).

(n16)Footnote 11. Gov. Code § 12993(a); Cal. Const., art. I, § 8.

(n17)Footnote 12. *See Rojo v. Kliger* (1990) 52 Cal. 3d 65, 73-82, 89-91, 276 Cal. Rptr. 130, 801 P.2d 373 (sexual harassment is a form of sex discrimination under Cal. Const. art. I, § 8); *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 230-237, 116 Cal. Rptr. 2d 770 (Cal. Const., art. I, § 8 and Title VII of Civil Rights of 1964 supported cause of action for wrongful discharge even though employer exempt from FEHA as religious corporation); *Badih v. Myers* (1995) 36 Cal. App. 4th 1289, 43 Cal. Rptr. 2d 229 (discharge due to pregnancy supported cause of action under Cal. Const., art. I, § 8 even if defendant exempt employer under FEHA).

(n18)Footnote 13. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1158, 77 Cal. Rptr. 2d 445, 959 P.2d 752 . For further discussion, *see* § 43.01[14][c.1] and ch. 60.

(n19)Footnote 14. *See Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514 .

(n20)Footnote 15. *See Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514, 1528-1530 .

(n21)Footnote 16. *See Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514, 1532-1533 .

(n22)Footnote 17. *See McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 283, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (42 U.S.C. § 1981; Title VII).

(n23)Footnote 18. *See E.E.O.C. v. Brown & Root, Inc.* (5th Cir. [Miss.] 1982) 688 F.2d 338, 340 ; *Vigars v. Valley Christian Ctr. of Dublin, Cal.* (N.D. Cal. 1992) 805 F.Supp. 802, 808 (Title VII claim based on sex discrimination prevailed over the employer's claim that non-pregnant out of wedlock status was a bona fide occupational qualification).

(n24)Footnote 19. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII) .

(n25)Footnote 20. *See Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 252-256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII) ; *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 281-284, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (42 U.S.C. § 1981; Title VII).

(n26)Footnote 21. *See Flowers v. Crouch-Walker Corp.* (7th Cir. 1977) 552 F.2d 1277, 1281, 1282 (Title VII).

(n27)Footnote 22. *See, e.g., Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417 (ADEA); *Oxman v. WLS-TV* (7th Cir. 1988) 846 F.2d 448 (ADEA); *Haydon v. Rand Corp.* (9th Cir. 1979) 605 F.2d 453 (ADEA; per curium).

(n28)Footnote 23. *See* (ADEA); *see also Watson v. Fort Worth Bank & Trust* (1988) 487 U.S. 977, 990-991, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII; subjective employment practices may be challenged under disparate impact analysis). For full discussions of the "disparate treatment" and "disparate impact" theories of liability, *see* §§ 41.10-41.11 and 41.20-41.21.

(n29)Footnote 24. See *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1421 (ADEA; adapting *McDonnell Douglas* test).

(n30)Footnote 25. See *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433 ; see [1], above for a more complete discussion of *O'Connor*.

(n31)Footnote 26. See *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1421 (ADEA; failure to prove replacement by younger employee is not necessarily fatal to age discrimination claim); *Haydon v. Rand Corp.* (9th Cir. 1979) 605 F.2d 453, 454 (ADEA; per curium; same).

(n32)Footnote 27. See *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1421-1422 (ADEA) .

(n33)Footnote 28. *Ewing v. Gill Indus., Inc.* (1992) 3 Cal. App. 4th 601, 608-613, 4 Cal. Rptr. 2d 640 (FEHA) .

(n34)Footnote 29. See Schlei and Grossman, *Employment Discrimination Law* (2d ed.) Ch. 18, *Discharge*.

(n35)Footnote 30. See *Fong v. American Airlines, Inc.* (9th Cir. 1980) 626 F.2d 759, 762 (42 U.S.C. § 1981; relying on *Teamsters v. United States* (1977) 431 U.S. 324, 336, 358, 97 S. Ct. 1843, 52 L. Ed 2d 396).

(n36)Footnote 31. See *E.E.O.C. v. Brown & Root, Inc.* (5th Cir. 1982) 688 F.2d 338, 340 (Title VII); *Green v. Armstrong Rubber Co.* (5th Cir. 1980) 612 F.2d 967, 968 (42 U.S.C. § 1981; Title VII); see also *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 275-276, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (42 U.S.C. § 1981; Title VII); *Fong v. American Airlines, Inc.* (9th Cir. 1980) 626 F.2d 759, 761-762 (42 U.S.C. § 1981).

(n37)Footnote 32. *Green v. Armstrong Rubber Co.* (5th Cir. 1980) 612 F.2d 967, 968 .

(n38)Footnote 33. cf. *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 ; see also *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1480 (sexual harassment plaintiff may offer testimony of other employees claiming to have been harassed to establish employer's claimed explanation was pretextual).

(n39)Footnote 34. See, e.g., *Talley v. United States Postal Serv.* (8th Cir. 1983) 720 F.2d 505, 507 (Title VII; black postal employee who was discharged for losing her mailbox keys held to have failed to establish "pretext for discrimination" because, although she presented evidence that other employees who permanently lost their keys were not discharged, she did not present evidence that she and the other employees were similarly situated).

(n40)Footnote 34.1. See, e.g., *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1248-1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal. App. 4th 1156, 1167-1168, 104 Cal. Rptr. 2d 95 (substantial evidence supported jury finding of constructive discharge; jury reasonably could have found continuous pattern of conduct, uncorrected by higher management, that resulted in intolerable working conditions); but see *Poland v. Chertoff* (9th Cir. 2007) 494 F.3d 1174, 1184-1186 (employee's testimony that he decided to take early retirement after transfer, because extended separation from his family was difficult and because his new position was "a career ender" was not enough to establish constructive discharge under case law requiring that employer create working conditions sufficiently extraordinary and egregious to overcome normal motivation of competent, diligent, and reasonable employee to remain on job to earn livelihood); *Montero v. AGCO Corp.* (9th Cir. 1999) 192 F.3d 856, 861 (employee was not constructively discharged because she resigned months after alleged harassment had ceased, harassing supervisors were disciplined and new manager was hired who would ensure no further harassment); *Cooper v. Neiman Marcus Group* (1997) 125 F.3d 786, 790-791 (ADA plaintiff who resigned after essentially being told to choose between severance options was not constructively discharged).

(n41)Footnote 35. See, e.g., *J.P. Stevens & Co., Inc. v. N.L.R.B.* (4th Cir. 1972) 461 F.2d 490, 494 .

(n42)Footnote 36. See *Irving v. Dubuque Packing Co.* (10th Cir. 1982) 689 F.2d 170, 172 (42 U.S.C. § 1981); *Johnson v. Bunny Bread Co.* (8th Cir. 1981) 646 F.2d 1250, 1256 (Title VII); *Muller v. United States Steel Corp.* (10th Cir. 1975) 509 F.2d 923, 929 (Title VII).

(n43)Footnote 37. *Bergene v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2001) 272 F.3d 1136, 1143-1144 (Title VII). See *Satterwhite v. Smith* (9th Cir. 1984) 744 F.2d 1380, 1381 (42 U.S.C. § 1981); *Nolan v. Cleland* (9th Cir. 1982) 686 F.2d 806, 812-813 (Title VII); *Held v. Gulf Oil Co.* (6th Cir. 1982) 684 F.2d 427, 432 (Title VII); *Bourque v. Powell Elec. Mfg. Co.* (5th Cir. 1980) 617 F.2d 61, 65 (Title VII); *Bodnar v. Synpol, Inc.* (5th Cir. 1988) 843 F.2d 190, 192; *Watson v. Nationwide Ins. Co.* (9th Cir. 1987) 823 F.2d 360, 361.

(n44)Footnote 37.1. *Bergene v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2001) 272 F.3d 1136, 1144 (Title VII) (evidence presented by plaintiff of her isolation as only woman supervisor during her tenure as acting foreman, demeaning and threatening comments made by her supervisor and his supervisor while her earlier pregnancy discrimination complaint was pending, and denial of promotion was sufficient to raise triable issue of fact as to whether reasonable person in plaintiff's position would have felt compelled to quit).

(n45)Footnote 37.2. *Pennsylvania State Police v. Suders* (2004) 124 S. Ct. 2342, 2351-2357, 159 L. Ed. 2d 204.

(n46)Footnote 37.3. For discussion of the burden of proof in sexual harassment actions generally, see § 41.81[1][b][ii].

(n47)Footnote 38. *Satterwhite v. Smith* (9th Cir. 1984) 744 F.2d 1380 (42 U.S.C. § 1981).

(n48)Footnote 39. See *Satterwhite v. Smith* (9th Cir. 1984) 744 F.2d 1380, 1381, 1383 (42 U.S.C. § 1981).

(n49)Footnote 40. See *Irving v. Dubuque Packing Co.* (10th Cir. 1982) 689 F.2d 170, 172 (42 U.S.C. § 1981); *Muller v. United States Steel Corp.* (10th Cir. 1975) 509 F.2d 923, 929 (Title VII).

(n50)Footnote 41. See *Satterwhite v. Smith* (9th Cir. 1984) 744 F.2d 1380, 1382-1383 (42 U.S.C. § 1981).

(n51)Footnote 42. See *Satterwhite v. Smith* (9th Cir. 1984) 744 F.2d 1380, 1383 (42 U.S.C. § 1981).

(n52)Footnote 43. *Schnidrig v. Columbia Mach., Inc.* (9th Cir. 1996) 80 F.3d 1406.

(n53)Footnote 44. See *Schnidrig v. Columbia Mach., Inc.* (9th Cir. 1996) 80 F.3d 1406, 1411-1412, cert. denied, 117 S. Ct. 295.

(n54)Footnote 45. For a general discussion of discriminatory harassment, including "hostile environment" harassment, see Part E, §§ 41.80-41.82.

(n55)Footnote 46. *Satterwhite v. Smith* (9th Cir. 1984) 744 F.2d 1380, 1381.

(n56)Footnote 47. See EEOC Compliance Manual (CCH) § 615, P 3114.

(n57)Footnote 48. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1248-1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022; see *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal. App. 4th 1156, 1166, 104 Cal. Rptr. 2d 95 (employer must either intentionally create or knowingly permit intolerable conditions to be held liable); *Casenas v. Fujisawa USA, Inc.* (1997) 58 Cal. App. 4th 101, 113-114, 67 Cal. Rptr. 2d 827 (as matter of law, no reasonable employee would find allegedly unfair performance evaluation and failure to consider plaintiff for management position so egregious as to constitute constructive discharge); see also *Addy v. Bliss & Glennon* (1996) 44 Cal. App. 4th 205, 216-218, 51 Cal. Rptr. 2d 642 (demotions, even with reductions in pay, are not by themselves enough to constitute constructive discharge in the absence of evidence that a reasonable person in the employee's position would be compelled to resign).

(n58)Footnote 49. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1252, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 .

(n59)Footnote 50. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1244, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 .

(n60)Footnote 51. *DFEH v. Rosenberg* (1990) FEHC Dec. No. 90-09, p. 9 (complainant's mental and physical health deteriorated so much as result of sexual harassment that she was forced to quit; circumstances such as denigration of complainant in front of customers, false stories about complainant's sex life, and permeation of harassment into complainant's work, home, and social life would have caused reasonable person to quit); *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 17 (employers had actual knowledge, after complainant's strong protest, that transfer to less favorable shift would force her resignation; any reasonable person would have felt compelled to escape persistent crude and invasive touching, gestures, and remarks, futility of efforts to stop them, and fear and trauma of sexual assault and its aftermath); *DFEH v. Madera County* (1990) FEHC Dec. No. 90-03, p. 31 (complainant's mental and physical health deteriorated so much as result of sexual harassment that she was forced to quit; reasonable person would have quit in light of sexual assault, continued approaches after assault, and employer's refusal or failure to stop harassment); *See also § 41.81.*

(n61)Footnote 52. *Clark v. Marsh* (D.C. Cir. 1981) 665 F.2d 1168, 1173, 214 U.S. App. D.C. 350 (Title VII; emphasis in original); *see Satterwhite v. Smith* (9th Cir. 1984) 744 F.2d 1380, 1382 (42 U.S.C. § 1981); *cf. Bourque v. Powell Elec. Mfg. Co.* (5th Cir. 1980) 617 F.2d 61, 66 (Title VII; failure to provide equal pay for equal work as sex discrimination under Title VII, but no constructive discharge because plaintiff offered no evidence of other objectionable working conditions); *Muller v. United States Steel Corporation* (10th Cir. 1975) 509 F.2d 923, 929 (Title VII; failure to promote based on national origin as violation of Title VII, but no constructive discharge because no evidence of deliberate effort to make things difficult for employee).

(n62)Footnote 53. *Satterwhite v. Smith* (9th Cir. 1984) 744 F.2d 1380, 1382 (42 U.S.C. § 1981); *see Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1110-1111 (constructive discharge after single harassing conduct within limitations period permissible when part of pattern of discriminatory acts; date of resignation triggers limitations period in constructive discharge case); *see also Watson v. Nationwide Ins. Co.* (9th Cir. 1987) 823 F.2d 360, 361 (Title VII; "single isolated instance" of employment discrimination is insufficient as matter of law to support finding of constructive discharge); *Soules v. Cadam, Inc.* (1992) 2 Cal. App. 4th 390, 402 , *disapproved on other grounds*, *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238 (FEHA; same); *Valdez v. City of Los Angeles* (1991) 231 Cal. App. 3d 1043, 1055, 282 Cal. Rptr. 726 (FEHA; same) ; *but see Schafer v. Board of Public Educ.* (3d Cir. 1990) 903 F.2d 243, 249-250 (district court erred by suggesting that constructive discharge necessarily requires evidence of aggravating circumstances).

(n63)Footnote 54. *Satterwhite v. Smith* (9th Cir. 1984) 744 F.2d 1380, 1382 n.2 (42 U.S.C. § 1981).

(n64)Footnote 55. *Valdez v. City of Los Angeles* (1991) 231 Cal. App. 3d 1043, 1057, 282 Cal. Rptr. 726 (FEHA)

(n65)Footnote 56. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1254, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (involving common-law wrongful termination action).

(n66)Footnote 57. *See Panopulos v. Westinghouse Electric Corp.* (1989) 216 Cal. App. 3d 660, 670, 264 Cal. Rptr. 810 .

(n67)Footnote 58. *See Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1253-1254, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (involving common-law wrongful termination action); *see also Valdez v. City of Los Angeles* (1991) 231 Cal. App. 3d 1043, 1058, 282 Cal. Rptr. 726 (FEHA; criticizing *Panopulos* dicta as arbitrary and illogical).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.58A

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.58A Disciplinary Suspension

A disciplinary suspension, even with pay, may constitute discrimination if motivated by a prohibited animus.ⁿ¹

In *Raad v. Fairbanks N. Star Borough*, ⁿ¹1 the Ninth Circuit reversed the trial court's grant of summary judgment to a school-district employer on the claim of a teacher of Lebanese national origin that, due to an alleged bomb threat, she was discriminatorily subjected to a disciplinary suspension in her eligibility to be hired either as a substitute or as a full-time teacher. The court applied the *McDonnell Douglas* test to the claim. Thus, a plaintiff alleging discriminatory subjection to a disciplinary suspension can establish a prima facie case of discrimination by showing that he or she (1) is a member of a protected class, (2) adequately performed her job, and (3) suffered an adverse employment actionⁿ² or was treated differently from others who were similarly situated.ⁿ² The plaintiff made out a prima facie case of discrimination with respect to the district's reaction to the alleged bomb threat by showing that (1) because of her Lebanese national origin, she is a member of a protected group, (2) she performed her job adequately before the alleged bomb threat, and (3) she suffered an adverse employment action when the district issued its disciplinary suspension. Therefore, the burden of production shifted to the district to articulate a legitimate, non-discriminatory reason for its actions. The district's assertion that it disciplined her because she made a bomb threat, and that it would have similarly sanctioned any other employee who made such a threat, was sufficient to shift the burden back to the plaintiff to show that the district's proffered reason was pretextual. The plaintiff presented evidence tending to show that the district's bomb-threat explanation was unworthy of credence. She offered proof that she did not threaten to blow up the building and presented evidence that the staff members may have misunderstood what she said because of their preconceptions regarding her religion and national origin, raising a genuine issue of fact as to whether the district's stated reason for disciplining her was pretextual.ⁿ³

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationActionable
DiscriminationLabor & Employment LawDiscriminationAge DiscriminationEmployment PracticesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal. App. 4th 359, 374 (in factual context of employment as peace officer, racially motivated suspension from duty for lying on police report, even with pay, constituted adverse employment action, where charge could destroy officer's career; reduction in authority and negative performance reviews also constituted adverse employment actions).

(n2)Footnote 1.1. *Raad v. Fairbanks N. Star Borough* (9th Cir. 2003) 323 F.3d 1185.

(n3)Footnote 1.2. If the claim is retaliation rather than direct discrimination, the adverse action need not be workplace-related or employment-related, only adverse. *See Burlington Northern & Santa Fe Railway Co. v. White* (2006) 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (scope of anti-retaliation provision of Title VII extends beyond workplace-related or employment-related retaliatory acts and harm, so employee need only allege and prove "adverse action" rather than "adverse employment action" under Title VII's anti-retaliation provision), discussed at § 41.130[1A], *below*.

(n4)Footnote 2. *Raad v. Fairbanks N. Star Borough* (9th Cir. 2003) 323 F.3d 1185, 1195-1196 . *see* § 41.11[1]; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n5)Footnote 3. *Raad v. Fairbanks N. Star Borough* (9th Cir. 2003) 323 F.3d 1185, 1196 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.59

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.59 English-Only Rules

[1] EEOC Guidelines

The EEOC guidelines on national origin discrimination¹ provide that a rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. According to the EEOC, the primary language of an individual is often an essential national origin characteristic.² Thus, the guidelines provide that prohibiting employees from speaking their primary language, or the language they speak most comfortably, at all times in the workplace disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation, and intimidation based on national origin that could result in a discriminatory working environment. Therefore, the EEOC will presume that an "English-only rule" violates Title VII, and will closely scrutinize it.³

EEOC Guidelines, as well as FEHC regulations, also state that an employer must provide a business justification for a rule requiring that employees speak only in English at certain times.⁴

[1A] FEHA

Under the FEHA,⁵ it is an unlawful employment practice for an employer to adopt or enforce a policy that limits or prohibits the use of any language in any workplace, unless both of the following conditions exist:⁶

- (1) The language restriction is justified by a business necessity.
- (2) The employer has notified its employees of the circumstances and the time when the language restriction must be observed and of the consequences of violating the language restriction.

For these purposes, "business necessity" means an overriding legitimate business purpose to the degree that each of the following is true:⁷

- (1) The language restriction is necessary to the safe and efficient operation of the business.
- (2) The language restriction effectively fulfills the business purpose it is supposed to serve.
- (3) There is no alternative practice to the language restriction that would accomplish the business purpose equally well with a lesser discriminatory impact.

[2] Cases Rejecting English-Only Guideline

The Ninth Circuit Court of Appeals has rejected the EEOC English-only rule guideline, finding that nothing in the plain language of Title VII supports the presumption that an employee establishes a prima facie case of disparate impact merely by proving the existence of an English-only policy or the requirement that an employer always provide a business justification for any English-only policy.ⁿ⁸ The Ninth Circuit followed the analysis employed by the Fifth Circuit in a case pre-dating the EEOC guidelines.ⁿ⁹ The Ninth Circuit reasoned that the Guideline improperly presumed that an English-only policy has a disparate impact in the absence of proof.ⁿ¹⁰ In addition, the court noted that Title VII does not simply fail to directly address whether English-only policies should be presumed discriminatory; it makes no mention of such policies at all.ⁿ¹¹ Thus, both the Fifth and Ninth Circuits have held that limited "English-only rules" may be permissible at certain times or under certain conditions.ⁿ¹² In *Garcia v. Gloor*,ⁿ¹³ an employer (a lumber and hardware store) had a rule that prohibited employees, most of whom were bilingual Hispanics, from speaking Spanish on the job unless they were speaking to Spanish-speaking customers. The rule did not apply to employees who worked in the lumber yard (most of whom could not speak English), nor did it apply during work breaks.ⁿ¹⁴ The plaintiff, a bilingual Hispanic-American who was fired for, among other things, deliberately speaking Spanish on the job in purposeful violation of the rule, argued that the rule had a discriminatory adverse impact because it was likely to be violated only by Hispanic-Americans, who therefore had a higher risk of incurring penalties.ⁿ¹⁵ The Fifth Circuit Court of Appeals held that the employer's rule, at least as applied to plaintiff, did not violate Title VII.ⁿ¹⁶ The court reasoned that there is no "disparate impact" if a rule is one that the affected employee can readily observe and nonobservance is a matter of preference.ⁿ¹⁷ The court further explained that the "English-only" rule, as applied by the plaintiff's employer to the plaintiff, did not forbid cultural expression to persons for whom compliance might impose a hardship—it merely prevented some employees, such as the plaintiff, from exercising a preference to converse in Spanish.ⁿ¹⁸ Although noting that language may be an immutable characteristic of national origin to a person who is not bilingual, the court held that Title VII does not support an interpretation that equates the language that a multilingual employee prefers to use with his or her national origin.ⁿ¹⁹

In *Jurado v. Eleven-Fifty Corp.*,ⁿ²⁰ the Ninth Circuit Court of Appeals cited *Gloor* in holding that a Mexican-American/Native-American disc jockey who was fired for refusing to comply with an order to stop speaking Spanish on the air in an English-language broadcast had not established a Title VII violation under the "disparate impact" theory.ⁿ²¹ The court based its decision on the fact that the disc jockey was fluently bilingual and could easily conform with the order.ⁿ²²

In *Garcia v. Spun Steak Co.*,ⁿ²³ the Ninth Circuit, cited both *Gloor* and *Jurado* with approval. In *Spun Steak*, bilingual employees brought suit against an employer that instituted a limited English-only policy that required employees to speak only English while working on the job. The court rejected the EEOC Guidelines long-standing ruleⁿ²⁴ that an English-only policy automatically creates a prima case of discrimination, which must be met by an employer's business justification for the rule.ⁿ²⁵ The court found that the plaintiffs had not made out a prima facie case that the rule created a hostile or abusive work environment under the facts of the case because the plaintiffs, with the exception of one of them, were bilingual employees who had not shown that the policy adversely affected them. The court also found that an individual has no right to speak a particular language at work, and that the right to converse at work is a privilege, which by definition is not required to be provided by employers. The court acknowledged that the result might have been different if the case had been brought by nonbilingual, Spanish-speaking employees who might have found it difficult or impossible to comply with the rule or if the rule had been enforced in a punitive way.ⁿ²⁶

[3] EEOC Notice

Because it is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language, an employer who believes it has a business necessity for an "English-only" rule at certain times should inform its employees of the general circumstances when speaking only in English is required, and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual because of a violation of the rule, the EEOC will consider the employer's application of the rule as evidence of discrimination based on national origin.ⁿ²⁷

Legal Topics:

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

Labor & Employment Law Discrimination General Overview Labor & Employment Law Discrimination Actionable Discrimination Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission Enforcement General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 C.F.R. §§ 1606.1-1606.8.

(n2)Footnote 2. *See* 29 C.F.R. § 1606.7(a); *but see Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480, 1489 (nothing in plain language of Title VII supports English-only rule *Guideline*); *Garcia v. Gloor* (5th Cir. 1980) 618 F.2d 264, 270 (Title VII does not support an interpretation that equates language an employee prefers to use with his or her national origin).

(n3)Footnote 3. 29 C.F.R. § 1606.7(a).

(n4)Footnote 4. 29 C.F.R. § 1606.7(b); 2 Cal. Code Reg. § 7289.5(d).

(n5)Footnote 5. *Gov. Code* § 12900 *et seq.*

(n6)Footnote 6. *Gov. Code* § 12951(a). For further discussion, *see* § 40.10[6].

(n7)Footnote 7. *Gov. Code* § 12951(b).

(n8)Footnote 8. *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480, 1489-1490 .

(n9)Footnote 9. *See Garcia v. Gloor* (5th Cir. 1980) 618 F.2d 264, 267 .

(n10)Footnote 10. *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480, 1490 .

(n11)Footnote 11. *Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480, 1490 .

(n12)Footnote 12. *See Garcia v. Spun Steak Co.* (9th Cir. 1993) 998 F.2d 1480, 1486-1490 , *cert. denied*, 512 U.S. 1228 (1994) (Title VII); *Garcia v. Gloor* (5th Cir. 1980) 618 F.2d 264, 272 (Title VII).

(n13)Footnote 13. *Garcia v. Gloor* (5th Cir. 1980) 618 F.2d 264 (Title VII).

(n14)Footnote 14. *See Garcia v. Gloor* (5th Cir. 1980) 618 F.2d 264, 266 (Title VII).

(n15)Footnote 15. *See Garcia v. Gloor* (5th Cir. 1980) 618 F.2d 264, 266, 270 (Title VII).

(n16)Footnote 16. *See Garcia v. Gloor* (5th Cir. 1980) 618 F.2d 264, 268-271, 272 (Title VII).

(n17)Footnote 17. *See Garcia v. Gloor (5th Cir. 1980) 618 F.2d 264, 270* (Title VII).

(n18)Footnote 18. *See Garcia v. Gloor (5th Cir. 1980) 618 F.2d 264, 270-271* (Title VII).

(n19)Footnote 19. *See Garcia v. Gloor (5th Cir. 1980) 618 F.2d 264, 270, 272* (Title VII).

(n20)Footnote 20. *Jurado v. Eleven-Fifty Corp. (9th Cir. 1987) 813 F.2d 1406* (Title VII).

(n21)Footnote 21. *See Jurado v. Eleven-Fifty Corp. (9th Cir. 1987) 813 F.2d 1406, 1408, 1412* (Title VII).

(n22)Footnote 22. *Jurado v. Eleven-Fifty Corp. (9th Cir. 1987) 813 F.2d 1406, 1408, 1412* (Title VII).

(n23)Footnote 23. *Garcia v. Spun Steak Co. (9th Cir. 1993) 998 F.2d 1480, 1487, 1488, 1489 , cert. denied, 512 U.S. 1228 (1994) .*

(n24)Footnote 24. *See 29 C.F.R. § 1606.7(b), discussed in [a], above.*

(n25)Footnote 25. *Garcia v. Spun Steak Co. (9th Cir. 1993) 998 F.2d 1480, 1489 , cert. denied, 512 U.S. 1228 (1994) .*

(n26)Footnote 26. *Garcia v. Spun Steak Co. (9th Cir. 1993) 998 F.2d 1480, 1486-1490 , cert. denied, 512 U.S. 1228 (1994) .*

(n27)Footnote 27. *29 C.F.R. § 1606.7(c); see 2 Cal. Code Reg. § 7289.5(d).*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.60

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.60 "Fetal Protection" Policies

A "fetal protection" policy is an employer program that excludes fertile female employees from hazardous jobs because of the employer's concern for the health of the unborn children such women may conceive. The United States Supreme Court held in *Auto Workers v. Johnson Controls*,ⁿ¹ that such a policy is unlawful sex discrimination under Title VII unless the employer can prove that sex is a "bona fide occupational qualification" (BFOQ). The Court rejected the finding by the Seventh Circuit Court of Appeals that the policy was facially neutral because it protected the offspring of all employees.ⁿ² The Supreme Court characterized the policy as "obviously" biased, observing that the policy classified on the basis of gender and childbearing capacity, rather than fertility alone. The Court concluded that thus the policy was facially discriminatory because it required only female employees to prove that they were incapable of reproducing.ⁿ³

The Supreme Court also relied in part on the Pregnancy Discrimination Act, which provides that sex discrimination under Title VII includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."ⁿ⁴ The Court reasoned that because the *Johnson Controls* policy expressly excluded women "capable of bearing children," it explicitly classified based on the potential for pregnancy. "[S]uch a classification", explained the Court, "must be regarded ... in the same light as explicit sex discrimination" under Title VII.ⁿ⁵ A California court of appeal has also held, in *Johnson Controls, Inc. v. Fair Employment & Housing Com.*,ⁿ⁶ that the foregoing fetal protection policy was a "facial, blatant, overt gender-based job discrimination violative of [the FEHA], unless warranted by a [bona fide occupational qualification]." The court declined to follow prior federal authority that characterized such policies as facially neutral and thus subject to the business necessity defense,ⁿ⁷ explaining that the FEHA expressly denotes the BFOQ defense as the standard to be applied in overt discrimination cases.ⁿ⁸

For a complete discussion of the BFOQ defense under both Title VII and the FEHA, as well as other equal employment opportunity laws, *see* § 41.94.

Legal Topics:

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

Labor & Employment LawDiscriminationDisability DiscriminationCoverage & DefinitionsDisabilitiesGeneral
OverviewLabor & Employment LawDiscriminationGender & Sex DiscriminationCoverage & DefinitionsPregnancy &
Parental RightsLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

FOOTNOTES:

(n1)Footnote 1. *Auto Workers v. Johnson Controls* (1991) 499 U.S. 187, 200, 111 S. Ct. 1196, 113 L. Ed. 2d 158 .

(n2)Footnote 2. *See International Union, UAW v. Johnson Controls* (7th Cir. 1989) 886 F.2d 871, 884-886 , rev'd, 499 U.S. 187 (1991) . This conclusion was apparently based on the false premise that an employer may rebut the presumption that fetal protection policies are facially discriminatory by proving that a hazard applies only to women, thereby transforming the policy into one that neutrally protects all employees' offspring but adversely affects only women. *See* EEOC Compliance Manual (CCH) § 624, P 4319 n.5 (construing *Hayes v. Shelby Memorial Hosp.* (11th Cir. 1984) 726 F.2d 1543, 1552) .

(n3)Footnote 3. *Auto Workers v. Johnson Controls* (1991) 499 U.S. 187, 197-199, 111 S. Ct. 1196, 113 L. Ed. 2d 158 .

(n4)Footnote 4. 42 U.S.C. § 2000e(k); *see* § 41.16[2][c]. *But cf.* *Armstrong v. Flowers Hosp., Inc.* (11th Cir. 1994) 33 F.3d 1308 (Pregnancy Disability Act did not require transfer of pregnant nurse charged with care of AIDS patient).

(n5)Footnote 5. *Auto Workers v. Johnson Controls* (1991) 499 U.S. 187, 198, 111 S. Ct. 1196, 113 L. Ed. 2d 158 .

(n6)Footnote 6. *Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal. App. 3d 517, 539, 267 Cal. Rptr. 158 .

(n7)Footnote 7. *See International Union, UAW v. Johnson Controls* (7th Cir. 1989) 886 F.2d 871 , rev'd, 499 U.S. 187 (1991) ; *Hayes v. Shelby Memorial Hosp.* (11th Cir. 1984) 726 F.2d 1543 ; *Wright v. Olin Corp.* (4th Cir. 1982) 697 F.2d 1172 . The "business necessity" defense is discussed in § 41.73.

(n8)Footnote 8. *Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal. App. 3d 517, 540, 267 Cal. Rptr. 158 ; *see* Gov. Code § 12940.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.61

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§ 41.61 Fringe Benefits

[1] Generally

According to the EEOC, "fringe benefits" include medical, hospital, accident, and life insurance; retirement benefits; profit sharing and bonus plans; leaves of absence; and similar benefits.ⁿ¹ Equal employment opportunity issues relating to fringe benefits are specifically addressed in the context of sex-based distinctions by Title VII and the Equal Pay Act (EPA);ⁿ² in the context of age-based distinctions by the ADEA;ⁿ³ in the context of disability-based distinctions by the ADA;ⁿ⁴ and with respect to sex, sexual orientation, marital status, age, pregnancy and medical condition, and disability-based distinctions by the FEHA.ⁿ⁵

[2] Age Issues

The ADEA contains an exemption from its general nondiscrimination provisions,ⁿ⁶ which states that it is not unlawful for an employer "to observe the terms of a bona fide employee benefit plan ... (i) [when], for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker ...; or (ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of [the ADEA]."ⁿ⁷

Age discrimination mandated by an employee benefit plan is prohibited where it requires or permits involuntary retirement of individuals on the basis of age.ⁿ⁸ However, an employer's early retirement plan which provides greater total benefits to younger employees, but the same monthly benefits, was not violative.ⁿ⁹ Similarly, an airline's imposition of a four week cap on the amount of vacation time employees could accrue was not intentional age discrimination, notwithstanding the fact that this policy more severely affected workers over 40.ⁿ¹⁰

Employers were not required to change existing bona fide retirement or pension programs when FEHA's age discrimination provisions were enacted in 1980.ⁿ¹¹

For a complete discussion of the "bona fide employee benefit plan" exemption under both the ADEA and the FEHA,

see § 41.93.

[3] Gender Issues

[a] Generally

Neither Title VII nor the Equal Pay Act (EPA) sanction any sex-based differentials relating to fringe benefits. Unlike statutes proscribing nondiscrimination on the basis of age, Title VII has no "bona fide employee benefit plan" exemption to the general proscription against sex discrimination.ⁿ¹² Under the EPA, fringe benefits, like wages, are considered remuneration for employment,ⁿ¹³ and as discussed in § 41.56[2], the EPA requires equal pay for equal work.ⁿ¹⁴ Moreover, EEOC guidelines and regulations interpreting Title VII and the EPA expressly provide that it is an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.ⁿ¹⁵ If employee health benefits are based on gender, therefore, a prima facie case of Title VII liability is established.ⁿ¹⁶

Furthermore, the EEOC guidelines state that under Title VII, it is not a defense to a charge of sex discrimination in benefits that the cost of those benefits is greater with respect to one sex than another.ⁿ¹⁷ These regulations also provide that an employer may not condition the availability of fringe benefits on an employee's sex or marital status.ⁿ¹⁸ However, the FEHA provisions regarding discrimination on the basis of sex do not affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan if the terms and conditions are in accordance with customary and reasonable or sound actuarial underwriting practices.ⁿ¹⁹

[b] Family Benefits

Under EEOC regulations, employers may not provide benefits for the spouses or families of employees of one gender when the same benefits are not provided for the spouses or families of opposite gender employees.ⁿ²⁰ Nor may employers provide maternity benefits to the wives of male employees, but fail to provide such benefits to female employees.ⁿ²¹

Notwithstanding the provisions prohibiting marital status discrimination, the FEHA regulations specifically allow bona fide fringe benefits which provide benefits to spouses or dependents,ⁿ²² and under these plans, employers may limit benefits or decline to provide benefits to non-employees, non-spouses and non-dependents.ⁿ²³

[c] "Head of Household" Rules

Some employers have adopted facially neutral "head of household" rules allowing both sexes to receive dependent coverage if an employee earns more than 50 percent of the combined income of the spouses.ⁿ²⁴ In *Wambheim v. J.C. Penney Co., Inc. (Wambheim I)*,ⁿ²⁵ the Ninth Circuit Court of Appeals held that a "head of household" rule had a disproportionate impact on female employees, thereby establishing a prima facie case of discrimination under Title VII, because only 37 percent of the female employees covered by a medical plan received dependent coverage, as opposed to 95 percent of the male employees.ⁿ²⁶ Accordingly, the *Wambheim I* court reversed a summary judgment for the employer and remanded the case for trial.ⁿ²⁷ In a subsequent appeal from a trial judgment for the employer (*Wambheim II*),ⁿ²⁸ the employer argued that its "head of household" rule was designed to benefit the largest number of employees and those with the greatest need. It explained that dependent children and spouses covered under the rule had the greatest need, and qualifying spouses were less likely to have other medical insurance. The Ninth Circuit in *Wambheim II* agreed and concluded that the employer thus demonstrated legitimate and overriding business justifications for its "head of household" rule.ⁿ²⁹

E.E.O.C. v. Fremont Christian School ⁿ³⁰ presented a challenge to a religious school's provision of health insurance coverage only to employees who were the "head of the household." Since the school believed that according to Scripture the "head of the household" role could only be performed by the husband, its rule effectively deprived female

employees of health insurance benefits.ⁿ³¹ The District Court for the Northern District of California found that there was a prima facie case of "disparate treatment" and "disparate impact."ⁿ³² The school attempted to justify its "head of household" rule by invoking its religious beliefs, but the court, relying on *Wambheim I* and *II*, held that such a justification is not equivalent to the business justification necessary to overcome a presumption of discrimination.ⁿ³³

The EEOC guidelines on sex discrimination observe that under "head of household" rules, benefits tend to be available only to male employees and their families. Therefore, because such rules discriminate against female employees, and because the "head of household" status bears no relationship to job performance, the EEOC will find benefits based on such rules to be in prima facie violation of Title VII.ⁿ³⁴ Similarly, EEOC regulations interpreting the EPA provide that a "head of household" defense to an alleged EPA violation will be closely scrutinized.ⁿ³⁵

FEHC regulations provide that insofar as an employment practice discriminates against one sex or on the basis of marital status, an employer or other entity covered by the FEHA may not condition the availability of fringe benefits on whether an employee is a "head of household," "principal wage earner," "secondary wage earner," or of other similar status.ⁿ³⁶

[d] Pregnancy Benefits

Both Title VII and the FEHA prohibit discrimination on the basis of pregnancy.ⁿ³⁷ According to the EEOC regulations, payment under any health or disability insurance or sick leave plan shall be made for disability due to pregnancy, childbirth, or related medical condition on the same terms and conditions as for other disabilities.ⁿ³⁸ Thus, it is unlawful to treat pregnancy-related conditions less favorably than other medical conditions for purposes of employment benefits.ⁿ³⁹ In *Newport News Shipbldg. & Dry Dock v. EEOC*,ⁿ⁴⁰ an employer's health insurance plan provided its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions. However, the plan provided less favorable pregnancy benefits for spouses of male employees.ⁿ⁴¹ The United States Supreme Court held that the employer's plan was unlawful.ⁿ⁴² The Court explained that the plan provided limited pregnancy-related benefits for employees' wives, and afforded more extensive coverage for employees' spouses for all other medical conditions.ⁿ⁴³ Thus, it reasoned that the husbands of female employees received a specified level of benefits for all conditions, while the wives of male employees received such coverage except for pregnancy-related conditions.ⁿ⁴⁴ The Court concluded that the plan unlawfully gave married male employees a benefit package for their dependents that was less inclusive than the dependency coverage provided to married female employees.ⁿ⁴⁵ Similarly, under the FEHA, with the exception of employers who are not subject to Title VII with fewer than 14 employees, employers who provide benefits for other temporary disabilities must also provide such benefits for pregnancy disability.ⁿ⁴⁶

[e] Retirement and Pension Plans

Both the EEOC and FEHA regulations disallow pension or retirement plans which have different optional or compulsory retirement ages for men and women.ⁿ⁴⁷ These regulations also prohibit the establishment of plans which require differing contributions or which pay out different benefits based on sex.ⁿ⁴⁸ The prohibition on predicated retirement benefits or contributions on a sex-based distinction is supported by the United States Supreme Court.ⁿ⁴⁹

[4] Disability and Medical Condition Issues

The ADA prohibits covered employers from discriminating against employees in the terms or conditions of employment.ⁿ⁵⁰ The regulations promulgated by the EEOC define fringe benefits as a term or condition of employment and include fringe benefits which are not administered by the employer.ⁿ⁵¹ Further, the ADA prohibits employers from contracting with fringe benefits providers if that contract or relationship would subject covered employees to prohibited discrimination.ⁿ⁵² However, under the ADA the terms of a health benefit plan may be based on risk classifications that are consistent with state law, unless they are actually a subterfuge to evade the purposes of

ADA regulations.n53

In order to assist employers in determining which of the health plans provided contain disability based distinctions which are not consistent with the ADA, the EEOC has issued interim guidelines regarding the provision of health benefits.n54 In these guidelines, the Commission defines the term "disability based distinction" in the context of employer provided health insurance.n55 Blanket pre-existing condition clauses, universal limits or exclusions of all experimental drugs or all elective surgery, and coverage limits on medical procedures that are not exclusively, or nearly exclusively, utilized for the treatment of a particular disability are not distinctions based on disability.n56 However, insurance provisions which single out a particular disability (deafness, AIDS, schizophrenia), a discrete group of disabilities (cancers, muscular dystrophies, kidney diseases), or disability in general (non-coverage of all conditions that substantially limit a major life activity) are disability based distinctions forbidden by the law.n57 Unlike age and sex discrimination statutes that specifically exclude bona fide plans which predated the applicable statute, *see* sections [2] and [3], *above*, based on the legislative history of the Act, the interim guidelines caution employers that "the ADA does not provide a 'safe harbor' for health insurance plans that were adopted prior to its July 26, 1990 enactment."n58 In contrast, the FEHA does not require employers to change bona fide health insurance plans or benefits based on its prohibitions on disability discrimination.n59 However, an employer may not condition any employment decision regarding a physically handicapped applicant or employee on the waiver of any fringe benefit.n60

For discussion of issues relating to discrimination in compensation generally, *see* § 41.56. For discussion relating to discrimination regarding the amount of contributions or benefits or eligibility for participation because of sex, *see* [3], *above*. For further discussion of the "bona fide employee benefit plan" exemption, *see* [2], *above*, and § 41.93.

Legal Topics:

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

Labor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General OverviewLabor & Employment LawEqual PayGeneral OverviewLabor & Employment LawU.S. Equal Employment Opportunity CommissionGeneral OverviewLabor & Employment LawU.S. Equal Employment Opportunity CommissionEnforcementGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 C.F.R. § 1604.9(a) (EEOC guideline on sex discrimination), 29 C.F.R. § 1620.11(EEOC regulation interpreting federal Equal Pay Act of 1963).

(n2)Footnote 2. *See* 29 C.F.R. § 1607.9(b) (Title VII); 29 C.F.R. § 1620.11(b) (EPA regulations).

(n3)Footnote 3. *See* 29 U.S.C. § 623.

(n4)Footnote 4. *See* 29 C.F.R. § 1630.16(f).

(n5)Footnote 5. *See* Gov. Code § 12940(a); *see also* Gov. Code § 12940(a)(3)(B) (marital status); Gov. Code § 12945(a) (pregnancy); Gov. Code § 12993(b) (sex or medical condition); and *see generally* Gov. Code § 12940(a) (general prohibition on discrimination against persons protected by the FEHA "in terms, conditions, or privileges of employment").

(n6)Footnote 6. *See* 29 U.S.C. § 623(a), (b), (c), and (e).

(n7)Footnote 7. 29 U.S.C. § 623(f)(2)(B). This section was part of the Older Workers Benefit Protection Act (OWBPA), Pub. L. No. 101-433, § 105(a) which applies to employee benefit plans established, modified, or otherwise affected on or after October 16, 1990 (the date the OWBPA was enacted). Plans established before that date are governed by the former ADEA "bona fide employee benefit plan" exemption unless and until they are modified or

otherwise affected. The pre-OWBPA exemption provided that it is not unlawful for an employer "to observe the terms of ... any bona fide employee benefit plan ... [that] is not subterfuge to evade the purposes of [the ADEA]." 29 U.S.C. § 623(f)(2), prior to amendment by Pub. L. No. 101-433. Plans established before 1978 are not subject to challenge based on age discrimination because they pre-date the original law. *See Public Employees Retirement System of Ohio v. Betts* (1989) 492 U.S. 158, 106 L. Ed. 2d 134, 109 S.Ct 2854.

(n8)Footnote 8. *See Smith v. Alum Rock Union Elementary School District* (1992) 6 Cal. App. 4th 1651, 8 Cal. Rptr. 2d 399 (court invalidated state law which limited eligibility for disability to those under age 60 as conflicting with ADEA; claim also stated a cause of action under former Gov. Code § 12941. Now see Gov. Code § 12940(a)(5).)

(n9)Footnote 9. *See Dorsch v. L.B. Foster Co.* (7th Cir. 1986) 782 F.2d 1421 .

(n10)Footnote 10. *See Finnegan v. Trans World Airlines, Inc.* (7th Cir. 1992) 967 F.2d 1161 .

(n11)Footnote 11. *See* former Gov. Code § 12941(a). That provision was repealed effective January 1, 2003. *see* Stats. 2002, ch. 525, § 2.

(n12)Footnote 12. *See* 42 U.S.C. § 2000e-2(a)(1),(2); for a discussion regarding exceptions to proscriptions against age discrimination in fringe benefits, *see* [2], *above*.

(n13)Footnote 13. 29 C.F.R. § 1620.10.

(n14)Footnote 14. *See Gunther v. County of Washington* (9th Cir. 1979) 623 F.2d 1303, 1309 , *aff'd on other grounds*, 452 U.S. 161 (1981) ; 29 U.S.C. § 216(d); *see also Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L. Ed. 2d 1 .

(n15)Footnote 15. 29 C.F.R. § 1604.9(b) (EEOC guideline on sex discrimination), 29 C.F.R. § 1620.11(b) (EEOC regulation interpreting EPA).

(n16)Footnote 16. *See Wambheim v. J.C. Penney Co., Inc.* (9th Cir. 1981) 642 F.2d 362, 365 ; *see also* 29 C.F.R. § 1604.9(b) (EEOC guideline on sex discrimination; discrimination between men and women with regard to fringe benefits is unlawful employment practice), 29 C.F.R. § 1620.11(b) (EEOC regulation interpreting EPA; same).

(n17)Footnote 17. 29 C.F.R. § 1604.9(e) (EEOC guideline on sex discrimination).

(n18)Footnote 18. *See* 2 Cal. Code Reg. §§ 7291.1(b)(1), 7292.6(a)(1).

(n19)Footnote 19. Gov. Code § 12993(b).

(n20)Footnote 20. *See* 29 C.F.R. § 1604.9(d) (EEOC guideline on sex discrimination), 29 C.F.R. § 1620.11(d) (EEOC regulation interpreting EPA); *see also Newport News Shipbldg. & Dry Dock v. EEOC* (1983) 462 U.S. 669, 682-683, 103 S. Ct. 2622, 77 L. Ed. 2d 89 .

(n21)Footnote 21. *See* 29 C.F.R. § 1604.9(d) (EEOC guideline on sex discrimination).

(n22)Footnote 22. *See* 2 Cal. Code Reg. § 7292.6(a)(A).

(n23)Footnote 23. *See* 2 Cal. Code Reg. § 7292.6(a)(B).

(n24)Footnote 24. *See Wambheim v. J.C. Penney Co., Inc.* (9th Cir. 1981) 642 F.2d 362, 364 .

(n25)Footnote 25. *Wambheim v. J.C. Penney Co., Inc.* (9th Cir. 1981) 642 F.2d 362 .

(n26)Footnote 26. *See Wambheim v. J.C. Penney Co., Inc.* (9th Cir. 1981) 642 F.2d 362, 365 . For a detailed

discussion relating to prima facie proof of discrimination under the "disparate impact" theory of liability, *see* § 41.21.

(n27)Footnote 27. *See Wambheim v. J.C. Penney Co., Inc.* (9th Cir. 1981) 642 F.2d 362, 363, 366 .

(n28)Footnote 28. *Wambheim v. J.C. Penney Co., Inc.* (9th Cir. 1983) 705 F.2d 1492 .

(n29)Footnote 29. *Wambheim v. J.C. Penney Co., Inc.* (9th Cir. 83) 705 F.2d 1492, 1495 ; *see E.E.O.C. v. J.C. Penney Co., Inc.* (6th Cir. 1988) 843 F.2d 249, 253 .

(n30)Footnote 30. *E.E.O.C. v. Fremont Christian School* (N.D. Cal. 1984) 609 F. Supp. 344 (Title VII; EPA).

(n31)Footnote 31. *E.E.O.C. v. Fremont Christian School* (N.D. Cal. 1984) 609 F. Supp. 344, 346 (Title VII; EPA).

(n32)Footnote 32. *E.E.O.C. v. Fremont Christian School* (N.D. Cal. 1984) 609 F. Supp. 344, 350-351 (Title VII; EPA); *see* discussion in §§ 41.10-41.11 and 41.20-41.21.

(n33)Footnote 33. *E.E.O.C. v. Fremont Christian School* (N.D. Cal. 1984) 609 F. Supp. 344, 350-351 (Title VII; EPA).

(n34)Footnote 34. *See* 29 C.F.R. § 1604.9(c).

(n35)Footnote 35. *See* 29 C.F.R. § 1620.21.

(n36)Footnote 36. 2 Cal. Code Reg. §§ 7291.1(b)(2), 7292.6(b)(2).

(n37)Footnote 37. *See* 42 U.S.C. §§ 2000e(k), 2000e-2(a) (Title VII); Gov. Code § 12945(FEHA); *see also* discussion in § 41.36[2][c].

(n38)Footnote 38. *See* 29 C.F.R. 1604.10(b); *see* EEOC Compliance Manual (CCH) § 626.8 (pregnancy, disability and sick-leave benefits).

(n39)Footnote 39. *Morgan v. Safeway Stores, Inc.* (9th Cir. 1989) 884 F.2d 1211, 1213 (Title VII) .

(n40)Footnote 40. *Newport News Shipbldg. & Dry Dock v. EEOC* (1983) 462 U.S. 669, 103 S. Ct. 2622, 77 L. Ed. 2d 89 .

(n41)Footnote 41. *See Newport News Shipbldg. & Dry Dock v. EEOC* (1983) 462 U.S. 669, 670, 103 S. Ct. 2622, 77 L. Ed. 2d 89 .

(n42)Footnote 42. *See Newport News Shipbldg. & Dry Dock v. EEOC* (1983) 462 U.S. 669, 676, 683-684, 103 S. Ct. 2622, 77 L. Ed. 2d 89 .

(n43)Footnote 43. *See Newport News Shipbldg. & Dry Dock v. EEOC* (1983) 462 U.S. 669, 683, 103 S. Ct. 2622, 77 L. Ed. 2d 89 .

(n44)Footnote 44. *See Newport News Shipbldg. & Dry Dock v. EEOC* (1983) 462 U.S. 669, 684, 103 S. Ct. 2622, 77 L. Ed. 2d 89 .

(n45)Footnote 45. *See Newport News Shipbldg. & Dry Dock v. EEOC* (1983) 462 U.S. 669, 684, 103 S. Ct. 2622, 77 L. Ed. 2d 89 .

(n46)Footnote 46. *See* 2 Cal Code Reg. § 7291.5(a)(5) and exception set out in 2 Cal Code Reg. § 7291.5(d) (employers who are not subject to Title VII with fewer than 14 employees need not provide benefits for pregnancy even

if they provide benefits for other temporary benefits).

(n47)Footnote 47. *See* 29 U.S.C. § 1604.9(f) (Title VII) and 2 *Cal Code Reg.* § 7291.1(4).

(n48)Footnote 48. *See* 29 U.S.C. § 1604.9(b) (prohibitions on discrimination in fringe benefits generally) and 2 *Cal Code Reg.* § 7291.1(3).

(n49)Footnote 49. *See Los Angeles, Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (Title VII prohibits employers from requiring female employees to make greater contributions in order to receive the same benefits as men) and *Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 1079, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 (Title VII prohibits employers from offering optional retirement plans which pay women lower benefits than men).

(n50)Footnote 50. 42 U.S.C. § 12112(a).

(n51)Footnote 51. *See* 29 C.F.R. § 1630.4.

(n52)Footnote 52. 42 U.S.C. § 12112(b)(2).

(n53)Footnote 53. *See* 29 C.F.R. § 1630.16(f).

(n54)Footnote 54. *See EEOC Compliance Manual (CCH)* § 902, P 6902 (interim enforcement guidance on application of ADA to disability based distinctions in employer provided health insurance).

(n55)Footnote 55. *See EEOC Compliance Manual (CCH)* § 902, P 6902 (interim enforcement guidance on application of ADA to disability based distinctions in employer provided health insurance).

(n56)Footnote 56. *See EEOC Compliance Manual (CCH)* § 902, P 6902 (interim enforcement guidance on application of ADA to disability based distinctions in employer provided health insurance).

(n57)Footnote 57. *See EEOC Compliance Manual (CCH)* § 902, P 6902 (interim enforcement guidance on application of ADA to disability based distinctions in employer provided health insurance).

(n58)Footnote 58. *See EEOC Compliance Manual (CCH)* § 902, P 6902 (interim enforcement guidance on application of ADA to disability based distinctions in employer provided health insurance).

(n59)Footnote 59. *See Gov. Code* § 12993(b).

(n60)Footnote 60. 2 *Cal. Code Reg.* § 7294.2(a).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.62

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.62 Layoffs and Reductions in Force

[1] General Discrimination Issues

Layoffs and reductions in force (RIFs), like any other adverse employment practice, are unlawful if they are based on membership in a classification protected by equal employment opportunity law. Unlawful discrimination may be established under either the "disparate treatment" or "disparate impact" theories of liability.ⁿ¹

[2] Disparate Treatment Cases

In cases alleging age discrimination arising out of RIFs, plaintiffs must satisfy a modified version of the prima facie case requirements of *McDonnell Douglas Corp. v. Green*.ⁿ² The analysis is the same in cases alleging race or gender discrimination in a RIF.^{n2.1} When the discharge results from a general RIF, plaintiffs need not show they were replaced; rather, they must show the discharge occurred under circumstances giving rise to an inference of discrimination. They can make this showing through circumstantial, statistical or direct evidence. The inference can be established by a showing that the employer had a continuing need for their skills and services in that their duties were still being performed, or by showing that others not in the protected class were treated more favorably.^{n2.2} Unlike other Title VII cases, however, ADEA plaintiffs need not prove that their protected characteristic (age) was the employer's sole motivating factor for the adverse employment decision.ⁿ³

If the plaintiff establishes a prima facie case, the employer may meet its burden of production by showing a legitimate, non-discriminatory reason. A RIF is a legitimate nondiscriminatory reason for laying off an employee.^{n3.1} In *Hazen Paper Co. v. Biggins*,ⁿ⁴ the Supreme Court held that permissible nondiscriminatory reasons can include laying off employees with the most years of service, provided the scheme is tenure based and not age based.^{n4.1} In a "disparate treatment" case, the burden then shifts to the plaintiff to prove the employer's reason is pretextual *and* that plaintiff has been the victim of willful discrimination.ⁿ⁵ Plaintiff may rely on the same evidence used to establish the prima facie case or present additional evidence.^{n5.1} To survive summary judgment, the burden is plaintiff to produce enough evidence to allow a reasonable factfinder to conclude either the alleged reason for the discharge was false or the true reason for the discharge was a discriminatory one.^{n5.2} Plaintiff must do more than establish a prima facie case and deny

the credibility of the defendant's witnesses.^{n5.3} In an ADEA action, to raise a triable issue of fact regarding pretext based solely on statistics, the statistics must show a stark pattern of discrimination unexplainable on grounds other than age.^{n5.4} Thus, a statistical analysis of a RIF taking into account only two variables, *i.e.*, the employee's age at the time of the RIF and whether the employee was terminated, and not making use of job performance as a variable, was insufficient to raise a triable issue of fact regarding pretext.^{n5.5}

In *O'Day v. McDonnell Douglas Helicopter*,ⁿ⁶ the employer had a general workforce reduction, but plaintiff believed he had been denied a promotion, and then laid off because of his age. During discovery, the employer learned that on the day plaintiff had been denied promotion, he copied "personal" documents from his supervisor's files. Upon learning of this, the employer converted plaintiff's layoff to a termination. In its motion for summary judgment, the employer argued it should be absolved of all liability for alleged age discrimination because of the after-acquired evidence of plaintiff's misconduct. The Ninth Circuit Court of Appeals reversed the trial court's grant of summary judgment, holding that under *McKennon v. Nashville Banner Publishing Co.*,ⁿ⁷ the employer is not immunized from liability for unlawful discrimination by virtue of after-acquired evidence of plaintiff's misconduct. Rather, the misconduct limits the back pay, front pay, and reinstatement remedies otherwise available to plaintiff.ⁿ⁸

[3] Disparate Impact Cases

Plaintiffs have often used statistical evidence to show the RIF had disproportionate impact on a protected classification of employees and thus evinced a discriminatory intent. In *Wards Cove Packing Co. v. Atonio*,ⁿ⁹ the Supreme Court reversed a Ninth Circuit holding that plaintiffs, who were cannery workers, had made out a prima facie case based solely on a bottom line statistical showing of a high percentage of non-White workers impacted by the employer's action. Although statistics may be strong evidence of discrimination,ⁿ¹⁰ the vitality of establishing age discrimination by use of a disparate impact theory is somewhat in doubt.ⁿ¹¹

For a detailed discussion relating to the "disparate treatment" and "disparate impact" theories of liability, *see* §§ 41.10-41.11 and 41.20-41.21. For further discussion of voluntary and involuntary retirement, *see* § 41.67[2].

Legal Topics:

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

Labor & Employment Law Discrimination Age Discrimination Employment Practices General Overview Labor & Employment Law Discrimination Age Discrimination Employment Practices Reductions in Force Labor & Employment Law Discrimination Disparate Treatment General Overview Labor & Employment Law Discrimination Disparate Treatment Employment Practices General Overview

FOOTNOTES:

(n1)Footnote 1. *See Whack v. Peabody & Wind Engineering Co.* (3d Cir. 1979) 595 F.2d 190, 193-194 (Title VII; "disparate treatment" and "disparate impact"); *Lim v. Citizens Sav. and Loan Ass'n (N.D. Cal. 1976) 430 F. Supp. 802, 813-816* (Title VII; "disparate treatment"); *see also Gov. Code § 12941*, discussed in § 41.104[1].

(n2)Footnote 2. *See McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (requiring prima facie case that (1) plaintiff was in protected class, (2) plaintiff was qualified for position, (3) plaintiff suffered adverse employment decision, (4) employer sought to, or did, replace plaintiff with person having similar qualifications); *see also Muzquiz v. City of Emeryville* (2000) 79 Cal. App. 4th 1106, 1121-1122, 94 Cal. Rptr. 2d 579 (employee failed to show prima facie age discrimination and failed to prove improper motive for job elimination).

(n3)Footnote 2.1. *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1295 (plaintiffs failed to meet standard under Title VII of showing race or gender discrimination in RIF).

(n4)Footnote 2.2. *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1281 (despite weaknesses in evidence, court assumed without deciding that plaintiffs had established prima facie case under ADEA).

(n5)Footnote 3. *See, e.g., Nidds v. Schindler Elevator Corp.* (9th Cir. 1996) 113 F.3d 912, 917 (failure to prove replacement by younger employee is not necessarily fatal to age discrimination claim where termination results from general reduction in force due to business conditions); *Montana v. First Federal S. & L. of Rochester* (2d Cir. 1989) 869 F.2d 100, 105 (plaintiff need only prove age "made a difference"); *Robinson v. Overseas Military Sales Corp.* (2d Cir. 1994) 21 F.3d 502, 508 (plaintiff need only prove age a "determinative factor"); *Overgard v. Cambridge Book Co.* (7th Cir. 1988) 858 F.2d 371 ("determining factor").

(n6)Footnote 3.1. *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1282 (employer met burden of production by showing plaintiffs' lack of proper qualifications to be selected for positions remaining after RIF).

(n7)Footnote 4. *See Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 346-347 .

(n8)Footnote 4.1. *See Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 346-347 ; *see also Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1290 ("favoritism" of managers in choosing to retain younger employee over employee in protected class is not prohibited age discrimination; employer may also choose not to demote employee to position for which employee is overqualified without violating ADEA if "overqualification" is not mask for age discrimination).

(n9)Footnote 5. *See St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 113 S. Ct. 2742, 2747-2748, 125 L. Ed. 2d 407 ; *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1282 ; *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 889 ; *but cf. Washington v. Garrett* (9th Cir. 1993) 10 F.3d 1421, 1432 .

(n10)Footnote 5.1. *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1282 .

(n11)Footnote 5.2. *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1287 .

(n12)Footnote 5.3. *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1289-1290 .

(n13)Footnote 5.4. *Pottenger v. Potlatch Corp.* (9th Cir. 2003) 329 F.3d 740, 748 ; *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1283 .

(n14)Footnote 5.5. *Pottenger v. Potlatch Corp.* (9th Cir. 2003) 329 F.3d 740, 748 .

(n15)Footnote 6. *O'Day v. McDonnell Douglas Helicopter Co.* (9th Cir. 1996) 79 F.3d 756 .

(n16)Footnote 7. *McKennon v. Nashville Banner Publ. Co.* (1995) 513 U.S. 352, 115 S. Ct. 879, 886-887, 130 L. Ed. 2d 852 .

(n17)Footnote 8. *See O'Day v. McDonnell Douglas Helicopter Co.* (9th Cir. 1996) 79 F.3d 756, 762 .

(n18)Footnote 9. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 649-650 .

(n19)Footnote 10. *See Leftwich v. Harris-Stowe State College* (8th Cir. 1983) 702 F.2d 686 (high statistical correlation between age of faculty and tenure).

(n20)Footnote 11. *See Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 351-352 (concurring opinion of Justice Kennedy, joined by Justice Rehnquist and Justice Thomas that "[there are] substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."); *but cf. Mangold v. California Pub. Utils. Comm'n* (9th Cir. 1995) 67 F.3d 1470 (instructing jury on the "disparate impact"

theory in an age discrimination case and combining the disparate impact and disparate treatment theories in the verdict form was not prejudicial error since the jury found the discrimination had been intentional.)



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2-41 California Employment Law § 41.63

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.63 Medical Examinations

The ADA provides that employers may require current employees to undergo medical examinations or inquiries (including psychiatric examinations or inquiries), but only for purposes that are job-related and consistent with a business necessity.ⁿ¹ In the examination or inquiry, an employer may ask questions regarding an employee's ability to perform job-related functions.ⁿ² In addition, an employer may conduct voluntary medical examinations, including voluntary medical histories, that are part of an employee health program.ⁿ³

Employees are not required to prove that they are qualified individuals with a disability to challenge the scope of medical examinations under the ADA.ⁿ⁴ The statute,ⁿ⁵ which prohibits a covered entity from inquiring into whether an employee is an individual with a disability unless the "examination or inquiry is shown to be job-related and consistent with business necessity," places the burden on the covered entity to make the requisite showing of job-relatedness.ⁿ⁶

Medical information obtained in either a required or a voluntary medical examination is confidential, subject to certain permitted disclosures to managerial and safety personnel and government officials.ⁿ⁷

Neither the ADA nor the implementing regulations define "medical examination," and case law interpreting this provision is limited. Agency guidance, however, is more detailed.ⁿ⁸ The interpretive appendix to the applicable regulationⁿ⁹ equates "fitness for duty exams" with medical exams allowed under the ADA, but distinguishes "physical agility tests," which may be given at any point in the application or employment process.ⁿ¹⁰ Physical agility tests must be given to all similarly situated applicants or employees regardless of disability. If the test screens out or tends to screen out an individual with a disability, the employer must demonstrate that the test is job-related and consistent with business necessity and that performance cannot be achieved with reasonable accommodation.ⁿ¹¹

EEOC Enforcement Guidance draws a further distinction between medical examinations and physical agility tests. It defines a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health," and provides the following seven factors to be considered in determining whether a test is a medical examination:ⁿ¹²

- (1) Whether the test is administered by a health care professional.
- (2) Whether the test is interpreted by a health care professional.
- (3) Whether the test is designed to reveal an impairment of physical or mental health.
- (4) Whether the test is invasive.
- (5) Whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task.
- (6) Whether the test normally is given in a medical setting.
- (7) Whether medical equipment is used.

Under the EEOC Enforcement Guidance, in some cases a combination of factors may be relevant to the determination of whether a test is a medical examination. In other cases, one factor may be enough to determine that a test or procedure is medical.

The Enforcement Guidance also provides a list of tests considered medical examinations, including "blood pressure screening and cholesterol testing" and "range-of-motion tests that measure muscle strength and motor function." It further states that certain employer-required tests are generally not medical examinations, including physical agility tests, which measure an employee's ability to perform actual or simulated job tasks, and physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting, as long as the tests do not include examinations that could be considered medical (*e.g.*, measuring heart rate or blood pressure).

Thus, for example, using the EEOC Enforcement Guidance, the Ninth Circuit found an employer-administered "physical capacity evaluation" ("PCE") to be a medical test under the ADA. The PCE included range of motion and muscle strength tests, and the state-licensed occupational therapist performing the test measured the employee's heart rate and recorded an observation about her breathing after a treadmill test. Each of those tests was within the EEOC's description of tests considered medical examinations. The post-treadmill test heart rate measurement and notation regarding the employee's "increased oxygen" intake and demonstration of "poor aerobic fitness" weighed heavily in favor of considering the PCE a medical exam, particularly because the occupational therapist had already noted that the employee "was able to walk for 20 minutes at 2.8 mph on treadmill without increased antalgic behavior or objective findings of pain complaints noted." If the observations had ended there, it might have been appropriate to characterize the treadmill test as a test that measured the employee's performance of a physical task. But measuring her heart rate and recording observations about her breathing and aerobic fitness were unnecessary to determine whether she could perform the task. Moreover, the EEOC Enforcement Guidance identified this kind of examination measurements as inappropriate to include in a non-medical physical agility or fitness test.¹³ Further, application of the seven-factor test established that the PCE was a medical examination under at least four of the factors: (1) it was performed by a medical professional; (an occupational therapist),¹⁴ (2) a medical professional interpreted it; (3) although it was ostensibly intended to determine whether the employee could return to work, the broad reach of the test was capable of revealing impairments of her physical and mental health, particularly in light of recording subjective reports of current pain level, use of medication and assistive devices, and communication, cognitive ability, attitude, and behavior; and (4) the therapist recorded the employee's heart rate and breathing pattern after the treadmill test and muscle pain and stiffness after the first day of testing, which were measurements of her physiological response to her performance of a task and went beyond collecting information necessary to determine whether she was physically capable of performing the task.¹⁵ Finally, the Ninth Circuit found that the limited case law available also established that the PCE was a medical examination.¹⁶

Legal Topics:

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

Labor & Employment Law Discrimination Disability Discrimination General Overview Labor & Employment Law Discrimination Disability Discrimination Employment Practices Examinations & Inquiries Labor & Employment Law Discrimination Disparate Treatment General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14(c); *EEOC Compliance Manual (CCH)* § 902 (Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities). *See also Jimeno v. Mobil Oil Co.* (9th Cir. 1995) 66 F.3d 1514 (plaintiff underwent medical examinations by his, the company's and an outside doctor to determine if his injury was work-related). For discussion of preemployment medical examinations under the ADA, *see* § 41.46. For general discussion of the defense of business necessity and job-relatedness, *see* § 41.95.

(n2)Footnote 2. 42 U.S.C. § 12112(d)(4); 29 C.F.R. § 1630.14(c).

(n3)Footnote 3. 42 U.S.C. § 12112(d)(4)(B); 29 C.F.R. § 1630.14(d); for a discussion of preemployment medical examinations, *see* § 41.46.

(n4)Footnote 4. *Indergard v. Georgia-Pacific Corp.* (9th Cir. 2009) 582 F.3d 1049, 2009 U.S. App. LEXIS 21312, *9 (42 U.S.C. § 12112(d)(4)(A) applies to all employees, whether or not they are disabled under ADA); *Fredenburg v. Contra Costa County Dep't of Health* (9th Cir. 1999) 172 F.3d 1176, 1182 (provisions of 42 U.S.C. § 12112(d)(2)-(4)--which state types of prohibited exams--refer to employees and job applicants, not qualified individuals with disability).

(n5)Footnote 5. 42 U.S.C. § 12112(d)(4)(A).

(n6)Footnote 6. *Fredenburg v. Contra Costa County Dep't of Health* (9th Cir. 1999) 172 F.3d 1176, 1182-1183 (resolution of issue is factual and situational questions best decided by district court in first instance).

(n7)Footnote 7. *See* 29 C.F.R. § 1630.14(c), (d).

(n8)Footnote 8. *Indergard v. Georgia-Pacific Corp.* (9th Cir. 2009) 582 F.3d 1049, 2009 U.S. App. LEXIS 21312, *9-*10. *See also Christensen v. Harris County* (2000) 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (interpretations in policy statements, agency manuals, and enforcement guidelines are entitled to respect only to extent they have power to persuade); *Meritor Sav. Bank v. Vinson* (1986) 477 U.S. 57, 65, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (although agency guidance documents are not controlling upon courts by reason of their authority, they constitute body of experience and informed judgment to which courts and litigants may properly resort for guidance).

(n9)Footnote 9. 29 C.F.R. § 1630.14(c).

(n10)Footnote 10. 29 C.F.R. Pt. 1630, App. § 1630.14(a).

(n11)Footnote 11. 29 C.F.R. Pt. 1630, App. § 1630.14(a).

(n12)Footnote 12. Enforcement Guidance on Disability-Related Inquiries and Medical Examinations, available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

(n13)Footnote 13. *Indergard v. Georgia-Pacific Corp.* (9th Cir. 2009) 582 F.3d 1049, 2009 U.S. App. LEXIS 21312, *13-*14.

(n14)Footnote 14. *See also Medlin v. Rome Strip Steel Co.* (N.D.N.Y. 2003) 294 F. Supp. 2d 279, 294 (that PCE was administered by business specializing in physical therapy and not medical doctor made it no less "medical" than

nurse taking blood pressure or emergency medical technician administering care to patient on way to hospital).

(n15)Footnote 15. *Indergard v. Georgia-Pacific Corp.* (9th Cir. 2009) 582 F.3d 1049, 2009 US. App. LEXIS 21312, *14-*17 .

(n16)Footnote 16. *See Conroy v. New York Dep't of Corr. Serv.* (2d Cir. 2003) 333 F.3d 88, 92, 95-96 (employer's policy that all employees returning from sick leave provide medical certification including brief general diagnosis sufficiently informative as to allow employer to make determination concerning employee's entitlement to leave was sufficient to trigger protections of ADA under 42 U.S.C. § 12112(d)(4)(A), because general diagnosis could tend to reveal disability); *Medlin v. Rome Strip Steel Co.* (N.D.N.Y. 2003) 294 F. Supp. 2d 279, 293-294 (because sole purpose of functional capacity evaluation was to determine whether employee could physically return to work without any restrictions and was in essence and in reality fitness for duty exam, it was likely medical examination).



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2-41 California Employment Law § 41.64

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.64 Nepotism

The principles discussed in § 41.43[3] relating to nepotistic hiring are also applicable to nepotistic practices affecting incumbent employees. The general rule is that such practices are unlawful if they perpetuate a discriminatory status quo.ⁿ¹ In *Bonilla v. Oakland Scavenger Co.*,ⁿ² shareholder-employees received preferential wages, hours, and job assignments. All shareholder-employees were of Italian ancestry, and every new shareholder-employee had either a relative or close friend who was a shareholder.ⁿ³ Using a "disparate impact" analysis,ⁿ⁴ the Ninth Circuit Court of Appeals held that although the preference plan was neutral on its face, it had a discriminatory impact on the employer's nonshareholder minority employees.ⁿ⁵ The employer argued that its "legitimate and overriding business consideration" for the plan was a superior interest in protecting and providing for members of the immediate families of the company's founders. The court countered that Title VII case law was clear that nepotistic concerns cannot supersede the nation's paramount goal of equal economic opportunity for all.ⁿ⁶ The court thus held that to the extent that preferential treatment is tied to stock ownership, the shareholder preference plan violated Title VII.ⁿ⁷

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

FOOTNOTES:

(n1)Footnote 1. See *Bonilla v. Oakland Scavenger Co.* (9th Cir. 1982) 697 F.2d 1297, 1303 (Title VII).

(n2)Footnote 2. See *Bonilla v. Oakland Scavenger Co.* (9th Cir. 1982) 697 F.2d 1297 (Title VII).

(n3)Footnote 3. See *Bonilla v. Oakland Scavenger Co.* (9th Cir. 1982) 697 F.2d 1297, 1300 (Title VII).

(n4)Footnote 4. See §§ 41.20-41.21.

(n5)Footnote 5. *See Bonilla v. Oakland Scavenger Co. (9th Cir. 1982) 697 F.2d 1297, 1303 .*

(n6)Footnote 6. *See Bonilla v. Oakland Scavenger Co. (9th Cir. 1982) 697 F.2d 1297, 1303 (Title VII); see also Robinson v. Lorillard Corp. (4th Cir. 1971) 444 F.2d 791, 798 n.5, cert. dismissed, 404 U.S. 1006 (1971) ; Local 53 of Int. Ass'n of Heat & Frost I. & A. Wkrs. v. Vogler (5th Cir. 1969) 407 F.2d 1047, 1054 .*

(n7)Footnote 7. *See Bonilla v. Oakland Scavenger Co. (9th Cir. 1982) 697 F.2d 1297, 1303-1304 (Title VII).*



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2-41 California Employment Law § 41.65

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.65 No-Spouse Rules

Although the FEHA expressly prohibits discrimination based on marital status,ⁿ¹ "no-spouse" rules prohibiting spouses from working in the same department, division, or facility may be lawful under the FEHA if they are imposed for reasons of supervision, safety, security, or morale.ⁿ² There is no express Title VII provision governing "no-spouse" rules, but presumably such rules are lawful if they are evenly applied. Accordingly, plaintiffs are required to produce sufficient evidence to establish the "disparate impact" of a "no-spouse" rule.ⁿ³

"No-spouse" rules applied to incumbent employees often require employees who marry other employees to transfer to other departments or terminate employment.ⁿ⁴ In *Thomas v. Metroflight, Inc.*,ⁿ⁵ the employer's "no-spouse" rule allowed employees who married the option of choosing which employee would quit. If neither quit, the employer terminated one of the employees based on seniority.ⁿ⁶ The Tenth Circuit Court of Appeals held that although the plaintiffs showed that female employees were fired in the only two instances that the employer enforced the "no-spouse" rule, the sample was too small to prove a case of disparate impact on female employees under Title VII.ⁿ⁷ The court also rejected the plaintiff's statistical evidence showing that if employees' decisions about which spouse should resign were always based on salary, more women would terminate than men because most women in the sample group were paid less than men. The court observed that the employer's "no-spouse" rule did not require the employees to base their decisions on salary, and that other factors, such as the availability of other jobs, may significantly affect such decisions.ⁿ⁸ The court stated that the evidence would be sufficient to show a disparate impact on women if salary was, in fact, a controlling factor, but the plaintiff presented only assumptions to that effect.ⁿ⁹

The *Thomas* court also explained that a plaintiff in a "no-spouse" case need not necessarily prove that only one factor, such as money, controls the termination decision in all cases. A plaintiff must, however, prove, by statistical studies, evidence of experience in sufficiently similar circumstances, expert testimony on decision-making in the context of "no-spouse" rules, or other evidence, that the choice made will result in the termination of the woman's employment in significantly more instances.ⁿ¹⁰

For a discussion relating to "no-spouse" rules relating to employee selection practices, see § 41.42[2][1].

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisparate ImpactEmployment PracticesGeneral OverviewLabor & Employment LawDiscriminationDisparate ImpactEmployment PracticesSelection ProceduresGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

FOOTNOTES:

(n1)Footnote 1. *See Gov. Code § 12940(a)*.

(n2)Footnote 2. *See Gov. Code § 12940(a)(3); 2 Cal. Code Reg. § 7292.5(a)*. For a discussion relating to this provision as a substantive defense to FEHA liability, *see* 41.110.

(n3)Footnote 3. *See Thomas v. Metroflight, Inc. (10th Cir. 1987) 814 F.2d 1506, 1509 ; Harper v. Trans World Airlines, Inc. (8th Cir. 1975) 525 F.2d 409, 414* . One court has suggested, however, that such rules in practice often result in discrimination against women and are generally unjustified. *See Thomas v. Metroflight, Inc. (10th Cir. 1987) 814 F.2d 1506, 1509* .

(n4)Footnote 4. *See, e.g., Thomas v. Metroflight, Inc. (10th Cir. 1987) 814 F.2d 1506, 1508 ; Harper v. Trans World Airlines, Inc. (8th Cir. 1975) 525 F.2d 409, 410* .

(n5)Footnote 5. *Thomas v. Metroflight, Inc. (10th Cir. 1987) 814 F.2d 1506* .

(n6)Footnote 6. *See Thomas v. Metroflight, Inc. (10th Cir. 1987) 814 F.2d 1506, 1508* .

(n7)Footnote 7. *See Thomas v. Metroflight, Inc. (10th Cir. 1987) 814 F.2d 1506, 1508 ; see also Harper v. Trans World Airlines, Inc. (8th Cir. 1975) 525 F.2d 409, 412* (evidence of four of five similar applications of "no-spouse" rule held to be inadequate).

(n8)Footnote 8. *See Thomas v. Metroflight, Inc. (10th Cir. 1987) 814 F.2d 1506, 1510* .

(n9)Footnote 9. *See Thomas v. Metroflight, Inc. (10th Cir. 1987) 814 F.2d 1506, 1510-1511 ; see also Harper v. Trans World Airlines, Inc. (8th Cir. 1975) 525 F.2d 409, 412* (presupposition, without proof, that income will be sole or dominant factor in decision is inadequate, and not accepted as general axiom).

(n10)Footnote 10. *See Thomas v. Metroflight, Inc. (10th Cir. 1987) 814 F.2d 1506, 1511* .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.66

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.66 Promotion

Neither Title VII nor the FEHA contain any express provision relating to promotions and transfers. However, Title VII provides that it is an unlawful employment "to limit, segregate, or classify ... employees in any way [that] would deprive any individual of employment opportunities" because of the individual's membership in a protected classification.ⁿ¹ Also, FEHC regulations provide that an employer or other entity covered by the FEHA may not restrict information on promotion and transfer opportunities to certain employees or classes of employees when the restriction has the effect of discriminating on a basis enumerated in the FEHA.ⁿ² Furthermore, an employer who considers bids or other requests for promotion or transfer must do so in a manner that does not discriminate against individuals on a basis enumerated in the FEHA, unless it is pursuant to a permissible defense.ⁿ³ For a discussion of the various classifications protected by Title VII and the FEHA, *see* Part B (§§ 41.30-41.36).

To make out a *prima facie* case for discrimination in a failure to promote context, a plaintiff must meet the *McDonnell Douglas* order of proof and show the following:^{n3.1}

- She or he belongs to a protected class.
- She or he applied for and was qualified for the position that she or he was denied.
- She or he was rejected despite her or his qualifications.
- The employer filled the position with an employee not of plaintiff's class, or continued to consider other applicants whose qualifications were comparable to plaintiff's after rejecting plaintiff.

If established, the *prima facie* case creates a rebuttable presumption that the employer unlawfully discriminated against the plaintiff. The burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. If the employer meets this burden, the presumption of unlawful discrimination simply drops out of the picture.^{n3.2} The plaintiff then must produce sufficient evidence to raise a genuine issue of material fact as to whether

the employer's proffered nondiscriminatory reason is merely a pretext for discrimination. The plaintiff may show pretext either (1) by showing that unlawful discrimination more likely motivated the employer, or (2) by showing that the employer's proffered explanation is unworthy of credence because it is inconsistent or otherwise not believable. Ultimately, the plaintiff's burden is to produce some evidence suggesting that the defendant's failure to promote him or her was due in part or whole to discriminatory intent. A plaintiff with direct--rather than circumstantial--evidence of animus can more easily avoid summary judgment.^{3.3}

Many of the considerations applicable to the initial hiring of employees also apply to the selection of employees for promotion. As in the case of hiring, promotions are often based on scored tests,^{3.4} nonscored objective criteria (such as experience or education), or subjective criteria (such as supervisor recommendations).⁴ Employment practices relating to promotions may be subject to both "disparate treatment" and "disparate impact" analysis.⁵ For a discussion relating to preemployment selection practices generally, see Part C (§§ 41.40-41.47). For a general discussion of the "disparate treatment" and "disparate impact" theories of liability, see §§ 41.10-41.11 and 41.20-41.21.

Accommodation of an employee's religious practices constitutes undue hardship for the employer if it would inhibit the employer's efforts to attract and retain a qualified, diverse workforce, which the company reasonably views as vital to its commercial success, or if accommodation would result in discrimination against the accommodated employee's co-workers or deprive them of contractual or other statutory rights. Title VII also does not require an employer to accommodate an employee's desire to impose his or her religious beliefs on his or her coworkers.^{5.1} On the other hand, accommodating an employee's religious beliefs does not create undue hardship for an employer merely because an employee's co-workers find his or her conduct irritating or unwelcome.^{5.2}

In establishing discriminatory failure to promote, a plaintiff need not prove that he or she applied for promotion and was rejected if the employer's promotion policy does not require employee application, or if promotion is initiated by the employer.⁶ For example, in *Reed v. Lockheed Aircraft Corp.*,⁷ a sex discrimination case involving a qualified female employee who was not promoted for 25 years, an employer's promotion policy involved approaching worthy candidates to ask if they wished promotion.⁸ The Ninth Circuit Court of Appeals held that the employer's policy constituted a continuing violation of Title VII, assuming that similarly situated males were promoted with more regularity.⁹ On the other hand, in *Gilligan v. Dept. of Labor*,¹⁰ plaintiff challenged the denial of his promotion on the basis of illegal gender discrimination. The Ninth Circuit held that in an institutional setting an employer may consider gender in a manner which is consistent with an existing moderate and flexible affirmative action plan, even if the hiring decision is not made in direct reliance on the plan. The court held that so long as gender is not the exclusive factor in the employment decision and so long as the affirmative action plan is not an "absolute bar" to the advancement of non-preferred groups, the employment decision is not unlawful.¹¹

A plaintiff is also not required to prove that he or she applied for promotion if application would have been futile.¹² In *Gifford v. Atchison, Topeka and Santa Fe Ry. Co.*,¹³ a female employee alleged that her employer had consistently failed to promote her, despite her qualification for promotion, and that the employee never applied for promotion because of the employer's well-known policy of excluding women.¹⁴ The Ninth Circuit Court of Appeals held that the employee's allegation that an application would have been futile because of her employer's prior refusal to promote women was sufficient to state a Title VII claim.¹⁵

Discriminatory promotion policies may also result when members of different classes (for example, men and women, whites and minorities) are initially hired in jobs that do not have comparable lines of progression. A federal district court recognized that the key point of discrimination in one such case was the employer's hiring policy, since original assignment in effect determined an employee's future chances of promotion. The court explained that the opportunity for advancement depended on the entry level position to which an employee was assigned.¹⁶ In that case, two entry level positions--"claims adjuster" and "claims representative"--had the same educational and experience requirements.¹⁷ However, all "claims adjusters" were male, and all "claims representatives" were female. The lines of responsibility for both positions were to the "claims supervisor," but promotion to "claims supervisor" was limited to

"claims adjusters." There was no avenue of promotion to "claims supervisor" from the "claims representative" position.ⁿ¹⁸ The court granted summary judgment for plaintiffs, noting that the plaintiff's statistical evidence established a prima facie case of discrimination,ⁿ¹⁹ and that the employer did not meet its burden under *McDonnell Douglas Corp. v. Green* ⁿ²⁰ of articulating a legitimate, nondiscriminatory reason for its policy.ⁿ²¹

Employers may be required to publicize promotion opportunities. For example, in one race discrimination case, an employer's failure to post notice of promotion openings, together with its reliance on supervisor recommendations and other factors, was held to support a finding of discrimination, even though the employer did not consider requests or require applications for promotions.ⁿ²² The court noted that job vacancy exposure was greater among white employees than black employees. Because most of the supervisors were white, "failure to post vacancies could only discourage applications by black employees to a greater degree than it discouraged white employees, who garnered information through the grapevine."ⁿ²³

Failure to promote can also be challenged on the basis of 42 U.S.C. § 1981. Prior to enactment of the Civil Rights Act of 1991, there was a cause of action "only where the [denied] promotion rises to the level of an opportunity for a new and distinct relation between the employee and employer,"ⁿ²⁴ However, since enactment of the Civil Rights Act of 1991, claims under 42 U.S.C. § 1981 were expanded to provide protection for employees in the "[m]aking, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." This includes differential or exclusionary treatment.ⁿ²⁵

The Ninth Circuit has stated that an employer's denial of an employee's opportunity to "enter an entirely different career" by virtue of promotion constitutes a refusal to hire, which negates the limitation on backpay in promotion cases.ⁿ²⁶ Thus, the court found that a plaintiff who repeatedly attempted to transfer from the hotel's laundry department to its accounting department was in effect attempting to enter a new career, which had to be considered equivalent to a refusal to hire for purposes of awarding backpay extending beyond the date of his quitting.ⁿ²⁷

Title VII, as amended by the Civil Rights Act of 1991,ⁿ²⁸ prohibits an employer or other covered entity, in connection with the selection or referral of applicants or candidates for employment or promotion, from adjusting the scores of, using different cutoff scores for, or otherwise altering the results of, employment-related tests on the basis of race, color, religion, sex, or national origin.ⁿ²⁹

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisparate ImpactGeneral OverviewLabor & Employment LawDiscriminationDisparate ImpactEmployment PracticesDemotions & PromotionsLabor & Employment LawDiscriminationDisparate ImpactEmployment PracticesSelection ProceduresGeneral Overview

FOOTNOTES:

(n1)Footnote 1. See 42 U.S.C. § 2000e-2(a)(2).

(n2)Footnote 2. See 2 Cal. Code Reg. § 7287.4(c).

(n3)Footnote 3. See 2 Cal. Code Reg. § 7287.4(c)(2).

(n4)Footnote 3.1. *Dominguez-Curry v. Nevada Trans. Dept.* (9th Cir. 2005) 424 F.3d 1027, 2005 U.S. App. LEXIS 19764, *18-*19 . see *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n5)Footnote 3.2. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 511, 113 S. Ct. 2742 .

(n6)Footnote 3.3. *Dominguez-Curry v. Nevada Trans. Dept.* (9th Cir. 2005) 424 F.3d 1027, 2005 U.S. App. LEXIS 19764, *18-*34 (female employee presented sufficient evidence of failure to promote based on gender to survive summary judgment, where it was undisputed that plaintiff established prima facie case of discrimination and defendants' articulated legitimate non-discriminatory reason for their conduct, *i.e.*, man selected was more qualified candidate, and where district court erred in requiring that plaintiff's evidence be both specific and substantial because requirement only applied to circumstantial, not direct, evidence of discriminatory motive and plaintiff offered direct evidence of animus).

(n7)Footnote 3.4. *See, e.g., Ricci v. DeStefano* (2009) 129 S. Ct. 2658, 174 L. Ed. 2d 490 (promotional examination for firefighters). For discussion of the *Ricci* case, *see* § 41.45, *above*.

(n8)Footnote 4. *See* Schlei and Grossman, *Employment Discrimination Law* (2d ed. 1983) Ch. 17, "Promotion."

(n9)Footnote 5. *See, e.g., United States Postal Service Bd. of Governors v. Aikens* (1983) 460 U.S. 711, 714-715 (in "disparate treatment" case, plaintiff not required to submit direct evidence of discriminatory intent); *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1121-1122 (Title VII; disparate impact based on race in failure to promote). *Stout v. Potter* (9th Cir. 2002) 276 F.3d 1118, 1123 (Title VII; disparate impact based on gender in failure to promote); *Casillas v. United States Navy* (9th Cir. 1984) 735 F.2d 338, 342 (aggrieved employees permitted to use either "disparate treatment" model or "disparate impact" model to challenge failure to promote); *Payne v. Travenol Laboratories, Inc.* (5th Cir. 1982) 673 F.2d 798, 826 ("disparate impact" of education requirement); *Reed v. Lockheed Aircraft Corp.* (9th Cir. 1980) 613 F.2d 757, 761 ("disparate treatment").

(n10)Footnote 5.1. *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, 607 (employee's two options for proposed accommodation, *i.e.*, that he be allowed to post anti-gay messages and company's "gay" posters promoting diversity remain, or that company remove posters and he would then remove anti-gay messages, would have imposed undue hardship on employer; first accommodation would have compelled company to permit employee to post messages intended to demean and harass his co-workers, and second accommodation would have forced company to exclude sexual orientation from its workplace diversity program).

(n11)Footnote 5.2. *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, 607 .

(n12)Footnote 6. *See Gifford v. Atchison, Topeka and Santa Fe Ry. Co.* (9th Cir. 1982) 685 F.2d 1149, 1154 ; *Reed v. Lockheed Aircraft Corp.* (9th Cir. 1980) 613 F.2d 757, 761 ; *Mangold v. California Public Utilities Com'n.* (9th Cir. 1995) 67 F.3d 1470, 1475 (direct evidence of disparate treatment of older workers supported verdict and court need not reach issue of admissibility of disparate impact evidence under the ADEA).

(n13)Footnote 7. *Reed v. Lockheed Aircraft Corp.* (9th Cir. 1980) 613 F.2d 757 .

(n14)Footnote 8. *See Reed v. Lockheed Aircraft Corp.* (9th Cir. 1980) 613 F.2d 757, 759 .

(n15)Footnote 9. *See Reed v. Lockheed Aircraft Corp.* (9th Cir. 1980) 613 F.2d 757, 760 .

(n16)Footnote 10. *Gilligan v. Dept. of Labor* (9th Cir. 1996) 81 F.3d 835 .

(n17)Footnote 11. *See Gilligan v. Dept. of Labor* (9th Cir. 1996) 81 F.3d 835 .

(n18)Footnote 12. *See Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1221 (objective evidence of futility is not necessary; subjective knowledge of futility is sufficient). *See Gifford v. Atchison, Topeka and Santa Fe Ry. Co.* (9th Cir. 1982) 685 F.2d 1149, 1154 ; *Reed v. Lockheed Aircraft Corp.* (9th Cir. 1980) 613 F.2d 757, 761 .

(n19)Footnote 13. *Gifford v. Atchison, Topeka and Santa Fe Ry. Co.* (9th Cir. 1982) 685 F.2d 1149 .

(n20)Footnote 14. *See Gifford v. Atchison, Topeka and Santa Fe Ry. Co.* (9th Cir. 1982) 685 F.2d 1149, 1154 ; *See also Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1221 (objective evidence of futility, such as posting of

"Whites Only" sign, is not necessary; subjective "knowledge" of futility is sufficient).

(n21)Footnote 15. See *Gifford v. Atchison, Topeka and Santa Fe Ry. Co.* (9th Cir. 1982) 685 F.2d 1149, 1154 .

(n22)Footnote 16. See *Wetzel v. Liberty Mut. Ins. Co.* (W.D. Pa. 1974) 372 F. Supp. 1146, 1149 , *aff'd*, 508 F.2d 239 (3d. Cir. 1974) , *cert. denied*, 421 U.S. 1011 (1975) .

(n23)Footnote 17. See *Wetzel v. Liberty Mut. Ins. Co.* (W.D. Pa. 1974) 372 F. Supp. 1146, 1150 , *aff'd*, 508 F.2d 239 (3d. Cir. 1974) , *cert. denied*, 421 U.S. 1011 (1975) . See *Addy v. Bliss & Glennon*, (1996) 44 Cal. App. 4th 205, 51 Cal. Rptr. 2d 642 where plaintiff challenged her lack of consideration for what she considered a promotion (a lower paying job leading to the same advancement opportunities as her current job), and the employer was granted a summary judgment based on her failure to establish a prima facie case of failure to promote.

(n24)Footnote 18. See *Wetzel v. Liberty Mut. Ins. Co.* (W.D. Pa. 1974) 372 F. Supp. 1146, 1149-1150 , *aff'd*, 508 F.2d 239 (3d. Cir. 1974) , *cert. denied*, 421 U.S. 1011 (1975) .

(n25)Footnote 19. See *Wetzel v. Liberty Mut. Ins. Co.* (W.D. Pa. 1974) 372 F. Supp. 1146, 1151-1152 , *aff'd*, 508 F.2d 239 (3d. Cir. 1974) , *cert. denied*, 421 U.S. 1011 (1975) .

(n26)Footnote 20. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; see discussion in § 41.11[1][c].

(n27)Footnote 21. *Wetzel v. Liberty Mut. Ins. Co.* (W.D. Pa. 1974) 372 F. Supp. 1146, 1152-1155 , *aff'd*, 508 F.2d 239 (3d. Cir. 1974) , *cert. denied*, 421 U.S. 1011 (1975) .

(n28)Footnote 22. See *Payne v. Travenol Laboratories, Inc.* (5th Cir. 1982) 673 F.2d 798, 827 .

(n29)Footnote 23. See *Payne v. Travenol Laboratories, Inc.* (5th Cir. 1982) 673 F.2d 798, 827 .

(n30)Footnote 24. See *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363.

(n31)Footnote 25. See *Strother v. S. Cal. Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859 .

(n32)Footnote 26. See *Odima v. Westin Tucson Hotel* (9th Cir. 1995) 53 F.3d 1484, 1494-1495 .

(n33)Footnote 27. See *Odima v. Westin Tucson Hotel* (9th Cir. 1995) 53 F.3d 1484, 1495-1496 .

(n34)Footnote 28. See Pub. L. No. 102-166, § 106.

(n35)Footnote 29. 42 U.S.C. § 2000e-2(l).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.67

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§ 41.67 Retirement or Pension Plans and Benefits

[1] Generally

For purposes of equal employment opportunity laws, retirement or pension *plans* are "condition[s] or privilege[s] of employment."ⁿ¹ Retirement or pension *benefits*, and the contributions that maintain them, are considered "compensation."ⁿ² For a discussion relating to employment discrimination with respect to compensation generally, *see* § 41.56. For discussion relating to "terms, conditions, or privileges of employment" generally, *see* §§ 41.57-41.70.

Federal equal employment opportunity law provides no specific definition of a "retirement plan," but FEHC regulations interpreting the FEHA provide that a "retirement or pension program" refers to any written plan, program, or policy of an employer that has been communicated to eligible or affected employees, and that is intended to provide an employee with income on retirement.ⁿ³ Such a program may include pension plans, profit-sharing plans, money-purchase plans, tax-sheltered annuities, employer sponsored Individual Retirement Accounts, employee stock ownership plans, matching thrift plans, stock bonus plans, or other forms of defined benefit or defined contribution plans.ⁿ⁴

Under a defined benefit plan, benefit amounts are determined at the inception of the plan and the necessary amount of money is contributed to fund the benefits. Defined contribution plans require an employer to contribute specified amounts that are then used to purchase whatever retirement benefits the funds, and the earnings on their investment, will buy.ⁿ⁵

[2] Age Discrimination Issues

[a] Mandatory Retirement

[i] ADEA

Although bona fide employee benefit plans are exempt from ADEA coverage under specified circumstances,ⁿ⁶ no such plan may require or permit the involuntary retirement of any person covered by the ADEA, because of the age of that

person.ⁿ⁷ However, compulsory retirement is permitted with respect to an employee who (1) has attained the age of 65 years; (2) is employed in a bona fide executive or high policy-making position for the two-year period immediately before retirement;ⁿ⁸ and (3) is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, that equals, in the aggregate, at least \$44,000.ⁿ⁹

[ii] FEHA

Under the FEHA, an employer must permit an employee to continue his or her employment beyond any retirement date contained in any private pension or retirement plan if the employee, within a reasonable time, indicates in writing a desire to continue working beyond the specified retirement date and can demonstrate the ability to continue working.ⁿ¹⁰ The employment must continue as long as the employee demonstrates his or her ability to perform the functions of the job adequately, and the employer is satisfied with the quality of the work performed.ⁿ¹¹

There are also exceptions to the FEHA's general prohibition against mandatory retirement. Thus, institutions of higher educationⁿ¹² may impose a mandatory retirement policy for tenured faculty members who have attained 70 years of age provided that the institution has a policy permitting reemployment of those individuals on a year-to-year basis.ⁿ¹³ Under this provision, the university must rehire those tenured faculty members over age 70 on a yearly basis if they are able to establish their competence.ⁿ¹⁴ Also, compulsory retirement is allowed with respect to (1) physicians who attain 70 years of age, and who are employed by professional medical corporations that have articles or bylaws providing for compulsory retirement; and (2) employees who (a) have attained the age of 65 years, (b) were employed in a bona fide executive or high policy-making position for the two-year period immediately before retirement, and (c) are entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, that equals, in the aggregate, at least \$27,000.ⁿ¹⁵

[b] Voluntary Early Retirement

[i] Basic Requirements of OWBPA

The ADEA, as amended by the Older Workers Benefit Protection Act of 1990 (OWBPA),ⁿ¹⁶ provides that it is not unlawful for an employer to observe the terms of a bona fide employee benefit plan that is a voluntary early retirement incentive plan consistent with the purposes of the ADEA.ⁿ¹⁷ Furthermore, the OWBPA provides that an individual may waive ADEA rights or claims if the waiver is knowingly and voluntarily made. A waiver of ADEA rights or claims is considered to be knowingly and voluntarily made if:ⁿ¹⁸

1. The waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by the individual, or by the average individual eligible to participate;ⁿ¹⁹
2. The waiver specifically refers to rights or claims arising under the ADEA;
3. The individual does not waive rights or claims that may arise after the date the waiver is executed;
4. The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;ⁿ²⁰
5. The individual is advised in writing to consult with an attorney prior to executing the agreement;
6. The individual is given a specified period, as discussed *below*, within which to consider the agreement;

7. The agreement provides that for a period of at least seven days following the execution of such agreement, the individual may revoke the agreement, and that the agreement will not become effective or enforceable until the revocation period has expired.

Generally, an individual must be given at least 21 days within which to consider a waiver agreement.ⁿ²¹ However, if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual must be given at least 45 days within which to consider the agreement.ⁿ²² Furthermore, at the commencement of the consideration period the employer must inform the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to:ⁿ²³

1. Any class, unit, or group of individuals covered by the program, any eligibility factors for the program, and any time limits applicable to the program; and
2. The job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

There are several areas of uncertainty as to what constitutes a program that requires the information disclosure requirements. One is whether the employer's action is indeed a "group termination program."ⁿ²⁴ Another is whether the disclosure requirements might be required in programs which the employer considers "involuntary" on the ground that the statute specifies programs being "offered" to the employees.ⁿ²⁵ⁿ²⁶

[ii] Disputes About Validity of OWBPA Agreements

If any dispute arises over whether any of the foregoing requirements, conditions, and circumstances have been met, the party asserting the validity of a waiver has the burden of proving that a waiver was knowingly and voluntarily made.ⁿ²⁷ The majority of disputes arise out of common law theories of tender back and ratification. Generally, employers argue that employees who pursue claims under the ADEA and assert the invalidity of the waiver and release provisions of its OWBPA program cannot do so unless they tender back the consideration for the release. Courts have met this argument with differing responses. The Fourth Circuit and Fifth Circuit Courts of Appeals regard OWBPA releases as voidable agreements and require employees seeking to circumvent waivers and releases to tender back consideration.ⁿ²⁸ However the Seventh and Eleventh Circuits have reached the opposite conclusion.ⁿ²⁹

In the 1998 case of *Oubre v. Entergy Operations, Inc.*,^{n29.1} the United States Supreme Court clarified the effect of a waiver or release of all claims against an employer that does not comply with the statutory requirements of the OWBPA. An employee may not waive an ADEA claim unless the waiver or release satisfies the OWBPA's requirements. The OWBPA governs the effect under federal law of waivers or releases on ADEA claims and incorporates no exceptions or qualifications. Thus, the OWBPA language forecloses defenses based on general contract principles, such as (1) a contracting party can only void a contract if the party first tenders back any benefits received and failure to do so constitutes ratification of the contract; and (2) equitable estoppel bars a party from avoiding the burdens of a voidable contract for as long as the party retains the benefits received under the contract. Therefore, as a statutory matter, a noncomplying release is unenforceable and cannot bar the employee's ADEA claims, regardless of the validity of the release as to other claims. The Court expressly left open the issues of whether the employer has claims for restitution, recoupment, or setoff against the employee.^{n29.2} In a separate concurring opinion, Justices Breyer and O'Connor illustrate that releases that fail to satisfy statutory requirements are voidable rather than void. This distinction is important because a void contract relieves an employer of its duties (such as a reciprocal obligation to provide ongoing health benefits) and offers legal protection, a result unintended by Congress. In contrast, a voidable contract, but not one specifying a tender-back precondition, permits an employer to obtain restitution for the consideration paid to the employee.^{n29.3}

Under its regulations on agreements waiving rights and claims under the ADEA, the EEOC sets forth requirements for the wording of the waivers, as well as the disclosure of specific information to the individual and how it must be presented, including information regarding the ages of all those selected for the termination/retirement.^{n29.4}

[c] Prevention of Pension-Vesting

An employer's decision to terminate an employee because his or her pension is close to vesting may be unlawful under § 510 of the Employee Retirement Income Security Act (ERISA),ⁿ³⁰ but it does not in itself constitute discriminatory treatment on the basis of age in violation of the ADEA.ⁿ³¹ According to the Supreme Court, such a decision is analytically distinct from a violation of the ADEA since it is based on years of service not on the age of the employee.ⁿ³²

However, an employer is subject to liability under the ADEA if age plays a part in the decision to terminate an employee whose pension is about to vest. For example, if an employer targets employees with a particular pension status because they are likely to be older, if the employer's motivation to fire an employee is based both on pension status and on age, or if an employee's pension is about to vest because of his or her age rather than years of service, and the employer fires the employee to prevent vesting, the employer may be liable under the ADEA.ⁿ³³

[3] Sex Discrimination Issues

[a] Contributions and Benefits

Los Angeles Dep't of Water & Power v. Manhart ⁿ³⁴ involved an employer-operated pension plan that required female employees to make larger contributions to receive the same monthly pension benefits as male employees (because female employees live, as a class, longer than male employees).ⁿ³⁵ In holding that this plan violated Title VII, the United States Supreme Court reasoned that although it is unquestionably true that women, as a class, do live longer than men, Title VII prohibits discrimination with respect to any *individual*.ⁿ³⁶ It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class, and even a true generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.ⁿ³⁷ The Court stressed, however, that its holding did not imply that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit that his or her accumulated contributions could command in the open market.ⁿ³⁸ Title VII primarily governs relations between employees and their employer, not between employees and third parties.ⁿ³⁹

The employer in *Manhart* argued that under the Bennett Amendment to Title VII, which allows a compensation differential based on sex if it is authorized by the EPA,ⁿ⁴⁰ the different contributions exacted from male and female employees were "based on any other factor other than sex" because they were based on longevity.ⁿ⁴¹ The Court explained, however, that life expectancy is based on a number of factors, including sex. It pointed out that there was no evidence the employer took into account any factor other than the employee's sex in calculating the differential.ⁿ⁴²

In *Arizona Governing Committee v. Norris*, ⁿ⁴³ the Court relied on its *Manhart* rationale to hold that, under Title VII, an employer may not offer the option of receiving retirement benefits from one of several employer-selected companies that, based on sex-based mortality tables, pay female employees lower monthly benefits than male employees who make the same contributions to a deferred compensation plan.ⁿ⁴⁴ The Court preliminarily held that an individual woman may not be paid lower monthly benefits (annuities) simply because women, as a class, live longer than men.ⁿ⁴⁵ The Court also reasoned that the *Norris* plan was the equivalent of the *Manhart* plan because female employees in *Norris* who wished to obtain annuities equal to those obtained by male employees would also be required to make greater monthly contributions than the males.ⁿ⁴⁶

In *Norris*, the employer relied on the *Manhart* caveat discussed above that employers may set aside equal contributions

and let the retiree purchase the largest benefit that he or she is able in the open market.ⁿ⁴⁷ The employer contended that the annuities offered by the participating companies reflected what was available in the open market.ⁿ⁴⁸ However, the Court declared that it is no defense that all annuities immediately available in the open market may have been based on sex-segregated tables. Furthermore, it was irrelevant whether any other companies offered annuities on a sex-neutral basis, since the employer did not simply set aside retirement contributions and let employees purchase annuities in the open market.ⁿ⁴⁹ Once the employer selected the companies, it entered into contracts with them governing the terms on which benefits were to be provided. There was thus no serious question that the employer was legally responsible for the discriminatory terms on which the annuities were offered.ⁿ⁵⁰

In *AT&T Corp. v. Hulteen*,^{n50.1} the United States Supreme Court held that an employer does not necessarily violate the Pregnancy Discrimination Act (PDA)^{n50.2} when it pays pension benefits calculated in part under an accrual rule, applied only prior to the PDA, that gave less retirement credit for pregnancy leave than for medical leave generally. In *Hulteen*, the Court found no violation because the benefit calculation rule was part of a bona fide seniority system under Title VII of the Civil Rights Act of 1964,^{n50.3} which insulated it from challenge. The employer provided pensions and other benefits based on a seniority system that relied on an employee's term of employment, understood as the period of service at the company minus uncredited leave time. Generally speaking, employees on disability leave received full service credit for the entire periods of absence, but prior to 1979, pregnancy leave was treated differently than disability leave and employees on pregnancy leave were given less service credit. Effective the same date as the PDA in 1979, the employer changed its policy to provide service credit for pregnancy leave on the same basis as leave taken for other temporary disabilities, but did not make any retroactive adjustments to the service credit calculations of women who had been subject to the pre-PDA personnel policies. The Court found that the payment of pension benefits was a function of a seniority system, because calculating benefits under the pension plan depended in part on an employee's term of employment.^{n50.4} Under Title VII, benefit differentials produced by a bona fide seniority-based pension plan are permitted unless they are the result of an intention to discriminate, and employer's system was bona fide as a system with no discriminatory terms.^{n50.5} The pre-1979 differential treatment of pregnancy leave was an element of the seniority system itself, but it did not taint the system under Title VII, because before the passage of the PDA, the Court had held in *General Elec. Co. v. Gilbert* ^{n50.6} an accrual rule limiting the seniority credit for time taken for pregnancy leave did not unlawfully discriminate on the basis of sex. Thus, as a matter of law, before 1979, an exclusion of pregnancy from a disability-benefits plan providing general coverage was not a gender-based discrimination at all.^{n50.7} The Court also held that the amendment to Title VII adopted in response to *Ledbetter v. Goodyear Tire & Rubber Co.*,^{n50.8} dealing specifically with discrimination in compensation, did not affect the result, because the employer's pre-PDA decision not to award service credit for pregnancy leave was not discriminatory, so that women who took pre-PDA pregnancy leave were not affected by application of a discriminatory compensation decision or other practice.^{n50.9}

The FEHA provisions regarding discrimination on the basis of sex and medical condition do not affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan if the terms and conditions are in accordance with customary and reasonable or actuarially sound underwriting practices.ⁿ⁵¹ However, FEHC regulations interpreting the FEHA provide that an employer covered may not require unequal employee contributions by similarly situated male and female employees to fringe benefit plans. Also, different amounts of basic benefits may not be established under fringe benefit plans for such employees.ⁿ⁵²

[b] Retirement Eligibility

EEOC regulations prohibit pension or retirement plans that, with respect to benefits, establish different optional or compulsory retirement ages based on sex, or that otherwise differentiate in benefits on the basis of sex.ⁿ⁵³ For example, an employer may not maintain a retirement plan that requires female employees to retire at an earlier age than male employees;ⁿ⁵⁴ nor may a plan *permit* female employees to retire with a full pension at an earlier age and with shorter length of service than male employees.ⁿ⁵⁵

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationAge
DiscriminationEmployment PracticesGeneral OverviewLabor & Employment LawDiscriminationAge
DiscriminationEmployment PracticesPension BenefitsLabor & Employment LawDiscriminationDisparate
TreatmentEmployment PracticesAdverse Employment ActionsBenefits

FOOTNOTES:

(n1)Footnote 1. *See Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 1079, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 (Title VII) .

(n2)Footnote 2. *See Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 1079, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 (Title VII) ; *Los Angeles, Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 712 n.23, 98 S. Ct. 1370, 55 L. Ed. 2d 657(Title VII) .

(n3)Footnote 3. *See 2 Cal. Code Reg. § 7295.1(d).*

(n4)Footnote 4. *2 Cal. Code Reg. § 7295.1(d).*

(n5)Footnote 5. *See Schlei and Grossman, Employment Discrimination Law*, ch. 12 (BNA 2d ed. 1983).

(n6)Footnote 6. *See 29 U.S.C. § 623(f)(2)(B); see also discussion in § 41.93[1].*

(n7)Footnote 7. *29 U.S.C. § 623(f)(2)(B); see also Smith v. Alum Rock Union Elementary School Dist.* (1992) 6 Cal. App. 4th 1651, 1655-1658, 8 Cal. Rptr. 2d 399 (statutory exclusion of employees over age 60 from disability allowance constituted involuntary retirement in violation of ADEA).

(n8)Footnote 8. *But see E.E.O.C. v Johnson & Higgins (S.D.N.Y 1995) 68 FEP Cases 1481* (policy requiring employees sitting on board of directors to retire at age 60 or 62 violative of ADEA because required forfeiture of employment, not merely directorship).

(n9)Footnote 9. *See 29 U.S.C. § 631(c)(1).*

(n10)Footnote 10. *Gov. Code § 12942; see 2 Cal. Code Reg. § 7296.0(a)* (mandatory retirement constitutes age discrimination under FEHA); *see also 2 Cal. Code Reg. § 7296.1*(procedures for continuing in employment past normal retirement date).

(n11)Footnote 11. *Gov. Code § 12942.*

(n12)Footnote 12. *See 20 U.S.C. § 1001* ("institute of higher education" defined), incorporated by reference into *Gov. Code § 12942(c)(1).*

(n13)Footnote 13. *See Gov. Code § 12942(c)(1).*

(n14)Footnote 14. *See Dubins v. Regents of University of California* (1994) 25 Cal. App. 4th 77, 85-86, 30 Cal. Rptr. 2d 336 .

(n15)Footnote 15. *Gov. Code § 12942(c); see 2 Cal. Code Reg. § 7296.0(c).*

(n16)Footnote 16. *See Pub. L. No. 101-433, §§ 101-105.*

(n17)Footnote 17. *29 U.S.C. § 623(f)(2)(B)(ii); see Henn v. National Geographic Soc.* (7th Cir. 1987) 819 F.2d

824, 828 , *cert. denied*, 108 S. Ct. 454 (1988) (incentives to retire early do not constitute age discrimination as long as employee receiving offer may choose to keep working); *see also* 29 C.F.R. § 1625.9(f) (retirement plan may permit individuals to elect early retirement at specified age at their own option).

(n18)Footnote 18. *See* 29 U.S.C. § 626(f)(1).

(n19)Footnote 19. *See Oberg v. Allied Van Lines* (7th Cir. 1993) 11 F.3d 679 , *cert. denied*, 114 S. Ct. 2104 (employees' continued acceptance of benefits did not cure employer's failure to comply with OWBPA); *but cf. Blistein v. St. John's College* (4th Cir. 1996) 74 F.3d 1459 (only writings were a list of benefits plaintiff was entitled to receive upon resignation and a letter from plaintiff's counsel representing a plan to withdraw EEOC charge; court disregarded failure to comply with OWBPA on ground that retirement agreement was merely voidable, not void and plaintiff had ratified by accepting benefits).

(n20)Footnote 20. *See Bowers v. NETI* (E.D. Pa. 1988) 690 F. Supp. 349 (where state law holds severance pay is part of employee's wages, consideration for waiver may be absent). *But cf. Griffin v. Kraft General Foods, Inc.* (11th Cir. 1995) 62 F.3d 368 (agreement providing enhanced benefits to all employees does not violate ADEA for failure to offer older workers greater consideration than employees outside the class).

(n21)Footnote 21. 29 U.S.C. § 626(f)(1)(F)(i).

(n22)Footnote 22. 29 U.S.C. § 626(f)(1)(F)(ii).

(n23)Footnote 23. 29 U.S.C. § 626(f)(1)(H).

(n24)Footnote 24. *See EEOC v. Sara Lee Corp.* (W.D. Mich. 1995) 70 FEP 57 (standardized termination package offered 4 employees pursuant to restructuring triggered disclosure under 29 U.S.C. §§ 626(f)(1)(H)(i), (ii)).

(n25)Footnote 25. *See Elliott v. United Technologies Corp.* (D. Conn. 1995) U.S. Dist. LEXIS 19325 (finding that term "exit incentive or other employment termination program" applies to involuntary terminations).

(n26)Footnote 26. [Reserved]

(n27)Footnote 27. 29 U.S.C. § 626(f)(3).

(n28)Footnote 28. *See Blistein v. St. John's College* (4th Cir. 1996) 74 F.3d 1459 ; *Wamsley v. Champlin Refining and Chems., Inc.*, (5th Cir. 1995) 11 F.3d 534 , *cert. denied*, 514 U.S. 1037 (1995) .

(n29)Footnote 29. *See Oberg v. Allied Van Lines* (7th Cir. 1993) 11 F.3d 679 ; *Griffin v. Kraft General Foods, Inc.* (11th Cir. 1995) 62 F.3d 368 ; *Forbus v. Sears, Roebuck & Co.* (11th Cir. 1992) 958 F.2d 1036 .

(n30)Footnote 29.1. *Oubre v. Entergy Operations, Inc.* (1998) 522 U.S. 422, 118 S. Ct. 838, 139 L. Ed. 2d 849 .

(n31)Footnote 29.2. *Oubre v. Entergy Operations, Inc.* (1998) 522 U.S. 422, 118 S. Ct. 838, 841-843, 139 L. Ed. 2d 849 (employee does not ratify ineffective release, or face estoppel, by retaining benefits of release; retention does not satisfy OWBPA's release requirements).

(n32)Footnote 29.3. *Oubre v. Entergy Operations, Inc.* (1998) 522 U.S. 422, 118 S. Ct. 838, 843-845, 139 L. Ed. 2d 849 (concurring opinion).

(n33)Footnote 29.4. *See* 29 C.F.R. § 1625.22.

(n34)Footnote 30. *See* 29 U.S.C. § 1140.

(n35)Footnote 31. *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 347-348

(n36)Footnote 32. *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 347-348

(n37)Footnote 33. *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 348-349

(n38)Footnote 34. *Los Angeles Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 657 .

(n39)Footnote 35. See *Los Angeles Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 711, 98 S. Ct. 1370, 55 L. Ed. 2d 657 .

(n40)Footnote 36. See *Los Angeles Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 707-708, 98 S. Ct. 1370, 55 L. Ed. 2d 657 .

(n41)Footnote 37. See *Los Angeles Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 708, 98 S. Ct. 1370, 55 L. Ed. 2d 657 . The Court stated, as an example, that if height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. The Court also noted that many women do not live as long as the average man and many men outlive the average woman. *Los Angeles Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 707, 708, 98 S. Ct. 1370, 55 L. Ed. 2d 657 .

(n42)Footnote 38. See *Los Angeles Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 718, 98 S. Ct. 1370, 55 L. Ed. 2d 657 .

(n43)Footnote 39. See *Los Angeles Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 718 n.33, 98 S. Ct. 1370, 55 L. Ed. 2d 657 .

(n44)Footnote 40. See 42 U.S.C. § 2000e-2(h); see also § 41.56[5][a].

(n45)Footnote 41. See *Los Angeles Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 712, 98 S. Ct. 1370, 55 L. Ed. 2d 657 ; see also 29 U.S.C. § 206(d) (permitting wage differentials based on bona fide factors other than sex).

(n46)Footnote 42. See *Los Angeles, Dep't of Water & Power v. Manhart* (1978) 435 U.S. 702, 712, 98 S. Ct. 1370, 55 L. Ed. 2d 657 ; see also 29 C.F.R. § 1620.11(b) (EEOC regulation interpreting EPA; differences in application of fringe benefits that are based on sex-based actuarial studies as not justified as "any other factor other than sex").

(n47)Footnote 43. *Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 .

(n48)Footnote 44. See *Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 1089-1091, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 . Under the *Norris* plan, participating employees could defer receipt of, and thereby payment of federal income tax on, a portion of their wages until retirement, when they receive the deferred amounts and any earnings on them. See *Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 1076, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 .

(n49)Footnote 45. See *Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 1081, 1085, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 (classification of employees on basis of sex as no more permissible at pay-out stage of retirement plan than at pay-in stage).

(n50)Footnote 46. *See Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 1082, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 .

(n51)Footnote 47. *See Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 1086-1087, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 .

(n52)Footnote 48. *See Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 1087, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 .

(n53)Footnote 49. *See Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 1088, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 .

(n54)Footnote 50. *See Arizona Governing Committee v. Norris* (1983) 463 U.S. 1073, 1089, 103 S. Ct. 3492, 77 L. Ed. 2d 1236 .

(n55)Footnote 50.1. *AT&T Corp. v. Hulteen* (2009) 129 S. Ct. 1962, 173 L. Ed. 2d 898, 2009 U.S. LEXIS 3470, *11-*27 .

(n56)Footnote 50.2. 42 U.S.C. § 2000e(k).

(n57)Footnote 50.3. *See* 42 U.S.C. § 2000e-2(h). For discussion of bona fide seniority systems under Title VII, *see* § 41.68[1], *below*.

(n58)Footnote 50.4. *AT&T Corp. v. Hulteen* (2009) 129 S. Ct. 1962, 173 L. Ed. 2d 898, 2009 U.S. LEXIS 3470, *12-*13 .

(n59)Footnote 50.5. *AT&T Corp. v. Hulteen* (2009) 129 S. Ct. 1962, 173 L. Ed. 2d 898, 2009 U.S. LEXIS 3470, *14-*17 . *See also Teamsters v. United States* (1977) 431 U.S. 324, 356, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (although advantages of seniority system flowed disproportionately to white employees because of employer's prior discrimination in job assignments, seniority system exemplified bona fide system without any discriminatory terms, where system did not have its genesis in discrimination and was maintained free from any illegal purpose).

(n60)Footnote 50.6. *General Elec. Co. v. Gilbert* (1976) 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 .

(n61)Footnote 50.7. *AT&T Corp. v. Hulteen* (2009) 129 S. Ct. 1962, 173 L. Ed. 2d 898, 2009 U.S. LEXIS 3470, *17-*25 . *See General Elec. Co. v. Gilbert* (1976) 429 U.S. 125, 136, 97 S. Ct. 401, 50 L. Ed. 2d 343 .

(n62)Footnote 50.8. *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) 550 U.S. 618, 127 S. Ct. 2162, 167 L. Ed. 2d 982 . For discussion of the *Ledbetter* case and the Lily Ledbetter Fair Pay Act of 2009, *see* § 42.62[3][d].

(n63)Footnote 50.9. *AT&T Corp. v. Hulteen* (2009) 129 S. Ct. 1962, 173 L. Ed. 2d 898, 2009 U.S. LEXIS 3470, *25-*27 .

(n64)Footnote 51. *Gov. Code* § 12993(b).

(n65)Footnote 52. *See* 2 *Cal. Code Reg.* § 7291.1(b)(3).

(n66)Footnote 53. *See* 29 C.F.R. § 1620.11(f); *see also* 2 *Cal. Code Reg.* § 7291.1(b)(4) (FEHC regulation interpreting FEHA).

(n67)Footnote 54. *See Bartmess v. Drewrys U.S.A., Inc.* (7th Cir. 1971) 444 F.2d 1186, 1190 .

(n68)Footnote 55. *See Rosen v. Public Service Electric and Gas Company* (3d Cir. 1973) 477 F.2d 90, 95 .



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.68

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§ 41.68 Seniority Systems

[1] Title VII "Bona Fide Seniority System" Exception (*Teamsters*)

As amended, Title VII permits differences in compensation and terms, conditions, or privileges of employment pursuant to bona fide seniority systems, provided the differentials are not the result of intentional discrimination.ⁿ¹

Formerly, cases had held that facially neutral seniority systems were not "bona fide," and therefore violated Title VII, if they perpetuated past acts of discrimination.ⁿ² An example of a system that may perpetuate past acts of discrimination is a "departmental" seniority system, in which an employee may transfer from one department to another only if the employee forfeits seniority already accrued in the department he or she is leaving. Such systems may be facially neutral in that they are applied to all employees. However, prior to the passage of Title VII, departments were often racially segregated, with wages and benefits in the minority departments inferior to those in the nonminority departments. Since Title VII passed, such segregated departments are unlawful,ⁿ³ and minority employees may no longer be prohibited from transferring from one department to another because of their minority status. However, under a "departmental" seniority system, transferring minority employees often lost their seniority, and in effect were "locked" into inferior positions.ⁿ⁴

In *Teamsters v. United States*,ⁿ⁵ the United States Supreme Court was presented with the question of whether such a "departmental" seniority system was "bona fide." The Court held that otherwise neutral, legitimate seniority systems are not unlawful, even if they perpetuate past acts of discrimination.ⁿ⁶ The Court relied on legislative history to conclude that the purpose of the "bona fide seniority system" exception was to ensure that application of such a system would not be unlawful.ⁿ⁷ "[T]he congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to passage of [Title VII]."ⁿ⁸

According to the proviso in the "bona fide seniority system" exception, however, seniority systems that intentionally discriminate are not "bona fide," and are not entitled to protection.ⁿ⁹ Even facially neutral seniority systems that have

their "genesis in [unlawful] discrimination," or that were "negotiated and [are] maintained" with an illegal purpose, are unlawful.ⁿ¹⁰ The burden is on the plaintiff to show the existence of discriminatory intent or illegal purpose.ⁿ¹¹ It is not enough to show that a seniority system has a discriminatory impact,ⁿ¹² but discriminatory impact may be an evidentiary consideration in reaching a finding on intent.ⁿ¹³ For example, proof that an employer's work force is racially balanced or that it contains a disproportionately high percentage of minority employees may be relevant to determining whether a seniority system intentionally discriminates.ⁿ¹⁴

In *James v. Stockham Valves & Fittings Co.*,ⁿ¹⁵ another case involving a "departmental" seniority system, the Fifth Circuit Court of Appeals relied on *Teamsters* to declare that the basic issue in such a case is "whether there [is] purposeful discrimination in connection with the establishment or continuation of a seniority system."ⁿ¹⁶ The court explained that the *Teamsters* Court's analysis suggests that the totality of the circumstances in the development and maintenance of the seniority system is relevant in examining the issue.ⁿ¹⁷ The court thus extracted from *Teamsters* the following factors for consideration:ⁿ¹⁸

1. Whether the seniority system operates to discourage all employees equally from transferring between seniority units;
2. Whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
3. Whether the seniority system had its genesis in racial discrimination; and
4. Whether the system was negotiated and has been maintained free from any illegal purpose.

For a discussion relating to the burden of proving discriminatory intent for equal employment opportunity purposes generally, *see* § 41.11. For a detailed discussion about what constitutes a "bona fide" seniority system generally, and using the "bona fide seniority system" exception as a substantive defense, *see* § 41.109.

[2] EEOC Guidelines

The EEOC guidelines on sex discrimination proscribe various practices that may operate to disguise discriminatory intent. Thus, it is an unlawful employment practice to maintain separate seniority lists based on sex if such a practice adversely affects any employee, unless sex is a bona fide occupational qualification (BFOQ) for the job.ⁿ¹⁹ Accordingly, an employment practice is also unlawful if it arbitrarily classifies jobs so that a female scheduled for layoff is prohibited from displacing a less senior male on a "male" seniority list, and vice versa.ⁿ²⁰ Furthermore, a seniority system that distinguishes between "light" or "heavy" jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to advancement by members of either sex into jobs that members of that sex would reasonably be expected to perform.ⁿ²¹

In *Bowe v. Colgate-Palmolive Company*,ⁿ²² the Seventh Circuit Court of Appeals relied on the foregoing EEOC guideline to determine that a seniority system that was bifurcated into separate eligibility lists for males and females was unlawful when it allowed male employees to bid for jobs plant-wide, but restricted women to jobs that did not require lifting more than 35 pounds.ⁿ²³ The court held that each employee who is able to demonstrate his or her ability to perform more strenuous work on a regular basis must be permitted to bid on and fill any position to which his or her seniority may entitle him or her.ⁿ²⁴

[3] The ADEA "Bona Fide Seniority System" Exception

The ADEA also contains a "bona fide seniority system" exception. Thus, the ADEA provides that it is not unlawful for an employer "to observe the terms of a bona fide seniority system ... which is not intended to evade the purpose of the

[ADEA].ⁿ²⁵ However, the ADEA also provides that "no such seniority system... [may] require or permit the involuntary retirement of any individual [covered by the ADEA] because of the age of [that] individual."ⁿ²⁶ For example, in *Trans World Airlines, Inc. v. Thurston*,ⁿ²⁷ a transfer policy adopted by an airline to comply with the ADEA proscription against mandatory retirement allowed 60-year-old airline captains to continue working as flight engineers if the captains were able to successfully bid for such positions as vacancies occurred. When a vacancy occurred, it was filled by the most senior captain with a "standing bid." If no vacancy occurred before a captain's 60th birthday, or if the captain lacked sufficient seniority for a successful bid, that captain was retired.ⁿ²⁸ The United States Supreme Court held that the transfer policy was not a "bona fide seniority system" because it "permitted" involuntary retirement within the meaning of the ADEA.ⁿ²⁹ The Court also noted that under a collective bargaining agreement, captains displaced for any reason other than age, such as medical disability, did not have to resort to the bidding process, but could "bump" less senior flight engineers. The Court concluded, therefore, that the mandatory retirement required by the policy was age-based in violation of the ADEA.ⁿ³⁰

For further discussion of the mandatory retirement proscription in the ADEA, *see* § 41.67[2][a].

[4] Seniority and Layoffs

Layoffs often occur by reverse order in seniority--last-hired, first-fired. Accordingly, equal employment opportunity problems may arise when employers who have hired a large number of minority or female employees, either voluntarily or through affirmative action plans, subsequently suffer economic downturns. In such a situation, layoffs based on seniority may have an adverse impact on the minority and/or female employees recently hired.ⁿ³¹ These problems were addressed, at least with respect to court-ordered affirmative action, by the United States Supreme Court in *Firefighters v. Stotts*.ⁿ³² In that case, the Court held that a court cannot override a bona fide seniority system under Title VII unless the system is intentionally discriminatory, or unless the plaintiffs challenging the system were individually victimized by discrimination.ⁿ³³

In *Stotts*, the plaintiffs, a class of black firefighters, charged that their employer, a city fire department, unlawfully based hiring and promotion decisions on race. The parties thereafter entered into a consent decree to remedy the alleged Title VII violations, but the decree contained no provisions relating to layoff procedures.ⁿ³⁴ The consent decree also contained no provision awarding seniority to the black employees who allegedly had been discriminated against.ⁿ³⁵ When the employer subsequently announced layoffs resulting from a budgetary shortfall, the district court enjoined the employer from relying on its seniority system in effectuating the layoffs, concluding that the layoffs would have a racially discriminatory *effect* and thus that the seniority system was not bona fide.ⁿ³⁶ As a result of the injunction, a modified layoff plan was presented, approved, and carried out, resulting in the layoffs of some nonminority employees with more seniority than minority employees who were not laid off.ⁿ³⁷ The Sixth Circuit Court of Appeals affirmed the district court's judgment granting the injunction.ⁿ³⁸

In reversing the Sixth Circuit's decision, the Supreme Court held that the employer's seniority system was bona fide, relying on its holding in *Teamsters v. United States* ⁿ³⁹ that the Title VII "bona fide seniority system" exception permits the routine application of a seniority system absent proof of an intention to discriminate.ⁿ⁴⁰ The Court explained that the layoff proposal in this case was not adopted to intentionally discriminate on the basis of race.ⁿ⁴¹

Although the Sixth Circuit in *Stotts* had also disagreed with the district court's finding that the employer's seniority system was not bona fide,ⁿ⁴² the appellate court had upheld the injunction on the ground that the district court had merely enforced the terms of the consent decree, as modified by the court.ⁿ⁴³ The Supreme Court, however, held that the injunction did not simply enforce the terms of the consent decree because the decree contained no layoff provisions and did not suggest any intention to depart from the seniority system.ⁿ⁴⁴ The Court further disagreed with the Sixth Circuit's conclusionⁿ⁴⁵ that the district court could override the seniority system by unilaterally "modifying" the consent decree.ⁿ⁴⁶ The Court acknowledged that although the district court could award competitive seniority to individual members of the plaintiff class who could prove that they were actual victims of discrimination, mere

membership in a disadvantaged class is insufficient to support such an award.ⁿ⁴⁷ The Court noted that in formulating the consent decree neither the district court nor the parties had identified any specific employees who were victims of discrimination and that no award of competitive seniority had been made to any employees.ⁿ⁴⁸ The Court concluded that the injunction therefore impermissibly imposed on the defendants, as an adjunct of the settlement, an obligation that the district court could not have ordered if the case had gone to trial and if the plaintiffs had proved a pattern or practice of discrimination.ⁿ⁴⁹

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationAge
DiscriminationEmployment PracticesGeneral OverviewLabor & Employment LawDiscriminationAge
DiscriminationEmployment PracticesDemotions & PromotionsLabor & Employment LawDiscriminationDisparate
ImpactEmployment PracticesDemotions & PromotionsLabor & Employment LawDiscriminationDisparate
TreatmentEmployment PracticesAdverse Employment ActionsDemotions & Promotions

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-2(h).

(n2)Footnote 2. *See, e.g., Local 189, United Papermakers & Paperworkers v. United States* (5th Cir. 1969) 416 F.2d 980, 994-996.

(n3)Footnote 3. *See* 42 U.S.C. § 2000e-2(a)(2) (Title VII prohibits employers from limiting, segregating, or classifying employees based on membership in protected classification).

(n4)Footnote 4. *See* Larson, Employment Discrimination, Ch. 6, "Preemployment and Employment Practices"; *see also* Schlei and Grossman, Employment Discrimination Law (2d ed. 1983) Ch. 3, "Seniority."

(n5)Footnote 5. *Teamsters v. United States* (1977) 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n6)Footnote 6. *See Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 353-354, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n7)Footnote 7. *See Teamsters v. United States* (1977) 431 U.S. 324, 352, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n8)Footnote 8. *See Teamsters v. United States* (1977) 431 U.S. 324, 353, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n9)Footnote 9. *See Teamsters v. United States* (1977) 431 U.S. 324, 353, 356, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n10)Footnote 10. *See Teamsters v. United States* (1977) 431 U.S. 324, 353, 356, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n11)Footnote 11. *Black Law Enf. Officers Ass'n v. City of Akron* (6th Cir. 1987) 824 F.2d 475, 481 ; *see also* *Lorance v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, 909, 109 S. Ct. 2261, 104 L. Ed. 2d 961 (intent as necessary element of Title VII actions challenging seniority systems).

(n12)Footnote 12. *See American Tobacco Co. v. Patterson* (1982) 456 U.S. 63, 65, 102 S. Ct. 1534, 71 L. Ed. 2d 748 ; *see also Lorance v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, 909-910, 109 S.Ct. 2261, 104 L. Ed. 2d 961 .

(n13)Footnote 13. *See Pullman-Standard v. Swint* (1982) 456 U.S. 273, 289, 102 S. Ct. 1781, 72 L. Ed. 2d 66 .

(n14)Footnote 14. *See Pullman-Standard v. Swint* (1982) 456 U.S. 273, 289 fn. 18, 102 S. Ct. 1781, 72 L. Ed. 2d 66 ; *Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 580, 98 S. Ct. 2943, 57 L. Ed. 2d 957 .

(n15)Footnote 15. *James v. Stockham Valves & Fittings Co.* (5th Cir. 1977) 559 F.2d 310 , cert. denied, 434 U.S. 1034 (1978) .

(n16)Footnote 16. *See James v. Stockham Valves & Fittings Co.* (5th Cir. 1977) 559 F.2d 310, 351 , cert. denied, 434 U.S. 1034 (1978) .

(n17)Footnote 17. *See James v. Stockham Valves & Fittings Co.* (5th Cir. 1977) 559 F.2d 310, 352 , cert. denied, 434 U.S. 1034 (1978) .

(n18)Footnote 18. *See James v. Stockham Valves & Fittings Co.* (5th Cir. 1977) 559 F.2d 310, 352 .

(n19)Footnote 19. *See 29 C.F.R. § 1604.3(a)*. For a discussion of the bona fide occupational qualification defense, *see § 41.94*.

(n20)Footnote 20. *See 29 C.F.R. § 1604.3(a)(2)*.

(n21)Footnote 21. *See 29 C.F.R. § 1604.3(b)*.

(n22)Footnote 22. *Bowe v. Colgate-Palmolive Company* (7th Cir. [Ind.] 1969) 416 F.2d 711.

(n23)Footnote 23. *See Bowe v. Colgate-Palmolive Company* (7th Cir. [Ind.] 1969) 416 F.2d 711, 717-718.

(n24)Footnote 24. *See Bowe v. Colgate-Palmolive Company* (7th Cir. [Ind.] 1969) 416 F.2d 711, 718.

(n25)Footnote 25. *29 U.S.C. § 623(f)(2)(A)*.

(n26)Footnote 26. *29 U.S.C. § 623(f)(2)(A)*; *see 29 C.F.R. § 1625.9(a)(2)* (EEOC regulation interpreting ADEA); *see also Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400, 403, 105 S. Ct. 2743, 86 L. Ed. 2d 321 (ADEA generally prohibits mandatory retirement).

(n27)Footnote 27. *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 105 S. Ct. 613, 83 L. Ed. 2d 523 .

(n28)Footnote 28. *See Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 120, 105 S. Ct. 613, 83 L. Ed. 2d 523 .

(n29)Footnote 29. *See Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 124, 105 S. Ct. 613, 83 L. Ed. 2d 523 .

(n30)Footnote 30. *See Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 124, 105 S. Ct. 613, 83 L. Ed. 2d 523 .

(n31)Footnote 31. *See Schlei and Grossman, Employment Discrimination Law* (2d ed. 1983) Ch. 3, "Seniority."

(n32)Footnote 32. *Firefighters v. Stotts* (1984) 467 U.S. 561, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n33)Footnote 33. *See Firefighters v. Stotts* (1984) 467 U.S. 561, 577-579, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n34)Footnote 34. *See Firefighters v. Stotts* (1984) 467 U.S. 561, 565, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n35)Footnote 35. *See Firefighters v. Stotts* (1984) 467 U.S. 561, 566, 578, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n36)Footnote 36. *See Firefighters v. Stotts* (1984) 467 U.S. 561, 566-567, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n37)Footnote 37. *See Firefighters v. Stotts* (1984) 467 U.S. 561, 567, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n38)Footnote 38. *See Stotts v. Memphis Fire Dep't* (6th Cir. 1982) 679 F.2d 541, 567 .

(n39)Footnote 39. *Teamsters v. United States* (1977) 431 U.S. 324, 352, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n40)Footnote 40. *See Firefighters v. Stotts* (1984) 467 U.S. 561, 577, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n41)Footnote 41. *See Firefighters v. Stotts* (1984) 467 U.S. 561, 577, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n42)Footnote 42. *See Stotts v. Memphis Fire Dep't* (6th Cir. 1982) 679 F.2d 541, 551 fn. 6 .

(n43)Footnote 43. *See Stotts v. Memphis Fire Dep't* (6th Cir. 1982) 679 F.2d 541, 556-564 .

(n44)Footnote 44. *See Firefighters v. Stotts* (1984) 467 U.S. 561, 574, 578, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n45)Footnote 45. *See Stotts v. Memphis Fire Dep't* (6th Cir. 1982) 679 F.2d 541, 564-567 .

(n46)Footnote 46. *See Firefighters v. Stotts* (1984) 467 U.S. 561, 578-579, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n47)Footnote 47. *See Firefighters v. Stotts* (1984) 467 U.S. 561, 578-579, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n48)Footnote 48. *See Firefighters v. Stotts* (1984) 467 U.S. 561, 579, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n49)Footnote 49. *See Firefighters v. Stotts* (1984) 467 U.S. 561, 579, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.69

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.69 Training and Advancement

Title VII provides that it is an unlawful employment practice "for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs[,] to discriminate against any individual" because of his or her membership in a protected classification.ⁿ¹ Thus, an employer may not discriminatorily deny access to training,ⁿ² or discriminatorily fail to train an employee adequately.ⁿ³ In one case involving failure to adequately train, the Ninth Circuit Court of Appeals stated that in order to establish a prima facie case of discriminatory training, a plaintiff is required to show that he or she was treated differently from other employees, and that the employer was aware of the discrimination and failed to remedy it.ⁿ⁴

Unless excepted because they are based on a reasonable factor other than ageⁿ⁵ or exempted by the EEOC,ⁿ⁶ the ADEA prohibits age limitations in apprenticeship programs.ⁿ⁷

The FEHA prohibits any person from discriminating against any other person in selection or training of that person in any apprenticeship training program or any other training program leading to employment because of the person's membership in a protected classification.ⁿ⁸ FEHC regulations provide that when training that may make an employee eligible for promotion and/or transfer is made available, it must be made available in a manner that does not discriminate against individuals on a basis enumerated in the FEHA.ⁿ⁹

In *Esberg v. Union Oil Co.*,ⁿ¹⁰ the California Supreme Court upheld the court of appeal finding that the FEHA's prohibition against age discrimination in employment extended to hiring, discharging, suspension, and demotion, but not to the furnishing of employee benefits such as educational assistance.ⁿ¹¹ Effective January 1, 2003, the California Legislature acted to reject the holding in *Esberg*. The Legislature repealed former *Government Code Section 12941* and amended *Government Code Section 12940* to include age within the prohibited bases for employment discrimination, without distinguishing age from other types of discrimination. The Legislature expressly stated its intent to construe and clarify the meaning and effect of existing law and to reject the interpretation given to the law in *Esberg*.ⁿ¹²

For discussion of the validity of job-training requirements as an employee selection criteria, see §§ 41.42 and

41.45[2][a].

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationAge
DiscriminationEmployment PracticesGeneral OverviewLabor & Employment LawDiscriminationAge
DiscriminationEmployment PracticesDemotions & PromotionsLabor & Employment LawDiscriminationDisability
DiscriminationEmployment PracticesDemotions & PromotionsLabor & Employment LawDiscriminationDisparate
ImpactEmployment PracticesDemotions & Promotions

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-2(d). For a discussion of the various classifications protected by Title VII, *see* Part B (§§ 41.30-41.36).

(n2)Footnote 2. *See Thompson v. Sawyer (D.C. Cir. 1982) 678 F.2d 257, 283 ; see also Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm. (9th Cir. 1987) 833 F.2d 1334, 1337* (Joint labor-management committee administering carpentry registry apprenticeship program violated Title VII because its system for providing apprentices with first jobs had effect of discriminating on basis of sex).

(n3)Footnote 3. *See Shah v. Mt. Zion Hospital & Medical Ctr. (9th Cir. [Cal.] 1981) 642 F.2d 268, 271 ; see also Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 51 Cal. Rptr. 2d 642* (plaintiff failed to prove unfair denial of training opportunities).

(n4)Footnote 4. *Shah v. Mt. Zion Hospital & Medical Ctr. (9th Cir. [Cal.] 1981) 642 F.2d 268, 271 .*

(n5)Footnote 5. *See* 29 U.S.C. § 623(f)(1).

(n6)Footnote 6. *See* 29 C.F.R. § 628.

(n7)Footnote 7. *See* 29 C.F.R. § 1625.21.

(n8)Footnote 8. *See Gov. Code § 12940(c); see also Gov. Code § 12940(l)*(discrimination in selection for training based on religion is unlawful unless reasonable accommodation cannot be accomplished). For a discussion of the various classifications protected by the FEHA, *see* Part B (§§ 41.30-41.36).

(n9)Footnote 9. 2 *Cal. Code Reg. § 7287.4(c)(2). See Jimeno v. Mobil Oil Corp. (9th Cir. 1995) 66 F.3d 1514 ,* where plaintiff had a pre-existing condition of physical disability and the employer terminated him as unfit and arranged for vocational rehabilitation training under workers' compensation.

(n10)Footnote 10. *Esberg v. Union Oil Co. (2002) 28 Cal. 4th 262, 47 P.3d 1069, 121 Cal. Rptr. 2d 203.*

(n11)Footnote 11. *Esberg v. Union Oil Co. (2002) 28 Cal. 4th 262, 264-271, 47 P.3d 1069, 121 Cal. Rptr. 2d 203 ; see Esberg v. Union Oil Co. (2001) 87 Cal. App. 4th 378, 104 Cal. Rptr. 2d 477 .*

(n12)Footnote 12. Stats. 2002, ch. 525 § 4.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART D. EMPLOYMENT PRACTICES GENERALLY

2-41 California Employment Law § 41.70

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§ 41.70 Transfer

Neither Title VII nor the FEHA contain any express provision relating to promotions and transfers. However Title VII provides that it is an unlawful employment practice "to limit, segregate, or classify ... employees in any way [that] would deprive any individual of employment opportunities" because of the individual's membership in a protected classification.ⁿ¹ Also, FEHC regulations provide that an employer or other entity covered by the FEHA may not restrict information on transfer opportunities to certain employees or classes of employees when the restriction has the effect of discriminating on a basis enumerated in the FEHA.ⁿ²

Discriminatory employment practices relating to transfers may be analyzed similarly to discriminatory promotion policies. Thus, the "disparate treatment" theory of liability may be applied to an alleged discriminatory transfer of, or refusal to transfer, an employee.ⁿ³ Presumably, facially neutral transfer policies may be subject to "disparate impact" analysis.ⁿ⁴

When an employer modifies its workforce for business reasons, it has no obligation to transfer an employee to another position within the company.ⁿ⁵ To the extent that an employer voluntarily assumes such an obligation, the court can draw an inference of discrimination only if the plaintiff can show that others not in the protected class were treated more favorably.ⁿ⁶

Legal Topics:

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

Labor & Employment Law Discrimination Disparate Treatment General Overview Labor & Employment Law Discrimination Disparate Treatment Employment Practices Adverse Employment Actions Reassignments & Transfers Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 General Overview

FOOTNOTES:

(n1)Footnote 1. *See 42 U.S.C. § 2000e-2(a)(2).*

(n2)Footnote 2. *See* 2 Cal. Code Reg. 4(c).

(n3)Footnote 3. *See Peters v. Jefferson Chemical Company* (5th Cir. 1975) 516 F.2d 447, 449-450 ; *Chapman v. Pacific Tel. & Tel. Co.* (N.D. Cal. 1978) 456 F. Supp. 65, 75 ; *Odima v. Westin Tucson Hotel* (9th Cir. 1995) 53 F.3d 1484, 1494-1495 (claims for denial of transfer would be actionable if it involved an increase in supervisory duties); *Horsford v. Board of Trustees of California State Univ.* (2005) 132 Cal. App. 4th 359, 374 (removing police lieutenant from his former position near top of department's chain of command, and then removing him entirely from law enforcement duties and transferring him to head department in which he had no training or expertise adversely changed objective terms and conditions of employment, and when motivated by racial animus constituted actionable adverse employment action).

(n4)Footnote 4. *Cf. Peters v. Jefferson Chemical Company* (5th Cir. 1975) 516 F.2d 447, 449 .

(n5)Footnote 5. *Gibbs v. Consolidated Services* (2003) 111 Cal. App. 4th 794, 800, 4 Cal. Rptr. 3d 187 ; *see also* *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1422 ; *Simpson v. Midland-Ross Corp.* (6th Cir. 1987) 823 F.2d 937, 942 n.6 .

(n6)Footnote 6. *Gibbs v. Consolidated Services* (2003) 111 Cal. App. 4th 794, 800, 4 Cal. Rptr. 3d 187 (plaintiff could not make showing of unlawful age discrimination in failure to offer him transfer to driving position, where only employee offered driving position was over 40); *see also* *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1422-1423 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
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2-41 California Employment Law §§ 41.71 through 41.79

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[Reserved]

§§ 41.71[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART E. HARASSMENT

2-41 California Employment Law § 41.80

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§ 41.80 Prohibited Bases of Workplace Harassment

[1] California Law

[a] Fair Employment and Housing Act (FEHA)

[i] Definition and Scope of Harassment

The FEHA expressly prohibits harassment of employees, applicants, or persons providing services pursuant to a contract¹ based on race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, sexual orientation, or age over 40 years.² The FEHA provides that "harassment because of sex" includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.³ According to FEHC regulations interpreting the FEHA, harassment of all kinds includes, but is not limited to:

- (1) Verbal harassment (e.g., epithets, derogatory comments, or slurs relating to a basis enumerated in the FEHA);
- (2) Physical harassment (e.g., assault, impeding or blocking movement, or any interference with normal work or movement when directed at an individual on a basis enumerated in the FEHA);
- (3) Visual forms of harassment (e.g., derogatory posters, cartoons, or drawings pertaining to a basis enumerated in the FEHA); or
- (4) Sexual favors (e.g., unwanted sexual advances that condition an employment benefit on an exchange of sexual favors).⁴

The FEHA imposes an affirmative duty on employers to take all reasonable steps to prevent discrimination and harassment from occurring.⁵ Consistent with the federal authorities discussed in [ii], *below*, the FEHA provides that

loss of tangible benefits is not necessary to establish unlawful harassment.ⁿ⁶ However, no suit may be maintained for violation of this affirmative duty if the plaintiff has not actually suffered any employment discrimination or harassment.ⁿ⁷ For a discussion of FEHA workplace posting requirements, see § 41.140[1][f].

The FEHA addresses discrimination and harassment separately. Discrimination refers to bias in the exercise of official actions on behalf of the employer, and harassment refers to bias that is expressed or communicated through interpersonal relations in the workplace.^{n7.1} Harassment consists of conduct outside the scope of necessary job performance, presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Commonly necessary personnel management actions do not come within the meaning of harassment. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment.^{n7.2} However, although discrimination and harassment are separate wrongs, they are sometimes closely interrelated, and even overlapping, particularly with regard to proof.^{n7.3}

Under the FEHA, harassment focuses on situations in which the social environment of the workplace becomes intolerable because the harassment, whether verbal, physical, or visual, communicates an offensive message to the harassed employee.^{n7.4} Because a harasser need not exercise delegated power on behalf of the employer to communicate an offensive message, it does not matter for purposes of proving harassment whether the harasser is the president of the company or an entry-level clerk, although harassment by a high-level manager of an organization may be more injurious to the victim because of the prestige and authority that the manager enjoys.^{n7.5}

When the harasser is a supervisor, the employer is strictly liable for the supervisor's actions.^{n7.6} When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence, *i.e.*, the employer knew or should have known of the harassment and failed to take appropriate corrective action.^{n7.7}

The FEHA does not place different degrees of liability for discrimination and harassment. Both are unlawful employment practices,^{n7.8} and in both cases an aggrieved employee can obtain full compensation for any resulting injury.^{n7.9} An employee who is the victim of discrimination based on an official action of the employer also can be the victim of harassment by a supervisor for abusive messages that create a hostile working environment, and under the FEHA the employee would have two separate claims of injury.^{n7.10} For example, in *Roby v. McKesson Corp.*,^{n7.11} an employee's discrimination claim sought compensation for official employment actions that were motivated by improper bias. The discriminatory actions included the termination of her employment based on her disability, and official employment actions that preceded the termination. Her harassment claim, by contrast, sought compensation for hostile social interactions in the workplace that affected the workplace environment because of the offensive message they conveyed to her. The harassing actions included actions by her supervisor, none of which could fairly be characterized as an official employment action. None involved the supervisor's exercising the authority the employer had delegated to her so as to cause the employer, in its corporate capacity, to take some action with respect to the employee. Rather, the actions were events that were unrelated to the supervisor's managerial role, engaged in for her own purposes.

Some official employment actions done in furtherance of a supervisor's managerial role also can have a secondary effect of communicating a hostile message. This occurs when the actions establish a widespread pattern of bias.^{n7.12} In *Roby*, some actions the supervisor took were best characterized as official employment actions rather than hostile social interactions in the workplace, but they could have contributed to the hostile message the supervisor was expressing to the employee in other, more explicit ways.^{n7.13}

Acts of discrimination can provide evidentiary support for a harassment claim by establishing discriminatory animus on the part of the manager responsible for the discrimination, thereby permitting the inference that rude comments or behavior by that manager was similarly motivated by discriminatory animus. Thus, discrimination and harassment claims can overlap as an evidentiary matter. The critical inquiry when a court is deciding whether the evidence is sufficient to uphold a verdict finding both discrimination and harassment is whether the evidence indicates violations of

both FEHA prohibitions, but nothing prevents a plaintiff from proving the two violations with the same (or overlapping) evidentiary presentations.^{n7.14} In *Roby*, the Court of Appeal erroneously allocated the employee's evidence between her discrimination claim and her harassment claim, and on that basis found the evidence of harassment insufficient. The evidence was ample to support the jury's harassment verdict, because it was sufficient to allow the jury to conclude that the hostility was pervasive and effectively changed the conditions of her employment. Moreover, the jury could infer, based on the discrimination evidence, that the supervisor's hostility was because of the employee's medical condition.^{n7.15}

[ii] Employers Covered Under FEHA

The FEHA proscription against all forms harassment, unlike its other provisions, applies to any "person regularly employing one or more persons, or regularly receiving the services of one or more persons providing services pursuant to a contract, or any person acting as an agent of an employer, directly or indirectly, the state, or any political or civil subdivision thereof, and cities."ⁿ⁸ However, employers that are nonprofit religious associations or corporations are exempt from the FEHA harassment provisions, except as provided in *Gov. Code § 12926.2*, discussed at § 40.10[3].ⁿ⁹

[b] Unruh Civil Rights Act

In 1994, the California Legislature amended the Unruh Civil Rights Actⁿ¹⁰ to include a proscription against sexual harassment in business, service and professional relationships.ⁿ¹¹ The statute provides that damages shall be awarded for violations of *Civil Code Section 51.9* as provided in *Civil Code Section 52*.

■ CONSULTANT'S COMMENT:

The reference in *Civil Code Section 51.9* to the remedial provisions of *Civil Code Section 52* suggests a drafting defect by the California legislature. Section 52 contains a number of subsections which outline the remedies applicable to specific portions of Section 51, but none of those remedial provisions mention Section 51.9. Thus, practitioners must await either a statutory amendment or court decisions which link the prohibitions in Section 51.9 to one or more subsections of Section 52. *Commentary by Kirby Wilcox.*

[c] Common Law

In *Rojo v. Kliger*,ⁿ¹² the California Supreme Court held sexual harassment victims need not pursue remedies under the FEHA because *art. I, § 8 of the California Constitution* states a fundamental public policy against sex discrimination. Accordingly, the court held that plaintiffs could pursue a tort remedy for termination in violation of public policy, noting "the FEHA does not displace any causes of action and remedies that are otherwise available" to plaintiffs who allege discrimination on the basis of sex.ⁿ¹³

[d] Workplace Violence Safety Act

In 1994, the California Legislature enacted the Workplace Violence Safety Act,ⁿ¹⁴ in order to provide employers optional remedies against workplace violence. However, the statute was not intended to obligate employers to seek its remedies.ⁿ¹⁵ The act provides injunctive relief to any employer whose employee has "suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace."ⁿ¹⁶

■ PRACTICE TIP:

Although the Legislature has stated that no employer is obligated to seek the remedies of the Workplace Violence Safety Act, it remains an open question whether, in an appropriate situation where the employer has notice of the danger, an individual harmed by the employer's failure to seek an injunction would be able to seek damages for negligence. *Commentary by Elizabeth W. Mandel.*

[2] Federal Law**[a] Title VII**

Title VII does not explicitly proscribe harassment based on membership in its protected classifications. Nevertheless, cases hold that harassment based on sex, race, national origin, or religion violates Title VII.ⁿ¹⁷ Courts have also recognized that harassment may occur on the basis of gender hostility, although no overt sexual harassment has occurred.ⁿ¹⁸

Although adverse employment decisions and the loss of tangible employment benefits may result from harassment,ⁿ¹⁹ findings of discrimination are most often based on the premise, first articulated in *Rogers v. Equal Employment Opportunity Com'n*,ⁿ²⁰ that a "working environmen[t] [may be] so heavily polluted with discrimination as to destroy completely the emotional and psychological stability" of the affected employees.ⁿ²¹ Thus, in *Meritor Savings Bank v. Vinson*,ⁿ²² the United States Supreme Court held that such "hostile environment" harassment violates Title VII even in the absence of economic loss.ⁿ²³ Relying on the language of Title VII, *Rogers*, and the EEOC guidelines on sex discrimination,ⁿ²⁴ the Court in *Vinson* rejected a contention that Title VII is concerned solely with "tangible loss" of "economic character."ⁿ²⁵

The EEOC has published guidelines discussing sexual harassmentⁿ²⁶ and national origin harassment.ⁿ²⁷ Among other things, the EEOC guidelines on sexual harassment proscribe unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.ⁿ²⁸

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

Harassment may not only be raised as an independent claim, but also as supporting evidence of discrimination regarding other employment practices. Harassment may be probative of disparate treatment. *Commentary by Bill Lann Lee.*

[b] Other Federal Statutes**[i] Title IX**

The proscription against sex discrimination in Title IX of the Education Amendments of 1972ⁿ²⁹ includes employees of all educational institutions which receive federal assistance.ⁿ³⁰ Currently the Office of Civil Rights (OCR) is the agency which enforces Title IX.

In *Franklin v. Gwinnett County Public Schools*,ⁿ³¹ the United States Supreme Court recognized that with respect to teachers and students, Title IX imposes the same rule against sex discrimination as does Title VII "when a supervisor sexually harasses a subordinate because of the subordinate's sex."ⁿ³² Some courts have held that this rule also applies to employees of covered educational institutions,ⁿ³³ while others have held that Title VII preempts Title IX.ⁿ³⁴

In *Jackson v. Birmingham Board of Education*,^{n34.1} the United States Supreme Court held that the private right of action implied by Title IX is cognizable when the recipient of federal funds under Title IX retaliates against an

individual because the individual complains about sex discrimination.^{n34,2}

[ii] Section 1983

An action for sexual harassment under *42 U.S.C. § 1983* may be available to state and local governmental employees. However, the employer agency may be liable only if the deprivation of civil rights is found to have been in furtherance of the government's policy or custom or that the harassment is an established practice.ⁿ³⁵

[iii] Section 1981

42 U.S.C. § 1981 encompasses a hostile work environment claim. Congress amended § 1981 as part of the 1991 Civil Rights Act. Congress added subsection (b), which defines "make and enforce contracts" as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." The congressional amendment to § 1981 evinced congressional intent to permit hostile work environment claims under § 1981.ⁿ³⁶ The legal principles guiding a court in a Title VII dispute apply with equal force in a § 1981 action.ⁿ³⁷

To establish the *prima facie* hostile work environment claim under either Title VII or § 1981, the plaintiff must raise a triable issue of fact as to the whether the following are true:ⁿ³⁸

- (1) The plaintiff was subjected to verbal or physical conduct because of his or her race.
- (2) The conduct was unwelcome.
- (3) The conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment.

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationActionable DiscriminationLabor & Employment LawDiscriminationDisparate TreatmentGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Gov. Code § 12940(j)(5)* ("person providing services pursuant to a contract" means a person who has the right to control performance under the contract, discretion as to the manner of performance, is customarily engaged in an independently established business, and has control over the time and place of performance, supplies tools and instrument used in the work, and performs work that requires a particular skill nor ordinarily used in the course of the employer's work).

(n2)Footnote 2. *Gov. Code § 12940(j)(1)*.

(n3)Footnote 3. *Gov. Code § 12940(j)(4)(C); see 2 Cal. Code Reg. § 7287.6(b)(2)*.

(n4)Footnote 4. *2 Cal. Code Reg. § 7287.6(b)(1); see Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 607-608, 262 Cal. Rptr. 842 (FEHA; sexual harassment). See Accardi v. Superior Court Of Simi Valley (Dist. 1993) 17 Cal. App. 4th 341, 348, 21 Cal Rptr. 2d 292*, where the court noted that the behavior need not involve sexual advances, rather the behavior must be based on the sex of the person which interferes with the person's work performance.

For the standard jury instruction defining "harassing conduct" under FEHA, *see* Judicial Council of California Civil

Jury Instructions, CACI 2523(Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction defining "hostile work environment," *see* Judicial Council of California Civil Jury Instructions, CACI 2524 (Matthew Bender). For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n5)Footnote 5. *Gov. Code § 12940(j)(1), (k)*; *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 20 (sexual harassment; employer must have in place, and inform its employees about, adequate procedure for handling harassment complaints as part of its independent obligation to prevent harassment); *DFEH v. Madera County* (1990) FEHC Dec. No. 90-03, p. 29 (same); *DFEH v. State University--Hayward* (1988) FEHC Dec. No. 88-18, p. 19 88-18 (same).

(n6)Footnote 6. *See Gov. Code § 12940(j)*; *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal. App. 3d 590, 607, 262 Cal. Rptr. 842 (FEHA; sexual harassment); *DFEH v. Rosenberg* (1990) FEHC Dec. No. 90-09, p. 6 (same); *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 12 (same); *DFEH v. Madera County* (1990) FEHC Dec. No. 90-03, p. 29 (same); *DFEH v. State University--Hayward* (1988) FEHC Dec. No. 88-18, pp. 14-15 (same).

(n7)Footnote 7. *Trujillo v. North County Transit Dist.* (1998) 63 Cal. App. 4th 280, 288-289, 73 Cal. Rptr. 2d 596 (special verdict for damages based on finding of violation of former *Gov. Code § 12940(i)* is impermissible when jury found that defendants did not discriminate, racially harass, or retaliate against plaintiffs or cause severe emotional distress).

(n8)Footnote 7.1. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *35 .

(n9)Footnote 7.2. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *35-*36 ; *Reno v. Baird* (1998) 18 Cal. 4th 640, 645-647 76 Cal. Rptr. 2d 499, 957 P.2d 1333 . For discussion of discrimination under the FEHA, *see* § 41.02[6], *above*.

(n10)Footnote 7.3. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *36 .

(n11)Footnote 7.4. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *33-*34 .

(n12)Footnote 7.5. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *34-*35 .

(n13)Footnote 7.6. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *35 ; *State Dept. of Health Services v. Superior Court* (2003) 31 Cal. 4th 1026, 1040-1041, 6 Cal. Rptr. 3d 441, 79 P.3d 556 .

(n14)Footnote 7.7. *Gov. Code § 12940(j)(1)*. *See also Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *35 .

(n15)Footnote 7.8. *See Gov. Code § 12940*.

(n16)Footnote 7.9. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *36 .

(n17)Footnote 7.10. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *36 .

(n18)Footnote 7.11. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009

*Cal. LEXIS 12374, *39-*47 .*

(n19)Footnote 7.12. *Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *41 ; Miller v. Dept. of Corrections (2005) 36 Cal. 4th 446, 466, 30 Cal. Rptr. 3d 797, 115 P.3d 77 .*

(n20)Footnote 7.13. *Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *41 .*

(n21)Footnote 7.14. *Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *41-*42 .*

(n22)Footnote 7.15. *Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *42-*45 . See Gov. Code § 12940(j)(i).*

(n23)Footnote 8. *Gov. Code § 12940(j)(4)(A); but cf. Campbell v. Arco Marine (1996) 42 Cal. App. 4th 1850, 1857-1858, 50 Cal. Rptr. 2d 626 (FEHA jurisdiction does not extend to nonresidents when the wrongful conduct occurred outside California).*

(n24)Footnote 9. *Gov. Code § 12940(j)(4)(B).*

(n25)Footnote 10. *Civ. Code § 51 et seq.*

(n26)Footnote 11. *Civ. Code § 51.9*(covered relationships include physicians, psychotherapists, and dentist-patient; attorney, marriage, family or child counselor, licensed clinical social worker, master of social work, real estate agent, real estate appraiser, accountant banker, trust officer, financial planner loan officer, collection service, contractor, or escrow loan officer-client; executor, trustee, or administrator-beneficiary; landlord or property manager-tenant; teacher-student; any relationship substantially similar to those enumerated).

(n27)Footnote 12. *Rojo v. Kliger (1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373 .*

(n28)Footnote 13. *See Rojo v. Kliger (1990) 52 Cal. 3d 65, 82, 276 Cal. Rptr. 130, 801 P.2d 373 .*

(n29)Footnote 14. *Code Civ. Proc. § 527.8.*

(n30)Footnote 15. *See* Legislature's historical and statutory notes to Section 1, Stats. 1993-94, 1st Ex. Sess., c. 29 (A.B. 68).

(n31)Footnote 16. *Code Civ. Proc. § 527.8(a).*

(n32)Footnote 17. *See, e.g., Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, 64-67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (sex discrimination); Snell v. Suffolk County (2d Cir. 1986) 782 F.2d 1094, 1102-1103 (race discrimination); Bundy v. Jackson (D.C. Cir. 1981) 641 F.2d 934, 942-943, 948 (sex discrimination); Firefighters Institute, Etc. v. City of St. Louis (8th Cir. 1977) 549 F.2d 506, 514-515 ; Rogers v. EEOC (5th Cir. 1971) 454 F.2d 234 (national origin); Abrams v. Baylor College of Medicine (5th Cir. 1986) 805 F.2d 528 (religion).*

(n33)Footnote 18. *See Rogers v. EEOC (5th Cir. 1971) 454 F.2d 234 .*

(n34)Footnote 19. *See, e.g., Bundy v. Jackson (D.C. Cir. 1981) 641 F.2d 934, 948-953, 948 .*

(n35)Footnote 20. *Rogers v. EEOC (5th Cir. 1971) 454 F.2d 234, 238 .*

(n36)Footnote 21. *See Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, 66, 106 S. Ct. 2399, 91 L. Ed. 2d 49 ;*

Snell v. Suffolk County (2d Cir. 1986) 782 F.2d 1094, 1102-1103 ; *Bundy v. Jackson* (D.C. Cir. 1981) 641 F.2d 934, 944-945 ; *Firefighters Institute, Etc. v. City of St. Louis* (8th Cir. 1977) 549 F.2d 506, 515.

(n37)Footnote 22. *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 .

(n38)Footnote 23. *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 64-67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 .

(n39)Footnote 24. 29 C.F.R. § 1604.11(a) (EEOC sex discrimination guideline; conduct having purpose or effect of unreasonably interfering with individual's work performance or creating intimidating, hostile, or offensive working environment as one circumstance of sexual harassment).

(n40)Footnote 25. See *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 64-65, 106 S. Ct. 2399, 91 L. Ed. 2d 49 .

(n41)Footnote 26. See 29 C.F.R. § 1604.11.

(n42)Footnote 27. See 29 C.F.R. § 1606.8.

(n43)Footnote 28. See 29 C.F.R. § 1604.11(a).

(n44)Footnote 29. See 20 U.S.C. § 1681.

(n45)Footnote 30. See 20 U.S.C. § 1681(a); *North Haven Board of Education v. Bell* (1982) 456 U.S. 512, 537 , (upholding HEW regulations).

(n46)Footnote 31. *Franklin v. Gwinnett County Public Schools* (1992) 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 .

(n47)Footnote 32. See *Franklin v. Gwinnett County Public Schools* (1992) 503 U.S. 60, 75, 112 S. Ct. 1028, 117 L. Ed. 2d 208 .

(n48)Footnote 33. See *Henschke v. New York Hospital-Cornell Medical Ctr.* (S.D.N.Y. 1993) 821 F. Supp. 166 .

(n49)Footnote 34. See *Wedding v. University of Toledo* (N.D. Ohio 1994) 862 F. Supp. 201 .

(n50)Footnote 34.1. *Jackson v. Birmingham Board of Education* (2005) 125 S. Ct. 1497, 161 L. Ed. 2d 361 .

(n51)Footnote 34.2. *Jackson v. Birmingham Board of Education* (2005) 125 S. Ct. 1497, 1503-1510, 161 L. Ed. 2d 361 (complaint of male girls' basketball coach that Board of Education violated Title IX by retaliating against him for protesting discrimination against girls' basketball team erroneously dismissed).

(n52)Footnote 35. See *Leer v. Murphy* (9th Cir. 1988) 844 F.2d 628, 632-633 ; *Thompson v. City of Los Angeles* (9th Cir. 1989) 885 F.2d 1439, 1443-1444 (custom must be proved by a permanent and well settled practice which although not authorized by written or express municipal policy constitutes usage with the force of law.); *Redman v. County of San Diego* (9th Cir. 1991) 942 F.2d 1435, 1445 (en banc) (routine failure to follow nondiscrimination policy can itself constitute an actionable custom).

(n53)Footnote 36. See *Manatt v. Bank of America NA* (9th Cir. 2003) 339 F.3d 792, 797 ; see also *Whidbee v. Garzarelli Food Specialties, Inc.* (2d Cir. 2000) 223 F.3d 62, 68-69 ; *Danco, Inc. v. Wal-Mart Stores, Inc.* (1st Cir. 1999) 178 F.3d 8, 13 ; *Witt v. Roadway Express* (10th Cir. 1998) 136 F.3d 1424, 1431-1432 ; *Jackson v. Motel Six Multipurpose, Inc.* (11th Cir. 1997) 130 F.3d 999, 1008 n.17 ; *Dennis v. County of Fairfax* (4th Cir. 1995) 55 F.3d 151, 155 ; *Johnson v. Uncle Ben's, Inc.* (5th Cir. 1992) 965 F.2d 1363, 1372 .

(n54)Footnote 37. *Manatt v. Bank of America NA* (9th Cir. 2003) 339 F.3d 792, 797 ; *see EEOC v. Inland Marine Indus.* (9th Cir. 1984) 729 F.2d 1229, 1233 n.7 (plaintiff must meet same standards in proving § 1981 claim that he or she must meet in establishing claim under Title VI); *see also Whidbee v. Garzarelli Food Specialties, Inc.* (2d Cir. 2000) 223 F.3d 62, 69 (analogizing § 1981 claim to Title VII claim); *Danco, Inc. v. Wal-Mart Stores, Inc.* (1st Cir. 1999) 178 F.3d 8, 13 (language in § 1981(b) tracks language of Title VII prohibiting discrimination with respect to compensation, terms, conditions, or privileges of employment); *Jurado v. Eleven-Fifty Corp.* (9th Cir. 1987) 813 F.2d 1406, 1412 .

(n55)Footnote 38. *Manatt v. Bank of America NA* (9th Cir. 2003) 339 F.3d 792, 798-799 (conduct of Chinese-American employee's coworkers and supervisor, while offensive and inappropriate, did not so pollute workplace that it altered conditions of her employment); *Kang v. U. Lim Am., Inc.* (9th Cir. 2002) 296 F.3d 810, 817 . For discussion of hostile environment generally, *see* § 41.81[1][b].



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART E. HARASSMENT

2-41 California Employment Law § 41.81

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.81 Sexual Harassment

[1] Types of Sexual Harassment

Under the FEHA, sexual harassment is actionable under *Government Code Section 12940(j)*, and as a form of discrimination "because of sex."ⁿ¹ The FEHA defines "harassment because of sex" to include sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions.ⁿ² As discussed in § 41.80[2], Title VII does not expressly proscribe harassment, but the United States Supreme Court has held that sexual harassment is unlawful under Title VII as a form of sex discrimination.ⁿ³

Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal, physical, or visual conduct of a sexual nature.ⁿ⁴ In *Jacobus v. Krambo Corp.*,^{n4.1} a jury found that a male co-worker's acts toward a female co-worker, including discussion of his sex life, sexual bantering, and showing her explicit sexual materials, did not constitute sexual harassment when the female co-worker consented to these exchanges.^{n4.2}

Sexual conduct by a person of the same gender as the victim may constitute sexual harassment.ⁿ⁵

Historically, California and federal courts construing the FEHA and Title VII, respectively, have recognized two distinct categories of sexual harassment: (1) "quid pro quo" sexual harassment, and (2) "hostile work environment" sexual harassment.ⁿ⁶ However, in *Burlington Industries, Inc. v. Ellerth*,^{n6.1} the Supreme Court carefully analyzed these terms and limited their application in the analysis of sexual harassment claims under Title VII. The Court noted that an employer is always liable for a supervisor's harassing conduct in any case involving a tangible action, *i.e.*, a significant change in employment status, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."^{n6.2} But the Court found that in cases where no tangible employment action occurs (traditionally "hostile environment" cases), the two terms are of "limited utility" and are only "helpful, perhaps, in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether."^{n6.3} The Court held that the issue of real concern is not the category of harassment, but rather whether an employer is vicariously liable for a supervisor's harassing conduct.^{n6.4} In

the absence of a tangible employment action, the employer's vicarious liability under Title VII for a supervisor's harassing conduct will depend upon whether the employer acted reasonably to prevent and correct the conduct and whether the employee unreasonably failed to take advantage of the employer's preventive or corrective opportunities.^{n6.5}

A tangible employment action requires an official act of the enterprise or a company act. In most cases, a tangible employment action inflicts direct economic harm.^{n6.6} A "tangible employment action" occurs when a supervisor abuses his or her authority to act on the employer's behalf by threatening to fire a subordinate if he or she refuses to participate in sexual acts with the supervisor, and then actually fires the employee when she continues to resist the demands.^{n6.7} A "tangible employment action" also occurs when the supervisor threatens the employee with discharge and, to avoid the threatened action, the employee complies with the supervisor's demands.^{n6.8}

The California Supreme Court has not directly addressed this issue since *Ellerth* ^{n6.9} and *Faragher* ^{n6.10} were handed down. California courts have held that the FEHA imposes strict liability on employers for the harassment of an employee by an agent or supervisor.^{n6.11}

[a] "Quid Pro Quo" Harassment

[i] Definition

"Quid pro quo" harassment occurs when submission to sexual conduct is made a condition for receiving concrete employment benefits.ⁿ⁷ Such harassment also occurs when submission to or rejection of sexual conduct by an individual is used as the basis for employment decisions affecting the individual.ⁿ⁸

[ii] Proof

In *Bundy v. Jackson*, ⁿ⁹ the Court of Appeals for the District of Columbia Circuit considered the appropriate allocation of proof in "quid pro quo" cases. In *Bundy*, the plaintiff claimed that she was denied promotion in retaliation for her refusal to submit to sexual advances.ⁿ¹⁰ The appellate court explained that the "disparate treatment" test in *McDonnell Douglas Corp. v. Green*, ⁿ¹¹ fails to precisely fit the sexual harassment situation, in which the alleged basis of discrimination is not the employee's gender per se, but the employee's refusal to submit to sexual advances that the employee suffered in large part because of his or her gender.ⁿ¹² The court therefore adjusted the *McDonnell Douglas* test to state that a prima facie case of illegal denial of promotion in retaliation for a plaintiff's refusal to submit to sexual advances may be established by a showing that (1) the plaintiff was a victim of a pattern or practice of sexual harassment attributable to his or her employer; and (2) the plaintiff applied for and was denied a promotion for which he or she was technically eligible, and for which he or she had a reasonable expectation. The court held that if a prima facie case is established, the employer must then bear the burden of showing, by clear and convincing evidence, that it had legitimate and nondiscriminatory reasons for denying the plaintiff's promotion. If the employer successfully rebuts the prima facie case, the plaintiff must have the opportunity to prove that the employer's purported reasons were pretextual.ⁿ¹³ For a detailed discussion relating to the order and allocation of proof under the "disparate treatment" theory of liability, see § 41.11.

The *Bundy* court explained that the most important difference between its formula and the *McDonnell Douglas* formula is that the former does not require the plaintiff to show that other employees who were no better qualified, but who were not similarly disadvantaged, were promoted at the same time the plaintiff was denied promotion. The court stated that it relieved the plaintiff of that requirement because it felt that the plaintiff's burden should be eased when he or she proves not only that he or she is a member of a disadvantaged group, but also that he or she has personally suffered illegal discrimination through the harassment itself.ⁿ¹⁴

The FEHC has held that retaliation for refusing to engage in sexual activities constitutes both unlawful sexual

harassment and retaliatory discrimination for opposing unlawful employment practices.ⁿ¹⁵ Under the FEHA, an employee must prove, by a preponderance of the evidence, that a causal connection exists between the employee's resistance to sexual harassment and an adverse action taken against the employee by his or her employer.^{n15.1} The employee need not show that his or her resistance was the sole or even the principal reason for the adverse action. The FEHA is violated if the action was caused at least in part by a retaliatory motive.ⁿ¹⁶ Close proximity in time between an adverse action and an employee's resistance or opposition to sexual harassment is strong evidence of retaliatory motive.ⁿ¹⁷ Furthermore, a quid pro quo plaintiff can offer the testimony of other non-party employees who also claim to have been harassed by the employer as evidence of the employer's motive in discharging plaintiff.ⁿ¹⁸

The EEOC guidelines provide that if employment opportunities or benefits are *granted* because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.ⁿ¹⁹

Thus, according to EEOC enforcement policy, if a female employee submits to unwelcome sexual advances in return for an employment benefit, another qualified female employee who was denied the benefit may establish that sex was generally made a condition for receiving the benefit, thereby stating a claim for implicit "quid pro quo" sexual harassment. If, however, a third-party female employee is unable to establish that sex was generally made a condition for the benefit, both male and female employees who were qualified for but were denied the benefit may challenge the favoritism based on the fact that they were injured as a result of the discrimination directed at the coerced female. On the other hand, a harassed employee who *submits* to the employer's advances and is rewarded with additional economic benefits is not precluded from recovering for quid pro quo harassment.ⁿ²⁰

The Ninth Circuit has stated in *Candelore v. Clark County Sanitation Dist.* ⁿ²¹ that, to establish a prima facie case of third party quid pro quo harassment, the objecting employee must identify (1) the employment opportunities or benefits actually extended to the less-qualified female coworker who responded to sexual overtures from work supervisors, and (2) the benefits that the objecting employee was entitled to but did not receive because of refusing a supervisor's sexual advances.ⁿ²² However, the concurring opinion in *Candelore* explained that the *Candelore* holding was not meant to be at odds with a decision from the Second Circuit, *DeCintio v. Westchester County Medical Center*,ⁿ²³ which held that a coworker's consensual romantic relationship with a supervisor is not sex discrimination under Title VII.ⁿ²⁴ The concurrence in *Candelore* noted that it had not reached that issue since the plaintiff had not established a prima facie case by identifying missed benefits because of the coemployee's romantic involvement with the supervisor.ⁿ²⁵

Furthermore, if favoritism based on the granting of sexual favors is widespread in the workplace, male and female employees who object to such conduct may also establish "hostile environment" sexual harassment, as discussed in [b], *below*, even if the employees who received benefits willingly bestowed sexual favors. However, the EEOC does not consider an isolated instance of favoritism based on a consensual romantic relationship to be a violation of Title VII, because co-employees are equally disadvantaged for reasons other than their gender.ⁿ²⁶

[b] "Hostile Work Environment" Harassment

[i] Definition

Historically, "hostile work environment" sexual harassment has been defined as unwelcome sexual conduct that has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.ⁿ²⁷ The Ninth Circuit Court of Appeals, relying on *Meritor Savings Bank v. Vinson*,ⁿ²⁸ has held that a plaintiff may establish a case of such harassment by showing that: (1) he or she was subjected to sexual conduct;ⁿ²⁹ (2) the conduct was unwelcome; and (3) the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment.ⁿ³⁰ California courts construing the FEHA have adopted a similar test.ⁿ³¹

However, the Supreme Court has held that under Title VII the terms "quid pro quo" and "hostile environment" are primarily relevant to sexual harassment litigation "when there is a threshold question whether a plaintiff can prove discrimination" in the absence of a tangible employment action. But if there is no tangible employment decision, to be actionable under Title VII, the offending conduct--including unfulfilled threats--must be "severe or pervasive."^{31.1}

Under both Title VII and the FEHA, the conduct at issue need not be "sexual" in the sense of having anything to do with sexual advances. The conduct may be actionable if it creates a discriminatory and hostile environment based on gender.³² The EEOC also recognizes that conduct not involving sexual activity or language, but involving gender-based acts of physical aggression, intimidation, hostility, or unequal treatment, may also violate Title VII if the conduct is sufficiently severe or pervasive.³³

[ii] Proof

When evaluating a claim of sexual harassment based on an alleged hostile work environment, the court must determine two things:^{33.1}

- Whether the plaintiff has established that she or he was subjected to a hostile work environment; and
- Whether the employer is liable for the harassment that caused the environment.

Both present mixed questions of law and fact that the court reviews de novo.^{33.2} To establish that he or she was subjected to a hostile work environment, a plaintiff must prove the following:^{33.3}

- (1) Subjection to verbal or physical conduct of a sexual nature;
- (2) The conduct was unwelcome; and^{33.4}
- (3) The conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.^{33.5}

There is no legal requirement that hostile acts be overtly sex- or gender-specific in content, whether marked by language, by sex or gender stereotypes, or by sexual overtures. Under the "differential effects" standard articulated by the Ninth Circuit, offensive conduct that is not facially sex-specific may violate Title VII if there is sufficient circumstantial evidence of qualitative and quantitative differences in the harassment suffered by female and male employees.^{33.6}

Sexually coarse and vulgar language in some circumstances may not create a hostile work environment when the language does not involve and is not aimed at plaintiff or other women in the workplace.^{33.7}

The United States Supreme Court has held that in a sexual harassment case, to establish constructive discharge in addition to sexual harassment, the plaintiff must make a further showing, *i.e.*, that the abusive working environment became so intolerable that the resignation qualified as a fitting response. An employer may defend against the claim by showing both (1) that it installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) the plaintiff unreasonably failed to avail herself or himself of that employer-provided preventive or remedial apparatus. The affirmative defense is not available, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing the plaintiff's employment status or situation, such as a humiliating demotion, an extreme cut in pay, or a transfer to a position in which the plaintiff would face unbearable working conditions.^{33.8}

A woman may be the victim of sexual harassment if she is forced to work in an atmosphere of hostility or degradation of her gender. If an employer or supervisor engages in conduct which sufficiently offends, humiliates, distresses or intrudes on its victim, so as to disrupt her emotional tranquility in the workplace or affect her ability to perform her job as usual, or otherwise interferes with and undermines her personal sense of well-being, the employer or supervisor engages in harassment based on sex.^{n33.9} In order to state a cause of action for sexual harassment under the FEHA, a plaintiff need not be a direct victim in the sense the harassment was directed at her personally. An employee subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touching were directed to or perpetrated on that employee. One not personally subjected to such remarks or touching must establish that she personally witnessed the harassing conduct and it was in her immediate work environment.^{n33.10}

The critical issue in "hostile work environment" cases is often the severity or pervasiveness of unwelcome sexual conduct.ⁿ³⁴ Conduct is actionable if it is either sufficiently severe or if it is pervasive.^{n34.1} To be actionable, the conduct must be extreme, but there is no requirement that the employee endure sexual harassment until the employee's psychological well being is so spent that he or she requires psychiatric assistance.^{n34.2} For example, in *Vinson*, allegations of repeated demands for sexual favors, numerous instances of sexual intercourse, public fondling, and forcible rape were held to be plainly sufficient to state a claim for "hostile work environment" sexual harassment.ⁿ³⁵ Repeated acts of staring at a fellow worker may qualify as actionable sexual harassment.^{n35.1} Numerous demeaning comments about women in the workplace, along with other conduct, also may qualify as actionable harassment.^{n35.2}

On the other hand, a mere isolated epithet usually fails to support such a claim.ⁿ³⁶ An isolated incident of harassment by a co-worker will rarely, if ever, give rise to a reasonable fear that sexual harassment has become a permanent feature of the employment relationship. If the employer takes appropriate corrective action, it will not have ratified the conduct.^{n36.1} If a single incident can ever suffice to support a hostile work environment claim, it must be extremely severe.^{n36.2} However, it is possible that a single incident of harassment can support a claim of hostile work environment because the frequency of the discriminatory conduct is only one factor in the analysis.^{n36.3} An isolated incident can amount to a discriminatory change in the terms and conditions of employment when it is extremely serious.^{n36.4} Recognizing that most claims, however, involve conduct that falls somewhere between these two extremes, the Supreme Court explicitly adopted a "middle path" in *Harris v. Forklift Systems, Inc.* ⁿ³⁷

In *Little v. Windermere Relocation*, ^{n37.1} the Ninth Circuit held that rape is among the most severe forms of sexual harassment. A rape by a business associate while on the job irrevocably alters the conditions of the victim's work environment; and it imports a profoundly serious level of abuse into a situation that, by law, must remain free of discrimination based on sex. Thus, being raped is, at a minimum, an act of discrimination based on sex.^{n37.2}

In *Herberg v. California Institute of the Arts*, ^{n37.3} applying FEHA, the court of appeal found that liability for sexual harassment may not be imposed based on a single incident that does not involve egregious conduct akin to a physical assault or the threat of physical assault. Thus, the display of a piece of student art for 24 hours in a gallery as part of a student exhibit, depicting an employee in a sexual act, did not constitute severe or pervasive harassment because of sex as a matter of law.^{n37.4}

Whether the sexual conduct complained of is sufficiently severe and pervasive to create a hostile work environment must be evaluated by examining the totality of the circumstances.ⁿ³⁸ Thus, rather than viewing incidents of sexual conduct separately and in isolation from one another, the court should inquire into the overall composite effect of all the incidents on the working environment.ⁿ³⁹ Factors to be considered in evaluating the totality of the circumstances include:^{n39.1}

- The nature of the unwelcome sexual acts or words (with physical touching generally considered more offensive than mere words);
- The frequency of the offensive acts or encounters;

- The total number of days over which all the offensive conduct occurred;
- The context in which the sexually harassing conduct occurred.

■ CONSULTANT'S COMMENT:

The decision in *Herberg v. California Institute of the Arts* n39.2 is important because many sexual harassment cases derive from single incidents of alleged improper conduct. While a single incident of physical touching may constitute harassment, *Herberg* indicates that such touching must rise to the level of a physical assault or threat of physical assault. In the absence of such proof, sexual harassment is actionable only upon proof of a severe or pervasive pattern of unwelcome behavior. *Commentary by Kirby Wilcox.*

In *Ellison v. Brady*, n40 the Ninth Circuit Court of Appeals explained that it is the *harasser's conduct* that must be severe or pervasive, not the alteration in the employment conditions.ⁿ⁴¹ Thus, "employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation."^{n41.1} Title VII protection "comes into play long before the point where victims ... require psychiatric assistance."ⁿ⁴² The U.S. Supreme Court has likewise held that sexual harassment is not limited to cases in which the harasser's conduct causes tangible psychological injury.ⁿ⁴³

The Ninth Circuit in *Ellison* identified two considerations in determining whether sexual conduct is sufficiently severe and pervasive to violate Title VII. First, the requisite severity or seriousness varies inversely with pervasiveness or frequency. In other words, a single extremely severe act, such as an offensive touching, may be enough, but generally repeated incidents create a stronger claim of hostile environment.ⁿ⁴⁴ Second, courts should focus on the victim's perspective, because to do otherwise (i.e., to analyze conduct from the "reasonable person's" perspective) would run the risk of reinforcing the prevailing level of discrimination. For example, harassers may continue to harass merely because a particular discriminatory practice was common. In this regard, the Ninth Circuit is mindful that men and women often have different perspectives relating to sexual conduct.ⁿ⁴⁵ Thus, a female plaintiff states a prima facie case of hostile environment sexual harassment if she alleges conduct that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.ⁿ⁴⁶

When violence or the threat of violence is added to behavior that would otherwise be considered only boorish or overbearing, a trier of fact could determine that the victim's conditions of employment have been drastically changed and she or he was in a hostile work environment.^{n46.1}

In one case, for example, the Ninth Circuit, applying the *Ellison* standard, rejected the employer's defense that the accused harasser abused both men and women and therefore his actions did not constitute sexual harassment toward the female plaintiff. The court suggested that the defendant's sexual epithets and offensive explicit references to women's bodies could form the basis for an action for sexual harassment by any of the female or male employees so affected.ⁿ⁴⁷

The EEOC has stated in a policy guideline that it will evaluate allegedly harassing conduct under a "reasonable person" standard; that is, no violation of Title VII will be found if the conduct would not substantially affect the work environment of a reasonable person. Appearances to the contrary, however, this standard does not conflict with *Ellison's* "reasonable victim" standard. The EEOC admonishes that its standard should not be applied in a vacuum, and thus it will consider the context in which alleged harassment occurred. Moreover, the EEOC expressly states that its "reasonable person" standard "should consider the *victim's perspective* and not stereotyped notions of acceptable behavior."ⁿ⁴⁸

After the plaintiff has shown that a reasonable person in the plaintiff's circumstances would find the workplace hostile, plaintiff must also show that he or she subjectively perceived the environment to be abusive.^{n48.1} Failure to seek

mental health treatment is not necessarily an indication that the conduct was welcome, since the scope of Title VII is not limited to conduct that affects a victim's psychological well-being.^{n48.2} Furthermore, the fact that not all of the victim's interactions with the harassers were hostile does not mean none of them was.^{n48.3}

The EEOC will presume that the unwelcome, intentional touching of intimate body areas is sufficiently offensive to alter conditions of a working environment and constitute a Title VII violation. In such a situation, the employer has the burden of showing that unwelcome conduct was not sufficiently severe to create a hostile work environment.ⁿ⁴⁹

If alleged harassment consists of verbal (i.e., non-physical) conduct, the EEOC will ascertain the nature, frequency, context, and intended target of the remarks. Factors considered by the EEOC will include:

1. Whether the alleged harasser singled out the charging party;
2. Whether the charging party participated;
3. The relationship between the charging party and the alleged harasser; and
4. Whether the remarks were hostile and derogatory.

No one factor will be determinative; the EEOC will evaluate the totality of the circumstances. Furthermore, the EEOC believes that a female does not assume the risk of harassment by voluntarily entering a vulgar, abusive, anti-female environment; depending on the totality of the circumstances, such an atmosphere may violate Title VII.ⁿ⁵⁰

According to the Ninth Circuit Court of Appeals in *Ellison*, the *mere presence* of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment (even after the harassment has stopped). The court examined this issue under the reasonable woman standard discussed above, but concluded that the record before it was too scant to reach any determination.ⁿ⁵¹

In *Draper v. Coeur Rochester, Inc.*,^{n51.1} a Title VII case, the Ninth Circuit held that the plaintiff had raised evidence to create a genuine issue of material fact as to whether the alleged hostile work environment continued into the statute of limitations period. Although most of the harassing incidents underlying the claim occurred outside the limitations period, the plaintiff contended that the hostile work environment continued until the day that the plaintiff resigned. The court found that because the claim was premised on a series of closely related similar events within the same general time period and stemmed from the same source, the plaintiff had properly set forth a claim of continuing violation.^{n51.2} The court noted that the United States Supreme Court's recent holding that an analysis of whether workplace behavior is discriminatory and creates a hostile work environment requires careful consideration of social context. The existence of harassment may depend on a "constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."^{n51.3} The Ninth Circuit emphasized that a single event that might otherwise appear innocuous in some circumstances may, in the context of a pattern of discriminatory harassment, take on a completely different character, causing a worker to feel demeaned, humiliated, or intimidated in the context of a barrage of harassing conduct. The plaintiff's evidence regarding persistent harassment, together with the evidence regarding the last confrontation with the supervisor (which occurred within the limitations period and constituted a discrete act of harassment tied to previous acts) precluded summary judgment.^{n51.4}

In *Fisher v. San Pedro Peninsula Hospital*,ⁿ⁵² an FEHA case, a California court of appeal held that whether harassment is sufficiently pervasive is determined from the totality of the circumstances. The plaintiff must prove (1) that the defendant's conduct would have interfered with a reasonable employee's work performance and would have seriously affected the psychological well-being of a reasonable employee;ⁿ⁵³ and (2) that the plaintiff was actually offended.ⁿ⁵⁴ Factors that may be considered include (1) the nature of the unwelcome sexual conduct;ⁿ⁵⁵ (2) the frequency of offensive encounters; (3) the total number of days over which all of the offensive conduct occurs; and (4)

the context in which the sexually-harassing conduct occurred. Acts of harassment that are sporadic or trivial do not violate the FEHA; rather, the plaintiff must show a concerted pattern of harassment of a repeated, routine, or a generalized nature.ⁿ⁵⁶ The *Fisher* court stated that a person who is not personally subjected to harassing behavior cannot establish that the work environment is permeated by sexual harassment.^{n56.1} Similarly, in *Beyda v. City of Los Angeles*,^{n56.2} the court agreed, concluding that a nexus must be established between the allegedly hostile environment and the plaintiff's experience in the workplace. However, the court did not interpret *Fisher* as limiting the admissibility of evidence of conduct towards other victims in all cases. Rather, this type of evidence is admissible if the plaintiff was a direct victim; further, knowledge of harassment of others may also be relevant.^{n56.3}

■ CONSULTANT'S COMMENT:

The *Beyda* decision attempts to provide "something for defendants" and "something for plaintiffs," but, in the end, greatly complicates the trials of harassment cases. For the benefit of defendants, the decision states that evidence of harassment of persons other than the plaintiff may not be offered to prove that the alleged harasser engaged in similar conduct against the plaintiff. Thus, "me too" evidence cannot be used to show a character "propensity." For the benefit of plaintiffs, the decision states that evidence of harassment of persons other than the plaintiff may be offered to prove the existence of a hostile working environment if the plaintiff witnessed or had knowledge of the conduct. Thus, "me too" can be used, even if the plaintiff was not physically present at the time of the alleged harassing behavior.

As if this distinction were not troublesome enough to draw in practice, the decision adds that evidence of the harassment of others is subject to the limitations of the hearsay rule. While the hearsay rule is clearly applicable, the opinion goes further and suggests that the best way to present evidence of the harassment of others is through testimony from actual victims of the challenged conduct or by witnesses to the conduct. In short, by flatly declaring the mere "awareness" of "me too" evidence to be relevant and by suggesting the means to present that evidence is through the "me too" victims and witnesses, *Beyda* literally sanctions the idea of a "trial within a trial within a trial." *Commentary by Kirby Wilcox.*

The showing of a pattern of discrimination constituting hostile work environment sexual harassment may affect the running of the statute of limitations on a discrimination claim. For example, in one FEHA case, the court found that a woman police officer had pled facts sufficient to permit a jury to conclude that she had suffered sexual harassment in an eleven-year campaign of discrimination against her. In so holding, the court concluded that the statute of limitations might not bar the suit even though no overtly discriminatory acts had taken place within the two-year period immediately prior to the filing of the suit.ⁿ⁵⁷ The court invoked the continuing violation theory, finding that the long-standing abusive working environment provided a potential equitable exception to the one-year statute of limitations otherwise applicable.ⁿ⁵⁸ The court stated that the circumstances should be viewed as a whole rather than as solitary events.ⁿ⁵⁹ Thus, the court observed that certain acts which occurred within the limitations period but which contained no sexual content, such as refusing to assign the employee to light duty tasks despite her partial disability, might actually have been done to rid the department of female officers.ⁿ⁶⁰ In short, seemingly nondiscriminatory events, when viewed through the perspective of a pattern of discrimination, might have been used as a pretext to provide a cover of legitimacy to existing hostile environment harassment.ⁿ⁶¹

In cases brought under Title VII, if the employer's conduct is sufficiently severe and pervasive to be actionable, the employer may escape liability by proving an affirmative defense that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and that the plaintiff unreasonably failed to take advantage of the employer's preventive or corrective opportunities.^{n61.1}

In California, in a civil action alleging sexual harassment, sexual assault, or sexual battery, the introduction of opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct by the defendant to prove the plaintiff's consent or the absence of injury to the plaintiff is prohibited, unless the injury alleged by the plaintiff is in the nature of loss of consortium.^{n61.2} There is an exception for the admission of evidence of the plaintiff's sexual

conduct with the alleged perpetrator,n61.3 and the prohibition does not apply to impeachment evidence offered under *Evid. Code* § 783.n61.4 If the defendant offers evidence of the plaintiff's sexual conduct in any of these types of cases to attack the plaintiff's credibility, the defendant must follow a procedure that includes a noticed written motion,n61.5 the affidavit of counsel reciting an offer of proof,n61.6 and a foundational hearing to question the plaintiff regarding the offer of proof.n61.7 After the court applies *Evid. Code* § 352, weighing the prejudicial effect against the probative value of the evidence, it must make an order stating what evidence the defendant may introduce and the nature of the questions permitted.n61.8

In applying *Evid. Code* § 1106, the court must determine whether the evidence proved consent or absence of injury, was within the meaning of "sexual conduct," and involved a "perpetrator" in an action alleging a hostile work environment.n61.9 "Sexual conduct" for these purposes includes all active or passive behavior (whether statements or actions), that directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity.n61.10 Also, for these purposes, "perpetrators" include not only the named defendants, but also the conduct of any other actor the plaintiff seeks to ascribe to the employing entity, regardless of whether it occurred in or outside the workplace.n61.11

[2] Unwelcomeness

Whether sexual conduct is actually unwelcome may also be an issue.n62 One court has defined "unwelcome" conduct as conduct that an employee did not solicit or incite, and that the employee regards as undesirable or offensive.n63 In a 1990 policy guideline, the EEOC explained that if "welcomeness" or witness credibility is at issue, a harassment claim will be strengthened if the charging party made a contemporaneous complaint or protest (i.e., while the harassment is ongoing or shortly after it has ceased). The EEOC added, however, that a complaint or protest is not a necessary element of a harassment claim, given that victims may fear repercussions from their complaints.n64

In one case, the Ninth Circuit rejected an employer's defense that the plaintiff, who allegedly was known for her "salty" and vulgar language, had welcomed the alleged harassment because there was no evidence that the abusive remarks actually were welcome. The court did note, however, that such a defense might be appropriate if the plaintiff's regular use of such language in effect invited coworkers to respond with similar language.n65

Sometimes, an individual will submit to sexual harassment out of fear that he or she will otherwise lose his or her job.n66 *Vinson* held that the "voluntariness" of such conduct, in the sense that the individual was not forced to participate against his or her will, is not a defense. The correct inquiry is whether an individual, by his or her conduct, indicated that the alleged sexual advances were unwelcome.n67 However, the EEOC guidelines provide that in determining whether alleged conduct constitutes sexual harassment, the EEOC will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.n68 Thus, although "voluntariness" in the sense of consent is not a defense, a plaintiff's sexually provocative speech or dress is relevant in determining whether he or she found particular sexual advances unwelcome.n69 According to the EEOC, however, occasional use of sexually explicit language does not necessarily negate a claim that sexual conduct was unwelcome. Furthermore, past conduct of the charging party offered to show "welcomeness" must relate to the alleged harasser.n70

The EEOC has also stated that if an employee first willingly participates in sexual conduct, but then ceases the conduct and claims that any continued conduct creates a "hostile work environment," the employee has the burden of showing that the further conduct is unwelcome and work-related. The employee must clearly notify the alleged harasser that the conduct is no longer welcome; failure to do so is evidence, although not dispositive, that the continued conduct is welcome or unrelated to work.n71

In FEHA sexual harassment cases, the Evidence Code and the Administrative Procedure Act (APA) severely limit the admissibility of evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged

perpetrator.ⁿ⁷² Thus, the FEHC has rejected the assumption that one can infer automatically from a female employee's voluntary sexual conduct with some persons a similar response to sexual conduct to which she is involuntarily subjected by others.ⁿ⁷³

A plaintiff may have a FEHA "hostile environment" sexual harassment claim even if he or she was not the object of the harassment, as long as the plaintiff establishes that the harassing conduct permeated his or her own direct work environment. Such a plaintiff must establish that he or she personally witnessed harassing conduct, and that it was in his or her immediate work environment.ⁿ⁷⁴ For example, in one case, the court of appeal held that it was not enough for the plaintiff, who was not the direct victim of sexual harassment, to allege that such harassment occurred in the hospital in which she worked; she was required to also allege exactly what occurred in her presence in her work environment, and to describe that work environment.ⁿ⁷⁵

The EEOC has observed that "quid pro quo" and "hostile environment" harassment often occur together. For example, tangible job conditions are affected when a hostile work environment results in constructive discharge. If constructive discharge is proven, the claim also becomes one of "quid pro quo" harassment on the theory that submission to the harassment was an implied term of employment and that the employee was forced to resign because of her refusal to submit. Similarly, a supervisor who makes sexual advances toward an employee may implicitly threaten to adversely affect the employee's job status if he or she does not comply. Thus, "hostile environment" harassment may acquire "quid pro quo" characteristics if the offending supervisor abuses his or her authority over employment decisions to force the victim to endure or participate in sexual conduct. Furthermore, there may be a retaliatory discharge if a harassed employee tells the harasser or the employer that he or she will no longer submit to the harassment, and is then fired for his or her protest.ⁿ⁷⁶ According to the FEHC, such retaliation also constitutes both sexual harassment and retaliatory discharge under the FEHA.ⁿ⁷⁷

For a discussion of constructive discharge in the equal employment opportunity context generally, *see* § 41.58[4]. For a detailed discussion relating to retaliation for refusing sexual advances, *see* [1][a], *above*.

[3] Soured Relationship Cases

In *Fuller v. City of Oakland, Cal.*,ⁿ⁷⁸ the plaintiff terminated a relationship with a fellow police officer. Thereafter, he harassed her for nearly a year. The Ninth Circuit Court of Appeals held that the harasser's conduct created a reasonable fear in plaintiff that she would not escape the harassing conduct and that a reasonable woman in such circumstances would believe her working environment to have been altered. The court also held that the employer could not defend itself by asserting that, as a consequence of its internal investigation, the offending behavior had ceased. On the contrary, the employer had conducted a limited investigation which had rejected plaintiff's allegations. Thus, the alleged harasser appeared to have altered his behavior on his own, not due to employer compulsion.ⁿ⁷⁹

[4] Same Sex Harassment

California courts have interpreted the FEHA to approve the viability of same sex harassment claims.^{n79.1} In *Mogilefsky v. Superior Court*,ⁿ⁸⁰ the court found that the plaintiff had been the victim of both quid pro quo and hostile environment sexual harassment in the form of lewd comments, direct overtures of physical contact, and innuendo suggesting the need to submit to such overtures to retain his employment. In *Matthews v. Superior Court*,ⁿ⁸¹ the court cited to *Mogilefsky* without further analysis of the issue. In *Valdez v. Clayton Industries, Inc.*,^{n81.1} the court, citing *Mogilefsky*, found that the plaintiff had raised triable issues of fact regarding whether he had suffered actionable harassment in the form of sexual remarks which plaintiff thought were serious requests for sex, which were sometimes made in ways likely to humiliate plaintiff, and which were accompanied by degrading physical gestures. The court rejected the employer's argument that under *Oncala v. Sundowner Offshore Services, Inc.*, discussed *below*, plaintiff's evidence would not support a claim for sexual harassment under Title VII. It found that the FEHA may go further than Title VII in offering protection against sexual harassment, and that in this case, regardless of how plaintiff would fare

under Title VII, he had a tenable harassment claim under the FEHA.^{n81.2} In *Sheffield v. Dept. of Social Services*,^{n81.3} the court cited *Mogilefsky* in stating that same sex harassment is considered sexual harassment covered by *Gov. Code § 12940* and in finding that a female employee alleged a hostile work environment caused by a female coworker and the employer's liability for its inaction sufficient to withstand the employer's summary judgment motion. One California court has interpreted the FEHA to prohibit the pursuit of a same sex harassment claim.ⁿ⁸²

In 1998, the United States Supreme Court confirmed the viability of same-sex harassment claims under Title VII, holding that workplace harassment can violate Title VII's prohibition against discrimination because of sex when the harasser and the harassed employee are of the same sex.ⁿ⁸³ The Court granted certiorari in *Oncale v. Sundowner Offshore Services, Inc.*ⁿ⁸⁴ to resolve conflicting opinions between the circuits courts as to the viability of this type of claim,^{n84.1} noting that the confusion had arisen primarily in the context of a hostile environment sexual harassment claims.^{n84.2} The Court found no justification for a categorical rule excluding same-sex harassment from the coverage of Title VII; Title VII's prohibition against discrimination based on sex extends to sexual harassment of any kind that satisfies the statutory requirements. The Court noted that although male-on-male sexual harassment in the workplace is clearly not the principal evil that Congress sought to avoid when Congress enacted Title VII, statutory prohibitions often go further than the principal evil to cover reasonably comparable evils.^{n84.3}

The critical issue in Title VII cases is whether members of one sex are exposed to disadvantageous employment terms or conditions to which members of the other sex are not exposed.^{n84.4} Thus, to support an inference of discrimination based on sex, harassing conduct need not be motivated by sexual desire and a plaintiff need not show that the same-sex harasser is homosexual. However, the plaintiff must always prove that the challenged conduct is not merely tinged with offensive sexual connotations, but actually constitutes discrimination because of sex. For example, a factfinder might reasonably find that a female victim was harassed in such sex-specific and derogatory terms by another woman as to show that the harasser is motivated by general hostility to women in the workplace. A same-sex harassment plaintiff may also offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.^{n84.5}

The protection of Title VII does not reach genuine but innocuous differences in the manner that men and women routinely interact with members of the opposite sex. Title VII bars behavior that is so objectively offensive as to alter the conditions of the victim's employment, but requires neither asexuality nor androgyny in the workplace.^{n84.6} Conduct that is not sufficiently severe or pervasive to create an objectively hostile or abusive work environment (that is, an environment that a reasonable person would find hostile or abusive) is beyond the purview of Title VII.^{n84.7} This principle is crucial, and suffices to ensure that courts and juries do not mistake ordinary socializing in the workplace, such as male-on-male horseplay or intersexual flirtation, for discriminatory conditions of employment.^{n84.8}

The objective severity of the alleged harassment should be judged from the perspective of a reasonable person in the plaintiff's position, in light of all surrounding circumstances. This inquiry in the same-sex harassment context, as in all harassment cases, requires careful consideration of the social context in which the particular conduct occurs and is experienced by the target. The real social impact of workplace behavior often depends on "a constellation of surrounding circumstances, expectations, and relationships" that are not fully captured by a simple recitation of the words used or physical acts performed. Common sense, as well as an appropriate sensitivity to social context, enables courts and juries to distinguish between simple teasing or roughhousing among members of the same sex from conduct that a reasonable person in the plaintiff's position would find severely hostile or abusive.^{n84.9}

In *Rene v. MGM Grand Hotel, Inc.*,^{n84.10} the Ninth Circuit, en banc, held that an employee who alleged that he was subjected to severe, pervasive, and unwelcome "physical conduct of a sexual nature" in the workplace stated a cause of action under Title VII for discrimination based on sex, even though he also alleged that the motivation for that discrimination was his sexual orientation. A plurality of the court would hold that an employee's sexual orientation is irrelevant for purposes of Title VII, whether the employee is male or female; and it neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation

is similarly irrelevant, neither providing nor precluding a cause of action. It is enough that the harasser engaged in severe or pervasive unwelcome physical conduct of a sexual nature.^{n84.11} The plurality took two lessons from the Supreme Court's opinion in *Oncale*: (1) Title VII forbids severe or pervasive same-sex offensive sexual touching, even when the perpetrator and the victim of an alleged sexual assault are of the same gender;^{n84.12} and (2) offensive sexual touching is actionable discrimination, even in a same-sex workforce.^{n84.13} Concurring judges would have held that the plaintiff had a claim for sexual harassment because he was a victim of gender stereotyping, *i.e.*, he was harassed because he did not conform to the stereotype of how a man should act.^{n84.14}

[5] Sexual Favoritism

In *Proksel v. Gattis*, ⁿ⁸⁵ the court of appeals rejected a hostile environment claim by female employees who contended that a coworker's romantic involvement with their employer caused the employer to have unwarranted favoritism culminating in plaintiff's termination. The court noted that absent a showing of other conduct that was either discriminatory or harassing, the supervisor's romantic involvement with a paramour did not constitute sexual harassment or discrimination.

In *Miller v. Dept. of Corrections*, ^{n85.1} the California Supreme Court held that an isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment of non-favored employees. However, when the sexual favoritism is sufficiently widespread, it may create an actionable hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as "sexual playthings" or that the requirement for women to get ahead in the workplace is engaging in sexual conduct with their supervisors or the management. Applying this standard to the circumstances of the case, the Court concluded that the evidence proffered by plaintiffs, viewed in its entirety, established a *prima facie* case of sexual harassment under a hostile-work-environment theory. In that case, in which plaintiffs were female employees of the California Department of Corrections, plaintiffs presented evidence that a male warden engaged concurrently in sexual affairs with three subordinate employees. There was evidence that the male warden promised and granted unwarranted and unfair employment benefits to the three subordinate employees. One of the unfair employment benefits granted to one of the women with whom he had a sexual affair was the power to abuse other employees who complained concerning the affairs. Further, there was evidence that advancement for women at one of the prisons was based on sexual favors, not merit. The evidence suggested the male warden viewed female employees as sexual playthings, and his ensuing conduct conveyed this demeaning message in a manner that had an effect on the work force as a whole. There was also evidence that his sexual favoritism caused plaintiffs to be subjected to harassment at the hands of one of the women with whom he was having an affair, whose behavior he refused or failed to control even after it escalated to physical assault. The harassment included loss of work responsibilities, demeaning comments in the presence of other employees, loss of entitlement to a pay enhancement and to disability accommodation, and physical assault and false imprisonment.^{n85.2} The presence of mere office gossip is insufficient to establish the existence of widespread sexual favoritism. However, in *Miller*, the evidence of favoritism included admissions by the participants concerning the nature of the relationships, boasting by the favored women, eyewitness accounts of incidents of public fondling, repeated promotion despite lack of qualifications, and the male warden's admission he could not control one of the women with whom he was having an affair because of his sexual relationship with her.^{n85.3}

[6] Liability

[a] Employer Direct Liability

[i] Generally

Under both Title VII and the FEHA, employers are liable for the harassing acts of supervisors. Although the Supreme Court in *Meritor Savings Bank v. Vinson* ⁿ⁸⁶ declined to issue a definitive rule on employer liability for the acts of its supervisors, it did note that the definition of "employer" in Title VII includes any "agent" of the employer.ⁿ⁸⁷ The

Court therefore concluded that Congress wanted courts to consider agency principles for guidance.ⁿ⁸⁸ The Court also relied on EEOC guidelines on sex discrimination.ⁿ⁸⁹ Those guidelines, as well as the EEOC guidelines on national origin discrimination,ⁿ⁹⁰ provide that an employer is responsible for its own acts and those of its agents and supervisory employees with respect to harassment. The EEOC will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.ⁿ⁹¹

Under the FEHA, the proscription against harassment expressly applies to any person who directly or indirectly acts as an employer's agent.ⁿ⁹² The proscription also expressly applies to an employee of an entity subject to regulation by *Gov. Code § 12940(j)*; such an employee is personally liable for any harassment he or she perpetrates, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action.ⁿ⁹³

An employer is strictly liable under the FEHA for hostile environment sexual harassment by a supervisor.^{n93.1} However, the avoidable consequences doctrine applies to damage claims under the FEHA, and a plaintiff's recoverable damages do not include those damages the plaintiff could have avoided with reasonable effort and without undue risk, expense, or humiliation.^{n93.2}

Under FEHA, an employer may also be responsible for sexual harassment by nonemployees when the employer or its agents or supervisors knows or should have known of the conduct and fails to take immediate and appropriate corrective action.^{n93.3}

[ii] Federal Law

The EEOC guidelines provide that an employer is liable for the acts of its agents or supervisors regardless of whether the specific acts complained of were authorized or even forbidden by the employer, and regardless of whether the employer knew or should have known of their occurrence.ⁿ⁹⁴ In one sexual harassment case, however, a federal appellate court explained that the standard for determining employer liability depends on the type of harassment that occurs.ⁿ⁹⁵ Thus, when a supervisor requires *quid pro quo* sexual favors for job benefits, the employer is strictly liable because then the supervisor, by definition, acts as the employer. By contrast, when a supervisor's conduct interferes with an employee's work or creates a "hostile environment," there is no *quid pro quo*. In such cases, the supervisor does not act as the employer, but acts outside the scope of his or her authority. Employer liability exists, therefore, only if the employer knew or should have known of the harassment and failed to take prompt remedial action.ⁿ⁹⁶ However, according to the Ninth Circuit Court of Appeals, the focus of the court's inquiry is on what management-level employees knew or should have known about the harasser employee's alleged conduct, not on whether the harassing employee acted within the scope of his employment.ⁿ⁹⁷

The EEOC has observed that most commonly an employer acquires actual knowledge of harassment through first-hand observation, by the victim's internal complaint to other supervisors or managers, or by a discrimination charge.ⁿ⁹⁸ Also, one case has held that the pervasiveness of harassment may give rise to an inference of knowledge or constructive knowledge.ⁿ⁹⁹ Thus, the EEOC will deem an employer to know of harassment that is openly practiced in the workplace or well-known among employees.ⁿ¹⁰⁰

If an employer is not put on notice of a supervisor's "hostile environment" harassment, the EEOC may impute employer liability if the supervisor was acting in an "agency capacity"; that is, within the scope of his or her employment.ⁿ¹⁰¹ An employer acts within the scope of his or her employment usually by exercising the powers actually vested in him or her; however, if an employer becomes aware of harassment by a supervisor and does nothing to stop it, the employer, by acquiescing, has brought the supervisor's actions within the scope of employment.ⁿ¹⁰² The EEOC may also impute employer liability if third parties, by virtue of the employer's conduct, reasonably believed that a supervisor was exercising authority that he or she possessed (i.e., "apparent authority").ⁿ¹⁰³ For example, the EEOC has observed that

employees may reasonably believe that a supervisor's sexual harassment will be ignored, tolerated, or even condoned by the employer if there is no strong, widely disseminated, and consistently enforced policy against such harassment.ⁿ¹⁰⁴

Other theories the EEOC may use to impute liability to an employer include "agency by estoppel," whereby the employer intentionally or carelessly causes an employee to mistakenly believe the supervisor is acting for the employer, or knows of the misapprehension and fails to correct it; negligent or reckless supervision of the harassing supervisor (if the employer had actual or constructive knowledge of the harassment, but failed to remedy it); assignment of a non-delegable statutory duty (i.e., the Title VII duty to provide employees with a workplace free of sexual harassment) to an employee; or accomplishment of a tort through the existence of an agency relationship.ⁿ¹⁰⁵

An employer must, however, impose sufficient penalties to assure a harassment-free workplace. Liability will attach if no remedy is undertaken or if the remedy attempted is ineffective.ⁿ¹⁰⁶ The effectiveness of a remedy is judged by the twin goals of ending the current harassment and deterring future harassment by the same offender or by others.ⁿ¹⁰⁷ Thus, the Ninth Circuit Court of Appeals has held that the employer still has an obligation to provide a remedy for harassment even when the harasser has stopped of his own accord.ⁿ¹⁰⁸ In *Fuller v. City of Oakland, Cal.*,ⁿ¹⁰⁹ during the employer's investigation of the plaintiff's allegations, the alleged harasser had ceased the behavior about which the plaintiff had complained. The employer argued that since the goal of any remedy is to stop harassment, it had no further obligation to provide a remedy. The Ninth Circuit disagreed: "The fact that harassment stops is only a test for measuring the *efficacy* of a remedy, not a way of excusing the *obligation* to remedy."ⁿ¹¹⁰ The court further noted that an employer cannot discharge its duty to remedy harassment solely by conducting an investigation.ⁿ¹¹¹ In other cases, the Ninth Circuit has held that a remedy is not reasonable if it requires a victim to work in a less desirable location. Furthermore, "a mere request to refrain from discriminatory conduct" is not sufficient; a remedy must involve some sort of discipline.ⁿ¹¹² For further discussion of the employer's duty to remedy hostile work environment harassment by coemployees, see [b] and [c], *below*.

[iii] California Law

Under the FEHA, an employer cannot be liable for harassing conduct by a nonsupervisory employee unless the employer (or its agent or a supervisor) knows or should know of the conduct and fails to take immediate and appropriate corrective action.ⁿ¹¹³ So long as the employer has no reason to know of the harassment, or takes immediate and appropriate corrective action when the harassment is or should be known, there is simply no "unlawful employment practice" that would subject the employer to liability under the FEHA.ⁿ¹¹⁴ The employee, however, will be liable for his or her harassing conduct, regardless of whether his or her employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action.ⁿ¹¹⁵

In cases in which the harasser is a supervisor, some lower courtsⁿ¹¹⁶ and now the California Supreme Court in dictumⁿ¹¹⁷ have indicated that strict liability follows, at least in some circumstances. However, the agent/supervisor must be acting within the scope of his or her agency/employment in order to impose liability on the employer.ⁿ¹¹⁸ Thus, for example, in one case, an employer was found not liable for the off-premises, off-duty sexual harassment of an employee by her supervisor when there was no sufficient nexus between the supervisor's conduct and his employment.ⁿ¹¹⁹ In another case, a court ruled that a supervisor's harassing conduct on the job was within the scope of his employment despite the fact that it violated an official company policy prohibiting sexual harassment.ⁿ¹²⁰

In *Chapman v. Enos*,^{n120.1} the California Court of Appeal considered the definition of supervisor in terms of a coworker with the ability to direct the work of the plaintiff. The trial court had modified the BAJI instruction to instruct the jury that for a person to be found to be a supervisor because he or she is responsible to direct the work of others, the direction must be more than merely routine or clerical. The direction must require the use of independent judgment, and the person giving the direction must be directly responsible for the performance of his or her department or unit and fully accountable and responsible for the performance and work product of the employees in the department or unit. The Court of Appeal concluded that while full accountability and responsibility are indicia of supervisory power, they are

not required elements of the FEHA definition of supervisor.^{n120.2} In *Chapman*, there was evidence that a deputy district attorney was a supervisor within the meaning of the FEHA so that the county could be held liable for his behavior toward an investigator whose work he directed. Although both senior and chief investigators ultimately supervised the investigator, the deputy district attorney directed her day-to-day duties to conduct investigations and trial preparation, and outlined her role in meetings and trainings. Further, the chief investigator would obtain information from the deputy district attorney to evaluate the investigator. Additionally, the investigator cleared her time off with the deputy district attorney before having it approved by the chief investigator, and she believed the deputy district attorney was her supervisor or boss.^{n120.3} The court then found that the trial court's error in modifying the instruction was prejudicial, because the error centered on the key issue in the case. Without a finding that the deputy district attorney was a supervisor, the jury could not reach the issue of whether his actions constituted sexual harassment.^{n120.4}

Under FEHA, an employer may also be responsible for sexual harassment by nonemployees when the employer or its agents or supervisors knows or should have known of the conduct and fails to take immediate and appropriate corrective action.^{n120.5}

[b] Employer Vicarious Liability for Supervisor Conduct

In *Meritor Sav. v. Vinson*,ⁿ¹²¹ the Court agreed with the EEOC's *amicus* brief which had argued that in "quid pro quo" harassment cases, liability of a supervisor who makes personnel decisions in a discriminatory manner should be imputed to the employer. However, the Court went on to suggest that employers would not be automatically held liable in hostile environment cases.ⁿ¹²² Similarly, in *Nichols v. Frank*ⁿ¹²³ the Ninth Circuit held that (1) an employer is liable for "quid pro quo" harassment by its supervisor, and (2) absent notice, the employer is not liable under Title VII for hostile environment harassment.ⁿ¹²⁴

In *Burlington Indus., Inc. v. Ellerth*ⁿ¹²⁵ and *Faragher v. City of Boca Raton*,ⁿ¹²⁶ the Supreme Court provided detailed guidance on determining an employer's vicarious liability for acts of its supervisors in sexual harassment claims brought under Title VII. The Court held that in cases involving a tangible employment action taken against the victimized employee that is related to harassment or complaints of harassment, the employer is always vicariously liable.ⁿ¹²⁷ But in cases in which no tangible employment decision is taken, an employer may be vicariously liable for the harassing acts of its supervisors if the harassment is pervasive or severe.^{n127.1} The Court explained the origin of this liability derives from the *Restatement (Second) of Agency* (1957), § 219(2)(d), which states that an employer is liable for the torts of a servant if "the servant ... was aided in accomplishing the tort by the existence of the agency relation."ⁿ¹²⁸ However, the employer will not be vicariously liable for an actionable hostile environment if it can plead and prove a two-part affirmative defense: that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior,^{n128.1} and that the "employee unreasonably failed to take advantage of any preventive or corrective opportunities" the employer provided.ⁿ¹²⁹ Whether the employer has a stated antiharassment policy is relevant to the first part; an employee's failure to use a complaint procedure provided by the employer will normally suffice to satisfy the employer's burden under the second part.ⁿ¹³⁰ This vicarious liability rule focuses on whether the alleged harasser has immediate or successively higher authority over the victim, and not on whether the employer knew or should have known about the harassment.ⁿ¹³¹ This affirmative defense applies only in cases of vicarious liability, in which the harasser is the victim's supervisor. It is not available to the employer when the harasser is the victim's coworker and the victim alleges the employer's negligence, *i.e.* the employer knew or should have known of the harassment but did not take adequate steps to address it.ⁿ¹³²

The California Supreme Court recognized a similar defense under the FEHA in *State Department of Health Services v. Superior Court (McGinnis)*.ⁿ¹³³ Although the court held that under Title VII the FEHA renders an employer strictly liable for sexual harassment committed by a supervisor,^{n133.1} the employer may reduce damages by raising and proving the defense of "avoidable consequences." Under that defense, a plaintiff victimized by sexual harassment may not recover damages at the point that he or she could have invoked the employer's policies and procedures against harassment and unreasonably failed to do so.

In earlier cases, courts had held that while an employer's liability under the FEHA for an act of sexual harassment committed by a supervisor or agent was broader than the liability created by the common law principle of respondeat superior, respondeat superior principles were relevant in determining liability when sexual harassment occurred away from the workplace and not during work hours.¹³⁴ However, as clarified in *Health Services*, an employer's FEHA liability for sexual harassment by a supervisor is not constrained by principles of agency law, unless the supervisor is not acting in the capacity of supervisor when the harassment occurs. Such cases will be rare, *i.e.*, when the supervisor's acts of harassment result from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours.¹³⁵

Further, harassment resulting from a relationship that is not completely private is actionable. Thus, for example, a trial court erred in granting an employer summary adjudication of a sexual harassment claim under FEHA, because the harassment did not result from a completely private relationship unconnected with the employment. There was no personal dating relationship between plaintiff and her supervisor at the time of the most significant incidents, which occurred during excursions away from the office, which were connected with the employment and of benefit to the employer's enterprise. Although there was evidence the employer did not approve of the out-of-office excursions, the evidence was conflicting on the point, precluding summary adjudication, and even if the employer did not approve of the practice, it admittedly was aware of the practice, would have benefitted from the practice, and did nothing to stop it.¹³⁶

[c] Employer Liability for Nonsupervisor Conduct

Section 12940(h)(1) of the FEHA states that an employer may be liable for harassment by an employee other than an agent or supervisor if the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action.¹³⁷

Federal authorities hold that an employer may also be liable in some instances for harassment by nonsupervisory employees. The EEOC guidelines on sex and national origin discrimination provide that with respect to conduct between fellow employees, an employer is responsible for harassment in the workplace when the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.¹³⁸

An employer is not liable for misconduct of which it was unaware. Thus, the employer is responsible only for acts of harassment committed after it has been put on notice.¹³⁹ Notice of sexually harassing conduct triggers the employer's duty to take prompt corrective action reasonably calculated to end the harassment.¹⁴⁰ For example, a temporary agency was not liable for sexual harassment because it acted reasonably with respect to an initial complaint of sexual harassment by a woman the agency placed with a client company. The woman did not complain to the agency about her alleged harassment by a co-worker at the client company for six months. After the agency investigated the complaint and contacted the woman to report the results of the investigation, the woman told the agency things had calmed down and made no further complaints to anyone. The agency was also told by the client company that the situation had been resolved.^{140.1}

The employer has a dual obligation: (1) to take temporary steps to deal with the situation while determining whether the complaint is justified; (2) to take permanent remedial steps upon completion of its investigation.¹⁴¹ The most significant immediate measure an employer can take in response to a complaint of sexual harassment is to launch a prompt investigation to determine whether the complaint is justified. The more egregious the alleged conduct and the more substantial the proof supporting the allegation, the greater must be the employer's effort to minimize further contact between the complainant and the alleged harasser pending the outcome of the investigation.

However, the employer is not *required* to separate the complainant and the alleged harasser pending the outcome of the

investigation. Depending on the circumstances, which can include the employer's legitimate interest in avoiding disruption to its business, the employer may reasonably decide that the employees must continue working together. Nevertheless, the employer must try to eliminate contact between the two employees that is not strictly business-related. If it reasonably concludes that the two employees must continue to have regular business contact during the course of the investigation, the employer must take reasonable steps to expedite the investigation.ⁿ¹⁴²

With regard to permanent steps, an employer does not satisfy its remedial obligation by transferring the victim to a less desirable location.ⁿ¹⁴³ However, after investigation, if the employer decides to separate the complainant and the alleged harasser in the workplace, the employer may properly consider the relative ease of moving them as well as their respective importance to business operations. The employer has wide discretion in choosing how to minimize contact between the two employees, so long as the accuser is not moved to an objectively less desirable position. Whether the position to which the complainant is moved is less desirable is determined by objective factors that include, but are not limited to, the terms of employment. For example, moving the complainant to a position with the same pay and responsibilities, but with a longer commute or an inconvenient work schedule, would be an inappropriate response.ⁿ¹⁴⁴ Not all harassment warrants dismissal; remedies should be "assessed proportionately to the seriousness of the offense."ⁿ¹⁴⁵ Even when it finds harassment has taken place, the employer may satisfy its remedial obligation by actions far short of formal discipline. Counseling or admonishing the offender can constitute an adequate disciplinary response.ⁿ¹⁴⁶ If proof of harassment is weak and disputed, the employer need not take formal disciplinary action simply to prove that it is serious about stopping sexual harassment in the workplace. Admonishing the harasser and separating the complainant and the harasser may be sufficient.ⁿ¹⁴⁷

[d] Employer Liability for Nonemployee Conduct

Under the FEHA, an employer may be responsible for sexual harassment by nonemployees with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, when the employer or its agents or supervisors knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility the employer may have with respect to the conduct of the nonemployees must be considered.^{n147.1} The 2003 amendment to the FEHA imposing liability on employers for sexual harassment by third-party nonemployees may be properly applied to the actions pending as of the effective date of the amendment, *i.e.*, actions brought before January 1, 2004.^{n147.2}

According to the EEOC, an employer may also be liable under Title VII for the acts of nonemployees who harass employees in the workplace when the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate action.ⁿ¹⁴⁸ In reviewing cases of harassment by nonemployees, the EEOC will consider the extent of the employer's control, and any other legal responsibility that the employer may have with respect to the conduct of the nonemployee.ⁿ¹⁴⁹ However many federal courts, including the Ninth Circuit, have held that Title VII does not authorize courts to hold harassing supervisors individually liable.ⁿ¹⁵⁰

In *Little v. Windermere Relocation, Inc.*,ⁿ¹⁵¹ the Ninth Circuit found that an employee presented sufficient evidence to survive the employer's motion for summary judgment under Title VII by showing that the employer ratified her rape by a business client when it failed to take immediate and effective corrective action. Construing the facts in the light most favorable to the employee, the court found the employer's response to the rape equivocal at best. The employee had been informed that she should "do anything" to get the account. She was advised by a coworker not to report the incident to top management because it would damage her career. When she reported the rape to her supervisor, she was not effectively removed from the account; when she finally reported the incident to the president, she was demoted and terminated. Also, the court found no evidence the employer took steps to prevent contact between the employee and the man who had raped her, such as effectively removing the employee from the account or informing the client that it must replace its contact with the employer.

Consistent with the EEOC's interpretation of Title VII, the FEHA provides that an employer is liable for harassment by a third person who is not the employer's agent or supervisor if the employer, or its agent or supervisor, knows or should have known of the harassing conduct and fails to take immediate and appropriate corrective action.ⁿ¹⁵² A plaintiff may prove an employer's knowledge of the harassment and failure to take remedial action by evidence of the perpetrator's harassment of other employees introducing evidence of the perpetrator's harassment of other employee's and the employer's lack of response.ⁿ¹⁵³

[e] Individual Liability

In *Carrisales v. Dept. of Corrections*, ⁿ¹⁵⁴ the California Supreme Court decided that a nonsupervisory coworker may not be personally liable for harassment under the FEHA. Effective January 1, 2001, however, the legislature amended the FEHA to provide that an employee of an entity subject to proscription against harassment of employees because of sex or other specified reasons is personally liable for any prohibited harassment that is perpetrated by that employee, regardless of whether the employer or covered entity knew or should have known of the conduct and failed to take immediate and appropriate corrective action.ⁿ¹⁵⁵ This amendment does not apply retroactively to impose liability for actions not subject to liability when performed, despite the Legislature's declaration that its provisions were declaratory of existing law.ⁿ¹⁵⁶ⁿ¹⁵⁷⁻¹⁶⁰

■ CONSULTANT'S COMMENT:

The existence of *Carrisales* was not well known until the California Supreme Court granted review, but its impact is significant. Many nonsupervisory coworkers no longer will be proper parties in sexual harassment cases. The holding in *Carrisales* thus has obvious significance for the affected individuals themselves. (Practically speaking, however, liability rarely was imposed on such individuals; they did not present an attractive deep pocket.) *Carrisales* also is significant for the employing entities. First, the absence of the individual defendant in many cases will result in complete diversity of citizenship, increasing the possibility of removal to federal court. Second, one fewer defendant often means one fewer lawyer, because the employing entity in many cases provides and pays for the individual defendant's separate counsel. Reducing the number of defendants thus will benefit the employer for that reason as well.

Carrisales left open two important questions. One is whether harassing *supervisors* may be individually liable.ⁿ¹⁶¹ The other is whether individuals may be liable for retaliation. *Reno v. Baird* ⁿ¹⁶² earlier explained that individuals cannot be liable for *discrimination*; *Carrisales* now resolved that nonsupervisory individuals cannot be liable for *harassment*. Whether the use of the term "person" in Section 12940(h) contemplates individual liability for *retaliation* remains to be resolved. *Commentary by Kirby Wilcox*.

Two California appellate divisions have ruled that individual supervisors may be individually liable for sexual harassment as "persons" under the FEHA if they participate personally in the harassment or aid or abet in the harassment by failing to investigate or remedy it.ⁿ¹⁶³ In reaching their decisions, the courts of appeal relied, in part, on the express language of the FEHA, which extends liability to "persons" for sexual harassment and for aiding and abetting acts proscribed by the FEHA.ⁿ¹⁶⁴ The decisions in *Page v. Superior Court*, ⁿ¹⁶⁵ and *Matthews v. Superior Court*, ⁿ¹⁶⁶ addressed only the liability of supervisors as "persons."

[7] Preventive and Corrective Actions Regarding Sexual Harassment

[a] Employer's Duty to Prevent

The EEOC guidelines on sex discrimination and the FEHA provide that an employer must take all steps necessary to prevent sexual harassment from occurring.ⁿ¹⁶⁷ The FEHA expressly makes the failure to take these requisite preventative steps an unlawful employment practice.ⁿ¹⁶⁸ However, no suit may be maintained for violation of this rule

if the plaintiffs have not actually suffered any employment discrimination or harassment.ⁿ¹⁶⁹

According to the EEOC, such preventative steps include affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.ⁿ¹⁷⁰ According to the Ninth Circuit Court of Appeals, however, the mere existence of such a policy will not insulate an employer from liability under the doctrine of respondeat superior for the acts of one of its supervisors.ⁿ¹⁷¹ On the other hand, the EEOC has stated that it generally will find an employer liable for "hostile environment" sexual harassment by a supervisor if the employer fails to establish such a policy.ⁿ¹⁷² Any sexual harassment policy should be specific about the prohibited conduct and avoid being vague or unclear.ⁿ¹⁷³

In *Burlington Industries, Inc. v. Ellerth*,ⁿ¹⁷⁴ and *Faragher v. City of Boca Raton*ⁿ¹⁷⁵ the Supreme Court established that in Title VII sexual harassment cases in which no tangible employment action is taken, an employer may not be held liable if it can establish a two-part affirmative defense: that it exercised reasonable care to prevent and correct promptly the harassing conduct, and that the employee unreasonably failed to utilize the employer's preventive and corrective procedures.ⁿ¹⁷⁶ The Court noted that making employer liability depend in part on the creation of such procedures effects Congress' intention to promote conciliation rather than litigation.ⁿ¹⁷⁷

[b] Employer's Duty to Effectively Respond to Complaints

It is also EEOC policy that an effective preventive program should include a procedure for resolving sexual harassment complaints.ⁿ¹⁷⁸ The FEHC has likewise construed the FEHA as requiring such a procedure.ⁿ¹⁷⁹ The Ninth Circuit Court of Appeals has held, however, that a Title VII plaintiff need not exhaust an employer's internal remedies before pursuing a civil action for sexual harassment.ⁿ¹⁸⁰

The EEOC has also declared that if an employer receives a complaint or otherwise learns of alleged sexual harassment, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the harasser may be necessary. The employer should make follow-up inquiries to ensure that harassment has not resumed and that the victim has not suffered retaliation. If an employer asserts it has taken remedial action, the EEOC will investigate to determine whether the action was appropriate and effective. If the EEOC so finds, it normally will administratively close the case.ⁿ¹⁸¹

In *Burlington Industries, Inc. v. Ellerth*ⁿ¹⁸² and *Faragher v. City of Boca Raton*,ⁿ¹⁸³ the Supreme Court emphasized that an employer's complaint procedures play a critical role in the employer's defense to harassment complaints.ⁿ¹⁸⁴ In *Faragher*, the Court particularly noted the ways in which defendant City of Boca Raton's complaint procedure had been inadequate: It had entirely failed to disseminate its sexual harassment policy among the employees in plaintiff's work environment; its officials made no attempt to keep track of the conduct of plaintiff's supervisors; its complaint procedure provided no assurance that harassing supervisors could be bypassed.ⁿ¹⁸⁵

The Ninth Circuit has adopted a similar standard requiring employers who learn of sexual harassment by their employees to take remedial action that is reasonably calculated to end the harassment by imposing sufficient penalties to assure a workplace free from sexual harassment.ⁿ¹⁸⁶ The reasonableness of the remedy depends on its ability to stop harassment by the person who engaged in it and persuade potential harassers to refrain from unlawful conduct.ⁿ¹⁸⁷ If the employer undertakes no remedy, or the remedy does not end the current harassment and deter future harassment, the employer is liable for both past and future harassment.ⁿ¹⁸⁸

In *Intlekofer v. Turnage*,ⁿ¹⁸⁹ the Ninth Circuit held that the employer had not met that standard when it failed to take more severe disciplinary measures once it learned that the harassing conduct had not stopped. The employer had

instituted certain measures designed to stop the harassment, including counseling and separation of the employees. The employer had also addressed the issue with the harassing employee after the incidents were reported, but had never made good on its threat of further disciplining the employee if he did not cease the harassment. The court found that under the *Ellison* standard, the remedies must be not only reasonably calculated to end the harassment, but also disciplinary in nature.ⁿ¹⁹⁰ Further, more severe disciplinary measures must be taken if the preceding measures have not put a stop to the harassment.ⁿ¹⁹¹ *Intlekofer* did not state that specific remedial options were required, but rather emphasized that the remedy must be appropriate to the circumstances of the case.ⁿ¹⁹² The court indicated that in the first instance, even an oral rebuke might be sufficient, but emphasized that whenever the measures first taken are found inadequate to prevent further harassment, progressive discipline must be applied until the harassment is stopped.ⁿ¹⁹³ Whether or not the employer labels its actions as "discipline" is not determinative of their adequacy as a remedy.ⁿ¹⁹⁴

In a later case, the Ninth Circuit, applying the *Intlekofer* standard, found that the employer's remediation of the harassment was not sufficient. The court noted that the employer was slow to react to the plaintiff's claims of harassment and that it did not seriously investigate them nor strongly reprimand the accused harasser until after the plaintiff had filed her administrative claim. In addition, the employer made the plaintiff change her shift to avoid the harassment, rather than changing the accused harasser's shift or firing him.ⁿ¹⁹⁵

In *Fuller v. City of Oakland, Cal.*,ⁿ¹⁹⁶ the employer failed to reprimand or discipline the alleged harasser, after conducting an investigation that the court found to be flawed. The employer argued that it met its remedial obligation because the harasser, on his own, ceased the harassment. The court rejected the employer's argument, explaining that the fact that the harasser stopped of his own accord did not discharge the employer's obligation to provide a remedy that met the twin goals of stopping the harassment and of deterring the harasser and others in the workplace from engaging in harassment.ⁿ¹⁹⁷ The court found that the employer took no remedial action whatsoever and thus could not shield itself from liability because, fortuitously, the harasser chose to stop the harassment.ⁿ¹⁹⁸

In *Nichols v. Azteca Restaurant Enterprises, Inc.*,ⁿ¹⁹⁹ the court found that the employer's action in response to an employee's complaints of harassment by a coworker was inadequate and the employer failed to either remedy the harassment or discipline those responsible. The employee complained to the human resources director, who told the employee to inform the general manager if the offensive conduct recurred. The human resources director also conducted a handful of spot checks in the two weeks after the complaint; this neither remedied the harassment nor deterred future harassment. The employer made no effort to investigate the complaint, did not discuss the allegations with the perpetrators, did not demand that the unwelcome conduct cease, and did not threaten more serious discipline if it continued. The court held that by conditioning its response on the employee's reports of further harassment, the employer placed virtually all of its remedial burden on the victimized employee. The court further found that while the employer's antiharassment policy and company-wide training program were sufficient to show it exercised reasonable care to prevent sexual harassment generally, it did not exercise reasonable care to promptly correct the sexually harassing behavior directed at this employee and therefore could not assert the affirmative defense.ⁿ²⁰⁰

Under the FEHA, the employer is liable for the harassment of an employee, applicant, or person providing services pursuant to a contract by an employee, other than an agent or supervisor, if the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action.^{n200.1} Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to end the current harassment and deter future harassment. The employer's obligation to take prompt corrective action requires that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified, and that permanent remedial steps be implemented by the employer to prevent future harassment once the investigation is completed. An employer has wide discretion in choosing how to minimize contact between the two employees, so long as it acts to stop the harassment.^{n200.2}

An employer will not be liable for harassing behavior that takes place outside of work over which it has not control.^{n200.3} When harassment is by a nonsupervisory employee, an employer's liability is predicated not on the

conduct itself, but on the employer's response once it learns of the conduct.n200.4

The most significant immediate measure an employer can take in response to a sexual harassment complaint is to launch a prompt investigation to determine whether the complaint is justified.n200.5 However, initiating an investigation cannot be the only step taken. An employer is required to take remedial action designed to stop the harassment, even when a complaint is uncorroborated or the coworker denies the harassment.n200.6

The FEHA also expressly requires employers to take steps to prevent sexual harassment from occurring,n201 and requires employers to provide specified information to employees regarding the illegality of sexual harassment.n202 For discussion of these requirements, *see* § 41.140[1][g].

[c] Employee's Obligation to Utilize Employer's Preventive and Corrective Opportunities

In Title VII sexual harassment cases in which no tangible employment action is taken against the employee, the employer may raise an affirmative defense to liability or damages by proving that it exercised reasonable care to prevent and promptly correct the harassing behavior *and* that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.n203 Thus, the Supreme Court has established harassed employees' obligation to utilize complaint procedures. However, it appears that the complaint procedure must be effective in order to trigger this obligation. For example, in *Faragher*, the court noted fatal weaknesses in the employer's complaint procedure and denied the employer the opportunity to relitigate based on the newly formulated defense.n203.1 The California Supreme Court recognized a similar defense under the FEHA.n204

[d] Employer's Duty to Train

By January 1, 2006, an employern204.1 having 50 or more employees must provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees employed as of July 1, 2005, and to all new supervisory employees within six months of their assumption of a supervisory position. An employer who has provided this training and education to a supervisory employee after January 1, 2003, is not required to provide training and education by the January 1, 2006, deadline. After January 1, 2006, each covered employer must provide sexual harassment training and education to each supervisory employee once every two years.n204.2 This required training and education is intended to establish a minimum threshold and should not discourage or relieve an employer from providing for longer, more frequent, or more elaborate training and education regarding workplace harassment or other forms of unlawful discrimination in order to meet its obligations to take all reasonable steps necessary to prevent and correct harassment and discrimination.n204.3

The training and education must include information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education must also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation. The training and education must be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.n204.4

If an employer violates the requirements of this section, the Fair Employment and Housing Commission will issue an order requiring the employer to comply with these requirements.n204.5

Notwithstanding *Government Code* § 12940(j) and (k), a claim that the training and education required by *Government Code* § 12950.1 did not reach a particular individual or individuals will not in and of itself result in the liability of an employer to any present or former employee or applicant in any action alleging sexual harassment. Conversely, an employer's compliance with *Government Code* § 12950.1 does not insulate the employer from liability for sexual harassment of any current or former employee or applicant.n204.6

The Fair Employment and Housing Commission has issued regulations on sexual harassment training and education, effective August 17, 2007, interpreting *Gov. Code § 12950.1*.^{n204.7} The regulations contain definitions,^{n204.8} and regulate training, including the following:

- Frequency of training.^{n204.9}
- Documentation of training.^{n204.10}
- Training at businesses created after January 1, 2006.^{n204.11}
- Training for new supervisors.^{n204.12}
- Duration of training.^{n204.13}

The regulations also define who may be trainers,^{n204.14} proscribe the content of training^{n204.15} and remedies for an employer's failure to comply,^{n204.16} and provide for good faith compliance prior to the effective date of the regulations.^{n204.17}

[8] Remedies

[a] Generally

The remedies available for sexual harassment are fairly comprehensive under both the FEHA and Title VII. California law differs in several respects, including the provision for administrative adjudication of complaints under the FEHA, the ability of courts to award unlimited compensatory and punitive damages, and the individual liability of supervisors for their harassing conduct. For a complete discussion of relief available under the FEHA, *see § 43.01[8]*; for a complete discussion of relief available under Title VII, *see § 43.10[9]*.

[b] Employer's Liability for Punitive Damages

Although an employer is strictly liable under the FEHA for harassing conduct by supervisory employees and may be liable for harassing conduct by other employees as discussed in [6][c], *above*, an employer is not subject to punitive damages for such conduct unless the requisites of *Civil Code Section 3294(b)* are met.ⁿ²⁰⁵ Under *Civil Code Section 3294(b)*, an employer is not liable for punitive damages based on an employee's conduct unless the employer (1) had advance knowledge of the unfitness of the employee and employed him or her with conscious disregard for the rights or safety of others; (2) authorized or ratified the employee's wrongful conduct; or (3) was personally guilty of oppression, fraud, or malice. For a corporate employer, punitive damages may not be imposed unless the advance knowledge and conscious disregard, the authorization or ratification, or the act of oppression, fraud, or malice was committed by an officer, director, or managing agent of the corporation.ⁿ²⁰⁶ Thus, in a case involving sexual harassment of an employee by her supervisor, the court upheld a refusal to impose punitive damages on the corporate employer when the jury found that the employer had not ratified the harassing supervisor's conduct and the evidence was insufficient as a matter of law to establish that the supervisor himself was a managing agent of the employer.ⁿ²⁰⁷

In a case involving racial harassment by coworkers, an employer was held liable for punitive damages because it had violated its independent obligation under the FEHA not to discriminate.ⁿ²⁰⁸ The employer violated that obligation by firing the employee after he had complained to management about the harassment and other discriminatory conduct, and sought the help of the employer's industrial relations department and a highly placed corporate manager. According to the court, the evidence thus "more than supported a finding that [the employer] participated in the discriminatory conduct."ⁿ²⁰⁹

For discussion of the general standard for awarding punitive damages under the FEHA, *see* Chapter 43, Part A. For further discussion of the circumstances under which an employer may be liable for punitive damages based on the conduct of its employees, *see* Chapter 30.

Legal Topics:

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

Labor & Employment Law Discrimination Gender & Sex Discrimination General Overview Labor & Employment Law Discrimination Gender & Sex Discrimination Coverage & Definitions General Overview Labor & Employment Law Discrimination Harassment Sexual Harassment General Overview Labor & Employment Law Discrimination Harassment Sexual Harassment Burdens of Proof General Overview Labor & Employment Law Discrimination Harassment Sexual Harassment Quid Pro Quo

FOOTNOTES:

(n1)Footnote 1. *See* DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-17, p. 12; DFEH v. Madera County (1990) FEHC Dec. No. 90-03, p. 19; DFEH v. State University-Hayward (1988) FEHC Dec. No. 88-18, p. 14; *see also* Gov. Code § 12940(a); 2 Cal. Code Reg. §§ 7287.6(b), 7291.1(f)(1).

(n2)Footnote 2. Gov. Code § 12940(j)(4)(C).

(n3)Footnote 3. *See Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 64-67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 .

(n4)Footnote 4. *See* 29 C.F.R. § 1604.11(a) (EEOC guideline on sex discrimination); 2 Cal. Code Reg. § 7291.1(f)(1) (FEHC regulation construing FEHA). The EEOC has stated that a "reasonable person" standard should be applied to the basic determination of whether challenged conduct is of a sexual nature. EEOC Compliance Manual (CCH) § 615, P 3114.

(n5)Footnote 4.1. *Jacobus v. Krambo Corp.* (2000) 78 Cal. App. 4th 1096, 93 Cal. Rptr. 2d 425 .

(n6)Footnote 4.2. *See Jacobus v. Krambo Corp.* (2000) 78 Cal. App. 4th 1096, 1099, 93 Cal. Rptr. 2d 425, 430-431 .

(n7)Footnote 5. *Oncale v. Sundowner Offshore Servs., Inc.* (1998) 523 U.S. 75, 77-79, 118 S. Ct. 998, 140 L. Ed. 2d 201 ; *see Sheffield v. Los Angeles County* (2003) 109 Cal. App. 4th 153, 160-161, 134 Cal. Rptr. 2d 492 ; *Matthews v. Superior Court* (1995) 34 Cal. App. 4th 598, 603, 40 Cal. Rptr. 2d 350 ; *Mogilefsky v. Superior Court* (1993) 20 Cal. App. 4th 1409, 1416, 26 Cal. Rptr. 2d 116 ; *but see Hart v. National Mortgage & Land Co.* (1967) 189 Cal. App. 3d 1420, 235 Cal. Rptr. 68 ; *see also* [4], *below*.

(n8)Footnote 6. *See* *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 875 (Title VII) ; *Hicks v. Gates Rubber Co.* (10th Cir. 1987) 833 F.2d 1406, 1413 (Title VII) ; *Sheffield v. Los Angeles County* (2003) 109 Cal. App. 4th 153, 161, 134 Cal. Rptr. 2d 492 (FEHA) ; *Herberg v. California Institute of the Arts* (2002) 101 Cal. App. 4th 142, 149, 124 Cal. Rptr. 2d 1 ; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 607, 262 Cal. Rptr. 842 (FEHA; relying on *Hicks*); *see also Burlington Industries, Inc., v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (quid pro quo cases are based on fulfilled threats to retaliate for denial of sexual liberties, as distinct from bothersome attentions or sexual remarks sufficiently severe or pervasive to create a hostile environment).

(n9)Footnote 6.1. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 ; *see also Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 .

(n10)Footnote 6.2. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633,

652-653 (traditionally known as "quid pro quo").

(n11)Footnote 6.3. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633, 646-647. See also *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1192 (label attached to particular claim has relevance to employer's liability for employee's discriminatory conduct).

(n12)Footnote 6.4. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633, 641.

(n13)Footnote 6.5. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633, 655; see also, *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 689. For further discussion, see [6][b], below and § 41.92A.

(n14)Footnote 6.6. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 762, 118 S. Ct. 2257, 141 L. Ed. 2d 633. see *Hardage v. CBS Broadcasting, Inc.* (9th Cir. 2005) 427 F.3d 1177, 2005 U.S. App. LEXIS 23551, *13 (no tangible employment action where plaintiff never experienced any decrease in compensation, hours, title, duties or benefits; plaintiff could show no triable issue of constructive discharge, where alleged sexual harassment ceased well in advance of plaintiff's resignation, employer proffered legitimate, non-retaliatory reasons for adverse performance memoranda addressed to both plaintiff and coworker, plaintiff was insubordinate and failed to meet sales goals in his last few months, and supervisor's allegedly snide remarks were insufficient as tangible employment action).

(n15)Footnote 6.7. *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158, 1167, citing *Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742, 753-754, 118 S. Ct. 2257, 141 L. Ed. 2d 633.

(n16)Footnote 6.8. *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158, 1167-1176 (although plaintiff properly alleged tangible employment action, in response to employer's and supervisor's motions for summary judgment, she failed to present sufficient evidence to raise genuine issue of material fact as to whether supervisor implicitly threatened to discharge her or conditioned her continued employment on her submission to his sexual demands); see also *Suders v. Easton* (3d Cir. 2003) 325 F.3d 432, 458-459; *Jin v. Metro. Life Ins. Co.* (2d Cir. 2002) 310 F.3d 84, 93.

(n17)Footnote 6.9. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633.

(n18)Footnote 6.10. *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662.

(n19)Footnote 6.11. *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal. App. 4th 397, 416, 27 Cal. Rptr. 2d 457; *Fiol v. Doellstedt* (1996) 50 Cal. App. 4th 1318, 1328, 58 Cal. Rptr. 2d 308. (But note, in June 1998, the California Supreme Court denied review and depublished *Lai v. Prudential Insurance Co. of America*, a court of appeal decision holding an employer strictly liable for sexual harassment by a supervisor regardless of whether the conduct was pleaded as quid pro quo or hostile environment harassment.).

(n20)Footnote 7. *Burlington Industries, Inc., v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633, 647; *Sheffield v. Los Angeles County* (2003) 109 Cal. App. 4th 153, 161, 134 Cal. Rptr. 2d 492 (FEHA; hostile environment); *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 607, 262 Cal. Rptr. 842 (FEHA); accord, 29 C.F.R. § 1604.11(a) (EEOC guideline on sex discrimination). See *Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, where the court recognized both an objective and a subjective (plaintiff's) point of view as to events and demand for sexual favors as the legal standard for proof of quid pro quo sexual harassment; *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, where the court held that evidence of the defendant's behavior toward others of the same sex as plaintiff could be introduced to prove his intentional discrimination and that his defense to sexual harassment was pretextual.

(n21)Footnote 8. *Burlington Industries, Inc., v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633,

647 ; 29 C.F.R. § 1604.11(a); see *Steele v. Offshore Shipbuilding, Inc.* (11th Cir. 1989) 867 F.2d 1311, 1315 (citing 29 C.F.R. § 1604.11(a)).

(n22)Footnote 9. *Bundy v. Jackson* (D.C. Cir. 1981) 641 F.2d 934 .

(n23)Footnote 10. See *Bundy v. Jackson* (D.C. Cir. 1981) 641 F.2d 934, 948 .

(n24)Footnote 11. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII) .

(n25)Footnote 12. *Bundy v. Jackson* (D.C. Cir. 1981) 641 F.2d 934, 951 .

(n26)Footnote 13. See *Bundy v. Jackson* (D.C. Cir. 1981) 641 F.2d 934, 953 ; see EEOC Compliance Manual (CCH) § 615, P 3114 (finding that employer's asserted reasons for adverse action are pretextual will usually establish "quid pro quo" harassment and evidence of retaliatory termination; finding violation of 42 U.S.C. § 2000e-3(a) prohibiting discrimination because employee filed a complaint is also appropriate). For a general discussion relating to discriminatory retaliation, see pt. G (§§ 41.130-41.132).

(n27)Footnote 14. See *Bundy v. Jackson* (D.C. Cir. 1981) 641 F.2d 934, 953 .

(n28)Footnote 15. *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 16; see *Gov. Code* § 12940(h); see also pt. G, (§§ 41.130-41.132).

(n29)Footnote 15.1. For the standard jury instruction on the essential factual elements of quid pro quo sexual harassment under FEHA, see *Judicial Council of California Civil Jury Instructions, CACI 2520 (Matthew Bender)*, also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction defining "supervisor" for use in a quid pro quo sexual harassment case under FEHA, see *Judicial Council of California Civil Jury Instructions, CACI 2525(Matthew Bender)*. For discussion of the CACI standard jury instructions generally, see § 61.05. For the CACI special verdict form for a claim of quid pro quo sexual harassment, see *Judicial Council of California Civil Jury Instructions, CACI VF-2505 (Matthew Bender)*. For discussion of the CACI special verdict forms, see § 61.06.

(n30)Footnote 16. *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 16.

(n31)Footnote 17. *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 17.

(n32)Footnote 18. See *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1477 (plaintiff claimed to have been fired the day after refusing owner's sexual proposition).

(n33)Footnote 19. 29 C.F.R. § 1604.11(g).

(n34)Footnote 20. See *Karibian v. Columbia University* (2nd Cir. 1994) 14 F.3d 773 .

(n35)Footnote 21. *Candelore v. Clark County Sanitation Dist.* (9th Cir. 1992) 975 F.2d 588 .

(n36)Footnote 22. See *Candelore v. Clark County Sanitation Dist.* (9th Cir. 1992) 975 F.2d 588, 590 .

(n37)Footnote 23. *DeCintio v. Westchester County Medical Center* (2d Cir. 1986) 807 F.2d 304 .

(n38)Footnote 24. See *Candelore v. Clark County Sanitation Dist.* (9th Cir. 1992) 975 F.2d 588, 591-592 .

(n39)Footnote 25. See *Candelore v. Clark County Sanitation Dist.* (9th Cir. 1992) 975 F.2d 588, 591-592 .

(n40)Footnote 26. See EEOC Compliance Manual (CCH) § 615, P 3113. See *Proksel v. Gattis* (1996) 41 Cal.

App. 4th 1626, 49 Cal. Rptr. 2d 322, where the court held that favoritism based on the paramour status of the person favored, while unfair, is not based on the sex of the complaining plaintiff and so is not remedies under sexual harassment.

(n41)Footnote 27. *29 C.F.R. § 1604.11(a)* (EEOC guideline on sex discrimination); see *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (Title VII; quoting *29 C.F.R. § 1604.11(a)*); *Steele v. Offshore Shipbuilding, Inc.* (11th Cir. 1989) 867 F.2d 1311, 1315 (Title VII; same); *Hicks v. Gates Rubber Co.* (10th Cir. 1987) 833 F.2d 1406, 1413 (Title VII; same); *Herberg v. California Institute of the Arts* (2002) 101 Cal. App. 4th 142, 149, 124 Cal. Rptr. 2d 1 (FEHA); *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 607, 262 Cal. Rptr. 842 (FEHA; same). See *Sheffield v. Los Angeles County* (2003) 109 Cal. App. 4th 153, 161, 134 Cal. Rptr. 2d 492 (FEHA; sex-based hostile or abusive environmental claims arise when workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter conditions of victim's employment).

(n42)Footnote 28. *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 64-68, 106 S. Ct. 2399, 91 L. Ed. 2d 49.

(n43)Footnote 29. See *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 875 n.5 (Title VII; love letter making several references to sex constitutes verbal conduct of sexual nature).

(n44)Footnote 30. *Porter v. Cal. Dept. of Corrections* (9th Cir. 2005) 419 F.3d 885, 892 (Title VII); *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1514-1515; see *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 875-876 (Title VII); *Jordan v. Clark* (9th Cir. 1988) 847 F.2d 1368, 1373.

(n45)Footnote 31. See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 608, 262 Cal. Rptr. 842; see also *DFEH v. Rosenberg* (1990) FEHC Dec. No. 90-09, p. 6 (preponderance of all evidence must demonstrate that (1) unwelcome sexual conduct or other hostile or unwelcome conduct linked to sex has occurred, (2) conduct led to deprivation of employment benefit or benefits, and (3) employer can be liable for conduct); *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 12 (same); *DFEH v. Madera County* (1990) FEHC Dec. No. 90-03, p. 19 (same); *DFEH v. State University-Hayward* (1988) FEHC Dec. No. 88-18, p. 14; 2 Cal. Code Reg. § 7286.5(f)(3) (FEHC regulation; "discrimination-free workplace" (i.e., workplace free of harassment) is employment benefit). The *Fisher* test includes two more elements: membership in a protected group and respondeat superior. The membership requirement seems superfluous since sex discrimination is a distinction based on gender, and males as well as females (and therefore all people) are members of the protected group. See *Newport News Shipbldg. & Dry Dock v. EEOC* (1983) 462 U.S. 669, 682, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (Title VII); 2 Cal. Code Reg. § 7290.7(a) (FEHC regulation); see also discussion in § 41.36[2][a][i]. For a discussion relating to employer liability for the harassing conduct of its supervisory and nonsupervisory employees (respondeat superior), see § 41.81[6].

(n46)Footnote 31.1. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633.

(n47)Footnote 32. See *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 1462; *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal. App. 4th 994, 1001, 112 Cal. Rptr. 2d 347; *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 347-348, 21 Cal. Rptr. 2d 292; see also *Gov. Code § 12940(j)(4)(C)*.

(n48)Footnote 33. See EEOC Compliance Manual (CCH) § 615, P 3114, p. 3276.

(n49)Footnote 33.1. *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 910, as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882; *Sheffield v. Los Angeles County* (2003) 109 Cal. App. 4th 153, 161-162, 134 Cal. Rptr. 2d 492 (FEHA); see *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 787-789, 118 S. Ct. 2275, 141 L. Ed. 2d 662; *Nichols v. Azteca Rest. Enters., Inc.* (9th Cir. 2001) 256 F.3d 864, 871-75.

(n50)Footnote 33.2. *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 910 , as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882 ; see *Nichols v. Azteca Rest. Enters., Inc.* (9th Cir. 2001) 256 F.3d 864, 871, 875 .

(n51)Footnote 33.3. *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 910 , as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882 ; *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1527 .; *Sheffield v. Los Angeles County* (2003)109 Cal. App. 4th 153, 162, 134 Cal. Rptr. 2d 492 (FEHA) .

For the standard jury instructions on the essential factual elements of hostile work environment sexual harassment under FEHA, see Judicial Council of California Civil Jury Instructions, CACI 2521 (employer or entity defendant); CACI 2522 (individual defendant) (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction defining "hostile work environment," see Judicial Council of California Civil Jury Instructions, CACI 2524 (Matthew Bender). For discussion of the CACI standard jury instructions generally, see § 61.05. For the CACI special verdict forms for claims of hostile work environment harassment, see Judicial Council of California Civil Jury Instructions, CACI VF-2506(employer or entity defendant); CACI VF- 2507 (individual defendant). For discussion of the CACI special verdict forms generally, see § 61.06.

(n52)Footnote 33.4. See [2], below.

(n53)Footnote 33.5. *Sheffield v. Los Angeles County* (2003)109 Cal. App. 4th 153, 162, 134 Cal. Rptr. 2d 492 (FEHA) , quoting *Harris v. Forklift Systems (1993) Inc.*, 510 U.S. 17, 21-22 (not severe or pervasive enough to create objectively hostile or abusive work environment, which reasonable person would find hostile or abusive, is beyond Title VII's purview if victim does not subjectively perceive environment to be abusive, conduct has not actually altered conditions of victim's employment). See also *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 788, 118 S. Ct. 2275, 2284, 141 L. Ed. 2d 662, 677 (conduct must be extreme to amount to change in terms and conditions of employment).

(n54)Footnote 33.6. *EEOC v. Nat'l Educ. Assn.* (9th Cir. 2005) 420 F.3d 840, 844-847 (numerous episodes of male supervisor shouting in loud and hostile manner at female employees, with little or no provocation, with hostile physical accompaniment, which shouting was frequent, profane, and often public and intimidated female employees, satisfied differential effects standard, where supervisor's treatment of women differed sufficiently in quality and quantity from his treatment of men to support claim of sex-based discrimination).

(n55)Footnote 33.7. *Lyle v. Warner Bros. TV Productions* (2006) 38 Cal. 4th 264, 42 Cal. Rptr. 3d 2, 132 P.3d 211, 2006 Cal. LEXIS 4719, *19-*66 (based on totality of undisputed circumstances, particularly fact that television show production was creative workplace focused on generating scripts for adult-oriented comedy show featuring sexual themes, no reasonable trier of fact could have concluded that sexually coarse and vulgar language constituted harassment directed at plaintiff because of her sex within meaning of FEHA; to extent triable issues of fact existed as to whether offensive comments were made about women other than plaintiff because of their sex, no reasonable trier of fact could have concluded comments were severe enough or sufficiently pervasive to create work environment hostile or abusive to plaintiff in violation of FEHA).

(n56)Footnote 33.8. *Pennsylvania State Police v. Suders* (2004) 124 S. Ct. 2342, 2351-2357, 159 L. Ed. 2d 204 .

(n57)Footnote 33.9. *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 608, 622, 262 Cal. Rptr. 842 .

(n58)Footnote 33.10. *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 611, 622, 262 Cal. Rptr. 842 .

(n59)Footnote 34. See *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49

(Title VII); *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (but no opinion whether a single unfulfilled threat constitutes discrimination); *Kortan v. California Youth Authority* (9th Cir. 2000) 217 F.3d 1104, 1110-1111 (conduct was concentrated on one occasion in wake of dispute about nurse's failure to follow instructions; court concluded no triable issue existed about whether conduct was frequent, severe or abusive enough to interfere unreasonably with plaintiff's employment); *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 607, 262 Cal. Rptr. 842 (FEHA). The Ninth Circuit Court of Appeals has declared that it will review de novo a district court's determination that conduct is not severe or pervasive enough to constitute an abusive environment. However, it will reverse the district court's factual findings only if it finds that they were "clearly erroneous." *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 876 (Title VII); *Jordan v. Clark* (9th Cir. 1988) 847 F.2d 1368, 1375 & n.7 (Title VII).

(n60)Footnote 34.1. *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49; *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 911, as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958. See *Sheffield v. Los Angeles County* (2003) 109 Cal. App. 4th 153, 162, 134 Cal. Rptr. 2d 492 (FEHA; harassment need not be severe and pervasive; either severe or pervasive will suffice).

(n61)Footnote 34.2. *Sheffield v. Los Angeles County* (2003) 109 Cal. App. 4th 153, 162, 134 Cal. Rptr. 2d 492 (FEHA); *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 878 (Title VII).

(n62)Footnote 35. See *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 60, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49; *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 911, as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882; (Title VII; plaintiff tendered sufficient evidence to preclude summary judgment on hostile work environment claim because three separate rapes by corporate client at business meeting with business client were "severe" since, under circumstances, it would have made reasonable woman feel her work environment had been altered, and employer's subsequent actions in not removing her from account and in taking adverse employment action by reducing her pay reinforced rather than remedied harassment).

(n63)Footnote 35.1. *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal. App. 4th 994, 1001-1002, 112 Cal. Rptr. 2d 347.

(n64)Footnote 35.2. See *Dominguez-Curry v. Nevada Trans. Dept.* (9th Cir. 2005) 424 F.3d 1027, 2005 U.S. App. LEXIS 19764, *10-*19 (evidence that supervisor made numerous demeaning comments about women in workplace, exhibited hostility toward women who took maternity leave, and told sexually explicit jokes in office was more than sufficient to create genuine issue of material fact as to whether supervisor's conduct was sufficiently severe or pervasive to create hostile work environment; district court erroneously disregarded evidence of discriminatory comments supervisor directed to other women).

(n65)Footnote 36. See *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 876, 878 (Title VII).

(n66)Footnote 36.1. *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 924; cf. *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 911, as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882; (Title VII; even assuming arguendo three incidents of rape on same evening constituted single incident, employer not only did not remedy, but arguably reinforced harassment by taking adverse employment action against plaintiff).

(n67)Footnote 36.2. *Herberg v. California Institute of the Arts* (2002) 101 Cal. App. 4th 142, 150-151, 124 Cal. Rptr. 2d 1 (FEHA); *Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 924 (Title VII).

(n68)Footnote 36.3. *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 911, as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882; (Title VII); see *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (noting that no single factor is required).

(n69)Footnote 36.4. *Clark County Sch. Dist. v. Breeden* (2001) 532 U.S. 268, 121 S. Ct. 1508, 1510, 149 L. Ed. 2d 509 ; *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 911 , as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882 .

(n70)Footnote 37. *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 .

(n71)Footnote 37.1. *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 912 , as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882 ; (Title VII).

(n72)Footnote 37.2. *See Brock v. United States* (9th Cir. 1995) 64 F.3d 1421, 1423 (9th Cir. 1995) ("Just as every murder is also a battery, every rape committed in the employment setting is also discrimination based on the employee's sex.").

(n73)Footnote 37.3. *Herberg v. California Institute of the Arts* (2002) 101 Cal. App. 4th 142, 124 Cal. Rptr. 2d 1 .

(n74)Footnote 37.4. *Herberg v. California Institute of the Arts* (2002) 101 Cal. App. 4th 142, 150-154, 124 Cal. Rptr. 2d 1 .

(n75)Footnote 38. *See Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 ; *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 872 (Title VII) ; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 876, 878 (Title VII); *Sheffield v. Los Angeles County* (2003)109 Cal. App. 4th 153, 162 (FEHA); *Herberg v. California Institute of the Arts* (2002) 101 Cal. App. 4th 142, 149-150, 124 Cal. Rptr. 2d 1(FEHA) ; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 609-610, 262 Cal. Rptr. 842 (FEHA) .

(n76)Footnote 39. *King v. Hillen* (Fed. Cir. 1994) 21 F.3d 1572, 1580-1581 ; *see Davis v. Team Electric Co.* (9th Cir. 2008) 520 F.3d 1080, 2008 U.S. App. LEXIS 6476, *32-*37 (female electrician's allegations of sexually harassing conduct were sufficient to overcome summary judgment on prima facie case, where conduct occurred repeatedly over course of her employment and reasonable woman could have had similar reaction to plaintiff's); *Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1109 (alleged occurrence of harassment must be evaluated in light of preceding circumstances and nature of relationship between employee and supervisor; otherwise innocuous event may, in context of pattern of discriminatory harassment, take on different character). *See, e.g., Mokler v. County of Orange* (2007) 157 Cal. App. 4th 121, 141-146, 68 Cal. Rptr. 3d 568 (FEHA; sexual harassment that occurred on three occasions over five-week period and involved no physical threats fell short of establishing pattern of continuous, pervasive harassment necessary to show hostile working environment, where acts demonstrated rude, inappropriate, and offensive behavior, but were not sufficiently severe or pervasive to alter conditions of employment and create abusive working environment); *Jones v. Dept. of Corrections* (2007) 152 Cal. App. 4th 1367, 1376-1379, 62 Cal. Rptr. 3d 200 (FEHA; based on totality of circumstances, corrections officer failed to present triable issue of material fact from which it reasonably could be inferred she suffered harassment, where absence of nexus between alleged harassment and plaintiff's gender negated claim, and where plaintiff failed to produce evidence that conditions she complained of were sufficiently severe or pervasive to constitute harassment). To view Court of Appeal briefs related to the *Jones* case that are available on Lexis.com, go to 2006 CA App. Ct. Briefs 48281 .

(n77)Footnote 39.1. *Sheffield v. Los Angeles County* (2003)109 Cal. App. 4th 153, 162, 134 Cal. Rptr. 2d 492 (FEHA) ; *Herberg v. California Institute of the Arts* (2002) 101 Cal. App. 4th 142, 149-150, 124 Cal. Rptr. 2d 1 (FEHA) ; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 609-610, 262 Cal. Rptr. 842 (FEHA) .

(n78)Footnote 39.2. *Herberg v. California Institute of the Arts* (2002) 101 Cal. App. 4th 142, 149-150, 124 Cal. Rptr. 2d 1 (FEHA) .

(n79)Footnote 40. *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872 .

(n80)Footnote 41. *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 877-878 (Title VII).

(n81)Footnote 41.1. *Sheffield v. Los Angeles County* (2003)109 Cal. App. 4th 153, 162, 134 Cal. Rptr. 2d 492 (FEHA) .

(n82)Footnote 42. *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 878 ; see *Andrews v. City of Philadelphia* (3d Cir. 1990) 895 F.2d 1469, 1485 (offensive conduct need not in each instance detrimentally affect employee to constitute impermissible discrimination).

(n83)Footnote 43. *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295, 302-303 .

(n84)Footnote 44. *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 878 (Title VII); accord, EEOC Compliance Manual (CCH) § 615, P 3114, pp. 3273-3275.

(n85)Footnote 45. *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 878-879 (Title VII); *Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 511-512 (objective standard considers standpoint of reasonable person with accuser's defining traits, including race, sex, age, disability, and sexual orientation).

(n86)Footnote 46. *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 879 (Title VII); see *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 872-873 (in action by male plaintiff, reasonable man standard used); *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1527 (whether the workplace is objectively hostile must be determined from the perspective of a reasonable person with the same fundamental characteristics as the plaintiff).

(n87)Footnote 46.1. *Sheffield v. Los Angeles County* (2003)109 Cal. App. 4th 153, 162, 134 Cal. Rptr. 2d 492 ; see *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 608, 262 Cal. Rptr. 842 .

(n88)Footnote 47. *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 1463-1464 .

(n89)Footnote 48. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3274 (emphasis added; environment replete with sexual slurs, "girlie" picture displays, and other offensive conduct can constitute hostile work environment even if many people deem it to be harmless or insignificant).

(n90)Footnote 48.1. *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 21-22, 114 S. Ct. 367, 126 L. Ed. 2d 295 ; *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 873 (plaintiff's complaints to human resources director and general manager and assistant manager about frequent, degrading verbal abuse supported conclusion that conduct was unwelcome and that plaintiff held subjective belief he was being harassed).

(n91)Footnote 48.2. *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 873 .

(n92)Footnote 48.3. *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 873 .

(n93)Footnote 49. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3275.

(n94)Footnote 50. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3275.

(n95)Footnote 51. See *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 883 .

(n96)Footnote 51.1. *Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104 .

(n97)Footnote 51.2. *Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1107-1109 . For further discussion of the continuing violations theory, see § 42.62[3][d].

(n98)Footnote 51.3. *Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1109 , quoting *Oncale v.*

Sundowner Offshore Servs., Inc., 523 U.S. 75, 81-82, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) .

(n99)Footnote 51.4. *Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1109 (alleged occurrence of harassment must be evaluated in light of preceding circumstances and nature of relationship between employee and supervisor); for discussion of statute of limitations issues in *Draper*, see § 60.07[1][b][v].

(n100)Footnote 52. *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 262 Cal. Rptr. 842 .

(n101)Footnote 53. *Accord*, DFEH v. Rosenberg (1990) FEHC Dec. No. 90-09, p. 8 (sex-linked conduct deprives its victims of discrimination-free workplace when conduct creates intimidating, oppressive, hostile, or offensive work environment, or otherwise interferes with victim's emotional well-being or ability to work); DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, pp. 14-15 (same); DFEH v. Madera County (1990) FEHC Dec. No. 90-03, p. 20 (same). *Fisher* defines a "reasonable employee" as one of the same sex as the plaintiff. *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 609-610 n.7, 262 Cal. Rptr. 842 .

(n102)Footnote 54. *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 609-610, 262 Cal. Rptr. 842 .

(n103)Footnote 55. The *Fisher* court opined that physical touching is generally more offensive than unwelcome verbal abuse. See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 610, 262 Cal. Rptr. 842 .

(n104)Footnote 56. *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 610, 262 Cal. Rptr. 842 ; see DFEH v. Rosenberg (1990) FEHC Dec. No. 90-09, p. 7 (evidence of repeated and continuous sexual comments and jokes about complainant in complainant's and others' presence, telling complainant to bend over so men could look up her dress, false, crude stories about complainant's sex life, and calling complainant "trashy" in front of customer established ongoing pattern of unwelcome sexual conduct); DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, p. 12 (pattern of unwelcome sexual comments, gestures and touching and, in one case, sexual advances and an assault, constitutes kind of hostile sex-linked conduct that may form basis for FEHA sexual harassment violation).

(n105)Footnote 56.1. *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal. App. 3d 590, 613, 262 Cal. Rptr. 842 .

(n106)Footnote 56.2. *Beyda v. City of Los Angeles* (1998) 65 Cal. App. 4th 511, 76 Cal. Rptr. 2d 547 .

(n107)Footnote 56.3. *Beyda v. City of Los Angeles* (1998) 65 Cal. App. 4th 511, 521, 76 Cal. Rptr. 2d 547 (no evidence was excluded as to acts that occurred in plaintiff's presence and her offer of proof did not show that plaintiff knew of them during employment); see *Kovatch v. California Cas. Management Co.* (1998) 65 Cal. App. 4th 1256, 1271, 77 Cal. Rptr. 2d 217 (in constructive discharge/sexual orientation discrimination case, incidents of offensive behavior not shown to be in plaintiff's presence, or learned of by plaintiff before termination, were disregarded in assessing adverse nature of plaintiff's working conditions; but evidence could be used to show anti-gay animus).

(n108)Footnote 57. *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 348-351, 21 Cal. Rptr. 2d 292 .

(n109)Footnote 58. *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 348-351, 21 Cal. Rptr. 2d 292 ; see Gov. Code § 12965(b).

(n110)Footnote 59. *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 348-351, 21 Cal. Rptr. 2d 292 .

(n111)Footnote 60. *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 348-351, 21 Cal. Rptr. 2d 292 .

(n112)Footnote 61. *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 348-351, 21 Cal. Rptr. 2d 292 .

(n113)Footnote 61.1. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d

633, 655 ; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 689 . For further discussion of employer's affirmative defense, see [6][b], below, and § 41.92A.

(n114)Footnote 61.2. *Evid. Code* § 1160(a).

(n115)Footnote 61.3. *Evid. Code* § 1160(b).

(n116)Footnote 61.4. *Evid. Code* § 1160(d).

(n117)Footnote 61.5. *Evid. Code* § 783(a).

(n118)Footnote 61.6. *Evid. Code* § 783(b).

(n119)Footnote 61.7. *Evid. Code* § 783(c).

(n120)Footnote 61.8. *Evid. Code* § 783(d).

(n121)Footnote 61.9. *Rieger v. Arnold* (2002) 104 Cal. App. 4th 451, 460-468, 128 Cal. Rptr. 2d 295 (there was adequate admissible evidence of plaintiff's conversations with defendant office manager regarding sexual matters and their sexual relationships to prove plaintiff did not find her work environment hostile; inadmissible evidence did not give false impression on issue, nor was tenor of inadmissible evidence more egregious than evidence properly before jury, and it was not reasonably probable plaintiff would have had more favorable result in its absence).

(n122)Footnote 61.10. *Rieger v. Arnold* (2002) 104 Cal. App. 4th 451, 461-462, 128 Cal. Rptr. 2d 295 .

(n123)Footnote 61.11. *Rieger v. Arnold* (2002) 104 Cal. App. 4th 451, 462-465, 128 Cal. Rptr. 2d 295 .

(n124)Footnote 62. See EEOC Compliance Manual (CCH) § 615, P 3114.

(n125)Footnote 63. *Henson v. City of Dundee* (11th Cir. 1982) 682 F.2d 897, 903 .

(n126)Footnote 64. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3270.

(n127)Footnote 65. *Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 1464 n.5 .

(n128)Footnote 66. See, e.g., *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 60-61, 106 S. Ct. 2399, 91 L. Ed. 2d 49 .

(n129)Footnote 67. See *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 68, 106 S. Ct. 2399, 91 L. Ed. 2d 49 ; see also EEOC Compliance Manual (CCH) § 615, P 3114.

(n130)Footnote 68. 29 C.F.R. § 1604.11(b).

(n131)Footnote 69. See *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 69, 106 S. Ct. 2399, 91 L. Ed. 2d 49 ; see also EEOC Compliance Manual (CCH) § 615, P 3114.

(n132)Footnote 70. EEOC Compliance Manual (CCH) § 615, P 3114, pp. 3271-3272.

(n133)Footnote 71. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3272.

(n134)Footnote 72. See *Evid. Code* § 1105; *Gov. Code* § 11513(c); see also ch. 42, pt. B.

(n135)Footnote 73. *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 14 (sharing sexual jokes with other female employees).

(n136)Footnote 74. See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 610-611, 262 Cal. Rptr. 842 .

(n137)Footnote 75. See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 610-611, 262 Cal. Rptr. 842 .

(n138)Footnote 76. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3268.

(n139)Footnote 77. See *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, pp. 15-16 (transfer to less desirable and remunerative shift in retaliation for resistance to sexual demands).

(n140)Footnote 78. *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522 .

(n141)Footnote 79. See *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1529 .

(n142)Footnote 79.1. See, e.g., *Singleton v. United States Gypsum Co.* (2006) 140 Cal. App. 4th 1547, 1556-1564, 45 Cal. Rptr. 3d 597 (trial court erred in granting summary judgment for employer on employee's same sex harassment hostile work environment action under FEHA, where employee showed facts to support his claim he was sexually harassed through unwelcome sexual comments by coworkers, he reported harassment to his supervisors, and no action was taken to correct and eliminate harassment); *Hope v. California Youth Authority* (2005) 134 Cal. App. 4th 577, 587-596, 36 Cal. Rptr. 3d 154 (substantial evidence supported jury's determinations that cook at youth incarceration facility was subjected to harassment because of his sexual orientation; harassment was sufficiently severe or pervasive because evidence supported finding that harassment would have interfered with reasonable employee's work performance and seriously affected psychological well-being of reasonable employee, and cook himself believed work environment was hostile and offensive; cook's superiors either knew or should have known about harassment and its cause; and employer did not take immediate and corrective action to stop harassment).

(n143)Footnote 80. *Mogilefsky v. Superior Court* (1993) 20 Cal. App. 4th 1409, 1416, 26 Cal. Rptr. 2d 116 .

(n144)Footnote 81. *Matthews v. Superior Court* (1995) 34 Cal. App. 4th 598, 603, 40 Cal. Rptr. 2d 350 .

(n145)Footnote 81.1. *Valdez v. Clayton Industries, Inc.* (2001) 88 Cal. App. 4th 1162, 1171-1172, 107 Cal. Rptr. 2d 15 .

(n146)Footnote 81.2. *Valdez v. Clayton Industries, Inc.* (2001) 88 Cal. App. 4th 1162, 1172-1173, 107 Cal. Rptr. 2d 15 (also finding that although sexual jokes and remarks were common in workplace, reasonable jury could conclude that supervisor's conduct was unwelcome because it targeted plaintiff, who repeatedly complained about it to supervisor and supervisor's supervisor, and plaintiff's adult novelty gifts to supervisor after conduct began and plaintiff unsuccessfully complained were intended solely to halt supervisor's conduct).

(n147)Footnote 81.3. *Sheffield v. Los Angeles County* (2003) 109 Cal. App. 4th 153, 161, 134 Cal. Rptr. 2d 492 .

(n148)Footnote 82. *Hart v. National Mort. & Land Co.* (1967) 189 Cal. App. 3d 1420, 235 Cal. Rptr. 68 ; rejected in *Mogilefsky v. Superior Court* (1993) 20 Cal. App. 4th 1409, 1415-1416, 26 Cal. Rptr. 2d 116 , see *Valdez v. Clayton Industries, Inc.* (2001) 88 Cal. App. 4th 1162, 1171-1172, 107 Cal. Rptr. 2d 15 .

(n149)Footnote 83. *Oncale v. Sundowner Offshore Servs., Inc.* (1998) 523 U.S. 75, 118 S. Ct. 998, 1001-1002, 140 L. Ed. 2d 201 ; see *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.* (1983) 462 U.S. 669, 682, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (no conclusive presumption that employer will not discriminate against members of own race).

(n150)Footnote 84. *Oncale v. Sundowner Offshore Servs., Inc.* (5th Cir. 1996) 83 F.3d 118 .

(n151)Footnote 84.1. See *Oncale v. Sundowner Offshore Servs., Inc.* (1998) 523 U.S. 75, 118 S. Ct. 998, 1001,

140 L. Ed. 2d 201 .

(n152)Footnote 84.2. *Oncale v. Sundowner Offshore Servs., Inc.* (1998) 523 U.S. 75, 79-80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (courts have limited difficulty in same-sex cases when employee claims to have been passed over for job or promotion); see *Johnson v. Transportation Agency, Santa Clara County* (1987) 480 U.S. 616, 624-626, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (Court did not consider fact that supervisor was same sex as plaintiff significant in case claiming sexual bias in promotions).

But see Kelly v. City of Oakland (9th Cir. 1999) 198 F.3d 779, 784-785 (employer cannot be held liable for same-sex harassment in form of hostile environment prior to time the federal right was established; but federal right to be free from quid pro quo sexual harassment was clear without need for specific holding).

(n153)Footnote 84.3. *Oncale v. Sundowner Offshore Servs., Inc.* (1998) 523 U.S. 75, 79-80, 118 S. Ct. 998, 140 L. Ed. 2d 201 ; see *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (Title VII language indicates congressional intent to strike at entire spectrum of disparate treatment of men and women in employment); see also *Harris v. Forklift Sys., Inc.* (1993) 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (Title VII violated when workplace is permeated with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment).

(n154)Footnote 84.4. *Oncale v. Sundowner Offshore Servs., Inc.* (1998) 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (quoting *Harris v. Forklift Sys., Inc.* (1993) 510 U.S. 17, 25, 114 S. Ct. 367, 126 L. Ed. 2d 295).

(n155)Footnote 84.5. *Oncale v. Sundowner Offshore Servs., Inc.* (1998) 523 U.S. 75, 79, 118 S. Ct. 998, 140 L. Ed. 2d 201 .

(n156)Footnote 84.6. *Oncale v. Sundowner Offshore Servs., Inc.* (1998) 523 U.S. 75, 79, 118 S. Ct. 998, 140 L. Ed. 2d 201 .

(n157)Footnote 84.7. *Harris v. Forklift Sys., Inc.* (1993) 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 .

(n158)Footnote 84.8. *Oncale v. Sundowner Offshore Servs., Inc.* (1998) 523 U.S. 75, 81, 118 S. Ct. 998, 1003, 140 L. Ed. 2d 201 .

(n159)Footnote 84.9. *Oncale v. Sundowner Offshore Servs., Inc.* (1998) 523 U.S. 75, 81, 118 S. Ct. 998, 1003, 140 L. Ed. 2d 201 .

(n160)Footnote 84.10. *Rene v. MGM Grand Hotel* (9th Cir. 2002) 305 F.3d 1061 (en banc).

(n161)Footnote 84.11. *Rene v. MGM Grand Hotel* (9th Cir. 2002) 305 F.3d 1061, 1065-1067 (en banc).

(n162)Footnote 84.12. *Rene v. MGM Grand Hotel* (9th Cir. 2002) 305 F.3d 1061, 1067 (en banc).

(n163)Footnote 84.13. *Rene v. MGM Grand Hotel* (9th Cir. 2002) 305 F.3d 1061, 1067 (en banc).

(n164)Footnote 84.14. *Rene v. MGM Grand Hotel* (9th Cir. 2002) 305 F.3d 1061, 1068 .

(n165)Footnote 85. *Proksel v. Gattis* (1996) 41 Cal. App. 4th 1626, 49 Cal. Rptr. 2d 322 .

(n166)Footnote 85.1. *Miller v. Department of Corr.* (2005) 36 Cal. 4th 446, 460-466, 30 Cal. Rptr. 3d 797, 115 P.3d 77 .

(n167)Footnote 85.2. *Miller v. Department of Corr.* (2005) 36 Cal. 4th 446, 466-468, 30 Cal. Rptr. 3d 797, 115 P.3d 77 .

(n168)Footnote 85.3. *Miller v. Department of Corr.* (2005) 36 Cal. 4th 446, 471, 30 Cal. Rptr. 3d 797, 115 P.3d 77.

(n169)Footnote 86. *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 72, 106 S. Ct. 2399, 91 L. Ed. 2d 49

(n170)Footnote 87. *See* 42 U.S.C. § 2000e(b).

(n171)Footnote 88. *See Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 72, 106 S. Ct. 2399, 91 L. Ed. 2d 49 ; *see also Miller v. Bank of America* (9th Cir. 1979) 600 F.2d 211, 213 (doctrine of respondeat superior applicable); 29 C.F.R. § 1604.11(c) (EEOC guideline on sex discrimination; employers liable for sexual harassment by its agents and supervisors).

(n172)Footnote 89. *See Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 71, 106 S. Ct. 2399, 91 L. Ed. 2d 49 ; 29 C.F.R. §§ 1604.1-1604.11.

(n173)Footnote 90. *See* 29 C.F.R. §§ 1606.1-1606.8; *see also* discussion in § 41.82[2].

(n174)Footnote 91. *See* 29 C.F.R. §§ 1604.11(c) (EEOC guideline on sex discrimination), 1606.8(c)(EEOC guideline on national origin discrimination).

(n175)Footnote 92. *See Gov. Code § 12940(j)*; *see also* 2 Cal. Code Reg. § 7287.6(b)(2) (harassment by employer's agents or supervisors unlawful). *See Chapman v. Enos* (2004) 116 Cal. App. 4th 920, 928, 10 Cal. Rptr. 3d 852 (under FEHA, employer is strictly liable for harassing actions of its supervisors and agents).

(n176)Footnote 93. *Gov. Code § 12940(j)(3)*.

(n177)Footnote 93.1. *State Dept. of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal. 4th 1026, 1039-1042, 6 Cal. Rptr. 3d 441, 79 P.3d 556.

(n178)Footnote 93.2. *State Dept. of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal. 4th 1026, 1042-1048, 6 Cal. Rptr. 3d 441, 79 P.3d 556 For discussion of recoverable compensatory damages under the FEHA, *see* § 43.01[8][3].

(n179)Footnote 93.3. *Gov. Code § 12940(j)(1)*.

(n180)Footnote 94. *See* 29 C.F.R. §§ 1604.11(c) (EEOC guideline on sex discrimination), 1606.8(c)(EEOC guideline on national origin discrimination); *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 72, 106 S. Ct. 2399, 91 L. Ed. 2d 49.

(n181)Footnote 95. *See Steele v. Offshore Shipbuilding, Inc.* (11th Cir. 1989) 867 F.2d 1311, 1316 ; *see also Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 508-509 ; *see also* discussion in [1]. *above*.

(n182)Footnote 96. *See Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1191-1192 (Title VII liability is direct, not derivative; employer is responsible for its own actions or omissions, not for co-worker's harassing conduct); *Steele v. Offshore Shipbuilding, Inc.* (11th Cir. 1989) 867 F.2d 1311, 1316 ; *see also* discussion in [1], *above*. *Accord, E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1515-1516 (employers are liable for failing to prevent or remedy hostile work environment when management-level employees knew or reasonably should have known of harassing conduct); *see also* EEOC Compliance Manual (CCH) § 615, P 3114, p. 3279 (employer is liable when it knew, or on reasonably diligent inquiry should have known, of harassment; relying on *Yates v. Avco Corp.* (6th Cir. 1987) 819 F.2d 630, 636). The EEOC has stated that if the employer takes immediate and appropriate remedial action to correct harassment and prevent its recurrence, and the EEOC determines that no further action is warranted, normally it will administratively close the case. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3279.

(n183)Footnote 97. *Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 508 .

(n184)Footnote 98. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3279; *see Henson v. City of Dundee* (11th Cir. 1982) 682 F.2d 897, 905 .

(n185)Footnote 99. *Henson v. City of Dundee* (11th Cir. 1982) 682 F.2d 897, 905 .

(n186)Footnote 100. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3279.

(n187)Footnote 101. EEOC Compliance Manual (CCH) § 615, P 3114, pp. 3279-3280 (relying on Restatement (Second) of Agency, § 219(1)).

(n188)Footnote 102. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3280.

(n189)Footnote 103. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3280 (relying on Restatement (Second) of Agency, §§ 7, 8, 219(2)(d)). *See Trent v. Valley Elec. Ass'n Inc.* (9th Cir. 1994) 41 F.3d 524 , where the employer was held liable for the sexually-harassing comments made by a trainer invited into the company to conduct safety instruction which the plaintiff was required to attend. *See Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459 , where the employer was held an employer's failure to control a harassing supervisor, including sexual innuendos.

(n190)Footnote 104. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3280; *see* discussion in [1], *above*.

(n191)Footnote 105. *See* EEOC Compliance Manual (CCH) § 615, P 3114, p. 3281-3282 (relying on Restatement (Second) of Agency, §§ 8B, 214, 219, 492).

(n192)Footnote 106. *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1528-1529 .

(n193)Footnote 107. *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1528 .

(n194)Footnote 108. *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1529 .

(n195)Footnote 109. *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522 .

(n196)Footnote 110. *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1528 (emphasis in original).

(n197)Footnote 111. *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1529 .

(n198)Footnote 112. *See Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882 (employer failed to chastise, reprimand, discipline, or warn a harassing coworker, but merely asked him to leave plaintiff alone); *accord*, EEOC Compliance Manual (CCH) § 615, P 3114, p. 3282 (disciplinary action, ranging from reprimand to discharge, may be necessary).

(n199)Footnote 113. *See Carrisales v. Department of Corrections* (1999) 21 Cal. 4th 1132, 1136, 90 Cal. Rptr. 2d 804, 988 P.2d 1083 ; *Gov. Code* § 12040(h)(1).

(n200)Footnote 114. *Carrisales v. Department of Corrections* (1999) 21 Cal. 4th 1132, 1136, 90 Cal. Rptr. 2d 804, 988 P.2d 1083.

(n201)Footnote 115. *Gov. Code* § 12940(j)(3).

(n202)Footnote 116. *See Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal. App. 4th 397, 417, 27 Cal. Rptr. 2d 457 .

(n203)Footnote 117. *Carrisales v. Department of Corrections* (1999) 21 Cal. 4th 1132, 1136, 90 Cal. Rptr. 2d 804, 988 P.2d 1083.

(n204)Footnote 118. *Capitol City Foods, Inc. v. Superior Court* (1992) 5 Cal. App. 4th 1042, 1047-1050, 7 Cal. Rptr. 2d 418 .

(n205)Footnote 119. *Capitol City Foods, Inc. v. Superior Court* (1992) 5 Cal. App. 4th 1042, 1047-1050, 7 Cal. Rptr. 2d 418 . See also *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal. 4th 992, 47 Cal. Rptr. 2d 478, 906 P.2d 440 (harassing employee was acting for personal purposes outside the scope of his employment); *John R. v. Oakland Unified School Dist.* (1989) 48 Cal. 3d 438 .

(n206)Footnote 120. See *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal. App. 4th 397, 417, 27 Cal. Rptr. 2d 457 . Note that a court has a duty to be impartial and cannot be biased against a plaintiff bringing harassment charges, *Catchpole v. Brannon* (1995) 36 Cal. App. 4th 237 .

(n207)Footnote 120.1. *Chapman v. Enos* (2004) 116 Cal. App. 4th 920, 10 Cal. Rptr. 3d 852 .

(n208)Footnote 120.2. *Chapman v. Enos* (2004) 116 Cal. App. 4th 920, 929-930, 10 Cal. Rptr. 3d 852 .

(n209)Footnote 120.3. *Chapman v. Enos* (2004) 116 Cal. App. 4th 920, 930, 10 Cal. Rptr. 3d 852 .

(n210)Footnote 120.4. *Chapman v. Enos* (2004) 116 Cal. App. 4th 920, 931-932, 10 Cal. Rptr. 3d 852 .

(n211)Footnote 120.5. *Gov. Code § 12940(j)(1)*.

(n212)Footnote 121. *Meritor Sav. Bank v. Vinson* (1986) 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 ; 29 C.F.R. §§ 1604.1-1604.11.

(n213)Footnote 122. See *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 70-72, 106 S. Ct. 2399, 91 L. Ed. 2d 49 .

(n214)Footnote 123. *Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503 .

(n215)Footnote 124. See *Nichols v. Frank* (9th Cir. 1994) 42 F.3d 503, 508-514 . This "knew or should have known" rule applies to sexual harassment by coworkers but not to harassment by a supervisor. *Burrell v. Star Nursery, Inc.* (9th Cir. 1999) 170 F.3d 951, 955-956 . For further discussion of nonsupervisor harassment, see [c], below.

(n216)Footnote 125. *Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 .

(n217)Footnote 126. *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 2292-2293, 141 L. Ed. 2d 662 .

(n218)Footnote 127. *Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 ; for further discussion of "tangible employment action" see [1], above. See also *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158, 1166-1167 (under *Faragher/ Ellerth*, when employee has been subjected to unlawful "tangible employment action" by supervisor, employer may be held liable without more); *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 877 (termination of employment did not preclude employer from raising affirmative defense because termination was unrelated to harassment or complaint of harassment, and before termination, employee was not demoted or reassigned and did not receive cut in pay or benefits).

(n219)Footnote 127.1. See, e.g., *Davis v. Team Electric Co.* (9th Cir. 2008) 520 F.3d 1080, 2008 U.S. App. LEXIS 6476, *37 (reasonable jury could find employer liable for hostile environment described by female electrician because its supervisors played significant role in creating environment, making it clear to electrician on more than one occasion that women were not welcome at work site).

(n220)Footnote 128. *Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 ; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 2292-2293, 141 L. Ed. 2d 662 .

(n221)Footnote 128.1. *See, e.g., Davis v. Team Electric Co.* (9th Cir. 2008) 520 F.3d 1080, 2008 U.S. App. LEXIS 6476, *38-*39 (employer failed to show it took steps to prevent sexual harassment in its workplace, where there was no evidence of anti-harassment policy or that it had other preventive measures in place, such as sexual harassment training; employer's only apparent attempt to correct harassment came after female employee contacted state agency following several months of alleged mistreatment by her supervisors, and there was no evidence any supervisors were disciplined for their conduct or even told to behave differently, and employer did not show female employee failed to take advantage of any preventive or corrective opportunities it offered).

(n222)Footnote 129. *Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 ; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 2292-2293, 141 L. Ed. 2d 662 . *See also Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158, 1167 (when employee has been unlawfully harassed, but there has been no "tangible employment action," employer may avoid liability by proving defense of "reasonable care"). For further discussion of employer's affirmative defense, *see* § 41.92A.

(n223)Footnote 130. *Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633 ; *but see Craig v. M&O Agencies, Inc.* (9th Cir. 2007) 496 F.3d 1047, 1053-1058 (employer's affirmative defense to allegations of sexual harassment by supervisor failed, where employee's minor delay in reporting harassing behavior did not meet stringent standard of *Faragher*); *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 876 n.10 (although employee's complaints of harassment did not follow formal reporting requirements of employer's antiharassment policy, they were sufficient to place company on notice of harassment).

(n224)Footnote 131. *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 805 ; *Burrell v. Star Nursery, Inc.* (9th Cir. 1999) 170 F.3d 951, 955-956 .

(n225)Footnote 132. *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 802-804 .

(n226)Footnote 133. *State Department of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal. 4th 1026, 6 Cal. Rptr. 3d 441, 79 P.3d 556 .

(n227)Footnote 133.1. *See also Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal. App. 4th 1403, 1421, 56 Cal. Rptr. 3d 501 (in order for employer to avoid strict liability for supervisor's actions under FEHA, sexual harassment must result from completely private relationship unconnected with employment; otherwise, employer is strictly liable for supervisor's actions regardless of whether supervisor was acting as employer's agent).

(n228)Footnote 134. *Doe v. Capital Cities* (1996) 50 Cal. App. 4th 1038, 1048-1049, 58 Cal. Rptr. 2d 122 (aspiring actor's complaint adequately alleged viable FEHA claim against casting director's employer for rape at meeting at casting director's home on Sunday); *Capitol City Foods, Inc. v. Superior Court* (1992) 5 Cal. App. 4th 1042, 7 Cal. Rptr. 2d 418 (employer was entitled to summary judgment on FEHA claim where employee claimed her supervisor raped her at his parent's house after she agreed to meet him for date, because regulations promulgated under FEHA indicated that, under theory of respondeat superior, employer is liable for harassment by supervisors committed within scope of employment or relationship with employer).

(n229)Footnote 135. *State Department of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal. 4th 1026, 1041 & n.3, 6 Cal. Rptr. 3d 441, 79 P.3d 556 ; *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal. App. 4th 1403, 1421-1422, 56 Cal. Rptr. 3d 501 .

(n230)Footnote 136. *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal. App. 4th 1403, 1421-1422, 56 Cal. Rptr. 3d 501 .

(n231)Footnote 137. *Gov. Code § 12940(j)(1)*; see *Carrisales v. Department of Corrections* (1999) 21 Cal. 4th 1132, 1136, 90 Cal. Rptr. 2d 804, 988 P.2d 1083 and discussion in [b] above; see also *Burrell v. Star Nursery, Inc.* (9th Cir. 1999) 170 F.3d 951, 955 ("knew or should have known" rule applies to sexual harassment by coworkers but not to harassment by a supervisor). See *Sheffield v. Los Angeles County* (2003) 109 Cal. App. 4th 153, 163-164, 134 Cal. Rptr. 2d 492 (FEHA; trier of fact could determine that employer failed to take reasonable steps to prevent same sex harassment once it knew of coworker's implied threats of violence but failed to act, because victim's immediate supervisor was aware of harassment).

(n232)Footnote 138. See 29 C.F.R. §§ 1604.11(d) (EEOC guideline on sex discrimination), 1606.8(d) (EEOC guideline on national origin discrimination); see also *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 803 (42 U.S.C. § 1981 racial harassment; if harasser is co-worker, plaintiff must prove employer knew or should have known of harassment but did not take adequate steps to address it); *Burrell v. Star Nursery, Inc.* (9th Cir. 1999) 170 F.3d 951, 955 (Title VII sexual harassment; "knew or should have known" rule applies to sexual harassment by coworkers but not to harassment by a supervisor); *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882 (Title VII; sexual harassment); *Davis v. Monsanto Chem. Co.* (6th Cir. 1988) 858 F.2d 345, 349 (racial harassment; employer liable for harassment by victim's coemployees if employer knew or should have known of alleged conduct and failed to take prompt remedial action).

(n233)Footnote 139. *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1192 & n.6.

(n234)Footnote 140. *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1192 (Title VII; sexual harassment); *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882 (Title VII; sexual harassment); see *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 875 (Title VII; employer is liable for hostile work environment created by coworker unless employer takes adequate remedial measures to avoid liability).

(n235)Footnote 140.1. *Mathieu v. Norrell Corp.* (2004) 115 Cal. App. 4th 1174, 1185, 10 Cal. Rptr. 3d 52 .

(n236)Footnote 141. *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1192 .

(n237)Footnote 142. *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1192-1193 & n.8.

(n238)Footnote 143. *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1194 ; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882 .

(n239)Footnote 144. *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1194-1195 (absence of evidence that complainant's new position was objectively less desirable rendered untenable jury's finding that Postal Service failed to take appropriate corrective action after learning of her complaint); see EEOC Compl. Man. (CCH) § 615.4(a)(9)(iii) (2000) (employer's action is appropriate if it fully remedies conduct without adversely affecting terms or conditions of charging party's employment in some manner, for example, by requiring charging party to work less desirable hours or in less desirable location).

(n240)Footnote 145. *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882 (Title VII; quoting *Dornhecker v. Malibu Grand Prix Corp.* (5th Cir. 1987) 828 F.2d 307, 309) .

(n241)Footnote 146. *Star v. West* (9th Cir. 2001) 237 F.3d 1036, 1039 ; see *Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773, 781-783 (Keep, J., concurring), 786 (Wiggins, J., dissenting) (adequate remedial action could be taken without disciplining harasser, at least as first response). but see *Yamaguchi v. U.S. Dep't of the Air Force* (9th Cir. 1997) 109 F.3d 1475, 1482-1483 (remedial measures must include some form of disciplinary action).

(n242)Footnote 147. *Swenson v. Potter* (9th Cir. 2001) 271 F.3d 1184, 1194-1198 .

(n243)Footnote 147.1. *Gov. Code § 12940(j)(1)*.

(n244)Footnote 147.2. *Carter v. Cal. Dept. of Veterans Affairs* (2006) 38 Cal. 4th 914, 920-930, 44 Cal. Rptr. 3d 223, 135 P.3d 637 (Legislature merely clarified existing law when it amended Gov. Code § 12940(j)(1) to refer specifically to acts of nonemployees, and court would not address retroactivity and related due process concerns, where such legislative act had no retrospective effect because true meaning of statute remained the same).

(n245)Footnote 148. See *Freitag v. Ayers* (9th Cir. 2006) 463 F.3d 838, 2006 U.S. App. LEXIS 23383, *18-*29 (court would not carve out exception to Title VII under which prison, due to its distinctive character and problems, and in particular inherently hostile environment, was immune from lawsuits (by correctional officers) arising from sexual harassment by inmates, and substantial evidence supported jury's finding that female prison guard was subjected to hostile work environment due to inmate sexual misconduct, and state corrections and rehabilitation department was liable because it failed to take prompt and effective remedial action reasonably calculated to address misconduct); *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 912 (Title VII; in 9th Circuit, employers are liable for harassing conduct by non-employees if employer either ratifies or acquiesces in harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct), citing *Folkerson v. Circus Circus Enters., Inc.* (9th Cir. 1997) 107 F.3d 754, 756 .

(n246)Footnote 149. See 29 C.F.R. §§ 1604.11(e) (EEOC guideline on sex discrimination), 1606.8(e)(EEOC national origin guideline).

(n247)Footnote 150. See *Miller v. Maxwell's Int'l, Inc.* (9th Cir. 1993) 991 F.2d 583 .

(n248)Footnote 151. *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 912-913 , as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958 .

(n249)Footnote 152. See Gov. Code § 12940(j); 2 Cal. Code Reg. § 7287.6(b)(3); *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal. App. 3d 590, 608 n.6, 262 Cal. Rptr. 842 ; *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 19 n.5; *DFEH v. Madera County* (1990) FEHC Dec. No. 90-03, p. 24.

(n250)Footnote 153. *Bihun v. AT&T Information Sys., Inc.* (1993) 13 Cal. App. 4th 976, 988-989, 16 Cal. Rptr. 2d 787 , disapproved on other grounds, *Lakin v. Watkins Associated Indus.* (1993) 6 Cal. 4th 644, 664 (evidence of sexual harassment of other female employees admitted); see *Randi W. v. Muroc Joint Unified Sch. Dist.* (1997) 14 Cal. 4th 1066, 1086-1087, 60 Cal. Rptr. 2d 263, 929 P.2d 582 .

(n251)Footnote 154. *Carrisales v. Department of Corrections* (1999) 21 Cal. 4th 1132, 90 Cal. Rptr. 2d 804, 988 P.2d 1083.

(n252)Footnote 155. Gov. Code § 12940(j)(3).

(n253)Footnote 156. *McClung v. Employment Devel. Dept.* (2004) 34 Cal. 4th 467, 20 Cal. Rptr. 3d 428, 99 P.3d 1015, 2004 Cal. LEXIS 10527, *4-*20 . See Gov. Code § 12940(j)(2).

(n254)Footnote 157-160. [Reserved]

(n255)Footnote 161. *Carrisales v. Department of Corrections* (1999) 21 Cal. 4th 1132, 1138, 90 Cal. Rptr. 2d 804, 988 P.2d 1083 .

(n256)Footnote 162. *Reno v. Baird* (1998) 18 Cal. 4th 640, 645, 76 Cal. Rptr. 2d 499, 957 P.2d 1333 .

(n257)Footnote 163. *Matthews v. Superior Court* (1995) 34 Cal. App. 4th 598, 599-600, 605-606, 40 Cal. Rptr. 2d 350 ; *Page v. Superior Court* (1995) 31 Cal. App. 4th 1206, 1213, 37 Cal. Rptr. 2d 529 .

(n258)Footnote 164. *Matthews v. Superior Court* (1995) 34 Cal. App. 4th 598, 602-605, 40 Cal. Rptr. 2d 350 ; *Page v. Superior Court* (1995) 31 Cal. App. 4th 1206, 1210-1213, 37 Cal. Rptr. 2d 529 ; see also Gov. Code § 12940(i),

(j).

(n259)Footnote 165. *Page v. Superior Court* (1995) 31 Cal. App. 4th 1206, 1212, 37 Cal. Rptr. 2d 529 .

(n260)Footnote 166. *Matthews v. Superior Court* (1995) 34 Cal. App. 4th 598, 605-606, 40 Cal. Rptr. 2d 350 .

(n261)Footnote 167. *Gov. Code § 12940(k)* (FEHA); 29 C.F.R. § 1604.11(f) (EEOC guideline).

(n262)Footnote 168. *Gov. Code § 12940(k)*.

(n263)Footnote 169. *Trujillo v. North County Transit Dist.* (1998) 63 Cal. App. 4th 280, 288-289, 73 Cal. Rptr. 2d 596 (special verdict for damages based on finding of violation of former *Gov. Code § 12940(i)* is impermissible when jury also found that defendants did not discriminate, racially harass, or retaliate against those plaintiffs or cause severe emotional distress).

(n264)Footnote 170. 29 C.F.R. § 1604.11(f); see EEOC Compliance Manual (CCH) § 615, P 3114, p. 3282 (effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented). see *Hardage v. CBS Broadcasting, Inc.* (9th Cir. 2005) 427 F.3d 1177, 2005 U.S. App. LEXIS 23551, *17-24 (employer had anti-harassment policy, with which plaintiff was familiar, and as supervisor, he was responsible for reporting sexual harassment to human resources department and understood that sexual harassment was prohibited).

(n265)Footnote 171. See *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1516 ; *Miller v. Bank of America* (9th Cir. 1979) 600 F.2d 211, 213 ; see also [6][b], above.

(n266)Footnote 172. EEOC Compliance Manual (CCH) § 615, P 3114, pp. 3280-3281; see discussion in [6][b], above.

(n267)Footnote 173. See *Cohen v. San Bernardino Valley College* (9th Cir. 1996) 92 F.3d 968, 971-972 (in case involving public entity, vagueness of sexual harassment policy created *First Amendment* violation in disciplining of college professor).

(n268)Footnote 174. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 .

(n269)Footnote 175. *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 .

(n270)Footnote 176. *Burlington Indus. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633, 655 ; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 141 L. Ed. 2d 662, 689 .

(n271)Footnote 177. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633, 654 .

(n272)Footnote 178. See EEOC Compliance Manual (CCH) § 615, P 3114, p. 3282.

(n273)Footnote 179. See *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 20.

(n274)Footnote 180. *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1516 ; see EEOC Compliance Manual (CCH) § 615, P 3114, p. 3279. However, failure to use an internal grievance procedure may defeat a claim of constructive discharge resulting from harassment, because a charging party would not be able to show that he or she had no alternative but to resign. If an internal procedure is to be used, the EEOC suggests filing a grievance and an EEOC charge simultaneously, because filing the grievance does not toll the limitations period for filing an EEOC charge. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3279 & nn.26, 37. For a general discussion of constructive

discharge in the equal employment opportunity context, *see* § 41.58[4].

(n275)Footnote 181. EEOC Compliance Manual (CCH) § 615, P 3114, p. 3282; *see also* DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, p. 20 (FEHA; duty to prevent sexual harassment necessarily includes an obligation to respond forcefully and effectively when employer learns of harassment); *Flait v. North American Watch Corp.* (1992) 3 Cal. App. 4th 467, 476-479, 4 Cal. Rptr. 2d 522 (FEHA; supervisor took appropriate remedial action by confronting officer of company, who was harassing supervisor's subordinate, particularly in light of fact that company had no policy regarding handling of harassment complaints).

(n276)Footnote 182. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 .

(n277)Footnote 183. *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 .

(n278)Footnote 184. *See* [a], *above*.

(n279)Footnote 185. *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 689 .

(n280)Footnote 186. *See Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882 ; *see also Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 875 ; *Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773, 777 . *See also Hardage v. CBS Broadcasting, Inc.* (9th Cir. 2005) 427 F.3d 1177, 2005 U.S. App. LEXIS 23551, *18-*21 (employer's response to employee's complaints of sexual harassment was both prompt and reasonable as matter of law, where employee asserted he wanted to handle matter by himself and did not tell human resources employee "gory details" or apprise supervisor of specifics about alleged sexual contact; supervisor's alleged comment was troubling but could not singularly serve to transform employer's response into unreasonable one or erase legal significance of employee's specific request not to investigate his admittedly minimal and vague complaint).

(n281)Footnote 187. *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 875 ; *Ellison v. Brady* (9th Cir. 1991) 924 F.2d 872, 882 .

(n282)Footnote 188. *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 875-876 ; *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1528-1529 .

(n283)Footnote 189. *Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773, 777 .

(n284)Footnote 190. *See Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773, 778-779 . *See also Yamaguchi v. United States Dep't of the Air Force* (9th Cir. 1997) 109 F.3d 1475, 1483-1484 (to adjudicate adequacy of military employer's response to sexual harassment, court must determine whether military employer adequately disciplined offending employee; goals of Title VII would be contravened by allowing a military employer to avoid liability by invoking right to unlimited discretion in disciplining soldiers).

(n285)Footnote 191. *See Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773, 778-779 .

(n286)Footnote 192. *See Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773, 779-781 .

(n287)Footnote 193. *See Intlekofer v. Turnage* (9th Cir. 1992) 973 F.2d 773, 777-781 .

(n288)Footnote 194. *Star v. West* (9th Cir. 2001) 237 F.3d 1036, 1039 (counseling harassing coworker, after which harassment ended, and moving coworker to different shift was adequate response to complaints of harassment even though they were not labeled as discipline).

(n289)Footnote 195. *See Steiner v. Showboat Operating Co.* (9th Cir. 1994) 25 F.3d 1459, 1464 .

(n290)Footnote 196. *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522 .

(n291)Footnote 197. *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1528 .

(n292)Footnote 198. *Fuller v. City of Oakland* (9th Cir. 1995) 47 F.3d 1522, 1529 .

(n293)Footnote 199. *Nichols Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864 .

(n294)Footnote 200. *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 877 ; for employer's affirmative defense, see § 41.92A.

(n295)Footnote 200.1. *Gov. Code § 12940(j)(1)*.

(n296)Footnote 200.2. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1630, 71 Cal. Rptr. 3d 222 .

(n297)Footnote 200.3. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1631, 71 Cal. Rptr. 3d 222 ; *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal. App. 4th 1403, 1419-1421, 56 Cal. Rptr. 3d 501 (no liability where incidents took place outside workplace and not related to employer's interests).

(n298)Footnote 200.4. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1631, 71 Cal. Rptr. 3d 222 ; *Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal. App. 4th 1403, 1419-1421, 56 Cal. Rptr. 3d 501 .

(n299)Footnote 200.5. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1631, 71 Cal. Rptr. 3d 222 .

(n300)Footnote 200.6. *Bradley v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal. App. 4th 1612, 1631-1634, 71 Cal. Rptr. 3d 222 (ample evidence supported jury's finding employer failed to take immediate and appropriate action as required by law, where investigation was factfinding undertaking and not designed to protect employee from harassment, and there was no follow-up, no evaluation of need for protection, and no further investigation). See *Hathaway v. Runyon* (8th Cir. 1997) 132 F.3d 1214, 1224 ; *Fuller v. City of Oakland, Cal.* (9th Cir. 1995) 47 F.3d 1522, 1529 .

(n301)Footnote 201. See *Gov. Code § 12940(j), (k)*; see [a], above.

(n302)Footnote 202. See *Gov. Code § 12950*.

(n303)Footnote 203. *Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633, 655 ; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 689 ; see *Hardage v. CBS Broadcasting, Inc.* (9th Cir. 2005) 427 F.3d 1177, 2005 U.S. App. LEXIS 23551, *24-*25 (employee unreasonably failed to make use of employer's anti-harassment policies and procedures by specifically requesting company not to make use of its remedial and preventative procedures, where in addition to waiting half a year to make sexual harassment complaint, he specifically asked company not to investigate it); but see *Nichols v. Azteca Restaurant Enterprises, Inc.* (9th Cir. 2001) 256 F.3d 864, 876 n.10 (although employee's complaints of harassment to assistant and general managers did not follow formal reporting requirements of employer's antiharassment policy, they were sufficient to place employer on notice of harassment).

(n304)Footnote 203.1. *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 ; see [b], above.

(n305)Footnote 204. *State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal. 4th 1026, 6 Cal. Rptr. 3d 441, 79 P.3d 556 .

(n306)Footnote 204.1. *See* Gov. Code § 12950.1(c), defining "employer" for these purposes only as any person regularly employing 50 or more persons or regularly receiving services of 50 or more persons providing services pursuant to contract, or any person acting as agent of employer, directly or indirectly, the state, or any political or civil subdivision of the state, and cities.

(n307)Footnote 204.2. *Gov. Code § 12950.1(a).*

(n308)Footnote 204.3. *Gov. Code § 12950.1(f).*

(n309)Footnote 204.4. *Gov. Code § 12950.1(a).*

(n310)Footnote 204.5. *Gov. Code § 12950.1(e).*

(n311)Footnote 204.6. *Gov. Code § 12950.1(d).*

(n312)Footnote 204.7. [Reserved]

(n313)Footnote 204.8. *2 Cal. Code Reg. § 7288.0(a).*

(n314)Footnote 204.9. *2 Cal. Code Reg. § 7288.0(b)(1).*

(n315)Footnote 204.10. *2 Cal. Code Reg. § 7288.0(b)(2).*

(n316)Footnote 204.11. *2 Cal. Code Reg. § 7288.0(b)(3).*

(n317)Footnote 204.12. *2 Cal. Code Reg. § 7288.0(b)(4).*

(n318)Footnote 204.13. *2 Cal. Code Reg. § 7288.0(b)(6).*

(n319)Footnote 204.14. *2 Cal. Code Reg. § 7288.0(a)(9)(A).*

(n320)Footnote 204.15. *2 Cal. Code Reg. § 7288.0(c).*

(n321)Footnote 204.16. *2 Cal. Code Reg. § 7288.0(d).*

(n322)Footnote 204.17. *2 Cal. Code Reg. § 7288.0(e).*

(n323)Footnote 205. *See Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 419-420, 27 Cal. Rptr. 2d 457; Roberts v. Ford Aerospace & Communications Corp. (1990) 224 Cal. App. 3d 793, 801, 274 Cal. Rptr. 139.*

(n324)Footnote 206. *Civ. Code § 3294(b).*

(n325)Footnote 207. *See Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 421-422 & n.6, 27 Cal. Rptr. 2d 457.*

(n326)Footnote 208. *Roberts v. Ford Aerospace & Communications Corp. (1990) 224 Cal. App. 3d 793, 800, 274 Cal. Rptr. 139* (action for wrongful termination in violation of public policy based on racial harassment violating FEHA); *see Gov. Code § 12940(h)* (unlawful employment practice to retaliate against employee for exercising equal employment opportunity rights). For a general discussion of retaliation, *see* pt. G (§§ 41.130-41.132). *See also* ch. 60, pt. A, for a general discussion of the common law tort of wrongful termination in violation of public policy.

(n327)Footnote 209. *Roberts v. Ford Aerospace & Communications Corp. (1990) 224 Cal. App. 3d 793, 800-801, 274 Cal. Rptr. 139.*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART E. HARASSMENT

2-41 California Employment Law § 41.82

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§ 41.82 Other Prohibited Bases of Harassment

[1] Statutes Prohibiting Harassment

The FEHA expressly provides that it is unlawful for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, sexual orientation, or age, to harass an employee or applicant."¹ Thus, California law proscribes harassment of all specified protected classes to the same extent as harassment based on sex.

As discussed in [2], [3], and [4], *below*, courts have held that Title VII also provides remedies for harassment based upon national origin, race, and religion.

[2] National Origin Harassment

EEOC guidelines provide that harassment on the basis of national origin is a violation of Title VII.² The guidelines declare that an employer has an affirmative duty to maintain a working environment free from harassment on the basis of national origin.³ Thus, the EEOC guidelines provide that ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when that conduct (1) has the purpose or effect of creating an intimidating, hostile, or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise affects an individual's employment opportunities.⁴

To prevail on a claim of harassment based on national origin, the plaintiff must show the following:⁵

1. The plaintiff was subjected to verbal or physical conduct because of his or her national origin.
2. The conduct was unwelcome.
3. The conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment.

Generally, a plaintiff alleging national origin harassment would present facts showing subjection to racial epithets in the workplace. However, in *Kang v. U. Lim America, Inc.*,ⁿ⁶ the plaintiff's evidence showed that he and other Korean workers suffered unwelcome physical and verbal abuse, as well as discriminatorily long working hours required because their supervisor viewed their national origin as superior. Although the case involved an unusual form of discrimination, plaintiffs' evidence showed a work environment that a reasonable person would find hostile or abusive and was sufficient to survive the employer's motion for summary judgment.ⁿ⁷

In *Cariddi v. Kansas City Chiefs Football Club*,ⁿ⁸ the Eighth Circuit Court of Appeals agreed with a trial court finding that although derogatory comments may be so excessive and opprobrious as to constitute an unlawful employment practice under Title VII, derogatory ethnic comments that were part of casual conversation did not rise to the level necessary to constitute a violation of Title VII.ⁿ⁹

In *Rogers v. Equal Employment Opportunity Com'n*,^{n9.1} a Hispanic employee was permitted to proceed with a national origin Title VII discrimination claim based on her allegation that her employer treated Hispanic customers in a discriminating manner, thereby creating a hostile environment for Hispanic employees. The court noted that "the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues... . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers."ⁿ¹⁰

Under FEHA, it is an unlawful employment practice to harass an employee because of national origin or ancestry.^{n10.1} The law prohibiting harassment is violated when the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.ⁿ¹¹ For example, an employee's supervisor asking her to lie about company business, asking her to secretly take a document from the desk of another supervisor, insulting her and using profanity in her presence, coupled with the supervisor's single abusive and hostile ethnic remark, was sufficient to create a triable issue of fact as to whether the employer created a hostile work environment.^{n11.1} Further, the fact that the employer replaced a Filipino employee with a person of Hispanic origin did not vitiate the triable issue of fact as to a hostile work environment because the claim involved discrimination based on Filipino ancestry.^{n11.2}

An employer may be held liable for actionable third-party national origin harassment of its employees by customers or others, where the employer ratifies or condones the conduct by failing to investigate and remedy it after learning of it. This hostile environment theory of employer liability is grounded in negligence and ratification, rather than intentional discrimination.^{n11.3}

[3] Racial Harassment

In *Snell v. Suffolk County*,ⁿ¹² the Second Circuit Court of Appeals declared that "[i]t is well-established ... that a working environment overrun by racial antagonism constitutes a Title VII violation."ⁿ¹³ The court held, however, that to establish a hostile atmosphere, a plaintiff must prove more than a few isolated incidents of racial enmity. Casual comments, or accidental or sporadic conversation, will not trigger Title VII relief. The alleged harassment must be sufficiently pervasive to create an abusive working environment^{n13.1} and whether racial acrimony is "sufficiently pervasive" is determined from the totality of the circumstances.ⁿ¹⁴ Simply causing an employee offense based on an isolated comment is not sufficient to create actionable harassment under Title VII. However, the harassment need not cause diagnosed psychological injury.^{n14.1}

To prevail on a hostile workplace claim premised on race, a plaintiff must show:^{n14.2}

- He or she was subjected to verbal or physical conduct of a racial^{n14.3} or sexual nature.

- The conduct was unwelcome.
- The conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive work environment.

In *Snell*, the court found that the daily use of racial slurs and the proliferation of racially derogatory literature created a racially hostile environment.ⁿ¹⁵ The court also held that once an employer has knowledge of a racially combative atmosphere in the workplace, it has a duty to take reasonable steps to eliminate it.ⁿ¹⁶ Whether an employer has fulfilled its responsibility must be determined on the facts in each case. Factors that may be considered are the gravity of the harm, the nature of the work environment, and the resources available to the employer.ⁿ¹⁷

A plaintiff must show that the work environment was both subjectively and objectively hostile.^{n17.1} Cases regarding hostile working environments created by gender discrimination can be used in evaluating allegations of racially hostile working environment.^{n17.2} In evaluating the objective hostility of a work environment, the factors to be considered include:^{n17.3}

- The frequency of discriminatory conduct.
- The severity of discriminatory conduct.
- Whether the discriminatory conduct is physically threatening or humiliating or a mere offensive utterance.
- Whether the discriminatory conduct unreasonably interferes with an employee's work performance.

The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct.^{n17.4} Allegations of a racially hostile work-place are assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.^{n17.5}

In *McGinest v. GTE Service Corp.*, ^{n17.6} the Ninth Circuit found that considering the facts in the light most favorable to the plaintiff, it was clear that incidents the plaintiff described were sufficient to survive the employer's motion for summary judgment on the claim of a racially hostile work environment. According to the plaintiff, he was involved in a serious automobile accident because, due to his race, both his supervisor and garage personnel were unwilling to ensure that his vehicle received necessary maintenance. He was forced to work in dangerous situations and barraged with insults and abuse by, among others, a supervisor. Over a two-year period, he was prevented from collecting overtime pay that he worked. His ability to perform his job was directly affected by the refusal of his coworkers to work under his direction on occasion. Additionally, he was subjected to extreme racial insults, as well as more subtle taunts, by supervisors and coworkers, which were significant exacerbating factors in evaluating the severity of the racial hostility.^{n17.7} Further, the use of "code words" can violate Title VII, including a reference to the plaintiff as a "drug dealer."^{n17.8}

If racial hostility pervades a workplace, a plaintiff may establish a violation of Title VII, even if the hostility was not directly targeted at the plaintiff.^{n17.9} The fact that an individual consistently abuses all employees alike may provide no defense to an accusation of prohibited harassment.^{n17.10} A white employee may also raise a claim of racially hostile work environment because of his or her association with black employees.^{n17.11}

An employer's liability for harassing conduct is evaluated differently when the harasser is a supervisor as opposed to a coworker. An employer is vicariously liable for a hostile environment created by a supervisor. As in sexual harassment actions, the employer may raise a two-pronged affirmative defense to avoid vicarious liability for a hostile environment

created by a supervisor: (1) the employer exercised reasonable care to prevent and correct promptly any invidious harassment, and 2) the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or avoid harm otherwise.^{n17.12} An employer is vicariously liable for actions by a supervisor who has immediate or successively higher authority over the employee. The distinction does not depend on job titles or formal structures within the workplace, but rather on whether a supervisor has the authority to demand obedience from an employee.^{n17.13} If the harasser is a coworker, the plaintiff must prove that the employer knew or should have known of the harassment but did not take adequate steps to address it.^{n17.14} The employer may avoid liability for coworker harassment by undertaking remedial measures reasonably calculated to end the harassment. The reasonableness of the remedy depends on its ability to stop harassment by the person who engaged in the harassment and persuade potential harassers to refrain from unlawful conduct. For the remedy to be adequate, the employer must intervene promptly. Remedial measures must include some form of disciplinary action, which must be proportionate to the seriousness of the offense.^{n17.15} Although counseling and a warning may suffice if successful in stopping the harassment, the action should be taken promptly. A delay will not satisfy Title VII's requirement of prompt remedial action.^{n17.16} Further, in order to be adequate, remedial actions must be designed not only to prevent future conduct by the harasser, but also by other potential harassers.^{n17.17}

In *Swinton v. Potomac Corp.*,ⁿ¹⁸ an African-American employee sued his former employer for racial harassment under 42 U.S.C. 1981. The Ninth Circuit found that there was undisputed testimony detailing racial harassment of the plaintiff by a supervisory employee other than plaintiff's supervisor, evidence of racial comments and acquiescence by co-workers, and undisputed testimony that plaintiff's supervisor witnessed the harassment but did nothing to end it. The court concluded that under the court's instruction to find for plaintiff upon a determination that management knew, through complaints or other circumstances, of the harassing conduct or language by the co-workers and failed to take reasonably prompt, corrective action designed to end the harassment (or that management should have known of the harassment due to the pervasiveness of the conduct or language or other circumstances and failed to take reasonably prompt, corrective action designed to end the harassment), the jury properly awarded plaintiff damages.ⁿ¹⁹

By contrast, the Sixth Circuit Court of Appeals has developed its own analysis, identifying two requisite elements for a claim of racially hostile work environment: (1) "repeated slurs," and (2) the employer's tolerance and condonation.ⁿ²⁰ With respect to the first element, "repeated slurs," the court expressly declined to follow other courts and distinguish between "a few isolated incidents of harassment" and a "pattern of harassment."ⁿ²¹ The court declared that an employee need not prove that instances of alleged harassment were related in either time or type. Rather, all the employee need show to satisfy the "repeated slurs" element is that the alleged conduct constituted an unreasonably abusive or offensive work environment or adversely affected the reasonable employee's ability to perform the tasks required by the employer.ⁿ²² Furthermore, in establishing adverse effect on work performance, the employee need not prove that his or her tangible productivity declined as a result of harassment. The employee need only show that the harassment made it more difficult to do the job.ⁿ²³ With respect to the second element, "employer tolerance and condonation," the Sixth Circuit held that the employee must establish that the employer knew or should have known of the alleged conduct and failed to take prompt remedial action.ⁿ²⁴

Harassment will not necessarily be held to violate Title VII when it results from "an atmosphere replete with instances of humiliating acts shared by all." For example, in *Vaughn v. Pool Offshore Co.*,ⁿ²⁵ an African-American offshore oil platform employee was subjected to raw pranks, crude practical jokes, and verbal abuse, some of it permeated with racial overtones.ⁿ²⁶ The Fifth Circuit Court of Appeals held, however, that although the environment on the platform was coarse, rowdy, and generally abusive, the harassment did not result from an environment "polluted with discrimination."ⁿ²⁷ The court explained that relations between the plaintiff and his co-employees, "aside from the crude excesses of platform atmosphere," were friendly and cordial.ⁿ²⁸ The court also noted that the plaintiff used racial slurs along with his co-employees, and that other employees were treated to the same obnoxious treatment.ⁿ²⁹

In addition to constituting unlawful racial harassment, the presence of racially hostile conduct in the workplace may be actionable under a disparate impact theory. In *Atonio v. Wards Cove Packing Co., Inc.* ⁿ³⁰ (*Atonio III*), the Ninth

Circuit Court of Appeals held that a workplace permeated with racially discriminatory intimidation may have an adverse impact upon racial minorities by serving as a "headwind" to advancement. In that case, the court had found "race labelling" to be pervasive and possibly linked to discrimination in hiring and certain post-hire employment opportunities.ⁿ³¹

In *Etter v. Veriflo Corp.*,ⁿ³² the court addressed the applicable standard for racial harassment by separately analyzing Title VII and FEHA precedent. With respect to Title VII,ⁿ³³ the court determined that racial harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of the victim's employment. Federal cases require that certain factors must be shown, such as: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or merely an offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance.ⁿ³⁴ The court concluded that the severe or pervasive standard under federal law excludes occasional, isolated, sporadic, or trivial incidents of verbal abuse.ⁿ³⁵ The *Etter* court then addressed the applicable standard under the FEHA, noting that California courts generally apply the federal threshold standard but that no California court had directly addressed racial harassment under the FEHA.ⁿ³⁶ Concluding that the severe or pervasive standard applied in FEHA racial harassment cases and that occasional, sporadic, or isolated incidents of verbal abuse do not meet this standard, the *Etter* court held that a jury instruction stating that severe or pervasive conduct requires more than "occasional, isolated, sporadic, or trivial" acts of racial harassment was not erroneous.ⁿ³⁷

■ CONSULTANT'S COMMENT:

The *Etter*ⁿ³⁸ case is important for at least four reasons. First, *Etter* clarifies and emphasizes that the word "severe" and the word "pervasive" are joined by the word "or," not the word "and." Thus, the applicable standard is "severe or pervasive." Second, *Etter* is among the growing number of cases across the country that are applying principles developed in the context of sex harassment to claims of race harassment. This may seem logical, but the trend is significant because it means that sporadic boorish behavior, even if morally offensive, will not meet the legal test for liability. Third, *Etter* illustrates the proof problems that plaintiffs face in harassment cases. In the crucible of trial, the evidence did not support plaintiff's assertions of daily, severe or pervasive behavior. Once the testimony revealed occasional offensive remarks, only, plaintiff's theory was untenable. Fourth, in a larger context, *Etter* is another case in the emerging judicial philosophy that a viable EEO lawsuit must involve a "judicially cognizable adverse employment action."^{n38.1} That is, federal and state courts are increasingly willing to conclude that it is not enough to claim that an employer took some action on the basis of an employee's race or sex. The action must be more than *de minimis*. It must rise to some threshold of adversity to justify a plaintiff's resort to the judicial system. Thus, to use a hypothetical, we may find it reprehensible that an employer would, on the basis of race or sex, move a drinking fountain from one location to another thus creating a "longer walk" for some employees, but such alleged "adverse action" is just too trivial to merit legal redress. *Commentary by Kirby Wilcox.*

[4] Religion Based Harassment

Although the FEHA proscribes harassment on the basis of religious creed, it should be noted that nonprofit religious associations and corporations are not considered "employer[s]," within the meaning of the harassment subdivision of the FEHA, except as provided in *Gov. Code section 12926.2*.ⁿ³⁹ Further, the ministerial exception to Title VII is not a per se bar to a minister's claim of sexual harassment.ⁿ⁴⁰ When harassment is the issue, the free exercise rationales supporting the ministerial exception to Title VII are absent. In *Bollard*,ⁿ⁴¹ not only did defendants, the Jesuits, not offer religious justification for the harassment, they condemned it as inconsistent with their values and beliefs.

In *Elvig v. Calvin Presbyterian Church*,^{n41.1} the Ninth Circuit found that applying the principles in *Bollard* requires a nuanced analysis, to avoid trenching on religious freedom without entirely eviscerating Congress's otherwise fully applicable command to protect employees from sex discrimination, even employees of religious organizations.^{n41.2} After extensively reviewing *Bollard*, the court held that under the ministerial exception, a church's decisions about

whom to employ as a minister are protected by the *First Amendment*. Thus to the extent the plaintiff's sexual harassment and retaliation claims implicated the church's ministerial employment decisions, those claims were foreclosed. However, to the extent the plaintiff stated narrower and thus viable sexual harassment and retaliation claims that did not implicate protected employment decisions, her sexual harassment claim could succeed if she proved she suffered a hostile work environment and if the defendants did not prove that she unreasonably failed to take advantage of available measures to prevent and correct that hostile environment. The retaliation claim could succeed if she proved that she suffered retaliatory harassment in the form of verbal abuse and intimidation because of her complaints to the church and the EEOC. If the church were to be found liable on either of these claims, the plaintiff could recover damages for consequent emotional distress and reputational harm. Within this framework, the Title VII suit could provide the plaintiff with redress for sexual harassment and retaliation without attaching liability to ministerial employment decisions protected by the *First Amendment*.^{n41.3}

In *McKeon v. Mercury Healthcare Sacramento*,ⁿ⁴² the California Supreme Court interpreted identical exclusionary language in the definitional statute of the FEHA.ⁿ⁴³ The court concluded that the religious entity exemption is not limited to entities organized under the Nonprofit Religious Corporation Law,ⁿ⁴⁴ but rather includes religious entities that are organized under the Nonprofit Public Benefit Corporation Law.ⁿ⁴⁵

In *Weiss v. United States* ⁿ⁴⁶ a terminated employee sought recovery under Title VII on the ground that his dismissal for poor work performance was a pretext for discrimination. Among other things, the court held that patterned and discriminatory harassment of plaintiff by his coworker and his supervisor violated plaintiff's right to non-discriminatory terms and conditions of employment.ⁿ⁴⁷

[5] Sexual Orientation Harassment

In *Dominguez v. Washington Mutual Bank*,ⁿ⁴⁸ the court held that a former employee, who worked at the employer as a temporary employee, presented sufficient evidence of sexual orientation harassment to deny the employer summary judgment under the FEHA. In order to prove discrimination under FEHA, plaintiff was required to show, among other things, that she was subjected to conduct that was so severe or pervasive that it created a hostile work environment. Relevant to the inquiry were the following:ⁿ⁴⁹

- The nature of the unwelcome acts.
- The frequency of the unwelcome acts.
- The total number of days when the conduct occurred.
- The context in which that conduct occurred.

This analysis required the use of common sense and an appropriate sensitivity to social context to determine whether a reasonable person in plaintiff's position would have found the conduct severely hostile or abusive.ⁿ⁵⁰ In *Dominguez*, the co-worker's offensive remarks were abusive and hostile, and after the remarks stopped, his harassing conduct was replaced by a daily or near daily campaign of interference with plaintiff's work that a trier of fact could have found was motivated by the same discriminatory intent. Further, there was clear evidence that the employer was on notice of the co-worker's conduct. Finally, there were also triable fact issues that the employer's stated reason for firing plaintiff--her habitual tardiness--was a pretext. Although there was evidence of her tardiness, two days before the firing, a supervisor sent her to fill out an application for full-time employment with the employer, which made it reasonable to infer that any and all tardiness from before that date was unimportant to the employer and had no bearing on the decision to fire her two days later.

Legal Topics:

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

Labor & Employment Law Discrimination Harassment General Overview Labor & Employment Law Discrimination Harassment National Origin Harassment

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12940(j)(1)*.

(n2)Footnote 2. *See 29 C.F.R. § 1606.8(a)*.

(n3)Footnote 3. *29 C.F.R. § 1606.8(a)*.

(n4)Footnote 4. *See 29 C.F.R. § 1606.8(b)*.

(n5)Footnote 5. *Kang v. U. Lim America, Inc. (9th Cir. 2002) 296 F.3d 810, 817*.

(n6)Footnote 6. *Kang v. U. Lim America, Inc. (9th Cir. 2002) 296 F.3d 810*.

(n7)Footnote 7. *Kang v. U. Lim America, Inc. (9th Cir. 2002) 296 F.3d 810, 817*.

(n8)Footnote 8. *Cariddi v. Kansas City Chiefs Football Club (8th Cir. 1977) 568 F.2d 87*.

(n9)Footnote 9. *See Cariddi v. Kansas City Chiefs Football Club (8th Cir. 1977) 568 F.2d 87, 88*.

(n10)Footnote 9.1. *Rogers v. EEOC (5th Cir. 1971) 454 F.2d 234*.

(n11)Footnote 10. *See Rogers v. EEOC (5th Cir. 1971) 454 F.2d 234, 238*.

(n12)Footnote 10.1. *Gov. Code § 12940(j)(1)*. For discussion of harassment under the FEHA generally, *see § 41.80[1][a], above*.

(n13)Footnote 11. *Nazir v. United Airlines, Inc. (2009) 178 Cal. App. 4th 243, 263-264* (summary adjudication of FEHA-based harassment claims was error, where giving credence to plaintiff's evidence, there was certainly triable issue of fact as to harassment).

(n14)Footnote 11.1. *Dee v. Vintage Petroleum, Inc. (2003) 106 Cal. App. 4th 30, 35-37, 129 Cal. Rptr. 2d 923* (reasonable trier of fact could infer slur was not isolated event because it explained supervisor's motivation for creating abusive working environment).

(n15)Footnote 11.2. *Dee v. Vintage Petroleum, Inc. (2003) 106 Cal. App. 4th 30, 37, 129 Cal. Rptr. 2d 923*.

(n16)Footnote 11.3. *Galdamez v. Potter (9th Cir. 2005) 415 F.3d 1015, 1022* (employee began to receive hostile comments from customers and others based on her race, accent, and national origin almost immediately upon taking job, which continued over course of three years; reasonable jury could have found community's treatment of plaintiff both subjectively and objectively severe or pervasive; evidence supported instruction on employer's potential liability for failing to investigate and remedy harassment).

(n17)Footnote 12. *Snell v. Suffolk County (2d Cir. 1986) 782 F.2d 1094*.

(n18)Footnote 13. *Snell v. Suffolk County (2d Cir. 1986) 782 F.2d 1094, 1102*; *see also McGinest v. GTE Service Corp. (9th Cir. 2004) 360 F.3d 1103, 1112* (courts have long recognized that workplace in which racial hostility is pervasive constitutes form of discrimination), citing *Woods v. Graphic Communications (9th Cir. 1991) 925 F.2d 1195, 1200*.

(n19)Footnote 13.1. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1112-1113 (harassment must be sufficiently severe or pervasive to alter conditions of victim's employment and create abusive working environment).

(n20)Footnote 14. *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 642-644 (allegedly harassing incidents, which occurred over course of more than one year and only two of which contained racially related epithets, did not create hostile work environment for Hispanic plaintiff); *Snell v. Suffolk County* (2d Cir. 1986) 782 F.2d 1094, 1103 ; see *Hicks v. Gates Rubber Co.* (10th Cir. 1987) 833 F.2d 1406, 1416-1417 (trial court may aggregate evidence of racial hostility with evidence of sexual hostility to determine whether there is pervasive discriminatory atmosphere sufficient to establish "hostile work environment harassment").

(n21)Footnote 14.1. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1113 .

(n22)Footnote 14.2. *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 642 .

(n23)Footnote 14.3. See *Surrell v. Cal. Water Service Co.* (9th Cir. 2008) 518 F.3d 1097, 1108-1109 (African-American employee's claim of racial harassment failed, where she presented no evidence that supervisor's comments were based on race, because comments were all performance-related; further, alleged comments were not sufficiently severe or pervasive to sustain hostile work environment claim).

(n24)Footnote 15. *Snell v. Suffolk County* (2d Cir. 1986) 782 F.2d 1094, 1098, 1103 .

(n25)Footnote 16. *Snell v. Suffolk County* (2d Cir. 1986) 782 F.2d 1094, 1104 .

(n26)Footnote 17. *Snell v. Suffolk County* (2d Cir. 1986) 782 F.2d 1094, 1104 .

(n27)Footnote 17.1. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1113-1118 (subjective hostility was clearly established sufficient to overcome summary judgment through employee's un rebutted testimony and his complaints to supervisor and EEOC).

(n28)Footnote 17.2. *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 642 ; see *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1112-1118 .

(n29)Footnote 17.3. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1113 .

(n30)Footnote 17.4. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1113 .

(n31)Footnote 17.5. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115 .

(n32)Footnote 17.6. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103 .

(n33)Footnote 17.7. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1113-1118 (beyond question that use of word "nigger" is highly offensive and demeaning, evoking history of racial violence, brutality, and subordination, and word is perhaps most offensive and inflammatory racial slur in English), citing *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 817 ; *Daso v. The Grafton School, Inc.* (D. Md. 2002) 181 F. Supp. 2d 485, 493 (D. Md. 2002) (word "nigger" is more than mere offensive utterance; no word in English language is as odious or loaded with as terrible a history); *NLRB v. Foundry Div. of Alcon Indus., Inc.* (6th Cir. 2001) 260 F.3d 631, 635 n.5 (that word "nigger" is slur is not debatable).

(n34)Footnote 17.8. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1116-1117 . See, e.g., *Daniels v. Essex Group, Inc.* (7th Cir. 1991) 937 F.2d 1264, 1273 (employer engaged in not subtle attempt to link drugs with plaintiff simply because he was black); *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 799 (reference to "Pontiac" as acronym for "Poor old nigger thinks it's a Cadillac" was racially offensive joke); *Jones v. City of Overland Park* (D. Kan. 1994) 1994 U.S. Dist. LEXIS 15238 (reference to plaintiff as "Aunt Jemima" was one factor in hostile

environment).

(n35)Footnote 17.9. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1117 . See, e.g., *Woods v. Graphic Communications* (9th Cir. 1991) 925 F.2d 1195, 1200 (work environment was racially hostile where plaintiff was surrounded by racial hostility and subjected directly to some of it); *Stingley v. Arizona* (D. Ariz. 1992) 796 F. Supp. 424, 428-29 (finding racial and sexual harassment based in part on use of racist nicknames and slurs about another worker in presence of plaintiff); *Kishaba v. Hilton Hotels Corp.* (D. Haw. 1990) 737 F. Supp. 549, 554 (even if plaintiff herself was never object of racial harassment, she might have Title VII claim if she were forced to work in atmosphere in which harassment was pervasive).

(n36)Footnote 17.10. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1117-1118 (coworker's use of racially charged words to goad both black and white employees made conduct more outrageous, not less so).

(n37)Footnote 17.11. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1118 . cf. *Taylor v. Western & Southern Life Ins. Co.* (7th Cir. 1992) 966 F.2d 1188 (affirming Title VII judgment for employee subjected to discrimination because of interracial marriage); *Brosmore v. City of Covington* (E.D. Ky. 1993) 1993 U.S. Dist. LEXIS 20733 (noting significance under Title VII of detriment due to interracial association).

(n38)Footnote 17.12. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1119 & n. 12. For the employer's liability for sexual harassment by a supervisor, see § 41.81[6][b].

(n39)Footnote 17.13. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1119 .

(n40)Footnote 17.14. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1119 . For the employer's liability for sexual harassment by a coworker, see § 41.81[6][c].

(n41)Footnote 17.15. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1119-1120 .

(n42)Footnote 17.16. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1121 (employer failed to issue warning until plaintiff had filed complaint with EEOC after plaintiff informed management of racially hostile events to no avail).

(n43)Footnote 17.17. *McGinest v. GTE Service Corp.* (9th Cir. 2004) 360 F.3d 1103, 1121 (although employer's actions may have been successful in persuading identified harassers to cease their activities, over ten-year period, plaintiff was subjected to inappropriate comments by minimum of six individuals and allegedly physically endangered or financially harmed through actions of several others, and employer took no action to ensure level of harassment did not continue for rest of plaintiff's tenure at company).

(n44)Footnote 18. *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794 .

(n45)Footnote 19. *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 803-804 .

(n46)Footnote 20. *Davis v. Monsanto Chem. Co.* (6th Cir. 1988) 858 F.2d 345, 349 .

(n47)Footnote 21. *Davis v. Monsanto Chem. Co.* (6th Cir. 1988) 858 F.2d 345, 349 .

(n48)Footnote 22. *Davis v. Monsanto Chem. Co.* (6th Cir. 1988) 858 F.2d 345, 349 .

(n49)Footnote 23. *Davis v. Monsanto Chem. Co.* (6th Cir. 1988) 858 F.2d 345, 349 .

(n50)Footnote 24. *Davis v. Monsanto Chem. Co.* (6th Cir. 1988) 858 F.2d 345, 349 .

(n51)Footnote 25. *Vaughn v. Pool Offshore Co.* (5th Cir. 1982) 683 F.2d 922 .

(n52)Footnote 26. *See Vaughn v. Pool Offshore Co.* (5th Cir. 1982) 683 F.2d 922, 923-924 .

(n53)Footnote 27. *See Vaughn v. Pool Offshore Co.* (5th Cir. 1982) 683 F.2d 922, 924-925 .

(n54)Footnote 28. *See Vaughn v. Pool Offshore Co.* (5th Cir. 1982) 683 F.2d 922, 924 .

(n55)Footnote 29. *Vaughn v. Pool Offshore Co.* (5th Cir. 1982) 683 F.2d 922, 924-925 .

(n56)Footnote 30. *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1993) 10 F.3d 1485 .

(n57)Footnote 31. *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1993) 10 F.3d 1485, 1503-1504 (Title VII).

(n58)Footnote 32. *Etter v. Veriflo Corp.* (1998) 67 Cal. App. 4th 457, 79 Cal. Rptr. 2d 33 , modified, 68 Cal. App. 4th 130a (1998).

(n59)Footnote 33. 42 U.S.C. § 2000e et seq.

(n60)Footnote 34. *See Etter v. Veriflo Corp.* (1998) 67 Cal. App. 4th 457, 462-465, 79 Cal. Rptr. 2d 33 ; see, e.g., *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 676 (sexual harassment); *Harris v. Forklift Systems, Inc.* (1993) 510 U.S. 17, 22-23, 114 S. Ct. 367, 126 L. Ed. 2d 295 . (sexual harassment; discriminatory conduct held sufficiently severe or pervasive to alter conditions of victim's employment).

(n61)Footnote 35. *See Etter v. Veriflo Corp.* (1998) 67 Cal. App. 4th 457, 462-465, 79 Cal. Rptr. 2d 33 , modified, 68 Cal. App. 4th 130a (1998).

(n62)Footnote 36. *Etter v. Veriflo Corp.* (1998) 67 Cal. App. 4th 457, 462-465, 79 Cal. Rptr. 2d 33 (California courts apply Title VII law to FEHA sexual harassment cases); see *Gov. Code § 12900 et seq.*; see also *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal. App. 3d 590, 609-610, 262 Cal. Rptr. 842 (acts of sexual harassment cannot be occasional, isolated, sporadic, or trivial; plaintiff must show concerted pattern of harassment or repeated, routine or generalized nature).

(n63)Footnote 37. *Etter v. Veriflo Corp.* (1998) 67 Cal. App. 4th 457, 462-465, 79 Cal. Rptr. 2d 33 (court rejected plaintiff's contention that instruction conflicts with principle that a single incident of severe harassment may be sufficient).

(n64)Footnote 38. *Etter v. Veriflo Corp.* (1998) 67 Cal. App. 4th 457, 79 Cal. Rptr. 2d 33 .

(n65)Footnote 38.1. If the claim is retaliation rather than direct discrimination, the adverse action need not be workplace-related or employment-related, only adverse. *See Burlington Northern & Santa Fe Railway Co. v. White* (2006) 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (scope of anti-retaliation provision of Title VII extends beyond workplace-related or employment-related retaliatory acts and harm, so employee need only allege and prove "adverse action" rather than "adverse employment action" under Title VII's anti-retaliation provision), discussed at § 41.130[1A], below.

(n66)Footnote 39. *Gov. Code § 12940(j)(4)(B)*; for discussion of *Gov. Code § 12926.2*, see § 40.10[3].

(n67)Footnote 40. *Bollard v. California Province of Soc. of Jesus* (9th Cir. 1999) 196 F.3d 940, 947 .

(n68)Footnote 41. *Bollard v. California Province of Soc. of Jesus* (9th Cir. 1999) 196 F.3d 940, 947 .

(n69)Footnote 41.1. *Elvig v. Calvin Presbyterian Church* (9th Cir. 2004) 375 F.3d 951 .

(n70)Footnote 41.2. *Elvig v. Calvin Presbyterian Church* (9th Cir. 2004) 375 F.3d 951, 956 .

(n71)Footnote 41.3. *Elvig v. Calvin Presbyterian Church* (9th Cir. 2004) 375 F.3d 951, 959-967 .

(n72)Footnote 42. *McKeon v. Mercury Healthcare Sacramento* (1998) 19 Cal. 4th 321, 79 Cal. Rptr. 2d 319, 965 P.2d 1189 .

(n73)Footnote 43. *See Gov. Code § 12926(d)*.

(n74)Footnote 44. *See Corp. Code § 9110 et seq.*

(n75)Footnote 45. *McKeon v. Mercury Healthcare Sacramento* (1998) 19 Cal. 4th 321, 325, 79 Cal. Rptr. 2d 319, 965 P.2d 1189 ; *see Corp. Code § 5110 et seq.*

(n76)Footnote 46. *Weiss v. United States* (E.D. Va. 1984) 595 F. Supp. 1050 .

(n77)Footnote 47. *See Weiss v. United States* (E.D. Va. 1984) 595 F. Supp. 1050, 1056 ; *see also Young v. Southwestern Sav. and Loan Ass'n* (5th Cir. 1975) 509 F.2d 140 ; *Compston v. Borden, Inc.* (S.D. Ohio 1976) 424 F. Supp. 157 .

(n78)Footnote 48. *Dominguez v. Washington Mutual Bank* (2008) 168 Cal. App. 4th 714, 724-727, 85 Cal. Rptr. 3d 705 .

(n79)Footnote 49. *Dominguez v. Washington Mutual Bank* (2008) 168 Cal. App. 4th 714, 725, 85 Cal. Rptr. 3d 705 .

(n80)Footnote 50. *Dominguez v. Washington Mutual Bank* (2008) 168 Cal. App. 4th 714, 725, 85 Cal. Rptr. 3d 705 ; *Beyda v. City of Los Angeles* (1998) 65 Cal. App. 4th 511, 519, 76 Cal. Rptr. 2d 547 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART E. HARASSMENT

2-41 California Employment Law §§ 41.83 through 41.89

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

[Reserved]

§§ 41.83[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law § 41.90

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.90 Defenses, Generally

Some of the defenses discussed in this part are established by the express terms of the various equal employment opportunity statutes. For example, Title VII, the ADEA, and the FEHA all provide statutory exceptions for, among other things, a bona fide occupational qualification (BFOQ),ⁿ¹ and Title VII and the ADEA provide statutory exemptions for bona fide seniority systems.ⁿ² Other defenses, such as the business necessity defense under Title VII, were developed by case law,ⁿ³ although the ADA expressly includes a business necessity defense.ⁿ⁴ In addition, some defenses are applicable only to certain theories of liability. In particular, the BFOQ defense is only applicable to disparate treatment claims not involving race discrimination,ⁿ⁵ while the business necessity defense is only applicable to disparate impact claims.ⁿ⁶

The sections below discuss the major defenses to the various equal employment opportunity laws, as well as the statutory or other legal bases for those defenses.

■ PRACTICE TIP:

In assessing a potential defense, it is necessary to consider whether the case involves disparate treatment, disparate impact, or evidence of both. The employer's burden under the treatment and impact models may differ.ⁿ⁷ *Commentary by Bill Lann Lee.*

Legal Topics:

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

Labor & Employment Law Discrimination General Overview Labor & Employment Law Discrimination Disparate Treatment General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. § 623(f)(1) (ADEA); 42 U.S.C. § 2000e-2(e) (Title VII); *Gov. Code* § 12940 (FEHA); *See also* § 41.94.

(n2)Footnote 2. *See* 42 U.S.C. § 2000e-2(h) (Title VII); 29 U.S.C. § 623(f)(2)(A). The United States Supreme Court has declared that it does not regard the Title VII "bona fide seniority system" exemption as a defense, but as a provision that itself delineates which employment practices are illegal and thereby prohibited, and which are not. *See Lorraine v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, 109 S. Ct. 2261, 104 L. Ed. 2d 961, 973 .

(n3)Footnote 3. *See, e.g., Moore v. Hughes Helicopters, Inc.* (9th Cir. 1983) 708 F.2d 475, 481 ; *Gay v. Waiters' and Dairy Lunchmen's Union* (9th Cir. 1982) 694 F.2d 531, 537 ; *Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1275-1280 .

(n4)Footnote 4. *See* 42 U.S.C. § 12113(a).

(n5)Footnote 5. *See E.E.O.C. v. Rath Packing Co.* (8th Cir. 1986) 787 F.2d 318, 327 n.10 (Title VII); *Harris v. Pan Am. World Airways, Inc.* (9th Cir. 1980) 649 F.2d 670, 674 (Title VII); *Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n.* (1990) 218 Cal. App. 3d 517, 540-541, 267 Cal. Rptr. 158 (FEHA) . For discussion of the BFOQ defense, *see* § 41.94.

(n6)Footnote 6. *See Pettway v. American Cast Iron Pipe Co.* (5th Cir. 1974) 494 F.2d 211, 244 (Title VII); *Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n* (1990) 218 Cal. App. 3d 517, 541-542, 267 Cal. Rptr. 158 (FEHA) ; *see also* 42 U.S.C. § 2000e-2(k)(2) (Title VII; business necessity may not be used as defense against claim of intentional discrimination). For discussion of the business necessity defense, *see* § 41.95.

(n7)Footnote 7. *See* §§ 41.10-41.11 and 41.20-41.21.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law § 41.91

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.91 Affirmative Action or Nondiscrimination Plans

Although Title VII generally prohibits the consideration of race, color, religion, sex, or national origin in making employment decisions,ⁿ¹ voluntary affirmative action plans have been held to be an acceptable means of remedying past discrimination if they do not unnecessarily trammel the rights of nonminority employees and if they are meant to be a temporary measure for the purpose of achieving, rather than maintaining, racial or gender balance.ⁿ² In fact, the Ninth Circuit Court of Appeals has held that such an affirmative action plan may be a legitimate nondiscriminatory reason for considering membership in a protected class when making an employment decision.ⁿ³

Affirmative action or equal opportunity evidence is relevant to and probative of an employer's intent not to discriminate.ⁿ⁴ By contrast, however, evidence that an employer violated its own affirmative action plan may be relevant to the question of an employer's contrary intent.ⁿ⁵ Although self-critical portions of an employer's equal employment opportunity efforts may enjoy a qualified privilege (based on the underlying goal of eliminating employment discrimination), if an employer voluntarily uses evidence of its equal employment opportunity efforts to prove nondiscrimination, it waives the qualified privilege, and a court abuses its discretion by admitting equal opportunity evidence while precluding self-critical material.ⁿ⁶

In addition, it appears that under appropriate circumstances, affirmative action may be available as a remedy for Title VII violations, either by court order,ⁿ⁷ or as part of a consent decree.ⁿ⁸ Certain contractors are also required to meet affirmative action obligations under state⁹ and federal law.ⁿ¹⁰ However in *Adarand Constructors, Inc. v. Peña*,ⁿ¹¹ the Supreme Court held that under the *Fifth Amendment due process clause* and the *Fourteenth Amendment equal protection clause*, a standard of strict scrutiny must be applied to all racial classifications imposed by any governmental authority--whether federal, state or local--and race based action must be narrowly tailored to further a compelling interest.ⁿ¹²

For a discussion of preemployment affirmative action issues, *see* § 41.47. For complete discussion of affirmative action, *see* Chapter 44.

Legal Topics:

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

Labor & Employment Law Affirmative Action General Overview Labor & Employment Law Discrimination General Overview Labor & Employment Law Discrimination Public Contracts Affirmative Action

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-2(a).

(n2)Footnote 2. *See Steelworkers v. Weber* (1979) 443 U.S. 193, 208-209, 99 S. Ct. 2721, 61 L. Ed. 2d 480 . *See also Johnson v. Transportation Agency, Santa Clara County* (1986) 480 U.S. 616, 637-638, 642, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (consideration of sex of county employee as one factor in promoting her over equally qualified male under voluntary affirmative action plan); *Gilligan v. Dept. of Labor* (9th Cir. 1996) 81 F.3d 835 (in institutional setting, reliance on affirmative action plan unnecessary if action taken is consistent with plan).

(n3)Footnote 3. *See Higgins v. City of Vallejo* (9th Cir. 1987) 823 F.2d 351, 355 ; *See also* § 41.11[1][c].

(n4)Footnote 4. *E.E.O.C. v. General Telephone Co. of Northwest* (9th Cir. 1989) 885 F.2d 575, 578 (Title VII) . *See Gilligan v. Dept. of Labor* (9th Cir. 1996) 81 F.3d 835, 839-840 (use of gender as a non-exclusive hiring factor does not necessarily constitute illegal discrimination; affirmative action plans are illegal only if they function as an "absolute bar" to the advancement of non-preferred groups); *Johnson v. Transportation Agency, Santa Clara County* (1986) 480 U.S. 616, 637-638, 107 S. Ct. 1442, 94 L. Ed. 2d 615 .

(n5)Footnote 5. *See Gonzales v. Police Dept., City of San Jose, Cal.* (9th Cir. 1990) 901 F.2d 758, 761 (Title VII).

(n6)Footnote 6. *E.E.O.C. v. General Telephone Co. of Northwest* (9th Cir. 1989) 885 F.2d 575, 578-579 (Title VII).

(n7)Footnote 7. *See Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 444-445, 482, 106 S. Ct. 3019, 92 L. Ed. 2d 344 .

(n8)Footnote 8. *See Firefighters v. Cleveland* (1986) 478 U.S. 501, 515-518, 106 S. Ct. 3063, 92 L. Ed. 2d 405 .

(n9)Footnote 9. *See Gov. Code* § 12990.

(n10)Footnote 10. *See* Exec. Order 11246; 29 U.S.C. § 793(a) (Rehabilitation Act); 38 U.S.C. § 4211 *et seq.* (disabled and Vietnam veterans).

(n11)Footnote 11. *Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, 115 S. Ct. 2097 , L. Ed. 2d 158.

(n12)Footnote 12. *Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, 115 S. Ct. 2097, 2112-2113, 132 L. Ed. 2d 158 (overruling *Metro Broadcasting, Inc. v. FCC* (1990) 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445); *see also Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (Fourteenth Amendment held to require strict scrutiny of all race-based action by state and local governments); *Arizona Public Serv. Co. v. Aspaas* (9th Cir. 1995) 69 F.3d 1026 (Title VII supersedes Indian nepotism employment practices).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law § 41.92

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.92 After-Acquired Evidence (Including Application or Resume Fraud)

One issue that has frequently arisen is the extent to which evidence of employee misconduct that would have justified an employer's adverse action, but which was not discovered by the employer until *after* it took an allegedly discriminatory employment action (so-called "after-acquired evidence"), may act as a defense to a discrimination claim. The most common factual context in which this issue has arisen has involved an employer's discovery, typically after the commencement of litigation of a discrimination claim, that the employee had falsified his or her resume or employment application. Employers have argued in such cases that the plaintiff should not be entitled to recovery because the plaintiff would have been fired (or would have not been hired in the first place) had the employer known of the falsification.ⁿ¹

In *McKennon v. Nashville Banner Pub. Co.*,^{n1.1} the United States Supreme Court, resolving a conflict among the federal appellate courts, rejected the lower court's holding that after-acquired evidence of employee wrongdoing bars an employee from any relief under the ADEA.ⁿ² The Court noted that the ADEA and Title VII reflect a societal condemnation of invidious bias in employment decisions.ⁿ³ Congress designed the remedial measures in these statutes to serve as a spur or catalyst to cause employers to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of discrimination. Thus, the statutes serve both a deterrence and compensation purpose. The private litigant who seeks redress for his or her injuries vindicates both of these objectives. The Court held that it would not accord with this scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for earlier violations of the ADEA.ⁿ⁴ For example, one case an employer interpreted its retirement plan to require that an employee who had reached retirement age but had not yet retired be considered eligible for retirement, with the result that his temporary disability benefits would have completely offset his retirement benefits. The court found this violated Title 29 *United States Code Section 623(f)(2)* because it coerced the employee into involuntarily retiring on the basis of age in order to retain any benefits.ⁿ⁵

The Court held, however, that the employee's own misconduct, while not completely barring relief, is relevant to the remedies available in a particular case, since the employer's legitimate interests must be taken into account in fashioning an equitable remedy. The Court stated that the proper boundaries of remedial relief in the general class of cases where,

after termination, it is discovered that the employee has engaged in wrongdoing must be addressed by the judicial system in the "ordinary course of future decisions." The court thus did not set standards for how the after-acquired evidence is to be treated in every case, rather left it to further decisions. The Court observed, however, that as a general rule, neither reinstatement nor front pay is an appropriate remedy in cases of this type.ⁿ⁶ The Court rejected any absolute rule barring backpay and stated that backpay should generally be calculated from the date of the unlawful discharge to the date that the new information was discovered, although in formulating a remedy the trial court can consider any extraordinary circumstances that affect the legitimate interests of either party.ⁿ⁷

The Court in *McKennon* further stated that when an employer seeks to rely on after-acquired evidence of wrongdoing to limit relief, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.ⁿ⁸

In *O'Day v. McDonnell Douglas Helicopter Co.* ⁿ⁹ the Ninth Circuit applied the *McKennon* standard to a claim brought under the ADEA. The court held that the Civil Rights Act of 1991, together with the portion of *Price Waterhouse v. Hopkins*,ⁿ¹⁰ which survived the Civil Rights Act of 1991, permits an employer to limit an employee's remedy if it can show by a preponderance of the evidence that it would have made the same decision apart from an illegal motive. The court pointed out that since O'Day had rifled through his supervisor's confidential files and had shared them with others, he had not engaged in protected activity. Thus, although his conduct warranted termination, he would nevertheless be entitled prove his right to recover limited remedies arising out of the alleged discrimination which preceded the ground for termination. The Ninth Circuit also applied this theory in *Schnidrig v. Columbia Machine, Inc.*,ⁿ¹¹ permitting the use of after-acquired evidence to limit remedies but declining to deny all relief, as inconsistent with the purpose of the ADEA. Summary judgment is denied and the after-acquired evidence can bear on the specific remedy.

The California Court of Appeal, in a case involving common-law wrongful termination and age discrimination claims, has also refused to adopt a blanket rule that after-acquired evidence of falsification of an employment application is a complete defense to a wrongful termination or employment discrimination claim.ⁿ¹² The court reasoned that an automatic forfeiture of all employment rights, regardless of circumstances, was too harsh a penalty in many cases. The court further reasoned that in cases in which an employer has fired a worker in violation of the statutory ban on discrimination, the purpose and effect of the discrimination statutes would be unacceptably undermined by a principle that would allow a fact that played no part in the firing decision to bar any recovery.ⁿ¹³ The court in that case did not discuss the potential effect of such after-acquired evidence on the amount of damages because the issue was not before the court.ⁿ¹⁴

In *Camp v. Jeffer, Mengels, Rutler & Marmaro*,^{n14.1} the California Court of Appeal held that the plaintiffs' application fraud supported a complete defense to their claim for wrongful termination in violation of public policy. The court distinguished *Cooper* ^{n14.2} on the grounds that the employer in *Camp* was required by federal law not to employ any convicted felons, and the plaintiffs lied on their resumes that they had not been convicted of felonies when they had. Thus, the court concluded, the plaintiffs' application fraud "went to the heart of their employment relationship with Jeffer Mengels."^{n14.3}

In *Murillo v. Rite Stuff Foods, Inc.*,ⁿ¹⁵ the plaintiff brought suit for, among other charges, sexual harassment and wrongful termination. During discovery, the employer learned that the plaintiff was an illegal alien who used false documents to secure employment on the suggestion of the interviewer. The employer moved for summary judgment under the doctrine of after-acquired evidence, alleging that it would never have hired the plaintiff (and would have immediately terminated employment) had it known of the false documentation. The plaintiff dismissed wrongful termination and related claims, recognizing that they would be barred by the unclean hands doctrine.ⁿ¹⁶ Although the after-acquired evidence would bar the wrongful termination and contract claims if it was proven that the employer would have refused to hire the plaintiff, summary judgment was improper because evidence was presented to show that the employer knew of the falsified documentation but did not take action.ⁿ¹⁷ Moreover, the unclean hands doctrine did not warrant a different result because the doctrine does not apply where Congress authorizes broad equitable relief to

serve important national policies; however, the unclean hands doctrine would bar the wrongful discharge and contract claims because the misrepresentation about her illegal alien status went to the heart of the employment relationship and related directly to her wrongful discharge and contractual claims.ⁿ¹⁸ The court concluded that neither the after-acquired evidence doctrine nor the unclean hands doctrine would bar discrimination and tort claims because the plaintiff's discrimination and tort claims arose from acts occurring during her employment and not from her discharge.ⁿ¹⁹

In *Thompson v. Tracor Flight Systems, Inc.*,ⁿ²⁰ the court considered the issue of after-acquired evidence in the context of an action for constructive discharge in retaliation for asserting the fair employment rights of others in violation of former *Gov. Code § 12940(f)*.ⁿ²¹ The former employee had taken home copies of files and documents at the time of her resignation, which the employer contended would have resulted in her termination had it known what she was doing. The jury found that the former employee had not engaged in wrongdoing which would have given the employer grounds to terminate her had it known of her misconduct at the time it occurred. The court held that substantial evidence permitted a reasonable jury to find that her motivation in taking the documents home constituted poor judgment and not theft and would have subjected her to, at most, lesser measures of discipline. The court also held the trial court did not err in not barring recovery or equitably reducing the damages award under the after-acquired evidence doctrine.

In *Finegan v. County of Los Angeles*,ⁿ²² a nurse sued his employer for violation of the FEHAⁿ²³ for removing him from his job in 1997 because of his physical disabilities. During trial, the employer presented the testimony of an expert physician, who opined that plaintiff was not able to perform his job during the period 1996 through 1998, based on the expert's examination of plaintiff in 1999 and a review of plaintiff's medical records. In finding the testimony of the expert admissible, the court relied heavily upon the holding in *McKennon*.ⁿ²⁴ According to the court, *McKennon* applies when the employer's discriminatory conduct has been established or conceded.ⁿ²⁵ If so, the employer may not avoid liability by pointing to some other reason which would have justified firing the plaintiff-employee, but which was not discovered until later. *McKennon* does not apply when the employer disputes liability and relies on later-acquired medical evidence to show the plaintiff was not qualified for the job.ⁿ²⁶ Thus, an employer who unlawfully discriminates against an employee may not necessarily rely on after-acquired evidence of previously unknown wrongdoing by the employee to justify its unlawful action. However, if later-acquired medical evidence is offered to support the originally proffered reason and show the plaintiff was not qualified for the job, the evidence is admissible.

Legal Topics:

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

Evidence
Procedural Considerations
General Overview
Labor & Employment Law
Preemployment Practices
Torts
Business Torts
Fraud & Misrepresentation
General Overview

FOOTNOTES:

(n1)Footnote 1. For the standard jury instruction on the affirmative defense of after-acquired evidence justifying employment action taken, *see* Judicial Council of California Civil Jury Instructions, CACI 2506 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n2)Footnote 1.1. *McKennon v. Nashville Banner Publ. Co. (1995) 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852* .

(n3)Footnote 2. *McKennon v. Nashville Banner Publ. Co. (1995) 513 U.S. 352, 356-357, 115 S. Ct. 879, 130 L. Ed. 2d 852* .

(n4)Footnote 3. *McKennon v. Nashville Banner Publ. Co. (1995) 513 U.S. 352, 357, 115 S. Ct. 879, 130 L. Ed. 2d 852* .

(n5)Footnote 4. *McKennon v. Nashville Banner Pub. Co. (1995) 513 U.S. 352, 358, 115 S. Ct. 879, 130 L. Ed. 2d*

852 .

(n6)Footnote 5. *See Kalvinskas v. Cal. Institute of Technology* (9th Cir. 1996) 96 F.3d 1305, 1309 .

(n7)Footnote 6. *McKennon v. Nashville Banner Publ. Co.* (1995) 513 U.S. 352, 361-362, 115 S. Ct. 879, 130 L. Ed. 2d 852 .

(n8)Footnote 7. *McKennon v. Nashville Banner Publ. Co.* (1995) 513 U.S. 352, 362, 115 S. Ct. 879, 130 L. Ed. 2d 852 .

(n9)Footnote 8. *McKennon v. Nashville Banner Publ. Co.* (1995) 513 U.S. 352, 362-363, 115 S. Ct. 879, 130 L. Ed. 2d 852 .

(n10)Footnote 9. *O'Day v. McDonnell Douglas Helicopter Co.* (9th Cir. 1996) 79 F.3d 756 .

(n11)Footnote 10. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 .

(n12)Footnote 11. *Schnidrig v. Columbia Machine, Inc.* (9th Cir. 1996) 80 F.3d 1406 .

(n13)Footnote 12. *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal. App. 4th 614, 617-618, 29 Cal. Rptr. 2d 642 .

(n14)Footnote 13. *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal. App. 4th 614, 618-619, 29 Cal. Rptr. 2d 642 .

(n15)Footnote 14. *See Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal. App. 4th 614, 619 n.1, 29 Cal. Rptr. 2d 642 .

(n16)Footnote 14.1. (1995) 35 Cal. App. 4th 620, 41 Cal. Rptr. 2d 329 .

(n17)Footnote 14.2. *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal. App. 4th 614, 29 Cal. Rptr. 2d 642 .

(n18)Footnote 14.3. (1995) 35 Cal. App. 4th 620, 637 .

(n19)Footnote 15. *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal. App. 4th 833, 77 Cal. Rptr. 2d 12 .

(n20)Footnote 16. *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal. App. 4th 833, 839-840, 77 Cal. Rptr. 2d 12 .

(n21)Footnote 17. *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal. App. 4th 833, 842-843, 846-850, 77 Cal. Rptr. 2d 12 (courts must be careful in applying after-acquired evidence doctrine to discrimination claims as likely consequence of its widespread use will be underenforcement of antidiscrimination statutes and underdeterrence of discriminatory employment practices).

(n22)Footnote 18. *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal. App. 4th 833, 843-845, 77 Cal. Rptr. 2d 12 (I.R.C.A. (8 U.S.C. § 1324) bars employers from knowingly hiring or continuing employment of unauthorized aliens).

(n23)Footnote 19. *Murillo v. Rite Stuff Foods, Inc.* (1998) 65 Cal. App. 4th 833, 847-849, 77 Cal. Rptr. 2d 12 (plaintiff's status as undocumented alien does not bar her from protections of employment law).

(n24)Footnote 20. *Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal. App. 4th 1156, 1172-1174, 104 Cal. Rptr. 2d 95 .

(n25)Footnote 21. *Now see Gov. Code § 12940(h).*

(n26)Footnote 22. *Finegan v. County of Los Angeles* (2001) 91 Cal. App. 4th 1, 109 Cal. Rptr. 2d 762 .

(n27)Footnote 23. *See Gov. Code § 12940(a).*

(n28)Footnote 24. *McKennon v. Nashville Banner Publ. Co.* (1995) 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 .

(n29)Footnote 25. *Finegan v. County of Los Angeles* (2001) 91 Cal. App. 4th 1, 9, 109 Cal. Rptr. 2d 762 .

(n30)Footnote 26. *Finegan v. County of Los Angeles* (2001) 91 Cal. App. 4th 1, 8-13, 109 Cal. Rptr. 2d 762 , citing *Mantolete v. Bolger* (9th Cir. 1985) 767 F.2d 1416 ; *Teahan v. Metro-North Commuter R. Co.* (2d Cir. 1996) 80 F.3d 50 ; *McConathy v. Dr. Pepper/Seven Up Corp.* (5th Cir. 1998) 131 F.3d 558 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law § 41.92A

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.92A Antiharassment Policy

In *Burlington Industries, Inc. v. Ellerth* ⁿ¹ and *Faragher v. City of Boca Raton*,ⁿ² the Supreme Court established that in Title VII sexual harassment cases in which no tangible employment action is taken, an employer may be held vicariously liable for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the victimized employee. However, in such cases an employer may raise a two-part affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. First, it must prove that "it exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Second, it must prove that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."ⁿ³ The Court also stated that proof of an antiharassment policy is not required in every case as a matter of law, but the need for such a policy may be addressed in any case litigating the first element of the defense. Similarly, while proof of the second element of the defense is not limited to showing that the employee unreasonably failed to use any complaint procedure, such proof "will normally suffice to satisfy the employer's burden" for that element of the defense.ⁿ⁴

The legal standard for evaluating an employer's efforts to prevent and correct harassment is not whether any additional steps or measures would have been reasonable if employed. The standard is whether the employer's actions as a whole established a reasonable mechanism for prevention and correction.ⁿ⁵ In *Holly D. v. California Institute of Technology*,ⁿ⁶ the Ninth Circuit found an employer's anti-harassment policy reasonable on its face. The employer promulgated a written policy that defined prohibited behavior, identified contact personnel, and established procedures to investigate and resolve any claims. The employer made the policy available in several publications, at least one of which the plaintiff received when she began working with the supervisor who allegedly harassed her. The employer also conducted periodic training on sexual harassment, which it publicized to staff and faculty by email, including at least one email sent during the period when the plaintiff was allegedly being harassed. The plaintiff testified that she knew about the training and that she knew that her supervisor's behavior constituted sexual harassment.ⁿ⁷

The plaintiff also failed to present evidence to support her charge that even if the policy was facially reasonable, it was unreasonably implemented, and that the employer failed promptly to correct harassment when it occurred. When the

employer learned about the plaintiff's allegations for the first time as the result of her filing a claim with the EEOC, it promptly convened an investigatory committee, which impartially interviewed every witness suggested by either the plaintiff or her supervisor. At first, the investigatory committee found insufficient evidence of harassment, but nevertheless recommended that the plaintiff be transferred to work for a female professor in a different department and location and that the supervisor be "reminded" of the harassment policy. Although post-complaint conduct will not exonerate a party at fault, once the employer gained access to physical evidence belying the supervisor's assertion that no sexual contact had occurred, which the plaintiff had declined to provide to the investigating committee, the employer immediately asked the supervisor for his resignation and he promptly resigned. The employer's failure to pursue all possible leads did not undermine the substantial showing that its investigation was, in toto, both prompt and reasonable.ⁿ⁸

With regard to proof of the plaintiff's failure to take advantage of preventive or corrective opportunities provided by the employer or to otherwise avoid harm, the plaintiff sought no relief of any kind from the employer until after a full year of unwelcome sexual activity and almost two years after the first sexual incident. The plaintiff explained her hesitation by asserting that she did not feel comfortable pursuing assistance from the employer's employee relations department because she was dissatisfied with how the department handled her earlier disability discrimination complaint. Even if her hesitation were reasonable, however, she offered no evidence to explain why she did not seek help through any other sources affiliated with the employer, which were all specifically identified by the written policy materials as equipped to offer assistance in cases of sexual harassment.ⁿ⁹

On the other hand, in *Taybron v. City & County of San Francisco*,ⁿ¹⁰ an action by two female employees of San Francisco's municipal transportation department, the district court's determination that there was no genuine issue of material fact with respect to the employer's remediation of their admitted sexual harassment was error. The plaintiffs' presented evidence of the following in opposition to the employer's motion for summary judgment:

- (1) For an extended period of time their female supervisor harassed one plaintiff and failed to prevent another employee from harassing the second plaintiff, despite their numerous oral complaints.
- (2) The second plaintiff was discouraged from complaining about harassment she faced.
- (3) The first plaintiff's complaints were not taken seriously.
- (4) A manager referred to plaintiffs disparagingly in context of their complaints.
- (5) The same manager threw his keys at the first plaintiff and verbally abused her for complaining.
- (6) The employer's EEO office failed to interview several employees and managers involved in the disputes.

Legal Topics:

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

Labor & Employment Law Discrimination Harassment General Overview Labor & Employment
Law Discrimination Harassment Racial Harassment Employer Liability General Overview Labor & Employment
Law Discrimination Harassment Racial Harassment Employment Practices General Overview

FOOTNOTES:

(n1)Footnote 1. *Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 .

(n2)Footnote 2. *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 .

(n3)Footnote 3. *Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742 ; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 . See also *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158, 1176-1179 (plaintiff failed to raise genuine issue of material fact as to either reasonableness of employer's preventive and corrective measures or her decision to forego those procedures).

(n4)Footnote 4. *Burlington Indus., Inc. v. Ellerth* (1998) 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 ; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 . For a form of pleading, see § 43.10[13][f].

(n5)Footnote 5. *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158, 1177 .

(n6)Footnote 6. *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158 .

(n7)Footnote 7. *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158, 1177 .

(n8)Footnote 8. *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158, 1177-1178 .

(n9)Footnote 9. *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158, 1178-1179 .

(n10)Footnote 10. *Taybron v. City & County of San Francisco* (9th Cir. 2003) 341 F.3d 957, 960 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law § 41.93

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.93 Bona Fide Employee Benefit Plans

[1] ADEA

[a] Generally

**[i] Benefit Plans Established or Modified On or After
October 16, 1990**

The ADEA, as amended by Title I of the Older Workers Benefit Protection Act of 1990 (OWBPA),ⁿ¹ provides that it is not unlawful for an employer to observe the terms of a bona fide employee benefit plan (1) when, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker;ⁿ² or (2) when the plan is a voluntary early retirement incentive plan that is consistent with the purposes of the ADEA.ⁿ³ An employer, employment agency, or labor organization that makes age-based distinctions based on such a plan has the burden of proving that its actions are lawful in any civil enforcement proceeding brought under the ADEA.ⁿ⁴

For example, in one case an employer interpreted its retirement plan to require that an employee who had reached retirement age but had not yet retired be considered eligible for retirement, with the result that his temporary disability benefits would have completely offset his retirement benefits. The court found this violated Title 29 *United States Code* section 623(f)(2) because it coerced the employee into involuntarily retiring on the basis of age in order to retain any benefits.ⁿ⁵

Title I of the OWBPA applies only to (1) employee benefit plans established or modified on or after October 16, 1990 (the date the OWBPA was enacted), and (2) other conduct occurring more than 180 days after that date.ⁿ⁶ Title I also does not apply to a series of benefit payments made to an individual or the individual's representative that began prior to October 16, 1990, and that continue after that date pursuant to an arrangement that was in effect on that date. However, no substantial modification to such an arrangement may be made after October 16, 1990, if the intent of the modification is to evade the ADEA's purposes.ⁿ⁷ In addition, with respect to benefits provided by a collective

bargaining agreement (1) that is in effect as of October 16, 1990; (2) that terminates after that date; (3) that was entered into by a labor organization;ⁿ⁸ and (4) that would be superseded (in whole or in part) by the OWBPA, Title I does not apply until the termination of the collective bargaining agreement or June 1, 1992, whichever occurs first.ⁿ⁹ The OWBPA also contains provisions governing its applicability and effective date with respect to state and other public employees.ⁿ¹⁰

With respect to plans established, modified, or otherwise affected on or after October 16, 1990, the OWBPA expressly overrules *Public Employees v. Betts*,ⁿ¹¹ discussed in [ii], *below*, stating that its purpose is "to restore the original congressional intent in passing and amending the [ADEA], which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations."ⁿ¹² In fact, the OWBPA amends the "bona fide employee benefit plan exemption" to essentially track the language of the EEOC cost-justification rule, which is also discussed in [ii], *below*.ⁿ¹³

The OWBPA also provides that an employee benefit plan must comply with the ADEA regardless of the date that the plan was adopted.ⁿ¹⁴ This provision apparently overrules the holding in *United Airlines, Inc. v. McMann*,ⁿ¹⁵ reaffirmed in *Betts*,ⁿ¹⁶ that a benefit plan drafted and implemented before the ADEA was enacted cannot be subterfuge to evade the purposes of the ADEA.ⁿ¹⁷ Thus, once a plan falls within the purview of the OWBPA (i.e., by a modification or some other act affecting the plan which occurs after October 16, 1990)ⁿ¹⁸ it is covered by the ADEA regardless of when it was established, and the *McMann/Betts* "subterfuge" analysis no longer applies.

[ii] Benefit Plans Established Before October 16, 1990

As discussed in [i], *above*, the OWBPA does not apply to employee benefit plans that existed on October 16, 1990, unless and until those plans are modified or affected in some way. Apparently such plans are governed by the pre-OWBPA version of the ADEA, which provided that it was not unlawful for an employer to observe the terms of a bona fide employee benefit plan, such as a retirement, pension, or insurance plan, that was not a subterfuge to evade the purposes of the ADEA.ⁿ¹⁹ In *Public Employees v. Betts*,ⁿ²⁰ the United States Supreme Court construed the pre-OWBPA "bona fide employee benefit plan" provision as completely exempting employee benefit plans from ADEA coverage unless they were subterfuge for discrimination in other, nonfringe-benefit aspects of the employment relationship. The Court stated that, for example, a plan formulated to retaliate against an employee for opposing a discriminatory employer action was not exempted.ⁿ²¹ *Betts* also held that the pre-OWBPA exemption is not a defense, but a description of the type of employer conduct prohibited in the benefit plan context. Thus, under *Betts*, the *employee* had the burden of proving that the purpose of a discriminatory plan is to discriminate in some nonfringe-benefit aspect of the employment relationship.ⁿ²²

In reaching its holding, *Betts* rejected the EEOC "cost-justification rule," declaring that because the rule did not appear in the exemption itself, it did not comport with the "plain language" of the ADEA.ⁿ²³ The EEOC "cost-justification rule" states that a plan that prescribes age-based lower benefits for older employees is not a subterfuge to evade the ADEA's purposes if the lower level of benefits is justified by age-related cost considerations.ⁿ²⁴ Under the rule, "benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers." Thus, the rule exempts a plan if the actual amount incurred on behalf of an older worker is equal to that made or incurred on behalf of a younger worker, even though the older worker may, as a result, receive a lesser amount of benefits than the younger worker.ⁿ²⁵

[b] Specified Additional Exemptions

Under the OWBPA, a voluntary early retirement incentive plan consistent with the ADEA's purposes is not unlawful.ⁿ²⁶ In addition, the following federal retirement programs are exempted:ⁿ²⁷

1. Employee Retirement Income Security Act (ERISA) employee pension benefit plans that provide for a

minimum age eligibility requirement,ⁿ²⁸ and

2. ERISA-defined benefit plans that provide for (a) payments that constitute the subsidized portion of an early retirement benefit, or (b) social security supplements that commence before the age and terminate at the age (specified by the plan) when participants are eligible for Social Security Act (42 U.S.C. § 401 *et seq.*) benefits, and that do not exceed those benefits.ⁿ²⁹

The OWBPA also provides that a benefit plan does not violate the ADEA solely because, as a result of a contingent event unrelated to age, the value of retiree health benefits received by an individual eligible for an immediate pension, and the value of additional pension benefits that are made available because of the contingent event, are deducted from severance pay made available as a result of the event.ⁿ³⁰ The OWBPA contains provisions for calculating and adjusting the value of benefits an employer is required to provide, depending on whether the employer's obligation to provide benefits is of limited or unlimited duration.ⁿ³¹

The OWBPA also exempts bona fide employee benefit plans under which long-term disability benefits are reduced by pension benefits (other than those attributable to employee contributions) (1) paid to the individual that the individual voluntarily elects to receive; or (2) for which an individual who has attained the later of age 62 or normal retirement age is eligible.ⁿ³²

For further discussion regarding issues arising out of implementing waivers and releases under OWBPA, *see* § 41.67[2][b].

[2] FEHA

The former FEHA age discrimination exemption providing that it did not require any changes in any bona fide retirement or pension programsⁿ³³ was repealed effective January 1, 2003.ⁿ³⁴ The FEHA "bona fide retirement or pension program" exemption was not construed by any case or FEHC regulation implementing the FEHA.ⁿ³⁵ Although at least one California case has discussed the relationship between the FEHA and pre-OWBPA exemptions,ⁿ³⁶ the FEHA exemption was substantially different from the far more detailed provisions of the federal OWBPA, discussed in [1], *above*.ⁿ³⁷ Accordingly, it was unclear whether the principles reflected in the OWBPAn³⁸ would have been applied to the FEHA exemption.

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment LawDiscriminationAge DiscriminationDefenses & ExceptionsBona Fide Benefit PlansPensions & Benefits LawEmployee Benefit PlansGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* Pub. L. No. 101-433, §§ 101-105.

(n2)Footnote 2. 29 U.S.C. § 623(f)(2)(B)(i); 29 C.F.R. § 1625.10(a)(1).

(n3)Footnote 3. 29 U.S.C. § 623(f)(2)(B)(ii).

(n4)Footnote 4. 29 U.S.C. § 623(f)(2).

(n5)Footnote 5. *See Kalvinskas v. Cal. Institute of Technology* (9th Cir. 1996) 96 F.3d 1305, 1309 .

(n6)Footnote 6. *See* Pub. L. No. 101-433, § 105(a).

- (n7)Footnote 7. *See* Pub. L. No. 101-433, § 105(e).
- (n8)Footnote 8. *See* 29 U.S.C. § 206(d)(4) (Fair Labor Standards Act; "labor organization" defined).
- (n9)Footnote 9. Pub. L. No. 101-433, § 105(b).
- (n10)Footnote 10. *See* Pub. L. No. 101-433, § 105(c).
- (n11)Footnote 11. *Public Employees v. Betts* (1989) 492 U.S. 158, 109 S. Ct. 2854, 106 L. Ed. 2d 134 .
- (n12)Footnote 12. *See* Pub. L. No. 101-433, § 101.
- (n13)Footnote 13. *See* 29 U.S.C. § 623(f)(2)(B) (incorporating 29 C.F.R. § 1625.10 by reference).
- (n14)Footnote 14. 29 U.S.C. § 623(k).
- (n15)Footnote 15. *United Airlines, Inc. v. McMann* (1977) 434 U.S. 192, 98 S. Ct. 444, 54 L. Ed. 2d 402 .
- (n16)Footnote 16. *See Public Employees v. Betts* (1989) 492 U.S. 158, 167-169, 109 S. Ct. 2854, 106 L. Ed. 2d 134 .
- (n17)Footnote 17. *United Airlines, Inc. v. McMann* (1977) 434 U.S. 192, 203, 98 S. Ct. 444, 54 L. Ed. 2d 402 (overruled in part by Pub. L. No. 95-256, § 2(a), which amended the ADEA to expressly prohibit involuntary early retirement).
- (n18)Footnote 18. *See* Pub. L. No. 101-433, § 105(a).
- (n19)Footnote 19. *See* 29 U.S.C. § 623(f)(2), prior to amendment by Pub. L. No. 101-433.
- (n20)Footnote 20. *Public Employees v. Betts* (1989) 492 U.S. 158, 109 S. Ct. 2854, 106 L. Ed. 2d 134 .
- (n21)Footnote 21. *Public Employees v. Betts* (1989) 492 U.S. 158, 176-182, 109 S. Ct. 2854, 106 L. Ed. 2d 134 .
- (n22)Footnote 22. *Public Employees v. Betts* (1989) 492 U.S. 158, 181-182, 109 S. Ct. 2854, 106 L. Ed. 2d 134 .
- (n23)Footnote 23. *See Public Employees v. Betts* (1989) 492 U.S. 158, 170-172, 109 S. Ct. 2854, 106 L. Ed. 2d 134 .
- (n24)Footnote 24. 29 C.F.R. § 1625.10(d).
- (n25)Footnote 25. 29 C.F.R. § 1625.10(a)(1).
- (n26)Footnote 26. 29 U.S.C. § 623(f)(2)(B)(ii).
- (n27)Footnote 27. *See* 29 U.S.C. § 623(l)(1).
- (n28)Footnote 28. *See* 29 U.S.C. § 1002(2) ("employee pension benefit plans" defined).
- (n29)Footnote 29. *See* 29 U.S.C. § 1002(35) ("defined benefit plans" defined).
- (n30)Footnote 30. 29 U.S.C. § 623(l)(2)(A),(B); *see* 29 U.S.C. § 623(l)(2)(C) ("severance pay" defined), (D) ("retiree health benefits" defined).
- (n31)Footnote 31. *See* 29 U.S.C. § 623(l)(2)(E).

(n32)Footnote 32. *See* 29 U.S.C. § 623(l)(3).

(n33)Footnote 33. *See* former Gov. Code § 12941(a).

(n34)Footnote 34. Stats. 2002, ch. 525, § 2.

(n35)Footnote 35. *See* 2 Cal. Code Reg. §§ 7295.0-7296.4 (age discrimination).

(n36)Footnote 36. *See* *Kubik v. Scripps College* (1981) 118 Cal. App. 3d 544, 552, 173 Cal. Rptr. 539 (former Gov. Code §§ 12941 and 12942 parallel ADEA, and goals of FEHA and ADEA are presumptively same).

(n37)Footnote 37. *See* 29 U.S.C. § 623(f)(2)(B).

(n38)Footnote 38. *See* discussion in [1][a], *above*.



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law § 41.94

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§ 41.94 Bona Fide Occupational Qualification

[1] Under Title VII

[a] Generally

Title VII provides that it is not an unlawful employment practice for an employer to hire and employ an individual on the basis of his or her religion, sex, or national origin in those instances in which religion, sex, or national origin is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business or enterprise.ⁿ¹ Race is not a permissible BFOQ because it was specifically excluded from the list of bases enumerated in the statute.ⁿ²

The BFOQ exception is an extremely narrow exception to the prohibition of discrimination under Title VII.ⁿ³ It applies only to "employment practices that purposefully discriminate" (disparate treatment),ⁿ⁴ and only to "hiring and employing," not to other terms and conditions of employment.ⁿ⁵

Since a BFOQ is an affirmative defense, the burden is on the defendant to prove it; the plaintiff is not required to disprove it.ⁿ⁶ The employer has the burden of proving that it had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all of the people excluded from the position (for example, all women) would be unable to perform safely and efficiently the duties of the job involved.ⁿ⁷ With respect to what constitutes a BFOQ, the United States Supreme Court explained in *Auto Workers v. Johnson Controls*,ⁿ⁸ that the language of the BFOQ defense favors the use of objective, verifiable requirements. The term "occupational" indicates that these requirements must concern job-related skills and aptitudes.ⁿ⁹ A particular qualification must relate to the "essence," or to the "central mission of the employer's business."ⁿ¹⁰

The BFOQ defense should not be confused with the business necessity defense,ⁿ¹¹ which applies only to disparate impact cases.ⁿ¹² However, although these two defenses are separate and distinct,ⁿ¹³ they sometimes overlap in judicial discussions. This is because, as one court has noted, the findings of fact for business necessity are often relevant to BFOQ analysis since the evidence needed to establish the two defenses is often similar.ⁿ¹⁴

For detailed discussions of the standards for establishing business necessity, *see* §§ 41.21[4] and 41.95[1].

[b] BFOQ as Applied to Religion

Religion is one of the enumerated bases for the BFOQ exception.ⁿ¹⁵ For the BFOQ defense to apply, the use of religion as an occupational qualification must be reasonably necessary to the normal operation of the employer's business or enterprise, but there is no requirement that the sole purpose of the employer be the promotion of religion or that the position be limited to the performance of religious functions.ⁿ¹⁶

An example of a bona fide requirement that an employee belong to a particular religion occurred in one case in which a job required a helicopter pilot to fly over Mecca. Under Saudi Arabian law, only Moslems may enter (or fly over) Mecca, and a non-Moslem who disobeys this law is subject to beheading if caught. The court held that requiring the pilot to convert to Islam as a condition of employment was a BFOQ.ⁿ¹⁷

In another case,ⁿ¹⁸ a medical school excluded Jewish doctors from an assignment to Saudi Arabia. The court addressed the BFOQ defense, although it said that the college had not directly raised it. Analyzing the defense, the court stated that it would be inapplicable under the facts raised in the case since the college had never tried to determine official Saudi policy regarding the Jewish doctors working there, nor whether there would have been difficulty in obtaining visas for them.ⁿ¹⁹

In another case,ⁿ²⁰ the court found that adherence to the Protestant faith was not a bona fide occupational requirement for teaching at a school despite the fact that a will that created and financed the school required that all teachers be Protestant. The court stated that except for the school's religious education teachers, as to whom Protestant affiliation was conceded to be a BFOQ, there was nothing to suggest that adherence to the Protestant faith was essential to the teaching of secular subjects. The court pointed out that a personal preference in a will has no more authority than one expressed by a living employer and could not create a BFOQ where the requirements for one were not met.ⁿ²¹

A defendant may be able to argue that it is entitled to impose a certain code of moral conduct on employees as a BFOQ under the exception allowing religious qualification if necessary. In one case, for example, a Catholic high school successfully asserted the BFOQ defense when it discharged a single teacher who became pregnant, based on the school's religious views and rules concerning premarital sex.ⁿ²²

[c] BFOQ as Applied to Sex

[i] Generally

The BFOQ exception for sex applies when the physical sex features of one sex or the other are necessary for the position (for example, a wet nurse), when the hiring of one sex is necessary for purposes of authenticity (for example, an acting role),ⁿ²³ or when the hiring of one sex or the other is necessary to maintain a general standard of privacy or decency for the job in question (for example, restroom attendants).ⁿ²⁴

The EEOC position, stated in its regulations, is that the BFOQ for sex is not applicable if based on

- (1) assumptions of the comparative employment characteristics of women in general;
- (2) stereotyped characterizations of the sexes, which consider characteristics generally attributed to the group, rather than considering individuals on the basis of their individual capacities; or
- (3) preferences of co-workers, the employer, or customers for a certain sex.ⁿ²⁵

However, not all circuits take the same position as the EEOC with regard to the second factor listed above. Some circuits, such as the Ninth Circuit,ⁿ²⁶ apply this individual standard based on the abilities of the particular person in question, while other circuits apply a standard based on the general abilities of the group.ⁿ²⁷ For discussion, *see* [iii], *below*.

[ii] Effect of True Sexual Characteristics

The BFOQ defense includes a "safety exception" that applies if sex or pregnancy actually interferes with an employee's ability to perform the job.ⁿ²⁸ This exception was first articulated in *Dothard v. Rawlinson*,ⁿ²⁹ a case involving a prison's refusal to hire a woman as a guard, at least partly because of a state regulation that prohibited the hiring of women in contact positions in the state prisons. Mindful that an employer may not refuse to hire an individual because of stereotypical assumptions concerning that person's sex,ⁿ³⁰ the United States Supreme Court nevertheless held that the BFOQ defense applied because the Alabama prison system is particularly hostile and it did not segregate sex offenders from the other prisoners. The Court reasoned that the use of women in guard positions would pose a threat to the security of the prison because of the likelihood of sexual assault on a female guard.ⁿ³¹ The Court pointed out that its decision was not based on a paternal attitude that a woman's safety would be at stake. It explained that normally the decision to take such a risk should be up to the woman; however, the essence of the guard position is to provide security in the prison, and the risk of a female guard becoming a victim of sexual assault could threaten the basic control, protection, and security of the prison.ⁿ³² The Court emphasized that it was the plaintiff's "very womanhood" that would directly undermine her capacity to provide the security that was the essence of the position of guard.ⁿ³³

Some subsequent cases have limited the *Dothard* holding to its facts, so that unless the situation involves the possibility of physical injury to a female applicant because of extremely dangerous surroundings and consequently the real possibility of a breach of security, the BFOQ will not apply.ⁿ³⁴ⁿ³⁵⁻⁴⁰

[iii] Stereotyped Characterizations

Other types of cases have involved stereotypes of certain traits of one sex or the other, as distinguished from the effect that the fact that the person is a male or female may have on the job in question. For example, a number of cases concerning the BFOQ for sex have involved generalizations concerning physical strength or other physical traits considered to be typical of one sex.ⁿ⁴¹

Differing standards have been formulated for application of the BFOQ for sex based on a trait that is identified with one sex. The Fifth Circuit, in *Weeks v. Southern Bell Telephone & Telegraph Company*,ⁿ⁴² upheld the application of the BFOQ exception with regard to the exclusion of women from a position because of a weight lifting requirement, stating that the standard was whether the defendant could prove it had reasonable cause to believe that all or substantially all women would be unable to perform safely and effectively the duties of the job involved. In *Rosenfeld v. Southern Pacific Company*,ⁿ⁴³ the Ninth Circuit rejected the *Weeks* standard, stating that the enumeration of that standard was not necessary to the holding in *Weeks* because the case had already gone to trial and it was only necessary for the court to decide whether the defendant had met its burden of proof for establishing a BFOQ. The standard set forth in *Rosenfeld* was that the defendant must establish whether or not employees are qualified for a position based on whether they have the individual capacity to perform the job and that employees must be given the opportunity to show that they do have that ability. The court stated that sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception. This standard is in accord with the EEOC standard for BFOQ based on sex set forth in the regulations.ⁿ⁴⁴

However, a later Ninth Circuit case seems to have backed away from the standard applied in *Rosenfeld*. In *Harriss v. Pan American World Airways, Inc.*,ⁿ⁴⁵ the court stated that it joined the Fourth Circuitⁿ⁴⁶ in adopting the standard developed by the Fifth Circuit for application of the BFOQ for sex. The court in *Harriss* stated that this standard

consisted of two parts. The first required a showing that the job qualification is reasonably necessary to the essence of the business.ⁿ⁴⁷ The second consisted of the *Weeks* requirement that the employer prove it had reasonable cause to believe that all or substantially all women would be unable to safely and efficiently perform the duties of the job.ⁿ⁴⁸ Applying the two-prong test, the court concluded that because of the safety risk involved in allowing pregnant flight attendants to continue flying, the BFOQ exception applied to the airline's policy of requiring pregnant flight attendants to take forced maternity leave.ⁿ⁴⁹ However, one case has suggested that a distinction may be drawn between *Harriss* and *Rosenfeld* in that *Harriss* involved a common carrier, which owes a higher standard of safety to its customers than does an ordinary employer, and thus that a lesser showing may be required to justify employment discrimination by a common carrier.ⁿ⁵⁰

[iv] Customer Preference

One of the leading cases on the subject of customer preference as a basis for the BFOQ exception is *Diaz v. Pan Am. World Airways, Inc.*ⁿ⁵¹ In that case, the Fifth Circuit Court of Appeals held that an airline could not restrict its hiring of flight attendants to women based on the airline's arguments that women had the proper "psychological make-up" for the job and on its customers' preference for women.ⁿ⁵² While recognizing that the public's expectation of finding one sex in a particular role might cause some initial difficulty in allowing the other sex to perform the job, the court nevertheless stated that it would be totally anomalous to allow the preferences and prejudices of customers to determine whether the sex discrimination was valid--especially since Title VII, to a great extent, was meant to overcome such prejudices.ⁿ⁵³ The court added that customer preference could be taken into account only when based on the company's inability to perform the primary function or service it offers.ⁿ⁵⁴ The Ninth Circuit Court of Appeals has also held that customers' stereotypical impressions of male and female roles do not qualify gender as a BFOQ.ⁿ⁵⁵

[v] Nonpregnancy as BFOQ

Title VII, as amended by the Pregnancy Discrimination Act (PDA),ⁿ⁵⁶ requires "women affected by pregnancy, childbirth, or related medical conditions [to] be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work" The United States Supreme Court has construed this provision, together with the BFOQ defense,ⁿ⁵⁷ as well as the PDA's legislative history and the case law,ⁿ⁵⁸ as essentially requiring an employer to treat an employee who is pregnant or *capable of becoming pregnant* the same as her male counterparts, unless her pregnancy or reproductive potential actually prevents her from performing the duties of her job.ⁿ⁵⁹ In effect, therefore, the PDA "contains a BFOQ standard of its own ..."ⁿ⁶⁰

Some courts, including the Ninth Circuit Court of Appeals, have used the "safety exception" discussed in [ii], *above*, to apply the BFOQ defense to employment policies requiring pregnant flight attendants to take maternity leave.ⁿ⁶¹ The rationale is that pregnancy could incapacitate a flight attendant in ways that might threaten the safe operation of the aircraft. Thus, the safety of the passengers, not the safety of the woman, is the proper consideration. The BFOQ defense applies because passenger safety is the "essence" of an airline's business.ⁿ⁶²

Courts have applied the BFOQ defense to other pregnancy scenarios. For example, in *Chambers v. Omaha Girls Club, Inc.*,ⁿ⁶³ in which an unmarried Girls Club staff member was discharged when she became pregnant, the Eighth Circuit Court of Appeals held that the club's "role model rule" banning single parent pregnancies among its staff members qualified as a BFOQ.ⁿ⁶⁴ Although the court acknowledged that it was borrowing from the analytical underpinnings of the business necessity defense, it explained that the facts relevant to establish BFOQ were the same as those that the district court relied on to find business necessity,ⁿ⁶⁵ and that the "manifest relationship" standard associated with business necessity also could apply to a claimed BFOQ. Thus, the court concluded that the "role model rule" was a BFOQ because it had a manifest relationship to the club's fundamental purpose of providing young women with "exposure to the greatest number of available positive options in life."ⁿ⁶⁶ For a discussion of the "manifest relationship" standard as it applies to the business necessity defense, *see* § 41.21[4].

[d] BFOQ as Applied to National Origin

The EEOC regulations state that the BFOQ for national origin should be strictly construed.ⁿ⁶⁷ Apparently no reported cases have applied the BFOQ for national origin defense.

[2] Under ADEA

BFOQ is also a defense under the ADEA, which provides that it is not unlawful for any employer to take any action otherwise prohibited if age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.ⁿ⁶⁸ Like the BFOQ exception under Title VII,ⁿ⁶⁹ the BFOQ exception for age discrimination is meant to be construed extremely narrowly.ⁿ⁷⁰

In *Western Air Lines, Inc. v. Criswell*,ⁿ⁷¹ the United States Supreme Court set forth the standard for the BFOQ defense in ADEA cases. The Court relied on *Usery v. Tamiami Trail Tours, Inc.*,ⁿ⁷² which held that an employer must establish that (1) the age qualifications are reasonably necessary to the essence of the business, and (2) the employer had reasonable cause to believe, on a factual basis, that all or substantially all persons over the age qualifications would be unable to perform safely and efficiently the duties of the job involved, or, alternatively, that individual testing of the employees is highly impractical or impossible.ⁿ⁷³

In another leading BFOQ case, *Trans World Airlines, Inc. v. Thurston*,ⁿ⁷⁴ the Supreme Court held that the BFOQ defense did not apply to an airline policy that prevented flight captains who had reached mandatory retirement (age 60) from automatically transferring to the position of flight engineer, a position which did not require retirement at age 60, while allowing other, younger flight captains to automatically transfer to the position of flight engineer. The Court stated that the BFOQ must apply to the particular position in question.ⁿ⁷⁵ In the case before the Court, the discriminatory transfer policy was not permissible under the BFOQ defense because age was not reasonably necessary for the position of flight engineer, even if it were reasonably necessary for the position of flight captain.ⁿ⁷⁶

According to an EEOC policy guideline construing *Thurston*, the ADEA requires an employer to offer an employee disqualified from a job or position because of an age-based BFOQ the same employment options it offers to other employees disqualified for non age-related reasons. The comparative aspect of the treatment is crucial; thus, if the employer offers no options to employees disqualified for non age-related reasons, it need not offer any options to an employee disqualified because of an age-based BFOQ. Furthermore, the disqualified employee must be qualified for the available option on the same basis as other employees who have been granted job options.ⁿ⁷⁷

[3] Under FEHA

The FEHA provides that a discriminatory employment practice is not unlawful if it is based on a BFOQ.ⁿ⁷⁸ The BFOQ defense under the FEHA applies to discrimination charges based on race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, age, and sexual orientation.ⁿ⁷⁹ However, the defense is extremely narrowly construed under the FEHA, as it is under Title VII and the ADEA.ⁿ⁸⁰ For example, even if the employer can demonstrate that certain jobs require members of one sex, the employer also has the burden of showing that because of the nature of the operation of the business it could not rearrange the job responsibilities in order to reduce the BFOQ necessity.ⁿ⁸¹

When applied to justify overt disparate treatment, the BFOQ defense has two components:^{n81.1}

- First, the employer must demonstrate that the occupational qualification is reasonably necessary to the normal operation of the particular business.
- Secondly, the employer must show that the categorical exclusion based on protected class

characteristic is justified, *i.e.*, that all or substantially all of the persons with the subject class characteristic fail to satisfy the occupational qualification.

Ordinarily, an employer asserts this defense to justify its categorical exclusion of all individuals having a particular class characteristic.

California cases have adopted the federal standard set forth in *Weeks v. Southern Bell Telephone & Telegraph Company*ⁿ⁸² for application of the BFOQ defense.ⁿ⁸³ The *Weeks* test requires that an employer prove that it had reasonable cause to believe that all or substantially all of the people excluded from a position would be unable to perform safely and efficiently the duties of the job involved.ⁿ⁸⁴ Thus, in *Johnson Controls, Inc. v. Fair Employment & Housing Com.*,ⁿ⁸⁵ a California court of appeal held that a "fetal protection" policy that barred fertile women from jobs involving lead exposure was not justified by the BFOQ defense because there was no evidence that such women could not perform the jobs. Furthermore, although *some* women became pregnant while working at the employer's facility, thus creating the *possibility* of harm to their offspring, that fact did not establish that "all or substantially all" female workers create such a risk. Thus, the "essence" of the business operation--making automotive batteries--was not undermined.ⁿ⁸⁶ In another case, a court rejected an employer's BFOQ defense because the employer excluded all people with back deficiencies from a position, even if they did not presently experience any disabling problems.ⁿ⁸⁷

In *Bohemian Club v. Fair Employment & Housing Com.*,ⁿ⁸⁸ a male club excluded women from employment based on privacy and male comradery concerns. The court of appeal held that the BFOQ was inapplicable because customer preference cannot be a basis for the exception and because the privacy concerns did not justify the exclusion in that enclosed shower and bathroom facilities were available for use by male club members.ⁿ⁸⁹

However, in one court of appeal case, the court upheld a city fire department's individually tailored maximum weight requirements on the basis that they were a BFOQ for the position of paramedic.ⁿ⁹⁰ The court stated that the need for medically reasonable body fat and weight limitations for paramedics was supported, not by stereotyped generalizations, but rather by statistical studies establishing that obesity decreases the strength, agility, endurance, and speed of paramedics and increases the risks of job-related injury, heart disease, stroke, and high blood pressure.ⁿ⁹¹

The FEHC regulations interpreting the FEHA state that privacy considerations may justify a BFOQ only under the following circumstances:ⁿ⁹²

1. If the job requires an employee to observe other individuals in a state of nudity or to conduct body searches; and
2. It would be offensive to prevailing social standards to have an individual of the opposite sex present; and
3. It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.

The regulations also set forth the following situations that will not justify the application of the BFOQ defense:ⁿ⁹³

1. A correlation between individuals of one sex and physical agility or strength;
2. A correlation between individuals of one sex and height;
3. Customer preference for employees of one sex;
4. The necessity for providing separate facilities for one sex; or

5. The fact that members of one sex have traditionally been hired to perform the particular type of job.

Legal Topics:

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

Labor & Employment Law Discrimination Age Discrimination Defenses & Exceptions Bona Fide Occupational Qualifications Labor & Employment Law Discrimination Disparate Impact General Overview Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 General Overview Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 Coverage & Definitions General Overview Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 Coverage & Definitions Employees

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-2(e).

(n2)Footnote 2. *Knight v. Nassau Cty. Civil Service Com'n* (2d Cir. 1981) 649 F.2d 157, 162 ; *see* 42 U.S.C. § 2000e-2(e).

(n3)Footnote 3. *Auto Workers v. Johnson Controls* (1991) 499 U.S. 187, 200-201, 111 S. Ct. 1196, 113 L. Ed. 2d 158, (BFOQ involving gender and fertility) ; *Dothard v. Rawlinson* (1977) 433 U.S. 321, 334, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (BFOQ involving gender) ; *Weeks v. Southern Bell Telephone & Telegraph Company* (5th Cir. 1969) 408 F.2d 228, 235 (BFOQ involving gender) ; *Kern v. Dynallectron Corp.* (N.D. Tex. 1983) 577 F. Supp. 1196, 1199 , *aff'd*, 746 F.2d 810 (5th Cir. 1984) (BFOQ involving religion); *see also* 29 C.F.R. §§ 1604.2(a) (sex as BFOQ), 1606.4 (national origin as BFOQ).

(n4)Footnote 4. *See Harriss v. Pan Am. World Airways* (9th Cir. 1980) 649 F.2d 670, 674 ; *see also* discussion in § 41.90.

(n5)Footnote 5. *See* 42 U.S.C. § 2000e-2(e); *E.E.O.C. v. Fremont Christian School* (9th Cir. 1986) 781 F.2d 1362, 1366-1367 (BFOQ defense not available when alleged discrimination consisted of employment policy of providing health insurance only to married men or single persons as heads of household, but not to married women); *see also* Larson, Employment Discrimination, ch. 4, § 13.00, pp. 4-1-4-2.

(n6)Footnote 6. *See Gifford v. Atchison, Topeka and Santa Fe Ry. Co.* (9th Cir. 1982) 685 F.2d 1149, 1155 .

(n7)Footnote 7. *See Weeks v. Southern Bell Telephone & Telegraph Company* (5th Cir. 1969) 408 F.2d 228, 235 .

(n8)Footnote 8. *Auto Workers v. Johnson Controls* (1991) 499 U.S. 187, 197-202, 111 S. Ct. 1196, 113 L. Ed. 2d 158 .

(n9)Footnote 9. *Auto Workers v. Johnson Controls* (1991) 499 U.S. 187, 202, 111 S. Ct. 1196, 113 L. Ed. 2d 158

(n10)Footnote 10. *Auto Workers v. Johnson Controls* (1991) 499 U.S. 187, 203-204, 111 S. Ct. 1196, 113 L. Ed. 2d 158 , *see Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400, 413-415, 105 S. Ct. 2743, 86 L. Ed. 2d 321 (construing ADEA BFOQ); *Dothard v. Rawlinson* (1977) 433 U.S. 321, 333, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (construing Title VII BFOQ).

(n11)Footnote 11. *See* discussion in § 41.95.

(n12)Footnote 12. *See Pettway v. American Cast Iron Pipe Company* (5th Cir. 1974) 494 F.2d 211, 244 , *cert. denied*, 439 U.S. 1115 (1979) .

(n13)Footnote 13. *See Harriss v. Pan Am. World Airways* (9th Cir. 1980) 649 F.2d 670, 674 .

(n14)Footnote 14. *See Chambers v. Omaha Girls Club, Inc.* (8th Cir. 1987) 834 F.2d 697, 701, 704 (applying business necessity "manifest relationship" standard to BFOQ analysis).

(n15)Footnote 15. *See 42 U.S.C. § 2000e-2(e)*; *see also* discussion in [a], *above*.

(n16)Footnote 16. *See Pime v. Loyola University of Chicago* (N.D. Ill. 1984) 585 F. Supp. 435, 443 (preferential hiring of Jesuit priests as teachers at Catholic-operated university upheld); *see also 42 U.S.C. § 2000e-2(e)(2)*. For discussion of a religious institution's right to hire members of a certain religion to teach, *see § 41.106*.

(n17)Footnote 17. *Kern v. Dynallectron Corp.* (N.D. Tex. 1983) 577 F. Supp. 1196, 1199, 1202 , *aff'd without op*, 746 F.2d 810 (5th Cir. 1984) .

(n18)Footnote 18. *Abrams v. Baylor College of Medicine* (5th Cir. 1986) 805 F.2d 528 .

(n19)Footnote 19. *See Abrams v. Baylor College of Medicine* (5th Cir. 1986) 805 F.2d 528, 533 .

(n20)Footnote 20. *EEOC v. Kamehameha Sch./Bishop Estate* (9th Cir. 1993) 990 F.2d 458 .

(n21)Footnote 21. *EEOC v. Kamehameha Sch./Bishop Estate* (9th Cir. 1993) 990 F.2d 458, 465-467 .

(n22)Footnote 22. *Dolter v. Wahlert High School* (N.D. Iowa 1980) 483 F. Supp. 266, 271 .

(n23)Footnote 23. *See 29 C.F.R. § 1604.2(a)(2)* (EEOC considers sex to be BFOQ if based on need for authenticity).

(n24)Footnote 24. *See Norwood v. Dale Maintenance Sys., Inc.* (N.D. Ill. 1984) 590 F. Supp. 1410, 1420-1423 (restroom cleaner); *Brooks v. ACF Industries, Inc.* (S.D. W. Va. 1982) 537 F. Supp. 1122, 1132 (female janitor in men's bath house); *Fesel v. Masonic Home of Delaware, Inc.* (D. Del. 1978) 447 F. Supp 1346, 1352-1354 , *aff'd without op*, 591 F.2d 1334 (3d Cir. 1979) (nursing assistant in home for elderly); *see also* Larson, Employment Discrimination, ch. 43 (Matthew Bender).

(n25)Footnote 25. *See 29 C.F.R. § 1604.2(a)(1)(i)-(iii)*.

(n26)Footnote 26. *See Rosenfeld v. Southern Pacific Co.* (9th Cir. 1971) 444 F.2d 1219, 1224-1225 .

(n27)Footnote 27. *See Weeks v. Southern Bell Telephone & Telegraph Co.* (5th Cir. 1969) 408 F.2d 228, 235 .

(n28)Footnote 28. *Auto Workers v. Johnson Controls* (1991) 499 U.S. 187 202, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (Title VII) .

(n29)Footnote 29. *Dothard v. Rawlinson* (1977) 433 U.S. 321, 97 S. Ct. 2720, 53 L. Ed. 2d 786 .

(n30)Footnote 30. *See [iii], below*.

(n31)Footnote 31. *Dothard v. Rawlinson* (1977) 433 U.S. 321, 333-335, 97 S. Ct. 2720, 53 L. Ed. 2d 786 .

(n32)Footnote 32. *Dothard v. Rawlinson* (1977) 433 U.S. 321, 335-336, 97 S. Ct. 2720, 53 L. Ed. 2d 786 .

(n33)Footnote 33. *Dothard v. Rawlinson* (1977) 433 U.S. 321, 336, 97 S. Ct. 2720, 53 L. Ed. 2d 786 .

(n34)Footnote 34. *See, e.g., Smith v. Fairman* (7th Cir. 1982) 678 F.2d 52, 54 ; *Gunther v. Iowa State Men's Reform.* (8th Cir. 1980) 612 F.2d 1079, 1085-1087 , *cert. denied*, 446 U.S. 966 (1980) ; *see also Torres v. Wis. Dep't of Health & Social Services* (7th Cir. 1988) 838 F.2d 944, 950 , *cert. denied*, 489 U.S. 1017 (1989) (*Dothard* security rationale did not apply to refusal to employ male correctional officers at prison for women).

(n35)Footnote 35-40. [Reserved]

(n36)Footnote 41. *See, e.g., Rosenfeld v. Southern Pacific Co. (9th Cir. 1971) 444 F.2d 1219, 1223-1227* (exclusion of women for certain positions because of physical demands of job deemed unsuitable for women); *Weeks v. Southern Bell Telephone & Telegraph Co. (5th Cir. 1969) 408 F.2d 228, 235* (weight lifting restriction for female employees).

(n37)Footnote 42. *Weeks v. Southern Bell Telephone & Telegraph Co. (5th Cir. 1969) 408 F.2d 228, 235* .

(n38)Footnote 43. *Rosenfeld v. Southern Pacific Co. (9th Cir. 1971) 444 F.2d 1219, 1224* .

(n39)Footnote 44. *See 29 C.F.R. § 1604.2*.

(n40)Footnote 45. *Harriss v. Pan Am. World Airways (9th Cir. 1980) 649 F.2d 670, 676* .

(n41)Footnote 46. *See Arritt v. Grisell (4th Cir. 1977) 567 F.2d 1267, 1271* (dealing with BFOQ under ADEA).

(n42)Footnote 47. *Harriss v. Pan Am. World Airways (9th Cir. 1980) 649 F.2d 670, 676* (citing *Usery v. Tamiami Trail Tours, Inc. (5th Cir. 1976) 531 F.2d 224, 236* and *Diaz v. Pan Am. World Airways, Inc. (5th Cir. 1971) 442 F.2d 385, 388*) ; *see also Gifford v. Atchison, Topeka and Santa Fe Ry. Co. (9th Cir. 1982) 685 F.2d 1149, 1155* (employer must prove that weight-lifting capability was actually reasonably necessary to particular position).

(n43)Footnote 48. *Harriss v. Pan Am. World Airways (9th Cir. 1980) 649 F.2d 670, 676* (citing *Weeks v. Southern Bell Telephone & Telegraph Company (5th Cir. 1969) 408 F.2d 228, 235*) .

(n44)Footnote 49. *Harriss v. Pan Am. World Airways (9th Cir. 1980) 649 F.2d 670, 677* . For discussion of nonpregnancy as BFOQ, *see [v], below*.

(n45)Footnote 50. *See Sterling Transit Co. v. Fair Employment Practice Com. (1981) 121 Cal. App. 3d 791, 797, 175 Cal. Rptr. 548* (distinguishing *Harriss*, in which not all or substantially all class members were shown to be unable to safely and efficiently perform job duties, on basis that *Harriss* involved common carrier and was thus subject to different standard).

(n46)Footnote 51. *Diaz v. Pan Am. World Airways, Inc. (5th Cir. 1971) 442 F.2d 385* .

(n47)Footnote 52. *Diaz v. Pan Am. World Airways, Inc. (5th Cir. 1971) 442 F.2d 385, 388-389* .

(n48)Footnote 53. *Diaz v. Pan Am. World Airways, Inc. (5th Cir. 1971) 442 F.2d 385, 389* .

(n49)Footnote 54. *Diaz v. Pan Am. World Airways, Inc. (5th Cir. 1971) 442 F.2d 385, 389* .

(n50)Footnote 55. *Fernandez v. Wynn Oil Co. (9th Cir. 1981) 653 F.2d 1273, 1276* (rejecting BFOQ based on claim that South American clients preferred conducting business with male employees); *see Blake v. City of Los Angeles (9th Cir. 1979) 595 F.2d 1367* .

(n51)Footnote 56. *42 U.S.C. § 2000e(k)*.

(n52)Footnote 57. *See 42 U.S.C. § 2000e-2(e); see also [a], above*.

(n53)Footnote 58. *See, e.g., California Federal S. & L. Ass'n v. Guerra (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613* (PDA mandates that pregnant employees must be treated same for all employment-related purposes as nonpregnant employees similarly situated with respect to their ability or inability to work).

(n54)Footnote 59. *See Auto Workers v. Johnson Controls (1991) 499 U.S. 187, 204-206, 111 S. Ct. 1196, 113 L.*

Ed. 2d 158 ("fetal protection" policy prohibiting employment of fertile women in jobs that expose them to toxic materials that allegedly endanger their unborn children).

(n55)Footnote 60. *Auto Workers v. Johnson Controls* (1991) 499 U.S. 187, 204-205, 111 S. Ct. 1196, 113 L. Ed. 2d 158 .

(n56)Footnote 61. *See, e.g., Levin v. Delta Air Lines* (5th Cir. 1984) 730 F.2d 994 ; *Harriss v. Pan Am. World Airways* (9th Cir. 1980) 649 F.2d 670 ; *Condit v. United Air Lines, Inc.* (4th Cir. 1977) 558 F.2d 1176 ; *In re Nat. Airlines, Inc.* (S.D. Fla. 1977) 434 F. Supp. 249, 263 , *aff'd*, 905 F.2d 1457 (11th Cir. 1990) (no BFOQ until 20th week of pregnancy).

(n57)Footnote 62. *See Levin v. Delta Air Lines* (5th Cir. 1984) 730 F.2d 994, 997 ; *Harriss v. Pan Am. World Airways* (9th Cir. 1980) 649 F.2d 670, 676-677 ; *see also Auto Workers v. Johnson Controls* (1991) 499 U.S. 187, 202-203, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (citing *Harriss* application of "safety exception" with approval).

(n58)Footnote 63. *Chambers v. Omaha Girls Club, Inc.* (8th Cir. 1987) 834 F.2d 697 .

(n59)Footnote 64. *Chambers v. Omaha Girls Club, Inc.* (8th Cir. 1987) 834 F.2d 697, 703 .

(n60)Footnote 65. *See Chambers v. Omaha Girls Club, Inc.* (8th Cir. 1987) 834 F.2d 697, 701, 703, 704 .

(n61)Footnote 66. *See Chambers v. Omaha Girls Club, Inc.* (8th Cir. 1987) 834 F.2d 697, 701, 704 .

(n62)Footnote 67. *See 29 C.F.R. § 1606.4.*

(n63)Footnote 68. *See 29 U.S.C. § 623(f)(1).*

(n64)Footnote 69. *See 42 U.S.C. § 2000e-2(e).* For discussion, *see* [1], *above*.

(n65)Footnote 70. *Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400, 412, 105 S. Ct. 2743, 86 L. Ed. 2d 321 ; *see 29 C.F.R. § 1625.6(a).*

(n66)Footnote 71. *Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400, 413-415, 105 S. Ct. 2743, 86 L. Ed. 2d 321 .

(n67)Footnote 72. *Usery v. Tamiami Trail Tours, Inc.* (5th Cir. 1976) 531 F.2d 224, 235-236 .

(n68)Footnote 73. *Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400, 413-415, 105 S. Ct. 2743, 86 L. Ed. 2d 321 ; *see Usery v. Tamiami Trail Tours, Inc.* (5th Cir. 1976) 531 F.2d 224, 235-236 ; *see also 29 C.F.R. § 1625.6(b); E.E.O.C. v. Boeing Co.* (9th Cir. 1988) 843 F.2d 1213, 1214, 1217-1220 .

(n69)Footnote 74. *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 122-124, 105 S. Ct. 613, 83 L. Ed. 2d 523 .

(n70)Footnote 75. *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 122, 105 S. Ct. 613, 83 L. Ed. 2d 523 .

(n71)Footnote 76. *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 123, 105 S. Ct. 613, 83 L. Ed. 2d 523 .

(n72)Footnote 77. *See EEOC Compliance Manual (CCH) § 801, P 6523.*

(n73)Footnote 78. *Gov. Code § 12940; Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal. App. 3d 1, 19, 231 Cal. Rptr. 769 .

(n74)Footnote 79. *See Gov. Code § 12940(a).*

(n75)Footnote 80. *Johnson Controls, Inc. v. Fair Employment & Housing Com. (1990) 218 Cal. App. 3d 517, 541, 267 Cal. Rptr. 158*; *Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 19, 231 Cal. Rptr. 769*; *see Dothard v. Rawlinson (1977) 433 U.S. 321, 334, 97 S. Ct. 2720, 53 L. Ed. 2d 786*; *see also [1][a], [2], above, respectively.*

(n76)Footnote 81. *Johnson Controls, Inc. v. Fair Employment & Housing Com. (1990) 218 Cal. App. 3d 517, 541, 267 Cal. Rptr. 158*; *Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 19, 231 Cal. Rptr. 769*; *see 2 Cal. Code Reg. § 7290.8(c).*

(n77)Footnote 81.1. *Johnson Controls, Inc. v. Fair Employment & Housing Com. (1990) 218 Cal. App. 3d 517, 541, 267 Cal. Rptr. 158*.

(n78)Footnote 82. *Weeks v. Southern Bell Tel. & Tel. Company (5th Cir. 1969) 408 F.2d 228, 235*.

(n79)Footnote 83. *See Johnson Controls, Inc. v. Fair Employment & Housing Com. (1990) 218 Cal. App. 3d 517, 540-541, 267 Cal. Rptr. 158*; *Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 19, 231 Cal. Rptr. 769*; *County of Alameda v. Fair Employment & Housing Com. (1984) 153 Cal. App. 3d 499, 505-506, 200 Cal. Rptr. 381*; *Sterling Transit Co. v. Fair Employment Practice Com. (1981) 121 Cal. App. 3d 791, 796-797, 175 Cal. Rptr. 548*.

(n80)Footnote 84. *Weeks v. Southern Bell Tel. & Tel. Company (5th Cir. 1969) 408 F.2d 228, 235*; *see discussion in [1][a], above.*

(n81)Footnote 85. *Johnson Controls, Inc. v. Fair Employment & Housing Com. (1990) 218 Cal. App. 3d 517, 267 Cal. Rptr. 158*.

(n82)Footnote 86. *Johnson Controls, Inc. v. Fair Employment & Housing Com. (1990) 218 Cal. App. 3d 517, 542, 267 Cal. Rptr. 158*.

(n83)Footnote 87. *Sterling Transit Co. v. Fair Employment Practice Com. (1981) 121 Cal. App. 3d 791, 796-797, 175 Cal. Rptr. 548*.

(n84)Footnote 88. *Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 231 Cal. Rptr. 769*.

(n85)Footnote 89. *Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 19-23, 231 Cal. Rptr. 769*.

(n86)Footnote 90. *Hegwer v. Board of Civil Service Comrs. (1992) 5 Cal. App. 4th 1011, 1025, 7 Cal. Rptr. 2d 389*.

(n87)Footnote 91. *Hegwer v. Board of Civil Service Comrs. (1992) 5 Cal. App. 4th 1011, 1025, 7 Cal. Rptr. 2d 389*; *see also McMillen v. Civil Service Com. (1992) 6 Cal. App. 4th 125, 130-131, 8 Cal. Rptr. 2d 548 (ambulance driver weight limitations upheld based on health and safety concerns, but BFOQ language not used).*

(n88)Footnote 92. *2 Cal. Code Reg. § 7290.8(b)(1)-(3).*

(n89)Footnote 93. *2 Cal. Code Reg. § 7290.8(a)(1)-(5).*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law § 41.95

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.95 Business Necessity/Job-Relatedness

[1] Generally

As discussed in § 41.21[4], after a plaintiff establishes the elements of a prima facie case of unlawful discrimination under the disparate impact theory of liability, the focus shifts to the business justification the employer offers for its use of a challenged employment practice. At this stage, under Title VII, the employer must either refute the plaintiff's evidence and demonstrate that the employment practice does not have a disparate impact¹ or demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity."² The employer has both the burden of producing evidence and the burden of persuasion regarding this issue.³ Proof that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination (i.e., disparate treatment) under Title VII.⁴

Title VII does not contain express definitions of "business necessity" or "job related," but one of the express purposes of the Civil Rights Act of 1991⁵ was to codify the concepts of "business necessity" and "job related" enunciated by the U.S. Supreme Court in *Griggs v. Duke Power Co.*,⁶ and in other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*.⁷ In *Wards Cove*, the Court had indicated that the an employment practice with a disparate impact was justified under Title VII if it merely "serve[d], in a significant way, the legitimate employment goals of the employer."⁸ By comparison, *Griggs* and lower federal court decisions prior to *Wards Cove* had held that an employment practice causing a disparate impact must be justified by "business necessity."⁹ The "business necessity" standard and the concept of "job-relatedness" are generally interrelated. In fact, Ninth Circuit cases use the terms interchangeably.¹⁰ The standard applied by the Ninth Circuit is that the practice passes the business necessity/job-relatedness test if it measures traits that are important to successful job performance; the practice need not be proven necessary to the operation of the business.¹¹

The ADA expressly includes a business necessity defense. Under the ADA, it is a defense to a charge of discrimination based on the use of qualification standards, employment tests, or other selection criteria,¹² that the challenged selection criterion is job-related and consistent with business necessity,^{12.1} and the performance cannot be

accomplished with reasonable accommodation required under the ADA.ⁿ¹³ Effective January 1, 2009, an employer must show that qualification standards, employment tests, or other selection criteria based specifically on an individual's uncorrected vision are job-related for the position in question and consistent with business necessity.^{n13.1} The ADA's business necessity defense may be asserted to defend against disparate treatment, disparate impact, and failure to accommodate claims under the ADA.^{n13.2} The ADA's version of the business necessity defense does not incorporate concepts from both the traditional Title VII business necessity defense to disparate impact claims and the BFOQ defense in Title VII and Age Discrimination in Employment Act (ADEA) disparate treatment challenges to a proscribed classification.ⁿ¹⁴

Under the ADA's business necessity defense, the employer has the burden of proving that discriminatory qualification standards satisfy the business necessity defense.^{n14.1} The standard is high and requires more of a showing than is needed to excuse an employer from accommodating a specific employee under the undue hardship standard.ⁿ¹⁵

To successfully assert the business necessity defense to an allegedly discriminatory application of a qualification standard, test or selection criteria, an employer bears the burden of showing that the qualification standard is each of the following:^{n15.1}

- Job-related.
- Consistent with business necessity.
- That performance cannot be accomplished by reasonable accommodation.

To show job-relatedness, the employer must demonstrate that the qualification standard fairly and accurately measures the individual's actual ability to perform the essential functions of the job.^{n15.2} When every person excluded by a qualification standard is a member of a protected class, *i.e.*, disabled persons, the employer must demonstrate a predictive or significant correlation between the qualification and performance of the job's essential functions.^{n15.3} To show that the disputed qualification standard is consistent with business necessity, the employer must show that it substantially promotes the business's needs.^{n15.4} To show that performance cannot be accomplished by reasonable accommodation, the employer must demonstrate either that no reasonable accommodation currently available would cure the performance deficiency or that reasonable accommodation poses an undue hardship on the employer.^{n15.5} The ADA does not provide a comprehensive recitation of what is encompassed by a reasonable accommodation, but gives some examples of what its terms may include.^{n15.6} The employer must show that the qualification standard substantially promotes the business's needs, is necessary, and is related to the specific skills and physical requirements of the position to which it applies.ⁿ¹⁶ However, before an employee can challenge an employer's qualification standard, the employee must first prove that he or she is a "qualified individual" within the meaning of the ADA, *i.e.*, one who can perform the job's essential functions with or without reasonable accommodation.^{n16.1} On the other hand, when an employer asserts a blanket safety-based qualification standard beyond the essential job function, which is not mandated by law and which screens out or tends to screen out an individual with a disability, the employer, not the employee, bears the burden of showing the higher qualification standard is job-related and consistent with business necessity, and that performance cannot be achieved through reasonable accommodation.^{n16.2} The fact that the qualification standard was negotiated by the employer and a labor union is not sufficient, by itself, to constitute business necessity.ⁿ¹⁷

It may also be a defense to an employee's charge of a medical examination having been requested for prohibited purposes that the medical examination is job-related and consistent with business necessity for the purpose of determining whether an employee is able to work.ⁿ¹⁸ In addition, it is a defense to a charge of discrimination under the ADA generally that a uniformly applied standard, criterion, or policy has a disparate impact on a disabled individual (or class), that the challenged standard has been shown to be job-related and consistent with business necessity, and the performance cannot be accomplished with reasonable accommodation required under the ADA.ⁿ¹⁹ For discussions relating to employee selection criteria and preemployment testing generally, *see* §§ 41.42 and 41.45. For a discussion of

reasonable accommodation under the ADA, *see* § 41.51[2][a].

The ADA also declares that the term "qualification standards" may include a requirement that an individual not pose a direct threat to the health or safety of others in the workplace.ⁿ²⁰ Presumably, therefore, an employer with such a requirement may have a business necessity defense if the employer can prove that a disabled individual poses such a threat.ⁿ²¹ For further discussion of the ADA "health or safety" defense, *see* § 41.97[2].

Courts have held that business necessity is a defense in ADEA disparate impact cases.ⁿ²² However, courts must interpret California statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, with the goal of protecting older workers as individuals and as a group.ⁿ²³

Business necessity is also a defense under the FEHA,ⁿ²⁴ as is job-relatedness.ⁿ²⁵ The California courts also seem to treat the two concepts interchangeably. In *City and County of San Francisco v. Fair Employment & Housing Com.*,ⁿ²⁶ the court of appeal stated that once the racially adverse impact of the employment practice is established, the burden of proof shifts to the defendant to prove the practice is job-related, and that to meet that burden the defendant must demonstrate a business necessity for its use.

For further discussion of the "business necessity" standard, *see* § 41.21[4].

[2] Preemployment Tests

The seminal case in the area of business necessity, *Griggs v. Duke Power Co.*,ⁿ²⁷ arose in the context of an employment examination process that had a discriminatory impact on African-Americans. The test, given to all employees wishing to transfer to a skilled position, required the attainment of the national median score on two general intelligence and comprehension exams. The tests were intended to improve the overall quality of the employer's work force, but there had been no meaningful study of their relationship to job-performance ability. The Supreme Court held that a scored test must measure whether the person is suitable for the particular position and not measure the qualifications of the person in the abstract.ⁿ²⁸

Similarly, in *Albemarle Paper Co. v. Moody*,ⁿ²⁹ the Supreme Court held that discriminatory tests are impermissible unless shown, by professionally acceptable standards, to predict or significantly correlate with job performance. Employers may determine whether their employment tests are job-related by the use of professional validation studies following the standards set forth by the EEOC on the use of such validation studies in its Uniform Guidelines on Employment Selection Procedures or by other professionally acceptable methods of validation.ⁿ³⁰

For further discussion of validity studies, *see* § 41.45.

[2A] Medical Testing Of Employees

The ADA provides that covered entities shall not require medical examinations of their employees in order to determine whether the employee is an individual with a disability or the nature and severity of a disability unless the examination is job-related and consistent with business necessity.ⁿ³¹ However, according to the Ninth Circuit, if health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination designed to determine the employee's ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability.ⁿ³² Thus, in *Yin v. State of Cal.*,ⁿ³³ the court found that the employer met the business necessity exception in requiring a medical examination of an employee whose excessive absenteeism and on-the-job illness had taken a serious toll on her productivity and overall job performance.

■ CONSULTANT'S COMMENT:

Although the *Yin* casen³⁴ cited in the text involves public employment, the portions of the opinion which concern the ADAⁿ³⁵ are equally applicable to private employers. Section 12112(d)(4)(A) of the ADA prohibits an employer from requiring an employee to have a medical examination or from making medical inquiries regarding an employee, "unless such examination or inquiry is shown to be job-related and consistent with business necessity." The question which arose in *Yin* from this passage was: Under what circumstances may an employer compel an employee to undergo a medical examination to determine his or her ability to perform the essential functions of his or her job?

The decision of the panel arguably engrafts a judicially-created exception upon Section 12112(d)(4)(A). On first reading, the opinion seems to create a workable rule: "We conclude that when health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability." On closer inspection, however, a number of issues arise. For example, many employers require "fitness for duty" examinations at the end of medical leaves of absence. Is a medical condition which has required a leave from work a condition which has had "a substantial and injurious impact on an employee's job performance?" Moreover, some employers require "reasonable suspicion" drug and alcohol testing. Is a person who exhibits signs of impairment from drugs or alcohol someone who has exhibited "a substantial and injurious impact on [his or her] job performance?"

In the final analysis, the ADA permits medical examinations and inquiries which are job-related and consistent with business necessity. The statute does not say anything about the need to prove the degree of impact upon employee job performance ("substantial and injurious") as a precondition to the right to require such examinations. Indeed, the statute contains definitions of "job-related" and "business necessity" which are the product of years of case law and statutory development. Those definitions provide their own safeguards upon cavalier employer decision making. Thus, the holding, while easily satisfied on the facts presented to the court, is potentially more restrictive than is warranted by the ADA itself. It is not clear from the opinion why the imposition of such a limitation was necessary or how it can withstand judicial scrutiny in the long run. *Commentary by Kirby Wilcox.*

[3] Experience Requirements

Many cases involving the defense of business necessity have arisen in the context of facially neutral requirements for a certain amount of experience for the position in question. In such cases, the court looks to the amount of skill required for the position and the economic and human risks involved.

If the job requires a small amount of skill, and the consequences of hiring an untrained applicant are insignificant, the court should closely examine the criteria that discriminate and should place a heavy burden on the employer to demonstrate that the criteria are job-related. Conversely, when the job clearly requires a high degree of skill, and the risk involved is great, the employer should bear a correspondingly lighter burden to show the criteria are job-related.ⁿ³⁶

For example, in one casen³⁷ the Tenth Circuit Court of Appeals held to be valid the requirements of a college degree and a minimum of 500 flight hours for the position of flight officer because the position required a great degree of skill, and the risks both to safety and to property were great.

However, in *E.E.O.C. v. Insurance Co. of North America*,ⁿ³⁸ the Ninth Circuit Court of Appeals held that a refusal to hire on the basis of "overqualification" did not constitute age discrimination in violation of the ADEA. The court cautioned that overqualification is vulnerable to serving as a proxy for age discrimination, but that the employer had demonstrated an objective criterion (danger of undue imposition on customer time) that was not age related.ⁿ³⁹

For additional discussion of experience requirements, *see* § 41.42[2][i]. For discussion of validation, *see* § 41.45[2].

Legal Topics:

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

Labor & Employment Law Discrimination Disparate Impact General Overview Labor & Employment
Law Discrimination Disparate Impact Employment Practices General Overview Labor & Employment
Law Discrimination Disparate Treatment General Overview Labor & Employment Law Discrimination Title VII of the
Civil Rights Act of 1964 General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-2(k)(1)(B)(ii); *See also* § 41.21[3] (what constitutes "disparate impact").

(n2)Footnote 2. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

(n3)Footnote 3. 42 U.S.C. §§ 2000e(m), 2000e-2(k)(1)(A)(i). The provision regarding burden of proof, which was added by the Civil Rights Act of 1991 (Pub. L. No. 102-166, § 104), was intended to overrule the U.S. Supreme Court's decision in *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 659-660, 109 S. Ct. 2115, 104 L. Ed. 2d 733, in which the Court had held that the employer had only the burden of producing evidence regarding a business justification for the challenged employment practice and that the burden of persuasion remained at all times with the plaintiff.

(n4)Footnote 4. 42 U.S.C. § 2000e-2(k)(2). For discussion of disparate treatment, *see* §§ 41.10-41.11.

(n5)Footnote 5. *See* Pub. L. No. 102-166, § 3(2); *see also* Pub. L. No. 102-166, § 2(2) (congressional finding that *Wards Cove* decision had weakened the scope and effectiveness of federal civil rights protection).

(n6)Footnote 6. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158.

(n7)Footnote 7. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733.

(n8)Footnote 8. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 659, 109 S. Ct. 2115, 104 L. Ed. 2d 733. However, it has been held that the Civil Rights Act of 1991 does not apply retroactively to the *Wards Cove* case itself, even though the holding in *Wards Cove* regarding business necessity was effectively reversed by the Civil Rights Act of 1991. *See Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1993) 10 F.3d 1485, 1496.

(n9)Footnote 9. *See Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158; *see also Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280; *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421; *Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1276, 1278.

(n10)Footnote 10. *See Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1276; *See also* § 41.03[2][d].

(n11)Footnote 11. *See Contreras v. City of Los Angeles* (9th Cir. 1981) 656 F.2d 1267, 1275-1280.

(n12)Footnote 12. *See* 42 U.S.C. § 12112(b)(6); *see also* 29 C.F.R. § 1630.10.

(n13)Footnote 12.1. *See, e.g., Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 889-892 (police department could not establish as requirements for desirable specialized assignment the need to perform patrol service during the year preceding and the year following specialized assignment).

(n14)Footnote 13. 42 U.S.C. § 12113(a); 29 C.F.R. § 1630.15(b)(1). *See Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 995 (although shorthand reference is "business necessity" defense, defense also incorporates

requirements of job-relatedness and reasonable accommodation).

(n15)Footnote 13.1. *42 U.S.C. § 12113(c)*.

(n16)Footnote 13.2. *Bates v. United Parcel Service, Inc. (9th Cir. 2007) 511 F.3d 974, 995, n.10*, agreeing with *Morton v. United Parcel Service, Inc. (9th Cir. 2001) 272 F.3d 1249, 1260-1261* (discussing interplay among *42 U.S.C. § 12112(b)*'s various definitions of discrimination and *§ 12113(a)*'s provision of business necessity defense). *See Raytheon Co. v. Hernandez (2003) 540 U.S. 44, 52-53, 124 S. Ct. 513, 157 L. Ed. 2d 357* (recognizing applicability of business necessity defense to both disparate treatment and disparate impact claims under ADA).

(n17)Footnote 14. *Bates v. United Parcel Service, Inc. (9th Cir. 2007) 511 F.3d 974, 994-998*, overruling *Morton v. United Parcel Service, Inc. (9th Cir. 2001) 272 F.3d 1249, 1260-1263*.

(n18)Footnote 14.1. *Morton v. United Parcel Service, Inc. (9th Cir. 2001) 272 F.3d 1249, 1257 n.8, 1258*, overruled on other grounds in *Bates v. United Parcel Service, Inc. (9th Cir. 2007) 511 F.3d 974, 995-998*; *Cripe v. City of San Jose (9th Cir. 2001) 261 F.3d 877, 890*.

(n19)Footnote 15. *Cripe v. City of San Jose (9th Cir. 2001) 261 F.3d 877, 890*. For discussion of undue hardship, *see § 41.51[4][a]*.

(n20)Footnote 15.1. *42 U.S.C. § 12113(a)*; *Bates v. United Parcel Service, Inc. (9th Cir. 2007) 511 F.3d 974, 995-998* (because district court based its rationale on now-overruled framework, Ninth Circuit vacated finding employer violated rights under ADA, vacated injunction, and remanded for proceedings consistent with its opinion, leaving to district court determination whether additional evidence would be appropriate in light of significant change in legal landscape of case).

(n21)Footnote 15.2. *Bates v. United Parcel Service, Inc. (9th Cir. 2007) 511 F.3d 974, 996*.

(n22)Footnote 15.3. *Bates v. United Parcel Service, Inc. (9th Cir. 2007) 511 F.3d 974, 996*, citing *Albemarle Paper Co. v. Moody (1975) 422 U.S. 405, 431, 95 S. Ct. 2362, 45 L. Ed. 2d 280*.

(n23)Footnote 15.4. *Bates v. United Parcel Service, Inc. (9th Cir. 2007) 511 F.3d 974, 996*.

(n24)Footnote 15.5. *Bates v. United Parcel Service, Inc. (9th Cir. 2007) 511 F.3d 974, 996-997*.

(n25)Footnote 15.6. *Bates v. United Parcel Service, Inc. (9th Cir. 2007) 511 F.3d 974, 996-997*. *See 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2); see also 29 C.F.R. §§ 1630.2(o)(1)* (defining "reasonable accommodation" to include modifications or adjustments to application processes, work environment, and access to benefits and privileges of employment).

(n26)Footnote 16. *Cripe v. City of San Jose (9th Cir. 2001) 261 F.3d 877, 890*.

(n27)Footnote 16.1. *Bates v. United Parcel Service, Inc. (9th Cir. 2007) 511 F.3d 974, 989*. For discussion of "qualified individual," *see § 41.32[2][a], above*.

(n28)Footnote 16.2. *Bates v. United Parcel Service, Inc. (9th Cir. 2007) 974, 992-993*. *See 42 U.S.C. § 12113(a)*.

(n29)Footnote 17. *See Cripe v. City of San Jose (9th Cir. 2001) 261 F.3d 877, 891-893*.

(n30)Footnote 18. *See Yin v. State of Cal. (9th Cir. 1996) 95 F.3d 864, 867-868, cert. denied, 519 U.S. 1114 (1997)*; *see also [2][a], below*.

(n31)Footnote 19. *29 C.F.R. § 1630.15(c)*.

(n32)Footnote 20. 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2).

(n33)Footnote 21. Cf. 42 U.S.C. § 12113(a), (b).

(n34)Footnote 22. See, e.g., *Geller v. Markham* (2d Cir. 1980) 635 F.2d 1027, 1032 .

(n35)Footnote 23. Gov. Code § 12941 (statute does not limit affirmative defenses traditionally available in employment discrimination cases, such as those set forth in 2 Cal. Code Reg. § 7286.7).

(n36)Footnote 24. See 2 Cal. Code Reg. § 7286.7(b).

(n37)Footnote 25. See 2 Cal. Code Reg. §§ 7286.7(c), 7287.4(e).

(n38)Footnote 26. *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 989, 236 Cal. Rptr. 716 .

(n39)Footnote 27. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n40)Footnote 28. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 428, 431, 436, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n41)Footnote 29. *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 431, 95 S. Ct. 2362, 45 L. Ed. 2d 280 .

(n42)Footnote 30. See 29 C.F.R. §§ 1607.1-1607.18 (Uniform Guidelines); *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1427-1428 . For discussion of Guidelines, see § 41.21[3][b] and ch. 40, pt. C.

(n43)Footnote 31. See 42 U.S.C. § 12112(d)(4)(A); see also *Fredenburg v. Contra Costa County Dep't of Health* (9th Cir. 1999) 172 F.3d 1176, 1182-1183 (employees need not prove that they are qualified individuals with a disability to challenge scope of medical examinations under ADA; covered entity (employer) has burden to show that examination is job-related and consistent with business necessity).

(n44)Footnote 32. See *Yin v. State of Cal.* (9th Cir. 1996) 95 F.3d 864, 867-868 , cert. denied, 519 U.S. 1114 (1997) .

(n45)Footnote 33. *Yin v. State of Cal.* (9th Cir. 1996) 95 F.3d 864, 867-868 , cert. denied, 519 U.S. 1114 (1997) .

(n46)Footnote 34. *Yin v. State of Cal.* (9th Cir. 1996) 95 F.3d 864 , cert. denied, 519 U.S. 1114 (1997) .

(n47)Footnote 35. 42 U.S.C. § 12101 et seq.

(n48)Footnote 36. *Spurlock v. United Airlines, Inc.* (10th Cir. 1972) 475 F.2d 216, 219 ; see *E.E.O.C. v. Local 14, Union of Op. Eng.* (2d Cir. 1977) 553 F.2d 251, 256 .

(n49)Footnote 37. *Spurlock v. United Airlines, Inc.* (10th Cir. 1972) 475 F.2d 216, 219 .

(n50)Footnote 38. *E.E.O.C. v Insurance Co. of North America* (9th Cir. 1995) 49 F.3d 1418 .

(n51)Footnote 39. See *E.E.O.C. v Insurance Co. of North America* (9th Cir. 1995) 49 F.3d 1418, 1420 .



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law § 41.96

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.96 Communist Party Affiliation

Title VII provides that the phrase "unlawful employment practice" does not apply to actions taken by an employer with respect to an individual who is a member of the Communist Party or other organization required to register as a Communist front organization.ⁿ¹

Legal Topics:

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

Labor & Employment LawDiscriminationDisparate TreatmentGeneral OverviewLabor & Employment
LawDiscriminationTitle VII of the Civil Rights Act of 1964General OverviewLabor & Employment
LawDiscriminationTitle VII of the Civil Rights Act of 1964Coverage & DefinitionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See 42 U.S.C. § 2000e-2(f).*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
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2-41 California Employment Law § 41.97

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.97 Employee's Inability to Perform Job or Danger to Health and Safety

[1] Under FEHA

Under the FEHA, employers may not discriminate against employees or applicants because of physical or mental disability or medical condition.ⁿ¹ However, an employer is justified in refusing to hire or discharging an employee because of a physical or mental disability or a medical condition if the employee cannot perform his or her essential duties at all, or cannot perform those duties in a manner that would not endanger his or her health or safety or that of others, even with reasonable accommodation.ⁿ² The FEHA defines "essential functions" as the fundamental duties of the employment position the individual with a disability holds or desires. "Essential functions" do not include the marginal functions of the position.ⁿ³ The employer has the burden of proving this defense by a preponderance of the evidence.ⁿ⁴

Under the FEHA, a job function may be considered essential for any of several reasons, including, but not limited to, the following:ⁿ⁵

1. The function may be essential because the reason the position exists is to perform the function;
2. The function may be essential because of the limited number of employees available among whom the performance of that job function may be distributed;
3. The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

Evidence of whether a particular function is essential includes, but is not limited to, the following:ⁿ⁶

1. The employer's judgment regarding which functions are essential;

2. Written job descriptions prepared before advertising or interviewing applicants for the job;
3. The amount of time spent on the job performing the function;
4. The consequences of not requiring the incumbent to perform the function;
5. The terms of a collective bargaining agreement;
6. The work experiences of past incumbents in the job; and
7. The current work experiences of incumbents in similar jobs.

The FEHC regulations interpreting the FEHA break this defense down into three elements, as follows: (1) inability to perform (after reasonable accommodation has been made); (2) danger to the health or safety of the disabled individual; and (3) danger to the health and safety of others.ⁿ⁷

The safety defense has a narrow scope.ⁿ⁸ Application of the defense requires more than mere conclusions on the part of the employer.ⁿ⁹ The employer must show that the employee faced an "imminent and substantial degree of risk" in performing the essential functions of the job. If the harm is merely potential, the defense fails.ⁿ¹⁰ Analysis of the defense must be tailored to the individual characteristics of each applicant or employee in relation to specific legitimate job requirements.ⁿ¹¹ For example, in *Sterling Transit Co. v. Fair Employment Practice Com.*,ⁿ¹² the employer, applying a policy of not hiring anyone with a back deficiency, refused to hire the plaintiff as a truck driver because he had scoliosis. The plaintiff had never had any job-related back problems and did not have any problems with his back at the time, had performed similar work for 10 years previously, and had worked in the identical position as a temporary worker for defendant for the previous 19 months. The court of appeal held that the defendant's evidence that plaintiff's condition created a possibility of future health problems was not sufficient to justify a refusal to employ the plaintiff, given the strong policy for providing equal employment opportunities for the disabled.ⁿ¹³

In *Ackerman v. Western Elec. Co., Inc.*,ⁿ¹⁴ a federal district court, in an action under the FEHA, applied the *Sterling* holding to a case involving an employer's refusal to hire the plaintiff because she had asthma. The court stated that although the employer had presented evidence that employment requiring physical exertion and exposure to dust might pose a risk of future injury to some asthmatics, it had failed to show that the plaintiff could not with reasonable accommodation have performed her particular duties without imminent and substantial risk to her health. The court held that the employer's evidence of abstract medical generalizations regarding the possibility of future injury was insufficient as a matter of law to qualify as a defense.ⁿ¹⁵

However, in two cases, one involving a city fire department paramedic,ⁿ¹⁶ and the other involving a city fire department ambulance driver,ⁿ¹⁷ the courts upheld maximum weight requirements on the basis that an obese person would be incapable of performing those jobs without endangering his or her own health or safety or that of others. In each case, the courts relied on statistical studies establishing that excess fat compromises an emergency worker's strength, agility, and ability to do all of the things necessary to perform the job safely and efficiently.ⁿ¹⁸

A federal court interpreting the FEHA held that UPS satisfied the safety-of-others defense in denying driver positions to employees with monocular vision who failed to meet UPS's vision protocol. The failure to meet the protocol was a sufficiently individualized determination to satisfy the safety-of-others defense because each applicant was tested for compliance with specific criteria that were a reasonable means of ensuring the safety of its employees and members of the public. The potential for traffic fatalities was a serious problem, and the potential for endangerment of human life justified safety-based restrictions even when the risk of occurrence was modest.^{n18.1}

In cases in which physical or mental disability or medical condition discrimination is alleged, the employer has the duty

to reasonably accommodate the employee, and failure to do so may negate the application of this defense.ⁿ¹⁹ "Reasonable accommodation" refers in this context to ways in which an employer can continue to provide a disabled employee with employment by removing the danger and making the position in question safe.ⁿ²⁰ For full discussion of the duty to accommodate handicaps and disabilities, *see* § 41.51[1].

[2] Under ADA

[a] Generally

The federal ADA generally prohibits "qualification standards" that discriminate based on disability.ⁿ²¹ However, that statute permits such standards to include a requirement that an individual not pose a direct threat to the individual's own health or to the health or safety of other individuals in the workplace.ⁿ²² A "direct threat" is a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.ⁿ²³

An employer is not required to defend all safety-related qualification standards under the direct-threat provision.ⁿ²⁴ However, under the ADA, the employer bears the burden of establishing that a challenged standard is job-related and consistent with business necessity.^{n24.1}

The determination that an individual poses a direct threat must be based on an individualized assessment of the person's present ability to perform safely the essential functions of the job, based on current medical knowledge. Relevant factors include the duration of the risk; the nature, severity, and imminence of the potential harm; and the likelihood of its occurrence.ⁿ²⁵ Before excluding an employee as a direct threat, the employer must demonstrate a "particularized enquiry into the harms the employee would probably face."^{n25.1} The mere fact that an employer avoids stereotypes in excluding an employee based on an alleged direct threat does not satisfy the employer's affirmative obligation to make an assessment based on "the most current medical knowledge and/or on the best available objective evidence."^{n25.2} The individualized risk assessment also requires consideration of relevant information about an employee's past work history.^{n25.3}

■ CONSULTANT'S COMMENT:

Although it may now seem obvious, it is worth noting that the federal judiciary has created both an obligation and a safe harbor for employers by requiring independent medical evidence to support adverse employment actions that are linked to alleged disabilities. Thus, *Arline* ⁿ²⁶ requires that employers not "play doctor," but instead base any adverse employment actions involving alleged disabilities upon medical records and testimony. Conversely, an employer that predicates adverse employment actions upon competent medical evidence often may offer that evidence as a complete defense to its conduct. *Commentary by Kirby Wilcox.*

In the Ninth Circuit, the employer bears the burden of proving that an employee constitutes a direct threat.ⁿ²⁷ Then employer must gather substantial information about an employee's work history and medical status. The employer's decision must be based on particularized facts using the best available objective evidence, as required by the regulations.^{n27.1} The employer must do more than consider generalized statements of potential harm. The employer must consider the severity, imminence, and potential likelihood of harm and, in precluding the employee, demonstrate at least a "significant risk of substantial harm."^{n27.2}

Courts should first consider whether the employer has demonstrated that the employee cannot perform the job without significant risk of harm.ⁿ²⁸ If a significant risk is posed, courts should then inquire whether the employer can make a reasonable accommodation (without undue hardship to the employer) that eliminates or reduces the risk. This analysis necessarily requires employers to gather "substantial information" about the employee's work history and medical status, and disallows reliance on subjective evaluations by the employer.ⁿ²⁹

Qualification standards that discriminate based on disability in order to protect the health or safety of other workers may also fall within the business necessity defense as discussed in § 41.95[1].ⁿ³⁰

[b] Food-Handling

The ADA also provides that if an individual has a specified infectious or communicable disease that is transmitted to others through the handling of food, and if the threat of transmission cannot be eliminated by reasonable accommodation, an employer may refuse to assign or continue to assign that individual to a job involving food handling.ⁿ³¹ Nothing in the ADA, however, may be construed to preempt, modify, or amend any state, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, because they have such a specified infectious or communicable disease.ⁿ³² As required by the ADA, the Secretary of Health and Human Services has published an interim list of infectious and communicable diseases that may be transmitted through food handling and a description of the methods of such transmission.ⁿ³³ The Secretary has divided the diseases into two categories: (1) pathogens *often* transmitted by infected food handlers, and (2) pathogens *occasionally* transmitted by food handlers, but usually transmitted at the source or in food processing or by routes other than through food. The diseases enumerated in the first category are: Hepatitis A virus, Norwalk and Norwalk-like viruses, salmonella typhi, shigella species, staphylococcus aureus, Streptococcus pyogenes. The diseases listed in the second category are: Camphylobacter jejuni, Entamoeba histolytica, Enterohemorrhagic escherichia coli, Enterotoxigenic escherichia coli, Giardia lamblia, Nontyphoidal salmonella, Rotavirus, Vibrio cholerae 01, and Yersinia enterocolitica.ⁿ³⁴

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationActionable DiscriminationLabor & Employment LawDiscriminationDisparate TreatmentGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Gov. Code § 12940(a)*. For discussion of the scope of the terms "physical disability," "mental disability," and "medical condition," *see § 41.32*.

(n2)Footnote 2. *Gov. Code § 12940(a)(1), (2)*. *see discussion of Jimeno v. Mobil Oil Corp. (9th Cir. 1995) 66 F.3d 1514* (interpreting FEHA requirements as to "danger to self" defense) under *BFOQ*; for discussion of *BFOQ* generally, *see § 41.94*. For the standard jury instruction for the affirmative defense to a disability discrimination claim under FEHA that the employee was unable to perform essential job duties, *see Judicial Council of California Civil Jury Instructions, CACI 2543* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction for the affirmative defense that an employee could not perform the job without being a health or safety risk, *see Judicial Council of California Civil Jury Instructions, CACI 2544* (Matthew Bender). For discussion of the standard jury instructions generally, *see § 61.05*.

(n3)Footnote 3. *Gov. Code § 12926(f)*.

(n4)Footnote 4. *Raytheon Co. v. Fair Employment & Housing Com. (1989) 212 Cal. App. 3d 1242, 1252, 261 Cal. Rptr. 197*; *DFEH v. General Dynamics, Inc. (1990) FEHC Dec. 90-08, p. 9*; *DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05, p. 6*.

(n5)Footnote 5. *Gov. Code § 12926(f)(1)*.

(n6)Footnote 6. *Gov. Code § 12926(f)(2)*.

(n7)Footnote 7. *See* 2 Cal. Code Reg. § 7293.8(b), (c), (d); DFEH v. Ca. State University-Sacramento (1988) FEHC Dec. No. 88-08, p. 18; DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05, pp. 6, 8.

(n8)Footnote 8. *Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514, 1534 ; *Ackerman v. Western Elec. Co., Inc.* (N.D. Cal. 1986) 643 F. Supp. 836, 848 .

(n9)Footnote 9. *Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514, 1534 .

(n10)Footnote 10. *Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514, 1534 .

(n11)Footnote 11. *Sterling Transit Co. v. Fair Employment Practice Com.* (1981) 121 Cal. App. 3d 791, 798, 175 Cal. Rptr. 548 ; DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05, p. 7.

(n12)Footnote 12. *Sterling Transit Co. v. Fair Employment Practice Com.* (1981) 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 .

(n13)Footnote 13. *Sterling Transit Co. v. Fair Employment Practice Com.* (1981) 121 Cal. App. 3d 791, 799, 175 Cal. Rptr. 548 ; *see Jimeno v. Mobil Oil Corp.* (9th Cir. 1995) 66 F.3d 1514, 1533-1535 ; *see also* 2 Cal. Code Reg. § 7293.8(e) (stating in part that future risk from disability or medical condition is not a defense so long as there is no present interference with ability to perform job in manner that will not immediately endanger handicapped individual or others); *Johnson v. Civil Service Com.* (1984) 153 Cal. App. 3d 585, 590-591, 200 Cal. Rptr. 289 (speculation of possibility of future injury and fiscal restraint held insufficient to justify failure to hire plaintiff as firefighter because of spinal condition).

(n14)Footnote 14. *Ackerman v. Western Elec. Co., Inc.* (N.D. Cal. 1986) 643 F. Supp. 836, 848-851 , *aff'd*, 860 F.2d 1514, 1519 (9th Cir. 1988) .

(n15)Footnote 15. *Ackerman v. Western Elec. Co., Inc.* (N.D. Cal. 1986) 643 F. Supp. 836, 851 , *aff'd*, 860 F.2d 1514, 1519-1520 (9th Cir. 1988) ; *see* DFEH v. General Dynamics, Inc. (1990) FEHC Dec. 90-08, pp. 9-11; DFEH v. Aluminum Precision Prods., Inc. (1988) FEHC Dec. No. 88-05, p. 6.

(n16)Footnote 16. *Hegwer v. Board of Civil Serv. Comrs.* (1992) 5 Cal. App. 4th 1011, 1025, 7 Cal. Rptr. 2d 389 .

(n17)Footnote 17. *McMillen v. Civil Serv. Comm'n* (1992) 6 Cal. App. 4th 125, 130-131, 8 Cal. Rptr. 2d 548 .

(n18)Footnote 18. *McMillen v. Civil Serv. Comm'n* (1992) 6 Cal. App. 4th 125, 130-131, 8 Cal. Rptr. 2d 548 ; *Hegwer v. Board of Civil Serv. Comrs.* (1992) 5 Cal. App. 4th 1011, 1025, 7 Cal. Rptr. 2d 389 .

(n19)Footnote 18.1. *EEOC v. United Parcel Service* (9th Cir. 2005) 424 F.3d 1060, 1074-1077 .

(n20)Footnote 19. *See* Gov. Code § 12940(a)(1), (m); *Fisher v. Superior Court* (1986) 177 Cal. App. 3d 779, 783, 223 Cal. Rptr. 203 ; DFEH v. General Dynamics, Inc. (1990) FEHC Dec. 90-08, p. 11; DFEH v. California State Univ.-Sacramento (1988) FEHC Dec. No. 88-08 at p. 19.

(n21)Footnote 20. DFEH v. California State Univ.-Sacramento (1988) FEHC Dec. No. 88-08, p. 20.

(n22)Footnote 21. *See* 42 U.S.C. § 12112(b)(6); 29 C.F.R. § 1630.7. *See also* § 41.42[1].

(n23)Footnote 22. *See* 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.15(b)(2). *See Collings v. Longview Fibre Co.* (9th Cir. 1995) 63 F.3d 828 discussed in § 41.94[3]. *See also Chevron U.S.A., Inc. v. Echazabal* (2002) 536 U.S. 73, 122 S. Ct. 2045, 153 L. Ed. 2d 82 (upholding 29 C.F.R. § 1630.15(b)(2) and reversing Ninth Circuit's holding in *Echazabal v. Chevron U.S.A., Inc.* (9th Cir. 2000) 226 F.3d 1063 that regulation was in excess of EEOC's rulemaking authority).

(n24)Footnote 23. 42 U.S.C. § 12111(3) ("significant risk to health of others"); 29 C.F.R. § 1630.2(r).

(n25)Footnote 24. *Morton v. United Parcel Service, Inc.* (9th Cir. 2001) 272 F.3d 1249, 1258, cert. denied, overruled on other grounds in *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 995-998.

(n26)Footnote 24.1. See also *Morton v. United Parcel Service, Inc.* (9th Cir. 2001) 272 F.3d 1249, 1257 n.8, 1258, overruled on other grounds in *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 995-998; *Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 890.

(n27)Footnote 25. 29 C.F.R. § 1630.2(r); see *Bragdon v. Abbott* (1998) 524 U.S. 624, 118 S. Ct. 2196, 2210, 141 L. Ed. 2d 540 (individualized direct threat inquiry must rely on best current medical or other objective evidence); see also *School Bd. of Nassau County, Fla. v. Arline* (1987) 480 U.S. 273, 287, 107 S. Ct. 1123, 94 L. Ed. 2d 307; *Echazabal v. Chevron USA, Inc.* (9th Cir. 2003) 336 F.3d 1023, 1031-1032 (while employee conceded duration of his medical condition, he raised material issues of fact about remaining factors, precluding summary judgment for employer that employee posed direct threat to himself); *Hutton v. Elf Atochem N. Am.* (9th Cir. 2001) 273 F.3d 884, 894-895 (applying individualized assessment of each factor in four-factor test supported conclusion that diabetic would pose direct threat to others by continuing employment as chlorine-finishing operator).

(n28)Footnote 25.1. *Echazabal v. Chevron USA, Inc.* (9th Cir. 2003) 336 F.3d 1023, 1028, quoting *Chevron U.S.A., Inc. v. Echazabal* (2002) 536 U.S. 73, 122 S. Ct. 2045, 2053, 153 L. Ed. 2d 82.

(n29)Footnote 25.2. *Echazabal v. Chevron USA, Inc.* (9th Cir. 2003) 336 F.3d 1023, 1028 n.3.

(n30)Footnote 25.3. *Echazabal v. Chevron USA, Inc.* (9th Cir. 2003) 336 F.3d 1023, 1032; see *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1248; *Mantolite v. Bolger* (9th Cir. 1985) 767 F.2d 1416, 1423.

(n31)Footnote 26. *School Board of Nassau County, Florida v. Arline* (1987) 480 U.S. 273, 287, 107 S. Ct. 1123, 94 L. Ed. 2d 307.

(n32)Footnote 27. *Echazabal v. Chevron USA, Inc.* (9th Cir. 2003) 336 F.3d 1023, 1027; *Hutton v. Elf Atochem N. Am.* (9th Cir. 2001) 273 F.3d 884, 893 (no dispute that plaintiff's continued employment constituted direct threat to others); *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1247. But see *EEOC v. Amego, Inc.* (1st Cir. 1997) 110 F.3d 135, 144 (plaintiff bears burden of demonstrating he or she can perform essential job functions so as not to endanger others); *Moses v. Am. Nonwovens, Inc.* (11th Cir. 1996) 97 F.3d 446, 447 (per curiam) (employee retains at all times burden of persuading jury he or she was not direct threat); see also *Emerson v. N. States Power Co.* (7th Cir. 2001) 256 F.3d 506, 513 (noting issue without taking clear position); *Borgialli v. Thunder Basin Coal Co.* (10th Cir. 2000) 235 F.3d 1284, 1294-95 (same); *Donahue v. CONRAIL* (3d Cir. 2000) 224 F.3d 226, 230-31 (same); *Rizzo v. Children's World Learning Ctrs., Inc.* (5th Cir.) 213 F.3d 209, 212-13 (5th Cir.), cert. denied, 531 U.S. 958 (2000) (same).

(n33)Footnote 27.1. *Echazabal v. Chevron USA, Inc.* (9th Cir. 2003) 336 F.3d 1023, 1028-1030 (employee raised material issue of fact as to whether potential employer's decision was based on reasonable medical judgment relying on most current medical knowledge and/or best available objective evidence, where employer's doctors were not specialists in area, but employee's doctors, who were specialists, offered the unequivocal assessment that employee could work without facing a substantial risk of harm beyond that faced by other workers, and employee presented evidence there was no scientific basis for the contrary opinions of employer's doctors).

(n34)Footnote 27.2. *Echazabal v. Chevron USA, Inc.* (9th Cir. 2003) 336 F.3d 1023, 1030.

(n35)Footnote 28. See, e.g., *Hutton v. Elf Atochem N. Am.* (9th Cir. 2001) 273 F.3d 884, 894 (severity and scale of potential harm to others presented by employment of diabetic as chlorine-finishing operator posed significant risk under direct-threat analysis).

(n36)Footnote 29. *Nunes v. Wal-Mart Stores, Inc.* (9th Cir. 1999) 164 F.3d 1243, 1247 (record lacked evidence of medical status at termination and any consideration of accommodations to reduce risk; avoiding lifting in cashier position might be reasonable accommodation to ease employer's fear that pregnant employee might drop heavy item lifted over head).

(n37)Footnote 30. *Cf.* 42 U.S.C. § 12113(a), (b).

(n38)Footnote 31. 42 U.S.C. § 12113(e)(2); 29 C.F.R. § 1630.16(e)(1).

(n39)Footnote 32. 42 U.S.C. § 12113(e)(3); 29 C.F.R. § 1630.16(e)(2).

(n40)Footnote 33. *See* 56 Fed. Reg. 22726 (1991) .

(n41)Footnote 34. *See* 56 Fed. Reg. 22726-22727 (1991) .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
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PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law § 41.98

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.98 "Foreign Laws" Defense

[1] Under Title VII and ADA

Title VII generally applies to U.S. citizens who are employed by American corporations (or their subsidiaries) in a foreign country.ⁿ¹ However, Title VII also provides that it is not unlawful for an employer (or a corporation controlled by an employer) or other covered entity to take any action otherwise prohibited by Title VII with respect to an employee in a workplace located in a foreign country if compliance with Title VII would cause the employer (or controlled corporation) or other covered entity to violate the law of the foreign country in which the workplace is located.ⁿ² If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by Title VII that is engaged in by the controlled foreign corporation is presumed to be engaged in by the employer.ⁿ³

The prohibitions of Title VII do not apply to the foreign operations of an employer that is a foreign person not controlled by an American employer.ⁿ⁴

For purposes of the "foreign laws" defense, the determination of whether an employer controls a corporation is based on the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control, of the employer and the foreign corporation.ⁿ⁵

The ADA contains a "foreign laws" defense that is virtually identical to the Title VII defense described above.ⁿ⁶

[2] Under ADEA

The ADEA provides that age discrimination is not unlawful if it involves an employee in a workplace in a foreign country, and compliance with the ADEA would cause the employer, or a corporation controlled by the employer, to violate the laws of the country in which the workplace is located.ⁿ⁷ Thus, according to an EEOC policy guideline construing this provision, there are three elements that an employer must satisfy in establishing a "foreign laws" defense: (1) the challenged practice involves an employee in a foreign workplace; (2) compliance with the ADEA would cause the employer or its corporation to violate foreign laws; and (3) the law violated is that of the country in

which the foreign workplace is located.ⁿ⁸

With respect to the first element (employee in a foreign workplace), the EEOC has stated that the foreign laws defense is unavailable if a challenged practice involves an employee in a workplace in any of the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, or the Outer Continental Shelf Lands as defined by the Outer Continental Shelf Lands Act.ⁿ⁹

With respect to the second element (compliance causes violation of foreign law), a "law," although difficult to define, does not include the employer's rules, regulations, or employment policies. Also, whether compliance with the ADEA causes an employer to violate foreign law depends on the nature and substance of the law. The issue is generally whether a practice inconsistent with the foreign law is mandated by the ADEA, or whether it is merely discretionary. Finally, under the third element of the defense (violation of law where foreign workplace is located), compliance with the ADEA must cause the employer to violate foreign law at the situs of the workplace. Thus, an employer's headquarters or place of incorporation is not determinative, unless the subject employee's workplace is also located there.ⁿ¹⁰

Legal Topics:

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

Labor & Employment Law
DiscriminationAge DiscriminationGeneral OverviewLabor & Employment
LawDiscriminationAge DiscriminationDefenses & ExceptionsGeneral OverviewLabor & Employment
LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

FOOTNOTES:

(n1)Footnote 1. *See 42 U.S.C. 2000e(f); see also* ch. 40, pt. C.

(n2)Footnote 2. *42 U.S.C. § 2000e-1(b).*

(n3)Footnote 3. *42 U.S.C. § 2000e-1(c)(1).*

(n4)Footnote 4. *42 U.S.C. § 2000e-1(c)(2).*

(n5)Footnote 5. *42 U.S.C. § 2000e-1(c)(3).*

(n6)Footnote 6. *See 42 U.S.C. § 12112(c); see also 29 C.F.R. § 1630.15(e).*

(n7)Footnote 7. *29 U.S.C. § 623(f)(1).*

(n8)Footnote 8. *E.E.O.C. Compliance Manual (CCH) § 801, P 6524.*

(n9)Footnote 9. *E.E.O.C. Compliance Manual (CCH) § 801, P 6524; see 29 U.S.C. § 630(i) ("state" defined); see also 43 U.S.C. § 1331 et seq. (Outer Continental Shelf Lands Act).*

(n10)Footnote 10. *See E.E.O.C. Compliance Manual (CCH) § 801, P 6524.*



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2-41 California Employment Law § 41.99

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.99 Health Plans Provided by Employers May Provide Greater Benefits for Dependents

Although the FEHA prohibits discrimination on the basis of marital status, the FEHA further provides that an employer is not prohibited from providing, in a bona fide health plan, additional or greater benefits to employees with dependents than to employees without dependents or with fewer dependents.ⁿ¹

Legal Topics:

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

Labor & Employment Law
Discrimination
Title VII of the Civil Rights Act of 1964
General Overview
Pensions & Benefits Law
Employee Benefit Plans
General Overview

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12940(a)(3)*.



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2-41 California Employment Law § 41.100

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.100 Indian Preference

Title VII provides that a business or enterprise on or near an Indian reservation may give preferential treatment under a publicly announced employment practice to an individual because he or she is an Indian living on or near a reservation.ⁿ¹ However, the Indian Preferences Exemption does not permit employment preferences based on tribal affiliation.ⁿ² In *Dawavendewa v. Salt River Project*,ⁿ³ a private employer who operated a facility on a Navaho reservation refused to consider a member of the Hopi tribe for an open position. The employer had a contractual obligation to grant employment preferences first to members of the Navaho tribe living on the reservation and then to other Navahos. The plaintiff brought suit for national origin discrimination in violation of Title VII.ⁿ⁴ Noting that the issue of whether the Indian Preferences Exemption applies to preferences based on tribal affiliation was one of first impression for federal courts, the Ninth Circuit reviewed EEOC guidelines on national origin discrimination, which state that tribal affiliation preferences conflict with the exemption.ⁿ⁵ Agreeing with the EEOC position, the court explained that the purpose of the exemption is to permit employers to favor Native Americans generally over all others to rectify past injustice, but not to favor one tribe over another. Therefore, the plaintiff's complaint alleged national origin discrimination that did not fall within the scope of this exemption.ⁿ⁶

If an Indian tribe is a necessary party to an action by the EEOC against an employer, it may be joined. When the EEOC asserts a cause of action against an employer and seeks no affirmative relief against the tribe, joinder of the tribe under Fed. Rule Civ. Proc. Rule 19 is not prevented by the fact that the EEOC cannot state a cause of action against the tribe. Because the EEOC is an agency of the United States, the tribe cannot object to joinder based on sovereign immunity.^{n6.1}

Title 25, *U.S.C. Section 450e(b)* provides that any contract, subcontract, grant, or subgrant pursuant to an act authorizing federal contracts with or grants to Indian organizations or for the benefit of Indians, must require that to the greatest extent feasible, preference be given to Indians in the employment and training opportunities connected with the grant. However, this statute does not create a private right of action.ⁿ⁷

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationActionable DiscriminationLabor & Employment LawDiscriminationNational Origin DiscriminationGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-2(i); *Morton v. Mancari* (1974) 417 U.S. 535, 547-548, 94 S. Ct. 2474, 41 L. Ed. 2d 290 ; *Livingston v. Ewing* (10th Cir. 1979) 601 F.2d 1110, 1113-1114 . *See* *Schwarz v. Secretary of Health & Human Servs.* (9th Cir. 1995) 73 F.3d 895 (plaintiff unsuccessfully challenged hiring contrary to Indian Preference Act) (25 U.S.C. § 472); *Arizona Pub. Serv. Co. v. Aspaas* (9th Cir. 1995) 69 F.3d 1026 (application of Title VII anti-nepotism provision to utility operating on Indian land, holding tribal authority had waived jurisdiction as to employment regulations).

(n2)Footnote 2. *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.* (9th Cir. 1998) 154 F.3d 1117, 1120-1124 ; Policy Statement on Indian Preference Under Title VII, Fair Empl. Prac. (BNA) 405:6647, 6653 (May 16 1988).

(n3)Footnote 3. *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.* (9th Cir. 1998) 154 F.3d 1117 .

(n4)Footnote 4. *See* § 41.33.

(n5)Footnote 5. *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.* (9th Cir. 1998) 154 F.3d 1117, 1120-1124 (level of deference afforded EEOC guidelines depends on EEOC's thoroughness of consideration, validity of reasoning, consistency with other pronouncements, and persuasiveness); Policy Statement on Indian Preference Under Title VII, Fair Empl. Prac. (BNA) 405:6647, 6653 (May 16 1988).

(n6)Footnote 6. *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.* (9th Cir. 1998) 154 F.3d 1117, 1120-1124 . *See also* *EEOC v. Peabody W. Coal Co.* (9th Cir. 2005) 400 F.3d 774, 777 (without deciding merits, court reiterated interpretation of Indian preference exception of Title VII, 42 U.S.C. § 2000e-2(i), to permit discrimination in favor of Indians living on or near reservation, but not against Indians belonging to other tribes).

(n7)Footnote 6.1. *EEOC v. Peabody W. Coal Co.* (9th Cir. 2005) 400 F.3d 774, 778 .

(n8)Footnote 7. *Solomon v. Interior Reg'l Housing Auth.* (9th Cir. 2002) 313 F.3d 1194, 1196-1201 (no private right of action under 25 U.S.C. § 450e(b) for Native Alaskan who applied unsuccessfully for job with Native Alaskan regional housing authority formed by Native Alaskan associations pursuant to Alaska statute to provide housing services to low-income Native Alaskans).



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2-41 California Employment Law § 41.101

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.101 Legally Required Action

Administrative regulations promulgated pursuant to the FEHA provide that notwithstanding a showing of discrimination, an employment practice is lawful if required by state or federal law or if done pursuant to order of a state or federal court of proper jurisdiction.ⁿ¹

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationActionable Discrimination

FOOTNOTES:

(n1)Footnote 1. *See 2 Cal. Code Reg. § 7286.7(f).*



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2-41 California Employment Law § 41.102

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.102 Medical Examination or Health Benefit Plan Under ADA

The regulations implementing the ADAⁿ¹ provide that an employer may defend against a charge of discrimination under the ADA if the alleged discriminatory action is specifically permitted by the regulations concerning medical examinations,ⁿ² health insurance,ⁿ³ life insurance, and other benefit plans.ⁿ⁴

These defenses are in addition to those provided by the ADA generally and the regulations that precisely correspond to the statutory provisions.ⁿ⁵

Legal Topics:

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

Labor & Employment LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment
LawDiscriminationDisability DiscriminationCoverage & DefinitionsGeneral OverviewLabor & Employment
LawPreemployment Practices

FOOTNOTES:

(n1)Footnote 1. *42 U.S.C. § 12101 et seq.*

(n2)Footnote 2. *See 29 C.F.R. § 1630.14; See also § 41.46* (preemployment medical examinations) and § 41.63 (medical examinations of current employees).

(n3)Footnote 3. *See § 41.61.*

(n4)Footnote 4. *29 C.F.R. § 1630.15(f); see 29 C.F.R. § 1630.16(f)* (insurance and other benefits plans).

(n5)Footnote 5. *29 C.F.R. § 1630.15(f).*



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2-41 California Employment Law § 41.103

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.103 Nondiscrimination Under ADA

It is a defense to a charge of disparate treatment brought under the ADAⁿ¹ that the challenged action is justified by a legitimate, nondiscriminatory reason.ⁿ² However, it is no defense to the denial of a position to a qualified individual with a disability that the employer afforded that individual a position he or she does not desire, if the desired position is available.ⁿ³

Legal Topics:

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

Labor & Employment LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationCoverage & DefinitionsGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationDefenses & ExceptionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 12112; *see also* 29 C.F.R. §§ 1630.4-1630.8, 1630.11-1630.12.

(n2)Footnote 2. 29 C.F.R. § 1630.15(a); *see Collings v. Longview Fibre Co.* (9th Cir. 1995) 63 F.3d 828, *cert. denied*, 516 U.S. 1048 (1996) (employee misconduct using drugs at the workplace and potentially placing others in danger is legitimate reason for discharge and not discrimination against drug addiction disability).

(n3)Footnote 3. *Cripe v. City of San Jose* (9th Cir. 2001) 261 F.3d 877, 893-894 (court did not consider whether offer of comparable position would have been sufficient if desired position were not available); *see* 29 C.F.R. § 1630.2(o) (reassignment may not be used to segregate employees with disabilities by forcing reassignments to undesirable positions or designated offices or facilities).



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2-41 California Employment Law § 41.104

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.104 Reasonable Factor Other Than Age Defense and Good Cause Defense

[1] Reasonable Factor Other Than Age

Under the ADEA, an employer may defend an age discrimination claim on the ground that the employer made a differentiation based on reasonable factors other than age.ⁿ¹ For example, in *Kelly v. American Standard, Inc.*,ⁿ² involving the termination of a 57-year-old sales representative, the Ninth Circuit Court of Appeals explained that if the jury found that the employee was terminated because he was the least effective member of the sales force, and not because of his age, the employee's discharge would have been based on a "reasonable factor other than age."ⁿ³ The court premised its discussion, however, on the observation that age may be one of many "reasonable factors," as long as it is not a determinative one.ⁿ⁴

In another case, the Ninth Circuit held that to make a case of age discrimination, the plaintiff must refute the employer's proffered legitimate, nondiscriminatory reasons for certain decisions that plaintiff claimed were made on the basis of age.ⁿ⁵ Plaintiff claimed that (1) coworkers had received more overtime; (2) certain work responsibilities that were originally the plaintiff's had remained with a younger employee after plaintiff returned from sick leave; and (3) the plaintiff had been reclassified to a lower position, all on the basis of her age. The court found reasonable the employer's explanations that (1) a younger coworker had received more overtime because she was responsible for a project in which plaintiff did not ask to assist; (2) the plaintiff had not been given back certain work responsibilities because she had been transferred to a new position on her return to work and also had been suffering from job-related stress; and (3) the plaintiff's reclassification had been based on an across-the-board review of all comparable positions, which had affected others in her position.ⁿ⁶ On these bases, the court found proper a summary judgment against the plaintiff for failing to refute the employer's reasons.ⁿ⁷

In *Baker v. Delta Air Lines, Inc.*,ⁿ⁸ an airline sought to avoid liability in a class action age discrimination case based on a proffered safety policy. The airline claimed that its policy of refusing to allow pilots to downbid to a lower cockpit position rather than completely retire when they reached age 60 was based on a long-standing safety policy based on the belief that having experienced ex-pilots in the cockpit in nonpilot positions would cause a "backseat driving situation,"

undermining the authority of the less-senior pilots in the cockpit. The court held that the plaintiffs should have been allowed to present evidence of executive memos written ten years prior to institution of the policy to refute the airline's safety rationale and to instead show that the airline had no such age-neutral rule in place at the time it refused to allow the pilots to downbid to other positions rather than retire.ⁿ⁹

The EEOC guideline on this defense states that no precise and unequivocal determination can be made about the scope of the phrase "differentiation based on reasonable factors other than age," and that whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.ⁿ¹⁰ Consistent with the *Kelly* rationale, the guideline also provides that when an employment practice uses age as a limiting criterion, the reasonable-factor-other-than-age-defense is unavailable.ⁿ¹¹

An employment practice, including a test, that is claimed as a basis for different treatment on the grounds that it is a factor other than age, but which has an adverse impact on individuals within the age group protected by the ADEA, must be justified under principles of business necessity or business justification.ⁿ¹² For discussion of principles relating to justification of employment tests, *see* § 41.45. For a discussion of the "disparate impact" theory of liability in general, *see* § 41.20. For a discussion of the business necessity or business justification defense generally, *see* § 41.95.

An employer facing a disparate-impact claim bears both the burden of production and the burden of persuasion on the basis of the reasonable-factor-other-than-age defense; thus, the employer must produce evidence raising the defense and persuade the factfinder of its merit.^{n12.1}

Similarly, when the reasonable-factor-other-than-age exception is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the reasonable factor exists.ⁿ¹³ Federal regulations state that a differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans that qualify for the exception discussed in § 41.93.ⁿ¹⁴ However, according to the U.S. Supreme Court, there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age.ⁿ¹⁵ Thus, the Court held that an employer that terminated an employee to prevent his pension from vesting, although it might have violated the Employee Retirement Income Security Act (ERISA),ⁿ¹⁶ did not violate the ADEA.ⁿ¹⁷ The Court stated that there is an analytical difference between years of service and age, and that employment decisions based on the former do not violate the ADEA.ⁿ¹⁸

Following Supreme Court precedent, the Ninth Circuit Court of Appeals has ruled that an employer may refuse to hire an individual because he or she is "overqualified" when that term is defined objectively and is thus not used as a proxy for age. In *E.E.O.C. v. Insurance Co. of North America*,ⁿ¹⁹ the court affirmed summary judgment for an employer that had rejected an applicant because the applicant was "overqualified" because the employer had demonstrated that the reasons why it perceived overqualification to be a problem were objective and not age-related.ⁿ²⁰ For further discussion, *see* § 41.67[2][c].

In *Marks v. Loral Corp.*,ⁿ²¹ after his layoff, the plaintiff filed age discrimination and retaliation claims under the ADEA and state law. The Court of Appeals concluded that price-based business decisions do not constitute illegal age discrimination. Stated differently, employers are entitled to prefer workers with lower salaries, even when that preference falls disproportionately on older, generally higher paid workers.ⁿ²² In discussing the ADEA, the court stated that the statutory purpose is to protect individuals from discrimination because of their age, such as discrimination based on a stereotype about age, not to protect older workers by virtue of their status as older workers. The court focused on the statute's explicit statement that an action based on "reasonable factors other than age" is not illegal age discrimination,ⁿ²³ and concluded that a differential based on salary is as reasonable a criterion as can be imagined in a market economy.ⁿ²⁴ Further, the court stated that disparate impact analysis is fundamentally inapplicable to age discrimination claims based on salary differentials.ⁿ²⁵ However, the Legislature has expressly rejected the *Marks v. Loral Corp.* opinion,ⁿ²⁶ declaring that it does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. Further, the Legislature stated that the disparate impact theory of proof may be used in

claims of age discrimination.ⁿ²⁷

The FEHA provides two analogous defenses to its prohibition of age discrimination. First, the FEHA provides that it does not prohibit an employer from rejecting an applicant or terminating employment if the individual applicant or employee failed to meet bona fide requirements for the job or position sought or held.ⁿ²⁸ Second, the FEHA age discrimination provision does not limit the employer's right to select the better qualified person from among all applicants for a job.ⁿ²⁹ In *Marks v. Loral Corp.*,ⁿ³⁰ the court analogized the FEHA's "selecting the better qualified person" to the ADEA's "reasonable factors other than age" language. The court concluded that it would be unrealistic to limit the "better qualification" to skills, experience, and ability and to exclude price. Because the FEHA protects against arbitrary and unreasonable discrimination based on age, its provisions do not prevent the use of salary to differentiate between employees, even when it disproportionately affects older workers as a group.ⁿ³¹ The court specifically upheld a jury instruction stating the following: "An employer is entitled to choose employees with lower salaries, even though this may result in choosing younger employees. If the choice is based on salary, there is no age discrimination."ⁿ³² But the Legislature has rejected the *Marks v. Loral Corp.* opinion,ⁿ³³ declaring that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if the use of that criterion adversely impacts older workers as a group.ⁿ³⁴ The Legislature further reaffirmed and declared its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also older workers as a group because they face unique obstacles in the later phases of their careers.ⁿ³⁵

For a discussion relating to the "disparate treatment" theory of liability, *see* § 41.10 et seq. For a discussion relating to the "disparate impact" theory of liability, *see* § 41.20 et seq.

[2] Good Cause

The ADEA provides that it is not unlawful for an employer to discharge or otherwise discipline an individual for good cause.ⁿ³⁶ This defense is closely related to the reasonable factors other than age defense discussed in [1], *above*.ⁿ³⁷ In one case, for example, the Ninth Circuit Court of Appeals upheld, on the basis that it was not clearly erroneous, a district court's determination that the employer had not constructively discharged the employee on the basis of age, but rather because of an unfortunate breakdown in intracorporate management relations.ⁿ³⁸ The district court had found that the evidence established that the employee had failed to show that the reasons proffered by the employer for the constructive discharge were pretextual, and that they constituted good cause and reasonable factors other than age.ⁿ³⁹ The appellate court expressed no view on the good-cause defense, but upheld the finding of the district court.ⁿ⁴⁰

In *O'Day v. McDonnell Douglas Helicopter Co.*,ⁿ⁴¹ a terminated employee claimed he had been terminated because of age discrimination. In response to the employer's showing, based on after-acquired evidence that it had good cause to terminate plaintiff, the Ninth Circuit held that good cause existed but did not completely eclipse plaintiff's right to recover for any age discrimination that preceded his misconduct.

Legal Topics:

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

Labor & Employment Law
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Age Discrimination
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Age Discrimination
Defenses & Exceptions
Good Cause Discharges

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. § 623(f)(1).

(n2)Footnote 2. *Kelly v. American Standard, Inc.* (9th Cir. 1981) 640 F.2d 974 .

(n3)Footnote 3. *See Kelly v. American Standard, Inc.* (9th Cir. 1981) 640 F.2d 974, 984 .

(n4)Footnote 4. *Kelly v. American Standard, Inc.* (9th Cir. 1981) 640 F.2d 974, 984 .

(N5)Footnote 5. *Candelore v. Clark County Sanitation Dist.* (9th Cir. 1992) 975 F.2d 588 .

(n6)Footnote 6. *Candelore v. Clark County Sanitation Dist.* (9th Cir. 1992) 975 F.2d 588, 590-591 .

(n7)Footnote 7. *Candelore v. Clark County Sanitation Dist.* (9th Cir. 1992) 975 F.2d 588, 591 .

(n8)Footnote 8. *Baker v. Delta Air Lines* (9th Cir. 1993) 6 F.3d 632 .

(n9)Footnote 9. *Baker v. Delta Air Lines* (9th Cir. 1993) 6 F.3d 632, 641 ; *see also Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400, 406-408, 105 S. Ct. 2743, 86 L. Ed. 2d 321 (automatically barring 60 year old flight engineers and 60 year old pilots from consideration for reassignment as flight engineers was not valid safety policy).

(n10)Footnote 10. *See 29 C.F.R. § 1625.7(b).*

(n11)Footnote 11. *29 C.F.R. § 1625.7(c).*

(n12)Footnote 12. *See 29 C.F.R. § 1625.7(d).*

(n13)Footnote 12.1. *Meacham v. Knolls Atomic Power Laboratory* (2008) 128 S. Ct. 2395, 2400-2407, 171 L. Ed. 2d 283 .

(n14)Footnote 13. *See 29 C.F.R. § 1625.7(e).*

(n15)Footnote 14. *See 29 C.F.R. § 1625.7(f).*

(n16)Footnote 15. *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 608-609, 113 S. Ct. 1701, 123 L. Ed. 2d 338 ; *cf E.E.O.C. v. Local 350, Plumbers and Pipefitters* (9th Cir. 1993) 998 F.2d 641, 646-647 (policy refusing access to hiring hall to retired members receiving pensions was not based on factor other than age).

(n17)Footnote 16. *See 29 U.S.C. § 1140.*

(n18)Footnote 17. *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 608-611, 113 S. Ct. 1701, 123 L. Ed. 2d 338 .

(n19)Footnote 18. *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 608-611, 113 S. Ct. 1701, 123 L. Ed. 2d 338 .

(n20)Footnote 19. *E.E.O.C. v. Insurance Co. of North America* (9th Cir. 1995) 49 F.3d 1418 .

(n21)Footnote 20. *E.E.O.C. v. Insurance Co. of North America* (9th Cir. 1995) 49 F.3d 1418, 1420-1421 .

(N22)Footnote 21. *Marks v. Loral Corp.* (1997) 57 Cal. App. 4th 30, 68 Cal. Rptr. 2d 1 .

(n23)Footnote 22. *Marks v. Loral Corp.* (1997) 57 Cal. App. 4th 30, 45-54, 68 Cal. Rptr. 2d 1 .

(n24)Footnote 23. *Marks v. Loral Corp.* (1997) 57 Cal. App. 4th 30, 45-51, 68 Cal. Rptr. 2d 1 ; *see 29 U.S.C. § 623(f)(1).*

(n25)Footnote 24. *Marks v. Loral Corp.* (1997) 57 Cal. App. 4th 30, 45-51, 54-59, 68 Cal. Rptr. 2d 1 (disparate impact analysis involves requirements or criteria that lack business justification); see *O'Connor v. Consolidated Coin Caterers Corp.* (1996) 517 U.S. 308, 116 S. Ct. 1307, 1310, 134 L. Ed. 2d 433 (ADEA protection focuses on discrimination against individuals, not protecting a class); see also *Markham v. Geller* (1981) 451 U.S. 945, 101 S. Ct. 2028, 68 L. Ed. 2d 332 (*Rehnquist dissent*) .

(n26)Footnote 25. *Marks v. Loral Corp.* (1997) 57 Cal. App. 4th 30, 61-64, 68 Cal. Rptr. 2d 1 (disparate impact analysis involves requirements or criteria that lack business justification).

(n27)Footnote 26. *Marks v. Loral Corp.* (1997) 57 Cal. App. 4th 30, 68 Cal. Rptr. 2d 1 .

(n28)Footnote 27. *Gov. Code* § 12941.

(n29)Footnote 28. See *Gov. Code* § 12940(a).

(n30)Footnote 29. *Gov. Code* § 12940(a).

(n31)Footnote 30. *Marks v. Loral Corp.* (1997) 57 Cal. App. 4th 30, 68 Cal. Rptr. 2d 1 .

(n32)Footnote 31. *Marks v. Loral Corp.* (1997) 57 Cal. App. 4th 30, 51-54, 59-60, 68 Cal. Rptr. 2d 1 .

(n33)Footnote 32. *Marks v. Loral Corp.* (1997) 57 Cal. App. 4th 30, 42-44, 68 Cal. Rptr. 2d 1 .

(n34)Footnote 33. *Marks v. Loral Corp.* (1997) 57 Cal. App. 4th 30, 68 Cal. Rptr. 2d 1 .

(n35)Footnote 34. *Gov. Code* § 12941.

(n36)Footnote 35. *Gov. Code* § 12941 (statute does not limit affirmative defenses traditionally available in employment discrimination cases, including but not limited to those in 2 Cal. Code Reg. § 7286.7).

(n37)Footnote 36. 29 U.S.C. § 623(f)(3). See *O'Day v. McDonnell Douglas Helicopter Co.* (9th Cir. 1996) 79 F.3d 756 , where an employer may discharge for sufficient reason but cannot avoid liability for illegal discrimination on the basis of age. There, the employer had after-acquired evidence that the plaintiff could have been fired for a legitimate reason (he searched through his supervisor's private files and shared them with another employee). The plaintiff was not engaged in protected activity under the ADEA and could be legally discharged for his misconduct. But the plaintiff is still entitled to a remedy from the date of his wrongful termination, before the sufficient reason was discovered. After-acquired evidence only affects the remedy.

(n38)Footnote 37. See *Larson, Employment Discrimination*, ch. 132 (Matthew Bender) (stating that the two provisions overlap considerably and are often found in same cases).

(n39)Footnote 38. See *Sutton v. Atlantic Richfield Co.* (9th Cir. 1981) 646 F.2d 407, 410, 412-413 .

(n40)Footnote 39. See *Sutton v. Atlantic Richfield Co.* (9th Cir. 1981) 646 F.2d 407, 410, 412 n.6 .

(n41)Footnote 40. See *Sutton v. Atlantic Richfield Co.* (9th Cir. 1981) 646 F.2d 407, 412 n.6 .

(n42)Footnote 41. *O'Day v. McDonnell Douglas Helicopter Co.* (9th Cir. 1996) 79 F.3d 756 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law § 41.105

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.105 Reliance on EEOC Opinion

Although EEOC regulations interpreting Title VII are not binding on the courts, they are entitled to great deference.ⁿ¹ Furthermore, Title VII expressly provides that an employer's reliance on a written interpretation or opinion of the EEOC is a defense to a charge that the employer violated Title VII.ⁿ² The employer must plead and prove that its act or omission was done in good faith, in conformity with, and in reliance on the opinion or interpretation.ⁿ³ The EEOC administrative regulations state that only the following may be relied on as a written interpretation or opinion of the EEOC pursuant to Title 42, *United States Code, Section 2000e-12(b)*:ⁿ⁴

1. A letter entitled "opinion letter" and signed by the legal counsel on behalf of and as approved by the EEOC, or, if issued in the conduct of litigation, by the General Counsel on behalf of and as approved by the EEOC;
2. Matter published and specifically designated as an EEOC interpretation or opinion in the Federal Register, including the EEOC's Guidelines on Affirmative Action;ⁿ⁵ or
3. An EEOC determination of no reasonable cause, issued under the circumstances described in Title 29 *Code of Federal Regulations, Section 1608.10*, a part of the EEOC's Affirmative Action Guidelines,ⁿ⁶ which authorizes reliance on the affirmative action guidelines to be a defense to an action against an employer, if the determination contains a statement that it is a "written interpretation or opinion of the Commission."

The Seventh Circuit Court of Appeals has held that a consent decree entered into by the EEOC does not constitute a written order or opinion by the EEOC that can be relied on as a defense by an employer, and that it was error for the district court to ignore the EEOC guidelines regarding what does constitute such an opinion or order pursuant to Section 2000e-12(b).ⁿ⁷ The Fourth Circuit has held that an EEOC determination of no reasonable cause is not a written interpretation or opinion that may be relied on to establish such immunity.ⁿ⁸

In addition, a showing by an employer that it in good faith, and in conformity with instructions issued by the EEOC, failed to publish and file information required to be published and filed, bars an action for failure to do so.ⁿ⁹ If such a defense is established, the action against the employer is barred even if the opinion or interpretation is subsequently modified or rescinded or determined by judicial authority to be invalid, or if any published or filed description or annual report is determined by judicial authority not to be in conformity with Title VII.ⁿ¹⁰

Legal Topics:

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

Labor & Employment Law
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Title VII of the Civil Rights Act of 1964
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Labor & Employment Law
U.S. Equal Employment Opportunity Commission
General Overview

FOOTNOTES:

(n1)Footnote 1. *Robinson v. Lorillard Corp.* (4th Cir. 1971) 444 F.2d 791, 801 .

(n2)Footnote 2. *See* 42 U.S.C. § 2000e-12(b)(1).

(n3)Footnote 3. *See* 42 U.S.C. § 2000e-12(b)(1).

(n4)Footnote 4. 29 C.F.R. § 1601.93(a)-(c).

(n5)Footnote 5. *See* 29 C.F.R. pt. 1608; *see* ch. 44.

(n6)Footnote 6. For discussion, *see* ch. 44, pt. A.

(n7)Footnote 7. *Eirhart v. Libbey-Owens Ford Co.* (7th Cir. 1980) 616 F.2d 278, 280-282 .

(n8)Footnote 8. *Robinson v. Lorillard Corp.* (4th Cir. 1971) 444 F.2d 791, 801 . However, as discussed above, a no reasonable cause determination that states that it is a "written interpretation or opinion of the Commission" would provide such immunity. *See* 29 C.F.R. § 1601.93.

(n9)Footnote 9. *See* 42 U.S.C. § 2000e-12(b)(2).

(n10)Footnote 10. *See* 42 U.S.C. § 2000e-12(b)(2).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law § 41.106

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§ 41.106 Religious Exemptions and Exceptions

Title VII does not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of the organization's activities.ⁿ¹ This exemption has been construed to allow religious organizations to base employment decisions on *religious preferences*. They may not, however, make such decisions based on race, sex, or national origin.ⁿ² Also, the sincere religious beliefs of owners and operators of a *secular* corporation are not enough in themselves to make the corporation "religious" within the meaning of the exemption.ⁿ³

Title VII also provides that it is not an unlawful employment practice for an educational institution to hire employees of a particular religion if the institution is in whole or substantial part owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of the educational institution is directed toward the propagation of a particular religion.ⁿ⁴

Courts have held that Title VII does not apply to the employment relationship between a church and its ministers, because such application would violate the *Free Exercise Clause of the First Amendment to the United States Constitution*.ⁿ⁵ The test is whether the employee's duties go to the heart of the church's function in the manner of a minister or a seminary teacher. To be considered clergy, an employee's primary duties must consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in a religious ritual and worship. In some cases, a court can be certain of the applicability of the ministerial exception as a matter of law based on the very nature of the plaintiff's job, which is unquestionably, inherently or exclusively religious, and the reason for the discharge implicates the religious teachings of the employer.^{n5.1} In essentially the same category are members of religious orders suing in regard to their relationship in the order.^{n5.2} Individuals whose function is essentially liturgical, *i.e.*, connected to the religious or worship service of the organization, also come within the ministerial exception. Music and choir directors in particular come within the liturgical function aspect of the exception.^{n5.3} Those who perform priestly functions that may not seem outwardly liturgical but are inextricably intertwined with the particular religious doctrine of a religious organization may also come within the ministerial exception.^{n5.4} The same is true for individuals whose duties for a church involve traditional public relations and who

are functionally paid to actively proselytize on a church's behalf.^{n5.5} Teaching religion for a church, as distinct from a school, comes within the ministerial exception.^{n5.6} When the role of the employee of an academic institution is inherently a religious one, like a campus chaplain, the ministerial exception applies.^{n5.7} When the subject matter is the institution's own religion, the exception applies, regardless of whether the teacher is ordained or a member of a religious order.^{n5.8} When the school itself is a seminary and is exclusively preoccupied with religion and the training of a religion's own clergy as distinct from more general learning, the ministerial exception categorically applies to faculty, whether or not ordained.^{n5.9} However, when neither the role of the employee nor the subject matter taught by the employee is necessarily religious, things are less clear.^{n5.10} Lay teachers of secular subjects at religious or parochial schools have been held not to come within the religious exception at both the high school and elementary school levels.^{n5.11} Teachers of clearly secular subjects have also been held not to be within the exception, even though incidentally the teacher may be a member of a religious order.^{n5.12} Purely secular work performed for a religious institution does not come within the ministerial exception.^{n5.13} For example, cleaning staff do not come within the ministerial exception except possibly at a traditional monastery, where the cleaning staff are the members of the religious order and the cleaning is seen as religious work.

The mere bestowal of a ministerial designation by a religious organization does not, however, control extra-religious legal status.ⁿ⁶ Thus, in one case a seminary argued that all of its employees (i.e., faculty, administrative staff, and support staff) served a ministerial function. The court held that Title VII did not apply to the seminary's faculty, since most of them were ordained and were ministerial role models for students, but it did apply to support personnel not engaged in activities traditionally considered ecclesiastical or religious.ⁿ⁷

Another court has observed that the "ministerial exception" to Title VII does not depend on ordination, but on the function of the position; thus, a court must determine whether a position is important to the spiritual and pastoral mission of the church.ⁿ⁸ The EEOC has stated that it will carefully examine the nature of a relationship between an individual and a church on a case by case basis when determining whether to apply the "ministerial exception."ⁿ⁹

Like Title VII, the ADA does not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on of such an organization's activities.ⁿ¹⁰ Furthermore, a religious organization may require that all applicants and employees conform to its religious tenets.ⁿ¹¹

Generally, a religious association or corporation that is not organized for private profit is not an "employer" under the FEHA.ⁿ¹² However, recent amendments to FEHA have expanded coverage to nonprofit religious corporations and associations. The FEHA now applies to such employers with respect to persons employed to perform duties other than religious duties at a health care facility operated by the association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation.ⁿ¹³ This religious entity exemption is not limited to entities organized under the Nonprofit Religious Corporation Law;ⁿ¹⁴ it also includes religious entities that are organized under the Nonprofit Public Benefit Corporation Law.ⁿ¹⁵ However, an unrelated business run by a religious organization is subject to the FEHA if it employs five or more persons and is subject to state or federal income taxes.ⁿ¹⁶

The FEHA does not apply to employment disputes between religious organizations and their ministerial employees. Further, the establishment and *free exercise clauses of the First Amendment* bar judicial review of these employment disputes.ⁿ¹⁷

Legal Topics:

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

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FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. § 2000e-1(a).

(n2)Footnote 2. See *Kelly v. Methodist Hospital of Southern California* (2000) 22 Cal. 4th 1108, 1116-1117, 95 Cal. Rptr. 2d 514, 997 P.2d 1169 (qualified religious association is exempt from the FEHA regardless of the nature of the type of discrimination it allegedly practiced); *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 233-237, 116 Cal. Rptr. 2d 770 (Title VII could serve as basis for wrongful discharge claim against nonprofit religious corporation for retaliation for filing earlier claim of race and sex discrimination); see also *Rayburn v. General Conf. of Seventh-Day Adventists* (4th Cir. 1985) 772 F.2d 1164, 1166; *E.E.O.C. v. Pacific Press Pub. Ass'n* (9th Cir. 1982) 676 F.2d 1272, 1277.

(n3)Footnote 3. *E.E.O.C. v. Townley Engineering & Mfg. Co.* (9th Cir. 1988) 859 F.2d 610, 619.

(n4)Footnote 4. See 42 U.S.C. § 2000e-2(e)(2).

(n5)Footnote 5. *McClure v. Salvation Army* (5th Cir. 1972) 460 F.2d 553, 560; *Scharon v. St. Luke's Episcopal Presbyterian Hosp.* (8th Cir. 1991) 929 F.2d 360, 362 (ministerial exception extends to church-related institutions that have "substantial religious character").

(n6)Footnote 5.1. *Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 734-735, 14 Cal. Rptr. 3d 643, citing *Gellington v. Christian Methodist Episcopal Church, Inc.* (11th Cir. 2000) 203 F.3d 1299 (minister); *Combs v. Central Tex. Annual Conf. of the United Methodist Church* (5th Cir. 1999) 173 F.3d 343 (clergy member); *Bell v. Presbyterian Church* (4th Cir. 1997) 126 F.3d 328 (ordained minister); *Young v. N. Ill. Conf. of United Methodist Church* (7th Cir. 1994) 21 F.3d 184 (probationary minister); *Rayburn v. General Conf. of the Seventh Day Adventists* (4th Cir. 1985) 772 F.2d 1164 (applicant for pastoral position at church); *Kraft v. Rector, Churchwardens, and Vestry of Grace in New York* (S.D.N.Y. 2004) 2004 U.S. Dist. LEXIS 4234 (ordained priest); *Williams v. Episcopal Diocese of Mass.* (Mass. 2002) 436 Mass. 574, 766 N.E.2d 820 (ordained priest); *Dunn v. Board of Incorporators African Methodist Episcopal Church* (N.D. Tex. 2001) 2001 U.S. Dist. LEXIS 20110 (church reverend); *Sanchez v. Catholic Foreign Soc. of America* (M.D.Fla. 1999) 82 F. Supp. 2d 1338 (ordained priest seeking to be rehired as priest).

(n7)Footnote 5.2. *Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 735-736, 14 Cal. Rptr. 3d 643, citing *Rosati v. Toledo, Ohio Catholic Diocese* (N.D. Ohio 2002) 233 F. Supp. 2d 917 (novitiate released from order because she got breast cancer); *Turner v. Church of Jesus Christ* (Tex. Ct. App. 2000) 18 S.W.3d 877 (termination of Mormon missionary because of illness).

(n8)Footnote 5.3. *Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 736, 14 Cal. Rptr. 3d 643, citing by way of example, *E.E.O.C. v. Roman Catholic Diocese of Raleigh NC* (4th Cir. 2000) 213 F.3d 795 (director of music ministry and part-time music teacher at cathedral's elementary school); *Starkman v. Evans* (5th Cir. 1999) 198 F.3d 173 (church choir director); *Assemany v. Archdiocese of Detroit* (1988) 173 Mich. App. 752, 434 N.W.2d 233 (church organist); *Egan v. Hamline United Methodist Church* (Minn. Ct. App. 2004) 679 N.W.2d 350 (church music director at church); *Miller v. Bay View United Methodist Church* (E.D.Wis. 2001) 141 F. Supp. 2d 1174 (music and choir director of church).

(n9)Footnote 5.4. *Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 736, 14 Cal. Rptr. 3d 643, citing by way of example *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.* (4th Cir. 2004) 363 F.3d 299 (kosher supervisor at Jewish elderly home).

(n10)Footnote 5.5. *Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 736, 14 Cal. Rptr. 3d 643, citing *Alicea-Hernandez v. Catholic Bishop of Chicago* (7th Cir. 2003) 320 F.3d 698 (Hispanic communications

manager for Archdiocese of Chicago, whose duties included outreach to local Hispanic community, including writing for church publications and translating church materials into Spanish).

(n11)Footnote 5.6. *Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 737, 14 Cal. Rptr. 3d 643, citing *Musante v. Notre Dame of Easton Church* (D.Conn. 2004) 2004 U.S. Dist. LEXIS 5611 (director of religious education and pastoral assistant at Catholic Church); *Bryce v. Episcopal Church in Diocese of Colorado* (10th Cir. 2002) 289 F.3d 648 (youth minister).

(n12)Footnote 5.7. *Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 737, 14 Cal. Rptr. 3d 643, citing *Schmoll v. Chapman Univ.* (1999) 70 Cal. App. 4th 1434, 1437, 83 Cal. Rptr. 2d 426 (minister of gospel of Jesus Christ, whose job description included serving total campus community as pastor and performing duties of leading worship).

(n13)Footnote 5.8. *Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 737, 14 Cal. Rptr. 3d 643, citing *E.E.O.C. v. Catholic University of America* (4th Cir. 1996) 83 F.3d 455, 317 U.S. App. D.C. 343 (nun who taught canon law); *Powell v. Stafford* (D. Colo. 1994) 859 F. Supp. 1343 (theology teacher at Catholic school).

(n14)Footnote 5.9. *Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 737, 14 Cal. Rptr. 3d 643, citing *E.E.O.C. v. Southwestern Bap. Theological Seminary* (5th Cir. 1981) 651 F.2d 277 (distinguishing faculty from non-faculty).

(n15)Footnote 5.10. *See, e.g., Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 738-742, 14 Cal. Rptr. 3d 643 (on motion for summary judgment, court could not say categorically that professors at religious university were within exception, where they were nonordained and taught marriage and family counseling, which was not necessarily religious, and because professors taught students in program to become Christian therapists, court could not say categorically they could not come within exception). *See also E.E.O.C. v. Mississippi College* (5th Cir. 1980) 626 F.2d 477, 485 (action against religious university by psychology professor for sex discrimination did not violate *First Amendment* because faculty and staff did not function as ministers, attend to religious needs of faithful, or instruct students in whole of religious doctrine); *Hartwig v. Albertus Magnus College* (D.Conn. 2000) 93 F. Supp. 2d 200, 212 n. 14 (question of fact whether recently self-declared homosexual professor of religious studies and philosophy at Catholic liberal arts college had primarily religious duties and fit within exception, and remanding case with regard to nature of professor's duties without prejudice so defendant could present additional evidence concerning nature of plaintiff's duties and responsibilities).

(n16)Footnote 5.11. *Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 737-738, 14 Cal. Rptr. 3d 643, citing *DeMarco v. Holy Cross High School* (2d Cir. 1993) 4 F.3d 166, 170-171 (math teacher at Catholic school, even though he led students in prayer and took them to mass); *Guinan v. Roman Cath. Archdiocese of Indianapolis* (S.D.Ind. 1998) 42 F. Supp. 2d 849 (fifth grade teacher at religious school who taught both secular and religious subjects); *E.E.O.C. v. First Baptist Church* (N.D. Ind. 1992) 1992 U.S. Dist. LEXIS 14479 (teachers at religious elementary school); *United States Dep't of Labor v. Shenandoah Baptist Church* (W.D.Vir. 1989) 707 F. Supp. 1450, 1462 n. 12 (employees of private religious school); *see also Geary v. Visitation of the Blessed Virgin Mary* (3rd Cir. 1993) 7 F.3d 324 (exception not applied to lay teacher at church-operated school as long as teacher did not challenge validity of religious reason for termination).

(n17)Footnote 5.12. *Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 738, 14 Cal. Rptr. 3d 643, citing *Welter v. Seton Hall University* (1992) 128 N.J. 279, 608 A.2d 206 (exception did not apply to nuns teaching computer science at religious school).

(n18)Footnote 5.13. *Hope Int'l University v. Superior Court* (2004) 119 Cal. App. 4th 719, 738, 14 Cal. Rptr. 3d 643, citing *Smith v. Raleigh Dist. of N. C. Methodist Church* (E.D.N.C. 1999) 63 F. Supp. 2d 694 (exception did not apply to church receptionist or pastor's secretary); *Lukaszewski v. Nazareth Hosp.* (E.D.Pa. 1991) 764 F. Supp. 57

(exception did not apply to director of plant operations at religiously affiliated hospital). *See Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, 543-544, 10 Cal. Rptr. 3d 283, 85 P.3d 67

(religiously-affiliated entity providing immigrant resettlement, elder care, counseling, food, clothing and affording housing to poor and needy and vocational training to developmentally disabled did not attempt to claim its employees had religious duties of ministers and most of employees were not members of affiliated religion).

(n19)Footnote 6. *E.E.O.C. v. Southwestern Bap. Theological Seminary* (5th Cir. 1981) 651 F.2d 277, 283 .

(n20)Footnote 7. *E.E.O.C. v. Southwestern Bap. Theological Seminary* (5th Cir. 1981) 651 F.2d 277, 283-284 .

(n21)Footnote 8. *Rayburn v. General Conf. of Seventh-Day Adventists* (4th Cir. 1985) 772 F.2d 1164, 1168-1169 (failure to promote female nonordained "associate in pastoral care" who taught baptismal and Bible classes, pastored singles group, occasionally preached, and had other evangelical, liturgical, and counseling responsibilities, was not subject to Title VII scrutiny).

(n22)Footnote 9. EEOC Compliance Manual (CCH) § 605, P 2166; *see Roby v. United States Dep't of Navy* (9th Cir. 1996) 76 F.3d 1052 (related issue of considering religious status of person claiming conscientious objector status, where the sincerity and depth of conviction requirements for the religious test were not met).

(n23)Footnote 10. *See 42 U.S.C. § 12113(d)(1)*.

(n24)Footnote 11. *See 42 U.S.C. § 12113(d)(2)*.

(n25)Footnote 12. *Gov. Code § 12926(d)*; *2 Cal. Code Reg. § 7286.5(a)(5)*; *see DFEH v. Bohemian Club* (1988) FEHC Dec. No. 88-01, pp. 12-13 (non-profit social club does not qualify for defense, notwithstanding spiritual value of comradery); *Arriaga v. Loma Linda Univ.* (1992) 10 Cal. App. 4th 1556, 1561, 13 Cal. Rptr. 2d 619 ; *see also Smith v. Fair Employment & Housing Com.* (1996) 12 Cal. 4th 1143, 51 Cal. Rptr. 2d 700, 913 P.2d 909 , (in housing case under FEHA, religious belief in sinful status of unmarried cohabiting couple not available defense).

(n26)Footnote 13. *Gov. Code § 12926.2(c)*.

(n27)Footnote 14. *See Corp. Code § 9110 et seq.*

(n28)Footnote 15. *McKeon v. Mercury Healthcare Sacramento* (1998) 19 Cal. 4th 321, 331, 79 Cal. Rptr. 2d 319, 965 P.2d 1189 ; *see Corp. Code § 5110 et seq.*

(n29)Footnote 16. *2 Cal. Code Reg. § 7286.5(a)(5)*.

(n30)Footnote 17. *Schmoll v. Chapman Univ.* (1999) 70 Cal. App. 4th 1434, 1438-1444 (ministerial exception applies equally in Title VII and FEHA cases; employment dispute between religious college and chaplain/director of campus ministry barred from judicial review).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law § 41.107

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.107 Same Decision Made Even in Absence of Discrimination

In *Price Waterhouse v. Hopkins*,ⁿ¹ a Title VII sex discrimination case, the United States Supreme Court held that when an employee proves that gender played a motivating part in an employment decision, the employer may avoid liability only by proving, by a preponderance of the evidence, that it would have made the same decision even if it had not taken the employee's gender into account.ⁿ² A plurality of the Court reasoned that the employer's burden is thus tantamount to an affirmative defense.ⁿ³

However, the Civil Rights Act of 1991 also provides that if the employer can demonstrate that it would have taken the same action in the absence of the impermissible motivating factor, the court may grant only declaratory relief, injunctive relief (other than hiring, admission, promotion, or reinstatement), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under Title 42 *United States Code Section 2000e-2(m)*.ⁿ⁴ The court may not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment of back pay.ⁿ⁵ For full discussion of remedies for violations of Title VII, *see* Chapter 43, Part B.

Legal Topics:

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

Labor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964Coverage & DefinitionsGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964RemediesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 .

(n2)Footnote 2. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 258, 260-261, 109 S. Ct. 1775, 104 L. Ed. 2d 268 .

(n3)Footnote 3. *See Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 246, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (Brennan, Marshall, Blackmun, Stevens, JJ.).

(n4)Footnote 4. 42 U.S.C. § 2000e-5(g)(2)(B).

(n5)Footnote 5. 42 U.S.C. § 2000e-5(g)(2)(B).



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2-41 California Employment Law § 41.108

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.108 Security Regulations

It is not an unlawful employment practice under Title VII for an employer to fail or refuse to hire an individual for a position, or to discharge an individual from a position, if the position, or any part of the premises on which the duties of the position are to be performed, is subject to any requirement imposed in the interest of the national security of the United States and the individual has not fulfilled or has ceased to fulfill that requirement.ⁿ¹ An employer is nevertheless required to observe proper procedures in conducting its security clearance.ⁿ² Similarly, under the FEHA, a discriminatory employment practice that conforms to security regulations established by the United States or the State of California is lawful.ⁿ³

Legal Topics:

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

Labor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964Coverage & DefinitionsGeneral OverviewLabor & Employment LawPreemployment Practices

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-2(g).

(n2)Footnote 2. *See Doe v. Lawrence Livermore National Laboratory* (9th Cir. 1995) 65 F.3d 771 .

(n3)Footnote 3. *See* Gov. Code § 12940; 2 Cal. Code Reg. § 7286.7(d).



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2-41 California Employment Law § 41.109

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.109 Seniority or Merit System

[1] Generally

Under Title VII, it is not an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment, pursuant to a bona fide seniority or merit system,ⁿ¹ provided that such differences are not the result of an intention to discriminate.ⁿ² The United States Supreme Court has stated that the Title VII "bona fide seniority system" exemption is not a defense; it is a provision that itself delineates which employment practices are illegal and thereby prohibited, and which are not.ⁿ³

Bona fide seniority systems are exempted from the coverage of Title VII even if they perpetuate the effects of past discrimination.ⁿ⁴ This immunization of bona fide seniority systems applies to systems adopted both before and after the effective date of Title VII.ⁿ⁵ However, a system that is not bona fide and that is the result of an intention to discriminate is not exempted by Title VII.ⁿ⁶ Thus, discriminatory impact is not sufficient to invalidate a seniority system, and actual intent to discriminate must be proved.ⁿ⁷ The plaintiff has the burden of showing the existence of the discriminatory intent or illegal purpose.ⁿ⁸ However, disproportionate impact is relevant in proving this intent.ⁿ⁹

For further discussion relating to bona fide seniority systems, *see* § 41.68.

[2] Determining Whether System Is "Bona Fide"

In *Teamsters v. United States*,ⁿ¹⁰ the United States Supreme Court analyzed what constitutes a "bona fide" seniority system. The Court stated that although the seniority system before it did have the effect of perpetuating past discrimination, the system was bona fide because: (1) it applied equally to all races and ethnic groups; (2) the placement of certain employees in a separate bargaining unit from other employees was rational, in accord with industry practice, and consistent with NLRB precedents; (3) the system did not have its genesis in racial discrimination; and (4) it was negotiated and maintained free from any illegal purpose.ⁿ¹¹

After *Teamsters*, courts that have been presented with the question of whether a seniority system that is facially neutral

is bona fide must determine whether there has been purposeful discrimination in connection with the establishment or continuation of the seniority system.ⁿ¹² The totality of the circumstances in the development and maintenance of the system is relevant to the ultimate factual finding of whether the system is bona fide.ⁿ¹³ In *James v. Stockham Valves & Fittings Co.*,ⁿ¹⁴ the Fifth Circuit approached the facts before it by using the four factors relied on in *Teamsters*, discussed above, to analyze whether the seniority system was valid. Other courts, including the United States Supreme Court, have followed this analysis.ⁿ¹⁵ In some cases, courts have found that a system is not bona fide, and that it was originated and maintained for an unlawful purpose, therefore precluding application of the seniority system exemption. For example, in one case,ⁿ¹⁶ the court found that the seniority system was not bona fide because it penalized blacks more than whites, the unequal treatment was not attributable to a legitimate division of bargaining units, and it was originated and maintained for a discriminatory purpose. Similarly, in another case,ⁿ¹⁷ the court held that a union's seniority system was not bona fide because it was negotiated and maintained for the illegal purpose of excluding blacks from membership, and with the intent and effect of discriminating against them because of their race.

[3] Determining Whether Practice Is "Seniority System"

Sometimes it is unclear whether or not the employment practice at issue is a seniority system within the meaning of Title VII. In *California Brewers Assn. v. Bryant*,ⁿ¹⁸ the United States Supreme Court defined such a system as a scheme that alone or in tandem with nonseniority criteria allots to employees ever-improving employment rights and benefits as their relative lengths of pertinent employment increase. The Court further stated that the principal feature of a seniority system is that preferential treatment is dispensed on the basis of some measure of time served in employment.ⁿ¹⁹ In analyzing the employment feature before it, the court applied these definitions and concluded that the collective bargaining agreement provision, which accorded greater benefits to permanent employees than to temporary employees and provided that a temporary employee must work 45 weeks to become a permanent employee, should be viewed as a seniority system.ⁿ²⁰

[4] Applicability of Seniority Exemption to Other Statutes

In addition to its application under Title VII, the seniority exemption has been held by three circuits to be applicable to Title 42 *United States Code*, section 1981 cases,ⁿ²¹ although one circuit has held that the exemption is not available in section 1981 cases.ⁿ²²

The ADEA contains specific language regarding the seniority exemption. It states that it is not unlawful for an employer to observe the terms of a bona fide seniority system that is not intended to evade the purposes of the ADEA, except that no such seniority system can require or permit involuntary retirement of any individual protected under the ADEA because of the age of the individual.ⁿ²³ The United States Supreme Court analyzed this exemption in a case involving a transfer policy that discriminated against pilots on the basis of age. The Court held that the exemption was inapplicable to the case because under the ADEA, a seniority system may not require or permit the involuntary retirement of a protected individual because of age, and since the seniority plan in the case permitted retirement, the system was not bona fide.ⁿ²⁴

For a full discussion of the seniority system exception to Equal Pay Act requirements, see § 41.56.

The FEHAⁿ²⁵ contains no express general exemption for seniority systems. Its age discrimination provision does, however, provide in part that hiring or promotion on the basis of experience or training, or rehiring on the basis of seniority and prior service with the employer, does not, in itself, constitute unlawful age discrimination under the FEHA.ⁿ²⁶ However, if candidates for hire have the same record of seniority or prior service with the employer, the employer may not refuse to select one of the candidates because he or she is over the age of 40 years.ⁿ²⁷

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964Coverage & DefinitionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. For discussion of meaning of "bona fide seniority or merit system," *see* [2] and [3], *below*.

(n2)Footnote 2. *See* 42 U.S.C. § 2000e-(2)(h).

(n3)Footnote 3. *Lorance v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, 908-909, 109 S. Ct. 2261, 104 L. Ed. 2d 961 .

(n4)Footnote 4. *Teamsters v. United States* (1977) 431 U.S. 324, 353-354, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n5)Footnote 5. *American Tobacco Co. v. Patterson* (1982) 456 U.S. 63, 77, 102 S. Ct. 1534, 71 L. Ed. 2d 748 .

(n6)Footnote 6. *Teamsters v. United States* (1977) 431 U.S. 324, 353, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n7)Footnote 7. *Lorance v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, 908-909, 109 S. Ct. 2261, 104 L. Ed. 2d 961 ; *American Tobacco Co. v. Patterson* (1982) 456 U.S. 63, 65, 102 S. Ct. 1534, 71 L. Ed. 2d 748 .

(n8)Footnote 8. *See Lorance v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, 908-909, 109 S. Ct. 2261, 104 L. Ed. 2d 961 ; *United Air Lines, Inc. v. Evans* (1977) 431 U.S. 553, 560, 97 S. Ct. 1885, 52 L. Ed. 2d 571 ; *Black Law Enf. Officers Ass'n v. City of Akron* (6th Cir. 1987) 824 F.2d 475, 481 .

(n9)Footnote 9. *Pullman-Standard v. Swint* (1982) 456 U.S. 273, 289, 102 S. Ct. 1781, 72 L. Ed. 2d 66 .

(n10)Footnote 10. *Teamsters v. United States* (1977) 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n11)Footnote 11. *Teamsters v. United States* (1977) 431 U.S. 324, 355-356, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n12)Footnote 12. *Bernard v. Gulf Oil Corp.* (5th Cir. 1988) 841 F.2d 547, 555 ; *James v. Stockham Valves & Fittings Co.* (5th Cir. 1977) 559 F.2d 310, 351-352 .

(n13)Footnote 13. *Pullman-Standard v. Swint* (1982) 456 U.S. 273, 279, 102 S. Ct. 1781, 72 L. Ed. 2d 66 ; *James v. Stockham Valves & Fittings Co.* (5th Cir. 1977) 559 F.2d 310, 352 .

(n14)Footnote 14. *James v. Stockham Valves & Fittings Co.* (5th Cir. 1977) 559 F.2d 310, 352 .

(n15)Footnote 15. *See, e.g., Pullman-Standard v. Swint* (1982) 456 U.S. 273, 279-290, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (using *James* factors, Court upheld district court's finding of no evidence that system was not bona fide); *Gantlin v. West Virginia Pulp and Paper Co.* (4th Cir. 1984) 734 F.2d 980, 990 (these factors have been treated as a nonexclusive list to aid in determination of whether system is bona fide); *Firefighters Inc. for Racial Equality v. Bach* (10th Cir. 1984) 731 F.2d 664, 668 .

(n16)Footnote 16. *United States v. Georgia Power Co.* (5th Cir. 1973) 634 F.2d 929 .

(n17)Footnote 17. *Wattleton v. Intern. Broth. of Boiler Makers, Etc.* (7th Cir. 1982) 686 F.2d 586, 593 .

(n18)Footnote 18. *California Brewers Asso. v. Bryant* (1980) 444 U.S. 598, 605-606, 100 S. Ct. 814, 63 L. Ed. 2d 55 .

(n19)Footnote 19. *California Brewers Asso. v. Bryant* (1980) 444 U.S. 598, 606, 100 S. Ct. 814, 63 L. Ed. 2d 55 .

(n20)Footnote 20. *California Brewers Asso. v. Bryant* (1980) 444 U.S. 598, 606, 100 S. Ct. 814, 63 L. Ed. 2d 55 .

(n21)Footnote 21. See *Freeman v. Motor Convoy, Inc.* (11th Cir. 1983) 700 F.2d 1339, 1349 ; *Pettway v. American Cast Iron Pipe Company* (5th Cir. 1978) 576 F.2d 1157, 1191-1192 fn. 37 ; *Johnson v. Ryder Truck Lines, Inc.* (4th Cir. 1978) 575 F.2d 471, 473-475 .

(n22)Footnote 22. *Bolden v. Pennsylvania State Police* (3d Cir. 1978) 578 F.2d 912, 921 .

(n23)Footnote 23. See 29 U.S.C. § 623(f)(2)(A).

(n24)Footnote 24. *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 124-125, 105 S. Ct. 613, 83 L. Ed. 2d 523 .

(n25)Footnote 25. See Gov. Code §§ 12900-12996.

(n26)Footnote 26. See Gov. Code § 12940(a)(5); see also 2 Cal. Code Reg. §§ 7295.7, 7295.8.

(n27)Footnote 27. See 2 Cal. Code Reg. § 7295.7(b).



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2-41 California Employment Law § 41.110

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.110 Spouses Working Together

The FEHA provides that, notwithstanding its prohibition against discrimination on the basis of marital status, an employer may reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the FEHC.ⁿ¹ FEHC regulations provide that an employer may refuse to place other spouses in the same department, division, or facility for business reasons of supervision, security, or morale, if the work involves potential conflicts of interest or other hazards greater for married couples than for other persons.ⁿ² In addition, the regulations provide that, for business reasons of safety, supervision, security, or morale, an employer may refuse to place one spouse under direct supervision of the other spouse.ⁿ³

In *DFEH v. Insurance America Sales Agency*,ⁿ⁴ the FEHC adopted a standard to determine whether there is a potential conflict of interest or hazard within the meaning of the FEHA and its regulations. The FEHC standard requires that in each case a careful assessment be made of the actual work setting to determine whether that setting would pose, because of the mutual concerns married couples are assumed to bear, a potential conflict of interest or other hazard greater for married couples than for other employees. If the potential conflict or hazard is greater, the employer may regulate the employment. In its efforts to avert the risks, the employer is required to match reasonably the severity of its actions toward one or the other spouse to the degree of risk and the significance of the potential harm involved.ⁿ⁵ The FEHC pointed out that the use of generalizations regarding married couples is unique, and that such use of generalizations is restricted to the same-department defense to marital status discrimination because an individual case-by-case evaluation would present great practical difficulties and be a threat to personal privacy.ⁿ⁶ In *Insurance America*, the employer had argued that the married couple's working in a common area would cause supervision, security, and morale problems. The FEHC rejected this argument on the ground that the employer had not specified the nature of the problems that could arise or made any showing that such problems had arisen in the past. The employer's second justification was that one spouse could end up supervising the other. The FEHC rejected this argument because it was "a mere possibility," and to ban the couple working together based on a mere possibility would be to vitiate the prohibition of marital status discrimination. However, the FEHC accepted the employer's third argument as establishing the same-department defense. The employer claimed that there was a potential for the spouses to pool their sales, thereby gaining a higher

commission for one spouse than either spouse could have received alone. The FEHC stated that the marriage bond gives married couples a greater incentive to jointly promote their interests, and if such pooling occurred, it would amount to employee malfeasance and could significantly injure the employer's interests.ⁿ⁷

For additional discussion of rules relating to an employee's marital status, *see* §§ 41.36[2][b], 41.42[2][l], and 41.65.

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisparate TreatmentGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Gov. Code § 12940(a)(3).*

(n2)Footnote 2. *2 Cal. Code Reg. § 7292.5(a)(2).*

(n3)Footnote 3. *See 2 Cal. Code Reg. § 7292.5(a)(1).*

(n4)Footnote 4. *DFEH v. Insurance America Sales Agency* (1988) FEHC Dec. No. 88-07.

(n5)Footnote 5. *DFEH v. Insurance America Sales Agency* (1988) FEHC Dec. No. 88-07 at p. 6.

(n6)Footnote 6. *DFEH v. Insurance America Sales Agency* (1988) FEHC Dec. No. 88-07 at p. 6 fn. 1.

(n7)Footnote 7. *DFEH v. Insurance America Sales Agency* (1988) FEHC Dec. No. 88-07 at pp. 7-8.



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2-41 California Employment Law § 41.111

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.111 Veterans' Preferences

Title VII provides that it shall not be construed to repeal or modify any federal, state, territorial, or local law creating special rights or preferences for veterans.ⁿ¹ The FEHA has a similar provision stating that nothing in the FEHA relating to discrimination on account of sex shall affect the right of an employer to use veteran status as a factor in employee selection or to give special consideration to Vietnam Era veterans.ⁿ² For discussion of the federal Vietnam Era Veterans Readjustment Assistance Act, *see* Chapter 40, Part C, and Chapter 44. For discussion of veterans' reemployment rights, *see* Chapter 40, Part C.

Legal Topics:

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

Labor & Employment LawDiscriminationDisparate TreatmentGeneral OverviewLabor & Employment
LawDiscriminationTitle VII of the Civil Rights Act of 1964General OverviewMilitary & Veterans
LawVeteransBenefitsVietnam Era Veterans Readjustment Assistance Act

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-11.

(n2)Footnote 2. *Gov. Code* § 12940(a)(4).



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2-41 California Employment Law § 41.112

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.112 Written Release of Claims

A written release of claims by an employee may be a valid defense against that employee's later claim of employment discrimination.ⁿ¹ In *Skrbina v. Fleming Companies*,ⁿ² a California court of appeal held that an employee who had signed a general release of all employment claims at the time of his layoff had extinguished his right to later bring an action against his employer for disability and age discrimination. The court found the language of the release could not have been plainer and that absent fraud, duress, deception, misrepresentation, or undue influence, a plaintiff's assertions that he or she did not intend to relinquish his or her rights to employment discrimination claims does not invalidate the release if the plaintiff had read and willingly signed the release.ⁿ³

In *Jefferson v. Department of Youth Authority*,ⁿ⁴ the California Supreme Court held that a compromise and release executed in a workers' compensation proceeding bars a civil action under FEHA for damages relating to the same events that resulted in the injury, if the compromise and release expressly releases "all claims and causes of action" relating to an injury and includes an attachment establishing the parties' intent to include civil claims within the scope of the release. The Court found two evidentiary points supporting its conclusion: (1) The attachment made clear the parties' intent to settle matters outside the scope of workers' compensation; and (2) plaintiff offered no extrinsic evidence establishing the parties' intent to exclude her FEHA claim from the settlement.ⁿ⁵

When the plaintiff executed the compromise and release covering "all claims and causes of action," she had already filed a complaint with the DFEH. Therefore, she not only contemplated the possibility of FEHA remedies; she was actively pursuing them. When she released all claims and causes of action relating to the injury, she knew, or should have known, that her FEHA claim would fall within the scope of that broad language.ⁿ⁶ The Court declined to discount the language of the release merely because it was on a preprinted form, since the form at issue (although mandatory)ⁿ⁷ did not compel the plaintiff to settle her FEHA action. Instead, the form provided a space in which the parties could enumerate express exceptions to the otherwise broad settlement.ⁿ⁸

The Court then concluded that when an employee has knowledge of a potential claim against the employer at the time of executing a general release in a workers' compensation proceeding, but has not yet initiated litigation of that claim,

the employee has the burden of expressly excepting the claim from the release. Absent this exception, and absent contrary extrinsic evidence, a court will enforce general language, such as that found in the compromise and release and attachment in this case, releasing all claims including civil claims.ⁿ⁹

In *Kohler v. Interstate Brands Corp.*,ⁿ¹⁰ following *Jefferson*, the court of appeal found a FEHA lawsuit against an employer fell within the scope of the broad release language in the workers' compensation release the employee signed. Having filed her complaint in her FEHA action two weeks before she signed the release, the employee clearly had knowledge of a potential FEHA claim against the employer at the time she executed the general release in the workers' compensation proceeding. Unlike the plaintiff in *Jefferson*, this plaintiff had initiated litigation of her FEHA action by filing her complaint before she signed the workers' compensation release. However, the court found that this distinction made no difference.ⁿ¹¹

When only the employee knows what claims or causes of action will be pursued, whether or not a civil action has been initiated, the rationale of *Jefferson* imposes the burden on the employee to expressly except those claims or causes of action from the broad language of the workers' compensation release. Otherwise, absent extrinsic evidence of a contrary intent, the employer is entitled to rely on the broad language of the release as settling all claims and causes of action, including those arising under the FEHA. In *Kohler*, it was undisputed the employer did not know of the FEHA lawsuit when the parties signed the workers' compensation release. The burden fell to the employee to expressly except her causes of action under the FEHA from the broad language of the release. She did not do so, and there was no extrinsic evidence sufficient to support a finding that the parties did not intend the release to encompass the FEHA lawsuit.ⁿ¹²

In *Claxton v. Waters*,^{n12.1} the California Supreme Court held that the standard language of the preprinted form used in settling workers' compensation claims releases only those claims that are within the scope of the workers' compensation system, and does not apply to claims asserted in separate civil actions, including, for example, claims of sexual harassment. The court distinguished *Jefferson* by noting that in *Jefferson*, the preprinted compromise and release form had an attachment expressing the parties' intent to have the release also apply to the employee's civil action alleging sex discrimination. In *Claxton*, the court held further that extrinsic evidence is not admissible to show that the standard preprinted workers' compensation release form also applies to claims outside the workers' compensation system.^{n12.2} This rule applies prospectively only, so that for any preprinted workers' compensation settlement form executed before the finality of *Claxton v. Waters*, extrinsic evidence may be admitted to prove the parties intended to release claims outside the workers' compensation system.^{n12.3} The court disapproved *Kohler* to the extent it is inconsistent with the view that in further proceedings addressed to the issue of the intent of the parties in entering into the workers' compensation compromise and release for cases involving workers' compensation settlement forms executed before the finality of *Claxton*, the interpretation of the compromise and release requires consideration of all credible evidence offered to prove the intention of the parties.^{n12.4}

■ CONSULTANT'S COMMENT:

The holdings in *Jefferson v. Department of Youth Authority* and *Kohler v. Interstate Brands Corp.*ⁿ¹³ make it clear that employers should closely coordinate their resolution of worker's compensation and EEO claims. Broad release language in forms compromising worker's compensation and other claims may extinguish the right to pursue EEO charges and civil lawsuits if a charge or lawsuit is pending at the time of the worker's compensation release or there is proof of a knowing and voluntary waiver of EEO claims not yet filed. *Commentary by Kirby Wilcox.*

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisparate ImpactDefenses & ExceptionsGeneral OverviewLabor & Employment LawDiscriminationDisparate TreatmentDefenses & ExceptionsGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of

1964General Overview

FOOTNOTES:

(n1)Footnote 1. *See Shaw v. City of Sacramento* (9th Cir. 2001) 250 F.3d 1289 ; *Skrbina v. Fleming Companies* (1996) 45 Cal. App. 4th 1353, 1366-1367, 53 Cal. Rptr. 2d 481 .

(n2)Footnote 2. *Skrbina v. Fleming Companies* (1996) 45 Cal. App. 4th 1353, 1366-1367, 53 Cal. Rptr. 2d 481 .

(n3)Footnote 3. *See Skrbina v. Fleming Companies* (1996) 45 Cal. App. 4th 1353, 1366-1367, 53 Cal. Rptr. 2d 481 . *See also Butler v. Vons Companies, Inc.* (2006) 140 Cal. App. 4th 943, 947-951, 45 Cal. Rptr. 3d 151 (question of fact whether employer intended compromise and release settlement agreement, which was entered into with employee after resolution of altercation employee had with co-employee, to cover employment discrimination action filed by employee less than two years thereafter, where employment discrimination action was entirely distinct from dispute involving co-employee, and release agreement was ambiguous because employee's union was also party to agreement, suggesting agreement was limited to grievance involving altercation with co-employee).

(n4)Footnote 4. *Jefferson v. Department of Youth Authority* (2002) 28 Cal. 4th 299, 121 Cal. Rptr. 2d 391, 48 P.3d 423 .

(n5)Footnote 5. *Jefferson v. Department of Youth Authority* (2002) 28 Cal. 4th 299, 304, 121 Cal. Rptr. 2d 391, 48 P.3d 423 .

(n6)Footnote 6. *Jefferson v. Department of Youth Authority* (2002) 28 Cal. 4th 299, 305-306, 121 Cal. Rptr. 2d 391, 48 P.3d 423 .

(n7)Footnote 7. *See 8 Cal. Code Regs. § 10874.*

(n8)Footnote 8. *Jefferson v. Department of Youth Authority* (2002) 28 Cal. 4th 299, 306, 121 Cal. Rptr. 2d 391, 48 P.3d 423 .

(n9)Footnote 9. *Jefferson v. Department of Youth Authority* (2002) 28 Cal. 4th 299, 310, 121 Cal. Rptr. 2d 391, 48 P.3d 423 .

(n10)Footnote 10. *Kohler v. Interstate Brands Corp.* (2002) 103 Cal. App. 4th 1096, 127 Cal. Rptr. 2d 366 .

(n11)Footnote 11. *Kohler v. Interstate Brands Corp.* (2002) 103 Cal. App. 4th 1096, 1100, 127 Cal. Rptr. 2d 366, 368 .

(n12)Footnote 12. *Kohler v. Interstate Brands Corp.* (2002) 103 Cal. App. 4th 1096, 1101, 127 Cal. Rptr. 2d 366, 369 .

(n13)Footnote 12.1. *Claxton v. Waters* (2004) 34 Cal. 4th 367, 372-377, 18 Cal. Rptr. 3d 246 .

(n14)Footnote 12.2. *Claxton v. Waters* (2004) 34 Cal. 4th 367, 377-378, 18 Cal. Rptr. 3d 246 .

(n15)Footnote 12.3. *Claxton v. Waters* (2004) 34 Cal. 4th 367, 378-379, 18 Cal. Rptr. 3d 246 . *See also Mitchell v. Union Central Life Ins. Co.* (2004) 118 Cal. App. 4th 1331, 1338-1342, 13 Cal. Rptr. 3d 732 , *overruled on other grounds in Claxton v. Waters* (2004) 34 Cal. 4th 367, 18 Cal. Rptr. 3d 246 (extrinsic evidence was sufficient to create triable issue of material fact concerning parties' intent at time parties settled workers' compensation case, and employer's motion for summary judgment based on workers' compensation compromise and release should have been denied, where employee had two lawyers, one representing her in workers' compensation action and other in civil action for harassment and discrimination, her workers' compensation lawyer had no authority to settle her civil action and did not intend to do so, civil action was not mentioned in compromise and release, and both employer's workers' compensation

lawyer and workers' compensation judge conceded civil action was not discussed at any time during their negotiations; and where employee had no intent to include civil action in her settlement of her workers' compensation case).

(n16)Footnote 12.4. *Claxton v. Waters* (2004) 34 Cal. 4th 367, 379, 18 Cal. Rptr. 3d 246 .

(n17)Footnote 13. *Jefferson v. Department of Youth Authority* (2002) 28 Cal. 4th 299, 121 Cal. Rptr. 2d 391 ;
Kohler v. Interstate Brands Corp. (2002) 103 Cal. App. 4th 1096, 1100, 127 Cal. Rptr. 2d 366, 368 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART F. SUBSTANTIVE DEFENSES

2-41 California Employment Law §§ 41.113 through 41.129

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

[Reserved]

§§ 41.113[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART G. RETALIATION

2-41 California Employment Law § 41.130

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.130 Governing Law

[1] Generally

Title VII, the ADEA, the ADA, and the FEHA contain substantially similar provisions making it an unlawful employment practice for an employer to discriminate against any person for (1) opposing any practice forbidden or made unlawful under those laws,ⁿ¹ or (2) filing a complaint, making a charge, testifying, assisting, or participating in any investigation, proceeding, hearing, or litigation under those laws.ⁿ² Although the federal-sector provision of the ADEA,^{n2.1} which allows federal employees to sue under the ADEA, does not contain the same explicit protection against retaliation as the private-sector provisions of the ADEA,^{n2.2} a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the ADEA.^{n2.3} Title 42 *United States Code*, section 1981 also encompasses a complaint of retaliation against a person who has complained about a violation of another person's contract-related right.^{n2.4} Effective January 1, 1988, former *Gov. Code* § 12940(f)ⁿ³ was amended to apply to *any person* who retaliates for engaging in protected activities.ⁿ⁴ The ADA also provides that it is unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of his or her ADA rights, or because he or she exercised or enjoyed those rights, or because he or she aided or encouraged someone else in the exercise or enjoyment of ADA rights.ⁿ⁵ The United States Constitution,ⁿ⁶ section 1983,ⁿ⁸ the EPA,ⁿ⁹ and Executive Order No. 11246ⁿ¹⁰ may also provide a basis for attacking such "retaliation."

The Family and Medical Leave Act of 1993 also contains a similarly worded non-retaliation provision.^{n10.1}

An employer generally can be held liable for the retaliatory actions of its supervisors.^{n10.2} A decision-maker's ignorance does not categorically shield the employer from liability if other substantial contributors to the decision bore the requisite animus.ⁿ¹¹

[1A] Scope of Protection Against "Discrimination"

In *Burlington Northern & Santa Fe Railway Co. v. White*, ^{n11.1} the United States Supreme Court considered the meaning of "discriminates against" in the anti-retaliation provision of Title VII to resolve disagreement among the

Circuit Courts of Appeal about whether the challenged action had to be employment-related or workplace-related and about how harmful the action or actions must be to constitute retaliation. The Court held that Title VII's substantive provision and its anti-retaliation provision were not coterminous. The scope of the anti-retaliation provision extended beyond workplace-related or employment-related retaliatory acts and harm. The Court rejected standards applied in the federal Courts of Appeals treating the anti-retaliation provision as forbidding the same conduct prohibited by the anti-discrimination provision and limiting actionable retaliation to so-called "ultimate employment decisions."^{11.2}

The Court then considered the scope of protection provided by the anti-retaliation provision, i.e., the level of seriousness to which injury or harm caused by the retaliation must rise before it becomes actionable retaliation. The Court held that a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination. The Court used the phrase "material adversity" to separate significant from trivial harms, and referred to a reasonable employee to set an objective standard for judging harm. The Court also emphasized the importance of context, because the significance of a given act of retaliation will often depend on the circumstances.^{11.3}

In *Burlington*, the Court found there was a sufficient evidentiary basis to support a jury verdict in favor of a female railway company employee on her claim of retaliation.^{11.4} The employee was the only woman working in the employer's maintenance of way department at one of its yards. The employee's supervisor was suspended and ordered to attend sexual-harassment training after the employee complained. Thereafter, she was removed from forklift duty and assigned to perform standard track laborer tasks, reflecting a co-worker's complaints that, in fairness, a "more senior man" should have the "less arduous and cleaner job" of forklift operator. Later, she was suspended without pay for alleged insubordination, but the employer concluded she had not been insubordinate and reinstated her and awarded her backpay for the days she was suspended. The jury found the reassignment from forklift duty to standard track laborer tasks and the suspension without pay amounted to retaliation. The Court found that reassignment of job duties could constitute retaliatory discrimination even when both former and present duties fell within the same job description. There was considerable evidence that track labor duties were more arduous and dirtier; the forklift operator position required more qualifications, which was an indication of prestige; and the forklift operator position was objectively considered a better job and the male employees resented the female employee for occupying it. The suspension without pay also could constitute retaliation even though the employer ultimately reinstated the employee with backpay, since it could well act as a deterrent to a reasonable employee.

Interestingly, the California Supreme Court, in *Yanowitz v. L'OrealUSA, Inc.*,^{11.5} considered nearly identical language in the FEHA's retaliation provision, but reached the opposite result. The court recognized that although the language of the FEHA's retaliation provision ("or otherwise discriminate") arguably was broader than the discrimination provision, it was more reasonable to conclude that the Legislature intended to extend comparable protection to both discrimination and retaliation plaintiffs.^{11.6} As a result, the court concluded that, to succeed on a theory of unlawful retaliation, an employee must demonstrate that he or she has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment, rather than simply that the employee has been subjected to an adverse action or treatment that reasonably would deter an employee from engaging in the protected activity.^{11.7} When an employer retaliates by denying prospects for advancement or promotions to employees because they filed discrimination claims, the employer has engaged in an adverse employment action in violation of FEHA.^{11.8} A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected.^{11.9} But if between the events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection.^{11.10}

As a result, the analysis of what constitutes actionable retaliatory conduct will depend on whether the analysis is conducted under federal or state law. But while the analysis may be different, the result may be the same. In *Taylor v. City of Los Angeles Dept. of Water & Power*,^{11.11} the employee's complaint for retaliation in violation of FEHA sufficiently stated a cause of action for retaliation under both what the court termed as the materiality test followed by the California Supreme Court in *Yanowitz* and the deterrence test adopted by the United States Supreme Court in

Burlington. The employee sufficiently pleaded that he experienced adverse employment action as a result of opposing race discrimination against a fellow employee that he supervised. He alleged that his supervisor engaged in a continuous course of conduct culminating in the employee's low rank on a civil service list for a position he had apparently been groomed to assume prior to assisting his fellow employee with his race discrimination complaints. Under the *Yanowitz* analysis, it was reasonable to conclude that the events represented adverse employment actions material to the terms, conditions or privileges of his employment.^{n11.12} The court also found that, assuming the truth of the allegations, the employee sufficiently pleaded that he suffered adverse employment action under the deterrence test. The court concluded that a reasonable city engineer with nearly two decades of tenure and similar promotional objectives would be deterred by his supervisor's course of conduct from making or supporting a charge of discrimination.^{n11.13}

In *Steele v. Youthful Offender Parole Board*, ^{n11.14} the Court of Appeal held that constructive discharge could serve as adverse employment action sufficient to support a claim of retaliation under the FEHA, and found that substantial evidence supported the jury's finding of an adverse employment action by the employer. The court found that constructive discharge, like actual discharge, is a materially adverse employment action, because a constructive discharge is legally regarded as a firing rather than a resignation.^{n11.15}

[2] Opposition to Employment Discrimination

[a] Scope of Protection

As discussed in [1], *above*, several equal employment opportunity laws protect persons who "oppose" unlawful employment practices.ⁿ¹² "Opposition" protected from retaliation may include complaints or protests to an employer,ⁿ¹³ meetings to discuss unlawful employment policies,ⁿ¹⁴ refusal to participate in unlawful employment practices and threatening to file a charge of employment discrimination.ⁿ¹⁵ In *Iwekaogwu v. City of Los Angeles*, the court allowed a jury to infer retaliation against a racial-minority employee who was refused promotions (which promotion in one instance went to a less qualified person), refused overtime, and was subjected to the hostile comments of second-level supervisor after having threatened to file race discrimination action.ⁿ¹⁶

In *Crawford v. Metro. Govt. of Nashville & Davidson County*,^{n16.1} the United States Supreme Court held that the protection against retaliation in Title VII extends to an employee who speaks out about discrimination not on the employee's own initiative, but in answering questions during an employer's internal investigation. The employer was looking into rumors of sexual harassment by its employee relations director. When one of the employer's human resources officers asked plaintiff, a 30-year employee, whether she had witnessed "inappropriate behavior" by the employee relations director, she described several instances of sexually harassing behavior. Two other employees also reported being sexually harassed by him. The employer took no action against the employee relations director, but fired plaintiff and the two other accusers soon after finishing the investigation, saying in plaintiff's case that it was for embezzlement. The Court held that the statement plaintiff said she gave to the human resources officer was covered by the opposition clause of Title VII, as an ostensibly disapproving account of sexually obnoxious behavior toward her by a fellow employee, which she said antagonized her employer to the point of firing her on a false pretense. Her description of the employee relations director's behavior would certainly qualify in the minds of reasonable jurors as "resistant" or "antagonistic" to his treatment, under an EEOC guideline providing that when an employee communicates to the employer a belief that the employer has engaged in a form of employment discrimination, that communication virtually always constitutes the employee's opposition to the activity.^{n16.2} Although there may be exceptions, such as an employee's description of a supervisor's racist joke as hilarious, these will be eccentric cases, and this case was not one of them. Opposition under Title VII does not demand active, consistent opposing activities to warrant protection against retaliation, and an employee need not instigate or initiate a complaint to be covered. Nothing in Title VII requires a rule protecting an employee who reports discrimination on the employee's own initiative but not one who reports the same discrimination in the same words when the boss asks a question.

Whether particular employee conduct is protected from retaliation as lawful "opposition" is not always easy to ascertain.

In *E.E.O.C. v. Crown Zellerbach Corp.*,ⁿ¹⁷ a case arising under Title VII, the Ninth Circuit Court of Appeals noted there is no rigorous requirement of specificity in determining what is an act of "opposition" for antiretaliation purposes.ⁿ¹⁸

In the leading case of *Hochstadt v. Worcester Foundation, Etc.*,ⁿ¹⁹ also construing Title VII, the First Circuit Court of Appeals focused on the *context* of an employee's act rather than the *nature* of the act, and developed a "reasonableness" standard. The court suggested that courts should balance the purpose of equal employment opportunity law in protecting reasonable "opposition" against the legislative desire not to interfere with employer personnel decisions.ⁿ²⁰ The court reasoned that the antiretaliation provision was not intended to provide an employee with immunity from discharge merely by claiming that at all times he or she was "opposing" discriminatory practices.ⁿ²¹ On the other hand, the provision was clearly intended to protect an employee against retaliation for filing complaints in good faith before federal and state agencies and for registering grievances through channels appropriate in the particular employment setting.ⁿ²² The court thus concluded that "[t]he standard can be little more definitive than the rule of reason applied by a judge or other tribunal to given facts."ⁿ²³ It explained that job requirements and "the tolerable limits of conduct in a particular setting must be explored."ⁿ²⁴

In *Fielder v. UAL Corp.*,ⁿ²⁵ the Ninth Circuit held that an employer could be liable under Title VII for the retaliatory actions of nonsupervisory employees.ⁿ²⁶ The court found that co-worker hostility or retaliatory harassment, if sufficiently severe, may constitute an adverse employment actionⁿ²⁷ for purposes of a retaliation claim.^{n27.1}

[b] Opposition to "Unlawful Practice"

The equal employment opportunity laws discussed in [1], *above*, protect "opposition" to employment practices made "unlawful" or "forbidden" by those laws.ⁿ²⁸ Thus, in *E.E.O.C. v. Crown Zellerbach Corp.*,ⁿ²⁹ the Ninth Circuit Court of Appeals held that an act of "opposition" must refer to some particular practice by an employer that is allegedly unlawful under Title VII.ⁿ³⁰ The court concluded that a letter by minority employees addressed to a school district protesting an affirmative action award to be presented to their employer was a protected expression of "opposition."ⁿ³¹ The letter specifically mentioned a history of unlawful employment charges filed against the employer and stressed that the employer was engaging in a continuing series of discriminatory employment practices.ⁿ³²

The *Crown Zellerbach* court explained that an employment practice need not be demonstrably unlawful; there need only be a *reasonable belief* by the objecting person that the employer was engaged in unlawful practices.ⁿ³³ In *Sias v. City Demonstration Agency*,ⁿ³⁴ the Ninth Circuit Court of Appeals reasoned that if "opposition" required proof of actual unlawful employment practices, the legitimate assertion of employee rights under equal employment opportunity law would be chilled.ⁿ³⁵ The court concluded that, on the other hand, protecting an employee who reasonably believes that discrimination exists is consistent with liberal construction of equal employment opportunity law in implementing the legislative purpose of eliminating discrimination in employment.ⁿ³⁶

Opposition to an offhand comment or isolated incident will not constitute protected activity if the comment or incident itself does not constitute illegal conduct. If a person has been subjected to only an isolated incident, a complaint about that incident does not constitute protected activity unless a reasonable person would believe that the isolated incident violated Title VII. This reasonable person determination requires looking at all the circumstances, including the frequency of the discriminatory conduct and its severity.^{n36.1} Further, if a person has been subjected to more than one comment, and if those comments, taken together, would be considered by a reasonable person to violate Title VII, that person need not complain specifically about all of the comments to which the person has been subjected. Unreported comments are relevant to the inquiry concerning the reasonableness of the belief that a violation has occurred. In these circumstances, a complaint about one or more of these comments is protected behavior.^{n36.2}

The antiretaliation provision does not protect against alleged retaliation because of opposition to discriminatory conduct by a co-employee, rather than unlawful practices by the employer, unless that conduct can be legally attributed to the

employer. In *Silver v. KCA, Inc.*,ⁿ³⁷ an employee alleged that she was discharged because of her opposition to a co-employee's racial slur. There was no evidence that the employer had authorized or approved the co-employee's remark, either before or after the incident, and the co-employee was reprimanded by the employer on the day that the incident occurred. The court concluded that there was no unlawful employment practice *by the employer* to which the alleged "opposition" related, and that therefore the opposition was not protected by Title VII.ⁿ³⁸

Under the FEHA, an employee's conduct may constitute protected activity not only when the employee opposes conduct that ultimately is determined to be unlawfully discriminatory under the FEHA, but also when the employee opposes conduct that the employee reasonably and in good faith believes to be discriminatory, whether or not the challenged conduct is ultimately found to violate the FEHA.ⁿ³⁹ Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, when there is no evidence the employer knew the employee's opposition was based on a reasonable belief the employer was engaging in discrimination. Complaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct. However, an employee need not formally file a charge in order to qualify as being engaged in protected opposing activity or use legal terms or buzzwords when opposing discrimination. The court will find opposing activity if the employee's comments, when read in their totality, oppose discrimination.ⁿ⁴⁰ Thus, an employee's refusal to follow a supervisor's order that the employee reasonably believes to be discriminatory constitutes protected activity under the FEHA. An employer may not retaliate against the employee on the basis of that conduct when the employer, in light of all the circumstances, knows the employee believes the order to be discriminatory, even when the employee does not explicitly state to a supervisor or the employer that the employee believes the order to be discriminatory.ⁿ⁴¹ⁿ⁴²⁻⁴⁴

An employee may bring a retaliation claim based on conduct by someone other than the employer if the employee reasonably believes that the conduct is unlawful and attributable to the employer. Thus, in *Trent v. Valley Elec. Ass'n Inc.*,ⁿ⁴⁵ the Ninth Circuit Court of Appeals permitted an employee to bring a retaliation claim against her employer based on sexually offensive remarks made by an outside consultant at an employer-mandated meeting. The Ninth Circuit ruled that it was reasonable for the employee to believe that it was unlawful under Title VII for her to be subject to sexually offensive remarks at a mandatory meeting.ⁿ⁴⁶ In another case, *Folkerson v. Circus Circus Enterprises, Inc.*,ⁿ⁴⁷ the Ninth Circuit stated that an employer can be held liable for sexual harassment on the part of a private individual only if the employer ratifies or acquiesces in the harassment by not taking immediate corrective action. Although plaintiff sought to establish that when she hit a patron who touched her, she was opposing an unlawful employment practice, the court found she had failed to adduce sufficient facts to show that the employer had ratified or acquiesced in the patron's actions.ⁿ⁴⁸

[3] Participation in Employment Discrimination Proceedings

Under the express provisions of most of the equal employment opportunity laws discussed in [1], *above*, employers may not retaliate against any employee who has "made a charge, testified, assisted, or participated" in employment discrimination proceedings.ⁿ⁴⁹ The considerations controlling the interpretation of the participation protection are not entirely the same as the opposition protection.ⁿ⁵⁰ The participation protection shields employees who use the tools provided by Congress to protect his or her rights.ⁿ⁵¹ An employee who files a formal discrimination charge is clearly protected,ⁿ⁵² but protection does not necessarily require filing formal charges. In *Pettway v. American Cast Iron Pipe Company*,ⁿ⁵³ a Title VII charge filed by an employee was dismissed by the EEOC. The employee thereafter wrote a letter to the EEOC complaining about the dismissal. His employer then fired him because the letter contained some allegedly libelous and fraudulent statements.ⁿ⁵⁴ The Fifth Circuit Court of Appeals considered the letter to be a "good charge" deserving EEOC investigation, notwithstanding the presence of arguably malicious material.ⁿ⁵⁵ Accordingly, the court held that the employee's discharge was a violation of the antiretaliation provision in Title VII.ⁿ⁵⁶

In *Raad v. Fairbanks N. Star Borough*,^{n56.1} the Ninth Circuit considered the trial court's grant of summary judgment

to a school district on two retaliation claims by a woman of Lebanese origin who was denied a full-time teaching position in a school district. She alleged that the decision to deny her a full-time position, even though four such open positions were filled while she was employed as a substitute teacher, was in retaliation for her complaints to an EEO counselor and that a disciplinary suspension allegedly imposed for a bomb threat was in reprisal for her complaints to the EEO counselor to the state commission for human rights. As to the second claim, the court held that based on evidence regarding the weakness and inconsistency of the district's recounting of the bomb threat incident, the plaintiff had demonstrated a factual dispute as to whether any threat was actually made and whether the district knew or should have known that the accusation was false. However, the first claim was based on four hiring decisions made by two principals at two different high schools after the alleged bomb threat incident. The court held that the plaintiff failed to present any evidence from which a reasonable trier of fact could conclude that the school principals who refused to hire her were aware that she had engaged in protected activity. Further, as a retaliation claim, her action could not be saved by the fact that she was more qualified than applicants who were hired.ⁿ⁵⁷

Even when the allegation of retaliation is based on participation in employment discrimination proceedings, such as by filing a complaint with the EEOC, the plaintiff must still show a causal link between the participation and the adverse action. Thus, where the employee's filing of a complaint with the EEOC and the denial of a promotion were separated by a year and a half, so that the timing alone did not establish a connection, and the employee did not offer any other explanation for the adverse action, summary judgment for the employer on the issue of retaliation was appropriate.^{n57.1}

Under the FEHA, employees who are involved as potential witnesses, which the employer perceives as participation in an activity of the Department of Fair Employment and Housing and the Fair Employment and Housing Commission, are protected against retaliation.^{n57.2}

[4] Protection for Former Employees

Former employees may sue a former employer under Title VII for post-employment retaliation. In *Robinson v. Shell Oil Co.*,ⁿ⁵⁸ the employer provided a negative employment reference for a discharged employee who had filed a charge of discrimination against the employer. Upholding the former employee's retaliation claim against the employer, the United States Supreme Court found that former employees are covered by Title VII anti-retaliation provisions. The Court stated that excluding such individuals would undermine the statute by allowing the threat of post-employment retaliation to deter employees and former employees from filing charges of discrimination.ⁿ⁵⁹ Further, the dissemination of a negative employment reference may be a violation of Title VII if motivated by discriminatory intent, even when the negative reference does not cause an adverse personnel decision by a prospective employer.ⁿ⁶⁰

[5] Supervisor Liability

Several courts have held that under the FEHA, a supervisor may be individually liable for retaliatory termination. In *Winarto v. Toshiba American Electronics Components, Inc.*,ⁿ⁶¹ the Ninth Circuit concluded that the plain meaning of FEHA's retaliation provisionⁿ⁶² is susceptible to only one interpretation: supervisors are "persons" and potentially liable for retaliation.ⁿ⁶³ The court distinguished the holding in *Reno v. Baird*ⁿ⁶⁴ that supervisors cannot be personally liable for discrimination under FEHA, since *Gov. Code § 12940(a)* prohibits only "an employer" from discriminating in hiring and employment decisions.ⁿ⁶⁵

In *Jones v. The Lodge at Torrey Pines Partnership*,^{n65.1} the California Supreme Court held that non-employer individuals may not be held liable for retaliation under the FEHA. Plaintiff sued his supervisor and his employer for retaliation. In *Reno v. Baird*,^{n65.2} the Court had held that, although an employer could be liable for unlawful discrimination, individuals working for the employer, including supervisors, could not be personally liable for discrimination. Language differences between the subdivisions of *Gov. Code § 12940* governing discrimination, *Gov. Code § 12940(a)*, and retaliation, *Gov. Code § 12940(h)*, did not require a different rule as to retaliation, even though the subdivision governing discrimination makes it an unlawful employment practice for "an employer" to discriminate,

while the subdivision governing retaliation makes it an unlawful employment practice for "any employer, labor organization, employment agency, or person" to retaliate.^{n65.3} Whether personal liability exists when the statutes prohibit discrimination by any person acting as an agent of an employer,^{n65.4} and by any person who aids and abets an unlawful employment practice,^{n65.5} resolved in *Reno*, was similar to the question presented in *Jones*, as to whether personal liability exists when the statute prohibits retaliation by any employer, labor organization, employment agency, or person.^{n65.6} The Court in *Jones* held that *Reno's* rationale for not holding individuals personally liable for discrimination applied equally to retaliation. All of the reasons the Court articulated in *Reno* for not imposing individual liability for discrimination-- *i.e.*, that supervisors can avoid harassment but cannot avoid personnel decisions, it is incongruous to exempt small employers but to hold individual nonemployers liable, sound policy favors avoiding conflicts of interest and the chilling of effective management, corporate employment decisions are often collective, and it is bad policy to subject supervisors to the threat of a lawsuit every time they make a personnel decision--applied equally to retaliation. Further, the Court's holding in *Yanowitz v. L'Oreal USA, Inc.*,^{n65.7} that employment actions that can give rise to a claim for retaliation are identical to actions that can give rise to a claim for discrimination, made it hard to conceive why the Legislature would impose individual liability for actions claimed to be retaliatory but not for the same actions claimed to be discriminatory. The immunity provided to discretionary acts of a governmental official under the Government Tort Claims Actⁿ⁶⁶ applies to claims of retaliation by a supervisor under FEHA only if the decisions in question are properly considered as basic policy decisions made at the planning stage of the governmental entity's operations, rather than routine duties incident to the normal operations of the employee's office or position.ⁿ⁶⁷

[6] Failure to Prevent Retaliation

It is unlawful for an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.ⁿ⁶⁸ *Gov. Code section 12940(k)* permits a claim for failure to prevent or investigate discrimination when the only cause of action at issue is retaliation.ⁿ⁶⁹

The FEHA itself is silent on whether retaliation is a form of discrimination actionable under § 12940(k). In *Taylor v. City of Los Angeles Dept. of Water & Power*,ⁿ⁷⁰ the Court of Appeal, in concluding that an employer's failure to prevent retaliation is actionable under *Gov. Code § 12940(k)*, found that the California Supreme Court's discussion in *Yanowitz*ⁿ⁷¹ supported the conclusion that retaliation is a form of discrimination. The court also looked to the United States Supreme Court's analogous federal statutory construction in its analysis of retaliation under Title IX of the 1972 Education Amendments:ⁿ⁷² the Court announced that retaliation is discrimination on the basis of sex because it is an intentional response to the nature of the complaint of an allegation of sex discrimination.ⁿ⁷³

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

FOOTNOTES:

(n1)Footnote 1. See discussion in Parts A through F of this chapter.

(n2)Footnote 2. See 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 2000e-3(a) (Title VII); *Gov. Code § 12940(h)* (FEHA); see *Strother v. S. Cal. Permanente Medical Group* (9th Cir. 1996) 79 F.3d 859, 865 (medical partner with reasonable belief she was an employee allowed to proceed with retaliation claim arising from having filed DFEH); 42 U.S.C. § 12203(a) (ADA; operative July 26, 1992).

(n3)Footnote 2.1. 29 U.S.C. § 633a(a).

(n4)Footnote 2.2. *See* 29 U.S.C. § 623(d).

(n5)Footnote 2.3. *Gomez-Perez v. Potter* (2008) 553 U.S. 474, 128 S. Ct. 1931, 170 L. Ed. 2d 887, 2008 U.S. LEXIS 4518, *10-*32 .

(n6)Footnote 2.4. *CBOCS West, Inc. v. Humphries* (2008) 128 S. Ct. 1951, 170 L. Ed. 2d 864, 2008 U.S. LEXIS 4516, *7-*26 .

(n7)Footnote 3. *Now see* Gov. Code § 12940(h).

(n8)Footnote 4. This amendment, however, has been held not to be retroactive. *See Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 615-616, 262 Cal. Rptr. 842 (holding that pre-1988 retaliation by coworker was not actionable under FEHA). For discussion of administrative enforcement proceedings under equal employment opportunity laws, *see* ch. 42. For discussion of civil actions under those laws, *see* ch. 43.

(n9)Footnote 5. *See* 42 U.S.C. § 12203(b).

(n10)Footnote 6. *See Freitag v. Ayers* (9th Cir. 2006) 463 F.3d 838, 2006 U.S. App. LEXIS 23383, *33-*44 (in action by female prison guard against prison for retaliation in violation of her *First Amendment* rights for protesting sexual misconduct by male inmates, jury properly found each element required to establish *First Amendment* claim against public employer, *i.e.*, that employee engaged in constitutionally protected speech, employer took adverse employment action against employee, and employee's speech was substantial or motivating factor in adverse action; however, remand was required because instruction permitted jury to consider unprotected speech with speech that was constitutionally protected); *Ramirez v. San Mateo County* (9th Cir. [Cal.] 1981) 639 F.2d 509, 51542 U.S.C. § 1983 ("retaliation" question properly submitted to jury as *First Amendment* claim). *But see Garcetti v. Ceballos* (2006) 547 U.S. 410, 126 S. Ct. 1951, 1957-1962, 164 L. Ed. 2d 689 (*First Amendment* did not protect deputy district attorney from retaliation based on memo criticizing search warrant and urging dismissal of prosecution made pursuant to his official duties). For a general discussion of the United States Constitution as an equal employment opportunity source, *see* Chapter 40, Part C.

(n11)Footnote 7. [Reserved]

(n12)Footnote 8. *See* Title 42 U.S.C., § 1983; *see Allen v. Iranon* (9th Cir. 2002) 283 F.3d 1070, 1077 (action by prison doctor under 42 U.S.C. § 1983 alleging defendants retaliated against him for exercising his *First Amendment* right to free speech).

(n13)Footnote 9. *See* 29 U.S.C. §§ 206(d), 215(a)(3) (discrimination for filing complaint or instituting proceeding is unlawful). For a discussion relating to the scope and application of the federal EPA generally, *see* Chapter 40, Part C.

(n14)Footnote 10. *See* Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965) , reprinted in 42 U.S.C.A. § 2000e(West 1981); 41 C.F.R. § 60-1.32 (federal contractors and contract applicants required to ensure that no person intimidates, threatens, coerces, or discriminates against anyone in order to interfere with enforcement of Exec. Order No. 11246 or any other equal employment opportunity law). For discussion of the scope and applicability of Exec. Order No. 11246 generally, *see* Chapter 40, Part C.

(n15)Footnote 10.1. *See* 29 U.S.C. § 2615.

(n16)Footnote 10.2. *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 420-421, 69 Cal. Rptr. 3d 1 (supervisor's threat to "crush" managers opposed to employer's plan that would adversely affect older managers showed intent to retaliate against manager who filed age discrimination claim challenging plan). *See also Reeves v. Safeway Stores, Inc.* (2004) 121 Cal. App. 4th 95, 109, n.9, 16 Cal. Rptr. 3d 717 .

(n17)Footnote 11. *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal. App. 4th 686, 723-727, 81 Cal. Rptr. 3d 406 (employer's claim that employee was fired by management officers, not by supervisors who could have been found to have acted out of impermissible motives, did not support grant of summary judgment, where reasonable inference from evidence was that supervisors consulted with upper management to be sure it was comfortable with their decision to fire him, and where supervisor could have been understood to believe that when he met with employee, he was vested with authority not to fire him if supervisor so decided); *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 421, 69 Cal. Rptr. 3d 1 (because supervisor who was involved in decision, even though he was not decision-maker, was motivating force in selection of person other than plaintiff, his animus was imputed to employer; further, notwithstanding decision-maker's alleged ignorance, employer must have known plaintiff made EEOC age discrimination claim, which prevented employer from implementing its plan to reduce employee compensation, giving employer motive to retaliate). *See also* *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal. App. 4th 95, 110, 16 Cal. Rptr. 3d 717 .

(n18)Footnote 11.1. *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 126 S. Ct. 2405, 165 L. Ed. 2d 345 .

(n19)Footnote 11.2. *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 126 S. Ct. 2405, 2410-2414, 165 L. Ed. 2d 345 .

(n20)Footnote 11.3. *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 126 S. Ct. 2405, 2414-2416, 165 L. Ed. 2d 345 .

(n21)Footnote 11.4. *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 126 S. Ct. 2405, 2416-2418, 165 L. Ed. 2d 345 .

(n22)Footnote 11.5. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 32 Cal. Rptr. 3d 436, 116 P.3d 1123 .

(n23)Footnote 11.6. *Yanowitz*, 36 Cal 4th at 1050 ("[W]e believe it is more reasonable to conclude that the Legislature intended to extend a comparable degree of protection both to employees who are subject to the types of basic forms of discrimination at which the FEHA is directed ... and to employees who are discriminated against in retaliation for opposing such discrimination, rather than to interpret the statutory scheme as affording a greater degree of protection against improper retaliation than is afforded against direct discrimination.").

(n24)Footnote 11.7. *Yanowitz*, 36 Cal 4th at 1051-1052 . *See, e.g.,* *Hammond v. County of Los Angeles* (2008) 160 Cal. App. 4th 1579, 1602 (FEHA; plaintiff's evidence was sufficient to raise triable issue of fact of actionable retaliation, where supervisor's reduction of plaintiff's teaching assignments was sufficient to constitute adverse employment action against plaintiff, where plaintiff's complaints to supervisor's supervisors about racially motivated mistreatment of plaintiff constituted protected activity under FEHA, and where supervisor's comment to plaintiff after plaintiff's first complaint supported reasonable inference that adverse employment action against plaintiff was in retaliation for plaintiff's complaints; further, defendants provided no legitimate, nonretaliatory reason for the adverse employment action).

(n25)Footnote 11.8. *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 420, 69 Cal. Rptr. 3d 1 (denying employee transfer in retaliation for filing age discrimination claim was adverse employment action because new position involved higher classification within management and offered higher salary).

(n26)Footnote 11.9. *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 421, 69 Cal. Rptr. 3d 1 .

(n27)Footnote 11.10. *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 421-422, 69 Cal. Rptr. 3d 1 (employee was not invited to serve on management committees or to apply for management positions and

was treated with coldness; other evidence also supported jury's findings that employer refused to engage in interactive process to discuss employee's disabilities and that it acted with malice). *See also* *Richards v. CH2M Hill, Inc.* (2001) 26 Cal. 4th 798, 823, 111 Cal. Rptr. 2d 87, 29 P.3d 175 ; *Podkovich v. Glazer's Distributors of Iowa, Inc.* (N.D. Iowa 2006) 446 F. Supp. 2d 982, 1009 (employer treating employee with hostility or rudeness); *Kim v. Nash Finch Co.* (8th Cir. 1997) 123 F.3d 1046, 1061 (excluding employee from discretionary assignments and meetings).

(n28)Footnote 11.11. *Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal. App. 4th 1216, 1228-1236, 51 Cal. Rptr. 3d 206 .

(n29)Footnote 11.12. *Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal. App. 4th 1216, 1231-1233, 51 Cal. Rptr. 3d 206 .

(n30)Footnote 11.13. *Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal. App. 4th 1216, 1233-1235, 51 Cal. Rptr. 3d 206 .

(n31)Footnote 11.14. *Steele v. Youthful Offender Parole Board* (2008) 162 Cal. App. 4th 1241, 1253-1260, 76 Cal. Rptr. 3d 632 .

(n32)Footnote 11.15. *Steele v. Youthful Offender Parole Board* (2008) 162 Cal. App. 4th 1241, 1253, 76 Cal. Rptr. 3d 632 . *See also* *Turner v. Anheuser-Busch* (1994) 7 Cal. 4th 1238, 1244-1245, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 .

(n33)Footnote 12. *See, e.g.,* 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 2000e-3(a) (Title VII); 42 U.S.C. § 12203(a) (ADA); *Gov. Code* § 12940(h) (FEHA).

(n34)Footnote 13. *See, e.g., Equal Employment Opportunity Commission v. Go Daddy Software, Inc.* (9th Cir. 2009) 581 F.3d 951, 2009 U.S. App. LEXIS 20159, *28-*32 (employee's complaints to member of employer's human resources department two or three times about what he perceived as discriminatory comments was protected activity).

(n35)Footnote 14. *See Lindsey v. Miss. Research & Development Center* (5th Cir. [Miss.] 1981) 652 F.2d 488, 492 (dictum; organization of minority employees to discuss discriminatory employment practices as "protected expressions").

(n36)Footnote 15. *See Iwekaogwu v. City of Los Angeles* (1999) 75 Cal. App. 4th 803, 815, 89 Cal. Rptr. 2d 505 .

(n37)Footnote 16. *See Iwekaogwu v. City of Los Angeles* (1999) 75 Cal. App. 4th 803, 816, 89 Cal. Rptr. 2d 505 .

(n38)Footnote 16.1. *Crawford v. Metro. Gov't. of Nashville & Davidson County* (2009) 129 S. Ct. 846, 17 L. Ed. 2d 650, 2009 U.S. LEXIS 870, *8-*16 . To view Supreme Court briefs related to the Crawford case that are available on Lexis.com, go to 2006 U.S. Briefs 1595 . To view Supreme Court transcript, go to 2008 U.S. Trans. LEXIS 50 .

(n39)Footnote 16.2. 2 EEOC Compliance Manual §§ 8-II-B(1), (2), p. 614:0003 (Mar. 2003).

(n40)Footnote 17. *E.E.O.C. v. Crown Zellerbach Corp.* (9th Cir. 1983) 720 F.2d 1008 .

(n41)Footnote 18. *See E.E.O.C. v. Crown Zellerbach Corp.* (9th Cir. 1983) 720 F.2d 1008, 1013 .

(n42)Footnote 19. *Hochstadt v. Worcester Foundation, Etc.* (1st Cir. 1976) 545 F.2d 222 .

(n43)Footnote 20. *See Hochstadt v. Worcester Foundation, Etc.* (1st Cir. 1976) 545 F.2d 222, 231 .

(n44)Footnote 21. *See Hochstadt v. Worcester Foundation, Etc.* (1st Cir. 1976) 545 F.2d 222, 230 .

(n45)Footnote 22. *See Hochstadt v. Worcester Foundation, Etc. (1st Cir. 1976) 545 F.2d 222, 230-231 .*

(n46)Footnote 23. *Hochstadt v. Worcester Foundation, Etc. (1st Cir. 1976) 545 F.2d 222, 231 .*

(n47)Footnote 24. *Hochstadt v. Worcester Foundation, Etc. (1st Cir. 1976) 545 F.2d 222, 231 .*

(n48)Footnote 25. *Fielder v. UAL Corp. (9th Cir. 2000) 218 F.3d 973.*

(n49)Footnote 26. *Fielder v. UAL Corp. (9th Cir. 2000) 218 F.3d 973, 984-985 .*

(n50)Footnote 27. After the Ninth Circuit decided *Fielder*, in *Burlington Northern & Santa Fe Railway Co. v. White* (2006), 126 S. Ct. 2405, 165 L. Ed. 2d 345 , discussed at [1A] above, the United States Supreme Court held that the scope of the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 extends beyond workplace-related or employment-related retaliatory acts and harm, so that an employee need only allege and prove "adverse action" rather than "adverse employment action" under Title VII's anti-retaliation provision.

(n51)Footnote 27.1. *Fielder v. UAL Corp. (9th Cir. 2000) 218 F.3d 973, 984-985 .*

(n52)Footnote 28. *See, e.g., 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 2000e-3(a) (Title VII); 42 U.S.C. § 12203(a) (ADA); Gov. Code § 12940(h) (FEHA).*

(n53)Footnote 29. *E.E.O.C. v. Crown Zellerbach Corp. (9th Cir. 1983) 720 F.2d 1008 .*

(n54)Footnote 30. *See E.E.O.C. v. Crown Zellerbach Corp. (9th Cir. 1983) 720 F.2d 1008, 1013 .*

(n55)Footnote 31. *See E.E.O.C. v. Crown Zellerbach Corp. (9th Cir. 1983) 720 F.2d 1008, 1014 .*

(n56)Footnote 32. *See E.E.O.C. v. Crown Zellerbach Corp. (9th Cir. 1983) 720 F.2d 1008, 1013 .*

(n57)Footnote 33. *E.E.O.C. v. Crown Zellerbach Corp. (9th Cir. 1983) 720 F.2d 1008, 1013 (Title VII). See Freitag v. Ayers (9th Cir. 2006) 463 F.3d 838, 2006 U.S. App. LEXIS 23383, *29-*32 (dispositive question was not whether administrators at prison believed their failure to correct conditions complained of by female prison guard constituted violation of Title VII for actionable sexual harassment, but rather whether they were aware guard had opposed that failure and whether guard's belief that their conduct was unlawful was reasonable); Little v. Windermere Relocation, Inc. (9th Cir. 2001) 265 F.3d 903, 913 (Title VII), as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882 ; Payne v. McLemore's Wholesale & Retail Stores (5th Cir. 1981) 654 F.2d 1130, 1140 (Title VII); Sias v. City Demonstration Agency (9th Cir. 1978) 588 F.2d 692, 695 (Title VII).*

(n58)Footnote 34. *See Sias v. City Demonstration Agency (9th Cir. 1978) 588 F.2d 692 .*

(n59)Footnote 35. *See Sias v. City Demonstration Agency (9th Cir. 1978) 588 F.2d 692, 695 (Title VII).*

(n60)Footnote 36. *See Sias v. City Demonstration Agency (9th Cir. 1978) 588 F.2d 692, 695 (Title VII); see also Moyo v. Gomez (9th Cir. 1994) 40 F.3d 982, 985 (correctional officer may bring a Title VII claim for retaliation for protesting employer's practice of permitting white inmates, but not black inmates, to shower because, although this practice may not actually violate Title VII, the correctional officer's belief that it did so was reasonable); but see Clark County Sch. Dist. v. Breeden (2001) 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (U.S. Supreme Court leaves open question as to whether Title VII protects against retaliation for opposing practices employee could reasonably believe were unlawful even if practices did not violate Title VII; employee could not reasonably believe that single, isolated incident constituted sexual harassment).*

(n61)Footnote 36.1. *Equal Employment Opportunity Commission v. Go Daddy Software, Inc. (9th Cir. 2009) 581*

*F.3d 951, 2009 U.S. App. LEXIS 20159, *29 . See Clark County School District v. Breeden (2001) 532 U.S. 268, 270-271, 121 S. Ct. 1508, 149 L. Ed. 2d 509 .*

(n62)Footnote 36.2. *Equal Employment Opportunity Commission v. Go Daddy Software, Inc. (9th Cir. 2009) 581 F.3d 951, 2009 U.S. App. LEXIS 20159, *28-*32* (employee's testimony regarding various comments by different co-workers was sufficient evidence supporting reasonable person's conclusion that conduct to which he was subjected at employer went beyond mere offhand comments and isolated incidents, and that his two or three complaints to member of employer's human resources department were therefore protected activity).

(n63)Footnote 37. *See Silver v. KCA, Inc. (9th Cir. 1978) 586 F.2d 138, 142 (Title VII).*

(n64)Footnote 38. *See Silver v. KCA, Inc. (9th Cir. 1978) 586 F.2d 138, 142 (Title VII) .*

(n65)Footnote 39. *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1043, 32 Cal. Rptr. 3d 436 .*

(n66)Footnote 40. *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1046-1048, 32 Cal. Rptr. 3d 436* (trier of fact properly could find that supervisor knew employee who objected repeatedly to order that she fire sales associate whom the supervisor found sexually unattractive believed in good faith the order was discriminatory).

(n67)Footnote 41. *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1042-1048, 32 Cal. Rptr. 3d 436* (employee refused to obey supervisor's order to terminate sales associate whom the supervisor found sexually unattractive, because she thought order represented application of different standard for female sales associates than male sales associates; her conduct constituted protected opposition to sex discrimination for which employer could not retaliate).

(n68)Footnote 42-44. [Reserved]

(n69)Footnote 45. *Trent v. Valley Elec. Ass'n Inc. (9th Cir. 1994) 41 F.3d 524 .*

(n70)Footnote 46. *Trent v. Valley Elec. Ass'n Inc. (9th Cir. 1994) 41 F.3d 524, 527 .*

(n71)Footnote 47. *Folkerson v. Circus Circus Enters., Inc. (9th Cir. 1997) 107 F.3d 754 .*

(n72)Footnote 48. *See Folkerson v. Circus Circus Enters., Inc. (9th Cir. 1997) 107 F.3d 754, 756 .*

(n73)Footnote 49. *See, e.g., 29 U.S.C. § 623(d) (ADEA); 42 U.S.C. § 2000e-3(a) (Title VII); 42 U.S.C. § 12203(a)(ADA); Gov. Code § 12940(h) (FEHA).*

(n74)Footnote 50. *See [2], above.*

(n75)Footnote 51. *Hashimoto v. Dalton (9th Cir. 1997) 118 F.3d 671, 679-680* (quoting *Sias v. City Demonstration Agency (9th Cir. 1978) 588 F.2d 692, 695*) (participation in Title VII's enforcement machinery may establish prima facie case of retaliation; visit with EEO counselor constitutes participation in enforcement machinery).

(n76)Footnote 52. *See Kauffman v. Sidereal Corp. (9th Cir. 1982) 695 F.2d 343, 344-345 (Title VII; retaliation for filing complaint with EEOC); but see Learned v. City of Bellevue (9th Cir. 1988) 860 F.2d 928, 932 , cert. denied, 103 L. Ed. 2d 835 (1989) (Title VII; mere fact that employee is participating in investigation or proceeding involving charges of some sort of discrimination does not automatically trigger 42 U.S.C. § 2000e-3(a); employee must reasonably perceive discrimination as violating Title VII, and must at least allege a valid Title VII claim).*

(n77)Footnote 53. *Pettway v. American Cast Iron Pipe Co. (5th Cir. 1969) 411 F.2d 998 .*

(n78)Footnote 54. *See Pettway v. American Cast Iron Pipe Co. (5th Cir. 1969) 411 F.2d 998, 1001-1002 .*

(n79)Footnote 55. *See Pettway v. American Cast Iron Pipe Co. (5th Cir. 1969) 411 F.2d 998, 1007 .*

(n80)Footnote 56. *See Pettway v. American Cast Iron Pipe Co. (5th Cir. 1969) 411 F.2d 998, 1007 ; 42 U.S.C. § 2000e-3(a).*

(n81)Footnote 56.1. *Raad v. Fairbanks N. Star Borough (9th Cir. 2003) 323 F.3d 1185 .*

(n82)Footnote 57. *Raad v. Fairbanks N. Star Borough (9th Cir. 2003) 323 F.3d 1185, 1196-1198 .*

(n83)Footnote 57.1. *McGinest v. GTE Service Corp. (9th Cir. 2004) 360 F.3d 1103, 1124 .*

(n84)Footnote 57.2. *2 Cal. Code Reg. § 7287.8(a)(2)(B)* (expressly defining "assisted in any proceeding" under FEHA as used in *Gov. Code § 12940(h)*, to include involvement as potential witness that employer perceives as participation in activity of DFEH or FEHC). *See, e.g., Steele v. Youthful Offender Parole Board (2008) 162 Cal. App. 4th 1241, 1252, 76 Cal. Rptr. 3d 632* (employee was engaged in protected activity, where fellow employee filed complaint with DFEH based, in part, on employer retaliating against fellow employee for her report of kissing incident involving chairman of employer's board and employee, so that employee was "potential witness" in proceeding).

(n85)Footnote 58. *Robinson v. Shell Oil Co. (1997) 519 U.S. 337, 117 S. Ct. 843, 136 L. Ed. 2d 808 .*

(n86)Footnote 59. *See Robinson v. Shell Oil Co. (1997) 519 U.S. 337, 346, 117 S. Ct. 843, 136 L. Ed. 2d 808 .*

(n87)Footnote 60. *Hashimoto v. Dalton (9th Cir. 1997) 118 F.3d 671, 674-675* (court rejects "no harm, no foul" approach; attorney's fee award to employee on retaliation claim proper when plaintiff partially succeeds, legal relationship between parties is materially altered, and remedial measures benefit community); *see Passer v. American Chemical Soc. (D.C. Cir. 1991) 935 F.2d 322, 330* (plaintiff may seek for relief for retaliatory actions taken after employment if alleged discrimination is related to or arises from employment relationship).

(n88)Footnote 61. *Winarto v. Toshiba American Electronics Components, Inc. (9th Cir. 2001) 274 F.3d 1276 .*

(n89)Footnote 62. *Gov. Code § 12940(h).*

(n90)Footnote 63. *Winarto v. Toshiba American Electronics Components, Inc. (9th Cir. 2001) 274 F.3d 1276, 1287-1288 ; see also Taylor v. City of Los Angeles Dept. of Water & Power (2006) 144 Cal. App. 4th 1216, 1236-1237, 51 Cal. Rptr. 3d 206* (supervisor may be held personally liable for retaliation under the FEHA); *Page v. Superior Court (1995) 31 Cal. App. 4th 1206, 1212* (FEHA unambiguously imposes personal liability for harassment or retaliation); *Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 615, 262 Cal. Rptr. 842* (implying that 1987 amendment of FEHA's retaliation provision adding "person" indicates legislative intent to extend liability to individuals).

(n91)Footnote 64. *Reno v. Baird (1998) 18 Cal. 4th 640, 76 Cal. Rptr. 2d 499, 957 P.2d 1333 .*

(n92)Footnote 65. *Winarto v. Toshiba American Electronics Components, Inc. (9th Cir. 2001) 274 F.3d 1276, 1288 ; see also Peterson v. Santa Clara Valley Medical Center (N.D. Cal. 2000) 2000 U.S. Dist. LEXIS 953, *9-*10 ; Soo v. UPS (N.D. Cal. 1999) 73 F. Supp. 2d 1126, 1129-1130 ; Liberto-Blanck v. City of Arroyo Grande (C.D. Cal. 1999) 33 F. Supp. 2d 1241, 1243 ; Kaminski v. Target Stores (N.D. Cal. 1998) 1998 U.S. Dist. LEXIS 13977, *7* (all holding that *Reno* does not apply to retaliation).

(n93)Footnote 65.1. *Jones v. The Lodge at Torrey Pines Partnership (2008) 42 Cal. 4th 1158, 72 Cal. Rptr. 3d 624, 177 P.3d 232 .*

(n94)Footnote 65.2. *Reno v. Baird (1998) 18 Cal. 4th 640, 76 Cal. Rptr. 2d 499, 957 P.2d 1333 .*

(n95)Footnote 65.3. *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal. 4th 1158, 1161-1173, 72 Cal. Rptr. 3d 624, 177 P.3d 232 .

(n96)Footnote 65.4. *Gov. Code § 12926(d)*.

(n97)Footnote 65.5. *Gov. Code § 12940(I)*.

(n98)Footnote 65.6. *Gov. Code § 12940(h)*.

(n99)Footnote 65.7. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 32 Cal. Rptr. 3d 436, 116 P.3d 1123 .

(n100)Footnote 66. *Gov. Code § 820.2*.

(n101)Footnote 67. *Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal. App. 4th 1216, 1238-1239, 51 Cal. Rptr. 3d 206 , *overruled on other grounds in Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal. 4th 1158, 72 Cal. Rptr. 3d 624, 177 P.3d 232 (supervisor was not immune, as public employee, from personal liability for retaliation under FEHA for performing discretionary personnel actions, where acts alleged did not fit within type of policy decisions Supreme Court determined would be immune under *Gov. Code § 820.2*; because decisions regarding job assignments, training and promotion could not be characterized as quasi-legislative policy-making decision sufficiently sensitive to call for judicial abstention from interference that might affect coordinate body's decision-making process of coordinate branch of government). *See Barner v. Leeds* (2000) 24 Cal. 4th 676, 685, 102 Cal. Rptr. 2d 97, 13 P.3d 704 .

(n102)Footnote 68. *Gov. Code § 12940(k)*.

(n103)Footnote 69. *Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal. App. 4th 1216, 1239-1240, 51 Cal. Rptr. 3d 206 . *See also Giovannetti v. Trs. of the Cal. State Univ.* (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 41750, 2006 WL 1626990 (unpub'd dec.).

(n104)Footnote 70. *Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal. App. 4th 1216, 1239-1240, 51 Cal. Rptr. 3d 206 .

(n105)Footnote 71. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1050, 32 Cal. Rptr. 3d 436 (when provisions of *Gov. Code § 12940* are viewed as whole, it is more reasonable to conclude Legislature intended to extend comparable degree of protection to employees subject to types of basic forms of discrimination at which the FEHA is directed, *e.g.*, discrimination on basis of race or sex, and to employees discriminated against in retaliation for opposing discrimination, rather than to interpret statutory scheme as affording greater degree of protection against improper retaliation than afforded against direct discrimination).

(n106)Footnote 72. *20 U.S.C. § 1681 et seq.*

(n107)Footnote 73. *Jackson v. Birmingham Bd. of Educ.* (2005) 544 U.S. 167, 174, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (concluding that funding recipient's retaliation against person because of complaint of sex discrimination constitutes intentional discrimination on basis of sex in violation of Title IX).



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART G. RETALIATION

2-41 California Employment Law § 41.131

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.131 Proof

[1] Generally

"Retaliation" actions are generally litigated under the disparate treatment theory,ⁿ¹ which applies when an employer treats an employee or employees differently because of membership in a protected class.ⁿ² Thus, the *McDonnell Douglas Corp. v. Green* ⁿ³ rules regarding order and allocation of proof apply to such actions.ⁿ⁴ A plaintiff must initially make out a prima facie case of retaliation.ⁿ⁵ The burden then shifts to the employer to articulate some legitimate, nonretaliatory reason for the adverse action.ⁿ⁶ If the employer adduces a lawful reason for the adverse action, the plaintiff may show that the employer's reason is merely a "pretext" covering up unlawful retaliation through the guise of innocent business planning.ⁿ⁷

However, a claim under § 503(b) of the Americans with Disabilities Act that an employer coerced, intimidated, threatened, or interfered with any individual in the exercise or enjoyment of his or her ADA rights,ⁿ⁸ without alleging retaliation, is not subject to Title VII's burden-shifting or hostile environment frameworks. Given the broad remedial purpose of the ADA,ⁿ⁹ the plain language of § 503(b) clearly prohibits an employer or supervisor from threatening an individual with transfer, demotion, or forced retirement unless the individual foregoes a statutorily protected accommodation. Conclusory allegations, without more, are insufficient to state a violation of § 503(b). An ADA plaintiff must also demonstrate that he or she has suffered a "distinct and palpable injury" as a result of the threat. That injury could consist of the giving up of ADA rights or another injury resulting from the employee's refusal to give up those rights, or from the threat itself.ⁿ¹⁰

[2] Prima Facie Case

According to the Ninth Circuit Court of Appeals, a prima facie case of retaliation may be established by showing (1) that the plaintiff engaged in a protected activity,ⁿ¹¹ (2) that the plaintiff was thereafter subjected to adverse action by his or her employer,ⁿ¹² and (3) that there was a causal link between the two.ⁿ¹³ Given the slightly different standards under Title VII and FEHA for establishing retaliation under each law, the prima facie case under each will be slightly different. Under the United States Supreme Court's holding in *Burlington Northern & Santa Fe Railway Co. v. White*,

n14 the scope of the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 extends beyond workplace-related or employment-related retaliatory acts and harm, so that an employee need only allege and prove an "adverse action" rather than an "adverse employment action." On the other hand, in *Yanowitz v. L'Oreal USA, Inc.*, n15 the California Supreme Court held that under the FEHA, the adverse action must materially affect the terms, conditions, or privileges of employment to be actionable. Thus under the FEHA, the allegedly retaliatory conduct must be workplace-related or employment-related. Employees are not required to elaborate to their employer on the legal theory underlying complaints they are making in order to be protected from retaliation under the FEHA.n16 An employee's mistake of law, as well as mistake of fact, may establish an employee's good faith but mistaken belief that he or she is opposing conduct prohibited by the FEHA.n17 Whether a jury or a court ultimately concludes defendants' conduct constituted sexual harassment, employees reasonably can believe they are making a claim of sexual harassment in violation of the FEHA when they complain of sexual favoritism in their workplace.n18 A prima facie case may be based on direct or circumstantial evidence.n19

The appropriate standard for determining whether an employee has been subjected to an adverse employment action for purposes of a retaliation claim under the FEHA is the "materiality" test, which requires an employer's adverse action to materially affect the terms and conditions of employment, rather than an arguably broader "deterrence" test.n20 However, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.n21

Under FEHA, when an employee alleges a pattern of systematic retaliation, the court need not consider whether each alleged retaliatory act constitutes an adverse employment action in and of itself. There is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries.n22

However, in *Thomas v. Department of Corrections*,n23 the court found that miscellaneous one-time events, such as delayed check, early job change, and failure to receive one overtime check, did not amount to an employment injury for purposes of a FEHA action.n24

■ CONSULTANT'S COMMENT:

Thomas v. Department of Correction n25 is one of an emerging number of California cases to adopt the phrase "adverse employment action" when making reference to cognizable wrongs under the FEHA and other statutes.n26 By holding that a number of miscellaneous, one-time events did not constitute employment injury, the appellate panel has joined scores of federal cases in finding that de minimis conduct does not trigger statutory protection. *Commentary by Kirby Wilcox.*

An action is cognizable as an adverse action if it is reasonably likely to deter employees from engaging in protected activity. Thus, whether an action is adverse is, at least in part, a subjective standard. However, it is not entirely subjective because the conduct must be reasonably likely to deter the protected activity, even by the charging party.n27

The FEHA does not define "adverse employment action." Under the FEHA, the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.n28 It is not enough for the plaintiff to show that he or she has been subjected to some form of adverse treatment. The plaintiff must show the employer's retaliatory actions had a detrimental and substantial effect on the plaintiff's employment.n29 A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient. Adverse employment actions include, but are not limited to, a material change in the terms and conditions of employment.n30

In *Akers v. County of San Diego*, the court found specifically that reduced promotional opportunities are a legally tenable basis to find the employer substantially and materially adversely affected the terms and conditions of the

plaintiff's employment on which to base a retaliation claim.ⁿ³¹ A mere oral or written criticism of an employee or a transfer into a comparable position does not meet the definition of an adverse employment action under FEHA. However, an unfavorable evaluation may be actionable if the employee proves the employer used the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment.ⁿ³² A temporary employment agency may be liable for retaliation based on a failure to exercise its prerogative to recommend that the client company with whom the agency placed the employee retain the employee rather than terminate him or her, or on the agency's failure to attempt to place the employee in a comparable position elsewhere after his or her discharge.ⁿ³³

For purposes of making a prima facie showing under the *McDonnell Douglas* test, the causal link element may be established by an inference derived from circumstantial evidence. A plaintiff can satisfy the initial burden under the test by producing evidence of nothing more than the employer's knowledge that the employee engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision.ⁿ³⁴ On summary judgment, the court cannot decide factual issues, but only may identify the presence or absence of factual issues related to whether plaintiff has made a prima facie showing.ⁿ³⁵

The causation element is the nexus between the protected activity and the employment action.ⁿ³⁶ Retaliatory motive is proved by a showing that plaintiff engaged in protected activities, the employer was aware of the protected activities, and the adverse action followed within a relatively short time.ⁿ³⁷ The causal link between a protected activity and the alleged retaliatory action can be inferred from timing alone when there is a close proximity between the two.ⁿ³⁸ However, causality is not dependent, as a matter of law, on temporal proximity. Although a lack of temporal proximity may make it more difficult to show causation, circumstantial evidence of a pattern of antagonism following protected conduct can also give rise to the inference.ⁿ³⁹ A specified time period cannot be a mechanically applied criterion.ⁿ⁴⁰ Even if a manager is not the ultimate decision-maker regarding the adverse action, the manager's retaliatory motive may be imputed to the employer if the manager was involved in the decision.ⁿ⁴¹

The issue is whether retaliatory animus was a but-for cause of the employer's adverse action.ⁿ⁴² The plaintiff can establish the element of causation by showing that any of the persons involved in bringing about the adverse action held the requisite animus, provided that such person's animus operated as a "but-for" cause, *i.e.*, a force without which the adverse action would not have happened.ⁿ⁴³ A defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation.ⁿ⁴⁴ Thus, for example, a supervisor annoyed by a worker's complaints about sexual harassment might decide to get rid of that worker by, for instance, fabricating a case of misconduct, or exaggerating a minor instance of misconduct into one that will lead to dismissal. Another manager, accepting the fabricated case at face value, may decide, entirely without animus, to discharge the plaintiff. The supervisor's utilization of a complex management structure to achieve the same result would not have the effect of insulating the employer from a liability that would otherwise be imposed.ⁿ⁴⁵ Thus, ignorance of a worker's protected activities or status does not afford a categorical defense unless it extends to all corporate actors who contributed materially to an adverse employment decision.ⁿ⁴⁶ Further, if a supervisor makes another his or her tool for carrying out a discriminatory action, *i.e.*, makes the other a "cat's paw," the original actor's purpose will be imputed to the tool, or through the tool to their common employer.ⁿ⁴⁷

A situation in which a subordinate employee with bias precipitates an investigation that leads to an adverse employment action, but an employee without bias makes the final decision to take the adverse action, raises the question of how involved in the investigation the biased subordinate must be for the subordinate's animus to be imputed to the employer that took the adverse employment action. In the Ninth Circuit, if a subordinate, in response to a plaintiff's protected activity, sets in motion a proceeding by an independent decision maker that leads to an adverse employment action, the subordinate's bias is imputed to the employer if the plaintiff can prove that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or decisionmaking process. Thus, if an adverse employment action is the consequence of an entirely independent investigation by an employer, the animus of the retaliating employee is not imputed to the employer. Conversely, even if the biased subordinate was not the principal decisionmaker, the biased subordinate's retaliatory

motive will be imputed to the employer if the subordinate influenced, affected, or was involved in the adverse employment decision. Thus, to establish the essential element of causation in a subordinate bias case, in which the investigation that led to the adverse employment decision was initiated by, and would not have happened but for, the biased subordinate, the plaintiff must show that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or the investigation leading thereto.ⁿ⁴⁸

The causal link may be established by direct evidence of retaliatory motive,ⁿ⁴⁹ such as an adverse action admittedly based on a letter to the Department of Housing and Urban Development complaining about hiring practices and job conditions.ⁿ⁵⁰ However, such evidence is rarely available,ⁿ⁵¹ and thus causation may be inferred from circumstantial evidence.ⁿ⁵² For example, an employee may show that other employees did not suffer the same consequences for the same conduct,ⁿ⁵³ or that there was a proximity in time between the employer's knowledge of protected activities and the alleged retaliatory adverse action.ⁿ⁵⁴ In *Iwekaogwu v. City of Los Angeles*, the court allowed a jury to infer retaliation against a racial-minority employee who was refused promotions (which promotion in one instance went to a less qualified person), refused overtime, and was subjected to the hostile comments of second-level supervisor after having threatened to file a race discrimination action.ⁿ⁵⁵

Although retaliation often involves termination, demotion, or financial loss,ⁿ⁵⁶ such actions are not a necessary predicate for a viable retaliation claim. All a plaintiff need show is that an employer took some action in response to the exercise of protected rights. For example, a refusal to transfer may be sufficient.ⁿ⁵⁷ In *Valdez v. Clayton Industries, Inc.*, the court found that plaintiff's complaints of sexual harassment by his supervisor and his temporally proximate layoff raised triable issues regarding causation and pretext, since a reasonable jury could infer that plaintiff's supervisor and his supervisor's supervisor terminated him in retaliation for his complaints, and not because there was an absence of work.ⁿ⁵⁸

Unlawful retaliation may also occur if an employer refuses to hire an individual because he or she engaged in protected activities.ⁿ⁵⁹ For example, in *Ruggles v. California Polytechnic State University*,ⁿ⁶⁰ a university allegedly retaliated against a part-time instructor who filed an EEOC complaint by eliminating a tenure-track position for which she applied.ⁿ⁶¹ The Ninth Circuit Court of Appeals described the case as a "hybrid" that was "part retaliation and part discrimination," explaining that a "failure-to-hire" factual setting usually produces discrimination claims because job applicants seldom have a pre-existing employment relationship that allows for retaliation.ⁿ⁶² The court noted, however, that although discrimination and retaliation claims have different prima facie elements,ⁿ⁶³ the *Wrighten* retaliation elements discussed in [1], *above*, are generally applicable,ⁿ⁶⁴ albeit with some modification. Explaining that those elements "had their genesis in termination cases and do not translate literally in the failure-to-hire context," the *Ruggles* court thus held that in order to satisfy the *Wrighten* "adverse employment action"ⁿ⁶⁵ element, a "failure-to-hire" plaintiff must show that a position for which he or she applied was eliminated as to him or her because of his or her protected activities.ⁿ⁶⁶

Further, the ADA bars retaliation against or interference with a person who has asserted rights under the ADA.ⁿ⁶⁷

Unlawful retaliation may occur when the employer takes adverse employment action against an employee who refuses to violate the rights of others. For example, in *Mamou v. Trendwest Resorts, Inc.*,ⁿ⁶⁸ an employee of Syrian heritage who was a naturalized citizen presented a prima facie case of unlawful retaliation in violation of the FEHA sufficient to withstand summary judgment by presenting evidence that his supervisor was "unhappy" when the employee initially refused to participate in discriminating against persons on medical leave; that the supervisor nonetheless persisted in seeking to enlist the employee's aid; that when the employee protested and stood fast in his refusal, both his supervisor and a management officer excoriated him for undermining their authority; and that his supervisor was outraged when the employee invoked the employer's "open door policy" to protest to upper management his retaliatory treatment.

[3] Employer's Rebuttal

To satisfy the burden to articulate a legitimate, nonretaliatory explanation for an adverse action, an employer need only produce admissible evidence that would allow the trier of fact to rationally conclude that the action was not motivated by discriminatory animus.ⁿ⁶⁹ For example, an employer may show lack of qualifications or subsequent disqualification, or elimination of the plaintiff's job for other business purposes.ⁿ⁷⁰

An employer that has asserted a facially valid and specific basis for an employment action such as a termination is not required to additionally prove the objective fairness of the employment procedures as part of its burden.ⁿ⁷¹

[4] Proof of Pretext

If the employer produces a legitimate reason for the adverse action, the presumption of retaliation drops out of the picture, and the burden shifts back to the employee to prove intentional retaliation.ⁿ⁷²

If the employer's rebuttal is successful, the plaintiff must carry his or her ultimate burden of establishing, by a preponderance of the evidence, that retaliatory intent motivated the employer's action.ⁿ⁷³

The employee must have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. The plaintiff's burden is to prove, by competent evidence, that the employer's proffered justification is mere pretext, *i.e.*, that the presumptively valid reason for the employer's action was in fact a cover-up.ⁿ⁷⁴ In responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff cannot simply show the employer's decision was wrong, mistaken, or unwise. The employee must demonstrate weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy or credence and thus infer that the employer did not act for the asserted nondiscriminatory reasons.ⁿ⁷⁵ This may be accomplished directly by showing that a retaliatory reason more likely motivated the employer's action,ⁿ⁷⁶ but because an employer's true motivation may be difficult to prove directly,ⁿ⁷⁷ intentional discrimination is most often indirectly established by showing that the employer's proffered reason was a pretext.ⁿ⁷⁸ Thus, for example, when an employer has advanced multiple fundamentally different justifications for its actions, this suggests the possibility that none of the official reasons given was the true reason and that a retaliatory motive was behind the employer's conduct.ⁿ⁷⁹ Further, even when an employer argues that different stated reasons for termination actually form a single basis for termination, a rational trier of fact could determine that the variations reveal fundamental differences and support allegations of pretext.ⁿ⁸⁰

Very little direct evidence of discriminatory motive suffices to establish pretext.ⁿ⁸¹ Circumstantial evidence of pretext must be "specific" and "substantial."ⁿ⁸² An unwarranted reduction in performance review scores can constitute evidence of pretext in retaliation cases.ⁿ⁸³ Pretext may be inferred from the timing of the employer's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination.ⁿ⁸⁴

Evidence that the employer's claimed reason is false, such as that it conflicts with other evidence, or appears to have been contrived after the fact, will tend to suggest that the employer seeks to conceal the real reason for its actions, and this in turn may support an inference that the real reason was unlawful. This does not mean that the fact finder can examine the employer's stated reasons and impose liability solely because they are found wanting. But it can take account of manifest weaknesses in the cited reasons in considering whether those reasons constituted the real motive for the employer's actions, or have instead been asserted to mask a more sinister reality.ⁿ⁸⁵ For example, in *Mamou v. Trendwest Resorts, Inc.*,ⁿ⁸⁶ there was ample evidence to support the inference that the employer's articulated reason for terminating the employee's employment, *i.e.*, that he was stealing from the employer, was false. The employer never rested on a single coherent explanation for its firing of the employee, and several, if not all, of its explanations were questionable. In its official form memorializing the discharge, the precise nature of the asserted misconduct and the policy it supposedly violated remained in serious doubt, and to the extent it could be identified, appeared heavily

controverted.

The causal link discussed in [2], *above*, is most severely contested at the "pretext" stage because a successful employer rebuttal creates a "question of mixed causation-- *i.e.*, retaliation plus legitimate business purpose ...".ⁿ⁸⁷ There is no consensus about the degree of retaliatory animus that must be shown to establish causation. Some courts hold that to prevail at the pretext stage (thereby proving a Title VII violation), a plaintiff must establish that protected activity was the "principal reason" for an adverse action.ⁿ⁸⁸ Others declare that it need only be shown that retaliation contributed, "among other reasons," to cause an adverse action.ⁿ⁸⁹ In *Kauffman v. Sidereal Corp.*,ⁿ⁹⁰ the Ninth Circuit Court of Appeals adopted a "but for" test, in which it must be established by a preponderance of the evidence both that protected activity was one of the reasons for an adverse action *and* that the action would not have been taken in the absence of such activity.ⁿ⁹¹ The "but for" test has also been adopted by other courts.ⁿ⁹²

In *Stegall v. Citadel Broadcasting Co.*,ⁿ⁹³ the Ninth Circuit discussed "single motive" versus "mixed motive" actions in the context of a retaliation claim under Title VII. The court opined that in mixed motive cases, it does not make sense to ask if the employer's stated reason for terminating an employee was a pretext for retaliation, when the employer has offered more than one reason for the action that it took. Rather, the relevant inquiry in a "mixed motive" case is distinct from that of a "single motive" or pretext case. The proper framework for analyzing a "mixed motive" case is that in cases in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, the jury should be instructed to determine first whether the discriminatory reason was "a motivating factor" in the challenged action. If the jury's answer to this question is in the affirmative, the employer has violated Title VII.ⁿ⁹⁴ In *Stegall*, the court found that after the employee presented a *prima facie* case of retaliation, the employer offered two legitimate, nondiscriminatory reasons to justify terminating her employment. The court then found that the employee presented circumstantial evidence sufficient to raise a genuine issue of material fact because she demonstrated that an illegitimate reason more likely motivated the employer, or was at least a motivating factor in her dismissal. Furthermore, she raised a genuine issue of material fact as to whether the employer's second reason for firing her, her allegedly negative attitude, was unworthy of credence. The district court had erred by granting the employer summary judgment because although the employee was required to produce evidence to rebut the employer's showing, in addition to evidence sufficient for her *prima facie* case, it was improper for the district court to ignore the evidence in support of her *prima facie* case, and the district court erred further by examining each piece of evidence in isolation and failing to consider the timing of her termination in its pretext analysis.ⁿ⁹⁵

The *Kauffman* approach seems to be indirectly supported by *Mt. Healthy City Board of Ed. v. Doyle*,ⁿ⁹⁶ in which a school board allegedly refused to rehire an untenured teacher in part because he disclosed the substance of a teacher dress code memorandum to a local radio station. The teacher brought an action under Title 42, *United States Code Section 1983* for reinstatement and damages, claiming a violation of his rights under the First and *Fourteenth Amendments to the United States Constitution*.ⁿ⁹⁷ The United States Supreme Court rejected a "rule of causation which focuses *solely* on whether protected conduct played a part, 'substantial' or otherwise," in an adverse action.ⁿ⁹⁸ The Court concluded that if the teacher met his burden of showing that constitutionally protected conduct was a "substantial" or "motivating" factor in the adverse action, the burden was on the school board to show, by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected conduct.ⁿ⁹⁹

Although a plaintiff can satisfy the initial burden under the *McDonnell Douglas* framework by producing evidence of nothing more than the proximity in time between the protected action and the allegedly retaliatory employment decision,ⁿ¹⁰⁰ evidence of a temporal proximity only shifts the burden to the employer to articulate a nondiscriminatory reason for the adverse employment action, and does not, without more, suffice to satisfy the secondary burden borne by the employee to show a triable issue of fact on whether the employer's articulated reason was untrue and pretextual. An employee seeking to avoid summary judgment after the employer has articulated a legitimate business reason for the action taken must adduce substantial additional evidence from which a trier of fact could infer the articulated reasons for the adverse employment action were untrue or pretextual.ⁿ¹⁰¹ Speculation about the employer's reasons for its

decision does not create a genuine issue of material fact.ⁿ¹⁰²

If the plaintiff succeeds at the "pretext" stage, a presumption is created that the adverse action was the product of discriminatory intent.ⁿ¹⁰³ The employer may rebut the presumption by showing, by a preponderance of the evidence, that the adverse action would have been taken even in the absence of discriminatory intent.ⁿ¹⁰⁴

Legal Topics:

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

EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewLabor & Employment

LawDiscriminationRetaliationGeneral OverviewLabor & Employment LawDiscriminationRetaliationBurdens of Proof

FOOTNOTES:

(n1)Footnote 1. *See* Schlei and Grossman, *Employment Discrimination Law*, ch. 2 (BNA 2d ed. 1983).

(n2)Footnote 2. For a detailed discussion of the disparate treatment theory, *see* §§ 41.10-41.11.

(n3)Footnote 3. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII) ; *see* discussion in § 41.11[1].

(n4)Footnote 4. *Williams v. Boorstin* (D.C. Cir. 1980) 663 F.2d 109, 116, 213 U.S. App. D.C. 345 (Title VII); *see Miller v. Fairchild Industries, Inc.* (9th Cir. 1989) 885 F.2d 498, 504 n.4 (Title VII).

(n5)Footnote 5. *See Miller v. Fairchild Indus., Inc.* (9th Cir. 1989) 885 F.2d 498, 504 n.4 (Title VII); *Williams v. Boorstin* (D.C. Cir. 1980) 663 F.2d 109, 116, 213 U.S. App. D.C. 345 (Title VII); *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1042, 32 Cal. Rptr. 3d 436 (FEHA) ; *Chen v. County of Orange* (2002) 96 Cal. App. 4th 926, 948, 116 Cal. Rptr. 2d 786 (FEHA); failure to present facts establishing prima facie case justifies grant of motion for nonsuit).

(n6)Footnote 6. *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, 1066 (Title VII); *Wrighten v. Metropolitan Hosps., Inc.* (9th Cir. 1984) 726 F.2d 1346, 1354 (Title VII) ; *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1042, 32 Cal. Rptr. 3d 436 (FEHA) ; *Chen v. County of Orange* (2002) 96 Cal. App. 4th 926, 948, 116 Cal. Rptr. 2d 786 (FEHA) ; *see Miller v. Fairchild Indus., Inc.* (9th Cir. 1989) 885 F.2d 498, 504 n.4 (Title VII); *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1514 (Title VII); *see also Williams v. Boorstin* (D.C. Cir. 1980) 663 F.2d 109, 116, 213 U.S. App. D.C. 345 (Title VII).

(n7)Footnote 7. *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, 1066 (Title VII); *Williams v. Boorstin* (D.C. Cir. 1980) 663 F.2d 109, 116, 213 U.S. App. D.C. 345 (Title VII); *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1042, 32 Cal. Rptr. 3d 436 (FEHA) ; *see Miller v. Fairchild Indus., Inc.* (9th Cir. 1989) 885 F.2d 498, 504 n.4 (Title VII); *see also E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1514 (Title VII); plaintiff may also show that retaliatory reason more likely motivated employer's action); discussion in [4], *below*.

(n8)Footnote 8. 42 U.S.C. § 12203(b).

(n9)Footnote 9. *See* 42 U.S.C. § 12101(b)(1).

(n10)Footnote 10. *Brown v. City of Tucson* (9th Cir. 2003) 336 F.3d 1181, 1189-1193 (employee raised triable issue of material fact with respect to interference claim with allegations that supervisor demanded she stop taking anti-depressant medication and perform night-time call- out work or face demotion or forced retirement, because employee alleged she suffered short-term memory problems and felt extremely stressed, harassed, and pressured by supervisor, especially when viewed alongside employee's assertions that supervisor made unauthorized inquiries to police department's Behavioral Sciences Unit and repeatedly questioned employee herself regarding nature of her

disability).

(n11)Footnote 11. See *Steele v. Youthful Offender Parole Board* (2008) 162 Cal. App. 4th 1241, 1252, 76 Cal. Rptr. 3d 632 (employee presented sufficient evidence to show she was engaged in protected activity, where fellow employee filed complaint with DFEH based, in part, on employer retaliating against fellow employee for her report of kissing incident involving chairman of employer's board and employee, so that employee was "potential witness" in proceeding); *Villanueva v. City of Colton* (2008) 160 Cal. App. 4th 1188, 1198-1199, 73 Cal. Rptr. 3d 343 (retaliation claim failed because there is no evidence plaintiff ever engaged in protected activity related to employment practice proscribed by FEHA, where record was devoid of evidence plaintiff ever complained to anyone about alleged racial discrimination or did anything to imply racial discrimination was issue, and neither of two formal grievances lodged through his association representative alleged racial discrimination or harassment based on race); *Flait v. North American Watch Corp.* (1992) 3 Cal. App. 4th 467, 476-479, 4 Cal. Rptr. 2d 522 (FEHA; mistaken, but sincere and reasonable, belief that plaintiff was opposing discrimination was sufficient); *Cal. Fair Employment & Housing Comm. v. Gemini Aluminum Corp.* (2004) 122 Cal. App. 4th 1004, 1018-1019, 18 Cal. Rptr. 3d 906 (informal complaints to management about discriminatory employment practices are considered sufficient opposition to trigger prohibition against retaliation; by protesting employer's failure to attempt to accommodate his religious observance and then by complaining to supervisor that suspension was unfair because of his religious needs, plaintiff engaged in protected activities for which employer was forbidden to retaliate; in spite of employee's mistaking name of agency responsible for employment discrimination claims, import of employee's statement of his intention to complain of religious discrimination was brought home to employer's management and was protected activity). See also *Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3d 802, 811-812 (Title VII); although evidence was insufficient to show plaintiff opposed discrimination against African American employee on account of employee's race, there was sufficient evidence to create genuine issue of material fact as to whether plaintiff opposed retaliation against employee on account of employee's own Title VII suit to be sufficient evidence that plaintiff engaged in protected opposition activity to satisfy first element of prima facie case); *EEOC v. Dinuba Medical Clinic* (9th Cir. 2000) 222 F.3d 580, 586 (filing criminal complaint against supervisor for assault and battery qualified as "opposition" activity).

(n12)Footnote 12. See, e.g., *Steele v. Youthful Offender Parole Board* (2008) 162 Cal. App. 4th 1241, 1253-1260, 76 Cal. Rptr. 3d 632 (employee established adverse action by constructive discharge, where employee presented substantial evidence to support jury's finding that employer intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at time of employee's resignation that reasonable employer would realize that reasonable person in the employee's position would be compelled to resign).

(n13)Footnote 13. *Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3d 802, 811 (Title VII); *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, 1065-1066 (Title VII); *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 646; *Brown v. City of Tucson* (9th Cir. 2003) 336 F.3d 1181, 1186-1187 (ADA); *Raad v. Fairbanks N. Star Borough* (9th Cir. 2003) 323 F.3d 1185, 1196-1197 (Title VII); *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 913 (Title VII), as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882; *EEOC v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1513-1514 (Title VII); *Wrighten v. Metropolitan Hosps., Inc.* (9th Cir. 1984) 726 F.2d 1346, 1354 (Title VII); see *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1020, 93 Cal. Rptr. 3d 338 (FEHA); *Chen v. County of Orange* (2002) 96 Cal. App. 4th 926, 948, 116 Cal. Rptr. 2d 786 (FEHA); *Akers v. County of San Diego* (2002) 95 Cal. App. 4th 1441, 1453, 116 Cal. Rptr. 2d 602 (FEHA, Lab. Code § 1102.5); *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 618, 622, 262 Cal. Rptr. 842 (FEHA); see also *Davis v. Team Electric Co.* (9th Cir. 2008) 520 F.3d 1080, 2008 U.S. App. LEXIS 6476, *28-*31 (temporal proximity between layoff and employee's civil rights claim was sufficient for defeating summary judgment, where she was terminated three days after EEOC dismissed her claim); *Hardage v. CBS Broadcasting, Inc.* (9th Cir. 2005) 427 F.3d 1177, 2005 U.S. App. LEXIS 23551, *26-*29 (where employee failed to meet sales goals and was insubordinate by disobeying supervisor's instruction that he return to work after charity event, employee failed to prove causal link between adverse performance memoranda and sexual harassment complaint); *Hernandez v. Spacelabs Med., Inc.* (9th Cir. 2003) 343 F.3d 1107, 1113-1114 (Title VII);

undisputed that employee satisfied first two factors by showing he reported superior's sexual harassment of fellow employee to human resources manager and was terminated, and employee provided sufficient evidence from which reasonable jury could infer both that superior either knew or suspected that employee had reported alleged harassment to human resources manager, and that there was causal connection between this knowledge or suspicion and employee's termination); *Steele v. Youthful Offender Parole Board* (2008) 162 Cal. App. 4th 1241, 1260-1261, 76 Cal. Rptr. 3d 632 (substantial evidence supported finding of causal link between employee's potential participation as witness in fellow employee's DFEH proceeding and constructive discharge, which was adverse employment action to support finding of retaliation under FEHA); *DFEH v. State Univ.-Hayward* (1988) FEHC Dec. No. 88-18, p. 19 (FEHA; plaintiff must prove, by preponderance of evidence, that (1) he or she engaged in protected activity, (2) he or she suffered adverse employment action, and (3) causal connection exists between protected activity and employer's adverse action; plaintiff need not show that retaliatory reason was sole or principal reason for adverse action); *DFEH v. Madera County* (1988) FEHC Dec. No. 88-11, pp. 30-31 (same); *DFEH v. Ca. State University-Sacramento* (1988) FEHC Dec. No. 88-08, p. 24 (same).

(n14)Footnote 14. *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006) , discussed at § 41.130[1A], above.

(n15)Footnote 15. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 32 Cal. Rptr. 3d 436, 116 P.3d 1123 , discussed at § 41.130[1A] above.

(n16)Footnote 16. *Miller v. Department of Corr.* (2005) 36 Cal. 4th 446, 474, 30 Cal. Rptr. 3d 797, 115 P.3d 77 .

(n17)Footnote 17. *Miller v. Department of Corr.* (2005) 36 Cal. 4th 446, 475, 30 Cal. Rptr. 3d 797, 115 P.3d 77 .

(n18)Footnote 18. *Miller v. Department of Corr.* (2005) 36 Cal. 4th 446, 475, 30 Cal. Rptr. 3d 797, 115 P.3d 77 (although plaintiffs may not have recited specific words "sexual discrimination" or "sexual harassment," nature of their complaint fell within general purview of FEHA).

(n19)Footnote 19. *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 913 (Title VII), as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882 ; *Moyo v. Gomez* (9th Cir. 1994) 40 F.3d 982, 984 .

(n20)Footnote 20. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1049-1055, 32 Cal. Rptr. 3d 436 , citing *Akers v. County of San Diego* (2002) 95 Cal. App. 4th 1441, 1454-1457, 116 Cal. Rptr. 2d 602 .

(n21)Footnote 21. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1052, 32 Cal. Rptr. 3d 436 .

(n22)Footnote 22. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1055-1056, 32 Cal. Rptr. 3d 436 .

(n23)Footnote 23. *Thomas v. Department of Corrections* (2000) 77 Cal. App. 4th 507, 91 Cal. Rptr. 2d 770 .

(n24)Footnote 24. See *Thomas v. Department of Corrections* (2000) 77 Cal. App. 4th 507, 511-512, 91 Cal. Rptr. 2d 770 . See also *McRae v. Dept. of Corrections & Rehabilitation* (2006) 142 Cal. App. 4th 377, 389-398 (jury's finding that African-American physician was subjected to adverse employment action as result of complaining about race discrimination in promotion decision was not supported by evidence, where actions other than transfer, whether viewed separately or collectively, were not part of process of progressive discipline and did not create abusive work environment; assuming transfer resulted in material change in terms and conditions of physician's employment, physician did not produce substantial evidence from which jury could conclude employer's legitimate reasons for transfer were mere pretexts unworthy of credence).

(n25)Footnote 25. *Thomas v. Department of Corrections* (2000) 77 Cal. App. 4th 507, 511-512, 91 Cal. Rptr. 2d 770 .

(n26)Footnote 26. See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1049, 32 Cal. Rptr. 3d 436 (although term "adverse employment action" does not appear in language of FEHA or Title VII, it has become familiar shorthand expression referring to kind, nature, or degree of adverse action against employee that will support cause of action under relevant provision of employment discrimination statute).

(n27)Footnote 27. *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 646 . see *Hardage v. CBS Broadcasting, Inc.* (9th Cir. 2005) 427 F.3d 1177, 2005 U.S. App. LEXIS 23551, *27-*29 (employer's snide remarks and threats were not non-trivial employment actions that would deter reasonable employees from complaining about Title VII violations so as to constitute actionable retaliation; even if remarks collectively created hostile work environment, considering totality of circumstances, comments were insufficiently severe to support retaliation claim).

(n28)Footnote 28. *Thomas v. Department of Corrections* (2000) 77 Cal. App. 4th 507, 511, 91 Cal. Rptr. 2d 770 .

(n29)Footnote 29. *Akers v. County of San Diego* (2002) 95 Cal. App. 4th 1441, 1455, 116 Cal. Rptr. 2d 602 ; *Thomas v. Department of Corrections* (2000) 77 Cal. App. 4th 507, 510-511, 91 Cal. Rptr. 2d 770 . See *Robinson v. City of Pittsburgh* (3d Cir. 1997) 120 F.3d 1286, 1300 ; *Torres v. Pisano* (2d Cir. 1997) 116 F.3d 625, 640 . See e.g., *Jones v. Dept. of Corrections* (2007) 152 Cal. App. 4th 1367, 1380-1382, 62 Cal. Rptr. 3d 200 (FEHA; former employee failed to provide any evidence disputing employer's claim that she suffered no adverse change in terms and conditions of her employment, where she never experienced loss or reduction in her classification, position, salary, benefits and work hours and her employment was not terminated, and where she failed to make out claim she was constructively discharged, because no evidence showed her employer intentionally created or knowingly permitted working conditions so intolerable or aggravated that reasonable employee in her position would have felt compelled to resign).

(n30)Footnote 30. *Akers v. County of San Diego* (2002) 95 Cal. App. 4th 1441, 1455, 116 Cal. Rptr. 2d 602 .

(n31)Footnote 31. *Akers v. County of San Diego* (2002) 95 Cal. App. 4th 1441, 1456-1457, 116 Cal. Rptr. 2d 602 (taking into account totality of circumstances, including language used in performance evaluation and counseling memorandum labeling deputy district attorney as dishonest, incompetent, and insubordinate, and evidence that top management demonstrated willingness to use information against her in significant employment decisions, was sufficient evidence for jury to find retaliatory actions after complaint of gender/pregnancy discrimination were adverse actions under the FEHA because they would preclude reasonable promotional opportunities). See also *Pinero v. Specialty Restaurants Corp.* (2005) 130 Cal. App. 4th 635, 639-647, 30 Cal. Rptr. 3d 348 (no adverse employment action shown where employee was not fired, demoted or transferred, did not lose any benefits, bonuses or commissions, did not suffer any wage reduction, and did not experience any change in job duties or responsibilities between time of transfer and his voluntary departure from employment).

(n32)Footnote 32. *Akers v. County of San Diego* (2002) 95 Cal. App. 4th 1441, 1457, 116 Cal. Rptr. 2d 602 .

(n33)Footnote 33. See *Mathieu v. Norrell Corp.* (2004) 115 Cal. App. 4th 1174, 1185-1186, 10 Cal. Rptr. 3d 52 (FEHA; summary adjudication properly denied).

(n34)Footnote 34. *Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 69, 105 Cal. Rptr. 2d 652 . See, e.g., *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1020, 93 Cal. Rptr. 3d 338 (FEHA; employee presented sufficient evidence to show causal link by showing that he suffered adverse employment action weeks after meetings with director of human resources and his supervisor).

(n35)Footnote 35. See, e.g., *Loggins v. Kaiser Permanente Intl.* (2007) 151 Cal. App. 4th 1102, 1109-1110, 60 Cal. Rptr. 3d 45 (although terminated employee's alleged hotline complaint about her supervisor, which allegedly was basis for retaliation against her, was uncorroborated by records, and former employer would have multiple avenues for attacking veracity of her testimony that she made telephone call, her averment raised factual issue of whether she engaged in protected conduct that was temporally close to and preceding adverse employment action, which sufficed to

shift burden to former employer).

(n36)Footnote 36. *See* Larson, Employment Discrimination, ch. 34 (Matthew Bender).

(n37)Footnote 37. *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal. App. 4th 1004, 1020, 18 Cal. Rptr. 3d 906 ; *Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 69, 105 Cal. Rptr. 2d 652 (FEHA) ; *see, e.g., Coons v. Sec'y of the United States Dep't of the Treasury* (9th Cir. 2004) 383 F.3d 879, 887 (Rehabilitation Act; there was no evidence of causal link between protected activity and demotion, where employee's request for reasonable accommodations was made full year before his demotion and distant time sequence was inadequate to show causal link); *Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3d 802, 812 (Title VII; plaintiff alleged facts sufficiently proximate to support inference of causation, where plaintiff recommended promoting African American and continued to oppose human resource director's treatment of African American thereafter, and approximately seven weeks after plaintiff first supported promotion, human resource director informed plaintiff that she was being placed on extended probation); *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 647 (retaliation claim failed to show causal link, where protected activity occurred thirteen months prior to alleged adverse action, and plaintiff did not provide evidence of surrounding circumstances showing retaliatory motive or that employer's proffered reason for employment action was pretextual); *Bell v. Clackamas County* (9th Cir. 2003) 341 F.3d 858, 865-867 (Title VII, §§ 1981, 1983; temporal proximity between plaintiff's complaints and alleged adverse employment actions, together with evidence of superiors' contemporaneous displeasure with plaintiff's complaints regarding racial comments and racial profiling, provided strong circumstantial evidence of retaliation); *Brown v. City of Tucson* (9th Cir. 2003) 336 F.3d 1181, 1187 (ADA; supervisor's investigation into detective's conduct began very day he was interviewed regarding her complaint against him regarding her disability, establishing prima facie case); *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 914-915 , *as amended on denial of rehearing and rejection of rehearing en banc*, 301 F.3d 958, 2002 U.S. App. LEXIS 882 (Title VII; employee presented prima facie case by showing (1) reasonable belief that by reporting rapes by client to vice president, despite belief it could endanger her career, she was opposing unlawful employment practice because she reasonably believed employer was required to take remedial steps; (2) adverse employment actions of reduction in pay and termination; and (3) adverse employment actions occurring within minutes of reporting rape to company president, who immediately reduced her pay and arguably fired her).

(n38)Footnote 38. *Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3d 802, 812 (Title VII) ; *Villiarimo v. Aloha Island Air, Inc.* (9th Cir. 2002) 281 F.3d 1054, 1065 .

(n39)Footnote 39. *Porter v. Cal. Dep't of Corr.* (9th Cir. 2005) 419 F.3d 885, 895 (Title VII; plaintiff sufficiently alleged retaliation where one of employer's agents was not in position to retaliate until after he became in charge of personnel assignment and plaintiff did not rely on mere temporal proximity but offered other evidence to support inference of retaliatory motive). *See also Kachmar v. SunGard Data Sys., Inc.* (3rd Cir. 1997) 109 F.3d 173, 177 .

(n40)Footnote 40. *Porter v. Cal. Dep't of Corr.* (9th Cir. 2005) 419 F.3d 885, 895 ; *Coszalter v. City of Salem* (9th Cir. 2003) 320 F.3d 968, 977-978 .

(n41)Footnote 41. *Bergene v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2001) 272 F.3d 1136, 1141 . *See Hernandez v. Spacelabs Med., Inc.* (9th Cir. 2003) 343 F.3d 1107, 1114-1115 (in reversing grant of summary judgment to employer on retaliation claim, Ninth Circuit concluded that employer did not proffer sufficient evidence to compel conclusion that chain of causation, begun by manager against whom employee registered complaint of sexual harassment of another employee, was broken by involvement of any other decision maker).

(n42)Footnote 42. *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal. App. 4th 95, 108 (FEHA) ; *see Clark v. Claremont University Center* (1992) 6 Cal. App. 4th 639, 665 n.6, 8 Cal. Rptr. 2d 151 , quoting *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 282 n.10, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (plaintiff need not show action was taken solely on basis of his race; no more is required to be shown than that race was but for cause); *Brown v.*

Smith (1997) 55 Cal. App. 4th 767, 783, 64 Cal. Rptr. 2d 301 (elements of claim for sexual harassment include that offensive act would not have happened but for plaintiff's sex).

(n43)Footnote 43. *See, e.g., Equal Employment Opportunity Commission v. Go Daddy Software, Inc.* (9th Cir. 2009) 581 F.3d 951, 2009 U.S. App. LEXIS 20159, *32-*36 (plaintiff sufficiently proved causation, where reasonable jury hearing plaintiff's testimony could have concluded that member of employer's human resources department to whom plaintiff complained had ample opportunities to inform plaintiff's supervisor of his complaint and had, in fact, done so; and where nothing in record supported conclusion employer decided to terminate plaintiff before he made complaints, based on evidence that employer's decision to terminate him was made sometime between time he was told he could return to his original sales position and time of termination, both of which occurred after he complained).

(n44)Footnote 44. *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal. App. 4th 95 (FEHA); *see Clark v. Claremont University Center* (1992) 6 Cal. App. 4th 639, 665-666, 8 Cal. Rptr. 2d 151 .

(n45)Footnote 45. *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal. App. 4th 95 (FEHA).

(n46)Footnote 46. *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal. App. 4th 95, 109 (FEHA; employer could not conclusively negate element of causation merely by showing ignorance of plaintiff's protected conduct on part of district manager who fired plaintiff). *See Cohen v. Fred Meyer, Inc.* (9th Cir. 1982) 686 F.2d 793, 797 n.5 (no evidence any company official or employee who had knowledge of plaintiff's protected conduct had any part in adverse policy decision); *Gunther v. County of Washington* (9th Cir. 1979) 623 F.2d 1303, 1316 (no showing defendants knew plaintiff had sought higher pay for female workers); *Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 73, 105 Cal. Rptr. 2d 652 (all of actual decision makers responsible for failing to rehire appellant affirmatively stated in their declarations they were not aware of appellant's grievance or past complaints); *Fisher v. Vassar College* (2d Cir. 1997) 114 F.3d 1332, 1338 n.4 (en banc) (fact of multiple decision-makers should not insulate decisions permeated by discrimination of individual participants); *Brown v. Sears Automotive Center (M.D.N.C. 2002)* 222 F. Supp. 2d 757, 762-764 (supervisor declared she alone made decision to terminate and did not know plaintiff had filed protected complaint); *Featherson v. Montgomery County Public Schools (D.Md.1990)* 739 F. Supp. 1021, 1025-1026 (mem.) (absolutely no evidence persons involved in any of alleged adverse decisions knew at time decisions were made that plaintiff had filed any EEO claims); *Garcia v. American Airlines, Inc. (D.Puerto Rico 1987)* 673 F. Supp. 63, 65, 67 (neither supervisor who decided to fire plaintiff nor manager who reviewed decision knew of protected activity); *Lihosit v. I & W, Inc. (N.M.App. 1996)* 121 N.M. 455, 457, 459, 913 P.2d 262, 264, 266 (no employee of employer, including in particular supervisor who fired plaintiff, knew of plaintiff's claim that statutory work-time limitations precluded compliance with order; employee fails to prove causal connection necessary to sustain claim for retaliatory discharge when there is no evidence that persons responsible for discharge had any knowledge employee engaged in an activity alleged to be protected). *But see Hill v. Lockheed Martin Logistics Management, Inc. (4th Cir. 2004)* 354 F.3d 277, 290-291 .

(n47)Footnote 47. *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal. App. 4th 95, 113-121 (FEHA; record justified inference that lower level actors engaged in retaliation under circumstances justifying imputation of their conduct and motives to employer). *See also Shager v. Upjohn Co. (7th Cir. 1990)* 913 F.2d 398, 405-406 .

(n48)Footnote 48. *Poland v. Chertoff* (9th Cir. 2007) 494 F.3d 1174, 1179-1184 (where supervisor, in retaliation for employee's age discrimination complaints, asked employer to undertake administrative inquiry of employee's performance, initiation of administrative inquiry, on its own, was not sufficient to impute supervisor's animus to employer's decision to transfer employee; however, animus was imputed because inquiry panel was not shielded from supervisor's animus, which had pervasive influence on administrative inquiry leading to adverse employment action, so that inquiry was not sufficiently independent to break causal chain between protected activity and adverse employment decision).

(n49)Footnote 49. *Miller v. Fairchild Indus., Inc.* (9th Cir. 1986) 797 F.2d 727, 731 (Title VII).

(n50)Footnote 50. *See Sias v. City Demonstration Agency* (9th Cir. 1978) 588 F.2d 692, 694, 695 (Title VII) ; *see also Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 69-74, 105 Cal. Rptr. 2d 652 (former employee failed to present direct evidence of retaliatory motive in failure to rehire where each individual who decided not to rehire him disclaimed knowledge of fact that he had previously filed grievance against employer so that they could not have acted in retaliation for filing of grievance).

(n51)Footnote 51. *See Gates v. Georgia-Pacific Corp.* (9th Cir. 1974) 492 F.2d 292, 296 (Title VII).

(n52)Footnote 52. *Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 69, 105 Cal. Rptr. 2d 652 (FEHA) .

(n53)Footnote 53. *See Merrick v. Farmers Ins. Group* (9th Cir. 1990) 892 F.2d 1434, 1442 (ADEA; instruction that jury may consider whether defendant treated plaintiff differently than other employees who had not filed age discrimination charge as proper); *cf. Acosta v. University of District of Columbia* (D.D.C. 1981) 528 F. Supp. 1215, 1224 (Title VII; plaintiff professor did not present prima facie case of retaliation when he did not show that other employees with same or lesser qualifications were given grants).

(n54)Footnote 54. *Flait v. North American Watch Corp.* (1992) 3 Cal. App. 4th 467, 476-479, 4 Cal. Rptr. 2d 522 (FEHA) ; *Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 69, 105 Cal. Rptr. 2d 652 (FEHA) ; *see Villiarimo v. Aloha Island Air, Inc.* (9th Cir. 2002) 281 F.3d 1054, 1065-1066 (Title VII; to support inference of retaliatory motive, adverse action such as termination must have occurred fairly soon after employee's protected expression; nearly 18-month lapse between protected activity and adverse action is simply too long, by itself, to give rise to inference of causation); *Miller v. Fairchild Industries, Inc.* (9th Cir. 1986) 797 F.2d 727, 731 (Title VII); *Hochstadt v. Worcester Found., Etc.* (D. Mass. 1976) 425 F. Supp. 318, 324 , *aff'd*, 545 F.2d 222 (1st Cir. 1976) (Title VII; prima facie case includes employer knowledge of protected activities together with proximity in time between activities and adverse action); *Dfeh v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 17 (FEHA; same); *see also Aguirre v. Chula Vista Sanitary Serv.* (9th Cir. 1976) 542 F.2d 779, 781 (Title VII; showing that plaintiff was discharged following protected activities *that employer was aware of* establishes prima facie case of retaliation).

(n55)Footnote 55. *See Iwekaogwu v. City of Los Angeles* (1999) 75 Cal. App. 4th 803, 816, 89 Cal. Rptr. 2d 505 .

(n56)Footnote 56. *See Ruggles v. California Polytechnic State Univ.* (9th Cir. 1986) 797 F.2d 782, 785 (Title VII) ; *cf. Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1223 (Title VII); *Kortan v. California Youth Authority* (9th Cir. 2000) 217 F.3d 1104, 1112-1113 (being forced to take medical leave because of stress of retaliatory actions is not "adverse" employment decision).

(n57)Footnote 57. *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211 (Title VII).

(n58)Footnote 58. *Valdez v. Clayton Industries, Inc.* (2001) 88 Cal. App. 4th 1162, 1174-1176, 107 Cal. Rptr. 2d 15 .

(n59)Footnote 59. *See, e.g., Nilsson v. City of Mesa* (9th Cir. 2007) 503 F.3d 947, 2007 U.S. App. LEXIS 21912, *12-*14 (Title VII; applicant for job as police officer made prima facie showing of retaliation in police department's alleged refusal to hire her based on her filing of EEOC complaint against former employer).

(n60)Footnote 60. *Ruggles v. California Polytechnic State Univ.* (9th Cir. 1986) 797 F.2d 782 (Title VII).

(n61)Footnote 61. *See Ruggles v. California Polytechnic State Univ.* (9th Cir. 1986) 797 F.2d 782, 784 .

(n62)Footnote 62. *See Ruggles v. California Polytechnic State Univ.* (9th Cir. 1986) 797 F.2d 782, 785 .

(n63)Footnote 63. *Compare McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L.

Ed. 2d 668 (Title VII) with Wrighten v. Metropolitan Hosps., Inc. (9th Cir. 1984) 726 F.2d 1346, 1354 (Title VII) . For a detailed discussion of the McDonnell Douglas prima facie elements for intentional discrimination, see § 41.11[1].

(n64)Footnote 64. *See Ruggles v. California Polytechnic State Univ. (9th Cir. 1986) 797 F.2d 782, 785 .*

(n65)Footnote 65. *Note: After the Ninth Circuit decided Wrighten, in Burlington Northern & Santa Fe Railway Co. v. White (2006) 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (discussed at [1A], above) the United States Supreme Court held that the scope of the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 extends beyond workplace-related or employment-related retaliatory acts and harm, so that an employee need only allege and prove "adverse action" rather than "adverse employment action" under Title VII's anti-retaliation provision.*

(n66)Footnote 66. *See Ruggles v. California Polytechnic State Univ. (9th Cir. 1986) 797 F.2d 782, 785-786 .*

(n67)Footnote 67. *Barnett v. United States Air, Inc. (9th Cir. 1998) 157 F.3d 744, 753-754 (Ninth Circuit applies Title VII retaliation analysis to ADA retaliation claims).*

(n68)Footnote 68. *Mamou v. Trendwest Resorts, Inc. (2008) 165 Cal. App. 4th 686, 714, 81 Cal. Rptr. 3d 406 .*

(n69)Footnote 69. *Winarto v. Toshiba America Electronics Components, Inc. (9th Cir. 2001) 274 F.3d 1276, 1284 (Title VII and FEHA); Miller v. Fairchild Indus., Inc. (9th Cir. 1986) 797 F.2d 727, 731 (Title VII) , quoting Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 257, 101 S. Ct. 1089, 67 L. Ed. 2d 207 ; see also Davis v. Team Electric Co. (9th Cir. 2008) 520 F.3d 1080, 2008 U.S. App. LEXIS 6476, *31-*32 (employer failed to articulate legitimate nonretaliatory reason for plaintiff's layoff, where, although plaintiff was laid off with sixteen other employees, there was no evidence in record as to why plaintiff was laid off; even if economic downturn were valid reason for layoff of some employees, company retained electricians less senior than she, and her supervisors considered her skilled and dedicated worker, creating further questions about why she was laid off despite her seniority); Surrell v. Cal. Water Service Co. (9th Cir. 2008) 518 F.3d 1097, 1107-1108 (employer presented legitimate, non-retaliatory reason for conducting drug tests on plaintiff who appeared to be in impaired state and was admittedly taking drugs); Trent v. Valley Elec. Ass'n, Inc. (9th Cir. 1999) 195 F.3d 534, 537-538 (employer's proffered reason for adverse employment action was credible and therefore must be upheld on appeal, unless clearly erroneous). See California Fair Employment & Housing Com. v. Gemini Aluminum Corp. (2004) 122 Cal. App. 4th 1004, 1022, 18 Cal. Rptr. 3d 906 (employer did not show leave request procedure was fairly devised or administered and it was ambiguous and could not serve as legitimate, nonretaliatory explanation for suspending employee and then terminating his employment).*

(n70)Footnote 70. *See Coons v. Sec'y of the United States Dep't of the Treasury (9th Cir. 2004) 383 F.3d 879, 887 (Rehabilitation Act; to support its decision to demote employee, employer presented ample evidence of employee's misuse of government computers, that employee accessed sex-related sites on those computers, and that employee lied in subsequent investigation of his misuse of government computers, which employee did not dispute, and although misuse occurred two years before demotion, investigation of misuse concluded shortly before employer made decision to demote employee); Little v. Windermere Relocation, Inc. (9th Cir. 2001) 265 F.3d 903, 914 , as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882 (Title VII; employer's evidence of growing dissatisfaction with employee's performance presented legitimate, non-discriminatory motive for altering employee's pay structure and termination); Loggins v. Kaiser Permanente Intl. (2007) 151 Cal. App. 4th 1102, 1110-1111, 60 Cal. Rptr. 3d 45 (FEHA; employer met burden of articulating legitimate, nondiscriminatory reason for terminating plaintiff's employment based on her violation of employer's computer usage policies by personal use).*

(n71)Footnote 71. *Loggins v. Kaiser Permanente Intl. (2007) 151 Cal. App. 4th 1102, 1111-1112, 60 Cal. Rptr. 3d 45 .*

(n72)Footnote 72. *Mamou v. Trendwest Resorts, Inc. (2008) 165 Cal. App. 4th 686, 715, 81 Cal. Rptr. 3d 406 ; Akers v. County of San Diego (2002) 95 Cal. App. 4th 1441, 1453, 116 Cal. Rptr. 2d 602 .*

(n73)Footnote 73. *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1284 (Title VII and FEHA); see *Surrell v. Cal. Water Service Co.* (9th Cir. 2008) 518 F.3d 1097, 1108 (employee failed to raise triable issue regarding whether employer's reasons for drug testing her were pretext for retaliation through unsubstantiated statement that she never used drugs or alcohol, where other than unsubstantiated statement, she presented no evidence contradicting results of drug tests, and, even if tests were flawed, employer had ample basis to conduct tests in first place, because employee did not dispute that she appeared impaired and was taking drugs); *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1061-1062, 32 Cal. Rptr. 3d 436 (FEHA; record revealed triable issues of fact as to whether employer's heightened response to plaintiff's allegedly poor performance after she refused to follow supervisor's order to fire employee supervisor found sexually unattractive was retaliation for protected activity under FEHA; taking into account all evidence submitted in support of and opposition to summary judgment motion, there existed genuine issue of material fact as to whether employer's articulated, nonretaliatory reasons for its actions were pretextual); *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1020-1021, 93 Cal. Rptr. 3d 338 (after employer articulated legitimate business reason for reducing employee's teaching load from full time to part time, employee failed to submit evidence showing employer's reasons were pretext and decision to reduce his course assignments had retaliatory motive, where employer's response to employee's application for unemployment benefits was incomplete rather than false, and reasonable trier of fact could not have drawn reasonable inference of retaliatory motive from employer's response); *Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 75, 105 Cal. Rptr. 2d 652 (FEHA; after employer presents evidence of legitimate, nondiscriminatory factors, employee must offer substantial evidence that employer's stated nondiscriminatory reason for adverse action was untrue or pretextual, or evidence employer acted with discriminatory animus, or combination of the two, such that reasonable trier of fact could conclude employer engaged in intentional discrimination).

(n74)Footnote 74. *Perez v. County of Santa Clara* (2003) 111 Cal. App. 4th 671, 676, 3 Cal. Rptr. 3d 867 .

(n75)Footnote 75. *Taybron v. City & County of San Francisco* (9th Cir. 2003) 341 F.3d 957, 960-961 (Title VII; employees raised genuine issues of material fact as to whether employer's asserted reasons for actions taken against them were pretextual by testifying that rationales given for changes in shifts continually varied and misrepresented facts, and even when new supervisor requested their hours be shifted back to facilitate efficient use of resources, their manager refused to allow it until their union became involved and record evidence suggested he wanted to forestall implication that his original decision to change their hours had been unjustified); *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 915 as amended on denial of rehearing and rejection of rehearing en banc, 301 F.3d 958, 2002 U.S. App. LEXIS 882 (Title VII; employee tendered sufficient evidence, in addition to proximity of events, to rebut employer's alleged dissatisfaction with her performance as a legitimate nondiscriminatory reason for pay cut and termination after she reported being raped by client, where employee testified that, until pay cut and termination, she had received only positive feedback and presented data showing her superior performance and evidence of her supervisor's surprise and concern at pay cut); *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal. App. 4th 1004, 1023, 18 Cal. Rptr. 3d 906 (employer's proffered reason for discharge, i.e., insubordination for refusing to provide documentation for leave to attend religious convention, was unbelievable, because employee was never asked for documentation, either before or after convention, and employee had already been disciplined for same reason); *Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 75, 105 Cal. Rptr. 2d 652 (FEHA; after employer offered evidence that individuals who decided not to hire former employee because he lacked specific qualifications and that they were unaware of his earlier grievance against employer alleging racial discrimination, former employee offered no evidence to demonstrate falsity of decision makers' claimed unawareness of grievance or other evidence from which reasonable trier of fact could infer employer's reasons to be pretextual).

(n76)Footnote 76. *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, 1066 (Title VII); *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1284 (Title VII and FEHA) . See *Wrighten v. Metropolitan Hosps., Inc.* (9th Cir. 1984) 726 F.2d 1346, 1354 (Title VII); see also *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1514 (Title VII).

(n77)Footnote 77. *See Miller v. Fairchild Indus., Inc.* (9th Cir. 1986) 797 F.2d 727, 731 (Title VII; such factual determinations as generally unsuitable for summary judgment disposition at pretext stage).

(n78)Footnote 78. *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, 1066 (Title VII). *See Hernandez v. Spacelabs Med., Inc.* (9th Cir. 2003) 343 F.3d 1107, 1115 (Title VII; employee offered evidence sufficient to survive summary judgment which demonstrated that employer's proffered reasons for firing him were pretextual both directly by persuading court that retaliatory reason for decision more likely motivated employer and indirectly by showing that employer's proffered explanation was unworthy of credence); *Winarto v. Toshiba Am. Elecs. Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1284 (Title VII and FEHA; showing that proffered explanation unworthy of credence); *Wrighten v. Metropolitan Hospitals, Inc.* (9th Cir. 1984) 726 F.2d 1346, 1354 (Title VII); *see also E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1514 (Title VII) .

(n79)Footnote 79. *Washington v. Garrett* (9th Cir. 1993) 10 F.3d 1421, 1434 (fundamentally different justifications give rise to genuine issue of material fact that preclude summary judgment); *see Nidds v. Schindler Elevator* (9th Cir. 1997) 113 F.3d 912, 919-920 (layoff based on poor performance and economics are not incompatible and are therefore not shifting).

(n80)Footnote 80. *Payne v. Norwest Corp.* (9th Cir. 1997) 113 F.3d 1079, 1080 (employer's shifting explanations may be acceptable in context but resolution of issue requires weighing of evidence that precludes summary judgment; after establishing prima facie case, plaintiff "need produce very little evidence of discriminatory motive to raise a genuine issue of fact as to pretext").

(n81)Footnote 81. *Bergene v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2001) 272 F.3d 1136, 1142 (evidence of supervisor's direct threat of denial of promotion if plaintiff vigorously pursued her earlier Title VII claim sufficient to create genuine issue of fact that employer's asserted reason that male was more qualified was pretext).

(n82)Footnote 82. *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, 1065-1072 (Title VII; because plaintiff proffered substantial amount of specific circumstantial evidence that employer's reasons for terminating her were motivated by retaliation for complaining of disparity in pay and bonuses between herself and her male counter-parts, district court's grant of summary judgment to employer reversed); *Brown v. City of Tucson* (9th Cir. 2003) 336 F.3d 1181, 1187-1188 (ADA; after employer adduced non-retaliatory explanation for its investigation and adverse employment action against detective, i.e., detective was suspended for falsifying reports in effort to cover up fact that she failed to timely submit citation in assault case, court properly found detective failed to present evidence sufficient to show explanation was pretextual, because her circumstantial evidence of pretext was neither specific nor substantial); *Winarto v. Toshiba Am. Elecs. Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1284 (Title VII and FEHA); *Bergene v. Salt River Project Agricultural Improvement and Power District* (9th Cir. 2001) 272 F.3d 1136, 1142 (Title VII) ; *Little v. Windermere Relocation, Inc.* (9th Cir. 2001) 265 F.3d 903, 915 ; *Godwin v. Hunt Wesson Inc.* (9th Cir. 1998) 150 F.3d 1217, 1222 .

(n83)Footnote 83. *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1284 (Title VII and FEHA; plaintiff presented sufficient evidence that low scoring performance review that lead to reduction in force was in retaliation for protected complaints and that employer's explanations were pretextual).

(n84)Footnote 84. *California Fair Employment & Housing Com. v. Gemini Aluminum Corp.* (2004) 122 Cal. App. 4th 1004, 1023, 18 Cal. Rptr. 3d 906 (employer's proffered reason for discharge was shown to be pretext, where timing of discharge was suspiciously quick, although committee unanimously made decision, company's founder and president could have made decision alone and he gave inconsistent reasons, and employee had perfect attendance in fifteen months that he worked at employer).

(n85)Footnote 85. *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal. App. 4th 686, 715, 81 Cal. Rptr. 3d 406 .

(n86)Footnote 86. *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal. App. 4th 686, 715-723, 81 Cal. Rptr. 3d 406 .

(n87)Footnote 87. *See Williams v. Boorstin* (D.C. Cir. 1980) 663 F.2d 109, 117, 213 U.S. App. D.C. 345 (Title VII).

(n88)Footnote 88. *See Tidwell v. American Oil Co.* (D. Utah 1971) 332 F. Supp. 424, 430 .

(n89)Footnote 89. *See Hochstadt v. Worcester Found.* (D. Mass. 1976) 425 F. Supp. 318, 324 , *aff'd*, 545 F.2d 222 (1st Cir. 1976) (Title VII).

(n90)Footnote 90. *See Kauffman v. Sidereal Corp.* (9th Cir. 1982) 695 F.2d 343 (Title VII) .

(n91)Footnote 91. *See Kauffman v. Sidereal Corp.* (9th Cir. 1982) 695 F.2d 343, 345 (Title VII); *see also E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1514 (Title VII).

(n92)Footnote 92. *See, e.g., Williams v. Boorstin* (D.C. Cir. 1980) 663 F.2d 109, 117 (rejecting argument that "hint" of retaliation, i.e., adverse impact partially undertaken for lawful purposes and partially for unlawful retaliatory purposes suffices to make showing of pretext, thereby proving Title VII violation).

(n93)Footnote 93. *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061 .

(n94)Footnote 94. *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, 1067 , citing *Costa v. Desert Palace, Inc.* (9th Cir. 2002) 299 F.3d 838, 856-857 .

(n95)Footnote 95. *Stegall v. Citadel Broadcasting Co.* (9th Cir. 2003) 350 F.3d 1061, 1068-1072 .

(n96)Footnote 96. *Mt. Healthy City Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 .

(n97)Footnote 97. *Mt. Healthy City Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 282-283, 97 S. Ct. 568, 50 L. Ed. 2d 471 .

(n98)Footnote 98. *Mt. Healthy City Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 285-286, 97 S. Ct. 568, 50 L. Ed. 2d 471 (emphasis added). For a discussion of 42 U.S.C. § 1983 as it relates to employment discrimination, *see* ch. 40, pt. C.

(n99)Footnote 99. *Mt. Healthy City Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 ; *see also Allen v. Iranon* (9th Cir. 2002) 283 F.3d 1070, 1077 (in retaliation action by prison doctor under 42 U.S.C. § 1983 based on plaintiff's claimed exercise of *First Amendment* right to speak out on behalf of inmates, trial court properly applied *Mt. Healthy* test without regard to whether evidence of retaliatory motive was direct or circumstantial).

(n100)Footnote 100. *See* [2], *above*.

(n101)Footnote 101. *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal. App. 4th 952, 990-991 (summary adjudication was properly granted to employer on retaliation cause of action after employer provided legitimate nondiscriminatory reason for employee's termination); *Loggins v. Kaiser Permanente Intl.* (2007) 151 Cal. App. 4th 1102, 1112-1113, 60 Cal. Rptr. 3d 45 (although there was evidence other similarly situated employees who also engaged in extracurricular business activities at work did not suffer adverse employment action, there was no evidence that coworkers devoted substantial time and resources to pursuing their own business during work hours, and employer investigated plaintiff's allegations about coworkers' extracurricular business activities and found activities were de minimis and insignificant compared to plaintiff's substantial use of employer's resources to conduct personal business); *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal. App. 4th 377, 48 Cal. Rptr. 3d 313

(n102)Footnote 102. Nilsson v. City of Mesa (9th Cir. 2007) - F.3d -, 2007 U.S. App. LEXIS 21912, *14-*16 .

(n103)Footnote 103. *Wrighten v. Metropolitan Hosps., Inc.* (9th Cir. 1984) 726 F.2d 1346, 1354 (Title VII). *See also E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1514 (Title VII).

(n104)Footnote 104. *Wrighten v. Metropolitan Hosps., Inc.* (9th Cir. 1984) 726 F.2d 1346, 1354 (Title VII); *but see Williams v. Boorstin* (D.C. Cir. 1980) 663 F.2d 109, 117 (Title VII; employer must rebut presumption by "clear and convincing evidence"); *see also E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1514 (Title VII).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART G. RETALIATION

2-41 California Employment Law § 41.132

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

§ 41.132 Defenses

Certain forms of "opposition" conduct, including illegal actsⁿ¹ or unreasonably hostile or aggressive conduct,ⁿ² may provide a legitimate, independent, and nondiscriminatory basis for adverse actions.ⁿ³ In *Hochstadt v. Worcester Foundation, Etc.*,ⁿ⁴ the First Circuit Court of Appeals concluded that the question is simply "whether [a] plaintiff went 'too far' in [his or] her particular employment setting."ⁿ⁵ Employers are entitled to loyalty and cooperativeness from their employees.ⁿ⁶ However, since employees are entitled to file good-faith discrimination complaints and appropriate grievances,ⁿ⁷ courts must balance the setting in which their conduct arises and the interests and motivations of both employers and employees.ⁿ⁸ For further discussion relating to the *Hochstadt* balancing test, see § 41.130[2][a].

Some courts have held that an employer's equal employment opportunity (EEO) officers are not protected from retaliation for taking actions against their employers for perceived unlawful employment practices. For example, in *Smith v. Singer Co.*,ⁿ⁹ the Ninth Circuit Court of Appeals held that an EEO officer was not protected by Title VII when he filed discrimination complaints against his employer because he "encountered lack of cooperation and commitment in his efforts to accomplish needed reforms" in the employer's affirmative action program.ⁿ¹⁰ The court declared that its holding was "an extremely narrow one," explaining that the plaintiff's position was unique in that it required him to act *on behalf of* the employer in an area where normally action against the employer on behalf of employees is protected.ⁿ¹¹ The court reasoned that the plaintiff placed himself in an adversarial position to his employer, thus disabling himself from continuing to represent the employer's interests as its liaison with enforcement agencies, and from continuing to work with the employer in the voluntary development of nondiscriminatory hiring programs.ⁿ¹² Similarly, in *Nelson v. Pima Community College*,ⁿ¹³ the court again found that an affirmative action officer, as an executive employee of the college, was required to obey reasonable orders and upheld summary judgement against her. In that case there was undisputed evidence that the affirmative action officer repeatedly disobeyed the orders of the college president, who was her supervisor, and that she produced no evidence that she had been terminated for her criticism of the college's affirmative action program.ⁿ¹⁴

Legal Topics:

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

Labor & Employment LawDiscriminationRetaliationGeneral OverviewLabor & Employment

LawDiscriminationRetaliationElementsGeneral OverviewLabor & Employment

LawDiscriminationRetaliationRemediesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 803, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII does not compel employer to absolve one who has engaged in deliberate unlawful activity against it).

(n2)Footnote 2. *See Hochstadt v. Worcester Found.* (1st Cir. 1976) 545 F.2d 222, 231 (Title VII; aggressive, hostile complaints, and bitter personal exchanges).

(n3)Footnote 3. *E.E.O.C. v. Crown Zellerbach Corp.* (9th Cir. 1983) 720 F.2d 1008, 1012 (Title VII).

(n4)Footnote 4. *Hochstadt v. Worcester Found.* (1st Cir. 1976) 545 F.2d 222 (Title VII).

(n5)Footnote 5. *See Hochstadt v. Worcester Found.* (1st Cir. 1976) 545 F.2d 222, 231 (Title VII).

(n6)Footnote 6. *Hochstadt v. Worcester Found.* (1st Cir. 1976) 545 F.2d 222, 230 (Title VII).

(n7)Footnote 7. *See Hochstadt v. Worcester Found.* (1st Cir. 1976) 545 F.2d 222, 231 (Title VII).

(n8)Footnote 8. *See Hochstadt v. Worcester Found.* (1st Cir. 1976) 545 F.2d 222, 232 (Title VII).

(n9)Footnote 9. *Smith v. Singer Co.* (9th Cir. 1981) 650 F.2d 214 .

(n10)Footnote 10. *See Smith v. Singer Co.* (9th Cir. 1981) 650 F.2d 214, 215, 217 .

(n11)Footnote 11. *See Smith v. Singer Co.* (9th Cir. 1981) 650 F.2d 214, 217 .

(n12)Footnote 12. *See Smith v. Singer Co.* (9th Cir. 1981) 650 F.2d 214, 217 .

(n13)Footnote 13. *Nelson v. Pima Community College* (9th Cir. 1996) 83 F.3d 1075 .

(n14)Footnote 14. *See Nelson v. Pima Community College* (9th Cir. 1996) 83 F.3d 1075, 1082 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART G. RETALIATION

2-41 California Employment Law §§ 41.133 through 41.139

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[Reserved]

§§ 41.133[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART H. EMPLOYER POSTING AND RECORDKEEPING REQUIREMENTS

2-41 California Employment Law § 41.140

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§ 41.140 State Law

[1] Fair Employment and Housing Act

[a] Recordkeeping Requirements, Generally

Pursuant to its statutory authority under the FEHA,ⁿ¹ the FEHC has promulgated regulations requiring employers to maintain certain relevant records of personnel actions.ⁿ² Employers subject to the FEHA must create and maintain the following records:

1. California Employer Information Reports (CEIR),ⁿ³ and
2. Applicant identification records.ⁿ⁴

Only some employers are required to prepare CEIR'S.ⁿ⁵ For discussion of who must prepare a CEIR, *see* [c], *below*.

In addition, as discussed in [b], *below*, employers are required to preserve other personnel and employment records for specified periods of time.ⁿ⁶

[b] Preservation of Records

[i] Generally

Any personnel or other employment records made or kept by an employer dealing with any employment practice and affecting any employment benefit of any applicant or employee must be preserved by the employer for two years after the date that the record was made or two years after the date of the personnel action involved, whichever occurs later.ⁿ⁷ Records that must be preserved, if made or kept, include the following:ⁿ⁸

1. Applications,

2. Personnel records or files,
3. Membership records or files (for labor organizations), and
4. Employment referral records or files.

[ii] Particular Records

Every employer who is required to prepare a CEIRⁿ⁹ must preserve the records used to prepare the CEIR for two years after the date of preparation.ⁿ¹⁰ Every employer who is required to maintain applicant identification recordsⁿ¹¹ must preserve applicant identification information for two years after the date the information was received.ⁿ¹²

Records concerning the sex, race, or national origin of anyone accepted for employment must be kept separately from the employee's main personnel file or other records available to those responsible for personnel decisions.ⁿ¹³ For example, the records could be kept as part of an automatic data processing system in the payroll department.ⁿ¹⁴

[iii] After Filing of Complaint

On notice or knowledge that a complaint has been filed against it under the FEHA, an employer must maintain and preserve all records and files relevant to the complaint until the complaint is fully and finally disposed of and all appeals or related proceedings have terminated.ⁿ¹⁵ This means that the records must be preserved until one of the following occurs:ⁿ¹⁶

1. The statutory period for a complainant or respondent to bring an action in superior court expires;ⁿ¹⁷
2. The parties reach an agreement whereby no further judicial review is available to any of the parties; or
3. The FEHC or a court enters a final order and the time for filing a notice of appeal on that order has expired.

"Related proceedings" include any action brought in superior court under *Government Code section 12965*.ⁿ¹⁸ Records and files relevant to the complaint" include, but are not limited to, the following:ⁿ¹⁹

1. Personnel or employment records relating to the complaining party;
2. Personnel or employment records relating to all employees at the facility or relevant subdivision where the discriminatory practice allegedly occurred who hold positions similar to that held or sought by the complainant;
3. Applications, forms, or test papers completed by the complainant and by all other candidates for the same position at that facility or subdivision;
4. All relevant records made or kept pursuant to the preparation of a CEIR (or other report prepared in lieu of a CEIR);ⁿ²⁰ and
5. All relevant records made or kept pursuant to the maintenance of applicant identification records.ⁿ²¹

[c] California Employer Information Reports

Employers that regularly employ 100 or more employees and certain apprenticeship programs must prepare a CEIR. The CEIR is an annual personnel report to be prepared in conformity with DFEH guidelines.ⁿ²² An employer may use an appropriate federal report instead of the CEIR. Appropriate federal reports include the EEOC's EEO-1, EEO-2, EEO-3, EEO-4, EEO-5, and EEO-6 reports and appropriate reports filed with the Office of Federal Contract Compliance Programs (OFCCP).ⁿ²³

If the employer is engaged in activities for which the standard reporting criteria are not appropriate, special reporting procedures may be necessary. If so, the employer should advise the DFEH of this need and submit a specific proposal for an alternative reporting system before the date on which the CEIR should be prepared.ⁿ²⁴ If the preparation of the CEIR would create undue hardship, the employer may apply to the DFEH for an exemption from the requirement.ⁿ²⁵

Sample forms and applicable guidelines are available to an employer from the DFEH's administrative office in Sacramento.ⁿ²⁶

For discussion of the duty to preserve CEIR records, *see* [b], *above*.

[d] Applicant Identification Records

Every employer must maintain data on the race, sex, and national origin of each applicant and the job for which he or she applied.ⁿ²⁷ This requirement is for recordkeeping purposes only, and it does not apply when otherwise prohibited by law.ⁿ²⁸ If the data is to be provided on an identification form, this form must be separate or detachable from the application form itself. Employment decisions may not be based on whether an applicant provides this information, nor may the information be used for discriminatory purposes, except pursuant to a bona fide affirmative action or nondiscrimination plan.ⁿ²⁹

For recordkeeping purposes, an "applicant" is any individual who files a formal application or, if an employer does not provide application forms, otherwise indicates to the employer a specific desire to be considered for employment. An individual who makes an informal inquiry or who files an unsolicited resume on which no employment action is taken is not an applicant.ⁿ³⁰

An employer must either keep the original documents used to identify applicants or keep statistical summaries of the collected information.ⁿ³¹ For discussion of the duty to preserve applicant identification records, *see* [b], *above*.

[e] Penalties and Remedies

[i] Unlawful Practices and Misdemeanors

It is an unlawful practice for an employer subject to the FEHA to fail to maintain and preserve all applications, personnel records and files, and employment referral records and files for at least two years after the records or files are first created or received.ⁿ³² It is also an unlawful practice for an employer subject to the FEHA to fail to retain personnel files of applicants or terminated employees for at least two years after the date of the employment action taken.ⁿ³³

The willful violation of the recordkeeping requirements of *Government Code Section 12946* is a misdemeanor, punishable by up to six months' imprisonment in a county jail, or a fine of up to \$1,000, or both.ⁿ³⁴ Willfully making false statements in a CEIR or other required record is a violation of *Government Code Section 12976* punishable by the same penalties.ⁿ³⁵

[ii] Enforcing FEHA Recordkeeping and Reporting Requirements

The DFEH may seek temporary or preliminary judicial relief as provided for in *Government Code Section 12974*.ⁿ³⁶

when judicial relief is necessary to enforce the recordkeeping requirements of *Government Code Section 12946* and regulations promulgated under that section.ⁿ³⁷ If an employer fails or refuses to prepare or to make available the CEIR or other required report,ⁿ³⁸ the FEHC or the DFEH may apply to the superior court for judicial relief, and the court may compel the employer to comply with the reporting requirements.ⁿ³⁹

[f] Posting

The FEHA regulations require every employer to post conspicuously on its premises a notice distributed by the DFEH.ⁿ⁴⁰ The required notice contains excerpts from the FEHA and other information deemed necessary by the DFEH to explain the FEHA,ⁿ⁴¹ including information relating to the illegality of sexual harassment.ⁿ⁴² If 10 percent or more of an employer's workers at any facility or establishment do not speak English, that employer must also post the notice in the appropriate foreign language at the facility or establishment. English and foreign language versions of the notice are available from the DFEH.ⁿ⁴³

[g] Dissemination of Information About Sexual Harassment

The FEHA requires every employer to obtain from the DFEH its information sheet on sexual harassment, which the DFEH must make available to employers for reproduction and distribution to employees.ⁿ⁴⁴ The DFEH must also make multiple copies of the information sheet available online.^{n44.1} Employers must either distribute the information sheet to its employees or provide them with equivalent information, which must contain at least the following minimum components:ⁿ⁴⁵

1. The illegality of sexual harassment;
2. The definition of sexual harassment under applicable state and federal law;
3. A description of sexual harassment, utilizing examples;
4. The internal complaint process of the employer that is available to the employee;
5. The legal remedies and complaint process available through the DFEH and FEHC;
6. Directions on how to contact the DFEH and FEHC; and
7. The protection against retaliation provided by FEHC regulationsⁿ⁴⁶ for opposing practices that are prohibited by the FEHA or for filing a complaint with or otherwise participating in an investigation, proceeding, or hearing conducted by, the DFEH or FEHC.

The DFEH information sheet or the above information must be delivered in a manner that ensures distribution to each employee, such as including the information with an employee's pay.ⁿ⁴⁷

The fact that the above information does not reach a particular individual does not in itself impose liability on the employer. However, failure to comply with these requirements could be evidence of an employer's failure to prevent sexual harassment, which is actionable.^{n47.1} Conversely, compliance with the above information requirements does not in itself insulate the employer from liability for sexual harassment.ⁿ⁴⁸

The FEHC can enforce the above requirements by issuing an order requiring the employer to comply.ⁿ⁴⁹

[h] Contractors

[i] Access to Records

Every contractor⁵⁰ must provide the Office of Compliance Programs (OCP) with any relevant information requested and must allow OCP access to its premises, on reasonable notice, during normal business hours to inspect or copy books, records, and other material relevant to an OCP investigation.⁵¹ Any information provided that contains or might reveal a trade secret referred to in Title 18 *United States Code*, Section 1905 or information that is confidential pursuant to *Government Code Sections 6250-6268* will be considered confidential. However, this information may be disclosed to officers or employees of DFEH and may be introduced as evidence in any hearing conducted pursuant to Title 2 *California Code of Regulations*, Section 8503 or *Government Code Section 12967*.⁵² The hearing officer or the Director of DFEH will issue appropriate orders to protect the confidentiality of the information.⁵³

[ii] Construction Contracts--Reporting Requirements

Contractors holding state construction contracts of \$50,000 or more must submit quarterly utilization reports to OCP on forms to be provided by OCP. The reports must include the following:⁵⁴

1. Identifying information;
2. The number and percentage of journey worker, apprentice, and trainee hours worked in each job classification by sex and ethnic group; and
3. The total number of employees and the total number of minority employees in each classification by sex.

The reports must cover each calendar quarter and must be received by OCP no later than the 15th day of the month following the end of the quarter. Contractors required to submit utilization reports to the federal government may submit a copy of the federal report to the OCP (at the same time they submit the report to the federal government) in lieu of the state report.⁵⁵

[iii] Service and Supply Contracts--Small Contracts

The following requirements apply to all contractors awarded a nonexempt state service and supply contract or subcontract⁵⁶ that is a small contract. A "small contract" is a state contract with a dollar value of \$25,000 or less.⁵⁷ Contractors awarded small contracts need not file any information with the OCP after execution of the contract, but must provide the OCP, on request, with access to records required by Title 2 *California Code of Regulations*, Section 8303.⁵⁸ Each contractor awarded a small contract must compile and maintain for inspection the following records:⁵⁹

1. Information about the contractor:
 - a. Federal employer identification number;
 - b. State contract identification number;
 - c. Legal name of the business organization and of any parent corporation or other outside ownership interest, with business telephone number, street address, city, state, and zip code;
 - d. Mailing address;
 - e. Total number of employees, identified by sex, race, and national origin;

f. Name, business phone, and mailing address of the contractor's EEO/AA officer, if there is one; and

g. Name of the person responsible for maintaining the required information.

2. Information about the contract:

a. Dollar value of the contract,

b. Time for performance of the contract,

c. Date that the contract was awarded,

d. Name of the awarding agency and the awarding officer, and

e. A brief description of the purpose or subject of the contract.

3. A copy, if one was required to be prepared, of the prime contractor's current CEIR or equivalent federal form.ⁿ⁶⁰

For discussion of the possible consequences of failing to comply with these recordkeeping requirements, *see* [v], *below*.

[iv] Service and Supply Contracts--Regulated Contracts

The following requirements apply to all contractors awarded a nonexempt state service and supply contract or subcontractⁿ⁶¹ that is a regulated contract. A "regulated contract" is a state contract with a dollar value of more than \$25,000.ⁿ⁶² Within 28 days after the execution of a regulated contract, the prime contractor must file the following information with the OCP:ⁿ⁶³

1. Information about the contractor:

a. Federal employer identification number;

b. State contract identification number;

c. Legal name of the business organization, with business telephone number, street address, city, state, and zip code;

d. Mailing address; and

e. Name, business phone, and mailing address of the contractor's EEO/AA officer.

2. Information about the contract:

a. Dollar value of the contract,

b. Date that the contract was awarded,

c. The name of the awarding agency and the awarding officer, and

d. A brief description of the purpose or subject of the contract.

3. A copy of the prime contractor's current CEIR or equivalent federal form (EEO-1). (If the contractor is not otherwise required to prepare a CEIR,ⁿ⁶⁴ it must nonetheless prepare one to comply with these reporting requirements.)

This information must be updated annually for as long as the contractor remains subject to *Title 2 California Code of Regulations, sections 8310-8312*.ⁿ⁶⁵

If a contractor is awarded more than one state contract in the same year, the contractor need not file the information about the contractor listed in item (1), above,ⁿ⁶⁶ for the second and all subsequent contracts awarded during that year.ⁿ⁶⁷

The OCP and the contract awarding agency will provide the contractor with the forms needed to furnish the required information.ⁿ⁶⁸

For discussion of the possible consequences of failing to comply with these reporting requirements, *see* [v], *below*.

[v] Decertification for Failure to Keep Records or Make Reports

Failure to comply with the recordkeeping requirements for small contractsⁿ⁶⁹ or the reporting requirements for regulated contractsⁿ⁷⁰ may result in a determination that the contractor has materially breached the state contract, and the contractor may be decertified from future state contracts.ⁿ⁷¹ "Decertification" means the decision by OCP that an employer's nondiscrimination program does not comply with the requirements of the FEHA or its regulations.ⁿ⁷²

[2] California Equal Pay Act

The California Equal Pay Act requires employers to give equal pay for equal work to persons of both sexes.ⁿ⁷³ To assist the Division of Labor Standards Enforcement (DLSE) in enforcing and administering this requirement,ⁿ⁷⁴ every employer must maintain the following records for all the people employed by that employer:ⁿ⁷⁵

1. Wages and wage rates,
2. Job classifications, and
3. Other terms and conditions of employment.

These records must be kept on file for two years.ⁿ⁷⁶

For discussion of the substantive requirements of the California Equal Pay Act, *see* § 41.56. For discussion of the scope of coverage of the act, *see* Chapter 40, Part B.

[3] State-Supported Programs

[a] Discrimination Prohibited

Government Code sections 11135 through 11139.5 prohibit discrimination in state-supported programs.ⁿ⁷⁷ *Title 22 of the California Code of Regulations, sections 98000 through 98413*, have been adopted to implement those statutes.ⁿ⁷⁸ For additional discussion, *see* Chapter 40, Part B.

[b] Compliance Reports and Compliance Information

Every recipientⁿ⁷⁹ is required to keep records and submit compliance reports that enable the responsible state agency to determine whether the recipient has complied or is complying with *Government Code sections 11135 through 11139.5*. At a minimum, recipients must make available data showing the extent to which people of a particular ethnic group, religion, age, sex, or color, or with a particular physical or mental disability are ultimate beneficiariesⁿ⁸⁰ of state-supported programs. Recipients are required to make the reports and maintain the data only when necessary to enforce compliance.ⁿ⁸¹

If a primary recipient transfers state support to another recipient, the other recipient is also required to submit compliance reports to the primary recipient as necessary to enable the primary recipient to comply with its reporting requirements.ⁿ⁸²

If the responsible state agency determines that preexisting records and reports required by another state or federal agency meet reporting and evaluation needs, the agency may accept these reports as a substitute for or, if needed, a complement to the compliance reports otherwise required by *Title 22 of the California Code of Regulations, section 98310*.ⁿ⁸³

[c] Agency Access to Information

Each recipient is required to allow the responsible state agency access to its records and facilities during normal business hours to ascertain compliance with *Government Code sections 11135 through 11139.5*. If information required of a recipient is in the hands of a third party who fails or refuses to furnish that information, the recipient is required to so certify and set forth the efforts it has made to get the information and the basis on which the other party is withholding it.ⁿ⁸⁴

[d] Failure to Comply With Reporting or Access Requirements

Failure by a recipient to file timely, complete, and accurate reportsⁿ⁸⁵ or to permit access to compliance informationⁿ⁸⁶ is considered noncompliance with the requirements of *Government Code sections 11135 through 11139.5* and grounds for the imposition of sanctions by the responsible state agency.ⁿ⁸⁷

Legal Topics:

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

Labor & Employment Law Discrimination General Overview Labor & Employment Law Posting & Recordkeeping

FOOTNOTES:

(n1)Footnote 1. *See Gov. Code §§ 12935(a), 12946.*

(n2)Footnote 2. *See 2 Cal. Code Reg. § 7287.0.*

(n3)Footnote 3. *See 2 Cal. Code Reg. § 7287.0(a).* For discussion of CEIR's, *see [c], below.*

(n4)Footnote 4. *See 2 Cal. Code Reg. § 7287.0(b).* For discussion of applicant identification records, *see [d], below.*

(n5)Footnote 5. *2 Cal. Code Reg. § 7287.0(a).*

(n6)Footnote 6. *See Gov. Code § 12946; 2 Cal. Code Reg. § 7287.0(c).*

(n7)Footnote 7. *Gov. Code § 12946; 2 Cal. Code Reg. § 7287.0(c).* The State Personnel Board is only required to

preserve the records for one year.

(n8)Footnote 8. *Gov. Code § 12946; 2 Cal. Code Reg. § 7287.0(c).*

(n9)Footnote 9. *See 2 Cal. Code Reg. § 7287.0(a); see also discussion in [c], below.*

(n10)Footnote 10. *2 Cal. Code Reg. § 7287.0(c)(1).*

(n11)Footnote 11. *See 2 Cal. Code Reg. § 7287.0(b); see also discussion in [d], below.*

(n12)Footnote 12. *2 Cal. Code Reg. § 7287.0(c)(2).*

(n13)Footnote 13. *2 Cal. Code Reg. § 7287.0(c)(3).*

(n14)Footnote 14. *2 Cal. Code Reg. § 7287.0(c)(3).*

(n15)Footnote 15. *Gov. Code § 12946; 2 Cal. Code Reg. § 7287.0(c)(4).*

(n16)Footnote 16. *2 Cal. Code Reg. § 7287.0(c)(4)(C).*

(n17)Footnote 17. For discussion of limitations periods for bringing civil actions under the FEHA, *see* Chapter 43, Part A.

(n18)Footnote 18. *2 Cal. Code Reg. § 7287.0(c)(4)(A).* For discussion of superior court actions under *Gov. Code § 12965*, *see* Chapter 43, Part A.

(n19)Footnote 19. *2 Cal. Code Reg. § 7287.0(c)(4)(B).*

(n20)Footnote 20. *See 2 Cal. Code Reg. § 7287.0(a) (CEIR's); see also discussion in [c], below.*

(n21)Footnote 21. *See 2 Cal. Code Reg. § 7287.0(b) (applicant identification records); see also discussion in [d], below.*

(n22)Footnote 22. *2 Cal. Code Reg. § 7287.0(a).*

(n23)Footnote 23. *2 Cal. Code Reg. § 7287.0(a)(1).*

(n24)Footnote 24. *2 Cal. Code Reg. § 7287.0(a)(3).*

(n25)Footnote 25. *2 Cal. Code Reg. § 7287.0(a)(3).*

(n26)Footnote 26. *2 Cal. Code Reg. § 7287.0(a)(2).*

(n27)Footnote 27. *2 Cal. Code Reg. § 7287.0(b).*

(n28)Footnote 28. *2 Cal. Code Reg. § 7287.0(b).*

(n29)Footnote 29. *2 Cal. Code Reg. § 7287.0(b).*

(n30)Footnote 30. *2 Cal. Code Reg. § 7287.0(b)(1).*

(n31)Footnote 31. *2 Cal. Code Reg. § 7287.0(b)(2).*

(n32)Footnote 32. *Gov. Code § 12946.*

(n33)Footnote 33. *Gov. Code § 12946.*

(n34)Footnote 34. *Gov. Code § 12976.*

(n35)Footnote 35. *2 Cal. Code Reg. § 7287.0(a)(5).*

(n36)Footnote 36. For discussion of the power of the DFEH under *Gov. Code § 12974* to bring a civil action to enforce the FEHA, *see* ch. 42, pt. B.

(n37)Footnote 37. *See Gov. Code § 12946.*

(n38)Footnote 38. *See* discussion in [c], *above*.

(n39)Footnote 39. *2 Cal. Code Reg. § 7287.0(a)(4).*

(n40)Footnote 40. *2 Cal. Code Reg. § 7287.0(d).*

(n41)Footnote 41. *2 Cal. Code Reg. § 7287.0(d).*

(n42)Footnote 42. *See Gov. Code § 12950(a).*

(n43)Footnote 43. *2 Cal. Code Reg. § 7287.0(d).*

(n44)Footnote 44. *Gov. Code § 12950(b).*

(n45)Footnote 44.1. *Gov. Code § 12950(b).*

(n46)Footnote 45. *Gov. Code § 12950(b).*

(n47)Footnote 46. *See 2 Cal. Code Reg. § 7287.8.*

(n48)Footnote 47. *Gov. Code § 12950(c).*

(n49)Footnote 47.1. *See, e.g., Myers v. Trendwest Resorts, Inc. (2007) 148 Cal. App. 4th 1403, 1425-1426, 56 Cal. Rptr. 3d 501* (summary adjudication for employer on claim that employer failed to prevent sexual harassment was precluded by existence of triable issue as to whether employer complied with its statutory obligation under *Gov. Code § 12950* to inform employee of remedies available through DFEH and FEHC).

(n50)Footnote 48. *See Gov. Code § 12950(d).*

(n51)Footnote 49. *Gov. Code § 12950(e).*

(n52)Footnote 50. For definition of "contractor," *see 2 Cal. Code Reg. § 8102(f)*; *see also* discussion in ch. 44, pt. B.

(n53)Footnote 51. *2 Cal. Code Reg. § 8119(a).*

(n54)Footnote 52. For discussion of OCP enforcement hearings under *2 Cal. Code Reg. § 8503*, *see* ch. 44, pt. B. For discussion of hearings on accusations as provided for in *Gov. Code § 12967*, *see* ch. 42, pt. B.

(n55)Footnote 53. *2 Cal. Code Reg. § 8119(b).*

(n56)Footnote 54. *2 Cal. Code Reg. § 8204.*

(n57)Footnote 55. *2 Cal. Code Reg. § 8204.*

(n58)Footnote 56. *2 Cal. Code Reg. § 8300.*

(n59)Footnote 57. *2 Cal. Code Reg. § 8301.*

(n60)Footnote 58. *2 Cal. Code Reg. § 8302.*

(n61)Footnote 59. *2 Cal. Code Reg. § 8303(a).*

(n62)Footnote 60. For discussion of CEIR's and when they must be prepared, *see [c], above.*

(n63)Footnote 61. *2 Cal. Code Reg. § 8300.*

(n64)Footnote 62. *2 Cal. Code Reg. § 8310.*

(n65)Footnote 63. *2 Cal. Code Reg. § 8311(a).*

(n66)Footnote 64. For discussion of CEIR's and when they must be prepared, *see [c], above.*

(n67)Footnote 65. *2 Cal. Code Reg. § 8311(a).* This apparently means that the information must be updated as long as the contractor is the prime contractor on the regulated state service and supply contract. *See 2 Cal. Code Reg. §§ 8300* (scope of regulations), *8311* (information filing requirements for regulated contracts).

(n68)Footnote 66. *See 2 Cal. Code Reg. § 8311(a)(1).*

(n69)Footnote 67. *2 Cal. Code Reg. § 8311(b).*

(n70)Footnote 68. *2 Cal. Code Reg. § 8311(c).*

(n71)Footnote 69. *See [iii], above.*

(n72)Footnote 70. *See [iv], above.*

(n73)Footnote 71. *2 Cal. Code Reg. §§ 8303(b), 8311(d).*

(n74)Footnote 72. *2 Cal. Code Reg. § 8102(i).* For discussion of decertification, *see* Chapter 44, Part B.

(n75)Footnote 73. *See Lab. Code § 1197.5(a).*

(n76)Footnote 74. *See Lab. Code § 1197.5(c).*

(n77)Footnote 75. *Lab. Code § 1197.5(d).*

(n78)Footnote 76. *Lab. Code § 1197.5(d).*

(n79)Footnote 77. A "state-supported program" is a program or activity that is funded directly by the state or receives state financial assistance. *22 Cal. Code Reg. § 98010.*

(n80)Footnote 78. *22 Cal. Code Reg. § 98000.*

(n81)Footnote 79. A "recipient" is a person who regularly employs five people or more and who receives more than \$10,000 per state fiscal year or more than \$1,000 per transaction in state support. "Person" includes associations, groups, and organizations as well as individuals. *22 Cal. Code Reg. § 98010.*

(n82)Footnote 80. An "ultimate beneficiary" is a person identified in *Gov. Code § 11135* who receives, applies for, or is unlawfully deterred from receiving or applying for, the benefits of or employment under a state-supported

program. 22 *Cal. Code Reg.* § 98010.

(n83)Footnote 81. 22 *Cal. Code Reg.* § 98310.

(n84)Footnote 82. 22 *Cal. Code Reg.* § 98311.

(n85)Footnote 83. 22 *Cal. Code Reg.* § 98312.

(n86)Footnote 84. 22 *Cal. Code Reg.* § 98313.

(n87)Footnote 85. *See* [b], *above*, for discussion of reporting requirements.

(n88)Footnote 86. *See* [c], *above*, for discussion of access requirements.

(n89)Footnote 87. 22 *Cal. Code Reg.* § 98314; *see* 22 *Cal. Code Reg.* § 98370 (sanctions for noncompliance).



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART H. EMPLOYER POSTING AND RECORDKEEPING REQUIREMENTS

2-41 California Employment Law § 41.141

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§ 41.141 Federal Law

[1] Title VII

[a] Records and Reports

[i] General Requirement

Every employer subject to Title VII¹ must keep such records and make such reports as the Equal Employment Opportunity Commission (EEOC) may by regulation require.² The EEOC has not yet adopted any rule generally applicable to employers that requires particular records to be made or kept.³ If, however, an employer does make or keep personnel or employment records, the employer must preserve the records for one year after the record is made or the personnel action involved is taken, whichever is later.⁴ If a discrimination charge has been filed, or an action has been brought by the EEOC or the Attorney General against an employer under Title VII of the ADA, the respondent employer must preserve all personnel records relevant to the charge or action until final disposition of the charge or action. Examples of "personnel records relevant to the charge" include the following:⁵

1. Personnel or employment records relating to the aggrieved person;
2. Personnel or employment records relating to all other employees holding positions similar to that held or sought by the aggrieved person; and
3. Application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position.

The date of final disposition of the charge or action is the date that the statutory period within which the aggrieved person may bring a civil action in federal district court expires. If an action is brought against the employer, the date of final disposition is the date on which the litigation is terminated.⁶ For discussion of limitations periods for bringing civil actions under Title VII, *see* Chapter 43, Part B.

In addition, certain employers are required to file Employer Information Reports,ⁿ⁷ discussed in [ii], *below*. There are also special recordkeeping and reporting requirements for apprenticeship programs,ⁿ⁸ state and local governments,ⁿ⁹ and educational institutions.ⁿ¹⁰

[ii] Employer Information Reports (EEO-1)

Every employer subject to Title VII with 100 or more employees must annually file Standard Form 100 (otherwise known as Employer Information Report EEO-1) with the EEOC or its delegate. At each reporting unit, or at company or divisional headquarters, the employer must retain a copy of the most recent EEO-1 filed for each unit and must make that report available if it is asked for by an officer, agent, or employee of the EEOC under the authority of Title 42 *United States Code*, section 2000e-9.ⁿ¹¹

An employer who knowingly and willfully makes a false statement on Report EEO-1 is guilty of violating Title 18 *United States Code*, section 1001, and may be punished as provided in that section.ⁿ¹² If an employer who is required to do so fails or refuses to file Report EEO-1, the EEOC may apply for a court order compelling the employer to file the report.ⁿ¹³

If an employer is engaged in activities for which the reporting unit criteria described in the instructions accompanying Report EEO-1 are not readily adaptable, special reporting procedures may be required. The employer should advise the EEOC or its delegate of this situation by submitting a specific proposal for an alternative reporting system before the report is due.ⁿ¹⁴ The employer also should advise the EEOC if it seeks to change the filing date or reporting periods by submitting a written alternative proposal before the report is due. If the preparation or filing of the report would create undue hardship, the employer may apply to the EEOC for an exemption from the reporting requirements.ⁿ¹⁵ If the application is denied, the employer may bring a civil action in the United States district court.ⁿ¹⁶

[iii] Access

When a charge of unlawful employment practices under Title VII has been filed,ⁿ¹⁷ the EEOC or its representative must be allowed access at any reasonable time to examine or copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by Title VII and is relevant to the charge being investigated.ⁿ¹⁸

[b] Posting

The EEOC has adopted a notice form that every employer must post and keep posted in conspicuous places on its premises in an accessible format.ⁿ¹⁹ A willful violation of this requirement is punishable by a fine of up to \$110 for each separate offense.ⁿ²⁰

For the text of the required notice, *see* Title 29 *Code of Federal Regulations*, Section 1601.30(a).

[c] Uniform Guidelines

[i] Purpose

The EEOC and other federal agencies have adopted uniform guidelines to assist employers in complying with federal laws prohibiting employment discrimination. The guidelines provide a framework for determining the proper use of tests and other selection proceduresⁿ²¹ as a basis for employment decisions.ⁿ²² The guidelines are applied by the OFCCP in enforcing Executive Order 11246,ⁿ²³ as well as by the EEOC in enforcing Title VII.ⁿ²⁴

For discussion of the substantive requirements of the guidelines, *see* § 41.45[2][b].

[ii] Information on Impact

In order to determine compliance with the uniform guidelines, every user²⁵ should maintain, and have available for inspection, records or other information that will disclose the impact of its selection procedures on the employment opportunities of individuals by identifiable race, sex, or ethnic group. If there are large numbers of applicants and the selection procedures are administered frequently, the information may be retained by using samples, if the sample used is appropriate to the applicant population and adequate in size.²⁶ The records are to be maintained by sex and by the following races and ethnic groups:²⁷

1. Blacks,
2. American Indians,
3. Asians,
4. Hispanics,
5. Whites other than Hispanics, and
6. Totals.

[iii] Documentation of Impact and Validity Evidence

Users of selection procedures who have fewer than 100 employees may use simplified recordkeeping procedures.²⁸ Other users should maintain and have available information on the adverse impact of the selection process for each job.²⁹ When a selection process has an adverse impact, the user should also maintain evidence of the validity of the selection process.³⁰

[2] Americans With Disabilities Act

Every employer, employment agency, labor organization, or joint labor-management committee covered by the ADA must post notices in an accessible format to applicants, employees, and members describing the applicable provisions of the ADA, in the manner prescribed by Title VII.³¹ With respect to recordkeeping, the ADA expressly incorporates the Title VII requirement that employers make any report that the EEOC may by regulation require.³² For a detailed discussion of Title VII posting and recordkeeping requirements, *see* [1], *above*.

[3] Age Discrimination in Employment Act**[a] Recordkeeping Requirement; Form of Records**

Under the authority granted it by the Age Discrimination in Employment Act (ADEA),³³ the EEOC has adopted rules³⁴ that require employers to keep certain records.³⁵ No particular order or form of record is required, only that the records contain the required information in some form. If the information is available in records kept for other purposes, or can be obtained readily by recomputing or extending data recorded in some other form, no further records need be made or kept.³⁶

[b] Content of Required Records

Every employer must keep the following information on record for each employee:³⁷

1. Name,

2. Address,
3. Date of birth,
4. Occupation,
5. Rate of pay, and
6. Weekly compensation.

The employer must keep this information on record for three years.ⁿ³⁸

[c] Records That Must Be Preserved if Made, Obtained, or Used in the Regular Course of Business

[i] The General Rule

An employer who makes, obtains, or uses in the regular course of business any personnel or employment records related to the following matters must retain those records for one year after the personnel action to which the records relate:ⁿ³⁹

1. Job applications, resumes, or other employment inquiries submitted to the employer in response to an advertisement or other notice of existing or anticipated job openings (including records pertaining to the failure or refusal to hire any individual);
2. The promotion, demotion, transfer, selection for training, layoff, recall, or discharge of any employee;
3. Job orders submitted by the employer to an employment agency or a labor organization to recruit people for job openings;
4. The test papers of applicants or candidates for a position if the papers disclose the results of any employer-administered aptitude or other employment test considered by the employer in connection with any personnel action;
5. The results of any physical examination if considered by the employer in any personnel action; and
6. Any advertisements or notices of job openings, promotions, training programs, or opportunities for overtime work.

Special preservation requirements apply when the records concern employee benefit plans (and seniority systems and merit systems) or temporary positions and when an enforcement action is commenced. These special requirements are discussed in [ii] through [iv], *below*.

[ii] Employee Benefit Plans, Seniority Systems, and Merit Systems

Every employer must keep on file any employee benefit plans (such as pension and insurance plans) as well as copies of any seniority systems and merit systems that are in writing.ⁿ⁴⁰ These plans or systems must be kept on file for as long as the particular plan or system is in effect and for at least one year after its termination. If the plan or system is not in writing, the employer should keep on file for the required period a memorandum fully outlining the terms of the plan or system and the way in which it has been communicated to the affected employees, along with notations of any changes or revisions.ⁿ⁴¹

[iii] Temporary Positions

Application forms and other preemployment records of applicants for temporary positions are subject to special preservation requirements if the applicant knew that the position was temporary. In that event, every record that must be retained pursuant to Title 29 *Code of Federal Regulations*, § 1627.3(b)(1)ⁿ⁴² must be retained for 90 days after the personnel action to which the record relates.ⁿ⁴³

[iv] After an Enforcement Action Is Commenced

When an enforcement action is commenced regarding a particular applicant or employee,ⁿ⁴⁴ the EEOC or its authorized representative may require the employer to retain any record that must be kept pursuant to Title 29 *Code of Federal Regulations*, § 1627.3(b)(1) or (2)ⁿ⁴⁵ until the final disposition of the enforcement action, if the record relates to the action.ⁿ⁴⁶

[d] Transcriptions and Reports

On written request to do so from the EEOC or its authorized representative, every employer or other entity required to maintain records under the ADEA must do the following:ⁿ⁴⁷

1. Extend, recompute, or transcribe its records;
2. Submit reports on actions taken; and
3. Submit reports on limitations and classifications of individuals set forth in the records.

[e] Posting

Every employer must post and keep posted in conspicuous places on its premises the notice on the applicability of the ADEA prescribed by the EEOC.ⁿ⁴⁸ The notice must be posted in prominent and accessible places where it can readily be observed by employees and applicants.ⁿ⁴⁹

[f] Petitions for Exceptions

An employer may petition the EEOC for relief from its ADEA recordkeeping requirements, if there is good cause for the petition.ⁿ⁵⁰ The employer may petition to keep records in a different way than required by Title 29 *Code of Federal Regulations*, Part 1627 or to be relieved of preserving records for the time required by that Part. The petition to the EEOC must be in writing, and it must include a request for relief, a statement of the reasons for the request, and a proposal of alternative recordkeeping procedures or record retention requirements.ⁿ⁵¹

The EEOC may grant the petition if it finds that the alternative proposed will not hamper or interfere with the enforcement of the ADEA and will be of equivalent usefulness. The grant of the petition may be subject to such conditions as the EEOC deems appropriate. Before any relief so granted is revoked for failure to comply with the conditions set, the affected employer will be given written notice and a chance to achieve or demonstrate compliance.ⁿ⁵²

[4] Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Assistance Act**[a] Regulations Under the Two Acts**

Although the Rehabilitation Act of 1973ⁿ⁵³ and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA)ⁿ⁵⁴ both have their own implementing regulations,ⁿ⁵⁵ the recordkeeping and posting requirements of the

two sets of regulations are identical. These requirements are therefore discussed together in [b] through [d], below.

[b] Recordkeeping

Each federal contractor and subcontractor subject to the Rehabilitation Act and VEVRAA must maintain for at least one year all records regarding complaints and actions taken under those complaints. Similarly, each contractor and subcontractor must maintain for at least one year any employment or other records that the Director of the OFCCPⁿ⁵⁶ requires. The information must be furnished in the form required by the Director.ⁿ⁵⁷ Failing to completely and accurately maintain the required records constitutes noncompliance with the affirmative action clause required by the two actsⁿ⁵⁸ and is grounds for the imposition of appropriate sanctions.ⁿ⁵⁹

[c] Access to Records

Each prime contractor and subcontractor must allow access during normal business hours to its places of business and its books, records, and accounts for purposes of complaint investigations and investigations of performance under the affirmative action clause of the federal contract or subcontract. Information obtained in this way will be used only in connection with the administration of VEVRAAⁿ⁶⁰ or the Rehabilitation Act of 1973.ⁿ⁶¹

[d] Posting

Among the steps that the contractor must take to ensure internal dissemination of the affirmative action policy is the posting of that policy on company bulletin boards. The posting should include a statement that employees and applicants are protected from coercion, intimidation, interference, or discrimination for filing a complaint or assisting in an investigation under VEVRAAⁿ⁶² or under the Rehabilitation Act of 1973.ⁿ⁶³

[5] The Equal Pay Act

As discussed in Chapter 40, Part C, the Equal Pay Actⁿ⁶⁴ is part of the Fair Labor Standards Act (FLSA).ⁿ⁶⁵ Employers having employees subject to the Equal Pay Act must therefore keep whatever records they are required to keep under Title 29 Code of Federal Regulations, Part 516, which governs records to be kept by employers subject to the FLSA.ⁿ⁶⁶ For discussion of recordkeeping requirements under the FLSA, *see* Chapter 7. In addition, employers must preserve any records made in the regular course of business that relate to one of the following:ⁿ⁶⁷

1. The payment of wages,
2. Wage rates,
3. Job evaluations or descriptions,
4. Merit systems or seniority systems,
5. Collective bargaining agreements, and
6. A description of practices or other matters that describe or explain the basis for payment of a wage differential to employees of the opposite sex in the same establishment and that may be pertinent to a determination of whether the differential is based on a factor other than sex.

An employer must preserve for at least two years any records made that explain the basis for the payment of any wage differential to employees of the opposite sex in the same establishment.ⁿ⁶⁸

[6] Executive Order 11246

[a] Regulations

Executive Order 11246 forbids discrimination in employment by federal government contractors and subcontractors.ⁿ⁶⁹ The regulations in Title 41 Code of Federal Regulations, Part 60-1 were adopted to implement Executive Order 11246.ⁿ⁷⁰

[b] Reports**[i] Prime Contractors and Subcontractors**

A prime contractor or subcontractor must file a report on Standard Form 100 (EEO-1) every year on or before March 31 if the prime contractor or subcontractor meets the following requirements:ⁿ⁷¹

1. It is not exempt from the requirements of the regulations.ⁿ⁷²
2. It has 50 or more employees.
3. It is a prime contractor or first tier subcontractor.
4. It has a contract, subcontract, or purchase order amounting to \$50,000 or more, or serves as a depository of government funds, or is a financial institution that is an issuing and paying agent for U.S. savings bonds and notes.

A subcontractor that is below the first tier must nonetheless file the required report if it performs construction work at the site of construction and if it meets the other three requirements listed above (items (1), (2), and (4)).ⁿ⁷³

The contractor or subcontractor must file the required report with the contracting or administering agency within 30 days after the award of the contract or subcontract unless the contractor or subcontractor has filed an EEO-1 within 12 months before the award.ⁿ⁷⁴ Failure to file timely, complete, and accurate reports constitutes noncompliance with the contractor's or subcontractor's obligations under the equal opportunity clause of the contract and is grounds for the imposition of sanctions.ⁿ⁷⁵

[ii] Bidders and Prospective Contractors

Federal contracting agencies require each bidder or prospective prime contractor and proposed subcontractor to state the following, when appropriate, in the bid or in writing at the outset of contract negotiations:ⁿ⁷⁶

1. Whether it has developed affirmative action programs and has them on file at each establishment;
2. Whether it has participated in any previous contract or subcontract subject to the equal opportunity clause; and
3. Whether it has filed all reports due under the applicable filing requirements.

[c] Records

The Director of the OFCCP or the applicant for federal assistance involving a construction contract (or other participant in a program involving a construction contract as determined by the regulations of an administering agency)ⁿ⁷⁷ may require a contractor to keep employment or other records. The Director or the applicant may also require the contractor to furnish, in the form requested, within reasonable limits, any information that the Director or the applicant deems necessary for the administration of Executive Order 11246.ⁿ⁷⁸

A prime contractor or subcontractor must allow access during normal business hours for the inspection and copying of books, records, accounts, and other material pursuant to a compliance investigation.ⁿ⁷⁹

[d] Posting

Paragraphs (1) and (3) of the equal opportunity clausesⁿ⁸⁰ contained in federal contracts pursuant to Executive Order 11246 require prime contractors and subcontractors to post notices. Unless the Director prescribes alternative notices, the notices to be posted are those set out in Title 41 *Code of Federal Regulations*, section 60-1.42(a). The notices will be provided by the contracting or administering agencies.ⁿ⁸¹

The notices must be posted in conspicuous places available to employees, applicants for employment, and labor organization representatives.ⁿ⁸²

Legal Topics:

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

Labor & Employment Law Discrimination General Overview Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview

FOOTNOTES:

(n1)Footnote 1. For discussion of which employers are subject to Title VII, *see* Chapter 40, Part C.

(n2)Footnote 2. 42 U.S.C. § 2000e-8(c).

(n3)Footnote 3. 29 C.F.R. § 1602.12.

(n4)Footnote 4. 29 C.F.R. § 1602.14(a).

(n5)Footnote 5. 29 C.F.R. § 1602.14(a).

(n6)Footnote 6. 29 C.F.R. § 1602.14(a).

(n7)Footnote 7. *See* 29 C.F.R. § 1607.

(n8)Footnote 8. *See* 29 C.F.R. §§ 1602.15-1602.21.

(n9)Footnote 9. *See* 29 C.F.R. §§ 1602.30-1602.38.

(n10)Footnote 10. *See* 29 C.F.R. §§ 1602.39-1602.55.

(n11)Footnote 11. 29 C.F.R. § 1602.7. For discussion of the EEOC's authority to conduct investigations under 42 U.S.C. § 2000e-9, *see* Chapter 42, Part B.

(n12)Footnote 12. 29 C.F.R. § 1602.8. 18 U.S.C. § 1001 makes false statements or entries in any matter within the jurisdiction of any department or agency of the United States punishable by imprisonment for up to five years, a fine, or both.

(n13)Footnote 13. 42 U.S.C. § 2000e-8(c); 29 C.F.R. § 1602.9.

(n14)Footnote 14. 29 C.F.R. § 1602.10.

(n15)Footnote 15. *29 C.F.R. § 1602.10.*

(n16)Footnote 16. *See 42 U.S.C. § 2000e-8(c).*

(n17)Footnote 17. For discussion of unlawful employment practice charges under *42 U.S.C. § 2000e-5*, *see* ch. 42, pt. C.

(n18)Footnote 18. *42 U.S.C. § 2000e-8(a)*; *see 29 C.F.R. § 1601.16* (EEOC subpoenas for access to or production of records or other evidence). *See Univ. of Pennsylvania v. EEOC (1990) 493 U.S. 182, 192, 110 S. Ct. 577, 107 L. Ed. 2d 571 (42 U.S.C. § 2000e-8(a) must be read as giving EEOC right to obtain evidence, not mere license to seek it).*

(n19)Footnote 19. *42 U.S.C. § 2000e-10(a)*; *29 C.F.R. § 1601.30(a).*

(n20)Footnote 20. *42 U.S.C. § 2000e-10(b)*; *29 C.F.R. § 1601.30(b).*

(n21)Footnote 21. *29 C.F.R. § 1607.1.*

(n22)Footnote 22. *29 C.F.R. § 1607.2.*

(n23)Footnote 23. For discussion of Executive Order 11246, *see* [6], *below*.

(n24)Footnote 24. *29 C.F.R. § 1607.2.*

(n25)Footnote 25. A "user" is any employer covered by federal equal employment opportunity law that uses a selection procedure as the basis for an employment decision. *29 C.F.R. § 1607.16W.*

(n26)Footnote 26. *29 C.F.R. § 1607.4A.*

(n27)Footnote 27. *29 C.F.R. § 1607.4B.*

(n28)Footnote 28. *See 29 C.F.R. § 1607.15A(1)* (simplified recordkeeping for users with fewer than 100 employees).

(n29)Footnote 29. *29 C.F.R. § 1607.15A(2).*

(n30)Footnote 30. *29 C.F.R. § 1607.15A(3).*

(n31)Footnote 31. *42 U.S.C. § 12115* (operative July 26, 1992); *see 42 U.S.C. 2000e-10*; *29 C.F.R. § 1602.1.*

(n32)Footnote 32. *See 42 U.S.C. § 12117* (operative July 26, 1992; procedures set forth in *42 U.S.C. § 2000e-8* are applicable to ADA).

(n33)Footnote 33. *29 U.S.C. § 626(a)*; *29 C.F.R. § 1627.1(a)*; *see 29 U.S.C. §§ 621-634.*

(n34)Footnote 34. *29 C.F.R. Part 1627.*

(n35)Footnote 35. *29 C.F.R. § 1627.3.*

(n36)Footnote 36. *29 C.F.R. § 1627.2.*

(n37)Footnote 37. *29 C.F.R. § 1627.3(a).*

(n38)Footnote 38. *29 C.F.R. § 1627.3(a).*

(n39)Footnote 39. *29 C.F.R. § 1627.3(b).*

(n40)Footnote 40. *29 C.F.R. § 1627.3(b)(2)*.

(n41)Footnote 41. *29 C.F.R. § 1627.3(b)(2)*.

(n42)Footnote 42. For discussion of *29 C.F.R. § 1627.3(b)(1)* and records that must be retained if made, obtained, or used in the regular course of business, *see [i], above*.

(n43)Footnote 43. *29 C.F.R. § 1627.3(b)(3)*.

(n44)Footnote 44. For discussion of administrative enforcement and civil actions under *29 U.S.C. § 626*, *see ch. 42, pt. C, and ch. 43, pt. B*.

(n45)Footnote 45. For discussion of *29 C.F.R. § 1627.3(b)(1)* and records that must be retained if made, obtained, or used in the regular course of business, *see [i], above*. For discussion of *29 C.F.R. § 1627.3(b)(2)* and records of employee benefit plans and seniority and merit systems, *see [ii], above*. For discussion of *29 C.F.R. § 1627.3(b)(3)* and preemployment records of applicants for temporary positions, *see [iii], above*.

(n46)Footnote 46. *29 C.F.R. § 1627.3(b)(3)*.

(n47)Footnote 47. *29 C.F.R. § 1627.7*.

(n48)Footnote 48. *29 U.S.C. § 627; 29 C.F.R. § 1627.10*.

(n49)Footnote 49. *29 C.F.R. § 1627.10*.

(n50)Footnote 50. *29 C.F.R. § 1627.11(a)*.

(n51)Footnote 51. *29 C.F.R. § 1627.11(a)*.

(n52)Footnote 52. *29 C.F.R. § 1627.11(b)*.

(n53)Footnote 53. *See 29 U.S.C. §§ 701-796i*. For discussion of act, *see Chapter 40, Part C*.

(n54)Footnote 54. *See 38 U.S.C. § 2011 et seq.* For discussion of VEVRAA, *see Chapter 40, Part C*.

(n55)Footnote 55. *See 41 C.F.R. Parts 60-250, 60-741*.

(n56)Footnote 56. For discussion of the OFCCP, *see Chapter 44*.

(n57)Footnote 57. *41 C.F.R. §§ 60-250.52(a), 60-741.52(a)*.

(n58)Footnote 58. *See 41 C.F.R. §§ 60-250.4, 60-741.4* (affirmative action clause); *see also 41 C.F.R. §§ 60-250.27, 60-741.27* (noncompliance with affirmative action clause). For discussion, *see Chapter 44*.

(n59)Footnote 59. *41 C.F.R. §§ 60-250.52(b), 60-741.52(b)*. Regarding actions for noncompliance, *see 41 C.F.R. §§ 60-250.28, 60-741.28*. Regarding formal hearings on a violation of the affirmative action clause, *see 41 C.F.R. §§ 60-250.29, 60-741.29*.

(n60)Footnote 60. *41 C.F.R. § 60-250.53*.

(n61)Footnote 61. *41 C.F.R. § 60-741.53*.

(n62)Footnote 62. *41 C.F.R. § 60-250.6(g)(9)*.

(n63)Footnote 63. 41 C.F.R. § 60-741.6(g)(9).

(n64)Footnote 64. *See* 29 U.S.C. § 206(d).

(n65)Footnote 65. 29 C.F.R. § 1620.1(a); *see* 29 U.S.C. §§ 201-219.

(n66)Footnote 66. 29 C.F.R. § 1620.32.

(n67)Footnote 67. 29 C.F.R. § 1620.32(b).

(n68)Footnote 68. 29 C.F.R. § 1620.32(c).

(n69)Footnote 69. For further discussion of Exec. Order No. 11246, *see* Chapter 40, Part C, and Chapter 44.

(n70)Footnote 70. 41 C.F.R. § 60-1.1.

(n71)Footnote 71. 41 C.F.R. § 60-1.7(a)(1).

(n72)Footnote 72. *See* 41 C.F.R. § 60-1.5(exemptions).

(n73)Footnote 73. 41 C.F.R. § 60-1.7(a)(1).

(n74)Footnote 74. 41 C.F.R. § 60-1.7(a)(2).

(n75)Footnote 75. 41 C.F.R. § 60-1.7(a)(4); *see* 41 C.F.R. § 60-1.27 (sanctions and penalties); *see also* Exec. Order No. 11246, §§ 209-212 (sanctions and penalties).

(n76)Footnote 76. 41 C.F.R. § 60-1.7(b)(1).

(n77)Footnote 77. *See* 41 C.F.R. § 60-1.3.

(n78)Footnote 78. 41 C.F.R. § 60-1.7(a)(3).

(n79)Footnote 79. 41 C.F.R. § 60-1.43.

(n80)Footnote 80. *See* 41 C.F.R. § 60-1.4(equal opportunity clause).

(n81)Footnote 81. 41 C.F.R. § 60-1.42(a).

(n82)Footnote 82. 41 C.F.R. § 60-1.42(b).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 41 Substantive Requirements Under Equal Employment Opportunity Laws
PART H. EMPLOYER POSTING AND RECORDKEEPING REQUIREMENTS

2-41 California Employment Law §§ 41.142 through 41.149

AUTHOR: By Christine Curtis, J.D., Lori A. M. Middlehurst, J.D., and Elizabeth W. Mandel, J.D.

[Reserved]

§§ 41.142[Reserved]



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TreatmentGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General
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Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisability
DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisparate TreatmentGeneral OverviewLabor
& Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws

3-42 California Employment Law 42.syn

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

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FOOTNOTES:

(n1)Footnote *. From 1978 to 1983, Ms. Brodsky was a staff attorney with the California Fair Employment and Housing Commission and the Department of Fair Employment and Housing. Since that time, she has been engaged in private practice in Massachusetts and California with an emphasis on employment discrimination and wrongful termination law. She is currently practicing in Oakland, California.

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws

3-42 California Employment Law Scope

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

Scope

By Dale L. Brodsky, J.D.^{n*} and Beverly Tucker, J.D.^{n**} SCOPE

This chapter discusses the administrative enforcement of California and federal equal employment opportunity laws. The chapter includes a discussion of factors that should be considered before deciding to bring an administrative action, such as the type of administrative and judicial remedies are available, the impact of the choice of forum on those remedies, exhaustion of administrative remedies, and the preclusive effects of administrative remedies on other proceedings. The chapter discusses in detail administrative proceedings under the Fair Employment and Housing Act (FEHA), Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the federal Equal Pay Act.

Chapter 40 provides an overview of the state and federal equal employment opportunity laws. Chapter 41 discusses the substantive provisions of the equal employment laws. Chapter 43 covers the procedure for bringing judicial actions under these laws. For discussion of enforcement of anti-discrimination and affirmative action provisions in government contracts under state and federal law, see Chapter 44.

FOOTNOTES:

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part A. INTRODUCTION

3-42 California Employment Law § 42.01

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.01 Remedies Available to Complainant

[1] Generally

In California, a person who believes that an employer, an employment agency, apprenticeship program, or a labor organization has engaged in discriminatory practices has recourse to state and federal administrative agencies, as well as the courts. The aggrieved person must assess the nature of the alleged unlawful practice, applicable statutes of limitations, the need to exhaust certain administrative remedies, the political climate in which the agencies are operating at the time, and other factors in deciding whether to initiate a state or federal proceeding and whether to seek an administrative or judicial remedy.

California's Fair Employment and Housing Act (FEHA)ⁿ¹ is administratively enforced under a "two-tier" administrative agency structure, consisting of the California Department of Fair Employment and Housing (DFEH)ⁿ² and the Fair Employment and Housing Commission (FEHC).ⁿ³ Most federal employment discrimination laws are administratively enforced by the agency created by Title VII of the Civil Rights Act of 1964--the Equal Employment Opportunity Commission (EEOC). Because most of the types of discrimination prohibited under California law are also prohibited under federal law, the DFEH and EEOC have entered into a worksharing agreement, under which charges of discrimination that are covered by either or both federal or state laws may be filed with either agency, and each agency acts as the agent of the other for purposes of receiving charges.ⁿ⁴ For discussion of the EEOC's and the DFEH's worksharing agreement, *see* §§ 42.24 and 42.63[2].

[2] State Administrative and Judicial Remedies

[a] Fair Employment and Housing Act

The FEHC and DFEH are independent administrative entities with different functions. The FEHC is empowered to promulgate substantive and procedural regulationsⁿ⁵ and to conduct hearings on administrative complaints brought by the DFEH,ⁿ⁶ as well as to perform other functions and duties set forth by statute.ⁿ⁷ The DFEH investigates, conciliates, and prosecutes complaints of unlawful discrimination before the FEHC.ⁿ⁸ Together, the two branches provide a

quasi-judicial forum, with quasi-legislative remedial powers,ⁿ⁹ to remedy violations of the FEHA. If the FEHC finds a violation of the FEHA, it may order relief such as hiring or reinstatement, with or without backpay, injunctive relief to prevent recurrence of the violation, and, subject to limitations, actual damages for emotional suffering and an administrative fine in cases involving oppression, malice, or fraud.ⁿ¹⁰ An individual or respondent employer whose case is litigated before the FEHC by the DFEH may obtain judicial review in superior court by filing a petition for writ of mandate, but such an individual cannot obtain a trial de novo.ⁿ¹¹ For discussion of judicial review of FEHC decisions, *see* § 42.40.

As a practical matter, the DFEH prosecutes very few cases before the FEHC.ⁿ¹² In most instances, the aggrieved person obtains a "right-to-sue" letter from the DFEH and litigates his or her case in a California superior court. The FEHA authorizes broad judicial remedies, including compensatory and punitive damages.ⁿ¹³

The FEHA also requires employers who contract with the State of California to comply with certain nondiscrimination and affirmative action requirements.ⁿ¹⁴ These provisions authorize the DFEH to compel reporting by state contractors, and to recommend sanctions against such contractors when prosecuting an accusation before the DFEH.ⁿ¹⁵ However, the FEHC has no authority to order debarment, sanctions, or other relief; the FEHA allows it only to "recommend" such sanctions to the contracting state agency. For discussion of nondiscrimination and affirmative action requirements for state and federal contractors and procedures for enforcing those requirements, *see* Chapter 44.

[b] Unruh Civil Rights Act, Ralph Civil Rights Act, and Public Access of Disabled Persons

In addition to enforcing the FEHA, the DFEH and FEHC have power to enforce the Unruh Civil Rights Act,ⁿ¹⁶ the Ralph Civil Rights Act,ⁿ¹⁷ and *Civil Code sections 54, 54.1, and 54.2*, relating to the rights of disabled persons or persons with medical conditions to full and equal access to all public accommodations.ⁿ¹⁸ In contrast to the requirements of the FEHA, neither the Unruh Act nor the Ralph Act require exhaustion of administrative remedies prior to commencing a civil action.ⁿ¹⁹ However, while the Unruh Act prohibits arbitrary discrimination by "business establishments," a term which has been broadly defined by the courts,ⁿ²⁰ the California Supreme Court has held that the Unruh Act does not cover discrimination in the employer-employee relationship.ⁿ²¹ In so holding, the Court reasoned that *Civil Code Section 51* was not intended to apply to discrimination by a business establishment other than in the course of furnishing goods, services, or facilities to its clients, patrons, or customers.ⁿ²²

The Ralph Act guarantees all persons the right to be free of violence or intimidation on account of race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics.ⁿ²³ Although rare in the employment context, a Ralph Act violation could arise in connection with an allegation of discrimination. The DFEH has taken the position that an allegation of harassment that includes an element of physical violence would be actionable under the Ralph Act.ⁿ²⁴

It is also an unlawful practice under the FEHAⁿ²⁵ for a person to deny or to aid, incite, or conspire in the denial of the rights created by *Civil Code sections 51.5*, relating to prohibited business transactions, and *54, 54.1, or 54.2*, relating to the rights of disabled persons to full and equal access to all public accommodations.ⁿ²⁶ Presumably, the same arguments supporting the holdings that the proscriptions of section 51 of the Unruh Actⁿ²⁷ do not apply to employment discrimination cases would also apply to violation of the prohibition against denying equal access to public accommodations to disabled persons. Thus, violations of *Civil Code sections 54, 54.1, and 54.2* would not provide grounds for a cause of action in an employment discrimination action.ⁿ²⁸

[c] California Equal Pay Act

An individual who alleges sex discrimination in connection with the payment of wages under the California Equal Pay Actⁿ²⁹ is not required to exhaust administrative remedies before bringing a civil action, and the DFEH has no direct

enforcement powers over Equal Pay Act violations.ⁿ³⁰ However, an aggrieved individual may file an administrative complaint with the Division of Labor Standards Enforcement (DLSE).ⁿ³¹ For further discussion of the administrative process under the Equal Pay Act, *see* Chapter 5, Part A. For further discussion of civil actions under the Equal Pay Act, *see* Chapter 43, Part A. For discussion of the scope and substantive requirements of the Equal Pay Act, *see* Chapter 40, Part B, and Chapter 41, Part D.

[3] Federal Administrative and Judicial Remedies

[a] Laws Enforced by Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with administrative enforcement of a number of federal anti-discrimination statutes, including Title VII of the Civil Rights Act of 1964 (Title VII),ⁿ³² the Americans With Disabilities Act of 1990,ⁿ³³ the Age Discrimination in Employment Act of 1967 (ADEA),ⁿ³⁴ the Equal Pay Act of 1963 (EPA),ⁿ³⁵ Section 501 of the Vocational Rehabilitation Act of 1973 (the Rehabilitation Act),ⁿ³⁶ and Title VI of the Civil Rights Act of 1964.ⁿ³⁷

Unlike the FEHC, the EEOC performs no quasi-judicatory functions. The EEOC has authority to investigate charges of discrimination on a range of bases;ⁿ³⁸ facilitate conciliation efforts;ⁿ³⁹ intervene in lawsuits brought by private litigants;ⁿ⁴⁰ enact procedural regulations;ⁿ⁴¹ and conduct a variety of technical studies.ⁿ⁴² The EEOC has no authority to order relief on its own.ⁿ⁴³ As a consequence, unless the EEOC has determined to seek preliminary injunctive relief under section 706(f)(2) of Title VII, or to bring a civil action in its own name pursuant to Title VII,ⁿ⁴⁴ the ADEA,ⁿ⁴⁵ the Equal Pay Act,ⁿ⁴⁶ or Section 501 of the Rehabilitation Act,ⁿ⁴⁷ the charging party must initiate a court action in state or federal court in order to obtain relief. Title VII authorizes the Attorney General to bring civil actions against a government, governmental agency or political subdivision.ⁿ⁴⁸

Although some circuit courts of appeal uphold the EEOC's right to bring a Title VII action when the charging party has already filed a private action,ⁿ⁴⁹ the Ninth Circuit Court of Appeals has ruled that the filing of a private suit extinguishes the EEOC's right to litigate.ⁿ⁵⁰ The EEOC may, however, move to intervene in a private Title VII action "upon certification that the case is of general public importance."ⁿ⁵¹ By contrast, when the EEOC has initiated an action under Title VII, the charging party may intervene as a matter of right.ⁿ⁵² Once the EEOC has brought suit under the ADEA,ⁿ⁵³ an aggrieved person is generally prohibited from filing a private action or intervening in the pending EEOC litigation.ⁿ⁵⁴

Historically, the likelihood of the EEOC filing a civil action in federal district court has been as small as the likelihood of the DFEH bringing a case to hearing before the FEHC. In fiscal year 1987, a total of 62,074 charges were filed with the EEOC nationwide. During that same time frame, the EEOC brought 429 civil actions and 94 subpoena enforcement actions in federal district court nationwide.ⁿ⁵⁵ In Northern California, the EEOC instituted 23 court actions and 4 subpoena enforcement actions. For further discussion of the EEOC's authority to file civil actions, *see* § 42.73.

[b] Prohibitions Against Discrimination by Federal Contractors

A number of federal laws and executive orders impose nondiscrimination and affirmative action requirements on federal contractors. These include (1) Executive Order 11246,ⁿ⁵⁶ which prohibits discrimination by certain federal contractors; (2) the Veterans' Reemployment Rights Act (VRRRA) and Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA), which protects reemployment rights of certain veterans of the military and requires certain government contractors to take affirmative action in employing veterans;ⁿ⁵⁷ and (3) Section 503 of the Rehabilitation Act of 1973, which requires affirmative action and nondiscrimination with regard to certain individuals with disabilities.ⁿ⁵⁸ These provisions are enforced by the Office of Federal Contract Compliance Programs (OFCCP) of the United States Department of Labor.ⁿ⁵⁹ For discussion of enforcement of these provisions, *see* Chapter 44.

[c] Prohibitions Against Discrimination by Programs Receiving Federal Assistance

Title VI of the Civil Rights Act of 1964ⁿ⁶⁰ prevents discrimination on the ground of race, color, or national origin by programs and activities receiving federal assistance. Both the EEOC and the agency providing the federal assistance have jurisdiction to accept charges from aggrieved individuals.ⁿ⁶¹ Once the charge is filed, the EEOC may follow the investigatory and conciliatory steps set out in Title VII, issue the individual a right to sue letter, or bring suit on its own if such action is warranted.ⁿ⁶²

Section 504 of the Rehabilitation Actⁿ⁶³ prohibits discrimination on the basis of disability in any program or activity receiving federal assistance or conducted by an agency of the federal government. The Department of Justice has issued regulations interpreting Section 504,ⁿ⁶⁴ but each agency that provides federal assistance enforces Section 504 with respect to its recipients.ⁿ⁶⁵ An aggrieved individual with a disability also has a private right of action against an employer-recipient of federal funding.ⁿ⁶⁶

[d] Other Federal Judicial Remedies

The Reconstruction Era Civil Rights Laws,ⁿ⁶⁷ provide no administrative enforcement mechanisms.ⁿ⁶⁸ Causes of action under these laws may be combined with the other statutes mentioned in [a]-[c], *above*, in employment discrimination litigation. Prior administrative proceedings may, however, in some cases bar subsequent civil actions under the civil rights statutes under the jurisprudential doctrines of issue and claim preclusion (also known as "res judicata" and "collateral estoppel").ⁿ⁶⁹ For further discussion of preclusive effects in connection with the Reconstruction Era Civil Rights Laws, *see* § 42.03[2][b].

Legal Topics:

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

Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview Labor & Employment Law Wage & Hour Laws Remedies General Overview Labor & Employment Law Wage & Hour Laws Statutory Application Title VII of the Civil Rights Act of 1964 Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12900 et seq.*

(n2)Footnote 2. For discussion of DFEH, *see* § 42.21.

(n3)Footnote 3. For discussion of FEHC, *see* § 42.20.

(n4)Footnote 4. *See* Fiscal Year 1988 Worksharing Agreement Between California DFEH and U.S. EEOC; EEOC Compliance Manual (CCH) §§ 5.2, 5.4-5.6.

(n5)Footnote 5. *Gov. Code § 12935(a).*

(n6)Footnote 6. *See Gov. Code § 12935(b).*

(n7)Footnote 7. *See Gov. Code § 12935.* For discussion of functions and duties of FEHC, *see* § 42.20.

(n8)Footnote 8. *Gov. Code § 12930(f), (h).* For discussion of functions and duties of DFEH, *see* § 42.21.

(n9)Footnote 9. *See Gov. Code § 12920.5* (Legislature conferred its constitutional authority under *Cal. Const.*, art. XIV, § 1 to remedy discrimination under FEHA).

(n10)Footnote 10. *See Gov. Code § 12970(a)-(d).* For detailed discussion of available relief, *see* § 42.39A.

(n11)Footnote 11. *See Code Civ. Proc. § 1094.5; Gov. Code §§ 11523, 12972.*

(n12)Footnote 12. For example, in fiscal year 1986-1987, 9,971 complaints ("charges") alleging discriminatory employment practices were filed with the DFEH. *see* Annual Report of the DFEH, July 1, 1986-June 30, 1987. During that period of time, the DFEH issued 165 accusations, and the FEHC decided 22 cases.

(n13)Footnote 13. *See Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal. 3d 211, 213, 216, 185 Cal. Rptr. 270, 649 P.2d 912 .

(n14)Footnote 14. *See Gov. Code § 12990.*

(n15)Footnote 15. *See Gov. Code § 12990(f).*

(n16)Footnote 16. *Civ. Code § 51.*

(n17)Footnote 17. *Civ. Code §§ 51.7, 52(f); Gov. Code § 12948.*

(n18)Footnote 18. *See Gov. Code § 12948.*

(n19)Footnote 19. *Civ. Code § 52(e).*

(n20)Footnote 20. *See, e.g., Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal. 3d 72, 78-85, 219 Cal. Rptr. 150, 707 P.2d 212 ; *see also Marina Point Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 730-736, 180 Cal. Rptr. 496, 640 P.2d 115 (Unruh Act's prohibition against arbitrary discrimination includes not only express bases of sex, race, color, religion, ancestry, and national origin, but also discrimination against families with children).

(n21)Footnote 21. *Alcorn v. Ambro Engineering, Inc.* (1970) 2 Cal. 3d 493, 497-498, 86 Cal. Rptr. 88, 468 P.2d 216 .

(n22)Footnote 22. *Alcorn v. Ambro Engineering, Inc.* (1970) 2 Cal. 3d 493, 497-498, 86 Cal. Rptr. 88, 468 P.2d 216 (fact that FEPA, precursor to FEHA, and Unruh Act were enacted concurrently and FEPA protects employees further establishes legislative intent that Unruh Act was not meant to apply to employment); *see Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal. 3d 72, 83 n.12, 219 Cal. Rptr. 150, 707 P.2d 212 . In a subsequent precedential opinion, the FEHC applied the reasoning of *Alcorn* and *Isbister* and held that individuals who claimed to be discriminated against in independent contractor relationships had no remedy under either the FEHA or the Unruh Act. *see DFEH v. Children's Hospital & Health Center* (1987) FEHC Dec. No. 87-24 at pp. 8-9.

(n23)Footnote 23. *Civ. Code § 51.7.*

(n24)Footnote 24. *See DFEH Enforcement Division Directive No. 59* (June 1, 1987).

(n25)Footnote 25. *Gov. Code § 12940 et seq.*

(n26)Footnote 26. *See Gov. Code § 12948.*

(n27)Footnote 27. *Civ. Code § 51.*

(n28)Footnote 28. *See Alcorn v. Ambro Engineering, Inc.* (1970) 2 Cal. 3d 493, 497-498, 86 Cal. Rptr. 88, 468 P.2d 216 .

(n29)Footnote 29. *See Lab. Code § 1197.5.*

(n30)Footnote 30. *Bass v. Great Western Sav. & Loan Assn.* (1976) 58 Cal. App. 3d 770, 773, 130 Cal. Rptr. 123 .

(n31)Footnote 31. *See Lab. Code §§ 98.7, 1197.5(c).*

(n32)Footnote 32. *42 U.S.C. §§ 2000e-2000e-17; see 42 U.S.C. § 2000e-5.*

(n33)Footnote 33. *42 U.S.C. § 12101 et seq.; see § 12117.*

(n34)Footnote 34. *29 U.S.C. §§ 621-634; see 29 U.S.C. § 626(a), (d); 29 C.F.R. §§ 1626.4, 1626.15; see also Pub. Law 98-532 (confirming presidential reorganization giving EEOC authority over enforcement of Act).*

(n35)Footnote 35. *29 U.S.C. § 206(d)* (part of Fair Labor Standards Act, *29 U.S.C. §§ 201-219*); *see Pub. Law 98-532 (confirming presidential reorganization giving EEOC authority over enforcement of Act); see also 29 C.F.R. § 1620.30(a).*

(n36)Footnote 36. *29 U.S.C. § 791* (requiring affirmative action by the federal government in the employment of individuals with disabilities); *see 29 U.S.C. § 794a(a)(1).*

(n37)Footnote 37. *42 U.S.C. § 2000d; see also 29 C.F.R. §§ 1691.6-1691.9.*

(n38)Footnote 38. *42 U.S.C. § 2000e-5(b).*

(n39)Footnote 39. *42 U.S.C. § 2000e-5(b).*

(n40)Footnote 40. *42 U.S.C. § 2000e-4(g)(6).*

(n41)Footnote 41. *42 U.S.C. § 2000e-12(a).*

(n42)Footnote 42. *42 U.S.C. § 2000e-4(g)(5).*

(n43)Footnote 43. *See, e.g., 42 U.S.C. § 2000e-4(g); 29 U.S.C. §§ 626(b), 633a(c); 29 U.S.C. § 206(d); 29 U.S.C. § 794a.*

(n44)Footnote 44. *See 42 U.S.C. § 2000e-5(f).*

(n45)Footnote 45. *See 29 U.S.C. § 626.*

(n46)Footnote 46. *See 29 U.S.C. § 206(d); 29 C.F.R. § 1620.33(b).*

(n47)Footnote 47. *See 29 U.S.C. §§ 791, 794a(a)(1).*

(n48)Footnote 48. *42 U.S.C. §§ 2000e-5(f)(2), 2000e-16; see West v. Gibson (1999) 527 U.S. 212, 119 S. Ct. 1906, 1909-1910, 144 L. Ed. 2d 196* (EEOC has authority to require federal agencies to pay compensatory damages when they discriminate in violation of Title VII).

(n49)Footnote 49. *Compare EEOC v. North Hills Passavant Hosp. (3d Cir. 1976) 544 F.2d 664, 668-672* (permitting EEOC to bring a private action while a private Title VII suit is pending) *with* decisions limiting EEOC to permissive intervention once a private action is filed, *e.g., EEOC v. Continental Oil Co. (10th Cir. 1977) 548 F.2d 884, 889-90; EEOC v. Missouri Pac. Ry. Co. (8th Cir. 1974) 493 F.2d 71*. Other courts have held that EEOC is not barred from bringing an action if its allegations are based on violations broader than those of the private action. *See, e.g., Equal Emp. Opportunity Com'n v. Kimberly-Clark Corp. (6th Cir. 1975) 511 F.2d 1352, 1363; EEOC v. Huttig Sash & Door Co. (5th Cir. 1975) 511 F.2d 453, 454-55*.

(n50)Footnote 50. *EEOC v. Pacific Press Pub. (9th Cir. 1976) 535 F.2d 1182, 1186*.

(n51)Footnote 51. *42 U.S.C. § 2000e-5(f)(1).*

(n52)Footnote 52. 42 U.S.C. § 2000e-5(f)(1).

(n53)Footnote 53. 29 U.S.C. §§ 621-634.

(n54)Footnote 54. 29 U.S.C. § 626(c)(1); cf. *Burns v. Equitable Life Assur. Soc. of U.S.* (2d Cir. 1982) 696 F.2d 21, 24, cert. denied, 464 U.S. 933 (1983) (pending private action under the ADEA not preempted by later filed EEOC suit).

(n55)Footnote 55. EEOC Office of Communications and Legislative Affairs, Washington, D.C.

(n56)Footnote 56. For general discussion of Order, see Ch. 40, pt. C.

(n57)Footnote 57. See 38 U.S.C. §§ 2011 et seq. For general discussion, see Ch. 40, pt. C.

(n58)Footnote 58. See 29 U.S.C. § 793. For general discussion of Act, see Ch. 40, pt. C.

(n59)Footnote 59. See Exec. Order No. 11246, § 209.

(n60)Footnote 60. 42 U.S.C. § 2000d-2000d-4.

(n61)Footnote 61. 29 C.F.R. §§ 1691.1-1691.13.

(n62)Footnote 62. 29 C.F.R. §§ 1691.6-1691.9.

(n63)Footnote 63. 29 U.S.C. § 794. For further discussion of Section 504, see Ch. 40, pt. C.

(n64)Footnote 64. See 28 C.F.R. §§ 41.1-41.58.

(n65)Footnote 65. See 29 U.S.C. § 794(a). For discussion, see Ch. 40, pt. C.

(n66)Footnote 66. See *CONRAIL v. Darrone* (1984) 465 U.S. 624, 637, 104 S. Ct. 1248, 79 L. Ed. 2d 568 .

(n67)Footnote 67. 42 U.S.C. §§ 1981, 1983, 1985. For further discussion, see Ch. 40, pt. C.

(n68)Footnote 68. See discussion in § 42.03[2].

(n69)Footnote 69. See, e.g., *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 796-799, 106 S. Ct. 3220, 92 L. Ed. 2d 635 ; *Eilrich v. Remas* (9th Cir. 1988) 839 F.2d 630, 632-635 , cert. denied, 488 U.S. 819 (1988) .



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part A. INTRODUCTION

3-42 California Employment Law § 42.02

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.02 Factors Influencing Choice of Forum

[1] Generally

The EEOC and DFEH are parties to a worksharing agreement,ⁿ¹ which provides that if a claim is filed with one agency it will be transmitted to the other agency for filing.ⁿ² The agency that initially receives the claim processes it unless it lacks subject matter jurisdiction.ⁿ³ Because of the dual filing, however, an aggrieved individual may obtain a notice of right to sue from either the EEOC or the DFEH, regardless of which agency received the charge first.ⁿ⁴ An EEOC right-to-sue letter authorizes the charging party to file a Title VII action in either federal or state court.ⁿ⁵ A DFEH right-to-sue letter authorizes the charging party to file an FEHA action either in state court or as a pendant claim to a Title VII action in federal court.

■ PRACTICE TIP:

As a practical matter, if one agency issues a right-to-sue letter, it so notifies the other agency, which then issues its own. However, a charging party who wishes to pursue both FEHA and Title VII claims in state court should be sure that he or she receives right-to-sue letters from *both* agencies. A DFEH right-to-sue letter is required to sue under the FEHA,ⁿ⁶ and although state courts have concurrent jurisdiction to hear Title VII claims,ⁿ⁷ an EEOC right-to-sue letter is still required for such claims. Counsel should also keep in mind that an EEOC right-to-sue letter is valid only for 90 days,ⁿ⁸ and thus a charging party who wishes to sue under both Title VII and the FEHA in state court must file a complaint within that limitations period, even though a DFEH right-to-sue letter is valid for one year.ⁿ⁹ *Commentary by Erica B. Grubb, Kirby Wilcox, and David M. Youngsmith.*

[2] Differences in Coverage

In some circumstances, the choice of administrative forums is limited because of differences in coverage between state and federal statutes. For example, state and federal statutes contain different definitions of "employer." The FEHA generally applies to private employers who regularly employ five or more employees and the state and its political or civil subdivisions and cities,ⁿ¹⁰ except that its prohibition of harassment because of race, religious creed, color,

national origin, ancestry, physical or mental disability, medical condition, marital status, sex, sexual orientation, or age applies to employers of one or more employees.ⁿ¹¹ Federal government agencies are not subject to the FEHA.ⁿ¹² By contrast, Title VII applies to employers of 15 or more employees, including federal government agencies, except for several specific statutory exclusions.ⁿ¹³ and the ADEA applies to employers of 20 or more employees.ⁿ¹⁴ The ADA applies to employers with 15 or more employees.ⁿ¹⁵

As another example, the pregnancy discrimination provisions of Title VII differ from those of the FEHA. The Pregnancy Discrimination Amendment to Title VII defines sex discrimination to include discrimination on the basis of pregnancy and also provides that women affected by pregnancy or pregnancy-related conditions must be treated, for employment-related purposes, the same as nonpregnant persons with similar inability to work.ⁿ¹⁶ However, Title VII does not require an employer to provide medical disability leave to a pregnant employee unless it is available to nonpregnant employees.ⁿ¹⁷

The FEHA, by contrast, contains a detailed set of prohibitions against pregnancy-based discrimination,ⁿ¹⁸ and includes a requirement that employers provide medical disability leave to pregnant employees for a reasonable period of time, provided the period does not exceed four months.ⁿ¹⁹ The employee is entitled to use any accrued vacation leave during this period of time.ⁿ²⁰ Reasonable period of time means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions.ⁿ²¹

For additionalⁿ²² discussion of provisions relating to pregnancy discrimination and leaves, *see* Chapter 41, Parts B and D. For full discussion of the scope of coverage of the different equal employment opportunity laws, *see* Chapter 40.

[3] Relief Available Under Federal and State Law

One of the most significant factors influencing an aggrieved party's choice of forum is the availability of different relief under California and federal law. Punitive damages and compensatory damages (such as damages for mental suffering and emotional distress), are available in FEHA civil actions.ⁿ²³ By contrast, in administrative proceedings before the FEHC, compensatory damages are subject to a statutory limit.ⁿ²⁴ In addition, the FEHC may not award punitive damages to the complaining party,ⁿ²⁵ but may assess an administrative fine against the respondent in cases involving fraud, oppression, or malice, which is deposited in the state's General Fund and is subject to a statutory maximum amount.^{n25.1} For further discussion of the FEHC's remedial power, *see* § 42.39A.

Compensatory and punitive damages are available only for intentional discriminatory conduct and are limited to a statutory maximum amount under Title VII and the ADA.ⁿ²⁶ Compensatory and punitive damages are unavailable under the federal Equal Pay Actⁿ²⁷ and the ADEA,ⁿ²⁸ which allow recovery of backpay as well as equitable remedies such as declaratory or injunctive relief. Thus, if plaintiff anticipates ultimately pursuing the claim in court, the availability of such relief may influence the plaintiff's decision regarding which administrative agency to file with.

For a complete discussion of judicial remedies under state and federal equal employment opportunity laws, *see* Chapter 43.

■ PRACTICE TIP:

In general, any case in which emotional distress is likely to be a significant factor should be brought under the FEHA (or, if applicable Title 42 *United States Code Section 1981*) rather than Title VII or the ADEA. This is an especially important consideration in sexual or racial harassment cases alleging hostile work environment in which no loss of tangible job benefits occurs. Although compensatory and punitive damages for intentional discrimination are now permitted in civil actions under Title VII as a result of the Civil Rights Act of 1991,ⁿ²⁹ there is a statutory cap on the amount of such damages.ⁿ³⁰ By contrast, the FEHA has no such cap in civil actions, and compensatory damages in FEHA actions are apparently not limited to cases of intentional discrimination. The damages limit is also inapplicable to civil actions

under Section 1981.ⁿ³¹ *Commentary by Dale Brodsky, Beverly Tucker, and Steven J. Revell.*

[4] Limitations Periods

The FEHA requires that a complaint be filed within one year from the date of the alleged unlawful practice. However, the filing period may be extended for (1) 90 days if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of its occurrence, (2) one year following a rebutted presumption of the identity of the person's employerⁿ³² to allow the person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer, (3) one year from the date the person aggrieved by an alleged violation of the Ralph Civil Rights Act--guaranteeing the right to be free from violence because of specific characteristicsⁿ³³--becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation, or (4) one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.ⁿ³⁴ By contrast, Title VII and the ADA require that a charge in California be filed within 300 days after the alleged violation.ⁿ³⁵ Thus, in some cases, the longer state limitations period will determine the forum. In addition to a requirement of timely filing, Title VII and the ADA also require that charges in so-called "deferral states,"ⁿ³⁶ including California, be filed initially with the administrative agency charged with enforcing the state anti-discrimination law.ⁿ³⁷ For discussion of deferral to state agencies, see § 42.63.

Under the FEHA, a complainant may bring suit in state court within one year after receiving a notice of right to sue.ⁿ³⁸ which is subject to tolling during the pendency of administrative proceedings before the EEOC.ⁿ³⁹ The corresponding period under Title VII and the ADA is only 90 days.ⁿ⁴⁰

[5] Time Required for Resolving Cases

The speed of initial processing of a DFEH complaint relative to an EEOC charge could be a strong factor in determining choice of forum. The FEHA provides two limits on the time within which the enforcement agency must complete processing of charges; Title VII provides none. First, the DFEH must complete its investigation, make a determination, attempt conciliation, and issue an accusationⁿ⁴¹ within two years after the filing of "group or class complaints" or a complaint alleging a violation of *Civil Code Section 51.7*, and within one year for all other complaints.ⁿ⁴² If no accusation issues within the statutory time limits, the DFEH closes its file on a case.ⁿ⁴³ In addition, if the DFEH does not issue an accusation within 150 days, it must notify the person claiming to be aggrieved that on his or her request the DFEH will issue a right-to-sue letter.ⁿ⁴⁴ If the person claiming to be aggrieved does not request the right-to-sue letter, the DFEH must issue the notice on completion of its investigation, and not later than one year after the complaint was filed.ⁿ⁴⁵

In contrast, the EEOC has no time limit for processing charges, and the EEOC may take several years to reach a determination, issue a right to sue notice, or bring a court action.ⁿ⁴⁶ A large "backlog" of old unresolved cases has been a persistent problem for the agency.

■ PRACTICE TIP:

In 1988, the average processing time for a charge filed in the Los Angeles office of the EEOC was approximately two years. It is a good practice to inquire about processing time and the hierarchy of processing priorities, and to ascertain if the particular charge is one that is entitled to priority processing.

An alternative available to a complainant who wishes to seek a Title VII judicial remedy but who wishes to avoid extended EEOC processing is to request an early right-to-sue letterⁿ⁴⁷ and to proceed to federal court. Such an option should only be pursued by a complainant who has counsel that is able to immediately prosecute the judicial action. *Commentary by Bill Lann Lee.*

[6] Availability of Counsel

The availability of legal counsel is another consideration that may influence the choice of forum. An aggrieved party who is not represented by counsel depends on the administrative agency to obtain relief. For such an individual, the possibility of obtaining an award of compensatory damages under the FEHA from the FEHC without the necessity of going to courtⁿ⁴⁸ may be the determining factor in choosing a state rather than a federal remedy.ⁿ⁴⁹ Although an aggrieved party may bring an action in state or federal court without being represented by an attorney, such a litigant faces an uphill battle.

Title VII and the ADA provide for appointment of counsel in certain cases. On application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for the complainant and may authorize the commencement of the action without the payment of fees, costs, or security.ⁿ⁵⁰ Appointment of counsel and waiver of fees are at the court's discretion, subject to consideration of efforts made by the aggrieved party to secure counsel, the aggrieved party's financial resources, and whether the aggrieved party's claim is meritorious.ⁿ⁵¹ There is no provision in California law for appointment of counsel in proceedings under the FEHA.

In addition to the Title VII provision for court appointment of counsel, the EEOC has made efforts to develop a private bar skilled in handling Title VII cases. Each EEOC district office is responsible for developing a "panel" of private attorneys who are available to review case files and provide legal assistance to aggrieved parties who may wish to file Title VII actions.ⁿ⁵² To become a member of a panel an attorney must complete EEOC Form 325 and must agree to make a decision to accept or reject a case referred by the EEOC within 10 days.ⁿ⁵³ The EEOC also provides educational materials to panel members and the private bar including draft complaints and interrogatories and a Title VII checklist for preparing a case.ⁿ⁵⁴ The DFEH does not provide assistance to aggrieved parties in securing private counsel.

■ PRACTICE TIP:

Although Title VII provides for the appointment of counsel at the discretion of the court, Congress has never appropriated funds to reimburse appointed counsel or to provide for their costs and expenses. Some district courts, such as the Northern District of California, have developed mechanisms for identifying counsel interested in such appointments. Local bar groups and civil rights organizations also may provide referrals. *Commentary by Bill Lann Lee.*

Legal Topics:

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

Civil Procedure
Venue
General Overview
Labor & Employment Law
U.S. Equal Employment Opportunity Commission
General Overview
Labor & Employment Law
Wage & Hour Laws
General Overview
Labor & Employment Law
Wage & Hour Laws
Statutory Application
Title VII of the Civil Rights Act of 1964
Public Health & Welfare Law
Housing & Public Buildings
Fair Housing

FOOTNOTES:

(n1)Footnote 1. *See* Fiscal Year 1988 Worksharing Agreement Between California Department of Fair Employment and Housing and the U.S. Equal Employment Opportunity Commission.

(n2)Footnote 2. 29 *C.F.R.* § 1601.13(a)(3),(4), (b); EEOC Compliance Manual (CCH) § 5.2. For discussion of worksharing agreement, *see* §§ 42.24, 42.63.

(n3)Footnote 3. EEOC Compliance Manual (CCH) § 5.2.

(n4)Footnote 4. EEOC Compliance Manual (CCH) § 6.7. For discussion, *see* §§ 42.25[3][c] and 42.71.

(n5)Footnote 5. *See Yellow Freight Sys. v. Donnelly* (1990) 494 U.S. 820, 821, 110 S. Ct. 1566, 108 L. Ed. 2d 834 .

(n6)Footnote 6. *See Gov. Code § 12965(b)*.

(n7)Footnote 7. *See Yellow Freight Sys. v. Donnelly* (1990) 494 U.S. 820, 821, 110 S. Ct. 1566, 108 L. Ed. 2d 834 .

(n8)Footnote 8. *See 42 U.S.C. § 2000e-5(f)(1)*.

(n9)Footnote 9. *See Gov. Code § 12965(b)*.

(n10)Footnote 10. *Gov. Code § 12926(d)*; *see Robinson v. Fair Employment & Hous. Comm'n* (1992) 2 Cal. 4th 226, 234-243, 5 Cal. Rptr. 2d 782, 825 P.2d 767 (number of employees on payroll is determinative of whether employer "regularly employs" five or more employees). For general discussion of coverage of FEHA, *see* Ch. 40, pt. B.

(n11)Footnote 11. *Gov. Code § 12940(j)*.

(n12)Footnote 12. *Gov. Code §§ 12926(d), 12940(j)*.

(n13)Footnote 13. *42 U.S.C. § 2000e(b)* (employers excluded include the U.S. government or corporations wholly owned by the U.S. government, Indian tribes, certain departments or agencies of the District of Columbia, and certain bona fide private membership clubs). For full discussion of employers covered and exempted under Title VII, *see* Ch. 40, pt. C.

(n14)Footnote 14. *29 U.S.C. § 630(b)*. For discussion of coverage of ADEA, *see* Ch. 40, pt. C.

(n15)Footnote 15. *42 U.S.C. § 12111(5)(A)*.

(n16)Footnote 16. *See 42 U.S.C. § 2000e(k)*.

(n17)Footnote 17. *See 29 C.F.R. § 1604.10(b)*.

(n18)Footnote 18. *See Gov. Code §§ 12926(p), 12945*.

(n19)Footnote 19. *Gov. Code § 12945(a)*.

(n20)Footnote 20. *Gov. Code § 12945(a)*.

(n21)Footnote 21. *Gov. Code § 12945(a)*.

(n22)Footnote 22. [Reserved]

(n23)Footnote 23. *See Peralta Community College Dist. v. Fair Employment & Hous. Comm'n* (1990) 52 Cal. 3d 40, 48, 276 Cal. Rptr. 114, 801 P.2d 357 ; *Commodore Home Sys., Inc. v. Superior Court* (1982) 32 Cal. 3d 211, 213, 216, 185 Cal. Rptr. 270, 649 P.2d 912 .

(n24)Footnote 24. *See Gov. Code § 12970(a)(3)*.

(n25)Footnote 25. *See Gov. Code § 12970(d)*.

(n26)Footnote 25.1. *See Gov. Code § 12970(c), (d)*.

(n27)Footnote 26. *See 42 U.S.C. § 1981a(a), (b)(3)*; *see also Pavon v. Swift Transp. Co* (9th Cir. 1999) 192 F.3d

902, 910 (Title VII's damage cap does not limit damages under theories such as 42 U.S.C. § 1981 and state common law claims; excess damages over statutory maximum could be attributed to non-Title VII claims).

(n28)Footnote 27. See *Altman v. Stevens Fashion Fabrics* (N.D. Cal. 1977) 441 F. Supp. 1318, 1320 ; see also 29 U.S.C. § 216(b).

(n29)Footnote 28. See *Hill v. Spiegel, Inc.* (6th Cir. 1983) 708 F.2d 233, 236 ; *Pfeiffer v. Essex Wire Corp.* (7th Cir. 1982) 682 F.2d 684, 688 ; *Slatin v. Stanford Research Institute* (4th Cir. 1979) 590 F.2d 1292, 1296 ; *Vazquez v. Eastern Air Lines, Inc.* (1st Cir. 1978) 579 F.2d 107, 112 ; *Dean v. American Sec. Ins. Co.* (5th Cir. 1977) 559 F.2d 1036, 1040 ; *Sant v. Mack Trucks, Inc.* (N.D. Cal. 1976) 424 F. Supp. 621, 622 ; but see *Hassan v. Delta Orthopedic Medical Group, Inc.* (E.D. Cal. 1979) 476 F. Supp. 1063, 1065 ; *Flynn v. Morgan Guaranty Trust Co. of N.Y.* (E.D.N.Y. 1979) 463 F. Supp. 676, 679 ; *Combes v. Griffin Television, Inc.* (W.D. Okla. 1976) 421 F. Supp. 841, 847 (allowing recovery under ADEA for pain and suffering).

(n30)Footnote 29. See 42 U.S.C. § 1981a(a), (b)(1).

(n31)Footnote 30. See 42 U.S.C. § 1981a(b)(3).

(n32)Footnote 31. See 42 U.S.C. § 1981a(b)(4).

(n33)Footnote 32. Gov. Code § 12928.

(n34)Footnote 33. Civil Code Section 51.7; see Ch. 40, § 40.12[2].

(n35)Footnote 34. Gov. Code § 12960.

(n36)Footnote 35. 42 U.S.C. § 2000e-5(e)(1); see also 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA). For detailed discussion of timeliness of EEOC charges and tolling of limitation periods, see § 42.62[3].

(n37)Footnote 36. State and local agencies are designated as "FEP agencies" or "deferral agencies" if the state anti-discrimination statute provides protection substantially equal to that afforded by Title VII. 42 U.S.C. § 2000e-5(c) (Title VII); 29 C.F.R. § 1601.70 (EEOC procedural regulation); see 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA).

(n38)Footnote 37. 42 U.S.C. § 2000e-5(c) (Title VII); see 42 U.S.C. § 12117 (operative July 26, 1992; procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA).

(n39)Footnote 38. Gov. Code § 12965(b). See *Salgado v. Atlantic Richfield Co.* (9th Cir. 1987) 823 F.2d 1322, 1324-1325, disapproved on other grounds, *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 81-82, 276 Cal. Rptr. 130, 801 P.2d 373 (§ 12695 statute of limitations is not jurisdictional and therefore subject to equitable tolling); *Downs v. Department of Water & Power* (1997) 58 Cal. App. 4th 1093, 1099-1102, 68 Cal. Rptr. 2d 590 (one-year time limit of Gov. Code § 12965(b) may be equitably tolled during pendency of administrative proceedings before EEOC); See also § 43.01[4].

(n40)Footnote 39. See Gov. Code § 12965(d), (e).

(n41)Footnote 40. 42 U.S.C. § 2000e-5(f)(1) (Title VII); see 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA). For discussion, see § 42.23[2].

(n42)Footnote 41. An accusation is equivalent to a complaint in a court proceeding and initiates the process that leads to an administrative hearing. see Gov. Code § 12965(a). For discussion of accusation, see § 42.32.

(n43)Footnote 42. *Gov. Code § 12965(a)*.

(n44)Footnote 43. DFEH Field Operations Directive No. 30(1/23/82).

(n45)Footnote 44. *Gov. Code § 12965(b)*. For discussion of right-to-sue letters, *see § 42.25[3][c]*.

(n46)Footnote 45. *Gov. Code § 12965(b)*.

(n47)Footnote 46. *See, e.g., Brown v. Continental Can Co. (9th Cir. 1985) 765 F.2d 810, 812* (six years from filing of charge until issuance of right to sue letter; *Equal Emp. Opportunity Comm'n v. Alioto Fish Co. (9th Cir. 1980) 623 F.2d 86* (suit filed by EEOC five years after charge filed); *EEOC v. Indiana Bell Telephone Co. (S.D. Ind. 1986) 641 F. Supp. 115, 117* (suit filed by EEOC nine years after charge filed); *Equal Emp. Opportunity Comm'n v. C&D Sportswear Corp. (M.D. Ga. 1975) 398 F. Supp. 300, 302* (suit filed six years after charge filed.)

(n48)Footnote 47. For form of right-to-sue letter issued on request, *see § 42.71[3][b]*.

(n49)Footnote 48. For discussion of available FEHC remedies under FEHA, *see § 42.39A*.

(n50)Footnote 49. For comparison of relief available under state and federal law, *see [3], above*.

(n51)Footnote 50. *42 U.S.C. § 2000e-5(f)(1)* (Title VII); *see 42 U.S.C. § 12117* (procedures set forth in *42 U.S.C. § 2000e-5* apply to ADA).

(n52)Footnote 51. *Darden v. Illinois Bell Tel. Co. (7th Cir. 1986) 797 F.2d 497, 501*; *Bradshaw v. Zoological Soc. of San Diego (9th Cir. 1981) 662 F.2d 1301, 1318-1320*.

(n53)Footnote 52. EEOC Compliance Manual (CCH) §§ 81.1-81.10.

(n54)Footnote 53. EEOC Compliance Manual (CCH) § 81.3(a),(e).

(n55)Footnote 54. EEOC Compliance Manual (CCH) § 81.6.



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part A. INTRODUCTION

3-42 California Employment Law § 42.03

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§ 42.03 Preclusive Effects of Administrative Adjudications and Court Judgments

[1] Res Judicata and Collateral Estoppel Generally

In determining whether to pursue a judicial or administrative remedy for employment discrimination, the complainant should also consider the impact of a determination in that forum on subsequent proceedings. Res judicata and collateral estoppel, or claim and issue preclusion, as they are respectively known,ⁿ¹ dictate the effect that a prior judgment has on a subsequent action. Res judicata precludes parties, or persons "in privity" with a party, from relitigating a cause of action that has been finally determined by a court of competent jurisdiction.ⁿ² Collateral estoppel bars the relitigation of issues rather than claims.ⁿ³ Collateral estoppel, or issue preclusion, has sometimes been referred to as a "secondary aspect" of the res judicata doctrine, and court decisions and commentators often do not distinguish between the two doctrines.ⁿ⁴

Under California law, res judicata precludes a plaintiff from litigating a claim if (1) it relates to the same primary right as a claim in a prior action, (2) the prior judgment was final and on the merits, and (3) the plaintiff was a party or in privity with a party in the prior action.ⁿ⁵ Collateral estoppel precludes a plaintiff from relitigating an issue if (1) the issue in the subsequent action is identical to that decided previously, (2) the prior judgment was final and on the merits, and (3) the plaintiff was a party or in privity with a party in the prior action.ⁿ⁶ In addition, the party against whom either doctrine is asserted must have had a full and fair opportunity to litigate the claim or issue in question.ⁿ⁷ Collateral estoppel also generally applies to prior administrative determinations when the agency acted in a judicial capacity and resolved disputed issues of fact that were properly before it and that the parties had an adequate opportunity to litigate.ⁿ⁸ For discussion of application of preclusion principles to prior administrative findings in the context of Title VII or Reconstruction Era Civil Rights actions, see discussions in [2][a][i] and [2][b][i], *below*, respectively.

For purposes of the res judicata requirement that the subsequent action be based on the same cause of action as that in the prior suit, the courts look to whether the same "primary right" is involved, not to the particular legal theory or label used in the litigation.ⁿ⁹ Thus, in an employment discrimination case, whether the cause of action relies on federal or

state anti-discrimination laws, the alleged injury is the same, and a second action may be precluded if the claim has already been fully litigated in another forum.¹⁰

In *Frank v. United Airlines, Inc.*,^{10.1} the Ninth Circuit held that a 1979 district court case brought on behalf of the class of past, present, and future flight attendants which had resulted in a finding that weight standards were not facially discriminatory but were discriminatorily applied, did not preclude the claims asserted in *Frank*.^{10.2} In the 1979 case, *Air Line Pilots Ass'n Int'l ("ALPA") v. United Air Lines, Inc.*,^{10.3} plaintiffs had claimed on behalf of a class of United flight attendants that United's 1977 weight policy discriminated against female flight attendants, in violation of Title VII. The district court certified a Rule 23(b)(2) class defined as all female flight attendants who are employed by United or who may become so employed in the future, and all former female flight attendants who were employed by United on or after October 14, 1971 and were suspended, removed from service, or terminated by United for failure to meet United's flight attendant weight standards.^{10.4} The district court in *ALPA* found that United's weight standards were not facially discriminatory, but that United had discriminated in applying those standards.^{10.5} After entry of judgment and while cross-appeals were still available, the parties settled the litigation. Plaintiffs agreed not to appeal the district court's holding that the 1977 weight policy was not facially discriminatory. The terms of the settlement were described in a letter to the district court, but the court was never asked to approve the settlement, as it would have been required to do under Rule 23(e) if the parties had entered into the same settlement prior to entry of judgment.

In *Frank*, plaintiffs sued United Airlines, Inc., on behalf of a class of female flight attendants to challenge the weight requirements United imposed upon flight attendants from 1980 to 1994, requirements based on sex, height, and age. Failure to maintain weight below the applicable maximum subjected a flight attendant to various forms of discipline, including suspension without pay and termination.^{10.6} The Ninth Circuit held that *Frank* was not precluded by *ALPA* because:^{10.7}

- Plaintiffs in *Frank* asserted claims based on alleged Title VII violations arising after 1980, and a claim arising after the date of an earlier judgment is not barred, even if it arises out of a continuing course of conduct that provided the basis for the earlier claim;^{10.8}
- The criterion in determining whether there is an identity of claims between the first and second adjudications, "whether the two suits arise out of the same transactional nucleus of facts," was not met because plaintiffs' Title VII claim is based on a different weight policy from that challenged in *ALPA*;^{10.9}
- Notice in *ALPA* was not sufficient under Rule 23 to preclude monetary claims in later suits, for the class in *ALPA* was certified and given notice as a Rule 23(b)(2) "injunction" class action, whereas the present suit was a Rule 23(b)(3) "damages" class action, which requires a higher standard of notice to the class that was not met in *ALPA*;^{10.10}
- The post-judgment settlement in *ALPA* was not incorporated into a judgment and therefore cannot have preclusive effect,^{10.11} but even if it were a judgment, it cannot be known whether it sufficiently protected the interests of the unnamed class members because a Rule 23(e) proceeding was not held; and
- The terms of the settlement in *ALPA* appear not to protect the interests of flight attendants, such as plaintiffs in this case, who might later have been subjected to discipline for failing to comply with United's post-settlement weight restrictions because the class representatives in *ALPA* failed to appeal the district court's decision that United's weight policy did not facially discriminate on the basis of sex, and elected, instead, to accept reinstatement and back pay. Female flight attendants who were then employed and had not previously been adversely affected by the weight limits, but who might have been so affected in the future, had an interest in appealing the district court's order on the legality of United's policy and no interest in obtaining reinstatement and back pay.

Application of the collateral estoppel doctrine frequently turns on whether or not the identical issue was adjudicated in the prior action. In *Garrett v. City and County of San Francisco*,ⁿ¹¹ for example, the facts involved a plaintiff who was fired from his job with the San Francisco Fire Department for allegedly having stolen property from the scene of a fire. He challenged the termination before the Civil Service Commission, which upheld the termination based on a finding that plaintiff had violated the Fire Department's rules. Plaintiff then sought judicial review, and the court of appeal held that the Civil Service Commission had not abused its discretion. Subsequently, the plaintiff brought a Title VII action in federal court, claiming that white employees who had violated Fire Department rules had not been as severely punished as he had been. The Ninth Circuit Court of Appeals concluded that the state court's review did not address the issue of race discrimination, and, for that reason, collateral estoppel did not preclude the plaintiff's subsequent federal Title VII action.ⁿ¹²

In another case,ⁿ¹³ the plaintiff challenged her termination before the city's civil service commission and, thereafter, filed an action in superior court alleging intentional infliction of emotional distress, sex discrimination under Title VIIⁿ¹⁴ and the FEHA,^{n14.1} violations of 42 U.S.C. §§ 1983 and 1985, and violation of public policy. The trial court dismissed all of the claims by demurrer and summary judgment. The appellate court sustained the dismissal of the emotional distress and public policy claims on the ground that both derived from the termination of the plaintiff and that the plaintiff had litigated her termination before the civil service commission to a final and binding conclusion. The appellate panel also sustained the dismissal of the Title 42 claims on the ground that they could have been raised before the commission. The appellate panel, however, reinstated the claims for sex discrimination on the grounds, among others, that the sex discrimination predated (and was not part of) the termination and that Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII claims.^{n14.2}

With regard to public employees, if internal remedies such as appeal to the civil service commission are available, a plaintiff must exhaust his or her administrative remedies first, but then proceed immediately to exhaust judicial remedies in order to prevent an administrative adjudication from becoming binding.^{n14.3} If the administrative finding is upheld or never challenged judicially, it may be binding on discrimination claims under the FEHA,^{n14.4} if all other requirements for issue preclusion are met.^{n14.5} For example, in *Risam v. County of Los Angeles*,^{n14.6} a county employee filed a grievance before the county Civil Service Commission to protest a demotion, allegedly in retaliation for sexual harassment complaints against supervisors. As part of his findings of fact and conclusions of law, the hearing officer decided that plaintiff had failed to present sufficient evidence to prove any violation of the ADA or FEHA. The employee did not file either timely objections or a petition for writ of administrative mandamus to challenge that conclusion. While the administrative hearing was ongoing, the employee filed a discrimination complaint with DFEH, alleging that she was demoted because of her sex, physical disability, and in retaliation for filing a complaint and protesting regarding discriminatory practices. The DFEH issued a right-to-sue letter, and the employee filed an action in state court. The court found that the previous administrative decision resulted in a final decision on the merits of the employee's claim for retaliatory demotion, which she could have--but did not--challenged by a petition for a writ of administrative mandate. The issue had been clearly before the hearing officer, and in light of the hearing officer's conclusion of law that the employee failed to present evidence sufficient to prove any violation of FEHA, it was implicit that he also made the factual finding that such evidence was not presented.^{n14.7}

The "privity" requirement "is a concept not readily susceptible to uniform definition."ⁿ¹⁵ Privity exists when one person's interests are so identified with another as to represent the same legal rightⁿ¹⁶ or when the relationship between the prior unsuccessful litigant is "sufficiently close" to justify application of the doctrine.ⁿ¹⁷ However, a person in privity with a party to a prior action is only bound by the earlier action if his or her interests were adequately represented.ⁿ¹⁸

Trujillo v. County of Santa Clara ⁿ¹⁹ addresses many of the issues that arise concerning res judicata and collateral estoppel in the employment discrimination context. In that case, the plaintiff had filed an administrative complaint with the DFEH, alleging that the County of Santa Clara had unlawfully terminated his employment for failing a

discriminatory exam. After a hearing, an administrative law judge found discrimination and awarded the plaintiff back pay through the date of the discharge. The FEHC adopted this order, except that it extended the award of back pay to the time of its decision. It refused to order the reinstatement that plaintiff requested. The County filed a petition for writ of mandate in superior court, and on review that court reversed the FEHC's decision, finding that no discrimination had occurred. The plaintiff did not appeal the superior court decision, but the FEHC did appeal. The court of appeal reversed the trial court's decision but awarded damages in a lower amount than the FEHC had ordered. Neither the County nor the plaintiff appealed this decision. However, before the conclusion of the state court proceedings, the plaintiff filed an action in federal court seeking, among other things, reinstatement, full damages, and attorney's fees under Title VII. The district court granted the County's summary judgment motion on the ground that res judicata barred the plaintiff's federal claims. Affirming the lower court's decision, the Ninth Circuit Court of Appeals declined to apply res judicata to the Title VII claim because the state court did not have jurisdiction over the Title VII claim,ⁿ²⁰ but held that certain issues in the federal action were precluded by collateral estoppel.ⁿ²¹ The court found privity between the plaintiff and the FEHC because the FEHC was clearly authorized to proceed against the employer on plaintiff's behalf, the plaintiff unquestionably had an interest in the outcome of the administrative proceedings, and the plaintiff was a party to the superior court proceedings because he responded to the petition as the real party in interest and filed a memorandum in support of his objections to both the County's petition and the FEHC's decision.ⁿ²²

■ PRACTICE TIP:

As further discussed in [2], below, res judicata and collateral estoppel apply only if there is an initial determination. Often there is no initial determination because the agency merely closes the files or a right-to-sue letter is issued prior to a determination being made. A complainant who anticipates an adverse determination may consider avoiding the determination by terminating the proceeding prior to an adverse determination (for example, requesting a right-to-sue letter)ⁿ²³ in order to preserve subsequent remedies.

It is also important to bear in mind that most administrative proceedings do not conclude with a determination as such. Most proceedings that reach the merits conclude with a prosecutorial assessment of probable cause to believe or not to believe that the claim is meritorious after an investigation. This is the case with EEOC probable cause finding and DFEH accusation decisions. There is no hearing as such comparable to a judicial proceeding. Such assessments do not constitute initial determinations with possible preclusive effects. Only FEHC adjudications constitute such determinations, and such adjudications are statistically rare. The practical scope of preclusion is, therefore, quite narrow.

Commentary by Bill Lann Lee.

[2] Preclusive Effect of State Proceedings

[a] On Title VII Proceedings

[i] Unreviewed Administrative Agency Determinations

The doctrines of claim and issue preclusion do not bar a plaintiff from bringing a Title VII action in federal court or an FEHA action in state court after obtaining a nonjudicially reviewed determination by the EEOC or a state administrative agency.ⁿ²⁴ The U.S. Supreme Court held in *University of Tennessee v. Elliott* ⁿ²⁵ that a prior unreviewed administrative proceeding does not preclude a later Title VII claim because it would not make sense for Congress to provide in Title VII that EEOC investigations must give substantial weight to state or local findings of factⁿ²⁶ if the federal court hearing the subsequent action would have to give preclusive effect to those same findings.ⁿ²⁷ In addition, the legislative history of Title VII clearly reflects Congress' intent to afford complaining parties the right to a trial de novo in federal court.ⁿ²⁸

However, with regard to actions under the Reconstruction civil rights statutes, Title 42 *United States Code sections 1981* and *1983*, the Supreme Court has held that fact-finding by administrative agencies acting in a judicial capacity

may have a preclusive effect, even if the administrative decision is not judicially reviewed.ⁿ²⁹

■ PRACTICE TIP:

A complainant who receives an adverse administrative determination must decide whether to seek judicial review of the determination or to seek an independent Title VII remedy unencumbered by the preclusive effect of the judicially-affirmed administrative determination. *Commentary by Bill Lann Lee.*

[ii] State Court Actions

Although an unreviewed administrative agency determination has no preclusive effect on a later Title VII court action,ⁿ³⁰ a state court judgment may bar a subsequent federal Title VII action.ⁿ³¹ In *Kremer v. Chemical Construction Corp.*,ⁿ³² the plaintiff had brought an administrative action before the state deferral agency, which concluded that the employer had not discriminated against plaintiff. A state trial court upheld that determination and plaintiff did not seek further review in state court, but instead, brought suit in federal court under Title VII. The Court held that under Title 28 *United States Code, Section 1738*, federal courts are required to give the same preclusive effect to a state court judgment as that judgment would have in the state in which it was rendered.ⁿ³³

Thus, the preclusive effect of a state court judgment in federal court depends on the law of the state in which the judgment was rendered.ⁿ³⁴ Under California law, superior court review of an FEHC decision, based on a petition for writ of mandate, is a final decision on the merits for purposes of collateral estoppel and res judicata.ⁿ³⁵

[b] On Reconstruction Era Civil Rights Actions

[i] Unreviewed Administrative Agency Determinations

In *University of Tennessee v. Elliott*,ⁿ³⁶ the U.S. Supreme Court held that, in actions under the Reconstruction Era civil rights statutes,ⁿ³⁷ federal courts must accord a state agency's fact-finding the same preclusive effect to which it would be entitled in state court whenever the agency acts in a judicial capacity and the parties have had an adequate opportunity to litigate the claim.ⁿ³⁸ Applying the principles enunciated in *Elliott*, the Ninth Circuit Court of Appeals has held that a plaintiff's Section 1983 civil rights claim brought in federal district court was barred by collateral estoppel because the same issues had been previously resolved in a state administrative proceeding from which the plaintiff could have sought judicial review by writ of mandate.ⁿ³⁹ A California court of appealⁿ⁴⁰ also held that a plaintiff's federal civil rights claims under Title 42 *United States Code, sections 1983 and 1985*, were precluded by res judicata because she failed to raise the issue at a hearing before the city civil service commission and did not seek administrative mandamus. The court found that the plaintiff was seeking to remedy the same primary right in court that was at stake at the administrative hearing, and her failure to raise the issue at the hearing or to seek administrative review rendered the issue final and binding.ⁿ⁴¹

[ii] State Court Actions

The United States Supreme Court has held that issues litigated in state court under the Reconstruction Era Civil Rights statutes, Title 42, *United States Code, Sections 1981, 1983, and 1985*, are entitled to the same collateral estoppel effect in a subsequent federal action that they would have been entitled to in courts of that state.ⁿ⁴² In *Migra v. Warren City School Dist. Bd. of Ed.*,ⁿ⁴³ the Court further held that petitioner's Section 1983 claim, which could have been, but was not actually, litigated in state court, was barred by principles of res judicata and could not be brought in federal court.

[c] On ADEA Actions

Relying on the rationale in *University of Tennessee v. Elliott*,ⁿ⁴⁴ the United States Supreme Court has held that judicially unreviewed findings of a state administrative agency also do not preclude subsequent ADEA proceedings.ⁿ⁴⁵

[3] Preclusive Effect of Judgment in Title VII Action on State Court Proceedings

A plaintiff who obtains a judgment or court-ordered settlement in a federal Title VII action cannot bring a subsequent FEHA civil action in state court based on the same events.ⁿ⁴⁶ The plaintiff in *Johnson v. American Airlines, Inc.*ⁿ⁴⁷ had been an unnamed class member in a Title VII class action in which a settlement was ordered pursuant to a consent decree. She had previously filed objections to the settlement and did not participate in the pay fund. Nonetheless, the California court of appeal held that res judicata barred her from pursuing a state remedy under the FEHA, explaining that the plaintiff could have challenged the settlement agreement by directly appealing the district court's order.ⁿ⁴⁸

Similarly, a Title VII judgment in federal court is a res judicata bar to a subsequent state-law claim for wrongful termination based on the same facts. Both actions involve the same primary right, namely the right to employment.ⁿ⁴⁹ For discussion of state-law wrongful termination claims, see Chapter 60.

[4] Preclusive Effect of Judgment in Action Brought by EEOC on Action Brought by Private Plaintiff

In actions brought by the Equal Employment Opportunity Commission ("EEOC") under Title VII of the Civil Rights Act of 1964 ("Title VII"),ⁿ⁵⁰ the EEOC is not a proxy for private plaintiffs. Thus, EEOC judgments do not automatically have res judicata effect on subsequent actions by private plaintiffs.ⁿ⁵¹ On the other hand, ADEA actions brought by the EEOC may bar subsequent state actions because the ADEA cuts off the aggrieved individual's right to sue once the EEOC brings an action.ⁿ⁵² However, one California court of appeal has held that if plaintiff files a state action before the EEOC files an ADEA action, the private plaintiff's right to sue does not automatically terminate,ⁿ⁵³ and res judicata does not necessarily apply.ⁿ⁵⁴ In *Victa v. Merle Norman Cosmetics, Inc.*,ⁿ⁵⁵ the court held the judgment in the EEOC case did not bar the previously-filed state action because the plaintiff was not in privity with the EEOC. That is, the plaintiff had no control over the EEOC's case and did not participate in it, other than to be available for deposition by the defendant, and the EEOC had pursued its case for the benefit of the public and not for the plaintiff's personal interest.ⁿ⁵⁶

For discussion of the EEOC's authority to bring civil actions for violation of federal discrimination laws, see § 42.73[1], [3].

Legal Topics:

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

Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil
ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataLabor & Employment LawDiscriminationGeneral
Overview

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Allen v. McCurry* (1980) 449 U.S. 90, 94 n.5, 101 S. Ct. 411, 66 L. Ed. 2d 308 .

(n2)Footnote 2. *Clark v. Leshner* (1956) 46 Cal. 2d 874, 880, 299 P.2d 865 ; *Johnson v. American Airlines, Inc.* (1984) 157 Cal. App. 3d 427, 431, 203 Cal. Rptr. 638 ; see also *Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal. App. 4th 454, 463, 24 Cal. Rptr. 2d 117 (plaintiff was not barred by res judicata from bringing state age discrimination action under FEHA after stipulated judgment against plaintiff in federal action brought by EEOC because no privity existed between plaintiff and EEOC).

(n3)Footnote 3. See, e.g., *Lawlor v. National Screen Service Corp.* (1955) 349 U.S. 322, 326, 75 S. Ct. 865, 99 L. Ed. 1122 ; *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal. 3d 865, 874, 151 Cal. Rptr. 285, 587 P.2d 1098 (en banc).

(n4)Footnote 4. *People v. Sims* (1982) 32 Cal. 3d 468, 477, n.6, 186 Cal. Rptr. 77, 651 P.2d 321 .

(n5)Footnote 5. *Trujillo v. County of Santa Clara* (9th Cir. 1985) 775 F.2d 1359, 1366 ; see *Slater v. Blackwood* (1975) 15 Cal. 3d 791, 795, 126 Cal. Rptr. 225, 543 P.2d 593 .

(n6)Footnote 6. *Trujillo v. County of Santa Clara* (9th Cir. 1985) 775 F.2d 1359, 1369 ; *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal. 3d 865, 874, 151 Cal. Rptr. 285, 587 P.2d 1098 .

(n7)Footnote 7. *Kremer v. Chemical Construction Corp.* (1982) 456 U.S. 461, 481, n.22, 102 S. Ct. 1883, 72 L. Ed. 2d 262 ; *Allen v. McCurry* (1980) 449 U.S. 90, 95, 101 S. Ct. 411, 66 L. Ed. 2d 308 .

(n8)Footnote 8. *People v. Sims* (1982) 32 Cal. 3d 468, 479, 186 Cal. Rptr. 77, 651 P.2d 321 , citing *United States v. Utah Construction and Mining Co.* (1966) 384 U.S. 394, 422, 86 S. Ct. 1545, 16 L. Ed. 2d 642 .

(n9)Footnote 9. *Johnson v. American Airlines, Inc.* (1984) 157 Cal. App. 3d 427, 432, 203 Cal. Rptr. 638 .

(n10)Footnote 10. *Johnson v. American Airlines, Inc.* (1984) 157 Cal. App. 3d 427, 432, 203 Cal. Rptr. 638 .

(n11)Footnote 10.1. *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845 .

(n12)Footnote 10.2. *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 851 .

(n13)Footnote 10.3. *Air Line Pilots Ass'n Int'l v. United Air Lines, Inc.*, (1979 E.D.N.Y.); 1979 U.S. Dist. LEXIS 11790, 26 Fair Empl. Prac. Cas. (BNA) 607 .

(n14)Footnote 10.4. *Air Line Pilots Ass'n Int'l v. United Air Lines, Inc.*, (1979 E.D.N.Y.); 1979 U.S. Dist. LEXIS 11790, 26 Fair Empl. Prac. Cas. (BNA) 607, 609 .

(n15)Footnote 10.5. *Air Line Pilots Ass'n Int'l v. United Air Lines, Inc.* (1979 E.D.N.Y.); 1979 U.S. Dist. LEXIS 11790, 26 Fair Empl. Prac. Cas. (BNA) 607, 615, 618, 621-622 .

(n16)Footnote 10.6. *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 847 .

(n17)Footnote 10.7. *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 851-853 .

(n18)Footnote 10.8. See *Lawlor v. Nation Screen Serv. Corp.* (1955) 349 U.S. 322, 328, 75 S. Ct. 865, 99 L. Ed. 1122 .

(n19)Footnote 10.9. See *Costantini v. Trans World Airlines* (9th Cir. 1982) 681 F.2d 1199, 1201-1202 .

(n20)Footnote 10.10. See *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 173, 94 S. Ct. 2140, 40 L. Ed. 2d 732

(n21)Footnote 10.11. See *Hydranautics v. Filmtec Corp.* (9th Cir. 2000) 204 F.3d 880, 885

(n22)Footnote 11. *Garrett v. City and County of San Francisco* (9th Cir. 1987) 818 F.2d 1515 .

(n23)Footnote 12. *Garrett v. City and County of San Francisco* (9th Cir. 1987) 818 F.2d 1515, 1519-1520 .

(n24)Footnote 13. See *Swartzendruber v. City of San Diego* (1992) 3 Cal. App. 4th 896, 908-911, 5 Cal. Rptr. 2d 64 .

(n25)Footnote 14. 42 U.S.C. § 2000e et seq.

(n26)Footnote 14.1. Gov. Code § 12940 et seq.

(n27)Footnote 14.2. *See Swartzendruber v. City of San Diego* (1992) 3 Cal. App. 4th 896, 908-911, 5 Cal. Rptr. 2d 64 .

(n28)Footnote 14.3. *Castillo v. City of Los Angeles* (2001) 92 Cal. App. 4th 477, 486, 111 Cal. Rptr. 2d 870 ; *Swartzendruber v. City of San Diego* (1992) 3 Cal. App. 4th 896, 5 Cal. Rptr. 2d 64 , *disapproved on other grounds*, *Johnson v. City of Loma Linda* (2000) 24 Cal. 4th 61, 72, 99 Cal. Rptr. 2d 316, 5 P.3d 874 .

(n29)Footnote 14.4. *Johnson v. City of Loma Linda* (2000) 24 Cal. 4th 61, 76, 99 Cal. Rptr. 2d 316, 5 P.3d 874 ; *Castillo v. City of Los Angeles* (2001) 92 Cal. App. 4th 477, 486, 111 Cal. Rptr. 2d 870 .

(n30)Footnote 14.5. *See, e.g., Castillo v. City of Los Angeles* (2001) 92 Cal. App. 4th 477, 484-487, 111 Cal. Rptr. 2d 870 (issue preclusion appropriate because city civil service had mature administrative process providing internal remedies satisfying due process requirements, employee suffered adverse finding in administrative process, and § 1094.5 petition was denied on merits).

(n31)Footnote 14.6. *Risam v. County of Los Angeles* (2002) 99 Cal. App. 4th 412, 121 Cal. Rptr. 2d 267 .

(n32)Footnote 14.7. *Risam v. County of Los Angeles* (2002) 99 Cal. App. 4th 412, 419-423, 121 Cal. Rptr. 2d 267 .

(n33)Footnote 15. *Clemmer v. Hartford Insurance Co.* (1978) 22 Cal. 3d 865, 875, 151 Cal. Rptr. 285, 587 P.2d 1098 .

(n34)Footnote 16. *Trujillo v. County of Santa Clara* (9th Cir. [Cal.] 1985) 775 F.2d 1359, 1367 .

(n35)Footnote 17. *Clemmer v. Hartford Insurance Co.* (1979) 22 Cal. 3d 865, 875, 151 Cal. Rptr. 285, 587 P.2d 1098 .

(n36)Footnote 18. *Trujillo v. County of Santa Clara* (9th Cir. [Cal.] 1985) 775 F.2d 1359, 1367, 1368 .

(n37)Footnote 19. *Trujillo v. County of Santa Clara* (9th Cir. [Cal.] 1985) 775 F.2d 1359 .

(n38)Footnote 20. *Trujillo v. County of Santa Clara* (9th Cir. [Cal.] 1985) 775 F.2d 1359, 1366 ; *see Valenzuela v. Kraft, Inc.* (9th Cir. [Cal.] 1984) 739 F.2d 434, 436 . The United States Supreme Court has since held that state courts have concurrent jurisdiction to hear Title VII claims. *see Yellow Freight System v. Donnelly* (1990) 494 U.S. 820, 821, 110 S. Ct. 1566, 108 L. Ed. 2d 834 .

(n39)Footnote 21. *Trujillo v. County of Santa Clara* (9th Cir. [Cal.] 1985) 775 F.2d 1359, 1369 .

(n40)Footnote 22. *Trujillo v. County of Santa Clara* (9th Cir. [Cal.] 1985) 775 F.2d 1359, 1367 .

(n41)Footnote 23. For form of request for right-to-sue letter, see § 42.71 [3][b].

(N42)Footnote 24. *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635, 645 ; *Kremer v. Chemical Construction Corp.* (1982) 456 U.S. 461, 470, fn. 7, 72 L. Ed. 2d 262 . 102 S. Ct. 1883 .

(n43)Footnote 25. *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635, 644 .

(n44)Footnote 26. *See 42 U.S.C. § 2000e-5(b).*

(n45)Footnote 27. *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635, 644 .

(n46)Footnote 28. *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635, 644 ; see *Kremer v. Chemical Construction Corp.* (1982) 456 U.S. 461, 470, fn. 7, 102 S. Ct. 1883, 72 L. Ed. 2d 262 ; *Chandler v. Roudebush* (1976) 425 U.S. 840, 863 n.39, 96 S. Ct. 1949, 48 L. Ed. 2d 416 .

(n47)Footnote 29. *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635 ; see discussion in [b][i], below.

(n48)Footnote 30. *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d. 635 ; see discussion in [i], above.

(n49)Footnote 31. *Kremer v. Chemical Construction Corp.* (1982) 456 U.S. 461, 476-478, 102 S. Ct. 1883, 72 L. Ed. 2d 262 .

(n50)Footnote 32. *Kremer v. Chemical Construction Corp.* (1982) 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 .

(n51)Footnote 33. *Kremer v. Chemical Construction Corp.* (1982) 456 U.S. 461, 466, 102 S. Ct. 1883, 72 L. Ed. 2d 262 .

(n52)Footnote 34. *Marrese v. American Academy of Orthopaedic Surgeons* (1985) 470 U.S. 373, 380-381, 105 S. Ct. 1327, 84 L. Ed. 2d 274 ; see also *Plaine v. McCabe* (9th Cir. 1986) 797 F.2d 713, 718 .

(n53)Footnote 35. *Trujillo v. County of Santa Clara* (9th Cir. 1985) 775 F.2d 1359, 1366 ; see *Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control* (1961) 55 Cal. 2d 728, 733, 13 Cal. Rptr. 104, 361 P.2d 712 ; *People v. Western Air Lines, Inc.* (1954) 42 Cal. 2d 621, 630, 268 P.2d 723 , appeal dismissed, 348 U.S. 859 (per curiam) (1954). See also *Takahashi v. Board of Education* (1988) 202 Cal. App. 3d 1464, 1473-1842, 249 Cal. Rptr. 578 (final determination on petition for writ of mandate by public school teacher challenging an adverse employment decision by school district's Commission of Professional Competence was res judicata, and thus plaintiff could not bring a subsequent private action under FEHA involving alleged violation of the same primary right).

(n54)Footnote 36. *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635 .

(n55)Footnote 37. See 42 U.S.C. §§ 1981, 1983, 1985.

(n56)Footnote 38. *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635, 646-647 .

(n57)Footnote 39. See *Eilrich v. Remas* (9th Cir. 1988) 839 F.2d 630, 632-635 ; cf. *Gjellum v. City of Birmingham, Ala.* (11th Cir. 1987) 829 F.2d 1056, 1070 (*Elliott* applies to issue preclusion rather than claim preclusion, and unreviewed state agency decisions do not receive claim preclusive effect in an action under 42 U.S.C. § 1983, regardless of whether a state court would bar § 1983 claim; however, issue preclusion may result from state agency fact-finding under *Elliott* standards); see also *Miller v. County of Santa Cruz* (9th Cir. 1994) 39 F.3d 1030, 1038 (plaintiff's Section 1983 claims were barred by both res judicata and collateral estoppel because procedures before administrative tribunal met procedural due process requirements and were thus "judicial" in nature and because de novo judicial review was available).

(n58)Footnote 40. See *Swartzendruber v. City of San Diego* (1992) 3 Cal. App. 4th 896, 908-910, 5 Cal. Rptr. 2d 64 .

(n59)Footnote 41. See *Swartzendruber v. City of San Diego* (1992) 3 Cal. App. 4th 896, 908-910, 5 Cal. Rptr. 2d 64 .

(n60)Footnote 42. *Allen v. McCurry* (1980) 449 U.S. 90, 97 & n.10 .

(n61)Footnote 43. *Migra v. Warren City School Dist. Bd. of Ed.* (1984) 465 U.S. 75, 83-84, 104 S. Ct. 892, 79 L. Ed. 2d 56 .

(n62)Footnote 44. *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635 ; see discussion in [a][i], above.

(n63)Footnote 45. *Astoria Fed. Sav. & Loan Ass'n v. Solimino* (1991) 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96, 103, 105-106 .

(n64)Footnote 46. *Johnson v. American Airlines, Inc.* (1984) 157 Cal. App. 3d 427, 432-433, 203 Cal. Rptr. 638 .

(n65)Footnote 47. *Johnson v. American Airlines, Inc.* (1984) 157 Cal. App. 3d 427, 203 Cal. Rptr. 638 .

(n66)Footnote 48. *Johnson v. American Airlines, Inc.* (1984) 157 Cal. App. 3d 427, 433, 203 Cal. Rptr. 638 .

(n67)Footnote 49. *Acuna v. Regents of University of California* (1997) 56 Cal. App. 4th 639, 649-651, 65 Cal. Rptr. 2d 388 (summary judgment on Title VII claims in federal court bars relitigation of same race and ethnicity discrimination claims under FEHA); *Gamble v. General Foods Corp.* (1991) 229 Cal. App. 3d 893, 896, 898, 901, 280 Cal. Rptr. 457 .

(n68)Footnote 50. 42 U.S.C. § 2000e et seq.

(n69)Footnote 51. See *General Telephone Co. v. EEOC* (1980) 446 U.S. 318, 326, 333, 100 S. Ct. 1698, 64 L. Ed. 2d 319 .

(n70)Footnote 52. See *E.E.O.C. v. U.S. Steel Corp.* (3d Cir. 1990) 921 F.2d 489, 494-495 ; 29 U.S.C. § 626(c)(1).

(n71)Footnote 53. 29 U.S.C. § 626(c)(1).

(n72)Footnote 54. *Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal. App. 4th 454, 466-467, 24 Cal. Rptr. 2d 117 .

(n73)Footnote 55. *Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal. App. 4th 454, 24 Cal. Rptr. 2d 117 .

(n74)Footnote 56. *Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal. App. 4th 454, 466-467, 24 Cal. Rptr. 2d 117 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part A. INTRODUCTION

3-42 California Employment Law §§ 42.04 through 42.19

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

[Reserved]

§§ 42.04[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.20

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.20 Fair Employment and Housing Commission

[1] Authority of Commission

Government Code Section 12935(a) and (b)ⁿ¹ authorizes the FEHC to hold hearings on accusations issued by the DFEH under the FEHA,ⁿ² the Unruh Civil Rights Act,ⁿ³ the Ralph Act,ⁿ⁴ *Civil Code sections 54, 54.1, or 54.2*, relating to the rights of disabled persons or persons with medical conditions to full and equal access to all public accommodations, and *Civil Code Section 51.5*, which prohibits discrimination in business transactions.ⁿ⁵ The FEHC also adjudicates complaints relating to the violation of *Government Code Section 11135*, which prohibits discrimination by contractors receiving state financial assistance, to the extent that the complaints relate to employment discrimination.ⁿ⁶ In addition, the FEHC has rule-making power to adopt, interpret, implement, and apply the provisions of the FEHA, regulate the conduct of hearings, and carry out all its other functions and duties.ⁿ⁷ These functions and duties include the publication of precedential opinions interpreting the FEHA,ⁿ⁸ the establishment of advisory committees and community outreach programs,ⁿ⁹ and the issuance of publications concerning discrimination.ⁿ¹⁰

The FEHC's quasi-judicial function commences on the filing of an accusation by the DFEH. The FEHC usually retains an administrative hearing officer (employed by the Office of Administrative Hearings) to conduct a hearing on the accusation pursuant to the Administrative Procedure Act.ⁿ¹¹ The FEHC has power to subpoena witnesses, compel witnesses' attendance at hearings,ⁿ¹² administer oaths, examine persons who testify, and require the production of any books or papers relating to any matter under investigation or in question before the FEHC.ⁿ¹³ As set forth in its procedural regulations, settlement agreements between the DFEH and a respondent, and the DFEH's withdrawal of an accusation after a case has been submitted to the FEHC for decision, must be approved by the FEHC.ⁿ¹⁴ The FEHC may also entertain a variety of motions before and after a hearing has commenced.ⁿ¹⁵

[2] Organizational Structure

The FEHC is composed of seven members, called commissioners, who are appointed by the Governor with the advice and consent of the Senate for four-year terms.ⁿ¹⁶ To conduct business, the FEHC must have a quorum of four commissioners.ⁿ¹⁷ A commissioner may serve for an unlimited number of terms, and there is no restriction on the

number of commissioners with a particular party affiliation as there is under Title VII.ⁿ¹⁸ A commissioner may not be removed from office before the expiration of his or her term other than for inefficiency, neglect of duty, misconduct, or malfeasance in office, and only after being given a written statement of the charges and an opportunity to be heard.ⁿ¹⁹ The FEHC employs an Executive Legal Affairs Secretary, a staff of attorneys, and other support personnel.ⁿ²⁰

Legal Topics:

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

Labor & Employment Law
Discrimination
General Overview
Public Health & Welfare Law
Housing & Public Buildings
Fair Housing

FOOTNOTES:

(n1)Footnote 1. *See also* 2 Cal. Code Reg. § 7285.5(a).

(n2)Footnote 2. *Gov. Code* §§ 12900-12996.

(n3)Footnote 3. *Civ. Code* § 51; *see Gov. Code* § 12948.

(n4)Footnote 4. *Civ. Code* § 51.7; *see Gov. Code* § 12948.

(n5)Footnote 5. *Gov. Code* § 12948. For further discussion, *see* Ch. 40.

(n6)Footnote 6. 22 Cal. Code Reg. § 98410.

(n7)Footnote 7. *Gov. Code* § 12935(a); *see* 2 Cal. Code Reg. §§ 7285.4 (regarding Commission's authority to promulgate rules and regulations).

(n8)Footnote 8. *Gov. Code* § 12935(h); 2 Cal. Code Reg. § 7285.5(c).

(n9)Footnote 9. *See Gov. Code* § 12935(g); 2 Cal. Code Reg. § 7285.7(b).

(n10)Footnote 10. *Gov. Code* § 12935(i).

(n11)Footnote 11. *See Gov. Code* § 12972(b); *see also Gov. Code* § 11500 *et seq.* (Administrative Procedure Act). For discussion of hearings before administrative law judges, *see* § 42.37. For discussion of the interrelationship between the FEHC and administrative law judges in the decision-making process, *see* § 42.39.

(n12)Footnote 12. For discussion of subpoenas and depositions of unavailable witnesses at hearing, *see* § 42.37[3].

(n13)Footnote 13. *Gov. Code* § 12935(f); 2 Cal. Code Reg. § 7285.6.

(n14)Footnote 14. 2 Cal. Code Reg. § 7416.

(n15)Footnote 15. *See* 2 Cal. Code Reg. § 7419. For discussion of pre- and post-hearing motions and procedures, *see* §§ 42.36 and 42.38, respectively.

(n16)Footnote 16. *Gov. Code* § 12903.

(n17)Footnote 17. *Gov. Code* § 12904.

(n18)Footnote 18. *See* 42 U.S.C. § 2000e-4(a) (providing that not more than three of the five members on the EEOC can be members of the same political party).

(n19)Footnote 19. *Gov. Code* § 12906.

(n20)Footnote 20. *2 Cal. Code Reg.* § 7285.3.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.21

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.21 Department of Fair Employment and Housing

[1] Authority to Investigate and Prosecute

Government Code section 12930(f) authorizes the DFEH to receive, investigate, and conciliate complaints alleging practices that are unlawful pursuant to the FEHA,ⁿ¹ the Unruh Civil Rights Act,ⁿ² the Ralph Civil Rights Act,ⁿ³ *Civil Code sections 54, 54.1, or 54.2*, relating to the rights of disabled persons or persons with medical conditions to full and equal access to all public accommodations, and *Civil Code § 51.5*, which prohibits discrimination in business transactions.ⁿ⁴ The DFEH also investigates complaints relating to the violation of *Government Code section 11135*, which prohibits discrimination by contractors receiving state financial assistance, to the extent that the complaints relate to employment discrimination.ⁿ⁵ In order to perform its functions, the DFEH has authority to appoint attorneys, investigators, conciliators, and other employees,ⁿ⁶ to adopt rules and regulations to carry out its duties,ⁿ⁷ and to obtain on request and use the services of all governmental departments and agencies.ⁿ⁸

In connection with the investigation of complaints, the DFEH has authority to do the following: (1) issue subpoenas to require the testimony of witnesses and/or the production of documents, and physical materials;ⁿ⁹ (2) administer oaths, examine witnesses under oath and take evidence, and take depositions and affidavits;ⁿ¹⁰ (3) issue written interrogatories;ⁿ¹¹ (4) request production of books, records, documents, and physical materials for inspection and copying;ⁿ¹² and (5) petition the superior courts to compel the appearance and testimony of witnesses or production of books, records, documents, and physical materials.ⁿ¹³ The DFEH may also issue accusations and prosecute them before the FEHC;ⁿ¹⁴ issue publications and results of investigations if doing so will promote good will and minimize or eliminate unlawful discrimination in employment;ⁿ¹⁵ investigate, approve, certify or decertify, monitor, and enforce nondiscrimination programs proposed by a contractor pursuant to *Government Code section 12990*;ⁿ¹⁶ and make annual reports to the Legislature of its activities and its recommendations.ⁿ¹⁷

In addition to its other duties, the DFEH may, on request by state or local public bodies or a person directly affected, assist in resolving disputes regarding discriminatory practices that impair rights guaranteed by state or federal laws or constitutions.ⁿ¹⁸ The DFEH may assist in such dispute resolution only when it determines that the dispute threatens

peaceful relations among citizens of the community, and its role is limited to investigation, conference, conciliation, and persuasion.ⁿ¹⁹

The DFEH may also use the efforts and experience of the Department of Rehabilitation in developing job opportunities for disabled persons.ⁿ²⁰ Finally, *Government Code section 12933* directs the DFEH to maintain liaison with city and county human relations commissions and provide nonconfidential information to them on request.

[2] Organizational Structure of DFEH

The DFEH is a department of the State and Consumer Services Agency.ⁿ²¹ The Director of the DFEH is appointed by the Governor, subject to confirmation by the Senate.ⁿ²²

Legal Topics:

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

Labor & Employment Law
Discrimination
General Overview
Public Health & Welfare Law
Housing & Public Buildings
Fair Housing

FOOTNOTES:

(n1)Footnote 1. *Gov. Code §§ 12900-12996*.

(n2)Footnote 2. *Civ. Code § 51; see Gov. Code § 12948*.

(n3)Footnote 3. *Civ. Code § 51.7; see Gov. Code § 12948*.

(n4)Footnote 4. *Gov. Code § 12948*.

(n5)Footnote 5. *22 Cal. Code Reg. § 98410*.

(n6)Footnote 6. *Gov. Code § 12930(c)*.

(n7)Footnote 7. *Gov. Code § 12930(e)*.

(n8)Footnote 8. *Gov. Code § 12930(d)*.

(n9)Footnote 9. *Gov. Code § 12930(g)(1)*. For discussion of pre-hearing discovery, *see §§ 42.27, 42.35*.

(n10)Footnote 10. *Gov. Code § 12930(g)(2)*. For discussion of pre-hearing discovery, *see §§ 42.27, 42.35*.

(n11)Footnote 11. *Gov. Code § 12930(g)(3)*. For discussion of pre-hearing discovery, *see §§ 42.27, 42.35*.

(n12)Footnote 12. *Gov. Code § 12930(g)(4)*. For discussion of pre-hearing discovery, *see §§ 42.27, 42.35*.

(n13)Footnote 13. *Gov. Code § 12930(g)(5)*. For discussion of pre-hearing discovery, *see §§ 42.27, 42.35*.

(n14)Footnote 14. *Gov. Code § 12930(h)*. For discussion of issuance of accusations, *see § 42.32*.

(n15)Footnote 15. *Gov. Code § 12930(i)*.

(n16)Footnote 16. *Gov. Code § 12930(j)*. For discussion of DFEH contract compliance programs, *see Chapter 44*.

(n17)Footnote 17. *Gov. Code § 12930(k)*.

(n18)Footnote 18. *Gov. Code § 12931*.

(n19)Footnote 19. *Gov. Code § 12931.*

(n20)Footnote 20. *See Gov. Code § 12932(a).*

(n21)Footnote 21. *Gov. Code § 12901.*

(n22)Footnote 22. *Gov. Code § 12901.*



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3-42 California Employment Law § 42.22

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.22 Overview of Complaint Procedure

FEHA proceedings are commenced by filing a complaint with the DFEH.ⁿ¹ Any person claiming to be aggrieved by a violation of the FEHA may file a complaint, as may the DFEH director or his or her authorized representative.ⁿ² After a complaint is filed, the DFEH, or the aggrieved party's attorney if represented by counsel, serves it on the respondent, accompanied by a notice requesting a response to the allegations and answers to specific questions.ⁿ³

Before beginning to investigate the complaint, a DFEH consultant assesses the case and determines to close it, to undertake predetermination settlement efforts, or to proceed with the investigation.ⁿ⁴ The DFEH may interview witnesses who have knowledge of the allegations in the complaint, either at the work site or elsewhere, and review statements and documents provided by the respondent in response to requests from the DFEH.ⁿ⁵ The DFEH also may use formal discovery procedures during the investigation, including subpoenas to compel the production of documents and/or the testimony of witnesses at a depositionⁿ⁶ and written interrogatories.ⁿ⁷

The complainant, respondent, or the DFEH may initiate settlement discussions at any stage of the investigation.ⁿ⁸ A settlement agreement must be in writing, and the agency has authority to bring a court action to enforce a settlement agreement.ⁿ⁹ The DFEH may close a case prior to completion of the investigation and a determination on the merits for a variety of reasons.ⁿ¹⁰ The DFEH may bring a civil action in court for preliminary relief if it determines, following a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of the FEHA.ⁿ¹¹ If after investigation is completed, the DFEH consultant determines that a complaint lacks merit, the DFEH closes the case and sends the complainant a right-to-sue letter.ⁿ¹² A right-to-sue letter may also be issued on request of the complainant at any time after the complaint is filed.ⁿ¹³ After a consultant determines that a complaint is valid, the DFEH may, but need not, attempt to "eliminate the unlawful employment practice by conference, conciliation, or persuasion."ⁿ¹⁴

If the DFEH finds that a case has merit and no settlement is reached, it is referred to the DFEH's legal staff for issuance of an accusation (the equivalent of a civil complaint), which initiates the administrative proceeding leading to a hearing before the FEHC.ⁿ¹⁵

After issuance of an accusation, the DFEH and the respondent may engage in limited discovery, and a hearing must be scheduled within 90 days after issuance of the accusation.ⁿ¹⁶ After the hearing, the FEHC must issue a written decision,ⁿ¹⁷ and if the FEHC determines that a violation of the FEHA has occurred, it can issue a cease and desist order, require hiring or reinstatement with back pay, award actual damages,ⁿ¹⁸ assess fines,ⁿ¹⁹ and order other relief.ⁿ²⁰ A respondent or complainant may seek judicial review of the FEHC's decision or order by writ of mandate.ⁿ²¹ The DFEH may petition the superior court to enforce the FEHC decision once the time limit for judicial review of the decision has passed.ⁿ²²

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Labor & Employment
Law Discrimination General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. *See Gov. Code § 12960.*

(n2)Footnote 2. *Gov. Code § 12960.* For discussion of complaint, *see § 42.23.*

(n3)Footnote 3. *See Gov. Code § 12962.*

(n4)Footnote 4. DFEH Complaint Process Flow Chart (March 9, 1988).

(n5)Footnote 5. For discussion of investigation, *see § 42.25[1].*

(n6)Footnote 6. *Gov. Code § 12963.1.*

(n7)Footnote 7. *Gov. Code § 12963.2(a).* For discussion of discovery during investigation, *see § 42.27.*

(n8)Footnote 8. For discussion of settlements, *see § 42.29.*

(n9)Footnote 9. *Gov. Code § 12964.*

(n10)Footnote 10. *See DFEH Enforcement Division Directive No. 8* (June 26, 1985) (case-closing categories and procedures). For discussion of case closure, *see § 42.30[2].*

(n11)Footnote 11. *Gov. Code § 12974.*

(n12)Footnote 12. *Gov. Code § 12965(b).*

(n13)Footnote 13. DFEH Enforcement Division Directive No. 7 (May 18, 1984). For discussion of right-to-sue letter, *see § 42.25[3][c].*

(n14)Footnote 14. *Gov. Code §§ 12963.7(a), 12965.* For discussion of conciliation, *see § 42.31.*

(n15)Footnote 15. *Gov. Code §§ 12965(a), 12967.* For discussion of accusation, *see § 42.32.*

(n16)Footnote 16. *Gov. Code § 12968.* For discussion of hearing, *see § 42.37; see DFEH v. State University--Hayward* (1988) FEHC Dec. No. 88-18, pp. 12-13 (compliance with *Gov. Code § 12968* is not jurisdictional prerequisite to administrative adjudication, but is statute of limitations subject to waiver, estoppel, and equitable tolling).

(n17)Footnote 17. *See Gov. Code § 11518.* For discussion of decision, *see § 42.39.*

(n18)Footnote 18. *See Gov. Code § 12970(a)(3), (b).*

(n19)Footnote 19. *See Gov. Code § 12970(c), (d).*

(n20)Footnote 20. *Gov. Code § 12970(a).* For detailed discussions of FEHC and judicial remedies available under the FEHA generally, *see § 42.01[2][a]* and Ch. 43, pt. A.

(n21)Footnote 21. *Gov. Code §§ 11523, 12972.* For discussion of judicial review, *see § 42.40.*

(n22)Footnote 22. *Gov. Code § 12973(b).*



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3-42 California Employment Law § 42.23

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.23 Initiating the Proceeding

[1] Filing of Complaint by Aggrieved Party

[a] Generally

An aggrieved party initiates a DFEH complaint by contacting one of several DFEH district offices in person, by telephone, or in writing to schedule an intake interview.ⁿ¹ The intake procedure begins with completion of a pre-complaint questionnaire by the aggrieved party,^{n1.1} followed by an interview in person or by telephone with a DFEH consultant, an employee responsible for accepting and investigating complaints. Based on the pre-complaint questionnaire and the intake interviews, the consultant determines whether to accept the complaint for filing by answering the following questions:

1. Is the complaint covered under one of the bases stated in the FEHA?
2. Did the alleged discriminatory act occur within jurisdictional time frames?
3. Did the employer employ the number of employees that would bring it within the jurisdiction of the FEHA?
4. Is the employer an entity other than a religious nonprofit organization?

If the response to any question is no, the consultant will not accept the complaint.ⁿ¹ If the DFEH refuses to accept a complaint for filing, the aggrieved party should request a Notice of Verification of Attempt to File.ⁿ² By making such a request, the aggrieved party may be able later to demonstrate that administrative remedies have been exhausted if he or she wishes to file a civil court action.

If the consultant decides that a complaint should be taken, he or she drafts it and sends it to the aggrieved party to be signed and verified. An attorney may verify a DFEH complaint for a client by subscribing the attorney's own name to

the complaint. The attorney may not verify by signing the client's name.^{n2.1} The California Court of Appeal has cautioned attorneys about verifying complaints unless they believe allegations to be true and they are acting in good faith, because attorneys are subject to penalties for perjury if they sign their name to DFEH complaints.^{n2.2}

Although the DFEH generally requires that complaints be filed on its own form, in some circumstances the DFEH will deem a complaint filed that is not on the official form. If timeliness is an issue, and it is likely that the filing period will expire before a complaint can be filed using the DFEH form (for example, if the DFEH receives a letter in the mail on the last day of the one-year complaint filing period), the DFEH may accept a written communication that contains the necessary information and file it as a complaint.ⁿ³ To be accepted as an alternative to the DFEH complaint form, the written communication must contain at a minimum the following information:ⁿ⁴

1. The name and address of the party complained about;
2. A description of the act complained of, including dates, sufficient to establish a presumption that the DFEH has jurisdiction; and
3. The name, address, and signature of the complainant.

If a written communication other than the regular complaint form is accepted to ensure timeliness, the DFEH will amend the complaint as soon as possible to comply with the DFEH's regular complaint procedures.ⁿ⁵

The official form that the DFEH uses for the complaint is the same as the EEOC charge form (EEOC Form 5), which is set forth at § 42.62[2][b].

The allegations of the DFEH complaint must give "fair notice" of the facts supporting the alleged discrimination so as to permit proper investigation of the charge. Therefore, it is critical that the complaint form cover all types of alleged discriminatory conduct and disabilities, as applicable. When alleging failure to accommodate under the FEHA, the DFEH charge must be based on the same disability that forms the basis for any subsequent legal action. Thus, for example, a plaintiff failed to exhaust administrative remedies when she attempted to shift the focus of the charge, which identified her sole physical disability as ulcerative colitis, to some form of mental disability (allegedly the root cause of the colitis) to avoid summary judgment.ⁿ⁶

■ PRACTICE TIP:

It is a good practice for counsel to discuss the nature and, particularly, the scope of a charge with the complainant prior to the complainant's interview at the DFEH, with a view toward subsequent proceedings. In some cases, counsel may wish to draft a complaint to assist DFEH personnel in understanding the nature and scope of the charge. If the charge involves a class claim, it should so state.

Commentary by Bill Lann Lee.

[b] Pre-Complaint Questionnaire

The pre-complaint questionnaire is a printed form obtainable from any DFEH office, or from the DFEH's website.^{n6.1} It is used by the DFEH to prepare the complaint. The aggrieved party completes the pre-complaint questionnaire, after which a DFEH consultant interviews him or her in person or by telephone.ⁿ⁷ If the interview is in person, the aggrieved party should bring the pre-complaint questionnaire to the interview. The actual complaint is drafted by the DFEH consultant. There is no statutory requirement for a pre-complaint questionnaire; its use is a matter of administrative procedure.

The pre-complaint questionnaire serves two main functions. First, it provides the agency with the information needed to determine whether the aggrieved party has stated an actionable claim under the FEHA and whether it should draft a

complaint. Second, the pre-complaint questionnaire provides the information necessary to initiate the investigation and to draft questions to the respondent in the Supplement to Notice of Filing of Employment Discrimination Complaint,ⁿ⁸ which is served with the complaint. Therefore, it is important that the questionnaire be filled out completely and that all available relevant information be provided.

In response to the question that requests the basis for discrimination, more than one item may be checked. For example, the aggrieved party may check both race and sex as bases for the alleged discrimination. Similarly, in response to the item that asks for the discriminatory conduct, more than one action may be checked: for example, fired and refused promotion. The form asks for the date of discrimination. If the discrimination has been continuing in nature, the most recent date should be given. For example, an aggrieved party who complains of unequal pay may state that this occurred "from the date of hire on May 2, 1985 and continuing until the present." The pre-complaint questionnaire need not be verified.

If the DFEH determines that it will file a complaint, the DFEH prepares the complaint based on the pre-complaint questionnaire and the interview with the aggrieved party. At the time they sign the complaint, complainants must file with the DFEH their telephone numbers, mailing addresses and addresses at which they can be personally served with documents and must notify the Department of any changes of addresses and telephone numbers during the investigation and administrative adjudication of the complaint and until payment of any judgment is complete.^{n8.1}

[2] Timeliness of Complaint

An aggrieved party must file a DFEH complaint within one year from the date on which the alleged unlawful employment practice occurred. However, the filing period may be extended for (1) 90 days if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of its occurrence, (2) one year following a rebutted presumption of the identity of the person's employerⁿ⁹ to allow the person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer, (3) one year from the date the person aggrieved by an alleged violation of the Ralph Civil Rights Act--guaranteeing the right to be free from violence because of specific characteristics^{n9.1}--becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation, or (4) one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.ⁿ¹⁰ It is not permissible to file a complaint with the DFEH after the foregoing limitations period has expired.ⁿ¹¹ but at least one federal court has held that failing to file a timely complaint with a state agency does not preclude filing a Title VII charge with the EEOC, as long as the EEOC charge is timely under federal law.ⁿ¹² For a discussion relating to the timely filing of EEOC complaints in "deferral states" like California, *see* §§ 42.24, 42.63[3][a], and 42.63.

When an employee voluntarily pursues an internal administrative remedy prior to filing a complaint under the FEHA, the statute of limitations on the FEHA claim is subject to equitable tolling.ⁿ¹³ Equitable tolling applies even when the plaintiff voluntarily terminates the administrative proceeding.ⁿ¹⁴

The FEHC has held that the time limit for filing a complaint with the DFEH is subject to equitable tolling when the DFEH, through no fault of the complainant, misleads him or her regarding filing obligations, commits errors in processing the complaint, or improperly discourages or prevents the complainant from filing at all.ⁿ¹⁵ In *DFEH v. Cairo*,ⁿ¹⁶ the complainant and her sister contacted a DFEH district office regarding the complainant's alleged termination from her job because she suffered from epilepsy. Based on these conversations and a letter from complainant's physician, the DFEH consultant made a determination that the case had no merit and decided not to take a complaint from her. The consultant did not tell complainant that she could file a complaint, nor did she schedule an interview for complainant to file a complaint. More than one year following her termination, complainant went to a private attorney who convinced the DFEH to permit complainant to file a complaint. In these circumstances, the FEHC

concluded "that the time limit for filing complaints must ... be subject to exception where essential justice demands it" and held that the one-year time limit for filing a complaint should be equitably tolled and the complaint be deemed timely because complainant had done all she could to file a complaint.¹⁷

The FEHC has held that in the case of continuing violations of the FEHA, the one-year time period for filing a DFEH complaint begins to run each time a new violation of the FEHA occurs. For discussion of the continuing violation doctrine as applied in FEHA actions, *see* § 43.01[4][a][ii].¹⁸⁻¹⁹

[3] Complainant's Request to Rescind Complaint Prior to Service

After the filing of the complaint, but before the DFEH serves it, the complainant may decide not to proceed and request that the respondent not be notified that a charge has been filed. If the complaint has not been served, the DFEH will honor the request and rescind (rather than close) the complaint. When the case was sent for dual filing with the EEOC, the DFEH will contact the EEOC State and Local Coordinator by telephone and request that the EEOC stop processing the complaint as well.²⁰ The rescission of the complaint does not fulfill any exhaustion of administrative remedies requirements.

[4] Service on Respondents

Upon the filing of a complaint,^{20.1} the DFEH must serve on the respondent an "accusation package."^{20.2} The package must include, but is not limited to, the following documents:^{20.3}

- A copy of the accusation.
- A copy of the underlying complaint that is the subject of the accusation.
- A copy of the FEHC's procedural regulations accompanied by a statement that those regulations are the governing procedure for administrative adjudication before the FEHC.
- A copy of a subpoena and a subpoena duces tecum form with instructions for their use.
- A copy of the DFEH's Statement to Respondents.
- A Notice of Defense form.^{20.4}
- A notice of the right to request, as needed, an interpreter or reasonable accommodation.
- If applicable under *Gov. Code* § 12965(c),^{20.5} a statement regarding respondent's right to elect to transfer the proceedings to court in lieu of administrative adjudication, and a form notice to transfer proceedings to court.
- A notice asking the respondent to consent to electronic, rather than stenographic, reporting of the proceedings at hearing.
- A copy of the DFEH's notice informing respondents and complainants of their obligation to keep the Department informed of any change of mailing address or telephone number.
- A Notice of Hearing or Notice of Impending Hearing.
- A proof of service specifying that all of the above documents have been served.

The DFEH must cause any verified complaint to be served on the employer personally or by certified mail.ⁿ²¹ The DFEH's failure to serve the employer is not a jurisdictional bar to a civil action by the complainant when the complainant is unrepresented by counsel.^{n21.1} However, if the person claiming to be aggrieved by an alleged unlawful practice hires or retains private counsel, the private counsel, not the DFEH, must cause the verified complaint to be served on the employer personally or by certified mail.^{n21.2} The complainant need not serve the administrative complaint on the respondent if the complainant elects a civil action rather than an administrative investigation, and the DFEH issues a right-to-sue letter.^{n21.3}

In either event, service must be made at the time of initial contact with the employer, or within 60 days, whichever first occurs.^{n21.4} The DFEH takes the position that section 12962 requires only that the DFEH *initiate* service within that time period and not that the service be actually *received* within that time.ⁿ²²

At the discretion of the director of the DFEH, the complaint may omit the name of the complaining party, unless the complaint is filed by the director or his or her authorized representative.ⁿ²³

When serving a complaint on a respondent, the DFEH must notify the respondent in writing of the following:ⁿ²⁴

- A complaint has been filed against it.
- It is required to file with the DFEH its telephone number, mailing address and address at which it can be personally served documents.
- It must notify the DFEH of any changes of address or telephone number during the investigation and administrative adjudication of the complaint and until payment of any judgment is complete.

[5] Class Action Complaints

Government Code section 12961 provides that a complainant or the DFEHⁿ²⁵⁻²⁹ director may file a complaint on behalf of a group or class alleging a violation of the FEHA. A class action may be brought when an unlawful practice adversely affects, in a similar manner, a group or class of persons of which the complainant is a member.ⁿ³⁰ A class action may also be brought if such an unlawful practice raises questions of law or fact that are common to such a group or class.ⁿ³¹ When a complainant wishes to file a class complaint, the DFEH consultant obtains the following information in addition to that required for other complaints: (1) how or why the respondent's alleged unlawful practice affects others in addition to the complainant; and (2) the names, addresses, telephone numbers, and protected group status of other persons affected by the unlawful employment practice.ⁿ³² Even if the complainant wishes to file a class complaint and includes language alleging injury to a class, the director of the DFEH has discretion to determine whether the agency will investigate and pursue the complaint as a class action complaint.ⁿ³³ The determination to treat a complaint as a group or class complaint must be made and the respondent so notified in writing within one year of filing the complaint.ⁿ³⁴ The DFEH may issue an accusation relating to a group or class complaint within two years of the date of filing the complaint rather than one year, which is the limitation period for individual complaints other than complaints alleging a violation of *Civil Code Section 51.7*.ⁿ³⁵

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Labor & Employment
Law Discrimination General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. An overview of the employment complaint process of the DFEH is available on the Internet at <http://www.dfeh.ca.gov/complaintEmployment.asp>. An employment complaint flowchart is available at <http://www.dfeh.ca.gov/complaintEmploymentflow.asp>. The DFEH also has a directive specifically for telephone interviews. See DFEH Enforcement Division Directive No. 201, § 4(A), Telephone Interviews, October 1, 1998, available on-line at <http://www.dfeh.ca.gov/Directives/e201.pdf>.

(n2)Footnote 1.1. For discussion of the pre-complaint questionnaire, see [b], below.

(n3)Footnote 1. DFEH Complaint Process Flow Chart (May 9, 1986).

(n4)Footnote 2. DFEH Form 100-11 (Jan. 1987).

(n5)Footnote 2.1. *Blum v. Superior Court* (2006) 141 Cal. App. 4th 418, 422-428, 45 Cal. Rptr. 3d 902.

(n6)Footnote 2.2. *Blum v. Superior Court* (2006) 141 Cal. App. 4th 418, 428, 45 Cal. Rptr. 3d 902.

(n7)Footnote 3. DFEH Enforcement Division Directive No. 28 (Nov. 8, 1982).

(n8)Footnote 4. DFEH Enforcement Division Directive No. 28 (Nov. 8, 1982).

(n9)Footnote 5. DFEH Enforcement Division Directive No. 28 (Nov. 8, 1982).

(n10)Footnote 6. *Hobson v. Raychem Corp.* (1999) 73 Cal. App. 4th 614, 626-632, 86 Cal. Rptr. 2d 497 (because plaintiff acknowledged that ulcerative colitis did not prevent her from performing her job, condition was not qualifying disability as matter of law).

(n11)Footnote 6.1. See <http://www.dfeh.ca.gov/Publications/DFEH%20600-03i.pdf>. The form is also available in Spanish. See <http://www.dfeh.ca.gov/Publications/DFEH%20600-03S.pdf>.

(n12)Footnote 7. DFEH Complaint Process Flow Chart (March 9, 1988).

(n13)Footnote 8. For discussion see [4][c], below.

(n14)Footnote 8.1. 2 Cal. Code Reg. § 7403.

(n15)Footnote 9. Gov. Code § 12928.

(n16)Footnote 9.1. Civil Code Section 51.7; see Ch. 40, § 40.12[2].

(n17)Footnote 10. Gov. Code § 12960.

(n18)Footnote 11. See *International Union etc. Engineers v. Fair Emp. Practice Com.* (1969) 276 Cal. App.2d 504, 510, 81 Cal. Rptr. 47 (construing former Lab. Code § 1422 (Fair Employment Practice Act)).

(n19)Footnote 12. See *Maurya v. Peabody Coal Co.* (6th Cir. 1987) 823 F.2d 933, 935; see also *Mohasco Corp. v. Silver* (1980) 447 U.S. 807, 816 n.19, 100 S. Ct. 2486, 65 L. Ed. 2d 532 (Congress included no express requirement under Title VII that state proceedings be initiated by any specific date).

(n20)Footnote 13. *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal. 4th 88; 194 P.3d 1026; 84 Cal. Rptr. 3d 734; 2008 Cal. LEXIS 12468, *8-*36.

(n21)Footnote 14. *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal. 4th 88; 194 P.3d 1026; 84 Cal. Rptr. 3d 734; 2008 Cal. LEXIS 12468, *36-*44.

(n22)Footnote 15. DFEH v. Cairo (1984) FEHC Dec. No. 84-04, at pp. 10-11. *See also Holland v. Union Pacific Railroad Co.* (2007) 154 Cal. App. 4th 940, 945-947, 65 Cal. Rptr. 3d 145 (under established doctrine of equitable estoppel, employee's untimely administrative complaint was not bar to his action at law, because he diligently pursued his administrative remedy and reasonable relied on conduct of administrative officials in believing limitations period was not concern).

(n23)Footnote 16. DFEH v. Cairo (1984) FEHC Dec. No. 84-04.

(n24)Footnote 17. DFEH v. Cairo (1984) FEHC Dec. No. 84-04, at pp. 10-11.

(n25)Footnote 18-19. [Reserved]

(n26)Footnote 20. *See* DFEH Enforcement Division Directive No. 500, § 4(E), Rescinded Complaints, May 26, 2006, available on-line at <http://www.dfeh.ca.gov/Directives/500.pdf>.

(n27)Footnote 20.1. *Note:* A complaint is referred to as "an accusation" in the Cal. Code Regs.

(n28)Footnote 20.2. 2 Cal. Code Reg. § 7408(h). The accusation and accusation package must be served on each respondent in accordance with 2 Cal. Code Reg. §§ 7406, 7407. 2 Cal. Code Reg. § 7408(h), (i). The DFEH must also serve the package on the complainant. 2 Cal. Code Reg. § 7408(i).

(n29)Footnote 20.3. 2 Cal. Code Reg. § 7408.

(n30)Footnote 20.4. For discussion of the Notice of Defense, *see* § 42.32[4], *below*.

(n31)Footnote 20.5. For discussion, *see* § 42.32[7], *below*.

(n32)Footnote 21. Gov. Code § 12962(a).

(n33)Footnote 21.1. *See Wasti v. Superior Court* (2006) 140 Cal. App. 4th 667, 673-674, 44 Cal. Rptr. 3d 625 (amendment to FEHA requiring service on employer by attorney was not bar to civil action by complainant, where complainant was unrepresented by counsel when she filed administrative complaint with DFEH and elected to pursue civil action rather than administrative action, and DFEH issued right-to-sue letter).

(n34)Footnote 21.2. Gov. Code § 12962(b).

(n35)Footnote 21.3. *See Wasti v. Superior Court* (2006) 140 Cal. App. 4th 667, 673, 44 Cal. Rptr. 3d 625 (construed in context of FEHA as a whole, 2003 amendments were intended to eliminate service requirement where employee opts to seek right-to-sue letter).

(n36)Footnote 21.4. Gov. Code § 12962(c).

(n37)Footnote 22. Supplemental Memorandum (August 12, 1987) to DFEH Enforcement Division Directive No. 6 (September 23, 1986).

(n38)Footnote 23. Gov. Code § 12962(c). This might be done if the complainant fears retaliation.

(n39)Footnote 24. *See* 2 Cal. Code Reg. § 7403.

(n40)Footnote 25-29. [Reserved]

(n41)Footnote 30. *See* Gov. Code § 12961.

(n42)Footnote 31. *See* Gov. Code § 12961.

(n43)Footnote 32. DFEH Enforcement Division Directive No. 14 (April 20, 1984). *See also* DFEH Enforcement Division Directive No. 226, October 1, 1998, available on-line at <http://www.dfeh.ca.gov/Directives/e226.pdf>.

(n44)Footnote 33. *See Gov. Code §§ 12961, 12965(a).*

(n45)Footnote 34. *Gov. Code § 12965(a).*

(n46)Footnote 35. *See Gov. Code § 12965(a).*



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.24

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.24 Deferral to Federal Agencies

The EEOC and the DFEH are parties to a worksharing agreement pursuant to which copies of all complaints received by one agency are sent to the other for filing.ⁿ¹ The agreement provides that the agency with which the complaint is originally filed must process it if it falls within the jurisdiction of both agencies. If one agency lacks jurisdiction, it will forward the complaint to the other for processing.ⁿ² Complainants and respondents are told which agency will process a complaint.

Because the FEHA's pregnancy discrimination provisions--aside from those involving pregnancy leave and those involving requests by pregnant employees for reasonable accommodation or to transfer to less strenuous or hazardous positions--did not apply to employers of 15 or more employees,ⁿ³ the DFEH had deferred most pregnancy-related complaints to the EEOC for processing under Title VII.ⁿ⁴

The DFEH also defers, for EEOC processing, all Title VII complaints within the jurisdiction of the EEOC that are filed more than 240 days but less than 300 days after the alleged violation.ⁿ⁵ In the absence of this practice, Title VII would prohibit the EEOC from considering such a charge for 60 days, during which the DFEH, as a state "deferral agency" has an exclusive opportunity to process it.ⁿ⁶ However, if the EEOC had to wait those 60 days, the EEOC "filing" would occur more than 300 days after the violation occurred, which is beyond the expiration of the Title VII limitations period.ⁿ⁷ The result of this late filing would be that the EEOC would never obtain jurisdiction, and the complainant would lose his or her right to sue in federal court.ⁿ⁸ However, a complaint filed with the EEOC after 240 days is timely if the state agency terminates its proceedings before the 300-day period expires.ⁿ⁹ Thus, when a complaint over which the EEOC and DFEH have concurrent jurisdiction is filed with the DFEH more than 240 days from the date of the alleged violation, the DFEH waives its rights and transmits the complaint directly to the EEOC in order to preserve the complainant's right to sue in federal court.ⁿ¹⁰ The Supreme Court has held that such a waiver "terminates" the state administrative proceedings for purposes of giving the EEOC jurisdiction over a claim filed within the 300-day period.ⁿ¹¹ For discussion of timeliness of filing of state complaint, *see* § 42.23 [2]. For discussion of timeliness of filing of federal complaint, *see* § 42.62 [3], and for coverage of federal deferral to state agencies, *see* § 42.63.

Legal Topics:

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

Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. EEOC Compliance Manual (CCH) § 5.2; *see* Fiscal Year 1988 Worksharing Agreement Between California DFEH and U.S. EEOC.

(n2)Footnote 2. EEOC Compliance Manual (CCH) § 5.4.

(n3)Footnote 3. *See* former *Gov. Code* § 12945(b)(2), (c), (e).

(n4)Footnote 4. *See* EEOC Compliance Manual (CCH) § 5.4.

(n5)Footnote 5. *See* DFEH Enforcement Division Directive No. 16 (Jan. 18, 1982).

(n6)Footnote 6. *See* 42 U.S.C. § 2000e-5(c).

(n7)Footnote 7. *See Mohasco Corporation v. Silver* (1980) 447 U.S. 807, 816-817, 100 S. Ct. 2486, 65 L. Ed. 2d 532 .

(n8)Footnote 8. *See Mohasco Corporation v. Silver* (1980) 447 U.S. 807, 817, 100 S. Ct. 2486, 65 L. Ed. 2d 532 .

(n9)Footnote 9. *See Mohasco Corporation v. Silver* (1980) 447 U.S. 807, 814 n. 16, 100 S. Ct. 2486, 65 L. Ed. 2d 532 .

(n10)Footnote 10. *See* DFEH Enforcement Division Directive No. 16 (Jan. 18, 1982).

(n11)Footnote 11. *See EEOC v. Commercial Office Products Co.* (1988) 486 U.S. 107, 114-122, 108 S. Ct. 1666, 100 L. Ed. 2d 96 (waiver of deferral by Colorado fair employment agency constituted "termination" for purposes of 42 U.S.C. § 2000e-5(c)).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.25

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.25 Investigation

[1] Authority to Conduct Investigation

The DFEH has authority to conduct an investigation under *Government Code section 12963*, which mandates a prompt investigation after the filing of any complaint alleging facts sufficient to constitute a violation of the FEHA.

[2] Assignment to Consultant

In general, the consultant who interviews the complainant during intake and drafts the complaintⁿ¹ also handles the case through the remainder of the administrative process. This practice is generally followed in DFEH offices statewide, but is not set forth in any written policy of the agency. A complainant or respondent who is dissatisfied with the performance of the consultant assigned to the case may contact the head of each DFEH enforcement office, known as the "district administrator."

[3] Predetermination

[a] Generally

Before the assigned consultant begins an investigation, he or she may make a predetermination to close the case or undertake settlement efforts.ⁿ² Usually within a short time from the service of a complaint, the consultant will contact the respondent by telephone to determine whether a settlement can be obtained.ⁿ³ If settlement efforts are unsuccessful, either because the respondent makes no offer or because the complainant refuses the offer, the investigation continues.ⁿ⁴ At this stage, the case may be closed for the following reasons: (1) the consultant concludes that the DFEH has no jurisdiction over the complaint or that the case should be waived to the EEOC; or (2) the complainant withdraws the complaint, elects court action, refuses to cooperate, cannot be contacted, or provides insufficient evidence for the DFEH to proceed.ⁿ⁵

Prior to closing the case for insufficient evidence, the consultant must inform the complainant of this intention and give

the complainant 14 days in which to respond.ⁿ⁶ⁿ⁷

[b] Request for Authorization to File a Lawsuit

After filing a complaint with the DFEH, a complainant may decide to ask the DFEH to discontinue proceedings and issue a right-to-sue letter, allowing the complainant to proceed to court.ⁿ⁸ If the DFEH terminates its proceedings, it must notify the respondent without undue delay.ⁿ⁹

[c] Issuance of Right-to-Sue Letter

Government Code Section 12965(b) provides that if an accusation is not issued within 150 days after a complaint is filed or if the DFEH earlier determines not to issue an accusation, the DFEH must promptly notify in writing the person claiming to be aggrieved that the DFEH will issue on his or her request a right-to-sue notice indicating his or her right to bring a civil action under the FEHA.ⁿ¹⁰ If the person claiming to be aggrieved does not request a right-to-sue notice, the DFEH must in any case issue the notice on completion of its investigation, and not later than one year after the complaint was filed.ⁿ¹¹

If the DFEH issues a right-to-sue letter and then rescinds it, the aggrieved employee's failure to obtain a second right-to-sue letter does not preclude a finding that he or she exhausted her administrative remedies. Thus, in *Grant v. Comp USA, Inc.*,ⁿ¹² under *Gov. Code § 12965(b)*, a formerⁿ¹³⁻¹⁴ employee's right to sue arose by operation of law when the DFEH failed to resolve the matter within one year from the time she filed her administrative complaint. The former employee's failure to obtain a second right-to-sue letter after the DFEH rescinded the first one in the course of reopening her case did not preclude a finding that she exhausted her administrative remedies.ⁿ¹⁵

[4] Priority Processing

As a general rule, the DFEH processes complaints on a first-come, first-served basis. However, because the administrative process from intake through FEHC decision takes at least two yearsⁿ¹⁶ and the investigation normally does not commence until six to ten months after a complaint is filed, certain types of complaints receive "priority status" to allow for special, expedited handling by the assigned consultant.ⁿ¹⁷

At present, complainants who allege that they have a terminal illness, such as AIDS or cancer,ⁿ¹⁸ or who bring retaliation complaints, receive priority treatment if certain conditions are met.ⁿ¹⁹ Retaliation complaints are designated priority cases if: (1) the retaliation occurred because the complainant previously filed a complaint with the DFEH or participated in an investigation, and (2) the alleged retaliation occurred within 180 days of the filing of the previously-filed complaint or within 180 days of the person's participation in a DFEH investigation.ⁿ²⁰

In addition to these agency-wide priority cases, the district administrator may designate any case a priority case, or may approve processing "out of order." Any exceptions to the DFEH priority procedures must have justification. Some types of complaints that may be appropriate for priority treatment include (1) class action complaints, (2) complaints concerning personnel practices that adversely affect eight or more persons, and (3) complaints that are one of numerous complaints against the same respondent.ⁿ²¹

If the complaint is of a priority nature, the consultant must investigate the allegations and submit an investigative report recommending a determination within 60 days of the filing date.ⁿ²²

■ PRACTICE TIP:

If the complainant's charge is entitled to priority processing, the complainant should bring it to the attention of the DFEH at the earliest opportunity. *Commentary by Bill Lann Lee.*

[5] On-Site Investigation

During an investigation, the DFEH consultant may find it useful to conduct part of the inquiry at the site of the alleged discriminatory conduct in order to review personnel records of the complainant and other employees and other relevant business records, to interview supervisory and nonsupervisory personnel,ⁿ²³ and to actually view the physical layout of respondent's facility. For example, the consultant may need to tour the place of employment in order to evaluate the merits of respondent's defense that it cannot reasonably accommodate a physically handicapped individual,ⁿ²⁴ or to assess whether respondent has properly invoked a bona fide occupational qualification ("BFOQ") defense that only persons of the same sex can be employed at the workplace.ⁿ²⁵

[6] Case Conference

Prior to making a determination on the merits of the case, the consultant may bring all of the parties together in a case conference, which is similar to a fact-finding conference. Holding a case conference is within the discretion of the individual consultant. The object of the case conference is to define the issues, determine which elements are undisputed, clarify those areas that are unclear, resolve any disputed issues that can be resolved, and ascertain if there is a basis for negotiated settlement of the complaint.ⁿ²⁶ The format of the conference is one in which the consultant questions both the complainant and respondent and allows them to respond to each other's statements in a nonadversarial setting. Usually, the consultant does not allow either party to bring an attorney to the conference.ⁿ²⁷

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. *See* § 42.23[1].

(n2)Footnote 2. DFEH Complaint Process Flow Chart (March 9, 1988).

(n3)Footnote 3. DFEH Complaint Process Flow Chart (March 9, 1988).

(n4)Footnote 4. DFEH Complaint Process Flow Chart (March 9, 1988).

(n5)Footnote 5. DFEH Complaint Process Flow Chart (March 9, 1988). *See also* DFEH Enforcement Division Directive No. 500, § 4(A), Case Closing Categories, May 26, 2006, available online at <http://www.dfeh.ca.gov/Directives/500.pdf>.

(n6)Footnote 6. DFEH Enforcement Division Directive No. 8 (June 26, 1985). *See also* DFEH Enforcement Division Directive No. 500, § 4(A)(06), *Insufficient Evidence to Prove a Violation of the Statute*, May 26, 2006; available online at <http://www.dfeh.ca.gov/Directives/500.pdf>.

(n7)Footnote 7. [Reserved]

(n8)Footnote 8. For discussion of issuance of the right-to-sue letter, *see* [c], *below*. The DFEH provides guidance on requesting a right-to-sue letter on its website at <http://www.dfeh.ca.gov/complaintRtoS.asp>.

(n9)Footnote 9. *Gov. Code* § 12971.

(n10)Footnote 10. *Gov. Code* § 12965(b).

(n11)Footnote 11. *Gov. Code* § 12965(b).

(n12)Footnote 12. *Grant v. Comp USA, Inc.* (2003) 109 Cal. App. 4th 637, 135 Cal. Rptr. 2d 177.

(n13)Footnote 13-14. [Reserved]

(n14)Footnote 15. *Grant v. Comp USA, Inc.* (2003) 109 Cal. App. 4th 637, 640-651, 135 Cal. Rptr. 2d 177 .

(n15)Footnote 16. Supplemental Memorandum to DFEH Enforcement Division Directive No. 4 (June 5, 1987).

(n16)Footnote 17. DFEH Enforcement Division Directive No. 4 (Jan. 18, 1982); Supplemental Memorandum to DFEH Enforcement Division Directive No. 4 (June 5, 1987). *See also* DFEH Enforcement Division Directive No. 202, October 1, 1998, available online at <http://www.dfeh.ca.gov/Directives/e202.pdf> .

(n17)Footnote 18. Supplemental Memorandum to Enforcement Directive Division Directive No. 4 (June 5, 1987).

(n18)Footnote 19. DFEH Enforcement Division Directive No. 4 (Jan. 18, 1982).

(n19)Footnote 20. DFEH Enforcement Division Directive No. 4 (Jan. 18, 1982).

(n20)Footnote 21. DFEH Enforcement Division Directive No. 4 (Jan. 18, 1982).

(n21)Footnote 22. DFEH Enforcement Division Directive No. 4 (Jan. 18, 1982); Supplemental Memorandum to DFEH Enforcement Division Directive No. 4 (June 5, 1987).

(n22)Footnote 23. The DFEH's general practice is to honor a respondent's request to have a company representative present during interviews of management personnel, but not during interviews of nonmanagement employees. If the respondent denies DFEH the right to interview employees outside the presence of a company representative, the consultant will ordinarily make contact with the witnesses during off-work hours. On occasion, the consultant may consent to allow an affirmative action officer or labor relations representative to sit in during the interview if the company's representative may be helpful in resolving the complaint.

(n23)Footnote 24. *See* 2 Cal. Code Reg. § 7293.9. For a detailed discussion of reasonable accommodation in physical handicap discrimination cases, *see* Ch. 41, pt. D.

(n24)Footnote 25. For full discussion of the BFOQ defense, *see* Ch. 41, pt. E.

(n25)Footnote 26. *See* DFEH Enforcement Division Directive No. 60 (Dec. 29, 1986).

(n26)Footnote 27. *See* DFEH Enforcement Division Directive No. 60 (Dec. 29, 1986).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.26

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.26 Presentation of Defenses

[1] Manner of Presenting Defenses

[a] Generally

At any time during the course of the DFEH's investigation of a complaint of discrimination, an employer-respondent may assert defenses to the allegations in the complaint. Likewise, at any time before the FEHC hearing commences, the DFEH may accept the respondent's defenses and withdraw a previously-issued accusation without the approval of the FEHC, unless the complainant has intervened in the action.ⁿ¹ The DFEH has wide discretion in carrying out its statutory duties and has no obligation to fully investigate or take every case to hearing.ⁿ² When the DFEH issues an accusation, the agency serves a notice of defense on the respondent. The notice of defense is a form that, when signed and returned by the respondent, acknowledges service of an accusation on the respondent.ⁿ³ By returning and filing the notice of defense, the respondent may request a hearing, object to or admit the accusation, and/or present new defenses.ⁿ⁴

[b] Statement of Position

[i] Initial Response

At distinct points in a DFEH investigation, the respondent may provide information concerning the allegations in the complaint. The first opportunity to assert defenses is in the employer's response to the DFEH's complaint.ⁿ⁵⁻⁶ This initial response is due 21 days after receipt of the complaint; however, extensions of time are routinely given. When appropriate, a consultant may also ask the respondent to provide information concerning workforce statistics, i.e., patterns within its current work force and applicant flow data.ⁿ⁷ As discussed in greater detail in [2] and [3], *below*, the respondent may submit information to rebut the factual allegations in the complaint, as well as to assert procedural defenses to the DFEH proceeding.

Within 21 days after receiving information from the respondent, the consultant will review the documentation to

determine whether it sufficiently covers the items enumerated in the supplemental list. If the respondent refuses to provide the requested information within 60 days, DFEH routinely sends a follow-up letter encouraging compliance and informing the respondent of the agency's authority to take depositions, issue interrogatories, and require the production of documents pursuant to *Government Code Section 12930(g)*.ⁿ⁸ If the respondent still does not furnish information, the consultant will apply for the issuance of a subpoena duces tecum.ⁿ⁹ For discussion of pre-accusation discovery, *see* § 42.27.

The consultant may accept one or more defenses raised and determine that dismissal of the complaint is warranted. For example, if the respondent raises a meritorious defense that the DFEH has no jurisdiction over the complaint,ⁿ¹⁰ the consultant closes the case under a category designated as "no jurisdiction."ⁿ¹¹

[ii] Subsequent Contacts with Respondent

Once the DFEH actually commences its investigation of a complaint, the respondent is expected to provide information in an on-going manner to rebut or clarify the complainant's allegations. Unless the respondent has refused to submit information voluntarily, the DFEH normally does not use its subpoena powers in the course of its investigation.

[2] Procedural Defenses

[a] Jurisdiction

The defense of "lack of jurisdiction" is a recognized basis for dismissing a complaint.ⁿ¹² Closure on this basis is warranted when a "complaint is found to be beyond the DFEH's scope of authority as defined by the laws enforced by DFEH."ⁿ¹³

Jurisdictional defenses that may result in dismissal of a DFEH complaint and that may be raised by the respondent at any time after a complaint has been filed include the following:

1. The employer has fewer than five regularly-employed persons;ⁿ¹⁴
2. The employer is a religious association or corporation not organized for private profit;ⁿ¹⁵
3. The complainant is employed by his or her parents, spouse, or child;ⁿ¹⁶
4. The complainant is employed under a special license in a nonprofit sheltered workshop or rehabilitation facility;ⁿ¹⁷
5. The complainant is an independent contractor rather than an employee;ⁿ¹⁸ⁿ¹⁹ and
6. The asserted basis of discrimination is not covered by the FEHA, such as discrimination on the basis of alcoholism, narcotics addiction, or the unlawful use of controlled substances or other drugs.ⁿ²⁰

For full discussion of the scope of coverage of the FEHA, *see* Chapter 40, Part B.

[b] Timeliness of Complaint

Pursuant to *Government Code Section 12960*, a complaint alleging employment discrimination must be filed within one year of the alleged unlawful practice. However, the filing period may be extended for (1) 90 days if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of its occurrence, (2) one year following a rebutted presumption of the identity of the person's employerⁿ²¹ to allow the person allegedly aggrieved by an unlawful practice to make a substitute

identification of the actual employer, (3) one year from the date the person aggrieved by an alleged violation of the Ralph Civil Rights Act, guaranteeing the right to be free from violence because of specific characteristics,ⁿ²¹ becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation, or (4) one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority. The party asserting the statute of limitations bar has the burden of proving that the complaint was untimely filed based on when the adverse action occurred or when the employee obtained specific knowledge of the action.ⁿ²²

The United States Supreme Court has held that the charge-filing period for EEOC charges begins on the date that an employee is notified of his or her termination, even if he or she continues to work until a later date.ⁿ²³ However, the California Supreme Court has held that because Title VII and the FEHA are distinct statutory schemes, the rules governing computation of the limitations period in claims brought under Title VII do not apply in cases brought under FEHA.ⁿ²⁴ In *Romano v. Rockwell International, Inc.*, the Court reasoned that because the FEHA makes "discharge" for discriminatory reasons an unlawful employment practice, requiring the limitations period to begin upon notification of future discharge, i.e., prior to the unlawful act, would be anomalous.ⁿ²⁵

For discussion of the timeliness of complaints under federal antidiscrimination provisions, *see* § 42.63[3]. For additional discussion of the timeliness of complaints under the FEHA, *see* § 42.02[4].

[c] Deference to Another Agency's Determination

If an agency with which DFEH has a worksharing agreement, such as the EEOC,ⁿ²⁶ has rendered a determination or completed an investigative report addressing the same issues raised in a DFEH complaint, the DFEH will dismiss the complaint and notify the complainant of the dismissal.ⁿ²⁷ However, if the plaintiff later files an amended charge with the EEOC, he or she must also notify the DFEH of the amendments in order to exhaust administrative remedies under the FEHA as to the new claims.ⁿ²⁸ For complete discussion of the requisites for exhaustion of administrative remedies under the FEHA, *see* Chapter 43, Part A.

■ PRACTICE TIP:

A respondent should apprise the DFEH of a relevant agency determination at the earliest opportunity to halt an investigation by the DFEH. *Commentary by Dale Brodsky and Beverly Tucker.*

[d] Consent Decree

The DFEH will also dismiss a complaint if it is covered by a court-ordered consent decree or if the respondent's allegedly unlawful conduct is required or approved by a consent decree.ⁿ²⁹

■ PRACTICE TIP:

A respondent should provide the DFEH with a copy of the consent decree and request a dismissal on that ground. *Commentary by Dale Brodsky and Beverly Tucker.*

[3] Substantive Defenses

Respondents may present evidence to rebut the factual allegations in the complaint and the evidence adduced by the DFEH in the course of its investigation, or the respondents may assert affirmative defenses such as bona fide occupational qualification (BFOQ) or business necessity. For a detailed discussion of substantive defenses to charges of employment discrimination, including BFOQ and business necessity, *see* Chapter 41, Part E.

■ PRACTICE TIP:

During a DFEH investigation, the respondent is not required by any law or regulation to present a

defense. The respondent is only required to provide information sought by the DFEH. However, if the respondent chooses to assert any defenses that go to the merits of the complaint, it is advisable to present every substantive defense warranted by the facts. A defense that is not advanced at the first opportunity may later be attacked by the complainant as pretextual or fabricated. *Commentary by Dale Brodsky and Beverly Tucker.*

Legal Topics:

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

Labor & Employment Law Discrimination General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. 2 *Cal. Code Reg.* § 7415.

(n2)Footnote 2. *See, e.g., Mahdavi v. Fair Employment Practice Com.* (1977) 67 *Cal. App. 3d* 326, 136 *Cal. Rptr.* 421. For discussion of DFEH's authority to investigate and prosecute cases, *see* § 42.21[1].

(n3)Footnote 3. *See Gov. Code* § 11505(a).

(n4)Footnote 4. *See Gov. Code* § 11506(a). For complete discussion of notice of defense, *see* § 42.32[4].

(n5)Footnote 5-6. [Reserved]

(n6)Footnote 7. DFEH Enforcement Division Directive No. 6 (Sept. 23, 1986).

(n7)Footnote 8. [Reserved]

(n8)Footnote 9. *See Gov. Code* §§ 12930(g)(1), 12963.1.

(n9)Footnote 10. *See* [2][a], *below*.

(n10)Footnote 11. Enforcement Division Directive No. 8 (June 26, 1985).

(n11)Footnote 12. Enforcement Division Directive No. 8 (June 26, 1985).

(n12)Footnote 13. Enforcement Division Directive No. 8 (June 26, 1985).

(n13)Footnote 14. *See Gov. Code* § 12926(d); *Robinson v. Fair Employment & Hous. Comm'n* (1992) 2 *Cal. 4th* 226, 234-243, 5 *Cal. Rptr. 2d* 782, 825 *P.2d* 767 (number of employees on payroll is determinative of whether employer "regularly employs" five or more employees). In harassment cases, the jurisdictional requirement of five or more employees is reduced to one employee. *See Gov. Code* § 12940(j)(4).

(n14)Footnote 15. *Gov. Code* § 12926(d); *see McKeon v. Mercury Healthcare Sacramento* (1998) 19 *Cal. 4th* 321, 331, 79 *Cal. Rptr. 2d* 319, 965 *P.2d* 1189 (religious entity exemption includes religious entities organized under Nonprofit Public Benefit Corporation Law as well as Religious Corporation Law); *see also* DFEH v. Bohemian Club (1988) FEHC Dec. No. 88-01, pp. 12-15 (1988-1989 CEB FEHC Decisions) (nonprofit entity must be religious to be exempt from FEHA).

(n15)Footnote 16. *Gov. Code* § 12926(c).

(n16)Footnote 17. *Gov. Code* § 12926(c).

(n17)Footnote 18. 2 *Cal. Code Reg.* § 7286.5(b)(1).

(n18)Footnote 19. [Reserved]

(n19)Footnote 20. *Gov. Code* § 12926(i), (k); 2 *Cal. Code Reg.* § 7293.6(a)(4).

(n20)Footnote 21. *Gov. Code* § 12928.

(n21)Footnote 21.1. *Civil Code Section 51.7*; see *Ch. 40*, § 40.12[2].

(n22)Footnote 22. *International Union of Operating Engineers, Local 12 v. Fair Employment Practice Comm'n* (1969) 276 *Cal. App. 2d* 504, 510, 81 *Cal. Rptr.* 47 .

(n23)Footnote 23. *Delaware State College v. Ricks* (1980) 449 *U.S.* 250, 257, 259, 101 *S. Ct.* 498, 66 *L. Ed. 2d* 431 (limitations period for EEOC charge began on the date that the plaintiff was notified of the decision to deny him tenure, rather than the date one year later when his employment terminated).

(n24)Footnote 24. *Romano v. Rockwell Int'l, Inc.* (1996) 14 *Cal. 4th* 479, 497, 59 *Cal. Rptr. 2d* 20, 926 *P.2d* 1114 .

(n25)Footnote 25. *Romano v. Rockwell Int'l, Inc.* (1996) 14 *Cal. 4th* 479, 497-501, 59 *Cal. Rptr. 2d* 20, 926 *P.2d* 1114 ; see also , *Mullins v. Rockwell Internat. Corp.* (1997) 63 *Cal. Rptr. 2d* 636 applying *Romano* reasoning to constructive termination in claims for wrongful termination.

(n26)Footnote 26. 29 *C.F.R.* § 1626.10(c).

(n27)Footnote 27. DFEH Enforcement Division Directive No. 8 (June 26, 1985).

(n28)Footnote 28. *Martin v. Lockheed Missiles & Space Co.* (1994) 29 *Cal. App. 4th* 1718, 1729-1730, 35 *Cal. Rptr. 2d* 181 .

(n29)Footnote 29. DFEH Enforcement Division Directive No. 8 (June 26, 1985).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.27

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.27 Discovery During Investigation

[1] DFEH's Discovery Powers

After a complaint is filed, the DFEH has a variety of discovery tools to obtain information. *Government Code Section 12963.1* authorizes the DFEH to issue and serve on an individual, corporation, partnership, association, public entity, or other organization subpoenas to compel the production of books, records, documents or other physical materials, and attendance and testimony of witnesses at deposition.ⁿ¹ A subpoena must identify with "reasonable particularity" the things to be producedⁿ² or the matters on which testimony is sought.ⁿ³ Subpoenas to compel appearance and production of books, records, documents, and physical materials need not be accompanied by an affidavit showing good cause or the materiality of the things sought to be produced.ⁿ⁴

In addition to taking depositionsⁿ⁵ and issuing and serving requests for production of documents by way of subpoena,ⁿ⁶ the DFEH may also issue and serve written interrogatories in the same manner that it issues and serves subpoenas under *Government Code Section 12963.1*.ⁿ⁷

These discovery devices may be used to obtain information not only from the respondent named in the complaint, but also from any other individual or entity in possession or control of the information sought.ⁿ⁸ If a notice of deposition is issued to an individual or organization not named in the complaint, the DFEH must also provide written notice of the deposition to each individual or organization alleged in the complaint to have committed an unlawful practice.ⁿ⁹

[2] [Reserved]

[3] [Reserved]

[4] Obtaining Compliance with Discovery Requests

If an individualⁿ¹⁰⁻¹¹ or organization fails to comply with a subpoena, interrogatory, request for production, or deposition examination, the DFEH may petition a superior court for an order compelling compliance.ⁿ¹² *Government*

Code section 12963.5 sets forth the procedural requirements for petitioning the superior court for an enforcement order and seeking a writ of mandamus in the appropriate court of appeal, if necessary.ⁿ¹³ The filing of a petition to compel compliance with discovery under *Government Code section 12963.5* extends the period of time within which the DFEH must file an accusation.ⁿ¹⁴ The extended period is the period between the filing of a petition under section 12963.5 and whichever of the following occurs later: (1) the final effective date, after the exhaustion of any challenges to the original order in higher courts, of an order of the superior court denying the petition, or (2) the filing by the DFEH of a certified statement pursuant to *Government Code section 12963.5(e)* indicating the respondent's compliance with the superior court order granting the petition.ⁿ¹⁵

Legal Topics:

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

Administrative Law
Agency Investigations
Scope
General Overview
Public Health & Welfare Law
Housing & Public Buildings
Fair Housing

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12963.1(a)*.

(n2)Footnote 2. *Gov. Code § 12963.1(c)*.

(n3)Footnote 3. *Gov. Code § 12963.1(d)*.

(n4)Footnote 4. *Gov. Code § 12963.1(c)*.

(n5)Footnote 5. *See Gov. Code § 12963.3*.

(n6)Footnote 6. *See Gov. Code § 12963.4*.

(n7)Footnote 7. *See Gov. Code § 12963.2(a)*.

(n8)Footnote 8. *See Gov. Code § 12963.1(a)*.

(n9)Footnote 9. *Gov. Code § 12963.3(a)*.

(n10)Footnote 10-11. [Reserved]

(n11)Footnote 12. *Gov. Code § 12963.5(a)*.

(n12)Footnote 13. *See Gov. Code § 12963.5(d)*.

(n13)Footnote 14. *Gov. Code § 12963.5(f)*.

(n14)Footnote 15. *Gov. Code § 12963.5(f)*.



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3-42 California Employment Law § 42.28

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.28 Confidentiality of Information Received by DFEH

[1] Statutes Governing Disclosure

[a] In General

The Information Practices Act,ⁿ¹ the Public Records Act,ⁿ² and a provision of the FEHAⁿ³ govern disclosure of information contained in DFEH investigative files.

[b] Information Practices Act

Under the Information Practices Act (IPA),ⁿ⁴ a public agency such as the DFEH may not disclose any personal information contained in its records in any manner that would link the information to the individual to whom it pertains, except under certain specified circumstances.ⁿ⁵ Such circumstances include the following:

1. When the disclosure is to the individual to whom the information pertains or to the duly appointed guardian or conservator of the individual or a person authorized to represent the individual;ⁿ⁶
2. When the individual has given prior written voluntary consent not more than 30 days before the disclosure, or within the time limit agreed to by the individual in the written consent;ⁿ⁷
3. When disclosure is made to officers, employees, attorneys, agents, or volunteers of the agency that has custody of the information, if the disclosure is relevant and necessary in the ordinary course of their official duties and is related to the purpose for which the information was acquired;ⁿ⁸
4. When disclosure is made to a person or another agency in order for the transferee agency to perform its constitutional or statutory duties, and the use is compatible with a purpose for which the information was collected, and the use or transfer is accounted for in accordance with *Civil Code section 1798.25*;ⁿ⁹

5. When disclosure is to a governmental entity and is required by state or federal law;ⁿ¹⁰
6. When disclosure is made to a law enforcement or regulatory agency and is required for an investigation of unlawful activity or for licensing, certification, or regulatory purposes, unless the disclosure is otherwise prohibited by law;ⁿ¹¹
7. When disclosure is made pursuant to the California Public Records Act;ⁿ¹² and
8. When disclosure is to another person or governmental organization to the extent necessary to obtain information as necessary for an investigation by the agency of a failure to comply with a specific state law that the agency is responsible for enforcing.ⁿ¹³

Individuals have a right of access to personal information maintained by the DFEH that pertains to them, subject to certain limitations.ⁿ¹⁴ However, under the IPA, the DFEH need not disclose personal information under certain specified circumstances, such as when the information pertains to the investigation of a grievance or complaint or a suspected civil offense, as long as the purpose of withholding the information is to avoid compromising the investigation or a related investigation.ⁿ¹⁵ Furthermore, the identities of individuals who provided information for the investigation may be withheld pursuant to *Civil Code section 1798.38*.ⁿ¹⁶ *Civil Code section 1798.38* provides that if information is received with the promise or understanding that the identity of the source would be held in confidence, and the source is not in a supervisory position with respect to the individual to whom the record pertains, the agency must inform the individual of all personal information about him or her without identifying the source.ⁿ¹⁷

If the DFEH does make a disclosure pursuant to *Civil Code section 1798.24(o)* or *(p)* of the IPA (disclosure for investigative purposes), the DFEH must keep an accurate accounting of the date, nature, and purpose of the disclosure.ⁿ¹⁸ If the DFEH makes a disclosure of a record pursuant to *Civil Code section 1798.24(e)* or *(f)*, the DFEH must make such an accounting or provide notice of the disclosure pursuant to notification requirements provided in *Civil Code sections 1798.9* and *1798.10*.ⁿ¹⁹

The IPA provides civil remediesⁿ²⁰ and disciplinary and criminal penalties for violations of the IPA.ⁿ²¹

[2] Information Nondisclosable on Prior Agreement of Confidentiality

The DFEH is required to provide conciliation assistanceⁿ²² in confidence and without publicity.ⁿ²³ In addition, *Government Code section 12932(b)* provides that the DFEH must hold confidential any information acquired in the regular performance of its duties on the understanding that it would be so held.ⁿ²⁴ The DFEH accepts information that is conditioned on confidentiality only when there is no other way to obtain the information, and the information is expected to lead to other information that need not be kept confidential.ⁿ²⁵ A consultant's notes of an oral communication as well as written material may be accepted as confidential.ⁿ²⁶

A directive issued by the DFEH distinguishes between confidential information that the DFEH obtains pursuant to *Government Code section 12932(b)* and confidential information under the IPA.ⁿ²⁷ Whereas the IPA requires disclosure to an individual to whom the information pertains as long as the source is not revealed (either by providing a summary of the information or by providing the material with appropriate deletions to maintain confidentiality),ⁿ²⁸ the DFEH policy regarding information conditioned on a promise of confidentiality under *Government Code section 12932(b)* is that the information may not be released for *any* purpose.ⁿ²⁹ Despite the apparent conflict between *Government Code section 12932(b)* and the IPA,ⁿ³⁰ which provides that it supersedes any other provision of state law that authorizes an agency to withhold personal information that is otherwise accessible under the IPA,ⁿ³¹ the DFEH policy may be justified by a different section of the IPA, which allows an agency to withhold from disclosure certain information that would compromise the investigation of a grievance, complaint, or suspected civil offense.ⁿ³²

A DFEH or FEHC employee who violates *Government Code section 12932(b)* is guilty of a misdemeanor.ⁿ³³ In addition, an employee who violates the confidentiality requirements may be subject to discipline pursuant to the Civil Service Act,ⁿ³⁴ although there are no reported cases on point.

[3] Confidentiality of EEOC Charges

Confidentiality provisions in the EEOC's worksharing agreement with the DFEH prohibit the DFEH from revealing the existence of a Title VII charge and any information obtained by the EEOC in the course of its investigation unless a Title VII lawsuit involving that information has already been instituted.ⁿ³⁵

[4] Disclosability of Information Sought by Parties in Open DFEH Files

[a] Information Sought by Legal Process

[i] Types of Disclosable Information

While a complaint is under investigation, either the complainant or respondent may subpoena documents contained in the DFEH's investigative file in the particular case. Discoverable information includes:ⁿ³⁶

1. The complaint;
2. The consultant's case diary or chronicle of contacts made in the course of the investigation;
3. The pre-complaint questionnaire completed by the complainant;
4. The DFEH's service letter;ⁿ³⁷
5. The consultant's notes and the progress report from the consultant to the DFEH chief counsel;ⁿ³⁸
6. Information to and from the complainant and respondent, including that which concerns respondent's financial situation and third parties;
7. Most settlement agreements; and
8. The 14-day closure letter sent to complainant.ⁿ³⁹

[ii] Types of Information Not Disclosable

Information that will not be disclosed, even pursuant to a subpoena, includes:ⁿ⁴⁰

1. All settlement and/or conciliation offers;
2. Medical reports;
3. Notes to and from attorneys on the DFEH's legal staff; and
4. Information obtained on the condition that it be kept confidential.ⁿ⁴¹

[b] Information Sought by Written Request

The complainant making a written request for production of documents is entitled to a copy of (1) the complaint, (2) the

pre-complaint questionnaire, (3) information sent to and received from the complainant, and (4) any settlement agreements contained in the DFEH file.ⁿ⁴² By written request, the respondent may obtain a copy of (1) the complaint, (2) the service letter, (3) information sent to and received from the respondent, including general and financial information and information that pertains to third parties, and (4) any settlement agreements.ⁿ⁴³

The consultant's case diary, notes, progress reports, or draft or final closing reports; settlement offers; medical reports; attorney notes; and confidential information from any source may not be obtained by written request.ⁿ⁴⁴

[5] Disclosability of Information Sought by Parties in Closed DFEH Files

[a] Types of Disclosable Information

In cases that have been closed by the DFEH, the complainant and respondent may obtain the following documents pursuant to a subpoena or court order:ⁿ⁴⁵

1. The complaint;
2. The case diary;
3. The service letter;ⁿ⁴⁶⁻⁴⁷
4. The consultant's notes;
5. Information to and from the complainant and respondent, including information regarding the respondent's financial condition and information regarding third parties;
6. Settlement agreements that contain no confidentiality provisions;
7. The DFEH 14-day letter sent to complainant. and
8. The consultant's closing report.

A complainant or respondent may also obtain the above information by written request, but a respondent is not entitled to either the pre-complaint questionnaire filled out by the complainantⁿ⁴⁸ or to information provided by or sent to the complainant after the case is closed, in the absence of a subpoena or court order.ⁿ⁴⁹ Similarly, the complainant must obtain a subpoena or court order to obtain information provided to or received from the respondent concerning third parties.ⁿ⁵⁰

[b] Types of Information Not Disclosable

The DFEH will not release the following information, even pursuant to a subpoena or court order:ⁿ⁵¹

1. Settlement/conciliation negotiation offers;
2. Medical reports;
3. Progress reports;ⁿ⁵²
4. Attorney notes and memoranda;

5. Confidential information from any source; and
6. Draft closing reports prior to final approval by the consultant's supervisor.

[6] Third Party Requests for Information Contained in DFEH Files

A person who is not the complainant or respondent but is named in the investigation may obtain by written request a copy of the complaint and other documents regarding him or her after they are purged of all other personal information.ⁿ⁵³ On written request, third parties who are not involved in the investigation, such as the press, other individuals, and business entities may also obtain a copy of a purged complaint only; however, all affected parties must be notified of the release of information prior to disclosure.ⁿ⁵⁴

[7] Procedures on Disclosure of DFEH Files

All requests for disclosure must be in writing.ⁿ⁵⁵ When the complainant's attorney requests information without legal process, the complainant must provide written verification that the attorney is complainant's attorney-of-record prior to disclosure.ⁿ⁵⁶ Prior to disclosure of documents to either the complainant or respondent, the IPAⁿ⁵⁷ requires that the DFEH purge all information that might identify third persons who provided information in confidence to the agency.ⁿ⁵⁸

Whenever personal or confidential information is disclosed pursuant to a legal process, the IPA requires that a reasonable attempt be made to notify the individual to whom the information pertains before the disclosure is made.ⁿ⁵⁹ To comply with this requirement, the DFEH sends a letter to the individual who will be identified when documents in the case file are disclosed, informing him or her of the impending disclosure.ⁿ⁶⁰

Legal Topics:

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

Administrative Law
Agency Investigations
General Overview
Public Health & Welfare Law
Housing & Public Buildings
Fair Housing

FOOTNOTES:

(n1)Footnote 1. *See Civ. Code §§ 1798-1798.78.*

(n2)Footnote 2. *See Gov. Code §§ 6250-6267.*

(n3)Footnote 3. *See Gov. Code § 12963.7(b)* (providing that it is misdemeanor for any DFEH staff person to disclose what has transpired in course of any endeavors to eliminate unlawful employment practice through conference, conciliation, and persuasion).

(n4)Footnote 4. *See Civ. Code §§ 1798-1798.78.*

(n5)Footnote 5. *See Civ. Code § 1798.24.*

(n6)Footnote 6. *See Civ. Code § 1798.24(a), (c).*

(n7)Footnote 7. *Civ. Code § 1798.24(b).*

(n8)Footnote 8. *Civ. Code § 1798.24(d).*

(n9)Footnote 9. *Civ. Code § 1798.24(e).* With respect to information transferred from a law enforcement or regulatory agency or to another law enforcement or regulatory agency, a use is compatible if use of the information

requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency or for licensing, certification, or regulatory purposes by that agency. *Civ. Code* § 1798.24(e).

(n10)Footnote 10. *Civ. Code* § 1798.24(f).

(n11)Footnote 11. *Civ. Code* § 1798.24(o).

(n12)Footnote 12. *Civ. Code* § 1798.24(g); *see Gov. Code* §§ 6250-6267.

(n13)Footnote 13. *Civ. Code* § 1798.24(p).

(n14)Footnote 14. *See Civ. Code* §§ 1798.30-1798.44.

(n15)Footnote 15. *Civ. Code* § 1798.40(d).

(n16)Footnote 16. *Civ. Code* § 1798.40(d).

(n17)Footnote 17. *See Civ. Code* § 1798.38.

(n18)Footnote 18. *See Civ. Code* § 1798.25.

(n19)Footnote 19. *See Civ. Code* § 1798.25.

(n20)Footnote 20. *See Civ. Code* §§ 1798.45-1798.53.

(n21)Footnote 21. *See Civ. Code* §§ 1798.55-1798.57.

(n22)Footnote 22. *See Gov. Code* § 12963.7(a).

(n23)Footnote 23. *See Gov. Code* § 12932(b). For discussion of conciliation generally, *see* § 42.31.

(n24)Footnote 24. *See Evid. Code* § 1040 (public official has privilege to refuse to disclose official information if disclosure would be against public interest).

(n25)Footnote 25. *See* Enforcement Division Directive No. 38 (June 16, 1983).

(n26)Footnote 26. *See* Enforcement Division Directive No. 38 (June 16, 1983).

(n27)Footnote 27. *See* Enforcement Division Directive No. 38 (June 16, 1983).

(n28)Footnote 28. *See Civ. Code* § 1798.38; *see also* discussion in [1][b], *above*.

(n29)Footnote 29. *See* Enforcement Division Directive No. 38 (June 16, 1983). Written documentation of confidential information is kept in a separately labeled envelope in the case file. Enforcement Division Directive No. 38 (June 16, 1983).

(n30)Footnote 30. Compare *Gov. Code* § 12932(b) with *Civ. Code* § 1798.38.

(n31)Footnote 31. *See Civ. Code* § 1798.70.

(n32)Footnote 32. *See Civ. Code* § 1798.40(d).

(n33)Footnote 33. *Gov. Code* § 12932(b).

(n34)Footnote 34. *See Cal. Const. Art. VII, § 3; Gov. Code* §§ 19570-19588.

(n35)Footnote 35. Supplemental Memorandum (Feb. 28, 1985) to Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n36)Footnote 36. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n37)Footnote 37. [Reserved]

(n38)Footnote 38. The DFEH's position is that progress reports are "attorney-client work products" and are thereby nondisclosable without a subpoena while a case is open. DFEH Enforcement Division Directive No. 49 (March 24, 1986). After an accusation has been issued a party may obtain a copy of the progress report by making a request for production of documents pursuant to *Gov. Code § 11507.6*. Supplemental Memorandum to DFEH Enforcement Division Directive No. 49 (August 1, 1986). For discussion of progress reports, *see § 42.30[1]*.

(n39)Footnote 39. [Reserved]

(n40)Footnote 40. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n41)Footnote 41. For discussion, *see [2], above*.

(n42)Footnote 42. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n43)Footnote 43. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n44)Footnote 44. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n45)Footnote 45. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n46)Footnote 46-47. [Reserved]

(n47)Footnote 48. Supplemental Memorandum (August 20, 1986) to DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n48)Footnote 49. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n49)Footnote 50. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n50)Footnote 51. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n51)Footnote 52. Progress reports are disclosable to respondents in cases which proceed to accusation before the FEHC. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n52)Footnote 53. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n53)Footnote 54. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n54)Footnote 55. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n55)Footnote 56. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n56)Footnote 57. *Civ. Code §§ 1798-1798.78*.

(n57)Footnote 58. *See Civ. Code § 1798.38; see also* DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n58)Footnote 59. *See Civ. Code § 1798.24(k); see also* DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).

(n59)Footnote 60. DFEH Enforcement Division Directive No. 21 (as amended July 1, 1986).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.29

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.29 Settlements

[1] Generally

The complainant, respondent, or DFEH may initiate efforts to settle a complaint of discrimination at any time during the administrative process. The consultant's first attempt to do so is at the predetermination stage shortly after the complaint has been filed and served on the employer.ⁿ¹ Once the case is actually under investigation, the consultant will again seek to negotiate a settlement. Settlement may also follow formal conciliation effortsⁿ² and prior to the filing of an accusationⁿ³ in a case in which the DFEH has found the allegations in the complaint to be meritorious.ⁿ⁴

[2] Effect of Collective Bargaining Agreement

Relying on judicial decisions concerning the effect of collective bargaining agreements on remedies for discrimination,ⁿ⁵ the DFEH requires that the union be a party to a settlement agreement if there is a collective bargaining agreement in effect covering the workplace, even if the union itself has not violated the law or aided and abetted in discrimination.ⁿ⁶ If the union refuses to accept the agreement voluntarily, the DFEH amends the complaint to name the union as a co-respondent and again attempts to secure a settlement. If the union still refuses to sign the agreement and the case is meritorious, the DFEH issues an accusation in which the union is named as a co-respondent for the purpose of effecting a remedy.ⁿ⁷

[3] Settlement Agreement

The DFEH uses standard settlement agreement forms.ⁿ⁸ If a respondent or respondent's attorney insists on preparing the settlement agreement, the District Administrator must approve it, the agreement must contain specific language from the DFEH's standard form, and the agreement must not contain any waiver language beyond the subject of the complaint being resolved.ⁿ⁹ The DFEH also discourages confidentiality language and overly broad waiver language in settlement agreements.^{n9.1}

The terms of any settlement agreement should be clear, specific and appropriate. All violations discovered in the course

of the DFEH's proceedings should be addressed. All agreements must specifically state the parties' intent in terms of dates by which specified acts must be performed; the names, titles, or groups of individuals who are to perform the acts; and, if appropriate, specifically which acts are to be performed.^{n9.2} When affirmative or prospective relief is part of the agreement, the agreement should include monitoring language.^{n9.3}

[4] Private Settlements Between Parties

The DFEH need not be a party to a settlement agreement entered into by the complainant and respondent during the administrative process.ⁿ¹⁰ DFEH may choose to exclude itself from a settlement agreement because it is unwilling to acquiesce to a respondent's insistence on the complainant's broad waiver of future rights or because it is dissatisfied with the proposed confidentiality requirements.ⁿ¹¹ The complainant and respondent may also wish to exclude the DFEH from being a party to a settlement agreement if, for example, the agreement is designed to resolve a complainant's pending or potential civil actions involving issues other than FEHA violations. Although it would be theoretically possible for the DFEH director to file a complaint in the public interest, notwithstanding the complainant's desire to settle with the respondent,ⁿ¹² once the complainant has confirmed that a settlement agreement has been reached, the DFEH will dismiss the complaint.ⁿ¹³

■ CONSULTANT'S COMMENT:

DFEH practice contrasts with EEOC practice in these circumstances, because the EEOC may continue investigating a charge--and eventually litigate it--notwithstanding a private settlement agreement between the charging party and the respondents.ⁿ¹⁴ Such an outcome would not allow the charging party to recover any additional monetary or "make-whole" relief, but it could result in injunctive relief or other remedies that the EEOC may seek "in the public interest."ⁿ¹⁵ As a consequence, it is highly important for an employer to reach a conciliation agreement in which the EEOC concurs if the employer wants to eliminate a dispute under Title VII, whereas the employer does not need DFEH concurrence to accomplish this goal under the FEHA. *Commentary by Erica B. Grubb and Kirby Wilcox.*

Legal Topics:

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

Administrative Law Agency Adjudication General Overview Civil Procedure Settlements General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. *See* DFEH Complaint Process Flow Chart (March 9, 1988). For discussion of pre-determination procedures generally, *see* § 42.25[3][a].

(n2)Footnote 2. For discussion of conciliation, *see* § 42.31.

(n3)Footnote 3. For discussion of accusation, *see* § 42.32.

(n4)Footnote 4. *See Gov. Code* § 12964.

(n5)Footnote 5. *See, e.g.,* *W.R. Grace & Co. v. Local 759* (1983) 461 U.S. 757, 771, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (holding that absent judicial determination, agreement of EEOC and employer could not alter collective bargaining agreement without union's consent); *E.E.O.C. v. Safeway Stores, Inc.* (5th Cir. 1983) 714 F.2d 567, 576-580, cert. denied, 467 U.S. 1204 (1984) (conciliation agreement providing for retroactive seniority in contravention of collective bargaining agreement held unenforceable without union's acceptance unless union has participated in adjudication that discrimination has occurred).

(n6)Footnote 6. Supplemental Memorandum (Jan. 30, 1987) to DFEH Enforcement Division Directive No. 48 (March 19, 1986).

(n7)Footnote 7. Supplemental Memorandum (Jan. 30, 1987) to DFEH Enforcement Division Directive No. 48 (March 19, 1986).

(n8)Footnote 8. DFEH Enforcement Division Directive 400, § 4(A)(1), October 1, 1998, available online at <http://www.dfeh.ca.gov/Directives/e400.pdf>.

(n9)Footnote 9. DFEH Enforcement Division Directive 400, § 4(A)(2), October 1, 1998.

(n10)Footnote 9.1. DFEH Enforcement Division Directive 400, § 4(B), (C), October 1, 1998.

(n11)Footnote 9.2. DFEH Enforcement Division Directive 400, § 4(D)(1), (2), October 1, 1998.

(n12)Footnote 9.3. DFEH Enforcement Division Directive 400, § 4(D)(3), October 1, 1998.

(n13)Footnote 10. DFEH Enforcement Division Directive No. 48 (March 19, 1986).

(n14)Footnote 11. DFEH Enforcement Division Directive No. 48 (March 19, 1986).

(n15)Footnote 12. *See Gov. Code § 12981(a)* (authorization for director's complaint if violation is not eliminated through conference, conciliation, and persuasion).

(n16)Footnote 13. DFEH Enforcement Division Directive No. 8 (June 26, 1985)(closing category No. 7).

(n17)Footnote 14. *See E.E.O.C. v. Goodyear Aerospace Corp. (9th Cir. 1987) 813 F.2d 1539, 1542-1543*.

(n18)Footnote 15. *See* discussion in § 42.73.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.30

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.30 Determination

[1] Finding of Cause and Progress Report

After completing an investigation, the consultant may determine that there is reasonable cause to believe that one of the statutes enforced by DFEH has been violated.ⁿ¹ In the event of such a "cause" determination, the consultant must prepare a progress report addressed to the DFEH chief counsel setting forth the reasons why he or she believes an accusation should be filed.ⁿ² The consultant prepares a progress report at or near the end of an investigation in which the complaint's allegations appear to be sustained by the evidence. The progress report contains a chronology of events, analysis of the merits of the complaint, and remedy information, including information concerning the complainant's damages and efforts to mitigate damages.ⁿ³

[2] Case Closure

[a] Closure Prior to Determination on the Merits

The consultant may decide to close the case for a number of reasons prior to actually making a determination on the merits of the allegations.ⁿ⁴ For example, a DFEH complaint will be dismissed before the completion of an investigation if:

1. The DFEH decides to waive the case to another agency (such as the EEOC) or another agency requests waiver;ⁿ⁵
2. It is not possible to make a merit determination within the time period specified in *Government Code section 12965(a)*;ⁿ⁶
3. The investigation reveals that the DFEH has no jurisdiction over the complaint;ⁿ⁷
4. A remedy that the DFEH deemed to be equitable was offered to and refused by the complainant;ⁿ⁸

5. No remedy is available;ⁿ⁹ or

6. The parties, with or without DFEH participation, negotiate a settlement agreement.ⁿ¹⁰

[b] Pre-Closure After Adverse Determination on Merits

If, after investigating the complaint, the consultant determines that there is insufficient evidence to prove a violation of the FEHA, he or she sends the complainant a pre-closure letter advising the complainant that the case will be closed at the expiration of 14 days unless additional information is provided to justify a continuation of the investigation.ⁿ¹¹ If the complainant provides no additional information, the consultant prepares a closing report and notifies the complainant and respondent of the final closure of the case.

On occasion, although the specific allegations in the complaint are not sustained by the investigation, the consultant discovers other violations of the FEHA. The consultant may enter into a settlement agreement with the respondent, with or without the participation of the complainant, to resolve other violations identified during the investigation and close the individual's case for lack of sufficient evidence.ⁿ¹²

[c] Notice of Case Closure and Right to Sue

The DFEH sends a printed notice of case closure and right to sue once the DFEH has made a final determination to close a case for insufficient evidence or any other reason discussed in [a], *above*. The DFEH sends a copy of the form letter to the complainant and the respondent. If the complainant has not previously received a right-to-sue letter,ⁿ¹³ this form constitutes notification of the right to bring a civil action.ⁿ¹⁴

Legal Topics:

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

Administrative Law Agency Investigations General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. DFEH Enforcement Division Directive No. 10 (March 30, 1983). For various reasons cases are sometimes closed prior to such a determination. For discussion, *see* [2], *below*.

(n2)Footnote 2. For discussion of disclosability of consultants' progress reports, *see* § 42.28[4][a][i].

(n3)Footnote 3. DFEH Enforcement Division Directive No. 49 (March 24, 1986).

(n4)Footnote 4. *See* DFEH Complaint Process Flow Chart (March 9, 1988).

(n5)Footnote 5. DFEH Enforcement Division Directive No. 8 (June 26, 1985)(closing category No. 11).

(n6)Footnote 6. DFEH Enforcement Division Directive Nos. 8 (June 26, 1985) (closing category No. 13), 30 (Nov. 23, 1982).

(n7)Footnote 7. DFEH Enforcement Division Directive No. 8 (June 26, 1985)(closing category No. 1).

(n8)Footnote 8. DFEH Enforcement Division Directive No. 8 (June 26, 1985)(closing category No. 17).

(n9)Footnote 9. For example, DFEH legal staff may advise the consultant that the respondent has declared bankruptcy and the debt resulting from any monetary remedy would be dischargeable. *see* DFEH Enforcement

Division Directive No. 40 (May 29, 1986); *see also* DFEH Enforcement Division Directive No. 8 (June 26, 1985) (closing category Nos. 9, 15).

(n10)Footnote 10. DFEH Enforcement Division Directives No. 48 (March 19, 1986), No. 8 (June 26, 1985) (closing category nos. 7, 16). For discussion of settlement, *see* § 42.29[1].

(n11)Footnote 11. The DFEH will not permit a complainant to request that the DFEH discontinue its investigation and elect court action in order to avoid an adverse finding after the 14-day pre-closure letter is sent. DFEH Enforcement Division Directive No. 7 (May 18, 1984). For discussion of and form of complainant's request to discontinue investigation of complaint, *see* § 42.25[3][b].

(n12)Footnote 12. DFEH Enforcement Division Directive No. 8 (June 26, 1985)(closing category No. 21).

(n13)Footnote 13. For discussion of right-to-sue letter and sample form of right-to-sue letter, *see* § 42.25[3][c] and [d], respectively.

(n14)Footnote 14. *See Gov. Code § 12965(b).*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
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3-42 California Employment Law § 42.31

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.31 Conciliation

The DFEH defines conciliation as any complaint resolution attempt "which occur[s] *AFTER* the Department has made a merit determination that there is reasonable cause to believe one of the statutes it enforces has been violated."ⁿ¹ Under *Government Code Section 12963.7(a)*, as soon as the DFEH determines that a complaint is valid, it "shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation, and persuasion."ⁿ² However, the DFEH may issue an accusation without having first engaged in conciliation efforts "if circumstances warrant."ⁿ³

The staff of the DFEH is prohibited from disclosing what has transpired during conciliation efforts.ⁿ⁴ Any staff member who discloses information in violation of the statute is guilty of a misdemeanor, and if employed through the civil service, he or she is also subject to disciplinary action under the State Civil Service Act.ⁿ⁵

Legal Topics:

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

Administrative Law Agency Investigations General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. DFEH Enforcement Division Directive No. 10 (March 30, 1983) (emphasis in original).

(n2)Footnote 2. *Gov. Code § 12963.7(a)*.

(n3)Footnote 3. *Gov. Code § 12965(a)*; see *Motors Ins. Corp. v. Division of Fair Employment Practices* (1981) 118 Cal. App. 3d 209, 224, 173 Cal. Rptr. 332 (decision under former Fair Employment Practices Act, precursor to FEHA); see also *DFEH v. Hoag Memorial Hospital Presbyterian* (1985) FEHC Dec. No. 85-10 at p. 10 (conciliation is not jurisdictional requirement for issuance of accusation).

(n4)Footnote 4. *Gov. Code § 12963.7(a)*.

(n5)Footnote 5. *Gov. Code § 12963.7(b)*. For discussion of confidentiality of DFEH information generally, *see* § 42.28.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.32

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.32 Accusation

[1] Procedure

The DFEH may issue a written accusation, which is a pleading analogous to a complaint in a civil action, if conciliation fails or before conciliation, if circumstances warrant it.ⁿ¹ The accusation must contain the name of the respondent-employer; it must be served on the respondent-employern² together with a copy of the verified complaint and any amendment; and it must require the respondent to answer the charges at a hearing.ⁿ³

An accusation must be issued within one year after filing of a complaint, except for a group or class complaint or a complaint alleging a violation of *Civil Code Section 51.7*, for which the accusation may be issued within two years after the complaint is filed.ⁿ⁴ An accusation is deemed issued on the date it is filed with the FEHC.ⁿ⁵

[2] Service of Accusation

[a] On Respondent

On filing an accusation, the DFEH must serve it on the respondent by any means selected by the agency.ⁿ⁶ The FEHC's regulations require that service on the respondent be by personal service, registered mail, certified mail, or first class mail.ⁿ⁷ Proof of service of the accusation must be as authorized in civil actions.ⁿ⁸ However, no order adversely affecting the rights of the respondent may be made in any case unless the respondent is served personally or by registered mail, or unless the respondent has filed a notice of defense or otherwise appeared.ⁿ⁹

With the accusation, the DFEH must also serve:

1. A copy of the underlying complaint;ⁿ¹⁰
2. A statement that respondent may request a hearing by filing a notice of defense, as provided in *Government Code Section 11506*, within 15 days after service of the accusation, and that failure to do so

will constitute a waiver of the right to a hearing.n11

3. A post card or form entitled "Notice of Defense," which, when signed on behalf of the respondent and returned to the agency, acknowledges service of the accusation and constitutes a notice of defense;n12

4. Copies of *Government Code Sections 11507.5, 11507.6, and 11507.7* (relating to discovery under Administrative Procedure Act);n13 and

5. A notice of the right to an interpreter at the hearing.n14

The DFEH may also include any other information that seems appropriate.n15

[b] On Complainant

The DFEH must also serve the accusation on the complainant, or--if the complainant has an attorney or representative of record--on that attorney or representative.n16 Service must be made personally, by first class, certified, or registered United States mail, or by leaving a copy at the principal office or place of business of the attorney, representative, or complainant.n17

[3] Reserved

[4] Notice of Defense

[a] Filing of Notice of Defense by Respondent

Within 15 days after service of an accusation by the DFEH, the respondent may file a written notice of defense in writing signed by or on behalf of the respondent.n18 The notice may be in the form provided by the DFEH in the accusation package or in any substantially equivalent form.n19 The respondent may use to notice to request a hearing and to state any objections to the form or substance of the accusation.n20 As with all papers filed with the Commission, the notice must be served on all parties and on the complainant, or on their attorneys or representatives.n21 Service must be by first class mail, registered or certified mail, overnight or express mail, or any other form of mail delivery or by facsimile transmission or other approved electronic means. If facsimile or electronic service is utilized, the person serving the document must also place a hard copy in the mail within any applicable time limit.n22 Service may also be by personal delivery.n23

The notice must provide the respondent's telephone number, mailing address and an address at which the respondent may be personally served.n24 If the respondent is represented or is a corporation, the notice shall state the attorney's or representative's name, mailing address and telephone number.n25 The notice need not be verified.n26

[b] Contents

The respondent may simply sign and return the notice of defense form that is served by DFEH with the accusation.n27 However, the respondent may also do any of the following in the notice of defense:n28

1. Request a hearing;
2. Object to the accusation on the ground that it does not state acts or omissions on which the agency may proceed;
3. Object to the form of the accusation on the ground that it is so indefinite or uncertain that the

respondent cannot identify the transaction or prepare a defense;

4. Admit the accusation in whole or in part;

5. Present new matter by way of defense; or

6. Object to the accusation on the ground that compliance with a regulation would result in a material violation of another department's regulation affecting substantive rights.

The respondent is entitled to a hearing on the merits if he or she files a notice of defense, and is deemed to have denied all parts of the accusation not expressly admitted.ⁿ²⁹ However, all objections to the form of the accusation are deemed waived if not raised in the notice of defense.ⁿ³⁰

Failure to file a notice of defense waives a respondent's right to a hearing, but the FEHC may grant a hearing in its discretion.ⁿ³¹

[5] Amended or Supplemental Accusation

Government Code, section 11507 authorizes the DFEH to file or permit the filing of an amended or supplemental accusation at any time before the matter is submitted for decision. However, the Commission regulations provide that the DFEH may amend an accusation issued pursuant to *Gov. Code §§ 12965 and 12948* to pray either for damages for emotional injury or for administrative fines, or both, only within the first thirty days after issuance of the original accusation.ⁿ³² The DFEH may amend with new charges (other than those in §§ 12965 and 12948) any time up to 30 calendar days prior to the original or continued date the hearing is scheduled to commence.ⁿ³³ Thereafter, an accusation may be amended with new charges only upon such terms as the Hearing Officer approves. "New charges" include any amendment which may affect the respondents' liability, such as the addition of a new respondent, substantive new facts, and a new or significantly modified prayer for relief.ⁿ³⁴

Any new charges shall be deemed controverted, and respondent need not file a new notice of defense. Objections to the amended accusation may be made orally and shall be noted on the record.ⁿ³⁵

The DFEH may amend the accusation to make nonsubstantive changes at any time before the matter is submitted to the Hearing Officer.ⁿ³⁶

The first amended accusation must be clearly labeled "First Amended Accusation," and subsequent amended accusations must be labeled consecutively. The DFEH must clearly identify the changes made in each amended accusation, either by highlighting them or through a separate written statement.ⁿ³⁷

Any amended accusations shall be filed with the Commission and served on all parties and the complainant in accordance with *2 Cal. Code Reg. §§ 7406, 7407*.ⁿ³⁸

[6] Withdrawal of Accusation

The DFEH may at any time withdraw an accusation issued pursuant to *Gov. Code §§ 12965 and 12948*. However, if a complainant's right-to-sue notice has expired and that complainant objects to the withdrawal, the Commission shall decide whether to permit the withdrawal and whether to allow the administrative adjudication to proceed without the DFEH, and if so, on what terms.ⁿ³⁹

[7] Election to Transfer Proceedings to Court

The employer may elect to transfer the proceedings to a court in lieu of an administrative hearing pursuant to *Government Code Section 12965(a)* if an accusation includes a prayer for damages for emotional injuries as a component of actual damages, or for administrative fines, or for both.ⁿ⁴⁰ To do so, the employer must serve a written notice to that effect on the DFEH, the FEHC, and the complainant in the manner prescribed by the FEHC within 30 days after the service of the accusation or amended accusation.ⁿ⁴¹

If the employer makes such an election, the DFEH must dismiss the accusation within 30 days of the notice and file (or elect to have the Attorney General file) an action on behalf of the complainant as the real party in interest in the appropriate court.ⁿ⁴² The rules for venue are the same as those for other civil actions brought pursuant to the FEHA.ⁿ⁴³ Transferred actions are assigned to the court's delay-reduction program or otherwise given priority by the court.ⁿ⁴⁴ The complainant has the right to participate as a party and to be represented by his or her own counsel.ⁿ⁴⁵ The complainant has the same right to relief as in actions filed pursuant to *Government Code Section 12965(b)*, in addition to any other relief that in the court's judgment will effectuate the purpose of the FEHA.ⁿ⁴⁶ For discussion of relief available in FEHA actions generally, *see* Chapter 43, Part A.

Legal Topics:

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

Administrative Law Agency Adjudication General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12965(a)*. *see* discussion in § 42.31.

(n2)Footnote 2. For discussion of service of accusation, *see* [2], *below*.

(n3)Footnote 3. *Gov. Code § 12965(a)*.

(n4)Footnote 4. *Gov. Code § 12965(a)*; *see Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1220, *cert. denied*, 502 U.S. 1005 (1991) (construing former *Lab. Code § 1422.2* (now *see Gov. Code § 12965(a)*); one-year deadline for DFEH to issue accusation is statute of limitations subject to equitable tolling, not jurisdictional prerequisite that divests courts of jurisdiction to hear claim). For discussion of *Civ. Code § 51.7*, *see* § 40.12.

(n5)Footnote 5. 2 *Cal. Code Reg. § 7408(b)*.

(n6)Footnote 6. *Gov. Code §§ 11505(a), (c), 12972(b)*.

(n7)Footnote 7. 2 *Cal. Code Reg. §§ 7408(i), 7407*.

(n8)Footnote 8. *Gov. Code §§ 11505(c), 12972(b)*.

(n9)Footnote 9. *Gov. Code §§ 11505(c), 12972(b)*.

(n10)Footnote 10. *Gov. Code § 12965(a)*; 2 *Cal. Code Reg. § 7408(i), 7407*.

(n11)Footnote 11. *Gov. Code §§ 11505(a), 12972(b)*; *see Gov. Code § 11506(b)* (setting forth form of required statement).

(n12)Footnote 12. *Gov. Code §§ 11505(a), 12972(b)*. For discussion of notice of defense, *see* [4], *below*.

(n13)Footnote 13. *Gov. Code § 11505(a)*.

(n14)Footnote 14. 2 *Cal. Code Reg. § 7408*.

(n15)Footnote 15. *Gov. Code §§ 11505(a), 12972(b)*; 2 *Cal. Code Reg. § 7436*.

(n16)Footnote 16. 2 *Cal. Code Reg. § 7407*.

(n17)Footnote 17. 2 *Cal. Code Reg. § 7407(h)(7)*.

(n18)Footnote 18. *Gov. Code §§ 11506(a), (c), 12972(b)*; 2 *Cal. Code Reg. § 7412(b)*.

(n19)Footnote 19. 2 *Cal. Code Reg. § 7412(a)*.

(n20)Footnote 20. 2 *Cal. Code Reg. § 7412(a)*.

(n21)Footnote 21. 2 *Cal. Code Reg. § 7407*.

(n22)Footnote 22. 2 *Cal. Code Reg. § 7407*.

(n23)Footnote 23. 2 *Cal. Code Reg. § 7407*.

(n24)Footnote 24. 2 *Cal. Code Reg. § 7412(b)*.

(n25)Footnote 25. 2 *Cal. Code Reg. § 7412(b)*.

(n26)Footnote 26. 2 *Cal. Code Reg. § 7412(b)*.

(n27)Footnote 27. *See Gov. Code §§ 11505(a), 12972*.

(n28)Footnote 28. *Gov. Code § 11506(a)(1)-(6)*.

(n29)Footnote 29. *Gov. Code §§ 11506(b), 12972*.

(n30)Footnote 30. *Gov. Code §§ 11506(b), 12972*.

(n31)Footnote 31. *Gov. Code §§ 11506(b), 12972*.

(n32)Footnote 32. 2 *Cal. Code Reg. § 7409(a)*.

(n33)Footnote 33. 2 *Cal. Code Reg. § 7409(b)*.

(n34)Footnote 34. 2 *Cal. Code Reg. § 7409(b)*.

(n35)Footnote 35. 2 *Cal. Code Reg. § 7409(c)*.

(n36)Footnote 36. 2 *Cal. Code Reg. § 7409(d)*.

(n37)Footnote 37. 2 *Cal. Code Reg. § 7409(e)*.

(n38)Footnote 38. 2 *Cal. Code Reg. § 7409(f)*.

(n39)Footnote 39. 2 *Cal. Code Reg. § 7415(a)*.

(n40)Footnote 40. *Gov. Code § 12965(c)(1)*.

(n41)Footnote 41. *Gov. Code § 12965(c)(1)*.

(n42)Footnote 42. *Gov. Code § 12965(c)(2)*.

(n43)Footnote 43. *Compare Gov. Code § 12965(c)(2) with Gov. Code § 12965(b); see* discussion in Ch. 43, pt. A.

(n44)Footnote 44. *Gov. Code § 12965(c)(2).*

(n45)Footnote 45. *Gov. Code § 12965(c)(2).*

(n46)Footnote 46. *Gov. Code § 12965(c)(3).*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.33

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.33 Parties to Proceeding

The respondent and the DFEH are parties to a proceeding before the FEHC.ⁿ¹ The Administrative Procedure Act (APA), which applies to proceedings before the FEHC,ⁿ² includes in its definition of "party" the agency, the respondent, and any person, other than an officer or an employee of the agency in his official capacity, who has been allowed to appear or participate in the proceeding.ⁿ³ On motion pursuant to 2 *Cal. Code Reg. § 7419*, the FEHC may in its discretion permit any person with an interest in the outcome of a matter to intervene as a party.ⁿ⁴ The FEHC has permitted intervention by the complainants and a labor union that was the bargaining representative of the complainants.ⁿ⁵ The FEHC has also ordered joinder of individuals who held positions on a challenged eligibility list, but who did not move for intervention as persons with an interest in the remedy and in the outcome of the proceeding.ⁿ⁶

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewPublic Health & Welfare LawHousing & Public BuildingsFair Housing

FOOTNOTES:

(n1)Footnote 1. *See Gov. Code § 11500(b)*.

(n2)Footnote 2. *See Gov. Code § 12972(b)*.

(n3)Footnote 3. *Gov. Code § 11500(b)*.

(n4)Footnote 4. 2 *Cal. Code Reg. § 7425(b)*.

(n5)Footnote 5. *DFEH v. City and County of San Francisco* (1982) FEHC Dec. No. 82-11 at p. 8, affirmed sub. nom. *City and County of San Francisco v. Fair Employment & Housing Commission* (1987) 191 *Cal. App. 3d* 976, 236 *Cal. Rptr.* 716 .

(n6)Footnote 6. DFEH v. City and County of San Francisco (1982) FEHC Dec. No. 82-11, pp. 8, 10, affirmed sub. nom. *City and County of San Francisco v. Fair Employment & Housing Commission* (1987) 191 Cal. App. 3d 976, 236 Cal. Rptr. 716 .



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3-42 California Employment Law § 42.34

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.34 Representation of Respondent

A respondent may represent himself or herself, or may have legal or nonlegal representation at all stages of administrative adjudication.ⁿ¹ When the respondent is not represented by legal counsel, the FEHC must make every effort to ensure that the respondent's rights are protected.ⁿ²

Legal Topics:

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

Administrative Law Agency Adjudication General Overview Civil Procedure Counsel General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. *2 Cal. Code Reg. § 7405(a)*.

(n2)Footnote 2. *See 2 Cal. Code Reg. § 7405(b)*.



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3-42 California Employment Law § 42.35

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.35 Post-Accusation Discovery

[1] Generally

The discovery rights of the DFEH are more limited after an accusation has been issued than during the investigation of a complaint.ⁿ¹ The DFEH and the respondent may each take only a single deposition in the manner prescribed by law for taking depositions in civil actions in the superior court.ⁿ² However, the FEHC may order a witness to be deposed if he or she will be unavailable at the hearing or cannot be compelled to attend the hearing.ⁿ³

After issuance of an accusation, the DFEH or any other party to an accusation may seek discovery from any party.ⁿ⁴ Within 30 days after service of an accusation or 15 days after service of an amended accusation a party may obtain the names and addresses of witnesses known to the other party, including but not limited to, those intended to be called to testify at the hearing.ⁿ⁵ Within that same time period a party may inspect and copy any of the following items in the possession or custody or under the control of the other party:ⁿ⁶

1. A statement of a person, other than the respondent, named in the accusation or amended accusation, when the DFEH bases its accusation on an act or omission by the respondent toward such person;
2. A statement by any party relating to the subject matter of the proceeding;
3. Statements of proposed witnesses and other persons having personal knowledge of the acts or events that are the basis for the proceeding, which are not included in (1) or (2), *above*;
4. All writings, including but not limited to, reports of mental, physical, and blood examinations and things that the party then proposes to offer in evidence;
5. Any other writing or thing that is relevant and that would be admissible in evidence; and

6. Investigative reports made by or on behalf of the DFEH or other party relating to the subject matter of the proceeding, to the extent that such reports (a) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions, or events which are the basis for the proceeding; (b) reflect matters perceived by the investigator in the course of his or her investigation; or (c) contain or include by attachment any writing described in paragraphs (1) through (5), *above*, or a summary thereof.

In the case of an accusation that alleges sexual harassment, sexual assault, or sexual battery, evidence of a complainant's sexual conduct with individuals other than the alleged perpetrator is *not* discoverable unless it is to be offered at a hearing to attack the complainant's credibility.ⁿ⁷

No party may discover any writing or thing that is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.ⁿ⁸

[2] FORM--Post-Accusation Request for Discovery

[a] Comment

The form set forth in [b], *below*, is a request for discovery from the DFEH following issuance of an accusation. Once an accusation is issued, a party is entitled to discovery.ⁿ⁹ The form can be modified to be used to request discovery from another party.

[b] Form

BEFORE THE FAIR EMPLOYMENT
AND HOUSING COMMISSION OF THE
STATE OF CALIFORNIA

In the Matter of the Accusation of THE DEPART-)
MENT OF FAIR EMPLOYMENT AND HOUSING,)
vs.)
_____[Name],)
Respondent,)
_____[Name],)
Complainant.)
)

NO. _____
REQUEST FOR DISCOVERY
[Gov. Code § 11507.6]

TO THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING:

Pursuant to *Government Code section 11507.6*, _____ [name of party requesting discovery] requests the following:

1. The names and addresses of all witnesses to the extent known by you, including, but not limited to, those intended to be called to testify at the hearing.
2. An opportunity to inspect and copy all of the documents set forth in *Government Code section 11507.6*, subparagraphs (a) through (f), which are in your possession or under your custody and control.

Dated: _____

[signature]

Attorney for _____

[*name of party*]

Legal Topics:

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

Administrative Law Agency Adjudication General Overview Administrative Law Agency Investigations General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. For discussion of discovery during the investigation of complaint, *see* § 42.27.

(n2)Footnote 2. *See Gov. Code § 12972(c); Cooper v. Board of Medical Examiners (1975) 49 Cal. App. 3d 931, 945, 123 Cal. Rptr. 563 .*

(n3)Footnote 3. *See Gov. Code §§ 11511, 12972.* For discussion, *see* § 42.37[3].

(n4)Footnote 4. *Gov. Code §§ 11507.6, 12972(b).*

(n5)Footnote 5. *See Gov. Code §§ 11507.6, 12972(b).*

(n6)Footnote 6. *Gov. Code §§ 11507.6(a)-(f), 12972(b).*

(n7)Footnote 7. *Gov. Code §§ 11507.6(g), 12972(b).*

(n8)Footnote 8. *Gov. Code §§ 11507.6(f), 12972(b).* For discussion of confidential information, *see* § 42.28.

2 Cal. Code Reg. § 7447(d).

(n9)Footnote 9. *2 Cal. Code Reg. § 7417(a).*



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3-42 California Employment Law § 42.36

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.36 Pre-Hearing Motions to FEHC

[1] Types of Motions

The FEHC's procedural regulations provide that the following non-discovery motions may be made to the FEHC prior to commencement of hearing:n1

1. Intervention;
2. Amicus briefs;
3. Motion compelling deposition of an unavailable witness;
4. Consolidation or severance of matters for hearing;
5. Request for interpreter, in compliance with the rules set forth in 2 *Cal. Code Reg. § 7418* and *Gov. Code §§ 11435.05-11435.65*;
6. Motion to amend accusation
7. Motion to withdraw accusation;
9. Motion to change venue;
10. Other motions, on prior approval of the Executive and Legal Affairs Secretary (ELAS).

Pre-hearing motions may not decide substantive matters, including jurisdictional or legal challenges, which must be presented at the hearing on the merits.n2 However, if the parties stipulate in writing that there is a jurisdictional or other

threshold dispositive issue which should be decided prior to the merits, the Hearing Officer assigned to the case may take evidence solely on that issue and issue a written ruling limited to that question.ⁿ³ For example, a respondent who, for example, contends that the FEHC lacks jurisdiction because the respondent employs fewer than five employeesⁿ⁴ must present this contention at a hearing and present a defense on the merits, as well, in the event the jurisdictional defense fails.ⁿ⁵

[2] Form and Procedure

Pre-hearing motions must be filed with the Executive and Legal Affairs Secretary (ELAS).ⁿ⁶ No special form of motion is required.ⁿ⁷ With a few specific exceptions, pre-hearing motions shall be filed and served at least 15 calendar days before the date set for commencement of the hearing.ⁿ⁸ Upon written application to, and approval of the ELAS, and for good cause on terms to be determined by the ELAS, motions may be heard on shorter notice.ⁿ⁹ The non-moving party shall have 7 days from the date of service of the motion (or on lesser or greater time in the discretion of the ELAS) to file and serve a response.ⁿ¹⁰

The ELAS or Hearing Officer assigned to the case shall issue an order granting or denying the motion; the order shall be in writing and served by mail on all parties of record.ⁿ¹¹

Legal Topics:

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

Administrative Law Agency Adjudication Prehearing Activity Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. 2 Cal. Code Reg. § 7419(b)

(n2)Footnote 2. 2 Cal. Code Reg. § 7419

(n3)Footnote 3. 2 Cal. Code Reg. § 7419(a).

(n4)Footnote 4. See Gov. Code § 12926(d).

(n5)Footnote 5. See Robinson v. Dept. of Fair Employment & Housing (1987) 192 Cal. App. 3d 1414, 1416, 239 Cal. Rptr. 908 .

(n6)Footnote 6. 2 Cal. Code Reg. § 7419(c)(1).

(n7)Footnote 7. 2 Cal. Code Reg. § 7419(c)(2).

(n8)Footnote 8. 2 Cal. Code Reg. § 7419(c)(3).

(n9)Footnote 9. 2 Cal. Code Reg. § 7419(c)(3).

(n10)Footnote 10. 2 Cal. Code Reg. § 7419(c)(3).

(n11)Footnote 11. 2 Cal. Code Reg. § 7419(c)(4).



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3-42 California Employment Law § 42.37

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.37 Hearing Before Administrative Law Judge

[1] Conduct of Hearing

The FEHC conducts hearings on accusations issued by the DFEHⁿ¹ in accordance with its procedural regulations and, if the Commission does not have a procedural regulation on a particular issue, in accordance with pertinent provisions of the Administrative Procedure Act (APA), *Government Code Section 11370 et seq.*ⁿ² The Administrative Adjudication *Bill of Rights*^{n2.1} and the rules for judicial review^{n2.2} apply to the Commission as well.^{n2.3} All hearings are open to the public, unless the interests of justice require otherwise.ⁿ³ Attorneys or agents of the DFEH present the case in support of the accusation.ⁿ⁴ The FEHC may appoint its own hearing officer to hear the case,ⁿ⁵ or it may decide to hear the case along with the hearing officer.ⁿ⁶

■ PRACTICE TIP:

In practice, the commissioners rarely preside over the hearings themselves. Commissioners do not serve full-time, and because they reside in various parts of the state, it is difficult to assemble a quorum to hear cases that typically last several days. *Commentary by Dale Brodsky and Beverly Tucker.*

If the FEHC hears the case, the hearing officer presides at the hearing, rules on the admission and exclusion of evidence, and advises the FEHC on matters of law.ⁿ⁷ When the FEHC hears a case, it may exercise all other powers relating to the conduct of a hearing, including questioning witnesses, but it may delegate any of its powers to the hearing officer.ⁿ⁸ The proceedings at a hearing are reported by a stenographic reporter, but may be reported electronically if all parties consent.ⁿ⁹

[2] Hearing Dates and Continuances

The FEHA provides that hearings must take place not more than 90 days after the issuance of the accusation by the DFEH.ⁿ¹⁰ The DFEH determines the time, date, and place of the hearing unless otherwise ordered by the Commission.ⁿ¹¹ Requests for continuance must be made in writing and filed with the Executive and Legal Affairs Secretary (ELAS), and served on all parties and the complainant. Before making a request, the moving party must

contact all the other parties to determine whether there is opposition. The moving party must state any opposition in its papers to the ELAS.ⁿ¹² Requests for continuance will only be granted for good cause.ⁿ¹³ A continuance beyond the 90-day time limitation after issuance of an accusation will only be granted by written stipulation of the parties, written waiver of the time limit by all respondents, and upon approval of the ELAS.ⁿ¹⁴

Moreover, once a hearing officer has been assigned to the hearing, a continuance may only be granted for good cause by the assigned judge or by the presiding judge of the appropriate regional office of the Office of Administrative Hearings.ⁿ¹⁵ A party must apply for a continuance within 10 working days after discovering the occurrence giving rise to good cause for a continuance.ⁿ¹⁶ However, a continuance may be granted after the 10-day period for good cause if the party is not responsible for the event or condition that established good cause and has made a good faith effort to prevent it.ⁿ¹⁷

If a hearing officer denies a request for a continuance, the party seeking the continuance must seek judicial review in the superior court within 10 working days.ⁿ¹⁸ A party applying for judicial relief from the denial of a continuance must give notice to the FEHC and parties to the action either orally (at the time of the denial) or in writing (at the time the application for judicial review is filed).ⁿ¹⁹ Failure to apply for judicial relief in this manner bars the party from such relief as a matter of jurisdiction.ⁿ²⁰

[3] Subpoenas and Depositions of Unavailable Witnesses

[a] Subpoenas

Before the hearing on the merits has commenced, the DFEH or the assigned administrative law judge, will issue subpoenas and subpoenas duces tecum, on the request by any party, for the attendance or production of documents at the hearing.

Subpoenas and subpoenas duces tecum must be issued in accordance with *Code of Civil Procedure Sections 1985 through 1985.3*, which apply generally to all trials of civil actions.ⁿ²¹

Two copies of each subpoena or subpoena duces tecum with proof of service must be filed with the FEHC.ⁿ²² They may be served in person in accordance with *Code of Civil Procedure Sections 1987 and 1988*.ⁿ²³

[b] Deposition of Unavailable Witnesses

A party may move the FEHC to take a deposition in lieu of testimony of material witnesses residing within or outside California who will be unable to attend or cannot be compelled to attend the hearing.ⁿ²⁴ The motion must set forth the following:ⁿ²⁵

1. The nature of the pending proceeding;
2. The name and address of the witness;
3. A showing of the materiality of the witness' testimony;
4. A showing that the witness is unable or cannot be compelled to attend; and
5. A request for an order requiring the witness to appear and testify before an officer named in the motion for that purpose.

Motions to take depositions of unavailable witnesses must be made by verified petition and filed and served in the same

manner as other motions to the FEHC.ⁿ²⁶ That is, the party must serve notice of hearing and a copy of the petition on the other parties at least 10 days before the hearing.ⁿ²⁷

[4] Introduction of Affidavit in Evidence

Ten or more days before a hearing, any party may mail or deliver to all other parties an affidavit the party proposes to introduce in evidence together with a notice so stating.ⁿ²⁸ Unless, within seven days of mailing or delivery, an opposing party mails or delivers a request to cross-examine the affiant, the right to cross-examination is waived, and the affidavit, if introduced into evidence, is given the same effect as oral testimony.ⁿ²⁹ If the opposing party has no opportunity to cross-examine, despite a timely request, the affidavit may be introduced as hearsay evidence.ⁿ³⁰

[5] Pre-Hearing Statement

No later than 5 business days prior to the scheduled hearing (and after a telephone conference in which the parties make best efforts to resolve or define the hearing issues), each party shall file with the Commission a pre-hearing statement signed by the party or his or her representative.ⁿ³¹ The statement shall include, but need not be limited to:ⁿ³²

- A brief summary of any stipulated facts.
- Identification of all operative pleadings by their title and date signed.
- A current estimate from each party of the time necessary to try its case.
- The name of each witness each party may call at hearing, along with a brief statement of the content of expected testimony.
- The name and address of each expert witness to be called at hearing, along with a brief statement of the opinion each expert is expected to give and a copy of the current resume or curriculum vitae of each expert witness.
- A list of documentary exhibits each party intends to present at hearing and a description of any physical or demonstrative evidence.
- The identity of any witness whose testimony will be presented by affidavit or deposition.ⁿ³³
- A concise statement of any significant evidentiary issues.
- A copy of any pre-hearing motion filed by either party, any response filed thereto, and, if applicable, any order from the ELAS or Hearing Officer.
- Any anticipated motions in limine.

A suggested format for the pre-hearing statement is set out in the appendix to 2 Cal. Code Reg. Ch. 4, § 7400 et seq. The Hearing Officer has the discretion to exclude any items excluded from the pre-hearing statement without good cause.ⁿ³⁴ However, the parties are not required to disclose rebuttal or impeachment evidence.ⁿ³⁵

[6] Presentation of Evidence at Hearing

[a] In General

Oral evidence at the hearing must be taken only on oath or affirmation.ⁿ³⁶ Each party may call and examine witnesses,

introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered on direct examination, impeach any witness, regardless of which party called the witness, and rebut evidence against him or her.ⁿ³⁷ If respondent does not testify on his or her behalf, he or she may be called and examined as if under cross-examination.ⁿ³⁸

[b] Applicable Rules of Evidence

Technical rules relating to evidence and witnesses do not apply to FEHA administrative hearings, except as specifically provided in *Government Code Section 11513*.ⁿ³⁹ Thus, any relevant evidence is admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of its inadmissibility under common law or statutory rules of evidence applicable to civil actions.ⁿ⁴⁰ Hearsay evidence may be used to supplement or explain other evidence, but cannot support a finding by itself unless it would be admissible over objection in a civil action.ⁿ⁴¹ Rules of privilege are effective to the extent that they are otherwise prescribed by statute, and irrelevant and unduly repetitious evidence must be excluded.ⁿ⁴²

■ PRACTICE TIP:

In practice, DFEH attorneys often make evidentiary objections based on the Evidence Code, and evidence is frequently held inadmissible by the hearing officer. Attorneys should make hearsay objections to evidence, even though it is admissible, because hearsay evidence may only be used for supplementing or explaining other evidence,ⁿ⁴³ and it may be important for the record to reflect that limitation. *Commentary by Dale Brodsky, Esq. and Beverly Tucker, Esq.*

The Hearing officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create substantial danger of undue prejudice or of confusing the issues.ⁿ⁴⁴ Judicial review of the hearing is governed by the Administrative Procedure Act, *Gov. Code § 11523*.ⁿ⁴⁵

[c] Evidence Regarding Complainant's Past Sexual Conduct

In any proceeding under the FEHA alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not admissible at hearing unless offered to attack the credibility of the complainant.ⁿ⁴⁶ Any such evidence offered to attack the complainant's credibility is presumed inadmissible absent an offer of proof establishing its relevance and reliability and that its probative value is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or will confuse the issue.ⁿ⁴⁷

Reputation or opinion evidence regarding the complainant's sexual behavior is not admissible for any purpose.ⁿ⁴⁸

Legal Topics:

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

Administrative Law Agency Adjudication Hearings General Overview Administrative Law Agency Adjudication Presiding Officers Administrative Law Judges Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12967*.

(n2)Footnote 2. *Gov. Code § 12972(b)(1)*.

(n3)Footnote 2.1. *See Gov. Code § 11425.10 et seq.*

(n4)Footnote 2.2. *See Gov. Code § 11523.*

(n5)Footnote 2.3. *Gov. Code § 12972(b)(2).*

(n6)Footnote 3. *2 Cal. Code Reg. § 7429(b).*

(n7)Footnote 4. *Gov. Code § 12969.* In practice, hearings are conducted by DFEH attorneys, frequently with the assistance of law clerks.

(n8)Footnote 5. *Gov. Code § 12935(j).*

(n9)Footnote 6. *Gov. Code § 11512(a).*

(n10)Footnote 7. *Gov. Code § 11512(b).*

(n11)Footnote 8. *See Gov. Code § 11512(b).*

(n12)Footnote 9. *Gov. Code § 11512(d).*

(n13)Footnote 10. *Gov. Code § 12968; see DFEH v. State Univ.--Hayward (1988) FEHC Dec. No. 88-18, pp. 12-13* (compliance with *Gov. Code § 12968* is not jurisdictional prerequisite to administrative adjudication, but is statute of limitations subject to waiver, estoppel, and equitable tolling).

(n14)Footnote 11. *See 2 Cal. Code Reg. § 7429(c).*

(n15)Footnote 12. *2 Cal. Code Reg. § 7414(c).*

(n16)Footnote 13. *2 Cal. Code Reg. § 7414(c)(1).*

(n17)Footnote 14. *2 Cal. Code Reg. § 7414(c)(2).*

(n18)Footnote 15. *Gov. Code § 11524(a).*

(n19)Footnote 16. *Gov. Code § 11524(b).*

(n20)Footnote 17. *Gov. Code § 11524(b).*

(n21)Footnote 18. *Gov. Code § 11524(c).*

(n22)Footnote 19. *Gov. Code § 11524(c).*

(n23)Footnote 20. *Gov. Code § 11524(c).*

(n24)Footnote 21. *Code Civ. Proc. §§ 1985-1985.3.* The cited Code of Civil Procedure sections are those that apply generally to trial of civil actions. For example, *Code Civ. Proc. § 1985* requires that a subpoena duces tecum be accompanied by an affidavit showing good cause for production of the matters and things described, specifying the matters and things to be produced, stating their materiality to the issues in the case, and stating that the witness has the designated matters or things in his or her possession or under his or her control. For discussion of subpoenas in civil cases generally, see California Forms of Pleading and Practice, *Depositions and Discovery* and *Subpoenas* (Matthew Bender) and DeMeo, California Deposition and Discovery Practice, Ch. 53 (Matthew Bender).

(n25)Footnote 22. *2 Cal. Code Reg. § 7455.*

(n26)Footnote 23. *Code Civ. Proc. §§ 1987, 1988.*

(n27)Footnote 24. *Gov. Code § 11511; 2 Cal. Code Reg. § 7453(a).*

(n28)Footnote 25. *Gov. Code § 11511.*

(n29)Footnote 26. *2 Cal. Code Reg. § 7427; see Gov. Code § 11511.* For discussion of procedure, *see § 42.36[2].*

(n30)Footnote 27. *Gov. Code § 11511.*

(n31)Footnote 28. *Gov. Code § 11514(a).*

(n32)Footnote 29. *Gov. Code § 11514(a).*

(n33)Footnote 30. *Gov. Code § 11514(a); see discussion in [6][b], below.*

(n34)Footnote 31. *2 Cal. Code Reg. § 7422(a), (b).*

(n35)Footnote 32. *2 Cal. Code Reg. § 7422(b).*

(n36)Footnote 33. *See 2 Cal. Code Reg. §§ 7427, 7428.*

(n37)Footnote 34. *2 Cal. Code Reg. § 7422(d).*

(n38)Footnote 35. *2 Cal. Code Reg. § 7422(e).*

(n39)Footnote 36. *Gov. Code § 11513(a); 2 Cal. Code Reg. § 7429(f)(1).*

(n40)Footnote 37. *Gov. Code § 11513(b); 2 Cal. Code Reg. § 7429(f)(2).*

(n41)Footnote 38. *Gov. Code § 11513(b).*

(n42)Footnote 39. *See Gov. Code § 11513(c).*

(n43)Footnote 40. *See Gov. Code § 11513(c).*

(n44)Footnote 41. *Gov. Code § 11513(c).*

(n45)Footnote 42. *Gov. Code § 11513(c).*

(n46)Footnote 43. *See Gov. Code § 11513(c).*

(n47)Footnote 44. *2 Cal. Code Reg. § 7429(f)(6).*

(n48)Footnote 45. *2 Cal. Code Reg. § 7437.*

(n49)Footnote 46. *Gov. Code § 11513(c).*

(n50)Footnote 47. *Gov. Code § 11513(o).*

(n51)Footnote 48. *Gov. Code § 11440.40(b).*



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.38

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.38 Post-Hearing Matters

[1] Post-Hearing Motions

As of March 15, 1999, post-hearing motions are no longer authorized by the Commission regulations.n1

[2] Post-Hearing Briefs

The parties shall be given an opportunity to file post-hearing briefs, as directed at the hearing. Copies shall be served on the parties and on the complainants as provided in 2 *Cal. Code Reg. § 7407*.n2

The matter will be deemed submitted to the Hearing officer on the latest of the dates he or she receives the transcripts of the hearing, hears oral argument, or receives the last timely post-hearing brief.n3

Legal Topics:

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

Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewPublic Health & Welfare LawHousing & Public BuildingsFair Housing

FOOTNOTES:

(n1)Footnote 1. Former 2 *Cal. Code Reg. § 7441* repealed.

(n2)Footnote 2. 2 *Cal. Code Reg. § 7432(a)*.

(n3)Footnote 3. 2 *Cal. Code Reg. § 7432(b)*.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
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3-42 California Employment Law § 42.39

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.39 Decision by FEHC

[1] Preparation and Submission of Proposed Decision

A contested case may be originally heard by the FEHC itself, or, at the FEHC's discretion, by an administrative law judge alone.ⁿ¹ If the FEHC originally hears the case, an administrative law judge must be present during the consideration of the case and, on request, assist and advise the FEHC in the conduct of the hearing. The FEHC must issue its decision within 100 days of the submission of the case.ⁿ² No member of the agency who did not hear the evidence may vote on the decision.ⁿ³ The agency's decision must be immediately filed as a public record and copies served on each party and his or her attorney.ⁿ⁴

If a contested case is originally heard by an administrative law judge alone, the judge must prepare a proposed decision within 30 days after the case is submitted in a form that may be adopted by the FEHC as the final decision. If the administrative law judge fails to deliver a decision within the prescribed period, the FEHC's rights are unaffected.ⁿ⁵ The FEHC will file a copy of the proposed decision as a public document within 30 days after receipt of the proposed decision and serve a copy on each party and his or her attorney. This filing and service does not constitute adoption of the proposed decision by the FEHC.ⁿ⁶ Within 100 days of receipt by the FEHC of the proposed decision, the FEHC must take action to adopt, amend, or reject the proposed decision.ⁿ⁷ If the FEHC fails to act within the 100-day period, the proposed decision is deemed adopted by the FEHC.ⁿ⁸

[2] Adoption or Modification of Proposed Decision

The FEHC may adopt the proposed decision in its entirety or reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision. The FEHC may also make technical or other minor changes to the proposed decision and adopt it as the agency's decision; these types of changes are limited to a clarifying change or change of a similar nature that does not affect the factual or legal basis of the proposed decision.ⁿ⁹ If the FEHC fails to act within the 100-day period, the proposed decision is deemed adopted by the FEHC.ⁿ¹⁰

[3] Non-Adoption of Proposed Decision

The FEHC may reject the proposed decision of the administrative law judge and refer the case to that judge, if reasonably available, or to another judge to take additional evidence. The referral judge will then prepare a revised proposed decision, based on the additional evidence, the transcript, and any other papers that are part of the earlier record. A copy of the proposed decision will be furnished to each party and attorney.ⁿ¹¹

Alternatively, the FEHC may reject the proposed decision and decide the case on the record, including the transcript, or on the agreed statement of the parties, with or without taking additional evidence.ⁿ¹² The FEHC has the authority to decide some but not all the issues in the case.ⁿ¹³ A copy of the record must be made available to the parties.ⁿ¹⁴ The FEHC may not itself decide the case without first affording the parties the opportunity to present oral or written argument before the agency. If additional oral evidence is introduced, no agency member may vote unless the member heard the additional oral evidence.ⁿ¹⁵ The FEHC must issue its final decision no later than 100 days after rejecting the proposed decision or, if the FEHC ordered a transcript of the proceedings before the administrative law judge, after receipt of the transcript. If the FEHC finds that special circumstances require further delay, the FEHC will issue an order delaying the decision for no more than 30 days and specifying the reasons for the delay.ⁿ¹⁶ The agency's decision must be immediately filed as a public record and copies served on each party and his or her attorney.ⁿ¹⁷

[4] Form of Decision and Effective Date

The FEHC's decision must be written and must contain findings of fact, a determination of the issues presented, and either an order stating the remedy or an order dismissing the accusation.ⁿ¹⁸ The decision and order must state the identity of the members who participated in the decisionⁿ¹⁹ and must inform parties of their right to appeal.ⁿ²⁰

The FEHC's decision becomes effective 30 days after it is mailed or delivered to the respondent, unless (1) the FEHC orders reconsideration within that time, (2) the FEHC orders an earlier effective date, or (3) the FEHC grants a stay of execution.ⁿ²¹ The FEHC may include a stay of execution in its decision or may grant a stay at any time before its decision becomes effective.ⁿ²²

[5] Precedential Opinions

The FEHC has the authority to establish and publish a system of precedential opinions pertaining to laws under its jurisdiction.ⁿ²³ The Commission's may designate all or part of a decision if it contains a significant legal or policy determination of general application that is likely to recur.ⁿ²⁴ Once designated as precedential, either the Commission or the parties may rely upon a decision in their arguments to the Commission or to the courts.ⁿ²⁵

The Commission must annually publish an index of significant legal and policy determinations made in its precedential decisions and must also annually publish the availability of the index.ⁿ²⁶ This index must be made available to the public in the Commission's office and by subscription.ⁿ²⁷

[6] Reconsideration of Decision by FEHC

The FEHC may order reconsideration of all or part of a decision on its own initiative or by petition of any party.ⁿ²⁸ The FEHC must notify a petitioner of the time limits for petitioning for reconsideration.^{n28.1} The FEHC's power to order reconsideration expires (1) 30 days after service of the decision, (2) on the date set by the FEHC as the effective date if such date occurs earlier, or (3) at the end of a stay, not to exceed 30 days, which the FEHC may grant for the purpose of filing a motion for reconsideration.ⁿ²⁹ A motion for reconsideration is deemed denied if the FEHC takes no action within the time allowed for ordering reconsideration.ⁿ³⁰ The FEHC may itself reconsider the case on the record including such additional evidence and argument as it may permit, or it may assign the case to an administrative law judge subject to the hearing procedure specified in *Government Code Section 11517*.ⁿ³¹

[7] Res Judicata Effect

Unless a party to an administrative agency proceeding challenges the unfavorable findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions.ⁿ³²

Legal Topics:

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

Administrative Law Agency Adjudication Decisions General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. *See Gov. Code § 11517(a).*

(n2)Footnote 2. *See Gov. Code § 11517(b)(1), (3).*

(n3)Footnote 3. *Gov. Code § 11517(b)(2).*

(n4)Footnote 4. *Gov. Code § 11517(d).*

(n5)Footnote 5. *See Gov. Code § 11517(c)(1); see also DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, p. 11 (30 day period is directory and noncompliance does not deprive FEHC of jurisdiction).*

(n6)Footnote 6. *See Gov. Code § 11517(c)(1).*

(n7)Footnote 7. *See [2], [3], below.*

(n8)Footnote 8. *See Gov. Code § 11517(c)(2).*

(n9)Footnote 9. *See Gov. Code § 11517(c)(2)(A)-(C).*

(n10)Footnote 10. *See Gov. Code § 11517(c)(2); see also 2 Cal. Code Reg. § 7434.*

Gov. Code § 11517(d).

(n11)Footnote 11. *See Gov. Code § 11517(c)(2)(D).*

(n12)Footnote 12. *See Gov. Code § 11517(c)(2)(E).* The parties may stipulate that the agency may decide the case on the record without including the transcript.

(n13)Footnote 13. *See Gov. Code § 11517(c)(2)(E)(iii).*

(n14)Footnote 14. *See Gov. Code § 11517(c)(2)(E)(i)* (fee may be required to cover direct copying costs).

(n15)Footnote 15. *See Gov. Code § 11517(c)(2)(E)(ii); 2 Cal. Code Reg. § 7434.*

(n16)Footnote 16. *See Gov. Code § 11517(c)(2)(E)(iv).* This order is subject to judicial review pursuant to *Government Code § 11523.*

(n17)Footnote 17. *Gov. Code § 11517(d).*

(n18)Footnote 18. *See Gov. Code §§ 11518, 12970(a)-(d), (g), (h); see, e.g., DFEH v. General Dynamics, Inc. (1990) FEHC Dec. 90-08, p. 12 (dismissal).*

(n19)Footnote 19. *Gov. Code § 12970(g).*

(n20)Footnote 20. *Gov. Code § 12970(h)*; *see, e.g., DFEH v. General Dynamics, Inc.* (1990) FEHC Dec. 90-08, p. 12.

(n21)Footnote 21. *Gov. Code § 11519(a)*; *2 Cal. Code Reg. § 7465(b)*.

(n22)Footnote 22. *Gov. Code § 11519(b)*.

(n23)Footnote 23. *2 Cal. Code Reg. § 7285.5(c)*.

(n24)Footnote 24. *2 Cal. Code Reg. § 7435(a)*.

(n25)Footnote 25. *2 Cal. Code Reg. § 7435(a)*.

(n26)Footnote 26. *2 Cal. Code Reg. § 7435(b)*.

(n27)Footnote 27. *2 Cal. Code Reg. § 7435(b)*.

(n28)Footnote 28. *Gov. Code § 11521(a)*, *2 Cal. Code Reg. § 7436*.

(n29)Footnote 28.1. *Gov. Code § 11521(a)*.

(n30)Footnote 29. *Gov. Code § 11521(a)*

(n31)Footnote 30. *Gov. Code § 11521(a)*.

(n32)Footnote 31. *Gov. Code § 11521(b)*. For discussion of procedures under *Gov. Code § 11517*, *see* [1]-[3], *above*.

(n33)Footnote 32. *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal. 3d 465, 484, 131 Cal. Rptr. 90, 551 P.2d 410 ; *see also Johnson v. City of Loma Linda* (2000) 24 Cal. 4th 61, 69-77, 99 Cal. Rptr. 2d 316, 5 P.3d 874 (public employee who failed to seek to set aside adverse findings of administrative proceeding is bound by those findings in later civil action under FEHA but not in action under Title VII).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.39A

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.39A Relief Awarded by FEHC

[1] Types of Relief Available

If the FEHC finds that a respondent has engaged in any unlawful practice under the FEHA, it must state its findings of fact and determination and must issue and have served a cease and desist order on the respondent.ⁿ¹ In addition, it may require the respondent to take action including, but not limited to, the following:ⁿ²

1. The hiring, reinstatement, or upgrading of employees, with or without back pay;
2. The admission or restoration to membership in any respondent labor organization;
3. The payment of actual damages as may be available in FEHA civil actions, subject to limitations as discussed in [2], *below*;
4. Affirmative or prospective relief to prevent the recurrence of the unlawful practice; and
5. A report to the FEHC regarding the manner of compliance with the FEHC's order.

In addition, in certain cases, the FEHC may assess an administrative fine, as further discussed in [3], *below*. ⁿ³

If the FEHC finds a respondent has engaged in an unlawful practice under the FEHA and is liable for actual damages, an administrative fine, or a civil penalty, any amount due to that respondent by a state agency may be offset to satisfy the FEHC's final order or decision.^{n3.1}

If the respondent is licensed or granted a privilege by a state agency to do business, provide a service, or conduct activities, and the respondent's unlawful practice is determined to have occurred in connection with the exercise of that license or privilege, the FEHC must provide the licensing or privilege-granting agency with a copy of the order.ⁿ⁴

[2] Actual Damages

As noted in [1], *above*, the FEHC may award a complainant actual damages as may be available in a civil action under the FEHA.ⁿ⁵ Actual damages include, but are not limited to, damages for emotional injuries if the accusation or amended accusation prays for those damages. Actual damages awarded under this provision for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses may not exceed, in combination with an administrative fine imposed under *Government Code Section 12970(c)*,ⁿ⁶ a total of \$150,000 per aggrieved person per respondent.ⁿ⁷ Notwithstanding this limitation, however, the FEHC may award actual damages of up to \$150,000 against a respondent if the unlawful practice involved a violation of *Civil Code Section 51.7* (right of persons to be free from violence committed against them because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics).ⁿ⁸

A finding of an unlawful practice under the FEHA, in and of itself, is not sufficient to sustain an award of actual damages by the FEHC; rather, the DFEH must prove, by a preponderance of the evidence, that the employee sustained "actual injury."ⁿ⁹ In determining whether to award damages for emotional injuries and the amount to award, the FEHC must consider relevant evidence of the effects of discrimination on the aggrieved person with regard to the following factors:ⁿ¹⁰

1. The aggrieved person's physical and mental well-being;
2. The aggrieved person's personal integrity, dignity, and privacy;
3. The aggrieved person's ability to work, earn a living, and advance in his or her career;
4. The aggrieved person's personal and professional reputation;
5. The aggrieved person's family relationships; and
6. The aggrieved person's access to the job and ability to associate with peers and coworkers.

In addition, the FEHC must consider the duration of the emotional injury, and whether the injury was caused or exacerbated by the aggrieved person's knowledge of the employer's failure to respond adequately to, or to correct, the discriminatory practice or by the egregiousness of the discriminatory practice.ⁿ¹¹

[3] Administrative Fines

The FEHC has no authority to award punitive damages to a complainant in an administrative proceeding under the FEHA.ⁿ¹² However, in order to vindicate the purposes and policies of the FEHA, the FEHC may assess an administrative fine against the respondent in an amount that may not exceed, in combination with actual damages awarded for emotional distress, a total of \$150,000 per aggrieved person per respondent.ⁿ¹³ Administrative fines assessed against employers are not awarded to the employee, but rather are deposited into the state's General Fund.ⁿ¹⁴

An administrative fine may be assessed only if the accusation or amended accusation prays for assessment of a fine.ⁿ¹⁵ Furthermore, the FEHC may not assess an administrative fine, unless it finds that the respondent has been guilty of oppression, fraud, or malice, express or implied, as required by *Civil Code Section 3294* (governing punitive damages in civil actions).ⁿ¹⁶ In making a determination on the amount of a fine, the FEHC must consider relevant evidence, including, but not limited to, the following:ⁿ¹⁷

1. Willful, intentional, or purposeful conduct on the part of the respondent;

2. The respondent's refusal to prevent or eliminate discrimination;
3. The respondent's conscious disregard of its employees' rights;
4. The commission of unlawful conduct by the respondent;
5. Intimidation or harassment on the part of the respondent;
6. Conduct by the respondent that is without just cause or excuse; and
7. Multiple violations of the FEHA by the respondent.

In addition to the administrative fine, the FEHC may assess against the respondent a civil penalty of up to \$25,000 if the respondent denied the complainant any right provided for in *Civil Code Section 51.7* (right of persons to be free from violence committed against them because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics).ⁿ¹⁸ Unlike the administrative fine, this civil penalty is awarded to the aggrieved person.ⁿ¹⁹

Legal Topics:

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

Administrative Law Agency Adjudication General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12970(a)*.

(n2)Footnote 2. *Gov. Code § 12970(a)*.

(n3)Footnote 3. *Gov. Code § 12970(c), (d)*.

(n4)Footnote 3.1. *Gov. Code § 12973(d)*.

(n5)Footnote 4. *Gov. Code § 12970(f)*.

(n6)Footnote 5. *Gov. Code § 12970(a)(3)*.

(n7)Footnote 6. *See [3], below*.

(n8)Footnote 7. *Gov. Code § 12970(a)(3)*. *See, e.g., Sasco Electric v. Fair Employment & Housing Commission* (2009) 176 Cal. App. 4th 532, 544-545, 97 Cal. Rptr. 3d 482 (Commission's award of \$85,000 in emotional distress damages to former employee who lost her job due to pregnancy discrimination was supported by substantial evidence, where testimony of employee, her husband, and her father-in-law established employer's actions profoundly affected her and her marriage; *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal. App. 4th 803, 812, 821-822, 89 Cal. Rptr. 2d 505 (award of over \$450,000 in emotional distress damages supported by testimony of employee and wife that employer's retaliation impaired employee's relationship with his wife and children and caused him to experience physical symptoms, become withdrawn and weepy, have trouble paying bills, and worry about providing private schooling for his children)).

(n9)Footnote 8. *See Gov. Code § 12970(a)(4)*.

(n10)Footnote 9. *Gov. Code § 12970(b)*.

(n11)Footnote 10. *Gov. Code § 12970(b)*.

(n12)Footnote 11. *Gov. Code § 12970(b)*.

(n13)Footnote 12. *Gov. Code § 12970(d)*; see *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal. 3d 1379, 1383, 241 Cal. Rptr. 67, 743 P.2d 1323 (decided prior to legislation authorizing FEHC to assess administrative fine; holding FEHC has no power to award punitive damages).

(n14)Footnote 13. *Gov. Code § 12970(a)(3), (c)*.

(n15)Footnote 14. See *Gov. Code § 12970(d)*.

(n16)Footnote 15. See *Gov. Code § 12970(c)*.

(n17)Footnote 16. *Gov. Code § 12970(d)*. See *Sasco Electric v. Fair Employment & Housing Commission* (2009) 176 Cal. App. 4th 532, 546, 97 Cal. Rptr. 3d 482 (substantial evidence supported Commission's finding of clear and convincing evidence of oppression and malice on employer's part to support imposition of administrative fine, including evidence that employer intentionally discriminated by terminating employment because employee was pregnant and contrived reduction in force to hide its discrimination, which affected only pregnant employee, and that employee suffered significant emotional distress and financial hardship because of employer's conduct). For general discussion of punitive damages in civil actions, see Levy, Golden & Sacks, California Torts, Ch. 54 (Matthew Bender).

(n18)Footnote 17. *Gov. Code § 12970(d)*.

(n19)Footnote 18. See *Gov. Code § 12970(e)*.

(n20)Footnote 19. Compare *Gov. Code § 12970(e)* with *Gov. Code § 12970(d)*.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
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Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.40

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.40 Judicial Review of FEHC Decision

[1] Procedure

[a] In General

Any party to a proceeding before the FEHC may obtain judicial review of the FEHC's decision and order by filing a petition for a writ of mandate in superior court pursuant to *Code of Civil Procedure Section 1094.5*.ⁿ¹ A party may file a petition for a writ of mandate even if the party did not petition the FEHC for reconsideration of its decision.ⁿ²³ The court hears the case without a jury.ⁿ⁴ The court determines whether the FEHC has proceeded without or in excess of its jurisdiction, whether there was a fair trial, and whether the FEHC committed any prejudicial abuse of discretion.ⁿ⁵ A petitioner establishes abuse of discretion by showing that the FEHC has not proceeded in the manner required by law, that its order or decision is not supported by the findings, or that its findings are not supported by the evidence.ⁿ⁶ For a discussion of the standard of review of evidence, see [d], *below*. When the reviewing court denies a petition for writ of mandate seeking review of a FEHC order or decision, the court must enter judgment denying the petition and enforcing the FEHC's final order or decision.^{n6.1}

Notwithstanding any other provision of law, the FEHC is not liable for attorney's fees of parties to the administrative adjudication of cases brought before the FEHC, including review proceedings pursuant to *Government Code Section 11523* and *Code of Civil Procedure Section 1094.5*.^{n6.2}

[b] Time Limit and Preparation of Record

The petition for writ of mandate generally must be filed within 30 days after the last day on which reconsideration can be ordered.ⁿ⁷ However, if the petitioner requests the FEHC to prepare all or part of the record (as described below) within 10 days after the last day on which reconsideration can be ordered,ⁿ⁸ the time within which a petition may be filed is extended until 30 days after delivery of the record to the requesting party.ⁿ⁹

The complete record of the proceedings or parts of it designated by the requesting party must be prepared by the FEHC

or the Office of Administrative Hearings and must be delivered to the requesting party within 30 days after the request is made and the fees paid.^{n9.1} The 30-day time limit for preparation of the record must be extended if good cause is shown.^{n9.2}

The complete record includes the pleadings, all notices and orders issued by the FEHC, any proposed decision by a hearing officer, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence, and any other papers in the case.^{n9.3}

The petitioner must pay the costs of preparing the record.ⁿ¹⁰ However, if the petitioner prevails in overturning the administrative decision on judicial review, the FEHC must reimburse the petitioner for the cost of preparing the transcript.ⁿ¹¹

[c] Stay of FEHC Decision and Order

The court may stay the operation of the FEHC's decision and order pending its judgment, or the filing of a notice of appeal from the court's judgment or expiration of the time for filing a notice of appeal, whichever occurs first.ⁿ¹² An application for a stay must be accompanied by proof of service of a copy of the application on the respondent.ⁿ¹³ The court may not impose or continue a stay of the FEHC's decision if it determines that to do so is against the public interest.ⁿ¹⁴ If the writ of mandate is denied and the denial is appealed, the FEHC's decision may not be stayed except by order of the court to which the appeal is taken.ⁿ¹⁵ However, in cases in which a stay is already in effect when the notice of appeal is filed, the stay continues by operation of law for 20 days following filing of the notice of appeal.ⁿ¹⁶ If an appeal is taken from a judgment granting the writ of mandate, the FEHC's order is stayed pending the decision on appeal unless the court to which the appeal is taken orders otherwise.ⁿ¹⁷

■ PRACTICE TIP:

As a practical matter, the FEHC in most cases stipulates to a stay of its decision and order on request by a petitioner for writ of mandate. *Commentary by Dale Brodsky, Esq. and Beverly Tucker, Esq.*

[d] Standard of Review

With respect to the court's review of administrative decisions, *Code of Civil Procedure Section 1094.5(c)* provides as follows:

Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

Because *Code of Civil Procedure section 1094.5* does not specify when each test is applicable, the task of determining which cases require independent judgment review is reserved to the courts.ⁿ¹⁸ The determination of which standard of review applies to administrative agency decisions depends on whether the agency's decision affects a fundamental and vested right.ⁿ¹⁹ If a decision of an administrative agency substantially affects a fundamental, vested right, the trial court not only examines the administrative record for errors of law, but also exercises its independent judgment in reviewing the evidence.ⁿ²⁰ However, if the administrative decision does not affect any fundamental vested right, the trial court reviews the entire administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law.ⁿ²¹ In such a case, the court must resolve all reasonable doubts in the agency's favor. The court may reverse the agency only if it determines that a reasonable person could not have reached the conclusion the agency reached.^{n21.1}

Applying the above analysis, courts have consistently held that the substantial evidence standard applies to judicial

review of FEHC decisions finding that unlawful discrimination occurred.ⁿ²² In *American National Ins. Co. v. Fair Employment & Housing Com.*,ⁿ²³ the California Supreme Court reasoned that an employer's right to establish its employment practices and procedures and to impose conditions of employment is not a fundamental vested right. Thus, the FEHC's findings of fact must be sustained if supported by substantial evidence on the record considered as a whole.ⁿ²⁴

However, in cases in which a *complainant* seeks judicial review of an adverse FEHC decision, courts have applied the independent judgment test because the right to equal employment opportunity is a fundamental vested right.ⁿ²⁵

■ **PRACTICE TIP:**

FEHC findings of fact are difficult to upset on review because of the deference courts pay to the FEHC as an expert body, and because of the difficult burden of proof imposed by the substantial evidence test. On the other hand, the independent judgment test permits courts to more easily reverse findings adverse to a complainant. *Commentary by William Lann Lee.*

[2] FORM--Petition by Employer for Writ of Mandate to Review Decision of FEHC

[a] Comment

The form set forth in [b], *below* is a petition for a writ of mandate in a superior court to seek review of a decision of the FEHC.ⁿ²⁶ The petition should set forth all grounds for reversing the FEHC's decision, such as the FEHC's actions in excess of or without jurisdiction, the lack of fairness of the hearing, or the FEHC's prejudicial abuse of discretion.ⁿ²⁷ The petition must be verified,ⁿ²⁸ and a memorandum of points and authorities should be filed with it.

This form set forth below has been drafted for use by the respondent-employer, but it may be modified for use by the complainant-employee or applicant.

[b] Form SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____)	
_____ [Name],)	NO. _____
Petitioner,)	PETITION FOR WRIT OF MANDATE
vs.)	[Gov. Code §§ 11523, 12972; Code Civ. Proc. §
FAIR EMPLOYMENT AND HOUSING COMMIS-)	1094.5]
SION OF THE STATE OF CALIFORNIA,)	Date: _____
Respondent. _____ [Name of)	Time: _____
Complainant], Real Party in Interest.)	Dept.: _____

Petitioner alleges:

1. Petitioner _____ [name] is _____ [identify petitioner and describe capacity in which the action is being brought, if other than as individual, e.g., a corporation organized and existing under the laws of the State of California] and is the Respondent in the action below before the Fair Employment and Housing Commission.

2. Respondent Fair Employment and Housing Commission of the State of California is an agency established pursuant

to the Fair Employment and Housing Act (*Government Code Sections 12900 through 12996*), which is authorized to hear and determine accusations alleging violations of the Fair Employment and Housing Act.

3. Real party in interest _____ [name] is the complainant in a complaint filed with the Department of Fair Employment and Housing (the Department) on _____ [date]. An accusation was issued by the Department in his/her behalf on _____ [date], alleging that respondent violated the Fair Employment and Housing Act by discriminating against complainant on the basis of _____ [specify basis of discrimination alleged, e.g., race]. A copy of the accusation is attached herewith and incorporated as though fully set forth.

4. On _____ [date], an administrative hearing was held before Administrative Law Judge _____ [name]. On _____ [date], Administrative Law Judge _____ [name] rendered his/her proposed decision _____ [summarize findings and order, e.g., finding that Petitioner herein had discriminated against complainant on the basis of his/her race and ordering payment of back wages to complainant].

5. On _____ [date], the Fair Employment and Housing Commission _____ [specify action taken by FEHC, e.g., adopted the proposed decision].

6. Respondent Fair Employment and Housing Commission _____ [specify ground for petition, e.g., acted in excess of its jurisdiction] in the following manner: _____ [summarize in detail defects in decision, e.g., the Commission lacked jurisdiction over the accusation because Petitioner did not regularly employ five or more employees at the time of the alleged violation].

7. Petitioner has exhausted all available administrative remedies.

8. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law.

WHEREFORE Petitioner prays:

1. That the court issue an alternative writ of mandate ordering respondent to set aside its decision in _____ [case name], issued on _____ [date], or to show cause before this court at a time specified by the court why a peremptory writ should not be issued;

2. That on the return of the alternative writ and the hearing of this petition, this court issue a peremptory writ of mandate ordering respondent to set aside said decision; and

3. For costs of this action and such other relief as the court deems just and proper.

_____ [signature]

Attorney for Petitioner

VERIFICATION [*Code Civ. Proc. §§ 446, 1086*]

I, _____ [name], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [date and place]

_____ [signature]

Legal Topics:

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

Administrative Law Agency Adjudication Decisions General Overview Administrative Law Judicial Review General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. *Gov. Code §§ 11523, 12972(b)(2)*; see *DFEH v. General Dynamics, Inc.* (1990) FEHC Dec. No. 90-08, p. 12.

(n2)Footnote 2. *Gov. Code § 11523*.

(n3)Footnote 3. [Reserved]

(n4)Footnote 4. *See Code Civ. Proc. § 1094.5(a)*.

(n5)Footnote 5. *See Code Civ. Proc. § 1094.5(b)*.

(n6)Footnote 6. *Code Civ. Proc. § 1094.5(b)*.

(n7)Footnote 6.1. *Gov. Code § 12973(c)*. For discussion of enforcement of FEHC's order or decision, *see § 42.41*.

(n8)Footnote 6.2. *Gov. Code § 12973(e)*.

(n9)Footnote 7. *Gov. Code § 11523*.

(n10)Footnote 8. For discussion of time limit for reconsideration, *see § 42.39[6]*.

(n11)Footnote 9. *Gov. Code § 11523*.

(n12)Footnote 9.1. *Gov. Code § 11523*.

(n13)Footnote 9.2. *Gov. Code § 11523*.

(n14)Footnote 9.3. *Gov. Code § 11523*.

(n15)Footnote 10. *Gov. Code § 11523; Code Civ. Proc. § 1094.5(a)*.

(n16)Footnote 11. *Gov. Code § 11523*.

(n17)Footnote 12. *Code Civ. Proc. § 1094.5(g)*.

(n18)Footnote 13. *Code Civ. Proc. § 1094.5(g)*. Service must be made in the manner provided by *Code Civ. Proc. §§ 405 et seq.* or *1010 et seq.*

(n19)Footnote 14. *Code Civ. Proc. § 1094.5(g)*.

(n20)Footnote 15. *Code Civ. Proc. § 1094.5(g)*.

(n21)Footnote 16. *Code Civ. Proc. § 1094.5(g)*.

(n22)Footnote 17. *Code Civ. Proc. § 1094.5(g)*

(n23)Footnote 18. *Bixby v. Pierno (1971) 4 Cal. 3d 130, 140, 93 Cal. Rptr. 234, 481 P.2d 242 .*

(n24)Footnote 19. *Bixby v. Pierno (1971) 4 Cal. 3d 130, 143-144, 93 Cal. Rptr. 234, 481 P.2d 242 .*

(n25)Footnote 20. *Bixby v. Pierno (1971) 4 Cal. 3d 130, 143-144, 93 Cal. Rptr. 234, 481 P.2d 242 .*

(n26)Footnote 21. *Bixby v. Pierno (1971) 4 Cal. 3d 130, 143-144, 93 Cal. Rptr. 234, 481 P.2d 242 .*

(n27)Footnote 21.1. *County of Fresno v. Fair Employment & Housing Com. (1991) 226 Cal. App. 3d 1541, 1548, 277 Cal. Rptr. 557 .*

(n28)Footnote 22. *American National Ins. Co. v. Fair Employment & Housing Com. (1982) 32 Cal. 3d 603, 607, 186 Cal. Rptr. 345, 651 P.2d 1151 ; County of Alameda v. Fair Employment & Housing Com. (1984) 153 Cal. App. 3d 499, 503, 200 Cal. Rptr. 381 ; Sterling Transit Co. v. Fair Employment Practice Com. (1981) 121 Cal. App. 3d 791, 795, 175 Cal. Rptr. 548 ; Northern Inyo Hosp. v. Fair Emp. Practice Com. (1974) 38 Cal. App. 3d 14, 23, 112 Cal. Rptr. 872 . See also County of Fresno v. Fair Employment & Housing Com. (1991) 226 Cal. App. 3d 1541, 1548, 277 Cal. Rptr. 557 ; Johnson Controls, Inc. v. Fair Employment & Housing Com. (1990) 218 Cal. App. 3d 517, 267 Cal. Rptr. 158 ; Raytheon Co. v. Fair Employment & Housing Com. (1989) 212 Cal. App. 3d 1242, 1250-1251, 261 Cal. Rptr. 197 .*

(n29)Footnote 23. *American National Ins. Co. v. Fair Employment & Housing Com. (1982) 32 Cal. 3d 603, 607, 186 Cal. Rptr. 345, 651 P.2d 1151 .*

(n30)Footnote 24. *American National Ins. Co. v. Fair Employment & Housing Com. (1982) 32 Cal. 3d 603, 607, 186 Cal. Rptr. 345, 651 P.2d 1151 .*

(n31)Footnote 25. *Kerrigan v. Fair Employment Practice Com. (1979) 91 Cal. App. 3d 43, 51-52, 154 Cal. Rptr. 29 , cert. denied, 444 U.S. 930 (1979) .*

(n32)Footnote 26. *See Gov. Code §§ 11523, 12972(b)(2); Code Civ. Proc. § 1094.5.*

(n33)Footnote 27. *See Code Civ. Proc. § 1094.5(b).*

(n34)Footnote 28. *Code Civ. Proc. § 1086.*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.41

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.41 Enforcement of FEHC Decision

The DFEH must conduct a compliance review within one year from the effective date of any final FEHC decision or order to determine whether it has been fully implemented and obeyed.ⁿ¹ Once the time for seeking judicial review of a final FEHC decision or order has expired,ⁿ² or if all means of judicial review have been exhausted, the DFEH may petition the superior court to enforce the FEHC's decision or order as issued or as judicially modified.ⁿ³ The court must hold a hearing, but it may not review the merits of the FEHC's decision or order.ⁿ⁴ If the court determines either that the time limits for judicial review of the FEHC's order or decision have lapsed or that the order or decision was upheld in whole or in part on judicial review, the court must issue a judgment enforcing the FEHC's order or decision.ⁿ⁵ The court's judgment is final and nonappealable and has the same force and effect as a judgment in a civil action.ⁿ⁶

Legal Topics:

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

Administrative Law Agency Adjudication Decisions General Overview Public Health & Welfare Law Housing & Public Buildings Fair Housing

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12973(a)*.

(n2)Footnote 2. *See Gov. Code § 11523; Code Civ. Proc. § 1094.5*. For discussion of time limit for judicial review, *see § 42.40[1][b]*.

(n3)Footnote 3. *Gov. Code § 12973(b)*.

(n4)Footnote 4. *Gov. Code § 12973(b)*.

(n5)Footnote 5. *Gov. Code § 12973(b)*.

(n6)Footnote 6. *Gov. Code § 12973(b)*.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part B. STATE PRACTICE AND PROCEDURE

3-42 California Employment Law §§ 42.42 through 42.59

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

[Reserved]

§§ 42.42 [Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part C. FEDERAL PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.60

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.60 Structure and Authority of EEOC

[1] Organizational Structure

The Equal Employment Opportunity Commission (EEOC) was established as a result of the passage of Title VII of the Civil Rights Act of 1964.ⁿ¹ The five members of the EEOC are appointed by the President with the advice and consent of the Senate for terms of five years, and not more than three of the five members may be members of the same political party.ⁿ² The President also appoints for a term of four years a General Counsel, who is responsible for conducting litigation as provided by Title 42, *United States Code Sections 2000e-5* and *2000e-6*.ⁿ³ The General Counsel must also concur with the Chairperson of the EEOC on the appointment and supervision of regional attorneys,ⁿ⁴ who may appear for and represent the EEOC in any case in court.ⁿ⁵

The EEOC's national headquarters are in Washington, D.C. The agency is organized into district offices each under the leadership of a district director, subunits of districts known as "areas" with "area directors," and subunits of areas known as "local offices" headed by local directors. In the chain of command, the district directors are subject to the supervision of the Program Director, Office of Program Operations, and the General Counsel.ⁿ⁶

[2] Statutes Enforced

The EEOC enforces claims by private employees under the following federal statutes:

1. Title VII of the Civil Rights Act of 1964 (Title VII),ⁿ⁷ prohibiting discrimination in employment on the basis of race, color, religion, sex, and national origin;ⁿ⁸
2. The Equal Pay Act (EPA), prohibiting discrimination in wages on the basis of sex;ⁿ⁹
3. The Age Discrimination in Employment Act of 1967 (ADEA);ⁿ¹⁰ and
4. The Americans With Disabilities Act of 1990 (ADA), which prohibits disability discrimination.ⁿ¹¹

The EEOC also enforces Section 501 of the Vocational Rehabilitation Act of 1973 (Section 501), requiring affirmative action in the employment of individuals with disabilities by the federal government.ⁿ¹²

Legal Topics:

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

Labor & Employment LawU.S. Equal Employment Opportunity CommissionGeneral OverviewLabor & Employment LawU.S. Equal Employment Opportunity CommissionEnforcementGeneral OverviewLabor & Employment LawU.S. Equal Employment Opportunity CommissionEnforcementInvestigative Authority

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-4(a).

(n2)Footnote 2. 42 U.S.C. § 2000e-4(a).

(n3)Footnote 3. 42 U.S.C. § 2000e-4(b)(1).

(n4)Footnote 4. 42 U.S.C. § 2000e-4(b)(1).

(n5)Footnote 5. 42 U.S.C. § 2000e-4(b)(2). However, the Attorney General must conduct any litigation before the United States Supreme Court in which the EEOC is a party. 42 U.S.C. § 2000e-4(b)(2).

(n6)Footnote 6. 29 C.F.R. § 1601.5.

(n7)Footnote 7. 42 U.S.C. § 2000e *et seq.*

(n8)Footnote 8. 42 U.S.C. § 2000e-5.

(n9)Footnote 9. *See* 29 U.S.C. § 206(d) (part of the Fair Labor Standards Act, 29 U.S.C. §§ 201-219); *see also* Pub. L. No. 98-532 (confirming presidential reorganization giving EEOC authority over enforcement of Act); 29 C.F.R. 1620.30(a).

(n10)Footnote 10. 29 U.S.C. § 621 *et seq.*; *see* 29 U.S.C. § 626(a),(d); 29 C.F.R. §§ 1626.4, 1626.15; *see also* Pub. L. No. 98-532 (confirming presidential reorganization giving EEOC authority over enforcement of Act).

(n11)Footnote 11. 42 U.S.C. § 12101 *et seq.* (operative July 26, 1992); 29 C.F.R. § 1601.1 *et seq.*

(n12)Footnote 12. 29 U.S.C. § 791; *see* 29 U.S.C. § 794a(a)(1).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part C. FEDERAL PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.61

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.61 Overview of Administrative Complaint Procedure

[1] Title VII and ADA

[a] Overlapping Jurisdiction of Agencies Under ADA and Rehabilitation Act

If a claim involves disability discrimination, the claim is potentially subject to the ADA, the Rehabilitation Act of 1973, or both Acts. The EEOC, the Department of Justice ("DOJ"), and the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") have cooperated in implementing regulations to address the processing of disability discrimination claims that potentially fall within their overlapping jurisdictions.ⁿ¹ The EEOC resolves charges under Title I of the ADA, which prohibits discrimination against qualified individuals with disabilities in all aspects of employment.^{n1.1} The DOJ coordinates the resolution of charges filed with individual government agencies under Section 504, which prohibits discrimination against otherwise qualified individuals with disabilities by programs or activities receiving federal financial assistance and programs or activities conducted by executive agencies of the United States Postal Service,^{n1.2} and Title II of the ADA.^{n1.3} The OFCCP processes charges under Section 503 of the Rehabilitation Act.^{n1.4} Enforcement of Section 503 is discussed in Chapter 44, Part C.

Under the regulations, if the EEOC receives a charge of employment discrimination, it must first determine whether it has jurisdiction over the charge under Title I of the ADA. If it has jurisdiction, it will generally process the charge itself pursuant to its usual Title I procedures,^{n1.5} as discussed in [b], *below*. If the EEOC determines that it does not have jurisdiction under Title I of the ADA, the EEOC will refer the charge to the Civil Rights Division of the DOJ to determine if a Section 504 agency has jurisdiction and for referral to the appropriate agency.^{n1.6} Charges retained by the EEOC will be investigated and processed under Title I only and will not be deemed dual-filed under Section 504, except for charges that also fall within the jurisdiction of Section 504 that the EEOC has declined to litigate.^{n1.7} In the latter type of case, the EEOC will refer the Section 504 charges to the appropriate agency, and the charges will be deemed dual-filed as of the date that the complaint was received by the EEOC.^{n1.8}

When charges are first filed with a Section 504 agency, rather than the EEOC, the agency must refer the complaint to the EEOC if the agency determines that it does not have jurisdiction but that the EEOC does have jurisdiction under

Title I of the ADA.^{n1.9} A Section 504 agency must also refer the complaint to the EEOC, even if the Section 504 agency does have jurisdiction, if the EEOC also has jurisdiction and the complaint alleges employment discrimination against an individual (but does not allege discrimination in other practices or services or a pattern or practice of discrimination), unless the complainant specifically requests the Section 504 agency to retain jurisdiction.^{n1.10} Complaints referred to the EEOC by a Section 504 agency having jurisdiction are deemed dual-filed, but the Section 504 agency defers its processing of the complaint to the EEOC pending resolution by the EEOC.^{n1.11}

The EEOC and Section 504 agencies will jointly develop procedures for determining whether charges have been dual-filed.^{n1.12} Under special circumstances, the agencies may elect to reallocate their investigative responsibilities.^{n1.13}

When a Section 504 agency determines that the EEOC should process a dual-filed complaint first, the Section 504 agency defers its action on the complaint until after the EEOC resolves the charge in one of several specified manners.^{n1.14} Similarly, when it is determined that a Section 504 agency should have jurisdiction first over a dual-filed complaint, the EEOC defers its action on the complaint until the charge is resolved by the Section 504 agency.^{n1.15}

[b] EEOC Complaint Procedure

The first step in the administrative process under Title VII and the ADA is for the aggrieved party, or someone acting on his or her behalf, to file a charge with the EEOC. The charging party must file within 180 days after the occurrence of the alleged discrimination, unless the charge was initially filed with a state agency having authority to grant relief, in which case the charging party must file with the EEOC within 300 days after the occurrence, or within 30 days after receiving notice that the state agency has terminated its proceedings, whichever is earlier.^{n1.16} The charging party must sign and verify the charge,ⁿ² but a charging party other than the aggrieved person need not identify by name the person on whose behalf the charge is made.ⁿ³ The EEOC may also file charges if conciliation efforts fail or if the case is one involving a pattern or practice of discrimination.ⁿ⁴

The EEOC must serve a notice of the charge on the respondent employer within ten days after the filing of the charge.ⁿ⁵ In most cases, this notice is accompanied by a request for information and a request for a position statement from the respondent.ⁿ⁶

Following service of the charge or complaint, the EEOC investigator commences an investigation, for which certain charges may be given priority handling.ⁿ⁷ During the investigation, the EEOC has authority to issue subpoenas to obtain testimony, documents, and access to evidence for the purposes of examination and the right to copy.ⁿ⁸

Prior to making a determination whether reasonable cause exists to believe that the alleged discrimination has occurred, the EEOC investigator generally initiates settlement efforts.ⁿ⁹ If no negotiated settlement is reached,ⁿ¹⁰ the investigator ordinarily conducts pre-determination interviews with the charging party and the respondent,ⁿ¹¹ and prepares an investigative memorandum containing the investigator's analysis and recommendations, which is submitted to his or her supervisor for approval.ⁿ¹² The investigator may make one or more of the following recommendations at this point:ⁿ¹³

1. Send appropriate dismissal/approval of withdrawal letters to the parties;
2. Execute a negotiated settlement agreement; or
3. Issue a cause or no-cause letter of determination.

If the supervisor approves an investigator's recommendation, the EEOC issues a letter of determination to all parties, informing them of EEOC's no causeⁿ¹⁴ or reasonable causeⁿ¹⁵ determination. For a discussion of determinations by

the EEOC, see § 42.69.

If the EEOC makes a cause determination,ⁿ¹⁶ the agency seeks to resolve the case through the conciliation process mandated by Title VII and the ADA.ⁿ¹⁷ If conciliation efforts fail, the EEOC sends a notice to that effect to the respondent,ⁿ¹⁸ and the regional attorney prepares a legal analysis of the case and recommendation of whether or not the EEOC should litigate. With the district director's concurrence or dissent, the case is forwarded to the General Counsel for litigation review and ultimately for approval or rejection by the full EEOC.ⁿ¹⁹ If the EEOC decides not to sue, it issues a notice of right to sue to the charging party within 90 days.ⁿ²⁰

[2] ADEA

Although the administrative procedures summarized in [1], *above*, generally apply to investigation of claims brought under the ADEA,ⁿ²¹ there are some differences that are briefly noted here and are more thoroughly discussed throughout this part.

The ADEA authorizes an aggrieved individual to file either a "charge" or a "complaint," which is information received from any source that is not a "charge," alleging a violation of the ADEA.ⁿ²² The EEOC generally does not disclose the source of a "complaint."ⁿ²³

The ADEA requires that a party file a charge with the EEOC within the same time limits as those required by Title VII.ⁿ²⁴ The EEOC notifies the respondent when an ADEA charge is filed,ⁿ²⁵ but not when an ADEA "complaint" is filed.ⁿ²⁶ For a further discussion of service on respondents, see § 42.62[4]. The EEOC then investigates the case.ⁿ²⁷ In ADEA cases, the ADEA must pursue pre-determination conciliation.ⁿ²⁸

Although the ADEA does not require the EEOC to issue formal determinations on the merits of an investigated case, the EEOC, in practice, issues a letter of determination once it has found reasonable cause.ⁿ²⁹

If the EEOC dismisses a charge filed under the ADEA or otherwise terminates its proceedings on the charge, the EEOC must notify the aggrieved person. An ADEA civil action may be brought by the aggrieved person against the respondent named in the charge within 90 days after the date that this notice is received.ⁿ³⁰ⁿ³¹⁻³³

[3] EPA

The administrative procedure for claims brought under the EPA is similar to the claim procedure in Title VII casesⁿ³⁴ and ADEA cases.ⁿ³⁵ Some of the differences in the procedure under EPA cases are noted here.

Under the EPA, there is no distinction between a charge and a "complaint"; only the latter is filed with the EEOC.ⁿ³⁶ Under the EPA, a complainant need not first file with the EEOC before commencing a civil action.ⁿ³⁷ A civil suit under the EPA must be filed within two years of the employer's unlawful conduct, or three years if the cause of action arises out of a willful violation,ⁿ³⁸ and the EEOC will not process an EPA complaint if it does not allege violations occurring within two or three years of the filing.ⁿ³⁹

The EEOC does not notify the respondent when an EPA complaint is filed,ⁿ⁴⁰ nor does it identify the individual who is the source of the EPA complaint.ⁿ⁴¹ For discussion of confidentiality of complaining parties, see §§ 42.62[1][g] and 42.72[1][b] and [c].

The EEOC investigates the EPA case.ⁿ⁴² The EPA does not require the EEOC to issue formal determinations on the merits of an investigated case, but, in practice, the EEOC issues a letter of determination once it has found reasonable cause.ⁿ⁴³ In EPA cases, the parties are notified of the complainant's right to file a private action,ⁿ⁴⁴ and no conciliation is required.ⁿ⁴⁵

[4] Federal Employees

Before bringing an action in federal court under Title VII, aggrieved federal employees must seek relief administratively in the agency that allegedly discriminated against them.ⁿ⁴⁶ Under statutory authorization to issue rules, regulations, orders and instructions as necessary and appropriate for federal employees to seek administrative relief before filing a civil action,ⁿ⁴⁷ the EEOC issued a regulation providing that aggrieved persons must consult a Counselor prior to filing a complaint to try to informally resolve.ⁿ⁴⁸ The aggrieved federal employee must initiate that contact within 45 days of the alleged discrimination.ⁿ⁴⁹

For discussion of the exhaustion requirement for federal employees generally, *see* § 43.10[4][b].

Legal Topics:

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

Labor & Employment Law Disability & Unemployment Insurance Disability Benefits General Overview Labor & Employment Law Discrimination Disability Discrimination General Overview Labor & Employment Law Discrimination Disability Discrimination Rehabilitation Act Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission Enforcement General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 C.F.R., pt. 1640 (addressing overlapping jurisdiction of Title I and II of ADA and Section 504 of Rehabilitation Act); 29 C.F.R., pt. 1641; 41 C.F.R., pt. 60-742 (addressing overlapping jurisdiction of Title I of ADA and Section 503 of Rehabilitation Act). For discussion of enforcement of Section 503 of Rehabilitation Act by OFCCP, *see* Ch. 44, pt. C.

(n2)Footnote 1.1. *See* 42 U.S.C. §§ 12111-12117.

(n3)Footnote 1.2. *See* 29 U.S.C. § 794(a).

(n4)Footnote 1.3. *See* 42 U.S.C. §§ 12131-12134.

(n5)Footnote 1.4. *See* 29 U.S.C. § 793(b).

(n6)Footnote 1.5. 29 C.F.R. § 1641.7(a)(1), (b).

(n7)Footnote 1.6. 29 C.F.R. § 1641.7(a)(2).

(n8)Footnote 1.7. 29 C.F.R. § 1641.7(b)(2).

(n9)Footnote 1.8. 29 C.F.R. § 1641.7(b)(2).

(n10)Footnote 1.9. 29 C.F.R. § 1641.6(c)(1), (3).

(n11)Footnote 1.10. 29 C.F.R. § 1641.6(c)(2).

(n12)Footnote 1.11. 29 C.F.R. §§ 1641.6(c)(4), 1641.8(a)(1).

(n13)Footnote 1.12. 29 C.F.R. § 1641.8(c).

(n14)Footnote 1.13. *See* 29 C.F.R. § 1641.8(e).

(n15)Footnote 1.14. *See* 29 C.F.R. § 1641.10(a).

(n16)Footnote 1.15. *See* 29 C.F.R. § 1641.11(a).

(n17)Footnote 1.16. 42 U.S.C. § 2000e-5(b),(e)(1) (Title VII); *see* 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA). For discussion of timeliness of filing generally, *see* § 42.62[3].

(n18)Footnote 2. 42 U.S.C. § 2000e-5(b) (Title VII); 29 C.F.R. § 1601.9 (Title VII); *see* 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA).

(n19)Footnote 3. 29 C.F.R. § 1601.7(a); EEOC Compliance Manual (CCH) § 2.4(c). For discussion of requirements for the charge, *see* § 42.62 [1]. For discussion of confidentiality of charges and complaints, *see* §§ 42.62[1][g] and 42.72[1].

(n20)Footnote 4. *See* 42 U.S.C. §§ 2000e-5(f)(1), 2000e-6 (Title VII); *see also* 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. §§ 2000e-5, 2000e-6 apply to ADA).

(n21)Footnote 5. 42 U.S.C. § 2000e-5(b),(e)(1) (Title VII); 29 C.F.R. § 1601.14(a); *see* 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA); *see also* EEOC Compliance Manual (CCH) § 3.1.

(n22)Footnote 6. EEOC Compliance Manual (CCH) § 14.1-14.3. For discussion of service on respondents, *see* § 42.62 [4]. For discussion of statements of position and requests for information, *see* § 42.64[4].

(n23)Footnote 7. *See* EEOC Compliance Manual (CCH) § 2.8. For discussion of investigation generally, *see* § 42.64 [1]. For discussion of priority handling of charges, *see* § 42.64 [2].

(n24)Footnote 8. 42 U.S.C. § 2000e-9 (Title VII); 29 C.F.R. § 1601.16; *see* 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-9 apply to ADA); *see also* EEOC Compliance Manual (CCH) § 24. For discussion of EEOC subpoena power, *see* § 42.64 [8].

(n25)Footnote 9. *See* 29 C.F.R. § 1601.20. For discussion of settlement, *see* § 42.66.

(n26)Footnote 10. EEOC Compliance Manual (CCH) § 15; 29 C.F.R. § 1601.20.

(n27)Footnote 11. EEOC Compliance Manual (CCH) § 27. For discussion, *see* § 42.64[1] and [7].

(n28)Footnote 12. EEOC Compliance Manual (CCH) § 29.

(n29)Footnote 13. EEOC Compliance Manual (CCH) § 29.2(f); *see also* 29 C.F.R. §§ 1601.18, 1601.19, 1601.21.

(n30)Footnote 14. 29 C.F.R. § 1601.19(a).

(n31)Footnote 15. 29 C.F.R. § 1601.21.

(n32)Footnote 16. EEOC Compliance Manual (CCH) § 40.

(n33)Footnote 17. 42 U.S.C. § 2000e-5(b) (Title VII); 29 C.F.R. 1601.24; *see* 42 U.S.C. § 12117 (operative July 26, 1992; procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA); *see also* EEOC Compliance Manual (CCH) §§ 60-62. For discussion of conciliation, *see generally* § 42.71.

(n34)Footnote 18. 29 C.F.R. § 1601.25; EEOC Compliance Manual (CCH) § 66.2.

(n35)Footnote 19. EEOC Compliance Manual (CCH) § 66.5; 29 C.F.R. § 1601.27.

(n36)Footnote 20. 42 U.S.C. § 2000e-5(f)(1) (Title VII); 29 C.F.R. § 1601.28(b)(1); *see* 42 U.S.C. § 12117 (operative July 26, 1992; procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA); *see also* EEOC Compliance

Manual (CCH) § 66.6. Notices of right to sue may also be given under other circumstances. *see* discussion in § 42.71[1].

(n37)Footnote 21. *29 U.S.C. § 621 et seq.*

(n38)Footnote 22. *See 29 C.F.R. § 1626.3.* For discussion of distinction between charges and complaints, *see* § 42.62[1][d] and [e].

(n39)Footnote 23. *29 C.F.R. § 1626.4*; EEOC Compliance Manual (CCH) § 2.4(c).

(n40)Footnote 24. *See 29 U.S.C. § 626(d)*; *29 C.F.R. § 1626.7(a)*. *see* discussion of Title VII time limits in [1], *above*.

(n41)Footnote 25. *29 U.S.C. § 626(d)*; *29 C.F.R. § 1626.11*; EEOC Compliance Manual (CCH) § 3.6.

(n42)Footnote 26. EEOC Compliance Manual (CCH) §§ 2.4(f), 3.1.

(n43)Footnote 27. *See* EEOC Compliance Manual (CCH) §§ 14, 22, 22.3(c). For discussion of the EEOC's investigation of charges and complaints generally, *see* § 42.64.

(n44)Footnote 28. *29 U.S.C. § 626(d)*. For discussion of pre-determination conciliation under ADEA, *see* § 42.68.

(n45)Footnote 29. EEOC Compliance Manual (CCH) § 40.1. For discussion of determinations generally, *see* § 42.69.

(n46)Footnote 30. *29 U.S.C. § 626(e)*.

(n47)Footnote 31-33. [Reserved]

(n48)Footnote 34. For overview of Title VII administrative procedure, *see* [1], *above*.

(n49)Footnote 35. For overview of administrative procedure in ADEA cases, *see* [2], *above*.

(n50)Footnote 36. EEOC Compliance Manual (CCH) § 2.1. However, EPA complaints may be brought as concurrent charges in a Title VII case because any violation of the EPA is also a violation of Title VII. *see 29 C.F.R. § 1620.27(a)*.

(n51)Footnote 37. *See 29 U.S.C. §§ 216, 217*; EEOC Compliance Manual (CCH) § 2.4(g)(3).

(n52)Footnote 38. *See 29 U.S.C. § 255*; *29 C.F.R. § 1620.33(b)*.

(n53)Footnote 39. EEOC Compliance Manual (CCH) § 2.4(d)(3).

(n54)Footnote 40. *See* EEOC Compliance Manual (CCH) § 2.4(a)(1)(ii), (f).

(n55)Footnote 41. *See* EEOC Compliance Manual (CCH) § 2.4(a)(1)(ii), (f).

(n56)Footnote 42. *See* EEOC Compliance Manual (CCH) §§ 14, 22, 22.3(c). For discussion of the EEOC's investigation of charges and complaints generally, *see* § 42.64.

(n57)Footnote 43. *See* EEOC Compliance Manual (CCH) § 40.1. For discussion of determinations generally, *see* § 42.69.

(n58)Footnote 44. *See* EEOC Compliance Manual (CCH) § 40.5(e).

(n59)Footnote 45. *See* EEOC Compliance Manual (CCH) § 66.1.

(n60)Footnote 46. *Brown v. GSA* (1976) 425 U.S. 820, 832, 96 S. Ct. 1961, 48 L. Ed. 2d 402 . *See also* 42 U.S.C. § 2000e-16(c).

(n61)Footnote 47. *See* 42 U.S.C. § 2000e-16(b).

(n62)Footnote 48. 29 C.F.R. § 1614.105(a).

(n63)Footnote 49. 29 C.F.R. § 1614.105(a)(1).



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part C. FEDERAL PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.62

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.62 Initiating the Proceeding

[1] Intake

[a] In General

The process of filing an EEOC charge generally begins with an intake interview with the charging party either in person or by telephone.ⁿ¹ If a person lives outside the normal commuting area of EEOC regional or area offices, he or she may have a charge/complaint taken by telephone and mailed for verification and signature.ⁿ² An individual who contacts the EEOC is advised of all the options for redress available under the statutes enforced by the agency.ⁿ³ Depending on the facts, an individual may file a charge under Title VIIⁿ⁴ or under the ADEA,ⁿ⁵ or a concurrent Title VII/EPAn⁶ charge or concurrent charge under all three statutes, or he or she may file an ADEA or EPAn⁷ complaint.ⁿ⁸ An individual may also file a charge under the ADA.^{n8.1} If the EEOC is investigating a possible violation of one statute and finds a violation of another statute that it enforces, it may process and seek a remedy pursuant to all applicable statutes.ⁿ⁹ However, any complaining party may advise EEOC that he or she wishes a complaint processed under a particular statute.ⁿ¹⁰

A potential charging party who visits an EEOC office completes a questionnaire,ⁿ¹¹ and participates in an intake interview conducted by an EEO Investigator (EEOI).ⁿ¹² The EEOI obtains as much information as possible regarding the circumstances leading to filing of the charge and information about the employer,ⁿ¹³ and determines whether any statute enforced by the EEOC applies.ⁿ¹⁴ In addition to in-person complaints, the EEOC will accept and process any correspondence that provides sufficient information to identify the parties and that complains of a matter that may constitute employment discrimination prohibited by Title VII or the ADEA.ⁿ¹⁵

The EEOC provides charge forms on request to charging parties or their attorneys, as well as copies of EEOC Compliance Manual section 2.5, which prescribes the format for drafting charges. A charge form (EEOC Form 5) that is completed and mailed to an EEOC office is assigned for investigation if it contains the required information.ⁿ¹⁶

A charge may be filed in person or by mail at any office of the EEOC.ⁿ¹⁷

■ PRACTICE TIP:

It is a good practice for counsel to discuss the nature and, particularly, the scope of a charge with the complainant prior to the complainant's interview at the EEOC with a view toward subsequent proceedings. In some cases, counsel may wish to draft a complaint to assist EEOC personnel in understanding the nature and scope of the charge. If the charge involves a class claim, it should so state.

Commentary by William Lann Lee.

[b] Intake Questionnaire

An intake questionnaire is filled out by the person alleging discrimination to inform the EEOC of the relevant allegations of discrimination and to allow the EEOC to determine whether it has jurisdiction over potential charges or complaints. The intake questionnaire form is available from any EEOC office.^{n17.1} The form is also available in Spanish.

[c] Title VII and ADA Charges

Title VII, the ADA, and EEOC regulations provide that a charge must be in writing under oath or affirmation and must contain such information and be in such form as the EEOC requires.ⁿ¹⁸ Each charge should contain the following:ⁿ¹⁹

1. The full name, address, and telephone number of the person making the charge;ⁿ²⁰
2. The name and address of the person against whom the charge is made (known as the respondent);
3. A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices;ⁿ²¹
4. The approximate number of employees employed by respondent, if known; and
5. A statement disclosing whether proceedings involving this employment practice have been commenced before another fair employment agency, and if so, the name of the agency and the date of commencement of proceedings.

A Title VII or ADA charge may be filed by "any person claiming to be aggrieved,"ⁿ²² that is, any person who has allegedly suffered harm because of alleged unlawful discrimination.ⁿ²³ A Title VII charge may also be filed on behalf of an aggrieved person by another person, agency, or organization.ⁿ²⁴ In such a case, the person or entity who files the charge informs the EEOC of the identity of the person on whose behalf the charge is filed, and if the aggrieved party so requests, the EEOC keeps his or her identity confidential.ⁿ²⁵

An EEOC commissioner may also file a Title VII or ADA charge,ⁿ²⁶ usually at the request of a person or organization.ⁿ²⁷ A commissioner's charge may be filed when there is reason to believe there exists a pattern or practice of unlawful discrimination.ⁿ²⁸ It is also sometimes used when the aggrieved party fears retaliation. For discussion of charges brought by the EEOC, *see* § 42.73.

■ PRACTICE TIP:

Although the EEOC may do so, it is doubtful whether an individual would be able to bring a private Title VII enforcement action if a charge was filed on behalf of an aggrieved person by another person, agency, or organization. The other person, agency, or organization generally would not have standing to sue on its own behalf. *Commentary by Bill Lann Lee.*

[d] ADEA Charges and Complaints

An aggrieved party initiates proceedings under the ADEA by filing either a charge or a complaint with the EEOC.ⁿ²⁹ A "charge" is a written statement filed with the EEOC by or on behalf of an aggrieved individual that alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the ADEA.ⁿ³⁰ A "complaint" is information received by the EEOC from any source, other than a charge, that alleges that an employer has violated the ADEA.ⁿ³¹

A charge must be in writing, name the prospective respondent, and generally allege the discriminatory acts.ⁿ³² The charge must conform to the same standards required of charges under Title VII, listed in [c], *above*.ⁿ³³ Charges and complaints may be submitted in person, by telephone, or by mail to any office of the EEOC, or to any designated representative of the EEOC.ⁿ³⁴ Charges that are received in person or by telephone must be reduced to writing.ⁿ³⁵

The phrase "a charge alleging unlawful discrimination" is used in the ADEA itself,^{n35.1} and the word "charge" appears in the EEOC's implementing regulations.^{n35.2} However, it is not defined in the statute, and, while EEOC regulations gave it some content,^{n35.3} the regulations do not identify all necessary components of a charge; it follows that a document meeting the requirements of 29 *C.F.R.* § 1626.6 is not a charge in every instance.^{n35.4} In deciding what constituted a charge under the ADEA, the federal Courts of Appeals adopted different definitions, resulting in difficulties in determining when employees could seek relief under the ADEA in courts of competent jurisdiction.^{n35.5} In *Federal Express v. Holowecki*,^{n35.6} the United States Supreme Court resolved those differences, defining "charge" for the purposes of the ADEA. The Court held that a filing with the EEOC is a charge if the document reasonably can be construed to request EEOC action and appropriate relief on the employee's behalf.^{n35.7} The Court also held that the submission of EEOC Form 283, which the EEOC labels an Intake Questionnaire,^{n35.8} with a signed affidavit describing alleged discriminatory employment practices in greater detail attached, constituted a charge.^{n35.9} The completed intake form contained all of the information required by 29 *C.F.R.* § 1626.8:

- The employee's name, address, and telephone number, as well as those of her employer.
- An allegation that she and other employees had been the victims of age discrimination.
- The number of employees who worked at facility where she was stationed.
- A statement indicating she had not sought the assistance of any government agency regarding this matter.

By itself, the intake form would not have been sufficient to constitute a charge. However, it was supplemented with a detailed six-page affidavit, and, at the end of the last page, the employee asked the agency to please force the employer to end the age discrimination plan so the employees could finish out their careers absent the unfairness and hostile work environment, which was properly construed as a request for the agency to act.

[e] EPA Complaints

The filing of a confidential affidavit with the EEOC initiates an administrative proceeding under the EPA.ⁿ³⁶ Generally, the EEOC processes a complaint alleging violations of the EPA and Title VII under both statutes unless there is no jurisdiction under one of the statutes.ⁿ³⁷

EPA complaints may be filed either with the EEOC or with any office of the Wage and Hour Division of the Department of Labor.ⁿ³⁸

[f] Sufficiency of Charges

The EEOC generally accepts charges that do not contain all of the required information, if they contain statements

sufficiently precise to identify the parties and to describe generally the challenged action or practices.ⁿ³⁹ Timeliness affects whether the EEOC will investigate the charge, but not whether the charge meets the minimal requirements.ⁿ⁴⁰ However, the EEOC is likely to dismiss a charge without investigation if it is clearly untimely or if it does not state a violation of Title VII or the ADA.ⁿ⁴¹ If a prospective charging party insists, the EEOC accepts a charge even if there is no apparent jurisdiction under Title VII. In such a circumstance, the EEOC dismisses the charge summarily if it determines there is no jurisdiction.ⁿ⁴²

In *Edelman v. Lynchburg College*, ^{n42.1} the United States Supreme Court upheld the EEOC regulation allowing a person who has otherwise timely filed an unverified charge to verify the charge after the time for filing has expired.^{n42.2} as an unassailable interpretation of Title VII, § 706.^{n42.3} However, the Court declined to decide whether an unverified letter faxed to the EEOC within the filing period claiming employment discrimination was or was not a charge on the basis of evidence showing that neither the claimant nor the EEOC treated it as one.^{n42.4}

The Ninth Circuit has upheld the sufficiency of an unsigned and unverified intake questionnaire because it adequately identified the parties and the charges, and was amended by the filing of a signed and verified charge.ⁿ⁴³ Other courts have also held that an EEOC charge is sufficient even though it is not sworn or affirmed when received so long as the defect is cured later.ⁿ⁴⁴

[g] Confidentiality of Complainant Party

The EEOC does not disclose the identity of an aggrieved person if a Title VII or ADEA charge is filed on his or her behalf by a third party, nor does the EEOC disclose the identity of ADEA and EPA complainants.ⁿ⁴⁵ For further discussion of the confidentiality of identity of a complaining party, *see* § 42.72[1][a].

[2] Sample Charge and Sample Complaint

[a] FORM--Sample EEOC Charge (EEOC Form 5)

[i] Comment

The form set forth in [b], *below*, is an EEOC charge, which is used by all field offices to take Title VII, ADEA, and concurrent charges.ⁿ⁴⁶ⁿ⁴⁷

The first paragraph in the space provided should outline the alleged harm, the date the practice first occurred and whether it is continuing, the charging party's work history with respondent, and the approximate number of employees. The second paragraph should describe the act, policy, or practice alleged to violate Title VII and how it applies to the charging party. The third paragraph should state why the charging party believes the act complained of is discriminatory. For example, if disparate treatment is alleged, this statement may compare the treatment of the charging party to the treatment of others. Finally, a fourth paragraph may include allegations regarding other aggrieved parties or class allegations.ⁿ⁴⁸

The EEOC may not delete any allegation made by a charging party without the charging party's permission. Consequently, the EEOI includes in the charge all allegations made by the charging party even though the EEOC may not fully investigate them.ⁿ⁴⁹

Although this is the suggested format for a charge, the EEOI need not force the allegations into this exact format if that would make the charge unclear or divert the investigator from the real issues. For example, multi-issue charges may be modified from this four-paragraph format.ⁿ⁵⁰

■ PRACTICE TIP:

Because the EEOI generally drafts a charge for the complainant, the complainant should carefully review

the draft charge to ensure that all possible allegations are included. In particular, the draft should be scrutinized for scope of the charge, which may affect the scope of subsequent proceedings, as well as the scope of the EEOC's investigation. *Commentary by William Lann Lee.*

[ii] Form Sample EEOC Charge (EEOC Form 5)

[Click here to view image.](#)

[b] FORM--Sample Complaint (EEOC Affidavit--EEOC Form 133)

[i] Comment

The form set forth in [ii], *below*, is an EEOC affidavit, which is used to file either an ADEA or EPA complaint.ⁿ⁵¹ For discussion of ADEA and EPA complaints, *see* [1][d] and [e], *above*, respectively.

[ii] Form Sample Complaint (EEOC Affidavit EEOC Form 133)

[Click here to view image.](#)

[3] Timeliness

[a] Statutory Charge-Filing Periods

Because California has a local agency (the DFEH) with authority to remedy discriminatory practices that are illegal under federal law, California is both a "deferral jurisdiction" under Title VII and the ADAn⁵² and a "referral jurisdiction" under the ADEA.ⁿ⁵³ Therefore, in California, Title VII, ADA, and ADEA charges must be filed with the EEOC within 300 days after the alleged unlawful act occurred or within 30 days after the DFEH terminates its processing of a charge, whichever occurs earlier.ⁿ⁵⁴ The purpose of the 300-day charge-filing period is to provide state and local agencies the initial opportunity to resolve claims of unlawful discrimination.ⁿ⁵⁵ However, if a state agency lacks subject matter jurisdiction over a charge,^{n55.1} or if the complainant fails to initiate proceedings with the state agency, the EEOC charge must be filed within 180 days after the alleged unlawful employment practice occurred.ⁿ⁵⁶ A claim is time barred if it is not filed within these time limits.ⁿ⁵⁷

As a practical matter, such a circumstance is unlikely to occur in California because the EEOC and the DFEH are parties to a worksharing agreement under which each agency is the other agency's agent for purposes of filing charges, and complaints and charges filed with one agency are transmitted to the other, as discussed in § 42.63.ⁿ⁵⁸ If the state agency waives its jurisdiction to the EEOC pursuant to a worksharing agreement, the state proceedings are deemed terminated for purposes of giving the EEOC jurisdiction over the claim.ⁿ⁵⁹ Furthermore, the claimant is entitled to the extended 300-day federal filing period even if his or her claim was not filed with the state agency within the applicable state limitations period.ⁿ⁶⁰ In addition, a claimant in a deferral state need not actually file with the state agency first to be entitled to the 300-day extension. If the claimant files with the EEOC first, the EEOC need only defer jurisdiction to the state agency within 300 days to trigger the extension.ⁿ⁶¹

[b] Charge-Filing Date

[i] In General

A Title VII or ADA charge is deemed filed on receipt by the EEOC.ⁿ⁶² The filing date for charges initiated by telephone is the date the signed Title VII charge is received.ⁿ⁶³ For charges received in the mail, the filing date is the date the charge is received by the office.ⁿ⁶⁴

The filing date of ADEA charges received by mail is the postmark date, if legible, or the date of the letter if the postmark is illegible.ⁿ⁶⁵ If both are illegible or cannot be accurately ascertained, the filing date is the date of receipt.ⁿ⁶⁶ The filing date for charges initiated by telephone is the date of the telephone call for ADEA charges.ⁿ⁶⁷

For "complaints" under both the ADEA and the EPA, the filing date is the date the complaint was received by mail, telephone, or in person.ⁿ⁶⁸

[ii] Amended Charges

A Title VII, ADA, or ADEA charge may be amended to cure technical defects or omissions, such as failure to verify the charge or unclear allegations in the original charge.ⁿ⁶⁹ Amendments may also allege additional acts that are directly related to the subject matter of the original charge.ⁿ⁷⁰ For purposes of determining the timeliness of charges, the EEOC deems that the amended charge was filed on the date that the original charge was filed.ⁿ⁷¹

Courts generally permit amended charges to relate back to the filing date of the original charge if the amended charge cures a technical defect (such as correcting the respondent's address) but alleges the same unlawful act as the original charge.ⁿ⁷² Amendments that add another basis of discrimination but leave the actions complained of in the original charge unchanged also have been held to relate back to the original charge.ⁿ⁷³ Similarly, an amendment that simply verified an unsworn original charge was held to relate back to the original charge.ⁿ⁷⁴ However, one court has held that an amended charge does not relate back to the filing date of the original charge when the amendment adds allegations of different unlawful acts based on facts not alleged in the original charge complaint.ⁿ⁷⁵

■ PRACTICE TIP:

If counsel is retained after the initial charge has been filed, he or she should review the charge to ascertain if an amendment should be filed. *Commentary by William Lann Lee.*

[c] Determining When Charge-Filing Period Begins

Under Title VII, the ADA, and the ADEA, the limitations period begins to run on the date that the alleged unlawful employment practice occurs.ⁿ⁷⁶ Although in some factual situations it is easy to determine when the alleged discriminatory act occurred, in others it is more difficult, especially if multiple events are involved in making an employment decision. Courts have, therefore, made this determination on a case-by-case basis. In *Delaware State College v. Ricks*,ⁿ⁷⁷ the United States Supreme Court held that determining the timeliness of an EEOC charge requires precise identification of the unlawful employment practice complained of and the date on which the charging party was notified of its occurrence. In *Ricks*, the Court found that the unlawful employment practice was the decision not to grant plaintiff tenure, rather than the date one year later when his employment terminated, because the eventual termination was an inevitable consequence of the denial of tenure.ⁿ⁷⁸ Thus, the Court held that the limitations period began on the date plaintiff was notified of the decision to deny him tenure.ⁿ⁷⁹

In other termination cases, courts have followed *Ricks* and held that the charge-filing period begins on the date that an employee is notified of his or her termination, even if he or she continues to work until a later date.ⁿ⁸⁰ In one case, the Supreme Court held that a discharge occurred on the charging party's last day at work and not later when her discharge grievance under a collective bargaining agreement was finally resolved.ⁿ⁸¹

In hiring cases, the charge-filing period begins to run on the date that the respondent fills or decides not to fill the position that the charging party sought.ⁿ⁸²

The analysis is similar in promotion cases. In one case, for example, the court held that the limitations period began to run when an eligibility list containing the plaintiff's name expired, rather than when the list was promulgated. The court distinguished *Ricks*, explaining that the plaintiff in the case before it was not certain that she would not be promoted

until the list expired.ⁿ⁸³

For purposes of determining when the limitations period begins to run on a challenge to an intentionally discriminatory seniority system,ⁿ⁸⁴ an unlawful employment practice is deemed to occur when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.ⁿ⁸⁵ This rule applies regardless of whether the discriminatory purpose is apparent on the face of the seniority provision.ⁿ⁸⁶

■ CONSULTANT'S COMMENT:

There is a question whether the statute of limitations codified in the Civil Rights Act of 1991 for challenges to seniority systems will ultimately be expanded to apply to benefit plans, promotion systems, and other employment programs. If the expansion occurs, the new statute of limitations will have an indirect impact on the law of "continuing violations" by permitting Title VII lawsuits under circumstances in which a time bar defense arguably would have prevailed in the past. *Commentary by Kirby Wilcox.*

However, a Title VII charge is not untimely if the charging party had no reason to believe that an unlawful act had occurred until after the charge-filing period expired. In such a case, the charge-filing period begins when the charging party learns of the facts giving rise to a discrimination charge.ⁿ⁸⁷

[d] Continuing Violations

Frequently, unlawful employment practices may be continuing in nature because they consist of a series of related discriminatory acts or maintenance of a discriminatory policy or practice over a period of time.ⁿ⁸⁸ Such unlawful practices or policies are referred to as "continuing violations."

In *National Railroad Passenger Corp. v. Morgan*,ⁿ⁸⁹ the United States Supreme Court addressed the issue of what constitutes a continuing violation for purposes of the timeliness of an EEOC charge.ⁿ⁹⁰ The Circuit Courts of Appeal have taken various approaches to the question of whether (and when) acts that fall outside of the statutory time period to file charges are actionable under Title VII.ⁿ⁹¹ The determination of what constitutes an unlawful employment practice and when that practice has occurred varies depending on whether the charge alleges discrete discriminatory acts or hostile work environment claims.ⁿ⁹²

A discrete retaliatory or discriminatory act, such as termination, failure to promote, denial of transfer, or refusal to hire, "occurs" on the day that it "happens." Each discrete discriminatory act starts a new clock for filing charges alleging that act.^{n92.1} The existence of past acts and the employee's prior knowledge of their occurrence does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are timely filed. Thus, a party must file the charge within the statutory period starting with the date of the act or lose the ability to recover for it. However, Title VII does not bar an employee from using the prior acts as background evidence in support of a timely claim.ⁿ⁹³ The Court rejected the argument that the EEOC's discussion of continuing violations in its *Compliance Manual*, which states that certain serial violations and systemic violations constitute continuing violations which allow relief for untimely events, as well as the positions the EEOC has taken in prior briefs before the Court, warranted deference.ⁿ⁹⁴ Furthermore, the time period for filing a charge is subject to equitable doctrines, such as tolling or estoppel.ⁿ⁹⁵ In *National Railroad Passenger Corp.*, the Court reversed the Ninth Circuit's application of the continuing violations doctrine to what the Ninth Circuit termed "serial violations," *i.e.*, the Ninth Circuit's holding that so long as one act falls within the charge-filing period, discriminatory and retaliatory acts plausibly or sufficiently related to that act may also be considered for the purposes of liability.^{n95.1} The Court noted that there may be circumstances under which it will be difficult to determine when the time period should begin to run. One such issue that may arise is whether the time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered.^{n95.2}

Following *Morgan*, there was disagreement among the Circuit Courts of Appeal as to the proper application of the limitations period in Title VII disparate-treatment pay cases.^{n95.3} In *Ledbetter v. Goodyear Tire & Rubber Co.*,^{n95.4} the United States Supreme Court held that because a pay-setting decision is a "discrete act," the period for filing an EEOC charge begins when the act occurs. The Court distinguished *Bazemore v. Friday*.^{n95.5} In *Bazemore*, in a concurring opinion by Justice Brennan (in which the entire Court joined), the Court held that when an employer adopts a facially discriminatory pay structure that puts some employees on a lower scale because of race, the employer engages in intentional discrimination whenever it issues a check to one of these disfavored employees. The Court found that *Bazemore* stands for the proposition that an employer violates Title VII and triggers a new EEOC charging period whenever the employer issues paychecks using a discriminatory pay structure. However, a new Title VII violation does not occur and a new charging period is not triggered when an employer issues paychecks pursuant to a system that is facially nondiscriminatory and neutrally applied.^{n95.6} The fact that precharging period discrimination adversely affects the calculation of a neutral factor such as seniority that is used in determining future pay does not mean that each new paycheck constitutes a new violation and restarts the EEOC charging period.

In response to the *Ledbetter* decision, Congress enacted the "Lilly Ledbetter Fair Pay Act of 2009,"^{n95.7} amending Title VII to provide that, effective May 28, 2007, and applicable to compensation discrimination claims pending as of that date,^{n95.8} an unlawful employment practice occurs, with respect to discrimination in compensation in violation of Title VII, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.^{n95.9} In addition to any relief authorized by 42 U.S.C. § 1981a, liability may accrue and an aggrieved person may obtain relief under Title VII,^{n95.10} including recovery of back pay for up to two years preceding the filing of the charge, when the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.^{n95.11} The identical amendment was made to the Age Discrimination in Employment Act,^{n95.12} and Congress specifically applied the amendments to Title VII enacted by the Lilly Ledbetter Fair Pay Act of 2009 to claims of compensation discrimination under Title I and § 503 of the Americans with Disabilities Act of 1990,ⁿ⁹⁶ and under §§ 501 and 504 of the Rehabilitation Act of 1973.^{n96.1} In enacting the Ledbetter Fair Pay Act, Congress found that the Supreme Court in the *Ledbetter* decision significantly impaired statutory protections against discrimination in compensation that Congress established and that had been bedrock principles of American law for decades. The decision undermined those statutory protections by unduly restricting the time period in which victims of discrimination could challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.^{n96.2} Congress found that the limitation imposed by the Court on the filing of discriminatory compensation claims ignored the reality of wage discrimination and was at odds with the robust application of the civil rights laws that Congress intended.^{n96.3} Congress also stated that with regard to any charge of discrimination under any law, nothing in the Lilly Ledbetter Act was intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that had occurred outside the time for filing a charge of discrimination,^{n96.4} and that nothing in the Act was intended to change current law treatment of when pension distributions are considered paid.^{n96.5}

Following *Morgan*, the Ninth Circuit held that if a plaintiff chooses to bring separate claims based on each discriminatory act, the assertion that this series of discrete acts flows from a company-wide, or systematic, discriminatory practice will not succeed in establishing the employer's liability for acts occurring outside the limitations period. The Supreme Court in *Morgan* determined that each incident of discrimination constitutes a separate actionable unlawful employment practice.^{n96.6} When a plaintiff alleges a systematic violation, each individual act of discrimination occurring within the limitations period may form the basis of an actionable claim, even if the discriminatory policy was initiated outside the limitations period.^{n96.7} A discriminatory practice, though it may extend over time and involve a series of related acts, remains divisible into a set of discrete acts, legal action on the basis of each of which must be brought within the statutory limitations period.ⁿ⁹⁷

In *Morgan*, the Court expressly failed to consider the timely filing question with respect to "pattern-or-practice" claims brought by private litigants.ⁿ⁹⁸ The Ninth Circuit has discussed this issue. For example, in *Anderson v. Reno*,ⁿ⁹⁹ plaintiff offered evidence of antecedent, untimely events that were arguably part of a pattern of discrimination and evidence that the pattern continued into the relevant limitations period.ⁿ¹⁰⁰

■ CONSULTANT'S COMMENT:

In *Anderson v. Reno* ⁿ¹⁰¹ the Ninth Circuit once again addresses the difficult subject of the "continuing violations" doctrine. The law in this area is extremely confused for the sole reason that courts cannot decide whether the plaintiff must: (1) allege sufficient facts to support a prima facie case of discrimination within the applicable limitations period, and only then be able to attach liability to like or related earlier wrongs; or (2) allege only a portion of a prima facie case within the liability period, and be permitted to supply the missing facts from pre-liability period events. While the record is mixed, differing rules appear to be emerging, depending upon whether the plaintiff is alleging discrimination or harassment.

In general, courts are more likely to require a plaintiff to supply all of the facts for his or her prima facie case of discrimination from events occurring within the liability period. Only then, are most courts willing to allow a plaintiff to attempt to impose liability for earlier like or related wrongs. The same rule should apply to harassment claims, but many cases--and *Anderson* is no exception--fail to clarify the standard they are using.

For example, the appellate panel in *Anderson* describes the liability conduct of the allegedly harassing supervisor as encompassing "repeated" unwelcome and sexually explicit comments, as well as considerable harassing conduct. The Ninth Circuit could have found this "repeated" conduct sufficient to establish a prima facie case, but it was silent on the issue. The opinion reveals only that the district court had found these facts insufficient to support a sexual harassment claim. The reversal by the Ninth Circuit, therefore, impliedly stands for the proposition that a course of harassing conduct that predates and postdates the liability period may be linked to establish a timely cause of action. Nonetheless, the decision is not conclusive on the matter because the panel may have been influenced by the short (45-day) window of opportunity for government employees to bring Title VII claims. Because private employees in California have a 300-day limitations period under Title VII (and a one-year limitations period under FEHA), it is less compelling for a plaintiff to argue that a claim is viable if no actionable wrong has occurred within that lengthy window, and a prima facie case is available only by resort to earlier facts. *Commentary by Kirby Wilcox.*

On the other hand, a hostile-work-environment claim is composed of a series of separate acts that collectively constitute one "unlawful employment practice."ⁿ¹⁰² Hostile-environment claims involve repeated conduct, which occurs over a series of days, or even years, and cannot be said to occur on any particular day. The claims are based on the cumulative effect of individual acts. The timely filing provision requires only that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice occurs. It does not matter that some of the component acts of the hostile work environment fall outside the statutory time period. Thus, provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability. To timely bring the charge, the employee need only file it within the statutory period of the occurrence of any act that is part of the hostile work environment. Furthermore, subsequent events may still be part of the one hostile work environment claim, and a charge may be filed at a later date and still encompass the whole.ⁿ¹⁰³ In *National Railroad Passenger Corp.*, the Supreme Court provided the following scenarios:ⁿ¹⁰⁴

1. Acts on days 1-400 create a hostile work environment. The employee files the charge on day 401. Can the employee recover for that part of the hostile work environment that occurred in the first 100 days?

2. Acts contribute to a hostile environment on days 1-100 and on day 401, but there are no acts between days 101-400. Can the act occurring on day 401 pull the other acts in for the purposes of liability?

The Court concluded that because a hostile environment constitutes one unlawful employment practice, it does not matter that nothing occurred within the intervening 301 days, so long as each act is part of the whole. Furthermore, if sufficient activity occurred by day 100 to make out a claim, it does not matter that the employee knows on that day that an actionable claim happened; on day 401 all incidents are still part of the same claim. However, if an act on day 401 had no relation to the acts between days 1-100, or if some other reason, such as certain intervening action by the employer, caused it to no longer be part of the same hostile-environment claim, the employee cannot recover for the previous acts, at least not by reference to the day 401 act. The court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile-work-environment practice, and if so, whether any act falls within the statutory time period.

With respect to hostile-environment claims, however, employers have recourse if a plaintiff unreasonably delays filing a charge. An employer may raise a laches defense, barring a plaintiff from maintaining a suit if the plaintiff unreasonably delays filing a suit and as a result harms the employer. The defense requires proof of lack of diligence by the plaintiff and of prejudice to the employer.ⁿ¹⁰⁵ In *National Railroad Passenger Corp.*, the Court expressly did not consider whether the laches defense may be asserted against the EEOC, even though traditionally the doctrine may not be applied against the sovereign.ⁿ¹⁰⁶

A continuing violation may affect an individual or a class,ⁿ¹⁰⁷ and often involves employment opportunities such as promotions or transfers.ⁿ¹⁰⁸

Courts have held that a continuing violation of Title VII or the EPA occurs each time a charging party receives less pay for performing equal work, and that a denial of equal pay is subject to a discrimination charge even though it occurred before the charge-filing period.ⁿ¹⁰⁹

A "continuing violation" should be distinguished from a claim that the present effect of past discrimination continues to affect an individual adversely. The leading case on this issue is *United Air Lines, Inc. v. Evans*.ⁿ¹¹⁰ *Evans* involved a female flight attendant who had been forced to resign in the late 1960s because of her employer's no-marriage policy, which applied only to women. The employee resumed work in 1972 after another lawsuit invalidated the no-marriage policy, but her seniority began accruing anew from her second hiring date. The United States Supreme Court found no Title VII violation based on the airline's refusal to credit her with lost seniority from her prior employment. According to the Court, even though a seniority system gives present effect to a past act of discrimination, if the previous act was not the subject of a timely EEOC charge, "it is merely an unfortunate event in history which has no present legal consequences."ⁿ¹¹¹

To be a continuing violation, the unlawful practice must continue to exist, or at least one instance of it must occur, within the limitation period before filing of the charge.ⁿ¹¹² Thus, the Ninth Circuit has held that a charge filed two years after an allegedly discriminatory failure to promote was untimely in spite of claimed continuing ill effects from the act.ⁿ¹¹³ The court noted that "[a] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation."ⁿ¹¹⁴ However, these holdings are now questionable in light of the United States Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*,ⁿ¹¹⁵ holding that for discrete acts of discrimination, a party must file the charge within the statutory period starting with the date of the act.

[e] Equitable Tolling of Charge-Filing Period

In *Zipes v. Trans World Airlines, Inc.*,ⁿ¹¹⁶ the Supreme Court held that timely filing of a charge with the EEOC is not a jurisdictional requirement, but rather is akin to a statute of limitations, which is subject to waiver, estoppel, and

equitable tolling. The United States Supreme Court cautions that equitable doctrines to toll the timely filing requirements are to be applied sparingly.ⁿ¹¹⁷ Courts have excused untimely filing of an EEOC charge in many different fact situations. For example, one court tolled the charge-filing period because the employer lied to the charging party about the basis for her discharge and whether her position had been filled.ⁿ¹¹⁸ Another court held that although an employee's disability discrimination claim was not filed with the EEOC within 300 days of his termination, an equitable exception applied. He diligently pursued his claim by going to the EEOC office shortly after his termination. He was *pro se* at the time and was misled by the EEOC representative, who told him that he needed to retain counsel before filing a claim. Following that advice, the employee retained counsel, but by the time the EEOC responded to counsel's inquiries, the time for filing the claim had expired.^{n118.1} Other courts have permitted equitable tolling of the charge-filing period when the respondent or an enforcement agency actively sought to mislead the charging party.ⁿ¹¹⁹

However, courts have generally refused to toll the limitations period merely because a charging party is unaware of a violation, absent concealment or misleading conduct.ⁿ¹²⁰ In *Santa Maria v. Pacific Bell*,ⁿ¹²¹ the Ninth Circuit refused to equitably estop the employer from asserting a statute of limitations defense because the employee could not show that he had reasonably relied on the employer's misrepresentation.ⁿ¹²²

■ CONSULTANT'S COMMENT:

Santa Maria v. Pacific Bell ⁿ¹²³ provides useful analytical clarification of two distinct doctrines: equitable estoppel and equitable tolling. Equitable estoppel "focuses primarily on the actions taken by the defendant in preventing a plaintiff from filing suit." Equitable tolling "focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant."ⁿ¹²⁴ The *Santa Maria* case addresses both doctrines, but its comments upon equitable tolling are tied to the particular facts of the case and, therefore, are not broadly applicable to other matters.

The remarks of the panel regarding equitable estoppel, however, are important. After identifying a non-exhaustive list of factors for determining the applicability of the doctrine (such as deceptive conduct and reasonable reliance), the panel endorses those cases that treat equitable estoppel as involving some form of "fraudulent concealment." That concealment, however, must be separate from the conduct of which the plaintiff complains. For example, if a plaintiff complains of age discrimination in the context of a termination, but files his or her suit after the lapse of the applicable limitations period, he or she cannot assert that the employer fraudulently concealed its age discriminatory intent at the time of the termination. If this were permissible, the doctrines of equitable estoppel and equitable tolling would merge. Thus, to preserve its distinct character, "[f]raudulent concealment necessarily requires active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time."ⁿ¹²⁵ *Commentary by Kirby Wilcox.*

Courts have consistently held that resort to remedies other than Title VII does not toll the charge-filing period. In *Electrical Workers, IUE v. Robbins & Myers*,ⁿ¹²⁶ the Supreme Court held that the Title VII charge-filing period is not tolled while the charging party pursues a grievance and arbitration procedure under a collective bargaining agreement. Based on *Robbins*, courts have declined to toll the charge-filing period when the charging party previously pursued remedies with the National Railroad Adjustment Board,ⁿ¹²⁷ filed a Title VI claim with the Department of Health, Education, and Welfare,ⁿ¹²⁸ and filed a charge with the Department of Labor.ⁿ¹²⁹

Courts will also apply the doctrine of equitable tolling to excuse a failure to comply with time limitations when the claimant had neither actual nor constructive notice of the filing period.^{n129.1} However, in *Johnson v. Henderson*,^{n129.2} the Ninth Circuit upheld a magistrate judge's refusal to apply equitable estoppel or equitable tolling to a federal postal worker's failure to exhaust administrative remedies before filing suit for sexual harassment. Nothing about either the employee's understanding of the requirements for filing an administrative EEO complaint or the Postal Service's conduct rose to a level sufficient to warrant equitable estoppel or equitable tolling of the 45-day deadline for seeking counseling.^{n129.3} Further, neither equitable tolling nor equitable estoppel applied to the employee's failure to file an

administrative complaint within 15 days of her claim.^{n129.4} Equitable tolling was unavailable because the employee was represented by counsel at the relevant time and charged with constructive knowledge of the law's requirements through her attorney. Equitable estoppel was unavailable because nothing in the Postal Service's actions was intended to deceive her, and there was no evidence the Postal Service knew or should have known it would have deceived her.^{n129.5}

[4] Service on Respondents

Title VII and the ADA provide that the EEOC must notify a respondent that a charge has been filed against it within ten days after the EEOC receives the charge.ⁿ¹³⁰ The ADEA requires that respondents be promptly notified of a charge without specifying a time limit.ⁿ¹³¹ If a complaint, rather than a charge, is filed under the ADEA or EPA, the respondent need not be notified.ⁿ¹³² For charges that have been filed first with a state or local fair employment practices agency, the ten-day service period begins to run from the date that the EEOC asserts jurisdiction over the charge.ⁿ¹³³ Under Title VII and the ADA, the notice must include the date, location, and circumstances giving rise to the charge, and the identity of the person or organization that filed the charge.ⁿ¹³⁴ The ADEA does not specify what must be included in the notice.ⁿ¹³⁵ Notices of charges filed by a third party on behalf of another person identify only the charging party and protect the confidentiality of the aggrieved party's identity.ⁿ¹³⁶

Ordinarily, the EEOC includes a copy of the charge when it serves the notice, unless sending the charge will impede the EEOC's law enforcement functions.ⁿ¹³⁷ The EEOC will not serve a copy of the charge in the following circumstances:ⁿ¹³⁸

1. The charge names more than one respondent unless the respondents are named jointly;
2. The charge is made on behalf of an aggrieved person who wishes to remain anonymous and the charge includes identifying information;
3. The charging party expresses concern about the information in the charge being sent to the respondent;
4. The allegations are vague, contradictory, incoherent, or would otherwise not facilitate resolution; or
5. The charge is not on an EEOC charge form.ⁿ¹³⁹

Although Title VII requires that the EEOC notify a respondent that a charge has been filed against it, the Ninth Circuit has held that failure by the EEOC to serve a charge does not extinguish the charging party's right to file a Title VII court action.ⁿ¹⁴⁰ The court reasoned that a Title VII plaintiff should not be penalized by the EEOC's failure to perform its statutory duties.ⁿ¹⁴¹

An employer may request that copies or notices of future charges that may be filed against facilities or affiliated entities also be sent to its headquarters or other specified location.ⁿ¹⁴²

[5] FORM--Sample Notice of Charge of Discrimination (EEOC Form 131)

[a] Comment

The form set forth in [b], *below*, is a notice of charge of discrimination,ⁿ¹⁴³ which informs the respondent that an EEOC charge has been filed against it and states the statutory basis or bases of the charge. It briefly states the circumstances of the alleged violation. The notice of charge may also request that respondent submit a statement of its position on the allegations of the charge, or the notice may be accompanied by a request for information. The notice also identifies the EEOC representative assigned to the charge. Because the EEOC and the DFEH are parties to a

worksharing agreement, certain cases are handled first by the DFEH and others by the EEOC.ⁿ¹⁴⁴ In a case that may be investigated first by the DFEH, the DFEH may file the charge and send a notice of charge to the respondent.ⁿ¹⁴⁵ For discussion of DFEH complaint and form of notice of complaint, *see* §§ 42.23[1][a] and [4][b], respectively.

[b] Form Sample Notice of Charge of Discrimination (EEOC Form 131)

[Click here to view image.](#)

Legal Topics:

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

Labor & Employment Law
Discrimination
General Overview
Labor & Employment Law
U.S. Equal Employment
Opportunity Commission
General Overview
Labor & Employment Law
U.S. Equal Employment Opportunity
Commission
Enforcement
General Overview

FOOTNOTES:

(n1)Footnote 1. *See* EEOC Compliance Manual (CCH) §§ 2.3, 2.4.

(n2)Footnote 2. *See* EEOC Compliance Manual (CCH) § 1.5.

(n3)Footnote 3. *See* EEOC Compliance Manual (CCH) § 2.1.

(n4)Footnote 4. *See* 42 U.S.C. § 2000e-5(b).

(n5)Footnote 5. *See* 29 U.S.C. § 626(d).

(n6)Footnote 6. *See* 29 U.S.C. § 206(d)(1); 29 C.F.R. § 1620.27(a).

(n7)Footnote 7. 29 U.S.C. § 206(d)(1).

(n8)Footnote 8. *See* EEOC Compliance Manual (CCH) § 2.1.

(n9)Footnote 8.1. *See* 42 U.S.C. § 12117 (Title VII enforcement powers, remedies, and procedures apply to ADA); 29 C.F.R. § 1601.1 *et seq.* (EEOC procedural regulations).

(n10)Footnote 9. *See* 29 C.F.R. § 1620.23(c)

(n11)Footnote 10. *See* 29 C.F.R. § 1620.23(b).

(n12)Footnote 11. [Reserved]

(n13)Footnote 12. *See* EEOC Compliance Manual (CCH) § 2.4.

(n14)Footnote 13. *See* EEOC Compliance Manual (CCH) § 2.4.

(n15)Footnote 14. *See* EEOC Compliance Manual (CCH) § 1.7.

(n16)Footnote 15. *See* EEOC Compliance Manual (CCH) § 2.2.

(n17)Footnote 16. *See* EEOC Compliance Manual (CCH) § 1.4.

(n18)Footnote 17. 29 C.F.R. § 1601.8.

(n19)Footnote 17.1. For a list of EEOC offices, see <http://www.eeoc.gov/offices.html> . The EEOC also provides

guidance on filing a charge and information about its charge processing procedures on its website.

(n20)Footnote 18. *42 U.S.C. § 2000e-5(b)* (Title VII); *29 C.F.R. § 1601.9*; *see 42 U.S.C. § 12117* (ADA; operative July 26, 1992; incorporating procedures set forth in *42 U.S.C. § 2000e-5*).

(n21)Footnote 19. *29 C.F.R. § 1601.12(a)(1)-(5)*.

(n22)Footnote 20. The person on whose behalf the charge is made need not be identified in the charge itself, but his or her name, address, and telephone number must be provided to the EEOC. *see 29 C.F.R. § 1601.7(a)*.

(n23)Footnote 21. *See 29 C.F.R. § 1601.15(b)*.

(n24)Footnote 22. *42 U.S.C. § 2000e-5(b)* (Title VII); *29 C.F.R. § 1601.7(a)*; *see 42 U.S.C. § 12117* (ADA; operative July 26, 1992; incorporating procedures set forth in *42 U.S.C. § 2000e-5*).

(n25)Footnote 23. *Banks v. Heun-Norwood* (8th Cir. 1977) 566 F.2d 1073, 1076-1077. For discussion of individuals covered under Title VII, *see* Ch. 40, pt. C.

(n26)Footnote 24. *42 U.S.C. § 2000e-5(b)* (Title VII); *29 C.F.R. § 1601.7(a)*; *see 42 U.S.C. § 12117* (ADA; operative July 26, 1992; incorporating procedures set forth in *42 U.S.C. § 2000e-5*); *see also* EEOC Compliance Manual (CCH) § 1.4.

(n27)Footnote 25. *29 CFR § 1601.7(a)* (except that identity of aggrieved person may be released to government agencies who agree to keep this confidential); EEOC Compliance Manual (CCH) § 2.4(c).

(n28)Footnote 26. *42 U.S.C. § 2000e-5(f)(1)* (Title VII); *29 C.F.R. § 1601.11(a)*; *see 42 U.S.C. § 12117* (ADA; operative July 26, 1992; incorporating procedures set forth in *42 U.S.C. § 2000e-5*).

(n29)Footnote 27. *29 C.F.R. § 1601.6(a)*.

(n30)Footnote 28. *See 42 U.S.C. § 2000e-6(e)* (Title VII); *see 42 U.S.C. § 12117* (ADA; operative July 26, 1992; incorporating procedures set forth in *42 U.S.C. § 2000e-6*).

(n31)Footnote 29. *See* EEOC Compliance Manual (CCH) §§ 2.3(c), 2.4(a)(3).

(n32)Footnote 30. *See 29 C.F.R. § 1626.3*. ADEA charges may allege a threatened future violation. For example, an employee may challenge a mandatory retirement requirement before the policy affects the employee, that is, before he or she reaches the mandatory retirement age. *see* EEOC Compliance Manual (CCH) § 2.4(a)(2).

(n33)Footnote 31. *29 C.F.R. § 1626.3*.

(n34)Footnote 32. *29 C.F.R. § 1626.6*.

(n35)Footnote 33. *See 29 C.F.R. § 1626.8(a)*.

(n36)Footnote 34. *29 C.F.R. § 1626.5*. The addresses of the EEOC's offices appear at *29 C.F.R. § 1610.4*.

(n37)Footnote 35. *29 C.F.R. § 1626.6*.

(n38)Footnote 35.1. *See 29 U.S.C. § 626(d)*.

(n39)Footnote 35.2. *See, e.g., 29 C.F.R. §§ 1626.3* (defining charge as statement filed with EEOC by or on behalf of aggrieved person, which alleges that named prospective defendant has engaged in or is about to engage in actions in violation of ADEA), *1626.6* (defining requirements for charge as being in writing, naming prospective respondent and

generally alleging discriminatory acts), 1626.8(a) (identifying five pieces of information charge should contain), (b) (providing that charge is sufficient if it meets requirements of 29 U.S.C. § 1626.6 and generally alleges discriminatory act(s)).

(n40)Footnote 35.3. *Fed. Express v. Holowecki* (2008) 128 S. Ct. 1147, 1154, 170 L. Ed. 2d 10 . To view briefs related to the *Holowecki* case that are available on Lexis.com, go to 2006 U.S. Briefs 1322 . To view the U.S. Supreme Court transcript, go to 2007 U.S. Trans. LEXIS 58 .

(n41)Footnote 35.4. *Fed. Express v. Holowecki* (2008) 128 S. Ct. 1147, 1155, 170 L. Ed. 2d 10 .

(n42)Footnote 35.5. *Fed. Express v. Holowecki* (2008) 128 S. Ct. 1147, 1152-1153, 170 L. Ed. 2d 10 .

(n43)Footnote 35.6. *Fed. Express v. Holowecki* (2008) 128 S. Ct. 1147, 1153, 170 L. Ed. 2d 10 .

(n44)Footnote 35.7. *Fed. Express v. Holowecki* (2008) 128 S. Ct. 1147, 1154-1159, 170 L. Ed. 2d 10 .

(n45)Footnote 35.8. *See* [b], *above*.

(n46)Footnote 35.9. *Fed. Express v. Holowecki* (2008) 128 S. Ct. 1147, 1159-1160, 170 L. Ed. 2d 10 .

(n47)Footnote 36. *See* 29 U.S.C. § 206(d); EEOC Compliance Manual (CCH) § 2.5(c).

(n48)Footnote 37. *See* EEOC Compliance Manual (CCH) § 2.1.

(n49)Footnote 38. 44 Fed. Reg. 38670 (July 2, 1979) .

(n50)Footnote 39. 29 C.F.R. § 1601.12(b); *see* EEOC Compliance Manual (CCH) §§ 2.2, 2.5(a).

(n51)Footnote 40. *See* EEOC Compliance Manual (CCH) § 2.2. For discussion of timeliness of charge, *see* [3], *below*.

(n52)Footnote 41. *See* EEOC Compliance Manual (CCH) § 4.3. For discussion of dismissal, *see* § 42.69.

(n53)Footnote 42. *See* 29 C.F.R. § 1601.18(a); EEOC Compliance Manual (CCH) § 4.3(a).

(n54)Footnote 42.1. *Edelman v. Lynchburg College* (2002) 535 U.S. 106, 122 S. Ct. 1145, 152 L. Ed. 2d 188 .

(n55)Footnote 42.2. *Edelman v. Lynchburg College* (2002) 535 U.S. 106, 122 S. Ct. 1145, 152 L. Ed. 2d 188, 196-197 ; *see* 29 C.F.R. § 1601.12(b).

(n56)Footnote 42.3. 42 U.S.C. § 2000e-5.

(n57)Footnote 42.4. *Edelman v. Lynchburg College* (2002) 535 U.S. 106, 122 S. Ct. 1145, 1152-1153, 152 L. Ed. 2d 188, 200-201 .

(n58)Footnote 43. *See Casavantes v. California State Univ.* (9th Cir. 1984) 732 F.2d 1441, 1443 ; *see also Laquaglia v. Rio Hotel & Casino, Inc.* (9th Cir. 1999) 186 F.3d 1172, 1175 (subsequent failure to check box on formal charging document to send claim to EEOC does not affect timeliness).

(n59)Footnote 44. *See Weeks v. Southern Bell Tel. & Tel. Co.* (5th Cir. 1969) 408 F.2d 228, 231 ; *Blue Bell Boots, Inc. v. EEOC* (6th Cir. 1969) 418 F.2d 355, 357 ; *Choate v. Caterpillar Tractor Co.* (7th Cir 1968) 402 F.2d 357, 360 .

(n60)Footnote 45. *See* EEOC Compliance Manual (CCH) § 2.4(c)(1), (2).

(n61)Footnote 46. *See* EEOC Compliance Manual (CCH) § 2.5(a).

(n62)Footnote 47. [Reserved]

(n63)Footnote 48. *See* EEOC Compliance Manual (CCH) § 2.5(b).

(n64)Footnote 49. *See* EEOC Compliance Manual (CCH) § 2.5(a). By including such allegations in the charge, the EEOC preserves the charging party's right to pursue them in court.

(n65)Footnote 50. *See* EEOC Compliance Manual (CCH) § 2.5(a)(1), (d).

(n66)Footnote 51. *See* EEOC Compliance Manual (CCH) § 2.3(b), (c).

(n67)Footnote 52. *See* 29 C.F.R. §§ 1601.74, 1601.80.

(n68)Footnote 53. *See* 29 C.F.R. § 1626.9.

(n69)Footnote 54. *See* 42 U.S.C. § 2000e-5(e)(2) (Title VII); 29 U.S.C. 626(d)(2) (ADEA); *see also* 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA). *see* *AMTRAK v. Morgan* (2002) 536 U.S. 101, 109, 122 S. Ct. 2061, 153 L. Ed. 2d 106, (in state with entity with authority to grant or seek relief with respect to alleged unlawful practice, employee who initially files grievance with that agency must file charge with EEOC within 300 days of employment practice; in all other states, charge must be filed within 180 days).

(n70)Footnote 55. *See* *E.E.O.C. v. Commercial Office Products Co.* (1988) 486 U.S. 107, 110-111, 108 S. Ct. 1666, 100 L. Ed. 2d 96; *Mohasco Corp. v. Silver* (1980) 447 U.S. 807, 100 S. Ct. 2486, 65 L. Ed. 2d 532.

(n71)Footnote 55.1. *See, e.g.,* *MacDonald v. Grace Church Seattle* (9th Cir. 2006) 457 F.3d 1079, 2006 U.S. App. LEXIS 20582, *7-*28 (although state equal employment opportunity commission generally was considered deferral agency, it did not have subject matter jurisdiction over discrimination charges against nonprofit religious employers under state law; Title VII's 180-day time limit applied, and employee suing religious nonprofit employers was not entitled to longer 300-day filing deadline).

(n72)Footnote 56. *See* 29 C.F.R. § 1601.13(a)(2); *Kocian v. Getty Refining and Marketing Company* (3d Cir. 1983) 707 F.2d 748, 752, *cert. denied*, 464 U.S. 852 (1983). The EEOC takes the position that a deferral agency that lacks subject matter jurisdiction is equivalent to a jurisdiction that does not have a deferral agency. EEOC Compliance Manual (CCH) § 5.4(d); *see* 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(c)(1) (limitations period for jurisdiction with no deferral agency).

(n73)Footnote 57. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 109, 122 S. Ct. 2061, 153 L. Ed. 2d 106, ("shall" makes act of filing charge within specified time period mandatory).

(n74)Footnote 58. Fiscal Year 1988 Worksharing Agreement Between California DFEH and U.S. EEOC.

(n75)Footnote 59. *E.E.O.C. v. Commercial Office Products Co.* (1988) 486 U.S. 107, 114-122, 108 S. Ct. 1666, 100 L. Ed. 2d 96; *see* *E.E.O.C. v. Dinuba Medical Clinic* (9th Cir. 2000) 222 F.3d 580, 585 (charge constructively filed with EEOC on date DFEH agreed to waive its exclusive 60-day jurisdiction and relinquished processing responsibility to EEOC); *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1510 (state proceedings may be "initially instituted" within meaning of 42 U.S.C. § 2000e-5(e)(1) notwithstanding state's advance waiver of initial charge processing).

(n76)Footnote 60. *E.E.O.C. v. Commercial Office Products Co.* (1988) 486 U.S. 107, 123-124, 108 S. Ct. 1666, 100 L. Ed. 2d 96; *see* *Maurya v. Peabody Coal Co.* (6th Cir. 1987) 823 F.2d 933, 935.

(n77)Footnote 61. *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1220 , cert. denied, 502 U.S. 1005 (1991) .

(n78)Footnote 62. 29 C.F.R. § 1601.13(a).

(n79)Footnote 63. EEOC Compliance Manual (CCH) § 2.7(a).

(n80)Footnote 64. EEOC Compliance Manual (CCH) § 2.7(a).

(n81)Footnote 65. 29 C.F.R. § 1626.7(b)(1); EEOC Compliance Manual (CCH) § 2.7(a).

(n82)Footnote 66. 29 C.F.R. § 1626.7(b)(1); EEOC Compliance Manual (CCH) § 2.7(a).

(n83)Footnote 67. 29 C.F.R. § 1626.7(b)(3); EEOC Compliance Manual (CCH) § 2.7(a).

(n84)Footnote 68. EEOC Compliance Manual (CCH) § 2.7(b); see 29 C.F.R. § 1626.7(b)(1)-(3).

(n85)Footnote 69. 29 C.F.R. §§ 1601.12(b), 1626.8(c); see discussion in [1][f], above; see also *Edelman v. Lynch-burg College* (2002) 535 U.S. 106, 122 S. Ct. 1145, 152 L. Ed. 2d 188 (upholding 29 C.F.R. § 1601.12(b) and allowing charge to be verified after filing period, as unassailable interpretation of Title VII).

(n86)Footnote 70. 29 C.F.R. §§ 1601.12(b), 1626.8(c).

(n87)Footnote 71. 29 C.F.R. §§ 1601.12(b), 1626.8(c).

(n88)Footnote 72. *Ramirez v. National Distillers & Chemical Corporation* (9th Cir. 1978) 586 F.2d 1315, 1318-1319 .

(n89)Footnote 73. *Hicks v. ABT Associates, Inc.* (3d Cir. 1978) 572 F.2d 960, 964 ; *Sanchez v. Standard Brands, Inc.* (5th Cir. 1970) 431 F.2d 455, 464 .

(n90)Footnote 74. *Blue Bell Boots, Inc. v. E.E.O.C.* (6th Cir. 1969) 418 F.2d 355, 357 .

(n91)Footnote 75. See *Hornsby v. Conoco, Inc.* (5th Cir. 1985) 777 F.2d 243, 247 .

(n92)Footnote 76. See 42 U.S.C. § 2000e-5(e)(1); 29 U.S.C. § 626(d); see also 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA).

(n93)Footnote 77. *Delaware State College v. Ricks* (1980) 449 U.S. 250, 257, 259, 101 S. Ct. 498, 66 L. Ed. 2d 431 .

(n94)Footnote 78. *Delaware State College v. Ricks* (1980) 449 U.S. 250, 257, 101 S. Ct. 498, 66 L. Ed. 2d 431 .

(n95)Footnote 79. *Delaware State College v. Ricks* (1980) 449 U.S. 250, 257, 259, 101 S. Ct. 498, 66 L. Ed. 2d 431 .

(n96)Footnote 80. See, e.g., *Aronsen v. Crown Zellerbach* (9th Cir. 1981) 662 F.2d 584, 593-594 ; *Price v. Litton Business Systems* (4th Cir. 1982) 694 F.2d 963, 965 .

(n97)Footnote 81. *Electrical Workers v. Robbins & Myers, Inc.* (1982) 429 U.S. 229, 234-235, 97 S. Ct. 441, 50 L. Ed. 2d 427 .

(n98)Footnote 82. *Gates v. Georgia-Pacific Corporation* (9th Cir. 1974) 492 F.2d 292, 294-295 . If there is evidence that the charging party knew or should have known that he or she would not be hired for a discriminatory reason before the date that the position is filled, the charge-filing period may begin to run on the date that the charging

party acquired or should have acquired such knowledge. *see Reeb v. Economic Opportunity Atlanta, Inc.* (5th Cir. 1975) 516 F.2d 924, 931 .

(n99)Footnote 83. *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1221 , *cert. denied*, 502 U.S. 1005 (1991) .

(n100)Footnote 84. *See* 42 U.S.C. § 2000e-2(h).

(n101)Footnote 85. 42 U.S.C. § 2000e-5(e)(2). This provision, which was added by the Civil Rights Act of 1991 (Pub. L. No. 102-166, § 112), overrules the U.S. Supreme Court's holding, in *Lorance v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, 911-912, 109 S. Ct. 2261, 104 L. Ed. 2d 961 , that the limitations period begins to run on the adoption of the seniority system and not on its later application to a particular individual.

(n102)Footnote 86. *See* 42 U.S.C. § 2000e-5(e)(2).

(n103)Footnote 87. *Tucker v. United Parcel Serv.* (5th Cir. 1981) 657 F.2d 724, 726 (charge-filing period began when African-American seasonal employees learned that white seasonal employees were being recalled and not when African-American employees were told they would not be recalled).

(n104)Footnote 88. *See, e.g., Gifford v. Atchison, Topeka and Santa Fe Ry. Co.* (9th Cir. 1982) 685 F.2d 1149, 1153-1154 (ongoing policy of assigning work sites alleged to discriminate on the basis of sex); *Roberts v. North Am. Rockwell Corp.* (6th Cir. 1981) 650 F.2d 823, 827 (longstanding hiring system allegedly did not consider women for employment); *Jenkins v. Home Ins. Co.* (4th Cir. 1980) 635 F.2d 310, 312 (ongoing practice of paying female employees less than male employees constituted "continuing violation" of Title VII/EPA); *Clark v. Olinkraft, Inc.* (5th Cir. 1977) 556 F.2d 1219, 1221 (continued discrimination in promotion and pay); *Rich v. Martin Marietta Corp.* (10th Cir. 1975) 522 F.2d 333, 348 (challenge to entire promotion system); *Wetzel v. Liberty Mutual Ins. Co.* (3d Cir. 1975) 508 F.2d 239, 246 (longstanding practice of assigning female employees to segregated jobs with limited promotional opportunities could be challenged by current employee); *Macklin v. Spector Freight Systems, Inc.* (D.C. Cir. 1973) 478 F.2d 979, 988-989 (ongoing refusal to hire could be continuing violation); *Bartmess v. Drewrys U.S.A., Inc.* (7th Cir. 1971) 444 F.2d 1186, 1188 (illegal mandatory retirement plan).

(n105)Footnote 89. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 .

(n106)Footnote 90. For discussion of the statutory charge filing period, *see* [a], *above*.

(n107)Footnote 91. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 . *see Morgan v. AMTRAK* (9th Cir. 2000) 232 F.3d 1008 (in Ninth Circuit, plaintiff can establish continuing violation by showing either series of related acts one or more of which are within the limitations period with evidence indicating that alleged acts of discrimination occurring prior to limitations period are sufficiently related to those within period, or by showing systematic policy or practice of discrimination that operated in part within limitations period); *Berry v. Board of Supervisors* (5th Cir. 1983) 715 F.2d 971, 981 (Fifth Circuit multi factor test, taking into account, among other things, (1) whether alleged acts involve same type of discrimination; (2) whether incidents are recurring or independent and isolated events; and (3) whether earlier acts have sufficient permanency to trigger employee's awareness of and duty to challenge alleged violation); *Galloway v. General Motors Service Parts Operations* (7th Cir. 1996) 78 F.3d 1164, 1167 (plaintiff may not base suit on conduct occurring outside limitations period unless it would have been unreasonable to expect plaintiff to sue before statute ran on conduct, such as conduct that could be recognized as actionable harassment only in light of events occurring within limitations period).

(n108)Footnote 92. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 120 .

(n109)Footnote 92.1. *See, e.g., Porter v. Cal. Dep't of Corr.* (9th Cir. 2005) 419 F.3d 885, 893-894 (bulk of allegedly sexually harassing conduct attributed by female employee to employer and its agents fell into category of discrete acts, which were time barred, including refusing to grant employee's requests for vacation or holidays, requiring

employee to be tested for tuberculosis by her own physician, threatening disciplinary action while she was on medical leave, leaving negative performance evaluation in her personnel file, and instructing her to enter work site through back gate; however, sexual propositions, offensive comments, and other offensive behavior, some of which occurred within allowable period, and which became less severe during allowable period, nonetheless were sufficient evidence to permit inference of sexually hostile environment persisting into allowable period).

(n110)Footnote 93. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 120-122 . *see Raad v. Fairbanks N. Star Borough* (9th Cir. 2003) 323 F.3d 1185, 1192 (evidence about time-barred claims was relevant and admissible insofar as it bore on claim that plaintiff was discriminatorily refused full-time teaching position within statutory period); *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, 1108-1112 (plaintiffs permitted to offer evidence of pre-limitations scheme in prosecution of timely claims).

(n111)Footnote 94. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 121 .

(n112)Footnote 95. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 122 . For discussion of equitable tolling, *see* [e], *below*.

(n113)Footnote 95.1. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 122-123 (while plaintiff alleged that he suffered from numerous discriminatory and retaliatory acts from date he was hired through date he was fired, only incidents that took place within timely filing period are actionable).

(n114)Footnote 95.2. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 123 n.7 (this case presented no occasion to resolve that issue).

(n115)Footnote 95.3. *Compare Ledbetter v. Goodyear Tire & Rubber Co., Inc.* (11th Cir. 2005) 421 F.3d 1169 , *cert. gr.* (2006) 126 S. Ct. 2965, 165 L. Ed. 2d 949 (Title VII pay discrimination claim cannot be based on pay decision that occurred prior to last pay decision affecting employee's pay during EEOC charging period), *with Forsyth v. Federation Employment & Guidance Serv.* (2d Cir. 2005) 409 F.3d 565 (discriminatory pay schedule is discrete act, even though it involves repeated conduct, and paycheck given within statute of limitations period would be actionable, even if based on discriminatory pay scale set up outside statutory period; but claimant could only recover damages related to paychecks actually delivered during statute of limitations period); *Shea v. Rice* (D.C. Cir. 2005) 409 F.3d 448, 366 U.S. App. D.C. 178 (each week's paycheck that delivered less to black than to similarly situated white was actionable wrong under Title VII, regardless of whether fact pattern began prior to limitations period).

(n116)Footnote 95.4. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* (2007) 2007 U.S. LEXIS 6295, *11-*43 .

(n117)Footnote 95.5. *Bazemore v. Friday* (1986) 478 U.S. 385, 395, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986) .

(n118)Footnote 95.6. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* (2007) 2007 U.S. LEXIS 6295, *34 , citing *Lorance v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, 911, 109 S. Ct. 2261, 104 L. Ed. 2d 961 .

(n119)Footnote 95.7. P.L. 111-2.

(n120)Footnote 95.8. P.L. 111-2, § 6.

(n121)Footnote 95.9. 42 U.S.C. § 2000e-5(e)(3)(A).

(n122)Footnote 95.10. *See* 42 U.S.C. § 20003-5(g)(1).

(n123)Footnote 95.11. 42 U.S.C. § 2000e-5(e)(3)(B).

(n124)Footnote 95.12. *See* 29 U.S.C. § 626(d) as amended by P.L. 111-2, § 4.

(n125)Footnote 96. P.L. 111-2, § (5)(a). *See 42 U.S.C. §§ 12111 et seq., 12203.*

(n126)Footnote 96.1. P.L. 111-2, § (5)(b). *See 29 U.S.C. §§ 791, 794.*

(n127)Footnote 96.2. P.L. 111-2, § (1).

(n128)Footnote 96.3. P.L. 111-2, § (2).

(n129)Footnote 96.4. P.L. 111-2, § (3).

(n130)Footnote 96.5. P.L. 111-2, § (4).

(n131)Footnote 96.6. *Lyons v. England (9th Cir. 2002) 307 F.3d 1092, 1107 .*

(n132)Footnote 96.7. *Lyons v. England (9th Cir. 2002) 307 F.3d 1092, 1107 n.7 .*

(n133)Footnote 97. *Lyons v. England (9th Cir. 2002) 307 F.3d 1092, 1108 . See also Raad v. Fairbanks N. Star Borough (9th Cir. 2003) 323 F.3d 1185, 1192* (because plaintiff filed her charge with state agency, 300-day limitations period governed her claim and school district could be held liable only for discriminatory acts perpetrated within 300 days of date of filing of charge, counting backward from that date; thus, failure-to-hire claims arising out of applications preceding 300 days back from filing of charge were time-barred, but evidence about those claims was relevant and admissible insofar as it bore on her claim that she was discriminatorily refused full-time teaching position within statutory period).

(n134)Footnote 98. *AMTRAK v. Morgan (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 123 n.9 .*

(n135)Footnote 99. *Anderson v. Reno (9th Cir. 1999) 190 F.3d 930 .*

(n136)Footnote 100. *See Anderson v. Reno (9th Cir. 1999) 190 F.3d 930, 936-937 .*

(n137)Footnote 101. *Anderson v. Reno (9th Cir. 1999) 190 F.3d 930 .*

(n138)Footnote 102. For discussion of hostile-environment claims generally, *see* Ch. 41, Part E.

(n139)Footnote 103. *AMTRAK v. Morgan (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 2002 U.S. LEXIS 4214, *27-38* (affirming Ninth Circuit's holding that pre- and post-limitations period incidents involved same type of employment actions, occurred relatively frequently, and were perpetrated by same managers).

(n140)Footnote 104. *AMTRAK v. Morgan (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 2002 U.S. LEXIS 4214, *33 .*

(n141)Footnote 105. *AMTRAK v. Morgan (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 2002 U.S. LEXIS 4214, *38-40 .* (Court does not address how and how much prejudice must be shown or what consequences follow if employer establishes laches).

(n142)Footnote 106. *AMTRAK v. Morgan (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 2002 U.S. LEXIS 4214, *40 n.14* (noting, however, that in *Occidental Life Ins. Co. of Cal. v. EEOC (1977) 432 U.S. 355, 373* , there seemed to be general agreement that courts can provide relief to defendants for inordinate delay by EEOC).

(n143)Footnote 107. *Domingo v. New England Fish Co. (9th Cir. 1984) 727 F.2d 1429, 1443 , modified, 742 F.2d 520 (1984) .*

(n144)Footnote 108. *See, e.g., Serpe v. Four-Phase Systems, Inc. (9th Cir. 1983) 718 F.2d 935, 937-938 .*

(n145)Footnote 109. *Hall v. Ledex, Inc.* (6th Cir. [Ohio] 1982) 669 F.2d 397, 398 ; *Satz v. ITT Financial Corp.* (8th Cir. 1980) 619 F.2d 738, 743-744 .

(n146)Footnote 110. *United Air Lines, Inc. v. Evans* (1977) 431 U.S. 553, 97 S. Ct. 1885, 52 L. Ed. 2d 571 .

(n147)Footnote 111. *See United Air Lines, Inc. v. Evans* (1977) 431 U.S. 553, 558, 97 S. Ct. 1885, 52 L. Ed. 2d 571 ; *see also Lorange v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, 912, 109 S. Ct. 2261, 104 L. Ed. 2d 961 .

(n148)Footnote 112. *See Roberts v. North Am. Rockwell Corp.* (6th Cir. 1981) 650 F.2d 823, 826-828 (ongoing practice of discriminatory refusal to hire).

(n149)Footnote 113. *See Ward v. Caulk* (9th Cir. 1981) 650 F.2d 1144, 1147 .

(n150)Footnote 114. *See Ward v. Caulk* (9th Cir. 1981) 650 F.2d 1144, 1147 ; *accord, Scott v. Pacific Maritime Asso.* (9th Cir. 1983) 695 F.2d 1199, 1205-1206 ; *Reed v. Lockheed Aircraft Corp.* (9th Cir. 1980) 613 F.2d 757, 760 . *See also E.E.O.C. v. Penton Indus. Pub. Co.* (6th Cir. 1988) 851 F.2d 835, 839 (no continuing violation when currently employed female is compensated at different wage than had been previously paid to employed male in similarly situated position).

(n151)Footnote 115. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 2002 U.S. LEXIS 4214, *19-25 .

(n152)Footnote 116. *Zipes v. Trans World Airlines, Inc.* (1982) 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 .

(n153)Footnote 117. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106, 2002 U.S. LEXIS 4214, *24 .

(n154)Footnote 118. *Reeb v. Economic Opportunity Atlanta, Inc.* (5th Cir. 1975) 516 F.2d 924, 929-930 .

(n155)Footnote 118.1. *Josephs v. Pac. Bell* (9th Cir. 2005) 432 F.3d 1006, 1014-1015 (employee's affidavit describing his dealings with EEOC was cognizable and could form basis for equitable tolling, because it stated facts based on personal knowledge and was not too conclusory).

(n156)Footnote 119. *See, e.g., Miller v. Marsh* (11th Cir. 1985) 766 F.2d 490, 493 ; *Martinez v. Orr* (10th Cir. 1984) 738 F.2d 1107, 1110 ; *Wolfolk v. Rivera* (7th Cir. 1984) 729 F.2d 1114, 1117-1119 .

(n157)Footnote 120. *Earnhardt v. Puerto Rico* (1st Cir. 1982) 691 F.2d 69, 71 ; *Lawson v. Burlington Industries, Inc.* (4th Cir. 1982) 683 F.2d 862, 864 ; *Wilkerson v. Siegfried Ins. Agency, Inc.* (10th Cir. 1982) 683 F.2d 344, 346-347 ; *see Morse v. Daily Press, Inc.* (4th Cir. 1987) 826 F.2d 1351, 1353 (equitable tolling not available when employer had posted in conspicuous place required notice of employee's rights under ADEA).

(n158)Footnote 121. *Santa Maria v. Pacific Bell* (9th Cir. 2000) 202 F.3d 1170 .

(n159)Footnote 122. *See Santa Maria v. Pacific Bell* (9th Cir. 2000) 202 F.3d 1170, 1176-1178 (employer's "misrepresentation" consisted of false assertion of what employee's own physician had recommended).

(n160)Footnote 123. *Santa Maria v. Pacific Bell* (9th Cir. 2000) 202 F.3d 1170 .

(n161)Footnote 124. *See Santa Maria v. Pacific Bell* (9th Cir. 2000) 202 F.3d 1170, 1177 ; *see also Johnson v. Henderson* (9th Cir. 2002) 314 F.3d 409, 414 (equitable tolling and equitable estoppel examined in context of federal employee's failure to exhaust administrative remedies before filing suit).

- (n162)Footnote 125. *See Santa Maria v. Pacific Bell* (9th Cir. 2000) 202 F.3d 1170, 1177 .
- (n163)Footnote 126. *Electrical Workers v. Robbins & Myers, Inc.* (1982) 429 U.S. 229, 234-235, 97 S. Ct. 441, 50 L. Ed. 2d 427 .
- (n164)Footnote 127. *Harris v. Norfolk & Western Ry. Co.* (8th Cir. 1980) 616 F.2d 377, 380 .
- (n165)Footnote 128. *Stafford v. Muscogee County Bd. of Educ.* (11th Cir. 1982) 688 F.2d 1383, 1388-1389 .
- (n166)Footnote 129. *See Bledsoe v. Pilot Life Ins. Co.* (4th Cir. 1979) 602 F.2d 652, 652 .
- (n167)Footnote 129.1. *Johnson v. Henderson* (9th Cir. 2002) 314 F.3d 409, 414 .
- (n168)Footnote 129.2. *Johnson v. Henderson* (9th Cir. 2002) 314 F.3d 409 .
- (n169)Footnote 129.3. *See 29 C.F.R. § 1614.105(a).*
- (n170)Footnote 129.4. *29 C.F.R. § 1614.106.*
- (n171)Footnote 129.5. *Johnson v. Henderson* (9th Cir. 2002) 314 F.3d 409, 414-417 .
- (n172)Footnote 130. *See 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.14; see also 42 U.S.C. § 12117* (procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA); *29 C.F.R. § 1601.1*(EEOC procedural regulations apply to ADA).
- (n173)Footnote 131. *See 29 U.S.C. § 626(d); 29 C.F.R. § 1626.11.*
- (n174)Footnote 132. *See EEOC Compliance Manual (CCH) § 3.1.*
- (n175)Footnote 133. *See EEOC v. Western Metal Specialty Inc., Div. of Western Indus. (E.D. Wis. 1976) 422 F. Supp. 49, 51-52 .*
- (n176)Footnote 134. *See 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.14(a). See also 42 U.S.C. § 12117* (procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA); *29 C.F.R. § 1601.1*(EEOC procedural regulations apply to ADA).
- (n177)Footnote 135. *See 29 C.F.R. § 1626.11.*
- (n178)Footnote 136. *See EEOC Compliance Manual (CCH) § 3.1.*
- (n179)Footnote 137. *See 29 C.F.R. § 1601.14(a); EEOC Compliance Manual (CCH) § 3.6.*
- (n180)Footnote 138. *See EEOC Compliance Manual (CCH) § 3.6(a)-(e).*
- (n181)Footnote 139. In such a case the charge is served after the charging party has been counseled and the charge has been redrafted on an EEOC Form 5. For sample of Form 5, *see [2][a][ii], above.*
- (n182)Footnote 140. *Watson v. Gulf and Western Indus.* (9th Cir. 1981) 650 F.2d 990, 992 .
- (n183)Footnote 141. *Watson v. Gulf and Western Indus.* (9th Cir. 1981) 650 F.2d 990, 992 . For discussion of private civil actions under Title VII, *see Ch. 43, pt. B.*
- (n184)Footnote 142. *See EEOC Compliance Manual (CCH) § 3.9.*
- (n185)Footnote 143. *See 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.14* (Title VII); *29 U.S.C. § 626(d); 29 C.F.R. § 1626.11* (ADEA). For discussion of notice of charge, *see [4], above.*

(n186)Footnote 144. *See* discussion of deferral to state agencies by EEOC in § 42.63 and discussion of deferral to EEOC by DFEH in § 42.24.

(n187)Footnote 145. *See* EEOC Compliance Manual (CCH) § 3.3(b)(1).



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part C. FEDERAL PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.63

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§ 42.63 Deferral to State Agencies

[1] In General

Title VII and the ADA provide that if a state or local law prohibits unlawful employment discrimination and contains provisions for seeking relief, no charge may be filed with the EEOC until 60 days after proceedings have been commenced under the state or local law, unless such proceedings have terminated earlier.ⁿ¹ By contrast, an aggrieved person may file charges based on the ADEA with the state agency and the EEOC simultaneously.^{n1.1}

State fair employment practice agencies are referred to as "FEP agencies."ⁿ² Certified FEP agencies are those whose findings and conclusions the EEOC will generally accept without review.ⁿ³ The DFEH is a certified FEP agency.ⁿ⁴

To comply with the Title VII and ADA requirements of initial processing by a state or local agency, the EEOC has developed a practice of deferring charges to such agencies if they are filed first with the EEOC.ⁿ⁵ The Supreme Court approved this practice in *Love v. Pullman Co.* ⁿ⁶ Thus, if a charge is subject to the jurisdiction of the DFEH and the DFEH has not waived its right to process the charge,ⁿ⁷ the EEOC will send the charge to the DFEH and notify the charging party that it has done so.ⁿ⁸ On expiration of the 60-day deferral period or when the DFEH has terminated its proceedings, the EEOC automatically asserts jurisdiction over the charge.ⁿ⁹

However, if the DFEH lacks subject matter jurisdiction over a charge, the EEOC treats it as if it were a charge arising in a jurisdiction that has no deferral agency. Such a charge must be filed with the EEOC within 180 days of the alleged violation in order to be timely.ⁿ¹⁰

[2] Waiver of Deferral to State Agencies and Worksharing Agreements

State and local fair employment agencies may waive their right to initial processing of discrimination charges.ⁿ¹¹

The EEOC and the DFEH have entered into a worksharing agreement that allocates responsibility for initial processing of charges, provides for waiver of state processing, and authorizes transmittal of charges between the two agencies.ⁿ¹²

Under the agreement, each agency designates the other as its agent for the purpose of receiving charges and agrees to forward to the other agency copies of all charges within the statutory jurisdiction of the other agency.ⁿ¹³ The agreement further provides that the DFEH will initially process (1) all charges covered by both Title VII and the FEHA received first by the DFEH and filed within 240 days of the alleged violation, and (2) all charges alleging employment discrimination covered by Title VII that also allege a basis covered exclusively by the FEHA, regardless of which agency first received the charge.ⁿ¹⁴

Under the worksharing agreement, the EEOC initially processes (1) charges covered by both Title VII and the FEHA that are received first by an EEOC office in California, (2) Commissioner's charges, (3) charges filed first with the EEOC that contain an allegation of sex-based wage discrimination within the meaning of the EPA, (4) charges filed first with the EEOC that contain an allegation of age discrimination within the meaning of the ADEA, (5) all charges received first by the DFEH between 241 and 300 days after the alleged discrimination that allege violations subject to both Title VII and the FEHA, and (6) all charges referred by other federal agencies against certain respondents who are recipients of federal financial assistance.ⁿ¹⁵ The agreement expressly waives the DFEH's right under Title VIIⁿ¹⁶ to an initial 60-day processing period for charges that are to be initially processed by the EEOC.ⁿ¹⁷

The worksharing agreement only refers to charges covered by both Title VII and the FEHA. However, the ADA expressly incorporates Title VII's "deferral" provision, as well as the provision empowering the EEOC to cooperate with state and local fair employment practices agencies.^{n17.1} In addition, EEOC procedural regulations governing deferral expressly apply to the ADA.^{n17.2} Presumably, therefore, the worksharing agreement will *de facto* be applied to charges alleging discrimination covered by both the ADA and the FEHA.

Legal Topics:

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

Labor & Employment Law
Discrimination
Disability Discrimination
Rehabilitation Act
Labor & Employment Law
Discrimination
Disparate Treatment
Statutory Application
General Overview
Labor & Employment Law
Discrimination
Disparate Treatment
Statutory Application
Americans With Disabilities Act
Labor & Employment Law
U.S. Equal Employment Opportunity Commission
General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-5(c); 29 C.F.R. § 1601.13(a)(3)(ii). *See also* 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA); 29 C.F.R. §§ 1601.1, 1601.13.

(n2)Footnote 1.1. *See Oscar Mayer & Co. v. Evans* (1979) 441 U.S. 750, 756, 99 S. Ct. 2066, 60 L. Ed. 2d 609 ; *cf.* 29 U.S.C. §§ 626(d), 633(b).

(n3)Footnote 2. *See* 29 C.F.R. §§ 1601.3, 1601.70(a); *see* EEOC Compliance Manual (CCH) § 5.1.

(n4)Footnote 3. *See* 29 C.F.R. §§ 1601.70(a), 1601.77. The EEOC will, however, review any case closed by a FEP agency for lack of jurisdiction, following unsuccessful conciliation, or when the charge involves an issue identified by the EEOC for priority review.

(n5)Footnote 4. *See* 29 C.F.R. § 1601.80.

(n6)Footnote 5. *See* 29 C.F.R. § 1601.13(a)(4)(i). *See also Josephs v. Pac. Bell* (9th Cir. 2005) 432 F.3d 1006, 1014 (because California is "deferral" state, claim must be filed within 300 days of claimed event of discrimination).

(n7)Footnote 6. *Love v. Pullman Co.* (1972) 404 U.S. 522, 525, 92 S. Ct. 616, 30 L. Ed. 2d 679 .

(n8)Footnote 7. *See* discussion in [2], *below*.

(n9)Footnote 8. *See* 29 C.F.R. § 1601.13(a)(4)(i).

(n10)Footnote 9. 29 C.F.R. § 1601.13(a)(3)(ii).

(n11)Footnote 10. *See* EEOC Compliance Manual (CCH) § 5.4(d); 29 C.F.R. § 1601.13(a)(2). For discussion of differences in jurisdiction between EEOC and DFEH, *see* § 42.02[2].

(n12)Footnote 11. *See* 29 C.F.R. § 1601.13(a)(3)(iii); *Isaac v. Harvard University* (1st Cir. 1985) 769 F.2d 817, 827-828 ; *Thompson v. Machinists* (D.D.C. 1984) 580 F. Supp. 662, 666-667 ; *Yeung v. Lockheed Missiles & Space Co.* (N.D. Cal. 1980) 504 F. Supp. 422, 424-425 .

(n13)Footnote 12. *See* Fiscal Year 1988 Worksharing Agreement between California DFEH and U.S. EEOC. Worksharing agreements between the EEOC and state agencies are authorized by 42 U.S.C. § 2000e-4(g)(1) and 29 C.F.R. §§ 1601.13(c), 1626.10(a).

(n14)Footnote 13. *See* Fiscal Year 1988 Worksharing Agreement between California DFEH and U.S. EEOC, p. 2.

(n15)Footnote 14. *See* Fiscal Year 1988 Worksharing Agreement between California DFEH and U.S. EEOC, p. 4.

(n16)Footnote 15. *See* Fiscal Year 1988 Worksharing Agreement between California DFEH and U.S. EEOC, pp. 4-6.

(n17)Footnote 16. *See* 42 U.S.C. § 2000e-5(c),(d).

(n18)Footnote 17. *See* Fiscal Year 1988 Worksharing Agreement between California DFEH and U.S. EEOC, p. 3.

(n19)Footnote 17.1. *See* 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. §§ 2000e-4, 2000e-5 apply to ADA).

(n20)Footnote 17.2. *See* 29 C.F.R. §§ 1601.1, 1601.13(a)(3).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part C. FEDERAL PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.64

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.64 Investigation

[1] In General

Title VII, the ADA, and the ADEA require that the EEOC investigate charges.ⁿ¹ The EEOC's investigatory authority under Title VII and the ADA is governed by Title 29, *United States Code section 161* (section 11 of the National Labor Relations Act),ⁿ² which provides that the agency may have access to and copy all evidence, require the attendance and testimony of witnesses, and issue subpoenas. The EEOC generally conducts investigations of Title VII, ADEA, and EPA cases according to the same procedural guidelines.ⁿ³ Because the ADA expressly incorporates Title VII's investigation provisions,^{n3.1} presumably the EEOC will conduct ADA investigations using the same procedures. However, because of the EEOC's independent authority under the ADEA, the broader permissible scope of EPA investigations, and the need to preserve the anonymity of ADEA and EPA complainants, the EEOC may expand its investigation beyond the allegations contained in ADEA and EPA complaints.ⁿ⁴

Interviews with the parties, other employees, and various other witnesses, are integral to the beginning of the investigative process,ⁿ⁵ and to the end of the investigation, when the EEOC attorney discusses a proposed determination with the charging party or the respondent.ⁿ⁶

[2] Charges Warranting Priority Processing

Immediately after intake, the EEOC attorney reviews for appropriate action every charge alleging retaliation or otherwise warranting preliminary relief (such as charges alleging racial and/or sexual harassment or cases where imminent destruction of records is likely).ⁿ⁷ Retaliation cases have priority for investigation, as do ADEA, EPA, and concurrent Title VII-EPA cases when the statute of limitations for filing an ADEA or EPA civil actionⁿ⁸ is about to expire.ⁿ⁹

The EEOC gives priority to ADEA charges received within 180 days before expiration of the statute of limitations for filing a civil action, and the EEOC informs those charging parties by written notice of the time limitations and of their rights and options under the ADEA.ⁿ¹⁰ If the EEOC has not filed suit in an ADEA case or a concurrent Title VII-EPA

case at least 60 days before the expiration of the limitations period for filing a civil action, the investigative staff must provide written notice of this fact and of the parties' time limits for filing a civil action.ⁿ¹¹ However, if the 180-day notice discussed above has already been given, the 60-day notice need not be sent.ⁿ¹² The investigative staff must also monitor the progress of any ADEA, EPA, and concurrent investigations still pending within 180 days before the statute of limitations expires, to ensure timely handling of the cases.ⁿ¹³ The above written notices need not be given if a charge is filed more than two years after the date of the most recent allegation affecting the charging party and if the investigator has given the charging party the "Information Sheet for Charging Parties and Complainants."ⁿ¹⁴ This information sheet sets out the EEOC's procedures in handling a charge, the charging party's responsibilities, and private suit rights under Title VII, the ADEA, and the EPA.ⁿ¹⁵

[3] Scope of Investigation

The EEOC may investigate any violations that are similar to, related to, or develop from the allegations of a Title VII charge.ⁿ¹⁶ In addition, an investigator may report on violations discovered during the investigation that were not alleged in the charge under investigation.ⁿ¹⁷ Under the ADEA, the EEOC may conduct investigations of potential statutory violations without a charge or complaint being filed.ⁿ¹⁸ Under the EPA, the EEOC may investigate job categories that the EEOC has found in the past to have a high incidence of violations.ⁿ¹⁹ Further, the scope of an investigation of an ADEA or EPA complaint should be broad enough to protect the anonymity of the complainant.ⁿ²⁰

[4] Statement of Position and Requests for Information from Respondent

[a] Generally

A respondent's first opportunity to present its defenses is during the investigation, in response to the EEOC's initial formal request for information, which accompanies the Notice of Charge of Discrimination.ⁿ²¹ Although the EEOC does not always request a position statement addressing the allegations of the complainant, the agency will generally accept one.ⁿ²² A respondent should submit such a statement early in the investigative process to help clarify the issues and to bring favorable evidence to the attention of the investigator. Generally, a statement of position is a letter that presents respondent's version of the facts that gave rise to the charge. It should include (1) a short statement of what the employer believes the charging party is alleging; (2) a statement of any procedural arguments that are clearly dispositive, such as the fact that the respondent is not an employer subject to Title VII or that the charge was not timely filed; (3) a detailed narrative of the facts which are relevant to the allegations of the charge; and (4) a short statement of the respondent's position on the issue of whether a Title VII violation occurred, including citations to case law.

The EEOI generally prepares a request for information based on a set of model questions, as well as additional questions reflecting the particular facts alleged in the charge. The request for information should be broad enough to cover the intended scope of the investigation and the questions should cover the appropriate time period to be addressed by the investigation. In ADEA and EPA investigations, the request for information may also request data pertaining to the issues and/or job categories beyond those specifically described in the charge or complaint.ⁿ²³ In cases in which the documentary evidence is likely to be extensive, the investigator may contact the respondent prior to preparing the request for information in order to ascertain the manner in which records are retainedⁿ²⁴ and to ask the respondent to submit a computerized tape and relevant code books if the respondent maintains data on computer.ⁿ²⁵

[b] Subsequent Opportunities to Present Defenses

If more information is needed by the EEOC investigator, he or she may send the respondent a follow-up request for written information.ⁿ²⁶ and may seek oral responses to additional points raised in the investigation. Moreover, at any time during the investigative process, a respondent should present applicable defenses in order to persuade the investigator to dismiss the charge and to assert, on the record, nonpretextual, legitimate defenses at the earliest opportunity.

[5] On-Site Investigations

The EEOC has authority to conduct on-site investigations.ⁿ²⁷ During the on-site investigation, the investigator may tour the facility to gain an understanding of respondent's operations, observe the charging party's work site, review records, and interview witnesses.ⁿ²⁸ If the respondent refuses to permit an on-site investigation, the EEOC may serve an "access" subpoena to enter and inspect the facility, examine and copy evidence, and interview employees.ⁿ²⁹ The investigator may report other potential Title VII, ADEA, or EPA violations observed during the on-site investigation, which may result in expanding the scope of the investigation or the filing of a Commissioner's charge.ⁿ³⁰

[6] Representation by Attorney

The EEOC requires attorneys for charging parties and respondents to submit a written statement of representation on the attorney's office stationery if they wish to communicate with the agency regarding a charge.ⁿ³¹ On receipt of such a statement, the EEOC does not contact the charging party or respondent without advising counsel of the contact by letter or telephone.ⁿ³² The EEOC determines whether the attorney wishes to be contacted before each communication with the charging party or respondent and notes this in the case file. The EEOC will honor an attorney's request in writing that all contacts, whether oral or written, be made directly with him or her.ⁿ³³

[7] Fact-Finding Conference

The fact-finding conference is intended to define the issues in a case, determine which facts are undisputed, clarify disputed issues and evidence, determine the evidence required to complete an investigation, and ascertain whether there is a basis for negotiated settlement of the charge.ⁿ³⁴ No fact finding conference occurs in the following cases:ⁿ³⁵ (1) when the alleged discrimination in the charge derives from an acknowledged or documented policy; (2) when charges are processed under expedited procedures; (3) when charges are made by a Commissioner; (4) when charges are made on behalf of an aggrieved individual whose identity is being kept confidential; and (5) when an ADEA or EPA complaint is made.

The EEO Investigator (EEOI) normally invites the charging party and the respondent's representatives or witnesses, including a person who has authority to enter a settlement and the person who allegedly committed the unlawful act, to the conference.ⁿ³⁶ If the charging party fails to cooperate in the scheduling of conferences or fails to attend conferences, the EEOI may dismiss the charge.ⁿ³⁷ A respondent who refuses to attend may be subpoenaed to appear and testify regarding disputed facts.ⁿ³⁸

Parties may take notes at the fact-finding conference, but no recording device is permitted.ⁿ³⁹ Both the charging party and the respondent may bring an attorney or other representative to the conference, but the attorney may only serve as an advisor and may not speak for a party or examine any person present.ⁿ⁴⁰ Consequently, the attorneys should thoroughly prepare their clients, and the employer representative and other witnesses should have reviewed the charge and related documents and should be able to articulate the company's position.

At the fact-finding conference, the EEOI reads the charge section by section, and the respondent and charging party state their positions regarding its allegations.ⁿ⁴¹ The EEOI attempts to resolve factual disputes, and may amend the charge during the conference.ⁿ⁴²

Either party may request a recess during the conference to discuss settlement, and the EEOI may conduct settlement discussions separately with each party.ⁿ⁴³ If the parties do not reach a settlement at the fact-finding conference, the case proceeds to predetermination interviews, additional investigative activity, and a determination of cause or no cause.ⁿ⁴⁴

[8] Subpoena Power

[a] Authority and Scope

The EEOC has authority to issue subpoenas to compel the testimony of witnesses, the production of evidence, and access to evidence.ⁿ⁴⁵ The agency prefers to secure voluntary compliance with its requests for information and usually issues subpoenas only after other investigative methods have failed.ⁿ⁴⁶ The EEOC has broad subpoena powers and may obtain any evidence relevant and necessary to the resolution of any issue presented in a charge.ⁿ⁴⁷ Although courts have broadly interpreted the relevance standard and have allowed the EEOC to request information regarding violations not alleged in the charge under investigation,ⁿ⁴⁸ the breadth of some EEOC subpoenas has led employers to seek judicial intervention limiting the scope of such subpoenas.ⁿ⁴⁹ For discussion of enforcement of subpoenas, see [d], below.

Because the EEOC perceived such litigation as an inappropriate drain on its resources, the agency adopted a new investigative compliance policy in 1986, which refined its approach to subpoenas.ⁿ⁵⁰ Under this policy, the EEOC strives for more focused subpoenas that are tailored to the needs of a particular investigation and more expeditious processing of challenges to such subpoenas. In addition, the new policy authorizes direct suit on the merits of a charge if issuance of a subpoena against an uncooperative respondent is not essential to reach a determination of the charge.ⁿ⁵¹

The EEOC may require production of evidence that does not currently exist in documentary form.ⁿ⁵² For example, an employer may be required to create lists including the names, positions, and racial identity of employees, when such information is within the control of the respondent.ⁿ⁵³

The EEOC's subpoena power does not cease when the EEOC issues a right-to-sue letter and the charging party initiates litigation based on that charge. In *Equal Employment Opportunity Commission v. Federal Express Corp.*,^{n53.1} the Ninth Circuit read Title VII, the relevant regulations,^{n53.2} and the EEOC's interpretation of those regulations^{n53.3} to mean that the EEOC's investigative mandate is triggered by the filing of a valid charge; the EEOC may bring its own action or may issue a right-to-sue notice to the charging party; and even though the EEOC normally terminates the processing of the charge when it issues the right-to-sue notice, it can, under limited circumstances, continue to investigate the allegations in the charge, which includes the authority to subpoena information relevant to that charge. The employee had filed a charge alleging personal discrimination and discrimination against other similarly-situated African Americans and Latinos. The EEOC, pursuant to his request, issued to him a right-to-sue notice. The EEOC decided, however, to continue investigating the charge because it involved a possible policy or pattern of discrimination affecting others, and there was nothing to suggest that the EEOC exceeded its authority in doing so.

[b] Procedure

An EEOC subpoena may be served in person or by certified mail on an appropriate high-ranking official of the respondent, the person who is expected to comply with the subpoena, or the respondent's attorney, subject to agreement to do so.ⁿ⁵⁴ A respondent who is served with a subpoena in connection with a Title VII charge may, within five days after service, petition to revoke or modify the subpoena on the grounds that it does not relate to the matter under investigation or does not describe with sufficient particularity the evidence required. The respondent must serve the petition on the EEOC's General Counsel in Washington, D.C., and on the person who issued the subpoena.ⁿ⁵⁵ There is no procedure for petitioning to revoke or modify an ADEA or EPA subpoena.ⁿ⁵⁶

[c] FORM--Sample EEOC Subpoena (EEOC Form 136)**[i] Comment**

The form set forth in [ii], below, is an EEOC subpoena used to require the attendance and testimony of witnesses, the production of evidence, and access to evidence for the purposes of examination and the right to copy.ⁿ⁵⁷ A check mark in an appropriate box on the form indicates whether testimony, evidence, or access to evidence is sought. If only

documents or compilations are sought the "mail" box is checked. The form indicates a date and time for production (normally at least 10 days from the date of service); the person to whom the evidence should be given; and the matters to be examined or the evidence to be produced.

[ii] Form Sample EEOC Subpoena (EEOC Form 136)

[Click here to view image.](#)

[d] Enforcement of Subpoena

If a respondent refuses to comply with a subpoena, the EEOC may seek federal district court enforcement of it.ⁿ⁵⁸ A federal district court has jurisdiction to determine the enforceability of an administrative subpoena issued by the EEOC pursuant to Title VII of the Civil Rights Act of 1964.^{n58.1} The federal Circuit Courts of Appeals have jurisdiction over appeals of district court determinations regarding administrative subpoenas issued by the EEOC, because an order of a district court enforcing an administrative subpoena is final and ripe for review.^{n58.2} Although a valid EEOC charge is a prerequisite to enforcement of an EEOC subpoena,ⁿ⁵⁹ courts generally enforce subpoenas in spite of objections to the merits of a charge on the ground that a subpoena enforcement proceeding is not the proper forum to litigate such issues.

The Ninth Circuit Court of Appeals has held that the scope of judicial inquiry in an EEOC subpoena enforcement proceeding is limited to: (1) whether Congress has granted the authority to investigate, (2) whether procedural requirements have been followed, and (3) whether the evidence is relevant and material to the investigation.ⁿ⁶⁰ If these factors are shown, the subpoena should be enforced unless it is unduly broad or burdensome.ⁿ⁶¹ Similarly, in *Pacific Maritime Association v. Quinn*,ⁿ⁶² the court rejected respondent's attempt to challenge an EEOC subpoena based on untimeliness of the underlying charge. The court found that the EEOC needed the information subpoenaed to make a determination of whether it had jurisdiction, i.e., whether the alleged violation was a continuing one. However, in an en banc decision, the Fourth Circuit Court of Appeals has declined to enforce a subpoena if it is based on a charge that shows *on its face* that it is untimely and cannot be pursued.ⁿ⁶³ However, the court said that in a situation in which the EEOC raises the possibility of waiver, estoppel, or other circumstances indicating that the charge may be timely despite its facial invalidity, the district court should consider those claims.ⁿ⁶⁴

In some cases, employers have succeeded in defeating enforcement of a subpoena for information relating to a basis of discrimination not stated in the chargeⁿ⁶⁵ and on the ground that compliance would be unduly burdensome.ⁿ⁶⁶

■ PRACTICE TIP:

In light of the EEOC's new Investigative Compliance Policy, respondents should deliberate carefully before initiating challenges to agency subpoenas. The sanctions for unreasonable resistance are heavy, and the subpoenas themselves are supposed to be "carefully tailored" to the needs of the particular investigation. An employer would expend fewer resources and would be likely to accomplish more by seeking to negotiate a satisfactory response to an investigative request, rather than litigating one.

Commentary by Erica B. Grubb and Kirby Wilcox.

[9] Action by EEOC for Temporary Relief Pending Final Disposition of Charge

Title VII and the ADA authorize the EEOC to seek relief pending final disposition of a charge if the agency concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of the statute.ⁿ⁶⁷ This procedure is designed to preserve the status quo pending the determination of administrative proceedings, and after that it is no longer proper to obtain injunctive relief under that provision.ⁿ⁶⁸

Legal Topics:

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

Labor & Employment Law Discrimination Disparate Impact Statutory Application General Overview Labor & Employment Law Discrimination Disparate Impact Statutory Application Americans With Disabilities Act Labor & Employment Law Discrimination Disparate Treatment Statutory Application Americans With Disabilities Act Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission Enforcement Investigative Authority

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. § 626(a) (ADEA); 42 U.S.C. § 2000e-5(b) (Title VII). *See also* 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-5 apply to ADA).

(n2)Footnote 2. 42 U.S.C. § 2000e-9. *see* 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-9 apply to ADA).

(n3)Footnote 3. *See, e.g.*, EEOC Compliance Manual (CCH) §§ 14, 22 (investigation procedures).

(n4)Footnote 3.1. *See* 42 U.S.C. § 12117 (procedures set forth in 42 U.S.C. § 2000e-9 apply to ADA).

(n5)Footnote 4. *See* EEOC Compliance Manual (CCH) § 22.3(c).

(n6)Footnote 5. *See* EEOC Compliance Manual (CCH) § 23.

(n7)Footnote 6. *See* EEOC Compliance Manual (CCH) § 27.

(n8)Footnote 7. *See* EEOC Compliance Manual (CCH) § 2.8.

(n9)Footnote 8. *See* 29 U.S.C. §§ 216(c), 255(a), 626(e); *see also* discussion in Ch. 43, pt. B.

(n10)Footnote 9. *See* EEOC Compliance Manual (CCH) § 2.8(a),(b).

(n11)Footnote 10. *See* EEOC Compliance Manual (CCH) § 2.8(b)(1).

(n12)Footnote 11. *See* EEOC Compliance Manual (CCH) § 2.8(b)(3).

(n13)Footnote 12. *See* EEOC Compliance Manual (CCH) § 2.8(b)(3).

(n14)Footnote 13. *See* EEOC Compliance Manual (CCH) § 2.8(b)(1).

(n15)Footnote 14. *See* EEOC Compliance Manual (CCH) § 2.8(b)(4).

(n16)Footnote 15. *See* EEOC Compliance Manual (CCH) § 2.6.

(n17)Footnote 16. *See General Telephone Co. v. EEOC* (1980) 446 U.S. 318, 326, 333, 100 S. Ct. 1698, 64 L. Ed. 2d 319 .

(n18)Footnote 17. *See* EEOC Compliance Manual (CCH) § 25.7.

(n19)Footnote 18. 29 C.F.R. § 1626.4; EEOC Compliance Manual (CCH) § 22.3(b).

(n20)Footnote 19. EEOC Compliance Manual (CCH) § 22.3(b).

(n21)Footnote 20. EEOC Compliance Manual (CCH) § 22.3(b).

(n22)Footnote 21. *See* EEOC Compliance Manual (CCH) § 3.4(b).

- (n23)Footnote 22. *29 C.F.R. § 1601.15(a)*.
- (n24)Footnote 23. EEOC Compliance Manual (CCH) § 26.3(a).
- (n25)Footnote 24. EEOC Compliance Manual (CCH) § 26.3(a)(1).
- (n26)Footnote 25. EEOC Compliance Manual (CCH) § 26.3(a)(2).
- (n27)Footnote 26. EEOC Compliance Manual (CCH) § 26.3(a)(5).
- (n28)Footnote 27. *42 U.S.C. § 2000e-8(a)*; *29 U.S.C. § 625*; *see* EEOC Compliance Manual (CCH) § 25.1. *see* *42 U.S.C. § 12117* (ADA, incorporating procedures set forth in *42 U.S.C. § 2000e-8*).
- (n29)Footnote 28. EEOC Compliance Manual (CCH) § 25.3, 25.4.
- (n30)Footnote 29. EEOC Compliance Manual (CCH) § 25.2(b)(2).
- (n31)Footnote 30. EEOC Compliance Manual (CCH) § 25.7.
- (n32)Footnote 31. EEOC Compliance Manual (CCH) § 82.2.
- (n33)Footnote 32. EEOC Compliance Manual (CCH) § 82.2.
- (n34)Footnote 33. *See* EEOC Compliance Manual (CCH) §§ 82.3, 82.4.
- (n35)Footnote 34. *29 C.F.R. § 1601.15(c)*; EEOC Compliance Manual (CCH) § 14.9(b).
- (n36)Footnote 35. *See* EEOC Compliance Manual (CCH) § 14.9(c)(1)-(5).
- (n37)Footnote 36. *See* EEOC Compliance Manual (CCH) § 14.10(a)(3),(b).
- (n38)Footnote 37. *See* EEOC Compliance Manual (CCH) §§ 4.4, 14.10(e)(3).
- (n39)Footnote 38. *See* EEOC Compliance Manual (CCH) § 14.10(e)(3).
- (n40)Footnote 39. *See* EEOC Compliance Manual (CCH) § 14.11(b)(1),(4).
- (n41)Footnote 40. *See* EEOC Compliance Manual (CCH) § 14.11(b)(2).
- (n42)Footnote 41. *See* EEOC Compliance Manual (CCH) § 14.11(b)(3).
- (n43)Footnote 42. *See* EEOC Compliance Manual (CCH) § 14.11(c),(d).
- (n44)Footnote 43. *See* EEOC Compliance Manual (CCH) § 14.11(e).
- (n45)Footnote 44. *See* EEOC Compliance Manual (CCH) § 14.12.
- (n46)Footnote 45. *See* *42 U.S.C. § 2000e-9* (Title VII; incorporating by reference *29 U.S.C. § 161*); *29 U.S.C. § 626(a)* (ADEA); *29 U.S.C. § 209* (EPA); *see* *29 C.F.R. § 1601.16(a)*; EEOC Compliance Manual (CCH) § 24.1. *See also* *42 U.S.C. § 12117* (ADA, incorporating procedures set forth in *42 U.S.C. § 2000e-9*).
- (n47)Footnote 46. *See* EEOC Compliance Manual (CCH) §§ 24.1, 24.4.
- (n48)Footnote 47. *See* EEOC Compliance Manual (CCH) § 24.4. *See also* *University of Pennsylvania v. EEOC* (1990) 493 U.S. 182, 183, 110 S. Ct. 577, 107 L. Ed. 2d 571 (unless specifically provided otherwise in Title VII, EEOC

may obtain all "relevant" evidence).

(n49)Footnote 48. *See Georgia Power Co. v. EEOC* (5th Cir. 1969) 412 F.2d 462, 468 (court enforced subpoena requesting information on job performance of all other employees in plant to determine comparable treatment); *Graniteville Co. (Sibley Div.) v. EEOC* (4th Cir. 1971) 438 F.2d 32, 39-42 (court enforced subpoena seeking class-wide information although case being investigated was individual one); *Parliament House Motor Hotel v. EEOC* (5th Cir. [Ala.] 1971) 444 F.2d 1335, 1340-1341 (court enforced subpoena seeking information for restaurant not named in charge because of common management); *Blue Bell Boots, Inc. v. EEOC* (6th Cir. 1969) 418 F.2d 355, 358 (employer required to produce hiring information and records of every employee in every category of employment in investigation of firing charge).

(n50)Footnote 49. *See, e.g., Georgia Power Co. v. EEOC* (N.D. Ga. 1968) 295 F. Supp. 950, 954-955 (reducing geographic scope and relevant time period of information to be produced); *Joslyn Dry Goods Co. v. EEOC* (10th Cir. [Colo.] 1973) 483 F.2d 178, 183-184 (refusing to require production of employee records from facilities unrelated to the charge).

(n51)Footnote 50. *See* EEOC, Investigative Compliance Policy (July 14, 1986), incorporated in EEOC Compliance Manual (CCH) § 632.2.

(n52)Footnote 51. *See* EEOC Compliance Manual (CCH) § 22.

(n53)Footnote 52. EEOC Compliance Manual (CCH) § 24.4(a).

(n54)Footnote 53. EEOC Compliance Manual (CCH) § 24.4(a); *E.E.O.C. v. Bay Shipbuilding Corp.* (7th Cir. [Wis.] 1981) 668 F.2d 304, 312 .

(n55)Footnote 53.1. *Equal Employment Opportunity Commission v. Federal Express Corp.* (9th Cir. 2008) 543 F.3d 531, 2008 U.S. App. LEXIS 19242, *12-*31 . To view 9th Circuit briefs available on *Lexis.com*, go to 2006 U.S. 9th Cir. Briefs 16864 .

(n56)Footnote 53.2. *See* 29 C.F.R. § 1601.28(a)(3).

(n57)Footnote 53.3. *See* 1 EEOC Compliance Manual § 6.4(e) (June 2006).

(n58)Footnote 54. EEOC Compliance Manual (CCH) § 24.7.

(n59)Footnote 55. 29 U.S.C. § 161(1); 29 C.F.R. § 1601.16(b).

(n60)Footnote 56. EEOC Compliance Manual (CCH) § 24.11.

(n61)Footnote 57. 29 C.F.R. § 1601.16(a)(1)-(3).

(n62)Footnote 58. *See* 42 U.S.C. § 2000e-9, which incorporates by reference 29 U.S.C. § 161; 29 C.F.R. § 1601.16(c); *see also* 42 U.S.C. § 12117 (ADA, incorporating procedures set forth in 42 U.S.C. § 2000e-9).

(n63)Footnote 58.1. *Equal Employment Opportunity Commission v. Federal Express Corp.* (9th Cir. 2008) 543 F.3d 531, 2008 U.S. App. LEXIS 19242, *2 . *See* 42 U.S.C. §§ 2000e-5(b) (requiring EEOC to investigate charges of discrimination); 2000e-9 (granting to EEOC investigatory and subpoena powers of National Labor Relations Board by incorporating 29 U.S.C. § 161, which provides that district courts have jurisdiction to determine enforceability of administrative subpoena).

(n64)Footnote 58.2. *Equal Employment Opportunity Commission v. Federal Express Corp.* (9th Cir. 2008) 543 F.3d 531, 2008 U.S. App. LEXIS 19242, *2-*3 . *See* 28 U.S.C. § 1291.

(n65)Footnote 59. *EEOC v. Shell Oil Co.* (1984) 466 U.S. 54, 62-64, 104 S. Ct. 1621, 80 L. Ed. 2d 41 .

(n66)Footnote 60. *Equal Employment Opportunity Commission v. Federal Express Corp.* (9th Cir. 2008) 543 F.3d 531, 2008 U.S. App. LEXIS 19242, *12-*13 ; *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001) ; *EEOC v. Children's Hospital Medical Center of Northern California* (9th Cir. 1983) 719 F.2d 1426, 1428 .

(n67)Footnote 61. *Equal Employment Opportunity Commission v. Federal Express Corp.* (9th Cir. 2008) 543 F.3d 531, 2008 U.S. App. LEXIS 19242, *31-*36 (because evidence requested by EEOC was relevant and material to investigation and request was not overbroad, district court did not err in enforcing EEOC's administrative subpoena); *EEOC v. Children's Hospital Medical Center* (9th Cir. 1983) 719 F.2d 1426, 1428 . The court rejected the defendant's argument that the EEOC subpoena should not be enforced because the charge was barred by a prior consent decree, stating that this would be a defense to a court action and could not be raised in a subpoena enforcement proceeding. *EEOC v. Children's Hospital Medical Center* (9th Cir. [Cal.] 1983) 719 F.2d 1426, 1429-1430 .

(n68)Footnote 62. *Pacific Maritime Association v. Quinn* (9th Cir. [Cal.] 1974) 491 F.2d 1294, 1297 .

(n69)Footnote 63. *EEOC v. Ocean City Police Dep't* (4th Cir. 1987) 820 F.2d 1378, 1380-1381 .

(n70)Footnote 64. *EEOC v. Ocean City Police Dep't* (4th Cir. 1987) 820 F.2d 1378, 1382 .

(n71)Footnote 65. *See General Insurance Co. of America v. EEOC* (9th Cir. 1974) 491 F.2d 133, 136 .

(n72)Footnote 66. *See Pacific Maritime Association v. Quinn* (9th Cir. [Cal.] 1974) 491 F.2d 1294, 1297 .

(n73)Footnote 67. *See 42 U.S.C. § 2000e-5(f)(2); see also 42 U.S.C. § 12117* (ADA, incorporating procedures set forth in 42 U.S.C. § 2000e-5); *Wagner v. Taylor* (9th Cir. 1987) 836 F.2d 566, 572-574 (42 U.S.C. § 2000e-5(f)(2) does not foreclose individual claimants from seeking interim injunctive relief to preserve status quo and to prevent retaliation while administrative process is advancing).

(n74)Footnote 68. *See Equal Employment Opportunity v. Pacific Press Pub.* (9th Cir. 1976) 535 F.2d 1182, 1187 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part C. FEDERAL PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.65

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.65 Defenses

[1] Procedural Defenses

[a] Jurisdictional Defects

The EEOC dismisses a charge for lack of jurisdiction if it finds that the applicable statutory requirements are not met.ⁿ¹ Examples of jurisdictional defects that result in dismissal include the following:

1. The respondent in a Title VII action has fewer than 15 regularly-employed persons,ⁿ² in an ADEA action less than 20 regularly-employed persons engaged in an industry affecting commerce,ⁿ³ or under the EPA less than two employees engaged in commerce or in the production of goods for commerce;ⁿ⁴
2. The ADEA or EPA charging party or complainant has already filed a lawsuit;ⁿ⁵
3. The respondent is a bona fide private membership club exempt from Title VII coverage;ⁿ⁶
4. The asserted basis of discrimination is not covered by the statute;ⁿ⁷ and
5. The charging party lacks standing under Title VIIⁿ⁸ or the ADEA.ⁿ⁹

For discussion of the scope and coverage of Title VII, the ADEA, and the EPA, see Chapter 40, Part C.

[b] Timeliness

The EEOC dismisses a charge as untimely when it finds that a Title VII, ADEA, or EPA charge or complaint has been filed after the expiration of the applicable limitations period. Time limitations for the filing of charges and administrative complaints under these acts are discussed in § 42.62 [3]. The respective statutes of limitations and exceptions to the limitations periods for bringing judicial actions are discussed in greater detail in Chapter 43, Part B.

Notwithstanding the untimely filing of a charge or complaint, the EEOC may pursue its investigation if:

1. The respondent's acts constituted a continuing violation of the law;ⁿ¹⁰
2. The time limit is subject to equitable tolling;ⁿ¹¹ or
3. The employer, because of its improper actions, should be equitably estopped from asserting that the limitations period commenced on a particular date.ⁿ¹²

[c] Prior State Court or Quasi-Judicial Decisions

The EEOC dismisses all charges when the respondent asserts the existence of a prior decision by a state court, a state or local administrative agency other than a 706 agency, or a judicial body such as a tribal court, if the new charge involves the same parties and issues as those that were raised or could have been raised in the prior proceeding.ⁿ¹³ In cases dismissed on this ground, the EEOC issues a Notice of Right to Sue but makes no determination on the merits.ⁿ¹⁴ For discussion of the preclusive effects of prior decisions, see § 42.03.

[2] Substantive Defenses

In order to obtain a "no cause" determination from the EEOC, a respondent must either present evidence to rebut the specific allegations in the charge or complaint or assert an affirmative defense to the alleged unlawful practice. In the absence of enough evidence to support a determination of cause, EEOC will dismiss the case.ⁿ¹⁵ The affirmative defenses applicable in Title VII, ADEA, and EPA actions are fully discussed in Chapter 41, Part E.

Legal Topics:

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

Labor & Employment LawDiscriminationDisparate ImpactStatutory ApplicationAmericans With Disabilities ActLabor & Employment LawDiscriminationDisparate TreatmentStatutory ApplicationAmericans With Disabilities ActLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General OverviewLabor & Employment LawU.S. Equal Employment Opportunity CommissionGeneral OverviewLabor & Employment LawU.S. Equal Employment Opportunity CommissionEnforcementGeneral Overview

FOOTNOTES:

(n1)Footnote 1. EEOC Compliance Manual (CCH) § 4.3(a).

(n2)Footnote 2. *See* 42 U.S.C. § 2000e(b).

(n3)Footnote 3. *See* 29 U.S.C. § 630(b).

(n4)Footnote 4. *See* 29 U.S.C. § 203(r),(s).

(n5)Footnote 5. EEOC Compliance Manual (CCH) § 4.4(f).

(n6)Footnote 6. *See* 42 U.S.C. § 2000e(b)(2); *cf.* Quijano v. University Federal Credit Union (5th Cir. [Tex.] 1980) 617 F.2d 129, 131-133 (private club exemption to be narrowly construed). The ADEA and the EPA contain no analogous exemptions for private clubs.

(n7)Footnote 7. For example, homosexuals alleging sex discrimination are not covered by *Title VII*. *DeSantis v. Pacific Tel. & Tel. Co., Inc.* (9th Cir. 1979) 608 F.2d 327, 329-330 .

(n8)Footnote 8. *See* 42 U.S.C. § 2000e-5(b); *see* EEOC Compliance Manual (CCH) § 4.3(c).

(n9)Footnote 9. *See* 29 U.S.C. §§ 626(c)(1), 626(d); EEOC Compliance Manual (CCH) §§ 4.3(c),(d), 605.3.

(n10)Footnote 10. According to the EEOC, continuing violations are those which "have no definite date on which they end. Thus, while the initial effect of a practice or policy may have been felt more than 180/300 days prior to the date on which the charge was filed, the continued existence of that practice or policy within the 180/300 day period makes it a timely subject of a Title VII charge." EEOC Compliance Manual (CCH) § 605.7(a). For discussion of continuing violations, *see* § 42.62[3][d].

(n11)Footnote 11. *See* Naton v. Bank of California (9th Cir. [Cal.] 1981) 649 F.2d 691, 696 ; EEOC Compliance Manual (CCH) § 605.7(d). For discussion of equitable tolling of charge-filing period, *see* § 42.62[3][e].

(n12)Footnote 12. *See* Naton v. Bank of California (9th Cir. [Cal.] 1981) 649 F.2d 691, 696 (factors determining the applicability of equitable estoppel include the plaintiff's actual and reasonable reliance on the respondent's conduct or representations and the respondent's actual or constructive knowledge of the deceptive nature of its conduct).

(n13)Footnote 13. *See* EEOC Compliance Manual (CCH) §§ 4.3(f), 605.17(f).

(N14)Footnote 14. EEOC Compliance Manual (CCH) § 4.3(f); *see* EEOC Compliance Manual (CCH) § 605.17(f)(2).

(n15)Footnote 15. *See generally* EEOC Compliance Manual (CCH) § 4.5.



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3-42 California Employment Law § 42.66

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.66 Predetermination Settlement

Prior to making a cause or no cause determination in a Title VII or ADA case,ⁿ¹ the EEOC attempts to secure an informal resolution of the matter.ⁿ² In ADEA and EPA cases, the EEOC may also attempt to negotiate a settlement between the parties before making a formal determination on the merits of the case.ⁿ³ ADEA and EPA complaints in which the aggrieved person is undisclosedⁿ⁴ and will not be a signatory to the agreement may be settled informally by written agreement between the EEOC office director and the respondent.ⁿ⁵

A charging party and respondent may enter into a settlement agreement with or without the EEOC being a signatory.ⁿ⁶ If the EEOC is not a party to the agreement, it does not attempt to enforce the agreement in the event of a breach.ⁿ⁷ Moreover, ADEA and EPA settlement agreements to which EEOC is not a party do not preclude the aggrieved person from later seeking other remedial relief in a civil action.ⁿ⁸

The ADEA, as amended by Title II of the Older Workers Benefit Protection Act of 1990 (OWBPA),^{n8.1} provides that an individual may agree to waive ADEA rights in settlement of a charge filed with the Equal Employment Opportunity Commission (EEOC).^{n8.2} The waiver must be knowingly and voluntarily made, and must meet specified minimum requirements.^{n8.3} However, no waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the EEOC.^{n8.4}

If the negotiated settlement contains provisions that affect the rights of other employees under respondent's collective bargaining agreement with a labor organization, the EEOC makes every effort to obtain the signature of the union representative.ⁿ⁹ This practice probably is based on the fact that the collective bargaining agreement may affect the remedies available from the employer.ⁿ¹⁰ For example, if the EEOC enters into an agreement with the parties but not the union, and the agreement conflicts with the terms of the collective bargaining agreement, the settlement agreement may not be enforceable.ⁿ¹¹ The EEOC's procedures do allow the EEOC to enter into an agreement with the employer even if the union refuses to sign a negotiated agreement, but the EEOC will first consider alternative forms of relief that do not conflict with the collective bargaining agreement.ⁿ¹²

Legal Topics:

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

Administrative Law Agency Adjudication General Overview Civil Procedure Settlements General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission Enforcement General Overview

FOOTNOTES:

(n1)Footnote 1. For discussion of determination, see § 42.69.

(n2)Footnote 2. 29 C.F.R. § 1601.20(a).

(n3)Footnote 3. 29 U.S.C. §§ 216(c) (EPA), 626(d) (ADEA); 29 C.F.R. § 1626.12; see EEOC Compliance Manual (CCH) § 15.3.

(n4)Footnote 4. See §§ 42.61[2], [3], 42.62[1][g], and 42.72[1][b],[c].

(n5)Footnote 5. EEOC Compliance Manual (CCH) § 15.9(b).

(n6)Footnote 6. See EEOC Compliance Manual (CCH) § 15.8(b).

(n7)Footnote 7. EEOC Compliance Manual (CCH) § 15.8(b).

(n8)Footnote 8. See *Brooklyn Savings Bank v. O'Neil* (1945) 324 U.S. 697, 703-704, 65 S. Ct. 895, 89 L. Ed. 1296 ; *Lynn's Food Stores, Inc. v. United States, Etc.* (11th Cir. [Ga.] 1982) 679 F.2d 1350, 1352-1353 ; EEOC Compliance Manual (CCH) § 15.8(b). These cases hold that the provisions of the FLSA, the remedial provisions of which apply to ADEA and EPA claims, are mandatory and are not subject to negotiation between employers and employees. The only compromise of FLSA claims that is allowed is a supervised administrative payment under 29 U.S.C. § 216(c) or a stipulated judgment under 29 U.S.C. § 216(b). See also *Lynn's Food Stores, Inc. v. United States, Etc.* (11th Cir. [Ga.] 1982) 679 F.2d 1350, 1352-1353 .

(n9)Footnote 8.1. See Pub. L. No. 101-433, §§ 201-202.

(n10)Footnote 8.2. See 29 U.S.C. § 626(f)(2).

(n11)Footnote 8.3. See 29 U.S.C. § 626(f)(1), (2).

(n12)Footnote 8.4. See 29 U.S.C. § 626(f)(4).

(n13)Footnote 9. See EEOC Compliance Manual (CCH) § 15.13.

(n14)Footnote 10. See, e.g., *W.R. Grace & Co. v. Local 759* (1983) 461 U.S. 757, 759-764, 772, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (holding employer liable for backpay damages to male employees who were laid off in violation of collective bargaining agreement while female employees were retained pursuant to terms of a consent decree entered into by employer and EEOC); *E.E.O.C. v. Safeway Stores, Inc.* (5th Cir. 1983) 714 F.2d 567, 576-580 , cert. denied, 467 U.S. 1204 (1984) (conciliation agreement providing for retroactive seniority in contravention of collective bargaining agreement held unenforceable without union's acceptance unless union has participated in adjudication that discrimination has occurred). For discussion of DFEH requirement of union involvement in settlement under FEHA, see § 42.29[2].

(n15)Footnote 11. See *W.R. Grace & Co. v. Local 759* (1983) 461 U.S. 757, 759-764, 772, 103 S. Ct. 2177, 76 L. Ed. 2d 298 ; *E.E.O.C. v. Safeway Stores, Inc.* (5th Cir. 1983) 714 F.2d 567, 576-580 , cert. denied, 467 U.S. 1204 (1984) .

(n16)Footnote 12. *See* EEOC Compliance Manual (CCH) § 15.13.



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3-42 California Employment Law § 42.67

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.67 Request for Withdrawal of Charge of Discrimination

[1] Generally

An individual who wishes to withdraw his or her Title VII or ADA or ADEA charge may do so by making a written request to the EEOC.ⁿ¹ There are no procedures for processing the withdrawal of ADEA or EPA complaints, as there are for Title VII charges.ⁿ²

In most cases, the EEOC will honor the individual's request to withdraw his or her charge,ⁿ³ particularly when the withdrawal is in conjunction with a negotiated settlement or conciliation agreement.ⁿ⁴ However, if a charge is withdrawn as a condition of a negotiated settlement,ⁿ⁵ the EEOC will not be a party to the settlement and will not attempt to enforce it.ⁿ⁶

The EEOC may continue any ADEA investigation and obtain relief for affected persons notwithstanding a request by a charging party to withdraw a charge.ⁿ⁷ The agency may also deny withdrawal requests on the grounds that it is not in the public's interest, such as when (1) the EEOC suspects that retaliation or coercion has been perpetrated by the respondent, (2) there is more than one aggrieved party and the EEOC determines that the charge should be further investigated, or (3) the case is in conciliation and the proposed withdrawal either does not provide a settlement or is part of a settlement that conflicts with the EEOC's conciliation standards.ⁿ⁸

[2] Consequences of Withdrawal

If a person withdraws his or her Title VII charge, the EEOC does not issue a Notice of Right to Sue.ⁿ⁹ In an ADEA case, in which a civil action may not be brought until 60 days after a charge has been filed with the EEOC,ⁿ¹⁰ an early withdrawal of the charge could adversely affect the individual's private suit rights.ⁿ¹¹ This is because some courts hold that the 60-day waiting period is jurisdictional and that conciliation is required before any legal action may be instituted.ⁿ¹² In those courts, failure to comply with these administrative requirements results in dismissal of the complaint.ⁿ¹³ As a practical matter, therefore, the EEOC will generally not authorize withdrawal of an ADEA charge until the 60-day period has expired.

[3] FORM--Request for Withdrawal of Charge of Discrimination (Title VII or ADEA) (Form 154)**[a] Comment**

The form set forth in [b], *below*, is for use by a charging party to withdraw his or her charge under Title VII or the ADEA.ⁿ¹⁴ If the charging party so desires, instead of completing Form 154, set forth below, he or she may provide the equivalent information in correspondence to the EEOC.ⁿ¹⁵

[b] Form Request for Withdrawal of Charge of Discrimination (Title VII or ADEA) (Form 154)

[Click here to view image.](#)

Legal Topics:

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

Labor & Employment Law Discrimination Disparate Impact Statutory Application Americans With Disabilities Act Labor & Employment Law Discrimination Disparate Treatment Statutory Application Americans With Disabilities Act Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission Enforcement General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 C.F.R. §§ 1601.10, 1626.13; EEOC Compliance Manual (CCH) § 7.3.

(n2)Footnote 2. EEOC Compliance Manual (CCH) § 7.1.

(n3)Footnote 3. EEOC Compliance Manual (CCH) § 7.1(a).

(n4)Footnote 4. EEOC Compliance Manual (CCH) § 7.5.

(n5)Footnote 5. *See* discussion in § 42.66.

(n6)Footnote 6. EEOC Compliance Manual (CCH) § 15.8(b).

(n7)Footnote 7. 29 C.F.R. § 1626.13.

(n8)Footnote 8. EEOC Compliance Manual (CCH) § 7.3(a).

(n9)Footnote 9. EEOC Compliance Manual (CCH) § 7.2(d).

(n10)Footnote 10. *See* 29 U.S.C. § 626(d).

(n11)Footnote 11. EEOC Compliance Manual (CCH) § 7.2(d).

(n12)Footnote 12. *See, e.g., Vance v. Whirlpool Corp.* (4th Cir. [N.C.] 1983) 707 F.2d 483, 489, *cert. denied*, 465 U.S. 1102 (1984), 467 U.S. 1226 (1984).

(n13)Footnote 13. *See, e.g., Vance v. Whirlpool Corp.* (4th Cir. [N.C.] 1983) 707 F.2d 483, 489, *cert. denied*, 465 U.S. 1102 (1984), 467 U.S. 1226 (1984).

(n14)Footnote 14. *See* 29 C.F.R. §§ 1601.10, 1626.13. For discussion of right to withdraw charge and effect of withdrawal, see [1] and [2], above.

(n15)Footnote 15. EEOC Compliance Manual (CCH) § 7.3.



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3-42 California Employment Law § 42.68

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.68 Predetermination Conciliation

The ADEA is the only statute enforced by the EEOC that mandates conciliation prior to a determination on the merits of the case.ⁿ¹ The EPA contains no provision for pre- or post-determination conciliation, and Title VII and the ADA mandate only post-determination conciliation.ⁿ²

Legal Topics:

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

Labor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment LawU.S. Equal Employment Opportunity CommissionGeneral OverviewLabor & Employment LawU.S. Equal Employment Opportunity CommissionEnforcementGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. § 626(d); 29 C.F.R. § 1626.12. For discussion of determination, *see* § 42.69.

(n2)Footnote 2. *See* 42 U.S.C. § 2000e-5(b). *See also* 42 U.S.C. § 12117 (ADA, incorporating procedures set forth in 42 U.S.C. § 2000e-5).



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3-42 California Employment Law § 42.69

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.69 Determination

[1] Cause Determinations

At the conclusion of an investigation in a Title VII or ADA case, if the EEOC has not settled, dismissed, or made a no cause finding as to every allegation in a charge,ⁿ¹ the EEOC must issue a determination that reasonable cause exists to believe that the alleged unlawful employment practice(s) occurred.ⁿ² In contrast, the ADEA and EPA do not specifically require the EEOC to issue formal determinations on the merits of cases.ⁿ³ However, the EEOC has adopted a policy of issuing a cause letter of determination (LOD) under any of the three statutes once the EEOC makes a determination that the case meets the EEOC's "reasonable cause" standard.ⁿ⁴

The EEOC defines a reasonable cause determination as a determination that more likely than not the charging party and/or members of a class were discriminated against because of a basis prohibited by the statutes enforced by the EEOC.ⁿ⁵ The likelihood that discrimination occurred is assessed based on evidence that establishes, under the appropriate legal theory, a prima facie case, and if the respondent has provided a viable defense, it is based on whether there is evidence of pretext.ⁿ⁶

The procedure for issuing a LOD involves four steps. First, the investigator recommends a cause determination. Second, the investigator's unit supervisor must approve the recommendation. Third, the office director and the regional attorney review the entire case file. Fourth, the office director decides whether a LOD is warranted under the reasonable cause standard.ⁿ⁷

The LOD describes the facts and conclusions supporting the cause determination based on the reasonable cause standard described above.ⁿ⁸ In Title VII and ADEA cases, the LOD also informs the parties of the EEOC's statutory mandate to attempt conciliation.ⁿ⁹ A LOD in an EPA case advises the parties of the remedies the respondent must undertake to comply with the EPA, the EEOC's policy of notifying all aggrieved persons of their private right of action, and the EEOC's receptivity to settlement discussions initiated by the respondent.ⁿ¹⁰

The EEOC sends a copy of the LOD to the person claiming to be aggrieved, his or her attorney, the person who filed the charge on behalf of an aggrieved person, the respondent, and the respondent's attorney.ⁿ¹¹ Because of confidentiality considerations surrounding ADEA and EPA complaints,ⁿ¹² the name of the complainant in such cases is deleted from the heading on the LOD.ⁿ¹³

[2] No Cause Determinations and Review

If the EEOC determines that there is no reasonable cause to believe that an unlawful employment practice has occurred, it must issue an LOD indicating that finding. The LOD is the EEOC's final determination. It must also inform the aggrieved person of his or her right to sue in federal district court within 90 days from the date that the LOD is received.ⁿ¹⁴

The EEOC, on its own initiative, or an issuing director, on his or her own initiative, may reconsider the no cause determination. The EEOC must send a notice of intent to reconsider to the parties. If such a notice is issued within 90 days after receipt of the final no cause determination, and the charging party has neither filed suit nor requested and received a notice of right to sue, the notice of intent to reconsider vacates the LOD and revokes the right to sue. If the 90-day suit period has expired, the charging party has already filed suit, or the charging party has requested a right-to-sue letter pursuant to Title 29 *Code of Federal Regulations Section 1601.28(a)(1)* or (2), the notice of intent to reconsider vacates the LOD but does not revoke the right to sue within 90 days. After reconsideration, the EEOC issues a new determination. If the right to sue was revoked by the notice of reconsideration, the new determination includes notice that a new 90-day right-to-sue period begins on the charging party's receipt of the reconsidered determination.ⁿ¹⁵

Legal Topics:

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

Labor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisparate ImpactStatutory ApplicationAmericans With Disabilities ActLabor & Employment LawU.S. Equal Employment Opportunity CommissionGeneral OverviewLabor & Employment LawU.S. Equal Employment Opportunity CommissionEnforcementGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* discussion in [2], *below*.

(n2)Footnote 2. *See* 29 C.F.R. § 1601.21(a).

(n3)Footnote 3. EEOC Compliance Manual (CCH) § 40.1.

(n4)Footnote 4. EEOC Compliance Manual (CCH) § 40.1. Until October, 1987, the EEOC distinguished between letters of determination in Title VII cases and letters of violation in ADEA and EPA cases. That distinction no longer exists. EEOC Compliance Manual (CCH) § 40.1.

(n5)Footnote 5. EEOC Compliance Manual (CCH) § 40.2.

(n6)Footnote 6. EEOC Compliance Manual (CCH) § 40.2.

(n7)Footnote 7. *See* EEOC Compliance Manual (CCH) § 40.3.

(n8)Footnote 8. *See* EEOC Compliance Manual (CCH) § 40.4(d).

(n9)Footnote 9. *See* 29 U.S.C. § 626(d) (ADEA); 42 U.S.C. § 2000e-5(b) (Title VII). For discussion of conciliation, *see* §§ 42.68 and 42.70.

(n10)Footnote 10. EEOC Compliance Manual (CCH) § 40.4(e)(3).

(n11)Footnote 11. EEOC Compliance Manual (CCH) § 40.6.

(n12)Footnote 12. For discussion, *see* §§ 42.61[2], [3] and 42.62[1][g].

(n13)Footnote 13. EEOC Compliance Manual (CCH) § 40.6.

(n14)Footnote 14. *29 C.F.R. § 1601.19(a)*; *see 29 U.S.C. § 626(e)* (ADEA); *42 U.S.C. § 2000e-5(f)(1)* (Title VII).

(n15)Footnote 15. *See 29 C.F.R. § 1601.19(b)*.



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3-42 California Employment Law § 42.70

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.70 Post-Determination Conciliation

[1] Title VII and ADA Requirements

After the EEOC has investigated a Title VII or ADA charge and found reasonable cause to believe a violation has occurred, the EEOC must attempt to resolve the matter by conference, conciliation, and persuasion.ⁿ¹ Indeed, if the EEOC fails to attempt conciliation with a party, that party may be dismissed in a subsequent civil action brought by the EEOC to remedy the discrimination.ⁿ² Anything that is said or done in the course of attempting to settle a matter by conference, conciliation, or persuasion is confidential and may not be used as evidence in a subsequent proceeding without the written consent of the persons involved.ⁿ³

The EEOC's obligation to conciliate a case terminates on the respondent's refusal to participate.ⁿ⁴ Once the EEOC determines that conciliation has failed and that further efforts would be futile or nonproductive, it must so notify the respondent in writing.ⁿ⁵

[2] ADEA Requirements

In cases brought under the ADEA, the EEOC must attempt conciliation promptly on the filing of a charge.ⁿ⁶ In addition, after the EEOC determines that a violation of the law has occurred and prior to instituting a civil action, the EEOC must again attempt to eliminate the unlawful practices and obtain voluntary compliance by conciliation.ⁿ⁷

[3] No Conciliation Requirement Under EPA

The EPA contains no provision requiring the EEOC to undertake conciliation efforts.ⁿ⁸

[4] Conciliation Procedure

After the EEOC makes a cause determination,ⁿ⁹ the conciliator attempts to set up a conciliation conference.ⁿ¹⁰ Prior to the conference, the conciliator contacts the charging party or complainantⁿ¹¹ and prepares a draft proposal for obtaining

relief from the respondent.ⁿ¹² Participants in the conciliation conference should include the union if it is a co-respondent, if a change in a collective bargaining agreement is contemplated, or if a proposed remedial action affects the rights of employees under a collective bargaining agreement.ⁿ¹³ In some cases it is possible and desirable to carry out conciliation efforts without face-to-face meetings.ⁿ¹⁴

[5] Conciliation Agreement

[a] Generally

Although the terms of a conciliation agreement depend on the facts of each particular case, an agreement ordinarily contains a number of uniform provisions, including the following:ⁿ¹⁵

1. The EEOC and charging party waive their right to sue the respondent based on the subject charge, provided the respondent fulfills its obligations under the terms of the agreement, but reserve the right to sue to enforce the terms of the agreement;
2. The EEOC has the right to proceed with like and related matters not covered by the agreement;
3. The respondent is committed to complying with the requirements of the applicable EEO statutes and guidelines;
4. Retaliation is prohibited;
5. The EEOC has authority to review compliance;
6. The period that the agreement remains in effect and the termination date;
7. Reservation of rights to the relief provided in the agreement for aggrieved persons who cannot be located;
8. The respondent agrees to cease the specific unlawful practices involved in the case;
9. The specific prospective and retroactive relief provided to the charging party and to members of any affected class, and the dates by which such relief must be provided;
10. When appropriate, specification that respondent will post a notice concerning the discriminatory practice and the remedial action taken;
11. Consent for release of public notice concerning the case; and
12. Respondent's timetable for making progress reports in implementing the revised practice.

[b] Conciliation Agreements Without Approval of a Party

[i] Absence of the Charging Party

Under certain circumstances, the EEOC has authority to enter into a conciliation agreement with a respondent without the charging party's approval or participation.ⁿ¹⁶ The EEOC may do so when the charging party cannot be located, when the charging party is recalcitrant about conciliation, or when the EEOC finds no cause with respect to the individual's charge but believes the respondent has otherwise committed unlawful discrimination.ⁿ¹⁷

[ii] Absence of the Union

The EEOC attempts to include the union in the conciliation if the union is named as a co-respondent, if a change in the collective bargaining agreement is involved, or if a proposed remedial action affects the rights of employees under a collective bargaining agreement.ⁿ¹⁸ EEOC policy provides that the union's failure to agree to an otherwise acceptable conciliation agreement does not prevent the EEOC from entering into the agreement with the employer if the conciliation involves revising the terms of a collective bargaining agreement or if the employer's actions were not governed by the specific terms of a collective bargaining agreement. However, if the proposed relief would interfere with the rights of other employees under the collective bargaining agreement, the EEOC will consider alternatives that would not so interfere.ⁿ¹⁹ Notwithstanding the EEOC's position, courts have held that a conciliation agreement may not provide for relief that has an impact on an existing collective bargaining agreement if the union had no opportunity to participate in an adjudication that discrimination occurred.ⁿ²⁰ Thus, in one case, the United States Supreme Court upheld an arbitration award against an employer for violating its collective bargaining agreement, even though the employer was complying with an EEOC conciliation agreement.ⁿ²¹

[6] Notification of Conciliation Failure

The EEOC's procedural regulations under Title VII and the ADA require that the respondent be notified in writing if conciliation efforts fail.ⁿ²² Although ADEA regulations do not require such notification, the EEOC has adopted procedures to send such a notice in ADEA cases.ⁿ²³

Prior to notifying the respondent of conciliation failure, the EEOC must decide whether or not to litigate the case. The decision to litigate rests ultimately with the full EEOC, based on an initial analysis by the regional attorney, followed by the District Director's and the General Counsel's reviews and recommendations.ⁿ²⁴

Legal Topics:

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

Labor & Employment Law Discrimination Disparate Impact Statutory Application Americans With Disabilities Act Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission Enforcement General Overview

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. § 2000e-5(b) (Title VII); 29 C.F.R. § 1601.24(a); see 42 U.S.C. § 12117 (ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n2)Footnote 2. *Patterson v. American Tobacco Co.* (4th Cir. 1976) 535 F.2d 257, 271-272, cert. denied, 429 U.S. 920 (1976) .

(n3)Footnote 3. 29 C.F.R. § 1601.26.

(n4)Footnote 4. See *Equal Employment Opportunity v. Radiator Specialty Co.* (4th Cir. 1979) 610 F.2d 178, 183 .

(n5)Footnote 5. 29 C.F.R. § 1601.25; EEOC Compliance Manual (CCH) § 66.2(a).

(n6)Footnote 6. 29 U.S.C. § 626(d).

(n7)Footnote 7. 29 U.S.C. § 626(b).

(n8)Footnote 8. See EEOC Compliance Manual (CCH) § 66.1; *E.E.O.C. v. Home of Economy, Inc.* (8th Cir. 1983) 712 F.2d 356, 357-358 .

(n9)Footnote 9. *See* EEOC Compliance Manual (CCH) § 62.1.

(n10)Footnote 10. EEOC Compliance Manual (CCH) § 62.1.

(n11)Footnote 11. EEOC Compliance Manual (CCH) § 62.2.

(n12)Footnote 12. EEOC Compliance Manual (CCH) § 62.3.

(n13)Footnote 13. EEOC Compliance Manual (CCH) § 62.6(c).

(n14)Footnote 14. *See* EEOC Compliance Manual (CCH) §§ 62.4, 62.5.

(n15)Footnote 15. EEOC Compliance Manual (CCH) § 65.2(c)-(i).

(n16)Footnote 16. *See* EEOC Compliance Manual (CCH) § 63.1.

(n17)Footnote 17. EEOC Compliance Manual (CCH) § 63.1.

(n18)Footnote 18. EEOC Compliance Manual (CCH) § 62.6.

(n19)Footnote 19. EEOC Compliance Manual (CCH) § 62.6.

(n20)Footnote 20. *W.R. Grace & Co. v. Local 759* (1983) 461 U.S. 757, 771, 103 S. Ct. 2177, 76 L. Ed. 2d 298 ; *E.E.O.C. v. Safeway Stores, Inc.* (5th Cir. 1983) 714 F.2d 567, 576-580 , *cert. denied*, 467 U.S. 1204 (1984) .

(n21)Footnote 21. *See W.R. Grace & Co. v. Local 759* (1983) 461 U.S. 757, 771-772, 103 S. Ct. 2177, 76 L. Ed. 2d 298 .

(n22)Footnote 22. 29 C.F.R. § 1601.25; EEOC Compliance Manual (CCH) § 66.2.

(n23)Footnote 23. EEOC Compliance Manual (CCH) § 66.2(b).

(n24)Footnote 24. EEOC Compliance Manual (CCH) § 66.5.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part C. FEDERAL PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.71

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.71 Notice of Right to Sue

[1] Procedure

[a] Title VII and ADA

If within 180 days of the filing of a Title VII or ADA charge with the EEOC, the EEOC dismisses the charge, has not filed a civil action, or has not entered into a conciliation agreement to which the aggrieved person is a party, the EEOC must notify the charging party that he or she has the right to bring a civil action against the respondent.ⁿ¹ In addition, the EEOC may issue a notice of right to sue on the written request of a charging party if 180 days have elapsed since the charge was filed, or before 180 days have elapsed if the EEOC certifies in writing that it will probably be unable to complete its processing within 180 days from the filing of the charge.ⁿ²

A recipient has 90 days from the date of receipt of the right to sue letter in which to bring a civil action.ⁿ³

For discussion of civil actions under Title VII and the ADA, see Chapter 43, Part B.

[b] EPA

EPA does not require the EEOC to issue a right-to-sue letter before an individual files a civil action. However, the EEOC does notify aggrieved parties of their private rights of action once it becomes apparent that a settlement cannot be reached.ⁿ⁴ⁿ⁵

For discussion of civil actions under the ADEA and the EPA, see Chapter 43, Part B.

[2] Contents of Right-to-Sue Letter

The notice of right to sue under Title VII or the ADA must contain the following:ⁿ⁶

1. Authorization to the aggrieved person to bring a civil action pursuant to Title VII or the ADA within 90 days from receipt of the authorization;
2. Advice concerning the institution of a civil action by the person aggrieved, when appropriate;
3. A copy of the charge; and
4. The EEOC's decision, determination, or dismissal, as appropriate.

[3] FORM--Notice of Right to Sue Issued on Request (EEOC Form 161-B)

[a] Comment

The form set forth in [b], *below*, is a right-to-sue letter issued by the EEOC on request of the charging party.ⁿ⁷ The form provides places for the EEOC to check whether it is issuing the form after the expiration of 180 days from the filing of the charge, or before that time when an appropriate EEOC official has determined that the EEOC will be unable to complete administrative processing of the charge within 180 days.ⁿ⁸

[b] Form Notice of Right to Sue Issued on Request (EEOC Form 161-B)

[Click here to view image.](#)

[4] FORM--Notice of Right to Sue on Failure of Conciliation (EEOC Form 161-A)

[a] Comment

The form set forth in [b], *below*, is a notice of right to sue issued after conciliation efforts have failed.ⁿ⁹

[b] Form Notice of Right to Sue on Failure of Conciliation (EEOC Form 161-A)

[Click here to view image.](#)

[5] FORM--Dismissal and Notice of Rights (EEOC Form 161)

[a] Comment

The form set forth in [b], *below*, is a notice of the right to sue issued when the EEOC dismisses the charge based on lack of jurisdiction, untimely filing of the charge, the charging party's failure or refusal to cooperate, inability to locate the charging party, the refusal of the charging party to accept a settlement offer by the respondent that would afford full relief to the charging party.ⁿ¹⁰

[b] Form Notice of Right to Sue Issued on Dismissal of Charge

[Click here to view image.](#)

[6] Effect of Private Actions on EEOC's Right to Litigate

Once the charging party has filed a private Title VII or ADA action, the EEOC's right to do so is extinguished.ⁿ¹¹ The EEOC may, however, move to intervene in a private Title VII or ADA action "on certification that the case is of general public importance."ⁿ¹² When the EEOC has initiated an action under Title VII or the ADA, the charging party may intervene as a matter of right.ⁿ¹³

If the EEOC has brought suit under the ADEA or the EPA, an aggrieved person may not file a private action or intervene in the pending EEOC litigation,ⁿ¹⁴ but several courts have held that a pending private action brought under the ADEA is not preempted by a later-filed EEOC suit.ⁿ¹⁵

Legal Topics:

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

Labor & Employment Law Discrimination Disparate Impact Statutory Application Americans With Disabilities Act Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview Labor & Employment Law U.S. Equal Employment Opportunity Commission Enforcement General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-5(f)(1) (Title VII); 29 C.F.R. § 1601.28; *see also* 42 U.S.C. § 12117 (ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n2)Footnote 2. 29 C.F.R. § 1601.28(a)(1), (2).

(n3)Footnote 3. *See* 42 U.S.C. § 2000e-5(f)(1) (Title VII); 29 C.F.R. § 1601.28(e)(1); *Nelmida v. Shelly Eurocars, Inc.* (9th Cir. 1997) 112 F.3d 380, 384-385 (90-day period in which to file Title VII action begins when postal service attempts to deliver right-to-sue letter at employee's address of record); *Gonzalez v. Stanford Applied Engineering* (9th Cir. 1979) 597 F.2d 1298, 1299 (per curiam); *see also* 42 U.S.C. § 12117 (ADA, operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n4)Footnote 4. *See* EEOC Compliance Manual (CCH) § 66.7.

(n5)Footnote 5. [Reserved]

(n6)Footnote 6. 29 C.F.R. § 1601.28(e)(1)-(4).

(n7)Footnote 7. *See* 29 C.F.R. § 1601.28(a). For discussion of when the EEOC may issue notice of right to sue, *see* [1], *above*.

(n8)Footnote 8. *See* 29 C.F.R. § 1601.28(a)(1),(2); *see also* discussion in [1][a], *above*.

(n9)Footnote 9. *See* 42 U.S.C. § 5000e-5(f)(1); 29 C.F.R. § 1601.28(b)(1); EEOC Compliance Manual (CCH) § 66.6; *see also* 42 U.S.C. § 12117(ADA, incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n10)Footnote 10. *See* 29 C.F.R. §§ 1601.18, 1601.28(b)(3).

(n11)Footnote 11. *See* Equal Employment Opportunity v. Pacific Press Pub. (9th Cir. 1976) 535 F.2d 1182, 1186 (Title VII) .

(n12)Footnote 12. 42 U.S.C. § 2000e-5(f)(1) (Title VII); *see* 42 U.S.C. § 12117 (ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-8). For discussion of EEOC intervention in private action, *see* § 42.73[2].

(n13)Footnote 13. 42 U.S.C. § 2000e-5(f)(1) (Title VII); *see* 42 U.S.C. § 12117 (ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5). For discussion of intervention by charging party in EEOC action, *see* § 42.73[3][d].

(n14)Footnote 14. 29 U.S.C. §§ 216(b),(c), 217, 626(c)(1); 29 C.F.R. § 1620.33(b).

(n15)Footnote 15. *See, e.g., Castle v. Sangamo Weston, Inc.* (11th Cir. 1984) 744 F.2d 1464, 1465 ; *Burns v. Equitable Life Assur. Soc. of U.S.* (2d Cir. 1982) 696 F.2d 21, 23 , *cert. denied*, 464 U.S. 933 (1983) ; *but see Jones v. City of Janesville, Wis.* (W.D. Wis. 1980) 488 F. Supp. 795, 797 (holding that EEOC suit preempts previously maintained private action).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part C. FEDERAL PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.71A

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.71A Notice of Dismissal or Termination

The ADEA requires that a charge be filed with the EEOC at least 60 days prior to the commencement of a civil action.ⁿ¹ When the EEOC dismisses the charge or the Commission's proceedings are otherwise terminated, the Commission will issue a Notice of Dismissal or Termination on the charge to the person claiming to be aggrieved. If the charge concerns more than one aggrieved person, the Commission will only issue a Notice of Dismissal or Termination when it dismisses the charge or proceedings are otherwise terminated as to all aggrieved persons.ⁿ² When the charge was been filed under the ADEA and Title VII or the Americans with Disabilities Act (ADA), the Commission will issue a Notice of Dismissal or Termination under the ADEA at the same time it issues the Notice of Right to Sue under Title VII or the ADA.ⁿ³ Notice of conciliation proceedings is not a Notice of Dismissal or Termination.ⁿ⁴

If the Commission becomes aware that the aggrieved person whose claim is the subject of a pending ADEA charge has filed an ADEA lawsuit against the respondent named in the charge, it must terminate further processing of the charge or the portion of the charge affecting that person unless specified persons or their designees determine at that time or at a later time that it would effectuate the purpose of the ADEA to further process the charge.ⁿ⁵ The issuance of a Notice of Dismissal or Termination also does not preclude the Commission from offering assistance to a person receiving the notice as the Commission deems necessary or appropriate. The issuance does not preclude or interfere with the Commission's continuing right to investigate and litigate the same matter or any ADEA matter under its enforcement authority.ⁿ⁶

The Notice of Dismissal or Termination must include each of the following:ⁿ⁷

- (1) A copy of the charge.
- (2) Notification that the charge has been dismissed or the Commission's proceedings have otherwise been terminated.
- (3) Notification that the aggrieved person's right to file a civil action against the respondent on the charge

under the ADEA will expire 90 days after receipt of the notice.ⁿ⁸

Legal Topics:

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

Labor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment LawU.S. Equal Employment Opportunity CommissionGeneral OverviewLabor & Employment LawU.S. Equal Employment Opportunity CommissionEnforcementGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. § 626(d). For discussion of exhaustion of administrative remedies under the ADEA, *see* § 43.11[4].

(n2)Footnote 2. 29 C.F.R. § 1626.17(a)(1). The Commission has delegated authority to issue notices to Directors of District, Field, Area and Local offices; the Director of the Office of Field Programs; the Director of Field Management Programs, Office of Field Programs; the General Counsel; or their designees. *See* 29 C.F.R. § 1626.17(b).

(n3)Footnote 3. 29 C.F.R. § 1626.17(a)(2). For discussion of the Notice of Right to Sue under Title VII or the ADA, *see* § 42.71.

(n4)Footnote 4. 29 C.F.R. § 1626.12. For discussion of conciliation proceedings under the ADEA, *see* §§ 40.21[2], 42.68.

(n5)Footnote 5. 29 C.F.R. § 1626.18(d).

(n6)Footnote 6. 29 C.F.R. § 1626.17(a)(3).

(n7)Footnote 7. 29 C.F.R. § 1626.17(c).

(n8)Footnote 8. *See* 29 U.S.C. § 626(e); 29 C.F.R. §§ 1626.17(3), 1626.18(c).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part C. FEDERAL PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.72

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

§ 42.72 Confidentiality of EEOC Records

[1] Generally

[a] Title VII and ADA

The EEOC must not make public any Title VII or ADA charges,ⁿ¹ or anything said or done during the EEOC's informal methods of conference, conciliation, and persuasion,ⁿ² or any records or information obtained by the EEOC in the course of investigating charges prior to the institution of court proceedings.ⁿ³ Parties to a Title VII or ADA action are not considered members of the public from whom disclosure is prohibited.ⁿ⁴ Thus, prior to the institution of proceedings under Title VII or the ADA, the EEOC may disclose information to charging parties or their attorneys and respondents or their attorneys, to witnesses when necessary to the investigation, and to governmental authorities in furtherance of the EEOC's efforts. The EEOC may also disclose information in a form that does not reveal the identity of the charging parties, respondents, or persons who provide the information.ⁿ⁵

Public disclosure of information obtained during conciliation is not only prohibited during the administrative process,ⁿ⁶ but also in subsequent proceedings unless the persons involved consent in writing to its evidentiary use.ⁿ⁷ The EEOC may disclose information to certain governmental agencies as necessary to carry out the EEOC's functions, but it may withhold otherwise disclosable information obtained during the conciliation if the agency does not maintain confidentiality or if the disclosure would not serve the purposes of enforcement of Title VII or the ADA.ⁿ⁸ Information obtained during conciliation but available through investigation will be considered to have been obtained during the investigatory process and therefore disclosable.ⁿ⁹ A person who violates the provision prohibiting disclosure of conciliation efforts is subject to a mandatory fine of up to \$1,000, imprisonment for up to one year, or both.ⁿ¹⁰

An aggrieved person on whose behalf a Title VII charge is filed may remain anonymous by requesting that his or her identity be kept confidential.ⁿ¹¹ Such a request for confidentiality does not prevent the EEOC from disclosing the person's identity to governmental agencies that agree to keep the information confidential.ⁿ¹² The EEOC makes every effort not to disclose the person's identity, unless required by a court order, without the aggrieved person's prior written consent.ⁿ¹³ If an investigation broad enough to protect the person's identity cannot be made, the EEOC obtains the

person's prior written consent before proceeding.ⁿ¹⁴ When the charge is filed and served on the respondent, the EEOC notifies the respondent of the charging party's identity, but not that of the person on whose behalf the charge was filed.ⁿ¹⁵ The person claiming confidentiality may later agree to disclosure of his or her identity during negotiated settlement or conciliation efforts by the EEOC.ⁿ¹⁶

[b] ADEA

During the EEOC's investigation and conciliation efforts, the EEOC may not disclose the identities of persons who provided information in confidence.ⁿ¹⁷ The EEOC may identify such persons only on obtaining their written consent or when necessary in a court proceeding.ⁿ¹⁸

A complainant or an aggrieved person on whose behalf an ADEA charge is filed may also request anonymity. In such a case, the EEOC follows the same procedures for safeguarding anonymity as it uses under Title VII.ⁿ¹⁹

[c] EPA

Since the EPA does not require conciliation, no regulations govern the confidentiality of information obtained in the course of such efforts. The EEOC processes EPA complaints in a manner that does not disclose to the respondent the identity of the complainant or the existence of a particular complaint.ⁿ²⁰ However, the complaining individual may later permit the EEOC to use his or her name in its efforts to negotiate a settlement.ⁿ²¹

[2] Method for Obtaining Disclosure of Open Files

[a] Disclosure to Parties in Title VII Cases

Once a Title VII action is filed, the EEOC discloses information on written request to the following persons: (1) charging parties and their attorneys, (2) aggrieved persons in Commissioner charges and those on whose behalf a charge was filed, (3) persons or organizations filing third-party charges, and (4) respondents and their attorneys, provided the charging party or aggrieved person has already filed a Title VII action against the respondents.ⁿ²²

The EEOC makes such disclosure only for "open" files, which are all case files except those for which a notice of right to sue has expired without suit being filed.ⁿ²³ The EEOC denies disclosure requests for closed files unless the aggrieved person "arguably has a continuing right of judicial action."ⁿ²⁴ To obtain disclosure of information contained in the EEOC's files, the requesting individual must agree in writing not to make the information public except as is necessary in a civil action or other proceeding instituted under Title VII.ⁿ²⁵

The EEOC removes certain confidential information from Title VII case files prior to disclosure. Such nondisclosable information includes:ⁿ²⁶

1. Information concerning the identity of and statements made by any witness who requested confidentiality during the investigation;
2. The cover sheet of any EEOC decision;
3. All memoranda, notes, proposals, and other documents prepared by EEOC staff or received from other government agencies that pertain to legal theories, strategies, settlement postures, and litigation;
4. Information identifying other respondents against whom the charging party may have filed complaints;
5. Information pertaining to settlement or conciliation;ⁿ²⁷ and

6. Material pertaining to ADEA or EPA allegations if an ADEA or EPA charge was filed concurrently with the Title VII charge.

The procedures outlined above for disclosure of information do not apply to disclosures in response to subpoenas and demands or orders of courts.ⁿ²⁸ In those circumstances, the procedures outlined in Title 29 *Code of Federal Regulations*, Sections 1610.30-1610.36 apply.ⁿ²⁹ For discussion of the applicable procedures, see [b][iv], *below*.

[b] Disclosure of Information to Nonparties in Title VII Cases and to All Persons in ADEA and EPA Cases

[i] In General

The Freedom of Information Act (FOIA),ⁿ³⁰ the Privacy Act,ⁿ³¹ and regulations promulgated by the EEOC to implement the FOIA and Privacy Actⁿ³² govern disclosability of information to nonparties, as members of the public, in Title VII cases, and to parties and nonparties in ADEA and EPA cases. The Privacy Act assures parties that they will have access by means of the FOIA to information contained in their own case files.ⁿ³³ Under the FOIA, parties must present in person or by mail a written request specifying the information sought.ⁿ³⁴

■ PRACTICE TIP:

Although the EEOC Compliance Manual states that disclosure in ADEA and EPA cases should conform to FOIA regulations,ⁿ³⁵ and the EEOC's FOIA regulationsⁿ³⁶ provide for specific procedures when a party requests disclosure of information in an ADEA or EPA case, as a practical matter, the clerk who receives the request normally treats it in the same manner as he or she does a Title VII disclosure request by a party. *Commentary by Dale Brodsky, Esq. and Beverly Tucker, Esq.*

[ii] Disclosable and Nondisclosable Information

The EEOC's FOIA regulationsⁿ³⁷ authorize public disclosure of the following matters:ⁿ³⁸

1. Certain industry, area, and other statistical information that does not reveal the identities of the responding entities;
2. All blank EEOC forms;
3. All signed contracts;
4. All final reports that do not contain statutorily confidential information in discernible individual form;
5. Agency correspondence to members of the public or Congress so long as disclosure does not result in an invasion of an individual's privacy;
6. Administrative staff manuals and instructions; and
7. Final votes of each Commissioner.

Pursuant to the same regulations, the EEOC does not disclose to nonparty members of the public the following records:

1. Title VII or ADA investigatory files, information given in confidence, and matters involving personal privacy;ⁿ³⁹
2. Title VII or ADA charges or conciliation efforts;ⁿ⁴⁰

3. Information obtained by the EEOC during its cooperative efforts with other governmental entities;ⁿ⁴¹
4. Statistical reports required under Title 29, *Code of Federal Regulations section 1602.1-1602.55*, such as the Employer Information Report EEO-1, prior to institution of proceedings;ⁿ⁴²
5. Information pertaining to ADEA or EPA open case files;ⁿ⁴³ and
6. Medical, financial, and personnel files of EEOC employees.ⁿ⁴⁴

The Privacy Act also prohibits the disclosure of records to third parties without the prior written consent of the individual to whom the record pertains,ⁿ⁴⁵ unless the FOIA or another statute expressly requires or permits such disclosure.

[iii] Appeal from Denial of Disclosure

The Legal Counsel's designee or EEOC regional attorney must either grant or deny a FOIA request within 10 working days.ⁿ⁴⁶ If the EEOC initially denies a FOIA request, the person requesting disclosure may appeal the decision by filing a written appeal with the EEOC Legal Counsel or designee within 30 days. The appeal must be clearly identified as an FOIA appeal.ⁿ⁴⁷ The Legal Counsel has 20 working days in which to respond to the appeal, and may obtain an extension of time if the full 10 days for the initial decision is not used.ⁿ⁴⁸ The decision on the appeal must be in writing, and if the appeal is denied the decision must explain the reasons for the denial if those reasons differ from reasons for the initial decision.ⁿ⁴⁹ The decision must also notify the requesting party that he or she may file a civil action if dissatisfied with the decision on appeal.ⁿ⁵⁰

[iv] Production of Documents in Response to Subpoena

The EEOC's FOIA regulations govern disclosure of information pursuant to subpoenas or other judicial authority.ⁿ⁵¹ When a demand is made on an EEOC employee or former employee for the production or disclosure of material in an EEOC file, information related to material contained in an EEOC file, or information obtained by an EEOC employee,ⁿ⁵² the employee must first obtain approval of the Legal Counsel before turning over the materials in question.ⁿ⁵³ If the employee's appearance or response is due before the EEOC Legal Counsel approves the disclosure, the Legal Counsel seeks a stay of the proceedings pending his or her review.ⁿ⁵⁴ However, if the court or other authority denies the request for stay or the Legal Counsel decides that disclosure is improper, the employee must refuse to comply with the court order.ⁿ⁵⁵

Legal Topics:

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

Labor & Employment Law
Discrimination
Disparate Impact
Statutory Application
Americans With Disabilities Act
Labor & Employment Law
Discrimination
Title VII of the Civil Rights Act of 1964
General Overview
Labor & Employment Law
U.S. Equal Employment Opportunity Commission
General Overview
Labor & Employment Law
U.S. Equal Employment Opportunity Commission
Enforcement
General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. §§ 2000e-5(b) (Title VII); *see also* 42 U.S.C. § 12117 (ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n2)Footnote 2. *See* 42 U.S.C. §§ 2000e-5(b) (Title VII); 29 C.F.R. § 1601.26; *see also* 42 U.S.C. § 12117 (ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n3)Footnote 3. *See* 42 U.S.C. §§ 2000e-8(e) (Title VII); 29 C.F.R. § 1601.22; *see also* 42 U.S.C. § 12117 (ADA;

operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n4)Footnote 4. 29 C.F.R. § 1601.22; *EEOC v. Associated Dry Goods Corp.* (1981) 449 U.S. 590, 598, 101 S. Ct. 817, 66 L. Ed. 2d 762 .

(n5)Footnote 5. *See* 29 C.F.R. § 1601.22; EEOC Compliance Manual (CCH) § 83.5.

(n6)Footnote 6. *See* 42 U.S.C. § 2000e-5(b) (Title VII); 29 C.F.R. § 1601.26(a); *see also* 42 U.S.C. § 12117 (ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n7)Footnote 7. *See* 29 C.F.R. § 1601.26(a).

(n8)Footnote 8. 29 C.F.R. § 1601.26(a).

(n9)Footnote 9. 29 C.F.R. § 1601.26(b).

(n10)Footnote 10. 42 U.S.C. § 2000e-5(b) (Title VII); *see* 42 U.S.C. § 12117 (ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n11)Footnote 11. 29 C.F.R. § 1601.7(a).

(n12)Footnote 12. 29 C.F.R. § 1601.7(a).

(n13)Footnote 13. EEOC Compliance Manual (CCH) § 2.4(c).

(n14)Footnote 14. EEOC Compliance Manual (CCH) § 2.4(c)(1).

(n15)Footnote 15. *See* EEOC Compliance Manual (CCH) § 3.1.

(n16)Footnote 16. EEOC Compliance Manual (CCH) § 2.4(c)(2).

(n17)Footnote 17. 29 C.F.R. § 1626.4.

(n18)Footnote 18. 29 C.F.R. § 1626.4; EEOC Compliance Manual (CCH) § 2.4(c)(1).

(n19)Footnote 19. *See* EEOC Compliance Manual (CCH) § 3.1; *see also* discussion in [a], *above*.

(n20)Footnote 20. *See* EEOC Compliance Manual (CCH) § 2.4(4)(1)(ii), (f).

(n21)Footnote 21. *See* EEOC Compliance Manual (CCH) § 2.4(c)(2).

(n22)Footnote 22. *See* EEOC Compliance Manual (CCH) § 83.5.

(n23)Footnote 23. *See* EEOC Compliance Manual (CCH) §§ 83.1, 83.4(a).

(n24)Footnote 24. *See* EEOC Compliance Manual (CCH) § 83.3(d).

(n25)Footnote 25. *See* EEOC Compliance Manual (CCH) § 83.4(c).

(n26)Footnote 26. *See* EEOC Compliance Manual (CCH) § 83.6(b).

(n27)Footnote 27. For discussion of confidentiality of conciliation efforts, *see* [1][a], *above*.

(n28)Footnote 28. EEOC Compliance Manual (CCH) § 83.3(a).

(n29)Footnote 29. EEOC Compliance Manual (CCH) § 83.3(a).

(n30)Footnote 30. *5 U.S.C. § 552.*

(n31)Footnote 31. *5 U.S.C. § 552a.*

(n32)Footnote 32. *29 C.F.R. §§ 1610.1-1610.36* (EEOC FOIA regulations), *1611.1-1611.14* (EEOC Privacy Act regulations); *see* EEOC Compliance Manual (CCH) § 83.1.

(n33)Footnote 33. *See 29 C.F.R. 1611.13(c).*

(n34)Footnote 34. *See 29 C.F.R. § 1610.5.*

(n35)Footnote 35. *See* EEOC Compliance Manual (CCH) § 83.1(a),(b).

(n36)Footnote 36. *See 29 C.F.R. §§ 1610.1-1610.36.*

(n37)Footnote 37. *See 29 C.F.R. §§ 1610.1-1610.36.*

(n38)Footnote 38. *See 29 C.F.R. § 1610.18.*

(n39)Footnote 39. *See 29 C.F.R. § 1610.17(a).*

(n40)Footnote 40. *See 29 C.F.R. § 1610.17(b).*

(n41)Footnote 41. *See 29 C.F.R. § 1610.17(c).*

(n42)Footnote 42. *See 29 C.F.R. § 1610.17(e).*

(n43)Footnote 43. *See 29 C.F.R. § 1610.17(f)* (exempting such open files on the ground that they are investigatory records compiled for law enforcement purposes).

(n44)Footnote 44. *See 29 C.F.R. § 1610.17(g).*

(n45)Footnote 45. *See 5 U.S.C. § 552a(b); 29 C.F.R. § 1611.10.*

(n46)Footnote 46. *See 29 C.F.R. § 1610.9(a).*

(n47)Footnote 47. *See 29 C.F.R. § 1610.11(a).*

(n48)Footnote 48. *See 29 C.F.R. § 1610.11(b); see 29 C.F.R. § 1610.9(a)* (time within which response must be made to request for information by Deputy Legal Counsel).

(n49)Footnote 49. *See 29 C.F.R. § 1610.11(c).*

(n50)Footnote 50. *See 29 C.F.R. § 1610.11(c).*

(n51)Footnote 51. *See* EEOC Compliance Manual (CCH) § 83.3(a); *29 C.F.R. §§ 1610.30-1610.36.*

(n52)Footnote 52. *See 29 C.F.R. § 1610.30.*

(n53)Footnote 53. *See 29 C.F.R. § 1610.32.*

(n54)Footnote 54. *See 29 C.F.R. § 1610.34(b).*

(n55)Footnote 55. *See 29 C.F.R. § 1610.36.*



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part C. FEDERAL PRACTICE AND PROCEDURE

3-42 California Employment Law § 42.73

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§ 42.73 Direct Civil Actions by EEOC

[1] Authority of EEOC to Prosecute Claims of Discrimination

[a] After Failure of Conciliation

Title VII and the ADA authorizes the EEOC to bring a civil action against any nongovernmental respondent if the agency cannot secure a conciliation agreement within 30 days after a charge has been filed.ⁿ¹ In addition, if preliminary investigation of a charge reveals that prompt judicial action is necessary to carry out the purposes of Title VII or the ADA, the EEOC may bring an action for temporary or preliminary relief.ⁿ²

In practice, once a district director concludes that conciliation efforts have failed, he or she refers the case to the regional attorney for review of litigation worthiness. The General Counsel and the Commissioners must approve any court action before it is filed.ⁿ³ If the EEOC decides to file suit, it notifies the charging party and, in Title VII actions, informs him or her of the right to intervene in the lawsuit.ⁿ⁴ If the EEOC does file a Title VII or ADA suit, the aggrieved party may intervene as a matter of right.ⁿ⁵

The EEOC may litigate even if the charging party has independently entered into a settlement agreement with the employer.ⁿ⁶ In such a situation, the EEOC is limited to remedies that serve the public interest and not those that merely benefit the individual, such as back pay.ⁿ⁷

The EEOC may also bring a civil action under the ADEA if conciliation fails.ⁿ⁸ The procedures for such an action, however, differ fundamentally from the procedures for Title VII EEOC actions. The primary difference is that the ADEA, unlike Title VII, incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA), which in turn authorize EEOC civil actions.ⁿ⁹ Also, the ADEA expressly provides that once the EEOC commences a civil action, the aggrieved individual's right to bring a private action terminates,ⁿ¹⁰ and it has been held that the ADEA also precludes any right to intervene in an EEOC action.ⁿ¹¹

The federal Equal Pay Act (EPA)ⁿ¹² is part of the FLSA, and thus EEOC EPA civil actions are governed by the FLSA

enforcement provisions mentioned above.ⁿ¹³ For a complete discussion of FLSA enforcement procedures, see Chapter 5.

[b] In Pattern or Practice Cases

The EEOC has authority to bring civil actions in United States district courts in "pattern or practice" cases.ⁿ¹⁴ The criterion for bringing such a case is that the EEOC has reasonable cause to believe that a person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII or the ADA, and that the pattern or practice is of such a nature and is intended to deny the full exercise of Title VII or ADA rights.ⁿ¹⁵ The EEOC's procedures for identifying and remedying pattern or practice cases, also known as "systemic" cases, are set forth in Section 16 of the EEOC Compliance Manual, and are governed by the EEOC procedural regulations at Title 29, *Code of Federal Regulations Sections 1601.6-1601.29*.ⁿ¹⁶ "Systemic" cases may be based on Commissioner's charges,ⁿ¹⁷ which identify the most serious patterns of employment discrimination and which, if successfully litigated, would have a significant positive impact on the employment opportunities available to minorities and women.ⁿ¹⁸

For a detailed discussion relating to "pattern of practice" discrimination claims, see Chapter 41, Part A.

[2] EEOC as Intervenor

A court may, in its discretion, permit the EEOC to intervene in a Title VII or ADA action brought by an aggrieved individual, if the EEOC applies for intervention in a timely fashion and certifies that the case is of general public importance.ⁿ¹⁹ This right to intervene is permissive, not absolute,ⁿ²⁰ and is committed to the discretion of the trial court.ⁿ²¹ The EEOC may intervene even if it has not completed administrative processing of a charge,ⁿ²² or conciliation, but a court may require conciliation efforts before allowing the EEOC to expand the scope of its intervention with new issues.ⁿ²³ In some cases, courts have denied intervention by the EEOC because the request was untimelyⁿ²⁴ or would result in undue delay.ⁿ²⁵ The trial court also has discretion to restrict EEOC intervention to the scope of the original action by the private party.ⁿ²⁶

[3] EEOC as Plaintiff

[a] Administrative Requirements for Filing Suit

[i] Under Title VII and ADA

The filing of a charge is a prerequisite to an EEOC court action.ⁿ²⁷ With respect to Commissioner's charges filed prior to civil actions in "pattern or practice" cases,^{n27.1} the United States Supreme Court has set forth the following standard: insofar as possible, the Commissioner should identify the groups of persons that he or she has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which he or she suspects the discrimination to have been practiced.ⁿ²⁸

With regard to other procedural prerequisites, courts will not necessarily dismiss an EEOC action if the agency failed to notify the respondent within ten days after filing that a charge had been filed.ⁿ²⁹ Courts also have not required the EEOC to conduct an adequate investigation as a prerequisite to filing suit.ⁿ³⁰ However, the Ninth Circuit has required that the EEOC make a reasonable cause finding before it files suit. In *Equal Employment Opp. Com'n v. Pierce Packing Co.*,ⁿ³¹ the EEOC entered into a settlement agreement and after concluding the agreement had been violated, sued under Title VII. The court dismissed the action on the basis that the EEOC must find cause and attempt conciliation before suing.ⁿ³² Additionally, other courts have held that the scope of an EEOC court action is limited to the scope of its reasonable cause determination.ⁿ³³

Because Title VII and the ADA expressly provide that the EEOC may file suit if the EEOC "has been unable to secure

... a conciliation agreement" that is acceptable,n34 courts have uniformly required the EEOC to make a good-faith effort to conciliate a charge prior to filing suit.n35 However, instead of dismissing an EEOC action because of its failure to conciliate the charge, some courts have issued a stay pending conciliation efforts.n36

[ii] Under ADEA and EPA

Filing a charge with the EEOC is not a prerequisite to the EEOC filing an ADEA action.n37 However, the ADEA does require that the EEOC attempt to eliminate the alleged discrimination and secure voluntary compliance with the act through conference, conciliation, and persuasion before it files suit.n38 The Fifth Circuit Court of Appeals has held that this requirement means that the EEOC must conduct an investigation sufficient to make conciliation efforts meaningful and must determine that there is reasonable cause to believe the ADEA has been violated.n39

In contrast, conciliation is not a prerequisite to a suit by the EEOC under the EPA.n40

■ PRACTICE TIP:

A complainant may seek to intervene in an enforcement action brought by the EEOC or may encourage the EEOC to intervene in his or her private enforcement action. In its litigation, the EEOC represents the public interest in addition to the interest of the individual complainant or complainants.n41 *Commentary by Bill Lann Lee.*

[b] Statutes of Limitations

[i] Under Title VII and the ADA

The EEOC may bring a Title VII or ADA action against a nongovernmental respondent if conciliation has been achieved within 30 days after filing of the charge.n42 Title VII provides no express limitation period within which the EEOC must commence the action. The United States Supreme Court held in *Occidental Life Insurance Co. v. EEOC* n43 that state statutes of limitations do not govern the time within which the EEOC may file a court action and that the statutory time limit for filing a charge with the EEOCn44 is not a limitation on the EEOC's right to file an action against the respondent. Although this means that the EEOC may initiate litigation years after a charge is filed, the Court held that its decision did not prejudice defendants because Title VII requires the EEOC to notify respondents promptly when a charge is filed so they may preserve relevant evidence.n45 However, the Court did state that federal courts have the power to provide relief to defendants who are handicapped in defending an action because of an inordinate delay by the EEOC in filing suit.n46

Accordingly, courts have applied the equitable doctrine of laches--unreasonable delay and a showing of prejudice--to bar EEOC actions. In *Equal Emp. Opportunity Com'n v. Alioto Fish Co.*, n47 the Ninth Circuit Court of Appeal held that an EEOC action was barred by laches when the action was filed five years after the charge was filed and 20 months after the EEOC failed to resolve the charge through conciliation.n48 The court rejected the EEOC's argument that the delay should be excused because of its heavy workload. Defendant proved that the delay had prejudiced its ability to defend because of the destruction of evidence, the death of witnesses, waning memories of witnesses, and increased back pay exposure.n49

[ii] Under ADEA

The limitations period within which the EEOC must file an ADEA civil action is now somewhat unclear. Prior to November 21, 1991, the ADEA incorporated the limitations period for actions under the Fair Labor Standards Act (FLSA),n50 which requires that civil actions be filed within two years after the cause of action accrues, except for "willful" violations, to which a three-year period applies.n51 However, the Civil Rights Act of 1991 amended the limitations provision of the ADEA to delete the reference to the FLSA limitations period and instead provides that an ADEA civil action may be brought by "a person defined in section 11(a)" against the respondent named in the EEOC

charge within 90 days after the date that the aggrieved person receives notice from the EEOC that it has dismissed the charge or otherwise terminated its proceedings.^{n51.1} Although the definition of "person" referred to^{n51.2} is arguably broad enough to include the EEOC, the new limitations period only addresses the situation in which the EEOC has dismissed an aggrieved person's charge or otherwise terminated its proceedings, and thus appears to be inapplicable to the situation where the EEOC has decided not to dismiss the charge or terminate proceedings but to instead file its own civil action against the respondent. Thus, while the EEOC still has authority to bring civil actions under the ADEA,^{n51.3} there appears to be no limitations period that is expressly applicable to such actions. It is possible that the principles applicable to EEOC civil actions filed under Title VII, discussed in [i], *above*, will henceforth apply to ADEA actions.

[iii] Under EPA

Under the EPA, the EEOC must file suit within two years after the cause of action accrued, unless the violation is willful, in which case the limitations period is three years.^{n51.4} "Willful" violations, in the context of the EPA, mean that the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited.ⁿ⁵²

[c] Scope of Litigation Under Title VII and ADA

[i] Class-Wide Actions

The United States Supreme Court has held in a Title VII case that the EEOC may file an action seeking relief for a group of individuals without meeting the requirements of Rule 23 of the Federal Rules of Civil Procedure relating to class certification.ⁿ⁵³ The Court relied in part on circuit court decisions holding that EEOC enforcement actions are not limited to the claims of the charging parties, but may encompass violations that the EEOC ascertains in the course of a reasonable investigation of the charge.ⁿ⁵⁴ Thus, the Court approved the EEOC's expansion of a charge to include similar violations against persons in the same protected class as the charging party.ⁿ⁵⁵

[ii] Additional Defendants

Title VII and the ADA state that the EEOC may file a court action against any nongovernmental respondent named in the charge.ⁿ⁵⁶ However, courts have in a few instances permitted the EEOC to sue defendants not named in a charge where the additional defendant was an agent or a successor of the respondent.ⁿ⁵⁷

[iii] Expanded Bases of Discrimination or Issues

The Ninth Circuit Court of Appeals has held that discrimination different from that alleged in the original charge may be the subject of a civil action by the EEOC, provided that the expanded basis of discrimination arose out of the investigation of the charge originally filed.ⁿ⁵⁸ In one case, for example, although the original charge had alleged discrimination against male employees, the EEOC's investigation disclosed discrimination against females and minority group members, and the court held that the EEOC properly included these allegations in its lawsuit.ⁿ⁵⁹ The EEOC must, however, have investigated the issues raised in the lawsuit, and must have included them as the basis of a reasonable cause determination and conciliation efforts.ⁿ⁶⁰

[iv] Expansion to Other Branches or Facilities of Respondent

The Ninth Circuit Court of Appeals also allows the EEOC to file actions that include other branches or facilities of the respondent that were not named in the charge, if the respondent has adequate notice of the investigation and the issues raised.ⁿ⁶¹ In *Lucky Stores, Inc. v. E.E.O.C.*,ⁿ⁶² the EEOC filed suit against one of Lucky's three warehouses, and then amended its complaint to include two other warehouses not named in the original charge. Workers had been transferred from the two other warehouses to the one originally named in the complaint, which had consolidated the operations of the other two warehouses. The district court allowed the EEOC to amend its complaint to include the other two

warehouses because Lucky had adequate notice that the EEOC was investigating its general warehouse hiring and firing practices. The Ninth Circuit upheld the district court's decision because the originally named warehouse was a consolidation of the operations at the other two warehouses, and Lucky had adequate notice of the investigation and the issues raised.ⁿ⁶³

[c.1] Scope of Litigation Under ADEA and EPA

As discussed in [1][a], *above*, the enforcement provisions of the FLSA govern EEOC civil actions under the ADEA and EPA.ⁿ⁶⁴ With respect to EEOC actions that seek class-wide relief, the Fifth Circuit Court of Appeals has relied on the rationale in *General Telephone Co. v. EEOC*,ⁿ⁶⁵ discussed in [c][i], *above*, to hold that Rule 23 of the Federal Rules of Civil Procedure, which generally requires class certification and notification, does not apply to FLSA cases.ⁿ⁶⁶ The Ninth Circuit Court of Appeals has expressly declined to decide the foregoing issue;ⁿ⁶⁷ however, as discussed in [d], *below*, apparently the EEOC may voluntarily notify noncharging "class" members of an EEOC action.ⁿ⁶⁸

The Ninth Circuit has opined that although noncharging "class" members in Title VII cases might not be bound by remedies or settlements resulting from EEOC civil actions,ⁿ⁶⁹ the same is not true in ADEA cases because the ADEA and the FLSA expressly preclude private actions after the EEOC commences a civil action. The court noted that Title VII has no analogous provision.ⁿ⁷⁰

For a full discussion of FLSA enforcement procedures, see Chapter 5.

[d] Intervention by Complainant

Although the charging party may not sue if the EEOC brings an action under Title VII, the charging party may intervene as a matter of right in an EEOC suit filed on his or her behalf.ⁿ⁷¹

If the EEOC files suit under the ADEA and EPA, aggrieved individuals may not intervene.ⁿ⁷² The EEOC may, however, invite prospective class members to identify themselves and share in the relief sought. Thus, for example, in one ADEA case involving the mandatory retirement of airline pilots at age 60, the EEOC filed suit on behalf of two named pilots and "any other persons who would have remained in the [defendant's] employment past the age of 60 in a Flight Engineer position but for the [defendant's] refusal to employ that person after he reached the age of 60."ⁿ⁷³ The EEOC thereafter mailed letters to 445 former pilots asking them to contact the EEOC if they were members of the foregoing class in order to "ensure that [they were] included in the EEOC's efforts to gain relief" from the defendant.ⁿ⁷⁴

[e] EEOC Liability for Attorney's Fees and Costs

Title VII provides that the court may in its discretion award the prevailing party, other than the EEOC or the United States, a reasonable attorney's fee (including expert fees), and further provides that the EEOC is liable for costs in the same manner as a private person.ⁿ⁷⁵ The leading case on the standards for award of attorney's fees to a prevailing defendant in a Title VII action is *Christiansburg Garment Co. v. EEOC*.ⁿ⁷⁶ In *Christiansburg*, the United States Supreme Court held that a district court may award attorney's fees on finding that the EEOC's action was frivolous, unreasonable, or without foundation, or that the EEOC continued to litigate after its action clearly became so, even though the case was not brought in subjective bad faith. The Court cautioned against awarding fees to prevailing defendants based on a finding that plaintiff's loss must have meant that the action was unreasonable or without foundation.ⁿ⁷⁷ Such a result would increase the risks of litigation and undercut the efforts of Congress to promote vigorous enforcement of Title VII.ⁿ⁷⁸

In one case, the Ninth Circuit Court of Appeal awarded attorney's fees and costs to a prevailing defendant in an action brought by the EEOC because the EEOC failed to comply with the requirements of Title VII and its regulations that the EEOC investigate a charge, make a reasonable cause determination, and attempt conciliation before filing suit.ⁿ⁷⁹

[4] Remedies in Suits by EEOC

With the exception of attorney's fees,ⁿ⁸⁰ all of the remedies that are available to private litigants are available in litigation by the EEOC, since the remedial provisions of the statutes it enforces do not differentiate between relief available in EEOC actions and relief available in actions brought by aggrieved individuals.ⁿ⁸¹ For discussion of the remedies available to private parties in Title VII, ADEA, and EPA actions, see Chapter 43, Part B.

Legal Topics:

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

Labor & Employment Law
Discrimination
Actionable Discrimination
Labor & Employment Law
U.S. Equal Employment Opportunity Commission
General Overview
Labor & Employment Law
U.S. Equal Employment Opportunity Commission
Enforcement
General Overview

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 2000e-5(f)(1); 42 U.S.C. § 12117 (ADA, incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n2)Footnote 2. *See* 42 U.S.C. § 2000e-5(f)(2); *Wagner v. Taylor* (9th Cir. 1987) 836 F.2d 566, 572-574 (42 U.S.C. § 2000e-5(f)(2) does not foreclose individual claimants from seeking interim injunctive relief to preserve status quo and to prevent retaliation while administrative process is advancing). *See also* 42 U.S.C. § 12117 (ADA, incorporating procedures set forth in 42 U.S.C. § 2000e-5). For further discussion relating to EEOC action for temporary relief, *see* § 42.64[9].

(n3)Footnote 3. *See* EEOC Compliance Manual (CCH) § 66.5.

(n4)Footnote 4. *See* EEOC Compliance Manual (CCH) § 66.8.

(n5)Footnote 5. *See* 42 U.S.C. § 2000e-5(f)(1); *but see McClain v. Wagner Elec. Corp.* (8th Cir. 1977) 550 F.2d 1115, 1119 (if EEOC sues first, individual employees are not permitted to sue independently but may intervene in EEOC suit as matter of right). *See also* 42 U.S.C. § 12117 (ADA, incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n6)Footnote 6. *See E.E.O.C. v. Goodyear Aerospace Corp.* (9th Cir. 1987) 813 F.2d 1539, 1542-1543 .

(n7)Footnote 7. *See E.E.O.C. v. Goodyear Aerospace Corp.* (9th Cir. 1987) 813 F.2d 1539, 1543 (permitting EEOC to seek injunctive relief against employer); *see E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1519 .

(n8)Footnote 8. *See* 29 U.S.C. §§ 216(c), 217, 626(b).

(n9)Footnote 9. *See* 29 U.S.C. §§ 216(b),(c), 626(b); *see also E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1504, 1505 n.3 (noting that although Congress ratified transfer of ADEA enforcement authority from Secretary of Labor to EEOC in 1984, FLSA inexplicably continues to refer only to Secretary of Labor). For further discussion, *see* Ch. 40, pt. C.

(n10)Footnote 10. *See* 29 U.S.C. §§ 216(c), 626(c)(1); *see also E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1507-1508 (due process does not require EEOC to notify claimants that they have lost their right to bring private actions). For further discussion, *see* Ch. 40, pt. C.

(n11)Footnote 11. *See E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1509 . For a discussion relating to intervention in EEOC actions generally, *see* [3][d], *below*.

(n12)Footnote 12. 29 U.S.C. § 206(d).

(n13)Footnote 13. See 29 U.S.C. § 216(c). For further discussion, see Ch. 40, pt. C.

(n14)Footnote 14. See 42 U.S.C. § 2000e-6; 42 U.S.C. § 12117 (ADA, incorporating procedures set forth in 42 U.S.C. § 2000e-6).

(n15)Footnote 15. See 42 U.S.C. § 2000e-6(a),(c); 42 U.S.C. § 12117 (ADA, incorporating procedures set forth in 42 U.S.C. § 2000e-6).

(n16)Footnote 16. See EEOC Compliance Manual (CCH) § 16.1.

(n17)Footnote 17. See discussion in [3][a][i], below, and in § 42.62[1][c].

(n18)Footnote 18. See EEOC Compliance Manual (CCH) § 16.1.

(n19)Footnote 19. See 42 U.S.C. § 2000e-5(f)(1); 42 U.S.C. § 12117 (ADA; incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n20)Footnote 20. See *Blowers v. Lawyers Co-operative Publishing Co.* (2d Cir. 1975) 527 F.2d 333, 334 .

(n21)Footnote 21. See *Van Hoomissen v. Xerox Corporation* (9th Cir. 1974) 497 F.2d 180, 181 .

(n22)Footnote 22. See *Mills v. Bartenders Local 41* (N.D. Cal. 1975) 21 Fair Empl. Prac. Cas. (B.N.A.) 42, 44.

(n23)Footnote 23. *Johnson v. Nekoosa-Edwards Paper Co.* (8th Cir. 1977) 558 F.2d 841, 847-848 , cert. denied, 434 U.S. 920 (1977) .

(n24)Footnote 24. See, e.g., *Blowers v. Lawyers Co-operative Publishing Co.* (2d Cir. 1975) 527 F.2d 333, 334 (EEOC's motion for intervention filed 21 months after action was commenced).

(n25)Footnote 25. *Blowers v. Lawyers Co-operative Publishing Co.* (2d Cir. 1975) 527 F.2d 333, 334 .

(n26)Footnote 26. *Van Hoomissen v. Xerox Corporation* (9th Cir. 1974) 497 F.2d 180, 181-182 .

(n27)Footnote 27. See 42 U.S.C. § 2000e-5(f)(1) (Title VII); *EEOC v. Shell Oil Co.* (1984) 466 U.S. 54, 62-64, 104 S. Ct. 1621, 80 L. Ed. 2d 41 ; *Equal Emp. Opportunity Com'n v. Container Corp. of Amer.* (M.D. Fla. 1972) 352 F. Supp. 262, 265 ; see also 42 U.S.C. § 12117(ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5). For detailed discussions relating to filing Title VII and ADA administrative charges, see §§ 42.61[1] and 42.62.

(n28)Footnote 27.1. See 42 U.S.C. § 2000e-6(a) (Title VII); see also 42 U.S.C. § 12117 (ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-6). For further discussion, see [1][b], above.

(n29)Footnote 28. *EEOC v. Shell Oil Co.* (1984) 466 U.S. 54, 73, 104 S. Ct. 1621, 80 L. Ed. 2d 41 .

(n30)Footnote 29. See *EEOC v. Burlington Northern, Inc.* (8th Cir. 1981) 644 F.2d 717, 720-721 ; see 42 U.S.C. § 2000e-5(e)(1) (Title VII); see also 42 U.S.C. § 12117 (ADA, operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5). For further discussion, see § 42.61[1].

(n31)Footnote 30. See, e.g., *E.E.O.C. v. St. Anne's Hospital of Chicago, Inc.* (7th Cir. 1981) 664 F.2d 128, 131 ; *E.E.O.C. v. General Elec. Co.* (4th Cir. 1976) 532 F.2d 359, 370-371 ; *E.E.O.C. v. KECO Industries, Inc.* (6th Cir. 1984) 748 F.2d 1097, 1100 .

(n32)Footnote 31. *Equal Emp. Opportunity Com'n v. Pierce Packing Co.* (9th Cir. 1982) 669 F.2d 605 .

(n33)Footnote 32. *See Equal Emp. Opportunity Com'n v. Pierce Packing Co.* (9th Cir. 1982) 669 F.2d 605, 607-608 ; *see* 29 C.F.R. §§ 1601.19(a), 1601.21(a); *see also* discussion in § 42.69.

(n34)Footnote 33. *See, e.g., Wright v. Olin Corp.* (4th Cir. 1982) 697 F.2d 1172, 1176 ; *E.E.O.C. v. Upjohn Corp.* (N.D. Ga. 1977) 445 F. Supp. 635, 639 .

(n35)Footnote 34. *See* 42 U.S.C. § 2000e-5(f)(1); *see also* 42 U.S.C. § 12117 (ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5). For a discussion of the EEOC's authority to sue after failure of conciliation, *see* [1][a], *above*. For a general discussion of conciliation under the Title VII and the ADA, *see* § 42.70.

(n36)Footnote 35. *See Wright v. Olin Corp.* (4th Cir. 1982) 697 F.2d 1172, 1176-1177 ; *EEOC v. Sears, Roebuck & Co.* (2d Cir. 1981) 650 F.2d 14, 18-19 ; *Patterson v. American Tobacco Co.* (4th Cir. 1976) 535 F.2d 257, 271-272 , *cert. denied*, 429 U.S. 920 (1976) .

(n37)Footnote 36. *See EEOC v. Zia Co.* (10th Cir. 1978) 582 F.2d 527, 532-533 .

(n38)Footnote 37. *See* 29 U.S.C. § 626(b); *see* discussion in § 42.71[1][b].

(n39)Footnote 38. *See* 29 U.S.C. § 626(b); 29 C.F.R. § 1626.15(d); *see* discussion in § 42.70.

(n40)Footnote 39. *See Marshall v. Sun Oil Co. (Delaware)* (5th Cir. 1979) 605 F.2d 1331, 1335-1336 .

(n41)Footnote 40. *See E.E.O.C. v. Home of Economy, Inc.* (8th Cir. 1983) 712 F.2d 356, 357-358 .

(n42)Footnote 41. *See General Telephone Co. v. EEOC* (1980) 446 U.S. 318, 326, 100 S. Ct. 1698, 64 L. Ed. 2d 319 .

(n43)Footnote 42. *See* 42 U.S.C. § 2000e-5(f)(1) (Title VII); *see also* 42 U.S.C. § 12117 (ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n44)Footnote 43. *Occidental Life Insurance Co. v. EEOC* (1977) 432 U.S. 355, 366-372, 97 S. Ct. 2447, 53 L. Ed. 2d 402 .

(n45)Footnote 44. *See* discussion in § 42.62[3][a].

(n46)Footnote 45. *See Occidental Life Insurance Co. v. EEOC* (1977) 432 U.S. 355, 372, 97 S. Ct. 2447, 53 L. Ed. 2d 402 ; *see* 42 U.S.C. § 2000e-5(e)(1) (Title VII); *see also* discussion in § 42.61[1].

(n47)Footnote 46. *See Occidental Life Insurance Co. v. EEOC* (1977) 432 U.S. 355, 373, 97 S. Ct. 2447, 53 L. Ed. 2d 402 .

(n48)Footnote 47. *Equal Emp. Opportunity Com'n v. Alioto Fish Co.* (9th Cir. 1980) 623 F.2d 86 .

(n49)Footnote 48. *See Equal Emp. Opportunity Com'n v. Alioto Fish Co.* (9th Cir. 1980) 623 F.2d 86, 88 .

(n50)Footnote 49. *Equal Emp. Opportunity Com'n v. Alioto Fish Co.* (9th Cir. 1980) 623 F.2d 86, 88-89 .

(n51)Footnote 50. *See* 29 U.S.C. § 626(e), prior to amendment by Pub. L. No. 102-166, § 115.

(n52)Footnote 51. *See* 29 U.S.C. § 255(a).

(n53)Footnote 51.1. *See* 29 U.S.C. § 626(e), as amended by Pub. L. No. 102-166, § 115.

(n54)Footnote 51.2. *See* 29 U.S.C. § 630(a) (definition of "person" for purposes of ADEA).

(n55)Footnote 51.3. *See* 29 U.S.C. § 626(b),(c)(1).

(n56)Footnote 51.4. *See* 29 U.S.C. §§ 216(c), 255(a).

(n57)Footnote 52. *See* *McLaughlin v. Richland Shoe Co.* (1988) 486 U.S. 128, 133, 108 S. Ct. 1677, 100 L. Ed. 2d 115 ; *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 126-129, 105 S. Ct. 613, 83 L. Ed. 2d 523 .

(n58)Footnote 53. *General Telephone Co. v. EEOC* (1980) 446 U.S. 318, 324, 100 S. Ct. 1698, 64 L. Ed. 2d 319 .

(n59)Footnote 54. *General Telephone Co. v. EEOC* (1980) 446 U.S. 318, 331, 100 S. Ct. 1698, 64 L. Ed. 2d 319 .

(n60)Footnote 55. *General Telephone Co. v. EEOC* (1980) 446 U.S. 318, 333-334, 100 S. Ct. 1698, 64 L. Ed. 2d 319 .

(n61)Footnote 56. 42 U.S.C. § 2000e-5(f)(1) (Title VII); *see* 42 U.S.C. § 12117 (ADA; operative July 26, 1992; incorporating procedures set forth in 42 U.S.C. § 2000e-5).

(n62)Footnote 57. *See, e.g.,* *Equal Emp. Opportunity Com'n v. MacMillan Bloedel Containers, Inc.* (6th Cir. 1974) 503 F.2d 1086, 1090-1091, 1093 (successor); *Equal Emp. Opportunity Com'n v. Raymond Metal Prod. Co.* (D. Md. 1974) 385 F. Supp. 907, 911 (agent).

(n63)Footnote 58. *E.E.O.C. v. Hearst Corp., Seattle Post-Intelligencer* (9th Cir. 1976) 553 F.2d 579, 580 .

(n64)Footnote 59. *E.E.O.C. v. Hearst Corp., Seattle Post-Intelligencer* (9th Cir. 1976) 553 F.2d 579, 580 ; *accord* *EEOC v. Occidental Life Ins. Co.* (9th Cir. 1976) 535 F.2d 533, 541-542 .

(n65)Footnote 60. *E.E.O.C. v. Hearst Corp., Seattle Post-Intelligencer* (9th Cir. 1976) 553 F.2d 579, 580 ; *see* *E.E.O.C. v. KECO Industries, Inc.* (6th Cir. 1984) 748 F.2d 1097, 1100 . For discussion of administrative prerequisites to EEOC court action, *see* [3][a], *above*.

(n66)Footnote 61. *See* *Lucky Stores, Inc. v. E.E.O.C.* (9th Cir. 1983) 714 F.2d 911, 912-913 .

(n67)Footnote 62. *Lucky Stores, Inc. v. E.E.O.C.* (9th Cir. 1983) 714 F.2d 911, 912-913 .

(n68)Footnote 63. *Lucky Stores, Inc. v. E.E.O.C.* (9th Cir. 1983) 714 F.2d 911, 912-913 .

(n69)Footnote 64. *See* 29 U.S.C. §§ 206(d), 216(c), 217, 626(b).

(n70)Footnote 65. *General Telephone Co. v. EEOC* (1980) 446 U.S. 318, 100 S. Ct. 1698, 64 L. Ed. 2d 319 .

(n71)Footnote 66. *See* *Donovan v. University of Texas at El Paso* (5th Cir. 1981) 643 F.2d 1201, 1203-1204, 1208 (EEOC action filed under 29 U.S.C. § 217 to enjoin violation of EPA).

(n72)Footnote 67. *See* *E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1508 n.10 .

(n73)Footnote 68. *See* *E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1500-1501, 1507-1508 (finding no due process violation in EEOC's decision to select settlement beneficiaries on basis of responses to notice).

(n74)Footnote 69. *See General Telephone Co. v. EEOC* (1980) 446 U.S. 318, 333, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (dictum); *see also* discussion in [c][i], *above*.

(n75)Footnote 70. *E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1508 n.11 .

(n76)Footnote 71. *See 42 U.S.C. § 2000e-5(f)(1)*; Fed. R. Civ. P., Rule 24(a),(c); *see, e.g., McClain v. Wagner Elec. Corp.* (8th Cir. 1977) 550 F.2d 1115, 1119 .

(n77)Footnote 72. *See 29 U.S.C. §§ 216(c), 626(c)*; *see also E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1509 (ADEA; permissive intervention under Fed. R. Civ. P., Rule 24, which requires basis for jurisdiction independent of court's jurisdiction over underlying action, is not available to charging party after EEOC commences civil action because charging party no longer has any substantive rights over which court would have jurisdiction).

(n78)Footnote 73. *See E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1500 .

(n79)Footnote 74. *See E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1501 .

(n80)Footnote 75. *See 42 U.S.C. § 2000e-5(k)*.

(n81)Footnote 76. *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 .

(n82)Footnote 77. *See Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 .

(n83)Footnote 78. *See Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 422, 98 S. Ct. 694, 54 L. Ed. 2d 648 ; *see also Hudson v. Western Airlines, Inc.* (9th Cir. 1988) 851 F.2d 261, 267 (mere fact that plaintiff did not prevail is not enough to justify award of attorney's fees to defendant).

(n84)Footnote 79. *See Equal Emp. Opportunity Com'n v. Pierce Packing Co.* (9th Cir. 1982) 669 F.2d 605, 609 .

(n85)Footnote 80. *See 42 U.S.C. § 2000e-5(k)* (Title VII); *29 U.S.C. § 216(b),(c)* (attorney's fees recoverable in action by aggrieved party under EPA, but not in action by EEOC); *see also 29 U.S.C. § 626(b)* (provisions of *29 U.S.C. § 216* apply to actions under ADEA).

(n86)Footnote 81. *See, e.g., 42 U.S.C. § 2000e-5(g)*.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 42 Administrative Enforcement of Equal Employment Opportunity Laws
Part C. FEDERAL PRACTICE AND PROCEDURE

3-42 California Employment Law §§ 42.74through 42.79

AUTHOR: By Dale L. Brodsky, J.D. and Beverly Tucker, J.D.

[Reserved]

§§ 42.74[Reserved]



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Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawU.S. Equal Employment
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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws

3-43 California Employment Law 43.syn

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§ 43.syn Synopsis to Chapter 43: Civil Actions Under Equal Employment Opportunity Laws

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By Mary C. Dunlap, J.D.^{n*} and Steven J. Revell, J.D.^{n**}

FOOTNOTES:

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Updates to this chapter are prepared by the Publisher's Editorial Staff.

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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws

3-43 California Employment Law Scope

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

Scope

By Mary C. Dunlap, J.D.n* and Steven J. Revell, J.D.n** SCOPE

This chapter discusses judicial remedies for employees, applicants, and other aggrieved persons under California and federal equal employment opportunity laws, including the Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and the California and federal Equal Pay Acts. The chapter covers such topics as burden of proof, exhaustion of remedies, statutes of limitations, jurisdiction, other procedural issues, and relief available under the various state and federal equal employment opportunity laws. The chapter provides forms of complaints, additional allegations, and affirmative defenses, as appropriate. This chapter also includes discussion of insurance coverage issues pertaining to employment discrimination actions.

An overview of the state and federal equal employment opportunity laws is provided in Chapter 40. Discussion of substantive provisions of the equal employment laws, including detailed discussions of the theories of liability and burdens of proof in employment discrimination cases, can be found in Chapter 41. Chapter 42 covers administrative agency enforcement under these laws. For discussion of enforcement of antidiscrimination and affirmative action provisions in government contracts under state and federal law, *see* Chapter 44.

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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part A. STATE LAW

3-43 California Employment Law § 43.01

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

§ 43.01 California Fair Employment and Housing Act

[1] Right of Action

The California Fair Employment and Housing Act (FEHA)ⁿ¹ permits a person aggrieved by a violation of the FEHA to file a civil action against the employer, after exhausting certain administrative remedies.ⁿ² The FEHA remedies are available for unlawful discriminatory practices in hiring, training, and promotion,ⁿ³ as well as unlawful discriminatory practices in failure to make a reasonable accommodation of a known physical or mental disability.^{n3.1} The FEHA also authorizes a civil action to be brought on behalf of a person claiming to be aggrieved due to HIV/AIDS discrimination against that person's employer by any city, county, or district attorney in a location having an enforcement unit established on or before March 1, 1991, pursuant to a local ordinance enacted for the purpose of prosecuting HIV/AIDS discrimination claims.ⁿ⁴

The scope of coverage of the FEHA is discussed in full in Chapter 40, Part B. The prohibited bases of discrimination and substantive prohibitions of the FEHA are discussed in Chapter 41. Briefly stated, the FEHA makes it an unlawful employment practice for an employer to discriminate against any person in recruiting, hiring, training, promotion, compensation, discipline or discharge, or any other term, condition, or privilege of employment, because of that person's race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, age, or sexual orientation.ⁿ⁵

The FEHA also prohibits discrimination against female employees because of pregnancy, childbirth, or related medical conditions.ⁿ⁶ Finally, the FEHA makes it an "unlawful employment practice" for employers, labor organizations, and employment agencies to discharge, expel, or otherwise discriminate against a person because he or she has opposed any practice made unlawful by the FEHA, or because he or she has filed a complaint, testified, or assisted in any proceeding under the FEHA.ⁿ⁷

■ PRACTICE TIP:

California courts have held that compensatory and punitive damages are available under the FEHA,ⁿ⁸ whereas compensatory and punitive damages in Title VII actions are available only in cases involving

intentional discriminatory conduct and are subject to a statutory maximum amount.ⁿ⁹ Therefore, it is usually advantageous for a plaintiff to proceed in state court under the FEHA if that statute is applicable. Because state courts have concurrent jurisdiction with federal courts to hear Title VII claims,ⁿ¹⁰ the plaintiff may also allege Title VII causes of action in state court. Tactically, however, it may not be in the plaintiff's interest to do so, because the defendant may then remove the entire action to federal court based on federal question jurisdiction.ⁿ¹¹ *Commentary by David M. Youngsmith.*

[2] Proving Employment Discrimination Under FEHA

[a] In General

There are relatively few California cases that discuss proving unlawful discrimination under the FEHA.ⁿ¹² However, FEHA cases that do involve proof issues generally rely on the theories of liability developed under Title VII--"disparate treatment" and "disparate impact."ⁿ¹³ These theories of liability, created by the United States Supreme Court,ⁿ¹⁴ set forth specific orders and allocations of proof that are applicable in most employment discrimination circumstances. However, California courts are not required to follow Title VII precedent,ⁿ¹⁵ and at least one court has suggested that Title VII proof requirements may be rejected in FEHA cases.ⁿ¹⁶ In fact, the FEHC has expressly rejected the Title VII order and allocation of proof for disparate treatment cases.ⁿ¹⁷

The "disparate treatment" and "disparate impact" theories of liability are briefly summarized in [b] and [c], *below*, but the practitioner should review Chapter 41, Part A, for a comprehensive analysis of these complex theories.

[b] Disparate Treatment

Disparate treatment occurs when an employer treats some people less favorably than others because of their race, color, religion, sex, national origin, or other status protected by the FEHA.ⁿ¹⁸ Under Title VII, the disparate treatment theory has been applied to both individual and class-wide or "pattern and practice" discrimination claims.ⁿ¹⁹ However, the order and allocation of proof developed for individual disparate treatment cases has been held to be inappropriate for class-wide or "pattern or practice" cases, which, unlike individual claims, often turn on statistical evidence of disparity.ⁿ²⁰ For a discussion of the order and allocation of proof in class-wide or "pattern or practice" cases, *see* Chapter 41, Part A.

As discussed in [a], *above*, the disparate treatment theory of liability was developed in Title VII cases.ⁿ²¹ California courts construing the FEHA have generally adopted the theory,ⁿ²² but the applicability to the FEHA of the federal standard for the order and allocation of disparate treatment proof is unsettled.ⁿ²³

To prevail under the disparate treatment theory of liability under both the FEHA and Title VII, a plaintiff must prove intentional discrimination.ⁿ²⁴ Discriminatory intent may be proven by direct evidence, such as an express admissionⁿ²⁵ or by a discriminatory employment policy.ⁿ²⁶ However, such direct evidence is often difficult to acquire, and thus intentional discrimination may be inferred from circumstantial evidence.ⁿ²⁷ In *McDonnell Douglas Corp. v. Green*,ⁿ²⁸ a landmark Title VII disparate treatment case, the United States Supreme Court formulated a test for establishing a prima facie case of intentional discrimination in most private, nonclass actions when only circumstantial evidence is available.ⁿ²⁹ Thus, a plaintiff must establish, by a preponderance of the evidence,ⁿ³⁰ that (1) he or she belongs to a protected class (i.e., race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, sexual orientation, age over 40 years, or pregnancy, childbirth, and related medical conditions);ⁿ³¹ (2) he or she applied and was qualified for an opportunity (or benefit) for which the defendant sought applicants; (3) despite the plaintiff's qualifications, he or she was rejected; and (4) after the plaintiff's rejection, the opportunity (or benefit) remained open and the defendant sought others with similar qualifications for the opportunity (or benefit).ⁿ³² If a plaintiff satisfies the *McDonnell Douglas* test, there is a rebuttable presumption of unlawful discrimination.ⁿ³³

McDonnell Douglas also established a framework, refined in *Texas Dept. of Community Affairs v. Burdine*,ⁿ³⁴ for the order and allocation of proof in disparate treatment cases. Thus, once a plaintiff establishes a prima facie case, the defendant must articulate some legitimate, nondiscriminatory reason for its action.ⁿ³⁵ Since the plaintiff has the ultimate burden of proof, the defendant need only *produce evidence* that raises a genuine issue of fact about whether the defendant discriminated.ⁿ³⁶ Once the defendant meets its burden of production, the presumption of discrimination raised by the prima facie case under *McDonnell Douglas* is no longer relevant, and the plaintiff retains the burden of proving intentional discrimination.ⁿ³⁷

If the employer meets its burden of production, the plaintiff may still prevail by showing, by a preponderance of the evidence, that the defendant's stated reason was in fact a pretext for discrimination.ⁿ³⁸ The plaintiff may prove pretext by showing either that a discriminatory reason more likely than not motivated the defendant, or that the defendant's proffered reason is unworthy of credence.ⁿ³⁹ However, employment decisions are often the product of "mixed motives" that include permissible and impermissible reasons. In such cases, a plaintiff need only prove that an impermissible consideration, such as race, sex, or some other protected classification or characteristic, played a motivating part in an employment decision, even though other factors may have also motivated the decision.ⁿ⁴⁰

Some FEHA cases have closely followed the *McDonnell Douglas/Burdine* approach,ⁿ⁴¹ while others have held that that approach is only one way of raising an inference of discrimination.ⁿ⁴² The FEHC has rejected the federal approach entirely, stating that it will find discrimination if a preponderance of all the evidence demonstrates a causal connection between a plaintiff's protected status and a defendant's adverse action.ⁿ⁴³ Thus, it is sufficient if the evidence shows that an adverse employment action was caused at least in part by a discriminatory motive.ⁿ⁴⁴

For a more comprehensive and detailed discussion of the "disparate treatment" theory of liability, *see* Chapter 41, Part A.

■ PRACTICE TIP:

Because the showing required of a plaintiff to establish prima facie disparate treatment and the showing required of a defendant to rebut a prima facie case are both minimal, in many cases the crucial issue is pretext. At the pretext stage, the issues are sharpened, and the basic issue is the validity of the justifications that the employer offers to show absence of discriminatory intent. Whether pretext is established is usually a highly fact-intensive inquiry. *Commentary by Bill Lann Lee.*

[c] Disparate Impact

Disparate impact occurs when a facially neutral employment practice in fact falls more harshly on one group than another.ⁿ⁴⁵ Like the disparate treatment theory,ⁿ⁴⁶ the disparate impact theory of liability was created by the United States Supreme Court in a Title VII case,ⁿ⁴⁷ and FEHA cases have generally adopted the analysis in appropriate circumstances.ⁿ⁴⁸ The theory has been applied to "objective" employment practices such as education requirements,ⁿ⁴⁹ preemployment and promotional testing,ⁿ⁵⁰ and height and weight requirements,ⁿ⁵¹ as well as "subjective" practices such as the use of hiring channels, "word-of-mouth" recruitment, nepotism, rehire policies,ⁿ⁵² and the subjective judgment of supervisors.ⁿ⁵³

The disparate impact plaintiff, unlike the disparate treatment plaintiff,ⁿ⁵⁴ need not prove discriminatory intent.ⁿ⁵⁵ A plaintiff may establish a prima facie case of disparate impact by showing that a specific or particular facially neutral employment practice has a significant adverse impact on members of a protected class.ⁿ⁵⁶ This is usually accomplished by statistical comparisons.ⁿ⁵⁷ For example, a plaintiff may present data showing that the success rate for protected class members on a preemployment or promotional test is lower than the success rate for majority group members.ⁿ⁵⁸ With respect to subjective employment practices or practices with both subjective and objective elements, a plaintiff may present data comparing a defendant's work force with the relevant labor or applicant pool.ⁿ⁵⁹ For a detailed

discussion relating to statistical methods used to establish "significant" adverse impact, *see* Chapter 41, Part A.

California courts interpreting the FEHA have applied a "business necessity" standard under which, after the plaintiff establishes a prima facie case of disparate impact, the burden of proof shifts to the defendant to show that its employment practice is job-related.ⁿ⁶⁰

Title VII cases have held that if the defendant meets its burden of proof, the plaintiff must then show that alternative practices with less adverse impact would also serve the defendant's legitimate interest.ⁿ⁶¹ By contrast, one FEHA case has suggested that the burden is on the *defendant* to show that there are no less discriminatory alternatives.ⁿ⁶²

For a more comprehensive and detailed discussion of the "disparate impact" theory of liability, *see* Chapter 41, Part A.

[d] Retaliation

Unlawful retaliation occurs when an employer discriminates against a person because he or she has opposed practices made unlawful by the FEHA, or filed a complaint, testified, or assisted in any proceeding under the FEHA.ⁿ⁶³ Proof of retaliation generally involves the order and allocation of proof for disparate treatment developed in *McDonnell Douglas Corp. v. Green*,ⁿ⁶⁴ and its progeny. Thus, (1) a plaintiff has the initial burden to establish a prima facie case of retaliation; (2) the defendant then has a burden of production to articulate some legitimate, nonretaliatory reason for its adverse employment action; and (3) if the defendant successfully rebuts, the burden is on the plaintiff to show that the defendant's reason is merely a pretext for discrimination.ⁿ⁶⁵

A prima facie case of retaliation may be established by direct evidence,ⁿ⁶⁶ or by showing that (1) the plaintiff engaged in a protected activity, (2) the plaintiff was thereafter subjected to adverse employment action, and (3) there was a causal link between the two.ⁿ⁶⁷ If plaintiff offers direct evidence of discrimination which is believed by the trier of fact, the defendant can avoid liability only by proving plaintiff would have been subjected to the same employment decision without reference to the unlawful factor.^{n67.1} The FEHC uses the foregoing model, and requires a plaintiff to establish a prima facie case by a preponderance of the evidence.ⁿ⁶⁸

For a complete discussion of the order and allocation of proof in retaliation cases generally, *see* Chapter 41, Part G.

■ PRACTICE TIP:

In retaliation cases, as in disparate treatment cases, the controversy often revolves around pretext. It is at this stage that causation is most severely contested, because the defendant's articulated reason for its adverse action often involves "mixed motives"--*i.e.*, both retaliatory and nonretaliatory. The plaintiff should, therefore, be prepared to present evidence showing that retaliation was at least one of the reasons for an adverse action, and that but for the retaliatory motivation the adverse action would not have been taken.ⁿ⁶⁹ The defendant will then be required to show that the action would have been taken even without retaliatory motivation.ⁿ⁷⁰ *Commentary by Bill Lann Lee and David M. Youngsmith.*

[3] Exhaustion of Administrative Remedies as Prerequisite to Civil Action

To bring a civil action pursuant to the FEHA, plaintiff must first do the following:

1. File a timelyⁿ⁷¹ complaint (also commonly referred to as a charge or claim) of discrimination and/or retaliation with the California Department of Fair Employment and Housing (DFEH);ⁿ⁷² and
2. Receive a notice of right of civil action from DFEH (also commonly referred to as a right-to-sue letter or letter-to-sue).ⁿ⁷³

If the plaintiff is a municipal employee, the plaintiff need not exhaust both the administrative remedy provided by the FEHA and any internal administrative remedy provided by the municipality. Receiving a DFEH right-to-sue letter is a sufficient prerequisite to filing an FEHA claim in superior court for a municipal employee.^{n73.1} However, having chosen a forum for discrimination claims, a public employee must exhaust the chosen administrative forum's procedural requirements. If a public employee requested a non-FEHA administrative remedy such as a civil service commission hearing and obtained an adverse decision, the employee must exhaust judicial remedies by filing a petition for writ of mandate in the trial court or the administrative decision will be binding on subsequent FEHA claims.^{n73.2} If a public employee's internal remedies are provided in a collective bargaining agreement, rather than by statute, and the collective bargaining agreement provides for arbitration, the employee is not required to exhaust those remedies even if the employee begins that process, in order to sue under the FEHA.^{n73.3}

If a plaintiff brings an FEHA suit without having filed a timely charge of discrimination with the DFEH and having received a right-to-sue letter from the DFEH, the plaintiff's civil action is subject to summary judgment, demurrer, or reversal of a favorable judgment on appeal.ⁿ⁷⁴ If the DFEH elects not to process the plaintiff's discrimination charge, the court will still consider administrative remedies to have been exhausted.ⁿ⁷⁵ However, if the DFEH defers processing of the charge to the EEOC and the plaintiff later files an amended charge with the EEOC, the plaintiff has not exhausted his or her administrative remedies as to the claims that are the subject of the amended charge unless he or she notifies the DFEH of the amendments and affords it an opportunity to conciliate the new claims.ⁿ⁷⁶ In *Martin v. Lockheed Missiles & Space Co.*,ⁿ⁷⁷ the court of appeal held that the plaintiff did not exhaust administrative remedies under the FEHA when she filed an amended charge with the EEOC and received a right-to-sue letter for that amended charge from the EEOC only.ⁿ⁷⁸

If the employee files an administrative complaint with the DFEH and the DFEH issues a right-to-sue letter, the employee has exhausted his or her administrative remedies, even if the DFEH later rescinds the letter and then fails to resolve the case within one year after the filing of the administrative complaint without issuing a new right-to-sue letter.^{n78.1} The failure by the DFEH to issue a right-to-sue notice after one year, as required by *Gov. Code § 12965(b)*, does not preclude a determination that an employee has exhausted his or her administrative remedies.^{n78.2}

The scope of the administrative complaint defines the permissible scope of the subsequent civil action.^{n78.3} The DFEH complaint satisfies the exhaustion requirement if its allegations are "like or related to" the allegations contained in the civil complaint, so that the DFEH investigation might reasonably have extended to the latter allegations.^{n78.4} Allegations in the civil complaint that fall outside of the scope of the administrative charge are barred for failure to exhaust.^{n78.5}

However, the allegations in the civil complaint need not be identical to those specifically set forth in the DFEH complaint.ⁿ⁷⁹ For example, in one case applying the "like or related to" standard, a California court of appeal held that the failure to include a national origin discrimination claim in the administrative complaint, which did include a race discrimination claim, was not a fatal defect and that the trial court abused its discretion in granting a demurrer without leave to amend.ⁿ⁸⁰ On the other hand, construing California law, the Ninth Circuit held that a DFEH charge alleging that plaintiff was the victim of race discrimination could not be construed to include a claim of disability discrimination, because the race discrimination claim would not reasonably have triggered an investigation into discrimination on the ground of disability. The two claims involved totally different kinds of allegedly improper conduct and the race discrimination charge was very specific, rendering it especially inappropriate to expand the civil action to include other claims.^{n80.1} Furthermore, although oral statements to the DFEH intake officer could provide an equitable excuse for failure to exhaust, they did not cure the legal defects in the charge.^{n80.2}

Stated differently, the allegations of the DFEH complaint must give "fair notice" of the facts supporting the alleged discrimination so as to permit proper investigation of the charge. For example, a plaintiff fails to exhaust administrative remedies when she attempts to shift the focus of the charge, which identifies her sole physical disability as ulcerative colitis, to some form of mental disability (allegedly the root cause of the colitis) to avoid summary judgment.ⁿ⁸¹

However, in a case in which the plaintiff added a retaliation claim to his civil action for race and national origin discrimination without adding it to his DFEH claim, the court reversed a jury verdict for plaintiff on the claim. The court held that the retaliation claim was barred by the exhaustion of remedies doctrine because (1) it was not "like nor reasonably related to" the other allegations; and (2) it would not have likely been uncovered in the course of a DFEH investigation.ⁿ⁸²

■ CONSULTANT'S COMMENT:

Okoli v. Lockheed Technical Operations Co. ⁿ⁸³ is one of the more significant appellate decisions regarding the exhaustion of administrative remedies under the FEHA. A jury returned a verdict adverse to Charles Okoli upon his claims for race and national origin discrimination in connection with alleged denials of promotional opportunities and alleged derogatory comments. The jury also returned a verdict favorable to Mr. Okoli upon his claims for retaliation. Mr. Okoli, however, had not alleged retaliation in the charge of discrimination that he originally had filed with the DFEH. Nor had he alleged retaliation in any amended charge. The court of appeal therefore ruled that Mr. Okoli had failed to exhaust his administrative remedies, thus depriving the trial court of subject matter jurisdiction over the retaliation claims.

The court of appeal began straightforwardly by stating that Mr. Okoli had raised an exhaustion issue and that exhaustion of remedies was a jurisdictional prerequisite to resort to the courts under the FEHA. The court of appeal then noted that the exhaustion doctrine required the complaining party to identify his or her allegation with specificity so as to place the DFEH on notice of the matter it would be expected to investigate. In the words of the opinion, "to exhaust his or administrative remedies as to a particular act made unlawful by the Fair Employment and Housing Act, the claimant must specify that act in the administrative complaint, " citing *Martin v. Lockheed Missiles & Space Co.*, discussed above in the text. Presumably to avoid creating an overly technical rule of administrative pleading, the court made it clear that the determination whether a subsequent complaint is impermissibly broader than the scope of the underlying agency charge is determined not only with reference to the specific content of that charge, but also with reference to two additional considerations. First, a court complaint may contain allegations not found within an agency charge, provided that the new allegations are "like or reasonably related to the allegations" in that charge.ⁿ⁸⁴ Second, a court complaint may contain allegations not found within an agency charge, provided that the new allegations can be said to lie within "the scope of the [agency] investigation which can reasonably be expected to grow out of the charge of discrimination."ⁿ⁸⁵

The reader might then have expected the court of appeal to apply these rules to the facts of the *Okoli* case. Surprisingly, however, the opinion does not do so. It instead concludes without any reference to the facts: "Okoli's complaint added claims [of retaliation] that were neither like nor reasonably related to his DFEH claim and were not likely to be uncovered in the course of a DFEH investigation." The significance of this holding is in its brevity. Because the decision nowhere articulates the content of Mr. Okoli's retaliation claims, and because the decision indicates that the retaliation occurred "[w]hile DFEH was investigating the charge," the court of appeal can only have intended its holding to require that all retaliation claims be made the subject of agency charge. Presumably, if the "like or reasonably" related rule had any value in the context of a retaliation case, the court would have compared the content of the retaliation claims to the claims contained in the underlying charge. Presumably also, if the "scope of the investigation" rule had any value in the context of a retaliation case, the court would have found it easy to conclude that the DFEH would have found the retaliation which occurred during its investigation during the natural course of talking to the complainant about his case. In short, *Okoli* seems to declare a blanket rule--retaliation claims not made the subject of timely DFEH charges are lost. *Commentary by Kirby Wilcox.*

Whether the failure to exhaust an administrative remedy is a jurisdictional, not a procedural, defect,^{n85.1} or should be viewed merely in the nature of a condition precedent or an affirmative defense that can be waived if it is not asserted by the defendant,^{n85.2} appears to be an open question under the FEHA.^{n85.3}

The "relation-back" doctrine is applicable to administrative charges.^{n85.4} Thus, an untimely amendment to a DFEH complaint can relate back to a timely filed charge.^{n85.5} However, the mere acceptance of an amendment by DFEH is not conclusive that the amendment relates back. The court must conduct its own de novo analysis of the amendment. Interpreting California law, the Ninth Circuit found that a timely administrative complaint of race discrimination failed to offer an adequate factual basis to support and warrant relation back of an untimely charge of disability discrimination, even though plaintiff told DFEH he was terminated because of absenteeism. The original charge explicitly stated that plaintiff believed his termination was due to race, and that the employer's reason for terminating him was pretextual because non-Mexican-Americans with more absences and accidents were not terminated. The court found that the allegations of race discrimination were entirely different from the claim that the employer had failed to acknowledge and accommodate a disability. The amended charge added new facts to support its new theory, including allegations that plaintiff had a mental disability, the employer knew he suffered from clinical depression at the time of his termination, and the employer failed to offer him accommodation.^{n85.6}

A plaintiff exhausts administrative remedies for a cause of action based on a violation not mentioned in the administrative charge if he or she notifies the administrative agency of the violation, and the failure to include the violation in the charge is the fault of the administrative agency and not the plaintiff.ⁿ⁸⁶ This is an equitable exception to the exhaustion requirement that is distinct from equitable tolling.^{n86.1} Whether to excuse the failure to include alleged unlawful conduct in an administrative charge requires a balancing of the equities in the particular case.^{n86.2} The equities favor a plaintiff when each of the following is true:^{n86.3}

- The plaintiff diligently pursued the claim;
- The plaintiff was misinformed or misled by the administrative agency responsible for processing the charge;
- The plaintiff relied in fact on the misinformation or misrepresentations of the agency, causing the plaintiff to fail to exhaust administrative remedies; and
- The plaintiff was acting pro se at the time.

In *Keiffer v. Bechtel Corp.*,ⁿ⁸⁷ a California court of appeal squarely addressed an issue implicit in *Okoli* and *Denney*, and expressly addressed elsewhere, that the exhaustion doctrine does not implicate subject matter jurisdiction, which may be raised at any time in the course of litigation. The doctrine is jurisdictional only in the sense that a court's failure to apply the rule when the issue has been properly raised can be corrected by the issuance of a writ of prohibition. Stated differently, a requirement may be jurisdictional, not procedural, and yet not affect the court's fundamental, subject matter jurisdiction.

The notion of jurisdiction encompasses several similar concepts, some fundamental to the nature of any judicial system, some derived from due process requirements, others determined by the constitutional or statutory structure of a particular court, some based on mere procedural rules originally devised for convenience and efficiency, and some made mandatory and jurisdictional by precedent. Thus, describing the FEHA's administrative requirements as "jurisdictional" does not resolve the question of whether those requirements implicate the trial court's fundamental, subject matter jurisdiction. Under *Government Code* § 12965(b), all that is required for jurisdiction is that the plaintiff file a complaint and receive a right to sue notice.ⁿ⁸⁸ In *Keiffer v. Bechtel Corp.*, the employer argued that the former employee failed to present the allegations to DFEH within one year of the date on which the alleged act of

discrimination occurred, and that the jury verdict was based on allegations not encompassed within the right to sue notice. The court determined that although the FEHA contains this and other procedural requirements, these prerequisites do not implicate the court's fundamental, subject matter jurisdiction. Therefore, the employer waived this contention because, at a minimum, the employer failed to raise this issue in its opening brief on appeal. When there is at least facially adequate compliance with the FEHA in the form of a right-to-sue notice, the details with respect to which claims are permitted by the notice is a matter that must be timely raised or forever waived.ⁿ⁸⁹

■ COMMENTARY

Keiffer should be viewed as a case with unusual facts that announces a rule of limited applicability. In an appellate reply brief, the respondent raised the untimeliness of the underlying DFEH charge with respect to certain acts that served as the basis for liability at trial. The appellate court rejected the argument and held that the untimeliness of the charge was not jurisdictional. The court, however, did not reach the opposite conclusion that the timeliness of a DFEH charge is merely a procedural issue. The opinion makes it clear that untimeliness is a substantive defect that will serve as a bar to liability if raised by an employer as an affirmative defense and made the subject of an appropriate motion or trial defense. Thus, equitable tolling may be available to plaintiffs under federal law, but there is nothing in *Keiffer* which holds that a late filing, if properly preserved and challenged, will be excused. *Commentary by Kirby Wilcox.*

Although an employee must exhaust the FEHA administrative remedy before bringing a civil action under the FEHA or seeking any remedies provided by the FEHA, exhaustion of the administrative remedy is not required before filing a civil action for damages alleging related, non-FEHA causes of action, such as termination in violation of public policy.ⁿ⁹⁰ For discussion of actions for wrongful termination, *see* Chapter 60.

For discussion of procedures and requirements for filing a complaint with the DFEH and issuance of right-to-sue letters under the FEHA, *see* Chapter 42, Part B.

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

The complainant should file his or her complaint with the DFEH promptly after discovering facts leading him or her to believe that discrimination or retaliation has occurred or is occurring. The FEHA requires complaints to be filed within one year of the most recent act of discrimination or retaliation, with a grace period not to exceed 90 days after the one-year period for cases in which the complainant did not learn of the discrimination or retaliation within a year of its last occurrence or within one year of the complainant attaining the age of majority.ⁿ⁹¹ The complainant should include any party in the DFEH complaint that he or she may later wish to sue in a civil action. *Government Code Section 12965(b)* provides that a civil action may be brought against the person, employer, labor organization, or employment agency named in the verified complaint filed with the DFEH. Thus, if the civil action names parties other than those named in the DFEH charge, such parties probably will succeed in claiming that the court lacks jurisdiction over them as parties in the civil action. For further discussion, *see* [3A], *below*.

The complainant also should cooperate as fully as practicable with the DFEH. Even if he or she intends to go to court, and expects no administrative redress, the DFEH retains a number of investigative, conciliatory, and other powers that can be exercised in a manner favorable or detrimental to the interests of the complainant.ⁿ⁹² *Commentary by Mary C. Dunlap.*

[3A] Proper Party Defendants

Government Code Section 12965(b) provides that a civil action may be brought against the person, employer, labor organization, or employment agency "named in" the complaint filed with the DFEH.ⁿ⁹³ Some California cases, however, have held that a plaintiff may sue a defendant who was not named in the caption of a FEHA administrative

charge, provided that the party was named or sufficiently identified in the body of the charge.ⁿ⁹⁴ Another California case has held that the statutory language of *Gov. Code § 12960* requires that an individual defendant must be named in either the caption or the body of a DFEH administrative charge in order for the plaintiff to bring a civil action against that individual.ⁿ⁹⁵ This rule presupposes that the individuals or other parties named are properly subject to liability under the FEHA.

California courts have ruled that individual supervisors may be liable for sexual harassment or retaliation as "persons" under the FEHA if they participate personally in the harassment or retaliation or aid or abet it.ⁿ⁹⁶ However, supervisory employees may not be sued for types of discrimination other than harassment or retaliation.ⁿ⁹⁷ In *Janken v. GM Hughes Electronics*,ⁿ⁹⁸ the court of appeal noted three reasons for finding that supervisory employees are not individually liable for discrimination even though they may be held individually liable for harassment: (1) the distinction between harassment as a type of conduct not necessary to a supervisor's job performance and a supervisor's unavoidable need to make personnel management decisions without having to face personal liability; (2) the statutory language of the FEHA, which prohibits *discrimination* by employers, including their agents, but prohibits *harassment* by "employer[s] ... or any other person"; and (3) the incongruity of holding supervisory employees liable for discrimination when small employers are exempt from such liability.ⁿ⁹⁹ In *Reno v. Baird*,ⁿ¹⁰⁰ the California Supreme Court approved and adopted the holding in *Janken*. The *Reno* court noted that in drafting the FEHA,ⁿ¹⁰¹ the Legislature had clearly distinguished between individual supervisor liability for harassment and liability for other forms of discrimination, allowing the former and proscribing the latter.ⁿ¹⁰² The Court also rejected *Reno*'s individual claim for wrongful discharge in violation of the public policy embodied in the FEHA. The Court found it "absurd to forbid a plaintiff to sue a supervisor under the FEHA, then allow essentially the same action under a different rubric." However, the Court expressed no opinion on the general question of whether discrimination based on a medical condition violates a fundamental public policy that will support a wrongful discharge claim.ⁿ¹⁰³ Following the *Reno* decision, a California court of appeal has held that supervisory personnel cannot be held individually liable for discrimination under ADA.ⁿ¹⁰⁴

California courts have not addressed whether nonsupervisory employees may be personally liable for harassment or other types of discrimination. Thus, the issue of whether individuals are named in the DFEH charge is only relevant with regard to whether individual supervisory employees unnamed in the charge may be sued for harassment or retaliation.

[4] Statutes of Limitation

[a] One-Year Statute of Limitation for Filing Charge With DFEH

[i] General Rule

The FEHA requires a complainant to file a charge with the DFEH within one year after the date on which the alleged unlawful employment practice occurred; however, the period may be extended for up to 90 days if the complainant first learned about the alleged unlawful employment practice after one year from the date of its occurrence, for up to one year following a rebutted presumption of the identity of the person's employerⁿ¹⁰⁵ to allow the person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer, or for up to one year from the date that the person allegedly aggrieved by the unlawful practice attained the age of majority.ⁿ¹⁰⁶ Filing a timely charge of discrimination with the DFEH is a jurisdictional requirement that must be met before the plaintiff may bring an FEHA claim;ⁿ¹⁰⁷ no equitable exception applies to extend the filing period of one year plus 90 days, even when the employee first discovered the alleged discrimination more than 16 months after the occurrence.ⁿ¹⁰⁸

■ CONSULTANT'S COMMENT:

Williams ⁿ¹⁰⁹ is one of the only reported cases to interpret that portion of the FEHA which deals with the 90-day extension of time to file an administrative complaint for plaintiffs who belatedly uncover evidence of discrimination. In this instance, the plaintiff learned, sixteen months after his denial of

employment, that the decision makers who denied him employment may have excluded his application on the basis of his race. He asserted, therefore, that he had properly filed his administrative complaint within one year of his knowledge of alleged wrongdoing, although well beyond one year from the denial of his employment application. The court of appeal concluded, however, that the FEHA already addressed the issue of late administrative filings and limited their availability to the 90-day window expressly provided in the statute--and not more. As a result, despite the potential unfairness, the plaintiff had no viable claim, because he had failed to timely exhaust his administrative remedies. *Commentary by Kirby Wilcox.*

By contrast, filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to bringing a Title VII suit in federal court.¹¹⁰

[ii] Effect of Continuing Violation

The "continuing violation" doctrine that has evolved under Title VII¹¹¹ has been applied to actions under the FEHA.¹¹² One California court of appeal has noted that although the United States Supreme Court in *National R.R. Passenger Corp. v. Morgan*,^{112.1} made a recent pronouncement on the continuing violation doctrine under Title VII, California state courts will not look to federal precedent under Title VII for guidance on FEHA questions. That rule only applies in absence of controlling state authority, and the California Supreme Court set out continuing violation doctrine under FEHA in *Richards v. CH2M Hill, Inc.*^{112.2}

Under the "continuing violation" doctrine, if like or related discriminatory treatment has occurred over a period of months or even years, the entire course of discrimination may be actionable if the DFEH charge properly alleges a "continuing violation" and is filed within one year of the most recent act of discrimination.¹¹³ However, the alleged discriminatory acts must be related closely enough to constitute a continuing violation; the relevant distinction is between the occurrence of isolated, intermittent acts and a persistent, ongoing pattern.^{113.1}

In *Richards v. CH2M Hill, Inc.*,^{113.2} the California Supreme Court held that an employer's persistent failure to reasonably accommodate a disability or to remedy a hostile work environment directed at a disabled employee is a continuing violation if the employer's actions meet the following three-part test:^{113.3}

- The employer's actions are sufficiently similar in kind, although similar kinds of unlawful employer conduct such as acts of harassment or failures to reasonably accommodate disability, may take many forms.
- The employer's actions have occurred with reasonable frequency.
- The employer's actions have not acquired a degree of permanence; "permanence" in the context of an ongoing process of accommodation or harassment is understood to mean that the employer's statements and actions make it clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile.

Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing to reasonably accommodate a disabled employee or by engaging in disability harassment, and the course of conduct does not constitute a constructive discharge, the statute of limitations does not necessarily begin to run when the employee first believes his or her rights may have been violated, but rather when either of the following occurs:^{113.4}

- The course of conduct is brought to an end, *e.g.*, by the employer's cessation of the conduct or the employee's resignation; or

- The employee is on notice that further efforts to end the unlawful conduct will be in vain.

In *Yanowitz v. L'Oreal USA Inc.*, n113.5 the California Supreme Court applied the continuing violations doctrine it had articulated in *Richards*, to a claim of retaliation in violation of the FEHA. Subsequent to the decision in *Richards*, the United States Supreme Court had decided *National Railroad Passenger Corp. v. Morgan*, n113.6 in which the United States Supreme Court held that, under Title VII, with regard to the applicability of the continuing violations doctrine, a distinction should be drawn between discrimination and retaliation claims on the one hand, and hostile work environment claims on the other hand. However, in *Yanowitz*, the California Supreme Court found that a rule categorically barring application of the continuing violation doctrine in retaliation cases would mark a significant departure from the reasoning and underlying policy rationale of previous cases interpreting the FEHA statute of limitations. Thus, in a retaliation case, as in a disability accommodation or harassment case, the FEHA statute of limitations begins to run when an alleged adverse employment action acquires some degree of permanence or finality. Applying the factors outlined in *Richards*, the Court found that at the summary judgment stage, on the evidence presented, a reasonable trier of fact could have found that the employer's solicitation of negative information from subordinates, criticism of Yanowitz both verbally and in written memos based in part on the negative information obtained from her subordinates, and the subsequent refusal to allow Yanowitz to answer the charges leveled against her, were similar in kind and occurred with sufficient frequency to constitute a continuous and temporally related course of conduct. Moreover, a reasonable trier of fact could have concluded Yanowitz was not on notice that further conciliatory efforts would be futile, until her final attempts to meet with company representatives to discuss the criticism directed at her were finally rebuffed.

In *Cucuzza v. City of Santa Clara*, n113.7 the court applied *Richards* in the context of an allegation of sex discrimination and held that the plaintiff failed to allege a continuing violation. In considering the first two prongs of the *Richards* test, the court first found it difficult to perceive the alleged adverse actions as a continuing course of conduct because on the record they looked much more like a collection of isolated employment decisions. However, even assuming the conduct was sufficiently similar and frequent enough to constitute a single course of conduct, the court applied the third *Richards* prong to find that the situation had reached permanence well over a year before plaintiff commenced her lawsuit.n113.8

In *Alch v. Superior Court*, n113.9 the court held that FEHA's one-year statute of limitations did not prevent deterred applicants from prosecuting a claim that, within the statutory period, employers and talent agencies enforced a systemic policy of age discrimination that deterred the writers from applying for positions as television screenwriters. The court noted that the *Richards* doctrine had no application to a claim of ongoing, company-wide, systematic discrimination against a protected class. Rather, the court applied the doctrine articulated in *Valdez v. City of Los Angeles* n113.10 and *City and County of San Francisco v. FEHC*, n113.11 as well as many federal cases, that a continuing violation may be found when a corporate policy is initiated before the limitations period, but continues in effect within that period to the detriment of the employee.

In *City and County of San Francisco v. Fair Employment & Housing Com.*, n114 the court applied the continuing violation doctrine to an FEHA challenge to a county's failure to promote African-American firefighters because of its reliance on an eligibility list generated by a discriminatory test. The court held that the action was timely filed because promotions continued to be made from the challenged eligibility list during the year preceding the filing of the complaint.n115

In hostile environment harassment claims, the success of the case often depends on proof of a pattern of continuous, pervasive harassment.n116 Accordingly, such claims lend themselves to the "continuing violation" doctrine.n116.1 For example, in *Accardi v. Superior Court*, n117 the court of appeal applied the continuing violation theory to a sexual harassment case in which an eleven-year pattern of discrimination existed, but no overtly discriminatory acts could be shown during the year prior to filing the complaint. The court held that the plaintiff's allegations concerning her treatment with regard to workers' compensation claims, job assignments, and disability claims could all be related to the

employer police department's general desire to rid itself of a female officer and could be shown to be a part of the prior pattern of harassment. These allegations were thus sufficient on demurrer to bring the prior acts within the statute of limitations.ⁿ¹¹⁸ In *Birschstein v. New United Motor Manufacturing, Inc.*,^{n118.1} the court reversed summary judgment in favor of the employer. The court found that a series of overtly sexual remarks by a coworker that began in the fall of 1995, coupled with the coworker's staring campaign that continued intermittently through 1996 and 1997, constituted a continuing course of unlawful conduct. The acts of staring were frequent and continuous. Their intermittent nature, likely caused by plaintiff's lengthy absence from work for surgery, did not alter the continuing nature of the violation. In *Dominguez v. Washington Mutual Bank*,^{n118.2} a former employee raised triable issues of fact to avoid summary judgment on whether she had timely filed a DFEH complaint alleging discrimination based on sexual orientation. A coworker made offensive remarks regarding her sexual orientation, but those remarks stopped more than one year before she filed her DFEH complaint. But plaintiff raised triable issues of fact that a continuing violation occurred after the co-worker stopped his sexual-orientation-themed verbal attacks, because despite the employer's attempts to minimize the coworker's conduct, plaintiff's account depicted a months-long, continual campaign to make her work life miserable after the remarks stopped. Thus, a reasonable inference arose that this was just another way for the coworker to harass plaintiff about her sexual orientation without expressly saying so. The court found that the conduct occurring within the limitations period need not have occurred outside the limitations period as well. Instead, the focus was on whether conduct within the limitations period could be viewed as part of a continuing violation, because there was evidence that the former was related to the latter. Further, based on evidence presented by plaintiff, a trier of fact could have found that the harassing conduct was reasonably frequent, and there were triable issues of fact as to when permanency was achieved.

However, if only isolated acts of harassment have occurred within the limitations period, a plaintiff may not be able to plead a timely hostile environment harassment claim.ⁿ¹¹⁹ For a detailed discussion relating to FEHA hostile environment harassment claims, *see* Chapter 41, Part D.

[b] One-Year Statute of Limitation for Filing of Civil Action

A the person claiming to be aggrieved under FEHA may bring a civil action within one year from the date of the right-to-sue notice.^{n119.1} That one-year period is tolled, however, when a charge is timely filed with the EEOC and DFEH and either (1) investigation of the charge is deferred by the DFEH to the EEOC and the DFEH issues a right-to-sue notice on deferral of the charge,^{n119.2} or (2) investigation is deferred by the EEOC to the DFEH and, after investigation and determination by the DFEH, the EEOC agrees to perform a substantial weight review of the determination by the DFEH or conducts its own investigation of the claim.^{n119.3} The tolling period expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the DFEH, whichever is later.^{n119.4}

In *Romano v. Rockwell International, Inc.*,ⁿ¹²⁰ the California Supreme Court considered when the statute of limitations began to run in a wrongful termination case in which the plaintiff has alleged causes of action sounding in tort and contract as well as violation of the FEHA. The plaintiff, Romano, had been notified of his termination two and one half years before his employment actually terminated. With respect to the FEHA claim, the court found that since the statute expressly lists discriminatory "discharge" as a ground for a claim, and further states that the time to bring administrative claims begins to run "after" the unlawful employment practice has "occurred." Thus, the claim for discriminatory discharge could not accrue until the discharge had actually happened.ⁿ¹²¹ The court expressly declined to follow the United States Supreme Court's decisions in *Delaware State College v. Ricks*ⁿ¹²² and *Chardon v. Fernandez*,ⁿ¹²³ which state that the cause of action occurs when the discriminatory decision is communicated to the plaintiff. The Court based its analysis on the fact that the FEHA defines "discharge" as a discriminatory act while the federal discrimination laws focus on the discriminatory decision.ⁿ¹²⁴

In reaching its holding, the court discussed the fact that requiring an employee to bring his or her claims while he or she is still employed creates a situation in which the chances for conciliation or correction of the wrongful or discriminatory

decision are greatly reduced.¹²⁵ It further expressly disapproved the holding in *Regents of the University of California v. Superior Court*¹²⁶ to the extent that decision suggests that causes of actions for wrongful termination and under the FEHA accrue when the decision to terminate was communicated to the plaintiff.¹²⁷

The FEHA right-to-sue notice must inform the complainant that he or she has one year from the date of that notice to file a civil action.¹²⁸ The Ninth Circuit Court of Appeals has held this one-year filing requirement to be a statute of limitations subject to equitable tolling rather than a jurisdictional requirement;¹²⁹ the Ninth Circuit has also held that when a plaintiff has the choice of pursuing two remedies and chooses to first pursue the remedy accorded by the EEOC, the FEHA statute of limitations is tolled pending resolution of the EEOC investigation.¹³⁰ Similarly, a California court of appeal has held that when a charge of discrimination or harassment is timely filed concurrently with the EEOC and the DFEH, the DFEH defers investigation of the charge to the EEOC under their work-sharing agreement, and the DFEH issues a right-to-sue letter on deferral, then the one-year period to bring a FEHA action is equitably tolled during the pendency of the EEOC investigation until a right-to-sue letter from the EEOC is received.¹³¹ This holding has been codified in *Government Code Section 12965(d)*.^{131.1} The one-year time limit may be tolled by the doctrine of equitable tolling regardless of whether the statute is construed as a procedural statute of limitations¹³² or as a condition on a substantive right which must be fulfilled as a prerequisite to filing an action.¹³³

■ CONSULTANT'S COMMENT:

Although *Downs* invokes the doctrine of "equitable tolling" to conclude that the pendency of an EEOC investigation stays the time to exercise a DFEH notice of the right to sue, the rationale of the case is limited. The holding in *Martin v. Lockheed Missiles & Space Co. (1994) 29 Cal. App. 4th 1718*, that a plaintiff must file his or her civil action within one year of receipt of a DFEH notice of right to sue, is still good law. *Downs* addresses the narrow question of the impact on that notice on an ongoing EEOC investigation. Citing to a three-part test set forth in *Collier v. City of Pasadena*, the panel has concluded that the one year mandate is not applicable to circumstances in which a plaintiff has pursued closely related claims.

There are two flaws, however, in the *Downs* analysis. First, charges originally filed with the EEOC are not always immediately addressed by that agency. Indeed, after cross-filing a charge with the DFEH, the EEOC (on its own initiative or at the request of a plaintiff) can issue a "no action required at this time" notice to the employer. Thus, if skillfully managed, a plaintiff can now sit on his or her DFEH right to sue (which the state will have issued immediately after receiving the cross-filing) and trigger an EEOC right to sue at his or her discretion—even years later after memories have faded. Second, the express terms of the *Downs* decision restrict equitable tolling to the period of the EEOC investigation, but the underlying facts seem to indicate that the tolling doctrine applies to the pendency of the EEOC investigation *plus* three months. That is, if the *Downs* holding were taken at its word, a plaintiff would have to file his or her DFEH action on the day of (or day after) receipt of an EEOC notice of right to sue. After all, the equitable tolling is only for the period of EEOC investigation—*not more*. However, the decision seems to contemplate that the tolling period is *further extended* to permit the filing of a DFEH action within the 90 days applicable to the filing of a Title VII action. *Commentary by Kirby Wilcox.*

Under California law, equitable tolling is warranted when the defendants have induced the plaintiff to delay filing until after the statute of limitations has run.^{133.1} Further, absent express statutory language, a plaintiff's voluntary dismissal does not entitle the plaintiff to toll the statute of limitations on a subsequently filed action.^{133.2}

The effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. The tolled interval is tacked onto the end of the limitations period, extending the deadline for suit by the entire length of time during which the tolling event previously occurred.^{133.3}

One court has applied the "relation back" doctrine to an amended complaint adding FEHA causes of action almost three

years after the DFEH issued a right-to-sue letter.ⁿ¹³⁴ The court applied the doctrine because the plaintiff had filed his initial complaint alleging common law causes of action before the DFEH issued the letter. The doctrine states that a statute of limitations does not bar an amended complaint alleging new causes of action if it rests on the same facts as the original complaint and refers to the same accident and same injuries as the original complaint. The court added that, although formerly an exception occurred when an amendment converted a common law cause of action to a statutory one, that exception is no longer recognized.ⁿ¹³⁵

Plaintiffs often assert FEHA causes of action in conjunction with allegations of other employment-related wrongs.ⁿ¹³⁶ The California Supreme Court has observed that a responsible attorney handling an employment discrimination case may have to plead a variety of statutory, tort, and contract causes of action in order to fully protect the interests of the client.ⁿ¹³⁷ However, the attorney should be aware that the statutes of limitations applicable to other claims may be different from the one-year statute of limitation under the FEHA.

The continuing violation doctrine, which courts have applied in the context of the filing of the charge,^{n137.1} may also apply in the context of the filing of the civil action. However, a court does not need to determine whether the continuing violation doctrine applies when the plaintiff submits evidence that within the one-year limitations period actionable conduct occurred.^{n137.2} In *National Railroad Passenger Corporation v. Morgan*, ^{n137.3} which arose under Title VII of the Civil Rights Act of 1964 (Title VII), the United States Supreme Court held that an act within the limitations period in furtherance of racial discrimination or retaliation is a discrete act that is not barred by the statute of limitations, and evidence of conduct outside the limitations period is admissible as relevant background evidence to show a prohibited motivation for the discrete act. In *Hammond v. County of Los Angeles*, ^{n137.4} the court applied the *Morgan* methodology and found that a supervisor's decisions concerning the number and type of teaching assignments plaintiff received starting one year before the date she filed her complaint, which were alleged adverse employment actions, could be attributed to plaintiff's race and age based on statements and acts that took place before July of 2003. Therefore, her FEHA claims based on acts that occurred within the limitations period were not barred by the one-year statute of limitations.^{n137.5} The court also noted that the reasoning of the United States Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, ^{n137.6} did not change the conclusion. *Ledbetter* distinguished for statute of limitations purposes between discriminatory acts occurring within the limitations period and discriminatory acts occurring outside the period that may have had residual adverse effects on the employee within the period. In *Ledbetter*, the employee claimed that during the course of her employment, her supervisors gave her poor performance evaluations based on her gender, which violated Title VII, because the evaluations resulted in her pay not increasing as it would have if she had been evaluated fairly.^{n137.7} According to the court in *Ledbetter*, even though the prior discriminatory evaluations and pay adjustments continued to have negative effects on the employee's pay throughout her employment, the cause of action accrued at the time the evaluations and pay adjustments were made, when the employer acted in a discriminatory manner with adverse consequences for the employee. The complaint in *Ledbetter*, which was a pay discrimination case, was based on acts of discrimination by a supervisor outside the limitations period that adversely affected the employer's nondiscriminatory pay decisions within the period.^{n137.8} In *Hammond*, unlike in *Ledbetter*, plaintiff's evidence supported a reasonable inference that the supervisor engaged in acts, including some within the limitations period, each of which was intentionally discriminatory. As a result, the rationale of *Ledbetter* had no application to a case in which plaintiff's evidence showed discrete acts of discrimination both inside and outside the limitations period. Plaintiff submitted evidence of statements and actions prior to one year before she filed her complaint under the FEHA, suggesting that the reduction in her classroom teaching assignments was based on age and race. But there also was evidence of acts within the limitations period that the supervisor continued to limit the number and types of teaching assignments that plaintiff would receive. In doing so, the supervisor made discrete decisions concerning plaintiff's workload within the limitations period, each of which was arguably a fresh violation of the FEHA.

[5] Subject Matter Jurisdiction

The superior courts of the State of California have jurisdiction over FEHA litigation.ⁿ¹³⁸ The amount in controversy determines which of these courts is the appropriate forum.ⁿ¹³⁹

A plaintiff's failure to comply with the administrative exhaustion requirements of the FEHAⁿ¹⁴⁰ deprives the court of subject matter jurisdiction.ⁿ¹⁴¹ By contrast, federal courts interpreting Title VII have held that failure to exhaust administrative remedies may give rise to an affirmative defense, which is subject to waiver and other exceptions.ⁿ¹⁴²

Cases under Title VII have held that the scope of the civil complaint may not exceed those allegations of discrimination that are made in, or that are reasonably related to the allegations made in, the party's administrative complaint.ⁿ¹⁴³ Relying on Title VII authority, one California court of appeal has held that an FEHA civil complaint is within the court's jurisdiction if its allegations are "like or related to" the allegations contained in the DFEH complaint, so that the DFEH investigation might reasonably have extended to the allegations contained in the civil complaint. The allegations in the civil complaint need not be identical to those specifically set forth in the DFEH complaint.ⁿ¹⁴⁴

[6] Venue

An action under the FEHA may be brought in (1) any county in California in which the unlawful practice is alleged to have been committed, (2) the county in which the records relevant to such practice are maintained and administered, or (3) the county in which the aggrieved person would have worked but for the alleged unlawful practice.ⁿ¹⁴⁵ However, if the defendant is not found within any such county, an action may be brought within the county of defendant's residence or principal office.ⁿ¹⁴⁶ Recently, one court of appeal, applied this rule to find that venue was proper in the Sacramento County where the alleged acts occurred and where all the relevant documents were maintained, even though the plaintiffs filed the action in Los Angeles County where they currently resided.ⁿ¹⁴⁷

FEHA plaintiffs may bring their actions wherever the FEHA venue provision permits, even if they have other causes of action that would establish venue elsewhere.ⁿ¹⁴⁸ The FEHA venue statute, *Government Code Section 12965(b)*, does not preclude the court from granting a change of venue for the convenience of witnesses as authorized by *Code of Civil Procedure Section 397(c)*, the general civil change-of-venue statute.ⁿ¹⁴⁹

[6A] Forum Selection and Inconvenient Forum

An employment agreement that specifies a specific state as the exclusive jurisdiction and venue for the resolution of all disputes arising under the agreement constitutes a mandatory forum selection clause. Actions alleging violations of equal opportunity employment laws, such as FEHA, will be governed by such a clause.^{n149.1} Thus, for example, an action for age discrimination in violation of FEHA was properly stayed on the ground of inconvenient forum.^{n149.2} The parties had entered into an employment agreement providing that New York was the state of exclusive jurisdiction and venue for disputes arising under the agreement. After his employment was terminated, the former employee sued in California, alleging age discrimination in violation of FEHA. The court concluded that the statutory cause of action for age discrimination under the FEHA, as well as a common law cause of action for wrongful discharge in violation of the public policy against age discrimination, were subject to the agreement's forum selection and choice of law provisions, and those provisions did not violate California public policy. Thus, the trial court's order enforcing the forum selection and choice of law provisions and staying the action on the ground of inconvenient forum was proper, since the forum selection and choice of law provisions required the dispute to be tried in New York pursuant to New York law. Further, New York afforded the former employee an adequate forum for his age discrimination claims.^{n149.3}

[7] Class Actions Under FEHA

Class actions concerning employment discrimination under Title VII are subject to the rigors of federal class action rules and procedures.ⁿ¹⁵⁰ Because California state courts have similar procedural rules for class action litigation, and interests similar to the federal courts in controlling complex litigation,ⁿ¹⁵¹ class-wide employment discrimination cases under the FEHA will likely be subject to the full range of state class action requirements. These requirements include showing that (1) there is an ascertainable class, and (2) there is a well-defined community of interest in the questions of

law and fact involved that affects the parties to be represented.ⁿ¹⁵²

In *McCullah v. Southern California Gas Co.* ^{n152.1} the court denied certification to a purported class of disabled plaintiffs because there was not a well-defined community of interest in the questions of law and fact.^{n152.2} If the discrimination claims are based on employees' physical or mental disabilities, the court noted that it is difficult to identify and certify the class because the question of whether the employer must provide reasonable accommodation involves a case-by-case inquiry.^{n152.3} The need for this individualized, fact-driven determination renders FEHA actions ill-suited for class treatment.^{n152.4}

The pendency of a civil class action in a federal court generally precludes the bringing of a class action under the FEHA in state court against the same defendant.ⁿ¹⁵³ However, the statutory proscription on filing or maintaining a FEHA class action in state court when the same persons have filed a class action in federal court alleging a comparable claim proscribes concurrent, not successive, class actions.^{n153.1}

In addition, the DFEH has special procedures for administrative handling of class complaints.ⁿ¹⁵⁴ For discussion of these procedures, *see* Chapter 42, Part B.

[8] Relief Available

[a] Generally

The remedial goal of the FEHA is to restore an individual who proves discrimination or retaliation in violation of the act to the position or status he or she would have enjoyed but for the defendant's wrongful conduct.ⁿ¹⁵⁵ Although *Government Code Section 12970* defines the remedial power of the FEHC in an administrative proceeding under the FEHA,ⁿ¹⁵⁶ *Government Code Section 12965(b)*, governing civil actions under the FEHA, does not specifically address the remedial powers of the courts in such actions, other than to authorize a discretionary award of reasonable attorney's fees and costs, including expert witness fees, to the prevailing party.ⁿ¹⁵⁷ However, courts have considerable discretion to fashion remedies that provide "the most relief possible" to victims of workplace discrimination.ⁿ¹⁵⁸ In *Commodore Home Systems, Inc. v. Superior Court*, ⁿ¹⁵⁹ the California Supreme Court held that all relief generally available in noncontractual actions, including punitive damages, may be awarded in civil actions under the FEHA.ⁿ¹⁶⁰ In actions in which the employer has elected to transfer the administrative proceeding to court because the accusation prays for actual damages and/or an administrative fine, the statute specifies that the court may grant the same relief to the plaintiff that a court is empowered to grant pursuant to *Gov. Code § 12965(b)*, in addition to any other relief that, in the court's judgment, would effectuate the purpose of the FEHA. This relief may include a requirement that the employer conduct training for employees, supervisors, and management on unlawful business practices, the applicable rights and remedies, and the employer's internal grievance procedures.ⁿ¹⁶¹

■ CONSULTANT'S COMMENT:

The breadth of available remedies in state court proceedings has made FEHA actions attractive. FEHA remedies may also be available in FEHA actions brought in federal court under pendent jurisdiction. In some areas of California, there is a substantial period of delay before trial. *Commentary by Bill Lann Lee.*

However, in FEHA actions, the right to recover damages is qualified by the common law doctrine of avoidable consequences. Under the doctrine of avoidable consequences, a person injured by another's wrongful conduct will not be compensated for damages the injured person could have avoided by reasonable effort or expenditure. The reasonableness of the injured party's efforts must be judged in light of the situation existing at the time and not with the benefit of hindsight.^{n161.1} Thus, for example, the California Supreme Court found that in a FEHA action against an employer for hostile environment sexual harassment by a supervisor, an employer may plead and prove a defense based on the avoidable consequences doctrine. In this context, the defense has three elements:^{n161.2}

- (1) The employer took reasonable steps to prevent and correct workplace sexual harassment. This will most likely include adopting appropriate antiharassment policies and communicating essential information about the policies and the implementing procedures to its employees.^{n161.3}
- (2) The employee unreasonably failed to use the preventive and corrective measures that the employer provided.
- (3) Reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered.

The Court also found that because employees may be reluctant to report their supervisors to higher management and may attempt informal negotiation with a supervisor, make efforts to avoid encounters with the supervisor, or resort to other informal strategies, delay resulting from an employee's initial resort to nonconfrontational means of dealing with supervisor harassment will have to be carefully evaluated to determine whether it was reasonable in a particular employment setting. The application of the avoidable consequences doctrine to hostile environment sexual harassment actions does not demand or expect that employees victimized by a supervisor's sexual harassment must always report the conduct immediately to the employer through internal grievance mechanisms. The employer may lack an adequate antiharassment policy or adequate procedures to enforce it, the employer may not have communicated the policy or procedures to the victimized employee, or the employee may reasonably fear reprisal by the harassing supervisor or other employees. In some cases an employee's natural feelings of embarrassment, humiliation, and shame may provide a sufficient excuse for delay in reporting acts of sexual harassment by a supervisor. The employee's conduct is judged against a standard of reasonableness.^{n161.4}

[b] Back Pay

The FEHC has express authority to award back pay in administrative proceedings,ⁿ¹⁶² and courts commonly award back pay in civil actions under the FEHA.ⁿ¹⁶³

Back pay refers to the amount that plaintiff would have earned but for the employer's unlawful conduct, minus the amount that plaintiff did earn or could have earned if he or she had mitigated the loss by seeking or securing other comparable employment.ⁿ¹⁶⁴ Back pay includes pension and profit-sharing contributions,ⁿ¹⁶⁵ vacation pay, sick pay, overtime and shift differential pay,ⁿ¹⁶⁶ fringe benefits (such as medical insurance),ⁿ¹⁶⁷ and all other compensation that would have been obtained but for the discrimination.ⁿ¹⁶⁸ For example, an employer who wrongfully terminated an employee is liable, after the former employee died during the pendency of the suit, for the face value of the employer-provided life insurance policy (with a double indemnity provision) that would have been in effect but for the wrongful termination, less any proceeds received by the estate from the pay-out on the employee's substitute life insurance coverage.ⁿ¹⁶⁹

In circumstances in which an employee has been discriminatorily denied a promotion, many circuits have limited backpay damages to the period between nonselection and voluntary resignation, unless constructive discharge can be shown.^{n169.1} If resolution of the discrimination from within the working relationship is not a viable option, however, there is no reason to require an employee either to stay on the job or to forfeit a right to post-resignation damages.^{n169.2}

If the back pay period involves a period of disability, the employer may still be liable for back pay during that period if the employer would have been required to accommodate the employee's disability.^{n169.3}

The FEHC has held that the burden is on the employer to prove, by a preponderance of the evidence, that no pay is due the plaintiff in some or all of the back pay period, and to prove any offsets to plaintiff's expected earnings.ⁿ¹⁷⁰ However, the plaintiff has the burden of demonstrating the amount he or she would have earned had he or she continued

to work for the employer.ⁿ¹⁷¹

[c] Front Pay or Future Lost Earnings

If the discrimination or retaliation proximately caused the applicant or employee to have lost earnings that will continue beyond the date of the judgment, courts may award "front pay" or "future lost earnings" under the FEHA.ⁿ¹⁷² In addition, when reinstatement is not feasible, front pay may be awarded.ⁿ¹⁷³ Front pay is an equitable remedy that a court may grant or deny, using its sound discretion. If a court grants front pay, the remedial goal may be (1) to compensate for lost reinstatement rights by allowing discharged employees to find comparable employment, (2) to deter future improper employer action, or (3) to make a discharged employee whole until the employee attains a level of earnings equivalent to what he or she enjoyed at the time of termination.ⁿ¹⁷⁴

Front pay usually reflects a temporary situation that will be remedied by other relief ordered in the judgment. If, for example, the court orders reinstatement of a fired employee or promotion to a job the employee was denied as a result of discrimination, front pay might be awarded to make up a wage differential if there were no vacancy into which the employee could immediately be reinstated or promoted.^{n174.1}

Occasionally, courts have awarded front pay based on a wage differential that will persist over the employee's working life. For example, an employee terminated from a private company that regularly paid year-end bonuses had accepted permanent employment with a government agency that did not pay bonuses and was awarded permanent front pay. There was evidence the employee planned to stay with the private employer for the rest of her career; that she still made less at the government agency after five years than she would have after her next promotion at the private employer; and that she had resigned when, after complaining of sexual harassment by a supervisor, the employer demoted her by two pay levels.^{n174.2} On the other hand, for an employee who testified that he had no intention of remaining employed by the employer beyond the age of 50, there was no basis for a front pay projection on continuous employment through age 55, and two additional years of lost-income damages was appropriate, based on the employee's relatively young age and ability to eliminate any loss of earnings going forward, in addition to the fact that he left his employment voluntarily and was never out of work thereafter.^{n174.3}

[d] Injunctive Relief

The FEHA expressly authorizes the FEHC to grant injunctive relief.ⁿ¹⁷⁵ Although the FEHA does not expressly authorize a court to grant injunctive relief, federal courts' authority to impose injunctive relief in employment discrimination cases supports the comparable power in the state courts by analogy.ⁿ¹⁷⁶

In fact, California courts have awarded various forms of injunctive relief under the FEHA, including hiring, promotion, and reinstatement orders,ⁿ¹⁷⁷ orders granting retroactive seniority,ⁿ¹⁷⁸ orders requiring removal of negative materials from work records and requiring employer to indicate voluntary departure from employment,ⁿ¹⁷⁹ and orders directing employers to cease and desist from policies or practices of discrimination.ⁿ¹⁸⁰

In *Aguilar v. Avis Rent A Car Sys.*,ⁿ¹⁸¹ the California Supreme Court upheld a remedial injunction barring the continued use of racial epithets in the workplace. After the jury awarded damages to the plaintiffs, the trial court issued an injunction against the future use of derogatory racist language. The employers appealed the imposition of the injunction, but did not challenge the finding that the defendants were guilty of unlawful employment discrimination in violation of the FEHA. Starting from the premise that the manager's misconduct created a hostile work environment for which Avis was properly held liable for knowingly failing to prevent the manager's misconduct, the plurality concluded that the injunction did not violate the right to freedom of speech once there had been a judicial determination of the existence of a hostile or abusive work environment and that the use of those epithets would contribute to the continuation of a hostile or abusive work environment and would therefore constitute employment discrimination.ⁿ¹⁸² *Aguilar* is significant in several respects. First, the plurality opinion acknowledged the *First Amendment* permits the

imposition of civil liability under the FEHA for speech that creates a racially hostile work environment. Second, the issuance of the injunction holds employers accountable even after a trial on the merits and an award of damages.ⁿ¹⁸³ Finally, the plurality opinion found that the injunction was not overbroad despite its injunction against the use of racial epithets, even outside the hearing of the targeted Latino employees. Due to the lack of a record and a transcript, the court had no basis to conclude that, under the circumstances, it would not be necessary to bar the use of racial epithets to prevent an abusive work environment.ⁿ¹⁸⁴

Apparently no reported case has discussed whether and to what extent state courts can order affirmative action (such as goals, timetables, or quotas) to remedy pervasive class-wide discrimination in actions under the FEHA. For discussion of affirmative action as a remedy under Title VII, *see* § 43.10[9][d][iv] and Chapter 44. For discussion of affirmative action requirements for federal and state contractors, as well as voluntary affirmative action plans, *see* Ch. 44.

[e] Compensatory Damages

Courts may award compensatory damages to victims of discrimination under the FEHA.ⁿ¹⁸⁵ Plaintiffs may recover damages for mental suffering and emotional distress resulting from discrimination, as well as for other resulting damages that are not included in the formulation of "back pay" and "front pay."ⁿ¹⁸⁶ Actual damages awarded for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses may not exceed, in combination with the amounts of any administrative fines imposed,ⁿ¹⁸⁷ \$150,000 per aggrieved person per respondent.ⁿ¹⁸⁸ The employee does not have the burden of proving that the employee cannot mitigate damages because of an inability to work. Rather, the employer must show that other employment was comparable, or substantially similar, to that of which the employee was deprived. The employer may not show the employee's rejection of or failure to seek other available employment of a different or inferior kind in order to show a failure to mitigate damages.^{n188.1}

[f] Punitive Damages

The California Supreme Court has held that punitive damages are available in civil actions under the FEHA.ⁿ¹⁸⁹ Such an award is governed by *Civil Code* § 3294.ⁿ¹⁹⁰ However, such damages are limited to violations of the FEHA that are accompanied by malice, oppression, or fraud.ⁿ¹⁹¹ Specifically, the imposition of punitive damages on an employer is authorized in three situations:ⁿ¹⁹²

- When a managing-agent employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others.
- When a managing-agent employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct.
- When the employer was itself guilty of the oppression, fraud or malice.^{n192.1}

In *Weeks v. Baker & McKenzie*,ⁿ¹⁹³ the court addressed and rejected the employer's argument that punitive damages could not be assessed against the employing law firm absent a showing that the firm itself was guilty of oppression, fraud, or malice. The court concluded that the legislative history does not support this interpretation, but rather establishes an understanding that employers may be found liable in any of these three situations without that additional explicit finding. To hold to the contrary would render the third alternative for employer liability surplusage. Thus, a plaintiff seeking punitive damages from an employer must show not only that an employee acted with oppression, fraud, or malice, but also that the employer itself engaged in any of the three types of misconduct defined above;ⁿ¹⁹⁴ *Civil Code* § 3294(b) requires only that an employer take reasonable steps to prevent a known harasser from committing future acts of harassment, and does not require that the employer terminate the harasser.ⁿ¹⁹⁵ The court

also rejected the argument that the liability for punitive damages is vicarious, and that an employer's liability could not exceed the award assessed against the harassing employee. Rather, the award is assessed against the employer for the employer's own wrongful conduct: the hiring or failing to control the harassing employee, ratifying the misconduct, or the employer's own oppression, fraud, or malice.ⁿ¹⁹⁶

On the other hand, in *Mathieu v. Norrell Corp.*, ^{n196.1} the trial court properly granted summary adjudication as to a former employee's claim for punitive damages against a temporary agency. The employee's counsel conceded that the conduct of a customer service manager at the agency did not rise to the level of oppression, fraud or malice. The court also rejected the argument that the agency's corporate failure to maintain and enforce a policy against sexual harassment was so wrongful as to give rise to punitive damages, declining to create new punitive damages liability without legislative history or case authority justifying such an expansion in the law. Further, the employee presented no evidence that the agency, as opposed to the client company at which the sexual harassment took place, did not have a sexual harassment policy or that it refused to provide her with a copy of its policy.^{n196.2}

In *Roby v. McKesson Corp.*, ^{n196.2.1} the California Supreme Court held that a jury's award of punitive damages against an employer exceeded the amount permitted under the federal constitution. The *due process clause of the Fourteenth Amendment of the United States Constitution* places constraints on state court awards of punitive damages.^{n196.2.2}

A ratio of one to one might be the federal constitutional maximum in a case involving relatively low reprehensibility and a substantial award of noneconomic damages.^{n196.2.3} Due process permits a higher ratio between punitive damages and a small compensatory award for purely economic damages containing no punitive element than between punitive damages and a substantial compensatory award for emotional distress.^{n196.2.4}

In *State Farm Mut. Auto Ins. Co. v. Campbell*,^{n196.2.5} the United States Supreme Court articulated "three guideposts" for courts reviewing punitive damages:

1. The degree of reprehensibility of the defendant's misconduct.
2. The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award.
3. The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.^{n196.2.6}

On the question of the degree of the reprehensibility of the defendant's conduct, courts should consider the following:^{n196.2.7}

- Whether the harm caused was physical as opposed to economic.
- Whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others.
- Whether the target of the conduct had financial vulnerability.
- Whether the conduct involved repeated actions or was an isolated incident.
- Whether the harm was the result of intentional malice, trickery, or deceit, or mere accident.

A corporate defendant cannot be punished for harassment merely because one of its employees harassed another employee in the workplace. The focus of the punitive damages inquiry must be on the corporation's institutional

responsibility, if any, for the harassment.^{n196.2.8} In *Roby v. McKesson Corp.*, the evidence establishing corporate wrongdoing in regard to a supervisor's unlawful harassment warranted an award of punitive damages, but did not indicate any repeated corporate misconduct or that the supervisor's actions were the product of a corporate culture that encouraged similar supervisory conduct. Rather, they appeared to be the isolated actions of a single supervisor, combined with a one-time failure on the employer's part to take prompt responsive action when these events came to its attention.^{n196.2.9} However, the employer's conduct, although wrongful, did not rise to the kind of oppressive, fraudulent, or malicious conduct that had in the past justified large punitive damages awards.^{n196.2.10} Thus, taking into account all five reprehensibility factors, the Court concluded that the employer acted wrongfully and in a manner warranting civil penalties, but the reprehensibility of the conduct was at the low end of the range of wrongdoing that could support an award of punitive damages under California law, notwithstanding the seriousness of the employee's emotional injury and her financial vulnerability.^{n196.2.11}

It is relevant for a reviewing court to consider the wealth of a defendant when applying federal constitutional limits to an award of punitive damages, thereby ensuring the award has the appropriate deterrent effect. However, the punitive damages award must not punish the defendant simply for being wealthy.^{n196.2.12}

The United States government is immune from civil penalties absent an express and unequivocal waiver of that immunity.^{n196.3} However, the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.^{n196.4} Congress has waived the sovereign immunity of certain federal government agencies and instrumentalities from the time of their inception by including a "sue and be sued" clause in the enabling legislation.^{n196.5} Unlike waivers given by the federal government itself, such a "sue and be sued" waiver is to be given a liberal construction.^{n196.6} notwithstanding the general rule that waivers of sovereign immunity are to be read narrowly in favor of the sovereign.^{n196.7} With three exceptions, "sue-and-be-sued" clauses cannot be limited by implication. Thus, a federal agency or instrumentality is not immune unless it can clearly show one of the following:^{n196.8}

- Certain types of suits are not consistent with the statutory or constitutional scheme.
- An implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function.
- For other reasons, it was plainly the purpose of Congress to use the "sue-and-be-sued" clause in a narrow sense.

Civil Code § 3295, which also applies in FEHA proceedings,ⁿ¹⁹⁷ requires trial courts, at the request of a defendant, to bifurcate the proceedings to preclude the admission of evidence of a defendant's profits or financial condition until after the trier of fact has returned a verdict for the plaintiff awarding actual damages and finding the defendant liable for punitive damages.ⁿ¹⁹⁸ For example, in *Weeks v. Baker & McKenzie*, the trial court bifurcated the proceedings. At the close of the first phase of the trial, the court submitted a special verdict form to the jury asking whether the law firm had advance knowledge of the unfitness of the employee and continued to employ him with a conscious disregard of the rights or safety of others, or ratified the employee's conduct that was found to be oppressive or malicious.ⁿ¹⁹⁹ The court rejected the argument that *Civil Code* § 3295 supports the position that punitive damage liability is vicarious and limited to the amount assessed against the employee.ⁿ²⁰⁰

There is no fixed mathematical formula for determining punitive damages in FEHA cases.ⁿ²⁰¹ Thus, in one case, the Ninth Circuit upheld an award of punitive damages under the FEHA that was ten times the amount of the compensatory damages awarded.ⁿ²⁰²

Nonetheless, punitive damage awards under FEHA are subject to the same constitutional considerations and limits as in other cases. To determine the constitutional limits of a punitive damages award against an employer, the court looks to

three guideposts articulated by the United States Supreme Court:^{202.1}

1. The degree of reprehensibility of the employer's misconduct.
2. The disparity between the actual or potential harm suffered by the employee and the punitive damages award.
3. The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

For example, in *Gober v. Ralph's Grocery Co.*, ^{202.2} in reviewing the trial court's awards of punitive damages to multiple plaintiffs in a sexual harassment action, the appellate court focused on the evidence supporting the jury's findings that the employer had advance knowledge of the harasser's unfitness, employed him with a conscious disregard of the rights and safety of others, and failed to take reasonable steps to prevent his gender-based harassment, as relevant to the evaluation of the constitutional limits on the punitive damages awards.^{202.3} The court held that a 6 to 1 ratio of punitive to compensatory damages was sufficient to punish the employer and deter it and others from similar conduct in the future. The ratio was reasonable and proportionate to the amount of harm suffered and to the compensatory damages that the plaintiffs recovered, which already contained a punitive element.^{202.4} The court assessed the degree of the employer's reprehensibility as modest, considering the following factors:^{202.5}

- Whether the harm caused was physical as opposed to economic.
- Whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others.
- Whether the target of the conduct had financial vulnerability.
- Whether the conduct involved repeated actions or was an isolated incident.
- Whether the harm was the result of intentional malice, trickery, or deceit, or mere accident.

In examining the ratio of the punitive damages award to the actual harm inflicted on the plaintiffs, extraordinary factors, such as extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages, may justify punitive damages in excess of a single-digit ratio.^{202.6}

Evidence about an employer's financial condition is necessary to determine punitive damages. However, the trial court has broad discretion to exclude time-consuming evidence of limited probative value that is collateral to the issue of net worth.^{202.7}

For discussion of circumstances under which an employer may be held liable for punitive damages based on the conduct of its managerial employees, *see* Chapter 30. For general discussion of the standards for awarding punitive damages, *see* Levy, Golden, and Sacks, California Torts, Chapter 54 (Matthew Bender).

[g] Prejudgment Interest

FEHA plaintiffs may recover prejudgment interest under *Civil Code Section 3287(a)* on awards of back pay and other tangible, easily ascertainable benefits under the FEHA.²⁰³

In addition, *Civil Code Section 3291* provides for recovery of prejudgment interest in "any action to recover damages for personal injury" (if defendant is not a public employee or entity) if plaintiff has made an offer to compromise under

Code of Civil Procedure Section 998, defendant does not accept the offer before trial or within 30 days, and plaintiff obtains a more favorable judgment after trial. The interest runs from the date of the first offer by plaintiff that is exceeded by the amount of the judgment.ⁿ²⁰⁴ One California court of appeal has held that an action for damages for sexual harassment under the FEHA constitutes an action for "personal injury" within the meaning of the statute and that prejudgment interest under *Civil Code Section 3291* is therefore recoverable.ⁿ²⁰⁵

[h] Attorney's Fees and Costs

The FEHA provides that in actions brought by private parties, the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees.ⁿ²⁰⁶ Absent an enforceable agreement to the contrary, attorney's fees awarded under Gov. Code § 12965 exceeding fees the client already has paid belong to the attorneys for whose work they are awarded.^{n206.1} The award of attorney's fees will not be overturned on appeal if the appealing party does not provide the court with an adequate record to show that the trial court has abused its discretion.^{n206.2} Attorney's fees and costs are not available if the action is filed by a public agency or a public official acting in an official capacity.ⁿ²⁰⁷

The standard governing the court's discretion to award attorney's fees under the FEHA was discussed by the court of appeal in *Cummings v. Benco Building Services*.ⁿ²⁰⁸ In *Cummings*, the court applied the standard used in federal cases under Title VII, as developed by the United States Supreme Court in *Christianburg Garment Co. v. EEOC*.ⁿ²⁰⁹ Under that standard, courts should ordinarily award attorney's fees to prevailing plaintiffs unless special circumstances would render an award unjust, but a prevailing defendant should recover attorney's fees only if the action is found to be "unreasonable, frivolous, meritless or vexatious."ⁿ²¹⁰

Under the particular facts before it, the *Cummings* court denied attorney's fees for the defendant employer because the plaintiff employee's action for age discrimination was not frivolous, unreasonable, or without foundation, as evidenced by the discussion in the majority and dissenting opinions in a prior appeal of the same case.ⁿ²¹¹ Prior to *Cummings*, another California court of appeal case, without discussing the standards for awarding attorney's fees to prevailing defendants under the FEHA, had awarded \$10,000 in attorney's fees to a prevailing employer after determining that the employee's action was "baseless."ⁿ²¹² In a case decided subsequent to *Cummings*, the court of appeal found that the trial court had not abused its discretion in denying fees to a defendant because the action was not frivolous, unreasonable, groundless, or in bad faith since the plaintiff could have obtained relief under some theories, even if a proper claim for relief could not have been made under another of plaintiff's theories.ⁿ²¹³ On the other hand, a trial court did not err in awarding an employer attorney's fees where the record reflected overwhelming evidence that the lawsuit was unfounded, unreasonable, and frivolous.^{n213.1} At the same time, even though an award of attorney's fees against plaintiff was justified at the trial, it was not justified for the appeal, because the appeal raised an arguable issue as to whether, and under what circumstances, a trial court is required to consider a plaintiff's ability to pay when awarding fees under Gov. Code § 12965.^{n213.2}

In awarding attorney's fees to a prevailing defendant, the trial court must take plaintiff's financial resources into account.^{n213.3}

In *Shaw v. City of Sacramento*,^{n213.4} the Ninth Circuit held that California courts have yet to determine whether 42 U.S.C. § 2000e-5(g)(2)(b), governing an award of attorney's fees in a "mixed motive" case under Title VII, applies to FEHA actions. The court held that whatever the outcome of that inquiry, the mixed motive defense did not apply to plaintiff's FEHA race discrimination claim based on termination of his employment. The defendant had prevailed on its defense that the plaintiff had executed a valid waiver of all claims. It never contended that, absent illegal discrimination, it would have taken the same action.^{n213.5} The court also held that plaintiff was not entitled to an award of attorney's fees, because he was not the prevailing party. On the special verdict form, the jury found that the employer had engaged in unlawful discrimination, but that plaintiff had released all claims by valid agreement. On that basis, the court had entered judgment for the defendant. The court found unpersuasive plaintiff's claim that he was the prevailing party

because the suit had restored his reputation and enhanced his future employment opportunities. Finally, citing *Weeks v. Baker & McKenzie*, the court held that fees under *Code Civ. Proc. § 1021.5* are not available in a FEHA cause of action.^{n213.6}

An award of attorney's fees to a prevailing defendant under the FEHA may not be permissible if the defendant has prevailed without consideration of the merits of the plaintiff's claims by the court.^{n213.7} "Consideration of the merits by the court" does not require an evidentiary hearing; the determination whether a claim is permissible may be made on the basis of any evidence in the record.^{n213.8} The case, moreover, need not conclude on the merits for the court to award attorney's fees to the defendant. In *Linsley v. Twentieth Century Fox Film Corp.*,^{n213.9} the court found plaintiff's claim to be frivolous, unreasonable, or groundless without reaching the merits of plaintiff's claim because plaintiff continued to litigate his unlawful discrimination claim after he had executed a release that was directed in part to that claim.^{n213.10}

While a trial court ordinarily should award attorney's fees to a prevailing defendant in a FEHA action when the court finds the plaintiff's action was frivolous, the court has the discretion not to do so if the actual beneficiary of the fee award is a defendant to whom the court could not otherwise make an award. Thus, for example, an individual defendant in a FEHA suit may obtain an award of only nominal attorney's fees as the prevailing party when the employer has defended the individual and the individual has not personally incurred or paid any attorney's fees. In *Young v. Exxon Mobil Corp.*,^{n213.11} although the trial court found plaintiff's disability discrimination claims brought against a supervisor to be unreasonable, frivolous, meritless and vexatious and the attorney's fees attributable to the defense of the supervisor reasonable in amount, the appellate court affirmed the trial court's award of attorney's fees of only \$1 to the supervisor. The FEHA action was not frivolous as to the employer, who incurred, was liable for, and paid all the attorney's fees. The trial court did not abuse its discretion in refusing to award fees to the supervisor, who did not incur or pay them, when the fee award would redound to the benefit of the employer, who was not entitled to an award of fees. Further, there was no evidence the employer incurred fees on the supervisor's behalf that it would not have incurred had the supervisor not been named as a defendant.

Under the FEHA, a prevailing plaintiff is entitled to recover attorney's fees and costs absent circumstances rendering the award unjust.^{n213.12} While the court is vested with discretion to deny attorney fees to a prevailing plaintiff, its discretion is narrow.^{n213.13} When a plaintiff prevails under the FEHA, the trial court does not have discretion to ignore the FEHA attorney's fees provision and instead exercise its discretion under *Code Civ. Proc. § 1033(a)* to deny costs because plaintiff's recovery was below its jurisdictional minimum. A modest verdict under FEHA itself is insufficient to deny a prevailing plaintiff attorney's fees under the FEHA.^{n213.14}

The standards governing the computation of reasonable attorney's fees under the FEHA derive from California rather than federal law.ⁿ²¹⁴ Under California law, the trial court is best qualified to assess the value of services rendered before the court, and that determination is reviewed for abuse of discretion.^{n214.1} The trial court's discretion is circumscribed by the California Supreme Court's endorsement of the touchstone or lodestar adjustment method of calculating the award.ⁿ²¹⁵

The Court has never required that a trial court use the lodestar adjustment method when calculating a reasonable award pursuant to a statute other than the private attorney general provision.ⁿ²¹⁶ Under the lodestar adjustment method, the trial court determines the lodestar figure based on a careful compilation of the time spent by, and reasonable hourly compensation for, each attorney.^{n216.1} This figure may be increased or decreased by assessing various relevant factors, such as the novelty and difficulty of the issues, the skill displayed, whether the litigation precluded other employment, and the contingent nature of the fee award, based on the uncertainty or prevailing on the merits and of establishing eligibility.ⁿ²¹⁷ In *Flannery v. California Highway Patrol*, the defendant challenged the amount of the attorney's fee award, arguing that the court should not have applied a multiplier to enhance fees based on recent federal Supreme Court precedent.ⁿ²¹⁸ After reviewing California precedent, although acknowledging the persuasiveness of the federal reasoning against use of a contingency enhancer, the *Flannery* court declined to hold that a trial court abuses its

discretion whenever it applies a multiplier to determine attorney's fees under FEHA.ⁿ²¹⁹ Nonetheless, the court concluded that the trial court applied incorrect standards in determining the amount of the award. When a trial court explicitly uses specific factors in setting the lodestar figure, those factors cannot be used again to enhance or apply a multiplier to that award.ⁿ²²⁰

In *Weeks v. Baker & McKenzie*,ⁿ²²¹ the court of appeal reviewed an attorney's fees award made pursuant to *Gov. Code § 12965(b)* and ruled that the trial court erred in enhancing the attorney's fees award by applying a multiplier of 1.7. Although the trial court relied on factors other than those used to set the lodestar figure, the mere existence of specific, enumerated factors does not, in and of itself, justify enhancing an award that already grants the legal professionals a reasonable hourly rate for every hour reasonably devoted to the litigation of the case. The factors must be analyzed not only in light of the policies they seek to advance, but also in light of the policies against litigation of claims for some purpose other than the worthiness of the cause or the need to redress the injury at issue. The *Weeks* court looked to the *Serrano* case, discussed *above*, as a classic example of a fee award deservedly enhanced. It involved litigation related to the public interest; it did not result in a fund of money from which attorney fees might be paid or any monetary recovery by the plaintiffs; the plaintiffs were not obligated to pay their attorneys for their efforts; and an award of fees was uncertain not only because of the complexity and difficulty of the legal issues but also because there was no clear statutory authority for shifting attorney fees to the defendant. In contrast, *Weeks* was essentially a personal injury case brought by a single plaintiff to recover her own economic damages; the case was not particularly difficult because of the novelty or complexity of the issues, but because of the inherent difficulty in proving sexual harassment. Furthermore, a fee agreement assured the attorneys of a portion of any recovery and, because of the availability of attorney fees under FEHA, the attorneys had no reason to assume that the amount of the plaintiff's recovery would limit the amount of fees they ultimately received.ⁿ²²²

The court can consider contingent risk as a factor in its decision of whether to apply a multiplier.^{n222.1} The purpose of a multiplier is to fix a fee at the fair market value for the particular action. The court in effect determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services.^{n222.2}

One California court of appeal upheld an attorney's fee award in an FEHA action based on an hourly rate of \$450, stating that the trial court was entitled to consider "fees customarily charged by that attorney and others in the community for similar work."ⁿ²²³ The court found the hourly rate to be at the "high end," but not "off the scale," in light of the record.ⁿ²²⁴

It is appropriate for the court to reduce a fee award when a plaintiff prevails on only one of his or her causes of action.^{n224.1} The trial court is in the best position to understand the relationship between claims on which the plaintiff prevailed and claims on which he or she did not prevail and to determine whether time spent on a related claim contributed to the plaintiff's objectives at trial.^{n224.2}

Under *Gov. Code § 12965(b)*, the court need not find the action to be frivolous, unreasonable, or groundless before it may exercise that discretion to award costs to a prevailing FEHA defendant. Ordinary litigation costs are recoverable by a prevailing FEHA defendant even if the lawsuit was not frivolous, groundless, or unreasonable.^{n224.3}

If an employer makes a pre-trial settlement offer pursuant to *Code of Civil Procedure Section 998*, and the plaintiff fails to recover a more favorable judgment at trial, the plaintiff may not recover post-offer costs and must pay the employer's costs from the time of the offer.ⁿ²²⁵ In addition, the court or arbitrator has discretion to require the plaintiff to pay a reasonable sum to cover the costs of the services of expert witnesses who are not regular employees of any party, actually incurred by the defendant and reasonably necessary for preparation for trial or arbitration and/or during trial or arbitration.ⁿ²²⁶ In a tort action, including an FEHA action, the plaintiff will be considered to have obtained a more favorable judgment if the damages award *plus* the plaintiff's pre-offer attorney's fees and costs exceed the employer's final settlement offer.ⁿ²²⁷ However, Section 998's punitive provisions have no application to an informal settlement

offer made during the course of a confidential mediation session. To reduce a plaintiff's request for fees simply because the plaintiff rejected an informal settlement offer would be inconsistent with the incentives provided in FEHA to prosecute discrimination claims.n227.1

If an employer makes a pre-trial settlement offer pursuant to *Code of Civil Procedure Section 998*, and the employee accepts, the employee will be entitled to an award of attorney's fees as part of the costs award, unless the fees and costs are expressly excluded in the offer to compromise.n227.2

■ **CONSULTANT'S COMMENT:**

The attorney should maintain contemporaneous time records to support an application for an award of attorney's fees. *Commentary by Bill Lann Lee.*

In deciding whether to award a defendant attorneys' fees when plaintiff in a FEHA action fails to recover a more favorable judgment at trial than that in a settlement offer by defendant under § 998, the court has the same discretion, governed by the same standards, as in any decision as to whether to award the defendant attorneys' fees in a FEHA action regardless of the application of § 998. Section 998 does not grant greater rights to attorney's fees than those provided by the underlying statute; rather, section 998 merely expands the group of those who are treated as prevailing parties and who therefore may be entitled to attorneys' fees as prevailing parties under the relevant statute. Under FEHA, a prevailing defendant is entitled to attorneys' fees only if the action is deemed unreasonable, frivolous, or meritless.n227.3

A prevailing plaintiff is not required to claim expert witness fees under the FEHA within the same time constraints imposed by the California Rules of Court for filing a memorandum of costs.n227.4 In the absence of a specific rule applicable to the discretionary award of expert witness fees, a motion for the expert witness fees permitted under FEHA is timely if filed within the same time constraints as those applicable to a noticed motion for attorney fees.n227.5

For discussion of attorney's fee awards in Title VII actions, *see* § 43.10[9][f].

[9] FORM--Complaint for Violation of FEHA--General Form

[a] Comment

[i] Use of Form

The form set forth in [b], *below*, is a complaint for damages and injunctive relief for violation of the FEHA.n228 The form is intended to be a generalized complaint that contains the basic allegations required in any complaint for violation of the FEHA. As an illustration of a factual basis for a complaint for discrimination, the complaint alleges that the plaintiff was terminated from his or her employment because of his or her FEHA-protected characteristic. For examples of allegations of other types of conduct prohibited by the FEHA, *see* [10], *below*. In an appropriate case, those allegations may be substituted for Paragraphs 9-12 in the general form *below*.

Plaintiff must serve a copy of the complaint on the principal offices of the DFEH and the FEHC.n229 If plaintiff fails to do so, he or she may be ordered to comply with this requirement.n230

■ **CONSULTANT'S COMMENT:**

In most cases, plaintiffs plead FEHA as one of several causes of action in tort or contract in order to maximize the availability of remedies. Alternative causes of action may be of particular significance in issues of limitations periods and availability of jury trial. *Commentary by Bill Lann Lee.*

[ii] Allegations

The complaint must contain certain allegations generally required of a civil complaint, or it is subject to a demurrer under *Code of Civil Procedure section 430.10*. A civil complaint under the FEHA must allege specific facts sufficient to constitute a cause of action for discrimination or retaliation.ⁿ²³¹

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

It is good practice to append a copy of the FEHA charge and incorporate its details by reference. Plaintiff may also wish to append to the complaint a copy of the DFEH notice of right to sue. *Commentary by Mary C. Dunlap.*

Defendants named in the complaint must be employers, employment agencies, labor organizations, or others subject to suit under the FEHA.ⁿ²³² Additionally, the plaintiff may not name as a defendant any person or entity not previously named in the FEHA administrative charge.ⁿ²³³

The complaint under the FEHA must also allege exhaustion of administrative remedies.ⁿ²³⁴ An FEHA complaint that fails to allege the timely filing of the prerequisite DFEH chargeⁿ²³⁵ and issuance of a DFEH right-to-sue notice within one year prior to the date of filing of the civil complaintⁿ²³⁶ is subject to dismissal.ⁿ²³⁷ One line of cases holds that these administrative prerequisites are jurisdictional,ⁿ²³⁸ but another line of cases considers them to operate as statutes of limitation on the right to sue.ⁿ²³⁹ The allegations of the civil complaint need not necessarily be identical to those set forth in the DFEH charge, as long as they are "like or related to" the allegations in the administrative complaint, so that the DFEH investigation could reasonably have extended to the allegations contained in the civil complaint.ⁿ²⁴⁰

However, a right-to-sue notice is not required if the suit is brought pursuant to *Gov. Code § 12965(c)*, which authorizes an employer to elect to transfer an administrative action to court if the accusation contains a prayer for damages for emotional injuries as a component of actual damages, or for administrative fines, or for both.ⁿ²⁴¹ In such a case, the DFEH dismisses the accusation and files, or elects to have the Attorney General file, the action on behalf of the complaining party as the real party in interest.ⁿ²⁴²

The form complaint contains the following allegations: (1) defendant's coverage by the FEHA (Paragraph 1);ⁿ²⁴³ (2) an optional "DOE" allegation (Paragraph 2); (3) an optional agency allegation (Paragraph 3); (4) an allegation establishing venue (Paragraph 4);ⁿ²⁴⁴ (5) residence and capacity of plaintiff to sue (Paragraphs 5 and 6);ⁿ²⁴⁵ (6) specific conduct of defendant that violated the FEHA (example used here is termination of employment because of FEHA-protected characteristic) (Paragraphs 7-11);ⁿ²⁴⁶ (7) defendant's discriminatory actions proximately caused injury and damages to plaintiff (Paragraphs 12-14);ⁿ²⁴⁷ including an optional paragraph requesting punitive damages (Paragraph 15);ⁿ²⁴⁸ (8) a request for injunctive relief, such as reinstatement or retroactive seniority (Paragraph 16);ⁿ²⁴⁹ and (9) exhaustion of administrative remedies by plaintiff (Paragraphs 17 and 18).ⁿ²⁵⁰

[iii] Discriminatory Termination From Employment

As noted in [i] and [ii], *above*, the factual example set forth in the form in [b], *below*, is based on the plaintiff's discriminatory termination from employment. This form of discrimination, prohibited by *Government Code Section 12940(a)*, has been the subject of numerous cases under the FEHA.ⁿ²⁵¹

For general discussion of discriminatory termination from employment, *see* Ch. 41, Pt. D.

[b] Form

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____, [name],
Plaintiff,

)

)

NO. _____

vs. _____ [name(s)], Defendant(s).) COMPLAINT FOR DAMAGES AND INJUNCT-
) IVE RELIEF FOR EMPLOYMENT DISCRIMINA-
) TION
) (Fair Employment and Housing Act)
 (Civ. Code §§ 3294, 3333, 3422; Code Civ. Proc. §
 526; Gov. Code §§ 12940, 12965(b))

Plaintiff alleges:

1. Defendant _____ [name] is [a corporation organized and existing under the laws of the State of _____ and is] an entity subject to suit under the California Fair Employment and Housing Act, *Government Code Section 12900 et seq.* (hereafter, the FEHA), in that defendant is _____ [specify facts showing that defendant is subject to suit under FEHA (*Gov. Code §§ 12926(d), (e), (g), 12940*), e.g., an employer who regularly employs five or more persons].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by the aforementioned defendants.)]

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants and, in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment.]

4. _____ [Allege facts showing proper venue under *Gov. Code § 12965(b)*, e.g., The unlawful employment practice(s) complained of herein occurred in _____ County].

5. Plaintiff _____ [name] is an adult person and a resident of the County of _____, State of California.

6. Plaintiff is a _____ [state plaintiff's membership in group protected by statute against which discrimination is claimed, e.g., black person, female, disabled person, person over age of 40 years, etc.].

[Paragraphs 7-10, below, set forth specific allegations]
 of discrimination based on termination of employment.
 Other allegations of discrimination based on different
 grounds may be substituted or added here.
 See Forms set forth in [10], below.]

7. On _____ [date], plaintiff was hired by defendant _____ [name of employer] in the capacity of _____ [specify plaintiff's position, e.g., cook]. On _____ [date], defendant terminated plaintiff's employment.

8. At all times herein mentioned, plaintiff was qualified for the position of _____ [specify] with defendant _____ [name of employer] in that _____ [specify facts indicating plaintiff's qualification for job: positive performance evaluations, merit raises, etc.].

9. The fact that plaintiff is a _____ [specify protected characteristic on which claim of discrimination is based, e.g., black person, female, disabled person, person over age of 40 years, etc.] was a substantial factor in the defendant's decision to terminate plaintiff's employment. Defendant _____ [intentionally] terminated plaintiff because of plaintiff's _____ [specify protected characteristic, e.g., race, sex, etc.]. The facts on which plaintiff bases this conclusion include _____ [specify facts from which conclusion of discrimination is drawn, including, but not limited to, statements of discriminatory intent, statistical evidence showing absence or paucity or disproportionately low number of plaintiff's group in defendant's employ, and/or in position held by plaintiff, evidence of policies or practices of defendant regarding employment of persons having characteristic for which plaintiff claims discrimination, admissions of employer or agents of employer regarding discriminatory attitude or outlook or hostility based on protected characteristic that is directed toward plaintiff or protected group. If case is based on disparate-impact analysis, also set forth facts showing facially neutral policy that had adverse impact on plaintiff, etc.].

[10. Defendant stated that plaintiff's termination of employment was due to _____ (state reason(s)). This/These reason(s) is/are a pretext for discrimination on account of plaintiff's _____ (specify protected characteristic on which discrimination is claimed, e.g., sex), in that _____ (set forth all facts that tend to show that defendant's reason is not real reason for termination or refusal to rehire, including inconsistent explanations provided by defendant for employment decision; others similarly situated to plaintiff were not terminated or were offered rehiring; statements of hostility or bias were made toward plaintiff as a person in a protected group, etc.).]

11. Defendant's discriminatory action(s) against plaintiff, as alleged above, constituted unlawful discrimination in employment on account of _____ [specify, e.g., sex, race, etc.], in violation of _____ [specify relevant section(s) of FEHA that plaintiff claims were or are being violated, e.g., Government Code Section 12940(a)].

12. As a proximate result of defendant's discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered the loss of the wages/salary, benefits, and additional amounts of money plaintiff would have received if _____ [specify, e.g., plaintiff had not been terminated from his/her position with defendant _____ (name of employer)]. As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ [in the amount of \$ _____ or in an amount according to proof].

[13. As a further proximate result of defendant's discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered the intangible loss of such employment-related opportunities as _____ (specify, e.g., experience in the position from which plaintiff was terminated). As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ (in the amount of \$ _____ or in an amount according to proof).]

[14. As a further proximate result of defendant's discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered humiliation, mental anguish, and emotional and physical distress, and has been injured in mind (and body) as follows: _____ (describe injury). As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ (in the amount of \$ _____ or in an amount according to proof).]

[15. The above-recited actions of defendant in terminating plaintiff's employment were done with malice, fraud, or oppression, and in reckless disregard of the plaintiff's rights under the FEHA. Specifically, _____ (set forth facts on showing malice, fraud, or oppression, within the meaning of Civ. Code § 3294).]

[16. No adequate remedy exists at law for the injuries suffered by plaintiff herein, insofar as the employment

opportunity that defendant has denied to plaintiff cannot be secured absent injunctive relief. If this court does not grant injunctive relief of the type and for the purpose specified below, plaintiff will suffer irreparable injury. Therefore, plaintiff requests the following injunctive relief: _____ (specify nature and extent of injunctive relief sought, *e.g.*, reinstatement to the employment position plaintiff previously held before plaintiff was terminated from employment).]

17. On _____ [date that appears on copy of DFEH charge at bottom of first page of charge], and within one year of the date of discrimination herein alleged against plaintiff by defendant, plaintiff filed a charge of discrimination with the California Department of Fair Employment and Housing (hereafter, DFEH). A copy of this charge is appended hereto, marked "Exhibit _____," and is incorporated by this reference as though fully set forth.

18. On _____ [date that appears at head of notice of right of action issued to charging party by DFEH], the DFEH issued to plaintiff a notice of right to bring a civil action based on the charge that is "Exhibit _____" to this complaint. A copy of this notice of right of action is appended hereto, marked "Exhibit _____," and is incorporated by this reference as though fully set forth.

WHEREFORE, plaintiff prays for judgment as follows:

1. For back pay, front pay, and other monetary relief _____ [in the sum of \$ _____ or according to proof];

[2. For general damages _____ (in the sum of \$ _____ or according to proof);]

[3. For punitive damages in an amount appropriate to punish defendant for its wrongful conduct and set an example for others;]

4. For interest on the sum of damages awarded, calculated from _____ [date that discrimination first began] to the date of judgment;

[5. For preliminary and permanent injunctive relief as specified in Paragraph 18, above;]

6. For reasonable attorney's fees and costs, including expert witness fees, pursuant to *Government Code Section 12965(b)*;

7. For costs of suit herein incurred; and

8. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff

[Add verification, if desired
(see *Code Civ. Proc.* §§ 446, 2015.5).]

[10] Specific Allegations of Policies, Practices, and Actions Constituting Violations of FEHA

[a] FORM--Allegations of Discriminatory Failure or Refusal to Hire

[i] Comment

The form set forth in [ii], *below*, contains allegations relating to the discriminatory failure or refusal of an employer to hire a person because of that person's protected characteristic under the FEHA.ⁿ²⁵² In an appropriate case, these allegations may be used in place of the allegations in Paragraphs 7-10 of the general complaint for violation of the FEHAⁿ²⁵³ set forth in [9][b], *above*.

Failure or refusal to hire or employ a person because of race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition,ⁿ²⁵⁴ marital status, sex, and sexual orientation, or age over 40 years violates the FEHA.ⁿ²⁵⁵ If the refusal or failure to hire results from a neutral policy that has a disparate impact on plaintiff as a member of a protected group (that is, persons of a particular sex, race, or other characteristic), the elements of disparate impact should be pleaded.ⁿ²⁵⁶

The second alternative to Paragraph 1, *below*, pertains to a situation in which the plaintiff did not apply for the position, because the alleged discriminatory policy deterred plaintiff from applying for the position. Actual deterrence can be the basis for an action for failure to hire; however, a deterred applicant seeking to establish discriminatory refusal to hire must make a more exacting showing than an actual applicant. A deterred applicant must show that he or she would have applied for the position had it not been for the discriminatory practice.ⁿ²⁵⁷ Individuals who without coercion or intimidation withdraw from the application process before being interviewed, tested, or hired, may not have a cause of action for discriminatory failure to hire under the FEHA.ⁿ²⁵⁸ For discussion of discriminatory preemployment practices, *see* Chapter 41, Part C.

[ii] Form Allegations of Discriminatory Failure or Refusal to Hire**[EITHER]**

1. On _____ [date], plaintiff applied for the position of _____ [specify, *e.g.*, cook] with defendant _____ [name of employer].

[OR]

1. On _____ [date], _____ [name of employer] advertised an opening for the position of _____ [specify]. Plaintiff wanted to apply for that position, but he/she did not apply for the position because he/she knew that it would be futile for him/her to do so because he/she is a _____ [specify plaintiff's membership in group protected by statute against which discrimination is claimed, *e.g.*, black person, female, disabled person, person over age of 40 years, etc.]. _____ [Set forth specific reasons why plaintiff knew his/her application for position would be futile because of protected characteristic, including previous rejected applications by plaintiff for positions with defendant, knowledge of rejection of other qualified applicants having same protected characteristic as plaintiff, knowledge that defendant hires only persons of certain background, etc.]

[EITHER]

2. Plaintiff was in all respects fully qualified for the position of _____ [specify] in that _____ [specify qualifications that defendant required, if any, and qualifications that plaintiff possessed for position].

[OR]

2. Defendant imposed the following qualifications for the position of _____ [specify]:
 _____ [list any qualifications for which plaintiff was not qualified because of plaintiff's protected characteristic, including height-weight requirements, etc.]. Plaintiff was not technically qualified for the position, because the aforesaid qualification excluded plaintiff because of plaintiff's _____ [specify protected characteristic, e.g., sex]. The qualification that plaintiff did not possess and that was required by defendant _____ [was intentionally imposed by defendant to exclude plaintiff on account of his/her _____ (specify protected group characteristic) or has a disparate adverse impact on plaintiff and other persons who are _____ (specify membership in protected group)]. Plaintiff was in all other respects fully qualified for the position.

[CONTINUE]

3. [Despite plaintiff's qualifications for the aforesaid position,] [D]efendant failed and refused to hire plaintiff for the position, and defendant _____ [continued to seek persons (of plaintiff's qualifications) for that position or hired another person for the position who was no more qualified than plaintiff].

[b] FORM--Allegations of Discriminatory Failure or Refusal to Promote, Train, or Transfer

[i] Comment

The form set forth in [ii], *below*, contains allegations relating to the discriminatory failure or refusal of an employer to promote, train, transfer, or afford some other discrete, identifiable job opportunity to an employee because of that person's protected characteristic under the FEHA.ⁿ²⁵⁹ Several reported FEHA cases concern this form of discrimination.ⁿ²⁶⁰ In an appropriate case, these allegations may be used in place of the allegations in Paragraphs 7-10 of the general complaint for violation of the FEHAⁿ²⁶¹ set forth in [9][b], *above*. For discussion of discrimination based on failure to promote, train, or transfer an employee, *see* Chapter 41, Part D.

[ii] Form Allegations of Discriminatory Failure or Refusal to Promote, Train, or Transfer

[EITHER]

1. On _____ [date], plaintiff applied to defendant _____ [name of employer] for _____ [specify employment opportunity applied for, e.g., promotion to Laboratory Assistant II position].

[OR]

1. On _____ [date], _____ [name of employer] _____ [specify employment opportunity, e.g., listed an opening for the promotional position of Laboratory Assistant II]. Plaintiff wanted to apply for _____ [specify employment opportunity, e.g., promotion to the position of Laboratory Assistant II], but he/she did not apply, because he/she knew that it would be futile for him/her to do so because he/she is a _____ [specify plaintiff's membership in group protected by statute against which discrimination is claimed, e.g., black person, female, disabled person, person over age of 40 years, etc.].
 _____ [Set forth specific reasons why plaintiff knew his/her application for specific employment opportunity, such as promotion to position, would be futile because of protected characteristic, including previous

rejected applications by plaintiff for promotions from defendant, knowledge of rejection of other qualified applicants having same protected characteristic as plaintiff for specific employment opportunity such as promotion, etc.]

[EITHER]

2. Plaintiff was in all respects fully qualified for _____ [specify employment opportunity, e.g., promotion to the position of Laboratory Assistant II] in that _____ [specify qualifications that defendant required, if any, and qualifications that plaintiff possessed for employment opportunity, such as promotion].

[OR]

2. Defendant imposed the following qualifications for _____ [specify employment opportunity, e.g., promotion to the position of Laboratory Assistant II]: _____ [list any qualifications for which plaintiff was not qualified because of plaintiff's protected characteristic, including height-weight requirements, etc.]. Plaintiff was not technically qualified for _____ [specify employment opportunity, e.g., promotion to the position of Laboratory Assistant II], because the aforesaid qualification excluded plaintiff because of plaintiff's _____ [specify protected characteristic, e.g., sex]. This qualification, which plaintiff did not possess and which was required by defendant, _____ [was intentionally imposed by defendant to exclude plaintiff on account of his/her _____ (specify protected group characteristic) or had a disparate adverse impact on plaintiff and other persons of plaintiff's (specify protected group characteristic)]. Plaintiff was in all other respects fully qualified for _____ [specify employment opportunity].

[CONTINUE]

3. [Despite plaintiff's qualifications for _____ (specify employment opportunity, e.g., promotion to the position of Laboratory Assistant II),] [D]efendant failed and refused to _____ [specify, e.g., promote plaintiff to the position sought by Plaintiff] [, and defendant _____ (continued to seek persons (of plaintiff's qualifications) for _____ (specify, e.g., promotion to that position) or selected another person who was no more qualified than plaintiff)].

[c] FORM--Allegations of Constructive Discharge Due to Discrimination or Retaliation in Violation of FEHA

[i] Comment

The form set forth in [ii], *below*, contains allegations relating to the constructive discharge of plaintiff due to the employer's discrimination or retaliation in violation of FEHA.ⁿ²⁶² In an appropriate case, these allegations may be used in place of the allegations in Paragraphs 7-10 of the general complaint for violation of the FEHA set forth in [9][b], *above*.

The concept of constructive discharge, born in labor relations cases,ⁿ²⁶³ holds that a person who leaves his or her job because working conditions are unbearable to any reasonable person may claim that those conditions forced him or her to resign, and may impose liability on the employer for this outcome. A constructive discharge can occur when discrimination is established, when the employer knows or should know that resignation is likely to result from its treatment of an employee, and when "working conditions have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."ⁿ²⁶⁴ The California Fair Employment and Housing Commission in a number of its administrative rulings has used the concept of discriminatory constructive

discharge.ⁿ²⁶⁵ The California courts of appeal have also applied the concept in actions alleging employment discrimination.ⁿ²⁶⁶ The California Supreme Court has held that a constructive discharge in violation of a fundamental public policy gives rise to a tort cause of action in favor of the terminated employee.ⁿ²⁶⁷ However, the Court has also held that a constructive discharge requires that the plaintiff show that a reasonable person faced with alleged intolerable working conditions or employer actions would have had no reasonable alternative except to quit and that the employer had actual, rather than merely constructive, knowledge of the intolerable conditions.ⁿ²⁶⁸ For further discussion of constructive discharge due to discrimination, *see* Chapter 41, Part D.

[ii] Form

1. During the period from _____ [*date that intolerable working conditions began*], until _____ [*date of resignation or other departure from employment*], defendant took the following actions regarding plaintiff: _____ [*state each circumstance on which plaintiff bases claim that his/her working conditions were rendered intolerable by reason of discrimination, retaliation, or both, in violation of FEHA.*]

2. The actions alleged in Paragraph _____, *above*, caused plaintiff to be constructively discharged from his/her employment, in that defendant _____ [*intentionally created and/or knowingly permitted*] the above-described working conditions, which were so intolerable or aggravated at the time of plaintiff's resignation that a reasonable employer would have realized that a reasonable person in plaintiff's position would be compelled to resign. As a proximate result of these working conditions, plaintiff did resign from his/her employment on _____ [*date*].

[d] FORM--Allegations of Retaliation in Violation of FEHA

[i] Comment

The form set forth in [ii], *below*, contains allegations that an employer took retaliatory actions against an employee because the employee opposed unlawful practices under the FEHA or because the employee filed a complaint, testified, or assisted in any proceeding under the FEHA.ⁿ²⁶⁹ In an appropriate case, these allegations may be used in place of, or in addition to, the allegations in Paragraphs 7-10 of the general complaint for violation of the FEHAⁿ²⁷⁰ set forth in [9][b], *above*.

A plaintiff must set forth a sufficient factual basis in the complaint to support the legal conclusion of retaliation.ⁿ²⁷¹ For full discussion of unlawful retaliation under equal employment opportunity laws, *see* Chapter 41, Part F.

[ii] Form Allegations of Retaliation in Violation of FEHA

1. On _____ [*date*], plaintiff took the following action: _____ [*describe action taken by plaintiff for which employer allegedly retaliated, e.g., Plaintiff filed a charge of discrimination with the California Department of Fair Employment and Housing*].

2. On _____ [*date*], defendant _____ [*name of employer*] took the following action(s) against plaintiff: _____ [*describe in detail retaliatory action(s) taken by defendant, e.g., defendant denied plaintiff a promotion to _____ (position), a position for which plaintiff was fully qualified*]. Defendant's action(s) was/were caused by and was/were in retaliation for the protected activity of plaintiff set forth in Paragraph _____, *above*, in that _____ [*state all facts showing causal link between protected activity of plaintiff and alleged retaliatory action of defendant, including statements of defendant's motives, proximity in time, inconsistent statements or explanations by defendant for actions taken, admissions of causal relationship between defendant's actions and plaintiff's actions, discriminatory nature of treatment of plaintiff vis-a-vis co-workers or others similarly situated, etc.*]

[e] FORM--Allegations of Refusal to Accommodate Religious Creed**[i] Comment**

The form set forth in [ii], *below*, contains allegations relating to an employer's violation of the FEHA by refusing to accommodate an employee's or applicant's religious creed.ⁿ²⁷² In an appropriate case, these allegations may be used in place of, or in addition to, the allegations in Paragraphs 7-10 of the general complaint for violation of the FEHAⁿ²⁷³ set forth in [9][b], *above*. If the employer has otherwise discriminated against the employee on the basis of religion (for example, by failing to promote him or her),ⁿ²⁷⁴ the employee may bring an action based on such discrimination, using the allegations set forth in the general complaint in [9][b], *above*, as well as any of the allegations set forth in [a][ii], [b][ii], [c][ii], and [d][ii], *above*, as appropriate.

Employers and labor unions must reasonably accommodate the sincerely held religious beliefs of any applicant or employee.ⁿ²⁷⁵ However, such accommodation cannot impose an undue hardship on the defendant.ⁿ²⁷⁶ Paragraph 3, in the form in [ii], *below*, is an optional paragraph stating that accommodation of plaintiff's religious beliefs or practices would not constitute an undue hardship on defendant.

For further discussion of religious discrimination and accommodation, *see* Chapter 41, Parts B and D.

[ii] Form Allegations of Refusal to Accommodate Religious Creed

1. Plaintiff's religious creed requires that _____ [*state sincerely held religious belief or creed that defendant failed to accommodate, e.g., plaintiff observe the Sabbath by resting and going to church on Sundays*].
2. From _____ [*date*], until _____ [*date*], defendant _____ [*name of employer*] refused to accommodate to plaintiff's religious beliefs and practices in the following manner:
 _____ [*state actions taken by defendant or action defendant failed to take that constituted refusal to accommodate religious creed, e.g., defendant insisted that plaintiff work on Sundays and threatened to discharge plaintiff if he/she did not work then*].
- [3. Accommodation of plaintiff's religious beliefs and practices would not have imposed an undue hardship on defendant.]

[f] FORM--Allegations of Refusal to Accommodate Physical or Mental Disability or Medical Condition**[i] Comment**

The form set forth in [ii], *below*, contains allegations relating to an employer's refusal to accommodate an employee having a disability or medical condition.ⁿ²⁷⁷ In an appropriate case, these allegations may be used in place of, or in addition to, the allegations in Paragraphs 7-10 of the general complaint for violation of the FEHAⁿ²⁷⁸ set forth in [9][b], *above*. In addition, if the employer has otherwise discriminated against the employee on the basis of the employee's disability or medical condition,ⁿ²⁷⁹ the employee may bring an action based on such discrimination, using the allegations set forth in the general complaint in [9][b], *above*, as well as any of the allegations set forth in [a][ii], [b][ii], [c][ii], and [d][ii], *above*, as appropriate.

Several courts have interpreted the provisions of the FEHA governing nondiscrimination against disabled persons and accommodation of disability.ⁿ²⁸⁰ "Medical condition," as used in the FEHA, includes (1) genetic characteristics and (2) any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, on the basis of competent medical evidence.ⁿ²⁸¹ In addition, the term includes a perception that a person has a medical condition, or that a person is associated with someone who has or is perceived to have a medical condition.ⁿ²⁸² For discussion of discrimination on the basis of disability or medical condition, and the requirement of

reasonable accommodation, *see* Chapter 41, Parts B and D.

Paragraph 4, in the form in [ii], *below*, is an optional paragraph stating that accommodation of plaintiff's physical or mental disability or medical condition would not constitute an undue hardship on defendant. "Undue hardship" is a defense to the duty to accommodate the disability or medical condition of an employee.ⁿ²⁸³

[ii] Form Allegations of Refusal to Accommodate Physical or Mental Disability or Medical Condition

1. Plaintiff has the following _____ [physical disability *or* mental disability *or* medical condition]:
_____ [*specify disability, mental disability or medical condition that defendant refused to accommodate*].

2. From _____ [date], until _____ [date], defendant _____ [name of employer] refused to reasonably accommodate to plaintiff's needs based on his/her _____ [physical disability *or* mental disability *or* medical condition] in the following manner: _____ [*state actions taken by defendant or action defendant failed to take that constituted refusal to accommodate physical disability, mental disability or medical condition, e.g., Defendant would not accommodate plaintiff's need to leave work when necessary for treatment of plaintiff's medical condition*].

3. At all times mentioned herein, plaintiff was willing and able to perform the duties and functions of his/her position if such reasonable accommodation had been made by defendant. At no time would the performance of the functions of the employment position, with a reasonable accommodation for plaintiff's _____ [physical disability *or* mental disability *or* medical condition], have been a danger to plaintiff's or any other person's health or safety.

[4. Accommodation of plaintiff's needs based on his/her _____ (physical disability *or* mental disability *or* medical condition) would not have imposed an undue hardship on defendant.]

[g] FORM--Allegation of Harassment in Violation of FEHA

[i] Comment

The form set forth in [ii], *below*, contains allegations relating to harassment based on an employee's or applicant's race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, sexual orientation, or age over 40 years.ⁿ²⁸⁴ In an appropriate case, these allegations may be used in place of, or in addition to, the allegations in Paragraphs 7-10 of the general complaint for violation of the FEHAⁿ²⁸⁵ set forth in [9][b], *above*. It may also be combined with allegations of constructive discharge set forth in [c][ii], *above*, if appropriate.

An employer is liable for harassment not only by its agents and supervisors, but also by other employees and nonemployees if the employer (or its agents or supervisors) knows or should have known of the harassment and fails to take immediate and appropriate corrective action,ⁿ²⁸⁶ or if it fails to take all reasonable steps to prevent harassment from occurring.ⁿ²⁸⁷ The FEHC had interpreted the FEHA to encompass and to prohibit harassment even before the FEHA expressly prohibited it.ⁿ²⁸⁸ A number of FEHC decisions have addressed this prohibition in the context of sexual harassment.ⁿ²⁸⁹

A person who observes harassing conduct but is not the actual object of harassment may claim environmental harassment as long as he or she establishes that the conduct permeated his or her own direct work environment. A plaintiff must establish that he or she personally witnessed harassing conduct, and that it was in his or her immediate work environment. The plaintiff must plead sufficient facts to establish a nexus between alleged harassment of others, his or her observations of the harassing conduct, and the work context in which it occurred.ⁿ²⁹⁰ In one such case, a

court held that a plaintiff did not state facts sufficient to establish a cause of action because her complaint only described in general terms what acts occurred and where they occurred, and only alleged in a conclusory manner that the plaintiff saw the defendant sexually harass others. The complaint was deficient because it did not indicate the frequency or intensity of the acts or the circumstances under which the plaintiff observed them.ⁿ²⁹¹

For full discussion of the prohibition against harassment, *see* Chapter 41, Part D.

[ii] Form Allegation of Harassment in Violation of FEHA

[EITHER]

1. _____ [Defendant _____ (*name of employer*) and/or Defendant's agent(s) and supervisor(s) _____ (*name(s)*)] engaged in the following actions with the intent of harassing plaintiff on account of his/her _____ [*specify protected group characteristic, e.g., race*]:
 _____ [*specify in detail actions taken by defendant that constitute harassment*].

[AND/OR]

1. Defendant's employee(s) _____ [*name(s)*] engaged in the following actions with the intent of harassing plaintiff on account of his/her _____ [*specify protected group characteristic, e.g., race*]:
 _____ [*specify in detail actions taken by defendant that constitute harassment*].
 _____ [_____ (Defendant and/or Defendant's agent(s) and supervisor(s) _____ (*name(s)*)) knew or should have known of these harassing actions because _____ (*state basis of actual or constructive knowledge of defendant, its agents, and/or its supervisors*)).
 Despite defendant's _____ (actual or constructive) knowledge of the above-mentioned harassment, (and the knowledge of his/her/its supervisors and agents,) defendant failed to take immediate and appropriate corrective action to stop the harassment *and/or* Before the harassment occurred, defendant failed to take all reasonable steps to prevent such harassment from occurring].

[h] FORM--Allegation of Discrimination on Account of Pregnancy

[i] Comment

The form set forth in [ii], *below*, contains an allegation relating to discrimination by an employer against a female employee because of pregnancy, childbirth, or any related medical condition.ⁿ²⁹² In an appropriate case, this allegation may be used in place of the allegations in Paragraphs 7-10 of the general complaint for violation of the FEHAⁿ²⁹³ set forth in [9][b], *above*.

In addition to prohibiting discrimination against female employees because of pregnancy, childbirth, or related medical condition,ⁿ²⁹⁴ *Government Code Section 12945* requires employers to grant unpaid leave to disabled pregnant employees for a reasonable period of time, not exceeding four months.ⁿ²⁹⁵ The United States Supreme Court held that the FEHA provision requiring unpaid leave and reinstatement is consistent with the nondiscrimination requirements in Title VII.ⁿ²⁹⁶

Government Code Section 12945 also requires that an employer comply with a pregnant employee's request, with the advice of her health care provider, for a reasonable accommodation or a transfer to a less strenuous or hazardous position for the duration of her pregnancy.ⁿ²⁹⁷

In addition, harassment because of pregnancy, childbirth, or related medical conditions is a form of prohibited sexual harassment under *Government Code Section 12940(j)*.n298

For full discussion of equal employment opportunity requirements relating to pregnancy and childbirth, *see* Chapter 41, Parts B and D.

[ii] Form Allegation of Discrimination on Account of Pregnancy

[EITHER]

1. From _____ [date], until _____ [date], defendant _____ [name of employer] engaged in the following actions: _____ [specify each and every act of alleged discrimination or harassment, including such acts as failure to promote, failure to select for training program, discharging plaintiff from employment or from training program, discrimination in compensation or in terms, conditions, or privileges of employment, etc., as a result of plaintiff's pregnancy, child birth, or related medical condition]. The above conduct constituted unlawful _____ [discrimination or harassment] against plaintiff on account of plaintiff's _____ [pregnancy and/or childbirth and/or medical condition related to _____ (pregnancy and/or childbirth)] in violation of Government Code Sections 12490(h)(1), (3)(C), 12945(a).

[AND/OR]

1. On _____ [date], plaintiff informed defendant _____ [name of employer], through his/her/its agent _____ [name] that plaintiff was pregnant, that plaintiff expected to give birth on or about _____ [date], and that plaintiff requested a leave of absence from her duties for a reasonable period of time, not exceeding _____ [specify period not exceeding four months], beginning on _____ [date], on account of such pregnancy and childbirth. _____ [Defendant refused and failed to grant plaintiff permission to take such leave, or any other reasonable leave of absence, in violation of *Government Code Section 12945(a)* or Defendant purported to grant plaintiff her request for a pregnancy leave of absence. On _____ (date), the date when plaintiff and defendant had agreed that plaintiff's leave would expire, plaintiff reported for work at the appointed time. However, defendant informed plaintiff that her job was no longer available and that no other comparable position for plaintiff was available at that time. Defendant's failure to reinstate plaintiff violated *Government Code Section 12945(c)(2)*].

[AND/OR]

1. On _____ [date], plaintiff informed defendant _____ [name of employer], through his/her/its agent _____ [name], that plaintiff was pregnant and that plaintiff, with the advice of her health care provider, requested a reasonable accommodation for the duration of her pregnancy: _____ [specify accommodation other than transfer, e.g., to avoid lifting 15 lbs. or more]. Defendant refused to make such an accommodation for the plaintiff, and this refusal violated *Government Code Section 12945(b)(1)*.

[AND/OR]

1. On _____ [date], plaintiff informed defendant _____ [name of employer],

through his/her/its agent _____ [name] , that plaintiff was pregnant and that plaintiff, with the advice of her doctor, requested a transfer to a less strenuous/hazardous position with defendant for the duration of her pregnancy because her present position was too strenuous/hazardous to plaintiff during her pregnancy, in that _____ [specify] . Defendant refused to make such a temporary transfer of plaintiff, even though such positions were available. Defendant would not have had to create additional employment that defendant would not otherwise have created, nor would defendant have had to discharge any other employee, transfer any employee with more seniority, or promote any employee who was not qualified to perform his or her job to place plaintiff in such a position. The defendant's refusal to grant plaintiff's request violated *Government Code Section 12945(b)*.

[i] FORM--Allegation of Improper Prohibition of Employee From Wearing Pants Based on Employee's Sex

[i] Comment

The form set forth in [ii], *below*, contains an allegation relating to an employer's violation of the FEHA by prohibiting an employee from wearing pants on account of the employee's sex.ⁿ²⁹⁹ Employers may, however, require employees in a particular occupation to wear a uniform or a costume while the employee is portraying a specific character or dramatic role.ⁿ³⁰⁰ Also, the FEHC may exempt an employer from the requirements of *Government Code Section 12947.5* for good cause shown.ⁿ³⁰¹ For discussion of dress codes generally, *see* Chapter 41, Part D.

[ii] Form

1. On _____ [date], defendant prohibited plaintiff from wearing pants to work for no reason other than the plaintiff's female gender. [Defendant did not and does not similarly prohibit male employees from wearing pants to work.] Defendant's actions are in violation of *Government Code Section 12947.5*.

[11] Common Grounds for Demurrer to FEHA Complaint

As discussed in [9][a][ii], *above*, a FEHA complaint may be subject to a demurrer under *Code of Civil Procedure Sections 430.10* and *430.30(a)*.

The most common grounds for demurrers to FEHA complaints include the following:

1. Failure to exhaust administrative remedies;ⁿ³⁰²
2. The naming of a party who was not named in the DFEH charge;ⁿ³⁰³
3. Insufficient facts to constitute a cause of action for violation of the FEHA;ⁿ³⁰⁴ and
4. Failure to file either the DFEH complaint or the civil action complaint within the time periods for filing those complaints under the FEHA.ⁿ³⁰⁵

[12] FORM--Answer to Complaint for Violation of FEHA--General Form

[a] Comment

The form set forth in [b], *below*, is an answer to a complaint for damages or injunctive relief for violation of the FEHA, containing the basic admissions, denials, and allegations for use in any answer for violation of the FEHA. For forms of affirmative defenses that may be added to the general form of answer, as appropriate, *see* [13], *below*.

The answer must contain (1) general or specific denials of the material allegations of the complaint that are controverted by the defendant, and (2) a statement of any new matter constituting a defense.ⁿ³⁰⁶ⁿ³⁰⁷ If the complaint is verified, the

answer must also be verified.ⁿ³⁰⁸ If the complaint is not verified, a general denial is sufficient but only puts in issue the material allegations of the complaint.ⁿ³⁰⁹ If the complaint is verified, the denial of the allegations must be made positively or according to the information and belief of the defendant.ⁿ³¹⁰ If the defendant has no information or belief on the subject sufficient to enable him or her to answer an allegation of the complaint, he or she may so state in his or her answer and place his or her denial on that ground.ⁿ³¹¹ A defendant may deny an allegation by reference to specific paragraphs or by express admission of certain allegations of the complaint, with a general denial of all allegations not so admitted.ⁿ³¹² A defendant also may deny certain allegations on information and belief, or for lack of sufficient information or belief, with a general denial of all allegations not so denied or expressly admitted.ⁿ³¹³ Any material allegation of the complaint that is not controverted by the answer is, for purposes of the action, deemed to be true.ⁿ³¹⁴

For additional general discussion of the format and rules relating to answers in civil actions, *see* California Forms of Pleading and Practice, Ch. 26, *Answers* (Matthew Bender).

[b] Form SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[or other as appropriate]

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	ANSWER TO COMPLAINT FOR DAMAGES
_____ [name(s)], Defendant(s).	)	AND INJUNCTIVE RELIEF FOR EMPLOYMENT
	)	DISCRIMINATION
	)	(Fair Employment and
	)	Housing Act)

Defendant answers the complaint and alleges as follows:

[EITHER, if complaint is unverified (general denial)]

Pursuant to *Code of Civil Procedure Section 431.30*, defendant _____ [name], in answer to plaintiff's unverified complaint, generally denies each and every allegation of the complaint and further specifically denies that plaintiff has suffered any injury or damages of any kind attributable in any way to an act or omission of defendant.

[OR, alternative answer for verified or unverified complaints]

1. Defendant _____ [admits or denies] that it is an employer as defined by the California Fair Employment and Housing Act, *Government Code Section 12926(d)*, as alleged in Paragraph _____ of plaintiff's complaint. Except as specifically admitted herein, defendant denies each and every other averment of said Paragraph _____.

2. Defendant _____ [admits or denies] that plaintiff _____ [was or is] an _____ [employee or applicant for employment], as alleged in Paragraph _____ of plaintiff's complaint. Except as specifically admitted herein, defendant denies each and every other averment of Paragraph _____.

3. Defendant _____ [admits or denies] that plaintiff is a _____ [state plaintiff's membership in group protected by statute against which plaintiff claimed discrimination, *e.g.*, black person, female,

disabled person, person over age of 40 years, etc.], as alleged in Paragraph _____ of plaintiff's complaint. Except as specifically admitted herein, defendant denies each and every other averment of Paragraph _____.

4. Defendant _____ [admits *or* denies] that the events alleged in Paragraph(s) _____ [- _____] of plaintiff's complaint occurred as alleged. Except as specifically admitted herein, defendant denies each and every other averment of Paragraph _____.

5. Defendant denies each and every allegation in Paragraph(s) _____ [- _____] of plaintiff's complaint [except that defendant admits that _____ (*specify*)].

6. Defendant is without sufficient information and belief to admit any of the allegations in Paragraph(s) _____ [- _____] of plaintiff's complaint, and on this basis, defendant denies each such allegation.

[7. Defendant denies each and every allegation contained in plaintiff's complaint that is not expressly admitted herein.]

[Insert affirmative defenses, if any. *see* [13], *below*.]

WHEREFORE, defendant prays judgment as follows:

1. That the complaint of plaintiff against defendant herein be dismissed;
2. That plaintiff take nothing by reason of his/her complaint;
3. That plaintiff be granted no relief in this action;
4. That defendant have judgment against plaintiff;
5. That defendant recover costs of suit incurred herein;
6. That defendant recover reasonable attorney's fees and costs, including expert witness fees, incurred herein, pursuant to *Government Code Section 12965(b)*; and
7. For such other relief as this court may deem just and proper.

_____ [*signature*]

Attorney for Defendant

[Add verification in superior court action, if complaint was verified. *see Code Civ. Proc. §§ 92(b), 446, 2015.5.*]

[13] Affirmative Defenses to Complaint for Violation of FEHA

[a] FORM--Affirmative Defense of Failure to Exhaust Administrative Remedies

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that the plaintiff failed to exhaust the requisite

administrative remedies under the FEHA.ⁿ³¹⁵ If plaintiff's failure to exhaust does not appear on the face of the complaint, defendant may raise this defect by way of an affirmative defense of failure to exhaust administrative remedies.ⁿ³¹⁶ If the defect appears on the face of the complaint, defendant may raise it by way of demurrer.ⁿ³¹⁷

When appropriate, this defense can be added to the general form of answer provided in [12][b], *above*.

[ii] Form

AS A _____ [specify, *e.g.*, FIRST] AFFIRMATIVE DEFENSE, defendant alleges that plaintiff has failed to exhaust the administrative remedies required under the Fair Employment and Housing Act, in that _____ [plaintiff has failed to file a timely complaint with the Department of Fair Employment and Housing, *or* for 90 days thereafter if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of its occurrence, *or* for up to one year following a rebutted presumption of the identity of the person's employer under *Government Code Section 12928*, *or* within one year from the date that plaintiff attained the age of majority, as required by *Government Code Section 12960* *and/or* plaintiff has failed to obtain a notice of the right to bring a civil action from the Department of Fair Employment and Housing, as required by *Government Code Section 12965(b)*].

[b] FORM--Affirmative Defense of Failure to File Within Limitation Period

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense that the plaintiff failed to file his or her complaint within the limitation periods of the FEHA.ⁿ³¹⁸ If the defect appears on the face of the complaint, defendant may raise it by way of demurrer.ⁿ³¹⁹ For discussion of statute of limitations, *see* [4], *above*.

When appropriate, this defense can be added to the general form of answer provided in [12][b], *above*.

[ii] Form

AS A _____ [specify, *e.g.*, FIRST] AFFIRMATIVE DEFENSE, defendant alleges that plaintiff's complaint herein is barred because he/she failed to file his/her _____ [administrative complaint with the Department of Fair Employment and Housing within one year after the date of the alleged unlawful acts complained of, *or* for 90 days thereafter if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of its occurrence, *or* for up to one year following a rebutted presumption of the identity of the person's employer under *Government Code Section 12928*, *or* within one year from the date that plaintiff attained the age of majority, as required by *Government Code Section 12960* *and/or* civil complaint in this action within one year after the date of the notice of right to file a civil action issued by the Department of Fair Employment and Housing, as required by *Government Code Section 12965(b)*].

[c] FORM--Affirmative Defense That Complaint Failed to State Cause of Action

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that the complaint fails to state a cause of action under the FEHA. The exact application of this affirmative defense will vary with the nature of the discrimination or retaliation alleged in the complaint. The complaint must set forth facts sufficient to constitute a cause of action, and the defect may be raised by demurrer or by affirmative defense in the answer.ⁿ³²⁰

When appropriate, this defense can be added to the general form of answer provided in [12][b], *above*.

[ii] Form

AS A _____ [specify, e.g., FIRST] AFFIRMATIVE DEFENSE, defendant alleges that the complaint does not state facts sufficient to constitute a cause of action in that _____ [specify particular deficiencies].

[d] FORM--Affirmative Defense That Plaintiff's Action Is Barred by Laches**[i] Comment**

The form set forth in [ii], *below*, is an affirmative defense stating that plaintiff's action should be barred because of undue delay in bringing the action that has caused prejudice to defendant ("laches"). As with Title VII, the FEHA is an equitable statute that is subject to equitable defenses such as laches. There is authority that lack of diligence may be a defense, where the claimant seeks to come within the concept of equitable tolling of one of the administrative time limitations under the FEHA.ⁿ³²¹ Delays on the part of the FEHC or the DFEH, however, do not give rise to the laches defense.ⁿ³²²

When appropriate, this defense can be added to the general form of answer provided in [12][b], *above*.

[ii] Form

AS A _____ [specify, e.g., FIRST] AFFIRMATIVE DEFENSE, defendant alleges that [even if plaintiff's action is not barred by the time limitations set forth in *Government Code Sections 12960 and 12965(b)*,] plaintiff's action should be barred by the doctrine of laches because plaintiff unreasonably delayed bringing his/her action against defendant, which substantially prejudiced defendant, in that _____ [specify].

[e] FORM--Affirmative Defense of Bona Fide Occupational Qualification (BFOQ)**[i] Comment**

The form set forth in [ii], *below*, is an affirmative defense stating that a bona fide occupational qualification (BFOQ) exists.ⁿ³²³ An employer asserting the BFOQ defense can justify its exclusion of a protected group because the individuals in that group would not be able to perform the particular job safely and efficiently, and the business operation would thus be undermined.ⁿ³²⁴ For discussion of the BFOQ defense, *see* Chapter 41, Part E.

When appropriate, this defense can be added to the general form of answer provided in [12][b], *above*.

[ii] Form

AS A _____ [specify, e.g., FIRST] AFFIRMATIVE DEFENSE, defendant alleges that the practice alleged by plaintiff to be discriminatory is justified by a bona fide occupational qualification, in that _____ [specify, e.g., all or substantially all _____ (specify protected class, e.g., women) could not perform the duties of the position of _____ (specify) in a safe and efficient manner, because _____ (specify reasons), and the essence of defendant's business operation would therefore be undermined if defendant were required to employ _____ (specify protected class, e.g., women) in such positions].

[f] FORM--Affirmative Defense Based on Business Necessity**[i] Comment**

The form set forth in [ii], *below*, is an affirmative defense stating that the defense of business necessity exists. This defense applies to a disparate-impact challenge of a facially neutral policy or practice of the defendant,ⁿ³²⁵ if the employer can show that the policy or practice is necessary to the safe and efficient operation of the business and that no other policy with a lesser discriminatory impact would serve as well.ⁿ³²⁶

When appropriate, this defense can be added to the general form of answer provided in [12][b], *above*. For further discussion of the business-necessity defense, *see* Chapter 41, Part E.

[ii] Affirmative Defense Based on Business Necessity

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that the practice complained of by plaintiff, namely _____ [*specify practice alleged in complaint to be discriminatory*], is permissible and is not a violation of the Fair Employment and Housing Act, because an overriding legitimate business purpose exists, namely _____ [*specify business purpose*], which makes this practice necessary to the safe and efficient operation of defendant's business. This practice fulfills such a business purpose and is the only reasonable practice that could accomplish this purpose [in that _____ (*add facts documenting necessity of practice, if desired*)].

[g] FORM--Affirmative Defense Based on Job-Relatedness

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense to a disparate-impact challenge of a facially neutral selection procedure or test. The defense asserts that the challenged procedure or test was "job-related," which means sufficiently related to an essential function of the job in question to warrant its use notwithstanding its disparate impact on the protected class to which plaintiff belongs.ⁿ³²⁷

When appropriate, this defense can be added to the general form of answer provided in [12][b], *above*. For discussion of the defense of job-relatedness generally, *see* Chapter 41, Part E.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that defendant's practice of _____ [*specify testing or selection device claimed by plaintiff to have adverse impact on plaintiff*] is permissible under the Fair Employment and Housing Act because it is related to an essential function of the job in question, in that _____ [*state facts showing relationship of defendant's procedure to job*].

[h] FORM--Affirmative Defense That Security Regulations Mandate Employment Practice

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that although the employment practice complained of may operate in a discriminatory manner, it conforms to applicable federal or state security regulations.ⁿ³²⁸

When appropriate, this defense can be added to the general form of answer provided in [12][b], *above*. For discussion of security regulations as a defense, *see* Chapter 41, Part E.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that the employment practice that plaintiff alleges operates in a discriminatory manner towards plaintiff is a lawful employment

practice because it conforms to the following security regulations established by government of _____
[the United States *and/or* the State of California]: _____ [*cite specific security regulations*].

[i] FORM--Affirmative Defense of Affirmative Action Plan, Nondiscrimination Plan, Court Order, or Other Legal Mandate

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that the challenged employment practice was implemented pursuant to a lawful affirmative action plan, nondiscrimination plan, court order, or other legal mandate.n329

When appropriate, this defense can be added to the general form of answer provided in [12][b], *above*. For discussion of this defense, *see* Chapter 41, Part E, and Chapter 44.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that the employment practice complained of by plaintiff, namely _____ [*specify*] is lawful notwithstanding any showing of discrimination, because it conforms to _____ [*specify, e.g., a lawful affirmative action plan*]. A copy of this _____ [*specify, e.g., affirmative action plan*] is appended hereto, marked "Exhibit _____," and is incorporated by this reference as though fully set forth.

[j] FORM--Affirmative Defense That Employee or Applicant Cannot Perform Duties

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that the plaintiff cannot perform the essential functions required of the position.n330 This defense may arise when a plaintiff claims discrimination based on physical or mental disability or medical condition.n331

When appropriate, this defense can be added to the general form of answer provided in [12][b], *above*. For discussion of this defense generally, *see* Chapter 41, Parts B and E.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that defendant _____ [refused to hire *or* discharged] plaintiff because plaintiff, as a result of his/her _____ [disability *or* medical condition], is unable to perform the essential duties of the position _____ [for which he/she applied *or* from which he/she was discharged], even with reasonable accommodation.

[k] FORM--Affirmative Defense That Employee or Applicant Would Endanger Health or Safety

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that the plaintiff, because of a physical or mental disability or a medical condition, cannot perform the essential duties of the position for which he or she applied, or from which he or she was discharged, without endangering the health or safety of plaintiff or others, even with reasonable accommodation.n332

When appropriate, this defense can be added to the general form of answer provided in [12][b], *above*. For discussion of this defense generally, *see* Chapter 41, Parts B and F.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that defendant _____ [refused to hire *or* discharged] plaintiff because plaintiff, as a result of his/her _____ [_____ physical/mental disability *or* medical condition], is unable to perform the essential duties of the position _____ [for which he/she applied *or* from which he/she was discharged] in a manner that would not endanger plaintiff's health or safety or the health or safety of others, even with reasonable accommodation.

[I] FORM--Affirmative Defense That Accommodation Would Cause Undue Hardship to Employer

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that it would cause undue hardship for the defendant to accommodate the plaintiff because of the plaintiff's physical or mental disability, medical condition, or religious beliefs.n333

When appropriate, this defense can be added to the general form of answer provided in [13][b], *above*. For discussion of this defense, *see* Chapter 41, Parts D and F.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that the accommodation sought by plaintiff for his/her _____ [disability *or* medical condition *or* religious _____ (belief *or* observance)] would impose an undue hardship on defendant in that such an accommodation would _____ [be unduly costly or burdensome *or* so negatively impact the operation of the business in the following manner: _____ (*specify*)].

[m] FORM--Affirmative Defense That Plaintiff Failed to Mitigate Damages

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that the plaintiff failed to act reasonably to mitigate his or her damages.n334

Where appropriate, this defense can be added to the general form of answer provided in [13][b], *above*. For discussion of mitigation of back-pay awards, *see* [8][b], *above*.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges upon information and belief that plaintiff has failed to act reasonably to mitigate the damages he/she has alleged in this action.

[14] Other Procedural Issues Under FEHA

[a] Removal From and Remand to State Court

An FEHA case may be removed to federal court if there is federal jurisdiction based on federal question or diversity of citizenship, or if one of the causes of action is totally preempted by a federal statute.n335

For a complete discussion of removal of state actions to federal courts generally, *see* California Forms of Pleading and Practice, *Federal Courts: Jurisdiction and Removal*, Part II.

■ PRACTICE TIP--EMPLOYER'S PERSPECTIVE:

As a practical matter, it is in the defendant's interest to remove a case to federal court whenever possible. Federal procedure insures that a single judge, with the sustained assistance of law clerks, will adjudicate all aspects of the litigation, from the earliest motions to the end of trial, thereby gaining familiarity through continuity. Such familiarity may enhance the judge's willingness to dispose of a meritless case--or portions of it--before a full-blown trial. In contrast, state court procedure usually involves different judges for different adjudicative functions within the same case: one to hear discovery matters, another for law and motion, another for pretrial settlement conferences, and still another for trial. This makes it harder for the judge to see weaknesses in a case before trial, and the longer a case takes to litigate, the more costly it is. Thus, defendants are likely to press for federal jurisdiction if it enhances the likelihood of speedy resolution. *Commentary by Erica B. Grubb.*

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

State courts have concurrent jurisdiction with federal courts to hear Title VII claims.ⁿ³³⁶ Thus, a plaintiff may allege Title VII causes of action in state court along with his or her FEHA claims. However, it may not be in the plaintiff's interest to do so, because the defendant may then remove the action to federal court based on federal question jurisdiction.ⁿ³³⁷ *Commentary by David M. Youngsmith.*

[b] Pendent Jurisdiction

Under the doctrine of pendent jurisdiction, the federal courts may decide certain state-law claims if they share a "common nucleus of operative fact" with claims based on federal law that confer jurisdiction on the federal courts.ⁿ³³⁸ That is, if the plaintiff's claims, considered without regard to their federal or state character, would ordinarily be tried in one judicial proceeding, and if the federal issues are substantial, the federal court has the power to hear the state claims, as well as the federal claims.ⁿ³³⁹ The doctrine of pendent jurisdiction is based on judicial economy, convenience, and fairness to the litigants.ⁿ³⁴⁰ Thus, a FEHA cause of action may be pleaded and determined in federal court under the doctrine of pendent jurisdiction, even if the federal causes have been disposed of.ⁿ³⁴¹ However, if it appears that the state issues substantially predominate over the federal issues in a case, the state claims may be dismissed without prejudice and left for the state court to resolve.ⁿ³⁴²

The common-law doctrine of pendent jurisdiction has essentially been codified by the Judicial Improvements Act of 1990.ⁿ³⁴³

For a discussion of pendant jurisdiction generally, *see* California Forms of Pleading and Practice, ch. 265, *Federal Courts: Jurisdiction and Removal*, Part II.

[c] Preemption of Other Causes of Action by FEHA

The FEHA does not preempt other state laws, including the common law, that prohibit or restrict employment discrimination unless those provisions provide less protection to the enumerated classes or persons covered under the FEHA.ⁿ³⁴⁴ Furthermore, although an employee must exhaust the FEHA administrative remedy before bringing a civil action under the FEHA or seeking any remedies provided by the FEHA,ⁿ³⁴⁵ exhaustion of the FEHA administrative remedy is not required before filing a civil action for damages alleging non-FEHA causes of action.ⁿ³⁴⁶

Thus, for example, the California Supreme Court has held that *California Constitution, Article I, section 8*, which provides that no person may be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin,ⁿ³⁴⁷ sets forth a fundamental public policy against

employment discrimination on any of those grounds and may be the basis for a tort cause of action for wrongful termination in violation of public policy, independent of the FEHA.ⁿ³⁴⁸ As another example, a court of appeal has held that sexual harassment, if properly pled, may constitute the outrageous behavior element of a tort cause of action for intentional infliction of emotional distress.ⁿ³⁴⁹ For discussion of common-law causes of action for wrongful termination and related causes of action, *see* Chapters 60 and 63.

[c.1] Preemption of FEHA Claims by Workers' Compensation Exclusivity

Before 1998, it was an open question whether or not a plaintiff could maintain an action for disability discrimination under the FEHA when the disability occurred due to a workplace injury, or whether such claims must be brought under *Labor Code Section 132a*. While some earlier cases found that such claims were preempted by the exclusivity of the workers' compensation law,ⁿ³⁵⁰ these cases were decided prior to amendments to the FEHA, effective January 1, 1994, to incorporate language to make its disability provisions similar to the ones set forth in the ADA.

Prior to the amendments, *Government Code Section 12993(a)* stated: "Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or any other law of the state relating to discrimination because of ... physical disability. ..." The amendments added the phrase: "unless those provisions provide less protection to the enumerated classes or persons covered under this part" to this subsection.ⁿ³⁵¹

After the enactment of this amendment, California appellate courts handed down radically differing opinions on whether it implicitly repealed *Labor Code 132a*.ⁿ³⁵² In *City of Moorpark v. Superior Court*,ⁿ³⁵³ the California Supreme Court concluded that *Labor Code Section 132a* does not provide an exclusive remedy precluding an employee from pursuing FEHA and common law wrongful discharge remedies.ⁿ³⁵⁴ Further, the Court expressly disapproved any cases that suggest the contrary.ⁿ³⁵⁵

Rejecting the court of appeal's reasoning, the Court did not base its decision on the effect of the 1993 amendment. Rather, the Court based its decision on two grounds. First, the Court distinguished Section 132a from other workers' compensation remedies: most workers' compensation remedies compensate an employee for a medical injury, whereas Section 132a addresses a breach of an employee's civil rights and applies regardless of whether or not a medical injury results. Because of this distinction, the Court saw no reason to treat Section 132a like other workers' compensation remedies.ⁿ³⁵⁶

Second, the Court noted that the scope of workers' compensation exclusivity depends on the terms of the exclusive remedy provisions, not the existence of the workers' compensation remedy. By their specific language, *Labor Code Sections 3600* and *3602(a)* are limited to provisions in Division 4. However, Section 132a is in Division 1. Thus, by the plain language of the Labor Code's provisions, exclusivity is limited to Division 4 remedies. Remedies placed in divisions other than Division 4 are simply not subject to the workers' compensation exclusive remedy provisions.ⁿ³⁵⁷

The Court further noted that the "compensation bargain" that forms the underlying basis for the workers' compensation exclusive remedy provisions is inapplicable to a termination in violation of Section 132a because, as in cases of racial and sexual discrimination, such a violation is contrary to public policy.ⁿ³⁵⁸ The Court also emphasized the distinctions between the terminology and definitions in the FEHA and Section 132a, concluding that a decision finding a violation under one does not necessarily establish a violation under the other; however, to the extent that the two overlap, double recovery is precluded.ⁿ³⁵⁹

In concluding that Section 132a does not provide an exclusive remedy, the Court also had to decide whether disability discrimination can form the basis of a common law tort action in violation of public policy. The Court applied a four-part test to determine whether a particular policy can support a common law wrongful discharge tort claim and concluded that the policy must be (1) delineated in either constitutional or statutory provisions; (2) *public* in the sense that it inures to the benefit of the public, rather than serving merely the interests of the individual; (3) well established at

the time of the discharge; and (4) substantial and fundamental.ⁿ³⁶⁰ In *Moorpark*, the only element in question was whether the policy against disability discrimination was substantial and fundamental. Observing that disability discrimination is in many ways indistinguishable from race or sex discrimination, the Court noted that disability discrimination is distinct from other types of FEHA discrimination in that employers can escape liability if the employee is unable, with reasonable accommodation, to perform essential job functions.ⁿ³⁶¹ Nonetheless, if disabled employees can prove they can perform the job duties as effectively as nondisabled employees, taking into consideration any possibility of change in conditions as well as the employer's short and long term needs, then discrimination based on disability, like sex and age discrimination, violates a "substantial and fundamental" public policy and can form the basis of a common law wrongful discharge claim.ⁿ³⁶²

In *Bagatti v. Department of Rehabilitation*,ⁿ³⁶³ the court of appeal held that the workers' compensation exclusivity provision in *Labor Code Section 3600* did not bar a FEHA action based on an employer's failure to accommodate under *Government Code Section 12940(m)*. The court differentiated this action from the one in *City of Moorpark*, which was brought under the FEHA's general anti-discrimination provision,ⁿ³⁶⁴ and which held that *Labor Code Section 132a* was not an exclusive remedy. However, in *City of Moorpark*, the California Supreme Court had held that disability discrimination falls outside the compensation bargain and workers' compensation is not the exclusive remedy.ⁿ³⁶⁵ Thus, the *Bagatti* court held that the employer's unlawful practice of failure to accommodate a known disability fell outside the compensation bargain as well, so that workers' compensation was not the exclusive remedy.ⁿ³⁶⁶

[c.2] Barring of Claim by Treaty

An employment discrimination claim brought under state law may be barred by a treaty with a foreign country. However, in *Haluck v. Ricoh Electronics, Inc.*,^{n366.1} the Japanese Friendship, Commerce and Navigation Treaty of 1953,^{n366.2} particularly article VIII(1), which allows companies of either party to the treaty to engage, within the territories of the other party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice,^{n366.3} did not bar an employment discrimination action by American employees of a Japanese company's wholly owned subsidiary in California.^{n366.4} In an earlier case, the court had found that the treaty did not apply to a domestically incorporated subsidiary of a Japanese corporation.^{n366.5}

[c.3] Governmental Discretionary Immunity

Governmental discretionary immunity under the Tort Claims Act^{n366.6} does not apply to employment discrimination actions under the FEHA against public entities as employers.^{n366.7} The Tort Claims Act applies to all public entities and their employees, including judges and other employees of the superior courts.^{n366.8} It permits private tort actions against government entities and employees when permitted by statute, but otherwise retains the general concept of immunity for government entities.^{n366.9} Government entities are generally liable for the acts of their employees.^{n366.10} Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity when the employee is immune from liability.^{n366.11}

Specific public employee immunities are set forth in the Tort Claims Act.^{n366.12} The discretionary act immunity statute^{n366.13} provides that, except as otherwise provided by statute, a public employee is not liable for an injury resulting from the employee's act or omission when the act or omission was the result of the exercise of the discretion vested in the employee, whether or not the employee abused that discretion.

In *Caldwell v. Montoya*,^{n366.14} a FEHA action was brought against individual school board members who voted to terminate the school district's superintendent. The California Supreme Court concluded that the Tort Claims Act discretionary act immunity prohibited suits under the FEHA against public employees or officials as individuals when the suit challenged a personnel action that amounted to "a basic policy decision," such as the selection or dismissal of the chief operating official of a school district. The trial court ruled correctly in sustaining the school board members' demurrers to the plaintiff's FEHA claims, because the personal immunity for discretionary acts applies even against

liabilities imposed by prohibitory state statutes of general application such as FEHA, unless there is a clear indication of legislative intent that immunity be withdrawn in the particular case. There was no indication of a legislative intent that public employees be personally liable for decisions which violated the FEHA, making the individual school board members immune from suit.^{n366.15} Further, the public entity for which the individual public employee defendant works cannot itself be vicariously liable for the employee's actions to the extent the employee is immune from suit.^{n366.16} However, the Court expressly declined to decide whether a government employer as an entity is amenable to suit under FEHA despite the discretionary act immunity and *Gov. Code* § 815.2(b). The Court emphasized, in dictum, the distinction between the immunity provided by *Gov. Code* § 820.2, which eliminates any potential vicarious liability of a public entity, and the potential for direct liability of the employer as an entity.^{n366.17}

In *DeJung v. Superior Court*,^{n366.18} a 64-year-old former court commissioner sued the superior court for age discrimination based on its refusal to hire him for a full-time position as a commissioner, when it instead hired a 43-year old. The court held that the discretionary act immunity for public employees, when read together with *Gov. Code* § 815.2(b), did not provide the superior court as an entity with immunity from FEHA claims based on the discretionary acts of its judiciary in selecting appointees for commissioner positions. The court found that the inclusion of "the state or any political or civil subdivision of the state" within FEHA's definition of "employer"^{n366.19} constituted an express declaration of the Legislature's intent to subject public entities to liability for violations of FEHA, and was a clear indication of legislative intent that governmental discretionary immunity be withdrawn in the particular case of the FEHA. Although the constitutional and statutory power of courts to select subordinate judicial officers to assist judges in performing their duties^{n366.20} includes the discretion to determine which candidate for such a position was best suited to a court's needs at a given time, courts may not apply invidiously discriminatory criteria upon which other employers, including other government entities, are forbidden to rely.^{n366.21}

[c.4] Evidentiary Issues

In *Beyda v. City of Los Angeles*,^{n366.22} an action for alleged workplace sexual harassment, the court barred the employee's evidence that some other employees also had been sexually harassed. The court found that the evidence, offered on the theory that an employer was likely to have committed the conduct at issue simply because it did the same thing before, went to propensity and so was inadmissible under *Evid. Code* § 1101(a).^{n366.23}

In *Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties*,^{n366.24} the court found that declarations by other former employees, to which the court referred as "me too" declarations, were admissible under *Evid. Code* § 1101(b) in an action by a former employee for alleged pregnancy discrimination based on the termination of her employment. The court distinguished *Beyda*, because *Beyda* only barred admission of "me too" evidence under *Evid. Code* § 1101(a) as evidence of propensity, and did not address whether the evidence could be admitted under *Evid. Code* § 1101(b), which allows evidence that a person committed a crime, civil wrong, or other act when relevant to prove a fact such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, other than the person's disposition to commit the act. The court noted that federal courts in employment discrimination actions have held that "me too" evidence is admissible under Fed. R. *Evid.* 404(b), which prohibits evidence of other crimes, wrongs, or acts to prove the character of a person to show action in conformity therewith, but provides that such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, to show intent or motive, for the purpose of casting doubt on an employer's stated reason for an adverse employment action and thereby creating a triable issue of material fact as to whether the stated reason was merely a pretext and the actual reason was wrongful under employment law.^{n366.25} The "me too" evidence was *per se* admissible under both relevance and *Evid. Code* § 352 standards. It set out factual scenarios related by former employees sufficiently similar to the one presented by the plaintiff concerning her own discharge to be admissible under *Evid. Code* § 1101(b), and the probative value of the evidence clearly outweighed any prejudice the employer would suffer by its admission. Dissimilarities between the facts in the declarations and the facts asserted by plaintiff with regard to her own case went to the weight of the evidence, not its admissibility.

[d] Availability of Jury Trial Under FEHA

The FEHA contains no express provision for a jury trial, nor does it prohibit one.ⁿ³⁶⁷ Although the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all,"ⁿ³⁶⁸ courts have interpreted this provision to mean that jury trials are guaranteed in those types of civil cases in which there was a common-law right to a jury in 1850.ⁿ³⁶⁹ Nevertheless, one court of appeal has held that there is a right to a jury trial in civil actions under the FEHA.ⁿ³⁷⁰

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

Although there is no specific authority for jury trials in FEHA cases, requests for jury trials in FEHA actions are frequently not opposed. General procedures for making the demand for jury trial in any civil action should be followed. Failure to do so or to post jury fees may be deemed a waiver of the right.ⁿ³⁷¹ *Commentary by Mary C. Dunlap.*

[e] Jury Instructions and Special Verdict Forms

The *Judicial Council of California Civil Jury Instructions* ("CACI") contain specific instructions for actions under FEHA.ⁿ³⁷² CACI are the official instructions for the State of California, authored and endorsed by the Judicial Council. The California Rules of Court strongly encourage their use.ⁿ³⁷³ The CACI also contain special verdict forms for actions under FEHA.ⁿ³⁷⁴ For discussion of the CACI jury instructions, see § 61.05. For discussion of the CACI special verdict forms, see § 61.06.

The CACI contain general jury instructions on, for example, burden of proof, as "fill-in-the-blank" instructions.ⁿ³⁷⁵ In an age discrimination action alleging a wrongful demotion, the trial court instructed the jury as proposed by the plaintiff, giving the defendant the burden of proving by a preponderance of the evidence all of the facts necessary to establish that in demoting the plaintiff its conduct was done in good faith and for a proper business purpose. The appellate court held that the instruction as given was wrong, because the defendant does not carry the burden of persuasion in a disparate treatment discrimination case, whether the case is a pretext or mixed motive case. Further, the instruction error was prejudicial because it may have misled the jury.ⁿ³⁷⁶ In an age discrimination retaliation action, the trial court erred in instructing the jury on what the employee had to prove to establish his claim, because the instruction failed to include language that the employer's retaliatory conduct must have had a substantial and material adverse effect on the terms and conditions of employment. However, the employer failed to show that it was reasonably probable that the employer would have obtained a more favorable result, because the instruction required jurors to find that the retaliation was a substantial factor that caused harm to the employee, and the court gave a special instruction advising jurors that they could not interfere with the employer's legitimate exercise of management discretion; they should not judge the employer's managers' reasons for their decisions based on what jurors felt they would have done; and they should defer to the employer's management discretion unless they found the employer was motivated by retaliation. The combined effect of the instructions required jurors to decide the retaliation issue by excluding employer conduct that would be considered trivial. Also, the employer's actions had a substantial and material impact on the conditions of employment, and the jury found the employer's actions were more than retaliatory, they were egregious (as shown by the findings on punitive damages).ⁿ³⁷⁷

Prior to the promulgation of the CACI, courts instructed juries in FEHA actions with instructions from the BAJI, California Jury Instructions, Civil: Book of Approved Jury Instructions, which courts continue to use.ⁿ³⁷⁸

Legal Topics:

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

Labor & Employment Law
Discrimination
General Overview
Labor & Employment Law
U.S. Equal Employment Opportunity Commission
Enforcement
General Overview
Public Health & Welfare Law
Housing & Public Buildings
Fair

Housing

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 12900 et seq.*

(n2)Footnote 2. *See Gov. Code § 12965(b), (c)(1).* For discussion of administrative procedures under the FEHA, *see ch. 42, pt. B.*

(n3)Footnote 3. *Gov. Code § 12940(a).*

(n4)Footnote 3.1. *Gov. Code § 12940(m); see Bagatti v. Department of Rehabilitation (2002) 97 Cal. App. 4th 344, 353-357, 118 Cal. Rptr. 2d 443 .*

(n5)Footnote 4. *See Gov. Code § 12965(b).*

(n6)Footnote 5. *Gov. Code § 12940(a); see Gov. Code § 12940(c), (d).* Discrimination on these bases by labor unions is also prohibited. *see Gov. Code § 12940(b).*

(n7)Footnote 6. *See Gov. Code § 12945.*

(n8)Footnote 7. *Gov. Code § 12940(h).*

(n9)Footnote 8. *See Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal. 3d 211, 213, 216, 185 Cal. Rptr. 270, 649 P.2d 912 ; see also Ackerman v. Western Elec. Co., Inc. (9th Cir. 1987) 860 F.2d 1514, 1517-1518 (construing FEHA).*

(n10)Footnote 9. *See 42 U.S.C. § 1981a.*

(n11)Footnote 10. *Yellow Freight Sys. v. Donnelly (1990) 494 U.S. 820, 110 S. Ct. 1566, 108 L. Ed. 2d 834, 838 .*

(n12)Footnote 11. *See 28 U.S.C. §§ 1331, 1343(a)(4), 1441(a); see also discussion in [14][a], below, and in 43.10[14][a][i].*

(n13)Footnote 12. *See, e.g., Hersant v. Department of Social Servs. (1997) 57 Cal. App. 4th 997, 1002-1004, 67 Cal. Rptr. 2d 483 (age discrimination); Ibarbia v. Regents of Univ. of Cal. (1987) 191 Cal. App. 3d 1318, 1326, 237 Cal. Rptr. 92 .*

(n14)Footnote 13. *See, e.g., University of Southern California v. Superior Court (1990) 222 Cal. App. 3d 1028, 1035-1036, 272 Cal. Rptr. 264 (disparate treatment); Mixon v. Fair Employment & Hous. Comm'n (1987) 192 Cal. App. 3d 1306, 1317-1318, 237 Cal. Rptr. 884 (disparate treatment); Ibarbia v. Regents of Univ. of Cal. (1987) 191 Cal. App. 3d 1318, 1327, 237 Cal. Rptr. 92 (disparate treatment); City and County of San Francisco v. Fair Employment & Hous. Comm'n (1987) 191 Cal. App. 3d 976, 985-987, 236 Cal. Rptr. 716 (disparate impact); County of Alameda v. Fair Employment & Housing Com. (1984) 153 Cal. App. 3d 499, 505-506, 200 Cal. Rptr. 381 (disparate treatment).* Although Title VII and the FEHA differ in some particulars, their objectives are identical, and California courts often rely on federal law to interpret analogous FEHA provisions. *see Baker v. Children's Hospital Medical Center (1989) 209 Cal. App. 3d 1057, 1062, 257 Cal. Rptr. 768 .*

(n15)Footnote 14. *See McDonnell Douglas v. Green (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (disparate treatment); Griggs v. Duke Power Co. (1971) 401 U.S. 424, 431-432, 91 S. Ct. 849, 28 L. Ed. 2d 158 (disparate impact).*

(n16)Footnote 15. *See Ibarbia v. Regents of Univ. of Cal. (1987) 191 Cal. App. 3d 1318, 1326 n.5, 237 Cal. Rptr. 92 ; see also Price v. Civil Service Comm'n (1980) 26 Cal. 3d 257, 276, 161 Cal. Rptr. 475, 604 P.2d 1365 .*

(n17)Footnote 16. See *Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1290, 261 Cal. Rptr. 204 (disparate treatment).

(n18)Footnote 17. See *DFEH v. Church's Fried Chicken* (1990) FEHC Dec. No. 90-11 (rejecting *McDonnell Douglas* disparate treatment framework as "unnecessary and artificial"); see also *Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1290, 261 Cal. Rptr. 204 (citing *Church's Fried Chicken* with approval). but see *Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703, 704 (*Church's* test is restricted to FEHC and is not applicable to California courts).

(n19)Footnote 18. See *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884 (FEHA) ; see also *Teamsters v. United States* (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) .

(n20)Footnote 19. See *Teamsters v. United States* (1977) 431 U.S. 324, 334-335, 97 S. Ct. 1843, 52 L. Ed. 2d 396 ; *Segar v. Smith* (D.C. Cir. 1984) 738 F.2d 1249, 1265-1266, 238 U.S. App. D.C. 103 . "Pattern or practice" cases involve a pattern of conduct in which an employer has intentionally discriminated against the plaintiff's protected class as a class. see *Teamsters v. United States* (1977) 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n21)Footnote 20. See *Teamsters v. United States* (1977) 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) ; *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1480 (en banc), rev'd on other grounds, 104 L. Ed. 2d 733 (1989) (Title VII) ; *Segar v. Smith* (D.C. Cir. 1984) 738 F.2d 1249, 1265-1266 (Title VII) .

(n22)Footnote 21. See *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 ; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n23)Footnote 22. See *University of Southern California v. Superior Court* (1990) 222 Cal. App. 3d 1028, 1035-1036, 272 Cal. Rptr. 264 ; *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884 ; *Ibarbia v. Regents of University of California* (1987) 191 Cal. App. 3d 1318, 1327, 237 Cal. Rptr. 92 .

(n24)Footnote 23. *Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1290, 261 Cal. Rptr. 204 ; see *DFEH v. Church's Fried Chicken* (1990) FEHC Dec. No. 90-11.

(n25)Footnote 24. *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884 (FEHA) ; see *Teamsters v. United States* (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII; proof of discriminatory motive is critical, although it can in some situations be inferred from mere fact of differences in treatment).

(n26)Footnote 25. See *Rosenfeld v. Southern Pac. Co.* (9th Cir. 1971) 444 F.2d 1219, 1223 (Title VII; woman denied employment assignment on ground that women, considered generically, are not physically or biologically suited for assignment).

(n27)Footnote 26. See *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (age-based disqualification of airline captains as violating ADEA).

(n28)Footnote 27. See *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1317-1318, 237 Cal. Rptr. 884 (FEHA) .

(n29)Footnote 28. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n30)Footnote 29. If direct evidence is available, the *McDonnell Douglas* test is inapplicable. *Trans World*

Airlines, Inc. v. Thurston (1985) 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523, 533 (ADEA) .

(n31)Footnote 30. See *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 252-253, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII) ; *Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1406 (Title VII) .

(n32)Footnote 31. See *Gov. Code §§ 12926(b), (h), (i), (k), (o), (p), 12940(a), 12945(a)*. This protected class includes persons about whom a perception exists that the person has any of these characteristics or that the person is associated with individuals who have (or are perceived to have) any of these characteristics. *Gov. Code § 12926(m)*. For full discussion of the scope of these protected characteristics, see ch. 41, pt. B.

(n33)Footnote 32. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; see *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884 (FEHA) . For the standard jury instruction on the essential factual elements of a cause of action for disparate treatment under FEHA, see Judicial Council of California Civil Jury Instructions, CACI 2500 (general instruction) (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions; Judicial Council of California Civil Jury Instructions, CACI 2540 (disability discrimination) (Matthew Bender). For discussion of the standard jury instructions generally, see § 61.05. For the CACI special verdict form for disparate treatment, see Judicial Council of California Civil Jury Instructions, CACI VF-2500 (general) (Matthew Bender); Judicial Council of California Civil Jury Instructions, CACI VF-2508 (disability discrimination disparate treatment) (Matthew Bender). For discussion of the special verdict forms, see § 61.06.

(n34)Footnote 33. See *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII) ; *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1318, 237 Cal. Rptr. 884 (FEHA) ; but see *Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n* (1990) 218 Cal. App. 3d 517, 545, 267 Cal. Rptr. 158 (FEHA; refusing to adopt analysis that holds that "overt, facial discrimination" creates only presumption of discrimination).

(n35)Footnote 34. *Texas Dep't. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII) .

(n36)Footnote 35. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII) ; *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1318, 237 Cal. Rptr. 884 (FEHA) ; see *University of Southern California v. Superior Court* (1990) 222 Cal. App. 3d 1028, 1035, 272 Cal. Rptr. 264 (FEHA) .

(n37)Footnote 36. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 506, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (Title VII) ; see *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253-254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII) ; *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1003, 67 Cal. Rptr. 2d 483 (FEHA age discrimination); *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1318-1319, 237 Cal. Rptr. 884 (FEHA) .

(n38)Footnote 37. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 506, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (Title VII) ; *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1003, 67 Cal. Rptr. 2d 483 (FEHA age discrimination; after employer offers evidence justifying adverse action on proper basis, burden shifts back to employee).

(n39)Footnote 38. See *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII) ; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (Title VII) ; *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1318-1319, 237 Cal. Rptr. 884 (FEHA) ; see *University of Southern California v. Superior Court* (1990) 222 Cal. App. 3d 1028, 1035, 272 Cal. Rptr. 264 (FEHA) .

(n40)Footnote 39. See *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII); *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1004, 67 Cal. Rptr. 2d 483 (FEHA age discrimination; employee must rebut employer's nondiscriminatory reason with substantial evidence of its falsity, present other evidence suggesting discriminatory basis, or combination of both); *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1318-1319, 237 Cal. Rptr. 884 (FEHA) .

(n41)Footnote 40. See 42 U.S.C. § 2000e-2(m) (Title VII); cf. *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1319, 237 Cal. Rptr. 884 (FEHA; plaintiff need not prove racial animus was sole reason behind challenged action, but must prove by preponderance of evidence that there was "causal connection" between plaintiff's protected status and adverse employment decision). Note, however, that under Title VII, if the employer can prove that it would have taken the same action even in the absence of the impermissible motivating factor, the relief that may be awarded is limited. see 42 U.S.C. § 2000e-5(g)(2)(B). For further discussion, see § 43.10[9][h], [13][e].

(n42)Footnote 41. See *University of Southern California v. Superior Court* (1990) 222 Cal. App. 3d 1028, 1035-1036, 272 Cal. Rptr. 264; *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1317-1320, 237 Cal. Rptr. 884; *Robinson v. Hewlett-Packard Corp.* (1986) 183 Cal. App. 3d 1108, 1125-1126, 228 Cal. Rptr. 591; *County of Alameda v. Fair Employment & Housing Com.* (1984) 153 Cal. App. 3d 499, 505-506, 200 Cal. Rptr. 381 .

(n43)Footnote 42. See *Ibarbia v. Regents of Univ. of Cal.* (1987) 191 Cal. App. 3d 1318, 1328, 237 Cal. Rptr. 92; see also *Williams v. Edward Appfels Coffee Co.* (9th Cir. 1986) 792 F.2d 1482, 1488 (construing FEHA; observing that FEHC has stated that "causal connection" may be satisfied by establishing inference of discrimination under *McDonnell Douglas*, or by other competent evidence).

(n44)Footnote 43. *DFEH v. Church's Fried Chicken* (1990) FEHC Dec. No. 90-11; see *DFEH v. Ca. State University--Sacramento* (1988) FEHC Dec. No. 88-08, p. 16; *DFEH v. Aluminum Precision Products, Inc.* (1988) FEHC Dec. No. 88-05, p. 5.

(n45)Footnote 44. See *Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1290, 261 Cal. Rptr. 204 (citing *Church's Fried Chicken* with approval); *DFEH v. Church's Fried Chicken* (1990) FEHC Dec. No. 90-11; see also *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1425 (discrimination claim fails under test in *Church's Fried Chicken* when there is no evidence to suggest that age was factor in discharge decisions). but see *Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703, 704 (*Church's* test is restricted to FEHC and is not applicable to California courts).

(n46)Footnote 45. See *Teamsters v. United States* (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII); *City and County of San Francisco v. Fair Employment & Hous. Comm'n* (1987) 191 Cal. App. 3d 976, 985-987, 236 Cal. Rptr. 716 (FEHA) .

(n47)Footnote 46. See [b], above.

(n48)Footnote 47. See *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n49)Footnote 48. See, e.g., *Ibarbia v. Regents of University of California* (1987) 191 Cal. App. 3d 1318, 1327, 237 Cal. Rptr. 92; *City and County of San Francisco v. Fair Employment & Housing Comm'n* (1987) 191 Cal. App. 3d 976, 985-987, 236 Cal. Rptr. 716 .

(n50)Footnote 49. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (Title VII) .

(n51)Footnote 50. See *Albamarle Paper Co. v. Moody* (1975) 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (Title VII); *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (Title VII); see also *Harris v. Civil Service Com.* (1998) 65 Cal. App. 4th 1356, 1368 (when undisputed evidence showed dramatic disparate

impact of employment test--far below invalidity threshold of four-fifths rule--commission refused to use or validate test; courts cannot compel validation study through administrative mandate for benefit of one protected group when agency has properly exercised discretion to cancel test shown to have disparate impact on another protected group); *City and County of San Francisco v. Fair Employment & Housing Comm'n* (1987) 191 Cal. App. 3d 976, 236 Cal. Rptr. 716 (FEHA) .

(n52)Footnote 51. See *Dothard v. Rawlinson* (1977) 433 U.S. 321, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (Title VII) .

(n53)Footnote 52. See *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477 (en banc) , rev'd on other grounds, 490 U.S. 642 (1989) (Title VII).

(n54)Footnote 53. See *Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 989-991, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII) .

(n55)Footnote 54. See [b], above.

(n56)Footnote 55. See *Teamsters v. United States* (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII) ; *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 (Title VII) ; *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1427 (Title VII) ; *Ibarbia v. Regents of University of California* (1987) 191 Cal. App. 3d 1318, 1329, 237 Cal. Rptr. 92(FEHA) ; *City and County of San Francisco v. Fair Employment & Housing Comm'n* (1987) 191 Cal. App. 3d 976, 985, 236 Cal. Rptr. 716 (FEHA) .

(n57)Footnote 56. *Connecticut v. Teal* (1982) 457 U.S. 440, 446, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (Title VII) ; *Albamarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (Title VII) ; *City and County of San Francisco v. Fair Employment & Housing Comm'n* (1987) 191 Cal. App. 3d 976, 985, 236 Cal. Rptr. 716 (FEHA) ; see *Ibarbia v. Regents of University of California* (1987) 191 Cal. App. 3d 1318, 1330, 237 Cal. Rptr. 92 (FEHA) . For the standard jury instruction on the essential factual elements of a cause of action for disparate impact under FEHA, see Judicial Council of California Civil Jury Instructions, CACI 2502 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the standard jury instructions generally, see § 61.05. For the special verdict form for a claim of disparate impact, see Judicial Council of California Civil Jury Instructions, CACI VF-2502 (Matthew Bender). For discussion of the CACI special verdict forms, see § 61.06.

(n58)Footnote 57. See *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1427 (Title VII) .

(n59)Footnote 58. See, e.g., *City and County of San Francisco v. Fair Employment & Housing Comm'n* (1987) 191 Cal. App. 3d 976, 986-987, 236 Cal. Rptr. 716(FEHA) .

(n60)Footnote 59. See *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 650-651, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (Title VII) ; *Ibarbia v. Regents of University of California* (1987) 191 Cal. App. 3d 1318, 1330, 237 Cal. Rptr. 92(FEHA) .

(n61)Footnote 60. See *City and County of San Francisco v. Fair Employment & Housing Comm'n* (1987) 191 Cal. App. 3d 976, 989, 236 Cal. Rptr. 716 ; accord, 2 Cal. Code Reg. § 7286.7(b) (FEHC regulation; defendant must prove (1) overriding legitimate business purpose for challenged employment practice; (2) practice is necessary to safe and efficient operation of business; and (3) challenged practice effectively fulfills business purpose it is supposed to serve); cf. 42 U.S.C. §§ 2000e(m), 2000e-2(k)(1)(A)(i) (Title VII; if plaintiff demonstrates disparate impact, defendant must demonstrate that practice is "job related for the position in question and consistent with business necessity"; "demonstrate" means to meet the burdens of production and persuasion).

(n62)Footnote 61. See *Connecticut v. Teal* (1982) 457 U.S. 440, 447, 102 S. Ct. 2525, 73 L. Ed. 2d 130 ; *Albamarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 .

(n63)Footnote 62. *See City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 989-990, 236 Cal. Rptr. 716 .

(n64)Footnote 63. *See Gov. Code § 12940(h)*. For a discussion relating to the types of activities protected from retaliation, *see* ch. 41, pt. F.

(n65)Footnote 64. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; *see* [b], *above*.

(n66)Footnote 65. *Miller v. Fairchild Industries, Inc.* (9th Cir. 1986) 797 F.2d 727, 731 (*Title VII and FEHA*) ; *see Wrighten v. Metropolitan Hospitals, Inc.* (9th Cir. 1984) 726 F.2d 1346, 1354 (*Title VII*; after defendant rebuts, plaintiff must be afforded fair opportunity to show that discriminatory intent motivated defendant's action by showing either that defendant's proffered explanation was pretext, or that discriminatory reason more likely motivated employer's action); *Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 68, 105 Cal. Rptr. 2d 652 (*FEHA*) ; *see also Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 256-257, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (disparate treatment).

For the standard jury instruction on retaliation under FEHA, *see* Judicial Council of California Civil Jury Instructions, CACI 2505 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the standard jury instructions generally, *see* § 61.05. For the special verdict form for a claim of retaliation under FEHA, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2504 (Matthew Bender). For discussion of the CACI special verdict forms, *see* § 61.06.

(n67)Footnote 66. *Miller v. Fairchild Industries, Inc.* (9th Cir. 1986) 797 F.2d 727, 731 (*Title VII and FEHA*) .

(n68)Footnote 67. *Miller v. Fairchild Industries, Inc.* (9th Cir. 1986) 797 F.2d 727, 731 (*Title VII and FEHA*) ; *Wrighten v. Metropolitan Hospitals, Inc.* (9th Cir. 1984) 726 F.2d 1346, 1354 (*Title VII*) ; *Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 69, 105 Cal. Rptr. 2d 652 (*FEHA*) ; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal. App. 3d 590, 614, 262 Cal. Rptr. 842 (*FEHA*) .

(n69)Footnote 67.1. *Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 67-68, 105 Cal. Rptr. 2d 652 .

(n70)Footnote 68. *See DFEH v. Madera County* (1990) FEHC Dec. No. 90-03, pp. 30-31 (*FEHA*); *DFEH v. State University--Hayward* (1988) FEHC Dec. No. 88-18, p. 19 (*FEHA*); *DFEH v. Ca. State University--Sacramento* (1988) FEHC Dec. No. 88-08, p. 24 (*FEHA*).

(n71)Footnote 69. *See Kauffman v. Sidereal Corp.* (9th Cir. 1982) 695 F.2d 343, 345 (*Title VII*) .

(n72)Footnote 70. *See Wrighten v. Metropolitan Hospitals, Inc.* (9th Cir. 1984) 726 F.2d 1346, 1354 (*Title VII*) .

(n73)Footnote 71. For discussion of the effects of untimely charges, *see* [4][a], *below*.

(n74)Footnote 72. *Gov. Code § 12960*.

(n75)Footnote 73. *Gov. Code § 12965(b)*. For discussion of right-to-sue letters, *see* ch. 42, pt. B. A right-to-sue notice is unnecessary if the employer has transferred the action pursuant to *Gov. Code § 12965(c)*, which authorizes an employer to elect to transfer an FEHA administrative proceeding to court if the accusation contains a prayer for damages for emotional injuries as a component of actual damages, or for administrative fines, or for both. *Gov. Code § 12965(c)(1)*. In such a case, the DFEH dismisses the accusation and files, or elects to have the Attorney General file, the action on behalf of the complaining party as the real party in interest. *Gov. Code § 12965(c)(2)*. *see Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 59 Cal. Rptr. 2d 20, 926 P.2d 1114 (under FEHA, employee must

exhaust administrative remedy, filing complaint with DFEH and must obtain notice of right to sue to be entitled to file civil action based on violations of FEHA); *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 83, 276 Cal. Rptr. 130, 801 P.2d 373 (right-to-sue notice is prerequisite to judicial action).

(n76)Footnote 73.1. *Schifando v. City of Los Angeles* (2003) 31 Cal. 4th 1074, 6 Cal. Rptr. 3d 457, 79 P.3d 569 (former employee alleging disability discrimination against city required only to file complaint with DFEH and receive right-to-sue letter, not required to exhaust administrative remedies under Charter of City of Los Angeles by filing demand for reinstatement with Board of Civil Service Commissioners and claim for compensation with City Clerk).

(n77)Footnote 73.2. *Johnson v. City of Loma Linda* (2000) 24 Cal. 4th 61, 65, 76, 99 Cal. Rptr. 2d 316, 5 P.3d 874 ; *Miller v. City of Los Angeles* (2008) 169 Cal. App. 4th 1373, 1379-1383, 87 Cal. Rptr. 3d 510 (having begun city's internal remedy procedure, municipal employee's notice of withdrawal/dismissal had no effect and employee was obligated to exhaust his judicial remedies but failed to do so, including failing to petition for administrative mandamus after administrative decision was rendered; thus, administrative decision was final and on merits, and consequently entitled to collateral estoppel effect; trial court properly sustained employer's demurrer to his complaint without leave to amend); *Page v. Los Angeles County Probation Dept.* (2004) 123 Cal. App. 4th 1135, 20 Cal. Rptr. 3d 598, 2004 Cal. App. LEXIS 1861, *10-*14 (after choosing civil service commission process and proceeding through three days of hearing over course of four months, resulting in comprehensive decision by hearing officer, municipal employee could not abandon administrative process and proceed to FEHA action for damages, but employee had to await final commission decision and, if adverse, file petition for writ of mandate in trial court to overturn commission decision).

(n78)Footnote 73.3. *See Ahmadi-Kashani v. Regents of University of California* (2008) 159 Cal. App. 4th 449, 456-461, 71 Cal. Rptr. 3d 556 (plaintiff's initiation of internal grievance process under collective bargaining agreement that provided for arbitration and her participation in process to extent of meeting with representative of employer to discuss her claims did not obligate her to complete process, where, because her participation in grievance process did not include quasi-judicial hearing, she remained free to walk away and pursue her FEHA claim in court); *Ortega v. Contra Costa Community College Dist.* (2007) 156 Cal. App. 4th 1073, 1080-1086, 67 Cal. Rptr. 3d 832 (where collective bargaining agreement governing plaintiff's employment relationship with community college district provided for multilevel grievance procedure, union exercised significant control over grievance, and collective bargaining agreement provided for arbitration of employee complaints, plaintiff's utilization of grievance process did not bar his state court FEHA actions against district; plaintiff's allegations in both demotion and termination cases that he timely filed complaint with DFEH was sufficient to plead exhaustion).

(n79)Footnote 74. *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal. App. 4th 1607, 1609, 1617, 43 Cal. Rptr. 2d 57 ; *Bennett v. Borden, Inc.* (1976) 56 Cal. App. 3d 706, 709-710, 128 Cal. Rptr. 627 ; *see Baker v. Children's Hospital Medical Center* (1989) 209 Cal. App. 3d 1057, 1062, 257 Cal. Rptr. 768 (exhaustion of administrative remedies is a jurisdictional prerequisite to civil action under FEHA); *Yurick v. Superior Court* (1989) 209 Cal. App. 3d 1116, 1121-1123, 257 Cal. Rptr. 665 (failure to exhaust administrative remedies undermines vital FEHA policy interests in resolving disputes and eliminating unlawful employment practices by conciliation); *Miller v. United Airlines, Inc.* (1985) 174 Cal. App. 3d 878, 890, 220 Cal. Rptr. 684 (failure to exhaust administrative remedies is a jurisdictional defect and a ground for summary judgment). *see* discussion of demurrer to complaint at [11], *below*.

(n80)Footnote 75. *See Hollon v. Pierce* (1967) 257 Cal. App. 2d 468, 475-476, 64 Cal. Rptr. 808 (decided under former Fair Employment Practices Act).

(n81)Footnote 76. *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal. App. 4th 1718, 1729-1730, 35 Cal. Rptr. 2d 181 .

(n82)Footnote 77. *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal. App. 4th 1718, 35 Cal. Rptr. 2d 181 .

(n83)Footnote 78. *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal. App. 4th 1718, 1724, 1730, 35 Cal.

Rptr. 2d 181 .

(n84)Footnote 78.1. *Grant v. Comp USA, Inc. (2003) 109 Cal. App. 4th 637, 640-651, 135 Cal. Rptr. 2d 177 .*

(n85)Footnote 78.2. *Grant v. Comp USA, Inc. (2003) 109 Cal. App. 4th 637, 651, 135 Cal. Rptr. 2d 177 .*

(n86)Footnote 78.3. *Rodriguez v. Airborne Express (9th Cir. 2001) 265 F.3d 890, 897 ; Yurick v. Superior Court (1989) 209 Cal. App. 3d 1116, 1121-1123, 257 Cal. Rptr. 665 .*

(n87)Footnote 78.4. *Rodriguez v. Airborne Express (9th Cir. 2001) 265 F.3d 890, 897 . See also Nazir v. United Airlines, Inc. (2009) 178 Cal. App. 4th 243, 264-269* (plaintiff's extensive submission to DFEH was sufficient to create triable issue of fact as to whether he exhausted administrative remedies as to his claim of national-origin based harassment, where in both pre-complaint questionnaires, he expressly claimed to be victim of constant harassment so that thorough DFEH investigation would have uncovered great many particulars of alleged 14 continuous years of harassment and unfair treatment plaintiff received from manager and colleagues and hostile environment in which he worked).

(n88)Footnote 78.5. *Rodriguez v. Airborne Express (9th Cir. 2001) 265 F.3d 890, 897 .*

(n89)Footnote 79. *See Baker v. Children's Hosp. Med. Ctr. (1989) 209 Cal. App. 3d 1057, 1062-1065, 257 Cal. Rptr. 768* (FEHA; relying on federal cases decided under Title VII).

(n90)Footnote 80. *Sandhu v. Lockheed Missiles & Space Co. (1994) 26 Cal. App. 4th 846, 858-860, 31 Cal. Rptr. 2d 617 .*

(n91)Footnote 80.1. *Rodriguez v. Airborne Express (9th Cir. 2001) 265 F.3d 890, 896-898 .*

(n92)Footnote 80.2. *Rodriguez v. Airborne Express (9th Cir. 2001) 265 F.3d 890, 898-900 , citing Cole v. Antelope Valley Union High Sch. Dist. (1996) 47 Cal. App. 4th 1505, 1515, 55 Cal. Rptr. 2d 443 .*

(n93)Footnote 81. *Hobson v. Raychem Corp. (1999) 73 Cal. App. 4th 614, 626-632, 86 Cal. Rptr. 2d 497* (because plaintiff acknowledged that ulcerative colitis did not prevent her from performing her job, condition was not qualifying disability as matter of law). Because the allegation of failure to accommodate must relate to a particular disability to have any significance, caution should be exercised in completing the DFEH charge so that all allegedly discriminatory conduct is covered. For further discussion, *see* ch. 42.

(n94)Footnote 82. *Okoli v. Lockheed Technical Operations Co. (1995) 36 Cal. App. 4th 1607, 1609, 1617, 43 Cal. Rptr. 2d 57 .*

(n95)Footnote 83. *Okoli v. Lockheed Technical Operations Co. (1995) 36 Cal. App. 4th 1607, 43 Cal. Rptr. 2d 57 .*

(n96)Footnote 84. *See Oubichon v. North Am. Rockwell Corp. (9th Cir. 1973) 482 F.2d 569 .*

(n97)Footnote 85. *See Sanchez v. Standard Brands, Inc. (5th Cir. 1970) 431 F.2d 455 .*

(n98)Footnote 85.1. *See Okoli v. Lockheed Technical Operations Co. (1995) 36 Cal. App. 4th 1607, 1613, 43 Cal. Rptr. 2d 57 ; Martin v. Lockheed Missiles & Space Co. (1994) 29 Cal. App. 4th 1718, 1724, 35 Cal. Rptr. 2d 181 ; Miller v. United Airlines, Inc. (1985) 174 Cal. App. 3d 878, 890, 220 Cal. Rptr. 684 .*

(n99)Footnote 85.2. *See Keiffer v. Bechtel Corp. (1998) 65 Cal. App. 4th 893, 900-901, 76 Cal. Rptr. 2d 827 ; see also Zipes v. Trans World Airlines, Inc. (1982) 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 ; Temengil v. Trust Territory of Pacific Islands (9th Cir. 1989) 881 F.2d 647, 654 ; Womble v. Bhangu (5th Cir. 1989) 864 F.2d*

1212, 1213 ; *Jackson v. Seaboard Coast Line R. Co.* (11th Cir. 1982) 678 F.2d 992, 1005 .

(n100)Footnote 85.3. *Grant v. Comp USA, Inc.* (2003) 109 Cal. App. 4th 637, 644-645, 135 Cal. Rptr. 2d 177 (exhaustion requirement is at least precondition to bringing civil suit on FEHA claims, and employee's complaint alleged timely complaint to DFEH and receipt of right-to-sue letter; question is whether possession of right-to-sue notice was necessary element of exhaustion given DFEH's rescission of letter, failure to resolve case within one year and failure to issue second letter).

(n101)Footnote 85.4. *Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 898 ; *see Gov. Code § 12920.*

(n102)Footnote 85.5. *FEHC v. County of Alameda, Sheriff's Dep't, FEHC Dec. No. 81-13, 1981 CAFEHC LEXIS 12, *22* (Cal. F.E.H.C. July 2, 1981) (adding sex discrimination charge related back to timely-filed race discrimination charge, because all allegations were based on same operative facts).

(n103)Footnote 85.6. *Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 899-900 .

(n104)Footnote 86. *Denney v. Universal City Studios, Inc.* (1992) 10 Cal. App. 4th 1226, 1232-1234, 13 Cal. Rptr. 2d 170 (equitable exception to exhaustion requirement permitted plaintiff to advance claims not included in administrative charge), *disapproved on other grounds*, *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n105)Footnote 86.1. *Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 902 n.11 .

(n106)Footnote 86.2. *Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 901 , citing *Naton v. Bank of California* (9th Cir. 1981) 649 F.2d 691, 696 & n.5; *Addison v. State* (1978) 21 Cal. 3d 313, 321, 146 Cal. Rptr. 224, 578 P.2d 941 .

(n107)Footnote 86.3. *Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 901-902 , citing *Albano v. Schering-Plough Corp.* (9th Cir. 1990) 912 F.2d 384, 388 ; *Denney v. Universal City Studios, Inc.* (1992) 10 Cal. App. 4th 1226, 1234, 13 Cal. Rptr. 2d 170 .

(n108)Footnote 87. *Keiffer v. Bechtel Corp.* (1998) 65 Cal. App. 4th 893, 76 Cal. Rptr. 2d 827 .

(n109)Footnote 88. *Keiffer v. Bechtel Corp.* (1998) 65 Cal. App. 4th 893, 897-899, 76 Cal. Rptr. 2d 827 .

(n110)Footnote 89. *Keiffer v. Bechtel Corp.* (1998) 65 Cal. App. 4th 893, 899-900, 76 Cal. Rptr. 2d 827 .

(n111)Footnote 90. *See Rojo v. Kliger* (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n112)Footnote 91. *See Gov. Code § 12960.* For discussion of statute of limitations, *see* [4], *below*, and ch. 42, pt. A.

(n113)Footnote 92. *See Gov. Code §§ 12930, 12963-12964; State Personnel Bd. v. Fair Employment & Housing Comm'n* (1985) 39 Cal. 3d 422, 428, 217 Cal. Rptr. 16, 703 P.2d 354 (DFEH can investigate, issue subpoenas, take depositions, and engage in discovery in furtherance of its fact-finding power, and can issue an accusation and act as prosecutor on complainant's behalf); *Marshall v. Fair Employment Practice Commission* (1971) 21 Cal. App. 3d 680, 681-685, 98 Cal. Rptr. 698, 701-702 (agency has broad discretion in handling complaints of discrimination). For discussion of authority of DFEH generally, *see* ch. 42, pt. B.

(n114)Footnote 93. *See Valdez v. City of Los Angeles* (1991) 231 Cal. App. 3d 1043, 1060-1061, 282 Cal. Rptr. 726 (upholding dismissal of civil action against individual defendants who were not named anywhere in the DFEH complaint).

(n115)Footnote 94. See *Saavedra v. Orange County Consolidated Transp. etc. Agency* (1992) 11 Cal. App. 4th 824, 826-828, 14 Cal. Rptr. 2d 282 (permitting civil action against defendant who was not named in the caption or the body of the DFEH charge, but who was identified in the body of the charge as the "man who demoted him"); *Martin v. Fisher* (1992) 11 Cal. App. 4th 118, 121-123, 13 Cal. Rptr. 2d 922 (defendant not named in caption but who was named in body of administrative charge and who participated in administrative investigation could be sued).

(n116)Footnote 95. See *Cole v. Antelope Valley Union High Sch. Dist.* (1996) 47 Cal. App. 4th 1505, 1515, 55 Cal. Rptr. 2d 443 .

(n117)Footnote 96. *Matthews v. Superior Court* (1995) 34 Cal. App. 4th 598, 599-600, 605-606, 40 Cal. Rptr. 2d 350 ; *Page v. Superior Court* (1995) 31 Cal. App. 4th 1206, 1213, 37 Cal. Rptr. 2d 529 .

(n118)Footnote 97. See *Janken v. GM Hughes Electronics* (1996) 46 Cal. App. 4th 55, 66, 53 Cal. Rptr. 2d 741 ; see *Le Bourgeois v. Fireplace Mfrs., Inc.* (1998) 68 Cal. App. 4th 1049, 80 Cal. Rptr. 2d 660 (supervisory personnel cannot be held individually liable for discrimination under ADA).

(n119)Footnote 98. *Janken v. GM Hughes Electronics* (1996) 46 Cal. App. 4th 55, 53 Cal. Rptr. 2d 741 .

(n120)Footnote 99. See *Janken v. GM Hughes Electronics* (1996) 46 Cal. App. 4th 55, 64-72, 53 Cal. Rptr. 2d 741 (emphasis added; citing *Gov. Code* §§ 12940(a), former 12941(a) [now see *Gov. Code* § 12940(a)], prohibiting age discrimination, other forms of discrimination, 12926(d), definition of employer with regard to discrimination, and former 12940(h)(1), (now see *Gov. Code* § 12940(j)(1)) prohibiting harassment).

(n121)Footnote 100. *Reno v. Baird* (1998) 18 Cal. 4th 640, 76 Cal. Rptr. 2d 499, 957 P.2d 1333 .

(n122)Footnote 101. *Gov. Code* § 12940 et seq.

(n123)Footnote 102. *Reno v. Baird* (1998) 18 Cal. 4th 640, 657, 76 Cal. Rptr. 2d 499, 957 P.2d 1333 (supervisor not individually liable for discrimination based on apparent knowledge of plaintiff's cancer disease).

(n124)Footnote 103. *Reno v. Baird* (1998) 18 Cal. 4th 640, 663, 76 Cal. Rptr. 2d 499, 957 P.2d 1333 .

(n125)Footnote 104. *Le Bourgeois v. Fireplace Mfrs., Inc.* (1998) 68 Cal. App. 4th 1049, 80 Cal. Rptr. 2d 660 (*Reno* rationale mandated result; supervisory personnel cannot be held individually liable for wrongful discharge in violation of fundamental public policy under FEHA).

(n126)Footnote 105. *Gov. Code* § 12928.

(n127)Footnote 106. See *Gov. Code* § 12960; see *Williams v. City of Belvedere* (1999) 72 Cal. App. 4th 84, 90-93, 84 Cal. Rptr. 2d 658 (timely filing required even when discrimination first discovered more than 16 months after employee notified that he would not be hired). *Gov. Code* § 12960 also extends the period for one year for an action under the Ralph Civil Rights Act, *Civ. Code* 51.7 [see Ch. 40 § 40.12[2], to become aware of the identity of a person liable for the alleged violation.

(n128)Footnote 107. *Miller v. United Airlines, Inc.* (1985) 174 Cal. App. 3d 878, 889-890, 220 Cal. Rptr. 684 ; see discussion at [3], above.

(n129)Footnote 108. *Williams v. City of Belvedere* (1999) 72 Cal. App. 4th 84, 90-93, 84 Cal. Rptr. 2d 658 (timely filing is a prerequisite to litigation; issuance of right to sue notice does not correct untimeliness of DFEH filing).

(n130)Footnote 109. *Williams v. City of Belvedere* (1999) 72 Cal. App. 4th 84, 84 Cal. Rptr. 2d 658 .

(n131)Footnote 110. *Zipes v. Trans World Airlines, Inc.* (1982) 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d

234 .

(n132)Footnote 111. See *Serpe v. Four-Phase Systems, Inc.* (9th Cir. 1983) 718 F.2d 935, 937 ; *Williams v. Owens-Illinois Inc.* (9th Cir. 1982) 665 F.2d 918, 924 ; *Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1290-1291, 261 Cal. Rptr. 204 ; see also § 43.10[6][a][ii].

(n133)Footnote 112. See *Valdez v. Clayton Industries, Inc.* (2001) 88 Cal. App. 4th 1162, 1177-1180, 107 Cal. Rptr. 2d 15 ; *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 982-983, 236 Cal. Rptr. 716 ; see also *Valdez v. City of Los Angeles* (1991) 231 Cal. App. 3d 1043, 1052-1053, 282 Cal. Rptr. 726 .

(n134)Footnote 112.1. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 .

(n135)Footnote 112.2. *Richards v. CH2M Hill, Inc.* (2001) 26 Cal. 4th 798, 111 Cal. Rptr. 2d 87, 29 P.3d 175 .

(n136)Footnote 113. See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal. App. 4th 714, 721-724, 85 Cal. Rptr. 3d 705 ; *Valdez v. City of Los Angeles* (1991) 231 Cal. App. 3d 1043, 1052, 282 Cal. Rptr. 726 ; *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 983, 236 Cal. Rptr. 716 .

(n137)Footnote 113.1. *Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 64-65, 105 Cal. Rptr. 2d 652 (alleging repeated failure to rehire in retaliation for complaints about racial discrimination, but not alleging systematic policy of discrimination, constituted challenges to series of decisions made by different decision makers in unrelated departments and did not demonstrate continuing violation).

(n138)Footnote 113.2. *Richards v. CH2M Hill, Inc.* (2001) 26 Cal. 4th 798, 111 Cal. Rptr. 2d 87, 29 P.3d 175 .

(n139)Footnote 113.3. *Richards v. CH2M Hill, Inc.* (2001) 26 Cal. 4th 798, 823, 111 Cal. Rptr. 2d 87, 29 P.3d 175 . For discussion of the employer's obligation to accommodate a disabled employee, see § 41.51; for workplace harassment generally, see § 41.80 et seq.

(n140)Footnote 113.4. *Richards v. CH2M Hill, Inc.* (2001) 26 Cal. 4th 798, 823, 111 Cal. Rptr. 2d 87, 29 P.3d 175 .

(n141)Footnote 113.5. *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 1055-1061, 32 Cal. Rptr. 3d 436 .

(n142)Footnote 113.6. *National Railroad Passenger Corporation v. Morgan* (2002) 536 U.S. 101, 122 S. Ct. 2061, 136 L. Ed. 2d 106 . For discussion of *Morgan*, see § 42.62[3][d].

(n143)Footnote 113.7. *Cucuzza v. City of Santa Clara* (2002) 104 Cal. App. 4th 1031, 128 Cal. Rptr. 2d 660 .

(n144)Footnote 113.8. *Cucuzza v. City of Santa Clara* (2002) 104 Cal. App. 4th 1031, 1040-1043, 128 Cal. Rptr. 2d 660 .

(n145)Footnote 113.9. *Alch v. Superior Court* (2004) 122 Cal. App. 4th 339, 367-377, 19 Cal. Rptr. 3d 29 .

(n146)Footnote 113.10. *Valdez v. City of Los Angeles* (1991) 231 Cal. App. 3d 1043, 1052-1054, 282 Cal. Rptr. 726 .

(n147)Footnote 113.11. *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 983, 236 Cal. Rptr. 716 .

(n148)Footnote 114. *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 236 Cal. Rptr. 716 .

(n149)Footnote 115. *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 983 , 236 Cal. Rptr. 716 ; see also *Valdez v. City of Los Angeles* (1991) 231 Cal. App. 3d 1043, 1052-1053, 282 Cal. Rptr. 726 .

(n150)Footnote 116. See *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal. App. 3d 590, 618, 622, 262 Cal. Rptr. 842 .

(n151)Footnote 116.1. See *Morgan v. Regents of University of California* (2000) 88 Cal. App. 4th 52, 65, 105 Cal. Rptr. 2d 652 (cases alleging hostile work environment due to racial or sexual harassment are often found to come within continuing violations framework). See also *Nazir v. United Airlines, Inc.* (2009) 178 Cal. App. 4th 243, 270-271 (summary adjudication in favor of employer on national-origin based harassment as continuing violation reversed, where plaintiff raised triable issues of fact on all three components: sufficient similarity; reasonable frequency; and conduct had not acquired degree of permanence).

(n152)Footnote 117. *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 21 Cal. Rptr. 2d 292 .

(n153)Footnote 118. *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, 21 Cal. Rptr. 2d 292 .

(n154)Footnote 118.1. *Birschtein v. New United Motor Manufacturing, Inc.* (2001) 92 Cal. App. 4th 994, 1003-1007, 112 Cal. Rptr. 2d 347 .

(n155)Footnote 118.2. *Dominguez v. Washington Mutual Bank* (2008) 168 Cal. App. 4th 714, 720-724, 85 Cal. Rptr. 3d 705 .

(n156)Footnote 119. See *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal. App. 3d 590, 618, 622, 262 Cal. Rptr. 842 .

(n157)Footnote 119.1. See *Gov. Code § 12965(b)*.

(n158)Footnote 119.2. *Gov. Code § 12965(d)(1)*. See *Gov. Code § 12965(d)(3)* (§ 12965(d) intended to codify holding in *Downs v. Department of Water and Power of City of Los Angeles* (1997) 58 Cal. App. 4th 1093, 68 Cal. Rptr. 2d 590).

(n159)Footnote 119.3. *Gov. Code § 12965(e)(1)*.

(n160)Footnote 119.4. *Gov. Code § 12965(d)(2), (e)(2)*.

(n161)Footnote 120. *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal. 4th 479, 59 Cal. Rptr. 2d 20, 926 P.2d 1114 .

(n162)Footnote 121. *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal. 4th 479, 490-493, 59 Cal. Rptr. 2d 20, 926 P.2d 1114 .

(n163)Footnote 122. *Delaware State College v. Ricks* (1980) 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 .

(n164)Footnote 123. *Chardon v. Fernandez* (1981) 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 .

(n165)Footnote 124. *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal. 4th 479, 497, 59 Cal. Rptr. 2d 20, 926 P.2d 1114 .

(n166)Footnote 125. *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal. 4th 479, 494, 59 Cal. Rptr. 2d 20, 926 P.2d 1114 .

(n167)Footnote 126. *Regents of the Univ. of California v. Superior Court* (1995) 33 Cal. App. 4th 1710, 39 Cal. Rptr. 2d 919 .

(n168)Footnote 127. *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal. 4th 479, 500, 59 Cal. Rptr. 2d 20, 926 P.2d 1114 .

(n169)Footnote 128. *See Gov. Code § 12965(b).*

(n170)Footnote 129. *See Salgado v. Atlantic Richfield Co.* (9th Cir. 1987) 823 F.2d 1322, 1324-1325 , *disapproved on other grounds*, *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 81-82, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n171)Footnote 130. *E.E.O.C. v. Farmer Bros. Co.* (9th Cir. 1994) 31 F.3d 891, 903 (expressly reaffirming *Salgado* decision on equitable tolling).

(n172)Footnote 131. *Downs v. Department of Water & Power* (1997) 58 Cal. App. 4th 1093, 1099-1102, 68 Cal. Rptr. 2d 590 ; *see Collier v. City of Pasadena* (1983) 142 Cal. App. 3d 917, 922-926, 191 Cal. Rptr. 681 (three-part test for equitable tolling).

(n173)Footnote 131.1. *Gov. Code § 12965(d)(3).*

(n174)Footnote 132. *Salgado v. Atlantic Richfield Co.* (9th Cir. 1987) 823 F.2d 1322, 1325 , *disapproved on other grounds*, *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 81-82, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n175)Footnote 133. *Downs v. Department of Water & Power* (1997) 58 Cal. App. 4th 1093, 1101 n. 3, 68 Cal. Rptr. 2d 590 ; *see Williams v. Pacific Mut. Life Ins. Co.* (1986) 186 Cal. App. 3d 941, 949, 231 Cal. Rptr. 234 .

(n176)Footnote 133.1. *Johnson v. Riverside Healthcare System, LP* (9th Cir. 2008) 534 F.3d 1116, 1127 (nothing in record suggested defendants' conduct caused plaintiff to voluntarily dismiss his state court action or wait additional 47 days before filing FEHA action in federal court).

(n177)Footnote 133.2. *Johnson v. Riverside Healthcare System, LP* (9th Cir. 2008) 534 F.3d 1116, 1127 (plaintiff's voluntary dismissal of state court action was not event to which equitable tolling applied).

(n178)Footnote 133.3. *Johnson v. Riverside Healthcare System, LP* (9th Cir. 2008) 534 F.3d 1116, 1127 n.3 (even if plaintiff could have demonstrated he was entitled to equitable tolling, he was not entitled to toll period necessary to render FEHA claim timely, where he filed his state action 25 days before FEHA statute of limitations period expired and voluntarily dismissed state action 41 days later, so that if equitable tolling applied, he would have been entitled to file in federal court within 41 days of his voluntary dismissal, but he delayed filing until 47 days after his voluntary dismissal, 6 days after maximum tolling period would have expired). *See Lantzy v. Centex Homes* (2003) 31 Cal. 4th 363, 370-71, 2 Cal. Rptr. 3d 655, 73 P.3d 517 (2003) .

(n179)Footnote 134. *Goldman v. Wilsey Foods, Inc.* (1989) 216 Cal. App. 3d 1085, 1094-1095, 265 Cal. Rptr. 294 .

(n180)Footnote 135. *Goldman v. Wilsey Foods, Inc.* (1989) 216 Cal. App. 3d 1085, 1094, 265 Cal. Rptr. 294 .

(n181)Footnote 136. *See, e.g., Robinson v. Hewlett-Packard Corp.* (1986) 183 Cal. App. 3d 1108, 1119-1120, 228 Cal. Rptr. 591 , *disapproved on other grounds*, *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373 (asserting claims of FEHA violation, wrongful termination, invasion of privacy and intentional infliction of emotional distress); *Miller v. Fairchild Indus., Inc.* (9th Cir. 1986) 797 F.2d 727, 730-734 (asserting claims of retaliation under Title VII and FEHA, breach of implied covenant of good faith and fair dealing, violation of 42 U.S.C. § 1981, and intentional and negligent infliction of emotional distress).

(n182)Footnote 137. *Brown v. Superior Court* (1984) 37 Cal. 3d 477, 486, 208 Cal. Rptr. 724, 691 P.2d 272 .

(n183)Footnote 137.1. See [4][b], above.

(n184)Footnote 137.2. *Hammond v. County of Los Angeles* (2008) 160 Cal. App. 4th 1579, 1594-1598 , *reh'g denied by and ordered not published by*, 2008 Cal. LEXIS 8820 (Cal. July 16, 2008) . (plaintiff's evidence showed that alleged actionable conduct, reduction in plaintiff's classroom teaching assignments, continued after one year preceding date of filing of complaint).

(n185)Footnote 137.3. *National Railroad Passenger Corp. v. Morgan* (2002) 536 U.S. 101, 112, 122 S. Ct. 2061, 153 L. Ed.2d 106 .

(n186)Footnote 137.4. *Hammond v. County of Los Angeles* (2008) 160 Cal. App. 4th 1579, 1594-1598 , *reh'g denied by and ordered not published by*, 2008 Cal. LEXIS 8820 (Cal. July 16, 2008) .

(n187)Footnote 137.5. *Gov. Code § 12960(d)*.

(n188)Footnote 137.6. *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) 127 S. Ct. 2162, 167 L. Ed.2d 982 , *superseded by statute* (see footnote 137.8).

(n189)Footnote 137.7. *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) 127 S. Ct. 2162, 2165-2166, 167 L. Ed.2d 982 , *superseded by statute* (see footnote 137.8).

(n190)Footnote 137.8. In response to the *Ledbetter* decision, Congress has enacted the "Lilly Ledbetter Fair Pay Act of 2009" (P.L. 111-2), amending Title VII and the Age Discrimination in Employment Act, among other statutes, to provide that, effective May 28, 2007, and applicable to compensation discrimination claims pending as of that date, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of Title VII, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice. In addition to any relief authorized by 42 U.S.C. § 1981a, liability may accrue and an aggrieved person may obtain relief under Title VII, including recovery of back pay for up to two years preceding the filing of the charge, when the unlawful employment practices that have occurred during the charge-filing period are similar to or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge. See 42 U.S.C. § 2000e-5(e)(3)(A), (B); 29 U.S.C. 626(d). For discussion, see § 42.62[3][d].

(n191)Footnote 138. *Gov. Code § 12965(b), (c)(2)*; see *Gov. Code § 70200* (trial court unification).

(n192)Footnote 139. See *Cal. Const., art. VI, § 10* (superior courts have jurisdiction over all actions except those in which jurisdiction is assigned to another court by statute); see also *Code Civ. Proc. § 86* (have original jurisdiction over limited civil cases, which are generally limited to matters in which amount in controversy does not exceed \$25,000).

(n193)Footnote 140. See [3], above.

(n194)Footnote 141. See *Miller v. United Airlines, Inc.* (1985) 174 Cal. App. 3d 878, 889-890, 220 Cal. Rptr. 684 ; *Bennett v. Borden, Inc.* (1976) 56 Cal. App. 3d 706, 710, 128 Cal. Rptr. 627 ; see also *Carter v. Smith Food King* (9th Cir. 1985) 765 F.2d 916, 921 (interpreting exhaustion of FEHA remedies, including filing of charge, as a "jurisdictional prerequisite" to FEHA suit).

(n195)Footnote 142. See *Zipes v. Trans World Airlines Inc.* (1982) 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (timely filing of charge with EEOC under Title VII is not a jurisdictional prerequisite, but is in nature of a

statute of limitations requirement, subject to waiver, estoppel and equitable tolling). *See also* § 43.01[3].

(n196)Footnote 143. *See Shah v. Mt. Zion Hosp. & Med. Ctr.* (9th Cir. 1981) 642 F.2d 268, 271 (decided under Title VII).

(n197)Footnote 144. *Baker v. Children's Hosp. Med. Ctr.* (1989) 209 Cal. App. 3d 1057, 1062-1065, 257 Cal. Rptr. 768 ; *see Gov. Code § 12965(b)*.

(n198)Footnote 145. *Gov. Code § 12965(b); Gov. Code § 12965(c)(2)*.

(n199)Footnote 146. *Gov. Code § 12965(b); Gov. Code § 12965(c)(2)*.

(n200)Footnote 147. *Ford Motor Credit Co. v. Superior Court* (1996) 50 Cal. App. 4th 306, 308, 57 Cal. Rptr. 2d 682 .

(n201)Footnote 148. *See Brown v. Superior Court* (1984) 37 Cal. 3d 477, 488-489, 208 Cal. Rptr. 724, 691 P.2d 272 .

(n202)Footnote 149. *Richfield Hotel Management, Inc. v. Superior Court* (1994) 22 Cal. App. 4th 222, 226-227, 27 Cal. Rptr. 2d 161 .

(n203)Footnote 149.1. *See Olinick v. BMG Entertainment* (2006) 138 Cal. App. 4th 1286, 1294, 42 Cal. Rptr. 3d 268 .

(n204)Footnote 149.2. *See Code Civ. Proc. § 418.10*.

(n205)Footnote 149.3. *Olinick v. BMG Entertainment* (2006) 138 Cal. App. 4th 1286, 1294, 1296-1304, 42 Cal. Rptr. 3d 268 .

(n206)Footnote 150. *See, e.g., Gen. Tel. Co. of the Southwest v. Falcon* (1982) 457 U.S. 147, 160-161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 ; *East Texas Motor Freight v. Rodriguez* (1977) 431 U.S. 395, 399-406, 97 S. Ct. 1891, 52 L. Ed. 2d 453 ; *Gay v. Waiters' and Dairy Lunchmen's Union* (9th Cir. 1977) 549 F.2d 1330, 1331-1334 .

(n207)Footnote 151. *See Collins v. Rocha* (1972) 7 Cal. 3d 232, 239, 102 Cal. Rptr. 1, 497 P.2d 225 .

(n208)Footnote 152. *See, e.g., Alch v. Superior Court* (2004) 122 Cal. App. 4th 339, 377-387, 19 Cal. Rptr. 3d 29 (television screenwriters alleging age discrimination in violation of FEHA properly alleged classwide claims of pattern or practice of age discrimination in violation of FEHA and were not required to plead facts supporting individual prima facie cases of discriminatory refusal to hire as predicate for classwide claims; claims by deterred applicants could not be dismissed on basis of allegedly inconsistent statistics pled in writers' federal complaint). *see Code Civ. Proc. § 382; Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732 ; *see generally* California Forms of Pleading and Practice, Ch. 120, *Class Actions*.

(n209)Footnote 152.1. *McCullah v. Southern California Gas Co.* (2000) 82 Cal. App. 4th 495, 98 Cal. Rptr. 2d 208 .

(n210)Footnote 152.2. *McCullah v. Southern California Gas Co.* (2000) 82 Cal. App. 4th 495, 500, 98 Cal. Rptr. 2d 208 .

(n211)Footnote 152.3. *McCullah v. Southern California Gas Co.* (2000) 82 Cal. App. 4th 495, 500, 98 Cal. Rptr. 2d 208 .

(n212)Footnote 152.4. *McCullah v. Southern California Gas Co.* (2000) 82 Cal. App. 4th 495, 500, 98 Cal. Rptr.

2d 208 .

(n213)Footnote 153. *Gov. Code § 12965(b)*.

(n214)Footnote 153.1. *Alch v. Superior Court (2004) 122 Cal. App. 4th 339, 362-367, 19 Cal. Rptr. 3d 29 (Gov. Code § 12965(b) did not bar television screenwriters who filed and dismissed claims in federal court class actions from filing FEHA class action in state court).*

(n215)Footnote 154. *See Gov. Code § 12961*.

(n216)Footnote 155. *Ackerman v. Western Elec. Co., Inc. (9th Cir. 1988) 860 F.2d 1514, 1519 (FEHA) ; see DFEH v. Rosenberg (1990) FEHC Dec. No. 90-09, p. 10; DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, p. 21; DFEH v. Madera County (1990) FEHC Dec. No. 90-03, p. 34 (same); DFEH v. Ca. State University--Sacramento (1988) FEHC Dec. No. 88-08, pp. 24-25 (same); DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05, p. 9 (same).*

(n217)Footnote 156. *See generally* ch. 42, pt. A.

(n218)Footnote 157. *See Gov. Code § 12965(b); Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal. 3d 211, 213, 216, 185 Cal. Rptr. 270, 649 P.2d 912 ; Ackerman v. Western Elec. Co., Inc. (9th Cir. 1988) 860 F.2d 1514,1519 ; see also [h], below.*

(n219)Footnote 158. *Sposato v. Electronic Data Sys., Corp. (9th Cir. 1999) 188 F.3d 1146, 1148 (Title VII) ; see City and County of San Francisco v. Fair Employment & Housing Comm'n (1987) 191 Cal. App. 3d 976, 985, 236 Cal. Rptr. 716 (courts often look to Title VII authority to interpret FEHA provisions).*

(n220)Footnote 159. *Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal. 3d 211, 213, 216, 185 Cal. Rptr. 270, 649 P.2d 912 .*

(n221)Footnote 160. *Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal. 3d 211, 213, 216, 185 Cal. Rptr. 270, 649 P.2d 912 .*

(n222)Footnote 161. *See Gov. Code § 12965(c)(3).* For discussion of election to transfer generally, *see* ch. 42, pt. B.

(n223)Footnote 161.1. *State Dept. of Health Services v. Superior Court (McGinnis) (2003) 31 Cal. 4th 1026, 1042-1044, 6 Cal. Rptr. 3d 441, 79 P.3d 556 .*

(n224)Footnote 161.2. *State Dept. of Health Services v. Superior Court (McGinnis) (2003) 31 Cal. 4th 1026, 1044, 6 Cal. Rptr. 3d 441, 79 P.3d 556 .*

(n225)Footnote 161.3. *See State Dept. of Health Services v. Superior Court (McGinnis) (2003) 31 Cal. 4th 1026, 1045, 6 Cal. Rptr. 3d 441, 79 P.3d 556 .*

(n226)Footnote 161.4. *State Dept. of Health Services v. Superior Court (McGinnis) (2003) 31 Cal. 4th 1026, 1044-1045, 6 Cal. Rptr. 3d 441, 79 P.3d 556 .*

(n227)Footnote 162. *See Gov. Code § 12970(a); 2 Cal. Code Reg. § 7286.9(a)(1); DFEH v. Ca. State University--Sacramento (1988) FEHC Dec. No. 88-08, pp. 24-25.* For further discussion of FEHC remedies, *see* ch. 42, pt. A.

(n228)Footnote 163. *See, e.g., Ackerman v. Western Elec. Co., Inc. (9th Cir. 1988)860 F.2d 1514, 1519 , (back pay awarded to disabled employee because employer failed to reasonably accommodate employee's asthma);*

American National Ins. Co. v. Fair Employment & Housing Com. (1982) 32 Cal. 3d 603, 607, 186 Cal. Rptr. 345, 651 P.2d 1151 (upholding back pay and reinstatement for individual with high blood pressure who was denied employment and accommodation); *Northern Inyo Hosp. v. Fair Emp. Practice Com.* (1974) 38 Cal. App. 3d 14, 24-26, 112 Cal. Rptr. 872 (upholding award of "lost wages" under former Fair Employment Practices Act for Native American who was denied rehiring because of racial discrimination and retaliation).

(n229)Footnote 164. See *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, pp. 21-22; *DFEH v. Madera County* (1990) FEHC Dec. No. 90-03, pp. 36-37; *DFEH v. J.E. Robinson, D.D.S.* (1989) FEHC Dec. No. 89-02, p. 14; *DFEH v. Aluminum Precision Products, Inc.* (1988) FEHC Dec. No. 88-05, p. 9. Title VII expressly requires a victim of discrimination to mitigate back pay loss by seeking comparable employment. 42 U.S.C. § 2000e-5(g)(1); *Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, 231 n.14, 102 S. Ct. 3057, 73 L. Ed. 2d 721. Although the FEHA contains no similar provision, the courts and the FEHC have imposed a duty to mitigate on prevailing plaintiffs with FEHA back-pay claims. see *Ackerman v. Western Elec. Co., Inc.* (N.D. Cal. 1986) 643 F. Supp. 836, 855 & n. 16, *aff'd*, 860 F.2d 1514, 1519 (9th Cir. 1988); see also 2 Cal. Code Reg. § 7286.9(a)(1)(A) (mitigation of back-pay awards by FEHC); *DFEH v. Rosenberg* (1990) FEHC Dec. No. 90-09, p. 10; *DFEH v. Madera County* (1990) FEHC Dec. No. 90-03, pp. 36-37. Unemployment compensation may not be deducted from an award of back pay under the FEHA. see *County of Alameda v. Fair Employment & Housing Com.* (1984) 153 Cal. App. 3d 499, 508, 200 Cal. Rptr. 381. However, disability payments that operate as partial wage replacements may be offset. see *DFEH v. Madera County* (1990) FEHC Dec. No. 90-03, pp. 36-37; *DFEH v. Ca. State University--Sacramento* (1988) FEHC Dec. No. 88-08, p. 25.

(n230)Footnote 165. See *DFEH v. Ca. State University--Sacramento* (1988) FEHC Dec. No. 88-08, p. 25; *cf.* *Patterson v. American Tobacco Co.* (4th Cir. 1976) 535 F.2d 257, 269 (Title VII).

(n231)Footnote 166. See *DFEH v. Ca. State University--Sacramento* (1988) FEHC Dec. No. 88-08, p. 25; *cf.* *Pettway v. American Cast Iron Pipe Company* (5th Cir. 1974) 494 F.2d 211, 263 (Title VII).

(n232)Footnote 167. See *County of Alameda v. Fair Employment & Housing Com.* (1984) 153 Cal. App. 3d 499, 509, 200 Cal. Rptr. 381 (stating that majority of courts appear to favor inclusion of fringe benefits as part of award of back pay).

(n233)Footnote 168. *cf.* *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 418-421, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (Title VII).

(n234)Footnote 169. *Sposato v. Electronic Data Sys., Corp.* (9th Cir. 1999) 188 F.3d 1146, 1148. In predicting California law, the Ninth Circuit distinguished a Fourth Circuit holding that the employee's widow was only entitled to the amount of premiums that the employer would have paid due to the widow's failure to obtain substitute coverage. see *Fariss v. Lynchburg Foundry* (4th Cir. 1985) 769 F.2d 958, 966. The *Sposato* court also held that California's survival statute (Code Civ. Proc. § 377.34) did not bar recovery. *Sposato v. Electronic Data Sys., Corp.* (9th Cir. 1999) 188 F.3d 1146, 1149-1150.

(n235)Footnote 169.1. See *Satterwhite v. Smith* (9th Cir. 1984) 744 F.2d 1380, 1381 fn.1.

(n236)Footnote 169.2. See *Cloud v. Casey* (1999) 76 Cal. App. 4th 895, 908, 90 Cal. Rptr. 2d 757 (when position for which plaintiff was denied promotion no longer available and no other positions existed with similar status, plaintiff could not be made whole by staying with company and therefore was entitled to back pay subsequent to voluntary resignation).

(n237)Footnote 169.3. See *Sasco Electric v. Fair Employment & Housing Commission* (2009) 176 Cal. App. 4th 532, 543-544, 97 Cal. Rptr. 3d 482 (assuming without deciding former employee became disabled during pregnancy, disability did not preclude Commission from awarding backpay for entire back pay period, where, had employer not unlawfully terminated her employment, it would have been required to reasonably accommodate her disability,

including temporarily transferring her to less strenuous or hazardous position, and where employer offered no evidence to show it could not have accommodated her work restrictions).

(n238)Footnote 170. *See* DFEH v. Rosenberg (1990) FEHC Dec. No. 90-09, p. 10; DFEH v. Madera County (1990) FEHC Dec. No. 90-03, p. 36.

(n239)Footnote 171. *See* DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, pp. 21-22 (refusing to order pre-hearing back pay because DFEH failed to carry its burden; granting post-hearing back pay up to time complainant was reinstated or declined offer of reinstatement).

(n240)Footnote 172. *See, e.g., Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514, 1519 .

(n241)Footnote 173. *Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514, 1519 .

(n242)Footnote 174. *Ackerman v. Western Elec. Co., Inc.* (N.D. Cal. 1986) 643 F. Supp. 836, 856 , *aff'd*, 860 F.2d 1514, 1519 (9th Cir. 1988) ; *see also* DFEH v. Madera County (1988) FEHC Dec. No. 88-11, p. 34 (front pay is based on difference between salary plaintiff would have earned had discrimination not occurred, and that which plaintiff is expected to earn at his or her current job until he or she is able to attain equivalent amount of earnings).

(n243)Footnote 174.1. *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal. App. 4th 359, 388-389, 33 Cal. Rptr. 3d 644 . *See generally* *Pollard v. E.I. du Pont de Nemours & Co.* (2001) 532 U.S. 843, 846-850, 121 S. Ct. 1946, 150 L. Ed. 2d 62 .

(n244)Footnote 174.2. *See Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal. App. 4th 976, 996-997, 16 Cal. Rptr. 2d 787 .

(n245)Footnote 174.3. *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal. App. 4th 359, 388-389, 33 Cal. Rptr. 3d 644 .

(n246)Footnote 175. *See Gov. Code § 12970(a)* (authorizing FEHC to issue cease and desist orders and orders requiring actions such as hiring, reinstatement, or upgrading of employees); DFEH v. Rosenberg (1990) FEHC Dec. No. 90-09, p. 12-13, 14 (ordering employers to take preventative actions, such as formal written policies and training programs, to assist employers in carrying out their affirmative duty under FEHA to take all reasonable steps necessary to prevent harassment); DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, pp. 21, 26 (same; also ordering employee reinstated to position that she was deprived of, together with all seniority, status, and other terms, conditions, and privileges of employment that would have accrued to her had she not been unlawfully discriminated against). For further discussion of FEHC remedies, *see* ch. 42, pt. A.

(n247)Footnote 176. *Cf. 42 U.S.C. § 2000e-5(g).*

(n248)Footnote 177. *See, e.g., Johnson v. Civil Service Com.* (1984) 153 Cal. App. 3d 585, 591, 200 Cal. Rptr. 289 (order directing city to employ petitioner as firefighter upheld); *Fair Employment Practice Com. v. State Personnel Bd.* (1981) 117 Cal. App. 3d 322, 323-324, 172 Cal. Rptr. 739 (retroactive promotion order upheld); *International Union etc. Engineers v. Fair Emp. Practice Com.* (1969) 276 Cal. App. 2d 504, 510-511, 81 Cal. Rptr. 47 (order to hire African-American business agent upheld).

(n249)Footnote 178. *See, e.g., County of Alameda v. Fair Employment & Housing Com.* (1984) 153 Cal. App. 3d 499, 200 Cal. Rptr. 381 (retroactive seniority granted to African-American female denied position by county as jail cook).

(n250)Footnote 179. *See Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514, 1519 .

(n251)Footnote 180. *See Northern Inyo Hosp. v. Fair Emp. Practice Com.* (1974) 38 Cal. App. 3d 14, 17, 112

Cal. Rptr. 872 (FEPC order to employer to cease and desist from discrimination on account of race upheld by court). *cf.* *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 *Cal. App. 4th* 359, 390-393, 33 *Cal. Rptr. 3d* 644 (although FEHA permits injunctive relief for discriminatory employment practices, plaintiffs failed to establish that trial court abused its discretion in refusing to enjoin implementation of employer's affirmative action plan).

(n252)Footnote 181. *Aguilar v. Avis Rent A Car Sys.* (1999) 21 *Cal. 4th* 121, 87 *Cal. Rptr. 2d* 132, 980 *P.2d* 846, *cert. denied*, 529 *U.S.* 1138 (2000) .

(n253)Footnote 182. *Aguilar v. Avis Rent A Car Sys.* (1999) 21 *Cal. 4th* 121, 128-131, 87 *Cal. Rptr. 2d* 132, 980 *P.2d* 846, *cert. denied*, 529 *U.S.* 1138 (2000) (FEHA permits courts to fashion remedies to prevent recurrence of misconduct).

(n254)Footnote 183. *Aguilar v. Avis Rent A Car Sys.* (1999) 21 *Cal. 4th* 121, 128-133, 87 *Cal. Rptr. 2d* 132, 980 *P.2d* 846, *cert. denied*, 529 *U.S.* 1138 (2000) (fact that defendants refrained from misconduct during trial does not obviate need for prospective relief).

(n255)Footnote 184. *Aguilar v. Avis Rent A Car Sys.* (1999) 21 *Cal. 4th* 121, 146, 87 *Cal. Rptr. 2d* 132, 980 *P.2d* 846, *cert. denied*, 529 *U.S.* 1138 (2000) .

(n256)Footnote 185. *See Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 *Cal. 3d* 40, 48, 276 *Cal. Rptr. 114*, 801 *P.2d* 357 (reaffirming that compensatory and punitive damages are available in civil actions under FEHA, although FEHC has no power to award them); *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 *Cal. 3d* 211, 213, 216, 185 *Cal. Rptr. 270*, 649 *P.2d* 912 ; *Garcia v. Los Angeles Unified School Dist.* (1985) 173 *Cal. App. 3d* 701, 711, 219 *Cal. Rptr. 544* ; *see also* [a], *above. See., e.g., Hope v. California Youth Authority* (2005) 134 *Cal. App. 4th* 577, 594-596, 36 *Cal. Rptr. 3d* 154 (in action for sexual orientation harassment, jury properly awarded economic damages based on determination that employee was improperly denied promotion because of his sexual orientation, that employee would have been employed until retirement age, that any performance problems and excessive absences were attributable to unlawful harassment, and that employee, who was HIV-positive, would have had normal life expectancy).

(n257)Footnote 186. *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 *Cal. 3d* 211, 213, 216, 185 *Cal. Rptr. 270*, 649 *P.2d* 912 ; *Garcia v. Los Angeles Unified School Dist.* (1985) 173 *Cal. App. 3d* 701, 711, 219 *Cal. Rptr. 544* ; *Civ. Code* § 3333 (general measure of damages for breach of obligation not arising from contract); *see also* *Alcorn v. Anbro Engineering, Inc.* (1970) 2 *Cal. 3d* 493, 497-498, 86 *Cal. Rptr. 88*, 468 *P.2d* 216 (damages for emotional distress due to discriminatory termination of black employee were available under tort theory). *cf.* *Sullivan v. Delta Airlines, Inc.* (1997) 15 *Cal. 4th* 288, 304-305, 63 *Cal. Rptr. 2d* 74, 935 *P.2d* 781 (no statutory bar to recovery of pain and suffering damages awarded to injured party who died after judgment but during pendency of appeal).

(n258)Footnote 187. *See Gov. Code* § 12970(c).

(n259)Footnote 188. *Gov. Code* § 12970(a)(3).

(n260)Footnote 188.1. *Hope v. California Youth Authority* (2005) 134 *Cal. App. 4th* 577, 595, 36 *Cal. Rptr. 3d* 154 .

(n261)Footnote 189. *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 *Cal. 3d* 211, 213, 216, 185 *Cal. Rptr. 270*, 649 *P.2d* 912 . By contrast, the FEHC cannot award punitive damages in administrative proceedings under the FEHA, although it can assess administrative fines. *See Gov. Code* § 12970(a)(3), (c), (d); *Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n* (1987) 43 *Cal. 3d* 1379, 1383, 241 *Cal. Rptr. 67*, 743 *P.2d* 1323 ; *See also* ch. 42, pt. B.

(n262)Footnote 190. *Weeks v. Baker & McKenzie* (1998) 63 *Cal. App. 4th* 1128, 1147-1148, 74 *Cal. Rptr. 2d* 510

(n263)Footnote 191. See *Civ. Code* § 3294; see, e.g., *Ackerman v. Western Elec. Co., Inc.* (N.D. Cal. 1986) 643 F.Supp. 836, 857, *aff'd*, (9th Cir. 1988) 860 F.2d 1514; *Monge v. Superior Court* (1986) 176 Cal. App. 3d 503, 511-512, 222 Cal. Rptr. 64 (plaintiffs who pleaded a sexually hostile working environment were entitled to seek punitive damages under FEHA). Public employers are exempt from punitive damage liability. See *Gov. Code* § 818.

(n264)Footnote 192. *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1151, 74 Cal. Rptr. 2d 510; see *Civil Code* § 3294(b).

(n265)Footnote 192.1. See, e.g., *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 428-429, 69 Cal. Rptr. 3d 1 (jury properly found employer liable for punitive damages for retaliation, where employer knew its older managers objected to compensation reduction plan and jurors could reasonably infer it used pretexts to deny employee who filed age discrimination claim transfer and created hostile work environment in retaliation for EEOC complaint; conduct of supervisor other than supervisor who made employment decisions was relevant, because jury could find he was managing agent, and jurors could find employer gave him discretion to decide how to punish managers and fostered tolerance of his retaliation by not repudiating his conduct).

(n266)Footnote 193. *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 74 Cal. Rptr. 2d 510.

(n267)Footnote 194. *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1153-1154, 1153 n. 9, 74 Cal. Rptr. 2d 510 (specific finding of employer oppression, fraud, or malice is not prerequisite for punitive damages award against employer).

(n268)Footnote 195. *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1156-1160, 74 Cal. Rptr. 2d 510.

(n269)Footnote 196. *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1154-1155, 74 Cal. Rptr. 2d 510.

(n270)Footnote 196.1. *Mathieu v. Norrell Corp.* (2004) 115 Cal. App. 4th 1174, 10 Cal. Rptr. 3d 52.

(n271)Footnote 196.2. *Mathieu v. Norrell Corp.* (2004) 115 Cal. App. 4th 1174, 1190-1191, 10 Cal. Rptr. 3d 52.

(n272)Footnote 196.2.1. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *47-*66.

(n273)Footnote 196.2.2. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *48. See *State Farm Mutual Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416-418, 123 S. Ct. 1513, 155 L. Ed. 2d. 585; *BMW of North America v. Gore* (1996) 517 U.S. 559, 568, 116 S. Ct. 1589, 134 L. Ed. 2d 809.

(n274)Footnote 196.2.3. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *62-*63. See *State Farm Mutual Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416-418, 123 S. Ct. 1513, 155 L. Ed. 2d. 585.

(n275)Footnote 196.2.4. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *62. See *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal. 4th 1159, 1189, 29 Cal. Rptr. 3d 379 P.3d 63.

(n276)Footnote 196.2.5. *State Farm Mutual Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416-418, 123 S. Ct. 1513, 155 L. Ed. 2d. 585. See also *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *63-*64 (after applying *State Farm* test, Court concluded that one-to-one ratio between

compensatory and punitive damages was federal constitutional limit based on specific facts of case, in particular the relatively low degree of reprehensibility on part of the employer and the substantial compensatory damages verdict, which included a substantial award of noneconomic damages).

(n277)Footnote 196.2.6. *See Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *63 (if employee had pursued her FEHA claims administratively before the California Fair Employment and Housing Commission, Commission could have assessed fine against employer in addition to awarding compensatory damages [Gov. Code § 12970(a), (c) and (d)], but fine could not have exceeded \$150,000 [Gov. Code § 12970(a)(3)], which was tiny by comparison to jury's punitive damages award of \$15 million against employer).

(n278)Footnote 196.2.7. *State Farm Mutual Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416-418, 123 S. Ct. 1513, 155 L. Ed. 2d. 585 .

(n279)Footnote 196.2.8. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *52-*56 (supervisor did not exercise sort of broad authority and was not "managing agent" for purposes of awarding punitive damages against employer under Civ. Code § 3294(b); however, sufficient evidence supported jury's inference that managing agent eventually became aware of supervisor's unlawful harassment, and that employer thereafter continued to employ supervisor without taking any corrective measures indicated conscious disregard of rights or safety of others, warranting punitive damages). *See Civ. Code § 3294(b)*; (employer not liable for punitive damages based upon acts of employee, unless employer had advance knowledge of unfitness of employee and employed him or her with conscious disregard of rights or safety of others or authorized or ratified wrongful conduct; with respect to corporate employer, advance knowledge and conscious disregard, authorization, or ratification must be on part of officer, director, or managing agent of corporation). *See also White v. Ultramar, Inc.* (1992) 21 Cal. 4th 563, 577, 88 Cal. Rptr. 2d 19, 981 P.2d 944 (officer, director, or managing agent must be someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy).

(n280)Footnote 196.2.9. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *56 .

(n281)Footnote 196.2.10. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *60-*61 . *See, e.g., Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 74 Cal. Rptr. 2d 510 (partner of the defendant law firm put his hand in breast pocket of his secretary's blouse, made grabbing gesture toward her breasts, touched her buttocks, and made sexually harassing statements; defendant law firm was aware of numerous prior incidents of severe sexual harassment involving same partner; punitive damages: \$3.5 million).

(n282)Footnote 196.2.11. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *61 .

(n283)Footnote 196.2.12. *Roby v. McKesson Corp.* (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, *64 ; *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal. 4th 1159, 1185-86, 29 Cal. Rptr. 3d 379, 113 P.3d 63 .

(n284)Footnote 196.3. *Missouri Pac. R. R. Co. v. Ault* (1921) 256 U.S. 554, 563-564, 41 S. Ct. 593, 65 L. Ed. 1087 .

(n285)Footnote 196.4. *Keifer & Keifer v. R. F. C.* (1939) 306 U.S. 381, 388, 59 S. Ct. 516, 83 L. Ed. 784 .

(n286)Footnote 196.5. *Loeffler v. Frank* (1988) 486 U.S. 549, 554, 108 S. Ct. 1965, 100 L. Ed. 2d 549 .

(n287)Footnote 196.6. *Postal Service v. Flamingo Industries (USA) Ltd.* (2004) 540 U.S. 736, 741, 124 S. Ct. 1321, 158 L. Ed. 2d 19 .

(n288)Footnote 196.7. *FDIC v. Meyer* (1994) 510 U.S. 471, 480, 114 S. Ct. 996, 127 L. Ed. 2d 308 .

(n289)Footnote 196.8. *FDIC v. Meyer* (1994) 510 U.S. 471, 480 [114 S. Ct. 996, 127 L. Ed. 2d 308 . Compare *McGee v. Tucoemas Federal Credit Union* (2007) 153 Cal. App. 4th 1351, 1356-1361, 63 Cal. Rptr. 3d 808 ("sue and be sued" clause in federal credit union enabling legislation presumptively waived immunity from punitive damages, and since defendants failed to clearly show applicability of exception to waiver presumption, sovereign immunity did not apply and federal credit union could be liable for punitive damages in employment discrimination action) with *Matter of Sparkman* (9th Cir. 1983) 703 F.2d 1097, 1101-1102 (two-judge majority holding that, as legislatively declared instrumentality of United States, production credit association was not subject to liability for punitive damages absent express waiver of immunity).

(n290)Footnote 197. See *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1151-1152, 74 Cal. Rptr. 2d 510 .

(n291)Footnote 198. *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1151-1152, 74 Cal. Rptr. 2d 510 .

(n292)Footnote 199. *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1153-1156, 74 Cal. Rptr. 2d 510 (court expressly did not reach issue of whether employer waived right to argue that jury must find that employer engaged in oppression, fraud, or malice by stipulating to special verdict form that did not request jury to make that determination).

(n293)Footnote 200. *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1153-1156, 1160-1161, 74 Cal. Rptr. 2d 510 (stipulation to liability on jury finding of sexual harassment did not render conduct towards other victims inadmissible; evidence was still relevant to firm's potential liability for punitive damages).

(n294)Footnote 201. *E.E.O.C. v. Farmer Bros. Co.* (9th Cir. 1994) 31 F.3d 891, 903-905 .

(n295)Footnote 202. See *E.E.O.C. v. Farmer Bros. Co.* (9th Cir. 1994) 31 F.3d 891, 903-905 . See also *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 429, 69 Cal. Rptr. 3d 1 (punitive damages of \$1 million, less than four times greater than compensatory damages of \$280,000, fell within range of multipliers commonly used to achieve goals of punitive damages); *McGee v. Tucoemas Federal Credit Union* (2007) 153 Cal. App. 4th 1351, 1361-1362, 63 Cal. Rptr. 3d 808 (in employment discrimination action, reduction in compensatory damages at trial from \$2 million to \$750,000 did not require corresponding reduction in punitive damages, where there was no requirement that original ratio between compensatory and punitive damages as measured by jury remain, and it could not be concluded that punitive damages were excessive as matter of law, because defendants' conduct was reprehensible).

(n296)Footnote 202.1. *Gober v. Ralph's Grocery Co.* (2006) 137 Cal. App. 4th 204, 215, 40 Cal. Rptr. 3d 92 . See *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585 , citing *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809 .

(n297)Footnote 202.2. *Gober v. Ralph's Grocery Co.* (2006) 137 Cal. App. 4th 204, 216-223, 40 Cal. Rptr. 3d 92 .

(n298)Footnote 202.3. *Gober v. Ralph's Grocery Co.* (2006) 137 Cal. App. 4th 204, 216-218, 40 Cal. Rptr. 3d 92 .

(n299)Footnote 202.4. *Gober v. Ralph's Grocery Co.* (2006) 137 Cal. App. 4th 204, 216-223, 40 Cal. Rptr. 3d 92 .

(n300)Footnote 202.5. *Gober v. Ralph's Grocery Co.* (2006) 137 Cal. App. 4th 204, 219-222, 40 Cal. Rptr. 3d 92 .

. See *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585 .

(n301)Footnote 202.6. *Gober v. Ralph's Grocery Co.* (2006) 137 Cal. App. 4th 204, 219-222, 40 Cal. Rptr. 3d 92 , citing *State Farm Mut. Auto Ins. Co. v. Campbell* (2003) 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 ; *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal. 4th 1159, 1182, 29 Cal. Rptr. 3d 379, 113 P.3d 63 .

(n302)Footnote 202.7. *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 429-430, 69 Cal. Rptr. 3d 1 (employer failed to show trial court abused its discretion by excluding evidence of how employer acquires its wealth, holds it or uses it).

(n303)Footnote 203. *DFEH v. Livermore Joe's, Inc.* (1990) FEHC Dec. No. 90-07, p. 22 (interest awarded on back pay amount, at rate of 10 percent per year, compounded annually, and running from time of wage loss to date of payment); *DFEH v. Ca. State University--Sacramento* (1988) FEHC Dec. No. 88-08, pp. 25-26; *DFEH v. Aluminum Precision Products, Inc.* (1988) FEHC Dec. No. 88-05, p. 9; see *County of Alameda v. Fair Employment & Hous. Comm'n* (1984) 153 Cal. App. 3d 499, 508, 200 Cal. Rptr. 381 (upholding without comment interest on back-pay award).

(n304)Footnote 204. *Civ. Code § 3291.*

(n305)Footnote 205. *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal. App. 4th 976, 988-989, 16 Cal. Rptr. 2d 787 , disapproved on other grounds, *Lakin v. Watkins Associated Indus.* (1993) 6 Cal. 4th 644, 664 .

(n306)Footnote 206. *Gov. Code § 12965(b); Cummings v. Benco Building Services* (1992) 11 Cal. App. 4th 1383, 1386-1388, 15 Cal. Rptr. 2d 53 ; see *Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514, 1520 (FEHA; appropriate for court to disallow hours spent on unrelated claims, including breach of covenant of good faith and fair dealing, misrepresentation, and violation of ERISA, on which plaintiff did not prevail); see also *Hon v. Marshall* (1997) 53 Cal. App. 4th 470, 476-477, 62 Cal. Rptr. 2d 11 (defendant granted summary judgment based on jurisdictional defect (failure to exhaust administrative remedies) is not prevailing party entitled to attorney's fee award because defendant did not prevail on any issue central to litigation). See also *Anthony v. City of Los Angeles* (2008) 166 Cal. App. 4th 1011, 1016-1017, 83 Cal. Rptr. 3d 306 (amendment of FEHA by Stats. 1999, ch. 591, § 12 expressly authorizes award of expert witness fees to prevailing party whether or not expert was hired by court).

(n307)Footnote 206.1. *Flannery v. Prentice* (2001) 26 Cal. 4th 572, 579, 110 Cal. Rptr. 2d 809, 28 P.3d 860 .

(n308)Footnote 206.2. *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal. App. 4th 440, 447, 94 Cal. Rptr. 2d 143 .

(n309)Footnote 207. *Gov. Code § 12965(b).*

(n310)Footnote 208. *Cummings v. Benco Building Services* (1992) 11 Cal. App. 4th 1383, 15 Cal. Rptr. 2d 53 .

(n311)Footnote 209. *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 417, 98 S. Ct. 694, 54 L. Ed. 2d 648 .

(n312)Footnote 210. *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 417, 98 S. Ct. 694, 54 L. Ed. 2d 648 ; see *Jersey v. John Muir Medical Center* (2002) 97 Cal. App. 4th 814, 830-832, 118 Cal. Rptr. 2d 807 (defendant not entitled to award of attorney's fees on plaintiff's dismissed sex discrimination claim under FEHA, because lack of merit was not proper standard for awarding attorney fees against losing plaintiff, trial court failed to make express written findings necessary to support award against plaintiff under FEHA, and plaintiff's action, while ultimately failing, could hardly be considered as frivolous and trial court did not consider it such); *Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 Cal. App. 4th 762, 767-768, 89 Cal. Rptr. 2d 429 (employer defendant entitled to attorney's fees, including those for defense on appeal, because plaintiff continued to litigate claims of unlawful discrimination after

signing general release of all claims related to termination of employment); *Guthrey v. State of Cal.* (1998) 63 Cal. App. 4th 1108, 1126-1127, 75 Cal. Rptr. 2d 27 (defendants were entitled to attorney's fees in having to defend summary judgment in their favor when plaintiff presented no issue with any arguable merit on appeal; conclusory allegations in appellate briefs citing only legal principles resulted in waiver); *see also Cummings v. Benco Building Services* (1992) 11 Cal. App. 4th 1383, 1387, 15 Cal. Rptr. 2d 53 .

(n313)Footnote 211. *Cummings v. Benco Building Services* (1992) 11 Cal. App. 4th 1383, 1387, 15 Cal. Rptr. 2d 53 .

(n314)Footnote 212. *See Gonzales v. Metpath, Inc.* (1989) 214 Cal. App. 3d 422, 428, 262 Cal. Rptr. 654 .

(n315)Footnote 213. *See Delaney v. Superior Fast Freight* (1993) 14 Cal. App. 4th 590, 600, 18 Cal. Rptr. 2d 33 ; *see also Chen v. County of Orange* (2002) 96 Cal. App. 4th 926, 953, 116 Cal. Rptr. 2d 786 (in action by former deputy district attorney against office and individuals in office, trial court properly denied attorney's fees to prevailing defendants, because marital status claim was one of first impression in state, race and gender claims were strong enough to get to jury, plaintiff had at least some anecdotal evidence to support race and gender discrimination claims, and fees of individual defendants had been paid by county).

(n316)Footnote 213.1. *Villanueva v. City of Colton* (2008) 160 Cal. App. 4th 1188, 1200-1201, 73 Cal. Rptr. 3d 343 .

(n317)Footnote 213.2. *Villanueva v. City of Colton* (2008) 160 Cal. App. 4th 1188, 1204, 73 Cal. Rptr. 3d 343 .

(n318)Footnote 213.3. *Villanueva v. City of Colton* (2008) 160 Cal. App. 4th 1188, 1202-1204, 73 Cal. Rptr. 3d 343 (but fee award to prevailing defendant without express finding on plaintiff's ability to pay was not abuse of discretion, where court was privy to plaintiff's salary, as provided by employer along with its fee request, and plaintiff offered no evidence that might have warranted reduced fee award). *See also Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal. App. 4th 859, 868 n42, 110 Cal. Rptr. 2d 903 (trial court should make findings as to plaintiff's ability to pay attorney's fees and how large award should be in light of plaintiff's financial situation).

(n319)Footnote 213.4. *Shaw v. City of Sacramento* (9th Cir. 2001) 250 F.3d 1289 .

(n320)Footnote 213.5. *Shaw v. City of Sacramento* (9th Cir. 2001) 250 F.3d 1289, 1294 .

(n321)Footnote 213.6. *Shaw v. City of Sacramento* (9th Cir. 2001) 250 F.3d 1289, 1294-1295 ; *see Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1169-1170, 74 Cal. Rptr. 2d 510 .

(n322)Footnote 213.7. *See Hon v. Marshall* (1997) 53 Cal. App. 4th 470, 478, 62 Cal. Rptr. 2d 11 (award of attorney's fees to defendant overturned because grant of summary judgment solely on basis plaintiff neglected to exhaust her administrative remedies required no consideration of the merits of her discrimination and harassment claims). *See also EEOC v. United Parcel Service* (9th Cir. 2005) 424 F.3d 1060, 1077-1078 (construing FEHA; although trial court erred in awarding attorney fees to defendant under *Gov. Code* § 12965 as sanction for plaintiffs' failure to voluntarily dismiss claims for which administrative remedies had not been exhausted, it was clear from record that trial court would have awarded the same sanctions under different provision, if one were available, so appellate court would remand).

(n323)Footnote 213.8. *See Cummings v. Benco Building Services* (1992) 11 Cal. App. 4th 1383, 1388, 15 Cal. Rptr. 2d 53 (review of record and subsequent events provided considerable proof that plaintiff's claim of age discrimination was neither frivolous, nor unreasonable, nor groundless); *see also Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 Cal. App. 4th 762, 770, 89 Cal. Rptr. 2d 429 (plaintiff had no legal basis to pursue unlawful discrimination cause of action because it was explicitly subject of enforceable release).

(n324)Footnote 213.9. *Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 Cal. App. 4th 762, 89 Cal. Rptr. 2d 429 .

(n325)Footnote 213.10. *Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 Cal. App. 4th 762, 767-768, 89 Cal. Rptr. 2d 429 .

(n326)Footnote 213.11. *Young v. Exxon Mobil Corp.* (2008) 168 Cal. App. 4th 1467, 1474-1477, 86 Cal. Rptr. 3d 507 .

(n327)Footnote 213.12. *Gov. Code § 12965(b)*; *Chavez v. City of Los Angeles* (2008) 160 Cal. App. 4th 410, 415, 72 Cal. Rptr. 3d 783 ; *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal. App. 3d 1394, 1406, 245 Cal. Rptr. 606 .

(n328)Footnote 213.13. *Chavez v. City of Los Angeles* (2008) 160 Cal. App. 4th 410, 415, 72 Cal. Rptr. 3d 783 ; *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal. App. 3d 1394, 1405, 245 Cal. Rptr. 606 .

(n329)Footnote 213.14. *Chavez v. City of Los Angeles* (2008) 160 Cal. App. 4th 410, 415-421, 72 Cal. Rptr. 3d 783 (in FEHA action, trial court abused its discretion in denying attorney's fees award under *Code Civ. Proc. § 1033(a)*, where court failed to consider *Gov. Code § 12965(b)* and whether attorney could have competently filed civil rights action as limited jurisdiction case and parties' efforts to settle action short of litigation; where parties participated in five mediation sessions and plaintiff made numerous attempts to settle but defendant flatly resisted all settlement discussions and never made substantive offer, forcing plaintiff to engage in extensive discovery and litigate action for five years through state and federal trial and appellate courts, incurring substantial attorney's fees; and where nothing in record evidenced special circumstances sufficient to render award of fees unjust, apart from modest verdict).

(n330)Footnote 214. *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 640, 646, 71 Cal. Rptr. 2d 632 .

(n331)Footnote 214.1. *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 430, 69 Cal. Rptr. 3d 1 ; *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal. App. 4th 418, 422, 124 Cal. Rptr. 2d 250 .

(n332)Footnote 215. *Serrano v. Priest* (1977) 20 Cal. 3d 25, 48-49, 141 Cal. Rptr. 315, 569 P.2d 1303 (*Serrano III*) . *See also* *Horsford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal. App. 4th 359, 393-401, 33 Cal. Rptr. 3d 644 (trial court abused its discretion in calculating attorney fees award to prevailing plaintiffs, where trial court failed to use counsels' time records as starting point for its lodestar determination, failed adequately to consider propriety of higher hourly rate for San Francisco attorney, failed to consider relevant factors for awarding enhancement multiplier, and improperly required plaintiffs' counsel to look to clients, under contingency fee agreement, to make up for any undercompensation arising from court's statutory fee award); *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal. App. 4th 418, 422, 124 Cal. Rptr. 2d 250 (in determining fee award under FEHA, trial court must first determine lodestar or touchstone figure).

(n333)Footnote 216. *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 640, 71 Cal. Rptr. 2d 632 (several courts have applied *Serrano III* to awards based on other statutes); *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1170, 74 Cal. Rptr. 2d 510 (attorney fees under Private Attorney General statute (*Code Civ. Proc. § 1021.5*) are not authorized in suit brought by individual to redress own economic injury). *See also* *Nichols v. City of Taft* (2007) 155 Cal. App. 4th 1233, 2007 Cal. App. LEXIS 1646, *10-*16 (lodestar enhancement is discretionary, not mandatory; trial court erred in concluding multiplier was mandatory to enhance fee award because plaintiff's counsel were from large, out-of-town law firms, in calculating attorney's fees award after settlement of sexual harassment action under FEHA).

(n334)Footnote 216.1. *See* *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal. App. 4th 418, 422, 124 Cal. Rptr. 2d 250 (in determining fee award under FEHA, trial court must first determine lodestar or touchstone figure,

which is product of number of hours worked by attorneys and reasonable fee per hour).

(n335)Footnote 217. *Serrano v. Priest* (1977) 20 Cal. 3d 25, 48-49, 141 Cal. Rptr. 315, 569 P.2d 1303 (Serrano III) ; *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal. App. 4th 418, 422, 124 Cal. Rptr. 2d 250 . See *Nichols v. City of Taft* (2007) 155 Cal. App. 4th 1233, 2007 Cal. App. LEXIS 1646, *16-*20 (use of fee multiplier to compensate for higher rates of out-of-town counsel required sufficient showing--which plaintiff failed to make--that hiring local counsel was impracticable).

(n336)Footnote 218. *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 638, 71 Cal. Rptr. 2d 632 ; see *Burlington v. Dague* (1992) 505 U.S. 557, 562-565, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (no enhancement of lodestar for contingency permitted under federal fee-shifting statutes); see also *Blum v. Stenson* (1984) 465 U.S. 886, 899-900, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (product of attorney's fee calculation is presumed to be reasonable when applicant has shown that claim rate and number of hours is reasonable; upward adjustment permitted in rare cases only).

(n337)Footnote 219. *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 646-647, 71 Cal. Rptr. 2d 632 ; see *State of California v. Meyer* (1985) 174 Cal. App. 3d 1061, 1073-1074, 220 Cal. Rptr. 884 (courts are not required to lodestar multiplier as matter of law).

(n338)Footnote 220. *Flannery v. California Highway Patrol* (1998) 61 Cal. App. 4th 629, 647, 71 Cal. Rptr. 2d 632, 643-644 .

(n339)Footnote 221. *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 74 Cal. Rptr. 2d 510 .

(n340)Footnote 222. *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1170-1176, 74 Cal. Rptr. 2d 510 (attorney fees under Private Attorney General statute (Code Civ. Proc. § 1021.5) are not authorized in suit brought by individual to redress own economic injury).

(n341)Footnote 222.1. *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal. App. 4th 418, 425-427, 124 Cal. Rptr. 2d 250 .

(n342)Footnote 222.2. *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132, 104 Cal. Rptr. 2d 377, 17 P.3d 735 .

(n343)Footnote 223. *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal. App. 4th 976, 988-989, 16 Cal. Rptr. 2d 787 , citing *Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514, 1520 , disapproved on other grounds, *Lakin v. Watkins Associated Indus.* (1993) 6 Cal. 4th 644, 664 .

(n344)Footnote 224. *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal. App. 4th 976, 997, 16 Cal. Rptr. 2d 787 , disapproved on other grounds, *Lakin v. Watkins Associated Indus.* (1993) 6 Cal. 4th 644, 664 .

(n345)Footnote 224.1. *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal. App. 4th 418, 423, 124 Cal. Rptr. 2d 250 (trial court awarded fees not for actual hours billed, but for reduced number of hours, including reductions for time spent on claims on which plaintiff did not prevail).

(n346)Footnote 224.2. *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal. App. 4th 418, 423, 124 Cal. Rptr. 2d 250 (claims of harassment and retaliation were based on common core of facts that presence of hangman's nooses in workplace, including one with effigy, created hostile work environment; in light of strong interrelationship between claims, court did not err in not further reducing its award of fees). See also *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 430-431, 69 Cal. Rptr. 3d 1 (although plaintiff alleged eight causes of action but only prevailed on retaliation cause of action and claim that employer did not engage in disability interactive process, employer failed to show trial court abused its discretion by not reducing attorney's fees award for time spent on unsuccessful claims, where trial court found employee obtained excellent results and apportionment of fees was not appropriate because issues in case were common to one another and intertwined; all claims involved underlying

disability and age discrimination issues and were based on paragraphs alleging facts in complaint, which employee alleged were common to all causes of action).

(n347)Footnote 224.3. *Knight v. Hayward Unif. Sch. Dist.* (2005) 132 Cal. App. 4th 121, 134-136, 33 Cal. Rptr. 3d 287 (FEHA; because plaintiff did not claim cost award to prevailing defendant would be inequitable, and because he did not provide any basis on which court could find cost award abuse of discretion, cost award was proper); *Perez v. County of Santa Clara* (2003) 111 Cal. App. 4th 671, 679-682, 3 Cal. Rptr. 3d 867 (disagreeing with court in *Cummings v. Benco Building Services* (1992) 11 Cal. App. 4th 1383, 15 Cal. Rptr. 2d 53, extending standard for award of attorney's fees to prevailing defendant as articulated by *United States Supreme Court in Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 to ordinary litigation expenses allowed by *Code Civ. Proc.* § 1033.5).

(n348)Footnote 225. *Code Civ. Proc.* § 998(c)(1), (e).

(n349)Footnote 226. *Code Civ. Proc.* § 998(c)(1); see *Code Civ. Proc.* § 998(h) (expert witness costs subject to limit set forth in *Gov. Code* § 68092.5). See also *Seever v. Copley Press, Inc.* (2006) 141 Cal. App. 4th 1550, 47 Cal. Rptr. 3d 206 (in FEHA action, although award of expert witness fees to prevailing employer was proper under *Code Civ. Proc.* § 998, remand was required because trial court made no inquiry about former employee's financial situation; appellate court could not determine whether amount of cost award represented unduly powerful settlement incentive to litigant of employee's means, given what record revealed about employee's occupation and employment situation).

(n350)Footnote 227. See *Code Civ. Proc.* § 998(c)(2)(A); see also *Wilson v. Safeway Stores, Inc.* (1997) 52 Cal. App. 4th 267, 271-274, 60 Cal. Rptr. 2d 532.

(n351)Footnote 227.1. *Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal. App. 4th 418, 425, 124 Cal. Rptr. 2d 250 (trial court properly rejected defendant's request to reduce plaintiff's award by amount of informal postoffer fees).

(n352)Footnote 227.2. *Engle v. Copenbarger & Copenbarger* (2007) 157 Cal. App. 4th 165, 168-171, 68 Cal. Rptr. 3d 461 (where employee accepted employer's § 998 offer to compromise, which was silent on costs and attorney's fees, and she prevailed on statutory causes of action for which fees may be recovered by accepting offer, it was abuse of discretion to deny fees on ground it was uncertain whether she prevailed on statutory claims).

(n353)Footnote 227.3. *Mangano v. Verity, Inc.* (2008) 167 Cal. App. 4th 944; 84 Cal. Rptr. 3d 526; 2008 Cal. App. LEXIS 1672, *4-*12 (trial court was correct to deny defendants' request for attorney's fees on basis that FEHA action was not without any legal or factual foundation).

(n354)Footnote 227.4. See *Cal. Rules of Ct., Rule 3.1700*.

(n355)Footnote 227.5. *Anthony v. City of Los Angeles* (2008) 166 Cal. App. 4th 1011, 1014-1016, 83 Cal. Rptr. 3d 306 (prevailing plaintiff filed her motion for expert witness fees well within 60-day period allowed for attorneys' fee motion).

(n356)Footnote 228. See *Gov. Code* § 12965(b).

(n357)Footnote 229. See *Gov. Code* § 12965(b).

(n358)Footnote 230. See *Gov. Code* § 12965(b).

(n359)Footnote 231. See *Code Civ. Proc.* § 430.10(e), (f); *Gray v. Superior Court* (1986) 181 Cal. App. 3d 813, 819-820, 226 Cal. Rptr. 570 (court of appeal upheld demurrer without leave to amend in case in which plaintiff's complaint asserted sex discrimination and retaliatory discharge in violation of FEHA, but provided no factual support

for conclusions).

(n360)Footnote 232. *See Gov. Code § 12926(d), (e), (g).*

(n361)Footnote 233. *See Carter v. Smith Food King (9th Cir. 1985) 765 F.2d 916, 921* (dismissal upheld regarding union that was not named in FEHA administrative charge, when content of charge provided no notice to union that plaintiff was complaining of discrimination by union); *Valdez v. City of Los Angeles (1991) 231 Cal. App. 3d 1043, 1060-1061, 282 Cal. Rptr. 726*; *see also Gov. Code § 12965(b).*

(n362)Footnote 234. Note, however, that although an employee must exhaust the FEHA administrative remedy before bringing a civil action under the FEHA or seeking any remedies provided by the FEHA, exhaustion of the FEHA administrative remedy is not required before filing a civil action for damages alleging non-FEHA causes of action. Thus, for example, exhaustion of FEHA administrative remedies is not a prerequisite to filing a civil action alleging a tort cause of action for wrongful termination in violation of public policy, which is independent of the FEHA. *see Rojo v. Kliger (1990) 52 Cal. 3d 65, 88-91, 276 Cal. Rptr. 130, 801 P.2d 373*. After the FEHA administrative process is exhausted and plaintiff obtains a "right-to-sue" letter, the plaintiff may then move to amend his or her wrongful termination complaint to add causes of action under the FEHA. *see Rojo v. Kliger (1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373*. For discussion of wrongful termination and related causes of action, *see* chs. 60, 61, and 63.

(n363)Footnote 235. *See Gov. Code § 12960*. For discussion of exhaustion of administrative remedies, *see* [3], *above*.

(n364)Footnote 236. *See Gov. Code § 12965(b).*

(n365)Footnote 237. *See Myers v. Mobil Oil Corp. (1985) 172 Cal. App. 3d 1059, 1062-1064, 218 Cal. Rptr. 630* (when plaintiff failed to file charge regarding retaliation and failed to file suit within one year after issuance of right-to-sue letter, defendant was granted judgment on pleadings).

(n366)Footnote 238. *See Baker v. Children's Hosp. Med. Ctr. (1989) 209 Cal. App. 3d 1057, 1062, 257 Cal. Rptr. 768*; *Stache v. International Union of Bricklayers (9th Cir. 1988) 852 F.2d 1231, 1233*; *Carter v. Smith Food King (9th Cir. 1985) 765 F.2d 916, 921*; *Bennett v. Borden, Inc. (1976) 56 Cal. App. 3d 706, 710, 128 Cal. Rptr. 627*.

(n367)Footnote 239. *See Grywczynski v. Shasta Beverages, Inc. (N.D. Cal. 1984) 606 F. Supp. 61, 65-66*; *cf. Zipes v. Trans World Airlines, Inc. (1982) 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234*.

(n368)Footnote 240. *See Baker v. Children's Hosp. Med. Ctr. (1989) 209 Cal. App. 3d 1057, 1062-1065, 257 Cal. Rptr. 768* (decided under FEHA; relying on federal cases decided under Title VII).

(n369)Footnote 241. *See Gov. Code § 12965(c)(1).*

(n370)Footnote 242. *See Gov. Code § 12965(c)(2)*. For discussion of election to transfer, *see* ch. 42, pt. B.

(n371)Footnote 243. *See Gov. Code §§ 12926(d), (e), (g), 12940*.

(n372)Footnote 244. *See Gov. Code § 12965(b).*

(n373)Footnote 245. *See Gov. Code §§ 12940, 12945*.

(n374)Footnote 246. *See Gov. Code §§ 12940, 12945*.

(n375)Footnote 247. *See Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal. 3d 211, 213, 216, 185 Cal. Rptr. 270, 649 P.2d 912* (compensatory damages); *Ackerman v. Western Elec. Co., Inc. (N.D. Cal. 1986) 643 F. Supp. 836, 853, 856, aff'd, 860 F.2d 1514 (9th Cir. 1988)* (back pay and front pay); *see also* [8][b], [c], [e], *above*.

(n376)Footnote 248. See *Civ. Code* § 3294; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal. 3d 211, 213, 216, 185 Cal. Rptr. 270, 649 P.2d 912 ; see also [8][f], above.

(n377)Footnote 249. See *Johnson v. Civil Service Com.* (1984) 153 Cal. App. 3d 585, 591, 200 Cal. Rptr. 289 (order directing city to employ petitioner as firefighter upheld); *County of Alameda v. Fair Employment & Housing Com.* (1984) 153 Cal. App. 3d 499, 200 Cal. Rptr. 381 (retroactive seniority granted to black female denied position by county as jail cook); *Fair Employment Practice Com. v. State Personnel Bd.* (1981) 117 Cal. App. 3d 322, 323-324, 172 Cal. Rptr. 739 (retroactive promotion order upheld); *International Union etc. Engineers v. Fair Emp. Practice Com.* (1969) 276 Cal. App. 2d 504, 510-511, 81 Cal. Rptr. 47 (order to hire black business agent upheld); see also [8][d], above.

(n378)Footnote 250. See *Gov. Code* §§ 12960, 12965(b).

(n379)Footnote 251. See, e.g., *Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514, 1519-1520 (termination of employment because of asthma-related disability and refusal to rehire her despite competent performance prior to discharge constituted discrimination based on physical handicap under FEHA); *American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal. 3d 603, 607, 186 Cal. Rptr. 345, 651 P.2d 1151 (termination of person from insurance sales agent position because of high blood pressure constituted physical handicap discrimination).

(n380)Footnote 252. See *Gov. Code* § 12940(a).

(n381)Footnote 253. See *Gov. Code* § 12965(b).

(n382)Footnote 254. See *Gov. Code* § 12926(h). "Medical condition" means (1) genetic characteristics and (2) any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer. "Genetic characteristics" means (1) any scientifically or medically identifiable gene or chromosome, or any combination or alteration thereof, that is known to cause a disease or disorder in a person or offspring, or that is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder or (2) inherited characteristics that may derive from individual or family member, that are known to cause disease or disorder in person or offspring, or that are determined to be associated with statistically increased risk of development of disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

(n383)Footnote 255. See *Gov. Code* § 12940(a); see, e.g., *Bohemian Club v. Fair Employment & Hous. Comm'n* (1986) 187 Cal. App. 3d 1, 6, 231 Cal. Rptr. 769 (refusal of club to hire women was discrimination on account of sex, in violation of FEHA); *County of Alameda v. Fair Employment & Housing Comm'n* (1984) 153 Cal. App. 3d 499, 504-505, 200 Cal. Rptr. 381 (county's employment of white person as cook when black person scored at top of eligibility list and was not hired constituted racially discriminatory refusal to hire, violating FEHA).

(n384)Footnote 256. See, e.g., *Hardy v. Stumpf* (1974) 37 Cal. App. 3d 958, 962-964, 112 Cal. Rptr. 739 (height and weight requirements for city police officer candidates had disparate impact on female applicants in violation of FEHA and California equal protection guarantee).

(n385)Footnote 257. See *Teamsters v. United States* (1977) 431 U.S. 324, 367-368, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n386)Footnote 258. See 2 Cal. Code Reg. § 7286.5(h); *Ibarbia v. Regents of Univ. of Cal.* (1987) 191 Cal. App. 3d 1318, 1328-1329, 237 Cal. Rptr. 92 (rejection of Filipino-American for position was not racial or national origin discrimination, because plaintiff failed to complete application process and submit to interview).

(n387)Footnote 259. See *Gov. Code* § 12940(a), (c).

(n388)Footnote 260. *See, e.g., City and County of San Francisco v. Fair Employment & Housing Comm'n* (1987) 191 Cal. App. 3d 976, 986-987, 236 Cal. Rptr. 716 (denial of promotion to black firefighters to lieutenant positions was based on promotional examination having disparate impact on black candidates); *Best v. California Apprenticeship Council* (1984) 161 Cal. App. 3d 626, 633-634, 207 Cal. Rptr. 863, 867-868 (denial of apprenticeship training to employee who had conscientious religious objection to nuclear power plant assignment violated FEHA's proscription of religious discrimination); *Fair Employment Practice Comm'n v. State Personnel Bd.* (1981) 117 Cal. App. 3d 322, 323-324, 172 Cal. Rptr. 739 (denial of promotion to minority consultant constituted prohibited racial discrimination).

(n389)Footnote 261. *See Gov. Code § 12965(b).*

(n390)Footnote 262. *See Gov. Code §§ 12940(a), (h); Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1252, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *Brady v. Elixir Industries* (1987) 196 Cal. App. 3d 1299, 1306, 242 Cal. Rptr. 324 (disapproved by Supreme Court in *Turner* to extent case permits plaintiff to state cause of action for constructive termination based on mere constructive knowledge by employer of intolerable conditions).

(n391)Footnote 263. *Muller v. United States Steel Corporation* (10th Cir. 1975) 509 F.2d 923, 929 ; *Young v. Southwestern Savings and Loan Association* (5th Cir. 1975) 509 F.2d 140, 144 .

(n392)Footnote 264. *Nolan v. Cleland* (9th Cir. 1982) 686 F.2d 806, 813 , quoting *Bourque v. Powell Elec. Mfg. Co.* (5th Cir. 1980) 617 F.2d 61, 65 ; *see Held v. Gulf Oil Co.* (6th Cir. 1982) 684 F.2d 427, 432 (three-year denial of promotion to female to marketing representative position, in atmosphere of sexist remarks and attitudes, constituted constructive discharge of plaintiff).

(n393)Footnote 265. *See, e.g., DFEH v. Jack's Restaurant* (1984) FEHC Dec. No. 84-08 at p. 10 (constructive discharge turns on whether working conditions were made so intolerable that reasonable person in employee's shoes would have felt compelled to resign); *DFEH v. Hart & Starkey Inc.* (1984) FEHC Dec. No. 84-23 at p. 26; *DFEH v. Napa Housing Authority* (1981) FEHC Dec. No. 81-12 at p. 24; *DFEH v. Corcoran Police Department* (1980) FEHC Dec. No. 80-31 at p. 13; *DFEH v. Xerox Corporation* (1980) FEHC Dec. No. 80-26 at p. 11.

(n394)Footnote 266. *See, e.g., Brady v. Elixir Industries* (1987) 196 Cal. App. 3d 1299, 1306, 242 Cal. Rptr. 324 (disapproved, *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1252, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 , to extent that it permits plaintiff to state cause of action for constructive termination based on mere constructive knowledge by employer of intolerable conditions).

(n395)Footnote 267. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1252, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *see discussion in ch. 60.*

(n396)Footnote 268. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1248-1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 .

(n397)Footnote 269. *See Gov. Code § 12940(h).*

(n398)Footnote 270. *See Gov. Code § 12965(b).*

(n399)Footnote 271. *Miller v. Fairchild Indus., Inc.* (9th Cir. 1986) 797 F.2d 727, 731-732 (terminations following soon after protected activity was sufficient to establish prima facie case of retaliation that survived motion for summary judgment by employer); *Gray v. Superior Court* (1986) 181 Cal. App. 3d 813, 821, 226 Cal. Rptr. 570 (conclusory allegation of retaliatory dismissal was insufficient to withstand demurrer); *Fair Employment Practice Comm'n v. State Personnel Bd.* (1981) 117 Cal. App. 3d 322, 323-324, 172 Cal. Rptr. 739 (employer's denial of promotion because employee had "ruined his future" by filing charge of discrimination established unlawful retaliation).

(n400)Footnote 272. *See Gov. Code § 12940(a), (l); see also Gov. Code § 12926(o)* (definition of "religious

creed"); 2 *Cal. Code Reg. § 7293.3* (guidelines regarding reasonable accommodation of religion). For the standard jury instruction on the essential elements of a claim of the employer's failure to accommodate in a cause of action for religious creed discrimination, *see* Judicial Council of California Civil Jury Instructions, CACI 2560 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for the failure to accommodate, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2511 (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n401)Footnote 273. *See Gov. Code § 12965(b)*.

(n402)Footnote 274. *See Gov. Code § 12940(a), (l)*.

(n403)Footnote 275. *Best v. California Apprenticeship Council* (1984) 161 *Cal. App. 3d* 626, 634, 207 *Cal. Rptr.* 863 (refusal of Joint Apprenticeship Training Council to accommodate sincerely held religious belief of trainee that prevented him from working in a nuclear power plant violated FEHA); *cf. Anderson v. General Dynamics Convair, Etc.* (9th Cir. 1978) 589 *F.2d* 397, 401 (employer and union were required by Title VII to accommodate employee's conscientious religious objection to joining union).

(n404)Footnote 276. *See Gov. Code § 12940(l); see also Gov. Code § 12926(s)* ("undue hardship" defined); 2 *Cal. Code Reg. § 7293.3*.

(n405)Footnote 277. *See Gov. Code § 12940(a); see Gov. Code § 12926(n)* (definition of "reasonable accommodation"). For the standard jury instruction on the essential factual elements of a claim of the employer's failure to reasonably accommodate a disability under FEHA, *see* Judicial Council of California Civil Jury Instructions, CACI 2541 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction defining "reasonable accommodation," *see* Judicial Council of California Civil Jury Instructions, CACI 2542 (Matthew Bender). For discussion of CACI jury instructions generally, *see* § 61.05. For the CACI special verdict form for reasonable accommodation, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2509 (Matthew Bender). For discussion of CACI special verdict forms, *see* § 61.06.

(n406)Footnote 278. *See Gov. Code § 12965(b)*.

(n407)Footnote 279. *See Gov. Code § 12940(a); 2 Cal. Code Reg. § 7293.9*.

(n408)Footnote 280. *See, e.g., Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 *F.2d* 1514 ; *American National Ins. Co. v. Fair Employment & Hous. Comm'n* (1982) 32 *Cal. 3d* 603, 607, 186 *Cal. Rptr.* 345, 651 *P.2d* 1151 ; *Fisher v. Superior Court* (1986) 177 *Cal. App. 3d* 779, 783, 223 *Cal. Rptr.* 203 ; *Johnson v. Civil Service Com.* (1984) 153 *Cal. App. 3d* 585, 588, 200 *Cal. Rptr.* 289 ; *Sterling Transit Co. v. Fair Employment Practice Comm'n* (1981) 121 *Cal. App. 3d* 791, 794-795, 175 *Cal. Rptr.* 548 .

(n409)Footnote 281. *Gov. Code § 12926(h)* ("genetic characteristics" means either (1) any scientifically or medically identifiable gene or chromosome, or any combination or alteration thereof, that is known to cause disease or disorder in person or offspring, or that is determined to be associated with statistically increased risk of development of disease or disorder and that is presently not associated with any symptoms of any disease or disorder or (2) inherited characteristics that may derive from individual or family member, that are known to cause disease or disorder in person or offspring, or that are determined to be associated with statistically increased risk of development of disease or disorder, and that are presently not associated with any symptoms of any disease or disorder).

(n410)Footnote 282. *Gov. Code § 12926(m)*.

(n411)Footnote 283. *See Gov. Code § 12940(m); see also Gov. Code § 12926(s)* (definition of "undue hardship"); *see also Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1998) 860 *F.2d* 1514 .

(n412)Footnote 284. *Gov. Code § 12940(j), (k); see Gov. Code § 12926(b), (j)*. For the standard jury instructions on the essential factual elements of a claim of sexual harassment under FEHA, *see* Judicial Council of California Civil Jury Instructions, CACI 2520 (quid pro quo) (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions; CACI 2521 (hostile work environment sexual harassment with employer or entity defendant); CACI 2522 (hostile work environment sexual harassment with individual defendant). For the standard jury instruction defining "harassing conduct," *see* CACI 2523. For the standard jury instruction defining "hostile work environment," *see* CACI 2524. For the standard jury instruction defining "supervisor" for use in a quid pro quo sexual harassment case under FEHA, *see* CACI 2525. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict forms for claims of sexual harassment under FEHA, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2505 (quid pro quo) (Matthew Bender); CACI VF-2506 (hostile work environment harassment with employer or entity defendant); CACI VF-2507 (hostile work environment harassment with individual defendant). For discussion of the CACI special verdict forms, *see* § 61.06.

(n413)Footnote 285. *See Gov. Code § 12965(b)*.

(n414)Footnote 286. *Gov. Code § 12940(j)*.

(n415)Footnote 287. *Gov. Code § 12940(k); Trujillo v. North County Transit Dist. (1998) 63 Cal. App. 4th 280, 288-289, 73 Cal. Rptr. 2d 596* (no suit may be maintained for violation of affirmative duty to prevent harassment if plaintiffs have not actually suffered any employment discrimination or harassment).

(n416)Footnote 288. *See 2 Cal. Code Reg. §§ 7287.6(b), 7291.1(f)(1)*.

(n417)Footnote 289. *See, e.g., DFEH v. Fresno Hilton Hotel (1984) FEHC Dec. No. 84-03; DFEH v. Jack's Restaurant (1984) FEHC Dec. No. 84-08; DFEH v. Bee Hive Answering Service (1984) FEHC Dec. No. 84-16; DFEH v. Ambylou Enterprises, Inc. (1982) FEHC Dec. No. 82-06*.

(n418)Footnote 290. *See Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 610, 612-613, 262 Cal. Rptr. 842*.

(n419)Footnote 291. *See Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 610, 613-614, 262 Cal. Rptr. 842*.

(n420)Footnote 292. *See Gov. Code §§ 12940(j)(1), 12945(a), (b)*.

(n421)Footnote 293. *See Gov. Code § 12965(b)*.

(n422)Footnote 294. *See Gov. Code § 12945(a)*. Title VII also prohibits discrimination on the basis of pregnancy, childbirth, or related medical conditions, as an aspect of its prohibition against sex discrimination. *see 42 U.S.C. § 2000e(k); see also 29 C.F.R. § 1604.10(a)* (excluding applicants or employees from employment because of pregnancy, childbirth, or related medical conditions is prima facie violation of Title VII).

(n423)Footnote 295. *See Gov. Code § 12945(a); see ch. 41, pt. D*.

(n424)Footnote 296. *California Federal S. & L. Ass'n v. Guerra (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613; see 42 U.S.C. § 2000e(k)*.

(n425)Footnote 297. *Gov. Code § 12945(b)* (employer is not required to create additional employment to reasonably accommodate, or to fire, transfer, or promote solely for this purpose); *see ch. 41, pt. D*.

(n426)Footnote 298. *Gov. Code § 12940(j)(1), (4)(C)*.

(n427)Footnote 299. *Gov. Code § 12947.5(a)*.

(n428)Footnote 300. *Gov. Code § 12947.5(b), (c).*

(n429)Footnote 301. *Gov. Code § 12947.5(d).*

(n430)Footnote 302. *See Gov. Code §§ 12960, 12965.* For discussion of exhaustion of administrative remedies under FEHA generally, *see* [3], *above*. For discussion of administrative remedies under FEHA, *see* ch. 42, pt. B.

(n431)Footnote 303. *See Carter v. Smith Food King (9th Cir. 1985) 765 F.2d 916, 922* (union not named in FEHA charge was properly dismissed from that cause of action in suit).

(n432)Footnote 304. *See Code Civ. Proc. § 430.10(e); see, e.g., Gray v. Superior Court (1986) 181 Cal. App. 3d 813, 820, 226 Cal. Rptr. 570 .*

(n433)Footnote 305. *See Gov. Code §§ 12960, 12965(b); see also* [4], *above*.

(n434)Footnote 306. *Code Civ. Proc. § 431.30(b).*

(n435)Footnote 307. [Reserved]

(n436)Footnote 308. *Code Civ. Proc. § 446.*

(n437)Footnote 309. *See Code Civ. Proc. § 431.30(d).*

(n438)Footnote 310. *See Code Civ. Proc. § 431.30(d).*

(n439)Footnote 311. *Code Civ. Proc. § 431.30(e).*

(n440)Footnote 312. *Code Civ. Proc. § 431.30(f).*

(n441)Footnote 313. *Code Civ. Proc. § 431.30(f).*

(n442)Footnote 314. *Code Civ. Proc. § 431.20(a).*

(n443)Footnote 315. *See Gov. Code §§ 12960, 12965.* For discussion, *see* [3], *above*.

(n444)Footnote 316. *See Code Civ. Proc. § 430.30(b); see also Myers v. Mobil Oil Corp. (1985) 172 Cal. App. 3d 1059, 1062-1064, 218 Cal. Rptr. 630* (when plaintiff failed to file charge of retaliation and failed to file suit within one year after issuance of right-to-sue letter, defendant obtained judgment on pleadings).

(n445)Footnote 317. *Code Civ. Proc. § 430.30(a).*

(n446)Footnote 318. *See Gov. Code §§ 12960* (limitation period for filing complaint with DFEH), *12965(b)* (limitation period for filing civil complaint).

(n447)Footnote 319. *Code Civ. Proc. § 430.30(a).*

(n448)Footnote 320. *See Code Civ. Proc. §§ 430.10(e), 430.30.*

(n449)Footnote 321. *See Williams v. Pacific Mutual Life Ins. Co. (1986) 186 Cal. App. 3d 941, 950-951, 231 Cal. Rptr. 234 .*

(n450)Footnote 322. *County of Fresno v. Fair Employment & Housing Com. (1991) 226 Cal. App. 3d 1541, 1556, 277 Cal. Rptr. 557 .*

(n451)Footnote 323. *See Gov. Code § 12940; 2 Cal. Code Reg. § 7286.7(a)*. For the standard jury instruction on the affirmative defense of bona fide occupational qualification under FEHA, *see* Judicial Council of California Civil Jury Instructions, CACI 2501 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for the affirmative defense of bona fide occupational qualification to a claim of disparate treatment, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2501 (Matthew Bender). For discussion of the CACI special verdict forms, *see* § 61.06.

(n452)Footnote 324. *See Gov. Code § 12940; 2 Cal. Code Reg. § 7286.7(a); Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 19-23, 231 Cal. Rptr. 769* (exclusion of women from employment by private men's club not justified by BFOQ defense nor by male preference for male employees).

(n453)Footnote 325. For discussion of order and burden of proof under disparate-impact theory, *see* [2][c], *above*. For discussion of disparate-impact theory generally, *see* ch. 41, pt. A.

(n454)Footnote 326. *See 2 Cal. Code Reg. § 7286.7(b)*. For the standard jury instruction on the affirmative defense of business necessity under FEHA, *see* Judicial Council of California Civil Jury Instructions, CACI 2503 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction on rebuttal to the business necessity defense under FEHA, *see* Judicial Council of California Civil Jury Instructions, CACI 2504 (Matthew Bender). For discussion of the standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for the affirmative defense of business necessity and rebuttal to the business necessity defense, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2503 (Matthew Bender). For discussion of the CACI special verdict form, *see* § 61.06.

(n455)Footnote 327. *See 2 Cal. Code Reg. §§ 7286.7(c), 7287.4(e)*. For the standard jury instruction on the affirmative defense of job relatedness under FEHA, *see* Judicial Council of California Civil Jury Instructions, CACI 2503 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction on rebuttal to the job relatedness defense under FEHA, *see* Judicial Council of California Civil Jury Instructions, CACI 2504 (Matthew Bender). For discussion of the standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for the affirmative defense of job relatedness and rebuttal to the job relatedness defense, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2503 (Matthew Bender). For discussion of the CACI special verdict form, *see* § 61.06.

(n456)Footnote 328. *See Gov. Code § 12940; 2 Cal. Code Reg. § 7286.7(d)*.

(n457)Footnote 329. *See 2 Cal. Code Reg. § 7286.7(e), (f)*.

(n458)Footnote 330. *See Gov. Code § 12940(a)(1), (2); see also Gov. Code § 12926(f)* (definition of "essential functions"). For the standard jury instruction for the affirmative defense to a disability discrimination claim under FEHA that the employee was unable to perform essential job duties, *see* Judicial Council of California Civil Jury Instructions, CACI 2543 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the standard jury instructions generally, *see* § 61.05.

(n459)Footnote 331. *See Gov. Code § 12940(a)(1), (2)*.

(n460)Footnote 332. *See Gov. Code § 12940(a)(1), (2); see also Gov. Code § 12926(f)* (definition of "essential functions"); *Ackerman v. Western Elec. Co., Inc. (9th Cir. 1988) 860 F.2d 1514*. For the standard jury instruction for the affirmative defense that an employee could not perform the job without being a health or safety risk, *see* Judicial Council of California Civil Jury Instructions, CACI 2544 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the standard jury instructions generally, *see* § 61.05.

(n461)Footnote 333. *See Gov. Code § 12940(l), (m); see also Gov. Code § 12926(s)* (definition of "undue hardship"); *see also Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514 (discussing undue-hardship defense but holding that employer could not show undue hardship with regard to disability accommodation). For the standard jury instruction for the affirmative defense in a FEHA claim that proposed accommodations would cause the employer undue hardship, *see* Judicial Council of California Civil Jury Instructions, CACI 2545 (disability discrimination) (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions; Judicial Council of California Civil Jury Instructions, CACI 2561 (religious discrimination) (Matthew Bender). For discussion of the standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for the affirmative defense of undue hardship, *see* CACI Judicial Council of California Civil Jury Instructions, VF-2510 (disability discrimination) (Matthew Bender); Judicial Council of California Civil Jury Instructions, CACI VF-2512 (religious discrimination) (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n462)Footnote 334. *See 2 Cal. Code Reg. § 7286.9(a)(1)(A)* (mitigation of back-pay awards in FEHC remedies); *see also Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514 .

(n463)Footnote 335. *See 28 U.S.C. §§ 1331, 1332, 1441. see Snead v. Metropolitan Property & Cas. Ins. Co.* (9th Cir. 2001) 237 F.3d 1080, 1094 (when entertaining motions for summary judgment in employment discrimination cases arising under state law, federal courts sitting in diversity must apply *McDonnell Douglas* burden-shifting scheme as federal procedural rule).

(n464)Footnote 336. *Yellow Freight System v. Donnelly* (1990) 494 U.S. 820, 110 S. Ct. 1566, 108 L. Ed. 2d 834, 838 .

(n465)Footnote 337. *See 28 U.S.C. §§ 1331, 1343(a)(4), 1441(a).*

(n466)Footnote 338. *See United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 722, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 .

(n467)Footnote 339. *See United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 .

(n468)Footnote 340. *See United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 .

(n469)Footnote 341. *See, e.g., Ackerman v. Western Elec. Co., Inc.* (N.D. Cal. 1986) 643 F. Supp. 836, 841 n.1 , *aff'd*, 860 F.2d 1514 (9th Cir. 1988) .

(n470)Footnote 342. *See United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 726-727, 86 S. Ct. 1130, 16 L. Ed. 2d 218 .

(n471)Footnote 343. *See 28 U.S.C. § 1367*, as added by Pub. L. No. 101-650, § 310.

(n472)Footnote 344. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 73-82, 276 Cal. Rptr. 130, 801 P.2d 373 ; *see Gov. Code § 12993(a).*

(n473)Footnote 345. *See generally* [3], *above*, and in ch. 42.

(n474)Footnote 346. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n475)Footnote 347. *See* ch. 40, pt. B.

(n476)Footnote 348. *See Rojo v. Kliger* (1990) 52 Cal. 3d 65, 89-91, 276 Cal. Rptr. 130, 801 P.2d 373 ; *Blom v. N.G.K. Spark Plugs, Inc.* (1992) 3 Cal. App. 4th 382, 386-388, 4 Cal. Rptr. 2d 139 .

(n477)Footnote 349. *Fisher v. San Pedro Peninsula Hosp.* (1989) 214 Cal. App. 3d 590, 618, 622, 262 Cal. Rptr. 842 ; *see generally* Levy, Golden, & Sacks, California Torts, ch. 44.

(n478)Footnote 350. *See Langridge v. Oakland Superior Sch. Dist.* (1994) 25 Cal. App. 4th 664, 666, 31 Cal. Rptr. 2d 34 , *disapproved on other grounds*, *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 959 P.2d 752 ; *Angell v. Peterson Tractor, Inc.* (1994) 21 Cal. App. 4th 981, 986-987, 26 Cal. Rptr. 2d 541 ; *Usher v. American Airlines Inc.* (1993) 20 Cal. App. 4th 1520, 1526, 25 Cal. Rptr. 2d 335 , *disapproved on other grounds*, *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 959 P.2d 752 .

(n479)Footnote 351. Gov. Code § 12993(a).

(n480)Footnote 352. *See City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n481)Footnote 353. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n482)Footnote 354. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1148, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n483)Footnote 355. *City of Moorpark v. Superior Court*(1998) 18 Cal. 4th 1143, 1158, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n484)Footnote 356. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1154, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n485)Footnote 357. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1154-1155, 77 Cal. Rptr. 2d 445, 959 P.2d 752 (*Portillo* court erred by ignoring fact that legislature can add remedies to supplement other remedies and holding that workers' compensation was exclusive remedy on ground that Section 132a addressed precise wrong in question); *Fretland v. County of Humboldt* (1999) 69 Cal. App. 4th 1478, 1483-1487, 1492-1493, 82 Cal. Rptr. 2d 359 (FEHA and emotional distress claims are not barred by workers' compensation exclusive remedy provisions).

(n486)Footnote 358. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1155, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n487)Footnote 359. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1158, 959 P.2d 752 .

(n488)Footnote 360. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1159, 77 Cal. Rptr. 2d 445, 959 P.2d 752 ; *see Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 894, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 .

(n489)Footnote 361. Gov. Code § 12940(a)(1).

(n490)Footnote 362. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1160-1161, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n491)Footnote 363. *Bagatti v. Department of Rehabilitation* (2002) 97 Cal. App. 4th 344, 363-368, 118 Cal. Rptr. 2d 443 .

(n492)Footnote 364. Gov. Code § 12940(a).

(n493)Footnote 365. *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1155, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n494)Footnote 366. *Bagatti v. Department of Rehabilitation* (2002) 97 Cal. App. 4th 344, 366-367, 118 Cal. Rptr. 2d 443 .

(n495)Footnote 366.1. *Haluck v. Ricoh Electronics, Inc.* (2007) 151 Cal. App. 4th 994, 60 Cal. Rptr. 3d 542 .

(n496)Footnote 366.2. Apr. 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863.

(n497)Footnote 366.3. 4 U.S.T. 2063, 2070.

(n498)Footnote 366.4. *See also Kirmse v. Hotel Nikko* (1996) 51 Cal. App. 4th 311, 317, 59 Cal. Rptr. 2d 96 (article VIII(1) is intended to give both parties to treaty degree of discretion in staffing enterprises operating in other's country with managerial or technical personnel from home country).

(n499)Footnote 366.5. *Kirmse v. Hotel Nikko* (1996) 51 Cal. App. 4th 311, 317, 59 Cal. Rptr. 2d 96 . *See also Sumitomo Shoji America, Inc. v. Avagliano* (1982) 457 U.S. 176, 102 S.Ct. 2374, 72 L.Ed.2d 765 (United States branches of Japanese corporation would be subject to treaty, while locally incorporated subsidiaries would not); *Fortino v. Quasar Co.* (7th Cir. 1991) 950 F.2d 389 (distinguishing *Sumitomo* on ground that in that case, there was no claim subsidiary's discriminatory conduct had been mandated by Japanese parent), *rejected by Kirmse v. Hotel Nikko* (1996) 51 Cal. App. 4th 311, 319-321, 59 Cal. Rptr. 2d 96 .

(n500)Footnote 366.6. *See Gov. Code §§ 815.2(b)*, 820.2.

(n501)Footnote 366.7. *DeJung v. Superior Court* (2008) 169 Cal. App. 4th 533, 542-548, 87 Cal. Rptr. 3d 99 .

(n502)Footnote 366.8. *Gov. Code §§ 811.2, 811.4, 811.9.*

(n503)Footnote 366.9. *Gov. Code § 815.*

(n504)Footnote 366.10. *Gov. Code § 815.2(a).*

(n505)Footnote 366.11. *Gov. Code § 815.2(b).*

(n506)Footnote 366.12. *See Gov. Code § 820.2 et seq.*

(n507)Footnote 366.13. *Gov. Code § 820.2.*

(n508)Footnote 366.14. *Caldwell v. Montoya* (1995) 10 Cal. 4th 972, 42 Cal. Rptr. 2d 842, 897 P.2d 1320 .

(n509)Footnote 366.15. *Caldwell v. Montoya* (1995) 10 Cal. 4th 972, 988-989, 42 Cal. Rptr. 2d 842, 897 P.2d 1320 .

(n510)Footnote 366.16. *Caldwell v. Montoya* (1995) 10 Cal. 4th 972, 988-989, 42 Cal. Rptr. 2d 842, 897 P.2d 1320 .

(n511)Footnote 366.17. *Caldwell v. Montoya* (1995) 10 Cal. 4th 972, 989 n.9, 42 Cal. Rptr. 2d 842, 897 P.2d 1320 . *See also Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal. 4th 992, 1014-1015 n. 12, 47 Cal. Rptr. 2d 478, 906 P.2d 440 (reiterating in dicta that FEHA provides basis of direct entity liability independent of derivative liabilities addressed in *Gov. Code § 815.2*).

(n512)Footnote 366.18. *DeJung v. Superior Court* (2008) 169 Cal. App. 4th 533, 542-548, 87 Cal. Rptr. 3d 99 .

(n513)Footnote 366.19. *See Gov. Code § 12926(d).*

(n514)Footnote 366.20. *See Cal. Const., art. VI, § 22; Gov. Code § 71622(a).*

(n515)Footnote 366.21. *See also* Cal. Stds. Jud. Admin. §§ 10.20, 10.21 (courts have duty to refrain from bias in conducting proceedings and not to discriminate in recruiting for court-appointed positions); Cal. Code Jud. Ethics, canon 3C (judges must discharge administrative responsibilities without bias or prejudice; must exercise the power of appointment impartially on the basis of merit; and must not engage in conduct that would reasonably be perceived as bias, including bias based on age).

(n516)Footnote 366.22. *Beyda v. City of Los Angeles* (1998) 65 Cal. App. 4th 511, 518, 76 Cal. Rptr. 2d 547 .

(n517)Footnote 366.23. *See Evid. Code § 1101(a)* (except as provided in *Evid. Code § 1101*, evidence of person's character or trait of character, whether in form of opinion, evidence of reputation, or evidence of specific instances of conduct, is inadmissible when offered to prove person's conduct on specified occasion).

(n518)Footnote 366.24. *Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties* (2009) 173 Cal. App. 4th 740, 93 Cal. Rptr. 3d 198, 2009 Cal. App. LEXIS 648, *30-*60 .

(n519)Footnote 366.25. *See Obrey v. Johnson* (9th Cir. 2005) 400 F.3d 691, 694-699 (in action alleging employer engaged in pattern or practice of racial discrimination in promotions to senior management positions, pattern or practice evidence in form of anecdotal evidence of three fellow employees who believed they had suffered race discrimination was relevant and admissible, where fact that jury had to assess credibility of three fellow employees to determine weight of their testimony did not constitute undue delay or waste of time under Fed. R. Evid. 403); *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1479-1480 (after plaintiff presented prima facie case of *quid pro quo* sexual harassment by owner of the restaurant in which she worked and owner asserted legitimate reason for the firing, *i.e.*, that plaintiff was late in opening up restaurant on two consecutive mornings, trial court committed prejudicial error in excluding testimonial evidence of other female employees at restaurant who allegedly were sexually harassed by owner, where employer's conduct tending to demonstrate hostility toward certain group was both relevant and admissible because employer's general hostility toward group was true reason behind firing employee who was member of that group, and where, although employer's alleged harassment of other female employees could not be used by plaintiff to show his character to prove that he acted toward plaintiff in conformity with that character, it was admissible to prove his motive or intent under Fed. R. Evid. 404 in discharging plaintiff). *See also Sprint/United Management Co. v. Mendelsohn* (2008) 128 S. Ct. 1140, 1144-1147, 170 L.Ed.2d 1 (in action involving alleged age discrimination, relevance of evidence from several former employees who claimed they too were discriminated against by employer because of their age and who had not worked in same department or been supervised by same people as plaintiff was fact based and depended on many factors, including how closely related evidence was to plaintiff's circumstances and theory of case, and similar considerations were involved in balancing probative value of evidence against its prejudicial effect; challenged evidence was neither *per se* admissible nor inadmissible, and trial court should have been given opportunity to clarify evidentiary ruling it made at trial because basis of ruling was not clear); *People v. Ewoldt* (1994) 7 Cal. 4th 380, 27 Cal. Rptr. 2d 646, 867 P.2d 757 (under *Evid. Code § 1101(b)*, evidence of intent is admissible to prove that defendant committed act alleged with intent comprising element of charged offense; to be admissible to prove intent, evidence of uncharged misconduct must be sufficiently similar to support inference that defendant probably harbored same intent in each instance); *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal. App. 4th 976, 987-988, 990-991, 16 Cal. Rptr. 2d 787 , disapproved on another point in *Lakin v. Watkins Associated Industries* (1993) 6 Cal. 4th 644, 664, 25 Cal. Rptr. 2d 109, 863 P.2d 179 (sexual harassment case in which testimony regarding employer's area vice-president's sexual harassment of other employees was admissible to show employer's knowledge of misconduct). For discussion of the requirements for a plaintiff in an employment discrimination action to show pretext, see § 41.41.11[1][d].

(n520)Footnote 367. *See Gov. Code § 12965(b)*.

(n521)Footnote 368. *See Cal. Const., Art. I, § 16*.

(n522)Footnote 369. *See, e.g., Strauss v. Summerhays* (1984) 157 Cal. App. 3d 806, 812, 204 Cal. Rptr. 227 ;

Interinsurance Exch. v. Savior (1975) 51 Cal. App. 3d 691, 693, 124 Cal. Rptr. 239 .

(n523)Footnote 370. See *Asare v. Hartford Fire Ins. Co.* (1991) 1 Cal. App. 4th 856, 868-869, 2 Cal. Rptr. 2d 452 .

(n524)Footnote 371. See *Code Civ. Proc.* § 631. For general discussion of right to jury trial generally and waiver of jury trial, see California Forms of Pleading and Practice, ch. 322, *Juries and Verdicts*.

(n525)Footnote 372. See Judicial Council of California Civil Jury Instructions, CACI 2500 et seq. (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

(n526)Footnote 373. Cal. Rules of Ct., Rule 2.1050.

(n527)Footnote 374. See Judicial Council of California Civil Jury Instructions, CACI VF-2500 et seq. (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

(n528)Footnote 375. See Judicial Council of California Civil Jury Instructions, CACI 260 (Matthew Bender) (Burden of Proof and Preponderance of Evidence).

(n529)Footnote 376. *Huffman v. Interstate Brands Corp.* (2004) 121 Cal. App. 4th 679, 700-707, 17 Cal. Rptr. 3d 397 . For the defendant's burden of proof in a discrimination case based on disparate treatment, see § 41.11[1][c].

(n530)Footnote 377. *Wysinger v. Automobile Club of So. Cal.* (2007) 157 Cal. App. 4th 413, 422-424, 69 Cal. Rptr. 3d 1 .

(n531)Footnote 378. See, e.g., *Harris v. City of Santa Monica* (2010) Cal. App, LEXIS 135 (trial court erred in refusing to instruct jury with BAJI No. 12.26 on city's "mixed-motive" defense).



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part A. STATE LAW

3-43 California Employment Law § 43.02

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

§ 43.02 California Equal Pay Act

[1] Right of Action

The California Equal Pay Act¹ provides that no employer may employ any person at a wage rate lower than that paid to employees of the opposite sex, in the same establishment, for equal work in jobs that require equal skill, effort, and responsibility and that are performed under similar working conditions.² However, the act does not prohibit a difference in wages that is due to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or any bona fide factor other than sex.³ For full discussion of the substantive requirements of the Equal Pay Act, *see* Chapter 41, Part D. Any employee who receives less than the wage to which he or she is entitled under the Equal Pay Act may bring a civil action against the employer.⁴

The substantive provisions of the California Equal Pay Act are comparable to the substantive provisions of the federal Equal Pay Act.⁵ Although few reported cases have interpreted the California Equal Pay Act, the similar purpose and nearly identical language of the two statutes make it likely that judicial interpretation of the California Equal Pay Act will follow the federal interpretation of the federal Equal Pay Act, just as judicial interpretation of the FEHA⁶ generally follows interpretation of the parallel provisions of Title VII.⁷ For discussion of the federal Equal Pay Act, *see* § 43.12.

The California Equal Pay Act, the FEHA, the federal Equal Pay Act, and Title VII overlap considerably in their application to sex discrimination in pay. An employee who alleges that he or she is being paid less on account of sex may choose one or more of these statutory bases for legal challenge to the practice.⁸

■ PRACTICE TIP:--EMPLOYEE'S PERSPECTIVE:

The proper choice among the four statutory remedies will vary with the facts of the case. The variables affecting this choice include (1) the effectiveness and helpfulness of the particular administrative agency that enforces the statute; (2) whether the case is a "pure" equal pay case, logically fitting within the California and federal Equal Pay Act(s), or whether it involves elements of "comparable worth," unequal job assignments, long-standing segregation of one sex into lower-paying job categories, or other

allegations that fit more appropriately into the framework of either Title VII⁹ or the FEHA;¹⁰ and (3) which defenses are likely to be asserted, and the strength of those defenses. *Commentary by Mary C. Dunlap.*

[2] Order and Burden of Proof

In an equal pay case, plaintiff bears the burden of proving the following:¹¹

1. That the employer¹² has paid or is paying the plaintiff less than the employer paid or pays one or more persons of the other sex;
2. That the male and female employees are working in the same establishment;
3. That the male and female employees are performing substantially equal work,¹³ which does not mean identical work;¹⁴
4. That the work of the employees requires equal skill, effort, and responsibility;¹⁵ and
5. That the work is performed under similar working conditions.¹⁶

If the plaintiff proves each of the elements of the case set forth above, the defendant can justify the wage difference only by proving that the pay difference is due to the following:¹⁷

1. A seniority system;
2. A merit system;
3. A system that measures earnings by quantity or quality of production; or
4. Any bona fide factor other than sex.¹⁸

For discussion of defenses under the Equal Pay Act, *see* Chapter 41, Parts D and E.

[3] Exhaustion of Administrative Remedies

A person seeking redress under the California Equal Pay Act need not file an administrative charge nor exhaust any other administrative remedy before or in lieu of filing a civil action under the act.¹⁹ In *Bass v. Great Western Sav. & Loan Assn.*,²⁰ the court of appeal held that a woman claiming that she received a \$700 per month advance against her commissions although males in the same sales positions received \$800 per month did not have to pursue any administrative remedy in order to bring a civil suit under the California Equal Pay Act, because the act itself sets forth the option of going directly to court,²¹ in contrast to the FEHA,²² which specifically requires exhaustion of administrative remedies.²³

The employee has the option of pursuing an administrative remedy by filing a complaint with the Labor Commissioner within six months after the occurrence of the violation, pursuant to *Labor Code Section 98.7*.²⁴ If such a claim is filed, the Labor Commissioner must investigate it, and may enforce the claimant's rights by administrative orders, and/or by bringing suit on behalf of the claimant.²⁵ If the employee is dissatisfied with the Labor Commissioner's handling of the complaint, he or she may bring an action or intervene in any action brought by the Commissioner.²⁶ However, the employee's consent to the Labor Commissioner's filing of suit waives the employee's private right of action.²⁷

For discussion of administrative procedure under *Labor Code Section 98.7*, see Chapter 5, Part A, Subpart 5.

[4] Statutes of Limitations

A civil action under the California Equal Pay Act must be filed not later than two years after the alleged violation of the act, or not later than three years after the alleged violation in a case where the violation is willful.ⁿ²⁸ This statute of limitations marks the beginning point of back pay and damage liability as well; that is, a person claiming unequal pay on account of sex cannot recover back pay (or liquidated damages) for any period more than two or three years, as applicable, before the filing of the complaint.ⁿ²⁹

Claims under the California Equal Pay Act are subject to equitable tolling.ⁿ³⁰ The doctrine of equitable tolling provides, among other things, that if an injured person has several legal remedies, and he or she reasonably and in good faith pursues one, the statute of limitation is tolled for the others.ⁿ³¹ Accordingly, the time limits set forth in *Labor Code Section 1197.5(h)* may be extended in certain situations. For example, in one case, in which a plaintiff with a California Equal Pay Act claim had pursued her remedy under federal law first under the federal Equal Pay Act, the court applied equitable tolling principles to extend the back-pay liability period to include the time between the federal filing and the state filing.ⁿ³² However, the doctrine, which is subject to judicial discretion, is not likely to rescue many plaintiffs from dismissal due to untimeliness.

[5] Subject Matter Jurisdiction and Venue

Superior or small claims courts have jurisdiction over state Equal Pay Act claims, depending on the amount of money that is at issue.ⁿ³³ When a plaintiff is litigating a federal Equal Pay Act claim, the federal court may adjudicate the state Equal Pay Act claim under the doctrine of pendent jurisdiction.ⁿ³⁴

Because the Equal Pay Act lacks a specific venue provision, venue in an action under the act is established according to the general venue provisions of the Code of Civil Procedure.ⁿ³⁵

[6] Parties

The parties to a California Equal Pay Act suit are the individual person(s) aggrieved and/or the State Labor Commissioner as plaintiffs,ⁿ³⁶ and the employer as defendant.ⁿ³⁷

It is unclear whether a party may bring a class action under the California Equal Pay Act. The federal Equal Pay Act prohibits class actions, in that it requires each named plaintiff to give individual written consent to the suit.ⁿ³⁸ The California Equal Pay Act does not contain a provision parallel to the federal law. However, the California statute does seem to allow the Labor Commissioner to bring class actions on behalf of similarly situated employees,ⁿ³⁹ although it leaves unclear the question of whether an employee can bring such an action on behalf of other similarly situated employees.

[7] Relief Available

[a] Back Pay

A private plaintiff as well as the Labor Commissioner may recover back pay for proven violations of the California Equal Pay Act.ⁿ⁴⁰ The amount of back pay that is recoverable consists of the wage differential for the period of discrimination, commencing at a time not to exceed two years prior to filing suit, or three years if the violation is willful, and ending with the date of judgment.ⁿ⁴¹ However, if equitable tolling principles apply, it is possible that the time period for recovery of back pay may be extended.ⁿ⁴²

[b] Injunctive Relief

In administrative proceedings before the Labor Commissioner under *Labor Code Section 98.7* for violation of the Equal Pay Act, or in a civil action brought by the complainant if the Labor Commissioner dismisses the administrative proceedings, injunctive relief is available, including restraints of violations.ⁿ⁴³ The Equal Pay Act itself does not expressly state whether or not such equitable remedies are available in a civil action under the act when the complainant does not first file an administrative complaint.ⁿ⁴⁴

[c] Liquidated Damages

In addition to back pay, the employee is also entitled to an amount that is equal to the amount of wages owed as "liquidated damages."ⁿ⁴⁵ However, if an employee recovers under *Labor Code Section 1197.5(b)* and also recovers under the federal Equal Pay Act for the same violation, the employee must return to the employer the amount of the lower recovery.ⁿ⁴⁶

[d] Prejudgment Interest

The California Equal Pay Act expressly declares that an employer who violates its substantive provision is liable for interest on the amount of wages that it owes.ⁿ⁴⁷

[e] Attorney's Fees and Costs

The prevailing plaintiff in a case under the California Equal Pay Act can recover costs of suit and reasonable attorney's fees.ⁿ⁴⁸ In administrative proceedings under the Equal Pay Act, the Labor Commissioner may direct the complainant to pay the employer's reasonable attorney's fees associated with the hearing if the Commissioner finds that the complaint was frivolous, unreasonable, groundless, and in bad faith.ⁿ⁴⁹ However, there is no provision in the Equal Pay Act for an award of attorney's fees to a prevailing employer in a civil action under the act.

[8] FORM--Complaint for Violation of California Equal Pay Act--General Form

[a] Comment

The form set forth in [b], below, is a general complaint for back pay and liquidated damages for violation of the California Equal Pay Act.ⁿ⁵⁰

The complaint contains the following allegations: (1) the capacity and residence of the plaintiff (Paragraph 1); (2) the sex of the plaintiff and the fact that plaintiff was or is an employee of defendant (Paragraph 2); (3) that the employer employs persons of both sexes and the location of the employer's business (Paragraph 3); (4) that plaintiff filed an administrative complaint with the Labor Commissioner, if plaintiff has filed such a complaint (Optional Paragraph 4);ⁿ⁵¹ (5) a description of plaintiff's employment position with defendant and his or her responsibilities in defendant's business (Paragraph 5); (6) that defendant has paid plaintiff at a lower rate than another employee or other employees of the opposite sex (Paragraph 6);ⁿ⁵² (7) that plaintiff and the higher-paid employee or employees of the opposite sex (a) work in the same establishment; (b) perform equal work; (c) perform work requiring equal skill, effort, and responsibilities; and (d) perform their jobs under the same working conditions (Paragraph 7);ⁿ⁵³ (8) that plaintiff is entitled to back pay plus interest, liquidated damages, attorney's fees, and costs for violation of the Equal Pay Act (Paragraph 8);ⁿ⁵⁴ and (9) if appropriate, that defendant's violation of the Equal Pay Act was willful (Optional Paragraph 9).ⁿ⁵⁵

For illustrative forms of allegations of other specific conduct that violates the California Equal Pay Act, *see* [9], below. Those allegations may be substituted for Paragraph 6 in the general form below.

[b] Form

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONETARY RELIEF FOR
_____ [name], Defendant.	)	UNEQUAL PAY ON ACCOUNT OF SEX
	)	(California Equal Pay Act)
	)	(Lab. Code § 1197.5)

Plaintiff alleges:

1. Plaintiff _____ [name] is an adult person and a resident of the County of _____, State of California.

2. Plaintiff is a _____ [female or male]. From _____ [date commencement of employment], to _____ [date of termination of employment, if any, or current date], plaintiff _____ [was or has been] employed by defendant _____ [name].

[EITHER]

3. Defendant is a(n) _____ [specify nature of defendant/employer, e.g., bank] employing approximately _____ [number] of employees of both sexes. Defendant's establishment is located at _____ [address], _____ [city], California.

[OR]

3. Defendant is a(n) _____ [specify nature of defendant/employer, e.g., bank]. Defendant employs plaintiff and at least one person of the _____ [state sex of employee(s) alleged to be paid more] sex. Defendant's establishment is located at _____ [address], _____ [city], California.

[CONTINUE]

[4. Plaintiff has filed a complaint with the Labor Commissioner pursuant to *Labor Code Section 98.7* based on his/her claim of discrimination in payment of wages because of sex. The Labor Commissioner took the following actions with regard to the complaint: _____ (describe actions taken by Labor Commissioner, including investigations and hearings, if any). The outcome of the investigation of charges by the Labor Commissioner is as follows: _____ (specify outcome of action by Labor Commissioner).]

5. Plaintiff is/was employed by defendant in the position of _____ [job title] in defendant's business establishment identified in Paragraph 3, above. In this capacity plaintiff's responsibilities include: _____ [describe nature of plaintiff's job; indicate duties performed and general nature of skill, effort, and responsibility required of plaintiff].

6. [On the basis of plaintiff's information and belief, plaintiff alleges that] [F]rom _____ [identify first date of unequal pay], until _____ [allege date, if any, on which employer ceased paying plaintiff less, due to sex, or, if the practice is continuing, allege current date and state that violation is continuing], defendant [has]

paid to plaintiff a lower _____ [wage or salary] rate than that paid to one or more of the employees of defendant of the _____ [specify the sex favored by discrimination] sex. [The amount of the difference between wages paid to plaintiff and wages paid to members of the _____ (specify) sex is \$ _____ per _____ (specify unit of time, e.g., hour).]

7. Plaintiff and the other employee(s) of defendant who is/are paid more than plaintiff (1) work in the same establishment; (2) perform equal work; (3) perform work that requires equal skill, effort, and responsibility; and (4) perform their jobs under similar working conditions.

8. [On the basis of plaintiff's information and belief, plaintiff alleges that] [D]efendant has failed or refused to pay to plaintiff the sum of \$ _____, which is the difference between the amount plaintiff has earned in the position and the amount paid to the other employee(s) of the _____ [sex favored by the discrimination] sex over the period of time alleged in Paragraph 6, above. Pursuant to the California Equal Pay Act, *Labor Code Section 1197.5*, defendant owes plaintiff that sum as and for back pay, a sum equal to that amount as and for "liquidated damages," interest on the back pay amount, and attorney's fees and costs of suit.

[9. Defendant employer's violation of plaintiff's rights under the California Equal Pay Act is and has been willful in that _____ (set forth knowledge or information and belief regarding facts giving rise to characterization of willful violation).]

WHEREFORE, plaintiff prays for judgment as follows:

1. For wages owed to plaintiff because of defendant's violation of the Equal Pay Act, in the amount of \$ _____ [specify amount or approximate amount based on information and belief], with interest on that amount from _____ [date];
2. For liquidated damages equal to the sum of wages owed to plaintiff because of defendant's violation of the Equal Pay Act, in the amount of \$ _____ [specify same amount as that listed in Paragraph 1 of prayer];
3. For reasonable attorney's fees pursuant to *Labor Code Section 1197.5(g)*;
4. For costs of suit incurred herein; and
5. For such other relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff

[Add verification, if desired
(see Code Civ. Proc. §§ 446, 2015.5).]

[9] Allegations of Specific Violations of California Equal Pay Act

[a] FORM--Allegations of Specific Violations of California Equal Pay Act--Unequal Salary, Wage, Bonus, Commission, or Draw

[i] Comment

The form set forth in [ii], below, contains allegations of different types of discriminatory pay in violation of the California Equal Pay Act, including sex-differential wages or salaryⁿ⁵⁶ or bonuses, commissions, or draws on commissions.ⁿ⁵⁷

These allegations should be used, as appropriate, to replace, modify, or supplement the allegations in Paragraph 6 of the general complaint for violation of the California Equal Pay Act set forth in [8][b] above.

[ii] Form

1. Plaintiff alleges that from _____ [first date of unequal pay], _____ [until _____ (date) or and continuing to the present time], defendant has paid to plaintiff a lower [rate of] _____ [wage or salary or bonus or commission or draw] than that paid to one or more of the employees of defendant of the _____ [specify sex favored by discriminatory act of employer] sex. [The amount of the difference between the _____ (wage or salary or bonus or commission or draw) paid to plaintiff and that paid to members of the _____ (specify sex favored by discriminatory act of employer) sex is \$ _____ per _____ (specify unit of time, e.g., month).]

[b] FORM--Allegations of Specific Violations of California Equal Pay Act--Unequal Fringe Benefits or Allowances

[i] Comment

The form set forth in [ii], below, contains an allegation of unequal fringe benefits or allowances in violation of the state Equal Pay Act. While no California court has applied the California Equal Pay Act to prohibit sex-differential fringe benefits and allowances, unequal allocation of benefits, such as clothing or travel allowances, on the basis of sex, violates the federal Equal Pay Act, which is similar in language and purpose to the state statute.ⁿ⁵⁸

When the alleged wrong consists of unequal benefits or allowances, this allegation should be used, as appropriate, to replace, modify, or supplement the allegations in Paragraph 6 of the general complaint for violation of the California Equal Pay Act set forth in [7][b] above.

[ii] Form

1. Plaintiff alleges that from _____ [first date of unequal compensation], _____ [until _____ (date) or and continuing to the present time], defendant has paid to plaintiff a lower _____ [allowance for _____ (specify, e.g., travel) or _____ (specify type of benefit, e.g., health insurance) benefit] than that paid to one or more of the employees of defendant of the _____ [specify sex favored by discriminatory act] sex. [The amount of the difference in the _____ (allowance or benefit) provided to plaintiff and that provided to members of the _____ (specify sex favored by discriminatory act of employer) sex is \$ _____ (per _____ (specify unit of time, e.g., month)).]

[10] FORM--General Answer to Complaint for Violation of California Equal Pay Act

[a] Comment

The form set forth in [b], below, is an answer to a complaint for violation of the California Equal Pay Act (*Labor Code Section 1197.5*).ⁿ⁵⁹ The employer in an action under the California Equal Pay Act may assert specific statutory defenses to an alleged violation of the act.ⁿ⁶⁰ Any answer to a complaint under the Equal Pay Act should either deny that there is any pay or compensation differential or plead one or more of these affirmative defenses, or both. The form in [b], below, sets forth the answer that there is no pay or compensation differential. For forms of affirmative defenses

based on the specific defenses listed in the California Equal Pay Act that may be added to the general answer, *see* [11], below.

For discussion of general requirements for answers under California law, *see* § 43.01[12][a].

[b] Form

SUPERIOR COURT OF CALIFORNIA

COUNTY OF _____

[or other court as appropriate]

_____ [name],

Plaintiff,

vs.

_____ [name], Defendant.

)

)

)

)

)

)

NO. _____

ANSWER TO COMPLAINT FOR MONETARY

RELIEF FOR DISCRIMINATION IN PAY ON AC-

COUNT OF SEX

(California Equal Pay Act)

(Lab. Code § 1197.5)

Defendant answers the complaint and alleges as follows:

[EITHER, if complaint is unverified (general denial)]

Pursuant to *Code of Civil Procedure section 431.30*, defendant _____ [name], in answer to plaintiff's unverified complaint, generally denies each and every allegation of the complaint and further specifically denies that plaintiff has suffered any injury or damages of any kind attributable in any way to an act or omission of defendant.

[OR, if complaint is verified or unverified]

1. Defendant _____ [admits or denies] that it is an employer covered by the California Equal Pay Act, *Labor Code Section 1197.5*, as alleged in Paragraph _____ of plaintiff's complaint. Except as specifically admitted herein, defendant denies each and every other averment of Paragraph _____.

2. Defendant _____ [admits or denies] that plaintiff _____ [is an employee of defendant or was an employee of defendant during the time period specified in Paragraph _____ of plaintiff's complaint]. Except as specifically admitted herein, defendant denies each and every other averment of Paragraph _____.

3. Defendant _____ [admits or denies] that plaintiff was paid less compensation than one or more persons of the _____ [specify the sex other than plaintiff's] sex, as alleged in Paragraph _____ of plaintiff's complaint. Except as specifically admitted herein, defendant denies each and every other averment of Paragraph _____.

4. Defendant denies each and every one, all and singular, of the allegations in Paragraph(s) _____ [-_____] of plaintiff's complaint [except that defendant admits _____ (specify)].

5. Defendant is without sufficient information and belief to admit any of the allegations in Paragraph(s) _____ [-_____] of plaintiff's complaint, and on this basis, defendant denies each of those allegations. Except as specifically admitted herein, defendant denies each and every other averment of Paragraph _____.

[6. Defendant denies each and every allegation contained in plaintiff's complaint that is not expressly admitted herein.]

[Insert affirmative defenses, if any. see [10], below.]

WHEREFORE, defendant prays judgment as follows:

1. That the complaint of plaintiff against defendant herein be dismissed;
2. That plaintiff take nothing by reason of his/her complaint;
3. That plaintiff be granted no relief in this action;
4. That defendant have judgment against plaintiff;
5. That defendant recover costs of suit incurred herein;
6. That defendant recover reasonable attorney's fees herein; and
7. For such other and further relief as this court may deem just and proper.

_____ *[signature]*

Attorney for Defendant

[Add verification in superior court, if complaint was verified. See Code Civ. Proc. §§ 92(b), 446, 2015.5.]

[11] Affirmative Defenses to Complaint for Violation of California Equal Pay Act

[a] FORM--Affirmative Defense That Differential Payment Was Based on Seniority System

[i] Comment

The form set forth in [ii], below, is an affirmative defense stating that the differential in compensation or pay was made pursuant to a seniority system.⁶¹ *Labor Code Section 1197.5(a)* provides that a seniority system is a defense to a complaint under the California Equal Pay Act.

When appropriate, this defense can be added to the general form of answer provided in [10][b].

[ii] Form

AS A _____ *[specify, e.g., FIRST]* AFFIRMATIVE DEFENSE, defendant alleges that the payment of which plaintiff complains is made pursuant to a seniority system of defendant. _____ *[Provide details of seniority system, as appropriate.]*

[b] FORM--Affirmative Defense That Differential Payment Was Based on Merit System

[i] Comment

The form set forth in [ii], below, is an affirmative defense stating that the differential in compensation or pay was made pursuant to a merit system.ⁿ⁶² *Labor Code Section 1197.5(a)* provides that a payment pursuant to a merit system is a defense to a complaint under the California Equal Pay Act.

When appropriate, this defense can be added to the general form of answer provided in [10][b], above.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that the payment of which plaintiff complains is made pursuant to a merit system of defendant. _____ [*Provide details of merit system, as appropriate.*]

[c] FORM--Affirmative Defense That Differential Payment Was Based on System That Measures Earnings by Quantity or Quality of Production

[i] Comment

The form set forth in [ii], below, is an affirmative defense stating that the differential in compensation or pay was made pursuant to a system that measures earnings by quantity or quality of production.ⁿ⁶³ *Labor Code Section 1197.5(a)* provides that such a system is a defense to a complaint under the California Equal Pay Act.

When appropriate, this defense can be added to the general form of answer provided in [10][b], above.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that the payment of which plaintiff complains is made pursuant to a system of defendant that measures earnings by quantity or quality of production. _____ [*Provide details of system, as appropriate.*]

[d] FORM--Affirmative Defense That Differential Payment Was Based on Bona Fide Factor Other Than Sex

[i] Comment

The form set forth in [ii], below, is an affirmative defense stating that the differential in compensation or pay is based on a bona fide factor other than sex.ⁿ⁶⁴ *Labor Code Section 1197.5(a)* provides that a pay differential based on a bona fide factor other than sex does not violate the California Equal Pay Act.

When appropriate, this defense can be added to the general form of answer provided in [10][b], above.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that the payment of which plaintiff complains is made pursuant to a bona fide factor other than sex. _____ [*Set forth details of bona fide factor, as appropriate.*]

[12] Availability of Jury Trial Under California Equal Pay Act

The California Equal Pay Act does not expressly provide for a jury trial, although it does authorize both legal and equitable remedies.ⁿ⁶⁵ By comparison, an aggrieved employee is entitled to a jury trial under the federal Equal Pay Act.ⁿ⁶⁶

Legal Topics:

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

Labor & Employment LawEqual PayGeneral OverviewLabor & Employment LawEqual PayEqual Pay ActGeneral OverviewLabor & Employment LawEqual PayFederal & State InterrelationshipsLabor & Employment LawU.S. Equal Employment Opportunity CommissionGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 1197.5.*

(n2)Footnote 2. *Lab. Code § 1197.5(a).*

(n3)Footnote 3. *Lab. Code § 1197.5(a).*

(n4)Footnote 4. *See Lab. Code § 1197.5(g).*

(n5)Footnote 5. Compare *Lab. Code § 1197.5* with 29 U.S.C. § 206(d).

(n6)Footnote 6. *See Gov. Code § 12900 et seq.*

(n7)Footnote 7. *See 42 U.S.C. §§ 2000e-2000e-17; See also § 43.01[1][a].*

(n8)Footnote 8. *See De Malherbe v. Intern. U. of Elevator Constructors (N.D. Cal. 1978) 449 F. Supp. 1335, 1348* (in dictum court indicated that victims of sex discrimination in pay in California "have two remedies" for unequal pay, consisting of FEHA and state Equal Pay Act).

(n9)Footnote 9. *See County of Wash. v. Gunther (1981) 452 U.S. 161, 177-180, 101 S. Ct. 2242, 68 L. Ed. 2d 751* (Title VII may provide redress to females where a study showed that females' jobs were worth 90 percent of males' jobs, and where females in fact were paid only 70 percent of males' pay, where jobs were similar). For discussion of Title VII actions regarding pay discrimination, *see § 43.10.*

(n10)Footnote 10. For discussion of FEHA, *see § 43.01.*

(n11)Footnote 11. *See Lab. Code § 1197.5(a).*

(n12)Footnote 12. For discussion of which employers are covered by the Equal Pay Act, *see ch. 40, pt. B.*

(n13)Footnote 13. *cf. Shultz v. Wheaton Glass Co. (3d Cir. 1970) 421 F.2d 259, 266* (paying male selector-packers 10 percent higher wages than female selector-packers, on the basis of occasional heavy lifting done by males violated Equal Pay Act).

(n14)Footnote 14. *cf. Brennan v. Prince William Hosp. Corp. (4th Cir. 1974) 503 F.2d 282, 291* (work performed by aides and orderlies in hospital, while not identical, is equal for purposes of federal Equal Pay Act).

(n15)Footnote 15. *See Usery v. Columbia Univ. (2d Cir. 1977) 568 F.2d 953, 960-962* (when heavy cleaners were required to exert greater effort than light cleaners, and all heavy cleaners were men, and all light cleaners were women, no violation of federal Equal Pay Act occurred); *but see Usery v. Bd. of Educ. of Baltimore Cty (D. Md. 1978) 462 F. Supp. 535, 567-568* (disparity not justified by fact that males, and not females, used heavy power-scrubbers and hauled trash).

(n16)Footnote 16. *cf. Corning Glass Works v. Brennan (1974) 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L. Ed. 2d 1* (higher base wage paid to male night-shift inspectors than wage paid to female inspectors who performed same job on day shift violated federal Equal Pay Act when night shift had historically been filled solely by men; but shift

differentials may sometimes be justified under Equal Pay Act).

(n17)Footnote 17. *See Lab. Code § 1197.5(a).*

(n18)Footnote 18. *See, e.g., Hodgson v. Robert Hall Clothes, Inc. (3d Cir. 1973) 473 F.2d 589, 596-597* (men paid more for selling higher-priced merchandise in men's department than women selling lower-priced merchandise in women's department was based on legitimate factor other than sex, i.e., profitability); *but cf. Brennan v. City Stores, Inc. (5th Cir. 1973) 479 F.2d 235, 240-241* (employer did not specifically defend on the basis of profitability, but where women selling women's and children's clothing were paid less than men selling men's clothing, court held that differential was not based on factor other than sex).

(n19)Footnote 19. *Bass v. Great Western Sav. & Loan Assn. (1976) 58 Cal. App. 3d 770, 772-773, 130 Cal. Rptr. 123 .*

(n20)Footnote 20. *Bass v. Great Western Sav. & Loan Assn. (1976) 58 Cal. App. 3d 770, 772-773, 130 Cal. Rptr. 123 .*

(n21)Footnote 21. *See Lab. Code § 1197.5(g).*

(n22)Footnote 22. *See Gov. Code § 12900 et seq.*

(n23)Footnote 23. *See Gov. Code § 12965.*

(n24)Footnote 24. *See Lab. Code §§ 98.7(a), 1197.5(e).*

(n25)Footnote 25. *Lab. Code § 98.7(b)-(c).*

(n26)Footnote 26. *See Lab. Code § 98.7(c), (f).*

(n27)Footnote 27. *Lab. Code § 1197.5(f).*

(n28)Footnote 28. *Lab. Code § 1197.5(h); see Jones v. Tracy Sch. Dist. (1980) 27 Cal. 3d 99, 107, 165 Cal. Rptr. 100, 611 P.2d 441 .*

(n29)Footnote 29. *Hudson v. Moore Business Forms (N.D. Cal. 1985) 609 F. Supp. 467, 470-471 , aff'd in part, vacated in part, and remanded on other grounds, 836 F.2d 1156 (9th Cir. 1988)* (plaintiff under California Equal Pay Act is limited to recovering back pay for period commencing two years, or three years if violation is willful, before filing suit and ending at date of judgment); *see also Jones v. Tracy Sch. Dist. (1980) 27 Cal. 3d 99, 107-109, 165 Cal. Rptr. 100, 611 P.2d 441* (plaintiff who filed complaint with U.S. Department of Labor and then filed suit under California Equal Pay Act may recover back pay from date two years before filing of earlier complaint with U.S. Department of Labor).

(n30)Footnote 30. *Jones v. Tracy Sch. Dist. (1980) 27 Cal. 3d 99, 108-109, 165 Cal. Rptr. 100, 611 P.2d 441 .*

(n31)Footnote 31. *Jones v. Tracy Sch. Dist. (1980) 27 Cal. 3d 99, 108, 165 Cal. Rptr. 100, 611 P.2d 441 .*

(n32)Footnote 32. *Jones v. Tracy Sch. Dist. (1980) 27 Cal. 3d 99, 108-109, 165 Cal. Rptr. 100, 611 P.2d 441 .*

(n33)Footnote 33. *See generally Cal. Const. art. I, § 10; Code Civ. Proc. §§ 86, 116.220* (jurisdictional limits of superior and small claims courts); "limited civil case" defined as matter in which amount in controversy does not exceed \$25,000.

(n34)Footnote 34. *See, e.g., Hudson v. Moore Business Forms (N.D. Cal. 1985) 609 F. Supp. 467, 470-471 , aff'd*

in part, reversed in part, and remanded on other grounds, 836 F.2d 1156 (9th Cir. 1988) (federal trial court took pendent jurisdiction of California EPA claim), *reversed in part on other grounds*, 827 F.2d 450 (9th Cir. 1987) ; *see generally United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 725-727, 86 S. Ct. 1130, 16 L. Ed. 2d 218 ; *Ackerman v. Western Elec. Co., Inc.* (9th Cir. 1988) 860 F.2d 1514 .

(n35)Footnote 35. *See generally Code Civ. Proc.* §§ 392-402 (venue in civil actions generally).

(n36)Footnote 36. *Lab. Code* §§ 98.7(c), 1197.5(a), (e), (f).

(n37)Footnote 37. *See generally Lab. Code* § 1197.5.

(n38)Footnote 38. *See 29 U.S.C. § 216(b)*. For discussion of bringing of action under U.S. Equal Pay Act, *see* § 43.12.

(n39)Footnote 39. *Lab. Code* § 1197.5(f).

(n40)Footnote 40. *See Lab. Code* §§ 98.7(c), (d), 1197.5(b), (g).

(n41)Footnote 41. *Hudson v. Moore Business Forms, Inc.* (N.D. Cal. 1985) 609 F. Supp. 467, 470-71 ; *Jones v. Tracy School Dist.* (1980) 27 Cal. 3d 99, 106-109, 165 Cal. Rptr. 100, 611 P.2d 441 .

(n42)Footnote 42. *Jones v. Tracy Sch. Dist.* (1980) 27 Cal. 3d 99, 108-109, 165 Cal. Rptr. 100, 611 P.2d 441 . For discussion, *see* [3], *above*.

(n43)Footnote 43. *See Lab. Code* § 98.7(c), (d).

(n44)Footnote 44. *See Lab. Code* § 1197.5(g), (h).

(n45)Footnote 45. *Lab. Code* § 1197.5(b), (f), (g).

(n46)Footnote 46. *See Lab. Code* § 1197.5(i).

(n47)Footnote 47. *Lab. Code* § 1197.5(b), (f), (g).

(n48)Footnote 48. *Lab. Code* § 1197.5(g); *see Jones v. Tracy Sch. Dist.* (1980) 27 Cal. 3d 99, 109-111, 165 Cal. Rptr. 100, 611 P.2d 441 (attorney's fees are a mandatory part of relief for prevailing plaintiff in Equal Pay Act case because of language of statute, its legislative history, and relative inability of some employees to bring wage discrimination suits).

(n49)Footnote 49. *See Lab. Code* § 98.7(d)(1).

(n50)Footnote 50. *See Lab. Code* § 1197.5(g) (authorizing civil action by employee).

(n51)Footnote 51. It is not necessary to show that administrative remedies have been exhausted under the *California Equal Pay Act*. *Bass v. Great Western Sav. & Loan Assn.* (1976) 58 Cal. App. 3d 770, 772-772, 130 Cal. Rptr. 123 . For discussion, *see* [2], *above*.

(n52)Footnote 52. *See Lab. Code* § 1197.5(a).

(n53)Footnote 53. *See Lab. Code* § 1197.5(a).

(n54)Footnote 54. *Lab. Code* § 1197.5(b), (g).

(n55)Footnote 55. This will affect the running of the statute of limitations. Statute of limitations for willful

violations is three years, as opposed to two years for nonwillful violations. *Lab. Code § 1197.5(h)*.

(n56)Footnote 56. *Hudson v. Moore Business Forms, Inc.* (N.D. Cal. 1985) 609 F. Supp. 467, 470 , rev'd in part on other grounds, 827 F.2d 450 (9th Cir. [Cal.] 1987); *Jones v. Tracy School Dist.* (1980) 27 Cal. 3d 99, 102, 113, 165 Cal. Rptr. 100, 611 P.2d 441 .

(n57)Footnote 57. *Bass v. Great Western Sav. & Loan Assn.* (1976) 58 Cal. App. 3d 770, 771-772, 130 Cal. Rptr. 123 ; cf. *Kouba v. Allstate Insurance Co.* (E.D. Cal. 1981) 523 F. Supp. 148, 151 , rev'd on other grounds, 691 F.2d 873 (9th Cir. [Cal.] 1982).

(n58)Footnote 58. See, e.g., *Laffey v. Northwest Airlines, Inc.* (D.C. Cir. 1980) 642 F.2d 578, 586-589 .

(n59)Footnote 59. For general form of complaint for violation of the Equal Pay Act and specific allegations for use in the complaint, see [7], above, and [8], above, respectively.

(n60)Footnote 60. *Lab. Code § 1197.5(a)*.

(n61)Footnote 61. See *Lab. Code § 1197.5(a)*.

(n62)Footnote 62. See *Lab. Code § 1197.5(a)*.

(n63)Footnote 63. See *Lab. Code § 1197.5(a)*.

(n64)Footnote 64. See *Lab. Code § 1197.5(a)*.

(n65)Footnote 65. See *Lab. Code §§ 98.7(c), (d), 1197.5(b), (g)*.

(n66)Footnote 66. See, e.g., *Altman v. Stevens Fashion Fabrics* (N.D. Cal. 1977) 441 F. Supp. 1318, 1323 (jury trial on wage claim, with liquidated damages to be awarded by court). For discussion of actions under the federal Equal Pay Act, see § 43.12.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part A. STATE LAW

3-43 California Employment Law §§ 43.03 through 43.09

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

[Reserved]

§§ 43.03[Reserved]



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part B. FEDERAL LAW

3-43 California Employment Law § 43.10

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

§ 43.10 Title VII of the Civil Rights Act of 1964

[1] Right of Action

Title VII of the federal Civil Rights Act of 1964ⁿ¹ prohibits various types of discrimination in employment based on an individual's race, color, religion, sex, or national origin.ⁿ² The substantive requirements of Title VII are discussed in Chapter 41. For discussion of the scope of coverage of Title VII, *see* Chapter 40, Part C.

Title VII expressly permits an individual aggrieved by a violation of its provisions to bring a civil action for specified relief, after fulfilling certain administrative procedural requirements.ⁿ³

[2] Proving Employment Discrimination Under Title VII

[a] In General

There are two theories of liability--"disparate treatment" and "disparate impact"--that may be used in most Title VII employment discrimination cases. The United States Supreme Court created these theories in *McDonnell Douglas v. Green*,ⁿ⁴ and in *Griggs v. Duke Power Co.*,ⁿ⁵ respectively, and they have since been developed and refined by the Court and a by plethora of federal intermediate appellate decisions.ⁿ⁶ Unlawful "disparate treatment" occurs when an employer treats some employees less favorably than others because of a characteristic protected by Title VII (i.e., race, color, religion, sex, or national origin).ⁿ⁷ Unlawful "disparate impact" occurs when a facially neutral employment practice in fact falls more harshly on a group protected by Title VII than on another,ⁿ⁸ and when there is no business justification for the practice.ⁿ⁹ The "disparate treatment" and "disparate impact" theories of liability are briefly summarized in § 43.01[2], and in [b] and [c], *below*, but the practitioner should review Chapter 41, Part A for a comprehensive analysis of these very complex theories.

■ PRACTICE TIP:

If there is any doubt regarding which theory to use, the plaintiff should plead and offer proof based on both theories; otherwise, the courts may apply the evidence according to a theory different from the one

on which plaintiff has relied. If this occurs, the court may find that the plaintiff has not proven the elements necessary to establish the prima facie case.ⁿ¹⁰ *Commentary by Mary C. Dunlap.*

[b] Disparate Treatment

To establish disparate treatment, a plaintiff must prove intentional discrimination.ⁿ¹¹ Intent may be proven by direct evidence,ⁿ¹² or inferred from circumstantial evidence under the test developed in *McDonnell Douglas Corp. v. Green*.ⁿ¹³ Under the *McDonnell Douglas* test, which only applies to private, nonclass (individual) disparate treatment actions,ⁿ¹⁴ a plaintiff may establish a prima facie case of discrimination by showing that (1) he or she belongs to a group protected by Title VII; (2) he or she applied and was qualified for an employment opportunity (or benefit) for which the defendant sought applicants; (3) despite the plaintiff's qualifications, he or she was denied the employment opportunity (or benefit); and (4) after the plaintiff was denied the employment opportunity (or benefit), the defendant continued to seek applicants with plaintiff's qualifications (or provide benefits to other such persons).ⁿ¹⁵ The prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination. The requirements for establishing a prima facie case under *McDonnell Douglas* do not apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.^{n15.1}

A *McDonnell Douglas* prima facie case creates a presumption of unlawful discrimination,ⁿ¹⁶ which the defendant may rebut by articulating some legitimate, nondiscriminatory reason for its action.ⁿ¹⁷ Because the ultimate burden of persuasion remains at all times with the plaintiff,ⁿ¹⁸ the defendant need only *produce evidence* sufficient to raise a genuine issue of fact about whether there was discrimination.ⁿ¹⁹ Once the defendant meets its burden of production, the presumption of discrimination raised by the prima facie case under *McDonnell Douglas* is no longer relevant, and plaintiff retains the burden of proving intentional discrimination. Although the trier of fact is *permitted* to infer intentional discrimination from its disbelief of the defendant's proffered reasons, together with the elements of the prima facie case, it is not *compelled* to do so.^{n19.1}

If a defendant meets its burden of production, the plaintiff must have the opportunity to show that the defendant's stated reason was in fact a pretext for discrimination.ⁿ²⁰ The plaintiff may do this either by showing that a discriminatory reason more likely motivated the defendant, or that the defendant's stated reason is not believable.ⁿ²¹ If an employment decision is the result of "mixed motives" (i.e., a combination of permissible and impermissible considerations), the plaintiff need only show that an impermissible consideration, such as race, sex, or some other protected classification or characteristic, played a motivating part in the decision, even though other factors may have also motivated the decision.ⁿ²² However, if the employer can prove that it would have taken the same action even in the absence of the impermissible motivating factor, the relief that may be awarded is limited.ⁿ²³ For further discussion, *see* [9][h] and [13][e], *below*.

■ PRACTICE TIP:

Because the showing required of a plaintiff to establish prima facie disparate treatment and the showing required of a defendant to rebut a prima facie case are both minimal, in many cases the crucial issue is pretext. At the pretext stage, the issues are sharpened, and the basic issue is the validity of the justifications the employer offers to show absence of discriminatory intent. Whether pretext is established is usually a highly fact-intensive inquiry. *Commentary by Bill Lann Lee.*

For discussion of the "disparate treatment" theory of liability as it is applied under the FEHA, *see* § 43.01[2][b]. For a comprehensive and detailed discussion of the theory, *see* Chapter 41, Part A.

[c] Disparate Impact

As discussed in [a], *above*, the disparate impact theory of liability applies to facially neutral employment practices that adversely affect protected group members.ⁿ²⁴ Such practices may be "objective," such as education requirements and

preemployment or promotional tests,ⁿ²⁵ or "subjective," such as hiring channels, "word-of-mouth" recruitment, nepotism, rehire policies, or subjective judgments.ⁿ²⁶

A disparate impact plaintiff need not prove discriminatory intent.ⁿ²⁷ Under the theory, a plaintiff may establish a prima facie case by showing that a facially neutral employment practice has a significant adverse impact on protected class members.ⁿ²⁸ This is usually accomplished by various statistical analyses.ⁿ²⁹

Under Title VII, the plaintiff must generally prove that a particular challenged employment practice causes a disparate impact on a protected group.ⁿ³⁰ However, if the plaintiff can demonstrate to the court that the elements of the employer's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.ⁿ³¹

If plaintiff establishes a prima facie case of disparate impact, the defendant must either refute the plaintiff's evidence and demonstrate that the employment practice does not have a disparate impactⁿ³² or demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity."ⁿ³³ "Demonstrate," for the above purposes, means meeting the burdens of production of evidence *and* persuasion.ⁿ³⁴ This definition, which was added by the Civil Rights Act of 1991,ⁿ³⁵ was intended to overrule the U.S. Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*,ⁿ³⁶ in which the Court had held that the employer had only the burden of producing evidence regarding a business justification for the challenged employment practice and that the burden of persuasion remained at all times with the plaintiff.ⁿ³⁷

Title VII does not contain express definitions of "business necessity" or "job related," but one of the express purposes of the Civil Rights Act of 1991 was to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*,ⁿ³⁸ and in other Supreme Court decisions prior to *Wards Cove*.ⁿ³⁹ In *Wards Cove*, the Court had indicated that an employment practice with a disparate impact was justified under Title VII if it merely "serve [d], in a significant way, the legitimate employment goals of the employer."ⁿ⁴⁰ Furthermore, the *Wards Cove* Court had held that although "an insubstantial justification ... will not suffice, ... there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business. ..."n41 However, under the Civil Rights Act of 1991, the *Wards Cove* standard is no longer applicable, and the standard for justifying an employment practice will instead be governed by *Griggs* and other pre-*Wards Cove* decisions. Under those decisions, the test is one of "business necessity," whereby the defendant is required to prove that the challenged practice has "a manifest relationship to the employment in question" (i.e., the practice is "job-related").ⁿ⁴²

1. Does disparate impact analysis apply to employment practices that do not involve employee selection?
2. Does proof of job relatedness require proof that links a selection criterion to job performance or will a defense based on non-performance related factors be sufficient?
3. Are costs a legitimate factor in analyzing job relatedness?
4. Does the disparate impact standard found in the Civil Rights Act of 1991 apply to ADEA cases?

The Civil Rights Act of 1991 does not resolve a number of questions regarding the meaning of the phrase "job related for the position in question and consistent with business necessity." The lack of resolution was not an oversight. It was the result of an inability to agree. The Senate so heatedly debated the definition question that it added a clause in Section 105(b) of the Act^{n42.1} declaring that no statements other than those found in Volume 137 of the Congressional Record, at page S. 15,276, could be cited as legislative history. The designated portion of the Congressional Record, however, says almost nothing about job relatedness. As a result, at least the following questions must await court determination:

1. Does disparate impact analysis apply to employment practices that do not involve employee selection?
2. Does proof of job relatedness require proof that links a selection criterion to job performance or will a defense based on non-performance related factors be sufficient?
3. Are costs a legitimate factor in analyzing job relatedness?
4. Does the disparate impact standard found in the Civil Rights Act of 1991 apply to ADEA cases?

Commentary by Kirby Wilcox.

■ CONSULTANT'S COMMENT:

A defendant may also rebut the plaintiff's prima facie case by challenging the reliability of the statistical data offered by the plaintiff.^{n42.2} A plurality of the Supreme Court, in a recent disparate impact decision, noted that typical examples of defective prima facie showings include small or incomplete data sets and inadequate statistical techniques; statistics based on an unqualified pool of applicants; and facts that failed to demonstrate a causal connection between the challenged employment practice and the statistical disproportion of minority or female employees.^{n42.3} Such efforts to discredit plaintiffs' statistics have generated battles of experts in many Title VII cases, but have probably been more successful than efforts to demonstrate "business necessity." *Commentary by Erica B. Grubb.*

Under Title VII, as amended by the Civil Rights Act of 1991, an unlawful employment based on disparate impact is also established if "the complaining party makes the demonstration described in Title 42 *United States Code Section 2000e-2(k)(1)(C)* with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice."^{n42.4} Title 42 *United States Code Section 2000e-2(k)(1)(C)* provides that "[t]he demonstration referred to ... shall be in accordance with the law as it existed on June 4, 1989 [the day before *Wards Cove* was decided], with respect to the concept of 'alternative employment practice.' "

Under prior cases, if defendant establishes that a practice is justified by business necessity, the plaintiff may still prevail by showing that alternative practices with less adverse impact would also serve the defendant's legitimate interest.^{n42.5}

For discussion of the "disparate impact" theory of liability as it is applied under the FEHA, *see* § 43.01[2][c]. For a comprehensive and detailed discussion of the theory, *see* Chapter 41, Part A.

[d] Retaliation

Under Title VII, an employer may not retaliate against a person for opposing an unlawful employment practice or for filing a charge, testifying, assisting, or participating in any Title VII proceeding.^{n42.6} Since retaliation is essentially a form of disparate treatment, courts generally follow the order and allocation of proof developed in *McDonnell Douglas Corp. v. Green* ^{n42.7} and *Texas Dept. of Community Affairs v. Burdine* ^{n42.8} (i.e., (1) plaintiff's prima facie case, (2) defendant's rebuttal, and (3) plaintiff's proof of pretext), as set forth in [b], *above*.^{n42.9} However, the formula for establishing a prima facie case of retaliation is somewhat different from the *McDonnell Douglas* prima facie disparate treatment formula. A prima facie case of retaliation may of course be established by direct evidence,^{n42.10} but if such evidence is unavailable, the plaintiff may create an inference of retaliation by establishing that (1) he or she engaged in a protected activity, (2) he or she was thereafter subjected to adverse action, and (3) there was a causal link between the two.ⁿ⁴³

For discussion of retaliation as it has been applied under the FEHA, *see* § 43.01[2][d]. For a complete discussion of the order and allocation of proof in retaliation cases, *see* Chapter 41, Part G.

[3] Subject Matter Jurisdiction and Venue

Title VII provides that the federal district courts have jurisdiction over civil actions brought under the statute.ⁿ⁴⁴ However, there is a presumption of concurrent state court jurisdiction over federal causes of action. Since Title VII contains no language expressly denying state courts their presumptive jurisdiction, state courts have concurrent jurisdiction over Title VII claims.ⁿ⁴⁵

Title VII places venue of a Title VII action in the judicial district in which (1) the alleged unlawful employment practice was allegedly committed; (2) the employment records relevant to the unlawful practice are located; or (3) the plaintiff would have worked but for the alleged discrimination.ⁿ⁴⁶ However, if the defendant is not found within any of the three districts listed above, the action may be brought within the district in which the defendant has its principal office.ⁿ⁴⁷ The Title VII venue provision governs over the more general federal venue provision of Title 28 *United States Code Section 1391*.ⁿ⁴⁸

[4] Exhaustion of Administrative Remedies as Prerequisite to Civil Action Under Title VII

[a] In General

Prior to filing a civil action under Title VII, the aggrieved employee or applicant must file a timely administrative charge with the Equal Employment Opportunity Commission (EEOC) or the DFEH,ⁿ⁴⁹ and obtain a "right-to-sue" letter from the EEOC.ⁿ⁵⁰ The aggrieved individual must pursue the administrative claim with diligence and in good faith, and must cooperate with the investigating agency and provide all relevant, available information. Failure to cooperate in the administrative process precludes exhaustion when it prevents the agency from making a determination on the merits.ⁿ⁵¹ The aggrieved individual exhausts administrative remedies by participating in the investigation sufficiently to permit the agency to examine the discrimination claim, despite a failure to provide a sworn affidavit as requested by the agency, if an agency reaches the merits of the claim, despite the claimant's failure to comply with requests for information.ⁿ⁵²

The right-to-sue letter must be obtained from the EEOC to satisfy the jurisdictional requirements for a claim under Title VII; a right-to-sue notice from the DFEH does not satisfy EEOC requirements.ⁿ⁵³ For discussion of procedures for filing administrative charges under Title VII and issuance of the right-to-sue letter, *see* Chapter 42, Part C. For discussion of time limits for filing charges and exceptions to those time limits, *see* [6][a], *below*.

However, failure to obtain a federal right-to-sue letter does not preclude federal jurisdiction.^{n53.1} Courts typically look to the relative fault of the parties to determine whether the failure to obtain a right-to-sue letter should be excused.^{n53.2} Courts have also concluded that once a plaintiff is entitled to receive a right-to-sue letter, it makes no difference whether the plaintiff actually obtained it.^{n53.3} Courts have reached that conclusion when worksharing agreements exist between the federal and state agencies.^{n53.4} Thus, when plaintiff is entitled to receive a right-to-sue letter from the EEOC, plaintiff may proceed absent such a letter, provided he or she has received a right-to-sue letter from the appropriate state agency.^{n53.5}

Other than the charge-filing and right-to-sue requirements listed above, there is no other administrative prerequisite to the litigation of a private individual Title VII civil action. For example, the EEOC's failure to address a claim asserted in the charge has no bearing on whether the plaintiff has exhausted administrative remedies with regard to that claim.ⁿ⁵⁴ Furthermore, investigation and conciliation by the EEOC are not administrative prerequisites to an individual's Title VII action.ⁿ⁵⁵ Nor is a finding of "reasonable cause" by the EEOC a prerequisite to commencement of a civil action. An individual who has filed a charge with the EEOC is entitled to a de novo judicial determination of his or her Title VII claim, even if the EEOC made no finding of reasonable cause, or found that reasonable cause did not exist.ⁿ⁵⁶ If the EEOC itself sues on behalf of persons aggrieved by alleged discrimination, however, it must satisfy administrative prerequisites, including investigation and conciliation of charges and a finding of reasonable cause to believe that a

violation of Title VII has occurred.ⁿ⁵⁷

The exhaustion requirement is satisfied if the civil claim is within the scope of the EEOC charge or any EEOC investigation actually done or that could reasonably have been expected to grow out of the charge.ⁿ⁵⁸ The court construes the language of charges with "utmost liberality" because they are made by people unschooled in the technicalities of formal pleading.ⁿ⁵⁹ In determining whether a plaintiff has exhausted allegations that he or she did not specify in the administrative charge, the court considers the following factors:ⁿ⁶⁰

- The alleged basis of the discrimination;
- Dates of discriminatory acts specified within the charge;
- Perpetrators of discrimination named in the charge; and
- Any locations at which discrimination is alleged to have occurred.

The court should also consider plaintiff's civil claims to be reasonably related to allegations in the charge to the extent that those claims are consistent with the plaintiff's original theory of the case.ⁿ⁶¹ The plaintiff can assert in the civil complaint any claims reasonably related to his or her original theory of the case as made manifest by the factual allegations of the charge. Title VII does not require that the plaintiff separately exhaust additional claims so closely related to the allegations in the charge that agency action would be redundant.ⁿ⁶² Thus, in one case, the Ninth Circuit held that a claim of discriminatory layoff was within the scope of a claim alleging discriminatory failure to rehire since the layoff was an integral part of the discriminatory plan to hire only male employees. Thus, according to the court, the charge gave the employer sufficient notice, and in addition, the EEOC would necessarily have had to investigate the circumstances of the layoff to make a determination with regard to charges of discriminatory failure to recall and rehire.ⁿ⁶³ In another case, plaintiff checked boxes indicating her belief she had been subjected to discrimination based on "race," "sex," and "national origin" and that she believed that she had been subject to "harassment." Her development of the facts supporting the allegations, however, was decidedly spare. She listed what she called allegations of "race and retaliation harassment," including verbal harassment and harassment following her submission of a formal complaint memorandum. The Ninth Circuit held that plaintiff could refer to allegations in her pre-complaint questionnaire to provide additional detail regarding the allegations of harassment (of which the state agency had notice). The court reached this conclusion even though the defendant was not sent the pre-complaint questionnaire, because the failure to include those details was due to the negligence of the agency representative that completed the charge.ⁿ⁶⁴ The court concluded that, in light of the information in the pre-complaint questionnaire, the fact that plaintiff checked boxes indicating a charge of sexual harassment, and an affidavit by the state agency official who assisted plaintiff that the agency intended her right to sue letter to afford her the right to pursue claims of sexual as well as racial harassment, the plaintiff had properly exhausted her Title VII sexual harassment claim.ⁿ⁶⁵

On the other hand, allegations of discrimination not included in the plaintiff's administrative charge may not be considered by a federal court unless the new claims are like or reasonably related to the allegations contained in the charge.ⁿ⁶⁶

Under limited circumstances, complete exhaustion of administrative remedies may not be required prior to seeking judicial relief in a Title VII action. For example, the court has power to grant preliminary injunctive relief, pending the EEOC's determination regarding probable cause and issuance of a right-to-sue letter, if the time required to exhaust those administrative prerequisites would result in irreparable harm and effectively preclude the court from ultimately granting relief.ⁿ⁶⁷

■ PRACTICE TIP:

Because the EEOC has a substantial backlog of cases, plaintiffs and their counsel may want to consider

whether to request a right-to-sue letter prior to completion of EEOC proceedings. Considerations include plaintiff's resources, the need for EEOC proceedings as an investigatory device, and the priority EEOC attaches to processing the plaintiff's administrative charge. The generally shorter processing time for charges filed with the DFEH makes it less necessary to pursue this alternative in FEHA cases.ⁿ⁶⁸

Commentary by Bill Lann Lee.

[b] Federal Employees

Title VII permits aggrieved federal employees to file civil actions in federal district court. However, as a precondition to filing, they must seek relief in the agency that allegedly discriminated against them.^{n68.1} Title VII authorizes the EEOC to issue rules, regulations, orders and instructions as necessary and appropriate for federal employees to seek administrative relief before filing a civil action.^{n68.2} Pursuant to that authority, the EEOC issued a regulation providing that aggrieved persons must consult a Counselor prior to filing a complaint to try to informally resolve the matter.^{n68.3} The aggrieved federal employee must initiate that contact within 45 days of the alleged discrimination.^{n68.4}

Failure to initiate contact with an EEO Counselor within 45 days is grounds for dismissal of the EEO complaint.^{n68.5} However, the time limit is subject to waiver, estoppel and equitable tolling.^{n68.6}

The pre-filing exhaustion requirement for federal employees does not carry the full weight of statutory authority and is not a jurisdictional prerequisite for suit in federal court.^{n68.7} However, absent waiver, estoppel, or equitable tolling, failure to comply will be fatal to a federal employee's discrimination claim in federal court.^{n68.8}

Under EEOC guidelines, a federal complainant may satisfy the criterion of EEO Counselor contact by initiating contact with any agency official logically connected with the EEO process, even if that official is not an EEO Counselor, and by exhibiting an intent to begin the EEO process.^{n68.9} This encompasses EEO personnel in positions with a variety of titles other than "Counselors," including EEO "officers."^{n68.10} Even contact with certain agency officials who are not EEO personnel will be held sufficient to satisfy the "contact with a Counselor" requirement, provided they are "logically connected to the EEO process" within the agency.^{n68.11} The EEOC's decisions interpreting the regulatory exhaustion requirement frequently make no distinction between EEO "officers" and EEO "counselors."^{n68.12}

[5] Parties

[a] Standing of Plaintiffs

[i] Individual Plaintiffs

Title VII provides that after exhaustion of the administrative remedies set forth in Title VII, the person aggrieved by the alleged unlawful employment practice may bring a civil action.ⁿ⁶⁹ The standing of a person to sue under Title VII is as broad as the United States Constitution permits,ⁿ⁷⁰ and requires two elements: (1) the challenged act must have caused the plaintiff injury in fact,^{n70.1} and (2) the interest sought to be protected must be within the zone of interests protected by the statute in question.ⁿ⁷¹

The plaintiff must also show that he or she has a personal stake in the outcome of the case.ⁿ⁷² Thus, a Title VII plaintiff may bring an action based on retaliation against him or her for opposing discrimination against persons not of his or her race or sex,ⁿ⁷³ but persons not themselves directly aggrieved do not generally have standing to sue under Title VII on behalf of others.ⁿ⁷⁴ To maintain standing, plaintiff's stake in the litigation must continue throughout the proceedings, including on appeal.^{n74.1}

A plaintiff seeking prospective injunctive relief will have standing only if he or she can demonstrate that he or she has suffered or is threatened with a concrete and particularized legal harm,^{n74.2} coupled with a sufficient likelihood that he or she will again be wronged in a similar way.^{n74.3} As to the second inquiry, the plaintiff must establish a real and

immediate threat of repeated injury.^{n74.4} Past wrongs do not in themselves amount to a real and immediate threat of injury necessary to make out a case or controversy.^{n74.5} However, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury.^{n74.6} In addition, the claimed threat of injury must be likely to be redressed by the prospective injunctive relief.^{n74.7}

[ii] Class Actions

There are two prerequisites to a class action under Title VII: (1) at least one individual plaintiff with a cognizable claim who has constitutional standing to raise the claim must have satisfied the procedural requirements of Title VII,ⁿ⁷⁵ and (2) the procedural requirements of Federal Rules of Civil Procedure, Rule 23 must be fulfilled.ⁿ⁷⁶ The first requirement means that the named plaintiffs must themselves have a direct injury and interest in issues raised on behalf of the class.ⁿ⁷⁷ As in an individual Title VII action, only the claims raised in the underlying EEOC charge, and those like or related to those claims, may be litigated.ⁿ⁷⁸ The second requirement means that each of the following must be true:^{n78.1}

1. The class must be so numerous that joinder of all members is impracticable.
2. There are questions of law or fact common to the class.ⁿ⁷⁹
3. The claims and defenses of the representative parties are typical of the claims or defenses of the class.
4. The representative parties will fairly and adequately protect the interests of the class.

Without fulfillment of each of these requirements, the action cannot be certified as a class action on behalf of the group of plaintiffs that the named plaintiff(s) seek to represent.^{n79.1}

A class action also must meet one of the classifications set forth in Fed. Rules Civ. Proc., Rule 23(b). Rule 23(b)(1) permits a class action where a plaintiff shows that the prosecution of separate actions would create a risk of inconsistent adjudications that would establish incompatible standards of conduct for the party opposing the class, or would be dispositive of the rights of individuals who were not parties to the adjudication. Rule 23(b)(2) requires that the party or parties seeking class certification show that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief appropriate with respect to the class as a whole.^{n79.2} Rule 23(b)(2) class actions can include claims for monetary damages, so long as those damages are not the predominant relief sought, but instead are secondary to the primary claim for injunctive or declaratory relief.^{n79.3} Rule 23(b)(3) requires the party seeking a class action to show that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

To proceed as a class action, a class that is large also must be manageable and accord with due process.^{n79.4} The party seeking class certification must present the trial court with a trial plan demonstrating how the court will be able to manage the class action at trial.ⁿ⁸⁰

If one named plaintiff in a Title VII class action has exhausted his or her administrative remedies,ⁿ⁸¹ others who have not filed may be named or unnamed plaintiffs in the suit and may join in the litigation of the action and the remedies, if any, that are secured.ⁿ⁸² The two requirements for this "single-filing rule" are that (1) at least one plaintiff must have timely filed an EEOC complaint that is not otherwise defective, and (2) the claims of the filing and nonfiling plaintiffs must have arisen out of similar discriminatory treatment in the same time frame.ⁿ⁸³

Previously, Title VII class actions entailed across-the-board challenges to alleged employment discrimination, whether or not the class representatives had been personally affected by the challenged practices.ⁿ⁸⁴ However, such

across-the-board Title VII class actions are no longer generally feasible,ⁿ⁸⁵ because Title VII class plaintiffs must satisfy the rigorous requirements of Federal Rules of Civil Procedure, Rule 23.ⁿ⁸⁶

■ PRACTICE TIP:

Class action litigation is often expensive for both the plaintiff and the defendant. Plaintiffs should bring a class action only if they have access to adequate resources and experienced counsel.ⁿ⁸⁷ It should also be noted that all settlements or dismissals of a class action must be approved by a court. *Commentary by Bill Lann Lee.*

[iii] Intervention

Nonparties may seek to intervene, either as of right or by permission of the court, in an existing class action in accordance with Rule 24.ⁿ⁸⁸

In determining the appropriateness of intervention as of right, an applicant seeking intervention must show that (1) the applicant has a "significant protectable interest" relating to the subject of the action; (2) the disposition may impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.ⁿ⁸⁹

In *Donnelly v. Glickman*,ⁿ⁹⁰ male forest service employees sought to intervene in the liability and remedial stages of a Title VII gender discrimination suit brought by female employees; the female plaintiffs expressly waived their right to any affirmative action remedy involving hiring, work assignments, and promotions. The Ninth Circuit panel affirmed the district court's judgment denying intervention as a matter of right because the proposed intervenors lacked a significant protectable interest in the plaintiffs' action. Although the intervenors' claims of gender-based discrimination were also covered by Title VII and the claims were against the same defendants, the claims were nevertheless unrelated to the plaintiffs' claims of hostile work environment discrimination against female employees. Because the plaintiffs' claims focused on a hostile work environment affecting female employees, the court held that resolution of their claims would not affect the intervenors' claims that male employees were subject to discriminatory treatment. The motion to intervene in the remedy phase also lacked a significant protectable interest in any of the plaintiffs' potential remedies because the plaintiffs had expressly waived their right to seek or receive such remedies as affirmative action in hiring, work assignments, and promotions. Furthermore, the court held that additional potential remedies would not inherently create discrimination against male employees and the intervenors' mere desire to obtain similar relief to the kinds of remedies sought by the plaintiffs was insufficient to necessitate intervention. Finally, the intervenors lacked any protectable interest in the plaintiffs' individual remedial requests involving work assignments and promotions because the intervenors had no legally protectable right to benefit from positions they may have obtained due to specific earlier discriminatory employment decisions.ⁿ⁹¹

Permissive intervention is allowable when (1) the applicant shares a common question of law or fact with the main action, (2) the motion is timely, and (3) the court has an independent basis for jurisdiction over the applicant's claims.ⁿ⁹² In light of the discretionary nature of intervention under (b)(2), however, a district court may deny permissive intervention even if these three threshold requirements are met.ⁿ⁹³ In *Donnelly v. Glickman*,ⁿ⁹⁴ the Ninth Circuit panel concluded that the district court did not abuse its discretion in denying intervention based on the following facts: (1) the proposed intervenors' and plaintiffs' claims shared no common factual proof; (2) the interests of the plaintiffs and the intervenors were in direct opposition, resulting in prejudice to the existing parties; and (3) the main action would be unduly delayed because of the differences in the interests and claims.ⁿ⁹⁵

[iv] Organizational and Union Plaintiffs

Organizations having one or more members who are aggrieved by an alleged Title VII violation may have standing to sue on behalf of those members.ⁿ⁹⁶ Likewise, labor unions have standing to sue under Title VII on behalf of their

members.ⁿ⁹⁷

[b] Defendants

The various substantive prohibitions of Title VII apply to employers, employment agencies, labor organizations, and joint labor-management committees controlling apprenticeships.ⁿ⁹⁸ Under Title VII, an "employer" is defined as any person engaged in any industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks of the year, and any agent of such a person, but does not include certain specified employers, including the United States government, private clubs that are tax-exempt, and Indian tribes.ⁿ⁹⁹ For full discussion of employers covered and exempted under Title VII, *see* Chapter 40, Part C.

Because the EEOC charge determines the scope of a Title VII action,ⁿ¹⁰⁰ a party not named in the EEOC charge will be dismissed from the suit.ⁿ¹⁰¹ The Ninth Circuit has held that a Title VII civil action cannot be brought against an employee individually.ⁿ¹⁰² Thus, in the Ninth Circuit, the issue of whether or not an individual employee defendant is named in the caption of the charge is of no relevance. In some other circuits, however, if a defendant in a Title VII action was not named in the caption of the EEOC charge but was named in the body of the charge or was in sufficient privity of interest, that party can be held liable.ⁿ¹⁰³

[6] Statutes of Limitations

[a] Time Periods for Filing EEOC Charge

[i] Filing EEOC Charge

A person who believes he or she has been discriminated or retaliated against in violation of Title VII must file a written charge with the EEOC within 180 days of the date that the alleged unlawful employment practice occurred.ⁿ¹⁰⁴ However, if there is a parallel state fair employment law and a state agency to enforce it (as in California, where the DFEH enforces the FEHA),ⁿ¹⁰⁵ and if the aggrieved person initially instituted proceedings with the state agency,ⁿ¹⁰⁶ the aggrieved person has 300 days from the date of the alleged unlawful practice to file an EEOC charge.ⁿ¹⁰⁷ Under the worksharing agreement between the DFEH and EEOC, charges filed with one agency are automatically sent to the other for filing.ⁿ¹⁰⁸ This type of deferral system has been specifically authorized by the Supreme Court.ⁿ¹⁰⁹

The DFEH also defers for EEOC processing all charges that are filed more than 240 days after the alleged violation. Because the complaint must be filed with the EEOC within 300 days in a deferral state,ⁿ¹¹⁰ and the EEOC can take no action until the state has been given 60 days to make a determination (or terminates its proceedings),ⁿ¹¹¹ a complaint filed after 240 days would normally exceed the 300-day period. If that happens, the EEOC does not obtain jurisdiction, and the aggrieved party cannot sue in federal court,ⁿ¹¹² unless the local agency terminates its proceedings before 300 days, and the aggrieved party then files with the EEOC within the 300-day period.ⁿ¹¹³ In California, however, the DFEH has a policy of waiving its jurisdiction and deferring such cases immediately to the EEOC.ⁿ¹¹⁴ This waiver has the effect of terminating the state proceedings and allowing the EEOC to accept the charge for immediate filing and processing.ⁿ¹¹⁵ For full discussion of time limitations for filing of administrative charges under Title VII and deferral of proceedings between the EEOC and DFEH, *see* Chapter 42, Part C.

The filing period commences when the facts that would support a charge of discrimination would have been apparent to a person similarly situated to the charging party, with a reasonably prudent regard for his or her rights.ⁿ¹¹⁶ For purposes of determining when the limitations period begins to run on a challenge to an intentionally discriminatory seniority system,ⁿ¹¹⁷ an unlawful employment practice is deemed to occur when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.ⁿ¹¹⁸ This rule applies regardless of whether the discriminatory purpose is apparent on the face of the seniority provision.ⁿ¹¹⁹

Under federal regulations promulgated by the EEOC, federal employees complaining of discrimination by a governmental agency must consult an EEO Counselor prior to filing a complaint in order to try to informally resolve the matter.ⁿ¹²⁰ They must initiate contact with a counselor within 45 days of the date of the matter alleged to be discriminatory.ⁿ¹²¹ Although it does not carry the full weight of statutory authority, failure to comply with this regulation has been held to be fatal to a federal employee's discrimination claim.ⁿ¹²²

[ii] Effect of Continuing Discrimination on Filing Requirements

Under the doctrine of "continuing violations," if the challenged policy or practice consists not of one discrete event, but of a series of ongoing events, the charge is timely if filed within the statutory period (either 180 or 300 days)ⁿ¹²³ following the most recent act in the series of events.ⁿ¹²⁴ For full discussion of the "continuing violation" rule and exceptions to the rule, *see* Chapter 42.

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

Because of uncertainties regarding application of the "continuing violation" doctrine,ⁿ¹²⁵ it is inadvisable to rely on the doctrine to justify filings with the EEOC that are not strictly within the limitations period. When the person knows or should know that he or she has been the victim of discrimination or retaliation, he or she should commence the Title VII administrative process by filing a charge.

It may sometimes be appropriate, particularly in urgent cases when there is any potential statute of limitations problem, for counsel to accompany the charging party to the EEOC office or to send written correspondence to the EEOC to urge immediate filing of a charge and to assure that the charge contains the requisite allegations of continuing discrimination, when that doctrine may be applicable. Counsel should also emphasize to potential Title VII claimants that they must file timely charges or risk losing their substantive rights by delays, including those occasioned by overburdened agency employees, who have responsibility for processing hundreds of charges of discrimination every year. *Commentary by Mary C. Dunlap.*

[b] Time Period for Filing Civil Action

If the EEOC dismisses a charge, or fails to file a civil action on behalf of a charging party within 180 days after the administrative charge was filed, the aggrieved party may request and the EEOC must issue a notice of right of civil action, entitling the charging party to bring a civil action under Title VII ("right-to-sue letter").ⁿ¹²⁶ A federal regulation also states that the EEOC may issue a right-to-sue letter prior to expiration of the 180-day period if the EEOC determines that it will probably not be able to complete administrative processing of the charge within 180 days of its filing.ⁿ¹²⁷

The aggrieved party must file the civil action within the 90-day time period recited in the right-to-sue letter.ⁿ¹²⁸ A complaint that is filed in compliance with Title VII and the Federal Rules of Civil Procedure is deemed filed for statute of limitations purposes.ⁿ¹²⁹ Ascertaining the date on which the limitations period begins is crucial to determining whether an action was timely filed. The Ninth Circuit measures the start of the limitations period from the date on which a right-to-sue notice letter arrived at the claimant's address of record.^{n129.1} When that date is known, the court deems the claimant to have received notice on that date, regardless of whether the claimant personally saw the right-to-sue letter. When the actual date of receipt is unknown but receipt itself is not disputed, the court does not demand proof of actual receipt, but applies a presumption to approximate receipt. The court estimates that date based on the date of EEOC disposition and issuance of notice, with some compensation for mailing time. The Ninth Circuit applies a three-day mailing presumption to determine notice of a right-to-sue letter, and a presumption that the letter issuance date is also the date on which the letter was mailed. Either presumption may be rebutted by evidence to the contrary.^{n129.2}

Failure to file suit within the 90-day right-to-sue period normally constitutes a basis for dismissal of the underlying Title VII action with prejudice.ⁿ¹³⁰ However, an amended complaint filed after the 90-day limitations period which relates back to an original complaint filed within the limitations period is timely filed.ⁿ¹³¹ⁿ¹³²⁻¹³⁷ Notice of the right of action to the aggrieved person's attorney or other designated representative may constitute satisfactory notice under the statute.ⁿ¹³⁸ Similarly, notice received at the aggrieved person's home by another family member may also constitute satisfactory notice under the statute.^{n138.1}

If an employer goes into bankruptcy proceedings, another time limitation must be considered by employees alleging discrimination claims. Discrimination claims arise in the context of bankruptcy proceedings under the Bankruptcy Code when they are within the employees' "fair contemplation." Thus, for example, in a sex discrimination action against a debtor corporation, the bankruptcy court erred in dismissing female employees' claims as having been discharged by its confirmation of the corporation's reorganization plan, because the claims could not have been in the employees' fair contemplation until after the confirmation, even if they arose before the reorganization took effect.^{n138.2}

A defendant's motion to dismiss based on the statute of limitations may be barred by laches if the plaintiff is prejudiced by the delay. To successfully establish laches, a party must show that: (1) There was inexcusable delay in the assertion of a known right, and (2) the party asserting laches has been prejudiced.^{n138.3}

[c] Tolling Principles for Title VII Filing Limitations Periods

[i] Individual Actions

The time periods for filing of EEOC charges and for filing civil actions under Title VII are not jurisdictional; rather, they are in the nature of statutes of limitation, and are thus subject to waiver, estoppel, and equitable tolling.ⁿ¹³⁹ For example, statutory time limits applicable to public employers are subject to equitable tolling.^{n139.1} and equitable tolling is routinely held to be proper when a claimant files suit in a venue without jurisdiction over the claim.^{n139.2} Further, equitable tolling may apply if a defendant, through wrongful conduct, prevents a plaintiff from asserting a claim or if extraordinary circumstances beyond the plaintiff's control make it impossible to file a claim on time. If such conditions arise, equitable tolling may be available to a represented plaintiff, so long as there is no countervailing prejudice to the defendant.^{n139.3}

Nevertheless, the doctrine of equitable tolling should be applied sparingly; courts are generally unforgiving when a late filing is due to the claimant's failure to exercise due diligence in preserving the claimant's legal rights.^{n139.4} The doctrine of equitable tolling ordinarily applies only when a procedural deficiency, such as the failure to file a timely charge or suit, is directly attributable to the fault of the EEOC (or a third party not within the claimant's control) and is not to attributable to the claimant.ⁿ¹⁴⁰

The time periods under Title VII are not tolled by pursuit of independent remedies. For example, pursuit of remedies under grievance procedures guaranteed by collective bargaining does not toll the Title VII time periods for filing.ⁿ¹⁴¹ Nor does the filing of a Title VII action toll statutes of limitations for actions based on statutes other than Title VII.ⁿ¹⁴² In addition, the time period is not tolled during the period of time that a family member of an aggrieved person has taken receipt of the notice at the aggrieved person's household but the aggrieved person did not know of the receipt.^{n142.1}

When a complaint is timely filed and later dismissed, the timely filing of the complaint does not toll or suspend the limitations period.^{n142.2} Dismissal of the original suit, even though without prejudice, may sound the death knell for the underlying cause of action if the sheer passage of time precludes the prosecution of a new action.^{n142.3} It is irrelevant that dismissal of the first complaint without prejudice was involuntary (such as the result of an automatic stay in bankruptcy) rather than voluntary.^{n142.4}

Equitable tolling is applied in the situation where a bankruptcy petition erects an automatic stay under *11 U.S.C. § 362*, which prevents a claimant from taking steps to protect a claim.^{n142.5} Thus, for example, employers created the situation that impeded an employee from pursuing claims under the Equal Pay Act by filing for bankruptcy, which created an automatic stay, and they could not claim to be prejudiced by the application of equitable tolling. Further, nothing in the EPA precluded equitable tolling of the limitations period. Thus, the period of time commencing with the issuance of the automatic stay and ending thirty days after the notice of termination of the stay^{n142.6} had to be excluded from the applicable EPA limitations period, which was two years for a general violation and three years for a willful violation.^{n142.7} Each discriminatory paycheck the plaintiff received constituted a separate violation of the EPA with a cause of action accruing, and the running of the limitations period commencing, on receipt of the discriminatory paycheck.^{n142.8} However, although the EPA violations may have been continuing, the continuing violation doctrine did not permit the plaintiff to recover back pay for discriminatory pay periods outside the applicable statute of limitations period.^{n142.9}

Equitable estoppel focuses primarily on actions taken by a defendant in preventing a plaintiff from filing suit.^{n142.10} A finding of equitable estoppel rests on the consideration of a non-exhaustive list of factors, including the following:^{n142.11}

- Plaintiff's actual and reasonable reliance on defendant's conduct or representations.
- Evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct.
- The extent to which the purposes of the limitations period have been satisfied.

Thus, for example, equitable estoppel was not warranted in a Title VII and ADEA action in which the first complaint, which had been timely filed, was dismissed as a result of an automatic stay resulting from defendant's bankruptcy proceedings. There was no evidence of improper purpose on the part of the defendant, or of the defendant's actual or constructive knowledge of the deceptive nature of its conduct.^{n142.12}

[ii] Class Actions

Title VII limitations periods are tolled for members of a pleaded class action, once the pleading is filed in the United States district court. Such a filing preserves the unnamed class members' rights under Title VII and tolls the time periods for each unnamed class member's claims until the class allegations are dismissed by an order denying class certification.ⁿ¹⁴³ If the class certification motion is denied, the unnamed class members may intervene in the action to appeal the denial of class certification, or they may independently file EEOC charges and civil actions.ⁿ¹⁴⁴ In this situation, an EEOC charge may be filed immediately on notice of dismissal of the class allegations,ⁿ¹⁴⁵ and this administrative filing will preserve the individual's right to file a new civil action under Title VII if intervention and/or appeal from denial of class certification is denied.

[7] EEOC Charge Determines Scope of Suit

The plaintiff in a Title VII civil action may plead all claims that are reasonably related to the contents of his or her underlying EEOC charge.ⁿ¹⁴⁶ If the plaintiff asserts claims that the EEOC could not reasonably have been expected to investigate pursuant to a charge, those claims will be dismissed.ⁿ¹⁴⁷

[8] Res Judicata and Collateral Estoppel Effects of Related Administrative and Judicial Proceedings

[a] Judicially Unreviewed State Administrative Proceedings

The United States Supreme Court held, in *University of Tennessee v. Elliott*,ⁿ¹⁴⁸ that unreviewed state administrative proceedings do not bar a subsequent trial de novo under Title VII on the same issuesⁿ¹⁴⁹ because Congress intended to allow an individual to pursue independent remedies under both Title VII and other applicable state and federal laws.ⁿ¹⁵⁰

In *Elliott*, a state administrative law judge had made findings concerning whether a discharge was motivated by racial prejudice. Such administrative fact-finding could occur in various contexts, such as a determination in an unemployment hearing denying unemployment benefits to a person who claims he or she was discharged due to discrimination.ⁿ¹⁵¹ *Elliott* clarified that such administrative adjudications do not have a preclusive effect on subsequent Title VII litigation.ⁿ¹⁵²

For further discussion of preclusive effects of prior administrative or state actions on subsequent discrimination claims generally, *see* Chapter 42, Part A.

[b] Judicially Reviewed State Administrative Proceedings

Under the doctrines of res judicata and collateral estoppel, a state court judgment reviewing an administrative decision on a fair employment claim bars a subsequent Title VII civil action in federal court if the plaintiff had a full and fair opportunity to litigate the claim or issue in state court.ⁿ¹⁵³

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

If the plaintiff desires to avoid the preclusive effect of possible adverse state judicial orders, he or she should forego state litigation of the administrative determination and proceed to federal court. However, if state remedies are more advantageous to the claimant than Title VII remedies, as in California, where compensatory and punitive damages may be recovered under the FEHA in state court, in contrast to the lack of these remedies under Title VII,ⁿ¹⁵⁴ the plaintiff may make an informed decision to go to state court, knowingly precluding any Title VII action thereafter. *Commentary by Mary C. Dunlap.*

[c] Affirmative Use of Collateral Estoppel

Plaintiffs may also seek to use collateral estoppel affirmatively in Title VII litigation by attempting to estop a defendant from relitigating issues litigated adversely to the defendant in a previous proceeding, even if the plaintiff was not a party to the previous action.ⁿ¹⁵⁵ Courts will not allow such affirmative estoppel if a plaintiff could easily have joined in the earlier action or if its use would be unfair to a defendant.ⁿ¹⁵⁶

In *City and County of San Francisco v. Fair Employment & Housing Com.*,ⁿ¹⁵⁷ a California court of appeal, hearing the case on administrative mandamus, upheld the Fair Employment and Housing Commission's decision that there had been discrimination in testing for promotions of firefighters to the position of lieutenant in the San Francisco Fire Department. However, noting the pendency of a federal Title VII civil action against the city by black and other minority firefighters, the court of appeal deferred all remedial considerations to the federal district court in which the Title VII action was pending. Subsequently, the United States district court granted partial summary judgment to the plaintiffs and gave preclusive effect to the state court decision that the promotional examination was invalid, even though the state court proceeding was brought by parties other than the Title VII plaintiffs.ⁿ¹⁵⁸

[d] Other Related Judicial Proceedings

Res judicata can be raised as a defense to an action for violation of Title VII based on a related state-court proceeding, even if the state-court proceeding takes place before an EEOC right-to-sue letter is issued and even if Title VII was not raised as a claim in the state-court proceeding. In *Owens v. Kaiser Foundation Health Plan*,^{n158.1} African Americans who lost their jobs when Kaiser relocated one of its facilities, filed charges with the EEOC and DFEH alleging racial discrimination and a state-court action alleging common law claims against Kaiser, individual supervisors, and their

union. The state-court action was ultimately dismissed with prejudice. After subsequently receiving right-to-sue letters from the EEOC, they then filed a federal court action solely against Kaiser alleging racial discrimination in violation of Title VII. The trial court granted Kaiser's motion for judgment on the pleadings based on res judicata and dismissed the action. The Ninth Circuit affirmed, holding that res judicata could apply even though the plaintiffs were barred from bringing their Title VII claims in the state-court action because they had not yet received their right-to-sue letters from the EEOC. The court held that Title VII claims are not exempt from the doctrine of res judicata if plaintiffs have neither sought a stay from the court for the purpose of pursuing Title VII administrative remedies nor attempted to amend their complaint to include their Title VII claims.^{158,2}

[9] Relief Available

[a] Back Pay

[i] Definition

Back pay under Title VII is defined as the amount that the plaintiff would have earned absent discrimination or retaliation, minus the amount he or she earned or should have earned by mitigating his or her losses with reasonable diligence.¹⁵⁹ The period for calculation of a back pay award commences not earlier than two years prior to the filing of a charge with the EEOC and terminates on the date of judgment in the action.¹⁶⁰

All amounts required to make the plaintiff whole from the losses occasioned by the Title VII violation should be included in the back pay award. Thus, back pay includes raises, bonuses, and fringe benefits that plaintiff would have received during the back pay period.¹⁶¹ The amount of back pay awarded is not to be reduced by unemployment insurance paid to the employee during the period of liability.¹⁶²

An award of back pay under Title VII is not excludable from gross income for income tax purposes and is subject to income tax withholding.^{162.1}

[ii] Availability

Although Title VII provides that the court "may" award back pay if it finds a violation,¹⁶³ the United States Supreme Court has held that back pay should be denied only for reasons that, if applied generally, would not frustrate the purposes of Title VII of eradicating discrimination throughout the economy and of making persons whole for injuries suffered through past discrimination.¹⁶⁴ Therefore, a court that does decline to award back pay must carefully articulate its reasons for doing so.¹⁶⁵ Absence of bad faith on the part of the employer does not establish a reason to deny back pay.¹⁶⁶ However, an employer's good-faith reliance on state protective laws (which violate Title VII) generally insulate an employer from back pay liability.¹⁶⁷

Although ordinarily an employee who has been discriminatorily denied an opportunity for a promotion may not collect backpay for periods beyond the employee's resignation unless the employee demonstrates that he or she was constructively discharged, if the employee was "preparing to enter an entirely different career" with the same employer, i.e., the refusal to promote was analogous to a refusal to hire, the employee may collect back pay extending beyond the date that the employee quit.^{167.1}

Back pay is available to undocumented alien employees who are subject to Title VII violations as long as they were not deported during and were available for employment throughout the backpay period.^{167.2}

[iii] Mitigation of Amount of Back Pay Award

Title VII provides that "[i]nterim earnings or amounts earned with reasonable diligence by the person or persons discriminated against operate to reduce the back pay otherwise allowable."¹⁶⁸ This statutory provision imposes on the

plaintiff a duty to mitigate his or her losses caused by a Title VII violation, by seeking and, when available, accepting comparable employment.ⁿ¹⁶⁹ This duty includes the plaintiff's obligation to accept the defendant employer's unconditional offer of the job originally sought, with or without retroactive seniority.ⁿ¹⁷⁰ However, the plaintiff does not have to mitigate losses by settling his or her claims with the employer under any circumstances,ⁿ¹⁷¹ or by seeking employment in another community,ⁿ¹⁷² or by accepting an "inferior" position, in terms of pay and status, relative to the position denied the person by defendant.ⁿ¹⁷³ Nor does the duty to mitigate damages require the plaintiff to quit his or her job to seek other employment comparable to a position denied by defendant's refusal to promote.^{n173.1} One court has held that ongoing backpay liability does not end if the plaintiff's rejection of a job offer was reasonable, given the form of the offer and the circumstances surrounding it.^{n173.2} A plaintiff is not entitled to an award of back pay for the period subsequent to his or her decision to voluntarily withdraw from the work force.^{n173.3}

The burden of proving failure of the duty to mitigate is on the defendant, once liability has been established by plaintiff.ⁿ¹⁷⁴

[b] Front Pay

[i] Definition

Courts may award equitable relief for the violation of Title VII.ⁿ¹⁷⁵ Front pay is a monetary remedy that may be awarded in the court's equitable discretion to compensate a prevailing plaintiff for the lost earnings that are reasonably likely to occur between the date of judgment and the time when the employee can assume the position to which he or she would be entitled but for the Title VII violation.ⁿ¹⁷⁶ An award of front pay is analogous to an award of future lost earnings in a tort case.ⁿ¹⁷⁷ Courts also may award front pay as an alternative to hiring or reinstatement when there is no available position or when hiring or reinstatement would be infeasible because of ongoing antagonism at the work place.ⁿ¹⁷⁸ When feasible, however, courts prefer hiring or reinstatement to front pay remedies under Title VII.ⁿ¹⁷⁹

The calculation of front pay depends on prediction of the period in which the employee will continue to be denied the employment opportunity that he or she would have enjoyed, but for the discrimination.ⁿ¹⁸⁰ Front pay, like back pay, is subject to the plaintiff's duty to mitigate, and the right to front pay may be cut off by offering the employee the sought-after job (with or without the requisite seniority) or a comparable opportunity with a competitor.ⁿ¹⁸¹

Front pay does not constitute an element of "compensatory damages" under 42 U.S.C. § 1981a, and thus, it is not subject to the statutory damages cap imposed by 42 U.S.C. § 1981a(b)(3).^{n181.1}

[ii] Availability

Front pay is within the trial court's broad discretion, and is generally awarded for one of two purposes: (1) to compensate plaintiffs for delays in full make-whole relief;ⁿ¹⁸² or (2) to compensate plaintiffs for the absence of reinstatement relief, which may be due to ongoing hostility between the parties.ⁿ¹⁸³

Front pay should not be awarded in the absence of specific findings to justify it.ⁿ¹⁸⁴ Because front pay calculations are fact-intensive, there is not uniform approach to the calculation and distribution of this monetary relief.

Thus, when an employer can demonstrate that a prevailing plaintiff would not have been hired even in the absence of discrimination, as for example when the employer had a reduction-in-force or did not contemplate any new vacancies, a court may be justified in denying an award of front pay altogether.ⁿ¹⁸⁵

[c] Compensatory and Punitive Damages

A provision of the Civil Rights Act of 1991ⁿ¹⁸⁶ provides that in a civil action under Title VII against a respondent who has engaged in unlawful intentional discrimination (i.e., not an employment practice that is unlawful because of its

disparate impact), the complaining party may recover compensatory and punitive damages, as further discussed below, in addition to any other relief authorized by Title VII.ⁿ¹⁸⁷ Compensatory and punitive damages are available in Title VII actions under this provision only if the complaining party cannot recover under Title 42 *United States Code Section 1981*.ⁿ¹⁸⁸ discussed in § 43.14, which already provides a civil damages remedy for racial discrimination and discrimination based on certain other ethnic characteristics.ⁿ¹⁸⁹ The "complaining party" for this purpose means the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under Title VII.ⁿ¹⁹⁰

A complaining party may recover punitive damages in a Title VII action against a respondent (other than a government, government agency, or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.ⁿ¹⁹¹ Thus, plaintiffs seeking an award of punitive damages under Title VII must make a showing beyond the threshold level of intent required for compensatory liability. The plaintiff must show that the employer had a "subjective consciousness" of the risk of injury or illegality. The employer's conduct need not be shown to be egregious, although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof.ⁿ¹⁹² After a showing of the requisite intent by certain managerial employees, the employee must also show that the requisite mental state can be imputed to the employer.ⁿ¹⁹³ In Title VII cases, in the context of punitive damages, an employer may not be vicariously liable for the discriminatory conduct of its managerial agents when the agents' decisions are contrary to the employer's good faith efforts to comply with Title VII (e.g., institution of a written sexual harassment policy).ⁿ¹⁹⁴ Of course, this higher standard is satisfied if, as an alternative to the reckless indifference standard stated above, the acts of discrimination giving rise to liability are willful and egregious.^{n194.1} In *Ngo v. Reno Hilton Resort Corp.*,^{n194.2} the record clearly supported the jury's finding of discrimination: the employer acted negligently and perhaps recklessly in denying a medical leave of absence for pregnancy complications and in terminating the employee by erroneously determining the length of service. However, negligent decisionmaking and poor communication among managers, although a proper basis for compensatory damages, does not warrant punishment, and the challenged acts would not be deterred by an award of punitive damages.^{n194.3}

In *E.E.O.C. v. Wal-Mart Stores, Inc.*, ^{n194.4} the court applied the higher evidentiary standard articulated in *Ngo v. Reno Resort Corp.*, ^{n194.5} and concluded that the district court should have submitted the issue of punitive damages to the jury. Specifically, the evidence established that Wal-Mart recklessly disregarded the plaintiff's right to be free from pregnancy discrimination by informing her that she was ineligible for hire due to her pregnancy and that she should reapply when she was no longer pregnant. The record further indicated that store management almost certainly knew that such conduct was illegal based on training and on prohibitions in handbooks against pregnancy discrimination; it also showed that Wal-Mart officials attempted to cover up its conduct by creating false reasons not to hire the plaintiff and by fabricating an interview during which the applicant allegedly expressed concerns about her pregnancy and ability to do the job.^{n194.6}

In *Hemmings v. Tidyman's Inc.*, ^{n194.7} the court held that the evidence was legally sufficient to support an award of punitive damages under the Civil Rights Act of 1991. Jury verdicts of intentional discrimination in the form of retaliation against both plaintiffs and failure to promote one of the plaintiffs were supported by sufficient evidence. Furthermore, the record contained substantial evidence from which a reasonable juror could have concluded that the employer acted with awareness of anti-discrimination laws. There was testimony that the employer hired additional women in store management positions, in part because of its concern about liability for discriminatory practices.^{n194.8} There was also testimony that the employer and its agents excluded plaintiffs from decision-making processes and harassed the plaintiffs after they sent their discrimination complaint. The court had no doubt that discriminatory actions by management officers could be imputed to the employer. The claims of intentional discrimination were based on the conduct of the chief operating officer, the chief executive officer, the chief financial officer, and the grocery supervisor, among others, and the employer did not argue that the actions of management were contrary to the good-faith, non-discriminatory policies of the company.^{n194.9}

In *Costa v. Desert Palace, Inc.*,^{n194.10} the court held that *Kolstad* provides the employer with a "good faith" defense, enabling it to escape punitive damages if it can show that the challenged actions were not taken by senior managers and were contrary to the employer's good-faith implementation of an effective antidiscrimination policy. *Kolstad* also suggests that the court review the type of authority the employer has given the employee, the amount of discretion given the employee in the action taken, and how it is accomplished.^{n194.11}

"Compensatory damages" for purposes of the Civil Rights Act of 1991 do not include backpay, interest on backpay, or any other type of relief authorized under Title VII,ⁿ¹⁹⁵ but do include amounts awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.ⁿ¹⁹⁶ The sum of the amount of such compensatory damages and the amount of punitive damages awarded may not exceed the following amounts for each complaining party:ⁿ¹⁹⁷

1. In the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;
2. In the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000;
3. In the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and
4. In the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

Each aggrieved employee represented by the EEOC in a Title VII action may receive up to the statutory cap without filing a separate suit or intervening in the EEOC's action.^{n197.1} The Title VII caps do not impose a ceiling on a plaintiff's damages for claims under other EEO statutes alleged in the complaint.^{n197.2} Front pay is not considered compensatory damages for purposes of calculating the cap on damages awarded.^{n197.3}

Prior to enactment of the Civil Rights Act of 1991, courts had consistently held that compensatory and punitive damages were unavailable in civil actions under Title VII.ⁿ¹⁹⁸ The Civil Rights Act of 1991 took effect immediately on its date of enactment,ⁿ¹⁹⁹ which was November 21, 1991. The United States Supreme Court has held, however, that the expanded damages provisions enacted by the Civil Rights Act of 1991 do not apply retroactively to cases pending at the time of enactment.^{n199.1}

■ PRACTICE TIP:

Although compensatory and punitive damages are now available in Title VII actions, plaintiffs may still find the Title VII monetary remedies inadequate in certain cases because of the limits on the amount of those damages, as discussed above. In those cases, theories of liability other than Title VII may be joined with the Title VII claim, including the FEHA,ⁿ²⁰⁰ Title 42, *United States Code Section 1981*,ⁿ²⁰¹ and tort and contract liability theories.ⁿ²⁰² *Commentary by Steven J. Revell.*

The Ninth Circuit has held that a ratio of punitive damages to compensatory damages of 6:5 is not an excessive amount of punitive damages.^{n202.1}

[c.1] Other Monetary Relief

Other monetary relief under Title VII might include differential amounts of benefits or differential contributions to benefit plans that were based on sex, race, or other protected criteria under Title VII. However, if retroactive liability for such benefits could be devastating for the underlying fund, or if the expectations of all employees depending on the

fund would be disappointed, or if current employees would be forced to pay for the benefits of past employees, the employer generally may avoid liability for past benefit differentials.ⁿ²⁰³

[d] Injunctive Relief

[i] Generally

Title VII specifically empowers district courts to enjoin the defendant from engaging in an unlawful employment practice, and to order "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees ... or any other equitable relief as the court deems appropriate," with specified exceptions for orders that require employment or union membership for persons denied these opportunities for reasons other than discrimination or retaliation.ⁿ²⁰⁴ The purpose of the equitable power granted to courts under Title VII is to fashion appropriate relief, both retrospective and prospective, to make whole the victims of discrimination and retaliation.ⁿ²⁰⁵ Injunctive relief is often ideally suited to that end.ⁿ²⁰⁶

Generally, victims of employment discrimination are entitled to an injunction against future discrimination, unless the employer proves it is unlikely to repeat the practice.^{n206.1} Such relief is appropriate if there are multiple Title VII violations, and if an employer fails to take prompt remedial actions. An employer that takes remedial actions only after it has been sued fails to provide sufficient assurances that the violations will not be repeated.ⁿ²⁰⁷

[ii] Preliminary Injunctions

Preliminary injunctions, which preserve the status quo pending conclusion of the litigation,ⁿ²⁰⁸ may serve a variety of purposes under Title VII, including prevention of retaliatory action by the defendant,ⁿ²⁰⁹ and preservation of employment opportunities pending final relief in the case.ⁿ²¹⁰ Some courts have held that the federal courts have equitable power, beyond the terms of Title VII, to grant preliminary injunctions in order to preserve their ability to do ultimate equity, which enables courts to grant emergency preliminary injunctions, even when the party seeking the preliminary injunction does not yet have the normally required Title VII right-to-sue letter.ⁿ²¹¹

[iii] Mandatory Hiring/Reinstatement

Title VII provides that a court may order hiring or reinstatement of an employee who has been discriminated or retaliated against.ⁿ²¹² Pursuant to this statutory power, courts have ordered hiring as well as reinstatement of victims of Title VII violations.ⁿ²¹³

[iv] Affirmative Action Remedies Including Quotas, Goals, and Timetables

The United States Supreme Court and lower federal courts have held that Title VII permits affirmative action relief, including quotas, goals, and timetables for hiring and promotion, in appropriate cases.ⁿ²¹⁴ A plurality of the United States Supreme Court has stated that court-imposed affirmative action, including race-conscious relief, may be imposed "[w]here an employer ... has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination."ⁿ²¹⁵

For full discussion of affirmative action as a court-imposed remedy for discrimination under Title VII, as well as rules regarding voluntary affirmative action programs, *see* Chapter 44.

[v] Retroactive Seniority

Retroactive seniority is a remedy designed to put the victim of discrimination under Title VII in the position that he or she would have held but for the discrimination.ⁿ²¹⁶ A court is obliged to grant the make-whole remedy of retroactive seniority unless there are reasons for denying it which, if applied generally, would not frustrate the purposes of Title

VII.n217 The terms "retroactive," "remedial," "constructive," and "synthetic" seniority are used interchangeably in discussion of this remedial concept. All refer to a "make-whole" remedy consisting of a court order reconstructing the date of hire, promotion, or some date relevant to the employee's seniority, for the purpose of restoring the employee to the position he or she would have held but for the discrimination.n218 Because employers and unions use seniority for a variety of purposes and under distinct systems, sometimes the term "seniority" is modified by words referring to those particular purposes or systems. For example, "competitive" seniority or "bidding" seniority date refers to the date that establishes the employee's "relative" seniority for purposes of seeking promotion or "bumping" (displacing) less senior personnel. Normally, courts avoid retroactive seniority remedies that permit "bumping,"n219 or which otherwise have an "unusual adverse impact" on nonvictim incumbent employees.n220 The measure of "unusual adverse impact" includes consideration of the number of victims of discrimination, the number of nonvictims who will be affected by the grant of retroactive seniority, the alternatives available to incumbent employees, and the economic circumstances of the relevant industry.n221 However, retroactive seniority may not be denied simply because it conflicts with the expectations of arguably innocent employees, that is, nonvictims of discrimination.n222

[e] Prejudgment Interest

The federal courts generally have discretion to award prejudgment interest on back pay awards under Title VII.n223 Prejudgment interest has been denied in some cases in which the discrimination was unintentional and the scope of liability or relief was not easily ascertainable.n224 Courts also may use their discretion in calculating prejudgment interest.n225

[f] Attorney's and Expert Fees

[i] To Prevailing Plaintiff Other Than United States or EEOC

In any action or proceeding under Title VII, the court, in its discretion, may allow the prevailing party, other than the EEOC or the United States, a reasonable attorney's fee as part of the costs.n226 Attorney's fees may be awarded against any defendant, including the EEOC, the United States,n227 or state and local governments.n228 The attorney's fee award under Title VII may include expert fees.n229 Deposition costs and costs for preparation of attorney's fees motions are also recoverable under Title VII in certain circumstances.n230

A litigant need not prevail on every issue, or even the central issue of the case, to be considered a "prevailing party;" rather, it is sufficient if the plaintiff succeeds "on any significant claim affording some of the relief sought."n230.1 Thus, if a plaintiff is only partially successful in seeking relief and achieves only some of the benefit sought by the litigation, the plaintiff is still a prevailing party.n230.2 In *Hashimoto v. Dalton*, n230.3 the plaintiff was entitled to prevailing party status because the EEOC found that the defendant engaged in retaliation and ordered remedial measures. Because these remedial measures effected a "material alteration in the legal relationship between the plaintiff and defendant[.]" the plaintiff was entitled to prevailing party status.n230.4 In *Norris v. Sysco Corp.*,n230.5 the court held that a plaintiff who prevails on her Title VII claim at trial may be awarded attorney's fees under Title VII, even if the jury does not award damages on the ground that the employer would have taken the same action for nondiscriminatory reasons.n230.6

The United States Supreme Court has stated that because of the strong public interest in having actions brought under Title VII to eradicate discriminatory employment practices, attorney's fees should ordinarily be awarded to the prevailing plaintiff against the losing defendant in all but special circumstances.n231 By contrast, attorney's fees may be awarded to a prevailing plaintiff against unsuccessful intervenors only when the intervenors' action was frivolous, unreasonable, or without foundation.n232

Attorney's fees are generally determined by calculating a "lodestar" amount, i.e., the number of hours reasonably expended on litigation, multiplied by a reasonable hourly rate.n232.1 However, when the plaintiff prevails but receives

only *de minimis* relief and achieves only technical success, the court may bypass the general rule requiring calculation of a lodestar and establish a low fee or no fee at all.^{n232.2} Nonetheless, plaintiffs who achieve significant nonmonetary results for the community in general attain more than a technical victory and are entitled to reasonable attorney's fees.^{n232.3}

The amount of attorney's fees to be awarded is guided by a number of factors, including the following:ⁿ²³³

1. The time and labor required;
2. The novelty and difficulty of the issues litigated;
3. The skill required to represent the plaintiff;
4. The preclusion of other employment by the attorney due to obligations of accepting the case;
5. The customary or standard fee for similar work;
6. Whether the fee in the case is fixed or contingent;
7. Time limitations imposed by the case on counsel;
8. The amount at stake in the controversy and the results obtained;
9. The experience, reputation, and ability of counsel;
10. The undesirability or unpopularity of the cause;
11. The nature and length of the professional relationship between counsel and the client; and
12. Awards in similar cases.

In the context of a class action settlement consent decree, attorney's fees are as subject to compromise as the merits provisions. Consequently, the fee amount in a class action settlement agreement can be less than would be awarded by a court.^{n233.1} Because the proper amount of fees is often open to dispute and the parties are compromising to avoid litigation, the court need not inquire into the reasonableness of the fees even at the high end with the same level of scrutiny as when the fee amount is litigated. But there must be some level of scrutiny by the trial court.^{n233.2}

In discrimination actions brought under Title VII, the existence of the statutory attorney's fees provision does not preclude recovery of attorney's fees from a "common fund."^{n233.3} An attorney's fee award in a class action settlement can fall under the common fund doctrine rather than under the Title VII fee-shifting provisions if the parties properly agree, the resulting fee is reasonable, and other requisites applicable to common fund fees are met. If the parties invoke common fund principles, they must follow common fund procedures and standards, designed to protect class members when common fund fees are awarded.^{n233.4}

Under the common fund doctrine, a litigant or a lawyer who recovers a common fund for the benefit of persons other than the litigant or the lawyer's client is entitled to a reasonable attorney's fee from the fund as a whole.^{n233.5} In a common fund case, the trial court can apply the lodestar method to determine the amount of attorney's fees, and can apply a risk multiplier when using the lodestar approach. The risk multiplier is a number by which the base lodestar figure is multiplied to increase or decrease an award of attorneys' fees on the basis of factors including the risk involved and the length of the proceedings. Alternatively, the court can determine the amount of attorney's fees to be awarded

from the fund by employing a "percentage" method. Under the percentage method, the court awards the attorneys a percentage of the fund.^{n233.6} The Ninth Circuit has established 25% of the common fund as a benchmark award for attorneys' fees.^{n233.7} However, only when the value of benefits deriving from injunctive relief can be accurately valued and traced to the beneficiaries may courts include such relief as part of the value of a common fund for purposes of applying the percentage method of determining fees.^{n233.8} Contingent fee agreements between counsel and client are valid in cases in which common fund fees are available.^{n233.9}

A court may adjust an attorney's fee rate to compensate for lost interest or inflation resulting from delay in payment.^{n233.10} Although the Ninth Circuit has held that a court may enhance the lodestar amount to account for the risks inherent in contingency fee agreements,^{n233.11} the United States Supreme Court, in a subsequent decision interpreting similar fee-shifting provisions in other federal statutes, has reached a contrary conclusion.^{n233.12}

■ PRACTICE TIP:

Since the amount of time spent by the attorney is one of the primary factors determining the amount of the attorney's fee award, counsel should maintain contemporaneous records of time spent in order to support an application for an award. *Commentary by Bill Lann Lee.*

Parties to a class action may not include in a settlement agreement an amount of attorneys' fees measured as a percentage of an actual or putative common fund created for the benefit of the class. To obtain fees justified on a common fund basis, the class's lawyers must ordinarily petition the court for an award of fees, separate from and subsequent to settlement. Further, parties ordinarily may not include an estimated value of undifferentiated injunctive relief in the amount of an actual or putative common fund for purposes of determining an award of attorneys' fees. The fact that counsel obtained injunctive relief in addition to monetary relief for their clients is, however, a relevant circumstance to consider in determining what percentage of the fund is reasonable as fees.^{n233.13}

[ii] To Prevailing Defendant Other than United States or EEOC

Attorney's fees are not awarded to prevailing defendants as a matter of course. Fees are awarded to a defendant in a Title VII action, other than the United States or the EEOC,ⁿ²³⁴ only if the defendant can show that the plaintiff's suit was frivolous, unreasonable, without foundation, or brought in bad faith.ⁿ²³⁵ A hindsight approach, which would interpret a plaintiff's failure to prevail as equivalent to a showing of lack of reasonableness or foundation, does not justify fees for a prevailing defendant.ⁿ²³⁶ In one case, the Ninth Circuit overturned a district court award of attorney's fees against a losing plaintiff because the EEOC's issuance of a reasonable cause determination showed that the plaintiff was reasonable in believing that there was an adequate basis in law and fact to pursue his claim of race discrimination, even though the case had ultimately been dismissed.ⁿ²³⁷

In another case, the Ninth Circuit held that the EEOC's failure to conciliate is not in itself "unreasonable" so as to warrant an award of attorney's fees to a prevailing defendant, at least when the EEOC reasonably believed that its efforts to conciliate were sufficient.^{n237.1} Furthermore, in the same case, the Ninth Circuit held that the district court's finding that the EEOC had failed to present credible evidence of discriminatory conduct was not a sufficient basis to support an award of attorney's fees to the prevailing defendant. In such circumstances, an action is deemed "frivolous, unreasonable, or without foundation" so as to justify an award of attorney's fees only if the plaintiff (in this case, the EEOC) should have anticipated at the outset that none of the plaintiff's evidence of discriminatory conduct was credible.^{n237.2}

In calculating the attorney's fees to be awarded to defendant, the district court considers not only what defendant paid to defend itself successfully in the litigation, but also what is reasonable, considering plaintiff's good faith or lack of it in litigating the action, and plaintiff's ability to pay.ⁿ²³⁸

[g] Relief to Class of Plaintiffs: Procedural Note

All of the remedies discussed in [a]-[f], *above*, are available to classes of plaintiffs, as well as to individual plaintiffs under Title VII.ⁿ²³⁹ Class actions frequently are tried in a bifurcated proceeding,ⁿ²⁴⁰ with the first stage devoted to determining liability,ⁿ²⁴¹ and the second stage devoted to establishing remedies, if liability is found in the first stage.ⁿ²⁴²

Although the Supreme Court asserted a preference for resolving the remedy phase of Title VII class actions by individual claim hearings,ⁿ²⁴³ this preference can be overcome in appropriate cases when the specific factual circumstances justify class-wide or formula distribution of back pay "to accommodate Title VII's remedial purpose."ⁿ²⁴⁴ These circumstances are present in two situations: (1) when the complexities of a case would force the court into speculation about which class members should be made whole; and (2) when individualized hearings would strain judicial manageability and economy beyond feasible limits.ⁿ²⁴⁵

The Ninth Circuit expressly acknowledged the existence of such circumstances in a case, *Domingo v. New England Fish Co.*,ⁿ²⁴⁶ in which the district court had ordered an individualized hearing procedure following a Stage I liability determination. In *Domingo*, the employer's lack of objective hiring criteria and use of word-of-mouth recruitment made it difficult to determine precisely which claimants would have been given a better job absent discrimination. Thus, the Ninth Circuit found that the facts of the case justified "a departure from an individualized remedy for each claimant," although the court recognized that "as a general rule such an approach should be used."ⁿ²⁴⁷ The Ninth Circuit ordered the district court to fashion "class-wide relief," which might consist of a lump sum to be distributed *pro rata* among the claimants.ⁿ²⁴⁸

[h] Limitations on Available Relief in "Mixed Motive" Cases

Title VII, as amended by the Civil Rights Act of 1991,ⁿ²⁴⁹ provides that, except as otherwise provided in Title VII, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.ⁿ²⁵⁰ However, the Civil Rights Act of 1991 also provides that if the employer can demonstrate that it would have taken the same action even in the absence of the impermissible motivating factor, the court may grant only declaratory relief, injunctive relief (other than hiring, admission, promotion, or reinstatement), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under Title 42 *United States Code Section 2000e-2(m)*.ⁿ²⁵¹ However, the plaintiff must allege a claim under Title VII in the complaint and prove a Title VII claim at trial in order to be entitled to an award of attorney's fees.^{n251.1} The court may not award damages or issue an order requiring admission, reinstatement, hiring, promotion, or payment of back pay.ⁿ²⁵²

[10] FORM--Complaint for Violation of Title VII--General Form

[a] Comment

[i] Use of Form

The form set forth in [b], *below*, is a general complaint for monetary and injunctive relief for violation of Title VII.ⁿ²⁵³ The form is intended for use by an individual aggrieved person and contains the basic allegations required in any complaint for violation of Title VII. As an illustration of conduct violating Title VII, the complaint alleges that defendant failed to promote plaintiff because of his or her sex, race, or other protected characteristic.ⁿ²⁵⁴ Illustrative forms of allegations of other specific practices or policies that violate Title VII can be found in the allegations set forth in § 43.01 [10], following the general complaint for violation of the FEHA.ⁿ²⁵⁵ Those allegations, which are based on parallel provisions of the FEHA, may be modified as appropriate (for example, by replacing the citations to the Government Code in those forms with citations to the appropriate provisions of Title VII and EEOC regulations) and substituted for Paragraphs 7-11 in the general form below. The following is a list of those allegations available for use in a Title VII complaint for which allegations of discrimination under the FEHA may be modified and used with this

form:

1. Discriminatory failure or refusal to hire;n256
2. Discriminatory termination from employment;n257
3. Constructive discharge due to discrimination or retaliation;n258
4. Retaliation for filing a complaint, testifying, or participating in Title VII proceedings, or for opposing practices made unlawful under Title VII;n259
5. Refusal to accommodate religious creed;n260 and
6. Harassment.n260.1

[ii] Federal Procedural Requirements for Civil Complaints Generally

Under Federal Rules of Civil Procedure, Rule 8(a), to state a claim for relief, a complaint must contain each of the following: a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; a short and plain statement of the claim showing that the pleader is entitled to relief;n261 and a demand for the relief sought, which may include relief in the alternative or different types of relief. Federal Rules of Civil Procedure, Rule 8(d) in pertinent part requires allegations of the complaint to be simple, concise, and direct. Under a notice pleading system, it is not appropriate to require a Title VII plaintiff to plead facts establishing a prima facie case of discrimination under the framework of *McDonnell Douglas Corp. v. Green*. n261.1 The *McDonnell Douglas* framework does not apply in every employment discrimination case, such as when a plaintiff presents evidence of direct discrimination. Furthermore, the precise requirements of a prima facie case can vary depending on the context and were never intended to be rigid, mechanized, or ritualistic.

An employment discrimination complaint need not include specific facts establishing a prima facie case. The complaint need only contain a short and plain statement of the claim, showing that the pleader is entitled to relief.n261.2 Furthermore, a Title VII complaint does not require greater "particularity" in pleading.n261.3 The ordinary rules for assessing the sufficiency of a complaint apply.n261.4

Federal Rules of Civil Procedure, Rule 10 prescribes the form of the pleadings, including the caption and naming of parties, the setting forth of separate statements of claims in separate paragraphs, and the adoption by reference of prior paragraphs and exhibits in the complaint.

Federal Rules of Civil Procedure, Rule 11 provides in pertinent part that every pleading of a party represented by an attorney must be signed by an attorney, or if the party is unrepresented, the party must sign the pleading. Such signing certifies that the attorney or party has read the pleading, that after "reasonable inquiry," he or she believes it to be well-grounded in fact and warranted by existing law or by a good-faith argument for extension, modification, or reversal of existing law, and that the pleading is not filed for any improper purpose, such as harassment, unnecessary delay, or to needlessly increase the cost of litigation.n262 Unsigned pleadings may be stricken if not signed within a reasonable time from notice of the deficiency to the pleader, and signing in violation of Rule 11 may expose the person who signed the pleading, the represented party, or both, to sanctions.n263 Because the truthfulness of the complaint is ensured by Rule 11, verification of the complaint is generally not required.n264 The above-cited Federal Rules of Civil Procedure generally govern federal civil complaints, and the general form provided below complies with these rules.n265

District courts generally have local rules governing the contents and order of pleadings, and, in particular, of complaints. The general form set forth in [b], *below*, also conforms to the Local Rules for Civil Practice of the United

States District Court for the Northern District of California, Rules 200-1 through 200-5. Because each federal district has its own local civil practice rules, the local rules of other district courts should be consulted for variations on the form used here, before filing Title VII pleadings.

■ **PRACTICE TIP:**

Federal pleading requirements are less stringent than California state pleading requirements. The rationale for the use of federal "notice pleading" is the availability of discovery devices for a defendant to probe a plaintiff's case. Nevertheless, it is a good practice to append a copy of the administrative charge and the right-to-sue letter to the complaint. *Commentary by Bill Lann Lee.*

[iii] Disparate Treatment and Disparate Impact Claims

The form in [b], *below*, alleges discrimination based on both disparate treatment and disparate impact theories because a complaint should preserve both theories unless one or the other of them is clearly inapplicable to the allegations of discrimination at issue.ⁿ²⁶⁶ Pleading a prima facie case of discrimination consisting of disparate treatment or of disparate impact, or both, should suffice to overcome a motion to dismiss for alleged failure to state a claim on which relief may be granted.ⁿ²⁶⁷

[iv] Allegations

The complaint in [b], *below*, contains the following allegations: (1) a preliminary statement of the substance of the complaint (preferred by some United States district courts) (Paragraph 1 (optional)); (2) the identities of the parties plaintiff (Paragraphs 2-4) and defendant (Paragraph 5);ⁿ²⁶⁸ (3) the basis for subject matter jurisdiction and venue (Paragraph 6);ⁿ²⁶⁹ (4) a claim for relief or cause of action for discrimination (Paragraphs 7-11);ⁿ²⁷⁰ (5) the grounds for monetary relief, including back payⁿ²⁷¹ and front pay (Paragraphs 12 and 13),ⁿ²⁷² compensatory damages (Paragraphs 15 and 16),ⁿ²⁷³ and punitive damages (Paragraph 17);ⁿ²⁷⁴ (6) the grounds for injunctive relief (Paragraph 17);ⁿ²⁷⁵ and (7) plaintiff's exhaustion of his or her administrative remedies under Title VII (Paragraphs 18 and 19).ⁿ²⁷⁶ The complaint concludes with a prayer setting forth the relief requested,ⁿ²⁷⁷ including interest, costs, and attorney's fees.ⁿ²⁷⁸

[v] Discriminatory Denial of Promotion in Violation of Title VII

As noted in [i]-[iv], *above*, the factual example set forth in the form in [b], *below*, is based on the discriminatory denial of a promotion because of plaintiff's sex, race, or other protected characteristic, in violation of Title VII.ⁿ²⁷⁹ In an action under Title VII for discriminatory denial of promotion, plaintiff must allege that he or she applied for the denied promotion unless plaintiff also alleges that application was not possible or would have been futile, that the employer does not use an application procedure, or that defendant would not accept plaintiff's application.ⁿ²⁸⁰

[b] Form UNITED STATES DISTRICT COURT

_____	[specify, e.g., NORTHERN] DISTRICT OF CALIFORNIA	)	
_____	[name],	)	Civil Case No. _____
Plaintiff,		)	INDIVIDUAL COMPLAINT FOR MONETARY
vs.		)	AND INJUNCTIVE RELIEF FOR EMPLOYMENT
_____	[name(s)], Defendant(s).	)	DISCRIMINATION
		)	(Title VII of Civil Rights
		)	Act of 1964)
		)	(42 U.S.C. §§ 1981a, 2000e et seq.)

Plaintiff alleges:

[1. This is an action brought pursuant to Title VII of the United States Civil Rights Act of 1964, as amended, Title 42 *United States Code Section 2000e et seq.*, to obtain relief for plaintiff _____ (name) for alleged discrimination in employment against plaintiff because of plaintiff's _____ (allege prohibited basis for discrimination under Title VII, e.g., sex). Plaintiff _____ (name) alleges that he or she has been _____ (specify discriminatory act of defendant, e.g., denied a promotion) on account of his/her _____ (allege prohibited basis for discrimination under Title VII, e.g., sex), in violation of Title VII of the United States Civil Rights Act of 1964, as amended, Title 42 *United States Code Section 2000e-2(a)(1)* and (2). By this action, plaintiff _____ (name) seeks the following relief, pursuant to Title VII, Title 42 *United States Code Section 2000e-5(g)* and (k): _____ (specify, e.g., monetary relief, including back pay, front pay, compensatory and punitive damages, attorney's fees and costs of suit, and injunctive relief, consisting of an order promoting him/her and granting retroactive seniority), for said discriminatory _____ (specify discriminatory employment practice, e.g., nonpromotion of plaintiff).]

2. Plaintiff _____ [name] is an adult person and is a resident of the County of _____, State of California.

[EITHER]

3. Plaintiff is an employee of defendant _____ [name], and has been employed by defendant _____ [name], in _____ [place of employment] since _____ [date].

[OR]

3. Plaintiff applied for employment with defendant _____ [name] on _____ [date] at _____ [place].

[OR]

3. Plaintiff was employed by defendant _____ [name] at _____ [place of employment] from _____ [date] until _____ [date].

[CONTINUE]

4. Plaintiff is a _____ [state plaintiff's characteristic protected by Title VII, e.g., female.]

5. Defendant _____ [name] is an employer subject to suit under Title VII in that defendant _____ [name] is engaged in an industry affecting commerce who has 15 or more employees for each working day of 20 or more calendar weeks in the year of, or preceding, the filing of this complaint.

6. Jurisdiction of the subject matter of this action is established in this court under Title VII of the United States Civil Rights Act of 1964, as amended, Title 42 *United States Code Section 2000e-5(f)(3)*. This is the proper venue for this action under Title VII of the United States Civil Rights Act of 1964, as amended, Title 42 *United States Code Section 2000e-5(f)(3)*, in that _____ [allege ground establishing venue, e.g., the unlawful employment practice alleged herein was committed within this court's judicial district.]

[Paragraphs 7-11 set forth specific allegations of discrimination based on unlawful failure to promote plaintiff because of her sex, race, or other protected characteristic. Other allegations of discrimination based on different grounds may be substituted here. See Forms set forth in § 43.01 [9] and [10], which can be adapted for use here.]

[EITHER]

7. On _____ [date], plaintiff applied for promotion to the position of _____ [allege job title of promotional opportunity sought by plaintiff].

[OR]

7. On _____ [date], plaintiff attempted to apply for promotion to the position of _____ [allege job title of promotional opportunity sought by plaintiff], but defendant _____ [name] refused to accept plaintiff's application.

[OR]

7. Plaintiff did not apply for the position of _____ [allege job title of promotional opportunity desired by plaintiff] because plaintiff knew that it was futile to apply for the position for the following reasons: _____ [specify].

[CONTINUE]

8. As of _____ [date], and at all times herein mentioned, plaintiff was in all respects qualified for promotion to _____ [allege job title of promotional opportunity sought by plaintiff] in that _____ [specify facts indicating plaintiff's qualifications for job, performance evaluations, etc.]

9. As of _____ [date of denial of promotional opportunity to plaintiff] [and continuing to the present time], defendant denied [and continues to deny] to plaintiff promotion to the position of _____ [job title], and defendant _____ [continued to seek persons of plaintiff's qualifications or selected another person without higher qualifications than plaintiff, who was not of plaintiff's _____ [specify protected characteristic, e.g., sex,] for promotion to that position.

10. Defendant's _____ [specify employment opportunity denied plaintiff, e.g., denial of promotion to plaintiff] constitutes disparate treatment in violation of _____ [specify statutory violation, e.g., Title VII of the United States Civil Rights Act of 1964, as amended, Title 42 United States Code Section 2000e-2(a)(1)] in that defendant intentionally denied the employment opportunity to plaintiff because of plaintiff's _____ [specify protected characteristic of plaintiff, e.g., sex].

11. In the alternative, the policy or practice of the employer that caused plaintiff to be _____ [specify loss of employment opportunity, e.g., denied the promotion that he/she desired] consists of _____ [specify policy or practice that caused the denial of the employment opportunity, e.g., a height and weight requirement for the promotional position that plaintiff desired]. This policy or practice has a disparate impact on plaintiff and other persons of his/her _____ [specify protected characteristic, e.g., sex], in that it causes persons of plaintiff's _____ [specify protected characteristic, e.g., sex] to be demonstrably disadvantaged,

vis-a-vis _____ [*specify group that has advantage because of requirement, e.g., male*] candidates seeking that position, in the following manner: _____ [*specify numerical disparity or other details concerning disparity caused by defendant's employment policy or practice*].

[CONTINUE]

12. Defendant's discriminatory action(s) against plaintiff, which constitutes an unlawful employment practice in violation of _____ [*specify statutory violation, e.g., Title VII of the United States Civil Rights Act of 1964, as amended, Title 42 United States Code Section 2000e-2(a)*], has caused and will continue to cause plaintiff losses of earnings, from the date of _____ [*specify loss of employment opportunity, e.g., denial of promotion*] until _____ [*specify date on which loss of earnings will cease, e.g., the date on which plaintiff is promoted into that position*].

13. Defendant's discriminatory action(s) against plaintiff, which constituted an unlawful employment practice in violation of _____ [*specify statutory violation, e.g., Title VII of the United States Civil Rights Act of 1964, as amended, Title 42 United States Code Section 2000e-2(a)*] has also caused and will continue to cause plaintiff loss of seniority, and losses of all other benefits accruing to said promotional opportunity, from the date of _____ [*specify loss of employment opportunity, e.g., denial of promotion*] until _____ [*specify date on which loss of earnings will cease, e.g., the date on which plaintiff is promoted into that position*].

[14. As a further proximate result of defendant's unlawful and intentional discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered the intangible loss of such employment-related opportunities as _____ (*specify, e.g., experience in the position from which plaintiff was terminated*). As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ (in the amount of \$ _____ or in an amount according to proof).]

[15. As a further proximate result of defendant's unlawful and intentional discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered emotional pain, humiliation, mental anguish, loss of enjoyment of life, and emotional distress. As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ (in the amount of \$ _____ or in an amount according to proof).]

[16. The above-recited actions of defendant were done _____ (with malice *and/or* with reckless indifference to plaintiff's rights under Title VII), in that _____ (*specify facts showing malice and/or reckless indifference*). Defendant's conduct warrants the assessment of punitive damages in an amount sufficient to punish defendant and deter others from engaging in similar misconduct.]

[17. Plaintiff has no adequate remedy at law to secure relief for the _____ (*specify loss of employment opportunity, e.g., deprivation of promotional opportunity to him/her by defendant*). If this court does not enter an order _____ (*specify injunctive relief needed, e.g., retroactively promoting plaintiff to the position of _____ (title of position), and ordering retroactive seniority for that position, retroactive to _____ (date on which plaintiff maintains he/she would have been promoted, but for discrimination)*), plaintiff will be irreparably injured.]

18. On _____ [*date*], plaintiff filed a charge of discrimination against defendant _____ [*name*] with the Equal Opportunity Commission (EEOC). A copy of that charge is attached to this complaint, marked "Exhibit _____," and is incorporated by this reference as though fully set forth. That charge was timely filed, under Title VII of the United States Civil Rights Act of 1964, as amended, Title 42 United States Code

Section 2000e-5(e), as follows: _____ [specify timely filing, e.g., plaintiff filed the charge with the EEOC within 300 days of the occurrence of the violation of Title VII herein alleged]. [Plaintiff also filed a timely charge of discrimination with the California Department of Fair Employment and Housing, pursuant to the California Fair Employment and Housing Act, *Government Code Section 12900 et seq.* On _____ [date], plaintiff received notice that the Department of Fair Employment and Housing had terminated its proceedings on plaintiff's charge.]

19. On _____ [date], plaintiff received notice from the EEOC of his/her right to bring this action, and plaintiff timely filed this action on _____ [date], within _____ [90 days after or the time period specified in] that notice. A copy of that notice of right of action is attached to this form, marked "Exhibit _____," and is incorporated by this reference as though fully set forth.

WHEREFORE, plaintiff prays for judgment as follows:

1. For back pay, with prejudgment interest, from _____ [set forth date of first denial of promotion, but not more than two years prior to filing of EEOC charge by plaintiff, pursuant to 42 U.S.C. § 2000e-5(g)(1)] to the date of judgment herein;

[2. For front pay, for the period from the date of judgment to the date at which plaintiff actually is promoted by defendant to the position that he or she has been denied because of discrimination;]

[3. For compensatory damages _____ (in the amount of \$ _____ or according to proof)];

[4. For punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar misconduct;]

[5. For injunctive relief, including but not limited to _____ (specify injunctive relief desired, e.g., retroactive promotion from the date that plaintiff would have been promoted, but for discrimination, including retroactive seniority and all other benefits of said retroactive promotion of plaintiff), and for all other injunctive relief required to make plaintiff whole for the losses caused by the violations of defendants;]

6. For costs of suit, including reasonable attorney's fees and expert fees, pursuant to Title 42 *United States Code Section 2000e-5(k)* and other applicable laws; and

7. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff

[Insert verification, if desired]

[11] Common Grounds for Motions to Dismiss Title VII Actions

Federal Rules of Civil Procedure, Rule 12(b) authorizes a defendant to move to dismiss a complaint on various grounds before filing an answer on the merits. Three common grounds that are likely to be asserted in motions for dismissal of Title VII actions are:

1. Failure to exhaust administrative remedies;n281
2. Naming a party in the complaint who was not named in the EEOC charge;n282 or
3. Insufficient allegations to state a claim on which relief may be granted.n283

[12] FORM--General Answer to Complaint for Violation of Title VII

[a] Comment

The form set forth in [b], *below*, is a general answer to an individual complaint for monetary and injunctive relief for violation of Title VII. The general form of such a complaint, alleging discrimination in denial of promotion, is set forth at [10][b], *above*. A general denial is permissible under the Federal Rules of Civil Procedure if it is filed in good faith, after reasonable inquiry into the matters alleged in the complaint.n284 If a matter in a complaint is not denied in the responsive pleading, it is deemed admitted, unless it concerns the amount of damage.n285

Affirmative defenses may be added to the general form of answer as appropriate. Many of the forms of affirmative defenses to a complaint for violation of the FEHA that are set forth in § 43.01[13] may be adapted for use as affirmative defenses to a Title VII complaint. These affirmative defenses include:

1. Failure to exhaust administrative remedies;n286
2. Failure to file the administrative charge or civil complaint within the relevant limitations periods;n287
3. Laches;n288
4. Bona fide occupational qualification (BFOQ) defense to allegation of discrimination based on religion, sex, or national origin;n289
5. Business necessity/job-relatedness;n290
6. Security regulations that mandate the particular employment practice;n291 and
7. Undue hardship resulting from accommodation of plaintiff's religious beliefs.n292

Additional forms of affirmative defenses that are set forth in [12], *below*, may also be added to the general answer.

[b] Form UNITED STATES DISTRICT COURT

_____ [*specify, e.g., NORTHERN*] DISTRICT OF CALIFORNIA

_____)	Civil Case No. _____
_____ [<i>name</i>],)	ANSWER TO INDIVIDUAL COMPLAINT FOR
Plaintiff, vs. _____ [<i>name(s)</i>],)	MONETARY AND INJUNCTIVE RELIEF FOR
Defendant(s).)	EMPLOYMENT DISCRIMINATION
)	(Title VII of Civil Rights Act of 1964, as amended)
)	(42 U.S.C. § 2000e et seq.; Fed. R. Civ. P., Rules
)	8-11;
	_____ (<i>specify any relevant local</i>
	<i>federal rules, e.g., Local Rules of U.S. Dist. Court for</i>
	<i>Northern California, Rules 200-1 through 200-5)</i>

Defendant answers the complaint and alleges as follows:

1. Defendant _____ [admits *or* denies] that it is an employer, as defined by Title 42 *United States Code Section 2000e(b)*. Except as specifically admitted herein, defendant denies each and every other averment of Paragraph _____.
2. Defendant _____ [admits *or* denies] that plaintiff _____ [was *or* is] an _____ [employee *or* applicant for employment] of defendant. Except as specifically admitted herein, defendant denies each and every other averment of Paragraph _____.
3. Defendant _____ [admits *or* denies] that plaintiff is a _____ [state plaintiff's membership in group protected by Title VII] as specified in Paragraph _____ of plaintiff's complaint. Except as specifically admitted herein, defendant denies each and every other averment of Paragraph _____.
4. Defendant _____ [admits *or* denies] that the events alleged in Paragraph(s) _____ [- _____] of plaintiff's complaint occurred as stated in said complaint. Except as specifically admitted herein, defendant denies each and every other averment of Paragraph _____.
5. Defendant denies each and every one, all and singular, of the allegations in paragraph(s) _____ [- _____] of plaintiff's complaint [except that defendant admits that _____ (*specify*)]. Except as specifically admitted herein, defendant denies each and every other averment of Paragraph(s) _____.
6. Defendant is without sufficient information and belief to admit any of the allegations in Paragraph(s) _____ [- _____] of plaintiff's complaint, and on this basis, defendant denies each of said allegations.
- [7. Defendant denies each and every allegation contained in plaintiff's complaint that is not expressly admitted herein.]

[Insert affirmative defenses, if any.

See [12], below; See also discussion in [a], above.]

WHEREFORE, defendant prays judgment as follows:

1. That the complaint of plaintiff against defendant herein be dismissed;
2. That plaintiff take nothing by reason of his/her complaint;
3. That plaintiff be granted no relief in this action;
4. That defendant have judgment against plaintiff;
5. That defendant recover costs of suit incurred herein;
6. That defendant recover reasonable attorney's fees and expert fees pursuant to Title 42 *United States Code Section 2000e-5(k)*; and
7. For such other relief as this court may deem just and proper.

_____ [signature]

Attorney for Defendant

[If complaint was verified, add verification to answer. See Fed. R. Civ. P., Rules 11 and 65.]

[13] Affirmative Defenses to Complaint for Violation of Title VII

[a] FORM--Affirmative Defense That Complaint Fails to State Claim on Which Relief Can Be Granted

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that the complaint fails to state a claim on which relief can be granted. The exact application of this affirmative defense will of course vary with the nature of the discrimination/retaliation at issue. The complaint must set forth a claim on which relief can be granted, and this defect may be raised by motion to dismiss or by way of affirmative defense to the answer.ⁿ²⁹³

When appropriate, this defense can be added to the general form of answer provided in [11][b], *above*.

■ PRACTICE TIP:

Defendant should be wary of asserting an expansive affirmative defense that plaintiff has failed to state *any* claim on which relief might be granted. If certain claims are defective, the defendant should challenge those defects in a motion under Federal Rules of Civil Procedure, Rule 12(b), or with an affirmative defense that focuses on the particulars of the defense, rather than by a blanket affirmative defense that may be stricken (or sanctioned) under Federal Rules of Civil Procedure, Rule 11.
Commentary by Erica B. Grubb.

[ii] Form

AS A _____ [specify, e.g., FIRST] AFFIRMATIVE DEFENSE, defendant alleges that the complaint fails to state a claim on which relief can be granted [in that _____ (specify particular deficiencies, if desired)].

[b] FORM--Affirmative Defense Based on Legitimate, Nondiscriminatory Reason

[i] Comment

The form set forth in [ii], *below*, alleges that the treatment complained of was based not on discriminatory motive, but on a legitimate, nondiscriminatory reason.ⁿ²⁹⁴ This defense is not applicable, however, to a disparate impact claim.ⁿ²⁹⁵

When appropriate, this defense can be added to the general form of answer provided in [11][b], *above*. For full discussion of this defense, see Chapter 41, Part E.

[ii] Form

AS A _____ [specify, e.g., FIRST] AFFIRMATIVE DEFENSE, defendant alleges that the alleged disparity in treatment of which plaintiff complains was not based on plaintiff's _____ [specify protected group characteristic(s) claimed by plaintiff, e.g., race], but was based on one or more legitimate, nondiscriminatory reasons [, consisting of the following _____ (allege details, if desired)].

[c] FORM--Affirmative Defense That Policy or Practice Is Justified by Bona Fide Seniority or Merit System**[i] Comment**

The form set forth in [ii], *below*, alleges that the defendant's action is justified by a bona fide seniority or merit system.ⁿ²⁹⁶

When appropriate, this defense can be added to the general form of answer, set forth in [11][b], *above*. For a full discussion of seniority systems, *see* Chapter 41, Parts D and E.

■ CONSULTANT'S COMMENT:

The Supreme Court in *Lorance v. AT&T Technologies, Inc.* ⁿ²⁹⁷ stated that the "bona fide seniority system" exemption is an exemption, which itself defines employment practices that are illegal and others that are not illegal, rather than a defense. Nonetheless, if an employer or union defendant seeks to rely on this exemption, they must plead it, and they will probably have the burden of establishing that they satisfy it. Accordingly, for purposes of this form, it is characterized as an "affirmative defense." Since notice pleading rules govern federal and California practice, however, the characterization is less important than the inclusion of the substance in some form. *Commentary by Erica B. Grubb.*

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that the policy, practice, or action complained of by plaintiff, namely _____ [*specify the alleged discriminatory policy, practice, or action*], was done pursuant to a bona fide _____ [*seniority system or merit system or system that measures earnings by quantity or quality of production*], and thus is not in violation of Title VII, as provided by Title 42 *United States Code Section 2000e-2(h)*.

[d] FORM--Affirmative Defense That Plaintiff Is Member of Communist Party or Other Subversive Organization**[i] Comment**

The form set forth in [ii], *below*, is an affirmative defense stating that plaintiff was denied an employment opportunity because of membership in the Communist Party or other subversive organization, a statutory defense under Title VII.ⁿ²⁹⁸

When appropriate, this affirmative defense can be added to the general form of answer, set forth in [11][b], *above*.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that the treatment of which plaintiff complains is not an unlawful employment practice, under Title VII, Title 42 *United States Code Section 2000e-2(f)*, because the action was taken because plaintiff is a member of _____ [*the Communist Party of the United States or a subversive organization required to register by the Subversive Activities Control Board, namely _____ (specify)*].

[e] FORM--Affirmative Defense That Defendant Would Have Made Same Employment Decision Absent Discriminatory Motive**[i] Comment**

The form set forth in [ii], *below*, is an affirmative defense stating that even if a discriminatory reason had been a motivating factor in an employment decision, the defendant would have made the same decision in any case.ⁿ²⁹⁹

Note that the defense set forth in this form is not a complete affirmative defense to a charge of disparate treatment involving "mixed motives."ⁿ³⁰⁰ However, this defense, if established, will limit the relief that may be ordered by the court.ⁿ³⁰¹ For discussion, *see* [9][h], *above*.

When appropriate, this affirmative defense may be added to the general form of answer, set forth in [11][b], *above*. For a complete discussion of "mixed motive" cases, *see* Chapter 41, Parts A and E.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that it would have _____ [*specify employment decision, e.g., held plaintiff's promotion for reconsideration*] regardless of plaintiff's _____ [*specify protected classification alleged by plaintiff, e.g., gender*] because of _____ [*specify permissible basis for employment decision, e.g., plaintiff's poor performance in his/her former position*].

[f] FORM--Affirmative Defense That Defendant Exercised Reasonable Care to Prevent and Correct Sexually Harassing Behavior and Plaintiff Unreasonably Failed to Utilize Procedure

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that defendant employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.^{n301.1}

The defense may be used by an employer to defend against allegations of vicarious liability or damages in sexual harassment claims brought under Title VII when no tangible employment action--such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits--has been taken against the plaintiff. It may not be used when a supervisor's harassment culminates in such tangible employment actions.^{n301.2}

When appropriate, the defense may be added to the general form of answer, set forth in [11][b], *above*. For a complete discussion of the antiharassment policy affirmative defense, *see* §§ 41.81[1], [6][b], [7], and 41.92A.

[ii] Form Affirmative Defense That Defendant Exercised Reasonable Care to Prevent and Correct Sexually Harassing Behavior and Plaintiff Unreasonably Failed to Utilize Procedure

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that it exercised reasonable care to prevent and correct promptly any and all sexually harassing behavior by _____ [*specify individual(s) alleged to have caused harassment*] in that defendant _____ [*specify preventive and corrective action, e.g., at all relevant times had a written antiharassment policy which was communicated to all employees and strictly enforced, etc.*]. Defendant also alleges that plaintiff unreasonably failed to take advantage of defendant's antiharassment policy in that _____ [*specify plaintiff's failure to utilize policy, e.g., plaintiff never reported the alleged incidents either to her supervisor or to any other person of successively higher authority over plaintiff*].

[14] Other Procedural Issues Under Title VII

[a] Removal, Preemption, and Pendent Jurisdiction**[i] Removal**

Although state and federal courts have concurrent jurisdiction over Title VII claims,ⁿ³⁰² federal district courts have original jurisdiction over such claims on the basis of federal question jurisdiction,ⁿ³⁰³ and thus defendants may remove Title VII actions from state court to federal court.ⁿ³⁰⁴ However, it is not proper to remove a discrimination action based solely on state law to federal court simply because a Title VII action could have been, but was not, pleaded in state court.ⁿ³⁰⁵

For a complete discussion of removal of state actions to federal courts generally, *see* California Forms of Pleading and Practice, ch. 265, *Federal Courts: Jurisdiction and Removal* (Matthew Bender).

[ii] Preemption

Title VII expressly disclaims Congressional intent to preempt state and local laws that provide rights of action or remedies for employment discrimination.ⁿ³⁰⁶ Thus, state laws that serve the common purpose of Title VII of eradicating employment discrimination are generally not held to be preempted by Title VII.ⁿ³⁰⁷ State and local laws that require or permit any act that would be an unlawful employment practice under Title VII are, however, preempted.ⁿ³⁰⁸ For additional discussion, *see* Chapter 40, Parts A and C.

For a discussion of supplemental jurisdiction generally, *see* California Forms of Pleading and Practice, ch. 265, *Federal Courts: Jurisdiction and Removal* (Matthew Bender).

[iii] Pendent (Supplemental) Jurisdiction

If a complaint alleging both Title VII and state-law causes of action is filed originally in federal court (or is removed from state court to federal court),ⁿ³⁰⁹ the issue of supplemental jurisdiction arises, i.e., whether the federal court will retain jurisdiction over the state-law claims or will decline to do so. Under the United States Supreme Court's decision in *United Mine Workers v. Gibbs*,ⁿ³¹⁰ district courts were given the authority to retain jurisdiction over pendent state claims if the state and federal claims derived from a common nucleus of operative facts, the claims were such that a plaintiff would ordinarily be expected to try them all in one judicial proceeding, and the federal issues were substantial. However, under *Gibbs*, courts were given the discretion to decline jurisdiction over state claims if the state claims involved novel or complex issues of state law, trial of the state and federal claims together was likely to cause jury confusion, or retention of the state claims required the expenditure of substantial additional judicial time and effort.ⁿ³¹¹

In 1990, Congress enacted Title 28, *United States Code, Section 1367*, which now governs "supplemental jurisdiction" of pendent state-law claims. Although Section 1367 codifies many aspects of the pendent jurisdiction doctrine set forth in *Gibbs*, it has altered the scope of a district court's discretion to remand pendent state-law claims. Section 1367(c) permits a district court to decline supplemental jurisdiction over a state-law claim in any of the following circumstances:ⁿ³¹²

1. The claim raises novel or complex issues of state law;
2. The claim substantially predominates over the claim or claims of which the district court has original jurisdiction (i.e., the federal claims);
3. The district court has dismissed all claims over which it has original jurisdiction; or
4. In exceptional circumstances, there are other compelling reasons for declining jurisdiction.

The Ninth Circuit Court of Appeals has held that Section 1367(c) provides the exclusive means by which a court may decline jurisdiction over supplemental claims if assertion of jurisdiction is permitted by subsections (a) and (b) of Section 1367.ⁿ³¹³ Thus, Section 1367(c) provides the only bases for declining jurisdiction, with the categories set forth in Section 1367(c)(1)-(3) reflecting the categories set forth in *Gibbs* for declining jurisdiction, and Section 1367(c)(4) providing a more narrow standard for discretionary remand of pendent state-law claims in "exceptional circumstances" when there are "compelling reasons" for declining jurisdiction.^{n313.1}

The statute of limitations for any claims for which the district court lacks original jurisdiction (state law claims), and for any other state law claim asserted in the same action that is voluntarily dismissed at the same time or after the dismissal without prejudice of a state law claim, is tolled while the claim is pending and for a period of 30 days after dismissal unless state law provides for a longer tolling period.^{n313.2}

[b] EEOC Administrative Records

[i] Confidentiality and Access to Records

The EEOC may not disclose certain records prior to the institution of any Title VII proceeding.ⁿ³¹⁴ Title VII imposes criminal penalties and fines on any officer or employee of the EEOC who makes public any confidential information.ⁿ³¹⁵ Other EEOC records are available in accordance with EEOC regulations on the subject.ⁿ³¹⁶ For full discussion of confidentiality of, and access, to EEOC records, *see* Chapter 42, Part C.

[ii] Admissibility

Under Title VII, the investigative findings of the EEOC are admissible in a subsequent civil action brought pursuant to the act.ⁿ³¹⁷ However, the findings of the EEOC are not binding on the federal court, and the Title VII plaintiff is entitled to a de novo trial on his or her claim of discrimination and/or retaliation, regardless of whether the agency found cause to believe the EEOC charge to be true.ⁿ³¹⁸

[c] Jury Trials

Prior to 1991, courts had held that there was no right to a jury trial in actions under Title VII because the relief in such actions was limited to equitable relief.ⁿ³¹⁹ However, as discussed under [9][c], *above*, the Civil Rights Act of 1991 now authorizes recovery of limited compensatory and punitive damages in actions under Title VII alleging intentional discrimination.ⁿ³²⁰ If a complaining party seeks compensatory or punitive damages under this provision, any party may demand a jury trial.ⁿ³²¹ Furthermore, if a plaintiff joins a Title VII claim with some other cause of action that entitles a plaintiff to damages, such as a claim under Title 42 *United States Code Section 1981*,ⁿ³²² he or she is entitled to a jury trial on all issues common to both claims, and the jury must resolve the legal claim before the court resolves the Title VII claim.ⁿ³²³ The United States Supreme Court has held that the jury trial provision of the Civil Rights Act of 1991 does not apply retroactively to cases pending at the time of enactment.ⁿ³²⁴

With regard to jury instructions, so long as the instructions set forth the essential elements the plaintiff must prove, and the plaintiff is free to explain those elements to the jury, a district court does not abuse its discretion in declining to give an instruction explicitly addressing pretext.^{n324.1}

[d] Validity of Waiver

The interpretation and validity of a waiver of a federal claim is governed by federal law. An agreement need not specifically recite the particular claims waived in order to be effective. However, courts closely scrutinize a waiver of rights under Title VII because of their remedial nature.ⁿ³²⁵ In *Nilsson v. City of Mesa*,ⁿ³²⁶ a waiver that an applicant for a position as a police officer signed did not waive her rights under Title VII, although it did preclude her from

asserting any claims that address the defendant-police department's investigation and inquiry, which were claims under the ADA and 42 U.S.C. Section 1983. The waiver encompassed any and all possible causes of legal action against the city, the police department, their officers, agents, and employees for any acts, or omissions in the course of the investigation into the applicant's background, employment history, health, family, personal habits and reputation and all causes of action to the extent that the police department investigation for purposes of evaluating her suitability for employment may violate or infringe upon the "aforementioned legal rights and causes of action." Based on her college-level education and prior work experience as a police officer, the applicant possessed sufficient education and experience to understand the waiver. Although she did not have an attorney read the waiver before signing it, there was no evidence she was discouraged or precluded from doing so. Rather, the waiver expressly advised the applicant in bold capital letters to read the waiver carefully and if not understood to seek competent legal advice. Thus, the waiver precluded her from asserting any claims that address the defendant-police department's investigation and inquiry, which were claims under the ADA and 42 U.S.C. Section 1983, while, the Title VII claim rested on her assertion that she was not hired due to her filing an EEOC complaint against her former employer (not because defendant improperly discovered her EEOC complaint during the course of its investigation). Thus the Title VII claim was not barred by the waiver.

Legal Topics:

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

Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 General Overview Labor & Employment Law Discrimination Title VII of the Civil Rights Act of 1964 Coverage & Definitions General Overview Labor & Employment Law Wage & Hour Laws Statutory Application Title VII of the Civil Rights Act of 1964

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. § 2000e et seq.

(n2)Footnote 2. See 42 U.S.C. § 2000e-2.

(n3)Footnote 3. See 42 U.S.C. § 2000e-5(f)(1),(g); see also discussion in [4] and [9], below.

(n4)Footnote 4. *McDonnell Douglas v. Green* (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (disparate treatment).

(n5)Footnote 5. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (disparate impact).

(n6)Footnote 6. See *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733, superseded by statute on other grounds by amendment of 42 U.S.C. § 1981, see 105 Stat. 1071 (disparate impact); *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, 293, 294, 295, superseded by statute on other grounds by amendment of 42 U.S.C. § 1981, see 105 Stat. 1071. (disparate treatment); *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (disparate treatment); *Dothard v. Rawlinson* (1977) 433 U.S. 321, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (disparate impact); *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (disparate impact).

(n7)Footnote 7. See *Teamsters v. United States* (1977) 431 U.S. 324, 335-336 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396. Another form of unlawful "disparate treatment" occurs when an employer retaliates against a person for opposing unlawful discrimination or for engaging in an activity protected by Title VII. see 42 U.S.C. § 2000e-3(a); see also discussion in [d], below.

(n8)Footnote 8. See *Teamsters v. United States* (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396.

(n9)Footnote 9. See *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733,

753 .

(n10)Footnote 10. *See, e.g., Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827, 841-843 (challenge of subjective criteria for promotions did not satisfy disparate treatment criteria but should have been evaluated under disparate impact analysis).

(n11)Footnote 11. *Teamsters v. United States* (1977) 431 U.S. 324, 335-336 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 ; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-805, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n12)Footnote 12. *See Rosenfeld v. Southern Pacific Co.* (9th Cir. 1971) 444 F.2d 1219, 1223 (woman denied employment assignment on ground that women, considered generically, are not physically or biologically suited for assignment); *see also Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 853-854 (uncontroverted evidence showed defendant chose weight maximums for women corresponding to medium frame category and weight maximums for men corresponding to large frame category so weight policy was facially discriminatory) *See also Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 853-854 (uncontroverted evidence showed defendant chose weight maximums for women corresponding to medium frame category and weight maximums for men corresponding to large frame category so weight policy was facially discriminatory).

(n13)Footnote 13. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 . If direct evidence is available, the *McDonnell Douglas* test is inapplicable. *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (ADEA) ; *see Lowe v. City of Monrovia* (9th Cir. 1985) 775 F.2d 998, 1006-1007 (Title VII) .

(n14)Footnote 14. The disparate treatment theory of liability also applies to class-wide or "pattern and practice" cases involving a pattern of intentional discrimination against the plaintiff's protected class as a class; however, the *McDonnell Douglas* order and allocation of proof has been held to be inappropriate for such cases. *see Teamsters v. United States* (1977) 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396(Title VII) ; *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1480 (en banc), *ret'd to panel* 827 F.2d 439 , *rev'd on other grounds*, 104 L. Ed. 2d 733 (1989) ; *Segar v. Smith* (D.C. Cir. 1984) 738 F.2d 1249, 1265-1266, 238 U.S. App. D.C. 103 , *cert. denied*, 471 U.S. 1115 (1985) . For a discussion of the order and allocation of proof in class-wide or "pattern or practice" cases, *see* ch. 41, pt. A.

(n15)Footnote 15. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n16)Footnote 15.1. *Swierkiewicz v. Sorema N.A.* (2002) 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1, 8 . For pleading requirements for Title VII actions, *see* [10][a][ii], *below*.

(n17)Footnote 16. *See Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 .

(n18)Footnote 17. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n19)Footnote 18. *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 .

(n20)Footnote 19. *See St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 505-506, 113 S. Ct. 2742, 125 L. Ed. 2d 407 ; *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 .

(n21)Footnote 19.1. *St. Mary's Honor Ctr. v. Hicks* (1993) 509 U.S. 502, 505-506, 113 S. Ct. 2742, 125 L. Ed. 2d 407 .

(n22)Footnote 20. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n23)Footnote 21. See *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 ; see also *Hersant v. Department of Social Servs.* (1997) 57 Cal. App. 4th 997, 1004, 67 Cal. Rptr. 2d 483 (FEHA age discrimination; employee must rebut employer's nondiscriminatory reason with substantial evidence of its falsity, present other evidence suggesting discriminatory basis, or combination of both).

(n24)Footnote 22. 42 U.S.C. § 2000e-2(m); cf. *Mixon v. Fair Employment & Hous. Comm'n* (1987) 192 Cal. App. 3d 1306, 1319, 237 Cal. Rptr. 884 (FEHA; plaintiff need not prove racial animus was sole reason behind challenged action, but must prove by preponderance of evidence that there was "causal connection" between plaintiff's protected status and adverse employment decision).

(n25)Footnote 23. See 42 U.S.C. § 2000e-5(g)(2)(B).

(n26)Footnote 24. *Teamsters v. United States* (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n27)Footnote 25. See *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n28)Footnote 26. See *Watson v. Fort Worth Bank & Trust* (1988) 487 U.S. 977, 989-991, 108 S. Ct. 2777, 101 L. Ed. 2d 827 ; *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1987) 810 F.2d 1477, 1479 (en banc), *ret'd to panel* 827 F.2d 439 , *rev'd on other grounds*, 490 U.S. 642 (1989) .

(n29)Footnote 27. See *Teamsters v. United States* (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 ; *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 ; *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1427 , *cert. denied*, 475 U.S. 1109 (1986) .

(n30)Footnote 28. See also *Katz v. Regents of the University of California* (9th Cir. 2000) 229 F.3d 831, 835 ; *Connecticut v. Teal* (1982) 457 U.S. 440, 446, 102 S. Ct. 2525, 73 L. Ed. 2d 130 ; *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 .

(n31)Footnote 29. See *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 656-658, 109 S. Ct. 2115, 104 L. Ed. 2d 733 ; *Clady v. County of Los Angeles* (9th Cir. 1985) 770 F.2d 1421, 1427 , *cert. denied*, 475 U.S. 1109 (1986) ; see also , discussions in § 43.01[2][c] and ch. 41, pt. A.

(n32)Footnote 30. See 42 U.S.C. § 2000e-2(k)(1)(A)(i), (B)(i); see also *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 656-657, 109 S. Ct. 2115, 104 L. Ed. 2d 733 .

(n33)Footnote 31. 42 U.S.C. § 2000e-2(k)(1)(B)(i). This provision, which was added by the Civil Rights Act of 1991 (Pub. L. No. 102-166, § 105(a)), relaxes the rule set forth in *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 656-657, 109 S. Ct. 2115, 104 L. Ed. 2d 733 , in which the Court had held that the plaintiff must demonstrate in all cases that application of a specific or particular employment practice created the disparate impact and that disparate impact may not be proved by showing that the employer's practices created a disparate impact "at the bottom line."

(n34)Footnote 32. See 42 U.S.C. § 2000e-2(k)(1)(B)(ii).

(n35)Footnote 33. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

(n36)Footnote 34. 42 U.S.C. § 2000e(m).

(n37)Footnote 35. See Pub. L. No. 102-166, § 104.

(n38)Footnote 36. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 .

(n39)Footnote 37. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 659-660, 109 S. Ct. 2115, 104 L. Ed. 2d 733 . It has been held that the Civil Rights Act of 1991 does not apply retroactively to the *Wards Cove* case itself, even though this holding in *Wards Cove* was effectively reversed by the Civil Rights Act of 1991. *Atonio v. Wards Cove Packing Co., Inc.* (9th Cir. 1993) 10 F.3d 1485, 1496 .

(n40)Footnote 38. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n41)Footnote 39. Pub. L. No. 102-166, § 3(2); *see also* Pub. L. No. 102-166, § 2(2) (congressional finding that *Wards Cove* decision had weakened the scope and effectiveness of federal civil rights protections).

(n42)Footnote 40. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 659, 109 S. Ct. 2115, 104 L. Ed. 2d 733 .

(n43)Footnote 41. *Wards Cove Packing Co. v. Atonio* (1989) 490 U.S. 642, 659, 109 S. Ct. 2115, 104 L. Ed. 2d 733 .

(n44)Footnote 42. *See Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 ; *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n45)Footnote 42.1. Pub. L. No. 102-166, § 105(b).

(n46)Footnote 42.2. *See 42 U.S.C. § 2000e-2(k)(1)(B)(ii)* (if defendant demonstrates that a specific employment practice does not cause the disparate impact, defendant need not demonstrate that practice is required by business necessity).

(n47)Footnote 42.3. *See Watson v. Ft. Worth Bank & Trust* (1988) 487 U.S. 977, 996-997, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII) ; *see also Katz v. Regents of the University of California* (9th Cir. 2000) 229 F.3d 831, 836 (ADEA) ; *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1424 (ADEA) .

(n48)Footnote 42.4. *42 U.S.C. § 2000e-2(k)(1)(A)(ii)*.

(n49)Footnote 42.5. *Connecticut v. Teal* (1982) 457 U.S. 440, 447, 102 S. Ct. 2525, 73 L. Ed. 2d 130 ; *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 .

(n50)Footnote 42.6. *See 42 U.S.C. § 2000e-3(a)*. For a discussion relating to the types of activities protected from retaliation, *see* ch. 41, pt. F.

(n51)Footnote 42.7. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n52)Footnote 42.8. *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 .

(n53)Footnote 42.9. *See E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1514 (Title VII) ; *Miller v. Fairchild Industries, Inc.* (9th Cir. 1986) 797 F.2d 727, 731 ; *Wrighten v. Metropolitan Hospitals, Inc.* (9th Cir. 1984) 726 F.2d 1346, 1354 ; *see also* discussion in § 43.01[2][b], [d], and in ch. 41, pts. A and F.

(n54)Footnote 42.10. *Miller v. Fairchild Industries, Inc.* (9th Cir. 1986) 797 F.2d 727, 731 .

(n55)Footnote 43. *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 548 U.S. 53, 26 S.Ct. 2405, 165 L.Ed. 2d 345 .

(n56)Footnote 44. *42 U.S.C. §§ 2000e-5(f)(3), 2000e-6(b)*. *See Arbaugh v. Y & H Corp.* (2006) 126 S. Ct. 1235, 1242-1245, 163 L. Ed. 2d 1097 (numerical qualification in Title VII's definition of "employer" does not affect

federal-court subject-matter jurisdiction, but, rather, delineates substantive ingredient of Title VII claim for relief).

(n57)Footnote 45. *Yellow Freight System v. Donnelly* (1990) 494 U.S. 820, 821-822, 110 S. Ct. 1566, 108 L. Ed. 2d 834 .

(n58)Footnote 46. 42 U.S.C. § 2000e-5(f)(3).

(n59)Footnote 47. 42 U.S.C. § 2000e-5(f)(3).

(n60)Footnote 48. *Johnson v. Payless Drug Stores Northwest, Inc.* (9th Cir. 1991) 950 F.2d 586, 587-588 , cert. denied, 112 S. Ct. 3044 (1992) .

(n61)Footnote 49. See 42 U.S.C. § 2000e-5(b),(c),(e),(f)(1); *Zipes v. Trans World Airlines, Inc.* (1982) 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 ; *Sommattino v. United States* (9th Cir. 2001) 255 F.3d 704, 709-710 (verbal complaints to EEO counselor and e-mails to supervisor were insufficient to constitute substantial compliance with claim presentment requirements of Title VII, especially because plaintiff's e-mails stated she had not formally filed any complaint); *Stache v. International Union of Bricklayers* (9th Cir. 1988) 852 F.2d 1231, 1233 ; but see *Temengil v. Trust Territory of Pacific Islands* (9th Cir. 1989) 881 F.2d 647, 654 (requirement that administrative remedies be exhausted is not jurisdictional); see also discussion in [6][a][i], below. The EEOC and DFEH are parties to a worksharing agreement, under which each agency acts as agent of the other for the purpose of receiving charges of discrimination. Under the agreement, each agency forwards to the other agency a copy of all charges it receives. Thus, Title VII charges may be filed with the DFEH, as well as the EEOC. see EEOC Compliance Manual §§ 5.2, 5.4-5.6 (CCH).

(n62)Footnote 50. See 42 U.S.C. § 2000e-5(f)(1); but see *Edwards v. Occidental Chemical Corp.* (9th Cir. 1990) 892 F.2d 1442, 1445 n.1 (Title VII plaintiff may file civil action prior to receiving EEOC right-to-sue letter, as long as premature filing did not preclude state from performing administrative duties and defendant was not prejudiced); *Wrighten v. Metropolitan Hospitals, Inc.* (9th Cir. 1984) 726 F.2d 1346, 1351 (although Title VII action filed before right-to-sue letters issued, subsequent issuance of letters cured any jurisdictional defects).

(n63)Footnote 51. *Jasch v. Potter* (9th Cir. 2002) 302 F.3d 1092, 1094 .

(n64)Footnote 52. *Jasch v. Potter* (9th Cir. 2002) 302 F.3d 1092, 1094-1096 (because EEOC issued decision on merits, it necessarily determined that sufficient information existed to permit such decision).

(n65)Footnote 53. *Roman v. County of Los Angeles* (2000) 85 Cal. App. 4th 316, 325-326, 102 Cal. Rptr. 2d 13 .

(n66)Footnote 53.1. *Surrell v. Cal. Water Service Co.* (9th Cir. 2008) 518 F.3d 1097, 1104-1105 . See *Temengil v. Trust Territory of Pacific Islands* (9th Cir. 1989) 881 F.2d 647, 654 (pursuit of administrative remedies is condition precedent to Title VII claim, but requirement is not jurisdictional); *Karim-Panahi v. Los Angeles Police Dept.* (9th Cir. 1988) 839 F.2d 621, 626 (plaintiff must file discrimination charge with EEOC and receive right-to-sue letter, and failure to observe requirements renders suit subject to dismissal in absence of equitable consideration to contrary); *Pietras v. Bd. of Fire Comm'rs* (2d Cir. 1999) 180 F.3d 468, 474 (every circuit that has faced question has held that plaintiff's failure to obtain notice-of-right-to-sue letter is not jurisdictional bar, but only precondition to bringing Title VII action that can be waived by parties or court).

(n67)Footnote 53.2. *Surrell v. Cal. Water Service Co.* (9th Cir. 2008) 518 F.3d 1097, 1105 (employee was specifically notified by State Employment Department that she needed to visit EEOC to obtain federal right-to-sue letter). See, e.g., *Pietras v. Bd. of Fire Comm'rs* (2d Cir. 1999) 180 F.3d 468, 474 (allowing claim to proceed where EEOC erroneously refused to send right-to-sue letter and plaintiff was diligent in seeking it). See also *Roman v. Cty. of Los Angeles* (2000) 85 Cal. App. 4th 316, 326, 102 Cal. Rptr. 2d 13 (barring Title VII claim because state right-to-sue notice specifically advised appellant that if he wanted federal right-to-sue notice he had to file complaint with EEOC).

(n68)Footnote 53.3. *Surrell v. Cal. Water Service Co.* (9th Cir. 2008) 518 F.3d 1097, 1105 . See, e.g., *Moore v. City of Charlotte* (4th Cir. 1985) 754 F.2d 1100, 1104 n.1 (entitlement to letter, without actual receipt of it, is sufficient to support federal jurisdiction).

(n69)Footnote 53.4. *Surrell v. Cal. Water Service Co.* (9th Cir. 2008) 518 F.3d 1097, 1105 . See *Burke v. Cornerstone*, No. 07-889, 2007 U.S. Dist. LEXIS 76662, at *5-6 (D. Conn. Oct. 12, 2007) (as purposes of exhaustion requirement, to provide notice to parties charged with violations and facilitate voluntary compliance should investigating agency find merit in complaint, were served by state proceeding, court did not view omission of actual right-to-sue letter as grounds for dismissal). But cf. *Jones v. Grinnell Corp.* (5th Cir. 2001) 235 F.3d 972, 975 (federal-state cooperation does not extend to exhaustion of administrative remedies).

(n70)Footnote 53.5. *Surrell v. Cal. Water Service Co.* (9th Cir. 2008) 518 F.3d 1097, 1105 .

(n71)Footnote 54. *B.K.B. v. Maui Police Dep't* (9th Cir. 2002) 276 F.3d 1091, 1099 ; *Yamaguchi v. United States Dep't of the Air Force* (9th Cir. 1997) 109 F.3d 1475, 1480 .

(n72)Footnote 55. *B.K.B. v. Maui Police Dep't* (9th Cir. 2002) 276 F.3d 1091, 1099-1100 ; *Gamble v. Birmingham Southern R.R. Co.* (5th Cir. 1975) 514 F.2d 678, 688-689 ; *Danner v. Phillips Petroleum Co.* (5th Cir. 1971) 447 F.2d 159, 161 ; *Miller v. International Paper Co.* (5th Cir. 1969) 408 F.2d 283, 288-291 .

(n73)Footnote 56. See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 797-798, 93 S. Ct. 1817, 36 L. Ed 2d 668 ; cf. *Chandler v. Roudebush* (1976) 425 U.S. 840, 863 n.39, 96 S. Ct. 1949, 48 L. Ed. 2d 416 (federal sector employees have same right to de novo trial, regardless of administrative findings of no discrimination, that private and nonfederal employees enjoy under Title VII).

(n74)Footnote 57. 42 U.S.C. § 2000e-5(b),(d),(f)(1); see, e.g., *E.E.O.C. v. General Elec. Co.* (4th Cir. 1976) 532 F.2d 359, 366 .

(n75)Footnote 58. See *B.K.B. v. Maui Police Dep't* (9th Cir. 2002) 276 F.3d 1091, 1100 ; *E.E.O.C. v. Farmer Bros. Co.* (9th Cir. 1994) 31 F.3d 891, 899 . See also *Josephs v. Pac. Bell* (9th Cir. 2005) 432 F.3d 1006, 1015 (refusal-to-reinstate claim was unquestionably related to claim of unlawful termination based on mental disability, where same employer allegedly refused to reinstate for same discriminatory reason that allegedly caused termination, and any administrative investigation of termination claim would have necessarily encompassed grievance proceeding that related to refusal to reinstate).

(n76)Footnote 59. *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, 1104 ; *B.K.B. v. Maui Police Dep't* (9th Cir. 2002) 276 F.3d 1091, 1100, 1103 ; *Kaplan v. Int'l Alliance of Theatrical & Stage Employees* (9th Cir. 1975) 525 F.2d 1354, 1359 , abrogated on other grounds by *Laughon v. Int'l Alliance of Theatrical Stage Employees* (9th Cir. 2001) 248 F.3d 931 ; but see *Love v. Pullman Co.* (1972) 404 U.S. 522, 527, 92 S. Ct. 616, 30 L. Ed. 2d 679 (technicalities particularly inappropriate in statutory scheme such as Title VII in which lay people, unassisted by trained lawyers, initiate process).

(n77)Footnote 60. *B.K.B. v. Maui Police Dep't* (9th Cir. 2002) 276 F.3d 1091, 1100 .

(n78)Footnote 61. *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, 1104 ; *B.K.B. v. Maui Police Dep't* (9th Cir. 2002) 276 F.3d 1091, 1100 .

(n79)Footnote 62. *B.K.B. v. Maui Police Dep't* (9th Cir. 2002) 276 F.3d 1091, 1100, 1102 ; *Sosa v. Hiraoka* (9th Cir. 1990) 920 F.2d 1451, 1457 n.2 .

(n80)Footnote 63. See *E.E.O.C. v. Farmer Bros. Co.* (9th Cir. 1994) 31 F.3d 891, 899 .

(n81)Footnote 64. *B.K.B. v. Maui Police Dep't* (9th Cir. 2002) 276 F.3d 1091, 1101-1102 ; see, e.g., *Anthony v. County of Sacramento* (E.D. Cal. 1995) 898 F. Supp. 1435, 1443 n.5 (pre-complaint questionnaire can be reviewed to determine scope of EEOC charge because, in preparing complaint, agency falsely abbreviated plaintiff's theory of case by substantially condensing and editing plaintiff's complaint); *Sickinger v. Mega Systems, Inc.* (N.D. Ind. 1996) 951 F. Supp. 153, 157-58 (plaintiff could rely on allegations in her pre-complaint questionnaire for purposes of exhaustion of remedies because EEOC representative who typed charge failed to include allegations of wrongful retaliation clearly presented on questionnaire); see also *Casavantes v. Cal. State Univ., Sacramento* (9th Cir. 1984) 732 F.2d 1441, 1443 (permitting plaintiff to exhaust Title VII claims by completing pre-complaint questionnaire within statutory limitations period for filing charge and supplementing complaint with sworn charge after statute of limitations had run); *Cheek v. W. & S. Life Ins., Co.* (7th Cir. 1994) 31 F.3d 497, 502 (allegations outside body of charge may be considered when it is clear charging party intended agency to investigate allegations); but see *Notivsky v. Am. Consulting Eng'rs* (7th Cir. 1999) 196 F.3d 699, 701-702 (plaintiff must rely to her detriment on her charge even if EEOC or state agency fulfilling its administrative function).

(n82)Footnote 65. *B.K.B. v. Maui Police Dep't* (9th Cir. 2002) 276 F.3d 1091, 1103 .

(n83)Footnote 66. *B.K.B. v. Maui Police Dep't* (9th Cir. 2002) 276 F.3d 1091, 1100 ; *Green v. Los Angeles City of Superintendent of Schs.* (9th Cir. 1989) 883 F.2d 1472, 1475-1476 , quoting *Brown v. Puget Sound Elec. Apprenticeship & Training Trust* (9th Cir. 1984) 732 F.2d 726, 729 ; see also *Vasquez v. County of Los Angeles* (9th Cir. 2002), See also 29 C.F.R. 1626.18(a) (aggrieved person may file civil action against respondent named in charge filed with EEOC in either federal or state court under section 7 of ADEA). (plaintiff did not exhaust his administrative remedies regarding retaliation for filing discrimination charge, which only claimed harassment and different treatment, but did exhaust administrative remedies for filing grievance); *Anderson v. Reno* (9th Cir. 1999) 190 F.3d 930, 935 ; *Sosa v. Hiraoka* (9th Cir. 1990) 920 F.2d 1451, 1456 .

(n84)Footnote 67. See, e.g., *Berg v. Richmond Unified School Dist.* (9th Cir. 1975) 528 F.2d 1208, 1211-1212 , vacated and remanded on other grounds, 434 U.S. 158 (1977) (district court had jurisdiction to grant preliminary relief to preserve its equitable powers when pregnant schoolteacher sought injunction under Title VII and 42 U.S.C. § 1983); *Drew v. Liberty Mutual Insurance Co.* (5th Cir. 1973) 480 F.2d 69, 72-76 (district court may act to preserve status quo ante, pending EEOC issuance of notice of right of action).

(n85)Footnote 68. Furthermore, a party's request for a right-to-sue letter prior to 150 days after filing of the complaint (or a determination by the DFEH that it will not issue an accusation within that time) may raise issues regarding whether the applicant has exhausted its administrative remedies. see *Gov. Code § 12965(b)*; but see *Carter v. Smith Food King* (9th Cir. 1985) 765 F.2d 916, 922-924 (fact that right-to-sue letter was issued at request of complainant before expiration of 150 days after filing of complaint did not constitute failure to exhaust administrative remedy when there was evidence that DFEH had determined that it would not be able to issue accusation within 150-day period).

(n86)Footnote 68.1. *Brown v. GSA* (1976) 425 U.S. 820, 832, 96 S. Ct. 1961, 48 L. Ed. 2d 402 . See also 42 U.S.C. § 2000e-16(c).

(n87)Footnote 68.2. 42 U.S.C. § 2000e-16(b).

(n88)Footnote 68.3. 29 C.F.R. § 1614.105(a).

(n89)Footnote 68.4. 29 C.F.R. § 1614.105(a)(1).

(n90)Footnote 68.5. 29 C.F.R. § 1614.107(a)(2).

(n91)Footnote 68.6. 29 C.F.R. § 1614.604(c).

(n92)Footnote 68.7. *Kraus v. Presidio Trust Facilities Division/Residential Mgmt. Branch* (9th Cir. 2009) 572 F.3d 1039, 1043 .

(n93)Footnote 68.8. *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, 1105 . See also *Johnson v. U.S. Treasury Dept.* (9th Cir. 1994) 27 F.3d 415, 416 (per curiam); *Boyd v. U.S. Postal Serv.* (9th Cir. 1985) 752 F.2d 410, 414 .

(n94)Footnote 68.9. EEOC Management Directive 110, at ch. 2, § I.A n.1. See also *Osuagwu v. Peake*, EEOC Dec. 0120081307, 2008 EEOPUB LEXIS 1830, *1 (EEOC May 20, 2008); *Kinan v. Cohen*, EEOC Dec. 01981121, 1999 EEOPUB LEXIS 2489, *2 (EEOC May 6, 1999); *Floyd v. Temple*, EEOC Dec. 01882317, *3 (EEOC June 22, 1989).

(n95)Footnote 68.10. *Kraus v. Presidio Trust Facilities Division/Residential Mgmt. Branch* (9th Cir. 2009) 572 F.3d 1039, 1043-1046 (federal employee exhausted remedies by contacting employing agency's EEO officer).

(n96)Footnote 68.11. *Kraus v. Presidio Trust Facilities Division/Residential Mgmt. Branch* (9th Cir. 2009) 572 F.3d 1039, 1045-1046 . See *Culpepper v. Schafer* (8th Cir. 2008) 548 F.3d 1119, 1122-1123 (8th Cir. 2008) (employee of federal Department of Agriculture who sent letters to Director of USDA's Office of Civil Rights satisfied regulation, because Director was logically connected with EEO process). See also *Duke v. Slater*, EEOC Dec. 01A02129, 2000 EEOPUB LEXIS 3424, *1 (EEOC May 22, 2000) (letter sent to Regional Director of Department of Transportation's Office of Civil Rights qualified as initiating contact).

(n97)Footnote 68.12. *Kraus v. Presidio Trust Facilities Division/Residential Mgmt. Branch* (9th Cir. 2009) 572 F.3d 1039, 1045 n.6 . See, e.g., *Stanley v. Ashcroft*, EEOC Dec. 01A31053, 2004 EEOPUB LEXIS 726, *3 (EEOC Feb. 12, 2004) (assuming contact with "EEO Officer" would satisfy exhaustion requirement, but employee had not produced sufficient evidence that he made contact in timely manner); *Hardy v. Danzig*, EEOC Dec. 01981978, 1999 EEOPUB LEXIS 721, *1 (EEOC Feb. 12, 1999) (if employee's initial contact with "Deputy EEO Officer" occurred as alleged, allegations were timely raised with EEO Counselor). See also *Waldrup v. Brownlee*, EEOC Dec. 01A43725, 2005 EEOPUB LEXIS 203, *3 (EEOC Jan. 14, 2005) (contact with "EEO Specialist" satisfied exhaustion requirement); *Clevenger v. Danzig*, EEOC Dec. 01985794, *2 (EEOC Feb. 29, 2000) (former Deputy EEO Director could be considered logically connected to EEO process for purposes of exhaustion requirement).

(n98)Footnote 69. See 42 U.S.C. § 2000e-5(f)(1).

(n99)Footnote 70. See *Senter v. General Motors Corp.* (6th Cir. 1976) 532 F.2d 511, 517 , cert. denied, 429 U.S. 870 ; *Rosen v. Public Service Electric and Gas Company* (3d Cir. 1973) 477 F.2d 90, 94 .

(n100)Footnote 70.1. See, e.g., *Williams v. Boeing Co.* (9th Cir. 2008) 517 F.3d 1120, 1126-1128 (in action alleging racial discrimination in compensation, plaintiffs met burden of demonstrating injury in fact, where plaintiffs' allegations that they sustained direct injury in form of less pay as result of employer's discriminatory compensation practices were sufficient on motion to dismiss to establish standing with regard to compensation discrimination claim; however, because one plaintiff affirmatively stated she was not injured by employer's compensation practices, she did not have standing with regard to compensation discrimination claim).

(n101)Footnote 71. *Association of Data Processing Service Organizations v. Camp* (1970) 397 U.S. 150, 152-153, 90 S. Ct. 827, 25 L. Ed. 2d 184 ; see, e.g., *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 278, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (Caucasians discriminated against vis-a-vis other race(s) in employment have Title VII standing); *Senter v. General Motors Corp.* (6th Cir. 1976) 532 F.2d 511, 516-517 ; *Hackett v. McGuire Bros., Inc.* (3d Cir. 1971) 445 F.2d 442, 446 ; *Taylor v. Jones* (8th Cir. 1971) 653 F.2d 1193, 1207-1208 .

(n102)Footnote 72. *Warth v. Seldin* (1975) 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343 .

(n103)Footnote 73. See *Great Am. Fed. Savings & Loan Ass'n v. Novotny* (1979) 442 U.S. 366, 99 S. Ct. 2345, 60 L. Ed. 2d 957 (remanding action for trial on question of male's claim that he suffered loss of employment

opportunities because of his advocacy for the rights of female employees); *see also* 42 U.S.C. § 2000e-3(a) (employer prohibited from retaliating against any person because he or she has "opposed any practice made unlawful" by Title VII).

(n104)Footnote 74. *See, e.g., Feng v. Sandrik* (N.D. Ill. 1986) 636 F. Supp. 77, 82 (spouse has no standing under Title VII to sue for discrimination against marital partner, when spouse was never an employee or applicant); *Pecorella v. Oak Orchard Community Health Ctr. Inc.* (W.D.N.Y. 1982) 559 F. Supp. 147, 149, *aff'd without op.*, 722 F.2d 728 (2d Cir. [N.Y.] 1983) (plaintiff male who was paid more than females cannot complain of discriminatory compensation on behalf of females); *Chavez v. Tempe U. High Sch. Dist. No. 213* (9th Cir. 1977) 565 F.2d 1087, 1093-1094 (plaintiff who was hired had no standing to complain of hiring discrimination on behalf of others).

(n105)Footnote 74.1. *Williams v. Boeing Co.* (9th Cir. 2008) 517 F.3d 1120, 1128-1129 (plaintiffs continued to have standing on compensation claims despite voluntary dismissal of individual claims in class action, where judgment in class action determining that employer did not engage in pattern or practice of racial discrimination against certified class of employees, did not preclude individual class members from maintaining subsequent civil actions alleging individual claims of discrimination against the employer; plaintiffs' statement that they were not waiving their right to appeal and district court's recognition of statement could be fairly read as effort to confirm that plaintiffs were not abandoning claims pending on appeal, rather than attempt to create jurisdiction where none existed).

(n106)Footnote 74.2. *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 985, citing *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351.

(n107)Footnote 74.3. *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 985, citing *City of Los Angeles v. Lyons* (1983) 461 U.S. 95, 111, 103 S. Ct. 1660, 75 L. Ed. 2d 675.

(n108)Footnote 74.4. *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 985, citing *O'Shea v. Littleton* (1974) 414 U.S. 488, 496, 94 S. Ct. 669, 38 L. Ed. 2d 674.

(n109)Footnote 74.5. *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 985, citing *City of Los Angeles v. Lyons* (1983) 461 U.S. 95, 103, 103 S. Ct. 1660, 75 L. Ed. 2d 675.

(n110)Footnote 74.6. *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 985, citing *O'Shea v. Littleton* (1974) 414 U.S. 488, 496, 94 S. Ct. 669, 38 L. Ed. 2d 674.

(n111)Footnote 74.7. *Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 985; *Graham v. Fed. Emergency Mgmt. Agency* (9th Cir. 1998) 149 F.3d 997, 1003 (plaintiffs need not demonstrate there is guarantee their injuries will be redressed by favorable decision, but only that favorable decision is likely to redress their injuries).

(n112)Footnote 75. *See [i], above. See also Bates v. United Parcel Service, Inc.* (9th Cir. 2007) 511 F.3d 974, 985-988 (even if employer was correct that named plaintiff's claim was no longer redressable or was moot because he was no longer eligible for position, it was not disputed he had standing at time of class certification and remaining class members were not foreclosed from attaining relief since class was long ago duly certified; further, class member satisfied injury, causation, and redressability requirements and therefore had standing to seek injunctive relief under ADA, so entire federal class had standing).

(n113)Footnote 76. *Griffin v. Dugger* (11th Cir. [Fla.] 1987) 823 F.2d 1476, 1482; *see Larson, Employment Discrimination*, vol. 2, ch. 9B, *Title VII Procedures: Part B*, § 49.51.

(n114)Footnote 77. *Jordan v. Swindall* (M.D. Ala. 1985) 105 F.R.D. 45, 47-48.

(n115)Footnote 78. *Ekanem v. Health & Hosp. Corp. of Marion County, Indiana* (7th Cir. [Ind.] 1983) 724 F.2d 563, 572-573; *Evans v. U.S. Pipe & Foundry Co.* (11th Cir. [Ala.] 1983) 696 F.2d 925, 928-929.

(n116)Footnote 78.1. Fed. R. Civ. Proc., Rule 23(a)(1)-(4). *See, e.g., Dukes v. Wal-Mart, Inc.* (9th Cir. 2007) 509 F.3d 1168, 1176-1185 (trial court did not abuse its discretion in certifying sex discrimination class action by class of more than 1.5 million women, where class met Rule 23(a)'s commonality and typicality requirements, and plaintiffs' claims for monetary relief did not predominate over their claims for injunctive or declaratory relief).

(n117)Footnote 79. *See, e.g., Parra v. Basha's, Inc.* (9th Cir. 2008) 536 F.3d 975, 978-979 (in action based on alleged pay discrimination based on national origin, court abused its discretion in denying certification of class of Hispanic employees, where plaintiffs established commonality even though their individual factual situations differed, because they all sought common legal remedy for common wrong; and where plaintiffs presented evidence of discriminatory pay scales common for all employees and statistical and anecdotal evidence of discrimination; and where class definition sought to reach Hispanic employees who suffered past discrimination under pay scales).

(n118)Footnote 79.1. *East Texas Motor Freight v. Rodriguez* (1977) 431 U.S. 395, 399-406, 97 S. Ct. 1891, 52 L. Ed. 2d 453 ; *Wetzel v. Liberty Mutual Insurance Co.* (3d Cir. [Pa.] 1975) 508 F.2d 239, 246 ; *Oatis v. Crown Zellerbach Corp.* (5th Cir. [La.] 1968) 398 F.2d 496, 499 ; *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1232 .

(n119)Footnote 79.2. Fed. R. Civ. P. 23(b)(2).

(n120)Footnote 79.3. *Dukes v. Wal-Mart, Inc.* (9th Cir. 2007) 509 F.3d 1168, 1186-1189 (putative class members who were no longer employees at time plaintiffs' complaint was filed lacked standing to seek injunctive relief because they would not stand to benefit from injunction requiring anti-discriminatory policies to cease at their former place of work; however, class certification under Rule 23(b)(2) was appropriate as to putative class members who were employees when plaintiffs' complaint was filed, because they had standing to seek injunctive and declaratory relief requested in complaint, and primary relief sought by these plaintiffs remained declaratory and injunctive in nature notwithstanding their request to also be made whole in monetary sense to full extent provided for under Title VII).

(n121)Footnote 79.4. *Dukes v. Wal-Mart, Inc.* (9th Cir. 2007) 509 F.3d 1168, 1190-1193 (there existed at least one method of managing class action alleging gender discrimination and involving more than 1.5 million women that, albeit somewhat imperfect, nonetheless protected due process rights of all involved parties).

(n122)Footnote 80. *See* Fed. R. Civ. P. 23(c)(1)(A) ("An increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof."); *see also* *Brown v. Fed. Express Corp.* (C.D. Cal. 2008) 2008 U.S. DIST. LEXIS 17125, at *8-9 .

(n123)Footnote 81. For discussion of requirement of exhaustion of remedies, *see* [4], *above*.

(n124)Footnote 82. *Allen v. United States Steel Corp.* (5th Cir. [Ala.] 1982) 665 F.2d 689, 695-696 ; *Chappell v. Emco Machine Works Co.* (5th Cir. 1979) 601 F.2d 1295, 1298 ; *Oatis v. Crown Zellerbach Corp.* (5th Cir. [La.] 1968) 398 F.2d 496, 499 .

(n125)Footnote 83. *Griffin v. Dugger* (11th Cir. [Fla.] 1987) 823 F.2d 1476, 1492 ; *Jackson v. Seaboard Coast Line RR.* (11th Cir. [Ga.] 1982) 678 F.2d 992, 1011-1012 .

(n126)Footnote 84. *See, e.g., Rich v. Martin Marietta Corp.* (10th Cir. [Colo.] 1975) 522 F.2d 333, 340 ; *Johnson v. Georgia Highway Express Co.* (5th Cir. [Ga.] 1969) 417 F.2d 1122, 1124 .

(n127)Footnote 85. *See General Tel. Co. v. Falcon* (1982) 457 U.S. 147, 157-61, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (plaintiffs who bring across-the-board challenges must have near-perfect standing and extremely strong individual substantive claims); *East Texas Motor Freight v. Rodriguez* (1977) 431 U.S. 395, 399-406, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (class representative must be part of class and possess same interest and suffer same injury as class members).

(n128)Footnote 86. *General Tel. Co. v. Falcon* (1982) 457 U.S. 147, 157-61, 102 S. Ct. 2364, 72 L. Ed. 2d 740 ; *East Texas Motor Freight v. Rodriguez* (1977) 431 U.S. 395, 399-406, 97 S. Ct. 1891, 52 L. Ed. 2d 453 ; see, e.g., *Dukes v. Wal-Mart, Inc.* (9th Cir. 2007) 474 F.3d 1214, 1224-1238 (upholding certification of nationwide class of approximately 1.5 million women, salaried and hourly, with range of positions, currently working or who worked in one or more of defendant's 3,400 stores in 41 regions at any time since 1998, where plaintiffs satisfied numerosity, commonality, typicality, and adequacy requirements, plaintiffs' requests for injunctive and declaratory relief predominated over their request for monetary relief, and district court neither deprived defendant of substantive defenses nor altered substantive law when it certified class); *Griffin v. Dugger* (11th Cir. 1987) 823 F.2d 1476, 1490-1492 ; *Moore v. Hughes Helicopters, Inc.* (9th Cir. 1983) 708 F.2d 475, 480 ; *Bowen v. General Motors Corp. AC Spark Plug Div.* 685 (6th Cir. 1982) F.2d 160, 162 ; *Harris v. Marsh* (E.D.N.C. 1983) 100 F.R.D. 315, 324-325 .

(n129)Footnote 87. See *Mandujano v. Basic Vegetable Prods., Inc.* (9th Cir. 1976) 541 F.2d 832, 835 (counsel to plaintiff class in a Title VII case have "responsibilities to each individual member of the class"); cf. *Harriss v. Pan Am. World Airways, Inc.* (N.D. Cal. 1977) 74 F.R.D. 24, 43 (adequacy of class representation is determined, in part, by gauging the proposed class' attorneys' "zeal, competence and experience").

(n130)Footnote 88. Fed. R. Civ. P. 24.

(n131)Footnote 89. See Fed. R. Civ. P. 24(a)(2); *Cabazon Band of Mission Indians v. Wilson* (9th Cir. 1997) 124 F.3d 1050, 1061 , cert. denied, 118 S. Ct. 2319 (1998) ; *Donnelly v. Glickman* (9th Cir. 1998) 159 F.3d 405, 409 (denial of motion to intervene as of right subject to immediate appeal; denial is reviewed de novo, with the exception of timeliness issues which are reviewed for abuse of discretion).

(n132)Footnote 90. *Donnelly v. Glickman* (9th Cir. 1998) 159 F.3d 405 .

(n133)Footnote 91. *Donnelly v. Glickman* (9th Cir. 1998) 159 F.3d 405, 409-411 .

(n134)Footnote 92. Fed. R. Civ. P. 24(b)(2); *Northwest Forest Resource Council v. Glickman* (9th Cir. 1996) 82 F.3d 825, 837 .

(n135)Footnote 93. *Donnelly v. Glickman* (9th Cir. 1998) 159 F.3d 405, 411-412 (appellate court has jurisdiction if district court abused its discretion; absent abuse, appellate court lacks jurisdiction to review).

(n136)Footnote 94. *Donnelly v. Glickman* (9th Cir. 1998) 159 F.3d 405 .

(n137)Footnote 95. *Donnelly v. Glickman* (9th Cir. 1998) 159 F.3d 405, 411-412 .

(n138)Footnote 96. *EEOC v. Nevada Resort Ass'n* (9th Cir. 1986) 792 F.2d 882, 885-886 ; *League of United Latin Am. Citizens v. City of Santa Ana* (C.D. Cal. 1976) 410 F. Supp. 873, 886-887 ; *NAACP v. Allen* (5th Cir. 1974) 493 F.2d 614, 617 .

(n139)Footnote 97. *International Woodworkers of Am. v. Chesapeake Bay Plywood Corp.* (4th Cir. 1981) 659 F.2d 1259, 1266-1267 ; *EEOC v. Printing Indus. of Metropolitan Washington D.C. Inc.* (D.D.C. 1981) 92 F.R.D. 51, 53 ; see *Social Servs. Union v. County of Santa Clara* (9th Cir. 1979) 609 F.2d 944, 946 .

(n140)Footnote 98. See 42 U.S.C. §§ 2000e-2, 2000e-3.

(n141)Footnote 99. See 42 U.S.C. § 2000e(b).

(n142)Footnote 100. See [7], below.

(n143)Footnote 101. 42 U.S.C. § 2000e-5(f)(1); see *Sanchez v. Pacific Powder Co.* (9th Cir. 1998) 147 F.3d 1097, 1101 (relying on *Stache v. International Union of Bricklayers and Allied Craftsmen* (9th Cir. 1988) 852 F.2d

1231, 1233-1234 ; requirement that EEOC charge name defendant is not jurisdictional; as condition precedent to civil suit, defendant may waive or be estopped from asserting lack of name as defense); *see also* *Shah v. Mt. Zion Hosp. & Med. Ctr.* (9th Cir. 1981) 642 F.2d 268, 271-272 ; *Smith v. American President Lines* (2d Cir. 1978) 571 F.2d 102, 107 n.10 ; *Ostapowicz v. Johnson Bronze Co.* (3d Cir. 1976) 541 F.2d 394, 399 , *cert. denied*, 429 U.S. 1041 (1977) ; *see also* [7], *below*.

(n144)Footnote 102. *Miller v. Maxwell's Int'l Inc.* (9th Cir. 1993) 991 F.2d 583, 587-588 , *cert. denied*, 510 U.S. 1109 (1994) ; *Padway v. Palches* (9th Cir. 1982) 665 F.2d 965, 968 .

(n145)Footnote 103. *See, e.g., Romain v. Kurek* (6th Cir. 1985) 772 F.2d 281, 282-283 ; *Eggleston v. Chicago Journeymen Plumbers' Local Union 130* (7th Cir. 1981) 657 F.2d 890, 904-905 , *cert. denied*, 455 U.S. 1017 (1982) ; *Keller v. University of Michigan* (D. Mich. 1974) 411 F. Supp. 1055, 1058-1059 .

(n146)Footnote 104. 42 U.S.C. § 2000e-5(e)(1).

(n147)Footnote 105. *See Gov. Code § 12900 et seq.* For general discussion of bringing of actions under FEHA, *see* § 43.01. For discussion of state administrative procedure under FEHA, *see* ch. 42, pt. B.

(n148)Footnote 106. *but see Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1220 , *cert. denied*, 502 U.S. 1005 (1991) (only requirement is that EEOC defer and state proceedings be instituted before expiration of 300-day extended filing period, not that state agency actually receive charge before EEOC).

(n149)Footnote 107. 42 U.S.C. § 2000e-5(e)(1); *see also* *Maurya v. Peabody Coal Co.* (6th Cir. 1987) 823 F.2d 933, 935 , *cert. denied*, 484 U.S. 1067 (1988) (failure to file complaint with state agency within time period required under state law does not preclude filing Title VII charge with EEOC, as long as EEOC charge is timely under federal law).

(n150)Footnote 108. *See 29 C.F.R. § 1601.13(b), (c), (e)* (deferral to state agencies and procedures for processing of charges); EEOC Compliance Manual (CCH) §§ 5.1-5.8 (worksharing and deferral agreements between EEOC and state agencies). For discussion of deferral and worksharing agreement, *see* ch. 42, pts. B and C.

(n151)Footnote 109. *Love v. Pullman Co.* (1972) 404 U.S. 522, 525-526, 92 S. Ct. 616, 30 L. Ed. 2d 679 .

(n152)Footnote 110. 42 U.S.C. § 2000e-5(e)(1).

(n153)Footnote 111. 42 U.S.C. § 2000e-5(c).

(n154)Footnote 112. *See Mohasco Corp. v. Silver* (1980) 447 U.S. 807, 817, 100 S. Ct. 2486, 65 L. Ed. 2d 532 .

(n155)Footnote 113. *See EEOC v. Commercial Office Prods. Co.* (1988) 486 U.S. 107, 114-122, 108 S. Ct. 1666, 100 L. Ed. 2d 96 ; *Mohasco Corp. v. Silver* (1980) 447 U.S. 807, 814 n.16, 100 S. Ct. 2486, 65 L. Ed. 2d 532 .

(n156)Footnote 114. *See* DFEH Enforcement Div. Directive No. 16 (Jan. 18, 1982).

(n157)Footnote 115. *See EEOC v. Commercial Office Prods. Co.* (1988) 486 U.S. 107, 114-122, 108 S. Ct. 1666, 100 L. Ed. 2d 96 .

(n158)Footnote 116. *See Boyd v. United States Postal Serv.* (9th Cir. 1984) 752 F.2d 410, 414 . *but see Delaware State College v. Ricks* (1980) 449 U.S. 250, 256-258, 101 S. Ct. 498, 66 L. Ed. 2d 431 (limitations period for claim by employee denied tenure commenced on date of notice of denial of tenure, not on date of subsequent termination), discussed in ch. 42.

(n159)Footnote 117. *See* 42 U.S.C. § 2000e-2(h).

(n160)Footnote 118. *See* 42 U.S.C. § 2000e-5(e)(2).

(n161)Footnote 119. *See* 42 U.S.C. § 2000e-5(e)(2).

(n162)Footnote 120. 29 C.F.R. § 1614.105(a).

(n163)Footnote 121. 29 C.F.R. § 1614.105(a)(1).

(n164)Footnote 122. *See, e.g., Whitman v. Mineta* (9th Cir. 2008) 541 F.3d 929, 932-933 (employee's challenge to employer's denial of extension of work detail was untimely, where employee failed to notify EEO counselor of incident within 45 days of its occurrence); *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, 1105-1108 (because plaintiffs initially contacted EEO counselor on June 20, 1996, claims arising out of incidents occurring before May 7, 1996 were time-barred); *Johnson v. United States Treasury Dep't* (9th Cir. 1994) 27 F.3d 415, 416 (affirming summary judgment based on plaintiff's failure to seek counseling before one year after alleged incident of discrimination).

(n165)Footnote 123. *See* 42 U.S.C. § 2000e-5(e)(1); *see also* [i], *above*.

(n166)Footnote 124. *See, e.g., Williams v. Owens-Illinois Inc.* (9th Cir. 1982) 665 F.2d 918, 923-924 .

(n167)Footnote 125. *See, e.g., Delaware State College v. Ricks* (1980) 449 U.S. 250, 256-258, 101 S. Ct. 498, 66 L. Ed. 2d 431 (doctrine inapplicable when employee who was allegedly denied tenure in violation of Title VII was later discharged for lack of tenure; limitations period commenced when employee was informed of denial of tenure); *United Air Lines, Inc. v. Evans* (1977) 431 U.S. 553, 559-560, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (current nondiscriminatory policy that has effect of perpetuating past, discontinued discriminatory practices does not constitute a "continuing violation" for purpose of Title VII limitations period).

(n168)Footnote 126. *See* 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28(a)(1); *Occidental Life Ins. Co. v. EEOC* (1977) 432 U.S. 355, 366, 97 S. Ct. 2447, 53 L. Ed. 2d 402 .

(n169)Footnote 127. *See* 29 C.F.R. § 1601.28(a)(2).

(n170)Footnote 128. *See* 42 U.S.C. § 2000e-5(f)(1).

(n171)Footnote 129. *See Gilardi v. Schroeder* (7th Cir. 1987) 833 F.2d 1226, 1233 (complaint filed in forma pauperis and rejected by court clerk held to be filed even though sent back to plaintiff by clerk for failure to conform with local court rules); *Loya v. Desert Sands Unified Sch. Dist.* (9th Cir. 1983) 721 F.2d 279, 281 (district court should regard complaint as being filed on time if complaint arrives in clerk's custody within statutory period but fails to conform with formal requirements in local rules).

(n172)Footnote 129.1. *Payan v. Aramark Mgmt. Svcs., L.P.* (9th Cir. 2007) 495 F.3d 1119, 1122 . *See Nelmda v. Shelly Eurocars, Inc.* (9th Cir. 1997) 112 F.3d 380, 384 ; *Scholar v. Pac. Bell* (9th Cir. 1992) 963 F.2d 264, 266-67 .

(n173)Footnote 129.2. *Payan v. Aramark Mgmt. Svcs., L.P.* (9th Cir. 2007) 495 F.3d 1119, 1121-1127 (plaintiff offered insufficient evidence to rebut 3-day presumption resulting in dismissal of her complaint for untimely filing, where she offered no corroborating evidence to conclude right-to-sue letter arrived more than three days after issuance by EEOC).

(n174)Footnote 130. *See, e.g., Nelmda v. Shelly Eurocars, Inc.* (9th Cir. 1997) 112 F.3d 380, 384 , *cert. denied*, 118 S.Ct. 158 (90-day period in which to file Title VII action begins when postal service attempts to deliver right-to-sue letter at employee's address of record); *Gonzalez v. Stanford Applied Eng'g* (9th Cir. 1979) 597 F.2d 1298, 1299 . *See also O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1111 (Title VII and ADEA claims asserted in employee's second complaint, filed after automatic stay in bankruptcy was lifted, were untimely; she filed second complaint more than ninety days after EEOC's issuance of right-to-sue letter, and second complaint did not relate back to first complaint

because second complaint was not amendment to first complaint--but, rather, separate filing).

(n175)Footnote 131. *See Edwards v. Occidental Chem. Corp.* (9th Cir. 1990) 892 F.2d 1442, 1445-1446 . *See also O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1112-1113 (employee's Equal Pay Act claims were timely because amendment asserting EPA claims related back to second complaint and equitable tolling applied, making second complaint timely under EPA statute of limitations).

(n176)Footnote 132-137. [Reserved]

(n177)Footnote 138. *See Gonzalez v. Stanford Applied Eng'g* (9th Cir. 1979) 597 F.2d 1298, 1299 .

(n178)Footnote 138.1. *See Scholar v. Pacific Bell* (9th Cir. 1992) 963 F.2d 264, 267-268 .

(n179)Footnote 138.2. *See ZiLOG, Inc. v. Corning (In re ZiLOG, Inc.)* (9th Cir. 2006) 450 F.3d 996, 1000-1002 (taking facts in the light most favorable to women, there was substantial possibility their discrimination claims arose post-confirmation, requiring reversal of bankruptcy court's grant of summary judgment on discrimination claims and remanding to bankruptcy court to determine when claims came within women's fair contemplation).

(n180)Footnote 138.3. *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1111-1112 (defendants' motion to dismiss based on statute of limitations was not barred by laches despite its filing over two years after plaintiff's second complaint; plaintiff was not prejudiced by delay because she had timely notice of statute of limitations defense from defendants' answer and delay was reasonable because it was due to multiple stays entered while parties pursued settlement talks and plaintiff sought attorney).

(n181)Footnote 139. *See Zipes v. Trans World Airlines, Inc.* (1982) 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 . *See also Schafer v. Board of Pub. Educ.* (3rd Cir. 1990) 903 F.2d 243, 251 (equitable tolling appropriate if (1) defendant has actively misled plaintiff, (2) plaintiff has in some extraordinary way been prevented from asserting his or her rights, or (3) plaintiff has timely asserted his or her rights mistakenly in wrong forum).

(n182)Footnote 139.1. *Irwin v. Department of Veterans Affairs* (1990) 498 U.S. 89, 95-96, 111 S. Ct. 453, 112 L. Ed. 2d 435 .

(n183)Footnote 139.2. *See, e.g., Valenzuela v. Kraft, Inc.* (9th Cir. [Haw.] 1986) 801 F.2d 1170, 1172 ; *Sloan v. West* (9th Cir. [Haw.] 1998) 140 F.3d 1255, 1262 (filing of mixed case claim with the Merit System Protection Board equitably tolls statute of limitations for filing with EEO and/or EEOC until appellant receives final jurisdictional determination from Federal Circuit).

(n184)Footnote 139.3. *Stoll v. Runyon* (9th Cir. 1999) 165 F.3d 1238, 1242 (egregious history of sexual harassment, rape, and abuse by supervisors and coworkers caused "severe psychological impairment" that left plaintiff unable to communicate with counsel or protect her legal rights).

(n185)Footnote 139.4. *Irwin v. Department of Veterans Affairs* (1990) 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 ; *Scholar v. Pacific Bell* (9th Cir. 1992) 963 F.2d 264, 268 ; *Stoll v. Runyon* (9th Cir. 1999) 165 F.3d 1238, 1242 (equitable tolling when "extraordinary circumstances beyond the plaintiff's control" makes it impossible to file claim on time).

(n186)Footnote 140. *See, e.g., Nelmida v. Shelly Eurocars, Inc.* (9th Cir. 1997) 112 F.3d 380, 384-385 , *cert. denied*, 118 S.Ct. 158 (1997) (equitable tolling inapplicable when claimant lacked diligence in securing right-to-sue notice, claimant received actual notice from EEOC, and claimant failed to explain delay); *Franks v. Bowman Transp. Co.* (5th Cir. 1974) 495 F.2d 398, 403-405 , *rev'd on other grounds*, 424 U.S. 747 (1976) (right-to-sue letter was lost by child, but party was allowed to bring suit when he received actual notice one year later); *Jenkins v. Blue Cross Mutual Hosp. Ins., Inc.* (7th Cir. 1976) 538 F.2d 164, 167 , *cert. denied*, 429 U.S. 986 (1976) (black female who filled out

charge, checking box for race discrimination but not for sex discrimination, without being advised that she needed to check both boxes to claim discrimination on account of race and sex, was not precluded from bringing action on both bases); *White v. Dallas Independent Sch. Dist.* (5th Cir. 1978) 581 F.2d 556, 562 (en banc); see also *Valenzuela v. Kraft, Inc.* (9th Cir. 1986) 801 F.2d 1170, 1172 (equitable tolling allowed because plaintiff originally filed suit in state court at time when it was unclear that state court had no subject matter jurisdiction over Title VII cases). but see *Temengil v. Trust Territory of Pacific Islands* (9th Cir. 1989) 881 F.2d 647, 654, cert. denied, 496 U.S. 925 (1990) (failure of plaintiffs' supervisors to inform them of necessity to file EEOC complaints did not excuse complete failure to file complaints).

(n187)Footnote 141. See *International Union of Elec., Radio and Mach. Workers, Local 790 v. Robbins & Myers, Inc.* (1976) 429 U.S. 229, 236-237, 97 S. Ct. 441, 50 L. Ed. 2d 427; cf. *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 47, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (contract rights and remedies are independent remedy from Title VII). Accord, EEOC Compliance Manual (CCH) § 615, P 3114. In a 1990 policy guideline, the EEOC suggests that in a harassment action, an employee should pursue both an internal grievance procedure and an EEOC charge simultaneously. Not only does an internal grievance not toll the limitations period for filing a Title VII charge, but failure to file a grievance may defeat a constructive discharge claim. EEOC Compliance Manual (CCH) § 615, P 3114.

(n188)Footnote 142. See *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 465-466, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (one-year statute applicable to 42 U.S.C. § 1981 claim under law of Tennessee is not tolled during pursuit of Title VII administrative remedies).

(n189)Footnote 142.1. See *Scholar v. Pacific Bell* (9th Cir. 1992) 963 F.2d 264, 267-268, cert. denied, 506 U.S. 868 (1992).

(n190)Footnote 142.2. *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1111; *Minnette v. Time Warner* (2d Cir. 1993) 997 F.2d 1023, 1027; see also *Wei v. State of Hawaii* (9th Cir. 1985) 763 F.2d 370, 372 (per curiam).

(n191)Footnote 142.3. *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1111; *Chico-Velez v. Roche Prods., Inc.* (1st Cir. 1998) 139 F.3d 56, 59.

(n192)Footnote 142.4. *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1111 (equitable tolling could not save Title VII or ADEA claims, where ninety-day limitations period had run before defendants filed for bankruptcy and automatic stay was issued, after which first complaint was dismissed, so at that point, there was no longer time left in ninety-day limitations period to equitably toll).

(n193)Footnote 142.5. *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1112-1113. See *Young v. United States* (2002) 535 U.S. 43, 50-51, 122 S. Ct. 1036, 152 L. Ed. 2d 79.

(n194)Footnote 142.6. See 11 U.S.C. § 108(c)(2).

(n195)Footnote 142.7. *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1113. See 29 U.S.C. § 255(a).

(n196)Footnote 142.8. *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1113. See *Bazemore v. Friday* (1986) 478 U.S. 385, 395, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (Brennan, J., concurring in part, joined by all other members of Court); *Bartelt v. Berlitz Sch. of Languages of Am., Inc.* (9th Cir. 1982) 698 F.2d 1003, 1007 (describing 29 U.S.C. § 255 as rendering employer who commits willful violation under EPA liable for back pay for up to three years before suit is filed); *Rural Fire Prot. Co. v. Hepp* (9th Cir. 1966) 366 F.2d 355, 361-362 (cause of action accrued at end of each pay period when minimum and maximum wage provisions of 29 U.S.C. §§ 206, 207 violated).

(n197)Footnote 142.9. *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1113.

(n198)Footnote 142.10. *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1111; *Santa Maria v. Pac. Bell*

(9th Cir. 2000) 202 F.3d 1170, 1176 .

(n199)Footnote 142.11. *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1111 ; *Santa Maria v. Pac. Bell* (9th Cir. 2000) 202 F.3d 1170, 1176 .

(n200)Footnote 142.12. *O'Donnell v. Vencor Inc.* (9th Cir. 2006) 466 F.3d 1104, 1111 .

(n201)Footnote 143. *See Satterwhite v. City of Greenville* (5th Cir. [Tex.] 1978), 997 (en banc).

(n202)Footnote 144. *See United Airlines Inc. v. McDonald* (1977) 432 U.S. 385, 391-395, 97 S. Ct. 2464, 53 L. Ed. 2d 423 ; *Satterwhite v. City of Greenville* (5th Cir. [Tex.] 1978) 578 F.2d 987, 997 (en banc).

(n203)Footnote 145. *See Fed. Rules Civ. Proc.*, Rule 23(e).

(n204)Footnote 146. *See Smith v. American President Lines* (2d Cir. [N.Y.] 1978) 571 F.2d 102, 107 fn. 10 ; *Ostapowicz v. Johnson Bronze Co.* (3d Cir. [Pa.] 1976) 541 F.2d 394, 399 , *cert. denied*, 429 U.S. 1041 (1977) ; *Sanchez v. Standard Brands, Inc.* (5th Cir. [Tex.] 1970) 431 F.2d 455, 466 . *See also* , *Stache v. International Union of Bricklayers* (9th Cir. 1988) 852 F.2d 1231, 1234 , *cert. denied*, 493 U.S. 815 .

(n205)Footnote 147. *See, e.g., Shah v. Mt. Zion Hospital & Medical Center* (9th Cir. [Cal.] 1981) 642 F.2d 268, 271-272 .

(n206)Footnote 148. *See University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635 .

(n207)Footnote 149. *See University of Tennessee v. Elliott* (1986) 478 U.S. 788, 792, 106 S. Ct. 3220, 92 L. Ed. 2d 635 ; *see also De Cintio v. Westchester County Medical Center* (2d Cir. 1986) 807 F.2d 304, 306 (findings against claimant by state human rights agency did not preclude claimant from relitigating Title VII claim).

(n208)Footnote 150. *See University of Tennessee v. Elliott* (1986) 478 U.S. 788, 792, fn. 5, 106 S. Ct. 3220, 92 L. Ed. 2d 635 ; *see Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 47, 94 S. Ct. 1011, 39 L. Ed. 2d 147 .

(n209)Footnote 151. *See generally* discussion in Chapter 80.

(n210)Footnote 152. *See University of Tennessee v. Elliott* (1986) 478 U.S. 788, 797, 106 S. Ct. 3220, 92 L. Ed. 2d 635 ; *see also Mack v. South Bay Beer Distributors, Inc.* (9th Cir. 1986) 798 F.2d 1279, 1283 (state unemployment hearing resulting in finding of just cause for termination of employment does not preclude subsequent age discrimination litigation). *cf. Miller v. County of Santa Cruz* (9th Cir. 1994) 39 F.3d 1030, 1038 (in Section 1983 action, unreviewed findings of state administrative tribunal are entitled to preclusive effect when procedures before tribunal meet procedural due process requirements and de novo judicial review is available).

(n211)Footnote 153. *Kremer v. Chemical Construction Corp.* (1982) 456 U.S. 461, 466-468, 480-482, 102 S. Ct. 1883, 72 L. Ed. 2d 262 .

(n212)Footnote 154. For discussion of availability of these state and federal remedies, *see* § 43.01[8][e], [f], and [8], *below*, respectively.

(n213)Footnote 155. *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 329, 99 S. Ct. 645, 58 L. Ed. 2d 552 .

(n214)Footnote 156. *Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 331, 99 S. Ct. 645, 58 L. Ed. 2d 552 .

(n215)Footnote 157. *See City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 236 Cal. Rptr. 716 .

(n216)Footnote 158. See unpublished order in *Davis v. City and County of San Francisco*, Civ. C-84-70B9 MHP.

(n217)Footnote 158.1. *Owens v. Kaiser Foundation Health Plan* (9th Cir. 2001) 244 F.3d 708 .

(n218)Footnote 158.2. *Owens v. Kaiser Foundation Health Plan* (9th Cir. 2001) 244 F.3d 708, 714-715 .

(n219)Footnote 159. See 42 U.S.C. § 2000e-5(g)(1); *Sias v. City Demonstration Agency* (9th Cir. [Cal.] 1978) 588 F.2d 692, 696-697 ; *Patterson v. American Tobacco Co.* (4th Cir. [Va.] 1976) 535 F.2d 257, 269 , cert. denied, 429 U.S. 920 (1976) . See also *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1518 . For full discussion of mitigation principles, see [iii], below.

(n220)Footnote 160. See 42 U.S.C. § 2000e-5(g)(1); *Stewart v. General Motors Corp.* (7th Cir. [Ill.] 1976) 542 F.2d 445, 453 , cert. denied, 433 U.S. 919 (1977) .

(n221)Footnote 161. See, e.g., *Patterson v. American Tobacco Co.* (4th Cir. [Va.] 1976) 535 F.2d 257, 268-269 , cert. denied, 429 U.S. 920 (pension and profit-sharing contributions of the employer are part of back pay awards); *Pettway v. American Cast Iron Pipe Co.* (5th Cir. [Ala.] 1974) 494 F.2d 211, 263 , cert. denied, 439 U.S. 1115 (1979) (sick pay, vacation pay, overtime pay, and shift differential pay are all parts of back pay awards); *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1518 (paid holidays).

(n222)Footnote 162. See, e.g., *Kauffman v. Sidereal Corp.* (9th Cir. [Or.] 1982) 695 F.2d 343, 346-347 .

(n223)Footnote 162.1. *Rivera v. Baker West, Inc.* (9th Cir. 2005) 430 F.3d 1253, 1256-1260 (settlement agreement for discrimination and wrongful discharge claim under Title VII encompassed only damages for lost wages, so that district court did not clearly err by classifying settlement proceeds as lost wages not entitled to exclusion from gross income under 26 U.S.C. § 104(a)(2) for damages for personal physical injuries or physical sickness, and settlement proceeds paid to compensate plaintiff for his lost wages were subject to income tax withholding).

(n224)Footnote 163. See 42 U.S.C. § 2000e-5(g)(1).

(n225)Footnote 164. See *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 ; *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1234 , cert. denied, 502 U.S. 1005 .

(n226)Footnote 165. See *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 ; *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1234 , cert. denied, 502 U.S. 1005 .

(n227)Footnote 166. See *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 .

(n228)Footnote 167. See, e.g., *Williams v. General Foods Corp.* (7th Cir. [Ill.] 1974) 492 F.2d 399, 407-408 ; *Rosenfeld v. Southern Pacific Company* (9th Cir. [Cal.] 1971) 444 F.2d 1219, 1227 .

(n229)Footnote 167.1. See *Odima v. Westin Tucson Hotel* (9th Cir. 1995) 53 F.3d 1484, 1495-1496 .

(n230)Footnote 167.2. See *E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1516-1517 .

(n231)Footnote 168. See 42 U.S.C. § 2000e-5(g)(1).

(n232)Footnote 169. See *Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, 231-234, 102 S. Ct. 3057, 73 L. Ed. 2d 721 .

(n233)Footnote 170. See *Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, 231-234, 102 S. Ct. 3057, 73 L. Ed. 2d 721 ; *Odima v. Westin Tucson Hotel* (9th Cir. 1995) 53 F.3d 1484, 1496-1497 (plaintiff is not required to accept job

offer conditioned on plaintiff's relinquishing discrimination claims against employer); *Toledo v. Nobel-Sysco, Inc.* (10th Cir. 1989) 892 F.2d 1481, 1493 (Title VII plaintiff's rejection of job offer normally ends defendant's ongoing responsibility for backpay).

(n234)Footnote 171. See *Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, 232 n.18, 102 S. Ct. 3057, 73 L. Ed. 2d 721. See also *Toledo v. Nobel-Sysco, Inc.* (10th Cir. 1989) 892 F.2d 1481, 1493 (defendant's responsibility for backpay does not end if job offer is conditioned on dropping Title VII claim).

(n235)Footnote 172. See *Hegler v. Board of Ed. of Bearden Sch. Dist., Bearden, Ark.* (8th Cir. 1971) 447 F.2d 1078, 1081.

(n236)Footnote 173. See *Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, 231 n.14, 102 S. Ct. 3057, 73 L. Ed. 2d 721; *Kaplan v. Intern. Alliance of Theatrical, Etc.* (9th Cir. 1975) 525 F.2d 1354, 1363.

(n237)Footnote 173.1. See *Edwards v. Occidental Chemical Corp.* (9th Cir. 1990) 892 F.2d 1442, 1448-1449.

(n238)Footnote 173.2. See *Toledo v. Nobel-Sysco, Inc.* (10th Cir. 1989) 892 F.2d 1481, 1493.

(n239)Footnote 173.3. *Caudle v. Bristow Optical Company, Inc.* (9th Cir. 2000) 224 F.3d 1014, 1020-1021.

(n240)Footnote 174. See *League of United Latin American Citizens v. City of Salinas* (9th Cir. 1981) 654 F.2d 557, 559; *Kaplan v. International Alliance of Theatrical & Stage Employees & Motion Picture Machine Operators* (9th Cir. 1975) 525 F.2d 1354, 1363; *Odima v. Westin Tucson Hotel* (9th Cir. 1995) 53 F.3d 1484, 1497; *Edwards v. Occidental Chemical Corp.* (9th Cir. 1990) 892 F.2d 1442, 1449; *Toledo v. Nobel-Sysco, Inc.* (10th Cir. 1989) 892 F.2d 1481, 1493.

(n241)Footnote 175. See 42 U.S.C. § 5000e-5(g)(1).

(n242)Footnote 176. See *Pollard v. E. I. Du Point de Nemours & Co.* (2001) 532 U.S. 843, 121 S. Ct. 1946, 150 L. Ed. 2d 62, 67 (front pay is money awarded for lost compensation during period between judgment and reinstatement or in lieu of reinstatement); *Patterson v. American Tobacco Co.* (4th Cir. 1976) 535 F.2d 257, 269, cert. denied, 429 U.S. 920 (1976); *Edwards v. Occidental Chemical Corp.* (9th Cir. 1990) 892 F.2d 1442, 1449.

(n243)Footnote 177. See *Patterson v. American Tobacco Co.* (4th Cir. 1976) 535 F.2d 257, 269 n.10, cert. denied, 429 U.S. 920 (1976).

(n244)Footnote 178. *Pollard v. E. I. Du Point de Nemours & Co.* (2001) 532 U.S. 843, 121 S. Ct. 1946, 150 L. Ed. 2d 62, 67 (front pay appropriate when, for example, appropriate position for plaintiff not immediately available without displacing incumbent employee, because of continuing hostility between plaintiff and employer or workers, or because of psychological injuries suffered by plaintiff as result of discrimination); see *Fadhl v. City and County of San Francisco* (9th Cir. 1984) 741 F.2d 1163, 1167; *Briseno v. Central Technical Community College Area* (8th Cir. 1984) 739 F.2d 344, 348.

(n245)Footnote 179. See *Goldstein v. Manhattan Industries, Inc.* (11th Cir. 1985) 758 F.2d 1435, 1448, cert. denied, 474 U.S. 1005 (1985).

(n246)Footnote 180. See *Thorne v. City of El Segundo* (9th Cir. 1987) 802 F.2d 1131, 1136-1137; *Patterson v. American Tobacco Co.* (4th Cir. 1976) 535 F.2d 257, 269, cert. denied, 429 U.S. 920 (1976).

(n247)Footnote 181. See 42 U.S.C. § 2000e-5(g); cf. *Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, 231-232, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (unemployed or underemployed claimant, like all other Title VII claimants, is subject to statutory duty to minimize damages). For discussion of plaintiff's duty to mitigate back pay, see [a][iii], above.

(n248)Footnote 181.1. *Pollard v. E. I. Du Point de Nemours & Co.* (2001) 532 U.S. 843, 121 S. Ct. 1946, 150 L. Ed. 2d 62, 71 ; *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174 ; for discussion of compensatory damages under 42 U.S.C. § 1981a, see [c], below.

(n249)Footnote 182. See *Thompson v. Sawyer* (D.C. Cir. 1982) 678 F.2d 257, 292 ; see *Thorne v. City of El Segundo* (9th Cir. 1987) 802 F.2d 1131, 1137 .

(n250)Footnote 183. See *Fadhl v. City and County of San Francisco* (9th Cir. 1984) 741 F.2d 1163, 1167 ; *James v. Stockham Valves & Fittings Co.* (5th Cir. 1977) 559 F.2d 310 ; *Patterson v. American Tobacco Co.* (4th Cir. 1976) 535 F.2d 257, 269 (front pay is the proper remedy when employees entitled to move up will not be able to do so by date of judgment); cf. *Franks v. Bowman Transp. Co.* (1976) 424 U.S. 747, 781, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (separate opinion of Burger, C.J., concurring in part and dissenting in part; front pay award could replace need for competitive-type seniority relief when promotions have been denied because of discriminatory seniority and promotional system).

(n251)Footnote 184. *Fadhl v. City and County of San Francisco* (9th Cir. 1984) 741 F.2d 1163, 1167 (remanding damages award, which included front pay, for additional findings).

(n252)Footnote 185. See *Fadhl v. City and County of San Francisco* (9th Cir. 1984) 741 F.2d 1163, 1167 ; see also *Dillon v. Coles* (3d Cir. 1984) 746 F.2d 998, 1006 .

(n253)Footnote 186. See 42 U.S.C. § 1981a.

(n254)Footnote 187. 42 U.S.C. § 1981a(a)(1).

(n255)Footnote 188. See 42 U.S.C. § 1981a(a)(1).

(n256)Footnote 189. See generally *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582 ; *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 ; See also ch. 40, pt. C.

(n257)Footnote 190. 42 U.S.C. § 1981a(d)(1)(A).

(n258)Footnote 191. 42 U.S.C. § 1981a(b)(1).

(n259)Footnote 192. *Kolstad v. American Dental Ass'n.* (1999) 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed. 2d 494, 506-507, 512 .

(n260)Footnote 193. *Kolstad v. American Dental Ass'n.* (1999) 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed. 2d 494, 508-512 .

(n261)Footnote 194. *Kolstad v. American Dental Ass'n.* (1999) 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed. 2d 494, 512 .

(n262)Footnote 194.1. *Ngo v. Reno Hilton Resort Corp.* (9th Cir. 1998) 140 F.3d 1299, 1304-1305 .

(n263)Footnote 194.2. *Ngo v. Reno Hilton Resort Corp.* (9th Cir. 1998) 140 F.3d 1299 .

(n264)Footnote 194.3. *Ngo v. Reno Hilton Resort Corp.* (9th Cir. 1998) 140 F.3d 1299, 1304-1305 (even considering better treatment toward white employee did not evince evil motive or conscious or deliberate disregard for federally protected right against discrimination).

(n265)Footnote 194.4. *E.E.O.C. v. Wal-Mart Stores, Inc.* (9th Cir. 1998) 156 F.3d 989 .

(n266)Footnote 194.5. *Ngo v. Reno Hilton Resort Corp.*, (9th Cir. 1998) 140 F.3d 1299, 1304 , amended 156 F.3d 988 .

(n267)Footnote 194.6. *E.E.O.C. v. Wal-Mart Stores, Inc.* (9th Cir. 1998) 156 F.3d 989, 992-993 .

(n268)Footnote 194.7. *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174 .

(n269)Footnote 194.8. *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174, 1196-1199 .

(n270)Footnote 194.9. *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174, 1197-1198 .

(n271)Footnote 194.10. *Costa v. Desert Palace, Inc.* (9th Cir. 2002) 299 F.3d 838 .

(n272)Footnote 194.11. *Costa v. Desert Palace, Inc.* (9th Cir. 2002) 299 F.3d 838, 864-865 (court could not equate jury's finding of "egregious" misconduct with employer's lack of "good faith" as matter of law).

(n273)Footnote 195. 42 U.S.C. § 1981a(b)(2); see 42 U.S.C. § 2000e-5(g) (relief under Title VII).

(n274)Footnote 196. See 42 U.S.C. § 1981a(b)(3). See *Lansdale v. Hi-Health Supermart Corp.* (9th Cir. 2002) 314 F.3d 355, 357-359 (cap is constitutional); *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174, 1200-1201 (same).

(n275)Footnote 197. 42 U.S.C. § 1981a(b)(3).

(n276)Footnote 197.1. *E.E.O.C. v. Dinuba Medical Clinic* (9th Cir. 2000) 222 F.3d 580, 589 .

(n277)Footnote 197.2. See *Pavon v. Swift Transp. Co., Inc.* (9th Cir. 1999) 192 F.3d 902, 910-911 (plaintiff who brought claims under Title VII and 42 U.S.C. 1981 was entitled to recover damages in excess of \$300,000 under the § 1981 claim).

(n278)Footnote 197.3. *Pollard v. E. I. du Point de Nemours & Co.* (2001) 532 U.S. 843, 121 S. Ct. 1946, 150 L. Ed. 2d 62, 70 ; *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174 ; see *Gotthardt v. AMTRAK* (9th Cir. 1999) 191 F.3d 1148, 1153-1155 .

(n279)Footnote 198. See, e.g., *Williams v. United States General Servs. Admin.* (9th Cir. 1990) 905 F.2d 308, 311 ; *Shah v. Mt. Zion Hosp. & Med. Ctr.* (9th Cir. 1981) 642 F.2d 268, 272 ; *Pearson v. Western Elec. Co.* (10th Cir. 1976) 542 F.2d 1150, 1151-1152 .

(n280)Footnote 199. Pub. L. No. 102-166, § 402(a).

(n281)Footnote 199.1. *Landgraf v. USI Film Products* (1994) 511 U.S. 244, 261, 114 S. Ct. 1483, 128 L. Ed. 2d 229, 241, 265 .

(n282)Footnote 200. See generally § 43.01.

(n283)Footnote 201. The Civil Rights Act of 1991 expressly provides that the damage limits that apply to Title VII actions do not limit the relief available under 42 U.S.C. § 1981. See 42 U.S.C. § 1981a(b)(4); see also *Pavon v. Swift Transp. Co* (9th Cir. 1999) 192 F.3d 902 (Title VII's damages cap does not limit damages under theories such as 42 U.S.C. § 1981 and state common law claims; excess damages over statutory maximum could be attributed to non-Title VII claims). For discussion, see § 43.14.

(n284)Footnote 202. For discussion of wrongful termination and related actions, see chs. 60-63.

(n285)Footnote 202.1. See *Pavon v. Swift Transp. Co., Inc.* (9th Cir. 1999) 192 F.3d 902, 909-910 .

(n286)Footnote 203. *City of Los Angeles Department of Water & Power v. Manhart* (1978) 435 U.S. 702, 722-723, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (employer's pension system overcharged females on discriminatory and erroneous premise that women live longer than men do, but overcharges could not be repaid to plaintiff class because of threat to pension fund and to other employees' expectations).

(n287)Footnote 204. *See* 42 U.S.C. § 2000e-5(g)(1), (2)(A).

(n288)Footnote 205. *See Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 418, 95 S. Ct. 2362, 45 L. Ed. 2d 280 .

(n289)Footnote 206. *See, e.g., City of Los Angeles Department of Water & Power v. Manhart* (1978) 435 U.S. 702, 721-723, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (while retroactive monetary relief was inappropriate, injunction against sex-differential benefits of municipal entity's pension plan upheld); *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747, 772, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (fashioning of appropriate remedies, including retroactive seniority to victims of racial discrimination, invokes the sound equitable discretion of the district courts).

(n290)Footnote 206.1. *See, e.g., Freitag v. Ayers* (9th Cir. 2006) 463 F.3d 838, 2006 U.S. App. LEXIS 23383, *47-*50 (although prison guard was no longer employed when trial court granted permanent injunction against employer, injunction was proper, because she possessed property interest in her job and sufficient connection to her employment with prison to support issuance of injunction).

(n291)Footnote 207. *See E.E.O.C. v. Hacienda Hotel* (9th Cir. 1989) 881 F.2d 1504, 1519 ; *E.E.O.C. v. Goodyear Aerospace Corp.* (9th Cir. 1987) 813 F.2d 1539, 1544 ; *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1233 (curative eleventh-hour action does not prove that employer is unlikely to discriminate again).

(n292)Footnote 208. For the general principles governing issuance of preliminary injunctive relief by federal district courts, *see* Fed. R. Civ. P., Rule 65; for procedural rules governing motions for preliminary injunctive relief in district courts, *see* local rules of the various district courts.

(n293)Footnote 209. *See, e.g., Garcia v. Lawn* (9th Cir. 1986) 805 F.2d 1400, 1404-1406 ; *Segar v. Civiletti* (D.D.C. 1981) 516 F. Supp. 314, 321 (preliminary injunction against demotion of witness in EEO proceeding).

(n294)Footnote 210. *See, e.g., I.M.A.G.E. v. Bailar* (N.D. Cal. 1981) 518 F. Supp. 800, 804-805 (preliminary injunction against filling of vacancies by employer to preserve court's ability to grant full final relief).

(n295)Footnote 211. *Wagner v. Taylor* (9th Cir. 1987) 836 F.2d 566, 572-574 (employees may seek interim injunctive relief to preserve status quo and to prevent retaliation while administrative process is advancing); *see, e.g., Berg v. Richmond Unified School Dist.* (9th Cir. 1975) 528 F.2d 1208, 1212 , *vacated and remanded on other grounds*, 434 U.S. 158 (1977) (pregnant schoolteacher entitled to preliminary injunction to prevent mandatory maternity leave, even absent right-to-sue letter); *Drew v. Liberty Mutual Insur. Co.* (5th Cir. 1973) 480 F.2d 69, 72-76 .

(n296)Footnote 212. *See* 42 U.S.C. § 2000e-5(g)(1).

(n297)Footnote 213. *See, e.g., Walters v. City of Atlanta* (11th Cir. 1986) 803 F.2d 1135, 1148-1150 (upholding order of mandatory hiring of African-American employee unlawfully denied employment, even though order required bumping of already-hired employee); *Kunda v. Muhlenberg College* (3d Cir. 1980) 621 F.2d 532, 549 (tenure ordered when faculty member was victim of discriminatory denial of job security based on sex); *Sebastian v. Texas Dep't of Corrections* (S.D. Tex. 1982) 541 F. Supp. 970, 976-979 (court ordered plaintiff reinstated to position in state prison system when she proved she was demoted because of sexist attitudes of prison management).

(n298)Footnote 214. *See, e.g., United States v. Paradise* (1987) 480 U.S. 149, 166-167, 107 S. Ct. 1053, 94 L. Ed. 2d 203 ; *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 444-445, 106 S. Ct. 3019, 92

L. Ed. 2d 344 ; *Association against Discrimination in Employment, Inc. v. City of Bridgeport* (2d Cir. 1981) 647 F.2d 256, 287-288 ; *Guardians Ass'n. of New York City v. Civil Serv.* (2d Cir. 1980) 630 F.2d 79, 109 .

(n299)Footnote 215. *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 444-445, 106 S. Ct. 3019, 92 L. Ed. 2d 344 .

(n300)Footnote 216. *See Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747, 772, 96 S. Ct. 1251, 47 L. Ed. 2d 444 .

(n301)Footnote 217. *Zipes v. Trans World Airlines Inc.* (1982) 455 U.S. 385, 398-400, 102 S. Ct. 1127, 71 L. Ed. 2d 234 ; *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747, 772, 96 S. Ct. 1251, 47 L. Ed. 2d 444 ; *see, e.g., EEOC v. M.D. Pneumatics, Inc.* (8th Cir. 1985) 779 F.2d 21, 23 ; *Wilson v. Southwest Airlines (N.D. Tex. 1983)* 98 F.R.D. 725, 728-729 (retroactive seniority should not be denied except for compelling reasons).

(n302)Footnote 218. *See, e.g., Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747, 779 n.41, 780, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (discussing "retroactive" and "rightful-place" seniority); *Ass'n Against Discrimination v. City of Bridgeport* (2d Cir. 1981) 647 F.2d 256, 287-288 , *cert. denied*, 455 U.S. 988 (1982) (using term "constructive" seniority); *Moseley v. Goodyear Tire & Rubber Co.* (5th Cir. 1980) 612 F.2d 187, 191 (stating that "remedial" seniority is a form of affirmative action under Title VII); *James v. Stockham Valves & Fittings Co.* (5th Cir. 1977) 559 F.2d 310, 355-356 (articulating "rightful place" concept of retroactive seniority).

(n303)Footnote 219. *See, e.g., Moseley v. Goodyear Tire & Rubber Co.* (5th Cir. 1980) 612 F.2d 187, 191 (preference to victims for future vacancies is better remedy when feasible than "bumping"; changes in work schedules of nonvictims does not constitute "bumping"); but *see Lander v. Lujan (D.C. Cir. 1989)* 888 F.2d 153, 158 (Title VII clearly authorizes bumping of innocent incumbents).

(n304)Footnote 220. *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747, 779 n.41, 96 S. Ct. 1251, 47 L. Ed. 2d 444 .

(n305)Footnote 221. *Teamsters v. United States* (1977) 431 U.S. 324, 376 n.62, 97 S. Ct. 1843, 52 L. Ed. 2d 396 ; *Romasanta v. United Air Lines, Inc.* (7th Cir. 1983) 717 F.2d 1140, 1148-1150 ; *Moore v. City of San Jose* (9th Cir. 1980) 615 F.2d 1265, 1272 .

(n306)Footnote 222. *EEOC v. M.D. Pneumatics Inc.* (8th Cir. 1985) 779 F.2d 21, 23 ; *Wilson v. Southwest Airlines (N.D. Tex. 1983)* 98 F.R.D. 725, 728-29 ; *Alaniz v. California Processors Inc.* (N.D. Cal. 1976) 73 F.R.D. 289, 292-293 , *aff'd*, 572 F.2d 657, 658-659 (9th Cir. 1978) .

(n307)Footnote 223. *See, e.g., Smith v. American Serv. Co.* (11th Cir. 1986) 796 F.2d 1430, 1432-1433 (remanded to determine propriety of prejudgment interest on back pay award); *Domingo v. New England Fish Co.* (9th Cir. 1984) 727 F.2d 1429, 1446 ; *Green v. United States Steel Corp.* (E.D. Pa. 1986) 640 F. Supp. 1521, 1549 .

(n308)Footnote 224. *See, e.g., Domingo v. New England Fish Co* (9th Cir. 1984) 727 F.2d 1429, 1446 ; *Green v. United States Steel Corp.* (E.D. Pa. 1986) 640 F. Supp. 1521, 1549 (relief limited to award for period from establishment of liability forward).

(n309)Footnote 225. *Compare Richardson v. Restaurant Marketing Assocs., Inc.* (N.D. Cal. 1981) 527 F. Supp. 690, 698 ; *Priest v. Rotary* (N.D. Cal. 1986) 634 F. Supp. 571, 585 ; *E.E.O.C. (U.S.A.) v. Pacific Press Pub. Ass'n* (N.D. Cal. 1979) 482 F. Supp. 1291, 1319-1320 (court applied interest rate equal to 90 percent of the average prime rate for the relevant year, compounded annually); *with Hunter v. Westinghouse Elec. Corp.* (S.D. Ohio 1983) 576 F. Supp. 704, 728 n.21 (8 percent flat rate, compounded annually, was awarded as prejudgment interest); *E.E.O.C. v. Wooster Brush Co. Employees Relief Ass'n* (6th Cir. 1984) 727 F.2d 566, 579 (discussing possibility of calculating prejudgment interest using postjudgment rate in 28 U.S.C. § 1961(a)).

(n310)Footnote 226. *See* 42 U.S.C. § 2000e-5(k); *see also* *Edwards v. Occidental Chemical Corp.* (9th Cir. 1990) 892 F.2d 1442, 1449-1450 (appellate court has discretion to award attorney fees on appeal to prevailing parties).

(n311)Footnote 227. *See* 42 U.S.C. § 2000e-5(k).

(n312)Footnote 228. *See* *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 456-457, 96 S. Ct. 2666, 49 L. Ed. 2d 614 .

(n313)Footnote 229. *See* 42 U.S.C. § 2000e-5(k), as amended by Pub. L. No. 102-166, § 113(b) (Civil Rights Act of 1991).

(n314)Footnote 230. *Hemmings v. Tidyman's Inc.* (9th Cir. 2002) 285 F.3d 1174 (district court did not abuse its discretion by denying costs for depositions or preparation of motion for attorneys fees).

(n315)Footnote 230.1. *Texas State Teachers Ass'n v. Garland Independent Sch. Dist.* (1989) 489 U.S. 782, 790-791, 109 S. Ct. 1486, 103 L. Ed. 2d 866 .

(n316)Footnote 230.2. *Stivers v. Pierce* (9th Cir. 1995) 71 F.3d 732, 751 (interpreting 42 U.S.C. § 1988, court concluded that degree of success is irrelevant to determination of prevailing party).

(N317)Footnote 230.3. *Hashimoto v. Dalton* (9th Cir. 1997) 118 F.3d 671 .

(n318)Footnote 230.4. *Hashimoto v. Dalton* (9th Cir. 1997) 118 F.3d 671, 676-678 (EEOC's finding that plaintiff was victimized by negative character reference resulted in ordering panoply of remedial measures but not reinstatement or back pay sufficient for prevailing party status); *see* *Smith v. Secretary of Navy* (D.C. Cir. 1981) 659 F.2d 1113, 1122 (plaintiff subjected to adverse performance evaluation in retaliation for EEO activities without financial harm is prevailing party even when only proper relief is excising negative reference from personnel file).

(n319)Footnote 230.5. *Norris v. Sysco Corp.* (9th Cir. 1999) 191 F.3d 1043 , *cert. denied*, 528 U.S. 1182, 145 L. Ed. 2d 1121 (2000) .

(n320)Footnote 230.6. *See* *Norris v. Sysco Corp.* (9th Cir. 1999) 191 F.3d 1043 , *cert. denied*, 528 U.S. 1182 (2000) (court found award of fees proper because much hard work and valid effort went into case in which employer was found to have discriminated, but no damages were awarded because discrimination was not only motive).

(n321)Footnote 231. *See* *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 417, 98 S. Ct. 694, 54 L. Ed. 2d 648 ; *Albamarle Paper Co. v. Moody* (1975) 422 U.S. 405, 415, 95 S. Ct. 2362, 45 L. Ed. 2d 280 ; *see* *Flight Attendants v. Zipes* (1989) 491 U.S. 754, 758-761, 109 S. Ct. 2732, 105 L. Ed. 2d 639 ; *but see* *Buckhannon Bd. and Care Home, Inc., v. West Virginia Dept. of Health and Human Resources* (2001) 532 U.S. 598, 607-609, 121 S. Ct. 1835, 149 L. Ed.2d 855, 865 ("catalyst theory" not permissible basis for award of attorney's fees under Fair Housing Amendments Act and ADA; party is not "prevailing party" under fee-shifting provisions of statutes if it has failed to secure judgment on the merits or court-ordered consent decree but has achieved desired result because lawsuit brought about voluntary change in defendant's conduct).

(n322)Footnote 232. *See* *Flight Attendants v. Zipes* (1989) 491 U.S. 754, 761, 109 S. Ct. 2732, 105 L. Ed. 2d 639 .

(n323)Footnote 232.1. *See* *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1235 .

(n324)Footnote 232.2. *Hashimoto v. Dalton* (9th Cir. 1997) 118 F.3d 671, 676-678 ; *Morales v. City of San Rafael* (9th Cir. 1996) 96 F.3d 359, 362-363 (whether plaintiff's success is purely technical or *de minimus* is determined by examining factors beyond amount of monetary award, such as significance of legal issues on which plaintiff claims to have prevailed and public purpose served by litigation); *see* *Farrar v. Hobby* (1992) 506 U.S. 103, 111-112, 113 S. Ct. 566, 121 L. Ed. 2d 494 ("no fee" exception for cases in which relief is *de minimus*).

(n325)Footnote 232.3. *Hashimoto v. Dalton* (9th Cir. [Haw.] 1997) 118 F.3d 671, 676-678 (attorney's fee award to employee on retaliation claim proper when plaintiff partially succeeds, legal relationship between parties is materially altered, and remedial measures benefit community).

(n326)Footnote 233. See *Johnson v. Georgia Highway Express, Inc.* (5th Cir. 1974) 488 F.2d 714, 717-719 ; *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1235 , cert. denied, 502 U.S. 1005 (declarations stating hourly rate was prevailing market rate in relevant community were sufficient to establish appropriate rate for lodestar purposes).

(n327)Footnote 233.1. *Staton v. Boeing Co.* (9th Cir. 2002) 313 F.3d 447, 475 , citing *Evans v. Jeff D.* (1986) 475 U.S. 717, 734-735, 106 S. Ct. 1531, 89 L. Ed. 2d 747 .

(n328)Footnote 233.2. See *Staton v. Boeing Co.* (9th Cir. 2002) 313 F.3d 447, 475 (appellate court could not determine whether fees that defendant agreed to pay in class action settlement decree were reasonable lodestar fees under Title VII's fee-shifting statute, because trial court conducted no such inquiry).

(n329)Footnote 233.3. *Staton v. Boeing Co.* (9th Cir. 2002) 313 F.3d 447, 476, 477 . See *Brytus v. Spang & Co.* (3d Cir. 2000) 203 F.3d 238, 246-247 (common funds can be appropriate in both settled and litigated cases when statutory fees are available); *Cook v. Niedert* (7th Cir. 1998) 142 F.3d 1004 (approving fees measured by common fund rather than statutory principles when statutory fees were available); *Florin v. Nationsbank* (7th Cir. 1994) 34 F.3d 560, 564 (common fund principles properly control case initiated under statute with fee shifting provision but settled with creation of common fund); *Skelton v. General Motors Corp.* (7th Cir. 1988) 860 F.2d 250, 256 (when settlement fund is created in exchange for release of defendant's liability both for damages and statutory attorneys' fees, equitable fund principles govern court's award of attorneys' fees).

(n330)Footnote 233.4. See *Staton v. Boeing Co.* (9th Cir. 2002) 313 F.3d 447, 478-481 (because parties negotiated amount of attorneys' fees awarded class counsel as a term of settlement agreement and conditioned merits settlement on judicial approval of agreed-upon fees and then attempted to justify fees not as statutory fees but as common fund fees, parties followed irregular and improper procedure).

(n331)Footnote 233.5. *Boeing Co. v. Van Gemert* (1980) 444 U.S. 472, 478, 100 S. Ct. 745, 62 L. Ed. 2d 676 .

(n332)Footnote 233.6. *Staton v. Boeing Co.* (9th Cir. 2002) 313 F.3d 447, 477 .

(n333)Footnote 233.7. *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150 F.3d 1011, 1026 .

(n334)Footnote 233.8. *Staton v. Boeing Co.* (9th Cir. 2002) 313 F.3d 447, 482 .

(n335)Footnote 233.9. *Staton v. Williams* (9th Cir. 2002) 313 F.3d 447, 478 .

(n336)Footnote 233.10. See *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1235-1236 , cert. denied, 502 U.S. 1005 .

(n337)Footnote 233.11. See *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, 1235-1236 , cert. denied, 502 U.S. 1005 .

(n338)Footnote 233.12. See *Burlington v. Dague* (1992) 505 U.S. 557, 563, 112 S. Ct. 2638, 120 L. Ed. 2d 449, 459 (interpreting attorney's fee provisions of Solid Waste Disposal Act (42 U.S.C. § 6972(e)) and Federal Clean Water Act (33 U.S.C. § 1365(d)).

(n339)Footnote 233.13. *Staton v. Boeing Co.* (2003) 327 F.3d 938, 2003 U.S. App. LEXIS 8139, *3-5, *59-*92 .

(n340)Footnote 234. See 42 U.S.C. § 2000e-5(k) explicitly prohibits awards of attorney's fees to the United States and EEOC.

(n341)Footnote 235. See *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 . This standard is also applicable to the imposition of sanctions against plaintiffs under Fed. R. Civ. P., Rule 11. *Warren v. City of Carlsbad* (9th Cir. 1995) 58 F.3d 439, 444-445 , cert. denied, 516 U.S. 1171 (1996) .

(n342)Footnote 236. See *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421-422, 98 S. Ct. 694, 54 L. Ed. 2d 648 ; *Hudson v. Western Airlines, Inc.* (9th Cir. 1988) 851 F.2d 261, 267 (mere fact that plaintiff did not prevail is not enough to justify award of attorney's fees to defendant).

(n343)Footnote 237. See *Mitchell v. Office of Los Angeles County* (9th Cir. 1986) 805 F.2d 844, 847 .

(n344)Footnote 237.1. See *E.E.O.C. v. Bruno's Restaurant* (9th Cir. 1993) 13 F.3d 285, 288-289 .

(n345)Footnote 237.2. See *E.E.O.C. v. Bruno's Restaurant* (9th Cir. 1993) 13 F.3d 285, 288-289 .

(n346)Footnote 238. *Faraci v. Hickey-Freeman Co., Inc.* (2d Cir. 1979) 607 F.2d 1025, 1027-1029 (court reduced defendant's \$2,500 fee request to \$200 award because plaintiff was unable to pay and had litigated in good faith).

(n347)Footnote 239. See generally 42 U.S.C. § 2000e-5(g),(k).

(n348)Footnote 240. Fed. R. Civ. P., Rule 42(b) generally permits this approach by motion or in the trier's discretion.

(n349)Footnote 241. See, e.g., *Sledge v. J.P. Stevens & Co.* (4th Cir. 1978) 585 F.2d 625, 634-635 , cert. denied, 440 U.S. 981 (1979) .

(n350)Footnote 242. See *Int'l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 356-358, 97 S. Ct. 1843, 52 L. Ed. 2d 396 ; *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747, 772, 96 S. Ct. 1251, 47 L. Ed. 2d 444 ; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; see also *League of United Latin American Citizens v. City of Salinas* (9th Cir. 1981) 654 F.2d 557, 558-559 ; *Meadows v. Ford Motor Co.* (6th Cir. 1975) 510 F.2d 939, 948 , cert. denied, 425 U.S. 998 (1976) .

(n351)Footnote 243. See *Teamsters v. United States* (1977) 431 U.S. 324, 361, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n352)Footnote 244. See *Segar v. Smith* (D.C. Cir. 1984) 738 F.2d 1249, 1289-1290, 238 U.S. App. D.C. 103 , cert. denied sub. nom., *Meese v. Segar*, 471 U.S. 1115 (1985) .

(n353)Footnote 245. See *Pettway v. American Cast Iron Pipe Company* (5th Cir. 1974) 494 F.2d 211, 261 , cert. denied, 439 U.S. 1115 (1979) ; *Segar v. Smith* (D.C. Cir. 1984) 738 F.2d 1249, 1290, 238 U.S. App. D.C. 103 , cert. denied sub. nom. *Meese v. Segar* 471 U.S. 1115 (1985) ; *Hameed v. Intern. Ass'n of Bridge, Etc.* (8th Cir. 1980) 637 F.2d 506, 520 ; see also *Parker, Escape From the Quagmire: A Reconsideration of the Role of Teamsters Hearings in Title VII Litigation*, 10 Indus. Rel. L.J. 171 (1988). The specific circumstances that make class-wide relief more appropriate than individualized claim hearings include large classes of potential discriminatees who are vying for a significantly smaller number of back pay "slots"; long liability periods dating so far back that it is impossible to reconstruct the progress that individuals might have made; incentive-based compensation systems, or other methods of paying employees that yield unpredictable salaries; and lack of objective criteria for individually determining who is an actual victim of discrimination.

(n354)Footnote 246. *Domingo v. New England Fish Co.* (9th Cir. 1984) 727 F.2d 1429 , modified on other grounds, 742 F.2d 520 .

(n355)Footnote 247. *Domingo v. New England Fish Co.* (9th Cir. 1984) 727 F.2d 1429, 1444 .

(n356)Footnote 248. *Domingo v. New England Fish Co.* (9th Cir. 1984) 727 F.2d 1429, 1444 .

(n357)Footnote 249. *See* Pub. L. No. 102-166, § 107.

(n358)Footnote 250. 42 U.S.C. § 2000e-2(m); *see generally* discussion in ch. 41, pt. A.

(n359)Footnote 251. 42 U.S.C. § 2000e-5(g)(2)(B).

(n360)Footnote 251.1. *Shaw v. City of Sacramento* (9th Cir. 2001) 250 F.3d 1289, 1293-1294 .

(n361)Footnote 252. 42 U.S.C. § 2000e-5(g)(2)(B).

(n362)Footnote 253. *See* 42 U.S.C. § 2000e-5(f),(g).

(n363)Footnote 254. *See* 42 U.S.C. § 2000e-2(a).

(n364)Footnote 255. *See* Gov. Code § 12900 *et seq.*

(n365)Footnote 256. *See* 42 U.S.C. § 2000e-2(a)(1). For general discussion of discriminatory preemployment practices under Title VII, *see* ch. 41, pt. C. *see* § 43.01[10][a][ii] for form that can be modified for use in a Title VII complaint.

(n366)Footnote 257. *See* 42 U.S.C. § 2000e-2(a)(1). For discussion of discriminatory discharge from employment, *see* ch. 41, pt. D. *see* § 43.01[9][b], Paragraphs 9-12, for allegations that can be modified for use in a Title VII complaint.

(n367)Footnote 258. *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a). For discussion of constructive discharge from employment, *see* ch. 41, pt. D. *see* § 43.01[10][c][ii] for allegations that can be modified for use in a Title VII complaint.

(n368)Footnote 259. *See* 42 U.S.C. § 2000e-3(a). For discussion of retaliation, *see* ch. 41, pt. F. *see* § 43.01[10][d][ii] for allegations that can be modified for use in a Title VII complaint.

(n369)Footnote 260. *See* 42 U.S.C. §§ 2000e(j), 2000e-2(a). For discussion of requirement of accommodation of an employee's religion, *see* ch. 41, pt. D. *see* § 43.01[10][e][ii] for allegations that can be modified for use in a Title VII complaint.

(n370)Footnote 260.1. *See* 42 U.S.C. §§ 2000e-2(a), 2000e-3. For discussion of harassment, *see* ch. 41, pt. D. *see* § 43.01[g][ii] for allegations that can be modified for use in a Title VII complaint.

(n371)Footnote 261. *See, e.g., Hearn v. San Bernardino Police Dept.* (9th Cir. 2008) 530 F.3d 1124, 1129-1133 (neither plaintiff's complaint nor amended complaint warranted dismissal under Fed. R. Civ. Proc. 8(a)(2), despite the fact that they were 81 pages long, where, although each set forth excessively detailed factual allegations, they were coherent and well-organized, and stated legally viable claims).

(n372)Footnote 261.1. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) ; *see* discussion of prima facie case at § [2][b], *above*.

(n373)Footnote 261.2. *See Swierkiewicz v. Sorema N.A.* (2002) 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1, 6-10 , *citing* Fed. Rule Civ. Proc. 8(a)(2). *See also Maduka v. Sunrise Hospital* (9th Cir. 2004) 375 F.3d 909, 911-913 (applying *Swierkiewicz* to action under 42 U.S.C. §§ 1981, 1988).

(n374)Footnote 261.3. *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 283 n. 11, 96 S. Ct. 2574, 49 L. Ed. 2d 493 .

(n375)Footnote 261.4. *Swierkiewicz v. Sorema N.A.* (2002) 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1, 9. *See Maduka v. Sunrise Hospital* (9th Cir. 2004) 375 F.3d 909, 911-913 (in action under 42 U.S.C. §§ 1981, 1988, district court erred in not applying ordinary rules for assessing sufficiency of complaint).

(n376)Footnote 262. Fed. R. Civ. P., Rule 11.

(n377)Footnote 263. Fed. R. Civ. P., Rule 11.

(n378)Footnote 264. *See* Moore's Federal Practice, vol. 2A, ch. 11, P 11.03, p. 11-28. However, a party cannot obtain a temporary restraining order without notice to the adverse party unless it appears from a verified complaint that immediate and irreparable injury will occur. Fed. R. Civ. P., Rule 65. Fed. R. Civ. P., Rule 11 is experiencing a burgeoning development in the application of sanctions on parties and counsel for the filing of allegedly meritless pleadings. *See, e.g., Hudson v. Moore Business Forms, Inc.* (9th Cir. 1987) 827 F.2d 450, 458 (appellate court upheld sanction of attorney's fee award against defense lawyers in Title VII case, when punitive damages in seven figures had been prayed for without adequate factual or legal basis, in "creative" cross-complaint against Title VII claimant; court noted that use of "offhanded, casual, or retaliatory damage prayers" is one practice that Rule 11 is intended to prohibit).

(n379)Footnote 265. *See* Fed. R. Civ. P., Rules 8-11.

(n380)Footnote 266. *See Teamsters v. United States* (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (stating that either theory may be applied to a particular set of facts). For full discussion of differences between "disparate treatment" and "disparate impact" models, *see* ch. 41, pt. A, and [2][b] and [c], *above*.

(n381)Footnote 267. *See, e.g., Miller v. Fairchild Industries, Inc.* (9th Cir. 1986) 797 F.2d 727, 730 ; *cf. McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-805, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n382)Footnote 268. *See* 42 U.S.C. § 2000e(a),(b),(f) (definitions of terms "person," "employer," and "employee" under Title VII). For discussion of parties generally, *see* [5], *above*, and for general discussion of employers and employees covered and exempted under Title VII, *see* ch. 40, pt. C.

(n383)Footnote 269. *See* 42 U.S.C. § 2000e-5(f)(3); Fed. R. Civ. P., Rule 8(a). For discussion of jurisdiction and venue, *see* [3], *above*.

(n384)Footnote 270. *See generally* Fed. R. Civ. P., Rule 8(a). As an example, this form alleges discriminatory denial of a promotional opportunity on account of sex, race, or other characteristic protected by Title VII. *See* 42 U.S.C. § 2000e-2(a). For discussion of prohibition of discrimination in training, advancement, and promotion on the job, *see* ch. 41, pt. D.

(n385)Footnote 271. *See* 42 U.S.C. § 2000e-5(g)(1); *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 415, 95 S. Ct. 2362, 45 L. Ed. 2d 280 ; but *see* 42 U.S.C. § 2000e-5(g)(2)(B) (back pay not available in certain "mixed motive" cases if defendant makes specified showing). For discussion of entitlement to back pay, *see* [9][a],[h], *above*.

(n386)Footnote 272. *See* 42 U.S.C. § 2000e-5(g)(1); *Thorne v. City of El Segundo* (9th Cir. 1987) 802 F.2d 1131, 1137 ; *Patterson v. American Tobacco Co.* (4th Cir. 1976) 535 F.2d 257, 269 , *cert. denied*, 429 U.S. 920 ; but *see* 42 U.S.C. § 2000e-5(g)(2)(B) (back pay not available in certain "mixed motive" cases if defendant makes specified showing). For discussion of entitlement to front pay, *see* [9][b], [h], *above*.

(n387)Footnote 273. *See* 42 U.S.C. § 1981a(a)(1), (b)(2),(3); but *see* 42 U.S.C. § 2000e-5(g)(2)(B) (damages not available in certain "mixed motive" cases if defendant makes specified showing); *see also* discussion in [9][c], [h], *above*.

(n388)Footnote 274. *See* 42 U.S.C. § 1981a(a)(1), (b)(1),(3); but *see* 42 U.S.C. § 2000e-5(g)(2)(B) (damages not

available in certain "mixed motive" cases if defendant makes specified showing); *see also* discussion in [9][c], [h], *above*.

(n389)Footnote 275. *See* 42 U.S.C. § 2000e-5(g)(1); *Franks v. Bowman Transportation Co.* (1976) 424 U.S. 747, 772, 96 S. Ct. 1251, 47 L. Ed. 2d 444 ; *see also* *League of United Latin American Citizens v. City of Salinas* (9th Cir. 1981) 654 F.2d 557, 558-559 . As an example, this form requests an injunction granting plaintiff a retroactive promotion with an award of retroactive seniority. For discussion of availability of injunctive relief in Title VII actions, *see* [9][d], *above*. Note, however that an order requiring hiring, reinstatement, promotion, or admission is not available in "mixed motive" cases if the defendant makes a specified showing. *See* 42 U.S.C. § 2000e-5(g)(2)(B). For discussion, *see* [9][h], *above*.

(n390)Footnote 276. *See* 42 U.S.C. § 2000e-5(e),(f)(1). For discussion of exhaustion of administrative remedies, *see* [4], *above*. For discussion of administrative remedies under Title VII, *see* ch. 42, pt. C.

(n391)Footnote 277. *See generally* Fed. R. Civ. P., Rule 8(a).

(n392)Footnote 278. *See* 42 U.S.C. § 2000e-5(k). For discussion of entitlement to prejudgment interest, *see* [9][e], *above*, and for discussion of entitlement to attorney's fees and costs, *see* [9][f], *above*.

(n393)Footnote 279. *See, e.g.,* *O'Brien v. Sky Chefs, Inc.* (9th Cir. 1982) 670 F.2d 864, 866-868 ; *Williams v. Owens-Illinois, Inc.* (9th Cir. 1982) 665 F.2d 918, 930 ; *Coble v. Hot Springs School District* (8th Cir. 1982) 682 F.2d 721, 723 ; *Reed v. Lockheed Aircraft Corp.* (9th Cir. 1980) 613 F.2d 757, 761-762 .

(n394)Footnote 280. *See* *Teamsters v. United States* (1977) 431 U.S. 324, 367-368, 97 S. Ct. 1843, 52 L. Ed. 2d 396 . For discussion of discriminatory denial of promotion, *see* discussion in ch. 41, pt. D.

(n395)Footnote 281. *See* 42 U.S.C. § 2000e-5(f)(1). For discussion of exhaustion of administrative remedies under Title VII, *see* [4], *above*.

(n396)Footnote 282. *See* 42 U.S.C. § 2000e-5(f)(1); *Schafer v. Board of Public Educ.* (3d Cir. 1990) 903 F.2d 243, 251-253 . For discussion of requirement that defendants named in civil action be limited to those named in EEOC charge, and exceptions to the requirement, *see* [7], *above*.

(n397)Footnote 283. *See* Fed. R. Civ. P., Rule 12(b)(6).

(n398)Footnote 284. *See* Fed. R. Civ. P., Rules 7(b), 11.

(n399)Footnote 285. Fed. R. Civ. P., Rule 7(d).

(n400)Footnote 286. *See* 42 U.S.C. § 2000e-5(a)-(f). For discussion of requirement of exhaustion of remedies, *see* [4], *above*. *See* § 43.01[13][a][ii] for allegations that may be modified for use in an answer to a Title VII complaint.

(n401)Footnote 287. *See* 42 U.S.C. § 2000e-5(e),(f)(1). For discussion of limitations periods, *see* [6], *above*. *See* § 43.01[13][b][ii] for allegations that may be modified for use in an answer to a Title VII complaint.

(n402)Footnote 288. *See, e.g.,* *Cleveland Newspaper Guild v. Plain Dealer Pub. Co.* (6th Cir. 1988) 839 F.2d 1147, 1154 ; *Boone v. Mechanical Specialties* (9th Cir. 1979) 609 F.2d 956, 959 ; but *see* *Brown v. Continental Can Co.* (9th Cir. 1985) 765 F.2d 810, 814 (declining to apply laches based on facts of case); *Gifford v. Atchison Topeka and Santa Fe Ry. Co.* (9th Cir. 1982) 685 F.2d 1149, 1152 (same); *Bratton v. Bethlehem Steel Corp.* (9th Cir. 1980) 649 F.2d 658, 666-667 (same). *See* § 43.01[13][d][ii] for allegations that may be modified for use in an answer to a Title VII complaint.

(n403)Footnote 289. *See* 42 U.S.C. § 2000e-2(e); *see also* 29 C.F.R. § 1604.1(a) (BFOQ defense should be

construed narrowly). For discussion of BFOQ defense, *see* ch. 41, pt. E. *see* § 43.01[13][e][ii] for allegations that may be modified for use in an answer to a Title VII complaint.

(n404)Footnote 290. 42 U.S.C. § 2000e-2(k); *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425, 430-436, 95 S. Ct. 2362, 45 L. Ed. 2d 280; *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 430-436, 91 S. Ct. 849, 28 L. Ed. 2d 158. For discussion of the business justification defense, *see* ch. 41, pts. A and E.

(n405)Footnote 291. 42 U.S.C. § 2000e-2(g). For discussion of security regulation defense, *see* ch. 41, pt. E. *see* § 43.01[13][h][ii] for allegations that may be modified for use in an answer to a Title VII complaint.

(n406)Footnote 292. *See* 42 U.S.C. § 2000e(j); *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 71-75, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (religious accommodation). For discussion of undue hardship as defense to an allegation of failure to accommodate an employee's or applicant's religious beliefs or practices, *see* ch. 41, pt. D. *see* § 43.01[13][l][ii] for allegations that may be modified for use in an answer to a Title VII complaint.

(n407)Footnote 293. *See* Fed. R. Civ. P., Rule 12(b)(6).

(n408)Footnote 294. *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 257-260, 101 S. Ct. 1089, 67 L. Ed. 2d 207; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-803, 93 S. Ct. 1817, 36 L. Ed. 2d 668.

(n409)Footnote 295. *See, e.g., Nash v. Consolidated City of Jacksonville* (11th Cir. 1985) 763 F.2d 1393, 1397.

(n410)Footnote 296. *See* 42 U.S.C. § 2000e-2(h); *Lorance v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, 908, 109 S. Ct. 2261, 104 L. Ed. 2d 961; *Teamsters v. United States* (1977) 431 U.S. 324, 353-355, 97 S. Ct. 1843, 52 L. Ed. 2d 396.

(n411)Footnote 297. *Lorance v. AT&T Technologies, Inc.* (1989) 490 U.S. 900, 908-909, 109 S. Ct. 2261, 104 L. Ed. 2d 961.

(n412)Footnote 298. *See* 42 U.S.C. § 2000e-2(f).

(n413)Footnote 299. *See* 42 U.S.C. § 2000e-5(g)(2)(B).

(n414)Footnote 300. *See* 42 U.S.C. § 2000e-2(m).

(n415)Footnote 301. *See* 42 U.S.C. § 2000e-5(g)(2)(B).

(n416)Footnote 301.1. *See Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 807.

(n417)Footnote 301.2. *See Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662.

(n418)Footnote 302. *Yellow Freight Sys., Inc. v. Donnelly* (1990) 494 U.S. 820, 110 S. Ct. 1566, 108 L. Ed. 2d 834, 838.

(n419)Footnote 303. *See* 28 U.S.C. §§ 1331, 1343(a)(4); 42 U.S.C. § 2000e-5(f)(3).

(n420)Footnote 304. *See* 28 U.S.C. § 1441(a).

(n421)Footnote 305. *See Ferrell v. Heck's Inc.* (S.D. W. Va. 1985) 604 F. Supp. 683, 684.

(n422)Footnote 306. *See* 42 U.S.C. § 2000e-7; *California Federal S. & L. Ass'n v. Guerra* (1987) 479 U.S. 272,

107 S. Ct. 683, 93 L. Ed. 2d 613 (interpreting 42 U.S.C. § 2000e-7 as expressly disclaiming Congressional intent to preempt state laws governing fair employment, in general); *Hays v. Potlatch Forests Inc.* (8th Cir. 1972) 465 F.2d 1081, 1082 .

(n423)Footnote 307. *See, e.g., California Federal S. & L. Ass'n v. Guerra* (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 (California law granting antidiscriminatory job security and related benefits to pregnant workers held not preempted by Title VII); *Rosenfeld v. Southern Pacific Company* (9th Cir. 1971) 444 F.2d 1219, 1225-1226 (California's "protective" laws setting maximum amounts of weight to be lifted and maximum hours to be worked by women were preempted by Title VII as conflicting with Title VII's purpose of overcoming, inter alia, sex discrimination).

(n424)Footnote 308. 42 U.S.C. § 2000e-7; *see California Federal S. & L. Ass'n v. Guerra* (1987) 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 .

(n425)Footnote 309. *See* [i], *above*.

(n426)Footnote 310. *United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 .

(n427)Footnote 311. *United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 726-727, 86 S. Ct. 1130, 16 L. Ed. 2d 218 .

(n428)Footnote 312. 28 U.S.C. § 1367(c).

(n429)Footnote 313. *See Executive Software N. Am. v. U.S. Dist. Court* (9th Cir. 1994) 24 F.3d 1545, 1555-1557 .

(n430)Footnote 313.1. *Executive Software N. Am. v. U.S. Dist. Court* (9th Cir. 1994) 24 F.3d 1545, 1557 .

(n431)Footnote 313.2. 28 U.S.C. § 1367(d); *Guevara v. Ventura Community College Dist.* (2008) 169 Cal. App. 4th 167, 170-174, 87 Cal. Rptr. 3d 50 (trial court erred by finding employee's action under 42 U.S.C. § 1983 and administrative mandamus was barred by the statute of limitations, where employee timely filed civil rights and administrative mandamus action in federal court, and, after employee's federal civil rights action was dismissed by federal court without prejudice, he timely filed his state court action within 30-day tolling period of 28 U.S.C. § 1367(d); even if employee was incorrect in believing he could file administrative mandamus action in federal court, his conduct was not in bad faith or unreasonable and result he sought was consistent with equitable tolling doctrine); *Kolani v. Gluska* (1998) 64 Cal. App. 4th 402, 409-410, 75 Cal. Rptr. 2d 257 (because 28 U.S.C. § 1367(d) codifies principles of equitable tolling found in state case law, court looks to California's case law doctrine of equitable tolling before construing statute; unreasonable to file claims in state court much later than 30-day limit).

(n432)Footnote 314. *See* 42 U.S.C. § 2000e-8(e).

(n433)Footnote 315. 42 U.S.C. § 2000e-8(e).

(n434)Footnote 316. *See* 29 C.F.R. § 1601.16.

(n435)Footnote 317. *Chandler v. Roudebush* (1976) 425 U.S. 840, 863 n.39, 96 S. Ct. 1949, 48 L. Ed. 2d 416 ; *Bradshaw v. Zoological Soc. of San Diego* (9th Cir. 1978) 569 F.2d 1066, 1069 .

(n436)Footnote 318. *Chandler v. Roudebush* (1976) 425 U.S. 840, 863-864, 96 S. Ct. 1949, 48 L. Ed. 2d 416 .

(n437)Footnote 319. *See, e.g., Slack v. Havens* (9th Cir. 1975) 522 F.2d 1091, 1094 (no right to jury trial under Title VII); *cf. Curtis v. Loether* (1974) 415 U.S. 189, 192-198, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (right to jury trial under Title VIII, but no right to jury trial where remedies are purely equitable in nature, as in Title VII); *see also*

Lytle v. Household Manufacturing (1990) 494 U.S. 545, 110 S. Ct. 1331, 108 L. Ed. 2d 504, 513 n.1 (assuming for purposes of opinion that plaintiff had no right to jury trial under Title VII).

(n438)Footnote 320. See 42 U.S.C. § 1981a(a)(1), (b).

(n439)Footnote 321. 42 U.S.C. § 1981a(c)(1). If the case is tried before a jury, the court may not inform the jury of the limitations on the amount of damages set forth in 42 U.S.C. § 1981a(b)(3), discussed in [9][c], above. See 42 U.S.C. § 1981a(c)(2).

(n440)Footnote 322. See discussion in § 43.14[6][a], [9]; See also ch. 40, pt. C.

(n441)Footnote 323. *Lytle v. Household Mfg.* (1990) 494 U.S. 545, 552, 110 S. Ct. 1331, 108 L. Ed. 2d 504 (court may not deprive litigant of right to jury trial by erroneously dismissing legal claim).

(n442)Footnote 324. See *Landgraf v. USI Film Prods.* (1994) 511 U.S. 244, 249, 114 S. Ct. 1483, 128 L. Ed. 2d 229 .

(n443)Footnote 324.1. *Browning v. United States* (9th Cir. 2009) 567 F.3d 1038, 1041-1042 . See also *Cassino v. Reichhold Chemicals, Inc.* (9th Cir. 1987) 817 F.2d 1338 (age discrimination action; no error in refusal to give plaintiff's proposed pretext instruction).

(n444)Footnote 325. *Nilsson v. City of Mesa* (9th Cir. 2007) 503 F.3d 947, 2007 U.S. App. LEXIS 21912, *5-*6 ; *Stroman v. West Coast Grocery Co.* (9th Cir. 1989) 884 F.2d 458, 461 .

(n445)Footnote 326. *Nilsson v. City of Mesa* (9th Cir. 2007) 503 F.3d 947, 2007 U.S. App. LEXIS 21912, *6-*9 .



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part B. FEDERAL LAW

3-43 California Employment Law § 43.10A

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

§ 43.10A Americans With Disabilities Act

[1] Rules Governing Civil Actions Under ADA

The Americans With Disabilities Act of 1990 (ADA),ⁿ¹ which prohibits disability discrimination in employment,ⁿ² expressly incorporates the powers, remedies, and procedures set forth in Title VII's enforcement provisions.ⁿ³ Therefore, individuals aggrieved by violations of the ADA have the same right to file civil actions as they do under Title VII,ⁿ⁴ after they exhaust certain specified administrative requirements, including filing an administrative claim with the EEOC.ⁿ⁵

For discussion of subject matter jurisdiction, parties, statutes of limitations, the appropriate scope of a civil action, and the general procedures for filing a civil action under Title VII, *see* § 43.10. For a detailed discussion of administrative procedures under the ADA, which are, in fact, the same as those required by Title VII,ⁿ⁶ *see* Chapter 42, Part C. Chapter 40, Part C contains a comprehensive discussion of the ADA's scope of coverage. Chapter 41 discusses the substantive prohibitions and defenses under the ADA.

To date, there are no cases determining what standards should be applied to alleged ADA violations, but presumably courts will apply the general theories of liability used under most other equal employment opportunity laws--i.e., "disparate treatment" and "disparate impact." In fact, the ADA expressly prohibits practices that have a disparate impact on disabled persons, unless justified by business necessity.ⁿ⁷ The "disparate treatment" and "disparate impact" theories of liability are discussed at length in Chapter 41, Part A and in §§ 43.01[2] and 43.10[2].

Discriminatory failure to reinstate is a separately actionable claim under the ADA, when there are new elements of unfairness, not existing at the time of the original violation, attached to denial of reemployment.^{n7.1}

The remedies available for unlawful discrimination under the ADA include equitable relief, back pay, and front pay, as under Title VII.ⁿ⁸ Attorney's fees may also be available to the prevailing party.ⁿ⁹ Remedies under Title VII are discussed in § 43.10[9].

In addition, pursuant to the Civil Rights Act of 1991, in an action brought by a complaining party under the ADA against a respondent who engaged in unlawful intentional discrimination (i.e., not an employment practice that is unlawful because of its disparate impact), the complaining party may recover compensatory and punitive damages as discussed below, in addition to any relief authorized by Title VII.n9.1 The "complaining party" for this purpose means the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under the ADA.n9.2

A complaining party may recover punitive damages in an ADA civil action against a respondent (other than a government, government agency, or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.n9.3

"Compensatory damages" for purposes of the Civil Rights Act of 1991 do not include backpay, interest on backpay, or any other type of relief authorized under Title VII.n9.4 but do include amounts awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.n9.5 The sum of the amount of such compensatory damages and the amount of punitive damages awarded may not exceed the following amounts for each complaining party:n9.6

1. In the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000;
2. In the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000;
3. In the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and
4. In the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000.

In cases in which a discriminatory practice involves the failure to provide reasonable accommodation pursuant to the ADA n9.7 or implementing regulations, damages may not be awarded under the Civil Rights Act of 1991 if the covered entity demonstrates good-faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.n9.8

The ADA sets forth various other affirmative defenses to a disability discrimination claim, namely business necessity/job-relatedness, danger to the health and safety of other employees, a "religious entity" exemption, and specified infectious and communicable diseases that may be transmitted through the handling of food.n10 In addition, the United States Supreme Court has decided three related cases which have significantly affected the determination of whether the plaintiff is actually a "qualified individual with a disability.n10.1 The determination must be made on a case-by-case basis, but these cases should support an affirmative defense in appropriate circumstances. For a form of affirmative defense, *see* [3][a], *below*; for further discussion of these defenses, *see* Chapter 41, Part E.

[2] FORM--Complaint for Violation of ADA--General Form

[a] Comment

[i] Use of Form

The form set forth in [b], *below*, is a general complaint for use by an aggrieved individual who seeks monetary and injunctive relief under the ADA.ⁿ¹¹ The form contains the basic allegations required in any complaint for a violation of the ADA. It conforms to the procedural requirements of the Federal Rules of Civil Procedure, Rules 8 through 11, as well as the Local Rules for Civil Practice of the United States District Court for the Northern District of California, Rules 200-1 through 200-5.ⁿ¹² Each district court has its own rules, however, and counsel should consult those rules before filing ADA pleadings.

[ii] Allegations

The complaint in [b], *below*, contains the following allegations: (1) an optional preliminary statement of the substance of the complaint (preferred by some courts) (Paragraph 1); (2) the identities of the plaintiff (Paragraphs 2-4) and the defendant or defendants (Paragraph 5); (3) the basis for subject matter jurisdiction and venue (Paragraph 6);ⁿ¹³ (4) a cause of action for disability discrimination in violation of the ADA,ⁿ¹⁴ including allegations for disparate treatment and disparate impact (Paragraphs 7 and 8);ⁿ¹⁵ (5) that the plaintiff is a "qualified individual" who can perform the job at issue with or without accommodation by the employer (Paragraph 9);ⁿ¹⁶ (6) the grounds for monetary relief, including back pay and front pay (Paragraph 10),ⁿ¹⁷ compensatory damages (Paragraphs 11 and 12),^{n17.1} and punitive damages (Paragraph 13);^{n17.2} (7) the grounds for injunctive relief (Paragraph 14);ⁿ¹⁸ and (8) that plaintiff exhausted his or her administrative remedies (Paragraphs 15 and 16).ⁿ¹⁹ The complaint also includes a prayer for appropriate remedies,ⁿ²⁰ including interest, costs, and attorney's fees.ⁿ²¹

[b] Form

UNITED STATES DISTRICT COURT,

_____ [Specify, e.g., NORTHERN] DISTRICT OF
CALIFORNIA

_____ [name],	)	
Plaintiff,	)	Civil Case No. _____
vs.	)	INDIVIDUAL COMPLAINT FOR MONETARY
_____ [name], Defendant(s).	)	AND INJUNCTIVE RELIEF FOR EMPLOYMENT
	)	DISCRIMINATION
	)	(Americans With Disabilities Act of 1990)
	)	[42 U.S.C. §§ 1981a, 12101 et seq.]

Plaintiff alleges:

[1. This action is brought pursuant to the Americans With Disabilities Act of 1990 (ADA), Title 42 *United States Code Section 12101 et seq.*, to obtain relief for plaintiff _____ (name) for alleged discrimination in employment by defendant(s) against plaintiff because of plaintiff's disability. Plaintiff _____ (name) alleges that defendant(s) _____ (specify discriminatory act, e.g., refused to hire plaintiff) because of plaintiff's disability, in violation of Title 42 *United States Code Section 12112(a)*. By this action, plaintiff _____ (name) seeks the following relief, pursuant to Title 42 *of the United States Code Section 12117(a)*, which incorporates the remedies set forth in Title VII of the Civil Rights Act of 1964, Title 42 *United States Code Section 2000e-5(g) and (k)*, for the discriminatory treatment of plaintiff in violation of the ADA: _____ (specify, e.g., monetary relief, including back pay, front pay, compensatory and punitive damages, attorney's fees and costs of suit, and injunctive relief, consisting of an order requiring defendant to hire plaintiff).]

2. Plaintiff _____ (name) is an adult person and is a resident of the County of _____,

State of California.

3. Plaintiff _____ (name) is "disabled" as defined by the ADA, Title 42 *United States Code Section 12102(1)*, in that he/she _____ [has *or* has a record of *or* is regarded as having] a _____ [physical *or* mental] impairment that substantially limits one or more of his or her major life activities, in that [describe manifestation of plaintiff's disability].

[EITHER]

4. Plaintiff is an employee of defendant _____ (name), and has been employed by defendant _____ (name), at [place of employment] since [date].

[OR]

4. Plaintiff applied for employment with defendant [name] at [place] on [date].

[OR]

4. Plaintiff was employed by defendant [name] at [place of employment] from [date] until [date].

[CONTINUE]

5. At all times relevant herein, defendant [name] has been an employer as defined by the ADA, Title 42 *United States Code Section 12111(5)(A)*, in that defendant is engaged in an industry affecting commerce and _____ [if discriminatory practice occurs before July 26, 1994, has had 25 or more employees *or*, if discriminatory practice occurs on or after July 26, 1994, has had 15 or more employees] for each working day in each of 20 or more calendar weeks in _____ [specify either year during which discriminatory practice occurred or preceding year, as appropriate]

6. Jurisdiction of the subject matter of this action is established in this court by the ADA, Title 42 *United States Code Section 12117(a)*, which incorporates the jurisdiction provisions in Title VII of the Civil Rights Act of 1964, Title 42 *United States Code Section 2000e-5(f)(3)*. This is the proper venue for this action under Title 42 *United States Code Sections 2000e-5(f)(3)* and *12117(a)*, in that _____ [allege ground establishing venue, e.g., the discriminatory employment practice alleged herein was committed within this court's judicial district.]

7. On or about [date], defendant(s) intentionally discriminated against plaintiff because of plaintiff's disability as described in Paragraph 3, in that _____ [specify discriminatory acts, e.g., defendant(s) refused to hire plaintiff because of his/her disability], [and defendant(s) continue(s) to discriminate against plaintiff in that _____ (specify continuing discriminatory practice or policy)].

8. In the alternative, the action of defendant(s) as set forth in Paragraph 7, above, was done pursuant to a policy or practice that has a discriminatory effect on plaintiff as a disabled person in the following manner: [set forth factual allegations showing disparate impact of facially neutral policy or practice on plaintiff and other disabled persons].

9. Plaintiff is a "qualified individual" within the meaning of Title 42 *United States Code Section 12111(8)* because he/she can, _____ [with *or* without] reasonable accommodation, perform the essential functions of the

job that he/she _____ [holds or held or sought or seeks] in the employ of the defendant(s).

10. The discriminatory action of defendant(s) as set forth in Paragraphs 7 and 8, above, has caused and will continue to cause plaintiff to suffer losses of earnings, from _____ [specify date of loss of employment opportunity, e.g., the date of the refusal to hire plaintiff] until _____ [specify date on which loss of earnings will cease, e.g., the date on which plaintiff is hired by defendant(s)].

[11. As a further proximate result of defendant's unlawful and intentional discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered the intangible loss of such employment-related opportunities as _____ (specify, e.g., experience in the position from which plaintiff was terminated). As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ (in the amount of \$ _____ or in an amount according to proof).]

[12. As a further proximate result of defendant's unlawful and intentional discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered emotional pain, humiliation, mental anguish, loss of enjoyment of life, and emotional distress. As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ (in the amount of \$ _____ or in an amount according to proof).]

[13. The above-recited actions of defendant were done _____ (with malice and/or with reckless indifference to plaintiff's rights under the ADA), in that _____ (specify facts showing malice and/or reckless indifference). Defendant's conduct warrants the assessment of punitive damages in an amount sufficient to punish defendant and deter others from engaging in similar misconduct.]

[14. Plaintiff has no adequate remedy at law to secure relief for the _____ (specify loss of employment opportunity, e.g., failure by defendant(s) to hire plaintiff). If this court does not enter an order _____ (specify injunctive relief needed, e.g., compelling defendant(s) to hire plaintiff to the job plaintiff applied and was qualified for) plaintiff will be irreparably injured in that _____ (set forth in detail facts showing irreparable injury).]

15. On [date], plaintiff filed a discrimination charge against defendant(s) [name] with the Equal Employment Opportunity Commission (EEOC). A copy of that charge is attached to this complaint, marked "Exhibit____," and is incorporated by this reference as though fully set forth. That charge was timely filed, under the ADA, Title 42 *United States Code Section 12117(a)*, which incorporates the procedures set forth in Title VII of the Civil Rights Act of 1964, Title 42 *United States Code Section 2000e-5(e)*, as follows: _____ [specify timely filing, e.g., Plaintiff filed the charge with the EEOC on _____ (date), within 300 days of the occurrence of the ADA violation herein alleged]. [Plaintiff also filed a timely discrimination charge with the California Department of Fair Employment and Housing (DFEH), pursuant to the California Fair Employment and Housing Act, *Government Code Section 12900 et seq.* On _____ (date), plaintiff received notice that the DFEH had terminated its proceedings on plaintiff's charge.]

16. On [date], plaintiff received notice from the EEOC of his/her right to bring this action, and plaintiff timely filed this action on [date], within _____ [90 days after or within time period specified in] that notice. A copy of that notice of right of action is attached to this form, marked "Exhibit____," and is incorporated by this reference as though fully set forth.

WHEREFORE, plaintiff prays for judgment as follows:

1. For back pay, with prejudgment interest, from _____ [set forth date of discriminatory action, but not more than two years prior to filing of EEOC charge by plaintiff, pursuant to 42 U.S.C. § 12117(a), which

incorporates the procedures set forth in 42 U.S.C. § 2000e-5(g)(1)] to the date of judgment herein;

[2. For front pay and/or future lost earnings, for the period from the date of judgment to _____ (*set forth the date at which plaintiff actually is placed in the position that he or she was denied because of discrimination*);]

[3. For compensatory damages _____ (in the amount of \$ _____ *or according to proof*);]

[4. For punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar misconduct;]

[5. For injunctive relief, including but not limited to _____ (*specify injunctive relief desired, e.g., an order compelling defendant(s) to hire plaintiff to the job he/she applied for*), and for all other injunctive relief required to make plaintiff whole for the losses caused by the violations of defendant(s);]

6. For costs of suit, including reasonable attorney's fees and expert fees, pursuant to Title 42 *United States Code Section 12117(a)*, which incorporates the remedies set forth in Title VII of the Civil Rights Act of 1964, Title 42 *United States Code Section 2000e-5(k)*; and

7. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff

[3] Affirmative Defenses to Complaint for Violation of ADA

[a] Affirmative Defenses Under ADA Generally

The ADA sets forth a few express affirmative defenses that are set out in [b] through [f], *below*.ⁿ²² However, because the ADA incorporates many of Title VII's operative provisions,ⁿ²³ presumably many of the procedural defenses applicable to Title VII also apply to the ADA. Thus, the defendant may assert that the plaintiff has failed to file an EEOC charge or a civil complaint within the limitations periods,ⁿ²⁴ or that the plaintiff's action is barred by laches.ⁿ²⁵ The ADA does not incorporate Title VII's statutory defenses,ⁿ²⁶ but substantive defenses developed by Title VII case law, such as a legitimate, nondiscriminatory motive for alleged disparate treatment,ⁿ²⁷ may apply in ADA cases. A Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim under the ADA for violations which occurred before discharge of the defendant in bankruptcy is proper. Such pre-discharge claims are held to be discharged in the bankruptcy. However, damages may be recovered for post-discharge ADA violations under two scenarios. If the violation is sufficiently independent of pre-discharge violations so that it does not constitute a continuing violation of the ADA, the employee may recover damages from the date of the violation. If the violation is so related to the pre-discharge violations that the pre- and post-discharge conduct constitutes a continuing violation, the employee may recover damages from the date of the bankruptcy discharge.^{n27.1}

Forms for the foregoing procedural and substantive affirmative defenses appear in §§ 43.01[13] (FEHA affirmative defenses) and 43.10[13] (Title VII affirmative defenses), and may be adapted for use in ADA cases. For a comprehensive discussion of ADA and Title VII substantive defenses, *see* Chapter 41, Part E.

[b] FORM--Affirmative Defense Based on Business Necessity/Job-Relatedness and Undue Hardship

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that a qualification standard, test, or selection criteria challenged under the ADA because of its adverse impact on disabled individuals is job-related and consistent with business necessity, and that successful performance of the standard, test, or criteria cannot be accomplished by reasonable accommodation.ⁿ²⁸

Effective January 1, 2009, an employer must show that qualification standards, employment tests, or other selection criteria based specifically on an individual's uncorrected vision are job-related for the position in question and consistent with business necessity.^{n28.1} This form can be modified to indicate that the standard, test or other selection criteria is specifically based on an individual's uncorrected vision.

[ii] Form

AS A _____ [specify, e.g., FIRST] AFFIRMATIVE DEFENSE, defendant alleges that the _____ [specify standard, test, or selection criteria alleged in complaint to be discriminatory] is permissible and does not violate the Americans With Disabilities Act of 1990 because it has a manifest relationship to the job in question, in that _____ [specify how standard, test, or selection criteria predicts or correlates with methods of work behavior that comprise, or are relevant to, the job], and thus is necessary to the safe and efficient operation of defendant's business. Defendant also alleges that the successful performance of the _____ [specify challenged standard, test, or criteria] cannot be accomplished by reasonable accommodation, in that _____ [specify how accommodation would impose an undue hardship on the operation of defendant's business].

[c] FORM--Affirmative Defense That Individual Poses a Direct Threat to Health and Safety

[i] Comment

The form of affirmative defense set forth in [ii], *below*, is based on the ADA's premise that a lawful "qualification standard" for a job may include the requirement that an individual may not pose a direct threat to the health or safety of other individuals in the workplace.ⁿ²⁹

[ii] Form

AS A _____ [specify, e.g., FIRST] AFFIRMATIVE DEFENSE, defendant alleges that defendant _____ [specify alleged discriminatory acts, e.g., refused to hire plaintiff] because plaintiff, by reason of his/her disability, poses a direct threat to the _____ [health or safety] of other individuals in defendant's workplace in that _____ [specify nature of threat to safety or health].

[d] FORM--Affirmative Defense That Employment Action Was Based on Exempted Religious Preference

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense that may be used by a religious corporation, association, educational institution, or society that gives employment preferences to individuals of a particular religion to perform work connected with the carrying on of the religious entity's activities.ⁿ³⁰

[ii] Form

AS A _____ [specify, e.g., FIRST] AFFIRMATIVE DEFENSE, defendant alleges that defendant is a religious _____ [corporation or association or educational institution or society], and that when defendant _____ [specify alleged discriminatory acts, e.g., refused to hire plaintiff] it was comporting

with an employment policy that, with respect to the carrying on of defendant's activities, gives preference in employment to persons of the particular religion to which defendant, but not plaintiff, subscribes.

[e] FORM--Affirmative Defense That Employment Action Was Based on Refusal to Follow Religious Tenet

[i] Comment

The affirmative defense set forth in [ii], *below*, may also be used by a religious corporation, association, educational institution, or society if a challenged employment action was taken because the plaintiff refused to conform to the organization's religious tenets.ⁿ³¹

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that defendant is a religious _____ [*corporation or association or educational institution or society*], and that defendant _____ [*specify alleged discriminatory acts, e.g., refused to hire plaintiff*] because he/she refused to conform to defendant's religious tenets in that _____ [*specify*].

[f] FORM--Affirmative Defense That Food Handler Has Specified Communicable Disease

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense that may be used by a defendant who makes an adverse employment decision because an individual has a specified infectious or communicable disease that is transmitted to others through the handling of food,ⁿ³² and which cannot be eliminated by reasonable accommodation, in which case the defendant may refuse to assign or to continue to assign that individual to a job involving food handling.ⁿ³³

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that defendant _____ [*specify alleged discriminatory acts, e.g., refused to hire plaintiff as a short order cook*] because plaintiff _____ [*was or is*] infected with _____ [*specify one of the diseases enumerated by the Secretary of Health and Human Services as being transmitted through the food supply*].

[g] FORM--Affirmative Defense That Plaintiff is Not a "Qualified Individual With a Disability"

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense that may be used in cases in which plaintiff's alleged impairment may no longer be considered a *substantial* impairment due to natural or other mitigating measures which plaintiff uses to correct the impairment.ⁿ³⁴

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that plaintiff is not a qualified individual within the meaning of Title 42 *United States Code, Section 12111(8)* because _____ [*specify mitigating measures taken by plaintiff to ameliorate impairment*] thereby causing plaintiff to not be substantially impaired.

Legal Topics:

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

Civil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *42 U.S.C. § 12101 et seq.* (operative July 26, 1992).

(n2)Footnote 2. *42 U.S.C. § 12112(a)* (operative July 26, 1992).

(n3)Footnote 3. *See 42 U.S.C. § 12117(a)* (operative July 26, 1992; *42 U.S.C. § 2000e-5* applies to ADA).

(n4)Footnote 4. *See 42 U.S.C. § 12117(a)* (operative July 26, 1992); *see also 42 U.S.C. § 2000e-5(f)(1),(g)* (Title VII).

(n5)Footnote 5. *See 42 U.S.C. § 12117(a)* (operative July 26, 1992); *see also 42 U.S.C. § 2000e-5(b),(c),(e),(f)(1)* (Title VII).

(n6)Footnote 6. *See 42 U.S.C. § 12117(a)* (operative July 26, 1992; *42 U.S.C. § 2000e-5* applies to ADA).

(n7)Footnote 7. *See 42 U.S.C. § 12112(b)(3)* (operative July 26, 1992; employer may not utilize standards, criteria, or methods of administration that have effect of discriminating against persons with disabilities).

(n8)Footnote 7.1. *Josephs v. Pac. Bell* (9th Cir. 2005) 432 F.3d 1006, 1013-1014 (plaintiff asserted and jury found that employer's denial of reinstatement was based on new element of unfairness, which was perception that plaintiff was mentally ill).

(n9)Footnote 8. *See 42 U.S.C. § 12117(a)* (operative July 26, 1992); *see also 42 U.S.C. § 2000e-5(g)* (Title VII).

(n10)Footnote 9. *See 42 U.S.C. § 12117(a)* (operative July 26, 1992); *see also 42 U.S.C. § 2000e-5(k)* (Title VII.) *but see Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health and Human Resources* (2001) 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855, 866 (in nonemployment ADA action, plaintiff not entitled to attorney's fees award as prevailing party, where defendant voluntarily changed conduct after plaintiff filed lawsuit but before plaintiff obtained judicial relief).

(n11)Footnote 9.1. *See 42 U.S.C. § 1981a(a)(2)*.

(n12)Footnote 9.2. *42 U.S.C. § 1981a(d)(1)(B)*.

(n13)Footnote 9.3. *42 U.S.C. § 1981a(b)(1)*.

(n14)Footnote 9.4. *42 U.S.C. § 1981a(b)(2)*; *see 42 U.S.C. § 2000e-5(g)* (relief under Title VII).

(n15)Footnote 9.5. *See 42 U.S.C. § 1981a(b)(3)*.

(n16)Footnote 9.6. *42 U.S.C. § 1981a(b)(3)*.

(n17)Footnote 9.7. *See 42 U.S.C. § 12112(b)(5)*; *see also* discussion in ch. 41, pt. D.

(n18)Footnote 9.8. *42 U.S.C. § 1981a(a)(3)*.

(n19)Footnote 10. *See 42 U.S.C. § 12113* (operative July 26, 1992.)

(n20)Footnote 10.1. *Sutton v. United Air Lines* (1999) 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450, 459-460, *overruled by statute on other grounds* [see P.L. 110-325, §§ 1, 2]; *Murphy v. Service, Inc.* (1999) 527 U.S. 516, 119 S. Ct. 2133, 144 L. Ed. 2d 484, 491, *overruled by statute on other grounds* [see P.L. 110-325, §§ 1, 2]; *Albertson's*,

Inc. v. Kirkingburg (1999) 527 U.S. 555, 119 S. Ct. 2162, 144 L. Ed. 2d 518, 530-533 , overruled by statute on other grounds [see P.L. 110-325, §§ 1, 2].

(n21)Footnote 11. 42 U.S.C. § 12101 *et seq.* (operative July 26, 1992).

(n22)Footnote 12. See discussion in § 43.10[10][a][ii].

(n23)Footnote 13. See 42 U.S.C. § 12117(a) (operative July 26, 1992; incorporating Title VII powers, remedies, and procedures); see also 42 U.S.C. § 2000e-5(f)(3) (Title VII); Fed. R. Civ. P., Rule 8(a).

(n24)Footnote 14. 42 U.S.C. § 12112(a) (operative July 26, 1992).

(n25)Footnote 15. See generally Fed. R. Civ. P., Rule 8(a). For discussions of the disparate treatment and disparate impact theories of liability, see § 43.10[2] and ch. 41, pt. A.

(n26)Footnote 16. 42 U.S.C. § 12111(8); see ch. 40, pt. C and ch. 41, pts. B and D.

(n27)Footnote 17. See 42 U.S.C. § 12117(a) (operative July 26, 1992; incorporating Title VII powers, remedies, and procedures); see also 42 U.S.C. § 2000e-5(g) (Title VII). For a discussion of back pay, front pay, and other relief available under Title VII, see § 43.10[9].

(n28)Footnote 17.1. See 42 U.S.C. § 1981a(a)(2), (b)(2),(3); see also discussion in [1], *above*.

(n29)Footnote 17.2. See 42 U.S.C. § 1981a(a)(2), (b)(1), (3) (Pub. L. No. 102-166, § 102; Rev. Stat. § 1977A(a)(2), (b)(1), (3)); see also discussion in [1], *above*.

(n30)Footnote 18. See 42 U.S.C. § 12117(a) (operative July 26, 1992; incorporating Title VII powers, remedies, and procedures); see also 42 U.S.C. § 2000e-5(g) (Title VII). For a discussion of injunctive relief under Title VII, see § 43.10[9][d].

(n31)Footnote 19. See 42 U.S.C. § 12117(a) (operative July 26, 1992; incorporating Title VII powers, remedies, and procedures); see also 42 U.S.C. § 2000e-5(b), (c), (e), (f)(1) (Title VII); ch. 42, pt. C.

(n32)Footnote 20. See generally Fed. R. Civ. P., Rule 8(a).

(n33)Footnote 21. See 42 U.S.C. § 12117(a) (operative July 26, 1992; incorporating Title VII powers, remedies, and procedures); see also 42 U.S.C. § 2000e-5(k) (Title VII). For discussion relating to interest, costs, and attorney's fees under Title VII, see § 43.10[9][e], [f].

(n34)Footnote 22. See 42 U.S.C. § 12113 (operative July 26, 1992); see also [1], *above*, and ch. 41, pt. E.

(n35)Footnote 23. See 42 U.S.C. § 12117(a) (operative July 26, 1992; 42 U.S.C. § 2000e-5 applies to ADA); see also discussion in [1], *above*.

(n36)Footnote 24. See 42 U.S.C. § 12117(a) (operative July 26, 1992); see also 42 U.S.C. § 2000e-5(e) (period for filing Title VII EEOC charge), (f)(1) (period for filing Title VII civil action).

(n37)Footnote 25. See 42 U.S.C. § 12117(a) (operative July 26, 1992); see also 42 U.S.C. § 2000e-5(g) (court may order equitable relief for violation of Title VII).

(n38)Footnote 26. See, e.g., 42 U.S.C. § 2000e-2(e) (bona fide occupational qualification), (f) (communist party affiliation).

(n39)Footnote 27. See *Texas Dep't of Community Affairs v. Burdine* (1981) 450 U.S. 248, 254, 101 S. Ct. 1089,

67 L. Ed. 2d 207 .

(n40)Footnote 27.1. *O'Loughlin v. County of Orange* (9th Cir. 2000) 229 F.3d 871, 876-877 .

(n41)Footnote 28. *See* 42 U.S.C. § 12113(a) (operative July 26, 1992); *See also* ch. 41, pt. E. For full discussion of reasonable accommodation, *see* ch. 41, pt. D.

(n42)Footnote 28.1. 42 U.S.C. § 12113(c).

(n43)Footnote 29. *See* 42 U.S.C. § 12113(b) (operative July 26, 1992); *See also* ch. 41, pt. E.

(n44)Footnote 30. *See* 42 U.S.C. § 12113(d)(1) (operative July 26, 1992); *See also* ch. 41, pt. E.

(n45)Footnote 31. *See* 42 U.S.C. § 12113(d)(1) (operative July 26, 1992); *See also* ch. 41, pt. E.

(n46)Footnote 32. *See* 56 Fed. Reg. 22726 (1991) (Public Health Service Notice enumerating diseases transmitted through food supply); *See also* ch. 41, pt. F.

(n47)Footnote 33. 42 U.S.C. § 12113(e)(2)(operative July 26, 1992); *See also* ch. 41, pt. E. For full discussion of reasonable accommodation, *see* ch. 41, pt. D.

(n48)Footnote 34. *See* 42 U.S.C. §§ 12102, 12111(8). For further discussion *see* §§ 41.32[2][a], 41.42[2][m.1], 41.51[2][a].



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part B. FEDERAL LAW

3-43 California Employment Law § 43.11

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

§ 43.11 Age Discrimination in Employment Act

[1] Right of Action

The Age Discrimination in Employment Act (ADEA)ⁿ¹ prohibits employment discrimination based on age against persons who are at least 40 years old.ⁿ² The wording of the substantive prohibitions in the ADEA is very similar to the wording of Title VII.ⁿ³ Like Title VII, the ADEA also prohibits retaliation for opposing ADEA violations, filing charges, or otherwise participating in enforcement of the ADEA.ⁿ⁴ For full discussion of the coverage of the ADEA, *see* Chapter 40, Part C. For discussion of the substantive provisions of the ADEA, *see* Chapter 41.

The purpose of the ADEA is to promote employment of older persons based on their ability rather than age, without reliance on age-based stereotypes that tend to restrict employment opportunities of older workers.ⁿ⁵

Any person aggrieved by a violation of the ADEA may bring a civil action for legal and equitable relief, after complying with administrative charge-filing requirements.ⁿ⁶ However, the individual's right of action terminates if the EEOC commences a civil action.^{n6.1}

[2] Burden of Proof

[a] Individual Actions

Both "disparate treatment" and "disparate impact" theories of liability are available to plaintiffs seeking to prove violations of the ADEA.ⁿ⁷ Briefly, unlawful disparate treatment occurs under the ADEA when an individual is treated differently because of his or her age; unlawful disparate impact occurs when a facially neutral employment policy or practice falls more harshly on a group protected by the ADEA than on another.ⁿ⁸ For detailed discussions of these theories, *see* § 43.10[2] and Chapter 41, Part A.

In *Coleman v. Quaker Oats Co.*,^{n8.1} the Ninth Circuit held that plaintiffs, whose complaint clearly stated disparate treatment claims under the ADEA but failed to plead disparate impact claims, could not proceed with a disparate impact

theory after the close of discovery at the summary judgment stage. According to the court, the late claim would have prejudiced Quaker for lack of time to prepare an adequate defense. The court held that the plaintiffs were required either to plead the disparate impact theory in their complaints or make known their intention to pursue recovery on that theory during discovery, even though it was not pleaded in their complaints. Accordingly, the trial court did not err in dismissing the disparate impact claims.^{n8.2} The Court found that a disparate impact theory does not require proof of intent, focuses on statistical analyses and requires the defendant to develop entirely different defenses from those to a disparate treatment claim, including the job-relatedness of the challenged business practice or its business necessity. After focusing on disparate treatment in their complaints and during discovery, the employees could not turn around and surprise the employer at summary judgment on a theory that an allegation of disparate treatment in the complaints sufficiently encompassed a disparate impact theory as well.^{n8.3}

Under either the disparate treatment theory or the disparate impact theory, the ultimate burden remains with the plaintiff to prove age discrimination.^{n8.4} The Ninth Circuit Court of Appeals has adopted the "determining factor," or "but for" test, under which the plaintiff has the burden of proving that age was *one*, but not the *sole*, reason for an adverse employment action,ⁿ⁹ and that age "made a difference" in determining whether to take the action.^{n9.1} If another factor was determinative, the "reasonable factor other than age" defense discussed below may apply.ⁿ¹⁰

In disparate treatment cases under the ADEA, as under Title VII, a plaintiff must prove that discriminatory treatment was intentional.ⁿ¹¹ The elements of proof of the prima facie case established in *McDonnell Douglas Corp. v. Green*,ⁿ¹² discussed previously in connection with Title VII,ⁿ¹³ apply to ADEA cases as well.ⁿ¹⁴ Once the plaintiff has made a prima facie case of disparate treatment on account of age, the defendant has the burden of going forward with evidence that a reasonable factor other than age motivated the action.ⁿ¹⁵ The United States Supreme Court has held that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age, for example, the prevention of the vesting of the employee's pension benefits based on years of service.^{n15.1} Alternatively, the employer may defend its actions based on certain statutory defenses.ⁿ¹⁶ These defenses include (1) that age is a bona fide occupational qualification (BFOQ) for the position,ⁿ¹⁷ (2) the employment decision was based on a bona fide seniority or employee benefit plan, provided that such plan is not offered to defend a failure to hire or an involuntary retirement based on age;ⁿ¹⁸ or (3) that the discharge or discipline of the employee was for "good cause."ⁿ¹⁹ For full discussion of defenses under the ADEA, *see* Chapter 41, Part E.

Once a defendant has adduced evidence that its action was based on a reasonable factor other than age, the plaintiff must prove that the proffered reason was a pretext for discrimination.ⁿ²⁰ If the defendant offers evidence that age is a BFOQ reasonably necessary to the operation of its business, the plaintiff must show that age is not a BFOQ, with evidence aimed at establishing that the age qualification is not necessary to the operation of the business, but is merely "reasonable" or "convenient" for the employer.ⁿ²¹

Under the disparate impact theory, the plaintiff must show that a neutral rule disproportionately affects persons in the protected age group, including the plaintiff.ⁿ²² Such a showing is frequently made by statistical evidence.ⁿ²³

[b] Class Actions

Class actions under Federal Rules of Civil Procedure, Rule 23, are not available under the ADEA because the ADEA incorporates the Fair Labor Standards Act requirement that individuals opt in and obtain the written consent of the court.ⁿ²⁴ In the Ninth Circuit, similarly-situated plaintiffs may opt in an ADEA case challenging a pattern or practice of discrimination if the named plaintiff timely complied with the ADEA's notice requirements.ⁿ²⁵ In such an opt-in class action, the plaintiffs must establish a causal connection between age and the alleged discriminatory action,ⁿ²⁶ and this link may be established through statistics.ⁿ²⁷

For a discussion of the allocation of proof in class-wide or "pattern or practice" cases generally, *see* Chapter 41, Part A.

[3] Jurisdiction

State and federal courts have concurrent jurisdiction of ADEA cases.ⁿ²⁸ The ADEA itself states that the aggrieved person may bring an action "in any court of competent jurisdiction."ⁿ²⁹ However, an action under the ADEA initiated in state court is subject to removal to federal court.ⁿ³⁰

[4] Exhaustion of Administrative Remedies as Prerequisite to Civil Action Under ADEA

No civil action under the ADEA may be commenced by an individual until 60 days after a charge has been filed with the EEOC.ⁿ³¹ Charges of age discrimination under the ADEA must be filed with the EEOC within 180 days of the violation, except in states, such as California, which have a state agency to enforce a state law prohibiting age discrimination.ⁿ³² If such a state agency exists, the aggrieved person must first commence proceedings with the state agency,ⁿ³³ and then file charges with the EEOC within 300 days of the violation or within 30 days after the aggrieved individual receives notice of termination of state proceedings, whichever occurs earlier.ⁿ³⁴

When the EEOC dismisses a charge or the Commission's proceedings are otherwise terminated, the Commission will issue a Notice of Dismissal or Termination on the charge.^{n34.1} An aggrieved person whose claims are the subject of a timely pending charge may file a civil action at any time after 60 days have elapsed from the filing of the charge with the Commission without waiting for a Notice of Dismissal or Termination to be issued.^{n34.2} The right of an aggrieved person to file suit expires 90 days after receipt of the Notice of Dismissal or Termination or on commencement of an action by the Commission to enforce the right of the person.^{n34.3} In California and other states with age discrimination laws that are enforced by a state agency, the aggrieved party may not commence a civil action under the ADEA before the expiration of 60 days after the state proceedings are commenced.ⁿ³⁵ The aggrieved party is not required to comply with the state-law time limits for commencing the state proceeding in order to proceed with an action under the ADEA; he or she must only file a written, signed complaint with the state agency and then wait the prescribed 60 days.ⁿ³⁶ However, the charge to the state agency must be filed within the 300-day limit to preserve the federal right of action.ⁿ³⁷ For full discussion of administrative proceedings under the ADEA, *see* Chapter 42, Part C.

Unlike Title VII of the Civil Rights Act, the ADEA has no express requirement that a federal employee complainant seek administrative relief.^{n37.1} However, a federal employee who wishes to file suit without pursuing administrative remedies must give the EEOC notice of intent to sue at least 30 days before filing suit.^{n37.2} However, the 30-day waiting period is not jurisdictional, so that filing the civil action before the expiration of the 30 days does not deprive the court of jurisdiction.^{n37.2.1} Federal law does allow an employee the option of pursuing administrative remedies, either through the agency's EEO procedures,^{n37.3} or through the Merit Systems Protection Board.^{n37.4} The federal statute regarding the filing of "mixed cases," 5 U.S.C. § 7702, does not implicitly bar suit under the ADEA when a plaintiff has filed a Merit Systems appeal but failed either to pursue it to an adjudication on the merits or to allow 120 days to elapse without administrative action before filing suit.^{n37.5} In the Ninth Circuit, the ADEA provisions for federal employees,^{n37.6} do not require a federal employee who is under no obligation to exhaust remedies in the first place, but who elects to file an administrative complaint, to pursue that remedy to resolution on the merits before filing suit.^{n37.7}

The right of the EEOC to file a civil action under the ADEA does not depend on the filing of a charge and is not affected by the issuance of a Notice of Dismissal or Termination to any aggrieved person.^{n37.8}

[5] Parties

[a] Standing of Plaintiffs

[i] In General

Any person who is at least 40 years old who is aggrieved by discrimination on account of age in employment has

standing to sue under the ADEA.ⁿ³⁸ If an aggrieved person fails to raise any issue in an EEOC charge, he or she has no standing to sue on those issues.ⁿ³⁹ ADEA actions survive the death of the plaintiff.ⁿ⁴⁰

[ii] Class Actions

In class actions under the ADEA, putative class members are not parties to the action unless they give written consent to the suit on their behalf.ⁿ⁴¹ Plaintiffs may notify putative class members of a suit, and the trial court has discretion to facilitate such notice.ⁿ⁴²ⁿ⁴³

In class actions under the ADEA, at least one named plaintiff must have complied with the requirements of exhaustion of administrative remedies and must notify the EEOC of that party's intent to sue on behalf of others.ⁿ⁴⁴ Failure of one named plaintiff to meet these administrative requirements will cause the entire class' suit to be dismissed.ⁿ⁴⁵

■ CONSULTANT'S COMMENT:

Across the country, litigants in ADEA cases are facing a procedural crisis for which there is no universally satisfactory answer. Simply stated, the question is whether an ADEA trial should involve testimony from some, but not all, opt-in plaintiffs who speak for the whole or whether the defendant may insist that every class member present his or her individual case. The "testimony by all" option is of little consequence if the class is fewer than 10 or 20 persons. The "testimony by all" option, however, creates significant logistical hurdles if the class is much larger, for example, 500 persons. How could a defendant make out a credible case for "testimony by all?" The answer lies in the peculiar remedial structure of the ADEA.

Rule 23 of the Federal Rules of Civil Procedure, which governs Title VII class actions, does not apply to ADEA actions. Instead, the ADEA invokes Section 216(b) of the Fair Labor Standards Act,ⁿ⁴⁶ which permits "representative" actions by individuals who are "similarly situated" and who affirmatively opt-in to the action. All those who take this step become parties to the proceeding. Thus, in an ADEA action, there are no absent class members. Every potential beneficiary of the suit is known.

These seemingly simple differences between a Title VII class action and an ADEA class action are profound. That is, a federal judge who is assigned a 200-person Title VII case and a separate 200-person ADEA case will not necessarily be able to structure the trials in each matter similarly for two reasons.

First, Rule 23 requires that the harms suffered by the named class representatives and the absent members of the class be the same. Thus, Rule 23 contains a due process feature intended to insure that, if a few individuals speak for the whole, the employer is not disadvantaged, because the present and absent class members are asserting the same claims. Under Section 216(b), however, the claims of the class members are only "similar." They are not necessarily the same. Thus, there is no comparable due process assurance that the few who may be allowed to speak for the whole are actually doing so.

Second, absent class members in a Rule 23 action are not parties. In a Section 216(b) class action, all opt-ins are parties. In discrimination actions, liability is usually determined by a testimonial "face-off" between party plaintiffs and defendants. If the plaintiff does not testify, there is no case at all (excepting rare cases brought by estates of deceased plaintiffs). To deprive an employer of its traditional right to cross-examine its plaintiff "accusers" is a grave matter.

In short, one party or the other in an ADEA class action (generally the defendant) can present a strong case for "testimony by all" and seriously challenge a trial structure in which "the few speak for the many." How best to resolve this dispute likely will lie in the character of the underlying claim. The more

"same" the allegations of the opt-ins, the fewer the due process problems. The bottom line is that Rule 23 and Section 216(b) set very different guidelines for representative actions and that courts will be forced to analyze differently the trial structures they develop under each provision. *Commentary by Kirby Wilcox.*

[b] Defendants

[i] Employers Covered Under ADEA

The ADEA covers all governmental employers, including the federal government,ⁿ⁴⁷ and all persons (including individuals, partnerships, associations, corporations, and other entities) engaged in industries affecting commerce, who have at least 20 or more employees for 20 or more calendar weeks during the year of or preceding the action.ⁿ⁴⁸ The term "employer" also includes any agent of such a person.ⁿ⁴⁹ For full discussion of employers and employees covered by the ADEA, *see* Chapter 40, Part C.

[ii] Parties Named in Charge

The ADEA, as amended by the Civil Rights Act of 1991, appears to preclude the filing of a civil action against a defendant who was not named in the EEOC administrative charge.ⁿ⁵⁰ Previously, the ADEA had contained no express requirement that the defendant be named in the EEOC charge, and courts had permitted suits against unnamed parties, provided that they had adequate notice of the pendency of the EEOC charge and its contents.ⁿ⁵¹ However, the requirement that a plaintiff name a defendant in a charge filed under the ADEA is not jurisdictional. Rather, the requirement is a condition precedent to filing an action that a defendant may waive or be estopped from asserting.^{n51.1}

Employees (e.g., supervisors) may not be sued in their individual capacity under the ADEA.ⁿ⁵²

[iii] Successor Employers

In some cases, employers who have succeeded to the operations or ownership of a predecessor business have been held liable for ADEA violations of the predecessor employer or for violation of injunctions against or settlements entered into by the predecessor in ADEA litigation. For example, in *Baker v. Delta Air Lines, Inc.*,ⁿ⁵³ Delta Air Lines, which acquired and took over the operations of Western Air Lines, was held liable for violating an injunction prohibiting Western from preventing pilots age 60 and over from "downbidding" to the position of second officer or flight engineer.ⁿ⁵⁴ The court stated that the three principal factors justifying successor liability had been met: (1) continuity in operations and work force of the successor and predecessor employers; (2) notice to the successor employer of its predecessor's legal obligation; and (3) ability of the predecessor to provide adequate relief directly.ⁿ⁵⁵ The court held that the date that a successorship claim is to be evaluated for those factors is the day on which the cause of action accrues, and not the date that the action is filed.ⁿ⁵⁶

[6] Statutes of Limitation

[a] Time Period for Filing Civil Action

[i] In General

As discussed in [4], *above*, an aggrieved person under the ADEA must file a written charge with the EEOC within 180 days after the date the alleged unlawful employment practice occurred,ⁿ⁵⁷ unless there is a parallel state fair employment law and an agency empowered to enforce it.ⁿ⁵⁸ If such a state law and enforcement agency exists, the aggrieved person must file a charge with the EEOC within 300 days after the date of the alleged unlawful employment practice, or within 30 days after notice that the state agency has terminated its proceedings, whichever occurs first.ⁿ⁵⁹ The aggrieved individual must also file a claim with the appropriate state agency before commencing suit under the

ADEA, but any shorter state time limits for filing state charges do not govern timeliness of ADEA charges.ⁿ⁶⁰ A charge to the state agency should, however, be filed within the 300-day limit to preserve the federal right of action.ⁿ⁶¹ The ADEA civil action may not be commenced until 60 days after the EEOC charge has been filedⁿ⁶² and 60 days after the state agency charge is filed, unless the state proceedings terminate sooner.ⁿ⁶³

If the EEOC dismisses the charge or otherwise terminates its proceedings on the charge, the EEOC must notify the aggrieved person. An ADEA civil action may be brought against the respondent named in the charge within 90 days after the date that the aggrieved person receives this notice.ⁿ⁶⁴

A federal employee who believes he has been discriminated against because of age has two options.^{n64.1} The employee may file an administrative action directly with the EEOC, and after exhausting the administrative remedies by waiting 180 days after filing an administrative action with the EEOC, or upon receiving a final agency determination, file a civil action in district court.^{n64.2} Alternatively, a federal employee may bypass administrative proceedings and file directly in district court.^{n64.3} In that case, the employee must file a notice of intent to file a civil action with the EEOC within 180 days from the alleged discriminatory conduct, and then wait 30 days before filing the civil action.^{n64.4} Federal employees are not required to file the civil action within 180 days from the alleged discriminatory conduct.^{n64.5}

[ii] Accrual of Cause of Action

A cause of action under the ADEA does not accrue until the aggrieved person's employment opportunities are adversely affected by the employer's policy or practice.ⁿ⁶⁵ For example, in one case, the court held that the employer's age-discriminatory seniority system could not be challenged until it affected the employees who complained.ⁿ⁶⁶ In the age discrimination context, a cause of action accrues when the adverse employment decision is made and communicated to the employee.ⁿ⁶⁷ Thus, one court held that the cause of action for age discrimination accrued when the employee's supervisor informed the employee of his termination and not on the actual date of termination.ⁿ⁶⁸

[iii] Continuing Violations

The doctrine of "continuing" violations developed under Title VIIⁿ⁶⁹ applies to ADEA cases. Under this doctrine, an action is timely if it is filed within the specified time period after the most recent of an ongoing series of discriminatory or retaliatory acts.ⁿ⁷⁰ The continuing violation doctrine cannot be used to circumvent the limitation period by labelling a completed act, such as a termination, a job transfer, or discontinuance of a particular job assignment, a continuing violation.ⁿ⁷¹ The violation itself must be ongoing for the doctrine to apply, and continuing effects of past discrimination do not trigger the application of the continuing violation doctrine.ⁿ⁷² For further discussion of continuing violations, *see* Chapter 42, Part A.

[iv] Willful Violations

Prior to the Civil Rights Act of 1991,ⁿ⁷³ the ADEA incorporated the limitations provision of the Fair Labor Standards Act, which includes a three-year statute of limitations for "willful violations."ⁿ⁷⁴ In one case, for example, the court found that because the plaintiff sufficiently alleged a willful violation by alleging that she was verbally harassed in an intentional effort to torment her and that the ADEA violations continued after she filed EEOC charges, the three-year limitations period for willful violations came into play.ⁿ⁷⁵ However, this longer limitations period now appears to be applicable only to actions that were filed before the effective date of the Civil Rights Act of 1991.

[b] Tolling Principles for ADEA Limitations Periods

Limitation periods under the ADEA, like those under Title VII,ⁿ⁷⁶ⁿ⁷⁷⁻⁸⁰ are in the nature of statutes of limitation rather than jurisdictional requirements and are, therefore, subject to waiver, estoppel, and tolling under proper circumstances.ⁿ⁸¹

Equitable tolling under the ADEA may apply, for example, if the employer held out hope of reemployment.ⁿ⁸² However, in one case, the Eighth Circuit held that attempts to provide a new job do not, without more, establish conditions for equitable tolling, and that the plaintiff must show either a deliberate design by the employer or actions by the employer that would unmistakably induce the employee to delay filing the charge.ⁿ⁸³

Equitable tolling also may apply if the plaintiff had no actual knowledge of his or her rights under the ADEA because the employer failed to provide proper notice, such as the posting of legally required notices advising employees of their ADEA rights.ⁿ⁸⁴ However, the cases are split on this issue, with some applying the strict construction that compliance with posting requirements is sufficient to avoid tolling,ⁿ⁸⁵ and others applying an equitable analysis.ⁿ⁸⁶ For discussion of posting and recordkeeping requirements under the ADEA and other equal employment opportunity laws, *see* Chapter 41, Part G.

Equitable tolling under the ADEA is not available if the party consults an attorney during the statutory filing period, because the attorney's constructive knowledge of the time limits for filing is imputed to the party.ⁿ⁸⁷

[c] Effect of Deficiencies in EEOC/DFEH Proceedings

Deficiencies in the handling of an ADEA charge by the state agency do not preclude federal action on the charge.ⁿ⁸⁸ Likewise, federal agency errors that are not the fault of a party should not preclude that party from proceeding under the ADEA.ⁿ⁸⁹

[7] Res Judicata and Collateral Estoppel

Normal rules of claim preclusion and issue preclusion apply under the ADEA.ⁿ⁹⁰ If a state court action did not provide a full and fair hearing of the issues in a subsequent federal ADEA action, and if the issues in the state and federal actions are not the same, neither res judicata nor collateral estoppel bars the federal action.ⁿ⁹¹ However, if a party brings a subsequent suit in federal court under the ADEA on the same employment decisions that gave rise to a prior suit in state court, and the parties in both suits were the same, res judicata bars the subsequent suit.ⁿ⁹² Judicially unreviewed findings of a state administrative agency do not preclude subsequent ADEA proceedings.^{n92.1}

[8] Relief Available

[a] Back Pay

The remedial power of courts under the ADEA is broad. In a private action brought by the aggrieved party, the ADEA permits the court to grant "such legal or equitable relief as may be appropriate to effectuate the purposes" of the ADEA.ⁿ⁹³ Thus, courts may order back pay in an ADEA case,ⁿ⁹⁴ even when not demanded by the plaintiff, when necessary to make the plaintiff whole.ⁿ⁹⁵

In an ADEA case, back pay is the difference between the value of the compensation to which plaintiff would have been entitled but for discrimination through the date of trial and the total value of plaintiff's benefits and earnings for all other employment from the date when actionable discrimination began through the trial date.ⁿ⁹⁶ This formula applies to cases of termination as well as refusals to hire because of age.ⁿ⁹⁷

Back pay includes accrued unpaid pension benefits and excludes amounts actually paid for pensions and severance and amounts earnable by reasonable diligence by the employee.ⁿ⁹⁸ The plaintiff in an ADEA case has a duty to mitigate his or her economic losses.ⁿ⁹⁹ The question of the employee's compliance with the duty to mitigate losses is a factual one, which may be presented to the jury.ⁿ¹⁰⁰

There is conflict among the federal courts as to whether unemployment compensation should be deducted from the back pay award in an ADEA case. The Ninth Circuit Court of Appeals has held that unemployment benefits should be

deducted.ⁿ¹⁰¹ Several other circuits have ruled to the contrary.ⁿ¹⁰² The U.S. Supreme Court has held that the amount received in settlement of a claim for back pay and liquidated damages for a violation of the ADEA is taxable income.^{n102.1}

[b] Front Pay

Front pay, or compensation for lost future earnings, may be awarded in the court's discretion in an ADEA case where reinstatement of the employee is an inappropriate remedy.ⁿ¹⁰³ An ADEA plaintiff has a duty to mitigate damages to be entitled to front pay; however, a plaintiff is not required to accept work that is substantially dissimilar to that of the former position, or work that pays a substantially lower salary.^{n103.1} For full discussion of front pay in the context of Title VII cases, *see* § 43.10[9][b].

[c] Injunctive Relief

[i] Generally

The ADEA empowers courts to fashion appropriate injunctive relief including judgments compelling employment, reinstatement, or promotion.ⁿ¹⁰⁴ Courts hearing ADEA cases thus have the equitable discretion to award whatever injunctive relief will restore victims of ADEA violations to the economic position that they would have held but for those violations.ⁿ¹⁰⁵

The scope of injunctive relief is governed by the scope of the ADEA violation. For example, it was held that a nationwide injunction was inappropriate when no discriminatory company policy or practice reaching outside the immediate jurisdiction was established.ⁿ¹⁰⁶ Similarly, in a case involving discriminatory advertising, the court held that the injunction should be tailored to include all of the advertised jobs.ⁿ¹⁰⁷

[ii] Mandatory Hiring, Reinstatement, or Promotion

As noted in [i], above, the ADEA expressly empowers the courts to order hiring, reinstatement, and promotion of persons whose rights are violated.ⁿ¹⁰⁸ Courts may refuse to order equitable relief under the ADEA only for reasons which, if applied generally, would not frustrate the purposes of the Act.ⁿ¹⁰⁹ For example, if a court does not compel employment after finding an ADEA violation, it must carefully articulate its reason for not doing so.ⁿ¹¹⁰ Reinstatement as a remedy is favored over front pay under the ADEA.ⁿ¹¹¹ If the employer proves that the employer-employee relationship is poisoned by hostility, then reinstatement may be impracticable and other remedies, such as front pay,ⁿ¹¹² may be awarded in lieu of reinstatement.ⁿ¹¹³

[iii] Affirmative Action Remedies Including Goals, Quotas, and Timetables

The ADEA contains no provision for affirmative action remedies.ⁿ¹¹⁴

[iv] Retroactive Seniority

The ADEA has been interpreted to permit awards of retroactive seniority in proper cases.ⁿ¹¹⁵ However, such awards should not cause "bumping" or displacement of incumbent employees.ⁿ¹¹⁶

[d] Liquidated Damages

The ADEA provides for awards of liquidated damages in cases of "willful" violations.ⁿ¹¹⁷ In *Trans World Airlines, Inc. v. Thurston*,ⁿ¹¹⁸ the United States Supreme Court held that a violation of the ADEA is willful, for purposes of the liquidated damages provision, if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. The Court in *Thurston* stated that knowledge of the existence of the ADEA does

not establish a willful violation for purposes of assessing liquidated damages.¹¹⁹

The Court has subsequently clarified a conflict among the federal circuit courts of appeal, a number of which had declined to apply the *Thurston* willfulness standard to informal disparate treatment cases, in which age had entered into the employment decision on an ad hoc, informal basis rather than through a formal policy. The Court reasoned that it is more logical to hold that an employer's informal policy, which manifests the employer's reluctance to acknowledge its reliance on an illegal factor, should be punished, and that this factor should not cut against imposing a penalty when in fact the employer is more likely under these facts to know that its conduct is illegal.¹²⁰ The Court also disagreed with the assumption that an employer who knowingly relies on age in reaching an employment decision invariably commits a knowing or reckless violation of the ADEA. The Court explained that an employer might incorrectly but in good faith and nonrecklessly believe that it is permitted to make a particular age-based decision, in which case liquidated damages should not be imposed.¹²¹ The Court thus reaffirmed that the *Thurston* standard applies to *all* disparate treatment cases under the ADEA, including those in which there was no formal policy behind the employer's action, and that once a "willful" violation is shown, the employee need not additionally show that the employer's conduct was outrageous, provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision.¹²²¹²³

Liquidated damages double the amount of unpaid wages and benefits owing to the plaintiff as a result of the defendant's violation of the ADEA.¹²⁶

Damages for independent causes of action (such as state law claims) neither duplicate nor preclude the remedy of liquidated damages under the ADEA.¹²⁷ The U.S. Supreme Court has held that the amount received in settlement of a claim for back pay and liquidated damages for a violation of the ADEA is taxable income.^{127.1}

[e] Compensatory and Punitive Damages Generally Not Available

Most courts have stated that the ADEA is limited to the damages specifically enumerated in the ADEA and that compensatory and punitive damages are therefore not available under the ADEA.¹²⁸ Courts have generally based these holdings on the fact that the remedial provisions of the ADEA are enforced in accordance with the FLSA,¹²⁹ which makes no provision for compensatory and punitive damages, and on the existence of a liquidated damages provision in cases of willful violations¹³⁰ which evidences an intent to preclude additional recovery of punitive damages.¹³¹

[f] Prejudgment Interest

Prejudgment interest is available on ADEA awards of back pay, lost income, and/or lost pension benefits.¹³² However, the courts are divided as to whether prejudgment interest may be awarded in a case if liquidated damages are also awarded. Some courts hold that prejudgment interest and liquidated damages should not both be awarded because to do so would provide a double recovery since liquidated damages compensate plaintiffs for any delays.¹³³ Other courts have held that liquidated damages and prejudgment interest may both be awarded because they serve different purposes in making plaintiffs whole, with the function of the former designed to punish defendants for intentional violations of the ADEA, and the latter designed to compensate the plaintiff for loss of use of the money during the period that payment is withheld.¹³⁴

[g] Attorney's Fees

Prevailing plaintiffs are entitled to attorney's fee awards under the ADEA.¹³⁵ The remedial provisions of the ADEA state that the ADEA is to be enforced in accordance with the remedial provisions of the FLSA,¹³⁶ which entitle prevailing plaintiffs to attorney's fees.¹³⁷ Attorney's fees may be awarded to prevailing defendants only if the losing plaintiff has acted in bad faith in bringing the action.¹³⁸

Awards of attorney's fees to prevailing plaintiffs under the ADEA should neither be unreasonably enhanced,ⁿ¹³⁹ nor necessarily diminished by failure of plaintiff to succeed on all issues or claims.ⁿ¹⁴⁰

Under the ADEA, attorney's fees are available to prevailing plaintiffs, not to plaintiff's counsel.^{n140.1}

[8A] Admissible Evidence

In *Sprint/United Management Co. v. Mendelsohn*, ^{n140.2} an action brought under the ADEA, plaintiff sought to introduce, and the district court excluded, testimony by nonparties alleging discrimination at the hands of supervisors (of the defendant company) who played no role in the adverse employment decision challenged by the plaintiff. The district court's order excluded evidence of discrimination against employees not similarly situated to plaintiff, clarifying that plaintiff could offer only evidence of discrimination against employees who were similarly situated to her. The Court defined similarly situated employees, for these purposes, as requiring proof that the same management person was the decision-maker in any adverse employment action and that there was temporal proximity. The Tenth Circuit Court of Appeals, concluding that the district court improperly applied a *per se* rule to exclude the evidence by relying on *Aramburu v. Boeing Co.* ^{n140.3} to define "similarly situated employee," engaged in its own analysis of the relevant factors under Fed. Rules of *Evid.* 401 and 403, and remanded with instructions to admit the challenged testimony. The United States Supreme Court concluded that the evidence was neither *per se* admissible nor *per se* inadmissible and remanded to the district court with instructions to clarify the basis for its evidentiary ruling under the applicable Rules of Evidence.

The Supreme Court noted first that the Court of Appeals erred in concluding that the district court applied a *per se* rule, given the circumstances of the case and the unclear basis of the district court's decision.^{n140.4} Had the district court applied a *per se* rule excluding the evidence, however, the Court of Appeals would have been correct to conclude that it had abused its discretion. Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules.^{n140.5} Whether evidence of discrimination by other supervisors is relevant in an individual ADEA case is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. Rules 401 and 403 do not make such evidence *per se* admissible or *per se* inadmissible.^{n140.6}

[9] FORM--Complaint for Violation of ADEA--General Form

[a] Comment

[i] Use of Form

The form set forth in [b], below, is a general complaint by an individual aggrieved person for monetary and injunctive relief under the ADEA.ⁿ¹⁴¹ A complaint under the ADEA may be filed in either federal or state court.ⁿ¹⁴²

The complaint must conform to the format rules of the federal or state jurisdiction in which it is filed. If the case is brought in federal court, the plaintiff must comply with the Federal Rules of Civil Procedure and with local federal rules of court. For discussion of some federal procedural requirements for bringing a federal civil complaint, *see* § 43.10[10][a][ii]. The form in [b], below, is set forth as a complaint to be filed in the federal court, but it may be modified for use in state court.

In addition to the allegations set forth in the complaint in [b], below,ⁿ¹⁴³ illustrative forms of allegations of other specific ADEA violations can be found in the forms set forth in § 43.01 [10], and can be modified for use with this complaint as appropriate.ⁿ¹⁴⁴

[ii] Allegations

The form set forth in [b], below, contains the following allegations: (1) a preliminary statement of the substance of the complaint (preferred by some United States district courts (Optional Paragraph 1); (2) the identities of the parties plaintiff (Paragraphs 2-4)n145 and defendant (Paragraph 5);n146 (3) the basis for jurisdiction of the action (Paragraph 6);n147 (4) a specific claim under the ADEA for age discrimination (Paragraphs 7-9), including alternative paragraphs setting forth claims under disparate treatment and disparate impact theories (Paragraphs 8 and 9, respectively);n148 (5) a statement that plaintiff was qualified for the position for which he or she applied (Paragraph 10); (6) a recital of plaintiff's entitlement to monetary relief, including lost wages and other earnings and benefits, as a consequence of defendant's discriminatory actions (Paragraph 11);n149 (7) an allegation that defendant's discriminatory action was willful and that plaintiff should be awarded liquidated damages (Optional Paragraph 12);n150 (8) a recital of the need for injunctive relief, such as an order compelling defendant to hire plaintiff (Optional Paragraph 13);n151 and (9) a statement that plaintiff has exhausted his or her administrative remedies under the ADEA (Paragraph 14).n152 The complaint also sets forth a prayer requesting relief, including monetary and injunctive relief,n153 prejudgment interest,n154 and costs and attorney's fees.n155n156

[b] Form UNITED STATES DISTRICT COURT

_____ [specify, e.g., NORTHERN] DISTRICT OF CALIFORNIA

[or other, as appropriate]

_____ [name], Plaintiff,	)	
vs.	)	Civil Case No. _____
_____ [name(s)], Defendant(s).	)	INDIVIDUAL COMPLAINT
	)	FOR MONETARY AND
	)	INJUNCTIVE RELIEF FOR
	)	EMPLOYMENT
	)	DISCRIMINATION
	)	(Age Discrimination in Employment Act)
	)	(29 U.S.C. §§ 621-634)
	)	

Plaintiff alleges:

[1. This is an action brought pursuant to the Age Discrimination in Employment Act (ADEA), Title 29 *United States Code*, sections 621-634, for alleged discrimination in employment against plaintiff _____ (name) by defendant(s) in that plaintiff alleges that defendant _____ (specify discriminatory act of defendant, e.g., refused to hire plaintiff) because of plaintiff's age. By this action, plaintiff seeks the following relief pursuant to Title 29 *United States Code*, section 626(b) and (c): _____ (specify, e.g., monetary relief, including back pay, front pay, liquidated damages, prejudgment interest, attorney's fees and costs of suit, and injunctive relief, consisting of an order requiring defendant to hire plaintiff) for said discriminatory treatment of plaintiff in violation of the ADEA.]

2. Plaintiff _____ [name] is an adult person and is a resident of the County of _____, State of California.

3. Plaintiff is an individual protected by the application of the ADEA, Title 29 *United States Code*, sections 623 and 631(a), in that plaintiff is a person who at all times herein relevant was at least 40 years of age.

[EITHER]

4. Plaintiff is an employee of defendant _____ [name] and has been employed by defendant _____ [name] at _____ [place of employment] since _____ [date].

[OR]

4. Plaintiff applied for employment with defendant _____ [name] at _____ [place] on _____ [date].

[OR]

4. Plaintiff was employed by defendant _____ [name] at _____ [place of employment] from _____ [date] until _____ [date].

[CONTINUE]

5. Defendant _____ [name] is an employer as defined by the ADEA, Title 29 *United States Code*, section 630(b), in that defendant is engaged in an industry affecting commerce and has had 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

6. Jurisdiction of the subject matter of this action is established in this court, under the ADEA, Title 29 *United States Code*, section 626(c)(1), which gives jurisdiction of any action under the ADEA to any court of competent jurisdiction.

[Paragraphs 7-9 set forth specific allegations of discrimination based on unlawful failure to hire plaintiff because of his or her age. Other allegations of discrimination based on different grounds may be substituted here. see Forms set forth in §§ 43.01[9] and [10] and 43.10 [10], which can be adapted for use here.]

7. On _____ [date], defendant discriminated against plaintiff because of plaintiff's age, in that _____ [specify discriminatory acts of defendant, e.g., defendant refused to hire plaintiff] [, and defendant continues to discriminate against plaintiff in that _____ (specify continuing discriminatory practice or policy)].

8. Defendant's _____ [specify discriminatory act of defendant, e.g., failure to hire plaintiff because of plaintiff's age] constituted disparate treatment of plaintiff in violation of the ADEA in that defendant's action was done with intent to discriminate against plaintiff because of plaintiff's age.

9. In the alternative, defendant's discriminatory act of _____ [specify, e.g., failing to hire plaintiff] because of plaintiff's age was based on a policy or practice of defendant having a disparate impact on plaintiff and other persons ages 40 and above, in that it disadvantaged persons in this age group, including plaintiff, as compared to persons not in this age group, in the following manner: _____ [specify how particular policy or requirement, such as test required of potential employees over a certain age, has effect on persons age 40 and above, setting forth statistical disparity or other details].

10. As of _____ [date], and at all times herein mentioned, plaintiff was in all respects qualified for

_____ [specify employment opportunity denied, e.g., the position for which he/she applied] in that
 _____ [specify facts indicating plaintiff's qualifications for employment opportunity.]

11. Defendant's discriminatory action against plaintiff, which violated the ADEA, has caused and will continue to cause plaintiff lost wages, salary, earnings, and other economic benefits of employment, from _____ [date of discriminatory action] until _____ [specify, e.g., such time as defendant shall hire plaintiff to the position refused plaintiff because of his/her age].

[12. Defendant's discriminatory action against plaintiff, which violated the ADEA, was willful, in that _____ (allege facts to show willful nature of alleged discriminatory treatment of plaintiff), and an award of liquidated damages, in an amount equal to the award of monetary damages due to plaintiff from defendant, is appropriate in this case, pursuant to Title 29 United States Code, sections 216(b) and 626(b).]

[13. Plaintiff has no adequate remedy at law to secure relief for the deprivation of equal employment opportunity to him/her by defendant. If this court does not enter an order _____ (specify injunctive order sought, e.g., compelling defendant to hire plaintiff to the position plaintiff applied and was qualified for) plaintiff will be irreparably injured in that _____ (specify).]

14. On _____ [date], plaintiff filed a timely charge of discrimination against defendant _____ [name] with the United States Equal Employment Opportunity Commission. A copy of that charge is appended hereto, marked "Exhibit _____," and is incorporated by reference as though fully set forth. On _____ [date], plaintiff also filed a charge of discrimination with the California Department of Fair Employment and Housing pursuant to the California Fair Employment and Housing Act, Government Code Sections 12900-12996. A copy of that charge is appended hereto, marked "Exhibit _____," and is incorporated by reference as though fully set forth. [On _____ (date), plaintiff received notice that the Department of Fair Employment and Housing had terminated its proceedings on plaintiff's charge.]

WHEREFORE, plaintiff prays relief against defendant as follows:

1. For back pay [, with prejudgment interest,] from the first date on which defendant violated plaintiff's rights under the ADEA, to and including the date of judgment in this case;

[2. For front pay, for the period from the date of judgment to the date at which plaintiff actually is placed by defendant in the position that he or she would be in, but for the discrimination;]

[3. For an amount of liquidated damages, equal to the award of back pay and other lost economic benefits, due to the willfulness of defendant's violation of plaintiff's rights under the ADEA;]

[4. For injunctive relief, including but not limited to _____ (specify injunctive relief desired, e.g., an order compelling defendant to hire plaintiff to the position he/she applied for), and all other injunctive relief required to make plaintiff whole for the losses caused by defendant's violation of plaintiff's rights under the ADEA;]

5. For costs of suit herein incurred;

6. For reasonable attorney's fees pursuant to Title 29, United States Code Sections 216(b) and 626(b); and

7. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff

[Add verification, if desired.]

[10] Reserved

[10A] FORM--Allegation That Defendant's Employee Benefit Plan Is Subterfuge for Intentional Discrimination

[a] Comment

The form set forth in [b], *below*, contains allegations stating that the defendant's employee benefit plan is a subterfuge for intentional age discrimination by the defendant with regard to the nonfringe-benefit aspects of the employment relationship, in violation of the ADEA.ⁿ¹⁵⁷ These allegation may be used to challenge age-based distinctions based on plans that were established (and not thereafter modified or otherwise affected) before October 16, 1990.ⁿ¹⁵⁸ With respect to employee benefit plans established, modified, or otherwise affected after that date, the "bona fide employee benefit plan" exemption is an affirmative defense. That is, the burden is on the employer to prove that its age-based distinctions based on such a plan are lawful.ⁿ¹⁵⁹ For a form of affirmative defense for use in such cases, *see* [11][d], *below*.

In an appropriate case, these allegations may be used in place of or in addition to the allegations in Paragraphs 7-9 of the general complaint for violation of the ADEA set forth in [8][b], *above*.

For full discussion of bona fide employee benefit plans, *see* Chapter 41, Part F.

[b] Form

1. On _____ [date], and continuing until _____ [_____ (date) or the present time], defendant instituted an employee benefit plan that is a subterfuge for defendant's intentional discrimination in violation of the Age Discrimination in Employment Act, in that it discriminated against the plaintiff(s) [and others] on the basis of his/her/their age in the following manner: _____[specify].

[11] Affirmative Defenses to Complaint for Violation of ADEA

[a] Affirmative Defenses Under ADEA Generally

The following affirmative defenses to the California FEHA and Title VII are also available under the ADEA. The forms for these defenses, cited below, may be modified for use, as appropriate, as affirmative defenses in answers to ADEA complaints:

1. Failure to exhaust administrative remedies;ⁿ¹⁶⁰
2. Failure to file within limitations period;ⁿ¹⁶¹
3. Failure to state cause of action or claim for relief;ⁿ¹⁶²
4. Laches;ⁿ¹⁶³
5. Bona fide occupational qualification (BFOQ);ⁿ¹⁶⁴

6. Job-relatedness;ⁿ¹⁶⁵ and

7. Bona fide seniority system.ⁿ¹⁶⁶

For full discussion of these defenses, *see* Chapter 41, Part F.

If the defendant is a state, it can assert its sovereign immunity to suit under the *Eleventh Amendment* to deprive the court of jurisdiction under the ADEA.^{n166.1} However, a state may waive its *Eleventh Amendment* immunity on a case-by-case basis by raising the defense and subjecting itself to suit under the ADEA.^{n166.2}

It is not unlawful under the ADEA for an employer to discharge or otherwise discipline an employee for "good cause."ⁿ¹⁶⁷ However, this defense is not an affirmative defense that must be specifically pleaded, but rather, is a form of denial of plaintiff's cause of action.ⁿ¹⁶⁸ The ADEA specifies other defenses to a complaint of age discrimination under the ADEA. These are listed in the subsections below, with accompanying forms.

[b] FORM--Affirmative Defense That Differentiation Is Based on Reasonable Factors Other Than Age

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that the defendant's action is justified because the differentiation was based on reasonable factors other than age, a statutory defense under the ADEA.ⁿ¹⁶⁹ When appropriate, this affirmative defense can be added to a general answer to an ADEA complaint.

For full discussion of this defense, *see* Chapter 41, Part E.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that the differentiation in treatment complained of by plaintiff, namely _____ [*specify practice alleged in complaint to be discriminatory*], is permissible and is not a violation of the Age Discrimination in Employment Act because it was based on reasonable factors other than age, namely _____ [*specify*].

[c] FORM--Affirmative Defense That Employee is Employed in Workplace in Foreign Country and Compliance With ADEA Would Violate Foreign Laws

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that the employee is employed in a workplace in a foreign country, and that compliance with the ADEA would violate that country's laws.ⁿ¹⁷⁰ This is a statutory defense under the ADEA.ⁿ¹⁷¹ When appropriate, this affirmative defense can be added to a general answer to an ADEA complaint.

For a complete discussion of the "foreign laws" defense, *see* Chapter 41, Part E.

[ii] Form

AS A _____ [*specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that:

1. Plaintiff is employed by defendant in _____ [*specify location of workplace*], which is located in _____ [*specify foreign country*].

2. The practices complained of by plaintiff, namely _____ [*specify*], are required by the laws of _____ [*specify foreign country*], specifically _____ [*specify foreign law requiring the particular employment practice*]. Even assuming that such practices violate the Age Discrimination in Employment Act (which defendant does not admit), if defendant were to treat plaintiff otherwise than as alleged in plaintiff's complaint, defendant would be in violation of the laws of _____ [*specify foreign country*], specifically _____ [*specify foreign laws that would be violated*].

[d] FORM--Affirmative Defense That Employer Observed the Terms of a Bona Fide Employee Benefit Plan

[i] Comment

The form set forth in [ii], *below*, is an affirmative defense stating that the defendant's actions were based on a bona fide employee benefit plan, either because (1) cost considerations required the employer's actions,ⁿ¹⁷² or (2) the plan provided incentives for voluntary early retirement which did not violate the ADEA's purposes.ⁿ¹⁷³ This affirmative defense is applicable only to (1) employee benefit plans established or modified on or after October 16, 1990, and (2) other conduct occurring more than 180 days after that date.ⁿ¹⁷⁴ When appropriate, it may be added to a general answer to an ADEA complaint.

[ii] Form

AS A _____ [*Specify, e.g., FIRST*] AFFIRMATIVE DEFENSE, defendant alleges that _____ [its employee benefit plan is bona fide because the actual amount of _____ (payments made *or* costs incurred) on behalf of the plaintiff was equal to that _____ (made *or* incurred) on behalf of employees under 40 years of age *or* the plaintiff retired pursuant to a voluntary early retirement incentive plan that is consistent with the relevant purposes the ADEA].

[12] EEOC Administrative Records: Confidentiality, Access, and Admissibility

[a] Confidentiality and Access

The ADEA, unlike Title VII,ⁿ¹⁷⁵ does not contain specific provisions providing for the confidentiality of records. However, a regulation promulgated by the EEOC pursuant to the ADEA states that the identity of a complainant, confidential witness, or aggrieved person on whose behalf a charge was filed ordinarily is not disclosed without prior written consent, unless necessary in a court proceeding.ⁿ¹⁷⁶

For full discussion of rules relating to confidentiality of and access to EEOC records, *see* Chapter 42, Part C.

[b] Admissibility

The nonconfidential records of the EEOC relating to an ADEA chargeⁿ¹⁷⁷ may be admissible at trial. For example, EEOC's form letter in an ADEA case stating that probable cause existed for maintaining suit may be admitted and examined by the jury.ⁿ¹⁷⁸ Generally, the admissibility of EEOC findings of discrimination under the ADEA should parallel the admissibility of EEOC findings of discrimination under Title VII, since EEOC's functions under the two laws are essentially identical.ⁿ¹⁷⁹

[13] Availability of Jury Trial

In an action by an aggrieved party under the ADEA, either party is entitled to a jury trial of any factual issue in the action for recovery of monetary relief, regardless of whether equitable relief is sought by any party in the action.ⁿ¹⁸⁰

[14] Jury Instructions

A mixed-motives jury instruction is never proper in an ADEA case, because the burden of persuasion never shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA.ⁿ¹⁸¹

Legal Topics:

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

Labor & Employment Law Discrimination Age Discrimination General Overview Labor & Employment Law Discrimination Age Discrimination Coverage & Definitions General Overview Labor & Employment Law Discrimination Age Discrimination Enforcement Labor & Employment Law Discrimination Age Discrimination Exhaustion of Remedies Labor & Employment Law Discrimination Age Discrimination Proof Burdens of Proof

FOOTNOTES:

(n1)Footnote 1. *See* 29 U.S.C. § 621 *et seq.*

(n2)Footnote 2. *See* 29 U.S.C. §§ 623, 631(a).

(n3)Footnote 3. *Compare* 29 U.S.C. § 623 (ADEA) with 42 U.S.C. § 2000e-2 (Title VII). *See also* *Monce v. City of San Diego* (9th Cir. 1990) 895 F.2d 560, 561 (complementary provisions of Title VII and ADEA are construed consistently).

(n4)Footnote 4. *Compare* 29 U.S.C. § 623(d) (ADEA) with 42 U.S.C. § 2000e-3(a) (Title VII).

(n5)Footnote 5. *See* 29 U.S.C. § 621(b); *Western Airlines, Inc. v. Criswell* (1985) 472 U.S. 400, 409-414, 105 S. Ct. 2743, 86 L. Ed. 2d 321; *EEOC v. County of Santa Barbara* (9th Cir. 1982) 666 F.2d 373, 376.

(n6)Footnote 6. *See* 29 U.S.C. § 626(c), (d); *see also* discussion in [4], *below*.

(n7)Footnote 6.1. *See* 29 U.S.C. § 626(c)(1); *E.E.O.C. v. Pan American World Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1505; *See also* ch. 40, pt. C.

(n8)Footnote 7. *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 120-125, 105 S. Ct. 613, 83 L. Ed. 2d 523; *Katz v. Regents of the University of California* (9th Cir. 2000) 229 F.3d 831, 835 (disparate impact); *Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 855-856; *Douglas v. Anderson* (9th Cir. 1981) 656 F.2d 528, 532-533; *Loeb v. Textron, Inc.* (1st Cir. 1979) 600 F.2d 1003, 1013-1015; but *see* *Laugesen v. Anaconda Co.* (6th Cir. 1975) 510 F.2d 307, 312-313.

(n9)Footnote 8. *See* *Goodman v. Heublein, Inc.* (2d Cir. 1981) 645 F.2d 127, 131 n.6; *see also* *Teamsters v. United States* (1977) 431 U.S. 324, 335-336 & n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII).

(n10)Footnote 8.1. *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271.

(n11)Footnote 8.2. *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1291-1294; *see also* *Josey v. John R. Hollingsworth Corp.* (3d Cir. 1993) 996 F.2d 632.

(n12)Footnote 8.3. *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1292-1293.

(n13)Footnote 8.4. *See* *Kelly v. American Standard, Inc.* (9th Cir. 1981) 640 F.2d 974, 984 (quoting *Smith v. Flax* (4th Cir. 1980) 618 F.2d 1062, 1066).

(n14)Footnote 9. *Note:* In *Burlington Northern & Santa Fe Railway Co. v. White* (2006) 126 S. Ct. 2405, 165 L.

Ed. 2d 345, discussed at § 41.130[1A], *above*, the United States Supreme Court held that the scope of the anti-retaliation provision of Title VII of the Civil Rights Act of 1964 extends beyond workplace-related or employment-related retaliatory acts and harm, so that an employee need only allege and prove "adverse action" rather than "adverse employment action" under Title VII's anti-retaliation provision. No court has yet held that the ADEA and the anti-retaliation provision of Title VII are to be construed coextensively, so case law requiring "adverse employment action" under the ADEA still appears to be good law.

(n15)Footnote 9.1. *See Cancellier v. Federated Department Stores* (9th Cir. 1982) 672 F.2d 1312, 1318; *Kelly v. American Standard, Inc.* (9th Cir. 1981) 640 F.2d 974, 984.

(n16)Footnote 10. *See Kelly v. American Standard, Inc.* (9th Cir. 1981) 640 F.2d 974, 984; *see also* discussion in [11][b], *below*.

(n17)Footnote 11. *See Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1421; *Lovelace v. Sherwin-Williams Co.* (4th Cir. 1982) 681 F.2d 230, 240-241.

(n18)Footnote 12. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668.

(n19)Footnote 13. *See* discussion in § 43.10[2][b][i].

(n20)Footnote 14. *See, e.g., Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1421; *Oxman v. WLS-TV* (7th Cir. 1988) 846 F.2d 448, 452; *Loeb v. Textron, Inc.* (1st Cir. 1979) 600 F.2d 1003, 1014-1017.

(n21)Footnote 15. *See 29 U.S.C. § 623(f)(1)*; *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1421 (burden is on employer to produce some evidence that it had legitimate, nondiscriminatory reasons for action); *EEOC v. Westinghouse Elec. Corp.* (3d Cir. 1983) 725 F.2d 211, 222-223; *Marshall v. Westinghouse Elec. Corp.* (5th Cir. 1978) 576 F.2d 588, 591-592; *See also* ch. 41, pt. A.

(n22)Footnote 15.1. *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610-613, 113 S. Ct. 1701, 123 L. Ed. 2d 338.

(n23)Footnote 16. *See 29 U.S.C. § 623(f)*.

(n24)Footnote 17. *See 29 U.S.C. § 623(f)(1)*; *Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400, 412-414, 105 S. Ct. 2743, 86 L. Ed. 2d 321 (BFOQ exception under ADEA is to be narrowly construed); *E.E.O.C. v. Boeing Co.* (9th Cir. 1988) 843 F.2d 1213, 1214, 1217-1220 (same).

(n25)Footnote 18. *See 29 U.S.C. § 623(f)(2)*. It is not unlawful to observe the terms of bona fide employee benefit plans that are established, modified, or otherwise affected on or after October 16, 1990 (1) in which age-based distinctions are made because of specified cost justifications, or (2) that are voluntary early retirement incentive plans consistent with the ADEA's purposes. *see 29 U.S.C. § 623(f)(2)(B)(i)*; *see also 29 C.F.R. § 1625.10(a)(1)* (EEOC "cost-justification rule"). Bona fide employee benefit plans established before October 16, 1990 (and not thereafter modified or otherwise affected) are lawful as long as they are not subterfuge to evade the purposes of the ADEA. *see 29 U.S.C. § 623(f)(2)*, prior to amendment by Pub. L. No. 101-433. For a full discussion of the ADEA "bona fide employee benefit plan" exemption, *see* ch. 41, pt. E.

(n26)Footnote 19. *See 29 U.S.C. § 623(f)(3)*; *see, e.g., Douglas v. Anderson* (9th Cir. 1981) 656 F.2d 528, 533.

(n27)Footnote 20. *See Perez v. Curcio* (9th Cir. 1988) 841 F.2d 255, 258 (as long as some evidence of pretext has been introduced, case should go to jury); *Coburn v. Pan American World Airways, Inc.* (D.C. Cir. 1983) 711 F.2d 339, 342-343; *Douglas v. Anderson* (9th Cir. 1981) 656 F.2d 528, 533-535; *Marshall v. Westinghouse Elec. Corp.* (5th Cir. 1978) 576 F.2d 588, 591-592 (employer need not prove that the differentiating factors other than age were applied

consistently to all similarly situated employees, because burden of proving pretext is on plaintiff).

(n28)Footnote 21. *Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400, 406-406, 414-419, 105 S. Ct. 2743, 86 L. Ed. 2d 321 .

(n29)Footnote 22. *Yartzoff v. State of Or., Emp. Div.* (9th Cir. 1984) 745 F.2d 557, 558 .

(n30)Footnote 23. *See Yartzoff v. State of Or., Emp. Div.* (9th Cir. 1984) 745 F.2d 557, 558 .

(n31)Footnote 24. 29 U.S.C. §§ 216(b), 626(b); *see, e.g., Woods v. New York Life Ins. Co.* (7th Cir. 1982) 686 F.2d 578, 579-580 .

(n32)Footnote 25. *Naton v. Bank of California* (9th Cir. 1981) 649 F.2d 691, 697 ; *Bean v. Crocker Nat. Bank* (9th Cir. 1979) 600 F.2d 754, 759 .

(n33)Footnote 26. *See Cancellier v. Federated Department Stores* (9th Cir. 1982) 672 F.2d 1312, 1318, 1315-1316 , *cert. denied*, 459 U.S. 859 .

(n34)Footnote 27. *See Haskell v. Kaman Corp.* (2d Cir. 1984) 743 F.2d 113, 119 .

(n35)Footnote 28. *Chapman v. City of Detroit* (6th Cir. 1986) 808 F.2d 459, 463 ; *Baldwin v. Sears, Roebuck and Co.* (5th Cir. 1982) 667 F.2d 458, 461 ; *Jacobi v. High Point Label, Inc.* (M.D.N.C. 1977) 442 F. Supp. 518, 520-521 ; *cf. Oscar Mayer & Co. v. Evans* (1979) 441 U.S. 750, 756-757, 99 S. Ct. 2066, 60 L. Ed. 2d 609 (state and federal agencies have concurrent administrative jurisdiction of ADEA charges). *See also* 29 C.F.R. 1626.18(a) (aggrieved person may file civil action against respondent named in charge filed with EEOC in either federal or state court under section 7 of ADEA).

(n36)Footnote 29. 29 U.S.C. § 626(c)(1).

(n37)Footnote 30. *Baldwin v. Sears, Roebuck and Co.* (5th Cir. 1982) 667 F.2d 458, 461 ; *Jacobi v. High Point Label, Inc.* (M.D.N.C. 1977) 442 F. Supp. 518, 521 .

(n38)Footnote 31. 29 U.S.C. § 626(d); *see* 29 C.F.R. § 1626.18(b) (aggrieved person whose claims are subject of timely pending charge may file civil action at any time after 60 days have elapsed from filing charge with EEOC or as provided in 29 C.F.R. § 1626.12 without waiting for Notice of Dismissal or Termination to be issued); *Wilson v. Westinghouse Elec. Corp.* (8th Cir. 1988) 838 F.2d 286, 289 .

(n39)Footnote 32. 29 U.S.C. § 626(d); *see also* 29 U.S.C. § 633(b). In California, age discrimination is prohibited under the FEHA. *see Gov. Code* §§ 12926(b), 12940. The DFEH and FEHC are empowered to administer the FEHA in California. *see Gov. Code* §§ 12930, 12935. For discussion of administrative enforcement of state discrimination claims generally, *see* ch. 42, pt. B.

(n40)Footnote 33. *See* 29 U.S.C. § 633(b); *Oscar Mayer & Co. v. Evans* (1979) 441 U.S. 750, 758, 99 S. Ct. 2066, 60 L. Ed. 2d 609 .

(n41)Footnote 34. 29 U.S.C. § 626(d).

(n42)Footnote 34.1. 29 C.F.R. § 1626.17(a)(1). For discussion of the Notice of Dismissal or Termination, *see* § 42.71A.

(n43)Footnote 34.2. 29 C.F.R. § 1626.18(b).

(n44)Footnote 34.3. 29 C.F.R. § 1626.18(c).

(n45)Footnote 35. 29 U.S.C. § 633(b); 29 C.F.R. § 1626.18(b); see *Oscar Mayer & Co. v. Evans* (1979) 441 U.S. 750, 758, 99 S. Ct. 2066, 60 L. Ed. 2d 609 .

(n46)Footnote 36. See *Oscar Mayer & Co. v. Evans* (1979) 441 U.S. 750, 759-762, 99 S. Ct. 2066, 60 L. Ed. 2d 609 ; 29 U.S.C. § 633(b).

(n47)Footnote 37. *Aronsen v. Crown Zellerbach* (9th Cir. 1981) 662 F.2d 584

(n48)Footnote 37.1. *Bankston v. White* (9th Cir. 2003) 345 F.3d 768, 770 , citing *Stevens v. Dep't of Treasury* (1991) 500 U.S. 1, 12, 111 S. Ct. 1562, 114 L. Ed. 2d 1 (Stevens, J., concurring and dissenting).

(n49)Footnote 37.2. *Bankston v. White* (9th Cir. 2003) 345 F.3d 768, 770 . See 29 U.S.C. § 633a(d) (allowing individual to file suit without filing EEOC complaint but requiring notice to EEOC of intent to sue); 29 C.F.R. § 1614.201(a) (as alternative to filing administrative complaint, aggrieved individual may file civil action in United States district court under ADEA).

(n50)Footnote 37.2.1. *Forest v. Chertoff* (9th Cir. 2007) 500 F.3d 920, 2007 U.S. App. LEXIS 20632, *9-*21 (time prescriptions in 29 U.S.C. § 633a, including 30-day waiting period, are not jurisdictional and may be forfeited, waived, or equitably modified).

(n51)Footnote 37.3. See 29 U.S.C. § 633a(b); 29 C.F.R. § 1614.106.

(n52)Footnote 37.4. *Bankston v. White* (9th Cir. 2003) 345 F.3d 768, 770 . See 5 U.S.C. § 7702 (providing procedures for "mixed cases" in which employment action is reviewable by Board and also is basis for discrimination claim).

(n53)Footnote 37.5. *Bankston v. White* (9th Cir. 2003) 345 F.3d 768, 770-772 .

(n54)Footnote 37.6. 29 U.S.C. § 633a.

(n55)Footnote 37.7. *Bankston v. White* (9th Cir. 2003) 345 F.3d 768, 772-777 (federal employee's dismissal of his Merit Systems appeal did not bar jurisdiction over his ADEA suit); see also *Bak v. Postal Serv.* (9th Cir. 1995) 52 F.3d 241 (claimant no longer required to exhaust administrative remedies with regard to age discrimination claim prior to filing civil suit); *Adler v. Espy* (7th Cir. 1994) 35 F.3d 263 (federal employee may bring lawsuit under ADEA despite having earlier abandoned EEOC proceedings); *Bornholdt v. Brady* (2d Cir. 1989) 869 F.2d 57, 63 (remarking in dictum that new EEOC regulation altered exhaustion rule); *Langford v. United States Army Corps of Engineers* (6th Cir. 1988) 839 F.2d 1192, 1194 (ADEA, unlike Civil Rights Act, does not require final agency action prior to filing suit, permitting ADEA case to proceed simultaneously with EEO proceedings). But see *Economou v. Caldera* (2d Cir.) 286 F.3d 144 , cert. denied, 123 S. Ct. 447 (2002) (reaffirming exhaustion requirement for claimant who abandoned Merit Systems appeal, even though requirement led to forfeiture); *McGinty v. United States Dep't of Army* (7th Cir. 1990) 900 F.2d 1114, 1116-1118 (dismissing suit filed during pendency of EEOC proceeding, and suit filed after EEOC proceeding dismissed for untimeliness); *White v. Frank* (5th Cir. 1990) 895 F.2d 243, 244 (per curiam) (ADEA plaintiff who chooses to appeal employer's determination to EEOC must await final action by EEOC before filing action in federal district court); *Rivera v. United States Postal Serv.* (9th Cir. 1987) 830 F.2d 1037 (joining courts that found exhaustion rule implied in ADEA for plaintiffs who voluntarily pursued administrative remedies; *Castro v. United States* (1st Cir. 1985) 775 F.2d 399, 404 (per curiam) (barring jurisdiction over ADEA lawsuit where plaintiff dismissed administrative proceeding before filing suit); *Purtill v. Harris* (3d Cir. 1981) 658 F.2d 134, 138 (federal employee's voluntary election to pursue administrative remedies created exhaustion requirement).

(n56)Footnote 37.8. 29 C.F.R. § 1626.19. For discussion of issuance of a Notice of Dismissal or Termination, see § 42.71A.

(n57)Footnote 38. *See* 29 U.S.C. §§ 626(c)(1), 631(a).

(n58)Footnote 39. *Blankenship v. Ralston Purina Co.* (N.D. Ga. 1973) 62 F.R.D. 35, 40-41 .

(n59)Footnote 40. *Asklar v. Honeywell Inc.* (D. Conn. 1982) 95 F.R.D. 419, 423-424 .

(n60)Footnote 41. *See* 29 U.S.C. §§ 216(b), 626(b) (remedial provisions of Fair Labor Standard Act, requiring class members to give consent to being made parties, apply to civil actions under ADEA); *La Chapelle v. Owens-Illinois, Inc.* (5th Cir. 1975) 513 F.2d 286, 289 ; *Lusardi v. Xerox Corp.* (D.N.J. 1983) 99 F.R.D. 89, 92 ; *Cooke v. Reynolds Metals Company* (E.D. Va. 1975) 65 F.R.D. 539, 540 ; *Hull v. Continental Oil Co.* (S.D. Tex. 1973) 58 F.R.D. 636, 637 .

(n61)Footnote 42. *See Hoffman-La Roche Inc. v. Sperling* (1989) 493 U.S. 165, 169, 110 S. Ct. 482, 107 L. Ed. 2d 480 .

(n62)Footnote 43. [Reserved]

(n63)Footnote 44. *Naton v. Bank of California* (9th Cir. 1981) 649 F.2d 691, 696-697 .

(n64)Footnote 45. *See Naton v. Bank of California* (9th Cir. 1981) 649 F.2d 691, 696-697 .

(n65)Footnote 46. *See* 29 U.S.C. § 216(b).

(n66)Footnote 47. *See* 29 U.S.C. §§ 630(b), 633a(a).

(n67)Footnote 48. 29 U.S.C. § 630(b).

(n68)Footnote 49. 29 U.S.C. § 630(b).

(n69)Footnote 50. *See* 29 U.S.C. § 626(e) which provides that aggrieved person may bring a civil action "against the respondent named in the charge" within 90 days after receipt of EEOC's notice that it is dismissing charges or otherwise terminating its proceedings.

(n70)Footnote 51. *See Barkley v. Carraux* (S.D. Tex. 1982) 533 F. Supp. 242, 244 .

(n71)Footnote 51.1. *Sanchez v. Pacific Powder Co.* (9th Cir. 1998) 147 F.3d 1097, 1100-1101 (analogizing to Title VII, court held that although unnamed defendant asserted noncompliance in answer, failure to raise issue in post-trial motions or opening appellate brief constituted waiver); *see Albano v. Schering-Plough Corp.* (9th Cir. 1990) 912 F.2d 384, 387 (plaintiff's failure to include particular claim in original EEOC charge is not jurisdictional bar to bringing claim as part of future court action).

(n72)Footnote 52. *Miller v. Maxwell's Intern. Inc.* (9th Cir. 1993) 991 F.2d 583, 587-588 .

(n73)Footnote 53. *Baker v. Delta Air Lines* (9th Cir. 1993) 6 F.3d 632 .

(n74)Footnote 54. *Baker v. Delta Air Lines* (9th Cir. 1993) 6 F.3d 632, 639 .

(n75)Footnote 55. *Baker v. Delta Air Lines* (9th Cir. 1993) 6 F.3d 632, 637 .

(n76)Footnote 56. *Baker v. Delta Air Lines* (9th Cir. 1993) 6 F.3d 632, 638 .

(n77)Footnote 57. 29 U.S.C. § 626(d)(1); *see Oscar Mayer & Co. v. Evans* (1979) 441 U.S. 750, 762, 99 S. Ct. 2066, 60 L. Ed. 2d 609 ; *McClinton v. Alabama By-Products Corp.* (11th Cir. 1984) 743 F.2d 1483, 1485-1486 .

(n78)Footnote 58. *See* 29 U.S.C. §§ 626(d)(2), 633(b).

(n79)Footnote 59. 29 U.S.C. § 626(d)(2).

(n80)Footnote 60. *See Oscar Mayer & Co. v. Evans* (1979) 441 U.S. 750, 762, 99 S. Ct. 2066, 60 L. Ed. 2d 609 ; 29 U.S.C. § 633(b).

(n81)Footnote 61. *Aronsen v. Crown Zellerbach* (9th Cir. 1981) 662 F.2d 584

(n82)Footnote 62. 29 U.S.C. § 626(d); *see Dempsey v. Pacific Bell Co.* (9th Cir. 1986) 789 F.2d 1451, 1452-1453 (action brought sooner than 60 days from filing of EEOC charge is jurisdictionally barred).

(n83)Footnote 63. 29 U.S.C. § 633(b).

(n84)Footnote 64. 29 U.S.C. § 626(e); 29 C.F.R. § 1626.18(c).

(n85)Footnote 64.1. 29 U.S.C. § 633a. For discussion of these options, see [4], above.

(n86)Footnote 64.2. 29 C.F.R. § 1614.201(c).

(n87)Footnote 64.3. 29 U.S.C. § 633a(d); 29 C.F.R. § 1614.201(a).

(n88)Footnote 64.4. 29 U.S.C. § 633a(d).

(n89)Footnote 64.5. *Forester v. Chertoff* (9th Cir. 2007) 500 F.3d 920, 2007 U.S. App. LEXIS 20632, *5-*9 . *See Stevens v. Department of Treasury* (1991) 500 U.S. 1, 7, 111 S. Ct. 1562, 114 L. Ed. 2d 1 (federal employee's filing of notice of intent to sue 176 days after alleged discriminatory action but not filing lawsuit until more than 30 days after giving notice satisfied bypass provision by giving notice of intent to sue within 180 days from the date of alleged discriminatory conduct and filing his civil action more than 30 days after he gave notice of intent to sue).

(n90)Footnote 65. *Morelock v. NCR Corp.* (6th Cir. 1978) 586 F.2d 1096, 1102-1103 .

(n91)Footnote 66. *Morelock v. NCR Corp.* (6th Cir. 1978) 586 F.2d 1096 .

(n92)Footnote 67. *Clark v. Resistoflex Co.* (M.D. La. 1987) 665 F. Supp. 1216, 1219 , *rev'd and remanded in part on other grounds*, 854 F.2d 762 (5th Cir. 1988) ; *cf. Delaware State College v. Ricks* (1980) 449 U.S. 250, 259, 101 S. Ct. 498, 66 L. Ed. 2d 431 (accrual of cause of action under Title VII).

(n93)Footnote 68. *Clark v. Resistoflex Co.* (M.D. La. 1987) 665 F. Supp. 1216, 1219 , *rev'd and remanded in part on other grounds*, 854 F.2d 762 (5th Cir. 1988) ; *see Wilson v. Westinghouse Elec. Corp.* (8th Cir. 1988) 838 F.2d 286, 288 (plaintiff's argument that limitation period began to run at expiration of severance benefits and not at time of termination letter was rejected).

(n94)Footnote 69. For discussion, *see* § 43.10[6][a][ii].

(n95)Footnote 70. *See EEOC v. Westinghouse Elec. Corp.* (3d Cir. 1983) 725 F.2d 211, 219 ; *Malarkey v. Texaco, Inc.* (S.D.N.Y. 1983) 559 F. Supp. 117, 121 , *aff'd*, 704 F.2d 674, 675 (2d Cir. 1983) .

(n96)Footnote 71. *Malarkey v. Texaco, Inc.* (S.D.N.Y. 1983) 704 F.2d 674, 675 (2d Cir. 1983) .

(n97)Footnote 72. *See Yokum v. St. Johnsbury Trucking Co., Inc.* (D. Conn. 1984) 595 F. Supp. 1532, 1533-1534 (layoffs do not constitute a continuing violation); *Goldman v. Sears, Roebuck & Co.* (1st Cir. 1979) 607 F.2d 1014, 1018 .

(n98)Footnote 73. *See* Pub. L. No. 102-166, § 115, amending 29 U.S.C. § 626(e).

(n99)Footnote 74. *See* 29 U.S.C. § 255(a); *Miller v. Maxwell's Intern. Inc.* (9th Cir. 1993) 991 F.2d 583, 586 .

(n100)Footnote 75. *Miller v. Maxwell's Intern. Inc.* (9th Cir. 1993) 991 F.2d 583, 586 .

(n101)Footnote 76. *cf.* *Zipes v. Trans World Airlines, Inc.* (1982) 455 U.S. 385, 102 S. Ct. 1127, 71 L. Ed. 2d 234 . For discussion, *see* § 43.10[6].

(n102)Footnote 77-80. [Reserved]

(n103)Footnote 81. *Ott v. Midland-Ross Corp.* (6th Cir. 1975) 523 F.2d 1367, 1370 ; *Potter v. Continental Trailways Inc.* (D. Colo. 1979) 480 F. Supp. 207 , 210-211; *see* *Kazanzas v. Walt Disney World Co.* (11th Cir. 1983) 704 F.2d 1527, 1530 , *cert. denied*, 464 U.S. 982 (1983) (reviewing cases allowing equitable relief but holding that relief was unavailable under facts).

(n104)Footnote 82. *See* *Potter v. Continental Trailways Inc.* (D. Colo. 1979) 480 F. Supp. 207, 210-211 .

(n105)Footnote 83. *See* *Wilson v. Westinghouse Elec. Corp.* (8th Cir. 1988) 838 F.2d 286, 288 ; *Funk v. Sperry Corp.* (9th Cir. 1988) 842 F.2d 1129, 1134 (equitable estoppel not invoked based on allegation that employer caused delay in filing EEOC claim by concealing reasons for termination and by finding employee new job).

(n106)Footnote 84. *See* *Elliott v. Group Medical and Surgical Service* (5th Cir. 1983) 714 F.2d 556, 563 ; *see* *Draeger v. Jockey Intern., Inc.* (S.D.N.Y. 1984) 583 F. Supp. 570, 572 , *aff'd without op.*, 751 F.2d 368 (2d Cir. 1984) (equitable tolling not applicable in case at bar because employee knew of rights); *but see* *Kazanzas v. Walt Disney World Co.* (11th Cir. 1983) 704 F.2d 1527, 1530 , *cert. denied*, 464 U.S. 982 (1983) (employer's failure to post notice is not grounds for equitable tolling of filing period).

(n107)Footnote 85. *See, e.g.,* *English v. Pabst Brewing Co.* (4th Cir. 1987) 828 F.2d 1047, 1050 (posting of notice in conspicuous place meets statutory obligations, even if employee lacks meaningful opportunity to see notice); *Morse v. Daily Press, Inc.* (4th Cir. 1987) 826 F.2d 1351, 1353 (posting of one notice regarding employees' rights under the ADEA in conspicuous place was sufficient to avoid equitable tolling); *see also* *Clark v. Resistoflex Co.* (M.D. La. 1987) 665 F. Supp. 1216, 1222 (holding that posting of notice on cafeteria bulletin board at headquarters but not at local office was sufficient notice because plaintiff had visited headquarters on numerous occasions and had ample opportunity to see notice).

(n108)Footnote 86. *See, e.g.,* *Charlier v. S.C. Johnson & Son, Inc.* (5th Cir. 1977) 556 F.2d 761, 765 (finding equitable tolling based on fact that employee who worked mostly at home and infrequently visited regional office did not have meaningful opportunity to see notice); *Edgeworth v. Fort Howard Paper Co.* (N.D. Ill. 1987) 673 F. Supp. 922, 925 (whether or not employer has technically complied with posting requirements, the analysis should be whether the employee had a reasonable opportunity to view the notice).

(n109)Footnote 87. *Clark v. Resistoflex Co.* (M.D. La. 1987) 665 F. Supp. 1216, 1223 ; *Hay v. Wells Cargo, Inc.* (D. Nev. 1984) 596 F. Supp. 635, 640 .

(n110)Footnote 88. *Oscar Mayer & Co. v. Evans* (1979) 441 U.S. 750, 762, 99 S. Ct. 2066, 60 L. Ed. 2d 609 .

(n111)Footnote 89. *See, e.g.,* *Holly v. City of Naperville* (N.D. Ill. 1983) 571 F. Supp. 668, 671, 672 ; *cf.* *Reeb v. Economic Opportunity Atlanta, Inc.* (5th Cir. 1975) 516 F.2d 924, 930-931 (Title VII action).

(n112)Footnote 90. For discussion of general principles of res judicata and collateral estoppel, *see* ch. 42, pt. A.

(n113)Footnote 91. *Whitfield v. City of Knoxville* (E.D. Tenn. 1983) 567 F. Supp. 1344, 1346-1347 , *aff'd*, 756

F.2d 455, 459 (6th Cir. 1985) ; see also *Novak v. World Bank (D.C. Cir. 1983) 703 F.2d 1305, 1309-1310* (collateral estoppel and res judicata do not apply if plaintiff's ADEA claim was not previously adjudicated and defendant was not party to prior action).

(n114)Footnote 92. See, e.g., *Capraro v. Tilcon Gammino Inc. (1st Cir. [R.I.] 1985) 751 F.2d 56, 58-59* ; see also *Morgan v. Department of Offender Rehabilitation (1983) 166 Ga. App. 611, 305 S.E. 2d 130, 133* (res judicata applied where the case had been dismissed by federal court, and where plaintiff could have but did not originally allege discrimination in federal case against same party).

(n115)Footnote 92.1. See *Astoria Fed. Sav. & Loan Ass'n v. Solimino (1991) 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96, 103, 105-106* .

(n116)Footnote 93. *29 U.S.C. § 626(b),(c)(1)*.

(n117)Footnote 94. *Syvock v. Milwaukee Boiler Mfg. Co., Inc. (7th Cir. [Wis.] 1981) 665 F.2d 149, 160* ; see *Marshall v. Arlene Knitwear, Inc. (E.D.N.Y. 1978) 454 F. Supp. 715, 730-731* , *aff'd*, *608 F.2d 1369 (2d Cir. 1979)* .

(n118)Footnote 95. *Mizrany v. Texas Rehabilitation Commission (S.D. Tex. 1981) 522 F. Supp. 611, 618* , *aff'd*, *685 F.2d 1384 (5th Cir. 1982)* .

(n119)Footnote 96. *Brennan v. Ace Hardware Corp. (8th Cir. 1974) 495 F.2d 368, 373* .

(n120)Footnote 97. *Brennan v. Ace Hardware Corp. (8th Cir. [Neb.] 1974) 495 F.2d 368, 373* .

(n121)Footnote 98. *Wise v. Olan Mills Inc. of Texas (D. Colo. 1980) 495 F. Supp. 257, 260* ; *Marshall v. Arlene Knitwear, Inc. (E.D.N.Y. 1978) 454 F. Supp. 715, 730* , *aff'd*, *608 F.2d 1369 (2d Cir. 1979)* .

(n122)Footnote 99. See, e.g., *Fiedler v. Indianhead Truck Line, Inc. (8th Cir. 1982) 670 F.2d 806, 809* ; *Equal Emp. Opportunity Com'n v. Sandia Corp. (10th Cir. 1980) 639 F.2d 600, 626, 627* ; see also *E.E.O.C. v. Pape (9th Cir. 1997) 115 F.3d 676, 682-683* (under circumstances, reasonable efforts to mitigate damages requirement met by searching want ads; EEOC presented evidence that lack of aggressiveness in seeking new work was common among older workers fired from long-term positions). For discussion of the mitigation concept in the Title VII context, see § 43.10[9][a][iii].

(n123)Footnote 100. *Wehr v. Burroughs Corp. (3d Cir. [Pa.] 1980) 619 F.2d 276, 278 fn. 3* .

(n124)Footnote 101. *Naton v. Bank of California (9th Cir. [Cal.] 1981) 649 F.2d 691, 699* .

(n125)Footnote 102. See, e.g., *McDowell v. Avtex Fibers Inc. (3d Cir. [Pa.] 1984) 740 F.2d 214, 217* ; *Equal Emp. Opportunity Com'n v. Sandia Corp. (10th Cir. 1980) 639 F.2d 600, 626, 624-625* .

(n126)Footnote 102.1. See *Commissioner v. Schleier (1995) 515 U.S. 323, 115 S. Ct. 2159, 132 L. Ed. 2d 294, 307* .

(n127)Footnote 103. *Blum v. Witco Chemical Corp. (3d Cir. 1987) 829 F.2d 367, 373-374* ; *Wildman v. Lerner Stores Corp. (1st Cir. [P.R.] 1985) 771 F.2d 605, 614-616* ; *EEOC v. Prudential Federal Sav. & Loan Ass'n (10th Cir. 1985) 763 F.2d 1166, 1173* ; *Goldstein v. Manhattan Industries, Inc. (11th Cir. [Ala.] 1985) 758 F.2d 1435, 1448-1449* ; *Davis v. Combustion Engineering Inc. (6th Cir. 1984) 742 F.2d 916* ; *Whittlesey v. Union Carbide Corp. (2d Cir. [N.Y.] 1984) 742 F.2d 724, 729* ; *Thompson v. Sawyer (D.C. Cir. 1982) 678 F.2d 257, 292* ; *Cancellier v. Federated Department Stores (9th Cir. 1982) 672 F.2d 1312, 1318, 1319* , *cert. denied*, *459 U.S. 859 (1982)* .

(n128)Footnote 103.1. *E.E.O.C. v. Pape (9th Cir. 1997) 115 F.3d 676, 682-683* .

(n129)Footnote 104. 29 U.S.C. § 626(b); *see* 29 U.S.C. § 626(c)(1).

(n130)Footnote 105. *Duffy v. Wheeling Pittsburgh Steel Corp.* (3d Cir. 1984) 738 F.2d 1393, 1398, *cert. denied*, 469 U.S. 1087 (1984); *Gibson v. Mohawk Rubber Co.* (8th Cir. [Ark.] 1982) 695 F.2d 1093, 1100.

(n131)Footnote 106. *Marshall v. Goodyear Tire & Rubber Co.* (5th Cir. [Fla.] 1977) 554 F.2d 730, 733-734.

(n132)Footnote 107. *Hodgson v. First Fed. Sav. & L. Ass'n* (5th Cir. [Fla.] 1972) 455 F.2d 818, 826-827.

(n133)Footnote 108. 29 U.S.C. § 626(b).

(n134)Footnote 109. *Dickerson v. Deluxe Check Printers, Inc.* (8th Cir. 1983) 703 F.2d 276, 279-280.

(n135)Footnote 110. *Dickerson v. Deluxe Check Printers, Inc.* (8th Cir. 1983) 703 F.2d 276, 279-280.

(n136)Footnote 111. *Blim v. Western Electric Co., Inc.* (10th Cir. [Okla.] 1984) 731 F.2d 1473, 1479, *cert. denied*, 469 U.S. 874 (1984)

(n137)Footnote 112. For discussion, *see* [b], *above*.

(n138)Footnote 113. *Merkel v. Scovill, Inc.* (S.D. Ohio 1983) 570 F. Supp. 141, 143-144; *Spagnuolo v. Whirlpool Corp.* (4th Cir. [N.C.] 1981) 641 F.2d 1109, 1115, *cert. denied*, 454 U.S. 860 (1981); *Combes v. Griffin Television Inc.* (W.D. Okla. 1976) 421 F. Supp. 841, 846-847.

(n139)Footnote 114. 29 U.S.C. § 626(b); *cf.* 42 U.S.C. § 2000e-5(g) (Title VII provision for affirmative action). For discussion of affirmative action under Title VII, *see* § 43.10[9][d][iv].

(n140)Footnote 115. *Spagnuolo v. Whirlpool Corp.* (4th Cir. [N.C.] 1983) 717 F.2d 114, 119-121; *Leftwich v. Harris-Stowe State College* (8th Cir. [Mo.] 1983) 702 F.2d 686, 693.

(n141)Footnote 116. *Spagnuolo v. Whirlpool Corp.* (4th Cir. [N.C.] 1983) 717 F.2d 114, 119-121.

(n142)Footnote 117. *See* 29 U.S.C. §§ 216(b), 626(b); *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 126-129, 105 S. Ct. 613, 83 L. Ed. 2d 523; *Kelly v. American Standard, Inc.* (9th Cir. [Wash.] 1981) 640 F.2d 974, 979; *see also* *E.E.O.C. v. Pape* (9th Cir. 1997) 115 F.3d 676, 681-682 (plaintiff may rely on same evidence used to establish underlying ADEA violation to establish willfulness).

(n143)Footnote 118. *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 126-129, 105 S. Ct. 613, 83 L. Ed. 2d 523.

(n144)Footnote 119. *Trans World Airlines, Inc. v. Thurston* (1985) 469 U.S. 111, 127-128, 105 S. Ct. 613, 83 L. Ed. 2d 523.

(n145)Footnote 120. *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610-611, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 350-351.

(n146)Footnote 121. *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610-611, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 350-351.

(n147)Footnote 122. *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610-611, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 350-351.

(n148)Footnote 123. [Reserved]

(n149)Footnote 126. *See* 29 U.S.C. §§ 216(b), 626(b); *Buchholz v. Symons Mfg. Co.* (E.D. Wis. 1978) 445 F. Supp. 706, 713 .

(n150)Footnote 127. *See* *Cancellier v. Federated Department Stores* (9th Cir. 1982) 672 F.2d 1312, 1318, 1318 , cert. denied, 459 U.S. 859 (1982) .

(n151)Footnote 127.1. *See* *Commissioner v. Schleier* (1995) 515 U.S. 323, 115 S. Ct. 2159, 132 L. Ed. 2d 294, 307 .

(n152)Footnote 128. *See* *Haskell v. Kaman Corp.* (2d Cir. 1984) 743 F.2d 113, 120-121 (compensatory damages); *Perrell v. FinanceAmerica Corp.* (10th Cir. 1984) 726 F.2d 654, 657 (compensatory damages); *Hill v. Spiegel, Inc.* (6th Cir. 1983) 708 F.2d 233, 236 (compensatory damages); *Pfeiffer v. Essex Wire Corp.* (7th Cir. 1982) 682 F.2d 684, 685 , cert. denied, 459 U.S. 1039 (1982) (pain and suffering and punitive damages); *Fiedler v. Indianhead Truck Line, Inc.* (8th Cir. 1982) 670 F.2d 806, 809-810 (compensatory damages); *Naton v. Bank of California* (9th Cir. 1981) 649 F.2d 691, 698-699 ; *Walker v. Pettit Const. Co., Inc.* (4th Cir. 1979) 605 F.2d 128, 129-130 (pain and suffering and punitive damages); *Slatin v. Stanford Research Institute* (4th Cir. 1979) 590 F.2d 1292, 1294-1296 (compensatory damages); *Vazquez v. Eastern Air Lines, Inc.* (1st Cir. 1978) 579 F.2d 107, 110-112 (compensatory damages); *Murphy v. American Motors Sales Corp.* (5th Cir. 1978) 570 F.2d 1226, 1227 (compensatory and punitive damages); *Dean v. American Sec. Ins. Co.* (5th Cir. 1977) 559 F.2d 1036, 1038-1040 , cert. denied, 434 U.S. 1066 (1978) (compensatory and punitive damages); *Rogers v. Exxon Research & Engineering Co.* (3d Cir. [N.J.] 1977) 550 F.2d 834, 841-842 , cert. denied, 434 U.S. 1022 (1978) (compensatory damages).

(n153)Footnote 129. *See* 29 U.S.C. § 626(b).

(n154)Footnote 130. *See* 29 U.S.C. §§ 216(b), 626(b); *see also* discussion in [d], above.

(n155)Footnote 131. *See, e.g.,* *Walker v. Pettit Const. Co., Inc.* (4th Cir. [N.C.] 1979) 605 F.2d 128, 129-130 .

(n156)Footnote 132. *See* *Blim v. Western Electric Co., Inc.* (10th Cir. [Okla.] 1984) 731 F.2d 1473, 1479 , cert. denied, 469 U.S. 874 (1984) ; *Cline v. Roadway Exp., Inc.* (4th Cir. [N.C.] 1982) 689 F.2d 481, 489 ; *Kelly v. American Standard, Inc.* (9th Cir. [Wash.] 1981) 640 F.2d 974, 982 .

(n157)Footnote 133. *See, e.g.,* *Blim v. Western Electric Co., Inc.* (10th Cir. [Okla.] 1984) 731 F.2d 1473, 1479 , cert. denied, 469 U.S. 874 (1984) ; *Gibson v. Mohawk Rubber Co.* (8th Cir. [Ark.] 1982) 695 F.2d 1093, 1102-1103 ; *Spagnuolo v. Whirlpool Corp.* (4th Cir. [N.C.] 1981) 641 F.2d 1109, 1114 , cert. denied, 454 U.S. 860 (1981) .

(n158)Footnote 134. *See, e.g.,* *Reichman v. Bonsignore, Brignati & Mazzotta P.C.* (2d Cir. [N.Y.] 1987) 818 F.2d 278, 281-282 ; *Criswell v. Western Airlines, Inc.* (9th Cir. 1983) 709 F.2d 544, 556-557 , *aff'd on other grounds*, 472 U.S. 400 (1985) .

(n159)Footnote 135. *See* *Hagelthorn v. Kennecott Corp.* (2d Cir. [N.Y.] 1983) 710 F.2d 76, 86 ; *Kelly v. American Standard Inc.* (9th Cir. [Wash.] 1981) 640 F.2d 974, 986 ; *Rogers v. Exxon Research & Engineering Co.* (3d Cir. [N.J.] 1977) 550 F.2d 834, 842-843 , cert. denied, 434 U.S. 1022 (1978) . *See also* *Merrick v. Farmers Ins. Group* (9th Cir. 1990) 892 F.2d 1434, 1442 (attorney fees may be awarded to plaintiffs who successfully prosecute appeals).

(n160)Footnote 136. *See* 29 U.S.C. § 626(b).

(n161)Footnote 137. *See* 29 U.S.C. § 216(b); *see also* discussion in Chapter 5, Part B, Subpart 2.

(n162)Footnote 138. *See* *Cova v. Coca-Cola Bottling Co. of St. Louis* (8th Cir. 1978) 574 F.2d 958, 962 ; *cf.* *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 417, 98 S. Ct. 694, 54 L. Ed. 2d 648 (in Title VII actions

fees awarded to prevailing defendants if plaintiff's suit was frivolous, unreasonable, or groundless).

(n163)Footnote 139. *See, e.g., Jones v. Central Soya Co., Inc.* (11th Cir. [Ala.] 1984) 748 F.2d 586, 589-590 ; *Davis v. Combustion Engineering Inc.* (6th Cir. 1984) 742 F.2d 916, 923-924 .

(n164)Footnote 140. *See, e.g., Syvock v. Milwaukee Boiler Mfg. Co., Inc.* (7th Cir. [Wis.] 1981) 665 F.2d 149, 162-165 (failure of plaintiff to succeed on issues of willfulness and mitigation should not diminish amount of attorney's fee award under ADEA); *Cleverly v. Western Electric Co.* (8th Cir. [Mo.] 1979) 594 F.2d 638, 643 (unsuccessful appeal from denial of reinstatement is not basis for disallowing attorney's fees for remainder of appeal).

(n165)Footnote 140.1. *Sinyard v. Comm'r* (9th Cir. 2001) 268 F.3d 756, 759 (attorney's fees paid to counsel by settling defendant taxable as income to plaintiffs, offset by deduction).

(n166)Footnote 140.2. *Sprint/United Management Co. v. Mendelsohn* (2008) 128 S. Ct. 1140, 170 L. Ed. 2d 1 . To view U.S. Supreme Court briefs related to the *Sprint* case that are available on Lexis.com, go to 2006 U.S. Briefs 1221 . To view the U.S. Supreme Court transcript, go to 2007 U.S. TRANS LEXIS 64 .

(n167)Footnote 140.3. *Aramburu v. Boeing Co.* (10th Cir. 1997) 112 F.3d 1398 .

(n168)Footnote 140.4. *Sprint/United Management Co. v. Mendelsohn* (2008) 128 S. Ct. 1140, 1144-1146, 170 L. Ed. 2d 1 .

(n169)Footnote 140.5. *Sprint/United Management Co. v. Mendelsohn* (2008) 128 S. Ct. 1140, 1147, 170 L. Ed. 2d 1 . *See* Advisory Committee's Notes on Fed. Rule Evid. 401, 28 U.S.C. App., p. 864 (relevancy is not inherent characteristic of item of evidence, but exists only as relation between item of evidence and matter properly provable in case).

(n170)Footnote 140.6. *Sprint/United Management Co. v. Mendelsohn* (2008) 128 S. Ct. 1140, 1147, 170 L. Ed. 2d 1 .

(n171)Footnote 141. *See* 29 U.S.C. §§ 621-634.

(n172)Footnote 142. *Chapman v. City of Detroit* (6th Cir. 1986) 808 F.2d 459, 463 ; *Baldwin v. Sears, Roebuck and Co.* (5th Cir. 1982) 667 F.2d 458, 461 ; *Jacobi v. High Point Label, Inc.* (M.D.N.C. 1977) 442 F. Supp. 518, 520-521 ; *see* 29 U.S.C. § 626(c)(1). For discussion of jurisdiction, *see* [2], above.

(n173)Footnote 143. For discussion of specific allegations, *see* [ii], below.

(n174)Footnote 144. *See* discussion regarding modification of allegations in FEHA complaint to Title VII complaint in comment to form at § 43.10 [10][a][i].

(n175)Footnote 145. 29 U.S.C. §§ 623, 631(a) (plaintiff must be 40 years of age or older). For discussion of standing of plaintiffs under ADEA, *see* [5][a], above.

(n176)Footnote 146. 29 U.S.C. § 630(b) (defining "employer" under ADEA). For discussion, *see* [5][b], above.

(n177)Footnote 147. *See* Fed. Rules Civ. Proc., Rule 8(a) (federal civil complaint must include statement of basis for subject matter jurisdiction); 29 U.S.C. § 626(c)(1) (ADEA action may be brought in any court of competent jurisdiction). For discussion of jurisdiction of ADEA cases, *see* [3], above.

(n178)Footnote 148. *See* 29 U.S.C. § 623(a); *see* *Loeb v. Textron, Inc.* (1st Cir. [R.I.] 1979) 600 F.2d 1003, 1019 (language in 29 U.S.C. § 623(a) stating that it is unlawful to discriminate "because of" a person's age means that plaintiff must show age was a "determinative factor" in defendant's action). For discussion of proof of disparate impact

or disparate treatment under ADEA, *see* [2][a], above.

(n179)Footnote 149. *See* 29 U.S.C. § 626(b),(c). For discussion of remedies of back pay and front pay under ADEA, *see* [8][a] and [b], above.

(n180)Footnote 150. *See* 29 U.S.C. §§ 216(b), 626(b). For discussion, *see* [8][d], above.

(n181)Footnote 151. *See* 29 U.S.C. § 626(b),(c). For discussion, *see* [8][c], above.

(n182)Footnote 152. *See* 29 U.S.C. §§ 626(d), 633(b); *Vaughn v. Chrysler Corporation* (E.D. Mich. 1974) 382 F. Supp. 143, 147-148 . For discussion of exhaustion of remedies under ADEA, *see* [4], above.

(n183)Footnote 153. *See* 29 U.S.C. § 626(b),(c). For discussion, *see* [8][a]-[e], above.

(n184)Footnote 154. *See* *Blim v. Western Electric Co., Inc.* (10th Cir. [Okla.] 1984) 731 F.2d 1473, 1479 , *cert. denied*, 469 U.S. 874 (1984) . For discussion of availability of prejudgment interest, *see* [8][f], above.

(n185)Footnote 155. *See* 29 U.S.C. §§ 216(b), 626(b). For discussion of availability of costs and attorney's fees, *see* [8][g], above.

(n186)Footnote 156. [Reserved]

(n187)Footnote 157. *See* 29 U.S.C. § 623(f)(2), prior to amendment by Pub. L. No. 101-433; *Public Employees v. Betts* (1989) 492 U.S. 158, 166, 109 S. Ct. 2854, 106 L. Ed. 2d 134 .

(n188)Footnote 158. *See* Pub. L. No. 101-433, § 105(a).

(n189)Footnote 159. *See* 29 U.S.C. § 623(f)(2)(B).

(n190)Footnote 160. *See* 29 U.S.C. §§ 626(c), 633(b). For form, *see* § 43.01[13][a][ii].

(n191)Footnote 161. *See* 29 U.S.C. §§ 626(d), 633(b) (period within which to file administrative charge); 29 U.S.C. § 626(e) (period within which to file civil action). For form, *see* § 43.01[13][b][ii].

(n192)Footnote 162. *See* *Code Civ. Proc.* §§ 430.10(e), 430.30; *Fed. Rules Civ. Proc.*, Rule 12(b)(6). For forms, *see* §§ 43.01[13][c][ii] (state court) and 43.10[12][a][ii] (federal court).

(n193)Footnote 163. *See* 29 U.S.C. § 626(b) provides for equitable remedies, and, therefore, equitable defenses, such as laches, may be available. For form, *see* § 43.01[13][d][ii].

(n194)Footnote 164. *See* 29 U.S.C. § 623(f)(1); *Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400, 412-414, 105 S. Ct. 2743, 86 L. Ed. 2d 321 . For form, *see* § 43.01[13][e][ii].

(n195)Footnote 165. *See* *Western Air Lines, Inc. v. Criswell* (1985) 472 U.S. 400, 407-414, 105 S. Ct. 2743, 86 L. Ed. 2d 321 . For form, *see* § 43.01[13][g][ii].

(n196)Footnote 166. *See* 29 U.S.C. § 623(f)(2)(A). For form, *see* § 43.10[13][c][ii].

(n197)Footnote 166.1. *See* *Kimel v. Florida Bd. of Regents* (2000) 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522, 535-536 (ADEA's purported abrogation of states' sovereign immunity is invalid).

(n198)Footnote 166.2. *Katz v. Regents of the University of California* (9th Cir. 2000) 229 F.3d 831, 834 .

(n199)Footnote 167. 29 U.S.C. § 623(f)(3).

(n200)Footnote 168. *See Marshall v. Westinghouse Elec. Corp.* (5th Cir. 1978) 576 F.2d 588, 591 .

(n201)Footnote 169. *See 29 U.S.C. § 626(f)(1); 29 C.F.R. § 1625.7.*

(n202)Footnote 170. *See 29 U.S.C. § 623(f)(1).*

(n203)Footnote 171. *See 29 U.S.C. § 623(f)(1).*

(n204)Footnote 172. *See 29 U.S.C. § 623(f)(2)(B)(i); 29 C.F.R. § 1625.10(a)(1).*

(n205)Footnote 173. *29 U.S.C. § 623(f)(2)(B)(ii).*

(n206)Footnote 174. *See Pub. L. No. 101-433, § 105(a).*

(n207)Footnote 175. *See 42 U.S.C. § 2000e-8(e).*

(n208)Footnote 176. *29 C.F.R. § 1626.4; see Wirtz v. Robinson & Stephens Inc.* (5th Cir. 1966) 368 F.2d 114, 116 ; *Wirtz v. BAC Steel Products Inc.* (4th Cir. 1962) 312 F.2d 14, 16 ; *Fleming v. Bernardi* (N.D. Ohio 1941) 1 F.R.D. 624, 626 ; *see also Donovan v. Forbes* (D. Vt. 1985) 614 F. Supp. 124, 126-127 .

(n209)Footnote 177. *See [a], above.*

(n210)Footnote 178. *Strickland v. American Can Co.* (N.D. Ga. 1983) 575 F. Supp. 1111, 1112 ; *but cf. Coffin v. South Carolina Dep't of Social Services* (D.S.C. 1983) 562 F. Supp. 579, 590-591 (state findings of discrimination were not admitted where they could unduly influence jury relative to questions of credibility that are within jury's unique province).

(n211)Footnote 179. *See § 43.10[12][b].*

(n212)Footnote 180. *29 U.S.C. § 626(c)(2); see Lorillard v. Pons* (1978) 434 U.S. 575, 582-583, 98 S. Ct. 866, 55 L. Ed. 2d 40 ; *EEOC v. Ford Motor Co.* (10th Cir. 1984) 732 F.2d 120, 121 ; *EEOC v. Corry Jamestown Corp.* (3d Cir. 1983) 719 F.2d 1219, 1223-1226 .

(n213)Footnote 181. *Gross v. FBL Fin. Servs.* (2009) 129 S. Ct. 2343, 2348-2352, 174 L. Ed. 2d 119 . For discussion of the burden of proof in an ADEA case, *see § 41.31.*



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part B. FEDERAL LAW

3-43 California Employment Law § 43.12

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§ 43.12 Equal Pay Act of 1963

[1] Right of Action

Like the California Equal Pay Act,ⁿ¹ the Federal Equal Pay Act (EPA)ⁿ² specifically addresses the prevention and remedy of sex-based differences in compensation of employees. The EPA is a part of the Fair Labor Standards Act (FLSA),ⁿ³ which also governs overtime and minimum wage compensation of employees.ⁿ⁴ For discussion of employers and employees covered by and exempted from the FLSA generally, *see* Chapter 1.

The EPA has the same basic coverage as the FLSA. However, unlike the FLSA, the EPA applies to executive, administrative, and professional employees.ⁿ⁵ Coverage of the EPA generally is discussed in Chapter 40, Part C. For discussion of the FLSA exemption for executive, administrative, and professional employees, *see* Chapter 2.

The FLSA authorizes an aggrieved employee to bring a civil action against an employer for appropriate legal and equitable relief under the EPA.ⁿ⁶

[2] Order and Burden of Proof

In a case brought under the EPA, the parties bear shifting burdens of proof.^{n6.1} First, the plaintiff bears the burden of proving a violation of the statute.ⁿ⁷ The plaintiff's burden is to show by a preponderance of the evidence that the employer pays different wages to employees of opposite sexes within the same "establishment"ⁿ⁸ for equal work on jobs requiring equal skill, effort, and responsibility, and that the jobs are performed under similar working conditions.ⁿ⁹ The EPA requires "substantial equality" of job content, which is tested factually, on a case-by-case basis;ⁿ¹⁰ the prima facie case is limited to a comparison of the jobs in question, and does not involve a comparison of the individuals holding those jobs.^{n10.1} The Ninth Circuit uses a two-step "substantially equal" analysis: first, the plaintiff must establish that the jobs being compared have a common core of tasks, that is, whether a significant portion of the two jobs is identical; second, the court must then determine whether any additional tasks, applicable to one job but not the other make the two jobs "substantially different."^{n10.2} The plaintiff need not show intent to discriminate.ⁿ¹¹

Once plaintiff has set out a prima facie case of an EPA violation, the burden of proof shifts to the employer to show that the wage disparity is justified by one of the following four statutory exceptions to the EPA:¹²

1. A seniority system;
2. A merit system;
3. A system that measures earnings by quantity or quality of production; or
4. A differential based on any factor other than sex.

The burden that shifts to the employer is a "heavy burden."¹³ The exceptions listed above are affirmative defenses on which the employer has both the burden of production and of persuasion.¹⁴ If the defendant's reasons appear to justify its actions, the plaintiff then has an opportunity to show that the employer's justification was pretextual.¹⁵

For full discussion of the substantive provisions and defenses to the prohibitions of the EPA, *see* Chapter 41, Parts D and E.

[3] Jurisdiction

State and federal courts have concurrent jurisdiction of EPA cases under the FLSA, of which the EPA is a part.¹⁶ For additional discussion of jurisdiction in actions under the FLSA, *see* Chapter 5, Part B, Subpart 2.

[4] Standing to Sue

Both private persons aggrieved by violations of the EPA and the EEOC, which is the administrative agency in charge of enforcing the EPA since 1978, may bring suits under the EPA to redress violations.¹⁷

Class actions under EPA are not "true" class actions under Federal Rules of Civil Procedure, Rule 23, but rather require class members to "opt in," as they must do under the ADEA.¹⁸ Members of a plaintiff class in an EPA case must opt in by filing written consent to the suit in the court in which the action is pending.¹⁹

An employee's right to bring an individual or class action against the employer terminates once the EEOC files a complaint to enforce the EPA on behalf of that employee or employees.²⁰

[5] Exhaustion of Administrative Remedies Unnecessary

A private plaintiff need not exhaust any administrative remedies before filing a civil action under the EPA.²¹ Nor is the private plaintiff obliged to exhaust any state remedies for equal pay violations.²²

[6] Statutes of Limitation

[a] Time Period for Filing Civil Action Under EPA

If the violation of the EPA is willful, the plaintiff has three years from the date of the violation to file a civil action; if the violation is not willful, the civil action must be commenced within two years after its occurrence.²³ A violation is willful under the FLSA if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA.^{23.1}

[b] Tolling Principles for EPA Filing Periods

The doctrines of estoppel or equitable tolling apply to EPA statutes of limitation, so that affirmative misrepresentations of the employer on which the plaintiff reasonably relies or failure of the employer to publish statutorily required notices as to employees' rights and remedies under the Act may toll the limitations period for filing suit.ⁿ²⁴ When class members file consents to participate in a class action under the EPA, those consents toll the limitations periods for those class members' individual suits.ⁿ²⁵

[7] Res Judicata and Collateral Estoppel Effects

Because both state and federal laws in California prohibit sex-discriminatory compensation in virtually identical terms,ⁿ²⁶ general principles of res judicata and collateral estoppel normally preclude relitigation of claims under the federal EPA that have already been litigated under the state statute, and vice versa. For discussion of general principles of res judicata and collateral estoppel as applied to equal employment opportunity laws, *see* Chapter 42, Part A.

[8] Relief Available

[a] Back Pay

The EPA authorizes back pay as a remedy.ⁿ²⁷ Back pay may include sex-based differences in salary, pension payments, lodging and uniform cleaning allowances, or other forms of compensation.ⁿ²⁸ The formula for calculating back pay under the EPA is the difference between plaintiff's base salary and the average base salary of the comparison person/group not of plaintiff's sex.ⁿ²⁹ Factors other than sex that contribute to the greater pay of the opposite-sex employee, for example, greater seniority, should be factored out before calculating the sum of back pay owed.ⁿ³⁰

[b] Front Pay

Front pay is not a prescribed remedy under the EPA,ⁿ³¹ and presumably is not available under it.

[c] Injunctive Relief

The power of courts to order injunctive relief under the EPA appears to be limited to orders effectuating the back pay and liquidated damage provisions of the Act.ⁿ³² If plaintiff is discharged or discriminated against because he or she has filed a complaint under or participated in any proceedings under the FLSA or the EPA,ⁿ³³ the court may also order reinstatement, promotion, or other equitable relief.ⁿ³⁴ However, plaintiffs seeking broad-based injunctive relief for violations of the principle of equal pay should use the California FEHA and Title VII, which clearly empower courts to order such relief.ⁿ³⁵ In one Ninth Circuit case, however, the court considered the merits of an action for a mandatory injunction under the EPA, but affirmed its denial based on the plaintiff's failure to prove her case.^{n35.1}

[d] Prejudgment Interest

As with ADEA actions,ⁿ³⁶ courts generally award prejudgment interest on back pay awards under the EPA,ⁿ³⁷ but they deny prejudgment interest when liquidated damages are awarded.ⁿ³⁸

[e] Liquidated Damages

Liquidated damages are a prescribed remedy under the EPA, consisting of an amount equal to the back pay award.ⁿ³⁹ Liquidated damages are compensatory, not punitive in nature.ⁿ⁴⁰ They must be awarded for EPA violations, unless the employer shows that it committed the violation in good faith and that it had reasonable grounds to believe that its act or omission did not violate the EPA.ⁿ⁴¹ The employer has the burden of making such a showing.ⁿ⁴² If the employer establishes good faith and reasonable grounds for its belief that it was not violating the EPA, the court may, in its discretion, award no liquidated damages or award a lesser amount.ⁿ⁴³ "Good faith" has been defined as "an honest intention to ascertain what the Equal Pay Act requires and [act] in accordance with it."ⁿ⁴⁴ However, conclusory

assertions that company officers thought they were in compliance with the EPA have been held to be insufficient to show good faith.ⁿ⁴⁵

For full discussion of "good faith" defenses to actions under the FLSA generally, *see* Chapter 5, Part B, Subpart 2.

[f] Attorney's Fees

Attorney's fees awards to prevailing plaintiffs under the EPA are mandatory.ⁿ⁴⁶ If plaintiff litigates an EPA case frivolously or in bad faith, a prevailing defendant in federal court may recover an award of attorney's fees in the court's discretion.ⁿ⁴⁷

[9] Complaint for Violation of Federal Equal Pay Act

Because the statutory provisions of the California and federal Equal Pay Acts are virtually identical,ⁿ⁴⁸ the form for a complaint under the California EPA set forth in § 43.02[7][b] may be used for a federal EPA case with the following modifications:

1. The federal EPA case may be brought in either state or federal court,ⁿ⁴⁹ so the caption should reflect the appropriate choice of forum.
2. Citations to the California EPAⁿ⁵⁰ should be changed to citations to the federal EPA.ⁿ⁵¹
3. The optional paragraph referring to exhaustion of administrative state remediesⁿ⁵² should be eliminated because there is no administrative procedure to be exhausted under the federal EPA.ⁿ⁵³
4. If the action is in federal court, and the plaintiff seeks a jury trial, he or she must demand it in writing.ⁿ⁵⁴

For discussion of certain other procedural aspects relevant to federal pleading of employment discrimination complaints, *see* discussion in the comments to the form to the Title VII complaint, at § 43.10[10][a][ii].

[10] Affirmative Defenses to Complaint for Violation of Federal Equal Pay Act

Because the affirmative defenses to a complaint for violation of the federal Equal Pay Act are identical to the affirmative defenses to a complaint for violation of the California Equal Pay Act,ⁿ⁵⁵ the forms for affirmative defenses to the California EPAⁿ⁵⁶ can be used in preparing an answer under the federal EPA, except that citations to the California EPA should be changed to citations to the federal EPA.ⁿ⁵⁷

[11] EEOC Administrative Records: Confidentiality, Access, and Admissibility

[a] Confidentiality and Access

The identity or identifying details of persons giving information in confidence to the EEOC as to violations of the EPA cannot be disclosed unless necessary in a court proceeding.ⁿ⁵⁸ This privilege is qualified by the employer's demonstrated need for information to prepare its defense.ⁿ⁵⁹ For discussion of confidentiality of EEOC records generally, *see* Chapter 42, Part C.

[b] Admissibility

No reported cases under the EPA have concerned the issue of admissibility of EEOC records in a court case, but it is arguable by analogy with other federal anti-discrimination statutes that any findings by the EEOC would be admissible

in EPA litigation.ⁿ⁶⁰

[12] Availability of Jury Trial

Private parties under the EPA have a right to jury trial on the issue of back pay,ⁿ⁶¹ but the question of entitlement to liquidated damages must be tried by the court.ⁿ⁶² If the action is in federal court, the party seeking jury trial must make a written demand for it.ⁿ⁶³

Legal Topics:

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

Labor & Employment LawEqual PayGeneral OverviewLabor & Employment LawEqual PayEqual Pay ActGeneral OverviewLabor & Employment LawEqual PayEqual Pay ActBurdens of ProofLabor & Employment LawEqual PayEqual Pay ActDefenses & ExceptionsLabor & Employment LawEqual PayEqual Pay ActRemedies

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 1197.5*. For discussion, *see § 43.02*.

(n2)Footnote 2. *See 29 U.S.C. § 206(d)*.

(n3)Footnote 3. *29 U.S.C. § 201 et seq.*

(n4)Footnote 4. *See 29 U.S.C. §§ 206, 207*.

(n5)Footnote 5. *See 29 U.S.C. § 213(a)(1); 29 C.F.R. § 1620.1(a)(1)*.

(n6)Footnote 6. *See 29 U.S.C. § 216(b); see also [8], below*.

(n7)Footnote 6.1. *Stanley v. University of S. Cal. (9th Cir. 1999) 178 F.3d 1069, 1073-1074, cert. denied, 145 L. Ed. 2d 413 (1999)*.

(n8)Footnote 7. *Corning Glass Works v. Brennan (1974) 417 U.S. 188, 196-197, 94 S. Ct. 2223, 41 L. Ed. 2d 1; Angelo v. Bacharach Instrument Co. (3rd Cir. 1977) 555 F.2d 1164, 1171*.

(n9)Footnote 8. For definition of "establishment" under the EPA, *see ch. 40, pt. C*.

(n10)Footnote 9. *Corning Glass Works v. Brennan (1974) 417 U.S. 188, 195, 94 S. Ct. 2223, 41 L. Ed. 2d 1; E.E.O.C. v. Maricopa Cty. Community College Dist. (9th Cir. 1984) 736 F.2d 510, 513; EEOC v. Hernando Bank, Inc. (5th Cir. 1984) 724 F.2d 1188, 1196; Brennan v. Inglewood Inc. (S.D. Miss. 1976) 412 F. Supp. 362, 365; see 29 U.S.C. § 206(d)(1); 29 C.F.R. § 1620.13*.

(n11)Footnote 10. *See, e.g., Usery v. Columbia Univ. (2d Cir. 1977) 568 F.2d 953, 958; Stanley v. University of S. Cal. (9th Cir. 1999) 178 F.3d 1069, 1073-1074, cert. denied, 145 L. Ed. 2d 413 (1999); Brennan v. South Davis Community Hosp. (10th Cir. 1976) 538 F.2d 859, 861-863*.

(n12)Footnote 10.1. *Stanley v. University of S. Cal. (9th Cir. 1999) 178 F.3d 1069, 1074, cert. denied, 145 L. Ed. 2d 413*.

(n13)Footnote 10.2. *Stanley v. University of S. California (9th Cir. 1999) 178 F.3d 1069, 1074, cert. denied, 145 L. Ed. 2d 413 (1999)* (Ninth Circuit joins Fourth and Seventh Circuits in adopting this approach in EPA cases; affirming summary judgment on non-gender factor, court did not decide second, disputed issue).

(n14)Footnote 11. *Patkus v. Sangamon-Cass Consortium (7th Cir. 1985) 769 F.2d 1251, 1260 n.5*.

(n15)Footnote 12. *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196-197, 94 S. Ct. 2223, 41 L. Ed. 2d 1 ; *E.E.O.C. v. Maricopa Cty. Community College Dist.* (9th Cir. 1984) 736 F.2d 510, 513 ; see 29 U.S.C. § 206(d)(1) (listing exceptions); see also [10], below.

(n16)Footnote 13. *Odomes v. Nucare, Inc.* (6th Cir. 1981) 653 F.2d 246, 251 .

(n17)Footnote 14. *Plemer v. Parsons-Gilbane* (5th Cir. 1983) 713 F.2d 1127, 1136 ; see *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 197, 94 S. Ct. 2223, 41 L. Ed. 2d 1 ; *Stanley v. University of S. Cal.* (9th Cir. 1999) 178 F.3d 1069, 1076-1077 , cert. denied, 145 L. Ed. 2d 413 (1999) ; see also EEOC Notice No. 915.002 (sex discrimination in compensation of sport coaches at universities).

(n18)Footnote 15. *Stanley v. University of S. Cal.* (9th Cir. 1999) 178 F.3d 1069, 1076-1077 , cert. denied, 145 L. Ed. 2d 413 (1999) .

(n19)Footnote 16. See 29 U.S.C. § 216(b).

(n20)Footnote 17. 29 U.S.C. § 216(b), (c); *EEOC v. Hernando Bank, Inc.* (5th Cir. 1984) 724 F.2d 1188, 1189-1190 ; Reorg. Plan No. 1 (President Carter) (1978); Pub. Law 98-532. Before 1978, the EPA was enforced by the Secretary of Labor. see 29 U.S.C. §§ 216(b),(c).

(n21)Footnote 18. See § 43.11[5][a][ii].

(n22)Footnote 19. 29 U.S.C. § 216(b); *Stansell v. Sherwin-Williams Co.* (N.D. Ga. 1975) 404 F. Supp. 696, 701 .

(n23)Footnote 20. See 29 U.S.C. § 216(b),(c) (language actually refers to Secretary of Labor, which preceded EEOC in enforcing Act); *Usery v. Board of Public Ed.* (W.D. Penn. 1976) 418 F. Supp. 1037, 1039 (same).

(n24)Footnote 21. See 29 U.S.C. § 216(b); *Ososky v. Wick* (D.C. Cir. 1983) 704 F.2d 1264, 1266 .

(n25)Footnote 22. *Burkey v. Marshall County Bd. of Education* (N.D. Va. 1981) 513 F. Supp. 1084, 1089-1090, 1097-1098 .

(n26)Footnote 23. 29 U.S.C. §§ 216(c), 255(a).

(n27)Footnote 23.1. See *McLaughlin v. Richland Shoe Co.* (1988) 486 U.S. 128, 130-135, 108 S. Ct. 1677, 100 L. Ed. 2d 115 .

(n28)Footnote 24. See *Beamon v. W.B. Saunders Co.* (E.D. Pa. 1976) 413 F. Supp. 1167, 1176 ; cf. *Kamens v. Summit Stainless, Inc.* (D. Pa. 1984) 586 F. Supp. 324, 328 (case brought under FLSA; court stated that equitable tolling is applicable to all federal statutes of limitation); see also discussions of equitable tolling in §§ 43.10[6][c] and 43.11[6][b].

(n29)Footnote 25. cf. *Partlow v. Jewish Orphans' Home, Inc.* (9th Cir. 1981) 645 F.2d 757, 760-761 , disapproved on other grounds, 493 U.S. 165 (1989) (FLSA) ; *King v. Carey* (W.D.N.Y. 1975) 405 F. Supp. 41, 44 (FLSA) .

(n30)Footnote 26. Compare 29 U.S.C. § 206(d) (federal EPA) with *Lab. Code § 1197.5* (California EPA); see also discussion in § 43.02[1].

(n31)Footnote 27. See 29 U.S.C. §§ 206(d)(3), 216(b).

(n32)Footnote 28. *Bullock v. Pizza Hut, Inc.* (M.D. La. 1977) 429 F. Supp. 424, 431 ; *Laffey v. Northwest Airlines, Inc.* (D.D.C. 1974) 374 F. Supp. 1382, 1385-1387 , supplemented on other grounds 392 F. Supp. 1076

(D.D.C. 1975) , *aff'd in relevant part*, 567 F.2d 429, 455-457 (D.C. Cir. 1976) , *cert. denied*, 434 U.S. 1086 (1978) .

(n33)Footnote 29. *See Melanson v. Rantoul* (D.R.I. 1982) 536 F. Supp. 271, 291 (plaintiff entitled to average difference, not to back pay based on base rate of highest paid male performing equal work); *Pedreyra v. Cornell Prescription Pharmacies* (D. Colo. 1979) 465 F. Supp. 936, 949 ; *Hodgson v. J.M. Fields, Inc.* (M.D. Fla. 1971) 335 F. Supp. 731, 733 .

(n34)Footnote 30. *See, e.g., E.E.O.C. v. Whitin Mach. Works, Inc.* (4th Cir. 1983) 699 F.2d 688, 689 .

(n35)Footnote 31. *See* 29 U.S.C. § 216(b).

(n36)Footnote 32. *See* 29 U.S.C. § 216(b).

(n37)Footnote 33. *See* 29 U.S.C. § 215(c)(3).

(n38)Footnote 34. *See* 29 U.S.C. § 216(b).

(n39)Footnote 35. For discussion of FEHA and Title VII remedies, *see* §§ 43.01[8] and 43.10[9], respectively; compare 29 U.S.C. § 216(b) with *Gov. Code* § 12970(a) and 42 U.S.C. § 2000e-5(g). Title VII addresses various forms of sex-based discrimination, in broad language, whereas the EPA addresses simply sex-discriminatory compensation in employment. 29 C.F.R. § 1620.27; *see also County of Washington v. Gunther* (1981) 452 U.S. 161, 163-181, 101 S. Ct. 2242, 68 L. Ed. 2d 751 (Title VII may provide cause of action for "comparable worth"--type violations of the equal pay principle); *but cf. Am. Fed. of S., C., & Mun. Emp. v. State of Wash.* (9th Cir. 1985) 770 F.2d 1401, 1405-08 (no Title VII violation where employer paid women less than men for work of comparable worth).

(n40)Footnote 35.1. *See Stanley v. University of Southern California* (9th Cir. 1994) 13 F.3d 1313, 1321 .

(n41)Footnote 36. *See* discussion in § 43.11[8][f].

(n42)Footnote 37. *See Hodgson v. Daisy Manufacturing Company* (8th Cir. [Ark.] 1971) 445 F.2d 823, 825 ; *Usery v. Godwin Hardware, Inc.* (W.D. Mich. 1976) 426 F. Supp. 1243, 1269 ; *Brennan v. Sterling Seal Company, Inc.* (W.D. Pa. 1973) 363 F. Supp. 1230, 1234 ; *cf. Brennan v. Board of Education, Jersey City, New Jersey* (D.N.J. 1974) 374 F. Supp. 817, 833-834 (interest under FLSA); *but see Schulte v. Wilson Industries, Inc.* (S.D. Tex. 1982) 547 F. Supp. 324, 343 .

(n43)Footnote 38. *See, e.g., Gibson v. Mohawk Rubber Co.* (8th Cir. [Ark.] 1982) 695 F.2d 1093, 1101-1103 ; *Grove v. Frostburg Nat. Bank* (D. Md. 1982) 549 F. Supp. 922, 948 .

(n44)Footnote 39. *See* 29 U.S.C. § 216(b).

(n45)Footnote 40. *E.E.O.C. v. First Citizens Bank of Billings* (9th Cir. 1985) 758 F.2d 397, 403 ; *Marshall v. Brunner* (3rd Cir. [Pa.] 1982) 668 F.2d 748, 753 .

(n46)Footnote 41. 29 U.S.C. §§ 216(b), 260; *E.E.O.C. v. First Citizens Bank of Billings* (9th Cir. 1985) 758 F.2d 397, 403 .

(n47)Footnote 42. *E.E.O.C. v. First Citizens Bank of Billings* (9th Cir. 1985) 758 F.2d 397, 403 .

(n48)Footnote 43. *See* 29 U.S.C. § 260; *E.E.O.C. v. First Citizens Bank of Billings* (9th Cir. 1985) 758 F.2d 397, 403 .

(n49)Footnote 44. *E.E.O.C. v. First Citizens Bank of Billings* (9th Cir. 1985) 758 F.2d 397, 403 .

(n50)Footnote 45. *E.E.O.C. v. First Citizens Bank of Billings* (9th Cir. 1985) 758 F.2d 397, 403 .

(n51)Footnote 46. 29 U.S.C. 216(b); see *Thompson v. Barrett* (D.D.C. 1984) 599 F. Supp. 806, 810 ; *Weisel v. Singapore Joint Venture, Inc.* (5th Cir. [Fla.] 1979) 602 F.2d 1185, 1191 fn. 18 ; *Nitterright v. Claytor* (D.D.C. 1978) 454 F. Supp. 130, 141 .

(n52)Footnote 47. *Kreager v. Solomon & Flanagan, P.A.* (11th Cir. [Fla.] 1985) 775 F.2d 1541, 1543-1544 . In an EPA action brought in a California state court, such an award might also be available under *Code Civ. Proc.* § 128.5.

(n53)Footnote 48. Compare 29 U.S.C. § 206(d) with *Lab. Code* § 1197.5; see also discussion in §§ 43.02[1] and 43.12 [1].

(n54)Footnote 49. See 29 U.S.C. § 216(b); see also discussion in [2], above.

(n55)Footnote 50. See *Lab. Code* § 1198.7.

(n56)Footnote 51. See 29 U.S.C. §§ 206(d) and 216(b).

(n57)Footnote 52. See § 43.02[8][b] at Paragraph 4 of the Form.

(n58)Footnote 53. See discussion in § 43.12[5].

(n59)Footnote 54. Fed. Rules Civ. Proc., Rule 38; see *Nulf v. International Paper Co.* (10th Cir. [Okla.] 1981) 656 F.2d 553, 563 . For discussion of availability of jury trial, see [12], below.

(n60)Footnote 55. Compare 29 U.S.C. § 206(d)(1) with *Lab. Code* § 1197.5(a).

(n61)Footnote 56. See § 43.02[11].

(n62)Footnote 57. See 29 U.S.C. § 206(d)(1)(i)-(iv) (affirmative defenses under federal EPA).

(n63)Footnote 58. 29 C.F.R. § 1620.30(c).

(n64)Footnote 59. *Usery v. Ritter* (10th Cir. 1977) 547 F.2d 528, 531 ; see also discussion of the privilege under the ADEA, in § 43.11[12].

(n65)Footnote 60. See discussion of this matter under Title VII in § 43.10[13] and under ADEA in § 43.11[12].

(n66)Footnote 61. *Nulf v. International Paper Co.* (10th Cir. 1981) 656 F.2d 553, 563 ; *Lazarus v. State of Maryland* (D. Md. 1978) 79 F.R.D. 633, 635 n.2 (party has right to jury trial, but it must be prayed for).

(n67)Footnote 62. *Altman v. Stevens Fashion Fabrics* (N.D. Cal. 1977) 441 F. Supp. 1318, 1321-1322 ; *Usery v. Venango Diagnostic & Training Center Inc.* (W.D. Pa. 1976) 72 F.R.D. 469, 470 .

(n68)Footnote 63. Fed. R. Civ. P., Rule 38(b); see *Nulf v. International Paper Co.* (10th Cir. 1981) 656 F.2d 553, 563 .



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part B. FEDERAL LAW

3-43 California Employment Law § 43.13

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§ 43.13 Rehabilitation Act of 1973

[1] Right of Action

Section 503ⁿ¹ of the Rehabilitation Act of 1973ⁿ² requires affirmative action by federal contractors as to employment of disabled persons, and Section 504ⁿ³ of the Act prohibits federally funded programs from discriminating against disabled persons in employment. The scope of coverage of these provisions is discussed in Chapter 40, Part C. For discussion of the substantive provisions of the Act, *see* Chapter 41. For discussion of affirmative action requirements under Section 503, *see* Chapter 44.

There is no private right of action under Section 503, the affirmative action provision of the Act,ⁿ⁴ but an individual within the protections of section 504 does have such a private right of action.ⁿ⁵

■ CONSULTANT'S COMMENT:

In *Consolidated Rail Corporation v. Darrone*, ⁿ⁶ the Supreme Court had held, among other things, that Section 504 limited "the ban of discrimination to the specific program or activity receiving federal funds,"ⁿ⁷ in the same way that Title IX of the 1972 Educational Amendments limited its nondiscrimination provisions.ⁿ⁸ Subsequently, however, Congress enacted the Civil Rights Restoration Act of 1987,ⁿ⁹ which overruled that part of the holding in *Darrone* and clarified that Section 504, as well as Title IX, the ADEA, and Title VI of the 1964 Civil Rights Act, apply to an entire institution or entity receiving federal funds, not just to the particular program or activity receiving them. This legislation will make it easier for private plaintiffs to litigate under section 504 because it considerably broadens the range of covered employees. For further discussion of the Civil Rights Restoration Act of 1987, *see* Chapter 40, Part C. *Comme ntary by Erica B. Grubb.*

In California, the state FEHA also prohibits discrimination based on mental or physical disability.ⁿ¹⁰ For discussion of civil actions under the FEHA, *see* § 43.01.

[2] Order and Burden of Proof

The respective burdens of proof of the plaintiff and defendant in a case under Section 504 of the Rehabilitation Act are similar to the burdens of proof and method of presentation of a case in a Title VII action alleging disparate treatment or disparate impact.ⁿ¹¹ Both disparate treatment and disparate impact theories are available to plaintiff in a Section 504 employment discrimination case.ⁿ¹² It should be noted, however, that if a private action is brought under a disparate impact theory, plaintiff may not be able to obtain compensatory damages.ⁿ¹³ Under either theory, the plaintiff's burden is to prove by a preponderance of the evidence that the defendant discriminated against plaintiff on the basis of the plaintiff's disability. The plaintiff may establish a prima facie case of disparate treatment by showing that:

1. Plaintiff is "an individual with a disability," as defined in the Rehabilitation Act of 1973;ⁿ¹⁴
2. Plaintiff sought an employment opportunity for which he or she was qualified or "otherwise qualified";ⁿ¹⁵
3. Defendant rejected plaintiff or denied him or her the employment opportunity under circumstances indicating that it was on the basis of his or her disability.ⁿ¹⁶

Once the plaintiff has established these factors, the burden then shifts to the defendant to rebut the presumption of discrimination by showing, in a disparate treatment case, that its actions were not based on plaintiff's disability but rather on a legitimate nondiscriminatory reason.ⁿ¹⁷ As in Title VII cases, pretext must be proved by plaintiff in a disparate treatment case, if defendant succeeds in establishing a reason other than plaintiff's disability to justify the disparate treatment.ⁿ¹⁸ In proving pretext in a Section 504 case, plaintiff must show that defendant's proffered reason for the treatment complained of is based on misconceptions or unjustified factual conclusions and that the reasons for rejection encompassed unjustified consideration of plaintiff's disability.ⁿ¹⁹

In a disparate impact case, the plaintiff need not prove that the employer acted with discriminatory intent, but rather that the challenged practice disproportionately disadvantaged the protected group, of which plaintiff is a member, and that plaintiff was qualified for the position under all but the challenged criteria.ⁿ²⁰ The burden then shifts to defendant, who must show that its actions were job-related and based on business necessity.ⁿ²¹ If the employer satisfies this standard, the plaintiff has the burden of persuasion to show that he or she could satisfy the job qualifications.ⁿ²²

Section 504 requires that a covered employer must reasonably accommodate those disabled persons who are otherwise qualified for employment.ⁿ²³ However, the authorities are split as to whether the burden of showing inability to accommodate otherwise qualified disabled employees is on the employer,ⁿ²⁴ or whether it is part of the plaintiff's prima facie case that he or she is "otherwise qualified."ⁿ²⁵ If it is the defendant's burden, then the assertion of an inability to accommodate is an alternative to defendant's articulation of a legitimate nondiscriminatory reason in a disparate treatment action. Defendants have attempted to satisfy this burden by claiming that the disability poses a high risk of future injury, but the courts have accepted this defense only when the risk is demonstrably related to the position sought.ⁿ²⁶

If, on the other hand, the feasibility of reasonable accommodation is part of plaintiff's prima facie case, a disabled person is not considered "otherwise qualified" for employment if the record shows that accommodation would "require either a modification of the essential nature of the program, or impose an undue burden on the recipient of federal funds."ⁿ²⁷ Once the employer presents credible evidence that indicates that accommodation would not reasonably be possible, the plaintiff has the burden of bringing forth evidence concerning his or her individual capabilities and suggestions for possible accommodations to rebut the employer's evidence.ⁿ²⁸ For full discussion of the requirement of accommodation, *see* Chapter 41, Part D.

[3] Jurisdiction

Federal courts have exclusive jurisdiction of Section 504 cases,ⁿ²⁹ because the remedy provision relating to Section 504 incorporates the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964,"ⁿ³⁰ which confers jurisdiction exclusively on federal courts.ⁿ³¹

[4] Exhaustion of Administrative Remedies

The federal courts are divided on the question of whether persons bringing suit under Section 504 against nonfederal employers must exhaust administrative remedies. Some courts hold that the administrative remedies under Section 504 for nonfederal employees are inadequate, and thus need not be exhausted.ⁿ³² Other courts hold that exhaustion is required as to Section 504 nonfederal employment discrimination cases.ⁿ³³

On the other hand, a federal employee must exhaust administrative remedies to bring a claim under the Rehabilitation Act.^{n33.1} Federal regulations require that federal employees who believe they have been discriminated against on the basis of a handicap must consult an EEOC counselor before filing a complaint to try to informally resolve the matter.^{n33.2} The consultation must occur within 45 days of the date of the matter alleged to be discriminatory or within 45 days of the effective date of a personnel action.^{n33.3} Failure to comply with the regulation is fatal to a federal employee's discrimination claim.^{n33.4} Thus, Postal Service employees who did not initiate contact with an EEOC officer within 45 days of the denial of their requests to wear respirators and who also could not point to any discrete, discriminatory act that occurred within the 45-day period failed to exhaust administrative remedies prior to bringing an act under the Rehabilitation Act based on the Postal Service's denial of their requests to wear respirators. Further, their claims were not timely under the continuing violations doctrine, even though the Postal Service denied their requests pursuant to an ongoing discriminatory policy. Claims based on discrete acts are only timely when the acts occurred within the limitations period.^{n33.5}

The jurisdictional scope of the federal employee's court action depends on the scope of the EEOC charge and investigation. The specific claims in district court should be presented to the EEOC. However, the district court has jurisdiction over charges of discrimination that are "like or reasonably related to" the allegations made before the EEOC, as well as charges within the scope of an EEOC investigation that reasonably could be expected to grow out of the allegations.^{n33.6} On the other hand, the district court will properly dismiss an allegation under the Rehabilitation Act the EEOC charge completely failed to include.^{n33.7}

Exhaustion of administrative remedies is not required for a federal employee under the Rehabilitation Act when the employee seeks review of the disposition of an administrative complaint, rather than enforcement of a final action or settlement agreement.^{n33.8} Thus, for example, a federal employee who sued civilly to seek *de novo* review of his administrative disability discrimination complaint by asking for the relief he was denied during the administrative process, was not required to exhaust administrative remedies.^{n33.9}

The exhaustion requirement for federal employees is akin to a statute of limitations and is subject to waiver, equitable estoppel,^{n33.10} and equitable tolling.^{n33.11}

[5] Standing

[a] In General

Individuals with disabilities, as defined in the Rehabilitation Act,ⁿ³⁴ have standing to bring suits under Section 504.ⁿ³⁵ In addition, organizations of disabled persons have standing to sue under Section 504,ⁿ³⁶ as do parents and guardians of aggrieved disabled individuals,ⁿ³⁷ and survivors of deceased aggrieved disabled individuals.ⁿ³⁸ In one case, in which a school psychologist alleged she was terminated from employment in retaliation for protecting the rights of a disabled student, the court held that the plaintiff had standing to bring a claim under the Rehabilitation Act because she was within the "zone of interests" meant to be protected by Section 504 and the anti-retaliation provisions of Title VI of

the Civil Rights Act of 1964, and she had suffered injuries for asserting those interests.ⁿ³⁹

[b] Class Actions

Class actions are available under Section 504.ⁿ⁴⁰ The standing and other requirements for class actions under Section 504 parallel requirements in other federal employment discrimination cases governed by Rule 23.ⁿ⁴¹

[6] Statutes of Limitation

[a] In General

The Rehabilitation Act does not contain any provision establishing time limits for bringing a civil action under the Act. Two cases have held that the forum state's statute of limitations governing those claims that are most closely analogous to the Rehabilitation Act complaint are controlling.ⁿ⁴² Because the defense of laches may be applicable to Section 504 cases,ⁿ⁴³ all plaintiffs should avoid unnecessary delay in bringing suit.

[b] Tolling Principles for Section 504 Limitations Periods

Regardless of which precise limitations period governs Section 504 actions, it appears that equitable tolling principles apply. Tolling principles have been applied when the plaintiff relied on those with apparent power to enforce the law,ⁿ⁴⁴ and when a pending administrative proceeding precluded immediate court action.ⁿ⁴⁵

[c] Continuing Violations

The continuing violations doctrine, which was developed under Title VII case law, applies to claims under the Rehabilitation Act.^{n45.1} Under the United States Supreme Court's analysis of the continuing violations doctrine, claims based on discrete acts, such as termination, failure to promote, denial of transfer, or refusal to hire, are only timely when the acts occurred within the limitations period. Claims based on a hostile environment are only timely when at least one act occurred during the limitations period.^{n45.2}

The Supreme Court expressly reserved the question of timely filing as applied to a pattern-or-practice claim.^{n45.3} However, the Ninth Circuit has held that a discriminatory policy claim does not extend the statute of limitations.^{n45.4}

[7] Res Judicata and Collateral Estoppel Effects

Normal principles of res judicata and collateral estoppel apply to relitigation of issues and claims under Section 504.ⁿ⁴⁶ For example, in a case in which mentally retarded persons were members of a class in a prior action and secured relief that was identical to the relief sought in the subsequent case, those individuals were precluded from relitigation of their claims of discrimination by res judicata and collateral estoppel.ⁿ⁴⁷

[8] Relief Available

[a] Generally

Section 504 expressly embodies the remedies afforded by Title VI of the Civil Rights Act,ⁿ⁴⁸ but the scope of available remedies under Title VI is unclear. In a Supreme Court case discussing the remedies available under Title VI, a plurality of the court agreed that compensatory relief was not available to a private plaintiff under Title VI absent proof of discriminatory intent.ⁿ⁴⁹ In a subsequent opinion, the Supreme Court held that in a case of intentional discrimination under the Rehabilitation Act, the plaintiff may recover back pay, a form of compensatory damages.ⁿ⁵⁰ With regard to the availability of compensatory damages other than back pay, few cases have been decided. Some district courts have held that equitable monetary damages similar to those recoverable under Title VII should be allowed,ⁿ⁵¹ but have

declined to approve damages for mental suffering or humiliation.ⁿ⁵² Other cases would allow compensatory damages for mental anguish and punitive damages.ⁿ⁵³ It should be noted that under the California FEHA,ⁿ⁵⁴ both compensatory and punitive damages are available for discrimination by private employers with five or more employees, as well as harassment in all nonfederal government employment on the basis of disability.ⁿ⁵⁵

Injunctive relief under the Rehabilitation Act is available in the Ninth Circuit under appropriate circumstances.ⁿ⁵⁶

[b] Attorney's Fees

Section 504 empowers the court in its discretion to allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.ⁿ⁵⁷ Case law upholds this availability of attorney's fees to a prevailing plaintiff under Section 504.ⁿ⁵⁸

[9] FORM--Complaint for Violation of Section 504 of Rehabilitation Act of 1973

[a] Comment

[i] Use of Form

The form set forth in [b], *below*, is a general complaint by a handicapped individual for monetary and injunctive relief for violation of Section 504 of the Rehabilitation Act of 1973.ⁿ⁵⁹ The extent of monetary relief available to private parties under Section 504 is currently unsettled.ⁿ⁶⁰

Since a case under Section 504 is brought in federal court, the plaintiff must comply with the Federal Rules of Civil Procedure, and with local federal rules of court. For discussion of some of the federal procedural requirements for bringing a federal civil complaint, *see* § 43.10[10][a][ii].

[ii] Allegations

The complaint in [b], *below*, contains the following allegations: (1) a preliminary statement of the substance of the complaint (preferred by some United States district courts) (Optional Paragraph 1); (2) the identities of the parties plaintiff and defendant (Paragraphs 2-4);ⁿ⁶¹ (3) the basis for jurisdiction of the subject matter of the action (Paragraph 5);ⁿ⁶² (4) a claim for relief for discrimination against plaintiff on the basis of his or her disability, based on intentional discrimination or disparate treatment (Paragraph 6) or disparate impact (Paragraph 7);ⁿ⁶³ (5) that plaintiff is an "otherwise qualified individual with a disability" who can perform the job despite the disability with reasonable accommodation by the employer (Paragraph 8);ⁿ⁶⁴ (6) an allegation of the need for monetary relief, including back pay (Paragraph 9);ⁿ⁶⁵ (7) an allegation that defendant's discriminatory actions were done with malice, fraud, or reckless disregard for plaintiff's rights and that punitive damages should be awarded to plaintiff (Optional Paragraph 10);ⁿ⁶⁶ and (8) an allegation of the need for injunctive relief (Optional Paragraph 11).ⁿ⁶⁷ In addition, the complaint sets forth a prayer setting forth the relief requested, including back pay, front pay, compensatory damages, interest, costs and attorney's fees.ⁿ⁶⁸ Because the scope of remedies available in a Section 504 case is not entirely clear, plaintiff should request all remedies that seem appropriate to the facts of the case.

[b] Form UNITED STATES DISTRICT COURT,

_____ [specify, e.g., NORTHERN] DISTRICT OF CALIFORNIA

_____ [name], Plaintiff,)

vs.)

_____ [name(s)], Defendant(s).)

Civil Case No. _____

INDIVIDUAL COMPLAINT FOR MONETARY
AND INJUNCTIVE RELIEF FOR EMPLOYMENT
DISCRIMINATION

Plaintiff alleges:

[1. This is an action brought pursuant to Section 504 of the Rehabilitation Act of 1973, Title 29 *United States Code*, Sections 791, 794, and 794a (hereafter referred to as "Section 504") for remedies for plaintiff _____ (name), for alleged discrimination in employment against plaintiff because of his/her disability. Plaintiff alleges that he/she has been discriminated against on account of his/her disability, in violation of Section 504, in that defendant has _____ (specify denial of employment opportunity because of disability, e.g., refused to hire) plaintiff because of plaintiff's disability. By this action, plaintiff _____ (name) seeks the following relief: _____ (specify, e.g., monetary relief, including back pay, compensatory damages, punitive damages, prejudgment interest, attorney's fees and costs of suit, and injunctive relief, consisting of an order requiring defendant to hire plaintiff) pursuant to Section 504.]

2. Plaintiff _____ [name] is an "individual with a disability," as defined in the Rehabilitation Act of 1973, Title 29 *United States Code* Section 706(8)(B), in that plaintiff _____ [has or has a record of or is regarded as having] a _____ [physical and/or mental] impairment that substantially limits one or more of plaintiff's major life activities, in that _____ [describe manifestation of disability of plaintiff].

[EITHER]

3. Plaintiff is an employee of defendant _____ [name], and has been employed by defendant _____ [name], at _____ [place of employment] since _____ [date].

[OR]

3. Plaintiff applied for employment with defendant _____ [name] at _____ [place] on _____ [date].

[OR]

3. Plaintiff was employed by defendant _____ [name] at _____ [place of employment] from _____ [date] until _____ [date].

[CONTINUE]

4. Defendant _____ [name] is an employer subject to suit under Section 504 of the Rehabilitation Act because defendant is a recipient of federal financial assistance within the meaning of that section, in that _____ [specify nature of federal financial assistance received by employer].

5. Jurisdiction of the subject matter of this action is established in this court by the Rehabilitation Act of 1973, Title 29 *United States Code* Sections 791, 794 and 794a(a)(2), by Title 28 *United States Code* Section 1331, and by Title 42 *United States Code* Section 2000d.

6. On _____ [date(s) of violation of plaintiff's rights under Section 504], on the basis of plaintiff's disability described in Paragraph 2, defendant intentionally denied an employment opportunity to plaintiff in the following manner: _____ [specify failure to hire or other violation such as denial of promotion,

benefits, seniority, transfer, or demotion, discipline, or discharge].

7. In the alternative, the action of defendant set forth in Paragraph 6, above, was done pursuant to a policy or practice that has a disparate impact on plaintiff as a disabled person in the following manner: _____ [*set forth factual allegations showing disparate impact of policy or practice on disabled persons including plaintiff*].

8. Plaintiff, although disabled, is an "otherwise qualified disabled individual" within the meaning of Section 504 of the Rehabilitation Act, in that with reasonable accommodation of his or her disability, he/she is able to perform the essential functions of the position that he/she _____ [*holds or held or sought or seeks*] in the employ of defendant, without endangering the health or safety of himself/herself or others.

9. Defendant's discriminatory action(s) against plaintiff as described above have caused and will cause plaintiff to suffer economic losses and damages, including but not limited to lost back pay, front pay/future lost earnings, other economic benefits of employment [such as _____ (*specify if known*)], emotional distress, embarrassment, harm to career and other losses, from _____ [*date of discriminatory action by defendant*] to _____ [*date on which plaintiff has been or will regain employment right*]. The exact amount of lost pay, damages, and other economic benefits to which plaintiff is entitled is unknown to plaintiff at the time of filing this complaint.

[10. Defendant has violated plaintiff's rights under Section 504 of the Rehabilitation Act oppressively, maliciously, fraudulently, or with reckless disregard for plaintiff's rights, justifying an award of punitive damages against defendant in this action.]

[11. Plaintiff has no adequate remedy at law to secure relief for the deprivation of equal employment opportunity to him/her complained of herein. If this court does not enter an order requiring defendant to _____ (*specify relief desired, such as reinstatement, hiring, promotion, award of retroactive seniority to plaintiff*), plaintiff will be irreparably injured by the actions of defendant complained of above.]

WHEREFORE, plaintiff prays for judgment as follows:

1. For back pay, with prejudgment interest, for the period from the first date of discrimination by defendant against plaintiff to the date of judgment in this action;

2. For front pay and/or future lost earnings for the period from the date of judgment to the date at which plaintiff actually is placed in the position that he or she has been denied because of the discrimination;

[3. For compensatory damages;]

[4. For punitive damages;]

[5. For injunctive relief, including but not limited to _____ (*specify injunctive relief desired, such as hiring, reinstatement, promotion, transfer, removal of discipline, retroactive seniority, etc.*), and for all other injunctive relief required to make plaintiff whole for the losses caused by the violation of defendant;]

6. For costs of suit, including a reasonable attorney's fee pursuant to Title 29 *United States Code Section 794a(b)*; and

7. For such other and further relief as the court deems proper.

_____ [*signature*]

Attorney for Plaintiff

[Add verification, if desired.]

[10] Affirmative Defenses to Complaint for Violation of Section 504 of Rehabilitation Act

Because of the disparate treatment/disparate impact approach to proving cases under Section 504 of the Rehabilitation Act,⁶⁹ the usual affirmative defenses to Title VII disparate treatment/disparate impact cases are applicable under Section 504. For example, the business necessity defense, which allows a defendant to justify a practice that has a disparate impact on a protected group based on a showing that the particular job requirements are job-related, is an available defense to a Section 504 complaint.⁷⁰ Other defenses that may be stated affirmatively are that the employer has fulfilled its duty to accommodate disabled workers, or that fulfillment of that duty would constitute an undue hardship on the employer.⁷¹

For examples of forms of affirmative defenses to an FEHA complaint based on handicap discrimination, which may be modified for use in an answer to a complaint under Section 504, *see* § 43.01[13][f], [g], [j], [k], [l].

Legal Topics:

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

Labor & Employment Law
Discrimination
Disability Discrimination
Federal & State Interrelationships
Labor & Employment Law
Discrimination
Disability Discrimination
Rehabilitation Act
Labor & Employment Law
Discrimination
Disparate Impact
Defenses & Exceptions
Bona Fide Occupational Qualifications
Labor & Employment Law
Discrimination
Public Contracts
Coverage & Definitions

FOOTNOTES:

(n1)Footnote 1. 29 U.S.C. § 793, referred to as Section 503 of the Rehabilitation Act.

(n2)Footnote 2. 29 U.S.C. § 701 *et seq.*

(n3)Footnote 3. *See* 29 U.S.C. § 794, referred to as Section 504 of the Rehabilitation Act.

(n4)Footnote 4. *Hodges v. Atchison, Topeka & Santa Fe Ry.* (10th Cir. 1984) 728 F.2d 414, 416, *cert. denied*, 469 U.S. 822 (1984); *Fisher v. City of Tucson* (9th Cir. 1981) 663 F.2d 861, 864-867, *cert. denied*, 459 U.S. 881 (1982).

(n5)Footnote 5. *CONRAIL v. Darrone* (1984) 465 U.S. 624, 630-631, 104 S. Ct. 1248, 79 L. Ed. 2d 568; *Smith v. United States Postal Service* (6th Cir. 1985) 766 F.2d 205, 206; *Graves v. Methodist Youth Services Inc.* (N.D. Ill. 1985) 624 F. Supp. 429, 433-434.

(n6)Footnote 6. *CONRAIL v. Darrone* (1984) 465 U.S. 624, 104 S. Ct. 1248, 79 L. Ed. 2d 568.

(n7)Footnote 7. *CONRAIL v. Darrone* (1984) 465 U.S. 624, 636, 104 S. Ct. 1248, 79 L. Ed. 2d 568.

(n8)Footnote 8. *See* *Grove City College v. Bell* (1984) 465 U.S. 555, 573, 104 S. Ct. 1211, 79 L. Ed. 2d 516.

(n9)Footnote 9. *See* Pub. L. No. 100-259.

(n10)Footnote 10. *See* Gov. Code §§ 12926(i), (k), 12940; *see, e.g., Ackerman v. Western Elec. Co., Inc.* (N.D. Cal. 1986) 643 F. Supp. 836, 842.

(n11)Footnote 11. *See* 42 U.S.C. § 2000e *et seq.*; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.

Ct. 1817, 36 L. Ed. 2d 668 ; *Doe v. New York University* (2d Cir. 1981) 666 F.2d 761, 776 . For discussion of burden of proof in Title VII action, *see* § 43.10[2].

(n12)Footnote 12. *See, e.g., Prewitt v. United States Postal Service* (5th Cir. 1981) 662 F.2d 292, 306-307 (disparate impact); *Pushkin v. Regents of University of Colorado* (10th Cir. 1981) 658 F.2d 1372, 1389-1390 (disparate treatment).

(n13)Footnote 13. *See Guardians Ass'n v. Civil Service Comm'n* (1983) 463 U.S. 582, 607 n.27, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (majority of justices would not allow compensatory damages in absence of proof of intentional discrimination). For discussion of relief available, *see* [8], *below*.

(n14)Footnote 14. *See* 29 U.S.C. § 706(8)(B). For discussion of persons covered by the Act, *see* ch. 40, pt. C, and ch. 41, pt. B.

(n15)Footnote 15. *See* 29 U.S.C. § 794(a); *see Norcross v. Sneed* (8th Cir. 1985) 755 F.2d 113, 117 ; *Doe v. New York University* (2d Cir. 1981) 666 F.2d 761, 766 . An "otherwise qualified" disabled person under 29 U.S.C. § 794(a) is one who can perform the essential functions of the job in question without endangering his or her own health and safety or that of others. *Mantolite v. Bolger* (D. Ariz. 1982) 96 F.R.D. 179, 182-183 ; *see Doe v. Region 13 Mental Health-Mental Retardation Com.* (5th Cir. 1983) 704 F.2d 1402, 1410-1412 (psychiatric worker's suicidal tendencies rendered her not an "otherwise qualified" disabled person under Section 504). For further discussion, *see* ch. 41, pt. B.

(n16)Footnote 16. *Norcross v. Sneed* (8th Cir. 1985) 755 F.2d 113, 117 .

(n17)Footnote 17. *Norcross v. Sneed* (8th Cir. 1985) 755 F.2d 113, 117 .

(n18)Footnote 18. *Norcross v. Sneed* (8th Cir. 1985) 755 F.2d 113, 117 .

(n19)Footnote 19. *See Pushkin v. Regents of University of Colorado* (10th Cir. 1981) 658 F.2d 1372, 1389-1390 .

(n20)Footnote 20. *Prewitt v. United States Postal Service* (5th Cir. 1981) 662 F.2d 292, 306 .

(n21)Footnote 21. *Prewitt v. United States Postal Service* (5th Cir. 1981) 662 F.2d 292, 306-307 .

(n22)Footnote 22. *Prewitt v. United States Postal Service* (5th Cir. 1981) 662 F.2d 292, 307 .

(n23)Footnote 23. *See School Board of Nassau County v. Arline* (1987) 480 U.S. 273, 287 n. 17, 107 S. Ct. 1123, 94 L. Ed. 2d 307 ; *Lucero v. Hart* (9th Cir. 1990) 915 F.2d 1367, 1372 ; *see also* 28 C.F.R. § 41.53 (Department of Justice coordinating regulation); 45 C.F.R. § 84.3(l) (Department of Health and Human Services regulation).

(n24)Footnote 24. *Prewitt v. United States Postal Service* (5th Cir. 1981) 662 F.2d 292, 307-308 .

(n25)Footnote 25. *See Strathie v. Department of Transp.* (3d Cir. 1983) 716 F.2d 227, 230 ; *Jasany v. United States Postal Service* (6th Cir. 1985) 755 F.2d 1244, 1249 n.5 .

(n26)Footnote 26. *See Pushkin v. Regents of University of Colorado* (10th Cir. 1981) 658 F.2d 1372, 1384-1390 (multiple sclerosis did not pose significant risk of future injury for psychiatric resident); *Bentivegna v. United States Dept't of Labor* (9th Cir. 1982) 694 F.2d 619, 623 (diabetes did not pose increased risk of injury for construction positions).

(n27)Footnote 27. *Strathie v. Department of Transp.* (3d Cir. 1983) 716 F.2d 227, 231 .

(n28)Footnote 28. *Prewitt v. United States Postal Service* (5th Cir. 1981) 662 F.2d 292, 308 .

(n29)Footnote 29. *See* 28 U.S.C. § 1331; *Armstead v. Pingree* (M.D. Fla. 1986) 629 F. Supp. 273, 276-277 .

(n30)Footnote 30. *See* 29 U.S.C. § 794a(a)(2).

(n31)Footnote 31. *See* 42 U.S.C. § 2000d.

(n32)Footnote 32. *See, e.g.,* Great L.A. Co. on *Deaf v. Com. Tel. of So. Cal.* (9th Cir. 1983) 719 F.2d 1017, 1021 , *cert. denied*, 467 U.S. 1252 (1984) ; *Miener v. Missouri* (8th Cir. 1982) 673 F.2d 969, 978 , *cert. denied*, 459 U.S. 909 (1982) ; *Kling v. County of Los Angeles* (9th Cir. 1980) 633 F.2d 876, 879 , *rev'd on other grounds*, 474 U.S. 936 (1985) ; *Shuttleworth v. Broward County* (S.D. Fla. 1986) 639 F. Supp. 654, 657-658 ; *Davis v. Modine Mfg. Co.* (D. Kan. 1981) 526 F. Supp. 943, 955 ; *Whitaker v. Board of Higher Ed. of City of New York* (E.D.N.Y. 1978) 461 F. Supp. 99, 108-109 .

(n33)Footnote 33. *Doe v. Colautti* (E.D. Pa. 1978) 454 F. Supp. 621, 630 , *aff'd*, 592 F.2d 704, 706 (3d Cir. 1979) .

(n34)Footnote 33.1. *See* *Leong v. Potter* (9th Cir. 2003) 347 F.3d 1117, 1121-1122 (although failure to file EEOC complaint is not complete bar to district court jurisdiction over action by federal employee, substantial compliance with exhaustion requirement is jurisdictional pre-requisite).

(n35)Footnote 33.2. 29 C.F.R. § 1614.105(a); *see, e.g.,* *Leong v. Potter* (9th Cir. 2003) 347 F.3d 1117, 1122 (Postal Service employee was required to consult with EEO counselor before filing action under Rehabilitation Act).

(n36)Footnote 33.3. 29 C.F.R. § 1614.105(a)(1).

(n37)Footnote 33.4. *Cherosky v. Henderson* (9th Cir. 2003) 330 F.3d 1243, 1245 ; *see* *Lyons v. England* (9th Cir. 2002) 307 F.3d 1092, 1105 (Title VII action) .

(n38)Footnote 33.5. *Cherosky v. Henderson* (9th Cir. 2003) 330 F.3d 1243, 1245-1248 . For discussion of continuing violations doctrine in Rehabilitation Act actions, *see* § 43.13[6][c].

(n39)Footnote 33.6. *Leong v. Potter* (9th Cir. 2003) 347 F.3d 1117, 1122 .

(n40)Footnote 33.7. *See, e.g.,* *Leong v. Potter* (9th Cir. 2003) 347 F.3d 1117, 1122 (district court properly dismissed Rehabilitation Act claim of discrimination based on mental disability by Postal Service employee, because employee never attempted to amend his EEOC charge to reflect Rehabilitation Act claim, disability claim relied on different theory and different statute than other claims, EEOC did not investigate disability discrimination and investigation could not have been reasonably expected to grow out of charges, nothing in employee's affidavit would have led EEOC to suspect he was disabled or had been subjected to disability discrimination, and charges did not provide Postal Service adequate notice of disability discrimination claim or that voluntary settlement of claim might be possible through reasonable accommodation of his mental illness).

(n41)Footnote 33.8. *Farrell v. Principi* (9th Cir. 2004) 366 F.3d 1066, 1067 . *see* 29 C.F.R. § 1614.504(a).

(n42)Footnote 33.9. *Farrell v. Principi* (9th Cir. 2004) 366 F.3d 1066, 1067-1069 .

(n43)Footnote 33.10. *Leong v. Potter* (9th Cir. 2003) 347 F.3d 1117, 1123 (there was no triable issue of fact as to whether Postal Service wrongfully prevented terminated employee from meeting with EEO counselor after his termination by not permitting him to enter former work site, because there was no evidence Postal Service refused to let him enter site because he wished to speak with EEO counselor or that meeting with counselor in person would have helped him advance his mental disability claim, which he failed to present in his claim).

(n44)Footnote 33.11. *Zipes v. Trans World Airlines, Inc.* (1982) 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d

234 . *see Leong v. Potter* (9th Cir. 2003) 347 F.3d 1117, 1123 (equitable tolling would excuse delay, but not Postal Service employee's complete failure to file disability claim with EEOC).

(n45)Footnote 34. *See* 29 U.S.C. § 706(8) (definition of "individual with a disability"); *see also* discussion in ch. 41, pt. B.

(n46)Footnote 35. *See, e.g., Nodleman v. Aero Mexico* (C.D. Cal. 1981) 528 F. Supp. 475, 480-481 .

(n47)Footnote 36. *Williams v. United States* (9th Cir. 1983) 704 F.2d 1162, 1163 (two disabled individuals and four organizations that had purpose of improving life for disabled persons had standing to sue federal agencies to seek ameliorative regulation under *Rehabilitation Act*); *NAACP v. Wilmington Medical Center, Inc.* (D. Del. 1978) 453 F. Supp. 280, 284 n.3 , *vacated on other grounds*, 599 F.2d 1247 (3d Cir. 1979) .

(n48)Footnote 37. *See Hoyt v. St. Mary's Rehabilitation Center* (8th Cir. 1983) 711 F.2d 864, 867 (friend and visitor of nursing home patient lacked standing under *Rehabilitation Act* because they were not relative or guardian); *Sanders by Sanders v. Marquette Public Schools* (W.D. Mich. 1983) 561 F. Supp. 1361, 1370 (father had standing to sue under *Act* on behalf of daughter during her minority, but he had no right to sue for derivative injuries allegedly caused to him by discrimination against daughter).

(n49)Footnote 38. *CONRAIL v. Darrone* (1984) 465 U.S. 624, 630, 637, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (widow had standing to recover backpay due to her deceased husband under Section 504).

(n50)Footnote 39. *Ross v. Allen* (S.D.N.Y. 1981) 515 F. Supp. 972, 976 .

(n51)Footnote 40. *See Burka v. New York City Transit Authority* (S.D.N.Y. 1986) 110 F.R.D. 595, 600-608 ; *Dyer-Neely v. City of Chicago* (N.D. Ill. 1984) 101 F.R.D. 83, 86-87 .

(n52)Footnote 41. Fed. R. Civ. P., Rule 23(a) requires that named plaintiff(s) in a class action must have claims typical of class members and must adequately represent them, raise claims common to the class, and show that class is too numerous for joinder to be practicable. *cf. Mantolet v. Bolger* (9th Cir. 1985) 767 F.2d 1416, 1424-1425 (foreclosing discovery to ascertain existence of nationwide class where only three persons were identified as epileptics with complaints of discrimination against employer); *Dyer-Neely v. City of Chicago* (N.D. Ill. 1984) 101 F.R.D. 83, 86-87 (class certification of otherwise qualified handicapped persons seeking police officer positions and challenging physical requirements claimed not to be sufficiently job-related).

(n53)Footnote 42. *Hutchings v. Erie City and County, Etc.* (W.D. Pa. 1981) 516 F. Supp. 1265, 1270 ; *Marin v. New York State Dep't of Labor* (S.D.N.Y. 1981) 512 F. Supp. 353, 355 .

(n54)Footnote 43. *See U.S. v. Univ. Hosp. of State Univ. of New York* (E.D.N.Y. 1983) 575 F. Supp. 607, 611 , *aff'd*, 729 F.2d 144 (2d Cir. 1984) ; *Wright v. Columbia University* (E.D. Pa. 1981) 520 F. Supp. 789, 794-795 .

(n55)Footnote 44. *See Curry v. United States Postal Service* (S.D. Ohio 1984) 583 F. Supp. 334, 345-346 .

(n56)Footnote 45. *See Hutchings v. Erie City and County, Etc.* (W.D. Pa. 1981) 516 F. Supp. 1265, 1271 .

(n57)Footnote 45.1. *See Cherosky v. Henderson* (9th Cir. 2003) 330 F.3d 1243, 1245 n.3 (Supreme Court's analysis of continuing violations doctrine is not limited to Title VII actions, but applies with equal force to *Rehabilitation Act* and actions arising under other civil rights laws).

(n58)Footnote 45.2. *Cherosky v. Henderson* (9th Cir. 2003) 330 F.3d 1243, 1245 ; *see AMTRAK v. Morgan* (2002) 536 U.S. 101, 122, 127, 122 S. Ct. 2061, 153 L. Ed. 2d 106 .

(n59)Footnote 45.3. *AMTRAK v. Morgan* (2002) 536 U.S. 101, 123 n.9, 122 S. Ct. 2061, 153 L. Ed. 2d 106 .

(n60)Footnote 45.4. *Cherosky v. Henderson* (9th Cir. 2003) 330 F.3d 1243, 1246-1247 .

(n61)Footnote 46. For discussion of general principles of res judicata and collateral estoppel, see ch. 42, pt. A.

(n62)Footnote 47. *Daniel B. v. O'Bannon* (E.D. Pa. 1984) 588 F. Supp. 1095, 1099-1102 .

(n63)Footnote 48. 29 U.S.C. § 794a(a)(2).

(n64)Footnote 49. *Guardians Ass'n v. Civil Service Comm'n* (1983) 463 U.S. 582, 607 n.27, 103 S. Ct. 3221, 77 L. Ed. 2d 866 ; see *Shuttleworth v. Broward County* (S.D. Fla. 1986) 649 F. Supp. 35, 36 .

(n65)Footnote 50. *CONRAIL v. Darrone* (1984) 465 U.S. 624, 630, 104 S. Ct. 1248, 79 L. Ed. 2d 568 .

(n66)Footnote 51. See, e.g., *Shuttleworth v. Broward County* (S.D. Fla. 1986) 649 F. Supp. 35, 38 ; *Gelman v. Department of Education* (D. Colo. 1982) 544 F. Supp. 651, 653-654 ; *Patton v. Dumpson* (S.D.N.Y. 1980) 498 F. Supp. 933, 937-939 . For discussion of remedies available under Title VII, see § 43.10[9].

(n67)Footnote 52. *Shuttleworth v. Broward County* (S.D. Fla. 1986) 649 F. Supp. 35, 38 ; *Martin v. Cardinal Glennon Memorial Hospital for Children* (E.D. Mo. 1984) 599 F. Supp. 284 .

(n68)Footnote 53. See, e.g., *Fitzgerald v. Green Valley Area Educ. Agency* (S.D. Iowa 1984) 589 F. Supp. 1130, 1138-1139 .

(n69)Footnote 54. Gov. Code § 12900 et seq.

(n70)Footnote 55. Gov. Code § 12940(a), (j); see, e.g., *Ackerman v. Western Elec. Co., Inc.* (N.D. Cal. 1986) 643 F. Supp. 836, 852-853 .

(n71)Footnote 56. See *Chalk v. U.S. Dist. Court Cent. Dist. of California* (9th Cir. 1988) 840 F.2d 701, 704 .

(n72)Footnote 57. See 29 U.S.C. § 794a(b).

(n73)Footnote 58. *United Handicapped Federation v. Andre* (8th Cir. 1980) 622 F.2d 342, 347-348 ; see *Disabled in Action of Pennsylvania v. Pierce* (3d Cir. 1986) 789 F.2d 1016, 1018-1021 ; *Cal. Ass'n of Physically Handicapped v. FCC* (9th Cir. 1983) 721 F.2d 667, 671-672 .

(n74)Footnote 59. See 29 U.S.C. § 794.

(n75)Footnote 60. See discussion in [8], above.

(n76)Footnote 61. See 29 U.S.C. §§ 706(8)(B), (F) (definition under Section 504 of "individual with a disability"), 794(a) (employers receiving federal financial assistance may not discriminate against otherwise qualified individual with a disability). For discussion of standing to sue, see [5], above. For discussion of coverage of the Rehabilitation Act, see ch. 40, pt. C.

(n77)Footnote 62. See 28 U.S.C. § 1331; 29 U.S.C. §§ 791, 794, 794a(a)(2); 42 U.S.C. § 2000d. For discussion of jurisdiction, see [3], above.

(n78)Footnote 63. See generally 29 U.S.C. § 794(a). It should be noted that if a disparate impact theory is pleaded, rather than disparate treatment, compensatory damages may not be available to plaintiff. see *Guardians Ass'n v. Civil Service Comm'n* (1983) 463 U.S. 582, 607 n.27, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (majority of justices would not allow compensatory damages in absence of proof of intentional discrimination). For discussion of remedies available under Section 504, see [8][a], above.

(n79)Footnote 64. *See* 29 U.S.C. § 794(a).

(n80)Footnote 65. *See* *CONRAIL v. Darrone* (1984) 465 U.S. 624, 630, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (entitlement to back pay). The question of which remedies are available in an action under 29 U.S.C. § 794 is an uncertain area of the law. For discussion, *see* [8], *above*.

(n81)Footnote 66. It is unclear whether punitive damages are available in such an action. *Compare* *Gelman v. Department of Education* (D. Colo. 1982) 544 F. Supp. 651, 653-654 (punitive damages not available under Section 504) with *Fitzgerald v. Green Valley Area Educ. Agency* (S.D. Iowa 1984) 589 F. Supp. 1130, 1138-1139 (punitive damages might be available but were inappropriate under facts presented); *see* discussion in [8][a], *above*.

(n82)Footnote 67. *See* 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 2000d.

(n83)Footnote 68. 29 U.S.C. § 794a(b) provides reasonable attorney's fees may be awarded to plaintiff.

(n84)Footnote 69. For discussion, *see* [2], *above*.

(n85)Footnote 70. *Prewitt v. United States Postal Service* (5th Cir. 1981) 662 F.2d 292, 306-307 ; *see* 29 C.F.R. § 613.704.

(n86)Footnote 71. *Prewitt v. United States Postal Service* (5th Cir. 1981) 662 F.2d 292, 307-309 ; *see* 29 C.F.R. § 613.704.



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part B. FEDERAL LAW

3-43 California Employment Law § 43.14

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§ 43.14 Civil Rights Act of 1866 (Title 42 United States Code, Section 1981)

[1] Right of Action

The Civil Rights Act of 1866 (codified in Title 42 *United States Code Section 1981*) provides, among other things, that all persons in the United States have the same right as white persons to make and enforce contracts.ⁿ¹ As used in Section 1981, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.ⁿ² Courts have held that Section 1981 prohibits purposeful racial discrimination in employment and affords a federal civil judicial remedy against private employers.ⁿ³ Other forms of discrimination that can be characterized as racial in nature, such as distinctions based on ancestry or ethnic characteristics, may also be challenged under Section 1981.ⁿ⁴ Section 1981 does not prohibit discrimination on account of sex,ⁿ⁵ age, or religion.ⁿ⁶

For full discussion of the scope of coverage of Title 42 *United States Code Section 1981*, see Chapter 40, Part C.

[2] Order and Burden of Proof

To establish a discrimination claim under Title 42 *United States Code Section 1981*, a plaintiff must demonstrate that the defendant engaged in purposeful or intentional discrimination, not merely practices that result in a disproportionate impact.ⁿ⁷ Proof of a violation of Section 1981 may be made by proving disparate treatment, and often claims under Title VII and Section 1981 are established by the same proof.ⁿ⁸ Courts analyze disparate treatment claims under Section 1981 according to the same standard used to analyze disparate treatment claims under Title VII.ⁿ⁹ The *McDonnell Douglas* ⁿ¹⁰ factors used to establish a Title VII disparate treatment case may be used to establish the order and burden of proof in a Section 1981 case.ⁿ¹¹ The *McDonnell Douglas* factors require that the plaintiff establish a prima facie case, which shifts the burden to the defendant to articulate a legitimate nondiscriminatory reason for its employment decision.ⁿ¹² If defendant articulates such a reason, the plaintiff must demonstrate that the employer's alleged reason for the adverse employment decision is a pretext for another motive that is discriminatory.

As under the Title VII disparate treatment model, the prima facie case under Section 1981 entails proof that:

1. Plaintiff belongs to a racial minority or to a definable group protected by Section 1981;ⁿ¹³
2. Plaintiff applied for and was qualified for the employment opportunity as to which discrimination was claimed;ⁿ¹⁴
3. Despite his or her qualifications, plaintiff was denied the employment opportunity;ⁿ¹⁵ and
4. After plaintiff was denied the employment opportunity, the employer continued to seek persons of plaintiff's qualifications.ⁿ¹⁶

[3] Exhaustion of Administrative Remedies

A plaintiff may bring a civil action under Title 42 *United States Code Section 1981*, without exhausting any administrative remedies.ⁿ¹⁷

[4] Jurisdiction

Federal courts have jurisdiction of Section 1981 actions, regardless of the amount in controversy.ⁿ¹⁸ State courts have concurrent jurisdiction over cases under Section 1981.ⁿ¹⁹

[5] Statute of Limitations

[a] Time Period for Filing Section 1981 Suit

Title 42 *United States Code Section 1981*, does not contain an express statute of limitations. Before the passage of the Civil Rights Act of 1991,^{n19.1} the United States Supreme Court had held that the appropriate statute of limitations for Section 1981 suits is the statute of limitations for personal injury actions in the state in which the cause of action arose.ⁿ²⁰ In California, the statute of limitations that applied to Section 1981 actions is a two-year statute.^{n20.1} However, the United States Supreme Court has now held that causes of action alleging violations of § 1981 as amended by the Civil Rights Act of 1991, are governed by the catchall 4-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990,ⁿ²¹ not by the personal injury statute of limitations of the forum state.^{n21.1} However, actions cognizable under the pre-1990 version of 42 *U.S.C. § 1981* are still governed by the applicable state statute of limitations.^{n21.2}

The statute of limitation for § 1981 bars claims for acts of discrimination occurring prior to four years before the complaint is lodged. Thus, for example, in *Williams v. Boeing Co.*,^{n21.3} plaintiffs' original complaint did not contain a claim of compensation discrimination based on race; thus, the statute of limitation ran from the lodging of the amended complaint six years later. Even though heightened pleading is not required in discrimination cases, the complaint still was required to give the employer fair notice of what the plaintiff's claim was and the grounds on which it rested.^{n21.4} An allegation that plaintiffs were subjected to different terms and conditions of employment was not sufficient to provide the employer with notice that they were asserting a claim of compensation discrimination. Specific references to pay in the original complaint also did not provide notice of a compensation discrimination claim, because the original complaint explicitly referred to plaintiffs having been denied promotions, subjected to a hostile work environment, and retaliated against on the basis of their race, and contained specific factual allegations supporting those claims. The references to pay were related only to pay increases accompanying promotions. Plaintiffs' reliance on the language of a consent decree as proof of what was originally alleged also was unavailing, because the consent decree never became effective and because, although a provision implied that plaintiffs alleged a compensation discrimination claim, the intent of the language used in the decree was to effectuate a broad release of all possible claims, including claims not alleged in the complaint. The allegations of compensation discrimination in the amended complaint also did not relate back to the earlier filings and were barred by the statute of limitation, because there was no common core of operative

facts between the compensation discrimination claim and the promotion discrimination, hostile work environment, and retaliation claims, and the amended complaint had to include additional facts to support the compensation discrimination claim.^{n21.5}

Claims under Section 1981 accrue when the plaintiff knows or has reason to know of the injury that is the basis of the action.^{n21.6} The injury is the adverse employment action, not the discovery of the employer's discriminatory intent. Thus, the claim accrues upon plaintiff's awareness of the actual injury, *i.e.*, the adverse employment action, not when the plaintiff suspects a legal wrong.^{n21.7}

[b] Tolling of Section 1981 Limitations Period

Equitable tolling is a doctrine that may apply to extend the limitations period. It focuses on whether there was excusable delay by the plaintiff. If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he or she needs.^{n21.8}

Since deciding that causes of action alleging violations of *42 U.S.C. § 1981* as amended by the Civil Rights Act of 1991 are governed by federal law, not state law,ⁿ²² the United States Supreme Court has not considered whether questions of tolling under § 1981 are also governed by federal law or state law.^{n22.1} To the extent that state law governs, equitable tolling should apply at least to the extent that California law provides for such tolling.ⁿ²³ The filing period for a Section 1981 suit is not tolled by the process of exhausting administrative remedies under Title VII; therefore, a plaintiff with causes of action under both statutes must file an independent Section 1981 action while awaiting the completion of the administrative process under Title VII.ⁿ²⁴

In *Williams v. Boeing Co.*,^{n24.1} without referring specifically to either state or federal law, the Ninth Circuit held that the statute of limitation on plaintiff's compensation discrimination claim was not tolled by the filing of a joint motion for approval of a consent decree, the district's approval of the consent decree, and its subsequent reversal on appeal. By its own terms, the consent decree was not in effect while on appeal, and plaintiffs could have filed a compensation discrimination claim while the consent decree was on appeal and the employer could not have asserted an affirmative defense that the claim had been released. Further, the statute of limitation was not tolled from the time the district court certified the settlement class. Commencement of the class action itself, not the class certification decision, suspended the statute of limitation as to all asserted members of the class, even if the class is eventually decertified.^{n24.2} The tolling rule did not leave a plaintiff free to raise different or peripheral claims following denial of class status, and the original complaints did not state a claim for compensation discrimination.

[c] Equitable Estoppel

Equitable estoppel is a doctrine that precludes a defendant from asserting the statute of limitations defense. It focuses primarily on actions taken by the defendant to prevent a plaintiff from filing suit, sometimes referred to as "fraudulent concealment."^{n24.3}

California equitable estoppel is similar to and not inconsistent with federal common law.^{n24.4} Under California law, equitable estoppel requires each of the following:^{n24.5}

- That the party to be estopped be apprised of the facts.
- That the party to be estopped intends that his or her conduct be acted on, or so acts that the party asserting the estoppel has a right to believe it was so intended.
- That the party asserting the estoppel be ignorant of the true state of facts.

- That the party asserting the estoppel reasonably rely on the conduct to his or her injury.

The conduct on which a plaintiff bases the claim of equitable estoppel must be different than the conduct on which the substantive claim is based. Thus, for example, in *Lukovsky v. City & County of San Francisco*,^{n24.6} the court found that defendants were not equitably estopped from asserting a statute of limitations defense based on alleged misrepresentations about requiring written verification of qualifying experience, concealing the fact that they were hiring unqualified Asian and Filipino applicants instead. The plaintiffs, however, could not point to fraudulent concealment or active conduct by the defendants above and beyond the wrongdoing upon which the plaintiffs' claim was filed, to prevent the plaintiffs from suing in time. Plaintiffs did not point to any misrepresentation by defendants concealing the composition of the applicant pool or the qualifications of those actually hired, or any promise by which defendants discouraged plaintiffs from timely asserting their rights.^{n24.7}

[6] Relief Available

[a] Generally

The U.S. Supreme Court has held that an individual who establishes a cause of action under Section 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages.ⁿ²⁵ Compensatory and punitive damage awards under Section 1981 are not subject to the statutory limits applicable to such awards under Title VII.^{n25.1}

Because the right to be free from discrimination under Title 42 *United States Code Section 1981*, is "absolute," proof of a Section 1981 violation entitles a plaintiff to nominal damages even without proof of actual damages.^{n25.2} Such nominal damages may support an award of punitive damages if the standard for imposition of punitive damages is met.^{n25.3}

[b] Back Pay

Back pay is available to a person who establishes employment discrimination under Section 1981.ⁿ²⁶ Unlike Title VII,ⁿ²⁷ back pay under Section 1981 is not limited to the period commencing two years prior to the violation giving rise to filing of an EEOC charge.ⁿ²⁸ In recovering back pay under Section 1981, the burden is on the plaintiff to show that he or she has lost earnings due to discrimination.ⁿ²⁹

[c] Front Pay

Because a plaintiff under Section 1981 is entitled to seek compensatory damages,ⁿ³⁰ and because front pay or "future lost earnings" is a form of compensatory damages for employment discrimination,ⁿ³¹ it appears that front pay is an available remedy under Section 1981.

[d] Compensatory Damages

Compensatory damages are available in actions under Title 42 *United States Code Section 1981*.ⁿ³² Compensatory damages may include recovery for emotional distress due to discrimination.ⁿ³³

[e] Punitive Damages

Punitive damages are available in actions under Title 42 *United States Code Section 1981*.ⁿ³⁴ In the employment discrimination context, an employer that discriminates risks that its actions will violate federal law and cause it to be liable for punitive damages.ⁿ³⁵ An employer will not be vicariously liable for discriminatory employment decisions of managerial agents that are contrary to the employer's good faith efforts to comply with the law.^{n35.1} An employer may

be liable for punitive damages if a supervisor who did not actually perpetrate the harassment but nonetheless was responsible under company policy for receiving and acting on complaints of harassment, failed to take action to remedy the harassment.^{n35.2} Evidence presented by the employer of post-charge remediation does not automatically bar the imposition of punitive damages. However, the trial court, in its discretion, may allow an employer to introduce evidence of remedial conduct undertaken in response to its discovery of discrimination to mitigate punitive damages. Further, if the plaintiff contends punitive damages are necessary to "teach the employer a lesson," post-charge remediation may be relevant and admissible.^{n35.3}

In California, the liability of an employer for punitive damages based on the conduct of an employee is governed by *Civil Code Section 3294(b)*. For discussion of this provision, *see* Chapter 30. For full discussion of availability of punitive damages under California law, *see* Levy, Golden, and Sacks, *California Torts*, Chapter 54.

[f] Equitable Remedies

Injunctive relief is available under Title 42 *United States Code Section 1981*.ⁿ³⁶ Reinstatement is a form of injunctive relief available under Section 1981.ⁿ³⁷ Affirmative hiring goals and timetables may also be available in some cases to remedy violations of Section 1981.ⁿ³⁸ In addition, awards of retroactive seniority may be made in actions under Section 1981.ⁿ³⁹

[g] Prejudgment Interest

Prejudgment interest on a Section 1981 award is available in the discretion of the court.ⁿ⁴⁰

[h] Attorney's Fee and Expert Fee Awards

Attorney's fees under Section 1981 are governed by Title 42 *United States Code Section 1988, the Civil Rights Attorney's Fees Awards Act of 1976*. Section 1988 provides in relevant part that "[i]n any action or proceeding to enforce a provision of Section ... 1981, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." However, costs, including legal fees, may not be awarded in an action against a judicial officer for an act or omission taken in his or her judicial capacity, unless the alleged action clearly exceeds that officer's jurisdiction.ⁿ⁴¹ In awarding an attorney's fee in any action or proceeding to enforce a provision of Section 1981, the court, in its discretion, may include expert fees as part of the attorney's fee.^{n41.1}

In *Barjon v. Dalton*,^{n41.2} the Ninth Circuit analyzed the discretionary award of reasonable attorney's fees under 42 *U.S.C. § 1988(b)*. These fees must be calculated according to the prevailing rates in the relevant community, regardless of the actual fee charged and whether the plaintiff is represented by private or non-profit counsel.^{n41.3} In general, the "relevant community" is the forum in which the district court sits;^{n41.4} however, rates outside the forum may be used if local counsel is unavailable, either because local counsel is unwilling or is unable to perform for lack of the requisite degree of experience, expertise, or specialization.^{n41.5}

A prevailing plaintiff may obtain attorney's fees against an unsuccessful intervenor, even if the intervenor did not violate the plaintiff's civil rights.ⁿ⁴² In determining whether to award attorney's fees to prevailing *defendants* under Section 1988, the standard enunciated in a Title VII attorney's fees case, *Christiansburg Garment Co. v. EEOC*,ⁿ⁴³ applies.ⁿ⁴⁴ That case held that a prevailing defendant may be awarded attorney's fees only if the plaintiff's suit was frivolous, unreasonable, or initiated or maintained in bad faith.ⁿ⁴⁵ For further discussion of the *Christiansburg* standard, *see* § 43.10[9][f][ii].

[7] FORM--Complaint for Violation of Section 1981 of Civil Rights Act of 1866

[a] Comment

[i] Use of Form

The form set forth in [b], *below*, is an individual complaint for monetary and injunctive relief for purposeful racial discrimination in employment in violation of Title 42 *United States Code Section 1981*.ⁿ⁴⁶ Because intentional discrimination must be shown,ⁿ⁴⁷ the disparate treatment model governs proof of discrimination in such actions, rather than the disparate impact model.ⁿ⁴⁸

The form set forth *below* is drafted for use in federal court. However, the state and federal courts have concurrent jurisdiction over actions under Section 1981.ⁿ⁴⁹ When an action under Title 42 *United States Code Section 1981*, is brought in federal court, the plaintiff must comply with the Federal Rules of Civil Procedure, and with local federal rules of court. For discussion of some of the procedural requirements for bringing a civil complaint in federal court, *see* § 43.10[10][a][ii].

[ii] Allegations

The complaint contains the following allegations: (1) a preliminary statement of the substance of the complaint (preferred by some United States district courts) (Optional Paragraph 1); (2) the identities of the parties plaintiff (Paragraphs 2-4) and defendant (Paragraph 5);ⁿ⁵⁰ (3) the federal court's jurisdiction of the action (Paragraph 6);ⁿ⁵¹ (4) the defendant's discriminatory conduct violating Section 1981 (example used here is failure to hire) (Paragraphs 7-9);ⁿ⁵² (5) the intentional nature of the discrimination (Paragraph 10);ⁿ⁵³ (6) injury and damages to plaintiff proximately caused by defendant's discriminatory actions (Paragraphs 11-13),ⁿ⁵⁴ including emotional distress (Optional Paragraph 13);ⁿ⁵⁵ (7) an optional allegation for punitive damages (Optional Paragraph 14);ⁿ⁵⁶ and (9) a request for injunctive relief (Optional Paragraph 15).ⁿ⁵⁷

Although this form alleges a discriminatory failure or refusal to hire the plaintiff as a factual example of actionable conduct, the protection of Section 1981, as amended by the Civil Rights Act of 1991, extends to "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."^{n57.1} Thus, Section 1981 prohibits racial discrimination in all aspects of employment. For examples of allegations of other types of discrimination that may be adapted for use in actions under Section 1981, *see* § 43.10 [9], [10][a]-[d], [g] (allegations of discrimination under FEHA).

In addition, the prayer includes requests for prejudgment interestⁿ⁵⁸ and for attorney's fees pursuant to the Civil Rights Attorney's Fees Act of 1976.ⁿ⁵⁹ When costs, including legal fees, are sought in an action against a judicial officer for an act or omission taken in that officer's judicial capacity, they may only be awarded when the alleged action clearly exceeds that officer's jurisdiction.^{n59.1} Therefore, when applicable, sufficient allegations should be included in the complaint to satisfy this standard.

[b] Form Complaint for Violation of Section 1981 of Civil Rights Act of 1866
UNITED STATES DISTRICT COURT

_____ [specify, e.g., NORTHERN] DISTRICT OF CALIFORNIA
 [or other, as appropriate]

_____ [name],	)	
Plaintiff,	)	Civil Case No. _____
vs.	)	INDIVIDUAL COMPLAINT
_____ [name], Defendant.	)	FOR MONETARY AND
	)	INJUNCTIVE RELIEF FOR
	)	EMPLOYMENT
	)	DISCRIMINATION
	)	(42 U.S.C. §§ 1981, 1988)
	)	

Plaintiff alleges:

[1. This is an action for racial discrimination in employment brought pursuant to the Civil Rights Act of 1866, Title 42 *United States Code Section 1981*, for remedies for employment discrimination on account of race by defendant _____ (name). Plaintiff _____ (name) alleges that defendant has intentionally and purposefully _____ (*allege adverse employment action, e.g., failed to hire*) plaintiff on account of his/her race. By this action, plaintiff _____ (name) seeks all legal and equitable relief to which he or she may be entitled, including but not limited to: back pay, front pay, compensatory and punitive damages, attorney's fees and costs, prejudgment interest, and injunctive relief against defendant _____ (name).]

2. Plaintiff _____ [name] is _____ [*specify race*].

3. Plaintiff is an adult person who resides in the County of _____, State of California.

[*EITHER*]

4. Plaintiff is an employee of defendant _____ [name], and plaintiff has been employed by defendant _____ [name], at _____ [*specify location of employment*] since _____ [date].

[*OR*]

4. Plaintiff _____ [name] applied for employment with defendant _____ [name] on _____ [date(s)] at _____ [*specify place(s) of application for employment*].

[*OR*]

4. Plaintiff _____ [name] was employed by defendant from _____ [date] to _____ [date] at _____ [*specify place(s) of employment of plaintiff by defendant*].

[*CONTINUE*]

5. Defendant _____ [name] is _____ [*identify type of employer, e.g., a corporation organized and incorporated under the laws of the State of _____, with its principal place of business in _____ (specify location) and engaged in the business of _____ (specify nature of employer's business)*].

6. Jurisdiction of the subject matter of this action is established in this court by Title 42 *United States Code Section 1981*, and Title 28 *United States Code Section 1343(4)*.

[*EITHER*]

7. On _____ [date], plaintiff _____ [applied for *or* sought] the position of

_____ [specify, e.g., cook] with defendant.

[OR]

7. On _____ [date], _____ [name of defendant] advertised an opening for the position of _____ [specify, e.g., cook]. Although qualified, plaintiff did not apply for or seek that position because plaintiff knew that it was futile to apply for the position for the following reasons: _____ [specify].

[CONTINUE]

8. At all times relevant to this action, plaintiff was in all respects qualified for the position of _____ [specify, e.g., cook] in that _____ [specify qualifications that defendant required, if any, and qualifications that plaintiff possessed for position].

9. Despite plaintiff's qualifications for the above-mentioned position, defendant failed and refused, and continues to fail and refuse, to hire plaintiff for the position. Defendant has _____ [continued to seek persons (of plaintiff's qualifications) for that position or hired a person of a different race for the position, who was no more qualified than plaintiff].

10. Defendant's failure to hire plaintiff was intentional on account of plaintiff's race.

11. As a proximate result of defendant's discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered the loss of the wages and salary, benefits, and additional amounts of money plaintiff would have received if _____ [specify, e.g., plaintiff had been hired]. As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ [in the amount of \$ _____ or in an amount according to proof].

[12. As a further proximate result of defendant's discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered the intangible loss of such employment-related opportunities as _____ (specify, e.g., experience in the position from which plaintiff was excluded). As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ (in the amount of \$ _____ or in an amount according to proof).]

[13. As a further proximate result of defendant's discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered humiliation, mental anguish, and emotional and physical distress, and has been injured in mind (and body) as follows: _____ (describe injury). As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ (in the amount of \$ _____ or in an amount according to proof).]

[14. The above-recited actions of defendant in _____ (specify, e.g., failing to hire plaintiff) were done with malice, fraud, oppression, or in reckless disregard of the rights of plaintiff under Title 42 United States Code, section 1981. Specifically, _____ (set forth all facts on which the claim of malice, fraud, oppression, or reckless disregard are based).]

[15. No adequate remedy exists at law for the injuries suffered by plaintiff herein, insofar as the employment opportunity that defendant has denied to plaintiff cannot be secured absent injunctive relief. If this court does not grant injunctive relief of the type and for the purpose specified below, plaintiff will suffer irreparable injury. Therefore,

plaintiff requests the following injunctive relief: _____ (specify nature and extent of injunctive relief sought, e.g., retroactive placement into the employment position to which plaintiff should have been hired and retroactive seniority).]

WHEREFORE, plaintiff prays for judgment as follows:

1. For back pay, front pay, and other monetary relief _____ [in the sum of \$ _____ or according to proof];

[2. For general damages _____ (in the sum of \$ _____ or according to proof);]

[3. For punitive damages in an amount appropriate to punish defendant for its wrongful conduct and set an example for others;]

4. For interest on the sum of damages awarded, calculated from _____ [date that discrimination first began] to _____ [date of judgment];

[5. For injunctive relief as specified in Paragraph 15, above;]

6. For reasonable attorney's fees pursuant to Title 42 United States Code, section 1988;

7. For costs of suit herein incurred; and

8. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff

[Add verification, if desired. For rules as to verification in federal court, see Fed. R. Civ. P., Rules 11, 65. For rules as to verification in state court, see Code Civ. Proc. §§ 92(b), 446, 2015.5.]

[8] Affirmative Defenses to Section 1981 Claim

Because a substantive cause of action for racial discrimination under Title 42 United States Code, section 1981, is essentially the same as a cause of action for disparate treatment under Title VII,ⁿ⁶⁰ the affirmative defenses developed under Title VII are likely to apply to a section 1981 case. For the affirmative defenses available in Title VII cases, and forms reflecting those affirmative defenses, see § 43.10 [13]. For discussion of defenses in employment discrimination actions generally, see Chapter 41, Part E.

[9] Availability of Jury Trial

Jury trial is available under Title 42 United States Code, section 1981, at least on claims for legal remedies such as damages.ⁿ⁶¹

■ PRACTICE TIP:

A jury demand should be included in the complaint in most cases. The right to jury trial is waived if not pleaded.ⁿ⁶² *Commentary by Bill Lann Lee.*

[10] Res Judicata and Collateral Estoppel Effects

In some cases, a party may be foreclosed from litigating a race discrimination claim under section 1981 by a prior quasijudicial administrative hearing or a state judicial proceeding based on the same facts or involving the same parties.ⁿ⁶³

Legal Topics:

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

Civil Rights Law Contractual Relations & Housing Civil Rights Act of 1866 Civil Rights Law Contractual Relations & Housing Property Rights (sec. 1982) Protected Rights Labor & Employment Law Discrimination General Overview Labor & Employment Law Discrimination Reconstruction Statutes (secs. 1981, 1983 & 1985)

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. § 1981(a).

(n2)Footnote 2. *See* 42 U.S.C. § 1981(b). This definition was added by the Civil Rights Act of 1991, Pub. L. No. 102-166, and was intended to overrule the U.S. Supreme Court decision in *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 176-182, 109 S. Ct. 2363, 105 L. Ed. 2d 132, which had held that 42 U.S.C. § 1981 was inapplicable to racially discriminatory conduct, such as harassment, that occurred after the employment contract was formed, i.e., after the plaintiff was hired. The U.S. Supreme Court subsequently held that this provision of the Civil Rights Act of 1991 does not apply retroactively to cases pending at the time of its enactment. *See also* *Rivers v. Roadway Express, Inc.* (1994) 511 U.S. 298, 306-307, 114 S. Ct. 1510, 128 L. Ed. 2d 274. Thus, for those cases, the issue of whether the particular type of employment practice is actionable under 42 U.S.C. § 1981 must be decided based on the rule in *Patterson*.

(n3)Footnote 3. *See* *General Bldg. Contractors v. Pennsylvania* (1982) 458 U.S. 375, 390-391, 102 S. Ct. 3141, 73 L. Ed. 2d 835; *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295; *see also* 42 U.S.C. § 1981(c) (rights are protected against infringement by nongovernmental entities and infringement under color of state law).

(n4)Footnote 4. *See, e.g.,* *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582 (Arabs are protected pursuant to 42 U.S.C. § 1981 because Arabs were considered distinct, non-Caucasian racial/ethnic group when statute was passed); *Gonzalez v. Stanford Applied Engineering* (9th Cir. 1979) 597 F.2d 1298, 1300 (discrimination against persons of Hispanic origin is a violation of 42 U.S.C. § 1981); *Manzanares v. Safeway Stores, Inc.* (10th Cir. 1979) 593 F.2d 968, 971-972; *but see* *Anooya v. Hilton Hotels Corp.* (7th Cir. 1984) 733 F.2d 48, 50 (discrimination against Hispanics is national origin, not race, discrimination, and is not encompassed by 42 U.S.C. § 1981).

(n5)Footnote 5. *Bobo v. ITT, Continental Baking Co.* (5th Cir. 1981) 662 F.2d 340, 343-344, *cert. denied*, 456 U.S. 933 (1982).

(n6)Footnote 6. *See* *Runyon v. McCrary* (1976) 427 U.S. 160, 167, 96 S. Ct. 2586, 49 L. Ed. 2d 415.

(n7)Footnote 7. *General Bldg. Contractors v. Pennsylvania* (1982) 458 U.S. 375, 390-391, 102 S. Ct. 3141, 73 L. Ed. 2d 835.

(n8)Footnote 8. *See, e.g.,* *Cooper v. City of North Olmsted* (6th Cir. 1986) 795 F.2d 1265, 1270 n.3; *Gibraltar v. City of New York* (E.D.N.Y. 1985) 612 F. Supp. 125, 129.

(n9)Footnote 9. *Williams v. Edward Appfels Coffee Co.* (9th Cir. 1986) 792 F.2d 1482, 1484.

(n10)Footnote 10. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-805, 93 S. Ct. 1817, 36 L. Ed. 2d 668 .

(n11)Footnote 11. See *Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 186-187, 109 S. Ct. 2363, 105 L. Ed. 2d 132, , superseded by statute on other grounds, by amendment of 42 U.S.C. § 1981 (see 105 Stat. 1071).

(n12)Footnote 12. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-805, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; *Williams v. Edward Apffels Coffee Co.* (9th Cir. 1986) 792 F.2d 1482, 1484 .

(n13)Footnote 13. See *Saint Francis College v. Al-Khazraji* (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582, 592 ; *McDonald v. Santa Fe Trail Transp. Co.* (1976) 427 U.S. 273, 296, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (42 U.S.C. § 1981 prohibits discrimination between races, including discrimination against Caucasians); see also *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; *Williams v. Edward Apffels Coffee Co.* (9th Cir. 1986) 792 F.2d 1482, 1485 .

(n14)Footnote 14. See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; *Williams v. Edward Apffels Coffee Co.* (9th Cir. 1986) 792 F.2d 1482, 1485 .

(n15)Footnote 15. See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; *Williams v. Edward Apffels Coffee Co.* (9th Cir. 1986) 792 F.2d 1482, 1485 .

(n16)Footnote 16. See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 ; *Williams v. Edward Apffels Coffee Co.* (9th Cir. 1986) 792 F.2d 1482, 1485 .

(n17)Footnote 17. *Gooding v. Warner-Lambert Co* (3d Cir. 1984) 744 F.2d 354, 359 ; *Grant v. Morgan Guar. Trust Co.* (S.D.N.Y. 1982) 548 F. Supp. 1189, 1192 ; see *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 465-466, 95 S. Ct. 1716, 44 L. Ed. 2d 295 ; *Dalton v. Employment Sec. Com. of N.C.* (4th Cir. 1982) 671 F.2d 835, 838 , cert. denied, 459 U.S. 862 (1982) .

(n18)Footnote 18. 28 U.S.C. § 1343(4); see, e.g., *Bowers v. Campbell* (9th Cir. 1974) 505 F.2d 1155, 1158-1159 .

(n19)Footnote 19. See *Trujillo v. County of Santa Clara* (9th Cir. 1985) 775 F.2d 1359, 1366 (state courts have jurisdiction over actions under 42 U.S.C. §§ 1981 and 1983); *Holmes v. Chicago Transit Authority* (N.D. Ill. 1981) 505 F. Supp. 877, 879-880 ; *Lakewood Homes, Inc. v. Board of Adjustment* (Ohio Ct. Common Pleas 1970) 258 N.E.2d 470, 508-509 (state courts have jurisdiction over actions under 42 U.S.C. §§ 1981, 1982, and 1983); cf. *Martinez v. California* (1980) 444 U.S. 277, 283 n.7, 100 S. Ct. 553, 62 L. Ed. 2d 481 (state courts have jurisdiction over actions under 42 U.S.C. § 1983); *Ochoa v. Superior Court* (1985) 39 Cal. 3d 159, 173 n.10, 216 Cal. Rptr. 661, 703 P.2d 1 (same); *Williams v. Horvath* (1976) 16 Cal. 3d 834, 837, 129 Cal. Rptr. 453, 548 P.2d 1125 (same).

(n20)Footnote 19.1. Pub. L. No. 102-166, 105 Stat. 1071.

(n21)Footnote 20. See *Goodman v. Lukens Steel Co.* (1987) 482 U.S. 656, 660-661, 107 S. Ct. 2617, 96 L. Ed. 2d 572 (statute of limitations for 42 U.S.C. §§ 1981 and 1983 is same); *Wilson v. Garcia* (1985) 471 U.S. 261, 278-279, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (applicable to 42 U.S.C. § 1983 cases); *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 462, 95 S. Ct. 1716, 44 L. Ed. 2d 295 .

(n22)Footnote 20.1. See *Code Civ. Proc.* § 335.1; *Jones v. Bechtel* (9th Cir. 1986) 788 F.2d 571, 573-574 ; but see *Rodriguez v. General Motors Corp.* (9th Cir. 1990) 904 F.2d 531, 535 (holding that three-year statute of limitations under former *Code Civ. Proc.* § 338(1) (applicable to actions commenced before January 1, 1990) (see now *Code Civ. Proc.* § 338(a), providing three-year statute of limitations for action upon liability created by statute, other than penalty or forfeiture), which governed actions on liability based on statute, was applicable because *Goodman v. Lukens Steel Co.* (1987) 482 U.S. 656, 661-663, 107 S. Ct. 2617, 96 L. Ed. 2d 572 was explicitly held not to be

retroactive). *cf.* *Gutowsky v. County of Placer* (9th Cir. 1997) 108 F.3d 256, 259-260 (continuing violation theory applies in 42 U.S.C. § 1983 action, such that statute of limitations did not begin to run until employee's date of termination).

(n23)Footnote 21. 28 U.S.C. § 1658.

(n24)Footnote 21.1. *Jones v. R.R. Donnelley & Sons Co.* (2004) 541 U.S. 369, 124 S. Ct. 1836, 158 L. Ed. 2d 645, 2004 U.S. LEXIS 3236, *11-*28 (because hostile work environment, wrongful termination, and failure-to-transfer claims did not allege violation of pre-1990 version of 42 U.S.C. § 1981, but did allege violations of amended statute, claims arose under amendment to § 1981 contained in 1991 Act and were subject to 4-year statute of limitations in § 1658). *See also* *Fonseca v. Sysco Food Services of Arizona, Inc.* (9th Cir. 2004) 374 F.3d 840, 845 (although Hispanic employee's Title VII claim alleging disparate treatment with regard to funeral leave was time-barred because he did not file complaint with EEOC within 300 days of discriminatory act, his claim under 42 U.S.C. § 1981 claim was timely under 28 U.S.C. § 1658, providing four-year statute of limitations for claims under federal statutes enacted after December 1, 1990).

(n25)Footnote 21.2. *Lukovsky v. City & County of San Francisco* (9th Cir. 2008) 535 F.3d 1044, 1048 n.2 .

(n26)Footnote 21.3. *Williams v. Boeing Co.* (9th Cir. 2008) 517 F.3d 1120, 1130-1132 .

(n27)Footnote 21.4. *See Swierkiewicz v. Sorema N.A.* (2002) 534 U.S. 506, 512, 122 S. Ct. 992, 152 L. Ed. 2d 1 .

(n28)Footnote 21.5. *Williams v. Boeing Co.* (9th Cir. 2008) 517 F.3d 1120, 1132-1134 .

(n29)Footnote 21.6. *Lukovsky v. City & County of San Francisco* (9th Cir. 2008) 535 F.3d 1044, 1048 .

(n30)Footnote 21.7. *Lukovsky v. City & County of San Francisco* (9th Cir. 2008) 535 F.3d 1044, 1048-1051 (plaintiffs' claims accrued at point at which they knew they had been injured and by whom, *i.e.*, at point at which they knew they were not hired for positions they sought, even if at that point in time plaintiffs did not know of legal injury, *i.e.*, that there was allegedly discriminatory motive underlying failure to hire).

(n31)Footnote 21.8. *Lukovsky v. City & County of San Francisco* (9th Cir. 2008) 535 F.3d 1044, 1051 .

(n32)Footnote 22. *See* [a], *above*.

(n33)Footnote 22.1. *See Wilson v. Garcia* (1985) 471 U.S. 261, 269 n.17, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (questions of tolling under 42 U.S.C. § 1983 are governed by state law). For general discussion of tolling of limitations periods under California law, *see* California Forms of Pleading and Practice, *Limitation of Actions*.

(n34)Footnote 23. *cf.* *Wilson v. Garcia* (1985) 471 U.S. 261, 269 n.17, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (questions of tolling under 42 U.S.C. § 1983 are to be governed by state law). For general discussion of tolling of limitations periods under California law, *see* California Forms of Pleading and Practice, *Limitation of Actions*.

(n35)Footnote 24. *See Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 465-466, 95 S. Ct. 1716, 44 L. Ed. 2d 295 .

(n36)Footnote 24.1. *Williams v. Boeing Co.* (9th Cir. 2008) 517 F.3d 1120, 1135-1136 .

(n37)Footnote 24.2. *See American Pipe & Construction Co. v. Utah* (1974) 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) ; *Crown, Cork & Seal Co., Inc. v. Parker* (1983) 462 U.S. 345, 350, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983) .

(n38)Footnote 24.3. *Lukovsky v. City & County of San Francisco* (9th Cir. 2008) 535 F.3d 1044, 1051 .

(n39)Footnote 24.4. *Lukovsky v. City & County of San Francisco* (9th Cir. 2008) 535 F.3d 1044, 1051 . See *Santa Maria v. Pac. Bell* (9th Cir. 2000) 202 F.3d 1170, 1176 .

(n40)Footnote 24.5. *Lukovsky v. City & County of San Francisco* (9th Cir. 2008) 535 F.3d 1044, 1051-1052 ; *Honig v. San Francisco Planning Dept.* (2005) 127 Cal. App. 4th 520, 529, 25 Cal. Rptr. 3d 649 .

(n41)Footnote 24.6. *Lukovsky v. City & County of San Francisco* (9th Cir. 2008) 535 F.3d 1044, 1051-1052 .

(n42)Footnote 24.7. *Lukovsky v. City & County of San Francisco* (9th Cir. 2008) 535 F.3d 1044, 1051-1052 .

(n43)Footnote 25. *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 .

(n44)Footnote 25.1. See 42 U.S.C. § 1981a(b)(4).

(n45)Footnote 25.2. *Hicks v. Brown Group, Inc.* (8th Cir. 1990) 902 F.2d 630, 652 (relying on *Carey v. Phipus* (1978) 435 U.S. 247, 266, 98 S. Ct. 1042, 55 L. Ed. 2d 252 , construing 42 U.S.C. § 1983).

(n46)Footnote 25.3. *Hicks v. Brown Group, Inc.* (8th Cir. 1990) 902 F.2d 630, 653 n.52 ; see discussion in [e], below.

(n47)Footnote 26. *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 ; *Waters v. Wisconsin Steel Works of International Harvester Co.* (7th Cir. 1974) 502 F.2d 1309, 1321 , cert. denied, 425 U.S. 997 (1976) .

(n48)Footnote 27. See 42 U.S.C. § 2000e-5(g)(1).

(n49)Footnote 28. *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 .

(n50)Footnote 29. *T & S Service Assocs., Inc. v. Crenson* (1st Cir. 1981) 666 F.2d 722, 728 ; see *Edwards v. Jewish Hosp. of St. Louis* (8th Cir. 1988) 855 F.2d 1345, 1349 (employer may avoid back pay award by demonstrating, by preponderance of evidence, that employee would have been discharged even if unlawful discrimination had not been motivating factor in adverse employment decision).

(n51)Footnote 30. See *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 .

(n52)Footnote 31. Cf. *Thorne v. City of El Segundo* (9th Cir. 1987) 802 F.2d 1131, 1136-1137 (Title VII) .

(n53)Footnote 32. *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 ; see *Phiffer v. Proud Parrot Motor Hotel Inc.* (9th Cir. 1980) 648 F.2d 548, 552-553 ; *Sanders v. Dobbs Houses, Inc.* (5th Cir. 1970) 431 F.2d 1097, 1101 , cert. denied, 401 U.S. 948 (1971) .

(n54)Footnote 33. See, e.g., *Hunter v. Allis-Chalmers Corp. Engine Div.* (7th Cir. 1986) 797 F.2d 1417, 1421 ; *Richardson v. Restaurant Marketing Associates Inc.* (N.D. Cal. 1981) 527 F. Supp. 690, 697 .

(n55)Footnote 34. *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 ; see 42 U.S.C. § 1988(a); *Pavon v. Swift Transp. Co* (9th Cir. 1999) 192 F.3d 902 (Title VII's damage cap does not limit damages under 42 U.S.C. § 1981; 6:5 ratio between punitive damages and compensatory damages was reasonable); *Mitchell v. Keith* (9th Cir. 1985) 752 F.2d 385, 390 ; *Hunter v. Allis-Chalmers Corp. Engine Div.* (7th Cir. 1986) 797 F.2d 1417, 1421 ; *Jones v. Western Geophysical Co.* (5th Cir. 1985) 761 F.2d 1158, 1162 ; *Mitchell v. Keith* (9th Cir. 1985) 752 F.2d 385, 389 .

(n56)Footnote 35. *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 809-810 (applying standard articulated in *Kolstad v. American Dental Ass'n* (1999) 527 U.S. 526, 536, 119 S. Ct. 2118, 144 L. Ed. 2d 494 to § 1981 action; 28:1 ratio between punitive and compensatory damages not excessive).

(n57)Footnote 35.1. *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 810, citing *Kolstad v. American Dental Ass'n* (1999) 527 U.S. 526, 545, 119 S. Ct. 2118, 144 L. Ed. 2d 494.

(n58)Footnote 35.2. *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 810-811; see also *Deters v. Equifax Credit Information Servs., Inc.* (10th Cir. 2000) 202 F.3d 1262 (plaintiff sexually harassed by co-workers complained to manager designated to receive reports who failed to act; employer could not avail itself of good faith defense because very person company entrusted to act on complaints of harassment failed to do so and acted with malice or reckless disregard to plaintiff's federally protected rights); *Cooke v. Stefani Management Servs., Inc.* (7th Cir. 2001) 250 F.3d 564, 569 (while institution of written policy against race discrimination may help to dispel claim about employer's reckless or malicious state of mind with respect to racial minorities, policy is not automatic bar to imposition of punitive damages).

(n59)Footnote 35.3. *Swinton v. Potomac Corp.* (9th Cir. 2001) 270 F.3d 794, 811-815 (trial court did not abuse its discretion by excluding evidence of anti-harassment training undergone by employer's managers and supervisors after plaintiff filed lawsuit where other evidence of remediation was admitted).

(n60)Footnote 36. See *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed. 2d 295.

(n61)Footnote 37. See, e.g., *Taylor v. Jones* (8th Cir. 1981) 653 F.2d 1193, 1203-1204; but see *Edwards v. Jewish Hosp. of St. Louis* (8th Cir. 1988) 855 F.2d 1345, 1349 (employer may avoid reinstatement by demonstrating, by preponderance of evidence, that employee would have been discharged even if unlawful discrimination had not been motivating factor in adverse employment decision).

(n62)Footnote 38. See, e.g., *Taylor v. Jones* (8th Cir. 1981) 653 F.2d 1193, 1203-1204.

(n63)Footnote 39. *Johnson v. Goodyear Tire & Rubber Co. Synthetic Rub. Pl.* (5th Cir. 1974) 491 F.2d 1364, 1373-1374.

(n64)Footnote 40. *Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist.* (1st Cir. 1981) 648 F.2d 761, 764, vacated in part on other grounds, 454 U.S. 807, aff'd in relevant part on remand, 670 F.2d 1, 2 (1st Cir. 1982).

(n65)Footnote 41. 42 U.S.C. § 1988(b).

(n66)Footnote 41.1. 42 U.S.C. § 1988(c). The provision regarding expert fees was added by the Civil Rights Act of 1991. see Pub. L. No. 102-166, § 113(a). The legislation was intended to overrule *West Va. Univ. Hosps. v. Casey* (1991) 499 U.S. 83, 111 S. Ct. 1138, 113 L. Ed. 2d 68, 85, in which the U.S. Supreme Court held that expert witness fees could not be included as part of an attorney's fee award under 42 U.S.C. § 1988.

(n67)Footnote 41.2. *Barjon v. Dalton* (9th Cir. 1997) 132 F.3d 496, cert. denied, 142 L. Ed. 2d 59 (1998).

(n68)Footnote 41.3. *Blum v. Stenson* (1984) 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891.

(n69)Footnote 41.4. *Davis v. Mason County* (9th Cir. 1991) 927 F.2d 1473, 1488; *Barjon v. Dalton* (9th Cir. 1997) 132 F.3d 496, 500-501, cert. denied, 142 L. Ed. 2d 59 (1998) (trial court correctly applied local forum rates rather than rates in counsel's place of business; parties' argument that geopolitical realities rather than local forum should govern award fails for lack of support; need for civil rights enforcement does not support higher award without evidence that local rates preclude attraction of competent counsel).

(n70)Footnote 41.5. *Gates v. Deukmejian* (9th Cir. 1992) 987 F.2d 1392, 1405 ; *Barjon v. Dalton* (9th Cir. 1997) 132 F.3d 496, 500-502 , *cert. denied*, 142 L. Ed. 2d 59 (1998) (failure to solicit local counsel is not necessarily fatal to establishing unavailability of qualified local counsel; prevailing plaintiff need not show unavailability of counsel outside local forum).

(n71)Footnote 42. *Charles v. Daley* (7th Cir. 1988) 846 F.2d 1057, 1070 .

(n72)Footnote 43. *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421-422, 98 S. Ct. 694, 54 L. Ed. 2d 648 .

(n73)Footnote 44. *See, e.g., Scott v. Coca-Cola Bottling Co. of St. Louis* (E.D. Mo. 1984) 583 F. Supp. 191, 196 ; *Davidson v. Allis-Chalmers Corp.* (W.D. Mo. 1983) 567 F. Supp. 1532, 1537 .

(n74)Footnote 45. *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421-422, 98 S. Ct. 694, 54 L. Ed. 2d 648 .

(n75)Footnote 46. *See General Bldg. Contractors v. Pennsylvania* (1982) 458 U.S. 375, 391-392, 102 S. Ct. 3141, 73 L. Ed. 2d 835 . For discussion of coverage of 42 U.S.C. § 1981 generally, *see* ch. 40, pt. C.

(n76)Footnote 47. *See General Bldg. Contractors v. Pennsylvania* (1982) 458 U.S. 375, 390-391, 102 S. Ct. 3141, 73 L. Ed. 2d 835 .

(n77)Footnote 48. *See Monroe v. Burlington Indus., Inc.* (4th Cir. 1986) 784 F.2d 568, 571 ; *Lewis v. St. Louis University* (E.D. Mo. 1983) 573 F. Supp. 300, 304-305 , *aff'd*, 744 F.2d 1368, 1370 (8th Cir. 1984) . For discussion of burden of proof under 42 U.S.C. § 1981, *see* [2], *above*. For a full discussion of the disparate treatment model under Title VII, *see* § 43.10[2][b] and ch. 41, pt. A.

(n78)Footnote 49. *See Trujillo v. County of Santa Clara* (9th Cir. 1985) 775 F.2d 1359, 1366 (state courts have jurisdiction over actions under 42 U.S.C. §§ 1981 and 1983); *see also* [4], *above*.

(n79)Footnote 50. *See* 42 U.S.C. § 1981; *General Bldg. Contractors v. Pennsylvania* (1982) 458 U.S. 375, 391-392, 102 S. Ct. 3141, 73 L. Ed. 2d 835 ; *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 . For discussion of coverage of 42 U.S.C. § 1981 generally, *see* ch. 40, pt. C.

(n80)Footnote 51. 28 U.S.C. § 1343(4); *see Bowers v. Campbell* (9th Cir. 1974) 505 F.2d 1155, 1158 ; Fed. R. Civ. P., Rule 8(a).

(n81)Footnote 52. *See* 42 U.S.C. § 1981; *General Bldg. Contractors v. Pennsylvania* (1982) 458 U.S. 375, 391-392, 102 S. Ct. 3141, 73 L. Ed. 2d 835 ; *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 . For discussion of coverage of § 1981 generally, *see* [1], *above*, and ch. 40, pt. C.

(n82)Footnote 53. *General Bldg. Contractors v. Pennsylvania* (1982) 458 U.S. 375, 392, 102 S. Ct. 3141, 73 L. Ed. 2d 835 . For discussion of proof, *see* [2], *above*.

(n83)Footnote 54. *See, e.g., Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 . For discussion of damages generally and specific types of damages, *see* [6][a]-[d], *above*.

(n84)Footnote 55. *See Hunter v. Allis-Chalmers Corp. Engine Div.* (7th Cir. 1986) 797 F.2d 1417, 1421 ; *Richardson v. Restaurant Mktg Assocs. Inc.* (N.D. Cal. 1981) 527 F. Supp. 690, 697 . For discussion of availability of damages for emotional distress, *see* [6][d], *above*.

(n85)Footnote 56. *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 . For discussion of availability of punitive damages, *see* [6][e], *above*.

(n86)Footnote 57. *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295 . For discussion of availability of equitable relief generally, see [6][f], above.

(n87)Footnote 57.1. 42 U.S.C. § 1981(b), as added by Pub. L. No. 102-166, § 101.

(n88)Footnote 58. See *Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist.* (1st Cir. 1981) 648 F.2d 761, 764 , vacated in part on other grounds, 454 U.S. 807 (1981) , *aff'd in relevant part on remand*, 670 F.2d 1, 2 (1st Cir. 1982) . For discussion of prejudgment interest, see [6][g], above.

(n89)Footnote 59. See 42 U.S.C. § 1988(b), (c). For discussion, see [6][h], above.

(n90)Footnote 59.1. 42 U.S.C. § 1988(b).

(n91)Footnote 60. For discussion, see [2], above.

(n92)Footnote 61. See, e.g., *Setser v. Novack Inv. Co.* (8th Cir. 1981) 638 F.2d 1137, 1142 , *cert. denied*, 454 U.S. 1064 (1981) ; *Thomas v. Resort Health Related Facility* (E.D.N.Y.1982) 539 F. Supp. 630, 633-634 (jury trial available on all legal claims under 42 U.S.C. § 1981); *Moore v. Sun Oil Co. of Pennsylvania* (6th Cir. 1980) 636 F.2d 154, 156 ; *Hildebrand v. Bd. of Trustees of Mich. S. Univ.* (6th Cir. 1979) 607 F.2d 705, 709-710 . See also *Lytle v. Household Mfg.* (1990) 494 U.S. 545, 552, 110 S. Ct. 1331, 108 L. Ed. 2d 504 .

(n93)Footnote 62. See Fed. R. Civ. P., Rule 38(d).

(n94)Footnote 63. See *University of Tennessee v. Elliott* (1986) 478 U.S. 788, 106 S. Ct. 3220, 92 L. Ed. 2d 635 ; *Trujillo v. County of Santa Clara* (9th Cir. 1985) 775 F.2d 1359, 1364-1365 (prior proceedings under California FEHA have collateral estoppel effect in subsequent 42 U.S.C. § 1981 action regarding issues that were or could have been raised in the prior proceedings).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part B. FEDERAL LAW

3-43 California Employment Law § 43.15

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

§ 43.15 Vietnam Era Veterans Readjustment Assistance Act and Uniformed Services Employment and Reemployment Rights Act

[1] Right of Action

[a] Vietnam Era Veterans Readjustment Assistance Act

The Vietnam Era Veterans Readjustment Assistance Act (VEVRAA)ⁿ¹ imposes affirmative action and nondiscrimination requirements on federal employers and federal government contractors.ⁿ² Veterans within the coverage of VEVRAAⁿ³ who believe that federal contractors have violated their rights may file complaints with the Veterans Employment Service or the U.S. Department of Labor.ⁿ⁴ Courts have uniformly held that there is no private right of action under the VEVRAA.ⁿ⁵ A private individual must therefore rely on the administrative remedy provided by VEVRAA,ⁿ⁶ and the action of the administrative agency cannot be overturned except on a showing of abuse of discretion (that is, arbitrary or capricious treatment of the claim).ⁿ⁷

[b] Uniformed Services Employment and Reemployment Rights Act of 1994

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)ⁿ⁸ (formerly known as the Veterans' Reemployment Rights Act (VRRA)),ⁿ⁹ provides generally for employment and reemployment of, and nondiscrimination against, persons returning to their jobs after service in the uniformed services.

A person who was in the uniformed services may bring an action in federal district court to enforce his or her rights regarding employment or reemployment under the USERRA without first exhausting his or her administrative requirements.ⁿ¹⁰ The district court can require an employer to comply with the provisions of the USERRA, award compensation for loss of wages or benefits, and award liquidated damages for willful failure to comply.ⁿ¹¹ The court may also use its fully equity powers, including injunctions, temporary restraining orders, and contempt orders to vindicate a person's USERRA rights.ⁿ¹² No fees or court costs may be taxed against any person claiming rights under USERRA,ⁿ¹³ but a person who prevails in a suit on his or her own behalf with the use of private counsel may receive reasonable attorney's fees, expert witness fees, and other litigation expenses, plus prejudgment interest.ⁿ¹⁴

The USERRA does not provide any time limit or statute of limitations, but it does specifically prohibit the use of state statutes of limitations.ⁿ¹⁵ Under the USERRA'S predecessor statute, the VERRA, which also had no statute of limitations and which also prohibited use of state statutes of limitation, the doctrine of laches was available to prevent the plaintiff from obtaining equitable relief if the defendant could show that the plaintiff failed to use diligence in bringing the suit and that the defendant was prejudiced thereby.ⁿ¹⁶ The laches doctrine may, therefore, also be available under the USERRA.

For further discussion of the coverage of the USERRA, *see* Chapter 40, Part C.

[2] FORM--Complaint for Damages and Injunctive Relief for Violation of USERRA

[a] Comment

The form set forth in [b], *below*, is a complaint by a plaintiff who was in the uniformed service and was denied employment, reemployment, or another employment benefit in violation of the USERRA.ⁿ¹⁷ The complaint sets forth allegations for compensation for lost wages and benefits, as well as allegations requiring instatement, reinstatement, or other equitable relief, plus a request for liquidated damages in the case of an employer's willful failure to comply with the USERRA, and costs and attorney's fees.ⁿ¹⁸

[b] Form Complaint for Damages and Injunctive Relief for Violation of USERRA

UNITED STATES DISTRICT COURT

_____ [*specify, e.g., NORTHERN*] DISTRICT OF CALIFORNIA

_____	)	
	)	Civil Case No. _____
_____ [<i>name</i>], Plaintiff,	)	INDIVIDUAL COMPLAINT
vs.	)	FOR INJUNCTIVE RELIEF AND
_____ [<i>name(s)</i>], Defendant(s).	)	MONETARY COMPENSATION
	)	FOR VIOLATION OF
	)	UNIFORMED SERVICES EMPLOYMENT
	)	AND REEMPLOYMENT RIGHTS ACT
	)	

Plaintiff alleges:

[1. This is an action brought under the Uniformed Services Employment and Reemployment Rights Act of 1994, Title 38, *United States Code*, Section 4301 *et seq.*, against defendant _____ (*name*) for _____ (*specify nature of statutory violation, e.g., failure to reemploy plaintiff* _____ (*name*) after he/she completed his/her service in the armed forces), in violation of the Act. By this action, plaintiff seeks the following relief, pursuant to Title 38, *United States Code*, Section 4323(c): _____ (*specify, e.g., monetary relief, including back pay, and injunctive relief, consisting of an order requiring defendant _____ (*name*) to employ or reinstate plaintiff to the position he/she was employed in prior to the commencement of his/her uniformed service, with retroactive seniority and other benefits, or, in the alternative, to employ plaintiff in another position with seniority, status, and pay like that of the position that plaintiff occupied prior to his/her military service*).

2. Jurisdiction of the subject matter of this action is established in this court, under Title 38, *United States Code*, Section 4323. This is the proper venue for this action, under Title 38, *United States Code*, Section 4323(b), in that defendant _____ [*name*] maintains a place of business in this district.

3. Plaintiff _____ [name] is an adult person and is a resident of the County of _____, State of California.

4. [Set forth specific allegations of discrimination or failure to employ or reemploy plaintiff because of his or her uniformed service, e.g., Plaintiff was employed by defendant _____ (name) at _____ (place of employment) from _____ (date) to _____ (date), at which time plaintiff gave his/her notice to defendant that he/she was _____ (specify, e.g., being inducted into) uniformed service in the _____ (specify branch of service, e.g., United States Army).]

5. Plaintiff commenced service in the _____ [specify branch of service, e.g., United States Army] on _____ [date] and served until he/she was honorably discharged from service on _____ [date].

6. Plaintiff informed defendant _____ [name] on _____ [date] that plaintiff had been honorably discharged from military service.

[EITHER]

7. At all times herein relevant, plaintiff was qualified [or with reasonable efforts by defendant was able to become requalified] to perform the duties of _____ [specify, e.g., the position for which he/she applied or his/her former position with defendant or the promotion for which he/she applied].

[OR]

7. Although, because of disability sustained during his/her military service, plaintiff is no longer qualified to perform the duties of his/her old position, and is unable to become requalified with reasonable efforts by defendant, he/she is qualified to perform the duties of the following other position(s), for which defendant employs persons, and which would afford plaintiff _____ [the same or similar] seniority, status, and pay as that afforded by his/her old position: _____ [specify positions].

[CONTINUE]

8. Despite plaintiff's request and availability for _____ [specify employment benefit, e.g., employment or reemployment or promotion], defendant _____ [willfully] failed and refused, and continues to _____ [willfully] fail and refuse, to _____ [specify, e.g., employ plaintiff or restore plaintiff to his/her former position with defendant or to a position of like seniority, status, and pay or promote plaintiff to the position for which he/she has applied and is qualified], in violation of Title 38, United States Code, Section _____ [4311 or 4312].

9. Defendant's failure to _____ [specify, e.g., employ plaintiff or restore plaintiff to his/her former position with defendant or to a position of like seniority, status, and pay or promote plaintiff to the position for which he/she has applied and is qualified], in violation of his/her statutory rights, has caused and will continue to cause plaintiff losses of earnings, from the date of _____ [specify date on which plaintiff applied for and was refused employment, reemployment, promotion, or other employment benefit by defendant].

10. Defendant's unlawful failure to _____ [specify, e.g., employ or reemploy or promote] plaintiff, has

also caused and will continue to cause plaintiff loss of seniority, and losses of all other benefits accruing thereto, from the date of _____ [specify date on which plaintiff applied for and was refused employment, reemployment, promotion, or other employment benefit by defendant].

[11. Plaintiff has no adequate remedy at law to secure relief for the loss of employment alleged in this complaint. If this court does not enter an order _____ (specify injunctive relief needed, *e.g.*, reinstating plaintiff to the position of _____ (*title of position*) or to a position of like seniority, status, and pay, and ordering retroactive seniority for that position, retroactive to _____ (*date*), plaintiff will be irreparably injured.]

WHEREFORE, plaintiff prays for judgment as follows:

1. For back pay, with prejudgment interest, from _____ [date] to the date of judgment herein;

[2. For injunctive relief, including but not limited to _____ (specify injunctive relief desired, *e.g.*, an order reinstating plaintiff to the position of _____ (*specify*), including retroactive seniority and all other benefits accruing thereto), and for all other injunctive relief required to make plaintiff whole for the losses caused by the violations of defendants;]

[3. For an amount of liquidated damages, equal to the award of back pay and any other lost economic benefits, resulting from the willfulness of defendant's violation of plaintiff's rights under the Uniformed Services Employment and Reemployment Rights Act.]

4. For reasonable attorney's fees and costs of suit herein incurred; and

5. For such other and further relief as the court deems proper.

[Firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Plaintiff _____ [name]

Legal Topics:

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

Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisparate TreatmentGeneral OverviewLabor & Employment LawDiscriminationPublic ContractsAffirmative ActionLabor & Employment LawLeaves of AbsenceMilitary LeaveMilitary & Veterans LawVeteransBenefitsVietnam Era Veterans Readjustment Assistance Act

FOOTNOTES:

(n1)Footnote 1. 38 U.S.C. § 4211 *et seq.*

(n2)Footnote 2. See 38 U.S.C. §§ 4212, 4214.

(n3)Footnote 3. VEVRAA affords coverage to disabled veterans and Vietnam era veterans generally. see 38 U.S.C. § 4211(1), (2). For discussion of coverage of VEVRAA, see ch. 40, pt. C.

(n4)Footnote 4. 38 U.S.C. § 4212(b).

(n5)Footnote 5. *See, e.g., Barron v. Nightingale Roofing, Inc. (1st Cir. 1988) 842 F.2d 20, 20-22 ; De Leon Cruz v. Loubriel (D.P.R. 1982) 539 F. Supp. 250, 251 ; Butler v. McDonnell-Douglas Saudi Arabia Corp. (D. Ohio 1981) 93 F.R.D. 384, 387 .*

(n6)Footnote 6. *See, e.g., De Leon Cruz v. Loubriel (D. P.R. 1982) 539 F. Supp. 250, 252-253 (person must exhaust administrative remedy); Marin v. New York State Dep't of Labor (S.D.N.Y. 1981) 512 F. Supp. 353, 355 (aggrieved person must have filed with DOL or VES).*

(n7)Footnote 7. *Clementson v. Donovan (D. 1985) 608 F. Supp. 152, 154-158 .*

(n8)Footnote 8. *38 U.S.C. § 4301 et seq.*

(n9)Footnote 9. *Former 38 U.S.C. § 2021 et seq.*

(n10)Footnote 10. *See 38 U.S.C. § 4323(a)(3).*

(n11)Footnote 11. *38 U.S.C. § 4323(c)(1)(A).*

(n12)Footnote 12. *38 U.S.C. § 4323(c)(3).*

(n13)Footnote 13. *38 U.S.C. § 4323(c)(2)(A).*

(n14)Footnote 14. *38 U.S.C. § 4323(c)(2)(B), (7).*

(n15)Footnote 15. *38 U.S.C. § 4323(c)(6).*

(n16)Footnote 16. *See Farries v. Stanadyne/Chicago Div. (7th Cir. 1987) 832 F.2d 374, 378-379 .*

(n17)Footnote 17. *See 38 U.S.C. §§ 4311, 4312, 4323.*

(n18)Footnote 18. *See 38 U.S.C. § 4323(c).*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part B. FEDERAL LAW

3-43 California Employment Law §§ 43.16through 43.19

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

[Reserved]

§§ 43.16[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part C. INSURANCE COVERAGE ISSUES

3-43 California Employment Law § 43.20

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

§ 43.20 Sources of Potential Insurance Coverage

Both plaintiff's and defense counsel in an employment discrimination action should investigate whether or not insurance coverage is potentially available for the discrimination claim. For plaintiff's counsel, the availability or non-availability of insurance coverage for one or more of the defendants should be considered at the outset of the litigation, since it may be relevant in determining whether or not the proposed litigation is economically viable, particularly if the employer or one or more of the individual defendants may not have adequate assets to satisfy the potential judgment in the action.

The employer's attorney responding to a civil action for employment discrimination should also consider whether insurance coverage is available. As discussed in more detail in § 43.22, even if it is ultimately determined that the damages assessed are not covered by insurance, in some cases the insurer may be obligated to furnish a defense to the employer. Thus, even if the employer is ultimately obligated to pay the judgment or settlement without any insurance reimbursement, the insurer may be required to defend the action or at least pay the costs of defense.

Most employers carry one or more of the following types of insurance policies, each of which should be examined for potential coverage of the discrimination claim:

1. Comprehensive general liability policy;
2. Professional liability ("errors and omissions") policy;
3. Employer's liability and workers' compensation policy; or
4. Umbrella and/or excess liability policies.

Legal Topics:

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

Insurance Law Claims & Contracts General Overview Labor & Employment Law Discrimination General Overview Labor
& Employment Law Employer Liability General Overview



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part C. INSURANCE COVERAGE ISSUES

3-43 California Employment Law § 43.21

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

§ 43.21 Indemnification for Damages Resulting From Discrimination

[1] Potential Coverage Based on Policy Language

A first step in determining whether insurance coverage exists for a discrimination or related wrongful termination claim is to examine the language of the applicable policy to determine whether the claim is covered either explicitly or implicitly, or whether the claim is explicitly excluded. Even if the policy does not expressly include discrimination or wrongful termination claims among the insured risks,ⁿ¹ in some cases the language of the "insuring clause" (i.e., the provision that lists the covered risks) may be broad enough to arguably cover the claim by implication. For example, the "employer's liability" portion of many workers' compensation policies typically contains a provision under which the insurer agrees to indemnify the insured against any liability for damages assessed in civil actions for injuries sustained by employees as a result of and in the course of their employment by the insured.ⁿ² The language of such insuring clauses may be broad enough to include damages caused by discrimination or wrongful discharge, in the absence of an exclusionary provision. However, many policies now contain express exclusions for such damages. Furthermore, as discussed in [2], *below*, the statutory exclusion of coverage for any "wilful act of the insured"ⁿ³ may preclude in coverage in many, though not necessarily all, discrimination actions.

[2] Effect of Insurance Code Section 533

[a] General Exclusion for "Wilful" Acts

Insurance Code Section 533 provides that "[a]n insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others." This statutory provision constitutes an implied exclusionary clause that is to be read into all insurance policies in California, regardless of whether the policy contains an express exclusion for such acts.ⁿ⁴ The purpose of Section 533 is to discourage the commission of wilful torts by prohibiting any attempt to shift liability for those torts from the tortfeasor to an insurer.ⁿ⁵

As implied by the language of Section 533, a "wilful act" requires more than the mere intentional commission of an act constituting ordinary negligence.ⁿ⁶ In *Clemmer v. Hartford Insurance Co.*,ⁿ⁷ the California Supreme Court indicated

that even an act that is "intentional" or "wilful" within the meaning of traditional tort principles will not exonerate an insurer from liability under Section 533 unless it is done with a "preconceived design to inflict injury."ⁿ⁸ In *Clemmer*, the insured had shot and killed his employer following an employment-related dispute and was subsequently convicted of second-degree murder. The Court held that insurance coverage was not precluded by Section 533 as a matter of law because there was psychiatric testimony that the insured did not have the mental capacity to know and recognize the nature of his act or to control his conduct and thus may not have acted with the requisite design to injure the employer.ⁿ⁹ Subsequent appellate decisions applying *Clemmer* held that Section 533 would not bar coverage unless the insured had a specific, subjective intent to cause injury or harm.ⁿ¹⁰

In *J.C. Penney Casualty Ins. Co. v M.K.*,ⁿ¹¹ however, the Supreme Court retreated somewhat from its earlier holding in *Clemmer*. Although not expressly overruling *Clemmer*, the Court held that an insurer need not show a "preconceived design to inflict harm" when the insured seeks coverage for an intentional and wrongful act "if the harm is inherent in the act itself."ⁿ¹² Thus, in *J.C. Penney*, the Court concluded that Section 533 precluded coverage of acts of child molestation, notwithstanding psychiatric testimony that the insured did not intend to harm the child, because child molestation is inherently harmful, and thus the molestor's subjective intent is irrelevant.ⁿ¹³

The application of the above principles by the courts to discrimination and wrongful termination claims is discussed in [b], *below*. For further general discussion of the "wilful acts" exclusion of Section 533, *see* California Insurance Law and Practice, ch. 41, pt. E (Matthew Bender).

[b] Application to Discrimination and Related Wrongful Termination Claims

[i] Generally

At least two court of appeal decisions subsequent to *J.C. Penney* have addressed the applicability of the Insurance Code Section 533 exclusion to various claims of employment discrimination, sexual harassment, and wrongful termination.ⁿ¹⁴ Although neither case appears to state a per se rule against coverage of all discrimination claims, the cases do suggest that, at least in the case of intentional discrimination and certain forms of sexual harassment, coverage will generally be barred by Section 533. However, as discussed in [iv], *below*, it appears that there may be a potential for insurance coverage of actions that allege acts of "nonintentional discrimination," i.e., disparate impact claims.ⁿ¹⁵

[ii] Intentional Discrimination and Wrongful Termination

In *B & E Convalescent Center v. State Compensation Ins. Fund*,ⁿ¹⁶ an employee sued her employer for wrongful termination in violation of public policy and for age, sex, and national origin discrimination in violation of the FEHA. She alleged that she had been fired because she (1) refused to carry out the employer's instructions to interfere with the efforts of a union to organize employees at one of the employer's facilities, and (2) refused the employer's demand that she systematically fire existing employees and replace them with persons of Filipino national origin, who the employer allegedly believed would be less likely than others to vote for the union. She also alleged that she was terminated on the basis of her age, sex, and national origin in that she was a woman of English national origin over 60 years old and was replaced by a younger male of Filipino descent. The employer had a policy with the defendant insurer, which included employer's liability and workers' compensation coverage. The employer tendered defense of the employee's action to the defendant, which refused to provide a defense on the ground that the employee's claims were not covered by the policy. Thereafter, the employer settled with the employee and brought an action against the insurer for declaratory relief, breach of contract, and insurance bad faith. The trial court granted summary judgment for the insurer, and the court of appeal affirmed.

Although the court in *B & E* addressed the issue of the insurer's duty to defendⁿ¹⁷ rather than its duty to indemnify, the court noted that the former issue is dependent in part on whether there is a potential for coverage under the indemnifying portion of the policy. Thus, the court found it critical to consider the impact of Section 533 on the

potential for coverage.ⁿ¹⁸ Relying on *J.C. Penney*, the court held that the reasoning of that case also applied to an employer who commits a wrongful employment termination in contravention of a fundamental and substantial public policy, including a termination in violation of the FEHA. The court noted that under *J.C. Penney*, Section 533 precludes indemnification by an insurer for any intentional and wrongful act if the harm is inherent in the act itself.ⁿ¹⁹ The court concluded that a termination of employment in violation of public policy is such an act.ⁿ²⁰ The court supported its conclusion by noting that it is self-evident that the act of terminating employment is an intentional one. Furthermore, the court reasoned, it can hardly be denied that a termination of employment in violation of antidiscrimination statutes or other fundamental and substantial public policies is inherently harmful, in view of the devastating impact of the loss of a job, whether from a financial, psychological, or emotional point of view.ⁿ²¹ Moreover, the court held, a termination in violation of such public policies is wrongful as a matter of law. The court stated that it would be unreasonable, mischievous, and improper if Section 533 "were construed in any way other than to deny insurance coverage in the most certain and unambiguous terms for willful and intentional acts that contravene" fundamental public policy.ⁿ²²

The court in *B & E* rejected the employer's reliance on *Republic Indemnity Co. v. Superior Court*,ⁿ²³ an earlier decision in which the court of appeal, relying on the Supreme Court's decision in *Clemmer*,ⁿ²⁴ had held that Section 533 did not absolve a liability insurer of its duty to defend an employer against an employee's action alleging termination in violation of the FEHA following an unlawful failure to accommodate the employee's medical condition. The court in *Republic* had reasoned that under *Clemmer*, the insurer was not exonerated from liability unless the insured subjectively intended to harm another, and that the employee's right to recovery under his failure to accommodate theory could be established by simply proving that the employer acted "unreasonably," i.e., negligently, and not necessarily with a preconceived intent to injure him. Likewise, the employer's termination of the employee, while an intentional act, was not necessarily committed with the intention of injuring the employee.ⁿ²⁵ The court in *B & E* noted that the situation alleged in that case was distinguishable from that in *Republic* in that a termination undertaken with the intent to interfere with protected labor union rights or to discriminate on the basis of gender, age, or ethnic origin cannot be the result of negligence.ⁿ²⁶ More fundamentally, the court in *B & E* noted that *Republic* was decided prior to, and thus its reliance on *Clemmer* was undermined by, the Supreme Court's decision in *J.C. Penney*, in which the Court held that a preconceived intent to injure is not necessary if the harm is inherent in the intentional act itself.ⁿ²⁷ As discussed above, the court in *B & E* concluded that termination in violation of public policy and antidiscrimination statutes was such an inherently harmful act.ⁿ²⁸

[iii] Sexual Harassment

In *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*,ⁿ²⁹ a court of appeal concluded that *Insurance Code Section 533* (as well as the language of the applicable insurance policy) barred insurance coverage of an employee's sexual harassment claim against her employer.ⁿ³⁰ In that case, a female telephone dispatcher was subjected to continuous sexual harassment from the company president during her two-month period of employment, including unwelcome sexual comments and propositions and an attempted sexual assault, before being terminated, ostensibly as part of a reduction in force due to economic conditions. Evidence indicated that the president had engaged in similar conduct toward other female employees many times in the past and that female employees who did not accede to his demands for sex were terminated. When the employee brought an action against the employer and its president for sexual harassment in violation of the FEHA and other tort causes of action, the employer tendered defense of the lawsuit to its general liability insurer. The insurer declined to defend the action on the grounds that the alleged sexual harassment and wrongful termination were intentional acts and therefore not covered by the policy. The employer settled with the employee and then sued the insurer for breach of contract and of the implied covenant of good faith and fair dealing. The trial court ruled that the insurer had no duty to defend or indemnify against the employee's sexual harassment claims, and the court of appeal affirmed.

The appellate court in *Coit Drapery* noted that the sexual harassment and wrongful termination involved in this case were clearly intentional and wilful in that one does not try to force an unwilling subordinate employee to the floor for intercourse, or fire her for refusing sexual favors, as a result of mere negligence.ⁿ³¹ Citing *J.C. Penney*, the court stated

that *Insurance Code Section 533*, and the public policy it represents, bar the attempt to shift liability for intentional sexual harassment and associated employment-related torts to an insurer.ⁿ³² The court concluded that, as in the case of the child molestation involved in *J.C. Penney*, Section 533 barred coverage of the sexual harassment involved in *Coit Drapery* because such conduct "is *always* intentional, it is *always* wrongful, and it is *always* harmful."ⁿ³³

Although it appears clear from *Coit Drapery* that the individual harasser cannot be indemnified for damages caused by sexual harassment, the decision does not appear to entirely foreclose the possibility of insurance coverage being afforded to an employer for acts of harassment by its employees. The court in *Coit Drapery* repeatedly emphasized that the acts of harassment in that case had been committed by a high managerial agent (i.e., the president) with the apparent knowledge and ratification of the corporation.ⁿ³⁴ The court observed that the sexual abuse of female employees by the corporate president was so widespread, well known, and ratified by the corporation as to constitute intentional corporate policy, which cannot be the subject of insurance coverage.ⁿ³⁵ The court's decision thus appears to leave open the possibility that an employer might be covered in other circumstances. For example, if the harassment was committed by a lower-level supervisor or co-employee in violation of a corporate policy against harassment and in spite of other steps taken to prevent harassment and if the employer took immediate steps to discipline the harasser and avoid any appearance of ratification, the employer may be able to argue that it had not engaged in any intentional wrongful act and that coverage should not be barred by Section 533.

[iv] Disparate Impact and Other "Non-Intentional" Discrimination Claims

Although California law appears to foreclose coverage of intentional acts of discrimination and sexual harassment by an employer, coverage may be available for "unintentional" discrimination, i.e. claims based on "disparate impact" theory. As discussed in more detail elsewhere,ⁿ³⁶ under disparate impact theory, an employer may be held liable for facially neutral employment policies that have a significant adverse impact on a protected group (e.g., women or racial minorities) and that are not justified by business necessity.ⁿ³⁷ A plaintiff proceeding under disparate impact theory need not prove that the defendant acted with discriminatory intent.ⁿ³⁸

In *Save Mart Supermarkets v. Underwriters*,ⁿ³⁹ a federal district court concluded that *Insurance Code Section 533* does not preclude coverage of disparate impact claims.ⁿ⁴⁰ The court in *Save Mart* interpreted the California Supreme Court's decision in *J.C. Penney* as precluding coverage if the insured intended to engage in a wrongful act and if that act was inherently harmful.ⁿ⁴¹ The court reasoned that unintentional discrimination may be inherently harmful, but a plaintiff need not establish that the insured intended to commit a wrongful act in order to recover under such a theory. Therefore, the standard set in *J.C. Penney* would not be met, and the policy of discouraging wilful torts would not be furthered, if coverage for unintentional discrimination were barred by Section 533.ⁿ⁴² The court distinguished *B & E Convalescent Center*, discussed in [ii], *above*, on the basis that the factual record in that case clearly indicated that the employer had intended to discriminate against the employee because of her race and her union activities.ⁿ⁴³

■ CONSULTANT'S COMMENT:

The decisions in *B & E Convalescent Center*, *Coit Drapery*, and *Save-Mart* (discussed above) could be interpreted to be a complete defense to an insurer's duty to defend and indemnify all claims of discrimination based on disparate treatment, because disparate treatment requires proof of intentional misconduct. Any such interpretation, however, would misconstrue the subtleties of the evidentiary burdens in discrimination actions. That is, an employer's liability for disparate treatment is not dependent on direct evidence of animus. A plaintiff may establish a prima facie case of disparate treatment with statistics *alone* or with circumstantial evidence *alone*. In *Price Waterhouse v. Hopkins*,ⁿ⁴⁴ for example, the United States Supreme Court stated that while a plaintiff's burden is to show that the employer actually relied on the plaintiff's gender or race to make an adverse employment decision, that showing can be made with indirect evidence of stereotyped remarks by the employer's decisionmakers.ⁿ⁴⁵ Thus, at the outset of a disparate treatment case, when an insurer's duty to defend first arises, it does not necessarily follow that just because the plaintiff must prove discriminatory animus, the plaintiff also will

necessarily establish that the defendant specifically intended the harm that the plaintiff has suffered. Deliberate misconduct may not have occurred. The better course for determining the applicability of the duty to defend, therefore, would be to focus on the known facts of the case at the time that the defense is tendered, rather than to focus on exclusively on labels like treatment or impact. *Commentary by Kirby Wilcox.*

Legal Topics:

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

Insurance Law Claims & Contracts Good Faith & Fair Dealing Indemnification Insurance Law Excess
Insurance Obligations Indemnification Insurance Law General Liability Insurance Obligations Indemnification Labor &
Employment Law Discrimination General Overview

FOOTNOTES:

(n1)Footnote 1. *See, e.g., American Motorists Ins. Co. v. Allied-Sysco Food Services, Inc. (1993) 19 Cal. App. 4th 1342, 1347, 1349, 24 Cal. Rptr. 2d 106* (rejecting employer's argument that excess liability policy covering "injury arising out of racial or religious discrimination" also covered damages for sex discrimination in hiring practices).

(n2)Footnote 2. *See, e.g., B & E Convalescent Center v. State Compensation Ins. Fund (1992) 8 Cal. App. 4th 78, 86-87 n.8, 9 Cal. Rptr. 2d 894 ; Republic Indemnity Co. v. Superior Court (1990) 224 Cal. App. 3d 492, 498, 273 Cal. Rptr. 331 .*

(n3)Footnote 3. *See Ins. Code § 533.*

(n4)Footnote 4. *J.C. Penney Casualty Ins. Co. v. M.K. (1991) 52 Cal. 3d 1009, 1019, 278 Cal. Rptr. 64, 804 P.2d 689 ; Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co. (1993) 14 Cal. App. 4th 1595, 1603, 18 Cal. Rptr. 2d 692 ; B & E Convalescent Center v. State Compensation Ins. Fund (1992) 8 Cal. App. 4th 78, 93, 9 Cal. Rptr. 2d 894 .*

(n5)Footnote 5. *See Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co. (1993) 14 Cal. App. 4th 1595, 1603, 18 Cal. Rptr. 2d 692 ; B & E Convalescent Center v. State Compensation Ins. Fund (1992) 8 Cal. App. 4th 78, 93, 9 Cal. Rptr. 2d 894 ; Save Mart Supermarkets v. Underwriters (N.D. Cal. 1994) 843 F. Supp. 597, 605 .*

(n6)Footnote 6. *J.C. Penney Casualty Ins. Co. v. M.K. (1991) 52 Cal. 3d 1009, 1021, 278 Cal. Rptr. 64, 804 P.2d 689 ; B & E Convalescent Center v. State Compensation Ins. Fund (1992) 8 Cal. App. 4th 78, 94, 9 Cal. Rptr. 2d 894 .*

(n7)Footnote 7. *Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 151 Cal. Rptr. 285, 587 P.2d 1098 .*

(n8)Footnote 8. *Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 887, 151 Cal. Rptr. 285, 587 P.2d 1098 .*

(n9)Footnote 9. *See Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 887, 151 Cal. Rptr. 285, 587 P.2d 1098 .*

(n10)Footnote 10. *See, e.g., Republic Indemnity Co. v. Superior Court (1990) 224 Cal. App. 3d 492, 501-503, 273 Cal. Rptr. 331 ; Allstate Ins. Co. v. Overton (1984) 160 Cal. App. 3d 843, 848-850, 206 Cal. Rptr. 823 .*

(n11)Footnote 11. *J.C. Penney Casualty Ins. Co. v. M.K. (1991) 52 Cal. 3d 1009, 278 Cal. Rptr. 64, 804 P.2d 689 .*

(n12)Footnote 12. *J.C. Penney Casualty Ins. Co. v. M.K. (1991) 52 Cal. 3d 1009, 1025, 278 Cal. Rptr. 64, 804 P.2d 689 .*

(n13)Footnote 13. *J.C. Penney Casualty Ins. Co. v. M.K. (1991) 52 Cal. 3d 1009, 1025, 1028, 278 Cal. Rptr. 64,*

804 P.2d 689 .

(n14)Footnote 14. *See Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal. App. 4th 1595, 1603-1604, 1612-1614, 18 Cal. Rptr. 2d 692 ; *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 86-87 n.8, 9 Cal. Rptr. 2d 894 .

(n15)Footnote 15. *See Save Mart Supermarkets v. Underwriters* (N.D. Cal. 1994) 843 F. Supp. 597, 606 .

(n16)Footnote 16. *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 9 Cal. Rptr. 2d 894 .

(n17)Footnote 17. *See* discussion in § 43.22.

(n18)Footnote 18. *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 92-93, 9 Cal. Rptr. 2d 894 .

(n19)Footnote 19. *See* discussion in [a], *above*.

(n20)Footnote 20. *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 97-98, 9 Cal. Rptr. 2d 894 .

(n21)Footnote 21. *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 98, 9 Cal. Rptr. 2d 894 .

(n22)Footnote 22. *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 98, 9 Cal. Rptr. 2d 894 .

(n23)Footnote 23. *Republic Indemnity Co. v. Superior Court* (1990) 224 Cal. App. 3d 492, 273 Cal. Rptr. 331 .

(n24)Footnote 24. *See* discussion in [a], *above*.

(n25)Footnote 25. *See Republic Indemnity Co. v. Superior Court* (1990) 224 Cal. App. 3d 492, 501-503, 273 Cal. Rptr. 331 .

(n26)Footnote 26. *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 95, 9 Cal. Rptr. 2d 894 .

(n27)Footnote 27. *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 96, 9 Cal. Rptr. 2d 894 .

(n28)Footnote 28. *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 96-97, 9 Cal. Rptr. 2d 894 .

(n29)Footnote 29. *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal. App. 4th 1595, 18 Cal. Rptr. 2d 692 .

(n30)Footnote 30. *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal. App. 4th 1595, 1603-1604, 1612-1614, 18 Cal. Rptr. 2d 692 .

(n31)Footnote 31. *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal. App. 4th 1595, 1602, 18 Cal. Rptr. 2d 692 .

(n32)Footnote 32. *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal. App. 4th 1595, 1603, 18 Cal. Rptr. 2d 692 .

(n33)Footnote 33. *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal. App. 4th 1595, 1613-1614, 18 Cal. Rptr. 2d 692 .

(n34)Footnote 34. *See Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal. App. 4th 1595, 1604, 1606-1606, 1609, 1612-1613, 18 Cal. Rptr. 2d 692 .

(n35)Footnote 35. *See Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal. App. 4th 1595, 1609, 18 Cal. Rptr. 2d 692 .

(n36)Footnote 36. *See* discussion in §§ 43.01[2][c], 43.10[2][c], and in ch. 41, pt. A.

(n37)Footnote 37. *See Teamsters v. United States* (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 .

(n38)Footnote 38. *Griggs v. Duke Power Co.* (1971) 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158 .

(n39)Footnote 39. *Save Mart Supermarkets v. Underwriters* (N.D. Cal. 1994) 843 F. Supp. 597 .

(n40)Footnote 40. *Save Mart Supermarkets v. Underwriters* (N.D. Cal. 1994) 843 F. Supp. 597, 606 .

(n41)Footnote 41. *See Save Mart Supermarkets v. Underwriters* (N.D. Cal. 1994) 843 F. Supp. 597, 605-606 .

(n42)Footnote 42. *Save Mart Supermarkets v. Underwriters* (N.D. Cal. 1994) 843 F. Supp. 597, 606 .

(n43)Footnote 43. *Save Mart Supermarkets v. Underwriters* (N.D. Cal. 1994) 843 F. Supp. 597, 606 .

(n44)Footnote 44. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268, *superseded by statute on other grounds*, by amendment of 42 U.S.C. § 1981 (*see* 105 Stat. 1071).

(n45)Footnote 45. *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 251, 109 S. Ct. 1775, 104 L. Ed. 2d 268 , *superseded by statute on other grounds*, by amendment of 42 U.S.C. § 1981 (*see* 105 Stat. 1071).



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part C. INSURANCE COVERAGE ISSUES

3-43 California Employment Law § 43.22

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

§ 43.22 Insurer's Defense of Discrimination Claims

[1] General Scope of Liability Insurer's Duty to Defend

A typical liability policy requires the insurer not only to indemnify the insured against covered claims, but also to defend the insured against actions seeking damages covered by the policy, even if the allegations are groundless, false, or fraudulent.

The duty to defend is said to be broader than the duty to indemnify the insured.ⁿ⁴⁶ The greater breadth is due to two factors, both of which result from the fact that the duty to defend arises at the time that the action against the insured is initiated. First, because a liability policy typically requires an insurer to defend the insured against actions alleging conduct covered by the policy, even if the allegations are false or groundless, the insurer may be required to defend an action even though it ultimately results in no liability for indemnification because the insured prevails in the action.ⁿ⁴⁷

Second, at the time the action is commenced, there may be considerable doubt regarding whether the insured will ultimately be found liable for conduct for which there is indemnification coverage.ⁿ⁴⁸ For example, the complaint may allege multiple theories of recovery, only some of which are subject to indemnification. The California courts have therefore held that a liability insurer must defend an action against the insured if (1) the action potentially seeks damages that are covered by the policy, or (2) the policy provisions lead the insured to reasonably expect that the insurer will provide a defense.ⁿ⁴⁹

Whether or not a potential for coverage exists, giving rise to a duty to defend, is determined by both the allegations of the complaint and any other facts available to the insurer at the time that the defense is tendered by the insured.ⁿ⁵⁰ Once a duty to defend has arisen, it does not dissolve merely because the insured is ultimately found liable under facts that preclude indemnification coverage.ⁿ⁵¹ The insurer is obligated to defend all claims, both covered and non-covered, until the insurer produces undeniable evidence supporting an allocation of a specific portion of the defense costs to a noncovered claim.ⁿ⁵²

For further discussion of the general nature and scope of the duty to defend, *see* California Insurance Law and Practice, ch. 41, pt. D (Matthew Bender).

[2] Duty to Defend Under Workers' Compensation Policies

Workers' compensation policies typically include not only an obligation to pay workers' compensation benefits for which the employer is liable, but also an obligation to defend any contested proceeding by an employee to recover such benefits. In a number of cases, employers have tendered defense of *civil damages actions* alleging employment discrimination or wrongful termination actions to their workers' compensation insurers.

In *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.*,ⁿ⁵³ the California Supreme Court held that a workers' compensation insurer had no duty to defend the insured employer against a civil damages action alleging race discrimination in violation of the FEHA and related wrongful termination claims.ⁿ⁵⁴ The policy involved in that case included a workers' compensation part, which provided for coverage of benefits payable under workers' compensation law, and an employers' liability part, which provided for coverage of civil damages, but expressly excluded coverage of (1) workers' compensation benefits, and (2) any damages arising out of the discharge, coercion of, or discrimination against any employee in violation of law. The employer apparently conceded that there was no obligation to defend under the employers' liability part of the policy, but sought to require the insurer to defend under the workers' compensation part, which included an obligation to defend "any claim, proceeding or suit against you for benefits payable by this insurance."

The Supreme Court held that there could be no reasonable expectation of coverage because the workers' compensation portion of the policy unambiguously included only payment of workers' compensation benefits, while the employers' liability part excluded workers' compensation benefits from the definition of damages. Thus, the Court concluded that the workers' compensation policy's language was susceptible to no other objective construction than providing coverage solely for workers' compensation benefits, or claims, proceedings, or suits for such benefits, and not for civil suits for damages.ⁿ⁵⁵ The Court also held that civil action involved no potential for damages within the coverage of the policy because the superior court had no jurisdiction to award workers' compensation benefits; the award of such benefits is exclusively within the jurisdiction of the Workers' Compensation Appeals Board.ⁿ⁵⁶ The conclusion that no potential for coverage existed was not altered by the fact that the employee might *later* file a claim for workers' compensation benefits based on similar facts. The Court stated the test is whether the underlying action for which defense and indemnity is sought potentially seeks relief within the coverage of the policy.ⁿ⁵⁷ The Court disapproved a previous court of appeal decision that had reached a contrary conclusion.ⁿ⁵⁸

[3] Effect of "Wilful Acts" Exclusion on Duty to Defend Discrimination and Related Wrongful Termination Claims

Although acknowledging that the duty to defend is potentially broader than the duty to indemnify, the appellate decisions that have found that *Insurance Code Section 533* bars indemnification of damages caused by employment discrimination and related wrongful termination claims have also generally concluded that the insurer owes no duty to defend such claims. For example, in *B & E Convalescent Center v. State Compensation Ins. Fund*,ⁿ⁵⁹ discussed in § 43.21[2][b][ii], the court of appeal held that the employee's action for wrongful termination in violation of public policy and the FEHA could not be the result of negligence because proof of the underlying action necessarily required proof of wilful and intentional misconduct,ⁿ⁶⁰ coverage of which, the court concluded, was precluded by *Insurance Code Section 533*. Hence, there was no "potential" for coverage.ⁿ⁶¹

The court in *B & E* also concluded that the language of the policy in that case could not be construed as providing a basis for a reasonable expectation by the insured employer that the insurer would provide a defense of claims for which indemnification is precluded by Section 533.ⁿ⁶² In reaching that conclusion, the court treated the exclusion of Section 533 as though it were an express exclusion contained in the policyn⁶³ and placed the burden on the insured employer to

show that the language of the policy created a reasonable expectation of a defense of the employee's action, notwithstanding the fact that indemnification would be barred by Section 533.ⁿ⁶⁴ The court concluded that the policy in that case merely gave the insurer an option to defend claims for which no indemnification was available and did not create a duty to defend the claims asserted by the employee.ⁿ⁶⁵

In *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.*,ⁿ⁶⁶ discussed in § 43.21[2][b][iii], in which the court of appeal concluded that *Insurance Code Section 533* barred coverage of an employee's sexual harassment and wrongful termination claims against the employer arising out of particularly egregious acts of sexual harassment by the company president, the court also concluded that the insurer had no duty to defend the claims.ⁿ⁶⁷ The court acknowledged that the duty to defend is broader than the duty to indemnify and may extend to circumstances in which there is no duty to indemnify, based on the objectively reasonable expectations of the insured. However, the court "fail[ed] to see how any corporation could reasonably expect it would be defended against intentional misconduct claims, where the sexual misconduct in issue was a matter of corporate policy, as here."ⁿ⁶⁸ As discussed previously,ⁿ⁶⁹ the court's repeated emphasis in *Coit Drapery* of the fact that the harassment in that case was carried on by a high managerial agent and apparently condoned and ratified by the corporation seems to leave open the possibility of coverage, and hence a duty to defend, in cases in which the harassment was done by lower-level supervisors or co-employees and was neither approved nor ratified by corporate management.

One court of appeal case did distinguish *Coit* in finding a potential duty to defend in a case that involved sexual harassment, among other related causes of action.ⁿ⁷⁰ In that case, a hospital administrator, another employee, and their employer, a convalescent hospital, were sued by several women employees for sexual harassment, as well as false imprisonment, defamation, and negligent supervision, among other things. The court found that a stay of the trial in the plaintiffs' declaratory relief action against their insurers was required since, although the causes of action relating to sexual misconduct might not be within the duty to defend, the other causes of action might have activated that duty, thus making the trial on the issue of the duty to defend inappropriate prior to the main trial.ⁿ⁷¹

As discussed in § 43.21[2][b][iv], one federal district court, applying California law, has concluded that insurance coverage of disparate impact claims is not precluded by *Insurance Code Section 533*.ⁿ⁷² If this approach is followed by the California courts, an insurer would also have a duty to defend such claims, at least when the policy language does not expressly exclude coverage of such claims.

Legal Topics:

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

Insurance LawGeneral Liability InsuranceObligationsGeneral OverviewInsurance LawGeneral Liability InsuranceObligationsDefenseLabor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawEmployer LiabilityGeneral Overview

FOOTNOTES:

(n1)Footnote 46. See *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal. 4th 1076, 1081, 17 Cal. Rptr. 2d 210, 846 P.2d 792 ; *American Motorists Ins. Co. v. Allied-Sysco Food Services, Inc.* (1993) 19 Cal. App. 4th 1342, 1353, 24 Cal. Rptr. 2d 106 ; *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal. App. 4th 1595, 1607, 18 Cal. Rptr. 2d 692 ; *CNA Casualty of California v. Seaboard Surety Co.* (1986) 176 Cal. App. 3d 598, 605 n.1, 222 Cal. Rptr. 276 .

(n2)Footnote 47. *Firco, Inc. v. Fireman's Fund Ins. Co.* (1959) 173 Cal. App. 2d 524, 527, 343 P.2d 311 ; see *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal. 4th 1076, 1081, 1085-1086, 17 Cal. Rptr. 2d 210, 846 P.2d 792 .

(n3)Footnote 48. See *Gray v. Zurich Insurance Co.* (1966) 65 Cal. 2d 263, 271-272, 54 Cal. Rptr. 104, 419 P.2d 168 ; *Firco, Inc. v. Fireman's Fund Ins. Co.* (1959) 173 Cal. App. 2d 524, 527, 343 P.2d 311 .

(n4)Footnote 49. *Gray v. Zurich Insurance Co.* (1966) 65 Cal. 2d 263, 274-276, 54 Cal. Rptr. 104, 419 P.2d 168 ; *American Motorists Ins. Co. v. Allied-Sysco Food Services, Inc.* (1993) 19 Cal. App. 4th 1342, 1353, 24 Cal. Rptr. 2d 106 ; *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 92, 9 Cal. Rptr. 2d 894 ; see *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal. 4th 27, 38, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 .

(n5)Footnote 50. *American Motorists Ins. Co. v. Allied-Sysco Food Services, Inc.* (1993) 19 Cal. App. 4th 1342, 1353, 24 Cal. Rptr. 2d 106 ; *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 92, 9 Cal. Rptr. 2d 894 ; *CNA Casualty of California v. Seaboard Surety Co.* (1986) 176 Cal. App. 3d 598, 605, 610, 222 Cal. Rptr. 276 .

(n6)Footnote 51. *Gray v. Zurich Insurance Co.* (1966) 65 Cal. 2d 263, 278, 54 Cal. Rptr. 104, 419 P.2d 168 .

(n7)Footnote 52. *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal. 4th 1076, 1081, 17 Cal. Rptr. 2d 210, 846 P.2d 792 ; *Hogan v. Midland National Ins. Co.* (1970) 3 Cal. 3d 553, 564, 91 Cal. Rptr. 153, 476 P.2d 825 .

(n8)Footnote 53. *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal. 4th 27, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 .

(n9)Footnote 54. *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal. 4th 27, 46, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 .

(n10)Footnote 55. *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal. 4th 27, 42, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 .

(n11)Footnote 56. *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal. 4th 27, 43, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 .

(n12)Footnote 57. *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal. 4th 27, 43-44, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 .

(n13)Footnote 58. *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal. 4th 27, 46 n.4, 36 Cal. Rptr. 2d 100, 884 P.2d 1048 (disapproving *Wong v. State Compensation Ins. Fund* (1993) 12 Cal. App. 4th 686, 695-696, 16 Cal. Rptr. 2d 1 to the extent it is inconsistent with *La Jolla* decision).

(n14)Footnote 59. *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 9 Cal. Rptr. 2d 894 .

(n15)Footnote 60. *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 95, 9 Cal. Rptr. 2d 894 .

(n16)Footnote 61. See *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 93-99, 9 Cal. Rptr. 2d 894 .

(n17)Footnote 62. *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 102, 9 Cal. Rptr. 2d 894 .

(n18)Footnote 63. See *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 100, 9 Cal. Rptr. 2d 894 .

(n19)Footnote 64. See *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 100-101, 9 Cal. Rptr. 2d 894 .

(n20)Footnote 65. *B & E Convalescent Center v. State Compensation Ins. Fund* (1992) 8 Cal. App. 4th 78, 102, 9 Cal. Rptr. 2d 894 .

(n21)Footnote 66. *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal. App. 4th 1595, 18 Cal. Rptr. 2d 692 .

(n22)Footnote 67. *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal. App. 4th 1595, 1607, 1613, 18 Cal. Rptr. 2d 692 .

(n23)Footnote 68. *Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co.* (1993) 14 Cal. App. 4th 1595, 1607, 18 Cal. Rptr. 2d 692 .

(n24)Footnote 69. *See* discussion in § 43.21[2][b][iii].

(n25)Footnote 70. *See David Kleis, Inc. v. Superior Court* (1995) 37 Cal. App. 4th 1035, 1049-1050, 44 Cal. Rptr. 2d 181 .

(n26)Footnote 71. *See David Kleis, Inc. v. Superior Court* (1995) 37 Cal. App. 4th 1035, 1050-1051, 44 Cal. Rptr. 2d 181 .

(n27)Footnote 72. *See Save Mart Supermarkets v. Underwriters* (N.D. Cal. 1994) 843 F. Supp. 597, 606 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part C. INSURANCE COVERAGE ISSUES

3-43 California Employment Law §§ 43.23through 43.29

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

[Reserved]

§§ 43.23[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part D. BIBLIOGRAPHY

3-43 California Employment Law § 43.30

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

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

Insurance LawGeneral Liability InsuranceObligationsGeneral OverviewInsurance LawGeneral Liability
InsuranceObligationsIndemnificationLabor & Employment LawDiscriminationGeneral OverviewLabor & Employment
LawEmployer LiabilityGeneral Overview



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CHAPTER 43 Civil Actions Under Equal Employment Opportunity Laws
Part D. BIBLIOGRAPHY

1-43 California Employment Law § 43.31

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

[Reserved]

§ 43.31[Reserved]



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3-43 California Employment Law § 43.32

AUTHOR: By Mary C. Dunlap, J.D. and Steven J. Revell, J.D.

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

Insurance LawGeneral Liability InsuranceObligationsGeneral OverviewLabor & Employment
LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisparate TreatmentGeneral
OverviewLabor & Employment LawEmployer LiabilityGeneral Overview



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action

3-44 California Employment Law 44.syn

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

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FOOTNOTES:

(n1)Footnote *. *From 1978 to 1983, Ms. Brodsky was a staff attorney with the California Fair Employment and Housing Commission and the Department of Fair Employment and Housing. Since that time, she has been engaged in private practice in Massachusetts and California, with an emphasis on employment-discrimination and wrongful-termination law. She is currently practicing in Oakland, California.

(n2)Footnote **. Publisher's Editorial Staff.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action

3-44 California Employment Law Scope

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

Scope

By Dale L. Brodsky, J.D.^{n*} and Judy B. Freeman, J.D.^{n**} SCOPE

This chapter discusses affirmative action requirements and enforcement under equal employment opportunity laws. The chapter discusses the propriety of court-ordered affirmative action plans as a remedy for employment discrimination, as well as the propriety of court-approved consent decrees. The chapter also discusses the legality of affirmative action programs voluntarily established by employers. Finally, the chapter covers the affirmative action requirements for government contractors under state and federal laws, and the procedures for enforcement of those requirements.

For an overview of equal employment opportunity laws generally, see Chapter 40. Chapter 41 discusses the substantive requirements of equal employment opportunity laws. Chapter 42 covers administrative enforcement, and Chapter 43 covers judicial enforcement of such laws.

FOOTNOTES:

(n3)Footnote *. *From 1978 to 1983, Ms. Brodsky was a staff attorney with the California Fair Employment and Housing Commission and the Department of Fair Employment and Housing. Since that time, she has been engaged in private practice in Massachusetts and California, with an emphasis on employment-discrimination and wrongful-termination law. She is currently practicing in Oakland, California.

(n4)Footnote **. Publisher's Editorial Staff.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action
Part A. VOLUNTARY AND COURT-ORDERED AFFIRMATIVE ACTION PLANS

3-44 California Employment Law § 44.01

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.01 Voluntary Affirmative Action Plans

[1] Generally

Within limits, Title VII permits employers to adopt voluntary race- or sex-conscious affirmative action plans.ⁿ¹ In *Steelworkers v. Weber*,ⁿ² the United States Supreme Court held that Title VII's prohibition against racial discriminationⁿ³ does not condemn all private, voluntary, race-conscious affirmative action plans, and that employers and unions in the private sector are free to take such race-conscious steps provided that their actions satisfy certain conditions. The Court upheld a collective bargaining agreement between a union and a company that contained an affirmative action plan giving preference to racial minorities entering into a skilled-craft training program. The Court stated that it would be ironic if a law triggered by concern over racial injustice and intended to improve the employment opportunities of protected minorities constituted a legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation.ⁿ⁴ The Court declined to define in detail the distinction between permissible and impermissible affirmative action plans but stated that the plan before it was clearly permissible for several reasons: (1) the plan was designed to eliminate manifest imbalance in the work force resulting from past racial segregation, (2) it did not unnecessarily trammel the interests of the white employees because it did not require their discharge and replacement by black employees, and (3) the plan was a temporary measure, not designed to maintain racial balance, that would end when the number of black skilled craftworkers approximated the number of blacks in the labor force.ⁿ⁵ Subsequent cases have generally applied these criteria to determine whether or not a voluntary plan is permissible.ⁿ⁶

The Supreme Court further addressed the first *Weber* factor, listed above, that is, whether a manifest imbalance existed which would justify taking race or sex into account, in *Johnson v. Transportation Agency*.ⁿ⁷ *Johnson* upheld a voluntary affirmative action plan that permitted the agency to use sex as a factor in making promotions to skilled craft positions in which women were significantly underrepresented.ⁿ⁸ The Court stated that the requisite determination of imbalance should be made by comparing the percentage of minorities and women in the employer's work force and the percentage minorities and women in the area's labor market or general population for jobs involving no special expertise. For jobs that require special training, the comparison should be made between the percentage of minorities

and women in the work force and the percentage of minorities and women in the labor force who possess the relevant qualifications. The Court added that the degree of manifest imbalance in a Title VII case need not be sufficient to support a prima facie case of employment discrimination against the employer.ⁿ⁹

■ CONSULTANT'S COMMENT:

Since *Weber* and *Johnson*, the lower courts have had difficulty articulating the standards that must be followed when making statistical comparisons to determine the existence of a "manifest imbalance."ⁿ¹⁰
Commentary by Kirby Wilcox.

Johnson also addressed the second *Weber* factor, whether the plan unnecessarily trammels the rights of nonminority or male employees. The Court concluded that the plan did not do so because it did not require the setting aside of any specific number of positions for women but simply allowed an applicant's gender to be a "plus" factor in making the employment determination. Importantly, because the focus in *Johnson* was on a promotion, and the male plaintiff who challenged his denial of promotion was one of several applicants qualified for the position in question, the Court held that he had no absolute entitlement to promotion and that he was not denied his present position, salary, seniority, or expectations of future promotions.ⁿ¹¹

With respect to the third *Weber* factor, whether or not a plan is sufficiently "temporary," and is intended to attain rather than maintain racial or gender balance, it appears that there is no requirement that affirmative action plans set fixed deadlines for eliminating race or sex imbalances in the work force.ⁿ¹² A plan that takes a moderate, gradual approach to eliminating the imbalance in the work force and creates realistic guidance for making hiring decisions, but does not seek to maintain a permanent racial and sexual balance, is permissible.ⁿ¹³

[2] Burden of Proof

The burden of proof in establishing the invalidity of an affirmative action plan is the same whether the plan is alleged to violate constitutional equal protection guarantees or Title VII.ⁿ¹⁴ The person allegedly aggrieved by the plan has the burden of demonstrating that the plan is unconstitutional or that it violates Title VII. The aggrieved person must make out a prima facie case that race or sex has been taken into account in the employer's decision. The burden then shifts to the employer to articulate a nondiscriminatory rationale for the decision. An affirmative action plan provides such a rationale. The burden then shifts back to the plaintiff to prove that this justification is a pretext and that the plan is invalid.ⁿ¹⁵

■ CONSULTANT'S COMMENT:

The *Johnson* decision's adoption of the *Weber* criteria has eliminated much of the uncertainty about the ground rules or guidelines for most voluntarily adopted affirmative action plans. Furthermore, *Johnson's* explication of the burdens of proof, particularly the employer's slight burden of articulating a nondiscriminatory rationale for the plan, has immunized most plans from challenge under Title VII.
Commentary by Bill Lann Lee.

[3] EEOC Guidelines

The Equal Employment Opportunity Commission (EEOC) has promulgated guidelines in Title 29 Code of Federal Regulations Part 1608, for the adoption of voluntary affirmative action plans by employers and labor organizations.ⁿ¹⁶ The California Department of Fair Employment and Housing (DFEH) has adopted these guidelines for purposes of enforcing the Fair Employment and Housing Act (FEHA).ⁿ¹⁷ One important effect of the guidelines is that if an employer relies on them, it may invoke the protection of Title 42 *United States Code section 2000e-12(b)(1)*, the Title VII provision stating that an action taken in good faith in conformity with and in reliance on a written interpretation or opinion of the EEOC is a defense to an action or proceeding against the employer for violation of Title VII.ⁿ¹⁸ The guidelines are applicable only to voluntary plans and not to plans set forth as a remedy to discrimination.ⁿ¹⁹ However, they are applicable to plans agreed to as part of a conciliation or settlement agreement approved by the EEOC,ⁿ²⁰ and if

a complaint is brought against an employer because of its conformity to such a plan, the EEOC will issue a no-cause determination and advise the employer that it has the right to rely on the agreement as a defense under Title 42 *United States Code* section 2000e-12(b)(1).ⁿ²¹

The guidelines identify appropriate reasons to adopt affirmative action plans, including (1) avoidance of actual or potential practices having an adverse impact on employees; (2) correction of effects of prior discriminatory practices; and (3) modification of a limited labor pool caused by past restrictions.ⁿ²² The guidelines state that a proper affirmative action plan contains three elements: (1) a reasonable self-analysis, (2) a reasonable basis for concluding action is appropriate, and (3) reasonable action.ⁿ²³ The guidelines set forth some examples of appropriate affirmative action.ⁿ²⁴

Legal Topics:

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

Labor & Employment Law Affirmative Action General Overview Labor & Employment Law Affirmative Action Compliance Labor & Employment Law Affirmative Action Discrimination Labor & Employment Law Affirmative Action Voluntary Plans

FOOTNOTES:

(n1)Footnote 1. *See Steelworkers v. Weber* (1979) 443 U.S. 193, 197, 208, 99 S. Ct. 2721, 61 L. Ed. 2d 480 .

(n2)Footnote 2. *Steelworkers v. Weber* (1979) 443 U.S. 193, 197, 208, 99 S. Ct. 2721, 61 L. Ed. 2d 480 .

(n3)Footnote 3. *See 42 U.S.C. § 2000e-2.*

(n4)Footnote 4. *See Steelworkers v. Weber* (1979) 443 U.S. 193, 204, 99 S. Ct. 2721, 61 L. Ed. 2d 480 .

(n5)Footnote 5. *See Steelworkers v. Weber* (1979) 443 U.S. 193, 208-209, 99 S. Ct. 2721, 61 L. Ed. 2d 480 .

(n6)Footnote 6. *See, e.g., Johnson v. Transportation Agency* (1987) 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615, 631-636 (upholding voluntary affirmative action plan by public employer).

(n7)Footnote 7. *Johnson v. Transportation Agency* (1987) 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615, 630-634 .

(n8)Footnote 8. *Johnson v. Transportation Agency* (1987) 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615, 632-633 .

(n9)Footnote 9. *Johnson v. Transportation Agency* (1987) 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615, 631-632 n.11 .

(n10)Footnote 10. *See, e.g., Higgins v. City of Vallejo* (9th Cir. [Cal.] 1987) 823 F.2d 351, 356 (city established requisite "manifest imbalance"); *Hammon v. Barry* (D.C. Cir. 1987) 826 F.2d 73, 78 , cert. denied, 108 S. Ct. 2023 (1988) (district fire department failed to establish requisite "manifest imbalance").

(n11)Footnote 11. *Johnson v. Transportation Agency* (1987) 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615, 635 ; *see also Hammon v. Barry* (D.C. Cir. 1987) 264 U.S. App. D.C. 1 , cert. denied, 108 S. Ct. 2023 (1988) (plan did unnecessarily trammel rights of whites); *Higgins v. Vallejo* (9th Cir. [Cal.] 1987) 823 F.2d 351, 356-358 (plan did not unnecessarily trammel rights of whites); *but see San Francisco Police Off. Ass'n v. San Francisco* (9th Cir. 1987) 812 F.2d 1125, 1130-1132 (employer's decision to reweigh discriminatory promotional exam in order to achieve particular racial result unlawfully restricted promotional opportunities of nonminority candidates).

(n12)Footnote 12. *See Higgins v. City of Vallejo* (9th Cir. [Cal.] 1987) 823 F.2d 351, 357 .

(n13)Footnote 13. *See Johnson v. Transportation Agency* (1987) 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615, 635-636 ; *Higgins v. City of Vallejo* (9th Cir. [Cal.] 1987) 823 F.2d 351, 357-358 ; *Ledoux v. District of Columbia* (D.C. Cir. 1987) 820 F.2d 1293, 1302 .

(n14)Footnote 14. *Johnson v. Transportation Agency* (1987) 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615, 627 ; *see Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, 277-278, 106 S. Ct. 1842, 90 L. Ed. 2d 260 .

(n15)Footnote 15. *See Johnson v. Transportation Agency* (1987) 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615, 627 ; *see also Higgins v. City of Vallejo* (9th Cir. [Cal.] 1987) 823 F.2d 351, 355 (holding that employee did not meet burden of proof in establishing that public employer's affirmative action plan violated Title VII); *cf. McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (order and burden of proof for establishing disparate treatment under Title VII); *see also* discussion in Chapter 41, Part A, and Chapter 43, Part B.

(n16)Footnote 16. *See 29 C.F.R. §§ 1608.1-1608.12.*

(n17)Footnote 17. *See 2 Cal. Code Reg. § 7286.8.*

(n18)Footnote 18. *See 29 C.F.R. §§ 1608.1(d), 1608.2, 1608.10.*

(n19)Footnote 19. *See 29 C.F.R. § 1608.11(a).*

(n20)Footnote 20. *See 29 C.F.R. § 1608.6(a).*

(n21)Footnote 21. *See 29 C.F.R. § 1608.6(b).*

(n22)Footnote 22. *See 29 C.F.R. § 1608.3(a)-(c).*

(n23)Footnote 23. *See 29 C.F.R. § 1608.4.*

(n24)Footnote 24. *See 29 C.F.R. § 1608.4(c)(1).*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action
Part A. VOLUNTARY AND COURT-ORDERED AFFIRMATIVE ACTION PLANS

3-44 California Employment Law § 44.02

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.02 Court-Imposed Affirmative Action Decrees as Remedy for Past Discrimination

Within limits, Title VII permits a court to order an employer found liable for Title VII violations to adopt race- or sex-conscious affirmative action remedies, even if such remedies benefit persons who are not identified as actual victims of discrimination. In *Sheet Metal Workers v. EEOC*, n1 the United States Supreme Court upheld contempt findings against a union that had violated a district court decree establishing both an affirmative action membership quota and a requirement that contempt sanctions be placed in a fund to increase minority membership in the union and in an apprenticeship program. The union had a long history of pervasive Title VII violations and disregard of prior district court decrees. In reaching its decision, the Court ruled that a district court may, in appropriate circumstances, order preferential relief benefiting individuals who are not the actual victims of discrimination as a remedy for violation of Title VII. In the plurality opinion, written by Justice Brennan, four justices agreed, after examining the legislative policy behind Title VII, that Congress did not intend to prohibit a court from exercising its remedial authority by fashioning a system of quotas or preferences as a remedy for a violation of Title VII.n2

The plurality opinion thus distinguished language in the earlier Supreme Court decision in *Firefighters v. Stotts*, n3 which stated in dicta that court-ordered affirmative action is not available to those who are not actual victims of illegal discrimination. In *Stotts*, the district court entered a consent decree designed to remedy the hiring and promotion practices of the Memphis Fire Department. Following entry of the decree, the court, in anticipation of departmental layoffs, enjoined the application of a last-hired, first-fired seniority provision within the firefighters' collective bargaining agreement. The Supreme Court reversed the district court injunction order for two reasons: (1) the injunction did not merely enforce the underlying consent decree, because the decree made no mention of demotion or layoffs and the injunction improperly implemented the purposes of the decree by denying innocent nonminorities the benefits of their competitive seniority; and (2) the injunction was not a legitimate modification of an existing decree, because that decree made no departures from the existing seniority system, and a court can award competitive seniority only when the beneficiary of the award is an actual victim of discrimination.n4

Justice Powell provided the swing vote in *Sheet Metal Workers* by agreeing that a court may order preferential relief to individuals who are not actual victims of discrimination as a remedy for violations of Title VII.n5 Justice Powell

emphasized that the district court order and the union membership goal did not violate the Constitution, because they were justified by a compelling state interest of eradicating discrimination and were narrowly tailored to the achievement of that goal.ⁿ⁶

In a concurring and dissenting opinion, Justice O'Connor agreed with portions of the plurality opinion, but dissented from the Court's judgment insofar as it affirmed the use of a membership goal. However, Justice O'Connor agreed with Justice White's dissenting opinion that the particular membership goal and fund order in this case operated as an impermissible racial quotaⁿ⁷ under Title 42 *United States Code* sections 2000e-5(g) and 2000e-2(j).ⁿ⁸ She specifically criticized the plurality for interpreting section 2000e-2(j) as limiting the substantive liability of employers and unions to grant preferences but not as limiting the remedial powers of courts to do so.ⁿ⁹ Justice O'Connor drew the distinction that an impermissible quota requires rigid adherence to numerical requirements that must be met on pain of imposition of sanctions, without regard to variables such as the number of qualified minority applicants available or the number of new apprentices needed, whereas a permissible goal requires only a good-faith effort on the employer's or union's part to come within a certain range.ⁿ¹⁰

Justice Rehnquist and Chief Justice Burger, in a separate dissenting opinion, disagreed that Title 42 *United States Code* Section 2000e-5(g) permits the ordering of preferences benefiting nonvictims of discrimination.ⁿ¹¹

■ CONSULTANT'S COMMENT:

Most affirmative action plans are either voluntarily adopted or the product of a consent decree.ⁿ¹² Thus, as a practical matter, the decisions in *Johnson v. Transportation Agency* ⁿ¹³ and *Firefighters v. Cleveland*, ⁿ¹⁴ upholding voluntarily adopted and consent-decree affirmative action measures, have ended the controversy about the validity of most plans. *Commentary by Bill Lann Lee.*

A nonparty who wishes to challenge the legality of court-imposed equitable relief under the Constitution or federal civil rights laws is subject to the limitations set forth in Title 42 *United States Code*, section 2000e-2(n). For further discussion, see § 44.03[2].

Legal Topics:

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative ActionCourt & Government Imposed PlansLabor & Employment LawAffirmative ActionDiscrimination

FOOTNOTES:

(n1)Footnote 1. *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344, 365-368, 392 .

(n2)Footnote 2. *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344, 380-381 . The plurality also upheld the court order against claims that it violated equal protection. see *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344 ..

(n3)Footnote 3. *Firefighters Local Union No. 1784 v. Stotts* (1984) 467 U.S. 561, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n4)Footnote 4. See *Firefighters v. Stotts* (1984) 467 U.S. 561, 104 S. Ct. 2576, 81 L. Ed. 2d 483 .

(n5)Footnote 5. See *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344, 393 .

(n6)Footnote 6. See *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 106 S. Ct. 3019,

92 L. Ed. 2d 344, 393-396 ..

(n7)Footnote 7. See *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344, 396-398 (opinion of O'Connor, J.); *Sheet Metal Workers v. EEOC* (1986) 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344, 403 , (dissenting opinion of White, J.).

(n8)Footnote 8. See *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344, 397-398 .

(n9)Footnote 9. See *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344, 397-398 .

(n10)Footnote 10. See *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344, 400-401 .

(n11)Footnote 11. See *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344, 403-404 .

(n12)Footnote 12. See discussion in § 44.03.

(n13)Footnote 13. *Johnson v. Transportation Agency* (1987) 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615, 630-634 .

(n14)Footnote 14. *Firefighters v. Cleveland* (1986) 478 U.S. 501, 106 S. Ct. 3063, 92 L. Ed. 2d 405, 418-420 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action
Part A. VOLUNTARY AND COURT-ORDERED AFFIRMATIVE ACTION PLANS

3-44 California Employment Law § 44.03

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.03 Consent Decrees

[1] Generally

Affirmative action plans based on consent decrees, which are voluntary agreements between the parties that are confirmed by the court, are a hybrid between purely voluntary plansⁿ¹ and court-ordered plans,ⁿ² having attributes of both contracts and judicial decrees.ⁿ³ In *Firefighters v. Cleveland*,ⁿ⁴ the United States Supreme Court held that Title VII does not preclude a court from imposing in a consent decree certain forms of race-conscious relief that benefit individuals who are not actual victims of discrimination. Although the case involved a public employer, the issue before the Court was whether any consent decree may order such race-conscious relief. Other issues peculiarly applicable to the voluntary actions of public employers, such as equal protection issues or issues regarding the limits placed on voluntary agreements not embodied in consent decrees, were not presented.ⁿ⁵

The Court stressed that voluntary compliance with Title VII is the preferred means of achieving the objectives of Title VII,ⁿ⁶ and stated that there seemed to be no reason to distinguish between voluntary action taken in a consent decree and voluntary action taken outside the context of litigation. Thus, the Court, having already upheld the validity of certain voluntary race-conscious affirmative action in *Steelworkers v. Weber*,ⁿ⁷ held the principles of analysis set forth in *Weber* to be applicable to the analysis of consent decrees.ⁿ⁸

In so ruling, the Court addressed the argument of the petitioner union that Title VII prohibits any order of a court, including a consent decree, from requiring relief that may benefit nonvictims of discrimination.ⁿ⁹ The Court responded that consent decrees have aspects of both voluntary agreements and court orders,ⁿ¹⁰ and added that the wording of Section 706(g) prohibits courts only from *requiring* certain race- and sex-conscious relief.ⁿ¹¹ The legislative history of Section 706(g) in turn manifests the congressional intent of protecting the managerial prerogatives of employers and unions. The Court, therefore, concluded that because of their voluntary nature, consent decrees do not disrupt these prerogatives and are not "orders," within the meaning of Section 706(g).ⁿ¹² Thus, the fact that a consent decree may be modified by a court and that it is enforceable by contempt citation does not alter the voluntary nature of the agreement.ⁿ¹³ Nor is a consent decree invalid simply because it provides greater relief than the court could have

decreed after a trial, as long as the relief granted does not conflict with Title VII.ⁿ¹⁴

In another case, the Ninth Circuit Court of Appeals held that a city could use the procedure of "banding" of test scores to comply with a consent decree.ⁿ¹⁵ The banding procedure involved the use of a statistically-derived range of scores from which it would be assumed candidates were essentially equivalent, and from which candidates for promotion would be chosen based on race, professional conduct, education, training, and experience. The court found that the banding procedure did not violate Title VII nor the amendment made to it by the Civil Rights Act of 1991 precluding adjustment of test scores based on race.ⁿ¹⁶

[2] Nonconsenting Parties

Notwithstanding any other provision of law, the Civil Rights Act of 1991ⁿ¹⁷ provides, with certain exceptions discussed below, that an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or federal civil rights laws may not be challenged under the Constitution or federal civil rights laws by either of the following classes of persons:ⁿ¹⁸

1. By a person who, prior to the entry of the judgment or order, had (a) actual notice of the proposed judgment or order sufficient to apprise the person that the judgment or order might adversely affect his or her interests and legal rights and that an opportunity was available to present objections to the judgment or order by a future date certain; and (b) a reasonable opportunity to present objections to the judgment or order; or
2. By a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

The above provisions may not be construed to alter the standards for intervention under Federal Rules of Civil Procedure, Rule 24, or to apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened.ⁿ¹⁹ Nor do the above provisions apply to the rights of parties to the action in which the litigated or consent judgment or order was entered, of members of a class represented or sought to be represented in the action, or of members of a group on whose behalf relief was sought in such an action by the federal government.ⁿ²⁰ Finally, the above provisions do not prevent challenges to a litigated or consent judgment or order on the ground that the judgment or order was obtained through collusion or fraud, is transparently invalid, or was entered by a court lacking subject matter jurisdiction;ⁿ²¹ or authorize or permit the denial to any person of the due process of law required by the Constitution.ⁿ²²

Any action not precluded under the above provisions that challenges an employment consent judgment or order must be brought in the court, and if possible before the judge, that entered the judgment or order, although a party may seek a transfer of the action pursuant to Title 28 *United States Code Section 1404*.ⁿ²³

Although the above provisions were included as part of Title VII, the language of the provisions indicates that the rules apply to challenges to judgments or consent decrees issued or approved under *any* federal civil rights law.ⁿ²⁴ Thus, it appears that challenges to consent decrees under other federal civil rights statutes, such as the ADA, ADEA, Rehabilitation Act, and Title 42 *United States Code Section 1981*, would also be governed by the above rules.

■ PRACTICE TIP:

Despite the limitations on challenges to consent decrees contained in the Civil Rights Act of 1991, employers are advised to include all interested parties in the decree negotiation process before the agreement is fully executed. For example, a union not named in a Title VII complaint should be involved in the decree negotiation process to avoid the potential for the creation of multiple inconsistent

obligations: those contained in the decree and those contained in the collective bargaining agreement.
Commentary by Kirby Wilcox.

■ PRACTICE TIP:

The procedural device of intervention has permitted both opponents and proponents of affirmative action plans to participate in proceedings in which the validity of such plans is in issue. Those seeking to participate in such proceedings should be aware of and comply with the Federal Rules of Civil Procedure or California Code of Civil Procedure provisions regarding intervention.ⁿ²⁵ *Commentary by Bill Lann Lee.*

[3] Effect of Post-Consent Decree Claims

One federal appellate court has held that an action challenging employment policies that were not mandated by a prior consent decree were not collaterally barred.ⁿ²⁶ The action was a reverse discrimination claim brought by white firefighters alleging that the consent decree mandating promotion of minority firefighters should not preclude non-minority plaintiffs from being promoted. The court found that the action was not barred because it did not challenge the terms of the decree, seek to modify it, or seek relief pursuant to it, but rather independently arose after the consent decree went into effect and the plaintiffs' promotions were denied.ⁿ²⁷ However, the court ultimately found the discrimination action baseless since the positions that were not required to be filled pursuant to the consent decree had all been filled by white firefighters.ⁿ²⁸

Legal Topics:

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

Labor & Employment Law Affirmative Action General Overview Labor & Employment Law Affirmative Action Consent Decrees

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 44.01.

(n2)Footnote 2. *See* discussion in § 44.02.

(n3)Footnote 3. *See Firefighters v. Cleveland* (1986) 478 U.S. 501, 106 S. Ct. 3063, 92 L. Ed. 2d 405, 421 ; *Ledoux v. District of Columbia* (D.C. Cir. 1987) 820 F.2d 1293, 1298 n.13 .

(n4)Footnote 4. *Firefighters v. Cleveland* (1986) 478 U.S. 501, 106 S. Ct. 3063, 92 L. Ed. 2d 405, 418-420 .

(n5)Footnote 5. *Firefighters v. Cleveland* (1986) 478 U.S. 501, 106 S. Ct. 3063, 92 L. Ed. 2d 405, 420 n.8 . For discussion of constitutional issues, *see* § 44.04.

(n6)Footnote 6. *Firefighters v. Cleveland* (1986) 478 U.S. 501, 106 S. Ct. 3063, 92 L. Ed. 2d 405, 419 , citing *Albamarle Paper Co. v. Moody* (1975) 422 U.S. 405, 417-418, 95 S. Ct. 2362, 45 L. Ed. 2d 280 ; *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 47, 94 S. Ct. 1011, 39 L. Ed. 2d 147 .

(n7)Footnote 7. *Steelworkers v. Weber* (1979) 443 U.S. 193, 204, 99 S. Ct. 2721, 61 L. Ed. 2d 480 . For discussion, *see* § 44.01[1].

(n8)Footnote 8. *Firefighters v. Cleveland* (1986) 478 U.S. 501, 106 S. Ct. 3063, 92 L. Ed. 2d 405, 420-421 ; *see also San Francisco Police Off. Ass'n v. San Francisco* (9th Cir. 1987) 812 F.2d 1125, 1130-1131 .

(n9)Footnote 9. *See* 42 U.S.C. § 2000e-5(g)(2)(A), which provides that no order of the court shall require the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him or her of any back pay, if he

or she was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin, or discrimination based on retaliation for testifying or participating in an investigation or other enforcement proceeding under Title VII.

(n10)Footnote 10. *Firefighters v. Cleveland* (1986) 478 U.S. 501, 519, 106 S. Ct. 3063, 92 L. Ed. 2d 405 .

(n11)Footnote 11. *See* 42 U.S.C. § 2000e-5(g)(1), (2)(A).

(n12)Footnote 12. *Firefighters v. Cleveland* (1986) 478 U.S. 501, 519-523, 106 S. Ct. 3063, 92 L. Ed. 2d 405 . In *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC* (1986) 478 U.S. 421, 445-447, 106 S. Ct. 3019, 92 L. Ed. 2d 344 , a majority of the Court held that 42 U.S.C. § 2000e-5(g) also does not prohibit court-ordered racial preferences as a remedy for Title VII violations. The justices stated that § 2000e-5(g) is meant simply to prohibit court orders from forcing admission or employment of individuals who have been refused admission or employment for reasons unrelated to discrimination. *see* discussion in § 44.02.

(n13)Footnote 13. *See Firefighters v. Cleveland* (1986) 478 U.S. 501, 523-524, 106 S. Ct. 3063, 92 L. Ed. 2d 405 .

(n14)Footnote 14. *Firefighters v. Cleveland* (1986) 478 U.S. 501, 524-528, 106 S. Ct. 3063, 92 L. Ed. 2d 405 .

(n15)Footnote 15. *Officers for Justice v. Civil Service Com'n* (9th Cir. 1992) 979 F.2d 721, 724-728 , *cert. denied*, (1993) 507 U.S. 1004, 113 S. Ct. 1645, 123 L. Ed. 2d 267 .

(n16)Footnote 16. Pub. L. No. 102-166, §§ 106, 107(a), 116, discussed in ch. 41, pt. D; *Officers for Justice v. Civil Service Com'n* (9th Cir. 1992) 979 F.2d 721, 724-728, *cert. denied*, 507 U.S. 1004 (1993).

(n17)Footnote 17. *See* Pub. L. No. 102-166, § 108.

(n18)Footnote 18. 42 U.S.C. § 2000e-2(n)(1)(A), (B).

(n19)Footnote 19. 42 U.S.C. § 2000e-2(n)(2)(A).

(n20)Footnote 20. 42 U.S.C. § 2000e-2(n)(2)(B).

(n21)Footnote 21. 42 U.S.C. § 2000e-2(n)(2)(C).

(n22)Footnote 22. 42 U.S.C. § 2000e-2(n)(2)(C).

(n23)Footnote 23. 42 U.S.C. § 2000e-2(n)(3).

(n24)Footnote 24. *See* 42 U.S.C. § 2000e-2(n)(1)(A).

(n25)Footnote 25. *See* Fed. R. Civ. P., Rule 24; *Code Civ. Proc.* § 387; *see generally* California Forms of Pleading and Practice, *Parties*, pt. II (Matthew Bender); *but see* *E.E.O.C. v. Pan American World American Airways, Inc.* (9th Cir. 1990) 897 F.2d 1499, 1509-1510 (ADEA; permissive intervention under Fed. R. Civ. P., Rule 24, which requires basis for jurisdiction independent of court's jurisdiction over underlying action, is not available to charging party after EEOC commences civil action, because charging party no longer has any substantive rights over which court would have jurisdiction).

(n26)Footnote 26. *O'Shea v. City of San Francisco* (9th Cir. 1992) 966 F.2d 503, 505-506 .

(n27)Footnote 27. *O'Shea v. City of San Francisco* (9th Cir. 1992) 966 F.2d 503, 505-506 .

(n28)Footnote 28. *O'Shea v. City of San Francisco* (9th Cir. 1992) 966 F.2d 503, 506-507 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY

CHAPTER 44 Affirmative Action

Part A. VOLUNTARY AND COURT-ORDERED AFFIRMATIVE ACTION PLANS

3-44 California Employment Law §§ 44.04through 44.19

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[Reserved]

§§ 44.04[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY

CHAPTER 44 Affirmative Action

Part B. DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, OFFICE OF COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.20

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.20 Contract Compliance Generally

In order to bid for or retain a contract for public works, goods, or services with the state of California, contractors must comply with the nondiscrimination requirements governing contract compliance set forth in the Fair Employment and Housing Act (FEHA),ⁿ¹ and the administrative regulations implementing them.ⁿ² The Fair Employment and Housing Commission (FEHC) has vested the Office of Compliance Programs (OCP), a unit within the Department of Fair Employment and Housing (DFEH), with the authority to certify that employers who enter or wish to enter into contracts with the state of California comply with these statutory and regulatory provisions.ⁿ³ If the DFEH determines that the contract compliance provisions of the FEHA or the regulations implementing them have been violated, or if the FEHC determines after conducting a hearing pursuant to *Government Code Section 12967*ⁿ⁴ that a contractor or subcontractor is engaging in discriminatory activities in violation of the FEHA, the DFEH or FEHC can recommend sanctions to the awarding state agency.ⁿ⁵ Whenever the DFEH issues an accusation pursuant to *Government Code Section 12965(a)* charging a violation of the FEHA, the DFEH must inform any state agency with which the employer has entered into a contract for the provision of goods or services.ⁿ⁶

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative ActionCompliancePublic Contracts LawPerformanceGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Gov. Code § 12990.*

(n2)Footnote 2. *See 2 Cal. Code Reg. §§ 8101-8504.*

(n3)Footnote 3. *2 Cal. Code Reg. § 8101.*

(n4)Footnote 4. *See generally* discussion in ch. 42, pt. B.

(n5)Footnote 5. *Gov. Code § 12990(f)*.

(n6)Footnote 6. *See Gov. Code § 12966*.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY

CHAPTER 44 Affirmative Action

Part B. DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, OFFICE OF COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.21

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.21 Coverage and Requirements

[1] Contracts Covered

All contracts for public works or goods or services with the state of California are covered by the contract compliance provisions of the FEHAⁿ¹ and applicable regulations,ⁿ² but are subject to differing requirements depending on the type and dollar amount of the contract.ⁿ³ Contracts are broadly defined by the administrative regulations as "all types of agreements, regardless of what they may be called, for the purchase or disposal of supplies, services, or construction to which a contract awarding agency is a party."ⁿ⁴ Covered "contracts" include awards and notices of award; contracts of a fixed-price, cost, cost-plus-a-fixed-fee, or incentive type; and contracts providing for the issuance of job or task orders.ⁿ⁵ The FEHA provisions also apply to supplemental agreements or contract modifications with respect to any of the foregoing types of agreements.ⁿ⁶

■ PRACTICE TIP:

In addition to the FEHA requirements, contractors may also be subject to nondiscrimination and affirmative action requirements under specific public works legislation or under county or municipal ordinances. Federal requirements may also apply if federal funds are used in state-administered programs.ⁿ⁷ *Commentary by Bill Lann Lee.*

[2] Requirements for Contracts of More Than \$5,000

[a] Nondiscrimination Clause

Each state contract of more than \$5,000 is required to include a nondiscrimination clause, unless exempted by regulation.ⁿ⁸ The contract may either contain verbatim one of two nondiscrimination clauses set forth in *Title 2 California Code of Regulations section 8107*, or incorporate the forms provided by the OCP into the contract by reference.ⁿ⁹ The two clauses contain provisions regarding the contractor's or subcontractors' nondiscrimination obligations to applicants for employment and requiring the contractor or subcontractor to give notice of these obligations to any labor organization with which the contractor or subcontractors have a collective bargaining

agreement.n10

[b] Forms--Nondiscrimination Clauses, Standardized Forms OCP-1 and OCP-2

[i] Comment

The forms set forth in [ii], below, are standardized forms of the nondiscrimination clauses required in state contracts for more than \$5,000 for public works or goods or services.n11 Depending on the state agency involved in the contract, either one or the other clause is used. The first form, OCP-1, contains provisions concerning nondiscrimination and compliance with *Government Code section 12900*. The second form, OCP-2, contains, among other things, nondiscrimination and compliance provisions relating to *Government Code section 12990* and to *Government Code section 11135*, which proscribes discrimination in any program that receives state financing.n12

[ii] Forms

NONDISCRIMINATION CLAUSE
(OCP - 1)

1. During the performance of this contract, contractor and its subcontractors shall not unlawfully discriminate against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, age (over 40) or sex, contractors and subcontractors shall insure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination. Contractors and subcontractors shall comply with the provisions of the Fair Employment and Housing Act (Government Code, Section 12900 et seq.) and the applicable regulations promulgated thereunder (California Administrative Code, Title 2, Section 7285.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code, Section 12990, set forth in chapter 5 of Division 4 of Title 2 of the California Administrative Code are incorporated into this contract by reference and made a part hereof as if set forth in full. Contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.
2. This contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.
1. During the performance of this contract, the recipient, contractor and its subcontractors shall not deny the contract's benefits to any person on the basis of religion, color, ethnic group identification, sex, age, physical or mental disability, nor shall they discriminate unlawfully against any employee or applicant for employment because of race, religion, color, national origin, ancestry, physical handicap, mental disability, medical condition, marital status, age or sex, contractor shall insure that the evaluation and treatment of employee and applicants for employment are free of such discrimination.
2. Contractor shall comply with the provision of the Fair Employment and Housing Act (Government Code, Section 12900 et seq.), the regulations promulgated thereunder (California Administrative Code, Title 2, Section 7285.0 et seq.), the provisions of Article 9.5, Chapter 1, Part 1, Division 3, Title 2 of the Government Code (Government Code, Section 11135-11139.5) and the regulations or standards adopted by the awarding State agency to implement such article.
3. Recipient, contractor and its subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective

bargaining or other contract.

4. The contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the contract.

[c] Nondiscrimination Program

[i] Generally

All employers who are, or wish to become, contractors with the state of California must develop and implement a nondiscrimination program for approval and certification by the OCP unless they are specifically exempted pursuant to *Title 2 California Code of Regulations section 8115*.ⁿ¹³ Among other exemptions, section 8115 exempts contracts of less than \$5,000 from this requirement.ⁿ¹⁴ A "nondiscrimination program" is defined as "a set of specific and result-oriented procedures to which a contractor or subcontractor commits itself for the purpose of insuring equal employment opportunity for all employees or applicants for employment."ⁿ¹⁵ A nondiscrimination program "may include an affirmative action component which establishes goals and timetables to remedy any underutilization of minorities and/or women which is identified."ⁿ¹⁶

[ii] Elements of Nondiscrimination Program

According to the regulations interpreting *Government Code section 12990*, a nondiscrimination program must contain certain elements, including the following:

1. Development of an equal employment opportunity policy;ⁿ¹⁷
2. Dissemination of the policy;ⁿ¹⁸
3. Establishment of responsibilities for implementation of the contractor's program;ⁿ¹⁹
4. Annual identification of practices that have resulted indisproportionately inhibiting the employment, promotion, or retention of persons protected by the FEHA;ⁿ²⁰
5. Development of programs designed to correct problems and attain equal employment opportunity;ⁿ²¹ and
6. Design and implementation of internal audit and reporting systems to measure the effectiveness of the nondiscrimination program.ⁿ²²

With respect to the fourth requirement listed above, that contractors annually identify employment practices that disproportionately inhibit the employment of minorities and women, the regulations set forth three additional required elements for nondiscrimination plans:

1. An analysis of employment selection procedures for promotional and entry-level opportunities;ⁿ²³
2. A work force analysis;ⁿ²⁴ and
3. A utilization analysis for employers employing 250 or more employees.ⁿ²⁵

[iii] Affirmative Action Plans

An employer whose employment practices have an adverse impact on one or more groups protected by the FEHA may

include an affirmative action component in its nondiscrimination program.ⁿ²⁶ Affirmative action may be required of employers who are found to have violated the FEHA.ⁿ²⁷ Such an affirmative action component may include, but is not limited to, the following:ⁿ²⁸

1. Supporting community action programs designed to improve employment opportunities for women and minorities;
2. Providing training for promotion to positions as they become available;
3. Encouraging women and minorities to seek and accept transfers and promotions that improve their future opportunities;
4. Recruiting of women and minorities;
5. Establishing training programs for entry-level positions; and
6. Establishing goals and timetables.

[iv] Contracts Exempt From Nondiscrimination Program Requirement

Licensed rehabilitation workshops are exempt from all requirements concerning nondiscrimination under the administrative regulations implementing *Government Code section 12990*.ⁿ²⁹ Employers who enter into a contract with the state pursuant to a declaration of emergency are also exempt from the requirement of developing and implementing a nondiscrimination programⁿ³⁰ and are exempt from the requirement of containing a written nondiscrimination clause within a contract, but remain subject to the requirements of the clause as an implied term of the contract.ⁿ³¹ These two exemptions may be granted only on application to the state awarding agency prior to the date the contract is awarded and only on proof of satisfaction of these exemption conditions.ⁿ³²

In addition, the OCP may exempt a contractor with fewer than 50 employees in its entire work force from the regulatory requirements pertaining to work-force analysis and utilization analysisⁿ³³ by allowing the potential contractor to file a California Employer Information Report (CEIR) annually.ⁿ³⁴ Construction contractors with fewer than 50 permanent employees may also obtain an exemption from the regulatory requirements pertaining to work-force and utilization analyses by annually filing a CEIRⁿ³⁵ with the OCP.ⁿ³⁶

Contracts for less than \$5,000 are automatically exempt.ⁿ³⁷ For further discussion of requirements for contracts under \$5,000, see [5], below.

[v] Effect of Filing of Federal Compliance Program

An affirmative action plan prepared voluntarily or for approval by a federal compliance agency, such as the Office of Federal Contract Compliance Programs (OFCCP)ⁿ³⁸ or the EEOC, may be filed with the OCP instead of a nondiscrimination program required by *Government Code section 12990* or its implementing regulations.ⁿ³⁹ Such a program creates a prima facie demonstration of compliance with section 12990 and the regulations.ⁿ⁴⁰ The OCP may rebut this presumption by showing, by a preponderance of the evidence, that the contractor's policies do not comply with the requirements of section 12990 and the implementing regulations.ⁿ⁴¹

[3] Additional Requirements for Construction Contracts of More Than \$5,000

Employers with state construction contracts of \$5,000 or more must fulfill a number of additional requirements.ⁿ⁴² "Construction" is defined under the regulations as "the process of building, altering, repairing,

improving, or demolishing any public structure or building, or other public improvements of any kind to any State of California real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property."ⁿ⁴³ The additional nondiscrimination program requirements for construction contractors include, but are not limited to (1) maintaining a work environment free of harassment by, for example, assigning two or more women to each construction project whenever possible; (2) advising the DFEH when a union's referral process has not referred to the contractor a minority person or woman sent by the contractor or has otherwise impeded the contractor's efforts; and (3) monitoring all personnel actions to make sure that seniority, job classifications, and work assignments do not have a discriminatory effect.ⁿ⁴⁴

A construction contractor's nondiscrimination program applies to its temporary, as well as its permanent, work force.ⁿ⁴⁵ Furthermore, a construction contractor may not transfer women and minority employees or trainees from contractor to contractor or from project to project for the sole purpose of meeting the contractor's nondiscrimination obligations.ⁿ⁴⁶

If a construction contractor holds a contract of \$50,000 or more with the state, the contractor must submit quarterly reports to the OCP concerning the number of minority and female employees in its work force.ⁿ⁴⁷ Reports prepared for a federal agency may be submitted in lieu of the state quarterly utilization report.ⁿ⁴⁸

[4] Additional Requirements for Supplies and Services Contracts of \$25,000 or More

Contractors who are awarded supplies and service contracts with a value of less than \$25,000 are not required to file any information with the OCP after execution of the contract, but must provide the OCP on request access to certain information required to be compiled and maintained.ⁿ⁴⁹ By contrast, contractors granted contracts valued at more than \$25,000, which are known as "regulated" contracts,ⁿ⁵⁰ are required to submit to the OCP, within 28 days of execution, background information regarding the contractor,ⁿ⁵¹ certain information concerning the contract,ⁿ⁵² and a copy of the prime contractor's CEIR.ⁿ⁵³

[5] Requirements for Contracts Under \$5,000

Title 2 California Code of Regulations section 8107, states that all state contracts must contain a nondiscrimination clause unless specifically exempted under *Title 2 California Code of Regulations section 8115*. Section 8115 states that contracts for less than \$5,000 are automatically exempt from the requirements of section 8107, but are subject to *Title 2 California Code of Regulations section 8102.5*. Section 8102.5 states that state contracts exempt from the requirements of section 8107 must include "as an express or implied term, the term set out in either Section 8107 Clause (a) or Clause (b)." In actual practice, this means that contracts for less than \$5,000, which are often informal and sometimes consist of order forms or even oral agreements, are exempt from the requirement of formally providing a written nondiscrimination clause, but such a clause is nevertheless an implied term in every contract covered under *Government Code section 12990*. In addition, employers holding contracts valued at less than \$5,000 are not required to establish nondiscrimination programs as required of employers with larger contracts.ⁿ⁵⁴ For a discussion of nondiscrimination programs, see [2], above.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative ActionCompliancePublic Contracts LawPerformanceGeneral Overview

FOOTNOTES:

(n1)Footnote 1. See *Gov. Code §§ 12966, 12990*.

(n2)Footnote 2. *2 Cal. Code Reg. §§ 8101-8504*.

(n3)Footnote 3. *See Gov. Code § 12990(d)(2).*

(n4)Footnote 4. *2 Cal. Code Reg. § 8102(d).*

(n5)Footnote 5. *2 Cal. Code Reg. § 8102(d).*

(n6)Footnote 6. *2 Cal. Code Reg. § 8102(d).*

(n7)Footnote 7. *See discussion in pt. C, below.*

(n8)Footnote 8. *Gov. Code § 12990(c); 2 Cal. Code Reg. §§ 8102.5, 8107, 8115(b).* For discussion of requirements for contracts for less than \$5,000, *see [5], below.*

(n9)Footnote 9. *2 Cal. Code Reg. § 8107.*

(n10)Footnote 10. *See Gov. Code § 12990(c); 2 Cal. Code Reg. § 8107.*

(n11)Footnote 11. *See Gov. Code § 12990; 2 Cal. Code Reg. § 8107.* For discussion of requirement of clauses, *see [a], above.*

(n12)Footnote 12. For discussion of *Gov. Code § 11135*, *see Chapter 40, Part B.*

(n13)Footnote 13. *See Gov. Code § 12990(b); 2 Cal. Code Reg. § 8103.*

(n14)Footnote 14. *2 Cal. Code Reg. § 8115(b).* For discussion of other exemptions, *see [iv], below.*

(n15)Footnote 15. *2 Cal. Code Reg. § 8104(a).*

(n16)Footnote 16. *2 Cal. Code Reg. § 8104(a).*

(n17)Footnote 17. *2 Cal. Code Reg. § 8104(a)(1).*

(n18)Footnote 18. *2 Cal. Code Reg. § 8104(a)(2).*

(n19)Footnote 19. *2 Cal. Code Reg. § 8104(a)(3).*

(n20)Footnote 20. *2 Cal. Code Reg. § 8104(a)(4).*

(n21)Footnote 21. *2 Cal. Code Reg. § 8104(a)(5).*

(n22)Footnote 22. *2 Cal. Code Reg. § 8104(a)(6).*

(n23)Footnote 23. *See 2 Cal. Code Reg. § 8104(a)(4)(A)* (requiring contractor to eliminate any practices that "disproportionately inhibit" employment of minorities or women unless justified by "business necessity upon a demonstration that no reasonable alternatives to such practice exist").

(n24)Footnote 24. *2 Cal. Code Reg. § 8104(a)(4)(B)* (requiring, for each job title, the numbers of employees by race, sex, and national origin; the wage and salary ranges for each job title; and other listed data).

(n25)Footnote 25. *2 Cal. Code Reg. § 8104(a)(4)(C)* (requiring analysis of major job groups at facility in order to determine whether women and minorities are underutilized when compared to their availability in labor force).

(n26)Footnote 26. *2 Cal. Code Reg. § 8104(b).*

(n27)Footnote 27. *2 Cal. Code Reg. § 8104(b).*

(n28)Footnote 28. *2 Cal. Code Reg. § 8104(b)(1)-(6)*.

(n29)Footnote 29. *2 Cal. Code Reg. § 8115(a)*.

(n30)Footnote 30. *See 2 Cal. Code Reg. § 8103* (requiring nondiscrimination programs).

(n31)Footnote 31. *2 Cal. Code Reg. § 8115(d); see 2 Cal. Code Reg. § 8102.5*.

(n32)Footnote 32. *2 Cal. Code Reg. § 8115(f)*.

(n33)Footnote 33. *See 2 Cal. Code Reg. § 8104(a)(4)(B)-(C)*.

(n34)Footnote 34. *2 Cal. Code Reg. § 8115(c)*.

(n35)Footnote 35. *See 2 Cal. Code Reg. § 7287.0(a)* (recordkeeping requirements). For discussion of recordkeeping requirements, see Chapter 41, Part G.

(n36)Footnote 36. *2 Cal. Code Reg. § 8115(e)*. For a further discussion of construction contracts, see [3], below.

(n37)Footnote 37. *See 2 Cal. Code Reg. § 8115(b)*.

(n38)Footnote 38. For discussion of compliance programs under OFCCP, see § 44.80.

(n39)Footnote 39. *Gov. Code § 12990(e)*.

(n40)Footnote 40. *Gov. Code § 12990(e); 2 Cal. Code Reg. § 8106*.

(n41)Footnote 41. *2 Cal. Code Reg. § 8106*.

(n42)Footnote 42. *See 2 Cal. Code Reg. § 8203*.

(n43)Footnote 43. *2 Cal. Code Reg. § 8102(c)*.

(n44)Footnote 44. *See 2 Cal. Code Reg. § 8203(6)(a)-(e)*.

(n45)Footnote 45. *2 Cal. Code Reg. § 8202*. However, work-force and utilization analyses required under *2 Cal. Code Reg. § 8104* need be prepared only for permanent employees. *2 Cal. Code Reg. § 8104*.

(n46)Footnote 46. *2 Cal. Code Reg. § 8202.5*.

(n47)Footnote 47. *See 2 Cal. Code Reg. § 8204*.

(n48)Footnote 48. *2 Cal. Code Reg. § 8204*. For additional discussion of recordkeeping requirements under the FEHA, see Chapter 41, Part G.

(n49)Footnote 49. *2 Cal. Code Reg. §§ 8301-8303*.

(n50)Footnote 50. *See 2 Cal. Code Reg. § 8310*.

(n51)Footnote 51. *2 Cal. Code Reg. § 8311(a)(1)*.

(n52)Footnote 52. *See 2 Cal. Code Reg. § 8311(a)(2)*.

(n53)Footnote 53. *2 Cal. Code Reg. § 8311(a)(4); see also 2 Cal. Code Reg. § 7287.0(a)* (regarding CEIRs and recordkeeping requirements under FEHA generally).

(n54)Footnote 54. 2 *Cal. Code Reg.* § 8115(b).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY

CHAPTER 44 Affirmative Action

Part B. DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, OFFICE OF COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.22

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.22 Statement of Compliance

[1] Generally

Every bid or proposal for a contract with the state must contain a statement of compliance with *Title 2 California Code of Regulations section 8103*, which requires a nondiscrimination program unless otherwise exempted.ⁿ¹ If a statement of compliance is not included in the bid, the awarding agency may not accept the bid.ⁿ² No contract may be awarded to a contractor who has not filed a statement of compliance as part of its bid with the state agency, unless the contractor is exempt.ⁿ³

[2] FORM--Statement of Compliance

[a] Comment

The form set forth in [b], below, is a statement of compliance with nondiscrimination provisions required of state contractors.ⁿ⁴ The statement, which is made under penalty of perjury to the awarding state agency, declares that the contractor has complied with *Title 2 California Code of Regulations section 8103*, requiring the adoption of nondiscrimination programs.ⁿ⁵ Such a statement is required for all bids and contracts of nonexempt contractors with state agencies.ⁿ⁶

[b] Form STATEMENT OF COMPLIANCE

_____(hereinafter referred to as
(Company Name)

"prospective contractors") hereby certifies, unless specifically exempted, compliance with *Government Code Section 12990* and California Administrative Code, Title II, Division 4, Chapter 5 in matters relating to the development, implementation and maintenance of a nondiscrimination programs. Prospective contractors agrees not to unlawfully discriminate against any employee or applicants for employment because of race, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, sex or age (over forty).

3-44 California Employment Law § 44.22

I _____ hereby swear that I am

(Name of Official)

dule authorized to legally bind the prospective contractor to the above described certification. I an fully aware that this certification executed on _____ in the country

(Date)

of _____ is made under the penalty of prejury

(Country)

under the laws of the State of California.

Title

Legal Topics:

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative
ActionComplianceLabor & Employment LawAffirmative ActionCourt & Government Imposed Plans

FOOTNOTES:

(n1)Footnote 1. 2 *Cal. Code Reg. § 8113(a)*. see § 44.21[2][c] for a description of the nondiscrimination program requirement.

(n2)Footnote 2. 2 *Cal. Code Reg. § 8112(a)*.

(n3)Footnote 3. 2 *Cal. Code Reg. § 8113(b)*; see 2 *Cal. Code Reg. § 8115* (exemptions). For discussion of exemptions under § 8115, see § 44.21[2][c][iv] and [5].

(n4)Footnote 4. See 2 *Cal. Code Reg. § 8113*.

(n5)Footnote 5. See 2 *Cal. Code Reg. § 8113*. For discussion, see [1], above.

(n6)Footnote 6. See 2 *Cal. Code Reg. §§ 8112, 8113*.



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CHAPTER 44 Affirmative Action

Part B. DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, OFFICE OF COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.23

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.23 Compliance Review Procedures

[1] Generally

The OCP may monitor the compliance of state contractors with FEHA nondiscrimination requirements.ⁿ¹ The review process commences when the awarding agency gives written notice to the OCP of the award within 10 days of execution of a contract.ⁿ² The notice serves to identify the contractor and state the purpose or subject of the contract.ⁿ³ When the OCP receives written notice from the awarding agency, it sends to each contractor a blank CEIR form for completion and submission. Identifying information and work force statistics taken from the CEIRs are then entered into the OCP's central computer.

[2] Types of Review

Contracts may be subject to two types of review: desk review or field review.ⁿ⁴ Although the OCP is authorized to conduct desk reviews on all contracts,ⁿ⁵ the OCP presently exercises its discretion to conduct a desk review only when a contractor's work force appears to have an underrepresentation of minorities or women in comparison to the proportion of minorities or women available in the work force.ⁿ⁶

A desk review consists of, among other things, a review of the applicable contract(s), information concerning the contractor's nondiscrimination program, and any other information required by the OCP.ⁿ⁷ The OCP may also review current and past personnel practices of a contractor.ⁿ⁸ In addition, the OCP may conduct a field review of the work place during the contractor's regular business hours and by prior arrangement.ⁿ⁹ If a contractor has been chosen for a routine desk or field review within the preceding 24 months and was found to be in compliance, it is not selected for another routine check.ⁿ¹⁰

[3] Compliance Investigation

If it appears that a contractor has engaged in a pattern of unlawful discrimination that has taken place within the past 12 months or is ongoing, the OCP conducts a compliance investigation of the contractor's employment practices, which is

more extensive than a desk or field review.ⁿ¹¹ The OCP decides, on the basis of the following factors, whether to conduct such an investigation: (1) the filing of a complaint by a contract-awarding agency; (2) the results of a regular compliance review by the OCP; (3) a notice of a complaint of employment discrimination filed pursuant to *Government Code section 12960* or *Title 2 California Code of Regulations section 8120*; or (4) the failure of a contractor to provide compliance information to the OCP.ⁿ¹² Compliance investigations involve a detailed review of the contractor's entire employment practices and procedures.ⁿ¹³

If the OCP determines during the course of its compliance investigation that a contractor has violated the applicable regulations, the OCP and the contractor may agree to a "letter of commitment" setting forth the contractor's deficiencies, actions the contractor intends to take to resolve the deficiencies, and a timetable for taking corrective action.ⁿ¹⁴ The letter of commitment is the last chance for a contractor to informally resolve an alleged violation of the contract compliance provisions before the OCP's issuance of a show-cause notice.ⁿ¹⁵

Legal Topics:

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative ActionCompliancePublic Contracts LawPerformanceGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See 2 Cal. Code Reg. § 8401.*

(n2)Footnote 2. *See 2 Cal. Code Reg. § 8117.5.*

(n3)Footnote 3. *See 2 Cal. Code Reg. § 8117.5.*

(n4)Footnote 4. *See 2 Cal. Code Reg. § 8401(b), (c).*

(n5)Footnote 5. *2 Cal. Code Reg. § 8401(a).*

(n6)Footnote 6. According to figures obtained from the OCP, from July 1, 1986, through June 30, 1987, the OCP staff conducted approximately 230 desk and field reviews.

(n7)Footnote 7. *2 Cal. Code Reg. § 8401(a).*

(n8)Footnote 8. *2 Cal. Code Reg. § 8401(a).*

(n9)Footnote 9. *2 Cal. Code Reg. § 8401(b); see also 2 Cal. Code Reg. § 8119(a)* (regarding OCP's access to contractor's work place).

(n10)Footnote 10. *2 Cal. Code Reg. § 8401(c).*

(n11)Footnote 11. *See 2 Cal. Code Reg. § 8402(a).*

(n12)Footnote 12. *2 Cal. Code Reg. § 8402(a).*

(n13)Footnote 13. *2 Cal. Code Reg. § 8402(a).*

(n14)Footnote 14. *2 Cal. Code Reg. § 8403.*

(n15)Footnote 15. *See 2 Cal. Code Reg. § 8501(a).*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY

CHAPTER 44 Affirmative Action

Part B. DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, OFFICE OF COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.24

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.24 Enforcement Procedures

[1] Refusal of Certification and Decertification

Prospective contractors who have never before contracted with the state, as well as those who have previously held state contracts, must obtain from the OCP certification of compliance with the nondiscrimination provisions of *Government Code section 12990* and its implementing regulations under *Title 2 California Code of Regulations sections 8101-8504*.ⁿ¹ The OCP may withhold certification when there is a refusal to (1) provide a CEIR when submission has been requested by the OCP, (2) cooperate in a desk review, or (3) submit a letter of commitment or correct the deficiencies as promised in a letter of commitment.ⁿ²

The administrator of the OCP may recommend to the deputy director of the DFEH that a contractor or proposed contractor be denied certification. If the deputy director approves the recommendation to refuse certification, the OCP notifies the contractor and sends a copy of the notice to any agency with which the contractor has a current contract. Following notification, the OCP compiles a list of contractors who have been denied certification and sends the list to all contracting state agencies on a quarterly basis.ⁿ³

A contractor who is refused certification may request that the OCP conduct a review to determine compliance with *Government Code section 12990*.ⁿ⁴ If the contractor is found to be in compliance, the OCP restores the contractor's eligibility to submit bids for state contracts and removes the contractor's name from the quarterly listing of contractors denied certification.ⁿ⁵

Under certain circumstances, a hearing is held to determine if a contractor is in violation of *Government Code section 12990* or *Title 2 California Code of Regulations sections 8101-8504*, its implementing regulations.ⁿ⁶ At such a hearing, the hearing officer may decertify the contractor's nondiscrimination program and recommend to the contracting agency that the existing contract be terminated.ⁿ⁷ A state awarding agency must declare unresponsive any bid on a state contract submitted by a contractor on the list of decertified contractors.ⁿ⁸

[2] Hearings

If the OCP has reasonable cause to believe that a contractor performing under a state contract is violating either *Government Code section 12990* or the compliance requirements of the implementing regulations,ⁿ⁹ the OCP may issue a notice requiring the contractor to show cause before a hearing officer why actions should not be taken to ensure compliance.ⁿ¹⁰

The show-cause notice must specifically state the incidents of noncompliance and the sanctions recommended by the OCP.ⁿ¹¹ During the 30-day show-cause period, the contractor and the OCP must attempt to resolve the deficiencies by conciliation, mediation, and persuasion.ⁿ¹² A written conciliation agreement providing for certain remedial action may be used to resolve the deficiencies.ⁿ¹³ If the OCP and the contractor are unable to resolve the deficiencies through informal means within 30 days, the Director of the DFEH appoints a hearing officer to conduct a hearing.ⁿ¹⁴ The contractor is entitled to a full evidentiary hearing conducted in accordance with applicable provisions of the Administrative Procedure Act.ⁿ¹⁵

As discussed in [1], above, decertification is one of the remedies authorized if a hearing officer finds the contractor has violated *Title 2 California Code of Regulations sections 8101-8504*.ⁿ¹⁶ Other remedies may include the imposition of periodic reporting requirements and the withdrawal of exemptions under *Title 2 California Code of Regulations section 8115*.ⁿ¹⁷

[3] Third-Party Complaints

Interested persons may lodge written complaints with either the DFEH or the contract-awarding state agency, alleging noncompliance by a contractor with its nondiscrimination obligations. Such written complaint must be made within one year from the date of the alleged noncompliance.ⁿ¹⁸ On receipt of a complaint, the OCP commences a review, which may include a show-cause hearing.ⁿ¹⁹

Legal Topics:

For related research and practice materials, see the following legal topics:
 Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative
 ActionEnforcementPublic Contracts LawPerformanceGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Gov. Code § 12990(b)*; DFEH Enforcement Division Directive No. 61 (Feb. 23, 1987).

(n2)Footnote 2. DFEH Enforcement Division Directive No. 61 (Feb. 23, 1987). For discussion of letter of commitment, see § 44.23[3].

(n3)Footnote 3. DFEH Enforcement Division Directive No. 61 (Feb. 23, 1987). From April 1987 through October 1987, there were 15 contractors who were refused certification by the OCP.

(n4)Footnote 4. DFEH Enforcement Division Directive No. 61 (Feb. 23, 1987).

(n5)Footnote 5. DFEH Enforcement Division Directive No. 61 (Feb. 23, 1987).

(n6)Footnote 6. *2 Cal. Code Reg. § 8501*. For discussion, see [2], below.

(n7)Footnote 7. *2 Cal. Code Reg. § 8504*.

(n8)Footnote 8. *2 Cal. Code Reg. § 8112(b)*.

(n9)Footnote 9. *2 Cal. Code Reg. §§ 8101-8504*.

(n10)Footnote 10. *Gov. Code § 12990(d)(1); 2 Cal. Code Reg. § 8501(a).*

(n11)Footnote 11. *2 Cal. Code Reg. § 8501(a).*

(n12)Footnote 12. *2 Cal. Code Reg. § 8501(b).*

(n13)Footnote 13. *2 Cal. Code Reg. § 8502.*

(n14)Footnote 14. *2 Cal. Code Reg. § 8503.*

(n15)Footnote 15. *2 Cal. Code Reg. § 8503 (specifically incorporating Gov. Code §§ 11507.6, 11507.7, 11508, 11510, 11512(c), (d), 11513, 11514, 11520, 11523, 11518).*

(n16)Footnote 16. *2 Cal. Code Reg. § 8504.*

(n17)Footnote 17. *2 Cal. Code Reg. § 8504.*

(n18)Footnote 18. *2 Cal. Code Reg. § 8120.*

(n19)Footnote 19. *2 Cal. Code Reg. § 8501(a).*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY

CHAPTER 44 Affirmative Action

Part B. DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, OFFICE OF COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.25

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.25 Coordination of Investigation and Complaint Procedures Among DFEH, OCP, and Contract-Awarding State Agency

In its questions posed to respondents in individual complaints of discrimination under the FEHA, the DFEH routinely requests information seeking to identify whether the respondent is a state contractor, for purposes of determining whether the respondent has complied with the nondiscrimination provisions required of state contractors.ⁿ¹ Thus, the respondent in a discrimination case is asked as a matter of course to supply the name of the awarding agency, the contract number, and dollar amount of any contract the respondent has had within the past year for the provision of goods, services, or public works with the state of California.ⁿ² If the DFEH issues an FEHA accusation against a state contractor, it must inform the awarding state agency of its determination.ⁿ³ The DFEH also requests that the state agency report to the DFEH any action the agency takes in response to this notice and issuance of accusation.ⁿ⁴ *Government Code Section 12990(f)* further requires the DFEH to recommend sanctions to the awarding state agency if it finds that the contractor has violated the law or implementing regulationsⁿ⁵ or if the FEHC finds a contractor in violation of the FEHA after conducting a hearing on an accusation.ⁿ⁶ The issuance of an accusation may also result, in certain cases, in the DFEH's recommendation to the OCP that the OCP conduct a full compliance review.ⁿ⁷

When a contractor is the subject of both a compliance investigation by the OCP and an investigation by the DFEH in connection with an individual complaint of employment discrimination pursuant to *Government Code section 12960*, the OCP and DFEH attempt to coordinate their investigations in order to avoid a duplication of efforts and burdensome inquiries.ⁿ⁸

Legal Topics:

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative ActionCourt & Government Imposed PlansPublic Contracts LawContract ProvisionsGeneral OverviewPublic Contracts LawPerformanceGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* discussion in Chapter 42, Part B.

(n2)Footnote 2. Supplemental Memorandum to DFEH Enforcement Division Directive No. 10 (June 26, 1985).

(n3)Footnote 3. *Gov. Code § 12966*.

(n4)Footnote 4. *Gov. Code § 12966*.

(n5)Footnote 5. *2 Cal. Code Reg. § 8101 et seq.*

(n6)Footnote 6. *Gov. Code § 12990(f)*.

(n7)Footnote 7. Supplemental Memorandum to DFEH Enforcement Division Directive No. 10 (June 26, 1985).
For discussion of compliance review procedures, see § 44.23.

(n8)Footnote 8. *See 2 Cal. Code Reg. § 8402(b)*.



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY

CHAPTER 44 Affirmative Action

Part B. DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING, OFFICE OF COMPLIANCE PROGRAMS

3-44 California Employment Law §§ 44.26through 44.39

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

[Reserved]

§§ 44.26[Reserved]



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action
Part C. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.40

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.40 Laws Enforced and Authority to Enforce

[1] Executive Order 11246

Executive Order 11246 requires all federal government contracting agencies to include in every government contract, not exempted by the order, an agreement by the contractor not to discriminate against applicants and employees on the bases of race, color, religion, sex, or national origin, and obligating the contractor to take affirmative action to ensure the availability of employment opportunities without regard to such factors.ⁿ¹ Executive Order 11246 is enforced by the United States Department of Labor through its Office of Federal Contract Compliance Programs (OFCCP).ⁿ² For a more detailed description of the substance of Executive Order 11246, see Chapter 40, Part C.

Pursuant to Executive Order 11246, the OFCCP is empowered to adopt rules, regulations, and orders to achieve the purposes of the Executive Order.ⁿ³ The OFCCP also has authority to do the following:

1. Require a covered contractor to submit compliance reports containing information regarding the contractor's practices, policies, programs, and statistics in accordance with the OFCCP's prescribed form;ⁿ⁴
2. Require the inclusion of an equal opportunity clause in every covered government contract or subcontract;ⁿ⁵
3. Cancel, suspend, or terminate existing contracts or debar a contractor from future government contracts;ⁿ⁶
4. Direct contracting agencies not to enter into contracts with any bidder or prospective contractor unless it has complied with the provisions of the order and submits an acceptable compliance program to the OFCCP;ⁿ⁷

5. Exempt certain contracting agencies from including in contracts provisions otherwise required by the order when special circumstances in the national interest so require, or exempt certain classes of contracts when the work is performed outside the United States, when the contract involves less than a specified amount of money or workers, when the contract is for standard commercial supplies or raw materials, or when a subcontract is below a specified tier;ⁿ⁸
6. Investigate the employment practices of any government contractor or subcontractor and investigate complaints filed by applicants and employees alleging discrimination in violation of the order;ⁿ⁹
7. Hold public and private hearings for compliance, enforcement, or educational purposes;ⁿ¹⁰ and
8. Issue or revoke certificates that exempt compliant employers, unions, and agencies from any reporting requirements.ⁿ¹¹

Pursuant to its authority,ⁿ¹² the OFCCP has promulgated regulations to interpret Executive Order 11246.ⁿ¹³ In 1981, the OFCCP proposed a new set of regulations implementing Executive Order 11246, which were scheduled for publication on January 29, 1981. However, the proposed regulations were suspended indefinitely, and those last promulgated in 1978 continue in force.ⁿ¹⁴

[2] Section 503 of Rehabilitation Act of 1973

The OFCCP has enforcement authority over Section 503 of the Rehabilitation Act of 1973 (Section 503),ⁿ¹⁵ which prohibits federal contractors from discriminating against disabled workers and which requires federal contractors to take affirmative action with respect to such disabled workers.ⁿ¹⁶ For a full discussion of the scope of Section 503, see Chapter 40, Part C.

Under Section 503, any federal contract exceeding \$10,000 must include a provision requiring the contractor to take affirmative action to employ and advance in employment qualified disabled individuals,ⁿ¹⁷ and the Secretary of Labor must accept, investigate, and take action on complaints from qualified disabled individuals alleging violations of Section 503 and its regulations.ⁿ¹⁸ Section 503 authorizes waiver of certain contracts or classes of contracts when special circumstances or the national security so requires.ⁿ¹⁹ Section 503 also authorizes the promulgation of regulations implementing the section,ⁿ²⁰ and the OFCCP has adopted such regulations,ⁿ²¹ which provide in part that each covered contractor or subcontractorⁿ²² prepare and maintain an affirmative action program,ⁿ²³ and which establish hearing procedures conforming to the hearing procedures set forth for Executive Order 11246.ⁿ²⁴

[3] Vietnam Era Veterans Readjustment Assistance Act of 1974

The OFCCP has enforcement authority over section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA).ⁿ²⁵ VEVRAA prohibits federal contractors from discriminating against certain veterans and requires federal contractors to take affirmative action with respect to such veterans.ⁿ²⁶ For discussion of the scope of VEVRAA, see Chapter 40, Part C.

The President and Secretary of Labor have delegated to the OFCCP the authority to require that every federal contract in an amount of \$10,000ⁿ²⁷ or more contain a provision obligating the contractor or subcontractor to take affirmative action to employ and advance in employment certain qualified disabled veterans and veterans of the Vietnam Era.ⁿ²⁸ The OFCCP is also authorized to promulgate regulations requiring that (1) covered contractorsⁿ²⁹ list job openings with the appropriate employment service office;ⁿ³⁰ (2) the OFCCP accept, investigate, and take action on complaints from aggrieved veterans;ⁿ³¹ and (3) covered contractors report on employment practices regarding veterans.ⁿ³²

Regulations issued by the Department of Labor authorize the OFCCP to (1) require each covered contractor or

subcontractor to include an affirmative action clause in every contract;n33 (2) require each covered contractor or subcontractor to prepare and maintain an affirmative action program;n34 (3) enforce the statute by following the hearing procedures established under Executive Order 11246;n35 and (4) notify all heads of federal agencies that they may not issue a waiver to any noncomplying contractor without the prior approval of the director of OFCCP.n36

[4] Executive Order 11141

Executive Order 11141, issued in 1964, prohibits federal contractors and subcontractors from discriminating on the basis of age.n37 However, the OFCCP has enacted no regulations to implement Executive Order 11141. For additional discussion of Executive Order No. 11141, see Chapter 40, Part C.

Legal Topics:

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative ActionDiscriminationLabor & Employment LawDiscriminationPublic ContractsAffirmative ActionPublic Contracts LawContract ProvisionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. Exec. Order No. 11246 § 202 (Sept. 24, 1965); 3 C.F.R. § 339 (1964-1965 Compilation), reprinted as amended in note following *42 U.S.C.A. § 2000e (West 1981)*.

(n2)Footnote 2. Exec. Order No. 11246 § 202 (Sept. 24, 1965), 3 C.F.R. § 339 (1964-1965 Compilation); *41 C.F.R. § 60-1.2*; *see also* Exec. Order No. 12086 (amending Exec. Order No. 11246), reprinted in note following *42 U.S.C.A. § 2000e (West 1981)*. Some independent agencies that are not under the authority of the OFCCP have their own contract compliance regulatory schemes, including the following: the Tennessee Valley Authority (18 C.F.R. pt. 1304); Federal Procurement (48 C.F.R. pt. 9903); and the Veterans Administration (48 C.F.R. pt. 800).

(n3)Footnote 3. Exec. Order No. 11246, §§ 201, 205.

(n4)Footnote 4. Exec. Order No. 11246, § 203(a).

(n5)Footnote 5. Exec. Order No. 11246, § 202; *41 C.F.R. § 60-1.4*.

(n6)Footnote 6. Exec. Order No. 11246, § 209(a)(5), (6).

(n7)Footnote 7. Exec. Order No. 11246, § 211.

(n8)Footnote 8. Exec. Order No. 11246, § 204.

(n9)Footnote 9. Exec. Order No. 11246, § 206.

(n10)Footnote 10. Exec. Order No. 11246, § 208(a).

(n11)Footnote 11. Exec. Order No. 11246, §§ 213-215.

(n12)Footnote 12. *See* Exec. Order No. 11246, § 201.

(n13)Footnote 13. *See 41 C.F.R. §§ 60-1.1-60-1.47*.

(n14)Footnote 14. *See 41 C.F.R.*, pt. 60; *46 Fed. Reg. 42865 (Aug. 25, 1981)* .

(n15)Footnote 15. *29 U.S.C. § 793*.

- (n16)Footnote 16. *See* Exec. Order No. 11758 (Jan. 15, 1974); *41 C.F.R.* § 60-741.1.
- (n17)Footnote 17. *29 U.S.C.* § 793(a); *see 41 C.F.R.* §§ 60-741.4, 60-741.20.
- (n18)Footnote 18. *29 U.S.C.* § 793(b).
- (n19)Footnote 19. *29 U.S.C.* § 793(c); *see 41 C.F.R.* §§ 60-741.3(b), 60-741.30.
- (n20)Footnote 20. *29 U.S.C.* § 793(a).
- (n21)Footnote 21. *See 41 C.F.R.* §§ 60-741.1-60-741.54.
- (n22)Footnote 22. For description of covered contractors and subcontractors, *see* ch. 40, pt. C.
- (n23)Footnote 23. *41 C.F.R.* § 60-741.5.
- (n24)Footnote 24. *41 C.F.R.* § 60-741.29(b)(1), (2). For discussion of administrative hearings, *see* § 44.45[3].
- (n25)Footnote 25. *See 38 U.S.C.* § 4212; Exec. Order No. 11758 (Jan. 15, 1974).
- (n26)Footnote 26. *See generally 38 U.S.C.* §§ 4211 *et seq.*
- (n27)Footnote 27. With respect to contracts entered into on or after Nov. 7, 2003, the amount is increased to \$100,000. *see* P.L. 107-288, § 2(b)(3).
- (n28)Footnote 28. *See 38 U.S.C.* § 4212(a); Exec. Order No. 11701; *41 C.F.R.* §§ 60-250.1-60-250.54.
- (n29)Footnote 29. *See* ch. 40, pt. C, for a description of covered contractors and subcontractors.
- (n30)Footnote 30. *38 U.S.C.* § 4012(a).
- (n31)Footnote 31. *See 38 U.S.C.* § 4212(b).
- (n32)Footnote 32. *See 38 U.S.C.* § 4212(d).
- (n33)Footnote 33. *See 41 C.F.R.* §§ 60-250.4, 60-250.20.
- (n34)Footnote 34. *41 C.F.R.* § 60-250.5.
- (n35)Footnote 35. *See 41 C.F.R.* § 60-250.29(b)(1), (2).
- (n36)Footnote 36. *See 41 C.F.R.* § 60-250.30; *see also 41 C.F.R.* § 60-250.3(b)(1).
- (n37)Footnote 37. Exec. Order No. 11141 (Feb. 12, 1964), 3 C.F.R. § 179 (1964-1965 Compilation), reprinted in note following 5 *U.S.C.A.* § 3301 (*West 1977*).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action
Part C. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.41

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.41 Structure of the Agency

The OFCCP is a part of the United States Department of Labor's Employment Standards Administration.ⁿ¹ The OFCCP is headed by a Director, who is appointed by the Secretary of Laborⁿ² and reports to the Deputy Under Secretary of Labor for Employment Standards Administration. The OFCCP has a headquarters office, regional offices, and area offices. The headquarters office develops policy, rules, regulations, and procedures, evaluates regional performance, and directs improvements in the program. The regional offices plan, direct, and administer the program in the region. The area offices, where most of the OFCCP's staff is located, conduct compliance reviews, receive and investigate complaints, and maintain daily contact with contractors, government agencies, and organizations representing minorities, women, the disabled, and veterans.ⁿ³

If the OFCCP is unable to obtain voluntary compliance by a contractor found to be in violation of the law, the case is transmitted to the regional office for review and to the Department of Labor's Solicitor of Labor for further review and enforcement.ⁿ⁴ In addition to conducting enforcement proceedings, the Office of the Solicitor also provides legal review of regulations, internal documents, and external communications that pertain to the setting of policy.ⁿ⁵

Administrative enforcement hearings are held before a Department of Labor administrative law judge (ALJ).ⁿ⁶ If the ALJ determines that there was a violation, the Administrative Review Board, United States Department of Labor, issues an order enjoining the violations and requiring an appropriate remedy.ⁿ⁷ For a further discussion of remedies for violations, see § 44.45[5], *below*.

Legal Topics:

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative ActionComplianceLabor & Employment LawDiscriminationPublic ContractsAffirmative ActionPublic Contracts LawContract ProvisionsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See 41 C.F.R. § 60-1.2.*

(n2)Footnote 2. *See Exec. Order No. 11246 § 401; 41 C.F.R. § 60-1.2.*

(n3)Footnote 3. U.S. Commission on Civil Rights, Federal Enforcement of Equal Employment Requirements (Clearinghouse Pub. 93, July 1987), p. 68.

(n4)Footnote 4. *See 41 C.F.R. §§ 60-1.26(a)(2), 60-30.5.* For discussion of compliance review, *see § 44.43.* For discussion of enforcement procedures, *see § 44.45.*

(n5)Footnote 5. U.S. Commission on Civil Rights, Federal Enforcement of Equal Employment Requirements (Clearinghouse Pub. 93, July 1987), p. 68.

(n6)Footnote 6. *41 C.F.R. § 60-30.14.*

(n7)Footnote 7. *See 41 C.F.R. § 1.26; see also 41 C.F.R. § 60-30.27.*



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action
Part C. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.42

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.42 Affirmative Action Program Requirements

[1] Executive Order 11246

[a] Requirements for Nonconstruction Contracts

The OFCCP has promulgated regulations setting forth separate affirmative action requirements for construction and nonconstruction contractors.ⁿ¹ Regulations known as Revised Order No. 4 establish affirmative action requirements for nonconstruction contractors.ⁿ² Any such contractor or subcontractor with 50 or more employees and a contract with a federal agency valued at \$50,000 or more is subject to the affirmative action requirements set forth at Title 41, *Code of Federal Regulations*, Sections 60-2.1-60-2.32.ⁿ³ Also subject to the OFCCP's affirmative action regulations for nonconstruction contractors are contractors or subcontractors having 50 or more employees and having government bills of lading expected to total at least \$50,000 in a 12-month period, or those who serve as depositories of government funds in any amount, or those that are financial institutions that are issuing and paying agents for United States savings bonds and notes in any amount.ⁿ⁴ Each of these contractors must develop a written affirmative action compliance program for each of its establishments within 120 days from the commencement of the contract.ⁿ⁵

■ CONSULTANT'S COMMENT:

The OFCCP Compliance Manual further extends the coverage of Executive Order 11246 beyond the limits set forth in Revised Order 4. Thus, for example, covered financial institutions include not only those that are depositories for federal funds and issuing and paying agents for United States savings bonds, but also those that accept federal depository insurance. *Commentary by Kirby Wilcox.*

An affirmative action program is defined as "a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort."ⁿ⁶ An acceptable affirmative action program must include an analysis of areas within which a contractor is deficient in the utilization of minorities and women. The program must also include goals and timetables to correct whatever deficiencies may exist in the contractor's work force and to achieve prompt and full utilization of minorities and women at all levels and segments of the work force where deficiencies exist.ⁿ⁷ To meet these objectives, the affirmative action program must specifically include two types of analyses. The first is a

work-force analysis consisting of a listing of each job title ranked from the lowest paid to the highest paid within each department or organizational unit in order to show each line of progression or career path by which an employee can move to the top of the line.ⁿ⁸ The second is a utilization analysis of all job groups at the facility and an explanation if minorities are being underutilized, that is, if there are fewer minorities and women in a job group than would reasonably be expected given their availability in the relevant labor market.ⁿ⁹ To determine underutilization in relation to the availability of minorities and women, contractors are directed to "consider" each of eight listed factors.ⁿ¹⁰

■ CONSULTANT'S COMMENT:

Although the Supreme Court has not evaluated the validity of Executive Order 11246 in the context of a reverse discrimination claim, it is arguable that the Executive Order could survive such a challenge for at least two reasons. First, affirmative action plans are arguably not mandatory. They can be viewed as voluntary commitments made by employers who choose to do business with the government. Second, if carefully constructed, affirmative action plans can be made to comply with the *Steelworkers v. Weber*ⁿ¹¹ guidelines. That is, goals should be set only if comparisons between "utilization" and "availability" statistics reveal "manifest imbalances" in the employment practice under scrutiny (*e.g.*, hiring or promotion). Care should be taken not to set a goal so high as to "unnecessarily trammel" the rights of nonminority employees, and the goal should be a temporary measure, designed to remedy the statistical imbalance, not to maintain racial balance in the work force. *Commentary by Kirby Wilcox.*

In developing the required goals and timetables,ⁿ¹² the contractor should consider the results that could reasonably be expected from its putting forth every good-faith effort to make its overall affirmative action program work. In determining levels of goals, the contractor should consider the same factors set forth in the regulations for determining underutilization.ⁿ¹³ The purpose of using goals is to insure that the contractor meets its affirmative action obligations; goals are not intended and should not be used to discriminate on the basis of race, color, religion, sex, or national origin.ⁿ¹⁴ If a contractor does not establish a goal, it must provide a detailed explanation for its failure to do so in the written affirmative action program.ⁿ¹⁵

By its regulations, the OFCCP also mandates a number of additional components of a contractor's affirmative action program and methods by which the requirements are to be implemented.ⁿ¹⁶ These include the following:

1. Development or reaffirmation of the contractor's equal employment policy;ⁿ¹⁷
2. Formal internal and external dissemination of the policy;ⁿ¹⁸
3. Establishment of responsibilities for implementing the contractor's equal employment policy;ⁿ¹⁹
4. Identification of problem areas by organizational units and job groups;ⁿ²⁰
5. Development and execution of action-oriented programs, designed to eliminate problems and attain established goals and objectives, including the validation of worker specifications using job performance criteria and the observance of the Uniform Guidelines on Employee Selection Procedures;ⁿ²¹
6. Design and implementation of an internal reporting and auditing system to measure the effectiveness of the affirmative action program;ⁿ²²
7. Compliance of personnel policies and practices with sex discrimination guidelines under the regulations;ⁿ²³
8. Consideration of recruiting of skilled minorities and women not currently in the work force;ⁿ²⁴ and

9. Support of community action and service programs designed to improve employment opportunities for minorities and women.ⁿ²⁵

[b] Construction Contracts

Construction contractors and subcontractors with federal or federally assisted contracts of \$10,000 or more are also subject to Executive Order 11246.ⁿ²⁶ⁿ²⁷ In the construction industry, contractors generally rely on a more transient work force than in other areas of employment, often rely on the use of union hiring halls and referral lists to select their workers, and in some cases have improperly excluded minorities and women from employment. For these reasons, the Department of Labor developed a somewhat different approach in its enforcement of Executive Order 11246 affirmative action requirements for construction contractors. OFCCP regulations set forth construction contractors' affirmative action requirements, which differ from those set forth for nonconstruction contractors.ⁿ²⁸ Among these is the requirement that all federal contracting officers and all applicants for federal construction contracts include, in solicitations and bids for contracts to be performed within certain specified geographic areas designated by the Director of the OFCCP, a Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity (Executive Order 11246), which acknowledges the contractor's affirmative action obligations and includes goals and timetables for utilizing minorities and women.ⁿ²⁹ All federal or federally assisted construction contracts must include an equal opportunity clause, unless the contract is exempt.ⁿ³⁰ In addition, construction contracts in excess of \$10,000 to be performed in geographical areas designated by the OFCCP Director must include a notice of specifications, entitled "Standard Federal Equal Employment Opportunity Construction Contract Specifications (Executive Order 11246)."ⁿ³¹ Whether or not these forms are physically incorporated in bids or contracts, they are deemed incorporated by reference in them.ⁿ³²

Whereas nonconstruction contractors are required to set their own goals and timetables for the utilization of minorities and women,ⁿ³³ construction contractors must incorporate into their affirmative action programs goals and timetables that have previously been published by the Director of the OFCCPⁿ³⁴ or those that have already been approved by the OFCCP.ⁿ³⁵ For example, the goal for the utilization of women in the construction industry has been set by the OFCCP at 6.9 percent.ⁿ³⁶ If goals and timetables have not been issued by the Director of the OFCCP, the contractor may use a "hometown plan" or "imposed plan" or "special bid condition" approved by the OFCCP to meet OFCCP minority utilization requirements.ⁿ³⁷

■ PRACTICE TIP:

Very few hometown plans are currently in operation. As a result, most construction contractors and subcontractors rely on goals and timetables established by the OFCCP. *Commentary by Dale Brodsky.*

Construction contractors are subject to somewhat more stringent reporting requirements than nonconstruction contractors.ⁿ³⁸ For a discussion of reporting requirements of contractors, see Chapter 41, Part G.

[2] Section 503 and VEVRAA

Except as noted below, the OFCCP's affirmative action requirements are identical for individuals with disabilities under Section 503 of the Rehabilitation Act of 1973ⁿ³⁹ and disabled veterans under the VEVRAA.ⁿ⁴⁰ Contractors and subcontractors with 50 or more employees and holding contracts valued at \$50,000 or more must prepare and maintain an affirmative action program within 120 days of the commencement of the contract.ⁿ⁴¹ However, under regulations implementing amendments to the affirmative action provisions of VEVRAA made by the Jobs for Veterans Act ("JVA") enacted in 2002, every government contractor that has 50 or more employees and a contract of \$100,000 or more must, within 120 days of the commencement of a contract, prepare and maintain an affirmative action program at each establishment.^{n41.1} Unlike affirmative action programs under Executive Order 11246, programs under Section 503 and VEVRAA do not require the establishment of goals and timetables or statistical or other types of analyses. Moreover, contractors and subcontractors must "invite" qualified persons with disabilities and disabled and Vietnam era

veterans, as well as recently separated veterans, other protected veterans, and Armed Forces service medal veterans, to identify themselves to the contractor.ⁿ⁴²

To comply with the affirmative action requirements imposed by the regulations implementing these statutes, a contractor must do the following:

1. Take affirmative action to employ and advance in employment qualified persons with disabilities and disabled and Vietnam era veterans and recently separated veterans, other protected veterans, and Armed Forces service medal veterans, at all levels of employment;ⁿ⁴³
2. Review present procedures and develop new procedures to assure the selection of known qualified persons with disabilities and disabled and Vietnam Era veterans and recently separated veterans, other protected veterans, and Armed Forces service medal veterans;ⁿ⁴⁴
3. Provide in the affirmative action program a schedule for the review of all physical or mental job qualification requirements to insure that they are job-related and consistent with business necessity and the safe performance of the job;ⁿ⁴⁵
4. Make reasonable accommodation to the physical and mental limitations of a disabled person, unless the contractor can demonstrate that the accommodation would impose an undue hardship on the conduct of its business as determined by, among other things, business necessity and the financial costs and expenses incurred in making the accommodation;ⁿ⁴⁶
5. Not reduce the compensation offered to an applicant or employee because of any disability income, pension, or other benefit he or she receives from another source;ⁿ⁴⁷
6. Provide outreach and positive recruitment activities internally and to groups of persons with disabilities and veterans organizations;ⁿ⁴⁸
7. Disseminate internally the affirmative action program;ⁿ⁴⁹ and
8. Designate an executive to be the manager of the affirmative action program and to direct and implement the program.ⁿ⁵⁰

[3] Uniform Guidelines on Employee Selection Procedures

The Uniform Guidelines on Employee Selection Procedures (Guidelines) were adopted in 1978 by the EEOC, the Civil Service Commission, the Department of Labor, and the Department of Justice as a way to standardize tests and selection procedures used by the federal government.ⁿ⁵¹ The Guidelines were designed to assist employers and other entities to comply with federal laws prohibiting discrimination on the bases of race, color, religion, sex, and national origin.ⁿ⁵² The OFCCP applies these guidelines in the enforcement of Executive Order 11246.ⁿ⁵³ The Guidelines are discussed in detail in Chapter 40, Part C, and Chapter 41, Part C.

Legal Topics:

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawDiscriminationPublic ContractsAffirmative Action

FOOTNOTES:

(n1)Footnote 1. *See 41 C.F.R. §§ 60-2.1-60-2.32* (nonconstruction contracts), 60-4.1-60-4.9 (construction contracts). For discussion of regulations applicable to construction contractors, *see [b], below*.

(n2)Footnote 2. *41 C.F.R. § 60-2.1(a)*.

(n3)Footnote 3. *See 41 C.F.R. § 60-2.1(a)*. For full discussion of coverage of Exec. Order No. 11246, *see ch. 40, pt. C*.

(n4)Footnote 4. *41 C.F.R. § 60-2.1*.

(n5)Footnote 5. *41 C.F.R. § 60-2.1*.

(n6)Footnote 6. *41 C.F.R. § 60-2.10*.

(n7)Footnote 7. *41 C.F.R. § 60-2.10*.

(n8)Footnote 8. *See 41 C.F.R. § 60-2.11(a)*.

(n9)Footnote 9. *41 C.F.R. § 60-2.11(b)*.

(n10)Footnote 10. *41 C.F.R. § 60-2.11(b)(1), (2)*.

(n11)Footnote 11. *Steelworkers v. Weber (1979) 443 U.S. 193, 197, 208-209, 99 S. Ct. 2721, 61 L. Ed. 2d 480*; for discussion, *see § 44.01[1]*.

(n12)Footnote 12. *See 41 C.F.R. §§ 60-2.10, 60-2.12, 60-2.13(e)*.

(n13)Footnote 13. *See 41 C.F.R. § 60-2.12(a)*.

(n14)Footnote 14. *41 C.F.R. § 60-2.30*.

(n15)Footnote 15. *41 C.F.R. § 60-2.12(k)*.

(n16)Footnote 16. *41 C.F.R. §§ 60-2.13, 60-2.20-60-2.26*.

(n17)Footnote 17. *41 C.F.R. §§ 60-2.13(a), 60-2.20*.

(n18)Footnote 18. *41 C.F.R. §§ 60-2.13(b), 60-2.21*.

(n19)Footnote 19. *41 C.F.R. §§ 60-2.13(c), 60-2.22*.

(n20)Footnote 20. *41 C.F.R. §§ 60-2.13(d), 60-2.23*.

(n21)Footnote 21. *41 C.F.R. §§ 60-2.13(f), 60-2.24*. For discussion of job validation in the context of the Uniform Guidelines on Employee Selection Procedures, *see [3], below*.

(n22)Footnote 22. *41 C.F.R. §§ 60-2.13(g), 60-2.25*.

(n23)Footnote 23. *41 C.F.R. § 60-2.13(h); see 41 C.F.R. §§ 60-20.1-60-20.6* (sex discrimination guidelines).

(n24)Footnote 24. *41 C.F.R. § 60-2.13(j)*.

(n25)Footnote 25. *41 C.F.R. §§ 60-2.13, (i) 60-2.26*.

(n26)Footnote 26. *See Exec. Order No. 11246 § 202*. For full discussion of coverage of Exec. Order No. 11246,

see ch. 40, pt. C.

(n27)Footnote 27. [Reserved]

(n28)Footnote 28. *Compare 41 C.F.R. §§ 60-2.1-60-2.32 (nonconstruction contract affirmative action requirements) with 41 C.F.R. §§ 60-4.1-60-4.9 (construction contract affirmative action requirements).* For discussion of affirmative action requirements for nonconstruction contracts, see [a], *above*.

(n29)Footnote 29. *41 C.F.R. §§ 60-4.2, 60-4.6.*

(n30)Footnote 30. *41 C.F.R. § 60-4.3(a); see 41 C.F.R. § 60-1.4(b) (setting out form).*

(n31)Footnote 31. *41 C.F.R. § 60-4.3(a).*

(n32)Footnote 32. *41 C.F.R. § 60-4.9.*

(n33)Footnote 33. *See 41 C.F.R. §§ 60-2.10, 60-2.12.* For discussion, see [a], *above*.

(n34)Footnote 34. *41 C.F.R. §§ 60-4.4, 60-4.6.*

(n35)Footnote 35. *41 C.F.R. §§ 60-4.4-60-4.6.*

(n36)Footnote 36. *45 Fed. Reg. 85750 (Dec. 30, 1980) .*

(n37)Footnote 37. *See 41 C.F.R. § 60-4.4(a); see also 41 C.F.R. § 60-4.5 (describing participation in hometown plans).* A hometown plan is an affirmative action plan that has been developed and implemented by local construction contractors, unions, and community organizations.

(n38)Footnote 38. *See 41 C.F.R. § 60-1.7(a) (requiring construction subcontractors below first tier to file Standard Form 100 (EEO-1), whereas nonconstruction contractors below first tier need not file that form).*

(n39)Footnote 39. *See 29 U.S.C. § 793.*

(n40)Footnote 40. *See 38 U.S.C. § 4212; compare 41 C.F.R. §§ 60-250.1-60-250.54 (VEVRAA affirmative action regulations), 41 C.F.R. § 300.1-60-300.84 (regulations implementing amendments to affirmative action provisions of VEVRAA made by Jobs for Veterans Act or "JVA"--enacted in 2002) with 41 C.F.R. §§ 60-741.1-60-741.54 (Section 503 affirmative action regulations).*

(n41)Footnote 41. *41 C.F.R. §§ 60-741.5(a) (Section 503), 60-250.5(a) (VEVRAA).* For complete discussion of coverage of Section 503 and of VEVRAA, see ch. 40, pt. C.

(n42)Footnote 41.1. *41 C.F.R. 60-300.40.*

(n43)Footnote 42. *41 C.F.R. § 60-250.5(d) (VEVRAA), 41 C.F.R. § 60-300.42 (regulations implementing amendments to affirmative action provisions of VEVRAA made by JVA, enacted in 2002), 60-741.5(c)(1) (Section 503).*

(n44)Footnote 43. *41 C.F.R. § 60-250.6(a) (VEVRAA), 41 C.F.R. § 60-300.43 (regulations implementing amendments to affirmative action provisions of VEVRAA made by JVA, enacted in 2002), 41 C.F.R. § 60-741.6(a) (Section 503).*

(n45)Footnote 44. *41 C.F.R. § 60-250.6(b) (VEVRAA), 41 C.F.R. § 60-300.44(b) (regulations implementing amendments to affirmative action provisions of VEVRAA made by JVA, enacted in 2002), 41 C.F.R. § 60-741.6(b) (Section 503).*

(n46)Footnote 45. 41 C.F.R. § 60-250.6(c)(1) (VEVRAA), 41 C.F.R. § 60-300.44(c)(1) (regulations implementing amendments to affirmative action provisions of VEVRAA made by JVA, enacted in 2002), 41 C.F.R. § 60-741.6(c)(1) (Section 503). The burden is on the contractor to demonstrate compliance with this requirement. 41 C.F.R. § 60-250.6(c)(2) (VEVRAA), 41 C.F.R. § 60-300.44(c)(2) (regulations implementing amendments to affirmative action provisions of VEVRAA made by JVA, enacted in 2002), 41 C.F.R. § 60-741.6(c)(2) (Section 503).

(n47)Footnote 46. 41 C.F.R. § 60-250.6(d) (VEVRAA), 41 C.F.R. § 60-300.44(d) (regulations implementing amendments to affirmative action provisions of VEVRAA made by JVA, enacted in 2002), 41 C.F.R. § 60-741.6(d) (Section 503).

(n48)Footnote 47. 41 C.F.R. § 60-250.6(e) (VEVRAA), 41 C.F.R. § 60-300.21(i) (regulations implementing amendments to affirmative action provisions of VEVRAA made by JVA, enacted in 2002), 41 C.F.R. § 60-741.6(e) (Section 503).

(n49)Footnote 48. 41 C.F.R. § 60-250.6(f) (VEVRAA), 41 C.F.R. § 60-300.44(f) (regulations implementing amendments to affirmative action provisions of VEVRAA made by JVA, enacted in 2002), 41 C.F.R. § 60-741.6(f) (Section 503).

(n50)Footnote 49. 41 C.F.R. § 60-250.6(g) (VEVRAA), 41 C.F.R. § 60-300.44(g) (regulations implementing amendments to affirmative action provisions of VEVRAA made by JVA, enacted in 2002), 41 C.F.R. § 60-741.6(g) (Section 503).

(n51)Footnote 50. 41 C.F.R. § 60-250.6(h) (VEVRAA), § 60-741.6(h) (Section 503), 41 C.F.R. § 60-300.44(i) (regulations implementing amendments to affirmative action provisions of VEVRAA made by JVA, enacted in 2002),

(n52)Footnote 51. 41 C.F.R. § 60-3.1A. The Uniform Guidelines on Employee Selection Procedures do not apply to 38 U.S.C. § 4212 or to the amendments to the affirmative action provisions of VEVRAA made by JVA. 41 CFR 60-300.21(g)(2).

(n53)Footnote 52. 41 C.F.R. § 60-3.1B.

(n54)Footnote 53. 41 C.F.R. § 60-3.2A; *see also* 41 C.F.R. §§ 60-3.1-60-3.18; 41 C.F.R. §§ 60-2.24(d)(2) (requiring nonconstruction contractors to observe Guidelines), 60-4.3(a), Standard Contract Specifications, P k (requiring construction contractors to observe Guidelines).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action
Part C. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.43

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.43 Compliance Reviews

[1] Generally

The purpose of a compliance review under Executive Order 11246 is to determine if the contractor or subcontractor maintains nondiscriminatory practices, policies, and conditions of employment and takes affirmative action to ensure that applicants and employees are treated without regard to race, color, religion, sex, or national origin.ⁿ¹ The compliance review also includes a review of employment practices under Section 503 of the Rehabilitation Act of 1973ⁿ² and the Vietnam Era Veterans' Readjustment and Assistance Act, as amended.ⁿ³ⁿ⁴

If the OFCCP finds deficiencies in a contractor's or subcontractor's actions, the OFCCP makes reasonable efforts to secure compliance through conciliation and persuasion, and the contractor must make a specific commitment to correct the problems.ⁿ⁵ If the contractor fails to correct the deficiencies, the OFCCP may recommend that sanctions be imposed.ⁿ⁶

Although there are specific procedures set forth in the OFCCP's regulations governing evaluation procedures for the conduct of compliance reviews for supplies and services contractors,ⁿ⁷ there are no similarly detailed rules applying to the construction industry.ⁿ⁸

■ PRACTICE TIP:

In Section 4.5 of its now out-of-date Compliance Manual, the OFCCP delineated standards for conducting compliance reviews of construction contractors and subcontractors. In practice, the procedures are approximately the same as those described in [b], *below*, for service and supply contractors, except that a desk audit of a construction contractor's operation is usually not conducted.

Commentary by Dale Brodsky.

[2] Selection of Contractors for Compliance Review

[a] Preaward Compliance Reviews

The OFCCP typically commences a preaward compliance review under one of three circumstances. First, the Director of the OFCCP may request that an awarding agency not enter into a contract or subcontract with a prospective contractor until a compliance review has been conducted and a determination made that the prospective contractor will be able to comply with the required equal opportunity clause.ⁿ⁹ Second, nonconstruction contracts of \$1 million or more are subject to mandatory preaward compliance reviews, which may precede the award by no more than 12 months.ⁿ¹⁰ The awarding agency triggers the preaward review for contracts in excess of \$1 million by notifying the OFCCP of the contract application. The OFCCP in turn must, by regulation, complete the review within 30 days of the request.ⁿ¹¹ Third, if it comes to the attention of the government contracting officer through sources within his or her own agency, the OFCCP, or any other governmental agency that the prospective contractor does not have an acceptable affirmative action program or has substantially deviated from the program, the contractor must be declared "nonresponsible." The prospective contractor may then request the Director to determine, in his or her discretion, if there are sufficient issues of law or fact to warrant a hearing.ⁿ¹² Alternatively, the Director may require the investigation or compliance review to be developed further or additional conciliation to be conducted, provided that every effort is made to develop during any preaward conference an acceptable affirmative action program through conciliation, mediation, and persuasion.ⁿ¹³ A prospective contractor may not be declared nonresponsible more than twice without receiving prior notice and the opportunity for a hearing.ⁿ¹⁴

Preaward reviews are excepted from the requirement of conducting a complete desk audit; an abbreviated desk audit and an immediate on-site review may be performed instead.ⁿ¹⁵

Notwithstanding the preaward compliance procedures set forth in the regulations, a number of federal appellate and district courts have ruled that the OFCCP cannot delay an award or instruct a contracting agency to pass over a prospective contractor without a hearing.ⁿ¹⁶ Furthermore, 30 days is seldom long enough for the OFCCP to fulfill its review and enforcement obligations. Thus, the OFCCP has implemented a policy that when a prospective contractor is found to be in noncompliance at the preaward stage, the contract will be let and review will continue until compliance is achieved or enforcement proceedings commenced.ⁿ¹⁷

[b] Postaward Compliance Review

After a contract has been awarded, any nonconstruction contractor or subcontractor subject to Executive Order 11246 may be selected for a compliance review according to "approved methods of priority selection."ⁿ¹⁸ In the past, some courts have upheld challenges to the OFCCP's methods of selecting contractors for compliance review, calling the methods unreasonable and impermissible searches within the meaning of the *Fourth Amendment* because they were not based on neutral or neutrally applied criteria.ⁿ¹⁹

Currently, the OFCCP employs a computerized data system for selecting nonconstruction contractors for compliance reviews, other than preaward reviews and those requested by the Director of the OFCCP.ⁿ²⁰ The method is known as the Equal Employment Data System (EEDS), and actual selections are made by the directors of the OFCCP area and field offices where the contractors' establishments are located.ⁿ²¹ The EEDS is a compilation of information about contractors and subcontractors derived solely from EEO-1 reports previously submitted. The computer printout produced by the system identifies the contractors and subcontractors and provides equal employment data about them. In addition, the system (1) lists contractors according to their utilization of minorities and women in the specific industry and geographical area, and (2) compares each establishment to itself by measuring trends in the distribution of minorities and women in highest to lowest job categories during a 12-month period.ⁿ²²

Each area and field office has a fiscal year program plan that fixes the number of supply and service contractors and subcontractors to be reviewed. Eliminated from the pool are contractors and subcontractors who have been reviewed during the past two years, who are signatories to the National Self-Monitoring and Reporting System,ⁿ²³ who are subject to a consent decree, or who are not currently government contractors. A certain proportion of the remaining

contractors and subcontractors are chosen for review at random by the OFCCP national office. The largest grouping of establishments chosen for compliance review by the area and field office directors are those flagged by the EEDS as having the lowest utilization of minorities or women. In addition to EEDS rankings, the OFCCP takes into account other factors in choosing contractors for compliance review. Factors that may cause the OFCCP to select a particular contractor for review (in descending order of importance) include (1) a small number of facilities reviewed in the past; (2) an unsatisfactory equal employment opportunity profile based on input from community organizations and the number of individual complaints; (3) a large facility (more than 1,000 employees) showing employment growth, especially because of a large federal contract award; and (4) a small facility showing growth because of a large federal contract. The OFCCP may also select up to 15 percent of the total number of supply and service contractors using these factors from sources other than the EEDS, such as the federal Procurement Data System, which provides year-to-date information on supply and service prime contracts and direct federal construction contracts valued at \$25,000 or more.²⁴

[3] Procedures for Compliance Reviews

[a] Generally

Procedures for compliance reviews of supplies and services contractors are set forth in detailed regulations.²⁵ No such analogous regulations exist for construction contractors. The basic procedures for evaluation of contractor compliance consist of the following:²⁶

1. A desk audit of the contractor's affirmative action program;
2. An on-site review of matters that are not fully or satisfactorily addressed in the affirmative action program and work-force analysis; and
3. When necessary, an off-site analysis of information supplied by the contractor during or pursuant to the on-site review.

These procedures are discussed in [b]-[d], *below*.

[b] Desk Audit

The first step the OFCCP takes in conducting a compliance review is to request that the contractor or subcontractor under review provide the OFCCP with information concerning the affirmative action program and supporting documentation, including a work-force analysis and supporting data for audit.²⁷ A work-force analysis is a listing of all job titles as they appear in applicable collective bargaining agreements or payroll records ranked from lowest paid to highest paid within each department, including separate lists for any lines of progression indicating the order of jobs through which an employee could move within the line. If there are no formal lines of progression or usual promotional sequences, the work-force analysis must list job titles by department, job families, or discipline, in order of wage rates or salary ranges. Each job title must be broken down into lists of the total number of incumbents, and further broken down by sex and certain racial or ethnic groups.²⁸ Contractors who are concerned with maintaining the confidentiality of such information as lists of employees, names of employees, reasons for termination, and pay data, may substitute alphabetic or numeric coding or an index of pay and pay ranges.²⁹

■ PRACTICE TIP:

As a matter of practice, the OFCCP does not conduct desk audits of construction contractors, but proceeds immediately to the on-site visit, which is discussed in [c], *below*. *Commentary by Dale Brodsky*

[c] On-Site Review

An on-site review of a contractor's establishment is carried out unless the desk audit demonstrates that either the contractor's affirmative action program is acceptable or that enforcement proceedings are warranted in light of the contractor's failure to make reasonable efforts to meet the OFCCP's affirmative action requirements.ⁿ³⁰ In determining that the affirmative action program is acceptable and on-site review is unnecessary, the OFCCP must have conducted an on-site review within the preceding 24 months and have concluded that circumstances of the previous on-site review did not substantially change.ⁿ³¹

Before the on-site review, the OFCCP officer requests the contractor to make available specific information that is necessary to carry out its review and to complete its compliance review report and that is not contained in or derived from information already submitted by the contractor.ⁿ³² The contractor must also provide full access to additional relevant information sought by the OFCCP at the time of the on-site visit.ⁿ³³

During the on-site review of a contractor's employment practices, the OFCCP compliance officer is expected to interview a reasonable number of employees.ⁿ³⁴ The OFCCP's policy is to interview nonmanagement and nonsupervisory employees in private but to allow the contractor's attorney or other representative to be present during interviews with management and supervisory personnel, who are then considered as spokespersons for the contractor.ⁿ³⁵

1. Desk Audits

- a. *Verify Coverage.* Determine whether the company has contracts or subcontracts that trigger Executive Order coverage.
- b. *Request Extensions of Time to Submit AAP Data Only Under Exceptional Circumstances.* The OFCCP routinely denies requests for extensions of time to submit affirmative action plan (AAP) and other data, and such requests may lead the OFCCP to believe that these documents were not in existence at the time of the request.
- c. *Designate One OFCCP Liaison.* Employers should "speak" to the OFCCP with "one voice," and therefore should designate one person to handle all communications with the OFCCP throughout the review process.
- d. *Keep a Communications Log.* The employer's OFCCP liaison should log, in chronological order, all written and oral communications with the OFCCP.
- e. *Keep a Documents File.* The employer's OFCCP liaison should keep a file, in chronological order, of all documents received from or sent to the OFCCP.
- f. *Prepare for the On-Site Review.* Counsel should (i) review AAP commitments that the employer has not fulfilled; (ii) review facts pertaining to unfavorable statistical comparisons (*e.g.*, where impact ratios for hires, promotions, and terminations fall below .80); (iii) review all outstanding EEO agency charges; and (iv) prepare the necessary salary roster.

2. On-Site Reviews

- a. *Prepare for the Entrance Conference.* The employer liaison should be fully conversant with the company's AAP and should be prepared to stress the positive and explain the negative aspects of it.

b. *Plan for Interviews.* The employer should expect the OFCCP to request (before or during the on-site review) interviews with management and rank-and-file employees. Those interviewed typically include managers of departments with significant underutilization of females and minorities; female and minority employees in "leader" jobs if promotions from such jobs are awarded disproportionately to males; employees identified as disabled; employees who have pending charges of discrimination; and employees who have EEO responsibilities.

c. *Establish Ground Rules for Interviews.* The OFCCP generally will not object to (i) a requirement that it give 24, or, preferably, 48 hours' notice of each interview to avoid work disruption; and (ii) the presence of a company representative at the interviews of all managers and supervisors. Employers are advised not to force the OFCCP to conduct employee interviews on nonwork time. All employees interviewed should be told that the choice of speaking with the OFCCP is theirs and that they will not be favored or disfavored for participating in the interview process.

d. *Establish Ground Rules for OFCCP Access to Records.* The OFCCP generally will not object to (i) a requirement that it give 24, or, preferably, 48 hours' notice of requests for specific documents to permit the company time to collect them; and (ii) a requirement that all documents be returned at the end of each day so that they may be properly secured. Because the OFCCP routinely requests documents for use during off-site review proceedings, the employer should decide in advance how it will handle requests for trade-secret or other confidential documents. At the least, the employer should not release original documents and should ask the OFCCP not to copy (and to return) all trade-secret documents.

e. *Special Reports.* Although employers are not required to prepare special reports for the OFCCP, such reports are frequently requested and can be useful tools in assisting the favorable outcome of the review.

f. *Exit Conference.* The exit conference provides an opportunity to learn the OFCCP's conclusions before they are reduced to writing. The employer should be prepared to offer additional data and/or argument regarding any perceived deficiencies.

Because the OFCCP Compliance Manual does not set a rigid structure for the conduct of desk audits and on-site reviews, individual compliance officers may follow divergent investigative procedures. Employers, therefore, are advised to consider the guidelines set forth below when planning for and dealing with OFCCP compliance investigations.

1. *Desk Audits*

a. *Verify Coverage.* Determine whether the company has contracts or subcontracts that trigger Executive Order coverage.

b. *Request Extensions of Time to Submit AAP Data Only Under Exceptional Circumstances.* The OFCCP routinely denies requests for extensions of time to submit affirmative action plan (AAP) and other data, and such requests may lead the OFCCP to believe that these documents were not in existence at the time of the request.

c. *Designate One OFCCP Liaison.* Employers should "speak" to the OFCCP with "one voice," and therefore should designate one person to handle all communications with the OFCCP throughout the review process.

d. *Keep a Communications Log.* The employer's OFCCP liaison should log, in chronological order, all written and oral communications with the OFCCP.

e. *Keep a Documents File.* The employer's OFCCP liaison should keep a file, in chronological order, of all documents received from or sent to the OFCCP.

f. *Prepare for the On-Site Review.* Counsel should (i) review AAP commitments that the employer has not fulfilled; (ii) review facts pertaining to unfavorable statistical comparisons (e.g., where impact ratios for hires, promotions, and terminations fall below .80); (iii) review all outstanding EEO agency charges; and (iv) prepare the necessary salary roster.

2. *On-Site Reviews*

a. *Prepare for the Entrance Conference.* The employer liaison should be fully conversant with the company's AAP and should be prepared to stress the positive and explain the negative aspects of it.

b. *Plan for Interviews.* The employer should expect the OFCCP to request (before or during the on-site review) interviews with management and rank-and-file employees. Those interviewed typically include managers of departments with significant underutilization of females and minorities; female and minority employees in "leader" jobs if promotions from such jobs are awarded disproportionately to males; employees identified as disabled; employees who have pending charges of discrimination; and employees who have EEO responsibilities.

c. *Establish Ground Rules for Interviews.* The OFCCP generally will not object to (i) a requirement that it give 24, or, preferably, 48 hours' notice of each interview to avoid work disruption; and (ii) the presence of a company representative at the interviews of all managers and supervisors. Employers are advised not to force the OFCCP to conduct employee interviews on nonwork time. All employees interviewed should be told that the choice of speaking with the OFCCP is theirs and that they will not be favored or disfavored for participating in the interview process.

d. *Establish Ground Rules for OFCCP Access to Records.* The OFCCP generally will not object to (i) a requirement that it give 24, or, preferably, 48 hours' notice of requests for specific documents to permit the company time to collect them; and (ii) a requirement that all documents be returned at the end of each day so that they may be properly secured. Because the OFCCP routinely requests documents for use during off-site review proceedings, the employer should decide in advance how it will handle requests for trade-secret or other confidential documents. At the least, the employer should not release original documents and should ask the OFCCP not to copy (and to return) all trade-secret documents.

e. *Special Reports.* Although employers are not required to prepare special reports for the OFCCP, such reports are frequently requested and can be useful tools in assisting the

favorable outcome of the review.

f. *Exit Conference.* The exit conference provides an opportunity to learn the OFCCP's conclusions before they are reduced to writing. The employer should be prepared to offer additional data and/or argument regarding any perceived deficiencies.

Commentary by Kirby Wilcox.

[d] Off-Site Analysis

Following the on-site review, the OFCCP compliance officer may find it necessary to conduct a further, off-site analysis of the information uncovered during the earlier two phases of the review before making a final determination.ⁿ³⁶ During the off-site analysis, the contractor may also be requested to provide additional data, which may be coded only if the contractor makes the code available to the compliance officer.ⁿ³⁷ If the contractor believes that the information sought by the OFCCP is not relevant, the contractor may request a ruling by the OFCCP Area Director, who must issue a ruling within 10 days of the request.ⁿ³⁸ The contractor may appeal that ruling to the Assistant Regional Administrator within 10 days, and a final ruling must be issued within 10 days.ⁿ³⁹ During the pendency of the appeals, the contractor must make the requested information available to the compliance officer, but the information is maintained in an investigatory file, which cannot be disclosed to the public and is accessible only to the compliance officer and the OFCCP personnel involved in the relevancy determination.ⁿ⁴⁰ Data determined to be not relevant to the investigation must be returned to the contractor immediately.ⁿ⁴¹

[4] Conciliation Agreements

If the compliance review reveals a "material violation" of the equal opportunity clause, and if the contractor, subcontractor, or bidder is willing to correct the violations or deficiencies and the OFCCP determines that settlement is appropriate, the parties may enter into a conciliation agreement.ⁿ⁴² The agreement provides for whatever remedial action is necessary to correct the violations or deficiencies and may include remedies such as back pay and retroactive seniority.ⁿ⁴³

■ PRACTICE TIP:

A conciliation agreement usually contains enforcement provisions. For discussion of enforcement, see § 44.45. *Commentary by Dale Brodsky.*

Legal Topics:

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative ActionComplianceLabor & Employment LawDiscriminationPublic ContractsAffirmative ActionPublic Contracts LawPerformanceGeneral Overview

FOOTNOTES:

(n1)Footnote 1. 41 C.F.R. § 60-1.20(a).

(n2)Footnote 2. 29 U.S.C. § 793(b); see 41 C.F.R. § 60-741.60.

(n3)Footnote 3. 38 U.S.C. § 4212i(b); see 41 C.F.R. § 60-250.60.

(n4)Footnote 4. [Reserved]

(n5)Footnote 5. 41 C.F.R. § 60-1.20(b).

(n6)Footnote 6. *41 C.F.R. § 60-1.20(a).*

(n7)Footnote 7. *41 C.F.R. §§ 60-60.1-60-60.8.*

(n8)Footnote 8. *See 41 C.F.R. § 60-4.8.*

(n9)Footnote 9. *41 C.F.R. § 60-1.29.*

(n10)Footnote 10. *See 41 C.F.R. § 60-1.20(d).*

(n11)Footnote 11. *See 41 C.F.R. § 60-1.20(d).*

(n12)Footnote 12. *41 C.F.R. § 60-2.2(b).*

(n13)Footnote 13. *41 C.F.R. § 60-2.2(b).*

(n14)Footnote 14. *41 C.F.R. § 60-2.2(b).*

(n15)Footnote 15. *See 41 C.F.R. § 60-60.3(b)(1).* For discussion of desk audits and on-site reviews, *see* [3][b], [c], *below*.

(n16)Footnote 16. *See, e.g., Illinois Tool Works, Inc. v. Marshall (7th Cir. 1979) 601 F.2d 943, 947 ; Pan American, Inc. v. Marshall (S.D.N.Y. 1977) 439 F. Supp. 487, 493-495 .*

(n17)Footnote 17. United States Commission on Civil Rights, Federal Enforcement of Equal Employment Requirements (Clearinghouse Pub. 93, July 1987), pp. 85-86.

(n18)Footnote 18. *41 C.F.R. § 60-60.3(b).*

(n19)Footnote 19. *See, e.g., United States v. New Orleans Public Service, Inc. (5th Cir. 1984) 723 F.2d 422, 426-428 ; but see First Alabama Bank of Montgomery v. Donovan (11th Cir. 1982) 692 F.2d 714, 721-722 (upholding the procedure as reasonable even though it was not premised on suspicion of noncompliance).*

(n20)Footnote 20. OFCCP Order No. ADM 92-1/SEL (Jan. 31, 1992).

(n21)Footnote 21. OFCCP Order No. ADM 92-1/SEL (Jan. 31, 1992). Order No. ADM 92-1/SEL instructs directors of the area and field offices to adhere to the selection guidelines set out in § 2 of the User's Manual, which is an attachment to the Order.

(n22)Footnote 22. OFCCP Order No. ADM 92-1/SEL (Jan. 31, 1992), User's Manual § 5.

(n23)Footnote 23. The OFCCP established this system in 1982 to permit some large corporations to monitor themselves and to submit national data only when a disagreement arose necessitating a compliance review. U.S. Commission on Civil Rights, Federal Enforcement of Equal Employment Requirements (Clearinghouse Pub. 93, July 1987), pp. 92-93.

(n24)Footnote 24. OFCCP Order No. ADM 92-1/SEL (Jan. 31, 1992), User's Manual § 5.

(n25)Footnote 25. *See 41 C.F.R. §§ 60-60.1-60-60.8.*

(n26)Footnote 26. *41 C.F.R. § 60-60.3(a)(1)-(3).*

(n27)Footnote 27. *41 C.F.R. § 60-60.3(a), (b).* The contractor must show its compliance with the regulations that set forth the required contents of affirmative action programs (*41 C.F.R. §§ 60-2.10-60-2.15*) and the regulations setting

forth the required methods of implementing affirmative action programs (41 C.F.R. §§ 60-2.20-60-2.26). 41 C.F.R. § 60-60.3(b). A desk audit may not be necessary in preaward compliance reviews and complaint investigations. 41 C.F.R. § 60-60.3(b)(1). For discussion of preaward compliance reviews, *see* [2] [a], *above*. For discussion of complaint investigations, *see* [5], *below*.

(n28)Footnote 28. 41 C.F.R. § 60-60.3(b).

(n29)Footnote 29. 41 C.F.R. § 60-60.4(a).

(n30)Footnote 30. 41 C.F.R. § 60-60.3(c); *see* 41 C.F.R. §§ 60-2.10-60-2.26 (affirmative action and implementation requirements). For discussion of these requirements, *see* [2], *above*.

(n31)Footnote 31. 41 C.F.R. § 60-60.3(c).

(n32)Footnote 32. 41 C.F.R. § 60-60.3(c)(1).

(n33)Footnote 33. 41 C.F.R. § 60-60.4(b).

(n34)Footnote 34. 41 C.F.R. § 60-60.5.

(n35)Footnote 35. OFCCP Compliance Manual § 3D03.

(n36)Footnote 36. 41 C.F.R. § 60-60.3(d).

(n37)Footnote 37. 41 C.F.R. § 60-60.4(c).

(n38)Footnote 38. 41 C.F.R. § 60-60.4(c).

(n39)Footnote 39. 41 C.F.R. § 60-60.4(c).

(n40)Footnote 40. 41 C.F.R. § 60-60.4(c), (d).

(n41)Footnote 41. 41 C.F.R. § 60-60.4(c).

(n42)Footnote 42. 41 C.F.R. § 60-1.33.

(n43)Footnote 43. 41 C.F.R. § 60-1.33.



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California Employment Law

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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action
Part C. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.44

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.44 Complaint Procedures

[1] Executive Order 11246 Complaints

Any applicant or employee of a covered government contractor or subcontractor who claims a violation of Executive Order 11246 must file a complaint with the OFCCP within 180 days after the alleged violation unless the time is extended by the Director of the OFCCP on a showing of good cause.ⁿ¹ The complainant must provide complete information to the OFCCP within 60 days, including identifying information for the individual and the contractor, a description of the allegedly discriminatory acts, and any other pertinent information, or the case may be closed.ⁿ² Pursuant to a Memorandum of Understanding entered into by the EEOC and the OFCCP in 1981,ⁿ³ the OFCCP may refer complaints filed with the OFCCP to the EEOC for processing under Title VII.ⁿ⁴ Most systemic or class complaints are retained by the OFCCP.ⁿ⁵

In conducting an investigation of the complaint, the OFCCP must, at a minimum, conduct a thorough evaluation of the allegations of the complaint and develop a complete case record.ⁿ⁶ The case record contains the name, address, and telephone number of each person interviewed; the interview statements; copies, transcripts, or summaries of pertinent documents; a reference to at least one covered contract; and a narrative report of the investigation with references to exhibits and other evidence relating to the alleged violations.ⁿ⁷

Within 60 days after receiving the complaint or within such additional time as the Director may allow on a showing of good cause, the OFCCP must process the complaint and develop the case record to be included in a report to the Director containing the following information: (1) the name and address of the complainant, (2) a brief summary of findings, including a statement regarding the contractor's compliance or noncompliance with the equal opportunity clause, and (3) a statement of the disposition of the case, including sanctions or penalties imposed or recommended.ⁿ⁸ In addition, a written report of every preaward compliance review and a written report describing every other compliance review or other matter involving an apparent violation of the equal opportunity clause and the disposition of the matter must be made.ⁿ⁹ If the OFCCP finds a contractor to have violated the Executive Order, enforcement proceedings must be commenced.ⁿ¹⁰ For discussion of enforcement proceedings, see § 44.45.

■ PRACTICE TIP:

In the course of investigating complaints under the Executive Order, OFCCP's usual practice is to conduct a compliance review of the contractor's facility. In Section 503 and VEVRAA investigations, compliance reviews are not routinely done.ⁿ¹¹ *Commentary by Dale Brodsky.*

■ PRACTICE TIP:

Complainants should be aware that an OFCCP complaint, unless referred to the EEOC, does not constitute exhaustion of remedies required for a Title VII action. To preserve Title VII remedies, complainants should consider filing complaints with both the OFCCP and the EEOC. Under a work-sharing agreement, the EEOC may request information obtained by the OFCCP in its compliance and investigative work. *Commentary by Bill Lann Lee.*

[2] Section 503 Complaints

An applicant or employee who claims that a covered government contractor or subcontractor has violated Section 503 of the Rehabilitation Act,ⁿ¹² may file a written complaint either personally or by an authorized representative alleging a violation of the act or the regulations.ⁿ¹³ The complaint must be filed with the OFCCP within 180 days after the alleged violation unless the time is extended by the Director on a showing of good cause.ⁿ¹⁴ In addition to standard identifying and descriptive information, the complaint must include a signed statement that the complainant is disabled, has a history of a disability or impairment, or was regarded by the contractor as having an impairment.ⁿ¹⁵

If the contractor has an internal review procedure, the OFCCP first refers the matter for internal processing and possible resolution.ⁿ¹⁶ If the complaint has not been resolved within 60 days of referral, the OFCCP proceeds with its own investigation.ⁿ¹⁷ The OFCCP must conduct a prompt investigation of the matter and prepare a case record, including (1) the names and addresses of each person interviewed, (2) summaries of their statements, (3) copies or summaries of pertinent documents, (4) a narrative summary of the evidence disclosed in the investigation as it relates to each charge, and (5) recommended findings and resolutions.ⁿ¹⁸

If the investigation indicates noncompliance by the contractor, efforts are made to resolve the matter through means of conciliation and persuasion, followed by a letter of commitment or conciliation agreement by the contractor to take the necessary corrective action.ⁿ¹⁹ If a violation is found and the OFCCP is unable to informally resolve the matter by obtaining a written letter of commitment or conciliation agreement to take corrective action,ⁿ²⁰ the OFCCP must afford the contractor an opportunity for a hearing conducted pursuant to the OFCCP's regulations governing Executive Order 11246 administrative proceedings.ⁿ²¹ For a discussion of enforcement proceedings under Executive Order 11246, see § 44.45.

The OFCCP must develop procedures to ensure that administrative complaints filed under Section 503 and the Americans with Disabilities Act of 1990 (ADA)^{n21.1} are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under Section 503 and the ADA.^{n21.2}

[3] VEVRAA Complaints

Complaints under the VEVRAAⁿ²² must first be filed with the Veteran's Employment Service of the Department of Labor through the Local Veteran's Employment Representative (LVER) within 180 days of the alleged violation unless the time for filing is extended by the Director of the OFCCP for good cause shown.ⁿ²³ In addition to standard identifying and descriptive information, the complaint must include the veteran's form DD-214 and, when applicable, VAL-5 or similar VA certification indicating the percentage of disability, updated within one year prior to the filing date of the complaint.ⁿ²⁴ A plaintiff who fails to file a complaint with the appropriate agency may be barred from later bringing a civil action under VEVRAA for failure to exhaust administrative remedies.ⁿ²⁵ The LVER promptly refers

the complaint to the OFCCP for investigation.ⁿ²⁶

As in Section 503 cases,ⁿ²⁷ if a contractor has an internal review procedure, the complaint is first referred to the contractor for resolution, and if no resolution satisfactory to the complainant is made, the OFCCP proceeds with investigation, hearings, and enforcement as necessary.ⁿ²⁸ Investigation and hearing procedures governing VEVRAA complaints are identical to those that are applicable to Section 503 complaints.ⁿ²⁹ On finding a violation under VEVRAA, the OFCCP must afford the contractor an opportunity for a formal hearing in accordance with the hearing procedures for Executive Order 11246 hearings.ⁿ³⁰

Legal Topics:

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

Labor & Employment Law Affirmative Action General Overview Labor & Employment Law Affirmative Action Enforcement Labor & Employment Law U.S. Equal Employment Opportunity Commission General Overview

FOOTNOTES:

(n1)Footnote 1. *41 C.F.R. § 60-1.21*.

(n2)Footnote 2. *41 C.F.R. § 60-1.23(a), (b)*.

(n3)Footnote 3. *See 46 Fed. Reg. 7435 (Jan. 23, 1981)*.

(n4)Footnote 4. *See 41 C.F.R. § 60-1.24(a)*. For discussion of administrative processing of Title VII complaints by EEOC, *see* ch. 42.

(n5)Footnote 5. *46 Fed. Reg. 7435 (Jan. 23, 1981)*.

(n6)Footnote 6. *41 C.F.R. § 60-1.24(b)*.

(n7)Footnote 7. *41 C.F.R. § 60-1.24(b)*.

(n8)Footnote 8. *41 C.F.R. § 60-1.24(d)(1)*.

(n9)Footnote 9. *41 C.F.R. § 60-1.24(d)(2), (3)*.

(n10)Footnote 10. *41 C.F.R. § 60-1.24(b)(3); see 41 C.F.R. § 60-1.26* (enforcement proceedings).

(n11)Footnote 11. For discussion of complaint procedures under Section 503 and VEVRAA, *see* [2] and [3], *below*, respectively.

(n12)Footnote 12. *See 29 U.S.C. § 793*.

(n13)Footnote 13. *41 C.F.R. § 60-741.26(a)*.

(n14)Footnote 14. *41 C.F.R. § 60-741.26(a)*.

(n15)Footnote 15. *See 41 C.F.R. § 60-741.26(c)*.

(n16)Footnote 16. *41 C.F.R. § 60-741.26(b)*.

(n17)Footnote 17. *41 C.F.R. § 60-741.26(b)*.

(n18)Footnote 18. *41 C.F.R. § 60-741.26(e); CWA v. Donovan* (S.D.N.Y. 1985) 37 Fair Empl. Prac. Cases (BNA) 1362, 1364-1365.

(n19)Footnote 19. *See* 41 C.F.R. § 60-741.26(g)(2).

(n20)Footnote 20. *See* 41 C.F.R. §§ 60-741.26(g)(2), 60-741.28(a).

(n21)Footnote 21. 41 C.F.R. §§ 60-741.26(g)(3), 60-741.29; 41 C.F.R. pt. 60-30.

(n22)Footnote 21.1. 42 U.S.C. § 12101 *et seq.* For discussion of ADA complaint procedures, *see* ch. 42, pt. C.

(n23)Footnote 21.2. 29 U.S.C. § 793(e).

(n24)Footnote 22. *See* 38 U.S.C. § 4212.

(n25)Footnote 23. 41 C.F.R. § 60-250.26(a).

(n26)Footnote 24. 41 C.F.R. § 60-250.26(c).

(n27)Footnote 25. *Marin v. New York State Dep't of Labor (S.D.N.Y. 1981) 512 F. Supp. 353, 355* .

(n28)Footnote 26. *See* 41 C.F.R. § 60-250.26(a).

(n29)Footnote 27. *See* discussion in [2], *above*.

(n30)Footnote 28. *See* 41 C.F.R. § 60-250.26(b).

(n31)Footnote 29. *Compare* 41 C.F.R. § 60-250.26(e) (VEVRAA investigations) *with* 41 C.F.R. § 60-741.26(e) (Section 503 investigations); *compare* 41 C.F.R. § 60-250.29 (VEVRAA hearing procedures) *with* 41 C.F.R. § 60-741.29 (Section 503 hearing procedures). For discussion of Section 503 investigations, *see* [2], *above*. For discussion of hearing procedures, *see* § 44.45[3].

(n32)Footnote 30. 41 C.F.R. §§ 60-250.26(g)(3), 60-250.29(b); *see* 41 C.F.R. pt. 60-30 (Exec. Order No. 11246 hearing procedures).



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action
Part C. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.45

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.45 Enforcement Procedures

[1] When Enforcement May Be Commenced

Violations of Executive Order 11246 may result in the institution of administrative or judicial enforcement proceedings.ⁿ¹ Violations may be found on the basis of the following:ⁿ²

1. Results of a complaint investigation;
2. Analysis of an affirmative action program;
3. Results of an on-site compliance review;
4. A contractor's refusal to submit an affirmative action program;
5. A contractor's refusal to allow an on-site visit of its facility;
6. A contractor's refusal to supply records or other required information; or
7. Any substantial or material violation or threat of violation of the applicable contractual provisions of the order or the regulations implementing the order.

[2] Order to Show Cause

[a] When Order to Show Cause Is Required

Whenever the OFCCP has reasonable cause to believe that a covered construction or nonconstruction contractor or subcontractor has violated the equal opportunity clause contained in its contract, the Executive Order, or regulations issued pursuant to the order, the agency may issue a notice requiring the contractor to show cause within 30 days why

enforcement proceedings should not be initiated.ⁿ³

If the contractor violates a letter of commitment and the OFCCP contemplates enforcement action, it must also issue a show cause notice specifying what enforcement is contemplated. The contractor is given 30 days to show why administrative enforcement should not be commenced, and if conciliation continues to fail, formal proceedings are brought pursuant to procedures for conducting hearings.ⁿ⁴

[b] When Order to Show Cause Is Not Required

When a conciliation agreement has been violated, the OFCCP sends the contractor a notice setting forth the alleged violations.ⁿ⁵ The contractor must respond to the notice within 15 days from receipt.ⁿ⁶ During the 15-day period the contractor may demonstrate that it has not violated its commitments,^{n6.1} but if the contractor is unable to demonstrate this or if irreparable injury will result, the OFCCP may initiate enforcement proceedings without issuing an order to show cause.ⁿ⁷ In any proceeding involving an alleged violation of a conciliation agreement, OFCCP may seek enforcement of the agreement itself, and is not required to present proof of the underlying violations resolved by the agreement.^{n7.1}

If a contractor refuses to submit an affirmative action plan to the OFCCP, refuses to supply records or other requested information, or refuses to allow the OFCCP access to its premises to conduct an on-site review, and if conciliation efforts are unsuccessful, the OFCCP may immediately initiate administrative enforcement proceedings to enjoin the violations, seek appropriate relief, and impose appropriate sanctions without issuing an order to show cause.ⁿ⁸

[3] Administrative Hearings

Administrative enforcement hearings are held if contract compliance violations are not corrected.ⁿ⁹ They are conducted under the control and supervision of the Solicitor of Labor in accordance with the OFCCP's rules of practice, contained in Title 41 Code of Federal Regulations Part 60-30.ⁿ¹⁰ The regulations detail prehearing procedures, including discovery, hearing procedures, posthearing procedures, and expedited hearing procedures.ⁿ¹¹ The OFCCP refers cases for administrative enforcement to the Solicitor of Labor, Associate Solicitor for Labor Relations, Civil Rights Regional Solicitors, and Regional Attorney.ⁿ¹² The OFCCP is designated as the plaintiff in the proceeding.ⁿ¹³ An administrative law judge of the Department of Labor presides over the proceeding.ⁿ¹⁴

The rules of practice governing proceedings under Section 503 of the Rehabilitation Act of 1973ⁿ¹⁵ and VEVRAAⁿ¹⁶ are identical to those set forth in Title 41, Code of Federal Regulations Part 60-30. The ALJ's recommended findings, conclusions, and decision are certified to the Administrative Review Board, United States Department of Labor, which issues an order enjoining the violations and requiring an appropriate remedy.ⁿ¹⁷ All exceptions and responses to the decision must also be filed with the Administrative Review Board.ⁿ¹⁸

[4] Judicial Enforcement

Whenever the Director of the OFCCP has reason to believe that a contractor has substantially or materially violated or threatens to violate contractual provisions relating to Executive Order 11246, he or she has the discretion to refer the matter to the Department of Justice to enforce the contract in an appropriate federal district court, to seek injunctive relief (including relief against noncontractors, such as labor unions, who seek to interfere with the implementation of the order and regulations), and to seek additional relief, including back pay.ⁿ¹⁹ In practice, this provision has been rarely used.ⁿ²⁰ The Attorney General is also authorized to initiate lawsuits in federal district court against contractors, subject to the approval of the Director of the OFCCP, and to seek the same type of remedies discussed above.ⁿ²¹

Regulations governing Section 503 and VEVRAA proceedings also permit the Director of the OFCCP to seek appropriate judicial action to enforce the contractual provisions pertaining to the two statutes.ⁿ²²

[5] Remedies**[a] Sanctions and Penalties Generally**

Executive Order 11246 sets forth a wide panoply of sanctions and penalties that the Secretary of Labor may adopt or issue for violation of the order, including the following:ⁿ²³

1. Publishing the names of noncomplying contractors or unions;
2. Recommending to the Department of Justice that it bring a civil action to enforce the provisions of the Order;
3. Recommending to the EEOC or the Department of Justice that proceedings be instituted under Title VII;
4. Recommending to the Department of Justice that criminal proceedings be brought against a contractor who furnishes false information to any contracting agency or to the Department of Labor;
5. Directing the contracting agency to cancel, terminate, or suspend any contract for failure of the contractor or subcontractor to comply with the equal opportunity provisions of the contract; and
6. Debarring the contractor or subcontractor from any future contracts until the contractor can show the establishment of employment policies in compliance with the order.

[b] Contract Termination, Cancellation, Suspension, and Debarment

Contract termination, suspension, cancellation, and debarment are specifically authorized as sanctions in the OFCCP's regulations.ⁿ²⁴ These sanctions, as well as the withholding of progress payments, are also designated remedies for Section 503 and VEVRAA violations.ⁿ²⁵ An order for cancellation, termination, suspension, debarment, or withholding of progress payments cannot be issued without first affording the contractor or subcontractor an opportunity for a hearing.ⁿ²⁶

The OFCCP is required to distribute periodically to all executive departments and agencies within the federal government a list of all contractors or subcontractors who have been declared ineligible for future contracts.ⁿ²⁷ Any contractor or subcontractor who is debarred from future contracts may seek reinstatement by directing a letter to the Director of the OFCCP. The contractor or subcontractor is required to show that it has established and will carry out policies and practices in compliance with the equal opportunity clause.ⁿ²⁸

■ CONSULTANT'S COMMENT:

The OFCCP is taking a close look at the scope of its remedial powers and is considering amending its procedural regulations under Executive Order 11246 to increase its enforcement options. Many employers assume that the severest OFCCP sanctions are contract suspension, contract cancellation, and contract debarment. Many employers also assume that none of these remedies is available without either an opportunity to conciliate or a hearing. Although this is true under the current regulations, Executive Order 11246 can be construed to leave a door open for regulations that would allow contract suspensions without conciliation or a hearing.

Executive Order 11246 states that no employer may be debarred from government contracts without a hearing.ⁿ²⁹ The Executive Order also states that the OFCCP may not cancel or terminate a contract, in whole or in part, without first undertaking conciliation efforts to achieve compliance.^{n29.1} The Order,

therefore, is silent on the availability of hearing or conciliation in advance of contract suspensions (for example, for one month or one year). Current OFCCP regulations, however, call for both conciliation and a hearing prior to the imposition of any sanction, including contract suspensions.^{n29.2}

In short, while the OFCCP provides pre-suspension opportunities to resolve differences with the agency, the Executive Order itself is less clear. Without attempting to analyze the significant due process issues that would apply to any such shift in enforcement policy, the cautionary note is simply that "fixed term" suspensions without conciliation or a hearing are under consideration. Employers should be aware of this issue and make sure that their OFCCP compliance personnel are adhering to agency policy guidelines.

Commentary by Kirby Wilcox.

[c] Back Pay

Back pay is not specifically mentioned as a remedy in the Executive Order but is set forth as a remedy in the OFCCP regulations,ⁿ³⁰ and for that reason, back pay as a remedy has been the subject of controversy.ⁿ³¹ However, back pay has been upheld as a lawful form of relief under Executive Order 11246 by at least some courts,ⁿ³² and has been widely used by the OFCCP as a means for remedying discrimination.ⁿ³³

[d] Injunctive Relief

Contract violations may also be enjoined in administrative and judicial enforcement proceedings under Executive Order 11246 and its implementing regulations.ⁿ³⁴ Circumstances that may warrant injunctive relief include the contractor's refusal to submit an affirmative action program, refusal to supply records or other requested information, or the refusal to allow the compliance agency access to its premises for an on-site review.ⁿ³⁵ If the matter is referred to the Department of Justice to bring a civil action in federal district court for enforcement, the Justice Department may seek injunctive relief.ⁿ³⁶

[6] Judicial Review of OFCCP Remedies

Determinations by the OFCCP are subject to judicial review in accordance with the provisions of Title 5, *United States Code, Sections 701-706*.ⁿ³⁷ However, courts have denied contractors judicial review of preliminary matters for failure to exhaust administrative remedies.ⁿ³⁸

With respect to the applicable standard of review of OFCCP determinations, one court has held that the question is "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment... The court is not empowered to substitute its judgment for that of the agency."ⁿ³⁹ In *Partridge v. Reich*,^{n39.1} the court discussed the applicable standard of review before finding that there was no basis for coverage under VEVRAA.^{n39.2} An agency decision, the OFCCP under VEVRAA, may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", or if the action fails to meet statutory, procedural, or constitutional requirements. An agency's interpretation of law is a question of law that is reviewed *de novo*: if Congress has spoken on the issue, courts must enforce that direction; if the statute is silent or ambiguous, courts defer to the agency's statutory construction if that construction is permissible. An agency's interpretation of its own regulations is controlling unless "plainly erroneous or inconsistent" with the regulation.^{n39.3}

[7] Private Right of Action

Most courts have held that there is no private right of action under Executive Order 11246ⁿ⁴⁰ or under Section 503 of the Rehabilitation Act.ⁿ⁴¹

However, some cases have held that parties expressly identified in a conciliation agreement between the OFCCP and a contractor as persons on whom certain benefits are to be conferred may bring an action as third-party beneficiaries to

enforce the conciliation agreement.ⁿ⁴²

Legal Topics:

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative ActionEnforcementLabor & Employment LawU.S. Equal Employment Opportunity CommissionEnforcementGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *41 C.F.R. § 60-1.26(a)*.

(n2)Footnote 2. *41 C.F.R. § 60-1.26(a)(1)*.

(n3)Footnote 3. *41 C.F.R. § 60-1.28*.

(n4)Footnote 4. *41 C.F.R. §§ 60-2.2(c), 60-4.8; see also 41 C.F.R. §§ 60-30.1-60-30.37* (rules of practice for enforcement proceedings).

(n5)Footnote 5. *41 C.F.R. § 60-1.34(a)(1)*.

(n6)Footnote 6. *41 C.F.R. § 60-1.34(a)(1)*.

(n7)Footnote 6.1. *41 C.F.R. § 60-1.34(b)*.

(n8)Footnote 7. *41 C.F.R. § 60-1.34(a)(3)*.

(n9)Footnote 7.1. *41 C.F.R. § 60-1.34(a)(4)*.

(n10)Footnote 8. *41 C.F.R. § 60-1.26(a)(2)*.

(n11)Footnote 9. *See 41 C.F.R. § 60-1.26(a)(2); OFCCP Compliance Manual § 8D02*.

(n12)Footnote 10. *41 C.F.R. § 60-1.26(c)*.

(n13)Footnote 11. *See 41 C.F.R. §§ 60-30.1-60-30.37*.

(n14)Footnote 12. *See 41 C.F.R. § 60-30.5(a)*.

(n15)Footnote 13. *See 41 C.F.R. § 60-30.5(a)*.

(n16)Footnote 14. *41 C.F.R. § 60-30.14*.

(n17)Footnote 15. *29 U.S.C. § 793*.

(n18)Footnote 16. *38 U.S.C. § 4212*.

(n19)Footnote 17. *See 41 C.F.R. § 1.26; see also 41 C.F.R. §§ 60-30.27* (Executive Order No. 11246), 60-259(b) (VEVRAA), and 60-741-29(b) (Section 503).

(n20)Footnote 18. *41 C.F.R. § 1.26; see 41 C.F.R. §§ 60-30.28-60-30.30* (Executive Order No. 11246), 60-259(b) (VEVRAA), and 60-741-29(b) (Section 503).

(n21)Footnote 19. *41 C.F.R. §§ 60-1.26(a)(2), (e)*.

(n22)Footnote 20. U.S. Commission on Civil Rights, Federal Enforcement of Equal Employment Requirements (Clearinghouse Pub. 93, July 1987), p. 89.

(N23)Footnote 21. *41 C.F.R. § 60-1.26(f)*.

(n24)Footnote 22. *See 41 C.F.R. §§ 60-250.28(b) (VEVRAA), 60-741.28(b) (Section 503)*.

(n25)Footnote 23. *See Exec. Order No. 11246, § 209*.

(n26)Footnote 24. *41 C.F.R. §§ 60-1.26(a)(2), 60-30.30*.

(n27)Footnote 25. *41 C.F.R. §§ 60-30.30, 60-741.28(c), (d), (e) (Section 503), 60-250.28(c), (d), (e) (VEVRAA)*.

(n28)Footnote 26. *41 C.F.R. §§ 60-1.26(a)(2) (Exec. Order No. 11246), 60-741.29(a)(2), (3) (Section 503), 60-250.29(a)(2), (3) (VEVRAA)*. For discussion of hearings, *see [3], above*.

(n29)Footnote 27. *41 C.F.R. §§ 60-1.30 (Exec. Order No. 11246), 60-250.31 (VEVRAA), 60-741.31 (Section 503)*.

(N30)Footnote 28. *41 C.F.R. §§ 60-1.31 (Exec. Order No. 11246), 60-250.50 (VEVRAA), 60-741.50 (Section 503)*.

(n31)Footnote 29. *Exec. Order No. 11246, § 208(b)*.

(n32)Footnote 29.1. *Exec. Order No. 11246, § 209(6)(b)*.

(n33)Footnote 29.2. *See 29 C.F.R. §§ 60-1.20(b), 60-1.24(c)(2), 60-1.26(c), (e), 60-30 et seq.*

(n34)Footnote 30. *See 41 C.F.R. §§ 60-1.26(a)(2) (administrative proceedings), 60-1.26(e) (judicial proceedings brought by Department of Justice) 60-1.33 (conciliation agreements)*.

(n35)Footnote 31. *See, e.g., United States v. Commercial Lovelace Motor Freight, Inc. (S.D. Ohio 1983) 31 Fair Empl. Prac. Cases (BNA) 499, 502 (referring to the controversy, but unable to conclude that back pay is unavailable as a matter of law)*.

(n36)Footnote 32. *See United States v. Whitney National Bank (E.D. La. 1987) 45 Fair Empl. Prac. Cases (BNA) 983, 984*.

(n37)Footnote 33. *See U.S. Commission on Civil Rights, Federal Enforcement of Equal Employment Requirements (Clearinghouse Pub. 93, July 1987), pp. 89-90 (setting forth statistics for back pay awards)*.

(n38)Footnote 34. *See Exec. Order No. 11246 § 209(a)(2); 41 C.F.R. § 60-1.26(a)(2)*.

(n39)Footnote 35. *41 C.F.R. § 60-1.26(a)(2)*.

(n40)Footnote 36. *41 C.F.R. § 60-1.26(a)(2), (e)*.

(n41)Footnote 37. *See Legal Aid Soc. of Alameda Cty. v. Brennan (9th Cir. 1979) 608 F.2d 1319, 1331, cert. denied sub nom., Chamber of Commerce of the United States v. Legal Aid Society of Alameda County, 447 U.S. 921 (1980)*. Under 5 U.S.C. §§ 701-706, final administrative actions are subject to judicial review unless the statute itself precludes judicial review or unless an administrative action is committed to agency discretion by law. 5 U.S.C. § 704; *see City of Santa Clara Cal. v. Andrus (9th Cir. 1978) 572 F.2d 660, 666, cert. denied sub nom., Pacific Gas & Electric Co. v. City of Santa Clara, 439 U.S. 859 (1978) (test for determining if action is committed to agency discretion is whether there is no law to be applied in case at hand). Preliminary, procedural, and intermediate agency*

actions are also reviewable in conjunction with the review of the final action. 5 U.S.C. § 704.

(n42)Footnote 38. *See, e.g., St. Regis Paper Co. v. Marshall* (10th Cir. 1979) 591 F.2d 612, 613-615 , *cert. denied*, 444 U.S. 828 (1979) .

(n43)Footnote 39. *Moon v. Secretary, United States Dep't of Labor* (11th Cir. 1984) 747 F.2d 599, 604 , *cert. denied*, 471 U.S. 1055 (1985) , quoting *Citizens to Preserve Overton Park v. Volpe* (1976) 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 , *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977) .

(n44)Footnote 39.1. *Partridge v. Reich* (9th Cir. 1998) 141 F.3d 920 .

(n45)Footnote 39.2. *Partridge v. Reich* (9th Cir. 1998) 141 F.3d 920, 923-925 ; *see* § 40.24.

(n46)Footnote 39.3. *Partridge v. Reich* (9th Cir. 1998) 141 F.3d 920, 923 .

(N47)Footnote 40. *See, e.g., Eatmon v. Bristol Steel & Iron Works, Inc.* (11th Cir. 1985) 769 F.2d 1503, 1515 ; *Cohen v. Illinois Institute of Technology* (7th Cir. 1975) 524 F.2d 818, 822 n.4 , *cert. denied*, 425 U.S. 943 (1976) ; *Weise v. Syracuse University* (2d Cir. 1975) 522 F.2d 397, 411 n.23 ; *McPartland v. American Broadcasting Companies, Inc.* (S.D.N.Y. 1985) 623 F. Supp. 1334, 1339-1340 ; *Traylor v. Safeway Stores, Inc.* (N.D. Cal. 1975) 402 F. Supp. 871, 875-876 .

(n48)Footnote 41. *Fisher v. City of Tucson* (9th Cir. 1981) 663 F.2d 861, 865 , *cert. denied*, 459 U.S. 881 (1982) ; *Davis v. United Air Lines, Inc.* (2d Cir. 1981) 662 F.2d 120, 121 , *cert. denied*, 456 U.S. 965 (1982) ; *Simpson v. Reynolds Metals Co., Inc.* (7th Cir. 1980) 629 F.2d 1226, 1237 ; *Rogers v. Frito-Lay, Inc.* (5th Cir. 1980) 611 F.2d 1074, 1084-1085 , *cert. denied*, 449 U.S. 889 (1980) ; *Hoopes v. Equifax, Inc.* (6th Cir. 1979) 611 F.2d 134, 135 ; *but see Davis v. Modine Mfg. Co.* (D. Kan. 1981) 526 F. Supp. 943, 954 (upholding private right of action under Section 503).

(n49)Footnote 42. *See, e.g., Eatmon v. Bristol Steel & Iron Works, Inc.* (11th Cir. 1985) 769 F.2d 1503, 1514-1516 ; *cf. Terry v. Northrup Worldwide Aircraft Services* (11th Cir. 1986) 786 F.2d 1558, 1560-1561 .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action
Part C. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

3-44 California Employment Law § 44.46

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.46 Public Disclosure of Information by OFCCP

The OFCCP's regulations governing the disclosure of information provided to the OFCCP by contractors and subcontractors in the course of their compliance with Executive Order 11246ⁿ¹ implement the Freedom of Information Act (FOIA),ⁿ² and supplement the policy and regulationsⁿ³ issued by the Department of Labor under the FOIA.ⁿ⁴ When any person makes a request for records that were obtained or generated pursuant to Executive Order 11246, the records must be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in the FOIA at Title 5, *United States Code Section 552(b)*, if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the OFCCP's functions.ⁿ⁵ However, disclosure is not required if disclosure of the records is prohibited by law.ⁿ⁶ The following documents are examples of documents that must be disclosed, if in the custody of the OFCCP:ⁿ⁷

1. Affirmative action plans, except in the limited circumstances discussed below;
2. Imposed plans or hometown plans, pending or approved;ⁿ⁸
3. The text of final conciliation agreements;
4. Validation studies of tests or other preemployment selection methods; and
5. Lists of dates and times of scheduled compliance reviews.

In addition, the OFCCP must disclose the Standard Form 100 (EEO-1) submitted by a contractor to the OFCCP or a Joint Reporting Committee servicing both the OFCCP and the EEOC, "pending further instructions from the Director."ⁿ⁹

Certain documents, or parts thereof, are exempt from mandatory disclosure, and the OFCCP will withhold these items if it determines that disclosure does not further the public interest and might impede the discharge of the OFCCP's

functions.ⁿ¹⁰ These items include the following:

1. Those portions of affirmative action plans, such as goals and timetables, that constitute confidential commercial or financial information because they indicate that a contractor plans major shifts or changes in its personnel requirements, if this information has not yet been made public, but only after the contractor verifies and explains satisfactorily that the information should be withheld;ⁿ¹¹
2. Portions of affirmative action plans that constitute information on staffing patterns and pay scales, but only to the extent that disclosure would injure the business or financial position of the contractor, would constitute a release of confidential financial information of an employee, or would be an unwarranted invasion of an employee's privacy;ⁿ¹²
3. The names of individual complainants;ⁿ¹³
4. Assignments to particular contractors of named OFCCP compliance officers, if disclosure would result in harassment or affect the enforcement of the Executive Order;ⁿ¹⁴
5. Compliance investigation files and reports, to the extent that the information contained in them constitutes trade secrets and confidential commercial or financial information; inter- or intra-agency memoranda or letters that would not be available by law to a private party in litigation with the agency; personnel, medical, or similar files, disclosure of which would be an unwarranted invasion of privacy; data that would be exempt from mandatory disclosure pursuant to an "informant's privilege"; or information whose disclosure is prohibited by statute;ⁿ¹⁵
6. Copies of preemployment selection tests used by contractors;ⁿ¹⁶ and
7. Other records, consistent with the FOIA, on a case-by-case basis with the prior approval of the Director of the OFCCP.ⁿ¹⁷

Contractors' objections to the OFCCP's disclosure of information to third parties have resulted in a number of legal challenges. For example, in one case,ⁿ¹⁸ the District of Columbia Circuit Court of Appeals rejected a contractor's claims that the OFCCP abused its discretion and acted arbitrarily and capriciously when it disclosed copies of a contractor's affirmative action programs and EEO-1 reports to a women's rights organization. The contractor claimed that disclosure would result in a violation of the Trade Secrets Act.ⁿ¹⁹ The court held that the Trade Secrets Act is not an absolute bar to disclosure of information that would otherwise be disclosable under the FOIA.ⁿ²⁰ The court examined Exemption 4 of the FOIA, which excludes from mandatory disclosure trade secrets and privileged or confidential commercial or financial information.ⁿ²¹ The court held that the scope of the Trade Secrets Act is coextensive with the scope of Exemption 4 of the FOIA, and in the absence of a regulation authorizing disclosure, disclosure of information that falls under Exemption 4 is prohibited.ⁿ²² However, the court concluded that the OFCCP had properly considered and applied the factors required under the FOIA in making its decision that Exemption 4 was inapplicable to the facts before it.ⁿ²³ The court further held that the OFCCP is not required to afford an evidentiary hearing to a contractor prior to disclosing information to third parties.ⁿ²⁴ Moreover, the court held that government contractors are not entitled to a trial de novo in federal district court of an OFCCP decision to disclose information. If the OFCCP's fact-finding procedures are adequate, the district court is confined to a review of the OFCCP record.ⁿ²⁵ If the record is inadequate, the case should be remanded to the OFCCP for it to properly exercise its discretion in determining the disclosability of information.ⁿ²⁶

■ CONSULTANT'S COMMENT:

Employers sometimes seek to shield their affirmative action plans from plaintiffs in employment discrimination lawsuits on the basis of a "self-critical analysis" privilege. The *Donovan* decision,ⁿ²⁷

discussed above, appears to undercut such claims by making affirmative action plans generally available to the public. *Commentary by Bill Lann Lee.*

Legal Topics:

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* 41 C.F.R. §§ 60-40.1-60-40.8.

(n2)Footnote 2. 5 U.S.C. § 552.

(n3)Footnote 3. 29 C.F.R. pt. 70.

(n4)Footnote 4. 41 C.F.R. § 60-40.1.

(n5)Footnote 5. 41 C.F.R. § 60-40.2(a), (b).

(n6)Footnote 6. 41 C.F.R. § 60-40.2(a), (b).

(n7)Footnote 7. 41 C.F.R. § 60-40.2(b).

(n8)Footnote 8. These are applicable in reviews of construction contracts. *see* 41 C.F.R. §§ 60-4.4, 60-4.5. For discussion of hometown plans, *see* § 44.42[1][b].

(n9)Footnote 9. 41 C.F.R. § 60-40.4.

(n10)Footnote 10. *See* 41 C.F.R. § 60-40.3(a).

(n11)Footnote 11. 41 C.F.R. § 60-40.3(a)(1).

(n12)Footnote 12. 41 C.F.R. § 60-40.3(a)(2).

(n13)Footnote 13. 41 C.F.R. § 60-40.3(a)(3).

(n14)Footnote 14. 41 C.F.R. § 60-40.3(a)(4).

(n15)Footnote 15. 41 C.F.R. § 60-40.3(a)(5).

(n16)Footnote 16. 41 C.F.R. § 60-40.3(a)(6).

(n17)Footnote 17. 41 C.F.R. § 60-40.3(b).

(n18)Footnote 18. *CNA Financial Corp. v. Donovan* (D.C. Cir. 1987) 830 F.2d 1132, 1155, *cert. denied*, 485 U.S. 977 (1988).

(n19)Footnote 19. *See* 18 U.S.C. § 1905.

(n20)Footnote 20. *CNA Financial Corp. v. Donovan* (D.C. Cir. 1987) 830 F.2d 1132, 1141, *cert. denied*, 485 U.S. 977 (1988).

(n21)Footnote 21. 5 U.S.C. § 552(b)(4); *CNA Financial Corp. v. Donovan* (D.C. Cir. 1987) 830 F.2d 1132,

1151-1152 , *cert. denied*, 485 U.S. 977 (1988) . Confidential information under Exemption 4 of FOIA has been defined as that which is "likely to ... cause substantial harm to the competitive position of the person from whom the information was obtained." *CNA Financial Corp. v. Donovan* (D.C. Cir. 1987) 830 F.2d 1132, 1152 , *cert. denied*, 485 U.S. 977 (1988) , quoting *National Parks and Conservation Ass'n v. Morton* (D.C. Cir. 1974) 498 F.2d 765, 770 .

(n22)Footnote 22. *CNA Financial Corp. v. Donovan* (D.C. Cir. 1987) 830 F.2d 1132, 1151-1152 , *cert. denied*, 485 U.S. 977 (1988) .

(n23)Footnote 23. *CNA Financial Corp. v. Donovan* (D.C. Cir. 1987) 830 F.2d 1132, 1155 , *cert. denied*, 485 U.S. 977 (1988) .

(n24)Footnote 24. *CNA Financial Corp. v. Donovan* (D.C. Cir. 1987) 830 F.2d 1132, 1159 , *cert. denied*, 485 U.S. 977 (1988) .

(n25)Footnote 25. *CNA Financial Corp. v. Donovan* (D.C. Cir. 1987) 830 F.2d 1132, 1162 , *cert. denied*, 485 U.S. 977 (1988) ; *see also* *NOW, Washington, D.C. Chapter v. Social Sec. Admin.* (D.C. Cir. 1984) 736 F.2d 727, 740-741 .

(n26)Footnote 26. *NOW, Washington, D.C. Chapter v. Social Sec. Admin.* (D.C. Cir. 1984) 736 F.2d 727, 729 .

(n27)Footnote 27. *See CNA Financial Corp. v. Donovan* (D.C. Cir. 1987) 830 F.2d 1132 , *cert. denied*, 485 U.S. 977 (1988) .



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DIVISION IV EQUAL EMPLOYMENT OPPORTUNITY
CHAPTER 44 Affirmative Action
Part C. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

3-44 California Employment Law §§ 44.47 through 44.59

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

[Reserved]

§§ 44.47[Reserved]



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3-44 California Employment Law § 44.60

AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

§ 44.60 Legal Texts

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative
ActionComplianceLabor & Employment LawAffirmative ActionConsent DecreesLabor & Employment
LawAffirmative ActionCourt & Government Imposed PlansLabor & Employment LawAffirmative
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AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

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41 Cal. Jur. 3d, "Labor," §§ 4, 5, 86, 88, 91.

53 Cal. Jur. 3d, "Public Works," §§ 5-8.

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

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AUTHOR: By Dale L. Brodsky, J.D. and Judy B. Freeman, J.D.

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

Labor & Employment LawAffirmative ActionGeneral OverviewLabor & Employment LawAffirmative
ActionComplianceLabor & Employment LawAffirmative ActionConsent DecreesLabor & Employment
LawAffirmative ActionCourt & Government Imposed PlansLabor & Employment LawAffirmative
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Chapters 45 -- 49 RESERVED

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Chapters 45 -- 49 RESERVED



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DIVISION V EMPLOYEE PRIVACY RIGHTS

CHAPTER 50 Limitations on Employer Collection of Private Information About Employees

3-50 California Employment Law 50.syn

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

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§ 50.50 Legal Texts

§ 50.51 Encyclopedias

§ 50.52 Law Reviews and Legal Periodicals

By Kaye M. Reeves, J.D.,^{n*} Edward Baskauskas, J.D.^{n**}

FOOTNOTES:

(n1)Footnote *. Ms. Reeves is an attorney in San Francisco. Updates to this chapter are prepared by the Publisher's Editorial Staff.

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DIVISION V EMPLOYEE PRIVACY RIGHTS

CHAPTER 50 Limitations on Employer Collection of Private Information About Employees

3-50 California Employment Law Scope

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

Scope

By Kaye M. Reeves, J.D.,^{n*} Edward Baskauskas, J.D.^{n**} SCOPE

This chapter discusses constitutional, statutory, and common-law restrictions on the right of a private employer to collect confidential or private information about employees.

Restrictions on the employer's use and disclosure of private information concerning employees are discussed in Chapter 51.

FOOTNOTES:

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(n4)Footnote **. Edward Baskauskas is a member of the California Bar and an adjunct professor of law at Golden Gate University.



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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part A. OVERVIEW OF EMPLOYEES' PRIVACY PROTECTION

3-50 California Employment Law § 50.01

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.01 Overlapping Sources of Privacy Rights

The right of an employee to be free from unreasonable intrusions into his or her person, property, and private affairs is protected by a number of legal theories, some of which overlap. An employer's right or ability to obtain private information about his or her employee may be limited in any given case by one or more of these theories.

First, various California and federal statutes limit the employer's right to acquire information about employees, whether directly from the employee or indirectly through such third parties as credit reporting agencies. Some of these statutes limit the collection of certain specific types of information; others limit the use of certain means of acquiring information. These statutory provisions are discussed in Part B (§§ 50.10-50.19).

Second, the California Constitution imposes potentially broad limitations on invasion of an employee's privacy by his or her employer.ⁿ¹ In more limited instances, protection may also be afforded to private employees by provisions of the United States Constitution, specifically the prohibition against unreasonable searches and seizures.ⁿ² Potential constitutional protections are discussed in § 50.30.

Finally, employees may seek recovery for employers' interference with their privacy rights under several common law tort theories. Tort theories of recovery are discussed in § 50.31.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessPrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyInvasion of Privacy

FOOTNOTES:

(n1)Footnote 1. *See Cal. Const., art. I, § 1.*

(n2)Footnote 2. *See U.S. Const., amend. IV.*



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CHAPTER 50 Limitations on Employer Collection of Private Information About Employees

Part A. OVERVIEW OF EMPLOYEES' PRIVACY PROTECTION

3-50 California Employment Law §§ 50.02 through 50.09

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

[Reserved]

§§ 50.02[Reserved]



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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part B. STATUTORY AND ADMINISTRATIVE PROVISIONS

3-50 California Employment Law § 50.10

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.10 HIV Test Results

The California Health and Safety Code contains provisions designed to ensure the confidentiality of the results of tests used to detect the human immunodeficiency virus or "HIV," the virus that causes acquired immune deficiency syndrome (AIDS),ⁿ¹ and to penalize most disclosures of such results made without the written authorization of test subjects.ⁿ² These provisions are discussed in detail in Chapter 51. Among other things, the Health and Safety Code provides that before ordering a test that identifies infection with HIV, a medical care provider must inform the patient that the test is planned, provide information about the test, inform the patient that there are numerous treatment options available for a patient who tests positive for HIV and that a person who tests negative for HIV should continue to be routinely tested, and advise the patient that he or she has the right to decline the test. If a patient declines the test, the medical care provider must note that fact in the patient's medical file.^{n2.1} Further, except as provided in *Health & Safety Code Section 120990(a)*, no person may administer a test for HIV infection unless the person being tested or his or her parent, guardian, conservator, or other person specified in *Health & Safety Code § 121020*, signs a written statement documenting the person's informed consent to the test.^{n2.2} These requirements do not apply, however, when a person independently requests an HIV test from the provider.^{n2.3} Furthermore, except as otherwise provided by statute,ⁿ³ the results of such an HIV test may not be used to determine suitability for employment.ⁿ⁴

The Health and Safety Code also prohibits the use of either (1) confidential, personally identifying information relating to AIDS research or (2) personally identifying information contained in public health records, in the event such information is disclosed to the employer, to determine the subject's employability.ⁿ⁵

The statutory prohibition on use of the results of an HIV test for determining suitability for employmentⁿ⁶ in effect precludes employers from (1) testing applicants and employees for AIDS and HIV and (2) from making hiring and other employment decisions based on such tests.

Although the Health and Safety Code specifically provides for civil penalties and the recovery of actual damages resulting from unauthorized *disclosure* of test results,ⁿ⁷ it does not contain an express cause of action for wrongful use of the information in making hiring decisions.ⁿ⁸ It is arguable, however, that an employee terminated after an

employer's illegal demand for an HIV test may have a cause of action for wrongful discharge in violation of public policy.ⁿ⁹ For full discussion of liability for wrongful termination, *see* Chapter 60.

Legal Topics:

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

Constitutional Law Substantive Due Process Privacy General Overview Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Medical & Related Examinations Torts Intentional Torts Invasion of Privacy General Overview

FOOTNOTES:

(n1)Footnote 1. *See Health & Safety Code § 120775(a), (b)* (definitions of "AIDS" and "HIV" test).

(n2)Footnote 2. *See Health & Safety Code §§ 120980, 120990, 121115, 121025.*

(n3)Footnote 2.1. *Health & Safety Code § 120990(a)*. Nothing in Section 120990 precludes a medical examiner or other physician from ordering or performing a test to detect HIV on a cadaver when an autopsy is performed or body parts are donated pursuant to the Uniform Anatomical Gift Act [*Health & Safety Code § 7150 et seq.*]. *See Health & Safety Code § 120990(d)*.

(n4)Footnote 2.2. *Health & Safety Code § 120990(c)*. If the patient is incompetent to give consent, consent may be given under certain circumstances by the patient's parent, guardian, conservator, or other person legally authorized to make health care decisions for the patient. *See Health & Safety Code § 121020*. These requirements do not apply when blood is tested as part of a scientific investigation conducted either by a medical researcher operating under the approval of an institutional review board or by the department, in accordance with a protocol for unlinked testing, *i.e.*, blood samples obtained anonymously, or that have the name or identifying information of the individual who provided the sample removed in a manner that prevents the test results from ever being linked to a particular individual who participated in the research or study. *Health & Safety Code § 120990(e)*.

(n5)Footnote 2.3. *Health & Safety Code § 120990(b)*.

(n6)Footnote 3. *See Ins. Code § 799 et seq.*, regarding underwriting of AIDS risks.

(n7)Footnote 4. *Health & Safety Code § 120980(f)*.

(n8)Footnote 5. *Health & Safety Code §§ 121025(f)* (ban on use of confidential public health records pertaining to AIDS to determine employability of subject), 12115 (ban on use of confidential AIDS research information to determine employability of research subject).

(n9)Footnote 6. *See Health & Safety Code § 120980(f)*.

(n10)Footnote 7. *See Health & Safety Code § 120980(a)-(d)*.

(n11)Footnote 8. *See Health & Safety Code § 120980*.

(n12)Footnote 9. *See Health & Safety Code § 120980(h)* (nothing in statute limits or expands right of injured subject to recover damages under any other applicable law); *cf. Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 172-179, 164 Cal. Rptr. 839, 610 P.2d 1330* (recognizing tort cause of action for termination of employment in violation of public policy).



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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part B. STATUTORY AND ADMINISTRATIVE PROVISIONS

3-50 California Employment Law § 50.11

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.11 Arrest Records

[1] Statutory Coverage

Labor Code Section 432.7 prohibits employers, with certain exceptions, from asking applicants for employment to disclose information regarding arrests or detentions not resulting in conviction, or referrals to or participation in any pretrial or posttrial diversion program,ⁿ¹ and from taking such information, from whatever source acquired, into consideration in determining any condition of employment.ⁿ² As used in Section 432.7, "conviction" includes a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court.ⁿ³ The limitations imposed on employers under *Labor Code Section 432.7* also apply with respect to applicants' convictions for certain marijuana-related offenses after two years from the date of such convictions.ⁿ⁴ In addition to violating *Labor Code Section 432.7*, consideration of information relating to an applicant's arrests not leading to conviction may violate antidiscrimination provisions of stateⁿ⁵ and federalⁿ⁶ law. That is, a practice of excluding applicants on the basis of arrest records, even if applied in a facially neutral manner, may unlawfully discriminate against minorities who are arrested with a frequency disproportionate to their representation in the population.ⁿ⁷ For discussion, *see* Chapter 41.

In the federal Combat Methamphetamine Epidemic Act of 2005 (CMA), which, effective September 30, 2006, permits retail pharmacies to ask applicants whether they had ever been convicted of any crime involving controlled substances notwithstanding state law,ⁿ⁸ Congress replaced California's prohibition against asking about a certain class of prior convictions with an express right to ask about those convictions, thereby effecting a partial repeal of *Lab. Code* § 432.7(c) without any express saving clause. This partial repeal of *Lab. Code* § 432.7 abated the pending state lawsuit of an applicant for employment at a retail store containing a pharmacy for violation of *Lab. Code* § 432.7 based on the store's application for employment containing a question as to whether the applicant had been convicted during previous last seven years of a felony, a crime concerning use or possession of illegal drugs, or any misdemeanor, which resulted in imprisonment. No vested or contractual rights had arisen under *Lab. Code* § 432.7. The delayed effective date of certain provisions was not an express saving clause, and the federal general saving statuten⁹ did not preclude application of abatement principles in this case.ⁿ¹⁰

[2] Substantive Rights and Responsibilities

No employer, whether a public agency or a private individual or corporation, is permitted to ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention that did not result in conviction.ⁿ¹⁰ Nor is any employer permitted to question an applicant about his or her referral to and participation in any pretrial or posttrial diversion program.ⁿ¹¹ Employers are prohibited from seeking from any source and from utilizing as a factor in determining any condition of employment (including hiring, promotion, termination, or any apprenticeship or training program leading to employment) information about which applicants may not be asked directly.ⁿ¹² An employer is permitted to ask an applicant or employee about an arrest for which the applicant or employee is out on bail or on his or her own recognizance pending trial.ⁿ¹³ However, the employer may not utilize such an arrest as a factor in making an employment decision.ⁿ¹⁴

In general, peace officers and employees of law enforcement agencies with access to criminal offender record information maintained by a local law enforcement criminal justice agency are prohibited by *Labor Code section 432.7* from knowingly disclosing, with intent to affect a person's employment, any information relating to an arrest or detention or proceeding that did not result in a conviction, including information concerning a referral to and participation in a pretrial or posttrial diversion program, to anyone not authorized by law to receive the information.ⁿ¹⁵ Other persons authorized by law to receive criminal offender record information are also prohibited from knowingly disclosing such information to anyone not authorized by law to receive the information.ⁿ¹⁶ Employers are not among the statutorily defined class of persons who are ordinarily authorized by law to receive such information.ⁿ¹⁷ No person who knows he or she is not authorized by law to receive or possess criminal justice records information pertaining to an arrest or other proceeding that did not result in a conviction (including information regarding a referral to and participation in a pretrial or posttrial diversion program) may receive or possess such information.ⁿ¹⁸ Knowing receipt or possession by an employer of prohibited information concerning an applicant constitutes a violation of section 432.7, for which the applicant may bring an action for damages.ⁿ¹⁹

The California Department of Justice is responsible for the security and dissemination of summary criminal offender information. One court of appeal has held that the right to privacy under *California Constitution, Article I, Section 1*ⁿ²⁰ in conjunction with *Labor Code section 432.7*, imposes certain limitations on the department's dissemination of criminal history summaries to employers. Specifically the court held that the state constitutional right to privacy prohibits the department from (1) disseminating nonconviction information for employment, licensing, and certification purposes, to employers and licensing agencies who are not exempt from *Labor Code section 432.7(a)*;ⁿ²¹ (2) disseminating to such "nonexempt" employers and licensing agencies information regarding arrests not followed by dispositions without confirming that charges are still pending; (3) disseminating to employers and licensing agencies pre-1962 juvenile arrests or detentions without indicating disposition; and (4) "masking" information in a manner so as to indicate to the inquiring agency that material has been omitted.ⁿ²²

The *Central Valley* court also held that the right to privacy prohibits the Department of Justice from disseminating the following information, for employment purposes, to employers who are exempt from *Labor Code section 432.7*:ⁿ²³ (1) information concerning an arrest for which diversion has been ordered without attempting to determine whether diversion has been successfully completed; (2) information concerning an arrest or detention followed by a dismissal or release without attempting to determine whether the individual was exonerated; and (3) information concerning an arrest without a disposition, without attempting to determine whether diversion was successfully completed or the individual was exonerated.ⁿ²⁴

[3] Employers Covered and Exempted

Labor Code section 432.7 applies to all employers except those specifically exempted by the statute. One exemption permits an employer at a health facility,ⁿ²⁵ such as a hospital or clinic, to ask persons applying for positions with regular access to patients to disclose arrests relating to specified types of sex offenses.ⁿ²⁶ An employer at a health facility may also ask an applicant for a position with access to drugs and medication to disclose arrests relating to

certain controlled substances.n27

[4] Employees Covered and Exempted

Labor Code section 432.7 exempts from its coverage persons employed or seeking employment as peace officers or in positions in the Department of Justice or other criminal justice agencies,n28 but imposes certain limitations on the use of arrest records by government agencies in making employment decisions concerning peace officers.n29

[5] Method of Enforcement

[a] Misdemeanor

An intentional violation of *Labor Code section 432.7* is a misdemeanor punishable by a fine of up to \$500.n30 If an employer knowingly and willfully asks an applicant to disclose arrest or other information covered by section 432.7, the applicant may file a complaint with local law enforcement authorities or with the Labor Commissioner.n31

[b] Civil Action

An applicant or employee who reasonably believes that an employer has obtained or used arrest or other information covered by *Labor Code section 432.7* in violation of that statute may bring a civil action for damages against the employer.n32 The applicant or employee is entitled to recover the greater of actual damages or \$200 for a violation of section 432.7, plus costs and reasonable attorney's fees.n33 For an intentional violation of the statute, the applicant or employee may recover treble actual damages or \$500, whichever is greater, plus court costs and reasonable attorney's fees.n34

An applicant cannot bring an action for violation of *Labor Code Section 432.8*, which precludes employers from asking for information regarding applicants' convictions for certain marijuana-related offenses after two years from the date of the convictions, even if the application is ambiguous regarding those offenses, if the applicant does not believe that he or she is being asked to disclose marijuana-related convictions that were more than two years old.n35 Further, those applicants who have no marijuana convictions to disclose cannot bring a class action on behalf of applicants who do, because they are not similarly situated to persons whose minor drug histories were wrongly revealed on improper job applications, or who refused to disclose the offenses in response to a question about them on an application, and who therefore may be entitled to actual damages or the statutory minimum under *Lab. Code §§ 432.7, 432.8. Labor Code § 432.7(c)* does not expressly provide that any applicant may recover a minimum of \$ 200 as a statutory penalty for an employer asking a prohibited question on a job application, regardless of any nexus to a marijuana conviction lurking somewhere in his or her past.n36

[c] FORM--Complaint Against Employer for Violation of Labor Code Section 432.7

[i] Comment

The form set forth in [ii], *below*, is for use by an employee or an applicant for employment to obtain damages from an employer who has asked the plaintiff to disclose either information concerning an arrest or detention that did not result in conviction, or information concerning the plaintiff's participation in a pretrial or posttrial diversion program. The form may also be used by an employee or applicant to obtain damages from an employer who has sought, from some other source, or used such prohibited information in determining any condition of employment.n37

In an action against an employer under *Labor Code section 432.7*, the complaint must allege (1) either that an employer-employee relationship exists between the plaintiff and the defendant or that the plaintiff applied for employment with the defendant and (2) that the defendant either asked the plaintiff, through any written form or orally, to disclose the prohibited information or sought the prohibited information from another source or used such

information to determine a condition of employment, such as hiring, promotion, termination, or an apprenticeship or other training program leading to employment.ⁿ³⁸ The complaint should also specify whether the violations were intentional, not intentional, or both, and demand either actual or statutory damages.ⁿ³⁹

The complaint must be filed within one year after the date of the violation.ⁿ⁴⁰

[ii] Form Complaint Against Employer for Violation of Labor Code Section 432.7

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	COMPLAINT AGAINST EMPLOYER FOR DAM-
Defendant.	)	AGES FOR VIOLATION OF LABOR CODE SEC-
	)	TION 432.7
	)	

[Lab. Code § 432.7]

Plaintiff alleges:

1. _____ [Allege capacity and residence of defendant, if venue allegation desired, e.g., Defendant is, and at all times mentioned herein was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ (city), _____ County].

[2. The acts complained of herein occurred in _____ (city), _____ County, California.]

[EITHER, if plaintiff is an applicant]

3. On _____ [date], plaintiff sought employment as a _____ [specify position sought, e.g., computer operator] with defendant by _____ [specify acts by which plaintiff sought employment, e.g., visiting the offices of defendant's human resources department, located in defendant's headquarters in _____ (city), and complying with the request of _____ (name), defendant's human resources administrator, to fill out a written employment application form].

[OR, if plaintiff is an employee]

3. On or about _____ [date], at _____ [city], _____ County, California, plaintiff and defendant entered into a _____ [a written or an oral] agreement for the employment of plaintiff by defendant _____ [describe general nature of work, e.g., as an account

executive in defendant's branch office in _____ (city)]. The terms of the agreement were _____ [as follows: _____ (specify) or as stated in the copy of the employment agreement attached hereto as Exhibit _____ and incorporated herein by reference]. Plaintiff subsequently entered into employment pursuant to the above-described agreement. [CONTINUE]

4. _____ [Allege defendant's violation of *Lab. Code § 432.7*, e.g., Question No. 7 on defendant's written employment application form asked, "Have you ever been arrested for a felony or misdemeanor offense?" Such question was designed to elicit information concerning arrests not resulting in plaintiff's conviction, in violation of *Labor Code section 432.7*. Plaintiff truthfully and accurately completed all of the questions on the form except for Question No. 7, which plaintiff at first left blank. Plaintiff asked _____ (name), defendant's human resources officer, whether every question on the form had to be answered. _____ (Name) replied that incomplete applications would not be considered. Plaintiff then answered Question No. 7 by disclosing that _____ (specify facts of arrest, detention, or diversion program, e.g., he/she had been arrested in 1979 in _____ County on suspicion of burglary, but that the prosecution had dismissed the charge before trial for insufficient evidence). On _____ (date), defendant notified plaintiff that plaintiff would not be offered employment].

5. Defendant's actions as alleged in Paragraph 4 constitute a violation of *Labor Code section 432.7*. [As a proximate result of defendant's actions herein alleged, plaintiff has suffered actual damages _____ (in the amount of \$ _____ or in an amount to be proven at trial), as follows: _____ (specify nature of damages suffered).] Pursuant to *Labor Code section 432.7(c)*, plaintiff is entitled to recover [the greater of his/her actual damages or] statutory damages in the amount of \$200.

[6. Defendant's actions as herein alleged were done intentionally and knowingly in violation of *Labor Code section 432.7*, thereby entitling plaintiff to the greater of three times his/her actual damages, as previously alleged, or \$500.]

WHEREFORE, plaintiff prays for judgment as follows:

[EITHER, if nonintentional violation is alleged]

1. For actual damages _____ [in the amount of \$ _____ or according to proof] or \$200, whichever is greater.

[OR, if intentional violation is alleged]

1. For three times the amount of plaintiff's actual damages, as alleged herein, or \$500, whichever is greater.

[CONTINUE]

2. For reasonable attorney's fees pursuant to *Labor Code section 432.7(c)*;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff

[Add verification, if desired (see Code Civ. Proc. §§ 446, 2015.5).]

Legal Topics:

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

Criminal Law & Procedure Arrests General Overview Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Disclosure of Employee Information General Overview Torts Intentional Torts Invasion of Privacy General Overview

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 432.7(j)* (definition of "diversion program").

(n2)Footnote 2. *Lab. Code § 432.7(a)*.

(n3)Footnote 3. *Lab. Code § 432.7(a)*.

(n4)Footnote 4. *Lab. Code § 432.8*.

(n5)Footnote 5. *See generally Gov. Code § 12940*.

(n6)Footnote 6. *See generally 42 U.S.C. § 2000e et seq.*

(n7)Footnote 7. *See Gregory v. Litton Systems, Inc. (C.D. Cal. 1970) 316 F. Supp. 401, 403 , modified on other grounds, 472 F.2d 631, 632, 634 (9th Cir. 1972) .*

(n8)Footnote 8. *21 U.S.C. § 830(e)(1)(G)*.

(n9)Footnote 9. *See 1 U.S.C. § 109*.

(n10)Footnote 10. *Rankin v. Longs Drug Stores California, Inc. (2009) 169 Cal. App. 4th 1246, 1253-1262, 87 Cal. Rptr. 3d 543 .*

(n11)Footnote 10. *Lab. Code § 432.7(a)*. *See, e.g., Starbucks Corp. v. Superior Court (2008) 168 Cal. App. 4th 1436, 1444-1445, 86 Cal. Rptr. 3d 482* (employment application used nationally and internationally, which contained disclaimer for California applicants regarding marijuana convictions, did not comply with *Lab. Code § 432.8*, where, although there was no problem with language of disclaimer, placement of disclaimer did not satisfy "clear and conspicuous" test, because disclaimer was on reverse side of application from convictions question, located immediately above signature line at very end of 346-word paragraph, with "U.S." disclaimer, followed by host of irrelevant provisions from states like Maryland and Massachusetts; any value to be gained by placing it in boldface for emphasis was submerged in veritable sea of boldface type; and reasonable applicant could have looked at convictions question and not have noticed misplaced California disclaimer on back side).

(n12)Footnote 11. *Lab. Code § 432.7(a)*; *see Lab. Code § 432.7(j)* ("pretrial or posttrial diversion program" is any program under *Penal Code §§ 1000-1000.5, 1001-1001.9, Veh. Code §§ 13201, 13352.5*, or any other program expressly authorized and described by statute as diversion program).

(n13)Footnote 12. *Lab. Code § 432.7(a)*.

(n14)Footnote 13. *Lab. Code § 432.7(a)*.

(n15)Footnote 14. *See Pitman v. City of Oakland* (1988) 197 Cal. App. 3d 1037, 1044, 243 Cal. Rptr. 306 (but sustaining demurrer to cause of action under *Lab. Code* § 432.7 on ground that arrest resulted in conviction).

(n16)Footnote 15. *Lab. Code* § 432.7(g)(1).

(n17)Footnote 16. *Lab. Code* § 432.7(g)(2).

(n18)Footnote 17. *See Lab. Code* § 432.7(g); *Penal Code* §§ 11105, 13300; but *see Penal Code* § 11105.3(a) (employer may request from Department of Justice records of convictions, or any arrest pending adjudication, involving sex crimes, drug crimes, and crimes of violence of person who applies for position in which he or she would have supervisory or disciplinary authority over minors or any person under his or her care; Department of Justice shall then give record to employer and furnish copy to applicant).

(n19)Footnote 18. *Lab. Code* § 432.7(g)(3).

(n20)Footnote 19. *Lab. Code* § 432.7(c).

(n21)Footnote 20. *Central Valley Chapter 7th Step Foundation, Inc. v. Younger* (1989) 214 Cal. App. 3d 145, 262 Cal. Rptr. 496 ; *see* discussion in § 50.30[1][a].

(n22)Footnote 21. *See* discussion of covered and exempt employers in [3], *below*.

(n23)Footnote 22. *Central Valley Chapter 7th Step Foundation, Inc. v. Younger* (1989) 214 Cal. App. 3d 145, 165, 262 Cal. Rptr. 496 .

(n24)Footnote 23. *See Lab. Code* § 432.7(a), (e); *Penal Code* § 13101; *see also* discussion in [3] and [4], *below*.

(n25)Footnote 24. *Central Valley Chapter 7th Step Foundation, Inc. v. Younger* (1989) 214 Cal. App. 3d 145, 170, 262 Cal. Rptr. 496 .

(n26)Footnote 25. *See Health & Safety Code* § 1250 (definition of health facility).

(n27)Footnote 26. *Lab. Code* § 432.7(f)(1) (employer at health facility may ask about arrests for alleged sex offenses listed in *Penal Code* § 290).

(n28)Footnote 27. *Lab. Code* § 432.7(f)(2); (employer at health facility may ask about arrests for drug-related offenses listed in *Health & Safety Code* § 11590).

(n29)Footnote 28. *Lab. Code* § 432.7(e); *see Penal Code* § 13101 (defining criminal justice agencies).

(n30)Footnote 29. *See Lab. Code* § 432.7(b) (authorizing release of certain criminal history information, including certain arrest records, to government agency employing peace officer, but limiting use of such records to imposition of paid administrative leave and initiation of independent, internal investigation).

(n31)Footnote 30. *Lab. Code* § 432.7(c).

(n32)Footnote 31. *See Lab. Code* § 95(a), (d).

(n33)Footnote 32. *See Lab. Code* § 432.7(c).

(n34)Footnote 33. *Lab. Code* § 432.7(c).

(n35)Footnote 34. *Lab. Code* § 432.7(c).

(n36)Footnote 35. *Starbucks Corp. v. Superior Court* (2008) 168 Cal. App. 4th 1436, 1445-1447, 86 Cal. Rptr. 3d 482 (trial court properly granted employer summary judgment, where applicants who admitted during deposition testimony that they read application and understood application did not ask for information about marijuana-related convictions more than two years old failed to show existence of triable issue of material fact on ambiguity).

(n37)Footnote 36. *Starbucks Corp. v. Superior Court* (2008) 168 Cal. App. 4th 1436, 1447-1452, 86 Cal. Rptr. 3d 482 .

(n38)Footnote 37. *Lab. Code § 432.7(c)*. For discussion, *see* [2], *above*.

(n39)Footnote 38. *Lab. Code § 432.7(a)*; *see also Pitman v. City of Oakland* (1988) 197 Cal. App. 3d 1037, 1044, 243 Cal. Rptr. 306 (plaintiff must affirmatively allege that the arrest asked about or considered in employment decision did not ultimately result in a conviction).

(n40)Footnote 39. *See Lab. Code § 432.7(c)*.

(n41)Footnote 40. *See Code Civ. Proc. § 340(a)*.



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California Employment Law

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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part B. STATUTORY AND ADMINISTRATIVE PROVISIONS

3-50 California Employment Law § 50.12

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.12 California Investigative Consumer Reporting Agencies Act

[1] Statutory Coverage

The California Investigative Consumer Reporting Agencies Actⁿ¹ is intended to ensure that entities engaged in assembling and evaluating information on consumers for employment, insurance, and housing purposes do so fairly, impartially, and with respect for the consumer's privacy.ⁿ² An investigative consumer report is a consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means.ⁿ³ The term does not include a consumer report or other compilation of information that is limited to specific factual information relating to a consumer's credit record or manner of obtaining credit directly from a creditor or from a consumer reporting agency, when that information was obtained directly from a potential or existing creditor of the consumer or from the consumer.ⁿ⁴ The collection and dissemination of information limited to a consumer's credit record is covered by the Consumer Credit Reporting Agencies Act,ⁿ⁵ which is discussed in § 50.13.

An investigative consumer reporting agency includes any person who, for monetary fees or dues, engages in the practice of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning consumers for the purposes of furnishing investigative consumer reports to third parties, but does not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes, or any licensed insurance agent, insurance broker, or solicitor, insurer, or life insurance agent.ⁿ⁶

The provisions of the federal Fair Credit Reporting Actⁿ⁷ overlap in many respects with the California Investigative Consumer Reporting Agencies Act.ⁿ⁸ An employer who requests or receives and uses a "investigative consumer report" from a "consumer reporting agency," as those terms are defined by the federal statute,ⁿ⁹ is subject to the federal provisions relating to users of such reports,ⁿ¹⁰ as well as to the California provisions. When both are applicable, the federal provisions supersede the state provisions to the extent that they are inconsistent.ⁿ¹¹ However, state law generally is not considered "inconsistent" if it goes further than the federal act in protecting the consumer, as long as compliance with state law would not result in a violation of the federal law.ⁿ¹² For discussion of the federal Fair Credit Reporting Act, see § 50.14.

[2] Substantive Rights and Responsibilities

[a] Limits on Employer's Right to Request Preparation of Report

An employer who intends to use consumer information for employment purposes other than suspicion of wrongdoing or misconduct¹³ by the subject of the investigation may procure an investigative consumer report or cause the report to be made, only if all of the following apply:¹⁴

1. The employer procuring the report has a permissible purpose, as defined in the Investigative Consumer Reporting Agencies Act.¹⁵
2. The employer provides a clear and conspicuous disclosure in writing to the consumer (employee) at any time before the employer procures the report in a document consisting solely of the disclosure, that includes the following information:
 - a. A statement that an investigative consumer report may be obtained;
 - b. The permissible purpose of the report is identified;
 - c. A statement that the disclosure may include information on the consumer's (employee's) character, general reputation, personal characteristics, and mode of living;
 - d. The name, address, and telephone number of the investigative consumer reporting agency conducting the investigation;
 - e. Notification in writing of the nature and scope of the investigation requested, including a summary of the provisions of *Civ. Code* § 1786.22, which specifies conditions under which a consumer may inspect the file.
3. The consumer (employee) has authorized the procurement of the report in writing.

■ CONSULTANT'S COMMENT:

Many employers mistakenly assume symmetry between the disclosure obligations under federal and state fair credit reporting statutes. The requirements, however, are materially different. The California rules require that employers make use of one set of disclosure forms in this state and a separate set of disclosure forms in all other states, except those that may have their own distinctive fair credit reporting procedures. Employers' counsel should carefully and thoroughly review their clients' California disclosure obligations. *Commentary by Kirby Wilcox.*

Further, the employer must certify to the agency that proper disclosures have been made.¹⁶

The notification requirement applies to investigations both prior to and during employment.¹⁷

[b] Disclosure and Scope of Report

The agency must disclose the recipients of any investigative consumer report on the applicant or employee that the agency has furnished for employment or insurance purposes within the three-year period preceding the request, and for any other purpose, within the three-year period preceding the request.¹⁸

The report may not contain any of the following types of information:¹⁹

1. Bankruptcies that, from the date of adjudication, predate the report by more than 10 years;
2. Suits that, from the date of filing, and satisfied judgments that, from the date of entry, predate the report by more than seven years;
3. Unsatisfied judgments that, from the date of entry, predate the report by more than seven years;
4. Unlawful detainer actions when the defendant was the prevailing party or the action is resolved by settlement agreement;
5. Paid tax liens that, from the date of payment, predate the report by more than seven years;
6. Accounts placed for collection or charged to profit and loss that predate the report by more than seven years; or
7. Records of arrest, indictment, information, misdemeanor complaint, or conviction of a crime that, from the date of disposition, release, or parole, predate the report by more than seven years. (These items of information may no longer be reported if at any time it is learned that, in the case of a conviction, a full pardon has been granted, or, in the case of an arrest, indictment, information, or misdemeanor complaint a conviction did not result.ⁿ²⁰ However, records of arrest, indictment, information, and misdemeanor complaints may be reported pending pronouncement of judgment on the particular subject matter of those records.)

Additionally, the report may not contain any other adverse information predating the report by more than seven years.ⁿ²¹ However, the prohibition on reporting the listed types of adverse information does not apply if the report is to be used by an employer explicitly required by a governmental regulatory agency to check for records prohibited by *Civil Code Section 1786.18(a)* when the employer is reviewing a consumer's qualification for employment.ⁿ²²

Every investigative consumer reporting agency is required to maintain reasonable procedures to avoid disclosure of prohibited information and to limit furnishing of reports to permitted purposes such as use for employment purposes.ⁿ²³ To that end, procedures mandated by the act impose on employers certain identification and certification requirements. Thus, agencies must require users of their reports to identify themselves, certify the purposes for which the information is sought and that the information will be used for no other purposes, and certify that the requisite disclosures have been made.ⁿ²⁴ The agency must make a reasonable effort to verify the identity of employers who are new prospective users of an agency's reports and the uses certified by such employers before the agency may lawfully furnish the reports.ⁿ²⁵

An agency may not make an inquiry in order to prepare an investigative consumer report for employment purposes if the inquiry by an employer or prospective employer would violate any applicable federal or state equal employment opportunity law or regulation.ⁿ²⁶

[c] Employer's Collection of Information in Lieu of Report

Any person who collects, assembles, evaluates, compiles, reports, transmits, transfers, or communicates information on a consumer's character, general reputation, personal characteristics, or mode of living for employment purposes, which are records documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment,ⁿ²⁷ in lieu of using the services of an investigative consumer reporting agency, must provide a copy of the related public record to the consumer within seven days after receipt of the information, regardless of whether the information is received in a written or oral form.ⁿ²⁸ An employer that obtains such records or information must provide on any job

application form or any other written form a box that, if checked by the consumer, permits the consumer to waive his or her right to receive a copy of any public record obtained pursuant to *Civil Code Section 1786.53*.ⁿ²⁹

If an employer obtains a public record for the purpose of conducting an investigation for suspicion of wrongdoing or misconduct by the subject of the investigation, the employer may withhold the information until completion of the investigation. Upon completion, however, the employer must provide a copy of the public record, unless the consumer waived his or her rights.ⁿ³⁰ If an employer takes any adverse actionⁿ³¹ as a result of receiving this information, the employer must provide the consumer with a copy of the public record, regardless of whether the consumer waived his or her rights.ⁿ³² However, nothing in *Civil Code Section 1786.53(a)* or *(b)* requires an employer to provide the same information to a consumer on more than one occasion.ⁿ³³ Further, nothing in the California Investigative Consumer Reporting Agencies Actⁿ³⁴ is intended to modify *Labor Code Section 1198.5* or existing law concerning information obtained by an employer or employment agency without the use of the services of an investigative consumer reporting agency for employment reference checks, background investigations, credential verifications, or employee investigations, except as provided in *Civil Code Section 1786.53*; and nothing in the Act is intended to change or supersede existing law related to privileged attorney-client communications or attorney work product, or require the production or disclosure of that information.ⁿ³⁵

[3] Method of Enforcement

[a] Right to Maintain Action

An employer who fails to comply with any requirement of the Investigative Consumer Reporting Agencies Act is liable to the person who is the subject of the report.ⁿ³⁶ The plaintiff may bring suit in any appropriate court of competent jurisdiction for actual damages or \$10,000, whichever is greater.ⁿ³⁷ A successful plaintiff may also recover court costs and a reasonable attorney's fee as determined by the court.ⁿ³⁸ Additionally, if the court determines that the violation was grossly negligent or willful, the court may assess punitive damages.ⁿ³⁹ No damages are recoverable if the failure to comply with the act results in a more favorable report than if there had been no failure to comply.ⁿ⁴⁰

The action to enforce liability under the act must be brought within two years of the date of discovery.ⁿ⁴¹

If a suit is pending against the employer under the federal Fair Credit Reporting Act,ⁿ⁴² no suit may be brought under the California Investigative Consumer Reporting Agencies Act for the same act or omission.ⁿ⁴³ Further, entry of a final judgment against the employer in an action under the Fair Credit Reporting Actⁿ⁴⁴ is a bar to the maintenance of any action based on the same act or omission that might be brought under the Investigative Consumer Reporting Agencies Act.ⁿ⁴⁵ For discussion of the Fair Credit Reporting Act, *see* § 50.14.

The remedy afforded by the Investigative Consumer Reporting Agencies Act does not preclude the employee from suing the employer under a common law invasion of privacy or defamation theory.ⁿ⁴⁶ For discussion of actions for invasion of privacy, *see* § 50.31. For discussion of actions for defamation, *see* Chapters 51 and 63.

An employer may not be held liable to a plaintiff for a failure to comply with the Investigative Consumer Reporting Agencies Act if its failure to comply results in a more favorable report than if there had not been a failure to comply.ⁿ⁴⁷

■ CONSULTANT'S COMMENT:

As the discussion of the California Investigative Consumer Reporting Agencies Act indicates, literal compliance with the terms of the statute will not necessarily free an employer from privacy-related lawsuits filed by applicants and employees.ⁿ⁴⁸ First, a consumer report may contain information regarding arrests. As discussed previously, however,ⁿ⁴⁹ *California Labor Code section 432.7* bars employers (with limited exceptions) from "seek[ing] from any source whatsoever" any "information concerning an arrest or detention which did not result in conviction."ⁿ⁵⁰

The tension between these two statutes is clear and requires most employers who wish to secure consumer reports to seriously consider instructing their consumer reporting agencies not to furnish arrest information of any kind. Also, a consumer report necessarily will contain information regarding the financial condition of an applicant or employee. Employers should be aware that in the absence of a showing of business necessity, an applicant or employee may be able to file an action under EEO laws alleging that consideration of financial information has an unlawful adverse impact on certain minorities protected under Title VII of the Civil Rights Act of 1964ⁿ⁵¹ and the California Fair Employment and Housing Act.ⁿ⁵² For discussion of potential discrimination claims, *see* Chapters 40 and 41. Finally, maintenance of consumer reports in a manner that may easily result in their disclosure to persons who have no business reason to know their contents may potentially subject an employer to a constitutional or common law action for invasion of privacy. Optimally, consumer reports should be kept in a locked cabinet, separate from the regular personnel file, to ensure against unintended disclosures. *Commentary by Kirby Wilcox.*

[b] FORM--Complaint for Damages for Failure to Comply With Requirements of Investigative Consumer Reporting Agencies Act

[i] Comment

The form set forth in [ii], *below*, is for use by an employee against an employer that has failed to comply with one or more of the requirements of the Investigative Consumer Reporting Agencies Act.ⁿ⁵³ For discussion of such actions, *see* [a], *above*.

In an action against an employer under the Investigative Consumer Reporting Agencies Act, the complaint must allege the following:

1. Either that an employer-employee relationship exists between the plaintiff and the defendant or that the plaintiff applied for employment with the defendant;
2. That the defendant procured or caused to be prepared an investigative consumer report concerning the plaintiff; and
3. That the defendant failed to comply with one or more of the requirements of the Investigative Consumer Reporting Agencies Act.

An employer's failure to comply may consist of a failure to notify the plaintiff, at any time before the report is procured, that an investigative consumer report regarding the plaintiff's character, general reputation, personal characteristics, and mode of living was being made, together with the name and address of the investigative consumer reporting agency making the report.ⁿ⁵⁴

The form contains an optional allegation for use when bringing a class action (Paragraph 4).

[ii] Form Complaint for Damages for Failure to Comply With Requirements of Investigative Consumer Reporting Agencies Act

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

3-50 California Employment Law § 50.12

_____ [name(s)], [On Behalf of)	
Himself/Herself/Themselves and All Others Similarly)	NO. _____
Situated,])	COMPLAINT AGAINST EMPLOYER FOR DAM-
Plaintiff(s),)	AGES FOR VIOLATION OF INVESTIGATIVE
vs.)	CONSUMER REPORTING AGENCIES ACT
_____ [name],)	[Civ. Code § 1786.50]
Defendant.)	

Plaintiff(s) allege(s):

1. [Capacity, residence of defendant. See Form in § 50.11[5][c][ii], Paragraph 1].

[2. Where acts complained of occurred. See Form in § 50.11[5][c][ii], Paragraph 2.]

3. [Relationship of parties. See Form in § 50.11[5][c][ii], Paragraph 3].

[4. Plaintiff(s) bring(s) this action on his/her/their own behalf and on behalf of all persons similarly situated. The class that plaintiff(s) represent(s) is composed of _____ (specify facts from which class can be determined). The persons in the class are so numerous (consisting of approximately _____ individuals) that the joinder of all such persons is impracticable and the disposition of their claims in a class action is a benefit to the parties and to the court. There is a well-defined community of interest in the questions of law and fact involved that affect the parties to be represented, in that _____ (specify common issues to be litigated). Proof of a common or single state of facts will establish the right of each member of the class to recover. The _____ (plaintiff's or plaintiffs') claims are typical of those of the class and plaintiff(s) will fairly and adequately represent(s) the interests of the class. There is no plain, speedy, or adequate remedy other than by maintenance of this class action, since plaintiff(s) _____ (is or are) informed and believe(s) that the damage to each plaintiff is relatively small (in that _____ (specify type and amount of damage)). Consequently there would be a failure of justice but for the maintenance of the present class action.]

5. _____ [Allege facts showing application of Investigative Consumer Reporting Agencies Act, e.g., Prior to his/her/its decision _____ (specify employment decision, e.g., whether to hire plaintiff or whether to terminate plaintiff's employment), defendant caused to be prepared, for his/her/its use in making that decision, an investigative consumer credit report concerning plaintiff's character, general reputation, personal characteristics, and mode of living. (This report was prepared by (defendant) _____ (name of investigative consumer credit reporting agency), and a copy of the report is attached hereto as Exhibit _____ and incorporated herein by reference)].

6. _____ [Allege defendant's violation of Investigative Consumer Reporting Agencies Act, e.g., Defendant notified plaintiff that such a report was to be prepared, but failed and refused to disclose to plaintiff the name of the investigative consumer reporting agency conducting the investigation and further failed to include in its notification a summary of the provisions of the Investigative Consumer Reporting Agencies Act, Civil Code Section 1786.22, as required by Civil Code Section 1786.16(a)(2). (Plaintiff is informed and believes and thereon alleges that) (W)hen, on or about _____ (date), defendant _____ (specify adverse action, e.g., declined to hire plaintiff or terminated plaintiff's employment), defendant failed to advise plaintiff _____ (name) that defendant's decision was based wholly or in part on the investigative consumer report and failed to supply plaintiff with the name and address of the investigative consumer reporting agency making the report.]

[7. As a proximate result of the acts alleged herein, plaintiff(s) suffered severe mental anguish and emotional (and physical) distress, and plaintiff(s) (has *or* have) been injured in mind (and body) as follows: _____ (describe injuries), all to _____ (plaintiff's *or* plaintiffs') damage (in the sum of \$ _____).]

[8. As a further proximate result of the acts alleged herein, plaintiff(s) _____ (was *or* were) required to and did employ _____ (specify medical professionals, e.g., physicians and psychotherapists) to examine, treat, and care for him/her/them and incurred medical expenses _____ (in the approximate amount of \$ _____ *or* in an amount that has not yet been ascertained). (Plaintiff(s) _____ (is *or* are) informed and believe(s) and thereon allege(s) that he/she/they will incur some additional medical expenses, the exact amount of which is presently unknown.)]

[9. By reason of the acts alleged herein, plaintiff(s) _____ (was *or* were) prevented from attending to his/her/their usual _____ (occupation *or* profession) and thereby lost earnings (in the amount of \$ _____). (Plaintiff(s) _____ (is *or* are) informed and believe(s) and thereon allege(s) that he/she/they will thereby be prevented from attending to his/her/their usual _____ (occupation *or* profession) for an additional period in the future that he/she/they cannot now ascertain and will thereby sustain further loss of earnings.)]

[10. *Unless action is brought as class action, allege:* Pursuant to *Civil Code Section 1786.50(a)(1)*, _____ [each] plaintiff is entitled to recover (the greater of his/her/their actual damages as previously alleged herein *or*) statutory damages in the amount of \$10,000.]

[11. *If punitive damages sought, allege:* Defendant's actions herein alleged were done _____ (willfully and knowingly in violation of the Investigative Consumer Reporting Agencies Act *or* with gross negligence and in complete disregard of its duty to comply with the requirements of the Investigative Consumer Reporting Agencies Act). Plaintiff(s) therefore request(s) that the court assess punitive damages against defendant pursuant to *Civil Code Section 1786.50(b)*.]

WHEREFORE, plaintiff(s) pray(s) for judgment as follows:

[*EITHER, if a class action*]

1. For actual damages [in the sum of \$ _____], as herein alleged;

[*OR, in all other cases*]

1. For actual damages [in the sum of \$ _____], as herein alleged, *or* statutory damages in the sum of \$3,500 per plaintiff, whichever is greater.

[*CONTINUE*]

[2. For an award of punitive damages in an amount appropriate to punish defendant and deter similar improper conduct by others;]

3. For reasonable attorney's fees pursuant to *Civil Code Section 1786.50(a)(2)*;

4. For costs of suit herein incurred; and
5. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff(s)

[Add verification, if desired (see Code Civ. Proc. §§ 446, 2015.5).]

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawPreemployment Practices

FOOTNOTES:

(n1)Footnote 1. *See Civ. Code §§ 1786 et seq.*

(n2)Footnote 2. *See Civ. Code § 1786.*

(n3)Footnote 3. *Civ. Code § 1786.2(c).*

(n4)Footnote 4. *See Civ. Code § 1786.2(c).*

(n5)Footnote 5. *See Civ. Code §§ 1785.1 et seq.*, effective July 1, 1998.

(n6)Footnote 6. *Civ. Code § 1786.2(d)* (term does not include governmental agencies whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes, or any licensed insurance agent, insurance broker, solicitor, insurer, or life insurance agent); *but see Civ. Code § 1786.54* (act does not apply to any investigative consumer report that is limited to disclosures from public records relating to land and land titles or to any person whose records are maintained primarily to report portions of public records imparting constructive notice under law of matters relating to land and land titles).

(n7)Footnote 7. *See 15 U.S.C. § 1681 et seq.*

(n8)Footnote 8. *Compare, e.g., 15 U.S.C. § 1681c* (information that may not be included in "consumer report" under federal act) *with Civ. Code § 1786.18* (information that may not be included in "investigative consumer report" under state law).

(n9)Footnote 9. *See 15 U.S.C. § 1681a(d), (e), (f).*

(n10)Footnote 10. *See 15 U.S.C. §§ 1681d, 1681m.*

(n11)Footnote 11. *See 15 U.S.C. § 1681t.*

(n12)Footnote 12. *Credit Data of Arizona, Inc. v. State of Arizona* (9th Cir. 1979) 602 F.2d 195, 198 ; *see 15 U.S.C. § 1681t(a), (d)(2).*

(n13)Footnote 13. *See Civ. Code § 1786.16(a)(2), (c).*

(n14)Footnote 14. *Civ. Code § 1786.16(a)(2).*

(n15)Footnote 15. *See Civ. Code § 1786.12.*

(n16)Footnote 16. *See Civ. Code § 1786.16(a)(4); see also Civ. Code § 1786.16(b).*

(n17)Footnote 17. *See Civ. Code § 1786.2(f).*

(n18)Footnote 18. *Civ. Code § 1786.10(c).*

(n19)Footnote 19. *Civ. Code § 1786.18(a).*

(n20)Footnote 20. *See Lab. Code § 432.7(a)* (no employer may seek from any source, or use as factor in determining any condition of employment, information relating to employee's or applicant's arrests not leading to conviction), discussed in § 50.11.

(n21)Footnote 21. *Civ. Code § 1786.18(a)(8).*

(n22)Footnote 22. *Civ. Code § 1786.18(b)(2).*

(n23)Footnote 23. *Civ. Code § 1786.20(a); see Civ. Code § 1786.12, 1786.18.*

(n24)Footnote 24. *Civ. Code § 1786.20(a); see Civ. Code § 1786.16(a)(4); see also [a], above.*

(n25)Footnote 25. *Civ. Code § 1786.20(a).*

(n26)Footnote 26. *Civ. Code § 1786.20(c).*

(n27)Footnote 27. *See Civ. Code § 1786.53(a)(3).*

(n28)Footnote 28. *Civ. Code § 1786.53(a), (b)(1).*

(n29)Footnote 29. *Civ. Code § 1786.53(b)(2).*

(n30)Footnote 30. *Civ. Code § 1786.53(b)(3).*

(n31)Footnote 31. *See Civ. Code § 1786.53(a)(1).*

(n32)Footnote 32. *Civ. Code § 1786.53(b)(4).*

(n33)Footnote 33. *Civ. Code § 1786.53(c).*

(n34)Footnote 34. *Civ. Code § 1786 et seq.*

(n35)Footnote 35. *Civ. Code § 1786.55.*

(n36)Footnote 36. *Civ. Code § 1786.50.*

(n37)Footnote 37. *Civ. Code §§ 1786.50(a)(1), 1786.52.*

(n38)Footnote 38. *Civ. Code § 1786.50(a)(2).*

(n39)Footnote 39. *Civ. Code § 1786.50(b).*

(n40)Footnote 40. *Civ. Code § 1786.50(c).*

(n41)Footnote 41. *Civ. Code* § 1786.52.

(n42)Footnote 42. *See 15 U.S.C. § 1681 et seq.*

(n43)Footnote 43. *Civ. Code* § 1786.52(a).

(n44)Footnote 44. *See 15 U.S.C. §§ 1681n, 1681o.*

(n45)Footnote 45. *Civ. Code* § 1786.52(b).

(n46)Footnote 46. *Civ. Code* § 1786.52.

(n47)Footnote 47. *Civ. Code* § 1786.50(c).

(n48)Footnote 48. *See Civ. Code* § 1786.52.

(n49)Footnote 49. *See* discussion in § 50.11.

(n50)Footnote 50. *See Lab. Code* § 432.7(a).

(n51)Footnote 51. *See 42 U.S.C. §§ 2000e-2000e-17.*

(n52)Footnote 52. *See Gov. Code* §§ 12900-12996.

(n53)Footnote 53. *Civ. Code* §§ 1786-1786.56; *see* [2], *above*.

(n54)Footnote 54. *See Civ. Code* § 1786.16(a)(2).



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California Employment Law

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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part B. STATUTORY AND ADMINISTRATIVE PROVISIONS

3-50 California Employment Law § 50.13

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.13 Consumer Credit Reporting Agencies Act

[1] Statutory Coverage

The Consumer Credit Reporting Agencies Actⁿ¹ is designed to insure that consumer credit reporting agencies exercise their responsibilities for assembling and evaluating consumer credit and other information on consumers with fairness, impartiality, and respect for the consumer's privacy by requiring such agencies to comply with certain requirements regarding confidentiality, accuracy, relevancy, and proper use of information gathered by such agencies.ⁿ²

A consumer credit report, as defined by the act, includes any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or collected in whole or in part to serve as a factor in establishing the consumer's eligibility for, among other purposes, employment.ⁿ³ As used in the act, a consumer credit report prepared for "employment purposes" means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee.ⁿ⁴

Not included in the definition is any report containing information solely on a consumer's character, general reputation, personal characteristics, or mode of living that is obtained through personal interviews with neighbors, friends, or associates of the consumer or others with whom the consumer is acquainted or who may have knowledge concerning any such items of information.ⁿ⁵ Such reports are governed by the Investigative Consumer Reporting Agencies Act, discussed in § 50.12.ⁿ⁶ The definition of consumer credit report also does not include the following: (1) a report (or communication) regarding solely the transactions between the consumer and the person making the report; (2) a communication of credit application information internal within the reporting organization (if it is conspicuously disclosed by specified means that the information may be provided); (3) any authorization or approval of a specific extension of credit by the issuer of a credit card or similar device; (4) any report by a person conveying a decision whether to make a specific extension of credit in response to a request by a third party, if certain conditions are satisfied; (5) a communication about a consumer regarding a credit transaction not initiated by the consumer, between persons affiliated by common ownership or common corporate control,ⁿ⁷ if either person has complied with the

requirements concerning a prequalifying report,ⁿ⁸ and the consumer has consented in writing to the provision and the use of the prequalifying report; and (6) a consumer credit report regarding an extension of credit solely for a commercial purpose.

The Consumer Credit Reporting Agencies Act does not apply to reports prepared by licensed private investigators unless employed directly by a consumer credit reporting agency.ⁿ⁹

The provisions of the federal Fair Credit Reporting Actⁿ¹⁰ overlap in many respects with the California Consumer Credit Reporting Agencies Act.ⁿ¹¹ An employer who requests or receives and uses a "consumer report" from a "consumer reporting agency," as those terms are defined by the federal statute,ⁿ¹² is subject to the federal provisions relating to users of those reports,ⁿ¹³ as well as to the California provisions. When both are applicable, the federal provisions supersede the state provisions to the extent that they are inconsistent.ⁿ¹⁴ However, state law generally is not considered "inconsistent" if it goes further than the federal act in protecting the consumer, as long as compliance with state law would not result in a violation of the federal law.ⁿ¹⁵ For discussion of the federal Fair Credit Reporting Act, *see* § 50.14.

[2] Substantive Rights and Responsibilities

[a] Limits on Employer's Right to Request Preparation of Report

An employer who intends to use the information for employment purposes may obtain a consumer credit report.ⁿ¹⁶ However, before requesting a consumer credit report for employment purposes, the user of the report must provide written notice to the person involved. The notice must inform the person that a report will be used and the source of the report, and must contain a box that the person may check off to receive a copy of the credit report. If the consumer indicates that he or she wishes to receive a copy of the report, the user must request that a copy be provided to the person when the user requests its copy from the credit reporting agency. The report to the user and to the subject person must be provided contemporaneously and at no charge to the subject person.ⁿ¹⁷ In addition, the employer may, in its discretion, notify the applicant or employee that on request the employer will contact the agency and ask it to investigate the current status of an item or items of information contained in the report if the consumer disputes the completeness or accuracy of information as provided to the employer.ⁿ¹⁸

A consumer may elect to place a security freeze on a credit report by making a request in writing by mail to a consumer credit reporting agency. "Security freeze" means a notice placed in a consumer's credit report at the consumer's request prohibiting the consumer credit reporting agency from releasing the consumer's credit report or any information from it without the express authorization of the consumer. When a security freeze is in place, the agency cannot release information from the credit report to a third party without prior express authorization from the consumer, but the agency can advise the third party that a security freeze is in effect.^{n18.1} If a consumer requests a security freeze, the agency must disclose both the process of placing and temporarily lifting a freeze and the process for allowing access to information from the report for a specific party or period of time while the freeze is in place.^{n18.2}

The agency must place a security freeze on a consumer's credit report no later than three business days after receiving a written request from the consumer,^{n18.3} send written confirmation of the security freeze to the consumer within ten business days, and provide the consumer with a unique personal identification number or password to be used by the consumer for providing authorization for the release of the credit report for a specific party or period of time.^{n18.4} A security freeze remains in place until the consumer, upon presentation of proper identification and any unique identification number or password, requests that it be removed. The agency must remove the security freeze within three business days of receiving any such request.^{n18.5}

If the consumer wishes to allow the credit report to be accessed by a specific party or during a period of time while a freeze is in place, the consumer must contact the consumer credit reporting agency and request that the freeze be

temporarily lifted by providing specified information, including the unique personal identification number or password provided by the credit reporting agency.^{n18.6} When a consumer credit reporting agency receives a request from a consumer to temporarily lift a freeze on a credit report, it must comply no later than three business days after receiving the request.^{n18.7} If an employer requests access to a consumer credit report on which a security freeze is in effect and the applicant does not allow the employer access to the credit report, the employer may treat the application as incomplete.^{n18.8}

Regardless of the existence of a security freeze, a consumer reporting agency may disclose public record information lawfully obtained by, or for, the consumer reporting agency from an open public record to the extent otherwise permitted by law. This does not prohibit a consumer reporting agency from electing to apply a valid security freeze to the entire contents of a credit report.^{n18.9}

[b] Scope of Report

The report may not contain any of the following items of information:ⁿ¹⁹

1. Bankruptcies that, from the date of adjudication, predate the report by more than ten years;ⁿ²⁰
2. Suits and judgments that, from the date of entry or renewal, predate the report by more than seven years or until the governing statute of limitations has expired, whichever period is longer;
3. Unlawful detainer actions, unless the lessor was the prevailing party;ⁿ²¹
4. Paid tax liens that, from the date of payment, predate the report by more than seven years;
5. Accounts placed for collection or charged to profit and loss that predate the report by more than seven years;ⁿ²³
6. Records of arrest, indictment, information, misdemeanor complaint, or conviction of a crime that, from the date of disposition, release, or parole, predate the report by more than seven years. These items of information must not be included in the report if at any time it is learned that, in the case of a conviction, a full pardon has been granted, or in the case of an arrest, indictment, information, or misdemeanor complaint, a conviction did not result.ⁿ²⁴

In addition, there are two, general limitations on the inclusion of other adverse information in a report. First, the report may not contain any adverse information predating the report by more than seven years.ⁿ²⁵ Second, the report may not include any adverse information concerning a consumer predating the report by more than ten years, or which otherwise is prohibited from being included in the report.ⁿ²⁶

A reporting agency may not furnish medical information for employment purposes without the consumer's consent.ⁿ²⁷ Also, a consumer reporting agency must include any information regarding the consumer's failure to pay overdue child or spousal support pursuant to the statewide automated reporting procedures,ⁿ²⁸ or reports by other federal, state, or local governmental agencies.ⁿ²⁹

Every consumer credit reporting agency is required to maintain reasonable procedures to avoid disclosure of prohibited information and to limit furnishing of reports to permitted purposes such as use for employment purposes.ⁿ³⁰ To that end, procedures mandated by the act impose on employers certain identification and certification requirements. For example, agencies must require users of their reports to identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purposes.ⁿ³¹ The agency must make a reasonable effort to verify the identity of employers who are new prospective users of an agency's reports and the uses

certified by such employers before the agency may furnish the reports.ⁿ³² No consumer credit reporting agency may furnish a report to any person unless the agency has reasonable grounds for believing that the report will be used for proper purposes;^{n32.1} the agency lacks reasonable grounds unless specific requirements are satisfied.^{n32.2} No consumer credit reporting agency may prohibit any user of the report from disclosing the contents to the consumer, if adverse actionⁿ³³ may be taken, based in whole or in part on the report.ⁿ³⁴ Disclosure in this context is not a basis for liabilityⁿ³⁵ of the consumer credit reporting agency or the user for violation of the provisions of the Consumer Credit Reporting Agencies Act.ⁿ³⁶

[c] Limit on Employer's Use of Report

If any person takes "adverse action" against any consumer, based in whole or in part on any information contained in a consumer credit report, that person must comply with certain procedures.ⁿ³⁷ "Adverse action" is defined in part as any denial of employment, or any other decision made for employment purposes that adversely affects any current or prospective employee.ⁿ³⁸ An employer to which this provision applies must do all of the following:ⁿ³⁹

1. Provide written notice of the adverse action to the consumer;
2. Provide the consumer with the name, address, and telephone number of the consumer credit reporting agency that furnished the report to the employer;
3. Provide a statement that the credit grantor's decision to take adverse action was based in whole or in part on information contained in a consumer credit report; and
4. Provide the consumer with a written notice of the rights of the consumer to receive a free copy of the report,ⁿ⁴⁰ and to dispute the accuracy or completeness of the report.ⁿ⁴¹

The employer cannot be held liable for a violation of this requirement if he or she shows, by a preponderance of the evidence, that at the time of the alleged violation he or she maintained reasonable procedures to assure compliance.ⁿ⁴²

[d] Obligations of Furnishers and Resellers of Credit Information

[i] Persons Who Regularly Furnish Credit Information

A person is prohibited from furnishing information on a specific transaction or experience to any consumer credit reporting agency, with the knowledge that the information is incomplete or inaccurate.ⁿ⁴³ A person who, in the ordinary course of business, routinely furnishes information about the person's own transactions with the consumer must notify the consumer credit reporting agency of any incomplete or inaccurate information, and provide the agency with the appropriate corrections.ⁿ⁴⁴ The person may not furnish information that is subject to a continuing dispute with the affected consumer, without including a notice to that effect.ⁿ⁴⁵ Special notification requirements apply if the information concerns an open-end credit account,ⁿ⁴⁶ or if the account in question is delinquent.ⁿ⁴⁷

If the consumer disputes the completeness or accuracy of information, the person furnishing the credit information must comply with certain investigation procedures.ⁿ⁴⁸ The furnisher of information to a consumer credit reporting agency is liable for failure to comply with its obligations, unless it establishes by a preponderance of the evidence that it maintained reasonable procedures for compliance at the relevant time.ⁿ⁴⁹

[ii] Creditors

A creditor may submit negative credit information concerning a consumer to a consumer credit reporting agency only if the creditor notifies the consumer affected. After providing this notice, a creditorⁿ⁵⁰ may submit additional information to a credit reporting agency respecting the same transaction or extension of credit that gave rise to the original negative

credit information without providing additional notice.ⁿ⁵¹

The notice must be in writing and must be delivered in person or mailed first class, postage prepaid, to the party's last known address, prior to or within 30 days after the transmission of the negative credit information.ⁿ⁵² The notice may be part of any notice of default, billing statement, or other correspondence, and must contain substantially the following language:ⁿ⁵³ "As required by law, you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations."

A creditor is liable for failure to provide the required notice, unless it establishes, by a preponderance of the evidence, that at the time of that failure to give notice the creditor maintained reasonable procedures for compliance.ⁿ⁵⁴

[iii] Persons Who Resell Credit Reports

A person may not procure a consumer credit report for the purpose of reselling the report, or any information in it, unless the person discloses to the consumer credit reporting agency issuing the report the identity of the ultimate end user and each permissible purpose for which the report is furnished.ⁿ⁵⁵

A person who procures a consumer credit report for the purpose of reselling the report or any information in it must comply with specified procedures to ensure use of the information for a permissible purpose.ⁿ⁵⁶

[3] Methods of Enforcement

[a] Procedure for Correction of Information

Consumer credit reporting agencies are required to allow any consumer to visually inspect all files regarding such consumer on request and proper identification, during normal business hours and on reasonable notice.ⁿ⁵⁷ Additionally, the consumer has the right to request and receive a copy of the file in written form.ⁿ⁵⁸ The consumer also has the right to receive on request a record of all inquiries within the previous twelve months, not initiated by the consumer, for which information was provided concerning a credit transaction, and a list of the recipients, including end users,ⁿ⁵⁹ of any report furnished for employment purposes within the previous two years.ⁿ⁶⁰ The consumer has a right to receive a record of all inquiries in the previous 12 months.^{n60.1} Additionally, the consumer will be able to request from the credit reporting agency his or her credit score, key factors which determined that score, and other related information.^{n60.2} A credit score is a score derived from one of a variety of credit scoring models.^{n60.3}

If the consumer disputes the completeness or accuracy of any item of information contained in the file and conveys the dispute to the agency, the agency must, within a reasonable period of time and without charge, reinvestigate and record the current status of the disputed information.ⁿ⁶¹ The agency must do so before the end of the 30-business-day period beginning on the date the agency receives notice of the dispute from the consumer or user, unless it has reasonable grounds to believe and determines that the dispute is frivolous or irrelevant.ⁿ⁶² Grounds for this belief include the consumer's failure to provide sufficient information that was requested by the agency to investigate the dispute.ⁿ⁶³ Unless the agency determines that the dispute is frivolous or irrelevant, before the end of the five-business-day period beginning on the date the agency receives notice of dispute, the agency must notify any person who provided information in the dispute at the address and in the manner specified by the person.^{n63.1} A consumer credit reporting agency may require that disputes by consumers be in writing.ⁿ⁶⁴

In its reinvestigation, the consumer credit reporting agency must review and consider all relevant information submitted by the consumer. If it determines that the dispute is frivolous or irrelevant, the agency must notify the consumer by mail, or other authorized means, within five business days that it is terminating its reinvestigation, stating the specific reasons for its finding.ⁿ⁶⁵ If the disputed item is found to be missing, inaccurate, or can no longer be verified by the evidence submitted, the agency must promptly add, correct, or delete the information from the file.ⁿ⁶⁶

After information is deleted according to this procedure, it may not be reinserted in a consumer's file unless the person furnishing the information certifies that it is accurate. If the information is reinserted, the agency must promptly notify the consumer in writing, or by any other means authorized by the consumer for that purpose. Further, within five business days after reinserting the information, the agency must provide the consumer the following items in writing:n67

1. A statement that the disputed information has been reinserted.
2. A notice that the agency will provide the consumer, within 15 days of a request, the name, address, and telephone number of the furnisher of the reinserted information.
3. The toll-free telephone number the consumer can use to obtain the name, address, and telephone number of the furnisher of the reinserted information.
4. A notice that the consumer has a right to a reinvestigation of the reinserted information and to add a statement disputing the accuracy or completeness of the information.

The consumer credit reporting agency must notify the consumer in writing of the results of any reinvestigation within five days. The notice must include the following items:n68

- (1) A statement that the reinvestigation is completed;
- (2) A consumer credit report that is based on the consumer's file as that file is revised as a result of the reinvestigation;
- (3) A description or indication of any changes made in the consumer credit report as a result of those revisions to the consumer's file, a description of any changes made or sought by the consumer that were not made, and an explanation why they were not made;
- (4) A notice that, if requested by the consumer, a description of the procedure used to determine the accuracy and completeness of the information shall be provided to the consumer by the consumer credit reporting agency, including the name, business address, and telephone number of any furnisher of information contacted in connection with that information;
- (5) A notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information;
- (6) A notice that the consumer has the right to request that the consumer credit reporting agency furnish notifications under subdivision (h);
- (7) A notice that the dispute will remain on file with the agency as long as the credit information is used; and
- (8) A statement about the details of the dispute will be furnished to any recipient as long as the credit information is retained in the agency's.

The agency must provide this notice not later than 15 days after receiving a request from the consumer.n68.1 This procedure is not required if the agency deletes the disputed information within three business days of receiving notice of the dispute and notifies the consumer of the deletion within five business days after the deletion.n68.2

If the dispute is found to be frivolous or irrelevant, or remains unresolved, or if the information is reinserted, the consumer may file a brief statement setting forth the nature of the dispute, which must be included in future reports provided by the agency.ⁿ⁶⁹

If after reinvestigation, the disputed information is deleted, or the information is reinserted but the consumer has provided a statement of dispute,ⁿ⁷⁰ on the consumer's request, the agency must furnish notification of that fact to any specifically designated person who has, within the previous two years, received a credit report concerning the consumer for employment purposes.ⁿ⁷¹

If information in a consumer's file has been deleted, the consumer credit reporting agency must maintain reasonable procedures designed to prevent the information's reinsertion in the file.ⁿ⁷²

If a consumer submits a copy of a valid police report or Department of Motor Vehicles investigative report filed pursuant to *Penal Code* § 530.5 to a credit reporting agency, the agency must promptly and permanently block reporting any information that the consumer alleges appears on the credit report as a result of a violation of that section, so that the information cannot be reported. The agency must promptly notify the furnisher of the information that the information has been blocked.^{n72.1}

[b] Action for Damages

An applicant or employee who suffers damages as a result of the employer's negligent violation of the Consumer Credit Reporting Agencies Act may bring an action against the employer in a court of competent jurisdiction to recover actual damages, including court costs, loss of wages, attorney's fees, and when applicable, pain and suffering.ⁿ⁷³ For a willful violation, the plaintiff may recover actual damages--as for a negligent violation--as well as punitive damages of not less than \$100 or more than \$5,000 for each violation, as the court deems proper, and any other relief the court deems proper.ⁿ⁷⁴ Injunctive relief is available to any consumer aggrieved by a violation or threatened violation of the Act, whether or not the person seeks any other remedy for the violation.ⁿ⁷⁵ In addition, a consumer who is awarded actual damagesⁿ⁷⁶ against a natural person who obtained a consumer credit report under false pretenses, or knowingly without a permissible purpose, must be awarded an amount not less than \$2,500.ⁿ⁷⁷

If a class action is brought under the act, any defendant who has willfully violated any requirement of the act may be liable for punitive damages in the amount the court allows.ⁿ⁷⁸ In determining the amount of the award in a class action, the court must consider among the relevant factors the amount of any actual damages awarded, the frequency of the violations, the violator's resources, and the number of persons adversely affected by the defendant's conduct.ⁿ⁷⁹

The prevailing party in any action is entitled to court costs and reasonable attorney's fees, unless the plaintiff seeks and obtains only injunctive relief to compel compliance with the Act. If the plaintiff seeks and obtains only injunctive relief, court costs and attorney's fees will be awarded pursuant to the general procedures for such awards in cases affecting matters of public interest.ⁿ⁸⁰ However, if the plaintiff brings an action against a debt collector^{n80.1} and the basis for the action is related to the collection of a debt, whether those issues are raised in the same or another proceeding, the debt collector will be entitled to recover reasonable attorney's fees if the court finds that the action was not brought in good faith.^{n80.2}

In addition to damages (or any other remedy provided by law), a consumer may seek civil penalties against any person who knowingly and willfully obtains access to a file or obtains data from a file other than as provided under *Civil Code Section 1785.11*,ⁿ⁸¹ or who uses the data from a file in violation of an agreement with the consumer reporting agency.ⁿ⁸² This remedy is also available against the person or entity responsible for the file accessed.ⁿ⁸³ A successful plaintiff is entitled to costs and reasonable attorney's fees.ⁿ⁸⁴

The action to enforce liability under the Act generally must be brought within two years from the date the plaintiff knew of, or should have known of, the violation of the Act, but no more than seven years from the earliest date on which liability could have arisen. However, if a defendant has materially and willfully misrepresented any information required under the Act to be disclosed to a consumer, and that information is material to the establishment of the defendant's liability, the action may be brought at any time within two years after the consumer discovers the misrepresentation.ⁿ⁸⁵

If a suit is pending against the employer under the federal Fair Credit Reporting Act,ⁿ⁸⁶ no suit may be brought under the California Consumer Credit Reporting Agencies Act for the same act or omission.ⁿ⁸⁷ Further, entry of a final judgment against the employer in an action under the Fair Credit Reporting Actⁿ⁸⁸ is a bar to the maintenance of any action based on the same act or omission that might be brought under the Consumer Credit Reporting Agencies Act.ⁿ⁸⁹

The remedy provided by the Consumer Credit Reporting Agencies Act is exclusive of all other remedies in the nature of defamation, invasion of privacy, and negligence that the applicant or employee might otherwise have against the employer (or the agency) with respect to information disclosed under the act,ⁿ⁹⁰ except in regard to false information furnished with malice or willful intent to injure the applicant or employee.ⁿ⁹¹

[c] FORM--Complaint for Damages for Violation of Consumer Credit Reporting Agencies Act

[i] Comment

The form set forth in [ii], *below*, is for use by an employee against an employer that has violated any of the requirements of the Consumer Credit Reporting Agencies Act.ⁿ⁹² For discussion of civil actions under the act, *see* [b], *above*.

In an action against an employer under the Consumer Credit Reporting Agencies Act, the complaint must allege the following:ⁿ⁹³

1. Either that an employer-employee relationship exists between the plaintiff and the defendant or that the plaintiff applied for employment with the defendant;
2. That the defendant procured or caused to be prepared a consumer credit report concerning the plaintiff; and
3. That the defendant violated the act.

An employer's violation of the act would most likely consist of a failure to notify the plaintiff that it adversely decided an employment question (such as hiring, termination, or promotion) concerning plaintiff, in whole or in part, because of information contained in a consumer credit report, and to provide the required notice.ⁿ⁹⁴ The required notice must include the name and address of the agency making the report, the telephone number of the agency, and an enumeration of the consumer's rights, such as the right to dispute the accuracy or completenessⁿ⁹⁵ of the report.ⁿ⁹⁶

The form provides for an optional allegation appropriate to a class action (Paragraph 4).

[ii] Form Complaint for Damages for Violation of Consumer Credit Reporting Agencies Act

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[or other as appropriate]

_____ [name(s)],	)	
[On Behalf of Himself/Herself/Themselves and All	)	NO. _____
Others Similarly Situated,] Plaintiff(s), vs.	)	COMPLAINT AGAINST EMPLOYER FOR DAM-
_____ [name],	)	AGES FOR VIOLATION OF CONSUMER CREDIT
Defendant.	)	REPORTING AGENCIES ACT

Plaintiff(s) allege(s):

1. [Capacity, residence of defendant. See Form in § 50.11[5][c][ii], Paragraph 1].
- [2. Where acts complained of occurred. See Form in § 50.11[5][c][ii], Paragraph 2.]
3. [Relationship of parties. See Form in § 50.11[5][c][ii], Paragraph 3].
- [4. Class action allegations, if appropriate. See Form in § 50.12[3][b][ii], Paragraph 4.]
5. _____ [Allege facts showing application of Consumer Credit Reporting Agencies Act, e.g., Prior to his/her/its decision _____ (specify adverse action regarding employment decision, e.g., whether to hire plaintiff or whether to terminate plaintiff's employment), defendant caused to be prepared, for his/her/its use in making that decision, a consumer credit report concerning plaintiff's credit worthiness, credit standing, and credit capacity. (The report was prepared by _____ (name of agency), and a copy of the report is attached hereto as Exhibit _____ and incorporated herein by reference)].
6. _____ [Allege defendant's violation of Consumer Credit Reporting Agencies Act, e.g., (Plaintiff is informed and believes and thereon alleges that) (W)hen, on or about _____ (date), defendant _____ (specify adverse action, e.g., declined to hire plaintiff or terminated plaintiff's employment), defendant failed to _____ (specify, e.g., provide plaintiff with the name, address, and telephone number of the consumer credit reporting agency making the report or provide plaintiff with written notice of the right to obtain a free copy of the report within 60 days or other requirement enumerated under Civ. Code § 1785.20(a)). Defendant has willfully continued to refuse to supply plaintiff with such information, in violation of the Consumer Credit Reporting Agencies Act, Civil Code Sections 1785.20(a) and 1785.20.5].
- [7. Defendant's actions herein alleged were done willfully and knowingly in violation of the Consumer Credit Reporting Agencies Act.]
8. [General damage allegation. See Form in § 50.12[3][b][ii] (Paragraph 8)].
- [9. Medical expense allegation. See Form in § 50.12[3][b][ii] (Paragraph 9).]
- [10. Lost earnings allegation. See Form in § 50.12[3][b][ii] (Paragraph 10).]
- [11. Allege the following if appropriate, to establish entitlement to minimum amount of \$2,500 in actual damages: Defendant _____ (name) is a natural person who obtained a consumer credit report under false

pretenses and/or knowingly without a permissible purpose.]

WHEREFORE, plaintiff(s) pray(s) for judgment as follows:

1. For actual damages [in the sum of \$_____];
- [2. For medical and related expenses (_____ (in the sum of \$_____ or according to proof));]
- [3. For lost earnings, past and future(, _____ (in the sum of \$_____ or according to proof));]
- [4. For punitive damages pursuant to *Civil Code Section 1785.31(a)(2)(B)*, in an amount appropriate to punish defendant and deter others from engaging in similar misconduct;]
5. For reasonable attorney's fees pursuant to *Civil Code Section 1785.31(a)(1)* and (d);
6. For costs of suit herein incurred; and
7. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff

[Add verification, if desired (see *Code Civ. Proc.* §§ 446, 2015.5).]

Legal Topics:

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

Banking LawConsumer ProtectionFair Credit ReportingConsumer ReportsLabor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawPreemployment Practices

FOOTNOTES:

(n1)Footnote 1. *Civ. Code* § 1785.1 *et seq.*, effective July 1, 1998.

(n2)Footnote 2. *See Civ. Code* § 1785.1(b), (c), (d). In addition, any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling, evaluating, or disseminating information on the checking account experiences of consumer customers of banks or other financial institutions is subject to the same laws that govern consumer credit reporting agencies. *Civ. Code* § 1785.5, effective until January 1, 2003. Effective January 1, 2003, *Civ. Code* § 1785.5 provides that any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practices of assembling, evaluating, or disseminating information on the checking account experiences of consumer customers of banks or other financial institutions is, with the exception of compliance with the requirements of *Civ. Code* § 1785.10(c)-(e), only with regard to the provision of the address and telephone number, shall be subject to the same laws which govern consumer credit reporting agencies.

(n3)Footnote 3. *Civ. Code* § 1785.3(c).

(n4)Footnote 4. *Civ. Code § 1785.3(f)*.

(n5)Footnote 5. *Civ. Code § 1785.3(c)*.

(n6)Footnote 6. *See Civ. Code § 1786.2(c)*.

(n7)Footnote 7. *See Corp. Code §§ 150, 160*.

(n8)Footnote 8. *See Civ. Code § 1785.20.1(b)(2)*.

(n9)Footnote 9. *Civ. Code § 1785.4; see Civ. Code § 1785.35* (Consumer Credit Reporting Agencies Act does not apply to any consumer credit report that is limited to disclosures from public records relating to land and land titles or to any person whose records are maintained primarily to report portions of public records imparting constructive notice under law of matters relating to land and land titles).

(n10)Footnote 10. *See 15 U.S.C. § 1681 et seq.*

(n11)Footnote 11. *Compare, e.g., 15 U.S.C. § 1681c* (information that may not be included in "consumer report" under federal act) *with Civ. Code § 1785.13* (information that may not be included in "consumer credit report" under state law).

(n12)Footnote 12. *See 15 U.S.C. § 1681a(d), (f)*.

(n13)Footnote 13. *See 15 U.S.C. §§ 1681b, 1681d, 1681m*.

(n14)Footnote 14. *See 15 U.S.C. § 1681t*.

(n15)Footnote 15. *Credit Data of Arizona, Inc. v. State of Arizona* (9th Cir. 1979) 602 F.2d 195, 198 ; *see 15 U.S.C. § 1681t(a)*.

(n16)Footnote 16. *See Civ. Code § 1785.11(a)(3)(B)*.

(n17)Footnote 17. *Civ. Code § 1785.20.5(a)*.

(n18)Footnote 18. *Civ. Code § 1785.21(a)*.

(n19)Footnote 18.1. *Civ. Code § 1785.11.2(a)*.

(n20)Footnote 18.2. *Civ. Code § 1785.11.2(i)*.

(n21)Footnote 18.3. *Civ. Code § 1785.11.2(b)*.

(n22)Footnote 18.4. *Civ. Code § 1785.11.2(c)*.

(n23)Footnote 18.5. *Civ. Code § 1785.11.2(j)*.

(n24)Footnote 18.6. *Civ. Code § 1785.11.2(d)*.

(n25)Footnote 18.7. *Civ. Code § 1785.11.2(e)*.

(n26)Footnote 18.8. *Civ. Code § 1785.11.2(h)*.

(n27)Footnote 18.9. *Civ. Code § 1785.11.2(n)*.

(n28)Footnote 19. *Civ. Code § 1785.13(a)*.

(n29)Footnote 20. Any information in a consumer credit report regarding a bankruptcy must designate the chapter of the federal bankruptcy law pursuant to which the bankruptcy proceeding was filed, if ascertainable from information provided. *Civ. Code* § 1785.13(c).

(n30)Footnote 21. For this purpose, the lessor is deemed to be the prevailing party only if final judgment was awarded to the lessor on entry of the tenant's default, on the granting of the lessor's motion for summary judgment, or following trial, or if the action was resolved by a written settlement agreement between the parties that states that the unlawful detainer action may be reported. In any other instance in which the action is resolved by settlement agreement, the lessor is not deemed to be the prevailing party for this purpose. *Civ. Code* § 1785.13(a)(3).

(n31)Footnote 22. [Reserved]

(n32)Footnote 23. The commencement of the seven-year limitation period is governed by *Civ. Code* § 1785.13(b).

(n33)Footnote 24. *See Lab. Code* § 432.7(a) (no employer may seek from any source, or use as a factor in determining any condition of employment, information relating to employee's or applicant's arrests not leading to conviction), discussed in § 50.11.

(n34)Footnote 25. *Civ. Code* § 1785.13(a)(7). The commencement of the seven-year limitation period is governed by *Civ. Code* § 1785.13(b).

(n35)Footnote 26. *Civ. Code* § 1785.13(d)

(n36)Footnote 27. *Civ. Code* § 1785.13(f).

(n37)Footnote 28. *See Fam. Code* § 4701.

(n38)Footnote 29. *Civ. Code* § 1785.13(g).

(n39)Footnote 30. *Civ. Code* § 1785.14(a); *see Civ. Code* § 1785.11, 1785.13.

(n40)Footnote 31. *Civ. Code* § 1785.14(a).

(n41)Footnote 32. *Civ. Code* § 1785.14(a).

(n42)Footnote 32.1. *Civ. Code* § 1785.14(a); *see Civ. Code* § 1785.11.

(n43)Footnote 32.2. *See Civ. Code* § 1785.14(a)(1)-(3).

(n44)Footnote 33. *See Civ. Code* § 1785.3(a)(2) (denial of employment or other employment decision constitutes adverse action).

(n45)Footnote 34. *Civ. Code* § 1785.14(c).

(n46)Footnote 35. *See Civ. Code* § 1785.31.

(n47)Footnote 36. *Civ. Code* § 1785.14(c).

(n48)Footnote 37. *Civ. Code* § 1785.20(a).

(n49)Footnote 38. *See Civ. Code* § 1785.3(a)(2).

(n50)Footnote 39. *Civ. Code* § 1785.20(a).

(n51)Footnote 40. *See Civ. Code § 1785.20(a)(4)(A).*

(n52)Footnote 41. *See Civ. Code § 1785.20(a)(4)(B); see also Civ. Code § 1785.6* (notices and disclosures to consumers under Consumer Credit Reporting Agencies Act required only as to consumers who have mailing addresses in California).

(n53)Footnote 42. *Civ. Code §§ 1785.20(c), 1785.20.5(b).*

(n54)Footnote 43. *Civ. Code § 1785.25(a).*

(n55)Footnote 44. *See Civ. Code § 1785.25(b).*

(n56)Footnote 45. *See Civ. Code § 1785.25(c).*

(n57)Footnote 46. *See Civ. Code § 1785.25(d).*

(n58)Footnote 47. *See Civ. Code § 1785.25(e).*

(n59)Footnote 48. *See Civ. Code § 1785.25(f).*

(n60)Footnote 49. *See Civ. Code § 1785.25(g).*

(n61)Footnote 50. "Creditor" includes an agent or assignee of a creditor. *Civ. Code § 1785.26(a)(1).*

(n62)Footnote 51. *Civ. Code § 1785.26(b).*

(n63)Footnote 52. *Civ. Code § 1785.26(c); see Civ. Code § 1785.6* (notices and disclosures to consumers under Consumer Credit Reporting Agencies Act required only as to consumers who have mailing addresses in California).

(n64)Footnote 53. *Civ. Code § 1785.26(c).* There is no authorization to use this notice with respect to a violation of 15 U.S.C. § 1592 et seq.; *Civ. Code § 1785.26(c)(4).*

(n65)Footnote 54. *Civ. Code § 1785.26(d).*

(n66)Footnote 55. *Civ. Code § 1785.22(a).*

(n67)Footnote 56. *See Civ. Code § 1785.22(b).*

(n68)Footnote 57. *Civ. Code §§ 1785.10(a), 1785.15(a).*

(n69)Footnote 58. *Civ. Code §§ 1785.10(a), 1785.15(a).*

(n70)Footnote 59. *See Civ. Code § 1785.15.*

(n71)Footnote 60. *Civ. Code § 1785.15(a)(4)(A).*

(n72)Footnote 60.1. *Civ. Code § 1785.10(d)(1)(B).*

(n73)Footnote 60.2. *Civ. Code § 1785.15(a)(2).*

(n74)Footnote 60.3. *See Civ. Code §§ 1785.15.1; 1785.15.2.*

(n75)Footnote 61. *Civ. Code § 1785.16(a).*

(n76)Footnote 62. *Civ. Code § 1785.16(a).*

(n77)Footnote 63. *Civ. Code § 1785.16(a)*.

(n78)Footnote 63.1. *Civ. Code § 1786.15(a)*.

(n79)Footnote 64. *Civ. Code § 1785.16(a)*.

(n80)Footnote 65. *Civ. Code § 1785.16(b)*; *see Civ. Code § 1785.16(f)* (consumer may file brief statement).

(n81)Footnote 66. *Civ. Code § 1785.16(b)*.

(n82)Footnote 67. *Civ. Code § 1785.16(c)*.

(n83)Footnote 68. *Civ. Code § 1785.16(d)*.

(n84)Footnote 68.1. *Civ. Code § 1785.16(d)*.

(n85)Footnote 68.2. *See Civ. Code § 1785.16(j)*; *see also Civ. Code § 1785.6* (notices and disclosures to consumers under Consumer Credit Reporting Agencies Act required only as to consumers who have mailing addresses in California).

(n86)Footnote 69. *Civ. Code § 1785.16(f), (g)*. This procedure is not required if the agency deletes disputed information within three days. *see Civ. Code § 1785.16(j)*.

(n87)Footnote 70. *See Civ. Code § 1785.16(f)*.

(n88)Footnote 71. *Civ. Code § 1785.16(h)*.

(n89)Footnote 72. *Civ. Code § 1785.16(i)*.

(n90)Footnote 72.1. *Civ. Code § 1785.16(k)* (grounds for unblocking blocked information).

(n91)Footnote 73. *Civ. Code §§ 1785.31(a)(1), 1785.33*.

(n92)Footnote 74. *Civ. Code § 1785.31(a)(2)*.

(n93)Footnote 75. *Civ. Code § 1785.31(b)*.

(n94)Footnote 76. *See Civ. Code § 1785.31(a)(1), (2)(A)*.

(n95)Footnote 77. *Civ. Code § 1785.31(a)(3)*.

(n96)Footnote 78. *Civ. Code § 1785.31(c)*.

(n97)Footnote 79. *Civ. Code § 1785.31(c)*.

(n98)Footnote 80. *Civ. Code § 1785.31(d), (f)*; *see Code Civ. Proc. § 1021.5*.

(n99)Footnote 80.1. *See Civ. Code § 1788.2* (definition).

(n100)Footnote 80.2. *Civ. Code § 1785.31(e)*.

(n101)Footnote 81. *See Civ. Code § 1785.11* (procedure for furnishing consumer credit report).

(n102)Footnote 82. *See Civ. Code § 1785.19(a)*.

(n103)Footnote 83. *Civ. Code* § 1785.19(a).

(n104)Footnote 84. *Civ. Code* § 1785.19(b).

(n105)Footnote 85. *Civ. Code* § 1785.33.

(n106)Footnote 86. *15 U.S.C. § 1681 et seq.* For discussion of Fair Credit Reporting Act, *see* § 50.14.

(n107)Footnote 87. *Civ. Code* § 1785.34(a).

(n108)Footnote 88. *See 15 U.S.C. §§ 1681n, 1681o.*

(n109)Footnote 89. *Civ. Code* § 1785.34(b).

(n110)Footnote 90. *See Civ. Code* §§ 1785.10 (inspection of files by consumer), 1785.15 (agency's supplying of files and information to consumer), 1785.20 (notice of adverse action based on report).

(n111)Footnote 91. *Civ. Code* § 1785.32. For discussion of actions for common law invasion of privacy, *see* § 50.31[1]. For discussion of actions for defamation, *see* chs. 51 and 63.

(n112)Footnote 92. *Civ. Code* § 1785.1 *et seq.*; *see* discussion in [2], *above*.

(n113)Footnote 93. *See Civ. Code* §§ 1785.20(a), 1785.20.5, 1785.31.

(n114)Footnote 94. *See Civ. Code* §§ 1785.20(a), 1785.20.5.

(n115)Footnote 95. *See Civ. Code* § 1785.16.

(n116)Footnote 96. *Civ. Code* § 1785.20(a).



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California Employment Law

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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part B. STATUTORY AND ADMINISTRATIVE PROVISIONS

3-50 California Employment Law § 50.14

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.14 Federal Fair Credit Reporting Act

[1] Coverage

[a] Scope of Act

The federal Fair Credit Reporting Actⁿ¹ is designed to ensure that consumer credit reporting agencies exercise their responsibilities for assembling and evaluating consumer credit and other information on consumers with fairness, impartiality, and respect for consumers' privacy.ⁿ² The act requires consumer credit reporting agencies to adopt procedures for meeting the needs of employers (and other permissible users) for personnel information in a manner that is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper use of the information in accordance with the requirements of the act.ⁿ³

A "consumer report," as defined by the act, is any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected, in whole or in part, to serve as a factor in establishing the consumer's eligibility for, among other things, employment purposes.ⁿ⁴ However, the term "consumer report" does not include any communication made to a prospective employer for the purpose of procuring an employee or procuring an opportunity for a person to work for the employer, if (1) the communication is made by a person who regularly performs such procurement, and (2) the communication will not be used for any purpose other than the procurement of an employee or employment. If the communication may be used for other purposes, and the communication otherwise qualifies as a consumer report, it will be treated as a consumer report unless the person making the communication obtains the consumer's consent to the communication and complies with certain other requirements concerning notice and disclosure to the consumer.ⁿ⁵ The term "consumer report" also does not include a communication to an employer if each of the following is true:^{n5.1}

- But for 15 U.S.C. § 1681a(d)(2)(D), the communication would be a consumer report.
- It was made to an employer in connection with an investigation of either suspected misconduct

relating to employment or of compliance with federal, state, or local laws and regulations, the rules of a self-regulatory organization,^{n5.2} or any preexisting written policies of the employer.

- It was not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity.

- It was not provided to any person except the employer or an agent of the employer; any federal or state officer, agency, or department, or any officer, agency, or department of a unit of general local government; any self-regulatory organization with regulatory authority over the activities of the employer or employee; as otherwise required by law; or pursuant to *15 U.S.C. § 608*.

Some courts have held that an insurance claim report prepared by an investigator for a workers' compensation adjuster does not constitute a "consumer report," on the ground that Congressional intent was to include only reports prepared to determine an applicant's eligibility for insurance, not information gathered to substantiate claims.ⁿ⁶

An "investigative consumer report," under the act, is a consumer report, or portion of a consumer report, in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with the consumer's neighbors, friends, or associates, or with others with whom the consumer is acquainted or who may have knowledge concerning any such items of information. An "investigative consumer report" does not include a report of specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when the information was obtained directly from a creditor of the consumer or from the consumer.ⁿ⁷ The use of a consumer report for "employment purposes" means the use of the report to evaluate a consumer for employment, promotion, reassignment, or retention as an employee.ⁿ⁸

A "consumer reporting agency," for purposes of the federal act, is any person (1) that, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and (2) that uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.ⁿ⁹ An employer who requests or receives and uses a consumer report from such an agency is thus subject to the federal provisions relating to users of such reports.ⁿ¹⁰

[b] State Law Generally Not Preempted

The provisions of the federal Fair Credit Reporting Act overlap in many respects with the California Investigative Consumer Reporting Agencies Actⁿ¹¹ and the California Consumer Credit Reporting Agencies Act,ⁿ¹² which were discussed previously.ⁿ¹³ The federal act provides that except as specifically provided by the act,ⁿ¹⁴ it does not annul, alter, or exempt any person subject to the federal law from complying with any state law with respect to the collection, distribution, or use of any information on consumers for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of the federal act, and then only to the extent of the inconsistency.ⁿ¹⁵ In interpreting this provision, the Ninth Circuit has held that a state law will not be considered "inconsistent" with the Fair Credit Reporting Act if it goes further than the federal act in protecting the consumer, as long as compliance with state law would not result in a violation of the federal law.ⁿ¹⁶ Therefore, as a practical matter, California employers will be required to comply with both laws, since the applicable California statutes are either identical to or more protective of the consumer than the federal act.

[c] Specific Preemptions of State Laws

The act does contain some specific preemptions of state law.ⁿ¹⁷ For example, the act preempts state laws imposing requirements concerning the duties of a person who takes adverse action (including any decision for employment

purposes that adversely affects a current or prospective employee) based on a consumer report.ⁿ¹⁸ Under the federal act, such duties include notifying the consumer of (1) the adverse decision, (2) the consumer reporting agency that submitted the report, and (3) the consumer's right to obtain a copy of the report and to dispute the report.ⁿ¹⁹

Also, any state law taking effect after September 30, 1996, is preempted to the extent that it conflicts with the federal act's provisions prohibiting the inclusion in a report of certain adverse information that antedates the report.ⁿ²⁰

The federal act generally preempts state laws regulating the duties of persons who furnish information to consumer reporting agencies.ⁿ²¹ However, this preemption does not apply to the provision of the California Consumer Credit Reporting Agencies Act (as of September 30, 1996) that prohibits any person from knowingly furnishing a consumer credit reporting agency with incomplete or inaccurate information on a specific transaction or experience.ⁿ²²ⁿ²³

[2] Substantive Rights and Responsibilities

[a] Limits on Employer's Right to Request Preparation of Report

An employer who intends to use the information for employment purposes may obtain a consumer report.ⁿ²⁴ A consumer reporting agency may furnish a consumer report for employment purposes only if the following conditions are satisfied:ⁿ²⁵

1. The employer certifies to the agency that (a) the employer has disclosed to the consumer that the report may be obtained,ⁿ²⁶ (b) that the employer will comply with the requirements of the Fair Credit Reporting Act if the employer takes adverse action based on the report,ⁿ²⁷ and (c) the information in the report will not be used in violation of any federal or state equal employment opportunity law or regulation; and
2. The agency includes with the report a summary of the consumer's rights under the Fair Credit Reporting Act.ⁿ²⁸

[b] Disclosures to Employee or Applicant; Consent to Procurement of Report

An employer may not procure or cause to be prepared a consumer report on an employee or applicant (the "consumer") unless both of the following conditions are satisfied:ⁿ²⁹

1. A clear and conspicuous disclosure has been made to the consumer at any time before the report is procured or caused to be procured, in a written document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and
2. The consumer has authorized in writing the procurement of the report by the employer.

In addition, if the report or a portion of it will be an *investigative* consumer report,ⁿ³⁰ the employer must do the following:ⁿ³¹

1. Clearly and accurately disclose to the employee or applicant that an investigative consumer report, including information about character, general reputation, personal characteristics, and mode of living, may be made. The disclosure must be made in a writing that is mailed or delivered not later than three days after the report was first requested and that includes (a) a statement informing the employee or applicant of the right to request additional disclosure of the nature and scope of the investigation requested, and (b) a written summary of the employee or applicant's rights under the Fair Credit Reporting Act.ⁿ³² (form and content of summary prescribed by Federal Trade Commission); and

2. Certify to the consumer reporting agency that the required disclosures have been made to the employee or applicant and that the employer will provide additional information requested by the employee or applicant pursuant to the act.

If the employee or applicant requests the additional disclosure, the disclosure must be made in a writing mailed or delivered to the employee or applicant not later than five days after the later of the date the request was received from the consumer or the date that the report was first requested.ⁿ³³ As discussed in [1], *above*, some courts have held that an insurance claim report prepared by an investigator for a workers' compensation adjuster is not a "consumer report" that must be furnished to an employee who filed a claim.ⁿ³⁴

After taking any adverse action based in whole or in part on a communication that was made to an employer in connection with an investigation of either suspected misconduct relating to employment or of compliance with federal, state, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer,^{n34.1} the employer must disclose to the consumer a summary containing the nature and substance of the communication on which the adverse action was based, except that the sources of information acquired solely for use in preparing what would be an investigative consumer report but for *15 U.S.C. § 1681a(d)(2)(D)* need not be disclosed.^{n34.2}

[c] Scope of Report

A consumer report for employment purposes may not contain any of the following items of information:ⁿ³⁵

1. Cases under Bankruptcy Code (Title 11 United States Code) or under the former federal Bankruptcy Act that, from the date of entry of the order for relief or the date of adjudication, predate the report by more than 10 years;
2. Civil suits, civil judgments, and records of arrestⁿ³⁶ that, from the date of entry, predate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period;
3. Paid tax liens that, from the date of payment, predate the report by more than seven years;
4. Accounts placed for collection or charged to profit and loss that predate the report by more than seven years;
5. Any other adverse information that predates the report by more than seven years;ⁿ³⁷
6. The name, address, and telephone number of any medical information furnisher that has notified the agency of its status, unless the name, address, and telephone number are restricted or reported using codes that do not identify, or provide information sufficient to infer, the specific provider or the nature of such services, products, or devices to a person other than the consumer, or the report is being provided to an insurance company for a purpose relating to engaging in the business of insurance other than property and casualty insurance.^{n37.1}

The prohibition on reporting the foregoing kinds of adverse information other than information about a medical information furnisher,^{n37.2} unless the information is relevant to process or effect the employment or credit transaction and does not apply, however, if the report relates to the employment of an individual at an annual salary that equals, or may reasonably be expected to equal, \$75,000 or more.ⁿ³⁸

A consumer reporting agency may not furnish for employment purposes a consumer report that includes medical information about the consumer, other than medical contact information treated in the manner required under *15 U.S.C. § 1681c(a)(6)*, unless the consumer consents to the furnishing of the report.ⁿ³⁹

Every consumer reporting agency is required to maintain reasonable procedures to avoid disclosure of prohibited information and to limit the furnishing of reports to permitted purposes such as use for employment purposes.ⁿ⁴⁰ To that end, procedures mandated by the act impose on employers certain identification and certification requirements. Agencies must require users of their reports to identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purposes.ⁿ⁴¹ An agency must make a reasonable effort to verify the identity of employers who are new prospective users of an agency's reports and the uses certified by such employers before the agency may furnish the reports.ⁿ⁴²

[d] Employer's Duties When Taking Adverse Action Based on Report

Before taking any adverse action based in whole or in part on the consumer report, an employer must provide the employee or applicant (the "consumer") a copy of the report and a written description of the consumer's rights under the Fair Credit Reporting Act.ⁿ⁴³ For purposes of the act, "adverse action" includes a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.ⁿ⁴⁴

In addition, when adverse action is taken, the employer must provide the consumer with the following, either orally, in writing, or electronically:ⁿ⁴⁵

1. Notice of the adverse action;
2. The name, address, and telephone number of the consumer reporting agency that furnished the report, including a toll-free telephone number if the agency compiles and maintains files on a nationwide basis; and
3. A statement that the consumer reporting agency did not make the adverse action and is unable to provide the specific reasons for the adverse action.

The employer cannot be held liable for failing to provide the three foregoing items if the employer shows, by a preponderance of the evidence, that at the time of the alleged violation the employer maintained reasonable procedures to assure compliance.ⁿ⁴⁶

[3] Methods of Enforcement

[a] Criminal Penalties

Any employer who knowingly and willfully obtains information on an employee or applicant from a consumer reporting agency under false pretenses is subject to a fine, imprisonment for not more than two years, or both.ⁿ⁴⁷

[b] Civil Liability for Willful Noncompliance

An employer that willfully fails to comply with any requirement imposed under the Fair Credit Reporting Act with respect to any employee or applicant is liable to the aggrieved employee or applicant for the following amounts:ⁿ⁴⁸

1. The employee or applicant's actual damages. "Actual damages" recoverable under the Fair Credit Reporting Act include, generally, all elements of compensatory awards, and not merely pecuniary or out-of-pocket losses.ⁿ⁴⁹ Even if the employee or applicant cannot establish actual damages, the employer may nevertheless be held liable for damages of up to \$1,000;

2. Punitive damages as the court may allow; and

3. In the case of a successful action to enforce any liability based on the employer's willful noncompliance, the costs of suit and reasonable attorney's fees as determined by the court.

The statutory provision authorizing recovery of punitive damages "as the court may allow" for willful noncompliance with the Fair Credit Reporting Act has been interpreted as a statutory codification of the court's duty to review excessive verdicts and to attempt to eliminate from the jury system emotion and prejudice, rather than a statement that the court alone must determine the punitive damage award.ⁿ⁵⁰

An employer who knowingly and willfully obtains information on an employee or applicant under false pretenses is liable for civil damages as well as the criminal penalties prescribed by the Fair Credit Reporting Act.ⁿ⁵¹

[c] Civil Liability for Knowing Noncompliance

Any employer who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose is liable to the agency for the agency's actual damages or \$1,000, whichever is greater.ⁿ⁵²

[d] Civil Liability for Negligent Noncompliance

An employer who negligently fails to comply with any requirement imposed under the Fair Credit Reporting Act with respect to an employee or applicant is liable to him or her in an amount equal to the sum of any actual damages he or she sustained as a result of the failure and, in a successful action to enforce such liability for negligent noncompliance, the costs of suit and reasonable attorney's fees as determined by the court.ⁿ⁵³

[e] Jurisdiction and Limitations Period

An action for damages for willful, knowing, or negligent noncompliance with the Fair Credit Reporting Act may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction.ⁿ⁵⁴ An appropriate state court is a "court of competent jurisdiction" within the meaning of the statute,ⁿ⁵⁵ and federal district courts have disagreed over the question whether a suit under the Fair Credit Reporting Act that is brought in a state court may be removed to a federal district court.ⁿ⁵⁶

An action for noncompliance with the Fair Credit Reporting Act must be brought not later than the earlier of 2 years after the date of discovery by the plaintiff of the violation that is the basis for liability or 5 years after the date on which the violation that is the basis for liability occurs.ⁿ⁵⁷

If an employee or applicant brings an action under the federal act, he or she will be precluded from bringing an action under the California Consumer Credit Reporting Agencies Actⁿ⁵⁸ or the California Investigative Consumer Reporting Agencies Actⁿ⁵⁹ for the same act or omission.ⁿ⁶⁰

[f] FORM--Complaint for Damages for Failure to Comply With Requirements of Federal Fair Credit Reporting Act

[i] Comment

The form set forth in [ii], *below*, is for use by an employee or applicant against an employer in a civil action for violation of the Fair Credit Reporting Act.ⁿ⁶¹ For discussion of such actions, *see [a]-[e], above*.

3-50 California Employment Law § 50.14

In an action against an employer under the Fair Credit Reporting Act, the complaint must allege the following:

1. Either that an employer-employee relationship existed between the plaintiff and the defendant during the relevant time or that the plaintiff applied for employment with the defendant;
2. That the defendant procured or caused to be prepared a consumer credit report concerning the plaintiff; and
3. That the defendant negligently, knowingly, or willfully violated the act.ⁿ⁶²

The form provides for an optional allegation appropriate to a class action (Paragraph 4).

If the court finds that an unsuccessful complaint or any other unsuccessful pleading, motion or paper in connection with the action was filed in bad faith or for purposes of harassment, the court must award reasonable attorney's fees to the prevailing party.ⁿ⁶³

[ii] Form Complaint for Damages for Failure to Comply With Requirements of Federal Fair Credit Reporting Act

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[or other as appropriate]

_____ [name(s)], [On Behalf of)	
Himself/Herself/Themselves and All Others Similarly)	NO. _____
Situated,])	COMPLAINT AGAINST EMPLOYER FOR DAM-
Plaintiff(s),)	AGES FOR _____ [WILLFUL or
vs.)	NEGLIGENT] VIOLATION OF FAIR CREDIT RE-
_____ [name],)	PORTING ACT
Defendant.)	[15 U.S.C. §§ _____ (1681n or
	1681o), 1681p]

Plaintiff(s) allege(s):

1. [Capacity, residence of defendant. See Form in § 50.11[5][c][ii], Paragraph 1].

[2. Where acts complained of occurred. See Form in § 50.11[5][c][ii], Paragraph 2.]

3. [Relationship of parties. See Form in § 50.11[5][c][ii], Paragraph 3].

[4. Class action allegations. See Form in § 50.12[3][b][ii], Paragraph 4.]

5. _____ [Allege facts showing application of Fair Credit Reporting Act, e.g., Prior to defendant's decision _____ (specify employment decision, e.g., whether to hire plaintiff or whether to terminate

plaintiff's employment), defendant caused to be prepared, for his/her/its use in making that decision, an investigative consumer report concerning plaintiff's character, general reputation, personal characteristics, and mode of living].

6. _____ [Allege defendant's violation of Fair Credit Reporting Act, e.g., Defendant notified plaintiff that such a report was to be prepared, but failed to obtain plaintiff's written authorization for the report and refused to disclose to plaintiff the name of the agency conducting the investigation and further failed to include in its notification to plaintiff a statement informing plaintiff of his/her right to request additional disclosure of the nature and scope of the investigation requested. Furthermore, when, on or about _____ (date), defendant _____ (specify adverse action, e.g., declined to hire plaintiff or terminated plaintiff's employment), defendant failed to advise plaintiff that defendant's decision was based wholly or in part on the investigative consumer report and failed to supply plaintiff with the name and address of the reporting agency making the report. Defendant has (willfully) continued to fail to supply plaintiff with such information, in violation of the Fair Credit Reporting Act, Title 15 United States Code, sections 1681b(b), 1681d(a), and 1681m(a)].

7. [General damage allegation. See Form in § 50.12[3][b][ii] (Paragraph 7)].

[8. Medical expense allegation. See Form in § 50.12[3][b][ii] (Paragraph 8).]

[9. Lost earnings allegation. See Form in § 50.12[3][b][ii] (Paragraph 9).]

[10. If seeking punitive damages for willful violation, allege the following: Defendant's actions herein alleged were done willfully and knowingly in violation of the Fair Credit Reporting Act, in that _____ (specify facts showing willful violation).]

WHEREFORE, plaintiff(s) pray(s) for judgment as follows:

1. For actual damages [in the sum of \$_____];

[2. For medical and related expenses (_____ (in the sum of \$_____ or according to proof));]

[3. For lost earnings, past and future(, _____ (in the sum of \$_____ or according to proof));]

[4. For an award of punitive damages in an amount appropriate to punish defendant and to deter others from engaging in similar misconduct, pursuant to Title 15 United States Code, section 1681n(a)(2);]

5. For prejudgment interest on all amounts claimed;

6. For reasonable attorney's fees, pursuant to Title 15 United States Code, section _____ [1681n or 1681o];

7. For costs of suit herein incurred; and

8. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff(s)

[Add verification, if desired (see Code Civ. Proc. §§ 446, 2015.5).]

[g] Administrative Enforcement

Compliance with the Fair Credit Reporting Act is also enforced under the Federal Trade Commission Act (FTCA) by the Federal Trade Commission (FTC) with respect to most consumer reporting agencies and users of consumer reports.ⁿ⁶⁴ Exceptions to the FTC's enforcement jurisdiction exist for (1) national banks, member banks of the Federal Reserve System, and banks insured by the Federal Deposit Insurance Corporation;ⁿ⁶⁵ (2) savings associations whose deposits are insured by the Federal Deposit Insurance Corporation;ⁿ⁶⁶ (3) federal credit unions;ⁿ⁶⁷ (4) common carriers subject to Title 49 United States Code, Subtitle IV, regulating interstate commerce;ⁿ⁶⁸ (5) air carriers and foreign air carriers subject to the Federal Aviation Act of 1958;ⁿ⁶⁹ and (6) activities subject to the Packers and Stockyards Act, 1921.ⁿ⁷⁰ Compliance with the Fair Credit Reporting Act by those entities is enforced by other federal agencies.ⁿ⁷¹

For purposes of administrative enforcement by the FTC, a violation of the Fair Credit Reporting Act constitutes an unfair or deceptive act or practice in commerce in violation of FTCA section 5(a)ⁿ⁷² and is subject to enforcement by the FTC under FTCA section 5(b)ⁿ⁷³ regardless of whether the violator is engaged in commerce or meets any other jurisdictional tests in the FTCA.ⁿ⁷⁴ The FTC has the procedural, investigative, and enforcement powers, including the power to require the filing of reports, the production of documents, and the appearance of witnesses, that it would have if the applicable provisions of the FTCA were a part of the Fair Credit Reporting Act.ⁿ⁷⁵ Any person violating the Fair Credit Reporting Act is subject to the penalties and entitled to the privileges and immunities provided in the FTCA, as if the applicable provisions were part of the Fair Credit Reporting Act.ⁿ⁷⁶

The Fair Credit Reporting Act also authorizes state agencies (1) to bring actions to enjoin violations of the act and (2) to sue on behalf of state residents to recover damages for violations of the act.ⁿ⁷⁷

Legal Topics:

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

Banking Law Consumer Protection Fair Credit Reporting Consumer Reports Civil Rights Law Contractual Relations & Housing Fair Housing Rights Credit & Mortgage Laws Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Disclosure of Employee Information General Overview

FOOTNOTES:

(n1)Footnote 1. *15 U.S.C. § 1681 et seq.*

(n2)Footnote 2. *See 15 U.S.C. § 1681(a)(3), (4).*

(n3)Footnote 3. *15 U.S.C. § 1681(b).*

(n4)Footnote 4. *15 U.S.C. § 1681a(d)(1).*

(n5)Footnote 5. *15 U.S.C. § 1681a(d)(2)(D)(o).*

(n6)Footnote 5.1. *15 U.S.C. § 1681a(x)(1).*

(n7)Footnote 5.2. For definition of "self-regulatory organization," *see 16 U.S.C. § 1681a(x)(3).*

(n8)Footnote 6. *Kemp v. County of Orange* (1989) 211 Cal. App. 3d 1422, 1425-1427, 260 Cal. Rptr. 131 ; *see Cochran v. Metropolitan Life Ins. Co.* (N.D. Ga. 1979) 472 F. Supp. 827, 831-832 (also noting that the FTC has determined that claims reports are not regulated by the act); *but see Beresh v. Retail Credit Co.* (C.D. Cal. 1973) 358

F. Supp. 260 (reaching the opposite conclusion, which *Kemp* declined to follow).

(n9)Footnote 7. *15 U.S.C. § 1681a(e)*.

(n10)Footnote 8. *15 U.S.C. § 1681a(h)*.

(n11)Footnote 9. *15 U.S.C. § 1681a(f)*.

(n12)Footnote 10. *See 15 U.S.C. §§ 1681d, 1681m; see also* discussion in [2], *below*.

(n13)Footnote 11. *See Civ. Code §§ 1786-1786.56*.

(n14)Footnote 12. *See Civ. Code §§ 1785.1-1785.35*.

(n15)Footnote 13. *See* discussions in §§ 5.12, 5.13.

(n16)Footnote 14. *See 15 U.S.C. § 1681t(b)-(d)* (specific areas in which act preempts state law).

(n17)Footnote 15. *15 U.S.C. § 1681t*.

(n18)Footnote 16. *Credit Data of Arizona, Inc. v. State of Arizona* (9th Cir. 1979) 602 F.2d 195, 198 .

(n19)Footnote 17. *15 U.S.C. § 1681t(b)*.

(n20)Footnote 18. *15 U.S.C. § 1681t(b)(1)(C); see 15 U.S.C. §§ 1681a(k)(1)(B)(ii), 1681m(a)*.

(n21)Footnote 19. *15 U.S.C. § 1681m(a)*.

(n22)Footnote 20. *15 U.S.C. § 1681t(b)(1)(E); see 15 U.S.C. § 1681c; see [2][c], below*.

(n23)Footnote 21. *15 U.S.C. § 1681t(b)(1)(F)*.

(n24)Footnote 22. *15 U.S.C. § 1681t(b)(1)(F); see Civ. Code § 1785.25(a)*.

(n25)Footnote 23. [Reserved]

(n26)Footnote 24. *15 U.S.C. § 1681b(a)(3)(B)*.

(n27)Footnote 25. *15 U.S.C. § 1681b(b)(1)*.

(n28)Footnote 26. *15 U.S.C. § 1681b(b)(2); see [b], below*.

(n29)Footnote 27. *15 U.S.C. § 1681b(b)(3); see [d], below*.

(n30)Footnote 28. *See 15 U.S.C. § 1681g(c)(3)* (form and content of summary prescribed by Federal Trade Commission).

(n31)Footnote 29. *15 U.S.C. § 1681b(b)(2)*.

(n32)Footnote 30. *See 15 U.S.C. § 1681a(e)*.

(n33)Footnote 31. *15 U.S.C. § 1681d(a)*.

(n34)Footnote 32. *See 15 U.S.C. § 1681g(c)(3)*

(n35)Footnote 33. *15 U.S.C. § 1681d(b)*.

(n36)Footnote 34. *See Kemp v. County of Orange* (1989) 211 Cal. App. 3d 1422, 1425-1427, 260 Cal. Rptr. 131 ; *but see Beresh v. Retail Credit Co.* (C.D. Cal. 1973) 358 F. Supp. 260 (reaching the opposite conclusion, which *Kemp* declined to follow).

(n37)Footnote 34.1. *See 15 U.S.C. § 1681a(x)(1); see § [1][a], above.*

(n38)Footnote 34.2. *15 U.S.C. § 1681a(x)(2)*.

(n39)Footnote 35. *15 U.S.C. § 1681c(a)*.

(n40)Footnote 36. Note that under California law, most employers are entirely prohibited from seeking or receiving from any source, or using as a factor in determining any condition of employment, information relating to an employee's or applicant's arrests not leading to conviction, regardless of how recent the arrest. Typically, the employer may ask only about arrests for which the employee is currently out on bail or own recognizance pending trial. *see Lab. Code § 432.7(a); see also Civ. Code §§ 1785.13(a)(6), 1786.18(a)(7)* (consumer credit reports and investigative consumer reports may not contain records of such arrests). For discussion of restrictions on receipt of information about employee arrests, *see § 50.11*.

(n41)Footnote 37. *15 U.S.C. § 1681c(a)(5)*.

(n42)Footnote 37.1. This addition to *15 U.S.C. § 1681c(a)* is effective at the end of the 15-month period beginning on Dec. 4, 2003. Act Dec. 4, 2003, P.L. 108-159, Title IV, § 412(b), (c), 117 Stat. 2002 (effective at end of 15-month period beginning on enactment, as provided by § 412(g) of Act, which appears as *15 U.S.C. § 1681b* note).

(n43)Footnote 37.2. This addition to *15 U.S.C. § 1681c(b)* is effective at the end of the 15-month period beginning on Dec. 4, 2003. Act Dec. 4, 2003, P.L. 108-159, Title IV, § 412(b), (c), 117 Stat. 2002 (effective at end of 15-month period beginning on enactment, as provided by § 412(g) of Act, which appears as *15 U.S.C. § 1681b* note).

(n44)Footnote 38. *15 U.S.C. § 1681c(b)(3)*.

(n45)Footnote 39. *15 U.S.C. § 1681b(g)*.

(n46)Footnote 40. *15 U.S.C. § 1681e(a)*.

(n47)Footnote 41. *15 U.S.C. § 1681e(a)*.

(n48)Footnote 42. *15 U.S.C. § 1681e(a)*.

(n49)Footnote 43. *15 U.S.C. § 1681b(b)(3); see 15 U.S.C. § 1681g(c)(3)* (form and content of summary prescribed by Federal Trade Commission).

(n50)Footnote 44. *15 U.S.C. § 1681a(k)(1)(B)(ii)*.

(n51)Footnote 45. *15 U.S.C. § 1681m(a)*.

(n52)Footnote 46. *15 U.S.C. § 1681m(c)*.

(n53)Footnote 47. *15 U.S.C. § 1681q*.

(n54)Footnote 48. *15 U.S.C. § 1681n(a)*.

(n55)Footnote 49. *See Razor v. Retail Credit Co.* (1976) 87 Wash. 2d 516, 554 P.2d 1041, 1049 .

(n56)Footnote 50. *Collins v. Retail Credit Co.* (E.D. Mich. 1976) 410 F. Supp. 924, 933 .

(n57)Footnote 51. *Hansen v. Morgan* (9th Cir. [Idaho] 1978) 582 F.2d 1214, 1217-1221 ; see 15 U.S.C. § 1681q (penalty for knowingly and willfully obtaining information on consumer from consumer reporting agency under false pretenses is fine, imprisonment for not more than two years, or both); see also [a], above.

(n58)Footnote 52. 15 U.S.C. § 1681n(b).

(n59)Footnote 53. 15 U.S.C. § 1681o(a).

(n60)Footnote 54. 15 U.S.C. § 1681p.

(n61)Footnote 55. See *Ruth v. Westinghouse Credit Co., Inc.* (W.D. Okla. 1974) 373 F. Supp. 468, 469 .

(n62)Footnote 56. Compare *Haun v. Retail Credit Co.* (W.D. Pa. 1976) 420 F. Supp. 859, 863-864 (holding that 15 U.S.C. § 1681p does not amount to prohibition against removal), with *Ruth v. Westinghouse Credit Co., Inc.* (W.D. Okla. 1974) 373 F. Supp. 468, 469-471 (holding suit not removable).

(n63)Footnote 57. 15 U.S.C. § 1681p.

(n64)Footnote 58. See Civ. Code §§ 1785.1-1785.13.

(n65)Footnote 59. See Civ. Code §§ 1786-1786.56.

(n66)Footnote 60. See Civ. Code §§ 1785.34, 1786.52; see also discussion in §§ 50.12[3][a], 50.13[3][b].

(n67)Footnote 61. 15 U.S.C. § 1681 et seq.

(n68)Footnote 62. See 15 U.S.C. §§ 1681n(a), (b), 1681o(a). For discussion of the duties imposed on employers by the act, see [2], above.

(n69)Footnote 63. 15 U.S.C. §§ 1681n(c), 1681o(b).

(n70)Footnote 64. 15 U.S.C. § 1681s(a).

(n71)Footnote 65. 15 U.S.C. § 1681s(b)(1); see 12 U.S.C. § 1818 (Federal Deposit Insurance Act § 8).

(n72)Footnote 66. 15 U.S.C. § 1681s(b)(2); see 12 U.S.C. § 1818 (Federal Deposit Insurance Act § 8).

(n73)Footnote 67. 15 U.S.C. § 1681s(b)(3); see 12 U.S.C. §§ 1751-1751k (Federal Credit Union Act).

(n74)Footnote 68. 15 U.S.C. § 1681s(b)(4); see 49 U.S.C. §§ 10101-11917.

(n75)Footnote 69. 15 U.S.C. § 1681s(b)(5); see generally 49 U.S.C. §§ 1301-1557 (Federal Aviation Act of 1958).

(n76)Footnote 70. 15 U.S.C. § 1681s(b)(6); see generally 7 U.S.C. §§ 181-229 (Packers and Stockyards Act).

(n77)Footnote 71. See 15 U.S.C. § 1681s(b), (c).

(n78)Footnote 72. See 15 U.S.C. § 45(a).

(n79)Footnote 73. See 15 U.S.C. § 45(b).

(n80)Footnote 74. 15 U.S.C. § 1681s(a).

(n81)Footnote 75. *15 U.S.C. § 1681s(a).*

(n82)Footnote 76. *15 U.S.C. § 1681s(a).*

(n83)Footnote 77. *15 U.S.C. § 1681s(c).*



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California Employment Law

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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part B. STATUTORY AND ADMINISTRATIVE PROVISIONS

3-50 California Employment Law § 50.15

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.15 Fingerprints and Photographs

[1] Substantive Rights and Responsibilities

Under California law, an employer may require, as a condition precedent to securing or retaining employment, fingerprints and photographs of applicants and employees for the employer's own use and information.ⁿ¹ *Labor Code section 1051* provides, however, that with certain exceptions discussed below, any person (or his or her agent or officer) who requires fingerprints or photographs for the purpose of furnishing them, or information concerning them or concerning the employee or applicant, to any other employer or a third person when the photographs or fingerprints could be used to the employee's or applicant's detriment is guilty of a misdemeanor.ⁿ² An employer is also guilty of a misdemeanor if it knowingly causes or permits an agent, supervisor, manager, or employee to violate *Labor Code section 1051* or fails to take all reasonable steps within its power to prevent such a violation.ⁿ³ The statute thus prohibits the employer from furnishing an applicant's or employee's fingerprints to a local law enforcement agency in order to obtain criminal offender information about him or her,ⁿ⁴ except in the limited situations described in [2] and [3], below. In addition to the criminal penalty provided for by *Labor Code section 1051*, a person who violates that section is liable to the aggrieved party in a civil action for treble damages.ⁿ⁵

[2] Employers Covered and Exempted

Banks and their affiliates, and savings and loan associations and their subsidiaries and their affiliates, may avail themselves of a limited statutory exemption from the operation of *Labor Code sections 1051, 1052, and 1054*.ⁿ⁶

Under the Financial Code, a savings and loan association, its subsidiary or affiliate, or any of its officers or employees may deliver fingerprints taken of a director, an officer, an employee, or an applicant for employment to local, state, or federal law enforcement agencies for the purpose of obtaining information about the existence and nature of a criminal record, if any, of the person fingerprinted relating to convictions, and to any arrest for which that person is released on bail or on his or her own recognizance pending trial, for the commission or attempted commission of a crime involving robbery, burglary, theft, embezzlement, fraud, forgery, bookmaking, receiving stolen property, counterfeiting, or involving checks or credit cards or using computers.ⁿ⁷ This provision applies notwithstanding *Labor Code sections*

1051, 1052, 1054 and *Penal Code* section 2947.n8 "Affiliate" for the purposes of this provision means any corporation controlling, controlled by, or under common control with, a savings association, whether directly, indirectly, or through one or more intermediaries.n9

The Department of Justice must, under *Penal Code* section 11105 (and a local agency may, under *Penal Code* section 13300), furnish to the officer of the savings and loan association or its subsidiary or affiliate responsible for the final decision regarding employment of the person fingerprinted, or to his or her designees having responsibilities for personnel or security decisions in the usual scope and course of their employment with the association, subsidiary, or affiliate summary criminal history information pursuant to the request.n10 If, on evaluation of the criminal history information received, the association, subsidiary, or affiliate determines that employment of the person fingerprinted would constitute an unreasonable risk to the association, subsidiary, or affiliate or its customers, the person fingerprinted may be denied employment.n11

The request for records must be made on the form approved by the Department of Justice and may not be submitted without the written consent of the person fingerprinted.n12 Any criminal history information obtained through this procedure is confidential, and recipients are prohibited from disclosing its contents other than for purposes for which it was acquired.n13

A similar provision applies to banks.n14 A bank or its affiliates, licensed under the laws of any state or of the United States, or any of its officers or employees, may deliver fingerprints taken of a director, an officer, an employee, or an applicant for employment to local, state, or federal law enforcement agencies for the same purposes.n15 An "affiliate" is any corporation controlling, controlled by, or under common control with, a bank, whether directly, indirectly, or through one or more intermediaries.n15.1 Additional provisions regarding request for summary criminal information to the Department of Justice by a bank and the confidentiality of criminal history information parallel those regarding a savings and loan association.n16 In addition, banks and their affiliates must submit to the Department of Justice fingerprint images and related information required by the Department of Justice of all directors, officers, employees, or an applicant for employment for the purpose of obtaining information regarding the existence and content of a record of state and federal convictions and also information regarding the existence and content of a record of state and federal arrests for which the Department of Justice establishes that the person is free on bail, or on his or her recognizance, pending trial or appeal.n16.1 When the Department of Justice receives a request for federal summary criminal history information, it must forward the request to the Federal Bureau of Investigation. Once the information is received from the FBI, the Department of Justice reviews, compiles, and disseminates the information to the federally chartered bank or affiliate pursuant *Penal Code* section 11105(o)(1).n16.2 When the Department of Justice receives a request for federal summary criminal history information from a nonchartered bank, it must forward the request to the FBI. Once the information is received from the FBI, the Department of Justice will review and provide a fitness determination on an applicant for employment based on criminal convictions or on arrests for which the person is released on bail or on his or her recognizance pending trial for the commission or attempted commission of crimes specified in *Finance Code* § 550(a).n16.3 A bank or affiliate may request from the Department of Justice subsequent arrest notification servicen16.4 for directors, officers, employees or applicants for employment.n16.5 The Department of Justice will charge a fee sufficient to cover the cost of processing these requests.n16.6 Any criminal history information obtained pursuant to *Fin. Code* § 550 is confidential. No recipient may disclose its contents other than for the purpose for which it was acquired.n16.7

■ CONSULTANT'S COMMENT:

Financial institutions that are covered by the provisions of Title 12, *United States Code*, Sections 1811-1832, relating to the Federal Deposit Insurance Corporation (FDIC), face difficult interpretive issues when, through fingerprinting or other means of investigation, they learn that a director, officer, or employee has been convicted of a criminal offense involving dishonesty or a breach of trust. Among the most difficult of these issues is how to treat a conviction that has occurred before a potential employee's date of hire, but that has been judicially dismissed or sealed.

Title 12, *United States Code*, Section 1829 provides that any person who has been convicted of any criminal offense involving dishonesty or a breach of trust may not, except with the prior written consent of the FDIC, own or control, become an institution-affiliated party, or otherwise participate, directly or indirectly, in any manner in the conduct of the affairs of an insured depository institution.ⁿ¹⁷

Furthermore, an insured depository institution may not permit such participation.ⁿ¹⁸ The statute also limits the FDIC's discretion to authorize such participation,ⁿ¹⁹ and provides federal criminal penalties for violations of its provisions.ⁿ²⁰

Penal Code Section 1203.4 pertains to the dismissal of felony convictions, *Penal Code Section 1203.4a* pertains to the dismissal of misdemeanor convictions, and *Penal Code Section 1203.45* governs the sealing of records of misdemeanor convictions of persons below the age of 18 years.

A question arises whether these Penal Code sections operate to release a covered financial institution from being required to seek FDIC consent under Section 1829. Although the answer is not free from doubt, it is arguable that if a record is sealed pursuant to *Penal Code Section 1203.45* before the date of hire, the financial institution could forgo seeking FDIC consent for hiring the new employee. By comparison, because *Penal Code Sections 1203.4* and *1203.4a* do not serve to seal the record or to treat the conviction as though it had never occurred, the requirements of Section 1829 would remain applicable. The important lesson is not to assume that the removal of *state* disabilities flowing from felony and misdemeanor convictions operates to eliminate *federal* obligations or to assume the legal equivalency of the many ways in which state courts may alter a felony or misdemeanor conviction history (such as by dismissing charges, expunging records, or sealing records). *Commentary by Kirby Wilcox.*

[3] Employees Covered and Exempted

Federal law extensively regulates the operations of investment management companies.ⁿ²¹ *Labor Code section 1051*'s prohibition on furnishing fingerprints and photographs taken of applicants and employees to other employers and to third persons when the fingerprints and photographs could be used to the detriment of the applicant or employee does not apply to any employee of a diversified or nondiversified management company (as defined in Title 15 *United States Code*, section 80a-5), and the affiliates of such a company (as defined in Title 15 *United States Code*, sections 80a-2(a)(2) and 80a-2(a)(3)), who is required to be fingerprinted pursuant to federal law.ⁿ²²

It also appears that *Labor Code section 1051* should not apply to any employee of a member of a national securities exchange, a securities broker or dealer, a registered transfer agent, or a registered clearing agency who is required to be fingerprinted pursuant to federal law.ⁿ²³ For discussion of fingerprint requirements under federal securities law, *see [5], below.*

[4] Methods of Enforcement

As previously mentioned, violation of *Labor Code section 1051* by an employer, or an employer's officer or agent, is a misdemeanor.ⁿ²⁴ Furthermore, under *Labor Code section 1052*, any person who knowingly causes, suffers, or permits an agent, superintendent, manager, or employee in his or her employ to commit a violation of section 1051, or who fails to take all reasonable steps within his or her power to prevent such a violation, is guilty of a misdemeanor.ⁿ²⁵

In addition to the criminal penalty, any employer, or an employer's officer or agent, who violates *Labor Code section 1051* or *1052* is liable to the aggrieved employee or applicant for treble damages in a civil action.ⁿ²⁶ An action for damages may be brought by the employee or applicant, or by his or her assignees or successors in interest, without first establishing criminal liability for the violation.ⁿ²⁷

The Labor Commissioner and Division of Labor Standards Enforcement (DLSE) also have jurisdiction to enforce the provisions of *Labor Code section 1051*.ⁿ²⁸ For discussion of proceedings before the Labor Commissioner, *see* Chapter 5.

[5] Fingerprinting Required by Federal Securities Law

Every member of a national securities exchange, broker, dealer, registered securities transfer agent, and registered securities clearing agency must require each of its partners, directors, officers, and employees to be fingerprinted and must submit the fingerprints to the Attorney General of the United States for processing.ⁿ²⁹ However, the Securities and Exchange Commission may by rule exempt from this requirement, on specified terms, conditions, and for specified periods, any class of partners, directors, officers, or employees if it finds such an exemption not inconsistent with the public interest or the protection of investors.ⁿ³⁰ An employer who furnishes fingerprints to the Justice Department pursuant to this provision is arguably exempt from the requirements of *Labor Code section 1051*.ⁿ³¹

[6] Fingerprinting Required for Licensed Child Care Providers

All child day care facilities must obtain fingerprints of the following people before initial licensure or, after initial licensure, as a condition of employment, residence, or presence in the facility unless exempt: (1) adults responsible for administration or direct supervision of staff; (2) any non-child residing in the facility; (3) any person providing care and supervision to the children; and (4) any staff person, volunteer, or employee who has contact with the children.ⁿ³² Further, the licensee may require a criminal record clearance of any otherwise exempt individuals.ⁿ³³

The fingerprints must be submitted to the Department of Justice on a card supplied by the California Department of Social Services (DSS), along with a second set for an F.B.I. search, before the individual's employment, residence, or initial presence in the facility. The fingerprints are forwarded to the DSS for processing. Within 14 calendar days of receipt of the fingerprints, the Department of Justice will notify the DSS of the criminal record information; if no criminal record information is recorded, the Department of Justice will provide the licensee and the DSS with a statement of that clearance within 14 days of receipt.ⁿ³⁴ However, if the fingerprint check reveals a prior conviction of a sex offense against a minor, or conviction of *Penal Code Sections 243.4, 273a, 273d, 273g, 368* or any felony, then the DSS will be notified and will in turn notify the licensee who must immediately terminate the person's employment, remove that person from the facility, or bar that person's entry to the facility.ⁿ³⁵ The DSS may subsequently grant an exemption.^{n35.1} If the conviction is for another crime except a minor traffic violation, the licensee must either immediately terminate the employment, remove the person from the child day care facility, or bar entry, or seek an exemption.ⁿ³⁶ The DSS will determine whether the individual may remain in the facility until a decision on the exemption is rendered.ⁿ³⁷ In addition, the DSS may issue an exemption on its own motion when the criminal history indicates that the person is of good character based on the age, seriousness, and frequency of the conviction(s).ⁿ³⁸ Concurrently with notifying the licensee, the DSS must also notify the affected individual of his or her right to seek an exemption, which is contingent on the licensee's terminating or removing that person from the facility after receiving notice from the DSS.ⁿ³⁹

Legal Topics:

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

Labor & Employment Law
Employee Privacy
General Overview
Labor & Employment Law
Employee Privacy
Disclosure of Employee Information
General Overview
Labor & Employment Law
Employee Privacy
Medical & Related Examinations

FOOTNOTES:

(n1)Footnote 1. *10 Ops. Cal. Atty. Gen. 19 (1947)* ; *see Lab. Code § 1051*.

(n2)Footnote 2. *Lab. Code § 1051.*

(n3)Footnote 3. *Lab. Code § 1052.*

(n4)Footnote 4. *10 Ops. Cal. Atty. Gen. 19 (1947) .*

(n5)Footnote 5. *Lab. Code § 1054; see also* discussion in [4], *below.*

(n6)Footnote 6. *See Fin. Code §§ 550, 6525.*

(n7)Footnote 7. *Fin. Code § 6525(a).*

(n8)Footnote 8. *Fin. Code § 6526(a); see Lab. Code § 432.7(a)* (general prohibition against seeking arrest records does not apply to arrests for which employee or applicant is out on bail or own recognizance pending trial), discussed in § 50.11; *see also Penal Code § 2947* (communication of felony conviction for purpose of depriving person of employment constitutes felony).

(n9)Footnote 9. *Fin. Code § 6525(e).*

(n10)Footnote 10. *Fin. Code § 6525(b).*

(n11)Footnote 11. *Fin. Code § 6525(b).*

(n12)Footnote 12. *Fin. Code § 6525(c).*

(n13)Footnote 13. *Fin. Code § 6525(d).*

(n14)Footnote 14. *See Fin. Code § 550.*

(n15)Footnote 15. *See Fin. Code § 550(a).*

(n16)Footnote 15.1. *Fin. Code § 550(i).*

(n17)Footnote 16. *See Fin. Code § 550(b)* (request to Department of Justice for summary criminal information history by officer of bank or affiliate), (h) (confidentiality of criminal history information).

(n18)Footnote 16.1. *Fin. Code § 550(c).*

(n19)Footnote 16.2. *Fin. Code § 550(d).*

(n20)Footnote 16.3. *Fin. Code § 550(e).*

(n21)Footnote 16.4. *See Pen. Code § 11105.2.*

(n22)Footnote 16.5. *Fin. Code § 550(f).*

(n23)Footnote 16.6. *Fin. Code § 550(g).*

(n24)Footnote 16.7. *Fin. Code § 550(h).*

(n25)Footnote 17. *12 U.S.C. § 1829(a)(1)(A).*

(n26)Footnote 18. *12 U.S.C. § 1829(a)(1)(B).*

(n27)Footnote 19. *See 12 U.S.C. § 1829(a)(2).*

(n28)Footnote 20. *See 12 U.S.C. § 1829(b).*

(n29)Footnote 21. *See generally 15 U.S.C. § 80a-1 et seq.*

(n30)Footnote 22. *Lab. Code § 1057.*

(n31)Footnote 23. *See 15 U.S.C. § 78q(f)(2)* (requiring fingerprinting of such employees); U.S. Const., Art. VI, cl. 2 (supremacy of federal law).

(n32)Footnote 24. *Lab. Code § 1051.*

(n33)Footnote 25. *Lab. Code § 1052.*

(n34)Footnote 26. *Lab. Code § 1054.*

(n35)Footnote 27. *Lab. Code § 1054.*

(n36)Footnote 28. *See Lab. Code §§ 95(a), 98(a).*

(n37)Footnote 29. *15 U.S.C. § 78q(f)(2).*

(n38)Footnote 30. *15 U.S.C. § 78q(f)(2).*

(n39)Footnote 31. *See generally* U.S. Const., Art. VI, cl. 2 (supremacy of federal statutes over state laws).

(n40)Footnote 32. *Health & Safety Code § 1596.871(a), (b)(1)(A)-(D), (c)(1)* (following are exempt from fingerprinting requirements (1) the volunteer provides time-limited specialized services and is directly supervised by the licensee or employee with criminal record clearance or exemption, spends no more than 16 hours per week at facility, and is not left alone with children in care; (2) a student enrolled or participating at accredited educational institution directly supervised by the licensee or employee with criminal record clearance or exemption, facility has agreement with institution concerning student's placement, student spends no more than 16 hours per week at facility and is not left alone with children in care; (3) the volunteer is relative, legal guardian, or foster parent of child in care; (4) a contracted repair person retained by facility if not left alone with children; and any person similar to those described, as defined by the Department of Social Services in regulations); *see Health & Safety Code § 1596.871(b)(1)(E)-(G)* (requirements for entity applicants), (H), (I) (exemptions); *see also 22 Cal. Code Reg. § 101169(d)(13), 101170(b), (c).*

(n41)Footnote 33. *Health & Safety Code § 1596.871(b)(2).*

(n42)Footnote 34. *Health & Safety Code § 1596.871(c)(1)(A), (B), (h)(1).*

(n43)Footnote 35. *Health & Safety Code § 1596.871(c)(2).*

(n44)Footnote 35.1. *Health & Safety Code § 1596.871(c)(2); see Health & Safety Code § 1596.871(f).*

(n45)Footnote 36. *Health & Safety Code § 1596.871(c)(2); see Health & Safety Code § 1596.871(f).*

(n46)Footnote 37. *Health & Safety Code § 1596.871(c)(2).*

(n47)Footnote 38. *Health & Safety Code § 1596.871(c)(3); see Health & Safety Code § 1596.871(f).*

(n48)Footnote 39. *Health & Safety Code § 1596.871(c)(4); see Health & Safety Code § 1596.871(f).*



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California Employment Law

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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part B. STATUTORY AND ADMINISTRATIVE PROVISIONS

3-50 California Employment Law § 50.16

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.16 Polygraph Examinations and Voice Stress Analysis

[1] State Law

[a] Polygraph Examinations

[i] Substantive Rights and Responsibilities

Labor Code section 432.2 prohibits private employers from demanding or requiring that any employee or applicant for employment submit to a polygraph, lie detector, or similar examination as a condition of employment or continued employment.ⁿ¹ The statute also prohibits employers from requesting that any person take such a test, or administering such a test, without first advising the person in writing, at the time the test is to be administered, of the rights guaranteed by section 432.2.ⁿ²

If the employer requests, and if the applicant or employee voluntarily consents to take an examination that produces damaging facts, the employer may refuse to hire the applicant or may fire the employee without violating *Labor Code section 432.2*.ⁿ³ However, because of the ease of claiming duress and the difficulties of demonstrating voluntariness in the event of a dispute, employers should be extremely cautious in requesting polygraph tests. For example, a "request" that an applicant submit to a polygraph test as an alternative to more rigorous or lengthy types of screening may in fact be deemed to constitute a prohibited "demand" if an applicant who refuses the test is not further screened or considered for employment.ⁿ⁴ Moreover, as discussed in [2], *below*, federal law provides additional restrictions on the circumstances under which employers may request that employees submit to polygraph examinations.ⁿ⁵

[ii] Employers and Employees Covered by Statute

Labor Code section 432.2 applies to all private employers.ⁿ⁶

The provisions of *Labor Code section 432.2* do not apply to applications for employment filed with common carriers by railroads who are subject to the Railway Labor Act.ⁿ⁷

[iii] Method of Enforcement

A violation of *Labor Code section 432.2* is a misdemeanor.ⁿ⁸

Labor Code section 432.2 does not provide an explicit civil remedy for its violation.ⁿ⁹ An employee who is threatened with a compulsory polygraph examination in violation of section 432.2 may apparently seek an injunction against such an examination.ⁿ¹⁰ The extent to which a discharged or disciplined employee can recover damages resulting from the employer's violation of Section 432.2 has not been addressed by the courts; presumably, however, the employee would be entitled to introduce evidence of the violation in support of a common law action for wrongful termination based on violation of public policy.ⁿ¹¹

The Labor Commissioner and DLSE have jurisdiction to enforce the provisions of *Labor Code section 432.2*.ⁿ¹² For discussion of proceedings before the Labor Commissioner, *see* Chapter 5.

■ CONSULTANT'S COMMENT:

Although polygraph testing by many employers is common, there are many issues to consider beyond those raised by *Labor Code section 432.2*. First, the employer must be careful to comply also with the federal statute,ⁿ¹³ discussed in [2], *below*, which prohibits a broader range of conduct than does *Labor Code section 432.2*, although it also provides a number of exemptions from its provisions. Second, polygraph testing remains a highly interpretive specialty. Employers should seek and check references before retaining a polygraph expert.ⁿ¹⁴ Third, when an employer retains a polygraph specialist, it does not retain just a technical professional. It also retains a potential witness for future legal proceedings. Therefore, employers should consider the credibility of a polygraph expert in an arbitration or judicial setting before agreeing to the retainer. Fourth, employers should be aware that the results of polygraph tests may be extremely difficult to introduce into evidence in subsequent court proceedings. Thus, it is not advisable to premise disciplinary proceedings solely on test results. There should be separate and sufficient grounds for the employer's decision.

Finally, given the speculative admissibility of polygraph test results and the desirability of independent grounds for discipline, there is good reason not to resort automatically to polygraph testing, but to do so only on a case-by-case basis. To give but one illustration of the need to consider each case individually, assume that an employer has an honest belief that an employee merits discipline, but chooses to attempt confirmation of its belief through polygraph testing. Assume further that the employee voluntarily consents to test and clearly passes the test. Under these circumstances, the test results make it legally difficult for the employer to continue to claim an honest belief in the need for discipline. If the employer nonetheless resorts to discipline, it may be at greater risk of a breach of its duty of good faith and fair dealing.ⁿ¹⁵ Assume further that the employee consents to the test and clearly flunks, but later claims that he or she took the test under duress, notwithstanding his or her signature on an agreement to be tested. If the employer resorts to discipline, it may not be greatly concerned that the test results are subject to exclusion at trial, because, it is hoped, the employer will have independent grounds for its action. However, the employer should be concerned that the allegation of forced testing will strengthen an otherwise weak claim that it has breached its duty of good faith and fair dealing in the investigation of the disciplinary matter. *Commentary by Kirby Wilcox.*

[b] Voice Stress Analysis

Penal Code section 637.3 provides that no person or entity may use any system that examines or records in any manner voice prints or other voice stress patterns of another person to determine the truth or falsity of statements made by that other person without his or her express written consent given in advance of the examination or recordation.ⁿ¹⁶ Any person injured by a violation of the statute may bring an action against the violator for actual damages or \$1,000,

whichever is greater.n17

[2] Federal Law

[a] Substantive Rights and Responsibilities

[i] General Prohibitions

With the exceptions discussed in [ii]-[v], below, the Employee Polygraph Protection Act of 1988 (EPPA) prohibits employers covered by the actn18 from doing any of the following:n19

1. Requiring, requesting, suggesting, or causing, directly or indirectly, any employee or prospective employee to take or submit to a lie detector test;
2. Using, accepting, or inquiring about the results of a lie detector test taken by any employee or prospective employee; and
3. Discharging, disciplining, discriminating against, denying employment or promotion, or threatening any employee or prospective employee with such action for refusal or failure to take or submit to such test, on the basis of the results of a test, for filing a complaint, for testifying in any proceeding, or for exercising any rights afforded by the EPPA.

Prohibited conduct includes an employer's active cooperation with a law-enforcement agency's polygraph testing of an employee in conjunction with an investigation arising from the employer's allegations of theft or similar wrongdoing, such as testing administered by the employer at a law-enforcement agency's request, or administered by a law enforcement agency and reimbursed by the employer.n20 Similarly, an employer's receipt of information from a polygraph test administered by law-enforcement authorities pursuant to an investigation is prohibited under the act.n21 This prohibited conduct is distinguishable from an employer's passive cooperation in a law-enforcement investigation that includes polygraph testing conducted by a law-enforcement agency, which is not prohibited by the EPPA.n22

In addition, prohibited conduct includes misleading the individual to believe that an actual test is being or may be performed (for example, to elicit confessions or admissions of guilt); connecting an employee (or prospective employee) to the instrument with no diagnostic purpose; placing an instrument, unconnected to the person, in an interrogation room; or merely suggesting that the instrument may be used during the course of the interview.n23

For purposes of the EPPA, a "lie detector" test includes a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.n24 The term "lie detector" does not include medical tests used to determine the presence or absence of controlled substances or alcohol in bodily fluids. The term also does not include written or oral tests commonly referred to as "honesty" or "paper and pencil" tests, machine-scored or otherwise, nor graphology tests commonly referred to as handwriting tests.n25 The term "polygraph" means an instrument that (1) records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and (2) is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.n26

The EPPA extends to all employees of covered employers,n27 regardless of citizenship status, and to foreign corporations operating in the United States. Moreover, the EPPA extends to any actions relating to the administration of lie detector (including polygraph) tests that occur within the territorial jurisdiction of the United States.n28 It also protects a former employee from employer discrimination (e.g., bad references), if he or she had resigned rather than

submit to a test, or exercised rights under the EPPA, such as filing a complaint with the Department of Labor.ⁿ²⁹

[ii] Exception for Employees of Certain Defense and Intelligence Contractors

The EPPA does not prohibit the administration by the federal government, in the performance of intelligence or counterintelligence functions, of lie detector tests to certain employees of private employers who have contracts with the Department of Defense, the Department of Energy, the National Security Agency, the Defense Intelligence Agency, the Central Intelligence Agency, the Federal Bureau of Investigation, or any other federal department, agency, or program whose duties involve access to classified information of a specified type.ⁿ³⁰ These exemptions apply only to the Federal Government; they do not allow private employers or their contractors to administer the tests.ⁿ³¹

[iii] Exception for Employer Investigations

Subject to certain limitations regarding the manner of conducting the examination and the use of the results, discussed in [vi], *below*, the act does not prohibit an employer from requesting an employee to submit to a polygraph test if all of the following criteria are met:ⁿ³²

1. The test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage;
2. The employee had access to the property that is the subject of the investigation;
3. The employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation; and
4. The employer executes a statement, provided to the examinee before the test, that does the following:
 - a. Sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees;
 - b. Is signed by a person (other than the polygraph examiner) authorized to legally bind the employer;
 - c. Is retained by the employer for at least three years;ⁿ³³ and
 - d. Contains, at a minimum, (i) an identification of the specific economic loss or injury to the business of the employer, (ii) a statement indicating that the employee had access to the property that is the subject of the investigation, and (iii) a statement describing the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.

For this exemption to apply, the "ongoing investigation" must be of a specific incident or activity. Random testing (or a "fishing expedition") is precluded by the EPPA. Thus, for example, an employer may not request that an employee submit to a polygraph test in an effort to determine whether or not any thefts have occurred. Moreover, the EPPA precludes testing pursuant to a continuous "ongoing investigation" based only on frequent losses of inventory items, rather than on a reasonable suspicion (i.e., observable, articulable basis in fact)ⁿ³⁴ that the employee tested was involved in the loss of specific items.ⁿ³⁵

"Economic loss or injury to the employer's business" includes both direct and indirect economic loss or injury.ⁿ³⁶

Direct loss or injury may consist of the misappropriation of confidential or trade-secret information, as well as the items enumerated, which are not exclusive.ⁿ³⁷ Indirect loss or injury may occur when an employee uses an employer's business to commit a crime, such as money-laundering, or commits theft of another's property in the custody of the employer, but does not occur merely because an illegal act, such as a drug transaction, takes place on the premises.ⁿ³⁸ This exemption does not permit testing based on economic loss resulting from unintentional or lawful conduct (e.g., a traffic accident), even if the employer in some way bears the cost of the incident;ⁿ³⁹ nor does it apply to polygraph testing to detect the employee's use of drugs, even if drug use may have caused economic loss.ⁿ⁴⁰

[iv] Exception for Security Services

Subject to limitations regarding the manner of conducting the examination and the use of the results, discussed in *[vi]*, *below*, the EPPA does not prohibit the use of polygraph tests on prospective employees by any private employer whose primary business purpose consists of providing armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel, and whose function includes protection of the following:ⁿ⁴¹

1. Facilities, materials, or operations having a significant impact on the health or safety of any state or political subdivision of a state, or on the national security of the United States, including (a) facilities engaged in the production, transmission, or distribution of electrical or nuclear power, (b) public water supply facilities, (c) shipments or storage of radioactive or other toxic waste materials, and (d) public transportation; or
2. Currency, negotiable securities, precious commodities or instruments, or proprietary information.

This exception does not apply if the test is administered to a prospective employee who would not be employed to protect the facilities, materials, operations, or assets referred to above.ⁿ⁴²

Persons who may be tested under this exemption include any job applicants who would likely protect the security of any qualifying "facilities, materials, operations, or assets" in a direct manner, such as armored-car drivers and alarm-system installers, as well as various support personnel who have no direct access to the protected entities, but who may nevertheless be able to breach security, for example, administrative employees with access to security information.ⁿ⁴³ "Prospective employee" within the meaning of this exemption, includes a current employee who was initially hired for a position outside the scope of this exemption, but subsequently applies for a position for which polygraph testing is permitted. In that case, any adverse action taken against the employee that is based in part on a polygraph test may be taken only with respect to the prospective position.ⁿ⁴⁴

An employer within the meaning of this exemption is one that has met the "primary business purpose" test (i.e., with at least 50 percent of employer's annual dollar volume of business derived from enumerated services)ⁿ⁴⁵ and whose operations include protection of at least one of the facilities within the scope of the exemption.ⁿ⁴⁶

Specific facilities, materials, or operations subject to the security protection under this exemption include those against which acts of sabotage, espionage, terrorism, or other hostile, destructive, or illegal acts could significantly impact on the general public's safety or health, or national security.ⁿ⁴⁷ They may be either publicly or privately owned,ⁿ⁴⁸ including commercial and industrial operations that are protected pursuant to government defense contracts or registration under the Controlled Substances Act,ⁿ⁴⁹ or that would pose a serious public threat, such as a hazardous-material manufacturer. They also include such entities as public and private power plants, oil and gas refineries, network computer systems, media transmission facilities, stock exchanges, hospitals, and large enclosed shopping centers.ⁿ⁵⁰

The terms "currency, negotiable securities, precious commodities or instruments or proprietary information" refer to

assets that are typically handled by, protected for, and transported between and among commercial and financial institutions. They also include cash assets of casinos, racetracks, lotteries, or other businesses in which cash constitutes the inventory or stock in trade. However, security-alarm or guard services provided to protect private homes, or businesses not primarily engaged in activities enumerated in the statute, are normally outside the scope of this exemption.ⁿ⁵¹

[v] Exception for Certain Drug Manufacturers and Distributors

Subject to limitations regarding the manner of conducting the examination and the use of the results, discussed in *[vi]*, *below*, the EPPA does not prohibit certain uses of polygraph tests by employers who are authorized (i.e., registered with the Drug Enforcement Administration)ⁿ⁵² to manufacture, distribute, or dispense certain controlled substances.ⁿ⁵³ Such an employer may administer polygraph tests to prospective employees who would have direct access to the manufacture, storage, distribution, or sale of any such controlled substance.ⁿ⁵⁴ A "prospective employee" includes a current employee who holds a position that does not entail direct access, but applies for a position that does. In that case, any adverse action taken against the employee that is based in part on a polygraph test may be taken only with respect to the prospective position.ⁿ⁵⁵ "Direct access" means either physical proximity to a controlled substance, or the ability to obtain possession by diverting the substance. A position allows direct access if it affords contact with or direct involvement in the manufacture, storage, testing, distribution, sale, or dispensing of a controlled substance, which may include such activities as packaging, ordering, licensing, shipping, providing security, and taking inventory.ⁿ⁵⁶

Such an employer may also administer a polygraph test to a current employee if (1) the test is administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of such a controlled substance by the employer, and (2) the employee had accessⁿ⁵⁷ to the person or property that is the subject of the investigation.ⁿ⁵⁸ A current employee may be tested only in connection with an investigation based on a specific incident or activity, or potential incident or activity, to the exclusion of random testing to discover the existence of theft.ⁿ⁵⁹ However, the employer has greater latitude to test an employee under this exemption than under the exemption regarding an investigation to discover economic loss.ⁿ⁶⁰ Unlike the economic-loss exemption, this exemption applies to ongoing investigations of misconduct involving potential drug losses, and does not require a "reasonable suspicion" standard.ⁿ⁶¹ Consequently, for example, a pharmacy employer is permitted to test all current employees who have access to a controlled substance after the substance is stolen from the inventory, or when evidence exists that theft of the substance is planned.ⁿ⁶² Moreover, unlike procedures regarding the economic-loss exemption,ⁿ⁶³ an employer is not required under this exemption to provide a current employee with a written statement describing the specific incident under investigation prior to testing.ⁿ⁶⁴ although, as with all exemptions under the EPPA, the employer must provide the employee with written notice regarding the polygraph-testing procedure and the employee's rights.ⁿ⁶⁵

Inasmuch as this exemption pertains only to employers registered with the Drug Enforcement Administration (DEA),ⁿ⁶⁶ it only affects the polygraph-testing of employees and prospective employees of those employers. Therefore, for example, truck drivers and warehouse employees are subject to testing if they are employed by persons or entities registered with the DEA, but are not within the scope of this exemption if they are employed by common or contract carriers that transport controlled substances but are not registered with the DEA.ⁿ⁶⁷

[vi] Restrictions on Manner of Conducting Test and Use of Results

The EPPA provides certain restrictions on the manner of conducting, and the use of results of, polygraph tests that are conducted pursuant to the exceptions described in *[iii]*-*[v]*, *above*. Those exceptions are inapplicable unless the employer complies with certain notice requirements and affords the employee specified rights regarding testing procedures and use of the test results.ⁿ⁶⁸

Before the examination,ⁿ⁶⁹ the employer must provide the examinee with a written notice, in a language understood by

the examinee, of the date, time, and location of the test, and of his or her right to consult with legal counsel or an employee representative before each phase of the test.ⁿ⁷⁰ The examinee must also be informed orally and in writing of the nature and characteristics of the tests and of the instruments involved, including an explanation of the physical operation of the polygraph instrument and the procedure used during the examination.ⁿ⁷¹

In addition, before the testing phase, the employer is required to present the examinee with a written notice, in a language understood by the examinee, containing specified additional information relating to the examinee's rights, which must be read and signed by the examinee.ⁿ⁷² The Department of Labor has provided a form of notice that contains all the required provisions.ⁿ⁷³ If the notice is in a different format, it must contain at least the following information concerning the examination and the employee's rights regarding the conduct of the examination:ⁿ⁷⁴

1. Whether the polygraph examination area contains a two-way mirror, a camera, or other device through which the examinee may be observed;ⁿ⁷⁵
2. Whether any other device, such as those used in conversation or recording, will be used during the examination.ⁿ⁷⁶
3. That both the examinee and the employer have the right, with the other's knowledge, to make a recording of the entire examination;ⁿ⁷⁷
4. That the examinee has the right to terminate the test at any time;ⁿ⁷⁸
5. That the examinee has the right, and will be given the opportunity, to review all questions to be asked during the test;ⁿ⁷⁹
6. That the examinee may not be asked questions in a degrading or needlessly intrusive manner;ⁿ⁸⁰
7. That the examinee may not be asked any questions concerning religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual behavior; or beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations;ⁿ⁸¹
8. That the test may not be conducted if there is sufficient written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination;ⁿ⁸²
9. That the test is not and cannot be required as a condition of employment;ⁿ⁸³
10. That the employer may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against the examinee based on the analysis of a polygraph test, or based on the examinee's refusal to take the test, without additional evidence that would support the action;ⁿ⁸⁴
11. In connection with an ongoing investigation,ⁿ⁸⁵ that the additional evidence required for the employer to take adverse action against the examinee, including termination,ⁿ⁸⁶ may be evidence that the examinee had access to the property that is the subject of the investigation, together with evidence supporting the employer's reasonable suspicion that the examinee was involved in the incident or activity under investigation;ⁿ⁸⁷ that any statement made by the examinee before or during the test may serve as additional supporting evidence for adverse employment action;ⁿ⁸⁸ and that any admission of criminal conduct by the examinee may be transmitted to an appropriate government law enforcement agency;ⁿ⁸⁹
12. That information acquired from a polygraph test may be disclosed by the examiner or by the

employer only to the examinee or any other person specifically designated in writing by the examinee to receive the information;ⁿ⁹⁰ to the employer that requested the test;ⁿ⁹¹ to a court, governmental agency, arbitrator, or mediator pursuant to a court order;ⁿ⁹² to a Department of Labor official when specifically designated in writing by the examinee to receive the information;ⁿ⁹³ and by the employer, to an appropriate governmental agency without a court order if, and only insofar as, the information disclosed is an admission of criminal conduct;ⁿ⁹⁴

13. That if any of the examinee's rights or protections under the EPPA are violated, the examinee has the right to file a complaint with the Wage and Hour Division of the Department of Labor, or to take action in court against the employer; that employers who violate the EPPA are liable to the affected examinee, who may recover appropriate legal or equitable relief, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees;ⁿ⁹⁵ and that the Secretary of Labor may also bring action to obtain compliance with the EPPA, and may assess civil money penalties against the employer;ⁿ⁹⁶

14. That the examinee has the right to obtain and consult with legal counsel or other representative before each phase of the test,ⁿ⁹⁷ although the legal counsel or representative may be excluded from the room in which the test is administered during the actual testing phase;ⁿ⁹⁸ and

15. That the employee's rights under the EPPA may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the EPPA, agreed to and signed by the parties.ⁿ⁹⁹

In addition, during the initial or any subsequent pretest phases, the examinee must be given the opportunity, at any time prior to the actual testing phase, to review all questions in writing that the examiner will ask during each testing phase.ⁿ¹⁰⁰ The examiner is prohibited from asking any question that was not presented in writing to the examinee for review before the test.ⁿ¹⁰¹ Further restrictions govern the length of the testing period,ⁿ¹⁰² and the number of tests that the employee may be given within a given time period.ⁿ¹⁰³

Before any adverse employment action, the employer must further interview the examinee on the basis of the results of the test, and provide him or her with a written copy of any opinion or conclusion reached as a result of the test, and a copy of the questions asked during the test, along with the corresponding charted responses.ⁿ¹⁰⁴

Finally, the EPPA provides that the exceptions described in *[iii]-[v], above*, do not apply unless the examiner complies with applicable state licensing requirements (if any), maintains a \$50,000 bond or an equivalent amount of professional liability insurance, and complies with certain requirements regarding the form, contents, and maintenance of the polygraph test results.ⁿ¹⁰⁵

[vii] Disclosure of Test Results

The EPPA provides that a polygraph examiner may disclose information acquired from a polygraph test only to (1) the examinee or other person specifically designated in writing by the examinee, (2) the employer that requested the test, or (3) any court, governmental agency, arbitrator, or mediator, in accordance with due process of law, pursuant to an order from a court of competent jurisdiction.ⁿ¹⁰⁶ An employer (other than employers subject to the exception for defense and intelligence contractors described in *[ii], above*) for whom a polygraph test is conducted may disclose information from the test only to (1) a person described in the preceding sentence, or (2) a governmental agency, but only insofar as the disclosed information is an admission of criminal conduct.ⁿ¹⁰⁷ A polygraph examiner may disclose test charts without any identifying information to another examiner solely for consultation purposes regarding the veracity of the examinee's answers.ⁿ¹⁰⁸

For discussion of other restrictions on the use and disclosure of private information concerning employees, *see* Chapter 51.

[viii] Activity Outside Scope of Prohibited Conduct

An employer who merely reports a theft or incident involving economic loss to a law enforcement agency does not violate the EPPA solely because the agency subsequently tests an employee suspected of culpability in the incident. Similarly, an employer's passive cooperation with law-enforcement authorities during the course of a criminal investigation by the agency that involves a polygraph test does not violate the EPPA. For example, an employer may properly allow testing by the agency on the employer's premises, and may release an employee during working hours to take a test at a law enforcement facility.ⁿ¹⁰⁹ This type of conduct is distinguishable from prohibited active participation in law-enforcement testing.ⁿ¹¹⁰

[b] Employers Covered and Exempted

The substantive prohibitions of the act apply to "any employer engaged in or affecting commerce or in the production of goods for commerce."ⁿ¹¹¹ For purposes of the act, "commerce" has same meaning as in the Fair Labor Standards Act (FLSA),ⁿ¹¹² that is, trade, commerce, transportation, transmission, or communication among the several States or between a state and any place outside the state.ⁿ¹¹³ Courts that have interpreted the phrase "affecting commerce" in other contexts have found coverage to be coextensive with the full scope of the Congressional power to regulate commerce.ⁿ¹¹⁴ Inasmuch as most employers engage in one or more types of activities that would be regarded as "affecting commerce" under widely accepted principles, virtually all employers are deemed subject to the provisions of the EPPA, unless specifically exemptedⁿ¹¹⁵ by the EPPA.ⁿ¹¹⁶

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.ⁿ¹¹⁷

Restrictions under the EPPA apply to state employment services, private employment placement agencies, job recruiting firms, and vocational trade schools with respect to persons who may be referred to potential employers. These entities are not liable for EPPA violations, however, by virtue of referring job applicants to employers who violate the EPPA, if the entities had no reason to know that the employers would do so.ⁿ¹¹⁸

The act does not apply to the United States government, any state or local government, or any political subdivision thereof.ⁿ¹¹⁹

[c] Methods of Enforcement

Violation of the act may result in the assessment of civil penalties by the Secretary of Labor, who may also bring an action for legal and equitable relief against employers who violate the act.ⁿ¹²⁰

In addition, an employer who violates the act is liable to the affected employee or prospective employee for appropriate legal or equitable relief including, but not limited to, employment, reinstatement, promotion, and payment of lost wages and benefits.ⁿ¹²¹ A civil action to obtain such relief may be brought in any federal or state court of competent jurisdiction within three years after the date of the alleged violation.ⁿ¹²² In its discretion, the court may award reasonable costs, including attorney's fees, to the prevailing party.ⁿ¹²³

[d] Effect on State or Local Law and Collective Bargaining Agreements

Apart from the exceptions relating to governmental agencies and certain national security and defense contractors,ⁿ¹²⁴ the EPPA does not preempt any provision of any state or local law or of any negotiated collective bargaining agreement that prohibits lie detector tests or is more restrictive with respect to such tests than any provision of the EPPA.ⁿ¹²⁵

However, industry exemptions and applicable restrictions on them under the EPPA do preempt less restrictive exemptions established by state law for the same industry.ⁿ¹²⁶ For discussion of California statutory provisions relating to lie detector tests,ⁿ¹²⁷ see [1], above.

[3] Effect of Arbitration Agreements

A civil action for violation of the federal or state polygraph protection statutes may be precluded by an arbitration provision that covers the subject matter of the claims.ⁿ¹²⁸ An employee who has signed a properly drafted arbitration agreement or is otherwise subject to industry rules requiring arbitration may therefore be precluded from bringing an action in federal or state court for violation of the statutes discussed above.

In *Saari v. Smith Barney, Harris Upham & Co., Inc.*,ⁿ¹²⁹ plaintiff, as a condition of his employment as a securities account executive, signed a securities registration application, which contained an arbitration provision. When he became a registered representative of the New York Stock Exchange, he also became subject to a rule of the Exchange requiring arbitration. Plaintiff was terminated after refusing to submit to a polygraph examination following the apparent theft of a client's money from the office. He filed a complaint in federal district court, alleging violation of the Federal Employee Polygraph Protection Act (EPPA),ⁿ¹³⁰ violation of *California Labor Code section 432.2*,ⁿ¹³¹ and slander.ⁿ¹³² Defendant filed a motion to compel arbitration and stay proceedings pending arbitration, pursuant to the Federal Arbitration Act.ⁿ¹³³ The federal district court denied the motion, but the Ninth Circuit reversed, holding that all the causes of action were subject to arbitration. With respect to the federal statutes, the court held that the EPPA's anti-waiver provisionⁿ¹³⁴ does not support the argument that the procedures available under the EPPA are solely judicial and therefore not subject to arbitration.ⁿ¹³⁵

With respect to the California statute, the court rejected plaintiff's contention that Congress intended to exempt state polygraph claims from arbitration by its enactment of the EPPA.ⁿ¹³⁶ The court also stated that plaintiff's termination for refusal to submit himself to polygraph examination arose out of the scope of his employment as a registered representative of the stock exchange, based on the securities rule in question, which states that "*any controversy between a registered representative and any member or member organization arising out of the employment or termination or employment of such registered representative by and with such member or member organization shall be settled by arbitration ...*"ⁿ¹³⁷

For additional discussion of the effect of arbitration agreements on civil actions for wrongful termination, see Chapter 90.

Legal Topics:

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

Criminal Law & Procedure
Discovery & Inspection
General Overview
Labor & Employment Law
Employee Privacy
General Overview
Labor & Employment Law
Employee Privacy
Disclosure of Employee Information
General Overview
Labor & Employment Law
Employee Privacy
Medical & Related Examinations

FOOTNOTES:

(n1)Footnote 1. *Lab. Code* § 432.2(a).

(n2)Footnote 2. *Lab. Code* § 432.2(b).

(n3)Footnote 3. *43 Ops. Cal. Atty. Gen.* 25, 27 (1964) .

(n4)Footnote 4. *43 Ops. Cal. Atty. Gen.* 25, 26 (1964) .

(n5)Footnote 5. *See 29 U.S.C. §§ 2002, 2006, 2007.*

(n6)Footnote 6. *See Lab. Code § 432.2(a)*. In addition, although they are excluded from the provisions of *Lab. Code § 432.2*, public employees may not be subjected to compulsory polygraph examinations. *see Gov. Code §§ 3301, 3307* ("public safety officers" may not be required to take lie detector test); *Long Beach City Employees Ass'n v. City of Long Beach* (1986) 41 Cal. 3d 937, 956, 227 Cal. Rptr. 90, 719 P.2d 660 (other public employees may not constitutionally be required to submit to polygraph examinations).

(n7)Footnote 7. *See Lab. Code § 434*.

(n8)Footnote 8. *See Lab. Code § 433*.

(n9)Footnote 9. *See Lab. Code § 432.2*.

(n10)Footnote 10. *See Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Long Beach City Employees Ass'n v. City of Long Beach* (1986) 41 Cal. 3d 937, 941, 227 Cal. Rptr. 90, 719 P.2d 660 .

(n11)Footnote 11. For discussion of liability for wrongful termination and discipline, *see* ch. 60.

(n12)Footnote 12. *See Lab. Code §§ 95(a), 98(a)*.

(n13)Footnote 13. *See 29 U.S.C. §§ 2001-2009*.

(n14)Footnote 14. Note that under federal law, the polygraph examiner must be licensed under any applicable state law and must either be bonded or maintain professional liability insurance in a specified amount. *see 29 U.S.C. § 2007(c)(1)*.

(n15)Footnote 15. *See generally* ch. 60.

(n16)Footnote 16. *Penal Code § 637.3(a)*. *see Gov. Code § 3307* ("public safety officers" may not be required to take any lie detector test, including voice stress analyzer).

(n17)Footnote 17. *Penal Code § 637.3(c)*.

(n18)Footnote 18. *See* discussion in [b], *below*.

(n19)Footnote 19. *29 U.S.C. § 2002; 29 C.F.R. § 801.4(a)*.

(n20)Footnote 20. *29 C.F.R. § 801.4(b)*.

(n21)Footnote 21. *29 C.F.R. § 801.4(c); see 29 U.S.C. § 2002(2)*.

(n22)Footnote 22. *See 29 C.F.R. § 801.4(c); see also [viii], below*.

(n23)Footnote 23. *29 C.F.R. § 801.4(d)*.

(n24)Footnote 24. *29 U.S.C. § 2001(3); 29 C.F.R. § 801.2(d)(1)*.

(n25)Footnote 25. *29 C.F.R. § 801.2(d)(2)*.

(n26)Footnote 26. *29 U.S.C. § 2001(4); 29 C.F.R. § 801.2(e)*.

(n27)Footnote 27. *See* discussion in [b], *below*.

(n28)Footnote 28. *29 C.F.R. § 801.3(b)*.

(n29)Footnote 29. *29 C.F.R. § 801.8(c).*

(n30)Footnote 30. *See 29 U.S.C. § 2006(b), (c); 29 C.F.R. § 801.11(b)-(e).*

(n31)Footnote 31. *29 C.F.R. § 801.11(a).*

(n32)Footnote 32. *29 U.S.C. § 2006(d); 29 C.F.R. § 801.12(a).*

(n33)Footnote 33. *See 29 C.F.R. § 801.30(a)(1)* (three-year period begins on date of examination, or, if no examination, on date of request for examination); *see also 29 C.F.R. § 801.12(a)(5)* (employer must also retain proof of service and make documents available to Department of Labor).

(n34)Footnote 34. *See 29 C.F.R. § 801.12(f).*

(n35)Footnote 35. *See 29 C.F.R. § 801.12(b); cf. 29 U.S.C. § 2006(f)(2)(B), discussed in [v], below.*

(n36)Footnote 36. *29 C.F.R. § 801.12(c)(1)(i).*

(n37)Footnote 37. *See 29 C.F.R. § 801.12(c)(1)(ii).*

(n38)Footnote 38. *See 29 C.F.R. § 801.12(c)(1)(iii), (iv).*

(n39)Footnote 39. *See 29 C.F.R. § 801.12(c)(2).*

(n40)Footnote 40. *See 29 C.F.R. § 801.12(d).* For discussion of employee drug-testing, *see § 50.43.*

(n41)Footnote 41. *29 U.S.C. § 2006(e)(1); 29 C.F.R. § 801.14(a).*

(n42)Footnote 42. *29 U.S.C. § 2006(e)(2); 29 C.F.R. § 801.14(g).*

(n43)Footnote 43. *See 29 C.F.R. § 801.14(g).*

(n44)Footnote 44. *29 C.F.R. § 801.14(b)(2).*

(n45)Footnote 45. *See 29 C.F.R. § 801.14(c)* (also providing that when parent corporation has subsidiary involved in security services, test applicable to subsidiary).

(n46)Footnote 46. *29 C.F.R. § 801.14(f).*

(n47)Footnote 47. *See 29 C.F.R. § 801.14(d)(2).*

(n48)Footnote 48. *See 29 C.F.R. § 801.14(d)(1).*

(n49)Footnote 49. *See 21 U.S.C. § 801 et seq.*

(n50)Footnote 50. *See 29 C.F.R. § 801.14(d)(2).*

(n51)Footnote 51. *29 C.F.R. § 801.14(e)(ii).*

(n52)Footnote 52. *29 C.F.R. § 801.13(b)(2); see 21 U.S.C. § 812 et seq. (Controlled Substances Act).*

(n53)Footnote 53. *See 29 U.S.C. § 2006(f)(1); 29 C.F.R. § 801.13(a); see also 29 C.F.R. § 801.13(b)(1)* (enumerated activities construed within meaning of *21 U.S.C. § 812 et seq. (Controlled Substances Act)*).

(n54)Footnote 54. *See 29 U.S.C. § 2006(f)(2)(A); 29 C.F.R. § 801.13(c).*

- (n55)Footnote 55. *29 C.F.R. § 801.13(d).*
- (n56)Footnote 56. *29 C.F.R. § 801.13(c)(1).*
- (n57)Footnote 57. *See 29 C.F.R. § 801.13(c)(2)* (access may be infrequent, random, or opportunistic, rather than direct).
- (n58)Footnote 58. *See 29 U.S.C. § 2006(f)(2)(B); 29 C.F.R. § 801.13(c).*
- (n59)Footnote 59. *29 C.F.R. § 801.13(f)(1).*
- (n60)Footnote 60. *See 29 U.S.C. § 2006(d)(3), discussed in [iii], above.*
- (n61)Footnote 61. *29 C.F.R. § 801.13(f)(1); cf. 29 U.S.C. § 2006(d)(3), discussed in [iii], above.*
- (n62)Footnote 62. *29 C.F.R. § 801.13(f)(1); but see 29 C.F.R. § 801.13(f)(2)* (exemption inapplicable based on theft of non-drug items, e.g., cosmetics in pharmacy, although testing may be permitted under *29 U.S.C. § 2006(d)*, discussed in *[iii], above*).
- (n63)Footnote 63. *See 29 U.S.C. 2006(d)(4), discussed in [iii], above.*
- (n64)Footnote 64. *29 C.F.R. § 801.13(e).*
- (n65)Footnote 65. *See 29 U.S.C. § 2007(b)(2), discussed in [vi], below.*
- (n66)Footnote 66. *29 C.F.R. § 801.13(b)(2); see 21 U.S.C. § 812 et seq. (Controlled Substances Act).*
- (n67)Footnote 67. *29 C.F.R. § 801.13(b)(2).*
- (n68)Footnote 68. *See 29 U.S.C. § 2007; see also 29 C.F.R. §§ 801.22-801.26; 29 C.F.R. pt. 801, app. A.*
- (n69)Footnote 69. Generally, the notice must be given at least 48 hours before the examination. *see 29 C.F.R. § 801.23(a)(1)* (time requirements).
- (n70)Footnote 70. *29 U.S.C. § 2007(b)(2)(A); 29 C.F.R. § 801.23(a)(1).*
- (n71)Footnote 71. *29 C.F.R. § 801.23(a)(2); see 29 U.S.C. § 2007(b)(2)(B).*
- (n72)Footnote 72. *29 C.F.R. § 801.23(a)(3); see 29 U.S.C. § 2007(b)(2)(C),(D).*
- (n73)Footnote 73. *See 29 C.F.R. pt. 801, app. A.*
- (n74)Footnote 74. *29 C.F.R. § 801.23(a)(3).*
- (n75)Footnote 75. *See 29 U.S.C. § 2007(b)(2)(C)(i).*
- (n76)Footnote 76. *See 29 U.S.C. § 2007(b)(2)(C)(ii).*
- (n77)Footnote 77. *See 29 U.S.C. § 2007(b)(2)(C)(iii).*
- (n78)Footnote 78. *29 U.S.C. § 2007(b)(1)(A); 29 C.F.R. § 801.22(b)(1); see 29 C.F.R. § 801.22(b)(5)* (rights regarding adverse action).
- (n79)Footnote 79. *See 29 U.S.C. § 2007(b)(2)(E).*

- (n80)Footnote 80. *See* 29 U.S.C. § 2007(b)(1)(B); 29 C.F.R. § 801.22(b)(2).
- (n81)Footnote 81. *See* 29 U.S.C. § 2007(b)(1)(C); 29 C.F.R. § 801.22(b)(3).
- (n82)Footnote 82. *See* 29 U.S.C. § 2007(b)(1)(D); 29 C.F.R. § 801.22(b)(4); *see also* 29 C.F.R. § 801.22(b)(5) (rights regarding adverse action).
- (n83)Footnote 83. 29 U.S.C. § 2007(b)(2)(D)(i).
- (n84)Footnote 84. 29 U.S.C. § 2007(a); *see* 29 U.S.C. § 2006(e), (f); *see also* 29 C.F.R. § 801.21.
- (n85)Footnote 85. *See* 29 U.S.C. § 2006(d).
- (n86)Footnote 86. *See* 29 U.S.C. § 2007(a)(1).
- (n87)Footnote 87. *See* 29 U.S.C. § 2006(d); *see also* 29 C.F.R. § 801.20.
- (n88)Footnote 88. 29 U.S.C. § 2007(b)(2)(D)(ii); 29 C.F.R. § 801.20(b)(2).
- (n89)Footnote 89. *See* 29 U.S.C. § 2008(c)(2).
- (n90)Footnote 90. *See* 29 U.S.C. § 2008(b)(1),(2); *see also* 29 C.F.R. § 801.35(a)(1).
- (n91)Footnote 91. *See* 29 U.S.C. § 2008(b)(2); *see also* 29 C.F.R. § 801.35(a)(2).
- (n92)Footnote 92. *See* 29 U.S.C. § 2008(b)(3); *see also* 29 C.F.R. § 801.35(a)(3).
- (n93)Footnote 93. *See* 29 U.S.C. § 2008(b)(1); *see also* 29 C.F.R. § 801.35(a)(4).
- (n94)Footnote 94. 29 U.S.C. § 2007(b)(2)(D)(v); *see* 29 U.S.C. § 2008(c); *see also* 29 C.F.R. § 801.35(b).
- (n95)Footnote 95. 29 U.S.C. § 2007(b)(2)(D)(iv); *see* 29 U.S.C. § 2005(c); *see also* discussion in [c], *below*.
- (n96)Footnote 96. *See* 29 U.S.C. § 2005(a), (b).
- (n97)Footnote 97. 29 U.S.C. § 2007(b)(2)(A).
- (n98)Footnote 98. 29 C.F.R. § 801.23(a)(3)(xiv).
- (n99)Footnote 99. *See* 29 U.S.C. § 2007(b)(2)(D)(v); *see also* 29 U.S.C. § 2005(d) (prohibition against waiver).
- (n100)Footnote 100. 29 C.F.R. § 801.23(b); *see* 29 U.S.C. § 2007(b)(2)(E).
- (n101)Footnote 101. 29 U.S.C. § 2007(b)(3); 29 C.F.R. § 801.24(a).
- (n102)Footnote 102. *See* 29 U.S.C. § 2007(b)(5) (90-minute minimum duration); *see also* 29 C.F.R. § 801.24(b).
- (n103)Footnote 103. *See* 29 U.S.C. § 2007(b)(5) (five-test maximum per day); *see also* 29 C.F.R. § 801.26(c)(2).
- (n104)Footnote 104. 29 U.S.C. § 2007(b)(4); *see* 29 C.F.R. § 801.25.
- (n105)Footnote 105. *See* 29 U.S.C. § 2007(c); *see also* 29 C.F.R. § 801.26.
- (n106)Footnote 106. *See* 29 U.S.C. § 2008(b); 29 C.F.R. § 801.35; *see also* discussion in [vi], *above*.

- (n107)Footnote 107. *See* 29 U.S.C. § 2008(c); 29 C.F.R. § 801.35; *see also* discussion in [vi], *above*.
- (n108)Footnote 108. *See* 29 C.F.R. § 801.35(c).
- (n109)Footnote 109. 29 C.F.R. § 801.4(b).
- (n110)Footnote 110. *See* discussion in [i], *above*.
- (n111)Footnote 111. *See* 29 U.S.C. § 2002.
- (n112)Footnote 112. 29 U.S.C. § 2001(1); 29 C.F.R. § 801.2(b)(1). For full discussion of the definition of "commerce" under the FLSA, *see* ch. 1.
- (n113)Footnote 113. 29 U.S.C. § 203(b); 29 C.F.R. § 801.2(b)(1).
- (n114)Footnote 114. *See* 29 C.F.R. § 801.3(a); *see, e.g.,* *Godwin v. Occupational Safety & Health Review Com'n* (9th Cir. 1976) 540 F.2d 1013, 1015 .
- (n115)Footnote 115. *See* 29 U.S.C. § 2006(a)-(c); *see also* 29 C.F.R. §§ 801.10, 801.11.
- (n116)Footnote 116. *See* 29 C.F.R. § 801.3(a).
- (n117)Footnote 117. 29 U.S.C. § 2001(2); 29 C.F.R. § 801.2(c) (polygraph examiner not included within definition).
- (n118)Footnote 118. 29 C.F.R. § 801.8(b).
- (n119)Footnote 119. 29 U.S.C. § 2006(a); *see* 29 C.F.R. § 801.10 (exclusion includes interstate governmental agency; exclusion does not extend to contractors or nongovernmental agents of governmental agency).
- (n120)Footnote 120. *See* 29 U.S.C. §§ 2001(5), 2005(a), (b); *see also* 29 U.S.C. § 2004 (Secretary of Labor's general authority to administer act); 29 C.F.R. §§ 801.40-801.75.
- (n121)Footnote 121. 29 U.S.C. § 2005(c)(1).
- (n122)Footnote 122. 29 U.S.C. § 2005(c)(2).
- (n123)Footnote 123. 29 U.S.C. § 2005(c)(3).
- (n124)Footnote 124. *See* 29 U.S.C. § 2006(a), (b), (c); *see also* discussion in [a][ii] and [b], *above*.
- (n125)Footnote 125. *See* 29 U.S.C. § 2009; 29 C.F.R. § 801.5(a).
- (n126)Footnote 126. 29 C.F.R. § 801.5(b)(3).
- (n127)Footnote 127. *See* *Lab. Code* § 432.2 (polygraphs); *Penal Code* § 637.3 (voice stress analyzers).
- (n128)Footnote 128. *See* *Saari v. Smith Barney, Harris Upham & Co., Inc.* (9th Cir. 1992) 968 F.2d 877, 881-883 .
- (n129)Footnote 129. *Saari v. Smith Barney, Harris Upham & Co., Inc.* (9th Cir. 1992) 968 F.2d 877 .
- (n130)Footnote 130. 29 U.S.C. § 2001 *et seq.*; *see* discussion in [2], *above*.
- (n131)Footnote 131. *See* discussion in [1][a], *above*.

(n132)Footnote 132. *See* discussion in ch. 51, pt. B.

(n133)Footnote 133. *See* 9 *U.S.C.* § 3.

(n134)Footnote 134. 29 *U.S.C.* § 2005(d); *see* discussion in [2][a], *above*.

(n135)Footnote 135. *Saari v. Smith Barney, Harris Upham & Co., Inc.* (9th Cir. 1992) 968 F.2d 877, 881 .

(n136)Footnote 136. *Saari v. Smith Barney, Harris Upham & Co., Inc.* (9th Cir. 1992) 968 F.2d 877, 883 .

(n137)Footnote 137. *Saari v. Smith Barney, Harris Upham & Co., Inc.* (9th Cir. 1992) 968 F.2d 877, 882-883 (emphasis provided by the court).



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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part B. STATUTORY AND ADMINISTRATIVE PROVISIONS

3-50 California Employment Law § 50.17

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.17 Security Clearance Investigations--Defense Department Regulations

Public employees and employees in private, defense-related industries may require access to classified information in the course of their duties, and accordingly may be required to obtain security clearances from the federal government.ⁿ¹ The security clearance determination process involves a detailed investigation of each employee applying for a clearance with respect to a number of matters that would be considered private in other employment contexts.ⁿ² Executive Order No. 10865ⁿ³ establishes the administrative framework for grants and denials of security clearances. Additional Defense Department regulations governing security clearance investigations are contained in the Code of Federal Regulations.ⁿ⁴ The Executive Order and regulations are aimed at protecting the United States against hostile or destructive activities by preventing unauthorized disclosures of classified national defense information while also recognizing, and providing certain procedural safeguards to protect, the interests of individuals affected by the regulations.ⁿ⁵

The Director of the Directorate for Industrial Security Clearance Review (DISCR) is the governmental official having responsibility for the management of the defense industrial personnel security clearance program, and the General Counsel, Department of Defense, is responsible for the program's administration.ⁿ⁶

Defense Department regulations require an applicant for a security clearance to give (and to authorize other persons to give) full, frank, and truthful answers to relevant questions needed by DISCR to reach a security clearance determination.ⁿ⁷ The applicant may choose not to comply, but refusal or failure to furnish or authorize the provision of relevant information needed by DISCR at any stage in the investigation or subsequent adjudication process may preclude DISCR from reaching the required finding that the granting or continuance of a security clearance with respect to the applicant is clearly consistent with the national interest.ⁿ⁸ The applicant's privacy interests have been held to be outweighed by the government's interest in preventing highly sensitive information from falling into the wrong hands, provided that the information sought and questions asked are relevant to a proper subject of inquiry and no more intrusive than is reasonably necessary to allow responsible officials to make an informed and rational determination that the granting or continuance of an applicant's security clearance is clearly consistent with the national interest.ⁿ⁹

Examples of criteria on which the security clearance determination is based, and about which the DISCR may investigate, are set forth in the regulations.ⁿ¹⁰ A broad range of personal characteristics and conduct may be investigated, including not only overt acts of espionage, treason, or sedition, but also other violations of law and such matters as "acts of sexual perversion," acts indicating poor judgment or untrustworthiness, illnesses or mental conditions that may cause a significant defect in judgment or reliability, excessive use of alcohol, illegal or improper use of drugs, and any circumstances that may render the applicant vulnerable to coercion or influence to act contrary to the national interest.ⁿ¹¹ The security clearance determination must include consideration of the nature and seriousness of the conduct; the circumstances surrounding the conduct; the frequency of the conduct and how recently it has occurred; the individual's age; and the individual's motivation, or the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the circumstances or consequences involved.ⁿ¹²

The regulations provide for a due process procedure to be followed in the event that a security clearance is to be denied or revoked, including notice, opportunity to respond, a hearing with a limited right of cross-examination, and a right to appeal.ⁿ¹³ However, in instances when the threat to the national interest is clearly direct and imminent, the Director of DISCR and the Director of the Defense Investigative Service are authorized to take emergency measures to suspend an existing security clearance after consultation with the Office of the Under Secretary of Defense for Policy and the Office of the General Counsel of the Department of Defense,ⁿ¹⁴ and the Secretary of Defense or the head of another agency or department may deny or revoke a security clearance without regard to the procedural requirements of the regulations whenever the security of the nation so requires, on a determination that the regulations cannot be invoked consistently with the national security.ⁿ¹⁵

When a security clearance is subsequently granted after suspension, denial, or revocation, an applicant may petition for reimbursement of loss of earnings resulting directly from the suspension, revocation, or denial of clearance.ⁿ¹⁶ The claim must be filed within one year after the date the claim arises.ⁿ¹⁷ Reimbursement is not authorized in cases in which the General Counsel, Department of Defense, or designee, finds that the Department of Defense was justified in taking the initial action to suspend, deny, or revoke the security clearance.ⁿ¹⁸ The amount of reimbursement shall not exceed the difference between the applicant's earnings at the time of the initial action and interim earnings, subject to reasonable efforts on the part of the applicant to mitigate any loss of earnings.ⁿ¹⁹ No reimbursement is allowed for any period of undue delay resulting from the applicant's acts or failure to act.ⁿ²⁰ Reimbursement is also not allowed for loss of merit raises and general increases, loss of employment opportunities, counsel fees, or other costs relating to the industrial security clearance proceeding.ⁿ²¹ Claims approved by the Department of Defense are forwarded for payment to the agency concerned.ⁿ²² Any payment made in response to a claim for reimbursement is in full satisfaction of any further claim against the United States or any federal agency, or any of its officers or employees.ⁿ²³

Legal Topics:

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

GovernmentsFederal GovernmentGeneral OverviewGovernmentsFederal GovernmentDomestic SecurityLabor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewPublic Contracts LawPerformanceSecurity Clearances & Restrictions

FOOTNOTES:

(n1)Footnote 1. *See* 32 C.F.R. §§ 155.2(c), 155.3.

(n2)Footnote 2. *See Marks v. Schlesinger (C.D. Cal. 1974) 384 F. Supp. 1373, 1377 ; 32 C.F.R. § 155.6.*

(n3)Footnote 3. Exec. Order No. 10865, reprinted following 50 U.S.C. § 401.

(n4)Footnote 4. 32 C.F.R. §§ 155.1-155.8.

(n5)Footnote 5. *See* Exec. Order No. 10865, reprinted following 50 U.S.C. § 401 (preamble).

(n6)Footnote 6. 32 C.F.R. § 155.5(b), (c).

(n7)Footnote 7. 32 C.F.R. § 155.6(b).

(n8)Footnote 8. 32 C.F.R. § 155.6(b), (c).

(n9)Footnote 9. *Marks v. Schlesinger* (C.D. Cal. 1974) 384 F. Supp. 1373, 1377-1378 ; see *Gayer v. Schlesinger* (D.C. Cir. 1973) 490 F.2d 740, 751-754 .

(n10)Footnote 10. See 32 C.F.R. § 155.6(e).

(n11)Footnote 11. See 32 C.F.R. § 155.6(e).

(n12)Footnote 12. 32 C.F.R. § 155.6(d).

(n13)Footnote 13. See 32 C.F.R. §§ 155.4, 155.6, 155.7.

(n14)Footnote 14. See 32 C.F.R. § 155.6(g).

(n15)Footnote 15. 32 C.F.R. § 155.6(k).

(n16)Footnote 16. 32 C.F.R. § 155.7(v).

(n17)Footnote 17. 32 C.F.R. § 155.7(w).

(n18)Footnote 18. 32 C.F.R. § 155.7(w).

(n19)Footnote 19. 32 C.F.R. § 155.7(x).

(n20)Footnote 20. 32 C.F.R. § 155.7(x).

(n21)Footnote 21. 32 C.F.R. § 155.7(x).

(n22)Footnote 22. 32 C.F.R. § 155.7(y).

(n23)Footnote 23. 32 C.F.R. § 155.7(y).



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DIVISION V EMPLOYEE PRIVACY RIGHTS
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Part B. STATUTORY AND ADMINISTRATIVE PROVISIONS

3-50 California Employment Law § 50.18

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.18 Shopping Investigator's Report

Labor Code section 2930 applies to an employer's use of shopping investigators to test the conduct, performance, or honesty of employees. A "shopping investigator" is a person who shops in commercial, retail, or service establishments to test the integrity of sales, warehouse, stockroom, and service personnel, and evaluates sales techniques and services rendered customers.ⁿ¹ The shopping investigator may also review the establishment's policies and standards to ascertain employee performance requirements and evaluate employees' sales techniques and courtesy by buying merchandise, ordering food, or utilizing services.ⁿ² The shopping investigator may carry merchandise to a checkstand or sales counter and observe employees during sales transactions in order to detect irregularities in listing or calling prices, itemizing merchandise, or handling cash.ⁿ³ Following one or more of such activities, the shopping investigator writes a report of his or her investigations for the establishment visited.ⁿ⁴

Any employer who disciplines or discharges an employee on the basis of a shopping investigator's report performed by a licensed private investigator must provide the employee with a copy of the investigation report before disciplining or discharging the employee.ⁿ⁵ When an interview occurs that might result in the termination of an employee for dishonesty, the employee must, prior to the conclusion of the interview, be handed a copy of the latest investigator's report on which the interview was based.ⁿ⁶

Labor Code section 2930 does not apply if the person conducting the investigation is employed exclusively and regularly by one employer in connection with the affairs of only that employer.ⁿ⁷ In such case, the investigator must be an employee of the employer; an independent contractor relationship would be insufficient to invoke this exception.ⁿ⁸ Additionally, the entire investigation must be conducted solely for that employer by the investigator.ⁿ⁹ *Labor Code section 2930* also appears not to apply to reports prepared by persons who are not licensed private investigators,ⁿ¹⁰ but employers should note that the Business and Professions Code prohibits unlicensed persons from engaging in a business regulated by the Private Investigator Act;ⁿ¹¹ and employers may be subject to criminal penalties for knowingly hiring an unlicensed private investigator.ⁿ¹²

Labor Code section 2930 does not explicitly provide a remedy for its violation, and no cases have yet arisen

determining whether an aggrieved employee has a private right of action under the statute. It is, therefore, uncertain whether and to what extent a discharged or disciplined employee can recover damages for an employer's failure to provide him or her with a copy of a shopping investigator's report. Conceivably, a plaintiff in a common law wrongful discharge suit might seek to introduce evidence of a violation of section 2930 in support of his or her cause of action. For discussion of wrongful termination and discipline, *see* Chapter 60.

The Labor Commissioner and DLSE have jurisdiction to enforce the provisions of *Labor Code section 2930*.ⁿ¹³ For discussion of proceedings before the Labor Commissioner, *see* Chapter 5.

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawPreemployment Practices

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 2930(b)*.

(n2)Footnote 2. *Lab. Code § 2930(b)*.

(n3)Footnote 3. *Lab. Code § 2930(b)*.

(n4)Footnote 4. *Lab. Code § 2930(b)*.

(n5)Footnote 5. *Lab. Code § 2930(a)*. (Although *Lab. Code § 2930(a)* refers to Ch. 11 of Div. 3 of the Bus. & Prof. Code, which until its repeal by 1983 Stats., ch. 1186, § 1, governed private detectives, it appears that § 2930(a) should instead refer to Ch. 11.5 of Div. 3 of the Bus. & Prof. Code, governing private investigators.) The current Ch. 11 regulates repossessioners.

(n6)Footnote 6. *Lab. Code § 2930(a)*.

(n7)Footnote 7. *Lab. Code § 2930(a)*.

(n8)Footnote 8. *See Lab. Code § 2930(a)*.

(n9)Footnote 9. *Lab. Code § 2930(a)*.

(n10)Footnote 10. *See Lab. Code § 2930(a)*.

(n11)Footnote 11. *Bus. & Prof. Code § 7520*; *see also Bus. & Prof. Code § 7521(a)* (private investigator defined as including any person or entity acting for purpose of investigating and reporting to any private employer information concerning the employer's employees involving questions of integrity, honesty, breach of rules, or other standards of performance of job duties).

(n12)Footnote 12. *See Bus. & Prof. Code § 7523(b)* (any person who conspires with another person to violate Private Investigator Act or who knowingly engages an unlicensed private investigator after being notified in writing by Bureau of Collection and Investigative Services of investigator's unlicensed status is guilty of misdemeanor punishable by fine not to exceed \$1,000 or by imprisonment in county jail not to exceed one year, or by both such fine and imprisonment).

(n13)Footnote 13. *See Lab. Code §§ 95(a), 98(a)*.



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Part B. STATUTORY AND ADMINISTRATIVE PROVISIONS

3-50 California Employment Law § 50.19

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.19 Wiretapping and Eavesdropping

[1] Coverage

No person other than an authorized law enforcement officer may wiretap or eavesdrop on confidential communications.ⁿ¹ The Legislature enacted these provisions to protect the right of privacy of the people of California, declaring that advances in science and technology had led to the development of new devices and techniques for eavesdropping on private communications and that the invasion of privacy resulting from the increasing use of such devices had created a serious and intolerable threat to the free exercise of personal liberties.ⁿ²

These provisions effectively prohibit an employer from engaging in electronic eavesdropping on employee telephone conversations or other confidential conversations.ⁿ³

[2] Substantive Rights and Responsibilities

[a] Wiretapping

The following wiretapping activities are criminal offenses:ⁿ⁴

- Intentionally tapping or making any unauthorized connection with any telegraph or telephone wire, line, cable, or instrument (whether physically, electrically, acoustically, inductively, or otherwise), including any internal telephonic communication system.
- Willfully and without the consent of all parties to the communication, or in any unauthorized manner, reading or attempting to read or to learn the contents or meaning of any message, report, or communication while it is in transit over any such telegraph or telephone wire, line, or cable, or while it is being sent from or received at any place in California.
- Using or attempting to use, in any manner or for any purpose, or communicating in any way, any

information obtained by means of a prohibited wiretap or unauthorized connection.

- Aiding, agreeing with, employing, or conspiring with any persons to unlawfully do, permit, or cause to be done any of the foregoing acts.

Evidence obtained in violation of the prohibition against wiretapping and related activities is inadmissible in any judicial, administrative, legislative, or other proceeding, except as proof in an action or prosecution for the violation.ⁿ⁵

[b] Eavesdropping on or Recording Confidential Communications

It is generally a crime for any person, intentionally and without the consent of all parties to a confidential communication, to eavesdrop on or record the communication by means of any electronic amplifying or recording device.ⁿ⁶ This prohibition applies whether the communication is carried on among the parties within the presence of one another or by telephone, telegraph, or any other device except a radio.ⁿ⁷

For purposes of this prohibition against eavesdropping, a "person" generally is any individual, business association, partnership, corporation, limited liability company, or other legal entity, as well as any individual acting on behalf of any government or government subdivision. However, an individual known by all parties to a confidential communication to be overhearing or recording the communication is not considered a person subject to the prohibition against eavesdropping.ⁿ⁸

A "confidential communication" for these purposes includes any communication carried on in circumstances that reasonably indicate that any party to the communication desires it to be confined to the parties to the communication. Thus, a communication made in a public gathering or in any circumstances in which the parties may reasonably expect that the communication may be overheard or recorded is not considered a confidential communication.ⁿ⁹

The prohibition against eavesdropping does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear.ⁿ¹⁰

Evidence obtained in violation of *Penal Code section 632* is inadmissible in any judicial, administrative, legislative, or other proceeding, except as proof in an action or prosecution for the violation.ⁿ¹¹

[c] Interception of Cellular Radio Telephone and Cordless Telephone Communications

It is a crime for any person, maliciously and without the consent of all parties to the communication, to intercept, receive, or assist in intercepting or receiving a communication transmitted between cellular radio telephones, between cordless telephones, between a cordless telephone and a cellular telephone, between a cellular radio telephone and a landline telephone, or between any cordless telephone and a landline telephone.ⁿ¹²

In addition, it is a crime for any person, without the consent of all parties to a communication, to intercept or receive and intentionally record, or to assist in the interception or reception, and intentional recordation of, a cellular radio telephone communication or a cordless telephone communication.ⁿ¹³ Communications covered by this provision include, but are not limited to, communications transmitted by voice, data, or image, including facsimile.ⁿ¹⁴

For these purposes, a "cellular radio telephone" is a wireless telephone authorized by the Federal Communications Commission to operate in the frequency bandwidth reserved for cellular radio telephones.ⁿ¹⁵ A "cordless telephone" is a two-way low-power communication system consisting of two parts (a "base" unit that is connected to the public switched telephone network, and a handset or "remote" unit) that are connected by a radio link and authorized by the Federal Communications Commission to operate in the frequency bandwidths reserved for cordless telephones.ⁿ¹⁶

[d] Exemptions

The statutory prohibitions on wiretapping, on eavesdropping on or recording confidential communications, and on interception of cellular radio telephone or cordless telephone communications do not apply to the following:ⁿ¹⁷

- Any public utility engaged in the business of providing communications services or facilities.
- The officers, employees, and agents of such a public utility, if the acts otherwise prohibited are done for the purpose of construction, maintenance, conduct, or operation of the services and facilities of the public entity.
- The use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of such a public utility. The use of an extension telephone for eavesdropping on confidential communications does not fall within this exception.ⁿ¹⁸
- Any telephonic communication system used for communication exclusively within a public correctional facility.

In addition, the prohibition on eavesdropping or wiretapping on telephone or telegraph communications does not apply to a public entity acting in good faith in reliance on a court order authorizing interception of wire communications relating to certain controlled substance offenses.ⁿ¹⁹

The statutory prohibitions on wiretapping, on eavesdropping on or recording confidential communications, and on interception of cellular radio telephone or cordless telephone communications are not intended to prohibit law enforcement officers from overhearing or recording any communication that they could lawfully have overheard or recorded before those statutes became effective.ⁿ²⁰

■ CONSULTANT'S COMMENT:

The provisions of *Penal Code sections 630-637.5* place severe restrictions on an employer's ability to monitor the quality of the service rendered to its customers or clients by listening to the telephone conversations of its employees. One means to address this issue without engaging in unlawful eavesdropping is to give advance notice of, and thereafter randomly place, telephone calls to employees by persons claiming to be customers, but who actually are members of a quality control group within the employer's organization. Such quality control "customers" can ask questions regarding employer services and rate employees on the accuracy of the information supplied and on such other matters as courtesy and responsiveness. *Commentary by Kirby Wilcox.*

[3] Enforcement**[a] Criminal Penalties**

A violation of any statutory prohibition on wiretapping, on eavesdropping on or recording confidential communications, or on the interception of cellular radio telephone or cordless telephone communications ordinarily is punishable by a fine of up to \$2,500, by imprisonment in the county jail for up to one year, by imprisonment in the state prison,ⁿ²¹ or by both the fine and imprisonment.ⁿ²² However, if the defendant has previously been convicted of such a violation, he or she may be punished by a fine of up to \$10,000, by imprisonment of up to one year in the county jail, by imprisonment in the state prison, or by both the fine and imprisonment.ⁿ²³ These punishments also apply to any person convicted of trespassing for the purpose of committing or attempting to commit any of the prohibited acts.ⁿ²⁴

[b] Civil Remedies

[i] Action for Damages

An employee or any other person who has been injured by a violation of the statutory prohibitions on wiretapping, on eavesdropping on or recording confidential communications, or on the interception of cellular radio telephone or cordless telephone communications may bring a civil action against the person who committed the violation.n25

The injured person is entitled to recover either \$5,000 or three times the amount of any actual damages, whichever is greater.n26 The plaintiff need not have sustained or be threatened with actual damages; he or she may recover statutory damages of \$5,000 without pleading or proof of actual damages.n27

[ii] Action for Injunctive Relief

An aggrieved employee or any other person may bring an action to enjoin and restrain any violation of the statutory prohibitions on wiretapping, on eavesdropping on or recording confidential communications, or on the interception of cellular radio telephone or cordless telephone communications.n28

An action for injunctive relief may be joined with an action for damages.n29

[c] FORM--Complaint for Damages and Injunction for Violation of Employee's Privacy Rights by Wiretapping or Unlawfully Eavesdropping**[i] Comment**

The form of complaint set forth in *[ii]*, below, is for use by an employee against an employer who has violated the employee's privacy rights by unlawfully wiretapping, eavesdropping, or recording the employee's confidential communications.n30 For discussion of the prohibition on wiretapping, eavesdropping, and recording, *see [2]*, above.

The complaint alleges the existence of the employer-employee relationship (Paragraph 3) and contains alternative allegations (Paragraph 4) (1) that the employer intentionally tapped or made an unauthorized connection with the employee's telephone and used the information so obtained, or that the employer willfully and without the consent of all parties to the communication, or in any other unauthorized manner, read or attempted to read or to learn the contents of the communication while it was in transit or as it was being sent or received in violation of *Penal Code section 631(a)*; and (2) that the employer intentionally and without the consent of all parties to a confidential communication between the employee and another person or persons eavesdropped on or recorded the communication, in violation of *Penal Code section 632(a)*. The form contains an optional allegation (Paragraph 6) of actual damages.n31 The form also contains optional allegations (Paragraph 5) for use when an injunction is sought.n32

The complaint must be filed within one year after the date on which the liability arose.n33

[ii] Form Complaint for Damages and Injunction for Violation of Employee's Privacy Rights by Wiretapping or Unlawfully Eavesdropping

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs. _____ [name],	)	COMPLAINT FOR DAMAGES FOR VIOLATION
Defendant.	)	OF EMPLOYEE'S PRIVACY RIGHTS BY UN-

3-50 California Employment Law § 50.19

-) LAWFULLY _____
) [WIRETAPPING or EAVESDROPPING]
 [Penal Code §§ _____ (631 or
 632), 637.2]
-

Plaintiff alleges:

1. [*Capacity, residence of defendant. See Form in § 50.11[5][c][ii], Paragraph 1*].

[2. *Where acts complained of occurred. See Form in § 50.11[5][c][ii], Paragraph 2.*]

3. [*Relationship of parties. See Form in § 50.11[5][c][ii], Paragraph 3*].

[*EITHER*]

4. [Plaintiff is informed and believes and thereon alleges that] [O]n or about _____ [date], defendant intentionally tapped and/or made an unauthorized connection with plaintiff's telephone line and used such information by the following means: _____ [specify, e.g., on or about _____ (date), unknown to plaintiff, defendant installed an electronic device inside plaintiff's office telephone, without his/her knowledge or consent. Plaintiff is informed and believes that this electronic device transmitted a signal to a recording device in the office of _____ (name), defendant's general manager, enabling _____ (name) to listen in on and record all incoming and outgoing calls made through plaintiff's office telephone. Plaintiff discovered the existence of the electronic device in his/her office telephone on _____ (date), and plaintiff is informed and believes that from _____ (date), until at least _____ (date), defendant listened in on or recorded all telephone calls made through plaintiff's office telephone. On _____ (date), defendant terminated plaintiff's employment without good cause. Plaintiff is informed and believes that defendant used the information obtained through its unlawful eavesdropping and recording of confidential communications in making its decision to terminate plaintiff's employment]. Defendant's unauthorized connection with plaintiff's telephone line and use of information obtained thereby was in violation of *Penal Code section 631(a)*.

[*AND/OR*]

4. [Plaintiff is informed and believes and thereon alleges that] [O]n or about _____ [date], defendant willfully and without the consent of all parties to the communication read or attempted to read or to learn the contents of a telephone message and/or communication between plaintiff and another person while it was in transit and/or as it was being sent or received by the following means: _____ [specify]. Defendant's unauthorized interception of plaintiff's telephone communication was in violation of *Penal Code section 631(a)*.

[*AND/OR*]

4. [Plaintiff is informed and believes and thereon alleges that] [O]n or about _____ [date], defendant intentionally and without the consent of all parties to a confidential communication between plaintiff and another person eavesdropped on and/or recorded the communication by the following means: _____ [specify].

Defendant's unauthorized eavesdropping on the confidential communication was in violation of *Penal Code section 632(a)*.

[*CONTINUE*]

[5. Defendant's wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff, in that _____ (*specify facts constituting great and irreparable harm to plaintiff*). Plaintiff has no adequate remedy at law for the injuries currently being suffered in that _____ (*specify facts showing inadequacy of legal remedy*)].

[6. As a proximate result of defendant's unlawful _____ (wiretapping or eavesdropping) as herein alleged, plaintiff has suffered actual damages _____ (in the amount of \$ _____ or in an amount to be proven at trial) in that _____ (*specify nature of actual damages*).]

WHEREFORE, plaintiff prays for judgment as follows:

1. For statutory damages in the sum of \$5,000, or in the alternative, three times the amount of actual damages sustained by plaintiff, whichever amount is greater, as provided in *Penal Code section 637.2(a)*;

[2. For an order requiring defendant to show cause, if any there be, why defendant should not be enjoined as hereinafter set forth during the pendency of this action;]

[3. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant, and his/her/its agents, servants, and employees, and all persons acting under, in concert with, or for them, _____ (*specify each act, course of conduct, and condition defendant is to be prohibited from doing and/or commanded to do, e.g., from listening in on and recording any and all confidential communications made through plaintiff's office telephone*);]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court deems proper.

_____ [*signature*]

Attorney for Plaintiff

[*Add verification, if desired (see Code Civ. Proc. §§ 446, 2015.5)*.]

[4] Comparison With Federal Law

Title III of the Omnibus Crime Control and Safe Streets Act of 1968³⁴ contains the federal law governing wiretapping and eavesdropping. Although principally aimed at regulating the electronic surveillance activities of law enforcement officials, the act also prescribes severe criminal penalties for any person found to have willfully violated the act and provides a civil remedy to persons aggrieved by its violation.³⁵ A crucial difference between California and federal law is that the former prohibits wiretapping and recording of confidential communications without the consent of all parties,³⁶ while the latter permits such activities with the consent of one party.³⁷ Furthermore, the "business extension exception" exempts from the operation of the federal act telephones furnished to the subscriber by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber in

the ordinary course of its business.ⁿ³⁸ It has been held that personal calls may not be intercepted in the ordinary course of business, except to the extent necessary to guard against unauthorized use of the telephone or to determine whether a call is personal or not.ⁿ³⁹

[5] Federal Stored Communications Act

Generally, the federal Stored Communications Act^{n39.1} prevents "providers" of communication services from divulging private communications to certain entities and/or individuals.^{n39.2} Under the Stored Communications Act ("SCA"), employees may have the right, depending on their employers' stated policies and practices, to the confidentiality of text messages sent and received by the employee, even if they are sent and received on equipment provided by the employer, such as a computer or a pager. For example, in *Quon v. Arch Wireless Operating Co.*,^{n39.3} the Ninth Circuit held that a wireless service that provided wireless pagers to a city's police department provided an "electronic communication service" to the city under the SCA and acted "knowingly" when it released transcripts of text messages sent and received by one of the police officers to the city on his pager. When the service knowingly turned over the text-messaging transcripts to the city, which under the SCA was a "subscriber," not "an addressee or intended recipient of such communication," the service provider violated the SCA.^{n39.4} The court, relying in part on evidence that a supervisor had informed the employees that such messages would remain confidential, found in favor of the employee, as well as the recipients and senders of the transcribed text messages.

Note:

The United States Supreme Court has granted *certiorari* in the city's appeal in *Quon v. Arch Wireless Operating Co.*,^{n39.5} while denying *certiorari* in the service's appeal.^{n39.6}

Legal Topics:

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

Criminal Law & Procedure Search & Seizure Electronic Eavesdropping General Overview Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Disclosure of Employee Information General Overview Labor & Employment Law Employee Privacy Invasion of Privacy Labor & Employment Law Preemployment Practices

FOOTNOTES:

(n1)Footnote 1. *Penal Code* §§ 631, 632-632.7, 636; *see Penal Code* §§ 633, 633.1 (limited exemptions for law enforcement officers).

(n2)Footnote 2. *Penal Code* § 630.

(n3)Footnote 3. *See Penal Code* §§ 631(a), 632(a), 632.5(a), 632.6(a), 632.7(a); *see also* [2], *below*.

(n4)Footnote 4. *Penal Code* § 631(a).

(n5)Footnote 5. *Penal Code* § 631(c).

(n6)Footnote 6. *Penal Code* § 632(a); *see People v. Gibbons* (1989) 215 Cal. App. 3d 1204, 1208, 263 Cal. Rptr. 905 (prohibition applies to use of video recorder to eavesdrop).

(n7)Footnote 7. *Penal Code* § 632(a).

(n8)Footnote 8. *Penal Code* § 632(b).

(n9)Footnote 9. *Penal Code* § 632(c).

(n10)Footnote 10. *Penal Code* § 632(f).

(n11)Footnote 11. *Penal Code* § 632(d).

(n12)Footnote 12. *Penal Code* §§ 632.5(a), 632.6(a).

(n13)Footnote 13. *Penal Code* § 632.7(a)

(n14)Footnote 14. *Penal Code* § 632.7(c)(3).

(n15)Footnote 15. *Penal Code* §§ 632.5(c), 632.7(c)(1).

(n16)Footnote 16. *Penal Code* §§ 632.6(c), 632.7(c)(2).

(n17)Footnote 17. *Penal Code* §§ 631(b), 632(e), 632.5(b), 632.6(b), 632.7(b).

(n18)Footnote 18. *See Ribas v. Clark* (1985) 38 Cal. 3d 355, 362-363, 212 Cal. Rptr. 143, 696 P.2d 637 .

(n19)Footnote 19. *Penal Code* § 631(b); *see Penal Code* §§ 629-629.48.

(n20)Footnote 20. *Penal Code* § 633.

(n21)Footnote 21. *See Penal Code* § 18 (unless a different term is prescribed by statute, an offense punishable by imprisonment in state prison is punishable by imprisonment for 16 months, two years, or three years).

(n22)Footnote 22. *Penal Code* §§ 631(a), 632(a), 632.5(a), 632.6(a), 632.7(a).

(n23)Footnote 23. *Penal Code* §§ 631(a), 632(a), 632.5(a), 632.6(a), 632.7(a).

(n24)Footnote 24. *Penal Code* § 634.

(n25)Footnote 25. *Penal Code* § 637.2(a). For the standard jury instruction in a civil action based on *Pen. Code* §§ 632, 637.2, *see Judicial Council of California Civil Jury Instructions, CACI 1809 (Matthew Bender)*, also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for a claim based on *Pen. Code* §§ 632, 637.2, *see Judicial Council of California Civil Jury Instructions, CACI VF-1807 (Matthew Bender)*. For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n26)Footnote 26. *Penal Code* § 637.2(a).

(n27)Footnote 27. *Penal Code* § 637.2(a)(1), (c); *see Nagy v. Whittlesey Automotive Group* (1995) 40 Cal. App. 4th 1238, 47 Cal. Rptr. 2d 395 ; *Coulter v. Bank of America* (1994) 28 Cal. App. 4th 923, 33 Cal. Rptr. 2d 766 ; *Ion Equipment Corp. v. Nelson* (1980) 110 Cal. App. 3d 868, 882, 168 Cal. Rptr. 361 .

(n28)Footnote 28. *Penal Code* § 637.2(b); *see Code Civ. Proc.* § 525 *et seq.*

(n29)Footnote 29. *Penal Code* § 637.2(b); *see Penal Code* § 637.2(a); *see also* [i], *above*.

(n30)Footnote 30. *See Penal Code* §§ 631, 632, 637.2.

(n31)Footnote 31. *See Penal Code* § 637.2(a). If no actual damages are suffered, plaintiff may still recover \$5,000 in statutory damages. *see Penal Code* § 637.2(a), (c).

(n32)Footnote 32. *See Penal Code* § 637.2(b).

(n33)Footnote 33. *See Code Civ. Proc. § 340(a).*

(n34)Footnote 34. *See 18 U.S.C. §§ 2510 et seq.*

(n35)Footnote 35. *See Citron v. Citron (S.D.N.Y. 1982) 539 F. Supp. 621, 624 , aff'd, 722 F.2d 14 (2d Cir. [N.Y.] 1983) , cert. denied, 466 U.S. 973 (1984) ; 18 U.S.C. §§ 2511, 2520.*

(n36)Footnote 36. *See Penal Code §§ 631(a), 632(a).*

(n37)Footnote 37. *See 18 U.S.C. § 2511(2)(d).*

(n38)Footnote 38. *See 18 U.S.C. § 2510(5)(a)(i).*

(n39)Footnote 39. *Watkins v. L.M. Berry & Co. (11th Cir. 1983) 704 F.2d 577, 582-584 .*

(n40)Footnote 39.1. *18 U.S.C. § 2701 et seq.*

(n41)Footnote 39.2. *Quon v. Arch Wireless Operating Co. (9th Cir. 2008) 529 F.3d 892, 900 .*

(n42)Footnote 39.3. *Quon v. Arch Wireless Operating Co. (9th Cir. 2008) 529 F.3d 892, 900-903 .*

(n43)Footnote 39.4. *See 18 U.S.C. § 2702(a)(1).*

(n44)Footnote 39.5. *See City of Ontario v. Quon (2009) 175 L. Ed. 2d 617 .*

(n45)Footnote 39.6. *See USA Mobility Wireless, Inc. v. Quon (2009) 175 L. Ed. 2d 618 .*



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California Employment Law

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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part B. STATUTORY AND ADMINISTRATIVE PROVISIONS

3-50 California Employment Law § 50.20

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.20 Audio, Photographic and Video Recording

No private or public employer may cause an audio or video recording to be made of an employee in a restroom, locker room, or other room designated by the employer for changing clothes unless authorized by a court order.ⁿ⁴⁰ No recording made in violation of this statute may be used by the employer for any purpose.ⁿ⁴¹ This ban does not apply to the federal government.ⁿ⁴²

Legal Topics:

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

Criminal Law & Procedure Search & Seizure Electronic Eavesdropping General Overview Criminal Law & Procedure Search & Seizure Electronic Eavesdropping Sealing Requirements Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Disclosure of Employee Information General Overview Labor & Employment Law Employee Privacy Invasion of Privacy

FOOTNOTES:

(n1)Footnote 40. *Lab. Code § 435(a)-(c)* (violation constitutes infraction).

(n2)Footnote 41. *Lab. Code § 435(b)*.

(n3)Footnote 42. *Lab. Code § 435(b)*.



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California Employment Law

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DIVISION V EMPLOYEE PRIVACY RIGHTS

CHAPTER 50 Limitations on Employer Collection of Private Information About Employees

Part B. STATUTORY AND ADMINISTRATIVE PROVISIONS

3-50 California Employment Law §§ 50.21 through 50.29

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

[Reserved]

§§ 50.21[Reserved]



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California Employment Law

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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part C. CONSTITUTIONAL AND COMMON LAW PRIVACY ISSUES

3-50 California Employment Law § 50.30

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.30 Constitutional Privacy Protections

[1] California Constitution

[a] Nature and Scope of Right to Privacy

[i] Rights Protected

In November 1972, California voters amended *Article I, Section 1, of the California Constitution* to include an express right of privacy among the various "inalienable rights" of the people. In the leading case interpreting the constitutional cause of action for invasion of privacy, *Hill v. National Collegiate Athletic Association*,ⁿ¹ the California Supreme Court limited the scope of state constitutional protection to specific, legally-protected privacy interests. The Court examined the analysis and arguments contained in the official ballot pamphlet to determine the voters' intent in enacting the provision.ⁿ²

The *Hill* Court identified the core values furthered by the constitutional right as informational privacy and autonomy privacy.ⁿ³ Informational privacy embodies the right against the unauthorized dissemination or misuse of sensitive and confidential information.ⁿ⁴ Autonomy privacy refers to the federal constitutional tradition of safeguarding certain intimate and personal decisions from government interference.ⁿ⁵ Whether a legally protected privacy interest exists depends on social norms, common law developments, constitutional development, statutory enactment, and the ballot arguments for the privacy initiative.ⁿ⁶

The right to privacy in the California Constitution sets standards similar to the common law tort of intrusion.^{n6.1}

[ii] Protection Encompasses Nongovernmental Action

The state constitutional right of privacy may be enforced against private entities. In *Hill v. National Collegiate Athletic Association*,ⁿ⁷ the California Supreme Court rejected the defendant's arguments that the state constitutional right only applied to governmental intrusions, and concluded that the right's protections encompass intrusions caused by private

conduct. The Court noted that court of appeal decisions had consistently reached the conclusion that, in contrast to the federal right of privacy, the state constitutional right of privacy may be enforced against private parties.ⁿ⁸

Although the Court in *Hill* allowed the right of privacy to be enforced against private entities, the Court concluded that the relative strength and importance of the right was not necessarily the same in cases of private, as opposed to governmental, action because of the following considerations:ⁿ⁹

1. The pervasive presence of coercive government power in basic areas of human life poses greater dangers to freedom than does private conduct.
2. An individual generally has greater choice and alternatives when dealing with private entities, as opposed to the government.
3. Some private conduct, such as the activities of voluntary associations, carries its own mantle of constitutional protection in the form of freedom of association.

Employers often encounter constitutional right of privacy arguments in connection with electronic communications by employees on employer-provided equipment, such as computers, pagers, cellular telephones, etc.^{n9.1} The privacy right protected by *Cal. Const., art. I, § 1* in the area of search and seizure is coextensive with the privacy right protected by the *Fourth Amendment*.^{n9.2} Thus, courts may utilize a *Fourth Amendment* analysis for claims by employees of violation of their privacy rights under the California Constitution by searches and/or seizures by the employer and others.

In *Quon v. Arch Wireless Operating Co.*,^{n9.3} because the employer was a public employer, the Ninth Circuit used a *Fourth Amendment* analysis to address privacy claims. The plaintiffs had also alleged a cause of action for violation of the California constitutional right to privacy, which the court found to be coterminous with their rights under the *Fourth Amendment* analysis.^{n9.4} The employer had a formal, written policy that no employee had a right to expect privacy or confidentiality in any communications sent or received on equipment supplied by the employer.^{n9.5} The employer also had an informal policy that text messages sent and received on a pager supplied to the employer by a wireless service would not be audited by the employer if the pager-user paid the cost of any characters over the amount allowed. Despite the informal policy, the employer asked the wireless service to provide transcripts of text messages sent and received by one employee. When the wireless service provided the messages, the employee and the senders and recipients of text messages to and from him sued for violations of privacy. The court found first that despite the employer's policy the plaintiffs had a reasonable expectation of privacy. Although the extent to which the *Fourth Amendment* provided protection for the contents of electronic communications in the Internet age was an open question, the court found that users of text messaging services such as those at issue in *Quon* have a reasonable expectation of privacy in their text messages stored on the service provider's network.^{n9.6} E-mail users have no expectation of privacy in the to/from addresses of their messages because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information.^{n9.7} However, e-mail users do have a reasonable expectation of privacy in the content of their e-mails vis-a-vis the service provider.^{n9.8} That the service provider may be able to access the contents of the messages for its own purposes is irrelevant.^{n9.9} In *Quon*, the senders and recipients of e-mails to the officer did not expect that the wireless service provider would monitor their text messages, much less turn over the messages to third parties, including his employer, without their consent, and since the employer surreptitiously reviewed the messages without the consent of the officer, as a matter of law, they had a reasonable expectation the employer would not review their messages absent consent from either a sender or recipient of the text messages.^{n9.10} The employee also had a reasonable expectation of privacy, because the employer's informal policy that the text messages would not be audited if he paid the overages rendered the employee's expectation of privacy in those messages reasonable, because the employer's formal policy was not the operational reality. The supervisor in charge of administering the use of the city-owned pagers had made it clear to the staff, and to the employee in particular, that he would not audit their pagers so long as they agreed to pay for any overages. Before the

events that transpired in *Quon*, the employer did not audit any employee's use of the pager for the eight months the pagers had been in use, and the employee had exceeded the character limit three or four times, and had paid for the overages every time without anyone reviewing the text of the messages. This demonstrated that the employer followed its informal policy and the employee reasonably relied on it. The court then found that the search was not reasonable, even though the employer's purpose in auditing the text messages was to determine the efficacy of the character limit, which was a legitimate work-related rationale. However, the search was not reasonable in scope, because there were alternative ways to verify the efficacy of the character limit without intruding on the plaintiffs' *Fourth Amendment* rights.^{9.11}

Note:

The United States Supreme Court has granted *certiorari* in the city's appeal in *Quon v. Arch Wireless Operating Co.*,^{9.12} while denying *certiorari* in the service's appeal.^{9.13}

■ PRACTICE TIP:

In the *Quon* case, the Ninth Circuit gave great weight to the statement of the supervisor in charge of administering the use of the city-owned pagers regarding the employer's informal policy, which implicated the employer's lack of enforcement of its own formal policy regarding electronic communications. Absent that statement or similar evidence regarding the employer's formal policy and its operational reality, the case might have come out differently. The message for employers with formal policies regarding the nonprivate and nonconfidential nature of electronic communications using its equipment is to make sure that none of their agents vary in practice from the formal policy established in writing by the employer. Employers might even want to state explicitly in their policies that no employee other than the appropriate level of employee has authority to waive, vary or amend the employer's email policy.

[b] Essential Elements of Privacy Action

In *Hill v. National Collegiate Athletic Association*,¹⁰ the California Supreme Court set forth three essential elements for a cause of action for invasion of the state constitutional right of privacy:^{10.1}

1. A legally-protected privacy interest.¹¹
2. A reasonable expectation of privacy.
3. A serious invasion of the privacy interest.

In *Loder v. City of Glendale*,¹² the California Supreme Court explained that these elements are threshold elements that are used to screen out insignificant intrusions. Once these elements are established, the court must then weigh and balance the employer's justification for the invasive conduct against the resulting intrusion on privacy.¹³

The plaintiff in an invasion of privacy case has the burden of establishing each element.¹⁴ The first element, whether a legally protected privacy interest exists, is a question of law¹⁵ that depends on social norms, common law developments, constitutional development, statutory enactment, and an analysis of the ballot arguments for the privacy initiative.¹⁶ Legally protected privacy interests include conducting personal activities without observation, intrusion, or interference as determined by established social norms derived from such sources as the common law and statutory enactment.^{16.1}

The second element, whether the plaintiff's expectation of privacy is reasonable, is a mixed question of law and fact.¹⁷ Factors affecting the extent of a privacy interest include advance notice of impending action, customs, societal norms and practices, physical settings surrounding particular activities, and the presence or absence of opportunities for

voluntary consent.ⁿ¹⁸

The third element, whether the defendant's invasion of privacy is serious, is a mixed question of law and fact.ⁿ¹⁹ An actionable invasion of privacy under *California Constitution, Article I, Section 1* must be sufficiently serious in its nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.ⁿ²⁰

[c] Competing Interest Defense--Balancing Test

In *Hill v. National Collegiate Athletic Association*,ⁿ²¹ the California Supreme Court recognized a competing interest defense that allows defendants to justify an invasion of privacy by asserting legitimate competing or countervailing interests.^{n21.1} This defense is less rigorous than the "compelling interest" defense referred to in previous appellate decisions. The Court in *Hill* limited the application of the compelling interest test to cases involving either "obvious government action impacting freedom of expression and association" or an "obvious invasion of an interest fundamental to personal autonomy."ⁿ²²

The competing interest defense involves the use of a balancing test that compares the specifically identified privacy interests of the plaintiff with legitimate competing and countervailing nonprivacy interests asserted by the defendant.ⁿ²³ If the interests asserted by the defendant justify the invasion of privacy, the intrusion does not violate the California Constitution. The relative importance of an asserted interest depends on its proximity to the central functions of a particular public or private enterprise.ⁿ²⁴

For purposes of the balancing function, and except in the rare case in which a fundamental right of personal autonomy is involved, the defendant need not present a compelling countervailing interest. Only general balancing tests are employed.^{n24.1} To the extent the plaintiff raises the issue in response to a claim or defense of competing interests, the defendant may show that less intrusive alternative means were not reasonably available. A relevant inquiry is whether the intrusion was limited, such that no confidential information was gathered or disclosed.^{n24.2}

In *Hill*, the California Supreme Court applied the competing interest defense for the first time.ⁿ²⁵ The plaintiffs were student athletes who established a prima facie case that a drug testing program administered by a private athletic association violated their state constitutional right of privacy.ⁿ²⁶ The drug testing program required the student athletes to provide urine samples under direct visual observation and to disclose medical information that could have caused embarrassment to individual athletes. The Court held that the athletes' privacy interest in urination was outweighed by two competing interests that justified the NCAA's conduct:ⁿ²⁷

1. Safeguarding the integrity of intercollegiate athletic competition; and
2. Protecting the health and safety of student athletes.

The first interest was persuasive, "whatever the provable incidence of drug use," to combat the perception that the use of certain drugs may enhance athletic performance and because of the practical realities of intercollegiate sports.ⁿ²⁸ The second interest exists for the benefit of all persons involved in sporting events, as well as the sport itself.ⁿ²⁹ The Court also found that the athletes' privacy interest in the confidentiality of medical treatment and information was not violated by the NCAA because the types of medical questions answered were routine in the athletic context, and the medical procedures had sufficient safeguards to protect the confidentiality of medical information furnished by the athletes.ⁿ³⁰

The plaintiff may rebut the assertion of a competing interest by showing that there are feasible and effective alternatives to the defendant's conduct that would have a lesser impact on privacy interests.ⁿ³¹ In *Hill*, the Court found that uncontradicted evidence in the record demonstrated as a matter of law the constitutional validity of the NCAA's program.ⁿ³²

[d] Compelling Interest Defense

In *Hill v. National Collegiate Athletic Association*,ⁿ³³ the California Supreme Court rejected the blanket use of the compelling interest defense, which requires a defendant to justify an invasion of privacy by proving both (1) a compelling interest, and (2) the absence of any alternative, less-intrusive means of accomplishing that interest.ⁿ³⁴ The Court analyzed its previous decision in *White v. Davis*,ⁿ³⁵ as applying only to some aspects of the right of privacy under *California Constitution, Article I, Section 1*, such as those that implicate obvious government action impacting freedom of expression.ⁿ³⁶ The Court also suggested that the compelling interest standard is applicable in cases involving an obvious invasion of an interest fundamental to personal autonomy, such as freedom from involuntary fertilization or the freedom to pursue consensual familial relationships.ⁿ³⁷ If the privacy right is less central, then the "balancing test" standard applies, and this test is less stringent than the compelling interest standard.ⁿ³⁸

Hill culminates a trend in California case law that makes it clear that "not every act which has some impact on personal privacy invokes the protections of the state's Constitution and requires such justification."ⁿ³⁹

Counsel should approach privacy cases decided before *Hill* with caution. The California Supreme Court has made it clear that the *Hill* standard will apply to future claims for invasion of the state constitutional right to privacy. The Court offered no analysis on the continuing vitality of cases decided before *Hill*.ⁿ⁴⁰

[e] Application to Employer-Employee Relationship

As noted in [a][ii], *above*, the right of privacy set forth in *California Constitution, Article I, Section 1*, has been held to be applicable to the conduct of private businesses and individuals.ⁿ⁴¹ Thus, the constitutional right of privacy represents a potential limitation on any type of practice or procedure whereby an employer attempts to gather private information about an employee or applicant. The actual scope of the limitations placed on the employer must be determined by a careful analysis of the interests involved in each particular case, and by a balancing of those interests.ⁿ⁴²

In *Loder v. City of Glendale*,ⁿ⁴³ the California Supreme Court applied the balancing test established in *Hill v. National Collegiate Athletic Association*,ⁿ⁴⁴ to determine the constitutionality of preemployment drug testing. The court overcame the threshold requirements set forth in *Hill*, *i.e.*, that drug testing which (1) requires individuals to provide a urine sample under surveillance, (2) uses the sample to acquire information about the individual's internal physical state, and (3) requires an individual to disclose those medications he or she currently is taking "clearly intrudes on both autonomy privacy interests and informational privacy interests which are protected by the state Constitution."ⁿ⁴⁵ The Court, however, found that the actual intrusion was lessened by the fact that the drug testing was part of a preemployment medical examination which a job applicant "reasonably must anticipate." It then balanced that intrusion against the employer's interest in avoiding the financial burdens and morale problems caused by an employee's abuse of drugs or alcohol.ⁿ⁴⁶ The court determined that the limited intrusion caused by a drug test performed on an individual who was already undergoing a complete medical examination was justified by the city's interests.ⁿ⁴⁷

Courts of appeal have applied *Hill* to the employment setting. *Pettus v. Cole* ⁿ⁴⁸ involved an employer who requested and obtained psychiatric information regarding an employee and used that information to make an adverse employment decision.ⁿ⁴⁹ The court found that the employee established legally cognizable informational and autonomy privacy rights,ⁿ⁵⁰ that he had a reasonable expectation of privacy,ⁿ⁵¹ that the intrusion was seriousⁿ⁵² and that there were less intrusive means to serve the countervailing interests of the employer.ⁿ⁵³

However, in *Feminist Women's Health Center v. Superior Court*,ⁿ⁵⁴ the court concluded that the employee's right to privacy was not violated by a requirement that employees of a women's health center demonstrate cervical self-examination to female clients and employees. Although the court stated that the requirement was an invasion of privacy, it concluded that the employee had a substantially diminished expectation of privacy because she had agreed at

the outset of her employment to perform the self-exams. It also found that the self-examination was a reasonable requirement for the job in question.ⁿ⁵⁵

In *TBG Ins. Servs. Corp. v. Superior Court*,ⁿ⁵⁶ the court, applying *Hill*, assumed that a terminated employee whose employer had provided a computer for home use but who allegedly used the computer to access pornographic web sites had an abstract privacy interest in the personal and financial information on the computer. The court concluded, however, that the employee had no reasonable expectation of privacy under the circumstances. The employee had signed the employer's "electronic and telephone equipment policy statement" and had agreed in writing that his computers could be monitored by his employer. The issue arose when the later sued the employer and the employer demanded production of the home computer. The court found that in the 21st century computer-dependent business community, the use of computers in the employment context carries with it social norms that effectively diminish an employee's reasonable expectation of privacy with regard to the use of the employer's computers, including the employer's reasonable monitoring of computer usage.ⁿ⁵⁷ The court then found that the employer's advance notice to the employee in the form of the company's policy statement gave the employee the opportunity to consent to or reject the employer's monitoring of his computer use at the office and at home, and that the notice, combined with his written consent to the policy, defeats his claim that he had a reasonable expectation of privacy.ⁿ⁵⁸ Finally, the court found that the employer's demand for production was not a serious invasion of any lingering privacy interest the employee had in the information he stored on the home computer and that appropriate protective orders could define the scope of the employer's inspection and copying of information on the computer to that directly relevant to the litigation and prohibit unnecessary copying and dissemination of the employee's financial and other information that had no rational bearing on the case.ⁿ⁵⁹

In *Ortiz v. Los Angeles Police Relief Assn.*,ⁿ⁶⁰ a private nonprofit association that administers police officers' benefits terminated one of its employees for her refusal to end an intimate relationship with an incarcerated felon. The court examined the three elements of a constitutional privacy claimⁿ⁶¹ to decide whether the employer's invasion of privacy was more than de minimus.ⁿ⁶²

Having concluded that Ortiz's claim satisfied the requirements of a serious invasion of privacy, it proceeded to evaluate the parties' competing interests. The court held first that the employer's conflict-of-interest rule, which required that the employee end the relationship or resign, was valid if it was rationally related to a legitimate employer interest, and did not warrant analysis under a strict scrutiny standard.ⁿ⁶³ The court then found that the conflict-of-interest rule served the employer's legitimate interests in preventing the improper disclosure of confidential information about police officers to criminals,ⁿ⁶⁴ and was a rational means of pursuing its legitimate interests.^{n64.1} The court concluded that the employee had not shown there were feasible and effective alternatives to the employer's conduct which would have had a lesser impact on privacy interests.ⁿ⁶⁵

In *Barbee v. Household Automotive Finance Corp.*,^{n65.1} the employer's termination of the employee based on his violation of a company policy restricting inter-company dating did not violate his state constitutional right to privacy. The employee may have had a legally protected privacy interest in pursuing an intimate or sexual relationship guaranteed by the California Constitution.^{n65.2} However, the employee could not prove a reasonable expectation of privacy in pursuing an intimate relationship with a subordinate because employers have legitimate interests in avoiding conflicts of interest between work-related and family-related obligations, reducing favoritism or even the appearance of favoritism; and preventing family conflicts from affecting the workplace, strongly suggesting that a supervisor has no reasonable expectation of privacy in pursuing an intimate relationship with a subordinate.^{n65.3} Courts have also recognized that managerial-subordinate relationships present issues of potential sexual harassment.^{n65.4} The company had an express policy requiring any supervisor who wanted to maintain an intimate relationship with a subordinate bring the matter to the attention of management to allow management the opportunity to take appropriate action to avoid the potential conflict of interest. Further, the employee's superiors expressly told him that intercompany dating was a bad idea, giving him advance notice that the company believed his conducting an intimate relationship with a subordinate would present a potential conflict of interest. The notice further diminished any expectation of privacy the

employee otherwise may have had in pursuing an intimate relationship with a subordinate.ⁿ⁶⁶

Employers should exercise caution when inquiring into any arguably private matters concerning an employee and should be prepared to justify both its need for the information and the means of acquiring that information. Thus, when investigating an employee or applicant for any purpose, employers should endeavor to limit both the scope of the information sought and the means of acquiring it in order to avoid unnecessary invasion of an employee's or applicant's privacy.

Privacy issues may arise in a number of employment contexts, including the following:

1. Questions asked in employment applications and hiring interviews;
2. Preemployment investigations into an employee's qualifications, reliability, or character;
3. Physical or medical examinations of employees or applicants, including drug or alcohol screening; and
4. Investigation of employees for the purpose of ascertaining violations of law or of the employer's policies, including surveillance of the employee or searches of the employee's workplace or personal belongings.

Privacy considerations relating to investigative searches, medical examinations, and drug and alcohol tests are further discussed in Part D (§§ 50.40-50.43).

[f] Remedies

Injunctive relief is available as a remedy for violation of the privacy clause of the California Constitution.^{n66.1} The California Supreme Court has not yet considered whether violation of the state constitutional privacy clause permits an action for damages.^{n66.2}

Public employers covered by the California Tort Claims Act are entitled to the immunity provided by *Gov. Code* § 821.6 for alleged conduct that might otherwise violate the state constitutional privacy provision.^{n66.3} The litigation privilege also applies to a constitutionally based privacy cause of action.^{n66.4}

[2] Federal Constitution

Several fundamental guarantees have been recognized by the courts as the source of a right of privacy under the United States Constitution. Among the provisions creating this right of privacy are the *First Amendment* (protecting the right to receive and express ideas), the *Fourth Amendment* (protecting against governmental invasions of the home and other places with respect to which persons entertain a reasonable expectation of privacy),^{n66.5} the *Fifth Amendment* (protecting against compulsory self-incrimination), and the *Ninth Amendment* (protecting rights not enumerated in the Constitution, but nevertheless retained by the people). These federal constitutional rights, by virtue of the *Due Process clause of the Fourteenth Amendment*, are protected against interference by the state.ⁿ⁶⁷ Thus, they generally will be inapplicable to actions by private employers.ⁿ⁶⁸ However, if private employees are subject to some type of government regulation, the circumstances must be evaluated to determine whether that regulation transforms otherwise private action into government action for purposes of the *Fourth Amendment*. For example, the United States Supreme Court has held that federal regulations that provide for mandatory drug and alcohol testing of private railroad employees are within the purview of the *Fourth Amendment*. It also found, under the circumstances, that the *Fourth Amendment* was applicable to regulations providing for permissive drug and alcohol testing of private railroad employees.^{n68.1}

Under the *Fourth Amendment*, a public employer's action to uncover information is considered a search if the target of

the search has a reasonable expectation of privacy in the information being sought, which means a subjective expectation of privacy that society is prepared to recognize as reasonable.^{n68.2} One does not have a reasonable expectation of privacy in one's information merely because that information is of a "private" nature,^{n68.3} and the *Fourth Amendment* does not prohibit obtaining information revealed to third party and conveyed by third party to Government authorities.^{n68.4} Thus, written inquiries sent to third parties, no matter how private the subject of their questioning, cannot be considered searches.^{n68.5} Further, the *Fourth Amendment* has not generally been applied to direct questioning.^{n68.6} Thus, the insistence of NASA that employees submit to in-depth background investigations was not likely to be found to violate employees' right of privacy under the *Fourth Amendment*, because the government's actions were not likely to be deemed searches.ⁿ⁶⁹

An employer's cooperation with law enforcement authorities may also implicate an employee's constitutional rights in a private employment context. For example, after a report to federal law enforcement authorities that an employee had accessed child-pornographic websites from his workplace computer, the employer cooperated in the investigation and had other employees voluntarily turn over a copy of the hard drive of the employee's computer to the F.B.I. without a search warrant. After being indicted, the employee moved to suppress the evidence obtained from the search of his computer on the ground that the F.B.I. agent, lacking a warrant, violated the *Fourth Amendment* by directing the other employees to search his computer. The district court denied the motion on the ground that the employee had no reasonable expectation of privacy in the files he accessed on the Internet.^{n69.1} The Ninth Circuit, however, found that the employee did have a reasonable expectation of privacy in his workplace computer and the files stored on it. His subjective expectation of privacy in his office and the computer were evidenced by his use of a password on his computer and the lock on his private office door. The court then held that the employee also had an objectively reasonable expectation of privacy. The court cited *Mancusi v. DeForte*,^{n69.2} in which the United States Supreme Court held that a union employee had a legitimate expectation of privacy in the contents of records he stored in an office he shared with several other union officials and therefore standing under the *Fourth Amendment* to object to the search and that the search was unreasonable. The Supreme Court found it clear that if the union employee had occupied a private office in union headquarters, and union records had been seized from a desk or a filing cabinet in that office, he would have had standing, because he could expect that he would not be disturbed except by business or personal invitees and that the records would not be taken except with the permission of his supervisors. The fact that the office was shared with a few other individuals was of no constitutional distinction.^{n69.3}

In *United States v. Ziegler*,^{n69.4} the Ninth Circuit found that *Mancusi* compels it to recognize that in the private employer context, employees retain at least some expectation of privacy in their offices.^{n69.5} In *Ziegler*, the employee's expectation of privacy in his office was reasonable, because his office was not shared by co-workers, and he kept it locked.^{n69.6} The existence of a master key did not necessarily defeat a reasonable expectation of privacy in an office given over for personal use.^{n69.7} Because Ziegler had a reasonable expectation of privacy in his office, any search of that space and the items located in the office had to comply with the *Fourth Amendment*.^{n69.8} The court then found that there clearly was a search and seizure by the government so as to invoke the *Fourth Amendment*.^{n69.9} Nonetheless, although the employee retained a legitimate expectation of privacy in his office, the search and seizure were not unreasonable, because his employer retained the ability to consent to a search of the office and his business computer, and because the employer gave a valid third party consent to search the office and computer located in the office.^{n69.10} The employer had the authority to consent to the search because it exercised "common authority" over the office and workplace computer, had complete administrative access to all employees' machines, routinely monitored workers' computer use, and had installed a firewall to monitor internet traffic. Moreover, the company informed employees of its monitoring efforts and that the company's computers should not be used for personal reasons.

For discussion of privacy issues relating to drug and alcohol testing, see § 50.43.

Legal Topics:

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

Constitutional Law Substantive Due Process Privacy General Overview Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Constitutional Protections Labor & Employment Law Employee Privacy Disclosure of Employee Information General Overview

FOOTNOTES:

(n1)Footnote 1. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n2)Footnote 2. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 16-18, 26 Cal. Rptr. 2d 834, 865 P.2d 633 ; *see also* *White v. Davis* (1975) 13 Cal. 3d 757, 775 n.11, 120 Cal. Rptr. 94, 533 P.2d 222 .

(n3)Footnote 3. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 35-36, 26 Cal. Rptr. 2d 834, 865 P.2d 633 ; *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1301, 120 Cal. Rptr. 2d 670 .

(n4)Footnote 4. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 35, 26 Cal. Rptr. 2d 834, 865 P.2d 633 ; *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1301-1302, 120 Cal. Rptr. 2d 670 ; *see* *White v. Davis* (1975) 13 Cal. 3d 757, 774, 120 Cal. Rptr. 94, 533 P.2d 222 ; *see also* *Planned Parenthood Golden Gate v. Superior Court* (2000) 83 Cal. App. 4th 347, 367-369, 99 Cal. Rptr. 2d 627 (privacy rights of abortion clinic's non-party employees, staff and volunteers outweighed state's interest in compelling disclosure of names, addresses and phone numbers in litigation brought by anti-abortion protestors).

(n5)Footnote 5. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 35, 26 Cal. Rptr. 2d 834, 865 P.2d 633 ; *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1301, 120 Cal. Rptr. 2d 670 .

(n6)Footnote 6. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 36, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n7)Footnote 6.1. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 287, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 ; *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal. 4th 1, 27, 26 Cal. Rptr. 2d 834, 865 P.2d 633 . For discussion of the elements of a state constitutional privacy action, *see* [b], *below*. For discussion of the elements of the common law tort of intrusion, *see* § 50.31[1][a], *below*.

(n8)Footnote 7. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 16-20, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n9)Footnote 8. *See, e.g., Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1299-1314, 120 Cal. Rptr. 2d 670 (applying right of privacy to private employer's termination of employee of organization administering police officers' benefits for refusal to terminate romantic relationship with incarcerated felon, but finding no violation); *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1040, 264 Cal. Rptr. 194 (applying constitutional right of privacy to private employer's preemployment drug-testing program, but finding no violation).

(n10)Footnote 9. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 38-39, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n11)Footnote 9.1. *See, e.g., Quon v. Arch Wireless Operating Co.* (9th Cir. 2008) 529 F.3d 892 .

(n12)Footnote 9.2. *See Quon v. Arch Wireless Operating Co.* (9th Cir. 2008) 529 F.3d 892, 903 ; *Hill v. Natl. Collegiate Ath. Ass'n* (1994) 7 Cal. 4th 1, 30 n.9, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n13)Footnote 9.3. *Quon v. Arch Wireless Operating Co.* (9th Cir. 2008) 529 F.3d 892, 903-909 .

(n14)Footnote 9.4. *Quon v. Arch Wireless Operating Co.* (9th Cir. 2008) 529 F.3d 892, 903 .

(n15)Footnote 9.5. *See, e.g., Muick v. Glenayre Elecs.* (7th Cir. 2002) 280 F.3d 741, 743 (employer announced that it could inspect laptops it furnished for use of its employees, which destroyed any reasonable expectation of privacy employee might have had); *Bohach v. City of Reno* (D. Nev. 1996) 932 F. Supp. 1232, 1234-35 (finding diminished expectation of privacy under *Fourth Amendment* where police department had issued memorandum informing employees that messages sent on city-issued pagers would be logged on department's network and certain types of messages were banned from system, and because any employee with access to, and working knowledge of, department's computer system could see messages). *See also O'Connor v. Ortega* (1987) 480 U.S. 709, 719, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (expectation of privacy would not be reasonable if employer had established any reasonable regulation or policy discouraging employees from storing personal papers and effects in their desks or file cabinets); *Schowengerdt v. General Dynamics Corp.* (9th Cir. 1987) 823 F.2d 1328, 1335 (employee would enjoy reasonable expectation of privacy in areas given over to his exclusive use, unless he was on notice from his employer that searches of type to which he was subjected might occur from time to time for work-related purposes).

(n16)Footnote 9.6. *Quon v. Arch Wireless Operating Co.* (9th Cir. 2008) 529 F.3d 892, 904-908 .

(n17)Footnote 9.7. *United States v. Forrester* (9th Cir. 2008) 512 F.3d 500, 510 .

(n18)Footnote 9.8. *Quon v. Arch Wireless Operating Co.* (9th Cir. 2008) 529 F.3d 892, 905-908 . *See also United States v. Finley* (5th Cir. 2007) 477 F.3d 250, 259 (defendant had reasonable expectation of privacy in text messages on his cell phone and consequently had standing to challenge search).

(n19)Footnote 9.9. *Quon v. Arch Wireless Operating Co.* (9th Cir. 2008) 529 F.3d 892, 905-906 . *See United States v. Heckenkamp*, 482 F.3d 1142, 1146-47 (9th Cir. 2007) (student did not lose his reasonable expectation of privacy in information stored on his computer despite university policy that it could access his computer in limited circumstances while connected to university's network); *United States v. Ziegler*, 474 F.3d 1184, 1189-90 (9th Cir. 2007) (employee had reasonable expectation of privacy in computer in locked office despite company policy that computer usage would be monitored).

(n20)Footnote 9.10. *Quon v. Arch Wireless Operating Co.* (9th Cir. 2008) 529 F.3d 892, 906 .

(n21)Footnote 9.11. *Quon v. Arch Wireless Operating Co.* (9th Cir. 2008) 529 F.3d 892, 907-909 .

(n22)Footnote 9.12. *See City of Ontario v. Quon* (2009) 175 L. Ed. 2d 617 .

(n23)Footnote 9.13. *See USA Mobility Wireless, Inc. v. Quon* (2009) 175 L. Ed. 2d 618.

(n24)Footnote 10. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 39-40, 26 Cal. Rptr. 2d 834, 865 P.2d 633 . *See also Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 287, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 .

(n25)Footnote 10.1. For the standard jury instruction on what is required to establish a claim under the right to privacy protected under the California constitution, *see Judicial Council of California Civil Jury Instructions, CACI 1806 (Matthew Bender)*, also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see § 61.05*. For the CACI special verdict form for a claim for violation of the right to privacy, *see Judicial Council of California Civil Jury Instructions, CACI VF-1805 (Matthew Bender)*. For discussion of the CACI special verdict forms generally, *see § 61.06*.

(n26)Footnote 11. *See Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1302-1304, 120 Cal. Rptr. 2d 670 (part of legally protected autonomy privacy-interest recognizes right of intimate association and right to marry).

(n27)Footnote 12. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 (drug

testing by public employer).

(n28)Footnote 13. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 893-894, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n29)Footnote 14. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 39, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n30)Footnote 15. *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1300, 120 Cal. Rptr. 2d 670 .

(n31)Footnote 16. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 36, 40, 26 Cal. Rptr. 2d 834, 865 P.2d 633 ; see also [a][i], above.

(n32)Footnote 16.1. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 287, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 .

(n33)Footnote 17. *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1300, 120 Cal. Rptr. 2d 670 (if undisputed material facts show no reasonable expectation of privacy, question of invasion may be adjudicated as matter of law).

(n34)Footnote 18. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 287, 288-294, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 (element rests on examination of customs, practices, and physical settings surrounding particular activities, as well as opportunity to be notified in advance and consent to intrusion; Court of Appeal did not err as matter of law in finding prima facie case on question of whether employer's secret video surveillance measures intruded upon employees' reasonable expectations of privacy simply because employer never intended to view or record employees or because employer did not capture employees' images at all, where employees had no reasonable expectation their employer would intrude so tangibly into their semiprivate office); *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 36-37, 40, 42, 26 Cal. Rptr. 2d 834, 865 P.2d 633 (upholding constitutionality of direct visual monitoring of urination by collegiate athletes after determining that they have a diminished expectation of privacy).

(n35)Footnote 19. *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1300, 120 Cal. Rptr. 2d 670 (if undisputed material facts show insubstantial impact on privacy interests, question of invasion may be adjudicated as matter of law).

(n36)Footnote 20. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 287, 295-301, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 (employees could not reasonably expect to establish that intrusion into privacy by secretly installed video system was sufficiently serious, where, from standpoint of reasonable person based on employer's vigorous efforts to avoid intruding on employees' visual privacy altogether, activation of video surveillance system was narrowly tailored in place, time, and scope, and was prompted by legitimate business concerns, and where employees were not at risk of being monitored or recorded during regular work hours and were never actually caught on camera or videotape); *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 37, 40, 43-52, 26 Cal. Rptr. 2d 834, 865 P.2d 633 (direct visual observation of urination is a very serious intrusion, but no violation of privacy right found due to justifying competing interests).

(n37)Footnote 21. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 37-38, 26 Cal. Rptr. 2d 834, 865 P.2d 633 . See also *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 287-288, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 .

(n38)Footnote 21.1. For the standard jury instruction on the competing interest defense, see *Judicial Council of California Civil Jury Instructions, CACI 1807 (Matthew Bender)*, also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, see §

61.05. For the CACI special verdict form for the competing interest defense, *see* Judicial Council of California Civil Jury Instructions, CACI VF-1806 (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n39)Footnote 22. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 34, 26 Cal. Rptr. 2d 834, 865 P.2d 633 ; *see* discussion in [d], below.

(n40)Footnote 23. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 37, 26 Cal. Rptr. 2d 834, 865 P.2d 633 (applying this test to NCAA drug testing program for student athletes and finding no violation).

(n41)Footnote 24. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 38, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n42)Footnote 24.1. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 288, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 ; *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 34, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n43)Footnote 24.2. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 288, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 ; *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 34, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n44)Footnote 25. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 40-57, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n45)Footnote 26. For discussion of the essential elements of a plaintiff's case, *see* [b], above.

(n46)Footnote 27. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 43-44, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n47)Footnote 28. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 45-46, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n48)Footnote 29. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 46, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n49)Footnote 30. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 52-54, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n50)Footnote 31. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 40, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n51)Footnote 32. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 40-57, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n52)Footnote 33. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 34-35, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n53)Footnote 34. *See, e.g., White v. Davis* (1975) 13 Cal. 3d 757, 776, 120 Cal. Rptr. 94, 533 P.2d 222 .

(n54)Footnote 35. *White v. Davis* (1975) 13 Cal. 3d 757, 120 Cal. Rptr. 94, 533 P.2d 222 .

(n55)Footnote 36. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 34, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n56)Footnote 37. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 34, 26 Cal. Rptr. 2d 834,

865 P.2d 633 .

(n57)Footnote 38. *See* discussion in [c], above.

(n58)Footnote 39. *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1046-1048, 264 Cal. Rptr. 194 , citing, e.g., *Schmidt v. Superior Court* (1989) 48 Cal. 3d 370, 375-391, 256 Cal. Rptr. 750, 769 P.2d 932 ; and *Alarcon v. Murphy* (1988) 201 Cal. App. 3d 1, 5, 248 Cal. Rptr. 26 (applying test of objectively reasonable expectation of privacy in finding no violation of privacy by city's disclosure of identity of murder suspect arrested by police).

(n59)Footnote 40. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 55-56 n.20, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n60)Footnote 41. *See Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 20, 26 Cal. Rptr. 2d 834, 865 P.2d 633 ; *Pettus v. Cole* (1996) 57 Cal. Rptr. 2d 46 ; *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1040-1044, 264 Cal. Rptr. 194 (preemployment drug testing by private employers).

(n61)Footnote 42. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 39, 26 Cal. Rptr. 2d 834, 865 P.2d 633 ; *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1046, 264 Cal. Rptr. 194 ; *see* discussion in [c], [d], above.

(n62)Footnote 43. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n63)Footnote 44. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n64)Footnote 45. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 896, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n65)Footnote 46. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 897-898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n66)Footnote 47. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n67)Footnote 48. *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 57 Cal. Rptr. 2d 46 .

(n68)Footnote 49. *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 457, 57 Cal. Rptr. 2d 46 .

(n69)Footnote 50. *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 457-458, 57 Cal. Rptr. 2d 46 .

(n70)Footnote 51. *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 458-460, 57 Cal. Rptr. 2d 46 .

(n71)Footnote 52. *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 460, 57 Cal. Rptr. 2d 46 .

(n72)Footnote 53. *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 460-462, 57 Cal. Rptr. 2d 46 .

(n73)Footnote 54. *Feminist Women's Health Ctr. v. Superior Court* (1997) 52 Cal. App. 4th 1234, 1244-1249, 61 Cal. Rptr. 2d 187 .

(n74)Footnote 55. *Feminist Women's Health Ctr. v. Superior Court* (1997) 52 Cal. App. 4th 1234, 1244-1249, 61 Cal. Rptr. 2d 187 .

(n75)Footnote 56. *TBG Ins. Servs. Corp. v. Superior Court* (2002) 96 Cal. App. 4th 443, 117 Cal. Rptr. 2d 155 .

(n76)Footnote 57. *TBG Ins. Servs. Corp. v. Superior Court* (2002) 96 Cal. App. 4th 443, 450-452, 117 Cal. Rptr. 2d 155 .

(n77)Footnote 58. *TBG Ins. Servs. Corp. v. Superior Court* (2002) 96 Cal. App. 4th 443, 452-453, 117 Cal. Rptr. 2d 155 .

(n78)Footnote 59. *TBG Ins. Servs. Corp. v. Superior Court* (2002) 96 Cal. App. 4th 443, 453, 117 Cal. Rptr. 2d 155 .

(n79)Footnote 60. *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 120 Cal. Rptr. 2d 670 .

(n80)Footnote 61. *See Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal. 4th 1, 37-38, 43, 26 Cal. Rptr. 2d 834, 865 P.2d 633 (elements are (i) legally protected privacy interest, (ii) reasonable expectation of privacy, and (iii) seriousness of invasion of privacy interest; *See also* § 50.30[1][b]).

(n81)Footnote 62. *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1301-1307, 120 Cal. Rptr. 2d 670

(n82)Footnote 63. *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1312, 120 Cal. Rptr. 2d 670 .

(n83)Footnote 64. *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1313, 120 Cal. Rptr. 2d 670 .

(n84)Footnote 64.1. *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1313-1314, 120 Cal. Rptr. 2d 670 .

(n85)Footnote 65. *Ortiz v. Los Angeles Police Relief Assn.* (2002) 98 Cal. App. 4th 1288, 1314, 120 Cal. Rptr. 2d 670 .

(n86)Footnote 65.1. *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal. App. 4th 525, 6 Cal. Rptr. 3d 406 .

(n87)Footnote 65.2. *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal. App. 4th 525, 531, 6 Cal. Rptr. 3d 406 (no California case has decided that state constitution protects right to pursue intimate relationship and court assumed possibility of right without resolving for purposes of analysis of case).

(n88)Footnote 65.3. *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal. App. 4th 525, 532, 6 Cal. Rptr. 3d 406 . *See also Parks v. City of Warner Robins, Ga.* (11th Cir. 1995) 43 F.3d 609, 615 .

(n89)Footnote 65.4. *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal. App. 4th 525, 532, 6 Cal. Rptr. 3d 406 . *See also Crosier v. United Parcel Service* (1983) 150 Cal. App. 3d 1132, 1140, 198 Cal. Rptr. 361 (employers are legitimately concerned with possible claims of sexual harassment created by romantic relationships between management and nonmanagement employees); *Holly D. v. California Institute of Technology* (9th Cir. 2003) 339 F.3d 1158 (plaintiff contending she was coerced into performing unwanted sexual acts with her supervisor by threats of discharge if she failed to comply with his demands has alleged tangible employment action under Title VII which, if proved, would entitle her to relief against her employer).

(n90)Footnote 66. *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal. App. 4th 525, 532-533 ., 6 Cal. Rptr. 3d 406 .

(n91)Footnote 66.1. *White v. Davis* (1975) 13 Cal. 3d 757, 120 Cal. Rptr. 94, 533 P.2d 222 ; *Richardson-Tunnell v. Schools Ins. Program for Employees* (2007) 157 Cal. App. 4th 1056, 1066, 69 Cal. Rptr. 3d 176 .

(n92)Footnote 66.2. *Katzberg v. Regents of University of California* (2002) 29 Cal. 4th 300, 313, fn. 13, 315, n. 16, 127 Cal. Rptr. 2d 482, 58 P.3d 339 . *See Richardson-Tunnell v. Schools Ins. Program for Employees* (2007) 157

Cal. App. 4th 1056, 1066, 69 Cal. Rptr. 3d 176 .

(n93)Footnote 66.3. *Richardson-Tunnell v. Schools Ins. Program for Employees* (2007) 157 *Cal. App. 4th 1056, 1066, 69 Cal. Rptr. 3d 176 .*

(n94)Footnote 66.4. *See Jacob B. v. County of Shasta* (2007) 40 *Cal. 4th 948, 961, 56 Cal. Rptr. 3d 477, 154 P.3d 1003 .*

(n95)Footnote 66.5. For the standard jury instruction for the essential factual elements of a cause of action in state court for violation of 42 U.S.C.A. § 1983 by unreasonable search without a warrant, *see Judicial Council of California Civil Jury Instructions, CACI 3003 (Matthew Bender)*, also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the CACI special verdict form for a claim of unreasonable search without a warrant under 42 U.S.C.A. § 1983, *see Judicial Council of California Civil Jury Instructions, CACI VF-3003 (Matthew Bender)*. For the standard jury instruction on the affirmative defense that the employee consented to the search, *see Judicial Council of California Civil Jury Instructions, CACI 3005 (Matthew Bender)*. For the standard jury instruction on the affirmative defense of exigent circumstances, *see Judicial Council of California Civil Jury Instructions, CACI 3006 (Matthew Bender)*. For the standard jury instruction on municipal liability under 42 U.S.C.A. § 1983, *see Judicial Council of California Civil Jury Instructions, CACI 3007 (Matthew Bender)*. For the CACI special verdict form on municipal liability, *see Judicial Council of California Civil Jury Instructions, CACI VF-3005 (Matthew Bender)*. For the standard jury instruction defining "official policy" under 42 U.S.C.A. § 1983, *see Judicial Council of California Civil Jury Instructions, CACI 3008 (Matthew Bender)*. For discussion of the CACI standard jury instructions generally, *see § 61.05*. For discussion of the CACI special verdict forms generally, *see § 61.06*.

(n96)Footnote 67. *Griswold v. Connecticut* (1965) 381 U.S. 479, 484-485, 85 S. Ct. 1678, 14 L. Ed. 2d 510 .

(n97)Footnote 68. *See, e.g., Wilkinson v. Times Mirror Corp.* (1989) 215 *Cal. App. 3d 1034, 1044-1045, 264 Cal. Rptr. 194* (regarding preemployment drug testing by private employer; *Fourth Amendment* inapplicable because state action not involved). For a discussion of the application of the *Fourth Amendment* to drug testing by a California public employer *see Loder v. City of Glendale* (1997) 14 *Cal. 4th 846, 866-887, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .*

(n98)Footnote 68.1. *Skinner v. Railway Labor Executives Association* (1989) 489 U.S. 602, 614-618, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (testing system permissible under the circumstances). However, in a subsequent case involving drug testing of employees by a private railroad, a California court of appeal held *Fourth Amendment* analysis to be inapplicable under the circumstances of that particular case because the plaintiff did not hold a position that was regulated by federal law and because the conduct under attack did not involve federal regulations. *Luck v. Southern Pacific Transportation Co.* (1990) 218 *Cal. App. 3d 1, 19 n.12, 267 Cal. Rptr. 618* (drug testing of computer programmer).

(n99)Footnote 68.2. *See United States v. Diaz-Castaneda* (9th Cir. 2007) 494 *F.3d 1146, 1151* , citing *Katz v. United States* (1967) 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (Harlan, J., concurring).

(n100)Footnote 68.3. *Nelson v. Natl. Aeronautics & Space Admin.* (9th Cir. 2008) 512 *F.3d 1134, 1146 . See United States v. Miller* (1976) 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (no reasonable expectation of privacy in bank records because information was voluntarily disclosed to bank).

(n101)Footnote 68.4. *Nelson v. Nat'l Aeronautics & Space Admin.* (9th Cir. 2008) 512 *F.3d 1134, 1146 . See United States v. Miller* (1976) 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (no reasonable expectation of privacy in bank records because information was voluntarily disclosed to bank).

(n102)Footnote 68.5. *Nelson v. Nat'l Aeronautics & Space Admin.* (9th Cir. 2008) 512 *F.3d 1134, 1146 .*

(n103)Footnote 68.6. *Nelson v. Nat'l Aeronautics & Space Admin.* (9th Cir. 2008) 512 F.3d 1134, 1145-1146 . See also *Greenawalt v. Ind. Dep't of Corr.* (7th Cir. 2005) 397 F.3d 587, 591 (historically, when objective is to obtain testimonial rather than physical evidence, relevant constitutional amendment is not Fourth but Fifth).

(n104)Footnote 69. *Nelson v. Nat'l Aeronautics & Space Admin.* (9th Cir. 2008) 512 F.3d 1134, 1145-1146 .

(n105)Footnote 69.1. *United States v. Ziegler* (9th Cir. 2006) 474 F.3d 1184, 2007 U.S. App. LEXIS 1952 .

(n106)Footnote 69.2. *Mancusi v. DeForte* (1968) 392 U.S. 364, 88 S. Ct. 2120, 20 L. Ed. 2d 1154 .

(n107)Footnote 69.3. *Mancusi v. DeForte* (1968) 392 U.S. 364, 369, 88 S. Ct. 2120, 20 L. Ed. 2d 1154 .

(n108)Footnote 69.4. *United States v. Ziegler* (9th Cir. 2007) 474 F.3d 1184, 2007 U.S. App. LEXIS 1952 .

(n109)Footnote 69.5. *United States v. Ziegler* (9th Cir. 2007) 474 F.3d 1184, 2007 U.S. App. LEXIS 1952, *13-*14 ; see *Mancusi v. DeForte* (1968) 392 U.S. 364, 369, 88 S. Ct. 2120, 20 L. Ed. 2d 1154 ; see also *Ortega v. O'Connor* (1987) 480 U.S. 709, 716, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (employees may have reasonable expectation of privacy against intrusions by police).

(n110)Footnote 69.6. *United States v. Ziegler* (9th Cir. 2007) 474 F.3d 1184, 2007 U.S. App. LEXIS 1952, *13-*14 ; see also *Schowengerdt v. United States* (9th Cir. 1991) 944 F.2d 483, 487 (plaintiff would enjoy reasonable expectation of privacy in areas given over to his exclusive use, unless he was on notice from his government employer that searches of type to which he was subjected might occur from time to time for work-related purposes); *United States v. Taketa* (9th Cir. 1991) 923 F.2d 665, 672-73 .

(n111)Footnote 69.7. *United States v. Ziegler* (9th Cir. 2007) 474 F.3d 1184, 2007 U.S. App. LEXIS 1952, *14 ; see *United States v. Taketa* (9th Cir. 1991) 923 F.2d 665, 673 (allowing existence of master key to overcome expectation of privacy would defeat legitimate privacy interest of any hotel, office, or apartment occupant).

(n112)Footnote 69.8. *United States v. Ziegler* (9th Cir. 2007) 474 F.3d 1184, 2007 U.S. App. LEXIS 1952, *14 .

(n113)Footnote 69.9. *United States v. Ziegler* (9th Cir. 2007) 474 F.3d 1184, 2007 U.S. App. LEXIS 1952, *15 .

(n114)Footnote 69.10. *United States v. Ziegler* (9th Cir. 2007) 474 F.3d 1184, 2007 U.S. App. LEXIS 1952, *15-22 .



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California Employment Law

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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part C. CONSTITUTIONAL AND COMMON LAW PRIVACY ISSUES

3-50 California Employment Law § 50.31

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§ 50.31 Common Law Theories of Recovery

[1] Invasion of Privacy (Intrusion)

[a] Elements of Cause of Action

Intrusion is one of the four types of invasions of privacy actionable under California common law, the others being (1) public disclosure of embarrassing private facts about the plaintiff; (2) publicity that places a plaintiff in a false light in the public eye; and (3) the appropriation, for the defendant's benefit, of the plaintiff's name or likeness.ⁿ¹ Intrusion is committed when there is an invasion of the plaintiff's seclusion or solitude or into his or her private affairs.ⁿ² The intrusion may involve either a physical or a technical trespass.ⁿ³

In order to be actionable as an intrusion, the invasion must be made into a place or sphere, such as the plaintiff's home or a restroom, from which the plaintiff could reasonably expect that the defendant should be excluded.ⁿ⁴ The defendant must have penetrated a zone of physical or sensory privacy or obtained unwanted access to data by electronic or other covert means, in violation of the law or social norms.^{n4.1} The second element of the tort requires the plaintiff to show that the intrusion was one that would have been highly offensive to a reasonable person.ⁿ⁵ The cause of action recognizes a measure of personal control over the individual's autonomy, dignity, and serenity. The gravamen is the mental anguish sustained when both conditions of liability exist.^{n5.1} The reasonableness of privacy expectations is linked to factors such as the following:^{n5.2}

- 1) The identity of the intruder.
- 2) The extent to which other persons had access to the subject place, and could see or hear the plaintiff.
- 3) The means by which the intrusion occurred.

Even in cases involving the use of photographic and electronic recording devices, which can raise difficult questions about covert surveillance, there is no bright line on "offensiveness," and each case must be taken on its facts.^{n5.3}

The preliminary determination of "offensiveness," for the purpose of assessing whether the plaintiff has a cause of action for intrusion, is made by the court, which must take into consideration the degree of intrusion and the context, conduct, and circumstances surrounding the intrusion, as well as the intruder's motives and objectives, the setting into which he or she intruded, and the expectations of those whose privacy was invaded.ⁿ⁶

An unreasonably intrusive investigation into the plaintiff's affairs may constitute a tortious invasion of privacy.ⁿ⁷ However, a defendant cannot be held liable for violating a plaintiff's sensibilities by instituting an investigation if the plaintiff would have voluntarily divulged the information sought.ⁿ⁸ The use or avoidance of deception by investigators is relevant to the determination whether the intrusion was reasonable.ⁿ⁹

For additional discussion of the tort of intrusion, *see* Levy, Golden, and Sacks, California Torts, Chapter 46, "Invasion of Privacy."

[b] Defenses

If the intrusion was unintended, or if it was not of a kind that is highly offensive to a reasonable person, but rather of a kind normally to be expected by people living in society, the intrusion is not actionable.ⁿ¹⁰ Furthermore, if the plaintiff had no reasonable expectation that the defendant should be excluded from the place intruded on, then the cause of action fails.ⁿ¹¹ In addition, although no California case has expressly addressed the issue, a plaintiff apparently may not recover for an invasion to which he or she has given consent, either explicitly or by his or her conduct.ⁿ¹²

[c] Application to Employer-Employee Relationship

In the employer-employee context, issues of intrusion may arise with respect to employer searches of desks, lockers, and other facilities owned by the employer and used by the employee for the storage of personal effects. Surveillance of employees in any place where they may have an expectation of privacy may also possibly give rise to liability for intrusion. No reported case in California has as yet squarely addressed the issue of the extent to which such searches and investigations are permissible. In such a situation, when both the employer and the employee may be said to have interests in the place or thing searched, analysis of the propriety of the search may depend on whether the employee reasonably expected that the employer should be excluded from the desk, locker, or other place searchedⁿ¹³ in light of any relevant employer policies, personnel handbooks, or customs, or a determination whether, despite the employee's interest in keeping his or her personal effects private, the employer has a privilege to search when a violation of law or plant rules is suspected.ⁿ¹⁴ In addition, the degree of suspicion (i.e., "probable cause," or some greater or lesser standard) necessary to justify a search remains to be decided by the courts.

Facts that may raise issues of common law liability for intrusion may also involve potential liability under certain statutes and the California Constitution. For example, the placing of electronic surveillance devices in employee offices is proscribed by *Penal Code section 632* and gives rise to a cause of action under *Penal Code section 637.2*.ⁿ¹⁵ Further, a common law intrusion may also implicate the right of privacy contained in the *California Constitution, Article I, Section 1*.ⁿ¹⁶

For further discussion of potential limitations on employer searches and surveillance, *see* § 50.41.

[2] False Imprisonment

[a] Elements of Cause of Action

False imprisonment is the unlawful violation of another's personal liberty.ⁿ¹⁷ It consists of the arrest or detention of another person without legal authority.ⁿ¹⁸ Confinement in an actual jail or prison is not necessary;ⁿ¹⁹ rather, false imprisonment is committed whenever there is an exercise of force, or an express or implied threat of force, by which a

person is deprived of his or her liberty, compelled to remain where he or she does not wish to remain, or to go where he or she does not wish to go.ⁿ²⁰

Actionable threats may be accomplished by conduct or by words, provided that the words or conduct are such as to induce a reasonable apprehension of force if the plaintiff does not submit to the false imprisonment.ⁿ²¹ An offer by the tortfeasor to release the plaintiff on some condition, such as the signing of a confession of wrongdoing, does not affect the existence of the right of action.ⁿ²²

Detention for any appreciable length of time, however short, gives rise to a cause of action for false imprisonment.ⁿ²³ The period of the detention may, however, be relevant to the amount of damages.

Intent, in the sense of a deliberate, voluntary act, is a necessary element of the tort of false imprisonment.ⁿ²⁴ Malice, however, is not an element, and no finding of ill will or desire to injure is required to prevail in an action for false imprisonment.ⁿ²⁵ Neither the defendant's good faith nor bad motive is an element of the cause of action or defense, although facts relating to motive may be considered in determining an award of punitive damages.ⁿ²⁶ Furthermore, it is not necessary that the plaintiff prove that the dispute underlying the imprisonment was finally resolved in his or her favor; in this respect false imprisonment differs from the tort of malicious prosecution.ⁿ²⁷

For full discussion of the tort of false imprisonment, *see* Levy, Golden, and Sacks, California Torts, Chapter 42.

[b] Defenses

[i] Privilege

At common law, a privilege exists for an owner to protect his or her property by restraining another person who seeks to interfere with or injure it.ⁿ²⁸ The privilege has been codified, with respect to merchants (as well as libraries, museums, and other similar facilities), in *Penal Code section 490.5(f)*. In exercising this privilege, an owner who has reasonable grounds to believe that another is stealing his or her property is justified in detaining the suspect for a reasonable length of time for the purpose of investigating the theft in a reasonable manner.ⁿ²⁹ However, the privilege does not extend to detentions undertaken not to investigate a current or ongoing theft but rather to secure a confession to an offense that was completed at some time in the past.ⁿ³⁰ The privilege is also lost if the manner of the detention is unreasonable, such as when the detention is for an excessively long period or when physical violence accompanies the detention.ⁿ³¹ At least in the case of merchants and employees of library facilities and museums, the detention includes the privilege to make a limited search of the detainee's packages, shopping bags, handbags, or other items in the immediate possession of the detainee for the purpose of recovering the item believed to be stolen, but does not include the right to search clothing worn by that person.ⁿ³²

[ii] Citizen's Arrest

In some instances, a private citizen may have a privilege to make a citizen's arrest of a person believed to have committed a public offense.ⁿ³³ If the offense for which the person is arrested is a felony and the person making the arrest has reasonable cause to believe that the person arrested committed the felony, the offense need not have been committed in the presence of the person making the arrest.ⁿ³⁴ In the case of any offense other than a felony, the arrest is not lawful unless the offense was committed in the presence of the person making the arrest.ⁿ³⁵

[c] Application to Employer-Employee Relationship

Potential issues of the employer's liability for false imprisonment may arise, for example, in the case of compulsory detention or search of an employee to investigate misconduct on the job, such as theft of the employer's property, unless conducted in a reasonable manner and based on a reasonable belief that the detained employee is committing or attempting to commit an offense.ⁿ³⁶

For further discussion of potential limitations on employer searches and surveillance, *see* § 50.41.

[3] Intentional Infliction of Emotional Distress

The elements of a prima facie case for the tort of intentional infliction of emotional distress are (1) outrageous conduct by the defendant; (2) the defendant's intention of causing, or reckless disregard of the probability of causing, emotional distress; (3) the plaintiff's suffering severe emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.ⁿ³⁷

Ordinarily, a civil action to recover damages based on intentional infliction of emotional distress in connection with an alleged wrongful termination or other disciplinary action will be precluded by the exclusive remedy doctrine of the California Workers' Compensation Act,ⁿ³⁸ unless the employer's conduct exceeds the bounds of the employment relationship. The California Supreme Court has held that even intentional misconduct may constitute a normal part of the employment relationship.ⁿ³⁹ In addition, the Court has held that even when no physical injury or disability is alleged, a claim for intentional or negligent infliction of emotional distress is within the exclusive remedy provisions of the Workers' Compensation Act, so long as the basic conditions of compensation are otherwise satisfied and the employer's conduct neither contravenes a fundamental public policy nor exceeds the risks inherent in the employment relationship.ⁿ⁴⁰

For further discussion of civil actions based on intentional infliction of emotional distress, *see* Levy, Golden, and Sacks, California Torts, Chapter 44.

For discussion of the exclusive remedy doctrine of the California Workers' Compensation Act generally, including emotional distress claims, *see* Chapter 20.

[4] Damages and Other Remedies Available

In a tort action, a successful plaintiff-employee is entitled to recover compensatory damages for all injuries proximately caused by the defendant employer's wrongful conduct, including medical expenses, lost income, and emotional distress.ⁿ⁴¹ Special damages (such as loss of income) may be recovered, if sustained; otherwise, general damages for injury to peace of mind, happiness, and feelings may be recovered in the absence of a showing of any specific loss.ⁿ⁴² Anxiety, embarrassment, humiliation, shame, depression, feelings of powerlessness, and anguish are elements that may be considered by the jury in awarding damages for emotional distress.ⁿ⁴³ For full discussion of compensatory damages in tort actions, *see* Levy, Golden, and Sacks, California Torts, Chapters 50-53.

As in any tort action, when the employer has acted with malice, oppression, or fraud, the jury may in its discretion award punitive damages to the employee.ⁿ⁴⁴ The requisite malice, oppression, or fraud must be proved by clear and convincing evidence.ⁿ⁴⁵ An employer is not, however, liable for punitive damages based on the acts of another employee (such as a manager or supervisor) unless the employer had advance knowledge of the unfitness of the employee and employed him or her with conscious disregard of the rights or safety of others or unless the employer authorized or ratified the employee's wrongful conduct, or was personally guilty of oppression, fraud, or malice.ⁿ⁴⁶ For a corporate employer to be held liable for punitive damages, the wrongdoer must have been a managerial employee.ⁿ⁴⁷ Whether an employee is managerial depends on the degree of discretion the employee has to make decisions that will ultimately determine corporate policy; the employee's status is not determined by his or her title.ⁿ⁴⁸ For full discussion of punitive damages, *see* Levy, Golden, and Sacks, California Torts, Chapter 54.

Permanent and temporary injunctive relief may also be available for violations or threatened violations of privacy rights in appropriate cases.ⁿ⁴⁹

[5] Possible Preemption of Tort Action by Workers' Compensation Law

While the general rule is that an action for damages for intentional infliction of physical and emotional injuries is subject to preemption by the exclusive-remedy provisions of the workers' compensation laws,ⁿ⁵⁰ in a case involving false imprisonment, the California Supreme Court found that the preemption did not apply.ⁿ⁵¹ It is possible that this reasoning might apply to physical and emotional injuries resulting from a constitutional invasion of privacy, but this issue has not yet been addressed by the courts.

For full discussion of the nature and scope of the exclusive-remedy doctrine under workers' compensation law, *see* Chapter 20.

Legal Topics:

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

Constitutional Law Substantive Due Process Privacy General Overview Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Invasion of Privacy Torts Intentional Torts Invasion of Privacy General Overview

FOOTNOTES:

(n1)Footnote 1. *Lugosi v. Universal Pictures* (1979) 25 Cal. 3d 813, 819, 160 Cal. Rptr. 323, 603 P.2d 425 ; *Alim v. Superior Court* (1986) 185 Cal. App. 3d 144, 150, 229 Cal. Rptr. 599 . For the standard jury instructions on the four types of actionable invasions of privacy, *see Judicial Council of California Civil Jury Instructions, CACI 1800* (intrusion into private affairs), 1801 (public disclosure of private facts), 1802 (false light), 1803 (appropriation of name or likeness) (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict forms for invasion of privacy, *see Judicial Council of California Civil Jury Instructions, CACI VF-1800* (intrusion into private affairs), VF-1801 (public disclosure of private facts), VF-1802 (false light), 1803 (appropriation of name or likeness). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n2)Footnote 2. *Dietemann v. Time, Inc.* (9th Cir. 1971) 449 F.2d 245, 248-249 .

(n3)Footnote 3. *Dietemann v. Time, Inc.* (9th Cir. 1971) 449 F.2d 245, 248-249 .

(n4)Footnote 4. *See Dietemann v. Time, Inc.* (9th Cir. 1971) 449 F.2d 245, 248-249 (reporters eavesdropping in plaintiff's home held actionable intrusion); *Bielicki v. Superior Court* (1962) 57 Cal. 2d 602, 605-609, 21 Cal. Rptr. 552, 371 P.2d 288 (person using toilet stall in public restroom enjoyed right of privacy); *cf.* *Cramer v. Consolidated Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683, 2001 U.S. App. LEXIS, 19157, *8-*9 , (employer's illegal activity in installing surveillance equipment in men's and women's restrooms in violation of *Pen. Code* § 653n was not preempted by 29 U.S.C. § 185 (§ 301 of Labor Management Relations Act); privacy claims were independent of the collective bargaining agreement (CBA) and, in any event, employer could not contract for the right to perform activity illegal under state law; *People v. Metcalf* (1971) 22 Cal. App. 3d 20, 23-24, 98 Cal. Rptr. 925 (*Penal Code* § 653n, prohibiting installation or maintenance of two-way mirrors and other disguised surfaces in specified places, including public restrooms, enunciates public policy that users of public restroom enjoy reasonable expectation of privacy there).

(n5)Footnote 4.1. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 287, 288-294, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 (Court of Appeal did not err as matter of law in finding prima facie case on question of whether employer's secret video surveillance measures intruded upon employees' reasonable expectations of privacy simply because employer never intended to view or record employees or because employer did not capture employees' images at all, where employees had no reasonable expectation their employer would intrude so tangibly into their semiprivate office); *Shulman v. Group W Productions, Inc.* (1998) 18 Cal. 4th 200, 232, 74 Cal. Rptr. 2d 843, 955 P.2d 469 .

(n6)Footnote 5. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 287, 295-301, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 (employees could not reasonably expect to establish that intrusion into privacy by secretly installed video system was sufficiently serious, where, from standpoint of reasonable person based on employer's vigorous efforts to avoid intruding on employees' visual privacy altogether, activation of video surveillance system was narrowly tailored in place, time, and scope, and was prompted by legitimate business concerns, and where employees were not at risk of being monitored or recorded during regular work hours and were never actually caught on camera or videotape); *Miller v. National Broadcasting Co.* (1986) 187 Cal. App. 3d 1463, 1481-1482, 232 Cal. Rptr. 668 ; *Rest. 2d Torts*, § 652B. *But cf.* *Kemp v. County of Orange* (1989) 211 Cal. App. 3d 1422, 1427-1428, 260 Cal. Rptr. 131 (investigator for workers' compensation adjuster not unreasonable in contacting credit-reporting agency, interviewing co-workers, and writing report without disclosing report to workers' compensation claimant).

(n7)Footnote 5.1. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 286, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 ; *Miller v. National Broadcasting Co.* (1986) 187 Cal. App. 3d 1463, 1484-1485, 232 Cal. Rptr. 668 .

(n8)Footnote 5.2. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 286-287, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 ; *Sanders v. American Broadcasting Companies* (1999) 20 Cal. 4th 907, 923, 85 Cal. Rptr. 2d 909, 978 P.2d 67 .

(n9)Footnote 5.3. *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 287, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 ; *Shulman v. Group W Productions, Inc.* (1998) 18 Cal. 4th 200, 237, 74 Cal. Rptr. 2d 843, 955 P.2d 469 .

(n10)Footnote 6. *Miller v. National Broadcasting Co.* (1986) 187 Cal. App. 3d 1463, 1483-1484, 232 Cal. Rptr. 668 . *See also* *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, 287, 97 Cal. Rptr. 3d 274, 211 P.3d 1063 (offensiveness element essentially involves policy determination as to whether alleged intrusion was highly offensive under particular circumstances, including degree and setting of intrusion and intruder's motives and objectives).

(n11)Footnote 7. *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal. App. 3d 654, 659-660, 109 Cal. Rptr. 269 .

(n12)Footnote 8. *Emerson v. J.F. Shea Co.* (1978) 76 Cal. App. 3d 579, 591-592, 143 Cal. Rptr. 170 ; *see also* *Solis v. Southern Cal. Rapid Transit Dist.* (1980) 105 Cal. App. 3d 382, 391-392, 164 Cal. Rptr. 343 (no invasion of privacy by unreasonably intrusive investigation occurred when investigators entered hospital emergency room and briefly questioned plaintiff while she was still receiving treatment, when plaintiff responded voluntarily).

(n13)Footnote 9. *See Solis v. Southern Cal. Rapid Transit Dist.* (1980) 105 Cal. App. 3d 382, 392, 164 Cal. Rptr. 343 .

(n14)Footnote 10. *Miller v. National Broadcasting Co.* (1986) 187 Cal. App. 3d 1463, 1482-1483, 232 Cal. Rptr. 668 .

(n15)Footnote 11. *Dietemann v. Time, Inc.* (9th Cir. 1971) 449 F.2d 245, 248-249 .

(n16)Footnote 12. *See Rest. 2d Torts* § 892A; *cf.* *Miller v. National Broadcasting Co.* (1986) 187 Cal. App. 3d 1463, 1486, 232 Cal. Rptr. 668 (allegation that television camera crew entered woman's home without her consent stated cause of action for intrusion).

(n17)Footnote 13. *Dietemann v. Time, Inc.* (9th Cir. 1971) 449 F.2d 245, 248-249 .

(n18)Footnote 14. *cf.* *Collyer v. S.H. Kress & Co.* (1936) 5 Cal. 2d 175, 180-181, 54 P.2d 20 (owner has privilege, at common law, to protect property by restraining person from interfering with or injuring it).

(n19)Footnote 15. *See* discussion in § 50.19.

(n20)Footnote 16. *See* discussion in § 50.30[1].

(n21)Footnote 17. *Penal Code § 236; City of Newport Beach v. Sasse (1970) 9 Cal. App. 3d 803, 810, 88 Cal. Rptr. 476* (Penal Code definition governs in civil as well as criminal actions).

(n22)Footnote 18. *Fermino v. Fedco, Inc. (1994) 7 Cal. 4th 701, 715, 30 Cal. Rptr. 2d 18, 872 P.2d 559; Vandiveer v. Charters (1930) 110 Cal. App. 347, 355, 294 P. 440*.

(n23)Footnote 19. *Ware v. Dunn (1947) 80 Cal. App. 2d 936, 943, 183 P.2d 128*.

(n24)Footnote 20. *Moffatt v. Buffums', Inc. (1937) 21 Cal. App. 2d 371, 374, 69 P.2d 424; Vandiveer v. Charters (1930) 110 Cal. App. 347, 355, 294 P. 440*.

(n25)Footnote 21. *Vandiveer v. Charters (1930) 110 Cal. App. 347, 355, 294 P. 440*.

(n26)Footnote 22. *See Vandiveer v. Charters (1930) 110 Cal. App. 347, 355, 294 P. 440*.

(n27)Footnote 23. *City of Newport Beach v. Sasse (1970) 9 Cal. App. 3d 803, 810, 88 Cal. Rptr. 476*.

(n28)Footnote 24. *See Capachi v. Glens Falls Insurance Co. (1963) 215 Cal. App. 2d Supp. 843, 848, 30 Cal. Rptr. 323*.

(n29)Footnote 25. *See Capachi v. Glens Falls Insurance Co. (1963) 215 Cal. App. 2d Supp. 843, 848, 30 Cal. Rptr. 323*.

(n30)Footnote 26. *Singleton v. Perry (1955) 45 Cal. 2d 489, 494, 289 P.2d 794*.

(n31)Footnote 27. *Singleton v. Perry (1955) 45 Cal. 2d 489, 494-495, 289 P.2d 794*.

(n32)Footnote 28. *Collyer v. S.H. Kress & Co. (1936) 5 Cal. 2d 175, 180-181, 54 P.2d 20*.

(n33)Footnote 29. *Collyer v. S.H. Kress & Co. (1936) 5 Cal. 2d 175, 180-181, 54 P.2d 20*.

(n34)Footnote 30. *Moffatt v. Buffums' Inc. (1937) 21 Cal. App. 2d 371, 374-375, 69 P.2d 424*.

(n35)Footnote 31. *Moffatt v. Buffums' Inc. (1937) 21 Cal. App. 2d 371, 374-375, 69 P.2d 424* (five-hour detention during which defendant took plaintiff by arm and pushed her down onto chair held unreasonable); *but see Penal Code § 490.5(f)(2)* (merchant or employee of "library facility" may use reasonable amount of nondeadly force necessary to protect himself or herself and to prevent escape of person detained or loss of property).

(n36)Footnote 32. *See Penal Code § 490.5(f)(4)*.

(n37)Footnote 33. *See Cervantez v. J.C. Penney Co. (1979) 24 Cal. 3d 579, 587, 156 Cal. Rptr. 198, 595 P.2d 975; Penal Code § 837*.

(n38)Footnote 34. *See Penal Code § 837(2), (3)*.

(n39)Footnote 35. *See Penal Code § 837(1)*.

(n40)Footnote 36. *See Moffatt v. Buffums' Inc. (1937) 21 Cal. App. 2d 371, 374-375, 69 P.2d 424*.

(n41)Footnote 37. *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 209-210, 185 Cal. Rptr. 252, 649 P.2d 894; State Rubbish Collectors Association v. Siliznoff (1952) 38 Cal. 2d 330, 337-339, 240 P.2d 282; Fletcher v. Western National Life Insur. Co. (1970) 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78*.

(n42)Footnote 38. *See Lab. Code § 3602*.

(n43)Footnote 39. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 752, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 ; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 .

(n44)Footnote 40. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 . See, e.g., *Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 9-10, 87 Cal. Rptr. 2d 554 (plaintiff's emotional distress action was preempted by workers' compensation law, because workers' compensation is exclusive remedy for intentional infliction of emotional distress caused by employer's work-related conduct when that conduct does not contravene public policy).

(n45)Footnote 41. See *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal. 3d 493, 497-498, 86 Cal. Rptr. 88, 468 P.2d 216 ; Civ. Code § 3333. For the standard jury instruction on damages in an action for invasion of privacy, see *Judicial Council of California Civil Jury Instructions, CACI 1820* (except for a cause of action for false light invasion of privacy) (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instructions on damages generally, see *Judicial Council of California Civil Jury Instructions, CACI 3900 et seq.* (Matthew Bender). For discussion of the CACI standard jury instructions generally, see § 61.05.

(n46)Footnote 42. *Fairfield v. American Photocopy Equipment Co.* (1955) 138 Cal. App. 2d 82, 88-89, 291 P.2d 194 .

(n47)Footnote 43. *Miller v. National Broadcasting Co.* (1986) 187 Cal. App. 3d 1463, 1485, 232 Cal. Rptr. 668 .

(n48)Footnote 44. Civ. Code § 3294(a).

(n49)Footnote 45. Civ. Code § 3294(a).

(n50)Footnote 46. Civ. Code § 3294(b).

(n51)Footnote 47. Civ. Code § 3294(b).

(n52)Footnote 48. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 577, 88 Cal. Rptr. 2d 19, 981 P.2d 944 ; *Egan v. Mutual of Omaha Ins. Co.* (1979) 157 Cal. Rptr. 482, 598 P.2d 452 ; See also ch. 30.

(n53)Footnote 49. See Civ. Code §§ 3420-3423; Code Civ. Proc. §§ 526, 527.

(n54)Footnote 50. See Lab. Code §§ 3601, 3602; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 .

(n55)Footnote 51. *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 715, 30 Cal. Rptr. 2d 18, 872 P.2d 559 .



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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part C. CONSTITUTIONAL AND COMMON LAW PRIVACY ISSUES

3-50 California Employment Law §

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ FORM--Complaint Against Employer for Damages Based on Collection of Private Information in Violation of Constitutional and Common Law Privacy Rights

[1] Comment

[a] Use of Form

The form of complaint set forth in [2], *below*, may be used by an employee in an action for damages against a private employer based on improper collection of private information about the employee. The form sets forth causes of action based on the California constitutional right of privacyⁿ¹ as well as the common law theory of invasion of privacy by intrusion on private affairs.ⁿ² The form also contains optional causes of action based on intentional infliction of emotional distress and false imprisonment.

In appropriate cases, counsel should consider adding causes of action based on the various statutory privacy provisions discussed in Part B. Examples of statutory provisions that may provide additional theories of recovery include the following:

1. *Labor Code section 432.7*, prohibiting employer inquiries regarding arrests that did not lead to a conviction;ⁿ³
2. The Investigative Consumer Reporting Agencies Act,ⁿ⁴ placing certain restrictions on an employer's use of investigative consumer reports about employees or applicants;ⁿ⁵
3. *Penal Code section 637.3*, prohibiting use of voice stress analysis systems without express written consent of the subject;ⁿ⁶
4. *Penal Code sections 631, 632, 632.5, 632.6 and 632.7*, which prohibit certain types of eavesdropping and electronic surveillance.ⁿ⁷

[b] Allegations

The cause of action for invasion of privacy in violation of the California Constitution⁸ alleges acts by the defendant constituting an invasion of privacy (Paragraph 5), the plaintiff's reasonable expectation of privacy regarding the matter invaded (Paragraph 6), the lack of justification for the alleged intrusion (Paragraph 7), and resulting damages (Paragraphs 8-10).

The common law cause of action for physical intrusion into the plaintiff's solitude or private affairs⁹ contains allegations of acts by the defendant constituting an intrusion (Paragraph 13), that such acts were offensive and objectionable to plaintiff and to a person of ordinary sensibilities (Paragraph 14), and that the place or subject intruded on was private and entitled to be kept private (Paragraph 15).

The optional cause of action for intentional infliction of emotional distress¹⁰ contains allegations of the defendant's extreme and outrageous conduct (Paragraph 19), the intent to cause the plaintiff severe emotional distress (Paragraph 20), and resulting injury to the plaintiff (Paragraph 21).

The optional cause of action for false imprisonment alleges acts by the defendant constituting an involuntary detention of the plaintiff by force or threat of force (Paragraph 24), as well as resulting injury (Paragraph 25).¹¹

Each cause of action contains an optional allegation of malice and oppression for use when punitive damages are sought.¹²

[c] Verification

The complaint is not required to be verified; however,¹³ a verified complaint requires the defendant to file a verified answer¹⁴ and precludes the use of a general denial.¹⁵

[d] Statute of Limitations

The complaint must be filed within two years after the date on which the cause of action arose.¹⁶

[2] Form Complaint Against Employer for Damages Based on Collection of Private Information in Violation of Constitutional and Common Law Privacy Rights

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT AGAINST EMPLOYER FOR DAM-
_____ [name(s)],	)	AGES [AND INJUNCTION] BASED ON COLLEC-
Defendant(s).	)	TION OF PRIVATE INFORMATION IN VIOLA-
	)	TION OF CONSTITUTIONAL AND COMMON
	)	LAW PRIVACY RIGHTS
		[Cal. Const., art. I, § 1; Civ. Code §§ 3294, 3333]

3-50 California Employment Law §

Plaintiff alleges:

FIRST CAUSE OF ACTION

(Invasion of Privacy in Violation of California Constitution,
Article I, Section 1)

1. [*Capacity, residence of defendant(s). See Form in § 50.11[5][c][ii], Paragraph 1*].

[2. *Where acts complained of occurred, for venue purposes. See Form in § 50.11[5][c][ii], Paragraph 2.*]

[3. Defendant(s) _____ (names) at all times mentioned herein _____ (was or were) the agent(s) and employee(s) of defendant _____ (name), and in doing the actions alleged herein _____ (was or were) acting within the course and scope of that agency and with the permission and consent of his/her/their codefendant(s).]

4. _____ [*Allege relationship of parties, e.g., On _____ (date), plaintiff was employed by defendant _____ (name) as _____ (specify position held). _____ (Plaintiff is currently so employed or On or about _____ (date), plaintiff _____ (resigned or was terminated) from his/her employment with defendant).*]

5. On or about _____ [date], defendant(s, and each of them,) invaded plaintiff's right to privacy under *California Constitution, Article I, Section 1*, by _____ [*specify acts constituting invasion of constitutional right of privacy*].

[6. The conduct of defendant(s) intruded on plaintiff's reasonable expectation of privacy in that _____ (*specify*).]

7. The above-alleged intrusion on plaintiff's expectation of privacy is unjustified because, among other things, it does not substantially further any compelling interest of defendant(s); the degree of intrusion into plaintiff's privacy interests far outweighs any interests asserted by defendant(s); and defendant(s) _____ [has or have] available to him/her/it/them less intrusive means of satisfying any such interests.

8. As a direct, proximate, and foreseeable result of the above-described conduct of defendant(s), [and each of them,] plaintiff has suffered humiliation, mental anguish, and _____ [severe] emotional and physical distress, and has been injured in mind [and body] as follows: _____ [*describe injuries, e.g., plaintiff has suffered sleeplessness, anxiety, and loss of appetite*], all to plaintiff's damage (in the amount of \$_____).

[9. As a further proximate result of the acts alleged herein, plaintiff was required to and did employ _____ (*specify medical professionals, e.g., physicians and psychotherapists*) to examine, treat, and care for him/her and incurred medical expenses _____ (in the approximate amount of \$_____ or in an amount that has not yet been ascertained). (Plaintiff is informed and believes and thereon alleges that he/she will incur some additional medical expenses, the exact amount of which is presently unknown.)]

[10. By reason of the acts alleged herein, plaintiff was prevented from attending to his/her usual _____ (occupation or profession) and thereby lost earnings (in the amount of \$_____). (Plaintiff is informed and believes and thereon alleges that he/she will thereby be prevented from attending to his/her usual _____ (occupation or profession) for an additional period in the future that he/she cannot now

ascertain and will thereby sustain further loss of earnings.)]

[11. *If seeking punitive damages, allege:* The actions of defendant(s), and each of them,) as herein alleged were committed maliciously, oppressively, and with conscious disregard for plaintiff's right of privacy under the California Constitution(, in that _____ (*specify*)].]

SECOND CAUSE OF ACTION

(Invasion of Privacy--Physical Intrusion Into Solitude or Private Affairs)

12. Plaintiff refers to and herein incorporates Paragraphs 1-4 of the First Cause of Action.

13. On or about _____ [*date*], defendant(s), [and each of them,] without plaintiff's consent, invaded plaintiff's right to privacy by _____ [*specify acts constituting physical intrusion into plaintiff's solitude or private affairs*].

14. The intrusion was offensive and objectionable to plaintiff and to a reasonable person of ordinary sensibilities in that _____ [*specify reasons*].

15. The intrusion was into a place or thing that was private and entitled to be private, in that _____ [*specify*].

16. As a direct, proximate, and foreseeable result of the above-described conduct of defendant(s), [and each of them,] plaintiff has suffered damages as previously alleged in Paragraphs 8-10 of the First Cause of Action, which plaintiff hereby refers to and incorporates herein.

[17. *If seeking punitive damages, allege:* The actions of defendant(s), and each of them,) as herein alleged were committed maliciously, oppressively, and with conscious disregard for plaintiff's right of privacy(, in that _____ (*specify*)].]

[*Include additional causes of action, as appropriate, such as the following*]

THIRD CAUSE OF ACTION

(Intentional Infliction of Emotional Distress)

18. Plaintiff refers to and herein incorporates Paragraphs 1-4 of the First Cause of Action.

19. _____ [*Allege defendant's extreme and outrageous conduct, including any facts showing defendant's misuse of position of authority and/or knowledge of plaintiff's particular susceptibility to emotional distress*].

20. Defendant _____'s [*name*] actions were intentional and malicious and were taken for the purpose of causing plaintiff to suffer severe emotional distress, and with reckless disregard for the likelihood that such distress would result. [Defendant _____'s [*name*] conduct in confirming and ratifying that conduct was done with knowledge that plaintiff's emotional (and physical) distress would thereby increase, and was done with a wanton and reckless disregard of the consequences to plaintiff.]

21. As a direct, proximate, and foreseeable result of the above-described conduct of defendant(s), [and each of them,]

plaintiff has suffered damages as previously alleged in Paragraphs 8-10 of the First Cause of Action, which plaintiff hereby refers to and incorporates herein.

[22. *If seeking punitive damages, allege:* The actions of defendant(s, and each of them,) as herein alleged were committed maliciously, oppressively, with intention to cause plaintiff mental and physical harm, and with conscious disregard for plaintiff's rights.]

FOURTH CAUSE OF ACTION

(False Imprisonment)

23. Plaintiff refers to and herein incorporates Paragraphs 1-4 of the First Cause of Action.

24. _____ [Describe plaintiff's detention by defendant(s), alleging use of force or words or actions threatening use of force by defendant(s)].

25. As a further direct, proximate, and foreseeable result of the above-described conduct of defendant(s), [and each of them,] plaintiff has suffered damages as previously alleged in Paragraphs 8-10 of the First Cause of Action, which plaintiff hereby refers to and incorporates herein.

[26. *If seeking punitive damages, allege:* The actions of defendant(s, and each of them,) in detaining plaintiff as herein alleged were committed maliciously, oppressively, with intention to cause plaintiff mental and physical harm, and with conscious disregard for plaintiff's rights.]

WHEREFORE, plaintiff prays for judgment as follows:

1. For general damages [in the sum of \$_____];

[2. For medical and related expenses (_____ (in the sum of \$_____ or according to proof));]

[3. For lost earnings, past and future(, _____ (in the sum of \$_____ or according to proof));]

[4. For an award of punitive damages against defendant(s), (and each of them,) in an amount appropriate to punish defendant(s) and deter others from engaging in similar misconduct;]

[5. For prejudgment interest on all amounts claimed;] and

6. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff

[Add verification, if desired (see Code Civ. Proc. §§ 446, 2015.5).]

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyInvasion of PrivacyTortsIntentional TortsInvasion of PrivacyGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Cal. Const., art. I, § 1; White v. Davis (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222 .*

(n2)Footnote 2. *See Miller v. National Broadcasting Co. (1986) 187 Cal. App. 3d 1463, 1481-1482, 232 Cal. Rptr. 668 .*

(n3)Footnote 3. For discussion and form of complaint, *see § 50.11.*

(n4)Footnote 4. *See Civ. Code §§ 1786-1786.56.*

(n5)Footnote 5. For discussion and form of complaint, *see § 50.11.* By contrast, the statutory remedies under the Consumer Credit Reporting Agencies Act (*Civ. Code §§ 1785.1-1785.35*) preclude commonlaw remedies for defamation, invasion of privacy, or negligence unless the defendant disclosed false information with malice or willful intent to injure the employee or applicant. *see Civ. Code § 1785.32; see also discussion in § 50.12[3][b].*

(n6)Footnote 6. For discussion, *see § 50.16[1][b].*

(n7)Footnote 7. For discussion and form of complaint, *see § 50.19.*

(n8)Footnote 8. *See Cal. Const., art. I, § 1; see also discussion in § 50.30[1].*

(n9)Footnote 9. *See Miller v. National Broadcasting Co. (1986) 187 Cal. App. 3d 1463, 1480-1481, 232 Cal. Rptr. 668 ; Rest. 2d Torts § 652B; see also discussion in § 50.31[1].*

(n10)Footnote 10. *See Alcorn v. Anbro Engineering, Inc. (1970) 2 Cal. 3d 493, 497-499, 86 Cal. Rptr. 88, 468 P.2d 216 ; see also discussion in § 50.31[3].*

(n11)Footnote 11. *See generally Vandiveer v. Charters (1930) 110 Cal. App. 347, 355, 294 P. 440 ; see also discussion in § 50.31[2].*

(n12)Footnote 12. *See Civ. Code § 3294.*

(n13)Footnote 13. [Reserved]

(n14)Footnote 14. *Code Civ. Proc. § 446.*

(n15)Footnote 15. *Code Civ. Proc. § 431.30(d).*

(n16)Footnote 16. *Code Civ. Proc. § 335.1; Cain v. State Farm Mut. Auto Ins. Co. (1976) 62 Cal. App. 3d 310, 313, 132 Cal. Rptr. 860 .*



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DIVISION V EMPLOYEE PRIVACY RIGHTS

CHAPTER 50 Limitations on Employer Collection of Private Information About Employees

Part C. CONSTITUTIONAL AND COMMON LAW PRIVACY ISSUES

3-50 California Employment Law §§ 50.33through 50.39

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

[Reserved]

§§ 50.33[Reserved]



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DIVISION V EMPLOYEE PRIVACY RIGHTS

CHAPTER 50 Limitations on Employer Collection of Private Information About Employees

Part D. SPECIFIC INFORMATION-GATHERING PRACTICES IMPLICATING EMPLOYEE PRIVACY ISSUES

3-50 California Employment Law § 50.40

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.40 Introduction

Almost any procedure by which an employer attempts to obtain information about an applicant or employee may raise potential issues of the applicant's or employee's right to privacy under the California Constitution and common law principles set out in Part C. Furthermore, the specific statutory provisions discussed in Part B may impose further limitations on the employer. This part discusses the potential effect of the legal principles previously discussed in this chapter on certain specific information-gathering practices of employers.

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyInvasion of PrivacyTortsIntentional TortsInvasion of PrivacyGeneral Overview



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DIVISION V EMPLOYEE PRIVACY RIGHTS

CHAPTER 50 Limitations on Employer Collection of Private Information About Employees

Part D. SPECIFIC INFORMATION-GATHERING PRACTICES IMPLICATING EMPLOYEE PRIVACY ISSUES

3-50 California Employment Law § 50.41

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.41 Employer Searches and Surveillance of Employees

Issues of employee privacy may arise in the context of investigative searches and surveillance by an employer to determine whether an employee has committed a violation of law or company policy or has otherwise committed misconduct in connection with his or her job.

The right of privacy under *California Constitution, Article I, Section 1*, is one potential limitation on an employer's right to conduct searches of an employee's office, desk drawers, or personal belongings. As noted previously, this constitutional provision is applicable to private business interests as well as the government and may therefore limit the conduct of private employers.ⁿ¹ In *Hill v. National Collegiate Athletic Association*,ⁿ² the California Supreme Court adopted a new "balancing test" approach for analyzing state constitutional privacy claims.ⁿ³ This standard is less stringent than the "compelling interest" standard, which under *Hill* only applies in limited circumstances.ⁿ⁴ The precise scope of each of these standards is not entirely settled, nor is the extent of an employee's privacy rights in a workplace setting. The result may depend on the public interest, the employer's special interests, and the employees' reasonable expectations of privacy in a particular employment setting.ⁿ⁵

With respect to places such as desk drawers or lockers where personal effects are typically stored, an employee may arguably be held to possess a reasonable expectation of privacy in the absence of facts indicating that such an expectation would be unreasonable. Such expectation might be found unreasonable if the employee was on notice that searches of desks, lockers, credenzas, and the like would occur for work-related purposes.ⁿ⁶ The existence in employee personnel handbooks of applicable provisions governing inspections or searches would presumably be relevant to the determination whether the employee's expectation of privacy was reasonable under the circumstances.ⁿ⁷ Notwithstanding notice to employees that their belongings were subject to search, any search actually performed must still be reasonable in its inception and scope.

Assuming the constitutionality of a given search, the employer must also be aware of potential statutory restrictions on the method of investigation, as discussed in Part B. For example, any use of eavesdropping, electronic surveillance devices, telephone wiretapping, or voice stress analyzers in an investigation may lead to criminal penalties under the

Penal Code,ⁿ⁸ as well as civil liability.ⁿ⁹ As another example, both federal and state law restrict the use of polygraph examinations by employers.ⁿ¹⁰

In addition, the manner of investigation may raise potential liability issues under common law tort theory. For example, the employer is potentially subject to liability under a theory of false imprisonment if the employer physically detains the employee.ⁿ¹¹ Furthermore, an otherwise justifiable search or investigation may lead to potential liability under a theory of intentional infliction of emotional distress if carried out in an "extreme" or "outrageous" manner.ⁿ¹²

1. *Area Searched.*

- a. What is targeted for the search? Remember that various areas and items fall along a privacy "continuum." (That is, some areas are more "private" than others. For example, (1) work station, (2) open office, (3) locked office; (1) shared desk, (2) exclusive unlocked desk, (3) locked desk; (1) locker, (2) briefcase, (3) handbag.)
- b. Does the employee have a reasonable expectation of privacy in the area or item targeted for search?

2. *Company Policy or Practice.*

- a. Does the company have an announced policy or long-standing practice of conducting searches that would tend to compromise an expectation of privacy on the part of the employee?
- b. If the company has an announced policy, does that policy recite its business justification?
- c. If the company has an announced policy or practice, has the policy been uniformly applied?

3. *Reason for Search.* What is the reason for the search? Is it work-related or is it primarily intended to gather information for public law enforcement authorities? An employer is on firmer ground if it can show a substantial work-related reason for a search. While the involvement of public law enforcement authorities is not necessarily problematic, such involvement poses (1) a risk that if public authorities drop the charges, the grounds for any discipline will be severely undermined; (2) a risk that the mere filing of charges will increase exposure to a claim of defamation; and (3) a risk that if other similarly situated employees were not similarly treated, the employer may be liable for breach of its duty of good faith and fair dealing.

4. *Level of Suspicion.*

- a. What level of suspicion justifies the search--a reasonable suspicion or probable cause? The employer should examine what specific facts it has to support that suspicion. Under either standard, a "hunch" will be insufficient to justify the search.
- b. Is the suspicion particularized? Suspicion focusing on a particular individual makes the search of that employee's locker or desk easier to justify than a more general suspicion, for example, that some unknown employees may have stored drugs at work.

5. *Consent.*

- a. Has the employee consented to the search?
- b. Are there compelling reasons not to ask the employee for consent? Employers should not inform employees that if they do not consent to the search, they will be disciplined or the search will take place anyway.

6. *Scope and Manner of Search.*

- a. Will the search be conducted to minimize its intrusiveness while preserving its effectiveness?
- b. Are areas targeted for search limited to those that are likely to contain the items that the search is intended to locate?

7. *Confidentiality of Results.*

- a. Is a mechanism in place to ensure that the results of the search are not communicated outside the circle of persons having a business need to know?
- b. Have the persons who will receive the information been informed of their possible exposure to liability (for example, for defamation) for improper disclosure of search results?

The legal issues identified in the text are grounds for caution in the context of employee searches. In advance of any such search, it is prudent to consider the following matters:

1. *Area Searched.*

- a. What is targeted for the search? Remember that various areas and items fall along a privacy "continuum." (That is, some areas are more "private" than others. For example, (1) work station, (2) open office, (3) locked office; (1) shared desk, (2) exclusive unlocked desk, (3) locked desk; (1) locker, (2) briefcase, (3) handbag.)
- b. Does the employee have a reasonable expectation of privacy in the area or item targeted for search?

2. *Company Policy or Practice.*

- a. Does the company have an announced policy or long-standing practice of conducting searches that would tend to compromise an expectation of privacy on the part of the employee?
- b. If the company has an announced policy, does that policy recite its business justification?
- c. If the company has an announced policy or practice, has the policy been uniformly applied?

3. *Reason for Search.* What is the reason for the search? Is it work-related or is it primarily intended to gather information for public law enforcement authorities? An employer is on firmer ground if it can show a substantial work-related reason for a search. While the involvement of public law enforcement authorities is not necessarily problematic, such involvement poses (1) a risk that if public authorities drop the charges, the grounds for any discipline will be severely undermined; (2) a risk that the mere filing of charges will increase exposure to a claim of defamation; and (3) a risk that if other similarly situated employees were not similarly treated, the employer may be liable for breach of its duty of good faith and fair dealing.

4. *Level of Suspicion.*

a. What level of suspicion justifies the search--a reasonable suspicion or probable cause? The employer should examine what specific facts it has to support that suspicion. Under either standard, a "hunch" will be insufficient to justify the search.

b. Is the suspicion particularized? Suspicion focusing on a particular individual makes the search of that employee's locker or desk easier to justify than a more general suspicion, for example, that some unknown employees may have stored drugs at work.

5. *Consent.*

a. Has the employee consented to the search?

b. Are there compelling reasons not to ask the employee for consent? Employers should not inform employees that if they do not consent to the search, they will be disciplined or the search will take place anyway.

6. *Scope and Manner of Search.*

a. Will the search be conducted to minimize its intrusiveness while preserving its effectiveness?

b. Are areas targeted for search limited to those that are likely to contain the items that the search is intended to locate?

7. *Confidentiality of Results.*

a. Is a mechanism in place to ensure that the results of the search are not communicated outside the circle of persons having a business need to know?

b. Have the persons who will receive the information been informed of their possible exposure to liability (for example, for defamation) for improper disclosure of search results?

Commentary by Kirby Wilcox.

Legal Topics:

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

Criminal Law & Procedure Search & Seizure General Overview Criminal Law & Procedure Search & Seizure Electronic

EavesdroppingGeneral OverviewLabor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyInvasion of PrivacyTortsIntentional TortsInvasion of PrivacyGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See* § 50.30[1][a][ii].

(n2)Footnote 2. *Hill v. National Collegiate Athletic Association (1994) 7 Cal. 4th 1, 37-38, 26 Cal. Rptr. 2d 834, 865 P.2d 633* .

(n3)Footnote 3. *See* § 50.30[1][c].

(n4)Footnote 4. *See* § 50.30[1][d].

(n5)Footnote 5. *Hill v. National Collegiate Athletic Association (1994) 7 Cal. 4th 1, 55-56 & n.20, 26 Cal. Rptr. 2d 834, 865 P.2d 633* .

(n6)Footnote 6. *cf. Schowengerdt v. General Dynamics Corp. (9th Cir. 1987) 823 F.2d 1328, 1335* (civilian Navy engineer had reasonable expectation of privacy in his office and was permitted to seek damages for federal agents' warrantless search of locked desk and credenza and seizure of personal photographs and correspondence relating to sexual matters, absent notice that such searches would occur for work-related purposes).

(n7)Footnote 7. *See Sec. & Law Enforcement Employees District Council 82 v. Carey (2d Cir. 1984) 737 F.2d 187, 202* (handbook provision warning employees that they were subject to search diminished employees' reasonable expectation of privacy in personal belongings).

(n8)Footnote 8. *Penal Code §§ 631, 632, 632.5, 632.6, 632.7, 637, 637.3. see Lab. Code § 435* (ban against causing audio or video recording of employees in restroom, locker room, or other room designated for changing clothes without court order).

(n9)Footnote 9. *Penal Code §§ 637.2, 637.3; see §§ 50.16[1][b], 50.19*.

(n10)Footnote 10. *Lab. Code § 432.2; 29 U.S.C. § 2001 et seq.; see § 50.16[1][a], [2]*.

(n11)Footnote 11. *See* § 50.31[2].

(n12)Footnote 12. *See* § 50.31[3].

(n13)Footnote 13. For discussion of legal restrictions on disclosure of private information, *see* ch. 51.

(n14)Footnote 13. For discussion of legal restrictions on disclosure of private information, *see* ch. 51.



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DIVISION V EMPLOYEE PRIVACY RIGHTS

CHAPTER 50 Limitations on Employer Collection of Private Information About Employees

Part D. SPECIFIC INFORMATION-GATHERING PRACTICES IMPLICATING EMPLOYEE PRIVACY ISSUES

3-50 California Employment Law § 50.42

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.42 Medical and Physical Examinations

[1] Constitutional Privacy Issues

[a] Generally

As in the case of any other information-gathering procedure, an employer's requirement that an applicant or employee submit to a medical or physical examination as a condition of hiring or continued employment raises potential issues under the right to privacy contained in *California Constitution, Article I, Section 1*.ⁿ¹ In *Hill v. National Collegiate Athletic Association*,ⁿ² the California Supreme Court adopted a new "balancing test" approach for analyzing state constitutional privacy claims.ⁿ³ This standard is less stringent than the "compelling interest" standard, which under *Hill* only applies in limited circumstances.ⁿ⁴ The precise scope of each of these standards is not entirely settled, nor is the extent of an employee's privacy rights in a workplace setting. The result may depend on the public interest, the employer's special interests, and the employees' reasonable expectations of privacy in a particular employment setting.ⁿ⁵

The *Hill* Court applied the balancing test to determine that collegiate athletes' privacy interest in the confidentiality of medical treatment and information was not violated by a private athletic association's drug-testing program because the types of medical questions answered were routine in the athletic context, and the medical procedures had sufficient safeguards to protect the confidentiality of medical information furnished by the athletes.ⁿ⁶ In *Pettus v. Cole* (discussed in *section 50.30[1][e], above*) the court of appeal applied the *Hill* analysis to a case involving an employer who invaded an employee's autonomy privacy by requiring that the employee enter a 30-day inpatient rehabilitation program as a condition of continued employment.ⁿ⁷ This required treatment was deemed an invasion of privacy because the employer offered no justification for that particular requirement, and it was clear from the record that there were far less intrusive alternatives.ⁿ⁸

Further, several pre-*Hill* court of appeal decisions have held, in a number of different contexts, that the right to privacy under the California Constitution protects the information contained in an individual's medical records in the absence of a compelling interest justifying the disclosure of that information.ⁿ⁹ The *Hill* Court offered no analysis on the

continuing vitality of these cases.

In *Loder v. City of Glendale*,¹⁰ the California Supreme Court determined that urinalysis drug testing occurring in the context of preemployment medical examinations is permissible, thus apparently assuming, without discussion, that preemployment medical examinations are constitutional. While the Court discussed the fact that post offer, preemployment physicals do not violate the FEHA¹¹ or the ADA,¹² the opinion contains no similar determination with respect to the viability of such examinations under the state constitution.¹³

In *Norman-Bloodsaw v. Lawrence Berkeley Lab.*,^{13.1} the Ninth Circuit determined that employees undergoing a general employee health examination may not be tested without their knowledge for highly private and sensitive medical and genetic information, such as syphilis, sickle cell trait, and pregnancy. Such medical tests may violate the right to privacy under federal and state law, as well as Title VII.^{13.2}

Initially, the court addressed the statute of limitations issue; the district court dismissed all claims on this ground, finding that the limitations period began to run when the tests were taken, in which case each claim was time-barred. Under federal law, a limitations period begins to run when the plaintiff knows or has reason to know of the injury that is the basis of the action. Whether plaintiffs knew or had reason to know of the specific testing turned on material issues of fact that precluded summary judgment; similarly, factual disagreements over the objective reasonableness of the specific tests could only be resolved at trial.^{13.3}

Second, the Ninth Circuit examined the merits of the claim of invasion of right to privacy under federal law under the *Fourth Amendment* and the due process clauses of the Fifth or *Fourteenth Amendment*.^{13.4} The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality. The most basic violation possible involves the performance of unauthorized tests, regardless of whether any disclosure has been made to third parties. Because few subjects are more personal and likely to implicate privacy interests than a person's health or genetic make-up, particularly when the intrusion involves such highly sensitive matters as sexual health, pregnancy, and reproductive decision-making, any additional testing beyond consent is not incremental, but rather constitutes a significant invasion of an important right. With regard to the syphilis and pregnancy tests, the Ninth Circuit clearly bars unregulated, unrestrained employer inquiries into personal sexual matters that do not bear on job performance. The court noted that no violation would occur if the test were authorized, or if the subjects reasonably should have known that the samples would be used for the disputed testing and failed to object.^{13.5}

The *Norman-Bloodsaw v. Lawrence Berkeley Lab.* court also examined the merits of the claim of invasion of right to privacy under the California Constitution.^{13.6} As a threshold matter, a cause of action for violation of privacy rights requires (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) conduct by the defendant amounting to a serious invasion of the protected privacy interest. Assuming that this test is met, the court must conduct a balancing test between the countervailing interests for the conduct in issue and the resulting privacy intrusion. Under the same rationale applied to the federal claim, the court concluded that the district court erred in granting summary judgment on the merits; the only possible difference between the state and federal claim is the threshold requirement that the invasion be serious.^{13.7}

Next, the court addressed the merits of the Title VII claim, which alleged that blacks and women were singled out for additional nonconsensual testing, and that certain employees' privacy interests were selectively invaded based on race, sex, and pregnancy. Because the preemployment examination was a condition of employment, the employment of blacks and women is conditioned on allegedly unconstitutional invasions of privacy, which did not affect white and/or male employees. Being subjected to an additional term or condition involving an unconstitutional invasion of privacy or illicit category is clearly actionable under Title VII; the requisite adverse effect on the employees is the unauthorized obtaining of sensitive medical information on the basis of race or sex.^{13.8}

Finally, the court examined the merits of the ADA claim, concluding that the ADA claim was properly dismissed. The ADA gives more latitude to these types of tests and imposes no restrictions on their scope, but only guarantees the confidentiality of the information gathered and restricts the use of that information.^{13.9}

Given the protected nature of the information revealed by a medical examination and the fact that the examination itself is necessarily physically intrusive, an employer may arguably be required to demonstrate a compelling need for requiring such an examination. In some instances, an employer may be able to demonstrate safety or security concerns that outweigh the employee's right to be free from physical examinations. For example, facts may raise a reasonable suspicion that an employee in (or applicant for) a critical position suffers from a health condition posing a substantial risk of harm to other employees or to the public. Furthermore, by analogy to employment discrimination law,¹⁴ an employer may be able to argue that the duties of a particular job require the employee to meet certain standards of health and physical condition and that these needs outweigh the employee's privacy interests. In that case, however, the right of privacy may require that the scope of the examination be limited to matters that are directly related to the employer's legitimate concerns.

[b] Waiver

Even if a required medical or physical examination would otherwise be constitutionally prohibited, such examinations may arguably be permitted if the applicant or employee has voluntarily waived his or her privacy rights. In the context of such medical examinations, the primary issues are (1) whether such a waiver is, in fact, voluntary, and (2) whether an employer may condition employment on waiver of a constitutional right. No California cases have discussed either issue in the context of private employment.

With regard to the first issue, in *Hill v. National Collegiate Athletic Association*,¹⁵ the California Supreme Court analyzed whether a collegiate athlete's participation in a private athletic association's drug testing program was voluntary in order to determine the reasonableness of the athlete's expectations of privacy, which is one of the essential elements of a plaintiff's invasion of privacy claim.¹⁶ The Court concluded that the athlete had a diminished expectation of privacy because of advance notice of the program and the opportunity to consent to testing. The Court reasoned that although a refusal to consent to drug testing disqualified the athlete from competition, "this consequence does not render the athlete's consent to testing involuntary in any meaningful legal sense. Athletic participation is not a government benefit or an economic necessity that society has decreed must be open to all."¹⁷ By analogy, the employer may be able to argue that a waiver made by an applicant is voluntary because the applicant has a minimal interest in the potential employment with any particular employer and is free to apply elsewhere. The strength of this argument may be diminished to the extent that other employers in a particular industry or field also require such examinations. Also, the argument may not be as strong in the case of current employees who have a greater stake in continued employment.

Regarding the second issue, the California Supreme Court has repeatedly held that a *public* employer cannot require current employees to waive their constitutional rights, including the right to privacy, as a condition of employment unless the public entity demonstrates a compelling interest justifying the waiver.¹⁸ Whether or not this rule applies to private employers has apparently never been addressed by any California appellate court. However, in the *Hill* case, the California Supreme Court drastically limited the continued application of the compelling interest standard.¹⁹ And in *Loder v. City of Glendale*,²⁰ the California Supreme Court held that applicants for public employment should "reasonably... anticipate" a preemployment medical exam.

[2] Related Legal Issues

[a] Equal Employment Opportunity Laws

Apart from the general privacy issues discussed in [1], *above*, employer-required physical and medical examinations

raise potential issues under equal employment opportunity laws. As discussed further in Chapters 40-44, both federal and state laws prohibit discrimination against employees and applicants based on physical or mental disability, as defined by those laws.ⁿ²¹ Thus, any requirement that an employee "pass" a physical examination or respond to questions about his or her physical or medical condition must comply with the requirements of state and federal equal employment opportunity laws.ⁿ²² For example, pursuant to its statutory authority under the Fair Employment and Housing Act (FEHA),ⁿ²³ the Fair Employment and Housing Commission (FEHC) has issued regulationsⁿ²⁴ implementing and interpreting the FEHA's statutory prohibition against employment discrimination based on physical disability.ⁿ²⁵ The regulations include a provision regulating the conditions under which an employer may require a job applicant to submit to a preemployment medical examination.ⁿ²⁶ Under that provision, an employer may condition an offer of employment on the results of a medical examination conducted before the employee enters into employment in order to determine fitness for the job in question, provided that all of the following requirements are met:ⁿ²⁷

1. All entering employees in similar positions are subjected to such an examination;
2. When the results of such a medical examination would result in disqualification for the position, the applicant may submit independent medical opinion for consideration before a final determination on disqualification is made; and
3. The results of medical examinations must be maintained on separate forms and must be accorded confidentiality as medical records,ⁿ²⁸ except that supervisors and managers may be informed of restrictions on the work or duties of physically handicapped individuals and of accommodations that are necessary, and first aid and safety personnel may be informed, when appropriate, that the employee's condition may require emergency treatment.

The regulation also provides that an employer may lawfully inquire concerning an applicant's present physical condition or medical history "if, and only if, that inquiry is directly related and pertinent to the position in question or is directly related to a determination of whether the applicant would endanger his or her health and safety or the health and safety of others."ⁿ²⁹

For full discussion of prohibitions against employment discrimination based on medical condition or disability, *see* Chapter 41. For discussion of employers and employees covered under equal employment opportunity laws, *see* Chapter 40.

[b] Other Issues

Assuming that the employer is legally justified in requiring an applicant or employee to submit to a medical examination, the employer must be careful to comply with statutory and case law restrictions regarding the use and disclosure of medical information obtained from such examinations.ⁿ³⁰ The Confidentiality of Medical Information Act prohibits an employer from discriminating against an employee in terms or conditions of employment because of that employee's refusal to sign an authorization for disclosure of medical records.ⁿ³¹ However, this provision also provides that the prohibition does not "prohibit an employer from taking such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization."ⁿ³² This provision appears to authorize an employer to take action against an employee who refuses to authorize release of the results of a physical or medical examination if such action is necessitated by the absence of medical information that would have been obtained from the examination. In *Loder v. City of Glendale* ⁿ³³ the plaintiff claimed that by rejecting applicants who refuse to authorize disclosure to the city, as employer, of the results of their drug test, the city violated *Civil Code section 56.20(b)*. The California Supreme Court, however, determined that the Confidentiality of Medical Information Act had no bearing on whether an employer could require either applicants or current employees to undergo drug testing.ⁿ³⁴ For discussion of restrictions on the use and disclosure of medical information, *see* Chapter 51.

In addition, the employer is required by statute to bear the cost of any preemployment medical or physical examination, or any examination required by federal, state, or local law.ⁿ³⁵

Legal Topics:

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

Constitutional Law Substantive Due Process Privacy General Overview Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Constitutional Protections Labor & Employment Law Employee Privacy Disclosure of Employee Information General Overview Labor & Employment Law Employee Privacy Medical & Related Examinations

FOOTNOTES:

(n1)Footnote 1. *See generally* discussion in § 50.30[1].

(n2)Footnote 2. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 37-38, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n3)Footnote 3. *See* § 50.30[1][c].

(n4)Footnote 4. *See* discussion in § 50.30[1][d].

(n5)Footnote 5. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 55-56 & n.20, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n6)Footnote 6. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 52-54, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n7)Footnote 7. *See Pettus v. Cole* (1996) 57 Cal. Rptr. 2d 46 .

(n8)Footnote 8. *See Pettus v. Cole* (1996) 57 Cal. Rptr. 2d 46 .

(n9)Footnote 9. *See Cutter v. Brownbridge* (1986) 183 Cal. App. 3d 836, 842-843, 228 Cal. Rptr. 545 ; *Board of Medical Quality Assur. v. Hazel Hawkins Memorial Hospital* (1982) 135 Cal. App. 3d 561, 565, 185 Cal. Rptr. 405 ; *Jones v. Superior Court* (1981) 119 Cal. App. 3d 534, 548-550, 174 Cal. Rptr. 148 ; *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal. App. 3d 669, 679, 156 Cal. Rptr. 55 .

(n10)Footnote 10. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n11)Footnote 11. *Gov. Code* § 12940 *et seq.*

(n12)Footnote 12. 42 U.S.C. § 12001 *et seq.*

(n13)Footnote 13. *See Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 995, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 (in context of *Fourth Amendment*, Court noted absence of authority suggesting such examinations are constitutionally impermissible); *see Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 1273-1274 (medical inquiries and exams conducted after offer of employment but before beginning duties need not be concerned solely with ability to perform job-related functions under ADA; ADA imposes no restrictions on scope of this type of exam, but guarantees confidentiality of information gathered).

(n14)Footnote 13.1. *Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260 .

(n15)Footnote 13.2. *Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 1268-1273 ; 42 U.S.C. § 2000e *et seq.* (Title VII).

(n16)Footnote 13.3. *Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 1266-1268 (for summary judgment purposes, foreseeability cannot be established on ground that plaintiffs were required to and did submit to general medical exam).

(n17)Footnote 13.4. *Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 1268-1270 (tests may be characterized as searches; under *Fourth Amendment*, court must balance government interest in tests against individual's privacy expectations).

(n18)Footnote 13.5. *Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 1268-1270 (consent to general medical exam does not abolish one's privacy right not to be tested for intimate, personal matters involving health; consent to provide blood and urine samples or completing questionnaire is not waiver; error to grant summary judgment on merits).

(n19)Footnote 13.6. *Cal. Const., art. I, § 3.*

(n20)Footnote 13.7. *Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 1271 .

(n21)Footnote 13.8. *Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 1270-1271 .

(n22)Footnote 13.9. *Norman-Bloodsaw v. Lawrence Berkeley Lab.* (9th Cir. 1998) 135 F.3d 1260, 1273-1274 (fact that employers did not provide or adequately describe privacy safeguards insufficient to state cause of action under ADA).

(n23)Footnote 14. *See* discussion in [2], below, and in ch. 41.

(n24)Footnote 15. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 42-43, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n25)Footnote 16. *See* discussion in § 50.30[1][b].

(n26)Footnote 17. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 42, 26 Cal. Rptr. 2d 834, 865 P.2d 633 . *see* *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1994) 23 Cal. App. 4th 51, 57, 67, 28 Cal. Rptr. 2d 210 (testing of oil-platform workers at annual physical exam did not violate right to privacy; court did not cite *Hill*).

(n27)Footnote 18. *See* *Long Beach City Employees Association v. City of Long Beach* (1986) 41 Cal. 3d 937, 951-952, 227 Cal. Rptr. 90, 719 P.2d 660 (privacy rights); *Bagley v. Washington Township Hospital District* (1966) 65 Cal. 2d 499, 501, 507, 55 Cal. Rptr. 401, 421 P.2d 409 (*First Amendment* rights).

(n28)Footnote 19. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 34-35, 26 Cal. Rptr. 2d 834, 865 P.2d 633 ; *see* discussion in § 50.30[1][d].

(n29)Footnote 20. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 896-898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 ; *see* 50.30[1][e], 50.42[1][b] for discussion of *Loder*.

(n30)Footnote 21. *See* 29 U.S.C. §§ 793, 794 (Rehabilitation Act of 1973), 12100 et seq. (Americans with Disabilities Act); Gov. Code § 12940 (Fair Employment and Housing Act).

(n31)Footnote 22. *See* *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n32)Footnote 23. *See* Gov. Code § 12935(a).

(n33)Footnote 24. *See* 2 Cal. Code Reg. §§ 7293.5-7294.2.

(n34)Footnote 25. *See Gov. Code § 12940(a).*

(n35)Footnote 26. *See 2 Cal. Code Reg. § 7294.0(d).*

(n36)Footnote 27. *2 Cal. Code Reg. § 7294.0(d).*

(n37)Footnote 28. For discussion of statutory provisions relating to confidentiality of medical records, *see* ch. 51.

(n38)Footnote 29. *2 Cal. Code Reg. § 7294.0(b)(3).*

(n39)Footnote 30. *See, e.g., Civ. Code §§ 56.20-56.24.*

(n40)Footnote 31. *See Civ. Code § 56.20(b).*

(n41)Footnote 32. *See Civ. Code § 56.20(b).*

(n42)Footnote 33. *Loder v. City of Glendale (1997) 14 Cal. 4th 846, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .*

(n43)Footnote 34. *Loder v. City of Glendale (1997) 14 Cal. 4th 846, 859-865, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .*

(n44)Footnote 35. *See Lab. Code § 222.5; see also* discussion in ch. 4.



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DIVISION V EMPLOYEE PRIVACY RIGHTS

CHAPTER 50 Limitations on Employer Collection of Private Information About Employees

Part D. SPECIFIC INFORMATION-GATHERING PRACTICES IMPLICATING EMPLOYEE PRIVACY ISSUES

3-50 California Employment Law § 50.43

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.43 Drug and Alcohol Tests

[1] Potential Legal Issues Involved in Drug Testing

[a] Testing of Employees

[i] No Statutory Prohibition of Drug Screening by Employers

Apparently in reaction to increased concern over the economic, societal, and safety problems associated with drug abuse and the use of drugs in the workplace, an increasing number of employers have instituted drug-screening programs, either as part of a required physical and medical examination or separately from such an examination. The programs vary in their scope. Some employers test only applicants.ⁿ¹ Others test current employees under various circumstances--for example, when there is "probable cause" to suspect drug use on the job, following an accident on the job, or at random. The most common method currently used to test for the presence of illegal drugs in the body involves urinalysis using the "EMIT system." This method detects the presence of drugs in an individual's blood system but cannot measure the degree of impairment of functions caused by such drugs.

There are currently no generally applicable California or federal statutes that directly prohibit private employers from requiring applicants or employees to submit to drug screening, although some local ordinances may restrict the practice.ⁿ² In fact, federal statutes and regulations actually *require* certain private employers (primarily in transportation-related industries, but also including other types of businesses that employ drivers who operate commercial motor vehicles in interstate commerce) to establish drug testing programs for employees engaged in safety-sensitive functions.ⁿ³ Space limitations preclude a full discussion of these provisions in this chapter. For a further discussion of these federal laws and regulations, *see* Larson, employment screening, ch. 12 (Matthew Bender).

In the absence of an express statutory provision either prohibiting or authorizing drug testing, institution of a mandatory drug-testing program poses many of the same potential legal issues previously discussed regarding medical and physical examinations.ⁿ⁴

[ii] Collective Bargaining Agreement May Limit Employer's Right to Conduct Drug Testing

If a union employee is discharged as a result of the outcome of a challenged drug test, federal labor laws may preclude state-law causes of action pertaining to the dispute. For example, the Ninth Circuit has held that *section 301 of the Labor Management Relations Act*⁵ preempts a unionized employee's action for wrongful termination under state law, violation of state constitutional rights, and related claims, when the employee's causes of action are based on suspicion-based drug testing by a private employer because an employee's right to be free from mandatory drug testing is the proper subject of collective bargaining.⁶

[iii] Balancing Employer's Interest in Drug-Free Workplace Against Employee's California Constitutional Right to Privacy

With regard to the right to privacy under the California Constitution,⁷ as previously discussed,⁸ the California Supreme Court in *Hill v. National Collegiate Athletic Assn.*⁹ applied a "balancing test" standard to hold that the National Collegiate Athletic Association's drug testing program did not violate the privacy rights of student athletes. The Court indicated that the same standard will apply to determine under what circumstances it is permissible to use drug testing in order to maintain a workplace free of substance abuse and applied this standard in *Loder v. City of Glendale*.¹⁰

Courts have previously indicated that individuals have a legitimate expectation of privacy in connection with conventional urinalysis testing.¹¹ The privacy right applies to the act of urination and the taking of the urine sample,¹² as well as the disclosure of test results.¹³ First, the act of urination is itself a private function.¹⁴ Thus, for example, any drug-screening methods that require a third party to observe the collection of the sample would implicate the employee's privacy interest. Second, as in the case of physical examinations, drug urinalysis may reveal other types of information that may be held to be private, including prescription-drug use and medical conditions (such as epilepsy and pregnancy) that are unrelated to whether the test subject uses illicit drugs.¹⁵

In *Loder v. City of Glendale*,¹⁶ the California Supreme Court stated that drug testing by an employer that requires individuals to provide a urine sample under surveillance, uses the sample to acquire information about the individual's internal physical state, and requires an individual to disclose those medications he or she currently is taking "clearly intrudes on both autonomy privacy interests and informational privacy interests which are protected by the state Constitution."¹⁷

In *Edgerton v. State Personnel Bd.*,^{17.1} the court found that the trial court properly permanently enjoined Caltrans from conducting off-duty follow-up drug testing of employees because it intruded on an employee's constitutionally protected right to privacy. The court found that Caltrans' on-duty random drug testing is a significant intrusion on an individual's privacy rights, which is significantly augmented when an employee is subject to follow-up testing on off-duty time. The court also noted that Caltrans' employees have no reasonable expectation they will be subject to off-duty follow-up testing on their personal time because written policies provide that employees will be subject to testing on duty, and that Caltrans failed to sustain its burden of showing that less intrusive alternatives were unavailable. Further, the injunction permitted testing contiguous to on-duty time, as well as off-duty follow-up testing if necessary to comply with federal regulations as less intrusive alternatives permitted Caltrans to conduct follow-up testing while protecting against an unjustified intrusion into employees' right of privacy.

In a case decided before *Hill* and *Loder*, one court of appeal held that a pupillary reaction eye examination, which consists of shining a light into the employee's eye and watching the reaction, may implicate the constitutional right of privacy, depending on factors such as the nature of the test, the equipment used, the manner of administration, the reliability of the testing method, and the handling of test results, and a weighing of those factors against any asserted justification for the test.¹⁸

In another case decided before *Hill*, and cited without approval in *Loder*, in the context of *preemployment* drug screening, an appellate court held that the justification of maintaining a workplace free of substance abuse outweighs the intrusiveness of drug testing.ⁿ¹⁹ The court in that case emphasized that the plaintiffs' status as mere applicants for employment, rather than employees, was perhaps the most important factor in its analysis.ⁿ²⁰ *Loder v. City of Glendale* ⁿ²¹ addressed this distinction peripherally. That is, *Loder* credited the argument that employers have no opportunity to observe applicants over a period of time.ⁿ²² Accordingly, the court found that employers have a greater need for suspicionless testing of applicants than of current employees.ⁿ²³

[iv] Fourth Amendment Issues in Drug Testing by Government Employer

Because *Loder* involved a municipal employer, the implied right to privacy under the *Fourth Amendment of the United States Constitution* was also at issue--a factor that directly implicated the propriety of current employee testing. The City of Glendale sought to require all employees who were offered a promotion to undergo drug testing as part of a required physical examination. The Court found that such suspicionless testing was impermissible under the principles set forth by the United States Supreme Court in *Treasury Employees v. Van Raab* ⁿ²⁴ because the City sought to test every promoted employee regardless of the nature of the position sought.ⁿ²⁵ Thus, the court sustained suspicionless drug testing of applicants but found similar testing of employees to exceed constitutional bounds.

In *Treasury Employees v. Von Raab*,ⁿ²⁶ the United States Supreme Court determined for the first time the constitutionality of drug testing of government employees. A federal employees' union challenged, on Fourth-Amendment grounds, a drug-testing program requiring certain United States Customs Service employees to submit to a urine test. The Customs Service had implemented a program under which drug testing was a condition of placement or employment for positions that required the following activities: (1) involvement in drug interdiction or enforcement of related laws; (2) possession of firearms; and (3) the handling of "classified" material. The United States Supreme Court upheld the constitutionality of the drug-testing program with respect to the first two positions enumerated above, and remanded the matter for further determination of the scope of the employment position regarding "classified material."ⁿ²⁷ The Court initially found that a warrant is not required by a balance of privacy and governmental interests, holding that the primary mission of the Customs Service would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions.ⁿ²⁸

The Court also relied on its decision in *Skinner v. Railway Labor Exec. Association*,ⁿ²⁹ for the holding that, in certain limited circumstances, the government's need to discover latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting searches without any measure of individualized suspicion.ⁿ³⁰ The Court found that the public interest involved, for example, in employing armed customs agents who are unimpaired by drug use, outweighed any invasion-of-privacy interests of the employees, noting, as it did in *Skinner*, that the nature of the employment implies a diminished expectation of privacy.ⁿ³¹ The Court reasoned, for example, that Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty have a diminished expectation of privacy with respect to the intrusions occasioned by a urine test.ⁿ³²

Unlike the circumstances under *Skinner*, the drug-testing program in *Von Raab* was not implemented pursuant to any preliminary study that revealed significant drug use among the affected employees. To the contrary, Customs employees had not exhibited any perceived drug problem, and the implementation of the testing program had not led to the discovery of a significant number of drug users. Nevertheless, the Court held that when the possible harm against which the government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the government's goal. It held that the mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity.ⁿ³³ The Court also rejected the union's argument that the method of testing is ineffective because employees are given notice of the test, and have an opportunity to abstain from any drug use prior to the testing. The Court cited expert opinion that the time it takes for particular drugs to become undetectable in urine can vary widely depending on the individual. It also

noted that persons addicted to drugs may be unable to abstain from use at any given time.ⁿ³⁴

The Supreme Court in *Von Raab* concluded that the government demonstrated that its compelling interests in safeguarding the borders of the United States and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm; and that the testing of those employees is reasonable under the *Fourth Amendment*.ⁿ³⁵

In *Lanier v. City of Woodburn*, ^{n35.1} the Ninth Circuit held that a city's requirement of a pre-employment drug and alcohol screening for all prospective applicants as a condition of employment was unconstitutional as applied to an applicant for the job of library page. The drug screening policy clearly effected a search within the meaning of the *Fourth Amendment*.^{n35.2} Further, the policy was not facially invalid, because the policy could constitutionally be applied to jobs that, for example, required the operation of dangerous equipment. However, the city could not demonstrate a special need to screen all prospective library pages for drugs without a showing of individualized suspicion as required by the *Fourth Amendment*.^{n35.3} The city asserted no evidence of a drug problem among library pages, and the library pages were not involved in interdiction or typically perform high-risk, safety-sensitive tasks.^{n35.4} Jobs are considered safety-sensitive if they involve work that may pose a great danger to the public, such as the following, and the city failed to show that the work of a library page entailed anything on that order of magnitude:

- Operation of railway cars.^{n35.5}
- The armed interdiction of illegal drugs.^{n35.6}
- Work in a nuclear power facility.^{n35.7}
- Work involving matters of national security.^{n35.8}
- Work involving the operation of natural gas and liquified natural gas pipelines.^{n35.9}
- Work in the aviation industry.^{n35.10}
- Work involving the operation of dangerous instrumentalities, such as trucks that weigh more than 26,000 pounds, that are used to transport hazardous materials, or that carry more than fourteen passengers at a time.^{n35.11}

Further, although the city had an obvious interest in protecting children, the link the city identified between that interest and a position as part-time library page was tenuous at best.

The California courts have not yet considered a drug-testing program designed to test employees only on particularized suspicion of impairment. It is likely, however, that such a program would be upheld, especially if the duties of the tested employees were safety-related.ⁿ³⁶ An employer might also argue that the employee has waived his or her privacy rights. Generally, issues regarding waiver are essentially the same as those previously discussed concerning physical and medical examinations.ⁿ³⁷

Edgerton v. State Personnel Bd.,^{n37.1} raises the *Fourth Amendment* issue of chain of custody. In *Edgerton*, the Court of Appeal held that the trial court properly set aside the State Personnel Board's decision terminating a Caltrans employee on the basis of a positive drug test on the ground that certification that the chain of custody over the employee's urine sample was complete was incorrect, rendering the positive test result inadmissible. The employer bears the ultimate burden of proof in establishing a positive drug test in order to justify an adverse employment action, but the employee bears the burden of proving a break in the chain of custody under the *Evid. Code* § 664 presumption that official duty has been regularly performed, which presumption the court found the employee rebutted.^{n37.2}

[v] Fourth Amendment Issues in Drug Testing by Private Employer

In *Skinner v. Railway Labor Executives Association*,ⁿ³⁸ the United States Supreme Court addressed the issue of whether the *Fourth Amendment* prohibits drug and alcohol testing of private railroad employees who are subject to government regulations requiring or permitting drug- and alcohol-testing under certain circumstances. In *Skinner*, the Railway Labor Executives' Association and member labor organizations sought to enjoin the enforcement of certain regulations promulgated by the Federal Railroad Administration. One of the two regulations in question provided for mandatory blood and urine testing of covered railroad employees following a "major train accident" or an "impact accident," or any train incident involving a fatality to any on-duty railroad employee.ⁿ³⁹ The other regulation provided for permissive breath or urine testing of covered employees following a reportable accident or incident on reasonable suspicion of the employee's culpability, in the event of certain specific rule violations, such as excessive speeding, and on reasonable suspicion that the employee is under the influence of alcohol.ⁿ⁴⁰ The Supreme Court concluded that, taking into account the nature of railroad employment, the interests of government in regulating railroad safety, and the extensiveness of the intrusion in question, neither the mandatory nor the permissive regulations violate a railroad employee's rights under the *Fourth Amendment*, because testing under the regulations is reasonable even without a warrant or reasonable suspicion that any particular employee may be impaired.ⁿ⁴¹ In so holding, the Supreme Court reversed the Ninth Circuit Court of Appeals, which had invalidated the federal regulations on the ground that a showing of particularized suspicion prior to testing is essential to ensure reasonableness within the meaning of the *Fourth Amendment*, and the regulations did not require such a showing.ⁿ⁴²

The Supreme Court in *Skinner* initially addressed the issue of whether government regulation of private railroad employees constituted government action regarding private conduct so as to bring the regulations within the reach of the *Fourth Amendment*. The Court noted that the mandatory-testing regulation implicates the *Fourth Amendment* because sovereign authority compels a railroad to comply with those provisions.ⁿ⁴³ It then discussed the permissive regulation, noting that whether a private party should be deemed an agent or instrument of the government for *Fourth Amendment* purposes necessarily turns on the degree of the government's participation in the private party's activities. The fact that the government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. The Court found that, in light of specific features of the regulations, the government did more than adopt a passive position toward the underlying private conduct; that it in fact encouraged, endorsed, and participated in the testing, to an extent sufficient to implicate the *Fourth Amendment*. It based that finding, among other reasons, on the fact that the regulations pre-empt state law and supersede any collective-bargaining agreement, and that the federal government is entitled to receive certain biological samples and test results.ⁿ⁴⁴ The Court found that subjecting a person to a breathalyzer test, blood test, and urinalysis are intrusions that constitute searches within the meaning of the *Fourth Amendment*.ⁿ⁴⁵

The Court then discussed whether the regulations met the *Fourth Amendment's* "reasonableness" requirement, focusing on three separate considerations: (1) the warrant requirement; (2) the probable-cause or "individualized suspicion" requirement; and (3) the legitimacy of government interest in testing without individualized suspicion. The Court found the absence of a warrant requirement reasonable, noting that the government's interest in dispensing with the warrant requirement is at its strongest when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." It found that to require a warrant under the regulations would frustrate the government's purpose, because alcohol and other drugs are eliminated from the body over the passage of time, and detection within a certain timeframe, depending on the method of testing, is crucial.ⁿ⁴⁶

With regard to the probable-cause requirement, the Court noted initially that even a search without a warrant must be based on probable cause to believe that the person to be searched has violated the law. When the balance of interests precludes insistence on a showing of probable cause, "some quantum of individualized suspicion" is usually required before a search is considered reasonable. However, in limited circumstances, when the privacy interests implicated by the search are minimal, and when an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of that

suspicion.ⁿ⁴⁷ The Court found the privacy interests of the employees involved to be minimal because of the nature of employment in the railroad industry, which the Court noted was subject to many regulations because of government interests in promoting safety. The Court pointed out that the interest in bodily security enjoyed by those employed in a regulated industry need not always be considered minimal, but noted that covered railroad employees have long been a principal focus of regulatory concern.ⁿ⁴⁸

Finally, the Court held that the compelling government interests served by the regulations would be significantly hindered if railroads were required to provide a reasonable suspicion of impairment before testing a given employee. It found the government interests compelling because of the significant dangers inherent in the performance of duties by impaired railroad employees. In view of its conclusion that the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered railroad employees, the Court held that the government's compelling interests outweigh privacy concerns.ⁿ⁴⁹

In a subsequent case, railroad workers challenged additional regulations on *Fourth Amendment* grounds.ⁿ⁵⁰ Unlike the regulations in *Skinner*, these involved *random* mandatory drug testing of railroad workers in safety-sensitive positions. The federal court of appeals upheld the implementation of the regulations based on the guidelines set forth in *Skinner* and *Von Raab*, holding that the increased intrusion on the privacy interests of the railroad employees is justified by the importance of maximizing safety in the railroad industry by preventing drug use.ⁿ⁵¹

Lower federal court opinions decided prior to *Skinner* and *Von Raab* had determined the extent of public employees' Fourth-Amendment rights with regard to drug and alcohol testing with conflicting results.ⁿ⁵²

In a case decided subsequent to *Skinner* and *Von Raab*, the District of Columbia Circuit upheld mandatory *random* drug testing of certain categories of employees in the U.S. Department of Transportation whose positions were deemed to have "a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or national security" against federal constitutional and statutory challenges.ⁿ⁵³

Based on *Skinner* and *Von Raab*, the Ninth Circuit upheld requirements of the Federal Highway Administration (FHWA) of the Department of Transportation, mandating various forms of drug testing for commercial motor vehicle operators, including random, biennial, and post-accident drug testing.ⁿ⁵⁴ The Court initially noted that testing conducted by private employers under compulsion of governmental regulations amounts to governmental action subject to the *Fourth Amendment*, and concluded after analyzing the nature of the testing program, that motor carriers need not obtain a search warrant prior to the administration of drug tests ordered by the FHWA, primarily because the interests of public safety outweigh the degree of potential employer abuses.ⁿ⁵⁵ Under the facts, the random-testing urinalysis program (allowing a maximum average of biennial tests) was found to be constitutional on its face, after balancing the degree of intrusion of drivers' privacy and the governmental interest in highway safety.ⁿ⁵⁶ The same balancing test supported the constitutionality of the periodic testing program under the facts (biennially in the course of thorough medical examinations, and only prior to full implementation of random testing program).ⁿ⁵⁷ In addition, the court upheld the constitutionality of the post-accident testing requirement (within 32 hours of a reportable accident), pursuant to the reasoning of *Skinner*.ⁿ⁵⁸

The Ninth Circuit has likewise upheld random drug testing of civilian employees of the United States Navy who hold top secret security clearances.ⁿ⁵⁹ The Court held that even though the plaintiffs were engineers who are not in fact allowed access to top secret areas, the Navy's determination that they require top secret clearance meets the justification criterion under *Von Raab* that the employees subject to testing are likely to gain access to sensitive information.ⁿ⁶⁰ The Court also deferred to the Navy's determination of which classifications of employees are subject to testing, noting that the naval officers responsible for that determination have discretion tempered by sufficient procedural safeguards.ⁿ⁶¹

Similarly, the Ninth Circuit has upheld random drug testing of clerical, warehouse, and maintenance employees at a nuclear plant pursuant to Nuclear Regulatory Commission regulations applicable to workers who have unescorted

access to "protected areas."ⁿ⁶² The Court noted that although the plaintiff (the union representing the employees) asserted that not all clerical and warehouse workers held safety-sensitive positions, it failed to particularize to which subgroups of employees it referred; consequently, testing of all those employees was held to be constitutional.ⁿ⁶³

Finally, the Ninth Circuit has also upheld a provision of the Department of Labor's Drug-Free Workplace Plan providing for drug testing of employees in public health and safety-sensitive or security-sensitive positions based on reasonable suspicion of off-duty drug use.ⁿ⁶⁴ The Court held that the provision was not facially unconstitutional under the *Fourth Amendment*, but emphasized that its opinion did not preclude a further constitutional challenge to the provision as applied.ⁿ⁶⁵

[b] Testing of Applicants for Employment

[i] Balancing Test for Analyzing Privacy Claims Under California Constitution

In *Hill v. National Collegiate Athletic Association*,ⁿ⁶⁶ the California Supreme Court adopted a new "balancing test" approach for analyzing state constitutional privacy claims. In *Loder v. City of Glendale*,ⁿ⁶⁷ the California Supreme Court applied the balancing test established in *Hill* to determine the constitutionality of pre-employment drug testing of all applicants by the City of Glendale. The city performed the drug testing at issue as a component of a physical examination required of all applicants who had received a conditional offer of employment.ⁿ⁶⁸ Applicants were notified of the drug testing in the job announcement bulletin and signed a consent form when they entered the doctor's office. The physician who performed the examination asked about medications currently being taken and required the applicant to provide a urine sample while an attendant stood next to the cubicle in which the applicant was urinating. The sample was tested for blood, sugar and protein as part of the medical screening and then sent to a drug lab for testing for drugs and alcohol.ⁿ⁶⁹

The Court easily overcame the threshold requirements set forth in *Hill*.ⁿ⁷⁰ It reasoned that *Hill* established that drug testing which requires individuals to provide a urine sample under surveillance, uses the sample to acquire information about the individual's internal physical state, and requires an individual to disclose those medications he or she currently is taking "clearly intrudes on both autonomy privacy interests and informational privacy interests which are protected by the state Constitution." The Court noted, however, that the actual intrusion was lessened by the fact that the drug testing was part of a preemployment medical examination that a job applicant "reasonably must anticipate."ⁿ⁷¹

The Court then balanced this intrusion against the employer's interest in avoiding the financial burdens and morale problems caused by an employee's abuse of drugs or alcohol.ⁿ⁷² The Court accepted the City's position that drug and alcohol abuse resulted in absenteeism and tardiness, decreased productivity, increased turnover and greater safety issues. It further agreed that employers have a greater need for suspicionless testing of applicants than current employees because they have not had an opportunity to observe the behavior of those individuals over time.ⁿ⁷³ The *Loder* court determined that the limited intrusion caused by a drug test performed on an individual who was already required to undergo a complete medical examination was justified by the city's interests.ⁿ⁷⁴

In *Pilkington Barnes Hind v. Superior Court*,^{n74.1} the court of appeal was faced with the narrow issue of whether the plaintiff was a job applicant or an employee within the meaning of *Loder* when the plaintiff submitted to a mandatory pre-employment drug test, in the absence of individualized suspicion of drug abuse, four days after the plaintiff was placed on the employer's payroll.^{n74.2} As discussed above, *Loder* distinguished between job applicants and current employees for purposes of an employer's legitimate interest in suspicionless testing: because a prospective employer lacks the ability to observe and evaluate the person as an employee, before incurring investment costs, the employer has a greater need for suspicionless drug testing of applicants. Although the plaintiff was already an "employee" on the date of the test,^{n74.3} the plaintiff was solely responsible for the delays in testing.^{n74.4} The court held that a job applicant, who requests and receives a delay in submitting to a constitutionally permissible preemployment drug test until after the start of employment, may not evade the employer's testing requirement after employment on the ground the applicant

became an "employee" and is immune from such testing. Under these facts, and for purposes of suspicionless drug testing, the applicant who caused delay must submit to testing after the employment date. If the "employee" fails the test given in the brief period between employment and administration of the test, that employment, conditioned on passing the delayed test, may be terminated. Thus, for purposes of *Loder*, the plaintiff was still a job applicant and the suspicionless drug test was constitutionally permissible.^{n74.5}

In *Loder*, the Court discussed, without either approving or disapproving, an earlier decision of the appellate court regarding applicant drug testing.ⁿ⁷⁵ In *Wilkinson v. Times Mirror Corp.*, the court of appeal upheld the constitutionality of a testing program that provided for notice to the job applicant of urinalysis requirements, limited intrusiveness of testing procedures, and restricted access to test results, emphasizing that its holding constituted a balancing of interests with regard to the particular program in the case before it.ⁿ⁷⁶

The employer in *Wilkinson*, a publishing company, implemented a policy providing for preemployment physical examinations, including a drug and alcohol-screening test for all job applicants.ⁿ⁷⁷ Under that policy, applicants who received a conditional offer of employment based on their applications, written tests, and interviews, were informed that the offer was contingent on successful completion of a medical examination, which included a medical history, certain diagnostic tests, and a urinalysis for drugs and alcohol. Applicants who accepted the conditional offer were referred to a medical clinic. They were asked to report all medication taken in the last 72 hours and to submit to urine collection during the examination, although the act of urination itself was not observed by medical personnel. The sample was sent to an independent laboratory for analysis. Based on the results of the physical examination and the urinalysis, applicants were assigned a numerical suitability rating from one to five. A rating of five precluded the applicant from consideration for employment. A positive test result was reported as a rating of five, but that rating could also result from some other disqualifying medical condition. No medical information revealed during the test was reported to the employer, which was informed only of the suitability rating. An applicant who received a rating of five was permitted to reapply for employment after six months. The testing program was part of an existing substance-abuse program, which did not include any testing of employees already hired.ⁿ⁷⁸

The plaintiffs in *Wilkinson* had applied for various editorial and office jobs and had completed various stages of the preemployment process, but all refused to submit to the required urinalysis; none of the applicants was hired. Their complaint stated causes of action under, *inter alia*, *California Constitution, Article I, Section 1*, and sought injunctive and declaratory relief on behalf of themselves as well as all others similarly situated, and damages for themselves. The trial court granted a preliminary injunction, restraining the employer from conditioning employment of the plaintiffs or any other job applicants on submission to mandatory urinalysis testing for alcohol and drugs. The employer appealed, and the court of appeal reversed.

The Court began its analysis with a discussion of the scope of the right to privacy under the *California Constitution, Article I, Section 1*. As discussed in § 50.30[1][a][ii], the court rejected the employer's contention that the constitutional protection limits only government actors, not private parties.ⁿ⁷⁹ The Court then turned to the question of whether the preemployment drug testing program in that case violated the state constitutional right to privacy. The Court noted that the general concept of privacy encompasses a broad range of personal action and belief, but that the right is not absolute. It emphasized that a balancing of interests, rather than a deduction from principle, is required for a determination of the boundaries of the right of privacy. In this respect, *Wilkinson* is consistent with the standards and elements subsequently announced in *Hill v. National Collegiate Athletic Association*.ⁿ⁸⁰

Another important factor guiding the *Wilkinson* court's decision was that the plaintiffs were applicants for employment, rather than current employees. The Court reasoned that any individual who chooses to seek employment necessarily also chooses to disclose certain personal information to prospective employers and to allow the prospective employer to verify that information. When plaintiffs were asked to consent to drug and alcohol screening as a condition of an employment offer, they were in effect asked to disclose voluntarily the personal information that might be revealed by that screening.

The Court noted also that although the collecting and testing of urine does to some extent intrude on reasonable expectations of privacy, several factors in this case minimized the intrusiveness of the employer's drug-screening program. As applicants for employment in private business, plaintiffs necessarily had to anticipate being asked to take a preemployment physical examination.ⁿ⁸¹ Further, California law authorizes private employers to condition an offer of employment on the results of a medical examination conducted to determine fitness for the job, subject to certain other restrictions.ⁿ⁸² The Court reasoned that urinalysis is ordinarily part of a routine physical examination, so that any applicant for private employment should reasonably anticipate that it would be required. Subjecting urine samples to analysis for alcohol and drugs is only slightly more intrusive than the procedures normally anticipated by job seekers with private business. Moreover, the employer in this case specifically informs job applicants, and did inform plaintiffs, that a job offer is conditioned on consent to drug testing.

Finally, the court noted that the testing procedures, such as disclosure restrictions, and the applicant's access to test results and right to challenge the results or reapply after six months, minimize the intrusion into individual privacy. The Court stated that the job applicants under this program have a choice: they may consent to the limited invasion of their privacy resulting from the testing, or decline both the test and the conditional offer of employment, in which case they may seek employment elsewhere.ⁿ⁸³

Plaintiffs argued that a private employer may not ask a prospective employee to consent to an invasion of privacy simply because that applicant has no independent right to the job, citing cases that hold that when the state implements a general public-benefit program, the California Constitution limits the state's ability to condition receipt of those benefits on waiver of a constitutional right.ⁿ⁸⁴ The Court held those cases inapplicable to the instant case, and stated that plaintiffs failed to cite any authority on point.

The Court noted that when selecting employees, private employers must comply with applicable federal and state statutes prohibiting many forms of discrimination, such as that based on race or religion.ⁿ⁸⁵ Subject to those restrictions, however, a private employer has considerable discretion in setting job-related hiring standards. The Court stated that a private employer "unquestionably" has a legitimate interest in a drug and alcohol-free work environment, and in excluding from employment those individuals whose drug and alcohol use may affect their job performance or threaten harm to themselves.ⁿ⁸⁶ Plaintiffs, while not disputing that goal, argued that drug testing is an unreliable and ineffective method of accomplishing it. The Court disagreed, noting that the United States Supreme Court in *Skinner* concluded that drug tests, if properly conducted, identify the presence of alcohol and drugs with great accuracy. The Court found that the employer's decision to rely on drug testing as a screening mechanism in the instant case was neither arbitrary nor irrational.ⁿ⁸⁷

The Court concluded that the employer in this case did not violate *California Constitution, article I, section 1*, by asking job applicants to consent to urinalysis tests for alcohol and other drugs as a condition of a job offer, given the notice provided to prospective employees, the limited intrusiveness of the collection process, and the procedural safeguards that restricted access to the test results.ⁿ⁸⁸ The Court emphasized that it was not holding that all preemployment drug and alcohol testing by private employers is constitutional, or that a private employer's hiring practices are absolutely immune from judicial scrutiny. It noted that there may be preemployment inquiries and requests of a personal nature that are so intrusive as to be constitutionally unreasonable.ⁿ⁸⁹ The Court urged the California Legislature to provide guidance regarding regulation of drug testing of employees and prospective employees.ⁿ⁹⁰

[ii] Issues Under Fair Employment and Housing Act (FEHA) and Americans With Disabilities Act (ADA)

In addition to privacy issues, a mandatory drug-testing program for applicants, to the extent that it constitutes a "physical examination" or an "inquiry" into an individual's "physical condition," may raise issues under FEHA and FEHC regulations that limit preemployment inquiries and physical examinations to those that are job-related.ⁿ⁹¹ However, as previously discussed,ⁿ⁹² these regulations were promulgated to implement the FEHA's prohibition against

discrimination based on physical disability.ⁿ⁹³ The FEHC regulations expressly exclude current "alcoholism" and "narcotics addiction" from the definition of physical disability.ⁿ⁹⁴ In the *Loder* case,ⁿ⁹⁵ the Court analyzed the effect of both the FEHA regulations and the ADAⁿ⁹⁶ on drug testing of applicants. The Court specifically found that nothing in the FEHAⁿ⁹⁷ or any other state statute "purports to prohibit, or place general limitations upon, employer-mandated drug testing."ⁿ⁹⁸ With respect to federal law, the Court found that while the ADA restricts medical examinations in general, it does not restrict applicant testing to determine if an applicant is engaging in illicit drug use.ⁿ⁹⁹

[iii] Drug Testing When Mandated by Law

Some private employers are subject to government-imposed requirements for applicant drug-testing. The cases decided thus far have involved employees whose positions may affect public safety, and testing has been upheld under balancing analyses that acknowledge the strong governmental interest in protecting the public.ⁿ¹⁰⁰ For example, applicants for the position of a commercial motor vehicle operator with a private carrier must submit to urinalysis for drugs during the course of a thorough preemployment medical examination, pursuant to mandates imposed by the Federal Highway Administration of the Department of Transportation. This testing program has withstood constitutional attacks on grounds of the right to privacyⁿ¹⁰¹ and the guarantees against unreasonable searches and seizures,ⁿ¹⁰² based on the balancing of the need to prevent transportation risks against the minimal intrusion of a job applicants' privacy under the facts.ⁿ¹⁰³

1. Before instituting a drug-screening program, identify and document, insofar as possible, the nature of any problem that the drug testing is intended to address, focusing on the extent of drug use in the workplace and the consequences of such use.
2. Tailor the program as closely as possible to address the problem identified.
3. Consider implementing a drug-screening program in conjunction with a comprehensive anti-drug program and policy.ⁿ¹⁰⁴
4. Publicize the employer's anti-drug program in writing well in advance of any testing or enforcement efforts.
5. Before engaging in any screening or testing, obtain a written waiver that conforms with the requirements of the California Confidentiality of Medical Information Act.ⁿ¹⁰⁵ If possible, obtain this waiver at the time of initial application for employment.
6. To the greatest extent possible, have the drug-screening program handled by reliable, certified outside laboratories or physicians.
7. To avoid possible violations of handicap discrimination laws, do not ask questions regarding the use of *legal* drugs that would not impair performance or pose on-the-job risks. If such information is needed to interpret test results, have information obtained by the outside health professionals administering the test and instruct them not to reveal the information to the employer's supervisors or employment decisionmakers.
8. Make every effort to ensure that test results are accurate by ensuring that any personnel conducting such tests follow proper procedures to safeguard specimens and chain of custody.
9. Be sensitive to potential privacy, emotional distress, and defamation concerns when obtaining samples, especially when testing "for cause."

10. If an employee is having performance problems, consider *not* testing the employee for the presence of drugs (regardless of whether there is "cause" to suspect a drug problem) and instead base any disciplinary action on the performance problems alone.

11. If the results of a test are positive, confirm the tests by a reliable method before acting on them, and consider providing the employee or an applicant with an opportunity to submit independent evaluations or to retest.

12. Maintain test results in the strictest confidence, apart from all other records concerning the applicant or employee, and do not disclose results to supervisors. Establish procedures to maintain confidentiality. If test results are positive, inform only those persons who "need to know."

13. If a current employee tests positive, be sure to comply with any accommodation requirements, and if possible emphasize rehabilitation rather than discipline.ⁿ¹⁰⁶

In light of the principles discussed above, an employer who plans to implement a mandatory drug-testing program may wish to take certain steps to try to avoid, or at least reduce, the potential litigation risks associated with such testing. Such steps might include the following:

1. Before instituting a drug-screening program, identify and document, insofar as possible, the nature of any problem that the drug testing is intended to address, focusing on the extent of drug use in the workplace and the consequences of such use.

2. Tailor the program as closely as possible to address the problem identified.

3. Consider implementing a drug-screening program in conjunction with a comprehensive anti-drug program and policy.ⁿ¹⁰⁴

4. Publicize the employer's anti-drug program in writing well in advance of any testing or enforcement efforts.

5. Before engaging in any screening or testing, obtain a written waiver that conforms with the requirements of the California Confidentiality of Medical Information Act.ⁿ¹⁰⁵ If possible, obtain this waiver at the time of initial application for employment.

6. To the greatest extent possible, have the drug-screening program handled by reliable, certified outside laboratories or physicians.

7. To avoid possible violations of handicap discrimination laws, do not ask questions regarding the use of *legal* drugs that would not impair performance or pose on-the-job risks. If such information is needed to interpret test results, have information obtained by the outside health professionals administering the test and instruct them not to reveal the information to the employer's supervisors or employment decisionmakers.

8. Make every effort to ensure that test results are accurate by ensuring that any personnel conducting such tests follow proper procedures to safeguard specimens and chain of custody.

9. Be sensitive to potential privacy, emotional distress, and defamation concerns when obtaining samples, especially when testing "for cause."

10. If an employee is having performance problems, consider *not* testing the employee for the presence of drugs (regardless of whether there is "cause" to suspect a drug problem) and instead base any disciplinary action on the performance problems alone.

11. If the results of a test are positive, confirm the tests by a reliable method before acting on them, and consider providing the employee or an applicant with an opportunity to submit independent evaluations or to retest.

12. Maintain test results in the strictest confidence, apart from all other records concerning the applicant or employee, and do not disclose results to supervisors. Establish procedures to maintain confidentiality. If test results are positive, inform only those persons who "need to know."

13. If a current employee tests positive, be sure to comply with any accommodation requirements, and if possible emphasize rehabilitation rather than discipline.ⁿ¹⁰⁶

Commentary by Kirby Wilcox.

[2] Potential Issues Involved in Alcohol Testing

In general, alcohol testing by employers and discipline based on such testing may raise the same potential privacy issues as do drug testing and consequent discipline;ⁿ¹⁰⁷ however, the balance between employer and employee interests may be struck differently with respect to alcohol testing. This different balance may result principally from the fact that the breathalyzer, the primary method of testing for evidence of alcohol consumption, is less physically intrusive than urinalysis and does not detect the use of substances other than alcohol. Moreover, alcohol testing, unlike drug urinalysis, can measure the level of on-the-job impairment. An employer, therefore, may be better able to justify a program of alcohol testing than drug urinalysis.

Discharge or discipline of employees on the basis of alcohol testing may, however, be problematic for other reasons. Both juries and labor arbitrators are more likely to be sympathetic to an employee with a drinking problem than an employee with a drug use problem.ⁿ¹⁰⁸ This sympathy may be attributable in part to the legality and consequently greater use and social acceptability of alcohol, as well as to the widespread perception of alcoholism as a disease.

[3] Accommodation of Employee in Alcohol or Drug Rehabilitation Program

In the event that an employer does conduct drug or alcohol tests, and discovers the presence of a potential drug or alcohol abuse problem, the employer may have a duty to assist a current employee in overcoming that problem. Private employers in California who have more than 25 employees have a statutory obligation under the Labor Code to reasonably accommodate any employee who wishes to voluntarily enter an alcohol or drug rehabilitation program as long as such accommodation does not impose undue hardship on the employer.ⁿ¹⁰⁹ The employer must also make reasonable efforts to safeguard the privacy of the employee regarding his or her enrollment in an alcohol or drug rehabilitation program.ⁿ¹¹⁰ However, this provision does not prohibit an employer from refusing to hire or from discharging an employee who, because of his or her current use of alcohol or drugs, is unable to perform his or her duties, or is unable to perform those duties without endangering his or her own health or safety or the health or safety of others.ⁿ¹¹¹ Furthermore, the employer is not required to provide time off with pay to participate in such a program, except that an employee may use sick leave to which he or she is entitled for this purpose.ⁿ¹¹² The Labor Code provision requiring employer accommodation of employees in alcohol or drug rehabilitation programs does not apply to the participants, director, and staff of a live-in alternative to incarceration rehabilitation program with special focus on substance abusers,ⁿ¹¹³ when participating in operations owned and operated by the program, so long as all revenues generated by the operations are used to support the program.ⁿ¹¹⁴

In addition, employers covered by the federal Rehabilitation Act of 1973ⁿ¹¹⁵ may in some instances have a duty to accommodate recovered or recovering alcoholics and drug abusers.ⁿ¹¹⁶ For a discussion of the duty to accommodate persons with disabilities under state and federal employment discrimination laws, *see* Chapter 41.

Legal Topics:

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

Constitutional Law Substantive Due Process Privacy General Overview Labor & Employment Law Employee Privacy Alcohol & Drug Testing Labor & Employment Law Employee Privacy Disclosure of Employee Information General Overview

FOOTNOTES:

(n1)Footnote 1. *See [b], below.*

(n2)Footnote 2. *See, e.g.,* San Francisco Police Code, § 3300A.5 ("worker privacy" ordinance barring testing of employees except when employer has reasonable grounds to believe employee's faculties are impaired on job; employee is in position where such impairment presents clear and present danger to physical safety of employee, another employee, or member of public; and employer provides employee, at employer's expense, opportunity to have sample tested or evaluated by state-licensed independent laboratory/testing facility and provides employee with reasonable opportunity to explain or rebut results); *see also* *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1051-1052, 264 Cal. Rptr. 194 (urging state legislation regarding permissible scope of employment and preemployment testing by private employers). At least 14 other states, however, have statutes that regulate this area.

(n3)Footnote 3. *See generally* Pub. L. No. 102-143, tit. V (Omnibus Transportation Employee Testing Act of 1991); 59 Fed. Reg. 7301 (Feb. 15, 1994); *see, e.g.,* 49 C.F.R., pt. 382 (Federal Highway Administration regulations regarding commercial motor vehicle operators).

(n4)Footnote 4. *See* discussion in § 50.42.

(n5)Footnote 5. 29 U.S.C. § 185(a).

(n6)Footnote 6. *Schlacter-Jones v. General Tel.* (9th Cir. 1991) 936 F.2d 435, 439-443. For discussion of wrongful termination generally, *see* chs. 60, 61. For discussion of LMRA preemption of wrongful termination claims, *see* ch. 60.

(n7)Footnote 7. *See* Cal. Const., art. I, § 1.

(n8)Footnote 8. *See* discussion in §§ 50.30[1], 50.42[1].

(n9)Footnote 9. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 37-38, 26 Cal. Rptr. 2d 834, 865 P.2d 633.

(n10)Footnote 10. *See* *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 896-898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200.

(n11)Footnote 11. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 41, 26 Cal. Rptr. 2d 834, 865 P.2d 633; *see* *Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal. App. 3d 1, 16, 267 Cal. Rptr. 618 (citing *Skinner v. Railway Labor Executives Association* (1989) 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (holding that mandatory urinalysis is a "search" for purposes of U.S. Const., amend. IV)).

(n12)Footnote 12. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 41, 26 Cal. Rptr. 2d 834,

865 P.2d 633 ; *Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal. App. 3d 1, 16, 267 Cal. Rptr. 618 .

(n13)Footnote 13. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 52, 26 Cal. Rptr. 2d 834, 865 P.2d 633 ; *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1038, 1051, 264 Cal. Rptr. 194 (upholding drug-testing program of employment applicants in part because procedural safeguards restricted access to test results).

(n14)Footnote 14. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 41, 26 Cal. Rptr. 2d 834, 865 P.2d 633 ; *Skinner v. Railway Labor Exec. Association* (1989) 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n15)Footnote 15. *Skinner v. Railway Labor Exec. Association* (1989) 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n16)Footnote 16. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n17)Footnote 17. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 896, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n18)Footnote 17.1. *Edgerton v. State Personnel Bd.* (2000) 83 Cal. App. 4th 1350, 1359-1361, 100 Cal. Rptr. 2d 491 .

(n19)Footnote 18. *Semore v. Pool* (1990) 217 Cal. App. 3d 1087, 1099-1100, 266 Cal. Rptr. 280 .

(n20)Footnote 19. See *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (involving a publishing company).

(n21)Footnote 20. See *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1048-1051, 264 Cal. Rptr. 194 . For full discussion of this case, see [b][i], below.

(n22)Footnote 21. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n23)Footnote 22. See *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 897, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n24)Footnote 23. See *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 897-898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n25)Footnote 24. *National Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 .

(n26)Footnote 25. See *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 877-881, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n27)Footnote 26. *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 .

(n28)Footnote 27. *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 664-665, 109 S. Ct. 1384, 103 L. Ed. 2d 685 .

(n29)Footnote 28. *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 666-667, 109 S. Ct. 1384, 103 L. Ed. 2d 685 .

(n30)Footnote 29. *Skinner v. Railway Labor Exec. Association* (1989) 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 , discussed above.

(n31)Footnote 30. *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 668, 109 S. Ct. 1384, 103 L. Ed. 2d 685 .

(n32)Footnote 31. *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 671, 109 S. Ct. 1384, 103 L. Ed. 2d 685 .

(n33)Footnote 32. *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 672, 109 S. Ct. 1384, 103 L. Ed. 2d 685 .

(n34)Footnote 33. *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 674, 109 S. Ct. 1384, 103 L. Ed. 2d 685 .

(n35)Footnote 34. *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 676, 109 S. Ct. 1384, 103 L. Ed. 2d 685 .

(n36)Footnote 35. *Treasury Employees v. Von Raab* (1989) 489 U.S. 656, 677, 109 S. Ct. 1384, 103 L. Ed. 2d 685 .

(n37)Footnote 35.1. *Lanier v. City of Woodburn* (9th Cir. 2008) 518 F.3d 1147, 1149-1152 .

(n38)Footnote 35.2. *See Chandler v. Miller* (1997) 520 U.S. 305, 322, 117 S. Ct. 1295, 137 L. Ed. 2d 513 .

(n39)Footnote 35.3. *See Chandler v. Miller* (1997) 520 U.S. 305, 314, 117 S. Ct. 1295, 137 L. Ed. 2d 513 ; *Skinner v. Ry. Labor Executives' Assn.* (1989) 489 U.S. 602, 617, 619, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n40)Footnote 35.4. *See Chandler v. Miller* (1997) 520 U.S. 305, 321-322, 117 S. Ct. 1295, 137 L. Ed. 2d 513 .

(n41)Footnote 35.5. *Skinner v. Ry. Labor Executives' Assn.* (1989) 489 U.S. 602, 628-629, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n42)Footnote 35.6. *Nat'l Treasury Employees Union v. Von Raab* (1989) 489 U.S. 656, 677-78, 109 S. Ct. 1384, 103 L. Ed. 2d 685 .

(n43)Footnote 35.7. *IBEW, Local 1245 v. United States NRC* (9th Cir. 1992) 966 F.2d 521, 525-26 .

(n44)Footnote 35.8. *AFGE Local 1533 v. Cheney* (9th Cir. 1991) 944 F.2d 503, 506 .

(n45)Footnote 35.9. *IBEW, Local 1245 v. Skinner* (9th Cir. 1990) 913 F.2d 1454, 1461-63 .

(n46)Footnote 35.10. *Bluestein v. Skinner* (9th Cir. 1990) 908 F.2d 451, 456 .

(n47)Footnote 35.11. *Int'l Bhd. of Teamsters v. Dep't of Transp.* (9th Cir. 1991) 932 F.2d 1292, 1303 .

(n48)Footnote 36. *cf. Skinner v. Railway Labor Executives Association* (1989) 489 U.S. 602, 628-633, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (upholding drug testing of certain railroad employees in absence of particularized-suspicion standard under *U.S. Const., amend. IV*); with *Luck v. Southern Pacific Transportation Co.* (1990) 218 Cal. App. 3d 1, 21-25, 267 Cal. Rptr. 618 (applying compelling-interest standard higher than that of *Fourth Amendment* in rejecting testing of employees having no safety-related duties).

(n49)Footnote 37. *See* discussion in § 50.42[1][b].

(n50)Footnote 37.1. *Edgerton v. State Personnel Bd.* (2000) 83 Cal. App. 4th 1350, 1356-1359, 100 Cal. Rptr. 2d 491 .

(n51)Footnote 37.2. *Edgerton v. State Personnel Bd.* (2000) 83 Cal. App. 4th 1350, 1358, 100 Cal. Rptr. 2d 491 .

(n52)Footnote 38. *Skinner v. Railway Labor Exec. Association* (1989) 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n53)Footnote 39. *See* 49 C.F.R. § 219.201(a) (also defining "major train accident" and "impact accident").

(n54)Footnote 40. *See* 49 C.F.R. § 219.301(b).

(n55)Footnote 41. *Skinner v. Railway Labor Exec. Association* (1989) 489 U.S. 602, 626-634, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n56)Footnote 42. *Skinner v. Railway Labor Exec. Association* (1989) 489 U.S. 602, 612-613, 634, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n57)Footnote 43. *Skinner v. Railway Labor Executives Association* (1989) 489 U.S. 602, 614-615, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n58)Footnote 44. *Skinner v. Railway Labor Executives Association* (1989) 489 U.S. 602, 614-615, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n59)Footnote 45. *Skinner v. Railway Labor Executives Association* (1989) 489 U.S. 602, 617, 617 n.4, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (also noting that blood and urine testing might constitute "seizures" under the *Fourth Amendment*).

(n60)Footnote 46. *Skinner v. Railway Labor Executives Association* (1989) 489 U.S. 602, 623, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n61)Footnote 47. *Skinner v. Railway Labor Executives Association* (1989) 489 U.S. 602, 624, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n62)Footnote 48. *Skinner v. Railway Labor Executives Association* (1989) 489 U.S. 602, 628, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n63)Footnote 49. *Skinner v. Railway Labor Executives Association* (1989) 489 U.S. 602, 628-633, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n64)Footnote 50. *Railway Labor Executives' Assoc. v. Skinner* (9th Cir. 1991) 934 F.2d 1096 (referring to *Skinner v. Railway Labor Exec. Association* (1989) 489 U.S. 602, 622-624, 632-633, 109 S. Ct. 1402, 103 L. Ed. 2d 639).

(n65)Footnote 51. *Railway Labor Executives' Assoc. v. Skinner* (9th Cir. 1991) 934 F.2d 1096, 1098-1100 (also holding that Federal Railroad Administration's random drug testing regulations do not violate separation of powers doctrine because Congress can delegate rule-making power to executive branch).

(n66)Footnote 52. *See, e.g., Mullholland v. Department of Army* (E.D. Va. 1987) 660 F. Supp. 1565, 1566-1570 (upholding random testing of civilian army employees in sensitive aviation-related positions); *Taylor v. O'Grady* (N.D. Ill. 1987) 669 F. Supp. 1422, 1434-1443 (invalidating compulsory drug urinalysis of county correctional officers without reasonable suspicion of illegal drug use); *Smith v. White* (E.D. Tenn. 1987) 666 F. Supp. 1085, 1089-1090 (mandatory urinalysis of nuclear power plant workers, based on reasonable suspicion of use, possession, and sale of illegal drugs, held reasonable); *Feliciano v. City of Cleveland* (N.D. Ohio 1987) 661 F. Supp. 578, 582-596 (surprise urinalysis of police cadets without individualized, reasonable suspicion and without waiver or consent held to be unreasonable search and seizure).

(n67)Footnote 53. See *American Federation of Government Employees v. Skinner* (D.C. Cir. 1989) 885 F.2d 884, 887 & n.4, 889-893.

(n68)Footnote 54. *International Brotherhood of Teamsters v. Department of Transportation* (9th Cir. 1991) 932 F.2d 1292, 1294-1309 (also involving preemployment testing program; for discussion, see [b][i], below).

(n69)Footnote 55. *International Brotherhood of Teamsters v. Department of Transportation* (9th Cir. 1991) 932 F.2d 1292, 1299-1300 (citing *Skinner v. Railway Labor Executives Association* (1989) 489 U.S. 602, 622-624, 632-633, 109 S. Ct. 1402, 103 L. Ed. 2d 639).

(n70)Footnote 56. *International Brotherhood of Teamsters v. Department of Transportation* (9th Cir. 1991) 932 F.2d 1292, 1300-1306 .

(n71)Footnote 57. *International Brotherhood of Teamsters v. Department of Transportation* (9th Cir. 1991) 932 F.2d 1292, 1306-1307 .

(n72)Footnote 58. *International Brotherhood of Teamsters v. Department of Transportation* (9th Cir. 1991) 932 F.2d 1292, 1306-1307 (citing *Skinner v. Railway Labor Exec. Association* (1989) 489 U.S. 602, 626-632, 109 S. Ct. 1402, 103 L. Ed. 2d 639).

(n73)Footnote 59. *AFGE Local 1533 v. Cheney* (9th Cir. 1991) 944 F.2d 503 .

(n74)Footnote 60. *AFGE Local 1533 v. Cheney* (9th Cir. 1991) 944 F.2d 503, 506 .

(n75)Footnote 61. *AFGE Local 1533 v. Cheney* (9th Cir. 1991) 944 F.2d 503, 506 .

(n76)Footnote 62. *International Brotherhood of Electrical Workers, Local 1245 v. United States Nuclear Regulatory Com.* (9th Cir. 1992) 966 F.2d 521 .

(n77)Footnote 63. *International Brotherhood of Electrical Workers, Local 1245 v. United States Nuclear Regulatory Com.* (9th Cir. 1992) 966 F.2d 521, 526-527 .

(n78)Footnote 64. *Local 2391 v. Martin* (9th Cir. 1992) 969 F.2d 788, 791-793 .

(n79)Footnote 65. *Local 2391 v. Martin* (9th Cir. 1992) 969 F.2d 788, 793 .

(n80)Footnote 66. *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 37-38, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n81)Footnote 67. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n82)Footnote 68. See *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 891-898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 (the city's drug testing program also applied to current employees who were seeking promotions. However, the decision held such testing to be unconstitutional under the implied right to privacy found in the *Fourth Amendment*).

(n83)Footnote 69. See *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 854-855, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n84)Footnote 70. See discussion in [a][iii], above.

(n85)Footnote 71. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 896-897, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n86)Footnote 72. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 897-898, 59 Cal. Rptr. 2d 696, 927 P.2d

1200 .

(n87)Footnote 73. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 897-898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n88)Footnote 74. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n89)Footnote 74.1. *Pilkington Barnes Hind v. Superior Court* (1998) 66 Cal. App. 4th 28, 77 Cal. Rptr. 2d 596 .

(n90)Footnote 74.2. *Pilkington Barnes Hind v. Superior Court* (1998) 66 Cal. App. 4th 28, 31, 77 Cal. Rptr. 2d 596 .

(n91)Footnote 74.3. *Pilkington Barnes Hind v. Superior Court* (1998) 66 Cal. App. 4th 28, 31-32, 77 Cal. Rptr. 2d 596 (court did not reach second argument that employer could terminate at will employee at any time with or without cause).

(n92)Footnote 74.4. *Pilkington Barnes Hind v. Superior Court* (1998) 66 Cal. App. 4th 28, 31-32, 77 Cal. Rptr. 2d 596 (court did not reach second argument that employer could terminate at will employee at any time with or without cause).

(n93)Footnote 74.5. *Pilkington Barnes Hind v. Superior Court* (1998) 66 Cal. App. 4th 28, 31-34, 77 Cal. Rptr. 2d 596 (court rejected arguments that four days of employment gave ample time to evaluate and that employment begins at precise moment of hire; court rejected notion that termination violated employee assistance program because program only applied to employees).

(n94)Footnote 75. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 888, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n95)Footnote 76. *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1051, 264 Cal. Rptr. 194 .

(n96)Footnote 77. *See Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1037-1038, 264 Cal. Rptr. 194 .

(n97)Footnote 78. *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1037-1038, 264 Cal. Rptr. 194 .

(n98)Footnote 79. *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1040, 264 Cal. Rptr. 194 ; see discussion in § 50.30[1][a].

(n99)Footnote 80. *See Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 37-38, 26 Cal. Rptr. 2d 834, 865 P.2d 633 .

(n100)Footnote 81. *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1048, 264 Cal. Rptr. 194 .

(n101)Footnote 82. *See 2 Cal. Code Reg. § 7294.0(d); see also Gov. Code §§ 12920, 12921, 12926, 12940* (FEHA disability discrimination provisions). For discussion, *see* § 50.42[2][a], and ch. 41, pt. C.

(n102)Footnote 83. *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1049-1050, 264 Cal. Rptr. 194 .

(n103)Footnote 84. *See, e.g., Long Beach Employees Association v. City of Long Beach* (1986) 41 Cal. 3d 937, 951-952, 227 Cal. Rptr. 90, 719 P.2d 660 ; *see also* discussion in § 50.42[1][b] (waiver issues).

(n104)Footnote 85. *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1050, 264 Cal. Rptr. 194 .

(n105)Footnote 86. *See, e.g., Lab. Code § 1025* (notwithstanding drug rehabilitation accommodation requirements, employer may discharge, or refuse to hire, person based on impaired performance due to drug use); *see also* discussion in [2], *below*.

(n106)Footnote 87. *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1051, 264 Cal. Rptr. 194 .

(n107)Footnote 88. *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1052, 264 Cal. Rptr. 194 . The Court also held that its conclusion that the employer's drug testing policy was constitutional was fatal to the plaintiffs' claims under *Bus. & Prof. Code §§ 17100-17208* (Unfair Practices Act), which were based on allegations that the employer's preemployment drug-testing policy was an unlawful business practice. *see Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1052, 264 Cal. Rptr. 194 .

(n108)Footnote 89. *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1051, 264 Cal. Rptr. 194 .

(n109)Footnote 90. *See Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1052, 264 Cal. Rptr. 194 .

(n110)Footnote 91. *See Gov. Code § 12940(e), (f); 2 Cal. Code Reg. § 7294.0(b)(3), (d).*

(n111)Footnote 92. *See* discussion in § 50.42[2][a].

(n112)Footnote 93. *See Gov. Code § 12940(a); 2 Cal. Code Reg. § 7293.5(b).*

(n113)Footnote 94. *See 2 Cal. Code Reg. § 7293.6(a)(4).*

(n114)Footnote 95. *Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 862-865, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n115)Footnote 96. *See 42 U.S.C. §§ 12112(d), 12114.*

(n116)Footnote 97. *See Gov. Code § 12935.*

(n117)Footnote 98. *See Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 865, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n118)Footnote 99. *See Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 864, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 .

(n119)Footnote 100. *See, e.g., Skinner v. Railway Labor Exec. Association* (1989) 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (involving private railroad employees; discussed in [a][v], *above*).

(n120)Footnote 101. *Skinner v. Railway Labor Executives Association* (1989) 489 U.S. 602, 626, 109 S. Ct. 1402, 103 L. Ed. 2d 639 .

(n121)Footnote 102. *See U.S. Const., amend. IV.*

(n122)Footnote 103. *International Brotherhood of Teamsters v. Department of Transportation* (9th Cir. 1991) 932 F.2d 1292, 1307 .

(n123)Footnote 104. In some circumstances, federal law now *requires* employers who are government contractors to have such a policy. *see 41 U.S.C. § 701 et seq.* In addition, California law requires employers involved in state and local government contracts to provide a drug-free workplace under certain circumstances. *see Gov. Code § 8351 et seq.* (Drug-Free Workplace Act of 1990). For an example of a comprehensive "drug-free workplace" policy, *see Morrison*

& Foerster, *california employers' guide to employee handbooks and personnel policy manuals*, §§ 2.34, 3.29 (Matthew Bender).

(n124)Footnote 105. *See Civ. Code §§ 56-56.37; see also* discussion in § 50.42[2][b]. For discussion of act, *see* ch. 51.

(n125)Footnote 106. *See* discussion in [2], *below*.

(n126)Footnote 104. In some circumstances, federal law now *requires* employers who are government contractors to have such a policy. *see 41 U.S.C. § 701 et seq.* In addition, California law requires employers involved in state and local government contracts to provide a drug-free workplace under certain circumstances. *see Gov. Code § 8351 et seq.* (Drug-Free Workplace Act of 1990). For an example of a comprehensive "drug-free workplace" policy, *see* Morrison & Foerster, *california employers' guide to employee handbooks and personnel policy manuals*, §§ 2.34, 3.29 (Matthew Bender).

(n127)Footnote 105. *See Civ. Code §§ 56-56.37; see also* discussion in § 50.42[2][b]. For discussion of act, *see* ch. 51.

(n128)Footnote 106. *See* discussion in [2], *below*.

(n129)Footnote 107. *See* discussion in [a], *above*.

(n130)Footnote 108. *See generally* Spencer, *The Developing Notion of Employer Responsibility for the Alcoholic, Drug-Addicted, or Mentally Ill Employee: An Examination Under Federal and State Employment Statutes and Arbitration Decisions*, 53 *St. John's L. Rev.* 659 (1979).

(n131)Footnote 109. *Lab. Code § 1025*.

(n132)Footnote 110. *Lab. Code § 1026*.

(n133)Footnote 111. *Lab. Code § 1025*.

(n134)Footnote 112. *Lab. Code § 1027*.

(n135)Footnote 113. *See Penal Code § 8001* (definition of qualifying programs).

(n136)Footnote 114. *See Penal Code § 8002*.

(n137)Footnote 115. *See 29 U.S.C. § 701 et seq.*

(n138)Footnote 116. *See 29 U.S.C. § 706(7)(c)(ii)* (successfully rehabilitated drug user or currently being rehabilitated).



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California Employment Law

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DIVISION V EMPLOYEE PRIVACY RIGHTS

CHAPTER 50 Limitations on Employer Collection of Private Information About Employees

Part D. SPECIFIC INFORMATION-GATHERING PRACTICES IMPLICATING EMPLOYEE PRIVACY ISSUES

3-50 California Employment Law §§ 50.44 through 50.49

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

[Reserved]

§§ 50.44[Reserved]



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CHAPTER 50 Limitations on Employer Collection of Private Information About Employees
Part E. BIBLIOGRAPHY

3-50 California Employment Law § 50.50

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

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Ch. 46, "Invasion of Privacy."

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State Bar of California, Labor and Employment Law Section, *Privacy in the Workplace*.

Legal Topics:

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

Constitutional Law Substantive Due Process Privacy General Overview Labor & Employment Law Employee
Privacy General Overview Labor & Employment Law Employee Privacy Disclosure of Employee Information General
Overview Labor & Employment Law Employee Privacy Invasion of Privacy Torts Intentional Torts Invasion of
Privacy General Overview



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Part E. BIBLIOGRAPHY

3-50 California Employment Law § 50.51

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

§ 50.51 Encyclopedias

6 Cal. Jur. 3d, "Assault and Other Willful Torts," §§ 49-97, 98-104, 105-127.

Legal Topics:

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

Constitutional Law Substantive Due Process Privacy General Overview Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Disclosure of Employee Information General Overview Labor & Employment Law Employee Privacy Invasion of Privacy Torts Intentional Torts Invasion of Privacy General Overview



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3-50 California Employment Law § 50.52

AUTHOR: By Kaye M. Reeves, J.D., Edward Baskauskas, J.D.

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Comment, "Use and Abuse of Urinalysis Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening," 35 *Emory L.J. 1011 (1986).*

Comment, "Your Urine or Job: Is Private Employee Drug Urinalysis Constitutional in California?" 19 *Loyola L. Rev. 1451 (1986).*

Note, "Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs," 39 *Stan. L. Rev. 1453 (1987).*

Legal Topics:

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

Constitutional Law Substantive Due Process Privacy General Overview Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Disclosure of Employee Information General Overview Labor & Employment Law Employee Privacy Invasion of Privacy Torts Intentional Torts Invasion of Privacy General Overview



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DIVISION V EMPLOYEE PRIVACY RIGHTS

CHAPTER 51 Use and Disclosure of Private Information About Employees

3-51 California Employment Law 51.syn

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.syn Synopsis to Chapter 51: Use and Disclosure of Private Information About Employees

§ 51.01 Employee Records Maintained by Employer

§ 51.02 Employees' Right to Inspect Employment Files

[1] Inspection of Personnel Files By Employees

[2] Disclosure of Written Employment References

[3] Disclosure Procedures

[4] Remedies

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§ 51.32 FORM--Complaint for Damages Against Employer for Invasion of Privacy by Disclosure of Private Information to Third Parties

[1] Comment

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§§ 51.33 through 51.39 [Reserved]

§ 51.40 Legal Texts

§ 51.41 Encyclopedias

§ 51.42 Law Reviews and Legal Periodicals

By John M. True, III, J.D.,^{n*} Edward Baskauskas J.D.^{n**}

FOOTNOTES:

(n1)Footnote *. Mr. True is an attorney with the Employment Law Center, a project of the San Francisco Legal Aid Society. He specializes in litigation involving employee privacy and related rights.

Updates to this chapter are prepared by the Publisher's Editorial Staff.

(n2)Footnote **. Edward Baskauskas is a member of the California Bar and an adjunct professor of law at Golden Gate University.



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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 51 Use and Disclosure of Private Information About Employees

3-51 California Employment Law Scope

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

Scope

By John M. True, III, J.D.,^{n*} Edward Baskauskas J.D.^{n**} SCOPE

This chapter discusses statutory, constitutional, and common law restrictions on an employer's use and disclosure of private information about employees. Part A enumerates and explains the circumstances under which an employer may be required by the provisions of various statutes to make disclosures to an employee who requests information such as the contents of a personnel file, medical records, or disciplinary records. Part B discusses restrictions on the disclosure of private information about employees to third parties. Applicable statutory law is treated in Subpart 1 of Part B (including restrictions on the results of AIDS tests, restrictions on the use of medical records, and other subjects). Constitutional and common law protections against employer disclosures are discussed in Subpart 2.

For discussion of the collection of private information by employers, *see* Chapter 50. Other issues relating to employee privacy are discussed elsewhere. Protections regarding garnishment of employees' wages are discussed in Chapter 4. Protections against dissemination of information gathered during investigations of alleged EEO violations are discussed in Chapter 42. Protections against discharge from employment or discipline for nonjob-related conduct, which may involve privacy concerns, are discussed in Chapter 60.

FOOTNOTES:

(n3)Footnote *. Mr. True is an attorney with the Employment Law Center, a project of the San Francisco Legal Aid Society. He specializes in litigation involving employee privacy and related rights.

Updates to this chapter are prepared by the Publisher's Editorial Staff.

(n4)Footnote **. Edward Baskauskas is a member of the California Bar and an adjunct professor of law at Golden Gate University.



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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 51 Use and Disclosure of Private Information About Employees
Part A. DISCLOSURE OF INFORMATION TO EMPLOYEES

3-51 California Employment Law § 51.01

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.01 Employee Records Maintained by Employer

As discussed in Chapter 50, employers compile and maintain a variety of information and records relating to their employees. Some of these records are required to be kept under federal and state statutes concerning health and safety, employment discrimination, and other matters.ⁿ¹ Other employee records are maintained for the administrative purposes of the employer. This part discusses the circumstances under which an employer must disclose such records or must allow an employee to inspect the records.

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawPosting & Recordkeeping

FOOTNOTES:

(n1)Footnote 1. *See, e.g., 42 U.S.C. § 2000e-8(c); 29 C.F.R. §§ 1602, 1607* (recordkeeping requirements under Title VII of Civil Rights Act of 1964); *Gov. Code § 12946; 2 Cal. Code Reg. § 7287.0(c)* (recordkeeping requirements under Fair Employment and Housing Act); *see also* discussion in Chapter 41.



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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 51 Use and Disclosure of Private Information About Employees
Part A. DISCLOSURE OF INFORMATION TO EMPLOYEES

3-51 California Employment Law § 51.02

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.02 Employees' Right to Inspect Employment Files

[1] Inspection of Personnel Files By Employees

The obligation of an employer to permit employees to inspect their own "personnel files" is codified in *Lab. Code § 1198.5*. Under § 1198.5(a), every employer must, at reasonable times and at reasonable intervals as determined by the California Labor Commissioner, on the request of an employee, permit that employee to inspect the personnel files that are used or that have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.ⁿ¹

The definition of "personnel file" is a broad one, intended to include any record used by an employer to make any personnel decision about an employee, such as anything used to determine the employee's qualifications for employment, promotion, additional compensation, termination, or other disciplinary action, wherever located.ⁿ² Thus, more than just the information in an employee's "official" personnel file must be disclosed.

Labor Code Section 1198.5(a) as repealed and reenacted effective January 1, 2001,ⁿ³ provides that every employee has the right to inspect the personnel records that the employer maintains relating to the employee's performance or to any grievance concerning the employee.

Under the Labor Commissioner's current interpretation of *Labor Code § 1198.5*, categories of records generally considered to be "personnel records" are those that are used or have been used to determine an employee's qualifications for promotion, additional compensation, or disciplinary action, including termination. The following are some examples of "personnel records": application for employment; payroll authorization form; notices of commendation, warning, discipline, and/or termination; notices of layoff, leave of absence, and vacation; notices of wage attachment or garnishment; education and training notices and records; performance appraisals/reviews; and attendance records.ⁿ⁴ Thus, for example, if a line supervisor keeps a file on an employee, and that file is used for any of the purposes enumerated in Section 1198.5(a), inspection generally must be permitted.

An employer must maintain a copy of each employee's personnel records at the place the employee reports to work, must provide them to the employee within a reasonable period of time following an employee's request, or permit the employee to inspect them at the location where they are kept, with no loss of compensation to the employee.ⁿ⁵ The employer must make the personnel records available to the employee at reasonable intervals and at reasonable times.ⁿ⁶ There is no requirement that a request to see personnel records be in writing.ⁿ⁷

The Labor Commissioner may adopt regulations that determine the reasonable times and reasonable intervals for the inspection of records maintained by an employer that is not a public agency.ⁿ⁸ Under the current interpretation, "reasonable times" is during the regular business hours of the office where personnel records are usually and ordinarily maintained or at anytime during the employee's regularly scheduled work shift, with sufficient time available to permit the employee an ample opportunity to conduct a thorough inspection. The inspection time must be commensurate with the volume and content of the file, as arbitrary time limits that do not allow for a sufficient review are not within the spirit of the law. The DLSE considers "reasonable intervals" to be once every year unless there is reasonable cause to believe that the file has been altered in a manner that might adversely affect the interests of the employee, or the file contains information pertinent to an ongoing investigation affecting the employee, in which case more frequent inspections would be considered "reasonable." The employer can require that the employee inspect the personnel file on the employee's own free time. However, if the employee is required to travel to the location where the records are stored, the inspection must be during a time when the employee is required to render services to the employer, and the employee must be compensated for that time at the employee's regular rate of pay.ⁿ⁹

Labor Code section 1198.5(d) provides some important exceptions to the general requirement that an employer must provide access to an employee's personnel records. For example, an employer need not disclose letters of reference.ⁿ¹⁰ In addition, the records of an employee relating to the investigation of a possible criminal offense need not be made available for inspection.ⁿ¹¹ Similarly, one court of appeal held that the identity of complainants who triggered an investigation of a physician by a hospital substance abuse committee was not required to be disclosed to the physician before suspension of his staff privileges.ⁿ¹² Also, the employer need not disclose ratings, reports, or records that were (1) obtained prior to the employee's employment, (2) prepared by identifiable examination committee members, or (3) obtained in connection with a promotional examination.ⁿ¹³

Moreover, the statute does not provide for anything more than inspection of the files that must be disclosed. Thus, an employer who does not permit employees to photocopy their files is generally in compliance with the statute.ⁿ¹⁴ However, an employee is entitled to a copy of any instrument relating to the obtaining or holding of employment that the employee has signed.ⁿ¹⁵ Thus, for example, some employers permit employees to inventory, to take notes, or to hand-copy the contents of their personnel files, but will not allow photocopying or other electronic reproduction of any documents except those signed by the employee.

Labor Code section 1198.5 also lacks any provision allowing employees to comment on or to demand removal of any item contained in a personnel file.ⁿ¹⁶ Although the statute is arguably intended to articulate a policy in favor of maintaining truthful and accurate employment records,ⁿ¹⁷ it does not provide a right of action by which an employee can seek to correct alleged inaccuracies.

Finally, the statute by its terms applies only to "employees," which is construed to mean a person who is currently employed, one who is laid off with rights of reemployment, or a person on leave of absence.ⁿ¹⁸ Thus, applicants for employment are not permitted to inspect the records, and neither are lawyers, union officials, or other representatives of employees. Former employees also have the right of inspection until the statute or limitations on any claims they may have against their former employer expire.ⁿ¹⁹

[2] Disclosure of Written Employment References

Labor Code section 1198.5 does not require the disclosure of letters of reference.ⁿ²⁰ Moreover, at least one court has

recognized that an employee's interest in the contents of his or her employment records can conflict with the rights of those who have provided the employer with a confidential reference, recommendation, or opinion about the employee's qualifications. In *Board of Trustees v. Superior Court*,ⁿ²¹ the court struck a balance between these two interests. The court held that an employee is entitled to discovery of his or her personnel file, including letters of reference, but that the employer may delete any information that would identify the person who had given the reference.ⁿ²²

[3] Disclosure Procedures

The employer's obligation to disclose personnel records is limited to a reasonable time at the place of work.ⁿ²³ The employer must (1) keep a copy of each employee's personnel records at the place where the employee reports to work; (2) make the employee's personnel records available at the place where the employee reports to work within a reasonable period of time following an employee's request; or (3) permit the employee to inspect the personnel records at the location where the employer stores the personnel records, with no loss of compensation to the employee.ⁿ²⁴ Other than as set forth in the previous sentence, the employer is not required to make personnel records available at a time when the employee is actually required to render service to the employer.ⁿ²⁵

[4] Remedies

It is a misdemeanor to violate, or to refuse or neglect to comply with, the provisions of *Labor Code section 1198.5*.ⁿ²⁶

In addition, an employee may apply to the Labor Commissioner for enforcement of the disclosure requirements of *Labor Code section 1198.5*.ⁿ²⁷ There is no statutory provision that expressly permits an employee to bring a civil action for enforcement, although there is no provision making the jurisdiction of the Labor Commissioner exclusive.

Legal Topics:

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

Labor & Employment Law Employee Privacy Disclosure of Employee Information General Overview Labor & Employment Law Employee Privacy Disclosure of Employee Information Personnel Files

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 1198.5(a)*.

(n2)Footnote 2. *Lab. Code § 1198.5(a)*; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal. App. 4th 110, 120, 124-125, 68 Cal. Rptr. 2d 844 (*Lab. Code § 1198.5* does not create implied exception to attorney-client privilege or work product doctrine; attorney client privilege applies to legal advice before litigation is threatened, as well as to communications made in anticipation of litigation); see *Kaiser Found. Hospitals v. Superior Court* (1998) 66 Cal. App. 4th 1217, 1227, 78 Cal. Rptr. 2d 543 (employer did not waive attorney-client privilege or work product protections either by pleading adequacy of its prelitigation investigation as defense to action for employee discrimination or harassment or by providing claimants substantial discovery of employer's nonattorney in-house investigation report, unless it could be established through other discovery that significant part of any particular communication had already been disclosed to third parties).

(n3)Footnote 3. 2000 Cal. Stat. 886, § 11.

(n4)Footnote 4. See http://www.dir.ca.gov/dlse/FAQ_RightToInspectPersonnelFiles.html.

(n5)Footnote 5. *Lab. Code § 1198.5(c)*.

(n6)Footnote 6. See *Lab. Code 1198.5(b)*.

(n7)Footnote 7. See generally *Lab. Code 1198.5(b)*.

(n8)Footnote 8. *Lab. Code § 1198.5(e)*.

(n9)Footnote 9. *See* http://www.dir.ca.gov/dlse/FAQ_RightToInspectPersonnelFiles.html.

(n10)Footnote 10. *See Johnson v. Winter (1982) 127 Cal. App. 3d 435, 439-440, 179 Cal. Rptr. 585 ; Board of Trustees v. Superior Court (1981) 119 Cal. App. 3d 516, 530-531, 174 Cal. Rptr. 160* . For further discussion of the question of employees' access to letters of reference about them, *see* [2], *below*.

(n11)Footnote 11. *Lab. Code § 1198.5(d)*.

(n12)Footnote 12. *Goodstein v. Cedars-Sinai Medical Ctr. (1998) 66 Cal. App. 4th 1257, 1268, 78 Cal. Rptr. 2d 577* (noting that although principles of constitutional criminal procedure did not apply in this setting, role of complainants here was essentially identical to the role that of informant in criminal case).

(n13)Footnote 13. *Lab. Code § 1198.5(d)(3)*.

(n14)Footnote 14. *See Lab. Code § 1198.5(a)*.

(n15)Footnote 15. *Lab. Code § 432; see* discussion in § 51.03.

(n16)Footnote 16. *cf. Gov. Code § 31011* (applicable to employees of State of California); *Educ. Code §§ 44031* (school district employees), 87031 (community college district employees), 89546 (state college and university employees).

(n17)Footnote 17. *See* D.L.S.E. Policy & Procedure Memo. No. 76-2 (Jan. 15, 1976).

(n18)Footnote 18. *See* http://www.dir.ca.gov/dlse/FAQ_RightToInspectPersonnelFiles.html.

(n19)Footnote 19. *See* http://www.dir.ca.gov/dlse/FAQ_RightToInspectPersonnelFiles.html.

(n20)Footnote 20. *Lab. Code § 1198.5(d)(2)*.

(n21)Footnote 21. *Board of Trustees v. Superior Court (1981) 119 Cal. App. 3d 516, 174 Cal. Rptr. 160* .

(n22)Footnote 22. *Board of Trustees v. Superior Court (1981) 119 Cal. App. 3d 516, 531-533, 174 Cal. Rptr. 160*

(n23)Footnote 23. *See Lab. Code § 1198.5(b)*.

(n24)Footnote 24. *Lab. Code § 1198.5(c)*.

(n25)Footnote 25. *Lab. Code § 1198.5(b)*.

(n26)Footnote 26. *Lab. Code § 1199(c); see* http://www.dir.ca.gov/dlse/FAQ_RightToInspectPersonnelFiles.html.

(n27)Footnote 27. *Lab. Code §§ 95(a), 96, 98-98.7*.



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Part A. DISCLOSURE OF INFORMATION TO EMPLOYEES

3-51 California Employment Law § 51.03

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.03 Disclosure of Instruments Relating to Employment Signed by Employee

If an employee or job applicant has signed any instrument relating to the obtaining or holding of employment, he or she must be given a copy of the instrument on request.ⁿ¹ Such instruments may include employment applications, employment agreements, confidentiality agreements, covenants not to compete, authorizations, tax forms, and employee evaluations.

Violation of this requirement is punishable as a misdemeanor,ⁿ² and the requirement can be enforced by the Labor Commissioner as head of the Division of Labor Standards Enforcement.ⁿ³ There is no statutory provision for private enforcement of the requirement; however, there is no provision making the Labor Commissioner's enforcement jurisdiction exclusive.

The employer's duty to provide copies of instruments signed by the employee is separate from the duty to make the instruments available for inspection.ⁿ⁴

■ CONSULTANT'S COMMENT:

*Labor Code sections 432 and 1198.5 and the DLSE's policyn5 answer many questions about employees' access to employment records, but they leave a number of practical and legal issues unresolved. For example, although an employer may refuse to give an employee a copy of unsigned personnel documents in his or her personnel file,ⁿ⁶ the prospect of the employee taking notes on file contents for hours may be unacceptable. Thus, many employers provide copies of files on request, even though they are under no legal obligation to do. In addition, although an employer may refuse to reveal "letters of reference" and records "relating to the investigation of a possible criminal offense,"ⁿ⁷ neither category of record is defined by statute. The employer also need not reveal certain specified ratings or reports.ⁿ⁸ In light of these interpretive dilemmas and the rise in wrongful discharge litigation, an employer that has reason to believe that a request for inspection of personnel records is the first step toward legal action may wish to consult counsel before deciding how best to respond. *Commentary by Kirby Wilcox.**

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationPersonnel Files

FOOTNOTES:

(n1)Footnote 1. *Lab. Code* § 432.

(n2)Footnote 2. *Lab. Code* § 433.

(n3)Footnote 3. *See Lab. Code* §§ 95(a), 98-98.9.

(n4)Footnote 4. *See Lab. Code* § 1198.5 (requiring only that employer allow employee to "inspect" personnel records); *see also* discussion in § 51.02.

(n5)Footnote 5. [Reserved]

(n6)Footnote 6. *Compare Lab. Code* § 1198.5(a) (providing for inspection of personnel records) *with Lab. Code* § 432 (requiring employer to provide copies of employment documents signed by employee or applicant); *see* discussion in § 51.02[1].

(n7)Footnote 7. *See Lab. Code* § 1198.5(d).

(n8)Footnote 8. *Lab. Code* § 1198.5(d)(3).



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CHAPTER 51 Use and Disclosure of Private Information About Employees
Part A. DISCLOSURE OF INFORMATION TO EMPLOYEES

3-51 California Employment Law § 51.04

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.04 Disclosure of Shopping Investigators' Reports

An employer in the retail, commercial, or service industry that conducts investigations of employees by means of a licensed "shopping investigator"ⁿ¹ must provide a copy of the investigator's report to any employee prior to disciplining or discharging that employee as a result of the investigation.ⁿ² If an investigatory interview occurs pursuant to the investigator's report and as a result of which the employee could be disciplined or discharged, the employer must make the investigator's report available to the employee during the course of the interview prior to its conclusion.ⁿ³ The employer must provide the report to the investigated employee in the foregoing circumstances regardless of whether the employee has requested the report.ⁿ⁴

The obligation to provide this information does not apply if the shopping investigator is employed exclusively and regularly by one employer in connection with the affairs of only that employer, there exists an employer-employee relationship, and the entire investigation is conducted solely for that employer by the investigator.ⁿ⁵ For discussion of restrictions on such investigations, *see* Chapter 50.

The duty to provide employees with shopping investigators' reports may be enforced by the Labor Commissioner as head of the Division of Labor Standards Enforcement.ⁿ⁶ There is no statutory provision for private enforcement of the duty; however, there is no provision making the Labor Commissioner's enforcement jurisdiction exclusive.

Legal Topics:

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

Labor & Employment Law Employee Privacy Disclosure of Employee Information General Overview Labor & Employment Law Employee Privacy Disclosure of Employee Information Personnel Files

FOOTNOTES:

(n1)Footnote 1. *See Lab. Code § 2930(b)* ("shopping investigator" is person who shops for, buys, or orders goods, or who observes or otherwise reviews the procedures and performance of retail, commercial or service employees, and

then writes report on what he or she has observed).

(n2)Footnote 2. *Lab. Code § 2930(a)*.

(n3)Footnote 3. *Lab. Code § 2930(a)*.

(n4)Footnote 4. *See Lab. Code § 2930(a)*.

(n5)Footnote 5. *Lab. Code § 2930(a)*.

(n6)Footnote 6. *See Lab. Code §§ 95(a), 98-98.9*.



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Part A. DISCLOSURE OF INFORMATION TO EMPLOYEES

3-51 California Employment Law § 51.05

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.05 Disclosure of Medical Records

The California Confidentiality of Medical Information Act generally restricts an employer's use and disclosure of employee medical records.ⁿ¹ However, the provisions of the Act do not affect existing laws relating to an employee's right of access to his or her own medical information, or relating to disclosures made pursuant to *Evidence Code section 1158*, or relating to privileges established under the Evidence Code.ⁿ² Similarly unaffected are obligations to disclose medical information to employees or their representatives under Cal/OSHA "right to know" regulations.ⁿ³ For example, employees may demand to see records of tests performed on them or others to measure the levels of toxic substances in their systems or in the work environment.ⁿ⁴

Legal Topics:

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

Labor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyMedical & Related Examinations

FOOTNOTES:

(n1)Footnote 1. *Civ. Code* §§ 56-56.37; *see* § 51.13.

(n2)Footnote 2. *Civ. Code* § 56.28.

(n3)Footnote 3. *Civ. Code* § 56.30(e); *see* 8 *Cal. Code Reg.* § 3204.

(n4)Footnote 4. *See* 8 *Cal. Code Reg.* § 3204(e).



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DIVISION V EMPLOYEE PRIVACY RIGHTS
CHAPTER 51 Use and Disclosure of Private Information About Employees
Part A. DISCLOSURE OF INFORMATION TO EMPLOYEES

3-51 California Employment Law § 51.06

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.06 Inspection and Copying of Records Regarding Wage Deductions

Employers must provide written statements of wage deductions to their employees, either semi-monthly or at the time of each wage payment.ⁿ¹ Employers who make cash payments of wages must keep copies of those statements or a record of deductions on file for at least three years at either the place of employment or a central location within California.ⁿ²

An employer that is required by the Labor Code or by any regulation to keep this information must afford any current or former employee the right to inspect or copy the records pertaining to that employee.ⁿ³ The employer may take reasonable steps to assure the identity of the current or former employee, and, if the employer provides copies of records, it may charge the actual cost of reproduction to the current or former employee.ⁿ⁴

Legal Topics:

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

Labor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationPersonnel FilesLabor & Employment LawWage & Hour LawsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Labor Code § 226(a)*; see Chapter 4.

(n2)Footnote 2. *Lab. Code § 226(a)*. For discussion of other recordkeeping requirements under wage and hour laws, see Chapter 7.

(n3)Footnote 3. *Lab. Code § 226(b)*.

(n4)Footnote 4. *Lab. Code § 226(b)*.



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3-51 California Employment Law §§ 51.07 through 51.09

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

[Reserved]

§§ 51.07[Reserved]



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Part B. RESTRICTIONS ON USE OF PRIVATE EMPLOYEE INFORMATION AND ON DISCLOSURE TO PERSONS OTHER THAN EMPLOYEE

Subpart 1. Specific Statutory Restrictions

3-51 California Employment Law § 51.10

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.10 Use and Disclosure of HIV Test Results

[1] Restrictions on Use and Disclosure of Test Results

The Legislature has responded to the problems posed by the spread of Acquired Immune Deficiency Syndrome (AIDS) by enacting comprehensive legislation providing for research in a number of areas, care of persons with AIDS, and other subjects. Among other things, this legislation restricts the use and disclosure of tests designed to detect the human immunodeficiency virus ("HIV," the virus that causes AIDS).ⁿ¹ For purposes of this legislation, an "HIV test" is any clinical test, laboratory or otherwise, used to identify HIV, a component of HIV, or antibodies or antigens to HIV.ⁿ²

The results of an HIV test that identifies or provides identifying characteristics of the person to whom the test results apply may not be used in any instance for the determination of suitability for employment, except as otherwise provided by statute.ⁿ³ This provision, coupled with other provisions requiring written consent to testing and covering privacy rights of persons subject to HIV blood tests,ⁿ⁴ effectively bans the use of HIV testing of employees or applicants for employment. Indeed, the statutory language is arguably broad enough to foreclose even questioning employees or applicants regarding whether they have tested positive for HIV.ⁿ⁵

In addition to these restrictions on the *use* of test results, the law imposes civil and criminal liability on those who improperly *disclose* test results.ⁿ⁶ For discussion of the remedies provided by the statutes, *see* [2], *below*.

Because the statute is worded expansively with respect to both use and disclosure of HIV test results,ⁿ⁷ there can be little question that it applies to all California employers, absent some specific statutory exemption. For discussion of the exemptions provided for by the statute, *see* [3], *below*.

[2] Remedies

Any person who negligently discloses results of an HIV test to any third party, in a manner that identifies or provides

identifying characteristics of the person to whom the test results apply, is subject to assessment of a civil penalty in an amount not to exceed \$2,500 plus court costs as determined by the court, to be paid to the subject of the test. This liability does not apply to (1) a disclosure made pursuant to a written authorization as described in *Health and Safety Code section 120980(g)*; (2) a disclosure under *Health and Safety Code sections 1603.1* or *1603.3*, which provide for notification of potential contamination of blood supplies, or *Health and Safety Code section 121022*, pertaining to reporting of cases of HIV and AIDS to the appropriate governmental agencies, or (3) a disclosure under any other statute that provides an exemption to the penalty.ⁿ⁸ For a willful violation, the amount of the civil penalty is not less than \$5,000 and not more than \$10,000, plus court costs as determined by the court.ⁿ⁹

Each wrongful disclosure of HIV test results is a separate violation of the statute.ⁿ¹⁰ Thus, if an employer has access to an employee's HIV test results, disclosure to a number of different individuals may give rise to multiple liability.

In addition to these civil penalties, any person who commits negligent or willful disclosure is liable to the subject for all actual damages, including damages for economic, bodily, or psychological harm that is proximately caused by the act.ⁿ¹¹ Additionally, an injured subject may recover damages under any other applicable law.ⁿ¹² Thus, for example, an employee may be able to bring an action for common law or constitutional invasion of privacy, for intentional infliction of emotional distress, or for defamation, in addition to the action based on the statutory restrictions on the disclosure of HIV test results. For discussion of constitutional and common law theories of recovery, *see* §§ 51.20, 51.21.

In contrast to the statutory remedies specified for wrongful disclosure of test results, there is no specific statutory remedy for the improper *use* of test results in a determination of suitability for employment.ⁿ¹³ However, an employee whose employment is terminated because of a positive test result could arguably state an action for wrongful discharge in violation of public policy based on the statutory prohibition of *Health and Safety Code section 120980(f)*.ⁿ¹⁴ For discussion of liability for wrongful termination, *see* Chapter 60.

[3] Exceptions to Liability

There is no liability for disclosure of HIV test results if the disclosure is made pursuant to written authorization by a person responsible for the care and treatment of the person tested.ⁿ¹⁵ However, this exemption from liability applies only to the disclosure of test results by a person responsible for the care and treatment of the person subject to the test. Moreover, written authorization is required for each separate disclosure of the test results, and the authorization must specify the person to whom the disclosure would be made.ⁿ¹⁶ Thus, the "written authorization" exemption would not ordinarily apply to disclosure by an employer.

Also exempt from liability are disclosures that are necessary for public health purposes.ⁿ¹⁷ In addition, other statutes may expressly provide exemptions from liability for disclosure.ⁿ¹⁸

Compliance with *Insurance Code sections 799 et seq.*, regarding the underwriting of risks associated with AIDS, is an exception to the prohibition of using the results of an HIV test that identifies or provides identifying characteristics of the person to whom the test results apply for the determination of suitability for employment.^{n18.1}

Finally, there is no liability or criminal sanction for disclosure of an HIV test in accordance with any reporting requirement for a diagnosed case of AIDS by the state Department of Health or the Centers for Disease Control under the United States Public Health Service.ⁿ¹⁹

Legal Topics:

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

Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Medical & Related Examinations

FOOTNOTES:

(n1)Footnote 1. *See Health & Safety Code § 120775(b)* (definition of HIV).

(n2)Footnote 2. *Health & Safety Code § 120775(c)*.

(n3)Footnote 3. *Health & Safety Code § 120980(f)*. *See Ins. Code § 799 et seq.*, regarding underwriting of AIDS risks.

(n4)Footnote 4. *Health & Safety Code §§ 120975, 120990*.

(n5)Footnote 5. *See Health & Safety Code § 120980(f)* (precluding use of test results to determine suitability for employment, except as otherwise provided by statute); *see also* Ch. 50.

(n6)Footnote 6. *Health & Safety Code § 120980(a)-(d)*; *see also Health & Safety Code § 120980(k), (l)* (defining "disclosed").

(n7)Footnote 7. *See Health & Safety Code § 120980(a),(b)* (imposing liability on "[a]ny person" who discloses results), (f) (precluding use of results "in any instance," except as otherwise provided by statute).

(n8)Footnote 8. *Health & Safety Code § 120980(a)*.

(n9)Footnote 9. *Health & Safety Code § 120980(b)*.

(n10)Footnote 10. *See Health & Safety Code § 120980(e)*.

(n11)Footnote 11. *Health & Safety Code § 120980(d)*.

(n12)Footnote 12. *Health & Safety Code § 120980(h)*.

(n13)Footnote 13. *See Health & Safety Code § 120980*.

(n14)Footnote 14. *See Health & Safety Code § 120980(h)* (section does not limit or expand right of injured subject under other applicable law).

(n15)Footnote 15. *Health & Safety Code § 120980(a), (b)*; *see [2], above*.

(n16)Footnote 16. *Health & Safety Code § 120980(g)*.

(n17)Footnote 17. *Health & Safety Code § 120980(a),(b)*; *see Health & Safety Code §§ 1603.1, 1603.3 121022*.

(n18)Footnote 18. *Health & Safety Code § 120980(a),(b)*; *see, e.g., Health & Safety Code § 120985* (regarding disclosure by physician who ordered test to other health care providers under certain conditions).

(n19)Footnote 18.1. *See Health & Safety Code § 120980(f)*.

(n20)Footnote 19. *Health & Safety Code § 120980(i)*.



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Subpart 1. Specific Statutory Restrictions

3-51 California Employment Law § 51.11

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.11 Alcohol and Drug Rehabilitation Programs

[1] Requirements

An employer of 25 or more employees must reasonably accommodate employees who wish to voluntarily enter and participate in an alcohol or drug rehabilitation program, by providing unpaid time off (or permitting the use of any accrued paid sick leave) for this purpose, provided that such accommodation does not impose an undue hardship on the employer.ⁿ¹ This accommodation must be accompanied by "reasonable efforts to safeguard the privacy of the employee" concerning the fact that he or she has enrolled in a rehabilitation program.ⁿ²

These substantive provisions have yet to be interpreted by the courts. Moreover, the term "reasonable efforts" in respect to safeguarding privacy is not defined in the statute.

The accommodation requirements and exceptions thereto are further discussed in Chapter 50.

[2] Method of Enforcement

An employee who believes that he or she has been denied reasonable accommodation to participate in an alcohol or drug rehabilitation program may file a complaint with the Labor Commissioner.ⁿ³

Although the statute does not provide a specific remedy for violations of its confidentiality provision,ⁿ⁴ it is likely that recourse to the Labor Commissioner may also be had by employees aggrieved by breaches of confidentiality with respect to statutorily mandated drug or alcohol program accommodation.ⁿ⁵

Additionally, the provisions of *Labor Code section 98.7* apply to a complaint based on a violation of the accommodation requirement.ⁿ⁶ *Labor Code section 98.7* permits a complainant to bring an action in an appropriate court after a determination by the Labor Commissioner that no violation has occurred.ⁿ⁷ Section 98.7(d) also permits

the appropriate court to determine whether a violation occurred, and if so, to restrain the violation and to order all appropriate relief to remedy the violation. Appropriate relief includes, but is not limited to, reimbursement of lost wages, with interest, and other compensation or equitable relief as is appropriate under the circumstances of the case.ⁿ⁸ For complete discussion of the remedies provided for by section 98.7, *see* Chapter 5.

A common law action for invasion of privacy also could conceivably include an allegation that an employer violated the statutory requirement that the employer to make reasonable efforts to safeguard the privacy of the employee concerning the enrollment in an alcohol or drug rehabilitation program.ⁿ⁹ For a discussion of common law principles that apply to employer disclosures of information about employees, *see* § 51.21.

■ CONSULTANT'S COMMENT:

Labor Code sections 1025-1028 pertaining to reasonable accommodation of employees who voluntarily enter alcohol or drug rehabilitation programs, present a number of difficult interpretive issues. For example, an employee whom an employer has legitimately decided to discipline or discharge may invoke section 1025 after the employer has decided to act but before the decision has been communicated to the employee. Section 1025 does not necessarily prohibit an otherwise legitimate discipline or discharge under such circumstances,ⁿ¹⁰ but the facial integrity of a consequent lawsuit brought pursuant to section 1025 is obvious. In addition, the absence of a statutory definition of the required accommodation leaves open the question whether courts will find the accommodation obligations under section 1025 and the accommodation obligations under the disability provisions of the Fair Employment and Housing Actⁿ¹¹ and the Rehabilitation Act of 1973ⁿ¹² to be coextensive.ⁿ¹³ *Commentary by Kirby Wilcox.*

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyAlcohol & Drug TestingLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code §§ 1025-1028; see Lab. Code §§ 1025, 1027; see also* Stats. 1984, ch. 1103, § 2, Stats. 1987, ch. 506 (stating legislative intent regarding alcohol and drug rehabilitation); *but see Penal Code § 8002* (exempting participants, director, and staff of certain live-in rehabilitation programs from application of *Lab. Code § 1025*).

(n2)Footnote 2. *Lab. Code § 1026.*

(n3)Footnote 3. *Lab. Code § 1028.*

(n4)Footnote 4. *See Lab. Code § 1026*

(n5)Footnote 5. *See Lab. Code § 95(a)* (providing that Division of Labor Standards Enforcement, of which the Labor Commissioner is the head, may enforce the provisions of the Labor Code the enforcement of which is not specifically vested in any other officer, board, or commission).

(n6)Footnote 6. *Lab. Code § 1028.*

(n7)Footnote 7. *See Lab. Code §§ 98.7(d)(1), 1028.*

(n8)Footnote 8. *Lab. Code § 98.7(d)(1).*

(n9)Footnote 9. *See Lab. Code § 1026.*

(n10)Footnote 10. *See Lab. Code § 1025.*

(n11)Footnote 11. *See Gov. Code §§ 12926(i), 12940(a); 2 Cal. Code Reg. § 7293.9.*

(n12)Footnote 12. *See 29 U.S.C. §§ 793, 794; 28 C.F.R. § 41.53; 41 C.F.R. § 60-741.21(f).*

(n13)Footnote 13. For discussion of accommodation requirements for physically handicapped employees and applicants under equal employment opportunity laws, *see* Chapter 41.



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3-51 California Employment Law § 51.12

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.12 Business Records Act

[1] Coverage of Act

The Business Records Act¹ provides in pertinent part that no business entity that performs bookkeeping services may disclose in whole or in part the contents of any record, including the disclosure of information in the record in any composite of information that is prepared or maintained by that business entity to any person, other than the individual or business entity that is the subject of the record, without the express written consent of that individual or business entity.² This provision precludes a business entity that performs bookkeeping services from disclosing to third parties the contents of records prepared by it without the consent of the subjects of such records, even though the identities of the individual subjects would not be disclosed with the information.³

The terms used in the Act are broadly defined.⁴ Although certain financial institutions are excluded from the law's coverage,⁵ the bookkeeping functions carried out by many employers appear to fall within the literal definition of the activities regulated by the statute. Thus, as most employers perform some "bookkeeping services,"⁶ a duty not to disclose private information about individuals whose personal data is contained in the employer's records may be inferred. Therefore, assuming that the Act applies to employers' personnel records, employees have a right not to have business records of which they are the subject disclosed to third parties without the employees' permission.⁷

[2] Employers Subject to Act

For purposes of The Business Records Act, a "business entity" includes a sole proprietorship, partnership, corporation, association or other group, however organized and whether or not organized to operate at a profit, but does not include a financial institution organized, chartered, or holding a license or authorization certificate under California or federal law to make loans or extend credit and subject to supervision by an official or agency of California or the United States, nor the parent of any such financial institution, nor any subsidiary of any such financial institution or parent.⁸

[3] Disclosures Exempt From Act

The Act does not prohibit any of the following:⁹

1. A disclosure¹⁰ made pursuant to a subpoena or court order.
2. A disclosure of information that is discoverable.
3. Compliance with a lawful search warrant.
4. A disclosure to a law enforcement agency when required for a lawful investigation of criminal activity.
5. A disclosure to a taxing agency for purposes of tax administration.

[4] Method of Enforcement

A person may initiate a civil action against a business entity in accordance with state law whenever the entity violates the provisions of The Business Records Act.¹¹ The action must be brought within two years after the cause of action arises.¹²

The plaintiff in such an action may recover actual damages sustained as a result of the violation (but not less than \$500), plus the attendant court costs and reasonable attorney's fees.¹³

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *Civ. Code §§ 1799-1799.3*

(n2)Footnote 2. *Civ. Code § 1799.1(a)*.

(n3)Footnote 3. *62 Ops. Cal. Atty. Gen. 10 (1979)* .

(n4)Footnote 4. *See Civ. Code § 1799(a)-(e)*.

(n5)Footnote 5. *See Civ. Code § 1799(b)*.

(n6)Footnote 6. *See Civ. Code § 1799(a)* (defining bookkeeping services to include keeping books, making trial balances, making audits, or preparing statements and reports, all as a part of bookkeeping operations, provided that the trial balances, statements, or reports are not issued as having been prepared or examined by a certified public accountant or public accountant over his or her name); *see also Civ. Code § 1799(e)* ("record" is any item, collection, or grouping of information about an individual or business entity).

(n7)Footnote 7. *See Civ. Code § 1799.1(a)*.

(n8)Footnote 8. *Civ. Code § 1799(b)*.

(n9)Footnote 9. *Civ. Code § 1799.1(b)*.

(n10)Footnote 10. Although the statute does not prohibit disclosure of personnel records pursuant to a subpoena, the employee's right of privacy under *Cal. Const., art. I, § 1* may impose limitations on such disclosure. *see El Dorado Savings & Loan Ass'n v. Superior Court* (1987) 190 Cal. App. 3d 342, 345-346, 235 Cal. Rptr. 303 (employee's personnel file was protected by constitutional right to privacy; plaintiff seeking disclosure of file in employment discrimination action had burden of showing that production of entire file was necessary and that there were no less intrusive means of obtaining the relevant information); *see also Harding Lawson Assocs. v. Superior Court* (1992) 10 Cal. App. 4th 7, 12 Cal. Rptr. 2d 538 (wrongful termination plaintiff failed to show compelling need for confidential documents in former coemployees' personnel files to justify trial court's discovery order regarding those files); and discussion in § 51.20. Furthermore, a subpoena seeking production of employment records must comply with the requirements of *Code Civ. Proc. § 1985.6*, as discussed in § 51.16.

(n11)Footnote 11. *Civ. Code § 1799.2(a)*.

(n12)Footnote 12. *Civ. Code § 1799.2(c)*.

(n13)Footnote 13. *Civ. Code § 1799.2(b)*.



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3-51 California Employment Law § 51.13

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.13 Confidentiality of Medical Information

[1] Duties Imposed on Employers and Health Care Providers

The Confidentiality of Medical Information Actⁿ¹ significantly restricts the use and disclosure of medical information about employees. For purposes of the Act, "medical information" is any individually identifiable information, in electronic or physical form, in possession of or derived from a provider of health care or health care service plan regarding a patient's medical history, mental or physical condition, or treatment. "Individually identifiable" means that the medical information includes or contains any element of personal identifying information sufficient to allow identification of the individual, such as the patient's name, address, electronic mail address, telephone number, social security number, or other information that, alone or in combination with other publicly available information, reveals the individual's identity.ⁿ²

The Act requires all employers to establish appropriate measures to ensure the confidentiality and protection from unauthorized use and disclosure of medical information.ⁿ³

In addition, the Act limits the disclosure of medical information by health care providers, health care service plans, or contractors.ⁿ⁴ Therefore, to the extent that an employer is also a provider of health care, the employer is also subject to these requirements.

An employer that is a provider of health care, health care service plans, or contractors does not violate the employers' duties spelled out in the Actⁿ⁵ by complying with their dutiesⁿ⁶ concerning medical information possessed in connection with providing health care services to the patients.ⁿ⁷ Conversely, such a health care provider does not violate the obligations of providers set forth in the Act by disclosing, in accordance with the duties imposed on employers, medical information possessed in connection with employing the provider's employees.ⁿ⁸

For further discussion of the Act as it relates to health care providers, *see* California Forms of Pleading and Practice, "Privacy."

[2] Employers' Substantive Rights and Responsibilities

[a] Limitations on Use and Disclosure of Medical Information

Each employer that receives medical information from a provider of health care must establish appropriate procedures to ensure the confidentiality and protection from unauthorized use and disclosure of that information.ⁿ⁹ These procedures may include, but are not limited to, instruction regarding confidentiality of employees and agents handling files containing medical information, and security systems restricting access to files containing medical information.ⁿ¹⁰

An employer generally may not use, disclose, or knowingly permit its employees or agents to use or disclose medical information about an employee without the employee having first signed an authorization permitting such use or disclosure.ⁿ¹¹ However, disclosure may be made under certain circumstances even if the employee has not authorized it.ⁿ¹²

■ CONSULTANT'S COMMENT:

In light of the statutory protections afforded employee medical information, employers are advised to keep employee medical information separate from other personnel records, under lock and key if possible. Only supervisors with clear business reasons to know the contents of such medical files should be allowed access. *Commentary by Kirby Wilcox.*

[b] Authorization for Release of Information

An authorization for the release of medical information must comply with the following requirements:ⁿ¹³

- The authorization must be either handwritten by the person who signs it or printed in at least 14-point type.ⁿ¹⁴
- The authorization must be clearly separate from any other language present on the same page, and it must be executed by a signature that serves no purpose other than to execute the authorization.ⁿ¹⁵
- The authorization must be signed and dated by either:
 - The patient.ⁿ¹⁶ However, if the patient is a minor, then he or she may sign an authorization only for the disclosure of information obtained by a health care provider in the course of furnishing services for which the minor could legally give consent.ⁿ¹⁷
 - The legal representative of the patient, if the patient is a minor or incompetent.ⁿ¹⁸ However, if the patient is a competent minor, his or her representative may not sign an authorization for the disclosure of information obtained by a health care provider in the course of furnishing services for which the minor could legally give consent.ⁿ¹⁹
 - The beneficiary or personal representative of a deceased patient.ⁿ²⁰
- The authorization must state the limitations, if any, on the types of medical information to be disclosedⁿ²¹ and on the uses to which the information may be put.ⁿ²²
- The authorization must state the name or functions of the employer or person authorized to disclose the information.ⁿ²³

■ The authorization must state the name or functions of the persons or entities authorized to receive the information.n24

■ The authorization must specify the date after which the employer is no longer authorized to disclose the medical information.n25

■ The authorization must include a statement advising the person who signed the authorization of the right to receive a copy of it.n26

On demand from the patient or the person who signed the authorization, an employer possessing the authorization must furnish a true copy of the authorization.n27

[c] FORM--Authorization for Release of Medical Information

[i] Comment

The form set forth in [ii], below, is sufficient to authorize the release of medical information under the provisions of the Confidentiality of Medical Information Act.n28

[ii] Form AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION

AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION

I hereby authorize _____ [*name of employer or person authorized to release information*] to release the medical information described below relating to _____ [*myself or name of patient*] to _____ [*name of person or entity authorized to receive information*].

This authorization is limited to the following types of information: _____ [*specify*] .

This information is limited to the following uses of the information released: _____ [*specify*] .

This authorization shall remain valid only until _____ [*date*] .

[*If authorization is signed by parent or guardian of minor employee, insert: I am the _____ (parent or guardian) of _____ (name), a minor, whose records are to be furnished only for the purpose of _____ (specify).*]

I understand that I have the right to receive a true copy of this authorization. By placing my initials to the left of this clause on the original authorization, I acknowledge that I have received a true copy of this authorization.

Date: _____.

_____ [*Signature*]

[d] Cancellation of Authorization

A person who can sign an authorization pursuant to the Confidentiality of Medical Information Act may cancel or modify the authorization. However, the cancellation or modification becomes effective only after the employer actually receives written notice of it.n29

[e] Establishment of More Restrictive Policy by Employer

If an employer maintains a written policy or makes a written agreement with one or more of its employees providing that particular types of medical information are not to be used or disclosed by the employer in particular ways, the employer must obtain authorization for such uses or disclosures, even if authorization would not otherwise be required by the Confidentiality of Medical Information Act.ⁿ³⁰

[f] Employer's Duty to Communicate Limits of Authorized Disclosure

An employer that discloses medical information pursuant to an authorization required by the Confidentiality of Medical Information Act must communicate to the person or entity to which it discloses the medical information any limitations in the authorization regarding its use. An employer that has attempted in good faith to comply with this requirement will not be held liable for any unauthorized use of the medical information by the person or entity to whom the employer disclosed the information.ⁿ³¹

[g] Disclosure by Recipient

A recipient of medical information pursuant to an authorization under the Confidentiality of Medical Information Act may not further disclose that medical information unless the further disclosure is made pursuant to a new authorization that meets the requirements of the Act, or as specifically required or permitted by other provisions of the Act or other laws.ⁿ³²

[h] No Waiver

No provider of health care, a health care service plan, or contractor may require a patient to sign an authorization, release, consent, or waiver permitting the disclosure of otherwise confidential medical information as a condition of receiving health care.ⁿ³³ Any waiver sought or obtained from an employee, except by valid authorization, is contrary to public policy and is unenforceable.ⁿ³⁴

[i] Discrimination by Employers

No employer may discriminate against an employee in terms or conditions of employment due to that employee's refusal to sign an authorization to release medical information under the Confidentiality of Medical Information Act.ⁿ³⁵ However, this provision does not prohibit an employer from taking such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization under the Act.ⁿ³⁶

Thus, for example, although an employer may not terminate or otherwise discipline an employee for the act of refusing to authorize disclosure of medical information by the employee's physician, the employer apparently would be permitted to draw adverse inferences from the resulting lack of pertinent medical information when making an employment decision.

[3] Exceptions to Prohibition Against Disclosure

An employer may disclose medical information under any of the following circumstances, even if the patient has not authorized disclosure:ⁿ³⁷

- When disclosure is compelled by judicial or administrative process or by any other specific provision of law.
- When the information is relevant to a lawsuit, arbitration, grievance, or other claim or challenge to which the employer and employee are parties and in which the employee has placed in issue his or her

medical history, mental or physical condition, or treatment.

- When the information is necessary for the administration and maintenance of employee benefit plans (including health care, disability, and workers' compensation plans), and for determining eligibility for paid and unpaid leave from work for medical reasons.

- When necessary to aid the diagnosis or treatment of the employee by a health care provider in circumstances in which the patient or other person who has the power to authorize disclosure³⁸ is unable to authorize the disclosure.

[4] Enforcement and Remedies

[a] Criminal Penalty

A violation of the Confidentiality of Medical Information Act that results in economic loss or personal injury to the employee is punishable as a misdemeanor.³⁹

[b] Civil Action

A patient who has sustained economic loss or personal injury as a result of a violation of the use or disclosure provisions of the Confidentiality of Medical Information Act may recover compensatory damages, punitive damages not to exceed \$3,000, attorney's fees not to exceed \$1,000, and the costs of litigation.⁴⁰ The Act's provision permitting the recovery of punitive damages does not specifically refer to *Civil Code section 3294*, which sets forth the requirements for imposing punitive damages in civil actions generally.⁴¹ It is not clear, therefore, whether the procedures and evidentiary showings required by section 3294 are required to recover punitive damages under the Act.

The foregoing civil remedy under the Act is available in addition to any other remedies available at law.⁴²

For a form of complaint for violation of the disclosure provisions of the Act, *see [5], below*.

The civil remedy provided under the Act refers only to violations of the Act's use and disclosure provisions.⁴³ It appears, therefore, that the only remedies for violation of the discrimination provision⁴⁴ would be common-law actions, such as actions for wrongful discharge or defamation. For discussion of wrongful discharge actions, *see* Chapter 60.

[5] FORM--Complaint for Damages Arising From Wrongful Disclosure of Medical Information

[a] Comment

This form is a complaint for damages brought by an employee against his or her employer, alleging wrongful disclosure of medical information in violation of the Confidentiality of Medical Information Act.⁴⁵

The complaint contains allegations of the identities and capacities of the parties, the medical information disclosed, the particulars of disclosure (when, by whom, and to whom), the damage sustained by the plaintiff, and a prayer for relief.

It is not clear whether an award of punitive damages under the Confidentiality of Medical Information Act requires the same showing as punitive damages awarded under the general punitive damages statute, *Civil Code, section 3294*.⁴⁶ If there is evidence that the defendant acted with oppression, fraud, or malice as defined in *Civil Code, section 3294*, counsel should allege such facts using the statutory language to the extent possible. For further discussion of the requirements for alleging punitive damages, *see* California Forms of Pleading and Practice, "Damages," Part I.

[b] Form Complaint for Damages Arising From Wrongful Disclosure of Medical Information

SUPERIOR COURT OF CALIFORNIA

COUNTY OF _____

[or other as appropriate]

_____ [name],	)	
Plaintiff,	)	No. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [name],	)	(Use and Disclosure of Medical Information in Viol-
Defendant(s).	)	ation of Confidentiality of Medical Information
	)	_____ [name(s)], Act)
	)	[Civil Code § 56.35]

Plaintiff alleges:

1. Plaintiff, _____ [name], is a resident of the City of _____, County of _____, State of California.

2. Defendant(s) _____ [name(s)], are residents of the County of _____, State of California.

3. At all times relevant to this complaint, plaintiff was an employee of defendant _____ [name of employer], during which time said defendant acquired the following information in regard to plaintiff: _____ [describe medical information].

4. On or about _____ [date], defendant _____ [name of second defendant] requested the following medical information from defendant _____ [name of employer]: _____ [describe medical information requested].

5. On or about _____ [date], defendant _____ [name of employer] disclosed to defendant _____ [name of second defendant] the medical information described above regarding plaintiff.

6. The request for and the disclosure of the medical information regarding plaintiff were without the prior written authorization of plaintiff, which authorization is required by *Civil Code section 56.20*; both the request and the disclosure were, therefore, contrary to the provisions of the California Confidentiality of Medical Information Act, *Civil Code sections 56-56.37*.

7. As a direct and proximate result of both the wrongful request for and the wrongful disclosure of the medical information described above, plaintiff has been damaged in that _____ [specify damages suffered, e.g., plaintiff's employment was terminated, and plaintiff was thereafter unable to pay for the necessities of life, which inability also resulted in emotional distress and illness]. [The economic loss suffered by plaintiff amounted to \$_____.]

8. [Defendant's conduct was _____ (*specify basis for punitive damages under Civil Code section 3294, e.g., malicious, in that it was despicable conduct carried on by defendant with a willful and conscious disregard of plaintiff's rights*).] Defendant's conduct warrants the assessment of punitive damages pursuant to *Civil Code section 56.35* in an amount appropriate to punish defendant and deter others from engaging in similar misconduct.

9. As a further direct and proximate result of both the wrongful request for and disclosure of the medical information described above, it has been necessary for plaintiff to engage the services of an attorney, and plaintiff has incurred attorney's fees in excess of \$1000.

WHEREFORE, plaintiff prays for judgment against defendants, jointly and severally, as follows:

1. Compensatory damages in the amount of: \$_____;
2. Punitive damages;
3. Attorney's fees in the amount of \$1000;
4. Costs of suit; and
5. Such other and further relief as the Court may deem just and proper.

_____ [signature]

Attorney for Plaintiff

[Verification, if desired]

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyMedical & Related Examinations

FOOTNOTES:

(n1)Footnote 1. *See Civ. Code § 56 et seq.*

(n2)Footnote 2. *Civ. Code § 56.05(g).*

(n3)Footnote 3. *Civ. Code § 56.20(a); see Civ. Code §§ 56.20-56.245, discussed in [2], below.*

(n4)Footnote 4. *Civ. Code § 56.10(a); see Civ. Code §§ 56.10-56.16; see also Civ. Code § 56.05(j)* (defining "provider of health care"). *see Garrett v. Young (2003) 109 Cal. App. 4th 1393, 1401-1410, 1 Cal. Rptr. 3d 134* (*Civ. Code § 56.16* permits health care providers to discuss general medical information about patient without his or her consent, and information disclosed by doctor to employer was of sufficiently nonspecific nature to fit within exception).

(n5)Footnote 5. *See Civ. Code § 56.20.*

(n6)Footnote 6. *See Civ. Code § 56.10.*

(n7)Footnote 7. *Civ. Code § 56.25(a).*

(n8)Footnote 8. *Civ. Code § 56.25(c).*

(n9)Footnote 9. *Civ. Code § 56.20(a).*

(n10)Footnote 10. *Civ. Code § 56.20(a).*

(n11)Footnote 11. *Civ. Code § 56.20(c); see Civ. Code §§ 56.11, 56.21 (requirements for authorization).*

(n12)Footnote 12. *Civ. Code § 56.20(c); see [3], below.*

(n13)Footnote 13. *Civ. Code § 56.21; see Civ. Code § 56.11.*

(n14)Footnote 14. *Civ. Code § 56.21(a).*

(n15)Footnote 15. *Civ. Code § 56.21(b).*

(n16)Footnote 16. *Civ. Code § 56.21(c)(1).*

(n17)Footnote 17. *Civ. Code § 56.21(c)(1); see Civ. Code §§ 25 et seq., 60 et seq.*

(n18)Footnote 18. *Civ. Code § 56.21(c)(2)*

(n19)Footnote 19. *Civ. Code § 56.21(c)(2); see Fam. Code § 6900 et seq. (consent to medical treatment of minors), Civ. Code §§ 25 et seq., 60 et seq.*

(n20)Footnote 20. *Civ. Code § 56.21(c)(3).*

(n21)Footnote 21. *Civ. Code § 56.21(d).*

(n22)Footnote 22. *Civ. Code § 56.21(g).*

(n23)Footnote 23. *Civ. Code § 56.21(e).*

(n24)Footnote 24. *Civ. Code § 56.21(f).*

(n25)Footnote 25. *Civ. Code § 56.21(h).*

(n26)Footnote 26. *Civ. Code § 56.21(i).*

(n27)Footnote 27. *Civ. Code § 56.22.*

(n28)Footnote 28. *See Civ. Code §§ 56.20(c), 56.21.*

(n29)Footnote 29. *Civ. Code § 56.24.*

(n30)Footnote 30. *Civ. Code § 56.20(d).*

(n31)Footnote 31. *Civ. Code § 56.23.*

(n32)Footnote 32. *Civ. Code § 56.245.*

(n33)Footnote 33. *Civ. Code § 56.37(a); see Civ. Code § 56.10; see also Health & Safety Code §§ 1374.7, 1389.1 (limited disclosure for underwriting process).*

(n34)Footnote 34. *Civ. Code* § 56.37(b); see *Civ. Code* §§ 56.11, 56.21, 56.26(b) (waiver authorization).

(n35)Footnote 35. *Civ. Code* § 56.20(b).

(n36)Footnote 36. *Civ. Code* § 56.20(b).

(n37)Footnote 37. *Civ. Code* § 56.20(c).

(n38)Footnote 38. See *Civ. Code* § 56.21(c).

(n39)Footnote 39. *Civ. Code* § 56.36(a).

(n40)Footnote 40. *Civ. Code* § 56.35.

(n41)Footnote 41. See *Civ. Code* § 3294 (punitive damages recoverable based on clear and convincing evidence of oppression, fraud, or malice).

(n42)Footnote 42. *Civ. Code* § 56.35.

(n43)Footnote 43. *Civ. Code* § 56.35.

(n44)Footnote 44. See *Civ. Code* § 56.20(b), discussed in [2][i], above.

(n45)Footnote 45. See *Civ. Code* § 56.35.

(n46)Footnote 46. See *Civ. Code* § 56.35 (punitive damages recoverable for violation of Act); *Civ. Code* § 3294 (punitive damages generally recoverable based on clear and convincing evidence of oppression, fraud, or malice); see also [4][a], above.



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PERSONS OTHER THAN EMPLOYEE
Subpart 1. Specific Statutory Restrictions

3-51 California Employment Law § 51.14

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.14 Unauthorized Commercial Use of Name or Likeness

Civil Code section 3344 codifies the existing common law tort of appropriation of name or likeness. The statute prohibits the knowing use by any person of another's name, voice, signature, photograph, or likeness, in any manner for business or commercial purposes without consent.ⁿ¹ The statute prohibits the appropriation of the likenesses of living persons only.ⁿ²

When a photograph or likeness of an employee of the person using the photograph or likeness appearing in the advertisement or other publication prepared by or on behalf of the user is only incidental, and not essential, to the purpose of the publication in which it appears, there is a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the consent of the employee was *not* a knowing use of the employee's photograph or likeness.ⁿ³ Thus, the employee must produce evidence that his or her employer's use for commercial purposes was "knowing" in order to prevail in an action under section 3344.

To constitute a violation of *Civil Code section 3344*, there must be a "direct connection" between the use of the name or likeness and a commercial purpose.ⁿ⁴

Civil Code section 3344.1, the Astaire Celebrity Image Protection Act, protects the name, voice, signature, photograph, or likeness of a "deceased personality" from misappropriation from acts occurring in California.ⁿ⁵ The Act also provides a method for contractual, intestate, trust, or testamentary transfer of the deceased person's property rights in these interests.ⁿ⁶ Unlike *Civil Code section 3344*, which protects against knowing use of another's likeness, *Civil Code section 3344.1* protects against any use of the likeness of a deceased personality.ⁿ⁷

One who violates either of these statutes is liable for any damages sustained, or for at least \$750, plus any profits attributable to the knowing misuse.ⁿ⁸ In establishing profits from any unauthorized use, the injured party need only present proof of the gross revenue attributable to the use.ⁿ⁹ Punitive damages may also be awarded, and a prevailing

party in an action under either section is entitled to attorneys' fees and costs.ⁿ¹⁰ These remedies are cumulative, and are available in addition to any others provided by law.ⁿ¹¹

For complete discussion of the tort of invasion of privacy in this context, *see* Levy, Golden, and Sacks, California Torts, Chapter 46 (Matthew Bender).

Legal Topics:

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

Labor & Employment Law Employee Privacy Privacy Act General Overview Torts Business Torts General Overview

FOOTNOTES:

(n1)Footnote 1. *Civ. Code* § 3344(a). For the standard jury instruction on use of name of likeness, *see* Judicial Council of California Civil Jury Instructions, CACI 1804 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the *First Amendment* defense to the use or appropriation of name or likeness, *see* *Judicial Council of California Civil Jury Instructions, CACI 1805 (Matthew Bender)*. For the standard jury instruction on damages in an action under *Civ. Code* § 3344, *see* Judicial Council of California Civil Jury Instructions, CACI 1821 (Matthew Bender). For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for a claim under *Civ. Code* § 3344 (Matthew Bender), *see* Judicial Council of California Civil Jury Instructions, CACI VF-1804 (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n2)Footnote 2. *Lugosi v. Universal Pictures* (1979) 25 Cal. 3d 813, 821-822, 160 Cal. Rptr. 323, 603 P.2d 425 .

(n3)Footnote 3. *Civ. Code* § 3344(c).

(n4)Footnote 4. *Compare Eastwood v. Superior Court* (1983) 149 Cal. App. 3d 409, 420-421, 198 Cal. Rptr. 342 (tabloid's printing of information about actor was sufficiently connected with commercial purpose to allow actor to invoke statute) with *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal. App. 3d 880, 895, 118 Cal. Rptr. 370 (educational textbook's use of plaintiff's name and likeness as educational tool was not directly connected with commercial purpose of publisher).

(n5)Footnote 5. *Civ. Code* § 3344.1(a)-(c), (n), (o); *see* *Civ. Code* § 3344.1(h) (defining "deceased personality"); *see also* *Civ. Code* § 3344.1(a)(2) (exception for specified works in entertainment or dramatic, literary, or musical work).

(n6)Footnote 6. *Civ. Code* § 3344.1(b), (d); *see* *Civ. Code* § 3344.1(e) (extinguishment of rights).

(n7)Footnote 7. *See* *Civ. Code* §§ 3344(a), 3344.1(a).

(n8)Footnote 8. *See* *Civ. Code* §§ 3344(a), 3344.1(a).

(n9)Footnote 9. *See* *Civ. Code* §§ 3344(a), 3344.1(a).

(n10)Footnote 10. *See* *Civ. Code* §§ 3344(a), 3344.1(a).

(n11)Footnote 11. *See* *Civ. Code* §§ 3344(g), 3344.1(m).



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PERSONS OTHER THAN EMPLOYEE
Subpart 1. Specific Statutory Restrictions

3-51 California Employment Law § 51.15

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.15 Disclosure of Information to Employing Law Enforcement Agency

An employer must, under certain conditions, disclose employment information to a law enforcement agency contemplating the hiring of a current or former employee of the employer.ⁿ¹ The purpose of this disclosure requirement is to allow law enforcement agencies to perform thorough background investigations of applicants.ⁿ²

Disclosure is required if the following three conditions are met:ⁿ³

- The request is made in writing.
- The request is accompanied by a notarized authorization by the applicant releasing the employer of liability.
- The request and the authorization are presented to the employer by a sworn officer or other authorized representative of the employing law enforcement agency.

The information that must be disclosed includes written information in connection with job applications, performance evaluations, attendance records, disciplinary actions, eligibility for rehire, and other information relevant to peace officer performance, except information prohibited from disclosure by any other state or federal law or regulation.ⁿ⁴

The employer may charge reasonable fees to cover the costs incurred in copying and furnishing the required documents.ⁿ⁵

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure
of Employee InformationGeneral OverviewLabor & Employment LawPreemployment Practices

FOOTNOTES:

(n1)Footnote 1. *Gov. Code § 1031.1(a).*

(n2)Footnote 2. *Gov. Code § 1031.1(a).*

(n3)Footnote 3. *Gov. Code § 1031.1(a).*

(n4)Footnote 4. *Gov. Code § 1031.1(c).*

(n5)Footnote 5. *Gov. Code § 1031.1(f).*



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Subpart 1. Specific Statutory Restrictions

3-51 California Employment Law § 51.16

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.16 Subpoena Seeking Production of Employment Records

Code of Civil Procedure section 1985.6 imposes certain requirements when a party to litigation seeks to subpoena employment records of an individual from his or her employer. Failure to comply with these requirements is a sufficient basis for the employer-witness to refuse to produce the employment records sought by the subpoena duces tecum.ⁿ¹

For purposes of this statute, "employment records" are the original or any copy of books, documents, other writings or electronic data pertaining to the employment of any employee maintained by the current or former employer of the employee, or by any labor organization that has represented or currently represents the employee.ⁿ² An "employee" is any individual who is or has been employed by a witness that is subject to a subpoena duces tecum, or any individual who is or has been represented by a labor organization that is a witness subject to a subpoena duces tecum.ⁿ³ A "subpoenaing party" is any person causing a subpoena duces tecum to be issued or served in connection with a civil action or proceeding, except for certain specified public agencies.ⁿ⁴ For these purposes, "labor organization" has the meaning set forth in *Lab. Code § 1117*.ⁿ⁵

The procedures specified by *Code of Civil Procedure section 1985.6* do not apply to workers' compensation or Cal/OSHA proceedingsⁿ⁶ or to any subpoena duces tecum that does not request the records of any particular employee and that requires a custodian of records to delete any information that would identify any employee whose records are to be produced.ⁿ⁷

At least 10 days before the date of production and 5 days before the subpoena is served on the custodian of the employment records (with extensions if service is by mail), the subpoenaing party must serve copies of the following papers on the employee, unless the subpoenaing party is the employee, and the employee is the only subject of the subpoenaed records:ⁿ⁸

- The subpoena duces tecum.

- The affidavit supporting issuance of the subpoena, if any.
- A notice to the employee, in a typeface designed to call attention to it, indicating the following:⁹
 - Employment records about the employee are being sought from the witness named in the subpoena.
 - The employment records may be protected by a right of privacy.
 - If the employee objects to the witness furnishing the records to the party seeking the records, the employee must file papers with the court before the date specified in the subpoena.
 - If the subpoenaing party does not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the employee's interest in protecting his or her privacy rights.
- Proof of service.¹⁰

If a notice of taking of deposition is also served, that other notice may be set forth in a single document with the notice required by *Code Civ. Proc. § 1985.6(e)*.¹¹

These papers must be served on the employee personally, at his or her last known address, in accordance with the procedures for service of papers in civil actions generally¹² or, if the employee is a party, on his or her attorney of record.¹³ If the employee is a minor, the papers must be served on the employee's parent, guardian, conservator, or similar fiduciary, or if none of these people can be found, on the person having care and custody of the minor or with whom the minor resides, and on the minor if the minor is at least 12 years of age.¹⁴

Before the production of records, the subpoenaing party must either (1) serve on the witness a proof of personal service or service by mail attesting to the subpoenaing party's compliance with the service and notice requirements; or (2) furnish the witness with a written authorization to release the records that is signed by the employee or by his or her attorney of record. The witness may presume that the attorney purporting to sign the authorization on behalf of the employee acted with the consent of the employee and that any objection to the release of records is waived.¹⁵

The subpoena itself must be served on the witness itself in sufficient time to allow the witness a reasonable time¹⁶ to locate and produce the records or copies of the records.¹⁷

The subpoenaing party may move for an order shortening the time for serving the subpoena duces tecum or waiving the requirements concerning service of copies of the subpoena and required notice on the employee. To obtain such an order, the subpoenaing party must show (1) good cause, (2) that the subpoenaing party has exercised due diligence, and (3) that the rights of the employee and witness will be preserved.¹⁸

An employee whose employment records are sought under a subpoena duces tecum may, before the date of production, bring a motion to quash or modify the subpoena duces tecum.¹⁹ Notice of the bringing of the motion must be given to the witness and to the deposition officer at least five days before the production of the records. The failure to provide notice to the deposition officer does not invalidate the motion, but may be raised by the deposition officer as an affirmative defense in any action for liability for improper release of records.²⁰ No witness or deposition officer may be required to produce employment records after receipt of notice that such a motion has been brought by an employee, or after receipt of a written objection from a nonparty employee, except on order of the court in which the action is

pending or by agreement of the parties, witnesses, and employees affected.ⁿ²¹ In addition, any nonparty employee whose records are sought by subpoena duces tecum may, before the date of production, serve a written objection on the subpoenaing party, the deposition officer, and the witness stating the specific grounds on which the production of the employment records should be prohibited.ⁿ²²

The party requesting an employee's employment records may bring a motionⁿ²³ to enforce the subpoena within 20 days of service of the written objection. The motion must be accompanied by a declaration showing a reasonable and good faith attempt at informal resolution of the dispute between the party requesting the records and the employee or the employee's attorney.ⁿ²⁴

■ CONSULTANT'S COMMENT:

The enactment of *Code of Civil Procedure section 1985.6* removes a portion, but not all, of the burden placed on employers to protect the privacy interests of their employees. Employers who receive a subpoena for employment records of a current or former employee should review the documents to ensure that the subpoenaing party has followed the requirements of the statute. If the subpoenaing party has failed to follow the timing, service, or notice requirements, the employer should inform the attorney of record for the subpoenaing party in writing that the employer will not produce the records.

A lingering question, however, is whether compliance by the subpoenaing party with the requirements of *Code of Civil Procedure section 1985.6* provides blanket immunity to the employer who then produces all subpoenaed employment records. For example, an employee may claim that the employer never informed the employee of the contents of the employee's personnel file, and, had the employee known of its contents, he or she would have objected to its production. Arguably, because the statute affords the employee the opportunity to object before production, the employee should not be heard to complain later. Nonetheless, employers who have questions regarding the production of employment records should consult with legal counsel before producing the documents.

Employers should also note that the procedure outlined in *Code of Civil Procedure section 1985.6* does not apply if the employer whose records are sought is a party to the litigation, and the requesting party uses the procedure for inspection of documents outlined in *Code of Civil Procedure section 2031.010 et seq.* In that case, the employer still has the obligation and the right to protect the privacy interests of its current and former employees in their employment records. *Commentary by Kirby Wilcox.*

Legal Topics:

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

Civil Procedure
Pretrial Matters
Subpoenas
Labor & Employment Law
Employee Privacy
General Overview
Labor & Employment Law
Employee Privacy
Disclosure of Employee Information
General Overview

FOOTNOTES:

(n1)Footnote 1. *Code Civ. Proc.* § 1985.6(j).

(n2)Footnote 2. *Code Civ. Proc.* § 1985.6(a)(3).

(n3)Footnote 3. *Code Civ. Proc.* § 1985.6(a)(2).

(n4)Footnote 4. *Code Civ. Proc.* § 1985.6(a)(5).

(n5)Footnote 5. *Code Civ. Proc.* § 1985.6(a)(4).

(n6)Footnote 6. *See Code Civ. Proc.* § 1985.6(i).

(n7)Footnote 7. *Code Civ. Proc. § 1985.6(h).*

(n8)Footnote 8. *Code Civ. Proc. § 1985.6(b), (e). See Code Civ. Proc. § 1985.6(k)* (if subpoenaing party is employee and employee is only subject of subpoenaed records, notice to employee and delivery to the employee of the other documents specified in § 1985.6(b) are not required).

(n9)Footnote 9. *Code Civ. Proc. § 1985.6(e).*

(n10)Footnote 10. *Code Civ. Proc. § 1985.6(c)(1).*

(n11)Footnote 11. *Code Civ. Proc. § 1985.6(e).*

(n12)Footnote 12. *See Code Civ. Proc. § 1010 et seq.*

(n13)Footnote 13. *Code Civ. Proc. § 1985.6(b)(1).*

(n14)Footnote 14. *Code Civ. Proc. § 1985.6(b)(1).*

(n15)Footnote 15. *Code Civ. Proc. § 1985.6(c).*

(n16)Footnote 16. *See Code Civ. Proc. § 2020.410.*

(n17)Footnote 17. *Code Civ. Proc. § 1985.6(d).*

(n18)Footnote 18. *Code Civ. Proc. § 1985.6(g).*

(n19)Footnote 19. *Code Civ. Proc. § 1985.6(f)(1); see Code Civ. Proc. § 1987.1.*

(n20)Footnote 20. *Code Civ. Proc. § 1985.6(f)(1); see Code Civ. Proc. §§ 1985.6(a)(1), 2020.420* ("deposition officer" defined).

(n21)Footnote 21. *Code Civ. Proc. § 1985.6(f)(3).*

(n22)Footnote 22. *Code Civ. Proc. § 1985.6(f)(2).*

(n23)Footnote 23. *See Code Civ. Proc. § 1987(c).*

(n24)Footnote 24. *Code Civ. Proc. § 1985.6(f)(4).*



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3-51 California Employment Law §§ 51.17 through 51.29

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

[Reserved]

§§ 51.17[Reserved]



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 Subpart 2. Constitutional and Common-Law Protection

3-51 California Employment Law § 51.30

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.30 Constitutional Protection

[1] Employee's Right to Privacy

Since 1972, the California Constitution's enumeration of rights has provided that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness *and privacy*."n1 This section discusses the constitutional implications of disclosure of private information about employees by private employers. For a general discussion of privacy rights under the California Constitution, *see* Chapter 50.

Courts interpreting the foregoing constitutional provision have indicated that the amendment adding the right to privacy did more than declare an already existing right:

The elevation of the right to be free from invasions of privacy to constitutional stature was ... intended to be an expansion of the privacy right. The election brochure ... states: "The right to privacy is more than 'unnecessary wordage.' It is fundamental to any free society. ... This simple amendment will *extend various court decisions* on privacy to insure protection of our basic rights."n2

One manifestation of this expansion of the constitutional protection of privacy is the creation of a constitutional right enforceable against private entities, including private employers, as well as the government. As one court stated, "[p]rivacy is protected not merely against state action; it is considered an unalienable right which may not be violated by anyone. ... The language of the election brochure argument refers to "effective restraint on the information activities of government and business."n3

The constitutional right to privacy provides protection against, among other things, the improper use of information properly obtained for a specific purpose, such as the use of it for another purpose or the disclosure of it to some third party.n4 An employer may potentially run afoul of the constitution, therefore, when it discloses private or confidential

information about an employee to a third person in the absence of sufficient justification.ⁿ⁵ For example, in *Payton v. City of Santa Clara*,ⁿ⁶ a communication to an employee concerning the reasons for his termination was posted on an employee bulletin board. Even though the information published was apparently truthful, the court held that the employee's complaint stated a cause of action for violation of the constitutional provision.ⁿ⁷ In *Sanchez v. County of San Bernardino*,ⁿ⁸ the chief of a county's employee relations division was asked to resign after her employer discovered that she had a dating relationship with the president of the union representing some county employees. The employee and the county entered into a confidential severance agreement regarding her resignation. Shortly thereafter, the county breached the confidentiality provision of the agreement by providing information for newspaper articles reporting on her resignation. The Court of Appeal concluded that the trial court erred in granting the county summary adjudication on the ground that the confidentiality provision was void as against public policy. Had there been a request under the Public Records Actⁿ⁹ for the severance agreement, arguably the county would have had to disclose it, which would not have violated the confidentiality provision, because it would have been a disclosure required by applicable law. However, merely disclosing the agreement would not have disclosed any of the circumstances surrounding the resignation. Although, the circumstances of the resignation were a matter of legitimate public concern, the broad, general public policy in favor of open government had to be balanced against the broad, general public policy in favor of privacy articulated in *California Constitution, article I, § 1*. In the absence of a statute requiring the county to make the disclosures, the county's agreement not to make the disclosures did not violate public policy.

Also, the disclosure of an employee's personnel records pursuant to subpoena or court order may be limited by the employee's constitutional right to privacy.ⁿ¹⁰

[2] Employee's Civil Action to Enforce Constitutional Right of Privacy

The constitutional right of privacyⁿ¹¹ is intended to be self executing; that is, the constitutional provision itself creates a legal and enforceable right of privacy for every Californian.ⁿ¹² An employee may therefore obtain enforcement of his or her constitutional privacy right by filing a civil suit for damages, declaratory relief, or injunctive relief.ⁿ¹³

In *Operating Engineers Local 3 v. Johnson*,ⁿ¹⁴ the court held that an employee's civil action based on the invasion of her constitutional right to privacy by intentional disclosure of a reprimand to coworkers with no need to know was a violation of her constitutional right to privacy in violation of public policy, and was not precluded by the exclusivity provision of the Workers' Compensation Act.ⁿ¹⁵

[3] Employer's Affirmative Defense Based on Compelling Interest

In general, a showing that the disclosure of the information is justified by a compelling need is a defense against a claim of violation of the constitutional right of privacy.ⁿ¹⁶ Thus, for instance, if an employee's suit is based on the public posting of the reasons for terminating the employee's employment, the employer can defend by showing some compelling public interest justifying the posting of the information.ⁿ¹⁷ However, even if a compelling need is established, the means taken to address that need must avoid or minimize the conflict between the values protected by the constitution and the values found to be of compelling interest, if possible.ⁿ¹⁸ For further discussion of defenses based on compelling need, *see* Ch. 50, pt. C.

The gravamen of an action based on a violation of the constitutional privacy right is the disclosure of private matter. Therefore, that the matter disclosed is true is not likely to constitute a defense to the action.ⁿ¹⁹

Legal Topics:

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

Constitutional Law Substantive Due Process Privacy Personal Information Labor & Employment Law Employee Privacy General Overview Labor & Employment Law Employee Privacy Constitutional Protections Labor & Employment

LawEmployee PrivacyInvasion of Privacy

FOOTNOTES:

(n1)Footnote 1. *Cal. Const., art. I, § 1* (emphasis added).

(n2)Footnote 2. *Porten v. University of San Francisco* (1976) 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839 (emphasis in original); see *City of Santa Barbara v. Adamson* (1980) 27 Cal. 3d 123, 130, 164 Cal. Rptr. 539, 610 P.2d 436 ; *Wood v. Superior Court* (1985) 166 Cal. App. 3d 1138, 1147, 212 Cal. Rptr. 811 . The California Supreme Court has recognized the election brochure as the definitive "legislative history" of the privacy amendment. *White v. Davis* (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222 .

(n3)Footnote 3. *Porten v. University of San Francisco* (1976) 64 Cal. App. 3d 825, 829 n.2, 134 Cal. Rptr. 839 ; see *White v. Davis* (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222 (noting that right to privacy is self-executing); *Rulon-Miller v. International Business Machines Corp.* (1984) 162 Cal. App. 3d 241, 248, 255, 208 Cal. Rptr. 524 (noting in apparent dictum that right to privacy may be implicated by employer's inquiry into employee's private life); see also *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 415, 57 Cal. Rptr. 2d 46 ; *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1040-1048, 264 Cal. Rptr. 194 ; but see *Schmidt v. Superior Court* (1989) 48 Cal. 3d 370, 389 n. 14, 256 Cal. Rptr. 750, 769 P.2d 932 (dictum suggesting that question of whether *Cal. Const., art. I, § 1*, applies to private entities is still unsettled).

(n4)Footnote 4. *White v. Davis* (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222 ; see *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1040-1051, 264 Cal. Rptr. 194 (upholding constitutionality of preemployment drug testing by private employer based on, *inter alia*, restrictions on disclosure of results); See also Chapter 50, pt. C.

(n5)Footnote 5. For discussion of factors that will justify disclosure, see [2], below.

(n6)Footnote 6. *Payton v. City of Santa Clara* (1982) 132 Cal. App. 3d 152, 183 Cal. Rptr. 17 .

(n7)Footnote 7. *Payton v. City of Santa Clara* (1982) 132 Cal. App. 3d 152, 154-155, 183 Cal. Rptr. 17 .

(n8)Footnote 8. *Sanchez v. County of San Bernardino* (2009) 176 Cal. App. 4th 516, 525-527, 98 Cal. Rptr. 3d 96 .

(n9)Footnote 9. *Gov. Code § 6250 et seq .*

(n10)Footnote 10. See, e.g., *Harding Lawson Assoc. v. Superior Court* (1992) 10 Cal. App. 4th 7, 10, 12 Cal. Rptr. 2d 538 (wrongful termination plaintiff failed to show compelling need for confidential documents in former co-employees' personnel files to justify trial court's discovery order regarding those files); *El Dorado Sav. & Loan Ass'n v. Superior Court* (1987) 190 Cal. App. 3d 342, 345-346, 235 Cal. Rptr. 303 (employee's personnel file was protected by constitutional right to privacy; plaintiff seeking disclosure of file in employment discrimination action had burden of showing that production of entire file was necessary and that there were no less intrusive means of obtaining the relevant information).

(n11)Footnote 11. *Cal. Const., art. I, § 1.*

(n12)Footnote 12. *White v. Davis* (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222 .

(n13)Footnote 13. See *White v. Davis* (1975) 13 Cal. 3d 757, 760, 120 Cal. Rptr. 94, 533 P.2d 222 ; *Payton v. City of Santa Clara* (1982) 132 Cal. App. 3d 152, 183 Cal. Rptr. 17 ; *Porten v. University of San Francisco* (1976) 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 .

(n14)Footnote 14. *Operating Engineers Local 3 v. Johnson* (2003) 110 Cal. App. 4th 180, 1 Cal. Rptr. 3d 552 .

(n15)Footnote 15. *Operating Engineers Local 3 v. Johnson* (2003) 110 Cal. App. 4th 180, 184-192, 1 Cal. Rptr. 3d 552 .

(n16)Footnote 16. See *White v. Davis* (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222 ; *Porten v. University of San Francisco* (1976) 64 Cal. App. 3d 825, 832, 134 Cal. Rptr. 839 . See also *Sanchez v. County of San Bernardino* (2009) 176 Cal. App. 4th 516, 528, 98 Cal. Rptr. 3d 96 (although county's statements regarding resignation of employee may have been protected under *First Amendment*, county could be liable for breach of confidentiality provision in severance agreement by disclosing information regarding resignation to newspapers, where confidentiality provision waived county's *First Amendment* free speech rights by contract); *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034, 1040-1048, 264 Cal. Rptr. 194 (holding that compelling-interest standard applies only if intrusion substantially affects privacy right; otherwise reasonable standard applies).

(n17)Footnote 17. *Payton v. City of Santa Clara* (1982) 132 Cal. App. 3d 152, 155, 183 Cal. Rptr. 17 .

(n18)Footnote 18. *Wood v. Superior Court* (1985) 166 Cal. App. 3d 1138, 1148, 212 Cal. Rptr. 811 ; see also *Long Beach City Employees Ass'n v. City of Long Beach* (1986) 41 Cal. 3d 937, 948 fn. 12, 227 Cal. Rptr. 90, 719 P.2d 660 ; *City of Santa Barbara v. Adamson* (1980) 27 Cal. 3d 123, 131-133, 164 Cal. Rptr. 539, 610 P.2d 436

(n19)Footnote 19. cf. *Restatement (Second) of Torts*, § 581A, comment i (rule that truth is defense to defamation actions "is not necessarily applicable" to "an action based on another rule of law," citing as example *Restatement (Second) of Torts*, § 652D, involving invasion of privacy); see also *Kapellas v. Kofman* (1969) 1 Cal. 3d 20, 35-39, 81 Cal. Rptr. 360, 459 P.2d 912 (noting that action for invasion of privacy does not necessarily require proof of falsity, but holding that no cause of action was stated; citing *Melvin v. Reid* (1931) 112 Cal. App. 285, 289, 297 P. 91); Levy, Golden and Sacks, *California Torts*, Ch. 46, "Invasion of Privacy"; Prosser & Keeton, *Law of Torts* (5th ed. 1984), Ch. 20, "Privacy," § 117, p. 856.



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DIVISION V EMPLOYEE PRIVACY RIGHTS
 CHAPTER 51 Use and Disclosure of Private Information About Employees
 Part B. RESTRICTIONS ON USE OF PRIVATE EMPLOYEE INFORMATION AND ON DISCLOSURE TO
 PERSONS OTHER THAN EMPLOYEE
 Subpart 2. Constitutional and Common-Law Protection

3-51 California Employment Law § 51.31

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.31 Common Law Protection

[1] Theories of Recovery

[a] Public Disclosure of Private Facts

Dissemination of false information about an employee can lead to employer liability under common law theories of defamationⁿ¹ or infliction of emotional distress.ⁿ² However, the dissemination even of *truthful* information can lead to common law tort liability for invasion of privacy under certain circumstances. To establish tort liability, a plaintiff must establish (1) public disclosure (2) of a private fact (3) that would be offensive and objectionable to the reasonable person, and (4) that is not of legitimate public concern.ⁿ³ Thus, there is a right "to be free from public disclosure of private embarrassing facts, in short, '[a] right to be let alone.'"ⁿ⁴

To establish common law liability for public disclosure of private facts, plaintiff must show that the private information was *publicly* disclosed.ⁿ⁵ Accordingly, an employer who discloses facts concerning an employee's drinking problem to a small number of supervisory personnel is not liable for common law invasion of privacy.ⁿ⁶

A cause of action for public disclosure differs from a claim of defamation or "false light" invasion of privacyⁿ⁷ in that the plaintiff seeking to recover damages based on improper public disclosure of private facts need not challenge the accuracy of the information published, but must assert that the publicity is so intimate and unwarranted as to outrage the community's notion of decency.ⁿ⁸ The distinction between defamation actions and public disclosure actions has been characterized as the difference between engendering a false opinion about a person, either in the mind of one other person or many people (defamation), and degrading a person by laying his or her life open to public view (invasion of privacy).ⁿ⁹

For further discussion of common law tort actions for invasion of privacy, *see* Levy, Golden, and Sacks, California Torts, Chapter 46.

[b] False Light Privacy Action

Placing another in a "false light" in the public eye is a form of the common law tort of invasion of privacy. The elements of the cause of action are (1) a public disclosure¹⁰ (2) that places the plaintiff in a false light¹¹ and (3) that is objectionable to a reasonable person.¹² If a false light action is based on a defamatory statement, the action will be viewed as substantially equivalent to a defamation claim and subject to the same requirements and restrictions as a defamation claim.¹³ Defamation actions are discussed briefly in [c], below.

For further discussion of common law tort actions for invasion of privacy, *see* Levy, Golden, and Sacks, California Torts, Chapter 46, "Invasion of Privacy."

[c] Defamation

An employer may incur liability under a defamation theory if any disclosures about an employee or former employee are shown to be false, and the employee or former employee's reputation is injured as a result.¹⁴ However, employers are protected from liability in many situations by the qualified privilege that protects a communication made without malice to an interested person by (1) one who is also interested, (2) one who stands in such relation to the person interested as to afford a reasonable ground for supposing an innocent motive for the communication, or (3) one who is asked by the interested person to give the information.¹⁵

Thus, absent evidence of malice, statements regarding an employee's conduct (such as allegations of dishonesty) to persons who have some reasonable interest in the information are ordinarily protected.¹⁶ For the purposes of this qualified privilege, "malice" is a state of mind arising from hatred or ill will toward the employee.¹⁷ For further discussion of this privilege, *see* Chapter 63.

Defamation law is discussed fully in Levy, Golden, and Sacks, California Torts, Chapter 45.

[d] Intentional Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress are (1) outrageous conduct by the defendant; (2) an intention to cause, or reckless disregard of the probability of causing, emotional distress; and (3) actual and proximate causation of severe emotional distress.¹⁸

In many cases, a tort cause of action for intentional infliction of emotional distress based on improper disclosure of private information may be precluded by workers' compensation exclusivity principles. Ordinarily, a civil action to recover damages based on intentional infliction of emotional distress in connection with an alleged wrongful termination or other disciplinary action will be precluded by the exclusive-remedy doctrine of the California Workers' Compensation Act,¹⁹ unless the employer's conduct exceeds the bounds of the employment relationship. Generally, even intentional misconduct may constitute a normal part of the employment relationship.²⁰ Moreover, even if no physical injury or disability is alleged, a claim for intentional or negligent infliction of emotional distress is within the exclusive remedy provisions of the Workers' Compensation Act, so long as the basic conditions of compensation are otherwise satisfied and the employer's conduct neither contravenes a fundamental public policy nor exceeds the risks inherent in the employment relationship.²¹

For further discussion of civil actions based on intentional infliction of emotional distress, *see* Levy, Golden, and Sacks, California Torts, Chapter 44.

For discussion of the exclusive remedy doctrine of the California Workers' Compensation Act, *see* Chapter 20.

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyInvasion of PrivacyTortsIntentional TortsInvasion of PrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyPublic Disclosure of Private FactsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See [c], below.*

(n2)Footnote 2. *See [d], below.*

(n3)Footnote 3. *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762 ; see also Prosser & Keeton, Law of Torts (5th ed. 1984), ch. 20, § 117; Restatement (Second) of Torts, § 652D.*

(n4)Footnote 4. *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 125, 188 Cal. Rptr. 762 (citing Melvin v. Reid (1931) 112 Cal. App. 285, 289, 297 P. 91).*

(n5)Footnote 5. *cf. Porten v. University of San Francisco (1976) 64 Cal. App. 3d 825, 828-829, 134 Cal. Rptr. 839 .*

(n6)Footnote 6. *See Hudson v. S.D. Warren Co. (D. Me. 1985) 608 F. Supp. 477, 480 .*

(n7)Footnote 7. "False light" privacy actions are discussed in *[b], below.*

(n8)Footnote 8. *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762 (citing Briscoe v. Reader's Digest Ass'n (1971) 4 Cal. 3d 529 ; Sidis v. F-R Pub. Corp. (2d Cir. 1940) 113 F.2d 806, 809) .*

(n9)Footnote 9. *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762 (quoting Nimmer, The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Cal. L. Rev. 935, 958-959 (1968)).*

(n10)Footnote 10. *See Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 120, 14 Cal. Rptr. 208 , disapproved on other grounds, Kapellas v. Kofman (1969) 1 Cal. 3d 20, 35 .*

(n11)Footnote 11. *O'Hilderbrandt v. Columbia Broadcasting System, Inc. (1974) 40 Cal. App. 3d 323, 334, 114 Cal. Rptr. 826 .*

(n12)Footnote 12. *Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 280, 239 P.2d 630 .*

(n13)Footnote 13. *See Fellows v. National Enquirer, Inc. (1986) 42 Cal. 3d 234, 248-249, 251, 228 Cal. Rptr. 215, 721 P.2d 97 (requiring proof of special damages under Civ. Code § 45a); Briscoe v. Reader's Digest Ass'n (1971) 4 Cal. 3d 529 (requiring compliance with Civ. Code § 48a concerning demand for retraction); Kapellas v. Kofman (1969) 1 Cal. 3d 20, 35, 81 Cal. Rptr. 360, 459 P.2d 912 (requiring compliance with Civ. Code § 48a concerning demand for retraction).*

(n14)Footnote 14. *See generally Civ. Code §§ 43, 44-48a.*

(n15)Footnote 15. *Civ. Code § 47(c); see Bierbower v. FHP, Inc. (1999) 70 Cal. App. 4th 1, 4, 82 Cal. Rptr. 2d 393 (discrepancy in office memo regarding date of alleged incident of sexual harassment is insufficient evidence of malice for purposes of avoiding common interest privilege under Civ. Code § 47(c)).*

(n16)Footnote 16. *See, e.g., Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 285, 186 Cal. Rptr. 184 ; Deaile v. General Tel. Co. of California (1974) 40 Cal. App. 3d 841, 845, 115 Cal. Rptr. 582 .*

(n17)Footnote 17. *Slaughter v. Friedman* (1982) 32 Cal. 3d 149, 156, 185 Cal. Rptr. 244, 649 P.2d 886 .

(n18)Footnote 18. *Agarwal v. Johnson* (1979) 25 Cal. 3d 932, 946, 160 Cal. Rptr. 141, 603 P.2d 58 .

(n19)Footnote 19. *See Lab. Code* § 3602.

(n20)Footnote 20. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 752, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 ; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 .

(n21)Footnote 21. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 . *See, e.g., Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 9-10, 87 Cal. Rptr. 2d 554 (plaintiff's emotional distress action was preempted by workers' compensation law, because workers' compensation is exclusive remedy for intentional infliction of emotional distress caused by employer's work-related conduct when that conduct does not contravene public policy).



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PERSONS OTHER THAN EMPLOYEE
Subpart 2. Constitutional and Common-Law Protection

3-51 California Employment Law § 51.32

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.32 FORM--Complaint for Damages Against Employer for Invasion of Privacy by Disclosure of Private Information to Third Parties

[1] Comment

This form is for use by an employee to recover damages from an employer who has intruded on the employee's privacy by improperly disclosing private information about the employee to third parties. The complaint alleges the tort of invasion of privacy based on public disclosure of private facts. If appropriate, counsel may also add causes of action based on statutory violations, such as the complaint set forth in § 51.13[5] for violation of the Confidentiality of Medical Information Act. If the information disclosed is false or tends to put plaintiff in a false light, counsel should consider adding causes of action for defamation or false-light invasion of privacy. Counsel may also wish to consider adding a cause of action based on the state constitutional right of privacy.¹

[2] Form Complaint for Damages Against Employer for Invasion of Privacy by Disclosure of Private Information to Third Parties

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

[or other as appropriate]

_____ [name],	)	
Plaintiff,	)	No. _____
vs.	)	COMPLAINT FOR DAMAGES

3-51 California Employment Law § 51.32

_____, [name(s)],) (Invasion of Privacy)
 Defendant(s).)
)
)

Plaintiff alleges:

1. _____ [Allege capacity and residence of defendant, if venue allegation desired, e.g., Defendant is, and at all times material herein was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ (city), _____ (county)].
2. _____ [Allege capacity and residence of plaintiff, e.g., Plaintiff is a resident of the city of _____ (city), _____ (county)].
3. _____ [Allege facts concerning the employment relationship of plaintiff and defendant, e.g., Since on or about _____ (date), plaintiff has been employed by defendant in the capacity of _____ (job title or description)].
4. _____ [Allege the acquisition of private information about plaintiff by defendant, e.g., On or about _____ (date) and thereafter from time to time defendant came into possession of private medical information about plaintiff by reason of _____ (specify, e.g., periodic physical examinations)].
5. _____ [Allege plaintiff's interest in maintaining the confidentiality of the information, e.g., At all material times the information collected by defendant about plaintiff was private and confidential _____ (specify, e.g., including but not limited to information about medications plaintiff has from time to time used, counseling, a treatment plaintiff has from time to time received.) A reasonable person would have an interest in maintaining the confidentiality of such information].
6. _____ [Allege disclosure, e.g., On or about _____ (date), defendant publicly disclosed the private information described above in Paragraph 5 to persons having no need for such information or legitimate interest in knowing it].
7. _____ [Allege objectionable nature of disclosure, e.g., Said disclosure was objectionable and highly offensive to plaintiff, and would be to any reasonable person].
8. As a proximate result of defendant's conduct herein alleged, plaintiff was seriously injured in his/her health, strength and activity and sustained shock to his/her nervous system and person, all of which have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. As a result of such injuries, plaintiff has suffered general damages _____ [in an amount according to proof *or* in the sum of \$_____].
9. As a further result of defendant's conduct herein alleged, plaintiff has incurred [, and will continue to incur,] medical and related expenses _____ [in an amount according to proof *or* in the sum of \$_____].
- [10. Defendant's conduct herein alleged was undertaken willfully, wantonly and maliciously to injure plaintiff, justifying an award of punitive damages in favor of plaintiff.] [Insert additional causes of action, including statutory causes of action, as appropriate.]

WHEREFORE, plaintiff prays for judgment as follows:

1. For general damages for pain and suffering [in the sum of \$_____];
2. For damages for past [and future] medical expenses [in the sum of \$_____];
- [3. For punitive and/or exemplary damages;]
4. For costs of suit herein incurred; and
5. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff

[Verification, if desired]

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure
of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyInvasion of
PrivacyTortsIntentional TortsInvasion of PrivacyGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Cal. Const., art. I, § 1; see also* discussion in § 51.20.



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PERSONS OTHER THAN EMPLOYEE

Subpart 2. Constitutional and Common-Law Protection

3-51 California Employment Law §§ 51.33 through 51.39

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

[Reserved]

§§ 51.33[Reserved]



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DIVISION V EMPLOYEE PRIVACY RIGHTS
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Part C. BIBLIOGRAPHY

3-51 California Employment Law § 51.40

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.40 Legal Texts

California Forms of Pleading and Practice (Matthew Bender), Ch. 429, *Privacy*.

California Points and Authorities (Matthew Bender), Ch. 185, *Privacy*.

Lareau, Labor and Employment Law, Ch. 272, *Privacy in the Workplace* (Matthew Bender).

Levy, Golden, and Sacks, California Torts (Matthew Bender), chs. 44-46.

Personal Injury: Actions, Defenses, Damages (Matthew Bender), *Right of Privacy*, §§ 1.06, 1.10.

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure
of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyInvasion of
PrivacyTortsIntentional TortsInvasion of PrivacyGeneral Overview



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3-51 California Employment Law § 51.41

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.41 Encyclopedias

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, §§ 105-127.

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure
of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyInvasion of
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Part C. BIBLIOGRAPHY

3-51 California Employment Law § 51.42

AUTHOR: By John M. True, III, J.D., Edward Baskauskas J.D.

§ 51.42 Law Reviews and Legal Periodicals

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Freger and Kramer, 39th N.Y. Univ. Conf. on Labor, ch. 16, *AIDS and the Workplace: Employment Law Issues* (1986).

Prosser, *Privacy*, 48 *Calif. L. Rev.* 383 (1960).

Weinstein, *Commercial Appropriation of Name or Likeness: Section 3344 and the Common Law*, 52 *L.A. Bar J.* 430 (1977).

Young & Wells, *Managing AIDS in the Workplace*, 41(3) *Prac. Law.* 29 (1995).

Note, *Publicity as an Aspect of Privacy and Personal Autonomy*, 55 *So. Cal. L. Rev.* 727 (1982).

Legal Topics:

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

Labor & Employment LawEmployee PrivacyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyInvasion of PrivacyTortsIntentional TortsInvasion of PrivacyGeneral Overview



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Chapters 52 -- 59 RESERVED



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 60 Liability for Wrongful Termination and Discipline

4-60 California Employment Law 60.syn

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.syn Synopsis to Chapter 60: Liability for Wrongful Termination and Discipline

§ 60.01 Employment At-Will, Generally

§ 60.02 Emergence of Exceptions to At-Will Doctrine

[1] Statutory Exceptions

[2] Judicial Exceptions

[a] Public Policy

[b] Breach of Contract

[c] Breach of Covenant of Good Faith and Fair Dealing

§ 60.03 Statutory Prohibitions and Limitations on Employer's Right to Terminate or Discipline Employees

[1] Generally

[2] California Statutes

[a] Accommodation for Alcohol and Drug Rehabilitation (Labor Code Sections 1025-1028)

[b] Accommodation for Illiteracy (Labor Code Section 1040 et seq.)

[c] Disclosure of Arrest Records (Labor Code Section 432.7)

[d] Disclosure or Assignment of Inventions as Condition of Employment (Labor Code Sections 2870 and 2871)

- [e] Discrimination in Violation of the Fair Employment and Housing Act (Government Code Sections 12900 et seq.)
- [f] [Reserved]
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- [h] Discrimination Against Employee for Seeking Unemployment Insurance Information (Unemployment Insurance Code Section 1237)
- [i] Discrimination Against Injured Workers (Labor Code Section 132a)
- [i.1] Domestic Violence or Sexual Assault Victims (Labor Code Section 230.1)
- [j] Elections Officer (Elections Code Section 12312)
- [k] Fingerprints or Photographs for Improper Purpose (Labor Code Sections 1051, 1052, 1054)
- [l] Garnishment or Assignment of Wages (Labor Code Section 2929(b); Family Code Section 5290)
- [m] Health Care Workers (Health and Safety Code Section 123420(a); Penal Code Section 11161.8; Government Code Section 12940(g))
- [n] Jurors and Witnesses (Labor Code Section 230)
- [o] Labor Organization Affiliation (Labor Code Sections 921, 923)
- [p] Medical Information Disclosure (Civil Code Sections 56.10(a) et seq.)
- [q] Military Duty (Military and Veterans Code Section 394)
- [r] Political Affiliation (Labor Code Sections 1101-1102)
- [s] Polygraph Examinations (Labor Code Section 432.2)
- [t] Refusal to Patronize Employer (Labor Code Section 450)
- [t.1] Relocations, Terminations, and Mass Layoffs (Labor Code Section 1400 et seq.)
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- [v] School Visit by Parent (Labor Code Section 230.8)
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[ii] False Claims Against Public Entity (Government Code Section 12653)

[iii] Reporting of Improper Governmental Activities (Government Code Section 8547)

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[bb] Parental Attendance at School of Suspended or Disciplined Child (Education Code Section 48900.1; Labor Code Section 230.7)

[cc] Health Insurance Coverage Assignments (Family Code Section 3769)

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[ee] Public Transit Service Contracts (Labor Code Section 1070 et seq.)

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[c] Civil Rights Acts of 1866 and 1871 (Title 42 United States Code, Sections 1981 and 1983)

[d] Mine Safety and Health Act Provision Protecting Employees (Title 30 United States Code, Section 815(c))

[e] Consumer Credit Protection Act Provision Regarding Wage Garnishment (Title 15 United States Code, Section 1674)

[f] Employee Polygraph Protection Act of 1988 (Title 29, United States Code, Section 2001 et seq.)

[g] Employee Retirement Income Security Act Provision Prohibiting Discharge to Avoid Payment of Benefits (Title 29 of United States Code, Section 1140)

[h] Environmental Statutes With Employee Protection Provisions

[i] Air Pollution Prevention and Control Act Provision Protecting Employees (Title 42 United States Code, Section 7622)

[ii] Energy Reorganization Act of 1974 Provision Protecting Employees (Title 42 United States Code, Section 5851)

[iii] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund Act) Provision Protecting Employees (Title 42 United States Code, Section 9610)

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- [v] Solid Waste Disposal Act Employee Protection Provision (Title 42 United States Code, Section 6971)
- [vi] Toxic Substances Control Act Provision Protecting Employees (Title 15 United States Code, Section 2622)
- [vii] Water Pollution Control Act Provision Protecting Employees (Title 33 United States Code, Section 1367)
- [i] Fair Labor Standards Act Provision Protecting Employees (Title 29 United States Code, Section 215(a)(3))
- [j] Immigration Reform and Control Act (Title 8 United States Code, Section 1324b)
- [k] Jury System Improvement Act of 1978 Employee Protection Provision (Title 28 United States Code, Section 1875)
- [l] National Labor Relations Act (Title 29 United States Code, Section 158)
- [m] Occupational Safety and Health Act Provision Protecting Employees (Title 29 United States Code, Section 660(c))
- [n] Amtrak Reform and Accountability Act of 1997 (Title 49 United States Code, Section 20101)
- [o] Railway Labor Act--Provision Protecting Employees (Title 45 United States Code, Section 152)
- [p] Rehabilitation Act of 1973 (Title 29 United States Code, Sections 701-796(i))
- [q] Title VII of the Civil Rights Act of 1964 (Title 42 United States Code Sections 2000e et seq.)
- [r] Uniformed Services Employment and Reemployment Rights Act of 1994 (Title 38, United States Code, Section 4301 et seq.)
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 - § 60.21 [Reserved]
 - § 60.22 Legal Periodicals

By Joy A. Maulitz, J.D.^{n*}

FOOTNOTES:

(n1)Footnote *. Ms. Maulitz practices in the Law Offices of Marilyn Mac Rae in Oakland, California, specializing in wrongful termination and employment discrimination law.

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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 60 Liability for Wrongful Termination and Discipline

4-60 California Employment Law Scope

AUTHOR: By Joy A. Maulitz, J.D.

Scope

By Joy A. Maulitz, J.D.n* SCOPE

This chapter provides an overview of wrongful termination law in California. It describes the employment at-will doctrine and discusses the exceptions to the at-will rule. The chapter examines the numerous state and federal statutes that provide protection to the employee against termination or other discrimination by the employer. It also discusses the three judicially developed exceptions to the at-will rule termination in violation of public policy, breach of an implied or express contract not to terminate except for good cause, and breach of the implied covenant of good faith and fair dealing and the applicability of principles of wrongful termination to disciplinary actions by the employer that fall short of actual termination. Finally, the chapter describes the remedies available to the plaintiff in a wrongful termination action, and covers the defenses that may be raised by the defendant.

For discussion of bringing and defending wrongful termination and discipline actions, *see* Chapter 61. Procedures and practices for avoiding claims of wrongful termination and discipline are discussed in Chapter 62. Related causes of action are covered in Chapter 63. For more detailed discussion of certain specific statutes relating to wrongful termination, *see* Chapter 5 (wage and hour remedies) and Chapters 40- 44 (equal employment opportunity laws).

FOOTNOTES:

(n2)Footnote *. Ms. Maulitz practices in the Law Offices of Marilyn Mac Rae in Oakland, California, specializing in wrongful termination and employment discrimination law.

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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 60 Liability for Wrongful Termination and Discipline
Part A. TEXT

4-60 California Employment Law § 60.01

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.01 Employment At-Will, Generally

In California, the at will rule is codified in *Labor Code Section 2922*, which reads in pertinent part: "An employment, having no specified term, may be terminated at the will of either party on notice to the other." Based on this provision, an at will employment relationship is presumed if there is no oral or written agreement specifying the length of employment or the grounds for termination.ⁿ¹

The at will rule found initial broad acceptance. Early interpretations of the at will doctrine in California included the holding that employment represented as "permanent" was, in fact, employment for an indefinite period, and thus employment at will.ⁿ² In a much-quoted passage, the early decision of *Union Labor Hosp. v. Vance Lumber Co.*,ⁿ³ emphasized freedom of contract and mutuality of obligation and the absolute right of the employer to discharge an employee at his or her discretion:

[I]t is the unquestioned right of the employee to leave the employment at his pleasure, and it is equally the right of the employer to discharge at his pleasure Precisely as may the employee cease labor at his whim or pleasure ... so, upon the other hand, may the employer discharge, and, whatever be his reason, good, bad, or indifferent, no one has suffered a legal wrong.ⁿ⁴

The unfettered right of the employer to discharge an employee without cause was reaffirmed in more recent cases. In *DeGonia v. Building Material Dump Truck Drivers Local Union 420*,ⁿ⁵ discharged employees sued their union and employers, alleging that they were pretextually fired in order to obtain new membership fees for the employees' union. The court held that no cause of action was stated against either defendant and quoted the above language from *Union Labor Hosp.* with approval.ⁿ⁶ In *Mallard v. Boring*,ⁿ⁷ an appellate court again cited with approval the *Union Labor Hosp.* opinion in denying a cause of action for wrongful discharge to an employee who allegedly was terminated for agreeing to serve on jury duty. In dicta, however, the court reprimanded the defendant for its "reprehensible" conduct.ⁿ⁸ In *Marin v. Jacuzzi*,ⁿ⁹ an employee who alleged he was fired for reporting his employer's violations of securities laws to appropriate state officials was also denied a cause of action. The court held that under an at will contract, the employer has an absolute privilege to discharge an employee at any time with or without cause, and this privilege is not

affected by "the presence of ill will or improper motive." Under present law, the employer's action in *Marin* would be prohibited by *Lab. Code § 1102.5*.ⁿ¹⁰

The at will doctrine continues to define employment relationships in many circumstances. However, Congress, the California Legislature, and the courts have now imposed substantial limitations on an employer's prerogative to discharge or discipline employees at will. It is these exceptions to the at will rule that make up the bulk of wrongful termination law in California today. For discussion of exceptions to the at will doctrine, *see § 60.09*.

It is important to note that the "at will" rule does not apply until an employment relationship has been created. Thus, an employer cannot defend a breach of contract claim by a *prospective* employee by demonstrating that employment *would have been* "at will." In *Comeaux v. Brown & Williamson Tobacco Co.*,ⁿ¹¹ the express terms of an oral offer provided that if the plaintiff satisfied certain conditions, the defendant would assign him "work and salary." This offer, together with an integrated employment application stating that employment would be "at will," constituted an employment contract. However, the defendant breached its agreement with the plaintiff because it never assigned him work and a salary after he satisfied the conditions set forth in the defendant's oral offer. Thus, "the parties never reached the point in time when the [application] would begin to govern termination of the relationship."ⁿ¹²

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

The analysis in any suit alleging wrongful termination or discrimination requires determination of whether one of the exceptions to the presumption of "at will" employment applies. Regardless of the unfairness of the discharge, unless the case can be pleaded and supported by proof of liability within the framework of one of the statutory and/or judicially created exceptions, the plaintiff will be unsuccessful in asserting such a claim.ⁿ¹³

Care should be taken to be sure that each of the elements of at least one of the applicable exceptions to *Labor Code Section 2922* are present. *Commentary by William M. Crosby.*

Legal Topics:

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

Labor & Employment Law
Employment Relationships
At-Will Employment
General Overview
Labor & Employment Law
Wrongful Termination
General Overview

FOOTNOTES:

(n1)Footnote 1. *See Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 675-677, 254 Cal. Rptr. 211, 765 P.2d 373 . For the standard jury instruction on the at-will presumption, *see* Judicial Council of California Civil Jury Instructions, CACI 2400 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI instructions generally, *see § 61.05*.

(n2)Footnote 2. *See Lord v. Goldberg* (1889) 81 Cal. 596, 601 602, 22 P. 1126 ; *see also Corp. Code § 312(b)*, with similar at will employment rule for corporate officers. For discussion, *see § 60.09[7]*.

(n3)Footnote 3. *Union Labor Hospital Asso. v. Vance Redwood Lumber Co.* (1910) 158 Cal. 551, 112 P. 886 .

(n4)Footnote 4. *Union Labor Hospital Asso. v. Vance Redwood Lumber Co.* (1910) 158 Cal. 551, 554, 112 P. 886 .

(n5)Footnote 5. *DeGonia v. Building Material etc. Union* (1957) 155 Cal. App. 2d 573, 583 584, 318 P.2d 486 .

(n6)Footnote 6. *DeGonia v. Building Material etc. Union* (1957) 155 Cal. App. 2d 573, 583 584, 318 P.2d 486 .

(n7)Footnote 7. *Mallard v. Boring* (1960) 182 Cal. App. 2d 390, 394, 396, 6 Cal. Rptr. 171 .

(n8)Footnote 8. *Mallard v. Boring* (1960) 182 Cal. App. 2d 390, 394, 396, 6 Cal. Rptr. 171 . For discussion of the statute that would now protect an employee called to jury duty, see § 60.03[2][n].

(n9)Footnote 9. *Marin v. Jacuzzi* (1964) 224 Cal. App. 2d 549, 553, 36 Cal. Rptr. 880 .

(n10)Footnote 10. For discussion of this statute, see § 60.03[2][aa][i].

(n11)Footnote 11. *Comeaux v. Brown & Williamson Tobacco Co.* (9th Cir. 1990) 915 F.2d 1264 .

(n12)Footnote 12. See *Comeaux v. Brown & Williamson Tobacco Co.* (9th Cir. 1990) 915 F.2d 1264, 1270 (emphasis omitted).

(n13)Footnote 13. See, e.g., *Burton v. Security Pacific National Bank* (1988) 197 Cal. App. 3d 972, 977, 243 Cal. Rptr. 277 .



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 60 Liability for Wrongful Termination and Discipline

Part A. TEXT

4-60 California Employment Law § 60.02

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.02 Emergence of Exceptions to At-Will Doctrine

[1] Statutory Exceptions

The limited applicability of the at will rule today is most apparent in the large volume of state and federal legislation restricting the employer's right to terminate or otherwise discipline or discriminate against its employees. The statutory scheme enacted in the late nineteenth and early twentieth centuries providing civil service protection to federal employees was the earliest legislation of this type.ⁿ¹ With the rise of labor unions in the early twentieth century came the next wave of federal legislation protecting concerted activity and collective bargaining.ⁿ²

The broadest and best-known federal legislation prohibiting discrimination in employment came about in 1964 with the enactment of Title VII of the Civil Rights Act,ⁿ³ but there are several other federal anti-discrimination laws as well.ⁿ⁴

For discussion of specific federal statutes limiting an employer's right to discharge or discipline employees, *see* § 60.03[3].

The California Legislature has also enacted significant legislation protecting employees. The Fair Employment and Housing Actⁿ⁵ prohibits discrimination on the same bases as Title VII and the Age Discrimination in Employment Act, as well as other bases, but sometimes provides broader remedies in civil actions.ⁿ⁶ Other California statutes forbid termination for a wide variety of protected activities, including service as an election officer,ⁿ⁷ service as a juror or witness,ⁿ⁸ appearance in court to obtain relief as a victim of domestic violence or sexual assault,ⁿ⁹ political affiliation,ⁿ¹⁰ "whistleblowing,"ⁿ¹¹ and exercise of one's statutory rights to initiate proceedings or testify under certain statutory schemes, such as the Occupational Safety and Health Act.ⁿ¹²

For discussion of specific state statutes limiting an employer's right to discharge or discipline employees, *see* § 60.03[2].

Some of these statutory schemes have been held to preempt certain common law causes of action. The National Labor

Relations Act, for example, preempts certain common law wrongful discharge actions brought by employees covered by collective bargaining agreements.ⁿ¹³

For discussion of statutory preemption of wrongful termination actions, *see* § 60.09.

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

If the basis for a public policy claim is a statute, care should be taken to review cases discussing the issues of whether the statute is considered the exclusive remedy, and whether it would be considered cumulative or in addition to a pre-existing common law remedy.ⁿ¹⁴

If the statute provides the exclusive remedy, a claim for breach of the implied covenant of good faith and fair dealing may nevertheless be available based on factors independent from the breach of the statute (such as breach of the employer's policies regarding discharge).ⁿ¹⁵ *Commentary by William M. Crosby.*

[2] Judicial Exceptions

In addition to the numerous statutory limitations on the at will rule, three broad exceptions to the rule have developed in the courts of California: wrongful termination in violation of public policy, breach of express or implied contract, and breach of the covenant of good faith and fair dealing.

[a] Public Policy

The first court-developed theory, wrongful termination in violation of public policy, was initially defined in detail by the California Supreme Court in *Tameny v. Atlantic Richfield Co.* ⁿ¹⁶

Later, in *Foley v. Interactive Data Corp.*, ⁿ¹⁷ *Gantt v. Sentry Insurance*,ⁿ¹⁸ and *Green v. Ralee Engineering Co.*,ⁿ¹⁹ the Court expanded on the characteristics that a public policy must possess to serve as the basis for a *Tameny* claim. For full discussion of the public policy exception, *see* § 60.04.

[b] Breach of Contract

The second theory, based in contract law, provides that an employee may not be terminated without cause if the employer has represented by written or oral agreement, or by its conduct, that the employee would be terminated only for cause. The seminal case under this theory is *Pugh v. See's Candies, Inc.*,ⁿ²⁰ which held that such a contract may be implied from a variety of circumstances. For a full discussion of the contract theory of wrongful discharge, *see* § 60.05.

[c] Breach of Covenant of Good Faith and Fair Dealing

The third judicial exception to the at will rule is breach of the implied covenant of good faith and fair dealing. Although the California Supreme Court has held that every contract contains such a covenant,ⁿ²¹ the Court has also stated that the damages available for breach of the covenant are not the same for all types of contractual relationships. In *Foley v. Interactive Data Corp.*, ⁿ²² the Court held that a plaintiff who alleges breach of the covenant in connection with an employment contract may recover contract damages only. For further discussion of the covenant of good faith and fair dealing exception to the at will rule, *see* § 60.06.

Legal Topics:

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

Labor & Employment Law Employment Relationships At-Will Employment General Overview Labor & Employment Law Employment Relationships At-Will Employment Exceptions General Overview

FOOTNOTES:

(n1)Footnote 1. Pendleton Act, 5 U.S.C. § 1502(a)(2); Lloyd-LaFollette Act, 5 U.S.C. § 7513.

(n2)Footnote 2. Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*; National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

(n3)Footnote 3. 42 U.S.C. § 2000e *et seq.* For detailed discussion of anti-discrimination laws, *see* chs. 40 and 41.

(n4)Footnote 4. *See, e.g.,* Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981, 1983; Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i. For detailed discussion of anti-discrimination laws, *see* chs. 40 and 41.

(n5)Footnote 5. Gov. Code § 12900 *et seq.* For detailed discussion, *see* chs. 40 and 41.

(n6)Footnote 6. *See Commodore Home Sys., Inc. v. Superior Court* (1982) 32 Cal. 3d 211, 213, 216, 185 Cal. Rptr. 270, 649 P.2d 912 .

(n7)Footnote 7. Elec. Code § 12312.

(n8)Footnote 8. Lab. Code § 230(a), (b).

(n9)Footnote 9. Lab. Code § 230(c).

(n10)Footnote 10. Lab. Code §§ 1101, 1102.

(n11)Footnote 11. Lab. Code § 1102.5.

(n12)Footnote 12. Lab. Code § 6310.

(n13)Footnote 13. *See Frisroe v. Reynolds Metals Co.* (9th Cir. 1980) 615 F.2d 1209, 1214 ; *but see Garibaldi v. Lucky Food Stores, Inc.* (9th Cir. 1984) 726 F.2d 1367, 1373-1375 (common law cause of action for discharge in violation of public policy is not preempted by federal labor law); *see also Lingle v. Norge Division, Magic Chef* (1988) 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410, 423 (discussing scope of federal preemption under Labor Management Relations Act).

(n14)Footnote 14. *See, e.g., Cabesuela v. Browning-Ferris Indus. of California, Inc.* (1998) 68 Cal. App. 4th 101, 109-110, 80 Cal. Rptr. 2d 60 (agreeing with *Hentzel v. Singer Co.* that Lab. Code § 6312 does not constitute exclusive remedy for action brought pursuant to Lab. Code § 6310, but rather is cumulative, and finding plaintiff could state cause of action for tortious discharge based on violation of Lab. Code § 6310); *Hentzel v. Singer Co.* (1982) 138 Cal. App. 3d 290, 303-304, 188 Cal. Rptr. 159 .

(n15)Footnote 15. *See Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n16)Footnote 16. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 .

(n17)Footnote 17. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 665-671, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n18)Footnote 18. *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 1090-1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , *overruled on other grounds, Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (clarifying that administrative regulations may be source of fundamental public policy).

(n19)Footnote 19. *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 75-80, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n20)Footnote 20. *Pugh v. See's Candies, Inc.* (1981) 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917 ; see also *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 676-681, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n21)Footnote 21. See *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co.* (1984) 36 Cal. 3d 752, 768, 206 Cal. Rptr. 354, 686 P.2d 1158 , overruled on other grounds, *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal. 4th 85, 88, 44 Cal. Rptr. 2d 420, 900 P.2d 669 .

(n22)Footnote 22. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373 .



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 60 Liability for Wrongful Termination and Discipline
Part A. TEXT

4-60 California Employment Law § 60.03

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.03 Statutory Prohibitions and Limitations on Employer's Right to Terminate or Discipline Employees

[1] Generally

There are numerous California and federal statutes that limit employers' rights to discipline, terminate, or discriminate against employees under various circumstances. These statutes are enumerated in subsections [2] (state statutes) and [3] (federal statutes), *below*. Some, but not all, of these statutes contain remedial provisions. Whether or not a violation of a statute may constitute a basis for a common law tort claim will depend on the particular statutory provision involved and the common law theory advanced. In some cases, the statutory remedy will be regarded as the exclusive remedy, and will thus preempt a common law action. For a discussion of preemption of common law causes of action by specific statutory schemes, *see* § 60.09[1].

■ CONSULTANT'S COMMENT:

There is no substitute for a general familiarity with the state and federal statutory restrictions on employee discharge. Evidence of an employer's good faith and fair dealing, no matter how extensive, will not necessarily provide a defense to a discharge that otherwise contravenes a statutory expression of "public policy." Furthermore, the number of statutes that proscribe an employer's discretion to discharge increases each year. Therefore, employers are advised to consult a personnel professional or counsel in connection with their discharge decisions to ensure that no statute exists that bears upon the discharge decision in question. *Commentary by Kirby Wilcox.*

■ CONSULTANT'S COMMENT:

It will rarely be economical to pursue a claim for statutory violation unless it is joined with a common law or statutory discrimination claim giving rise to tort damages. Pleading additional counts of statutory violations may, however, tend to support the plaintiff's goal of establishing a pattern of wrongful conduct on the part of the employer. *Commentary by William M. Crosby.*

[2] California Statutes

[a] Accommodation for Alcohol and Drug Rehabilitation (Labor Code Sections 1025-1028)

Labor Code Section 1025 provides that any private employer regularly employing 25 or more employees must "reasonably accommodate" any employee who wishes to enter an alcohol or drug rehabilitation program, as long as such accommodation does not impose any "undue hardship" on the employer. *Labor Code Section 1026* requires the employer to make reasonable efforts to protect the employee's privacy regarding his or her enrollment in such a program. If an employee's rights under Section 1025 are violated, he or she may file a complaint with the Labor Commissioner.ⁿ¹

Section 1025 does not require an employer to hire or to continue employing an employee who is unable to properly perform his or her duties or cannot perform the duties without endangering the health and safety of the employee or others because of alcohol or drug abuse.ⁿ²

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

In *Sullivan v. Delta Airlines* ⁿ³ the First District Court of Appeal held that *Labor Code Section 1025* does not articulate a public policy concerning discrimination against a person suffering from alcoholism.ⁿ⁴ Thus, the plaintiff's practitioner should take care to proceed under the statute's terms alone and *not* use it as an articulation of public policy. *Commentary by John M. True, III.*

For discussion of the privacy aspects of the Alcohol and Drug Rehabilitation Act, *see* Chapters 50, Part C, and 51, Part B.

[b] Accommodation for Illiteracy (Labor Code Section 1040 et seq.)

The Employee Literacy Education Assistance Act requires private employers who regularly employ 25 or more employees to reasonably accommodate and assist any employee who reveals a problem of illiteracy and requests employer assistance in enrolling in an adult literacy education program, provided that the reasonable accommodation does not impose an undue hardship on the employer.ⁿ⁵

"Employer assistance" includes, but is not limited to, providing the employee with the locations of local literacy education programs or arranging for a literacy education provider to visit the jobsite.ⁿ⁶

The employer must make reasonable efforts to safeguard the privacy of the employee as to the fact that he or she has a problem with illiteracy.ⁿ⁷ An employer is expressly not required to provide time off with pay for an employee to enroll and participate in an adult illiteracy program.ⁿ⁸ An employee who reveals a problem of illiteracy and who satisfactorily performs his or her work may not be subject to termination of employment because of the disclosure of illiteracy.ⁿ⁹

[c] Disclosure of Arrest Records (Labor Code Section 432.7)

Labor Code Section 432.7(a) makes it unlawful for any employer to obtain or seek from any source or to use either information concerning an arrest or detention that did not result in conviction, or information about participation in a pretrial or posttrial diversion program.ⁿ¹⁰

It also prohibits the employer from using such information as a factor in determining any condition of employment, including, among other things, termination.ⁿ¹¹ In *Faria v. San Jacinto Unified School District* ⁿ¹² a California court of appeal read *Labor Code Section 432.7(a)* broadly to extend the statute's protections to employees.

There are certain limited exceptions to the proscriptions of Section 432.7(a). For example, persons employed or applying for employment as peace officers are exempted from its protections.ⁿ¹³

Further, a health care facility employer is specifically permitted to ask an applicant for a position involving regular access to patients about any arrest under the sex offender statutes,ⁿ¹⁴ and to ask an applicant for a position with access to drugs about any drug-related arrest.ⁿ¹⁵ In addition, an employer may ask an employee or applicant about an arrest for which the employee is out on bail or on his or her own recognizance pending trial.ⁿ¹⁶

However, the employer may not *use* the information about such arrests in making an employment decision.ⁿ¹⁷

When an employer violates *Labor Code Section 432.7*, the applicant may sue for actual damages or \$200, whichever is greater (or, in the case of an intentional violation, treble the damages or \$500), plus costs and attorney's fees.ⁿ¹⁸ An intentional violation is also a misdemeanor punishable by a fine not to exceed \$500.ⁿ¹⁹ These remedies are cumulative to those otherwise provided by law.ⁿ²⁰ However, an employee who sues for violation of this statute is limited to his or her actual damages and is not entitled to treble damages or attorney's fees.ⁿ²¹

■ CONSULTANT'S COMMENT:

Faria ⁿ²² provides mixed news for employees and employers. The plaintiff sought damages for his demotion from assistant principal to teacher and prevailed at the trial court on two separate theories of recovery. First, he prevailed on a non-jury count based upon an allegation that the school district had provided untimely notice of his reassignment. For this count, the trial court awarded him actual damages of \$17,766, the difference between his salary as assistant principal and his salary as a teacher for one school year. Second, he recovered on a jury count under *Labor Code Section 432.7* based upon an allegation that the school district had used an arrest record as factor in its demotion decision. For this count, a jury awarded him more than \$250,000 in "actual" damages. The trial court reduced that total to \$213,192 a sum precisely 12 times the one-year pay differential of \$17,766. The trial court also tripled the award and granted attorneys' fees under the terms of the statute.

The appellate panel eliminated the multiplier and the award of attorneys' fees, but allowed the "actual" damages of \$213,192 to stand. It did so on two grounds. First, the remedial clause of section 432.7 expressly indicates that its provisions pertain only to applicants. Thus, the plaintiff an employee was ineligible for any statutory recovery. Second, proceeding on the notion that for every wrong, there must be a remedy, the appellate panel created a private right of action for employees under the section.

In short, *Faria* has construed a statute that practitioners apply most often in the context of applicants for employment as providing significant rights for employees. *Faria* also has opened the remedies available to employees to include any damages awarded at common law presumably, back pay, front pay, interest, damages for emotional distress, and punitive damages. While employment law practitioners have known for many years not to use arrest records for any employment-related purpose (except as authorized by statute), *Faria* adds good reason to be vigilant for any lapses in that prohibition. *Commentary by Kirby Wilcox.*

Labor Code Section 432.7 also prohibits law enforcement personnel from disseminating arrest record information, with the intent to affect a person's employment, to anyone not authorized to receive it.ⁿ²³

For discussion of the privacy implications of *Labor Code Section 432.7*, see Chapter 50, Part B.

[d] Disclosure or Assignment of Inventions as Condition of Employment (Labor Code Sections 2870 and 2871)

Under *Labor Code Section 2870*, any provision in an employment agreement that requires an employee to assign his or her rights in an invention to his or her employer is unenforceable if the employee developed the invention on his or her own time, without use of the employer's facilities, equipment, supplies, or trade secret information. Such an agreement

is not void, however, if (1) the invention relates to the employer's business, or (2) the invention results from work performed for the employer. *Labor Code Section 2871* prohibits an employer from requiring a provision made unenforceable by *Labor Code Section 2870* as a condition of employment or continued employment. Thus, an employer can neither refuse to hire nor terminate an employee for refusing to enter into such an agreement. However, the statute provides no specific remedies for violation of its provisions. These statutes do not hinder the employer's right to require confidential disclosure of all the employee's inventions during the term of his or her employment.ⁿ²⁴

For further discussion of the rights of employees and employers to inventions developed as part of the employment, *see* Chapter 70.

[e] Discrimination in Violation of the Fair Employment and Housing Act (Government Code Sections 12900 et seq.)

The Fair Employment and Housing Act (FEHA)ⁿ²⁵ prohibits discrimination based on race, religious creed, color, national origin, marital status, medical condition, physical and mental disability, sex, age, or sexual orientation,ⁿ²⁶ pregnancy,ⁿ²⁷ or taking family care leave.ⁿ²⁸

The FEHA requires exhaustion of its administrative remedies prior to pursuing a FEHA civil action. The administrative procedures include a one-year period after the act of discrimination during which one may file an administrative complaintⁿ²⁹ and a one-year period after receipt of the right-to-sue letter during which one may file a civil suit.ⁿ³⁰

Remedies in court actions include compensatory and punitive damages and attorneys' fees as well as back pay and injunctive relief.ⁿ³¹

The FEHA does not preempt other state laws, including the common law, that prohibit or restrict employment discrimination.ⁿ³²

For further discussion, *see* § 60.09[1][e].

For full discussion of equal employment opportunity laws, *see* Chapters 40- 44.

[f] [Reserved]

[g] Discrimination Against Employee for Filing Claim With Labor Commissioner (Labor Code Sections 98.6, 98.7)

Labor Code Section 98.6 prohibits discharge or any other form of discrimination against an employee because he or she has filed a bona fide complaint or instituted any proceeding with the Labor Commissioner, or has testified or will testify in any such proceeding.ⁿ³³ It includes conduct under *Labor Code Section 96(k)*, which allows the Labor Commissioner to take assignments of claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises.^{n33.1}

Reinstatement and reimbursement of lost wages and benefits are remedies for a violation of the statute.ⁿ³⁴ It is also a misdemeanor for the employer to refuse to so remedy a violation on a finding of entitlement for the employee.ⁿ³⁵

Section 98.6, however, does not adequately support a public policy against a private employer's termination of an employee for the employee's lawful conduct, otherwise unprotected by the Labor Code, occurring during nonworking hours away from the employer's premises.^{n35.1} In *Grinzi v. San Diego Hospice Corp.*,^{n35.2} the discharged employee sought to base a cause of action for public policy wrongful termination (allegedly resulting from her participation in an investment group during nonworking hours) on *Labor Code Sections 98.6* and *96(k)*, which allows the Labor

Commissioner to take assignments of claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises. The court held that, to successfully establish a tortious discharge claim under Section 96(k) as included in Section 98.6, the employee had to allege her discharge occurred because she asserted a recognized constitutional right. However, the *First Amendment* speech guarantees she alleged were only recognized against government interference, and her former employer was a private entity. Consequently, she was not terminated for exercising a recognized constitutional right as described in Section 96(k) as proscribed by Section 98.6. Further, although Section 98.6 prohibits termination because of the exercise by the employee on behalf of himself, herself, or others of "any rights" afforded him or her, the Legislature intended the phrase "any rights" to refer to rights otherwise protected by the Labor Code. The discharged employee in this case did not allege her termination occurred because she exercised a right protected by the Labor Code.

Labor Code Section 98.7 provides that an employee may file a complaint with the Division of Labor Standards Enforcement (DLSE) within six months after an alleged violation of Section 98.6.ⁿ³⁶ The six-month period may be extended for good cause.ⁿ³⁷ The employee may file concurrently during the same time period with the United States Department of Labor.ⁿ³⁸ On the filing of a complaint, the DLSE undertakes an investigation of the complaint, and the Labor Commissioner makes a determination within 60 days.ⁿ³⁹ If the Commissioner dismisses the complaint, the employee may file a civil action.ⁿ⁴⁰

The rights and remedies provided by *Labor Code Section 98.7* are not exclusive.ⁿ⁴¹

[h] Discrimination Against Employee for Seeking Unemployment Insurance Information (Unemployment Insurance Code Section 1237)

Unemployment Insurance Code Section 1237 prohibits any business entity from discharging or otherwise discriminating against any person because such individual has (1) sought information from the Employment Development Department concerning his or her rights under either the Unemployment Insurance Code or the Labor Code, (2) has cooperated with any investigation undertaken by the department, or (3) has testified or is about to testify in any proceeding under the Unemployment Insurance Code or Labor Code.ⁿ⁴² An employee who believes that his or her rights under this provision have been violated may file a complaint with the Labor Commissioner.ⁿ⁴³

The rights, remedies, and procedures applicable to the complaint are the same as for a violation of *Labor Code Section 98.6*.ⁿ⁴⁴

For full discussion of the Unemployment Insurance Code, *see* Chapter 80.

[i] Discrimination Against Injured Workers (Labor Code Section 132a)

Labor Code Section 132a prohibits discrimination against any employee, including discharge or threats to discharge, because the employee has (1) filed or plans to file a worker's compensation claim, (2) received a rating, award, or settlement, or (3) testified or will testify in another employee's proceedings. An employer who violates Section 132a is guilty of a misdemeanor. In addition, an employee who establishes a violation of Section 132a is entitled not only to reinstatement and reimbursement of lost wages, but to an increase of his or her workers' compensation benefits of up to one-half (but not to exceed \$10,000), plus costs and expenses not exceeding \$250.ⁿ⁴⁵

These penalties apply to any insurance carrier that influences its insured to take such discriminatory actions, as well as to the employer.ⁿ⁴⁶ An employee damaged under *Labor Code Section 132a* must institute proceedings before the Workers' Compensation Appeals Board within one year of the discriminatory act or date of termination of the employee.ⁿ⁴⁷

Because the preface to *Labor Code Section 132a* states a public policy prohibiting discrimination against injured

workers, the statute has been interpreted broadly to prohibit discriminatory conduct not specifically enumerated in its provisions.ⁿ⁴⁸ Furthermore, the statute is not the exclusive remedy for persons discharged in violation of its provisions: remedies under *Government Code Section 12940(a)* and common law remedies are available to employees for discrimination based on a disability created by a workplace injury.ⁿ⁴⁹

For further discussion of discrimination based on work-related injuries, *see* Chapter 20.

[i.1] Domestic Violence or Sexual Assault Victims (Labor Code Section 230.1)

An employer with 25 or more employees may not discharge or in any manner discriminate or retaliate against an employee who is a victim of domestic violence^{n49.1} or sexual assault^{n49.2} for taking time off from work to attend to any of the following:^{n49.3}

1. To seek medical attention for injuries caused by domestic violence or sexual assault;
2. To obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence or sexual assault;
3. To obtain psychological counseling related to an experience of domestic violence or sexual assault;
4. To participate in safety planning and take other actions to increase safety from future domestic violence or sexual assault, including temporary or permanent relocation.

For these absences, an employee may use vacation, personal leave, or compensatory time off otherwise available under the terms of employment or under a collective bargaining agreement. The employee's entitlement to be absent for these purposes cannot be diminished by a collective bargaining agreement term or condition.^{n49.4} However, *Labor Code section 230.1* does not create a right for an employee to take unpaid leave that exceeds the unpaid leave time allowed under, or in addition to the unpaid leave time permitted by, the federal Family and Medical Leave Act of 1993 [29 U.S.C. § 2606 et seq.].^{n49.5}

As a condition of taking time off for one of these purposes, the employee must give the employer reasonable advance notice of the employee's intention to take time off, unless the advance notice is not feasible.^{n49.6} When an unscheduled absence occurs, the employer must not take any action against the employee if the employee, within a reasonable time after the absence, provides a certification to the employer. Certification is sufficient in the form specified in *Labor Code section 230.1*.^{n49.7} To the extent allowed by law, an employer must maintain the confidentiality of any employee requesting leave under *Labor Code section 230.1(a)*.^{n49.8}

An employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment for an absence authorized by this statute, is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the employer's acts. An employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee determined to be eligible for rehiring or promotion by a grievance procedure or hearing authorized by law is guilty of a misdemeanor.^{n49.9} The employee may file a complaint with the Division of Labor Standards Enforcement of the Department of Industrial Relations within one year.^{n49.10}

[j] Elections Officer (Elections Code Section 12312)

Elections Code Section 12312 prohibits the suspension or termination of an employee because of his or her absence from work while serving as an election officer on election day. In *Kouff v. Bethlehem-Alameda Shipyard*,ⁿ⁵⁰ the court relied on a predecessor statute to Section 12312ⁿ⁵¹ as the basis for a common law wrongful termination action.

[k] Fingerprints or Photographs for Improper Purpose (Labor Code Sections 1051, 1052, 1054)

Labor Code Section 1051 makes it a misdemeanor for an employer to require an employee or job applicant, as a condition of securing or retaining employment, to submit to photographs or fingerprints for the purpose of furnishing them, or information concerning them, to any third party, if the photographs or fingerprints "could be used to the detriment of the employee or applicant." This section does not apply to any employee of a diversified or nondiversified management company, as defined in *Labor Code Section 1057*.ⁿ⁵²

In addition to the criminal penalty for violation of *Labor Code Section 1051*, the aggrieved employee may bring a civil action against the employer for treble damages.ⁿ⁵³ Criminal liability need not be established before the civil action may be brought.ⁿ⁵⁴

For additional discussion of this provision, see Chapter 50, Part B.

[l] Garnishment or Assignment of Wages (Labor Code Section 2929(b); Family Code Section 5290)

Labor Code Section 2929(b) forbids termination of an employee based on a threatened garnishment of wages or an actual garnishment for any one indebtedness. Any employment contract providing less protection to the employee is void as against public policy.ⁿ⁵⁵ The procedures by which an employer may withhold earnings of an employee for payment of a judgment or other debt are discussed in Chapter 4.

Labor Code Section 2929(e) indicates that the statute is intended to aid in the enforcement of the prohibition against discharge for garnishment of earnings provided in the federal Consumer Credit Protection Act.ⁿ⁵⁶ The Law Revision Commission Comments to section 2929 state that the section is therefore meant to be interpreted consistently with the federal provisions. For discussion of these federal statutes, see [3][d] below.

In addition, a Family Code provision pertaining to judicially ordered wage assignments for child, spousal, and family support prohibits any employer from using such a wage assignment as grounds for refusing to hire a person, for discharging or taking disciplinary action against an employee, for denying a promotion to an employee, or for taking any other action adversely affecting the terms and conditions of employment of an employee.ⁿ⁵⁷ An employer's violation of this provision may result in assessment of a civil penalty of up to \$500.ⁿ⁵⁸

[m] Health Care Workers (Health and Safety Code Section 123420(a); Penal Code Section 11161.8; Government Code Section 12940(g))

Health care workers receive special protection under several California statutes. The first of these, *Health and Safety Code Section 123420(a)*, relates to specified health care employees who refuse to participate in the performance of abortions. No employer or other person may require a physician, registered nurse, licensed vocational nurse, or any other person employed or with staff privileges at a hospital, facility, or clinic to directly participate in the performance of an abortion if that individual has filed a written statement with the employer, hospital, facility, or clinic indicating a moral, ethical, or religious basis for his or her refusal to participate.ⁿ⁵⁹ A person may not be penalized in any way for such a refusal.ⁿ⁶⁰

On the other hand, a facility that does not permit the performance of abortions may not discriminate against any employee or individual with staff privileges due to that person's participation in the performance of abortions elsewhere.ⁿ⁶¹

Two other statutes provide protection to health care workers who file reports of patient abuse with governmental authorities. Penal Code Section 11161.8 requires that certain health care workers who observe a patient suffering from a condition that appears to be the result of abuse or neglect must file a report within 36 hours with the local police

authority and the county health department. An employee may not be discharged, suspended, disciplined, or harassed for making such a report.ⁿ⁶²

Government Code Section 12940(g), which is part of the Fair Employment and Housing Act,ⁿ⁶³ also forbids discrimination against or discharge of a person who has made such a report.

[n] Jurors and Witnesses (Labor Code Section 230)

Labor Code Section 230 prohibits discharge or other discrimination against an employee for taking time off from work to serve as a juror as long as the employee gives reasonable notice of the anticipated absence.ⁿ⁶⁴

Labor Code Section 230 also prohibits discharge, or other discrimination, or retaliation against an employee (including, but not limited to an employee who is a victim of a crime) for taking time off to appear in court to comply with a subpoena or other court order as a witness in any judicial proceeding.ⁿ⁶⁵

Additionally, *Labor Code Section 230* prohibits discharge, or other discrimination, or retaliation against an employee who is a victim of domestic violenceⁿ⁶⁶ or sexual assaultⁿ⁶⁷ for taking time off from work to obtain any relief to help ensure the health, safety, or welfare of the employee or his or her child.ⁿ⁶⁸ As a condition for taking time off in these circumstances, the employee must give the employer reasonable advance notice of the employee's intention to take time off, unless the advance notice is not feasible.ⁿ⁶⁹ When an unscheduled absence occurs, the employer must not take any action against the employee if the employee, within a reasonable time after the absence, provides a certification to the employer.ⁿ⁷⁰

Labor Code Section 230 further provides that an employee who has been discharged or suffered discrimination or retaliation in violation of this section is entitled to reinstatement and reimbursement of lost wages and benefits.ⁿ⁷¹ In addition, an employer who fails to rehire or restore an eligible employee is guilty of a misdemeanor.ⁿ⁷² Moreover, an employee who is discharged or has suffered discrimination or other retaliation in violation of this section may file a complaint with the Department of Industrial Relations, Division of Labor Standards Enforcement.^{n72.1}

An employee is entitled to use available vacation, personal leave, or compensatory time off for time taken off for a purpose specified in this section, unless otherwise provided by a collective bargaining agreement.^{n72.2}

[o] Labor Organization Affiliation (Labor Code Sections 921, 923)

Labor Code Section 921 sets forth the public policy against any employment agreement that includes a promise by either party to join or not join, or remain or not remain a member of, a labor or employer organization. *Labor Code Section 923* proclaims the broader policy of granting every worker "full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment."

The protections of the statute have been interpreted fairly broadly. Two courts of appeal found that *Labor Code Section 923* permitted an individual employee to designate an attorney or other individual to represent him or her in negotiating terms and conditions of employment, and that discharge for doing so constitutes a violation of section 923.ⁿ⁷³ In *Gelini v. Tishgart*,^{n73.1} the court would have found the discharge of an employee for using an attorney to negotiate terms and conditions of employment not to be violation of section 923, but for the decision in *Montalvo v. Zamora* ^{n73.2} and favorable references to that decision by the California Supreme Court in *Tameny* ^{n73.3} and *Foley*.^{n73.4}

■ CONSULTANT'S COMMENT:

In *Gelini*,^{n73.5} the court of appeal found a violation of public policy in the termination of an employee for retaining an attorney who wrote a letter of complaint to the employer on behalf of the employee. At the core of the decision is the panel's reluctant conclusion that it must follow past precedent interpreting

Labor Code Section 923 to mean that "the individual employee has the right to designate an attorney or other individual to represent him in negotiating the terms and conditions of his employment."^{n73.6}

Whether or not this interpretation will survive if reviewed by the California Supreme Court, one question that lingers in the aftermath of *Gelini* deserves special attention. Stated most simply: must an employer now allow an employee to have his or her attorney present during an investigatory interview of the employee? Nothing in *Gelini* suggests that this question must be answered in the affirmative. That is, the right of an employee to retain an attorney to represent him or her in the negotiation of the terms and conditions of his or her employment does not encompass a right to require that the employer deal only with (or only in the presence of) that attorney. Thus, the common practice of interviewing employees without the presence of counsel to determine their knowledge of or complicity in a specific fact pattern would appear to remain intact. *Commentary by Kirby Wilcox.*

However, there are limits to the application of the statute. Another court of appeal rejected an employee's claim that the employer violated *Labor Code Section 923* by allegedly discharging the employee for requesting the presence of an attorney at performance evaluations.ⁿ⁷⁴ The court noted that requiring an employer to permit an attorney to be present at every informal job performance evaluation would seriously affect a company's efficiency.ⁿ⁷⁵

The public policy protecting labor organization affiliation was an early exception to the general rule allowing termination of employees at will. As early as 1961, *Labor Code Section 923* was interpreted as prohibiting an employer from terminating an employee solely because of his or her union membership or activity.ⁿ⁷⁶ An employee so terminated has been held to be entitled to tort damages as well as injunctive relief.ⁿ⁷⁷

Whether such a termination gives rise to liability depends on whether it was "primarily" due to the employee's union affiliation; the union affiliation need not be the sole motive for the termination in order for liability to attach.ⁿ⁷⁸

However, because the National Labor Relations Actⁿ⁷⁹ gives exclusive jurisdiction of cases in which a covered employer wrongfully terminates an employee for union-related activities to the National Labor Relations Board (NLRB), a state wrongful termination action based on *Labor Code Sections 921* and *923* would be preempted, unless the NLRB for some reason declines to issue a complaint.ⁿ⁸⁰

For discussion of preemption of state wrongful termination actions by federal labor law, *see* § 60.09[1][b].

[p] Medical Information Disclosure (Civil Code Sections 56.10(a) et seq.)

Health care providers and employers must obtain a written authorization to disclose medical information about an individual, except in certain limited circumstances.ⁿ⁸¹

Civil Code Section 56.20(b) provides that an employer may not discriminate against an employee for refusing to sign an authorization for such disclosure. If an employee does sign an authorization, the employer must provide the employee with a copy of the document on demand.ⁿ⁸²

For further discussion of restrictions on disclosure of medical information by employers, *see* Chapter 51, Part B.

[q] Military Duty (Military and Veterans Code Section 394)

Military and Veterans Code Section 394 forbids discrimination against any officer or enlisted person in the military or naval forces of California or the United States. It specifically prohibits employers from discriminating against any employee for "the performance of any ordered military duty or training."ⁿ⁸³

[r] Political Affiliation (Labor Code Sections 1101-1102)

Labor Code Section 1101 prohibits employers from making or enforcing any policy which prevents employees from engaging in political activities or from running for public office, or which tends to control or direct the political activities or affiliations of employees. *Labor Code Section 1102* forbids employers from attempting to coerce or influence employees' political activities by means of threat of discharge.

These sections were construed broadly by the California Supreme Court in *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*,ⁿ⁸⁴ in which the Court held that "political activity" includes participation in litigation, wearing armbands, and associating with others for the advancement of ideas.ⁿ⁸⁵

In *Ali v. L.A. Focus Publication*,^{n85.1} the court stated that *Labor Code §§ 1101 and 1102* reinforce the substantial public interest in protecting the fundamental right of employees to engage in political activity without interference or threat of retaliation from employers. There is no doubt that the statutory protection for an employee's political activity, particularly political speech, inures to the public at large rather than simply to the individual or proprietary interests of the employee or employer.^{n85.2}

[s] Polygraph Examinations (Labor Code Section 432.2)

Labor Code Section 432.2(a) forbids private employers from requiring employees or job applicants to take polygraph or similar tests as a condition of employment or continued employment. An employer may request employees or applicants to take such tests voluntarily, as long as the employer provides written notice of the rights guaranteed by *Labor Code § 432.2*.ⁿ⁸⁶

Although public employees are specifically exempted from the provisions of *Labor Code Section 432.2(a)*, they are afforded similar protection from involuntary polygraph examinations by the privacy clause of the California Constitution.ⁿ⁸⁷

Federal law also restricts use of polygraph examinations and prohibits discipline or discharge of employees who fail or refuse to take such examinations or based on the results of such examinations, subject to certain exemptions.ⁿ⁸⁸

For discussion, see [3][f], *below*. For further discussion of *Labor Code Section 432.2*, see Chapter 50, Part B.

[t] Refusal to Patronize Employer (Labor Code Section 450)

An employer may not force an employee or a job applicant to patronize the employer or any other person in connection with the purchase of any thing of value.ⁿ⁸⁹ A violation of *Labor Code Section 450* is a misdemeanor,ⁿ⁹⁰ but no other remedies are explicitly stated in the statute, and no reported cases have indicated whether any civil remedies exist for violation of the statute.

[t.1] Relocations, Terminations, and Mass Layoffs (Labor Code Section 1400 et seq.)

An employern^{90.1} may not order a mass layoff,^{n90.2} relocation,^{n90.3} or termination^{n90.4} at a covered establishment^{n90.5} unless, 60 days before the order takes effect, the employer gives written notice of the order to the following:^{n90.6}

1. The employees^{n90.7} of the facility affected by the order.
2. The Employment Development Department, the local workforce investment board, and the chief elected official of each city and county government within which the termination, relocation, or mass

layoff occurs.

However, an employer is not required to provide notice if a mass layoff, relocation, or termination is necessitated by a physical calamity or act of war.^{n90.8} Moreover, the notice requirement does not apply when the closing or layoff is the result of the completion of a particular project or undertaking of an employer subject to the Wage Orders governing the broadcasting industry,^{n90.9} motion picture industry,^{n90.10} or certain on-site occupations in the construction, drilling, logging and mining industries,^{n90.11} and the employees were hired with the understanding that their employment was limited to the duration of that project or undertaking.^{n90.12} Nor does the notice requirement apply to employees in seasonal employment hired with the understanding that their employment was seasonal and temporary.^{n90.13} An employer also is not required to comply with the notice requirement if the Employment Development Department determines that all of the following conditions exist:^{n90.14}

1. As of the time the notice would have been required, the employer was actively seeking capital or business.
2. The capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination.
3. The employer reasonably and in good faith believed that giving the required notice would have precluded the employer from obtaining the needed capital or business.

Moreover, there is no "mass layoff" within the meaning of the California WARN Act, and an employer is not required to give notice, if employees are transferred from one employer to another for whom they perform the same work at the same rates of pay and with whom they retain the same benefits.^{n90.15}

An employer required to give notice of a mass layoff, relocation, or termination must include in its notice the elements required by the federal Worker Adjustment and Retraining Notification Act ("WARN Act").^{n90.16}

An employer who fails to give the required notice before ordering a mass layoff, relocation, or termination is liable to each terminated employee for all of the following:^{n90.17}

1. Back pay at the average regular rate of compensation received by the employee during the last three years of employment, or the employee's final rate of compensation, whichever is higher;
2. The value of the cost of any benefits to which the employee would have been entitled had his or her employment not been lost, including the cost of any medical expenses incurred by the employee that would have been covered under an employee benefit plan.

Liability is calculated for the period of the employer's violation, up to a maximum of 60 days, or one-half the number of days the employment, whichever is smaller.^{n90.18} The amount of liability is reduced by the following:^{n90.19}

1. Any wages, except vacation moneys accrued prior to the period of the employer's violation, paid by the employer to the employee during the period of the employer's violation;
2. Any voluntary and unconditional payments made by the employer to the employee that were not required to satisfy any legal obligation; or
3. Any payments by the employer to a third party or trustee, such as premiums for health benefits or payments to a defined-contribution pension plan on behalf of and attributable to the employee, for the period of the violation.

An employer who fails to give the required notice is also subject to a civil penalty for each day of violation, unless the employer pays all applicable employees the amounts for which the employer is liable within three weeks from the date the employer orders the mass layoff, relocation, or termination.^{n90.20} A person, including a local government or an employee representative, seeking to establish liability against an employer may bring a civil action on behalf of the person, other persons similarly situated, or both, in any court of competent jurisdiction. The court may award reasonable attorney's fees as part of costs to any prevailing plaintiff.^{n90.21} If the court determines that an employer conducted a reasonable investigation in good faith, and if the employer had reasonable grounds to believe that its conduct was not a violation of the notice requirement, the court may reduce the amount of any penalty imposed against the employer.^{n90.22}

Payments by an employer who failed to provide the advance notice of facility closure required by *Lab. Code § 1400 et seq.* or the federal Worker Adjustment and Retraining Notification Act^{n90.23} may not be construed as wages or compensation for personal services for unemployment insurance purposes.^{n90.24} Unemployment insurance benefits^{n90.25} may not be denied or reduced because of the receipt of payments related to an employer's violation of the notice requirements or the federal WARN Act.^{n90.26}

In any investigation or proceeding relating to these requirements, the Labor Commissioner has, in addition to all other powers granted by law, the authority to examine the books and records of an employer.^{n90.27}

■ CONSULTANT'S COMMENT:

The California WARN Act is materially different from the federal WARN Act. In addition, many of the provisions of the California WARN Act are confusing and seemingly internally inconsistent. Employers should not assume that compliance with the federal WARN Act is sufficient to satisfy California law.

Commentary by Kirby Wilcox

[u] Safety of Employees (Labor Code Sections 6300 et seq.)

The California Occupational Safety and Health Act (Cal/OSHA)ⁿ⁹¹ prohibits discrimination against employees who make oral or written complaints about workplace safety to either their employer or a governmental agency, or who participate in an occupational health and safety committee established pursuant to *Labor Code Section 6401.7*, or who institute or testify in proceedings under the Act.ⁿ⁹² An employer may not retaliate against an employee because the employer fears the employee will make a complaint.^{n92.1}

The prohibitions in *Labor Code Section 6310(b)*, permitting an action for damages if the employee is discharged, threatened with discharge, or discriminated against because of complaints about unsafe working conditions, have been broadly interpreted to include refusing to renew an employment contract that has expired on its own terms.ⁿ⁹³

The protections of Cal/OSHA do not depend on whether a Cal/OSHA standard ultimately is found to have been violated; it is sufficient that the employee complained in good faith about working conditions he or she reasonably believed to be unsafe.ⁿ⁹⁴

Labor Code Section 6311 forbids the termination or layoff of an employee who refuses to work in conditions which violate the provisions of Cal/OSHA if the violation would create a real and apparent hazard to the employee or other employees. An employee who is terminated or who is not paid because of such a refusal to work has a right of action for lost wages.ⁿ⁹⁵

An employee claiming a violation of *Labor Code Sections 6310* or *6311* may file a complaint with the California Labor Commissioner, pursuant to the procedures set out in *Labor Code Section 98.7*.ⁿ⁹⁶ The employee must file the complaint within six months of the violation.ⁿ⁹⁷ Potential remedies include rehiring or reinstatement, and

reimbursement of lost wages and benefits, with interest and attorney's fees.ⁿ⁹⁸ See Chapter 5 for discussion of proceedings before the Labor Commissioner.

The administrative remedy provided a terminated employee by *Labor Code Section 6312* is not exclusive, and does not preclude a common law wrongful discharge action.ⁿ⁹⁹ An arbitration decision under a collective bargaining agreement (CBA) does not have preclusive effect in a civil suit for retaliatory discharge under *Labor Code section 6310(b)* unless both of the following are true:^{n99.1}

- The CBA clearly and unmistakably provided for binding arbitration of the employee's statutory claim under the Labor Code.
- The arbitration was conducted in a manner that allowed for a full litigation and fair adjudication of the Labor Code claim.

For full discussion of Cal/OSHA, see Chapter 21.

[v] School Visit by Parent (Labor Code Section 230.8)

Labor Code Section 230.8(a)(1) prohibits an employer who employs 25 or more employees working at the same location from discharging or in any way discriminating against an employee who is a parent, guardian, or grandparent with custody of one or more children in kindergarten or grades 1 to 12, inclusive, or attending a licensed child day care facility, for taking off up to 40 hours each year, not exceeding eight hours in any calendar month, to participate in activities of the school or licensed child day care facility of any child, if the employee, prior to taking the time off, gives reasonable notice to the employer of the planned absence of the employee.ⁿ¹⁰⁰

An employee must utilize existing vacation, personal leave, or compensatory time off for purposes of the planned absence under *Labor Code Section 230.8*, unless otherwise provided by a collective bargaining agreement entered into before January 1, 1995, and in effect on that date. An employee may also utilize time off without pay for this purpose, to the extent made available by his or her employer. The entitlement of any employee under section 230.8 cannot be diminished by any collective bargaining agreement term or condition that is agreed to on or after January 1, 1995.ⁿ¹⁰¹

The employee, if requested by the employer, must provide documentation from the school or licensed child day care facility that he or she participated in school or day care facility activities on a specific date and at a particular time.ⁿ¹⁰²

An employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in terms or conditions of employment by his or her employer because the employee has taken time off to participate in school or licensed child day care activities as described in *Labor Code Section 230.8* is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the employer's acts.ⁿ¹⁰³ An employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law is subject to a civil penalty equal to three times the amount of the employee's lost wages and work benefits.ⁿ¹⁰⁴

[w] Shopping Investigations (Labor Code Section 2930)

Labor Code Section 2930 provides some protection to a sales employee who is the subject of a report by a "shopping investigator." A "shopping investigator" is defined in *Labor Code Section 2930(b)* as a person who shops in business establishments to test the integrity, sales technique, and courtesy of employees and then writes a report of his or her investigation for each establishment visited.

Labor Code Section 2930(a) provides that an employer who disciplines or fires an employee based on a shopping

investigator's report must provide the employee with a copy of the report before the discipline or termination occurs. Moreover, if the employer interviews the worker about some alleged dishonesty and it is possible that the interview may result in termination, the employer must give the employee a copy of the latest investigation report during the course of the interview.ⁿ¹⁰⁵

However, *Labor Code Section 2930* does not apply if the shopping investigator is employed exclusively by one employer and conducts his or her entire investigation solely for that employer.ⁿ¹⁰⁶

For further discussion of shopping investigator reports, *see* Chapters 50 and 51.

[x] Voice Stress Analysis (Penal Code Section 637.3)

Penal Code Section 637.3 prohibits the use of any system that examines or records in any manner voice prints or other voice stress patterns of another person to determine the truth or falsity of statements made by that person without his or her express written consent given in advance of the examination or recordation.ⁿ¹⁰⁷ The statute does not apply to the use of a voice stress system by a peace officer who is carrying out his or her official duties.ⁿ¹⁰⁸

Any person injured by a violation of *Penal Code Section 637.3* may bring a civil action for the amount of actual damages or \$1,000, whichever is greater.ⁿ¹⁰⁹

Although *Penal Code Section 637.3* does not expressly prohibit termination based on the results of, or the refusal to submit to, a voice stress test, it arguably embodies a public policy against nonconsensual testing that could form the basis of a common law wrongful termination action.

[y] Volunteer Firefighters, Reserve Peace Officers, Emergency Rescue Personnel (Labor Code Section 230.3)

Labor Code Section 230.3 prohibits any employer from discharging or in any manner discriminating against an employee for taking time off to perform emergency duty as a volunteer firefighter, reserve peace officer, or emergency rescue personnel.ⁿ¹¹⁰

Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms of conditions or employment by his or her employer because the employee has taken time off to perform emergency duty as a volunteer firefighter, reserve peace officer, or emergency rescue personnel is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the employer's acts.ⁿ¹¹¹ An employer who willfully refuses to rehire, promote, or otherwise restore any such employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law is guilty of a misdemeanor.ⁿ¹¹²

Labor Code Section 230.3 does not apply to any public safety agency or provider of emergency medical services when, as determined by the employer, the employee's absence would hinder the availability of public safety or emergency medical services.ⁿ¹¹³

[z] Wage Amount Disclosure by Employees (Labor Code Section 232)

An employer may not forbid an employee from disclosing the amount of his or her wages, nor require an employee to sign a writing that purports to forbid such disclosure.ⁿ¹¹⁴ Further, an employer may not discharge, discipline, or otherwise discriminate against an employee who discloses the amount of his or her compensation.ⁿ¹¹⁵

[z.1] Disclosure of Working Conditions (Labor Code Section 232.5)

An employer may not require, as a condition of employment, that an employee refrain from disclosing information

about the employer's working conditions and may not require an employee to sign a waiver or other document purporting to deny the employee the right to disclose information about the employer's working conditions.n115.1 Further, an employer may not discharge, formally discipline, or otherwise discriminate against an employee who discloses information about the employer's working conditions.n115.2 However, *Labor Code Section 232.5* is not intended to permit an employee to disclose proprietary information, trade secret information, or information otherwise subject to a legal privilege, without the consent of the employer.n115.3

[aa] Whistleblowing Activities

[i] Generally (Labor Code Section 1102.5)

Labor Code Section 1102.5 provides that an employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, when the employee has a reasonable belief that the information reveals a violation of, or noncompliance with, state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.n116 "Employee" for this purpose includes, but is not limited to, any individual employed by the state or its subdivisions, any county, city, city and county (including any charter city or county), and any school district, community college district, municipal or public corporation, political subdivision, or the University of California.n117

Section 1102.5 prohibits retaliation by an employer against an employee under the following circumstances:

- For disclosing information to a government or law enforcement agency, when the employee has reasonable cause to believe the information discloses a violation of state or federal statute or a violation or noncompliance with a state or federal rule or regulation.n118
- For refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.n119
- For having exercised his or her rights under *Labor Code section 1102.5(a), (b), or (c)* in any former employment.n119.1

A report by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to *Labor Code section 1102.5(a) and (b)*.n119.2

Section 1102.5 does not apply to rules, regulations, or policies which implement, or actions against employees who violate, any of the following:n119.3

- The confidentiality of the lawyer-client privilege.n119.4
- The confidentiality of the physician-patient privilege.n119.5
- Trade secret information.

Section 1102.5 does not apply when the alleged violation is of an employer's own policies.n119.6

Matters such as transferring employees, writing up employees, and counseling employees are personnel matters, which do not rise to the level of whistleblowing retaliation under section 1102.5.n119.7

Violation of this statute is a misdemeanor, punishable in the case of an individual by imprisonment in the county jail not to exceed one year or a fine not to exceed \$1,000, or both.n120 Violation by a corporation is punishable by a fine not to

exceed \$5,000.n121

In addition to other penalties, a corporation or limited liability company is liable for a civil penalty not exceeding \$10,000 for each violation of *Labor Code section 1102.5*.n121.1 This statutory remedy does not, however, preclude the injured employee from recovering damages from his or her employer.n122 In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that a proscribed activity was a contributing factor in the alleged prohibited action against the employee, the employer has the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.n122.1

When the employer provides administrative remedies, an employee alleging a violation of *Labor Code § 1102.5* must exhaust administrative remedies prior to filing a lawsuit, even when no internal damage remedy is available or when a plaintiff seeks only money damages, so that resort to the courts is inevitable.n122.2 However, a party may waive the exhaustion requirement by failing to raise it at trial, and may not raise it for the first time on appeal.n122.3

Similar statutory provisionsn123 protect state employees from retaliation for whistleblowing.n124

In addition to this statutory protection, the California Supreme Court has held that discrimination against whistleblowing employees is contrary to public policy.n125 Although the Court noted that other jurisdictions permit common law wrongful discharge actions by terminated whistleblowers, it refrained from deciding whether such relief was available in California.n126 At least one court of appeal has, however, suggested that *Labor Code Section 1102.5* supports a common law wrongful termination claim. Specifically, in *Collier v. Superior Court*,n127 the court suggested that *Labor Code Section 1102.5(b)*, which prohibits employer retaliation for reporting reasonably suspected illegal activity in the workplace to a government or law enforcement agency, may support a claim by an employee who is fired for reporting such activity to his or her employer.n128 Although section 1102.5(b) does not directly protect such employees, it does evince a strong policy interest in encouraging employee reports of illegal activity in the workplace.n129 The fundamental public interest in a crime-free workplace would not be served if public policy were strictly circumscribed to protect only employees who report reasonable suspicions to public agencies. Such a delineation could deter employees from reporting their reasonable suspicions at all. Thus, an employee might not report his or her suspicion to an employer out of fear of retaliation.n129.1

The standard of "adverse employment action" applicable in an employment retaliation lawsuit under the California Fair Employment and Housing Act (FEHA) also applies to an employment retaliation lawsuit under *Labor Code section 1102.5(b)* for retaliation for whistleblowing.n129.2

It is a defense to a claim for retaliation under *Labor Code § 1102.5* and the statutory provisions protecting state employees that the employer's conduct was privileged under *Civil Code § 47(b)*, which bars a civil action for damages based on statements made in a judicial proceeding, in an official proceeding authorized by law, or in the initiation or course of a mandate-reviewable proceeding authorized by law.n129.3

An action under *Labor Code Section 1102.5* is subject to a motion to strike the complaint as a SLAPP (strategic lawsuit against public participation) suit under *Code of Civil Procedure Section 425.16*, when the complaint arises out of statements and writings made before official and judicial proceedings, thus falling within the ambit of the anti-SLAPP statute. The court will dismiss the action if it falls within the ambit of *Code Civ. Proc. § 425.16* and the plaintiff cannot demonstrate a probability of prevailing on the merits of the causes of action.n129.4

The Attorney General's office must maintain a whistleblower hotline to receive calls from persons who have information regarding possible violations of state or federal statutes, rules, or regulations, or violations of fiduciary responsibility by a corporation or limited liability company to its shareholders, investors, or employees.n130 The Attorney General refers calls received on the hotline to the appropriate government authority for review and possible

investigation.n130.1 During the initial review of a call, the Attorney General or appropriate government agency holds information disclosed through the hotline in confidence, including the identity of the caller disclosing the information and the employer identified by the caller.n130.2 A call made to the hotline or its referral to the appropriate agency may not be the sole basis for a time period under a statute of limitation to commence. This does not change existing law relating to statutes of limitation.n130.3 An employer must prominently display in lettering larger than size 14 type a list of employees' rights and responsibilities under the whistleblower laws, including the telephone number of the whistleblower hotline.n130.4

Article VIII(1) of the Friendship, Commerce, and Navigation Treaty,n130.5 which confers on Japanese employers the limited right to discriminate in favor of their fellow citizens for certain managerial and technical positions, does not preempt California's whistle bower protection laws.n130.6

For discussion of other California whistleblower protection statutes, *see* [m] and [u], *above*. For discussion of wrongful discharge actions based on public policy, *see* § 60.04.

[ii] False Claims Against Public Entity (Government Code Section 12653)

Government Code Section 12651 imposes liability for damages and a civil penalty on any person who knowingly presents a false claim against the state or a political subdivision or who engages in certain other specified activities related to false claims.n131

Government Code Section 12652 sets forth procedures for bringing a civil action by the Attorney General, the prosecuting authority for the political subdivision, or a private party in the name of the state or a political subdivision to enforce the liability imposed by *Government Code Section 12651*.

Government Code Section 12653 prohibits an employer from making, adopting, or enforcing any rule, regulation, or policy that prevents an employee from disclosing information to a government or law enforcement agency or from assisting in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under *Government Code Section 12652*.n132

The statute further prohibits any employer from discharging, demoting, suspending, threatening, harassing, denying a promotion to, or in any other manner discriminating against an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of himself or herself or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under *Government Code Section 12652*.n133 The elements of a cause of action are as follows:n133.1

- The employee was engaged in protected conduct.
- The employer knew the employee engaged in such conduct.
- The employer retaliated against the employee because of the conduct.

An employer who violates the prohibition against retaliatory discharge or discrimination contained in *Government Code Section 12653(b)* is liable for all relief necessary to make the employee whole, including (1) reinstatement with the same seniority status that the employee would have had but for the discrimination, (2) double the amount of back pay, (3) interest on the back pay, (4) compensation for any special damages sustained as a result of the discrimination, and (5) when appropriate, punitive damages.n134 In addition, the defendant employer is required to pay litigation costs and reasonable attorney's fees.n135 An employee may bring an action in the appropriate superior court to obtain this relief.n136

An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in terms or conditions of employment by his or her employer because of participation in conduct that directly or indirectly resulted in a false claim being submitted to the state or a political subdivision is entitled to the statutory remedies under *Government Code Section 12653(c)* only if both of the following occur:ⁿ¹³⁷

1. The employee voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed; and
2. The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place.

When the employer provides administrative remedies, an employee alleging a violation of *Gov. Code § 12653* must exhaust administrative remedies prior to filing a lawsuit, even when no internal damage remedy is available or a plaintiff seeks only money damages, so that resort to the courts is inevitable.^{n137.1}

[iii] Reporting of Improper Governmental Activities (Government Code Section 8547)

Government Code Section 8547 imposes liability for damages and criminal penalties on any person who retaliates against or threatens a state employee or applicant for state employment who discloses improper governmental activities.ⁿ¹³⁸ The term "improper governmental activities" includes illegal activities and those that are economically wasteful or involve gross misconduct, incompetency, or inefficiency.ⁿ¹³⁹

A University of California employee must exhaust internal remedies before bringing suit against the University.^{n139.1} The employee may then bring a suit for damages if the resolution by the University is not timely.^{n139.2} The employee need not challenge the untimely decision by a writ of mandate.^{n139.3}

A University employee also must exhaust administrative remedies before bringing suit against individual University employees under *Gov. Code § 8547.11*, which prohibits University of California employees from directly or indirectly using or attempting to use the official authority or influence of the employee to intimidate, threaten, coerce, command, or attempt to intimidate, threaten, coerce, or command any person for the purpose of interfering with the right of that person to whistleblow.^{n139.4} Causes of action against individual employees of the University may be barred by privileges, including the absolute privilege in *Civ. Code § 47(b)* for official proceedings, and the immunity provided by *Gov. Code § 821.6*.^{n139.5}

State employees other than those employed by the University of California are also required to exhaust internal remedies by filing a complaint with the State Personnel Board before bringing a court action to challenge an adverse employment action in retaliation for whistleblowing.^{n139.6} So long as the Board has issued findings or the deadline for issuing findings has passed, the employee may proceed with a damages action in superior court regardless of whether the Board's findings are favorable or unfavorable to the employee. Once the Board has issued findings, the employee need not pursue additional administrative remedies and need not challenge the findings by way of a petition for a writ of administrative mandate.^{n139.7}

The damages and penalties authorized by *Government Code Section 8547* are in addition to any other penalties that may be provided by law.ⁿ¹⁴⁰

[iv] Child Day Care Facilities Act Violations

The California Child Day Care Facilities Act^{n140.1} is a comprehensive statutory scheme governing the licensing and

staffing of various childcare facilities. Under the Act, no employer may discriminate against an employee who makes a good faith complaint to a regulatory agency or an employer covered under the Act regarding violations of the law by the employer.^{n140.2} An employee who is discriminated against in violation of this provision must, in most cases, pursue a grievance through the Division of Labor Standards Enforcement.^{n140.3}

In *Boston v. Penny Lane Centers, Inc.*,^{n140.4} a former employee of a social services agency that operated group homes for juveniles and offered therapy for children and families, sued for wrongful termination, alleging a violation of the California Occupational Safety & Health Act,^{n140.5} tortious termination in violation of public policy, defamation of character, discrimination based on disability, and harassment based on disability. She did not reference *Health & Saf. Code §§ 1596.881, 1596.882* in her complaint, and her case at trial did not rely on the employer having violated the law governing staff-child ratios. However, the employer argued that because her workplace safety concerns had to do with inadequate staffing, she was limited as a matter of law to pursuing her claim under *Health & Saf. Code §§ 1596.881 and 1596.882*. The appellate court found first that it was unclear whether the employer was subject to the Act, given an exception from the Act for community care facilities.^{n140.6} The court did not resolve that question, however, in light of the conclusion that even if the Act applied, it did not bar the action for wrongful discharge in violation of the public policy favoring workplace safety. The gravamen of her claim was that she was retaliated against for complaining about an unsafe work environment, not illegal staffing ratios violating the Act. Her wrongful termination claim was tethered to the protections embodied in the Occupational Safety and Health Act of 1973 (Cal-OSHA), which specifically prohibits retaliation against an employee who makes a complaint with reference to employee safety or health.^{n140.7} Thus, she vindicated her right to a safe workplace using the common law tort of wrongful discharge, which preexisted and was separate from the cause of action created by *Health & Safety Code §§ 1596.881 and 1596.882*.

[bb] Parental Attendance at School of Suspended or Disciplined Child (Education Code Section 48900.1; Labor Code Section 230.7)

Pursuant to *Education Code Section 48900.1*, a school district may request that the parent or guardian of a pupil who has been suspended for specified disciplinary reasons attend the class from which the child was suspended after the child's return from suspension.ⁿ¹⁴¹ No employer may discharge or in any manner discriminate against an employee who is the parent or guardian of a pupil for taking time off to appear in the pupil's school pursuant to a request made under *Education Code Section 48900.1* if the employee, prior to taking the time off, gives reasonable notice to the employer that he or she is requested to appear in the school.ⁿ¹⁴²

Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has taken time off to appear in the school of a pupil pursuant to a request made under *Education Code Section 48900.1* is entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer.ⁿ¹⁴³

[cc] Health Insurance Coverage Assignments (Family Code Section 3769)

Statutory provisions governing family law proceedings authorize a court to order an employer to enroll a covered employee's child in any available health care insurance coverage and to deduct the necessary premiums or contributions from the employee's earnings.ⁿ¹⁴⁴ An employer may not use a health insurance coverage assignment for supported children as grounds for discharging or taking disciplinary action against an employee.ⁿ¹⁴⁵ An employer who violates this provision is subject to a civil penalty of \$500.ⁿ¹⁴⁶

[dd] Displaced Janitor Opportunity Act (Labor Code Section 1060 et seq.)

When a contract or subcontract for janitorial or building maintenance services performed within Californian^{n146.1} has been or will be terminated,^{n146.2} the successor contractor or subcontractor must retain employees employed by the terminated contractor or its subcontractors for a 60-day transition period, so long as the employees worked for the

preceding four months or longer at the sites covered by the successor contract. The successor contractor or subcontractor is excused from this obligation, if it has reasonable and substantiated cause not to hire a particular employee based on the employee's performance or conduct while working under the terminated contract.n146.3

Except for the obligations specified in *Lab. Code § 1061(a)*, (b), nothing in *Lab. Code § 1060 et seq.* changes or increases the relationship or duties of a property owner or an awarding authority, or their agents, with respect to contractors, subcontractors, or their employees.n146.4 Furthermore, nothing in *Lab. Code § 1060 et seq.* limits the right of a property owner or an awarding authority to terminate a service contract or to replace a contractor with another contractor or with the property owner's or awarding authority's own employees.n146.5 The successor contractor or successor subcontractor must make a written offer of employment to each employee in the employee's primary language or another language in which the employee is literate, stating the time within which the employee must accept that offer, but in no case less than 10 days. However, the successor contractor or subcontractor is not required to pay the same wages or offer the same benefits as the prior contractor or prior subcontractor.n146.6

If at any time the successor contractor or subcontractor determines that fewer employees are needed to perform the services than were required by the terminated contractor, the successor contractor or subcontractor must retain employees by seniority within the job classification.n146.7 During the transition period, the successor contractor or subcontractor must maintain a preferential hiring list of eligible covered employees not retained by the successor contractor or subcontractor from which the successor contractor or successor subcontractor must hire additional employees until all of the terminated contractor's or subcontractor's employees have been offered employment with the successor contractor or successor subcontractorn146.8 and may not discharge without cause an employee retained from the terminated contractor or subcontractor. Cause may be based only on the performance or conduct of the particular employee.n146.9 At the end of the transition period, the successor contractor or subcontractor must provide a written performance evaluation to each retained employee. If the employee's performance during the period is satisfactory, the successor contractor or subcontractor must offer the employee continued employment. Any employment after the transition period is at-will, meaning the employee may be terminated without cause.n146.10

An employee who is not offered employment or discharged in violation of *Labor Code Section 1060 et seq.*, may bring an action against the successor contractor or subcontractor. Upon finding a violation *Labor Code Section 1060 et seq.*, the court must award backpay, including the value of benefits, for each day during which the violation occurred and continues to occur.n146.11 The court may also order a preliminary or permanent injunction of a continuing violation.n146.12 If the employee is the prevailing party, the court will award the employee reasonable attorney's fees and costs.n146.13 In the absence of a claim that an employee was terminated in violation of *Labor Code § 1060 et seq.*, the employee may not maintain a cause of action solely for the employer's failure to provide a written performance evaluation.n146.14

Nothing in *Labor Code Section 1060 et seq.* prohibits a local government agency from enacting ordinances relating to displaced janitors that impose greater standards than, or establish additional enforcement provisions to, those prescribed in *Labor Code Section 1060 et seq.*.n146.15

[ee] Public Transit Service Contracts (Labor Code Section 1070 et seq.)

Labor Code Section 1070 et seq. establishes a bidding preference for public transit servicen146.16 contractorsn146.17 and subcontractorsn146.18 who agree to retain, for a period of at least 90 days, certain employees who were employed to perform essentially the same services by the previous contractor or subcontractor.n146.19 Contractors or subcontractors who agree to retain employees under these provisions must offer employment to those employees except for reasonable and substantiated cause, as specified.n146.20 If a successor contractor or subcontractor determines that fewer employees are needed than under the prior contract, qualified employees must be retained by seniority within the job classification.n146.21 The existing contractor, when required by the awarding authority,n146.22 must provide employment information relating to wage rates, benefits, dates of hire, and job classifications of employees under the

existing service contract to the awarding authority or a successor contractor, as specified.^{n146.23}

An employee not offered employment or discharged in violation of these provisions may bring a civil action against the successor contractor or subcontractor. On finding a violation, the court will order the employee reinstated with the successor contractor or subcontractor and backpay, including the value of benefits, for each day of violation.^{n146.24} and reasonable attorneys' fees and costs.^{n146.25} The court may also preliminarily or permanently enjoin the continued violation.^{n146.26}

[3] Federal Statutes

[a] Age Discrimination in Employment Act (Title 29 United States Code, Sections 621-634)

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

In California, where state employment discrimination remedies closely track, and in some cases surpass, federal remedies, it is rarely wise to plead a cause of action based on federal law unless it is absolutely necessary to do so. Inclusion of a federal claim will permit the employer to remove the lawsuit to federal court, a forum generally considered to be less favorable for employment plaintiffs. *Commentary by John M. True, III.*

The Age Discrimination in Employment Act of 1967 (ADEA)ⁿ¹⁴⁷ prohibits discrimination against persons 40 years of age and older.ⁿ¹⁴⁸ Litigation under the ADEA requires prior exhaustion of administrative remedies.ⁿ¹⁴⁹ The ADEA provides a right to a jury trial,ⁿ¹⁵⁰ as well as remedies including, among other things, injunctive relief, back pay, and liquidated damages for a willful violation.ⁿ¹⁵¹ Although compensatory and punitive damages are not available under the ADEA, they may be recovered in a pendent state claim in the Ninth Circuit and some other circuits.ⁿ¹⁵² For example, in one Ninth Circuit Court of Appeal case,ⁿ¹⁵³ in which the plaintiff's ADEA claims were based on age discrimination in firing, the court held that the ADEA does not preempt the award of tort damages and, therefore, upheld the award of punitive damages to the plaintiff for violation of the covenant of good faith and fair dealing under California law.

For further discussion of the ADEA, *see* Chapters 40 through 43.

[b] Americans With Disabilities Act (Title 42 United States Code Section 12101 et seq.)

The Americans With Disabilities Act of 1990ⁿ¹⁵⁴ prohibits employment discrimination against disabled persons.ⁿ¹⁵⁵ A disabled person who has suffered discrimination must file a timely charge with the Equal Employment Opportunity Commission (EEOC), which will then investigate the charge. Either the EEOC or the aggrieved individual may ultimately file a civil action and receive various remedies, including equitable relief, reinstatement with or without back pay, and front pay.ⁿ¹⁵⁶

Limited compensatory and punitive damages are also available in cases involving intentional discriminatory conduct.ⁿ¹⁵⁷

For further discussion of the ADA, *see* Chapters 40 through 43.

[c] Civil Rights Acts of 1866 and 1871 (Title 42 United States Code, Sections 1981 and 1983)

Like Title VII of the Civil Rights Act of 1964,ⁿ¹⁵⁸ the Civil Rights Acts of 1866 and 1871ⁿ¹⁵⁹ have been interpreted to prohibit employment discrimination. The two primary provisions of these early Civil Rights Acts differ somewhat in their coverage. Title 42 *United States Code Section 1981* states that all persons within the jurisdiction of the United States have the same right to make and enforce contracts as is enjoyed by white citizens.ⁿ¹⁶⁰ For purposes of section 1981, the term "make and enforce contracts" includes the making, performance, modification, and termination of

contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.ⁿ¹⁶¹ The section relates primarily to racial discrimination,ⁿ¹⁶² although it has also been held to apply to discrimination on the basis of alienage,ⁿ¹⁶³ and to discrimination on the basis of Arab ancestry.ⁿ¹⁶⁴

Section 1981 applies to both public and private employers.ⁿ¹⁶⁵

Section 1983 provides that any person who under color of law deprives a citizen or other person within the jurisdiction of the United States of any right, privilege, or immunity secured by the Constitution or by statute is liable to the injured party.ⁿ¹⁶⁶

Section 1983 has been held to cover more bases of discrimination than does section 1981. For example, section 1983 prohibits discrimination based on sex and religion, but it is applicable only when the defendant has acted under color of state law.ⁿ¹⁶⁷

Unlike Title VII, sections 1981 and 1983 do not require the exhaustion of administrative remedies before a civil action may be brought, and both sections afford a right to jury trial.ⁿ¹⁶⁸ Moreover, in addition to injunctive relief and back pay, compensatory and punitive damages may be sought under sections 1981 and 1983.ⁿ¹⁶⁹ Compensatory and punitive damage awards under section 1981 are not subject to the statutory limits applicable to such awards under Title VII.ⁿ¹⁷⁰ For further discussion of the Civil Rights Acts of 1866 and 1871, *see* Chapters 40 through 43.

[d] Mine Safety and Health Act Provision Protecting Employees (Title 30 United States Code, Section 815(c))

The Federal Coal Mine Safety and Health Actⁿ¹⁷¹ prohibits discrimination against any miner, applicant for employment in a mine, or representative of miners because of that person's involvement in proceedings under the act or exercise of rights afforded by the act.ⁿ¹⁷² A person who believes he or she is the victim of this type of discrimination may file a complaint with the Secretary of the Interior within 60 days of the alleged discrimination.ⁿ¹⁷³ The Secretary will commence an investigation within 15 days of receipt of the complaint. If it appears that the complaint was not frivolously brought, reinstatement of the miner may be ordered.ⁿ¹⁷⁴ Within the following 90 days, the Secretary will inform the parties if a violation has been established.ⁿ¹⁷⁵ If so, the Secretary files a complaint with the Federal Mine Safety and Health Review Commission, which provides an opportunity for hearing and orders appropriate relief.ⁿ¹⁷⁶ Remedies include "such affirmative action to abate the violation as the Commission deems appropriate," including but not limited to reinstatement with back pay and interest, costs, and attorney's fees.ⁿ¹⁷⁷ Even if the Secretary finds no violation, the complainant may file a complaint with the Commission on his or her own behalf.ⁿ¹⁷⁸

[e] Consumer Credit Protection Act Provision Regarding Wage Garnishment (Title 15 United States Code, Section 1674)

A provision of the Consumer Credit Protection Actⁿ¹⁷⁹ prohibits an employer from discharging an employee because his or her wages have been garnished to satisfy any one indebtedness.ⁿ¹⁸⁰ A willful violation of this prohibition is punishable by a fine of up to \$1,000 and/or imprisonment for up to one year.ⁿ¹⁸¹

The discharge of an employee whose wages have been garnished more than once is not unlawful under the federal act, except when the discharge is the result of discrimination against the employee on the basis of race, color, religion, sex, or national origin.ⁿ¹⁸²

Although there is disagreement among the federal circuit courts, there appears to be no private right of action for violation of the federal act.ⁿ¹⁸³

The provisions of the Consumer Credit Protection Act must be read in connection with section 525(b) of the Federal Bankruptcy Act,ⁿ¹⁸⁴ which, under specified circumstances, may prohibit an employer from discharging an employee

whose wages have been garnished for more than one indebtedness.ⁿ¹⁸⁵

For discussion of California laws concerning employee protection regarding wage garnishment, *see* [2][1], *above*, and Chapter 4.

[f] Employee Polygraph Protection Act of 1988 (Title 29, United States Code, Section 2001 et seq.)

The Employee Polygraph Protection Act of 1988 prohibits an employer engaged in or affecting commerce or engaged in the production of goods for commerceⁿ¹⁸⁶ from doing any of the following:ⁿ¹⁸⁷

1. Directly or indirectly requiring, requesting, suggesting, or causing any employee or prospective employee to take or submit to any lie detector test;
2. Using, accepting, referring to, or inquiring concerning the results of any lie detector test of any employee or prospective employee;
3. Discharging, disciplining, discriminating against in any manner, or denying employment or promotion to, or threatening to take any such action against (a) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test, or (b) any employee or prospective employee on the basis of the results of any lie detector test; or
4. Discharging, disciplining, discriminating against in any manner, or denying employment or promotion to, or threatening to take any such action against an employee or prospective employee (a) because the individual has filed any complaint or instituted or caused any proceeding under or related to the Act, (b) because the individual has testified or is about to testify in any such proceeding, or (c) because of the exercise by the individual, on behalf of himself or herself or another person, of any right afforded by the Act.

For purposes of this provision, a "lie detector test" includes a polygraph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.ⁿ¹⁸⁸

The act does not apply to the United States government, any state or local government, or any political subdivision thereof.ⁿ¹⁸⁹ The act also provides exemptions for administration by the federal government, in the performance of intelligence or counterintelligence functions, of lie detector tests to certain employees of private employers who have contracts with the Department of Defense, the Department of Energy, the National Security Agency, the Defense Intelligence Agency, the Central Intelligence Agency, the Federal Bureau of Investigation, or any other department, agency, or program whose duties involve access to certain classified information.ⁿ¹⁹⁰ Certain limited exemptions are also provided for private employers when the lie detector test is part of an ongoing investigation involving economic loss to the employer's business,ⁿ¹⁹¹ or when the employer's primary business purpose consists of providing specified types of security services, unless the prospective employee to whom the test is to be administered is not employed to render those services.ⁿ¹⁹² In addition, employers who are authorized to manufacture, distribute, or dispense certain controlled substances are also permitted to administer lie detector tests to current or prospective employees under specified circumstances.ⁿ¹⁹³

Violation of the act may result in the assessment of civil penalties by the Secretary of Labor, who may also bring an action for legal and equitable relief against employers who violate the Act.ⁿ¹⁹⁴ In addition, an employer who violates the Act is liable to the affected employee or prospective employee for appropriate legal or equitable relief including, but not limited to, employment, reinstatement, promotion, and payment of lost wages and benefits.ⁿ¹⁹⁵ A civil action to obtain such relief may be brought in any federal or state court of competent jurisdiction within three years of the alleged violation.ⁿ¹⁹⁶ In its discretion, the court may award reasonable costs, including attorney's fees, to the prevailing

party.ⁿ¹⁹⁷

Except for the exemptions relating to governmental agencies and certain national security and defense contractors, the act does not preempt any provision of any state or local law or of any negotiated collective bargaining agreement that prohibits lie detector tests or is more restrictive with respect to such tests than any provision of the act.ⁿ¹⁹⁸

For discussion of California statutory provisions relating to lie detector tests,ⁿ¹⁹⁹ *see* [2][s] and [x], *above*. For complete discussion of federal and state statutory restrictions on the use of lie detector tests, *see* Chapter 50.

[g] Employee Retirement Income Security Act Provision Prohibiting Discharge to Avoid Payment of Benefits (Title 29 of United States Code, Section 1140)

The Employee Retirement Income Security Act (ERISA)ⁿ²⁰⁰ makes it unlawful for an employer to discharge, fine, suspend, expel, discipline, or otherwise discriminate against anyone for exercising his or her rights or testifying in a proceeding related to ERISA or for the purpose of interfering with the attainment of any right to which the person may become entitled under an employee benefits plan.ⁿ²⁰¹ The section can be enforced by a civil action pursuant to Title 29 *United States Code Section 1132*.ⁿ²⁰² No specific remedies are provided by the statute, but the case law indicates that courts may award back pay, reinstatement, and other make-whole relief, including attorney's fees.ⁿ²⁰³

It should be noted that a common law wrongful termination action relating to ERISA benefits is preempted by ERISA.ⁿ²⁰⁴

For further discussion of preemption by ERISA, *see* § 60.09[1][c].

■ CONSULTANT'S COMMENT:

In a common law wrongful termination complaint, plaintiff's counsel should carefully avoid any reference to an alleged motivation on the part of the employer to deprive the employee of severance or pension benefits (or any other benefits regulated by ERISA) as a basis for the termination. The broad sweep of ERISA preemption will almost certainly be held to defeat any tort claims based on such allegations of bad faith. *Commentary by William M. Crosby.*

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

ERISA does not require however, a well pleaded state-law complaint be preempted just because it includes in its prayer language demanding back pay *and benefits*. *Commentary by John M. True, III.*

[h] Environmental Statutes With Employee Protection Provisions

[i] Air Pollution Prevention and Control Act Provision Protecting Employees (Title 42 United States Code, Section 7622)

Title 42 *United States Code Section 7622(a)*, provides that no employer may discharge or otherwise discriminate against any employee for his or her participation in any proceedings related to the Air Pollution Prevention and Control Act.ⁿ²⁰⁵

Section 7622 provides an administrative remedy for an employee who believes he or she has suffered such discrimination.ⁿ²⁰⁶ The employee must file a complaint with the Secretary of Labor within thirty days of the alleged discriminatory action.ⁿ²⁰⁷ The Secretary investigates and notifies both parties of the results of the investigation within thirty days.ⁿ²⁰⁸ Within the following 90 days, after providing notice and an opportunity for a hearing, the Secretary either denies the complaint or orders relief.ⁿ²⁰⁹ Relief may include any "affirmative action to abate the violation," as well as reinstatement, lost wages and benefits, compensatory damages, and attorney's fees and costs.ⁿ²¹⁰ Review of the Secretary's order is in the United States Court of Appeals; a petition for such review must be filed within 60 days after

the issuance of the order.ⁿ²¹¹ The employee or the Secretary of Labor may file a civil action in federal district court to enforce an order issued by the Secretary under section 7622(b), and, if successful, may obtain relief including injunctive relief and compensatory and punitive damages.ⁿ²¹²

In addition, any person on whose behalf an order is issued under section 7622(b) may bring a civil action to enforce the order in federal district court.ⁿ²¹³ In enforcing the order, the court may award attorneys fees and costs in its discretion.ⁿ²¹⁴

[ii] Energy Reorganization Act of 1974 Provision Protecting Employees (Title 42 United States Code, Section 5851)

Title 42 *United States Code Section 5851(a)* prohibits employers from discriminating against any employee who notifies his or her employer of an alleged violation of, refuses to engage in any practice made unlawful by, or participates in a proceeding under the Energy Reorganization Actⁿ²¹⁵ or the Atomic Energy Act of 1954.ⁿ²¹⁶ The Fourth Circuit has held that, in addition to retaliatory discharge, retaliatory harassment is a form of discrimination actionable under this statute.ⁿ²¹⁷ However, not every termination of an employee involved in activity protected by the Act is a violation of the statute. For example, in one case, the Ninth Circuit upheld a decision by the Secretary of Labor finding that an employer could require an employee to obtain permission from a supervisor to engage in certain protected activity, and that failure to obtain such permission could give rise to a reasonable cause for termination.ⁿ²¹⁸

An employee who believes he or she has experienced discrimination under the statute must file a complaint with the Secretary of Labor within 180 days of the discriminatory act.ⁿ²¹⁹

Within 30 days thereafter, the Secretary will investigate, provide notice and a hearing, and within 90 days issue an order.ⁿ²²⁰

Potential relief includes any "affirmative action to abate the violation," including reinstatement, back pay, compensatory damages, and costs and attorney's fees. Appeal from the Secretary's order must be taken within 60 days to the United States Court of Appeals.ⁿ²²¹ If the Secretary has not issued a final decision within 1 year after the filing of the complaint, and there is no showing that the delay is due to the bad faith of the employee seeking relief, the employee may bring an action at law or equity for de novo review in the appropriate federal district court, which has jurisdiction over the action without regard to the amount in controversy.^{n221.1}

The remedies provided under the statute are cumulative to any relief available under pre-existing state law.ⁿ²²² Thus, for example, the United States Supreme Court has held that an employee's state law claim for intentional infliction of emotional distress, arising from an alleged wrongful termination because of the employee's complaints about nuclear safety violations, was not preempted by the Energy Reorganization Act.ⁿ²²³ For further discussion of preemption issues, see § 60.09[1][f].

[iii] Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund Act) Provision Protecting Employees (Title 42 United States Code, Section 9610)

The Comprehensive Environmental Response, Compensation, and Liability Act (Superfund Act)ⁿ²²⁴ regulates the release of hazardous substances into the environment. It prohibits terminating or discriminating against any employee or employee representative for providing information, instituting a proceeding, or testifying in any proceeding under the Act.ⁿ²²⁵ The Act provides an administrative remedy for violation of the employee's rights under the Act.ⁿ²²⁶ The employee may apply to the Secretary of Labor for review of any termination or discriminatory act against the employee within 30 days of the occurrence of the firing or discrimination.ⁿ²²⁷

The Secretary investigates the charges and holds a hearing at the request of any party.ⁿ²²⁸ If the Secretary finds that the

violation did occur, he or she may order affirmative action to abate the violation, including rehiring or reinstatement and attorney's fees.ⁿ²²⁹ The statute has no application to any employee who, acting without discretion from the employer, deliberately violates any requirement of the Act.ⁿ²³⁰

In *Pogue v. U.S. Department of Labor*,ⁿ²³¹ the Secretary of Labor dismissed a complaint for wrongful termination based on retaliation under this statute, in contravention of the administrative law judge's finding of retaliation, and the Ninth Circuit reversed. The court held that the evidence supported the conclusion that the plaintiff's discharge resulted from her attempts to report instances of hazardous waste noncompliance at the naval shipyard in which she was a civilian employee charged with responsibility for surveying and reporting on hazardous waste compliance. Because the defendant asserted that legitimate reasons existed for the plaintiff's discharge, the court applied the "dual motive" test. Under this test, once the employee shows that illegal motives played some part in the discharge, the employer must prove that it would have discharged the employee even if he or she had not been engaged in protected conduct. Based on the facts in this case, the employer failed to meet that burden.ⁿ²³²

[iv] Safe Drinking Water Act Employee Protection Provision (Title 42 United States Code, Section 300j-9)

Title 42 *United States Code* Section 300j-9(i)(1) prohibits an employer from discharging or otherwise discriminating against an employee for commencing, testifying in, or assisting or participating in proceedings under the Safe Drinking Water Actⁿ²³³ or comparable state regulations. An employee who feels that the section has been violated may report the violation to the Secretary of Labor within 30 days.ⁿ²³⁴ The Secretary is empowered to order reinstatement, back pay, compensatory and punitive damages, and attorney's fees and costs.ⁿ²³⁵ If a party fails to comply with the Secretary's order, the Secretary may file a civil action in federal district court to enforce it.ⁿ²³⁶ Review of the Secretary's orders takes place in the United States Court of Appeals.ⁿ²³⁷

[v] Solid Waste Disposal Act Employee Protection Provision (Title 42 United States Code, Section 6971)

The Solid Waste Disposal Actⁿ²³⁸ is a statutory scheme providing for proper and economical solid waste disposal practices. Title 42 *United States Code* Section 6971(a) prohibits discharge or other discrimination against any employee or employee representative for filing, instituting, or testifying in proceedings under the Act. An aggrieved employee may file a complaint with the Secretary of Labor within 30 days of the alleged discriminatory act.ⁿ²³⁹ Potential remedies include, without limitation, rehiring or reinstatement, back pay, attorney's fees, and costs.ⁿ²⁴⁰

[vi] Toxic Substances Control Act Provision Protecting Employees (Title 15 United States Code, Section 2622)

The Toxic Substances Control Actⁿ²⁴¹ regulates chemical substances that pose a risk of injury to health or the environment. The act prohibits discharge or discrimination against any employee who commences proceedings or assists or testifies in such proceedings.ⁿ²⁴² An employee who feels that the section has been violated may report the violation to the Secretary of Labor within 30 days.ⁿ²⁴³ The Secretary is empowered to order reinstatement, back pay, compensatory and punitive damages, and attorney's fees and costs.ⁿ²⁴⁴ The Secretary may file a civil action in federal district court to enforce an order.ⁿ²⁴⁵ Review of the Secretary's orders takes place in the United States Court of Appeals.ⁿ²⁴⁶

[vii] Water Pollution Control Act Provision Protecting Employees (Title 33 United States Code, Section 1367)

Title 33 *United States Code* Section 1367(a) prohibits the firing of or discrimination against an employee or employee representative because that person has filed, instituted, or testified in proceedings to administer or enforce the Water Pollution Control Act.ⁿ²⁴⁷ Anyone subjected to a violation of section 1367(a) may file a complaint within 30 days with the Secretary of Labor, who will investigate the complaint, provide an opportunity for a hearing, and make a determination.ⁿ²⁴⁸ If the Secretary determines that a violation did occur, the Secretary may require affirmative action

to remedy the violation, including but not limited to reinstatement, attorney's fees and costs.ⁿ²⁴⁹

Any employee or employee representative who is discharged, laid off, threatened with discharge or layoff, or otherwise discriminated against because of the results of any effluent limitation or order issued under the act may request a full investigation and public hearing on the matter.ⁿ²⁵⁰

A public report on the matter must be prepared, indicating the effect of the effluent order on the discharge, lay-off, or discrimination, and making recommendations regarding the same.ⁿ²⁵¹

[i] Fair Labor Standards Act Provision Protecting Employees (Title 29 United States Code, Section 215(a)(3))

The Fair Labor Standards Act (FLSA)ⁿ²⁵² governs the wages and hours of certain employees. Title 29 *United States Code Section 215(a)(3)*, makes it unlawful to discharge or otherwise discriminate against any person for filing, instituting, or testifying in proceedings under the FLSA. Title 29 *United States Code Section 216(b)* provides that an employer violating section 215(a)(3) shall be liable for such legal and equitable relief as may be appropriate to effectuate the protective purposes of section 215(a)(3), including but not limited to reinstatement, promotion, back pay, and an equal additional amount as liquidated damages.^{n252.1} The injured employee may file an action on behalf of himself or herself and any similarly situated employee in any state or federal court of competent jurisdiction.ⁿ²⁵³ A successful plaintiff may also obtain attorney's fees and costs.ⁿ²⁵⁴ The right to bring such a civil action terminates if the Secretary of Labor files a complaint for minimum wages or overtime compensation or for legal or equitable relief for violation of section 215(a)(3).ⁿ²⁵⁵

For discussion of administrative and judicial remedies under federal wage and hour laws, *see* Chapter 5.

[j] Immigration Reform and Control Act (Title 8 United States Code, Section 1324b)

The Immigration Reform and Control Act of 1986 (IRCA)ⁿ²⁵⁶ contains a provision prohibiting employment discrimination based on an authorized alien's national origin or, if the alien is a "protected individual" (e.g., a lawful permanent resident or a temporary resident), because of the alien's citizenship status.ⁿ²⁵⁷ An aggrieved alien must file a discrimination charge with the Justice Department's Special Counsel for Immigration-Related Unfair Employment Practices.ⁿ²⁵⁸ The Special Counsel will investigate the charge and may bring a discrimination complaint before an administrative law judge (ALJ).ⁿ²⁵⁹

After a hearing, the ALJ will issue a discrimination determination,ⁿ²⁶⁰ and may order various remedies, including back pay and specified civil penalties.ⁿ²⁶¹

For an overview of the IRCA antidiscrimination provisions, *see* Chapter 40, Part C.

[k] Jury System Improvement Act of 1978 Employee Protection Provision (Title 28 United States Code, Section 1875)

A provision of the Jury System Improvement Act of 1978ⁿ²⁶² protects permanent employees from discharge, intimidation, or coercion because of actual or scheduled federal jury service.ⁿ²⁶³ An employer violating this provision may be liable to the employee for reinstatement, lost wages and benefits, and any "other appropriate relief."ⁿ²⁶⁴ Additionally, the employer may be fined up to \$5,000 for each violation as to each employee, and may be ordered to perform community service.ⁿ²⁶⁵

An employee who believes he or she has been subjected to a violation of the statute may apply to the appropriate district court to obtain appointed counsel.ⁿ²⁶⁶ A prevailing employee in a jury service discrimination case may obtain

attorney's fees and costs, while a prevailing employer can obtain attorney's fees only on a showing that the action was frivolous, vexatious, or brought in bad faith.n267

Any employee who is reinstated in accordance with this statute is considered to have been on furlough or leave of absence during the period of jury service, and the absence will not deprive the employee of any seniority rights, insurance, or benefits relating to employees on furlough or leave of absence.n268

[l] National Labor Relations Act (Title 29 United States Code, Section 158)

The National Labor Relations Act,n269 enacted in 1935, codifies the right of employees to engage in self-organization, collective bargaining, and mutual aid and protection. The act prohibits discharge based on union activity or other concerted activity relating to the employees' common interests, or the exercise of any rights under the act.n270 A common law wrongful termination claim is preempted by the NLRA if the plaintiff contends he or she was discharged for union or other concerted activity.n271 The employee terminated for such activity must file an unfair labor practice charge with the National Labor Relations Board.n272

For discussion of preemption of common law wrongful discharge actions by federal labor laws, *see* § 60.09[1][b].

[m] Occupational Safety and Health Act Provision Protecting Employees (Title 29 United States Code, Section 660(c))

The Occupational Safety and Health Act (OSHA)n273 forbids discharge or discrimination against any employee because he or she has instituted or testified in any proceedings under the Act or exercised rights afforded by its provisions.n274 Title 29 *United States Code Section 660* provides that an employee who believes he or she has been discharged in violation of the Act may file a complaint with the Secretary of Labor within 30 days of the discriminatory action.n275 If, on investigation, the Secretary finds a violation, he or she must bring a civil action against the violator in the district court.n276 The court may order reinstatement, back pay, and any other appropriate remedy.n277

Section 660(c) does not give rise to a private right of action.n278

[n] Amtrak Reform and Accountability Act of 1997 (Title 49 United States Code, Section 20101)

A section of the Amtrak Reform and Accountability Act of 1997n279 provides that a railroad engaged in interstate or foreign commerce may not discharge, demote, suspend, reprimand, or otherwise discriminate against any employee because the employee has filed a complaint, instituted proceedings, or testified under the Act.n280 It further provides that the railroad may not discharge, demote, suspend, reprimand, or discriminate against an employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if the following conditions exist: (1) the refusal is in good faith and there is no reasonable alternative available to the employee; (2) the condition is such that a reasonable person would conclude that it posed imminent danger of death or serious injury; (3) there is insufficient time to eliminate the danger through regular statutory channels; and (4) the employee, when possible, has notified the employer of the existence of the hazardous condition and his or her intention not to work unless the condition is corrected immediately.n281

Any dispute under Title 45 *United States Code Section 441*, is subject to the jurisdiction of the National Railroad Adjustment Board and the administrative procedures set out in Title 45 *United States Code Section 153*.n282 An employee protected by section 441 and any other provision of law must elect either the remedy provided in the Railroad Safety Act or the other available remedy.n283

The Secretary of Transportation or the Secretary of Homeland Security may not disclose the name of an employee who has provided information about an alleged violation of either this act, or 49 *U.S.C. § 5101 et seq.*, or a regulation under

either, except that the employee's identity may be disclosed to the Attorney General if the matter is referred to the Attorney General for enforcement.^{n283.1}

[o] Railway Labor Act--Provision Protecting Employees (Title 45 United States Code, Section 152)

The Railway Labor Actⁿ²⁸⁴ governs the relationship between covered railway and airline employers and employees. In Title 45 *United States Code Section 152*, the act sets out the following general rights and duties of the employer and employee, among other things: (1) carriers and employees must make every reasonable effort to make and maintain agreements and to settle disputes; (2) employers must not coerce employees in their designation of representatives; (3) employees have the right to organize and bargain collectively; and (4) carriers may not require job applicants to sign any agreement promising to join or not join a labor organization. Section 152 also sets out the procedure for resolving disputes, and provides that a willful failure to comply with any of these provisions is a misdemeanor punishable by a fine and/or imprisonment.

An individual discharged in violation of this section may bring a private civil action for damages and reinstatement.ⁿ²⁸⁵ The statute has been interpreted broadly to provide a private right of action for a nonunion employee discharged for his or her organizing activities.ⁿ²⁸⁶ The remedy for a violation of the statute includes reinstatement and compensatory damages.ⁿ²⁸⁷ Moreover, the Supreme Court has determined that the RLA does not preempt a claim for wrongful discharge in violation of public policy brought under the state whistleblower statute.ⁿ²⁸⁸ For discussion, *see* § 60.09[1][c][iii].

[p] Rehabilitation Act of 1973 (Title 29 United States Code, Sections 701-796(i))

In addition to the provisions of the California Fair Employment and Housing Actⁿ²⁸⁹ and the Americans With Disabilities Act of 1990,ⁿ²⁹⁰ disabled employees may be protected by the federal Rehabilitation Act of 1973.ⁿ²⁹¹

Title 29 *United States Code Section 793(a)*, requires federal contractors to take affirmative action to employ and advance qualified handicapped persons. An employee may file a complaint with the Department of Labor if section 793(a) is violated.ⁿ²⁹² However, there is no private right of action under this provision.ⁿ²⁹³

The act also forbids discrimination against the disabled by any program or activity receiving federal financial assistance.ⁿ²⁹⁴ This type of discrimination may be addressed by way of a private civil action.ⁿ²⁹⁵ The act explicitly makes available all the rights and remedies set forth in section 717 of Title VII,ⁿ²⁹⁶ including injunctive relief, back pay, and attorney's fees.ⁿ²⁹⁷

For discussion of disability discrimination against employees generally, *see* Chapters 40 through 44.

[q] Title VII of the Civil Rights Act of 1964 (Title 42 United States Code Sections 2000e et seq.)

Title VII of the Civil Rights Act of 1964,ⁿ²⁹⁸ prohibits employment discrimination, including discharge, on the basis of race, color, sex, religion, or national origin.ⁿ²⁹⁹ It also prohibits retaliation against an employee who opposes any practice prohibited by Title VII or who participates in any proceedings under Title VII.ⁿ³⁰⁰ An employee or job applicant who believes he or she has experienced discrimination violative of Title VII must file a charge of discrimination with the Equal Employment Opportunity Commission within prescribed periods of time.ⁿ³⁰¹ The complainant must commence a civil action within 90 days of the EEOC's issuance of a notice of right to sue.ⁿ³⁰² A Title VII plaintiff in a civil action may be able to obtain back pay, injunctive relief, attorney's fees, and any other equitable relief that the court may deem proper.ⁿ³⁰³ In addition, compensatory and punitive damages, up to a statutory maximum, are available in Title VII civil actions involving intentional discrimination.ⁿ³⁰⁴ For further discussion of Title VII, *see* Chapters 40 through 43.

[r] Uniformed Services Employment and Reemployment Rights Act of 1994 (Title 38, United States Code,

Section 4301 et seq.)

Federal law provides job protection to working persons who leave work to perform service in the armed forces or other uniformed service.ⁿ³⁰⁵

Generally, these statutory provisions provide for employment and reemployment of, and prohibit discrimination against, persons returning to their jobs after service in the uniformed services. Once a person is reemployed, he or she may not be discharged, except for cause, for one year after the date of reemployment if he or she served more than 180 days, for 180 days after the date of reemployment if he or she served more than 30 but less than 180 days.ⁿ³⁰⁶ A person reemployed under these provisions is entitled to retain seniority and certain other benefits on reemployment.ⁿ³⁰⁷

The provisions protecting former uniformed services members may be enforced administratively through complaints filed with the Department of Labor.ⁿ³⁰⁸ Alternatively, the aggrieved person may bring an action in federal district court on his or her own behalf to obtain relief for violation of the statute.ⁿ³⁰⁹ The potential relief available in such an action includes lost wages and benefits, liquidated damages for wilful violations, equitable relief, attorney's fees and other litigation costs, and prejudgment interest.ⁿ³¹⁰

For additional discussion of protections applicable to veterans, *see* Chapters 40, 43, and 44.

[s] Worker Adjustment and Retraining Notification Act (Title 29 United States Code, Sections 2101 et seq.)

Under the Worker Adjustment and Retraining Notification Act (WARN Act),ⁿ³¹¹ certain employers are generally required to give employees notice of "plant closings" or "mass layoffs,"ⁿ³¹² as defined in the WARN Act,ⁿ³¹³ and they may not order such closings or layoffs until 60 days after they have served written notice thereof on the employee representativesⁿ³¹⁴ or employees and on the state dislocated worker unit and the chief elected official of the unit of local governmentⁿ³¹⁵ within which the closing or layoff is to occur.ⁿ³¹⁶

The WARN Act defines "employer" as any business enterprise that employs either (1) 100 or more employees, excluding part-time employees, or (2) 100 or more employees who in the aggregate work at least 4,000 hours per week, exclusive of overtime.ⁿ³¹⁷

The WARN Act requires employers to give employees 60 days' notice in the event of a plant closing or mass layoff at a "single site of employment."^{n317.1} For construction workers, the "site of employment" is the workers' actual work site, under the Act's implementing regulations.^{n317.2}

An employer who violates the WARN Act is liable to each aggrieved employeeⁿ³¹⁸ who suffers an employment loss because of the closing or layoff.ⁿ³¹⁹ An aggrieved employee is entitled to back pay for each day of the violation, up to a maximum of 60 days, and certain employee benefits governed by ERISA.ⁿ³²⁰ The Ninth Circuit joins the majority of circuits which have addressed the issue in construing the statute to mean 60 work days, rather than 60 calendar days. Thus, "back pay" means pay for every work day the employee would have been paid had the violation not occurred, not pay for each calendar day during the period.ⁿ³²¹ "Back pay" includes tip income and holiday-rate pay if employees can prove that they would have worked on a holiday.ⁿ³²² The employer's liability is reduced by certain payments made by the employer to the employee or to third parties on behalf of the employee.ⁿ³²³ Employers who fail to give notice to local government units with respect to these notice requirements are also subject to a civil penalty of not more than \$500 for each day of violation.ⁿ³²⁴ The court may award attorney's fees, in its discretion, to the prevailing party as part of the costs.ⁿ³²⁵ Payments to employees for violations of the WARN Act may not be construed to be wages or compensation for purposes of unemployment compensation benefits. Thus, unemployment compensation benefits may not be denied or reduced because of the receipt of payments related in any way to an employer's violation of the WARN Act.ⁿ³²⁶

The U.S. Supreme Court has held that the statute of limitations for a claim alleging a violation of the WARN Act is determined by borrowing the statute of limitations from the most closely analogous state statute.ⁿ³²⁷

A federal district court had previously held that the analogous California statute of limitations to be applied to WARN Act violations is *Code of Civil Procedure, section 338(a)*, which provides a three-year limitation period for an action on a liability created by statute, other than a penalty or forfeiture.ⁿ³²⁸

[t] Family and Medical Leave Act (FMLA) (Title 29 United States Code, Section 2101 et seq.)

The Family and Medical Leave Act (FMLA) (Title 29 United States Code Section 2101 et seq.) limits an employer's right to terminate or discipline employees. For a complete discussion of the statute, see Chapter 8.

[u] Federal Airline Deregulation Act's Whistleblower Protection Program

The Federal Airline Deregulation Act's Whistleblower Protection Programⁿ³²⁹ does not create a private right of action, allowing an aggrieved employee to bring a suit in federal district court to allege violations of the Act.ⁿ³³⁰

[4] Local Ordinances

An ordinance enacted by the City of Los Angeles requiring purchasers of large grocery stores to employ the prior store's workforce for 90 days was preempted by the California Retail Food Code,ⁿ³³¹ based on the Legislature's express intent to fully occupy the field of health and sanitation standards for retail food facilities, because the ordinance required successor grocery employers to employ experienced workers in order to maintain health and safety standards at the store during the transition to new management.ⁿ³³² Further, the ordinance was preempted by the National Labor Relations Actⁿ³³³ and federal law interpreting its provisions, because it invaded a zone reserved to market freedom and altered the bargaining process established under federal law, as shown by its effect on a new employer's obligation to bargain with the employees of its predecessor.ⁿ³³⁴

Legal Topics:

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

Labor & Employment Law Employment Relationships At-Will Employment General Overview Labor & Employment Law Wrongful Termination General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 1028*.

(n2)Footnote 2. *Lab. Code § 1025*. See also *Gosvener v. Coastal Corp.* (1996) 51 Cal. App. 4th 805, 815-816, 59 Cal. Rptr. 2d 339, 51 Cal. App. 4th 805, 59 Cal. Rptr. 2d 339 (employer that repeatedly accommodated employee's attempts to recover from alcoholism could properly discharge employee after he began drinking after each accommodation and was often too drunk to come to work).

(n3)Footnote 3. *Sullivan v. Delta Airlines* (1997) 58 Cal. App. 4th 938, 68 Cal. Rptr. 2d 584.

(n4)Footnote 4. *Sullivan v. Delta Airlines* (1997) 58 Cal. App. 4th 938, 942, 68 Cal. Rptr. 2d 584.

(n5)Footnote 5. *Lab. Code § 1041(a)*.

(n6)Footnote 6. *Lab. Code § 1041(b)*.

(n7)Footnote 7. *Lab. Code § 1042*.

(n8)Footnote 8. *Lab. Code § 1043.*

(n9)Footnote 9. *Lab. Code § 1044.*

(n10)Footnote 10. *Pitman v. City of Oakland (1988) 197 Cal. App. 3d 1037, 1044, 243 Cal. Rptr. 306* (to state cause of action under *Lab. Code § 432.7*, plaintiff must affirmatively allege that that arrest did not result in a conviction).

(n11)Footnote 11. *Lab. Code § 432.7(a).*

(n12)Footnote 12. *Faria v. San Jacinto Unified School District (1996) 50 Cal. App. 4th 1939, 1943-1948, 59 Cal. Rptr. 2d 72 .*

(n13)Footnote 13. *Lab. Code § 432.7(e).*

(n14)Footnote 14. *Lab. Code § 432.7(f)(1).*

(n15)Footnote 15. *Lab. Code § 432.7(f)(2).*

(n16)Footnote 16. *Lab. Code § 432.7(a).*

(n17)Footnote 17. *Pitman v. City of Oakland (1988) 197 Cal. App. 3d 1037, 1044, 243 Cal. Rptr. 306 .*

(n18)Footnote 18. *Lab. Code § 432.7(c).*

(n19)Footnote 19. *Lab. Code § 432.7(c).*

(n20)Footnote 20. *Lab. Code § 432.7(d).*

(n21)Footnote 21. *See Lab. Code § 432.7(c)* (section only refers to applicants); *see also Faria v. San Jacinto Unified School District (1996) 50 Cal. App. 4th 1939, 1943-1948, 59 Cal. Rptr. 2d 72 .*

(n22)Footnote 22. *Faria v. San Jacinto Unified School District (1996) 50 Cal. App. 4th 1939, 59 Cal. Rptr. 2d 72 .*

(n23)Footnote 23. *Lab. Code § 432.7(g).*

(n24)Footnote 24. *Lab. Code § 2871.*

(n25)Footnote 25. *Gov. Code § 12900 et seq.*

(n26)Footnote 26. *Gov. Code § 12940(a).*

(n27)Footnote 27. *Gov. Code § 12945(a).*

(n28)Footnote 28. *Gov. Code § 12945.2.*

(n29)Footnote 29. *Gov. Code § 12960.*

(n30)Footnote 30. *Gov. Code § 12965(b).* For discussion of the statutes of limitation under FEHA, *see ch. 43, .*

(n31)Footnote 31. *Gov. Code § 12965(b); Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal. 3d 211, 215, 185 Cal. Rptr. 270, 649 P.2d 912 ; see American National Ins. Co. v. Fair Employment & Housing Com. (1982) 32 Cal. 3d 603, 607, 186 Cal. Rptr. 345, 651 P.2d 1151* (awarding back pay and reinstatement to victim of

discrimination under FEHA). For discussion of remedies under FEHA, *see* ch. 43, pt. A.

(n32)Footnote 32. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 894-901, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 (FEHA's age discrimination remedies are not exclusive and "do not bar a tort claim for wrongful discharge in violation of the public policy against age discrimination"); *Nelson v. United Technologies* (1999) 74 Cal. App. 4th 597, 611-612, 88 Cal. Rptr. 2d 239 (California Family Rights Act (CFRA) remedies are not exclusive and do not bar claim for wrongful discharge based on violation of CFRA); *Rojo v. Klinger* (1990) 52 Cal. 3d 65, 73 82, 276 Cal. Rptr. 130, 801 P.2d 373 ; *see* Gov. Code § 12993(a) (FEHA not deemed to repeal any other California law relating to discrimination, unless provisions of other law provide less protection than that afforded by FEHA to enumerated classes of persons covered under FEHA).

(n33)Footnote 33. *Lab. Code* § 98.6(a). *See* ch. 5 for discussion of proceedings before Labor Commissioner.

(n34)Footnote 33.1. *Lab. Code* § 98.6(a).

(n35)Footnote 34. *Lab. Code* § 98.6(b).

(n36)Footnote 35. *Lab. Code* § 98.6(b).

(n37)Footnote 35.1. *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal. App. 4th 72, 84-87, 14 Cal. Rptr. 3d 893 .

(n38)Footnote 35.2. *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal. App. 4th 72, 84-87, 14 Cal. Rptr. 3d 893 .

(n39)Footnote 36. *Lab. Code* § 98.7(a).

(n40)Footnote 37. *Lab. Code* § 98.7(a).

(n41)Footnote 38. *Lab. Code* § 98.7(a).

(n42)Footnote 39. *Lab. Code* § 98.7(e).

(n43)Footnote 40. *Lab. Code* § 98.7(d)(1).

(n44)Footnote 41. *Lab. Code* § 98.7(f).

(n45)Footnote 42. *Unemp. Ins. Code* § 1237(a).

(n46)Footnote 43. *Unemp. Ins. Code* § 1237(b).

(n47)Footnote 44. *Unemp. Ins. Code* § 1237(b); *see* *Labor Code* §§ 98.6, 98.7; *see also* § 60.03[2][g].

(n48)Footnote 45. *Lab. Code* § 132a(1).

(n49)Footnote 46. *Lab. Code* § 132a(2), (3), (4).

(n50)Footnote 47. *Lab. Code* § 132a(4).

(n51)Footnote 48. *Judson Steel Corp. v. Workers' Compensation Appeals Board* (1978) 22 Cal. 3d 658, 667, 150 Cal. Rptr. 250, 586 P.2d 564 , *disapproved on other grounds*, *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n52)Footnote 49. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1148, 77 Cal. Rptr. 2d 445, 959

P.2d 752 .

(n53)Footnote 49.1. For these purposes, "domestic violence" is any of the types of abuse set forth in *Fam. Code § 6211*; *Lab. Code § 230.1(g)(1)*.

(n54)Footnote 49.2. For these purposes, "sexual assault" is any of the crimes set forth in *Pen. Code §§ 261, 261.5, 262, 265, 266, 266a, 266b, 266c, 266g, 266j, 267, 269, 273.4, 285, 286, 288, 288a, 288.5, 289, 311.4*; *Lab. Code § 230.1(g)(2)*.

(n55)Footnote 49.3. *Lab. Code § 230.1(a)*.

(n56)Footnote 49.4. *Lab. Code § 230.1(e)*.

(n57)Footnote 49.5. *Lab. Code § 230.1(f)*.

(n58)Footnote 49.6. *Lab. Code § 230.1(b)(1)*.

(n59)Footnote 49.7. *Lab. Code § 230.1(b)(2)*.

(n60)Footnote 49.8. *Lab. Code § 230.1(b)(3)*.

(n61)Footnote 49.9. *Lab. Code § 230.1(c)*.

(n62)Footnote 49.10. *Lab. Code § 230.1(d)*; *see Lab. Code § 98.7*.

(n63)Footnote 50. *Kouff v. Bethlehem-Alameda Shipyard (1949) 90 Cal. App. 2d 322, 324-325, 202 P.2d 1059 .*

(n64)Footnote 51. Former Elec. Code § 695.

(n65)Footnote 52. *Lab. Code §§ 1051, 1057*. While not addressed by these Labor Code sections, licensed day care providers would presumably be exempt from these provisions because they are required to obtain and submit fingerprints of their employees. *See Health & Safety Code § 1596.871(c)(1)*.

(n66)Footnote 53. *Lab. Code § 1054*.

(n67)Footnote 54. *Lab. Code § 1054*.

(n68)Footnote 55. *Lab. Code § 2929(b)*.

(n69)Footnote 56. *15 U.S.C. § 1671 et seq.*

(n70)Footnote 57. *Fam. Code § 5290*.

(n71)Footnote 58. *Fam. Code § 5290*.

(n72)Footnote 59. *See Health & Safety Code § 123420(a)*.

(n73)Footnote 60. *See Health & Safety Code § 123420(a)*.

(n74)Footnote 61. *Health & Safety Code § 123420(a)*.

(n75)Footnote 62. *Penal Code § 11161.8*.

(n76)Footnote 63. *Gov. Code § 12900 et. seq.* For discussion of FEHA, *see [c], above*.

(n77)Footnote 64. *See Lab. Code § 230(a).*

(n78)Footnote 65. *Lab. Code § 230(b).*

(n79)Footnote 66. *See Fam. Code § 6211* ("domestic violence" defined).

(n80)Footnote 67. *See Pen. Code §§ 261, 261.5, 262, 265, 266, 266a, 266b, 266c, 266g, 266j, 267, 269, 273.4, 285, 286, 288, 288a, 288.5, 289, 311.4* ("sexual assault" defined).

(n81)Footnote 68. *Lab. Code § 230(c).*

(n82)Footnote 69. *Lab. Code § 230(d)(1).*

(n83)Footnote 70. *Lab. Code § 230(d)(2)* (sufficient certification defined).

(n84)Footnote 71. *See Lab. Code § 230(e).*

(n85)Footnote 72. *Lab. Code § 230(e).*

(n86)Footnote 72.1. *See Lab. Code § 230(f); see also Lab. Code § 98.7.*

(n87)Footnote 72.2. *Lab. Code § 230(g).*

(n88)Footnote 73. *Montalvo v. Zamora* (1970) 7 Cal. App. 3d 69, 75, 86 Cal. Rptr. 401 .

(n89)Footnote 73.1. *Gelini v. Tishgart* (1999) 77 Cal. App. 4th 219, 222, 91 Cal. Rptr. 2d 447 .

(n90)Footnote 73.2. *Montalvo v. Zamora* (1970) 7 Cal. App. 3d 69, 75, 86 Cal. Rptr. 401 .

(n91)Footnote 73.3. *See Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 176, 164 Cal. Rptr. 839, 610 P.2d 1330 .

(n92)Footnote 73.4. *See Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 666, fn. 5, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n93)Footnote 73.5. *Gelini v. Tishgart* (1999) 77 Cal. App. 4th 219, 91 Cal. Rptr. 2d 447 .

(n94)Footnote 73.6. *See Gelini v. Tishgart* (1999) 77 Cal. App. 4th 219, 222, 91 Cal. Rptr. 2d 447 .

(n95)Footnote 74. *Robinson v. Hewlett-Packard Corp.* (1986) 183 Cal. App. 3d 1108, 1131-1132, 228 Cal. Rptr. 591 .

(n96)Footnote 75. *Robinson v. Hewlett-Packard Corp.* (1986) 183 Cal. App. 3d 1108, 1131-1132, 228 Cal. Rptr. 591 .

(n97)Footnote 76. *Glenn v. Clearman's Golden Cock Inn* (1961) 192 Cal. App. 2d 793, 798, 13 Cal. Rptr. 769 .

(n98)Footnote 77. *Wetherton v. Growers Farm Labor Ass'n* (1969) 275 Cal. App. 2d 168, 175, 79 Cal. Rptr. 543 , *disapproved on other grounds*, *Applied Equipment Corp. V. Litton Saudi Arabia Ltd.* (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454 ; *Glenn v. Clearman's Golden Cock Inn* (1961) 192 Cal. App. 2d 793, 797, 13 Cal. Rptr. 769 .

(n99)Footnote 78. *Escamilla v. Marshburn Bros.* (1975) 48 Cal. App. 3d 472, 483, 121 Cal. Rptr. 891 .

(n100)Footnote 79. *29 U.S.C. § 151 et seq.*

(n101)Footnote 80. *Henry v. Intercontinental Radio, Inc. (1984) 155 Cal. App. 3d 707, 711-715, 202 Cal. Rptr. 328.*

(n102)Footnote 81. *See Civ. Code §§ 56.10(a)-(c), 56.20(c), 56.30.*

(n103)Footnote 82. *Civ. Code § 56.22.*

(n104)Footnote 83. *Mil. & Vet. Code § 394; see also 38 U.S.C. § 4031 et seq.* for similar federal provisions. For discussion of federal provisions, *see [3][o], below.*

(n105)Footnote 84. *Gay Law Students Assn. v. Pac. Tele. & Tele. Co. (1979) 24 Cal. 3d 458, 156 Cal. Rptr. 14, 595 P.2d 592.*

(n106)Footnote 85. *Gay Law Students Assn. v. Pac. Tele. & Tele. Co. (1979) 24 Cal. 3d 458, 156 Cal. Rptr. 14, 595 P.2d 592.*

(n107)Footnote 85.1. *Ali v. L.A. Focus Publication (2003) 112 Cal. App. 4th 1477, 5 Cal. Rptr. 3d 791.*

(n108)Footnote 85.2. *Ali v. L.A. Focus Publication (2003) 112 Cal. App. 4th 1477, 1487, 5 Cal. Rptr. 3d 791* (plaintiff's allegations that his position as newspaper columnist was terminated after he appeared on radio show and criticized congresswoman, who was friend of newspaper publisher and who pressured publisher to terminate relationship, was sufficient evidence of public policy violation to survive summary judgment).

(n109)Footnote 86. *Lab. Code § 432.2(b).*

(n110)Footnote 87. *Cal. Const., art. I, § 1; Long Beach City Employees Ass'n v. City of Long Beach (1986) 41 Cal. 3d 937, 948, 227 Cal. Rptr. 90, 719 P.2d 660.*

(n111)Footnote 88. *See 29 U.S.C. §§ 2002, 2006, 2007.*

(n112)Footnote 89. *Lab. Code § 450 (a); see Lab. Code § 450(b)* (examples of employer coercion); *see also* discussion in ch. 2, pt. B.

(n113)Footnote 90. *See Lab. Code § 451.*

(n114)Footnote 90.1. *See Lab. Code § 1400(b)* ("employer" is any person, as defined by *Lab. Code § 18*, who directly or indirectly owns and operates a "covered establishment", as defined in *Lab. Code § 1400(a)* (has employed at least 75 persons within past 12 months), and includes a parent corporation as employer of any covered establishment directly owned and operated by its corporate subsidiary).

(n115)Footnote 90.2. *See Lab. Code § 1400(c)*, ("layoff" for these purposes is a separation from a position for lack of funds or lack of work); and *Lab. Code § 1400(d)* ("mass layoff" is a layoff during any 30-day period of 50 or more employees at a covered establishment).

(n116)Footnote 90.3. *See Lab. Code § 1400(e)* ("relocation" is removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location at least 100 miles away).

(n117)Footnote 90.4. *See Lab. Code § 1400(f)* ("termination" is the cessation or substantial cessation of industrial or commercial operations in a covered establishment).

(n118)Footnote 90.5. *See Lab. Code § 1400(a)* ("any industrial or commercial facility or part thereof that employs,

or has employed within the preceding 12 months, 75 or more persons").

(n119)Footnote 90.6. *Lab. Code § 1401(a)*.

(n120)Footnote 90.7. *See Lab. Code § 1400(h)* ("employee" for these purposes is "a person employed by an employer for at least six of the 12 months preceding the date on which notice is required").

(n121)Footnote 90.8. *Lab. Code § 1401(c)*.

(n122)Footnote 90.9. *See* discussion of Wage Order 11 in Ch. 1, § 1.05[2][b][xi]

(n123)Footnote 90.10. *See* discussion of Wage Order 12 in Ch. 1, § 1.05[2][b][xi].

(n124)Footnote 90.11. *See* discussion of Wage Order 16 in Ch. 1, § 1.05[2][c.1].

(n125)Footnote 90.12. *Lab. Code § 1400(g)(1)*.

(n126)Footnote 90.13. *Lab. Code § 1400(g)(2)*.

(n127)Footnote 90.14. *Lab. Code § 1402.5(a)*.

(n128)Footnote 90.15. *MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal. App. 4th 1076, 1081-1092, 36 Cal. Rptr. 3d 650 (42 employees who were transferred to new employer were not separated from their positions and would not be added to 20 employees laid off to require notice under California WARN Act, where transferred employees continued to perform same functions at new employer that they had performed at former employer, new employer took on transferred employees at same pay, with same benefits, and at same level of seniority they had at former employer, and transferred employees lost not even one minute of work).

(n129)Footnote 90.16. *Lab. Code § 1401(b)*. The federal WARN act is codified at 29 U.S.C. § 2101 *et seq.*

(n130)Footnote 90.17. *Lab. Code 1402(a)*.

(n131)Footnote 90.18. *Lab. Code § 1402(b)*.

(n132)Footnote 90.19. *Lab. Code § 1402(c)*.

(n133)Footnote 90.20. *Lab. Code § 1403*.

(n134)Footnote 90.21. *Lab. Code § 1404*

(n135)Footnote 90.22. *Lab. Code § 1405*.

(n136)Footnote 90.23. 29 U.S.C. § 2101 *et seq.*

(n137)Footnote 90.24. *Lab. Code § 1407(a)*; *Unemp. Ins. Code § 1265.1(a)*. *See Unemp. Ins. Code § 926 et seq.* For discussion of unemployment insurance, *see* Ch. 80.

(n138)Footnote 90.25. *Unemp. Ins. Code § 1265.1(b)*. *See Unemp. Ins. Code § 1251*; for discussion, *see* Ch. 80.

(n139)Footnote 90.26. *Lab. Code § 1407(b)*.

(n140)Footnote 90.27. *Lab. Code § 1406*.

(n141)Footnote 91. *Lab. Code § 6300 et seq.*

(n142)Footnote 92. *Lab. Code § 6310.*

(n143)Footnote 92.1. *Lujan v. Minagar (2004) 124 Cal. App. 4th 1040, 1044-1046, 21 Cal. Rptr. 3d 861* (employer could not fire employee she feared would make OSHA complaint).

(n144)Footnote 93. *See Daly v. Exxon Corp. (1997) 55 Cal. App. 4th 39, 45, 63 Cal. Rptr. 2d 727 .*

(n145)Footnote 94. *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 299, 188 Cal. Rptr. 159 .*

(n146)Footnote 95. *Lab. Code § 6311.*

(n147)Footnote 96. *Lab. Code § 6312.*

(n148)Footnote 97. *Lab. Code § 98.7(a).*

(n149)Footnote 98. *Lab. Code §§ 98.7, 6310(b).*

(n150)Footnote 99. *Cabesuela v. Browning-Ferris Indus. of California, Inc. (1998) 68 Cal. App. 4th 101, 109-110, 80 Cal. Rptr. 2d 60 ; Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 449, 262 Cal. Rptr. 798 ; Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 303 304, 188 Cal. Rptr. 159 . See § 60.04[2][e].*

(n151)Footnote 99.1. *Taylor v. Lockheed Martin Corp. (2003) 113 Cal. App. 4th 380, 384-387, 6 Cal. Rptr. 3d 358* (trial court erroneously granted summary judgment in favor of employer after determining employee's claim under § 6310 was collaterally estopped by labor arbitrator's decision that employee was terminated for good cause, because CBA was never presented to court and there was no evidence it clearly and unmistakably provided for arbitration of employee's statutory claim).

(n152)Footnote 100. *Lab. Code § 230.8(a)(1); see Lab. Code § 230.8(a)(2)* (priorities if both parents employed by same employer at one work site, requiring employer approval for both parents to take leave at same time).

(n153)Footnote 101. *Lab. Code § 230.8(b)(1); see Lab. Code § 230.8(b)(2)* (limitation if employer accords all full-time employees vacation during same period of time during calendar year).

(n154)Footnote 102. *Lab. Code § 230.8(c)* (also providing that "documentation" means whatever written verification of parental participation school or licensed child day care facility deems appropriate and reasonable).

(n155)Footnote 103. *Lab. Code § 230.8(d).*

(n156)Footnote 104. *Lab. Code § 230.8(d).*

(n157)Footnote 105. *Lab. Code § 2930(a).*

(n158)Footnote 106. *Lab. Code § 2930(a).*

(n159)Footnote 107. *Penal Code § 637.3(a).*

(n160)Footnote 108. *Penal Code § 637.3(b).*

(n161)Footnote 109. *Penal Code § 637.3(c).*

(n162)Footnote 110. *Lab. Code § 230.3(a).* For purposes of this provision, "volunteer firefighter" has the same meaning as the term "volunteer" in *Gov. Code § 50952(n)* (pertaining to length-of-service awards for firefighters). *Lab. Code § 230.3(d).*

(n163)Footnote 111. *Lab. Code § 230.3(b)*.

(n164)Footnote 112. *Lab. Code § 230.3(b)*.

(n165)Footnote 113. *Lab. Code § 230.3(c)*.

(n166)Footnote 114. *See Lab. Code § 232(a), (b)*.

(n167)Footnote 115. *Lab. Code § 232(c)*.

(n168)Footnote 115.1. *Lab. Code § 232.5(a), (b)*.

(n169)Footnote 115.2. *Lab. Code § 232.5(c)*.

(n170)Footnote 115.3. *Lab. Code § 232.5(d)*.

(n171)Footnote 116. *See Lab. Code § 1102.5(a)*.

(n172)Footnote 117. *See Lab. Code § 1106*.

(n173)Footnote 118. *Lab. Code § 1102.5(b)*. *See Mokler v. County of Orange (2007) 157 Cal. App. 4th 121, 138-141, 68 Cal. Rptr. 3d 568* (substantial evidence supported former county employee's claim of retaliation in violation of *Lab. Code § 1102.5(b)*, where employee established prima facie case by presenting substantial evidence she reasonably believed county's proposed action was illegal and her supervisors also believed change was illegal, because they instructed her not to inform state officials, and where evidence supporting pretext included fact she had never been reprimanded or received negative performance review during her county employment before she complained).

(n174)Footnote 119. *Lab. Code § 1102.5(c)*.

(n175)Footnote 119.1. *Lab. Code § 1102.5(d)*.

(n176)Footnote 119.2. *Lab. Code § 1102.5(e)*.

(n177)Footnote 119.3. *Lab. Code § 1102.5(g)*.

(n178)Footnote 119.4. *See Evid. Code § 950 et seq.*

(n179)Footnote 119.5. *See Evid. Code § 990 et seq.*

(n180)Footnote 119.6. *See, e.g., Mueller v. County of Los Angeles (2009) 176 Cal. App. 4th 809, 821-822, 98 Cal. Rptr. 3d 281* (trial court properly granted employer summary judgment as to claim under *Lab. Code § 1102.5*, where claim was not about perceived violations of federal or state statutes, rules or regulations, but, rather, about perceived violations of employer's own policies, which were local policies).

(n181)Footnote 119.7. *Mueller v. County of Los Angeles (2009) 176 Cal. App. 4th 809, 822, 98 Cal. Rptr. 3d 281* ; *Patten v. Grant Joint Union High School Dist. (2005) 134 Cal. App. 4th 1378, 1385, 37 Cal. Rptr. 3d 113* .

(n182)Footnote 120. *Lab. Code § 1103*.

(n183)Footnote 121. *Lab. Code § 1103*.

(n184)Footnote 121.1. *Lab. Code § 1102.5(f)*.

(n185)Footnote 122. *Lab. Code § 1105*.

(n186)Footnote 122.1. *Lab. Code § 1102.6.*

(n187)Footnote 122.2. *Campbell v. Regents of University of California* (2005) 35 Cal. 4th 311 .

(n188)Footnote 122.3. *Mokler v. County of Orange* (2007) 157 Cal. App. 4th 121, 133-138, 68 Cal. Rptr. 3d 568 .

(n189)Footnote 123. *See Gov. Code § 8547 et seq.*

(n190)Footnote 124. *See Shoemaker v. Myers* (1992) 2 Cal. App. 4th 1407, 1416, 1427-1428, 4 Cal. Rptr. 2d 203 (construing former *Gov. Code § 19683*).

(n191)Footnote 125. *Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal. 3d 575, 588, 205 Cal. Rptr. 501, 685 P.2d 61 . *See Colores v. Board of Trustees* (2003) 105 Cal. App. 4th 1293, 1301 n.1, 130 Cal. Rptr. 2d 347 (*Lab. Code § 1102.5* reflects broad public-policy interest in encouraging whistleblowers to report unlawful acts without fearing retaliation): quoting *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 77, 78 Cal. Rptr. 2d 16, 960 P.2d 1046).

(n192)Footnote 126. *Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal. 3d 575, 588 n.12, 205 Cal. Rptr. 501, 685 P.2d 61 .

(n193)Footnote 127. *Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 279 Cal. Rptr. 453 . *See also Colores v. Board of Trustees* (2003) 105 Cal. App. 4th 1293, 1305-1313, 130 Cal. Rptr. 2d 347 (former employee of state university system who reported suspected embezzlement to her employer could assert public-policy wrongful discharge claim without having informed other governmental agency).

(n194)Footnote 128. *See Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 1123-1124, 279 Cal. Rptr. 453 . *but see American Computer Corp. v. Superior Court* (1989) 213 Cal. App. 3d 664, 667-669, 261 Cal. Rptr. 796 (no violation of the public policy contained in *Labor Code Section 1102.5* where employee reported suspected embezzlement to his employer, because only the employer's interest was served by the employee's report, as opposed to any public interest).

(n195)Footnote 129. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 77, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 . *Lab. Code § 1102.5* has codified this holding with regard to government employees in *Labor Code § 1102.5(e)*, which provides that a report by an employee of a government agency to his or her employer is a protected disclosure.

(n196)Footnote 129.1. *Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 1123, 279 Cal. Rptr. 453 .

(n197)Footnote 129.2. *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal. App. 4th 1378, 1384-1390, 37 Cal. Rptr. 3d 113 (trial court erred in granting summary judgment to employer where, although several disclosures by junior high school principal did not amount to whistleblowing as matter of law, others did present triable issue of material fact of protected whistleblowing, and where principal raised triable issue of material fact regarding whether her transfer from one position to another in smaller school constituted adverse employment action even though wages, benefits and duties were same and both schools were junior highs). *See Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal. 4th 1028, 32 Cal. Rptr. 3d 436 .

(n198)Footnote 129.3. *Brown v. Dept. of Corrections* (2005) 132 Cal. App. 4th 520 (state employee's action for retaliation based on criminal prosecution of employee, who had made criminal threats against other correctional officers in course of phone call reporting misbehavior by officers, was barred by *Civ. Code § 47(b)*).

(n199)Footnote 129.4. *See Hansen v. Dept. of Corrections & Rehabilitation* (2008) 171 Cal. App. 4th 1537, 1542-1546, 90 Cal. Rptr. 3d 381 (trial court properly dismissed former correctional officer's cause of action for violation of *Lab. Code § 1102.5* based on former employer's obtaining search warrant and having his home searched

after he had retired, where statements and writings by employer's personnel during internal investigation and in securing search warrant were protected by anti-SLAPP statute as arising during official proceeding and judicial proceeding; officer did not establish that employer's activities were illegal as matter of law, given that there was no evidence that false accusations were knowingly made by employer's personnel; officer did not meet his burden of demonstrating probability of prevailing on his claims, as alleged retaliation took place after officer retired so that employer-employee relationship did not exist and officer could not state cause of action under *Lab. Code § 1102.5*).

(n200)Footnote 130. *Lab. Code § 1102.7(a)*.

(n201)Footnote 130.1. *Lab. Code § 1102.7(b)*.

(n202)Footnote 130.2. *Lab. Code § 1102.7(c)*.

(n203)Footnote 130.3. *Lab. Code § 1102.7(d)*.

(n204)Footnote 130.4. *Lab. Code § 1102.8(a)*.

(n205)Footnote 130.5. U.S.-Japan, April 2, 1953, 4 U.S.T. 2063.

(n206)Footnote 130.6. *Ventress v. Japan Airlines (9th Cir. 2007) 486 F.3d 1111, 2007 U.S. App. LEXIS 9289, *6-17* (reversing district court's granting of judgment on pleadings for employer on ground that claims under California whistleblower statute, *Lab. Code § 1102.5*, were pre-empted by treaty).

(n207)Footnote 131. *See Gov. Code § 12651(a)*.

(n208)Footnote 132. *Gov. Code § 12653(a)*.

(n209)Footnote 133. *Gov. Code § 12653(b)*.

(n210)Footnote 133.1. *Mendonado v. Centinela Hospital Medical Center (9th Cir. 2008) 2008 U.S. App. LEXIS 6854*, *(nurse's complaint against employer alleging that she was wrongfully terminated in violation of *Gov. Code § 12653(b)* stated claim, where she alleged that she engaged in protected activity because she reasonably believed employer was possibly committing fraud against government and she investigated possible fraud, she complained to employer's CEO about possible civil and criminal violations, and employer terminated her because of her investigation into facts relating to employer's submission of false claims and false records to government).

(n211)Footnote 134. *Gov. Code § 12653(c)*.

(n212)Footnote 135. *Gov. Code § 12653(c)*.

(n213)Footnote 136. *Gov. Code § 12653(c)*.

(n214)Footnote 137. *Gov. Code § 12653(d)*.

(n215)Footnote 137.1. *Campbell v. Regents of University of California (2005) 35 Cal. 4th 311*.

(n216)Footnote 138. *Gov. Code § 8547.3, 8547.8, 8547.10, 8547.11, 8547.12*.

(n217)Footnote 139. *Gov. Code § 8547.2(b)*.

(n218)Footnote 139.1. *Gov. Code § 8547.10(c)* (action for damages not available to injured party unless injured party has first filed complaint with designated university officer, and university has failed to reach decision regarding complaint within time limits established for that purpose by regents). *See, e.g., Jones v. Regents of University of California (2008) 164 Cal. App. 4th 1072, 1076-1077, 79 Cal. Rptr. 3d 817* (nurse employed by UCLA was not entitled

to injunction against university's use of complaint form to report retaliation for whistleblowing, where use of form was not mandatory for whistleblower retaliation complaint, as long as complainant fulfilled requirement of *Gov. Code* § 8547.10(a) of statement made under penalty of perjury, and where form's confidentiality requirement was not itself act of whistleblower retaliation, violative of *Lab. Code* § 1102.5, because form was intended to remediate whistleblower retaliation, and its limited and optional requirement of applicant confidentiality did not constitute adverse employment action).

(n219)Footnote 139.2. *Miklosy v. Regents of University of California* (2008) 44 Cal. 4th 876, 885-898, 80 Cal. Rptr. 3d 690, 188 P.3d 629 (former employees were precluded from bringing damages action for retaliation, where University of California timely decided their retaliation complaint); *Brand v. Regents of University of California* (2008) 159 Cal. App. 4th 1349, 1361-1367, 72 Cal. Rptr. 3d 419 (former employee of University of California could bring action for damages under *Gov. Code* § 8547.10(c) after seeking internal resolution of his grievance that University retaliated against him, ultimately by terminating his employment, for whistleblowing, where judicially noticed documents established that Regents failed to make decision to deny grievance within the applicable time limits).

(n220)Footnote 139.3. *Brand v. Regents of University of California* (2008) 159 Cal. App. 4th 1349, 1367-1369, 72 Cal. Rptr. 3d 419 .

(n221)Footnote 139.4. *Brand v. Regents of University of California* (2008) 159 Cal. App. 4th 1349, 1369-1372, 72 Cal. Rptr. 3d 419 .

(n222)Footnote 139.5. See *Brand v. Regents of University of California* (2008) 159 Cal. App. 4th 1349, 1372-1375, 72 Cal. Rptr. 3d 419 .

(n223)Footnote 139.6. *Gov. Code* § 8547.8(c) (action for damages not available to injured party unless injured party has first filed complaint with State Personnel Board and board has issued or failed to issue findings pursuant to *Gov. Code* § 19683).

(n224)Footnote 139.7. *State Bd. of Chiropractic Examiners v. Superior Court* (2009) 45 Cal. 4th 963, 971-978, 89 Cal. Rptr. 3d 576, 201 P.3d 457 , disapproving *California Public Employees' Retirement System v. Superior Court* (2008) 160 Cal. App. 4th 174, 72 Cal. Rptr. 3d 561 to extent it reaches contrary conclusion.

(n225)Footnote 140. *Gov. Code* § 8547.8(c), 8547.10(c), 8547.12(c).

(n226)Footnote 140.1. *Health & Saf. Code* § 1596.70 et seq.

(n227)Footnote 140.2. *Health & Saf. Code* § 1596.881.

(n228)Footnote 140.3. See *Health & Saf. Code* § 1596.882(f) (except for grievance procedure or arbitration or hearing available to employee pursuant to collective bargaining agreement, *Health & Saf. Code* § 1596.882 is exclusive means for presenting claims under Act).

(n229)Footnote 140.4. *Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal. App. 4th 936, 942-947, 88 Cal. Rptr. 3d 707 .

(n230)Footnote 140.5. See *Lab. Code* §§ 6310-6312.

(n231)Footnote 140.6. See *Health & Saf. Code* § 1596.792(c).

(n232)Footnote 140.7. [*Lab. Code* § 6310.]

(n233)Footnote 141. *Educ. Code* § 48900.1(a); *Educ. Code* §§ 48900, 48910 (grounds for discipline; procedures for suspension).

(n234)Footnote 142. *Lab. Code § 230.7(a)*.

(n235)Footnote 143. *Lab. Code § 230.7(b)*.

(n236)Footnote 144. *See Fam. Code § 3760 et seq.*

(n237)Footnote 145. *Fam. Code § 3769*.

(n238)Footnote 146. *See Fam. Code § 3769*.

(n239)Footnote 146.1. *See Lab. Code § 1060 et seq.* (applies to contracts and subcontracts entered into on or after January 1, 2002).

(n240)Footnote 146.2. *Lab. Code § 1063(a)*.

(n241)Footnote 146.3. *Lab. Code § 1061(b)(1)*.

(n242)Footnote 146.4. *Lab. Code § 1063(b)*.

(n243)Footnote 146.5. *Lab. Code § 1063(c)*.

(n244)Footnote 146.6. *Lab. Code § 1061(b)(2)*.

(n245)Footnote 146.7. *Lab. Code § 1061(b)(3)*.

(n246)Footnote 146.8. *Lab. Code § 1061(d)*.

(n247)Footnote 146.9. *Lab. Code § 1061(e)*.

(n248)Footnote 146.10. *Lab. Code § 1061(f)*.

(n249)Footnote 146.11. *Lab. Code § 1062(a)* (calculation of backpay).

(n250)Footnote 146.12. *Lab. Code § 1062(b)*.

(n251)Footnote 146.13. *Lab. Code § 1062(c)*.

(n252)Footnote 146.14. *Lab. Code § 1062(d)*.

(n253)Footnote 146.15. *Lab. Code § 1064*.

(n254)Footnote 146.16. *See Lab. Code § 1071(f)* for definition of "public transit services."

(n255)Footnote 146.17. *See Lab. Code § 1071(c)* for definition of "contractor" in this context.

(n256)Footnote 146.18. *See Lab. Code § 1071(h)* for definition of "subcontractor" in this context.

(n257)Footnote 146.19. *See Lab. Code § 1072(a), (b)*.

(n258)Footnote 146.20. *Lab. Code § 1072(c)(2)*.

(n259)Footnote 146.21. *Lab. Code § 1072(c)(4)*.

(n260)Footnote 146.22. *See Lab. Code § 1071(a)* for definition of "awarding authority."

(n261)Footnote 146.23. *Lab. Code § 1072(c)(1)*.

(n262)Footnote 146.24. *Lab. Code § 1073(a)*. A violation continues for each day the successor contractor or subcontractor fails to employ the employee. *See Lab. Code § 1073(a)*.

(n263)Footnote 146.25. *Lab. Code § 1073(c)*.

(n264)Footnote 146.26. *Lab. Code § 1073(b)*.

(n265)Footnote 147. *29 U.S.C. §§ 621-634*

(n266)Footnote 148. *29 U.S.C. §§ 623, 631(a)*.

(n267)Footnote 149. *29 U.S.C. § 626(d)*.

(n268)Footnote 150. *29 U.S.C. § 626(c)(2)*.

(n269)Footnote 151. *29 U.S.C. § 626(b)*.

(n270)Footnote 152. *See Cancellier v. Federated Department Stores (9th Cir. 1982) 672 F.2d 1312, 1318, cert. denied, 459 U.S. 859, 103 S. Ct. 131, 74 L. Ed. 2d 113 (1982)*.

(n271)Footnote 153. *Cancellier v. Federated Department Stores (9th Cir. 1982) 672 F.2d 1312, 1318, cert. denied, 459 U.S. 859, 103 S. Ct. 131, 74 L. Ed. 2d 113 (1982)*.

(n272)Footnote 154. *42 U.S.C. § 12101 et seq.*

(n273)Footnote 155. *See 42 U.S.C. §§ 12111(2), 12112.*

(n274)Footnote 156. *See 42 U.S.C. § 12117(a)* (incorporating Title VII enforcement and remedies provisions, *42 U.S.C. §§ 2000e-4 2000e-6, 2000e-8, 2000e-9*); *see also* discussion in [q], *below*.

(n275)Footnote 157. *See 42 U.S.C. § 1981a(a)(2), (b)*.

(n276)Footnote 158. *42 U.S.C. § 2000e et seq.* For discussion, *see* [q], *below*.

(n277)Footnote 159. *42 U.S.C. §§ 1981, 1983.*

(n278)Footnote 160. *42 U.S.C. § 1981(a)*.

(n279)Footnote 161. *42 U.S.C. § 1981(b)*.

(n280)Footnote 162. *Johnson v. Railway Express Agency (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295*.

(n281)Footnote 163. *See Graham v. Richardson (1971) 403 U.S. 365, 377, 91 S. Ct. 1848, 29 L. Ed. 2d 534*. For discussion of coverage of *42 U.S.C. § 1981*, *see* ch. 40, pt. B; *see also* Schlei and Grossman, *Employment Discrimination Law*, ch. 21 (BNA 2d ed. 1976), and cases cited therein.

(n282)Footnote 164. *Saint Francis College v. Al-Khazraji (1987) 481 U.S. 604, 107 S. Ct. 2022, 95 L. Ed. 2d 582, 592*.

(n283)Footnote 165. *Johnson v. Railway Express Agency (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295*; *42 U.S.C. § 1981(c)*.

(n284)Footnote 166. 42 U.S.C. § 1983.

(n285)Footnote 167. See Larson, Employment Discrimination, vol. 1, ch. 2; Schlei and Grossman, Employment Discrimination Law, ch. 21 (BNA 2d ed. 1976). For discussion of coverage of 42 U.S.C. § 1983 generally, see ch. 40, pt. C.

(n286)Footnote 168. See *Long v. Ford Motor Company* (6th Cir. 1974) 496 F.2d 500, 503 .

(n287)Footnote 169. *Johnson v. Railway Express Agency* (1975) 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed 2d 295 ; *Smith v. Wade* (1983) 461 U.S. 30, 35, 103 S. Ct. 1625, 75 L. Ed. 2d 632 .

(n288)Footnote 170. See 42 U.S.C. § 1981a(b)(4).

(n289)Footnote 171. 30 U.S.C. § 801 et seq.

(n290)Footnote 172. 30 U.S.C. § 815(c)(1).

(n291)Footnote 173. 30 U.S.C. § 815(c)(2).

(n292)Footnote 174. 30 U.S.C. § 815(c)(2).

(n293)Footnote 175. 30 U.S.C. § 815(c)(3).

(n294)Footnote 176. 30 U.S.C. § 815(c)(2).

(n295)Footnote 177. 30 U.S.C. § 815(c)(2), (3).

(n296)Footnote 178. 30 U.S.C. § 815(c)(2), (3).

(n297)Footnote 179. 15 U.S.C. §§ 1671-1677.

(n298)Footnote 180. 15 U.S.C. § 1674(a).

(n299)Footnote 181. 15 U.S.C. § 1674(b).

(n300)Footnote 182. *Johnson v. Pike Corporation of America* (C.D. Cal. 1971) 332 F. Supp. 490, 496 ; see 15 U.S.C. § 1674.

(n301)Footnote 183. See *Le Vick v. Skaggs Cos.* (9th Cir. 1983) 701 F.2d 777, 780 ; *Smith v. Cotton Bros. Baking Co., Inc.* (5th Cir. 1980) 609 F.2d 738, 743 , cert. denied, 449 U.S. 821, 101 S. Ct. 79, 66 L. Ed. 2d 23 (1980) ; *McCabe v. City of Eureka, Mo.* (E.D. Mo. 1980) 500 F. Supp. 59, 62 , aff'd, 664 F.2d 680 (8th Cir. 1981) ; but see *Stewart v. Travelers Corporation* (9th Cir. 1974) 503 F.2d 108, 114 (holding that private right of action exists); *Ellis v. Glover & Gardner Const. Co.* (M.D. Tenn. 1983) 562 F. Supp. 1054, 1065 (same); *Maple v. Citizens National Bank & Trust Co.* (W.D. Okla. 1977) 437 F. Supp. 66, 69 (same).

(n302)Footnote 184. 11 U.S.C. § 525(b).

(n303)Footnote 185. 11 U.S.C. § 525(b) also modifies the "one garnishment" rule found in Lab. Code § 2929.

(n304)Footnote 186. See 29 U.S.C. § 2001(1) (commerce has same meaning as in Fair Labor Standards Act, 29 U.S.C. § 203(b)).

(n305)Footnote 187. 29 U.S.C. § 2002.

(n306)Footnote 188. 29 U.S.C. § 2001(3).

(n307)Footnote 189. 29 U.S.C. §§ 2006(a).

(n308)Footnote 190. 29 U.S.C. §§ 2006(b), (c).

(n309)Footnote 191. 29 U.S.C. §§ 2006(d), 2007(a)(1), (b), (c).

(n310)Footnote 192. 29 U.S.C. §§ 2006(e), 2007(a)(2), (b), (c).

(n311)Footnote 193. 29 U.S.C. §§ 2006(f), 2007(a)(2), (b), (c).

(n312)Footnote 194. 29 U.S.C. §§ 2001(5), 2005(a), (b); 29 U.S.C. § 2004 (Secretary of Labor's general authority to administer Act).

(n313)Footnote 195. 29 U.S.C. § 2005(c)(1).

(n314)Footnote 196. 29 U.S.C. § 2005(c)(2).

(n315)Footnote 197. 29 U.S.C. § 2005(c)(3).

(n316)Footnote 198. See 29 U.S.C. § 2009.

(n317)Footnote 199. See Lab. Code § 432.2 (polygraphs); Penal Code § 637.3 (voice stress analyzers).

(n318)Footnote 200. 29 U.S.C. §§ 1001-1461.

(n319)Footnote 201. 29 U.S.C. § 1140. See also *Inter-Modal Railway Employees Association v. Atchison, Topeka and Santa Fe Ry.* (1997) 520 U.S. 510, 117 S. Ct. 1513, 1516, 137 L. Ed. 2d 763, 769-770 (ERISA prohibits interference with attainment of vested or unvested rights under welfare benefits plans, as well as pension plans); *Ingersoll-Rand v. McClendon* (1990) 498 U.S. 133, 142, 111 S. Ct. 478, 112 L. Ed. 2d 474 (ERISA protects plan participants from termination motivated by employer's desire to prevent pension from vesting).

(n320)Footnote 202. 29 U.S.C. § 1140.

(n321)Footnote 203. See *Bittner v. Sandoff & Rudoy Industries* (E.D. Wis. 1980) 490 F. Supp. 534, 536. Whether compensatory and punitive damages are available in such an action appears to be an open question. See *Massachusetts Mut. Life Insurance Co. v. Russell* (1985) 473 U.S. 134, 139 n.5, 146-148, 150, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (holding that 29 U.S.C. § 1109(a), establishing liability of employee benefit plan for breach of fiduciary duty, did not authorize award of compensatory and punitive damages in action brought by employee under 29 U.S.C. § 1132(a)(2) for improper or untimely processing of benefit claims, but leaving open the question of whether such damages are available under other provisions of ERISA).

(n322)Footnote 204. See *Ingersoll-Rand v. McClendon* (1990) 498 U.S. 133, 137-145, 111 S. Ct. 478, 112 L. Ed. 2d 474; *Sorosky v. Burroughs Corp.* (9th Cir. 1987) 826 F.2d 794, 799.

(n323)Footnote 205. 42 U.S.C. §§ 7401-7642.

(n324)Footnote 206. 42 U.S.C. § 7622(b).

(n325)Footnote 207. 42 U.S.C. § 7622(b)(1).

(n326)Footnote 208. 42 U.S.C. § 7622(b)(2)(A).

- (n327)Footnote 209. 42 U.S.C. § 7622(b)(2)(A).
- (n328)Footnote 210. 42 U.S.C. § 7622(b)(2)(B).
- (n329)Footnote 211. 42 U.S.C. § 7622(c)(1).
- (n330)Footnote 212. 42 U.S.C. § 7622(d).
- (n331)Footnote 213. 42 U.S.C. § 7622(e)(1).
- (n332)Footnote 214. 42 U.S.C. § 7622(e)(2).
- (n333)Footnote 215. 42 U.S.C. §§ 5801 *et seq.*
- (n334)Footnote 216. 42 U.S.C. §§ 2011 *et seq.*
- (n335)Footnote 217. *English v. Whitfield* (4th Cir. 1988) 858 F.2d 957, 963-964 .
- (n336)Footnote 218. *See Lockert v. United States Dep't of Labor* (9th Cir. 1989) 867 F.2d 513, 518 .
- (n337)Footnote 219. 42 U.S.C. § 5851(b)(1).
- (n338)Footnote 220. 42 U.S.C. § 5851(b)(2)(A).
- (n339)Footnote 221. 42 U.S.C. § 5851(b)(2)(B).
- (n340)Footnote 221.1. 42 U.S.C. § 5851(b)(4).
- (n341)Footnote 222. *Stokes v. Bechtel North American Power Corp.* (N.D. Cal. 1985) 614 F. Supp. 732, 744 .
- (n342)Footnote 223. *English v. General Electric Co.* (1990) 496 U.S. 72, 84-85, 110 S. Ct. 2270, 110 L. Ed. 2d 65 .
- (n343)Footnote 224. 42 U.S.C. §§ 9601 *et seq.*
- (n344)Footnote 225. 42 U.S.C. § 9610(a).
- (n345)Footnote 226. 42 U.S.C. § 9610(b).
- (n346)Footnote 227. 42 U.S.C. § 9610(b).
- (n347)Footnote 228. 42 U.S.C. § 9610(b).
- (n348)Footnote 229. 42 U.S.C. § 9610(b), (c).
- (n349)Footnote 230. 42 U.S.C. § 9610(d).
- (n350)Footnote 231. *Pogue v. United States Dep't of Labor* (9th Cir. 1991) 940 F.2d 1287 .
- (n351)Footnote 232. *See Pogue v. United States Dep't of Labor* (9th Cir. 1991) 940 F.2d 1287, 1289-1291 .
- (n352)Footnote 233. 42 U.S.C. §§ 300f *et seq.*
- (n353)Footnote 234. 42 U.S.C. § 300j-9(i)(2)(A).

(n354)Footnote 235. 42 U.S.C. § 300j-9(i)(2)(B)(ii).

(n355)Footnote 236. 42 U.S.C. § 300j-9(i)(4).

(n356)Footnote 237. 42 U.S.C. § 300j-9(i)(3)(A).

(n357)Footnote 238. 42 U.S.C. §§ 6901-6991i.

(n358)Footnote 239. 42 U.S.C. § 6971(b).

(n359)Footnote 240. 42 U.S.C. § 6971(b), (c).

(n360)Footnote 241. 15 U.S.C. § 2601 *et seq.*

(n361)Footnote 242. *See* 15 U.S.C. § 2622(a).

(n362)Footnote 243. 15 U.S.C. § 2622(b)(1).

(n363)Footnote 244. 15 U.S.C. § 2622(b)(2)(B).

(n364)Footnote 245. 15 U.S.C. § 2622(d).

(n365)Footnote 246. 15 U.S.C. § 2622(c).

(n366)Footnote 247. 33 U.S.C. § 1251 *et seq.*

(n367)Footnote 248. 33 U.S.C. § 1367(b).

(n368)Footnote 249. 33 U.S.C. § 1367(b), (c).

(n369)Footnote 250. 33 U.S.C. § 1367(e).

(n370)Footnote 251. 33 U.S.C. § 1367(e).

(n371)Footnote 252. 29 U.S.C. § 201 *et seq.*

(n372)Footnote 252.1. 29 U.S.C. § 216(b); *Mitchell v. De Mario Jewelry* (1960) 361 U.S. 288, 295-296, 80 S. Ct. 332, 4 L. Ed. 2d 323; *see Lambert v. Ackerley* (9th Cir. 1999) 180 F.3d 997, 1011, *cert. denied*, 528 U.S. 1116 (2000) (revealing that court would likely conclude that punitive damages are available under FLSA, but treating issue as waived, because defendant did not raise any objection in district court).

(n373)Footnote 253. 29 U.S.C. § 216(b).

(n374)Footnote 254. 29 U.S.C. § 216(d).

(n375)Footnote 255. 29 U.S.C. § 216(b).

(n376)Footnote 256. 8 U.S.C. § 1324b.

(n377)Footnote 257. 8 U.S.C. § 1324b(a)(1); *see* 8 U.S.C. §§ 1324a(h)(3) ("unauthorized alien" defined), 1324b(a)(3)(A) ("protected individual" defined).

(n378)Footnote 258. *See* 8 U.S.C. § 1324b(b), (c).

(n379)Footnote 259. *See* 8 U.S.C. § 1324b(d).

(n380)Footnote 260. *See* 8 U.S.C. § 1324b(e), (f), (g).

(n381)Footnote 261. *See* 8 U.S.C. § 1324b(g)(2)(B)(iii), (iv).

(n382)Footnote 262. 28 U.S.C. §§ 1363, 1863, 1865, 1866, 1869, 1871, 1875.

(n383)Footnote 263. 28 U.S.C. § 1875(a).

(n384)Footnote 264. *See* 28 U.S.C. § 1875(b)(1), (2). The Jury System Improvement Act of 1978 amended the Jury Selection and Service Act of 1968. 28 U.S.C. § 1861 *et seq.*

(n385)Footnote 265. 28 U.S.C. § 1875(b)(3).

(n386)Footnote 266. 28 U.S.C. § 1875(d)(1).

(n387)Footnote 267. 28 U.S.C. § 1875(d)(2).

(n388)Footnote 268. 28 U.S.C. § 1875(c).

(n389)Footnote 269. 29 U.S.C. § 151 *et seq.*

(n390)Footnote 270. *See* 29 U.S.C. § 158(a)(1), (3), (4).

(n391)Footnote 271. *Henry v. Intercontinental Radio, Inc.* (1984) 155 Cal. App. 3d 707, 715, 202 Cal. Rptr. 328 .

(n392)Footnote 272. *See* 29 U.S.C. § 160.

(n393)Footnote 273. 29 U.S.C. § 651 *et seq.*; *see* discussion in ch. 21.

(n394)Footnote 274. 29 U.S.C. § 660(c)(1).

(n395)Footnote 275. 29 U.S.C. § 660(c)(2).

(n396)Footnote 276. 29 U.S.C. § 660(c)(2).

(n397)Footnote 277. 29 U.S.C. § 660(c)(2).

(n398)Footnote 278. *George v. Aztec Rental Center Inc.* (5th Cir. 1985) 763 F.2d 184, 187 ; *Taylor v. Brighton Corp.* (6th Cir. 1980) 616 F.2d 256, 264 ; *Irving v. United States (D.N.H. 1982)* 532 F. Supp. 840, 843 .

(n399)Footnote 279. 49 U.S.C. § 20101 *et seq.*, formerly codified as the Railroad Safety Act at 45 U.S.C. 421 *et seq.*

(n400)Footnote 280. 49 U.S.C. § 20109(a).

(n401)Footnote 281. 49 U.S.C. § 20109(b).

(n402)Footnote 282. 49 U.S.C. § 20109(d).

(n403)Footnote 283. 49 U.S.C. § 20109(f).

(n404)Footnote 283.1. 49 U.S.C. § 20109(i).

(n405)Footnote 284. 45 U.S.C. § 151 *et seq.*

(n406)Footnote 285. *Burke v. Compania Mexicana de Aviacion, S.A.* (9th Cir. 1970) 433 F.2d 1031, 1033-1034 .

(n407)Footnote 286. *Stepanischen v. Merchants Despatch Transportation Corp.* (1st Cir. 1983) 722 F.2d 922, 927 .

(n408)Footnote 287. *Brady v. Trans World Airlines, Inc.* (3d Cir. 1968) 401 F.2d 87, 102 .

(n409)Footnote 288. *Hawaiian Airlines v. Norris* (1994) 512 U.S. 246, 264-265, 114 S. Ct. 2239, 129 L. Ed. 2d 203, 220 . See *Saridakis v. United Airlines* (9th Cir.) 166 F.3d 1272, 1278 (RLA did not preempt claim for wrongful discharge in violation of public policy because plaintiff's allegations that his termination was due to disability discrimination, not breach of collective bargaining agreement (CBA), gave rise to right independent of CBA); *Fennessy v. Southwest Airlines* (9th Cir. 1996) 91 F.3d 1359, 1362 (following *Hawaiian Airlines*).

(n410)Footnote 289. *Gov. Code § 12900 et seq.* For discussion of FEHA, see [2][e], above.

(n411)Footnote 290. 42 U.S.C. § 12101 et seq. For discussion, see [b], above.

(n412)Footnote 291. 29 U.S.C. § 701 et seq.

(n413)Footnote 292. 29 U.S.C. § 793(b).

(n414)Footnote 293. *Fisher v. City of Tucson* (9th Cir. 1981) 663 F.2d 861, 867 .

(n415)Footnote 294. 29 U.S.C. § 794; *CONRAIL v. Darrone* (1984) 465 U.S. 624, 631-637, 104 S. Ct. 1248, 79 L. Ed. 2d 568 (29 U.S.C. § 794 applies to private employer receiving federal assistance regardless of whether primary purpose of assistance was to provide employment).

(n416)Footnote 295. *Kling v. County of Los Angeles* (9th Cir. 1980) 633 F.2d 876, 878 .

(n417)Footnote 296. 42 U.S.C. § 2000e-16.

(n418)Footnote 297. 29 U.S.C. § 794a.

(n419)Footnote 298. 42 U.S.C. § 2000e et seq.

(n420)Footnote 299. 42 U.S.C. § 2000e-2(a).

(n421)Footnote 300. 42 U.S.C. § 2000e-3(a).

(n422)Footnote 301. 42 U.S.C. § 2000e-5(e).

(n423)Footnote 302. 42 U.S.C. § 2000e-5(f)(1).

(n424)Footnote 303. 42 U.S.C. § 2000e-5(g), (k).

(n425)Footnote 304. See 42 U.S.C. § 1981a.

(n426)Footnote 305. See 38 U.S.C. § 4301 et seq. For definition of "uniformed services," see 38 U.S.C. § 4303(16).

(n427)Footnote 306. 38 U.S.C. § 4316(c).

(n428)Footnote 307. 38 U.S.C. §§ 4316(a), 4317, 4318.

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(n429)Footnote 308. 38 U.S.C. §§ 4321, 4322, 4323(a)(1).

(n430)Footnote 309. 38 U.S.C. § 4323(a)(3).

(n431)Footnote 310. 38 U.S.C. § 4323(d), P.L. 105-368, Nov. 10, 1998, 112 Stat. 3315.

(n432)Footnote 311. 29 U.S.C. § 2101 et seq.

(n433)Footnote 312. Under certain circumstances, an employer may order a shutdown or plant closing or mass layoff before the conclusion of the 60-day period. See 29 U.S.C. § 2102(b)(1), (2)(A), (B). Certain other plant closings or mass layoffs are exempt from the act. See 29 U.S.C. § 2103; see also *Deveraturda v. Globe Aviation Security Svcs.* (9th Cir. 2006) 454 F.3d 1043, 1046-1049 (WARN Act did not apply to mass layoff of employees who worked for private employer as airport security screeners until United States government federalized airport security services and took over operations at their airport under Aviation and Transportation Security Act (ATSA) of 2001); *International Alliance v. Compact Video Servs., Inc.* (9th Cir. 1995) 50 F.3d 1464, 1466-1469 (sale of business does not by itself trigger requirement of WARN Act notice; sale must be accompanied by an "employment loss" as defined in 29 U.S.C. § 2101(a)(6)).

(n434)Footnote 313. 29 U.S.C. § 2101(a)(2), (3) (defining "plant closing" and "mass layoff").

(n435)Footnote 314. 29 U.S.C. § 2101(a)(4) (definition of "employee representatives").

(n436)Footnote 315. 29 U.S.C. § 2101(a)(7) (definition of "unit of local government").

(n437)Footnote 316. 29 U.S.C. § 2102(a)(1), (2).

(n438)Footnote 317. 29 U.S.C. § 2101(a)(1)(A), (B).

(n439)Footnote 317.1. 29 U.S.C. § 2101(a)(2) ("plant closing" defined as loss of employment for at least 50 full-time employees at single site of employment during any 30-day period, as a result of permanent or temporary shutdown of single site of employment).

(n440)Footnote 317.2. *Bader v. Northern Line Layers* (9th Cir. 2007) 2007 U.S. App. LEXIS 21645, *6-*22 (plaintiffs failed to demonstrate that 50 or more laid-off employees worked at single site of employment so that layoffs were not covered by WARN Act, where remote construction locations did not qualify as single site of employment under 29 C.F.R. § 639.3(i)(1)-(5), and, with respect to 29 C.F.R. § 639.3(i)(6), there was no evidence employees at remote construction projects physically reported to headquarters during course of projects, that headquarters originated work or was responsible for day-to-day management of the majority of workers at remote construction project locations, or that workers directly reported their progress to headquarters).

(n441)Footnote 318. "Aggrieved employee" means an employee who has worked for the employer ordering the plant closing or mass layoff and who, as a result of the failure by the employer to comply with the notice requirements of 29 U.S.C. § 2102, did not receive the required timely notice either directly or through his or her representative. See 29 U.S.C. § 2104(a)(7).

(n442)Footnote 319. 29 U.S.C. § 2104(a)(1).

(n443)Footnote 320. 29 U.S.C. § 2104(a)(1)(A), (B); see 29 U.S.C. § 1002(3) (employee benefit plans under ERISA).

(n444)Footnote 321. *Burns v. Stone Forest Indus., Inc.* (9th Cir. 1998) 147 F.3d 1182, 1185 (employees deprived of 60-days notice of plant closing are entitled to be paid only for what would have been work days during that period, citing cases from other circuits).

(n445)Footnote 322. *Local Joint Executive Board of Culinary/Bartenders Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001) 244 F.3d 1152, 1157-1159 .

(n446)Footnote 323. 29 U.S.C. § 2104(a)(2). See *Local Joint Executive Board of Culinary/Bartenders Trust Fund v. Las Vegas Sands, Inc.* (9th Cir. 2001) 244 F.3d 1152, 1159-1160 (neither payments to nonunion employees on condition they not quit before date of casino's closure nor payments to union employees pursuant to bargained-for Memorandum of Agreement were "voluntary and unconditional payments" casino could deduct from WARN Act damages).

(n447)Footnote 324. 29 U.S.C. § 2104(a)(3).

(n448)Footnote 325. 29 U.S.C. § 2104(a)(6).

(n449)Footnote 326. Unemp. Ins. Code § 1265.1.

(n450)Footnote 327. *North Star Steel Co. v. Thomas* (1995) 515 U.S. 29, 33-34, 115 S. Ct. 1927, 132 L. Ed. 2d 27 .

(n451)Footnote 328. *Wholesale and Retail Food v. Santa Fe Terminal Services, Inc.* (C.D. Cal. 1993) 826 F. Supp. 326, 329-331 .

(n452)Footnote 329. 49 U.S.C. § 42121.

(n453)Footnote 330. *Williams v. United Airlines, Inc.* (9th Cir. 2007) 500 F.3d 1019, 2007 U.S. App. LEXIS 20962, *4-*14 .

(n454)Footnote 331. *Health & Saf. Code § 113700 et seq.*

(n455)Footnote 332. *Cal. Grocers Assn. v. City of Los Angeles* (2009) 176 Cal. App. 4th 51, 63-65, 98 Cal. Rptr. 3d 34 .

(n456)Footnote 333. 29 U.S.C. § 151 et seq.

(n457)Footnote 334. *Cal. Grocers Assn. v. City of Los Angeles* (2009) 176 Cal. App. 4th 51, 65-77, 98 Cal. Rptr. 3d 34 .



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 60 Liability for Wrongful Termination and Discipline
Part A. TEXT

4-60 California Employment Law § 60.04

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§ 60.04 Violation of Public Policy

[1] Public Policy Limitations on Discharge

[a] Elements of Cause of Action

The elements of a cause of action for wrongful discharge in violation of public policy are as follows:ⁿ¹

1. A public policy;
2. An adverse employment action that violates the public policy, such as a termination in retaliation for statutorily protected activity or for refusal to participate in illegal activity;
3. Damages resulting from the adverse employment action.

For further discussion, *see* [1][b] and [2], *below*, and Chapter 61.

[b] Generally

Under *Labor Code Section 2922*, an employment contract of indefinite duration is terminable at the will of either party. However, courts have created a public policy exception. This exception does not depend on the terms of an express or implied employment agreement, but, rather, reflects a duty that is imposed by federal or state law.

The first California case that considered the public policy exception in any detail was *Petermann v. International Brotherhood of Teamsters*.^{n1.1} The plaintiff in *Petermann* had been instructed by his employer to lie to a legislative committee; when he refused to do so, he was fired the next day. The court first noted that, according to *Labor Code Section 2922*, an employment contract of indefinite duration is generally terminable at the will of either party.ⁿ² The court held, however, that the right to terminate an employee may be limited by statute or by public policy.ⁿ³ While acknowledging the vagueness of the term "public policy," the court adopted the following definition: "that principle of

law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good."ⁿ⁴ Noting that the penal statutes make perjury and its solicitation unlawful,ⁿ⁵ the court found that public policy would be offended by permitting an employer to fire an employee because the employee refused to commit an unlawful act.ⁿ⁶

Other early public policy cases involved an employee's statutorily protected right to join a unionⁿ⁷ and to designate a representative to negotiate the terms and conditions of his or her employment. In both *Glenn v. Clearman's Golden Cock Inn* ⁿ⁸ and *Wetherton v. Growers Farm Labor Assn.*, ⁿ⁹ plaintiffs were terminated for union activities. In both cases, the court held that *Labor Code Sections 922 and 923*, granting workers the rights of association and self-organization, were a declaration of public policy and thus an exception to the at will rule. The *Wetherton* court noted that violation of such a public policy statute is actionable even though no specific remedy is provided.ⁿ¹⁰ In *Montalvo v. Zamora*, ⁿ¹¹ plaintiffs, a husband and wife, were terminated when their attorney representative wrote to their employer to demand that the wife be paid the minimum wage. The court held that the termination violated the rights to designate representatives and negotiate the terms and conditions of employment protected by *Labor Code Section 923*.ⁿ¹²

Today, the law of wrongful discharge in violation of public policy is principally defined by the California Supreme Court's decision in *Tameny v. Atlantic Richfield Co.* ⁿ¹³ The Supreme Court later refined the scope of such claims in *Foley v. Interactive Data Corp.*,ⁿ¹⁴ *Gantt v. Sentry Insurance*,ⁿ¹⁵ and *Green v. Ralee Engineering Co.* ^{n15.1} In *Tameny*, the plaintiff was a sales representative who allegedly was terminated by his employer for refusing to participate in an illegal scheme to fix gasoline prices. The Court held that a discharged employee may bring a tort action against an employer if the discharge violated fundamental principles of public policy.ⁿ¹⁶ The Court noted the existence of the general rule of employment at will expressed in *Labor Code Section 2922*, but explained that judicial authorities in California and elsewhere had long recognized that the employer's right to discharge an employee was limited by statute and public policy.ⁿ¹⁷

Significantly, the *Tameny* decision also explicitly approved of tort remedies for wrongful termination of the contractual relationship of employment. The Court identified other California decisions outside the employment area holding that wrongful acts committed in the course of a contractual relationship give rise to both tort and contract remedies.ⁿ¹⁸ The Court stated that when the defendant has breached a duty arising out of the contract, rather than merely a promise set forth in the contract, the plaintiff is entitled to tort relief.ⁿ¹⁹ The Court also pointed out that although *Petermann* did not address the issue, subsequent decisions had interpreted that decision as approving tort remedies in a wrongful discharge case.ⁿ²⁰

Another important aspect of *Tameny* was its affirmation of the notion that a termination might violate public policy even if there is no statute expressly prohibiting termination on the grounds indicated in the particular case. The Court approved earlier decisions (i.e., *Petermann*, *Glenn*, *Wetherton*, and *Montalvo*) in which courts recognized that general statutes affording employees certain rights formed the basis of fundamental public policies, which would be contravened by employee dismissal.ⁿ²¹ Thus, a public policy against termination could be deduced by the courts from statutes condemning or protecting certain types of conduct. Although *Tameny* did not expressly base its finding of public policy on any particular statute, its determination that "the employer cannot condition employment upon required participation in unlawful conduct"ⁿ²² apparently derived from the penal statutes outlawing price-fixing.

Several years later, in *Foley v. Interactive Data Corp.* ⁿ²³ the California Supreme Court reaffirmed the existence of a public policy tort for wrongful termination, but limited the scope of such claims by holding that the violation which forms the basis for the action must inure to the public interest, rather than to a particular individual.ⁿ²⁴

In *Foley*, the employer allegedly discharged the plaintiff for reporting that his new supervisor was under investigation by the FBI for embezzling funds from a previous employer. According to the plaintiff, the discharge violated "a substantial public policy that imposes a legal duty on employees to report relevant business information to

management."²⁵ The Court, however, disagreed. In analyzing the plaintiff's claims, the Court declined to decide whether a *Tameny* action "may be based only on policies derived from a statute or constitutional provision or whether nonlegislative sources may provide the basis for such a claim."²⁶ Instead, the Court held that, whatever the source of the duty alleged by the plaintiff "to report information relevant to his employer's interest, we do not find a substantial public policy prohibiting an employer from discharging an employee for performing that duty."²⁷ To illustrate the absence of a distinctly "public" interest in *Foley*, the Court drew an analogy to the law of contracts. According to the Court, "if an employer and employee were *expressly* to agree that the employee has no obligation to, and should not, inform the employer of any adverse information the employee learns about a fellow employee's background, nothing in the state's public policy would render such an agreement void."²⁸ By contrast, as indicated in *Tameny*, a contract "purporting to obligate the employee to ... violate the antitrust laws would clearly [be] void as against public policy."²⁹ For further discussion, see [2][b], *below*.

Later, in *Gantt v. Sentry Insurance*,³⁰ the Court answered the question left open by *Foley* regarding the source of a public policy underlying a wrongful termination action. According to the Court, in order to support a tortious discharge action, a public policy must be derived from statutory or constitutional authority.³¹ The Court clarified that administrative regulations can be the source of fundamental public policy.^{31.1}

From these Supreme Court decisions, and the Supreme Court's recent reexamination and recitation of the elements of a cause of action for tortious wrongful discharge in violation of fundamental public policy in *Stevenson v. Superior Court*,^{31.2} and *Green v. Ralee Engineering Co.*,^{31.3} the characteristics of a public policy that will support a wrongful discharge action have emerged: the policy must be supported by a statutory or constitutional provision,³² it must inure to the public interest,³³ it must have been well-established at the time of the discharge, and the policy must be "fundamental" and "substantial."³⁴ In addition, the policy must be applicable to the defendant.³⁵

There is no tort cause of action under *Tameny* for failure to renew a fixed term employment agreement. For example, one court of appeal found that where an employer refused to renew a contract because the employee had complained about unsafe working conditions, the employee could not state a claim for tort damages.³⁶ Similarly, an emergency-credentialed teacher hired by a school district for a specific period of time had no cause of action for tortious nonrenewal of her employment contract in violation of public policy.^{36.1}

Furthermore, a *Tameny* action does not extend outside the employment relationship. Thus, for example, there is no tort cause of action for breach of a commercial contract in violation of public policy.³⁷ Similarly, independent contractors may not state a tort claim for wrongful termination in violation of the public policy against racial discrimination grounded in the California Constitution.³⁸

[2] Sources of Public Policy

[a] Legislative or Constitutional Basis Required

In *Gantt v. Sentry Insurance*,³⁹ the California Supreme Court stated that in wrongful termination actions based on violation of public policy, the public policy must derive from constitutional or statutory authority; reliance on judicial or other nonlegislative sources is insufficient to support this cause of action.⁴⁰ This opinion resolved the previous conflict among courts of appeal⁴¹ regarding whether the public policy sufficient to support a tort cause of action for wrongful termination may be based solely on decisional law.⁴²

In support of its position, the Court stated that a public policy exception to the at will doctrine, carefully tethered to fundamental policies that are delineated⁴³ in constitutional or statutory provisions, strikes the proper balance among the interests of employers, employees, and the public. The employer is bound, at a minimum, to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes. So limited, the public policy exception presents no impediment to employers that operate within the bounds of law. Employees are protected against

employer actions that contravene fundamental state policy, and society's interests are served through a more stable job market, in which its most important policies are safeguarded.ⁿ⁴⁴ The Court reiterated these guidelines in *Stevenson v. Superior Court*,ⁿ⁴⁵ in which it found a public policy against age discrimination in the Fair Employment and Housing Act (FEHA). In *D'Sa v. Playhut, Inc.*,^{n45.1} the court found in *Bus. & Prof. Code § 16600* a clear legislative declaration of public policy against covenants not to compete and held that termination of an employee who refuses to sign an employment agreement containing an illegal covenant not to compete constitutes wrongful termination in violation of public policy.^{n45.2} In *Haney v. Aramark Uniform Services, Inc.*,^{n45.3} allegations that an employee was terminated for complaining about and refusing to engage in fraudulent billing practices were sufficient to state a claim for retaliatory discharge in violation of a public policy. The employee supported the allegation with references to *Civil Code Sections 1572, 1709 and 1710, Penal Code Sections 484 and 536, and Business & Professions Code Section 17200*.

In *Franklin v. The Monadnock Co.*,^{n45.4} the court found that *Labor Code Sections 6400 et seq.*, addressing employers' duties and responsibilities regarding safety in employment, established a public policy sufficient to support a claim for wrongful termination, after an employee was fired for complaining about another employee's threats to his life and the lives of coworkers and the employee's report of an assault to the police.

However, the Court has also limited the scope of the public policies to which employers must conform, to exclude those from which a particular defendant is exempt. Thus, despite the statutory declaration in the FEHA that discrimination in employment on the basis of age is against the public policy of the state,ⁿ⁴⁶ an employer who is exempt from the FEHA's substantive prohibition against age discrimination because he or she does not employ the requisite number of employees cannot be held liable in a common law tort action based on that statement of public policy.ⁿ⁴⁷ Similarly, a nonprofit, religious employer that was exempt from the FEHA at the time plaintiff's claim arose is exempt from the common law claim as well.^{n47.1} For further discussion of the limitations on the scope of legislative expressions of public policy, *see* [d], *below*.

Regarding the sources of public policy, the Supreme Court has settled the issue of whether the public policy supporting a wrongful termination claim may be based on administrative regulations. In *Green v. Ralee Engineering Co.*ⁿ⁴⁸ the Court overruled *Gantt* to the extent it could be read to conclude that administrative regulations could not be the source of fundamental public policy,^{n48.1} explaining that fundamental public policy may be enunciated in administrative regulations that serve a statutory objective.^{n48.2} The Court emphasized that only administrative regulations that implicated substantial public policies could be the basis for declaring a public policy in the context of a retaliatory discharge action and went on to conclude that important public safety regulations governing commercial airline safety could provide such a basis.^{n48.3}

The statutes comprising public policy fall into two categories: those explicitly prohibiting termination or discipline, and those embodying a public policy but not expressly addressing the issue of termination or discipline of employees. Examples of these provisions, and the issues raised by them, are discussed in [e] and [f], *below*. Constitutional bases for public policy are discussed in [g], *below*.

Terminations of employment in violation of public policy generally fall into one of the following categories:^{n48.4}

- Termination for refusing to violate a statute or governmental regulation that enunciates a fundamental public policy and is authorized by statute.^{n48.5}
- Termination for performing a statutory obligation.
- Termination for exercising a statutory right or privilege.
- Termination for reporting an alleged violation of a statute of public importance.

[b] Termination Must Affect Duty That Inures to Benefit of Public at Large

In *Foley v. Interactive Data Corp.*,ⁿ⁴⁹ the California Supreme Court held that in a wrongful termination action based on violation of public policy, the termination must affect a duty that inures to the benefit of the public at large, rather than to a particular employer or employee. In *Foley*, the plaintiff asserted violation of public policy based on statute, and the Court stressed that even when a statutory or constitutional basis has been asserted, disparagement of a public policy must be alleged. The Court noted, for example, that many statutes simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental public policy concerns.ⁿ⁵⁰ In *Deschene v. Pinole Point Steel Company*,ⁿ⁵¹ a court of appeal found that a claim of wrongful termination in violation of public policy can be based on an employer's retaliatory actions against an employee who gives truthful adverse testimony pursuant to a subpoena.ⁿ⁵² In *Jie v. Liang Tai Knitwear Co., Ltd.*,^{n52.1} the court found that a claim of wrongful termination in violation of public policy can be based on an employer's layoff of employees in retaliation for reporting the employer's violations of the Immigration and Naturalization Act^{n52.2} to the Immigration and Naturalization Service.

There are a number of court decisions addressing when a report directly to an employer of wrongdoing will support a public policy claim. Relying on *Foley*, the court of appeal in *American Computer Corp. v. Superior Court*,ⁿ⁵³ held there was no public policy violation when an employer discharged an employee for reporting payment of consulting fees to former employees who were not performing any consulting services for the employer. The court held that this was a strictly private concern of the employer.ⁿ⁵⁴

In *Collier v. Superior Court*,ⁿ⁵⁵ however, another court of appeal distinguished both *Foley* and *American Computer* and held that an employee had stated a cause of action for wrongful discharge in violation of public policy because he was fired for reporting to his employer suspected illegal conduct by coemployees.ⁿ⁵⁶ The court explained that there were policy implications in *Collier* not present in *Foley*, namely active violations of antitrust laws and laws against bribery, kickbacks, embezzlement, tax evasion, and possibly even drug trafficking and money laundering.ⁿ⁵⁷

Thus, the employee's report served not only his employer's interests, but also the public interest in deterring crime and the interests of persons who stood to suffer specific harm.ⁿ⁵⁸ Similarly, the court found *American Computer* to be factually distinguishable, because the only victim of wrongdoing in that case was the employer.ⁿ⁵⁹

Collier also pointed out that *American Computer* had erroneously focused on the absence of both an attempt to coerce the plaintiff to engage in criminal conduct and a direct violation of a statute protecting the plaintiff's rights.ⁿ⁶⁰ Soon after *American Computer*, the California Supreme Court expressly rejected the argument that public policy claims should be limited to those situations. In *Rojo v. Kliger*,ⁿ⁶¹ the Court declared instead that a public policy claim will lie when the basis of a discharge contravenes fundamental public policy, such as a "fundamental public interest in a workplace free from ... sexism."ⁿ⁶² According to *Collier*, "[t]he fundamental public interest in a workplace free from crime is no less compelling."ⁿ⁶³

[c] Policy Must Be Fundamental and Substantial

In establishing a set of guidelines regarding the characteristics of a public policy that will support a tortious discharge action, the California Supreme Court has stated that the policy must be "fundamental" and "substantial."ⁿ⁶⁴ The Court has noted that there is no difference between "fundamental" and "substantial," and that the two terms are interchangeable.ⁿ⁶⁵ Despite its broad acceptance, the principle underlying the public policy exception is more easily stated than applied. The difficulty lies in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee. This determination depends in large part on whether the public policy alleged is sufficiently clear to provide the basis for such a potent remedy as tortious wrongful discharge. Because an employer, at a minimum, is bound to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes, the public policy

exception limited to fundamental and substantial policies presents no impediment to employers that operate legally. Employees are protected against employer actions that contravene fundamental state policy; society's interests are served through a more stable job market, in which its most important policies are safeguarded.ⁿ⁶⁶ The Court has clarified that fundamental public policy may be enunciated in administrative regulations that serve a statutory objective.ⁿ⁶⁷

The Court has not articulated a test for determining when a public policy is sufficiently fundamental and substantial to support a wrongful discharge in violation of public policy action. However, in *Stevenson v. Superior Court*,ⁿ⁶⁸ the Court did identify certain considerations that underly a fundamental public policy. In deciding whether the public policy against age discrimination was sufficiently fundamental and substantial, the Court considered the following: the fact that the policy was similar to the substantial public policy prohibiting race and sex discrimination; the fact that the Fair Employment and Housing Act declares age discrimination to be against public policy; the fact that the policy against age discrimination has been the law for over 35 years and has been reaffirmed by the state legislature at least twice; and the fact that there is a wide variety of other California laws prohibiting age discrimination. As additional assurance that the policy against age discrimination was fundamental and substantial, the Court pointed to the fact that the policy is found in the laws of other jurisdictions, including federal laws.ⁿ⁶⁹ The Court has also concluded that the policy against disability discrimination is fundamental and substantial, noting that disability discrimination is indistinguishable in many ways from race and sex discrimination.ⁿ⁷⁰ The Court cautioned, however, that an employer may treat a disabled employee differently than a nondisabled employee if the disability impacts the ability to perform a particular job.ⁿ⁷¹

In *Green v. Ralee Engineering Co.*,ⁿ⁷² the Court examined whether the policy expressed in Federal Aviation Administration regulations promoting proper manufacture and inspection of component airline parts advanced important public policy objectives. After reviewing Congress' delegation of authority to the FAA in the commercial aircraft safety context, the Court concluded that if a statute seeking to further public policy delegates the authority to adopt regulations to an administrative agency to fulfill that objective, and that agency then adopts regulations within the scope of that authority, those regulations may manifest important public policy.ⁿ⁷³

In *Sullivan v. Delta Air Lines, Inc.*,ⁿ⁷⁴ the court examined whether the policy expressed in the Alcohol and Drug Rehabilitation Act (ADRA)ⁿ⁷⁵ is fundamental and substantial. The *Sullivan* court carefully reviewed the *Stevenson* Court's emphasis on sufficient notice to employers,ⁿ⁷⁶ noting that the *Stevenson* considerations can be grouped into two categories of factors that provide clear notice to employers of potential tort liability: the similarity between the subject policy and other policies that have already been declared substantial and fundamental, such as policies against race and sex discrimination; and the broad and consistent legislative and statutory support for the policy.ⁿ⁷⁷ In concluding that *Lab. Code § 1025* is not substantial and fundamental, the *Sullivan* court recognized the following:ⁿ⁷⁸

- The ADRA expresses three potentially conflicting policies: accommodation of employees involved in alcohol and drug rehabilitation programs, avoidance of undue hardship on employers, and intolerance to alcohol and drug use that interferes with employee performance.
- There is no explicit declaration of the significance of the statute's policies in either the Constitution or the ADRA.
- The legislature chose not to impose criminal sanctions for statutory violations.
- It is difficult to determine precisely what employer conduct is prohibited, especially because of the broad grant of authority to employers to discharge employees for deficient performance caused by the same condition that precipitates the need for accommodation.
- The statute contains multiple conflicting undefined standards for employer conduct, such as the employer's duty to reasonably accommodate the employee's rehabilitation program and the employer's

right to avoid any obligation if compliance would create an "undue hardship."

Overall, the undefined and potentially contradictory standards of conduct stated in *Labor Code § 1025* are insufficient to enable an employer to know the fundamental public policies expressed in that law. Further, the policy of requiring reasonable accommodation of an employee's alcohol or drug rehabilitation efforts does not resemble other public policies that have been found to support a cause of action for tortious discharge; an employee's voluntary participation in an alcohol or drug rehabilitation program does not reflect an immutable characteristic like race, gender, or age.ⁿ⁷⁹

In *Nelson v. United Technologies*,ⁿ⁸⁰ the court of appeal held that the policy within the California Family Rights Act (CFRA),ⁿ⁸¹ prohibiting discrimination based on an employee's taking family and medical leave, is fundamental and substantial, and that an employee may state a claim under California law for wrongful discharge in violation of the policy.ⁿ⁸² The inclusion of this provision in the Fair Employment and Housing Act (FEHA)ⁿ⁸³ indicates that it is fundamental and substantial and promotes the stability and security of families, an important policy and one that has been declared important in other jurisdictions.ⁿ⁸⁴ In addition, FEHA's policy against employment discrimination for the exercise of rights under the CFRA is well-established; that is, it has been contained in a statutory provision long enough for an employer to have notice of it.ⁿ⁸⁵ As the federal counterpart to CFRA, violation of the FMLA also must constitute a violation of public policy.^{n85.1}

In *Phillips v. Gemini Moving Specialists*,ⁿ⁸⁶ the court of appeal held that there is a fundamental public policy against an employer's retaliation for its employee having asserted a right to be free of the employer's withholding of pay.ⁿ⁸⁷ The court identified a number of Labor Code Sections demonstrating, generally, the importance the Legislature has attached to the payment of an employee's wages.ⁿ⁸⁸ The court further noted that *Code of Civil Procedure Section 487.020* (prohibiting the attachment of an employee's wages except under certain limited circumstances not present in this case), and the cases construing it,ⁿ⁸⁹ demonstrate the importance to an employee, to his or her family, and to society at large, of the employee's prompt receipt of wages.ⁿ⁹⁰ The *Phillips* court found a clear fundamental and substantial public policy, set forth in the enumerated Labor Code Sections and in *Code of Civil Procedure Section 487.020*, protecting an employee's wages both in general and in particular from setoffs such as the one in this case, taken without written authorization, contrary to plaintiff's request, and for an amount in excess of the agreed-on sum.ⁿ⁹¹

In *Lagatree v. Luce, Forward, Hamilton & Scripps* ⁿ⁹² the court of appeal found that if a claim of wrongful termination in violation of public policy is based on a right or duty that can be bargained away, the claim is not rooted in a substantial public policy, absent other factors to the contrary.ⁿ⁹³ In *Lagatree*, the plaintiff was discharged because he would not agree, predispute, to arbitrate disputes with the employer rather than take those disputes to court.ⁿ⁹⁴ Plaintiff alleged that he had been terminated in violation of public policy for refusing to waive his constitutional right to a jury trial and a judicial forum.ⁿ⁹⁵ The *Lagatree* court, after reviewing the enforceability of arbitration agreements, found that under both federal and state law an employee's rights to a jury trial and a judicial forum can be validly waived by agreement, even where the waiver is required as a condition of employment. Thus, these rights do not implicate a substantial public policy.ⁿ⁹⁶

In *Jie v. Liang Tai Knitwear Co., Ltd.*,^{n96.1} the court found that the criterion that the policy be fundamental and substantial was met by a claim of wrongful termination in violation of public policy based on an employer's laying off employees in retaliation for reporting the employer's violations of the Immigration and Naturalization Act^{n96.2} to the Immigration and Naturalization Service.

In *Scott v. Phoenix Schools, Inc.*, ^{n96.3} the court concluded that the public policy embodied in 22 Cal. Code Reg. § 101216.3, which governs student-teacher ratios, was substantial and fundamental. The purpose of the teacher-student ratios was to protect the safety and ensure the educational development of the children by ensuring they are adequately supervised. The court found that the public policy embodied by the regulation was no less substantial and fundamental than other public policies courts found sufficient to subject an employer to tort liability.^{n96.4} The regulation regarding

teacher-student ratios had been in effect for over 20 years, the ratios were clearly set forth, and the school's administrators were well aware of the ratios.

[d] Policy Must Be Applicable to Defendant

The California Supreme Court has held that a statutory provision cannot establish the existence of a fundamental public policy if an inseparable part of the legislative statement of policy exempts defendant from the statutory provision.ⁿ⁹⁷ Absent some other statutory or constitutional basis for the policy alleged to have been contravened by the termination of plaintiff's employment, a cause of action for wrongful discharge in violation of public policy will not lie if the defendant is exempt from the statute.ⁿ⁹⁸

In *Jennings v. Marralle*,ⁿ⁹⁹ defendant employed fewer than five employees and was therefore exempt from the age-discrimination provisions of the Fair Employment and Housing Act (FEHA).ⁿ¹⁰⁰ Plaintiff's complaint alleged that her termination was based on her age and therefore was a violation of public policy, even though defendant was not subject to the FEHA, because of the statutory public policy prohibiting age discrimination.ⁿ¹⁰¹ The California Supreme Court rejected this argument, holding that the exemption of small employers from the substantive provisions of the FEHA is inseparable from the legislative statements of policy concerning age discrimination.ⁿ¹⁰² The Court stated that it would be unreasonable to expect employers who are expressly exempted from the FEHA ban on age discrimination to nonetheless realize that they must comply with the law from which they are exempted under pain of possible tort liability.ⁿ¹⁰³

Similarly, in *Badih v. Myers*,ⁿ¹⁰⁴ the defendant argued that his exemption from the FEHA because he employed fewer than five employees compelled reversal of a jury verdict that he had wrongfully discharged a former employee on the basis of pregnancy in violation of public policy. The court of appeal explained, however that, unlike the prohibition against age discrimination, a proscription against pregnancy discrimination exists that is independent of the FEHA. Specifically, *California Constitution, Article I, Section 8*, expresses a public policy against sex discrimination, which, the court found, includes pregnancy discrimination. Thus, the court affirmed the judgment for the employee.ⁿ¹⁰⁵

■ CONSULTANT'S COMMENT:

Although *Badih* dealt with a small employer, its lesson for the scope of sex discrimination under the California Constitution is applicable to all employers in the state.

Leonard Myers, a doctor in an office employing fewer than five persons, terminated Fatmeh Badih because she became pregnant. Badih filed a public policy tort claim against Myers alleging that pregnancy discrimination is sex discrimination under *Article I, Section 8, of the California Constitution*. The jury ruled in favor of Badih. Myers appealed contending that pregnancy discrimination is not sex discrimination, and therefore *Jennings v. Marralle*ⁿ¹⁰⁶ barred Ms. Badih's public policy claim. The court of appeal disagreed and sustained the verdict.

Although most practitioners have long operated under statutory authority that equates sex discrimination and pregnancy discrimination, it is important to note that the bedrock of that authority lies in definitions placed in the FEHA and Title VII after the U.S. Supreme Court decision in *General Electric Co. v. Gilbert*.ⁿ¹⁰⁷

Thus, it is important to stress that, however one reacts to the conduct of Leonard Myers, Ms. Badih did not face an easy task of equating sex discrimination with pregnancy discrimination under constitutional authority that drew no such express link. That is, the court of appeal could just as easily have ruled that the only definitive California authority interpreting pregnancy discrimination to be sex discrimination is found in the FEHA and that *Jennings* controls. Instead, the court of appeal construed the legislative action following *Gilbert* to be a declaration that the Supreme Court's failure to link pregnancy and sex

discrimination was the product of faulty logic, and that there was no reason to conclude that the link found in the FEHA applied only to that statute.

Badih, therefore, stands for the general proposition that the prohibition against sex discrimination in the California Constitution also extends to discrimination on the basis of pregnancy. *Commentary by Kirby Wilcox*.

In *Phillips v. St. Mary Regional Medical Center*, n107.1 the court of appeal upheld the trial court's finding that the FEHA did not support plaintiff's cause of action for wrongful discharge in violation of public policy because the defendant was a nonprofit, religious corporation, which was exempt from the FEHA at the time plaintiff's race and sex discrimination and retaliation claims arose. n107.2 The FEHA was later amended to include religious corporations in the definition of *employer* with coverage limited to persons employed to perform duties other than religious duties, at a health care facility operated by the corporation for the provision of health care not restricted to adherents of the religion that established the corporation, n107.3 which would have applied to the defendant had the legislation been enacted before plaintiff's claim arose. The court also found that the FEHA amendments were not retroactive, precluding plaintiff's reliance on them as the basis of public policy for his wrongful discharge claim. However, as in *Badih*, the court found that plaintiff could base a claim on the *California Constitution, Article I, Section 8's* prohibition of sex and race discrimination. n107.4 The court also found that the plaintiff could base a wrongful discharge claim on Title VII, even though it directly conflicted with the California Legislature's intent at the time of plaintiff's termination that nonprofit religious corporations should be exempt from anti-discrimination legislation. The court found that Title VII could be the basis for the claim because, although there was a conflict between state and federal law, no authority restricted the use of federal law as an articulation of the public policy for a wrongful discharge claim. The court also found that because California religious-entity employers were required to comply with federal anti-discrimination statutes, they had adequate notice of those laws, including Title VII. The court also found adequate notice in the fact that in his first charge with the DFEH, plaintiff noted that he had filed his claim with both the DFEH and the EEOC and listed his EEOC claim number on the DFEH charge. n107.5

The *First Amendment* free speech provision does not support a public policy on which to base a tortious discharge claim against a private employer's termination of an employee for the employee's exercise of *First Amendment* rights. n107.6 The *First Amendment* free speech provision expresses a guarantee only against action taken by the government. n107.7 Thus, no protection or redress is provided by the *First Amendment* itself against a private corporation or person who seeks to abridge the free expression of others. n107.8 The *First Amendment* free speech rights are distinguishable from the California constitutional right to privacy because the privacy right is an inalienable right which may not be violated by anyone, including private parties. n107.9

It is not clear from these opinions whether plaintiff must plead and prove that a statute or constitutional provision is expressly applicable to defendant, or whether instead the defendant must prove that an exemption limits the nature of the fundamental policy. It would appear that the plaintiff will be required to prove the fundamental nature of the policy, which would include a showing of the policy's applicability to defendant, but the courts have not expressed any opinion on the appropriate burden of proof.

[e] Statutes Explicitly Prohibiting Termination or Discipline

Termination of an employee most clearly violates public policy when it contravenes the provisions of a statute expressly forbidding termination for a specified reason or in a specified manner. Thus, for example, an employee terminated for missing work in order to serve as an election officer may bring a wrongful termination action for the employer's violation of *Elections Code Section 12312*, which expressly forbids such a discharge. n108

Similarly, one court has suggested that an employee who is terminated for reporting to his or her employer the illegal activities of a coworker may base a common law wrongful termination claim on *Labor Code Section 1102.5(b)*, which

generally prohibits such retaliation.ⁿ¹⁰⁹ Another court allowed a claim for constructive wrongful discharge in violation of public policy in retaliation for plaintiff's whistle blowing activities.^{n109.1}

A physician or surgeon terminated for advocating medically appropriate health care may premise a common law wrongful termination claim on *Bus. & Prof. Code § 2056*, which prohibits such a termination.^{n109.2}

When an employee asserts that he or she has been discharged for exercising a statutory right, the employee must prove that she actually exercised the right protected by the statute.^{n109.3} In *Harvey v. Sybase, Inc.*,^{n109.4} the court found that although *Lab. Code § 232*, which prohibits an employer from discharging an employee who discloses the amount of his or her wages, can support a claim of wrongful termination in violation of public policy,^{n109.5} plaintiff could not state a claim for wrongful termination of public policy based on *Labor Code § 232(c)*, because no substantial evidence supported the claim that her employment was terminated because she disclosed the amount of her wages.

To support a claim for wrongful termination in violation of public policy, the policy must be established at the time of the termination. For example, in *Harvey v. Sybase, Inc.*,^{n109.6} plaintiff also advanced a claim for wrongful termination in violation of the public policy expressed in *Lab. Code § 232.5*, which prohibits the discharge of an employee who discloses information about the employer's working conditions.^{n109.7} The court assumed solely for the purposes of discussion that the statute could support such a claim in appropriate circumstances and that plaintiff's conduct satisfied the statute's requirements. However, the trial court properly granted nonsuit on the claim because the policy set forth in § 232.5 was not well-established at the time of her discharge. A particular policy can support a common law wrongful discharge claim only if it is, among other things, well-established at the time of the discharge.^{n109.8} At the time of plaintiff's discharge, there was no well-established public policy protecting plaintiff's right to complain about her proposed demotion or her supervisor, because *Lab. Code § 232.5* became effective approximately six weeks before the termination. Once a policy is expressed in a statute, it is not necessarily well-established for purposes of a wrongful termination claim. The court declined to fully flesh out the precise amount of time required before a statutory policy may be considered well-established, but concluded that the six-week period in *Harvey* was too short absent evidence the policy predated the statute's effective date.

The statutory means for an employee to redress his or her grievances is not necessarily the exclusive remedy available. For example, in *City of Moorpark v. Superior Court* ⁿ¹¹⁰*Labor Code Section 132a*, which prohibits discrimination on the basis of a work-related injury, was found not to preclude Fair Employment and Housing Act (FEHA) and common law claims for discrimination.ⁿ¹¹¹ Similarly, in *Hentzel v. Singer Co.*,ⁿ¹¹² the existence of laws protecting employees' health and safety in the workplace (Cal OSHA)ⁿ¹¹³ was held not to preclude the common law wrongful termination action. In *Hentzel*, the plaintiff was fired in retaliation for his efforts to obtain a smoke-free work environment. The court noted the Legislature's express prohibition of terminations based on employees' activities promoting health and safety in the workplace,ⁿ¹¹⁴ and pointed out the irony that would be present if an employee were prevented from bringing a civil action precisely because of the Legislature's expressed concern in the area. The court found that when common law rights protecting employees exist before a statutory remedy is created and there is no apparent legislative intent to preclude a common law action, the statutory remedy is deemed cumulative and does not bar a wrongful termination action based on its provisions.ⁿ¹¹⁵

In another case, the court of appeal upheld a state employee's *Tameny* claim based on the employer's violation of public policy as expressed in a statute that protected state employees from retaliation for reporting illegal activities,ⁿ¹¹⁶ as well as the Public Safety Officers' Procedural *Bill of Rights* Act,ⁿ¹¹⁷ which gives public safety officers certain due process rights.ⁿ¹¹⁸

A wrongful termination action may be based on retaliation for an employee's filing or making known his or her intention to file a claim for workers' compensation with the employer in violation of *Labor Code section 132a*. In analyzing these wrongful termination claims, courts apply the burden-shifting test from *McDonnell Douglas*.^{n118.1} To establish a prima facie case of retaliation, a plaintiff must show (1) he or she engaged in conduct protected by *Labor*

Code section 132a, (2) the employer subjected him or her to an adverse employment action, and (3) there is a causal link between the two.^{n118.2} The employer is then given an opportunity to articulate a legitimate, nondiscriminatory reason for the employment action.^{n118.3} The employee can then present evidence that the employer's articulated reason is a pretext.^{n118.4}

The Fair Employment and Housing Act (FEHA),ⁿ¹¹⁹ which generally prohibits employment discrimination based on race, religion, sex or sexual orientation, age, national origin, physical disability, mental disability, medical condition, or marital status,ⁿ¹²⁰ provides its own remedies for unlawful discharge.ⁿ¹²¹ In *Rojo v. Kliger*,ⁿ¹²² the California Supreme Court held that a civil action for wrongful termination in violation of public policy may lie for discriminatory discharge or discipline based on the California *California Constitution, Article I, Section 8*, which prohibits, among other things, employment discrimination based on sex, race, creed, color, or national or ethnic origin. The rationale is that the California Constitution sets forth a fundamental public policy that is independent of the FEHA.ⁿ¹²³ The Court left unsettled the question of whether the FEHA itself could form the basis for a public policy wrongful discharge action. Later, however, in *Stevenson v. Superior Court*,ⁿ¹²⁴ the California Supreme Court confirmed that the FEHA does not preempt state common law remedies for employment discrimination. Thus, the Court found that a plaintiff could bypass the FEHA's administrative scheme and rely on the FEHA's articulation of a public policy against age discrimination to support an action for wrongful discharge in violation of the public policy.ⁿ¹²⁵ Note, however, that if the FEHA claim fails or would fail, the wrongful termination claim necessarily fails as well.^{n125.1} Further, the broad statement of public policy that the FEHA sets forth in *Government Code Section 12920* is not sufficient, standing alone, to impose tort liability on an employer that is specifically exempted from the substantive prohibition on age discrimination contained in the FEHA, because there is no other legislative or constitutional basis for a fundamental policy against age discrimination by small employers.ⁿ¹²⁶ Further, the FEHA does not provide remedies to national guardsmen on state active duty when the challenged personnel action is incident to military service. A national guardsman therefore could not state a tort claim predicated on the FEHA as the targeted public policy. A decision to terminate a national guardsman on the basis of disability without offering reasonable accommodation was incident to military service as a matter of law. Thus, the trial court properly granted the defendant's demurrer without leave to amend.^{n126.1}

For a complete discussion of the scope and application of the FEHA, *see* Chapter 40, Part A. For further discussion of wrongful termination in violation of public policy based on employment discrimination, *see* , § 60.09[1][g].

[f] Statutes Not Explicitly Prohibiting Termination or Discipline

In many of the published cases involving wrongful termination violative of public policy derived from statute, the statutes relied on do not explicitly prohibit termination of employment. In most of these cases, the employee was terminated for either refusing to commit an act made illegal by statute, or for asserting rights protected by statute.

Two of the significant early cases in this area involved employees who were discharged for refusing to break the law for their employers. In *Petermann v. International Brotherhood of Teamsters*,ⁿ¹²⁷ the plaintiff refused to commit perjury. In *Tameny v. Atlantic Richfield Co.*,ⁿ¹²⁸ the plaintiff refused to be involved in a price-fixing scheme.

Later, in *Gantt v. Sentry Insurance*,ⁿ¹²⁹ the California Supreme Court held that an employer's attempt to induce or coerce an employee to lie to an investigator from the Department of Fair Employment and Housing (DFEH) plainly contravenes the public policy of the state, and consequently supports a claim for wrongful discharge based on violation of public policy. Specifically, *Government Code Section 12975* (willful interference with a DFEH investigation constitutes misdemeanor),ⁿ¹³⁰ a provision of the Fair Employment and Housing Act (FEHA),ⁿ¹³¹ enjoins any obstruction of a DFEH investigation. The Court stated that the facts of *Gantt* fit squarely within the rubric of *Petermann* and *Tameny*. In *Gantt*, the plaintiff, despite the employer's indirect threats of retaliation, testified at a DFEH hearing on behalf of a coworker who asserted sex discrimination claims against the employer. The employer thereafter demoted the plaintiff, who ultimately resigned under stressful circumstances. The Supreme Court held that the plaintiff had

established a valid claim for wrongful discharge (i.e., wrongful constructive discharge) based on violation of public policy, finding that the employer had retaliated against him as a consequence of his refusal to withhold information or to provide false information to the DFEH.ⁿ¹³²

In *Green v. Ralee Engineering Co.* ⁿ¹³³ the Court overruled *Gantt* to the extent it could be read to conclude that administrative regulations could not be the source of fundamental public policy,ⁿ¹³⁴ explaining that fundamental public policy may be enunciated in administrative regulations that serve a statutory objective.ⁿ¹³⁵ The Court examined whether the policy expressed in Federal Aviation Administration regulations promoting proper manufacture and inspection of component airline parts advanced important public policy objectives. After reviewing Congress' delegation of authority to the FAA in the commercial aircraft safety context, the Court concluded that if a statute seeking to further public policy delegates the authority to adopt regulations to an administrative agency to fulfill that objective, and that agency then adopts regulations within the scope of that authority, those regulations may manifest important public policy.ⁿ¹³⁶

In another case, an employee stated a claim for wrongful termination in violation of public policy based on allegations that he was terminated for purposes of avoiding payment to him of commissions and vacation pay and in retaliation for reporting to management the failure to pay overtime.ⁿ¹³⁷ The court of appeal found that both matters are the subject of statutory protections that exist for the benefit of society as a whole.ⁿ¹³⁸ Similarly, in *Phillips v. Gemini Moving Specialists*,ⁿ¹³⁹ an employee stated a valid *Tameny* cause of action based on allegations that he was fired because he asserted his right to receive wages free from his employer's withholding of pay:ⁿ¹⁴⁰ "One need only examine provisions in the Labor Code to realize that 'the prompt payment of wages due an employee is a fundamental public policy right of this state.'" ⁿ¹⁴¹

In *Garibaldi v. Lucky Food Stores, Inc.*, ⁿ¹⁴² a Ninth Circuit decision, an employee reported spoiled milk to health authorities, ignoring his supervisor's instruction to deliver it. Sale or delivery of spoiled milk is forbidden by *Food and Agricultural Code Section 32906*. The court held that termination for refusing to commit the illegal act of delivering bad milk is grounds for a wrongful termination action.ⁿ¹⁴³

In *Casella v. SouthWest Dealer Services, Inc.*, ^{n143.1} the court found the employee's wrongful termination in violation of public policy claim sufficiently tethered to *Penal Code § 487*, defining "fraudulent activities." The wrongful termination in violation of public policy claim as presented to the jury was premised on the theory that the employee reasonably suspected the employer was committing or was aiding and abetting the commission of fraudulent activities proscribed by *Penal Code § 487*.^{n143.2} Although the conduct the employee described constituted payment packing and the Legislature did not pass legislation proscribing payment-packing practices until after trial, the employer was on notice of the long-established policies prohibiting theft by misrepresentation to customers as proscribed by *Penal Code § 487*, and the viability of the claim did not depend on the existence of another statute specifically proscribing car dealers from secretly inflating monthly payment quotes to customers.

Earlier cases are also illustrative of sufficient statutory bases for this cause of action. For example, courts have disapproved the termination of employees who had exercised the rights of self-organization and designation of representatives guaranteed by *Labor Code Sections 922 and 923*.ⁿ¹⁴⁴

On the other hand, some statutes will not support a public policy claim. *Labor Code Section 96(k)*, for example, does not provide a statutory basis for a wrongful termination claim based on the employee's conduct during nonworking hours. Section 96(k) allows the Labor Commissioner to take assignments of claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises. It does not set forth an independent public policy providing employees with substantive rights, but, rather, establishes a procedure by which the Labor Commissioner may assert recognized constitutional rights on behalf of employees by outlining the types of claims over which the Labor Commissioner may exercise jurisdiction.^{n144.1} In *Ross v. RagingWire Telecommunications, Inc.*, ^{n144.2} the California Supreme Court held that the

Compassionate Use Act of 1996,^{n144.3} which was adopted by the voters of California and gives a person who uses marijuana for medical purposes on a physician's recommendation a defense to certain state criminal charges involving the drug, could not support a cause of action for wrongful termination in violation of public policy by a former employee against his employer for firing him for using medical marijuana. The Court first held that the employee could not state a cause of action under the FEHA for disability discrimination based on the employer's refusal to accommodate his use of marijuana.^{n144.4} The employee also attempted, based on the employer's refusal to accommodate his use of marijuana, to state a cause of action for wrongful termination in violation of public policy based on the violation of fundamental public policies supported by the Compassionate Use Act and the privacy clause of the California Constitution.^{n144.5} The California Supreme Court found that the Compassionate Use Act did not speak to employment law, because nothing in the act's text or history indicated the voters intended to articulate policy concerning marijuana in the employment context, or a fundamental public policy requiring employers to accommodate marijuana use by employees. Further, because the Act articulated no such policy, reading the FEHA in light of the Compassionate Use Act led to no different result. The Compassionate Use Act did not put the employer on notice that employers would thereafter be required under the FEHA to accommodate the use of marijuana.^{n144.6} The Court also found that the discharge did not violate the public policy that underlies an adult patient's right to determine whether or not to submit to lawful medical treatment,^{n144.7} located both in the privacy clause of the state Constitution and in the common law.^{n144.8} However, that body of law imposes, inferentially, an obligation on health care providers to seek patients' informed consent before undertaking medical procedures. An employer's decision not to accommodate an employee's marijuana use does not implicate the employee's right to refuse medical treatment.^{n144.9}

In other cases, the required nexus between the statute and the termination appears to be looser. In *Hentzel v. Singer Co.*,ⁿ¹⁴⁵ the court disapproved the termination of an employee in retaliation for his efforts to obtain a smoke-free workplace. The court did so without citing any statutory guarantee of a smoke-free working environment. Instead, it found the requisite "firmly established principle[s] of public policy" in three different statutes: (1) *Labor Code Section 923*, protecting employees' right to criticize their working conditions; (2) *Labor Code Sections 6400* and *6404*, protecting the safety of employees, and (3) *Labor Code Sections 6310* and *6312*, prohibiting terminations based on employees' activities concerning workplace health and safety.ⁿ¹⁴⁶

A later court of appeal decision distinguished *Hentzel* in a case in which an employee alleged that she was terminated because she took a lengthy medical leave following surgery. The court rejected the employee's contention that Labor Code provisions protecting the health and safety of employeesⁿ¹⁴⁷ provided a general public policy in favor of proper medical care for employees.ⁿ¹⁴⁸

In *Dabbs v. Cardiopulmonary Management Services*,ⁿ¹⁴⁹ the plaintiff, a respiratory therapist, was terminated after she refused to work the night shift. Her refusal was a protest over what she perceived as the serious understaffing of the respiratory care unit during the nighttime hours. The trial court held that plaintiff had not stated a cause of action because she could not claim she was fired for refusing to engage in illegal activities. The court of appeal reversed, finding support for plaintiff in a number of statutes dealing with safeguards for the health of patients, which denote a public policy favoring qualified care for the ill and infirm. The court found public policy embodied in the Respiratory Care Practice Act,ⁿ¹⁵⁰ which went into effect two months after plaintiff was fired, as well as general societal concerns for qualified patient care.ⁿ¹⁵¹ The court also noted that in *Hentzel v. Singer Co.*, discussed above, although there was no express statute dealing with smoking in the workplace, the *Hentzel* court had looked to California's general policy of protecting employees in the workplace as embodied in various provisions of the Labor Code, and from this had implied a public policy against discharging an employee for protesting reasonably perceived hazardous conditions in the workplace.ⁿ¹⁵²

In another case, *Hejmadi v. AMFAC, Inc.*,ⁿ¹⁵³ an employee alleged, among other causes of action, that the employer had wrongfully terminated him in retaliation for his protests that the employer was engaging in illegal behavior by allowing store security personnel to stripsearch customers to determine if shoplifting had occurred. The court stated that the employee had stated a cause of action for wrongful discharge based on public policy by pleading that (1) the

employer contravened a statutory proscription affecting matters relating to the employer's business, (2) the employee protested the unlawful policy to company management, and (3) the company terminated the employee in retaliation for the protest.ⁿ¹⁵⁴

[g] Constitutional Bases for Public Policy

Tortious discharge claims based on public policy that is derived from the California Constitution generally have arisen in the context of privacy or discrimination. Several court of appeal opinions have dealt with the issue of whether a violation of an employee's state constitutional right to privacyⁿ¹⁵⁵ constitutes a violation of public policy sufficient to support a tort cause of action for wrongful termination. In two cases, courts held that employee drug testing programs violated the right to privacy.ⁿ¹⁵⁶ The courts, however, reached opposite conclusions regarding whether an employee who is fired for refusing to submit to drug testing has a cause of action for wrongful termination based on tortious violation of public policy.ⁿ¹⁵⁷ In *Semore v. Pool*,ⁿ¹⁵⁸ the court concluded that there is a public policy concern in an individual's right to privacy and that assertion of the right not to participate in a drug test establishes a fundamental right shared by other employees and Californians generally. The court thus held that the plaintiff employee had stated a cause of action for wrongful termination in violation of public policy.ⁿ¹⁵⁹

By contrast, in *Luck v. Southern Pacific Transportation Co.*,ⁿ¹⁶⁰ the court held that, under the *Foley* standard requiring that the public policy inure to the public benefit,ⁿ¹⁶¹ a violation of the right to privacy, by its very name, cannot be a public right. In addition, the court in *Luck* stated that two other requirements set forth in *Foley* for a public policy cause of action were missing. First, the public policy must be one about which reasonable persons can have little disagreement; drug testing, however, is a hotly contested issue about which there is no consensus concerning whether it is consistent with privacy rights. Second, the public policy must be one that was firmly established at the time of the termination; at the time the plaintiff in *Luck* was terminated, however, no cases had held that drug testing intruded on privacy rights.ⁿ¹⁶² In more recent cases, other courts have found that a violation of an employee's right to privacy does give rise to a claim for wrongful termination in violation of public policy.ⁿ¹⁶³ In both *Pettus v. Cole*ⁿ¹⁶⁴ and *Feminist Women's Health Center v. Superior Court*,ⁿ¹⁶⁵ the courts, after reviewing *Luck* and *Semore*, concluded that a claim for wrongful termination in breach of public policy could lie if the elements for invasion of privacy were all present.

In *Rojo v. Kliger*,ⁿ¹⁶⁶ the California Supreme Court held that *California Constitution, Article I, Section 8*, which provides that no person may be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin,ⁿ¹⁶⁷ sets forth a fundamental public policy against employment discrimination on any of those grounds and may be the basis for a tort cause of action for wrongful termination in violation of public policy, independent of the Fair Employment and Housing Act (FEHA).ⁿ¹⁶⁸ More recently, the California Supreme Court found that the FEHA itself articulated a public policy against employment discrimination that is sufficient to support a common law tortious discharge cause of action.ⁿ¹⁶⁹

Even more recently, the California Supreme Court has held that a nonprofit religious organization's termination of an employee for what the employer considered to be objectionable religious speech was not contrary to a fundamental public policy of the state "tethered to" a constitutional or statutory provision.^{n169.1} *Article I, Section 8 of the California Constitution* expresses a fundamental policy against religious discrimination in employment and requires reasonable accommodation of employees' religious practices. However, the state and federal free exercise and *establishment clauses* give religious organizations some degree of latitude to choose their employees in order to define their religious mission. Further, the FEHA expressly exempts nonprofit religious organizations from liability for religious and other forms of discrimination in order to further that goal.^{n169.2} Thus, the Court concluded that reading *California Constitution, Article I, Section 8's* prohibition against religious discrimination in employment together with the free exercise and *establishment clauses* of the state and federal constitutions, and with the FEHA's explicit exemption of religious organizations from liability for such discrimination, the Court could not say there is a fundamental and substantial public policy that prohibits a religious employer from terminating an employee because of his or her objectionable religious speech in the workplace.^{n169.3} The Court expressly did not consider whether a religious

employer would be liable in tort for terminating an employee in violation of a public policy against sexual discrimination found in *article I, section 8 of the California Constitution*, despite the FEHA exemption.^{n169.4} Since the case involved a nonprofit religious corporation providing health care as the employer, the Court also found that the addition of *Gov. Code Section 12926.2(c)* in 1999, to define "employer" under FEHA to include a religious corporation or association with respect to persons employed by the religious association or corporation to perform duties, other than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation, did not alter its holding. Assuming *arguendo* the amendment created an unqualified, fundamental public policy against religious health care employers unreasonably restricting religious speech at workplaces, the amendment occurred after the termination, and therefore could have no bearing on the suit. The employer could not be liable for violating a public policy that was not manifest at the time it committed the alleged tortious action.^{n169.5}

In *Jersey v. John Muir Medical Center*,^{n169.6} the employer discharged the plaintiff for filing a lawsuit against a patient who had assaulted her. The plaintiff sued for wrongful termination in violation of public policy. She based her claim on the right of access to the courts and other statutory provisions. The court found that access to the courts is a right guaranteed to all persons by the federal and state constitutions because it is regarded as arising from the *First Amendment* right to petition the government for redress of grievances, which is a right also protected by *article 1, section 3 of the California Constitution*.^{n169.7} However, the court found that none of the broad constitutional and statutory provisions on which the plaintiff relied reflected a legislative determination that it is against public policy for an employer to insist that its employees not sue its customers, clients, or patients. Notwithstanding plaintiff's clear right to bring an action for injuries against the third-party who caused them,^{n169.8} the court noted that not every discharge that contravenes a fundamental public policy satisfies the criteria for a wrongful termination action: "Discharging an employee for exercising a right is tortious only if the criteria enumerated in *Gantt* and subsequent decisions are met."^{n169.9}

The *Jersey* court also found that an explicit agreement between an employee and employer, in which the employee agreed not to sue patients for their behavior while in the hospital, would not be unenforceable as against public policy. The court thus held that because the plaintiff could expressly waive the right to bring such an action, it followed that there is no strong public policy preventing her employer from discharging her for commencing litigation, despite the absence of an express agreement.^{n169.10} Finally, the court held the absence of a provision in the employee handbook or any other personnel rule forbidding the plaintiff from suing a patient was irrelevant because her employment was at will.^{n169.11}

For further discussion of the relationship of the FEHA to wrongful termination law, *see* § 60.09[1][f]. For full discussion of equal employment opportunity laws, including the FEHA, *see* Chapters 40 through 44.

[h] Required Showing of Statutory Violation

It is not yet clear exactly what standard a plaintiff must meet in order to establish that his or her termination violated a statute or constitutional provision, therefore supporting a claim for tort damages. In *Holmes v. General Dynamics Corp.*,ⁿ¹⁷⁰ the plaintiff alleged that the true reason for his discharge was to retaliate against him for his disclosure of his employer's violations of the federal False Statements Actⁿ¹⁷¹ in conjunction with defendant's contracts with the Department of Defense. The trial court entered judgment for plaintiff based on a jury verdict finding that defendant had violated the False Statements Act. The defendant appealed in part on the ground that there was insufficient evidence that its breaches of the government contracts violated the act.ⁿ¹⁷²

The appellate court in *Holmes* found that sufficient evidence supported the jury's conclusion that defendant had in fact violated the act,ⁿ¹⁷³ and therefore did not address whether some lesser standard might have sufficed.

However, in a recent case, the California Supreme Court stated that an employee need not prove an actual violation of

law. It would suffice if the employee was fired for reporting "reasonably based suspicions" of illegal activity.ⁿ¹⁷⁴ Further, statutes that expressly prohibit retaliation have been held to protect an employee who acts under a reasonable belief that the employer was acting unlawfully, without requiring proof of an actual violation.ⁿ¹⁷⁵

[i] Special Rules Applied to Attorney Employees

The California Supreme Court has held that an attorney's status as "in-house" counsel does not preclude a tort cause of action for discharge in violation of public policy, but that an action may be stated only if (1) the reasons for discharge contravene an attorney's mandatory ethical obligations, or (2) the reasons would support a claim by a non-attorney employee and a statutory or ethical code provision permits the attorney to depart from the usual rule that client matters remain confidential.ⁿ¹⁷⁶

In *General Dynamics Corp. v. Superior Court*, ⁿ¹⁷⁷ the Court noted the increasing number and professional stature of so-called in-house or corporate counsel, and the difficulties inherent in attempting to apply standards applicable to outside law firms to attorneys whose economic fate is tied to a single employer. The Court described their status as often similar to other corporate executives, with the addition (by virtue of the attorney's professional license) of ethical imperatives that exceed those of non-attorneys. The Court therefore phrased the issue as a consideration of the effects of in-house counsel's professional role and ethical duties on access to judicial remedies for alleged wrongful termination available to the nonattorney colleague.ⁿ¹⁷⁸

The Court discussed the conflicting values presented. On the one hand, there is a case for shielding the in-house attorney from retaliation by the employer for either insisting on adhering to mandatory ethical norms of the profession or for refusing to violate them; on the other hand, there is a case for protecting the confidential role of the attorney from the damage that could be caused by suits against the client, especially given an attorney's ethical obligation to withdraw from representation when an ethical conflict arises.ⁿ¹⁷⁹ The Court rejected the approach taken by courts in other states, under which actions by in-house counsel are precluded on the ground that the ethical obligation to withdraw is sufficient.ⁿ¹⁸⁰ Instead, the Court held that it is *because* of the nature of the attorney's role that a remedy should be available when mandatory ethical norms embodied in the Rules of Professional Conduct collide with illegitimate demands of the employer, and the attorney insists on adhering to his or her clear professional duty.ⁿ¹⁸¹ The "remedy" of withdrawal (i.e., resignation) from representation of the client was seen as illusory, in that it appeared more likely that, in the absence of any available remedy, counsel would tend to remain silent in the face of unethical demands.ⁿ¹⁸²

Instead, the Court fashioned a rule designed to support in-house counsel in remaining faithful to the fundamental public policies reflected in the governing ethical code when carrying out professional assignments.ⁿ¹⁸³ The Court held that the fiduciary values of mutual trust and confidence can be protected from the threat of damages by limiting judicial access to those claims grounded in the explicit and unequivocal ethical norms embodied in the Rules of Professional Conduct and statutes, and to claims that are maintainable by the non-attorney employeeⁿ¹⁸⁴ under circumstances in which the Legislature has manifested a judgment that the principle of professional confidentiality does not apply.ⁿ¹⁸⁵

If the elements of a wrongful discharge in violation of public policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege.ⁿ¹⁸⁶

Whether the attorney-client privilege precludes a plaintiff's recovery will ordinarily not be resolvable at the demurrer stage. Rather, in the usual case, whether the privilege serves as a bar to the plaintiff's recovery will be litigated and determined in the context of motions for protective orders or to compel further discovery responses, as well as at the time of summary judgment.ⁿ¹⁸⁷ In making this determination, the trial court can and should apply an array of ad hoc measures within its equitable powers in order to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege.ⁿ¹⁸⁸ The Court rejected any suggestion that the scope of the attorney-client privilege should be diluted in the context of in-house counsel and their corporate

clients.n189

The Court also set forth subsidiary rules that will deter the incidence of strike suits or claims filed in bad faith. The contested ethical requirement must be clearly established by the ethics code or statutory provision; disagreements over policy are not actionable. The plaintiff bears the burden of establishing the unequivocal requirements of the ethical norm at issue, and that the employer's conduct was motivated by impermissible considerations under a "but for" standard of causation. The ethical norm at issue must be one that is intended for the protection of the public at large; measures designed solely for the benefit of the attorney or the client will not suffice to support a wrongful discharge claim.n190

In *Fox Searchlight Pictures, Inc. v. Paladino*, n191 the court of appeal held further that former in-house counsel may disclose ostensible employer-client confidences to his or her own attorneys to the extent they may be relevant to the preparation and prosecution of a wrongful termination action against the former client-employer. The court based its holding on three grounds:n192

1. The opinion of the California Supreme Court in *General Dynamics* itself contemplates that in a wrongful termination action, a limited disclosure of employer-client confidences to the plaintiff's own attorney will take place. The Court's apprehension about the public disclosure of confidential information did not include in-house counsel's disclosure of the former employer's secrets to counsel's own attorneys. Plaintiff's attorneys are themselves bound by the rules of confidentiality and attorney-client privilege, so that disclosure to them is not public disclosure.
2. The disclosure does not violate the plaintiff's duty of confidentiality to the employer under *Bus. & Prof. Code § 6068(e)* so long as the disclosure is limited to information plaintiff reasonably believes is necessary to the attorney's preparation and prosecution of the case.
3. Fundamental fairness to the plaintiff requires the plaintiff be allowed to make limited disclosure of the former employer's secrets to plaintiff's own attorneys to the extent necessary to prepare a claim for wrongful discharge.

[3] Subsequent Employer's Retaliation for Protected Activities in Previous Job

In *Skillsky v. Lucky Stores, Inc.*, n193 an employee claimed that his original employer had informed his subsequent employer of the employee's health and safety complaints to OSHA, which had led to the original employer being required to replace a fleet of ten trucks. The employee claimed that he was then discharged by the subsequent employer in retaliation for his whistleblowing. The Ninth Circuit stated that although there were no California cases on point, it predicted that if the issue arose in a California court, the Supreme Court would allow an action for retaliatory discharge against the subsequent employer for public policy reasons.n194

[4] Actions Against Public Entities

The Government Claims Actn195 establishes the limits of common law liability for public entities. Under the Government Claims Act, except as otherwise provided by statute, a public entity is not liable for an injury, whether the injury arises out of an act or omission of the public entity or a public employee or any other person.n196 California courts have held that section 815 abolishes common law tort liability for public entities.n197

In *Miklosy v. Regents of University of California*, n198 the California Supreme Court held in the context of a whistleblower retaliation claim against the University of California that section 815 bars *Tameny*-public policy violation actions against public entities.

Notwithstanding the elimination of common law tort liability for public entities, however, they are liable under the doctrine of respondeat superior for the actions of their employees.ⁿ¹⁹⁹ A public employee generally is liable for an injury caused by his or her act or omission to the same extent as a private person.ⁿ²⁰⁰ When the act or omission of the public employee occurs in the scope of employment, the public entity is vicariously liable for the injury.ⁿ²⁰¹ On the other hand, a public entity cannot be liable in respondeat superior for a *Tameny* action for wrongful discharge, because that claim can only be asserted against an employer.ⁿ²⁰²

[5] Actions Against Individuals

In *Miklosy v. Regents of University of California*,ⁿ²⁰³ the California Supreme Court held that *Tameny* actions cannot be brought against individual defendants, such as supervisors. A *Tameny* action for wrongful discharge can be asserted only against an employer. An individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; rather, the individual can only be the agent by which an employer commits that tort.

Legal Topics:

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

Labor & Employment Law
Employment Relationships
At-Will Employment
General Overview
Labor & Employment Law
Employment Relationships
At-Will Employment
Exceptions
Public Policy
Labor & Employment Law
Wrongful Termination
General Overview

FOOTNOTES:

(n1)Footnote 1. For the standard jury instruction on the essential factual elements of a claim for wrongful discharge/demotion in violation of public policy, *see Judicial Council of California Civil Jury Instructions, CACI 2430 (Matthew Bender)*, also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions; for the special verdict form for a cause of action for wrongful discharge/demotion in violation of public policy, *see Judicial Council of California Civil Jury Instructions*. For the standard jury instruction for a claim that plaintiff was required to violate public policy and constructively discharged in violation of public policy, *see Judicial Council of California Civil Jury Instructions, CACI 2431 (Matthew Bender)*; for the special verdict form for a cause of action for constructive discharge in violation of public policy, that plaintiff was required to violate public policy, *see Judicial Council of California Civil Jury Instructions, CACI VF-2407 (Matthew Bender)*. For the standard jury instruction on the allegation that plaintiff was required to endure intolerable conditions for an improper purpose violating public policy and constructively discharged in violation of public policy, *see Judicial Council of California Civil Jury Instructions, CACI 2432 (Matthew Bender)*; for the special verdict form for a cause of action for constructive discharge in violation of public policy, that plaintiff was required to endure intolerable conditions for an improper purpose that violates public policy, *see Judicial Council of California Civil Jury Instructions, CACI VF-2408 (Matthew Bender)*. For discussion of the CACI instructions and special verdict forms generally, *see §§ 61.05, 61.06*.

(n2)Footnote 1.1. *Petermann v. Int'l Bhd. of Teamsters* (1959) 174 Cal. App. 2d 184, 344 P.2d 25 .

(n3)Footnote 2. *Petermann v. Int'l Bhd. of Teamsters* (1959) 174 Cal. App. 2d 184, 188, 344 P.2d 25 .

(n4)Footnote 3. *Petermann v. Int'l Bhd. of Teamsters* (1959) 174 Cal. App. 2d 184, 188, 344 P.2d 25 .

(n5)Footnote 4. *Petermann v. Int'l Bhd. of Teamsters* (1959) 174 Cal. App. 2d 184, 188, 344 P.2d 25 , *quoting Safeway Stores, Inc. v. Retail Clerks International Association* (1953) 41 Cal. 2d 567, 575, 261 P.2d 721 .

(n6)Footnote 5. *See Penal Code §§ 118, 653f*.

(n7)Footnote 6. *Petermann v. Int'l Bhd. of Teamsters* (1959) 174 Cal. App. 2d 184, 188-189, 344 P.2d 25 .

(n8)Footnote 7. However, a cause of action for wrongful termination in violation of public policy may be

preempted by federal labor laws if the public policy allegedly violated is within the exclusive jurisdiction of the National Labor Relations Board. *See, e.g., Kelecheva v. Multivision Cable T.V. Corp.* (1993) 18 Cal. App. 4th 521, 527-529, 22 Cal. Rptr. 2d 453 . For discussion of preemption of wrongful termination claims by federal labor law, *see* § 60.09[1][b].

(n9)Footnote 8. *Glenn v. Clearman's Golden Cock Inn* (1961) 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 , *disapproved on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal. 4th 503, 521 .

(n10)Footnote 9. *Wetherton v. Growers Farm Labor Ass'n* (1969) 275 Cal. App. 2d 168, 79 Cal. Rptr. 543 .

(n11)Footnote 10. *Wetherton v. Growers Farm Labor Ass'n* (1969) 275 Cal. App. 2d 168, 174, 79 Cal. Rptr. 543 , *disapproved on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal. 4th 503, 521 .

(n12)Footnote 11. *Montalvo v. Zamora* (1970) 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 .

(n13)Footnote 12. *Montalvo v. Zamora* (1970) 7 Cal. App. 3d 69, 73-75, 86 Cal. Rptr. 401 .

(n14)Footnote 13. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 .

(n15)Footnote 14. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 661-671, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n16)Footnote 15. *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , *overruled on other grounds, Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (clarifying that administrative regulations can be source of fundamental policy); *see* discussion of *Gantt* in [2][a], *below*.

(n17)Footnote 15.1. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 75-78, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n18)Footnote 16. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 170, 164 Cal. Rptr. 839, 610 P.2d 1330 .

(n19)Footnote 17. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 172, 164 Cal. Rptr. 839, 610 P.2d 1330 , citing *Montalvo v. Zamora* (1970) 7 Cal. App. 3d 69, 73-75, 86 Cal. Rptr. 401 ; *Glenn v. Clearman's Golden Cock Inn* (1961) 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 ; *Petermann v. International Bhd. of Teamsters* (1959) 174 Cal. App. 2d 184, 344 P.2d 25 .

(n20)Footnote 18. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 174 175, 164 Cal. Rptr. 839, 610 P.2d 1330 , citing *Aweeka v. Bonds* (1971) 20 Cal. App. 3d 278, 281, 97 Cal. Rptr. 650 (wrongfully evicted tenant entitled to tort damages); *Sloane v. Southern Cal. Ry. Co.* (1896) 111 Cal. 668, 676 677, 44 P. 320 (passenger wrongfully ejected from train may obtain tort damages).

(n21)Footnote 19. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 175-176, 164 Cal. Rptr. 839, 610 P.2d 1330 .

(n22)Footnote 20. *See, e.g., Glenn v. Clearman's Golden Cock Inn* (1961) 192 Cal. App. 2d 793, 797, 13 Cal. Rptr. 769 .

(n23)Footnote 21. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 177, 164 Cal. Rptr. 839, 610 P.2d 1330 .

(n24)Footnote 22. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330 .

(n25)Footnote 23. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n26)Footnote 24. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 661-667, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n27)Footnote 25. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 669, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n28)Footnote 26. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 669, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n29)Footnote 27. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 670, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n30)Footnote 28. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 670 n.12, 254 Cal. Rptr. 211, 765 P.2d 373 (emphasis in original); see *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal. App. 4th 1105, 1117, 88 Cal. Rptr. 2d 664 , petition for review filed 10/22/99 (finding no cause of action for wrongful termination in violation of public policy based on employee's discharge for refusing to sign predispute arbitration agreement requiring work-related disputes be resolved through binding arbitration because rights at issue--rights to jury trial and to judicial forum--were subject to waiver by agreement and additional factors weighed against recognition of public policy claim).

(n31)Footnote 29. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 670 n.12, 254 Cal. Rptr. 211, 765 P.2d 373 ; but see *Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 1125, 279 Cal. Rptr. 453 (applying *Foley* test to conclude that agreement prohibiting employee from reporting suspicions of ongoing coworker criminal conduct would be disservice to public interests, and would present serious public policy concerns).

(n32)Footnote 30. *Gantt v. Sentry Insurance* (1992) 1 Cal. 4th 1083, 1090-1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (clarifying that administrative regulations can be source of fundamental public policy); see full discussion of *Gantt* in [2][a], below.

(n33)Footnote 31. *Gantt v. Sentry Insurance* (1992) 1 Cal. 4th 1083, 1090-1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (clarifying that administrative regulations can be source of fundamental public policy).

(n34)Footnote 31.1. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n35)Footnote 31.2. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 887-890, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 .

(n36)Footnote 31.3. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 77-79, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n37)Footnote 32. See *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal. App. 4th 525, 533, 6 Cal. Rptr. 3d 406 (sole basis for employee's claim he was terminated for asserting civil rights guaranteed by California Constitution was that employer violated his state constitutional right to privacy by terminating his employment because of his relationship with subordinate; termination of his employment did not invade his right to privacy, so that wrongful termination claim failed as matter of law). See § [2][a], below.

(n38)Footnote 33. See [2][b], below.

(n39)Footnote 34. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 669-670, 254 Cal. Rptr. 211, 765 P.2d 373 . See *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 75-79, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 ; *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 889-890, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 ; *Barbee v. Household*

Automotive Finance Corp. (2003) 113 Cal. App. 4th 525, 533, 6 Cal. Rptr. 3d 406 ; *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 226, 116 Cal. Rptr. 2d 770 ; *Nelson v. United Technologies* (1999) 74 Cal. App. 4th 597, 609-610, 88 Cal. Rptr. 2d 239 . See also [2][c], below.

(n40)Footnote 35. *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 135, 32 Cal. Rptr. 2d 275, 876 P.2d 1074 ; see [2][d], below.

(n41)Footnote 36. *Daly v. Exxon Corp.* (1997) 55 Cal. App. 4th 39, 45, 63 Cal. Rptr. 2d 727 ; see *Tollefson v. Roman Catholic Bishop* (1990) 219 Cal. App. 3d 843, 854, 268 Cal. Rptr. 550 , disapproved on other grounds, *Scott v. Pacific Gas and Elec. Co.* (1995) 11 Cal. 4th 454, 474 fn.5, 46 Cal. Rptr. 2d 427, 904 P.2d 834 .

(n42)Footnote 36.1. *Motevalli v. Los Angeles Unified School Dist.* (2004) 122 Cal. App. 4th 97, 108-113, 18 Cal. Rptr. 3d 562 . See also *Wells v. Bd. of Trs. of the Cal. State Univ.* (N.D. Ca. 2005) 393 F. Supp. 2d 990, 997 (an employee, whose fixed-term contract is not renewed, cannot state a claim for wrongful discharge).

(n43)Footnote 37. *Harris v. Atlantic Richfield Co.* (1993) 14 Cal. App. 4th 70, 77, 17 Cal. Rptr. 2d 649 (party to franchise agreement alleged retaliatory conduct by oil company in violation of public policy based on pricing dispute and plaintiff's reporting gasoline leak to authorities).

(n44)Footnote 38. *Sistare-Meyer v. Young Men's Christian Assn.* (1997) 58 Cal. App. 4th 10, 16-18, 67 Cal. Rptr. 2d 840 (analyzing Cal. Const., art. I, § 8; neither constitutional provision nor body of law concerning independent contractors clearly favors public interest in curbing discrimination over existing social benefits attached to independent contractor-hiring party relationship).

(n45)Footnote 39. *Gantt v. Sentry Insurance* (1992) 1 Cal. 4th 1083, 1090-1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (clarifying that administrative regulations can be source of fundamental public policy).

(n46)Footnote 40. *Gantt v. Sentry Insurance* (1992) 1 Cal. 4th 1083, 1090-1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (clarifying that administrative regulations can be source of fundamental public policy); see also *Carter v. Escondido Union High School Dist.* (2007) 148 Cal. App. 4th 922, 928-935, 56 Cal. Rptr. 3d 262 (discharged high school teacher's failure to identify statutory or constitutional policy that would be thwarted by his discharge doomed his cause of action; even if school district's decision to terminate him for having reported at prior job that football coach had recommended nutritional supplement to student was misguided or based on erroneous factual premise, that would not eliminate need for clear expression of legislative policy disfavoring discharge for that reason to support wrongful discharge claim); *Jie v. Liang Tai Knitwear Co., Ltd.* (2001) 89 Cal. App. 4th 654, 661-662, 107 Cal. Rptr. 2d 682 (although violation of statute or constitutional provision is not invariably prerequisite to conclusion that discharge violates public policy, existence of statute on particular topic is one excellent method of establishing public policy as to that subject; if employer fires employee who complains to authorities about violation, termination is in violation of public policy).

(n47)Footnote 41. See *Gantt v. Sentry Insurance* (1992) 1 Cal. 4th 1083, 1090-1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (clarifying that administrative regulations can be source of fundamental public policy).

(n48)Footnote 42. Compare, e.g., *Dabbs v. Cardiopulmonary Management Servs.* (1987) 188 Cal. App. 3d 1437, 1443, 234 Cal. Rptr. 129 (dictum suggesting that action may be based on judicial definition); with *Gray v. Superior Court* (1986) 181 Cal. App. 3d 813, 819, 226 Cal. Rptr. 570 (public policy must derive from statute); *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal. App. 3d 467, 477, 199 Cal. Rptr. 613 (same).

(n49)Footnote 43. See *Sequoia Ins. Co. v. Superior Court* (1993) 13 Cal. App. 4th 1472, 1480, 16 Cal. Rptr. 2d

888 ("delineate" entails more specificity than "derived from"; employer insurance company's alleged practice of inflating policy reserves was not addressed in Proposition 103 or any other source required under *Gantt*).

(n50)Footnote 44. *Gantt v. Sentry Insurance* (1992) 1 Cal. 4th 1083, 1090-1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680, overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046.

(n51)Footnote 45. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 889-901, 66 Cal. Rptr. 2d 888, 941 P.2d 1157; see *Nelson v. United Technologies* (1999) 74 Cal. App. 4th 597, 609-610, 88 Cal. Rptr. 2d 239 (public policy against discrimination based on employee's taking family and medical leave under California Family Rights Act (CFRA), *Gov. Code* § 12945.2).

(n52)Footnote 45.1. *D'Sa v. Playhut, Inc.* (2000) 85 Cal. App. 4th 927, 102 Cal. Rptr. 2d 495.

(n53)Footnote 45.2. See *Walia v. Aetna, Inc.* (2001) 93 Cal. App. 4th 1213, 1224-1227, 113 Cal. Rptr. 2d 737 (covenant not to compete violated *Bus. & Prof. Code* § 16600, and discharge of employee for refusal to sign violated public policy); *D'Sa v. Playhut, Inc.* (2000) 85 Cal. App. 4th 927, 935, 102 Cal. Rptr. 2d 495; see also *Advanced Bionics Corp. v. Medtronic, Inc.* (2001) 87 Cal. App. 4th 1235, 1249-1250, 105 Cal. Rptr. 2d 265, mod. 88 Cal. App. 4th 594a (in action involving enforceability of covenant not to compete signed in Minnesota by then-employee of Minnesota company, after which employee termination employment and became California resident working for California employer, court held that *Bus. & Prof. Code* § 16600 reflects strong public policy of California; that California had materially greater interest than Minnesota in application of its law to dispute; and that California's interests would be more seriously impaired if its policy were subordinated to Minnesota policy favoring use and enforcement of noncompetition covenants).

(n54)Footnote 45.3. *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal. App. 4th 623, 641-643, 17 Cal. Rptr. 3d 336.

(n55)Footnote 45.4. *Franklin v. The Monadnock Co.* (2007) 151 Cal. App. 4th 252, 258-263, 59 Cal. Rptr. 3d 692.

(n56)Footnote 46. See *Gov. Code* § 12920.

(n57)Footnote 47. *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 134-136, 32 Cal. Rptr. 2d 275, 876 P.2d 1074.

(n58)Footnote 47.1. *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 227-230, 116 Cal. Rptr. 2d 770.

(n59)Footnote 48. *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 78 Cal. Rptr. 2d 16 P.2d 1046.

(n60)Footnote 48.1. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046.

(n61)Footnote 48.2. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80, 78 Cal. Rptr. 2d 16, 960 P.2d 1046.

(n62)Footnote 48.3. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 82-83, 78 Cal. Rptr. 2d 16, 960 P.2d 1046.

(n63)Footnote 48.4. *Gantt v. Sentry Insurance* (1992) 1 Cal. 4th 1083, 1090-1091, 4 Cal. Rptr. 2d 874, 824 P.2d 680; *Scott v. Phoenix Schools, Inc.* (2009) 175 Cal. App. 4th 702, 708-709, 96 Cal. Rptr. 3d 159.

(n64)Footnote 48.5. *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 79-80, 78 Cal. Rptr. 2d 16, 960 P.2d 1046. See *Scott v. Phoenix Schools, Inc.* (2009) 175 Cal. App. 4th 702, 708-715, 96 Cal. Rptr. 3d 159 (termination of school teacher who refused to enroll child in violation of 22 Cal. Code Reg. § 101216.3, governing student-teacher ratios, violated public policy enunciated in teacher staffing regulation, where jury's conclusion that addition of one more

child would have caused classroom to operate out of compliance was a reasonable inference, where there was substantial evidence from which jury could reasonably infer teacher disclosed violation to employer, and where public policy embodied in regulation was substantial and fundamental.

(n65)Footnote 49. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n66)Footnote 50. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 669, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n67)Footnote 51. *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal. App. 4th 33, 90 Cal. Rptr. 2d 15 .

(n68)Footnote 52. *See Deschene v. Pinole Point Steel Co.* (1999) 76 Cal. App. 4th 33, 43 .

(n69)Footnote 52.1. *Jie v. Liang Tai Knitwear Co., Ltd.* (2001) 89 Cal. App. 4th 654, 661, 107 Cal. Rptr. 2d 682 .

(n70)Footnote 52.2. 8 U.S.C. § 1101 et seq.

(n71)Footnote 53. *American Computer Corp. v. Superior Court* (1989) 213 Cal. App. 3d 664, 261 Cal. Rptr. 796 .

(n72)Footnote 54. *American Computer Corp. v. Superior Court* (1989) 213 Cal. App. 3d 664, 667-669, 261 Cal. Rptr. 796 .

(n73)Footnote 55. *Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 279 Cal. Rptr. 453 .

(n74)Footnote 56. *Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 1119 1120, 279 Cal. Rptr. 453 .

(n75)Footnote 57. *Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 1122, 279 Cal. Rptr. 453 .

(n76)Footnote 58. *Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 1123, 279 Cal. Rptr. 453 ; *see also Franklin v. The Monadnock Co.* (2007) 151 Cal. App. 4th 252, 263-266, 59 Cal. Rptr. 3d 692 (plaintiff's complaints of coworker's threats to his life and lives of coworkers and his report of assault to police served public interest in promoting workplace safety, in deterring workplace crime, and the interests of innocent coworkers who could have suffered harm, so that plaintiff's conduct inured to benefit of public); *Gould v. Maryland Sound Indus., Inc.* (1995) 31 Cal. App. 4th 1137, 1149-1150, 37 Cal. Rptr. 2d 718 (employee's complaint to supervisors regarding current failure to pay overtime wages supported public policy claim when complaint related to ongoing conduct that was not only illegal, but also inimical to public health and general welfare of the state).

(n77)Footnote 59. *Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 1125-1126, 279 Cal. Rptr. 453 .

(n78)Footnote 60. *Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 1126, 279 Cal. Rptr. 453 ; *see American Computer Corp. v. Superior Court* (1989) 213 Cal. App. 3d 664, 668, 261 Cal. Rptr. 796 .

(n79)Footnote 61. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n80)Footnote 62. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 91, 276 Cal. Rptr. 130, 801 P.2d 373 ; *see discussion in [e], below, and in § 60.09[1][e].*

(n81)Footnote 63. *Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 1127, 279 Cal. Rptr. 453 .

(n82)Footnote 64. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 889, 896-897, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 (primary rationale for requiring that public policy be substantial and fundamental is to ensure that employers have adequate notice of conduct that will subject them to tort liability for discharging employees); *see Sullivan v. Delta Air Lines, Inc.* (1997) 58 Cal. App. 4th 938, 943, 68 Cal. Rptr. 2d 584 (corollary of substantial and fundamental

requirement is that the relevant law must sufficiently describe type of prohibited conduct to enable employer to know fundamental policies expressed in law); *Gould v. Maryland Sound Indus., Inc.* (1995) 31 Cal. App. 4th 1137, 1147, 37 Cal. Rptr. 2d 718 (fundamental policy must be sufficiently clear to employer at time of discharge); *see also* [a], *above*.

(n83)Footnote 65. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 896-897, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 .

(n84)Footnote 66. *Gantt v. Sentry Insurance* (1992) 1 Cal. 4th 1083, 1090-1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , *overruled on other grounds*, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (clarifying that administrative regulations can be source of fundamental public policy); *Sullivan v. Delta Air Lines, Inc.* (1997) 58 Cal. App. 4th 938, 942-943, 68 Cal. Rptr. 2d 584 .

(n85)Footnote 67. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n86)Footnote 68. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 896-897, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 .

(n87)Footnote 69. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 896-897, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 .

(n88)Footnote 70. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1160-1161, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n89)Footnote 71. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1160, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n90)Footnote 72. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n91)Footnote 73. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 82, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n92)Footnote 74. *Sullivan v. Delta Air Lines, Inc.* (1997) 58 Cal. App. 4th 938, 68 Cal. Rptr. 2d 584 .

(n93)Footnote 75. *See Lab. Code* § 1025.

(n94)Footnote 76. *Sullivan v. Delta Air Lines, Inc.* (1997) 58 Cal. App. 4th 938, 943, 68 Cal. Rptr. 2d 584 ; *see Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1256, n. 9, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (statutory provision must sufficiently describe type of prohibited conduct to enable employer to know fundamental public policies expressed in that law).

(n95)Footnote 77. *Sullivan v. Delta Air Lines, Inc.* (1997) 58 Cal. App. 4th 938, 943-944, 68 Cal. Rptr. 2d 584 .

(n96)Footnote 78. *Sullivan v. Delta Air Lines, Inc.* (1997) 58 Cal. App. 4th 938, 944-945, 68 Cal. Rptr. 2d 584 .

(n97)Footnote 79. *Sullivan v. Delta Air Lines, Inc.* (1997) 58 Cal. App. 4th 938, 945-947, 68 Cal. Rptr. 2d 584 (ADRA is not buttressed by other consistent constitutional or statutory provisions; employees have no recognized constitutional right to voluntarily enter drug or alcohol rehabilitation program; Legislature has not given this policy same broad recognition as fundamental public policy against race, gender, and age discrimination); *see also Sinatra v. Chico Unified School Dist.* (2004) 119 Cal. App. 4th 701, 705-708, 14 Cal. Rptr. 3d 661 (Educ. Code § 44922, under which governing board of school district or county superintendent of schools may establish regulations allowing certificated employees to reduce workload from full-time to part-time duties, does not embody fundamental public policy to establish wrongful termination in violation of public policy, because school districts are not obligated to provide part-time program and there is no direct benefit to public at large). *Compare Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 887-890, 896, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 (policy involved immutable characteristic

like race, gender, or age and has broad and consistent legislative and statutory support).

(n98)Footnote 80. *Nelson v. United Technologies* (1999) 74 Cal. App. 4th 597, 88 Cal. Rptr. 2d 239 .

(n99)Footnote 81. *Gov. Code § 12945.2*.

(n100)Footnote 82. *Nelson v. United Technologies* (1999) 74 Cal. App. 4th 597, 611-612, 88 Cal. Rptr. 2d 239 (employee may state claim for tortious wrongful discharge based on violation of CFRA, but undisputed evidence established that employer did not fire this employee for exercising his rights under CFRA). *See also Liu v. Amway Corp.* (9th Cir. 2004) 347 F.3d 1125, 1137-1138 (because there was triable issue of material fact as to whether employee was terminated in violation of FMLA and CFRA, summary judgment improper on whether her termination violated public policy); *Faust v. California Portland Cement Co.* (2007) 150 Cal. App. 4th 864, 886, 58 Cal. Rptr. 3d 729 (because employee had viable claims for violation of CFRA, it necessarily followed that triable issue existed with respect to cause of action for wrongful termination in violation of public policy).

(n101)Footnote 83. *Gov. Code § 12900 et seq.*

(n102)Footnote 84. *Nelson v. United Technologies* (1999) 74 Cal. App. 4th 597, 610-611, 88 Cal. Rptr. 2d 239 .

(n103)Footnote 85. *Nelson v. United Technologies* (1999) 74 Cal. App. 4th 597, 610-611, 88 Cal. Rptr. 2d 239 .

(n104)Footnote 85.1. *Liu v. Amway Corp.* (9th Cir. 2004) 347 F.3d 1125, 1138 .

(n105)Footnote 86. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 74 Cal. Rptr. 2d 29 .

(n106)Footnote 87. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 571, 74 Cal. Rptr. 2d 29 .

(n107)Footnote 88. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 571-572, 74 Cal. Rptr. 2d 29 ("One need only examine provisions in the Labor Code to realize that 'the prompt payment of wages due an employee is a fundamental public policy right of this state,' " quoting *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal. App. 4th 1137, 1148, 37 Cal. Rptr. 2d 718). *See also Lab. Code § 201, 202* (prompt payment required), 216 (misdemeanor for employee willfully not to pay wages), 221 (unlawful for employer to collect or receive any part of wages paid to employee), 222 (unlawful to withhold wages agreed to in collective bargaining agreement), 224 (enumerating unlawful deductions from pay), 1175 (misdemeanor to fail to furnish information on employee's wages to Industrial Welfare Commission).

(n108)Footnote 89. *See § 4.10[1][b]*.

(n109)Footnote 90. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 572-574, 74 Cal. Rptr. 2d 29 .

(n110)Footnote 91. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 574, 74 Cal. Rptr. 2d 29 (employee may bring tortious discharge action based on fundamental public policy of right to be free from employer's withholding of pay).

(n111)Footnote 92. *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal. App. 4th 1105, 88 Cal. Rptr. 2d 664 .

(n112)Footnote 93. *See Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal. App. 4th 1105, 1121-1122, 88 Cal. Rptr. 2d 664 .

(n113)Footnote 94. *See Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal. App. 4th 1105, 1109-1110, 88 Cal. Rptr. 2d 664 .

(n114)Footnote 95. See *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal. App. 4th 1105, 1110, 88 Cal. Rptr. 2d 664 .

(n115)Footnote 96. See *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal. App. 4th 1105, 1128, 88 Cal. Rptr. 2d 664 ; see § 90.10 for discussion of compelling employee to arbitrate pursuant to collective bargaining agreement.

(n116)Footnote 96.1. *Jie v. Liang Tai Knitwear Co., Ltd.* (2001) 89 Cal. App. 4th 654, 661, 107 Cal. Rptr. 2d 682 .

(n117)Footnote 96.2. 8 U.S.C. § 1101 et seq.

(n118)Footnote 96.3. *Scott v. Phoenix Schools, Inc.* (2009) 175 Cal. App. 4th 702, 712-715, 96 Cal. Rptr. 3d 159 .

(n119)Footnote 96.4. See, e.g., *Eisenberg v. Insurance Co. of North America* (9th Cir. 1987) 815 F.2d 1285, 1289 (applying California law; employee terminated in retaliation for complaints that company required its employees to manage too many claims sufficiently stated *Tameny* claim for violation of California Department of Insurance guidelines setting maximum caseload, where public policy to ensure each insurance claim received adequate consideration was significant); *Hentzel v. Singer Co.* (1982) 138 Cal. App. 3d 290, 297, 188 Cal. Rptr. 159 (recognizing *Tameny* claim of employee after complaining about other employees smoking in workplace).

(n120)Footnote 97. *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 135-136, 32 Cal. Rptr. 2d 275, 876 P.2d 1074 .

(n121)Footnote 98. *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 135, 32 Cal. Rptr. 2d 275, 876 P.2d 1074 .

(n122)Footnote 99. *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 32 Cal. Rptr. 2d 275, 876 P.2d 1074 .

(n123)Footnote 100. See Gov. Code § 12926(d).

(n124)Footnote 101. See Gov. Code §§ 12920, 12921.

(n125)Footnote 102. *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 135, 32 Cal. Rptr. 2d 275, 876 P.2d 1074 .

(n126)Footnote 103. *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 135-136, 32 Cal. Rptr. 2d 275, 876 P.2d 1074 . But later, in *Stevenson v. Superior Court*, 16 Cal. 4th 880, 894-901, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 , the California Supreme Court found that, as applied to employers regularly employing five or more workers, the FEHA does state a fundamental public policy prohibiting employment discrimination against older workers sufficient to support a cause of action for tortious wrongful discharge.

(n127)Footnote 104. *Badih v. Myers* (1995) 36 Cal. App. 4th 1289, 43 Cal. Rptr. 2d 229 .

(n128)Footnote 105. *Badih v. Myers* (1995) 36 Cal. App. 4th 1289, 1293-1296, 43 Cal. Rptr. 2d 229 .

(n129)Footnote 106. *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 32 Cal. Rptr. 2d 275, 876 P.2d 1074 ; see discussion in [b.1], above.

(n130)Footnote 107. *General Elec. Co. v. Gilbert* (1976) 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 .

(n131)Footnote 107.1. *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 116 Cal. Rptr. 2d 770 .

(n132)Footnote 107.2. *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 227-230, 116 Cal. Rptr. 2d 770 .

(n133)Footnote 107.3. *See Gov. Code § 12926.2(c).*

(n134)Footnote 107.4. *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 230-233, 116 Cal. Rptr. 2d 770 ; *see Badih v. Myers* (1995) 36 Cal. App. 4th 1289, 1293-1296, 43 Cal. Rptr. 2d 229 .

(n135)Footnote 107.5. *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 233-237, 116 Cal. Rptr. 2d 770 .

(n136)Footnote 107.6. *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal. App. 4th 72, 80-84, 14 Cal. Rptr. 3d 893 .

(n137)Footnote 107.7. *Hudgens v. N.L.R.B.* (1976) 424 U.S. 507, 513, 96 S. Ct. 1029, 47 L. Ed. 2d 196 .

(n138)Footnote 107.8. *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal. App. 4th 72, 82, 14 Cal. Rptr. 3d 893 .

(n139)Footnote 107.9. *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal. App. 4th 72, 82, 14 Cal. Rptr. 3d 893 .

(n140)Footnote 108. *Kouff v. Bethlehem-Alameda Shipyard* (1949) 90 Cal. App. 2d 322, 324-325, 202 P.2d 1059 (based on former Elec. Code § 655).

(n141)Footnote 109. *Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 1123-1124, 279 Cal. Rptr. 453 ; *see Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 77, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (while employee who reports suspicions directly to employer is not covered, *Lab. Code § 1102.5* shows legislative interest in encouraging employees to report workplace activity that may violate important public policies). *Lab. Code § 1102.5* has codified this protection for government employees in *Labor Code § 1102.5(e)*, which provides that a report by an employee of a government agency to his or her employer is a protected disclosure.

(n142)Footnote 109.1. *Colores v. Board of Trustees* (2003) 105 Cal. App. 4th 1293, 1305-1313, 130 Cal. Rptr. 2d 347 .

(n143)Footnote 109.2. *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal. App. 4th 32, 51-52, 100 Cal. Rptr. 2d 627 (anesthesiologist presented sufficient evidence from which jury could have concluded that termination of his employment was principally result of protesting surgery he reasonably believed impaired his ability to provide medically appropriate health care to patient and that came within meaning of *Bus. & Prof. Code § 2056*).

(n144)Footnote 109.3. *Harvey v. Sybase, Inc.* (2008) 2008 Cal. App. LEXIS 580, *32 . *See Hejmadi v. AMFAC, Inc.* (1988) 202 Cal. App. 3d 525, 539, 249 Cal. Rptr. 5 (plaintiff could state no claim for whistleblowing under *Lab. Code § 1102.5*, prohibiting retaliation against employees who disclose violations of law to government or law enforcement agencies, where plaintiff made no complaints to any governmental agency).

(n145)Footnote 109.4. *Harvey v. Sybase, Inc.* (2008) 2008 Cal. App. LEXIS 580, *32-*37 .

(n146)Footnote 109.5. *See Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal. App. 4th 1361, 1378, n. 2, 122 Cal. Rptr. 2d 204 (*Lab. Code § 232*, in combination with *Lab. Code § 923* and provisions of National Labor Relations Act at 29 U.S.C. § 151 *et seq.*, could support claim of wrongful termination in violation of public policy).

(n147)Footnote 109.6. *Harvey v. Sybase, Inc.* (2008) 2008 Cal. App. LEXIS 580, *37-*44 .

(n148)Footnote 109.7. *See Lab. Code § 232.5(c).*

(n149)Footnote 109.8. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1159, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n150)Footnote 110. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1148, 77 Cal. Rptr. 2d 445, 448, 959 P.2d 752 .

(n151)Footnote 111. *See Lab. Code § 132a; Gov. Code § 12900 et seq.; see, e.g., Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1485-1492, 82 Cal. Rptr. 2d 359 (applying *Moorpark's* holding that *Lab. Code § 132a* is not exclusive remedy for work-related injury discrimination and allowing claims against two coemployees for disability discrimination in violation of FEHA and for emotional distress).

(n152)Footnote 112. *Hentzel v. Singer Co.* (1982) 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 .

(n153)Footnote 113. *Lab. Code § 6300 et seq.*

(n154)Footnote 114. *Lab. Code §§ 6310, 6312*. For discussion, *see § 60.03[2][u]* and ch. 21.

(n155)Footnote 115. *Hentzel v. Singer Co.* (1982) 138 Cal. App. 3d 290, 300-301, 188 Cal. Rptr. 159 ; *accord, Jenkins v. Family Health Program* (1989) 214 Cal. App. 3d 440, 449, 262 Cal. Rptr. 798 . *See, e.g., Cablesuela v. Browning-Ferris Indus. of California, Inc.* (1998) 68 Cal. App. 4th 101, 109-110, 80 Cal. Rptr. 2d 60 (agreeing with *Hentzel* that *Lab. Code § 6312* does not constitute exclusive remedy for action brought pursuant to *Lab. Code § 6310*, but rather is merely cumulative, and finding plaintiff could state cause of action for tortious discharge based on violation of *Lab. Code § 6310*).

(n156)Footnote 116. Former *Gov. Code § 19683* (now *see Gov. Code § 8547*).

(n157)Footnote 117. *Gov. Code § 3300 et seq.* For discussion, *see California Public Sector Labor Relations*, ch. 16, pt. C (Matthew Bender).

(n158)Footnote 118. *Shoemaker v. Myers* (1992) 2 Cal. App. 4th 1407, 1419-1421, 4 Cal. Rptr. 2d 203 (finding, however, that the *Tameny* claim is subject to immunity under Government Tort Claims Act (*Gov. Code § 810 et seq.*)).

(n159)Footnote 118.1. *Arteaga v. Brink's, Inc.* (2008) 163 Cal. App. 4th 327, 77 Cal. Rptr. 3d 654 ; *Crown Appliance v. Workers' Comp. Appeals Bd.* (2004) 115 Cal. App. 4th 620, 624-625, 9 Cal. Rptr. 3d 415 .

(n160)Footnote 118.2. *Arteaga v. Brink's, Inc.* (2008) 163 Cal. App. 4th 327, 356, 77 Cal. Rptr. 3d 654 (plaintiff presented prima facie case by showing that he filed workers' compensation claims with employer; his employment was terminated, which constituted adverse employment action; and he was terminated within few days of filing claims). *See also Crown Appliance v. Workers' Comp. Appeals Bd.* (2004) 115 Cal. App. 4th 620, 624-625, 9 Cal. Rptr. 3d 415 ; *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal. App. 4th 1378, 1384, 37 Cal. Rptr. 3d 113 .

(n161)Footnote 118.3. *Arteaga v. Brink's, Inc.* (2008) 163 Cal. App. 4th 327, 356, 77 Cal. Rptr. 3d 654 (employer submitted adequate evidence to support its stated reason for terminating employee, that management lost confidence in him, as legitimate nondiscriminatory business reason for termination).

(n162)Footnote 118.4. *Arteaga v. Brink's, Inc.* (2008) 163 Cal. App. 4th 327, 356-357, 77 Cal. Rptr. 3d 654 (employee failed to show employer's articulated reason for termination was pretext).

(n163)Footnote 119. *Gov. Code § 12900 et seq.*

(n164)Footnote 120. *Gov. Code § 12940*.

(n165)Footnote 121. *Gov. Code § 12965(b)*.

(n166)Footnote 122. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n167)Footnote 123. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 89-91, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n168)Footnote 124. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 894-901, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 .

(n169)Footnote 125. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 894-901, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 ; see *Nelson v. United Technologies* (1999) 74 Cal. App. 4th 597, 611-612, 88 Cal. Rptr. 2d 239 (California Family Rights Act's remedies (CFRA), Gov. Code § 12945.2, are not exclusive and therefore do not bar tort claim for wrongful discharge in violation of CFRA); see also *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1161, 77 Cal. Rptr. 2d 445, 959 P.2d 752 (disability discrimination can form basis of common law wrongful discharge claim); *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal. App. 4th 1693, 1704-1706, 39 Cal. Rptr. 2d 65 (employee could base common law wrongful termination action on public policy against sexual orientation discrimination as expressed in former Lab. Code § 1102.1, now see Gov. Code § 12940).

(n170)Footnote 125.1. See, e.g., *Arteaga v. Brink's, Inc.* (2008) 163 Cal. App 4th 327, 355, 77 Cal. Rptr. 3d 654 (where wrongful termination claim based on FEHA's prohibition of physical disability discrimination failed, wrongful termination claim failed for same reasons).

(n171)Footnote 126. *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 134-136, 32 Cal. Rptr. 2d 275, 876 P.2d 1074 , discussed in [1][b], above.

(n172)Footnote 126.1. *Estes v. Monroe* (2004) 120 Cal. App. 4th 1347, 1355-1365 .

(n173)Footnote 127. *Petermann v. Int'l Bhd. of Teamsters* (1959) 174 Cal. App. 2d 184, 344 P.2d 25 . See discussion of *Petermann* in [1], above.

(n174)Footnote 128. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330 . See discussion of *Tameny* in [1], above.

(n175)Footnote 129. *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (clarifying that administrative regulations can be source of fundamental public policy); see discussion of *Gantt* in [a], above.

(n176)Footnote 130. See also Penal Code §§ 118 (perjury), 653f (solicitation to commit felony).

(n177)Footnote 131. See Gov. Code § 12900 et seq. For full discussion of the FEHA, see chs. 40-44.

(n178)Footnote 132. *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 1096-1097, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (clarifying that administrative regulations can be source of fundamental public policy).

(n179)Footnote 133. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n180)Footnote 134. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n181)Footnote 135. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n182)Footnote 136. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 82, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n183)Footnote 137. *Gould v. Maryland Sound Indus., Inc.* (1995) 31 Cal. App. 4th 1137, 1146-1150, 37 Cal. Rptr. 2d 718 .

(n184)Footnote 138. *Gould v. Maryland Sound Indus., Inc.* (1995) 31 Cal. App. 4th 1137, 1146-1150, 37 Cal. Rptr. 2d 718 .

(n185)Footnote 139. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 74 Cal. Rptr. 2d 29 .

(n186)Footnote 140. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 574, 74 Cal. Rptr. 2d 29 (employee may bring tortious discharge action based on fundamental public policy of right to be free from employer's withholding of pay).

(n187)Footnote 141. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 571, 74 Cal. Rptr. 2d 29 , quoting *Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal. App. 4th 1137, 1148, 37 Cal. Rptr. 2d 718).

(n188)Footnote 142. *Garibaldi v. Lucky Food Stores, Inc.* (9th Cir. 1984) 726 F.2d 1367 .

(n189)Footnote 143. *Garibaldi v. Lucky Food Stores, Inc.* (9th Cir. 1984) 726 F.2d 1367, 1369 .

(n190)Footnote 143.1. *Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal. App. 4th 1127, 69 Cal. Rptr. 3d 445 .

(n191)Footnote 143.2. *Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal. App. 4th 1127, 1140-1143, 69 Cal. Rptr. 3d 445 . See also *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal. App. 4th 623, 17 Cal. Rptr. 3d 336 (where employee sued employer for wrongful termination in violation of public policy referring to, inter alia, *Penal Code* § 484 defining theft, employee's allegations that he was terminated for complaining about and refusing to engage in fraudulent billing practices were sufficient to state claim for retaliatory discharge in violation of public policy).

(n192)Footnote 144. *Montalvo v. Zamora* (1970) 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 ; *Glenn v. Clearman's Golden Cock Inn* (1961) 192 Cal. App. 2d 793, 13 Cal. Rptr. 769 .; see also *Gelini v. Tishgart* (1999) 77 Cal. App. 4th 219, 222, 91 Cal. Rptr. 2d 447 (court would have found discharge of employee for using attorney to negotiate terms and conditions of employment *not* a violation of section 923 but for *Montalvo* and approving reference thereto by California Supreme Court). See discussion of cases in [1], above.

(n193)Footnote 144.1. *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal. App. 4th 72, 84, 14 Cal. Rptr. 3d 893 . See also *Barbee v. Household Automotive Finance Corp.* (2003), 113 Cal. App. 4th 525, 533, 535, 6 Cal. Rptr. 3d 406 .

(n194)Footnote 144.2. *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal. 4th 920, 931-933, 70 Cal. Rptr. 3d 382, 174 P.3d 200 .

(n195)Footnote 144.3. *Health & Saf. Code* § 11362.5.

(n196)Footnote 144.4. *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal. 4th 920, 925-931, 70 Cal. Rptr. 3d 382, 174 P.3d 200 . For discussion, see § 41.51[3][a].

(n197)Footnote 144.5. *Cal. Const., art. I, § 1.*

(n198)Footnote 144.6. *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal. 4th 920, 931-932, 70 Cal. Rptr. 3d 382, 174 P.3d 200 .

(n199)Footnote 144.7. See *Cobbs v. Grant* (1972) 8 Cal. 3d 229, 242, 104 Cal. Rptr. 505, 502 P.2d 1 .

(n200)Footnote 144.8. See *Conservatorship of Wendland* (2001) 26 Cal. 4th 519, 531-532, 110 Cal. Rptr. 2d 412, 28 P.3d 151 .

(n201)Footnote 144.9. *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal. 4th 920, 932-933, 70 Cal. Rptr. 3d 382, 174 P.3d 200 .

(n202)Footnote 145. *Hentzel v. Singer Co.* (1982) 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 .

(n203)Footnote 146. *Hentzel v. Singer Co.* (1982) 138 Cal. App. 3d 290, 295-296, 297-298, 188 Cal. Rptr. 159 (quoting *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 172, 164 Cal. Rptr. 839, 610 P.2d 1330); see *Jenkins v. Family Health Program* (1989) 214 Cal. App. 3d 440, 449, 262 Cal. Rptr. 798 (holding nurse had right to bring action for retaliatory discharge because of her complaints about unsafe and unhealthy working conditions).

(n204)Footnote 147. *Lab. Code* §§ 6303, 6401.

(n205)Footnote 148. *Davaris v. Cubaleski* (1993) 12 Cal. App. 4th 1583, 1589, 16 Cal. Rptr. 2d 330 (cited statutes required the employer to maintain a safe and healthful workplace, rather than to encourage proper medical care).

(n206)Footnote 149. *Dabbs v. Cardiopulmonary Management Servs.* (1987) 188 Cal. App. 3d 1437, 234 Cal. Rptr. 129 .

(n207)Footnote 150. *Bus. & Prof. Code* § 3700 et seq.

(n208)Footnote 151. *Dabbs v. Cardiopulmonary Management Servs.* (1987) 188 Cal. App. 3d 1437, 1443-1444, 234 Cal. Rptr. 129 .

(n209)Footnote 152. *Dabbs v. Cardiopulmonary Management Servs.* (1987) 188 Cal. App. 3d 1437, 1442, 234 Cal. Rptr. 129 .

(n210)Footnote 153. *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal. App. 3d 525, 538-540, 249 Cal. Rptr. 5 .

(n211)Footnote 154. *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal. App. 3d 525, 538-540, 249 Cal. Rptr. 5 .

(n212)Footnote 155. See *Cal. Const.*, art. I, § 1.

(n213)Footnote 156. For discussion of employee privacy issues pertaining to drug testing, see ch. 50, pt. D.

(n214)Footnote 157. See *Luck v. S. Pac. Transp. Co.* (1990) 218 Cal. App. 3d 1, 26-29, 267 Cal. Rptr. 618 ; *Semore v. Pool* (1990) 217 Cal. App. 3d 1087, 1096-1098, 266 Cal. Rptr. 280 .

(n215)Footnote 158. *Semore v. Pool* (1990) 217 Cal. App. 3d 1087, 266 Cal. Rptr. 280 .

(n216)Footnote 159. *Semore v. Pool* (1990) 217 Cal. App. 3d 1087, 1096-1098, 266 Cal. Rptr. 280 . See also *Kraslawsky v. Upper Deck Co.* (1997) 56 Cal. App. 4th 179, 194, 65 Cal. Rptr. 2d 297 (court denied summary judgment to employer on tortious discharge cause of action based on claim that requiring employee to submit to drug test violated her right to privacy because employer did not have reasonable cause to demand the test).

(n217)Footnote 160. *Luck v. S. Pac. Transp. Co.* (1990) 218 Cal. App. 3d 1, 26-29, 267 Cal. Rptr. 618 .

(n218)Footnote 161. See discussion in [b], above.

(n219)Footnote 162. *Luck v. S. Pac. Transp. Co.* (1990) 218 Cal. App. 3d 1, 28-29, 267 Cal. Rptr. 618 .

(n220)Footnote 163. See *Feminist Women's Health Ctr. v. Superior Court* (1997) 52 Cal. App. 4th 1234, 1244-1249, 61 Cal. Rptr. 2d 187 ; *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 456, 57 Cal. Rptr. 2d 46 .

(n221)Footnote 164. *Pettus v. Cole* (1996) 49 Cal. App. 4th 402, 456, 57 Cal. Rptr. 2d 46 .

(n222)Footnote 165. *Feminist Women's Health Ctr. v. Superior Court* (1997) 52 Cal. App. 4th 1234, 61 Cal. Rptr. 2d 187 .

(n223)Footnote 166. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n224)Footnote 167. See discussion in ch. 40, pt. B.

(n225)Footnote 168. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 89-91, 276 Cal. Rptr. 130, 801 P.2d 373 ; see also Gov. Code § 12993(a) (FEHA does not preempt other state laws barring employment discrimination).

(n226)Footnote 169. See *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 894-901, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 . See also [a], above.

(n227)Footnote 169.1. *Silo v. CHW Medical Foundation* (2002) 27 Cal. 4th 1097, 119 Cal. Rptr. 2d 698, 45 P.3d 1162 .

(n228)Footnote 169.2. Gov. Code § 12926(d); *Silo v. CHW Medical Foundation* (2002) 27 Cal. 4th 1097, 119 Cal. Rptr. 2d 698, 45 P.3d 1162 .

(n229)Footnote 169.3. *Silo v. CHW Medical Foundation* (2002) 27 Cal. 4th 1097, 119 Cal. Rptr. 2d 698, 45 P.3d 1162).

(n230)Footnote 169.4. *Silo v. CHW Medical Foundation* (2002) 27 Cal. 4th 1097, 119 Cal. Rptr. 2d 698, 45 P.3d 1162).

(n231)Footnote 169.5. *Silo v. CHW Medical Foundation* (2002) 27 Cal. 4th 1097, 119 Cal. Rptr. 2d 698, 45 P.3d 1162 .

(n232)Footnote 169.6. *Jersey v. John Muir Medical Center* (2002) 97 Cal. App. 4th 814, 118 Cal. Rptr. 2d 807 .

(n233)Footnote 169.7. *Jersey v. John Muir Medical Center* (2002) 97 Cal. App. 4th 814, 821, 118 Cal. Rptr. 2d 807 .

(n234)Footnote 169.8. See, e.g., Lab. Code §§ 3852 (injured worker's claim does not affect right of action against any person other than the employer), 3856 (priority of payments from third-party prosecution); *Jersey v. John Muir Medical Center* (2002) 97 Cal. App. 4th 814, 827, 118 Cal. Rptr. 2d 807 .

(n235)Footnote 169.9. *Jersey v. John Muir Medical Center* (2002) 97 Cal. App. 4th 814, 821, 118 Cal. Rptr. 2d 807 .

(n236)Footnote 169.10. *Jersey v. John Muir Medical Center* (2002) 97 Cal. App. 4th 814, 827-828, 118 Cal. Rptr. 2d 807 .

(n237)Footnote 169.11. *Jersey v. John Muir Medical Center* (2002) 97 Cal. App. 4th 814, 828, 118 Cal. Rptr. 2d 807 .

(n238)Footnote 170. *Holmes v. General Dynamics Corp.* (1993) 17 Cal. App. 4th 1418, 22 Cal. Rptr. 2d 172 .

(n239)Footnote 171. 18 U.S.C. § 1001.

(n240)Footnote 172. *Holmes v. General Dynamics Corp.* (1993) 17 Cal. App. 4th 1418, 1427, 22 Cal. Rptr. 2d 172 .

(n241)Footnote 173. *Holmes v. General Dynamics Corp.* (1993) 17 Cal. App. 4th 1418, 1427-1432, 22 Cal. Rptr.

2d 172 .

(n242)Footnote 174. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 79, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 , citing *Collier v. Superior Court* (1991) 228 Cal. App. 3d 1117, 1125, 279 Cal. Rptr. 453 .

(n243)Footnote 175. See, e.g., *E.E.O.C. v. Crown Zellerbach Corp.* (9th Cir. 1983) 720 F.2d 1008, 1013 (Title VII) ; *Sias v. City Demonstration Agency* (9th Cir. 1978) 588 F.2d 692, 695 (Title VII) . For complete discussion of retaliation in the employment discrimination context, see ch. 41, pt. F.

(n244)Footnote 176. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1188-1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n245)Footnote 177. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n246)Footnote 178. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1172-1173, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n247)Footnote 179. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1182-1185, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n248)Footnote 180. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1185, 32 Cal. Rptr. 2d 1, 876 P.2d 487 (citing *Balla v. Gambro, Inc.* (Ill. 1991) 145 Ill. 2d 492, 164 Ill. Dec. 892, 584 N.E.2d 104).

(n249)Footnote 181. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1186, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n250)Footnote 182. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1188, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n251)Footnote 183. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n252)Footnote 184. See *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 75-79, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (reviewing requirements of *Tameny* action) discussed in [a], above.

(n253)Footnote 185. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n254)Footnote 186. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n255)Footnote 187. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n256)Footnote 188. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1191, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n257)Footnote 189. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n258)Footnote 190. *General Dynamics Corp. v. Superior Court* (1994) 7 Cal. 4th 1164, 1191, 32 Cal. Rptr. 2d 1, 876 P.2d 487 .

(n259)Footnote 191. *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal. App. 4th 294, 106 Cal. Rptr. 2d 906 .

(n260)Footnote 192. *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal. App. 4th 294, 308-315, 106 Cal. Rptr. 2d 906 .

(n261)Footnote 193. *Skillsky v. Lucky Stores, Inc.* (9th Cir. 1990) 893 F.2d 1088 .

(n262)Footnote 194. *Skillsky v. Lucky Stores, Inc.* (9th Cir. 1990) 893 F.2d 1088, 1092, 1094 .

(n263)Footnote 195. *Gov. Code § 810 et seq.*

(n264)Footnote 196. *Gov. Code § 815(a).*

(n265)Footnote 197. *See Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal. 4th 1175, 1179, 7 Cal. Rptr. 3d 552, 80 P.3d 656 ; *Zelig v. County of Los Angeles* (2002) 27 Cal. 4th 1112, 1127-1128, 119 Cal. Rptr. 2d 709, 45 P.3d 1171 . *See also Lloyd v. County of Los Angeles* (2009) 172 Cal. App. 4th 320, 328-330, 90 Cal. Rptr. 3d 872 (former county employee's common law tort claims of retaliation in violation of the public policy in Cal. Const., art. I, §§ 1, 8 failed to state a cause of action); *Adkins v. State of California* (1996) 50 Cal. App. 4th 1802, 1817-1818, 59 Cal. Rptr. 2d 59 ; *Michael J. v. Los Angeles County Dept. of Adoptions* (1988) 201 Cal. App. 3d 859, 866-867, 247 Cal. Rptr. 504 . *See also* Legis. Com., 32 West's Ann. Gov. Code (1995) foll. § 815, p. 167 (section 815 abolishes all common law or judicially declared forms of liability for public entities, except when liability is required by state or federal constitution, e.g., inverse condemnation).

(n266)Footnote 198. *Miklosy v. Regents of University of California* (2008) 44 Cal. 4th 876, 898-900, 80 Cal. Rptr. 3d 690, 188 P.3d 629 . *See also Lloyd v. County of Los Angeles* (2009) 172 Cal. App. 4th 320, 328-330, 90 Cal. Rptr. 3d 872 (former county employee's *Tameny* claim alleging wrongful termination in violation of public policy against retaliation for whistleblower activity, predicated on public policies set forth in *Lab. Code* §§ 98.6, 1102.5, 6399.7, and *Gov. Code* § 8547 failed to state a cause of action); *Palmer v. Regents of University of California* (2003) 107 Cal. App. 4th 899, 132 Cal. Rptr. 2d 567 (also applying section 815 in context of whistleblower retaliation and holding in dictum that section 815 barred *Tameny* claim, because only statutory authorization for civil damage action based on alleged retaliation against University of California employee for reporting improper activity is *Gov. Code* § 8547.10, and "classic *Tameny* cause of action" is common law, judicially created tort and not authorized by statute). *Cf. City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1158-1161, 77 Cal. Rptr. 2d 445, 959 P.2d 752 (allowing employee to bring *Tameny* cause of action against public entity, but question of public entity's tort immunity was not raised).

(n267)Footnote 199. *Lloyd v. County of Los Angeles* (2009) 172 Cal. App. 4th 320, 330, 90 Cal. Rptr. 3d 872 . *See Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341 .

(n268)Footnote 200. *Lloyd v. County of Los Angeles* (2009) 172 Cal. App. 4th 320, 330, 90 Cal. Rptr. 3d 872 . *See Gov. Code* § 820(a); *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127, 119 Cal. Rptr. 2d 709, 45 P.3d 1171 .

(n269)Footnote 201. *Lloyd v. County of Los Angeles* (2009) 172 Cal. App. 4th 320, 330, 90 Cal. Rptr. 3d 872 . *See Gov. Code* § 815.2; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1127, 119 Cal. Rptr. 2d 709, 45 P.3d 1171 .

(n270)Footnote 202. *Lloyd v. County of Los Angeles* (2009) 172 Cal. App. 4th 320, 330, 90 Cal. Rptr. 3d 872 . *See* [5], *below*.

(n271)Footnote 203. *Miklosy v. Regents of University of California* (2008) 44 Cal. 4th 876, 900-901, 80 Cal.

Rptr. 3d 690, 188 P.3d 629 .



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 60 Liability for Wrongful Termination and Discipline
Part A. TEXT

4-60 California Employment Law § 60.05

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.05 Breach of Express or Implied-in-Fact Promise Not to Terminate Except for Cause

[1] Contractual Limitations on Discharge

[a] Elements of a Cause of Action

The elements of a cause of action for breach of an express or implied agreement not to terminate except for good cause include:ⁿ¹

1. A contract, which may be oral, written, or implied by conduct;
2. Adverse action that is contrary to the terms of the agreement; and
3. Damages resulting from the adverse action.

For further discussion, *see* [1][b], *below*.

[b] Generally

The presumption created by *Labor Code Section 2922* that employment is at will may be overcome by evidence in the form of an express (oral or written) or implied agreement to terminate only for cause. Thus, an employer's right to discharge an employee at will may be limited if the action is contrary to such an agreement between the parties.

In the landmark decision of *Foley v. Interactive Data Corp.*,^{n1.1} the California Supreme Court defined the parameters of a claim for breach of an express or implied agreement not to terminate except for cause. In so doing, Foley approved the reasoning of *Pugh v. See's Candies, Inc.*,ⁿ² which was the first case to provide a detailed analysis of the cause of action by applying basic contract principles in the context of an employment relationship. Two earlier decisions, however, *Drzewiecki v. H & R Block, Inc.*,ⁿ³ and *Rabago-Alvarez v. Dart Industries, Inc.*,ⁿ⁴ were important antecedents to *Foley* and *Pugh* and merit brief mention.

Each of the two earlier decisions had held that the employment at will presumption was rebuttable with evidence of a promise by the employer that the employee could be terminated only for cause.ⁿ⁵ In *Drzewiecki*, the employee had a written contract stating he could be terminated only if he conducted the business improperly. The court noted the general presumption that contracts for "permanent" employment are terminable at will, pointing out that a few cases had found the presumption rebutted when there was some additional consideration beyond the employee's services.ⁿ⁶ The court held, however, that even without such "independent consideration," the employment contract can be terminated only for good cause if the employer has expressly or impliedly limited its right to terminate the employee at will.ⁿ⁷

Rabago-Alvarez followed *Drzewiecki* in holding that employment contracts are terminable only for good cause if either of two conditions exist: (1) the contract is supported by some consideration independent of the employee's services, or (2) the parties have an express or implied agreement to this effect.ⁿ⁸ In *Rabago-Alvarez*, both conditions were satisfied. Plaintiff was persuaded to leave a steady, satisfying job (the independent consideration) by oral promises that her position with defendant would be permanent as long as her work was satisfactory (the express agreement).ⁿ⁹ Because the trial court found that plaintiff was not dismissed for good cause, the court of appeal upheld the jury verdict for plaintiff.ⁿ¹⁰

The Ninth Circuit Court of Appeals, construing California wrongful termination law including *Rabago-Alvarez*, has stated that an employee does not convert an at will employment relationship into one allowing termination only for cause simply by showing that he or she left attractive prior employment to take a new job. In *Comeaux v. Brown & Williamson Tobacco Co.* ⁿ¹¹ the court explained that the employee must show that he or she gave up prior employment only after *explicitly* bargaining with the employer to do so, in exchange for the promise of a termination only for cause contract. The court added that relocation, in and of itself, does not constitute independent consideration, absent evidence of such explicit bargaining.ⁿ¹²

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

In any circumstance in which the plaintiff has given up secure employment to accept a job or has otherwise detrimentally relied on employer promises, counsel should consider including claims of fraud or promissory estoppel as long as such claims can be articulated with some precision.ⁿ¹³ Also, if an employee has relocated, consider alleging a violation of *California Labor Code Section 970* which prohibits inducing an employee to move from one location to another by means of material misrepresentations about the terms of employment. *Commentary by John M. True, III.*

Pugh modified and expanded the rules announced in these early cases by characterizing the independent consideration factor as an evidentiary matter, rather than a substantive requirement, by broadly defining an implied agreement to terminate only for cause, and by holding that such an agreement takes the employment contract out of the strictures of *Labor Code Section 2922*.ⁿ¹⁴

In *Foley*, the California Supreme Court affirmed *Pugh*, rejecting the argument that an express contract provision requiring good cause for termination was required for a wrongful discharge cause of action. The Court approved the plaintiff's claim for breach of an implied in fact contract based on a course of conduct, including oral representations.ⁿ¹⁵

The Court explained that the presumption of at will employment contained in *Labor Code Section 2922* can be overcome by evidence of an express oral or written agreement specifying the term of employment.ⁿ¹⁶ However, the absence of such an express agreement does not automatically indicate that the employment is at will, because the at will presumption can be overcome by evidence that the parties had a contrary intent.ⁿ¹⁷

Foley also adopted *Pugh's* rejection of the requirement that there be separate consideration in order to support an implied in fact contract not to terminate without good cause, stating that an implied in fact agreement is not void merely

because it fails to impose a mutual obligation on the employee.ⁿ¹⁸ The Court explained that there is no analytical reason why an employee's promise to render services or actual rendition of services over time may not support an employer's promise both to pay a particular wage and to refrain from arbitrary dismissal.ⁿ¹⁹ In *Pugh*, the court of appeal acknowledged that some cases have suggested a requirement of "independent consideration" for such a limitation on the employer's rights, but stated that such a requirement contradicts the general contract principle that courts should not inquire into the adequacy of consideration.ⁿ²⁰ Instead, the Court said, independent consideration should be viewed as serving an evidentiary function in the essential determination of whether there was an agreement to terminate only for cause. Such consideration would show that it is more probable that the parties intended a continuing relationship, with limitations on the employer's dismissal authority, when the employee has provided some benefit to the employer, or suffers some detriment, beyond the usual rendition of service.ⁿ²¹

[c] Factors Creating an Implied Agreement

In *Foley*, the Court specified a number of factors, originally identified by *Pugh*, that can be relied on, apart from consideration and express terms, to ascertain the existence and content of an employment agreement.ⁿ²²

These factors include:

1. The personnel policies or practices of the employer;
2. The employee's longevity of service;
3. Actions or communications by the employer reflecting assurances of continued employment;^{n22.1} and
4. The practices of the industry in which the employee is engaged.

Applying these factors, the Supreme Court in *Foley* was persuaded by the following alleged facts that the plaintiff had stated a cause of action: (1) the employee had worked for the employer for six years, nine months; (2) the employer had given oral assurances of job security; (3) the employer had given consistent promotions, salary increases, and bonuses; (4) the employer had placed self-imposed limitations on its power to discharge at will in the form of written termination guidelines; and (5) the employee had signed a noncompetition agreement, which was probative of an intent to create a continuing employment relationship.ⁿ²³

In *Pugh*, the plaintiff was a 32-year employee who had received numerous promotions and awards and no criticism for his job performance. He was frequently told that his future with the company was secure if he was loyal and did a good job. The defendant had a longstanding practice of terminating employees only for good cause. Plaintiff alleged he had been terminated because of his opposition to his employer's "sweetheart contract" with a union. The court of appeal found that at least the first three of the above factors were found to be present in the plaintiff's employment history, buttressed by the lack of criticism of plaintiff's performance and the commendations and promotions he received. The court said that although "oblique language" alone is not enough to prove an implied agreement, the "totality of the parties' relationship" was sufficient to send the case to the jury.ⁿ²⁴

The Ninth Circuit has held that the length of employment alone may be sufficient to show an implied contract to terminate only for cause. In one pre-*Foley* case, the Ninth Circuit, interpreting *Pugh*, found that mere length of employment could suffice to establish an implied contract.ⁿ²⁵ The court upheld jury instructions that included the sentence: "[t]he expectation of continued employment can be inferred from the longevity of plaintiff's employment."ⁿ²⁶ The court stated that the instructions were not misleading because they also included reference to the variety of factors given in *Pugh* and used permissive rather than mandatory language.ⁿ²⁷

Since *Robards*, in *Guz v. Bechtel National, Inc.*,ⁿ²⁸ the California Supreme Court found that "an employee's mere

passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot *alone* form an implied-in-fact contract that the employee is no longer at will.^{n28.1} The Court noted that absent other evidence of the employer's intent, longevity, pay raises and promotions are their own rewards for the employee's continuing valued service; they do not, *in and of themselves*, additionally constitute a contractual guarantee of future employment security. A rule granting such contract rights on the basis of successful longevity alone would discourage the retention and promotion of employees.^{n28.2}

In *Davis v. Consolidated Freightways*,ⁿ²⁹ the court of appeal held that evidence of nine years' employment, and regular promotions and salary increases during that time, were insufficient to establish an implied in fact agreement to terminate only for cause. The *Davis* court stated that promotions and salary increases are natural occurrences when an employee remains with an employer for a substantial period of time. Without some evidence of assurances of continued employment, or some other evidence controverting the presumption of at will employment, the court held that summary judgment for the employer was proper.ⁿ³⁰

On the other hand, in *Lenk v. Total-Western, Inc.*,^{n30.1} the court found that the record did not support the former employee's contention that he had either an express or implied contract for a minimum one-year term of employment. The employment agreement set forth no term of employment, and the statement in the agreement that a performance review was "to be completed after twelve (12) months of employment" did not constitute a minimum one-year contract term. The former employee had signed an employment application confirming he was an at-will employee and acknowledged receipt of a personnel manual with an explicit at-will provision. Furthermore, he admitted that no one told him he had a one-year employment contract or that he could be terminated only for cause. His contention that his supervisor told him he would have his job for at least a year had no support in the record. Finally, his "understanding" of the meaning of the performance review provision in the contract was not competent extrinsic evidence.^{n30.2}

■ CONSULTANT'S COMMENT:

The decision of the California Supreme Court in *Foley v. Interactive Data Corp.* ⁿ³¹ made a number of important changes in the law of wrongful discharge, but left a number of questions unanswered. With respect to the cause of action based on an implied in fact contract, the *Foley* Court not only unanimously reaffirmed the decision of the court of appeal in *Pugh v. See's Candies, Inc.*, ⁿ³² but also eliminated the statute of frauds defense to implied in fact contract claims. Of the two holdings, the reaffirmation of *Pugh* is the most far-reaching.

However, because *Foley*, like *Pugh*, involved multiple factors alleged to create an implied in fact contract, it remains unclear whether a plaintiff may establish an implied in fact contract by indicating that an employee handbook *alone* or a proprietary information agreement *alone* may contain the requisite "facts." In addition, *Foley* suggests that the *lack* of at will language in certain personnel documents (the opinion used the example of a proprietary information agreement) may be construed as an indication that at will employment is not intended. By implication, therefore, employers that are interested in creating or maintaining at will employment environments are strongly advised to include at will clauses in all significant employment documents.ⁿ³³ Moreover, *Foley* does not resolve the question of whether an employer may compromise at will defenses that it creates at the outset of an employment relationship by later contrary statements and conduct. The Court acknowledged the existence of *Shapiro v. Wells Fargo Realty Advisors*, ⁿ³⁴ a court of appeal case which held that express at will contracts could not be contradicted by implied agreements to terminate for cause only, but the Supreme Court did not indicate whether it approved that precedent.ⁿ³⁵

In addition, a question arises over the proper interpretation of documents that contain *both* at will clauses and clauses typically viewed as inconsistent with at will employment. For example, it is not uncommon for an employee handbook to contain an at will clause and a clause providing for discharge for violation of specified rules of conduct. If the rules of conduct exist for the benefit of the employee as a form of

notice of impermissible behavior, a court may view the at will clause as "superseded" by a "just cause" standard of discipline. Thus, it may be necessary for employers to specify that such rules of conduct clauses exist for their benefit only, to ensure that supervisors exercise their discretion in the manner which the employer deems appropriate for the conduct of its business. *Commentary by Kirby Wilcox.*

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

The flip side of this advice, for the plaintiff's practitioner, is that the mere appearance of "at will" language somewhere in an employment application, a personnel policy or even an offer letter is not fatal to a breach of employment contract claim unless the at will language appears in an integrated contract of employment. Cases should be evaluated on the totality of the circumstances they present, and not rejected because the employer has simply inserted at will language in the hope of magically insulating itself from employment litigation. *Commentary by John M. True, III.*

[d] The Good Cause Requirement

The nature of the good cause required for the termination of a particular contract depends on the individual circumstances of each case. In the effort to determine good cause, the *Pugh* court warned that care must be taken not to interfere with the legitimate exercise of managerial discretion, particularly with regard to an employee in a sensitive managerial or confidential position.ⁿ³⁶

Good cause, in the context of implied employment contracts, means "fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual."^{n36.1} In an action involving termination based on plaintiff's breach of the employer's rules or policies, the question is not whether plaintiff in fact violated the rule or policy, but whether the employer had reasonable grounds for believing plaintiff had done so.^{n36.2}

The concern expressed in *Pugh* for the legitimate exercise of managerial discretion was echoed in *Crosier v. United Parcel Service, Inc.* ⁿ³⁷ In that case, the plaintiff violated his employer's well-known rule forbidding fraternization with nonmanagement employees, and was terminated. The court held that the termination was properly within the substantial scope accorded an employer in dealing with a managerial employee.ⁿ³⁸ For further discussion of *Crosier* and good cause, see § 60.09[5]. A breach of contract action based on an oral or implied agreement not to terminate except for good cause is not barred by the statute of frauds.ⁿ³⁹ For further discussion of the statute of frauds, see § 60.09[2].

The principles underlying an action for breach of contract based on an express or implied agreement not to terminate are also applicable to actions for breach of an express or implied agreement not to demote.ⁿ⁴⁰ For further discussion of this topic, see § 60.07[2].

[2] Effect of Written Employment Contracts, Handbooks, Policies, and Other Writings

[a] Writings May Be Relevant to At Will Issue

Documents such as personnel manuals, bylaws, and letters of understanding that include language limiting the employer's prerogative to terminate an employee at will may be treated as agreements not to terminate without good cause.ⁿ⁴¹ In *Foley v. Interactive Data Corp.*, ⁿ⁴² for example, the California Supreme Court stated that an agreement to limit the grounds for termination may be inferred from the employer's personnel manual or policies.

The importance of drafting specific and comprehensive written at will policies is evident from the cases discussed below. For guidance in drafting effective employee handbooks and personnel policies, see Morrison & Foerster, California Employers' Guide to Employee Handbooks and Personnel Policy Manuals (Matthew Bender).

[b] Written Employment Contracts

A written contract that contains an express at will clause creates evidence of an at will relationship that is difficult to rebut.ⁿ⁴³ For example, in *Dore v. Arnold Worldwide, Inc.*,^{n43.1} the California Supreme Court held that the verbal formulation "at any time" in the termination clause of an employment contract was not *per se* ambiguous merely because it did not expressly speak to whether cause was required. Rather, as a matter of simple logic, the formulation would ordinarily entail the notion of "with or without cause." The Court also found that the employee's proffered extrinsic evidence did not render the contract ambiguous concerning whether he could be terminated only for cause.^{n43.2} Courts may refuse to allow parol evidence to rebut an integrated employment contract containing an at will clause.^{n43.3} In *Halvorsen v. Aramark Uniform Services, Inc.*,^{n43.4} for example, the court refused to even consider the *Pugh* factors, calling them "irrelevant," because the plaintiff's written employment contract provided that he could be terminated on two weeks notice.^{n43.5}

A provision in an employment contract providing for termination upon specified notice is not reasonably susceptible, without more, to an interpretation allowing for the existence of an implied-in-fact agreement that termination will occur only for cause.ⁿ⁴⁴ Thus, for example, an insurance agent could not sue the insurance company he formerly represented in a contract action for constructive wrongful termination, because the agency agreement contained a provision allowing either side to terminate the agreement on notice.^{n44.1} The agent could not introduce extrinsic evidence that the company omitted "with or without cause" language from the termination provision, provided a termination review process, and stated in its company magazine in 1977 that termination would not occur without a serious breach, because the plain language of the termination-on-notice provision was not reasonably susceptible to an interpretation requiring the employer to have good cause for termination.^{n44.2} Further, a termination-review provision in the agency agreement, placed just after the termination-notice provision, did not provide for more than simply termination upon specified notice. The termination-review provision merely provided an internal forum, primarily for the insurance company's benefit, for reconsidering a decision to end an agency agreement.

When an employment agreement has both express and implied terms that are contradictory, the express terms control—even if the express terms are not contained in an integrated contract.^{n44.3} For example, in one case, an employee received housing assistance from his employer that resulted in a co-ownership agreement. That agreement, reached years after his date of hire, declared that the employee's employment was at will.^{n44.4} Following his termination for differences over "management style," the employee argued that the policies and practices of his employer were sufficient to establish an implied contract to be terminated only for cause. While stating in dictum that an agreement containing at will language could be so tenuously related to employment as to be nonbinding and that conduct subsequent to the formation of an express at will agreement could undermine its terms, the court of appeal found no such evidence in this case.^{n44.5} Moreover, the standard plaintiffs must meet is extremely high: "substantial evidence that the parties did not intend the written express term to be controlling."^{n44.6}

However, if the written contract is *not* integrated, the fact that "at will" language exists does not preclude the existence of an implied in fact contract to terminate for cause only.ⁿ⁴⁵

[c] Personnel Manuals and Policies

Personnel manual provisions or established employment policies may be construed to require good cause for termination if an at will policy is not otherwise clearly expressed and understood between the parties. For example, an express personnel policy providing for termination on failure to meet specified job requirements has been held to support the existence of an implied contract requiring cause for termination.ⁿ⁴⁶ Based on similar analysis, a court held an employer liable for contract damages for violating a policy that requires recall of laid off employees for any position for which they are qualified, even if outside applicants are better qualified.ⁿ⁴⁷

However, although courts will sometimes imply an agreement from a personnel manual or employment policy contrary to the statutorily presumed at-will status, courts will not imply an agreement to vary the terms of an express at-will

employment agreement signed by the employee.^{n47.1} In *Tomlinson v. Qualcomm, Inc.*, ^{n47.2} the employee signed an employment application and an employment agreement expressly stating that her employment was at will. She was then laid off, while on family leave, as part of a company-wide workforce reduction. The court found that statements on family leave in the employer's personnel handbooks failed to create an implied agreement that vitiated her at-will status. Even assuming that the statements contradicted the express agreement by guaranteeing her continued employment, there could not be a valid express contract and an implied contract, each embracing the same subject, but requiring different results. The express term controlled, even if it was not part of an integrated employment contract. It nevertheless precluded the existence of an implied contract requiring good cause for termination.^{n47.3} Finally, the court concluded that, even assuming that the personnel policies, coupled with the guarantee of reinstatement contained in the letter granting the employee's request for family leave, could be deemed a valid and binding modification of her at-will status, the guarantee did not preclude the employer from terminating her employment as part of a company-wide reduction in work force.^{n47.4}

If a personnel manual states that one class of employee is subject to at will termination, a court may infer that other employees have an implied contract to be terminated only for cause. In one case, an employee handbook stated that probationary employees could be terminated at any time within the probationary period on the ground of unsatisfactory performance. The court held that the issue remained whether the policy implied that a nonprobationary employee could be terminated only for good cause.ⁿ⁴⁸

In that case, the handbook also stated that a nonprobationary employee was eligible for all benefits, presumably including the grievance procedures outlined elsewhere in the handbook.ⁿ⁴⁹

A disciplinary policy may also be construed to limit the grounds for termination to those that are in harmony with the stated discipline procedures. In a case in which a baseball coach at a private college was terminated without adherence to the employer's disciplinary policies set forth in a personnel manual, the court denied the employer's motion for summary judgment.ⁿ⁵⁰ However, the mere existence of a progressive discipline policy does not negate at will status.ⁿ⁵¹

The employer's conduct may enhance the effect of a written policy that is neutral with respect to at will status. In one case, the Ninth Circuit upheld a jury verdict finding that the employer had impliedly promised the employee that she would be treated fairly and not be laid off except in accordance with personnel policies and procedures.ⁿ⁵²

The employer's conduct and circumstances of the plaintiff's employment may contravene express at will language in a personnel manual, converting at will status to an implied promise not to terminate except for good cause. In one case, the court held that at will language in the handbook was contravened by such factors as the plaintiff's 19 1/2 years of service, consistent promotions, salary increases, and the defendant's implemented personnel policies.ⁿ⁵³ In another case, the court held that at will provisions in the handbook and operations manual did not as a matter of law preclude the existence of a contrary implied promise of termination only for cause. The court stated that because the parties had not reduced their employment relationship to an integrated writing, the employee handbook and manual were only factors regarding the existence and content of the employment agreement; other factors included the personnel policies and practices of the employer.ⁿ⁵⁴

The effect of a written personnel policy on at will status may be inferred from its stated purpose. For example, a personnel policy stated to be "a guide for supervisors involved with an employment termination" was held not to be part of an employment contract. The court construed the policy to be only a guideline, and not mandatory.ⁿ⁵⁵ In *Asmus v. Pacific Bell*, ^{n55.1} the California Supreme Court found that a policy that was apparently mandatory while it was in place could be unilaterally terminated by the employer if the condition was one of indefinite duration and the employer effected the change after a reasonable time, on reasonable notice and without interfering with the employees' vested benefits.^{n55.2}

[d] Employment Applications

An employment application may establish an at will employment relationship if it expressly so provides and is intended to be a complete integration of the terms on that issue.ⁿ⁵⁶ However, California appellate courts are divided on whether the parol evidence rule applies to employment applications. One line of reasoning holds that the courts must determine whether the application contains an integrated at will clause.ⁿ⁵⁷ Other courts have held that the application is not a contract at all, but rather a solicitation of an offer of employment, relegating an at will clause to mere evidence of any ultimate agreement between the parties.ⁿ⁵⁸

One court, following the first approach, found that an employment application was not determinative of the issue of at will employment because (1) the application was not the complete and integrated contract between the parties that would exclude evidence of all other agreements; (2) parol evidence was admissible to show that the application language was susceptible to other meanings; and (3) the evidence, including the employer's personnel manual, indicated an implied contract for termination based only on cause.ⁿ⁵⁹ In a similar case, the court analysed that a standardized two-page application. It lacked an integration clause and stated that an individual's employment was for no definite period and could be terminated at any time, but did not state the individual's position or salary, nor did it state the employment could be terminated for any reason. The court found the application did not have provisions indicative of an "at will" relationship. That court also found that an express personnel policy providing for termination on failure to meet specified job requirements supported the existence of an implied contract requiring cause.ⁿ⁶⁰

[e] Other Writings

In the absence of an express contract between the parties, or personnel policies on point, a court may need to evaluate other writings that imply the status of the employee as at will or entitled to good cause for termination.

In one case, the court considered a written letter of understanding, which read in pertinent part: "termination of this letter of understanding by either party may be accomplished upon thirty days' notice. [P] We look forward to a long, pleasant, and mutually satisfactory relationship with you ...".ⁿ⁶¹ It held that the document was irrelevant to the issue of at will or good cause status, rejecting plaintiff's assertion that the employer's hope of a good relationship constituted a promise of termination only for cause.ⁿ⁶² The court also rejected the parties' contentions that language requiring thirty days' notice supported either position, holding rather that the clause was silent regarding the possible causes for termination.ⁿ⁶³

The same court indicated that an employer's bylaws may constitute a contract with its employees in certain circumstances, holding that bylaws, like other written rules and procedures, could form part of the employment contract if the employer and employee had a mutual understanding that the rules or procedures would apply to the employee.ⁿ⁶⁴

In another case, a stock option agreement signed by the employee that expressly stated that the employer had the right to terminate him at any time, was held to constitute an express agreement between the parties defining an at will relationship. In that action, the plaintiff could not produce any documents to the contrary, and the court concluded that, because there cannot be both an express and an implied agreement requiring different results, the plaintiff could not rebut the at will status.ⁿ⁶⁵ Similarly, an at will provision contained in a property ownership agreement, reached years after the employee's date of hire, was held to constitute an express agreement between the parties. In that case, the employee admitted reading the agreement before signing and admitted that no one at the company told him that the at will provision was not meant to have the stated effect.^{n65.1}

An employee who signed several versions of a document entitled "Sales Regulations," the last of which contained express at will language, was held not to be an at will employee. The court observed that the language was inserted only shortly before the employee's termination and without his knowledge. Thus, the court categorized the new language as an "ex parte addition to the Sales Regulations."ⁿ⁶⁶ In another case, the court found that a confidentiality agreement

with an at will termination clause and which expressly stated that it could only be modified by the president of the company in writing, whether or not it was considered an "employment agreement," was a complete and integrated expression of the parties' intent with respect to termination.ⁿ⁶⁷

For additional discussion of employee handbooks and model provisions for inclusion in such handbooks, *see* Morrison & Foerster California Employers' Guide to Employee Handbooks and Personnel Policy Manuals (Matthew Bender).

■ CONSULTANT'S COMMENT:

The existence of an implied contract cause of action within the law of wrongful discharge necessarily obligates an employer to make no promises that it does not intend to keep. Such advice is easy to state, but requires care in its implementation. For example, employers may wish to consider an audit of their complete inventory of personnel forms, personnel manuals, personnel practices, and benefit plans. Such audits need not be time-consuming or disruptive, and may be of significant defensive value. Even simple modification of recruitment practices, offer letters, application forms, and employee handbooks can serve to limit exposure to wrongful discharge liability.ⁿ⁶⁸ *Commentary by Kirby Wilcox.*

Legal Topics:

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

Labor & Employment Law
Employment Relationships
Employment Contracts
General Overview
Labor & Employment Law
Employment Relationships
Employment Contracts
Breach
Labor & Employment Law
Wrongful Termination
General Overview

FOOTNOTES:

(n1)Footnote 1. For the standard jury instruction on the essential factual elements for a claim of breach of employment contract for an unspecified term without good cause, *see* Judicial Council of California Civil Jury Instructions, *CACI 2401* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the special verdict form for a cause of action for breach of an employment contract for an unspecified term, *see* Judicial Council of California Civil Jury Instructions, *CACI VF-2400* (Matthew Bender). For the standard jury instructions that pertain to contracts generally, *see* Judicial Council of California Civil Jury Instructions, *CACI 300 et seq.* (Matthew Bender). For discussion of the CACI instructions and special verdict forms generally, *see* §§ 61.05, 61.06.

(n2)Footnote 1.1. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 676-681, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n3)Footnote 2. *Pugh v. See's Candies, Inc.* (1981) 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 .

(n4)Footnote 3. *Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal. App. 3d 695, 101 Cal. Rptr. 169 .

(n5)Footnote 4. *Rabago-Alvarez v. Dart Indus., Inc.* (1976) 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 .

(n6)Footnote 5. *Rabago-Alvarez v. Dart Indus., Inc.* (1976) 55 Cal. App. 3d 91, 96, 127 Cal. Rptr. 222 ; *Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal. App. 3d 695, 703, 101 Cal. Rptr. 169 .

(n7)Footnote 6. *Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal. App. 3d 695, 702, 101 Cal. Rptr. 169 .

(n8)Footnote 7. *Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal. App. 3d 695, 703-704, 101 Cal. Rptr. 169 , citing dicta in *Ruinello v. Murray* (1951) 36 Cal. 2d 687, 689, 690, 227 P.2d 251 .

(n9)Footnote 8. *Rabago-Alvarez v. Dart Indus., Inc.* (1976) 55 Cal. App. 3d 91, 96, 127 Cal. Rptr. 222 .

(n10)Footnote 9. *Rabago-Alvarez v. Dart Indus., Inc.* (1976) 55 Cal. App. 3d 91, 96, 127 Cal. Rptr. 222 .

(n11)Footnote 10. *Rabago-Alvarez v. Dart Indus., Inc.* (1976) 55 Cal. App. 3d 91, 96, 127 Cal. Rptr. 222 .

(n12)Footnote 11. *Comeaux v. Brown & Williamson Tobacco Co.* (9th Cir. 1990) 915 F.2d 1264 .

(n13)Footnote 12. *Comeaux v. Brown & Williamson Tobacco Co.* (9th Cir. 1990) 915 F.2d 1264, 1272, n.8 .

(n14)Footnote 13. *Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 645 ; see also *Lenk v. Total-Western, Inc.* (2001) 89 Cal. App. 4th 959, 108 Cal. Rptr. 2d 34 (employer's false statements made to induce person to become employee were basis for civil lawsuit alleging fraud against employer); *Toscano v. Greene Music* (2005) 124 Cal. app. 4th 685, 21 Cal. Rptr. 3d 732 (employee who resigns from at-will employment in reliance on prospective employer's unfulfilled promise of other employment may recover, under a promissory estoppel theory, future wages based on what employee would have earned at prior employment, provided the damages are not speculative or remote and are supported by substantial evidence); *Helmer v. Bingham Toyota Isuzu* (2005) 129 Cal. App. 4th 1121, 29 Cal. Rptr. 3d 136 (same).

(n15)Footnote 14. *Pugh v. See's Candies* (1981) 116 Cal. App. 3d 311, 324 329, 171 Cal. Rptr. 917 .

(n16)Footnote 15. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 675-682, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n17)Footnote 16. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 677, 254 Cal. Rptr. 211, 765 P.2d 373 . See *Pugh v. See's Candies* (1981) 116 Cal. App. 3d 311, 324 325, 171 Cal. Rptr. 917 , citing, inter alia, *Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal. App. 3d 695, 704, 101 Cal. Rptr. 169 and *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal. App. 3d 91, 96, 127 Cal. Rptr. 222 .

(n18)Footnote 17. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 677, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n19)Footnote 18. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 679, 254 Cal. Rptr. 211, 765 P.2d 373 ; *Pugh v. See's Candies* (1981) 116 Cal. App. 3d 311, 325-326, 171 Cal. Rptr. 917 .

(n20)Footnote 19. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 679, 254 Cal. Rptr. 211, 765 P.2d 373 . See *Pugh v. See's Candies* (1981) 116 Cal. App. 3d 311, 325-326, 171 Cal. Rptr. 917 .

(n21)Footnote 20. *Pugh v. See's Candies* (1981) 116 Cal. App. 3d 311, 325, 171 Cal. Rptr. 917 .

(n22)Footnote 21. *Pugh v. See's Candies* (1981) 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917 .; but see *Comeaux v. Brown & Williamson Tobacco Co.* (9th Cir. 1990) 915 F.2d 1264, 1271-1272 & n.8 (no for cause contract existed because plaintiff failed to show independent consideration, even though he resigned from prior job and relocated as condition of new job).

(n23)Footnote 22. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 680, 254 Cal. Rptr. 211, 765 P.2d 373 ; *Pugh v. See's Candies* (1981) 116 Cal. App. 3d 311, 326-327, 171 Cal. Rptr. 917 ; see *Gould v. Maryland Sound Indus., Inc.* (1995) 31 Cal. App. 4th 1137, 1151-1153, 37 Cal. Rptr. 2d 718 (insufficient showing of implied contract based only on employee's length of service (three years), his completion of 90-day probationary period, and supervisor statement that employees who complete probationary period become "members" of company and "long-term" employees); *Knights v. Hewlett Packard* (1991) 230 Cal. App. 3d 775, 780, 281 Cal. Rptr. 295 (no triable issue as to whether employer promised to terminate only for good cause, in part because plaintiff had no longevity of service). For the standard jury instruction on the essential factual elements for a claim of breach of employment contract for an unspecified term, implied-in-fact promise not to discharge without good cause, see Judicial Council of California Civil

Jury Instructions, *CACI 2403* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI instructions generally, *see* § 61.05.

(n24)Footnote 22.1. *See Stillwell v. The Salvation Army* (2008) 167 Cal. App. 4th 360, 381-383 (employee presented substantial evidence to support jury's verdict that employer promised to terminate employee only for good cause, through considerable evidence that employer's managers made repeated assurances of continued employment during employee's long tenure with organization, evidence of his long and distinguished career with employer, and evidence that employer's customary practice was to terminate employees only for cause; language in several employee handbooks that described his employment relationship as being at will did not foreclose possibility of implied agreement to terminate only for cause and same handbooks contained personnel policies arguably inconsistent with at-will employment relationship); *Kelly v. Stamps.com Inc.* (2005) 135 Cal. App. 4th 1088, 1102-1103, 38 Cal. Rptr. 3d 240 (trial court properly granted employer summary adjudication on former employee's claim that two-part retention bonus employer had awarded employee created implied contract that otherwise at-will employment would continue until at least second installment had been paid, which employer breached by discharging former employee, where memo by which employer extended bonus expressed employer's desire that employee remain working for it and provided as incentive that to receive two parts of bonus employee had to be employed with company on each of respective dates, which may have represented offer of unilateral contract for bonus, calling for employee to continue employment, but it could not be read to have included promise by employer of continued employment).

(n25)Footnote 23. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n26)Footnote 24. *Pugh v. See's Candies* (1981) 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917 .

(n27)Footnote 25. *Robards v. Gaylord Bros., Inc.* (9th Cir. 1988) 854 F.2d 1152, 1156-1157 .

(n28)Footnote 26. *Robards v. Gaylord Bros., Inc.* (9th Cir. 1988) 854 F.2d 1152, 1156-1157 .

(n29)Footnote 27. *Robards v. Gaylord Bros., Inc.* (9th Cir. 1988) 854 F.2d 1152, 1157 .

(n30)Footnote 28. *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 .

(n31)Footnote 28.1. *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 341-342, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 ; *see also Haycock v. Hughes Aircraft Co.* (1994) 22 Cal. App. 4th 1473, 1489-1495, 28 Cal. Rptr. 2d 248 (employer's failure to present substantial evidence that employment was at will did not permit court to rule that longevity created implied agreement to terminate only for cause).

(n32)Footnote 28.2. *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 342, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 .

(n33)Footnote 29. *Davis v. Consolidated Freightways* (1994) 29 Cal. App. 4th 354, 34 Cal. Rptr. 2d 438 .

(n34)Footnote 30. *Davis v. Consolidated Freightways* (1994) 29 Cal. App. 4th 354, 368-369, 34 Cal. Rptr. 2d 438 . *See also Liu v. Amway Corp.* (9th Cir. 2004) 347 F.3d 1125, 1138 (short term of employment and explicit at-will provisions in employment letter and employee handbook suggested that no implied-in-fact contract was created limiting employer's ability to terminate employment at any time; further, even if employee could demonstrate employer was required to terminate her for good cause, valid reduction in force constituted good cause and there was no evidence to suggest reduction in force was invalid).

(n35)Footnote 30.1. *Lenk v. Total-Western, Inc.* (2001) 89 Cal. App. 4th 959, 108 Cal. Rptr. 2d 34 .

(n36)Footnote 30.2. *Lenk v. Total-Western, Inc.* (2001) 89 Cal. App. 4th 959, 969-970, 108 Cal. Rptr. 2d 34 .

(n37)Footnote 31. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n38)Footnote 32. *Pugh v. See's Candies, Inc.* (1981) 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 .

(n39)Footnote 33. *See* [2], *below*.

(n40)Footnote 34. *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 .

(n41)Footnote 35. *See* *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 680 n.23, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n42)Footnote 36. *Pugh v. See's Candies* (1981) 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917 ; *see also* *Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 Cal. 4th 93, 108, 69 Cal. Rptr. 2d 900, 948 P.2d 412 (good cause must be judged on objective basis, with jury evaluating termination decision under circumstances known to employer at time decision was made); *Moore v. May Dept. Stores Co.* (1990) 222 Cal. App. 3d 836, 840, 271 Cal. Rptr. 841 (termination based on plaintiff's violation of employer's security rules upheld, quoting *Pugh*).

(n43)Footnote 36.1. *Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 Cal. 4th 93, 108 . 17 Cal. 4th 93, 69 Cal. Rptr. 2d 900, 948 P.2d 412 ; *King v. United Parcel Service, Inc.* (2007) 152 Cal. App. 4th 426, 438, 60 Cal. Rptr. 3d 359 .

(n44)Footnote 36.2. *King v. United Parcel Service, Inc.* (2007) 152 Cal. App. 4th 426, 438-440, 60 Cal. Rptr. 3d 359 (critical question was not whether plaintiff violated employer's integrity policy by encouraging subordinate to falsify his timecard, but whether employer, acting in good faith following appropriate investigation, had reasonable grounds for believing plaintiff had done so).

(n45)Footnote 37. *Crosier v. United Parcel Serv., Inc.* (1983) 150 Cal. App. 3d 1132, 1139-1140, 198 Cal. Rptr. 361 .

(n46)Footnote 38. *Crosier v. United Parcel Serv., Inc.* (1983) 150 Cal. App. 3d 1132, 1139-1140, 198 Cal. Rptr. 361 .

(n47)Footnote 39. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 675, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n48)Footnote 40. *See* *Scott v. Pacific Gas and Elec. Co.* (1995) 11 Cal. 4th 454, 464-465, 46 Cal. Rptr. 2d 427, 904 P.2d 834 .

(n49)Footnote 41. *See, e.g.,* *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373 ; *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal. App. 3d 525, 541, 249 Cal. Rptr. 5 (policies and procedures manuals provided that employees would not be discharged without just cause); *Burton v. Security Pacific Nat'l Bank* (1988) 197 Cal. App. 3d 972, 978, 243 Cal. Rptr. 277 ; *Prevost v. First W. Bank* (1987) 193 Cal. App. 3d 1492, 1501-1502, 239 Cal. Rptr. 161 ; *Walker v. Northern San Diego County Hosp. Dist.* (1982) 135 Cal. App. 3d 896, 903-905, 185 Cal. Rptr. 617 ; *see also* *Asmus v. Pacific Bell* 2000 Cal. Daily Op. Service 4247, 4247 (employment security policy enforceable until modified).

(n50)Footnote 42. (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n51)Footnote 43. *See, e.g.,* *DeHorney v. Bank of Am. Nat'l Trust and Sav. Ass'n* (9th Cir. 1989) 879 F.2d 459, 466-467 (bank's personnel policies did not modify clear terms of employment contract creating employment at will); *Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal. App. 4th 33, 105 Cal. Rptr. 2d 525 (supervisor's assurances of continued employment absent cause for termination did not create implied contract in face of express written acknowledgment signed by employee that his employment was at will).

(n52)Footnote 43.1. *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal. 4th 384, 388-391 .

(n53)Footnote 43.2. *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal. 4th 384, 391-393 .

(n54)Footnote 43.3. *See, e.g., Stillwell v. The Salvation Army* (2008) 167 Cal. App. 4th 360, 377-378 (assuming for sake of argument that if employment contract was valid, there could not be valid implied agreement to terminate only for cause, where contract had explicit termination at-will provision; given assumption, if court were to conclude trial court properly determined contract was enforceable as matter of law, employer would be entitled to JNOV because employee could not prevail on his claim of breach of implied agreement to terminate only for cause); *Haggard v. Kimberly Quality Care Inc.* (1995) 39 Cal. App. 4th 508, 521, 46 Cal. Rptr. 2d 16 (integrated at will clause precluded introduction of parol evidence); *Anderson v. Savin Corp.* (1988) 206 Cal. App. 3d 356, 363-364, 254 Cal. Rptr. 627 ; *Gerdlund v. Elec. Dispensers Int'l* (1987) 190 Cal. App. 3d 263, 270, 235 Cal. Rptr. 279 (implied covenant of good faith and fair dealing may not be relied on to establish a "good cause" requirement for termination if an express at will employment contract exists, because no obligation can be implied that would result in the obliteration of a right expressly given under a written contract); *see also* § 60.09[3].

(n55)Footnote 43.4. *Halvorsen v. Aramark Uniform Servs., Inc.* (1998) 65 Cal. App. 4th 1383, 77 Cal. Rptr. 2d 383, 385 .

(n56)Footnote 43.5. *Halvorsen v. Aramark Uniform Servs., Inc.* (1998) 65 Cal. App. 4th 1383, 1388, 77 Cal. Rptr. 2d 383 ; *see* *Pugh v. See's Candies, Inc.* (1981) 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917 (factors to be considered in determining existence of implied in fact agreement not to terminate except for good cause), discussed in [1][c], *above*; *see also* *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal. App. 4th 620, 630, 41 Cal. Rptr. 2d 329 .

(n57)Footnote 44. *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal. 4th 384, 389, 46 Cal. Rptr. 3d 668, 139 P.3d 56 ; *Bernard v. State Farm Mutual Automobile Ins. Co.* (2007) 158 Cal. App. 4th 304, 309, 69 Cal. Rptr. 3d 700 ; *Bionghi v. Metropolitan Water Dist.* (1999) 70 Cal. App. 4th 1358, 1364, 83 Cal. Rptr. 2d 388 .

(n58)Footnote 44.1. *Bernard v. State Farm Mutual Automobile Ins. Co.* (2007) 158 Cal. App. 4th 304, 309-311, 69 Cal. Rptr. 3d 700 . *See also* *Appling v. State Farm Mut. Auto. Ins. Co.* (9th Cir. 2003) 340 F.3d 769, 778 ; *Olander v. State Farm Mut. Auto. Ins. Co.* (8th Cir. 2003) 317 F.3d 807, 811-812 (en banc); *Mooney v. State Farm Insurance Companies* (D.N.H. 1972) 344 F. Supp. 697, 699-700 ; *Ex Parte Gardner* (Ala. 2001) 822 So. 2d 1211, 1217-1219 ; *Melnick v. State Farm Mut. Auto. Ins. Co.* (1988) 106 N.M. 726, 749 P.2d 1105, 1110-1111 .

(n59)Footnote 44.2. *See also* *Appling v. State Farm Mut. Auto. Ins. Co.* (9th Cir. 2003) 340 F.3d 769, 778 (insurance agents erroneously sought to introduce extrinsic evidence to add "good cause" term to termination provision in agency agreement, rather than to properly interpret words of provision).

(n60)Footnote 44.3. *Cruey v. Gannett Co., Inc.* (1998) 64 Cal. App. 4th 356, 362-363, 76 Cal. Rptr. 2d 670 ; citing *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal. App. 4th 620, 630, 41 Cal. Rptr. 2d 329 .

(n61)Footnote 44.4. *Cruey v. Gannett Co., Inc.* (1998) 64 Cal. App. 4th 356, 361-362, 76 Cal. Rptr. 2d 670 .

(n62)Footnote 44.5. *Cruey v. Gannett Co., Inc.* (1998) 64 Cal. App. 4th 356, 364, 76 Cal. Rptr. 2d 670 .

(n63)Footnote 44.6. *Cruey v. Gannett Co., Inc.* (1998) 64 Cal. App. 4th 356, 364, 76 Cal. Rptr. 2d 670 (plaintiff was unable to establish triable issue of fact to defeat summary judgment even though defendant employer had a progressive disciplinary policy and had personnel manuals that inconsistently stated that employment could and could not be terminated at will).

(n64)Footnote 45. *See* *McLain v. Great Am. Ins. Cos.* (1989) 208 Cal. App. 3d 1476, 1483-1487, 256 Cal. Rptr. 863 (implied promise may supersede previous at will agreement embodied in nonintegrated document); *Thomka v. Fin. Corp. Of Am.* (1993) 15 Cal. App. 4th 877, 883-885, 19 Cal. Rptr. 2d 382 (employer's addition of at will language

to sales regulations did not preclude jury finding that termination breached implied in fact agreement not to terminate without cause).

(n65)Footnote 46. *Seubert v. McKesson Corp.* (1990) 223 Cal. App. 3d 1514, 1520 (personnel policy providing that salesperson could be terminated for failing to meet quota for two quarters).

(n66)Footnote 47. *Kerr v. Rose* (1990) 216 Cal. App. 3d 1551, 1560-1562, 265 Cal. Rptr. 597 . but see *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal. App. 4th 620, 629-630, 41 Cal. Rptr. 2d 329 (signed acknowledgment that employment is at will can be basis for summary judgment against plaintiff on implied contract claim).

(n67)Footnote 47.1. *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal. App. 4th 934, 944, 118 Cal. Rptr. 2d 822 .

(n68)Footnote 47.2. *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal. App. 4th 934, 118 Cal. Rptr. 2d 822 .

(n69)Footnote 47.3. *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal. App. 4th 934, 944-947, 118 Cal. Rptr. 2d 822 .

(n70)Footnote 47.4. *Tomlinson v. Qualcomm, Inc.* (2002) 97 Cal. App. 4th 934, 947-948, 118 Cal. Rptr. 2d 822 .

(n71)Footnote 48. *Walker v. Northern San Diego County Hosp. Dist.* (1982) 135 Cal. App. 3d 896, 903-905, 185 Cal. Rptr. 617 .

(n72)Footnote 49. *Walker v. Northern San Diego County Hosp. Dist.* (1982) 135 Cal. App. 3d 896, 903-905, 185 Cal. Rptr. 617 .

(n73)Footnote 50. *Wood v. Loyola Marymount Univ.* (1990) 218 Cal. App. 3d 661, 671, 267 Cal. Rptr. 230 .

(n74)Footnote 51. See *Davis v. Consol. Freightways* (1994) 29 Cal. App. 4th 354, 368-369, 34 Cal. Rptr. 2d 438 .

(n75)Footnote 52. *Kern v. Levolor Lorentzen, Inc.* (9th Cir. 1990) 899 F.2d 772, 776 .

(n76)Footnote 53. *Walker v. Blue Cross of California* (1992) 4 Cal. App. 4th 985, 993, 6 Cal. Rptr. 2d 184 (reversing summary judgment for defendant on cause of action for breach of implied in fact contract).

(n77)Footnote 54. *Wilkerson v. Wells Fargo Bank* (1989) 212 Cal. App. 3d 1217, 1226-1228, 261 Cal. Rptr. 185 (disapproved on other grounds in *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal. 4th 93, 108, 69 Cal. Rptr. 2d 900, 948 P.2d 412); see also *Thomka v. Financial Corp. of Am.* (1993) 15 Cal. App. 4th 877, 883-885, 19 Cal. Rptr. 2d 382 (reaching similar result, based on at will language added to regulations during course of employment).

(n78)Footnote 55. *Knights v. Hewlett Packard* (1991) 230 Cal. App. 3d 775, 780, 281 Cal. Rptr. 295 (also noting that even if the policy had been mandatory, it permitted termination for unacceptable performance, which applied to plaintiff).

(n79)Footnote 55.1. *Asmus v. Pacific Bell* (2000) 23 Cal. 4th 1, 96 Cal. Rptr. 2d 179, 999 P.2d 71 ; 23 Cal. 4th 1, 96 Cal. Rptr. 2d 179, 999 P.2d 71, 2000 Cal. LEXIS 4412 .

(n80)Footnote 55.2. *Asmus v. Pacific Bell* (2000) 23 Cal. 4th 1, 11, 18, 96 Cal. Rptr. 2d 179, 999 P.2d 71 ; 23 Cal. 4th 1, 96 Cal. Rptr. 2d 179, 999 P.2d 71, 2000 Cal. LEXIS 4412 .

(n81)Footnote 56. See, e.g., *Comeaux v. Brown & Williamson Tobacco Co.* (9th Cir. 1990) 915 F.2d 1264, 1271 n.7 .

(n82)Footnote 57. *See, e.g., Seubert v. McKesson Corp.* (1990) 223 Cal. App. 3d 1514, 1520 .

(n83)Footnote 58. *See Harden v. Maybelline Sales Corp.* (1991) 230 Cal. App. 3d 1550, 1555-1556, 282 Cal. Rptr. 96 .

(n84)Footnote 59. *McLain v. Great Am. Ins. Companies* (1989) 208 Cal. App. 3d 1476, 1484-1487, 256 Cal. Rptr. 863 .

(n85)Footnote 60. *Seubert v. McKesson Corp.* (1990) 223 Cal. App. 3d 1514, 1520 . *See also Reid v. Smithkline Beecham Corp.* (S.D. Cal. 2005) 366 F. Supp. 2d 989 (at-will provision in employment application and employee handbook did not bar employee from presenting evidence of implied employment contract where application and handbook stated that they were not intended to be contracts).

(n86)Footnote 61. *Hillsman v. Sutter Community Hosps.* (1984) 153 Cal. App. 3d 743, 748, 200 Cal. Rptr. 605 .

(n87)Footnote 62. *Hillsman v. Sutter Community Hosps.* (1984) 153 Cal. App. 3d 743, 750, 200 Cal. Rptr. 605 .

(n88)Footnote 63. *Hillsman v. Sutter Community Hosps.* (1984) 153 Cal. App. 3d 743, 750-751, 200 Cal. Rptr. 605 .

(n89)Footnote 64. *Hillsman v. Sutter Community Hosps.* (1984) 153 Cal. App. 3d 743, 753, 755, 200 Cal. Rptr. 605 (citing *Walker v. Northern San Diego County Hosp. Dist.* (1982) 135 Cal. App. 3d 896, 902 905, 185 Cal. Rptr. 617).

(n90)Footnote 65. *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal. App. 3d 467, 482, 199 Cal. Rptr. 613 , *disapproved on other grounds*, *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *see also Rochlis v. Walt Disney Co.* (1993) 19 Cal. App. 4th 201, 211, 23 Cal. Rptr. 2d 793 (provision in stock option agreement, reserving employer's right to terminate with or without cause, precluded as a matter of law any implied agreement to the contrary); *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 690 n. 23, 254 Cal. Rptr. 211, 765 P.2d 373 (noting *Shapiro* but not deciding whether express at will agreement may be contradicted by implied in fact agreement).

(n91)Footnote 65.1. *Cruey v. Gannett Co., Inc.* (1998) 64 Cal. App. 4th 356, 363-364, 76 Cal. Rptr. 2d 670 (plaintiff was unable to establish triable issue of fact to defeat summary judgment even though defendant employer had a progressive disciplinary policy and had personnel manuals that inconsistently stated that employment could and could not be terminated at will).

(n92)Footnote 66. *Thomka v. Fin. Corp. of Am.* (1993) 15 Cal. App. 4th 877, 882-883, 19 Cal. Rptr. 2d 382 .

(n93)Footnote 67. *Haggard v. Kimberly Quality Care* (1995) 39 Cal. App. 4th 508, 523, 46 Cal. Rptr. 2d 16 .

(n94)Footnote 68. For full discussion of suggested procedures for avoiding wrongful discharge claims, *see* ch. 62.



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California Employment Law

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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 60 Liability for Wrongful Termination and Discipline
Part A. TEXT

4-60 California Employment Law § 60.06

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.06 Breach of Implied Covenant of Good Faith and Fair Dealing

[1] Generally

In *Foley v. Interactive Data Corp.*,ⁿ¹ the California Supreme Court held that although there is an implied covenant of good faith and fair dealing in employment contracts, only contract, and not tort, remedies are available for its breach. The Court noted that a "well-developed" body of California case law had permitted tort recovery against *insurers* for breach of the implied covenant of good faith and fair dealing in the performance of insurance contracts;ⁿ² but the Court characterized the insurance cases as "a major departure from traditional principles of contract law."ⁿ³

Although a number of court of appeal decisions had previously permitted tort recovery for breach of the implied covenant of good faith in the employment termination context,ⁿ⁴ the Court criticized these cases because of their "uncritical" incorporation of the insurance model into the employment context,ⁿ⁵ and disapproved their allowance of tort damages.ⁿ⁶ The Court stated that the tortious breach theory in the insurance area was based on a special relationship between the insured and the insurer and that the employer-employee relationship is sufficiently different that extension of the tort remedies was not warranted.ⁿ⁷ The Court cited the following differences between the two types of relationships: (1) a breach in the employment context does not place the employee in the same economic dilemma that an insured faces when an insurer refuses in bad faith to pay a claim, because the employee can seek other employment; (2) the employer does not have a "quasi-public" function of providing protection to its employees as does an insurance company; and (3) the interests of employer and employee are not financially at odds as are those of an insurer and an insured.ⁿ⁸

Courts are not free to imply a covenant of good faith and fair dealing directly at odds with a contract's express grant of discretionary power. The exception is the relatively rare instance in which a literal reading would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement. In all other situations in which the contract is unambiguous, the express language governs. No obligation can be implied that would result in the obliteration of an express right in a written contract.^{n8.1}

Foley also precludes tort damages for negligence that is only a contributing cause of a termination decision. Thus, one court has held that an employee who was fired for missing a meeting, even though he did so out of fear of a coemployee who was harassing him, could not turn a contractual wrongful discharge action into a tort claim by alleging negligent supervision of the harassing coemployee.ⁿ⁹

In *Guz v. Bechtel National, Inc.*, ^{n9.1} the Court held that the reasoning in *Foley* applies to any case in which an employee argues that even if the employment was at will, an arbitrary dismissal frustrated contract benefits and thus violated the implied covenant of good faith and fair dealing. Precisely because employment at will allows the employer freedom to terminate the relationship as it chooses, the employer does not frustrate the employee's contractual rights merely by doing so. In that case, the employee cannot complain about a deprivation of the benefits of continued employment, because the agreement never provided for a continuation of its benefits in the first instance. The Court acknowledged that the covenant might be violated if termination of an at-will employee was a mere pretext to cheat the worker out of another contract benefit to which the employee was clearly entitled, such as compensation already earned.^{n9.2}

[2] Elements

The elements of a cause of action for breach of an implied covenant of good faith and fair dealing include:^{n9.3}

1. A contract, one of the terms of which is a covenant of good faith and fair dealing;
2. Conduct that violates the covenant; and
3. Damages resulting from the conduct.

It is important to note that an implied covenant claim cannot be used to convert an employment relationship that is terminable at will into one that is terminable for good cause only. The claim can be used only to enforce the promises of the employment agreement.ⁿ¹⁰ If the agreement is at will, the only promise regarding its termination is that it may be terminated at any time, for any reason, by either party.ⁿ¹¹ In *Guz v. Bechtel Nat'l, Inc.*, ^{n11.1} the California Supreme Court found that the covenant of good faith and fair dealing could not impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.^{n11.2} Thus, unless a contract term provides otherwise, the employer may terminate the employee for any reason or no reason and in any manner. If the termination does not breach a specific contract provision providing otherwise, the unfairness of the manner of termination does not set forth a cause of action for breach of the implied covenant of good faith and fair dealing.^{n11.3}

In one pre-*Foley* case, *Hejmadi v. AMFAC, Inc.*, ⁿ¹² the court suggested that even though an at will employee could not bring an implied covenant claim on the ground that he or she had been terminated without good cause, such an employee could bring an implied covenant claim to enforce another promise in the agreement that is not tied to continuous employment. The court opined that an at will employee could bring an implied covenant claim under the following circumstances: (1) the employee has an expectation of a benefit from the contract; (2) the benefit is independent of any alleged promise that the employee could be terminated for cause only; and (3) the employee was terminated by the employer in bad faith, so as to deprive the employee of this independent benefit.ⁿ¹³

In contrast, an employee who is employed under an express or implied contract to terminate for cause only may bring an implied covenant claim to enforce the alleged promise of continuous employment.ⁿ¹⁴ However, the advantage of alleging an implied covenant claim in this circumstance is questionable, since the same promise can be enforced under traditional breach of contract theory, and tort damages can no longer be recovered for breach of the implied covenant.ⁿ¹⁵

The implied covenant may not be the basis of an action for failure to enter into a new contract or to renew an expired

one.ⁿ¹⁶ For example, in one case involving an employment contract that expressly provided for a one-year term and stated that there was no obligation to renew it, a court of appeal held that the implied covenant did not require an employer to apply an objective standard before deciding not to renew. The court concluded that there was no implied agreement to employ the plaintiff indefinitely absent good cause for not renewing the employment relationship.ⁿ¹⁷

■ CONSULTANT'S COMMENT:

The elements of a cause of action for breach of the covenant of good faith and fair dealing remain unclear even after *Foley*.ⁿ¹⁸

In the absence of clear definition, employers are advised to evaluate their discharge decisions against at least the following standards.

If the discharge is for misconduct, the employer should consider each of the following questions: (1) Does the employer have an existing policy or practice that prohibits the conduct in which the employee engaged? (2) In the absence of such a policy or practice, does the conduct in which the employee engaged exceed some identifiable boundary of reasonable behavior? (3) Did the employee know about the policy or practice that he or she violated (or should the employee have recognized that his or her behavior exceeded the bounds of reasonable conduct)? (4) Is there clear evidence that the employee engaged in the prohibited conduct? (5) Does the punishment fit the offense? (6) Have others who have engaged in similar behavior received similar discipline?

If the discharge is for poor performance, the employer should analyze whether the employee has received prior notice of (1) what is wrong with his or her performance (identifying specific examples of the problem), (2) what is required to *correct* (as distinguished from merely improving) the deficiencies, (3) how long the employee has to correct the deficiencies, and (4) the consequences of failure to correct the deficiencies at any time within the specified time period. *Commentary by Kirby Wilcox.*

Legal Topics:

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

Labor & Employment Law Employment Relationships At-Will Employment Exceptions Implied Contracts Labor & Employment Law Employment Relationships Employment Contracts Breach

FOOTNOTES:

(n1)Footnote 1. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n2)Footnote 2. *See, e.g., Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal. 3d 566, 578, 108 Cal. Rptr. 480, 510 P.2d 1032 ; *Crisci v. Security Ins. Co.* (1967) 66 Cal. 2d 425, 432, 58 Cal. Rptr. 13, 426 P.2d 173 .

(n3)Footnote 3. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 684, 690, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n4)Footnote 4. *See, e.g., Koehrer v. Superior Court* (1986) 181 Cal. App. 3d 1155, 1171-1172, 226 Cal. Rptr. 820 ; *Gray v. Superior Court* (1986) 181 Cal. App. 3d 813, 821, 226 Cal. Rptr. 570 ; *Khanna v. Microdata Corp.* (1985) 170 Cal. App. 3d 250, 260-264, 215 Cal. Rptr. 860 ; *Rulon-Miller v. International Business Machines Corp.* (1984) 162 Cal. App. 3d 241, 247-248, 252, 208 Cal. Rptr. 524 ; *Cleary v. American Airlines, Inc.* (1980) 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722 .

(n5)Footnote 5. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 689, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n6)Footnote 6. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 700 n.42, 254 Cal. Rptr. 211, 765 P.2d

373 .

(n7)Footnote 7. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 690-693, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n8)Footnote 8. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 692-693, 254 Cal. Rptr. 211, 765 P.2d 373 . The Supreme Court subsequently held that *Foley* should be applied retroactively. See *Newman v. Emerson Radio Corp.* (1989) 48 Cal. 3d 973, 976, 993, 258 Cal. Rptr. 592, 772 P.2d 1059 ; see also *Fidler v. Hollywood Park Operating Co.* (1990) 223 Cal. App. 3d 483, 488, 272 Cal. Rptr. 895 (reversing judgment awarding compensatory and punitive damages because, although trial was completed, *Foley* was decided during pendency of appeal); but see *Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal. App. 3d 1507, 1519, 281 Cal. Rptr. 890 (*Foley* decided after trial judgment entered; declining to reverse based on erroneous punitive damages instruction because jury did not award punitive damages and therefore instruction did not prejudice defendant).

(n9)Footnote 8.1. *Oracle Corp. v. Falotti* (9th Cir. 2003) 319 F.3d 1106, 1112 (employee's stock option agreement afforded employer's compensation committee sole discretion to interpret agreement, thus depriving employee of rights to stock options or stock-option damages).

(n10)Footnote 9. *Hine v. Dittrich* (1991) 228 Cal. App. 3d 59, 64, 278 Cal. Rptr. 330 .

(n11)Footnote 9.1. *Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 350, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 .

(n12)Footnote 9.2. *Guz v. Bechtel National, Inc.* (2000) 24 Cal. 4th 317, 353, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 ; see also *Agosta v. Astor* (2004) 120 Cal. App. 4th 596, 607-608, 15 Cal. Rptr. 3d 565 (at-will employee could not claim breach of implied covenant of good faith and fair dealing, where employee did not claim entitlement to earned benefits under employer's compensation plan, but, rather, sought losses associated with termination of his contract benefits, such as continuing future employment and receipt of continued higher compensation, which were claims precluded by *Guz*).

(n13)Footnote 9.3. For the standard jury instruction on the essential factual elements for an action for breach of the implied covenant of good faith and fair dealing, see Judicial Council of California Civil Jury Instructions, *CACI 2423* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the special verdict form for a cause of action for breach of the implied covenant of good faith and fair dealing, see Judicial Council of California Civil Jury Instructions, *CACI VF-2404* (Matthew Bender). For discussion of the CACI instructions and special verdict forms generally, see §§ 61.05, 61.06.

(n14)Footnote 10. *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal. App. 4th 1383, 1390, 77 Cal. Rptr. 2d 383 (covenant cannot be used to imply obligation which would obliterate express right provided in written contract); see *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 690, 254 Cal. Rptr. 211, 765 P.2d 373 . In one of its few comments on the issue of the elements of a claim for breach of the implied covenant, the Court said only (in dictum) that "with regard to an at will employment relationship, breach of the implied covenant cannot logically be based on a claim that discharge was made without good cause." *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 698 n.39, 254 Cal. Rptr. 211, 765 P.2d 373 ; see also *Flait v. North Am. Watch Corp.* (1992) 3 Cal. App. 4th 467, 481, 4 Cal. Rptr. 2d 522 ; *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal. App. 3d 799, 806, 270 Cal. Rptr. 585 ; *Schneider v. TRW, Inc.* (9th Cir. 1991) 938 F.2d 986, 991 ; *Rose v. Wells Fargo & Co.* (9th Cir. 1990) 902 F.2d 1417, 1426 . But cf. *Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal. App. 3d 61, 66-68, 266 Cal. Rptr. 784 (although plaintiff could not prove contract to terminate for good cause, he could nonetheless seek contract damages for breach of implied covenant).

(n15)Footnote 11. See *Flait v. North Am. Watch Corp.* (1992) 3 Cal. App. 4th 467, 481, 4 Cal. Rptr. 2d 522 ; *Schneider v. TRW, Inc.* (9th Cir. 1991) 938 F.2d 986, 991 .

(n16)Footnote 11.1. *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 .

(n17)Footnote 11.2. *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 349-350, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 .

(n18)Footnote 11.3. *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 350-352, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 .

(n19)Footnote 12. *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal. App. 3d 525, 249 Cal. Rptr. 5 .

(n20)Footnote 13. *Hejmadi v. AMFAC, Inc.* (1988) 202 Cal. App. 3d 525, 551, 249 Cal. Rptr. 5 ; *see also* *Walker v. Blue Cross of California* (1992) 4 Cal. App. 4th 985, 996-997, 6 Cal. Rptr. 2d 184 .

(n21)Footnote 14. *See Hejmadi v. AMFAC, Inc.* (1988) 202 Cal. App. 3d 525, 547-549, 249 Cal. Rptr. 5 .

(n22)Footnote 15. *See Aragon-Haas v. Family Security Ins. Servs., Inc.* (1991) 231 Cal. App. 3d 232, 240, 282 Cal. Rptr. 233 .

(n23)Footnote 16. *Tollefson v. Roman Catholic Bishop* (1990) 219 Cal. App. 3d 843, 854, 268 Cal. Rptr. 550 . *Cf. Daly v. Exxon Corp.* (1997) 55 Cal. App. 4th 39, 45, 63 Cal. Rptr. 2d 727 (where employer failed to renew fixed term employment agreement because employee complained about unsafe working conditions, employee could not state a cause of action for wrongful discharge in violation of public policy).

(n24)Footnote 17. *Tollefson v. Roman Catholic Bishop* (1990) 219 Cal. App. 3d 843, 855, 268 Cal. Rptr. 550 .

(n25)Footnote 18. However, the Court in *Foley* did expressly state that "with regard to an at will employment relationship, breach of the implied covenant cannot logically be based on a claim that a discharge was made without good cause." *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 698 n.39, 254 Cal. Rptr. 211, 765 P.2d 373 .



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 60 Liability for Wrongful Termination and Discipline
Part A. TEXT

4-60 California Employment Law § 60.06A

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.06A Retaliatory Discharge

In *Lakeside-Scott v. Multnomah County*,ⁿ¹ the Ninth Circuit held that the final decision maker's wholly independent, legitimate decision to terminate the employee insulated from liability a lower-level supervisor involved in the process who had a retaliatory motive to have the employee fired, because the termination decision was not shown to have been influenced by the subordinate's retaliatory motives. The employee brought a retaliatory discharge lawsuit in federal district court against the employer, a county agency, and the supervisor, alleging she was wrongfully terminated because she filed a complaint with a state agency alleging, among other things, that the supervisor gave preferential treatment to gays and lesbians in hiring and promotions, and because she openly criticized both the employer and the supervisor, claiming these were protected activities under the *First Amendment* and *42 U.S.C. § 1983* as well as under the state's whistle-blower act. The person who fired the employee testified that she was fired for misusing county property, conducting personal business on county time, accessing other employees' emails and documents, and engaging in workplace harassment and prejudicial acts, and that the supervisor played no role in the decision to fire the employee. The employee did not produce any evidence to the contrary. The Ninth Circuit held that the employee's protected conduct was not a substantial or motivating factor in her termination, which would have occurred even in the absence of this conduct, because even assuming the jury could have reasonably found that the supervisor harbored animosity toward the employee, a different person made the final and independent decision to terminate her.

FOOTNOTES:

(n1)Footnote 1. *Lakeside-Scott v. Multnomah County* (9th Cir. 2009) 556 F.3d 797, 803-809 .



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 60 Liability for Wrongful Termination and Discipline
Part A. TEXT

4-60 California Employment Law § 60.07

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.07 Employer Actions Short of Actual Discharge

[1] Constructive Discharge

[a] Constructive Discharge Has Legal Effect of Employer Termination of Employment

Normally, in order to establish liability under one of the theories discussed §§ 60.04-60.06, the plaintiff will need to establish that the *employer* terminated the plaintiff's employment.ⁿ¹ However, the fact that the plaintiff resigned from his or her employment will not bar recovery for wrongful termination if he or she can prove that the employer's conduct forced him or her to resign and thus amounted to a "constructive" termination.ⁿ² An actual or constructive discharge in violation of fundamental public policy gives rise to a tort action in favor of the terminated employee.^{n2.1}

Standing alone, constructive discharge is neither a tort nor a breach of contract; it is a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing constructive discharge, an employee must independently prove a breach of contract or tort in connection with the termination of employment in order to obtain damages for wrongful termination.ⁿ³ The substantive doctrines that can support a wrongful discharge cause of action are discussed in §§ 60.04 through 60.06.

[b] Elements Required to Establish Constructive Discharge

[i] Employee's Burden of Proof

In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated that a reasonable person in the employee's position would be compelled to resign.ⁿ⁴ The individual elements are discussed in [ii] through [iv], *below*.

[ii] Intolerable Conditions

In order to support a claim of constructive discharge, the conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job and earn a livelihood and serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee.ⁿ⁵ An employer need not provide a stress-free work environment. Rather, an employee is protected from unreasonably harsh conditions, in excess of those faced by his or her co-workers.^{n5.1}

The adverse working conditions must be unusually aggravated or amount to a continuous pattern before the situation will be deemed intolerable.ⁿ⁶ In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge.ⁿ⁷ Generally, though, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even if accompanied by a reduction in pay, does not by itself trigger a constructive discharge.ⁿ⁸ Similarly, the mere failure to promote the plaintiff, even if that failure is unlawfully discriminatory, does not support a finding of constructive discharge.^{n8.1}

The length of time an employee remains on the job after the onset of the alleged intolerable conditions may be one factor in determining whether a reasonable person would find the conditions intolerable; but it is not always dispositive.^{n8.2}

[iii] Intolerability Determined by Objective Standard

A constructive discharge can only exist if, under an objective standard, a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative but to quit.ⁿ⁹ Thus, courts will examine the circumstances surrounding an employee's resignation and determine whether those conditions were sufficiently egregious.ⁿ¹⁰

Whether conditions were so intolerable or aggravated under this standard is usually a question of fact. However, summary judgment against an employee on a constructive discharge claim is appropriate when, under the undisputed facts, the decision to resign was unreasonable as a matter of law.^{n10.1}

[iv] Employer Knowledge or Intent Required

The California Supreme Court has declined to require a showing that the employer intended to cause the employee to resign, but instead requires proof that the employer either deliberately created the intolerable conditions that triggered the discharge or, at a minimum, knew about the conditions and failed to remedy the situation in order to force the employee to resign.ⁿ¹¹ For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, that is, its officers, directors, managing agents, or supervisory employees.ⁿ¹²

The Court disapproved a line of cases that had permitted a constructive discharge to be established based on the employer's *constructive* knowledge of the intolerable conditions.ⁿ¹³ The Court stated that requiring employees to notify someone in a position of authority of their plight permits employers unaware of any wrongdoing to correct a potentially destructive situation.ⁿ¹⁴

Some language in the Court's discussion of the knowledge requirement suggests that an element of the proof is the employer's intent to force the employee to resign.ⁿ¹⁵ However, the Court also stated that it was not imposing an express intent requirement.ⁿ¹⁶ Thus, the Court took a middle position by requiring prior knowledge and an opportunity to correct the intolerable working conditions, without requiring evidence that the employer created the working conditions or permitted them to exist for the purpose of causing a resignation.

[v] Effect of Delay Before Resignation

Another issue that has arisen in regard to constructive discharge claims is the effect of a delay between the onset of the allegedly intolerable working conditions and the employee's resignation. The California Supreme Court made clear in *Turner v. Anheuser-Busch, Inc.* n17 that the "reasonable employee" standard (discussed in [iii], *above*) makes the length of time one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable employee, but that it is not the dispositive factor.n18 The Court disapproved a court of appeal opinion to the extent that it held that a delay greater than the applicable statute of limitations period precluded a constructive discharge claim.n19 However, in the case before it the Court held that the delay between the allegedly illegal activities of the employer and the employee's resignation supported a conclusion that a reasonable employee would not have found the working conditions intolerable.n20

The California Supreme Court has held that in a constructive discharge action, the statute of limitations begins to run when the employment actually is terminated, that is, when the employee resigns, and not when the alleged intolerable working conditions occur.n21 The Court pointed out that having the statute of limitations run from the date of termination would not enable an employee to delay bringing a lawsuit indefinitely because the longer the employee delays resigning, the more difficult it may be to prove that the conditions were intolerable or that such conditions caused the resignation.n22

Similarly, the Ninth Circuit has held that in constructive discharge cases, periods of limitation begin to run on the date of the employee's resignation, just as they do in other cases of wrongful discharge.n22.1 In considering the timeliness of the complaint, the court first stated that the period of limitations runs from the discriminatory act. The court then concluded that while a resignation is ordinarily not a discriminatory act, when a resignation is a constructive discharge, it is a discriminatory act.n22.2 Accordingly, in this Title VII case, plaintiff's discrimination claim was timely filed when her quitting was precipitated by her supervisor's harassing and discriminatory conduct on that day, which was within the relevant period of limitations, even though plaintiff's action was the result of the cumulative effects of her supervisor's repeated acts of discrimination, most of which occurred before that date.n22.3

[2] Wrongful Discipline and Demotion

The California Supreme Court has held that the principles underlying an action for breach of an express or implied in fact agreement not to terminate are equally applicable in the context of discipline. In *Scott v. Pacific Gas and Electric Co.*, n23 the plaintiffs alleged that their employer violated an implied agreement not to demote when they were demoted without the benefits of the employer's detailed progressive discipline policy. Following the court of appeal's dismissal of the action on the ground that there was no cognizable claim for wrongful demotion, the Supreme Court stated that it could see no reason why courts should not enforce contracts, express or implied, that restrict an employer's ability to demote an employee at will.n24 The Court explained that, just as in the termination context, there is a common law presumption that an employee may be demoted at will.n25 It concluded that under the principles enunciated in *Foley v. Interactive Data Corp.*, n26 this presumption may be rebutted by evidence of an express or implied contractual agreement to demote only for good cause.n27

The Court found that the employer's progressive discipline policy, which was intended to be applicable to all employees, supported an implied agreement not to demote without good cause. Furthermore, the employer's failure to apply the progressive discipline policy to plaintiffs compelled the conclusion that the employer breached its implied contractual agreement by wrongfully demoting plaintiffs.n28

Similarly, the doctrine of wrongful termination in violation of public policy has been interpreted to embrace wrongful discipline as well. In *Garcia v. Rockwell Int'l Corp.*, n29 the plaintiff alleged that his employer ordered him to mischarge the amount of time he and other workers spent on certain government projects. When he reported this alleged instruction to the appropriate governmental agency, the employer suspended him without pay. After he filed suit, the

employer reinstated him. The court stated that it could see no reason why the rationale prohibiting retaliatory firing should not be applicable in a case in which an employee is wrongfully disciplined and suffers damage as a result of, not breach of a contract term, but rather, breach of a duty growing out of the contract.ⁿ³⁰ The court found that the public policy expressed in *Labor Code Section 1102.5*, which forbids retaliation against an employee for whistleblowing activities,ⁿ³¹ clearly prohibited the conduct of the plaintiff's employer.ⁿ³² It stated that there was no logical reason to disallow a cause of action for wrongful discipline when one exists for wrongful termination because the same wrongful conduct is involved whether the wrong inflicted (i.e., the retaliation) is a suspension without pay or a discharge.ⁿ³³ The court noted that the employer had not offered the employee reinstatement until after he had filed suit, and that if the court held that the employee only had a remedy for tortious termination, employers would not be encouraged to avoid legal action by offering reinstatement after imposition of retaliatory punitive measures.ⁿ³⁴

On the other hand, in *Carter v. CB Richard Ellis, Inc.*,^{n34.1} a woman sued her employer based on the employer's reorganization, which resulted in her demotion and reduction in her salary. The court recognized a cause of action for wrongful demotion without cause. However, the court held that the plaintiff presented no evidence suggesting the employer contractually limited its right to reorganize its administrative operations in any manner it saw fit. There was no evidence establishing or suggesting (or from which a reasonable inference could be drawn) that the employer created any such implied contractual rights orally or by implication in fact.

[3] Salary Reductions

In a case of first impression, the California Court of Appeal adopted the apparent majority rule that the power to terminate an employee at will includes the power to modify the terms of the employment relationship, such as salary terms. Further, continued employment after modification is deemed acceptance of that modification.ⁿ³⁵ In *DiGiacinto v. Ameriko-Omserv Corp.*,ⁿ³⁶ the defendant-employer received notification from a contracting party that the plaintiff-employee's position should be eliminated as a cost-saving measure. The defendant instead reorganized the department, decreased the plaintiff's responsibilities, and reduced his pay rate. After written and oral notification of the decrease, the plaintiff asked that his pay not be reduced. After being informed that the decrease was the only way to preserve the job, the plaintiff refused to sign the notification letter, but continued to work for the defendant for almost one year before filing suit. The plaintiff argued that he did not expressly or impliedly rescind, repudiate, or abandon his claim for damages for breach of the original employment contract, and that continuing to work for the defendant constituted mitigation of damages. The defendant contended that plaintiff was an at-will employee whose employment was terminated and who was offered a new contract based on lower prospective compensation, and that the plaintiff's continued employment with knowledge of the lower compensation constitutes acceptance of the new contract and waiver of any right to claim additional compensation.ⁿ³⁷ The court concluded that an employer of an at-will employee can unilaterally change the compensation agreement without being in breach of the employment agreement; with respect to an at-will employee, the employer can terminate the old contract and make an offer for a unilateral contract under new terms. The *DiGiacinto* court identified the majority rule holding that, as a matter of law, an at-will employee who continues in the employ of an employer after that employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions.ⁿ³⁸ The court further noted that the minority rule does not reach this result as a matter of law, but examines the facts of each case to determine whether the employee accepted the modified terms.ⁿ³⁹ Expressly not choosing between these analyses, the *DiGiacinto* court concluded that the employee accepted the modified terms of employment. Moreover, the court concluded that the letter lowering the employee's salary constitutes the employer's notice of termination of the old at-will employment contract and an offer of a unilateral contract under new terms.ⁿ⁴⁰

Legal Topics:

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

Labor & Employment Law
 Discrimination
 Disparate Treatment
 Defenses & Exceptions
 General Overview
 Labor & Employment Law
 Employment Relationships
 General Overview
 Labor & Employment Law
 Wrongful

TerminationConstructive DischargeGeneral Overview

FOOTNOTES:

(n1)Footnote 1. An employer's coworkers may not be held liable for terminating the employee's employment, under either a common law contract or tort theory. *See Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal. App. 3d 1507, 1522, 281 Cal. Rptr. 890 (agents of an employer, acting within the course and scope of their authority, and not solely for their own benefit, are protected by the manager's privilege from incurring tort liability for personnel decisions); *Kacludis v. GTE Sprint Communications Corp.* (N.D. Cal. 1992) 806 F. Supp. 866, 872 ("If [the] privilege protects nothing else, it protects a manager's right to manage personnel (including firing and hiring) without fear of independent liability, absent concrete and specific allegations that such actions were *entirely* for the benefit of the individual.") (emphasis in original).

(n2)Footnote 2. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1245, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *Colores v. Board of Trustees of California State University* (2003) 105 Cal. App. 4th 1293, 1305-1313, 130 Cal. Rptr. 2d 347 (allowing claim for wrongful constructive discharge in violation of public policy in retaliation for plaintiff's whistle blowing activities); *see Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1110 ("Constructive discharge is, indeed, just one form of wrongful discharge. The fact that the actual act of terminating employment is initiated by the employee, who concludes that she is compelled to leave as a result of the employer's actions, rather than by the employer directly does not change the fact that the employee has been discharged"; thus, since date of employee's resignation fell within relevant period of limitations, her Title VII discrimination claim was timely filed).

For the standard jury instruction on the essential factual elements for a claim of breach of employment contract for unspecified term by constructive discharge, *see* Judicial Council of California Civil Jury Instructions, CACI 2402 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the special verdict form for a cause of action for breach of an employment contract for an unspecified term, constructive discharge, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2401 (Matthew Bender). For discussion of the CACI instructions and special verdict forms generally, *see* §§ 61.05, 61.06.

(n3)Footnote 2.1. *Colores v. Board of Trustees of California State University* (2003) 105 Cal. App. 4th 1293, 1306, 130 Cal. Rptr. 2d 347 .

(n4)Footnote 3. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *Colores v. Board of Trustees of California State University* (2003) 105 Cal. App. 4th 1293, 1306, 1313-1314, 130 Cal. Rptr. 2d 347 (plaintiff presented evidence of breach of implied employment contract in both employer's personnel practice of not firing except for cause and employee's 21-year service); *see Starzynski v. Capital Public Radio, Inc.* (2001) 88 Cal. App. 4th 33, 105 Cal. Rptr. 2d 525 (at-will employee has no contractual claim for wrongful discharge based on constructive discharge on account of intolerable working conditions).

(n5)Footnote 4. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *Colores v. Board of Trustees of California State University* (2003) 105 Cal. App. 4th 1293, 1305, 1314-1319, 130 Cal. Rptr. 2d 347 (plaintiff's disability retirement did not preclude finding of constructive discharge); *Casenas v. Fujisawa USA, Inc.* (1997) 58 Cal. App. 4th 101, 103, 113-115, 67 Cal. Rptr. 2d 827 (as matter of law, no reasonable employee would find Casenas's working conditions so egregious as to compel resignation; textbook example of appropriate response to harassment complaint).

(n6)Footnote 5. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1246, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 .

(n7)Footnote 5.1. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1247, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *Casenas v. Fujisawa USA, Inc.* (1997) 58 Cal. App. 4th 101, 113-114, 67 Cal. Rptr. 2d 827 .

(n8)Footnote 6. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1247, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *Colores v. Board of Trustees of California State University* (2003) 105 Cal. App. 4th 1293, 1306, 130 Cal. Rptr. 2d 347 .

(n9)Footnote 7. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1247 n.3, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (noting that case before it involved no such allegations).

(n10)Footnote 8. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1247, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (citing *Valdez v. City of Los Angeles* (1991) 231 Cal. App. 3d 1043, 1056, 282 Cal. Rptr. 726 , and *Soules v. Cadam, Inc.* (1991) 2 Cal. App. 4th 390, 401, 3 Cal. Rptr. 2d 6); *Colores v. Board of Trustees of California State University* (2003) 105 Cal. App. 4th 1293, 1306, 130 Cal. Rptr. 2d 347 ; see also *Schnidrig v. Columbia Mach., Inc.* (9th Cir. 1996) 80 F.3d 1406, 1411-1412 (replacement of employee with younger worker, move to smaller office, exclusion from meetings and decisions did not constitute constructive termination under federal age discrimination law); *King v. AC & R Advertising* (9th Cir. 1995) 65 F.3d 764, 767 (demotion in job level, even when accompanied by reduction in pay does not constitute constructive discharge); *Addy v. Bliss & Glennon* (1996) 44 Cal. App. 4th 205, 217-218, 51 Cal. Rptr. 2d 642 (denial of training and demotion not sufficiently intolerable to avoid summary judgement on constructive discharge claim); *Gibson v. Aro Corp.* (1995) 32 Cal. App. 4th 1628, 1634-1636, 38 Cal. Rptr. 2d 882 .

(n11)Footnote 8.1. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1247, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *Casenas v. Fujisawa USA, Inc.* (1997) 58 Cal. App. 4th 101, 114-115, 67 Cal. Rptr. 2d 827 .

(n12)Footnote 8.2. *Colores v. Board of Trustees of California State University* (2003) 105 Cal. App. 4th 1293, 1306, 130 Cal. Rptr. 2d 347 .

(n13)Footnote 9. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1248, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *Colores v. Board of Trustees of California State University* (2003) 105 Cal. App. 4th 1293, 1305, 1307-1313, 130 Cal. Rptr. 2d 347 (plaintiff made sufficient showing to raise a triable issue as to whether reasonable person would have felt compelled to resign; recognizing claim for constructive discharge in violation of public policy in retaliation for plaintiff's whistle blowing activities).

(n14)Footnote 10. See *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1254-1256, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (allegations of illegality at workplace were insufficient to support claim of constructive discharge); see also *Casenas v. Fujisawa USA, Inc.* (1997) 58 Cal. App. 4th 101, 114-115, 67 Cal. Rptr. 2d 827 (as matter of law, no reasonable employee would find allegedly unfair performance evaluation and failure to consider plaintiff for management position so egregious as to compel resignation); *Gibson v. Aro Corp.* (1995) 32 Cal. App. 4th 1628, 1636 1637, 38 Cal. Rptr. 2d 882 (employee's embarrassment about working as sales representative did not convert demotion into constructive discharge; proper focus is on working conditions themselves and not on employee's subjective reaction to those conditions); *Rochlis v. Walt Disney Co.* (1993) 19 Cal. App. 4th 201, 212-213, 23 Cal. Rptr. 2d 793 , disapproved on other grounds, *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (allegations that (1) job was not what plaintiff had expected, (2) plaintiff had not been given sufficient authority to carry out job's responsibilities, (3) plaintiff did not receive compensation he believed he deserved, and (4) plaintiff was criticized, held insufficient as matter of law to constitute constructive discharge; court characterized those allegations as merely common conditions for highly paid senior executives such as plaintiff).

(n15)Footnote 10.1. *Scotch v. Art Institute of California* (2009) 173 Cal. App. 4th 986, 1022-1023, 93 Cal. Rptr. 3d 338 (employee was not constructively discharged as matter of law by change of his status from full time to part time, where employer did not change his working conditions or make it difficult for him to perform his job functions, there was no evidence he was shunned, treated harshly, or subjected to epithets and scorn, and his appointment letter informed him employer might change his employment status to part time in case of enrollment decline, so that reasonable employer would not have realized reasonable person in employee's position would be compelled to resign).

(n16)Footnote 11. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1248-1249, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; see also *Gibson v. Aro Corp.* (1995) 32 Cal. App. 4th 1628, 1638-1640, 38 Cal. Rptr. 2d 882 (judgment for employee reversed because employer did not have actual knowledge of alleged intolerable working conditions and employee admitted he did not tell any of his superiors that job was intolerable).

(n17)Footnote 12. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1251, 876 P.2d 1022, 1032 Cal. Rptr. 2d 223 *Colores v. Board of Trustees* (2003) 105 Cal. App. 4th 1293, 1305-1306, 130 Cal. Rptr. 2d 347 .

(n18)Footnote 13. See *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (disapproving cases following *Brady v. Elixir Industries* (1987) 196 Cal. App. 3d 1299, 1306, 242 Cal. Rptr. 324 , to the extent that they required only constructive knowledge).

(n19)Footnote 14. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1250, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 .

(n20)Footnote 15. See *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1249-1250, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (employer must "know about [the intolerable working conditions] and fail to remedy the situation in order to force the employee to resign").

(n21)Footnote 16. See *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1248, 1249, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (noting that majority of courts have declined to require express intent, and that express intent requirement might unduly focus trier of fact's attention on presence or absence of direct evidence).

(n22)Footnote 17. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 .

(n23)Footnote 18. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1254, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 .

(n24)Footnote 19. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1254, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (disapproving *Panopulos v. Westinghouse Elec. Corp.* (1989) 216 Cal. App. 3d 660, 264 Cal. Rptr. 810).

(n25)Footnote 20. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1255, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 .

(n26)Footnote 21. *Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal. 4th 731, 737-739, 63 Cal. Rptr. 2d 636, 936 P.2d 1246 .

(n27)Footnote 22. *Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal. 4th 731, 740, 63 Cal. Rptr. 2d 636, 936 P.2d 1246 .

(n28)Footnote 22.1. *Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1111 (date of resignation triggers the limitations period in a constructive discharge case).

(n29)Footnote 22.2. *Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1111 .

(n30)Footnote 22.3. *Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1110 (time limitation period for constructive discharge begins with employee's resignation when employer's discriminatory conduct persisted to employee's final day on job).

(n31)Footnote 23. *Scott v. Pac. Gas and Elec. Co.* (1995) 11 Cal. 4th 454, 46 Cal. Rptr. 2d 427, 904 P.2d 834 .

(n32)Footnote 24. *Scott v. Pac. Gas and Elec. Co.* (1995) 11 Cal. 4th 454, 465, 46 Cal. Rptr. 2d 427, 904 P.2d 834 .

(n33)Footnote 25. *Scott v. Pac. Gas and Elec. Co.* (1995) 11 Cal. 4th 454, 464-465, 46 Cal. Rptr. 2d 427, 904 P.2d 834 .

(n34)Footnote 26. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n35)Footnote 27. *Scott v. Pac. Gas and Elec. Co.* (1995) 11 Cal. 4th 454, 465, 46 Cal. Rptr. 2d 427, 904 P.2d 834 .

(n36)Footnote 28. *Scott v. Pac. Gas and Elec. Co.* (1995) 11 Cal. 4th 454, 465-466, 46 Cal. Rptr. 2d 427, 904 P.2d 834 .

(n37)Footnote 29. *Garcia v. Rockwell Int'l Corp.* (1986) 187 Cal. App. 3d 1556, 1560-1562, 232 Cal. Rptr. 490 .

(n38)Footnote 30. *Garcia v. Rockwell Int'l Corp.* (1986) 187 Cal. App. 3d 1556, 1561, 232 Cal. Rptr. 490 .

(n39)Footnote 31. See discussion of Lab. Code § 1102.5 at § 60.03[2][aa].

(n40)Footnote 32. *Garcia v. Rockwell Int'l Corp.* (1986) 187 Cal. App. 3d 1556, 1561, 232 Cal. Rptr. 490 .

(n41)Footnote 33. *Garcia v. Rockwell Int'l Corp.* (1986) 187 Cal. App. 3d 1556, 1562, 232 Cal. Rptr. 490 .

(n42)Footnote 34. *Garcia v. Rockwell Int'l Corp.* (1986) 187 Cal. App. 3d 1556, 1562, 232 Cal. Rptr. 490 .

(n43)Footnote 34.1. *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal. App. 4th 1313, 1326-1329 .

(n44)Footnote 35. *DiGiacinto v. Ameriko-Omserv Corp.* (1997) 59 Cal. App. 4th 629, 636-639, 69 Cal. Rptr. 2d 300 .

(n45)Footnote 36. *DiGiacinto v. Ameriko-Omserv Corp.* (1997) 59 Cal. App. 4th 629, 69 Cal. Rptr. 2d 300 .

(n46)Footnote 37. *DiGiacinto v. Ameriko-Omserv Corp.* (1997) 59 Cal. App. 4th 629, 632-634, 69 Cal. Rptr. 2d 300 (superior court rejected plaintiff's mitigation of damages argument as unpersuasive and lacking factual support; if employer had terminated employment, employee would have had no action against employer and, therefore, no damages to mitigate).

(n47)Footnote 38. *DiGiacinto v. Ameriko-Omserv Corp.* (1997) 59 Cal. App. 4th 629, 636-637, 69 Cal. Rptr. 2d 300 ; see, e.g., *Hathaway v. General Mills, Inc.* (Tex. 1986) 711 S.W.2d 227, 229 (continuation of work after modification constitutes acceptance as matter of law).

(n48)Footnote 39. *DiGiacinto v. Ameriko-Omserv Corp.* (1997) 59 Cal. App. 4th 629, 636-637, 69 Cal. Rptr. 2d 300 ; see, e.g., *Schoppert v. CCTC Int'l, Inc.* (N.D. Ill. 1997) 972 F. Supp. 444, 446-447 (continued employment for two and a half years after modification without indication that employer might change position constitutes acceptance despite oral objections to modifications).

(n49)Footnote 40. *DiGiacinto v. Ameriko-Omserv Corp.* (1997) 59 Cal. App. 4th 629, 639, 69 Cal. Rptr. 2d 300 .



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California Employment Law

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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 60 Liability for Wrongful Termination and Discipline
Part A. TEXT

4-60 California Employment Law § 60.08

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.08 Remedies in Wrongful Discharge Action

[1] Introduction

Relatively few cases address specific damages issues relating to wrongful discharge. Therefore, the discussion below focuses on the general availability of certain types of damages. In some instances, remedies available in other areas of law, such as employment discrimination, are discussed when it seems likely that similar damages would be available to a wrongful discharge plaintiff.

[2] Tort Action

[a] General Damages

In tort actions generally, a plaintiff may obtain compensation for all harm proximately caused by the defendant's wrongful conduct.ⁿ¹ Damages properly include "[r]easonable compensation for any pain, discomfort, fears, anxiety and other mental and emotional distress suffered by [him or her] and of which injury was a cause [and for similar suffering reasonably certain to be experienced in the future from the same cause]."ⁿ² Tort damages are available in an action for wrongful termination in violation of public policy.ⁿ³

In *Foley v. Interactive Data Corp.*,ⁿ⁴ the California Supreme Court held that tort remedies are not available for the breach of the implied covenant of good faith and fair dealing in the employment context. The dissent, however, suggested that, under circumstances where it could be shown that the employer was aware at the time of the contract that bad faith discharge would create emotional distress, the plaintiff might be able to recover damages for emotional distress.ⁿ⁵ The dissent cited four past contract cases outside of the employment context that held that emotional distress damages are available in contract cases if it is reasonably foreseeable at the time of making the contract that breach of the contract would cause plaintiff mental anguish.ⁿ⁶

For a general discussion of tort damages, see Levy, Golden, and Sacks, California Torts, Ch. 50, *Damages, Costs, Attorneys' Fees, and Interest*, Part A, and Ch. 51, *Recovery for Pain and Suffering*.

[b] Special Damages**[i] Wages and Benefits**

The plaintiff can obtain damages for lost wages and benefits, including health insurance and life insurance, which should be calculated at the replacement cost for plaintiff, not the cost to the employer.ⁿ⁷ In most cases, the trier of fact must determine the period of time that plaintiff would have worked for defendant, and then calculate the monetary value of all the compensation he or she would have received during that time, subtracting any amounts obtained or obtainable through reasonable efforts at mitigation.ⁿ⁸ If the plaintiff would have received raises absent defendant's tortious conduct, damages should include amounts representing such raises.ⁿ⁹ Although these damages may to some degree be speculative, by analogy to the employment discrimination context it can be argued that "unrealistic exactitude" is not required and that any uncertainties in the calculation of damages should be resolved against an employer who has wrongfully terminated an employee.ⁿ¹⁰

Often, the amount of lost wages is determined by expert witnesses. There may be disparity between opposing experts' estimates and methodological disagreements, but a court will not reverse the fact finder's determination "unless the testimony on which it is based is wholly unacceptable to reasonable minds or unbelievable per se."ⁿ¹¹

[ii] Future Earnings

Compensation for wages and benefits from the date of judgment forward are referred to as "front pay." Front pay based on future earnings is available to a plaintiff in a wrongful discharge action.ⁿ¹² In Title VII cases, front pay is generally awarded as an alternative to reinstatement if reinstatement appears inappropriate.ⁿ¹³ For this reason, it may be wise for plaintiff's counsel to include a request for reinstatement when requesting front pay as an element of damages.ⁿ¹⁴ Front pay is generally awarded only for a limited period of time.ⁿ¹⁵

■ PRACTICE TIP:

No case expressly limits the amount of front pay that may be awarded in a wrongful termination suit. However, the employer may be able to argue mitigation of damages as an offset to front pay awards.ⁿ¹⁶
Commentary by William M. Crosby.

In general, that portion of a compensatory damages award which represents future wages and benefits must be reduced "to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received."ⁿ¹⁷ Competent evidence on any or all of the following factors should be considered by the trier of fact: (1) the amount the plaintiff would have earned during each period of lost compensation, (2) the discount rate that properly produces a present lump sum which by way of safe investments might yield the appropriate future sums, and (3) the effects of inflation.ⁿ¹⁸ For further discussion of discounting of future awards generally, see Levy, Golden, and Sacks, California Torts, Ch. 52, *Recovery for Medical Expenses and Economic Loss*.

[iii] Prejudgment Interest

Prejudgment interest is an element of compensatory damages that provides plaintiff with "the accretion of wealth which money or particular property could have produced during a period of loss."ⁿ¹⁹

In a California tort case, prejudgment interest may be available under any of three statutes. *Civil Code Section 3287(a)* states that interest must be awarded if damages are certain or capable of being made certain by calculation on a particular day prior to judgment.ⁿ²⁰ This statute has been interpreted to apply to tort as well as contract causes of action.ⁿ²¹ However, the statute applies only if the dispute concerns a question of liability alone and not the basis on which damages are computed.ⁿ²² Thus, it may have limited utility with regard to damages other than those representing lost wages in wrongful termination cases because the amount of such damages is usually disputed.

Prejudgment interest also may be obtained in a wrongful discharge case sounding in tort under *Civil Code Section 3288*, which permits interest to be awarded at the discretion of the trier of fact in any case of a breach of a noncontractual obligation or in any case of malice, fraud, or oppression.ⁿ²³ Prejudgment interest under section 3288 does not apply to the portion of the judgment representing emotional distress damages.ⁿ²⁴

The third statute providing for prejudgment interest in a tort actionⁿ²⁵ is *Civil Code Section 3291*. This section provides that if the plaintiff in a "personal injury" action makes a written pretrial settlement offer pursuant to *Code of Civil Procedure section 998*, which defendant declines, and plaintiff later achieves a more favorable result at trial, he or she will receive interest at the legal rate of ten percent from the date of the unaccepted offer.ⁿ²⁶ It is not clear whether wrongful termination tort causes of action are classified as "personal injury" actions for purposes of this statute. One court of appeal held that a wrongful discharge action primarily involves the infringement of property rights and not personal injury. Therefore, according to the court, a wrongful discharge action is not an action to recover personal injury damages within the meaning of the statute.ⁿ²⁷

For a general discussion of prejudgment interest in tort actions, see Levy, Golden, and Sacks, *California Torts*, Ch. 50, *Damages, Costs, Attorneys' Fees, and Interest*, §§ 50.50; 50.52.

[c] Punitive Damages

Punitive damages are available in tort actions in which it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice,ⁿ²⁸ and acted with an intent to vex, injure, or annoy, or with a conscious disregard of plaintiff's rights.ⁿ²⁹

Malice, oppression, and fraud are defined in *Civil Code Section 3294(c)*.ⁿ³⁰ Wrongful termination, without more, will not sustain a finding of malice or oppression.^{n30.1}

Conscious disregard of rights is conduct by a defendant who is aware of the probable dangerous consequences of such conduct to plaintiff's interests and willfully and deliberately fails to avoid those consequences.ⁿ³¹ Punitive damages may be obtained in a wrongful discharge action that sounds in tort, i.e., violation of public policy.ⁿ³² For example, in one caseⁿ³³ in which an employee who resigned following his refusal to participate in illegal activities sued for tortious "constructive discharge," the employee was awarded punitive damages because the employer consciously disregarded the employee's rights by willfully failing to ensure that employees were informed of the law relevant to their duties or to ensure that employees would not be required to participate in illegal conduct.

In order to award punitive damages, the trier of fact must find that the plaintiff suffered some actual damages, but the amount of actual damages may be nominalⁿ³⁴ or offset by a defendant's cross-claim.ⁿ³⁵ Although it is often stated that punitive damages must bear a "reasonable relationship" to actual damages,ⁿ³⁶ no formula has been established to determine what is reasonable, and in fact the cases vary widely in their determinations on this issue.ⁿ³⁷

It appears that the "reasonableness" of the relationship between punitive and actual damages may depend in part on the reprehensibility of the defendant's conduct.ⁿ³⁸

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

In wrongful termination cases, particularly where employment discrimination or harassment is not alleged, punitive damages are by no means automatic. The practitioner should choose carefully when to plead and attempt to prove them. Typically, they may be awarded when an employer takes undue, overreaching advantage of a vulnerable employee. Obviously, after *Foley*, they are not available at all unless a violation of public policy is alleged. *Commentary by John M. True, III.*

An employer may be liable for punitive damages for the acts of an employee (for example, a supervisor), if the employer had advance knowledge of the unfitness of the employee but employed or continued to employ him or her with conscious disregard for the rights of others.ⁿ³⁹ If the employer authorized or ratified the wrongful conduct for which the damages are awarded, or if the employer was personally guilty of oppression, fraud, or malice.ⁿ⁴⁰ In employment cases, the primary defendant is often a corporation. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification, or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.ⁿ⁴¹ Retention of the offending employee after the corporation has full knowledge of the wrongful acts constitutes ratification.ⁿ⁴² An employer's failure to act on an employee's complaints about harassment by coworkers and retaliation for such complaints also constitute ratification that may subject the corporate employer to punitive damages.ⁿ⁴³

In *White v. Ultramar, Inc.*,ⁿ⁴⁴ the California Supreme Court construed the meaning of the term "managing agent" under *Civ. Code* § 3294(b). The Court variously defined the responsibilities of a managing agent to include:

- "Substantial independent authority and judgment over decisions that ultimately determine corporate policy[;]"ⁿ⁴⁵
- "Substantial discretionary authority over decisions that ultimately determine corporate policy[;]"^{n45.1} and
- "Substantial discretionary authority over significant aspects of a corporation's business."^{n45.2}

Accordingly, liability turns not on the employee's managerial classification or title, but on the extent of his or her decision-making discretion.^{n45.3} Thus, supervisors who have no discretionary authority over decisions that ultimately determine corporate policy are not to be considered managing agents even though they may have the ability to hire or fire other employees. In order to demonstrate that an employee is a true managing agent under *Civ. Code* § 3294(b), a plaintiff seeking punitive damages must show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business.^{n45.4}

The *White* Court approved the holding in *Egan v. Mutual of Omaha Ins. Co.*,^{n45.5} stating that the key factor in determining whether an employee acts with managerial authority is not always determined by the employee's title in the corporate hierarchy, but rather by his or her ability to make more or less final decisions for the company in the particular aspect of the company's business which is at issue, for example, termination of a subordinate's employment.^{n45.6}

Punitive damages are awarded "for the sake of example and by way of punishing the defendant."ⁿ⁴⁶ Thus, in arriving at the amount of punitive damages, juries are instructed to determine the amount that will have a deterrent effect on the particular defendant in light of its financial condition.ⁿ⁴⁷ If the defendant is a large, profitable corporation, punitive damages must be proportionately sizeable to have the intended effect of punishment and deterrence.ⁿ⁴⁸ The financial condition of a defendant may be measured in terms of its net worth.ⁿ⁴⁹ Evidence of what proportion of a company's annual income is embodied by the punitive damages award may also be used to determine whether the amount of the award is proper.ⁿ⁵⁰ However, because defendant's financial condition is not relevant to compensatory damages and may be prejudicial to the jury,ⁿ⁵¹ a defendant may obtain a protective order requiring the plaintiff to establish a prima facie case of liability for punitive damages prior to the introduction of evidence of defendant's financial condition or any profits made by the defendant because of the alleged wrongful conduct.ⁿ⁵² In addition, the trial court, on application of the defendant, must bifurcate a trial in which punitive damages are sought; in that case, evidence of the defendant's profits and financial condition is admitted only after a verdict is returned for plaintiff awarding actual damages and finding that defendant's conduct warranted an award of punitive damages.ⁿ⁵³

For a complete discussion of punitive damages, *see* Levy, Golden, and Sacks, California Torts, Ch. 54, "Punitive

Damages."

[3] Contract Action

[a] Wages and Benefits

Civil Code Section 3300 provides that the proper measure of damages for breach of a contract is the amount that will compensate the party aggrieved for all the detriment proximately caused thereby, or that in the ordinary course of things would be likely to result therefrom.ⁿ⁵⁴ The general rule is that the measure of recovery by a wrongfully discharged employee in a contract action is the amount of salary agreed on for the period of service, less the amount which the employer proves the employee has earned or with reasonable effort might have earned from other employment.ⁿ⁵⁵ Benefits, such as health and life insurance provided by the employer, are included as part of the compensation to which wrongfully discharged employees are entitled.ⁿ⁵⁶ *see* discussion of calculation of damages for lost wages and benefits in [2][b][i], *above*.

It should be noted that once an employer is found to have wrongfully discharged an employee, the former employee is entitled to recover lost wages and benefits, even if the person is disabled from working following the termination.ⁿ⁵⁷

However, any workers' compensation or disability benefits the former employee receives may be offset from the contract damages.ⁿ⁵⁸

[b] Future Earnings

Awards of future lost earnings, or front pay, are available in a wrongful discharge action based on contract.ⁿ⁵⁹ *see* discussion of calculation of damages for future earnings in [2][b][ii], *above*.

[c] Reliance Damages

In most wrongful discharge cases based on breach of an employment contract, the damages suffered by plaintiff are based on the loss of the benefit of the bargain agreed to by plaintiff and defendant. In some cases, plaintiff may suffer additional damages because he or she acted in reliance on the existence of the contract. For example, a plaintiff may have moved a substantial distance to begin employment. Such "reliance" damages are properly included in plaintiff's recovery.ⁿ⁶⁰ The California Supreme Court has held that a plaintiff alleging fraud in the inducement of employment against his or her former employer may properly seek reliance damages for the cost of uprooting family, expenses incurred in relocation and loss of security and income associated with former employment.ⁿ⁶¹

[d] Prejudgment Interest

In a contract cause of action, prejudgment interest may be available under *Civil Code Section 3287*. *Civil Code Section 3287(a)* allows interest on damages that are certain, or able to be made certain by calculation, and that are vested in the plaintiff on a particular day. For discussion of the availability of interest under section 3287(a), *see* [2][b][iii], *above*.

Prejudgment interest may also be available in a contract case under *Civil Code Section 3287(b)*, which permits an award of interest in a contract action where the amount of damages is not liquidated. The award of interest is in the court's discretionⁿ⁶² and must not be decided by the jury.ⁿ⁶³ Interest may run from any date chosen by the court, as early as the date the action was commenced.ⁿ⁶⁴ The delay involved in the litigation appears to be an important factor in determining whether to award interest under Section 3287(b).ⁿ⁶⁵

The good or bad faith of defendant in opposing plaintiff's claim may also play a role in the decision to award interest.ⁿ⁶⁶

[4] Mitigation of Damages and Deduction of Collateral Compensation

Plaintiffs in tort and contract actions generally have a duty to make a reasonable effort to minimize the damage caused by defendant's actions.ⁿ⁶⁷ In the case of the wrongfully discharged employee, mitigation means seeking other employmentⁿ⁶⁸ and making a reasonable effort to retain any employment that is secured.ⁿ⁶⁹ Defendant may show that compensation earned by the plaintiff after termination, or that amount which could have been earned with reasonable diligence, should be deducted from plaintiff's damages.ⁿ⁷⁰ Defendant must prove plaintiff's failure to mitigate by showing that comparable positions were available for which plaintiff was qualified, and that plaintiff did not make reasonable efforts to obtain them.ⁿ⁷¹ In the event that plaintiff found but failed to retain comparable employment, defendant may prove failure to mitigate by showing that plaintiff did not make reasonable efforts to retain such employment.ⁿ⁷² For example, if plaintiff is fired from the newly-obtained employment for cause, any amount the employee could have earned by retaining that employment should be deducted from plaintiff's damages.ⁿ⁷³

Plaintiff is not required to bear undue risk, burden, or humiliation in order to fulfill the duty to mitigate; only reasonable diligence is demanded.ⁿ⁷⁴ Thus, plaintiff need not accept inferior employment or work of a different kind,ⁿ⁷⁵ nor must he or she relocate to find a job.ⁿ⁷⁶ Plaintiff's damages should include any sums expended in his or her reasonable efforts at mitigation.ⁿ⁷⁷

A unique opportunity to mitigate damages may arise if the defendant employer offers the terminated employee his or her job back. In *Ford Motor Co. v. Equal Employment Opportunity Commission*,ⁿ⁷⁸ a case arising under Title VII of the Civil Rights Act of 1964, the United States Supreme Court held that an ex-employee's refusal of the employer's unconditional offer of reinstatement to the same or substantially equivalent position operates to cut off the back pay period at the date of refusal. The holding does not affect plaintiff's right to back pay for the period predating the effective date of the reinstatement offer.ⁿ⁷⁹ One Ninth Circuit case has stated that the *Ford Motor Co.* decision does not change the California rule that the question of whether the injured party has acted reasonably to minimize damages is one of fact.ⁿ⁸⁰ The court stated that the *Ford Motor Co.* rule need not be applied inflexibly, and held proper the jury's decision that an employer's offer of reinstatement was not a reasonable alternative mandated by the duty to mitigate damages because the evidence showed special circumstances for the employee's refusal to accept reinstatement, including the employee's poor mental condition.ⁿ⁸¹

As discussed above, a damages award may be reduced by the amounts earned or earnable by the plaintiff through reasonable diligence. Under the collateral source rule, other types of compensation received by the plaintiff from sources other than the defendant generally are not deducted from the award.ⁿ⁸² Note that the rule applies only to sources other than the defendant; thus, severance pay paid by defendant may be deducted from damages.ⁿ⁸³ Collateral benefits that are not deducted include unemployment benefits,ⁿ⁸⁴ retirement benefits,ⁿ⁸⁵ and medical benefits.ⁿ⁸⁶ However, workers' compensation benefitsⁿ⁸⁷ or disability benefitsⁿ⁸⁸ received by the plaintiff must be set off against any economic or contract damages recovered for wrongful termination.

For discussion of mitigation of damages and the collateral source rule generally, *see* Levy, Golden, and Sacks, California Torts, ch. 53 (Matthew Bender).

[5] Equitable Remedies

To date, only one court of appeal case has addressed the issue of the availability of reinstatement as an equitable remedy in common law wrongful termination actions. In *Barndt v. County of Los Angeles*,ⁿ⁸⁹ the court of appeal held that specific performance is not available as a remedy in a wrongful termination action because of the long-established rule that a contract for personal services cannot be specifically enforced.ⁿ⁹⁰ In *Barndt*, the plaintiff, a cardiologist, sued his employer to specifically enforce the terms of a settlement agreement that had been entered into by the parties, part of which included a withdrawal of plaintiff's termination and his appointment to a permanent position in the cardiology department of the medical center. The court of appeal held that plaintiff had not shown that money damages could not

have adequately compensated him for his loss of employment and any consequent loss of professional status flowing from the alleged breach of contract.ⁿ⁹¹ Additionally, the court pointed out that the position to which plaintiff aspired required a marked degree of cooperation and goodwill among the parties, which an equitable decree requiring specific enforcement could not regulate, especially in light of the conceded conflict between plaintiff and the chief of cardiology.ⁿ⁹² It should be noted, however, that the above rule concerning reinstatement appears to be inapplicable to cases in which the employee is discharged in violation of a statute that expressly provides for reinstatement as a remedy.ⁿ⁹³ For discussion of the effect of an offer of reinstatement on a damages award, *see* [4], *above*.

For discussion of equitable remedies, including reinstatement, in employment discrimination cases, *see* Chapter 43.

Legal Topics:

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

Labor & Employment Law
Employment Relationships
General Overview
Labor & Employment Law
Wrongful Termination
General Overview

FOOTNOTES:

(n1)Footnote 1. *Civ. Code* § 3333.

(n2)Footnote 2. *BAJI No. 14.13*; *see also* *Agarwal v. Johnson* (1979) 25 Cal. 3d 932, 952-953, 160 Cal. Rptr. 141, 603 P.2d 58. However, emotional distress claims that arise out of a normal part of the employment relationship may be preempted by the workers' compensation laws. *See* *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 18, 20, 25, 276 Cal. Rptr. 303, 801 P.2d 1054; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 159, 233 Cal. Rptr. 308, 729 P.2d 743. For discussion of preemption by workers' compensation laws, *see* § 60.09[1][d] and ch. 20.

(n3)Footnote 3. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 176-178, 164 Cal. Rptr. 839, 610 P.2d 1330.

(n4)Footnote 4. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373; *see* discussion in § 60.06.

(n5)Footnote 5. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 701-702, 254 Cal. Rptr. 211, 765 P.2d 373 (Broussard, J., concurring and dissenting).

(n6)Footnote 6. *See* *Ross v. Forest Lawn Memorial Park* (1984) 153 Cal. App. 3d 988, 995, 203 Cal. Rptr. 468 (upholding claim for mental distress occasioned by breach of contract to protect grave from vandalism); *Wynn v. Monterey Club* (1980) 111 Cal. App. 3d 789, 799-800, 168 Cal. Rptr. 878 (upholding cause of action for mental suffering arising out of defendant's breach of contract to bar plaintiff's wife from gaming tables and consequent break-up of marriage); *Allen v. Jones* (1980) 104 Cal. App. 3d 207, 211, 163 Cal. Rptr. 445 (upholding mental distress claim for breach of contract to transport cremated remains of plaintiff's brother); *Windeler v. Scheers Jewelers* (1970) 8 Cal. App. 3d 844, 88 Cal. Rptr. 39 (upholding mental distress claim for breach of contract of bailment resulting in loss of jewelry of great sentimental value).

(n7)Footnote 7. *See* *Wise v. Southern Pacific Co.* (1970) 1 Cal. 3d 600, 608, 83 Cal. Rptr. 202, 463 P.2d 426. However, counsel should keep in mind that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, is broadly preemptive of claims relating to employee benefit plans. *See, e.g.,* *Sorosky v. Burroughs Corp.* (9th Cir. 1987) 826 F.2d 794, 800. For discussion of ERISA preemption of wrongful termination actions, *see* § 60.09[1][c].

(n8)Footnote 8. *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal. App. 3d 503, 518, 241 Cal. Rptr. 916; *see* *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal. 3d 176, 181, 89 Cal. Rptr. 737, 474 P.2d 689; *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal. App. 3d 91, 98-99, 127 Cal. Rptr. 222. For discussion of

mitigation of damages, *see* [4], *below*.

(n9)Footnote 9. *Compare EEOC v. Kallir, Phillips, Ross, Inc. (S.D.N.Y. 1976) 420 F. Supp. 919, 923 (Title VII case) ; with Smith v. Brown-Forman Distillers Corp. (1987) 196 Cal. App. 3d 503, 518-519, 241 Cal. Rptr. 916* (court of appeal upheld jury award of compensatory damages which may have included value of increases in bonuses and benefits which might have been received by constructively discharged employee).

(n10)Footnote 10. *Hairston v. McLean Trucking Co. (4th Cir. [N.C.] 1975)520 F.2d 226, 233 (Title VII case) ; see Holloway & Leech, Employment Termination: Rights & Remedies (BNA 1985), Ch. 11, "Money Damages and Reinstatement," pp. 402-403. For discussion of Title VII remedies, see ch. 43, pt. B.*

(n11)Footnote 11. *Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 1518-1519, 281 Cal. Rptr. 890 .*

(n12)Footnote 12. *See Smith v. Brown-Forman Distillers Corp. (1987) 196 Cal. App. 3d 503, 241 Cal. Rptr. 916 ; Ortiz v. Bank of America (9th Cir. 1987) 824 F.2d 692 ; Petermann v. International Brotherhood of Teamsters (1963) 214 Cal. App. 2d 155, 159, 29 Cal. Rptr. 399 .*

(n13)Footnote 13. *See Ackerman v. Western Elec. Co., Inc. (N.D. Cal. 1986) 643 F. Supp. 836 .*

(n14)Footnote 14. *See Whittlesey v. Union Carbide Corp. (2d Cir. [N.Y.] 1984) 742 F.2d 724, 727-728 ; Cancellier v. Federated Department Stores (9th Cir. 1982) 672 F.2d 1312, 1318 ; see also Clapp, "Practical Tip: Drafting a Complaint for Wrongful Termination," 5(7) San Francisco Barrister 36, 39 (1986). However, there is some question as to the availability of reinstatement as a remedy. See Civ. Code § 3390. See also discussion in [5], below.*

(n15)Footnote 15. *Rabago-Alvarez v. Dart Industries (1976) 55 Cal. App. 3d 91, 97, 127 Cal. Rptr. 222 (4 years); Drzewiecki v. H & R Block, Inc. (1972) 24 Cal. App. 3d 695, 705, 101 Cal. Rptr. 169 (10 years).*

(n16)Footnote 16. *See discussion in [4], below.*

(n17)Footnote 17. *See Canavin v. Pacific Southwest Airlines (1983) 148 Cal. App. 3d 512, 521, 196 Cal. Rptr. 82 , citing BAJI No. 14.70.*

(n18)Footnote 18. *Jones & Laughlin Steel Corp. v. Pfeifer (1983) 462 U.S. 523, 537-538, 103 S. Ct. 2541, 76 L. Ed. 2d 768* (ascertaining future damages of injured worker under *Longshoremen's and Harbor Workers Compensation Act*); *United States v. English (9th Cir. 1975) 521 F.2d 63, 75* (wrongful death action under *Federal Tort Claims Act*); *Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 662, 151 Cal. Rptr. 399* (personal injury action by employee against contractors and subcontractors).

(n19)Footnote 19. *Greater Westchester Homeowners Association v. City of Los Angeles (1979) 26 Cal. 3d 86, 102-103, 160 Cal. Rptr. 733, 603 P.2d 1329 ; see also Berns v. Pan American World Airways, Inc. (9th Cir. 1982) 667 F.2d 826, 829-830 ; In re Pago Pago Aircrash of January 30, 1974 (C.D. Cal. 1981) 525 F. Supp. 1007, 1013 .*

(n20)Footnote 20. *Civ. Code § 3287(a); see E.L. White, Inc. v. City of Huntington Beach (1982) 138 Cal. App. 3d 366, 377, 187 Cal. Rptr. 879 .*

(n21)Footnote 21. *Levy-Zentner Co. v. Southern Pac. Transportation Co. (1977) 74 Cal. App. 3d 762, 796-798, 142 Cal. Rptr. 1 .*

(n22)Footnote 22. *See National Farm Workers Service Center v. M. Caratan, Inc. (1983) 146 Cal. App. 3d 796, 810, 194 Cal. Rptr. 617*

(n23)Footnote 23. *Civ. Code § 3288; Harsany v. Cessna Aircraft Co. (1983) 148 Cal. App. 3d 1139, 1142, 196*

Cal. Rptr. 374 .

(n24)Footnote 24. *Berns v. Pan American World Airways, Inc.* (9th Cir. 1982) 667 F.2d 826, 829-830 ; *Greater Westchester Homeowners Association v. City of Los Angeles* (1979) 26 Cal. 3d 86, 103, 160 Cal. Rptr. 733, 603 P.2d 1329 .

(n25)Footnote 25. *See* section [3][d], *below* for discussion of prejudgment interest in contract cases.

(n26)Footnote 26. *See* *Civ. Code* § 3291.

(n27)Footnote 27. *See* *Holmes v. General Dynamics Corp.* (1993) 17 Cal. App. 4th 1418, 1436, 22 Cal. Rptr. 2d 172 .

(n28)Footnote 28. *Civ. Code* § 3294(a).

(n29)Footnote 29. *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal. App. 3d 503, 516, 241 Cal. Rptr. 916 ; *Fleming v. Safeco Insurance Co.* (1984) 160 Cal. App. 3d 31, 43, 206 Cal. Rptr. 313 .

(n30)Footnote 30. The definitions of "malice" and "oppression" were amended in 1987 to require that plaintiff show that the defendant's conduct was "despicable" in order to recover punitive damages. *See* *Civ. Code* § 3294(c), as amended by 1987 Stats. ch. 1498, § 5.

(n31)Footnote 30.1. *Scott v. Phoenix Schools, Inc.* (2009) 175 Cal. App. 4th 702, 715-717, 96 Cal. Rptr. 3d 159 (although jury properly found employer wrongfully terminated employee in violation of public policy, trial court should have granted employer's motion for judgment notwithstanding jury's verdict awarding employee punitive damages based on lack of finding of malice or oppression, where there was no evidence employer attempted to hide reason for termination, and where there was no evidence employer engaged in program of unwarranted criticism to justify her termination).

(n32)Footnote 31. *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal. App. 3d 503, 516, 241 Cal. Rptr. 916 ; *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Insurance Co.* (1986) 185 Cal. App. 3d 1149, 1155, 230 Cal. Rptr. 276 .

(n33)Footnote 32. *See* *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 176 178, 164 Cal. Rptr. 839, 610 P.2d 1330 .

(n34)Footnote 33. *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal. App. 3d 503, 516, 241 Cal. Rptr. 916 .

(n35)Footnote 34. *Werschull v. United California Bank* (1978) 85 Cal. App. 3d 981, 1002-1003, 149 Cal. Rptr. 829 ; *James v. Public Finance Corp.* (1975) 47 Cal. App. 3d 995, 1000, 121 Cal. Rptr. 670 .

(n36)Footnote 35. *Esparza v. Specht* (1976) 55 Cal. App. 3d 1, 8 9, 127 Cal. Rptr. 493 .

(n37)Footnote 36. *See, e.g.,* *Rosener v. Sears, Roebuck & Co.* (1980) 110 Cal. App. 3d 740, 751, 168 Cal. Rptr. 237 .

(n38)Footnote 37. *Compare, e.g.,* *Chodos v. Insurance Co. of North America* (1981) 126 Cal. App. 3d 86, 178 Cal. Rptr. 831 (1400-to-1 ratio approved) with *Rosener v. Sears, Roebuck & Co.* (1980) 110 Cal. App. 3d 740, 168 Cal. Rptr. 237 (63-to-1 ratio adjudged excessive).

(n39)Footnote 38. *Betts v. Allstate Insurance Co.* (1984) 154 Cal. App. 3d 688, 711, 201 Cal. Rptr. 528 .

(n40)Footnote 39. *Civ. Code* § 3294(b); see *BAJI No. 14.73.1*.

(n41)Footnote 40. *Civ. Code* § 3294(b); see *Agarwal v. Johnson* (1979) 25 Cal. 3d 932, 950, 160 Cal. Rptr. 141, 603 P.2d 58; *BAJI No. 14.73*; see also *Roberts v. Ford Aerospace and Communications Corp.* (1990) 224 Cal. App. 3d 793, 801, 274 Cal. Rptr. 139.

(n42)Footnote 41. *Civ. Code* § 3294(b).

(n43)Footnote 42. *Davis v. Local Union No. 11*, *Davis v. Local Union No. 11, Internat. Etc. of Elec. Workers* (1971) 16 Cal. App. 3d 686, 697, 94 Cal. Rptr. 562.

(n44)Footnote 43. See *Roberts v. Ford Aerospace and Communications Corp.* (1990) 224 Cal. App. 3d 793, 801, 274 Cal. Rptr. 139.

(n45)Footnote 44. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 88 Cal. Rptr. 2d 19, 981 P.2d 944.

(n46)Footnote 45. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 573, 88 Cal. Rptr. 2d 19, 981 P.2d 944.

(n47)Footnote 45.1. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 573, 88 Cal. Rptr. 2d 19, 981 P.2d 944.

(n48)Footnote 45.2. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 577, 88 Cal. Rptr. 2d 19, 981 P.2d 944.

(n49)Footnote 45.3. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 577, 88 Cal. Rptr. 2d 19, 981 P.2d 944; see *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal. App. 4th 397, 421-422, 27 Cal. Rptr. 2d 457 (plaintiff was not entitled to punitive damages in sexual harassment action because there was no evidence that her manager had substantial discretion in his decision-making capabilities, even though he was company administrator who had direct authority over plaintiff's employment responsibilities).

(n50)Footnote 45.4. *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 577, 88 Cal. Rptr. 2d 19, 981 P.2d 944 (manager who terminated plaintiff was managing agent under *Civ. Code* § 3294(b), whose conduct could lead to imposing punitive damages on defendant corporation, because she "exercised substantial discretionary authority over vital aspects of [defendant's] business" that included managing eight retail stores staffed by at least 65 employees and making significant decisions affecting both store and company policy).

(n51)Footnote 45.5. *Egan v. Mutual of Omaha Ins. Co.* (1979) 157 Cal. Rptr. 482, 598 P.2d 452

(n52)Footnote 45.6. *Egan v. Mutual of Omaha Ins. Co.* (1979) 157 Cal. Rptr. 482, 598 P.2d 452; see *BAJI No. 1471* (an agent or employee of a corporation acts with managerial authority "where the degree of discretion permitted the [employee] in making decision is such that the [employee's] decisions will ultimately determine the business policy of the [employer]"). For further discussion, see § 30.07

(n53)Footnote 46. *Civ. Code* § 3294(a).

(n54)Footnote 47. *BAJI No. 14.71*.

(n55)Footnote 48. *Neal v. Farmers Insurance Exchange* (1978) 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389, 582 P.2d 980; *Bertero v. National General Corp.* (1974) 13 Cal. 3d 43, 65, 118 Cal. Rptr. 184, 529 P.2d 608.

(n56)Footnote 49. *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal. App. 3d 381, 391, 202 Cal. Rptr. 204.

(n57)Footnote 50. *Moore v. American United Life Insurance Co.* (1984) 150 Cal. App. 3d 610, 642, 197 Cal. Rptr. 878; *Egan v. Mutual of Omaha Ins. Co.* (1979) 157 Cal. Rptr. 482 n.5, 598 P.2d 452.

(n58)Footnote 51. *Farmy v. College Housing, Inc.* (1975) 48 Cal. App. 3d 166, 183, 121 Cal. Rptr. 658 .

(n59)Footnote 52. *See Civ. Code § 3295(a); Richards v. Superior Court* (1978) 86 Cal. App. 3d 265, 272, 150 Cal. Rptr. 77 .

(n60)Footnote 53. *See Civ. Code § 3295(d).*

(n61)Footnote 54. *Civ. Code § 3300.* For the standard jury instruction on damages in an action for breach of employment contract, *see* Judicial Council of California Civil Jury Instructions, *CACI 2406* (unspecified term); Judicial Council of California Civil Jury Instructions, *CACI 2422*(specified term) (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction on damages in an action for wrongful discharge in violation of public policy, *see* Judicial Council of California Civil Jury Instructions, *CACI 2433* (Matthew Bender). For discussion of the CACI instructions generally, *see § 61.05.*

(n62)Footnote 55. *Parker v. Twentieth Century-Fox* (1970) 3 Cal. 3d 176, 181-182, 89 Cal. Rptr. 737, 474 P.2d 689 ; *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal. App. 3d 91, 98, 127 Cal. Rptr. 222 .

(n63)Footnote 56. *Wise v. Southern Pacific Co.* (1970) 1 Cal. 3d 600, 607, 83 Cal. Rptr. 202, 463 P.2d 426 .

(n64)Footnote 57. *Mayer v. Multistate Legal Studies* (1997) 52 Cal. App. 4th 1428, 1433-1436, 61 Cal. Rptr. 2d 336 .

(n65)Footnote 58. *Mayer v. Multistate Legal Studies* (1997) 52 Cal. App. 4th 1428, 1433-1436, 61 Cal. Rptr. 2d 336 .

See discussion of mitigation of damages in [d], *below.*

(n66)Footnote 59. *Smith v. Brown-Forman Distillers Corp.* (1987) 196 Cal. App. 3d 503, 241 Cal. Rptr. 916 ; *Ortiz v. Bank of America* (9th Cir. 1987) 824 F.2d 692 ; *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal. App. 3d 91, 127 Cal. Rptr. 222 (4 years); *Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal. App. 3d 695, 705, 101 Cal. Rptr. 169 (10 years).

(n67)Footnote 60. *Thomas v. Olin Mathieson Chem. Corp.* (1967) 255 Cal. App. 2d 806, 811, 63 Cal. Rptr. 454 ; *see also Lab. Code §§ 970-972* (employer liability for inducing person to change location as a result of false representations concerning employment).

(n68)Footnote 61. *See Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 649, 49 Cal. Rptr. 2d 377, 909 P.2d 981 .

(n69)Footnote 62. *Civ. Code § 3287(b).*

(n70)Footnote 63. *George v. Double-D Foods, Inc.* (1984) 155 Cal. App. 3d 36, 47, 201 Cal. Rptr. 870 .

(n71)Footnote 64. *See Civ. Code § 3287(b).*

(n72)Footnote 65. *A & M Produce Co. v. FMC Corp.* (1982) 135 Cal. App. 3d 473, 496, 186 Cal. Rptr. 114 ; *Moreno v. Jessup Buena Vista Dairy* (1975) 50 Cal. App. 3d 438, 448, 123 Cal. Rptr. 393 .

(n73)Footnote 66. *Zalk v. General Exploration Co.* (1980) 105 Cal. App. 3d 786, 795, 164 Cal. Rptr. 647 .

(n74)Footnote 67. *See Ash v. Soo Sing Lung* (1918) 177 Cal. 356, 361-362, 170 P. 843 . For the standard jury instruction on the employee's duty to mitigate damages in an action for breach of employment contract for an unspecified term, *see* Judicial Council of California Civil Jury Instructions, *CACI 2407* (Matthew Bender), also

available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI instructions generally, *see* § 61.05.

(n75)Footnote 68. *Meyer v. Byron Jackson, Inc.* (1984) 161 Cal. App. 3d 402, 416-417, 207 Cal. Rptr. 663 .

(n76)Footnote 69. *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal. App. 4th 1495, 1502-1503, 44 Cal. Rptr. 2d 565 ; *see West v. Bechtel Corp.* (2002) 96 Cal. App. 4th 966, 117 Cal. Rptr. 2d 647, 662-663 (in age discrimination and breach of contract action, plaintiff failed to mitigate damages as matter of law because uncontradicted evidence showed that employer gave him every opportunity to resume working at comparable or substantially similar employment after he returned from Saudi Arabia, where he had been fired because of his age, and there was no evidence of disability).

(n77)Footnote 70. *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal. 3d 176, 181, 89 Cal. Rptr. 737, 474 P.2d 689 ; *cf. Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, 231 n.14, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (Title VII) .

(n78)Footnote 71. *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal. 3d 176, 182, 89 Cal. Rptr. 737, 474 P.2d 689 . *See also Hope v. California Youth Authority* (2005) 134 Cal. App. 4th 577, 36 Cal. Rptr. 3d 154 4 (employer has burden of proving mitigation (*i.e.*, the amount the employee has earned or with reasonable effort might have earned from other comparable employment)).

(n79)Footnote 72. *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal. App. 4th 1495, 1501-1502, 44 Cal. Rptr. 2d 565 .

(n80)Footnote 73. *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal. App. 4th 1495, 1502-1503, 44 Cal. Rptr. 2d 565 .

(n81)Footnote 74. *See Restatement (Second) of Contracts*, § 350 (1979).

(n82)Footnote 75. *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal. 3d 176, 182, 89 Cal. Rptr. 737, 474 P.2d 689 ; *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal. App. 3d 91, 99, 127 Cal. Rptr. 222 .

(n83)Footnote 76. *Hegler v. Board of Education of Bearden School Dististrict, Bearden, Ark.* (8th Cir. 1971) 447 F.2d 1078, 1081 .

(n84)Footnote 77. *W.C. Cook & Co. v. White Truck etc. Co.* (1932) 124 Cal. App. 721, 727, 13 P.2d 549 .

(n85)Footnote 78. *Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, 102 S. Ct. 3057, 73 L. Ed. 2d 721 .

(n86)Footnote 79. *Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, 231 n.14, 102 S. Ct. 3057, 73 L. Ed. 2d 721 .

(n87)Footnote 80. *Ortiz v. Bank of America National Trust and Savings Association* (9th Cir. 1988) 852 F.2d 383, 386-387 .

(n88)Footnote 81. *Ortiz v. Bank of America National Trust and Savings Association* (9th Cir. 1988) 852 F.2d 383, 386-387 .

(n89)Footnote 82. *Helfend v. Southern Cal. Rapid Transit District* (1970) 2 Cal. 3d 1, 6, 84 Cal. Rptr. 173, 465 P.2d 61 ; *see Graham v. Balcov Co.* (9th Cir. 2001) 241 F.3d 1246 , clarifying mandate issued in *Graham v. Balcov Co.* (9th Cir. 1998) 146 F.3d 1052 (ERISA did not preempt state causes of action for breach of contract, breach of covenant of good faith and fair dealing and intentional infliction of emotional distress based on termination of payments for former employee's medical expenses, where agreement under which employee agreed to waive wrongful discharge or employment discrimination claims if employer kept her enrolled in its employee benefits plan so long as she was

disabled did not arise in course of employer's administration of benefits plan).

(n90)Footnote 83. *Equal Emp. Opportunity Com'n v. Sandia Corp.* (10th Cir. 1980) 639 F.2d 600, 626 ; *Equal Employment Opportunity Commission (U.S.A.) v. Pacific Press Publishing Association (N.D. Cal. 1979)* 482 F. Supp. 1291, 1317-1318 .

(n91)Footnote 84. *Monroe v. Oakland Unified School District* (1981) 114 Cal. App. 3d 804, 810-812, 170 Cal. Rptr. 867 .

(n92)Footnote 85. *Hume v. Lacey* (1952) 112 Cal. App. 2d 147, 152, 245 P.2d 672 .

(n93)Footnote 86. *Helfend v. Southern Cal. Rapid Transit District* (1970) 2 Cal. 3d 1, 6, 84 Cal. Rptr. 173, 465 P.2d 61 .

(n94)Footnote 87. *Pichon v. Pacific Gas and Electric Co.* (1989) 212 Cal. App. 3d 488, 498-501, 260 Cal. Rptr. 677 .

(n95)Footnote 88. *Mayer v. Multistate Legal Studies* (1997) 52 Cal. App. 4th 1428, 1433-1436, 61 Cal. Rptr. 2d 336 .

(n96)Footnote 89. *Barndt v. County of Los Angeles* (1989) 211 Cal. App. 3d 397, 403-406, 259 Cal. Rptr. 372 .

(n97)Footnote 90. *See Civ. Code § 3390* (codifying common law rule that personal service contracts cannot be specifically enforced).

(n98)Footnote 91. *Barndt v. County of Los Angeles* (1989) 211 Cal. App. 3d 397, 405-406, 259 Cal. Rptr. 372 .

(n99)Footnote 92. *Barndt v. County of Los Angeles* (1989) 211 Cal. App. 3d 397, 404-405, 259 Cal. Rptr. 372 .

(n100)Footnote 93. *See, e.g., Lab. Code § 132a(1)* (employee who is discharged for filing workers' compensation claim or testifying in workers' compensation proceeding is entitled to reinstatement, among other things).



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California Employment Law

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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 60 Liability for Wrongful Termination and Discipline
Part A. TEXT

4-60 California Employment Law § 60.09

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.09 Defenses to Wrongful Discharge Action

[1] Preemption by Statutory Remedy

[a] Generally

■ CONSULTANT'S COMMENT:

The most important defenses against wrongful discharge lawsuits are (1) careful investigation of the facts relevant to the discharge decision, (2) careful consideration of whether similarly situated employees have been similarly disciplined in the past, and (3) careful explanation of the discharge decision by a person whom the dischargee respects. Too many employers ignore the possibility that wrongful discharge juries may view their charter as little more than a reconsideration of the perceived "fairness" of the underlying discharge decisions. Because this possibility exists, employers are well advised to analyze their discharge decisions from the twin perspectives of factual integrity and potential "appearance" to persons who may never understand the facts as well as the discharging supervisors. The obvious difficulties in predicting the outcome of jury deliberations should not necessarily deflect an employer from implementing a discharge decision, but such prediction difficulties should be considered in assessing the risks of ultimate liability. *Commentary by Kirby Wilcox.*

A number of state and federal employment-related laws may preempt common law wrongful termination causes of action. Generally, preemption by a state statute occurs when a statute provides that it is the exclusive remedy for a particular wrong.ⁿ¹ Federal preemption may (1) be explicit or implicit (from a statute's structure or purpose); (2) be inferred from a statutory scheme that is so pervasive that there is "no room for the States to supplement it"; or (3) occur when a state law conflicts with a federal law.ⁿ²

This section discusses the major state and federal statutes that most often preempt common law wrongful termination causes of action. Counsel should research all statutes relevant to the plaintiff's particular fact pattern to determine whether they will affect the existence of a common law remedy. For discussion of some statutes that explicitly affect an employee's rights regarding termination and discipline, *see* § 60.03[2] and [3].

[b] Banking Laws

Federal banking laws may preempt state law wrongful termination actions when the latter interfere or conflict with a federal interest in the regulation of banking employment agreements.ⁿ³ For example, the National Bank Act (Bank Act) gives national banks the power to appoint "president[s], vice president[s], cashier [s], and other officers," and to dismiss those officers "at pleasure."ⁿ⁴ In *Peatros v. Bank of America NT & SA*,ⁿ⁵ the California Supreme Court considered whether bank officers' state law causes of action against dismissal are preempted by the National Bank Act.ⁿ⁶ The Court held that the National Bank Act preempts the FEHA only to the extent it conflicts with the Bank Act (as impliedly modified by Title VII and the ADEA).^{n6.1} In particular, the FEHA limits the power of a national bank to dismiss any of its officers at the pleasure of the board of directors by prohibiting dismissal on the grounds of race, color, religion, sex, national origin or age.^{n6.2} The FEHA is preempted, however, to the extent it would prohibit a national bank from dismissing any of its officers at the pleasure of the board of directors on the grounds of physical disability, mental disability, medical condition, marital status, or ancestry.^{n6.3}

However, not all banking laws or regulations preempt wrongful termination actions. One court has pointed out that generally only banking laws that contain "at pleasure" language have been held to preempt such actions;ⁿ⁷ other courts have found less uniformity in federal decisions in considering the preemptive effect of federal dismissal-at-pleasure provisions.^{n7.1} In *Hall v. Great Western Bank*, the court held that a federal regulation governing the power of savings associations to terminate employment did not preempt a cause of action for wrongful termination in violation of public policy.ⁿ⁸ The regulation provides that an association may terminate its employees "at any time," but that an employee fired for any reason other than "for cause" retains the "right to compensation or other benefits under the contract."ⁿ⁹ The regulation does not contain "at pleasure" language; thus, there was no conflict between state law that allows tort remedies for public policy violations and a federal regulation that allows contract remedies for termination without cause.ⁿ¹⁰ With the proliferation of failed financial institutions, the issue of a receiver's liability has been raised in several contexts, including wrongful termination. The "*D'Oench, Duhme* doctrine,"ⁿ¹¹ a partially codifiedⁿ¹² common law rule of estoppel that precludes a borrower from asserting against the FDIC defenses based on a secret or unrecorded side agreement that alters the terms of facially unqualified obligations, has been raised in defense of a breach of an implied in fact employment contract claim.ⁿ¹³ The doctrine operates to bar both defenses and affirmative claims for relief and encompasses any claim against an insolvent institution that would either diminish the value of the institution's assets or increase its liabilities.ⁿ¹⁴ In the first published California case in this context, the court stated that if applicable, the doctrine would bar the former employee's recovery. In that case, however, the doctrine had no factual application (i.e., plaintiff did not impede or hinder any bank examiner from evaluating the bank's assets, nor did he rely on any unrecorded documents or arrangements).ⁿ¹⁵

[c] Federal Labor Law

[i] National Labor Relations Act

The National Labor Relations Act (NLRA)ⁿ¹⁶ governs labor-management relations in the private sector, and claims brought under the NLRA are within the primary jurisdiction of the National Labor Relations Board (NLRB). The NLRA preempts certain types of state law claims for retaliatory or wrongful discharge of employees. In *San Diego Unions v. Garmon*,^{n16.1} the United States Supreme Court held that state law claims are preempted if they concern conduct that is "arguably" protected by section 7 or prohibited by section 8 of the NLRA. A second strand of federal preemption prohibits state interference with conduct Congress intended to be left unregulated, even if not protected or prohibited by the NLRA.^{n16.2} The scope of preemption based on conduct arguably protected by the NLRA does not extend to state law claims when the activity regulated is merely a peripheral concern of the NLRA^{n16.3} or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act.^{n16.4} For example, claims for wrongful discharge in retaliation for complaining about unsafe work conditions are not preempted by the NLRA.^{n16.5} The United States Supreme Court has refined its preemption analysis under the "arguably prohibited" branch of the

preemption test. The critical inquiry is not whether the state is enforcing a law relating specifically to labor relations or one of general application, but whether the controversy is identical to or different from one which could have been but was not presented to the NLRB. Only in the latter context does the state court's exercise of jurisdiction necessarily involve a risk of interference with the unfair labor practice jurisdiction of the NLRB, which the "arguably prohibited" branch of the preemption test was designed to avoid.^{n16.6} The United States Supreme Court has addressed what "arguable" means in the context of questions of law and questions of fact. As to questions of law, the party asserting preemption must advance a statutory construction of the NLRA that is not plainly contrary to its language and that has not been authoritatively rejected by the courts or the NLRB. As to questions of fact, the party must put forth enough evidence to enable the court to find that the NLRB reasonably could uphold a claim based on such an interpretation.^{n16.7}

In *Haney v. Aramark Uniform Services, Inc.*,^{n16.8} the court held that a unionized employee's wrongful discharge action was not preempted by Section 7 of the NLRA.^{n16.9} The NLRB standard for determining when the acts of a single employee constitute concerted activity is an objective test requiring some linkage to group action before finding an act concerted.^{n16.10} The requirement for linkage or nexus between the individual employee's acts and a group is met in at least three distinct factual situations:^{n16.11}

1. An individual's act stems from prior concerted activity.
2. An individual acts, formally or informally, on behalf of a group.
3. An individual attempts to bring about or prepare for group action, even if those attempts are unsuccessful in achieving group action.

In the second situation, individual action is on behalf of a group and therefore concerted if engaged in with or on the authority of other employees.^{n16.12} In *Haney*, the employer did not identify any prior group action or prior concerted activity that could be associated with the employee's complaints about the employer's practices and refusal to act for which he was discharged, and did not show that the employee made the complaints and refusals in preparation for group action. Thus, the employer did not show that the employee engaged in concerted activity under either the first or third situation. With regard to the second situation, the employer did not show that one or more employees explicitly or implicitly authorized the discharged employee to complain about alleged overcharging of customers for which he was allegedly discharged.^{n16.13}

On the other hand, in *Luke v. Collotype Labels USA, Inc.*,^{n16.14} the former employee's complaint for wrongful termination in violation of public policy^{n16.15} was pre-empted by the NLRA. The employee was fired because of discussions with other employees regarding working conditions, which have been held to be protected activity under the NLRA.^{n16.16} A cause of action for wrongful termination in violation of California public policy does not fall within either exception to the general rule of NLRA preemption articulated by the United States Supreme Court. The first is that Congress did not intend to deprive states of the power to regulate when the activity regulated was a merely peripheral concern of the NLRA or when the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, the Court could not infer that Congress had deprived the States of the power to act (*Garmon* preemption).^{n16.17} *Garmon* pre-emption involves balancing the state's interest in controlling or remedying the effects of the conduct in question against the interference with the National Labor Relations Board's ability to adjudicate controversies committed to it by the Act, and the risk that the state will sanction conduct that the Act protects.^{n16.18} The preemption issue as to both arguably prohibited and arguably protected conduct turns primarily on whether preemption is necessary to avoid conflicting adjudications that would interfere with the regulatory activity of the administrative board.^{n16.19} The second preemption doctrine is that state laws and state causes of action are preempted when they concern conduct that Congress intended to leave unregulated.^{n16.20} When a cause of action for wrongful termination in violation of public policy does not involve health and safety laws, courts have held the claims are preempted by the NLRA.^{n16.21} The complaints for which the

employee was fired in *Luke* did not involve unsafe working conditions, because he did not allege in his complaint, or testify in his deposition, that the employer terminated his employment because he complained about ColloTYPE's violations of California health and safety regulations. Moreover, he did not allege in his complaint that he was fired because of his own complaints to management regarding unsafe working conditions. He alleged instead that complaints about working conditions were made to him by two fellow employees, and management perceived he was a sympathetic ear because he advised the employees to keep notes to protect themselves, and to bring their complaints to management.

Thus, if the gravamen of a plaintiff's complaint is that he or she was discharged or disciplined because of his or her exercise of rights protected by the National Labor Relations Act (NLRA), the plaintiff's exclusive remedy is through the National Labor Relations Board (NLRB).ⁿ¹⁷ For example, in *Henry v. Intercontinental Radio, Inc.*,ⁿ¹⁸ the plaintiff brought a wrongful termination action against his employer, a radio station. The complaint alleged that a significant contributing factor in the decision to terminate the plaintiff was the perception on the defendant's part that the plaintiff was working to increase wages and working conditions for employees and to bring a union to the station. The California court of appeal upheld the granting of a demurrer to the complaint because discharge or discrimination based on union-related factors is arguably within the jurisdiction of the NLRB.ⁿ¹⁹ In another case, a cab driver brought a wrongful termination claim alleging that he was terminated in retaliation for his testimony at an administrative hearing in opposition to his employer's efforts to obtain an airport van permit. The driver's opposition was based in part on the potential effect such a permit would have on employees. The court held that the driver's conduct was actually protected union activity, and the action was therefore preempted by the NLRA.ⁿ²⁰

However, in *Balog v. LRJV, Inc.*,^{n20.1} the court of appeal held that if an action alleges mixed motivations for the wrongful discharge, which include the employee's refusal to commit an unfair labor practice, the action is not preempted by the NLRA, and the employee may recover for the wrongful discharge based on the other reasons.ⁿ²¹ Relying on *Balog*,^{n21.1} the court of appeal in *Inter-Modal Rail Employees Ass'n v. Burlington Northern and Santa Fe Ry. Co.* held that the NLRA does not preempt a state law claim for wrongful termination and unfair business practices based on violations of California safety regulations.^{n21.2} The court stated that federal preemption was improper because safety concerns are within the states' police powers to legislate, and the NLRA does not preempt them.^{n21.3} The court rejected defendants' argument that the large number of workers involved in the complaints distinguished the circumstances of this case from those in other cases that plainly hold the NLRA does not preempt wrongful termination actions based on retaliation for bringing safety complaints.^{n21.4}

Similarly, one court of appeal has held that an action for breach of an implied contract of employment, or an action for a breach of the implied covenant of good faith and fair dealing, is not preempted by the NLRA unless the controversy presented to the court is identical to that which would be presented to the NLRB.ⁿ²² The court reasoned that, in the case of an employee not covered by a collective bargaining agreement (such as a supervisory employee), the interest of the state in providing contract remedies outweighs any marginal effect the adjudication of those employees' contract claims might have on the administration of national labor policies.ⁿ²³

[ii] Labor Management Relations Act Section 301

Some wrongful discharge claims may be preempted by *section 301 of the Labor Management Relations Act* (LMRA),ⁿ²⁴ which provides the exclusive remedy for challenging a breach of a collective bargaining agreement. In *Allis-Chalmers Corp. v. Lueck*,ⁿ²⁵ the United States Supreme Court held that when "evaluation of [a state law] tort claim is inextricably intertwined with consideration of the terms of the labor contract," section 301 preempts the state law action. In *Hansen v. Aerospace Defense Related Industry Dist.*,^{n25.1} the court held that a wrongful discharge claim by a clerical employee in the office of a subordinate unit of a labor union was preempted by the LMRA. The employee claimed that the reason given for her lay off, *i.e.*, a lack of work resulting from the closure of the office, was pretextual and that the employer violated the collective bargaining agreement by laying her off before other, less senior, employees. In order to find pretext, the jury necessarily had to find she was laid off out of seniority order, and that the interpretation of the collective bargaining agreement was a prerequisite to the resolution of her claim.

Because a collective bargaining agreement generally governs the employment relationship between an employer and a unionized employee, such an employee's common law action for breach of contract or breach of the covenant of good faith and fair dealing is likely to fail.ⁿ²⁶ In addition, the Ninth Circuit Court of Appeals has held that a cause of action for breach of the implied covenant of good faith and fair dealing may be preempted by section 301 even when the collective bargaining agreement provides no comparable protection against discharge at will, reasoning that a labor union may waive any requirement of good cause for termination that otherwise may be implied under California common law.ⁿ²⁷

The Ninth Circuit also held that a cause of action for wrongful termination, violation of state constitutional rights, and related claims, based on termination following mandatory drug testing by a private employer, was preempted by section 301 because determination of the employer's liability necessarily involved contract interpretation.ⁿ²⁸ In that case, the collective bargaining agreement contained no provision regarding drug testing, which was implemented by the employer after the plaintiff had been hired. The grievance arbitration resulted in a finding that, although the drug testing policy was not negotiated by collective bargaining, it was not a unilateral and illegal change of the bargaining agreement.ⁿ²⁹

However, not every state law cause of action concerning employment of unionized employees or tangentially involving a provision of a collective bargaining agreement is preempted by the LMRA.ⁿ³⁰ In *Lingle v. Norge Division, Magic Chef*,ⁿ³¹ the United States Supreme Court held that application of state law is preempted by section 301 of the LMRA *only* if such application requires interpretation of the collective bargaining agreement.ⁿ³² The fact that dispute resolution under a collective bargaining agreement and judicial analysis of a state law claim would require analysis of the *same set of facts* does not in itself render the state claim preempted, as long as the state law claim can be resolved without interpreting the agreement itself.ⁿ³³ Thus, in *Lingle*, the Court held that a plaintiff's cause of action under Illinois law for retaliatory discharge for filing a workers' compensation claimⁿ³⁴ was not preempted by section 301 because none of the factual questions required to determine the state law claim required interpretation of the collective bargaining agreement in that case.ⁿ³⁵

Several Ninth Circuit cases have held that state law wrongful discharge claims based on violation of public policy were not preempted by section 301.ⁿ³⁶ These decisions have been largely based on the fact that the claims involved did not require interpretation of the collective bargaining agreement.ⁿ³⁷ However, the Ninth Circuit has also considered whether the purpose of the state law was to "regulate the employment relationship,"ⁿ³⁸ whether the state law applies to "all employees as individual workers, not [just] because they are or are not members of a collective bargaining association,"ⁿ³⁹ and whether the rights provided by state law are "non-negotiable."ⁿ⁴⁰ In *Lingle*, however, the Supreme Court stated, in dicta, that neither the fact that a state-law remedy is "non-negotiable," nor the fact that it applies uniformly to unionized and nonunionized workers, ensures non-preemption. Such laws may still be pre-empted if their application in a given case requires interpretation of the collective bargaining agreement.ⁿ⁴¹ For example, in one California wrongful termination case, *Moreau v. San Diego Transit Corp.*,ⁿ⁴² a plaintiff argued that his claim was not preempted because he was constructively discharged after having been entrapped into selling drugs in the workplace, and that the action was thus based on violation of a nonnegotiable right. The court of appeal held that because California has not articulated a public policy preventing parties from negotiating the means by which drug problems may be dealt with in the workplace, there was no nonnegotiable right involved. Furthermore, citing *Lingle*, the court stated that even if there had been a state nonnegotiable right involved, resort to the collective bargaining agreement to resolve the wrongful discharge actions would have been required, thus triggering preemption.ⁿ⁴³

The Ninth Circuit Court of Appeals has stated that in deciding whether a cause of action for wrongful discharge based on public policy is preempted, the court must consider the following factors:ⁿ⁴⁴

1. Whether the collective bargaining agreement contains provisions that govern the actions giving rise to a state claim, and if so;

2. Whether the state has articulated a standard sufficiently clear that the state claim can be evaluated without considering the overlapping provisions of the agreement; and
3. Whether the state has shown an intent not to allow its prohibition to be altered or removed by private contract.

Under this test, the Ninth Circuit has stated that if the answer to the first question is affirmative, and the answer to either the second or third questions is negative, the state law will be preempted.ⁿ⁴⁵ Applying this test, the Ninth Circuit held that a state anti-discrimination law was not preempted by the collective bargaining agreement.ⁿ⁴⁶

In *Newberry v. Pacific Racing Association*,ⁿ⁴⁷ the Ninth Circuit applied the *Lingle* test and concluded that because the employee's claim for wrongful discharge was based on her employment contract, and because her employment contract consisted of the collective bargaining agreement itself, the court would have to interpret the specific language of the terms of the collective bargaining agreement; therefore, the case was preempted.ⁿ⁴⁸ In another case, *Harris v. Alumax Mill Products, Inc.*,ⁿ⁴⁹ the Ninth Circuit held that an employee's wrongful termination claim that his employer violated the covenant of good faith and fair dealing was clearly dependent on the terms of the collective bargaining agreement and was thus preempted. The agreement expressly provided for an employee to grieve any discharge or application of work rules. The employee's action was based on his employer's rule deeming any 3-day unauthorized absence to be a voluntary termination. Because the complaint involved both wrongful discharge and application of a work rule, both of which were covered under the agreement, the action was preempted.ⁿ⁵⁰ In *Jackson v. Southern California Gas Co.*,ⁿ⁵¹ in which a collective bargaining agreement covered in detail the conduct that would give rise to dismissal for cause, the employee's action for breach of the covenant of good faith and fair dealing was also held preempted by section 301. However, in a case in which the collective bargaining agreement had expired prior to the employee's discharge, the court held that section 301 could not preempt the wrongful termination action.ⁿ⁵² In *Balcorta v. Twentieth Century Fox*,^{n52.1} the Ninth Circuit found that section 301 does not completely preempt a claim under *Labor Code Section 201.5*, pertaining to termination of motion picture employees.^{n52.2} The *Balcorta* court found that the determination of whether Twentieth Century Fox had violated section 201.5 was a factual issue that a court could ascertain without the need to interpret the collective bargaining agreement.^{n52.3} Thus, a plaintiff's mere reference to the collective bargaining agreement is not enough for preemption pursuant to section 301.^{n52.4}

In *Caterpillar v. Williams*, the United States Supreme Court held that state-law claims based on individual contracts were not preempted, where the plaintiffs had claimed that the employer breached both their individual employment contracts and the collective bargaining agreement.ⁿ⁵³ However, the Ninth Circuit has held that an independent employment agreement concerning a job position covered by the collective bargaining agreement can be effective only as part of the collective bargaining agreement. Therefore, according to the court, state law claims seeking to enforce the independent agreement are preempted.ⁿ⁵⁴ The court distinguished *Caterpillar* on the ground that *Caterpillar* dealt with a situation in which the individual employment contracts involved positions not covered by the collective bargaining agreement, at a time when the employees were not covered by the collective bargaining agreement.ⁿ⁵⁵

Of course, section 301 does not preempt a wrongful termination action by an employee who is not actually covered by an existing collective bargaining agreement.ⁿ⁵⁶ Furthermore, section 301 does not preempt such an action merely because a court must scrutinize a collective bargaining agreement to determine whether an employee is covered.ⁿ⁵⁷

■ PRACTICE TIP:

Unless the attorney has particular expertise in dealing with union and collective bargaining issues, it is recommended that a suit alleging violation of section 301 of the LMRA not be undertaken. State law tort remedies will not be available, and remedies under the LMRA are limited (generally to back pay, possible reinstatement, and attorney's fees). Moreover, the employee's union must be joined as a defendant in a claim of breach of the duty of fair representation. This will necessitate dealing with two

sets of opposing counsel in federal court. As a practical matter, such litigation is generally uneconomical.
Commentary by William M. Crosby.

[iii] Railway Labor Act

Another federal law that may preempt a wrongful discharge action is the Railway Labor Act (RLA),ⁿ⁵⁸ which applies to employees of railroads and commercial airlines. The RLA was enacted to promote stability in the railroad industry and to provide for prompt and efficient resolution of labor-management disputes arising out of railroad collective bargaining agreements.ⁿ⁵⁹ Thus, the RLA provides that all disputes between railroad employees and carriers growing out of grievances or interpretations of agreements concerning rates of pay, rules, or working conditions, which are "minor disputes," cannot be litigated in court, but must instead be referred to a railroad arbitration board for compulsory arbitration.ⁿ⁶⁰ The role of the courts is therefore limited in the area of minor disputes.ⁿ⁶¹ Moreover, the Supreme Court has determined that the RLA does not preempt a claim for wrongful discharge in violation of public policy brought under the state whistleblower statute.ⁿ⁶² The RLA does not preempt a wrongful termination action brought by a nonunion employee who is not subject to a collective bargaining agreementⁿ⁶³

[iv] Labor-Management Reporting and Disclosure Act

In *Screen Extras Guild, Inc. v. Superior Court*,ⁿ⁶⁴ the California Supreme Court held that the Labor-Management Reporting and Disclosure Act (LMRDA),ⁿ⁶⁵ the primary objective of which is to ensure that labor unions are democratically governed and responsive to the will of their memberships,ⁿ⁶⁶ preempts wrongful discharge claims brought against unions or their officials by former policy-making or confidential employees.ⁿ⁶⁷ The Court explained that to allow such a claim would interfere with the ability of elected union officials to implement, by selecting their own administrators, the will of the union members they represent; the Court said such a result would frustrate the full realization of the goal of union democracy embodied by the LMRDA.ⁿ⁶⁸ The Court held that the *Screen Extras* plaintiff, a union business agent with significant decision-making responsibility for the implementation of union policies and their application to individual cases, was a policy-making or confidential employee covered by the LMRDA.ⁿ⁶⁹

In *Thunderburk v. United Food & Commercial Workers' Union*,^{n69.1} the court held that LMRDA preempted a wrongful termination action by a union chapter's "executive secretary"; although she was concededly not a management or policy-making employee and many of her job responsibilities were of a clerical, nonconfidential nature, she was a confidential employee because she had access to confidential union information, which if disclosed, could have thwarted union policies and objectives. LMRDA preempted both the contract causes of action for breach of implied contract and implied covenant of good faith and fair dealing, and the tort cause of action for tortious discharge based on public policy, *Labor Code Sections 1101 and 1102*, which prohibit discharge of employees for refusing to follow "any particular course or line of political action or political activity."^{n69.2}

On the other hand, in *Smith v. International Brotherhood of Electrical Workers, Local Union 11*,^{n69.3} the court held that the LMRDA does not preempt claims by a union employee against the union for wrongful discharge based on violation of the public policy against age and disability discrimination. As a union organizer, the plaintiff was a policymaking employee, which barred his action for breach of contract.^{n69.4} However, the LMRDA did not pre-empt his cause of action for wrongful discharge in violation of public policy and his age and disability discrimination claims under the California Fair Employment and Housing Act.^{n69.5}

[d] Pension Benefits

Plaintiffs whose claims relate to deprivation of benefits under employee benefit plans must be especially wary of preemption by the Employee Retirement Income Security Act of 1974, commonly known as ERISA.ⁿ⁷⁰ ERISA is broadly preemptive, superseding "any and all State laws insofar as they may now or hereafter relate to an employee

benefit plan described in [Section 4(a) of ERISA] and not exempt under [Section 4(b) of ERISA].ⁿ⁷¹ The words "relate to an employee benefit plan" are interpreted broadly to include any cause of action which has "a connection with or reference to such a plan."ⁿ⁷² Thus, an action need not seek actual recovery of pension benefits to be preempted by ERISA. In *Ingersoll-Rand v. McClendon*,ⁿ⁷³ the United States Supreme Court held that a wrongful termination action alleging that a defendant fired a plaintiff to avoid contributing to his pension fund was preempted, even though the claim sought tort and contract damages rather than recovery of benefits. The Court reasoned that the cause of action "related to" a covered plan because it specifically referred to, "and indeed [was] premised on, the existence of a pension plan."ⁿ⁷⁴ In order to prevail on his wrongful termination action, the plaintiff had to plead, and the trial court had to find, both the existence of an ERISA plan and that the defendant intended to avoid the plan by firing the plaintiff.ⁿ⁷⁵

Furthermore, ERISA expressly provides a civil cause of action for, among other things, discharging an employee "for the purpose of interfering with the attainment of" covered benefits.ⁿ⁷⁶ Thus, ERISA, by its terms, prohibits an employer from firing an employee to prevent the employee's pension from vesting,ⁿ⁷⁷ and ERISA is the exclusive remedy for such an action.ⁿ⁷⁸ A common law cause of action based on such a termination is preempted because it purports to provide a remedy for the violation of a right expressly guaranteed and exclusively enforced by ERISA.ⁿ⁷⁹

The Ninth Circuit Court of Appeals has addressed these issues in *Sorosky v. Burroughs Corp.*,ⁿ⁸⁰ a case involving a breach of contract claim that included allegations that the plaintiff's employer acted to deprive the plaintiff of pension benefits. The court held that, to the extent the cause of action related to the retirement plan, it was preempted. However, those portions of the cause of action independent of the employee benefit plan, such as allegations of termination without good cause, were not preempted by ERISA.ⁿ⁸¹ The court applied a similar analysis to plaintiff's claim for breach of the covenant of good faith and fair dealing.ⁿ⁸² ERISA preempts such claims, however, if they are based on misconduct that is identical to conduct on which an ERISA claim is based.ⁿ⁸³

The Ninth Circuit has emphasized that a claim does not relate to ERISA, and thus is not preempted, when the loss of pension benefits was a mere consequence of, but not a motivating factor behind, the termination.ⁿ⁸⁴

Thus, in one wrongful discharge case in which the employee asserted damages including "loss of employment and benefits," but the case did not otherwise relate to a covered plan or its administration, the court held that ERISA did not preempt the state action.ⁿ⁸⁵ In another case, the court found that an employee's allegation in his prayer for punitive damages that the employer knew he would lose his benefits as a consequence of termination did not state a cause of action that relates to an employee benefit plan.ⁿ⁸⁶

■ PRACTICE TIP:

Counsel should scrupulously avoid any reference to deprivation of pension or severance benefits as an alleged motive for the termination in order to avoid ERISA preemption. At trial, such unpaid benefits can be presented as damages.ⁿ⁸⁷ As a practical matter, jurors will likely infer such motives and take them into account in assessing whether the employer is guilty of bad faith. *Commentary by William M. Crosby.*

[e] California Workers' Compensation Law

A common law wrongful discharge action may be defeated by the exclusive nature of California's workers' compensation laws in either of two ways. First, *Labor Code Section 132a* provides the exclusive remedy for an employee who claims he or she was fired because he or she filed a workers' compensation claim for injuries on the job.ⁿ⁸⁸ The Workers' Compensation Appeals Board has exclusive jurisdiction over such claims of wrongful termination.ⁿ⁸⁹ *Labor Code section 132a* does not, however, provide the exclusive remedy for a claim alleging disability discrimination based on a work-related injury and does not preempt a claim of disability discrimination under the FEHA.ⁿ⁹⁰ For further discussion of section 132a, see Chapter 20.

More generally, workers' compensation law may preempt most actions by employees seeking damages for physical or mental injuries arising out of wrongful termination or discipline. The workers' compensation law provides that when the conditions for recovering workers' compensation benefits are satisfied, it is the employee's sole and exclusive remedy against the employer for injuries arising out of and in the course and scope of employment.ⁿ⁹¹ The California Supreme Court has held that termination of employment, and the events culminating in termination, are deemed a normal part of the employment relationship, and that the exclusive remedy doctrine bars an action for personal injury caused by termination, unless the injury is the result of conduct that does not reasonably come within the compensation bargain.ⁿ⁹² In *Livitsanos v. Superior Court*,ⁿ⁹³ the California Supreme Court held that even when no physical injury or disability is alleged, a claim for intentional or negligent infliction of emotional distress arising out of termination of employment is within the exclusive remedy provisions of the workers' compensation act, so long as the basic conditions of compensation are otherwise satisfied and the employer's conduct neither contravenes a fundamental public policy nor exceeds the risks inherent in the employment relationship.ⁿ⁹⁴

In *Gantt v. Sentry Insurance*,ⁿ⁹⁵ however, the Court specifically held that a cause of action for tortious discharge in violation of public policy is not preempted by workers' compensation law.ⁿ⁹⁶ Applying *Gantt*, the Ninth Circuit has held that the workers' compensation act did not preempt an employee's claims for intentional and negligent infliction of emotional distress when these claims arose out of conduct implicating fundamental public policies.ⁿ⁹⁷ For full discussion of the exclusive remedy doctrine and its applicability to wrongful termination and related actions, see Chapter 20.

[F] Discrimination Claims

The Fair Employment and Housing Act (FEHA)ⁿ⁹⁸ prohibits employment discrimination based on race, religion, sex or sexual orientation, age, national origin, physical or mental disability, and various other personal characteristics. In *Rojo v. Kliger*,ⁿ⁹⁹ the California Supreme Court has held that the FEHA supplements, but does not preempt other state laws, including the common law, that prohibit or restrict such discrimination.ⁿ¹⁰⁰ Furthermore, although an employee must exhaust the FEHA administrative remedy before bringing a civil action under the FEHA or seeking any remedies provided by the FEHA, exhaustion of the administrative remedy is not required before filing a civil action for damages alleging nonstatutory causes of action.ⁿ¹⁰¹

For public employees, both internal and external administrative remedies may be available. The California Supreme Court has determined that a city employee who claimed to have suffered employment-related discrimination is not required to exhaust both the internal administrative remedy in the city charter and the administrative remedy provided by the FEHA before filing a FEHA disability discrimination claim in superior court.^{n101.1} A public employee who claims employment-related discrimination and asserts both FEHA claims and nonstatutory claims for wrongful demotion and constructive termination in violation of public policy is similarly not required to exhaust the internal administrative remedy provided by his or her employer with respect to FEHA-related nonstatutory claims when the resolution of those claims would have a preclusive impact on the FEHA claim. However, the public employee is required to exhaust internal administrative remedies as to nonstatutory claims which are not FEHA-related, because the resolution of the nonstatutory claims would have no preclusive effect on the FEHA claim against the former employer.^{n101.2}

In *Rojo*, the California Supreme Court found that *California Constitution, Article I, Section 8*,ⁿ¹⁰² which provides that no person may be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin, sets forth a fundamental public policy against employment discrimination on any of those grounds. The Court further held that the constitutional provision may be the basis for a tort cause of action for wrongful termination in violation of public policy, independent of the FEHA.ⁿ¹⁰³

In *Phillips v. St. Mary Regional Medical Center*,^{n103.1} the court held that a wrongful discharge claim for violation of public policy for retaliation for filing discrimination claims could be based on *California Constitution, Article I, Section*

8. The court found that even though Section 8 does not explicitly enumerate retaliation as a prohibited form of discrimination, employment discrimination often manifests itself in retaliatory conduct. The court also noted that in *Rojo*, plaintiffs alleged they had been terminated for refusing to submit to their employer's sexual advances and in retaliation for exercising their fundamental right to be free from sexual harassment, and that the California Supreme Court indicated that under either theory, the plaintiffs' causes of action for wrongful discharge in violation of public policy were sufficient to survive demurrer.^{n103.2}

Rojo left open the issue of whether the FEHA itself, in the absence of any other constitutional or statutory provision, could serve as the source of a fundamental public policy to establish a claim for wrongful discharge in violation of public policy. In *Stevenson v. Superior Court*,ⁿ¹⁰⁴ the California Supreme Court answered this question in the affirmative. The Court found that employees may bring a common law tortious discharge claim in violation of the FEHA's policy against age discrimination. Moreover, in order to bring such an action, a plaintiff does not need to exhaust the administrative remedies that are applicable to statutory claims under the FEHA.ⁿ¹⁰⁵ And, subsequently, the Court concluded that the policy against disability discrimination is fundamental and substantial, noting that disability discrimination is indistinguishable in many ways from race and sex discrimination.^{n105.1}

In *Silo v. CHW Medical Foundation*,^{n105.2} the California Supreme Court found that a Catholic hospital was exempt under the FEHA because it was a nonprofit religious corporation and therefore not an "employer" within the meaning of the FEHA.^{n105.3} Thus, it was not liable for terminating an employee in violation of public policy, *i.e.*, for using what the employer considered objectionable religious speech in the workplace. Citing *Rojo*, the Court noted at the outset that the employer's exemption from FEHA liability did not necessarily mean it had no tort liability for terminating an employee in violation of public policy.^{n105.4} The Court distinguished *Jennings v. Marralle*,^{n105.5} in which the Court had held that the FEHA exemption for employers of fewer than five persons^{n105.6} precluded a tortious wrongful discharge claim based on the general public policy statements within the FEHA.^{n105.7} The Court made the distinction because the form of employment discrimination at issue in *Jennings* was age discrimination, which had only a statutory--not a constitutional--basis. In *Silo*, the Court confirmed that *art. I, § 8 of the California Constitution* articulates a fundamental public policy against religious discrimination, *i.e.*, discrimination on the basis of creed, sufficient to sustain a wrongful discharge action.^{n105.8} However, the Court held that reading the *art. I, § 8* prohibition against religious discrimination in employment together with the *Free Exercise and Establishment clauses* of the federal and state constitutions, and with the FEHA's explicit exemption of religious organizations from liability for such discrimination, the Court could not say there is a fundamental and substantial public policy that prohibits a religious employer from terminating an employee because of his or her objectionable religious speech in the workplace.^{n105.9} The Court expressly declined to consider whether a religious employer would be liable in tort for terminating an employee in violation of a public policy against sexual discrimination in *article I, section 8 of the California Constitution*, despite the FEHA exemption.^{n105.10} Finally, the Court held that the disposition was unaffected by the 1999 addition of *Gov. Code § 12926.2(c)*, defining "employer" for the purposes of FEHA to include a religious corporation or association with respect to persons employed by the religious association or corporation to perform duties, other than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care not restricted to adherents of the religion that established the association or corporation. The Court opined that, assuming *arguendo* the amendment now creates an unqualified, fundamental public policy against religious health care employers' unreasonable restriction of religious speech in the workplace, it would have no bearing on the decision in *Silo* because an employer cannot be held liable for violating a public policy that was not manifest at the time it committed the alleged tortious action.^{n105.11}

[g] Nuclear Industry Regulatory Laws

In *English v. General Electric Co.*,ⁿ¹⁰⁶ the United States Supreme Court held that a state law claim for infliction of emotional distress arising from a wrongful termination was not preempted by the Energy Reorganization Act of 1974,ⁿ¹⁰⁷ a federal law that regulates the nuclear power industry. The claim was based on actions allegedly taken by a nuclear fuels production facility to retaliate against a technician for her nuclear safety complaints. Such retaliation is

forbidden by the federal statute, which provides an administrative remedy for such retaliation.¹⁰⁸ The Court held that although the field of nuclear safety is generally preempted by federal law, the state tort action was not preempted because it was not within the field of nuclear safety nor motivated by safety concerns, nor would it have a direct and substantial effect on nuclear safety concerns.¹⁰⁹ The Court also held that the state tort claim did not conflict with particular aspects of the federal statute, including its antiretaliation provisions.¹¹⁰

[h] Federal Immigration Laws

In *Jie v. Liang Tai Knitwear Co., Ltd.*,^{110.1} the California Court of Appeal held that California law allowing suits for wrongful termination based on retaliation for reporting violations of the federal Immigration and Naturalization Act (INA),^{110.2} is not preempted by the Immigration Reform and Control Act of 1986 (IRCA).^{110.3} The court found no actual conflict between IRCA and California law allowing employees to sue for wrongful termination, if they allege they were fired because they reported their employer for violating federal or state laws against employing undocumented workers. The court found that allowing the suits does not interfere with the policies behind IRCA and that no Congressional intent to foreclose the state remedy appears in IRCA. The court also held that the IRCA does not preempt the damages recoverable for wrongful termination in violation of public policy or operate to limit the damages recoverable in such an action.^{110.4}

In *Incalza v. Fendi North America, Inc.*,^{110.5} the Ninth Circuit held that the Immigration Reform and Control Act of 1986 (IRCA) did not preempt California labor laws forbidding employers from firing an employee without good cause, because IRCA did not require the employer to terminate the employment. The court found that there was no conflict between federal and California law, because the employee was not discharged because of his unauthorized employment status, and the employer could lawfully have taken action other than discharge and been in compliance with IRCA. The employer itself recognized that discharge was not required, as evidenced by its decision to continue to employ an employee in the same position as the discharged employee while obtaining an H1-B visa for him. Further, the employer could have granted the employee's request for temporary, unpaid leave so that he could resolve his work authorization problems. IRCA requires that an employer not continue to employ workers who are unauthorized, but does not bar an employer from suspending an employee or placing the employee on unpaid leave for a reasonable period while the employee remedies the deficiency in his status. *Hoffman Plastic Compounds v. NLRB* ^{110.6} did not require the employer to terminate the employee immediately. Under *Hoffman*, as a general rule, individuals who are indisputably not authorized to work must be discharged immediately. *Hoffman* did not consider whether employees who were able to resolve their work authorization problems within a short time could be suspended or granted leave without pay for the interim period.^{110.7}

[2] Statute of Frauds

The statute of frauds does not bar wrongful termination claims based on breach of an oral or implied in fact contract not to terminate except for cause.¹¹¹ In *Foley v. Interactive Data Corp.*,¹¹² the employer had argued that the plaintiff's contract claims were barred by *Civil Code Section 1624(a)*, which invalidates any unwritten agreement that "by its terms is not to be performed within a year from [its making]." The California Supreme Court held that the statute was inapplicable because it refers only to contracts which, by their terms, cannot possibly be performed within a year.¹¹³ The Court reasoned that an employment agreement with a good-cause limitation has the possibility of being completed within one year, because an employee may quit or the employer may discharge the employee for cause within that time.¹¹⁴

This rule is not limited to contracts of an indefinite term. If a contract for a specific term in excess of one year can possibly be terminated within one year, the statute of frauds does not require the contract be in writing.¹¹⁵

[3] Parol Evidence Rule

In some cases, the plaintiff-employee has signed an employment contract that provides for at will employment, but other oral promises have been made by the employer to the effect that termination will be for cause only. In these cases, the first issue to determine is whether or not the written at will contract is integrated, because the parol evidence rule generally prohibits the introduction of any extrinsic evidence that would vary or contradict the terms of an integrated written agreement (that is, one that is meant to be the complete and final embodiment of the agreement).ⁿ¹¹⁶ For example, in one case,ⁿ¹¹⁷ the court of appeal found that a contract that stated that employment would continue so long as it was "mutually agreeable to both parties" created an at will employment contract. Because the court found that the contract was integrated and because the contract provided that it superseded all prior agreements, evidence of an implied agreement contradicting those terms was not admissible.ⁿ¹¹⁸ In another case, the court held that an employment letter authorizing termination by either party in their discretion was the complete integrated contract, and therefore parol evidence was inadmissible to establish that under prior oral representations the employer had created an employment terminable only for cause.ⁿ¹¹⁹

Recently, the court held that an at will clause in a confidentiality agreement constituted a fully integrated agreement with respect to the subject of termination, thus precluding parol evidence.ⁿ¹²⁰ Another case held that an employment application and employment contract that each used at will language constituted an integrated agreement, and therefore the employer did not have to show good cause for termination or justify its business judgment in terminating the employee as part of a reduction in force.ⁿ¹²¹ An unintegrated application, however, does not preclude the introduction of parol evidence to determine whether the relationship could only be terminated for cause.ⁿ¹²²

If the contract is integrated, parol evidence may nevertheless be admitted to explain the meaning of the written contractual language, but only if the relevant language is reasonably susceptible to the interpretation advanced by the parol evidence.ⁿ¹²³ In two different cases dealing with this issue, the courts denied admission of parol evidence contradicting at will contracts which contained language, in one case, stating that the employment would continue so long as it was "mutually agreeable" and in the other case, that employment could be terminated "for any reason." The courts held that these terms were clear and not susceptible of other meanings.ⁿ¹²⁴ However, in another case, in which an employee had signed an employment application stating that employment could be terminated with or without cause at any time, the court held that parol evidence was admissible to establish an implied termination for cause agreement between the parties because (1) the application was not a complete integrated agreement, and (2) even if the agreement were an integrated one, the evidence was admissible to explain a meaning of the language of the application to which the language was reasonably susceptible.ⁿ¹²⁵

An agreement may also be only partially integrated, and in such cases the parol evidence rule applies to the integrated part of the agreement. However, extrinsic evidence may be used to prove elements of the agreement not reduced to writing.ⁿ¹²⁶ Thus, a court may consider such evidence to construe language in an unintegrated part that is susceptible to the meaning urged by either party.ⁿ¹²⁷ One court held that an at will provision in an employment application was a partial integration and that parol evidence of a subsequent agreement for permanent employment was inadmissible because it was not integrated with respect to the term of employment.ⁿ¹²⁸

In one unusual case, the plaintiff had a series of one-year contracts that provided for termination by either party on two weeks notice and stated that upon termination for any reason, the employer would continue to pay the employee for a specified period of time; but the contract did not specify that termination could be for any reason. The court held that the contract was silent on the acceptable grounds for termination and was only partially integrated. Therefore the plaintiff could properly offer parol evidence of a related oral understanding to prove additional terms of the contract not inconsistent with the express language of the writing.ⁿ¹²⁹ The court emphasized that the plaintiff's burden in this type of case is high, in that he or she must show the existence of an oral understanding, establish that it required good cause for termination, and also defeat the existence of good cause for his or her termination.ⁿ¹³⁰

[4] Statute of Limitations

There are several statutes of limitations set out in the Code of Civil Procedure that are potentially relevant to various causes of action in a wrongful termination suit. *Code of Civil Procedure, section 337(1)* establishes a four-year period for an action based on a written contract. *Code of Civil Procedure, section 338(a)* prescribes a three-year period for an action on a liability created by statute, other than a penalty or forfeiture. *Code of Civil Procedure, section 339(1)* provides a two-year limitations period for an action based on a contract not in writing. Additionally, *Code of Civil Procedure, section 335.1* sets out a two-year statute for an action for injury caused by the wrongful act or neglect of another.

Although there are no cases directly on point, a wrongful termination action styled as a breach of contract case would appear to be governed by either the four-year statute for written contracts,ⁿ¹³¹ or the two-year statute for oral or implied contracts.ⁿ¹³²

A claim of wrongful termination in violation of public policy sets forth a claim for violation of a personal right. Accordingly, it has been held that the appropriate statute of limitations is the two-year statute set forth in *Code Civ. Proc. § 335.1*.ⁿ¹³³ The Ninth Circuit has also stated (without discussion) that the applicable statute of limitations for a wrongful discharge action based on violation of public policy is two years, pursuant to *Code of Civil Procedure, section 335.1*.ⁿ¹³⁴ Similarly, in light of the fact that the primary nature of the right sued on in a wrongful termination action is personal, the Ninth Circuit has held that the statute of limitations for a claim for wrongful termination in violation of *ERISA Section 510*^{n134.1} is the two-year statute set forth in *Code Civ. Proc. § 335.1*.^{n134.2}

The one-year limitations period under the Fair Employment and Housing Actⁿ¹³⁵ does not apply to bar a wrongful discharge action that alleges discrimination based on common law claims that are independent of the act. In *Carmichael v. Alfano Temporary Personnel* ⁿ¹³⁶ the plaintiff had pursued administrative remedies under both the FEHAⁿ¹³⁷ and Title VII of the Civil Rights Act of 1964.ⁿ¹³⁸ After receiving right to sue letters from both agencies,ⁿ¹³⁹ the plaintiff filed a complaint stating common law causes of action for wrongful discharge (including violation of public policy) based on discrimination, after the limitations period under the FEHA had lapsed, but one day prior to the expiration of the one-year limitations period under former *Code of Civil Procedure section 340(3)*^{n139.1} (that limitations period having been tolled during plaintiff's pursuit of federal administrative remedies).ⁿ¹⁴⁰ Following *Rojo v. Kliger*, ⁿ¹⁴¹ the court of appeal held that the applicability of the one-year limitations period under the FEHA depends on whether the plaintiff alleged a common law claim independent of the act. After reviewing the facts, the court concluded that plaintiff's claims, based on retaliation for reporting discriminatory conduct, stated an independent cause of action in violation of public policy and therefore were not subject to the limitations period set forth in FEHA.ⁿ¹⁴²

In *Mathieu v. Norrell Corp.*, ^{n142.1} the California Court of Appeal held that the two-year limitations period for an action for wrongful discharge in violation of public policy is not tolled while the plaintiff pursues an administrative claim with the Department of Fair Employment and Housing. The court found the tolling argument inconsistent with California Supreme Court decisions holding that a common law cause of action for discharge in violation of public policy is, in effect, an independent alternative to a FEHA administrative claim and subsequent cause of action under the Fair Employment and Housing Act.^{n142.2}

In *Eisenberg v. Insurance Co. of North America*, ⁿ¹⁴⁴ the Ninth Circuit held that a claim for the breach of the covenant of good faith and fair dealing was governed by the two-year limitations period set forth in *Code of Civil Procedure, section 339(1)*, governing actions based on oral or implied contracts.

In *Romano v. Rockwell International, Inc.*, ⁿ¹⁴⁵ the California Supreme Court considered when the statute of limitations began to run in a wrongful termination case in which the plaintiff had alleged causes of action sounding in tort and contract, as well as violation of the FEHA. The plaintiff, Romano, had been notified of his termination two and one-half years before his employment actually terminated. Under all causes of action, the claim accrued on the date of his actual termination. With respect to the contract claim, the Court reasoned that although the notification constituted an anticipatory breach on which plaintiff could elect to sue, the anticipatory breach did not prevent plaintiff from

electing to wait until the actual breach occurred and suing on the actual breach. With respect to the tort claim for wrongful termination in breach of public policy, the Court reasoned that the cause of action alleged was one that limited the defendant's right to dismiss the plaintiff at will and therefore the action could not accrue until the actual dismissal. Finally, with respect to the FEHA claim, the Court found that because the statute expressly lists discriminatory "discharge" as grounds for a claim, and further states that the time to bring administrative claims begins to run "after" the unlawful employment practice has "occurred", the claim for discriminatory discharge could not accrue until the discharge had actually happened.ⁿ¹⁴⁶ The court expressly declined to follow the United States Supreme Court's approach in the decisions *Delaware State College v. Ricks* ⁿ¹⁴⁷ and *Chardon v. Fernandez*, ⁿ¹⁴⁸ which state that the cause of action occurs when the discriminatory decision is communicated to the plaintiff. The Court based its analysis on the fact that the FEHA defines "discharge" as a discriminatory act, while the federal discrimination laws focus on the discriminatory decision.

In reaching its holding, the Court discussed the fact that requiring an employee to bring his or her claims while still employed creates a situation in which the chances for conciliation or correction of the wrongful or discriminatory decision are greatly reduced. Later, in *Mullins v. Rockwell International Corp.*,ⁿ¹⁴⁹ the Court relied on *Romano* to find that in constructive discharge actions, the statute of limitations begins to run on the date employment actually is terminated, *i.e.*, when the employee resigns, and not when the alleged intolerable conditions occur.

An employer may include in an employment contract a provision shortening the statute of limitations for suits related to the contract, including wrongful termination suits. In *Soltani v. Western & Southern Life Ins. Co.*, ^{n149.1} the Ninth Circuit construed California law and held that a contractual provision limiting to six months the time within which suits on an employment contract could be brought was not unconscionable. The court found the provision to be enforceable, despite some element of adhesion, because the six-month limitation was not substantively unconscionable.^{n149.2} However, the court held unconscionable a contractual requirement obligating the employee to serve the employer with written notice of the employment contract claim's particulars ten days before commencing suit. Applying the analysis set forth by the California Supreme Court in *Armendariz*, ^{n149.3} the court could find little justification for the notice requirement. It held that ten days is not enough time for the company to investigate the factual bases of a claim, to settle a claim without litigation, to consider the fiscal implication of potential litigation or to take corrective action to prevent other such claims. In addition, the ten-day notice provision does not prevent stale claims, since it applies to any claim, irrespective of its age. Finally, the notice provision cannot promote judicial economy, because there was no corresponding requirement to exhaust company grievance procedures. Thus, the court found the requirement unconscionable because failure to comply deprived an employee of a judicial forum and its concomitant rights.^{n149.4}

■ CONSULTANT'S COMMENT:

As a practical matter, employers risk the invalidation of their arbitration agreements to the extent they curtail substantive and procedural rights otherwise available in court litigation. *Soltani*, however, is a reminder that some limitations upon substantive and procedural rights are permissible. *Soltani* should not be taken as a license to "experiment" with such limitations, but it is extremely helpful to know that certain statutes of limitation may be shortened, thus permitting more rapid resolution of employee concerns. *Commentary by Kirby Wilcox.*

[5] Termination for Cause

[a] Order and Burden of Proof

In many wrongful termination cases, the plaintiff claims that he or she was protected from the dismissal at will, normally permissible under *Labor Code Section 2922*, by a contract or covenant (express or implied) requiring that there be good cause for termination. Assuming that such a contract or covenant exists in a given case, the plaintiff may not recover if the employer had good cause for termination. However, a court may decide as a matter of law that there was no agreement to terminate for good cause if there are no facts to show the existence of such an agreement.ⁿ¹⁵⁰ For

further discussion, *see* 60.05.

Plaintiff carries the ultimate burden of proving that he or she was terminated wrongfully. First, plaintiff must demonstrate a prima facie case that he or she was terminated despite adequate job performance. The employer must then produce evidence of having conducted an appropriate investigation and having reached an honest belief that there was good cause for the termination.ⁿ¹⁵¹ The plaintiff may then attack the defendant's proffered reason for termination, either on the ground that it is pretextual and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles.ⁿ¹⁵²

When the plaintiff-employee alleges that the termination violated the implied covenant of good faith and fair dealing, the plaintiff must bring forth facts to show that the employer acted in bad faith and lacked probable cause to believe that it had cause to terminate the employee.ⁿ¹⁵³ In the absence of facts showing that the employer lacked a reasonable belief in the existence of cause for discharge, the employee cannot prevail merely by showing that the employer was mistaken and that, in fact, no good cause existed for the discharge.ⁿ¹⁵⁴

[b] What Constitutes "Good Cause"

Good cause for termination may be spelled out in an employment contract or may appear in written or unwritten company policies.ⁿ¹⁵⁵ If the employer has never defined good cause for the dismissal of its employees, the court considering the termination of an employee will likely adopt the definition employed in *Pugh v. See's Candies, Inc.* ("*Pugh I*"):ⁿ¹⁵⁶ "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." This definition was further elucidated in *Pugh v. See's Candies, Inc.* ("*Pugh II*").ⁿ¹⁵⁷ the opinion on appeal of the *Pugh I* case after remand and trial. In *Pugh II*, the court of appeal stated that this definition allows the trier of fact to consider the business judgment of the employer or the fairness to the employee of the decision to discharge, while giving substantial weight to managerial discretion. The court stated that the employer's interest in operating its business efficiently and profitably should be balanced against the employee's interest in maintaining his or her employment.ⁿ¹⁵⁸ Thus, the trier of fact must scrutinize the employer's business judgment and determine whether the discharge was justified under all of the circumstances, and if it finds that the employer's reasons for discharge were trivial, capricious, or pretextual, it may find that the termination was not made for a "fair and honest cause or reason" regulated by good faith.ⁿ¹⁵⁹

In *Pugh II*, the court also discussed the employer's discretion to make termination decisions in cases involving high-ranking administrative or managerial employees. The court stated that an employer must have wide latitude in making independent decisions concerning high-ranking employees whose failure to perform may be difficult to articulate because "[m]easuring the effective performance of such an employee involves consideration of many intangible attributes such as personality, initiative, ability to function as part of the management team and to motivate subordinates, and the ability to conceptualize and effectuate management style and goals."ⁿ¹⁶⁰

Generally, employers have prevailed by showing good cause for termination in two ways. In one type of case, the termination was prompted by legitimate business reasons that had nothing to do with the employee's job performance.ⁿ¹⁶¹ In other cases, the employer acted in good faith by terminating an employee whom it reasonably believed had violated company policy.ⁿ¹⁶²

Reorganization of a company's business to respond to changing economic conditions was held to be good cause for termination in *Gianaculas v. Trans World Airlines, Inc.* ⁿ¹⁶³ and *Clutterham v. Coachmen Industries, Inc.* ⁿ¹⁶⁴ In *Gianaculas*, three management employees were terminated in a reduction in force ("RIF"). All were offered nonmanagement positions and declined them. They sued the company, claiming it breached their employment contracts and covenants of good faith and fair dealing by failing to follow its own policy manual regarding the displacement of lower-level managers. The court affirmed a summary judgment for the employer, holding that terminations that were part of a general RIF caused by economic conditions and that the abolition of certain job positions was not without good

cause.ⁿ¹⁶⁵

Summary judgment for the employer was affirmed on similar reasoning in *Clutterham*.ⁿ¹⁶⁶ Defendant produced uncontradicted evidence that the termination was due to depressed market conditions and the concomitant reorganization of the business. The court cited *Gianaculas* ⁿ¹⁶⁷ for its holding that a business judgment to reorganize one's operations constitutes good cause for the termination of employees.ⁿ¹⁶⁸ Defendant carried its burden of producing evidence of good cause, and plaintiff failed to show that it was pretextual or that the employer acted in bad faith; therefore, summary judgment was held proper.ⁿ¹⁶⁹

Defendants have prevailed in other cases by showing that the terminations in question were carried out because the employee had violated company policies. In one case, for example, the court affirmed a summary judgment for the defendant because plaintiff failed to show that defendant's proffered reasons for terminating him were pretextual or that it had acted in bad faith.ⁿ¹⁷⁰ Plaintiff had violated an unwritten but well-known rule of the employer prohibiting fraternization among employees. He admitted in both his complaint and his deposition that he believed his fraternization with a nonmanagement employee was the reason for his termination. The court found that plaintiff's argument that the dismissal was based on other, improper motives was mere conjecture and speculation, insufficient to raise a triable issue of material fact.ⁿ¹⁷¹

Plaintiff also argued that violation of the no-fraternization rule was not good cause for termination because the rule was unreasonable and selectively applied. The court rejected the contention, concurring with the statement in *Pugh v. See's Candies* ("Pugh I") that an employer "must of necessity be allowed substantial scope for the exercise of subjective judgment" concerning the termination of an employee in a managerial position.ⁿ¹⁷² Moreover, the court found the employer's and the public's interests in preventing sexual harassment and/or favoritism outweighed plaintiff's interest in keeping his job.ⁿ¹⁷³ The court rejected defendant's proposal that it adopt a *per se* rule precluding judicial review of an employer's business reasons for discharging an employee. The court stated that the employer should not always be the final arbiter of what constitutes good cause.ⁿ¹⁷⁴

In *Cotran v. Rollins Hudig Hall International, Inc.*, ⁿ¹⁷⁵ the California Supreme Court considered the case of an employee who contested his termination for sexually harassing other employees. Specifically, the Court decided the jury's role in resolving whether an employee who has been dismissed for alleged misconduct, has been properly terminated for good cause.ⁿ¹⁷⁶ The Court rejected the plaintiff's argument that the jury's function is to decide whether the acts that led to the termination decision actually occurred. Rather, the Court said, "[I]t is the employer that decides whether acts of an employee amounting to just cause have occurred--and ... the role of the jury is to assess, through the lens of an objective standard, the reasonableness of that decision under the circumstances known to the employer at the time [the decision] was made." Therefore, the court held that the employer need not prove that the harassment actually occurred, only that it conducted an appropriate investigation and that it honestly concluded, for reasons that are neither arbitrary nor pretextual, that a dischargeable act had been committed.ⁿ¹⁷⁷

An employee's involvement in organizing a competing business may constitute a violation of the employee's duty of loyaltyⁿ¹⁷⁸ and may furnish good cause for termination of employment.ⁿ¹⁷⁹ In *Fowler v. Varian Associates, Inc.*, ⁿ¹⁸⁰ a court of appeal upheld summary judgment for the employer in an action for wrongful termination based, in part, on breach of an alleged implied agreement not to terminate except for good cause. The court held that the employer had good cause for terminating the employee, as a matter of law, on either of two bases: (1) the employee's refusal to disclose information he had gathered concerning an enterprise being organized to compete directly with the employer, and (2) the employee's assistance in obtaining financing for the competing enterprise.ⁿ¹⁸¹ Similarly, another court of appeal found sufficient cause for termination existed when extensive acts were performed by plaintiffs, who were managerial level employees with access to confidential information, to establish a competing business.ⁿ¹⁸² In *Stokes*, the court affirmed judgment for the defendant even though the employees were not actually competing, because the extensive preparations to compete constituted a breach of loyalty and conflicts of interest.ⁿ¹⁸³

Summary judgment was reversed in one case, however, in which an employee was terminated before his job in another state even began, because the employer's proffered reasons for terminating the employee were disputed or did not show good cause.ⁿ¹⁸⁴ The employer's declarations in support of the motion stated that the employee had made disparaging and demeaning remarks regarding the employer and the city in which it was located. The court of appeal held that the declarations were based on conclusions rather than evidentiary facts.ⁿ¹⁸⁵

The declarations also stated that the employee had appeared at the office inappropriately attired. However, this occurred prior to the employee's actual starting date, and the declaration did not state that this was the reason for the termination. The court held that this was thus a disputed issue that could not be resolved by summary judgment.ⁿ¹⁸⁶

"Good cause" in the context of at-will employment differs from "good cause" for termination of a contract for employment for a specified term, which is governed by *Lab. Code § 2924*. An employment contract for a specified term may only be terminated for a willful breach of duty, habitual neglect of duty, or continued incapacity to perform.^{n186.1} In *Khajavi v. Feather River Anesthesia Medical Group*,^{n186.2} the court held that *Lab. Code § 2924* does not allow termination of an employee under a contract for a specified term for an honest but mistaken belief that discharge was required or that the employee had breached his or her duty.^{n186.3}

[6] No Employment Relationship

Tort liability for violation of public policy is inapplicable when the relationship terminated is one of independent contractors, rather than employer and employee.ⁿ¹⁸⁷ In one case, a court of appeal found that independent contractors may not state a tort claim for wrongful termination in violation of the public policy against racial discrimination grounded in the California Constitution.ⁿ¹⁸⁸ Another court also indicated that the covenant of good faith and fair dealing is inapplicable to independent contractor relationships.ⁿ¹⁸⁹

Generally, whether an individual was an employee or independent contractor is a question of fact that depends on the trier of fact's evaluation of several factors, most notably whether the alleged employer has the right to control not only the result but also the means by which the work is accomplished.^{n189.1} Other relevant factors include the following:^{n189.2}

- (a) Whether the person performing services is engaged in a distinct occupation or business.
- (b) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision.
- (c) The skill required in the particular occupation.
- (d) Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work.
- (e) The length of time for which the services are to be performed.
- (f) The method of payment, whether by the time or by the job.
- (g) Whether the work is part of the regular business of the principal.
- (h) Whether the parties believe they are creating the relationship of employer-employee.

In addition, evidence that the relationship could be terminated by either party without cause is strong evidence of an at-will employment relationship.^{n189.3} On the other hand, neither the small amount of payment nor the failure to

withhold taxes is controlling.^{n189.4} The factors are not to be mechanically applied. They are intertwined, and their weight depends often on particular combinations.^{n189.5} Thus, for example, in *Ali v. L.A. Focus Publication*,^{n189.6} the plaintiff, who was a newspaper columnist, raised a triable issue of fact as to whether he was an employee rather than independent contractor. The relatively nominal amount the defendant-newspaper paid the plaintiff and the fact that no taxes were withheld were not controlling; that he was paid by the article rather than given a guaranteed monthly salary was indicative of an independent contractor status, but that fact alone was not dispositive if other indicia of an employer-employee relationship existed. Particularly relevant was evidence the defendant controlled not only the result but also the means by which the result was accomplished. Whether the defendant maintained this control was disputed. The parties disputed whether the plaintiff attended or was required to attend weekly staff meetings, whether the defendant provided him with an office, computer and a receptionist to take messages on his behalf, and whether he assisted the editor in other editorial duties. The plaintiff submitted evidence that none of the people whom the defendant identified as "freelance writers" was afforded the instrumentalities the defendant gave him nor were they required to attend staff meetings; and it was of some dispute whether the defendant identified the plaintiff as an employee when it obtained a press pass for him.^{n189.7}

In a related vein, one court of appeal refused to hold a parent corporation liable for the acts or omissions of its subsidiary in an action alleging sex discrimination, age discrimination, and wrongful termination, even though the subsidiary was wholly owned and financially controlled by the parent company.ⁿ¹⁹⁰ The court pointed to the strong presumption that a parent company is not the employer of its subsidiary's employees,ⁿ¹⁹¹ and rejected the four arguments advanced by the plaintiff to sue the parent of an employee's employer: (1) integrated enterprise, (2) agency, (3) alter ego, and (4) equitable estoppel, absent any evidence that the parent corporation exercised day-to-day control over the subsidiary's employment decisions or that it exercised any control over the subsidiary's decisions with respect to the plaintiff.ⁿ¹⁹²

[7] At-Will Employment of Corporate Officers

Corporations Code Section 312(b) states in part that "[e]xcept as otherwise provided by the articles or bylaws, officers shall be chosen by the board and serve at the pleasure of the board, subject to the rights, if any, of an officer under any contract of employment." Courts have held that this provision essentially corresponds to the at-will presumption of *Labor Code Section 2922*, which is applicable to employees generally,ⁿ¹⁹³ and it creates a comparable presumption.ⁿ¹⁹⁴ However, as noted in the above-quoted language, the terms of "any contract of employment" may overcome the presumption of at-will status that would otherwise apply (just as in the case of employees who are not corporate officers).ⁿ¹⁹⁵ In one corporate officer wrongful termination case, the plaintiff alleged an implied contract not to terminate except for good cause. The court of appeal found plaintiff's allegations of longevity of service, promotions, praise of her work, regular pay raises and bonuses, and the corporation's express personnel practices and policies indicating its obligation to deal fairly and in good faith were sufficient, if proved, to overcome the presumption of at-will employment created by *Corporations Code Section 312(b)*.ⁿ¹⁹⁶

[8] Arbitration Agreements

In recent years, federal and state courts have given much attention to the effect of arbitration agreements on a civil action for wrongful discharge, and especially the question of whether the civil action is precluded by the arbitration agreement. For full discussion, *see* Chapter 90.

[9] Effect of After-Acquired Evidence Justifying Termination

One issue that has frequently arisen is the extent to which evidence of employee misconduct that would have justified an employer's adverse employment action, but which was not discovered by the employer until *after* it took an allegedly wrongful employment action (so-called "after-acquired evidence"), may act as a defense to a wrongful discharge cause of action. The most common factual context in which this issue has arisen has involved an employer's discovery,

typically after the commencement of litigation, that the employee had falsified his or her resume or employment application. In such cases, employers have argued that the plaintiff should not be entitled to recovery because the plaintiff would have been fired (or would have not been hired in the first place) had the employer known of the falsification.

In *Cooper v. Rykoff-Sexton, Inc.*,ⁿ¹⁹⁷ the California Court of Appeal for the Second District, in a case involving common law wrongful termination and age discrimination claims, refused to adopt a blanket rule that after-acquired evidence of falsification of an employment application is a complete defense to a wrongful termination or employment discrimination claim.ⁿ¹⁹⁸ The court reasoned that an automatic forfeiture of all employment rights, regardless of circumstances, was too harsh a penalty in many cases. The court further reasoned that in cases in which an employer has fired a worker in violation of the statutory ban on discrimination, the purpose and effect of the discrimination statutes would be unacceptably undermined by a principle that would allow a fact that played no part in the firing decision to bar any recovery.ⁿ¹⁹⁹ The court did not discuss the potential effect of such after-acquired evidence on the amount of damages, as the issue was not before the court.ⁿ²⁰⁰

The court in *Cooper* noted the existence of two conflicting lines of authority in the federal court decisions applying the "after-acquired evidence" doctrine to employment discrimination claims. One line of cases, rejected by the California court in *Cooper*,ⁿ²⁰¹ follows the reasoning of *Summers v. State Farm Mutual Auto Insurance Co.*,ⁿ²⁰² in which the Tenth Circuit held that after-acquired evidence of employment application or resume falsification completely bars the plaintiff from obtaining any relief.ⁿ²⁰³ The Eleventh Circuit and Seventh Circuit have rejected a no-recovery rule, but have held that such evidence may preclude certain types of relief, such as front pay or reinstatement.ⁿ²⁰⁴

In *McKennon v. Nashville Banner Publishing Co.*,ⁿ²⁰⁵ which involved alleged age discrimination in violation of the Age Discrimination in Employment Act (ADEA),ⁿ²⁰⁶ the United States Supreme Court rejected the *Summers* line of authority and held that after-acquired evidence of employee misconduct does *not* completely bar a plaintiff from any relief for ADEA violations.ⁿ²⁰⁷ The Court in *McKennon* did indicate, however, that such evidence is relevant to the scope of relief available and will, as a general rule, preclude reinstatement or front pay as a remedy, but that the plaintiff may generally recover back pay measured from the date of the unlawful discharge to the date of discovery of the evidence of misconduct.ⁿ²⁰⁸

One case has indicated, however, that, notwithstanding the *Cooper* and *McKennon* decisions, after-acquired evidence may still act as a complete bar to a wrongful termination claim in exceptional circumstances. In *Camp v. Jeffer, Mangels, Butler & Marmaro*,ⁿ²⁰⁹ a California court of appeal seized on language in *Cooper* suggesting that after-acquired evidence might limit or bar an employee's claims in some situations,ⁿ²¹⁰⁻²⁹²⁻ⁿ²⁹³ to find that public policy wrongful discharge claims were barred by after-acquired evidence of the plaintiffs' prior felony convictions. In *Camp*, the employer, a federal contractor, was required by law to certify that none of its employees had been convicted of a felony. The plaintiffs lied on their employment applications by denying any prior felony convictions, and one plaintiff also signed a post-employment form stating that she had never been convicted of a felony. In affirming a summary judgment for the employer on the plaintiffs' wrongful discharge claims, the court stated that after-acquired evidence could bar liability altogether where, as in the present case, the misrepresentations relate directly to the wrongful termination claims and would have disqualified the plaintiff from employment.ⁿ²⁹⁴ In distinguishing the facts of the case before it from both *Cooper* and *McKennon*, the court found significant that the employer policies in those cases were self-imposed.ⁿ²⁹⁵ By contrast, in the present case the employees misrepresented a job qualification that was required by law and which rendered them lawfully unqualified for the job.ⁿ²⁹⁶

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

The availability of after acquired evidence as a partial defense to wrongful termination remedies requires plaintiff's counsel to be especially careful in evaluating cases and advising potential clients. Indeed, the scope of the initial interview is necessarily significantly broadened because of this doctrine. Care should be taken to go over a potential client's resume, prior employment history, college and post-graduate

degrees and any other information that the employer might have considered in hiring the employee. Additionally, where employer documents may be in the possession of the employee, careful inquiry into the employer's rules and policies about the confidentiality of those documents is advised. *Commentary by John M. True, III.*

For further discussion of the application of the after-acquired evidence doctrine in discrimination cases, *see* Chapter 41, Part E.

[10] Effect of Bankruptcy Proceedings

In one case, a California court of appeal held that a husband and wife's bankruptcy case did not preclude wrongful termination claims arising from the husband's post-petition termination.ⁿ²⁹⁷ The court rejected defendant's argument that all causes of action accruing subsequent to the filing of the bankruptcy petition belonged to the bankruptcy estate. The court reasoned that plaintiffs' causes of action arising from the husband's termination of employment, whether based on a contract for servicesⁿ²⁹⁸ or another theory, accrued post-petition and thus were not part of the bankruptcy estate.ⁿ²⁹⁹ With regard to the causes of action that accrued before the bankruptcy petition was filed, including the cause of action arising from the wife's termination, the court found that under the liberal amendment policy set forth in California cases, plaintiffs should have been allowed to amend their defective pleadings to substitute the bankruptcy trustee as party plaintiff and that the amendment would relate back to the original complaint.ⁿ³⁰⁰

[11] Issue Precluded by Prior Administrative Proceeding

Public employees may be required to administratively appeal a discharge before filing suit.ⁿ³⁰¹ If an administrative agency has determined that a public employee was not wrongfully terminated, the administrative determination is a basis upon which the employer may assert issue preclusion or collateral estoppel in the defense of a subsequent court action alleging wrongful termination. The threshold requirements for issue preclusion are the following:ⁿ³⁰²

- (1) The issue is identical to that decided in the former proceeding.
- (2) The issue was actually litigated in the former proceeding.
- (3) The issue was necessarily decided in the former proceeding.ⁿ³⁰³
- (4) The decision in the former proceeding is final and on the merits.
- (5) Preclusion is sought against a person who was a party or in privity with a party to the former proceeding.

When these requirements are met, the propriety of preclusion then depends on whether application will further the following public policies:ⁿ³⁰⁴

- Preserving the integrity of the judicial system.
- Promoting judicial economy.
- Protecting litigants from harassment by vexatious litigation.

Issue preclusion bars the relitigation of issues previously resolved in an administrative hearing by an agency acting in a judicial capacity as well as the relitigation of court findings.ⁿ³⁰⁵

In *Castillo* n305.1 issue preclusion was a proper ground for summary judgment for the employer against an employee of a municipal public works department who alleged that his discharge was in violation of public policies, including federal and state prohibitions against discrimination on the bases of age, race, and national origin. The employee had appealed his discharge to the civil service commission, but had not expressly raised the issue of discrimination in that proceeding. The hearing officer made findings that the employee had unsatisfactory attendance, that he had failed to improve that attendance over an extended period, and that the discharge was appropriate. At the hearing, the employee presented evidence of disparate treatment by his supervisor and others, but did not attribute the disparity to discrimination. The court, nonetheless, found issue preclusion proper. The court found that the issue was actually litigated in the administrative proceeding on the basis of evidence presented by the employee and that the employee was not precluded from presenting admissible evidence relevant to discrimination. The court also found that the issue of discrimination was necessarily decided on the ground that if the hearing officer had found that the reasons for discharge were merely a pretext for discrimination, she would not have found the discharge appropriate. Thus, the rejection of the employee's pretext claim was not entirely unnecessary to the judgment in the administrative proceeding.n306 In addition, the court found that allowing the employee to relitigate the discharge would diminish the value of the administrative process, especially if (as in this case) an employee must challenge the action administratively before filing suit. Finally, the court found that judicial economy was served by applying issue preclusion; the policy against vexatious litigation favored issue preclusion because the employee had an adequate opportunity at the administrative hearing to prove that his discharge was wrongful; and a single interest was protected by both the administrative and judicial proceedings.n307

[12] Failure to Exhaust Internal Grievance Procedures

In *Palmer v. Regents of the University of California*, n308 the court held that a former employee's failure to exhaust internal grievance procedures precluded her civil action for wrongful termination.n309 When a private association or public entity establishes an internal grievance mechanism, as the Regents had done in *Palmer*, failure to exhaust those internal remedies precludes any subsequent private civil action.n310 Exhaustion is jurisdictional.n311

The court distinguished exhaustion of external administrative remedies, such as the remedy provided by FEHA,n312 which an employee need not exhaust before bringing a civil suit.n313 The court also found that the doctrine of primary jurisdiction, which requires a litigant to first seek relief from an outside regulatory agency (such as the State Insurance Commissioner, the Federal Communications Commission or the Civil Aeronautics Board), did not apply to the requirement that internal administrative remedies be exhausted.n314 The court also held that in this case, *Gov. Code § 8547.10*, (part of the California Whistleblower Protection Act), reinforced the propriety of applying the exhaustion requirement since plaintiff had sued the Regents for wrongful termination without first exhausting the University's internal grievance procedures.n315 *Government Code section 8547.10(c)*, which specifically applies to employees of the University of California, allows an action for damages against any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a university employee or applicant for employment for having made a protected disclosure. However, section 8547.10(c) provides that an action for damages is not available to the injured party unless the injured party has first filed a complaint with the specified university officer, and the university has failed to reach a decision regarding the complaint within the time limits established for that purpose by the Regents. Further, *Gov. Code § 8547.10(f)*, which was added after the plaintiff in *Palmer* filed her lawsuit against the Regents, expressly preserves an employee's remedies under any other state law. However, a common-law action for wrongful termination in violation of public policy against retaliating against one who reports unlawful activity is generally not a "remedy under state law" available to a person in the position of the plaintiff in *Palmer*.

In *Shuer v. County of San Diego*, n316 a probationary employee sued the county for wrongful termination, and the trial court granted the county's demurrer for failure to exhaust internal administrative remedies. The court held that the county provided an administrative remedy to redress the claim of retaliatory dismissal from employment even though the rights of probationary employees were not as extensive as those of permanent employees. However, because the county provided the probationary employee with misleading and mistaken information concerning the availability of an

administrative remedy, it was estopped from asserting her failure to exhaust the remedy.

In *Lloyd v. County of Los Angeles*,ⁿ³¹⁷ however, the trial court properly held that a county employee was not required to exhaust internal administrative remedies prior to filing suit against the county for retaliation, because the employee's claim that he suffered discrimination based on whistleblowing was not governed by the county's internal rules. The court distinguished *Shuer* on the ground that there, the county charter and rules repeatedly stated that all employment decisions had to be made on the basis of job-related qualifications, merit and equal opportunity without regard to age, color, creed, disability, national origin, political affiliation, race, religion, sex, or any other non-job-related factor, and a decision to dismiss an employee for revealing unethical or illegal conduct by county employees discriminated against her based on a non-job-related factor. In contrast, the county rule at issue in *Lloyd* was much narrower, and a claim of retaliation for whistleblower activity did not constitute discrimination on the basis of a factor within the meaning of that rule.

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Defenses General Overview

FOOTNOTES:

(n1)Footnote 1. *See, e.g., Lab. Code §§ 132a* (workers' compensation is exclusive remedy for employee who is fired for filing workers' compensation claim), 3600, 3602 (workers' compensation benefits are exclusive remedy for certain injuries arising out of employment); *see also* discussion in [d], *below*.

(n2)Footnote 2. *See Aalgaard v. Merchants National Bank, Inc. (1990) 224 Cal. App. 3d 674, 686, 274 Cal. Rptr. 81* .

(n3)Footnote 3. *See Hall v. Great Western Bank (1991) 231 Cal. App. 3d 713, 720, 282 Cal. Rptr. 640* ; *Aalgaard v. Merchants National Bank, Inc. (1990) 224 Cal. App. 3d 674, 692, 274 Cal. Rptr. 81* .

(n4)Footnote 4. *See 12 U.S.C. § 24*, para. 5; *Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082, 1091, 282 Cal. Rptr. 841, 811 P.2d 1025* ("bank officers" defined).

(n5)Footnote 5. *Peatros v. Bank of America (2000) 22 Cal. 4th 147, 91 Cal. Rptr. 2d 659, 990 P.2d 539* .

(n6)Footnote 6. *12 U.S.C. § 24 et seq.*

(n7)Footnote 6.1. *See Peatros v. Bank of America (2000) 22 Cal. 4th 147, 172, 91 Cal. Rptr. 2d 659, 990 P.2d 539* .

(n8)Footnote 6.2. *See Peatros v. Bank of America (2000) 22 Cal. 4th 147, 172, 91 Cal. Rptr. 2d 659, 990 P.2d 539* .

(n9)Footnote 6.3. *See Peatros v. Bank of America (2000) 22 Cal. 4th 147, 172-173, 91 Cal. Rptr. 2d 659, 990 P.2d 539* .

(n10)Footnote 7. *Hall v. Great Western Bank (1991) 231 Cal. App. 3d 713, 720, 282 Cal. Rptr. 640* ; *see Inglis v. Feinerman (9th Cir. 1983) 701 F.2d 97 (12 U.S.C. § 1432(a))*; *Bollow v. Federal Reserve Bank of San Francisco (9th Cir. 1981) 650 F.2d 1093 (12 U.S.C. § 341, para. 5)*; *Aalgaard v. Merchants National Bank, Inc. (1990) 224 Cal. App. 3d 674, 274 Cal. Rptr. 81 (12 U.S.C. § 24, para. 5)*.

(n11)Footnote 7.1. *Marques v. Bank of Am. NT&SA (1997) 59 Cal. App. 4th 356, 361, 69 Cal. Rptr. 2d 154* ; *see,*

e.g., *Moodie v. Federal Reserve Bank of N. Y.* (S.D.N.Y. 1993) 831 F. Supp. 333, 336-337 (court found nothing in Federal Reserve Act supporting view that Congress considered employment discrimination at the time of enactment and nothing in dismissal-at-pleasure language to support view that Congress intended to exempt federal reserve banks, regarding employment discrimination, from state statutes or regulations, particularly when state scheme is consistent with federal legislation); *White v. Federal Reserve Bank* (Ohio Ct. App. 1995) 103 Ohio App. 3d 534, 660 N.E.2d 493, 495-496 (following *Moodie*).

(n12)Footnote 8. *Hall v. Great Western Bank* (1991) 231 Cal. App. 3d 713, 719-722, 282 Cal. Rptr. 640 ; accord *Thomka v. Financial Corp. of Am.* (1993) 15 Cal. App. 4th 877, 887-891, 19 Cal. Rptr. 2d 382 .

(n13)Footnote 9. See 12 C.F.R. § 563.39. This regulation was promulgated under the Home Owner's Loan Act, which, among other things, charters federal savings associations. See 12 U.S.C. § 1464(a).

(n14)Footnote 10. See *Hall v. Great Western Bank* (1991) 231 Cal. App. 3d 713, 721-722, 282 Cal. Rptr. 640 ; *Honig v. Financial Corp. of Am.* (1992) 6 Cal. App. 4th 960, 964-965, 7 Cal. Rptr. 2d 922

(n15)Footnote 11. *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation* (1942) 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 .

(n16)Footnote 12. 12 U.S.C. § 1823(e).

(n17)Footnote 13. *Thomka v. Financial Corp. of Am.* (1993) 15 Cal. App. 4th 877, 887-891, 19 Cal. Rptr. 2d 382 .

(n18)Footnote 14. *Thomka v. Financial Corp. of Am.* (1993) 15 Cal. App. 4th 877, 887, 19 Cal. Rptr. 2d 382 .

(n19)Footnote 15. *Thomka v. Financial Corp. of Am.* (1993) 15 Cal. App. 4th 877, 889, 19 Cal. Rptr. 2d 382 .

(n20)Footnote 16. 29 U.S.C. § 151 et seq.

(n21)Footnote 16.1. *San Diego Unions v. Garmon* (1959) 359 U.S. 236, 246, 79 S. Ct. 773, 3 L. Ed. 2d 775 .

(n22)Footnote 16.2. See *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Empl. Rels. Comm'n* (1976) 427 U.S. 132, 149-151, 96 S. Ct. 2548, 49 L. Ed. 2d 396 .

(n23)Footnote 16.3. *San Diego Unions v. Garmon* (1959) 359 U.S. 236, 243, 79 S. Ct. 773, 3 L. Ed. 2d 775 .

(n24)Footnote 16.4. *Operating Engineers v. Jones* (1983) 460 U.S. 669, 676, 103 S. Ct. 1453, 75 L. Ed. 2d 368 ; *San Diego Unions v. Garmon* (1959) 359 U.S. 236, 244, 79 S. Ct. 773, 3 L. Ed. 2d 775 .

(n25)Footnote 16.5. See, e.g., *Paige v. Henry J. Kaiser Co.* (9th Cir. 1987) 826 F.2d 857 (no preemption where two workers discharged after complaining about Cal-OSHA safety violations); *Inter-Modal Rail Employees Assn. v. Burlington Northern & Santa Fe Ry. Co.* (1999) 73 Cal. App. 4th 918, 87 Cal. Rptr. 2d 60 (no preemption where employees who formed association to complain about unsafe working conditions were terminated en masse because of importance of state interest in providing safe workplace).

(n26)Footnote 16.6. *Sears, Roebuck & Co. v. Carpenters* (1978) 436 U.S. 180, 197, 98 S. Ct. 1745, 56 L. Ed. 2d 209 .

(n27)Footnote 16.7. *Longshoremen v. Davis* (1986) 476 U.S. 380, 395, 106 S. Ct. 1904, 90 L. Ed. 2d 389 .

(n28)Footnote 16.8. *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal. App. 4th 623, 632-639, 17 Cal. Rptr. 3d 336 .

(n29)Footnote 16.9. 29 U.S.C. § 157 (employees have the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection).

(n30)Footnote 16.10. *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal. App. 4th 623, 634-635, 17 Cal. Rptr. 3d 336 . See also *Ewing v. N.L.R.B.* (2d Cir. 1988) 861 F.2d 353, 355 .

(n31)Footnote 16.11. *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal. App. 4th 623, 635, 17 Cal. Rptr. 3d 336 . See also *Ewing v. N.L.R.B.* (2d Cir. 1988) 861 F.2d 353, 361 .

(n32)Footnote 16.12. *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal. App. 4th 623, 635, 17 Cal. Rptr. 3d 336 . See *Meyers Industries, Inc.* (1984) 268 N.L.R.B. 493, 497 .

(n33)Footnote 16.13. *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal. App. 4th 623, 635-639, 17 Cal. Rptr. 3d 336 .

(n34)Footnote 16.14. *Luke v. Collotype Labels USA, Inc.* (2008) 159 Cal. App. 4th 1463, 1469-1474, 72 Cal. Rptr. 3d 440 .

(n35)Footnote 16.15. *Lab. Code* § 232.5.

(n36)Footnote 16.16. See e.g., *Aroostook County v. N.L.R.B.* (1996) 81 F.3d 209, 317 U.S. App. D.C. 114 (effect of employer's conditioning rehiring of fired employees on their agreement they would bring their complaints to him, avoid any discussions with particular employees, and cease all gossiping and complaining amongst themselves likely would have had on employees' ability to engage in behavior protected under NLRA was so obvious that employer did not seriously attempt to defend legitimacy of conditions); *Needell & McGlone, P.C.* (1993) 311 N.L.R.B. 455 (employee who engaged in discussions with other secretaries about what she perceived to be preferential treatment received by other secretary was discharged because employer believed she was engaged in concerted activities that by their nature are protected by NLRA).

(n37)Footnote 16.17. *San Diego Unions v. Garmon* (1959) 359 U.S. 236, 243-244, 79 S. Ct. 773, 3 L. Ed. 2d 775 .

(n38)Footnote 16.18. *Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 748-749 n.26, 105 S. Ct. 2380, 85 L. Ed. 2d 728 .

(n39)Footnote 16.19. *Hillhaven Oakland Nursing etc. Center v. Health Care Workers Union* (1996) 41 Cal. App. 4th 846, 855, 49 Cal. Rptr. 2d 11 , quoting *Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal. 3d 60, 69-70, 160 Cal. Rptr. 745, 603 P.2d 1341 .

(n40)Footnote 16.20. *Machinists v. Wisconsin Emp. Rel. Comm'n* (1976) 427 U.S. 132, 140, 96 S. Ct. 2548, 49 L. Ed. 2d 396 .

(n41)Footnote 16.21. See *Ruscigno v. American National Can Co.* (2000) 84 Cal. App. 4th 112, 118, 100 Cal. Rptr. 2d 585 (preemption of action for wrongful termination in violation of public policy against discrimination based on being witness in legal proceeding or because of testimony offered in legal proceeding); *Rodriguez v. Yellow Cab Cooperative, Inc.* (1988) 206 Cal. App. 3d 668, 253 Cal. Rptr. 779 (preemption of action for wrongful termination in violation of public policy based on employee's testimony before Public Utilities Commission and involvement in class action); *Kelecheva v. Multivision Cable T.V. Corp.* (1993) 18 Cal. App. 4th 521, 528-529, 22 Cal. Rptr. 2d 453 (preemption of employee's cause of action for wrongful termination in violation of public policy based on his refusal to participate in employer's antiunion harassment).

(n42)Footnote 17. *Rodriguez v. Yellow Cab Cooperative, Inc.* (1988) 206 Cal. App. 3d 668, 674-679, 253 Cal.

Rptr. 779 ; *Henry v. Intercontinental Radio, Inc.* (1984) 155 Cal. App. 3d 707, 713-715, 202 Cal. Rptr. 328 ; *see also* *McGough v. University of San Francisco* (1989) 214 Cal. App. 3d 1577, 1586, 263 Cal. Rptr. 404 (NLRA preempted causes of action for breach of contract and bad-faith denial of existence of contract).

(n43)Footnote 18. *Henry v. Intercontinental Radio, Inc.* (1984) 155 Cal. App. 3d 707, 202 Cal. Rptr. 328 .

(n44)Footnote 19. *Henry v. Intercontinental Radio, Inc.* (1984) 155 Cal. App. 3d 707, 713, 202 Cal. Rptr. 328 .

(n45)Footnote 20. *Rodriguez v. Yellow Cab Cooperative, Inc.* (1988) 206 Cal. App. 3d 668, 674 679, 253 Cal. Rptr. 779 ; *see also* *Ethridge v. Harbor House Restaurant* (9th Cir. 1988) 861 F.2d 1389, 1396 1402 (because NLRB has exclusive primary jurisdiction over matters arguably protected by NLRA, federal courts have neither original *nor* removal jurisdiction over such actions; state-law wrongful termination action that is allegedly preempted by NLRA may not be removed to federal court solely on federal question grounds; state court is entitled to decide preemption issue, subject to appellate review. *See also* *Kelecheva v. Multivision Cable T.V. Corp.* (1993) 18 Cal. App. 4th 521, 528, 22 Cal. Rptr. 2d 453 (claim of discharge from supervisory position, allegedly due to plaintiff's refusal to participate in employer's campaign of anti-union harassment, was preempted by NLRA).

(n46)Footnote 20.1. *Balog v. LRJV, Inc.* (1988) 204 Cal. App. 3d 1295, 250 Cal. Rptr. 766 .

(n47)Footnote 21. *Balog v. LRJV, Inc.* (1988) 204 Cal. App. 3d 1295, 1304, 1311, 250 Cal. Rptr. 766 (plaintiff "has alleged that he was fired for five distinct reasons, only one of which constitutes an unfair labor practice under the NLRA [refusal to engage in anti-union acts]. The other reasons all involve various violations of California health and safety regulations, which are not even arguably unfair labor practices, as they in no way implicate collective bargaining or unionization. [The employer's] alleged conduct in terminating [plaintiff] for refusing to violate these regulations, and for thereby refusing to endanger the health and safety of California workers, is clearly conduct which touches interests deeply rooted in local feeling and responsibility, and which is, if of any concern of the NLRA, of only peripheral concern. Therefore, to the extent that [the plaintiff's] causes of action are premised on such conduct, they are not preempted by the [National Labor Relations] Act." (emphasis in original)); *but cf.* *Kelecheva v. Multivision Cable T.V. Corp.* (1993) 18 Cal. App. 4th 521, 528-529, 22 Cal. Rptr. 2d 453 (plaintiff's admission that defendant's sole unlawful motivation for termination involved "unionbusting" precluded reliance on "mixed motive" exception to preemption).

(n48)Footnote 21.1. *Balog v. LRJV, Inc.* (1988) 204 Cal. App. 3d 1295, 250 Cal. Rptr. 766 .

(n49)Footnote 21.2. *Inter-Modal Rail Employees Ass'n. v. Burlington Northern and Sante Fe Ry. Co.* (1999) 73 Cal. App. 4th 918, 925, 87 Cal. Rptr. 2d 60 (NLRA did not preempt state law claim for wrongful termination and unfair business practices following mass firing of employees who complained of unsafe working conditions).

(n50)Footnote 21.3. *Inter-Modal Rail Employees Ass'n. v. Burlington Northern and Sante Fe Ry. Co.* (1999) 73 Cal. App. 4th 918, 926-927, 87 Cal. Rptr. 2d 60 .

(n51)Footnote 21.4. *Inter-Modal Rail Employees Ass'n. v. Burlington Northern and Sante Fe Ry. Co.* (1999) 73 Cal. App. 4th 918, 927-928, 87 Cal. Rptr. 2d 60 (reviewing cases).

(n52)Footnote 22. *Kelecheva v. Multivision Cable T.V. Corp.* (1993) 18 Cal. App. 4th 521, 529-532, 22 Cal. Rptr. 2d 453 .

(n53)Footnote 23. *See* *Kelecheva v. Multivision Cable T.V. Corp.* (1993) 18 Cal. App. 4th 521, 532, 22 Cal. Rptr. 2d 453 .

(n54)Footnote 24. 29 U.S.C. § 185(a).

(n55)Footnote 25. *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 211, 105 S. Ct. 1904, 85 L. Ed. 2d 206 .

(n56)Footnote 25.1. *Hansen v. Aerospace Defense Related Industry Dist.* (2001) 90 Cal. App. 4th 977, 983-985, 109 Cal. Rptr 2d 482 .

(n57)Footnote 26. *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 221, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (preemption of cause of action for breach of implied covenant of good faith and fair dealing based on denial of group insurance benefits provided pursuant to collective bargaining agreement); *Aguilera v. Pirelli Armstrong Tire Corp.* (9th Cir. 2000) 223 F.3d 1010, 1015-1016 (state-law based contract claims arising from alleged pre-employment misrepresentations are preempted by § 301 when employee is subsequently hired under CBA); *Cook v. Lindsay Olive Growers* (9th Cir. 1990) 911 F.2d 233, 238-239 (breach of covenant of good faith and fair dealing cause of action preempted if collective bargaining agreement contains terms governing job security); *Young v. Anthony's Fish Grottos, Inc.* (9th Cir. 1987) 830 F.2d 993, 997-1001 (claims for breach of contract and breach of implied covenant of good faith and fair dealing); *Paige v. Henry J. Kaiser Co.* (9th Cir. 1987) 826 F.2d 857, 861-862 .

(n58)Footnote 27. *See Young v. Anthony's Fish Grottos, Inc.* (9th Cir. 1987) 830 F.2d 993, 999-1001 .

(n59)Footnote 28. *Schlacter-Jones v. General Tel.* (9th Cir. 1991) 936 F.2d 435, 439-443 . For discussion of drug testing generally *see* ch. 50.

(n60)Footnote 29. *See Schlacter-Jones v. General Tel.* (9th Cir. 1991) 936 F.2d 435, 438 . *See also Busey v. P.W. Supermarkets, Inc.* (N.D. Cal. 2005) 368 F. Supp. 2d 1045, 1054-55 (where plaintiff's employment was governed by the terms of a collective bargaining agreement, his claims for breach of contract and wrongful discharge are preempted by Section 301 of the Labor Relations Management Act).

(n61)Footnote 30. *See Lingle v. Norge Division, Magic Chef* (1988) 486 U.S. 399, 413, 108 S. Ct. 1877, 100 L. Ed. 2d 410 & n.12, 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 ; *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 211, 105 S. Ct. 1904, 85 L. Ed. 2d 206 .

(n62)Footnote 31. *Lingle v. Norge Division, Magic Chef* (1988) 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 .

(n63)Footnote 32. *Lingle v. Norge Div. of Magic Chef* (1988) 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410, 423 .

(n64)Footnote 33. *Lingle v. Norge Division, Magic Chef* (1988) 486 U.S. 399, 409 410, 108 S. Ct. 1877, 100 L. Ed. 2d 410 ; *see also Firestone v. Southern Cal. Gas Co.* (9th Cir. 2000) 219 F.3d 1063, 1066-1067 (section 301 of LMRA preempted state law claim because resolution of dispute required interpretation of pay and overtime provisions in collective bargaining agreement).

(n65)Footnote 34. For an analogous cause of action under California law, *see Lab. Code § 132a*, discussed in § 60.03[2][h] and in ch. 20.

(n66)Footnote 35. *Lingle v. Norge Division, Magic Chef* (1988) 486 U.S. 399, 408 410, 108 S. Ct. 1877, 100 L. Ed. 2d 410 ; *see, e.g., Niehaus v. Greyhound Lines, Inc.* (9th Cir. 1999) 173 F.3d 1207, 1211-1212 (former employee's breach of contract claims against union, based on union official's individual promise that employee would receive union's cooperation in his transfer from management to union position, were not preempted by LMRA and were properly remanded to state court, because even if contract claims could give rise to contract defenses which referenced collective bargaining agreement, meaning of collective bargaining agreement was not in dispute).

(n67)Footnote 36. *See, e.g., Cook v. Lindsay Olive Growers* (9th Cir. 1990) 911 F.2d 233, 237-238 (wrongful termination in violation of public policy against religious discrimination embodied in FEHA, *Gov. Code § 12940(a)*); *Paige v. Henry J. Kaiser Co.* (9th Cir. 1987) 826 F.2d 857, 863 (wrongful termination in violation of public policy embodied in *Lab. Code §§ 6310, 6311, 6400-6404*, governing occupational health and safety); *Garibaldi v. Lucky Food*

Stores, Inc. (9th Cir. 1984) 726 F.2d 1367, 1373-1374 (wrongful termination action based on retaliation for "whistleblowing" by employee who reported sale of spoiled milk).

(n68)Footnote 37. *Cook v. Lindsay Olive Growers* (9th Cir. 1990) 911 F.2d 233, 237-238 ; *Paige v. Henry J. Kaiser Co.* (9th Cir. 1987) 826 F.2d 857, 863 ; see also *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal. App. 4th 623, 639-641, 17 Cal. Rptr. 3d 336 (wrongful discharge complaint alleging unionized employee was terminated by employer without justifiable cause or reason and in violation of public policy and employer's own policies and procedures, was independent of CBA and not preempted by LMRA, where allegation regarding violation of employer's policies and procedures was not essential to legal theory under which employee sought relief, and where dispute over motivating reason for discharge involved factual issues that could be resolved without interpreting CBA); *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal. App. 4th 33, 40-41, 90 Cal. Rptr. 2d 15 (employee's state law claims of wrongful termination based upon retaliation were not preempted by section 301 because issues under claims were factual in nature and would not require court to construe terms of collective bargaining agreement).

(n69)Footnote 38. *Paige v. Henry J. Kaiser Co.* (9th Cir. 1987) 826 F.2d 857, 863 ; *Garibaldi v. Lucky Food Stores, Inc.* (9th Cir. 1984) 726 F.2d 1367, 1374, 1375 .

(n70)Footnote 39. *Paige v. Henry J. Kaiser Co.* (9th Cir. 1987) 826 F.2d 857, 863 .

(n71)Footnote 40. *Miller v. AT&T Network Systems* (9th Cir. 1988) 850 F.2d 543, 548, 550 .

(n72)Footnote 41. See *Lingle v. Norge Division, Magic Chef* (1988) 486 U.S. 399, 407 n.7, 108 S. Ct. 1877, 100 L. Ed. 2d 410 ; see also *Moreau v. San Diego Transit Corp.* (1989) 210 Cal. App. 3d 614, 627, 258 Cal. Rptr. 647 (stating that *Garibaldi* doctrine was rejected by decision in *Lingle* holding that preemption occurs whenever it is necessary to interpret collective bargaining agreement, regardless of the cause of action asserted).

(n73)Footnote 42. *Moreau v. San Diego Transit Corp.* (1989) 210 Cal. App. 3d 614, 258 Cal. Rptr. 647 .

(n74)Footnote 43. *Moreau v. San Diego Transit Corp.* (1989) 210 Cal. App. 3d 614, 628, 258 Cal. Rptr. 647 .

(n75)Footnote 44. *Miller v. AT & T Network Systems* (9th Cir. 1988) 850 F.2d 543, 548, 550 .

(n76)Footnote 45. *Miller v. AT & T Network Systems* (9th Cir. 1988) 850 F.2d 543, 548, 550 .

(n77)Footnote 46. *Miller v. AT & T Network Systems* (9th Cir. 1988) 850 F.2d 543, 548, 550 (Oregon anti-discrimination statute not preempted); see also *Chmiel v. Beverly Wilshire Hotel Co.* (9th Cir. 1989) 873 F.2d 1283, 1286-1287 (California FEHA not preempted). For discussion of the preemptive effect of section 301 on the FEHA, see ch. 40, pt. A.

(n78)Footnote 47. *Newberry v. Pacific Racing Association* (9th Cir. 1988) 854 F.2d 1142 .

(n79)Footnote 48. *Newberry v. Pacific Racing Association* (9th Cir. 1988) 854 F.2d 1142, 1147 .

(n80)Footnote 49. *Harris v. Alumax Mill Products, Inc.* (9th Cir. 1990) 897 F.2d 400 .

(N81)Footnote 50. *Harris v. Alumax Mill Products, Inc.* (9th Cir. 1990) 897 F.2d 400, 402-403 .

(n82)Footnote 51. *Jackson v. Southern California Gas Co.* (9th Cir. 1989) 881 F.2d 638, 644-645 .

(n83)Footnote 52. *Overby v. Chevron USA, Inc.* (9th Cir. 1989) 884 F.2d 470, 473-474 .

(n84)Footnote 52.1. *Balcorta v. Twentieth Century Fox* (9th Cir. 2000) 208 F.3d 1102 .

(n85)Footnote 52.2. *See Balcorta v. Twentieth Century Fox* (9th Cir. 2000) 208 F.3d 1102, 1112 .

(n86)Footnote 52.3. *See Balcorta v. Twentieth Century Fox* (9th Cir. 2000) 208 F.3d 1102, 1110 .

(n87)Footnote 52.4. *See Balcorta v. Twentieth Century Fox* (9th Cir. 2000) 208 F.3d 1102, 1108-1109 .

(n88)Footnote 53. *See Caterpillar, Inc. v. Williams* (1987) 482 U.S. 386, 391-392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 .

(n89)Footnote 54. *Beals v. Kiewit Pacific Co., Inc.* (9th Cir. 1997) 114 F.3d 892, 894-895 .

(n90)Footnote 55. *Beals v. Kiewit Pacific Co., Inc.* (9th Cir. 1997) 114 F.3d 892, 894-895 .

(n91)Footnote 56. *See Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal. App. 3d 1507, 1515, 281 Cal. Rptr. 890 (plaintiff manager refused to quit union, but collective bargaining agreement requiring that management employees not be union members was inconsistent with intent that such employees be covered by agreement).

(n92)Footnote 57. *Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal. App. 3d 1507, 1517, 281 Cal. Rptr. 890 .

(n93)Footnote 58. 45 U.S.C. § 151 et seq.

(n94)Footnote 59. *See Union Pacific Railroad Co. v. Sheehan* (1978) 439 U.S. 89, 94, 99 S. Ct. 399, 58 L. Ed. 2d 354 ; *Lewy v. Southern Pacific Transportation Co.* (9th Cir. 1986) 799 F.2d 1281, 1289 .

(n95)Footnote 60. 45 U.S.C. §§ 151a(5), 153(i); *see Consolidated Rail Corp. v. Labor Executives* (1989) 491 U.S. 299, 109 S. Ct. 2477, 105 L. Ed. 2d 250, 266 (describing test for differentiating between major and minor disputes).

(n96)Footnote 61. *See DeTomaso v. Pan American World Airways, Inc.* (1987) 43 Cal. 3d 517, 525, 235 Cal. Rptr. 292, 733 P.2d 614 .

(n97)Footnote 62. *Hawaiian Airlines v. Norris* (1994) 512 U.S. 246, 264-265, 114 S. Ct. 2239, 129 L. Ed. 2d 203); *see Saridakis v. United Airlines* (9th Cir.) 166 F.3d 1272, 1278 (RLA did not preempt claim for wrongful discharge in violation of public policy because plaintiff's allegations that his termination was due to disability discrimination, not breach of collective bargaining agreement (CBA), gave rise to right independent of CBA); *Fennessey v. Southwest Airlines* (9th Cir. 1996) 91 F.3d 1359, 1362 (following *Hawaiian Airlines*).

(n98)Footnote 63. *Luck v. Southern Pac. Transp. Co.* (1990) 218 Cal. App. 3d 1, 11 12, 267 Cal. Rptr. 618 , cert. denied, 498 U.S. 939, 111 S. Ct. 344, 112 L. Ed. 2d 309 (1990) ; *Mungo v. UTA French Airlines* (1985) 166 Cal. App. 3d 327, 330 332, 212 Cal. Rptr. 369 .

(n99)Footnote 64. *Screen Extras Guild, Inc. v. Superior Court* (1990) 51 Cal. 3d 1017, 275 Cal. Rptr. 395, 800 P.2d 873 .

(n100)Footnote 65. 29 U.S.C. § 401 et seq.

(n101)Footnote 66. *See Finnegan v. Leu* (1982) 456 U.S. 431, 435-436, 102 S. Ct. 1867, 72 L. Ed. 2d 239 .

(n102)Footnote 67. *Screen Extras Guild, Inc. v. Superior Court* (1990) 51 Cal. 3d 1017, 1024, 1032, 275 Cal. Rptr. 395, 800 P.2d 873 .

(n103)Footnote 68. *Screen Extras Guild, Inc. v. Superior Court* (1990) 51 Cal. 3d 1017, 1030, 275 Cal. Rptr. 395, 800 P.2d 873 .

(n104)Footnote 69. *See Screen Extras Guild, Inc. v. Superior Court* (1990) 51 Cal. 3d 1017, 1031-1032, 275

Cal. Rptr. 395, 800 P.2d 873 ; see also Hansen v. Aerospace Defense Related Industry Dist. (2001) 90 Cal. App. 4th 977, 981-983, 109 Cal. Rptr 2d 482 (wrongful discharge action of appointed business agent preempted by LMRDA because pretext claim required interpretation of seniority clause of collective bargaining agreement; employer had contended that it terminated employee for poor performance and insubordinate criticizing of management, and president had right to have appointed business agent who supported his agenda).

(n105)Footnote 69.1. *Thunderburk v. United Food & Commercial Workers' Union (2001) 92 Cal. App. 4th 1332, 112 Cal. Rptr. 2d 609 .*

(n106)Footnote 69.2. *Thunderburk v. United Food & Commercial Workers' Union (2001) 92 Cal. App. 4th 1332, 1343-1345, 112 Cal. Rptr. 2d 609 ; for discussion of Lab. Code §§ 1101, 1102, see § 60.03[2][r].*

(n107)Footnote 69.3. *Smith v. International Brotherhood of Electrical Workers, Local Union 11 (2003) 109 Cal. App. 4th 1637, 1 Cal. Rptr. 3d 374 .*

(n108)Footnote 69.4. *Smith v. International Brotherhood of Electrical Workers, Local Union 11 (2003) 109 Cal. App. 4th 1637, 1647-1648, 1 Cal. Rptr. 3d 374 .*

(n109)Footnote 69.5. *Smith v. International Brotherhood of Electrical Workers, Local Union 11 (2003) 109 Cal. App. 4th 1637, 1648-1654, 1 Cal. Rptr. 3d 374 . For age discrimination under FEHA, see § 41.31; for disability discrimination under FEHA, see § 41.32.*

(n110)Footnote 70. *29 U.S.C. § 1001 et seq.*

(n111)Footnote 71. *29 U.S.C. § 1144(a).*

(n112)Footnote 72. *Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 139, 111 S. Ct. 478, 112 L. Ed. 2d 474, 484 ; Shaw v. Delta Air Lines, Inc. (1983) 463 U.S. 85, 97, 103 S. Ct. 2890, 77 L. Ed. 2d 490 ; Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794, 799 800 .*

(n113)Footnote 73. *Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 145, 111 S. Ct. 478, 112 L. Ed. 2d 474, 483, 486 .*

(n114)Footnote 74. *Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 140, 111 S. Ct. 478, 112 L. Ed. 2d 474, 484-485 .*

(n115)Footnote 75. *Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 140, 111 S. Ct. 478, 112 L. Ed. 2d 474, 485 .*

(n116)Footnote 76. *29 U.S.C. §§ 1132(a)(3), 1140.*

(n117)Footnote 77. *Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 139, 111 S. Ct. 478, 112 L. Ed. 2d 474, 486 ; see also Inter-Modal Ry. Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. (1997) 520 U.S. 510, 117 S. Ct. 1513, 1516, 137 L. Ed. 2d 763, 769-770 (ERISA also prohibits discharging an employee for the purpose of interfering with attainment of rights under health and welfare benefit plans).*

(n118)Footnote 78. *Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 140, 111 S. Ct. 478, 112 L. Ed. 2d 474, 487 (relying on Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 54, 107 S. Ct. 1549, 95 L. Ed. 2d 39).*

(n119)Footnote 79. *Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 145, 111 S. Ct. 478, 112 L. Ed. 2d 474, 488 .*

(n120)Footnote 80. *Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794 .*

(n121)Footnote 81. *Sorosky v. Burroughs Corp.* (9th Cir. 1987) 826 F.2d 794, 800 ; *see also Totton v. New York Life Ins. Co.* (D. Conn. 1987) 682 F. Supp. 731, 735 (opinion on grant of reconsideration; ERISA does not preempt state-law claim for breach of employment contract that includes lost pension benefits as element of damages); *Barnick v. Longs Drug Stores, Inc.* (1988) 203 Cal. App. 3d 377, 383-384, 250 Cal. Rptr. 10 (holding only portions of causes of action relating to pension plan were preempted and other portions were not preempted).

(n122)Footnote 82. *Sorosky v. Burroughs Corp.* (9th Cir. 1987) 826 F.2d 794, 800 ; *see Graham v. Balcors Co.* (9th Cir. 2001) 241 F.3d 1246, 1248 (clarifying mandate issued in *Graham v. Balcors Co.* (9th Cir. 1998) 146 F.3d 1052 (ERISA did not preempt state causes of action for breach of contract, breach of covenant of good faith and fair dealing and intentional infliction of emotional distress based on termination of payments for former employee's medical expenses, because agreement under which employee agreed to waive wrongful discharge or employment discrimination claims if employer kept her enrolled in its employee benefits plan so long as she was disabled did not arise in course of employer's administration of benefits plan).

(n123)Footnote 83. *Dytrt v. Mountain State Tele. & Tele. Co.* (9th Cir. 1990) 921 F.2d 889, 897 (allegations of breach of express or implied covenant of good faith and fair dealing based on Plan Review Committee's denial of plaintiff's request to revoke her acceptance of early retirement).

(n124)Footnote 84. *Campbell v. Aerospace Corp.* (9th Cir. 1997) 123 F.3d 1308, 1311-1314 , *cert. denied*, 523 U.S. 1117, 118 S.Ct. 1794, 140 L. Ed. 2d 935 (1998) ; *Ethridge v. Harbor House Restaurant* (9th Cir. 1988) 861 F.2d 1389, 1404 .

(n125)Footnote 85. *Ethridge v. Harbor House Restaurant* (9th Cir. 1988) 861 F.2d 1389, 1404 .

(n126)Footnote 86. *Campbell v. Aerospace Corp.* (9th Cir. 1997) 123 F.3d 1308, 1311-1314 , *cert. denied*, 523 U.S. 1117, 118 S.Ct. 1794, 140 L. Ed. 2d 935 (1998) .

(n127)Footnote 87. *See Totton v. New York Life Ins. Co.* (D. Conn. 1987) 682 F. Supp. 731, 735 .

(n128)Footnote 88. *Portillo v. G. T. Price Prods, Inc.* (1982) 131 Cal. App. 3d 285, 290, 182 Cal. Rptr. 291 , *disapproved on other grounds*, *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n129)Footnote 89. *Portillo v. G. T. Price Prods., Inc.* (1982) 131 Cal. App. 3d 285, 290, 182 Cal. Rptr. 291 , *disapproved on other grounds*, *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n130)Footnote 90. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1148, 77 Cal. Rptr. 2d 445, 959 P.2d 752 .

(n131)Footnote 91. *See Lab. Code §§ 3600, 3602.*

(n132)Footnote 92. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 17-20, 276 Cal. Rptr. 303, 801 P.2d 1054 ; *see Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 ; *see also Kaccludis v. GTE Sprint Communications Corp.* (N.D. Cal. 1992) 806 F. Supp. 866, 870-871 (plaintiff's assertion that workers' compensation exclusivity is inapplicable because of defendant's fraud was ineffective because of insufficiency of fraud pleading); *but see Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 715, 30 Cal. Rptr. 2d 18, 872 P.2d 559 (false imprisonment cause of action outside compensation bargain by its nature).

(n133)Footnote 93. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 .

(n134)Footnote 94. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d

1195 . See, e.g., *Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 9-10, 87 Cal. Rptr. 2d 554 (plaintiff's emotional distress action was preempted by workers' compensation law, because workers' compensation is exclusive remedy for intentional infliction of emotional distress caused by employer's work-related conduct when that conduct does not contravene public policy).

(n135)Footnote 95. *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (clarifying that administrative regulations can be source of fundamental public policy).

(n136)Footnote 96. *Gantt v. Sentry Ins.* (1992) 1 Cal. 4th 1083, 1101, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80, n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 (clarifying that administrative regulations can be source of fundamental public policy); see *Shoemaker v. Myers* (1992) 2 Cal. App. 4th 1407, 1428, 4 Cal. Rptr. 2d 203 (in wrongful termination action against state entities and employees, *Tameny* claim not barred by workers' compensation law, but defendants entitled to immunity under Government Tort Claims Act (*Gov. Code* § 810 *et seq.*); see also *Leibert v. Transworld Sys., Inc.* (1995) 32 Cal. App. 4th 1693, 1706 1707, 39 Cal. Rptr. 2d 65 .

(n137)Footnote 97. *Maynard v. City of San Jose* (9th Cir. 1994) 37 F.3d 1396, 1405-1406 .

(n138)Footnote 98. *Gov. Code* § 12900 *et seq.*; see discussion in § 60.03[2][d] and in chs. 40 through 43.

(n139)Footnote 99. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n140)Footnote 100. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 73-82, 276 Cal. Rptr. 130, 801 P.2d 373 ; *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 894-901, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 ; see also *Gov. Code* § 12993(a); *Blom v. N.G.K. Spark Plugs (U.S.A.), Inc.* (1992) 3 Cal. App. 4th 382, 386, 4 Cal. Rptr. 2d 139 .

(n141)Footnote 101. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 894-901, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 ; *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n142)Footnote 101.1. *Schifando v. City of Los Angeles* (2003) 31 Cal. 4th 1074, 6 Cal. Rptr. 3d 457, 79 P.3d 569 . For discussion of administrative remedies under FEHA generally, see § 43.01[3].

(n143)Footnote 101.2. *Williams v. Housing Authority of Los Angeles* (2004) 121 Cal. App. 4th 708, 719-737, 17 Cal. Rptr. 3d 374 (claims for wrongful demotion and constructive termination in violation of public policy were barred for failure to exhaust internal administrative remedy, because permissive internal administrative procedures in city charter required exhaustion, employee did not allege futility to excuse exhaustion requirement, and employee could not allege equitable estoppel to revive nonstatutory claims).

(n144)Footnote 102. For discussion of this provision, see ch. 40, pt. B.

(n145)Footnote 103. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 89 91, 276 Cal. Rptr. 130, 801 P.2d 373 .

(n146)Footnote 103.1. *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 116 Cal. Rptr. 2d 770 .

(n147)Footnote 103.2. *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal. App. 4th 218, 230-233, 116 Cal. Rptr. 2d 770 .

(n148)Footnote 104. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 894-901, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 .

(n149)Footnote 105. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 894-901, 66 Cal. Rptr. 2d 888, 941

P.2d 1157; see *Nelson v. United Technologies* (1999) 74 Cal. App. 4th 597, 611-612, 88 Cal. Rptr. 2d 239 (California Family Rights Act, Gov. Code § 12945.2, remedies are not exclusive and therefore do not bar tort claim for wrongful discharge in violation of CFRA because California legislature manifested intent to amplify, not abrogate, injuries relating to employment discrimination).

(n150)Footnote 105.1. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 1160, 77 Cal. Rptr. 2d 445, 456, 959 P.2d 752 .

(n151)Footnote 105.2. *Silo v. CHW Medical Foundation* (2002) 27 Cal. 4th 1097, 119 Cal. Rptr. 2d 698, 45 P.3d 1162 .

(n152)Footnote 105.3. Gov. Code § 12926(d).

(n153)Footnote 105.4. *Silo v. CHW Medical Foundation* (2002) 27 Cal. 4th 1097, 1104, 119 Cal. Rptr. 2d 698, 45 P.3d 1162, 1167 .

(n154)Footnote 105.5. *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 134-135, 32 Cal. Rptr. 2d 275, 876 P.2d 1074 .

(n155)Footnote 105.6. Gov. Code § 12926(d).

(n156)Footnote 105.7. Gov. Code §§ 12920, 12921.

(n157)Footnote 105.8. *Silo v. CHW Medical Foundation* (2002) 27 Cal. 4th 1097, 1104-1105, 119 Cal. Rptr. 2d 698, 45 P.3d 1162 .

(n158)Footnote 105.9. *Silo v. CHW Medical Foundation* (2002) 27 Cal. 4th 1097, 1109, 119 Cal. Rptr. 2d 698, 45 P.3d 1162 .

(n159)Footnote 105.10. *Silo v. CHW Medical Foundation* (2002) 27 Cal. 4th 1097, 1109-1110, 119 Cal. Rptr. 2d 698, 45 P.3d 1162 .

(n160)Footnote 105.11. *Silo v. CHW Medical Foundation* (2002) 27 Cal. 4th 1097, 1110, 119 Cal. Rptr. 2d 698, 45 P.3d 1162 .

(n161)Footnote 106. *English v. General Elec. Co.* (1990) 496 U.S. 72, 110 S. Ct. 2270, 110 L. Ed. 2d 65 .

(n162)Footnote 107. 42 U.S.C. § 5801 et seq.

(n163)Footnote 108. See 42 U.S.C. § 5851; see also discussion in § 60.03[3][h][ii].

(n164)Footnote 109. *English v. General Elec. Co.* (1990) 496 U.S. 72, 84-85, 110 S. Ct. 2270, 110 L. Ed. 2d 65 .

(n165)Footnote 110. *English v. General Elec. Co.* (1990) 496 U.S. 72, 84-85, 110 S. Ct. 2270, 110 L. Ed. 2d 65 .

(n166)Footnote 110.1. *Jie v. Liang Tai Knitwear Co., Ltd.* (2001) 89 Cal. App. 4th 654, 107 Cal. Rptr. 2d 682 .

(n167)Footnote 110.2. 8 U.S.C. § 1101 et seq.

(n168)Footnote 110.3. Pub. L. 99-603 (Nov. 6, 1986) 100 Statutes at Large 3359, effective July 1, 1987.

(n169)Footnote 110.4. *Jie v. Liang Tai Knitwear Co.* (2001) 89 Cal. App. 4th 654, 665, 107 Cal. Rptr. 2d 682 .

(n170)Footnote 110.5. *Incalza v. Fendi North America, Inc.* (9th Cir. 2007) 479 F.3d 1005, 2007 U.S. App.

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(n171)Footnote 110.6. *Hoffman Plastic Compounds v. NLRB* (2002) 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271 .

(n172)Footnote 110.7. *See also Zamora v. Elite Logistics, Inc.* (10th Cir. 2006) 449 F.3d 1106, 1114-15 (employer who placed employee on leave without pay while immigration status was being clarified could defend itself in subsequent Title VII suit on basis that it did so to comply with IRCA).

(n173)Footnote 111. *See Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 673-675, 254 Cal. Rptr. 211, 765 P.2d 373 & n.19, 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (disapproving *Newfield v. Ins. Co. of the West* (1984) 156 Cal. App. 3d 440, 446-447, 203 Cal. Rptr. 9). The Supreme Court has held that *Foley* should be applied retroactively. *See Newman v. Emerson Radio Corp.* (1989) 48 Cal. 3d 973, 976, 993, 258 Cal. Rptr. 592, 772 P.2d 1059 .

(n174)Footnote 112. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 673-675, 254 Cal. Rptr. 211, 765 P.2d 373 & n.19, 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n175)Footnote 113. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 675, 254 Cal. Rptr. 211, 765 P.2d 373 ; *see White Lighting Co. v. Wolfson* (1968) 68 Cal. 2d 336, 343, 66 Cal. Rptr. 697, 438 P.2d 345 & n.2, 68 Cal. 2d 336, 66 Cal. Rptr. 697, 438 P.2d 345 .

(n176)Footnote 114. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 675, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n177)Footnote 115. *See Abeyta v. Superior Court* (1993) 17 Cal. App. 4th 1037, 1043-1045, 21 Cal. Rptr. 2d 680 .

(n178)Footnote 116. *Gerdlund v. Elec. Dispensers Int'l* (1987) 190 Cal. App. 3d 263, 270, 235 Cal. Rptr. 279 ; *Malmstrom v. Kaiser Aluminum and Chem. Corp.* (1986) 187 Cal. App. 3d 299, 314, 231 Cal. Rptr. 820 .

(n179)Footnote 117. *Malmstrom v. Kaiser Aluminum and Chem. Corp.* (1986) 187 Cal. App. 3d 299, 231 Cal. Rptr. 820 .

(n180)Footnote 118. *Malmstrom v. Kaiser Aluminum and Chem. Corp.* (1986) 187 Cal. App. 3d 299, 315-316, 231 Cal. Rptr. 820 ; *see also Gerdlund v. Elec. Dispensers Int'l* (1987) 190 Cal. App. 3d 263, 273, 235 Cal. Rptr. 279 (citing *Malmstrom* and obtaining same result, interpreting contract terms stating notice of termination could be given "for any reason"); *see also Tollefson v. Roman Catholic Bishop* (1990) 219 Cal. App. 3d 843, 853-857, 268 Cal. Rptr. 550 (express written contract between administrator and parochial school allowing termination at will for any reason after one year superseded any implied contract for renewal absent good cause not to renew).

(n181)Footnote 119. *Anderson v. Savin Corp.* (1988) 206 Cal. App. 3d 356, 364, 254 Cal. Rptr. 627 .

(n182)Footnote 120. *Haggard v. Kimberly Quality Care Inc.* (1995) 39 Cal. App. 4th 508, 521, 46 Cal. Rptr. 2d 16 .

(n183)Footnote 121. *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal. App. 3d 799, 804-806, 270 Cal. Rptr. 585 ; *see also Comeaux v. Brown & Williamson Tobacco Co.* (9th Cir. 1990) 915 F.2d 1264, 1271, n.8 (application stating that it constituted terms of employment contract and that employment relationship was "at will" was a complete integration of the at will nature of the relationship).

(n184)Footnote 122. *See Seubert v. McKesson Corp.* (1990) 223 Cal. App. 3d 1514, 1520, 273 Cal. Rptr. 296 , (parol evidence rule does not apply to employment application because application is solicitation of offer of

employment, not contract), overruled in part, *Dore v. Arnold Worldwide, Inc.* 39 Cal. 4th 384 .

(n185)Footnote 123. See, e.g., *McLain v. Great Am. Ins. Cos.* (1989) 208 Cal. App. 3d 1476, 1485-1486, 256 Cal. Rptr. 863 ; *Gerdlund v. Elec. Dispensers Int'l* (1987) 190 Cal. App. 3d 263, 272-273, 235 Cal. Rptr. 279 ; *Malmstrom v. Kaiser Aluminum & Chem. Corp.* (1986) 187 Cal. App. 3d 299, 314, 231 Cal. Rptr. 820 ; see also *Aragon-Haas v. Family Sec. Ins. Servs., Inc.* (1991) 231 Cal. App. 3d 232, 240, 282 Cal. Rptr. 233 .

(n186)Footnote 124. *Gerdlund v. Elec. Dispensers Int'l* (1987) 190 Cal. App. 3d 263, 272-273, 235 Cal. Rptr. 279 ; *Malmstrom v. Kaiser Aluminum & Chem. Corp.* (1986) 187 Cal. App. 3d 299, 314, 231 Cal. Rptr. 820 ; but see *Aragon-Haas v. Family Sec. Ins. Servs., Inc.* (1991) 231 Cal. App. 3d 232, 240, 282 Cal. Rptr. 233 (fact that terms of contract appear clear does not preclude possibility that parties chose language to express different terms).

(n187)Footnote 125. *McLain v. Great Am. Ins. Cos.* (1989) 208 Cal. App. 3d 1476, 1485-1486, 256 Cal. Rptr. 863 .

(n188)Footnote 126. *Wallis v. Farmers Group, Inc.* (1990) 220 Cal. App. 3d 718, 730 .

(n189)Footnote 127. *Wallis v. Farmers Group, Inc.* (1990) 220 Cal. App. 3d 718, 730-731 .

(n190)Footnote 128. *Wagner v. Glendale Adventist Medical Ctr.* (1989) 216 Cal. App. 3d 1379, 1388-1390, 265 Cal. Rptr. 412 .

(n191)Footnote 129. *Esbensen v. Userware Int'l Inc.* (1992) 11 Cal. App. 4th 631, 636-640, 14 Cal. Rptr. 2d 93 .

(n192)Footnote 130. *Esbensen v. Userware Int'l Inc.* (1992) 11 Cal. App. 4th 631, 636-640, 14 Cal. Rptr. 2d 93 .

(n193)Footnote 131. *Code Civ. Proc.* § 337(1).

(n194)Footnote 132. *Code Civ. Proc.* § 339(1).

(n195)Footnote 133. *Barton v. New United Motor Mfg., Inc.* (1996) 43 Cal. App. 4th 1200, 1209, 51 Cal. Rptr. 2d 328 (decided under former *Code Civ. Proc.* § 340(3), prescribing one-year statute of limitations for action for personal injury); see also *Newfield v. Ins. Co. of the West* (1984) 156 Cal. App. 3d 440, 443, 203 Cal. Rptr. 9 (dicta).

(n196)Footnote 134. *Funk v. Sperry Corp.* (9th Cir. 1988) 842 F.2d 1129, 1133 (decided under former *Code Civ. Proc.* § 340(3), prescribing one-year statute of limitations for action for personal injury and citing a California appellate case that was ultimately granted review and transferred without disposition).

(n197)Footnote 134.1. See 29 U.S.C. § 1140 (making it unlawful to discharge, discipline, or discriminate against any participant of an employee benefit plan for exercising or attaining any right under that plan).

(n198)Footnote 134.2. *Burrey v. Pac. Gas & Elec. Co.* (9th Cir. 1998) 159 F.3d 388, 392-393 (decided under former *Code Civ. Proc.* § 340(3), prescribing one-year statute of limitations for action for personal injury and citing *Barton v. New United Motor Mfg., Inc.* (1996) 43 Cal. App. 4th 1200, 1207-1209, 51 Cal. Rptr. 2d 328).

(n199)Footnote 135. See *Gov. Code* § 12965(b). For discussion generally, see ch. 43, pt. A.

(n200)Footnote 136. *Carmichael v. Alfano Temporary Personnel* (1991) 233 Cal. App. 3d 1126, 285 Cal. Rptr. 143 .

(n201)Footnote 137. See *Gov. Code* § 12900 et seq. For discussion, see ch. 43, pt. A.

(n202)Footnote 138. See 42 U.S.C. § 2000e et seq. For discussion, see ch. 43, pt. B.

(n203)Footnote 139. For discussion of administrative remedies, *see* ch. 42.

(n204)Footnote 139.1. *Now see Code Civ. Proc. § 335.1*, prescribing a two-year statute of limitations for personal injury actions.

(n205)Footnote 140. For discussion of administrative remedies under FEHA and the EEOC generally, *see* ch. 42.

(n206)Footnote 141. *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 82, 276 Cal. Rptr. 130, 801 P.2d 373 . For discussion, *see* § 60.04[2][b], [g].

(n207)Footnote 142. *Carmichael v. Alfano Temporary Personnel* (1991) 233 Cal. App. 3d 1126, 1131-1132, 285 Cal. Rptr. 143 .

(n208)Footnote 142.1. *Mathieu v. Norrell Corp.* (2004) 115 Cal. App. 4th 1174, 10 Cal. Rptr. 3d 52 .

(n209)Footnote 142.2. *Mathieu v. Norrell Corp.* (2004) 115 Cal. App. 4th 1174, 1189-1190, 10 Cal. Rptr. 3d 52 . *See Rojo v. Kliger* (1990) 52 Cal.3d 65, 86, 276 Cal. Rptr. 130, 801 P.2d 373 (although employee must exhaust administrative remedy under FEHA before bringing cause of action under FEHA, exhaustion is not required before filing civil action for damages alleging nonstatutory tort of wrongful discharge in violation of public policy against sex discrimination and sexual harassment in employment); *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 905, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 (applying *Rojo* to claim of wrongful discharge in violation of public policy against age discrimination).

(n210)Footnote 144. *Eisenberg v. Insurance Co. of North America* (9th Cir. 1987) 815 F.2d 1285, 1291 .

(n211)Footnote 145. *Romano v. Rockwell International* (1996) 14 Cal. 4th 479, 490-492, 59 Cal. Rptr. 2d 20, 926 P.2d 1114 .

(n212)Footnote 146. *See Gov. Code § 12960.*

(n213)Footnote 147. *Delaware State College v. Ricks* (1980) 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 .

(n214)Footnote 148. *Chardon v. Fernandez* (1981) 454 U.S. 6, 102 S. Ct. 28, 70 L. Ed. 2d 6 .

(n215)Footnote 149. *Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal. 4th 731, 737-739, 63 Cal. Rptr. 2d 636, 936 P.2d 1246 .

(n216)Footnote 149.1. *Soltani v. Western & Southern Life Ins. Co.* (9th Cir. 2001) 258 F.3d 1038 .

(n217)Footnote 149.2. *Soltani v. Western & Southern Life Ins. Co.* (9th Cir. 2001) 258 F.3d 1038, 1042-1045 (applying *Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669 , unconscionability analysis; *see* § 40.04[2]).

(n218)Footnote 149.3. *Armendariz v. Foundation Health Psychcare Services* (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669 ; *see* § 40.04[2]).

(n219)Footnote 149.4. *Soltani v. Western & Southern Life Ins. Co.* (9th Cir. 2001) 258 F.3d 1038, 1045-1047 .

(n220)Footnote 150. *See, e.g., Miller v. Pepsi-Cola Bottling Co.* (1989) 210 Cal. App. 3d 1554, 1558-1559, 259 Cal. Rptr. 56 (court held as matter of law there was no enforceable contract to terminate for good cause only because it was undisputed that employer had no established policies governing termination of sales personnel and plaintiff received no oral assurances of job security).

(n221)Footnote 151. *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal. 4th 93, 108, 69 Cal. Rptr. 2d 900, 948 P.2d 412 ; see *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal. App. 4th 832, 856-857, 89 Cal. Rptr. 2d 540 (employer not entitled to summary judgment on employee's claim of breach of implied contract not to terminate except for good cause where employee was fired for single instance of unethical conduct after long history of unblemished service).

(n222)Footnote 152. See *Pugh v. See's Candies, Inc.* (1981) 116 Cal. App. 3d 311, 329-330, 171 Cal. Rptr. 917 ; see also *Huber v. Standard Insurance Co.* (9th Cir. 1988) 841 F.2d 980, 985-986 (employee's affidavit stating verifiable facts contradicting stated reasons for termination raised genuine issue of fact regarding good cause for termination sufficient to avoid employer's motion for summary judgment).

(n223)Footnote 153. See *Burton v. Security Pacific National Bank* (1988) 197 Cal. App. 3d 972, 979, 243 Cal. Rptr. 277 ; see also discussion in § 60.06[3].

(n224)Footnote 154. See *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal. 4th 93, 108, 69 Cal. Rptr. 2d 900, 948 P.2d 412 (jury must assess reasonableness of employer's decision under circumstances known to employer at the time); *Burton v. Security Pacific National Bank* (1988) 197 Cal. App. 3d 972, 979, 243 Cal. Rptr. 277 (upholding summary judgment for employer when undisputed facts showed that employer conducted investigation of charges of misconduct against employee and employee failed to produce any evidence showing that employer had lack of good-faith belief that charges were true).

(n225)Footnote 155. For discussion of effect of handbooks and other written policies on definition of good cause, see § 60.05[2]. For examples of handbook provisions defining good cause, see ch. 62.

(n226)Footnote 156. *Pugh v. See's Candies, Inc.* (1981) 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917 ; see *Stokes v. Dole Nut Co.* (1995) 41 Cal. App. 4th 285, 293, 48 Cal. Rptr. 2d 673 ; *Moore v. May Department Stores* (1990) 222 Cal. App. 3d 836, 839-840, 271 Cal. Rptr. 841 .

(n227)Footnote 157. *Pugh v. See's Candies, Inc.* (1988) 203 Cal. App. 3d 743, 250 Cal. Rptr. 195 .

(n228)Footnote 158. See *Pugh v. See's Candies, Inc.* (1988) 203 Cal. App. 3d 743, 769, 250 Cal. Rptr. 195 .

(n229)Footnote 159. *Pugh v. See's Candies, Inc.* (1988) 203 Cal. App. 3d 743, 769 770, 250 Cal. Rptr. 195 . For the standard jury instruction on the definition of good cause in an action for breach of employment contract, see Judicial Council of California Civil Jury Instructions, *CACI 2404* (unspecified term); Judicial Council of California Civil Jury Instructions, *CACI 2405* (specified term) (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction on the good cause defense in an action for breach of employment contract for a specified term, see Judicial Council of California Civil Jury Instructions, *CACI 2421* (Matthew Bender). For the special verdict form for the good cause defense in an action for breach of employment contract for a specified term, see Judicial Council of California Civil Jury Instructions, *CACI VF-2403* (Matthew Bender). For the standard jury instruction on the good faith mistaken belief defense in an action for breach of the implied covenant of good faith and fair dealing, see Judicial Council of California Civil Jury Instructions, *CACI 2424* (Matthew Bender). For the special verdict form for the affirmative defense of good faith mistaken belief in an action for breach of the implied covenant of good faith and fair dealing, see Judicial Council of California Civil Jury Instructions, *CACI VF-2405* (Matthew Bender). For discussion of the CACI instructions and special verdict forms generally, see §§ 61.05, 61.06.

(n230)Footnote 160. *Pugh v. See's Candies, Inc.* (1988) 203 Cal. App. 3d 743, 769, 250 Cal. Rptr. 195 .

(n231)Footnote 161. See, e.g., *Gianaculas v. Trans World Airlines, Inc.* (9th Cir. 1985) 761 F.2d 1391, 1394-1395 ; *Clutterham v. Coachmen Industries, Inc.* (1985) 169 Cal. App. 3d 1223, 1227, 215 Cal. Rptr. 795 ; see also *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal. 4th 317, 350-352, 100 Cal. Rptr. 2d 352, 8 P.3d 1089 .

(n232)Footnote 162. *See, e.g., Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal. 4th 93, 108, 69 Cal. Rptr. 2d 900, 948 P.2d 412 (jury question whether employer acted in good faith, after appropriate investigation and honest decision based upon circumstances known to employer at the time); *Crosier v. United Parcel Service, Inc.* (1983) 150 Cal. App. 3d 1132, 1138-1139, 198 Cal. Rptr. 361 .

(n233)Footnote 163. *Gianaculas v. Trans World Airlines, Inc.* (9th Cir. 1985) 761 F.2d 1391, 1394-1395 .

(n234)Footnote 164. *Clutterham v. Coachmen Industries, Inc.* (1985) 169 Cal. App. 3d 1223, 1226-1228, 215 Cal. Rptr. 795 .

(n235)Footnote 165. *Gianaculas v. Trans World Airlines, Inc.* (9th Cir. 1985) 761 F.2d 1391, 1395 .

(n236)Footnote 166. *Clutterham v. Coachmen Industries, Inc.* (1985) 169 Cal. App. 3d 1223, 1227, 215 Cal. Rptr. 795 .

(n237)Footnote 167. *Gianaculas v. Trans World Airlines, Inc.* (9th Cir. 1985) 761 F.2d 1391, 1395 .

(n238)Footnote 168. *Clutterham v. Coachmen Industries, Inc.* (1985) 169 Cal. App. 3d 1223, 1227, 215 Cal. Rptr. 795 .

(n239)Footnote 169. *Clutterham v. Coachmen Industries, Inc.* (1985) 169 Cal. App. 3d 1223, 1227, 215 Cal. Rptr. 795 , citing *Crosier v. United Parcel Service, Inc.* (1983) 150 Cal. App. 3d 1132, 1138-1140, 198 Cal. Rptr. 361 ; *see also Liu v. Amway Corp.* (9th Cir. 2004) 347 F.3d 1125, 1138 (summary judgment for employer proper, where there was no evidence to suggest employer's reduction in force was invalid); *but see Sorosky v. Burroughs Corp.* (9th Cir. 1987) 826 F.2d 794, 802-803 (employee laid off after plant closing raised triable issue regarding alleged breach of covenant of good faith and fair dealing because of employee's lengthy service and employer's failure to follow its own termination policies).

(n240)Footnote 170. *Crosier v. United Parcel Service, Inc.* (1983) 150 Cal. App. 3d 1132, 1138-1139, 198 Cal. Rptr. 361 .

(n241)Footnote 171. *Crosier v. United Parcel Service, Inc.* (1983) 150 Cal. App. 3d 1132, 1139, 198 Cal. Rptr. 361 .

(n242)Footnote 172. *Crosier v. United Parcel Service, Inc.* (1983) 150 Cal. App. 3d 1132, 1139-1140, 198 Cal. Rptr. 361 , quoting *Pugh v. See's Candies, Inc.* (1981) 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917 ; *Moore v. May Department Stores* (1990) 222 Cal. App. 3d 836, 840, 271 Cal. Rptr. 841 .

(n243)Footnote 173. *Crosier v. United Parcel Service, Inc.* (1983) 150 Cal. App. 3d 1132, 1140, 198 Cal. Rptr. 361 .

(n244)Footnote 174. *Crosier v. United Parcel Service, Inc.* (1983) 150 Cal. App. 3d 1132, 1140, 198 Cal. Rptr. 361 .

(n245)Footnote 175. *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal. 4th 93, 108, 69 Cal. Rptr. 2d 900, 948 P.2d 412

(n246)Footnote 176. *Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 Cal. 4th 93, 108, 69 Cal. Rptr. 2d 900, 948 P.2d 412 .

(n247)Footnote 177. *Cotran v. Rollins Hudig Hall Int'l, Inc.* (1998) 17 Cal. 4th 93, 108, 69 Cal. Rptr. 2d 900, 948 P.2d 412 .

(n248)Footnote 178. *See generally* discussion in ch. 70.

(n249)Footnote 179. *Fowler v. Varian Assocs., Inc.* (1987) 196 Cal. App. 3d 34, 41-43, 241 Cal. Rptr. 539 .

(n250)Footnote 180. *Fowler v. Varian Assocs., Inc.* (1987) 196 Cal. App. 3d 34, 241 Cal. Rptr. 539 .

(n251)Footnote 181. *Fowler v. Varian Assocs., Inc.* (1987) 196 Cal. App. 3d 34, 43, 241 Cal. Rptr. 539 .

(n252)Footnote 182. *See Stokes v. Dole Nut Co.* (1995) 41 Cal. App. 4th 285, 296, 48 Cal. Rptr. 2d 673 .

(n253)Footnote 183. *See Stokes v. Dole Nut Co.* (1995) 41 Cal. App. 4th 285, 296, 48 Cal. Rptr. 2d 673 .

(n254)Footnote 184. *Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal. App. 3d 61, 67-68, 266 Cal. Rptr. 784 .

(n255)Footnote 185. *Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal. App. 3d 61, 67-68, 266 Cal. Rptr. 784 .

(n256)Footnote 186. *Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal. App. 3d 61, 67-68, 266 Cal. Rptr. 784 .

(n257)Footnote 186.1. *Lab. Code* § 2924. For the standard jury instruction on the essential factual elements for a claim of breach of employment contract for specified term, *see* Judicial Council of California Civil Jury Instructions, CACI 2420 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the special verdict form for a cause of action for breach of an employment contract for a specified term, *see* Judicial Council of California Civil Jury Instructions, CACI VF-2402 (Matthew Bender). For discussion of the CACI instructions and special verdict forms generally, *see* §§ 61.05, 61.06.

(n258)Footnote 186.2. *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal. App. 4th 32, 100 Cal. Rptr. 2d 627 .

(n259)Footnote 186.3. *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal. App. 4th 32, 55-59, 100 Cal. Rptr. 2d 627 (employer was not entitled to have jury instructed under BAJI 10.37 that employer who acts in good faith on honest but mistaken belief that discharge is required by legitimate business reason has not breached contract, where employment contract was for specified term).

(n260)Footnote 187. *Sistare-Meyer v. Young Men's Christian Assn.* (1997) 58 Cal. App. 4th 10, 16-18, 67 Cal. Rptr. 2d 840 ; *Abrahamson v. NME Hosps., Inc.* (1987) 195 Cal. App. 3d 1325, 1329-1330, 241 Cal. Rptr. 396 . *See also Ali v. L.A. Focus Publication* (2003) 112 Cal. App. 4th 1477, 1485 n.4, 5 Cal. Rptr. 3d 791 (plaintiff did not challenge holding that because independent contractors are not employees, they lack standing to assert claim for wrongful termination in violation of public policy). *See, e.g., Varisco v. Gateway Science & Engineering, Inc.* (2008) 166 Cal. App. 4th 1099, 1105-1108 (defendant met its burden of showing plaintiff was independent contractor, not employee, where undisputed facts established that he was independent contractor, not employee, and where single clause in the parties' letter agreement that allowed either party to terminate at will did not transform relationship into employment relationship).

(n261)Footnote 188. *Sistare-Meyer v. Young Men's Christian Assn.* (1997) 58 Cal. App. 4th 10, 16-18, 67 Cal. Rptr. 2d 840 (analyzing Cal. Const., art. I, § 8).

(n262)Footnote 189. *See Abrahamson v. NME Hosps., Inc.* (1987) 195 Cal. App. 3d 1325, 1329-1330, 241 Cal. Rptr. 396 .

(n263)Footnote 189.1. *Ali v. L.A. Focus Publication* (2003) 112 Cal. App. 4th 1477, 1485, 5 Cal. Rptr. 3d 791 . *See also S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 350-351, 256 Cal. Rptr. 543, 769 P.2d 399 .

(n264)Footnote 189.2. *Ali v. L.A. Focus Publication* (2003) 112 Cal. App. 4th 1477, 1485, 5 Cal. Rptr. 3d 791 . See also *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 351, 256 Cal. Rptr. 543, 769 P.2d 399 , citing Rest.2d Agency § 220.

(n265)Footnote 189.3. *Ali v. L.A. Focus Publication* (2003) 112 Cal. App. 4th 1477, 1485, 5 Cal. Rptr. 3d 791 . See also *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 350, 256 Cal. Rptr. 543, 769 P.2d 399 ; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 949, 88 Cal. Rptr. 175, 471 P.2d 975 .

(n266)Footnote 189.4. *Ali v. L.A. Focus Publication* (2003) 112 Cal. App. 4th 1477, 1486, 5 Cal. Rptr. 3d 791 .

(n267)Footnote 189.5. *Ali v. L.A. Focus Publication* (2003) 112 Cal. App. 4th 1477, 1485, 5 Cal. Rptr. 3d 791 . See also *S. G. Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 341, 351, 256 Cal. Rptr. 543, 769 P.2d 399 .

(n268)Footnote 189.6. *Ali v. L.A. Focus Publication* (2003) 112 Cal. App. 4th 1477, 5 Cal. Rptr. 3d 791 .

(n269)Footnote 189.7. *Ali v. L.A. Focus Publication* (2003) 112 Cal. App. 4th 1477, 1485-1486, 5 Cal. Rptr. 3d 791 .

(n270)Footnote 190. *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal. App. 4th 727, 740, 80 Cal. Rptr. 2d 454 .

(n271)Footnote 191. *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal. App. 4th 727, 738, 80 Cal. Rptr. 2d 454 , citing *Frank v. U.S. West., Inc.* (10th Cir. 1993) 3 F.3d 1357, 1364 .

(n272)Footnote 192. *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal. App. 4th 727, 738-743, 80 Cal. Rptr. 2d 454 .

(n273)Footnote 193. See generally discussion in § 60.01.

(n274)Footnote 194. *Bell v. Superior Court* (1989) 215 Cal. App. 3d 1103, 1108-1109, 263 Cal. Rptr. 787 .

(n275)Footnote 195. See generally discussion in § 60.05.

(n276)Footnote 196. *Bell v. Superior Court* (1989) 215 Cal. App. 3d 1103, 1110-1111, 263 Cal. Rptr. 787 .

(n277)Footnote 197. *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal. App. 4th 614, 29 Cal. Rptr. 2d 642 .

(n278)Footnote 198. *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal. App. 4th 614, 617-618, 29 Cal. Rptr. 2d 642 .

(n279)Footnote 199. *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal. App. 4th 614, 618-619, 29 Cal. Rptr. 2d 642 .

(n280)Footnote 200. See *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal. App. 4th 614, 619 n.1, 29 Cal. Rptr. 2d 642 .

(n281)Footnote 201. See *Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal. App. 4th 614, 618-619, 29 Cal. Rptr. 2d 642 .

(n282)Footnote 202. *Summers v. State Farm Mut. Auto Ins. Co.* (10th Cir. 1988) 864 F.2d 700 .

(n283)Footnote 203. See *Summers v. State Farm Mut. Auto Ins. Co.* (10th Cir. 1988) 864 F.2d 700, 704 708 .

(n284)Footnote 204. See *Kristufek v. Hussmann Foodservice Co.* (7th Cir. 1993) 985 F.2d 364, 371 ; *Wallace v. Dunn Construction Co.* (11th Cir. 1995) 62 F.3d 374, 379-380 (decided after *McKennon*).

(n285)Footnote 205. *McKennon v. Nashville Banner Publ'g Co.* (1995) 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852 .

(n286)Footnote 206. 29 U.S.C. § 621 *et seq.*

(n287)Footnote 207. *McKennon v. Nashville Banner Publ'g Co.* (1995) 513 U.S. 352, 115 S. Ct. 879, 883, 130 L. Ed. 2d 852, 860 .

(n288)Footnote 208. *McKennon v. Nashville Banner Publ'g Co.* (1995) 513 U.S. 352, 115 S. Ct. 879, 886, 130 L. Ed. 2d 852, 863-864 .

(n289)Footnote 209. *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal. App. 4th 620, 633, 41 Cal. Rptr. 2d 329 .

(n290)Footnote 210-292-. [Reserved]

(n291)Footnote 293. *See Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal. App. 4th 614, 616, 617, 29 Cal. Rptr. 2d 642 (commenting that many of the decisions granting summary judgment based on job application misrepresentations had "probably reached the correct result on their facts" and "declin[ing] to adopt a blanket rule that material falsification of an employment application is a complete defense to [an employee's claim].").

(n292)Footnote 294. *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal. App. 4th 620, 638-640, 41 Cal. Rptr. 2d 329 .

(n293)Footnote 295. *See Cooper v. Rykoff-Sexton, Inc.* (1994) 24 Cal. App. 4th 614, 29 Cal. Rptr. 2d 642 (policy against hiring applicants previously fired by another employer); *McKennon v. Nashville Banner Publ'g Co.* (1995) 513 U.S. 352, 115 S. Ct. 879, 883, 130 L. Ed. 2d 852 (policy prohibiting removal of confidential documents).

(n294)Footnote 296. *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal. App. 4th 620, 636, 41 Cal. Rptr. 2d 329 .

(n295)Footnote 297. *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal. App. 4th 497, 505-506, 85 Cal. Rptr. 2d 352 ; *see 11 U.S.C. § 101 et seq.* (Bankruptcy Reform Act of 1978).

(n296)Footnote 298. *See 11 U.S.C. § 541(a)(6)* (excluding earnings from personal services from bankruptcy estate).

(n297)Footnote 299. *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal. App. 4th 497, 506, 85 Cal. Rptr. 2d 352 .

(n298)Footnote 300. *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal. App. 4th 497, 509, 85 Cal. Rptr. 2d 352 .

(n299)Footnote 301. *See, e.g., Castillo v. City of Los Angeles* (2001) 92 Cal. App. 4th 477, 483, 111 Cal. Rptr. 2d 870 .

(n300)Footnote 302. *Castillo v. City of Los Angeles* (2001) 92 Cal. App. 4th 477, 481, 111 Cal. Rptr. 2d 870 , citing *Lucido v. Superior Court* (1990) 51 Cal. 3d 335, 341, 272 Cal. Rptr. 767, 795 P.2d 1223 .

(n301)Footnote 303. *See Lucido v. Superior Court* (1990) 51 Cal. 3d 335, 342, 272 Cal. Rptr. 767, 795 P.2d 1223 (issue "not entirely unnecessary" to judgment in prior proceeding).

(n302)Footnote 304. *Castillo v. City of Los Angeles* (2001) 92 Cal. App. 4th 477, 481, 111 Cal. Rptr. 2d 870 , citing *Lucido v. Superior Court* (1990) 51 Cal. 3d 335, 341, 272 Cal. Rptr. 767, 795 P.2d 1223 .

(n303)Footnote 305. *Castillo v. City of Los Angeles* (2001) 92 Cal. App. 4th 477, 481, 111 Cal. Rptr. 2d 870 , citing *Knickerbocker v. City of Stockton* (1988) 199 Cal. App. 3d 235, 242, 244 Cal. Rptr. 764 .

(n304)Footnote 305.1. *Castillo v. City of Los Angeles* (2001) 92 Cal. App. 4th 477, 111 Cal. Rptr. 2d 870 .

(n305)Footnote 306. *Castillo v. City of Los Angeles* (2001) 92 Cal. App. 4th 477, 482-483, 111 Cal. Rptr. 2d 870 .

(n306)Footnote 307. *Castillo v. City of Los Angeles* (2001) 92 Cal. App. 4th 477, 483-484, 111 Cal. Rptr. 2d 870 .

(n307)Footnote 308. *Palmer v. Regents of the University of California* (2003) 107 Cal. App. 4th 899, 132 Cal. Rptr. 2d 567 .

(n308)Footnote 309. *Palmer v. Regents of the University of California* (2003) 107 Cal. App. 4th 899, 903-910, 132 Cal. Rptr. 2d 567 (because employee did not pursue to completion grievance procedures available to her under either employer's personnel policies or procedures for whistle blowing, trial court properly granted employer summary judgment).

(n309)Footnote 310. *Shuer v. County of San Diego* (2004) 117 Cal. App. 4th 476, 482, 11 Cal. Rptr. 3d 776 ; *Palmer v. Regents of the University of California* (2003) 107 Cal. App. 4th 899, 904, 132 Cal. Rptr. 2d 567 , citing *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal. 3d 465, 131 Cal. Rptr. 90, 551 P.2d 410 (physician's failure to pursue hospital's internal grievance process barred civil suit for damages based on hospital's purportedly improper denial of staff privileges), *see* § 62.03[4][a].

(n310)Footnote 311. *See Shuer v. County of San Diego* (2004) 117 Cal. App. 4th 476, 482, 11 Cal. Rptr. 3d 776 ; *Palmer v. Regents of the University of California* (2003) 107 Cal. App. 4th 899, 906, 132 Cal. Rptr. 2d 567 .

(n311)Footnote 312. *Gov. Code* § 12900 *et seq.*

(n312)Footnote 313. *See Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 905, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 ; *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373 . *see* discussion at [1][f], *above*.

(n313)Footnote 314. *Palmer v. Regents of the University of California* (2003) 107 Cal. App. 4th 899, 906-907, 132 Cal. Rptr. 2d 567 .

(n314)Footnote 315. *Palmer v. Regents of the University of California* (2003) 107 Cal. App. 4th 899, 908-910, 132 Cal. Rptr. 2d 567 .

(n315)Footnote 316. *Shuer v. County of San Diego* (2004) 117 Cal. App. 4th 476, 481-487, 11 Cal. Rptr. 3d 776 .

(n316)Footnote 317. *Lloyd v. County of Los Angeles* (2009) 172 Cal. App. 4th 320, 326-328, 90 Cal. Rptr. 3d 872 .



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 60 Liability for Wrongful Termination and Discipline

Part A. TEXT

4-60 California Employment Law § 60.10

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.10 Potential Counter-Claims Against Employee

In one case, the Ninth Circuit held that an employer's counterclaim in the employee's wrongful discharge and discrimination suit that the employee had breached the covenant of good faith and fair dealing, her duty of loyalty to the employer, and certain statutory duties, was proper on its face and that the counterclaim was not necessarily an unreasonable or frivolous claim.ⁿ¹ The court stated that the district court's imposition of sanctions based on the frivolous nature of these claims was incorrect. However, the court did remand the case to the district court to reconsider its calculation of sanctions because the circuit court agreed that the damage claim for \$4.2 million dollars warranted sanctions as an unconscionable attempt to chill the employee from bringing her wrongful discharge claim.ⁿ²

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Wrongful Termination General Overview

FOOTNOTES:

(n1)Footnote 1. *Hudson v. Moore Business Forms, Inc.* (9th Cir. 1987) 836 F.2d 1156, 1160-1162 ; cf. *Tonry v. Security Experts, Inc.* (9th Cir. 1994) 20 F.3d 967, 973 (affirming judgment for plaintiff rejecting allegation of employee's breach of duty of loyalty).

(n2)Footnote 2. *Hudson v. Moore Business Forms, Inc.* (9th Cir. 1987) 836 F.2d 1156, 1162-1164 .



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
 CHAPTER 60 Liability for Wrongful Termination and Discipline
 Part A. TEXT

4-60 California Employment Law § 60.11

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.11 Unclean Hands

In *Jacobs v. Universal Development Corp.*,ⁿ¹ a California court of appeal addressed the extent to which an employer may use the *in pari delicto* (unclean hands) doctrine--which prevents a party whose actions were in bad faith with regard to the action in which he or she seeks relief from obtaining such relief--to bar a wrongful discharge public policy action. The court stated that before applying the rule, courts should consider the realities of the situation and the parties' relative fault. In *Jacobs*, the plaintiff participated in his employer's allegedly illegal rebate program, and was fired when he refused to participate further. The court found that the *in pari delicto* defense did not apply because the plaintiff merely acquiesced in his employer's scheme because he feared, rightly, that he would be fired for failing to do so.ⁿ² However, the court left open the possibility that the doctrine might apply under different factual circumstances.

Legal Topics:

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

Civil Procedure Pleading & Practice Defenses, Demurrers & Objections Affirmative Defenses General Overview Contracts Law Remedies Equitable Relief Unclean Hands Labor & Employment Law Wrongful Termination General Overview

FOOTNOTES:

(n1)Footnote 1. *Jacobs v. Universal Dev. Corp.* (1997) 53 Cal. App. 4th 120, 53 Cal. App. 4th 692, 699-703, 62 Cal. Rptr. 2d 446 .

(n2)Footnote 2. *Jacobs v. Universal Dev. Corp.* (1997) 53 Cal. App. 4th 120, 53 Cal. App. 4th 692, 699-703, 62 Cal. Rptr. 2d 446 .



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 60 Liability for Wrongful Termination and Discipline

Part A. TEXT

4-60 California Employment Law §§ 60.12 through 60.19

AUTHOR: By Joy A. Maulitz, J.D.

[Reserved]

§§ 60.12[Reserved]



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CHAPTER 60 Liability for Wrongful Termination and Discipline
Part B. BIBLIOGRAPHY

4-60 California Employment Law § 60.20

AUTHOR: By Joy A. Maulitz, J.D.

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California Employers' Guide to Employee Handbooks and Personnel Policy Manuals.

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Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Wrongful
Termination General Overview



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Part B. BIBLIOGRAPHY

1-60 California Employment Law § 60.21

AUTHOR: By Joy A. Maulitz, J.D.

[Reserved]

§ 60.21[Reserved]



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4-60 California Employment Law § 60.22

AUTHOR: By Joy A. Maulitz, J.D.

§ 60.22 Legal Periodicals

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Wrongful Termination General Overview



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 61 Bringing and Defending Wrongful Termination Claims

4-61 California Employment Law 61.syn

AUTHOR: By Lawrence J. King, J.D. and Elizabeth D. Laporte, J.D.

§ 61.syn Synopsis to Chapter 61: Bringing and Defending Wrongful Termination Claims

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[b] Initial Contact

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[d] Interviewing the Client

[e] Preliminary Investigation

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§ 61.04A Exclusion of Evidence

§ 61.05 Jury Instructions

§ 61.06 Verdict Forms

§§ 61.07 through 61.09 [Reserved]

§ 61.10 Legal Texts

§ 61.11 Encyclopedias

§ 61.12 Law Reviews and Legal Periodicals

By Lawrence J. King, J.D.n* and Elizabeth D. Laporte, J.D.n**

FOOTNOTES:

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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 61 Bringing and Defending Wrongful Termination Claims

4-61 California Employment Law Scope

AUTHOR: By Lawrence J. King, J.D. and Elizabeth D. Laporte, J.D.

Scope

By Lawrence J. King, J.D.n* and Elizabeth D. Laporte, J.D.n** SCOPE

This chapter examines the practical considerations involved in bringing and defending against wrongful termination claims. The chapter includes a discussion of the following areas: (1) initial client contact and investigation of wrongful discharge claims; (2) essential elements of a wrongful discharge complaint and factors to consider in deciding what to include in such a complaint; (3) alternative responses to a wrongful discharge claim and the tactical considerations involved in choosing the appropriate response; and (4) discovery plans for both plaintiffs and defendants in wrongful discharge actions. In addition, this chapter contains a form of complaint for wrongful termination and related causes of action.

For detailed discussion of the applicable legal theories for wrongful discharge claims and defenses to such claims, *see* Chapter 60. For discussion of related tort causes of action, *see* Chapter 63.

FOOTNOTES:

(n3)Footnote *. Mr. King is "of counsel" to the firm of Turner & Brorby in San Francisco. His practice emphasizes employment litigation. Previously, Mr. King was an Assistant Attorney General for the State of Texas, where he handled several complex employment discrimination cases; an associate in the firm of Morrison & Foerster in San Francisco, where he represented corporate employers in employment litigation; the Assistant to the Legal Director of the Texas Civil Liberties Foundation, Inc.; and law clerk to the Honorable Barefoot Sanders, United States District Judge for the Northern District of Texas.

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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 61 Bringing and Defending Wrongful Termination Claims
Part A. TEXT

4-61 California Employment Law § 61.01

AUTHOR: By Lawrence J. King, J.D. and Elizabeth D. Laporte, J.D.

§ 61.01 Initial Client Contact and Investigation

[1] Plaintiff

[a] Generally

The importance of the initial interview with a potential client and a preliminary investigation of a potential client's wrongful termination claims cannot be overemphasized. The initial interview and the preliminary investigation provide the opportunity to screen each case to determine if it is worth bringing, to spot legal or factual barriers to recovery, to identify the need for immediate action when necessary to preserve meritorious claims, to give initial advice to the client, and to frame the initial strategy. Conversely, the failure to undertake an adequate investigation of the merits of an action prior to filing suit may burden the attorney with weak cases that are difficult to resolve and may subject the attorney to sanctions.ⁿ¹

To avoid such consequences, plaintiff's counsel should advise the client at the outset that a thorough analysis and investigation will be required before counsel decides what action should be taken on the client's behalf. Counsel may want to consider charging a potential client an hourly fee or a flat rate to provide an initial evaluation of the potential claims. As discussed below, this service would include a review of the employee's responses to a detailed questionnaire or a chronology prepared by the employee, a review of the documents provided by the employee, an interview with the employee, a preliminary factual investigation of the employee's potential claims, an initial evaluation, and basic advice, such as advice regarding the applicable statutes of limitations.

The exact format of the interview and the preliminary investigation will vary according to an attorney's individual style and the nature of the case. However, the process should include at least the steps discussed in [b]-[f], *below*.

■ PRACTICE TIP:

A competent "first interview" in a wrongful termination case will generally require at least one hour of the attorney's time to review the facts and explain the "legal framework" to the client. Because of the large number of referrals a plaintiff's attorney in this area may receive, counsel may wish to consider

charging an initial consultation fee. *Commentary by William M. Crosby.*

[b] Initial Contact

Often, an attorney's first contact with a potential wrongful discharge plaintiff consists of a personal visit or a telephone inquiry from the potential client. Some attorneys have their staff screen such visits or calls, while others prefer to handle the initial request for representation themselves. Whoever handles the initial contact should obtain at least the following information: (1) the employee's full name; (2) the employer's full name, and the name of any related or affiliated corporate entities; (3) the full name of any individual whom the employee believes was involved in the decision to take the adverse action against the employee; (4) length of employment; (5) a brief description of what has occurred; (6) a brief description of any disabling injuries that the employee may attribute to the adverse employment action; (7) both the date the employee was notified of the adverse employment action and the date the action occurred or is scheduled to occur; (8) whether any written policies existed that may not have been followed; (9) whether the employee contends that the termination may be a result of refusal to commit an illegal act or other public policy violation; and (10) whether the employee is a union member and, if so, the full name of the union. This information is necessary to determine whether there is a potential conflict of interest that could prevent the attorney from representing the employee. It also will enable counsel to identify any preemption problems and to determine whether immediate action is necessary to preserve any of the employee's potential claims from the running of an applicable statute of limitations. For discussion of the substantive law concerning preemption and statutes of limitation, *see* Chapter 60.

■ PRACTICE TIP:

As a practical matter, in nearly all cases in which the employee does not have a written employment contract or a strong "public policy" or fraud claim, or if there is not significant longevity of employment, counsel should consider declining the case or limiting the representation to efforts to obtain a good reference or better severance pay. *Commentary by William M. Crosby.*

[c] Pre-Interview Information and Documentation

After the attorney has determined from the information obtained in the initial contact that there are no obvious reasons why he or she cannot represent the employee and that the attorney is interested in considering the case, an appointment should be scheduled to interview the employee more fully. At the time that the interview is scheduled, the employee should be informed that the attorney will need certain detailed information prior to the scheduled appointment in order to evaluate the employee's claims properly and to determine whether he or she will agree to represent the employee. It is important to make clear to the employee at this juncture that the attorney has not yet agreed to represent the employee, but that the attorney is interested in meeting with the employee to see if the case is potentially successful and whether an agreement to handle the case can be reached. If the attorney intends to charge an hourly rate or a flat fee for doing the initial evaluation of the case, this arrangement should be discussed with the employee at this time. The necessary information may be obtained by having the employee fill out a detailed questionnaire or by having the employee prepare a detailed chronology. In either case, the employee should be requested to provide the following information:

1. Employee's profile:

- a. Name;
- b. Address;
- c. Telephone number;
- d. Age;

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- e. Race;
- f. Sex;
- g. Sexual orientation;
- h. National origin;
- i. Marital status;
- j. Any physical or mental disabilities, or other medical conditions such as pregnancy;
- k. Occupation or business;
- l. Current employer, if any;
- m. Current business address and telephone number.

2. *Employee's prior employment history.*

3. *Profile of the employer:*

- a. Name;
- b. Address and telephone number of company's headquarters;
- c. Address and telephone number of location where employee worked, if different than company headquarters;
- d. Nature of business;
- e. Type of business organization (i.e., corporation, partnership, etc.);
- f. Number of employees;
- g. Financial status of company;
- h. Related or affiliated corporate entities (such as parent corporations or subsidiary corporations).

4. *Factual background relating to termination:*

- a. Date of hire;
- b. Person who recruited or hired employee;
- c. Description of recruitment or hire, including any promises or statements concerning job security or future with the company;
- d. Position at time of hire;

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- e. Salary at time of hire;
- f. Subsequent promotions;
- g. Subsequent salary increases;
- h. Subsequent promises or statements concerning job security;
- i. List of persons to whom employee reported and dates employee was supervised by those individuals;
- j. Description of employee's progress at the company and company's perception of employee's contributions, including any warnings that employee's performance was not satisfactory or any commendations received by the employee;
- k. Any grievances or complaints filed by employee against employer prior to termination;
- l. If employee resigned, reasons for doing so;
- m. If employee was fired, reasons employer gave for firing the employee;
- n. Reason employee believes he or she was terminated;
- o. Factual basis for employee's belief;
- p. List of individuals employee believes were involved in decision to fire employee;
- q. Circumstances of termination, including who was present, what was said, any prior warning;
- r. Position and salary at time of termination;
- s. Date that employee was first notified of termination or tendered resignation; and
- t. Date that termination or resignation was effective.

Before the scheduled interview, counsel should also obtain from the employee whatever documentation the employee has or can obtain concerning the employee's potential claims. These documents include:

1. The employee's entire personnel file, including the employee's employment application, discipline record, performance evaluations, and salary history;ⁿ²
2. The employer's personnel policies, especially those concerning termination, progressive discipline, salary, and benefits;
3. All employee manuals and handbooks;
4. All correspondence and memoranda between the employee and employer, from the time the employer began recruiting the employee up to the present, with special attention to any offer letters, written

employment agreements, arbitration agreements, confidentiality and trade secret agreements, union contracts, stock options, bonus plans, the notice of termination or notice of resignation, and documents signed by the employee in connection with the termination;

5. All internal grievances or complaints filed by the employee against the employer, including but not limited to any grievance filed concerning the employee's termination;

6. All documents relating to any charge or complaint that the employee has filed against the employer with a government agency, such as complaints filed with the United States Equal Employment Opportunity Commission (EEOC), the California Department of Fair Employment and Housing (DFEH), or the California Labor Commission;ⁿ³

7. All documents relating to any applications for unemployment insurance, workers compensation, or disability insurance or benefits;

8. All letters of reference by the employer;

9. All medical or psychiatric records concerning any condition from which the employee has suffered during his or her employment or as a result of the termination;

10. All written statements the employee has obtained from fellow employees or other potential witnesses;

11. The employee's current resume; and

12. All documentation of the employee's efforts to find another job.ⁿ⁴

[d] Interviewing the Client

Before the initial interview, the attorney should carefully review the questionnaire or chronology prepared by the employee and the documents that the employee has provided. Based on this review, the attorney may find it helpful to prepare a detailed list of questions or topics to discuss with the employee. Such a list should help ensure that counsel obtains all of the information necessary to make an informed decision on the merits of the case.

One of the primary goals of the initial interview with a potential plaintiff in a wrongful discharge case is to assess the employee's credibility and jury appeal, factors which can be determinative of success or failure at trial. For this reason, it is usually best for the attorney to allow the employee to narrate what happened in his or her own words rather than simply to question the employee based upon the list discussed above. When questioning the employee, counsel may wish to vary the style of questions. Sympathetic questions will help counsel build trust and rapport with the client; more challenging "devil's advocate" questions may help reveal how the employee will handle cross-examination. At an appropriate time, counsel should be sure to remind the employee that in order to assess the case accurately and to represent the employee adequately, the attorney must be told the full story--both the good news and the bad. Also, the attorney should explain to the employee the nature and the scope of the attorney-client privilege,ⁿ⁵ and the circumstances under which the privilege is waived.

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

Many plaintiff's counsel *begin* an initial interview with a careful explanation of the attorney-client privilege and the reasons for its existence. This serves the dual purpose of (1) putting the client at ease in what is often a difficult situation and (2) encouraging the client to be as frank, forthcoming and objective as possible in regard to all aspects of his or her employment. By emphasizing that a complete, detailed

history of all of the facts--good, bad and ugly--is necessary to an accurate legal "diagnosis" of the problem, clients can be encouraged to disclose important information which they might otherwise be reluctant to mention. *Commentary by John M. True, III.*

Another objective of the initial interview should be to fill in the basic facts in support of the employee's potential claims and alert counsel to defenses that the employer is likely to raise. It is better to find out early if there are any insurmountable legal barriers, such as statute of limitations or federal preemption, that could defeat the employee's claims, regardless of their factual merit. Therefore, counsel should be sure to determine when the employee received the notice of his or her termination, and advise the employee immediately about the statutes of limitations applicable to his or her potential claims. Counsel should also discuss with the employee his or her union status, if any, and whether there is a binding arbitration provision in the contract of employment to determine whether there are any potential problems concerning preemption. For discussion of these substantive defenses, *see* Chapter 60.

The interview should also cover the following:

1. The client's entire employment history before and after the alleged wrongful termination;
2. The employee's history with the terminating employer, including any notices by the employer that the employee was an employee at will or any promises of job security, any demotions or promotions, salary increases, decreases, bonuses or failure to meet the necessary goals to be eligible for a bonus, performance reviews, and disciplinary records, warnings, or commendations given to the employee;
3. The circumstances of the termination, including the reasons given by the employer and what the employee believes are the true reasons;
4. The method of termination, including any warning and the manner in which the termination was carried out;
5. Any abusive behavior on the employer's part or deviation from the employer's personnel policies;
6. Whether the termination was part of a general layoff and whether the employer offered to transfer the employee as an alternative to termination;
7. Whether the termination was related to the employee's whistleblowing activities or other conduct by the employee in furtherance of public policy;
8. The employer's treatment of similarly situated employees;
9. Whether the employee was replaced, and if so, by whom;
10. Any negotiations over the termination or discussions of a severance agreement;
11. The employee's knowledge of similar lawsuits by other employees; and
12. The employee's age, race, ethnic status, and other information regarding the plaintiff or others in the company that may relate to possible discrimination claims.

The purpose of going over each of these areas is to be sure that there are facts to establish the essential elements of the employee's potential claims or, conversely, to defeat the defenses that the employer may raise.

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

Now that the "after-acquired evidence" doctrine is available to employers to abate, or in some cases even completely defend against wrongful termination claims, it is advisable to review carefully with a potential client all of the possible sources of difficulties in this area. Educational background, work history, resume claims and/or the client's possession of employer documents should be explored.

Commentary by John M. True, III.

Another essential objective of the interview is to assess the damages to which the employee may be entitled if successful. It serves no practical purpose for an employee to prosecute a wrongful discharge claim if the costs of such a suit will be greater than his or her potential recovery. Concerning damages, the interview should cover (1) lost wages and benefits, taking into account how long the employee was likely to continue on the job had the termination not occurred; (2) the employee's efforts to find a new job and the expenses the employee has incurred in that endeavor; (3) the employee's subsequent employment history and earnings; (4) any offer made by the employer to reinstate the employee and what conditions, if any, were placed upon the reinstatement; and (5) any emotional and medical problems related to the termination, as well as any psychiatric and medical treatment received. For complete discussion of recoverable damages in wrongful termination actions, *see* Chapter 60.

The interview should also cover the employee's objectives and expectations about the outcome of litigation. It is important to be sure that the employee has a realistic view of the litigation process and understands that counsel cannot guarantee a particular result. The employee must also be advised of attorney's fee arrangement and informed that he or she will be responsible for paying the costs incurred in the litigation and, if the employee loses the suit, may be liable for the employer's costs as well.⁶ It is often helpful to find out if the employee has any prior litigation experience or has consulted with other attorneys concerning the termination. If so, it may be advisable to obtain the employee's permission to contact the other attorneys.

Finally, it is important to inquire about potential witnesses, both those who will testify on the employee's behalf and those who the employee anticipates will testify on the company's behalf. Counsel should determine if the employee has discussed his or her termination with these individuals, and should compile a summary (in as much detail as is possible) of what the employee expects the potential witnesses to say. This will greatly assist you in the preliminary investigation of the employee's claims, and serve as a benchmark of the employee's credibility. The interview is also a good time to obtain the names and addresses of any treating physicians, psychiatrists, or counselors that the employee has seen during the relevant period, and a written release authorizing them to disclose otherwise confidential information to the attorney.

[e] Preliminary Investigation

In addition to reviewing relevant documents and interviewing the client, counsel should interview key potential witnesses. It is not uncommon for individuals whom the employee believes to be friendly witnesses to have a viewpoint different from the employee's regarding the reasons for the employee's termination, or to refuse to cooperate out of fear for their own job security. It is best to discover such facts before committing to represent the employee. On the other hand, finding one or two credible witnesses who corroborate the employee's version of the termination greatly enhances the employee's chances of defeating a summary judgment, negotiating a favorable settlement, or eventually convincing a jury of the merits of the employee's claims. Former employees may be more willing to testify on behalf of the terminated employee than employees who still work for the potential defendant, although a friendly witness who is still employed by the potential defendant may have greater credibility. Counsel may wish to obtain signed declarations from friendly witnesses to ensure against future changes of heart, and to preserve their testimony for possible use in summary judgment proceedings. Alternatively, having a third party present at the witness interview will permit impeachment later if necessary, while avoiding any need for the attorney to take the stand.

Before contacting witnesses who work for the employer, counsel should consider the ethical limitation on direct

communication with a party who has legal representation. In general, counsel may not communicate with an employee if the subject of the communication is an act or omission of the employee in connection with a matter that may be binding on or imputed to the employer for purposes of civil liability. Counsel also may not communicate with any officer, director, or managing agent of the employer.ⁿ⁷ Although Los Angeles County Bar Association Opinion 410 (1983) and *Mills Land and Water Co. v. Golden West Refining Co.*ⁿ⁸ would seem to support a blanket ban on communication with all employees, they appear to conflict with *D.I. Chadbourne, Inc. v. Superior Court*.ⁿ⁹ *Chadbourne* held that a defendant corporation's attorney-client privilege does not extend to statements by an employee who was a witness to conduct giving rise to potential liability, but who was neither personally involved with that conduct nor the natural person to be speaking for the corporation to its attorneys.ⁿ¹⁰ The Los Angeles County Bar Association itself repudiated its opinion 410 in its comments dated December 17, 1986 on an earlier version of proposed California Rule 2-100 (then numbered 7-103). Moreover, *Mills Land and Water Co.* is arguably of limited applicability in that the employee contacted by the attorney in that case was the corporation's former president and was a member of its board of directors when contacted.ⁿ¹¹

One court of appeal has held that the *Mills Land* decision does not bar *ex parte* contacts with former employees who are not and were not members of the employer's top management "control group."ⁿ¹² More recently, a court has found that Rule 2-100(B)(2) applies only to current employees so that an attorney may properly contact unrepresented former employees.ⁿ¹³ Finally, in the most recent opinion on this issue, another court has addressed this issue in the context of a motion to disqualify counsel for contacts with present employees prior to beginning litigation.ⁿ¹⁴ At issue was the fact that before filing suit, the plaintiff's counsel had her investigator interview the alleged harasser and two other employees. The court found that the contacts did not violate Rule 2-100, because those individuals were not represented by counsel (notwithstanding defendant's argument that it had in-house counsel) and the suit was not filed until 7 months later.ⁿ¹⁵ Rather, counsel was lauded for making a thorough investigation.ⁿ¹⁶

■ CONSULTANT'S COMMENT:

Many practitioners assume fault on the part of any attorney who interviews "key witnesses" in actual or potential litigation without securing the permission of the counsel for such individuals. That is not the law. *California Rule of Professional Conduct, rule 2-100* indicates that there is nothing ethically wrong with direct (or indirect) contact by an attorney with a party about the subject matter of the attorney's representation unless the attorney "knows" the party to be represented in the matter. In the *Jorgensen* case, the defendant sought to expand the word "knows" to mean "knew or should have known." The appellate panel declined.

As a practical matter, if an attorney (typically an attorney for a defendant) wishes to avoid the possibility that an opponent will interview important witnesses before the attorney has the opportunity to do so, the solution is to identify and contact all such witnesses as early in a case as feasible. In that contact, the attorney may instruct potential employee witnesses not to speak to any other counsel or investigators about a particular controversy (assuming the authorization of the employer to give that instruction and assuming that the attorney has clearly stated his or her role in the controversy); or the attorney may offer his or her representation in connection with the controversy (assuming proper admonitions regarding joint representation). As *Jorgensen* specifies, an attorney for a corporation also can "send the other party a letter warning that [its] employees are represented by counsel in the matter, and may not be interviewed under rule 2-100 without the consent of counsel." If no such protections are utilized, the courts will not discipline an attorney who conducts interviews without knowledge that the interviewees are represented.
Commentary by Kirby Wilcox

For additional discussion of ethical limitations on contact with potential witnesses, *see* California Attorney Practice, Chapter 22 (Matthew Bender).

[f] Initial Advice to Prospective Plaintiffs

Prospective wrongful discharge plaintiffs usually come to an attorney with only a general sense that they have been treated unfairly, and little understanding of the legal strengths and weaknesses of their claims. They must depend on their lawyer to evaluate the legal merits of their case and estimate the likelihood of success. Whether or not the attorney decides to take an employee's case after completing the preliminary investigation and evaluation, the attorney can provide a real service to the employee by giving a basic outline of the law of wrongful discharge and an honest initial evaluation. Otherwise, the employee may pursue the emotionally and financially draining illusion of a successful lawsuit at the expense of getting his or her career and life back on track. At the same time, and in order to avoid misleading the employee or risking malpractice liability, the attorney should be very careful to explain that the evaluation is only preliminary and based on the attorney's own opinion in a legal area fraught with uncertainty. Especially when providing a negative evaluation, the attorney should stress the difficulty of predicting outcomes in this area of the law, and should encourage the employee to seek another legal opinion.

The attorney should also carefully explain applicable statutes of limitations, including those for administrative agencies like the EEOC and DFEH, again explaining any uncertainties and cautioning against waiting until the last minute. If time is running out, some attorneys who decide not to handle a case nonetheless assist the employee in filing a *pro se* complaint to preserve the employee's rights, giving the employee time to find another attorney.

If the employee has not yet been given notice of termination, but rather fears that termination is imminent, advice is especially important. It is never appropriate to tell an employee to quit. Rather, the attorney should explain the risks of resigning and the difficulty of prevailing on a theory of constructive discharge,ⁿ¹⁷ and should let the employee reach his or her own decision. If the employee chooses to remain on the job, the attorney should caution the employee that, if termination occurs, any subsequent wrongful discharge action will be stronger if the employee can document the conduct of the employer that will support the action. Therefore, the employee should (1) be counseled to document all important events, (2) ask the employer to give reasons for any adverse actions, (3) defend his or her record in writing in response to any criticisms, and see that a copy is placed in the employee's personnel file, (4) exhaust internal grievance procedures, (5) take care not to make admissions (for example, in exit interviews) that may damage the employee's case, and (6) not sign any documents without first consulting an attorney. The employee should also be advised to collect all relevant documents to which the employee is entitled.

Finally, if the attorney does accept the case, all fee and cost arrangements should be fully explained.ⁿ¹⁸

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

In cases in which an attorney has decided to represent a new client, careful attention must be paid to drafting a clear, binding retainer agreement which adequately sets forth the respective duties of each party. The agreement should be written in simple, non-legalistic English so as to put the client on notice of what he or she may expect from the attorney and what is expected in return. Particularly important is advising the client of responsibilities to support the litigation as it goes forward, not only in respect to its cost but in other respects as well. Language such as the following might be used:

The Client warrants that all facts within the Client's knowledge that are material to the dispute which is the subject of this representation have been disclosed to the Attorneys and that no facts--favorable or unfavorable--have been held back from disclosure. The Client understands that the Attorneys are relying on this warranty in agreeing to this representation.

The Client shall keep the Attorneys advised of the Client's address at all times, shall appear on reasonable notice at any and all meetings or other appearances, and shall comply with all reasonable requests of the Attorneys in connection with the preparation and presentation of the Client's claims.

Also, careful consideration should be given to a demand letter at this stage of representation. In almost

all cases, such a communication to the other side is useful. Cases which need not be litigated can be settled at the pre-complaint stage either through negotiations between counsel or with the assistance of a mediator. Even where settlement does not follow a demand letter, counsel can often learn useful information about the employer's version of the events leading to the termination, or about the termination itself, by providing the employer with some detail respecting the employee's claims.

Commentary by John M. True, III.

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

If the attorney has agreed to conduct an investigation of the client's potential claims and ultimately decides *not* to take the case, it is strongly advised that a letter be sent to the client advising him or her briefly as to the reasons why the case was declined, applicable time periods for filing administrative claims, and applicable statutes of limitation. This may help avoid future malpractice claims against the attorney. *Commentary by William M. Crosby.*

[2] Defendant

[a] Generally

A preliminary investigation of a wrongful discharge claim is just as crucial to defense counsel as it is to plaintiff's counsel. A major difference is that often defense counsel already has an established relationship with the client and may even have played a role advising the client prior to the termination. However, whether defense counsel is called upon by an existing client or by a new client, the importance of the preliminary investigation cannot be overestimated. A timely and thorough preliminary investigation can lay the groundwork for a successful defense or a quick and satisfactory settlement by enabling the employer to develop evidence that undermines the factual and legal basis for the employee's claims, and by identifying and rectifying potential problems before they come to the opposing counsel's attention. In addition, a timely and thorough preliminary investigation will enable defense counsel to take an effective deposition of the employee before the employee has the benefit of any discovery.

[b] Initial Contact

When contacted about a potential new case, defense counsel should obtain sufficient information about the employer, the aggrieved employee, and the employee's allegations to be sure that no conflict of interest will ensue that would prevent counsel from representing the client, and that counsel has sufficient expertise to handle the case. Counsel should also ascertain when the employee's suit was filed and served on the employer so that an appropriate response can be filed in a timely manner. For instance, if there are grounds to remove the case to federal court and it is in the employer's interest to do so, a removal must be effectuated no later than 30 days after the employer has received the complaint or other paper from which it may be ascertained that the case is one that is, or has become, removable.ⁿ¹⁹ For further discussion of removal of actions to federal court, *see* § 61.03[1].

[c] Preliminary Investigation

The preliminary investigation should begin with an analysis of the employee's complaint. Counsel should determine the theory on which each claim is based, and the facts that have been alleged in support of each claim. It is also useful to outline the chronology of events that form the nucleus of the employee's factual allegations. Counsel should also ascertain whether the individuals mentioned in the complaint are currently employees, and which of them are likely to be friendly or hostile. This preliminary analysis will change over time as more information is gathered; however, from the very start it should operate as a blueprint of the case, including the potential strengths and weaknesses of the employee's claims. Based on this preliminary analysis, defense counsel should be able to ascertain whether the case can be removed to federal court based on the information in the complaint,ⁿ²⁰ whether any of the claims are preempted,ⁿ²¹ whether any of the claims are barred by the applicable statute of limitations,ⁿ²² and, finally, whether sufficient facts have been alleged in support of each claim to survive a demurrer.ⁿ²³ Similarly, an initial case analysis will help defense

counsel identify who should be interviewed before a response is filed and what questions they should be asked.

Next, defense counsel should investigate the facts of the case. The employer will often have an in-house counsel or a member of its personnel office act as the liaison between defense counsel and the employer. Such a contact within the company can be used effectively to minimize defense counsel's time spent gathering documents and arranging interviews. However, defense counsel should not make the mistake of leaving the preliminary investigation, including interviews of the key percipient witnesses and decision makers, to the in-house counsel or personnel official. Defense counsel should personally evaluate the demeanor of potential witnesses and the credibility of the employer's explanation of the circumstances and reasons for the termination. Additionally, information obtained second-hand or third-hand often becomes distorted as it is passed from person to person. Accordingly, defense counsel should personally review the key documents in the case, including: the contents of the employee's personnel file and the documentation of the reasons for the termination; the employer's personnel policies; any employment contract, union contract, stock option plan, or bonus plan relating to the employee; the employer's files relating to any application made by the employee for worker's compensation or unemployment benefits; and all correspondence with the employee.ⁿ²⁴ Defense counsel should then personally interview the employee's supervisors and co-workers, with special attention given to the individuals who were involved in the decision to fire the employee.

When interviewing company employees, counsel should advise them that all discussions they have with the company's attorney are privileged and confidential. Further, counsel should explain to such employees the circumstances under which they risk waiving that privilege. In particular, they should be advised that they should not repeat what is said during the interviews except when the company's attorney is present or when instructed to do so for the purpose of preparing the company's defense. Counsel must be particularly sensitive in handling co-workers who may be sympathetic to the plaintiff. It is important that counsel win the confidence of potential witnesses so that a full and forthright statement of their knowledge can be obtained. It is also important that counsel play the devil's advocate and test the demeanor and credibility of potential witnesses.

The defense counsel's preliminary investigation should focus on whether the employee's claims can be defeated without reaching the factual merits of those claims and, if not, whether a jury can be convinced that the employee was terminated in good faith for a legitimate business reason and in a fair and reasonable manner. Therefore, it is important that defense counsel be able to answer the following questions at the completion of the preliminary investigation:ⁿ²⁵

1. Are any of the employee's claims expressly predicated on a federal statute that confers jurisdiction on the federal courts (thereby providing an explicit basis to remove the case to federal court based upon federal question jurisdiction)?
2. Has the employee named any defendants who are residents of the state in which the employee has sued or has the employee named any "Doe" defendants (thereby defeating a removal to federal court based upon diversity)?
3. Is there a collective bargaining agreement that covers the employee? If so, does the employee claim that the termination violated the terms and conditions of that agreement? Does the collective bargaining agreement require binding arbitration of employment disputes?
4. Is the employee's employment covered by an individual employment contract? If so, does that contract require binding arbitration of the employee's claims?
5. Was the employee given any written or oral promises concerning how long he or she would be employed or indicating that his or her employment would only be terminated for cause?
6. Does the employer have a written policy setting forth the reasons for which an employee may be

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terminated or the manner in which a termination should be carried out?

7. How long was the employee employed by the defendant? What raises, promotions, and commendations did the employee receive?

8. What was the employee's salary and title at the time of the termination?

9. Was the employee's performance periodically evaluated and, if so, how was the employee's performance rated?

10. Was the employee ever disciplined prior to the termination?

11. Did the employee ever file a grievance, complaint, or charge against the employer prior to termination?

12. Who was involved in the decision to terminate the employee? What is their reputation, demeanor and credibility? Do the employer's key witnesses have consistent versions of what occurred?

13. What were the reasons for the termination? Are the reasons documented? Are the reasons consistent with the employer's written policies and past practices, and any individual or union contract governing the employee's employment?

14. When and how was the employee notified of the decision? What was the employee told were the reasons for the termination? Who was present?

15. Was the manner in which the employee was terminated consistent with the employer's written policies and past practices, and any individual or union contract governing the employee's employment?

16. Was the employee's termination consistent with the treatment accorded other similarly situated employees?

17. Did the employee sign any document at the time of the termination that contained a waiver of any claims concerning the employee's employment?

18. Are any of the key witnesses hostile to the employer or likely to testify on the employee's behalf? Do any of them verify the employee's factual allegations?

19. Has the employee filed an internal grievance, an administrative complaint challenging the termination, or a claim for unemployment benefits or workers' compensation? If so, are the employee's allegations and testimony in any such proceeding consistent with the allegations in the judicial complaint? Likewise, are the statements made by any representatives of the employer consistent with the employer's current explanation of the reasons for the termination and the manner in which it was carried out?

20. What is the employee's reputation, demeanor, and credibility?

This list is not intended to be comprehensive. Each case will raise issues in addition to the ones suggested by this list. However, insofar as possible, defense counsel should gather the information necessary to answer these questions before responding to the complaint or taking the plaintiff's deposition.

■ CONSULTANT'S COMMENT:

Plaintiff's counsel and defense counsel may wish to consider the use of letters containing factual and legal arguments as strategic additions to exchanges of wrongful discharge pleadings. Counsel for plaintiff may wish to prepare such letters before or after serving the complaint to achieve a variety of purposes: (1) to alert the defendant to the broad scope of an intended or actual lawsuit; (2) to highlight favorable facts and legal arguments (for example, to alert the defendant to statements by supervisors that the supervisors may not have admitted to the defendant's investigators); and (3) to create pressure in favor of an early settlement. Counsel for defendant may wish to prepare such letters for similar purposes, tailored to the facts and arguments favorable to the defense perspective.

While many counsel for both plaintiffs and defendants have used such letters effectively, they pose a number of risks, including (1) the potential for misstatements of presumed facts and law that provide unintended encouragement for opposing counsel; (2) the disclosure of "free discovery" to the opponent; and (3) the "free" disclosure of the writer's potential litigation theory and strategy. Despite these drawbacks, wrongful discharge cases remain a fruitful area of the law for use of such tactical letters. As fact patterns begin to repeat themselves in case after case, litigation theory and strategy become increasingly predictable, thus rendering moot the fear of "free" information disclosures. Furthermore, because the contents of written settlement offers must be communicated to a client,ⁿ²⁶ and because the recipient counsel may simply give the client a copy of the letter, the writer may effectively reach a party with whom direct communication is otherwise prohibited.ⁿ²⁷ *Commentary by Kirby Wilcox.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law Wrongful Termination General Overview

FOOTNOTES:

(n1)Footnote 1. *See Fed. Rules Civ. Proc., Rule 11* (permitting sanctions, including attorneys' fees, when pleading or other paper is filed without a belief--formed after reasonable inquiry--that the pleading or other paper is well-grounded in fact and warranted by existing law or a good faith argument for the extension of existing law); *Code Civ. Proc. § 128.5* (permitting award of expenses, including attorneys' fees, for bad-faith actions or tactics that are frivolous or undertaken solely for purposes of delay). *Code of Civ. Proc. § 128.5* applies to complaints filed prior to December 31, 1994. *Code Civ. Proc. § 128.7* imposes similar sanctions for complaints filed after January 1, 1995.

(n2)Footnote 2. If the employee does not have a copy of his or her personnel file, counsel should advise the employee to request a copy. Inform the employee that if the employer refuses to provide the employee a complete copy of the file, the employer must at least provide the employee copies of documents signed by the employee, which typically include employment applications, disciplinary notices, and performance evaluations. *see Lab. Code § 432*. Also, the employer must give the employee an opportunity to inspect his or her personnel file, except for records relating to investigations of possible criminal offenses, letters of reference, and other specified information. *see Lab. Code § 1198.5(a), (c)*. For further discussion of an employee's right of access to personnel files, *see* ch. 51.

(n3)Footnote 3. The administrative files of the EEOC and DFEH can be particularly helpful, as they typically contain the employer's initial position on the employee's claim and responses to the agency's request for information, workforce statistics, witness interviews, and the investigator's notes. The employee is entitled to examine and copy the files after receiving a right to sue letter or filing a notice of intention to file a civil suit. *see EEOC Compliance Manual (CCH) §§ 83.4(a), 83.5; Associated Dry Goods Corp. v. E.E.O.C. (4th Cir. 1983) 720 F.2d 804, 811*.

(n4)Footnote 4. If the employee has not been keeping records of his or her job search, copies of newspaper advertisements, applications for specific jobs, and rejection letters, the employee should be advised to do so.

(n5)Footnote 5. *See Evid. Code §§ 952, 954.*

(n6)Footnote 6. *See Fed. Rules Civ. Proc., Rule 54(d); Code Civ. Proc. § 1032(b).*

(n7)Footnote 7. *See Cal. Rules Prof. Conduct, Rule 2-100.*

(n8)Footnote 8. *Mills Land & Water Co. v. Golden West Refining Co. (1986) 186 Cal. App. 3d 116, 127-129, 230 Cal. Rptr. 461* (decided under former *Prof. Rules Cond.*, rule 7-103, predecessor to current *Prof. Rules Cond.*, rule 2-100).

(n9)Footnote 9. *D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 736-737, 36 Cal. Rptr. 468, 388 P.2d 700 .*

(n10)Footnote 10. *D.I. Chadbourne, Inc. v. Superior Court (1964) 60 Cal. 2d 723, 736-737, 36 Cal. Rptr. 468, 388 P.2d 700 .*

(n11)Footnote 11. *See Mills Land & Water Co. v. Golden West Refining Co. (1986) 186 Cal. App. 3d 116, 127-129, 230 Cal. Rptr. 461* (decided under former *Prof. Rules Cond.*, rule 7-103, predecessor to current *Prof. Rules Cond.*, rule 2-100).

(n12)Footnote 12. *See Bobele v. Superior Court (1988) 199 Cal. App. 3d 708, 713, 245 Cal. Rptr. 144 .*

(n13)Footnote 13. *See Continental Ins. Co. v. Superior Court (1995) 32 Cal. App. 4th 94, 120-121, 37 Cal. Rptr. 2d 843 .*

(n14)Footnote 14. *Jorgensen v. Taco Bell Corp. (1996) 50 Cal. App. 4th 1398, 58 Cal. Rptr. 2d 178 .*

(n15)Footnote 15. *See Jorgensen v. Taco Bell Corp. (1996) 50 Cal. App. 4th 1398, 58 Cal. Rptr. 2d 178 .*

(n16)Footnote 16. *See Jorgensen v. Taco Bell Corp. (1996) 50 Cal. App. 4th 1398, 58 Cal. Rptr. 2d 178 .*

(n17)Footnote 17. For discussion of constructive discharge principles, *see* ch. 60.

(n18)Footnote 18. For discussion of ethical duties regarding fee arrangements, *see* California Attorney Practice, ch. 10, "Fee Arrangements With Clients." (Matthew Bender).

(n19)Footnote 19. *See 28 U.S.C. § 1446(b).*

(n20)Footnote 20. *See* discussion in § 61.03[1].

(n21)Footnote 21. For discussion of preemption as a substantive defense, *see* Chapter 60.

(n22)Footnote 22. For discussion of the use of statutes of limitation as a defense to a wrongful discharge action, *see* Chapter 60; for discussion of the use of demurrers in raising a defense based on a statute of limitations, *see* § 61.03[2].

(n23)Footnote 23. For discussion of the use of demurrers in wrongful discharge actions, *see* § 61.03[2].

(n24)Footnote 24. For complete list of documents that should be obtained and reviewed by counsel, *see* § 61.01[1][c].

(n25)Footnote 25. For discussion of the substantive law underlying these questions, *see* ch. 60.

(n26)Footnote 26. *See Cal. Rules Prof. Conduct, Rule 3-510.*

(n27)Footnote 27. *cf. Cal. Rules Prof. Conduct, Rule 2-100* (attorney ordinarily prohibited from directly or indirectly contacting party known to be represented by counsel regarding subject of controversy, in absence of counsel's consent).



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California Employment Law

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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 61 Bringing and Defending Wrongful Termination Claims
Part A. TEXT

4-61 California Employment Law § 61.02

AUTHOR: By Lawrence J. King, J.D. and Elizabeth D. Laporte, J.D.

§ 61.02 FORM--Complaint for Damages for Wrongful Termination or Discipline

[1] Comment

[a] Use of Form

[i] Generally

The form set forth in [2], *below*, is a complaint for damages for wrongful termination of employment. The complaint can also be used to allege wrongful discipline or demotion. The form complaint alleges the following causes of action: (1) wrongful discharge in violation of public policy (also known as "tortious discharge");ⁿ¹ (2) breach of an implied-in-fact contract;ⁿ² and (3) breach of the implied covenant of good faith and fair dealing.ⁿ³ The complaint includes a prayer for damages requesting lost wages and benefits, punitive and emotional distress damages (available on the public policy claims), and attorney's fees (arguably available on the implied covenant of good faith and fair dealing claim to the extent incurred to secure benefits due under contract).ⁿ⁴ For complete discussion of the substantive law governing wrongful discharge, *see* Chapter 60.

Because the facts of each case vary greatly, counsel should carefully tailor the form to the specific case. In addition to the three basic "wrongful discharge" theories for recovery (public policy tort claim, implied contract claim, implied covenant of good faith and fair dealing claim), a number of related tort theories of recovery may be available, depending on the facts of the particular case, such as assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, defamation, invasion of privacy, and interference with prospective business advantage.ⁿ⁵ For discussion of related tort theories of recovery, *see* Chapter 63. For discussion of tort liability for invasion of privacy, *see* Chapters 50 and 51.

Certain statutory remedies may also be available in particular cases.ⁿ⁶ For complete discussion of related statutory remedies, *see* Chapters 60 and 63. Causes of action based on these statutes may be added to the complaint when appropriate. Counsel should remember, however, that certain statutory remedies are exclusive and will preempt a common-law wrongful termination based on conduct covered by the statutory remedy.ⁿ⁷ In addition, counsel should

bear in mind that previous statutory actions may have a res judicata effect on common law wrongful termination claims. For example, in one case, a federal court judgment in an action based on Title VII of the Civil Rights Act of 1964ⁿ⁸ was res judicata and therefore precluded a subsequent state court action for breach of the implied covenant of good faith and fair dealing.ⁿ⁹

In choosing which causes of action to plead, counsel should carefully weigh whether to allege all possible causes of action or whether to allege only the strongest possible causes of action in light of the facts involved in the case. A "kitchen sink" complaint alleging every possible claim poses a greater risk of expensive and successful demurrers, motions for summary judgment or summary adjudication, and, eventually, jury confusion. Selective pleading of the strongest claims is advisable. However, excessively narrow complaints risk the possibility that the law may change, or that after the complaint is filed counsel will discover that the facts support an unpleaded cause of action better than the cause of action set forth in the complaint.

Counsel should carefully draft the complaint to avoid federal preemption.ⁿ¹⁰ For example, the complaint should not allege that the termination was for the purpose of depriving plaintiff of pension benefits, because such an allegation may trigger ERISA preemption.ⁿ¹¹

The complaint should be factually specific and detailed. This will help to discourage and defeat demurrers, and will impress the judge and opposing counsel with the seriousness of the lawsuit.

[ii] Naming the Parties

Usually the terminated employee will be the sole plaintiff. In rare cases, members of the employee's family may have separate claims, such as loss of consortium or intentional infliction of emotional distress.ⁿ¹² However, unless there are sufficient facts to support the family member's claim for damages in addition to the damages suffered by the employee, the extra time, trouble, and expense of bringing these claims will probably outweigh the benefits.

The key defendant, of course, is the employer. There is, however, a strong presumption that a parent company is not the employer of its subsidiary's employees.^{n12.1} Consequently, in a wrongful termination suit brought by a subsidiary employee, counsel representing the employee should be certain to name the subsidiary corporation, absent strong evidence that the parent corporation exercised day-to-day control over the subsidiary's employment decisions or that it exercised any control over the subsidiary's decisions with respect to the plaintiff.^{n12.2}

Because they are not parties to the employment contract, individual employees are usually not liable for the employer's breach of the employment contract or for breach of the covenant of good faith and fair dealing.ⁿ¹³ Moreover, except when a statutory exception applies, an employee or former employee cannot sue other employees based on their conduct, including acts and words relating to personnel actions, whether or not the employees acted within the scope of their employment and regardless of their personal motives.^{n13.1} However, it appears that coemployees are not entirely exempt when it comes to their conduct relating to personnel actions if there is a statutory basis, such as libel, for a suit.^{n13.2}

■ CONSULTANT'S COMMENT:.

The fact that the *Sheppard* court found triable issues of fact as to coemployees' malice^{n13.3} is unfortunate, because the holding seems to automatically bar demurrers of libel claims against coworkers and to force the issue of malice into summary judgment or trial. It would appear far more appropriate to require the plaintiff to specifically present facts in his or her complaint that show that the business interests of the employer were not a motivating factor for the conduct of the individual defendant. Under this test, an individual defendant may not like the plaintiff and may strongly hope that the plaintiff is discharged. However, so long as the individual defendant supplies some business-related information to the employer to support the challenged decision, any other motivations of the defendant would seem

irrelevant. Stated otherwise, employees do and do not get along in the workplace--so long as there are business justifications for employment actions, "malice" should not include ill will born of petty jealousies. *Commentary by Kirby Wilcox.*

Furthermore, unless the supervisor is alleged to be a sexual harasser, supervisory personnel cannot be held individually liable for discrimination under the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*)^{n13.4} or for wrongful discharge in violation of public policy based on violation of the Fair Employment and Housing Act (FEHA) (Gov. Code § 12900 *et seq.*)ⁿ¹⁴ For further discussion of proper party defendants in FEHA actions, *see* § 43.01[3A].

As a practical matter, individual employees who may be named as defendants are more likely to be "judgment proof," and the jury may be sympathetic towards individual employees who are sued in their individual capacity rather than their official capacity. Finally, naming individual employees may increase their hostility as witnesses. Therefore, it is usually better not to name individual employees as defendants unless it is necessary to destroy diversity, or unless there is a serious possibility that the employee's harmful conduct toward plaintiff will be found to have been outside the course and scope of employment.ⁿ¹⁵ If an individual employee is named as a defendant, the complaint should allege that the employee acted for his or her own purpose and out of "malice and ill will." The complaint should also allege that the employee acted, at least in part, within the course and scope of his or her employment, so that the employer may be held liable on the basis of respondeat superior.ⁿ¹⁶

As a matter of law, only an employer can be liable for the tort of wrongful discharge in violation of public policy.^{n16.1} Thus, someone other than the employer, even someone who allegedly conspired with the employer to discharge the former employee in violation of public policy, cannot be liable for the termination of employment.^{n16.2}

Plaintiff should also name "Doe" defendantsⁿ¹⁷ when he or she does not know the true names and capacities of potential defendants or when plaintiff believes other unknown individuals or companies may be liable (e.g., based on agency or conspiracy).

[iii] Verification

It is not necessary to verify a wrongful discharge complaint, and it is usually better practice not to do so. A verified complaint may pin the plaintiff down prematurely, before he or she has the benefit of discovery. Thus, it provides a fertile source for impeachment of the plaintiff, and may come back to haunt him or her on demurrer or summary judgment. Although a verified complaint in superior court forces the defendant to file a verified answer,ⁿ¹⁸ the same benefit can be obtained by interrogatories and requests for admission.

[b] Pleading Public Policy Tort Claim

The first cause of action in the form set forth in [2], *below*, seeks recovery of damages for a termination (or other adverse action) in violation of public policy. To state the cause of action, the complaint must allege (1) a public policy; (2) conduct by the employer in violation of public policy, such as termination or other adverse employment action in retaliation for an employee's participation in legally protected activity or refusal to commit an illegal act; and (3) damages resulting from the adverse employment action.ⁿ¹⁹ For complete discussion of the elements of a cause of action for termination in violation of public policy, *see* Chapter 60.

Counsel should plead the source of the public policy as specifically as possible, whether a statute, constitutional provision, or administrative regulation.ⁿ²⁰ In addition, the California Supreme Court has held that the policy must be one that "affects a duty which inures to the benefit of the public at large rather than to a particular employer or employee," it must have been well-established at the time of the discharge, and the policy must be "fundamental" and "substantial."ⁿ²¹ Furthermore, the policy must be applicable to the defendant.ⁿ²²

If the statute that embodies the public policy also provides a private right of action, the statutory cause of action may in some cases be the exclusive remedy and/or may require exhaustion of administrative remedies. Therefore, if plaintiff can comply with the statutory requirements, such as the shorter statutes of limitation and requirements of exhaustion of administrative remedies, counsel should consider forgoing a common law public policy claim in favor of pleading the statute exclusively. Such a choice may provide counsel with advantages such as less jury confusion, better-developed law, and statutory attorney's fees. For discussion of situations in which a statutory remedy preempts a wrongful discharge action, *see* Chapter 60. For discussion of statutory remedies for employment discrimination, *see* Chapters 40-44.

Counsel should specifically allege that the public policy violation claimed was the proximate cause of the discharge or other adverse action.ⁿ²³ If the defendant did not actually terminate plaintiff's employment, but plaintiff resigned as a result of the employer's violation of public policy, the complaint should use the alternative allegations in Paragraph 7 of the form in [2], *below*, to allege either the action (such as discipline or demotion) taken by the employer, or facts that will support a conclusion that the conditions were so intolerable that a reasonable person would feel compelled to resign, and that the employer had actual knowledge of those conditions.ⁿ²⁴

When plaintiff is seeking emotional distress damages for tortious breach of public policy, the distress should be alleged. However, allegations that the termination caused emotional distress, especially allegations that the plaintiff continues to suffer from symptoms of mental distress, put the plaintiff's mental condition in controversy and may trigger a psychological examination by defendant's expert.ⁿ²⁵ Furthermore, plaintiff's counsel should be wary of potential workers' compensation preemption issues that may be raised if the complaint alleges that the distress resulted from acts occurring during the course of employment.ⁿ²⁶

If plaintiff wishes to seek punitive damages, the allegations in Paragraphs 9 and/or 10 should be used as appropriate to allege any bases for punitive damages,ⁿ²⁷ with particular attention to the allegations that will suffice to impute liability to the employer for conduct actually committed by the employer's agents or employees.ⁿ²⁸ For discussion of punitive damages awards in wrongful discharge actions, *see* Chapter 60. For discussion of circumstances under which an employer may be held liable for punitive damages based on conduct by its employees, *see* Chapter 30.

[c] Pleading Claim for Breach of Contract

The second cause of action in the form set forth in [2], *below*, alleges a breach of the employment contract, specifically a breach of a promise to terminate the employment only for cause. In alleging this cause of action, the complaint should specify whether the contract is written, oral, implied by conduct, or a combination of these types of contracts.ⁿ²⁹ If the contract is written, counsel should quote the contract or attach it as an exhibit. If the contract is oral or implied by conduct, the complaint should allege the specific conduct or representations that the plaintiff alleges are the basis for the existence of a contract.

If the action is not based on an express contract providing that termination must be for cause, plaintiff should allege in Paragraph 12 of the form facts sufficient to overcome the presumption of at will employment embodied in *Labor Code section 2922*, including as many of the following as possible: specific oral or written assurances of continued employment absent good cause for termination; longevity of service; commendations, promotions, and lack of criticism; the employer's personnel policies or practices (especially those governing discipline and termination); and industry practices regarding job security.ⁿ³⁰ A mere assertion that the employer implied that plaintiff would not be terminated as long as his performance was satisfactory is not sufficient to create an implied in fact contract.ⁿ³¹

If the employer caused the employee to change location by intentional misrepresentations about aspects of the work set forth in *Labor Code section 970*, the complaint should also allege a cause of action for double damages pursuant to *Labor Code section 972*. For discussion of those provisions, *see* Chapter 63.

If the contract was an express contract, either oral or written, counsel should allege in Paragraph 14 the terms of the agreement that plaintiff alleges were breached by the defendant. Paragraph 15 alleges that plaintiff was and is ready to perform his or her obligations under the contract. In Paragraph 16, counsel should allege the circumstances of plaintiff's termination, emphasizing those facts supporting the conclusion that plaintiff was discharged without the good cause required by the contract. Paragraph 17 sets forth the damages suffered as a result of the breach.

[d] Pleading Claim for Breach of Implied Covenant of Good Faith and Fair Dealing

The third cause of action set forth in the form in [2], *below*, alleges a breach of the implied covenant of good faith and fair dealing. A complaint for a breach of the implied covenant of good faith and fair dealing in the context of an employment contract must allege at least (1) the existence of an employment contract, whether written, oral, or implied by conduct, one term of which is the implied covenant of good faith and fair dealing (*see* Paragraph 19), (2) defendant's breach of the covenant (*see* Paragraph 23 and optional Paragraphs 24 and 25), and (3) plaintiff's resulting damages (*see* Paragraph 26).

In *Foley v. Interactive Data Corp.*,³² the California Supreme Court held that a cause of action for breach of the implied covenant of good faith and fair dealing in an employment contract is not a tort and, therefore, relief is restricted to contract remedies. The Court, however, did not discuss the elements necessary to state a cause of action for breach of the implied covenant in the employment context. Cases decided before *Foley* were in disagreement regarding such elements. Thus, the issue remains open.³³

If applicable to the particular facts involved, the complaint should allege that the employee was treated differently from similarly situated employees, that the employer denied the employee the benefit of personnel policies or practices that it afforded to other employees, and any particularly abusive conduct involved in the way plaintiff was terminated.³⁴

For discussion of the substantive issues surrounding the implied covenant of good faith and fair dealing in the employment context, *see* Chapter 60.

Counsel should be careful *not* to allege that the reason for the termination was to deprive the plaintiff of benefits (such as pensions), because such an allegation will probably lead to a ruling that the action is preempted by ERISA.³⁵ Other possible preemption "traps" to be avoided in pleading breach of the implied covenant include alleging retaliation for filing a workers' compensation claim and retaliation for union-organizing activities. For further discussion of preemption of wrongful discharge actions, *see* Chapter 60.

[2] Form Complaint for Damages for Wrongful Termination or Discipline

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[or other as appropriate]

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	COMPLAINT FOR DAMAGES FOR TORTIOUS
[and DOES I through _____],	)	_____ [DISCHARGE or DISCIP-
Defendant[s].	)	LINE or DEMOTION] IN VIOLATION OF PUBLIC

-) POLICY; BREACH OF CONTRACT; BREACH OF
) THE COVENANT OF GOOD FAITH AND FAIR
 DEALING[; AND _____ (*specify
 other causes of action, if included, e.g., DEFAMA-
 TION*)]
-

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant(s), for purposes of venue, e.g., Defendant _____ (name) is, and at all times mentioned herein was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ County, California*].

[2. _____ (*Set forth Doe allegations, e.g., Defendants DOES I through _____ were at all times relevant herein _____ (specify capacity, e.g., employees, agents, and/or members of the Board of Directors of defendant _____ (name)). Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will pray leave of this court to amend this complaint to allege the true names and capacities when ascertained.*]

[3. Plaintiff is informed and believes, and thereon alleges, that each of the defendants herein was, at all times relevant to this action, the agent, employee, representing partner, or joint venturer of the remaining defendants and was acting within the course and scope of that relationship. Plaintiff is further informed and believes, and thereon alleges, that each of the defendants herein gave consent to, ratified, and authorized the acts alleged herein to each of the remaining defendants.]

FIRST CAUSE OF ACTION

(_____ [*Termination or Discipline or Demotion*] in Violation of Public Policy)

4. From _____ [*date*], to _____ [*date*], plaintiff was employed by defendant as a _____ [*describe position and duties, e.g., regional sales manager with responsibility for distribution of defendant's products to retailers*].

5. _____ [*Allege facts showing that defendant's actions were contrary to public policy, or facts showing that plaintiff either exercised rights protected by public policy or refused to act contrary to public policy as ordered by the employer, e.g., On or about _____ (date), defendant's directors, officers, and management proposed that defendant enter into a secret agreement with its competitors, whereby defendant and its competitors would fix the price of certain products distributed to retailers. On or about _____ (date), defendant's vice president of sales and marketing _____ (name), acting within the course and scope of his/her employment, approached plaintiff and asked him/her to contact _____ (name), the sales director for _____ (name), a competing firm, for the purpose of implementing the price-fixing plan. At that time and on subsequent occasions, plaintiff refused to participate in any manner in the plan to engage in price-fixing with competitors*].

6. _____ [*Allege specific public policy involved with any applicable citations, e.g., The actions defendant ordered plaintiff to engage in would have violated the Sherman Antitrust Act, Title 15 United States Code Sections 1 through 7, and the California Cartwright Act, Business and Professions Code, section 16700 et seq.*].

[EITHER]

7. As a proximate result of plaintiff's conduct as described in Paragraph 5, above, and in violation of public policy as set forth in Paragraph 6, above, defendant _____ [name] terminated plaintiff's employment on _____ [date].

[OR]

7. As a proximate result of plaintiff's conduct as described in Paragraph 5, above, and in violation of public policy as set forth in Paragraph 6, above, defendant _____ [name] disciplined plaintiff by _____ [specify discipline imposed, e.g., suspended plaintiff without pay for a period of two weeks from _____ (date) until _____ (date)].

[OR]

7. As a proximate result of plaintiff's conduct as described in Paragraph 5, above, and in violation of public policy as set forth in Paragraph 6, above, defendant _____ [name] demoted plaintiff by _____ [specify action, e.g., reassigning plaintiff to a lower paying position].

[OR]

7. As a proximate result of plaintiff's conduct as described in Paragraph 5, above, and in violation of public policy as set forth in Paragraph 6, above, defendant _____ [name] _____ [specify defendant's conduct toward plaintiff, e.g., verbally harassed plaintiff, changed plaintiff's territory so that far less compensation could be earned, and threatened to terminate plaintiff's employment unless he/she cooperated in defendant's price-fixing plan]. As a result of this treatment, plaintiff reasonably concluded that the conditions of employment were intolerable, and resigned. At all times relevant hereto, defendant _____ [name of employer] [, through his/her/its directors, officers, managing agents, and supervisors,] had actual knowledge of these conditions.

[CONTINUE]

8. As a proximate result of defendant's conduct, plaintiff has suffered harm, including lost earnings and other employment benefits [, humiliation, embarrassment, and mental anguish], all to his/her damage _____ [in the sum of \$ _____ or in an amount to be established at trial].

[9. In doing acts set forth above, defendants knew that _____ (specify defendants' knowledge of plaintiff's rights, e.g., the conduct that they would have required of plaintiff was unlawful, and required plaintiff to choose between violating the law and losing his/her job). Notwithstanding this knowledge, defendant despicably subjected plaintiff to cruel and unjust hardship in conscious disregard of plaintiff's rights by _____ (specify facts showing oppressive or cruel and unjust treatment by defendant, e.g., insisting that plaintiff violate the law, and terminating plaintiff's employment when plaintiff refused to do so, and castigating plaintiff in front of plaintiff's co-workers). _____ (When employer is a corporation, add when appropriate: This oppressive conduct was committed by _____ (name of officer, director, or managing agent of corporation), a managing agent of the defendant.) Defendant's conduct warrants the assessment of punitive damages.]

[EITHER]

[10. Defendant _____ (*name of employer*) employed _____ (*name of employee who personally committed act(s) complained of*) with advance knowledge of his/her unfitness, and employed him/her with a conscious disregard of the rights and safety of others. _____ (*If employer is a corporation, add: The advance knowledge and conscious disregard was by _____ (name of officer, director, or managing agent of corporation), a managing agent of the defendant.*)]

[AND/OR]

[10. Defendant _____ (*name of employer*) _____ (*authorized or ratified*) the conduct of _____ (*name of employee who personally committed act(s) complained of*) specified in Paragraph 9 by _____ (*specify facts supporting inference of ratification or authorization, e.g., retaining the employee after learning of his/her conduct toward plaintiff and failing and refusing to discipline or reprimand him/her*). _____ (*If employer is a corporation, add: The (authorization or ratification) was by _____ (name of officer, director, or managing agent of corporation).*)]

SECOND CAUSE OF ACTION

(Breach of _____ [Implied *and/or* Express] Contract of Continued Employment)

11. Plaintiff incorporates herein by reference Paragraphs _____ (*specify paragraph numbers of relevant allegations in previous cause of action*).

12. _____ [*Allege facts establishing written, oral, or implied by conduct contract not to terminate without cause, e.g., Plaintiff was employed by defendant for 15 years, consistently received good to excellent performance evaluations and merit raises, was assured on numerous occasions that he/she would not be terminated arbitrarily, and relied on the provisions of the personnel manual (a copy of which is appended as Exhibit _____) regarding the causes for which employees could be discharged to conclude that plaintiff and defendant had entered into an implied contract that plaintiff would not be discharged unless there was good cause to do so*].

13. Based on the _____ [(written contract *or* oral representations and promises) *and/or* conduct of defendant], as set forth in Paragraph[s] _____, above, plaintiff had an employment contract with defendant that he/she would be employed by defendant so long as his/her performance was satisfactory and that defendant would not discharge him/her without good and just cause.

[14. The terms of the employment contract included, but were not limited to, the following: _____ (*specify terms, e.g., defendant would not demote, discipline, or discharge plaintiff without good cause and fair warning, based on objective, reasonable job evaluations of plaintiff*).]

15. Plaintiff at all times fulfilled his/her duties and conditions under the contract and has been ready, willing, and able to continue performing them in a competent and satisfactory manner.

16. Notwithstanding the _____ [express *or* implied] promise to terminate the employment contract only for good cause, on or about _____ [date], defendant terminated plaintiff's employment [or disciplined or demoted plaintiff] _____ [*specify facts supporting inference that good cause to terminate, discipline, or demote did not exist, e.g., without specifying any cause for the termination or on the alleged*]

ground of poor performance, even though plaintiff had received consistently good performance evaluations and had received a merit raise only two months before his/her termination].

17. As a proximate result of defendant's breach of the employment contract, plaintiff has suffered and continues to suffer losses in earnings and other employment benefits, to his/her damage _____ [in the sum of \$ _____ or in an amount to be established at trial].

THIRD CAUSE OF ACTION

(Breach of Implied Covenant of Good Faith and Fair Dealing)

18. Plaintiff incorporates by reference and realleges Paragraphs _____ (*specify paragraph numbers of relevant allegations in previous cause(s) of action*).

19. The employment agreement referred to above contained an implied covenant of good faith and fair dealing, which obligated defendant[s] to perform the terms and conditions of the agreement fairly and in good faith and to refrain from doing any act that would prevent or impede plaintiff from performing any or all of the conditions of the contract that he/she agreed to perform, or any act that would deprive plaintiff of the benefits of the contract.

[20. _____ (*Allege facts showing long service to employer and existence of employer policies that the employer failed to follow, especially policies or practices providing the employee with prior notice of intended termination or discipline and an opportunity to appeal such actions, e.g., Plaintiff was employed by defendant for 15 years, and reasonably relied on the provisions of the personnel manual (a copy of which is appended as Exhibit _____) regarding the causes for which employees could be discharged and the procedures set forth for such discharges for the expectation that defendant would apply its policies even-handedly to afford plaintiff the protections of those procedures if defendant believed there was cause to discharge plaintiff.*]

[21. Plaintiff performed all the duties and conditions of the employment agreement.]

[22. Defendant knew that plaintiff had fulfilled all his/her duties and conditions under the contract.]

23. Defendant breached the implied covenant of good faith and fair dealing under the employment agreement by _____ [discharging or _____ (*allege other adverse employment actions or facts giving rise to constructive discharge*)] plaintiff intentionally, maliciously, and without probable cause, in bad faith and for reasons extraneous to the contract. _____ [*Allege facts showing ill motivation and/or non-job-related reasons for discharge, e.g., In fact, defendant discharged plaintiff, not because of alleged poor performance, but because plaintiff, in good faith and in a reasonable, appropriate, and businesslike manner, had attempted to secure payment of commissions due under the employment agreement. Such motives were retaliatory in nature and extraneous to the employment relationship and were intended to deprive plaintiff of the benefits thereof*].

[24. Defendant further breached the implied covenant of good faith and fair dealing by violating and failing to follow its own personnel policies by _____ (*allege facts showing defendant did not comply with personnel policies, e.g., not providing plaintiff with the written warning of performance deficiency required by its personnel policy before discharge*).]

[25. Defendant further breached the implied covenant of good faith and fair dealing by depriving plaintiff of _____ (*allege facts establishing that the termination deprived the employee of benefits about to accrue, e.g., commissions earned by plaintiff on sales completed before his/her termination and due as soon as the merchandise ordered was delivered*).]

26. As a proximate result of defendant's breach of the implied covenant of good faith and fair dealing, plaintiff has suffered and continues to suffer losses in earning and other employment benefits, to his/her damage _____ [in the sum of \$ _____ or in an amount to be established at trial]. As a further proximate result of defendant's breach of the implied covenant of good faith and fair dealing, plaintiff has incurred reasonable attorneys' fees in attempting to secure the benefits owed him/her under the employment contract. [*Allege additional cause of action, if desired and appropriate. See Chapter 63.*]

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For damages for breach of contract according to proof, including lost earnings and other employee benefits, past and future;
2. For compensatory damages according to proof, including lost earnings and other employee benefits[, costs of seeking other employment] [, and damages for emotional distress, humiliation, and mental anguish];
3. For interest on lost earnings and benefits at the prevailing legal rate from _____ [date];
- [4. For punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar misconduct;]
- [5. For reasonable attorney's fees incurred by plaintiff in obtaining the benefits due him/her under the employment contract with defendant;]
6. For costs of suit incurred by plaintiff;
7. For such other and further relief as the court deems proper.

_____ [signature]

Attorney for Plaintiff

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Complaints General Overview Labor & Employment Law Wrongful Termination General Overview Labor & Employment Law Wrongful Termination Remedies General Overview

FOOTNOTES:

(n1)Footnote 1. For discussion of the considerations involved in pleading this cause of action, *see* [b], *below*.

(n2)Footnote 2. For discussion of the considerations involved in pleading this cause of action, *see* [c], *below*.

(n3)Footnote 3. For discussion of the considerations involved in pleading this cause of action, *see* [d], *below*.

(n4)Footnote 4. *cf.* *Brandt v. Superior Court* (1985) 37 Cal. 3d 813, 817, 210 Cal. Rptr. 211, 693 P.2d 796 (plaintiff in insurance bad-faith action could plead reasonable attorney's fees required to obtain policy benefits denied by insurer, as distinct from recovery of fees attributable to bringing of bad-faith suit itself).

(n5)Footnote 5. *See, e.g., Rulon-Miller v. Int'l Business Machines Corp.* (1984) 162 Cal. App. 3d 241, 254-256, 208 Cal. Rptr. 524 (intentional infliction of emotional distress).

(n6)Footnote 6. *See, e.g., Lab. Code § 132a; see also* discussion in chs. 20, 60.

(n7)Footnote 7. *See* discussion in ch. 60.

(n8)Footnote 8. *42 U.S.C. § 2000e et seq.*

(n9)Footnote 9. *See Gamble v. Gen. Foods Corp. (1991) 229 Cal. App. 3d 893, 896, 280 Cal. Rptr. 457*. For a comprehensive discussion of Title VII claims *see* ch. 43, pt. C.

(n10)Footnote 10. For complete discussion of federal preemption of wrongful discharge actions, *see* ch. 60.

(n11)Footnote 11. *See 29 U.S.C. §§ 1132(e)(1), 1144(a); Velarde v. Pace Mbershp Warehouse (9th Cir. 1997[Ariz.]) 105 F.3d 1313, 1316-1317*; (severance package not covered by ERISA because benefit does not "implicate" an "ongoing administrative scheme"); *Inter-Modal Rail Emples. Ass'n v. Atchison, Topeka & Santa Fe Ry. (1997) 520 U.S. 510, 117 S. Ct. 1513, 137 L. Ed. 2d 763, 769-770* (ERISA section 510 covers rights that vest, e.g., pension benefits, and rights that do not vest, e.g., welfare benefits); *Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 137-145, 111 S. Ct. 478, 112 L. Ed. 2d 474* (ERISA preemption of wrongful termination claim alleging employer terminated plaintiff to avoid making contributions because claim "related to" plan); *Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794, 799-800* (wrongful discharge claim preempted, and therefore within jurisdiction of federal courts, to the extent that claim "related to" ERISA plan); *see also* discussion in ch. 60.

(n12)Footnote 12. *See, e.g., Wayte v. Rollins Int'l, Inc. (1985) 169 Cal. App. 3d 1, 17, 215 Cal. Rptr. 59* (wife stated claim for intentional infliction of emotional distress by alleging that she relied on representations that son was covered under her husband's policy and coverage was then denied, causing her severe emotional distress).

(n13)Footnote 12.1. *Laird v. Capital Cities/ABC, Inc. (1998) 68 Cal. App. 4th 727, 738, 80 Cal. Rptr. 2d 454*, citing *Frank v. U.S. West., Inc. (10th Cir. 1993) 3 F.3d 1357, 1364*.

(n14)Footnote 12.2. *See Laird v. Capital Cities/ABC, Inc. (1998) 68 Cal. App. 4th 727, 738-743, 80 Cal. Rptr. 2d 454*.

(n15)Footnote 13. *See Cleary v. American Airlines, Inc. (1980) 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722*, *disapproved on other grounds*, *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 700 n.42, 254 Cal. Rptr. 211, 765 P.2d 373*.

(n16)Footnote 13.1. *Sheppard v. Freeman (1998) 67 Cal. App. 4th 339, 342, 79 Cal. Rptr. 2d 13* ("[p]ersonnel actions are made for the benefit of the enterprise--the employer, and it is the employer, not the individual employees, that must bear the risks and responsibilities attendant to these actions").

(n17)Footnote 13.2. *See, e.g., Sheppard v. Freeman (1998) 67 Cal. App. 4th 339, 348-349, 79 Cal. Rptr. 2d 13* (because libel is statutory action under *Civ. Code* §§ 43-48.5, former employee could sue other employees based on their allegedly libelous conduct relating to his termination).

(n18)Footnote 13.3. *See Sheppard v. Freeman (1998) 67 Cal. App. 4th 339, 348-349, 79 Cal. Rptr. 2d 13*.

(n19)Footnote 13.4. *Le Bourgeois v. Fireplace Manufacturing, Inc. (1998) 68 Cal. App. 4th 1049, 1051, 80 Cal. Rptr. 2d 660*.

(n20)Footnote 14. *Reno v. Baird (1998) 18 Cal. 4th 640, 663-664, 76 Cal. Rptr. 2d 499, 957 P.2d 1333*; *Le Bourgeois v. Fireplace Manufacturing, Inc. (1998) 68 Cal. App. 4th 1049, 1051, 80 Cal. Rptr. 2d 660*; *see* discussion in Ch. 41.

(n21)Footnote 15. *cf. Sanborn v. Chronicle Publ'g Co. (1976) 18 Cal. 3d 406, 411, 134 Cal. Rptr. 402, 556 P.2d*

764 (employer may be held liable for defamation if publication was within scope of employment). *see* § 63.02 (defamation).

(n22)Footnote 16. *See generally* discussion in ch. 30.

(n23)Footnote 16.1. *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal. App. 4th 32, 53, 100 Cal. Rptr. 2d 627 .

(n24)Footnote 16.2. *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal. App. 4th 32, 53-55, 100 Cal. Rptr. 2d 627 (ophthalmologist who was brother of anesthesiologist's employer and with whom anesthesiologist had argument about propriety of surgery for patient, could not be liable for discharge of or conspiracy to discharge anesthesiologist from employment in retaliation for advocating medically appropriate care in violation of *Bus. & Prof. Code* § 2056, because ophthalmologist had no power to terminate anesthesiologist's employment).

(n25)Footnote 17. *See Code Civ. Proc.* § 474.

(n26)Footnote 18. *See Code Civ. Proc.* § 446; *see also Code Civ. Proc.* § 92(b) (verified answer to verified complaint not required in limited civil cases).

(n27)Footnote 19. *See Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 174, 178, 164 Cal. Rptr. 839, 610 P.2d 1330 ; *see also BAJI No.* 10.42.

(n28)Footnote 20. *Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 80, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n29)Footnote 21. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 669-670, 254 Cal. Rptr. 211, 765 P.2d 373 . *See also Green v. Ralee Eng'g Co.* (1998) 19 Cal. 4th 66, 75-80, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 ; *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 888-890, 896-897, 66 Cal. Rptr. 2d 888, 941 P.2d 1157 .

(n30)Footnote 22. *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 135, 32 Cal. Rptr. 2d 275, 876 P.2d 1074 .

(n31)Footnote 23. *See Tameny v. Atlantic Richfield Co.* (1980) 27 Cal. 3d 167, 171 n.3, 164 Cal. Rptr. 839, 610 P.2d 1330 (allegations that sole reason for discharge was employee's refusal to commit illegal acts sufficiently alleged proximate cause).

(n32)Footnote 24. *See Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1248-1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *see also* discussion in ch. 60.

(n33)Footnote 25. *See Code Civ. Proc.* § 2032(d); (*Code Civ. Proc.* §§ 2032.310, 2032.320 operative July 1, 2005). *Vinson v. Superior Court* (1987) 43 Cal. 3d 833, 840-841, 239 Cal. Rptr. 292, 740 P.2d 404 . *but see Doyle v. Superior Court* (1996) 50 Cal. App. 4th 1878, 1885-1887, 58 Cal. Rptr. 2d 476 (employee who did not allege *continuing* emotional distress did not put her mental condition at issue so as to justify mental examination). For discussion of the examination of plaintiff during discovery, *see* § 61.04[2][e].

(n34)Footnote 26. *See Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 ; *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 13-20, 276 Cal. Rptr. 303, 801 P.2d 1054 ; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 159-160, 233 Cal. Rptr. 308, 729 P.2d 743 ; *Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 9-10, 87 Cal. Rptr. 2d 554 (plaintiff's emotional distress action was preempted by workers' compensation law, because workers' compensation is exclusive remedy for intentional infliction of emotional distress by employer's work-related conduct when that conduct does not contravene public policy); *see also* discussion in chs. 20 and 60.

(n35)Footnote 27. *See Civ. Code* § 3294(a), (c).

(n36)Footnote 28. *See Civ. Code § 3294(b).*

(n37)Footnote 29. *See Code Civ. Proc. § 430.10(g)* (permitting defendant to object to complaint by answer or demurrer when it cannot be ascertained whether contract was written, oral, or implied by conduct).

(n38)Footnote 30. *See Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 680, 254 Cal. Rptr. 211, 765 P.2d 373*; *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917*.

(n39)Footnote 31. *See Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 304, 188 Cal. Rptr. 159* (facts alleged did not support existence of implied contract; court permitted amendment of complaint on remand).

(n40)Footnote 32. *See Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373*.

(n41)Footnote 33. *Compare Cleary v. American Airlines, Inc. (1980) 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722* (employee's long service, and existence of employer's procedures for terminating employees, as sufficient to give rise to cause of action for breach of the implied covenant when plaintiff was terminated without cause and without protection of the employer's procedures) *with Koehrer v. Superior Court (1986) 181 Cal. App. 3d 1155, 226 Cal. Rptr. 820* (breach of implied covenant established if employer asserted existence of good cause to discharge employee without good-faith belief in cause to discharge) *and Khanna v. Microdata Corp. (1985) 170 Cal. App. 3d 250, 262-263, 215 Cal. Rptr. 860* (breach of implied covenant established by proof of employer's bad-faith conduct extraneous to contract coupled with intent to frustrate employee's contract rights); *see also Pugh v. See's Candies, Inc. (1988) 203 Cal. App. 3d 743, 770, 250 Cal. Rptr. 195* ("Pugh II"; stating elements of cause of action as follows: (1) contract of employment exists; (2) circumstances of termination reveal bad faith; (3) damages caused by bad faith).

(n42)Footnote 34. *See Rulon-Miller v. International Business Machines Corp. (1984) 162 Cal. App. 3d 241, 255, 208 Cal. Rptr. 524*.

(n43)Footnote 35. *See 29 U.S.C. §§ 1132(e)(1), 1144(a); Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 137-142, 111 S. Ct. 478, 112 L. Ed. 2d 474*; *Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794, 799-800* (wrongful discharge claim preempted, and therefore within jurisdiction of federal courts, to the extent that claim "related to" ERISA plan).



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California Employment Law

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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 61 Bringing and Defending Wrongful Termination Claims
Part A. TEXT

4-61 California Employment Law § 61.03

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§ 61.03 Responding to a Wrongful Discharge Complaint

[1] Removal to Federal Court

[a] Generally

When a wrongful discharge complaint has been filed in state court, one of defense counsel's first considerations should be whether there are grounds to remove the case to federal court and, if so, whether to do so. It is usually in the employer's interest to remove a wrongful discharge suit to federal court. An important advantage for defendants is that the employee must obtain a unanimous jury verdict in order to prevail in federal court (unless the parties agree otherwise).ⁿ¹ In state court, the plaintiff may prevail by convincing 3/4 or more of the jurors.ⁿ² Additionally, it is not uncommon for the employee to waive the right to a jury trial in federal court by inadvertently failing to make a jury demand within ten days after the case has been removed.ⁿ³ Also, federal judges are more likely to be familiar with many of the federal defenses to a wrongful discharge suit, such as preemption. Finally, the United States Supreme Court has instructed federal district and appellate courts to give more serious consideration to dispositive motions.ⁿ⁴

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

Federal courts have generally been found to be a more hostile forum to plaintiffs in wrongful termination suits than California courts. Since in most federal jurisdictions cases are handled on a "single assignment" basis, federal judges are frequently more inclined to consider granting summary judgment than state court law and motion judges might be. Also, case management techniques required by Rules 16 and 26 of the Federal Rules of Civil Procedure and many local federal court rules require early disclosure of substantial amounts of information. Often, this can work to the disadvantage of the plaintiff. *Commentary by John M. True, III.*

[b] Grounds for Removal

[i] Generally

An employer may remove to federal court any civil action brought in state court that originally could have been filed in federal court.ⁿ⁵ The two most common bases for removing a state wrongful discharge suit to federal court are federal question jurisdiction, discussed in [ii], *below*, and diversity jurisdiction, discussed in [iii], *below*.

[ii] Federal Question Jurisdiction

Pursuant to federal statute, "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."ⁿ⁶ Accordingly, if the employee's complaint asserts on its face a federal cause of action, the employer may remove the entire case to federal court, without regard to the citizenship or residence of the parties. For instance, if an employee's complaint includes a claim that he or she was terminated on the basis of race in violation of the Civil Rights Act of 1866,ⁿ⁷ the employer may remove the case to federal court. Further, the court has discretion to exercise pendant jurisdiction over any state law claims asserted in the same case, so long as they arise from the same nucleus of facts as the federal race claim.ⁿ⁸

Not surprisingly, plaintiff's attorneys (who usually prefer state court for the very reasons that defense counsel prefer federal court) often attempt to avoid having their cases removed to federal court by omitting mention of federal claims in their complaint. To the degree that both a state and a federal remedy are available to an employee based on the facts alleged, the employee may choose the state remedy and avoid removal to federal court.ⁿ⁹ For instance, if the plaintiff asserts that his or her employment was terminated for a reason violative of public policy, he or she may choose to sue based on the state law remedy rather than, for example, the Labor Management Relations Act (LMRA), and the action will not be removable to the federal court even though the facts could support an action under the LMRA.ⁿ¹⁰

Although the employee is the master of his or her own complaint, federal jurisdiction may not be avoided by "artful pleading," that is, by omitting from the complaint allegations of federal law that are essential to one or more claims stated therein.ⁿ¹¹ Rather, the determination whether a suit may be removed on the basis of federal question jurisdiction is governed by the judicially created "well-pleaded complaint" rule, which provides that a cause of action arises under federal law only when a federal question would be presented on the face of a properly pleaded complaint.ⁿ¹² On the one hand, under the "well-pleaded complaint" rule a federal court analyzes an ambiguous complaint to determine whether, had the complaint been properly pleaded, it would state a federal claim.ⁿ¹³ On the other hand, the same rule prevents an employer from removing a case to federal court on the basis that the employer intends to raise a federal *defense* to the claims asserted in the complaint. Thus, the case cannot be removed even if the defense is that a federally created remedy preempts the state-law cause of action stated in the complaint.ⁿ¹⁴

One corollary of the well-pleaded complaint rule, however, is that Congress may preempt claims in a particular area so completely that any civil complaint raising this select group of claims is necessarily federal in character.ⁿ¹⁵ In other words, the preemptive force of the particular federal statute may be so extraordinary that it "converts an ordinary state law claim into one stating a federal claim for purposes of the well-pleaded complaint rule."ⁿ¹⁶

In employment cases, the "complete preemption rule" has been applied primarily when a plaintiff has asserted certain state claims that are preempted by the Labor Management Relations Act (LMRA).ⁿ¹⁷ Section 301 of the LMRA provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties.ⁿ¹⁸

The preemptive force of section 301 has been held to be so powerful that it entirely displaces any state cause of action for violation of contracts between an employer and a labor organization. Any such suit is purely a creature of federal

law, notwithstanding the fact that that state law would provide a cause of action in the absence of section 301.ⁿ¹⁹ However, the United States Supreme Court has more recently held that a state-law wrongful discharge claim is preempted by section 301 *only* if the claim requires interpretation of the collective bargaining agreement.ⁿ²⁰ The fact that dispute resolution under a collective bargaining agreement and judicial analysis of a state-law claim would require analysis of the *same set of facts* does not in itself render the state claim preempted, as long as the state-law claim can be resolved without interpreting the agreement itself.ⁿ²¹

The "complete preemption rule" also applies to state-law claims that purport to remedy the violation of pension rights exclusively protected by the Employee Retirement Income Security Act (ERISA).ⁿ²² For example, the United States Supreme Court has held that ERISA's preemptive effect is so complete that state law causes of action alleging the improper processing of benefits claims may be removed to federal court even if an ERISA preemption defense does not appear on the face of the complaint, as is normally required by the well-pleaded complaint rule.ⁿ²³ The Ninth Circuit Court of Appeals has applied this principle to a common law cause of action alleging that an employer fired an employee in order to deprive the employee of his retirement benefits.ⁿ²⁴

The Ninth Circuit has ruled that the National Railway Labor Act (RLA),ⁿ²⁵ which governs labor relations for certain railroad and airline employees, does not "completely preempt" state-law claims alleging that employees covered by the RLA were fired in retaliation for exercising rights guaranteed to them under the RLA, so as to require removal to federal court.ⁿ²⁶

For full discussion of federal preemption of wrongful termination actions, *see* Chapter 60.

[iii] Diversity Jurisdiction

Federal district courts also have original jurisdiction over all civil actions between citizens of different states, between a citizen of a state and citizens or subjects of a foreign state, or between a foreign state as plaintiff and citizens of a state or different states.ⁿ²⁷ The matter in controversy must exceed the sum of \$75,000, excluding interest and costs.ⁿ²⁸ This jurisdiction also extends to actions in which a citizen or subject of a foreign state is an additional party.ⁿ²⁹ Title 28 of the *United States Code*, section 1441(b), provides that when a federal court would have had jurisdiction based on diversity of citizenship, the action may be removed only if *none* of the parties in interest who have been properly joined and served as defendants is a citizen of the state in which the action is brought. Accordingly, a wrongful discharge action brought in California state court may be removed to federal district court if neither the employer nor any of the named defendants is a citizen of California. For purposes of removal based on diversity of citizenship, the citizenship of any defendants sued under fictitious names is ignored.ⁿ³⁰

Even if the employee names individual defendants who are citizens of the state in which the suit is filed, the case may nonetheless be removed if no valid cause of action is stated against the individual defendants.ⁿ³¹ For example, an employee's co-employees are ordinarily not liable for the employer's breach of the implied covenant of good faith and fair dealing, as they are not parties to the employment contract.ⁿ³² Thus, if the only cause of action alleged against a resident defendant is a claim that a co-employee breached the implied covenant, it would seem that removal based on diversity of citizenship would be proper.

[c] Procedures for Removal

In order to remove a case to federal court, a defendant must file a notice of removal within 30 days after receiving a copy of the pleading, motion, order, or other paper, from which it could be ascertained that the case is removable.ⁿ³³ However, an action may not be removed on the basis of diversity of citizenshipⁿ³⁴ more than one year after the commencement of the action.ⁿ³⁵ The notice must be filed in the District Court of the United States for the district and division in which the state court action is pending, and the notice must be accompanied by a copy of all process, pleadings, and orders served on the defendant-employer in the state court action. The notice must be signed pursuant to

Federal Rules of Civil Procedure, Rule 11, and must contain a short and plain statement of the grounds for removal.ⁿ³⁶ Thus, if the case is being removed based on the court's federal question jurisdiction, the notice should plainly identify the federal cause of action that the employee has asserted on the face of his or her complaint, or demonstrate that the employee's state claims are completely preempted by, for example, the LMRA or ERISA. Similarly, if the removal is based on diversity jurisdiction, the notice should identify all the defendants and demonstrate that none of the defendants named in the state court action is a citizen of California. When a corporation is named as a defendant, the notice should demonstrate that the corporate defendant is not incorporated in California and that neither the corporation's principal place of business nor its corporate headquarters is located in California.ⁿ³⁷ When individuals have been named as defendants, the notice should demonstrate that each of the individual defendants is a citizen of a state other than California.

The notice should also set forth the date the employer received the state court pleading, order, or paper from which it could be ascertained that the case was removable, and should state that the notice for removal is being filed within 30 days thereof.ⁿ³⁸ If removal is sought on the basis of diversity of citizenship,ⁿ³⁹ the notice should also show that removal is being sought within one year after commencement of the action.ⁿ⁴⁰ If there is more than one defendant, the notice should also state that all the defendants that have been served agree to the removal.

Promptly after the notice of removal has been filed in federal court, the employer must give written notice to all adverse parties and file a copy of the notice of removal with the clerk of the state court in which the case was originally filed.ⁿ⁴¹

Once the notice of removal has been properly filed and the state court has been given notice of the removal, the case has been effectively removed, and the state court may proceed no further unless and until the case is remanded.ⁿ⁴² Unless remanded by order of the federal court, the case will proceed as any other case in federal court, and the Federal Rules of Civil Procedure apply.ⁿ⁴³

[d] Remand

If at any time before final judgment it appears that the federal district court lacks subject matter jurisdiction, the court must remand the action.ⁿ⁴⁴ A lack of subject matter jurisdiction may be challenged at any time before final judgment by a motion to remand,ⁿ⁴⁵ and may also be challenged on appeal.ⁿ⁴⁶ Although a litigant may "object" to removal by moving to remand the action to state court, the objection is not preserved unless an interlocutory appeal is filed challenging the order denying remand.ⁿ⁴⁷ If the litigant fails to move for remand and the action is tried on the merits, the remand may be challenged on appeal, but the issue is no longer whether the case was properly removed; it is whether the federal court would have had original jurisdiction had the case been filed in that court.ⁿ⁴⁸

A plaintiff may also request the federal court to exercise its discretion to remand to state court any claim that is separate and independent from the claim that provided the basis for removal, and that would not have been removable but for the joinder with the removable claim.ⁿ⁴⁹ In interpreting the "separate and independent" standard, courts have held that actions for recovery for a single wrong, even if stated as separate causes of actions against different defendants, are *not* separate and independent.ⁿ⁵⁰ In many cases, the claims included in a wrongful discharge suit will not be separate and independent from the federal claim that provided the basis for removal. For instance, if the basis of the removal was that the termination violated a collective bargaining agreement, all the employee's claims may arise from the same nucleus of common facts surrounding the termination, and therefore not be "separate and independent." On the other hand, if the employee is not covered by a collective bargaining agreement and the basis of the removal is that, after his or her termination, the employer refused to process pension benefits to which the employee was entitled (i.e., an ERISA claim), the other state-law claims may be sufficiently separate and independent to give the federal court discretion to remand the employee's state-law wrongful discharge claims to state court.

If the removal was based on federal question jurisdiction, and the federal claim has been eliminated and only pendent

state claims remain to be adjudicated, the federal court may remand the case to state court.ⁿ⁵¹ This may occur, for example, when the employee initially includes a federal claim in his or her suit and later determines that the evidence will not support that claim, or when a summary judgment is granted on the federal claim. However, remand under such circumstances is not mandatory. Once a federal court acquires removal jurisdiction over a case, it also acquires jurisdiction over pendent state claims. Dismissal of the federal claims does not deprive a federal court of the power to adjudicate the remaining pendent state claims. The exercise of this power is discretionary, and the court should consider and weigh the values of judicial economy, convenience, fairness and comity.ⁿ⁵²

If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the state court.ⁿ⁵³ Whether to deny joinder or permit joinder and remand the action appears to be within the discretion of the district court.

If remand is sought on the basis of a defect in the removal procedure (rather than on the basis of lack of subject matter jurisdiction), a motion to remand the case must be made within 30 days after the filing of the notice of removal.ⁿ⁵⁴

An order remanding the case may require the payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal.ⁿ⁵⁵ A certified copy of the remand order is mailed by the district court clerk to the clerk of the state court. On receipt of the remand order, the state court may proceed with the case.ⁿ⁵⁶

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

Where there is any reasonable basis on which to do so, a motion to remand is advisable. Crowded dockets quite naturally cause federal judges to look askance at defense attempts to drag cases into federal court if they have been properly filed in state court. *Commentary by John M. True, III.*

[2] Demurrer and Answer

Once the complaint has been served on the employer, defense counsel must decide whether to demur to the complaint, or to answer and defer any attack on the plaintiff's case until a motion for summary judgment.ⁿ⁵⁷ The defendant must demur to or answer the complaint, or both,ⁿ⁵⁸ within 30 days after the date that the complaint was served.ⁿ⁵⁹ A demurrer must be accompanied by a memorandum supporting.ⁿ⁶⁰

Filing a demurrer has both advantages and disadvantages. On the one hand, demurrers take time and money and may serve to educate opposing counsel concerning the developing law of wrongful discharge. Further, many deficiencies in the complaint can be cured simply by filing an amended complaint. On the other hand, it is worthwhile to demur to a complaint containing defects that cannot be cured by amendment, as when a cause of action is barred by a statute of limitations, or when a demurrer will substantially narrow the issues in a "scattershot" complaint.

The grounds for demurrer are set forth in *Code of Civil Procedure section 430.10*. The demurrer is limited to attacking deficiencies that appear on the face of the complaint, or from any matter of which the court is required to or may take judicial notice.ⁿ⁶¹ Any objections that do not appear on the face of the complaint may be made by answer,ⁿ⁶² either by denying the material allegation(s) of the complaint,ⁿ⁶³ or by alleging additional facts constituting a defense.ⁿ⁶⁴ All defenses or objections to the complaint are waived if not asserted in either a demurrer or an answer, except lack of subject matter jurisdiction and failure to state facts sufficient to constitute a cause of action.ⁿ⁶⁵

The most common grounds for demurrer in wrongful discharge cases are:

1. The action is barred by the applicable statutes of limitations;^{n65.1}
2. The exclusive remedy for the allegedly wrongful conduct is established by a state statute, such as the workers compensation law;ⁿ⁶⁶

3. Federal law preempts any state-law remedy;
4. The complaint fails to state a specific, statutory or constitutional basis for a claim that the discharge violated public policy;
5. The complaint does not contain sufficient allegations of fact to state a claim;
6. The plaintiff is collaterally estopped from asserting his or her claim;ⁿ⁶⁷ or
7. The claims for breach of contract and conspiracy do not apply to the individual defendants.

For more detailed discussion of these and other potential defenses, *see* Chapter 60.

Counsel may also demur for uncertainty, e.g., if it is not clear from the face of the complaint whether the alleged contract is written, oral or implied by conduct.ⁿ⁶⁸ However, demurrers for uncertainty are usually not cost-effective because defects are easily cured.

A motion to strike irrelevant or false matters in the pleadingsⁿ⁶⁹ may be combined with a demurrer. For example, counsel may move to strike claims for emotional distress and punitive damages in actions alleging breach of contract and breach of the covenant of good faith and fair dealing.ⁿ⁷⁰ Counsel may also move to strike claims that have no basis in law or fact, such as assertions of a right to a fair hearing when there is no allegation that an employer policy provides for one.ⁿ⁷¹

For full discussion of procedures regarding demurrers and motions to strike, *see* California Forms of Pleading and Practice, *Demurrers, Motions to Strike, Motions for Judgment on the Pleadings, and Motions for Nonsuit and Judgment*, Parts I and II (Matthew Bender), and California Civil Actions--Pleading and Practice, Chapters 10 and 22, Part C (Matthew Bender). For general discussion of answers, *see* California Forms of Pleading and Practice, *Answers*, and California Civil Actions--Pleading and Practice, Chapter 9 (Matthew Bender).

[3] Summary Judgment or Summary Adjudication

[a] Tactics and Procedure

A motion for summary judgment is an invaluable defense tool, as it can resolve the case or at least substantially narrow the causes of action or defenses left for trial. It may also force plaintiff to reveal his or her legal theories and best evidence before trial. However, summary judgment is time-consuming, helps to educate the opponent, and requires careful planning to assemble the uncontested facts through discovery and to bring a properly timed motion.

Summary judgment motions may be brought when there is no merit to the action at all, or there is no defense thereto.ⁿ⁷² The court may grant summary judgment only if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law.ⁿ⁷³ Alternatively, a party may move for summary adjudication regarding a particular cause of action or defense if the moving party contends that the cause of action or defense has no merit.ⁿ⁷⁴ Defendants may also move for summary adjudication regarding claims for punitive damages, and either party may move for summary adjudication regarding the issue of whether the defendant owed a legal duty to the plaintiff.ⁿ⁷⁵ In determining whether the moving party has met his or her burden of proof, the court must construe the affidavits or declarations of the moving party strictly, and those of the opposing party liberally, and any doubts are resolved in favor of the opposing party.ⁿ⁷⁶ However, the opposing party cannot create a triable issue of fact, thereby avoiding summary judgment, by making a statement in his or her declaration that contradicts an admission in his or her deposition.ⁿ⁷⁷

The basic procedures and requirements for summary judgment and summary adjudication under California law are set forth in *Code of Civil Procedure, section 437c*.ⁿ⁷⁸ A motion for summary judgment or adjudication in California state court may be made any time after 60 days have elapsed since the first general appearance of the opposing party, but may not be heard fewer than 30 days before the date of trial, unless the court for good cause orders otherwise.ⁿ⁷⁹ Notice of motion and supporting papers must be served at least 75 days before the hearing date, and that time is extended further if served by mail, facsimile transmission, or another method of delivery providing for overnight delivery.ⁿ⁸⁰ Counsel should also note that filing a summary judgment motion too early risks denial on the grounds that plaintiff has not had enough time for discovery.ⁿ⁸¹ The notice of motion must be accompanied by a supporting memorandum.ⁿ⁸²

When moving for summary judgment and/or summary adjudication of issues, counsel should always consult local court rules, which may impose additional requirements. For example, in San Francisco Superior Court, moving papers must be filed at least 15 calendar days before the hearing unless an order shortening time has been granted, and all supporting papers must accompany the notice of motion.ⁿ⁸³ Within 1 day of the filing, an endorsed copy of all motions, oppositions, and responses, including supporting papers, must be lodged with the Law and Motion Clerk.ⁿ⁸⁴ Failure to file this courtesy copy may cause the motion to be taken off the calendar.

Counsel should also be careful to request summary adjudication of individual causes of action or defenses in the notice of motion, as an alternative to summary judgment.ⁿ⁸⁵ Otherwise, the court may deny the entire summary judgment motion even if only one triable issue of fact is raised concerning only one cause of action.ⁿ⁸⁶ Further, counsel should specify with precision the issues that are argued to be without substantial controversy, and frame the issues no more broadly than the evidence will support.ⁿ⁸⁷

The moving party must prepare a separate statement of all material facts that he or she contends are undisputed, followed by a reference to the supporting evidence.ⁿ⁸⁸ Failure to comply with this requirement can, in the court's discretion, constitute sufficient grounds for denying the motion.^{n88.1} The opposing party must file a separate statement that responds to each of the purportedly undisputed facts, indicating agreement or disagreement.ⁿ⁸⁹ The opposing party's statement must also set forth plainly and concisely any other material facts the opposing party contends are disputed, followed by a reference to the supporting evidence.ⁿ⁹⁰ Failure to do so may be grounds for granting the motion for summary judgment.ⁿ⁹¹ All affidavits or declarations in support of or in opposition to the motion must be based on personal knowledge of the affiant or declarant, must set forth admissible evidence, and must affirmatively show that the affiant or declarant is competent to testify to the matters stated therein.ⁿ⁹² However, all objections based on failure to comply with the requirements regarding sufficiency of the supporting affidavits or declarations must be made at the hearing or will be deemed waived.ⁿ⁹³

■ PRACTICE TIP:

Code of Civil Procedure section 437c(g) requires that an order denying summary judgment set forth in the record any issues that the court determines are triable and the evidence proffered in support of and in opposition to the motion as to each issue. Plaintiff's counsel should prepare a proposed order for the judge's signature, along with the papers submitted in opposition to a defense motion for summary judgment. This should also include reference to all triable issues of ultimate fact, including any key issues that were not raised in the motion. This will help assure that the plaintiff's principal objective--causing the trial judge to find triable issues--will be achieved. *Commentary by William M. Crosby.*

Objections to the opposing party's evidence must be made in writing, and filed and served by 4:30 p.m. on the third court day before the hearing,ⁿ⁹⁴ unless counsel has arranged for a court reporter to be present at the hearing, in which case oral objections may be made.ⁿ⁹⁵ If objections are not made either in writing or orally at the hearing, the objections are waived.ⁿ⁹⁶ The objections must identify the objectionable evidence by page and line number and state the ground

with the same specificity as a motion to strike evidence at trial.ⁿ⁹⁷ Prudent counsel should, if at all possible, prepare written objections, as busy superior court judges may not be receptive to last-minute oral objections.

Moreover, counsel should be aware that if a party makes evidentiary objections in reply to opposition papers, those objections are deemed granted for the purposes of the appellate record only if the trial court specifically so indicates in its summary judgment/adjudication order. In the words of a recent opinion: "The trial court's statement that it had considered only the admissible evidence was not an implied ruling sustaining unspecified evidentiary objections. On the contrary ... we must take this statement as an implied overruling of any objection not specifically sustained."^{n97.1}

■ CONSULTANT'S COMMENT:

Laird^{n97.2} comment upon the record before an appellate court bears special mention. *Laird* teaches that practitioners should avoid drafting orders sustaining motions for summary judgment/adjudication that tie an award too closely to specific evidentiary rulings. Such narrowly tailored orders may be overturned on appeal, if the appellate panel disagrees with the trial court's treatment of the evidence. The wiser course is to prepare orders that offer alternative analyses. On the one hand, the order can link specific conclusions to specific evidence in the record. On the other hand, the order should also suggest that, even if certain excluded evidence is considered or certain included evidence is ignored, the party drafting the order should prevail. *Commentary by Kirby Wilcox.*

If the court grants the motion on the ground that there is no triable issue of material fact, the court must, by written or oral order, specify the reasons for its determination. The order must specifically refer to the supporting and opposing evidence that indicates that no triable issue exists.ⁿ⁹⁸

In a recent case of first impression,^{n98.1} a court of appeal held that even though the only parties to the arbitration agreement were the employee-plaintiff and the employer (and not the individual defendants), the employer was not barred from seeking summary judgment on the basis that all claims against it were subject to arbitration; plaintiff's allegations of nonarbitrable claims against the other defendants did not vitiate the employer-employee arbitration agreement.^{n98.2} The court interpreted the summary judgment statute^{n98.3} as being applicable in circumstances in which one defendant is entitled to judgment even though other defendants are not,^{n98.4} reasoning that to hold otherwise would encourage spurious claims and frivolous litigation by permitting the plaintiff to avoid arbitration merely by naming nonparties to the arbitration agreement, even if the plaintiff had no valid claims against those individuals.^{n98.5}

For additional discussion of procedures for summary judgment and summary adjudication of issues, *see* California Forms of Pleading and Practice, Ch. 537 *Summary Judgment* (Matthew Bender), and California Civil Actions--Pleading and Practice, Ch. 45 (Matthew Bender).

■ CONSULTANT'S COMMENT:

If a defendant has a good-faith belief in the merits of a potential motion for summary judgment or summary adjudication, the defendant is strongly advised to file the motion despite the potentially significant cost and despite the potential for losing the motion. Motions for summary judgment serve at least three critical litigation goals for the defendant. First, if successful, they can narrow the scope of the issues at trial, and such narrowing is a key to a strong defense. Defense counsel should be aware that, as court dockets become more crowded with wrongful discharge cases, and as wrongful discharge law becomes clearer, law and motion judges are becoming more willing to grant well-drafted summary judgment motions in full. Second, motions for summary judgment can create strong bargaining leverage while they are pending. Third, a motion for summary judgment is among the defendant's most powerful discovery devices. Even if a plaintiff does not believe that the motion will succeed, the plaintiff cannot be sure of success in opposing the motion. Thus, the plaintiff's opposing memorandum of points and authorities, of necessity, frequently contains a "blueprint" of the plaintiff's trial theory, as well as declarations containing documents and statements not previously revealed in the litigation.

Motions for summary judgment and summary adjudication are technical traps for the unwary in California state court. *Code of Civil Procedure section 437c* and the various local court rules contain detailed filing requirements, which must be followed to the letter. The better practice is to read Section 437c and the applicable local rules before *every* filing, no matter how exactly counsel may believe that he or she recalls the filing requirements. Consider, for example, that (1) *Code of Civil Procedure section 437c(b)* requires a *separate statement* of undisputed facts, including *specific references* to attached *supporting evidence*; (2) section 437c(b) further requires written or oral evidentiary objections, or else such objections are waived; (3) *Code of Civil Procedure section 437c(d)* requires that affidavits and declarations contain *admissible evidence* based on *personal knowledge* and thus may not, for example, contain hearsay; and (4) *Code of Civil Procedure section 437c(h)* requires the trial court to deny the motion if facts essential to the opposition *may* exist but cannot then be presented, such as when discovery is not sufficiently complete at the time of the motion. Summary judgment or summary adjudication motions, therefore, require considerable planning with respect to substantive content, technical preparation, and timing. *Commentary by Kirby Wilcox.*

[b] Grounds for Motion

The same defenses that will support a demurrer (such as expiration of the statute of limitations, failure to exhaust administrative remedies, and exclusivity of a statutory remedy), discussed in [a], *above*, are also grounds for summary judgment against plaintiff. The distinction between a demurrer and a motion for summary judgment is that a motion for summary judgment may be made when the defects do not appear on the face of the complaint, but can be established by affidavits, declarations, admissions, answers to interrogatories or deposition questions, or matters of which the court may or must take judicial notice.ⁿ⁹⁹ For example, the fact that the terms of employment are governed by a collective bargaining agreement, thereby creating the possibility of a preemption defense based on federal labor law, may not necessarily appear on the face of the complaint, but may be readily established by affidavit or other evidence.ⁿ¹⁰⁰ Such technical defenses often lend themselves to relatively simple, inexpensive, and early motions for summary judgment.

Defendant may also move for summary judgment if the undisputed material facts show that one or more of the essential substantive elements of plaintiff's theory of recovery is lacking. Common grounds for summary judgment raised in wrongful termination actions include the following:

1. Undisputed material facts, such as the express terms of a written employment contract, show that plaintiff was an at will employee, and that cause for discharge was therefore not required (potentially negating a cause of action based on an implied in fact agreement not to terminate except for cause or the implied in law covenant of good faith and fair dealing).ⁿ¹⁰¹
2. Undisputed material facts show that plaintiff was terminated for good cause and in good faith (again negating a cause of action based on an implied in fact agreement not to terminate except for cause or the implied in law covenant of good faith and fair dealing, and possibly a cause of action based on violation of public policy).ⁿ¹⁰²
3. The facts regarding the reason for the discharge are undisputed, and defendant's reasons do not violate any public policy embodied in a statutory or constitutional provision.ⁿ¹⁰³
4. The plaintiff was not in fact discharged, but resigned voluntarily.ⁿ¹⁰⁴

In the case of a public employee suing for wrongful termination, the employer may be able to move for summary judgment on the ground that a public agency, such as a civil service commission, has made an administrative determination of the identical issue.ⁿ¹⁰⁵

For full discussion of these and other substantive principles that may provide potential grounds for summary judgment, see Chapter 60.

Legal Topics:

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

Civil Procedure Pleading & Practice Pleadings Answers Labor & Employment Law Wrongful Termination General Overview

FOOTNOTES:

(n1)Footnote 1. See *Fed. R. Civ. P.*, Rule 48.

(n2)Footnote 2. See *Code Civ. Proc.* § 618.

(n3)Footnote 3. See *Fed. Rules Civ. Proc.*, Rule 81(c).

(n4)Footnote 4. See *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 326, 106 S. Ct. 2548, 91 L. Ed. 2d 265, 276 ; see also *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.* (1986) 475 U.S. 574, 585-588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 .

(n5)Footnote 5. 28 U.S.C. § 1441(a).

(n6)Footnote 6. 28 U.S.C. § 1441(b).

(n7)Footnote 7. See 42 U.S.C. § 1981.

(n8)Footnote 8. See *United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 ; see also *Nishimoto v. Federman-Bachrach & Associates* (9th Cir. 1990) 903 F.2d 709, 714 .

(n9)Footnote 9. *Caterpillar, Inc. v. Williams* (1987) 482 U.S. 386, 391-392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 ; see *Garibaldi v. Lucky Food Stores, Inc.* (9th Cir. 1984) 726 F.2d 1367, 1373-1375, 1370 , cert. denied, 471 U.S. 1099 (1985) .

(n10)Footnote 10. See *Garibaldi v. Lucky Food Stores, Inc.* (9th Cir. 1984) 726 F.2d 1367, 1373-1375, 1370-1375 , cert. denied, 471 U.S. 1099 (1985) ; see also *Campbell v. Aerospace Corp.* (9th Cir. 1997) 123 F.3d 1308, 1314-1315 ; (incorporating federal False Claims Act as the source of the public policy violated did not raise a sufficiently substantial disputed question of federal law so as to confer federal question jurisdiction).

(n11)Footnote 11. See *Paige v. Henry J. Kaiser Co.* (9th Cir. 1987) 826 F.2d 857, 861 ; *Olguin v. Inspiration Consol. Copper Co.* (9th Cir. 1984) 740 F.2d 1468, 1472 ; *Schroeder v. Trans World Airlines, Inc.* (9th Cir. 1983) 702 F.2d 189, 191 ; *Fristoe v. Reynolds Metals Co.* (9th Cir. 1980) 615 F.2d 1209, 1214, 1212 .

(n12)Footnote 12. See *Caterpillar, Inc. v. Williams* (1987) 482 U.S. 386, 391-392, 107 S. Ct. 2425, 96 L. Ed. 2d 318, 331 ; *Franchise Tax Bd. v. Laborers Vacation Trust* (1983) 463 U.S. 1, 9-11, 103 S. Ct. 2841, 77 L. Ed. 2d 420 ; *Gully v. First National Bank* (1936) 299 U.S. 109, 112-113, 57 S. Ct. 96, 81 L. Ed. 70 .

(n13)Footnote 13. See *Paige v. Henry J. Kaiser Co.* (9th Cir. 1987) 826 F.2d 857, 861 ; *Olguin v. Inspiration Consol. Copper Co.* (9th Cir. 1984) 740 F.2d 1468, 1472 ; *Schroeder v. Trans World Airlines, Inc.* (9th Cir. 1983) 702 F.2d 189, 191 ; *Fristoe v. Reynolds Metals Co.* (9th Cir. 1980) 615 F.2d 1209, 1214, 1212 .

(n14)Footnote 14. See *Caterpillar, Inc. v. Williams* (1987) 482 U.S. 386, 391-392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 ; *Metropolitan Life Insurance Co. v. Taylor* (1987) 481 U.S. 58, 66, 107 S. Ct. 1542, 95 L. Ed. 2d 55 . See also

Willy v. Coastal Corp. (5th Cir. 1988) 855 F.2d 1160, 1165-1167 .

(n15)Footnote 15. See *Caterpillar, Inc. v. Williams* (1987) 482 U.S. 386, 391-392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 ; *Metropolitan Life Insurance Co. v. Taylor* (1987) 481 U.S. 58, 66, 107 S. Ct. 1542, 95 L. Ed. 2d 55 . See also *Nishimoto v. Federman-Bachrach & Associates* (9th Cir. 1990) 903 F.2d 709, 713 .

(n16)Footnote 16. *Metropolitan Life Insurance Co. v. Taylor* (1987) 481 U.S. 58, 64-66, 107 S. Ct. 1542, 95 L. Ed. 2d 55 ; see also *Caterpillar, Inc. v. Williams* (1987) 482 U.S. 386, 391-392, 107 S. Ct. 2425, 96 L. Ed. 2d 318, 327-328 ; *Franchise Tax Bd. v. Laborers Vacation Trust* (1983) 463 U.S. 1, 9-11, 103 S. Ct. 2841, 77 L. Ed. 2d 420 ; *Avco Corp. v. Aero Lodge No. 735, International Asso. of Machinists & Aerospace Workers* (6th Cir. 1967) 376 F.2d 337, 339-340 , *aff'd*, *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968) .

(n17)Footnote 17. 29 U.S.C. §§ 141-187; see discussion in ch. 60.

(n18)Footnote 18. 29 U.S.C. § 185(a).

(n19)Footnote 19. *Franchise Tax Bd. v. Laborers Vacation Trust* (1983) 463 U.S. 1, 9-11, 103 S. Ct. 2841, 77 L. Ed. 2d 420 ; see also *Caterpillar, Inc. v. Williams* (1987) 482 U.S. 386, 391-392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (quoting *Franchise Tax Bd.*); *Avco Corp. v. Aero Lodge No. 735*, *Avco Corp. v. Aero Lodge No. 735, International Asso. of Machinists & Aerospace Workers* (6th Cir. 1967) 376 F.2d 337, 339-340 , *aff'd*, 390 U.S. 557 (1968) (state law does not exist as independent source of private right to enforce collective bargaining agreements); *Olguin v. Inspiration Consol. Copper Co.* (9th Cir. 1984) 740 F.2d 1468, 1472 (plaintiff's claims for breach of contract, wrongful discharge, and intentional infliction of emotional distress as arising under collective bargaining agreement, and therefore governed exclusively by federal labor law); *Fristoe v. Reynolds Metals Co.* (9th Cir. 1980) 615 F.2d 1209, 1214, 1212 (complaint's failure to refer to § 301 does not preclude federal jurisdiction over action). See also *Abreu v. Svenhard's Swedish Bakery* (1989) 208 Cal. App. 3d 1446, 1452-1454, 257 Cal. Rptr. 26 .

(n20)Footnote 20. See *Lingle v. Norge Division, Magic Chef* (1988) 486 U.S. 399, 409, 108 S. Ct. 1877, 100 L. Ed. 2d 410 .

(n21)Footnote 21. See *Lingle v. Norge Division, Magic Chef* (1988) 486 U.S. 399, 409, 108 S. Ct. 1877, 100 L. Ed. 2d 410, 420-421 ; *Balcorta v. Twentieth Century Fox* (9th cir. 2000) 208 F.3d 1102, 1110 (section 301 does not preempt claim under *Labor Code* section 201.5 because determination of issues requires reference to collective bargaining agreement but not interpretation of it); see also *Niehaus v. Greyhound Lines, Inc.* (9th Cir. 1999) 173 F.3d 1207, 1211-1212 ; (former employee's breach of contract claims against union, based on union official's individual promise that employee would receive union's cooperation in his transfer from management to union position, were not preempted by LMRA and were properly remanded to state court, because even if contract claims could give rise to contract defenses which referenced collective bargaining agreement, meaning of collective bargaining agreement was not in dispute).

(n22)Footnote 22. 29 U.S.C. § 1001 *et seq.*; see 29 U.S.C. § 1132(a) (ERISA's civil enforcement mechanism); *Pilot Life Ins. Co. v. Dedeaux* (1987) 481 U.S. 41, 54, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (Congress intended 29 U.S.C. § 1132(a) to be exclusive remedy for ERISA rights).

(n23)Footnote 23. *Metropolitan Life Insurance Co. v. Taylor* (1987) 481 U.S. 58, 63-65, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (construing 29 U.S.C. § 1132(a)(1)(B)).

(n24)Footnote 24. See *Sorosky v. Burroughs Corp.* (9th Cir. 1987) 826 F.2d 794, 799 (construing 29 U.S.C. § 1132(a)(3)); see also *Ingersoll-Rand v. McClendon* (1990) 498 U.S. 133, 139, 111 S. Ct. 478, 112 L. Ed. 2d 474, 487 (29 U.S.C. § 1132(a)(3) preempts wrongful termination action alleging that defendant fired plaintiff to avoid contributing to pension fund; citing *Metropolitan Life* with approval); *Nishimoto v. Federman-Bachrach & Associates* (9th Cir. 1990) 903 F.2d 709, 713 (claim alleging that plaintiff was fired to prevent her from receiving pension and

insurance benefits was preempted by ERISA).

(n25)Footnote 25. *45 U.S.C. § 151 et seq.*

(n26)Footnote 26. *See Price v. PSA, Inc. (9th Cir. 1987) 829 F.2d 871, 876 .*

(n27)Footnote 27. *28 U.S.C. § 1332(a).*

(n28)Footnote 28. *28 U.S.C. § 1332(a).* For actions commenced before January 17, 1997, the jurisdictional amount was \$50,000.

(n29)Footnote 29. *See 28 U.S.C. § 1332.*

(n30)Footnote 30. *28 U.S.C. § 1441(a).*

(n31)Footnote 31. *See McCabe v. General Foods Corp. (9th Cir. 1987) 811 F.2d 1336, 1339* (when plaintiff's failure to state cause of action against only resident defendant is obvious, removal is proper).

(n32)Footnote 32. *See Cleary v. American Airlines, Inc. (1980) 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722 .*

(n33)Footnote 33. *See 28 U.S.C. § 1446(a), (b).*

(n34)Footnote 34. *See 28 U.S.C. § 1332.*

(n35)Footnote 35. *See 28 U.S.C. § 1446(b).*

(n36)Footnote 36. *28 U.S.C. § 1446(a).*

(n37)Footnote 37. *See 28 U.S.C. § 1332(c)* (for purposes of diversity jurisdiction, corporation is deemed a citizen of both state of incorporation and state where principal place of business is located).

(n38)Footnote 38. *See 28 U.S.C. § 1446(b).*

(n39)Footnote 39. *See 28 U.S.C. § 1332.*

(n40)Footnote 40. *See 28 U.S.C. § 1446(b).*

(n41)Footnote 41. *28 U.S.C. § 1446(d).*

(n42)Footnote 42. *See 28 U.S.C. § 1446(d).*

(n43)Footnote 43. *See Fed. R. Civ. P., Rule 81(c).*

(n44)Footnote 44. *28 U.S.C. § 1447(c).*

(n45)Footnote 45. *28 U.S.C. § 1447(c)* (a motion to remand based on any defect other than lack of subject matter jurisdiction must be made within 30 days after the notice of removal is filed); *see Jenkins v. United Steel Workers of America (E.D. Pa. 1981) 522 F. Supp. 80, 82 .*

(n46)Footnote 46. *See Grubbs v. General Electric Credit Corp. (1972) 405 U.S. 699, 702, 92 S. Ct. 1344, 31 L. Ed. 2d 612 .*

(n47)Footnote 47. *See Nishimoto v. Federman-Bachrach & Associates (9th Cir. 1990) 903 F.2d 709, 713 .*

(n48)Footnote 48. *See Nishimoto v. Federman-Bachrach & Associates (9th Cir. 1990) 903 F.2d 709, 712-713 .*

(n49)Footnote 49. *See* 28 U.S.C. § 1441(c).

(n50)Footnote 50. *See American Fire & Casualty Co. v. Finn* (1951) 341 U.S. 6, 14, 71 S. Ct. 534, 95 L. Ed. 702 .

(n51)Footnote 51. *See Nishimoto v. Federman-Bachrach & Associates* (9th Cir. 1990) 903 F.2d 709, 715 (balance of judicial economy, convenience, fairness, and comity generally points toward declining to exercise jurisdiction over remaining state claims); *Ondis v. Barrows* (1st Cir. 1976) 538 F.2d 904, 908 (district court in such a situation should either resolve case on its merits or remand to state court).

(n52)Footnote 52. *See Nishimoto v. Federman-Bachrach & Associates* (9th Cir. 1990) 903 F.2d 709, 715 .

(n53)Footnote 53. 28 U.S.C. § 1447(e).

(n54)Footnote 54. 28 U.S.C. § 1447(c). For discussion of removal procedure, *see* [c], *above*.

(n55)Footnote 55. 28 U.S.C. § 1447(c).

(n56)Footnote 56. 28 U.S.C. § 1447(c).

(n57)Footnote 57. *See* discussion in [3], *below*.

(n58)Footnote 58. *See Code Civ. Proc.* § 430.30(c) (party objecting to complaint may demur and answer at same time).

(n59)Footnote 59. *See Code Civ. Proc.* §§ 412.20(a)(3), 430.40(a), 585(a).

(n60)Footnote 60. *See* Cal. Rules of Ct., Rule 3.1113(a).

(n61)Footnote 61. *Code Civ. Proc.* § 430.30(a); *see, e.g., Afuso v. United States Fid. and Guar. Co.* (1985) 169 Cal. App. 3d 859, 862, 215 Cal. Rptr. 490 ; *see also Code Civ. Proc.* § 430.70 (matters of which court is requested to take judicial notice must be specified in demurrer or in supporting points and authorities).

(n62)Footnote 62. *Code Civ. Proc.* § 430.30(b).

(n63)Footnote 63. *See Code Civ. Proc.* §§ 431.20(a), 431.30(b)(1), (f).

(n64)Footnote 64. *See Code Civ. Proc.* § 431.30(b)(2), (g).

(n65)Footnote 65. *See Code Civ. Proc.* § 430.80(a).

(n66)Footnote 65.1. *See, e.g., Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal. App. 4th 34, 44-46, 43 Cal. Rptr. 3d 874 (trial court properly determined cause of action for wrongful termination in violation of public policy against disability discrimination was time-barred, where plaintiff's claim for wrongful discharge was not filed until nearly two and one-half years after he ceased being employee).

(n67)Footnote 66. *See Lab. Code* §§ 3600, 3602(a).

(n68)Footnote 67. When the ground for demurrer is collateral estoppel, counsel must request judicial notice of the ruling in the other forum. *see Evid. Code* § 452(a), (c)-(e) (grounds for judicial notice).

(n69)Footnote 68. *See Code Civ. Proc.* § 430.10(g).

(n70)Footnote 69. *See Code Civ. Proc.* §§ 435(b)(1), 436(a).

(n71)Footnote 70. *See Civ. Code §§ 3294* (punitive damages available only in actions not arising from contract), 3300 (limiting damages recoverable for breach of contract); *Sawyer v. Bank of America* (1978) 83 Cal. App. 3d 135, 139, 145 Cal. Rptr. 623 ; *O'Neil v. Spillane* (1974) 45 Cal. App. 3d 147, 159, 161, 119 Cal. Rptr. 245 ; *see also Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373 (holding that tort remedies are not available for breach of implied covenant of good faith and fair dealing).

(n72)Footnote 71. *See Crosier v. United Parcel Service, Inc.* (1983) 150 Cal. App. 3d 1132, 1140-1141, 198 Cal. Rptr. 361 (private employees have no general right to due process hearing).

(n73)Footnote 72. *See Code Civ. Proc. § 437c(a)*.

(n74)Footnote 73. *Code Civ. Proc. § 437c(c)*.

(n75)Footnote 74. *Code Civ. Proc. § 2032(j)* (*Code Civ. Proc. §§ 2032.640, 2032.650* operative July 1, 2005).

(n76)Footnote 75. *See Code Civ. Proc. § 437c(f)(1)*.

(n77)Footnote 76. *Corwin v. Los Angeles Newspaper Service Bureau, Inc.* (1971) 4 Cal. 3d 842, 851-852, 94 Cal. Rptr. 785, 484 P.2d 953 .

(n78)Footnote 77. *See D'Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1, 21-22, 112 Cal. Rptr. 786, 520 P.2d 10 ; *State Farm Mutual Auto. Ins. Co. v. Eastman* (1984) 158 Cal. App. 3d 562, 573, 204 Cal. Rptr. 827 ; *see also Foster v. Arcata Assoc., Inc.* (9th Cir. 1985) 772 F.2d 1453 , *cert. denied*, 106 S. Ct. 1267 (1986) (applying Federal Rules of Civil Procedure).

(n79)Footnote 78. A similar procedure for federal courts is codified in *Fed. R. Civ. P., rule 56*. For a good discussion of the summary judgment procedures used in the federal courts, *see Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 322-325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 .

(n80)Footnote 79. *Code Civ. Proc. § 437c(a)*.

(n81)Footnote 80. *Code Civ. Proc. § 437c(a)*.

(n82)Footnote 81. *Code Civ. Proc. § 437c(h)*.

(n83)Footnote 82. Cal. Rules of Ct., Rule 3.1113(a).

(n84)Footnote 83. *See San Francisco Super. Ct. Law & Motion Man., § 16(a)*.

(n85)Footnote 84. *See San Francisco Super. Ct. Law & Motion Man., § 16(d)*.

(n86)Footnote 85. *See Code Civ. Proc. § 437c(f)* (motion for summary adjudication of cause of action, defense, punitive damage claim, or issue of duty may be made by itself or as an alternative to motion of summary judgment).

(n87)Footnote 86. *Homestead Savings v. Superior Court* (1986) 179 Cal. App. 3d 494, 498-499, 224 Cal. Rptr. 554 .

(n88)Footnote 87. *See, e.g., San Francisco Super. Ct. Law & Motion Man., § 77(a)* (papers supporting motion must include separate statement of all material facts moving party contends are undisputed, with each fact referenced to supporting evidence; court will deny motion for failure to file separate statement).

(n89)Footnote 88. *Code Civ. Proc. § 437c(b)*.

(n90)Footnote 88.1. *Code Civ. Proc. § 437c(b)*.

(n91)Footnote 89. *Code Civ. Proc.* § 437c(b).

(n92)Footnote 90. *Code Civ. Proc.* § 437c(b).

(n93)Footnote 91. *Code Civ. Proc.* § 437c(b).

(n94)Footnote 92. *Code Civ. Proc.* § 437c(d); *see also Ibarbia v. Regents of Univ. of Cal.* (1987) 191 Cal. App. 3d 1318, 1330 n.7, 237 Cal. Rptr. 92 (inadmissible evidence can neither support nor defeat summary judgment motion).

(n95)Footnote 93. *Code Civ. Proc.* § 437c(d).

(n96)Footnote 94. Cal. Rules of Ct., Rule 3.1354(b).

(n97)Footnote 95. *See* Cal. Rules of Ct., Rule 3.1352.

(n98)Footnote 96. *Code Civ. Proc.* § 437c(b).

(n99)Footnote 97. Cal. Rules of Ct., Rule 3.1354(2).

(n100)Footnote 97.1. *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal. App. 4th 727, 740, 80 Cal. Rptr. 2d 454 .

(n101)Footnote 97.2. *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal. App. 4th 727, 740, 80 Cal. Rptr. 2d 454 .

(n102)Footnote 98. *Code Civ. Proc.* § 437c(g).

(n103)Footnote 98.1. *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal. App. 4th 1199, 1212, 78 Cal. Rptr. 2d 533 (suit for sexual harassment).

(n104)Footnote 98.2. *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal. App. 4th 1199, 1208-1209, 78 Cal. Rptr. 2d 533 .

(n105)Footnote 98.3. *Code Civ. Proc.* § 437c(c).

(n106)Footnote 98.4. *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal. App. 4th 1199, 1208-1209, 78 Cal. Rptr. 2d 533 .

(n107)Footnote 98.5. *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal. App. 4th 1199, 1209, 78 Cal. Rptr. 2d 533 .

(n108)Footnote 99. *Compare Code Civ. Proc.* § 430.30(a) with *Code Civ. Proc.* § 437c(b), (d).

(n109)Footnote 100. For discussion of federal labor law preemption, *see* ch. 60.

(n110)Footnote 101. *See, e.g., Cruey v. Gannett Co., Inc.* (1998) 64 Cal. App. 4th 356, 364, 76 Cal. Rptr. 2d 670 (plaintiff was unable to establish triable issue of fact as to implied-in-fact agreement not to terminate except for good cause sufficient to overcome contrary express at will provision in property ownership agreement, despite employer's progressive disciplinary policy and personnel manuals that inconsistently stated employment could/could not be terminated at will); *DeHorney v. Bank of Am. Nat'l Trust and Sav. Ass'n* (9th Cir. 1989) 879 F.2d 459 ; *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal. App. 3d 467, 482, 199 Cal. Rptr. 613 .

(n111)Footnote 102. *See, e.g., Clutterham v. Coachmen Indus., Inc.* (1985) 169 Cal. App. 3d 1223, 1226-1228, 215 Cal. Rptr. 795 ("good cause" established as matter of law when plaintiff laid off as part of general reduction in force required by business conditions). If the motion is based on a claim that good cause existed, plaintiff may counter that the alleged reason for termination was a pretext for the real, improper reason. *See, e.g., Rulon-Miller v. Int'l*

Business Machines Corp. (1984) 162 Cal. App. 3d 241, 252 n.6, 208 Cal. Rptr. 524 (whether plaintiff's supposed conflict of interest in dating employee of competitors was true reason for termination was question of fact for jury). A genuine dispute over material facts regarding motive or intent may be sufficient to defeat summary judgment. *See, e.g., Breitman v. May Co. Cal.* (9th Cir. 1994) 37 F.3d 562, 564-565 (genuine issue of material fact existed regarding whether the falsification of timecards provided good cause for discharge when, although employer had policy prohibiting falsification, employee presented evidence that it was common practice to pay employees for their expenses by adding hours to time cards); *Khanna v. Microdata Corp.* (1985) 170 Cal. App. 3d 250, 263, 215 Cal. Rptr. 860 (noting, while affirming jury verdict, that the "true reasons for an employee's dismissal, and whether they show bad faith rather than dissatisfaction with services and reflect intentions to deprive the discharged employee of the benefits of the contract, are evidentiary questions most properly resolved by the trier of fact"). An employee's allegations of improper motives based solely on conjecture will not defeat summary judgment. *see Crosier v. United Parcel Serv., Inc.* (1983) 150 Cal. App. 3d 1132, 1139, 198 Cal. Rptr. 361. However, defense counsel must introduce declarations affirmatively showing good faith or lose the motion for summary judgment. *see Koehrer v. Superior Court* (1986) 181 Cal. App. 3d 1155, 1171-1172, 226 Cal. Rptr. 820 (summary judgment on implied covenant of good faith and fair dealing claim reversed because defendant failed to introduce evidence of good-faith belief in existence of asserted grounds for discharge); *see also Sheppard v. Morgan Keegan & Co.* (1990) 218 Cal. App. 3d 61, 67-68, 266 Cal. Rptr. 784 (summary judgment for employer reversed because employer's supporting declarations were based on conclusions rather than evidentiary facts and failed to show good cause as a matter of law).

(n112)Footnote 103. *See Green v. Ralee Eng'g Co.* (1998)19 Cal. 4th 66, 75-80, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 ; *see also* discussion in ch. 60.

(n113)Footnote 104. Note, however, that the plaintiff may avoid summary judgment on this latter ground if he or she sets forth facts in the opposing affidavit demonstrating a triable issue of fact as to whether he or she was "constructively" discharged. *see Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *see also* discussion in ch. 60.

(n114)Footnote 105. *See, e.g., Castillo v. City of Los Angeles* (2001) 92 Cal. App. 4th 477, 481, 111 Cal. Rptr. 2d 870 , discussed at § 60.90[11].



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 61 Bringing and Defending Wrongful Termination Claims
Part A. TEXT

4-61 California Employment Law § 61.04

AUTHOR: By Lawrence J. King, J.D. and Elizabeth D. Laporte, J.D.

§ 61.04 Discovery

[1] Plaintiff's Discovery

[a] Timing and General Considerations

The Code of Civil Procedure provides defendants with a window of time after they have been served or have appeared in a case during which plaintiffs may not commence discovery unless the plaintiff, for good cause shown, has received leave of court to do so.ⁿ¹ The statutory "waiting periods" are 10 days for interrogatories, requests for admission, and demands for inspection of documents,ⁿ² and 20 days for notices of deposition.ⁿ³ As a practical matter, these "waiting periods" provide defendants an opportunity to notice and take a plaintiff's deposition before having their own depositions taken. However, if the defendant misses its statutory opportunity to notice plaintiff's deposition first, plaintiff should consider serving defendants with a document request and taking the deposition of at least one key defense witness before the deposition of plaintiff. This will afford plaintiff an opportunity to discover defendant's version of events before plaintiff's own deposition is taken.

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

In every case, even the smallest one, it is a very good idea to draft a discovery plan at the same time the complaint is drafted. A "discovery plan" need be nothing more than a list of the material allegations of the complaint (including the essential elements of each cause of action) in one column and the potential sources of proof (*e.g.*, witness testimony, admissions, documents, etc.) of each allegation in an adjacent column. This technique provides a "road map" for the first round of discovery. Then, as the case develops, the discovery plan can be amended and expanded to include new sources of information as they become available. Ultimately, it becomes the trial lawyer's trial notebook. *Commentary by John M. True, III.*

In most wrongful discharge cases, the heart of plaintiff's discovery is the depositions of employer witnesses, such as the decision makers involved in the discharge, key personnel officials, and co-employees who witnessed the disputed events.ⁿ⁴ An early deposition of at least one of the individuals directly involved in the termination decision permits the

plaintiff to tie down the defendants' version of the reasons for the termination before defendants have had an opportunity to establish their defense and smooth over inconsistencies in the key witnesses' testimonies. Further, although serving defendants a set of interrogatories is less expensive and less time-consuming than taking a deposition, interrogatory responses are prepared by defendants' counsel and are, therefore, less useful than depositions except to obtain routine, objective information. For discussion of the uses of interrogatories, *see* [b], *below*.

In formulating plaintiff's discovery plan and preparing for depositions, counsel should take full advantage of the information already obtained from his or her initial investigation, as discussed previously.ⁿ⁵ Ideally, plaintiff's counsel would obtain and review key documents before filing suit, including plaintiff's personnel file, correspondence with the employer, and any administrative files from government agencies such as the EEOC. Counsel also should have thoroughly interviewed the plaintiff and talked to key sympathetic witnesses, such as other former employees who are favorably inclined. This information should enable counsel to prepare for an initial deposition and assess what documents and other information are needed, if any, before the deposition. If counsel does not already have the contents of plaintiff's personnel file and other key documents, counsel should consider serving defendants with a request for production of documents before the first deposition.

■ PRACTICE TIP:

By the time discovery is commenced, however, plaintiff's counsel should have carefully reviewed plaintiff's personnel file as part of the pre-screening investigation. It will be "too late" if a well-documented "paper trail" leading up to the discharge is discovered for the first time during discovery. *Commentary by William M. Crosby.*

Alternatively, to avoid the delay of waiting for a response to a request for production, counsel may include a notice to produce documents in the deposition notice to the initial company witness, requiring him or her to bring the key documents to that deposition.ⁿ⁶ However, this procedure does not provide counsel an opportunity to review the documents in advance of the deposition, and may be thwarted if the defendant either does not produce the documents sought, or produces voluminous documents that counsel cannot carefully review at the deposition.

The initial deposition of one of the defendant's witnesses should be followed up by interrogatories, document requests, further depositions of other witnesses and, finally, requests for admissions. Each of these is discussed below.

For full discussion of discovery procedures, *see* DeMeo, California Deposition and Discovery Practice; California Forms of Pleading and Practice, *Depositions and Discovery* (Matthew Bender); and California Civil Actions--Pleading and Practice, Chapter 34 (Matthew Bender).

[b] Interrogatories

Written interrogatories can be useful to get certain basic information, such as the existence of personnel policies, the warnings (if any) given plaintiff before termination, and the names and titles of all persons involved in the termination decision. They may also be useful to follow up on assertions or information obtained in depositions. For maximum effectiveness, interrogatories should usually be combined with requests for production of documents. Although interrogatories may only be directed to parties,ⁿ⁷ this is usually not a disadvantage in wrongful discharge suits because the defendant employer has most of the relevant information. Moreover, the employer has a duty to provide information known to any of its officers or agents, except when the information is equally available to plaintiff.ⁿ⁸ However, interrogatories are answered with the assistance of counsel over a period of weeks (the statutory period of 30 daysⁿ⁹ plus extensions if the interrogatories are served by mailⁿ¹⁰ and any courtesy extensions). Therefore, they are usually less effective than depositions when it comes to probing hotly contested issues or obtaining helpful admissions. Finally, although initially interrogatories may be less expensive than depositions, their cost mounts if foot-dragging and evasive answers necessitate a motion to compel answers or further answers.ⁿ¹¹

A party may serve only 35 interrogatories, without any subparts, unless accompanied by a declaration of necessity signed by the attorney stating why the additional interrogatories are needed.ⁿ¹² However, if additional interrogatories are accompanied by a declaration of necessity, defendant cannot object, but may only move for a protective order on the ground that the number of questions is "unwarranted."ⁿ¹³ The official form interrogatories approved by the Judicial Council do not count toward the 35-interrogatory limit.ⁿ¹⁴ Although many of the form interrogatories are inapplicable to wrongful discharge cases, some of the standard questions, such as those dealing with the status of a business entity, contract formation, damages, witnesses, affirmative defenses, and insurance, may be useful.

■ **PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:**

In particular, Form Interrogatory 15.1 requires a defendant to disclose: "all facts upon which you base [a] denial or special or affirmative defense," to specify "the names, addresses, and telephone numbers of all persons who have knowledge of those facts," and to identify "all documents and other tangible things which support your denial or special or affirmative defense," stating "the name, address, and telephone number of the person who has each document." This question can be very useful, allowing a plaintiff to require an answer to what is in effect a blanket contention interrogatory about all of an employer's facts and legal theories. *Commentary by John M. True, III.*

Counsel should cover the following topics in the initial set of interrogatories served on the defendants:

1. Plaintiff's work history with defendant, including dates, titles and job duties, salary and benefits, promotions, performance reviews, commendations, and criticisms;
2. Personnel policies, manuals, and handbooks, including information on their dissemination to employees and a description of key policies (such as those concerning progressive discipline and termination);
3. Facts surrounding the termination, including who made the decision, the alleged reasons, existence of documentation of the reasons, and the date and the manner that the employee was notified;
4. Identification of percipient witnesses;
5. Information on similarly situated employees;
6. Post-termination discussions by defendant about plaintiff with co-workers or prospective employers;
7. Salary and benefit information pertaining to what plaintiff would have earned if still employed; and
8. Insurance coverage.

■ **PRACTICE TIP:**

It is crucial to "pin down" the defense regarding all reasons for the termination communicated to the plaintiff, because defendants frequently "dredge up" reasons to justify the termination at trial. Pinning down these reasons during discovery will assist in preparing appropriate *in limine* motions and in showing the unfairness of the discharge. *Commentary by William M. Crosby.*

In addition to obtaining basic facts, interrogatories may be used to determine defendant's legal contentions.ⁿ¹⁵ For example, plaintiff may ask whether defendant contends that it could terminate plaintiff without good cause, and request the facts on which defendant bases its contention. Similarly, plaintiff may ask whether defendant contends that plaintiff was fired for poor performance, and ask for the facts and documents that defendant claims support that contention.

[c] Request for Production of Documents and Other Tangible Evidence

Obtaining key documents, like favorable performance reviews or applicable personnel policies that were not followed by the employer, is crucial to plaintiff's case. Conversely, establishing the lack of supporting documentation for the purported reasons for the termination also can be helpful.

Documents may be obtained by a demand for inspection of documents addressed to the defendant (also known as a request for production);ⁿ¹⁶ a notice to produce documents accompanying a deposition notice of a party witness (including defendant's officers, directors, or managing agents);ⁿ¹⁷ or a deposition subpoena to a nonparty.ⁿ¹⁸ When subpoenaing nonparty records, a live deposition is not necessary if only "business records" are sought.ⁿ¹⁹ Regardless of which of the methods listed above is used, the documents sought must be described with reasonable particularity; however, specific information identifiable only to the deponent's record system is not required.ⁿ²⁰ Unlike interrogatories, there is no limit on the number of document requests or inspection demands that may be served. Also, it is often beneficial to serve document requests simultaneously with interrogatories.

Documents that plaintiff should request include:

1. Plaintiff's entire personnel file, including the employment application, discipline record, performance evaluations, and salary and benefit history;
2. The employer's personnel policies in effect during plaintiff's tenure, particularly concerning termination, progressive discipline, salary, and benefits;
3. Employee manuals and handbooks;
4. Documents from which plaintiff's future earnings and benefits if he or she had not been terminated may be calculated;
5. Documents related to plaintiff's performance, such as successful reports prepared by plaintiff, or plaintiff's attendance records;
6. All correspondence and memoranda between employer and employee, including any offer letters, written employment agreements, stock options, bonus plans, notice of termination, and documents signed by the employee in connection with the termination;
7. Any document specifying that plaintiff could be terminated at will;
8. Any documents relating to internal grievance procedures;
9. All documents relating to charges filed by the employee with a government agency (such as the EEOC, DFEH, California Labor Commission, or relating to benefit claims, such as workers' compensation or unemployment insurance);
10. Letters of reference by the employer; and
11. The employer's annual report, if any (for punitive damages purposes).ⁿ²¹

Occasionally, tangible evidence other than documents may be helpful. For example, if the employee's job involved activities such as building models or taking photographs, tangible examples of the employee's work could help to impress the jury with the plaintiff's competence. Counsel should consider requesting inspection of such objects.

The facts of the case may warrant the production of documents in which third parties, such as other employees, customers, or clients, may have an interest. For instance, if the case involves the treatment of similarly situated employees or defendant's conduct toward customers or others, that information may help plaintiff's case, but plaintiff's access is limited by those third parties' rights.ⁿ²²

Plaintiff's right to production of the personnel files of other employees is restricted by those employees' right to privacy under the *California Constitution, Article I, Section 1*.ⁿ²³ To counter the privacy interests involved, plaintiff must show a compelling public need for the discovery of particular documents (*e.g.*, the relevancy of the information sought to the action), and that the information cannot reasonably be obtained through depositions or from nonconfidential sources. Even if discovery is granted in this context, the scope of the discovery must be narrowly circumscribed.ⁿ²⁴ In addition, a subpoena seeking production of employment records must comply with the requirements of *Code of Civil Procedure, section 1985.6*, which are discussed in Chapter 51.

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

Discovery of the personnel files and/or related information concerning comparators in wrongful discharge/employment discrimination cases is usually vigorously resisted by defendants and frequently leads to energetic motion practice. Quite often, information as to whether a plaintiff has been the subject of disparate treatment is *only* found by studying the personnel records of other, similarly situated employees. While there are no dispositive cases, so as to develop this crucial area of proof, plaintiff's counsel should be permitted to gather this information, subject to appropriate privacy safeguards set out in a protective order. Judges and discovery referees are more likely to be responsive to narrowly drafted discovery requests seeking *only* relevant comparative information and accompanied with an appropriately drawn protective order rather than "shotgun" attempts to sweep in information which is clearly extraneous to the issues in the case. *Commentary by John M. True, III.*

In one case in which the plaintiff's case stemmed from her conduct with respect to the company's bid for a federal contract, the plaintiff sought production of the government bids and related documents. The court held that bid documents already presented to governmental agencies and opened by them are discoverable.ⁿ²⁵

[d] Depositions

Depositions are usually the most important discovery tool in wrongful discharge cases. Plaintiff can accomplish multiple purposes through depositions: (1) uncover the basic facts, (2) elicit favorable admissions, (3) avoid unpleasant surprises at trial, (4) assemble evidence to defeat summary judgment (or, less frequently, to move for summary judgment), (5) pin down defense witnesses so they cannot change their testimony at trial without risking impeachment, (6) assess witness credibility, and (7) preserve favorable testimony when the witness will not be available. At the same time, depositions are expensive and time-consuming, so it is important to assess carefully which depositions are really necessary. Finally, timing of depositions is especially important because natural persons (including parties) may only be deposed once, absent a court order based on a showing of good cause or a stipulation of the parties, including the consent of the deponent if the deponent is not a party.ⁿ²⁶

The most important depositions for plaintiff usually are those of the key decision makers, including the officials who recommended termination, and those who approved or ratified the decision to terminate plaintiff (particularly if plaintiff seeks punitive damages). It is important to act quickly to identify the alleged reasons for the termination. Often, inconsistencies between the reasons provided to plaintiff and the real reasons, discrepancies between witnesses, or the lack of supporting documentation are the employer's "Achilles' heel." For example, plaintiff may be able to show that the employer gave one reason to plaintiff at the time of his discharge, another to the EEOC prior to litigation, and yet a third in deposition by defendant's key witnesses.

Additionally, it is often useful to depose a responsible personnel official about personnel practices and the way written personnel policies are applied, especially if the official was consulted concerning the termination. Although written personnel policies may seem clear on their face, deposing personnel officials will help prepare plaintiff's counsel for unexpected interpretations of the policies and the claim that, in practice, the policies were not generally followed but subject to numerous unwritten exceptions. The deposition will also allow counsel to explore whether the employer applied the policies consistently to similarly situated employees. In addition, personnel officials with a reputation for treating employees fairly will, on occasion, candidly concede the importance of adherence to company rules, such as progressive discipline and shortcomings in the company's handling of plaintiff's termination. Conversely, some company personnel officials are so defense-oriented that they commit themselves to weak or extreme positions that may find little favor with the jury, and may provide a basis for effective impeachment.

Also, plaintiff's counsel should either depose or talk informally to other important percipient witnesses, such as co-workers who overheard key statements, or any supervisors who may have disagreed with the decision. However, counsel should be mindful of possible ethical limitations on *ex parte* interviews of defendant's employees. For discussion, see § 61.01[1][e].

[e] Requests for Admission

Any party may request in writing that the other party admit the genuineness of specified documents, or the truth of specified matters of fact, opinion relating to fact, or application of law to fact.ⁿ²⁷

Requests for admission are useful in that they may avoid wasteful expenditure of time and effort necessary to authenticate relevant documents whose genuineness is not in doubt or to establish facts that are not disputed by the parties. Thus, for example, plaintiff's counsel should request that defendant employer admit the genuineness of employee handbooks, performance evaluations, or any other document that he or she may wish to introduce as evidence at trial.

Requests for admission are not limited to undisputed facts and may relate to matters that are in controversy between the parties.ⁿ²⁸ Responses to requests for admission may serve as a basis for summary judgment or summary adjudication of issuesⁿ²⁹ and help narrow the scope of trial to those factual and legal issues that are genuinely and reasonably disputed by the parties. Any matter admitted in response to a request for admission is conclusively established against the party making the admission for purposes of the pending action, unless the court has permitted withdrawal or amendment of the admission as provided by statute.ⁿ³⁰ If a party fails to admit the genuineness of a document or the truth of any matter when requested to do so pursuant to a proper request, and the requesting party thereafter proves the genuineness of the document or the truth of the matter, the party requesting the admission may move the court for an order requiring the answering party to pay the reasonable expenses, including attorney's fees, incurred in making that proof.ⁿ³¹ The court must grant the order unless it finds that (1) an objection to the request was sustained or a response to the request was waived by the requesting party, (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had reasonable ground to believe that the party would prevail on the matter, or (4) there was other good reason for the failure to admit the matter.ⁿ³²

No party may request, as a matter of right, more than 35 requests for admission, except that requests for the admission of genuineness of documents are unlimited, except as justice requires to protect the responding party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense.ⁿ³³ However, as in the case of interrogatories, an attorney may attach a declaration in a prescribed form stating that additional admissions are necessary due to the complexity of the case or quantity of existing and potential issues in the particular case.ⁿ³⁴ If the declaration is attached, the other party must respond to the additional requests unless the responding party successfully moves for a protective order limiting the responding party's obligation to respond.ⁿ³⁵ The requests must conform to certain format requirements.ⁿ³⁶

■ PRACTICE TIP:

An effective method to "flush out" key defense contentions is to serve a companion set of interrogatories inquiring into the factual basis, witnesses, and documents in support of any denials or conditional admissions. *Commentary by William M. Crosby.*

A party on whom requests for admission have been served must serve responses within 30 days after the requests were served, unless the time is extended as provided by statute.ⁿ³⁷ If a party fails to serve timely responses to requests for admission, the requesting party may move for an order that the genuineness of any documents and the truth of any matters specified in the requests be deemed admitted, as well as for monetary sanctions.ⁿ³⁸ Responses to requests must be complete and straightforward and comply with the other requirements set forth in *Code of Civil Procedure section 2033(f)* and *(g)* (*Code Civ. Proc.* §§ 2033.040, 2033.080 operative July 1, 2005).

[2] Defendant's Discovery**[a] Timing and General Consideration**

The California Code of Civil Procedure prohibits a plaintiff from serving defendants with interrogatories, demands for inspection of documents, and requests for admission until at least 10 days after the defendants have been served or appeared in a case,ⁿ³⁹ and from serving defendants with notices of deposition until at least 20 days after the defendants have been served or appeared in a case,ⁿ⁴⁰ unless the plaintiff obtains leave from the court.ⁿ⁴¹ Accordingly, defendants have an opportunity to seize the initiative in the discovery process and thereby gain certain tactical advantages. For example, defendants may serve plaintiff's counsel with an initial set of interrogatories, a request for production of documents, and a notice of plaintiff's deposition, timed to enable defendant's counsel to obtain this discovery before plaintiff's deposition of defendant's witnesses or defendant's responses to plaintiff's discovery requests. By engaging in early discovery, defendant's counsel often can tie down the plaintiff's version of events before plaintiff's counsel has adequately evaluated the weaknesses in the plaintiff's case and before plaintiff's counsel has had the opportunity to shape plaintiff's strategy in light of the weaknesses in the defendant's case. Further, by acting quickly, defendant's counsel can often force plaintiff's counsel to spend precious time and resources responding to defendant's discovery request rather than seizing the initiative for plaintiff.

In a wrongful discharge case, the defendants' discovery should focus on ascertaining the key facts, documents, and witnesses on which the plaintiff is basing his or her claim of wrongful discharge. It is equally important to ascertain the injuries that plaintiff has allegedly sustained. The initial case evaluation conducted by defendant's counselⁿ⁴² should enable defendant's counsel to serve plaintiff with a first set of interrogatories and requests for the production of documents and to prepare for an early deposition of the plaintiff. Defendant's counsel should follow plaintiff's deposition with the depositions of other individuals that plaintiff has identified as potential witnesses who favor the plaintiff's version of events, additional interrogatories and requests for the production of documents, and, finally, with requests for admissions. Each of these methods of discovery are discussed in more detail below.

[b] Interrogatories

Written interrogatories are a useful tool to force plaintiff to disclose the facts and evidence on which he or she bases a claim. Plaintiffs often rely on vague and broad allegations in the complaint. Although defendant's counsel can demur to a complaint on the ground that it is too vague to place defendant on proper notice of the basis of the claims asserted,ⁿ⁴³ courts often will deny such a demurrer on the ground that the discovery process provides defendant a fair opportunity to ascertain the basis of the plaintiff's claims. Accordingly, defendant's counsel should serve plaintiff with an initial set of interrogatories asking for the following:

1. Each and every fact on which plaintiff bases each of the claims asserted in the complaint;

2. The names, addresses, and phone numbers of any individual who has knowledge of the facts that plaintiff contends supports each of the claims asserted in the complaint; and
3. Identification of any document that supports each of the claims asserted in the complaint.

For example, if the plaintiff has asserted a claim for breach of contract, then the initial set of interrogatories should include three separate interrogatories requiring the plaintiff to disclose (1) the facts on which he or she bases the contract claim, (2) the identity of any individual whom plaintiff believes has knowledge concerning the formation or the breach of the contract, and (3) any documents that the plaintiff maintains constitute the contract, including offer letters, personnel policies, procedural manuals, or a document that itself purports to be an employment contract.

A party may serve only 35 specially prepared interrogatories, without any subparts, unless accompanied by a declaration of necessity signed by the attorney stating why the additional interrogatories are needed.ⁿ⁴⁴ However, if additional interrogatories are accompanied by a declaration of necessity, plaintiff cannot object, but may only move for a protective order on the ground that the number of questions is "unwarranted."ⁿ⁴⁵ When warranted, defendant's counsel should serve plaintiff with as many interrogatories as reasonably necessary to flush out plaintiff's claims. However, defendant's counsel should be careful to avoid the appearance that an excess number of interrogatories has been served for the purpose of harassment, rather than to obtain the information necessary to prepare a defense.

The official form interrogatories approved by the Judicial Council do not count toward the limit,ⁿ⁴⁶ and are objection-proof as to form. Some of the standard questions, such as those dealing with damages and witnesses, may be particularly useful.

■ CONSULTANT'S COMMENT:

Defense counsel should carefully evaluate the need to propound non-form interrogatories in advance of plaintiff's deposition. As a general matter, such interrogatories are not strategically advisable because (1) they may cause plaintiff's counsel to conduct an early evaluation of plaintiff's case and alert plaintiff to specific lines of inquiry; (2) they may be asked equally effectively at a deposition; and (3) they may unnecessarily waste a portion of the 35 interrogatories to which parties are normally entitled.ⁿ⁴⁷ By contrast, the propounding of Judicial Council form interrogatories before plaintiff's deposition is less strategically harmful because (1) they are not tailored to the facts of the particular case (and thus are not apt to alert plaintiff's counsel to matters that the defendant considers important); and (2) they are not counted toward the 35-interrogatory limit.ⁿ⁴⁸ *Commentary by Kirby Wilcox.*

[c] Requests for Production of Documents and Other Tangible Evidence

The documents that a plaintiff has in his or her possession or control may contain the key evidence in the defense of a wrongful discharge case. For example, if the plaintiff has in his or her possession a copy of the application for employment, a company manual, or a stock option plan that clearly sets forth that the plaintiff was hired as an employee at will, such a document may provide defendant's counsel an opportunity to demonstrate during the deposition or cross-examination of the plaintiff that plaintiff knew that he or she did not have a valid basis to assert a good cause requirement for termination. Note, however, that if plaintiff has taken confidential and/or privileged documents without the employer's consent, the employer may seek the return of such documents without going through normal discovery procedures.ⁿ⁴⁹

Furthermore, if the plaintiff has taken notes over a long period of time, they may provide the only contemporaneous record of the plaintiff's conduct and perceptions. While that record is not likely to contain more than a few entries helpful to the defendant, those few entries often serve to undercut key portions of a plaintiff's strategy. In either case, it is crucial that defendant's counsel serve plaintiff with a document request that requires plaintiff to give defendant's counsel access to any notes or documents that plaintiff has kept concerning his or her employment with the defendant.

and the representations, incidents, or events on which the plaintiff bases his or her claims.

■ CONSULTANT'S COMMENT:

A defendant's document request should include requests for all documents that the plaintiff removed from work on or before the last day of employment. On occasion, a plaintiff will take documents containing trade secrets, which, even in the absence of a cross-claim by the defendant, may so seriously damage plaintiff's credibility that the defendant secures a favorable position for settlement or trial.

Commentary by Kirby Wilcox.

Similarly, if the plaintiff has asserted a claim for physical or emotional injuries, the records of the plaintiff's consultations with doctors, psychiatrists, psychologists, and counselors may either (1) reveal the true motivation for the suit or the actual causes of whatever emotional distress the plaintiff may be suffering, or (2) convince the defendant regarding the sincerity of the plaintiff's claims. In either event, whenever a plaintiff asserts a claim for physical or emotional injuries, defendant's counsel should serve plaintiff's doctors, psychiatrists, psychologists, and counselors with a subpoena duces tecum.ⁿ⁵⁰ Defendant's counsel need not take the depositions of these non-party witnesses at the time the medical and psychological records are tendered.ⁿ⁵¹ The better practice is to subpoena the records sufficiently before the individual's deposition is taken to enable defendant's counsel to have the records reviewed by an appropriate expert hired as a consultant. After the expert has reviewed the records, defendant's counsel should obtain the expert's opinion regarding the contents of the records, as well as recommendations concerning potential lines of inquiry to be pursued during the deposition. The expert should not be listed as an expert witness nor be requested to put his or her opinion in writing until after the expert has reviewed the records and defendant's counsel has consulted with the expert.

■ CONSULTANT'S COMMENT:

A defendant should subpoena the medical records of the plaintiff as soon as it learns the names and addresses of plaintiff's physicians, psychologists, and other medical practitioners. The importance of such records cannot be overemphasized. They may reveal that (1) the stress that plaintiff links to the work environment has other causes; (2) the medical condition for which the plaintiff seeks compensation predates the employment relationship; (3) plaintiff was, for example, making a routine office visit to a doctor on a day previously alleged to have been spent in a hospital; or (4) plaintiff made *no* visits to doctors on one or more days requested off for that purpose. The medical records may also clarify critical time sequences relating to the case by revealing whether medical appointments preceded or followed specified employment actions. *Commentary by Kirby Wilcox.*

[d] Depositions

Depositions are the most important discovery tool in wrongful discharge cases. Defendant can accomplish multiple purposes through depositions: (1) compel the plaintiff to explain the factual basis for his or her claims; (2) elicit favorable admissions; (3) avoid surprises at trial; (3) assemble evidence to support summary judgment; (4) record the testimony of witnesses so they cannot change their testimony at trial without risking impeachment; (5) assess the credibility of the plaintiff and other witnesses; and (6) preserve favorable testimony in case the witness will not be available to testify at trial.

Natural persons (including parties) may be deposed only once absent a court order based on a showing of good cause.ⁿ⁵² Therefore, defendant's counsel should not risk taking any deposition, including the plaintiff's deposition, without proper preparation. This creates an obvious tension between scheduling plaintiff's deposition early and spending more time collecting information to use in the deposition. The better practice is to move quickly to complete a thorough case evaluation and schedule plaintiff's deposition as soon as practicable. If new information surfaces later concerning which defendant's counsel needs to depose plaintiff, defendants' counsel can move the court for an order permitting an additional deposition.ⁿ⁵³

[e] Requests for Admissions

Requesting the plaintiff to admit the truth of specific facts, his or her opinions as to matters of fact, and the genuineness of particular documents is an effective method for obtaining evidence to support a motion for summary judgment and for narrowing the issues at trial. The procedure for obtaining admissions is set forth in *Code of Civil Procedure section 2033* (*Code of Civil Procedure section 2033.010 et seq.* operative July 1, 2005). A party may not request, as a matter of right, that the other party admit more than 35 matters.ⁿ⁵⁴ However this limit does not apply to requests concerning the genuineness of documents.ⁿ⁵⁵ Furthermore, counsel may request more than 35 admissions if he or she attaches a supporting declaration, in a specified form, stating that the greater number is warranted by the complexity or quantity of existing or potential issues in the case.ⁿ⁵⁶

The matters to which the plaintiff admits are conclusively established for purposes of the pending action, unless the court permits the plaintiff to withdraw or amend the admission.ⁿ⁵⁷ The court may permit withdrawal or amendment of an admission only if it determines that the admission is the result of a mistake, inadvertence or excusable neglect *and* that the defendant will not be substantially prejudiced by the withdrawal or amendment.ⁿ⁵⁸ Further, if, in response to a request made pursuant to section 2033 (section 2033.010 et seq. operative July 1, 2005), plaintiff fails to admit the genuineness of a document or the truth of a particular matter and defendant later proves the genuineness of the document or the truth of the matter in question, the court may require the plaintiff to pay the expense incurred by the defendant in making that proof, including reasonable attorney's fees.ⁿ⁵⁹

[f] Psychiatric Examination

If the plaintiff alleges emotional distress, defendant's counsel should consider seeking a stipulation or court order under *Code of Civil Procedure, section 2032* (*Code of Civil Procedure section 2032.010 et seq.* operative July 1, 2005) for a mental examination of the plaintiff by a psychiatrist or psychologist retained by the defense. A psychiatric examination of the plaintiff offers a number of benefits to the defense. It helps the defendant discover the actual degree of plaintiff's emotional injury and to what extent it was caused by the termination. It also enhances the credibility of a psychiatric expert retained by the defense to testify at trial against the plaintiff's emotional distress claim. Further, it is an opportunity for the defendant's expert to interview the plaintiff outside the presence of plaintiff's counsel, unless the plaintiff convinces the court with specific evidence that the defendant's expert will not respect the plaintiff's privacy or would be likely to disobey any court-imposed restrictions on the scope of the exam.ⁿ⁶⁰ Nevertheless, a mental examination of the plaintiff may pose some disadvantages for the defendant. First, it cannot be obtained automatically but requires a court order or stipulation.ⁿ⁶¹ Second, an examination is expensive. Third, an examination carries the risk that the defendant's expert will bolster plaintiff's case. Furthermore, because the plaintiff is entitled to receive a written report of the expert's findings on timely demand,ⁿ⁶² the plaintiff will be able to obtain written documentation of the expert's opinion, which will be valuable to the plaintiff if that opinion supports the plaintiff's claim.

Accordingly, defendant's counsel should first obtain the plaintiff's medical and psychiatric recordsⁿ⁶³ and depose the plaintiff and any other key percipient witness to the alleged distress, particularly any treating doctor. This discovery may eliminate the need for a defense mental exam if it sufficiently undermines the claims of emotional distress. (For example, the plaintiff's own doctor, friends, and family may admit that they did not observe any significant change in plaintiff's mood or behavior after the termination.) Counsel should also try to discover whether plaintiff intends to call his or her treating doctor or a specially retained expert to testify at trial to the causation and degree of plaintiff's emotional distress. If not, defendant may not need to counter with a psychologist or psychiatrist witness of its own. But if plaintiff does have some credible evidence of emotional distress and is likely to call a psychiatric witness, defendant should usually retain its own expert to examine plaintiff and testify at trial.

As noted above, to require plaintiff to submit to an examination, defendant must first obtain a court order based on a showing of good cause or a stipulation.ⁿ⁶⁴ In *Vinson v. Superior Court*,ⁿ⁶⁵ the court noted that a mere general allegation of severe emotional distress is not enough to show good cause, but allegations of continuing mental ailments such as ongoing reduced self-esteem, motivation, and appetite; sleeplessness; and loss of social contact and reputation

may be sufficient. Even when an examination is ordered, the areas that the expert may inquire into are limited by plaintiff's right of privacy, which may be overcome only by a showing that the information is directly relevant and essential for the fair resolution of the case.ⁿ⁶⁶ In a recent case, plaintiff amended her pleadings to allege that her emotional distress was not ongoing and the court determined that this varied from the facts in *Vinson*;ⁿ⁶⁷ accordingly, the court declined to compel a mental examination.ⁿ⁶⁸ The court noted that the Supreme Court had limited the *Vinson* holding to the facts of that case.ⁿ⁶⁹

As noted above, plaintiff is not entitled to have his or her attorney present, absent an unusual showing of likelihood of abuse.ⁿ⁷⁰ However, the exam may be audio tape-recorded at the option of either party.ⁿ⁷¹ For the defendant, tape-recording the examination offers the advantage of an additional source of potential impeachment of the plaintiff, if plaintiff later contradicts earlier versions of key events. For the plaintiff, tape-recording the examination provides a check on whether the examination was conducted fairly and in compliance with any limitations ordered by the court or agreed to by the parties.

If the plaintiff fails to submit to a court-ordered or stipulated examination, defendant may move for sanctions.ⁿ⁷² The plaintiff in turn has the right to demand, in writing, that the defendant turn over a detailed written report by the examining doctor, setting forth all findings, diagnoses, prognoses, and conclusions; plaintiff also may enforce the demand by motion, and may request sanctions for defendant's failure to provide the report.ⁿ⁷³ In return, plaintiff must provide defendant with copies of any written reports prepared by plaintiff's doctors.ⁿ⁷⁴ However, plaintiff's counsel may avoid the risk of having to provide an unfavorable report by asking the expert to report orally, instead of in writing.

Legal Topics:

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

Civil ProcedureDiscoveryGeneral OverviewLabor & Employment LawWrongful TerminationGeneral Overview

FOOTNOTES:

(n1)Footnote 1. See *Code Civ. Proc.* §§ 2025(b)(2), 2030(b), 2031(b), 2033(b)(*Code Civ. Proc.* §§ 2025.210, 2030.020, 2031.020, 2033.020 operative July 1, 2005).

(n2)Footnote 2. See *Code Civ. Proc.* §§ 2030(b), 2031(b)), 2033(b) (*Code Civ. Proc.* §§ 2030.020, 2031.020, 2033.020 operative July 1, 2005).

(n3)Footnote 3. See *Code Civ. Proc.* § 2025(b)(2) (*Code Civ. Proc.* § 2025.210 operative July 1, 2005).

(n4)Footnote 4. For discussion of depositions, see [d], below.

(n5)Footnote 5. See discussion in § 61.01[1][c]-[e].

(n6)Footnote 6. See *Code Civ. Proc.* § 2025(d)(4), (h)(1) (*Code Civ. Proc.* §§ 2025.220(a)(4), 2025.280(a) operative July 1, 2005).

(n7)Footnote 7. See *Code Civ. Proc.* § 2030(a) (*Code Civ. Proc.* § 2030.010 operative July 1, 2005).

(n8)Footnote 8. See *Code Civ. Proc.* § 2030(f)(1) (*Code Civ. Proc.* § 2030.220 operative July 1, 2005); *Gordon v. Superior Court* (1984) 161 Cal. App. 3d 157, 167-168, 207 Cal. Rptr. 327.

(n9)Footnote 9. See *Code Civ. Proc.* § 2030(h) (*Code Civ. Proc.* § 2030.260 operative July 1, 2005).

(n10)Footnote 10. See *Code Civ. Proc.* § 2019(e) (*Code Civ. Proc.* § 2016.050 operative July 1, 2005) (providing that provisions of *Code Civ. Proc.* § 1013(a) apply to discovery methods).

(n11)Footnote 11. *See Code Civ. Proc. § 2030(l) (Code Civ. Proc. § 2030.300 operative July 1, 2005).*

(n12)Footnote 12. *Code Civ. Proc. § 2030(c)(1), (3) (Code Civ. Proc. §§ 2030.030, 2030.050 operative July 1, 2005).*

(n13)Footnote 13. *Code Civ. Proc. §§ 2030(c)(1), (2) (Code Civ. Proc. §§ 2030.030, 2030.040 operative July 1, 2005).*

(n14)Footnote 14. *See Code Civ. Proc. § 2030(c)(1) (Code Civ. Proc. § 2030.030 operative July 1, 2005).*

(n15)Footnote 15. *See Code Civ. Proc. § 2030(c)(6) (Code Civ. Proc. § 2030.010(b) operative July 1, 2005); see also Fed. Rules Civ. Proc., Rule 33(b).*

(n16)Footnote 16. *See Code Civ. Proc. § 2031 (Code Civ. Proc. § 2031.010 et seq. operative July 1, 2005).*

(n17)Footnote 17. *See Code Civ. Proc. § 2025(h)(1) (Code Civ. Proc. § 2025.280(a) operative July 1, 2005).*

(n18)Footnote 18. *See Code Civ. Proc. § 2025(h)(2) (Code Civ. Proc. § 2025.280(b) operative July 1, 2005); see also Code Civ. Proc. § 2020 (Code Civ. Proc. § 2020.010 et seq. operative July 1, 2005) (obtaining discovery from nonparties).*

(n19)Footnote 19. *See Code Civ. Proc. § 2020(a)(2), (d) (Code Civ. Proc. §§ 2020.010(b), 2020.410 et seq. operative July 1, 2005).*

(n20)Footnote 20. *See Code Civ. Proc. §§ 2020(d)(1), (e), 2031(c)(1) (Code Civ. Proc. §§ 2020.410 (a)-(c), 2020.510, 2031.030 operative July 1, 2005).*

(n21)Footnote 21. Annual reports of corporations whose stock is publicly traded are public documents, and defendants will often produce them. However, plaintiffs are not entitled to discovery of defendant's financial condition absent a court order based on a finding of "substantial probability" that plaintiff will prevail on his or her claim for punitive damages. *see Civ. Code § 3295(c).*

(n22)Footnote 22. *See, e.g., Harding Lawson Associates v. Superior Court (1992) 10 Cal App. 4th 7, 10, 12 Cal. Rptr. 2d 538 .*

(n23)Footnote 23. *El Dorado Savings & Loan Ass'n v. Superior Court (1987) 190 Cal. App. 3d 342, 345-346, 235 Cal. Rptr. 303 .*

(n24)Footnote 24. *Harding Lawson Associates v. Superior Court (1992) 10 Cal App. 4th 7, 10, 12 Cal. Rptr. 2d 538*

(n25)Footnote 25. *Harding Lawson Associates v. Superior Court (1992) 10 Cal. App. 4th 7, 10-11, 12 Cal. Rptr. 2d 538 .*

(n26)Footnote 26. *See Code Civ. Proc. § 2025(t) (Code Civ. Proc. § 2025.610 operative July 1, 2005).*

(n27)Footnote 27. *Code Civ. Proc. § 2033(a) (Code Civ. Proc. § 2033.010 operative July 1, 2005).*

(n28)Footnote 28. *See Code Civ. Proc. § 2033(a) (Code Civ. Proc. § 2033.010 operative July 1, 2005).*

(n29)Footnote 29. *See discussion in § 61.03[3].*

(n30)Footnote 30. *Code Civ. Proc. § 2033(n) (Code Civ. Proc. § 2033.410 operative July 1, 2005); see Code Civ. Proc. § 2033(m) (Code Civ. Proc. § 2033.300 operative July 1, 2005) (court may permit withdrawal or amendment of*

admission only if it determines that admission was result of mistake, inadvertence, or excusable neglect and that party who obtained admission will not be substantially prejudiced).

(n31)Footnote 31. *Code Civ. Proc.* § 2033(o) (*Code Civ. Proc.* § 2033.420 operative July 1, 2005).

(n32)Footnote 32. *Code Civ. Proc.* § 2033(o) (*Code Civ. Proc.* § 2033.420 operative July 1, 2005).

(n33)Footnote 33. *Code Civ. Proc.* § 2033(c)(1) (*Code Civ. Proc.* § 2033.030 operative July 1, 2005).

(n34)Footnote 34. *See Code Civ. Proc.* § 2033(c)(2), (3) (*Code of Civil Procedure* §§ 2033.210-2033.240 operative July 1, 2005).

(n35)Footnote 35. *See Code Civ. Proc.* § 2033(c)(2), (e) (*Code Civ. Proc.* §§ 2033.040, 2033.080 operative July 1, 2005).

(n36)Footnote 36. *See Code Civ. Proc.* § 2033(c)(4)-(7) (*Code Civ. Proc.* § 2033.060(a)-(h) operative July 1, 2005).

(n37)Footnote 37. *See Code Civ. Proc.* § 2033(h), (i) (*Code Civ. Proc.* §§ 2033.250, 2033.260 operative July 1, 2005).

(n38)Footnote 38. *See Code Civ. Proc.* § 2033(k) (*Code Civ. Proc.* § 2033.280 operative July 1, 2005).

(n39)Footnote 39. *See Code Civ. Proc.* §§ 2030(b), 2031(b), 2033(b) (*Code Civ. Proc.* §§ 2030.020, 2031.020, 2033.020 operative July 1, 2005).

(n40)Footnote 40. *See Code Civ. Proc.* § 2025(b)(2) (*Code Civ. Proc.* § 2025.210 operative July 1, 2005).

(n41)Footnote 41. *See Code Civ. Proc.* §§ 2025(b)(2), 2030(b), 2031(b), 2033(b) (*Code Civ. Proc.* §§ 2025.210, 2030.020, 2031.020, 2033.020 operative July 1, 2005).

(n42)Footnote 42. *See* discussion in § 61.01[2].

(n43)Footnote 43. *See Code Civ. Proc.* § 430.10(f).

(n44)Footnote 44. *See Code Civ. Proc.* § 2030(c)(1), (2) (*Code Civ. Proc.* §§ 2030.030, 2030.040 operative July 1, 2005).

(n45)Footnote 45. *See Code Civ. Proc.* § 2030(c)(1), (2) (*Code Civ. Proc.* §§ 2030.030, 2030.040 operative July 1, 2005).

(n46)Footnote 46. *See Code Civ. Proc.* §§ 2030(c)(1); 2033.5 (*Code Civ. Proc.* §§ 2030.030, 2033.710 et seq. operative July 1, 2005).

(n47)Footnote 47. *See Code Civ. Proc.* § 2030(c)(1) (*Code Civ. Proc.* § 2030.030 operative July 1, 2005).

(n48)Footnote 48. *See Code Civ. Proc.* § 2030(c)(1) (*Code Civ. Proc.* § 2030.030 operative July 1, 2005).

(n49)Footnote 49. *See Pillsbury, Madison & Sutro v. Schectman* (1997) 55 Cal. App. 4th 1279, 1288-1289, 64 Cal. Rptr. 2d 698 .

(n50)Footnote 50. *See Code Civ. Proc.* §§ 1985, 1985.3.

(n51)Footnote 51. *See Code Civ. Proc.* § 2020(a), (d) (*Code Civ. Proc.* §§ 2020.010 et seq., 2020.410 et seq.

operative July 1, 2005).

(n52)Footnote 52. *See Code Civ. Proc. § 2025(t) (Code Civ. Proc. § 2025.610 operative July 1, 2005).*

(n53)Footnote 53. *See Code Civ. Proc. § 2025(t) (Code Civ. Proc. § 2025.610 operative July 1, 2005).*

(n54)Footnote 54. *Code Civ. Proc. § 2033(c)(1) (Code Civ. Proc. § 2033.030 operative July 1, 2005).*

(n55)Footnote 55. *See Code Civ. Proc. § 2033(c)(1) (Code Civ. Proc. § 2033.030 operative July 1, 2005).*

(n56)Footnote 56. *See Code Civ. Proc. § 2033(c)(1)-(3) (Code Civ. Proc. §§ 2033.030-2033.050 operative July 1, 2005).*

(n57)Footnote 57. *Code Civ. Proc. § 2033(n) (Code Civ. Proc. § 2033.410 operative July 1, 2005).*

(n58)Footnote 58. *Code Civ. Proc. § 2033(m) (Code Civ. Proc. § 2033.300 operative July 1, 2005).*

(n59)Footnote 59. *Code Civ. Proc. § 2033(o) (Code Civ. Proc. § 2033.420 operative July 1, 2005).*

(n60)Footnote 60. *See Vinson v. Superior Court (1987) 43 Cal. 3d 833, 844-846, 239 Cal. Rptr. 292, 740 P.2d 404 .*

(n61)Footnote 61. *Code Civ. Proc. § 2032(d), (e) (Code Civ. Proc. §§ 2032.310, 2032.320, 2016.030 operative July 1, 2005).*

(n62)Footnote 62. *Code Civ. Proc. § 2032(h) (Code Civ. Proc. §§ 2032.610, 2032.620 operative July 1, 2005).*

(n63)Footnote 63. *Code Civ. Proc. § 1985.3.*

(n64)Footnote 64. *Code Civ. Proc. § 2032(d), (e) (Code Civ. Proc. §§ 2032.310, 2032.320, 2016.030 operative July 1, 2005).*

(n65)Footnote 65. *See Vinson v. Superior Court (1987) 43 Cal. 3d 833, 840-841, 239 Cal. Rptr. 292, 740 P.2d 404 .*

(n66)Footnote 66. *Vinson v. Superior Court (1987) 43 Cal. 3d 833, 841-842, 239 Cal. Rptr. 292, 740 P.2d 404 .*

(n67)Footnote 67. *Vinson v. Superior Court (1987) 43 Cal. 3d 833, 239 Cal. Rptr. 292, 740 P.2d 404 .*

(n68)Footnote 68. *Doyle v. Superior Court (1996) 50 Cal. App. 4th 1878, 1885-1887, 58 Cal. Rptr. 2d 476 .*

(n69)Footnote 69. *Doyle v. Superior Court (1996) 50 Cal. App. 4th 1878, 1885-1887, 58 Cal. Rptr. 2d 476 (quoting Vinson v. Superior Court (1987) 43 Cal. 3d 833, 840, 239 Cal. Rptr. 292, 740 P.2d 404).*

(n70)Footnote 70. *Vinson v. Superior Court (1987) 43 Cal. 3d 833, 844-846, 239 Cal. Rptr. 292, 740 P.2d 404 .*

(n71)Footnote 71. *Code Civ. Proc. § 2032(g)(2) (Code Civ. Proc. § 2032.530 operative July 1, 2005).*

(n72)Footnote 72. *Code Civ. Proc. §§ 2023, 2032(f) (Code Civ. Proc. §§ 2023.010 et seq., 2032.410, 2032.420 operative July 1, 2005).*

(n73)Footnote 73. *Code Civ. Proc. § 2032(h) (Code Civ. Proc. §§ 2032.610, 2032.620 operative July 1, 2005); see also Code Civ. Proc. § 2023 (Code Civ. Proc. § 2023.010 et seq. operative July 1, 2005) (sanctions for abuse of discovery).*

(n74)Footnote 74. *Code Civ. Proc.* § 2032(j) (*Code Civ. Proc.* §§ 2032.640, 2032.650 operative July 1, 2005).



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 61 Bringing and Defending Wrongful Termination Claims
Part A. TEXT

4-61 California Employment Law § 61.04A

AUTHOR: By Lawrence J. King, J.D. and Elizabeth D. Laporte, J.D.

§ 61.04A Exclusion of Evidence

The gathering of evidence for the discipline or termination of an employee may implicate the *Fourth Amendment's* proscription of illegal searches and seizures and require the exclusion of evidence. But when the search takes place as part of a different proceeding, such as a criminal prosecution, the *Fourth Amendment* exclusionary rule may not apply. Thus, for example, a state transportation employee could not have the exclusionary rule applied in civil disciplinary proceedings to exclude evidence seized during a criminal investigation that was not conducted by the agency that employed him, even though the search was illegal.ⁿ¹

FOOTNOTES:

(n1)Footnote 1. *Dept. of Transportation v. State Personnel Bd.* (2009) 178 Cal. App. 4th 568, 2009 Cal. App. LEXIS 1690, *10-*21 (exclusionary rule did not apply in civil disciplinary proceeding to bar introduction of incriminating evidence seized from state transportation employee's car and pockets by the California Highway Patrol; although illegal search took place, it occurred during criminal investigation and was not conducted by agency that employed worker being disciplined).



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 61 Bringing and Defending Wrongful Termination Claims
Part A. TEXT

4-61 California Employment Law § 61.05

AUTHOR: By Lawrence J. King, J.D. and Elizabeth D. Laporte, J.D.

§ 61.05 Jury Instructions

The *Judicial Council of California Civil Jury Instructions* (Matthew Bender) ("CACI") contain specific instructions for wrongful termination actions.ⁿ¹ CACI are the official instructions for the State of California, authored and endorsed by the Judicial Council. The California Rules of Court strongly encourage their use.ⁿ²

Each instruction contains directions for its use. The instructions alert the user to special circumstances involving the instruction and may include references to other instructions that should or should not be used. Each instruction contains an analysis of applicable law. The instructions also give references to a variety of legal publications.ⁿ³ The instructions were drafted for the typical case. They can be used as drafted in most cases. However, when a case involves unique or complex circumstances, the user must adapt the instruction to the case.ⁿ⁴

The instructions provide for the insertion of names rather than legal titles such as "plaintiff" or "defendant," because jurors more easily understand instructions that refer to parties by name rather than by legal terms. For simplicity, the instructions use single party plaintiffs and defendants. If a case involves multiple parties or cross-complaints or counterclaims, the user will need to modify the instruction. The Judicial Council suggests that rather than naming a number of parties in each place calling for names, the user consider putting the names of all applicable parties in the beginning and thereafter identifying them as "plaintiff," "defendant," "cross-complainant," etc.ⁿ⁵

The instructions avoid separate definitions of legal terms whenever possible, but rather incorporate the definition into the language of the instruction.ⁿ⁶

In many instructions, "harm" is used in place of "damage," "injury" or other similar words. The drafters of the instructions felt that "harm" was clearer to jurors. The instructions frequently use "substantial factor" to state the element of causation, rather than referring to "cause" and then defining "cause" in a separate instruction as a substantial factor. There is an instruction that defines "substantial factor" in the series of instructions on negligence, but its use is not limited to cases involving negligence.ⁿ⁷ The drafters substituted "indirect evidence" for "circumstantial evidence," but the instructions include a sentence explaining that indirect evidence is also known as circumstantial evidence.ⁿ⁸

For ease of understanding, the elements of causes of action or affirmative defenses are listed by numbers and factors to be considered by jurors in their deliberations are listed by letters. The applicable burden of proof is included in each instruction explaining a cause of action or affirmative defense. For ease of understanding, instructions explaining affirmative defenses use the term "affirmative defense" in the title.ⁿ⁹

At the end of the instructions, CACI includes tables of related instructions in BAJI, *California Jury Instructions, Civil, Book of Approved Jury Instructions*.ⁿ¹⁰

In a wrongful termination action, if the trial court has previously granted summary adjudication on other causes of action, the court may not rely on the "undisputed facts" that supported summary adjudication of the other causes of action to instruct the jury that certain "facts" were established for purposes of trial. The summary judgment statute itselfⁿ¹¹ precludes comment on the grant or denial of a summary adjudication motion to a jury.ⁿ¹²

Legal Topics:

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

Civil Procedure Trials Jury Trials Jury Instructions General Overview Labor & Employment Law Wrongful Termination General Overview

FOOTNOTES:

(n1)Footnote 1. *See* Judicial Council of California Civil Jury Instructions, CACI 2400 et seq. (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

(n2)Footnote 2. Cal. Rules of Ct., Rule 2.1050.

(n3)Footnote 3. *Judicial Council of California Civil Jury Instructions*, Guide for Using Judicial Council of California Civil Jury Instructions, at xii (Matthew Bender).

(n4)Footnote 4. *Judicial Council of California Civil Jury Instructions*, Guide for Using Judicial Council of California Civil Jury Instructions, at xii.

(n5)Footnote 5. *Judicial Council of California Civil Jury Instructions*, Guide for Using Judicial Council of California Civil Jury Instructions, at xii.

(n6)Footnote 6. *Judicial Council of California Civil Jury Instructions*, Guide for Using Judicial Council of California Civil Jury Instructions, at xiii.

(n7)Footnote 7. *Judicial Council of California Civil Jury Instructions*, Guide for Using Judicial Council of California Civil Jury Instructions, at xiii. *see* CACI 430, Causation: Substantial Factor.

(n8)Footnote 8. *Judicial Council of California Civil Jury Instructions*, Guide for Using Judicial Council of California Civil Jury Instructions, at xiii.

(n9)Footnote 9. *Judicial Council of California Civil Jury Instructions*, Guide for Using Judicial Council of California Civil Jury Instructions, at xiii. Titles are not part of the instruction and should be removed before presentation to the jury.

(n10)Footnote 10. *Judicial Council of California Civil Jury Instructions*, Guide for Using Judicial Council of California Civil Jury Instructions, at xii (Matthew Bender).

(n11)Footnote 11. *Code Civ. Proc.* § 437c(n)(3).

(n12)Footnote 12. *See Raghavan v. The Boeing Co.* (2005) 133 Cal. App. 4th 1120, 1134-1139, 35 Cal. Rptr. 3d 397 (in action by former employee alleging causes of action for wrongful termination in violation of public policy, defamation, breach of implied contract, and breach of covenant of good faith and fair dealing, trial court granted employer's motion for summary adjudication as to each cause of action other than wrongful termination; trial court, relying on "undisputed facts" supporting summary adjudication of defamation cause of action, erroneously instructed jury that "facts" were established for purposes of trial; summary adjudication of defamation cause of action did not restrict type of evidence employee could introduce in support of wrongful termination cause of action).



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 61 Bringing and Defending Wrongful Termination Claims
Part A. TEXT

4-61 California Employment Law § 61.06

AUTHOR: By Lawrence J. King, J.D. and Elizabeth D. Laporte, J.D.

§ 61.06 Verdict Forms

The *Judicial Council of California Civil Jury Instructions* (Matthew Bender) ("CACI") contain special verdict forms for wrongful termination actions.ⁿ¹ The forms generally track the elements of the cause of action. The purpose of the special verdict forms is to obtain the jury's finding on the elements defined in an instruction. Thus, modifications to an instruction will ordinarily necessitate modifications to a corresponding special verdict form.ⁿ²

The verdict forms address one plaintiff against one defendant. In cases involving multiple parties, the issues and evidence may allow the jury to reach different results for different parties. The jury should consider the liability of each defendant individually and determine damages to be awarded to each plaintiff separately. Thus, the drafters recommend that separate special verdicts be prepared for each plaintiff with regard to each defendant in the case.ⁿ³ The forms are directed to a particular cause of action. When multiple causes of action are submitted to the jury, it may be better to combine the forms and eliminate duplication.ⁿ⁴

Legal Topics:

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

Civil Procedure Trials Jury Trials Verdicts General Overview Labor & Employment Law Wrongful Termination General Overview

FOOTNOTES:

(n1)Footnote 1. *See* Judicial Council of California Civil Jury Instructions, CACI VF-2400 et seq. (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. The drafters have indicated that these are models only and can rarely be used without modification to fit the circumstances of the case.

(n2)Footnote 2. *Judicial Council of California Civil Jury Instructions*, Guide for Using Judicial Council of California Civil Jury Instructions, at xiv.

(n3)Footnote 3. *Judicial Council of California Civil Jury Instructions*, Guide for Using Judicial Council of

California Civil Jury Instructions, at xiv.

(n4)Footnote 4. *Judicial Council of California Civil Jury Instructions*, Guide for Using Judicial Council of California Civil Jury Instructions, at xiv.



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
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Part A. TEXT

4-61 California Employment Law §§ 61.07 through 61.09

AUTHOR: By Lawrence J. King, J.D. and Elizabeth D. Laporte, J.D.

[Reserved]

§§ 61.07[Reserved]



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4-61 California Employment Law § 61.10

AUTHOR: By Lawrence J. King, J.D. and Elizabeth D. Laporte, J.D.

§ 61.10 Legal Texts

California Forms of Pleading and Practice, "Master and Servant" (Matthew Bender).

California Points and Authorities, "Employer and Employee" (Matthew Bender).

Larson, Employment Discrimination, Ch. 26, "Employment-At-Will Exceptions," §§ 117-121 (Matthew Bender).

Larson and Borowsky, Unjust Dismissal(Matthew Bender).

Ch. 3, "Judicial Exceptions Based on Contract Theory."

Ch. 4, "Judicial Exceptions Based on Tort Theory."

Ch. 9, "Employer Defenses."

"Practice Appendix."

Advising California Employers, ch. 17 (Cal. C.E.B. 1997).

Wrongful Employment Termination Practice (Cal. C.E.B. 1987)

Ch. 2, "Theories of Liability," §§ 2.32-2.50, 2.52.

Ch. 4, "Bringing the Action," §§ 4.1-4.11, 4.21-4.32, 4.65-4.83, 4.86.

Ch. 5, "Defending the Action."

Ch. 6, "Discovery."

Legal Topics:

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

Labor & Employment Law Wrongful Termination General Overview



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4-61 California Employment Law § 61.11

AUTHOR: By Lawrence J. King, J.D. and Elizabeth D. Laporte, J.D.

§ 61.11 Encyclopedias

29 Cal. Jur. 3d, "Employer and Employee," §§ 63, 70-79.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWrongful TerminationGeneral Overview



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4-61 California Employment Law § 61.12

AUTHOR: By Lawrence J. King, J.D. and Elizabeth D. Laporte, J.D.

§ 61.12 Law Reviews and Legal Periodicals

Mirman, "Wrongful Termination is a Dubious Use for Writs of Attachment", 11(2) Cal. Law. 60 (1991).

Brandon, "From Tameny to Foley: Time for Constitutional Limitations on California Employment At Will Doctrine," 15 *Hastings Const. L.Q.* 359 (1988).

Jensen, "Developments in California Wrongful Discharge Law. (Forum: Labor Law Symposium Proceedings)," 10 *Industrial Relations L.J.* 27 (1988).

Kornblau, "Common Law Remedies for Wrongfully Discharged Employee," 9 *Industrial Relations L.J.* 660 (1987).

Perritt, "Wrongful Dismissal Legislation," 35 *U.C.L.A. L. Rev.* 65 (1987).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWrongful TerminationGeneral Overview



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 62 Avoiding Wrongful Termination and Discipline Claims

4-62 California Employment Law 62.syn

AUTHOR: By Ray E. Smith, J.D.

§ 62.syn Synopsis to Chapter 62: Avoiding Wrongful Termination and Discipline Claims

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§ 62.02 Formation of the Employment Relationship

[1] Advertising and Recruiting

[2] Employment Applications

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[c] FORM--Disclaimer Clause

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[ii] Form

[3] Employment Interviews

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[e] FORM--Introductory Period Clause

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[g] Discipline and Discharge Clauses

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[3] Performance Evaluations

[4] Grievance Procedures

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§ 62.05 Termination of the Employment Relationship

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- [c] Release of Workers' Compensation Claims

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- [g] Waiver of Reemployment Rights

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- [ii] FORM--Settlement Agreement and Release

- [i] FORM--Short Form Separation Agreement

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- [6] Post-Discharge Procedure

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[b] Unemployment Insurance Claims

[c] Workers' Compensation Claims

§§ 62.06through 62.19 [Reserved]

§ 62.20 Legal Texts

§ 62.21 Legal Periodicals

By Ray E. Smith, J.D.^{n*}

FOOTNOTES:

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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 62 Avoiding Wrongful Termination and Discipline Claims

4-62 California Employment Law Scope

AUTHOR: By Ray E. Smith, J.D.

Scope

By Ray E. Smith, J.D.n* SCOPE

This chapter discusses suggested procedures to be followed by an employer in the formation, maintenance, and termination of the employment relationship to help avoid claims for wrongful termination or discipline. It includes discussion of recruitment, employment applications, and pre-employment interviews. It also discusses offer letters and employment agreements and provides sample forms of each.

This chapter also examines the factors to be considered in drafting and using employment handbooks and policies, performance evaluations, and grievance procedures, and includes sample forms, when applicable. Finally, the chapter discusses procedures to be followed in terminating an employee and includes a checklist as well as forms of sample releases.

For discussion of legal principles governing liability for wrongful termination, *see* Chapter 60. For discussion of causes of action related to wrongful termination, *see* Chapter 63. For discussion of bringing and defending wrongful termination actions, *see* Chapter 61. Employment discrimination laws and remedies are covered in Chapters 40 -44.

For additional discussion of, and model provisions for use in, employee handbooks and personnel policy manuals, *see* California Employers' Guide to Employee Handbooks and Personnel Policy Manuals (Matthew Bender).

FOOTNOTES:

(n2)Footnote *. Mr. Smith is with the firm of Thierman, Cook, Brown, and Mason in San Francisco. He specializes in labor and employment law. Before joining the firm, he was in-house counsel for DHL Worldwide Courier Express. His prior publications include "Preempting State Regulation of Employment Relations: A Model for Analysis," *20 U.S.F. L. Rev.* 35 (1985).

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California Employment Law

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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 62 Avoiding Wrongful Termination and Discipline Claims
Part A. TEXT

4-62 California Employment Law § 62.01

AUTHOR: By Ray E. Smith, J.D.

§ 62.01 Introduction

The California Labor Code provides generally that an employment having no specified term may be terminated at the will of either party on notice to the other.ⁿ¹ However, as fully discussed in Chapter 60, numerous limitations are imposed by statutory and case law on an employer's power to terminate an employee. Some of these limitations involve a prohibition against disciplining or terminating an employee for specified reasons;ⁿ² others involve an implied requirement that an employee not be terminated except for good cause. In either case, improper termination of the employee can expose the employer to substantial liability.ⁿ³ This chapter sets forth suggested procedures that may help avoid disputes that may lead to wrongful termination litigation and that may strengthen the employer's position in the event of such litigation.

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Employment Relationships At-Will Employment General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code* § 2922.

(n2)Footnote 2. *See, e.g., Lab. Code* § 132a (prohibition against discharging employee for filing workers' compensation claim, receiving award, or testifying regarding another employee's claim).

(n3)Footnote 3. *See generally* generally discussion in Chapter 60.



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 62 Avoiding Wrongful Termination and Discipline Claims
Part A. TEXT

4-62 California Employment Law § 62.02

AUTHOR: By Ray E. Smith, J.D.

§ 62.02 Formation of the Employment Relationship

[1] Advertising and Recruiting

Although no California case has held that statements regarding job tenure or security in advertisements or recruiting documents are necessarily binding on the employer as a matter of law, such statements may serve as evidence that limitations on the freedom to discipline or discharge were intended. Therefore, unless specifically desired, employers should avoid written or oral representations to prospective employees or new-hires regarding "permanent," "steady," "secure," or "long-term" employment; employment "so long as" an employee performs "satisfactorily"; or the "hope" that the individual will "grow into the position."

To be enforceable, promises regarding job security or termination for cause must be communicated in "express language or [by] clear implication."ⁿ¹ The mere indication of optimism and good will does not necessarily alter the at will nature of an employment relationship.ⁿ² The totality of the circumstances determines the nature of the contract. For example, an agreement limiting the employer's power to terminate may be shown by longevity of employment, repeated oral assurances of job security, consistent promotions, salary increases and bonuses, an employer's own termination guidelines, and other acts that would lead an employee to reasonably expect he or she will not be discharged except for good cause.ⁿ³ The California Supreme Court has made it clear that independent consideration is not necessary to support an implied promise to discharge only for good cause.ⁿ⁴

Apart from liability for wrongful termination, knowingly false representations made during the recruiting process may also support an independent action for deceit. In *Lazar v. Superior Court* ⁿ⁵ representations made by the defendant that induced plaintiff to leave secure employment and move his family across the country to begin employment with defendant were found by the California Supreme Court to be actionable as fraud.ⁿ⁶ In an earlier case,ⁿ⁷ the plaintiff was permitted to state causes of action for breach of contract and deceit by alleging "repeated requests" by the defendant to close his competing jewelry business and come to work for defendant as a manager for "so long as he should satisfactorily perform his duties," and by alleging he was discharged shortly thereafter.ⁿ⁸ In addition, knowingly false representations regarding employment that induce a person to change his or her place of residence subject an employer

to misdemeanor liability and double civil damages under *Labor Code sections 970-972*.ⁿ⁹

[2] Employment Applications

[a] Applications Generally

Careful drafting of employment applications raises many questions regarding the scope of inquiries permitted under federal and state equal employment opportunity laws, the permissible scope of inquiries under state privacy law, and the possible creation of limitations on the right to terminate at will. For discussion of limitations on permissible inquiries in employment applications under equal employment opportunity laws, *see* Chapter 41. For discussion of various statutory and case law restrictions on the employer's right to obtain private information about the applicant, either through an application form or otherwise, *see* Chapter 50. For discussion of at will employment recitations in an application, *see* [b] and [c], *below*.

If applicants are required to sign an employer's application form,ⁿ¹⁰ a copy must be provided the applicant on request.ⁿ¹¹ The Fair Employment and Housing Act requires that employers, labor organizations, and employment agencies maintain applications on file for a minimum of two years.ⁿ¹²

[b] Disclaimer Clauses in Applications

An express disclaimer in an employment application form that employment is at will can limit the exposure of an employer to a later claim by an employee that he or she accepted employment in reliance on an implied agreement that termination would occur only for cause or that the employment would be for a specific term.ⁿ¹³ While the issue remains unresolved, there is authority in California and in other jurisdictions suggesting that express disclaimers that are prominently placed to give actual notice to applicants may be enforced.ⁿ¹⁴ Nevertheless, even if enforced, express disclaimers will not necessarily provide broad protection against all wrongful discharge causes of action, including counts based on alleged violations of statute or violations of public policy.

It is also possible that a court or jury could hold that oral assurances by a personnel representative or manager override a written disclaimer in an application, although there is case authority implying otherwise.ⁿ¹⁵ However, in one case, a disclaimer in an employment application which stated that the terms of employment could be changed at any time was overridden by subsequent implied promises found in the personnel manual and employer practices.ⁿ¹⁶ To avoid this problem, the disclaimer should state that its terms cannot be altered except in writing by a specified and highly placed company representative.

[c] FORM--Disclaimer Clause

[i] Comment

The sample disclaimer clause set forth in [ii], *below*, is intended to be used in employment application forms. A modification of this language is suggested for inclusion in employee handbooks and in the acknowledgment of receipt which the employee signs when he or she receives that handbook.ⁿ¹⁷

[ii] Form EMPLOYMENT AT WILL

EMPLOYMENT AT WILL

In consideration of my employment, I agree to conform to all Company work rules and policies. I further agree that my employment with the company is at will so that either I or the Company may terminate my employment with or without cause and with or without prior notice, at any time. I also agree that I may be demoted or disciplined at any time and the

terms of my employment may be altered at any time, with or without cause, at the discretion of the Company. No one other than an officer of the Company has the authority to alter this arrangement, to enter into an agreement for employment for a specified period of time, or to make any agreement contrary to this policy, and any such agreement must be in writing and must be signed by an officer of the Company and by me.

[3] Employment Interviews

Pre-employment interviews raise many of the same questions encountered in the context of drafting lawful employment applications, such as the permissible scope of inquiries under federal and state EEO and privacy laws and the need to avoid unintended representations regarding employment tenure. As a consequence, managers, supervisors, personnel administrators, and other company representatives who participate in the pre-employment interview process should avoid statements that violate EEO or privacy laws, that may bind the employer to an implied contract for any specific term, or that otherwise limit the employer's right to discharge. If possible, such persons should be intimately familiar with both the legal purpose and the content of company policies regarding hiring and retention of employment. For discussion of permissible inquiries under EEO laws, *see* Chapter 41.

The best defense against later employment disputes, whether regarding job performance, misconduct, or job tenure, is to screen applicants thoroughly to ensure the hiring of a person qualified for the job in question. Employers should not assume that, during probationary periods, they will retain unfettered discretion to discharge employees for perceived performance deficiencies.¹⁸ Probationary periods are not substitutes for proper interviewing and hiring procedures.

[4] Offer Letters

[a] Acceptable and Unacceptable Statements

Offer letters are a step in the hiring process and, like oral recruiting comments, may constitute evidence of intended limitations on the employer's freedom to discipline or discharge. Whether an offer letter will be deemed to constitute a written employment contract for a definite term will depend, of course, on the particular facts and circumstances of the case, including the specific wording of the letter.¹⁹ Therefore, if an employer decides to use offer letters in its employment process, it should carefully review their contents for unintended promises.

As a general rule, offer letters should confirm only the employment benefits discussed during the recruiting process and should avoid reference to a specified term (that is, duration) of employment.²⁰ If the employer wishes, the letter may include express language disclaiming employment for any specified term or declaring the employment to be at will.²¹ In specifying salary benefits, the employer should be aware that some cases have suggested that a specific employment term may be inferred from the period designated for the measure of compensation.²² Although the same logic might apply to other benefits as well, one court has held that a reference to vesting schedules or other waiting periods for accrual of rights to deferred compensation will not by itself create implied agreements of employment for any specified term.²³

■ CONSULTANT'S COMMENT:

Offer letters often are introduced in wrongful discharge litigation as evidence that the employer intended employment for a specified term, intended discharge only for "just cause," or intended "just cause" to have a narrow meaning. Similarly, offer letters, even if not introduced as evidence of an implied contract, nevertheless may be used as evidence of bad faith and unfair dealing in the administration of the post-hire relationship. Thus, whether or not an employer considers its employment relationship to be at will, offer letters may be strong evidence of what the employer "really intended" for the particular employee.

In short, unless specifically desired, employers should avoid such statements as: "You will be entitled to an annual bonus"; "You will be responsible for restoring XYZ Division to profitability" (such

assignments imply a sufficiently lengthy employment to enable the parties to measure "success"); or "You will be entitled to exercise your stock options at annual intervals" (unless the employer also indicates that no specified employment term is intended and that entitlement to stock options is governed by a separate option agreement).

Finally, although mentioned in the text, it is important to emphasize that offer letters also are commonly used as evidence of violation of *Labor Code sections 970-972*. Those sections create criminal liability and civil liability for double damages for inducing an individual by false representations to move from one location to another for employment. While a defendant employer may view the allegations of false representations as unfounded, *Labor Code section 970-972* claims are difficult to defeat by pre-trial motion. *Commentary by Kirby Wilcox*.

[b] FORM--Offer Letter

[i] Comment

The form of offer letter set forth in [ii], *below*, is suggested for situations in which the employer concludes that written confirmation of the terms of hire is advisable.

[ii] Form Offer Letter

Re: Offer of Employment

Dear _____:

Thank you for taking the time to meet with _____ [*names of company officials who interviewed applicant*] to discuss the possibility of joining _____ [*name of employer*] as _____ [*title of position*]. After considering your qualifications and your interest in working for _____ [*name of employer*], we are pleased to offer you the position of _____ [*title of position*], at a salary of \$_____ per _____ [*specify, e.g., hour, week or month*]. We understand that if you decide to accept this offer, you will be available to work on _____ [*date*].

If you accept this offer, your employment with _____ [*name of employer*] will be at will so that you or _____ [*name of employer*] may terminate the employment relationship with or without cause and with or without prior notice, at any time.

[As we discussed, this offer is contingent on the satisfactory results of an employment reference check, as well as on the satisfactory results of _____ [*specify, e.g., drug and/or alcohol test, medical examination, criminal background investigation, credit records check, driving record check*].

[For your information, I have enclosed a copy of our current employee handbook that describes the other terms and conditions of employment with _____ (*name of employer*), as well as the various benefits to which you may be entitled.] If you have any questions about this offer, [the other terms of employment described in the handbook, or about your eligibility to participate in or be covered by any of the described benefits,] please call me directly at _____ [*telephone number*].

We hope that you will accept our offer by signing and dating this letter in the space provided below and returning it to us by no later than _____ [*date*].

Yours very truly,

_____ [signature]

[Title of employer's representative]

ACCEPTED on _____ [date], by _____ [signature of prospective employee].

[5] Employment Agreements

[a] Acceptable and Unacceptable Statements

Written employment agreements provide an opportunity to clearly and thoroughly define the terms of employment. They are advised for high-level executives, sales representatives, and employees (such as professional or technical employees) hired to perform highly specialized job duties. They are required under *Labor Code sections 2751 and 2752* for commissioned employees if the employer has no permanent and fixed place of business in California. They are also required under *Civil Code section 3423(e)* if the contract obligates the employee to render services exclusively for the employer and the employer wishes to obtain injunctive relief in court in the event of a breach.

Regardless of the desirability or mandatory nature of an employment contract, except for an employee who is a party to a contract to render personal service in the production of phonorecords in which sounds are first fixed,^{n23.1} and a contract of apprenticeship,^{n23.2} a contract to render personal service may not be enforced against the employee beyond seven years from the commencement of service under it.ⁿ²⁴

Care in the drafting of written employment agreements is essential. Ambiguities in agreements drafted by the employer will be resolved in favor of the employee.ⁿ²⁵ However, well drafted agreements according the employer broad discretion to discipline and discharge may possibly preclude an employee from later successfully alleging an inconsistent implied agreement to terminate only for cause.ⁿ²⁶ A written contract that contains an express at will clause creates evidence of an at will relationship that is difficult to rebut.ⁿ²⁷ Courts may refuse to allow parol evidence to rebut an integrated employment contract containing an at will clause.ⁿ²⁸ However, if the written contract is *not* integrated, the fact that at will language exists does not preclude the existence of an implied in fact contract to terminate for cause only.ⁿ²⁹

[b] Checklist of Clauses for Written Employment Agreements

The following is a checklist, with comments where appropriate, of potential clauses for written employment agreements. The list is not exhaustive, but covers most common contract terms.

1. *Period of Employment.* The agreement should state (a) the basic term of the contract, and (b) any provisions for contract renewal. Care should be taken not to guarantee employment for the duration of the basic term unless such guarantee is intended.

2. *Position, Duties, and Responsibilities.* The agreement should state (a) the employee's job title, (b) the employee's primary job duties, (c) the employer's discretion to modify the job title or duties, and (d) the standard of care or performance (for example, "best efforts") applicable to performance of job duties.

3. *Compensation, Benefits, and Expenses.* The agreement should state (a) the amount and method of compensation (for example, by salary and commissions payable monthly); (b) the benefits to which the employee is entitled (referring to the master benefit plans wherever appropriate to avoid inconsistencies in benefit descriptions), and (c) the employer's policy regarding reimbursement of employee expenses.

4. *Termination.* The agreement should state the grounds for its termination, including, for example, (a) by the death,

disability, or incapacity of the employee (or the employer, if the employer is a natural person);ⁿ³⁰ (b) by the merger, sale, bankruptcy, or dissolution of the employer, if the employer is a corporation;ⁿ³¹ (c) by the employer for cause and/or not for cause;ⁿ³² and (d) by the employee (for example, for material breach by the employer).ⁿ³³ The agreement should also include the obligations of the employee upon termination, such as (a) return of the employer's property, and (b) survival of any confidentiality provisions.

5. *Proprietary Information.* The agreement should (a) define any proprietary information of the employer that is covered by the agreement, (b) state the restrictions on its use by the employee, (c) include a covenant not to compete during the term of the employment, and (d) state the remedies for breach of the agreement. For discussion of trade secrets, proprietary information, and covenants not to compete, *see* Chapter 70.

6. *Employee Inventions and Ideas.* The agreement should cover (a) disclosure of inventions and ideas to the employer; (b) assignments of inventions and ideas; and (c) any exclusions from the disclosure obligations. The clause should discuss inventions and ideas developed during the post-termination period. For example, the clause might include a presumption that inventions made within one year of termination were conceived during the employment. Finally, the clause should comply with *Labor Code sections 2870-2872*, which require the inclusion of a specific disclaimer that excludes inventions developed on the employee's own time that are unrelated to the employer's business. For full discussion of employee inventions, *see* Chapter 70.

7. *Assignment of Rights and Binding Effect on Successors.*

8. *Required Notices.*

9. *Merger or Integration Clause* (also known as a "zipper" or "entire agreement" clause), incorporating all previous written and oral representations.

10. *Amendments and Waivers.*

11. *Severability and Enforcement.*

12. *Governing Law.*

13. *Opportunity to Consult Counsel/Understanding of Agreement.*

14. *Remedies.* The agreement should cover (a) injunctive relief; (b) liquidated damages; (c) resort to arbitration; and (d) the exclusive nature of the specified remedies and remedial procedures.

[c] FORM--Employment Agreement

[i] Comment

The sample employment agreement below is a simple contract for an indefinite period. For sensitive positions, or high-level managers or executives, the employer may wish to more fully describe the respective rights and obligations of the parties.

■ CONSULTANT'S COMMENT:

Employment agreements are valuable beyond their ability to limit exposure for wrongful termination. They provide a vehicle for making critical employment policies a matter of contract (such as policies regarding trade secrets, inventions, ⁿ³⁴ and employee privacy regarding testing or employer searches).ⁿ³⁵ They provide a vehicle confirming the scope of special employee benefits arrangements.

They provide a vehicle for confirming exempt status under state and federal wage and hour laws,ⁿ³⁶ which, although not binding on the federal Wage and Hour Administrator or the California Labor Commissioner, may nevertheless help preclude imposition of penalties if the exempt status is successfully challenged. They also provide a vehicle for confirming the interpretation of important equal employment obligations, such as leave for pregnancy disabilities or nepotism rules and their application to married employees.ⁿ³⁷ *Commentary by Kirby Wilcox.*

[ii] Form Employment Agreement

EMPLOYMENT AGREEMENT

This agreement is made as of _____ [date] between _____ [employer's name] ("Employer") and _____ [employee's name] ("Employee").

1. The Employee shall serve as _____ [specify job title or position], and shall perform all services necessary, required, or advisable to fulfill the duties of that position. The Employee shall at all times be subject to the direction of the Employer, its management and other authorized agents, and to all policies established from time to time by the Employer.

2. The Employer's duties shall include _____ [specify], and such other duties as may be assigned from time to time.

3. The Employee will at all times faithfully, industriously, and to the best of his/her ability, experience, and talents, perform all the duties that may be required of him/her. The Employee shall not without the prior written consent of the Employer render services of a business, commercial, or professional nature to any other person or organization that might create a conflict of interest or otherwise interfere in any way with the Employee's obligations under this agreement.

4. As compensation for his/her services, the Employee shall receive a _____ [specify period, e.g., weekly or hourly] salary of \$_____, payable _____ [specify time for payment, e.g., bi-weekly] during the period of employment, pro-rated for any partial payroll period.

5. The Employee shall also receive the following benefits: _____ [specify all benefits to be received, such as medical coverage, holidays, defined benefit or defined contribution plans, deferred compensation, life insurance, and sick pay].

[6. Insert confidentiality provision, if appropriate, or refer to separate attached agreement. See discussion in Chapter 70.]

[7. Insert intellectual property assignment clause, if appropriate.]

8. Either party may terminate this agreement for any reason, with or without cause, on _____ days' written notice, without further obligation or liability (except that Employer shall be obligated to pay Employee all compensation then due and owing and make payment for accrued unused vacation, if any). The foregoing notwithstanding, the Employer may terminate this agreement on immediate notice if the Employee materially breaches his/her obligations or neglects his/her duties hereunder. This agreement will terminate automatically on the death or incapacity of the Employee, or on _____ [the death or incapacity of the Employer or the merger, sale of assets, or dissolution of the Employer]. [It is expressly understood that the provisions of Paragraph 6 are intended to extend and remain in effect and enforceable despite the cancellation of the remainder of this agreement.]

9. This document embodies the entire terms and conditions of the agreement between the parties, and the Employee acknowledges that he/she has not relied on any warranties, representations, or promises except as set forth expressly in this document. This agreement may be changed, amended, or superseded only by an agreement in writing signed by the parties.

10. The parties further agree that they have been represented by counsel in the negotiation and preparation of this agreement or have been afforded the opportunity to be so represented. Each party agrees that they enter into this agreement freely, without coercion, and relying on each party's own judgment, not on any representations or promises made by the other party, except those contained herein.

[11. *Insert grievance or arbitration clause, if desired. See discussion in § 62.03[1][f]-[h].*]

12. This agreement shall be construed in accordance with the laws of the State of California [, and the parties hereby submit themselves to the courts of the County of _____ (*insert desired county, such as the county in which the Employer has its principal place of business*) for the purpose of enforcing the agreement].

Executed at _____ [*insert city or county*], California, on _____ [*date*] .

_____ [*signature*]

[*Employer's name*]

_____ [*signature*]

[*Employee's name*]

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Employment Relationships Employment Contracts General Overview Labor & Employment Law Preemployment Practices

FOOTNOTES:

(n1)Footnote 1. *See Drzewiecki v. H & R Block, Inc.* (1972) 24 Cal. App. 3d 695, 703, 101 Cal. Rptr. 169

(n2)Footnote 2. *Hillsman v. Sutter Community Hospitals* (1984) 153 Cal. App. 3d 743, 750, 200 Cal. Rptr. 605 .

(n3)Footnote 3. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 677-682, 254 Cal. Rptr. 211, 765 P.2d 373 ; *Pugh v. See's Candies, Inc.* (1981) 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917 (discussing factors showing implied agreement to terminate for cause only).

(n4)Footnote 4. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 679, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n5)Footnote 5. *Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 49 Cal. Rptr. 2d 377, 909 P.2d 981 .

(n6)Footnote 6. *Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 649, 49 Cal. Rptr. 2d 377, 909 P.2d 981 ; *see also* discussion in ch. 63.

(n7)Footnote 7. *Bondi v. Jewels by Edwar, Limited* (1968) 267 Cal. App. 2d 672, 73 Cal. Rptr. 494 .

(n8)Footnote 8. *Bondi v. Jewels by Edwar, Limited* (1968) 267 Cal. App. 2d 672, 674-675, 73 Cal. Rptr. 494 . For

general discussion of tort of deceit, *see* Levy, Golden, and Sacks, California Torts, ch. 40, "Fraud and Deceit and Other Business Torts," Part A (Matthew Bender).

(n9)Footnote 9. *Seubert v. McKesson Corp.* (1990) 223 Cal. App. 3d 1514, 1521-1522 ; *see also* Lab. Code §§ 973-976 (criminal sanctions for misrepresentations regarding existence of labor dispute or compensation); *but cf.* *Tyco Industries, Inc. v. Superior Court* (1985) 164 Cal. App. 3d 148, 156-157, 211 Cal. Rptr. 540 (cause of action for violation of Lab. Code § 970 not stated under facts of case). For discussion of liability for fraud or violation of Labor Code sections 970-972, *see* ch. 63.

(n10)Footnote 10. [Reserved]

(n11)Footnote 11. Lab. Code § 432.

(n12)Footnote 12. Gov. Code § 12946; *see* discussion in Chapter 41.

(n13)Footnote 13. *See* *Comeaux v. Brown & Williamson Tobacco Co.* (9th Cir. 1990) 915 F.2d 1264, 1271 .

(n14)Footnote 14. *See* *Seubert v. McKesson Corp.* (1990) 223 Cal. App. 3d 1514, 1520 (disclaimer in application form enforceable if contains integration clause); *Novosel v. Sears, Roebuck & Co.* (E.D. Mich. 1980) 495 F. Supp. 344, 346 (enforcing express disclaimer on an application form that was located directly above the applicant's signature); *Crain v. Burroughs Corp.* (C.D. Cal. 1983) 560 F. Supp. 849, 852 (plaintiff not entitled to introduce evidence of an implied agreement to terminate only for cause to contradict express written disclaimer); *but see* *Harden v. Maybelline Sales Corp.* (1991) 230 Cal. App. 3d 1550, 1555-1556, 282 Cal. Rptr. 96 (application not a contract, but only a solicitation of an offer of employment, relegating at will clause to mere evidence of any ultimate agreement between the parties).

(n15)Footnote 15. *See* *Mannion v. Campbell Soup Co.* (1966) 243 Cal. App. 2d 317, 323, 52 Cal. Rptr. 246 (personnel manager had no authority to bind the company to an employment for a specified term); *Bene v. La Grande Laundry Co.* (1937) 22 Cal. App. 2d 512, 515, 71 P.2d 351 (company officials had no apparent authority to bind the employer to an agreement of employment for life).

(n16)Footnote 16. *McLain v. Great American Ins. Companies* (1989) 208 Cal. App. 3d 1476, 1485-1487, 256 Cal. Rptr. 863 .

(n17)Footnote 17. *See* discussion in § 62.03[1][b].

(n18)Footnote 18. For a discussion of the use of introductory periods, *see* § 62.03[1][d].

(n19)Footnote 19. *See, e.g.,* *Ferreya v. E. & J. Gallo Winery* (1964) 231 Cal. App. 2d 426, 41 Cal. Rptr. 819 ; *Seifert v. Arnold Bros.* (1934) 138 Cal. App. 324, 31 P.2d 1059 , in which offer letters were found not to create contracts for a specified period.

(n20)Footnote 20. *See* Lab. Code § 2924.

(n21)Footnote 21. *See* discussion in § 62.03[1][b].

(n22)Footnote 22. *See* *Swaffield v. Universal Ecsco Corp.* (1969) 271 Cal. App. 2d 147, 168, 76 Cal. Rptr. 680 (assuming, but not deciding, that corporate minutes providing for an annual salary for plaintiff might evidence a one-year employment contract); *Mannion v. Campbell Soup Co.* (1966) 243 Cal. App. 2d 317, 320, 52 Cal. Rptr. 246 (when employment contract fixes no duration, term of employment extends for such period as the parties fix for the computation of salary).

(n23)Footnote 23. *Bos v. United States Rubber Co.* (1950) 100 Cal. App. 2d 565, 569, 224 P.2d 386 .

(n24)Footnote 23.1. *See Lab. Code § 2855(b).*

(n25)Footnote 23.2. *See Lab. Code §§ 2855(a), 3070 et seq.*

(n26)Footnote 24. *Lab. Code § 2855.*

(n27)Footnote 25. *See Civ. Code § 1654; Hamilton v. Stockton Unified Sch. Dist. (1966) 245 Cal. App. 2d 944, 951-952, 54 Cal. Rptr. 463 (adhesion contract construed against drafting party).*

(n28)Footnote 26. *See Gerdlund v. Elec. Dispensers Int'l (1987) 190 Cal. App. 3d 263, 270, 235 Cal. Rptr. 279 ; Malmstrom v. Kaiser Aluminum & Chem. Corp. (1986) 187 Cal. App. 3d 299, 313-314, 231 Cal. Rptr. 820 ; Shapiro v. Wells Fargo Realty Advisors (1984) 152 Cal. App. 3d 467, 482, 199 Cal. Rptr. 613 ; Wal-Noon Corp. v. Hill (1975) 45 Cal. App. 3d 605, 613, 119 Cal. Rptr. 646 ; Bos v. United States Rubber Co. (1950) 100 Cal. App. 2d 565, 570, 224 P.2d 386 ; Crain v. Burroughs Corp. (C.D. Cal. 1983) 560 F. Supp. 849, 852 ; Crossen v. Foremost-McKesson, Inc. (N.D. Cal. 1982) 537 F. Supp. 1076, 1077 ; Anderson v. Savin Corp. (1988) 206 Cal. App. 3d 356, 364, 254 Cal. Rptr. 627 ; Haggard v. Kimberly Quality Care, Inc. (1995) 39 Cal. App. 4th 508, 521, 46 Cal. Rptr. 2d 16 (integrated at will clause precluded introduction of parol evidence).*

(n29)Footnote 27. *See, e.g., DeHorney v. Bank of Am. Nat. Trust and Sav. Ass'n (9th Cir. 1989) 879 F.2d 459, 466-467 (bank's personnel policies did not modify clear terms of employment contract creating employment at will).*

(n30)Footnote 28. *See, e.g., Halvorsen v. Aramark Unif. Serv., Inc. (1998) 65 Cal. App. 4th 1383, 1388, 77 Cal. Rptr. 2d 383 (factors supporting existence of implied-in-fact employment agreement are irrelevant when there is express at will agreement); Haggard v. Kimberly Quality Care Inc. (1995) 39 Cal. App. 4th 508, 521, 46 Cal. Rptr. 2d 16 (integrated at will clause precluded introduction of parol evidence); Anderson v. Savin Corp. (1988) 206 Cal. App. 3d 356, 363-364, 254 Cal. Rptr. 627 ; Gerdlund v. Elec. Dispensers Int'l (1987) 190 Cal. App. 3d 263, 270, 235 Cal. Rptr. 279 (implied covenant of good faith and fair dealing may not be relied on to establish a "good cause" requirement for termination if an express at will employment contract exists, because no obligation can be implied that would result in the obliteration of a right expressly given under a written contract); see also discussion in § 60.09[3].*

(n31)Footnote 29. *See McLain v. Great Am. Ins. Cos. (1989) 208 Cal. App. 3d 1476, 1483-1487, 256 Cal. Rptr. 863 (implied promise may supersede previous at will agreement embodied in nonintegrated document); Thomka v. Fin. Corp. Of Am. (1993) 15 Cal. App. 4th 877, 883-885, 19 Cal. Rptr. 2d 382 (employer's addition of at will language to sales regulations did not preclude jury finding that termination breached implied in fact agreement not to terminate without cause).*

(n32)Footnote 30. *See Lab. Code §§ 2920(c), (d), 2921, 2923.*

(n33)Footnote 31. *See Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 29, 136 Cal. Rptr. 574, 560 P.2d 3 ; Gaspar v. United Milk Producers of Cal. (1944) 62 Cal. App. 2d 546, 551, 144 P.2d 867 ; Pierce v. Riverside Mortg. Securities Co. (1938) 25 Cal. App. 2d 248, 254-255, 77 P.2d 226 ; cf. Corp. Code § 1107(a) (after merger, surviving corporation is subject to all liabilities of disappearing corporation).*

(n34)Footnote 32. *See Lab. Code § 2924; Compton, "Self-Insurance Against Wrongful Discharge Suits," 7 Cal. Lawyer 14 (May 1987).*

(n35)Footnote 33. *See Lab. Code § 2925.*

(n36)Footnote 34. *See generally* discussion in ch. 70.

(n37)Footnote 35. *See generally* discussion in ch. 50.

(n38)Footnote 36. *See generally* discussion in chs. 1 -7.

(n39)Footnote 37. *See generally* discussion in ch. 41.



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 62 Avoiding Wrongful Termination and Discipline Claims
Part A. TEXT

4-62 California Employment Law § 62.03

AUTHOR: By Ray E. Smith, J.D.

§ 62.03 Maintenance of Employment Relationship

[1] Handbooks and Policy Manuals

[a] Affirming Employer Discretion to Control Employment Relationship

A well-drafted employee handbook serves many useful purposes. It can help (1) create and promote a desired image or "corporate culture"; (2) improve employee morale by acquainting employees with their benefits and other aspects of employment that make the company a desirable place to work; (3) reduce employer-employee disputes by giving notice of uniform employment guidelines and policies (especially those concerning equal employment opportunity and employee discipline and discharge); (4) limit the possibility of union organizing; and (5) persuade an opposing counsel, a judge, or a jury in a wrongful discharge case that the employer has followed a coherent employee relations philosophy.

■ PRACTICE TIP:--EMPLOYER'S PERSPECTIVE

Some high-tech employers have put their employee manuals "on-line." This allows human resources professionals or counsel to make revisions as the law or policy changes and insures that supervisors and employees have current information. An "on-line" manual, however, is a document to which employees have access and not necessarily a document which an employer can prove that it has *distributed*.

Therefore, employers who create "on-line" manuals should make sure that e-mail or some other communication is sent to all employees advising them of new provisions. Moreover, employers should take note of the posting and notice requirements of various state and federal statutes, which may require hard copies of some employment policies to be delivered to employees or posted in the workplace.

Commentary by Lori A.M. Middlehurst.

Wrongful discharge law, however, dictates caution in the drafting of handbooks. An employer may be held contractually bound by the representations it makes to its employees through both employee handbooks and policy manuals.¹ For example, an employer's violation of termination guidelines in employment manuals or of other policies implying self-imposed limitations on the power to terminate at will may be sufficient to state a cause of action for

breach of an implied in fact employment contract.ⁿ² Nor is a decision to avoid publishing a handbook a solution to this problem. Oral representations by employer representatives or past practice may similarly limit an employer's freedom to discipline or discharge.ⁿ³

As a consequence, the best protection in developing a handbook is to assume that the document will be treated as a contract and, therefore, to preserve the maximum discretion in policy administration and to make only those promises that the employer truly intends to keep. Nonetheless, employers are well advised to seriously consider the inclusion of a clause in their employee handbooks that disclaims the contractual nature of the document and that indicates that the employment relationship is at will. Thus, if the contract disclaimer is upheld, the employer preserves considerable control over the employment relationship. If the contract disclaimer is not upheld, the employer becomes party to an agreement that contains only those assurances that the employer freely supports and that contains an express indication of at will employment status.

For additional discussion of, and model provisions for use in, employee handbooks and personnel policy manuals, *see* California Employers' Guide to Employee Handbooks and Personnel Policy Manuals (Matthew Bender).

■ CONSULTANT'S COMMENT:

The decision whether or not to adopt an employee handbook or a policy manual, or both, requires careful consideration. The two documents serve different functions.

An employee handbook should be viewed as an employer's simplest and most direct statement to its employees concerning its basic employment guidelines—for example, its equal employment opportunity, vacation, sick leave, disability, and discipline policies.ⁿ⁴ A policy manual should be viewed as a more expansive statement to an employer's managers and supervisors of most, if not all, of its employment policies. The policy manual, for example, is the most appropriate place to provide explanations of *how* to implement specific policies and to provide copies of important or frequently used personnel forms.ⁿ⁵ If adopted, a policy manual should not be distributed to nonmanagement employees. Adoption of an employee handbook is strongly recommended. It serves the purposes stated in the text and, thereby, can help to reduce the many problems that can arise in a vacuum of employment guidelines.

Adoption of a policy manual is *not* automatically advisable. As noted above, a judge or a jury has the discretion to find a policy manual to be a binding contract, no matter how carefully an employer may try to draft clauses to avoid that effect. The same holds true for employee handbooks, but policy manuals are typically longer and more procedurally complex. Thus, policy manuals, if adopted and ignored, can turn from a useful tool of personnel administration into damaging evidence of failure to follow internal guidelines. In short, an employer should adopt only those policies that it can say *with assurance* that it will follow. If an employer has doubts about the utility of a policy manual, the best advice is to develop an employee handbook only, and to reconsider the need for a policy manual at a later date. *Commentary by Kirby Wilcox.*

[b] Disclaimer Clauses

Not all employers will wish to include in their handbooks a blunt statement that employment is "at will" and that employees may be discharged at any time and for any reason. Such statements may provide fuel to union organizers, who often rely on the promise of negotiating a "just cause" provision in any collective bargaining agreement. An employer may suspect that confronting its employees with an express disclaimer may affect morale or exacerbate turnover. A disclaimer that is not well drafted may inject into the handbook a tone that undermines the promotional purpose of the remainder of the publication. Finally, a disclaimer may simply be inconsistent with the employer's overall employment relations philosophy. However, the best defense against a wrongful discharge suit based on handbook representations is an express limitation of their binding effect, and should be included in every handbook if it

is management's intent to preserve maximum flexibility in dealing with its employees.

While the issue is unsettled, it appears that clear disclaimers limiting the legal effect of handbooks will be given effect. In *Crain v. Burroughs Corp.*,ⁿ⁶ a federal district court, applying California law, held that a plaintiff was not entitled to reach a jury on the issue of "just cause" for termination because a written agreement provided that either party could terminate the relationship at any time and for any reason. Because there was a valid express contract, the plaintiff could not rely on the terms of an implied contract, based on the employee manual or otherwise, to contradict the terms of the written agreement. The court also commented, "Moreover, the Preface to the ... Manual ... provides that [its] contents were under no circumstances to be construed as describing conditions of employment or as creating or constituting a contract. ... "n7

A well-drafted disclaimer should include a statement that the handbook is not intended to cover all possible situations that may arise in the employment relationship or to be contractually binding, that no employer representative except for specified individuals (for example, the president or other designated management employees) may create any employment contract or alter the provisions of the handbook, and that any such agreements must be in writing and signed by the affected employee and by a company official. The clause should also reserve to the employer the right to change the handbook's provisions at any time. However, notice to employees may nonetheless be required for new or changed policies to become effective.ⁿ⁸

This disclaimer should be echoed in other areas of the handbook that deal with the exercise of employer discretion, such as performance appraisalsⁿ⁹ and discipline and discharge provisions.ⁿ¹⁰ The employer should be aware that although a well-drafted disclaimer clause may avoid liability based on breach of an implied or express contract not to terminate except for cause, it will not necessarily avoid liability for violations of public policy.ⁿ¹¹

■ CONSULTANT'S COMMENT:

Whether or not an employer should include an at will clause in an employee handbook (or in an application form or employment contract) is a business decision. On the one hand, such clauses may provide a limited defense to liability in wrongful discharge litigation. On the other hand, such clauses may adversely affect employee morale. ⁿ¹² From a purely legal perspective, the inclusion of at will language is recommended. It is true that at will clauses in employee handbooks and policy manuals provide less protection than employee signatures on application forms and contracts that declare the employment relationship to be at will. It is also true that at will clauses in employee handbooks or policy manuals (or poorly drafted at will clauses in employment applications or contracts) may be weakened or completely neutralized by employer statements or conduct that are inconsistent with at will employment. Nonetheless, existing case law suggests that at will statements can be of value and involve no legal "downside" risks.

From a purely human relations perspective, the inclusion of at will language in employment documents is a closer question. As indicated in the text, at will statements in employee handbooks and policy manuals alone are not "bombproof" defenses in wrongful discharge lawsuits. They are merely helpful. Yet, the cost to the employer of adopting at will language may be a significant negative reaction from the workforce. The adoption of at will language could also become an issue in the event of a union organizing effort. In summary, while the election whether to include at will clauses is a business decision, their inclusion is recommended from a legal standpoint. *Commentary by Kirby Wilcox.*

[c] FORM--Sample Disclaimer Clause

[i] Comment

The sample introductory disclaimer clause below follows generally the guidelines described in [b], above, and is

suggested for enclosure in handbooks. A similar disclaimer clause is set out in § 62.02[2][c][ii] for inclusion in employment applications.

[ii] Form Sample Disclaimer Clause

This handbook is intended to help you get acquainted with _____ [name of employer]. While it addresses many of the matters of concern to employees, this handbook is not intended to be an exhaustive compilation of the Company's employee relations policies. Nothing in this handbook is intended to create an express or implied contract of employment with the Company, or to modify or add to any contract of employment with the Company, or to create an expectation of continued employment for any specified term. The Company recognizes that both it and you remain free to terminate the employment relationship at any time, with or without cause. No agreement varying the at will nature of employment with the Company is valid unless reduced to a writing and signed by you and by an official of the Company.

Each employee is responsible for reading and following this handbook. If you at any time have questions regarding the application of the company's employee relations policies, we encourage you to discuss them with the Personnel Department or your supervisor.

Company policies may change from time to time, and the Company reserves the right to add to, modify, or delete provisions of this handbook or the policies and procedures on which they may be based, at any time without advance notice. This handbook supersedes and replaces all previous personnel policies, practices, and guidelines.

[d] Probationary Period Clauses

The concept of a "probationary period" derives from the collective bargaining practice of excepting from the "just cause" standard for discharge in the agreement a limited trial period, during which management has a virtually unlimited right to discharge a new employee.¹³ Employers who incorporate into their handbooks language that invokes this traditional industrial relations concept run a risk that a court may imply a "cause" standard for discharge after an employee successfully has completed the "probationary" period. The rationale is that if the employer states that an employee may be discharged for any reason, or for no reason whatsoever, during this limited period, implicitly the employer must be applying a more restrictive discharge standard after the probationary period has expired. The "successful" completion by an employee of a probationary period, or the employer's failure to criticize performance or extend a probationary period, also may estop an employer from alleging that the employee's unsatisfactory performance justified a discharge that occurs not long after expiration of the probationary period.

Walker v. Northern San Diego County Hospital District ¹⁴ demonstrates the danger of adopting a traditional "probationary period." In that case, the plaintiff was held to be entitled to try before a jury the issue of whether she was entitled to a pre-termination hearing and to be discharged only for cause. The court found that the plaintiff could be entitled to these protections because of the employer's "Probationary Period" clause in its employee handbook. During the employee's tenure, the clause was published in the handbook in three different versions. The first version stated that an employee would be promoted from "probationary" to "permanent employee" status at the completion of three months' employment if his or her work was "satisfactory." This language was amended to provide that the employer "reserve [d] the right to terminate employment without notice" if the employee's work during the probationary period was unsatisfactory, and later was again changed to provide that "If your overall performance is unsatisfactory, the [employer] reserves the right to terminate employment at any time within the probationary period."¹⁵ The court held that any of these versions could be sufficient to create an express or implied promise by the employer that "once an employee successfully completes the probationary period, [the employer] no longer has an unfettered right to discharge the employee."¹⁶

A traditional "probationary" period is logically inconsistent with the concept of at will employment. No employer who

desires to maintain an unfettered right to discipline and discharge should include such language in an employee handbook. Instead, the employer should be careful to expressly state that the completion of the probationary period (or whatever other term is used for the initial period of employment) does not guarantee employment for any period or modify the employer's at will employment standard, if such a standard exists. The probationary period thus becomes little more than a period of, perhaps, limited entitlement to employee benefits.

[e] FORM--Introductory Period Clause

[i] Comment

The sample clause set forth in [ii], *below* is an alternative, as discussed in [d], *above*, to a traditional "probationary" clause. The clause provides for an "introductory" period that makes no reference to termination with or without cause. The employer may wish to include language that defers full eligibility for benefits until expiration of the introductory period.

[ii] Form Introductory Period Clause

The Company recruits carefully and believes that it is hiring the best employee for each position. It is, however, to both the Company's and the employee's advantage to have an initial period of employment during which the employee has time to appraise the Company and job content and the Company to appraise the new employee's job performance. Thus, each new employee must satisfactorily complete an introductory period of _____ [*specify period, e.g., 90 days*], measured from his or her initial date of hire. [*If desired, specify any limitations on eligibility for benefits during the introductory period, e.g., the employee will not be eligible for nor earn any benefits during the introductory period, except for holiday pay.*] At the Company's discretion, this period may be extended one or more times.

The successful completion of the introductory period does not mean that the employee is guaranteed employment for any specific duration [, nor does it limit the employee's or the Company's right to terminate the employment at any time, with or without cause].

[f] Grievance Clauses

Although dispute resolution procedures may be set out in separate documents, the handbook provides a convenient medium to publicize their existence and provisions. If the employer wishes to provide some form of binding dispute resolution procedure, such as arbitration, as a precondition to litigation, a written arbitration agreement is necessary.¹⁷ For examples of grievance procedures, *see* [4], *below*.

[g] Discipline and Discharge Clauses

In light of current wrongful discharge law, prudence dictates that employers advise employees of what is expected of them, and the circumstances under which employees may be disciplined or discharged. However, if an employer adopts a discipline or discharge policy, it must scrupulously follow the terms of that policy. An employer's violation of discipline or termination guidelines in employment manuals or of other policies implying self-imposed limitations on the employer's power to discipline or terminate at will may be sufficient to state a cause of action for breach of an implied-in-fact employment contract.¹⁸

In addition, enforcement of rules and the assessment of discipline should be exercised consistently. All employees who commit the same type of offense should be treated the same, unless there is a reasonable and demonstrable basis for differences in the punishment (for example, different degrees of fault or mitigating or aggravating circumstances). By creating its own discipline and discharge policy, an employer should be able to determine for itself the standards by which it will deal with its employees, escaping the imposition of some other standard by a court or jury, and will also provide a written basis to monitor the consistent administration of discipline. The policy may recite that discharge will

be for "just," "good," or "sufficient" cause, if the employer wishes to bind itself to such a standard, or the employer may leave undefined the standard to be applied. In any event, the policy should be broad, covering most misconduct and performance problems, and should contain a disclaimer regarding its completeness. The policy also should include an express reservation of management discretion in administering the policy.ⁿ¹⁹

Many discipline and discharge policies include a provision for progressive discipline. The effective application of progressive discipline prohibits employees from asserting later that they were not warned that their conduct could lead to discharge, helps assure consistency by formalizing guidelines for the administration of discipline, and demonstrates the employer's wish to act reasonably and in good faith with its employees. Steps in progressive discipline policies typically begin with oral counselling, followed by a series of written warnings (which may or may not be signed by the employee) placed in the employee's personnel file, and end with probation or suspension. Some offenses, like theft or fighting, are so clearly inappropriate that progressive discipline will not be applied, and many companies establish two categories of offenses--misconduct that will not warrant progressive discipline, and other performance problems (like failure to meet performance standards or absenteeism or tardiness) that will. However, it is better to maintain the maximum flexibility in administering the policy regarding all offenses, and not to categorize offenses by severity.

It is important to note, however, that progressive discipline policies create a risk that the employer will bind itself to follow all of the steps.ⁿ²⁰ Therefore, the more prudent practice is to state in the policy that the employer reserves the right to choose the level of discipline, without first resorting to less severe disciplinary measures.

The size of the company should be taken into account in drafting a discipline policy. A formalized policy that may be appropriate in a larger company may be too restrictive or administratively burdensome in a smaller organization. No discipline policy should be adopted unless management intends to follow it.ⁿ²¹ Each rule to be included in the policy should be screened, to assure that it bears some reasonable relationship to a legitimate business interest.ⁿ²²

[h] FORM--Sample Discipline and Discharge Clause

[i] Comment

The sample clause set forth in [ii], *below* enumerates some of the common reasons why employers discharge and discipline employees. It is not exhaustive and does not contain a formal progressive discipline provision. The normal steps in such a system, such as warnings, probation, and suspension, are identified, but the use and timing of these choices is expressly reserved to management. *see* discussion in [g], *above*.

[ii] Form

Employees are expected to observe certain standards of job performance and conduct. The Company will endeavor, when appropriate, to provide an employee with a reasonable opportunity to correct any deficiencies in performance or adherence to Company rules. However, an employee who fails to do so may be subject to discipline, including termination of employment.

This section of the manual is intended to provide employees with fair notice of the standards of conduct and job performance expected of them. Of course, it is impossible to anticipate and list every conceivable circumstance that may arise and that may warrant imposition of discipline. Therefore, employees should recognize that conduct not specifically listed below, but that is otherwise detrimental to the interests of the Company, other employees, or customers, may also result in disciplinary action. Employees also should recognize that nothing in this policy is intended to alter the at will nature of their employment with the company.

Circumstances that may result in discipline, including termination of employment, include but are not limited to the following:

1. *Inadequate Job Performance.* Failure or refusal to satisfactorily perform the duties that are part of the employee's job, including failure to follow instructions or Company procedures or policies.

2. *Tardiness and Absenteeism.* Failure to be present at work as scheduled, including unauthorized failure to report to work on time; unauthorized failure to observe time limitations for meal periods or other work breaks; leaving work early without obtaining prior approval; excessive absences from work, regardless of the reason; and failure to notify the employee's supervisor or other appropriate employer representative of authorized absences from the job (such as for illness or vacation).

3. *Insubordination and Disruptive Conduct.* Examples include failure or unreasonable delay in carrying out instructions; discourteous, abusive, obscene, or offensive conduct or language toward customers, clients, business contacts, supervisors, or other employees; fighting on the job or on Company property; and threatening or inflicting bodily harm on another person.

4. *Sexual and Other Harassment of Fellow Employees, Customers, and Others.*

5. *Health and Safety Violations.* Failure to observe the health and safety regulations of the Company, or otherwise endangering the health and safety of others, including possession of a firearm or other dangerous weapon on company property.

6. *Willful or Negligent Destruction or Damage of Company Property, or of Another Employee's Property.*

7. *Dishonesty or Abuse of Company Policies.* Examples include failure to give complete or accurate information for personnel records; falsification of time sheets; false statements about the Company, other employees, or yourself; disclosure of confidential or proprietary information about the Company; being under the influence or in possession of, or selling, alcoholic beverages or narcotic or illegal drugs during work hours or on Company property; unauthorized possession of Company property or use of a Company vehicle; gambling on Company premises or during working hours; violation of conflict of interest rules; or other violation or abuse of Company policies.

8. *Misuse of Time.* Examples include neglect of job responsibilities; interfering with the work of other employees; sleeping on the job; or acts of inattention to duty.

9. *Theft or Pilfering.* Taking, possessing, or tampering with Company property, or that of customers or other employees, without authority.

10. *Illegal Actions.* Violations of public law or the commission of a criminal offense, if such violation or offense (a) indicates unfitness for the job, (b) adversely affects or indicates a potential threat to the Company and/or its employees, customers, or property, or (c) results in imprisonment of the employee or other criminal punishment that adversely affects his or her ability to adequately perform the duties of his or her job.

[i] Modifying Employment Policies

In *Asmus v. Pacific Bell* n22.1 the California Supreme Court found that an employment policy that had been unilaterally created by the employer could also be unilaterally modified or terminated by the employer if the policy was one of indefinite duration and the employer effected the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits.n22.2 In *Asmus* the employer issued a management employment securitypolicy ("MESP") in 1986. The MESP provided that it would be Pacific Bell's policy to offer management employees job security through reassignment and retraining if their jobs were eliminated and that the MESP would be maintained so long as there was no change that would materially affect achievement of Pacific Bell's business

plan.^{n22.3} In January 1990, Pacific Bell notified its managers that it might terminate the MESP. In October 1991, Pacific Bell announced it would terminate the MESP on April 1, 1992.^{n22.4} The Supreme Court found that the condition that the MESP would be maintained so long as there was no change that would materially affect the business plan achievement was not an ascertainable event that could be measured in any reasonable manner; therefore, the contract created by the MESP was one of indefinite duration, and the general rule of terminating or modifying unilateral contracts applied. The general rule of modifying or terminating unilateral contracts is that no additional consideration is required if reasonable notice of the change is given.^{n22.5} The Court also found that the MESP did not create an illusory contract because the plaintiffs' had obtained the benefits of the policy while it was operable.^{n22.6}

[2] Stock Purchase Plans and Profit-Sharing Agreements

Statements that employment is "at will" that are included in documents other than employee handbooks may be enforced if they are published in such a manner as to provide actual notice to the employee.ⁿ²³ In *Shapiro v. Wells Fargo Realty Advisors*,ⁿ²⁴ the court of appeal held that a jury was not entitled to reach the issue of whether cause was required for termination because a statement in a stock option agreement signed by the employee expressly provided that employment was at will.ⁿ²⁵ The court rejected the employee's argument that the agreement was an adhesion contract, but cautioned that the agreement "does not grant [the employer] the right to terminate an employee in violation of the law."ⁿ²⁶ Such disclaimer clauses therefore will not protect an employer against claims for discharge in violation of public policy.

The agreement in *Shapiro* required the employee to continue his employment for one year in order to be entitled to the stock option.ⁿ²⁷ Such clauses conditioning a grant of benefits on employment for a specified period are common in stock option and other benefit agreements, and raise the issue of whether such deferred compensation arrangements create enforceable expectations of continued employment. In *Bos v. United States Rubber Co.*,ⁿ²⁸ the court held that a pension agreement that reserved eligibility determinations to the employer did not create a contractually enforceable expectation that the employee would remain in the employer's employ until retirement age. A clause in the agreement disclaimed any "right of service" for any employee, and reserved to the employer "its right and privilege to discharge at any time any officer, employee or agent when the interests of the Company, in its judgment, may so require. ..."ⁿ²⁹ Other California cases confirm that pension or deferred compensation plans with vesting schedules or conditions of service do not by themselves create enforceable agreements of employment for a specified term.ⁿ³⁰

[3] Performance Evaluations

An employer's disciplinary policies often provide for progressive discipline, including counseling, oral or written warnings, and perhaps probation, before discharge will be authorized.ⁿ³¹ It also may be difficult to prove to a jury that a discharge was for a good reason if there is no documentation of poor performance or if the employee's personnel file contains only documents relating to salary increases or other indications of satisfactory performance. An effective performance evaluation procedure therefore is an important step toward limiting potential liability for wrongful discharge or discipline.ⁿ³² Such a procedure may be systematic, including annual or semi-annual scheduled reviews, or informal, with written comments or evaluations provided to the employee from time to time as necessary. Either way, the process should be calculated to provide the employee accurate, timely, and specific information on performance. A jury may conclude that the employer was at fault or acting in bad faith if notice of poor performance was not given before discharge.ⁿ³³

Standardizing review criteria and educating managers to formally and regularly evaluate their employees reduces the potential for arbitrary treatment or differential standards in discharge and discipline.ⁿ³⁴ However, to make the system work effectively, managers must be properly trained, and the employees must be aware of how the procedure is structured and what is expected of them. After a written evaluation is prepared, a meeting with the employee should be scheduled. The manager should set specific objectives for the meeting, including specific changes he or she wishes to see in the employee's performance. The manager should encourage a dialogue during the interview, and should provide

an opportunity for the employee to respond in writing as well. It will be difficult for the employee to challenge the manager's observations later if no objection is documented at or near the time of the review. The manager's comments on the appraisal should be detailed and candid. Where improvement is indicated, a plan and timetable for improvement should be specified by the manager. The manager should re-evaluate the employee's performance at the end of the designated time. Each performance appraisal should be subject to review by at least the next higher level of management, and the appraisal process should be audited from time to time to ensure consistency. The employer may also wish to make some appeal process available, perhaps through an "open door" or other informal grievance process.ⁿ³⁵ Whether or not the employee agrees with the performance review, the manager should obtain his or her signature on the review, documenting that he or she has received the review.

One court of appeal case has indicated that employers are not required to allow an employee's attorney to be present at discussions of the employee's performance.ⁿ³⁶

[4] Grievance Procedures

[a] Types of Procedures

Many employers have adopted some type of formal or informal internal dispute resolution procedure as an attempt to assure their employees an opportunity to voice their concerns before such concerns lead to litigation.ⁿ³⁷ Resolving disputes internally, when possible, may avoid litigation and avoids unnecessary publicity, which is particularly advantageous with sensitive claims such as sexual harassment. Finally, because one of a union's strongest organizing arguments is that a collective bargaining agreement will contain a mandatory grievance and arbitration procedure, an effective internal procedure may help an employer remain union-free.

Although there are numerous options available to employers, there are three basic approaches to drafting a dispute resolution procedure. The most informal is often referred to as an "open door" policy,ⁿ³⁸ and simply encourages open communication between the grievant and all levels of management. No formal dispute resolution process is provided. The second involves some variant of a formal grievance procedure.ⁿ³⁹ Typically, such procedures involve a series of steps in the resolution process, with ultimate appeal to a line manager, a disinterested manager, a high-level authority (such as the company president), or a committee composed of employees or of employees and managers. The third approach combines some form of grievance procedure with formal arbitration. The arbitration procedure may be binding or non-binding.

No employer should adopt a formal grievance or arbitration procedure unless it is prepared to follow it uniformly in all cases.ⁿ⁴⁰ To make the process effective, the employer must permit its employees to invoke the process without being labeled by management as "troublemakers" and without fear of retaliation. Management also must be prepared to evaluate realistically the merit of complaints brought at the lowest steps of the procedure, and not simply force all complaints through the process. Companies that permit line managers or committees to resolve disputes must also decide how much power to invest in them. The employer must decide whether these individuals are to have the right to reinstate discharged employees, and whether they are to have authority to resolve the dispute, or simply to recommend a solution to management. Some employers give their managers or committees the right to interpret established policy as it applies to specific circumstances, but not to change or establish policy.

Employers that establish internal dispute resolution procedures also should be aware that management's review and upholding of a discipline or discharge may establish the elements of knowledge and ratification necessary to impute to the company punitive damages.ⁿ⁴¹ On the other hand, the risk of a bad faith award should be substantially mitigated if the employer can show that it provided an opportunity for review of management's decision, and that, in its implementation of the review procedure, it dealt seriously with the employee's grievance.

One of the advantages to a formalized arbitration process may be to require an employee to submit a discharge dispute

to arbitration, rather than to a jury. Requiring employees to exhaust available grievance and arbitration remedies serves the policy of providing a quick, relatively inexpensive alternative to court litigation. Arbitration is less disruptive to the conduct of the employer's business and to the employee's personal life, and promotes the resolution of problems with some uniformity by persons with experience in handling employment disputes. A written agreement to submit disputes to arbitration should be enforceable in most, but not all, types of employment disputes.ⁿ⁴² However, to be enforceable, the stipulated procedure must be fair to the employee and provide minimum due process protections.ⁿ⁴³

Before promulgating an arbitration procedure, the employer will want to examine a number of options regarding how it is to be implemented. Central to the procedure is the question of how arbitrators are to be selected. Some private organizations, like the American Arbitration Association, provide lists of qualified arbitrators, or other individuals can be selected who commonly arbitrate traditional labor disputes. Alternatively, arbitrators can be selected from the workforce. Commercial and labor arbitrators bring with them a knowledge of traditional employee relations concepts and industry practice. On the other hand, an employer may question whether the rules applied by traditional labor arbitrators are appropriate for union-free enterprises, or whether a non-legalistic "common sense" approach may be desirable. In all grievance and arbitration procedures, the employer should also decide under what circumstances lawyers will be allowed,ⁿ⁴⁴ whether transcripts will be taken, who may be called as witnesses, and who will bear the costs of the proceeding. It may be appropriate to require the employee to bear some of the costs, including, for example, his or her own attorney's fees; however, imposing too great a cost burden on the employee may affect access to or the basic fairness of the procedure. The California Supreme Court has concluded that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.^{n44.1}

While procedurally fair arbitration agreements may be enforced, it is less clear that employees will be required to exhaust grievance procedures before resorting to a court suit. In *Westlake Community Hospital v. Superior Court*,ⁿ⁴⁵ a suit against a hospital association for revoking staff privileges was dismissed for failure to exhaust grievance procedures available under the association's bylaws. At least in states such as California, where courts are prepared to find that an employer's published policies and procedures are contractually binding,ⁿ⁴⁶ the policy favoring arbitration of disputes supports an argument for exhaustion of published internal grievance procedures that observe the basic dictates of due process.

[b] FORM--Open Door Policy

[i] Comment

The "Open Door Policy" described in [ii], *below*, sets forth the most informal format for resolution of grievances.ⁿ⁴⁷ It directs the chain of review through the first line supervisor, but thereafter leaves the options open to suit the circumstances. It is also a good idea to include an express representation that employees need not fear reprisals by invoking the process.

[ii] Form Sample Discipline and Discharge Clause

RESOLUTION OF GRIEVANCES (Open-Door Policy)

The Company believes that most problems can be resolved satisfactorily between the individual employee and his or her supervisor by talking things over. The Company therefore encourages each employee to first discuss all problems and misunderstandings with his or her immediate supervisor, or with another supervisor, if the employee so chooses. Any employee who is not then satisfied with the resolution need not hesitate to bring the matter to the attention of

anyone in management. The employee's standing in the Company will in no way be prejudiced by doing so.

The Company will attempt to keep all such expressions of concern, the results of any investigation, and the terms of any resolution confidential. However, in the course of investigating and resolving the matter, some dissemination of information to others may be necessary.

[c] FORM--Informal Grievance Procedure

[i] Comment

The sample grievance procedure set forth in [ii], *below*, is a combination of the "Open Door Policy" and a formal written complaint procedure. The employee may invoke either the informal or written procedures, depending on the circumstances. The stipulation in this procedure that written complaints will be responded to in writing is optional; some employers may choose to leave the manner of response flexible.

[ii] Form Open Door Policy

RESOLUTION OF GRIEVANCES

The Company believes that problems and misunderstandings are best dealt with promptly, before they get out of hand. If you feel your employment has been adversely affected by an employment decision, you may bring your complaint to the attention of management in the following ways:

1. If you feel that satisfactory resolution of your complaint could best be handled in an informal fashion, you may bring it to the attention of your immediate supervisor or manager, or to another supervisor if you so choose; or
2. You may file a written statement with _____ [*specify designated managerial employee, e.g., the company President*], setting out all the facts and circumstances of your complaint.

All written complaints filed with _____ [*specify designated managerial employee, e.g., the company President*] will be investigated[, and a resolution proposed in writing]. [The decision of the _____ (*specify designated manager*) will be final.]

The Company will attempt to keep all such expressions of concern, the results of any investigation, and the terms of any resolution confidential. However, in the course of investigating and resolving the matter, some dissemination of information to others may be necessary.

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Employment Relationships Employment Contracts Interpretation

FOOTNOTES:

(n1)Footnote 1. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373 ; see *Prevost v. First Western Bank* (1987) 193 Cal. App. 3d 1492, 1501-1502, 239 Cal. Rptr. 161 ; *Rulon-Miller v. International Business Machines Corp.* (1984) 162 Cal. App. 3d 241, 249-251, 208 Cal. Rptr. 524 ; see also Note, "Implied Contract Rights to Job Security," 26 *Stan. L. Rev.* 335 (1974).

(n2)Footnote 2. See *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765

P.2d 373 ; *Seubert v. McKesson Corp.* (1990) 223 Cal. App. 3d 1514, 1520 ; *Kerr v. Rose* (1990) 216 Cal. App. 3d 1551, 1560-1562, 265 Cal. Rptr. 597 ; *see also* discussion in ch. 60.

(n3)Footnote 3. *See Davis v. Consolidated Freightways* (1994) 29 Cal. App. 4th 354, 368-369, 34 Cal. Rptr. 2d 438 ; *Pugh v. See's Candies, Inc.* (1981) 116 Cal. App. 3d 311, 317, 329, 171 Cal. Rptr. 917 (company president "had a practice of not terminating administrative personnel except for good cause"); *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal. App. 3d 91, 97, 127 Cal. Rptr. 222 (representations during recruiting created implied limitations on termination at will); *see also* discussion in § 62.02[1]-[4].

(n4)Footnote 4. *See* California Employers' Guide to Employee Handbooks and Personnel Policy Manuals (Matthew Bender).

(n5)Footnote 5. *See* California Employers' Guide to Employee Handbooks and Personnel Policy Manuals (Matthew Bender).

(n6)Footnote 6. *Crain v. Burroughs Corp.* (C.D. Cal. 1983) 560 F. Supp. 849 .

(n7)Footnote 7. *Crain v. Burroughs Corp.* (C.D. Cal. 1983) 560 F. Supp. 849, 852-853 (contract also provided that provisions of the Manual would not apply to termination); *see also Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal. App. 3d 467, 474-475, 199 Cal. Rptr. 613 (employee signed stock option agreement allowing at will employment termination); *Gianaculas v. Trans World Airlines, Inc.* (9th Cir. 1985) 761 F.2d 1391, 1394 (employment application expressly provided for at will employment).

(n8)Footnote 8. *See Chapin v. Fairchild Camera etc. Corp.* (1973) 31 Cal. App. 3d 192, 194 n.2, 196-197, 107 Cal. Rptr. 111 .

(n9)Footnote 9. *See* discussion in [3], *below*.

(n10)Footnote 10. *See* discussion in [g], [h], *below*.

(n11)Footnote 11. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (liability under implied contract theory is based on contract, while liability under public policy sounds in tort).

(n12)Footnote 12. *See* California Employers' Guide to Employee Handbooks and Personnel Policy Manuals (Matthew Bender).

(n13)Footnote 13. *See Hill & Sinicropi, Management Rights: A Legal and Arbitral Analysis* (BNA 1986), pp. 293-295.

(n14)Footnote 14. *Walker v. Northern San Diego County Hospital District* (1982) 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 .

(n15)Footnote 15. *Walker v. Northern San Diego County Hospital District* (1982) 135 Cal. App. 3d 896, 902-903, 185 Cal. Rptr. 617 .

(n16)Footnote 16. *Walker v. Northern San Diego County Hospital District* (1982) 135 Cal. App. 3d 896, 903, 185 Cal. Rptr. 617 .

(n17)Footnote 17. *See Code Civ. Proc.* § 1281.

(n18)Footnote 18. *See Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal. 4th 454, 465, 46 Cal. Rptr. 2d 427, 904 P.2d 834 ; *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681-682 ; *see also* discussion in § 62.03[1][a].

(n19)Footnote 19. *See Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal. 4th 454, 465, 46 Cal. Rptr. 2d 427, 904 P.2d 834 ; *see generally* discussion in [a] and [b], *above*.

(n20)Footnote 20. *See Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal. 4th 454, 465, 46 Cal. Rptr. 2d 427, 904 P.2d 834 .

(n21)Footnote 21. *See Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal. 4th 454, 465, 46 Cal. Rptr. 2d 427, 904 P.2d 834 ; *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373 ; *Rulon-Miller v. International Business Machines Corp.* (1984) 162 Cal. App. 3d 241, 248, 208 Cal. Rptr. 524 .

(n22)Footnote 22. *See Rulon-Miller v. International Business Machines Corp.* (1984) 162 Cal. App. 3d 241, 248-251, 208 Cal. Rptr. 524 . This is important not only from a wrongful discharge perspective, but because of the requirements of equal employment opportunity laws. *See generally* discussion in ch. 41.

(n23)Footnote 22.1. *Asmus v. Pacific Bell* (2000) 23 Cal. 4th 1, 96 Cal. Rptr. 2d 179, 999 P.2d 71 .

(n24)Footnote 22.2. *See Asmus v. Pacific Bell* (2000) 23 Cal. 4th 1, 11, 18, 96 Cal. Rptr. 2d 179, 999 P.2d 71 .

(n25)Footnote 22.3. *See Asmus v. Pacific Bell* (2000) 23 Cal. 4th 1, 7, 96 Cal. Rptr. 2d 179, 999 P.2d 71 .

(n26)Footnote 22.4. *See Asmus v. Pacific Bell* (2000) 23 Cal. 4th 1, 7, 96 Cal. Rptr. 2d 179, 999 P.2d 71 .

(n27)Footnote 22.5. *See Asmus v. Pacific Bell* (2000) 23 Cal. 4th 1, 14-15, 96 Cal. Rptr. 2d 179, 999 P.2d 71 .

(n28)Footnote 22.6. *See Asmus v. Pacific Bell* (2000) 23 Cal. 4th 1, 15-16, 96 Cal. Rptr. 2d 179, 999 P.2d 71 .

(n29)Footnote 23. *Rochlis v. Walt Disney Co.* (1993) 19 Cal. App. 4th 201, 211, 23 Cal. Rptr. 2d 793 (provision in stock option agreement, reserving employer's right to terminate with or without cause, precluded as a matter of law any implied agreement to the contrary).

(n30)Footnote 24. *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 .

(n31)Footnote 25. The agreement provided that "Nothing in this Stock Option Agreement or in the Plan shall confer upon the Employee any right to continue in the employ of the Trust or the Advisor or shall interfere with or restrict in any way the rights of the Trust or the Advisor, which are hereby expressly reserved, to discharge the Employee at any time for any reason whatsoever, with or without good cause." *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal. App. 3d 467, 473 n. 1, 199 Cal. Rptr. 613 .

(n32)Footnote 26. *Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal. App. 3d 467, 482 n. 10, 199 Cal. Rptr. 613 .

(n33)Footnote 27. *See Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal. App. 3d 467, 473 n. 1, 199 Cal. Rptr. 613 .

(n34)Footnote 28. *Bos v. United States Rubber Co.* (1950) 100 Cal. App. 2d 565, 569, 224 P.2d 386 .

(n35)Footnote 29. *Bos v. United States Rubber Co.* (1950) 100 Cal. App. 2d 565, 567, 224 P.2d 386 .

(n36)Footnote 30. *See Magee v. San Francisco Bar Pilots Benevolent & Protective Ass'n* (1948) 88 Cal. App. 2d 278, 287, 198 P.2d 933 ; *Hunter v. Sparling* (1948) 87 Cal. App. 2d 711, 722-723, 197 P.2d 807 .

(n37)Footnote 31. *See* discussion in [1][g]-[h], *above*.

(n38)Footnote 32. *See* Martin, Bartol & Levine, "The Legal Ramifications of Performance Appraisal," 12 Empl.

Rel. L.J. 370 (1986-1987).

(n39)Footnote 33. While no California case has directly addressed the issue, courts in other jurisdictions have permitted employees to state a cause of action for negligence where advance notice adequate to permit the employee to improve performance was not provided prior to discharge. *see Schipani v. Ford Motor Co.* (1981) 102 Mich. App. 606, 302 N.W.2d 307, 315 ; *Bulkin v. Western Kraft East, Inc.* (E.D. Pa. 1976) 422 F. Supp. 437, 443-444 .

(n40)Footnote 34. *See* Martin, Bartol & Levine, "The Legal Ramifications of Performance Appraisal," 12 Empl. Rel. L. J. 370 (1986-1987).

(n41)Footnote 35. *See* discussion in [4], *below*.

(n42)Footnote 36. *Robinson v. Hewlett-Packard Corp.* (1986) 183 Cal. App. 3d 1108, 1131-1132, 228 Cal. Rptr. 591 .

(n43)Footnote 37. For discussions of various dispute resolution options, and their advantages and disadvantages, *see* Steiber, Blackburn & Pratt eds., *Protecting Unorganized Employees Against Unjust Discharge: Proceedings of a Conference Held at Michigan State University* (1983); Coulson, "Arbitration for the Individual Employee," 5 Empl. Rel. L.J. 406 (1979-1980); Lansing & Pegnetter, "Fair Dismissal Procedures for Non-Union Employees," 20 *Amer. Bus. L.J.* 75 (1982).

(n44)Footnote 38. *See* form in [b], *below*.

(n45)Footnote 39. *See* form in [c], *below*.

(n46)Footnote 40. *See Cleary v. American Airlines, Inc.* (1980) 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722 (the employer's adoption of a grievance procedure "compels the conclusion that this employer had recognized its responsibility to engage in good faith and fair dealing rather than in arbitrary conduct with respect to *all* of its employees") (emphasis in original); *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal. 3d 807, 825-826, 171 Cal. Rptr. 604, 623 P.2d 165 .

(n47)Footnote 41. *See Civ. Code* § 3294(b); *see also* discussion in ch. 30.

(n48)Footnote 42. *See* discussion in ch. 60.

(n49)Footnote 43. *See* discussion in ch. 60.

(n50)Footnote 44. One case has suggested that employers are not required to allow an employee's attorney to be present at discussions of the employee's performance. *see Robinson v. Hewlett-Packard Corp.* (1986) 183 Cal. App. 3d 1108, 1131-1132, 228 Cal. Rptr. 591 .

(n51)Footnote 44.1. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 110-111, 99 Cal. Rptr. 2d 745, 6 P.3d 669 .

(n52)Footnote 45. *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal. 3d 465, 475-477, 131 Cal. Rptr. 90, 551 P.2d 410 .

(n53)Footnote 46. *See Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal. 4th 454, 464-465, 46 Cal. Rptr. 2d 427, 904 P.2d 834 ; *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n54)Footnote 47. *See* discussion in [a], *above*.



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 62 Avoiding Wrongful Termination and Discipline Claims
Part A. TEXT

4-62 California Employment Law § 62.04

AUTHOR: By Ray E. Smith, J.D.

§ 62.04 General Considerations in Disciplining Employees

[1] Review to Ensure Compliance With Statutes, Employer Policy, and Past Practice

Before an employee is formally disciplined, the employer should review the decision to ensure that it is consistent with statutory limitations on the right to discipline and discharge,ⁿ¹ with published employer policies,ⁿ² and with the employer's past practice in like circumstances.ⁿ³ Circumstances that raise concerns regarding potential legal liability should be reviewed by counsel before discipline is implemented.ⁿ⁴

[2] Consideration of Disciplinary Alternatives

The employer should also review the proposed discipline to ensure that it fits the circumstances, and that no other alternative might be more appropriate. Unless the reason for proposed discipline involves extreme misconduct by the employee, it is advisable that discipline be administered only if the employee has had advance notice of the employer's expected standards of performance or conduct. If the employer has any doubts in this regard, it may be appropriate to consider other disciplinary alternatives, such as counseling, or oral or written warnings.

If the employer's investigation reveals that a personality conflict between supervisor and employee may be at least partly to blame, the company may wish to try a change in departments, job duties, or supervision. In addition to the value of making an effort to salvage an employee, the employer's litigation posture will be enhanced if it can demonstrate that it indeed chose discharge only as a last resort.

Before finally deciding to discharge an employee, the employer may wish to consider placing the employee on formal probation, or suspending him or her without pay, as an alternative to or the last step before discharge. *see* more detailed discussion in § 62.05[4][c].

Legal Topics:

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

Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See generally* discussion in ch. 60.

(n2)Footnote 2. *See* discussion in § 62.03[1][a].

(n3)Footnote 3. *See generally* *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n4)Footnote 4. *See* discussion in § 62.05[4][a][iii].



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 62 Avoiding Wrongful Termination and Discipline Claims
Part A. TEXT

4-62 California Employment Law § 62.05

AUTHOR: By Ray E. Smith, J.D.

§ 62.05 Termination of the Employment Relationship

[1] Voluntary Termination

[a] Exit Interviews

Employers should consider conducting exit interviews with all voluntarily terminating employees, in order to ascertain the true reason for leaving, and in order to obtain important information on how well the employer's employee relations policies are being implemented. A thorough exit interview may help expose internal problems and protect against surprise "constructive discharge" claims later.ⁿ¹ An employee who opens up in the interview because he or she perceives that the employer is listening may also seek to resolve any problems directly with the employer, rather than going to a lawyer or an outside administrative agency.

The interview should be conducted by someone other than the employee's direct supervisor, preferably someone with personnel training. The interviewer should solicit as much detail as possible concerning the reasons for leaving. Thorough notes of what is said should be taken by the interviewer. If the employee indicates that some mistreatment by the employer is responsible, the interviewer should consider asking the employee to permit the employer an opportunity to investigate the circumstances alleged before the employee resigns.

For discussion of exit interviews in the context of involuntary terminations, *see* [4][d], *below*.

[b] Constructive Discharge

[i] Employer-Offered Option to Resign or Be Terminated

Sometimes an employer will attempt to avoid discharging an employee by asking the employee to "resign" or "retire" in lieu of being fired. The employer may do this, perhaps, because it wishes to avoid an unpleasant task, or because it believes that there will be no danger of liability for discharge if the employee "resigns." However, the courts will treat an option to resign in lieu of discharge as a "constructive discharge," and will give it the same legal effect as though the

employee were simply fired.ⁿ² Providing an employee the opportunity to save face may, however, help ease the termination, and may also provide consideration supporting a separation agreement and release.ⁿ³

[ii] Resignations Because of Employee Claim of Intolerable Working Conditions

As discussed in Chapter 60, a constructive discharge may also arise in situations in which the employee quits as a result of intolerable working conditions.ⁿ⁴

In order to demonstrate constructive termination the employee has the burden of proving by a preponderance of the evidence that the employer either intentionally or knowingly created working conditions that were so intolerable or aggravated that a reasonable person would be compelled to resign.ⁿ⁵ It is not enough that resignation was one option; the conditions must have been so egregious that resignation was the only option.ⁿ⁶ In some circumstances a single incident, such as a crime of violence against an employee by an employer or a demand that the employee commit a crime, may constitute a constructive discharge. Generally, though, either single isolated incidents of misconduct or demotion or negative performance ratings, even when accompanied by a decrease in pay, are insufficient to support a claim.ⁿ⁷

In addition to conducting exit interviews to determine the reasons for an employee's resignation, an effective protection against constructive discharge liability is to properly train supervisors and managers, and to be candid with employees regarding the discharge decision. Finally, employers should promptly respond to and investigate employee complaints, particularly where statutory or public policy infractions are suggested.

[c] "No-Show" Policies

Some employers adopt policies that if an employee fails to report to work or call in for a certain period of time (typically 3 days), the employee will be deemed to have resigned. Although the termination may be treated by the employer as a voluntary resignation, the systematic enforcement of such policies, without a full investigation in each instance of the circumstances concerning the employee's failure to report in, may expose the employer to liability for wrongful discharge. For example, the employee may be disabled and unable to communicate with the employer; the employee may in fact have communicated with a supervisor other than the one to whom he or she ordinarily reports; or the employee's personal circumstances that caused the failure to report may create sympathy with a jury. In no event should a no-show policy be implemented without an attempt to thoroughly investigate the circumstances, and the employee should be notified in writing of the fact of termination.

[2] Expiration of Express Contract

Employment for a term specified in an express employment agreement terminates automatically on expiration of the specified period.ⁿ⁸ Although the employment may be continued by sufferance, the employment thereafter should be terminable at the will of either party, absent an express or implied agreement to the contrary,ⁿ⁹ and subject to any limitations imposed by public policy, as discussed in Chapter 60.

[3] Layoff

Termination pursuant to a layoff or reduction in force constitutes an involuntary discharge. Such terminations have been considered by some courts to be for "good cause."ⁿ¹⁰ Assuming that terminations for economic reasons are permissible, the employer should nevertheless be prepared to document those economic reasons and establish that they are not merely a pretext for discriminatory or other unlawful treatment of the employee.

[4] Discharge Procedure

[a] Independent Review to Ensure Compliance With Statutes, Employer Policy, and Past Practice

[i] In General

A pragmatic discharge procedure, consistently applied, will help avoid wrongful discharge liability. An effective pre-termination review will permit an objective evaluation of the sufficiency of "cause" for termination, will verify that documentation sufficient to sustain the decision is in the personnel file, and will protect against liability by assuring that the discharge itself is carried out appropriately.

A good practice to forestall discharges hastily considered, and to permit a thorough review of the discharge decision, is to prohibit line managers from immediately terminating employees. If the employee has committed a repetitive offense (such as excessive absenteeism or tardiness), or if the problem is one of poor performance, evaluation of the decision to discharge can take place while the employee remains on the job. If immediate removal from the workplace is dictated by the circumstances, for example, in situations involving insubordination or other misconduct, supervisors could be authorized to suspend the employee pending investigation. All discharges should be subject to prior review by the next higher level of management and, preferably, by someone such as a human resources professional who is trained in handling discharges. Discharges of employees who are in a protected class, or who otherwise present litigation risks,ⁿ¹¹ should be reviewed by an attorney as well. Above all, the procedure should ensure that the employer's treatment of the terminated employee is fair, when objectively examined. Conduct by the employer in discharging the employee, if unduly outrageous, will subject the employer to compensatory damages for emotional distress and punitive damages.ⁿ¹²

[ii] Verify Documentation Sufficient to Support the Discharge

Before any discharge is approved, the employee's personnel file should be reviewed, and supervisors or managers should be asked about written warnings or other pertinent documentation that may not have been placed in the personnel file. Recent performance evaluations or merit salary increases should be reviewed. The employer should verify that the reason proffered for discharge is objectively justifiable as legitimate to the operation of the business. The employer should check the employee's length of service--the greater the tenure an individual has, the more substantial, and substantiated, should be the reason for discharge. However, the employer should avoid a "kitchen sink" approach, in which all possible reasons for a discharge are given; the company may later be required to prove all of these allegations.

[iii] Check for "Red Flag" Situations

A discharge should be carefully scrutinized if the circumstances raise a "red flag" regarding the possibility of litigation. The employer should be especially cautious if the employee to be terminated is long-tenured, is a member of a racial or ethnic minority, is a woman in a job traditionally dominated by men, is over 40 years old, is pregnant or has a pregnancy-related medical condition, is disabled,ⁿ¹³ has requested or recently taken family and medical leave or pregnancy leave,ⁿ¹⁴ has suffered an on-the-job injury, or has filed a worker's compensation claim or testified concerning another employee's claim.ⁿ¹⁵ The employer similarly should be cautious in discharging an employee who recently made complaints of sexual or racial harassment,ⁿ¹⁶ or of workplace safety or possible illegal conduct by the employer, who has filed a complaint with the Labor Commissioner or testified in proceedings before the Commissioner,ⁿ¹⁷ or who has engaged in other protected activities.ⁿ¹⁸ Companies also should be alert for claims by employees that performance problems are attributable to drug or alcohol addiction. Private employers regularly employing 25 or more employees must reasonably accommodate employees who wish to enter a drug or alcohol rehabilitation program.ⁿ¹⁹

[iv] Investigate the Facts and Circumstances

The individual responsible for reviewing the discharge should speak with all persons who have knowledge of the relevant facts and circumstances. He or she should take detailed notes, and consider obtaining signed statements if a witness later may be unavailable or may be hostile to the company's position. Because interviews and statements given

to persons other than attorneys are not protected by the attorney-client privilege, there may be some situations that are sensitive enough to warrant participation by in-house or outside counsel (for example, an investigation involving allegations of sexual harassment, or a discharge in which the employer believes a lawsuit will follow). The California Supreme Court has recently reiterated that "good cause" for termination means, "A reasoned conclusion ... supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond."²⁰

[v] Verify That All Applicable Rules and Procedures Are Followed

In reviewing and implementing the discharge, the appropriate manager or personnel officer should review all applicable handbook statements and personnel policies and procedures to assure that they have been followed.²¹ That individual should also determine how persons similarly situated have been dealt with, to assure the uniform application of rules and procedures.²² If the company has a progressive discipline policy, the employer should verify that discipline was truly progressive. An employer risks liability for bad faith if it discharges in a situation where the offending conduct was tolerated for some period of time, and the employee then is subjected to a series of accelerated warnings or is summarily discharged as "an example." An employer also faces potential liability if it fails to follow all the steps in a progressive discipline procedure as outlined in its handbook.²³

However, even if the employer has not complied with certain policies, such as employee evaluations, if the contract is an express contract for a term, and there is no requirement of renewal, the employer is not liable for failure to renew.²⁴

[b] Pre-Termination Interview of Employee

The employer should meet with the employee and tell him that discharge is being considered, but that before making a final decision the company wishes to hear the employee's version of the events in question. The employee should be permitted a full opportunity to explain. Although a formal hearing may not be required,²⁵ prudence dictates that the employee's side of the story be heard before a decision is reached.²⁶ The employer may wish to consider asking the employee for a signed statement. If the employee raises factual allegations that have not been investigated, the employer should investigate them. If the employer has a grievance procedure in its handbook, it may be compelled to follow it should the employee request use of the process.²⁷ The employee should be advised or reminded (preferably in writing) of the existence of the procedure and any applicable time restrictions.

[c] Consideration of Probation or Other Alternatives

Before finally deciding to discharge, the employer should at least consider less severe alternatives. Some companies place employees on formal probation, or suspend them without pay as an alternative to or last step before discharge. If formal probation is used, the employee should be counseled as to what aspects of his or her performance need to be improved, a defined timetable for improvement should be established, and the employee should be warned that the next step will be discharge if the employee does not successfully complete the probationary period. All of this should be thoroughly documented. Additional training should also be considered, if this would assist the employee. At the end of the probation period (or sooner if the employee's performance deteriorates), the employee should be formally evaluated, and either discharged or, if performance has improved acceptably, taken off probation. Having agreed to provide the employee a designated probationary period to improve, the employer is probably taking a liability risk in discharging the employee before the expiration of that period, unless the employee's performance dips dramatically.²⁸

In certain situations, facts such as a personality conflict between the supervisor and employee may become known and the company may wish to try a change in departments, job duties, or supervision in an effort to salvage the employee. As stated above, the employer's litigation posture will be enhanced if it can demonstrate that it indeed chose discharge only as a last resort.

[d] Exit Interview

Discharged employees should be given exit interviews, if practical. The employee may provide a more candid assessment of the discharge than after he or she is coached by a lawyer. No attempt to dissuade the employee to take advantage of company benefits should be made, nor should the employer threaten to contest unemployment. The ability to continue the company's health benefits should be explained, and confirmed in writing.ⁿ²⁹ The employer should confirm that all wages have been paid, including commissions earned and payable and accrued unused vacation.ⁿ³⁰

Many discharged employees file lawsuits or charges with administrative agencies only after having been frustrated by their inability to obtain another job. If the company has a policy of confirming only dates of employment and job title,ⁿ³¹ the employee should be informed of this, and any available outplacement services should be explained. The employer should also consider providing a neutral letter confirming employment, or a letter of reference if one can be drafted that candidly describes the employee's good qualities. However, an employer can be held liable for injuries to a third party caused by the employer's failure to warn a prospective employer of the former employee's violent propensities.ⁿ³²

[e] FORM--Termination Checklist

[i] Comment

The checklist below is not exhaustive, but is intended to cover some of the major points that counsel for the employer should review and investigate before approving a discharge.

[ii] Form Termination Checklist

1. DISCIPLINARY PROCEDURES

- a. Were the employer's procedures and customary practices followed before the decision was made to terminate?
- b. Did the employee receive adequate, and all required, oral and written warnings?
- c. Is either probation or suspension required by the employer's policies or practices, and if so, has it been provided?
- d. Did the employee have adequate notice of the employer's conduct and performance standards, as well as the employer's assessment of the employee's conduct or performance, and an opportunity to improve his or her conduct or performance?
- e. Did the employer conduct a thorough investigation, including permitting the employee to tell his or her side of the story?
- f. Does the employee's conduct justify termination now?

2. SUFFICIENCY OF DOCUMENTATION

- a. Do the documents in the file adequately support the termination with demonstrable facts?
- b. Are there statements or credible witnesses to support the employer's allegations?

- c. Does the employee's prior disciplinary record support discipline?
- d. Can the employer demonstrate treatment consistent with how it previously had dealt with similarly situated individuals?
- e. Are both the documentation and the decision to terminate timely?

3. REPRESENTATIONS REGARDING CONTINUED EMPLOYMENT

- a. Were any representations made to the employee relating to job security, or suggesting that employment was promised for any particular period of time?
- b. If representations were made to the employee, were there any conditions (for example, that employment was subject to satisfactory performance)?
- c. How long has the employee worked for the company?
- d. Did the employee give up other job opportunities, or move, to accept the position?

4. PROTECTED ACTIVITY.

Does the decision to terminate follow suspiciously close to conduct by the employee that could be deemed protected activity under any state or federal statute (for example, the National Labor Relations Act, the Occupational Health and Safety Act, Title VII or the Fair Employment and Housing Act, or federal or state wage and hour laws)?

5. PROTECTED CLASS STATUS

- a. Is the employee a member of a class of employees protected by equal employment opportunity laws (for example, race, sex, pregnancy or pregnancy-related condition, marital status, national origin, religion, age, physical or mental disability, veteran, or sexual orientation)?
- b. If so, could the employee's protected class status have affected the decision to discharge in any way?
- c. If the employee is disabled, or if religious beliefs or practices may be a factor in the discharge, were all reasonable attempts to accommodate carried out?
- d. Did the employee oppose a practice directed at a co-employee in a protected class, or did the employee testify or offer to assist in a complaint by a member of a protected class?

[5] Releases of Liability

[a] Unilateral or Mutual General Release

In some situations, the employer may wish to reach an agreement to settle any possible claims the employee might have prior to termination of the employment relationship. The employer might also wish to do so in some situations in which an employee who has been terminated files, or threatens to file, an action against the employer. All agreements to compromise disputed employment claims should, as a matter of good practice, be evidenced by a written release, formal or informal according to the circumstances. The topics that should be covered in the agreement are set out in [b]-[h],

below, and a formal agreement is set out in [i], *below*. A form of informal agreement is set out in [j], *below*. The releasing language should be broad enough to encompass all individuals in an employment relationship with the employer, and all independent contractors or other agents of the company. The language should also be broad enough to encompass, to the extent permitted by law,ⁿ³³ every possible cause of action the employee might have.^{n33.1} The release should recite as supporting consideration all sums to be paid, any agreement to maintain insurance or other benefits, and any nonmonetary consideration, such as a letter of reference or the right to reinstatement.

An employee may request that a release be mutual, where there is a potential claim against him or her by the employer. This may arise, for example, where the employee has caused the employer financial loss, or where there are issues relating to the divulgence of confidential or proprietary information or trade secrets of the employer. Before the employer consents to a mutual release, it should conduct an appropriate investigation to ascertain any damages and the limits of its potential loss.

The doctrine of economic duress may arise in release, settlement, or severance agreement contexts if the employer's demand for a release can be seen as the doing of a wrongful act which was sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the employer's pressure.^{n33.2} But courts are reluctant to set aside settlements, and they apply economic duress only in limited circumstances and as a last resort.^{n33.3} To invalidate a settlement agreement, the person opposing it must show each of the following:^{n33.4}

- The employer knew there was no legitimate dispute and that it was liable for the full amount.
- The employer nevertheless refused in bad faith to pay and thereby created the economic duress of imminent bankruptcy for the employee.
- The employer, knowing the vulnerability its own bad faith had created, used the situation to escape an acknowledged debt.
- The employee was forced to accept an inequitably low amount.

The employee also may assert the doctrine of an unconscionable adhesion contract to attempt to invalidate a release. Unconscionability has both a procedural and a substantive element. The procedural element focuses on oppression or surprise due to unequal bargaining power. The substantive element focuses on overly harsh or one-sided results. Procedural and substantive unconscionability must both be present for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability. However, they need not be present in the same degree. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.^{n33.5}

[b] Releases From Wage Claims

By statute, an employee who is not hired for a specified term is entitled to compensation for all services rendered up to the time of his or her dismissal.ⁿ³⁴ With certain limited exceptions,ⁿ³⁵ any wages earned and unpaid at the time of discharge (including pay for earned and unused vacation time)ⁿ³⁶ are due and payable immediately.ⁿ³⁷ An employer may not require an employee to execute a release of any claim for wages that are due or to become due, unless those wages have already been paid.ⁿ³⁸ For these purposes, "execution of a release" includes requiring an employee, as a condition of being paid, to execute a statement of the hours the employee worked during a pay period, which the employer knows to be false.^{n38.1} The release therefore should not allocate any portion of the monetary consideration to wages due or to be paid up to the time of discharge. It appears that the employer may allocate a portion of the sum paid to compensation allegedly owed after the date of termination (that is, compensation that the employee would have earned but for the termination).

[c] Release of Workers' Compensation Claims

A release will not extinguish an employee's right to recovery under the worker's compensation laws, absent formal approval by the Worker's Compensation Appeals Board of the release and the sufficiency of the consideration provided.ⁿ³⁹ Presumably, claims for discrimination against workers' compensation claimants under *Labor Code section 132a* are also subject to this approval requirement, because the penalty for discrimination partially consists of an increase in the employee's compensation award.ⁿ⁴⁰

[d] Waiver of Unknown Claims

Absent an express waiver, *Civil Code section 1542* precludes the general release of claims unknown to the releasor at the time of signing which, were they known, would have materially affected the decision to sign. To be effective, the intent to waive this protection must be clear,ⁿ⁴¹ and the better practice is to quote the language of the statute verbatim in the release. However, nothing in § 1542 requires that it be designated in the release or that a party specifically waive its provisions. Thus, the absence of an explicit waiver under *Civ. Code § 1542* will not necessarily invalidate the release. For example, the absence of an explicit waiver of *Civ. Code § 1542* in a severance agreement did not preclude enforcement of the agreement, because the agreement stated that the plaintiff waived all claims existing as of the date he signed the agreement arising from or relating to his employment or the termination of his employment and any claims arising under the common law of contract, implied contract, tort, public policy, or statute, such as claims under specified legislative enactments, or any other federal or state law, statute, decision, order, policy or regulation establishing or relating to claims or rights of employees, including, but not limited to, any and all claims in tort or contract, based upon public policy, and any and all claims alleging breach of an express or implied, or oral or written, contract, or alleging misrepresentation, defamation, interference with contract, or wrongful discharge. Plaintiff understood he was releasing claims arising under all statutes to which the agreement referred, even those he did not understand, which was sufficient to withstand the provisions of *Civ. Code § 1542*.^{n41.1}

[e] Confidentiality

The employer often will be concerned about a "snowball" effect if word gets out that it has settled with an employee. To help protect against this, it may wish to include a clause requiring the employee to hold in confidence the fact of settlement and the terms of the agreement.

[f] Employment References

Counsel for the employee will often request that only specified information be given out by the employer in response to inquiries from prospective employers or others. If the employer agrees to this, it should condition its agreement on a requirement that the employee direct all inquiries to one or two identified managers. The employer otherwise may have little control over information being disseminated, and risks breach of the agreement. Another way to handle the issue is to draft and attach as an exhibit to the agreement a neutral letter of reference which incorporates the information the parties agree should be disclosed.

[g] Waiver of Reemployment Rights

To eliminate all ambiguity regarding whether the employee is eligible for rehire, the agreement should specify that the employee waives any rehire or reemployment rights. The execution by the employer of a settlement agreement that includes the reinstatement or retention of an employee may create an implied covenant that the employee will continue to be employed for a reasonable period thereafter.ⁿ⁴²

[h] FORM--Release**[i] Comment**

The settlement agreement and release set forth in [ii], *below* is intended for use in situations in which there are contested claims that may result in litigation, or in settlement of a lawsuit already filed. For discussion of the agreement and the various terms in the agreement, *see* [a]-[h], *above*.

If the employee has raised or may potentially raise allegations of age discrimination, the agreement must contain additional provisions specified in the Older Workers Benefit Protection (OWBPA) if it is to be effective as a waiver of rights under the Age Discrimination in Employment Act (ADEA).⁴³ The OWBPA has many procedural requirements, including a mandate that the employee be given a specified amount of time within in which to consider any agreement to waive rights under the ADEA.⁴⁴ For full discussion of the OWBPA requirements for a valid waiver of ADEA rights in the context of voluntary early retirement programs, *see* Chapter 41, Part D.

[ii] FORM--Settlement Agreement and Release Settlement Agreement and Release

SETTLEMENT AGREEMENT, GENERAL RELEASE, AND COVENANT NOT TO SUE

For and in consideration of the mutual promises set forth below, _____ [name of employee] ("Employee"), and _____ [name of employer] ("Employer") agree as follows:

1. On the execution of this Settlement Agreement, General Release, and Covenant Not to Sue ("Agreement") by Employee, Employer shall:

a. Pay Employee the net sum of \$ _____, as compensation for his/her claims of personal injury, including emotional distress and general damages; and

b. Pay Employee the gross sum of \$ _____, less applicable state and federal tax withholdings, as compensation for his/her claims of lost wages; and

c. Make such payments in the form of a check payable _____ [jointly] to Employee [and his/her attorney, _____ (name of attorney)]; and

d. Respond to inquiries from prospective employers of Employee as follows: (1) If in writing, Employer shall respond as follows: "This is to inform you that _____ [name of employee] was an employee of _____ [name of employer] from _____ [date], to _____ [date]. During his/her tenure, Mr./Ms. _____ [last name of employee] advanced from the position of _____ [title of first position] to the position of _____ [title of last position]. During the same period, Mr./Ms. _____ [last name of employee] received regular salary increases." (2) If orally: Employer shall endeavor to convey the substance of the written response above and shall state that it is against the policy of Employer to comment further on the quality of a former employee's performance.

[2. Simultaneously with the execution of this Agreement Employee shall cause his/her attorneys to sign and return to Employer a Stipulation and Order of Dismissal with Prejudice, which dismisses in its entirety and with prejudice Civil Action No. _____ presently pending in the Superior Court of California, County of _____. Employer will file the Stipulation and Order of Dismissal with Prejudice with the court.]

3. Employee _____ [further] agrees not to sue or initiate against Employer, or any of the persons, corporations, or other entities covered by the release in Paragraph 5 below, any compliance review, action, or proceeding, or to participate in same, individually or as a member of a class, under any contract (express or implied), law, or regulation, whether federal, state, or local, pertaining in any manner whatsoever to Employee's employment by

Employer OR THE TERMINATION THEREOF.n45

4. Employee further agrees that he/she shall not at any time seek employment with Employer, nor shall Employer at any time be under any obligation to hire him/her.

5. Employee, his/her heirs, representatives, successors, and assigns do hereby completely release and forever discharge Employer, its parent, affiliated, and subsidiary corporations, and it and their present and former shareholders, officers, agents, directors, employees and all of its or their heirs, representatives, successors, and assigns from all claims, rights, demands, actions, obligations, and causes of action of any and every kind, nature, and character, known or unknown, that Employee may now have, or has ever had, against Employer, including without limitation any and all claims for damages, declaratory or injunctive relief or attorneys' fees, that are in any way related to Employee's employment at Employer or the termination thereof [or which were raised or could have been raised in Civil Action No. _____ mentioned in Paragraph 2, *above*].

6. It is understood and agreed that this is a full and final release applying not only to all claims as defined in Paragraph 5 above that are presently known, anticipated or disclosed to Employee, but also to all claims as defined in Paragraph 5 above that are presently unknown, unanticipated, and undisclosed to Employee. Employee hereby waives any and all rights or benefits that he/she may now have, or may have in the future, under the terms of *California Civil Code, section 1542*, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his settlement with the debtor.

7. This Agreement and its terms shall be maintained by the parties and their attorneys in strict confidence, and neither a party nor his/her attorney shall disclose the Agreement or any of its terms, or the contents of any negotiations that led to this Agreement to any other person or entity, other than his/her spouse, without the express written consent of the other parties, unless required to do so by law.

8. It is understood and agreed that this is a compromise settlement of a disputed claim, or disputed claims, and that the furnishing of consideration pursuant to this Agreement shall not be deemed or construed at any time or for any purpose as an admission of liability by any party to this Agreement.

9. The parties to this Agreement further agree and promise that the parties shall bear their own costs and attorneys' fees with regard to the negotiation of this Agreement [and the prosecution of Civil Action No. _____ mentioned in Paragraph 2, *above*].

10. The undersigned parties to this Agreement acknowledge that they have been represented by counsel in the negotiation and preparation of this Agreement; that they have read the Agreement; that they are fully aware of its contents and of its legal effect; that the preceding paragraphs recite the sole consideration for this Agreement; that, with the exception set forth in the following two paragraphs, all agreements and understandings between the parties to this Agreement are embodied and expressed herein; and that each party enters into this Agreement freely, without coercion, and based on the party's own judgment and not in reliance on any representations or promises made by the other party, other than those contained herein.

11. Nothing in this Agreement shall be construed to bar Employee from receiving a total of \$_____ from Employer under the terms of its master pension plan, a sum that Employee does not dispute as his/her total entitlement under the master pension plan and a sum that Employer agrees to pay in addition to the sums set forth in Paragraph 1 above.

12. Employee agrees to indemnify, defend, and hold harmless Employer, its parent, affiliated, and subsidiary entities, and its and their directors, officers, employees, agents, attorneys, successors, and assigns from any taxes, assessments, penalties, or interest payments that Employer may at any time incur by reason of any demand, proceeding, action, or suit brought against Employer arising out of or in any manner related to local, state, or federal taxes allegedly due from Employee in connection with the settlement of Employee's claims against Employer for personal injuries, including emotional distress and general damages. If any demand, proceeding, action, or suit is made against Employer for any such alleged taxes due from Employee arising out of this settlement, Employer agrees to notify Employee and his/her attorney, _____ [name of attorney], immediately.

[13. If appropriate, insert confidentiality clause to protect Employer's confidential and proprietary information and trade secrets. *see* discussion in Chapter 70.]

14. This Agreement shall be construed and governed by the laws of the State of California. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any party. [The parties hereby submit themselves to the Courts of California in and for the County of _____ (insert desired county, such as county of Employer's principal place of business) for the purpose of enforcing this Agreement.]

15. Should any provision of this Agreement be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms, or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Agreement.

Dated: _____

By: _____ [signature]

Employee

Dated: _____

By: _____ [signature]

Attorney for Employee

Dated: _____

By: _____ [signature]

Employer

Dated: _____

By: _____ [signature]

Attorney for Company

[i] FORM--Short Form Separation Agreement

[i] Comment

The sample short form separation agreement in [ii], *below*, is for use in situations in which a longer, more legalistic, settlement agreement and release might be inappropriate. It should be used only to document simple separation

arrangements and should not be used when the circumstances suggest litigation will follow. No agreement or release should be used without first consulting with counsel. This form is insufficient to release claims under the Age Discrimination in Employment Act (ADEA).ⁿ⁴⁶ *see* discussion of releases in [a]-[h], *above*.

[ii] Form Short Form Separation Agreement

Dear _____:

This letter confirms the agreement reached during our conversation _____ [date or time, e.g., today].

I told you that the Company had reached a decision to terminate your employment, effective _____ [date], because _____ [give reason]. You and I agreed that in lieu of discharge you could submit a letter of resignation. Although our normal policy in such situations is _____ [specify], we agreed to compromise our differences by permitting your personnel file to reflect your resignation, by continuing your current compensation (except for any bonuses or vacation accrual, and subject to required withholding) until _____ [specify last date], and by paying the premiums for you on our group health insurance until _____ [specify last date]. We also agreed that the Company would not contest the award to you of unemployment benefits.

Except as specified above, this agreement between us completely extinguishes any claim you may have against the Company, and its officers, directors, agents, and employees, relating to your employment by and separation from the Company, including any claim for breach of contract or tort, or for violation of federal or state discrimination laws. No promises other than those referred to in this confirming letter were made to you to induce you to agree to this compromise.

I wish you the best in your future endeavors.

_____ [signature]

[Title of Employer's representative]

I understand and accept the above terms [and acknowledge that I have been provided the opportunity to consult with an attorney].

Date: _____

_____ [signature]

[Employee's name]

Date: _____

_____ [signature]

Witness

[6] Post-Discharge Procedure

[a] Employment References

Handling inquiries from prospective employers regarding a discharged employee is a delicate matter. The employer is guilty of a misdemeanor, and subject to treble civil damages, if it makes a misrepresentation that prevents, or attempts to prevent, a former employee from obtaining new employment.ⁿ⁴⁷ However, the employer may in response to a special request furnish without liability truthful information concerning the reason why a former employee resigned or was discharged.ⁿ⁴⁸ Caution is required, however, because a reference that describes an employee's strengths, but omits mention of the employee's negative qualities, such as violent propensities, could expose the employer to liability for damages if a third party is harmed as a result of the employer's failure to warn.ⁿ⁴⁹

Employers are required to divulge specified types of information regarding current and former employees to a law enforcement agency conducting a background investigation on an applicant.ⁿ⁵⁰ In the absence of fraud or malice, no employer is subject to any civil liability for any relevant cause of action by virtue of releasing employment information required by this provision.ⁿ⁵¹ The provision is intended to address the increasingly prevalent practice of employers to refuse to divulge information, even in the situation in which the applicant has signed a waiver to release the information.ⁿ⁵² For further discussion of this provision, see Chapter 51.

The employer may also incur liability for defamation. *Civil Code Section 47(c)* creates a qualified privilege against defamation liability for information provided to "interested" persons.ⁿ⁵³ The privilege covers statements regarding the reasons for discharge made to employees within the organization with a "need to know,"ⁿ⁵⁴ and to inquiring prospective employers.ⁿ⁵⁵ Section 47(c) expressly provides that the privilege applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based on credible evidence, made without malice, by a current or former employer of the applicant to, and on request of, one whom the employer reasonably believes is a prospective employer of the applicant. Section 47(c) also authorizes a current or former employer, or the employer's agent, to answer, whether or not the employer would rehire a current or former employee. However, the qualified privilege will be lost if the statements are knowingly falseⁿ⁵⁶ or concern aspects of the employee's personal life that have no bearing on the employment relationship.ⁿ⁵⁷ Furthermore, the statutory privilege specifically does not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by *Code of Civil Procedure Section 527.3* (concerning labor disputes) or any other provision of law.ⁿ⁵⁸ For additional discussion, see Chapter 63.

■ CONSULTANT'S COMMENT:

To protect themselves, many companies have adopted policies that they will only verify dates of employment, the last position held, and salary if disclosure is authorized by the employee in writing. For such a policy to be effective, all inquiries should be referred to a central source, who should emphasize that refusal to disclose additional information is "company policy," so that the inquirer draws no adverse inferences from the failure to elaborate. One problem with such a policy is that it prevents companies from giving recommendations for good employees who have left the company. Some employers instead prefer to provide letters of reference whenever possible. Even when an employee is discharged for "cause," it is often feasible to draft a neutral letter.

Although employers occasionally provide letters of reference for employees discharged involuntarily, the contents of such letters should be carefully considered. In a wrongful discharge action, a "favorable" letter or a letter that emphasizes the employee's "good points" may be used as evidence that the employee was not a poor performer. Therefore, employers are best advised to issue entirely neutral reference letters to involuntarily discharged employees and to consult counsel regarding the letter if litigation appears likely. *Commentary by Kirby Wilcox.*

[b] Unemployment Insurance Claims

Unemployment insurance was enacted as a nonadversarial social program designed to provide financial support to discharged employees. A former employee may, however, be disqualified from receiving benefits if, among other

things, he or she (1) voluntarily left his or her most recent work "without good cause," or (2) was discharged for "misconduct" in connection with that work.ⁿ⁵⁹ The rules governing eligibility for unemployment benefits are fully discussed in Chapter 80.

Terminated employees file for benefits routinely, and few employers make it a practice to contest an award. However, an employer sometimes will fight the award of benefits to a terminated employee, either as a cost control measure (because premiums are based on loss experience) or out of a sense of being wronged by an employee who "is not going to get away with it." The latter motivation is seldom defensible and may bolster an employee's claim of bad faith discharge.

A better reason for contesting benefits is that discharged employees often pursue multiple remedies simultaneously, including unemployment claims, charges of discrimination with state or federal agencies, and worker's compensation claims, in addition to wrongful discharge suits. At least at the early stages of an unemployment claim, the employee is seldom represented by an attorney, and unemployment hearings are informal. This permits a contesting employer to cross-examine and obtain from the employee a version of the pertinent events that may be more candid than might be offered after coaching by a lawyer. While an employer formerly had to worry about the collateral estoppel effect of fully contesting a benefits claim,ⁿ⁶⁰ a statute now prohibits the application of the collateral estoppel doctrine to unemployment benefits determinations.ⁿ⁶¹ However, statements made by the employer (or a person authorized to speak for the employer) during the course of the unemployment benefits proceedings may be used against the employer in subsequent court litigation to which the employer is a party,ⁿ⁶² and statements made by any other witness may be used to impeach subsequent inconsistent testimony by that witness.ⁿ⁶³ It is illegal to discharge or otherwise discriminate against any person who seeks information about their unemployment rights, cooperates with an unemployment benefits investigation, or testifies in any proceeding under the Unemployment Insurance Code.ⁿ⁶⁴

[c] Workers' Compensation Claims

As discussed in Chapter 20, with limited exceptions, workers' compensation is the exclusive remedy for any injury sustained by an employee arising out of and in the course of the employment.ⁿ⁶⁵ Because the workers' compensation procedure preempts any tort remedy based on injuries covered under the workers' compensation law, the determination on the claim should not have any collateral estoppel effect in subsequent litigation. However, as discussed in [b], *above*, in connection with unemployment insurance proceedings, the employer must bear in mind that statements made by the employer or its representatives in the workers' compensation proceedings may be used against it in subsequent litigation.ⁿ⁶⁶ Although workers' compensation claims tend to be handled routinely through insurance carriers, employers should carefully investigate the facts before making statements in these proceedings. The employer also should be aware that a release of workers' compensation claims will not preclude the employee's right to sue in court for other remedies, absent separate and specific release of those claims.ⁿ⁶⁷

The Labor Code prohibits an employer from discharging or discriminating against an employee because he or she has filed (or made known his or her intention to file) a workers' compensation claim or an application for adjudication, because he or she has received a workers' compensation award, or because he or she has testified (or indicated intent to testify) in another employee's case.ⁿ⁶⁸ The employer must therefore be careful in handling any workers' compensation claim not to give the appearance that the employee's discharge was in any way related to the workers' compensation claim.

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Employment Relationships At-Will Employment General Overview Labor & Employment Law Employment Relationships Employment Contracts General Overview Labor & Employment Law Employment Relationships Employment Contracts Conditions &

TermsDischargesLabor & Employment LawEmployment RelationshipsEmployment ContractsInterpretation

FOOTNOTES:

(n1)Footnote 1. *See* discussion in [b], *below*.

(n2)Footnote 2. *See Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1110 ("Constructive discharge is, indeed, just one form of wrongful discharge. The fact that the actual act of terminating employment is initiated by the employee, who concludes that she is compelled to leave as a result of the employer's actions, rather than by the employer directly does not change the fact that the employee has been discharged[;]" because date of employee's resignation fell within relevant period of limitations, her Title VII discrimination claim was timely filed); *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *Deaile v. General Telephone Co. of California* (1974) 40 Cal. App. 3d 841, 845, 115 Cal. Rptr. 582 (plaintiff told she could either retire, quit, or be fired); *see also* discussion in chs. 41 and 60.

(n3)Footnote 3. *See* discussion in [5], *below*.

(n4)Footnote 4. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 .

(n5)Footnote 5. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *see Casenas v. Fujisawa USA, Inc.* (1997) 58 Cal. App. 4th 101, 103, 113-115, 67 Cal. Rptr. 2d 827 (in wrongful constructive discharge case based on claims of harassment, court noted that employer's actions represented textbook example of appropriate response to harassment complaint).

(n6)Footnote 6. *Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 .

(n7)Footnote 7. *See Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1247, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 ; *see also Schnidrig v. Columbia Machine, Inc.* (9th Cir. 1996) 80 F.3d 1406, 1411-1412 (replacing employee with younger worker, moving to smaller office, excluding from meetings and decisions did not constitute constructive termination under federal age discrimination law); *King v. AC & R Advertising* (9th Cir. 1995) 65 F.3d 764, 767 (demotion in job level, even when accompanied by reduction in pay does not constitute constructive discharge); *Addy v. Bliss & Glennon* (1996) 44 Cal. App. 4th 205, 217-218, 51 Cal. Rptr. 2d 642 (denial of training and demotion not sufficiently intolerable to avoid summary judgment on constructive discharge claim).

(n8)Footnote 8. *Lab. Code* § 2920(a).

(n9)Footnote 9. *Lab. Code* § 2922.

(n10)Footnote 10. *See Malmstrom v. Kaiser Aluminum and Chem. Corp.* (1986) 187 Cal. App. 3d 299, 321, 231 Cal. Rptr. 820 ; *Clutterham v. Coachmen Industries, Inc.* (1985) 169 Cal. App. 3d 1223, 1226-1228, 215 Cal. Rptr. 795 ; *but see Sorosky v. Burroughs Corp.* (9th Cir. 1987) 826 F.2d 794, 802-803 (reversing summary judgment for employer; holding that discharge for "economic reasons" did not necessarily establish that covenant of good faith and fair dealing was not breached); *see* discussion in ch. 60.

(n11)Footnote 11. *See* discussion in [iii], *below*.

(n12)Footnote 12. *See Agarwal v. Johnson* (1979) 25 Cal. 3d 932, 947, 160 Cal. Rptr. 141, 603 P.2d 58 ; *see also* discussion in ch. 63.

(n13)Footnote 13. For discussion of restrictions imposed by equal employment opportunity laws, *see* ch. 41.

(n14)Footnote 14. For discussion of restrictions imposed by family and medical leave laws and pregnancy leave laws, *see* ch. 8.

(n15)Footnote 15. *See* discussion in ch. 20.

(n16)Footnote 16. *See* discussion in ch. 41.

(n17)Footnote 17. *See* discussion in ch. 5.

(n18)Footnote 18. *See* discussion in ch. 60.

(n19)Footnote 19. *Lab. Code § 1025*. Employers are not required, however, to continue to employ an individual who, because of alcohol or drug abuse, is unable to perform his or her job duties or is a danger to himself or herself or to others. *Lab. Code § 1025*; *Gosvener v. Coastal Corp.* (1996) 51 Cal. App. 4th 805, 815-816, 59 Cal. Rptr. 2d 339 (employer could properly discharge alcoholic employee who began drinking after each accommodation and was often too drunk to come to work).

(n20)Footnote 20. *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal. 4th 93, 108, 69 Cal. Rptr. 2d 900, 948 P.2d 412 .

(n21)Footnote 21. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n22)Footnote 22. *See Rulon-Miller v. International Business Machines Corp.* (1984) 162 Cal. App. 3d 241, 247-248, 208 Cal. Rptr. 524 (duty of good faith and fair dealing requires that similarly situated employees be treated similarly).

(n23)Footnote 23. *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal. 4th 454, 465, 46 Cal. Rptr. 2d 427, 904 P.2d 834 .

(n24)Footnote 24. *Tollefson v. Roman Catholic Bishop* (1990) 219 Cal. App. 3d 843, 853-857, 268 Cal. Rptr. 550 (also holding no cause of action for negligent performance of duty to evaluate); *see also Daly v. Exxon Corp.* (1997) 55 Cal. App. 4th 39, 45, 63 Cal. Rptr. 2d 727 (no claim for wrongful termination in violation of public policy for failure to renew fixed-term employment agreement).

(n25)Footnote 25. Courts have held that a private industry employee is not entitled to a "due process" pre-termination hearing of any kind, at least in the absence of a contractual promise to provide one. *See Shapiro v. Wells Fargo Realty Advisors* (1984) 152 Cal. App. 3d 467, 483, 199 Cal. Rptr. 613 ; *Crosier v. United Parcel Service, Inc.* (1983) 150 Cal. App. 3d 1132, 1140, 198 Cal. Rptr. 361 .

(n26)Footnote 26. *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal. 4th 93, 108, 69 Cal. Rptr. 2d 900, 948 P.2d 412 .

(n27)Footnote 27. *See Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373 (failure to follow steps set forth in employer's "termination guidelines" may constitute breach of implied in fact employment contract).

(n28)Footnote 28. In *Schaeffer v. Sperry Corp.* (C.D. Cal. 1984) 119 L.R.R.M. (BNA) 2688, 2692 , the district court rejected plaintiff's contention that memoranda placing him on probation contractually bound the company to continue his employment so long as he continued to meet the conditions of probation. Analyzing California law, the court held that "To accept plaintiff's contention that these memoranda rose to a level of contractual significance would only discourage employers from providing substandard employees with an opportunity to improve their performance. Moreover, it would effectively establish a greater degree of job security for substandard employees than for their

outstanding [at will] counterparts." *Schaeffer v. Sperry Corp.* (C.D. Cal. 1984) 119 L.R.R.M. (BNA) 2688, 2692 .

(n29)Footnote 29. 29 U.S.C. §§ 1161-1167 (enacted as part of the Consolidated Omnibus Reconciliation Act of 1985, commonly referred to as "COBRA") require that certain private group health plans offer continuation of health benefits under certain circumstances when coverage would otherwise be terminated, such as termination of the covered employee's employment (other than for gross misconduct). *see* 29 U.S.C. §§ 1162, 1163; *see also* *Health & Safety Code* §§ 1366.20-1366.28, *Ins. Code* §§ 10128.50-10128.58 (requiring COBRA-type notices and benefits for employees who work for employers with two to nineteen employees).

(n30)Footnote 30. *See Lab. Code* §§ 201, 201.5, 201.7, 203, 227.3; *see also* discussion in ch. 4.

(n31)Footnote 31. *See* discussion in [6][a], *below*.

(n32)Footnote 32. *See Randi W. v. Muroc Joint Unified School District* (1997) 14 Cal. 4th 1066, 60 Cal. Rptr. 2d 263, 929 P.2d 582 .

(n33)Footnote 33. *See* discussion in [b], [d], [e], *below*.

(n34)Footnote 33.1. Claims of wrongful discharge based on military service may not be waivable in a severance or settlement agreement. *See Perez v. Uline* (2007) 157 Cal. App. 4th 953, 957-958, 68 Cal. Rptr. 3d 872 (because USERRA directs that its provisions may not be eliminated by contract-- 38 U.S.C. § 4302(b)--release of rights in severance agreement obtained from captain in United States Marine Corps Reserves, terminating his employment on day he returned from duty, could not be enforced to extent severance agreement dealt with claims of termination based on plaintiff's membership in military or his military service)

(n35)Footnote 33.2. *Perez v. Uline* (2007) 157 Cal. App. 4th 953, 959, 68 Cal. Rptr. 3d 872 . *See Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal. App. 3d 1154, 1158, 204 Cal. Rptr. 86 .

(n36)Footnote 33.3. *Perez v. Uline* (2007) 157 Cal. App. 4th 953, 959, 68 Cal. Rptr. 3d 872 . *See San Diego Hospice v. County of San Diego* (1995) 31 Cal. App. 4th 1048, 1058, 37 Cal. Rptr. 2d 501 .

(n37)Footnote 33.4. *Perez v. Uline* (2007) 157 Cal. App. 4th 953, 959-960, 68 Cal. Rptr. 3d 872 (employee could not assert economic duress to invalidate severance agreement with employer, where there was no evidence employer knew it owed plaintiff money in addition to what was paid and used agreement to avoid paying acknowledged debt, or that employee was on verge of bankruptcy, six weeks' salary was inequitably low, or employee was forced to accept settlement amount to stave off financial disaster; that employee did not have job and needed money offered under agreement to pay his bills did not equate to economic duress).

(n38)Footnote 33.5. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669 . *See Perez v. Uline* (2007) 157 Cal. App. 4th 953, 959-960, 68 Cal. Rptr. 3d 872 (fact that employee did not expect to be terminated and presented with release agreement was not surprise described by *Armendariz*, nor was there any evidence that terms of agreement were too harsh or one-sided). For discussion of unconscionability in arbitration agreements and *Armendariz*, *see* § 90.20[1][e].

(n39)Footnote 34. *Lab. Code* § 2926.

(n40)Footnote 35. *See Lab. Code* §§ 201.5, 201.7.

(n41)Footnote 36. *See Lab. Code* § 227.3.

(n42)Footnote 37. *Lab. Code* § 201. For complete discussion of rules regarding time for payment of wages, *see* ch. 4.

(n43)Footnote 38. *See Lab. Code § 206.5(a); see also* discussion in chs. 4 and 5.

(n44)Footnote 38.1. *Lab. Code § 206.5(b).*

(n45)Footnote 39. *See Lab. Code § 5001.*

(n46)Footnote 40. *See Lab. Code § 132a(1); see also* discussion in chs. 20 and 60.

(n47)Footnote 41. *Casey v. Proctor (1963) 59 Cal. 2d 97, 109-110, 28 Cal. Rptr. 307, 378 P.2d 579 .*

(n48)Footnote 41.1. *Perez v. Uline (2007) 157 Cal. App. 4th 953, 958-959, 68 Cal. Rptr. 3d 872 . See also Skrbina v. Fleming Companies (1996) 45 Cal. App. 4th 1353, 53 Cal. Rptr. 2d 481* (release signed by plaintiff laid off by defendant, in exchange for severance pay, which did not refer to *Civ. Code § 1542*, but in which plaintiff agreed he was releasing defendant from all claims, known or unknown, that he had currently or in past, or that he may have in future, was valid).

(n49)Footnote 42. *See Miller v. Fairchild Industries, Inc. (9th Cir. 1986) 797 F.2d 727, 735 .*

(n50)Footnote 43. *See 29 U.S.C. § 626(f)(1).*

(n51)Footnote 44. *See 29 U.S.C. § 626(f)(1)(F).*

(n52)Footnote 45. Note that this paragraph will not necessarily bar the filing and investigation of certain charges of discrimination filed with the Equal Employment Opportunity Commission, or certain remedies under federal wage and hour laws. *see* EEOC Compliance Manual (CCH) § 15.8(b); *see also* discussion in chs. 5 and 42.

(n53)Footnote 46. *See 29 U.S.C. § 626(f)(1).* For a full discussion of the requirements for a valid waiver of ADEA rights, *see* ch. 41, Part D.

(n54)Footnote 47. *See Lab. Code §§ 1050, 1052, 1054; see also* discussion in ch. 63.

(n55)Footnote 48. *Lab. Code § 1053.*

(n56)Footnote 49. *Randi W. v. Muroc Joint Unified School District (1997) 14 Cal. 4th 1066 .*

(n57)Footnote 50. *Gov. Code § 1031.1(a)* (also setting forth conditions that must be met by agency's request).

(n58)Footnote 51. *Gov. Code § 1031.1(b).*

(n59)Footnote 52. *See Stats. 1993, ch. 135, § 1(d).*

(n60)Footnote 53. For a discussion of the qualified privilege, *see* Duffy, Defamation and Employer Privilege, 9 Empl. Rel. L.J. 444 (1983-1984).

(n61)Footnote 54. *Deaile v. General Telephone Co. of California (1974) 40 Cal. App. 3d 841, 846, 115 Cal. Rptr. 582 .*

(n62)Footnote 55. *Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 877, 111 Cal. Rptr. 117 .*

(n63)Footnote 56. *Blender v. Superior Court (1942) 55 Cal. App. 2d 24, 26, 130 P.2d 179 .*

(n64)Footnote 57. *See Schessler v. Keck (1954) 125 Cal. App. 2d 827, 834, 271 P.2d 588 .*

(n65)Footnote 58. *Civ. Code § 47(c).*

(n66)Footnote 59. *Unemp. Ins. Code* § 1256.

(n67)Footnote 60. *See People v. Sims* (1982) 32 Cal. 3d 468, 186 Cal. Rptr. 77, 651 P.2d 321 .

(n68)Footnote 61. *Unemp. Ins. Code* § 1960.

(n69)Footnote 62. *Evid. Code* §§ 1220, 1222.

(n70)Footnote 63. *See Evid. Code* §§ 780(h), 1202, 1235. A witness may not, however, be subjected to criminal prosecution or "penalty or forfeiture" based on any matter concerning which he or she is compelled to testify or produce evidence in an unemployment insurance proceeding, after claiming the privilege against self-incrimination. *see Unemp. Ins. Code* § 1955; *see also* discussion in ch. 80.

(n71)Footnote 64. *See Unemp. Ins. Code* § 1237; *see also* discussion in ch. 60.

(n72)Footnote 65. *See Lab. Code* §§ 3600(a), 3601(a), 3602(a); *see also Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 (workers' compensation is sole remedy for compensable injuries caused by misconduct involving actions that are a "normal part" of the employment relationship).

(n73)Footnote 66. *See Evid. Code* §§ 780(h), 1202, 1220, 1222.

(n74)Footnote 67. *See Ortiz v. Bank of America National Trust and Savings Association* (9th Cir. 1987) 852 F.2d 383, 387-388 (contract claim not released); *Pichon v. Pacific Gas and Electric Co.* (1989) 212 Cal. App. 3d 488, 502-503, 260 Cal. Rptr. 677 (same); *accord, Panopulos v. Westinghouse Electric Corp.* (1989) 216 Cal. App. 3d 660, 666-668, 264 Cal. Rptr. 810 .

(n75)Footnote 68. *See Lab. Code* § 132a(1), (3); *see also* discussion in chs. 20 and 60.



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 62 Avoiding Wrongful Termination and Discipline Claims
Part A. TEXT

4-62 California Employment Law §§ 62.06through 62.19

AUTHOR: By Ray E. Smith, J.D.

[Reserved]

§§ 62.06[Reserved]



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 62 Avoiding Wrongful Termination and Discipline Claims
Part B. BIBLIOGRAPHY

4-62 California Employment Law § 62.20

AUTHOR: By Ray E. Smith, J.D.

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Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Employment Relationships At-Will Employment General Overview Labor & Employment Law Employment Relationships Employment Contracts General Overview



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 62 Avoiding Wrongful Termination and Discipline Claims
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AUTHOR: By Ray E. Smith, J.D.

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Note, *Implied Contract Rights to Job Security*, 26 Stan. L. Rev. 335 (1974).

Legal Topics:

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

Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral Overview



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 63 Causes of Action Related to Wrongful Termination

4-63 California Employment Law 63.syn

AUTHOR: By James Buyoucos, J.D.

§ 63.syn Synopsis to Chapter 63: Causes of Action Related to Wrongful Termination

§ 63.01 Assault and Battery

[1] Applicability to Wrongful Termination Actions

[2] Elements of Cause of Action

[a] Assault

[b] Battery

[3] Defenses

[4] Remedies

§ 63.02 Defamation

[1] Applicability to Wrongful Termination Actions

[2] Elements of Cause of Action

[a] Generally

[b] Defamatory Statement

[c] Publication

[d] Identification

[e] Intent

[f] Damages

[3] Defenses

[a] Preemption

[i] Workers' Compensation Law

[ii] Federal Labor Law

[b] Privileges Under State Law

[c] Constitutional Privilege

[d] Truth

[e] Consent

[4] Remedies

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§ 63.03 False Imprisonment

§ 63.04 Interference With Contract/Interference With Prospective Economic Advantage

§ 63.05 Fraud and Deceit

[1] Tort Damages for Fraud Unavailable for Misrepresentation Committed in Course of Termination of Employment

[2] Cause of Action Can Be Stated for Misrepresentation Independent of Termination

[3] Elements of Cause of Action

[4] Remedies

§ 63.06 Other Related Causes of Action

[1] Misrepresentation to Induce Worker to Change Residence (Labor Code Section 970)

[2] Preventing Subsequent Employment of Former Employee by Misrepresentation (Labor Code Section 1050)

[3] Other Statutory Violations

[4] No Loss of Consortium or Negligent Infliction of Emotional Distress Action for Employee's Spouse

[5] No Tort Action for Negligent Performance of Contractual Duty to Evaluate

[6] Employee's Claim for Intentional and Negligent Infliction of Emotional Distress

[7] Promissory Estoppel and Reliance Damages

§§ 63.07through 63.19 [Reserved]

§ 63.20 Legal Texts

By James Buyoucos, J.D.n*

FOOTNOTES:

(n1)Footnote *. Publisher's Editorial Staff.



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 63 Causes of Action Related to Wrongful Termination

4-63 California Employment Law Scope

AUTHOR: By James Buyoucos, J.D.

Scope

By James Buyoucos, J.D.n* SCOPE

This chapter provides an overview of tort causes of action (in addition to those discussed in Chapter 60) that may in certain factual settings arise out of termination of an employment relationship. The tort theories summarized include libel and slander, assault and battery, false imprisonment, deceit, and interference with prospective economic advantage. Also discussed are specific statutory causes of action that arise in the employment context including actions for blacklisting an employee and for wrongfully causing an employee to relocate for the purpose of gaining employment. It also discusses limitations placed on other theories of recovery when raised in the employment context, e.g., emotional distress claims. The chapter focuses on these torts as they relate to the employment relationship and includes a discussion of defenses that are likely to be available to an employer, including the exclusive remedy provision of workers' compensation law. For a further discussion of preemption of a tort cause of action under the exclusive remedy provision of workers' compensation law, *see* Chapter 20. For a complete discussion of these torts in general, *see* Levy, Golden, and Sacks, *California Torts* (Matthew Bender).

For discussion of liability for wrongful termination of employment in itself, under statutory, tort, and contractual theories, and defenses to such liability, *see* Chapter 60.

FOOTNOTES:

(n2)Footnote *. Publisher's Editorial Staff.



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 63 Causes of Action Related to Wrongful Termination

Part A. TEXT

4-63 California Employment Law § 63.01

AUTHOR: By James Buyoucos, J.D.

§ 63.01 Assault and Battery

[1] Applicability to Wrongful Termination Actions

In cases in which the employee is terminated as a result of a physical altercation with the employer or with a fellow employee, or in which the employee's dismissal is accompanied by physical force applied by the employer or a supervisor, the employee may have a cause of action for assault or battery as well as a cause of action for wrongful termination.

[2] Elements of Cause of Action

Although the torts of assault and battery often occur in tandem, they are separate torts.

[a] Assault

Although the reported California cases have not always been consistent in setting forth the elements of the tort of assault, it appears that those elements are (1) the demonstration of an unlawful intent by one person to inflict immediate injury on the person of another person who is then present, and (2) apprehension of such injury by the person present.ⁿ¹ It is immaterial that the tortfeasor did not have the present ability to inflict injury, so long as the party bringing the action had a reasonable apprehension of injury.ⁿ² It should be noted that when a person has been threatened and suffers apprehension of *future* injury, the elements of the tort of assault are not satisfied, but an action for intentional infliction of emotional distress may be available.ⁿ³ Similarly, while mere words are normally insufficient to support a cause of action for assault,ⁿ⁴ words alone may support a cause of action for intentional infliction of emotional distress.ⁿ⁵

[b] Battery

The elements of the tort of battery consist of an intentional, unlawful, and harmful or offensive contact by one person with the person of another.ⁿ⁶ An act is "intentional" if either: (1) the actor acted with the intention of touching the injured party, regardless of whether he or she intended to hurt the injured party; or (2) the actor intended to put the

injured party in apprehension of a harmful or offensive touching.ⁿ⁷ Case law has not clearly defined the term "unlawful" as it relates to the definition of a battery. However, one case has held that lack of consent is an essential element of battery.ⁿ⁸ A contact is "harmful or offensive" not only in cases of physical beatings,ⁿ⁹ but also in cases in which the contact was not harmful but offended a reasonable sense of personal dignity.ⁿ¹⁰

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

An important tactical consideration to keep in mind when considering whether to allege the tort of battery in connection with wrongful discharge litigation is that it may aid in the characterization of damages in the event of a negotiated settlement. Since the tax laws were changed, it has been difficult, if not impossible, to characterize the proceeds of a wrongful termination settlement as tax-free, personal injury damages, even in part. The exception lies in physical injuries arising from, e.g., battery. Thus, in a sexual harassment case in which an unwanted touching has occurred, and particularly where any amount of violence is involved, an allegation of battery may permit characterization of some or all of the damages as nontaxable. *Commentary by John M. True, III.*

For a full discussion of the elements of the torts of assault and battery, *see* Levy, Golden, and Sacks, California Torts, Chapter 41 (Matthew Bender).

[3] Defenses

Normally, an employer is not insulated from liability for intentional assaults or batteries by the exclusive remedy provision of workers' compensation law.ⁿ¹¹ However, this specific exception to workers' compensation exclusivity for cases in which an employer commits a willful physical assault on an employeeⁿ¹² does not authorize a private action against an employer based on another *employee's* willful and unprovoked physical act of aggression.ⁿ¹³ In *Fretland v. County of Humboldt*,ⁿ¹⁴ the court of appeal rejected plaintiff's argument that the employer was liable for the unprovoked attack of a coemployee under the doctrine of respondeat superior.ⁿ¹⁵ The court concluded that only positive misconduct by the employer can be the basis for an employer's liability for assault and battery, and the imposition of respondeat superior liability in these circumstances would directly violate *Labor Code Section 3601(b)*.ⁿ¹⁶ The court acknowledged, however, that if the employer had joined in the assault, or ratified it, the employer could be jointly liable with the coemployee.ⁿ¹⁷

The privilege of self-defense is one of the primary defenses to the torts of assault and battery.^{n17.1} Under *Civil Code section 50*, a person may use any necessary force to protect the person or the property of himself or herself, or of a relative or member of the family, or of a ward, employee, employer, or guest. The degree of force that may be used in self defense is limited to the amount that would have appeared necessary to a reasonable person under the circumstances based on the knowledge and facts presented to the defendant at the time he or she acted.ⁿ¹⁸ In addition, a person may use reasonable force to protect a third person from assault. Thus, an employee may go to the aid of a fellow employee who is being assaulted and may use as much force as is reasonably necessary to prevent the assault.ⁿ¹⁹

Consent is also a defense to an action for assault and/or battery.ⁿ²⁰ However, an act that exceeds the scope of the consent given constitutes a battery.ⁿ²¹

For a thorough discussion of defenses to the torts of assault and battery, *see* Levy, Golden, and Sacks, California Torts, Ch. 41, *Assault and Battery*, (Matthew Bender).

[4] Remedies

In an action for assault and battery, a successful plaintiff is entitled to compensation for all harm proximately caused by the assault and battery including damages for pain and suffering, fear, anxiety, and other types of emotional distress, as well as damages for lost wages and earning capacity and medical expenses.ⁿ²² In addition, punitive damages are also

available in actions for assault and battery, assuming that plaintiff is able to prove the requisite malice, oppression, or fraud on the part of the defendant.ⁿ²³

For a discussion of remedies available in actions for assault and battery, *see* Levy, Golden, and Sacks, California Torts, Chapter 41, *Assault and Battery* (Matthew Bender). For a discussion of remedies available in tort actions generally, *see* Levy, Golden, and Sacks, California Torts Chapters 50- 58 (Matthew Bender).

Legal Topics:

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

Labor & Employment Law Wrongful Termination General Overview Torts Intentional Torts Assault & Battery General Overview

FOOTNOTES:

(n1)Footnote 1. *See Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 6-7, 146 P.2d 57*; *see also Restatement (Second) of Torts § 21(1)* (requiring apprehension of harmful or offensive contact rather than apprehension of injury); *but see Fraguglia v. Sala (1936) 17 Cal. App. 2d 738, 742, 62 P.2d 783* (utilizing definition of assault found in *Penal Code § 240*, which defines assault as attempt to commit violent injury on another). For the standard jury instruction on the essential factual elements of a cause of action for assault, *see* Judicial Council of California Civil Jury Instructions, *CACI 1301* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction on intent in the context of a claim for assault, *see* Judicial Council of California Civil Jury Instructions, *CACI 1320* (Matthew Bender). For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for an assault claim, *see* Judicial Council of California Civil Jury Instructions, *CACI VF-1302* (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n2)Footnote 2. *See Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57* (defendant's act of pointing unloaded gun at plaintiff as assault).

(n3)Footnote 3. *See State Rubbish Collectors Association v. Siliznoff (1952) 38 Cal. 2d 330, 336, 240 P.2d 282*, discussed in § 63.04.

(n4)Footnote 4. *See Restatement 2d Torts § 31.*

(n5)Footnote 5. *See State Rubbish Collectors Association v. Siliznoff (1952) 38 Cal. 2d 330, 336, 240 P.2d 282*.

(n6)Footnote 6. *Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422*. For the standard jury instruction on the essential factual elements of a cause of action for battery, *see* Judicial Council of California Civil Jury Instructions, *CACI 1300* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For the standard jury instruction on intent in the context of a claim for battery, *see* Judicial Council of California Civil Jury Instructions, *CACI 1320* (Matthew Bender). For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for a claim of battery, *see* Judicial Council of California Civil Jury Instructions, *CACI VF-1300* (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n7)Footnote 7. *Weisbart v. Flohr (1968) 260 Cal. App. 2d 281, 284-285, 67 Cal. Rptr. 114* (dicta).

(n8)Footnote 8. *Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 938, 198 Cal. Rptr. 249*.

(n9)Footnote 9. *Boyes v. Evans (1936) 14 Cal. App. 2d 472, 479, 58 P.2d 922*.

(n10)Footnote 10. *See Restatement (Second) of Torts § 19.*

(n11)Footnote 11. *Lab. Code § 3602(b)*. For a discussion of employer defenses under the exclusive remedy provision of workers' compensation law, *see* Chapter 20.

(n12)Footnote 12. *Lab. Code § 3602(b)(1)*.

(n13)Footnote 13. *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1486-1487, 82 Cal. Rptr. 2d 359 ; *see Lab. Code § 3601(a)(1)* (authorizing suit for assault against coemployee, but not against employer); *Lab. Code § 3601(b)* (prohibiting imposition of civil liability on employer for employee's assault and battery against coemployee); *cf. Lab. Code § 3602(b)(1)* (addressing assault on employee by employer, not by coemployee).

(n14)Footnote 14. *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1487, 82 Cal. Rptr. 2d 359 .

(n15)Footnote 15. *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1487, 82 Cal. Rptr. 2d 359 .

(n16)Footnote 16. *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1487, 82 Cal. Rptr. 2d 359 ; *accord Iverson v. Atlas Pacific Eng'r* (1983) 143 Cal. App. 3d 219, 226, 191 Cal. Rptr. 696 .

(n17)Footnote 17. *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1487-1488, 82 Cal. Rptr. 2d 359 ;*see, e.g., Iverson v. Atlas Pacific Eng'r* (1983) 143 Cal. App. 3d 219, 228, 191 Cal. Rptr. 696 ; *See also* § 20.43[1].

(n18)Footnote 17.1. For the standard jury instruction on self-defense or defense of others as a defense to a claim of assault and/or battery, *see* Judicial Council of California Civil Jury Instructions, *CACI 1304* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for the defense of self-defense or defense of others to a claim of battery, *see* Judicial Council of California Civil Jury Instructions, *CACI VF-1301* (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n19)Footnote 18. *Boyer v. Waples* (1962) 206 Cal. App. 2d 725, 727, 24 Cal. Rptr. 192 .

(n20)Footnote 19. *Ward v. De Martini* (1930) 108 Cal. App. 745, 748, 292 P. 192 .

(n21)Footnote 20. *Barbara A. v. John G.* (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422 ; *Sayadoff v. Warda* (1954) 125 Cal. App. 2d 626, 631-632, 271 P.2d 140 (consent as valid defense even though conduct complained of was illegal). For the standard jury instructions relating to the defense of consent, *see* Judicial Council of California Civil Jury Instructions, *CACI 1302 et seq.* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n22)Footnote 21. *See Barbara A. v. John G.* (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422 .

(n23)Footnote 22. *Delia S. v. Torres* (1982) 134 Cal. App. 3d 471, 482, 184 Cal. Rptr. 787 , *overruled by Christensen v. Superior Court* (1991) 54 Cal. 3d 868, 905, 2 Cal. Rptr. 2d 79 (to extent that *Delia S.* held that claims for intentional infliction of emotional distress may arise out of egregious conduct proximately caused by defendant, but not directed toward plaintiff); *McChristian v. Popkin* (1946) 75 Cal. App. 2d 249, 262-263, 171 P.2d 85 .

(n24)Footnote 23. *See Civ. Code § 3294; Scruggs v. Haynes* (1967) 252 Cal. App. 2d 256, 269, 60 Cal. Rptr. 355 .



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California Employment Law

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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 63 Causes of Action Related to Wrongful Termination

Part A. TEXT

4-63 California Employment Law § 63.02

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§ 63.02 Defamation

[1] Applicability to Wrongful Termination Actions

In cases in which an employee is terminated as a result of a false statement made about the employee that injures the employee's reputation, or in which such false statements are made about plaintiff in the connection with the termination, the employee may have a cause of action for defamation, i.e., for libel or slander, as well as a cause of action for wrongful termination. In addition, an employee who has left an employer for any reason may have a cause of action for defamation against the former employer if the employer publishes any defamatory falsehoods about the employee.ⁿ¹ This may occur when the employee searches for new employment, and a prospective employer contacts the former employer concerning the employee's fitness for employment.ⁿ² However, as discussed in [3], *below*, the employee may have difficulty overcoming certain defenses that are often available when a defamatory statement is made in the employment context.

Under the doctrine of respondeat superior, an employer may be vicariously liable for a defamatory statement made by one of its employees.ⁿ³ Furthermore, coemployees may be sued for libel relating to an employer's personnel actions, because libel is a statutory action.^{n3.1} For a full discussion of the doctrine of respondeat superior, *see* Ch. 30.

[2] Elements of Cause of Action

[a] Generally

With minor exceptions that are noted below, the torts of libel and slander have essentially the same elements. The primary difference between them is that libel involves a defamatory statement by writing or other fixed representation to the eye,ⁿ⁴ while slander involves a defamatory statement uttered orally.ⁿ⁵ The elements of a claim for libel or slander are (1) a false and defamatory statement,ⁿ⁶ (2) publication,ⁿ⁷ (3) identification,ⁿ⁸ (4) intent,ⁿ⁹ and (5) resulting damages.ⁿ¹⁰

If a statement is defamatory per se, an action may be brought without alleging special damages.ⁿ¹¹ The rules of libel

and slander differ in the following regard. A statement is slanderous per se if it fits within one of the four specific categories found in *Civil Code section 46*, including a statement that injures the defamed party in his or her office, profession, trade, or business.ⁿ¹² A slander that falls within the first four categories of *Civil Code § 46* requires no proof of actual damages.^{n12.1} A slander that does not fit into those four categories is slander *per quod*, and the plaintiff must prove special damages in order to recover.^{n12.2} A statement is libelous per se if it is defamatory on its face.ⁿ¹³ A statement is defamatory on its face if a defamatory meaning appears from the language itself without the necessity of explanatory matter.ⁿ¹⁴

For full discussion of the tort of defamation, see Levy, Golden, and Sacks, California Torts, Chapter 45, "Defamation" (Matthew Bender).

[b] Defamatory Statement

A statement is defamatory if it lowers a person's reputation, either generally, or with respect to the person's occupation.ⁿ¹⁵ *Civil Code section 46* defines slander as falling into five categories and includes, within its definition, statements that tend to directly injure a person in his or her office, profession, trade, or business by imputing to the person "general disqualification in those respects which the occupation peculiarly requires."ⁿ¹⁶ *Civil Code section 45* defines libel to include statements that expose a person to hatred, contempt, ridicule, or obloquy, cause the person to be shunned or avoided, or have a tendency to injure the person in his or her occupation. Under these provisions, untrue statements suggesting that an employee is incompetent, unethical, or otherwise unfit for employment are defamatory.ⁿ¹⁷ Such statements need not be specific, and will be considered defamatory as long as they generally impugn the employee's character.ⁿ¹⁸

One court of appeal has stated broadly that an employer's performance evaluation cannot support a cause of action for libel unless the evaluation falsely accuses an employee of criminal conduct, lack of integrity, dishonesty, incompetence, or reprehensible personal characteristics or behavior.ⁿ¹⁹ The court stated that this was the proper test even if the employer's perceptions about an employee's efforts, attitude, performance, potential, or worth to the enterprise are objectively wrong and cannot be supported by reference to concrete, provable facts.ⁿ²⁰ Another court cautioned that performance evaluations are inherently subjective and "courts should be extremely cautious before allowing such comments to be the basis of a libel action."ⁿ²¹ Yet, another court reversed the dismissal of libel actions against defendant-coworkers, accusing them of falsifying evaluations of plaintiff's performance because libel is a statutory action under *Civ. Code §§ 43-48.5*.^{n21.1}

In addition to statements that directly injure a person in his or her occupation, imputations of criminal conduct or having an infectious, contagious, or "loathsome" disease are defamatory.ⁿ²² Statements that imply that a person lacks proper decorum may also be held to be defamatory.ⁿ²³

A statement of opinion, as opposed to an assertion of fact, is not actionable as defamatory.^{n23.1}

If the content of an allegedly defamatory statement is true, the statement cannot form the basis for liability for libel or slander.ⁿ²⁴ While it is not clear whether truth is an affirmative defense or an element of plaintiff's cause of action, the plaintiff bears the burden of alleging and proving the falsity of the statement in certain cases involving constitutional privilege under the *First Amendment*.ⁿ²⁵ For further discussion, see [3][c], below.

Because an action for defamation will lie only for false statements of fact, and because an opinion cannot be false, a statement that is an opinion will not support an action for defamation.ⁿ²⁶

[c] Publication

An essential element of a claim for libel or slander is that the defamatory statement be published, that is, communicated

to a third person.ⁿ²⁷ In the employment context, the fact that a statement is communicated only by one of the defendant's employees to other employees of the defendant via internal corporate statements does not preclude a finding that the statement was published. A publication occurs if the statement is communicated to any person other than the party defamed.ⁿ²⁸ However, in one case, although the trial court ruled that the plaintiff had failed to show either publication of the libelous statement or lack of privilege with regard to all defendants but one, the court of appeal reversed the demurrer in favor of the employer on the ground that liability for libel may be based on a conspiracy theory as the plaintiff had alleged.^{n28.1}

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

Plaintiff's counsel should be alert to the possibility of a claim of defamation by self-publication. When an employee has been put in the position of having to communicate to potential employers that he or she has been terminated--allegedly wrongfully--California law allows a claim that he or she has, in effect, been forced to publish a defamatory statement.ⁿ²⁹ To make out this cause of action, it must be shown that the defendant had reason to know that the person defamed would be under a strong compulsion to disclose the defamatory statement.ⁿ³⁰

Such a claim has advantages and disadvantages. Since employer insurance policies often provide coverage for claims of defamation made against them, the possibility of using the cause of action to plead into insurance coverage is obvious. On the other hand, raising the issue entitles an employer to discover from an employee the identities of all those from whom he or she has sought employment and then to question those potential employers as to what was said in any employment interview about the reasons for the prior termination. Such inquiries could have a negative effect on a plaintiff's chances to find employment after a termination. *Commentary by John M. True, III.*

[d] Identification

A statement is not defamatory unless it specifically refers to the person who has allegedly been defamed.ⁿ³¹ However, the statement does not have to identify the person by name.ⁿ³² A statement sufficiently identifies a person if the recipient of the communication correctly, or mistakenly but reasonably, understands that the statement was intended to refer to the defamed party.ⁿ³³ In addition, if the defamatory statement refers to a group of persons to which the allegedly defamed person belongs, the identification element is normally satisfied if the group is small.ⁿ³⁴

[e] Intent

Unless a constitutional privilege or a qualified privilege under state law applies,ⁿ³⁵ a person may be liable for publishing a defamatory statement regardless of whether he or she intended to make a false statement that would injure the reputation of the plaintiff or had reason to know that the plaintiff would be so harmed.ⁿ³⁶ However, in the employment context a qualified privilege often applies, which requires a showing of malice on the part of the defendant before liability may attach.ⁿ³⁷

[f] Damages

"Special damages" are an element of a defamation claim unless the statement is defamatory per se.ⁿ³⁸ Special damages in this context means actual economic loss such as out-of-pocket expenses, medical bills, or time lost from work.ⁿ³⁹ Statements that tend to injure a person in his or her occupation are, in the case of slander, normally defamatory per se,ⁿ⁴⁰ and in the case of libel are also often defamatory per se.ⁿ⁴¹

[3] Defenses

[a] Preemption

[i] Workers' Compensation Law

A cause of action for defamation brought by an employee against an employer is not subject to the exclusive remedy provision of the Workers' Compensation Act,ⁿ⁴² for the reasons discussed below. Therefore, in an action against an employer brought by a former employee who alleges wrongful termination and related causes of action, a cause of action for defamation will survive the defense of workers' compensation exclusivity even though the remaining counts may fail.ⁿ⁴³

Defamatory statements that have no other purpose than to damage an employee's reputation are neither a normal part of, nor a risk inherent in, the employment relationship for purposes of the exclusive remedy doctrine of the Workers' Compensation Act.ⁿ⁴⁴ The California Supreme Court in *Livitsanos v. Superior Court* ⁿ⁴⁵ (in dictum) noted that lower courtsⁿ⁴⁶ have determined that the gravamen of an action for libel or slander is damage to reputation, a proprietary--as distinct from a physical or mental--injury. Consequently, defamation does not lie within the purview of the workers' compensation law.ⁿ⁴⁷

In one court of appeal decision, cited by the Supreme Court in *Livitsanos* as well as in *Shoemaker v. Myers*,ⁿ⁴⁸ the court of appeal observed:

The right to benefits under the Act is the employee's exclusive remedy against the employer where the conditions of liability under the Act exist. ... The conditions of liability attach where the employee receives a personal injury arising out of and in the course of his employment. ... The personal injuries for which the Act provides a remedy include physical and mental injuries suffered on account of employment. ... Thus, the Act relates to medical and/or occupational injuries, i.e., those risks to which the fact of employment in the industry exposes the employee. ... The gist of an action for slander, however, is damage to reputation. ... The harm flowing therefrom is not a personal injury (i.e., medical or physical injury to the body) or a risk of employment within the purview of the workers' compensation law. ... In fact, an injury to reputation affects a proprietary interest and as such is not a personal injury at all, any concomitant physical or mental injury notwithstanding.ⁿ⁴⁹

In a subsequent court of appeal decision, the employer allegedly made false accusations before and after the termination that plaintiff, a bookkeeper, stole money from the company. The trial court sustained the defendant's demurrer to the plaintiff's defamation claim, but the court of appeal reversed. The court of appeal held that the remarks made after the termination can, "by no stretch," be deemed to have occurred in the course and scope of employment. Further, the court held that the harm incurred by the statements made during employment were not in the nature of personal injury for purposes of the Workers' Compensation Act.ⁿ⁵⁰

[ii] Federal Labor Law

In an employment context involving a collective bargaining agreement, an employee's action for defamation may in some cases be preempted by federal labor law.ⁿ⁵¹ If the claim is inextricably intertwined with matters covered by the labor contract, the claim is preempted.ⁿ⁵² For example, when the claim is based on defamatory statements made in an investigation required by collective bargaining agreement, the claim may be preempted, at least in instances in which the conduct of the investigation is subject to the collective bargaining agreement's grievance adjustment procedure.ⁿ⁵³ However, a defamation claim is not preempted if it is based on facts either "unrelated to matters expressly or impliedly governed by the collective bargaining agreement" or which "so far exceed the scope of reasonable conduct in the context of such matters that reference to the collective bargaining agreement is unnecessary to resolve the claim."ⁿ⁵⁴

For discussion of preemption of wrongful termination claims under federal labor law, *see* Chapter 60.

[b] Privileges Under State Law

Under state law, there are two types of privileges that are available in defamation actions: absolute privileges and qualified privileges. An absolute privilege is a privilege that cannot be defeated by malice on the part of the publisher.ⁿ⁵⁵ An absolute privilege is available for statements made by specified high-ranking public officials, statements made by legislators, statements made in judicial proceedings and other official or unofficial proceedings authorized by law, and fair and true reports of official proceedings and public meetings.ⁿ⁵⁶ In the employment context, an absolute privilege under *Civil Code section 47(b)* may apply to statements made:

- During a background inspection of a potential employee that is required by law.ⁿ⁵⁷
- To a complaint of harassment made to the EEOC, as required by law before initiating an action under Title VII.^{n57.1}
- To statements made during the course of a grievance procedure established by a collective bargaining agreement and reviewable by mandate.ⁿ⁵⁸
- To statements made to the police, the local prosecutor, or an appropriate regulatory agency, even if the report is made in bad faith.^{n58.1}

A qualified privilege acts as a bar to liability when the statement was published without malice.ⁿ⁵⁹ Qualified privileges exist for statements made by persons with a common interest, persons in special relationships, and persons responding to a request for information.ⁿ⁶⁰ In the employment context, the qualified privilege available to interested parties often applies.ⁿ⁶¹ This privilege exists when the communicator and the recipient have a common interest and the communication is reasonably calculated to further that interest. Communication among a company's employees concerning the conduct of an employee fall squarely within this privilege.ⁿ⁶² Thus, for example, an employer who publishes to certain of its employees the reasons for the termination of another employee may be protected by this qualified privilege, at least if the other employees have a legitimate interest in knowing that information.ⁿ⁶³ Or, an employee's letter to the head of her employer's human resources department, accusing her manager of sexual harassment, may be protected by this qualified privilege, provided there is no showing of malice.^{n63.1}

Civil Code, section 47(c) expressly provides that the qualified privilege for communications to interested persons based on a request applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based on credible evidence, made without malice, by a current or former employer of the applicant to, and on request of, the prospective employer.^{n63.2} Section 47(c) authorizes a current or former employer, or the employer's agent, to answer, whether or not the employer would rehire a current or former employee. The statute specifically does not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by *Code of Civil Procedure, section 527.3* (concerning labor disputes) or any other provision of law.ⁿ⁶⁴

To defeat this conditional privilege, a plaintiff must specifically allege malice. A general allegation of malice will not suffice; plaintiff must allege detailed facts showing defendant's ill will toward plaintiff.ⁿ⁶⁵ Malice is not inferred from the communication itself.^{n65.1} The malice necessary to defeat a qualified privilege is actual malice, which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights.^{n65.2}

The conditional privilege applies to statements current or former employers make to prospective employers when the statements are based on credible evidence, made without malice.^{n65.3} Standing alone, the phrase "based on credible evidence" connotes a negligence standard. However, by adding the "based upon credible evidence" language to *Civ. Code § 47(c)* when it amended § 47) in 1994 to expressly state the common-interest privilege applies to

communications made by current or former employers to prospective employers, the Legislature, out of an abundance of caution, intended to bar any argument that in the employment reference context, the protection of the interest involved may make it reasonable to report mere rumors or unfounded gossip. Thus, the Legislature clarified that if a current or former employer's publication was based on mere rumor, the privilege is lost because he or she lacked reasonable grounds for believing the truth of the publication. Although negligence is relevant in determining probable cause, mere negligence in the sense of oversight or unintentional error, is not alone enough to constitute malice.^{n65.4}

Application of the privilege involves a two-step inquiry. The first question is whether the factual predicate for the privilege was present--whether, in traditional terms, the "occasion" was "privileged." At trial, the defendant bears the burden of proof on this question. If the defendant succeeds, the burden shifts to the plaintiff to show that the statement was made with malice.^{n65.5} On summary judgment, the defendant bears the burden of showing in the first instance that there is no triable issue of fact as to either issue, *i.e.*, that the statement was made on a privileged occasion, and that it was made without malice.^{n65.6}

Malice sufficient to overcome a qualified privilege is a state of mind arising from hatred or ill will evidencing a willingness to vex, annoy, or injure another person.ⁿ⁶⁶ The privilege is lost if the publication is motivated by any cause other than to protect the interest for which the protection of the privilege was granted.ⁿ⁶⁷

A federal district court has applied a common law privilege similar to the statutory privileges described above, the "manager's privilege," to a defamation cause of action in the employment context.ⁿ⁶⁸ California appellate courts have previously applied this privilege with respect to the tort of interference with prospective economic advantage.ⁿ⁶⁹ In the federal diversity case, plaintiff included a slander per se cause of action in his complaint, which essentially alleged that defendant made defamatory comments in connection with the breach of an employment contract, and defendant asserted the defense of privileged communication under *Civil Code, section 47(c)* with respect to that cause of action. The court held that disparaging remarks made by supervisors about plaintiff concerning his qualifications (leading to plaintiff's termination) were protected under the manager's privilege.ⁿ⁷⁰ At least one other federal decision construing California law has also applied the manager's privilege to a defamation claim.ⁿ⁷¹

In an action for slander and libel against an employer and another employee regarding statements made to third parties indicating that plaintiff had been fired for sexual harassment, one California court of appeal has found applicable the manager's privilege in *Civil Code Section 47(c)* for communications made without malice concerning job performance.^{n71.1}

In one defamation case that arose in an employment termination context,ⁿ⁷² the court of appeal expressed disfavor for libel suits based on communications in employment performance reviews, particularly when the plaintiff is attempting to avoid the limitations of *Foley*.ⁿ⁷³ However, this case did not reach any defense issues because plaintiff was held not to have established the element of a libelous statement.ⁿ⁷⁴ In another wrongful termination case, the court of appeal recognized the deleterious effect on business if disciplined employees could avoid the limitations of *Foley* by simply alleging malice and suing coemployees for damages on alternative tort theories, when the identical personnel action cannot give rise to tort damages against the employer.^{n74.1} The court, however, reversed the dismissal of libel actions against the individual defendants because libel is a statutory action under *Civ. Code §§ 43-48.5*.^{n74.2}

For full discussion of the absolute and qualified privileges, *see* Levy, Golden, and Sacks, California Torts, Chapter 45 (Matthew Bender).

[c] Constitutional Privilege

The right of free speech set forth in the *First Amendment to the United States Constitution* has been held to provide qualified privileges to publishers of defamatory statements in certain circumstances. If the defamed party is a public figure or a public official, a defamation action is barred by the constitutional privilege unless the publication was made

with "actual malice." Actual malice in this context means that the statement was made with knowledge of its falsity or reckless disregard for whether the statement was true or false.ⁿ⁷⁵ In addition, if the defamed individual is a private individual and the allegedly defamatory statement involves a matter of public concern, the Constitution prohibits the imposition of "presumed" or punitive damages without a showing of "actual malice."ⁿ⁷⁶ Furthermore, there is authority for the proposition that the Constitution protects all publishers of defamatory statements from liability without a showing of "fault."ⁿ⁷⁷ However, a more recent Supreme Court case suggests that the "fault" requirement applies only in cases in which the allegedly defamatory statement involves a matter of public concern.ⁿ⁷⁸ It should be noted that the constitutional privileges discussed above apparently apply to nonmedia as well as media defendants.^{n78.1}

If the employer is a church, *First Amendment* protections for religious doctrine may be a defense as well.ⁿ⁷⁹

For full discussion of the constitutional privileges, *see* Levy, Golden, and Sacks, California Torts, Chapter 45 (Matthew Bender).

[d] Truth

Truth is an absolute defense to a claim of defamation.^{n79.1} In cases involving private plaintiffs on matters of private concern, the burden of proving the statement is true is on the defendant. In cases involving public figures or matters of public concern, the burden of proving falsity is on the plaintiff.^{n79.2}

[e] Consent

The consent of the plaintiff to the publication of defamatory matter is a complete defense.^{n79.3}

[4] Remedies

In a defamation action, a successful plaintiff may be entitled to both general and special damages. Special damages are actual economic losses proximately caused by the defamation including out-of-pocket expenses and amounts lost in one's occupation.ⁿ⁸⁰ General damages compensate for loss of reputation, shame, mortification, and hurt feelings in any context, including the plaintiff's business or occupation.ⁿ⁸¹ In addition, punitive damages are available on the proper showing of malice.ⁿ⁸²

■ CONSULTANT'S COMMENT:

The availability of punitive damages may be restricted by constitutional considerations.ⁿ⁸³ Also, in the case of a defamatory statement that is not actionable per se, special damages are a prerequisite to the maintenance of a defamation action.ⁿ⁸⁴ Employers should be aware that defamation allegations frequently are included in wrongful discharge actions. Typically, the allegations are based on comments that the discharging supervisor has made to co-workers, to prospective employers, or to his or her acquaintances. Although the text indicates that a supervisor has a qualified privilege to discuss a termination with "interested" personsⁿ⁸⁵ (raising an obvious question of how mere acquaintances could be "interested"), an employer is best advised to limit the number of people who are given access to facts about the discharge. Similarly, an employer is best advised to scrutinize the wording of discharge forms and memoranda to ensure that their terms are factually accurate and not needlessly inflammatory (for example, use of the term "serious misconduct" is preferable to use of the term "embezzlement"). Many employers have "snatched defeat from the jaws of victory" by discharging employees for good cause and then publishing embellished accounts of the actions to persons who had no business reason to know any such information. *Commentary by Kirby Wilcox.*

[5] Anti-SLAPP Motion

Because defamation actions often involve issues of free speech (or other rights), in response to a defamation action by

an employee or former employee, an employer may move to strike the complaint under the anti-SLAPP (strategic lawsuit against public participation) statute.ⁿ⁸⁶ In considering whether the anti-SLAPP statute applies, courts engage in a two-step process. First, the court determines whether the employer made a threshold showing that the cause of action triggered the anti-SLAPP statute. If this condition is met, the court considers whether the employee has demonstrated a probability of prevailing on the claim.ⁿ⁸⁷

In considering whether the anti-SLAPP statute applies, the court examines whether the employee's cause of action arose from acts in furtherance of the employer's right of petition or free speech in connection with a public issue.ⁿ⁸⁸ The employer, as the moving party, bears the burden on this issue.ⁿ⁸⁹ As used in the anti-SLAPP statute,ⁿ⁹⁰ a protected act includes:

1. Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.ⁿ⁹¹
2. Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.
3. Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.
4. Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

A private employer's procedure for investigating employee sexual harassment complaints does not qualify for these purposes as an official proceeding authorized by law.ⁿ⁹² Further, the public interest in the fair resolution of claims of sexual harassment does not bring a complaint alleging defamation during a sexual harassment investigation into the ambit of the anti-SLAPP statute.ⁿ⁹³

The anti-SLAPP statute may apply to preclude an employer's defamation action against an employee or former employee.ⁿ⁹⁴

Legal Topics:

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

Labor & Employment Law Wrongful Termination General Overview Torts Intentional Torts Defamation General Overview

FOOTNOTES:

(n1)Footnote 1. *See, e.g., Prevost v. First West. Bank* (1987) 193 Cal. App. 3d 1492, 1497-1500, 239 Cal. Rptr. 161 .

(n2)Footnote 2. It should be noted that an action under *Lab. Code §§ 1050-1054* may also be available in such a circumstance. *see* discussion in § 63.07[2].

(n3)Footnote 3. *Kelly v. General Tel. Co.* (1982) 136 Cal. App. 3d 278, 284, 186 Cal. Rptr. 184 .

(n4)Footnote 3.1. *See, e.g., Sheppard v. Freeman* (1998) 67 Cal. App. 4th 339, 348-349, 79 Cal. Rptr. 2d 13 (because libel is statutory action under *Civ. Code §§ 43-48.5*, former employee could sue other employees based on their allegedly libelous conduct relating to his termination); *See also* § 61.02[1][a][ii].

(n5)Footnote 4. *See Civ. Code § 45.*

(n6)Footnote 5. *See Civ. Code § 46.*

(n7)Footnote 6. *See* discussion in [b], *below*.

(n8)Footnote 7. *See* discussion in [c], *below*.

(n9)Footnote 8. *See* discussion in [d], *below*.

(n10)Footnote 9. *See* discussion in [e], *below*.

(n11)Footnote 10. *See* discussion in [f], *below*. For the standard jury instructions pertaining to defamation, *see* Judicial Council of California Civil Jury Instructions, *CACI 1700 et seq.* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict forms for defamation claims, *see* Judicial Council of California Civil Jury Instructions, *CACI VF-1700 et seq.* (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n12)Footnote 11. *Civ. Code* § 45a; *Slaughter v. Friedman* (1982) 32 Cal. 3d 149, 153-154, 185 Cal. Rptr. 244, 649 P.2d 886 ; *see* discussion in [e], *below*.

(n13)Footnote 12. *White v. Valenta* (1965) 234 Cal. App. 2d 243, 254, 44 Cal. Rptr. 241 ; *Civ. Code* § 46(3).

(n14)Footnote 12.1. *The Nethercutt Collection v. Regalia* (2009) 172 Cal. App. 4th 361, 367, 90 Cal. Rptr. 3d 882 ; *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal. App. 4th 90, 107, 15 Cal. Rptr. 3d 215 .

(n15)Footnote 12.2. *The Nethercutt Collection v. Regalia* (2009) 172 Cal. App. 4th 361, 367-370, 90 Cal. Rptr. 3d 882 (statements that former employee demanded finder's fee to which he was not entitled and that other employees would not work for him and would leave if he remained employed were not slander per se as injury to business reputation; person could make claim for money that is rejected as not being justified and still not be viewed as having committed an act reflecting negatively on that person; statement that employee was fired because other employees would not work for him and would leave if he remained employed did not, on its face, clearly fall into category of injury to business reputation, because the fact that one or more employees do not want to work for someone, without more, did not necessarily reflect adversely on him as employees might not want to work for person because of person's work ethic or rectitude, or legitimate business policies).

(n16)Footnote 13. *Civ. Code* § 45a; *Selleck v. Globe Int'l, Inc.* (1985) 166 Cal. App. 3d 1123, 1132-1133, 212 Cal. Rptr. 838 .

(n17)Footnote 14. *Civ. Code* § 45a; *MacLeod v. Tribune Publ'g Co.* (1959) 52 Cal. 2d 536, 551, 343 P.2d 36 .

(n18)Footnote 15. *MacLeod v. Tribune Publ'g Co.* (1959) 52 Cal. 2d 536, 546, 343 P.2d 36 .

(n19)Footnote 16. *Civ. Code* § 46(3).

(n20)Footnote 17. *Bates v. Campbell* (1931) 213 Cal. 438, 443-446, 2 P.2d 383 ; *Gallant v. City of Carson* (2005) 128 Cal. App. 4th 705, 27 Cal. Rptr. 3d 318, 2005 Cal. App. LEXIS 617, *5 ; *Von Stein v. Hardie* (1930) 105 Cal. App. 780, 782-783, 288 P. 680 .

(n21)Footnote 18. *Von Stein v. Hardie* (1930) 105 Cal. App. 780, 782-783, 288 P. 680 .

(n22)Footnote 19. *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal. App. 4th 958, 965, 18 Cal. Rptr. 2d 83 .

(n23)Footnote 20. *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal. App. 4th 958, 965, 18 Cal. Rptr. 2d 83 (soleremedy if employer feigned negative evaluation is action in contract for breach of the implied covenant of good faith and fair dealing).

(n24)Footnote 21. *Campanelli v. Regents of the Univ. of Cal.* (1996) 44 Cal. App. 4th 572, 581, 51 Cal. Rptr. 2d 891 .

(n25)Footnote 21.1. *Sheppard v. Freeman* (1998) 67 Cal. App. 4th 339, 348-349, 79 Cal. Rptr. 2d 13 (former employee could sue other employees based on their allegedly libelous conduct relating to his termination); *See also* § 61.02[1][a][ii].

(n26)Footnote 22. *Civ. Code* § 46(1), (2).

(n27)Footnote 23. *Burnett v. National Enquirer, Inc.* (1983) 144 Cal. App. 3d 991, 1013, 193 Cal. Rptr. 206 (statements made by defendant implied that plaintiff had been objectionably inebriated in a restaurant).

(n28)Footnote 23.1. *See, e.g., Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal. App. 4th 686, 727-729, 81 Cal. Rptr. 3d 406 (court could readily dispose of proposition that employer's statements were nonactionable statements of opinion, where employee presented substantial evidence that at least some challenged statements were flat assertions of fact).

(n29)Footnote 24. *Gantry Constr. Co. v. American Pipe & Constr. Co.* (1975) 49 Cal. App. 3d 186, 194-196, 122 Cal. Rptr. 834 .

(n30)Footnote 25. *Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 768-769, 106 S. Ct. 1558, 89 L. Ed. 2d 783 .

(n31)Footnote 26. *See Jensen v. Hewlett-Packard Co.* (1993) 14 Cal. App. 4th 958, 965, 18 Cal. Rptr. 2d 83 (employer's evaluations of employees are typically statements of opinion rather than fact); *Campanelli v. Regents of the University of Cal.* (1996) 44 Cal. App. 4th 572, 581, 51 Cal. Rptr. 2d 891 ; *see also Gertz v. Welch* (1974) 418 U.S. 323, 334-336, 94 S. Ct. 2997, 41 L. Ed. 2d 789 ; *Okun v. Superior Court* (1981) 29 Cal. 3d 442, 450, 175 Cal. Rptr. 157, 629 P.2d 1369 .

(n32)Footnote 27. *Kelly v. Gen. Tel. Co.* (1982) 136 Cal. App. 3d 278, 284, 186 Cal. Rptr. 184 .

(n33)Footnote 28. *Kelly v. Gen. Tel. Co.* (1982) 136 Cal. App. 3d 278, 284, 186 Cal. Rptr. 184 .

(n34)Footnote 28.1. *Sheppard v. Freeman* (1998) 67 Cal. App. 4th 339, 349, 79 Cal. Rptr. 2d 13 , citing *Wilcox v. Superior Court* (1994) 27 Cal. App. 4th 809, 827-828, 33 Cal. Rptr. 2d 446 .

(n35)Footnote 29. *McKinney v. Santa Clara* (1980) 110 Cal. App. 3d 787, 168 Cal. Rptr. 89 .

(n36)Footnote 30. *Schneider v. United Air Lines, Inc.* (1989) 208 Cal. App. 3d 71, 75, 256 Cal. Rptr. 71 . For the standard jury instruction on coerced self-publication, *see* Judicial Council of California Civil Jury Instructions, CACI 1708 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05.

(n37)Footnote 31. *Noral v. Hearst Publications* (1940) 40 Cal. App. 2d 348, 350, 104 P.2d 860 .

(n38)Footnote 32. *Washer v. Bank of America* (1943) 21 Cal. 2d 822, 829, 136 P.2d 297 , *overruled on other grounds, MacLeod v. Tribune Publ'g Co.* (1959) 52 Cal. 2d 536, 551, 343 P.2d 36 .

(n39)Footnote 33. *Dewing v. Blodgett* (1932) 124 Cal. App. 100, 103-105, 11 P.2d 1105 .

(n40)Footnote 34. *Noral v. Hearst Publications* (1940) 40 Cal. App. 2d 348, 353, 104 P.2d 860 .

(n41)Footnote 35. *See* discussion in [3][c], *below*.

(n42)Footnote 36. *Davis v. Hearst* (1911) 160 Cal. 143, 154-155, 116 P. 530 .

(n43)Footnote 37. See discussion in [3][b], *below*.

(n44)Footnote 38. See *Forsher v. Bugliosi* (1980) 26 Cal. 3d 792, 806-807, 163 Cal. Rptr. 628, 608 P.2d 716 ; Civ. Code § 45a; see also [a], *above*, for discussion of when statement is defamatory per se.

(n45)Footnote 39. *Gomes v. Fried* (1982) 136 Cal. App. 3d 924, 939-940, 186 Cal. Rptr. 605 ; Civ. Code §§ 45a, 48a(4)(b).

(n46)Footnote 40. Civ. Code § 46(3); *White v. Valenta* (1965) 234 Cal. App. 2d 243, 251-254, 44 Cal. Rptr. 241 .

(n47)Footnote 41. *Von Stein v. Hardie* (1930) 105 Cal. App. 780, 782-783, 288 P. 680 .

(n48)Footnote 42. Lab. Code § 3201 *et seq.*

(n49)Footnote 43. See, e.g., *Davaris v. Cubaleski* (1993) 12 Cal. App. 4th 1583, 1591, 16 Cal. Rptr. 2d 330 .

(n50)Footnote 44. *Davaris v. Cubaleski* (1993) 12 Cal. App. 4th 1583, 1591, 16 Cal. Rptr. 2d 330 ; *Howland v. Balma* (1983) 143 Cal. App. 3d 899, 905, 192 Cal. Rptr. 286 .

(n51)Footnote 45. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 .

(n52)Footnote 46. See, e.g., *Howland v. Balma* (1983) 143 Cal. App. 3d 899, 904-905, 192 Cal. Rptr. 286 .

(n53)Footnote 47. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 747, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 (cited in *Davaris v. Cubaleski* (1993) 12 Cal. App. 4th 1583, 1590, 16 Cal. Rptr. 2d 330).

(n54)Footnote 48. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303, 801 P.2d 1054 .

(n55)Footnote 49. *Howland v. Balma* (1983) 143 Cal. App. 3d 899, 904, 192 Cal. Rptr. 286 (quotation marks and citations omitted; cited by *Davaris v. Cubaleski* (1993) 12 Cal. App. 4th 1583, 1590-1591, 16 Cal. Rptr. 2d 330).

(n56)Footnote 50. *Davaris v. Cubaleski* (1993) 12 Cal. App. 4th 1583, 1591, 16 Cal. Rptr. 2d 330 .

(n57)Footnote 51. See 29 U.S.C. § 185(a) (Labor Management Relations Act).

(n58)Footnote 52. *De Tomaso v. Pan Am. World Airways, Inc.* (1987) 43 Cal. 3d 517, 530, 235 Cal. Rptr. 292, 733 P.2d 614 ; *Allis-Chalmers Corp. v. Lueck* (1985) 471 U.S. 202, 211, 105 S. Ct. 1904, 85 L. Ed. 2d 206 .

(n59)Footnote 53. See *De Tomaso v. Pan Am. World Airways, Inc.* (1987) 43 Cal. 3d 517, 530-533, 235 Cal. Rptr. 292, 733 P.2d 614 ; but cf. *Tellez v. Pacific Gas and Elec. Co., Inc.* (9th Cir. 1987) 817 F.2d 536, 538-539 (defamation action based on statements that were neither required by collective bargaining agreement nor part of grievance process was not preempted by federal labor law).

(n60)Footnote 54. *De Tomaso v. Pan Am. World Airways, Inc.* (1987) 43 Cal. 3d 517, 529, 235 Cal. Rptr. 292, 733 P.2d 614 ; *Tellez v. Pacific Gas and Elec. Co., Inc.* (9th Cir. 1987) 817 F.2d 536, 538 (state defamation claim was not pre-empted by federal labor law because it neither asserted rights derived from the collective bargaining agreement nor required interpretation of agreement; California defamation law establishes nonnegotiable rights and obligations that are independent of any labor agreement).

(n61)Footnote 55. See *Kilgore v. Younger* (1982) 30 Cal. 3d 770, 778, 180 Cal. Rptr. 657, 640 P.2d 793 .

(n62)Footnote 56. See Civ. Code § 47(a)-(b), (d)-(e); but see *Prevost v. First Western Bank* (1987) 193 Cal.

App. 3d 1492, 1498-1499, 239 Cal. Rptr. 161 (privilege for statements made in "other official proceedings authorized by law" was inapplicable to statement made about former employee in proof of loss statement by employer-bank to bonding company, even though proof of loss statement was required by law).

(n63)Footnote 57. *O'Shea v. General Tel. Co. (1987) 193 Cal. App. 3d 1040, 1047-1048, 238 Cal. Rptr. 715* (absolute privilege for background inspection of peace officers required by *Gov. Code § 1031*).

(n64)Footnote 57.1. *Cruey v. Gannett Co., Inc. (1998) 64 Cal. App. 4th 356, 368, 76 Cal. Rptr. 2d 670* (employee's complaint made to EEOC was absolutely privileged under *Civ. Code § 47(b)*, which provides absolute privilege for communications in proceedings authorized by law, because employee must file complaint with EEOC before filing suit under Title VII).

(n65)Footnote 58. *See Wallin v. Vienna Sausage Mfg. Co. (1984) 156 Cal. App. 3d 1051, 1054-1055, 203 Cal. Rptr. 375*.

(n66)Footnote 58.1. *Cabesuela v. Browning-Ferris Indus. of California, Inc. (1998) 68 Cal. App. 4th 101, 112, 80 Cal. Rptr. 2d 60* (plaintiff failed to state cause of action for defamation based on defendants' communication with police).

(n67)Footnote 59. *Saroyan v. Burkett (1962) 57 Cal. 2d 706, 708, 21 Cal. Rptr. 557, 371 P.2d 293*. For the standard jury instruction on qualified privilege in the context of a defamation claim, *see* Judicial Council of California Civil Jury Instructions, *CACI 1723* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see § 61.05*.

(n68)Footnote 60. *Civ. Code § 47(c)*.

(n69)Footnote 61. *Civ. Code § 47(c)*.

(n70)Footnote 62. *Cuenca v. Safeway San Francisco Employees Fed. Credit Union (1986) 180 Cal. App. 3d 985, 995-996, 225 Cal. Rptr. 852*; *see also Kacludis v. GTE Sprint Communications Corp. (N.D. Cal. 1992) 806 F. Supp. 866, 872* (disparaging remarks made by plaintiff's supervisors about his qualifications presumed to be privileged); *Kelly v. General Telephone Co. (1982) 136 Cal. App. 3d 278, 285, 186 Cal. Rptr. 184* (communication designed to insure accurate company records as privileged).

(n71)Footnote 63. *Deaile v. General Tel. Co. of California (1974) 40 Cal. App. 3d 841, 847, 115 Cal. Rptr. 582*. *See also King v. United Parcel Service, Inc. (2007) 152 Cal. App. 4th 426, 440-442, 60 Cal. Rptr. 3d 359* (former employee failed to show that employer lost its common interest privilege by terminating him with malice, and plaintiff failed to produce any evidence that employer over-published statements about him to those with no interest in business or for any nefarious motives).

(n72)Footnote 63.1. *Cruey v. Gannett Co., Inc. (1998) 64 Cal. App. 4th 356, 369-370, 76 Cal. Rptr. 2d 670* (applying conditional privilege in *Civ. Code § 47(c)*, but reversing grant of summary judgment to determine whether privilege could be overcome by showing of malice before trier of fact).

(n73)Footnote 63.2. *See Noel v. River Hills Wilsons, Inc. (2003) 113 Cal. App. 4th 1363, 1369, 7 Cal. Rptr. 3d 216* (Legislature amended *Civ. Code § 47(c)* in 1994 to expressly state the common-interest privilege applies to communications made by current or former employers to prospective employers).

(n74)Footnote 64. *Civ. Code § 47(c)*.

(n75)Footnote 65. *Robomatic, Inc. v. Vetco Offshore (1990) 225 Cal. App. 3d 270, 276, 275 Cal. Rptr. 70*. *See, e.g., Mamou v. Trendwest Resorts, Inc. (2008) 165 Cal. App. 4th 686, 729-731, 81 Cal. Rptr. 3d 406* (on summary

judgment motion by employer, employee presented evidence showing triable issues with respect to existence of malice, where jury could easily find that statements by supervisors responsible for his firing were motivated by ill will towards employee).

(n76)Footnote 65.1. *Civ. Code § 48; Noel v. River Hills Wilsons, Inc. (2003) 113 Cal. App. 4th 1363, 1370, 7 Cal. Rptr. 3d 216 .*

(n77)Footnote 65.2. *Noel v. River Hills Wilsons, Inc. (2003) 113 Cal. App. 4th 1363, 1370-1373, 7 Cal. Rptr. 3d 216* (in defamation action by former employee against former employer based on statements to subsequent employer by employee, no reasonable jury could find malice was motivating cause of statements, where undisputed evidence showed she made unintentional error or careless blunder by paying insufficient attention to inquiry and gave inaccurate employment information on former employee because she was expecting inquiry from prospective employer on another former employee and she did not doubt truth of information she conveyed or show reckless disregard for plaintiff's rights or feelings).

(n78)Footnote 65.3. *Civ. Code § 47(c).*

(n79)Footnote 65.4. *Noel v. River Hills Wilsons, Inc. (2003) 113 Cal. App. 4th 1363, 1370-1373, 7 Cal. Rptr. 3d 216* (employee of former employer reported no rumors or gossip regarding former employee's employment, she had no improper purpose and her statements were caused by careless blunder, so that summary judgment for former employer in defamation action was proper).

(n80)Footnote 65.5. *Taus v. Loftus (2007) 40 Cal. 4th 683, 721, 54 Cal. Rptr. 3d 775, 151 P.3d 1185 ; Mamou v. Trendwest Resorts, Inc. (2008) 165 Cal. App. 4th 686, 729, 81 Cal. Rptr. 3d 406 .*

(n81)Footnote 65.6. *Mamou v. Trendwest Resorts, Inc. (2008) 165 Cal. App. 4th 686, 729, 81 Cal. Rptr. 3d 406 .*

(n82)Footnote 66. *Agarwal v. Johnson (1979) 25 Cal. 3d 932, 944, 160 Cal. Rptr. 141, 603 P.2d 58 ; see also Cuenca v. Safeway San Francisco Employees Federal Credit Union (1986) 180 Cal. App. 3d 985, 997, 225 Cal. Rptr. 852* (stating that malice may be established by showing that publisher lacked reasonable grounds to believe statement was true and thus acted in reckless disregard for rights of plaintiff).

(n83)Footnote 67. *Agarwal v. Johnson (1979) 25 Cal. 3d 932, 944-945, 160 Cal. Rptr. 141, 603 P.2d 58* (privilege overcome when statements concerning employee's competence were maliciously motivated for purpose of terminating employee).

(n84)Footnote 68. *Kacludis v. GTE Sprint Communications Corp. (N.D. Cal. 1992) 806 F. Supp. 866, 872* (also holding that *Civ. Code § 47(c)* applies).

(n85)Footnote 69. *See, e.g., Olivet v. Frischling (1980) 104 Cal. App. 3d 831, 164 Cal. Rptr. 87 , disapproved on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 . See also Halvorsen v. Aramark Unif. Servs., Inc. (1998) 65 Cal. App. 4th 1383, 1386, 77 Cal. Rptr. 2d 383* (in tort action for interference with at will employment contract, holding that manager's privilege is absolute when at will employee is terminated).

(n86)Footnote 70. *Kacludis v. GTE Sprint Communications Corp. (N.D. Cal. 1992) 806 F. Supp. 866, 872 .*

(n87)Footnote 71. *See Clement v. American Greetings Corp. (S.D. Cal. 1986) 636 F. Supp. 1326, 1329-1330 .*

(n88)Footnote 71.1. *Cruey v. Gannett Co., Inc. (1998) 64 Cal. App. 4th 356, 369-370, 76 Cal. Rptr. 2d 670* (applying conditional privilege in *Civ. Code § 47(c)*, but reversing grant of summary judgment to determine whether privilege could be overcome by showing of malice before trier of fact).

(n89)Footnote 72. *Jensen v. Hewlett-Packard Co. (1993) 14 Cal. App. 4th 958, 964, 18 Cal. Rptr. 2d 83*

(defamation suit filed while plaintiff still employed, although plaintiff alleged at trial that defamation ultimately caused his termination).

(n90)Footnote 73. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373 ; see discussion in ch. 60.

(n91)Footnote 74. *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal. App. 4th 958, 969-971, 18 Cal. Rptr. 2d 83 (affirming nonsuit and holding that an employer's performance evaluation cannot support a cause of action for libel unless it accuses the employee of criminal conduct, lack of integrity, dishonesty, incompetence, or reprehensible personal characteristics or behavior).

(n92)Footnote 74.1. *Sheppard v. Freeman* (1998) 67 Cal. App. 4th 339, 344-345, 79 Cal. Rptr. 2d 13 (citing *Jensen v. Hewlett-Packard Co.* (1993) 14 Cal. App. 4th 958, 959, 18 Cal. Rptr. 2d 83 , for the proposition that under *Foley*, proper remedy against employer for allegedly false performance reviews is action in contract).

(n93)Footnote 74.2. *Sheppard v. Freeman* (1998) 67 Cal. App. 4th 339, 348-349 79 Cal. Rptr. 2d 13 (former employee could sue other employees based on their allegedly libelous conduct relating to his termination); see § 61.02[1][a][ii] for further discussion.

(n94)Footnote 75. *Gertz v. Welch* (1974) 418 U.S. 323, 334-336, 94 S. Ct. 2997, 41 L. Ed. 2d 789 ; see also *Rattray v. City of National City* (9th Cir. 1994) 51 F.3d 793, 800 (police officer was public official who had to prove that defendant police chief acted with actual malice in making allegedly defamatory statement that police officer was terminated for dishonesty).

(n95)Footnote 76. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 757-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593 .

(n96)Footnote 77. See *Gertz v. Welch* (1974) 418 U.S. 323, 347, 94 S. Ct. 2997, 41 L. Ed. 2d 789 .

(n97)Footnote 78. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 757-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593 .

(n98)Footnote 78.1. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 784, 105 S. Ct. 2939, 86 L. Ed. 2d 593 .

(n99)Footnote 79. See, e.g., *Gunn v. Mariners Church, Inc.* (2008) 167 Cal. App. 4th 206, 213-217 (statements allegedly made by church leaders to congregation regarding termination of employment of worship director, which was based on his homosexuality, were not actionable under *First Amendment* law, where they necessarily implicated truth or falsity of religious doctrine and were part of process of his termination).

(n100)Footnote 79.1. *Campanelli v. Regents of the University of California* (1996) 44 Cal. App. 4th 572, 581-582, 51 Cal. Rptr. 2d 891 ; Restatement Second of Torts § 581A.

(n101)Footnote 79.2. See Judicial Council of California Civil Jury Instructions, CACI 1720 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, see § 61.05.

(n102)Footnote 79.3. *Royer v. Steinberg* (1979) 90 Cal. App. 3d 490, 498-499, 153 Cal. Rptr. 499 ; *Restatement Second of Torts* § 583. For the standard jury instruction on the defense of consent, see Judicial Council of California Civil Jury Instructions, CACI 1721 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, see § 61.05.

(n103)Footnote 80. See *Civ. Code* §§ 45a, 48a(4)(b); *Gomes v. Fried* (1982) 136 Cal. App. 3d 924, 939-940, 186

Cal. Rptr. 605 .

(n104)Footnote 81. *Civ. Code § 48a(4)(a); Gomes v. Fried (1982) 136 Cal. App. 3d 924, 939, 186 Cal. Rptr. 605*

(n105)Footnote 82. *Civ. Code § 3294; see also McCoy v. Hearst Corp. (1986) 42 Cal. 3d 835, 872-873, 231 Cal. Rptr. 518, 727 P.2d 711 .*

(n106)Footnote 83. *See discussion in [3][c], above.*

(n107)Footnote 84. *See discussion in [2][f], above.*

(n108)Footnote 85. *See Civ. Code § 47(c).*

(n109)Footnote 86. *Code Civ. Proc. § 425.16. See, e.g., Neville v. Chudacoff (2008) 160 Cal. App. 4th 1255, 1261-1269, 73 Cal. Rptr. 3d 383* (in former employee's defamation action against employer's attorney, based on attorney's letter to customers accusing former employee of breach of contract and misappropriation of trade secrets and suggesting that, to avoid potential involvement in ensuing litigation as material witness or otherwise, customers should not do business with former employee, letter was writing made in connection with issue under consideration or review by judicial body and covered by anti-SLAPP statute, where letter directly related to employer's claims against former employee, and employer was seriously and in good faith contemplating litigation against former employee); *Olaes v. Nationwide Mutual Ins. Co. (2006) 135 Cal. App. 4th 1501, 1505-1513, 38 Cal. Rptr. 3d 467* (trial court properly denied employer's anti-SLAPP motion, where employee's defamation action based on employer's dismissal of employee based on sexual harassment complaints did not implicate statements made during legislative, executive, or judicial proceeding and did not concern a matter of public interest).

(n110)Footnote 87. *See Dible v. Haight Ashbury Free Clinics, Inc. (2009) 170 Cal. App. 4th 843, 848-849, 88 Cal. Rptr. 3d 464 ; Olaes v. Nationwide Mutual Ins. Co. (2006) 135 Cal. App. 4th 1501, 1505, 38 Cal. Rptr. 3d 467 .*

(n111)Footnote 88. *Code Civ. Proc. § 425.16(b)(1).*

(n112)Footnote 89. *See Dible v. Haight Ashbury Free Clinics, Inc. (2009) 170 Cal. App. 4th 843, 849, 88 Cal. Rptr. 3d 464 ; Olaes v. Nationwide Mutual Ins. Co. (2006) 135 Cal. App. 4th 1501, 1505, 38 Cal. Rptr. 3d 467 ; Gallimore v. State Farm Fire & Casualty Ins. Co. (2002) 102 Cal. App. 4th 1388, 1397, 126 Cal. Rptr. 2d 560 .*

(n113)Footnote 90. *Code Civ. Proc. § 425.16(e).*

(n114)Footnote 91. *Dible v. Haight Ashbury Free Clinics, Inc. (2009) 170 Cal. App. 4th 843, 849-852, 88 Cal. Rptr. 3d 464* (employer met its burden of showing acts in furtherance of employer's right of free speech in connection in public issue, where allegedly false statements made by employer in communication to Employment Development Department in allegedly attempting to deny former employee benefits and justify its termination of her were unequivocally part of official proceeding).

(n115)Footnote 92. *Olaes v. Nationwide Mutual Ins. Co. (2006) 135 Cal. App. 4th 1501, 1505-1510, 38 Cal. Rptr. 3d 467 .*

(n116)Footnote 93. *Olaes v. Nationwide Mutual Ins. Co. (2006) 135 Cal. App. 4th 1501, 1510-1511, 38 Cal. Rptr. 3d 467 .*

(n117)Footnote 94. *See Nygard, Inc. v. Uusi-Kerttula (2008) 159 Cal. App. 4th 1027, 1036-1054, 72 Cal. Rptr. 3d 210* (trial court properly struck employer's complaint against former employee for variety of tort and contract claims, based on interview former employee gave to magazine about his work experiences, pursuant to *Code Civ. Proc. § 425.16*, where employee's statements were written or oral statements or writings made in place open to public or public

forum in connection with issue of public interest, and employer failed to make prima facie showing of likelihood of prevailing on any one of five causes of action, including defamation claim).



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 63 Causes of Action Related to Wrongful Termination

Part A. TEXT

4-63 California Employment Law § 63.03

AUTHOR: By James Buyoucos, J.D.

§ 63.03 False Imprisonment

In cases in which an employee brings an action against an employer for wrongful termination, the employee may, in limited circumstances, have an additional cause of action against an employer for false imprisonment. Such a situation might arise, for example, when an employee is wrongfully detained by his or her employer under the mistaken belief that the employee has stolen company property and the employee is also terminated as a result.

The essence of a claim for false imprisonment is the restraint of a person's liberty so that a person is compelled to remain in a place where he or she does not wish to remain.ⁿ¹ Temporary restraint is sufficient and the use of actual physical force is not necessary.ⁿ² In one case, a bank employee was detained at a supervisor's desk for interrogation with respect to bank shortages and was threatened with federal prosecution if she did not sign a confession. In upholding a jury verdict for the plaintiff-employee, the court found the fact that the employee did agree to sign such a confession, even though she was absolutely innocent of any wrongdoing, as sufficient to support a finding that a threat of force was used to detain the employee.ⁿ³

There is no false imprisonment, however, if the restraint is lawful.ⁿ⁴ Thus, for example, if a merchant has probable cause to believe that a person has unlawfully taken his or her property, he or she is entitled to detain the person for a reasonable time for the purpose of conducting a reasonable investigation.ⁿ⁵ A property owner may similarly take reasonable steps to protect his or her property from theft or injury.ⁿ⁶ Whether an employer's specific actions were reasonable, justifiable, or privileged, so as to preclude liability for false imprisonment, are generally questions for the trier of fact.ⁿ⁷

Fermino v. Fedco, Inc. ⁿ⁸ involved a false imprisonment action brought by an employee who, accused of theft by her employer, was detained in a room by a manager and two security agents. The California Supreme Court concluded that a false imprisonment is not a normal aspect of the employment relationship, however legitimate its initial justification. Thus, a false imprisonment committed by an employer against an employee is always outside the scope of the "compensation bargain," and an action against an employer for false imprisonment is not preempted by the exclusive remedy doctrine of workers' compensation law.ⁿ⁹ For complete discussion of the exclusive remedy doctrine of workers'

compensation law, *see* Chapter 20, Part A.

For a complete discussion of the tort of false imprisonment, *see* Levy, Golden, and Sacks, California Torts, Chapter 42 (Matthew Bender).

■ CONSULTANT'S COMMENT:

Employers should be aware that nearly every discharge includes the potential for supervisory conduct amounting to false imprisonment of the dischargee. A common source of that potential is argument over the ownership of property (documents or other tangible items) that the dischargee has collected to remove from the employer's premises. Under such circumstances, the employer is clearly in a dilemma. If it restrains the dischargee, it faces possible false imprisonment charges (as well as possible claims for intentional infliction of emotional distress or for battery). If the employer does not restrain the dischargee, it may lose valuable property. The most prudent course is to ask the dischargee to permit a brief inspection of the property. Reasonable force (directed at the property, rather than the employee, if possible) should be used *only* if the employer has an *objective* basis for concluding that the dischargee is about to remove employer property of *significant proprietary value*. *Commentary by Kirby Wilcox.*

Legal Topics:

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

Labor & Employment Law Wrongful Termination General Overview Torts Intentional Torts False Imprisonment General Overview

FOOTNOTES:

(n1)Footnote 1. *Onick v. Long* (1957) 154 Cal. App. 2d 381, 386, 316 P.2d 427 ; *Parrott v. Bank of America* (1950) 97 Cal. App. 2d 14, 23, 217 P.2d 89 . For the standard jury instruction for the essential factual elements of a claim for false imprisonment not involving an arrest, which would be generally applicable in the employment context, *see* Judicial Council of California Civil Jury Instructions, CACI 1400 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form for a claim of false imprisonment with no arrest involved, *see* Judicial Council of California Civil Jury Instructions, CACI VF-1400 (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n2)Footnote 2. *Parrott v. Bank of America* (1950) 97 Cal. App. 2d 14, 23, 217 P.2d 89 .

(n3)Footnote 3. *Parrott v. Bank of America* (1950) 97 Cal. App. 2d 14, 23, 217 P.2d 89 .

(n4)Footnote 4. *Singleton v. Perry* (1955) 45 Cal. 2d 489, 494, 289 P.2d 794 . For the standard jury instruction on the common law right to detain for investigation, *see* Judicial Council of California Civil Jury Instructions, CACI 1409 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see* § 61.05. For the CACI special verdict form on the affirmative defense of the right to detain for investigation, *see* Judicial Council of California Civil Jury Instructions, CACI VF-1401 (Matthew Bender). For discussion of the CACI special verdict forms generally, *see* § 61.06.

(n5)Footnote 5. *See Penal Code* § 490.5(f).

(n6)Footnote 6. *Collyer v. S.H. Kress & Co.* (1936) 5 Cal. 2d 175, 180-181, 54 P.2d 20 .

(n7)Footnote 7. *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 723, 30 Cal. Rptr. 2d 18, 872 P.2d 559 .

(n8)Footnote 8. *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 30 Cal. Rptr. 2d 18, 872 P.2d 559 .

(n9)Footnote 9. *Fermino v. Fedco, Inc. (1994) 7 Cal. 4th 701, 723, 30 Cal. Rptr. 2d 18, 872 P.2d 559 .*



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 63 Causes of Action Related to Wrongful Termination

Part A. TEXT

4-63 California Employment Law § 63.04

AUTHOR: By James Buyoucos, J.D.

§ 63.04 Interference With Contract/Interference With Prospective Economic Advantage

As a general rule, an employee has no cause of action for inducing the breach of an employment contract, or for interference with prospective economic advantage (which encompasses the tort of inducing breach of contract)ⁿ¹ against either his or her employer or against other employees acting within the scope of their employment.ⁿ² The California Supreme Court has observed, "It is well established that corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract."ⁿ³ This is particularly true in the case of at will employment. For example, in *Halvorsen v. Aramark Unif. Servs., Inc.*, ^{n3.1} the plaintiff, an at will employee, brought a claim against his immediate superior based on his alleged actions in inducing the plaintiff's termination. The court concluded that when an at will employee is terminated, the manager's privilege is absolute. The court reasoned that the manager's motives and communications with the employer concerning termination should receive the strongest protection.^{n3.2} Furthermore, third parties who are not the plaintiff's employer cannot be liable for conspiracy to effect wrongful termination in violation of public policy.ⁿ⁴

However, an employee may have a cause of action against a third person for inducing the employer to terminate an employment contract, even if the contract is terminable at will.ⁿ⁵ Third persons could include corporate shareholders or directors or any other party not authorized to terminate the plaintiff's employment.ⁿ⁶ For example, in one wrongful-discharge action brought against a school district, the board of education, and an individual member of the board, based on the board member's successful attempt to fire plaintiff because he refused to offer business contracts to the member's friends, the board member was held subject to a cause of action for intentional interference with plaintiff's employment contract, because he had no authority as an individual member to bind the school district to a contract, and was not a party to the plaintiff's employment contract.ⁿ⁷

One employer may have a cause of action against another employer for intentional interference with at-will employment relations for inducing an at-will employee to quit working for the first employer. Such an interference is primarily an interference with the future relation between the first employer and the at-will employee. Thus, an employer may recover damages for intentional interference with an at-will employment relation under the same standard applicable to claims for intentional interference with prospective economic advantage. To recover for another employer's interference

with an at-will employment relation, the first employer must plead and prove that the second employer engaged in an independently wrongful act, *i.e.*, an act proscribed by a constitutional, statutory, regulatory, common law, or other determinable legal standard, that induced the at-will employee to leave the first employer.^{n7.1} An employer is not subject to liability for intentional interference if the interference consists merely of extending a job offer that induces an employee to terminate his or her at-will employment. Thus, when no unlawful methods are used, public policy generally supports a competitor's right to offer more pay or better terms to another's employee, so long as the employee is free to leave.^{n7.2}

The elements of a cause of action for interference with prospective economic advantage are (1) an economic relationship between the plaintiff and a third person containing the probability of future economic benefit to the plaintiff (such as an existing employment agreement); (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the plaintiff proximately caused by the acts of the defendant.ⁿ⁸

The first element, probability of future economic benefit, is satisfied by an employment relationship, even if the employment is terminable at will.ⁿ⁹ Thus, an employee was held to have stated a cause of action against the major shareholder of a corporation for inducing breach of contract when the employee alleged that the defendant intentionally and without justification caused the corporation to terminate plaintiff's employment.ⁿ¹⁰

Justification is a defense to an action for interference with prospective economic advantage. For example, a person who has a financial interest in the business of another is privileged to cause him or her not to enter into or continue a relation with a third person in that business, provided the actor does not employ improper means and is acting to protect his or her interest from being prejudiced by the relation.ⁿ¹¹

For a complete discussion of the the tort of interference with prospective economic advantage and applicable defenses, see Levy, Golden, and Sacks, *california tort*, Chapter 40, Part D (Matthew Bender).

Legal Topics:

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

Labor & Employment Law
Wrongful Termination
General Overview
Torts
Intentional Torts
Interference With Personal Relationships
General Overview

FOOTNOTES:

(n1)Footnote 1. See *Buckaloo v. Johnson* (1975) 14 Cal. 3d 815, 823, 122 Cal. Rptr. 745, 537 P.2d 865 , *disapproved on other grounds*, *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal. 4th 376, 393 .

(n2)Footnote 2. See *DeHorney v. Bank of America Nat'l Trust and Sav.* (9th Cir. 1989) 879 F.2d 459, 464 ; *Mallard v. Boring* (1960) 182 Cal. App. 2d 390, 393-394, 6 Cal. Rptr. 171 .

(n3)Footnote 3. *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 24-25, 276 Cal. Rptr. 303, 801 P.2d 1054 ; *see also* *Kacludis v. GTE Sprint Communications Corp.* (N.D. Cal. 1992) 806 F. Supp. 866, 872 .

(n4)Footnote 3.1. *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal. App. 4th 1383, 77 Cal. Rptr. 2d 383 .

(n5)Footnote 3.2. *Halvorsen v. Aramark Unif. Servs., Inc.* (1998) 65 Cal. App. 4th 1383, 1395, 77 Cal. Rptr. 2d 383 ; *See also* § 63.03[3][b].

(n6)Footnote 4. *Weinbaum v. Goldfarb, Whitman & Cohen* (1996) 46 Cal. App. 4th 1310, 1315, 54 Cal. Rptr. 2d 462 ; *see* *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 575-576, 74 Cal. Rptr. 2d 29 (plaintiff's

supervisor did not commit tort of wrongful termination in violation of public policy because that tort has its basis in employer-employee relationship and supervisor was not plaintiff's employer, citing *Weinbaum v. Goldfarb*).

(n7)Footnote 5. *Kozlowsky v. Westminster Nat. Bank* (1970) 6 Cal. App. 3d 593, 598, 86 Cal. Rptr. 52 .

(n8)Footnote 6. *Kozlowsky v. Westminster Nat. Bank* (1970) 6 Cal. App. 3d 593, 598-600, 86 Cal. Rptr. 52 .

(n9)Footnote 7. *Mouchette v. Bd. of Educ.* (1990) 217 Cal. App. 3d 303, 312, 266 Cal. Rptr. 1 , disapproved on other grounds, *Caldwell v. Montoya* (1995) 10 Cal. 4th 972, 984 .

(n10)Footnote 7.1. *Reeves v. Hanlon* (2004) 33 Cal. 4th 1140, 1147-1155, 17 Cal. Rptr. 3d 289, 95 P.3d 513 (second employer properly found to be liable where second employer did not simply extend job offers to first employer's at-will employees, but, rather, purposely engaged in unlawful acts that crippled first employer's business operations and caused first employer's personnel to terminate their at-will employment contracts).

(n11)Footnote 7.2. *Reeves v. Hanlon* (2004) 33 Cal. 4th 1140, 1151-1153, 17 Cal. Rptr. 3d 289, 95 P.3d 513 .

(n12)Footnote 8. *Blank v. Kirwan* (1985) 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58 . However, in certain circumstances, negligent interference with prospective economic advantage is also actionable. See *J'aire Corp. v. Gregory* (1979) 24 Cal. 3d 799, 805-806, 157 Cal. Rptr. 407, 598 P.2d 60 .

For the standard jury instructions on economic interference, see Judicial Council of California Civil Jury Instructions, CACI 2200 (inducing breach of contract); CACI 2201 (intentional interference with contractual relations); CACI 2202 (intentional interference with prospective economic relations), CACI 2203 (intent), 2204 (negligent interference with prospective economic relations) (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, see § 61.05. For the CACI special verdict forms for economic interference, see Judicial Council of California Civil Jury Instructions, CACI VF-2200 (inducing breach of contract), VF-2201 (intentional interference with contractual relations), VF-2202 (intentional interference with prospective economic relations), VF-2203 (negligent interference with prospective economic relations) (Matthew Bender). For discussion of the CACI special verdict forms generally, see § 61.06.

(n13)Footnote 9. *Kozlowsky v. Westminster Nat. Bank* (1970) 6 Cal. App. 3d 593, 598, 86 Cal. Rptr. 52 .

(n14)Footnote 10. *Kozlowsky v. Westminster Nat. Bank* (1970) 6 Cal. App. 3d 593, 598-600, 86 Cal. Rptr. 52 .

(n15)Footnote 11. *Kozlowsky v. Westminster Nat. Bank* (1970) 6 Cal. App. 3d 593, 599, 86 Cal. Rptr. 52 .



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 63 Causes of Action Related to Wrongful Termination
Part A. TEXT

4-63 California Employment Law § 63.05

AUTHOR: By James Buyoucos, J.D.

§ 63.05 Fraud and Deceit

[1] Tort Damages for Fraud Unavailable for Misrepresentation Committed in Course of Termination of Employment

Whether a discharged employee may assert a claim for fraud or deceit against a former employer depends in part on the nature and timing of the alleged misrepresentations. In *Hunter v. Up-Right, Inc.*,ⁿ¹ the California Supreme Court held that wrongful termination of employment ordinarily does not give rise to a cause of action for fraud or deceit, even if some misrepresentation is made in the course of the employee's dismissal. The Court stated that tort recovery is available only if the plaintiff can establish all of the elements of fraud with respect to a misrepresentation that is separate from the termination of the employment contract.ⁿ²

In reaching this conclusion, the Court discussed the policy considerations that supported the holding in *Foley v. Interactive Data Corp.* ⁿ³ that tort remedies are not recoverable for a breach of the implied covenant of good faith and fair dealing in the employment context, and held that the same considerations support the conclusion that tort remedies are not available for a wrongful termination merely because an employer has made a misrepresentation to end the employment relationship.ⁿ⁴ The Court stated that the employer in the case before it could have terminated the plaintiff without any subterfuge, and would have been liable only for contractual damages if the termination was wrongful. As a consequence, the Court held that the use of a misrepresentation to achieve the same result should not give rise to tort damages.ⁿ⁵

In a later case, however, the Court held that its holding in *Hunter* was *not* intended to create a broad immunity from all traditional tort liability for fraud in the employment context.ⁿ⁶ Thus, as discussed in [2], *below*, tort remedies for fraud and deceit may be available for misrepresentations that were not merely made for the purpose of effecting termination of the plaintiff's employment.

[2] Cause of Action Can Be Stated for Misrepresentation Independent of Termination

The California Supreme Court in *Hunter* (discussed in [1], *above*) indicated in dictum that a misrepresentation that is

not aimed at effecting termination of employment, but designed instead to induce the employee to alter detrimentally his or her position in some other respect, can be the basis of a valid fraud claim, even in the context of a wrongful termination.ⁿ⁷ To state such a cause of action, the plaintiff must establish all of the elements of fraud with respect to a misrepresentation that is separate from the termination of the employment contract.ⁿ⁸ In a later case, *Lazar v. Superior Court*,ⁿ⁹ the Court followed the dictum in *Hunter*. The Court held that a terminated employee who alleged that he had been induced by the defendant's knowingly false promises of job security to give up secure employment in another state and move with his family across country to accept defendant's employment offer had stated a valid cause of action for promissory fraud.ⁿ¹⁰ The Court found the facts alleged in *Lazar* distinguishable from those involved in *Hunter* in that the misrepresentations in *Hunter* were made during the course of terminating the employee. Because the employer could have terminated the employee directly without making any misrepresentation and incurred only contract damages, the Court in *Hunter* had reasoned that the plaintiff had not suffered any detriment as a result of the misrepresentation beyond that which would be caused by a mere breach of the employment contract. By contrast, the alleged misrepresentations in *Lazar* occurred during the employer's recruitment of the plaintiff and were made, not to terminate the plaintiff's employment, but to induce him to give up his previous employment and go to work for defendant. The plaintiff thus suffered actual detriment (e.g., moving expenses, loss of income from the previous employment) as a result of his reliance on that misrepresentation.ⁿ¹¹

It appears that such an employee would apparently also be able to state a statutory cause of action under *Labor Code*, section 970, although the issue was not directly addressed by the Court in *Lazar*. For discussion, see § 63.07[1].

■ CONSULTANT'S COMMENT:

The considerable legal discussion surrounding *Foley*,ⁿ¹² *Hunter*, and *Lazar* merits comment. *Foley* recognized the ease with which tort claims can be alleged, compared to the difficulty of resolving them short of trial, a difficulty with significant economic consequences. Allege a promise not kept, and you have a contract claim. Allege a promise never intended to be kept, and you have fraud. The consequence, if such claims are too easily asserted, is an inevitable chill on the decision-making process surrounding employment terminations. Employers will be dissuaded from making necessary terminations, for fear of "giv[ing] rise to potential tort recovery in every case." *Foley* rejected the ready transformation of contract claims into tort in a particular context, and it did so based on policy arguments that appeared to have much broader scope. *Foley* appeared to stand, at a minimum, for the proposition that one cannot use pleading artifice to convert a contract claim into a tort, where the facts supporting each are essentially the same. As most broadly construed, *Foley* seemed to go further and say that only contract remedies are available for claims triggered by termination, unless the termination violated public policy. *Lazar* rejected the broad reading of *Foley*, though it would be premature to declare the demise of the public policy against the ready assertion of tort claims in the context of the employment relationship. Further, even on its own terms, *Lazar* offers some protection against an onslaught of fraud claims.

The Court in *Lazar* first distinguished *Hunter*, noting that it involved a situation in which the employer misrepresented to the employee the reason for the termination. Because the employer, according to the Court, could have accomplished the termination without the misrepresentation, the employee could not be said to have relied on the misrepresentation to his detriment. Thus, the Court noted, *Hunter* did not preclude employment fraud claims; it merely found that the plaintiff in that case could not establish detrimental reliance, one of the essential elements. According to the Court in *Lazar*, "[o]ur decision in *Hunter* was not meant to alter fundamentally the law of fraud or to suggest it necessarily applies differently in the employment context." The Court next rejected the employer's suggestion that *Foley* limits the remedies for employment termination to contract damages, absent a violation of public policy. *Lazar* noted that in *Foley* the question presented was whether the employment relationship was a "special relationship" that warranted the imposition of tort damages for what ordinarily would be a contract claim (breach of the covenant of good faith and fair dealing). *Foley* refused to extend tort remedies, in light of the "countervailing concerns about economic policy and stability, the traditional separation of tort and

contract law, and ... the numerous protections against improper terminations already afforded employees." *Foley* described such an extension of remedies as "better suited for legislative decision making." In *Lazar*, the Court similarly relied on judicial restraint to counsel against creating a special exemption for employers from traditional fraud claims. The Court noted succinctly that it was "affirming, not inventing, the cause of action for promissory fraud." While the Court thus rejected, on grounds of judicial restraint, an extension of *Foley*, it did not question the holding of *Foley* itself nor the soundness of the policy considerations articulated both there and in *Hunter*. Those policy considerations still stand, and they should continue to inform the decisions of the courts as they confront tort pleadings in the employment context. In particular, there is no reason to conclude that *Lazar* opens the door to pleading artifice where an attempt is made to transform the very facts establishing the contract claim into tort, without more.

In recognition of *Foley's* concern not to create "potential tort recovery in every [discharge] case," the *Lazar* Court admonished that fraud must be "pled specifically; general and conclusory allegations do not suffice." The Court noted that the "policy of liberal construction of pleadings" will not ordinarily save defective fraud claims; rather, plaintiffs must allege "facts which show, how, where, to whom, and by what means the representations were tendered." In the case of fraud claims asserted against "a corporate employer," plaintiff's burden "is even greater." Plaintiffs must "allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, [and] what they said or wrote."

While the Court did not discuss the scienter requirement of a fraud claim, there is no reason to exempt that element from the same strict pleading requirements applicable to all the other elements, and much reason not to. If plaintiffs need allege only the legal conclusion that the employer never intended to keep its promise, with no supporting facts other than that the promise was not kept, the policy of *Foley* and the admonitions of *Lazar* become ephemeral indeed; there truly will be "potential tort recovery in every [discharge] case." While imperfect, enforcement of the strict pleading requirement for all elements of fraud claims is at present the best available means to insure that only "deserving" cases give rise to tort relief. *Commentary by Kirby Wilcox.*

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

While plaintiff's counsel should be careful to distinguish between facts which may give rise to a breach of contract claim (*e.g.*, "I was promised X, and then things changed and I only got Y.") and those which give rise to a legitimate fraud claim ("The employer promised me X with no intention of ever giving me anything but Y."), fraud should be alleged where there is evidence, even circumstantial evidence, on which to base the claim. In most cases, an employee will not know with any certainty at all what was in his or her employer's mind at the time an offer of employment was made. This does not mean that a valid fraud claim cannot be brought. If external facts, such as market conditions, a desire to accommodate another, more favored employee, or internal company politics suggest that the offer of employment was not genuinely meant, the basis for a fraud claim is present. *Commentary by John M. True, III.*

Even if an employee has litigated wage claims before the Labor Commissioner based on the same facts as the misrepresentation claims, *res judicata* will not apply to preclude the misrepresentation claims, because the Labor Commissioner lacks jurisdiction over the misrepresentation claims.^{n12.1}

[3] Elements of Cause of Action

The elements of a cause of action for deceit (or fraud or misrepresentation) are (1) the misrepresentation or concealment of a material fact, (2) knowledge of the falsity or lack of a reasonable ground for belief in the truth of the representation, (3) intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) resulting damage.ⁿ¹³ The tort of negligent

misrepresentation does not require scienter or intent to defraud, but does require proof of justifiable reliance and resulting damage.^{n13.1}

Promissory fraud is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, when a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud.^{n13.2} An action for promissory fraud may lie when a defendant fraudulently induces the plaintiff to enter into a contract. In those cases, the plaintiff's claim does not depend on whether the defendant's promise is ultimately enforceable as a contract. If it is enforceable, the plaintiff has a cause of action in tort as an alternative at least, and perhaps in some instances in addition to the cause of action on the contract. Recovery, however, may be limited by the rule against double recovery of tort and contract compensatory damages.^{n13.3} Fraudulent inducement causing damages unrelated to an employee's discharge is an actionable tort regardless of whether the employee is "at-will."^{n13.4}

To be actionable, the matter misrepresented must normally relate to a past or existing fact.ⁿ¹⁴ However, a promise to act in the future is an actionable misrepresentation if the promisor, at the time the promise was made, had no intention of performing the promised action.ⁿ¹⁵ An opinion is not actionable as a misrepresentation unless it was not honestly entertained by the defendant and was given in circumstances in which it was reasonable for the plaintiff to rely on the opinion, such as when the plaintiff reasonably believed that the defendant was an expert in the subject or when the defendant occupied a position of confidence and trust as to the plaintiff.ⁿ¹⁶ Furthermore, if an opinion misrepresents the facts on which it is based or implies the existence of facts that are nonexistent, it constitutes an actionable misrepresentation.ⁿ¹⁷

Nondisclosure of a material fact may constitute an actionable misrepresentation if the defendant was under a duty to disclose the fact. Such a duty may arise, for example, when the defendant stands in a fiduciary relationship with the plaintiff.ⁿ¹⁸ In addition, nondisclosure is actionable when (1) the defendant makes representations but does not disclose facts that materially qualify the facts disclosed, or that render the facts disclosed misleading; (2) the facts are known or accessible only to the defendant and the defendant knows that they are not known to or reasonably discoverable by the plaintiff; and (3) the defendant actively conceals discovery from the plaintiff.ⁿ¹⁹ The employment relationship may give rise to a duty on the part of the employer to disclose certain facts.ⁿ²⁰ In one case, for example, independent sales representatives were told that, pursuant to a corporate reorganization, they were required to sign an agreement providing for termination without cause as a mere "formality" or else be terminated immediately. They signed and were subsequently terminated. The court found that they had stated a cause of action for fraudulent concealment based on allegations that the employer intended to replace the sales representatives at the time it induced their signatures on the agreements.ⁿ²¹

There is authority that suggests that if a deceit cause of action is based on a negligent misrepresentation, the misrepresentation must be in the form of a positive assertion rather than an implied representation or nondisclosure.ⁿ²²

A cause of action for deceit must be supported by proof that the false representation was made by the defendant with knowledge of its falsity or without reasonable grounds for believing it was true.ⁿ²³ An indisputably true statement cannot support an action for deceit.ⁿ²⁴ In addition, plaintiff must show that the defendant intended to induce the plaintiff to rely on the false representation,ⁿ²⁵ that the plaintiff did rely on the representation, and that the reliance was justifiable or reasonable.ⁿ²⁶ When the circumstances of the case would suggest to a reasonable person that the defendant's representation may have been false, the plaintiff may be under a duty to investigate further, and reliance may not be justifiable.ⁿ²⁷ One court of appeal has suggested that a plaintiff's duty to investigate is relaxed in the employment setting when an employee relies on the representations of the employer.ⁿ²⁸

For a further discussion of the the tort of deceit, *see* Levy, Golden, and Sacks, California Torts, Chapter 40, Part A (Matthew Bender).

[4] Remedies

Compensatory damages are the primary remedy in an action for deceit. Plaintiff is entitled to recover for all damages, including pecuniary losses and physical harm, caused by the misrepresentation.ⁿ²⁹ Time and effort expended as a result of the misrepresentation are also compensable.ⁿ³⁰

Punitive damages may be available in actions for deceit. *Civil Code*, section 3294 provides that punitive damages may be awarded if the plaintiff shows by clear and convincing evidence that the defendant has been guilty of oppression, malice, or fraud.ⁿ³¹ Under this provision, "fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of depriving a person of property or legal rights or otherwise causing injury.ⁿ³² Thus, punitive damages are not available in cases involving a non-intentional misrepresentation.

Damages for emotional distress are ordinarily not recoverable in an action for negligent misrepresentation when the injury other than the emotional distress is only economic.ⁿ³³

Legal Topics:

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

Labor & Employment Law Wrongful Termination General Overview Torts Business Torts Fraud & Misrepresentation General Overview

FOOTNOTES:

(n1)Footnote 1. *Hunter v. Up-Right, Inc.* (1993) 6 Cal. 4th 1174, 26 Cal. Rptr. 2d 8, 864 P.2d 88 .

(n2)Footnote 2. *Hunter v. Up-Right, Inc.* (1993) 6 Cal. 4th 1174, 1178, 26 Cal. Rptr. 2d 8, 864 P.2d 88 . For discussion of this exception to the general rule of non-recovery, *see* [2], *below*. For discussion of the statutory cause of action under *Lab. Code* § 970 if an employee was induced by an employer's misrepresentation to relocate to take employment, *see* § 63.07[1].

(n3)Footnote 3. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 . For complete discussion of *Foley*, *see* Ch. 60.

(n4)Footnote 4. *Hunter v. Up-Right, Inc.* (1993) 6 Cal. 4th 1174, 1180-1184, 26 Cal. Rptr. 2d 8, 864 P.2d 88 .

(n5)Footnote 5. *Hunter v. Up-Right, Inc.* (1993) 6 Cal. 4th 1174, 1184-1185, 26 Cal. Rptr. 2d 8, 864 P.2d 88 .

(n6)Footnote 6. *Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 641, 49 Cal. Rptr. 2d 377, 909 P.2d 981 .

(n7)Footnote 7. *Hunter v. Up-Right, Inc.* (1993) 6 Cal. 4th 1174, 1185, 26 Cal. Rptr. 2d 8, 864 P.2d 88 (citing *Miller v. Fairchild Industries, Inc.* (9th Cir. 1989) 885 F.2d 498, 508-510 , as example of case in which fraud cause of action was proper because misrepresentation concerned plaintiff's settlement of civil rights action rather than termination of employment relationship).

(n8)Footnote 8. *Hunter v. Up-Right, Inc.* (1993) 6 Cal. 4th 1174, 1178, 26 Cal. Rptr. 2d 8, 864 P.2d 88 . For discussion of the elements of a fraud cause of action, *see* [3], *below*.

(n9)Footnote 9. *Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 49 Cal. Rptr. 2d 377, 909 P.2d 981 .

(n10)Footnote 10. *Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 648-649, 49 Cal. Rptr. 2d 377, 909 P.2d 981 .

(n11)Footnote 11. *Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 641-644, 49 Cal. Rptr. 2d 377, 909 P.2d 981 .

(n12)Footnote 12. *Foley v. Interactive Data Corp.* (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 .

(n13)Footnote 12.1. *Noble v. Draper* (2008) 160 Cal. App. 4th 1, 11-16, 73 Cal. Rptr. 3d 3 .

(n14)Footnote 13. See *Agosta v. Astor* (2004) 120 Cal. App. 4th 596, 603, 15 Cal. Rptr. 3d 565 ; *Pulver v. Avco Financial Services* (1986) 182 Cal. App. 3d 622, 639, 227 Cal. Rptr. 491 ; see also Civ. Code §§ 1709-1710.

(n15)Footnote 13.1. *Agosta v. Astor* (2004) 120 Cal. App. 4th 596, 603, 15 Cal. Rptr. 3d 565 (employer failed to meet his initial burden of showing entitlement to summary adjudication on misrepresentation causes of action, and burden never shifted to employee to raise triable issue of material fact); *Fox v. Pollack* (1986) 181 Cal. App. 3d 954, 962, 226 Cal. Rptr. 532 .

(n16)Footnote 13.2. *Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377, 909 P.2d 981 ; *Agosta v. Astor* (2004) 120 Cal. App. 4th 596, 603, 15 Cal. Rptr. 3d 565 .

(n17)Footnote 13.3. *Lazar v. Superior Court* (1996) 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377, 909 P.2d 981 ; *Agosta v. Astor* (2004) 120 Cal. App. 4th 596, 603, 15 Cal. Rptr. 3d 565 (former at-will employee produced evidence from which jury could reasonably infer employer promised employee his desired compensation package that employee sought to lure him into changing employment, employer never intended to live up to agreement, and employee suffered compensable damages apart from damages caused by his firing, and that employee was entitled to compensation for loss of security and income associated with former employment).

(n18)Footnote 13.4. *Agosta v. Astor* (2004) 120 Cal. App. 4th 596, 603-606, 15 Cal. Rptr. 3d 565 .

(n19)Footnote 14. *Richard P. v. Vista Del Mar Child Care Service* (1980) 106 Cal. App. 3d 860, 865, 165 Cal. Rptr. 370 .

(n20)Footnote 15. *Church of Merciful Saviour Volunteers of America* (1960) 184 Cal. App. 2d 851, 858-859, 8 Cal. Rptr. 48 ; see *Lazar v. Superior Court* (Cal. 1996) 12 Cal. 4th 631, 641-644 49 Cal. Rptr. 2d 377, 909 P.2d 981 .

(n21)Footnote 16. *Wilke v. Coinway, Inc.* (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845 .

(n22)Footnote 17. *Wilke v. Coinway, Inc.* (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845 .

(n23)Footnote 18. See *Reed v. King* (1983) 145 Cal. App. 3d 261, 264-265, 193 Cal. Rptr. 130 .

(n24)Footnote 19. *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal. 3d 285, 294, 85 Cal. Rptr. 444, 466 P.2d 996 .

(n25)Footnote 20. See *Foster v. Xerox Corp.* (1985) 40 Cal. 3d 306, 309-310, 219 Cal. Rptr. 485, 707 P.2d 858 (employer who knows that employee had contracted disease in course of employment is under a duty to disclose fact to employee).

(n26)Footnote 21. *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal. App. 4th 603, 612-614, 7 Cal. Rptr. 2d 859 .

(n27)Footnote 22. See Civ. Code § 1573(2); *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal. App. 3d 278, 303-304, 136 Cal. Rptr. 603 (dicta).

(n28)Footnote 23. See Civ. Code § 1710(1), (2); *Gagne v. Bertran* (1954) 43 Cal. 2d 481, 487, 275 P.2d 15 .

(n29)Footnote 24. See *Kerr v. Rose* (1990) 216 Cal. App. 3d 1551, 1564, 265 Cal. Rptr. 597 .

(n30)Footnote 25. *Gagne v. Bertran* (1954) 43 Cal. 2d 481, 488 n.5, 275 P.2d 15 .

(n31)Footnote 26. *Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal. App. 3d 799, 807, 270 Cal. Rptr. 585 ;
Wagner v. Benson (1980) 101 Cal. App. 3d 27, 36, 161 Cal. Rptr. 516 .

(n32)Footnote 27. *Roland v. Hubenka* (1970) 12 Cal. App. 3d 215, 224-225, 90 Cal. Rptr. 490 .

(n33)Footnote 28. See *Ramey v. General Petroleum Corp.* (1959) 173 Cal. App. 2d 386, 400, 343 P.2d 787 .

(n34)Footnote 29. *Walker v. Signal Companies, Inc.* (1978) 84 Cal. App. 3d 982, 995-996, 149 Cal. Rptr. 119 ;
O'Hara v. Western Seven Trees Corp. (1977) 75 Cal. App. 3d 798, 805, 142 Cal. Rptr. 487 .

(n35)Footnote 30. *Sutter v. General Petroleum Corp.* (1946) 28 Cal. 2d 525, 534-535, 170 P.2d 898 .

(n36)Footnote 31. Civ. Code § 3294(a).

(n37)Footnote 32. Civ. Code § 3294(c)(3).

(n38)Footnote 33. *Branch v. Homefed Bank* (1992) 6 Cal. App. 4th 793, 798, 8 Cal. Rptr. 2d 182 .



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES
CHAPTER 63 Causes of Action Related to Wrongful Termination
Part A. TEXT

4-63 California Employment Law § 63.06

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§ 63.06 Other Related Causes of Action

[1] Misrepresentation to Induce Worker to Change Residence (Labor Code Section 970)

Labor Code, section 970 provides that no person, agent, or officer thereof shall, directly or indirectly, influence, persuade, or engage any person to move from one place to another within California or from any place outside California to any place within the state, or from any place within California to any place outside the state, for the purposes of working in any branch of labor, through or by means of knowingly false representations, whether spoken, written, or advertised in written form, concerning any of the following matters:

1. The kind, character, or existence of such work;
2. The length of time such work will last, or the compensation for the work;
3. The sanitary or housing conditions relating to or surrounding the work; or
4. The existence or nonexistence of any strike, lockout, or other labor dispute affecting the work and pending between the proposed employer and the persons then or last engaged in the performance of the labor for which the employee is sought.

A violation of *Labor Code, section 970* constitutes a misdemeanor, punishable by a fine of not less than \$50 nor more than \$1,000, or imprisonment for not more than 6 months, or both.ⁿ¹ In addition, a person who violates *Labor Code, section 970* is liable to the aggrieved person in a civil action for double damages resulting from the misrepresentations.ⁿ² The action may be brought by the aggrieved person, or his or her assigns or successors in interest, without establishing any criminal liability.ⁿ³

The elements of a cause of action under *Labor Code, section 970* are (1) an intentional misrepresentation concerning one or more of the above-listed matters relating to the employment,ⁿ⁴ and (2) relocation by a person for purposes of

work as a result of the misrepresentation.^{n4.1}

Although *Labor Code section 970* was apparently enacted to cure problems relating to the solicitation of agricultural employees or other seasonal or mass hiring situations, the statute, by its terms, is not so restricted and may apply in all types of employment situations falling within the provisions of that section.ⁿ⁵ It applies to relocations while working for the same employer as well as relocations to gain new employment.ⁿ⁶

It appears that *Labor Code section 970* applies to a temporary relocation of residence as well as a permanent relocation. However, a mere change in site of the employment, without a relocation of residence, is not sufficient to bring *Labor Code section 970* into operation.ⁿ⁷

Although no case has so held, by analogy to cases decided under similar statutes that provide for enhanced damages, it is arguable that if malice is established in such a cause of action, the plaintiff may be entitled to punitive damages.ⁿ⁸ However, in the event punitive damages are allowed, the plaintiff may have to elect between double damages and punitive damages.ⁿ⁹ Because a violation of *Labor Code section 970* constitutes an intentional misrepresentation (due to the statutory prohibition on "knowingly false representation"), damages for emotional distress may be recovered even if unaccompanied by physical injury.ⁿ¹⁰

[2] Preventing Subsequent Employment of Former Employee by Misrepresentation (Labor Code Section 1050)

Labor Code section 1050 provides that any person, or agent or officer thereof, who by any misrepresentation prevents or attempts to prevent a former employee from obtaining employment, after having discharged the employee or after the employee has voluntarily terminated the employment, is guilty of a misdemeanor. *Labor Code section 1052* provides that any person who knowingly causes, suffers, or permits an agent, superintendent, manager, or employee to commit a violation of *Labor Code section 1050*, or who fails to take all reasonable steps within his or her power to prevent such a violation is also guilty of a misdemeanor. A person who violates *Labor Code sections 1050* or *1052* is also liable to the aggrieved person in a civil action for treble damages.ⁿ¹¹ Civil liability is not contingent on a finding of criminal liability.ⁿ¹²

An action under *Labor Code section 1050* applies only to misrepresentations made to prospective employers other than the defendant. It does not apply to misrepresentations made by the defendant's employees to other employees of the defendant.ⁿ¹³ By its literal terms, *Labor Code section 1050* does not apply if the employee is still employed by the defendant at the time the misrepresentation was made.

An action for violation of *Labor Code sections 1050* or *1052* may be brought by the aggrieved employee, or by his or her assignees or successors in interest.ⁿ¹⁴ The employee's union may not, however, bring such an action.ⁿ¹⁵

The privileges of *Civil Code section 47* available to a defendant in a defamation action also apply in actions for violation of *Labor Code sections 1050* or *1052*.ⁿ¹⁶

Labor Code, section 1053 provides that nothing in *Labor Code, sections 1050-1057* prevents an employer, or an agent, employee, superintendent, or manager of an employer, from furnishing a truthful statement concerning the reason for the discharge of an employee or of the reason why the employee voluntarily left the service of the employer, on special request for such a statement.ⁿ¹⁷ However, a statement that "furnishes any mark, sign, or other means conveying information different from that expressed by the words therein," or that was given without a special request therefor, is prima facie evidence of a violation of *Labor Code, sections 1050* and *1052*.ⁿ¹⁸

As mentioned above, *Labor Code, section 1054* provides for treble damages in cases in which a violation of *Labor Code, sections 1050* or *1052* is established. The constitutionality of the treble damage provision has been upheld.ⁿ¹⁹ If malice

is established, punitive damages may be awarded under *Civil Code, section 3294* in an action under *Labor Code, section 1054*.ⁿ²⁰ However, the plaintiff may not recover both punitive damages and treble damages and is limited to either treble damages or untrebled damages plus punitive damages.ⁿ²¹

Because the crux of such an action is a misrepresentation, a plaintiff is presumably entitled to the same damages as are recoverable in a tort action for deceit, although no reported cases have discussed the point. For a discussion of damages in actions for deceit, *see* § 63.06[3], and Levy, Golden, and Sacks, *California Torts*, Chapter 40, Part A (Matthew Bender).

[3] Other Statutory Violations

A number of California statutes impose liability on an employer for discharging or discriminating against employees under various specified circumstances. For example, *Labor Code, section 132a* provides remedies for an employee who is penalized by an employer for asserting his or her rights under the workers' compensation system. For a comprehensive survey of such statutes, *see* Chapter 60.

[4] No Loss of Consortium or Negligent Infliction of Emotional Distress Action for Employee's Spouse

In one case, the spouse of an employee who was alleged to have been wrongfully discharged was held not to have a cause of action against the employer for loss of consortium or negligent infliction of emotional distress caused by the discharge of her husband.ⁿ²² The court held that the wife of an employee fired from his job did not have a cause of action against the employer for loss of consortium because the husband had only become "mentally upset, distressed and aggravated" as a result of his termination, but his emotional disquiet did not rise to the level of a "neurosis, psychosis, chronic depression, or phobia" sufficient to substantially disturb the marital relationship on more than a temporary basis.ⁿ²³ In addition, the employer owed no duty of care to the wife on which she could predicate her action for emotional distress occasioned by her husband's discharge.ⁿ²⁴

For discussion of causes of action for negligent infliction of emotional distress and loss of consortium generally, *see* Levy, Golden, and Sacks, *California Torts*, Chapters 5 and 56, respectively.

[5] No Tort Action for Negligent Performance of Contractual Duty to Evaluate

One case has held that in California there is no recognized cause of action in tort for negligent performance of a contractual duty by the employer to evaluate the employee, although it has been recognized in other jurisdictions.ⁿ²⁵ The court stated that, even in the states that recognize the cause of action, a complete failure to perform an evaluation is actionable only as a breach of contract. However, the court held that under the facts of the case before it, such a theory would be inapplicable for lack of compensable damages because the employer was not contractually obligated to renew a school administrator's contract, regardless of her job performance.ⁿ²⁶

[6] Employee's Claim for Intentional and Negligent Infliction of Emotional Distress

The elements of a cause of action for intentional infliction of emotional distress are (1) outrageous conduct by the defendant; (2) intention to cause, or reckless disregard of the probability of causing, emotional distress; and (3) actual and proximate causation of severe emotional distress.ⁿ²⁷

Ordinarily, a civil action to recover damages based on intentional infliction of emotional distress in connection with an alleged wrongful termination will be precluded by the exclusive remedy doctrine of the California Workers' Compensation Act,ⁿ²⁸ unless the employer's conduct exceeds the bounds of the employment relationship. The California Supreme Court has held that even intentional misconduct may constitute a normal part of the employment relationship.ⁿ²⁹ Moreover, even when no physical injury or disability is alleged, a claim for intentional or negligent infliction of emotional distress is within the exclusive remedy provisions of the Workers' Compensation Act, so long as

the basic conditions of compensation are otherwise satisfied and the employer's conduct neither contravenes a fundamental public policy nor exceeds the risks inherent in the employment relationship.ⁿ³⁰

However, a cause of action may be available notwithstanding the exclusive remedy doctrine if the conduct of the employer constituted a willful physical assault by the employer, within the meaning of *Labor Code section 3602(b)(1)*.ⁿ³¹ In addition, one court of appeal has held that emotional distress claims based on "work-related injury discrimination" are not barred by the exclusivity rule.ⁿ³² The court relied on *City of Moorpark v. Superior Court* ⁿ³³ for the proposition that work-related injury discrimination is not a normal risk of the compensation bargain, and consequently *Lab. Code § 132a* does not preclude an employee from pursuing FEHA and common law remedies.ⁿ³⁴

In a few reported cases,ⁿ³⁵ employees have sought recovery based on a claim for negligent infliction of emotional distress, which has been categorized generally as a theory of recovery of damages pursuant to the tort of negligence (entailing the traditional elements of duty, breach of duty, causation, and damages), rather than as a tort or cause of action in and of itself.ⁿ³⁶ Under such a claim, generally, a plaintiff has a right to recover damages for serious emotional distress in a negligence action.ⁿ³⁷ This theory of recovery is available to persons who are considered to be "direct victims" of the defendant's negligence.ⁿ³⁸ This cause of action, however, is also subject to preemption based on the exclusive remedy provisions of the California Workers' Compensation Act,ⁿ³⁹ discussed above, which, in the great majority of cases, will preclude recovery of such a claim in connection with an alleged wrongful discharge.ⁿ⁴⁰

One court of appeal, however, has held that workers' compensation does not prevent an employee from recovering for infliction of emotional distress if the plaintiff has a tort cause of action for wrongful termination in violation of public policy or in violation of an express statute because, in these contexts, emotional distress damages are simply a component of compensatory damages.ⁿ⁴¹ However, it is unclear in this case why the court permitted a stand-alone cause of action for wrongful infliction of emotional distress. To the extent that the plaintiff may recover emotional distress damages as part of a public policy claim, the separate cause of action is redundant. To the extent that the plaintiff seeks to maintain an emotional distress cause of action independent of the public policy cause of action, it would clearly be barred by the Workers' Compensation Act.

Another court of appeal has held that when a plaintiff's emotional distress claim is premised on the employer's violation of a fundamental public policy, that misconduct lies outside the exclusive remedy provisions of the Labor Code, and the plaintiff may state a cause of action for intentional infliction of emotional distress.ⁿ⁴² In this case, the court relied on the reasoning in *Gant v. Sentry Ins.*,ⁿ⁴³ to conclude that when an employer's decision to discharge an employee results from an animus that violates fundamental policy, that misconduct cannot be considered a normal part of the employment relationship.ⁿ⁴⁴ Thus, if the premise of a plaintiff's emotional distress claim is his or her employer's violation of a fundamental public policy of this state, such misconduct lies outside of the exclusive remedy provisions of the Labor Code and the claim is actionable.ⁿ⁴⁵

For further discussion of civil actions based on negligent infliction of emotional distress and intentional infliction of emotional distress, *see* Levy, Golden, and Sacks, California Torts, Chapters 5 and 44.

For discussion of the exclusive remedy doctrine of the California Workers' Compensation Act generally, including discussion of its applicability to actions involving wrongful termination and intentional and negligent infliction of emotional distress, *see* Chapter 20.

For discussion of the defense of preemption of civil actions by federal labor law,ⁿ⁴⁶ which may be applicable when an employment relationship involves a collective bargaining agreement, *see* Chapter 60.

[7] Promissory Estoppel and Reliance Damages

In *Toscano v. Greene Music*, ⁿ⁴⁷ a California court held for the first time that a plaintiff who resigns from at-will

employment in reliance on an unfulfilled promise of other employment may recover, under a promissory estoppel theory, reliance damages based on wages lost from his or her prior employment. Relying on out-of-state cases,ⁿ⁴⁸ the defendant-potential employer had argued that reliance damages did not include lost future earnings, because future earnings represented "expectancy" damages that were not recoverable under promissory estoppel, and the employee could not prove entitlement to such earnings because there was no guarantee of future employment in an at-will setting. The defendant also maintained that the only lost income recoverable was wages lost between the time the employee left his former job and the time the new promised job would have begun. The employee conceded the weight of authority prevented an employee in his circumstances from recovering future lost wages from the prospective employer that induced him to resign his employment, but asserted that the law permitted the employee to recover what he would have earned in the future from his former employer as a component of reliance damages. The Court of Appeal held that the plaintiff's lost future wages from the former at-will employer were recoverable under the promissory estoppel theory as long as they were not speculative or remote and were supported by substantial evidence. In this case, however, the evidence was too speculative to lend support to the trial court's award of lost future earnings from his proposed start date with defendant to his retirement. Although plaintiff had a history of remaining with his employers until offered new employment, his intentions or practices were not relevant to whether he could expect to remain with his former employer until his retirement, because his proposed employment would have been at will.

Legal Topics:

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

Labor & Employment Law Wrongful Termination General Overview Torts Business Torts General Overview

FOOTNOTES:

(n1)Footnote 1. *Lab. Code § 971*.

(n2)Footnote 2. *Lab. Code § 972*.

(n3)Footnote 3. *Lab. Code § 972*.

(n4)Footnote 4. *Tyco Industries, Inc. v. Superior Court (1985) 164 Cal. App. 3d 148, 156-157, 211 Cal. Rptr. 540*

(n5)Footnote 4.1. For the standard jury instruction on the essential factual elements of a claim for solicitation of an employee by misrepresentation under *Lab. Code § 970*, see Judicial Council of California Civil Jury Instructions, *CACI 2710* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, see § 61.05. For the CACI special verdict form for a claim of solicitation of an employee by misrepresentation, see Judicial Council of California Civil Jury Instructions, *CACI VF-2704* (Matthew Bender). For discussion of the CACI special verdict forms generally, see § 61.06.

(n6)Footnote 5. *Munoz v. Kaiser Steel Corp. (1984) 156 Cal. App. 3d 965, 980, 203 Cal. Rptr. 345*; *Seubert v. McKesson Corp. (1990) 223 Cal. App. 3d 1514, 1522*.

(n7)Footnote 6. *Tyco Industries, Inc. v. Superior Court (1985) 164 Cal. App. 3d 148, 157, 211 Cal. Rptr. 540*.

(n8)Footnote 7. See *Collins v. Rocha (1972) 7 Cal. 3d 232, 239, 102 Cal. Rptr. 1, 497 P.2d 225* (dicta; change of location was temporary for two weeks and employer provided transportation).

(n9)Footnote 8. See *Marshall v. Brown (1983) 141 Cal. App. 3d 408, 418-419, 190 Cal. Rptr. 392*, discussed in [2], *below*.

(n10)Footnote 9. See *Marshall v. Brown (1983) 141 Cal. App. 3d 408, 418-419, 190 Cal. Rptr. 392*, discussed in [2], *below*.

(n11)Footnote 10. *Finch v. Brenda Raceway Corp.* (1994) 22 Cal. App. 4th 547, 554, 27 Cal. Rptr. 2d 531 .

(n12)Footnote 11. *Lab. Code § 1054*. For the standard jury instruction on the essential factual elements of a cause of action for preventing subsequent employment by misrepresentation under *Lab. Code § 1050*, see Judicial Council of California Civil Jury Instructions, *CACI 2711* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, see § 61.05. For the CACI special verdict form for a claim of preventing subsequent employment by misrepresentation, see Judicial Council of California Civil Jury Instructions, *CACI VF-2705* (Matthew Bender). For discussion of the CACI special verdict forms generally, see § 61.06.

(n13)Footnote 12. *Lab. Code § 1054*.

(n14)Footnote 13. *Kelly v. General Telephone Co.* (1982) 136 Cal. App. 3d 278, 288-289, 186 Cal. Rptr. 184 .

(n15)Footnote 14. *Lab. Code § 1054*.

(n16)Footnote 15. *Service Employees International Union v. Hollywood Park, Inc.* (1983) 149 Cal. App. 3d 745, 765, 197 Cal. Rptr. 316 .

(n17)Footnote 16. See *O'Shea v. General Telephone Company* (1987) 193 Cal. App. 3d 1040, 1047, 238 Cal. Rptr. 715 . For a discussion of privileges in the context of defamation actions, see § 63.02[3][b].

(n18)Footnote 17. *Lab. Code § 1053*.

(n19)Footnote 18. See *Lab. Code § 1053*.

(n20)Footnote 19. *Marshall v. Brown* (1983) 141 Cal. App. 3d 408, 417-418, 190 Cal. Rptr. 392 .

(n21)Footnote 20. *Marshall v. Brown* (1983) 141 Cal. App. 3d 408, 418-419, 190 Cal. Rptr. 392 .

(n22)Footnote 21. *Marshall v. Brown* (1983) 141 Cal. App. 3d 408, 419, 190 Cal. Rptr. 392 .

(n23)Footnote 22. *Anderson v. Northrop Corp.* (1988) 203 Cal. App. 3d 772, 776-781, 250 Cal. Rptr. 189 .

(n24)Footnote 23. *Anderson v. Northrop Corp.* (1988) 203 Cal. App. 3d 772, 780-781, 250 Cal. Rptr. 189 .

(n25)Footnote 24. *Anderson v. Northrop Corp.* (1988) 203 Cal. App. 3d 772, 776-780, 250 Cal. Rptr. 189 .

(n26)Footnote 25. *Tollefson v. Roman Catholic Bishop* (1990) 219 Cal. App. 3d 843, 857, 268 Cal. Rptr. 550 .

(n27)Footnote 26. *Tollefson v. Roman Catholic Bishop* (1990) 219 Cal. App. 3d 843, 857, 268 Cal. Rptr. 550 .

(n28)Footnote 27. *Agarwal v. Johnson* (1979) 25 Cal. 3d 932, 946, 160 Cal. Rptr. 141, 603 P.2d 58 ; see generally Levy, Golden, & Sacks, California Torts, ch. 44 (Matthew Bender). See *Noble v. Draper* (2008) 160 Cal. App. 4th 1, 18-19, 73 Cal. Rptr. 3d 3 (former employees' action for intentional infliction of emotion distress, based on threatening phone call made to one employee threatening other employee's daughter if first employee testified in administrative wage hearing, failed, where employees were unable to identify person who allegedly placed phone call). For the standard jury instructions on intentional infliction of emotional distress, see Judicial Council of California Civil Jury Instructions, *CACI 1600 et seq.* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, see § 61.05. For the CACI special verdict form on intentional infliction of emotional distress, see Judicial Council of California Civil Jury Instructions, *CACI VF-1600* (Matthew Bender). For discussion of the CACI special verdict forms generally, see § 61.06.

(n29)Footnote 28. *See Lab. Code § 3602.*

(n30)Footnote 29. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 752, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 ; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743 .

(n31)Footnote 30. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 ; *Gibbs v. American Airlines, Inc.* (1999) 74 Cal. App. 4th 1, 9-10, 87 Cal. Rptr. 2d 554 (plaintiff's emotional distress action was preempted by workers' compensation law, because workers' compensation is exclusive remedy for intentional infliction of emotional distress caused by employer's work-related conduct when that conduct does not contravene public policy). *See Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 577, 74 Cal. Rptr. 2d 29 (workers' compensation does not preempt emotional distress action against employer in context of tort cause of action for wrongful termination in violation of public policy or in violation of an express statute).

(n32)Footnote 31. *See Herrick v. Quality Hotels, Inns & Resorts, Inc.* (1993) 19 Cal. App. 4th 1608, 1616-1618, 24 Cal. Rptr. 2d 203 (also finding sufficient evidence of employer ratification of supervisor's threat to "blow [plaintiff's] head off" during termination).

(n33)Footnote 32. *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1491-1492, 82 Cal. Rptr. 2d 359 .

(n34)Footnote 33. *City of Moorpark v. Superior Court* (1998) 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445, 959 P.2d 752 ; *see § 20.11* (discussing *Moorpark*).

(n35)Footnote 34. *Fretland v. County of Humboldt*, 69 Cal. App. 4th 1478, 1492, 82 Cal. Rptr. 2d 359 ; *see § 20.12* (discussing exceptions to exclusivity rule).

(n36)Footnote 35. *See, e.g., Robards v. Gaylord Bros., Inc.* (9th Cir. 1988) 854 F.2d 1152, 1157-1158 ; *Pichon v. Pacific Gas and Elec. Co.* (1989) 212 Cal. App. 3d 488, 260 Cal. Rptr. 677 (involving both negligent and intentional infliction of emotional distress); *Davaris v. Cubaleski* (1993) 12 Cal. App. 4th 1583, 1587-1588, 16 Cal. Rptr. 2d 330 (involving both negligent and intentional infliction of emotional distress, and filed against the same employer as in *Livitsanos*).

(n37)Footnote 36. *See Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.* (1989) 48 Cal. 3d 583, 588, 257 Cal. Rptr. 98, 770 P.2d 278 ; *see generally* Levy, Golden, & Sacks, California Torts, ch. 5 (Matthew Bender).

(n38)Footnote 37. *Molien v. Kaiser Found. Hosps.* (1980) 27 Cal. 3d 916, 930, 167 Cal. Rptr. 831, 616 P.2d 813 .

(n39)Footnote 38. *Molien v. Kaiser Found. Hosps.* (1980) 27 Cal. 3d 916, 930, 167 Cal. Rptr. 831, 616 P.2d 813 . For the standard jury instruction on the essential factual elements for negligent infliction of emotional distress by a direct victim, *see* Judicial Council of California Civil Jury Instructions, *CACI 1620* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions. For discussion of the CACI standard jury instructions generally, *see § 61.05*. For the CACI special verdict form for negligent infliction of emotional distress on a direct victim, *see* Judicial Council of California Civil Jury Instructions, *CACI VF-1603* (Matthew Bender). For discussion of the CACI special verdict forms generally, *see § 61.06*.

(n40)Footnote 39. *See Lab. Code § 3600.*

(n41)Footnote 40. *Livitsanos v. Superior Court* (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195 .

(n42)Footnote 41. *Phillips v. Gemini Moving Specialists* (1998) 63 Cal. App. 4th 563, 577, 74 Cal. Rptr. 2d 29 (workers' compensation does not preempt emotional distress action against employer in context of tort cause of action

for wrongful termination in violation of public policy or in violation of an express statute).

(n43)Footnote 42. *Cabesuela v. Browning-Ferris Indus. of California, Inc.* (1998) 68 Cal. App. 4th 101, 112-113, 80 Cal. Rptr. 2d 60 .

(n44)Footnote 43. *Gantt v. Sentry Insurance* (1992) 1 Cal. 4th 1083, 1100, 4 Cal. Rptr. 2d 874, 824 P.2d 680 , overruled on other grounds, *Green v. Ralee Eng'r Co.* (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046 .

(n45)Footnote 44. *Cabesuela v. Browning-Ferris Indus. of California, Inc.* (1998) 68 Cal. App. 4th 101, 112-113, 80 Cal. Rptr. 2d 60 .

(n46)Footnote 45. *Cabesuela v. Browning-Ferris Indus. of California, Inc.* (1998) 68 Cal. App. 4th 101, 112, 80 Cal. Rptr. 2d 60 .

(n47)Footnote 46. *See, e.g., 29 U.S.C. § 185(a)* (§ 301 of the National Labor Relations Act).

(n48)Footnote 47. *Toscano v. Greene Music* (2004) 124 Cal. App. 4th 685, 21 Cal. Rptr. 3d 732 .

(n49)Footnote 48. *See Wyatt v. Bellsouth, Inc.* (M.D.Ala. 1998) 18 F. Supp. 2d 1324 ; *Zenor v. El Paso Healthcare System, Ltd.* (5th Cir. 1999) 176 F.3d 847 . *but see Pepsi-Cola General Bottlers, Inc. v. Woods* (Ind.App. 1982) 440 N.E.2d 696 (where plaintiff quit former employment in reliance on promise of employment with defendant, she had right of action under promissory estoppel; court refused to permit her to recover lost wages she would have earned from defendant, because such damages would give her benefit of her bargain; although she was entitled to damages for expenses incurred in reliance on promise, there was insufficient proof of out-of-pocket expenses to compute damages).



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DIVISION VI WRONGFUL TERMINATION AND RELATED DISPUTES

CHAPTER 63 Causes of Action Related to Wrongful Termination

Part A. TEXT

4-63 California Employment Law §§ 63.07through 63.19

AUTHOR: By James Buyoucos, J.D.

[Reserved]

§§ 63.07[Reserved]



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AUTHOR: By James Buyoucos, J.D.

§ 63.20 Legal Texts

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Legal Topics:

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

Labor & Employment LawWrongful TerminationGeneral Overview



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues

4-70 California Employment Law 70.syn

AUTHOR: By James Buyoucos, J.D.

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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues

4-70 California Employment Law Scope

AUTHOR: By James Buyoucos, J.D.

Scope

By James Buyoucos, J.D. n* SCOPE

This chapter discusses the employer's rights regarding an employee's use and disclosure of the employer's confidential and proprietary information obtained in the course of employment, as well as restrictions on an employee's or former employee's right to compete with his or her employer or former employer. Specifically, the chapter discusses the law of trade secrets, unfair competition and related causes of action, ownership of inventions, and other issues relating to proprietary rights arising out of the employment relationship.

FOOTNOTES:

(n2)Footnote *. Publisher's Editorial Staff.



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
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 PART A. OVERVIEW OF GOVERNING LAW

4-70 California Employment Law § 70.01

AUTHOR: By James Buyoucos, J.D.

§ 70.01 Introduction

The law governing the right of an employee or a former employee to compete with his or her employer or former employer and the use of the employer's confidential information by such an employee or former employee involves a number of overlapping legal theories. There is a close relationship between a cause of action for misappropriation of a trade secret¹ and one for unfair competition whenever an employee or former employee uses information gained in the course of employment to compete with the employer.² In addition, if the employee was given information in confidence, and later uses that information to compete with the employer, the employee may be subject to a tort cause of action for breach of confidence.³ If the employee has agreed by contract not to use or disclose confidential employer information or not to compete with the employer, the employee may be subject to a suit for breach of contract.⁴ Furthermore, if an employee, prior to termination, competes with his or her employer or acts adversely to the employer's interests, the employee may be subject to an action for breach of the duty of loyalty or breach of fiduciary duty.⁵ Finally, if an employee or former employee wrongfully attempts to divert business from his or her employer, the employee may be subject to an action for interference with contract or interference with prospective economic advantage.⁶

Given the overlap, multiple causes of action are often available in suits by an employer against a former employee. In one case in which it was alleged that former employees overstepped the bounds of fair competition in attempting to solicit the customers of their former employer, the employer alleged causes of action for (1) misappropriation of a trade secret, (2) interference with prospective economic advantage, (3) interference with contractual relations, (4) breach of contract, (5) breach of fiduciary duty, and (6) unfair competition.⁷

Legal Topics:

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

Labor & Employment Law
 Employment Relationships
 General Overview
 Labor & Employment Law
 Employment Relationships
 Employment Contracts
 Conditions & Terms
 Trade Secrets & Unfair Competition
 Noncompetition & Nondisclosure Agreements

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 70.02.

(n2)Footnote 2. *See* discussion in § 70.03.

(n3)Footnote 3. *See* discussion in § 70.05.

(n4)Footnote 4. *See* discussion in § 70.07.

(n5)Footnote 5. *See* discussion in § 70.04.

(n6)Footnote 6. *See* discussion in § 70.06.

(n7)Footnote 7. *See Moss, Adams & Co. v. Shilling (1986) 179 Cal. App. 3d 124, 127, 224 Cal. Rptr. 456 .*



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PART A. OVERVIEW OF GOVERNING LAW

4-70 California Employment Law § 70.02

AUTHOR: By James Buyoucos, J.D.

§ 70.02 Trade Secrets

[1] Overview of Law Governing Trade Secret Protection

[a] Uniform Trade Secrets Act (UTSA)

Trade secrets are protected by statute under the Uniform Trade Secrets Act (UTSA).ⁿ¹ The UTSA provides a specific cause of action for misappropriation of a trade secret, as well as providing a comprehensive scheme of remedies.ⁿ² The UTSA became operative in 1985. However, as discussed in [b], *below*, pre-UTSA law may still apply in certain cases and pre-UTSA case law may still be of use in interpreting the UTSA.

[b] Effect of Pre-UTSA Law

Prior to the enactment of the UTSA in 1984, the common law provided a cause of action for misappropriation of a trade secret.ⁿ³ The UTSA does not apply to cases of trade secret misappropriation that occurred entirely prior to January 1, 1985.ⁿ⁴ In addition, if a continuing misappropriation otherwise covered by the UTSA began before January 1, 1985, the UTSA does not apply to the part of the misappropriation occurring before that date.ⁿ⁵ It does, however, apply to the part of the misappropriation occurring on or after that date unless the appropriation was not a misappropriation under the law in effect before the operative date of the UTSA (January 1, 1985).ⁿ⁶ A complete discussion of the law prior to enactment of the UTSA is found in Levy, Golden, and Sacks, *California Torts*, Chapter 40, Part B, Subpart 2.

The UTSA invalidates prior case law regarding trade secrets that is in conflict with its provisions.ⁿ⁷ However, the legislative intent in codifying the UTSA was to incorporate the better reasoned cases applying the common law of trade secrets and thus the UTSA, to a large extent, codifies the then-existing common law.ⁿ⁸

[c] Effect of Federal Patent and Copyright Laws

Although a trade secret may in some cases consist of a device or process that is patentable, patentability is not a prerequisite to classification as a trade secret.ⁿ⁹

The holder of a patent has the protections afforded by federal patent law in cases of infringement and need not resort to state trade secret law.ⁿ¹⁰ A patented item or process cannot be the subject matter of a state law trade secrets action.ⁿ¹¹ However, an item or process that could be patented but is not patented, as well as unpatentable matter, can be the subject of a state law trade secrets action.ⁿ¹² Federal patent law thus does not preempt state trade secret law in regard to items that have not been patented.ⁿ¹³

States may regulate trade secrets only to the extent that the regulation does not conflict with federal copyright law.^{n13.1} However, federal copyright law does not preempt a state trade secret cause of action that involves a legal or equitable right that is in addition to or qualitatively different from a claim based on copyright infringement.^{n13.2} This rule leaves areas in which state trade secret laws may properly apply to copyrighted material. For example, one court held that the owner of copyrighted computer software programs could state a trade secret cause of action against its licensee for surreptitiously obtaining an "unprotected" copy of the program because the California statute pleaded^{n13.3} did not involve a legal or equitable right equivalent to an exclusive right of a copyright owner under the Copyright Act,^{n13.4} but only prohibited certain means of obtaining confidential information. Thus, under those circumstances application of the UTSA did not conflict with federal copyright law.^{n13.5}

[d] Effect of Out-of-State Decisions

Civil Code Section 3426.8 provides that the UTSA "shall be applied and construed to effectuate its general purpose to make uniform the law with respect to [trade secret misappropriation] among states enacting it." Thus, the decisions of courts outside California will have potential precedential value in California cases involving application and construction of the UTSA.

[e] Effect of UTSA on Other Laws

The UTSA does not affect (1) contractual remedies, whether or not based on misappropriation of a trade secret, (2) other civil remedies that are not based on misappropriation of a trade secret, or (3) criminal remedies, whether or not based on misappropriation of a trade secret.ⁿ¹⁴ There is considerable overlap between a cause of action for misappropriation of a trade secret and a cause of action for unfair competition based on use of a trade secret.ⁿ¹⁵ On one hand, it would appear that *Civil Code Section 3426.7(b)* suggests that the UTSA does not preempt such actions for unfair competition. However, it can be argued that if a cause of action for unfair competition is "based on misappropriation of a trade secret," the UTSA will govern if there is any inconsistency between its rules and those applicable to the action for unfair competition.ⁿ¹⁶ One important difference between a cause of action for unfair competition and one under the UTSA is that punitive damages are more restricted under the UTSA.ⁿ¹⁷

The UTSA provides that "[e]xcept as otherwise expressly provided, this title does not supersede any statute relating to misappropriation of a trade secret, or any statute otherwise regulating trade secrets."ⁿ¹⁸ Such other statutes involve government regulation of industry.ⁿ¹⁹ In addition, the UTSA does not affect the disclosure of a record by a state or local agency under the California Public Records Act.ⁿ²⁰ Any determination about whether the disclosure of a record under that act constitutes misappropriation of a trade secret and the rights and remedies with respect to such a disclosure shall be made pursuant to the law in effect before the operative date of the UTSA, that is, January 1, 1985.ⁿ²¹

[f] Overlap With Other Legal Theories

To a large extent, a cause of action for misappropriation of a trade secret overlaps with a cause of action for unfair competition. Indeed, some courts speak of misappropriation of a trade secret as merely an aspect of unfair competition.ⁿ²² The first California case to grant a remedy for unfair competition for soliciting a former employer's customers based its decision on the rationale that equity will protect an employer against "unwarranted disclosure of trade secrets and confidential communications."ⁿ²³ Such a statement seems to encompass a cause of action for

misappropriation of a trade secret. However, such a statement also implies that there is a class of information that is "confidential," but does not amount to a trade secret, which, if used by an employee in an unwarranted manner, may give rise to an action for unfair competition. Prior to the advent of the UTSA, the courts often treated cases involving an employee's use of the employer's confidential information to compete with the employer without clearly distinguishing whether the cause of action was for trade secret misappropriation or unfair competition. In fact, this issue was not of any practical importance because both causes of action sounded in tort and required basically the same showing, and the remedies were the same regardless of the theory used to impose liability. However, under the UTSA, special rules now apply to actions for trade secret misappropriation so that the determination of the type of action may have a major effect on the litigation. For example, punitive damages are more restricted in trade secret misappropriation actions than they are in unfair competition actions.ⁿ²⁴

[2] Elements of Cause of Action for Misappropriation of Trade Secret

[a] Generally

Under the UTSA, a cause of action for misappropriation of a trade secret consists of two elements: (1) the existence of a trade secret, and (2) misappropriation of the trade secret.ⁿ²⁵ Under prior law, when the defendant was an employee of the plaintiff or obtained the trade secret from the plaintiff's employees, most courts required that the plaintiff show the existence of a public policy favoring the protection of the trade secret that outweighed the ex-employee's interest in using his or her knowledge as a means of support.ⁿ²⁶ This issue was of primary importance in cases involving an employee's right to solicit the clients of a former employer when it was contended that a list of clients was a trade secret.ⁿ²⁷ The courts thus recognized that enforcement of trade secret protection has the effect of restraining the ex-employee from the pursuit of his or her profession, and, in some cases, deprives the ex-employee of the use of knowledge and skill that he or she developed or acquired himself or herself.ⁿ²⁸ Some courts therefore stated that protection should be afforded when, and only when, the information in question has value in the sense that it affords the former employer a competitive advantage over competitors who do not possess such information and when the granting of such protection will not unduly hamper the ex-employee in the practice of his or her occupation or profession.ⁿ²⁹

The UTSA does not mention this balancing of public interest against the livelihood interest of the ex-employee defendant. Therefore, it may be argued that this balancing of policies is not an element of the cause of action in cases to which the UTSA applies. On the other hand, it may be argued that this determination is relevant to the issue of whether or not a trade secret exists under the UTSA.ⁿ³⁰ In any event, it would seem that this balancing of interests is relevant to the "balancing of equities and hardships" and to the issue of "irreparable injury" or to the determination of equitable defenses in cases in which injunctive relief is sought.ⁿ³¹

[b] What Constitutes a Trade Secret

[i] Generally

Under the UTSA, the term "trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that (1) derives independent economic value,ⁿ³² actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.ⁿ³³ The Legislative Committee comment to the UTSA states that the terms "method" and "technique" include the concept of "know how."ⁿ³⁴

The foregoing California definition differs from the Uniform Trade Secrets Act proposed by the National Conference of Commissioners on Uniform State Laws in that it does not include the phrase "and not being readily ascertainable by proper means" after "generally known to" in *Civil Code Section 3426.1(d)(1)*. The deletion apparently resulted from arguments that conditioning the scope of a trade secret on the extent to which the information was not readily ascertainable would muddy the meaning of the term "trade secret" and invite the various parties to speculate on the time

needed to discover a secret.^{n34.1} While the ease of ascertainability is irrelevant to the definition of a trade secret, the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation if the defendant can establish that its knowledge of the information resulted from its own efforts or some other proper means.^{n34.2}

The UTSA definition of trade secret does not differ greatly from the definition of trade secret under prior law. The comments to the first Restatement of Torts state that "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers."ⁿ³⁵ Prior to the enactment of the UTSA, the Restatement definition of trade secret had been adopted by the California appellate courts.ⁿ³⁶ Thus, given the similarity of the definition of a trade secret under the UTSA and former case law, prior case law may often provide persuasive authority in determining whether a trade secret exists. Under prior law, factors used to determine whether information is a trade secret include (1) the extent to which the information is known outside the employer's business, (2) the extent to which it is known by employees and others involved in the business, (3) the extent of measures taken by the employer to guard the secrecy of the information, (4) the value of the information to the employer and to competitors of the employer, (5) the amount of effort or money expended in developing the information, and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.ⁿ³⁷

While the UTSA did not constitute a major departure from prior law in defining trade secrets, it did make some changes. Under pre-UTSA case law, a key element of a trade secret was the need for its continued use in order to maintain a competitive advantage over others.ⁿ³⁸ Under the UTSA, a trade secret need not be continuously used, and thus may encompass material that has not yet been used because the plaintiff has yet to have the opportunity or means to put it to use.ⁿ³⁹ In addition, the UTSA definition of trade secret includes information that has commercial value from a negative viewpoint including, for example, the results of extensive research that proves that a process will not work.ⁿ⁴⁰

In the employment context, one of the most frequently litigated areas of trade secret law involves customer lists. For discussion of when an employer's customer list may be afforded trade secret protection against use or disclosure by a former employee, *see* § 70.11[1]. In addition, trade secret litigation often involves special machines, formulas, or designs for the production of goods.ⁿ⁴¹

An employee's subjective qualities and characteristics generally do not in themselves constitute a protectable "trade secret" of an employer.^{n41.1} In *Metro Traffic Control, Inc. v. Shadow Traffic Network*, ^{n41.2} plaintiff had contracted to provide traffic reporting services for a radio station. The plaintiff had written employment agreements with its reporters, which contained, among other things, provisions prohibiting employees from working for competitors for one year following termination of employment. When plaintiff's contract with the radio station expired, defendant contracted with the station to provide traffic reporting services. On expiration of plaintiff's contract with the station, several of plaintiff's reporters terminated their employment with plaintiff and began working for defendant. Plaintiff sued to enjoin defendant from soliciting its employees to violate the noncompetition clauses.

The court of appeal affirmed the trial court's denial of injunctive relief. The court held that the noncompetition agreements were unenforceable unless necessary to protect the plaintiff's trade secrets.^{n41.3} The plaintiff argued that the radio station had particular requirements regarding the quality, sound, and personality of traffic reporters and that plaintiff's knowledge of these requirements was a trade secret that it had conveyed to its reporters in the course of their employment. The appellate court noted that the "quality, sound, and personality" of plaintiff's reporters were subjective dimensions of employees hired by the plaintiff and found acceptable by the radio station and not part of an informational base belonging to plaintiff. The court observed that although plaintiff may have conveyed the station's preferences and requirements to its employees, this did not amount to the compilation of an intangible property right

owned by the employer. The court stated that actors, musicians, athletes, and others are frequently trained, tutored, and coached to satisfy the requirements of their sponsors and audiences, but their talents belong to them to contract away as they please. The court concluded that simply hiring personnel who possess the requirements specified by a customer does not convert the employee into a trade secret. In other words, a stable of trained and talented at-will employees do not constitute an employer's trade secret.^{n41.4} The court further noted that the radio station's requirements could not be a trade secret belonging to the plaintiff because information concerning those requirements could be obtained directly from the station by anyone who contracted with the station.^{n41.5}

[ii] Secrecy Element

Under the UTSA, the secrecy requirement is met if the information alleged to be a trade secret (1) is not generally known to the public or to other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.ⁿ⁴² If the information is generally known in the trade and already used by good-faith competitors, it is not a protectable trade secret.ⁿ⁴³ Similarly, if the information is readily ascertainable by proper means, an action for misappropriation of a trade secret cannot prevail.ⁿ⁴⁴ Information is readily ascertainable if it is available in trade journals, reference books, or published materials. Moreover, the nature of a product often will make it susceptible to being copied as soon as it is available on the market.ⁿ⁴⁵

The Legislative Committee comments state that reasonable efforts to maintain secrecy include (1) advising an employee of the existence of a trade secret, (2) limiting access to the trade secret on a "need to know basis," and (3) controlling plant access. By contrast, public disclosure of information through display, trade journal publications, advertising, or carelessness may preclude protection.ⁿ⁴⁶

The efforts required to maintain secrecy are those that are "reasonable under the circumstances."ⁿ⁴⁷ Extreme and unduly expensive procedures to protect against flagrant industrial espionage are not required, and controlled disclosure to employees and licensees is consistent with the requirement of secrecy.ⁿ⁴⁸

[c] Misappropriation

Under the UTSA, misappropriation means:ⁿ⁴⁹

1. Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
2. Disclosure or use of a trade secret of another without express or implied consent by a person who:
 - a. Used improper means to acquire knowledge of the trade secret; or
 - b. At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was: (i) derived from or through a person who had utilized improper means to acquire it; or (ii) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (iii) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - c. Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

The term "improper means," as used by the UTSA in defining the term "misappropriation," includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or

other means.ⁿ⁵⁰ Reverse engineering or independent derivation alone is not considered improper means.ⁿ⁵¹ Reverse engineering involves starting with a known product and working backward to derive the process that produced it.ⁿ⁵² It should be noted, however, that the mere fact that a trade secret could be discovered by reverse engineering does not preclude a finding of misappropriation unless the defendant actually did discover the secret by means of reverse engineering.ⁿ⁵³

Ordinarily, an employee does not acquire his or her employer's trade secrets by "improper means." Usually the employer tells the employee the trade secret or the employee develops the secret himself or herself. Thus, an employer, in proving misappropriation by a former employee, will normally have to show that the trade secret was acquired under circumstances giving rise to a duty by the employee to keep the information confidential or to limit its use.ⁿ⁵⁴

If the employee develops the trade secret without the use of confidential employer information, the employee may not be under a duty to keep the information confidential or to limit its use.ⁿ⁵⁵ In one case, decided prior to the advent of the UTSA, an employee developed a new system related to the use of cranes in the cargo business. After the employee terminated his employment, he sold the system to a competitor. The court of appeal held that the former employer did not have a protectable trade secret in the system. The court reasoned that because the employee had knowledge of the basic principles involved in developing the system before he commenced employment and had not obtained through a confidential relationship something that he did not previously know, there was no basis for a finding of a misappropriation of a trade secret.ⁿ⁵⁶

In another pre-UTSA case, an employee developed a valve design for his employer (the plaintiff) based on knowledge gained from prior employment. The employee then went to work for a competitor who put the design to use. The court of appeal held that while the design was a trade secret of the the plaintiff-employer, the employee was privileged to use it by virtue of the fact that the employee did not breach any duty of confidence owed to his employer.ⁿ⁵⁷ However, cases decided prior to the advent of the UTSA upheld actions for unfair competition based on a former employee's use of customer list trade secrets that were developed on the initiative of the employee.ⁿ⁵⁸

One "has reason to know" if one is on constructive notice and should make further inquiry regarding ownership of the secret.^{n58.1} Constructive notice is codified in *Civil Code Section 19*: every person who has actual notice of the circumstances sufficient to put a prudent person on inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which by prosecuting the inquiry, he or she might have learned the fact.

If no duty is imposed by law on a person to make inquiry and the circumstances are such that a prudent person would not be put on inquiry, the fact that the means of obtaining the true facts are open to a person and he or she does not pursue those means is not sufficient for imposition of liability. No definite rule can be formulated to specify what, in a particular instance, is sufficient to arouse suspicion. The better rule is that even information regarding collateral facts, which if pursued would have lead to the discovery of ultimate facts, is sufficient to charge the person failing to pursue.^{n58.2}

In a case involving defendant's acquisition from plaintiff's employee of a concept for a television show, the employee allegedly misrepresented to defendant that he owned the rights to the concept. Defendant claimed it had a right to rely on the representation. Plaintiff claimed that reliance was not reasonable, but that the defendant had a duty to investigate. The court of appeal held that summary judgement for the defendant was improper and that a triable issue of fact existed. The court noted several relevant considerations which were not addressed in the record before it. The record did not disclose whether defendant ever received the written verification it requested from the employee of the oral representations that the employee owned the concept and that another studio had not decided to exercise its option on it.^{n58.3} The court noted that general business practices and one's own actions are considered in determining if there is constructive notice.^{n58.4} Although the record reflected that defendant's usual practice was to have its legal department handle clearances for shows, there was no indication whether those normal business practices were followed to establish that the employee owned the concept. Nor did the record contain any evidence regarding industry standards for

obtaining clearances.n58.5

The case involved a continuing misappropriation that had begun in 1983. The court noted that under the common law, the issues to be determined would be whether defendant paid value in good faith to acquire the concept and whether defendant changed its position so that subjecting it to liability would be inequitable.n58.6

[3] Remedies

[a] Injunctive Relief

Under the UTSA, actual or threatened misappropriation of a trade secret may be enjoined.n59 On application to the court, an injunction shall be terminated when the trade secret has ceased to exist.n60 Thus, an injunction should terminate when what once might have been a trade secret becomes known to good-faith competitors.n61 However, an injunction may be continued for an additional period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.n62

If the court determines that it would be unreasonable to prohibit future use of a trade secret, an injunction may condition future use on payment of a reasonable royalty for no longer than the period of time that the use could have been prohibited.n63 In appropriate circumstances, other affirmative acts to protect a trade secret may be compelled by court order.n64

If a preliminary injunction is issued, the plaintiff must furnish an undertaking equal to the damages the defendant may sustain as a result of the injunction. That estimate is an exercise of the trial court's discretion and will not be disturbed on appeal unless there is a clear abuse of discretion or the amount is arbitrary, capricious, or beyond the bounds of reason.n64.1 Although lost profits will be offset by savings resulting from reduced sales expenses or cost of goods sold, the trial court cannot usually assume that losses a defendant is likely to suffer will be easily compensated by new customers for its product. The amount of the undertaking must factor in reasonable attorneys fees and expenses that the defendant will have to expend to procure a final decision dissolving the injunction.n64.2

The fact that the employer which owns the trade secret wrongfully terminated the employee who misappropriated the trade secret does not usually amount to "unclean hands" to bar injunctive relief. Unclean hands is determined by the impact the conduct has on the equitable relations between the parties. The firing of an employee on a pretextual basis does not implicate the equities between the parties arising out of the employee's misconduct or obligation to refrain from a tortious invasion of the employer's proprietary rights.n64.3 To conclude otherwise would invite every disgruntled employee to defend charges of misappropriation and theft by establishing breach or wrongful termination of employment contract.n64.4

[b] Damages and Unjust Enrichment

Under the UTSA, a complainant may recover damages for the actual loss caused by the misappropriation of a trade secret.n65 This rule is substantially the same as the common-law rule in effect prior to the advent of the UTSA.n66 and thus cases decided under prior law on the issue of damages should still be persuasive authority. Compensatory damages for trade secret misappropriation may include loss of gross profits due to reduction of sales and price.n67 The fact that the employment of the employee who misappropriated the trade secret was wrongfully terminated does not provide a defense or bar to prevent the employer from recovering compensatory relief.n67.1

A complainant may also recover for the unjust enrichment caused by a misappropriation that is not taken into account in computing damages for actual loss.n68 It thus appears that a successful complainant may have the option of recovering either his or her actual damages or the amount by which the defendant was enriched as a result of the misappropriation, whichever is greater.

[c] Royalties

Under the UTSA, a court may order the payment of royalties under *Civ. Code* § 3426.2 or *Civ. Code* § 3426.3, *Civ. Code* § 3426.2 authorizes injunctive relief (*see* [a], *above*), while *Civ. Code* § 3426.3 authorizes a monetary award (*see* [b], *above*). Both statutes provide for the payment of royalties as an alternative remedy--either as an alternative to an injunction against future use^{n68.1} or as an alternative to an award of damages.^{n68.2} Under *Civ. Code* § 3426.2(b), if the court determines that it would be "unreasonable" to prohibit future use of a trade secret, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prevented.ⁿ⁶⁹ Under *Civ. Code* § 3426.3(b), if neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.ⁿ⁷⁰ A court may not, however, issue an injunction against future use and also order payment of royalties when lost future profits has been included within a claim for damages. To order the payment of royalties in these circumstances would result in unauthorized double recovery.^{n70.1}

The UTSA does not define the term "royalty" or specify the manner in which a "reasonable royalty" is to be calculated. For example, the statute does not indicate whether the royalty is intended to be a flat fee or whether it would be based on some percentage of the profits derived by the defendant from use of the trade secret. The statute appears to leave the manner of determining the royalty to the discretion of the trial court.ⁿ⁷¹

[d] Exemplary Damages

The UTSA provides that if willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under the subdivisions authorizing money damages.ⁿ⁷² This provision differs from the exemplary damages rule of *Civil Code Section 3294*, which is applied in other tort cases. First, the UTSA provision requires both willfulness and malice, whereas the general punitive damages statute requires fraud, oppression, *or* malice. Second, the UTSA limits the award of exemplary damage to twice the award of actual damages and unjust enrichment or twice the amount of royalties awarded in lieu of damages or unjust enrichment,ⁿ⁷³ whereas the amount of the exemplary damages award under *Civil Code Section 3294* is in the discretion of the trier of fact and is not limited to any specific percentage or multiple of the compensatory damage award.ⁿ⁷⁴

[e] Attorney's Fees and Costs

The UTSA provides that if a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees and costs to the prevailing party.^{n74.1}

The UTSA does not provide an express definition of "bad faith" for purposes of awarding attorney's fees. Courts, however, have developed a two-prong standard:^{n74.2}

(1) Objective speciousness of the claim.^{n74.3}

(2) Subjective bad faith in bringing or maintaining the action, *i.e.*, for an improper purpose.^{n74.4}

Section 3426.4 authorizes the trial court to award attorney fees as a deterrent to specious trade secret claims.^{n74.5} Because the award is a sanction, a trial court has broad discretion in awarding fees.^{n74.6} One court of appeal has held that the bad faith requirement is satisfied by a jury's determination, on clear and convincing evidence, to award punitive damages because that determination necessitates a finding that the defendant's acts of misappropriation were done with malice.^{n74.7}

The Uniform Trade Secrets Act requires an actual or threatened misappropriation.ⁿ⁷⁵ A "threatened misappropriation"

is a threat by a defendant to misuse trade secrets, manifested by words or conduct, where the evidence indicates imminent misuse. Mere possession of trade secrets by a departing employee is not enough for an injunction. Further, the inevitable disclosure doctrine is not the law in California. Thus, a hard drive download is not necessarily a "threatened" misappropriation under the Uniform Trade Secrets Act, when the injunction is sought under the inevitable disclosure doctrine.^{n75.1}

Because attorney's fees to a prevailing plaintiff when defendant's misappropriation is willful and malicious are authorized by statute, they are awarded pursuant to *Code of Civil Procedure section 1033.5(a)(10)*, and the amount of the award is fixed by the court in a post-trial noticed motion.^{n75.2} The amount of the award need not reflect the monetary relief awarded when the most significant relief is the injunctive relief granted.^{n75.3} If the misappropriation began before the effective date of the UTSA (January 1, 1985),^{n75.4} any attorney's fee award must be apportioned so that it is only attributable to misappropriations occurring after January 1, 1985.^{n75.5}

Recoverable costs include a reasonable sum to cover the costs to the prevailing party of the services of expert witnesses, who are not regular employees of any party. The sum must be actually incurred and reasonably necessary in either or both preparation for trial or arbitration or during trial or arbitration of the case by the prevailing party.^{n75.6}

On appeal from an order awarding attorney's fees and costs in a UTSA action, the appellant has an uphill battle and must overcome both the sufficiency of evidence rule and the abuse of discretion rule.^{n75.7}

[f] Preserving Secrecy During Litigation

The UTSA includes a broad "protection-of-secrecy" provision. In an action under the UTSA, a court is required to preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.ⁿ⁷⁶

Furthermore, in *any* litigation (whether or not it is brought under the UTSA), the owner of the trade secret, or his or her agent or employee, has a general privilege under the Evidence Code to refuse to disclose a trade secret and to prevent another from disclosing it, if allowing the privilege will not tend to conceal fraud or otherwise work injustice.^{n76.1}

[4] Statute of Limitations

Under the UTSA, an action for misappropriation of a trade secret must be brought within three years after the misappropriation is discovered or, by the exercise of reasonable diligence, should have been discovered.ⁿ⁷⁷

With respect to continuing misappropriations, the UTSA provides that "a continuing misappropriation constitutes a single claim."ⁿ⁷⁸ Although this provision does not expressly define the point in time at which the cause of action accrues, the general rule is that when a continuing tort constitutes a single claim, the cause of action accrues at the beginning of the continuing wrong and does not accrue anew for each new injury suffered as a result of the continuing wrong.ⁿ⁷⁹ Presumably, therefore, a cause of action for a continuing misappropriation under the UTSA accrues on the first day that the misappropriation was discovered or should have been discovered. This conclusion is consistent with at least one case under the prior law.ⁿ⁸⁰

[5] FORM--Complaint by Employer Against Former Employee and Others for Misappropriation of Trade Secret--General Form

[a] Comment

The form set forth in [b], *below*, is a complaint for misappropriation of a trade secret. It is designed to be used against multiple defendants, as in the case in which the plaintiff is alleging that a former employee misappropriated trade

secrets acquired through employment with the plaintiff and then communicated the secrets to a new employer who put them into practice.

The form is based on the Uniform Trade Secrets Act,ⁿ⁸¹ which governs misappropriations occurring on or after January 1, 1985.ⁿ⁸² In the rare instance in which a misappropriation occurred before January 1, 1985, and is not barred by the statute of limitations, plaintiff must allege a common-law cause of action.ⁿ⁸³

The complaint alleges the elements necessary to support an action for misappropriation of a trade secret: (1) the existence and possession by plaintiff of a trade secret (Paragraph 5),ⁿ⁸⁴ (2) the economic value of the trade secret (Paragraph 6),ⁿ⁸⁵ (3) the measures taken by plaintiff to insure its secrecy (Paragraph 7),ⁿ⁸⁶ (4) the nature of defendants' wrongful misappropriation (Paragraph 8),ⁿ⁸⁷ (5) damages (Paragraphs 9 and 10),ⁿ⁸⁸ and (6) an optional allegation to support a claim for punitive damages, attorney's fees and costs (Paragraph 11).ⁿ⁸⁹ Finally, it includes allegations in support of a claim for temporary and permanent injunctive relief (Paragraphs 13 and 14).ⁿ⁹⁰ For a discussion of the elements of a cause of action for misappropriation of trade secrets, *see* [2], above. For discussion of remedies, *see* [3], above.

In any action alleging misappropriation of a trade secret under the UTSA, before commencing discovery relating to the trade secret, the party alleging the misappropriation "shall identify the trade secret with reasonable particularity subject to any orders that may be appropriate" under *Civil Code Section 3426.5*, which governs the court's duty to preserve the secrecy of an alleged trade secret.ⁿ⁹¹ The statute does not clearly indicate whether the plaintiff must identify the trade secret with reasonable particularity in the complaint or by some other means. In order to preserve the "secret" nature of the trade secret, the plaintiff should not divulge the precise nature of the secret in the complaint, but should first seek an appropriate protective order under *Civil Code Section 3426.5* to prevent improper use or disclosure by the defendant or other participants in the litigation.

In an appropriate case, counsel may wish to insert additional causes of action for breach of fiduciary dutyⁿ⁹² or breach of confidence.ⁿ⁹³

For a form of complaint for use against a former employee for solicitation of the employer's customers, including a cause of action based on misappropriation of a trade secret, *see* § 70.12.

[b] Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[or other as appropriate]

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND INJUNCT-
_____ [name],	)	IVE RELIEF FOR MISAPPROPRIATION OF
[and DOES I through XX,] Defendant(s).	)	TRADE SECRET
	)	[Civ. Code §§ 3426.1-3426.4]
	)	

Plaintiff alleges:

[1. _____ (Allege identity and capacity of plaintiff, e.g., Plaintiff _____ (name) is, and at all times herein mentioned was, a corporation organized and existing under the laws of the state of California, and doing business in California).]

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2. Defendant _____ [name], from _____ [date] until _____ [date], was employed by plaintiff as _____ [specify job title], whose job duties included _____ [specify]. Defendant _____ [name] is a resident of _____ [city], _____ County, California. [_____] (Allege identity and capacity of defendant(s) other than individuals, e.g., Defendant _____ (name) is, and at all times herein mentioned was, a partnership sued herein under the name _____ (by which it is known or which it has assumed), with its principal office located at _____ (address), _____ (city), _____ County, California).]

[3. Defendants DOES I through XX, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences alleged in this complaint, and that plaintiff's damages as alleged in this complaint were proximately caused by such defendants.]

[4. Plaintiff is informed and believes and thereon alleges that at all times mentioned in this complaint, each of the defendants was the agent of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and with the permission and consent of his/her codefendants.]

5. _____ [Identify nature of plaintiff's trade secret in general terms, e.g., Since _____ (date), plaintiff has developed and used a trade secret consisting of a secret recipe for making high quality cookies].

6. Prior to the acts complained of herein, plaintiff's _____ [specify trade secret, e.g., secret recipe] had economic value deriving from the fact that it was not generally known to the public or to plaintiff's competitors, who could obtain economic value from its disclosure and use because _____ [state specific reasons why trade secret has economic value, e.g., its use resulted in the creation of high quality cookies that are in great demand and the sale of which constitutes a major portion of plaintiff's business. Prior to the wrongful acts alleged in this complaint, no other cookie manufacturer had knowledge of this recipe and therefore no other manufacturer had been able to produce cookies of a character and quality similar to plaintiff's, thus giving plaintiff a competitive advantage in the cookie market].

7. Plaintiff made reasonable efforts to insure that the _____ [specify trade secret, e.g., secret recipe for making cookies] remained a secret by _____ [specify measures used by plaintiff to maintain secrecy, e.g., (1) disclosing the recipe to only those employees who needed to know it in order to do their job, (2) emphasizing to each employee the company's need to keep the recipe a secret, and (3) requiring, as a condition of employment, that all employees promise not to disclose any information relating to the secret recipe].

8. On or about _____ [date], [and continuing to the present time], defendant(s)[, and each of them,] have misappropriated the above-described trade secret of plaintiff in the following manner:

[In following subparagraphs, describe act(s) of misappropriation within definition of Civ. Code § 3426.1(b) by each defendant, such as the following:]

a. On or about _____ [date], defendant _____ [name], a former employee of plaintiff who, while so employed, had been informed of plaintiff's trade secret by plaintiff so that he/she could perform his/her job function, wrongfully disclosed the trade secret to defendants _____ [names of other defendants to whom secret was disclosed] knowing that the disclosure was a breach of his/her duty to keep the recipe a secret.

b. On or about _____ [date], defendants _____ [names of defendants other than

former employee] misappropriated plaintiff's trade secret by using the recipe without the consent of plaintiff, knowing that their knowledge of the trade secret was derived through defendant _____ [*name of former employee*], and with reason to know that _____ [*name of former employee*] had violated his/her duty to plaintiff to maintain the secrecy of the recipe.

[*CONTINUE*]

9. As a proximate result of the use by defendants of plaintiff's trade secret as alleged above, plaintiff has suffered actual damages in the sum of \$_____ in that _____ [*specify nature of damages*]. [As a further proximate result of the misappropriation, plaintiff is informed and believes that defendants _____ (*names*) have been unjustly enriched as a result of their misappropriation of the trade secret. The amount of this unjust enrichment cannot presently be ascertained, and plaintiff will move to amend this complaint to specify the amount when it becomes known to him/her/it, or on proof thereof.]

10. In the event that neither plaintiff's actual damages nor defendant's unjust enrichment are subject to proof, plaintiff is entitled to a reasonable royalty _____ [*specify nature and amount of royalty, e.g., in the amount of 55 percent of the revenue received by defendant(s) _____ (name(s)) from sales of household goods made using plaintiff's customer list*], as provided by *Civil Code Section 3426.3(b)*.

[11. (Plaintiff is informed and believes and thereon alleges that) (T)he aforementioned acts of the defendant(s) were willful and malicious in that _____ (*allege facts indicating presence of willfulness and malice, e.g., defendant(s) misappropriated plaintiff's secret process with the deliberate intent to injure plaintiff's business and improve his/her/its/their own*), thereby warranting an award of exemplary damages, as provided by *Civil Code Section 3426.3(c)*, and an award of reasonable attorney's fees and costs, as provided by *Civil Code Section 3426.4*.]

[12. The wrongful conduct of defendant(s) _____ (*describe conduct, e.g., in misappropriating plaintiff's secret process*), unless and until enjoined and restrained by order of this court, will _____ (*specify particular facts establishing grounds for preliminary injunctive relief, e.g., cause great and irreparable injury to plaintiff's business in that plaintiff has lost several of its most profitable wholesale customers and is continuing to lose accounts, plaintiff has been forced to lay off workers and will be forced to lay off more, and is operating at such a loss that it may be forced out of business before this action can be brought to trial*).]

[13. Plaintiff has no adequate remedy at law for the injuries currently being suffered in that _____ (*specify any additional facts tending to show grounds for permanent injunctive relief, e.g., defendant will continue to misappropriate the trade secret and plaintiff would be required to maintain a multiplicity of judicial proceedings to protect its interests*).]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

[1. For an order requiring defendants to show cause, if any they have, why they should not be enjoined as hereinafter set forth, during the pendency of this action;]

[2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all requiring defendants and their agents, servants, and employees, and all persons, acting under, in concert with, or for them to (a) refrain from _____ (*specify each of the acts and courses of conduct defendants are to be prohibited from doing, commencing, or continuing, e.g., continuing the misappropriation of plaintiff's trade secret by ongoing use of plaintiff's secret recipe*); and (b) _____ (*specify each of the acts and courses of conduct defendants are to be commanded to do or undertake, e.g., return all copies of the secret recipe to plaintiff*);]

4-70 California Employment Law § 70.02

3. For actual damages [and any amount necessary to prevent the unjust enrichment of defendant(s)], in the sum of \$ _____, or, in the alternative, for imposition of a reasonable royalty to be paid by defendants computed on the following basis: _____ [*specify basis for computing royalty*];

[4. For punitive damages in an amount appropriate to punish defendant(s) and deter others from engaging in similar misconduct;]

[5. For reasonable attorney's fees and costs, pursuant to *Civil Code Section 3426.4*;]

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

[signature]

Attorney for Plaintiff

[Add verification, if injunctive relief is sought
(see *Code Civ. Proc.* §§ 446, 527(a)).]

VERIFICATION

I, _____ [name], declare:

[*EITHER, if plaintiff is a corporation*]

I am an officer, specifically _____ [*specify office held, e.g., president*], of _____ [*name of corporation*], a corporation organized and existing under the laws of _____ [*specify state or country*], which is the plaintiff in the above-entitled action, and I have been authorized to make this verification on its behalf.

I have read the foregoing complaint and know the contents thereof. I am informed and believe that the matters stated therein are true and on that ground I allege that the matters stated therein are true.

[*OR, if plaintiff is an individual*]

I am the plaintiff in the above-entitled action.

I have read the foregoing complaint and know its contents. The same is true of my own knowledge, except in regard to matters that are stated on information and belief, and in regard to those matters I believe the complaint to be true.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [date and place]

_____ [signature]

[6] Judicial Proceeding Privilege Inapplicable

Civil Code Section 3426.11 provides that, notwithstanding *Civil Code Section 47(b)*, referred to as the judicial proceedings privilege, there is no privilege for the voluntary, intentional disclosure of trade secret information, unauthorized by its owner, to a competitor or potential competitor of the owner of the trade secret information or to the agent or representative of that competitor or potential competitor in any legislative or judicial proceeding, or in any other official proceeding authorized by law, or in the initiation or course of any other proceeding authorized by law and reviewable by writ of mandate.ⁿ⁹⁴ Such disclosure is not privileged and is not a privileged communication for purposes of *Civil Code Section 43 et seq.*ⁿ⁹⁵

Civil Code Section 3426.11 does not in any manner limit, restrict, impair, or otherwise modify either the application of the other subdivisions of *Civil Code Section 47* to the conduct to which *Civil Code Section 3426.11* applies or the court's authority to control, order, or permit access to evidence in any case before it.ⁿ⁹⁶ Nor may *Civil Code Section 3426.11* be construed to limit, restrict, or otherwise impair, the capacity of persons employed by public entities to report improper government activity, as defined in former *Government Code Section 10542* (now see *Government Codes Section 8547.2*), or the capacity of private persons to report improper activities of a private business.ⁿ⁹⁷

Civil Code Section 3426.11 was enacted by 1992 legislationⁿ⁹⁸ and was apparently intended to abrogate the holding in *ITT Telecom Products Corp. v. Dooley*,ⁿ⁹⁹ which held that the judicial proceedings privilege applied to disclosure of trade secrets during the course of litigation unless the disclosure was prohibited by an express agreement between the former employee and the owner of the trade secret.ⁿ¹⁰⁰

Legal Topics:

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

Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition General Overview Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition Noncompetition & Nondisclosure Agreements Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition Trade Secrets Trade Secrets Law Protection of Secrecy General Overview

FOOTNOTES:

(n1)Footnote 1. See *Civ. Code § 3426 et seq.*

(n2)Footnote 2. See discussion in [2]-[5], *below*.

(n3)Footnote 3. See, e.g., *Empire Steam Laundry v. Lozier* (1913) 165 Cal. 95, 130 P. 1180 .

(n4)Footnote 4. *Civ. Code § 3426.10*.

(n5)Footnote 5. *Civ. Code § 3426.10*. See *Ralph Andrews Productions, Inc v. Paramount Pictures Corp.* (1990) 222 Cal. App. 3d 676, 685, 271 Cal. Rptr. 797 .

(n6)Footnote 6. *Civ. Code § 3426.10. See Ralph Andrews Productions, Inc v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 685-686, 271 Cal. Rptr. 797 .*

(n7)Footnote 7. *American Paper & Packaging Products, Inc. v. Kirgan (1986) 183 Cal. App. 3d 1318, 1324, 228 Cal. Rptr. 713 ; cf. Civ. Code § 3426.7(b)(2) (UTSA does not preempt other civil remedies that are not based on misappropriation of a trade secret).*

(n8)Footnote 8. *American Paper & Packaging Products, Inc. v. Kirgan (1986) 183 Cal. App. 3d 1318, 1324, 228 Cal. Rptr. 713 .*

(n9)Footnote 9. *Rigging Internat. Maintenance Co. v. Gwin (1982) 128 Cal. App. 3d 594, 613, 180 Cal. Rptr. 451 ; Sinclair v. Aquarius Electronics, Inc. (1974) 42 Cal. App 3d 216, 222, 116 Cal. Rptr. 654 .*

(n10)Footnote 10. *See 35 U.S.C. §§ 271 (definition of patent infringement), 281-295 (remedies for infringement). For a complete discussion of patent law, see Chisum, patents.*

(n11)Footnote 11. *See Sinclair v. Aquarius Electronics, Inc. (1974) 42 Cal. App. 3d 216, 222, 116 Cal. Rptr. 654 ("a trade secret consists of any unpatented idea which can be used for industrial and commercial purposes"); Painton & Company v. Bourns, Inc. (2d Cir. 1971) 442 F.2d 216, 222 & n.2 (applying California law in diversity case).*

(n12)Footnote 12. *Kewanee Oil Co. v. Bicron Corp. (1974) 416 U.S. 470, 479-482, 94 S. Ct. 1879, 40 L. Ed. 2d 315 (prior law); see also Sinclair v. Aquarius Electronics, Inc. (1974) 42 Cal. App 3d 216, 222, 224-225, 116 Cal. Rptr. 654 .*

(n13)Footnote 13. *Kewanee Oil Co. v. Bicron Corp. (1974) 416 U.S. 470, 479-493, 94 S. Ct. 1879, 40 L. Ed. 2d 315 .*

(n14)Footnote 13.1. *S.O.S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1090 n.13 ; see Balboa Ins. Co. v. Trans Global Equities (1990) 218 Cal. App. 3d 1327, 1346-1350, 267 Cal. Rptr. 787 .*

(n15)Footnote 13.2. *S.O.S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1089-1090 ; Balboa Ins. Co. v. Trans Global Equities (1990) 218 Cal. App. 3d 1327, 1340, 1346-1350, 267 Cal. Rptr. 787 (referred to as the "extra element" test).*

(n16)Footnote 13.3. *Civ. Code § 3426.1(a),(b); see discussion in [2][c], below.*

(n17)Footnote 13.4. *See 17 U.S.C. § 301(b).*

(n18)Footnote 13.5. *S.O.S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1089-1090 (reversing summary judgment on pendent state claim and holding triable issue of fact existed regarding whether licensing contract allowed licensee to have copy of program that was not protected by source codes).*

(n19)Footnote 14. *Civ. Code § 3426.7(b).*

(n20)Footnote 15. *See discussion in § 70.03.*

(n21)Footnote 16. *See Civ. Code § 3426.7(b); see also Moss, Adams & Co. v. Shilling (1986) 179 Cal. App. 3d 124, 130, 224 Cal. Rptr. 456 (use of trade secret as unfair competition).*

(n22)Footnote 17. *Compare Civ. Code § 3426.3(c) with Civ. Code § 3294.*

(n23)Footnote 18. *Civ. Code § 3426.7(a).*

(n24)Footnote 19. *See, e.g., Health & Safety Code § 43206* (excluding from public availability trade secrets contained in automobile manufacturers' reports to State Air Resources Board).

(n25)Footnote 20. *Civ. Code § 3426.7(c); see Gov. Code § 6250 et seq.* (California Public Records Act).

(n26)Footnote 21. *Civ. Code § 3426.7(c).*

(n27)Footnote 22. *See, e.g., Sarkes Tarzian, Inc. v. Audio Devices, Inc. (S.D. Cal. 1958) 166 F. Supp. 250, 256 .*

(n28)Footnote 23. *Empire Steam Laundry v. Lozier (1913) 165 Cal. 95, 99, 130 P. 1180 .*

(n29)Footnote 24. Compare *Civ. Code § 3426.3(c)* with *Civ. Code § 3294*; *see* discussion in § 70.02[3][d].

(n30)Footnote 25. *See Civ. Code §§ 3426.2(a), 3426.3(a).*

(n31)Footnote 26. *See, e.g., Rigging Internat. Maintenance Co. v. Gwin (1982) 128 Cal. App. 3d 594, 606-607, 180 Cal. Rptr. 451 ; Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 288, 23 Cal. Rptr. 198* (court cannot compel person who changes employers to wipe clean the slate of his or her memory).

(n32)Footnote 27. *See* discussion in § 70.11[1].

(n33)Footnote 28. *Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 288, 23 Cal. Rptr. 198 .*

(n34)Footnote 29. *Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 288, 23 Cal. Rptr. 198 .*

(n35)Footnote 30. As discussed below, a trade secret under the UTSA must be the subject of efforts that are reasonable under the circumstances to maintain its secrecy. *See Civ. Code § 3426.1(d)*. Thus, a former employee may contend that it is not "reasonable under the circumstances" to require an employee to keep secret information that will significantly limit his or her future job opportunities.

(n36)Footnote 31. *See generally Code Civ. Proc. §§ 526(a)(2), 527(c)(1); IT Corp. v. County of Imperial (1983) 35 Cal. 3d 63, 72-73, 196 Cal. Rptr. 715, 672 P.2d 121 ; Wright v. Best (1942) 19 Cal. 2d 368, 386, 121 P.2d 702 ; Volpicelli v. Jared Sydney Torrance Memorial Hosp. (1980) 109 Cal. App. 3d 242, 247, 167 Cal. Rptr. 610 .*

(n37)Footnote 32. *See Religious Technology Center v. Wollersheim (9th Cir. 1986) 796 F.2d 1076, 1089-1091* (holding, in determining pendent state claim, that church's scriptural materials were not trade secrets because church alleged no competitive market advantage from maintaining their secrecy and only religious harm; thus, material did not have independent economic value necessary under *Civ. Code § 3426.1(d)*).

(n38)Footnote 33. *Civ. Code § 3426.1(d).*

(n39)Footnote 34. Legislative Committee Comment (Senate) to *Civ. Code § 3426.1*.

(n40)Footnote 34.1. *ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 21, 286 Cal. Rptr. 518* (declining to follow *American Paper & Packaging Products, Inc. v. Kirgan (1986) 183 Cal. App. 3d 1318, 1326, 228 Cal. Rptr. 713* , to extent it suggests that information is not protectable as trade secret if it is "known or readily ascertainable").

(n41)Footnote 34.2. *ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 21-22 n.9, 286 Cal. Rptr. 518 ; see* discussion of misappropriation under [c], *below*.

(n42)Footnote 35. Restatement Torts § 757, comment b.

(n43)Footnote 36. *Uribe v. Howie (1971) 19 Cal. App. 3d 194, 208, 96 Cal. Rptr. 493 .*

(n44)Footnote 37. See *Futurecraft Corp. v. Clary Corp.* (1962) 205 Cal. App. 2d 279, 289, 23 Cal. Rptr. 198 .

(n45)Footnote 38. See Restatement Torts § 757, comment b; *Cal Francisco Inv. Corp. v. Vrionis* (1971) 14 Cal. App. 3d 318, 322, 92 Cal. Rptr. 201 (information used in a single transaction, such as the amount or terms of secret bid on contract, or projected date for bringing out new model, as not constituting trade secret).

(n46)Footnote 39. See Legislative Committee Comment (Senate) to Civ. Code § 3426.1.

(n47)Footnote 40. See Legislative Committee Comment (Senate) to Civ. Code § 3426.1.

(n48)Footnote 41. See, e.g., *Cal Francisco Inv. Corp. v. Vrionis* (1971) 14 Cal. App. 3d 318, 322, 92 Cal. Rptr. 201 ; *Daniel Orifice Fitting Co. v. Whalen* (1962) 198 Cal. App. 2d 791, 797-800, 18 Cal. Rptr. 659 (design for improvements and modifications of specialized valve manufactured by employer); *Ungar Electric Tools, Inc. v. Sid Ungar Co., Inc.* (1961) 192 Cal. App. 2d 398, 403-404, 13 Cal. Rptr. 268 (processes used to manufacturer heating units; disapproved on another point in *Nichols v. Hast* (1965) 62 Cal. 2d 598, 601, 43 Cal. Rptr. 641, 400 P.2d 753); *By-Buk Co. v. Printed Cellophane Tape Co.* (1958) 163 Cal. App. 2d 157, 166, 329 P.2d 147 (machine developed to produce specially shaped masking tape).

(n49)Footnote 41.1. See *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal. App. 4th 853, 861-862, 27 Cal. Rptr. 2d 573 .

(n50)Footnote 41.2. *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal. App. 4th 853, 27 Cal. Rptr. 2d 573 .

(n51)Footnote 41.3. *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal. App. 4th 853, 859, 860, 27 Cal. Rptr. 2d 573 ; see also discussion in § 70.07[2][b], [3][a].

(n52)Footnote 41.4. *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal. App. 4th 853, 862, 27 Cal. Rptr. 2d 573 .

(n53)Footnote 41.5. See *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal. App. 4th 853, 863, 27 Cal. Rptr. 2d 573 .

(n54)Footnote 42. See Civ. Code § 3426.1(d).

(n55)Footnote 43. *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1326, 228 Cal. Rptr. 713 .

(n56)Footnote 44. See Legislative Committee Comment (Senate) to Civ. Code § 3426.1; see also *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal. App. 4th 853, 863, 27 Cal. Rptr. 2d 573 (information regarding radio station's preferences and requirements regarding traffic reporters as not a trade secret of traffic reporting service that formerly employed reporters because information was available directly from radio station to anyone contracting with the station).

(n57)Footnote 45. Legislative Committee Comment (Senate) to Civ. Code § 3426.1; see *Self-Directed Placement Corp. v. Control Data Corp.* (9th Cir. 1990) 908 F.2d 462, 465-466 (because elements of employment counseling program were obvious to anyone who enrolled in program, they were generally known to public or other persons who can obtain economic value from them, and thus not a trade secret under California law); *Futurecraft Corp. v. Clary Corp.* (1962) 205 Cal. App. 2d 279, 289, 23 Cal. Rptr. 198 (prior law); but see *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal. App. 4th 34, 50, 6 Cal. Rptr. 2d 602 (in case in which employees stole product designs and drawings and then went to work for another corporation that manufactured and sold the products, court of appeal found it unnecessary to consider whether the secret was fully disclosed by the products themselves because there was sufficient

evidence to support the conclusion implied by the verdict that the plans and designs taken by the employees were trade secrets under both common law and the UTSA in that it was clear that the plaintiff treated them as secrets and took reasonable steps to protect them).

(n58)Footnote 46. Legislative Committee Comment (Senate) to *Civ. Code* § 3426.1.

(n59)Footnote 47. *See Civ. Code* § 3426.1(d)(2); *see, e.g., Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal. App. 4th 34, 42, 50, 6 Cal. Rptr. 2d 602 (visitor logs, sign-out sheets for proprietary documents, document destruction policy, locked storage cabinets in engineering department, and strict control measures with respect to documents that necessarily had to be made available to third-party vendors or subcontractors, including bold type warning legend on documents, constituted reasonable efforts to maintain secrecy).

(n60)Footnote 48. *See* Legislative Committee Comment (Senate) to *Civ. Code* § 3426.1, citing *E.I. duPont deNemours & Company v. Christopher* (5th Cir. 1970) 431 F.2d 1012, 1015-1017, *cert. denied*, 400 U.S. 1024 (1970).

(n61)Footnote 49. *Civ. Code* § 3426.1(b); *see Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal. App. 4th 34, 51, 6 Cal. Rptr. 2d 602 (defendant's continued use after effective date of UTSA of engineering drawings taken before effective date of UTSA to market products derived from the drawings was misappropriation under UTSA definition).

(n62)Footnote 50. *Civ. Code* § 3426.1(a).

(n63)Footnote 51. *Civ. Code* § 3426.1(a); *see ABBA Rubber Co. v. Seaquist* (1991) 235 Cal. App. 3d 1, 21-22 n.9, 286 Cal. Rptr. 518 (assertion that matter is readily ascertainable by proper means is a defense to claim of misappropriation if defendant can establish that its knowledge of information resulted from its own efforts or some other proper means). In fact, if reverse engineering is lengthy and expensive, a person who discovers another's trade secret through reverse engineering may have his or her own trade secret in that information. Legislative Committee Comment (Senate) to *Civ. Code* § 3426.1; *see Sinclair v. Aquarius Electronics, Inc.* (1974) 42 Cal. App. 3d 216, 226, 116 Cal. Rptr. 654 (prior law).

(n64)Footnote 52. *See Sinclair v. Aquarius Electronics, Inc.* (1974) 42 Cal. App. 3d 216, 226, 116 Cal. Rptr. 654 (decided under common law).

(n65)Footnote 53. *See Sarkes Tarzian, Inc. v. Audio Devices, Inc.* (S.D. Cal. 1958) 166 F. Supp. 250, 261 (applying California law); *Sinclair v. Aquarius Electronics, Inc.* (1974) 42 Cal. App. 3d 216, 226, 116 Cal. Rptr. 654.

(n66)Footnote 54. *See Civ. Code* § 3426.1(b)(2)(B)(ii).

(n67)Footnote 55. *See Rigging Internat. Maintenance Co. v. Gwin* (1982) 128 Cal. App. 3d 594, 613, 180 Cal. Rptr. 451. However, when an employee is hired to invent, the invention becomes the property of the employer. *Daniel Orifice Fitting Co. v. Whalen* (1962) 198 Cal. App. 2d 791, 798, 18 Cal. Rptr. 659; *see* discussion in § 70.20.

(n68)Footnote 56. *Rigging Internat. Maintenance Co. v. Gwin* (1982) 128 Cal. App. 3d 594, 613, 180 Cal. Rptr. 451.

(n69)Footnote 57. *Futurecraft Corp. v. Clary Corp.* (1962) 205 Cal. App. 2d 279, 288, 23 Cal. Rptr. 198.

(n70)Footnote 58. *See, e.g., Reid v. Mass Co., Inc.* (1957) 155 Cal. App. 2d 293, 302, 318 P.2d 54; *see also* discussion in § 70.11[1].

(n71)Footnote 58.1. *See Ralph Andrews Productions, Inc v. Paramount Pictures Corp.* (1990) 222 Cal. App. 3d 676, 681-682, 271 Cal. Rptr. 797

(n72)Footnote 58.2. *See Ralph Andrews Productions, Inc v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 682, 271 Cal. Rptr. 797 .*

(n73)Footnote 58.3. *See Ralph Andrews Productions, Inc v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 683-685, 271 Cal. Rptr. 797* (disagreeing with defendant's statement that inquiry to the other studio was not likely to reveal ownership of the concept).

(n74)Footnote 58.4. *See Ralph Andrews Productions, Inc v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 683, 271 Cal. Rptr. 797 .*

(n75)Footnote 58.5. *See Ralph Andrews Productions, Inc v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 684-685, 271 Cal. Rptr. 797 .*

(n76)Footnote 58.6. *See Ralph Andrews Productions, Inc v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 686, 271 Cal. Rptr. 797 ; see also Restatement of Torts, § 758.*

(n77)Footnote 59. *Civ. Code § 3426.2(a).*

(n78)Footnote 60. *Civ. Code § 3426.2(a).*

(n79)Footnote 61. *American Paper & Packaging Products, Inc. v. Kirgan (1986) 183 Cal. App. 3d 1318, 1326, 228 Cal. Rptr. 713 .*

(n80)Footnote 62. *Civ. Code § 3426.2(a).*

(n81)Footnote 63. *Civ. Code § 3426.2(b); see also discussion in [c], below.*

(n82)Footnote 64. *Civ. Code § 3426.2(c).* This provision appears to permit a mandatory injunction in addition to a prohibitory injunction.

(n83)Footnote 64.1. *See ABBA Rubber Co v. Seaquist (1991) 235 Cal. App. 3d 1, 14, 22, 286 Cal. Rptr. 518* (dissolving preliminary injunction because \$1,000 was insufficient bond in view of the evidence that 87.7 percent of defendant's invoices or \$315,000 per year came from customers on plaintiff's customer list).

(n84)Footnote 64.2. *See ABBA Rubber Co v. Seaquist (1991) 235 Cal. App. 3d 1, 14-15, 286 Cal. Rptr. 518 .*

(n85)Footnote 64.3. *See Vacco Industries, Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 52-54, 6 Cal. Rptr. 2d 602* (wrongful termination occurred after the employee had stolen engineering plans and drawings and parts comprising trade secrets but before employee started using them to solicit plaintiff's customers or manufacture competing products).

(n86)Footnote 64.4. *See Vacco Industries, Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 53, 6 Cal. Rptr. 2d 602 .*

(n87)Footnote 65. *Civ. Code § 3426.3(a).*

(n88)Footnote 66. *See Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 466, 151 Cal. Rptr. 118* (under common law plaintiff could recover compensatory damages for any injury proximately caused by trade secret misappropriation).

(n89)Footnote 67. *See Sarkes Tarzian, Inc. v. Audio Devices, Inc. (S.D. Cal. 1958) 166 F. Supp. 250, 269* (prior law); *see also Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 466, 151 Cal. Rptr. 118* (damages may include profits lost on sales diverted from plaintiff by defendant's use of trade secret).

(n90)Footnote 67.1. *See Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal. App. 4th 34, 53, 6 Cal. Rptr. 2d 602 .

(n91)Footnote 68. *Civ. Code* § 3426.3(a).

(n92)Footnote 68.1. *Civ. Code* § 3426.2.

(n93)Footnote 68.2. *Civ. Code* § 3426.3.

(n94)Footnote 69. *Civ. Code* § 3426.2(b).

(n95)Footnote 70. *Civ. Code* § 3426.3(b).

(n96)Footnote 70.1. *Robert L. Cloud & Assocs., Inc. v. Mikesell* (1999) 69 Cal. App. 4th 1141, 1150-1151, 82 Cal. Rptr. 2d 143 .

(n97)Footnote 71. *See Civ. Code* §§ 3426.2(b), 3426.3(b).

(n98)Footnote 72. *Civ. Code* § 3426.3(c).

(n99)Footnote 73. *See Civ. Code* § 3426.3(c).

(n100)Footnote 74. *See Finney v. Lockhart* (1950) 35 Cal. 2d 161, 164, 217 P.2d 19 . For general discussion of requirements for recovery of punitive damages, *see* Levy, Golden, and Sacks, California Torts, Ch. 54, "Punitive Damages."

(n101)Footnote 74.1. *Civ. Code* § 3426.4.

(n102)Footnote 74.2. *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal. App. 4th 1270, 1275, 95 Cal. Rptr. 3d 307 ; *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal. App. 4th 1249, 1262, 116 Cal. Rptr. 2d 358 .

(n103)Footnote 74.3. *See FLIR Systems, Inc. v. Parrish* (2009) 174 Cal. App. 4th 1270, 1276-1278, 95 Cal. Rptr. 3d 307 (objective speciousness properly found, where evidence supported finding that former employer filed specious action as preemptive strike and for anticompetitive purpose, where speculation that departing employees might misappropriate and use trade secret in startup business did not support injunction, and where there was no evidence of misappropriation, threatened misappropriation, imminent harm, or ongoing wrongdoing).

(n104)Footnote 74.4. *See FLIR Systems, Inc. v. Parrish* (2009) 174 Cal. App. 4th 1270, 1278, 95 Cal. Rptr. 3d 307 (although former employer suspected that trade secrets would be misappropriated and claimed that reasonable suspicion was evidence of its good faith, trial court properly did not credit this theory, instead finding that reasons for bringing and maintaining action were "inevitable disclosure" arguments, which is not law in California).

(n105)Footnote 74.5. *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal. App. 4th 1270, 1275, 95 Cal. Rptr. 3d 307 ; *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal. App. 4th 1249, 1261, 116 Cal. Rptr. 2d 358 .

(n106)Footnote 74.6. *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal. App. 4th 1270, 1275, 95 Cal. Rptr. 3d 307 ; *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal. App. 4th 1249, 1262, 116 Cal. Rptr. 2d 358 .

(n107)Footnote 74.7. *See Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal. App. 4th 34, 54, 6 Cal. Rptr. 2d 602 .

(n108)Footnote 75. *Civ. Code* § 3426.2(a).

(n109)Footnote 75.1. *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal. App. 4th 1270, 1279, 95 Cal. Rptr. 3d 307 .

(n110)Footnote 75.2. *See Code Civ. Proc. § 1033.5(c)(5); Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal. App. 4th 34, 55, 6 Cal. Rptr. 2d 602 .

(n111)Footnote 75.3. *See Vacco Indus., Inc. v. Van Den Berg* (1992) 5 Cal. App. 4th 34, 55, 6 Cal. Rptr. 2d 602 (relatively minor monetary award only reflected fact that defendant had not yet been successful in injuring plaintiffs).

(n112)Footnote 75.4. *See Civ. Code § 3426.10.*

(n113)Footnote 75.5. *See Vacco Indus., Inc. v. Van Den Berg* (1992) 5 Cal. App. 4th 34, 55-56, 6 Cal. Rptr. 2d 602 .

(n114)Footnote 75.6. *Civ. Code § 3426.4.*

(n115)Footnote 75.7. *FLIR Systems, Inc. v. Parrish* (2009) 174 Cal. App. 4th 1270, 1275-1276, 95 Cal. Rptr. 3d 307 .

(n116)Footnote 76. *Civ. Code § 3426.5.*

(n117)Footnote 76.1. *See Evid. Code § 1060; see also Evid. Code §§ 1061-1063* (assertion of privilege in criminal proceedings).

(n118)Footnote 77. *Civ. Code § 3426.6.*

(n119)Footnote 78. *Civ. Code § 3426.6.*

(n120)Footnote 79. *See Monolith Portland Midwest Co. v. Kaiser Aluminum & C. Corp.* (9th Cir. 1969) 407 F.2d 288, 293 . *See also Kolani v. Gluska* (1998) 64 Cal. App. 4th 402, 407, 75 Cal. Rptr. 2d 257 (new claims for misappropriation of trade secrets "relate back" for limitation purposes to date of filing of original state court complaint if claims are based on same operative facts as alleged in original complaint).

(n121)Footnote 80. *See Monolith Portland Midwest Co. v. Kaiser Aluminum & C. Corp.* (9th Cir. 1969) 407 F.2d 288, 293 .

(n122)Footnote 81. *See Civ. Code §§ 3426-3426.10.*

(n123)Footnote 82. *See Civ. Code § 3426.10.*

(n124)Footnote 83. *See Cal Francisco Inv. Corp. v. Vrionis* (1971) 14 Cal. App. 3d 318, 321-322, 92 Cal. Rptr. 201 (in common-law trade secret action, facts pleaded must show existence of subject matter that is capable of protection as trade secret and disclosure of secret under circumstances giving rise to a contractual or other legally imposed obligation not to use or disclose secret to detriment of the discloser).

(n125)Footnote 84. *See Civ. Code § 3426.1(d).*

(n126)Footnote 85. *See Civ. Code § 3426.1(d)(1).*

(n127)Footnote 86. *See Civ. Code § 3426.1(d)(2).*

(n128)Footnote 87. *See Civ. Code § 3426.1(b).*

(n129)Footnote 88. *See Civ. Code § 3426.3(a), (b).*

(n130)Footnote 89. *See Civ. Code §§ 3426.3(c), 3426.4.*

(n131)Footnote 90. *See Civ. Code § 3426.2*. If a temporary restraining order is sought without notice, the requirements of *Code Civ. Proc. § 527(c)(2), (d)* must be satisfied. For discussion, *see California Forms of Pleading and Practice, Injunctions* (Matthew Bender).

(n132)Footnote 91. *Code Civ. Proc. § 2019(d) (Code Civ. Proc. § 2019.210* operative July 1, 2005).

(n133)Footnote 92. *See form in § 70.04[2]*.

(n134)Footnote 93. *See form in § 70.05[3]*.

(n135)Footnote 94. *Civ. Code § 3426.11; see Code Civ. Proc. § 1084 et seq.* (mandate).

(n136)Footnote 95. *Civ. Code § 3426.11*.

(n137)Footnote 96. *Civ. Code § 3426.11*.

(n138)Footnote 97. *Civ. Code § 3426.11*.

(n139)Footnote 98. *See Stats. 1992, ch. 165*.

(n140)Footnote 99. *ITT Telecom Products Corp. v. Dooley (1989) 214 Cal. App. 3d 307, 262 Cal. Rptr. 773*.

(n141)Footnote 100. *See ITT Telecom Products Corp. v. Dooley (1989) 214 Cal. App. 3d 307, 314-317, 320, 262 Cal. Rptr. 773*.



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California Employment Law

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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART A. OVERVIEW OF GOVERNING LAW

4-70 California Employment Law § 70.03

AUTHOR: By James Buyoucos, J.D.

§ 70.03 Unfair Competition

[1] Availability of Cause of Action

In the context of the employment relationship, the term "unfair competition," as broadly defined, includes a number of causes of action, including causes of action for misappropriation of a trade secretⁿ¹ as well as theories such as breach of the duty of loyalty.ⁿ² However, the term "unfair competition" also denotes a specific cause of action in its own right. *Business and Professions Code Sections 17200-17301* provide remedies for "unfair competition," which is defined to include any unlawful, unfair, or fraudulent business act or practice.ⁿ³ This provision is broadly construed.ⁿ⁴ In *Alch v. Superior Court*,ⁿ⁵ an action by television screenwriters over the age of 40 for age discrimination against networks, studios and talent agencies, the court held that the plaintiffs were not required to show potential competitive harm or consumer deception to state a claim under the Unfair Competition Law. However, effective January 1, 2005, with the passage of Proposition 64, it is the intent of the voters of California in amending *Business and Professions Code Sections 17203, 17204, 17206, 17535, and 17536* to prohibit private attorneys from filing lawsuits for unfair competition when they have no client who has been injured in fact under the standing requirements of the United States Constitution.ⁿ⁶ Thus, an unfair competition action may only be brought by a private individual who has suffered injury in fact and has lost money or property as a result of such unfair competition.ⁿ⁷ A private person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of *Business and Professions Code Section 17204* (requiring actual injury in fact and the loss of money or property as the result of the alleged unfair competition) and complies with *Code of Civil Procedure Section 382* (joinder as defendant of one who should be joined as plaintiff but will not consent). These limitations do not apply to unfair competition claims by the Attorney General, or any district attorney, county counsel, city attorney or city prosecutor.ⁿ⁸

The California Supreme Court has addressed two procedural issues regarding pursuit of a claim under Section 17200. In *Amalgamated Transit Union v. Superior Court*,^{n8.1} the Court addressed whether a union could seek recovery under the UCL on behalf of its member employees for alleged violations of the California Labor Code and Wage Orders. The Court noted that prior to the passage of Proposition 64 in 2004, a plaintiff did not have to show any actual injury to bring a claim under the UCL. But Proposition 64 amended the UCL to allow private representative claims for relief to

be brought only by a "person who has suffered injury in fact and has lost money or property as a result of the unfair competition." The union admittedly could not meet those requirements, but asserted that it could bring the action as the representative of those who could. Reasoning that an assignment of rights to a non-injured person or entity by a person who did suffer injury in fact would nullify the proposition passed by the voters, the Court concluded that, "under the UCL an injured employee's assignment of rights cannot confer standing on an uninjured assignee." As a result, the union lacked standing to bring the claim.

In *Amalgamated* and in a companion case, *Arias v. Superior Court*,^{n8.2} the Court also concluded that Proposition 64 further required anyone seeking relief under the UCL to meet the procedural requirements of class actions. The Court relied on Proposition 64's express language stating that to bring a representative action under the UCL, a private plaintiff must "compl[y] with *Section 382 of the California Code of Civil Procedure*." Focusing on the historical application of Section 382 to authorize class actions, and on the information provided to voters when passing Proposition 64, the Court construed the language of Proposition 64 to mean that a UCL claim "must meet the requirements for a class action."

In addition, the equitable doctrine of unfair competition, established by case law, protects against the inequitable pirating of the fruits of another's labor and then either "palming off" those fruits as one's own or simply gaining unearned commercial benefit from them.ⁿ⁹ It has been stated broadly that a showing of misappropriation and wrongful use of confidential information will support recovery under a theory of unfair competition.ⁿ¹⁰ In the employment context, a duty arises out of the employment relationship under which an employee may not divulge confidential information gained in the course of his or her employment, or use such information to the employer's prejudice.ⁿ¹¹

The *inevitable disclosure doctrine* assumes that an employee who has knowledge of trade secrets and accepts a similar job with a direct competitor in a highly competitive industry will disclose the employer's trade secrets in the course of performing the duties of the new employment.ⁿ¹² Under this theory, the employee may be enjoined if the former employer demonstrates that the employee's new job duties will inevitably cause the employee to rely upon knowledge of the former employer's trade secrets. In *Schlage Lock Co. v. Whyte*,ⁿ¹³ a court of appeal rejected the inevitable disclosure doctrine as contrary to California law and policy because it creates an after-the-fact covenant not to compete, thereby restricting employee mobility.ⁿ¹⁴

Most actions for unfair competition arising out of the employment context involve suits brought by employers against their former employees. For a discussion of unfair solicitation of an employer's customers by a former employee, see Part B (§§ 70.10- 70.12).

An action for unfair competition may also be brought against the new employer of a former employee for acts of unfair competition committed by the employee after leaving the plaintiff's employment. Thus, an action for unfair competition will lie against a party who is aware of or ratifies a breach of confidence or breach of a fiduciary duty by an employee and receives the benefits of the employee's breach.ⁿ¹⁵ Directors, officers and shareholders of a corporation cannot be held vicariously liable for the torts of that corporation, but they may be held liable for the commission of torts in which they personally participated. In other words, the corporate entity cannot shield them from liability for their own tortious conduct.ⁿ¹⁶

Although this chapter focuses on the duties of employees and former employees, it should be noted that an *employer* may be liable for unfair competition against an employee in certain circumstances. In one case, an insurance business hired a salesperson who, prior to employment, had acquired a selective and confidential list of customers with whose needs he was familiar and with whom he had a valuable good will. After the employee left the position, the employer attempted to solicit customers from the employee's list to whom the employee had sold insurance during the employment period. The court of appeal upheld an injunction against such solicitation.ⁿ¹⁷ The California Supreme Court has held that unlawfully withheld overtime wages may be recovered as restitution in a UCL action,ⁿ¹⁸ but a court of appeal has held that individual owners, directors, managers, etc., of a corporate employer who did not personally

obtain or misappropriate funds from employees will not be liable for restitution in a UCL action for unpaid wages, because awarding restitution against them would not replace any money or property they took directly from any employee.ⁿ¹⁹ The court of appeal also found an action under the UCL for injunctive relief appropriate when a business engaged in an unlawful practice under the California Fair Employment and Housing Actⁿ²⁰ of discriminating against older workers.ⁿ²¹

[2] Remedies

[a] Compensatory Damages

In an action for unfair competition, loss of profits constitutes the surest type of monetary damages available under the law. In the case in which a former employee has wrongfully solicited business from his or her former employer, the employer is normally entitled to the profit that would have been realized but for the wrongful solicitation.ⁿ²² The amount of defendant's gains may be used as a yardstick to measure this amount.ⁿ²³ However, in such cases, if the defendant had lower costs in producing the profit than plaintiff would have had, any damage award based on the amount of defendant's profit must be reduced by this cost difference. Conversely, if plaintiff could have realized the income that defendant realized but could have saved on costs, then any damage award based on defendant's profits should be increased by the additional costs defendant incurred over what the plaintiff would have incurred.ⁿ²⁴

Future lost profits may also be recovered if it is shown with reasonable certainty that such losses will accrue.ⁿ²⁵ The fact such damages are incapable of exact determination or subject to contingencies does not bar recovery, and a reasonably approximate estimation is deemed sufficient.ⁿ²⁶

Expenses incurred in attempting to remedy an act of unfair competition may also be recoverable.ⁿ²⁷

On the other hand, in *Alch v. Superior Court*,ⁿ²⁸ an action by television screenwriters over the age of 40 for age discrimination, against networks, studios and talent agencies, the court held that the trial court did not have the authority, pursuant to injunctive relief available under the Unfair Competition Law, to enter an order compelling the employers to reimburse the class for wages lost as a result of unfair competition practices in the form of classwide backpay.

[b] Accounting

No California case has held that an accounting for profits is a proper remedy in an action for unfair competition in the employment context. However, one case has suggested in dicta that it is a proper remedy.ⁿ²⁹ In addition, there is out-of-state authority supporting the use of an accounting in an action of this type.ⁿ³⁰ For a complete discussion of an accounting as a remedy, see California Forms of Pleading and Practice, *Accounting*.

[c] Punitive Damages

Under *Civil Code Section 3294(a)*, punitive damages are available in an action not based on the breach of an obligation arising from contract if the plaintiff proves by clear and convincing evidence that defendant has been guilty of oppression, fraud, or malice, as defined in *Civil Code Section 3294(c)*. In one case of unfair competition, which was characterized by the court as one of "trade secret larceny," the court upheld an award of punitive damages and further noted that such awards are proper in cases involving fraud and may be allowed even though the tort incidentally involves a contract.ⁿ³¹ Thus, while punitive damages are not available in an action based solely on breach of a covenant not to compete, if a cause of action for unfair competition is established, punitive damages may be available. It should be noted, however, that while punitive damages are also available in causes of action based on misappropriation of a trade secret, such damages are limited to an amount not to exceed twice the sum of other damages properly awarded.ⁿ³²

[d] Injunction**[i] Availability of Injunctive Relief**

Under *Business and Professions Code Section 17203*, any person who engages, has engaged, or proposes to engage, in unfair competition may be enjoined in any court of competent jurisdiction. In addition, *Civil Code Section 3422* allows injunctive relief when money damages would not afford adequate relief or when it would be extremely difficult to ascertain the amount of money damages that would afford adequate relief. These factors are often present in unfair competition cases involving misuse of confidential information by former employees, resulting in loss of customers by the employer. It is often extremely difficult to ascertain how much future business a customer would have provided to the employer and to ascertain the value of a satisfied customer to an employer in promoting the employer's good name to other potential customers.

A person may pursue representative claims or relief on behalf of others, including injunctive relief, only if the claimant has suffered injury in fact and has lost money or property as a result of the unfair competition. These limitations do not apply to the Attorney General or to a district attorney, county counsel, city attorney or city prosecutor.ⁿ³³

Injunctive relief, however, is granted only on convincing proof of a harmful violation of the plaintiff's rights, and the instances in which those rights are violated by a former employee's misuse of information given during employment are rare.ⁿ³⁴ Some courts state that whether or not injunctive relief will be granted is determined by whether the knowledge gained by an employee is secret and confidential; only if the information is secret and confidential will its use by a former employee be enjoined.ⁿ³⁵ If the trade secrets obtained by a former employee are not used by him or her, or that employee's subsequent employer, no ground for any injunction exists. The receipt or acceptance of further business by the new employer from former customers of the former employer who were not solicited or are not retained through the use of the former employer's trade secret may not be enjoined.ⁿ³⁶

For a discussion of injunctions in actions for misappropriation of trade secret, *see* § 70.02[3][a].

[ii] Limits of Relief

As a general rule, a court in equity, in granting an injunction against unfair competition, may limit the duration of the injunction to the period of time necessary to protect the legal interests of the party seeking the injunction.ⁿ³⁷ For example, an injunction in an action for unfair competition based on improper use of a trade secret was limited to the time it would have taken the restrained party to develop the trade secret on its own time.ⁿ³⁸

Further, in *Alch v. Superior Court*,ⁿ³⁹ an action by television screenwriters over the age of 40 for age discrimination, against networks, studios and talent agencies, the court held that the trial court did not have the authority, pursuant to injunctive relief available under the Unfair Competition Law, to enter an order compelling the employers to reimburse the class for wages lost as a result of unfair competition practices in the form of classwide backpay.

[e] Restitution

Restitution is available as a remedy under the Unfair Competition Law when the defendant wrongfully acquired funds or property in which plaintiff had an ownership or vested interest.ⁿ⁴⁰ Restitution under the Unfair Competition Law includes two separate components:ⁿ⁴¹

- The offending party must have obtained something to which it was not entitled.
- The victim must have given up something he or she was entitled to keep.

Orders for restitution compel a UCL defendant to return money obtained through an unfair business practice to these persons in interest from whom the property was taken, *i.e.*, to persons who had an ownership interest in the property or those claiming through that person.ⁿ⁴²

[3] Statute of Limitations

The period of limitations for an action for unfair competition in the employment context (which normally involves an act of the employee in wrongfully competing with his or her former employer) is unclear. No California case authority is directly on point. In the context of a trade libel action, one court has stated broadly that tortious interference with a person's trade or business comes within the two-year limitation period of *Code of Civil Procedure section 339(1)*, which governs actions upon an obligation not founded upon an instrument in writing.ⁿ⁴³ Another court has noted that the two-year limitation period of *Code of Civil Procedure section 339(1)* has an exceedingly broad scope and covers miscellaneous tort actions.ⁿ⁴⁴ Despite the existence of these authorities, unfair competition by a present or former employee arguably falls within the broad definition of unfair competition found in *Business and Professions Code Section 17200*,ⁿ⁴⁵ and the period of limitation for statutory unfair competition is four years.ⁿ⁴⁶

[4] Jury Trial

In an employment-related action brought under *Business and Professions Code Section 17200*, there is no right to a jury trial. The gist of the section 17200 cause of action is equitable and the relief sought is equitable, even when the basis for the unfair competition claim is violation of a statute or contract.ⁿ⁴⁷ Thus, for example, in an action principally about overtime pay, in which the plaintiffs dismissed their statutory cause of action and alleged only violation of the Unfair Competition Law, the defendants had no right to a jury trial, even though plaintiffs could have requested damages for the same violations under a claim for Labor Code violations, the employer asserted an affirmative defense under a Wage Order, and the UCL cause of action required proof of the underlying Labor Code violations.ⁿ⁴⁸

Legal Topics:

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

Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition General Overview Torts Business Torts Unfair Business Practices General Overview

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 70.02.

(n2)Footnote 2. *See* discussion in § 70.04.

(n3)Footnote 3. *See* *Bus. & Prof. Code § 17200*.

(n4)Footnote 4. *Barquis v. Merchants Collection Asso.* (1972) 7 Cal. 3d 94, 111, 101 Cal. Rptr. 745, 496 P.2d 817 (unlawful, unfair, or fraudulent business practices within meaning of *Bus. & Prof. Code § 17200* includes wrongful business conduct in whatever context such activity might occur). *See, e.g., Harris v. Investor's Business Daily, Inc.* (2006) 138 Cal. App. 4th 28, 33-36, 41 Cal. Rptr. 3d 108 (Fair Labor Standards Act claim for overtime compensation (under 29 U.S.C. § 207) could serve as predicate act for *Bus. & Prof. Code § 17200* cause of action by telemarketers who sold newspaper subscriptions, despite opt-in requirement for members of class under FLSA, where claim was not preempted by federal law); *Northern Cal. Carpenters Regional Council v. Warmington Hercules Assocs.* (2004) 124 Cal. App. 4th 296, 20 Cal. Rptr. 3d 918 (in action for unfair business practices by carpenters regional council and individual plaintiff against building contractors and subcontractors engaged in development of housing project for breach of wage obligations in purchase and development agreements by failing to pay or require subcontractors to pay workers not covered by project labor agreement at rate equal to prevailing wage rate as determined by Department of Industrial Relations, trial court properly denied defendants' motion to strike complaint pursuant to *Code Civ. Proc. §*

425.16, commonly known as anti-SLAPP statute, because action came within *Code Civ. Proc.* § 425.17(b), providing that § 425.16 does not apply to action brought solely in public interest or on behalf of general public if all of specified conditions exist, where complaint sought to vindicate public policy by assuring enforcement of city's prevailing wage policy, which was action solely in public interest).

(n5)Footnote 5. *Alch v. Superior Court* (2004) 122 Cal. App. 4th 339, 400-403, 19 Cal. Rptr. 3d 29 .

(n6)Footnote 6. Proposition 64, approved by California voters on November 2, 2004, § 1(e).

(n7)Footnote 7. *Bus. & Prof. Code* § 17204 Former *Bus. & Prof. Code* § 17204 allowed any person to file an action acting for the interests of the general public. Effective January 1, 2005, with the passage of Proposition 64 on November 2, 2004, an individual may no longer file and prosecute unfair competition actions on behalf of the general public. *See also* Proposition 64, approved by California voters on November 2, 2004, § 1(f) (intent of California voters in enacting Proposition 64 that only Attorney General and local public officials be authorized to file and prosecute actions on behalf of general public).

(n8)Footnote 8. *Bus. & Prof. Code* § 17203. These standing requirements apply to cases already pending when Proposition 64 took effect on January 1, 2005. *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal. 4th 223, 228-233 . *See also* *Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal. 4th 235, 240-244 (Proposition 64 does not affect ordinary rules governing amendment of complaints and their relation back, and courts may permit plaintiffs to amend complaints to satisfy Proposition 64's standing requirements by applying established rules governing leave to amend (*Code Civ. Proc.* § 473) and relation back of amended complaints);

(n9)Footnote 8.1. *Amalgamated Transit Union v. Superior Court* (2009) 46 Cal. 4th 993, 1001-1002, 95 Cal. Rptr. 3d 605, 209 P.3d 937 .

(n10)Footnote 8.2. *Arias v. Superior Court* (2009) 46 Cal. 4th 969, 977-988, 95 Cal. Rptr. 3d 588, 209 P.3d 923 .

(n11)Footnote 9. *KGB, Inc. v. Giannoulas* (1980) 104 Cal. App. 3d 844, 850, 164 Cal. Rptr. 571 ; *see also* *Ball v. American Trial Lawyers Assn.* (1971) 14 Cal. App. 3d 289, 303-304, 92 Cal. Rptr. 228 .

(n12)Footnote 10. *Klamath-Orleans Lumber, Inc. v. Miller* (1978) 87 Cal. App. 3d 458, 464, 151 Cal. Rptr. 118 .

(n13)Footnote 11. *Pasadena Ice Co. v. Reeder* (1929) 206 Cal. 697, 702, 275 P. 944 .

(n14)Footnote 12. *See Pepsi Co., Inc. v. Redmond* (7th Cir. 1995) 54 F.3d 1262, 1269 .

(n15)Footnote 13. *Schlage Lock Co. v. Whyte* (2002) 101 Cal. App. 4th 1443, 125 Cal. Rptr. 2d 277 .

(n16)Footnote 14. *Schlage Lock Co. v. Whyte* (2002) 101 Cal. App. 4th 1443, 1458-1464, 125 Cal. Rptr. 2d 277 .

(n17)Footnote 15. *See Bancroft-Whitney Co. v. Glen* (1966) 64 Cal. 2d 327, 353, 49 Cal. Rptr. 825, 411 P.2d 921 .

(n18)Footnote 16. *PMC, Inc. v. Kadisha* (2000) 78 Cal. App. 4th 1368, 1379-1380, 93 Cal. Rptr. 2d 663 .

(n19)Footnote 17. *See Foster v. Peters* (1941) 47 Cal. App. 2d 204, 206, 117 P.2d 726 .

(n20)Footnote 18. *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal. 4th 163, 96 Cal. Rptr. 2d 518, 999 P.2d 706 ; *see* § 21.69.

(n21)Footnote 19. *Bradstreet v. Wong* (2008) 161 Cal. App. 4th 1440, 2008 Cal. App. LEXIS 553, *34-*47 .

(n22)Footnote 20. *Gov. Code § 12900 et seq.*.

(n23)Footnote 21. *See Herr v. Nestle U.S.A., Inc. (2003) 109 Cal. App. 4th 779, 781, 789-790, 135 Cal. Rptr. 2d 477* . For discussion of age discrimination generally, *see § 41.31* .

(n24)Footnote 22. *Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 466-467, 151 Cal. Rptr. 118* .

(n25)Footnote 23. *Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 466-467, 151 Cal. Rptr. 118* ; *Gordon v. Schwartz (1956) 147 Cal. App. 2d 213, 215-216, 305 P.2d 117* .

(n26)Footnote 24. *Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 466-467, 151 Cal. Rptr. 118* .

(n27)Footnote 25. *Southern Cal. Disinfecting Co. v. Lomkin (1960) 183 Cal. App. 2d 431, 449-450, 7 Cal. Rptr. 43* .

(n28)Footnote 26. *Southern Cal. Disinfecting Co. v. Lomkin (1960) 183 Cal. App. 2d 431, 450, 7 Cal. Rptr. 43* .

(n29)Footnote 27. *See Bancroft-Whitney Co. v. Glen (1966) 64 Cal. 2d 327, 356, 49 Cal. Rptr. 825, 411 P.2d 921* (plaintiff should have been permitted to introduce evidence of cost of hiring replacements for employees that were wrongfully "raided" by defendant, a former employee and corporate officer).

(n30)Footnote 28. *Alch v. Superior Court (2004) 122 Cal. App. 4th 339, 403-408, 19 Cal. Rptr. 3d 29* .

(n31)Footnote 29. *See Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 467 fn.7, 151 Cal. Rptr. 118* .

(n32)Footnote 30. *See Comment, Monetary Awards for Unfair Competition in California, 34 U.S.C. L. Rev. 282, 303 (1961), and cases cited therein.*

(n33)Footnote 31. *See Southern Cal. Disinfecting Co. v. Lomkin (1960) 183 Cal. App. 2d 431, 446, 451, 7 Cal. Rptr. 43* .

(n34)Footnote 32. *See Civ. Code § 3426.3(c), discussed in § 70.02[3][d]*.

(n35)Footnote 33. *Bus. & Prof. Code §§ 17203, 17204*. The claimant must also comply with *Code Civ. Proc. § 382*, relating to joinder as a defendant of one who should be joined as a plaintiff but will not consent.

(n36)Footnote 34. *See Mathews Paint Co. v. Seaside Paint Co. (1957) 148 Cal. App. 2d 168, 175, 306 P.2d 113* .

(n37)Footnote 35. *Mathews Paint Co. v. Seaside Paint Co. (1957) 148 Cal. App. 2d 168, 175, 306 P.2d 113* ; *American Alloy Steel Corp. v. Ross (1957) 149 Cal. App. 2d 215, 218-219, 308 P.2d 494* .

(n38)Footnote 36. *Whitted v. Williams (1964) 226 Cal. App. 2d 52, 59, 37 Cal. Rptr. 692* .

(n39)Footnote 37. *See Fidelity etc. Co. v. Federal etc. Co. (1933) 217 Cal. 307, 318, 18 P.2d 950* .

(n40)Footnote 38. *See Winston Research Corp. v. Minnesota Min. & Mfg. Co. (9th Cir. 1965) 350 F.2d 134, 142* .

(n41)Footnote 39. *Alch v. Superior Court (2004) 122 Cal. App. 4th 339, 403-408, 19 Cal. Rptr. 3d 29* .

(n42)Footnote 40. *Feitelberg v. Credit Suisse First Boston, LLC (2005) 134 Cal. App. 4th 997, 1012, 36 Cal. Rptr. 3d 592* .

(n43)Footnote 41. *Day v. AT & T Corp.* (1998) 63 Cal. App. 4th 325, 340, 74 Cal. Rptr. 2d 55 .

(n44)Footnote 42. *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal. 4th 116, 126-127, 96 Cal. Rptr. 2d 485, 999 P.2d 718 .

(n45)Footnote 43. *Guess, Inc. v. Superior Court* (1986) 176 Cal. App. 3d 473, 478, 222 Cal. Rptr. 79 .

(n46)Footnote 44. *Edwards v. Fresno Community Hosp.* (1974) 38 Cal. App. 3d 702, 706, 113 Cal. Rptr. 579 .

(n47)Footnote 45. See *Barquis v. Merchants Collection Asso.* (1972) 7 Cal. 3d 94, 111, 101 Cal. Rptr. 745, 496 P.2d 817 (unlawful, unfair, or fraudulent business practices within meaning of *Bus. & Prof. Code* § 17200 includes wrongful business conduct in whatever context such activity might occur).

(n48)Footnote 46. *Bus. & Prof. Code* § 17208.

(n49)Footnote 47. *Hodge v. Superior Court* (2006) 145 Cal. App. 4th 278, 284-285, 51 Cal. Rptr. 3d 519 .

(n50)Footnote 48. *Hodge v. Superior Court* (2006) 145 Cal. App. 4th 278, 284-287, 51 Cal. Rptr. 3d 519 .



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART A. OVERVIEW OF GOVERNING LAW

4-70 California Employment Law § 70.04

AUTHOR: By James Buyoucos, J.D.

§ 70.04 Breach of Duty of Loyalty or Fiduciary Duty

[1] Availability of Cause of Action

Under California law, an employee owes a "duty of loyalty" toward his or her employer during the term of employment.ⁿ¹ Although few reported California cases have discussed the subject, it appears that an employee who improperly breaches this duty by competing with his or her employer or assisting a competing business during the course of employment, or who utilizes the employer's confidential information while so employed in order to enable himself or herself to compete with the employer after termination of employment, may be liable to the employer under a theory of breach of fiduciary duty. Furthermore, a breach of the duty of loyalty may constitute good cause for an employee's discharge.ⁿ²

The Second Restatement of Agency provides that an employee is subject to a duty to his or her employer to act solely for the benefit of the employer in all matters connected with the employment.ⁿ³ The Restatement further provides that an employee, unless otherwise agreed, cannot compete with the employer or act for persons whose interests are in conflict with those of the employer in matters with respect to which the employee is employed.ⁿ⁴ The employee is liable to the employer for all losses caused by breach of the duty of loyalty.ⁿ⁵ Thus, the employee has a duty to faithfully serve the employer during working hours and not to engage in a competing business even outside of working hours.ⁿ⁶ When an employee engages in a business that makes him or her a competitor of the employer, no matter how much or how little time is devoted to it, there is an interest against this duty and therefore a violation of the employment contract, even though the agreement does not contain a noncompetition provision.ⁿ⁷

The notion of a duty of loyalty owed to one's employer is further reflected in *Labor Code Section 2863*, which provides that an employee who has any business to transact on his or her own account that is similar to that entrusted to the employee by his or her employer must give preference to the business of the employer. Thus, if an employee transacts the business of the employer for his or her own profit, the employer is entitled to those profits.ⁿ⁸

An employee's duty of loyalty is clearest and most strict in the case of corporate officers. Corporate officers stand in a

fiduciary relationship with the corporation and are not permitted to use their position of trust to further their own objectives.ⁿ⁹ Thus, when a corporate officer competes with the corporation prior to terminating his or her relationship with the corporation, without disclosing this fact to the corporation, he or she may be liable for breach of fiduciary duty.ⁿ¹⁰ The mere fact that an employee makes plans to compete with his or her employer while still employed does not constitute a breach of the duty of loyalty,ⁿ¹¹ even if the employee is a corporate officer.ⁿ¹² But if a corporate officer fails to disclose his or her plans to compete with the corporation and there are particular circumstances that render nondisclosure harmful to the corporation, the officer may be liable for breach of a fiduciary duty.ⁿ¹³ In addition, it is a breach of fiduciary duty when a corporate officer, while still employed in that capacity, assists a competitor of his employer to solicit his or her employer's employees to go to work for the competitor.ⁿ¹⁴

Although most of the reported California cases have involved breach of fiduciary duty by corporate officers,ⁿ¹⁵ the same principles could logically be applied to other employees in positions of trust and confidence who utilize the employer's resources or confidential information to establish or aid a competing business. In one case, the court of appeal held that a marketing manager who participated in the formation of a company that was to compete with his employer assisted the potential competitor in obtaining financing, and who had failed to disclose his knowledge about the competitor to his employer, had violated his duty of loyalty, thus providing good cause for his discharge.ⁿ¹⁶

[2] FORM--Complaint by Employer Against Former Employee for Damages for Breach of Fiduciary Duty

[a] Comment

The form of complaint set forth in [b], below, may be used by an employer who wishes to assert a cause of action for damages against a former employee for breach of fiduciary duty. The cause of action may be asserted when an employee in a position of trust and confidence, such as a corporate officer, engages in acts of competition with his or her employer or uses confidential information acquired from the employment to the detriment of the employer.ⁿ¹⁷ In an appropriate case, counsel may wish to set forth an additional cause of action for misappropriation of a trade secret,ⁿ¹⁸ or for breach of confidence.ⁿ¹⁹

The form in [b], below, alleges (1) plaintiff's employment of defendant in a position of trust and confidence (Paragraph 5); and (2) defendant's breach of his or her fiduciary duty to plaintiff (Paragraph 6). It also contains allegations of resulting damages (Paragraph 7) and an optional allegation of facts supporting an award of punitive damages (Paragraph 8).ⁿ²⁰

[b] Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[or other as appropriate]

_____ [name],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [name],	)	COMPLAINT FOR DAMAGES FOR BREACH OF
[and DOES I through XX],	)	FIDUCIARY DUTY
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

[1. *Allege identity and capacity of plaintiff. See form in § 70.02[5][b], Paragraph 1.*]

4-70 California Employment Law § 70.04

[2. *Allege identity and capacity of defendant(s).* See form in § 70.02[5][b], Paragraph 2.]

[3. *Fictitious name allegations.* See form in § 70.02[5][b], Paragraph 3.]

[4. *Allegation of agency among defendants.* See form in § 70.02[5][b], Paragraph 4.]

5. From _____ [date] until _____ [date], defendant _____ [name of employee] was employed by plaintiff in a position of trust and confidence, specifically as _____ [specify position held by defendant, e.g., vice president in charge of plaintiff's research and development division]. While so employed, defendant _____ [name of employee] was under a fiduciary duty to act solely for the benefit of plaintiff and not contrary to plaintiff's interests with respect to all matters connected with this employment relationship.

6. On or about _____ [date], while so employed in this position of trust and confidence, defendant _____ [name of employee] breached his/her fiduciary duty to plaintiff by _____ [allege breach of duty, e.g., secretly organizing a competing business, utilizing confidential information acquired during the course of his/her employment with plaintiff and soliciting key employees in plaintiff's research and development division to come to work for defendant after he terminated his/her employment with plaintiff, using confidential information concerning the work record and salaries of those key employees].

7. As a proximate result of defendant's breach of his/her fiduciary duty, plaintiff has suffered actual damages in the sum of \$ _____ in that _____ [specify nature of damages, e.g., plaintiff was forced to incur expenses in finding, hiring, and training comparably qualified individuals to replace the key employees who left plaintiff's employ as a result of improper solicitation by defendant].

[8. In committing the breach of fiduciary duty as described above, defendant was guilty of malice and/or oppression in that _____ (allege facts indicating presence of malice and/or oppression, e.g., defendant organized a competing business and induced his coemployees to leave plaintiff's employ with the deliberate intent to injure plaintiff's business and improve his/her own and acted with conscious disregard for plaintiff's rights and for his/her own fiduciary duty to plaintiff), thereby warranting an award of punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar misconduct.]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages, in the sum of \$ _____;

[2. For punitive damages in an amount appropriate to punish defendant(s) and deter others from engaging in similar misconduct;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

[signature]

Attorney for Plaintiff

Legal Topics:

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

Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsFiduciary Responsibilities

FOOTNOTES:

(n1)Footnote 1. *Fowler v. Varian Associates, Inc.* (1987) 196 Cal. App. 3d 34, 41, 241 Cal. Rptr. 539 .

(n2)Footnote 2. *See Fowler v. Varian Associates, Inc.* (1987) 196 Cal. App. 3d 34, 40-43, 241 Cal. Rptr. 539 (employee who breached duty of loyalty could not sue employer for wrongful constructive discharge in violation of duty of good faith and fair dealing); *see also* discussion in Chapter 60.

(n3)Footnote 3. *See* Rest. 2d Agency § 387; *see also* Rest. 2d Agency § 1, comments d and e (principal as employer, agent as employee).

(n4)Footnote 4. Rest. 2d Agency §§ 393, 394.

(n5)Footnote 5. *See* Rest. 2d Agency § 401.

(n6)Footnote 6. *Charles T. Powner Co. v. Smith* (1928) 91 Cal. App. 101, 102, 266 P. 833 .

(n7)Footnote 7. *Puritas Laundry Co. v. Green* (1911) 15 Cal. App. 654, 660, 115 P. 660 .

(n8)Footnote 8. *Sumner v. Nevin* (1906) 4 Cal. App. 347, 350, 87 P. 1105 .

(n9)Footnote 9. *Bancroft-Whitney Co. v. Glen* (1966) 64 Cal. 2d 327, 345, 49 Cal. Rptr. 825, 411 P.2d 921 .

(n10)Footnote 10. *See Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal. App. 2d 281 .

(n11)Footnote 11. *See Fowler v. Varian Associates, Inc.* (1987) 196 Cal. App. 3d 34, 41, 241 Cal. Rptr. 539 .

(n12)Footnote 12. *Bancroft-Whitney Co. v. Glen* (1966) 64 Cal. 2d 327, 347, 49 Cal. Rptr. 825, 411 P.2d 921 .

(n13)Footnote 13. *See Bancroft-Whitney Co. v. Glen* (1966) 64 Cal. 2d 327, 352-353, 49 Cal. Rptr. 825, 411 P.2d 921 ; *see also Daniel Orifice Fitting Co. v. Whalen* (1962) 198 Cal. App. 2d 791, 800, 18 Cal. Rptr. 659 (corporate officer liable for breach of fiduciary duty when officer, while creating improvements to corporation's product, was concealing improvements and secretly doing all that was necessary to set up competing business).

(n14)Footnote 14. *See Bancroft-Whitney Co. v. Glen* (1966) 64 Cal. 2d 327, 347, 350-351, 49 Cal. Rptr. 825, 411 P.2d 921 ; *see also GAB Business Servs., Inc. v. Lindsey & Newsome Claim Servs., Inc.* (2000) 83 Cal. App. 4th 409, 416-421, 99 Cal. Rptr. 2d 665 (corporate officer's fiduciary duty to corporation is duty as matter of law).

(n15)Footnote 15. *See, e.g., Bancroft-Whitney Co. v. Glen* (1966) 64 Cal. 2d 327, 352-353, 49 Cal. Rptr. 825, 411 P.2d 921 ; *Daniel Orifice Fitting Co. v. Whalen* (1962) 198 Cal. App. 2d 791, 800, 18 Cal. Rptr. 659 .

(n16)Footnote 16. *See Fowler v. Varian Associates, Inc.* (1987) 196 Cal. App. 3d 34, 41-42, 241 Cal. Rptr. 539 . *See also Huong Que, Inc. v. Luu* (2007) 150 Cal. App. 4th 400, 410, 58 Cal. Rptr. 3d 527 (court properly imposed duty of loyalty on couple who had sold business to plaintiff and then agreed to act as managing agents, where there was ample evidence they assented to act as agents for plaintiffs and nothing on face of contract and no extrinsic evidence supported supposition that parties intended to excuse them from duty of loyalty otherwise flowing from their agency relationship; trial court properly granted preliminary injunction against them, where court expressly found credible averments by plaintiffs' witnesses that husband, while still managing agent of plaintiff, actively solicited plaintiff's customers for business that directly competed with plaintiffs).

(n17)Footnote 17. *See Bancroft-Whitney Co. v. Glen* (1966) 64 Cal. 2d 327, 345-352, 49 Cal. Rptr. 825, 411

P.2d 921 .

(n18)Footnote 18. *See* form in § 70.02[5].

(n19)Footnote 19. *See* form in § 70.05[3].

(n20)Footnote 20. *See Civ. Code* § 3294.



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART A. OVERVIEW OF GOVERNING LAW

4-70 California Employment Law § 70.05

AUTHOR: By James Buyoucos, J.D.

§ 70.05 Breach of Confidence

[1] Availability of Cause of Action

The California Supreme Court has expressly left open the issue of whether or not a cause of action for breach of confidence exists in California.ⁿ¹ A number of court of appeal decisions have concluded that such a cause of action does exist.ⁿ² However, at least one court of appeal has suggested that there is considerable doubt regarding whether such a cause of action does exist.ⁿ³

[2] Elements of Cause of Action

[a] Generally

Courts that have recognized the tort of breach of confidence have stated that the cause of action arises when (1) a protectable idea is offered to another in confidence, and (2) the idea is voluntarily received by the offeree in confidence with the understanding that it is not to be disclosed to others, and is not to be used by the offeree for purposes beyond the limits of the confidence without the offeror's permission.ⁿ⁴

In the employment context, an action for breach of confidence may be available not only to an employer who has conveyed an idea to an employee in confidence but also to an employee who has shared an idea with the employer in confidence.

[b] Protected Ideas

An idea must be novel and confidential to warrant protection under the theory of breach of confidence.ⁿ⁵ While trade secrets are generally protected under this theory, an idea need not be a trade secret in order to warrant protection.ⁿ⁶ In addition, copyright protectability of literary work is not a necessary element of a cause of action for breach of confidence.ⁿ⁷

Examples of ideas that may be the subject of a breach of confidence cause of action include (1) an idea for a sports quiz show,ⁿ⁸ (2) an idea for a movie,ⁿ⁹ (3) a marketing idea for a product,ⁿ¹⁰ and (4) improved business forms.ⁿ¹¹ In another case, confidentiality protection was granted for training program elements that did not constitute a trade secret because they were obvious to anyone who enrolled in the program.^{n11.1}

[c] Confidential Relationship

The essence of the tort of breach of confidence is an understanding between the parties that an idea is offered on a condition of confidence.ⁿ¹² A confidential relationship sufficient to support an action for breach of confidence will not be created merely by the unsolicited submission of an idea to another.ⁿ¹³ There must exist evidence that the plaintiff communicated to the defendant the confidentiality of the submission, or evidence from which a confidential relationship between the parties may be inferred.ⁿ¹⁴ Evidence supporting a confidential relationship may include (1) proof of the existence of an implied-in-fact contract, (2) proof that the confidential material was protected by reason of sufficient novelty and elaboration, or (3) proof of a particular relationship that would impose a duty to receive the idea in confidence,ⁿ¹⁵ such as that of employer and employee.ⁿ¹⁶

The confidential relationship must be based on actual notice to the defendant of the confidential nature of the idea; mere constructive notice is insufficient.ⁿ¹⁷ In addition, knowledge of the confidential nature of the information must precede the disclosure.ⁿ¹⁸ An opportunity to reject the information is necessary if the defendant is to be charged with having voluntarily assumed the obligation to maintain the confidentiality of the disclosed information.ⁿ¹⁹

[3] FORM--Complaint by Employer Against Former Employee for Damages for Breach of Confidence

[a] Comment

The form of complaint set forth in [b], below, may be used by an employer who wishes to assert a cause of action for damages against a former employee for breach of confidence. In an appropriate case, counsel may wish to set forth an additional cause of action for misappropriation of a trade secret,ⁿ²⁰ or for breach of the employee's fiduciary duty.ⁿ²¹

The form in [b], below, alleges the elements of a cause of action for breach of confidence, which areⁿ²² (1) a novel idea offered to the employee in confidence (Paragraph 5); (2) voluntarily reception of the idea by the employee with the understanding that it is not to be disclosed to others, and is not to be used by the employee for purposes beyond the limits of the confidence without the employer's permission (Paragraph 6); and (3) breach of the duty of confidence (Paragraph 7). It also contains allegations of resulting damages (Paragraph 8) and an optional allegation of facts supporting an award of punitive damages (Paragraph 9).ⁿ²³

[b] Form

SUPERIOR COURT OF CALIFORNIA

COUNTY OF _____

_____, [name],)
 Plaintiff,)
 vs.)
 _____ [name], [and DOES I)
 through XX,] Defendant(s).)
)

NO. _____
 COMPLAINT FOR DAMAGES FOR BREACH OF
 CONFIDENCE

Plaintiff alleges:

[1. *Allege identity and capacity of plaintiff. see form in § 70.02[5][b], Paragraph 1.*]

4-70 California Employment Law § 70.05

[2. *Allege identity and capacity of defendant(s).* see form in § 70.02[5][b], Paragraph 2.]

[3. *Fictitious name allegations.* see form in § 70.02[5][b], Paragraph 3.]

[4. *Allegation of agency among defendants.* see form in § 70.02[5][b], Paragraph 4.]

5. On or about _____ [date], plaintiff communicated a novel and protectable confidential idea to defendant _____ [name of employee], who at that time was an employee of plaintiff, concerning _____ [allege novel idea, e.g., a novel and completely new idea for a children's game of skill].

6. Defendant _____ [name of employee] voluntarily received this idea in confidence by _____ [allege confidential communication of idea to employee, e.g., agreeing, before he/she was told of the idea to keep the idea in the strictest of confidence and not to disclose the idea to any other person without the permission of plaintiff. Defendant further understood that the idea was being communicated to him/her for the sole purpose of obtaining defendant's opinion in regard to its feasibility].

7. _____ [Allege employee's breach of duty of confidence, e.g., Defendant _____ (name of employee) breached his/her duty of confidence owed to plaintiff by _____ (allege breach of duty, e.g., communicating this idea to defendant _____ (name), a competitor of plaintiff)].

8. As a proximate result of defendant's breach of his/her duty of confidence as alleged above, plaintiff has suffered actual damages in the sum of \$ _____ in that _____ [specify nature of damages, e.g., profits that plaintiff would have made by developing and selling its novel idea have been diverted to plaintiff's competitor, defendant _____ (name), who used the idea to develop and market a game of its own based on plaintiff's idea].

[9. In committing the breach of confidence as described above, defendant was guilty of malice and/or oppression in that _____ (allege facts indicating presence of malice and/or oppression, e.g., defendant disclosed plaintiff's novel idea with the deliberate intent to injure plaintiff's business and improve that of its competitor and acted with conscious disregard for plaintiff's rights and for his/her own duty of confidence, thereby warranting an award of punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar misconduct).]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages, in the sum of \$ _____;

[2. For punitive damages in an amount appropriate to punish defendant(s) and deter others from engaging in similar misconduct;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

[signature]

Attorney for Plaintiff

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Employment Relationships Fiduciary Responsibilities

FOOTNOTES:

(n1)Footnote 1. *Davies v. Krasna* (1975) 14 Cal. 3d 502, 506-508, 121 Cal. Rptr. 705, 535 P.2d 1161 .

(n2)Footnote 2. *See, e.g., Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal. App. 3d 455, 461-466, 214 Cal. Rptr. 276 ; *Faris v. Enberg* (1979) 97 Cal. App. 3d 309, 321, 158 Cal. Rptr. 704 ; *Self-Directed Placement Corp. v. Control Data Corp.* (9th Cir. 1990) 908 F.2d 462, 467 (relying on *Tele-Count* and *Faris* in holding that causes of action for breach of confidential relationship and common law misappropriation were stated with regard to training program elements that did not constitute trade secrets; employee, who was hired away by defendant, had secrecy agreement with plaintiff, and defendant, as potential licensee, also had confidential relationship).

(n3)Footnote 3. *See Rokos v. Peck* (1986) 182 Cal. App. 3d 604, 618, 227 Cal. Rptr. 480 .

(n4)Footnote 4. *Faris v. Enberg* (1979) 97 Cal. App. 3d 309, 323, 158 Cal. Rptr. 704 ; *but see Self-Directed Placement Corp. v. Control Data Corp.* (9th Cir. 1990) 908 F.2d 462, 467 (finding cause of action stated and describing it as applying to idea, whether or not protectable; breach of confidence protection was granted for training program elements that did not constitute trade secret because they were obvious to anyone who enrolled in the program).

(n5)Footnote 5. *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal. App. 3d 455, 462, 214 Cal. Rptr. 276 .

(n6)Footnote 6. *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal. App. 3d 455, 463, 214 Cal. Rptr. 276 .

(n7)Footnote 7. *Faris v. Enberg* (1979) 97 Cal. App. 3d 309, 323, 158 Cal. Rptr. 704 .

(n8)Footnote 8. *See Faris v. Enberg* (1979) 97 Cal. App. 3d 309, 314-315, 158 Cal. Rptr. 704 .

(n9)Footnote 9. *See Mann v. Columbia Pictures, Inc.* (1982) 128 Cal. App. 3d 628, 644-646, 180 Cal. Rptr. 522 .

(n10)Footnote 10. *See Thompson v. California Brewing Co.* (1957) 150 Cal. App. 2d 469, 472, 310 P.2d 436 .

(n11)Footnote 11. *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal. App. 3d 455, 460, 214 Cal. Rptr. 276 .

(n12)Footnote 11.1. *See Self-Directed Placement Corp. v. Control Data Corp.* (9th Cir. 1990) 908 F.2d 462, 467 .

(n13)Footnote 12. *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal. App. 3d 455, 464, 214 Cal. Rptr. 276 .

(n14)Footnote 13. *See Faris v. Enberg* (1979) 97 Cal. App. 3d 309, 323-324, 158 Cal. Rptr. 704 .

(n15)Footnote 14. *Faris v. Enberg* (1979) 97 Cal. App. 3d 309, 323-324, 158 Cal. Rptr. 704 ; *see Self-Directed Placement Corp. v. Control Data Corp.* (9th Cir. 1990) 908 F.2d 462, 467 (employee who was hired away by defendant has secrecy agreement with plaintiff, and defendant, who acquired information during course of negotiations for license, also had a confidential relationship with plaintiff).

(n16)Footnote 15. *Faris v. Enberg* (1979) 97 Cal. App. 3d 309, 323, 158 Cal. Rptr. 704 .

(n17)Footnote 16. *See Thompson v. California Brewing Co.* (1957) 150 Cal. App. 2d 469, 475, 310 P.2d 436 (suggesting that confidential relationship exists between employer and employee).

(n18)Footnote 17. *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal. App. 3d 455, 464-465, 214 Cal. Rptr. 276 .

(n19)Footnote 18. *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal. App. 3d 455, 464-465, 214 Cal. Rptr. 276 .

(n20)Footnote 19. *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co.* (1985) 168 Cal. App. 3d 455, 465, 214 Cal. Rptr. 276 .

(n21)Footnote 20. *See* form in § 70.02[5].

(n22)Footnote 21. *See* form in § 70.04[2].

(n23)Footnote 22. *See Faris v. Enberg* (1979) 97 Cal. App. 3d 309, 323, 158 Cal. Rptr. 704 , discussed in [2], *above*.

(n24)Footnote 23. *See Civ. Code* § 3294.



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California Employment Law

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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART A. OVERVIEW OF GOVERNING LAW

4-70 California Employment Law § 70.06

AUTHOR: By James Buyoucos, J.D.

§ 70.06 Tortious Interference With Economic Relationships

[1] Interference With Prospective Economic Advantage

A tort cause of action for interference with prospective economic advantage may be available in situations involving unfair competition by an employee against an employer or a former employer. One court of appeal has broadly defined this tort as consisting of the intentional act of diverting or taking away business of another by methods that are not within the privilege of fair competition.ⁿ¹ While the parameters of this tort are not entirely settled, it is clear that the tort is actionable even though no breach of contract is involved.ⁿ²

The elements of a cause of action for interference with prospective economic advantage are (1) an economic relationship between the plaintiff and a third party containing the probability of future economic benefit; (2) knowledge by the defendant of the existence of the relationship; (3) intentional acts by the defendant to disrupt the relationship; (4) actual disruption of the relationship; and (5) proximately caused actual damage.ⁿ³

Negligent acts by the defendant may also be the basis for a cause of action for interference with prospective economic advantage.ⁿ⁴ For a complete discussion of the tort of interference with prospective economic advantage, *see* Levy, Golden, and Sacks, California Torts, Ch. 40, "Fraud and Deceit and Other Business Torts," Part D, Subpart 1.

[2] Interference With Contractual Relations

Interference with contractual relations is now viewed as merely a factual example of the broader tort of interference with prospective economic advantage.ⁿ⁵ The elements of a cause of action for interference with contractual relations are (1) the existence of a valid contract between plaintiff and a third party; (2) defendant's knowledge of the contract and intent to induce its breach; (3) breach of the contract by the third party; (4) a causal relationship between the breach and the defendant's unjustified or wrongful conduct; and (5) resulting damage to plaintiff.ⁿ⁶ In addition, there is dicta to the effect that a cause of action for interference with contractual relations may exist when the defendant's actions did not cause a breach of the contract but rendered performance more expensive or burdensome.ⁿ⁷ For a complete discussion of the tort of interference with prospective economic advantage, *see* Levy, Golden, and Sacks, California Torts, Ch. 40,

"Fraud and Deceit and Other Business Torts," Part D, Subpart 2.

Legal Topics:

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

Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition General Overview Torts Business Torts Unfair Business Practices General Overview

FOOTNOTES:

(n1)Footnote 1. *See Hill Medical Corp. v. Wycoff* (2001) 86 Cal. App. 4th 895, 103 Cal. Rptr. 2d 779 (court refused to apply *Bus. & Prof. Code* § 16601 to enforce covenant not to compete in stock redemption agreement against radiologist who resigned and sold stock back to medical corporation, where there was nothing to indicate that goodwill was part of repurchase, and where there was no evidence that radiologist was compensated to relinquish his rights to continued patronage from patients and doctors with whom he had developed personal relationships); *A.F. Arnold & Co. v. Pacific Professional Ins., Inc.*, (1972) 27 Cal. App. 3d 710, 714, 104 Cal. Rptr. 96 .

(n2)Footnote 2. *See A.F. Arnold & Co. v. Pacific Professional Ins., Inc.*, (1972) 27 Cal. App. 3d 710, 714, 104 Cal. Rptr. 96 .

(n3)Footnote 3. *Buckaloo v. Johnson* (1975) 14 Cal. 3d 815, 827, 122 Cal. Rptr. 745, 537 P.2d 865 .

(n4)Footnote 4. *J'Aire Corp. v. Gregory* (1979) 24 Cal. 3d 799, 805, 157 Cal. Rptr. 407, 598 P.2d 60 .

(n5)Footnote 5. *See Buckaloo v. Johnson* (1975) 14 Cal. 3d 815, 823, 122 Cal. Rptr. 745, 537 P.2d 865 ; *see also* discussion in [1], *above*.

(N6)Footnote 6. *See Wanland v. Los Gatos Lodge, Inc.* (1991) 230 Cal. App. 3d 1507, 1522, 281 Cal. Rptr. 890 ; *see also Dryden v. Tri-Valley Growers* (1977) 65 Cal. App. 3d 990, 995, 135 Cal. Rptr. 720 .

(n7)Footnote 7. *See Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal. 2d 224, 232, 11 Cal. Rptr. 97, 359 P.2d 465 .



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART A. OVERVIEW OF GOVERNING LAW

4-70 California Employment Law § 70.07

AUTHOR: By James Buyoucos, J.D.

§ 70.07 Breach of Contract and Statutory Restrictions

[1] Statutory Prohibition Against Contracts in Restraint of Trade or Profession

Business and Professions Code Section 16600 provides that every contract by which anyone is restrained from practicing a trade, business, or profession is, to that extent, void except as provided in *Business and Professions Code Sections 16600 through 16607*.ⁿ¹ The primary exceptions found in those code provisions relate to the sale of a business^{n1.1} and dissolution of the partnership or dissociation of the partner from the partnership,ⁿ² and are beyond the scope of this chapter. It should be noted, however, that an employer may not use a partnership or corporate structure as a sham to avoid the rule barring covenants restraining trade.ⁿ³

In *Edwards v. Arthur Andersen LLP*, ^{n3.1} the California Supreme Court held that a noncompetition agreement violated section 16600, because it restrained the employee's ability to practice his profession as an accountant. The agreement prohibited the employee, for an 18-month period, from performing professional services of the type he had provided while at the employer, for any client on whose account he had worked during 18 months prior to his termination. It also prohibited him, for a year after termination, from "soliciting," defined by the agreement as providing professional services to any client of the office of the employer in which he had worked.^{n3.2}

In *Edwards*, the Court refused to adopt the limited or "narrow-restraint" exception to section 16600 discussed by the Ninth Circuit in *Campbell v. Trustees of Leland Stanford Jr. University*, ^{n3.3} and followed in other cases.^{n3.4} The Ninth Circuit acknowledged that California has rejected the common law "rule of reasonableness" with respect to restraints on the ability to pursue a profession, but concluded that section 16600 only made illegal restraints precluding one from engaging in a lawful profession, trade, or business.^{n3.5} The Ninth Circuit noted that some California courts excepted agreements that barred the employee from pursuing only a small or limited part of the business, trade or profession from the application of section 16600.^{n3.6} The Ninth Circuit cited two California cases it believed may have carved out this exception to section 16600.^{n3.7} But the California Supreme Court found that the analyses in the two cases did not provide persuasive support for adopting the narrow-restraint exception. The Court found that California courts have not embraced the Ninth Circuit's narrow-restraint exception, and that California courts have been clear in

their expression that section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat.^{n3.8}

Business and Professions Code Section 16600, as a general rule, invalidates provisions in employment contracts that prohibit an employee from working for another employer after completion of his or her employment or imposing a penalty on the employee if he or she does so.ⁿ⁴ However, as discussed in [2], below, some contractual provisions that are limited in scope may validly restrict future employment, and covenants that restrict an employee while the employee is still employed are often upheld.

Business and Professions Code Section 16600 does not invalidate an entire employment contract that contains a provision that is void under that section. Rather, the void provision is normally severable from other provisions of the contract.ⁿ⁵ In addition, if it is possible to construe an anticompetitive provision narrowly so as to render it lawful, the courts will attempt to do so.ⁿ⁶

As used in this chapter, the term "covenant not to compete" is, unless otherwise stated, used in the broad sense to cover all contractual provisions that restrain an employee's or former employee's right to practice his or her trade or profession.

[2] Covenants Not to Compete

[a] Generally

Covenants not to compete that prohibit an employee from working in competition with the employer after termination of the employment contract, or penalize such an employee, are invalid when they are unlimited in scope.ⁿ⁷ An employer cannot lawfully make the signing of an employment agreement containing an unenforceable covenant not to compete a condition of continued employment, even if the agreement contains choice of law or severability provisions which would enable the employer to enforce other provisions of the agreement. Termination of an employee who refuses to sign such an agreement constitutes a wrongful termination in violation of public policy.^{n7.1}

However, covenants not to compete that do not restrain an employee from pursuing an entire type of business, trade, or profession, but rather prohibit the employee from pursuing only a small or limited part of a business, trade, or profession may be valid in some cases.ⁿ⁸ For example, a covenant that prohibits a former employee from soliciting business from the employer's customers for a limited time after termination of employment has been upheld.ⁿ⁹

Covenants that prohibit an employee from disclosing trade secrets are permissible.^{n9.1} In addition, covenants that prohibit an employee from working for a competitor while working for the employer are permissible.ⁿ¹⁰ A covenant not to compete that reasonably limits its geographical scope also may be permissible.ⁿ¹¹ However, absent any mistake justifying reformation, courts will not "save" an overbroad, and thus illegal, covenant not to compete by narrowly construing it.^{n11.1} Further, the mere fact that a covenant not to compete is only a partial restraint on an employee's ability to pursue a trade or profession does not preclude a finding that the restraint is invalid. For example, a restraint that prohibits an employee from soliciting only certain customers may still be invalid.ⁿ¹²

To the extent that covenants not to compete are allowed, the contractual language is strictly construed against the employer.ⁿ¹³

[b] Efficacy of Covenants Not to Compete

There is currently a controversy about whether a covenant not to compete may validly restrict the conduct of an employee to a greater extent than the restrictions embodied in the law of unfair competition, including the law regarding misappropriation of trade secrets.ⁿ¹⁴ Under one line of authority, covenants that restrict future employment are

unnecessary because such covenants may not validly provide greater restraints on future employment than the law permits in the absence of such a covenant.ⁿ¹⁵ The other line of authority holds that a contract may restrict the conduct of an employee to a greater extent than the law of unfair competition otherwise allows.ⁿ¹⁶ As the discussion below indicates, contractual restraints that impose reasonable and minor restraints on an employee are often upheld.

Even if the protection afforded by covenants not to compete is legally limited to that which would otherwise be afforded by law in the absence of such a covenant, the inclusion of such provisions in an employment contract may serve a useful purpose by placing the employee on notice of his or her legal obligation to desist from certain conduct.ⁿ¹⁷

An employment agreement may contain both a covenant not to compete and an arbitration clause. It may also contain a choice-of-law provision if the employment situation involves an out-of-state employer and/or employee. In that case, if a party challenges the validity of a contractual provision other than the arbitration clause itself, such as a covenant not to compete, the issue of the clause's legality is subject to arbitration.^{n17.1}

[c] Provisions Requiring Penalties for Competition

A covenant not to compete may be held to violate *Business and Professions Code Section 16600* as an unlawful restraint of trade even though it does not purport to completely bar future competition with the employer but rather penalizes the employee in some way for such competition. Thus, a provision that required the employee to pay a sum of \$50 to the employer for each customer the employee serviced during employment and then called on after employment had terminated was found to be invalid as an unlawful restraint of trade.ⁿ¹⁸ Similarly, a provision of a corporate pension plan that became part of the employment contract that said pension benefits would be terminated if a retired employee competed in any way with the employer was void as a restraint of trade.ⁿ¹⁹ However, the Ninth Circuit has allowed forfeiture clauses to be enforced against plaintiffs who have violated a profit-sharing plan's non-competition clause.^{n19.1} These clauses are governed by ERISA, which preempts state laws regarding non-competition clauses.^{n19.2} Under ERISA, non-competition forfeiture clauses are valid so long as the plan provides that vested benefits cannot be forfeited.^{n19.3} The employer can condition benefits more generous than those required by ERISA upon a non-competition clause.^{n19.4}

In *Buskuhl v. Family Life Ins. Co.*,ⁿ²⁰ the court also upheld a provision in an employment contract requiring the forfeiture of an insurance agent's future commissions if the agent should disturb the employer's relations with its customers within five years after termination of employment. The court further upheld a provision requiring the forfeiture of the agent's future commissions if the agent should attempt to induce other agents of the employer to leave the employer and represent another insurer.ⁿ²¹

In *IBM v. Bajorek*,^{n21.1} the Ninth Circuit upheld a forfeiture penalty against an employee who had signed an agreement not to work for a competitor within six months after he exercised his stock options. The employee joined a competitor and exercised his options, earning more than \$900,000. The employee sued in California for declaratory relief and IBM sued in New York for violation of the agreement. The New York action was transferred to California and dismissed. The trial court ruled in favor of the employee in the California declaratory relief case, but the Ninth Circuit reversed. The Circuit panel, among other rulings, held that *Business and Professions Code Section 16600* was not a bar to recovery of the profits of the employee. According to the opinion, the agreement "would exclude him from one small corner of the market but would not preclude him from engaging in his profession, trade or business. The covenant not to compete is limited to six months and to competitors." Stated alternatively, the court found that the agreement presented the employee with three reasonable alternatives: (1) to have exercised his options six months before his resignation, and then to have gone to work for the competitor; (2) to leave IBM, go to work in the same industry and keep his money, so long as he did not work for a competitor; and (3) to go to work for a competitor and give up what he was paid.

[d] Remedies for Breach of Covenant Not to Compete

If a valid covenant not to compete is breached, plaintiff is entitled to recover all damages proximately caused by the defendant's breach.ⁿ²² In such cases, plaintiff's damages are normally the value of the business lost to plaintiff as a result of the breach.ⁿ²³

If future harm is threatened, the court may issue an injunction requiring the defendant to refrain from further breaches of the covenant.ⁿ²⁴

[3] Types of Contractual Provisions Restraining Competition

[a] Covenants Concerning Trade Secrets and Other Confidential Business Information

A number of cases have stated that covenants not to compete will be upheld if they are necessary to protect an employer's confidential information or trade secrets (including confidential customer lists).ⁿ²⁵ However, the courts are not in agreement about whether a covenant not to use the confidential information or trade secrets of an employer may validly extend to information that does not strictly qualify as a trade secret or extend to activity that is not otherwise prohibited under the law of unfair competition. Under one line of authority, a covenant in an employment contract governing confidential information does not protect the employer in regard to information that does not meet the formal definition of a trade secret.ⁿ²⁶ Since trade secrets are protected regardless of the existence of an express agreement, such covenants add little to the employer-employee relationship.ⁿ²⁷ For discussion of trade secrets, *see* § 70.02. For a discussion of unfair competition as it relates to use of confidential employer information, *see* § 70.03[1].

Under a contrary line of authority, covenants not to compete may restrict the conduct of an employee to a greater extent than the law of unfair competition otherwise would.ⁿ²⁸

The vast majority of reported cases dealing with confidential employer information relate to an employee's covenant not to take away the employer's customers when he or she terminates employment. For a discussion of this issue, *see* Part B (§§ 70.10- 70.12).

[b] FORM--Employment Contract Provisions Regarding Employee's Use of Employer's Trade Secrets or Confidential Information

[i] Comment

The form set forth in [ii], *below*, contains contractual provisions restricting an employee's use of the employer's trade secrets or confidential information. These provisions may be inserted in an employment contract (1) to provide that the employee will not, either during or after termination of his or her employment, compete with the employer while using the employer's trade secrets and other confidential information; and (2) to provide that the employee will not disclose any trade secrets or confidential information, either during or subsequent to his or her employment.^{n28.1}

The employer should consider setting forth all matters that constitute trade secrets or confidential business information that the employer would like to protect. Although some cases indicate that a contractual specification of a matter as a "trade secret" is not binding on the courts,ⁿ²⁹ such a provision may nevertheless be useful in establishing that the matter was understood between the parties to be confidential.

For a sample employer policy on employee use and disclosure of trade secrets and other confidential information, *see* Morrison & Foerster, *california employers' guide to employee handbooks and personnel policy manuals*, §§ 2.27, 3.20 (Matthew Bender).

[ii] Form

■ CAUTION:

Care should be taken to draft narrow contractual restraints on a departing employee. Absent any mistake justifying reformation, courts will not rewrite an overbroad (and thus illegal) covenant not to compete into a narrower bar on theft of confidential information. To do so would undermine the policy of *Bus. & Prof. Code § 16600*, which prohibits contracts restraining anyone from engaging in his or her lawful trade, business, or profession.^{n29.1}

1. Employee agrees that he or she will not, except as required in the conduct of Employer's business or as authorized in writing by Employer, publish or disclose, during Employee's term of employment or subsequent thereto, any trade secret or confidential information concerning any invention or other matter relating to Employer's business that Employee may in any way acquire by reason of his or her employment by Employer.

Covenant Not to Compete by Use of Employer's
Trade Secrets After Termination of Employment

2. Employee further promises and agrees not to engage in competition with Employer, at any time after the termination of this agreement, while making use of Employer's trade secrets. Employee acknowledges and agrees that the term trade secrets, as used in this Section, includes information concerning _____ [*specify any particular matter constituting a trade secret, e.g., Employer's methods and processes used in manufacturing _____ (specify product, e.g., chocolate chip cookies)*].

[c] Covenants Protecting Against Solicitation of Former Coemployees

One court of appeal has upheld the validity of a covenant prohibiting a former employee from "raiding" his former employer's employees.ⁿ³⁰ In this case, the employee, a corporate executive, entered into a termination agreement with his employer under which he agreed not to "raid" the corporation's employees. On termination of his employment, he obtained other employment and then allegedly induced some of his former co-workers to go to work for his new employer.ⁿ³¹ The former employer brought suit against its former employee for breach of the termination agreement. The trial court granted a nonsuit on the grounds that the covenant was void in that it violated *Business and Professions Code Section 16600*. The court of appeal reversed. The court held that the employee's promise not to lure away other employee's was not invalid in restraint of trade, at least to the extent that enforcement was sought within one year of the termination of employment.ⁿ³² The court in this case did not decide whether covenants of a duration longer than one year would be upheld.

[d] FORM--Employment Contract Provision Protecting Against Solicitation of Employer's Employees by Former Employee**[i] Comment**

This form may be inserted in an employment contract to provide that the employee is prohibited from soliciting any of the employer's other employees for a competing business during employment and for a period of time after termination of employment. The form contains a blank for insertion of the length of the period that the employee is to refrain from soliciting the employer's employees. This period should not be any longer than is reasonably required to protect the employer's interests. For a discussion of the validity of such provisions generally, *see* [c], above.

[ii] Form Solicitation of Coemployees

Employee agrees that he/she will not, either during his/her period of employment, or for a period of _____ [*specify, e.g., one year*] after employment has terminated, solicit any of Employer's employees for a competing business or otherwise induce or attempt to induce such employees to terminate their employment with

Employer.

[e] FORM--Employment Contract Provision Protecting Against Competition by Employee During Term of Employment Contract

[i] Comment

This form may be inserted in an employment contract to provide that the employee will not compete directly or indirectly with the employer during the term of the agreement. Competition by the employee with his or her employer during the term of the employment contract is prohibited even though the employment contract does not contain an express provision to that effect.ⁿ³³ However, inclusion of such a clause in the agreement may help to deter an employee from engaging in such activity by making it clear to the employee that any competitive activity during the term of the employment contract is a breach of contract.

[ii] Form Noncompetition During Term of Employment Contract

During the term of this contract Employee shall not, directly or indirectly, either as an employee, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or in any other individual or representative capacity, engage or participate in any business that is in competition in any manner whatsoever with the business of Employer.

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition General Overview Torts Business Torts Unfair Business Practices General Overview

FOOTNOTES:

(n1)Footnote 1. See *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, 946, 81 Cal. Rptr. 3d 282, 189 P.3d 285 (like Legislature, California Supreme Court generally condemns noncompetition agreements). To view California Supreme Court briefs available on *Lexis.com*, go to 2006 CA S. Ct. Briefs 47190A .

(n2)Footnote 1.1. See *Hill Medical Corp. v. Wycoff* (2001) 86 Cal. App. 4th 895, 903-904, 103 Cal. Rptr. 2d 779 (court refused to apply *Bus. & Prof. Code* § 16601 to enforce covenant not to compete in stock redemption agreement against radiologist who resigned and sold stock back to medical corporation, because there was nothing to indicate that goodwill was part of repurchase, and there was no evidence that radiologist was compensated to relinquish his rights to continued patronage from patients and doctors with whom he had developed personal relationships); *Hilb, Rogal & Hamilton Ins. Services v. Robb* (1995) 33 Cal. App. 4th 1812, 1824-1827, 39 Cal. Rptr. 2d 887 (*Bus. & Prof. Code* § 16601 applied to non-competition clause contained in employment agreement executed in connection with merger in which employee-officer exchanged all his stock in former corporation for stock in acquiring corporation); *Vacco Industries, Inc. v. Van Den Berg* (1992) 5 Cal. App. 4th 34, 48-49, 52-54, 6 Cal. Rptr. 2d 602 (*Bus. & Prof. Code* § 16601 applicable to render non-competition agreement enforceable against officer and former employee who, when he sold shares, was the ninth largest shareholder of corporation and substantial factor in sale of all corporate stock to another company); see also *Bus. & Prof. Code* § 16601.

(n3)Footnote 2. See *Bus. & Prof. Code* § 16602; see also *Bus. & Prof. Code* § 16602.5 (similar exception for dissolution of a limited liability company).

(n4)Footnote 3. See *Bosley Med. Group v. Abramson* (1984) 161 Cal. App. 3d 284, 292, 207 Cal. Rptr. 477 .

(n5)Footnote 3.1. *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, 81 Cal. Rptr. 3d 282, 189 P.3d 285 .

(n6)Footnote 3.2. *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, 946-948, 81 Cal. Rptr. 3d 282, 189 P.3d 285 .

(n7)Footnote 3.3. *Campbell v. Trustees of Leland Stanford Jr. Univ.* (9th Cir. 1987) 817 F.2d 499 .

(n8)Footnote 3.4. See e.g., *International Business Machines Corp. v. Bajorek* (9th Cir. 1999) 191 F.3d 1033 (upholding agreement mandating that employee forfeited stock options if employed by competitor within six months of leaving employment); *General Commercial Packaging v. TPS Package* (9th Cir. 1997) 126 F.3d 1131, 1133 (bargained-for contractual provision barring one party from courting specific named customer was not illegal restraint of trade prohibited by § 16600, because it did not entirely preclude party from pursuing its trade or business).

(n9)Footnote 3.5. *Campbell v. Trustees of Leland Stanford Jr. Univ.* (9th Cir. 1987) 817 F.2d 499, 502 .

(n10)Footnote 3.6. *Campbell v. Trustees of Leland Stanford Jr. Univ.* (9th Cir. 1987) 817 F.2d 499, 502 .

(n11)Footnote 3.7. See *Boughton v. Socony Mobil Oil Co.* (1964) 231 Cal. App. 2d 188, 41 Cal. Rptr. 714 (interpreting deed restriction on land use); *King v. Gerold* (1952) 109 Cal. App. 2d 316, 240 P.2d 710 (rejecting manufacturer's argument that clause not to produce its product after license expiration was not illegal restraint under § 16600).

(n12)Footnote 3.8. *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, 948-949, 81 Cal. Rptr. 3d 282, 189 P.3d 285 , quoting *Scott v. Snelling and Snelling, Inc.* (N.D. Cal. 1990) 732 F. Supp. 1034, 1042 .

(n13)Footnote 4. *Muggill v. Reuben H. Donnelley Corp.* (1965) 62 Cal. 2d 239, 242, 42 Cal. Rptr. 107, 398 P.2d 147 .

(n14)Footnote 5. *Winston Research Corp. v. Minnesota Min. & Mfg. Co.* (9th Cir. 1965) 350 F.2d 134, 140 ; *Zajicek v. Koolvent Metal Awning Corp. of Am.* (9th Cir. 1960) 283 F.2d 127, 133 .

(n15)Footnote 6. *State Farm Mut. etc. Ins. Co. v. Dempster* (1959) 174 Cal. App. 2d 418, 427, 344 P.2d 821 .

(n16)Footnote 7. See *Bus. & Prof. Code § 16600*; *Walia v. Aetna, Inc.* (2001) 93 Cal. App. 4th 1213, 1220-1224, 113 Cal. Rptr. 2d 737 (covenant of six-month restriction prohibiting current and former employees from working for any competitor in same state in which the employee worked for employer or within 50-mile radius of sales territory previously covered for employer restricted employees' mobility and betterment and violated *Bus. & Prof. Code § 16600*); *Kolani v. Gluska* (1998) 64 Cal. App. 4th 402, 407, 75 Cal. Rptr. 2d 257 (covenant not to compete in employment contract was void as outright prohibition on competition when covenant prohibited employee from soliciting, interfering with, competing with, or endeavoring to entice away in any manner any client or customer or any potential client or customer with which employer was actively engaged in sales or promotional efforts); *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1971) 20 Cal. App. 3d 668, 672, 97 Cal. Rptr. 811 (provision in profit sharing plan requiring employee to forfeit benefits if employee voluntarily terminated employment and worked for competitor as invalid).

(n17)Footnote 7.1. *Walia v. Aetna, Inc.* (2001) 93 Cal. App. 4th 1213, 1224-1227, 113 Cal. Rptr. 2d 737 ; *D'Sa v. Playhut, Inc.* (2000) 85 Cal. App. 4th 927, 929, 102 Cal. Rptr. 2d 495 . See *Thompson v. Impaxx, Inc.* (2003) 113 Cal. App. 4th 1425, 1428-1432, 7 Cal. Rptr. 3d 427 (trial court erred in dismissing on pleadings complaint alleging wrongful termination for refusal to sign covenant not to solicit employer's customers within one year of termination, because complaint alleged identity of customers was not confidential and thus not trade secret, which was question of fact). For discussion of wrongful discharge in violation of public policy, see § 60.04.

(n18)Footnote 8. *Loral Corp. v. Moyes* (1985) 174 Cal. App. 3d 268, 276, 219 Cal. Rptr. 836 ; *Boughton v. Socony Mobil Oil Co.* (1965) 231 Cal. App. 2d 188, 190-191, 41 Cal. Rptr. 714 .

(n19)Footnote 9. *See, e.g., Alliant Ins. Services v. Gaddy* (2008) 159 Cal. App. 4th 1292, 1306-1307, 72 Cal. Rptr. 3d 259 (on sale of insurance agency and employment of seller, noncompetition covenant prohibiting former owner, who was also former employee of buyer, from soliciting not only clients of sold business but also buyer's other customers was not invalid, where buyers' confidential client information constituted trade secrets, and trial court expressly found former employee used their trade secrets); *Matull & Assocs. v. Cloutier* (1987) 194 Cal. App. 3d 1049, 1054-1055, 240 Cal. Rptr. 211 ; *Buskuhl v. Family Life Ins. Co.* (1969) 271 Cal. App. 2d 514, 522, 76 Cal. Rptr. 602 ; *see* discussion in [3][a], *below*. *But see Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, 946-948, 81 Cal. Rptr. 3d 282, 189 P.3d 285 (agreement prohibiting employee, for 18-month period, from performing professional services of type he had provided while at employer, for any client on whose account he had worked during 18 months prior to his termination, and prohibiting him, for one year after termination, from "soliciting," defined by agreement as providing professional services to any client of office of employer in which he had worked, was invalid).

(n20)Footnote 9.1. *See Muggill v. Reuben H. Donnelley Corp.* (1965) 62 Cal. 2d 239, 242, 42 Cal. Rptr. 107, 398 P.2d 147 ; *see also* discussion in [3][b], *below*.

(n21)Footnote 10. *See Puritas Laundry Co. v. Green* (1911) 15 Cal. App. 654, 660, 115 P. 660 ; *see also* discussion in [3][e], *below*.

(n22)Footnote 11. *See Alliant Ins. Services v. Gaddy* (2008) 159 Cal. App. 4th 1292, 1300-1306, 72 Cal. Rptr. 3d 259 (on sale of insurance agency and employment of seller, noncompetition covenant expressly defining restricted territory as 58 counties in State of California was not invalid as an illegal restraint on trade because geographic scope exceeded territory where sold agency did business, where there was evidence sold agency carried business in all 58 counties of California by procuring products from insurance companies located throughout 58 counties of California).

(n23)Footnote 11.1. *Kolani v. Gluska* (1998) 64 Cal. App. 4th 402, 407-408, 75 Cal. Rptr. 2d 257 (refusing to rewrite broad covenant not to compete into narrower bar on theft of confidential information, despite agreement's savings clause authorizing court to revise covenant if it were "unfair" or "commercially unreasonable"); *see Thompson v. Impaxx, Inc.* (2003) 113 Cal. App. 4th 1425, 1431, 7 Cal. Rptr. 3d 427 (refusing to narrowly construe covenant not to solicit employer's customers within one year of termination, because employee was presented with contract as written and for purposes of motion for judgment on pleadings was fired for refusing to sign it as written); *D'Sa v. Playhut, Inc.* (2000) 85 Cal. App. 4th 927, 934-935, 102 Cal. Rptr. 2d 495 (refusing to narrowly construe broad covenant not to compete for one year to be protection of defendant's property, trade secrets and other proprietary information).

(n24)Footnote 12. *See Morris v. Harris* (1954) 127 Cal. App. 2d 476, 478, 274 P.2d 22 .

(n25)Footnote 13. *KGB, Inc. v. Giannoulas* (1980) 104 Cal. App. 3d 844, 853, 164 Cal. Rptr. 571 .

(n26)Footnote 14. *See* § 70.03 for a discussion of unfair competition and § 70.02 for a discussion of trade secrets.

(n27)Footnote 15. *See Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal. App. 4th 853, 860-861, 27 Cal. Rptr. 2d 573 ; *see also American Paper & Packaging Prods., Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1325, 228 Cal. Rptr. 713 ; *Moss, Adams & Co. v. Shilling* (1986) 179 Cal. App. 3d 124, 130, 224 Cal. Rptr. 456 (employer may restrain by contract only that conduct of former employee that would be subject to judicial restraint under law of unfair competition absent the contract).

(n28)Footnote 16. *See Loral Corp. v. Moyes* (1985) 174 Cal. App. 3d 268, 276, 219 Cal. Rptr. 836 ; *see Aetna Bldg. Maintenance Co. v. West* (1952) 39 Cal. 2d 198, 203, 246 P.2d 11 (dicta).

(n29)Footnote 17. *See generally* Hays, "Unfair Competition--Another Decade," 51 Cal. L. Rev. 51, 70 (1963).

(n30)Footnote 17.1. *Jones v. Humanscale Corp.* (2005) 130 Cal. App. 4th 401, 408-411, 29 Cal. Rptr. 3d 881 (in action seeking enforcement of arbitration award involving employment agreement between New Jersey employer and

California employee with covenant not to compete, arbitration provision, and choice-of-law provision requiring application of New Jersey law, trial court erred in vacating New Jersey arbitration award in favor of employer because it disagreed with arbitrator's findings on applicable law and enforceability of noncompetition clause, where agreement authorized arbitrator to determine both applicable law and enforceability of the covenant not to compete, and arbitrator's findings and decision on enforceability of covenant were not palpably erroneous under California law).

(n31)Footnote 18. See *Gordon Termite Control v. Terrones* (1978) 84 Cal. App. 3d 176, 179, 148 Cal. Rptr. 310 (rejecting employer's argument that \$50 amount was for sale of accounts and not in nature of liquidated damages to enforce covenant not to compete).

(n32)Footnote 19. See *Muggill v. Reuben H. Donnelley Corp.* (1965) 62 Cal. 2d 239, 242-243, 42 Cal. Rptr. 107, 398 P.2d 147 .

(n33)Footnote 19.1. See *Clark v. Loren Young Tire Center Profit Sharing Trust* (1987) 816 F.2d 480, 481 ; see also *Lojek v. Thomas* (1983) 716 F.2d 675, 678-679 ; *Weinfurhter v. Source Serv. Corp. Emp. Profit-Sharing Plan and Trust* (N.D. Cal. 1991) 759 F. Supp. 599, 602 . See also *Campbell v. Board of Trustees*, 817 F.2d 499, 502 (9th Cir. 1987) (*Bus. & Prof. C. § 16600* does "not make all restrictions unenforceable." The statute "only makes illegal those restraints which preclude one from engaging in a lawful profession, trade or business." Thus a contract is valid if a promisor is "barred from pursuing only a small or limited part of the business, trade or profession. ...")

(n34)Footnote 19.2. See *Clark v. Loren Young Tire Center Profit Sharing Trust* (1987) 816 F.2d 480, 481 .

(n35)Footnote 19.3. See *Clark v. Loren Young Tire Center Profit Sharing Trust* (1987) 816 F.2d 480, 481 (decided under pre-1994 ERISA minimum vesting standards); see also 29 U.S.C. § 1053(a)(2)(A).

(n36)Footnote 19.4. See *Clark v. Loren Young Tire Center Profit Sharing Trust* (1987) 816 F.2d 480, 481-482 .

(n37)Footnote 20. *Buskuhl v. Family Life Ins. Co.* (1969) 271 Cal. App. 2d 514, 522, 76 Cal. Rptr. 602 .

(n38)Footnote 21. See *Buskuhl v. Family Life Ins. Co.* (1969) 271 Cal. App. 2d 514, 522, 76 Cal. Rptr. 602 . The court noted, however, that another provision in the employment contract requiring the forfeiture of future commissions merely on the agent's becoming employed by another insurer may have been in violation of *Bus. & Prof. Code § 16600*. See also *Weber, Lipshie & Co. v. Christian* (1997) 52 Cal. App. 4th 645, 653-657, 60 Cal. Rptr. 2d 677 (upholding liquidated damages provision of covenant restricting former partners from servicing firm clients for five years).

(n39)Footnote 21.1. *IBM v. Bajorek* 191 F.3d 1033 (9th Cir. 1999)

(n40)Footnote 22. See *Civ. Code § 3300*; *Gordon v. Landau* (1958) 49 Cal. 2d 690, 694, 321 P.2d 456 .

(n41)Footnote 23. See *General Paint Corp. v. Seymour* (1932) 124 Cal. App. 611, 615-616, 12 P.2d 990 .

(n42)Footnote 24. See *Gordon v. Schwartz* (1956) 147 Cal. App. 2d 213, 213-219, 305 P.2d 117 ; see also *Matull & Associates v. Cloutier* (1987) 194 Cal. App. 3d 1049, 1055-1056, 240 Cal. Rptr. 211 (acknowledging that covenants not to compete can be enforced by injunction, but holding particular injunction at issue to be overbroad).

(n43)Footnote 25. See, e.g., *Alliant Ins. Services v. Gaddy* (2008) 159 Cal. App. 4th 1292, 1306-1307, 72 Cal. Rptr. 3d 259 ; *Kolani v. Gluska* (1998) 64 Cal. App. 4th 402, 407, 412, 75 Cal. Rptr. 2d 257 (acknowledging that narrow contractual restraints which prohibit former employees from using confidential information have been upheld as lawful and granting appellant leave to amend to plead claims for theft of confidential information and trade secrets); *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal. App. 4th 853, 859, 27 Cal. Rptr. 2d 573 ; *Matull & Associates v. Cloutier* (1987) 194 Cal. App. 3d 1049, 1054-1055, 240 Cal. Rptr. 211 ; *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1322, 228 Cal. Rptr. 713 ; *State Farm Mut. etc. Ins. Co. v.*

Dempster (1959) 174 Cal. App. 2d 418, 425, 344 P.2d 821 .

(n44)Footnote 26. *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1325, 228 Cal. Rptr. 713 ; *State Farm Mut. etc. Ins. Co. v. Dempster* (1959) 174 Cal. App. 2d 418, 426, 344 P.2d 821 (agreement between employer and employee defining trade secret may not be decisive in determining if trade secret exists); *see also Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal. App. 4th 853, 860-863, 27 Cal. Rptr. 2d 573 (agreement not to work for competitors for one year after termination of employment was unenforceable against former employees because plaintiff former employer had no trade secret that would be protected by enforcement of agreement).

(n45)Footnote 27. *Moss, Adams & Co. v. Shilling* (1986) 179 Cal. App. 3d 124, 130, 224 Cal. Rptr. 456 ; *but see American Credit Indemnity Co. v. Sacks* (1989) 213 Cal. App. 3d 622, 630-631, 262 Cal. Rptr. 92 (existence of agreement as factor in establishing existence of trade secret under definition in *Civ. Code* § 3426.1(d) (UTSA)).

(n46)Footnote 28. *Loral Corp. v. Moyes* (1985) 174 Cal. App. 3d 268, 276, 219 Cal. Rptr. 836 (dicta).

(n47)Footnote 28.1. *See ITT Telecom Prods. Corp. v. Dooley* (1989) 214 Cal. App. 3d 307, 262 Cal. Rptr. 773 .

(n48)Footnote 29. *See American Paper & Packaging Prods., Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1325, 228 Cal. Rptr. 713 , discussed in [2][b], *above*.

(n49)Footnote 29.1. *Kolani v. Gluska* (1998) 64 Cal. App. 4th 402, 407-408, 75 Cal. Rptr. 2d 257 (refusing to rewrite broad covenant not to compete into narrower bar on theft of confidential information, despite agreement's savings clause, authorizing court to revise covenant if it were "unfair" or "commercially unreasonable"); *see Bus. & Prof. Code* § 16600; *Bus. & Prof. Code* § 16601, 16602 (exceptions); *See also* § 70.07[2].

(n50)Footnote 30. *Loral Corp. v. Moyes* (1985) 174 Cal. App. 3d 268, 274-280, 219 Cal. Rptr. 836 .

(n51)Footnote 31. *Loral Corp. v. Moyes* (1985) 174 Cal. App. 3d 268, 274, 219 Cal. Rptr. 836 .

(n52)Footnote 32. *Loral Corp. v. Moyes* (1985) 174 Cal. App. 3d 268, 279, 219 Cal. Rptr. 836 .

(n53)Footnote 33. *See Puritas Laundry Co. v. Green* (1911) 15 Cal. App. 654, 660, 115 P. 660 ; *see also* discussion in § 70.04[1].



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART A. OVERVIEW OF GOVERNING LAW

4-70 California Employment Law §§ 70.08 through 70.09

AUTHOR: By James Buyoucos, J.D.

[Reserved]

§§ 70.08[Reserved]



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART B. LIMITATIONS ON SOLICITATION OF FORMER EMPLOYER'S CUSTOMERS OR EMPLOYEES

4-70 California Employment Law § 70.10

AUTHOR: By James Buyoucos, J.D.

§ 70.10 Introduction

Public policy supports the right of an individual to the unhampered pursuit of the livelihood of his or her choice.ⁿ¹ Thus, as a general rule, a former employee has the right to engage in a competitive business for himself or herself and may enter into competition with his or her former employer, even for the business of those who were the customers of the former employer, provided that such competition is fairly conducted.ⁿ² It is often stated that the law will not require employees who change employment to "wipe clean the slates of their memories."ⁿ³ The mere fact that an employer has expended sums in building a clientele by cultivating a demand for a product does not give the employer a monopoly on the sale of the product to those customers.ⁿ⁴

However, as discussed in the remainder of this part, the law does impose significant limits on the solicitation of the customers or employees of an employer by an employee or a former employee. If an employer's "customer list" is deemed a trade secret, an employee may be subject to an action for misappropriation of a trade secret if the employee solicits the business of those customers.ⁿ⁵ If an employer has practices related to the solicitation of employees which are deemed trade secrets, a former employee may be liable for misappropriation of a trade secret.^{n5.1} In addition, a former employee who solicits the business of the customers of his or her former employer may be subject to an action for unfair competition.ⁿ⁶ An employee who solicits an employer's customers prior to termination of employment may be subject to an action for breach of the duty of loyalty, as well as for misappropriation of a trade secret and unfair competition.ⁿ⁷ Finally, if an employment contract contains a valid covenant not to compete, the employee may be subject to a cause of action for breach of contract if the employee competes with the employer for the business of its customers in violation of the contract.ⁿ⁸

To a large extent, the law regarding unfair solicitation of an employer's customers under a theory of unfair competition overlaps with the law of trade secrets. The first California case to grant a remedy for such activity was based on the rationale that equity will protect an employer against "unwarranted disclosure of trade secrets and confidential communications."ⁿ⁹ Prior to the advent of the UTSA, which became effective in 1985, cases often treated the issue of solicitation of customers by a former employee without clearly indicating whether the cause of action was for trade secret misappropriation or unfair competition. In fact, this issue was of little practical importance because both causes

of action sounded in tort, required basically the same showing, and the remedies were the same regardless of the theory used to impose liability. However, under the UTSA special rules now apply to actions for trade secret misappropriation so that the determination of the theory of recovery may have important consequences on the litigation. For example, punitive damages are more restricted in trade secret misappropriation actions than they are in those for unfair competition actions.ⁿ¹⁰

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition General Overview Torts Business Torts Unfair Business Practices General Overview

FOOTNOTES:

(n1)Footnote 1. *Futurecraft Corp. v. Clary Corp.* (1962) 205 Cal. App. 2d 279, 285-286, 23 Cal. Rptr. 198 .

(n2)Footnote 2. *Continental Car-Na-Var Corp. v. Moseley* (1944) 24 Cal. 2d 104, 110, 148 P.2d 9 .

(n3)Footnote 3. *See, e.g., Moss, Adams & Co. v. Shilling* (1986) 179 Cal. App. 3d 124, 129, 224 Cal. Rptr. 456 .

(n4)Footnote 4. *Avocado Sales Co. v. Wyse* (1932) 122 Cal. App. 627, 634, 10 P.2d 485 .

(n5)Footnote 5. *See* discussion in § 70.11[1].

(n6)Footnote 5.1. *See* discussion in § 70.11[1].

(n7)Footnote 6. *See* discussion in § 70.11[2].

(n8)Footnote 7. *See* discussion in § 70.11[4].

(n9)Footnote 8. *See* discussion in § 70.11[3].

(n10)Footnote 9. *See Empire Steam Laundry v. Lozier* (1913) 165 Cal. 95, 99, 130 P. 1180 .

(n11)Footnote 10. Compare Civ. Code § 3426.3(c) with Civ. Code § 3294; *see* discussion in § 70.02[3][d].



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART B. LIMITATIONS ON SOLICITATION OF FORMER EMPLOYER'S CUSTOMERS OR EMPLOYEES

4-70 California Employment Law § 70.11

AUTHOR: By James Buyoucos, J.D.

§ 70.11 Theories of Liability

[1] Misappropriation of Trade Secrets

[a] Availability of Cause of Action

A former employee may not use the trade secrets of the employer to solicit the customers of the former employer.ⁿ¹ If a list of customers constitutes a trade secret, a cause of action for misappropriation of a trade secret under the UTSAⁿ² will lie for the use of the trade secret to solicit customers of the employer.ⁿ³

For a discussion of misappropriation of a trade secret generally, *see* § 70.02.

[b] Customer Lists as Trade Secrets

[i] Generally

The term "customer list," as used in the cases and legal articles concerning trade secrets and unfair competition is a term of art that has an expansive meaning. In addition to written lists, the term applies to "lists" that are unwritten and exist only in the memory of the employee.ⁿ⁴ In addition, the so-called "customer list" cases include cases in which there was nothing secret about the list of customers, but the employee had other confidential information about the customers.ⁿ⁵ Similarly, a "preferred customer" list may be deemed a trade secret.ⁿ⁶

A customer list may be a trade secret if it meets the definition of the UTSA.ⁿ⁷ Although the UTSA does not mention customer lists in its definition of a trade secret, the definition is inclusive, not exclusive, and customer lists can be protectable trade secrets under the UTSA.ⁿ⁸

Cases analyzing the UTSA in the context of a customer list have defined a trade secret as (1) information (2) that is valuable because it is unknown to others and (3) that the owner has attempted to keep secret.ⁿ⁹

The "value" element requires the information to have value to other businesses that are unaware of the information and that could put that information, if known, to valuable use.ⁿ¹⁰ To illustrate, suppose the hypothetical widget industry consists of five sellers and there are 1,000,000 businesses engaged in industries that have been known to use widgets in their operations, but there is no way for the sellers to know for sure which of those 1,000,000 use widgets and which do not. Seller A's customer list of 500 would therefore have value to its competitors because it would allow them to distinguish the proven customers from those that are only potential customers and thus allow them to focus their sales efforts. However, if each of Seller A's competitors already knows that the businesses on A's customer list are proven widget consumers (even though they do not know that those businesses buy their widgets from A), A's customer list has no independent value because the identities of its customers are already known to its competitors. In the first situation, A's customer list would be a protectable trade secret, but in the second it would not.ⁿ¹¹

A case that fits within the first hypothetical is *American Credit Indemnity Co. v. Sacks*,ⁿ¹² which involved a customer list of a company selling credit insurance. Credit insurance is a product that protects entities selling receivables against defaults. Of the potential market for credit insurance at the time of the case, when credit insurance was new and there was resistance to it, only 6.5 percent of the projected customer base had purchased the product. Therefore, knowledge of the customer list would benefit a competitor.ⁿ¹³ In *American Credit*, the uniqueness of the product and customer resistance to it gave value to the customer list.ⁿ¹⁴

Another example of a product market in which a customer has value to competitors is the market for temporary employees. Such a list is potentially protectable as a trade secret because a competitor who did not possess the list would have to expend considerable effort to determine which potential purchasers are actual purchasers.ⁿ¹⁵

The secrecy element can be satisfied even if the employee is not required to sign an agreement regarding confidentiality, as in a situation in which the information is not divulged to anyone outside the business, is only divulged to employees when necessary for them to effectively carry out their functions, and the employees are told the information is confidential.ⁿ¹⁶

Before enactment of the UTSA, case law had adopted a five-prong test for determining whether a customer list was a trade secret. This test required that (1) the information not be readily available to others; (2) the former employee have solicited the customers on the list with intent to injure his or her former employer; (3) the solicitations be directed at preferred customers whose business was particularly profitable and whose identities were not generally known to the public; (4) the business or industry involved be one in which a customer ordinarily will patronize only one concern; and (5) the established business relationship between the customer and the former employer normally would continue unless interfered with.ⁿ¹⁷ Under the UTSA, the "intent to injure" element has been dropped as a requirement for stating a cause of action for misappropriation of a customer list as a trade secret.ⁿ¹⁸ However, the "value" element, whether expressed as a single criteria or as several indicia, still turns on an analysis of the nature of the business and of the customer relationships within that industry as requiring the development of a personal, exclusive, and continuing relationship so that the customer list, or the information contained in it, could not be easily duplicated or developed. For example, even confidential information is not likely to transform a list into a trade secret when a business is a type in which patronage depends on superiority of product or service rather than personal relationships with the customer.ⁿ¹⁹ On the other hand, if the employer provides a relatively unusual service, the list may have protectable economic value. In *Morlife, Inc. v. Perry*,^{n19.1} plaintiff specialized in commercial roof repair and maintenance, as distinguished from replacement roofing. Noting that Morlife had taken years to develop a list which contained names, addresses, contact persons, pricing information and knowledge about particular customer needs, the court found the list to have independent economic value.^{n19.2}

In *American Paper & Packaging Products, Inc. v. Kirgan*,ⁿ²⁰ plaintiff manufactured paper and packaging products and hired salespersons, including the defendants, to sell their products to manufacturers in need of shipping supplies. In holding that a list of such manufacturers did not constitute a trade secret, the court relied primarily on the fact that while the list of such manufacturers was not known to the general public, it was certainly known or readily ascertainable to

other persons in the shipping business. In this regard, the court noted that the compilation of such a list is neither sophisticated nor difficult nor time consuming.ⁿ²¹ In addition, the shipping business was very competitive and manufacturers (buyers) often dealt with more than one packaging supplier at a time. Long term relationships between manufacturers and shipping companies depended as much on price, speed, and quality of product as on previous relationships.ⁿ²² The court did suggest, however, that the result would perhaps have been different if the plaintiff had shown that the defendants used confidential information regarding the special packaging requirements of its customers or if the plaintiff had shown that the defendants had interrupted what otherwise would have been an exclusive business relationship between the employer and its customers.ⁿ²³ⁿ²⁴

In another case, a court of appeal has held that the names of customers of an accounting firm that were known by the employees because they had provided services for those customers did not constitute a trade secret. The court noted in this case that the names of the employer's other customers, that is, those that were not personally known to the employees, may have been protected trade secrets.ⁿ²⁵

[ii] Certain Customer Lists Deemed Trade Secret by Statute

Certain customer lists are deemed to constitute trade secrets by statute. *Business and Professions Code Section 16606* provides that the customer list, including the names, addresses, and identities of customers of a telephone answering service company, constitutes a trade secret.

In addition, *Business and Professions Code Section 16607(a)* provides that the customer list, including the names, addresses, and identities of all employer customers who have listed job orders with an employment agency within a period of 180 days prior to the separation of an employee from the agency and including the names, addresses, and identities of all applicant customers of the employment agency, constitutes a trade secret. However, this provision contains an exception providing that no liability will attach to and no cause of action may arise from the use of a customer list of an employment agency by a former employee who enters into business as an employment agency more than one year immediately following termination of his or her employment.ⁿ²⁶

When an injunction is premised not only on misappropriation of a staffing agency's customer lists, but also on misappropriation of numerous other trade secret items, there is no time limitation on the duration of injunctive relief as to use of the other trade secret information.^{n26.1}

[c] Solicitation of Employees

Mere solicitation of an employee (who is under no contract of employment) to leave and associate with a competing firm is not illegal. However, if either the defecting employee or the competitor is guilty of some concomitant, unconscionable conduct, the injured former employer has a cause of action to recover for the detriment thereby suffered. Misappropriation of trade secrets can serve as the concomitant of the solicitation.^{n26.2} For example, in *ReadyLink Healthcare v. Cotton*,^{n26.3} a healthcare staffing company sued a former employee who had stolen database information about nurses the former employer used as well as customer information, and then began soliciting the former employer's employees, nurses and customers. There was overwhelming evidence that in soliciting the employees, nurses, and healthcare provider customers, the former employee used trade secret information within the meaning of the UTSA, both in obtaining employment with a competitor and in his intention to start his own nurse staffing business in competition with the former employer, using the former employer's proprietary and confidential information (such as databases containing lists of the former employer's nurses, employees, and healthcare facility customers, compilations of compensation, employment preferences, contact information, nurse applications and tests, and the former employer's unique per diem program). The declarations supporting the former employer's motion for a preliminary injunction sufficiently established that the trade secret information had potential economic value, because the former employer went to great expense to compile the data and the information would enable a competitor to recruit away from the former employer nurses and employees under contract with the former employer. The former employer

took reasonable steps to insure the secrecy of its trade secret information by requesting that employees sign nondisclosure agreements, which the former employee had signed. Further, by not appealing the subdivision of the preliminary injunction that enjoined the use or disclosure of the former employer's trade secret information, the former employee in effect conceded that those items were enjoined trade secrets.

[2] Unfair Competition

[a] Availability of Cause of Action

An action for unfair competition will lie against a former employee who has used a trade secret or confidential information of the former employer to solicit the customers of the former employer.ⁿ²⁷ In addition, in certain instances, an action for unfair competition may also be available when a former employee has solicited the customers of a former employer even though no confidential information is involved.ⁿ²⁸

[b] Acts Constituting Prohibited Solicitation

The law of unfair competition makes a distinction between receiving the business of a customer and the solicitation of that business. Thus, while a former employee may, in certain circumstances, be prohibited from soliciting his or her former employer's customers, the employee may not be prohibited from receiving the business of those customers in the absence of solicitation. Advertisements that are aimed at the general public do not constitute solicitation.ⁿ²⁹ Similarly, the act of merely notifying an employer's customers of a change of employment, and nothing more, or discussing business with them at their invitation does not, as a general rule, constitute prohibited solicitation by the former employee.ⁿ³⁰ Thus, in one case in which the employees of an accounting firm wrote letters to customers with whom they had a working relationship in which they informed the customers that they were forming a new accounting firm, the court held that no solicitation had occurred.ⁿ³¹ On the other hand, solicitation was found in another case in which the defendant told his former employer's customers that he was no longer working for his former employer and would appreciate their business.ⁿ³² Another case held that an "announcement" of new employment that informs a former employer's customers of the interesting competitive alternatives available from the employee's new employer and invites inquiries goes beyond announcing new employment and constitutes solicitation.^{n32.1}

[c] Protected Information

To the extent that customer lists or other customer information constitute a trade secret of the employer, a former employee who uses such information to solicit the customers of the employer, or to the disadvantage of the employer in any way, may be liable under a theory of either misappropriation of a trade secretⁿ³³ or unfair competition.ⁿ³⁴ It is not clear, however, if a cause of action for unfair competition exists when a former employee has used confidential information not amounting to a trade secret, as defined by the UTSA, to solicit the business of customers of his or her former employer. Language in some cases seems to suggest that in the absence of a trade secret, an action for unfair competition will not lie.ⁿ³⁵ However, other cases have upheld judgments against former employees for solicitation based on confidential information on a theory of unfair competition, without expressly finding that the information used constituted a trade secret.ⁿ³⁶ In *Rigging Internat. Maintenance Co. v. Gwin*,ⁿ³⁷ the court stated: "A former employee's use of confidential information obtained from his former employer to compete with his old employer and to solicit the business of his former employer's customers, is regarded as unfair competition." The court went on to state that a former employee who goes into competition with his or her old employer is judged by two separate standards: (1) the employee may not use confidential information to solicit the former employer's customers; and (2) the employee is judged as any other competitor in determining whether he or she has competed fairly. In regard to the second standard, the court noted that in order for the acts of a business rival to be denounced as unfair, the acts must be of extraordinary character.ⁿ³⁸

An action for unfair competition will not normally lie against a former employee who has not used any confidential information of the former employer.ⁿ³⁹ However, some older cases appear to recognize an exception to this rule. If a business is such that it involves little competition in regard to price or quality of the goods or services involved, but

rather depends on the personal relationship between the company's representative and the customer so that the business relationship will normally continue unless it is interfered with, some cases have upheld an action for unfair competition even though there did not appear to be any use of confidential information involved. This situation usually occurs in the so called "route cases" in which a business caters to its customers by sending a salesperson or delivery person along a route either to solicit sales and deliver a product to the customer or to perform a service at the home or business residence of the customer. The typical route cases have involved such businesses as home milk deliveryⁿ⁴⁰ and laundry services.ⁿ⁴¹ In *George v. Burdusis*, ⁿ⁴² a typical route case, the court recognized, in upholding an action for unfair competition, that it is not merely the identity of the customers but also the "friendly contact" with them that is important to solicitors.

[3] Breach of Contract

[a] Availability of Cause of Action

Generally speaking, an employee is free, within the limits set forth by the laws of unfair competition and trade secrets,ⁿ⁴³ to solicit the customers of a former employer. Covenants that attempt to limit the right of a former employee to deal freely with persons who were the customers of the employee's former employer are subject to the charge that they unlawfully restrain trade in violation of *Business and Professions Code Section 16600*.ⁿ⁴⁴ However, reasonable restraints of trade may be permitted when necessary to protect the legitimate interests of an employer. For example, information concerning customers that an employer compiled at great expense and that represents a valuable business asset is protected by the law of unfair competition.ⁿ⁴⁵ Clearly, if a list of customers is considered a trade secret,ⁿ⁴⁶ an employment contract may provide for protection of the trade secret by an antisolicitation clause.ⁿ⁴⁷

Business & Professions Code section 16600 bars a court from specifically enforcing, by way of injunctive relief, a contractual clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee's new business. However, a court may enjoin tortious conduct as violative of either the Uniform Trade Secrets Act^{n47.1} or the unfair competition law, by banning the former employee from using trade secret information to identify existing customers, to facilitate the solicitation of those customers, or to otherwise unfairly compete with the former employer.^{n47.2} The conduct is enjoined not because it falls within a judicially created "exception" to the ban in *Business & Professions § 16600* on contractual nonsolicitation clauses, but because it is wrongful independent of any contractual undertaking.^{n47.3} In *The Retirement Group v. Galante*, ^{n47.4} the injunctive provisions of an agreement prohibiting former independent contractors from directly or indirectly soliciting any current customers violated the holding of the California Supreme Court in *Edwards v. Arthur Andersen LLP*, ^{n47.5} and could not rationally be upheld as an injunction limited in scope to the only legitimate protection, *i.e.*, enjoining the misappropriation of trade secrets, for which injunctive relief could be issued. The injunctive provisions purported to bar the former independent contractors from engaging in conduct substantively indistinguishable from the contractually proscribed conduct that the California Supreme Court in *Edwards* had concluded was violative of the protections of § 16600. Further, the provisions could not be upheld as an injunction designed to have the limited effect of protecting against the misappropriation of trade secrets, because other injunctive provisions of the agreement already granted the full range of trade secret protections to which the organization was entitled.

In *Gordon v. Wasserman*, ⁿ⁴⁸ the court of appeal upheld a covenant in which the employee, a door-to-door salesperson of household goods, promised not to solicit the employer's customers for one year after termination of employment and not to divulge the names of the customers to any other person or firm for one year. The holding was based in part on the fact that the employer's list of customers was deemed "confidential." In a subsequent case brought by the same employer, and involving virtually the same contractual language, the California Supreme Court upheld the validity of the antisolicitation provision. The Court relied on the fact that the employer's list of preferred customers was a real asset to its business and necessary to its survival and thus constituted a trade secret.ⁿ⁴⁹

In *State Farm Mut. etc. Ins. Co. v. Dempster*, ⁿ⁵⁰ the court of appeal upheld the enforcement of a provision under

which the employee agreed not to solicit the employer's customers for one year following termination, but only after construing the provision in a limited manner. In this case, the employees, who were insurance agents, had promised not to interfere with existing policyholders of the insurer for one year after termination of employment. The trial court had found that this provision could only be enforced to the extent that it applied to policy holders whom the agents had serviced. The court of appeal agreed, holding that the trial court properly limited enforcement of the contract to the interests that equity protects.ⁿ⁵¹

While "antisolicitation" clauses may be upheld as the *Gordon* and *State Farm* cases illustrate, if the clause attempts to prohibit solicitation for too long a period of time, it may be found invalid, or limited to a shorter period of time under the reasoning of *State Farm*. The longer the period of restraint, the less likely it is that the court will deem the restraint reasonable. In *Morris v. Harris*,ⁿ⁵² the court invalidated a provision in a contract that prohibited the employee from soliciting the employer's clients or accepting work from those clients without solicitation for a period of ten years. Although the duration of the term may have been a factor in the court's decision, it appears that the court invalidated the provision in large part because it prohibited the employee from accepting employment from the former employer's customers even *without* solicitation by the former employee.ⁿ⁵³

For a general discussion of covenants not to compete, *see* § 70.07.

[b] FORM--Contract Provision Prohibiting Solicitation of Employer's Customers

[i] Comment

The form set forth in [ii], below, may be inserted in an employment contract to provide that the employee is prohibited from soliciting business from the employer's customers for a limited period after termination of employment. It is for use primarily in employment contracts for sales or other personnel who have access to information concerning the employer's customers.

This form contains a blank for insertion of the length of the period that the employee is to refrain from soliciting the employer's customers. This period should not be any longer than is reasonably required to protect the employer's interests. A one-year restraint has been upheld by the courts in several instances.ⁿ⁵⁴

[ii] Form Soliciting Customers After Termination of Employment

1. Employee acknowledges and agrees that the names and addresses of Employer's customers and all other confidential information relating to those customers, including their buying habits and special needs, are provided in confidence and constitute trade secrets of Employer and that the sale or unauthorized use or disclosure of any of Employer's trade secrets obtained by Employee during his/her employment with Employer constitutes unfair competition. Employee promises and agrees not to engage in any unfair competition with Employer.

2. For a period of _____ [*specify, e.g., one year*] immediately following the termination of his/her employment with Employer, Employee shall not directly or indirectly make known to any person, firm, or corporation the names or addresses of any of the customers of Employer or any other information pertaining to them, or call on, solicit, take away, or attempt to call on, solicit, or take away any of the customers of Employer on whom Employee called or with whom Employee became acquainted during his/her employment with Employer, either for himself/herself or for any other person, firm, or corporation.

[4] Other Theories of Liability

Although no reported case has expressly discussed the point, a cause of action for breach of fiduciary duty should logically be available in situations in which an employee attempts to solicit the customers of his or her employer while still employed.ⁿ⁵⁵ A cause of action for negligent or intentional interference with contract or interference with

prospective economic advantage may also be available in such situations.ⁿ⁵⁶

Legal Topics:

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

Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition General Overview Torts Business Torts Unfair Business Practices General Overview Trade Secrets Law Misappropriation Actions General Overview

FOOTNOTES:

(n1)Footnote 1. See *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal. App. 3d 622, 638, 262 Cal. Rptr. 92 ; see also *Moss, Adams & Co. v. Shilling* (1986) 179 Cal. App. 3d 124, 128, 224 Cal. Rptr. 456 ; *George v. Burdusis* (1942) 21 Cal. 2d 153, 160, 130 P.2d 399 . For a discussion of what constitutes impermissible solicitation, see [2][b], below.

(n2)Footnote 2. See Civ. Code § 3426 et seq., discussed in § 70.02.

(n3)Footnote 3. See *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1324, 228 Cal. Rptr. 713 .

(n4)Footnote 4. See *George v. Burdusis* (1942) 21 Cal. 2d 153, 160, 130 P.2d 399 ; *Reid v. Mass Co., Inc.* (1957) 155 Cal. App. 2d 293, 302, 318 P.2d 54 .

(n5)Footnote 5. See, e.g., *Scavengers Protective Asso. v. Serv-U-Garbage Co.* (1933) 218 Cal. 568, 572-573, 24 P.2d 489 .

(n6)Footnote 6. *Gordon v. Landau* (1958) 49 Cal. 2d 690, 694, 321 P.2d 456 .

(n7)Footnote 7. *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal. App. 3d 1, 18, 286 Cal. Rptr. 518 ; *Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal. App. 3d 1278, 1287-1291, 272 Cal. Rptr. 352 ; *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal. App. 3d 622, 630-631, 262 Cal. Rptr. 92 ; see *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1324, 228 Cal. Rptr. 713 (but concluding that list in that case was not trade secret). For discussion of what constitutes trade secret generally, see § 70.02[2][b].

(n8)Footnote 8. *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal. App. 3d 1, 18, 286 Cal. Rptr. 518 ; *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1323-1324, 228 Cal. Rptr. 713 .

(n9)Footnote 9. See, e.g., *MAI Sys. Corp. v. Peak Computer* (9th Cir. 1993) 991 F.2d 511, 521 (computer company's confidential customer database was a trade secret under California UTSA); *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal. App. 3d 1, 18, 286 Cal. Rptr. 518 ; *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal. App. 3d 622, 630, 262 Cal. Rptr. 92 ; see also *Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal. App. 3d 1278, 1287-1291, 272 Cal. Rptr. 352 ; *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal. App. 3d 622, 630, 262 Cal. Rptr. 92 (describing test as consisting only of second and third elements).

(n10)Footnote 10. *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal. App. 3d 1, 19, 286 Cal. Rptr. 518 .

(n11)Footnote 11. *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal. App. 3d 1, 19, 286 Cal. Rptr. 518 .

(n12)Footnote 12. *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal. App. 3d 622, 262 Cal. Rptr. 92

(n13)Footnote 13. See *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal. App. 3d 622, 630-631, 638, 262 Cal. Rptr. 92

(n14)Footnote 14. *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal. App. 3d 622, 630-631, 638, 262 Cal. Rptr. 92 .

(n15)Footnote 15. See *Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal. App. 3d 1278, 1282, 272 Cal. Rptr. 352 . See also *ReadyLink Healthcare v. Cotton* (2005) 126 Cal. App. 4th 1006, 24 Cal. Rptr. 3d 720 (declarations supporting former employer=s motion for preliminary injunction sufficiently established that trade secret information had potential economic value because former employer went to great expense to compile data, and information would enable competitor to recruit away from former employer nurses and employees under contract with former employer).

(n16)Footnote 16. *Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal. App. 3d 1278, 1288, 272 Cal. Rptr. 352 ; see also *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal. App. 3d 622, 631, 262 Cal. Rptr. 92 (plaintiff's standard confidentiality agreement respected its client list, expiration dates of customer contracts, lists of business leads, history of customer relationships, and related client information, although defendant claimed never to have signed it).

(n17)Footnote 17. *Aetna Bldg. Maintenance Co. v. West* (1952) 39 Cal. 2d 198, 204-205, 246 P.2d 11 .

(n18)Footnote 18. Compare *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal. App. 3d 1, 18-19, 286 Cal. Rptr. 518 with *Aetna Bldg. Maintenance Co. v. West* (1952) 39 Cal. 2d 198, 204-205, 246 P.2d 11 .

(n19)Footnote 19. *Aetna Bldg. Maintenance Co. v. West* (1952) 39 Cal. 2d 198, 246 P.2d 11 (janitorial service); see *Avocado Sales Co. v. Wyse* (1932) 122 Cal. App. 627, 634, 10 P.2d 485 .

(n20)Footnote 19.1. *Morlife, Inc. v. Perry* (1997) 56 Cal. App. 4th 1514, 66 Cal. Rptr. 2d 731 .

(n21)Footnote 19.2. *Morlife, Inc. v. Perry* (1997) 56 Cal. App. 4th 1514, 1521, 66 Cal. Rptr. 2d 731 .

(n22)Footnote 20. *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 228 Cal. Rptr. 713 .

(n23)Footnote 21. *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1326, 228 Cal. Rptr. 713 .

(n24)Footnote 22. *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1325-1326, 228 Cal. Rptr. 713 .

(n25)Footnote 23. *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1326, 228 Cal. Rptr. 713 ; see *George v. Burdusis* (1942) 21 Cal. 2d 153, 159-160, 130 P.2d 399 ; *Klamath-Orleans Lumber, Inc. v. Miller* (1978) 87 Cal. App. 3d 458, 465, 151 Cal. Rptr. 118 (pre-UTSA cases so holding).

(n26)Footnote 24. [Reserved]

(n27)Footnote 25. *Moss, Adams & Co. v. Shilling* (1986) 179 Cal. App. 3d 124, 128-129, 224 Cal. Rptr. 456 . Although this case was decided after the effective date of the UTSA, it makes no reference to the Act and was apparently decided under prior law.

(n28)Footnote 26. *Bus. & Prof. Code* § 16607(b).

(n29)Footnote 26.1. *ReadyLink Healthcare v. Cotton* (2005) 126 Cal. App. 4th 1006, 1021-1022, 24 Cal. Rptr. 3d 720 (*Bus. & Prof. Code* § 16607 did not bar injunction prohibiting former employee of healthcare staffing company from soliciting company's employees, nurses and customers, because injunction was premised not only on misappropriation of customer lists, but also on misappropriation of numerous other trade secret items); *John F. Matull*

& Associates, Inc. v. Cloutier (1987) 194 Cal. App. 3d 1049, 240 Cal. Rptr. 211 (covenant not to compete for five years after employee and officer left firm did not violate Bus. & Prof. Code § 16600 to extent it sought to prevent use of firm's confidential information to compete and solicit firm's labor-relations clients).

(n30)Footnote 26.2. *ReadyLink Healthcare v. Cotton* (2005) 126 Cal. App. 4th 1006, 1019, 24 Cal. Rptr. 3d 720 , quoting *Hollingsworth Solderless Terminal Co. v. Turley* (1980) 622 F.2d 1324, 1337-1338 .

(n31)Footnote 26.3. *ReadyLink Healthcare v. Cotton* (2005) 126 Cal. App. 4th 1006, 1017-1021, 1019, 24 Cal. Rptr. 3d 720 .

(n32)Footnote 27. See, e.g., *Courtesy Temporary Service, Inc. v. Camacho* (1990) 222 Cal. App. 3d 1278, 1291-1292, 272 Cal. Rptr. 352 ; see also *Klamath-Orleans Lumber, Inc. v. Miller* (1978) 87 Cal. App. 3d 458, 464-465, 151 Cal. Rptr. 118 . For a discussion of what types of information will support a cause of action for unfair competition, see [c], below.

(n33)Footnote 28. See discussion in [c], below.

(n34)Footnote 29. See *Theodore v. Williams* (1919) 44 Cal. App. 34, 37-39, 185 P. 1014 .

(n35)Footnote 30. See *Hilb, Rogal & Hamilton Ins. Services v. Robb* (1995) 33 Cal. App. 4th 1812, 1821-1822, 39 Cal. Rptr. 2d 887 (even assuming former employer's client list and other client information were trade secrets, former employee was not precluded from merely announcing his change of employment to former clients and then using information provided by them to move their accounts to his new employer); *MAI Sys. Corp. v. Peak Computer* (9th Cir. 1993) 991 F.2d 511, 521 (applying California law; former employee may announce new employment even to trade secret customers of former employer without violating UTSA, but solicitation of such customers constitutes misappropriation; merely informing former employer's customers of change of employment, without more, is not solicitation). See also *Aetna Bldg. Maintenance Co. v. West* (1952) 39 Cal. 2d 198, 204, 246 P.2d 11 ; *Matull & Associates v. Cloutier* (1987) 194 Cal. App. 3d 1049, 1056, 240 Cal. Rptr. 211 ; *Moss, Adams & Co. v. Shilling* (1986) 179 Cal. App. 3d 124, 127-128, 224 Cal. Rptr. 456 .

(n36)Footnote 31. See *Moss, Adams & Co. v. Shilling* (1986) 179 Cal. App. 3d 124, 127-130, 224 Cal. Rptr. 456 . The court in *Moss, Adams & Co.* noted that the fact that no solicitation took place does not absolve an employee of civil liability if the employee used a trade secret of the employer to announce the change of employment. However, the court held that in the case at bar, the employees' use of the employer's rolodex file to notify the customers did not constitute the use of a trade secret of the employer because (1) the employees had only notified those customers with whom they had a working relationship and had not attempted to contact any other customers of employer, and (2) the addresses of the customers obtained from the rolodex were easily obtainable from normal resources such as a telephone book. For a discussion of customer information as a trade secret, see [1][b], above.

(n37)Footnote 32. *George v. Burdusis* (1942) 21 Cal. 2d 153, 162, 130 P.2d 399 .

(n38)Footnote 32.1. See *American Credit Indemnity Co. v. Sacks* (1989) 213 Cal. App. 3d 622, 636-637, 262 Cal. Rptr. 92 ; see also *MAI Sys. Corp. v. Peak Computer* (9th Cir. 1993) 991 F.2d 511, 521-522 (applying California law; former employee's use of former employer's database to personally contact former employer's customers and try to induce them to switch over to his new employer constituted improper solicitation).

(n39)Footnote 33. See, e.g., *American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1324, 228 Cal. Rptr. 713 .

(n40)Footnote 34. See, e.g., *Klamath-Orleans Lumber, Inc. v. Miller* (1978) 87 Cal. App. 3d 458, 464-465, 151 Cal. Rptr. 118 .

- (n41)Footnote 35. *See Moss, Adams & Co. v. Shilling* (1986) 179 Cal. App. 3d 124, 128-130, 224 Cal. Rptr. 456 .
- (n42)Footnote 36. *See, e.g., Klamath-Orleans Lumber, Inc. v. Miller* (1978) 87 Cal. App. 3d 458, 464, 151 Cal. Rptr. 118 ; *Greenly v. Cooper* (1978) 77 Cal. App. 3d 382, 392, 143 Cal. Rptr. 514 .
- (n43)Footnote 37. *Rigging Internat. Maintenance Co. v. Gwin* (1982) 128 Cal. App. 3d 594, 606, 180 Cal. Rptr. 451 .
- (n44)Footnote 38. *Rigging Internat. Maintenance Co. v. Gwin* (1982) 128 Cal. App. 3d 594, 607-608, 180 Cal. Rptr. 451 .
- (n45)Footnote 39. *See Rigging Internat. Maintenance Co. v. Gwin* (1982) 128 Cal. App. 3d 594, 607, 180 Cal. Rptr. 451 .
- (n46)Footnote 40. *See Dairy Dale Co. v. Azevedo* (1931) 211 Cal. 344, 345, 295 P. 10 .
- (n47)Footnote 41. *See George v. Burdusis* (1942) 21 Cal. 2d 153, 155, 130 P.2d 399 .
- (n48)Footnote 42. *George v. Burdusis* (1942) 21 Cal. 2d 153, 160, 130 P.2d 399 .
- (n49)Footnote 43. *See* discussions in [1] and [2], *above*.
- (n50)Footnote 44. *See* discussion in § 70.07[1].
- (n51)Footnote 45. *Klamath-Orleans Lumber, Inc. v. Miller* (1978) 87 Cal. App. 3d 458, 464, 151 Cal. Rptr. 118 .
- (n52)Footnote 46. *See, e.g., American Paper & Packaging Products, Inc. v. Kirgan* (1986) 183 Cal. App. 3d 1318, 1324, 228 Cal. Rptr. 713 (customer list as trade secret under UTSA); *see* discussion in [1][b], *above*.
- (n53)Footnote 47. *State Farm Mut. etc. Ins. Co. v. Dempster* (1959) 174 Cal. App. 2d 418, 425-427, 344 P.2d 821 .
- (n54)Footnote 47.1. *Civ. Code* § 3426 *et seq.* For discussion of solicitation as a violation of the UTSA, *see* [1], *above*. For discussion of the UTSA generally, *see* § 70.02.
- (n55)Footnote 47.2. For discussion of solicitation as unfair competition, *see* [2], *above*. For discussion of unfair competition generally, *see* § 70.03.
- (n56)Footnote 47.3. *The Retirement Group v. Galante* (2009) 176 Cal. App. 4th 1226, 1238, 98 Cal. Rptr. 3d 585 .
- (n57)Footnote 47.4. *The Retirement Group v. Galante* (2009) 176 Cal. App. 4th 1226, 1238-1241, 98 Cal. Rptr. 3d 585 .
- (n58)Footnote 47.5. *Edwards v. Arthur Andersen LLP* (2008) 44 Cal. 4th 937, 81 Cal. Rptr. 3d 282, 189 P.3d 285 . *See* discussion at § 70.07[1].
- (n59)Footnote 48. *Gordon v. Wasserman* (1957) 153 Cal. App. 2d 328, 330, 314 P.2d 759 .
- (n60)Footnote 49. *See Gordon v. Landau* (1958) 49 Cal. 2d 690, 694, 321 P.2d 456 .
- (n61)Footnote 50. *State Farm Mut. etc. Ins. Co. v. Dempster* (1959) 174 Cal. App. 2d 418, 425, 344 P.2d 821 .
- (n62)Footnote 51. *State Farm Mut. etc. Ins. Co. v. Dempster* (1959) 174 Cal. App. 2d 418, 425, 344 P.2d 821 .

(n63)Footnote 52. *Morris v. Harris* (1954) 127 Cal. App. 2d 476, 478, 274 P.2d 22 .

(n64)Footnote 53. *See Morris v. Harris* (1954) 127 Cal. App. 2d 476, 478, 274 P.2d 22 ; *see also* discussion in [2][b], *above*.

(n65)Footnote 54. *See Gordon v. Landau* (1958) 49 Cal. 2d 690, 321 P.2d 456 ; *Gordon v. Wasserman* (1957) 153 Cal. App. 2d 328, 329-330, 314 P.2d 759 ; *State Farm Mut. etc. Ins. Co. v. Dempster* (1959) 174 Cal. App. 2d 418, 425-427, 344 P.2d 821 .

(n66)Footnote 55. For discussion of breach of fiduciary duty, *see* § 70.04.

(n67)Footnote 56. For a discussion of interference with contract or with prospective economic advantage, *see* § 70.06.



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California Employment Law

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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART B. LIMITATIONS ON SOLICITATION OF FORMER EMPLOYER'S CUSTOMERS OR EMPLOYEES

4-70 California Employment Law § 70.12

AUTHOR: By James Buyoucos, J.D.

§ 70.12 FORM--Complaint by Employer Against Former Employee for Damages and Injunctive Relief for Soliciting Employer's Customers--Unfair Competition, Misappropriation of Trade Secret, and Related Causes of Action

[1] Comment

[a] Use of Form

The form set forth in [2], below, is a complaint for use by an employer in an action against a former employee (and other defendants, such as the former employee's new employer) based on the former employee's wrongful solicitation of the employer's customers after termination of employment.

The complaint includes causes of action for unfair competition,ⁿ¹ misappropriation of a trade secret,ⁿ² and breach of contract.ⁿ³ The cause of action for breach of contract should, of course, only be included if the employer and employee had entered into an express employment agreement containing a valid covenant not to compete. The first two causes of action include a claim for temporary and permanent injunctive relief. In appropriate cases, counsel may also wish to add a cause of action for intentional or negligent interference with contract or with prospective economic advantage.ⁿ⁴ Counsel may also wish to include a cause of action for breach of fiduciary duty if the former employee improperly solicited the employer's clients for a competing business *prior* to termination of employment.ⁿ⁵

[b] Allegations

The first cause of action for unfair competition alleges an employment relationship between the plaintiff and defendant-employee (Paragraph 5), the confidential nature of the plaintiff's customer list and other customer information given to the defendant (Paragraph 6), termination of the employment relationship and defendant's entrance into competition with his or her former employer (Paragraph 7), and the acts of wrongful solicitation by the defendant employee (Paragraph 8). The first cause of action also alleges compensatory damages (Paragraph 9) and contains an optional allegation for punitive damages (Paragraph 10).ⁿ⁶ As a basis for injunctive relief, it alleges irreparable injury necessary to support a temporary restraining order (Paragraph 11),ⁿ⁷ and an inadequate remedy at law necessary to

support a permanent injunction (Paragraph 12).n8

The second cause of action for misappropriation of a trade secret incorporates by reference the general provisions of the first cause of action (Paragraph 13) and alleges (1) the existence and possession by plaintiff of a trade secret (Paragraph 14);n9 (2) the economic value of the trade secret derived from its not being known to the public or to competitors (Paragraph 15);n10 (3) the measures taken by plaintiff to insure its secrecy (Paragraph 16);n11 (4) acts of misappropriation by the defendants (Paragraph 17);n12 (5) resulting actual damages and unjust enrichment, or, in the alternative, entitlement to a royalty (Paragraphs 18 and 19);n13 (6) an optional allegation to support a claim for punitive damages, attorney's fees and costs (Paragraph 20)n14 and (7) allegations in support of a claim for temporary and permanent injunctive relief (Paragraphs 21 and 22).n15

The third cause of action for breach of contract incorporates by reference the general provisions of the first cause of action (Paragraph 23) and alleges (1) the existence of the contract and the performance of all conditions on plaintiff's part (Paragraphs 24 and 25); (2) breach of the covenant not to compete by the defendant (Paragraph 26); and (3) resulting damages (Paragraph 27).

As previously discussed,n16 the period of limitations for an action for unfair competition appears to be two years from the date that the cause of action arose.n17 The period of limitation for an action for misappropriation of a trade secret is three years from the date that the misappropriation is discovered or, in the exercise of reasonable diligence, should have been discovered.n18 The period of limitation for an action for breach of a written contract is four years from the date that the cause of action arose.n19

[2] Form SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

[or other as appropriate]

_____ [name],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND INJUNCT-
_____ [name(s)], Defendant(s).	)	IVE RELIEF FOR UNFAIR COMPETITION, MIS-
	)	APPROPRIATION OF TRADE SECRET, AND
	)	BREACH OF CONTRACT
		<i>(Bus. & Prof. Code §§ 17200, 17203; Civ. Code §§</i>
		<i>3300, 3422, 3426.2-3426.4; Code Civ. Proc. § 527)</i>

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Unfair Competition)

[1. *Allege identity and capacity of plaintiff. see form in § 70.02[5][b], Paragraph 1.]*

[2. *Allege identity and capacity of defendant(s) other than individuals. see form in 70.02[5][b], Paragraph 2.]*

[3. *Fictitious name allegations. see form in § 70.02[5][b], Paragraph 3.]*

[4. *Allegation of agency among defendants. see form in 70.02[5][b], Paragraph 4.]*

5. On or about _____ [date], defendant _____ [name] was employed by plaintiff as a _____ [describe employment, e.g., salesman of household goods for plaintiff's business, which consists of retail sales of household articles].

[Allege acts constituting unfair competition, including defendant-employee's misuse of confidential information, such as the following:]

6. Defendant _____ [name], as a part of his/her duties of employment was given a confidential list, which had been compiled by defendant over a substantial period of time, of customers who had patronized the plaintiff's business by purchasing their household products from plaintiff's salesperson. In addition to the names and addresses of the customers, the list contained confidential information concerning the buying habits of the listed customers. Defendant _____ [name] was told that both the list of customers and the information about those customers was confidential. The information contained in the list, including the names, addresses, and buying habits of the customers, was not otherwise readily ascertainable by others, including plaintiff's competitors, in that _____ [explain].

7. On or about _____ [date], defendant _____ [name] terminated his/her employment with plaintiff and commenced working for defendant _____ [name], one of plaintiff's competitors in the business of door-to-door sales of household goods.

8. On or about _____ [date], using plaintiff's confidential and proprietary information obtained from the lists previously described, defendant began soliciting the plaintiff's customers for his/her new employer by urging the customers to forgo patronizing plaintiff and to instead purchase their household supplies from defendant _____ [name].

[CONTINUE]

9. As a proximate result of the defendant's acts as alleged above, plaintiff has suffered actual damages, consisting of lost profits, in the sum of \$_____.

[10. Defendant(s), in engaging in the aforementioned acts, was/were guilty of malice and oppression in that _____ (allege facts indicating presence of malice and oppression, e.g., defendant(s) acted with the deliberate intent to injure plaintiff's business and improve his/her/its/their own by misrepresenting facts to plaintiff's former customers and acted in conscious disregard for plaintiff's rights). Defendant's conduct therefore warrants the assessment of punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar misconduct.]

[11. Defendant's wrongful conduct _____ (describe conduct, e.g., in soliciting plaintiff's former customers), unless and until enjoined and restrained by order of this court, will _____ (specify particular facts establishing grounds for preliminary injunctive relief, e.g., cause great and irreparable injury to plaintiff's business in that plaintiff has lost several of its most profitable customers to defendant and is continuing to lose accounts, plaintiff has been forced to lay off workers and will be forced to lay off more, and is operating at such a loss that it may be forced out of business before this action can be brought to trial).]

[12. Plaintiff has no adequate remedy at law for the injuries currently being suffered in that _____ (specify any additional facts tending to show grounds for permanent injunctive relief, e.g., defendant(s) will continue to wrongfully solicit plaintiff's customers or accept business from those that have already been wrongfully solicited, and plaintiff would be required to maintain a multiplicity of judicial proceedings to protect its interests, and in addition,

there is no reasonable basis to calculate all the monetary damage caused plaintiff by the wrongful solicitation because plaintiff depends on customer recommendations to promote plaintiff's products).]

SECOND CAUSE OF ACTION

(Misappropriation of Trade Secret)

13. Plaintiff refers to Paragraphs 1-6 of the First Cause of Action of this complaint and makes them a part of this complaint by reference.

14. At all times relevant to this complaint, plaintiff possessed a trade secret, consisting of _____ [identify general nature of trade secret, e.g., a list of customers who regularly patronized plaintiff's business].

15. Plaintiff's _____ [specify trade secret, e.g., customer list] contained information that is not generally known to the public or to plaintiff's competitors, who can obtain economic value from its disclosure and use in that _____ [specify, e.g., the list was compiled based on plaintiff's years of experience in dealing with customers who purchased products from plaintiff and contained confidential information concerning the buying habits and peculiar requirements of various purchasers, which is not otherwise readily ascertainable]. As a result, the list had economic value in that _____ [specify, e.g., plaintiff was able to more effectively and efficiently serve its customers than its competitors, who did not have access to the information, thereby giving plaintiff a competitive advantage].

16. Plaintiff made reasonable efforts to insure that the _____ [specify trade secret, e.g., customer list] remained a secret, including _____ [specify measures used by plaintiff to maintain secrecy, e.g., (1) emphasizing to each employee the company's need to keep the customer list a secret, and (2) requiring, as a condition of employment, that all employees promise not to disclose any information relating to the customer list].

17. On or about _____ [date], [and continuing to the present time,] defendant(s) [and each of them,] misappropriated the above-described trade secret of plaintiff as follows: _____ [Describe act of misappropriation within definition of Civ. Code § 3426.1(b) by each defendant, e.g., On or about _____ (date), defendant _____ (name), a former sales employee of plaintiff who, while so employed, had been given a copy of plaintiff's customer list by plaintiff so that he/she could perform his/her job function, wrongfully disclosed some or all of the contents of the list to _____ (names of other defendants to whom secret was disclosed), knowing that the disclosure was a breach of his/her duty to keep the customer list a secret. Thereafter, defendants _____ (names of defendants other than former employee) used plaintiff's trade secret without the consent of plaintiff and with reason to know that their knowledge of the trade secret was derived through defendant _____ (name of former employee), who had a duty to plaintiff to maintain the secrecy of the process].

18. As a proximate result of the use by defendants of plaintiff's trade secret as alleged above, plaintiff has suffered actual damages in the sum of \$ _____ in that _____ [specify nature of damages]. [As a further proximate result of the misappropriation, plaintiff is informed and believes that defendant(s) _____ (name(s)) have been unjustly enriched as a result of their misappropriation of the trade secret. The amount of this unjust enrichment cannot presently be ascertained, and plaintiff will move to amend this complaint to specify the amount when it becomes known to him/her, or on proof thereof.]

19. In the event that neither plaintiff's actual damages nor defendant's unjust enrichment are subject to proof, plaintiff is entitled to a reasonable royalty _____ [specify nature and amount of royalty, e.g., in the amount of 55 percent of the revenue received by defendant(s) _____ (name(s)) from sales of household goods made using plaintiff's customer list], pursuant to Civil Code Section 3426.3(b).

[20. The (plaintiff is informed and believes and thereon alleges that the) aforementioned acts of the defendant(s) in misappropriating plaintiff's trade secret were willful and malicious in that _____ (*allege facts indicating presence of willfulness and malice, e.g.,* defendant(s) misappropriated plaintiff's customer list with the deliberate intent to injure plaintiff's business and improve his/her/its/their own), thereby warranting an assessment of exemplary damages, pursuant to *Civil Code Section 3426.3(c)*, and an award of reasonable attorney's fees and costs, pursuant to *Civil Code Section 3426.4*.]

[21. The wrongful conduct of defendant(s) _____ (*describe conduct, e.g.,* in misappropriating plaintiff's customer list and soliciting customers from that list), unless and until enjoined and restrained by order of this court, will _____ (*specify particular facts establishing grounds for preliminary injunctive relief, e.g.,* cause great and irreparable injury to plaintiff's business in that plaintiff has lost several of its most profitable customers and is continuing to lose accounts and may be forced out of business before this action can be brought to trial).]

[22. Plaintiff has no adequate remedy at law for the injuries currently being suffered in that _____ (*specify any additional facts tending to show grounds for permanent injunctive relief, e.g.,* defendant will continue to misappropriate the trade secret and solicit plaintiff's customers and plaintiff would be required to maintain a multiplicity of judicial proceedings to protect its interests).]

THIRD CAUSE OF ACTION (Breach of Contract)

23. Plaintiff refers to Paragraphs 1-5 of the First Cause of Action of this complaint and makes them a part of this complaint by reference.

24. On or about _____ [*date*], at _____ [*place*], plaintiff and defendant _____ [*name*] entered into a written employment contract, a copy of which is attached to this complaint as Exhibit _____ and hereby made a part of this complaint. [The contract provided in part as follows: _____ (*specify pertinent parts of contract, e.g.,* Defendant _____ (*name*) understood and agreed that information contained in the list of customers distributed to him/her was a trade secret, was provided in confidence for the sole purpose of facilitating his/her duties as a salesperson for plaintiff, and was not to be disclosed, in whole or part, to any person without plaintiff's express written consent. Defendant further agreed that in the event his/her employment with plaintiff was terminated, he/she would not solicit, or contact for the purpose of soliciting, any customer named in the list for the purpose of selling any product that was the same as or similar to products sold by plaintiff for a period of one year following termination of his/her employment, whether on his/her own behalf or on behalf of any third person or entity).]

25. Plaintiff has performed all conditions, covenants, and promises required of him/her under the terms of this contract.

26. On or about _____ [*date*], defendant _____ [*name*] breached the contract by _____ [*specify acts constituting breach of covenant not to compete, e.g.,* soliciting the business of patrons of the plaintiff contained on the previously mentioned customer list, whom defendant had served while employed for plaintiff, after termination of defendant's employment with plaintiff].

27. As a proximate result of the defendant's acts as alleged above, plaintiff has suffered actual damages, consisting of lost profits, in the sum of \$_____.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

On ALL CAUSES OF ACTION:

1. For actual damages in the sum of \$_____;
2. For costs of suit in this action; and
3. For such other and further relief as the court may deem proper.

[On the FIRST AND SECOND CAUSES OF ACTION:]

[4. For an order requiring defendants to show cause, if any, why they should not be enjoined as hereinafter set forth, during the pendency of this action;]

[5. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all requiring defendant and his/her agents, servants, and employees, and all persons, acting under, in concert with, or for him/her:]

[a. To refrain from _____ (*specify each of the acts and courses of conduct defendants are to be prohibited from doing, commencing, or continuing, e.g., continuing the misappropriation of plaintiff's trade secret by ongoing solicitation of plaintiff's customers from plaintiff's customer list*);]

[b. To _____ (*specify each of the acts and courses of conduct defendants are to be commanded to do or undertake*); and]

[6. For punitive damages in an amount appropriate to punish defendant(s) and deter others from engaging in similar misconduct;]

[On the SECOND CAUSE OF ACTION only:]

[7. For the amount necessary to prevent the unjust enrichment of defendant(s), to the extent that such amount is not included in any actual damages awarded, as prayed for in Paragraph 1; and]

[8. For reasonable attorney's fees and costs, pursuant to *Civil Code Section 3426.4*.]

[signature]

Attorney for Plaintiff

[Add verification, if injunctive relief is sought

(see *Code Civ. Proc.* §§ 446, 527(a). *see* form in § 70.02[5][b]).]

Legal Topics:

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

Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition General Overview Torts Business Torts Unfair Business Practices General Overview Trade Secrets Law Misappropriation Actions General Overview

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 70.11[1].

(n2)Footnote 2. *See* discussion in § 70.11[2].

(n3)Footnote 3. *See* discussion in § 70.11[3].

(n4)Footnote 4. *See generally* discussion in § 70.06.

(n5)Footnote 5. *See generally* discussion in § 70.04.

(n6)Footnote 6. *See Civ. Code* § 3294.

(n7)Footnote 7. *See Code Civ. Proc.* § 527. If a temporary restraining order is sought without notice, the requirements of *Code Civ. Proc.* § 527(c)(2), (d) must also be satisfied. For discussion, *see* California Forms of Pleading and Practice, *Injunctions* (Matthew Bender).

(n8)Footnote 8. *See Bus. & Prof. Code* § 17203; *Civ. Code* § 3422, discussed in § 70.03[2][d]. For a complete discussion relating to the availability of injunctive relief, *see* California Forms of Pleading and Practice, "Injunctions."

(n9)Footnote 9. *See Civ. Code* § 3426.1(d), discussed in § 70.02[2][b].

(n10)Footnote 10. *See Civ. Code* § 3426.1(d)(1), discussed in § 70.02[2][b][i].

(n11)Footnote 11. *See Civ. Code* § 3426.1(d)(2), discussed in § 70.02[2][b][ii].

(n12)Footnote 12. *See Civ. Code* § 3426.1(b), discussed in § 70.02[2][c].

(n13)Footnote 13. *See Civ. Code* § 3426.3(a),(b), discussed in § 70.02[3][b].

(n14)Footnote 14. *See Civ. Code* §§ 3426.3(c), 3426.4, discussed in § 70.02[3][d], [e].

(n15)Footnote 15. *See Civ. Code* § 3426.2, discussed in 70.02[3][a]. If a temporary restraining order is sought without notice, the requirements of *Code Civ. Proc.* §§ 527(c)(2), (d) must also be satisfied. For discussion, *see* California Forms of Pleading and Practice, *Injunctions* (Matthew Bender).

(n16)Footnote 16. *See* discussion in § 70.03[3].

(n17)Footnote 17. *See Edwards v. Fresno Community Hosp.* (1974) 38 Cal. App. 3d 702, 706, 113 Cal. Rptr. 579 ; *Code Civ. Proc.* § 339(1).

(n18)Footnote 18. *Civ. Code* § 3426.6, discussed in § 70.02[4].

(n19)Footnote 19. *See Code Civ. Proc.* § 337(1).



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION

CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues

PART B. LIMITATIONS ON SOLICITATION OF FORMER EMPLOYER'S CUSTOMERS OR EMPLOYEES

4-70 California Employment Law §§ 70.13 through 70.19

AUTHOR: By James Buyoucos, J.D.

[Reserved]

§§ 70.13[Reserved]



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART C. EMPLOYEE INVENTIONS

4-70 California Employment Law § 70.20

AUTHOR: By James Buyoucos, J.D.

§ 70.20 Ownership Rights Generally

Under California law, the inventor of an invention or design has exclusive ownership of the invention so long as it remains in his or her possession.ⁿ¹ The inventor's rights are lost when the invention is made public.ⁿ² However, the inventor may obtain exclusive right of ownership in a patentable invention by disclosing the invention in compliance with federal patent laws.ⁿ³

An invention is generally regarded as the property of the one who conceived, developed, and perfected it.ⁿ⁴ If an employer conceives the result embraced in an invention or the general idea of a machine on a particular principle, and hires employees to carry out the idea, the invention belongs to the employer, regardless of whether the employees have used their inventive skill in working out the details.ⁿ⁵ In other words, if an employee is hired to invent and succeeds during the term of employment, the invention belongs to the employer, and the employee must assign to the employer any patent obtained.ⁿ⁶ However, the courts are not in favor of this latter rule and do not apply it when the employee is not specifically hired to make inventions, even when the invention relates to the employee's field of expertise on the job.ⁿ⁷ Thus, for example, when an employee was hired as a general employee and assigned to the employer's machine design department, the employee was held to have the patent rights to a machine he invented while working in the department.ⁿ⁸

If an invention is made by an employee who was not hired to invent, the patent rights to the invention belong to the employee unless the employee has contracted away his or her rights in the invention.ⁿ⁹ For a discussion of such assignments, *see* § 70.23. It should be noted that in situations when the employee has used the employer's time or property in creating an invention, the employer may be entitled to a nonexclusive right, called a "shop right," to use the invention without compensating the inventor.ⁿ¹⁰ For a discussion of shop rights, *see* § 70.22.

Legal Topics:

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

Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets &

Unfair CompetitionEmployee InventionsTortsBusiness TortsUnfair Business PracticesGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See Civ. Code § 980(b).*

(n2)Footnote 2. *See Zachary v. Western Publishing Co. (1977) 75 Cal. App. 3d 911, 918, 143 Cal. Rptr. 34 ; Civ. Code § 983.*

(n3)Footnote 3. *See 35 U.S.C. § 101; see generally Dunner, Gambrell, Adelman, and Lipsey, Patent Law Perspectives.*

(n4)Footnote 4. *Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 654, 3 Cal. Rptr. 421 .*

(n5)Footnote 5. *See Famous Players-Lasky Corp. v. Ewing (1920) 49 Cal. App. 676, 679-680, 194 P. 65 ; see also Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 660, 3 Cal. Rptr. 421 (noting that while party who employs another to work out details of invention does not lose his or her rights in invention, this is only true so long as discovery of employee does not depart from the original principle and purpose of employer).*

(n6)Footnote 6. *United States v. Dubilier Condenser Corp. (1932) 289 U.S. 178, 187, 53 S. Ct. 554, 77 L. Ed. 1114 .*

(n7)Footnote 7. *See United States v. Dubilier Condenser Corp. (1932) 289 U.S. 178, 187-188, 53 S. Ct. 554, 77 L. Ed. 1114 ; Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 658, 3 Cal. Rptr. 421 .*

(n8)Footnote 8. *Goodyear Tire & Rubber Co. v. Miller (S.D. Cal. 1926) 14 F.2d 776, 777-778 ; see also Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 648, 659-660, 3 Cal. Rptr. 421 ; (salesman whose duties included design of metal products to solve customer's individual problems held not hired to invent new designs).*

(n9)Footnote 9. *Goodyear Tire & Rubber Co. v. Miller (S.D. Cal. 1926) 14 F.2d 776, 778 ; Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 654, 3 Cal. Rptr. 421 .*

(n10)Footnote 10. *See Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 661-664, 3 Cal. Rptr. 421 .*



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART C. EMPLOYEE INVENTIONS

4-70 California Employment Law § 70.21

AUTHOR: By James Buyoucos, J.D.

§ 70.21 Employer's Theories of Recovery

If an invention belonging to an employer is also a trade secret, and if it has been misappropriated (for example, when an employee discloses the intricacies of the invention to a competitor), the employer may protect its rights in the invention by an action for misappropriation of a trade secret.ⁿ¹

If a patented invention is wrongfully used by an employee, the patent owner's rights must be asserted under federal law in an action for patent infringement.ⁿ² If the invention is unpatented and has not been disclosed to the public, the employer-owner may have a cause of action under *Civil Code Section 980(b)*, concerning inventions not yet reduced to tangible form.ⁿ³

If the ownership rights to either a patented or unpatented invention are in dispute, a person alleging ownership of the invention or the patent may bring an action for declaratory relief in state court.ⁿ⁴

Legal Topics:

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

Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition General Overview Torts Business Torts Unfair Business Practices General Overview Torts Business Torts Unfair Business Practices Remedies Trade Secrets Law Misappropriation Actions General Overview

FOOTNOTES:

(n1)Footnote 1. See *Futurecraft Corp. v. Clary Corp.* (1962) 205 Cal. App. 2d 279, 281-292, 23 Cal. Rptr. 198. For a discussion of misappropriation of trade secrets, see § 70.02. For a form of complaint for misappropriation of a trade secret, see § 70.02[5].

(n2)Footnote 2. See 35 U.S.C. §§ 281-295, see generally Dunner, Gambrell, Adelman, and Lipsey, Patent Law Perspectives.

(n3)Footnote 3. *See Zachary v. Western Publishing Co. (1977) 75 Cal. App. 3d 911, 918, 143 Cal. Rptr. 34 .*

(n4)Footnote 4. *See Cubic Corp. v. Marty (1986) 185 Cal. App. 3d 438, 445-449, 229 Cal. Rptr. 828 .*



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART C. EMPLOYEE INVENTIONS

4-70 California Employment Law § 70.22

AUTHOR: By James Buyoucos, J.D.

§ 70.22 Employer's Shop Rights

As discussed in § 70.21, the existence of the employer-employee relationship is not always sufficient in itself to entitle the employer to the rights to an employee's invention. However, in situations in which the employee is entitled to the patent rights to his or her invention, the employer may nonetheless be entitled to free use of the invention under the "shop right" rule. Under this rule, when an employee during the hours of employment, working with the employer's tools and equipment, conceives and perfects an invention, he or she must give the employer a nonexclusive, royalty-free right to make use of the invention in its own business.ⁿ¹ The shop right arises out of equitable principles and is a license implied from the facts.ⁿ² The employer who is entitled to a shop right has the power to contract away the shop right.ⁿ³

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition General Overview Torts Business Torts Unfair Business Practices General Overview

FOOTNOTES:

(n1)Footnote 1. *Banner Metals, Inc. v. Lockwood* (1960) 178 Cal. App. 2d 643, 661, 3 Cal. Rptr. 421 ; see *Treu v. Garrett Corp.* (1968) 264 Cal. App. 2d 432, 436, 70 Cal. Rptr. 284 ; *Aero Bolt & Screw Co. v. Iaia* (1960) 180 Cal. App. 2d 728, 736-737, 5 Cal. Rptr. 53 .

(n2)Footnote 2. *Treu v. Garrett Corp.* (1968) 264 Cal. App. 2d 432, 436, 70 Cal. Rptr. 284 ; *Aero Bolt & Screw Co. v. Iaia* (1960) 180 Cal. App. 2d 728, 736-737, 5 Cal. Rptr. 53 .

(n3)Footnote 3. *Aero Bolt & Screw Co. v. Iaia* (1960) 180 Cal. App. 2d 728, 739-740, 5 Cal. Rptr. 53 .



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DIVISION VII TRADE SECRETS AND UNFAIR COMPETITION
CHAPTER 70 Trade Secrets, Unfair Competition, and Related Issues
PART C. EMPLOYEE INVENTIONS

4-70 California Employment Law § 70.23

AUTHOR: By James Buyoucos, J.D.

§ 70.23 Contractual Assignments

[1] Validity and Restrictions

The respective rights and obligations of employer and employee regarding an invention by the employee are governed by the employment contract.ⁿ¹ An employee may normally assign his or her rights in an invention to the employer.ⁿ² However, if such an assignment is not part of the employment contract, it must be supported by independent consideration or it is invalid.ⁿ³ In addition, under *Labor Code Section 2870*, a provision in an employment contract may not require an employee to assign rights in an invention that is unrelated to the employment. By statute, any provision in an employment agreement requiring that an employee assign, or offer to assign, any of his or her rights in an invention to his or her employer does not apply to an invention that the employee developed entirely on his or her own time without using the employer's equipment, supplies, facilities, or trade secret information, unless the invention either (1) relates, at the time of conception or reduction to practice, to the employer's business, or to actual or demonstrably anticipated research or development of the employer; or (2) results from any work performed by the employee for the employer.ⁿ⁴ Furthermore, to the extent that a provision in an employment contract attempts to specifically assign the excluded inventions described above, it is unenforceable.ⁿ⁵

An employer may not require an assignment of an employee's rights in an invention made void and unenforceable under *Labor Code Section 2870* as a condition of employment.ⁿ⁶ However, a contract of employment may validly require an employee to make a confidential disclosure to the employer of all inventions made by the employee, solely or jointly with others, during the term of employment.ⁿ⁷ In addition, an employment contract provision governing inventions may validly provide for a review process by the employer to determine such issues as may arise.ⁿ⁸ Such a provision may also provide for full title to certain patents and inventions to be given to the United States government if a contract between the employer and the government so requires.ⁿ⁹

If an employment agreement contains a provision requiring the employee to assign or offer to assign any of his or her rights in any invention to the employer, the employer must also provide written notification to the employee that the agreement does not apply to inventions that qualify fully under the provisions of *Labor Code Section 2870*.ⁿ¹⁰ The

notification must be given at the time the employment agreement is made.¹¹ However, this notification rule does not apply to agreements entered into before January 1, 1980.¹²

It may be improper as a restraint of trade for a provision in an employment contract to require an employee to assign rights to inventions conceived after employment has terminated. In one case, a federal district court partially invalidated a contract provision under which the employee agreed to assign all inventions relating to the employer's field of work that occurred to the employee within one year from the termination of employment.¹³ The court noted, however, that assignment provisions may extend beyond the period of employment if they relate to inventions based on the confidential information or trade secrets of the employer.¹⁴

[2] FORM--Employment Contract Provisions Assigning Employee's Inventions to Employer

[a] Comment

The form set out in [b], below, is for use in an employment contract when the parties wish to insert a provision specifying the circumstances under which an employee must assign to the employer the employee's rights to any inventions developed during the term of employment. The form is designed to conform to the requirements of *Labor Code Sections 2870-2872* setting forth rules governing provisions of this type.¹⁵ This form may also be used as an independent contract. However, in that event, it must be modified to comply with all the requisites of a valid contract. Most importantly, it must contain consideration to be received by the employee in exchange for the assignment.¹⁶

[b] Form Inventions and Patents

1. Employee agrees that any inventions made by Employee, solely or jointly with others, during the term of this contract, that are (1) made with Employer's equipment, supplies, facilities, trade secrets, or time, or (2) that relate, at the time of conception or of reduction to practice, to the business of Employer or Employer's actual or demonstrably anticipated research or development, or (3) that result from any work performed by Employee for Employer, shall belong to Employer, and promises to assign any and all rights in such inventions to Employer.
2. Employee agrees that any inventions made by Employee, solely or jointly with others, made after the date that this employment agreement terminates that are based on trade secrets of Employer shall belong to Employer, and Employee promises to assign any and all rights in such inventions to Employer. For the purposes of this paragraph, an invention is based on the trade secrets of the employer if the invention incorporates any such secrets in principle or design.
3. Employee also agrees that Employer shall have the right to keep any inventions covered by this agreement as trade secrets, and Employee agrees not to disclose any such invention to third parties, except as specifically authorized by Employer.
4. Employee agrees to assign to Employer all rights in any other inventions made by Employee if Employer is required to grant those rights to the United States Government or any of its agencies.
5. Notwithstanding any provision of this agreement, Employee shall not be required to assign, nor shall he/she be deemed to have assigned, any of Employee's rights in any invention, as set forth in *Labor Code Section 2870*, that Employee develops entirely on his/her own time without using Employer's equipment, supplies, facilities, or trade secret information, except for inventions that either (1) relate, at the time that the invention is conceived or reduced to practice, to Employer's business or to actual or demonstrably anticipated research or development of Employer; or (2) result from any work performed by Employee for Employer.
6. In order to permit Employer to claim rights to which it may be entitled, Employee agrees to disclose to Employer in confidence (1) all inventions that Employee makes, either solely or jointly with others, during the term of his/her

employment, and (2) all patent applications filed by Employee during, or within _____ [specify time period, e.g., one year] after termination of his/her employment. Employee also agrees to submit to a reasonable and confidential review process under which Employer may determine such issues as may arise under this agreement.

7. Employee shall assist Employer in obtaining patents on all inventions, designs, improvements, and discoveries deemed patentable by Employer in the United States and in all foreign countries, and shall execute all documents and do all things necessary to obtain letters patent, to vest Employer with full and extensive titles to those patents, and to protect the same against infringement by others, both during and after the termination of this agreement. In the event that assistance of the employee is needed after the termination of this agreement, employee will be paid for that assistance at the hourly rate he earned when this agreement terminated.

8. For the purposes of this agreement, an invention is deemed to have been made during the period of Employee's employment if the invention was conceived or first actually reduced to practice during that period.

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets & Unfair Competition General Overview Torts Business Torts Unfair Business Practices General Overview

FOOTNOTES:

(n1)Footnote 1. *United States v. Dubilier Condenser Corp.* (1932) 289 U.S. 178, 187, 53 S. Ct. 554, 77 L. Ed. 1114 .

(n2)Footnote 2. *See Goodyear Tire & Rubber Co. v. Miller* (S.D. Cal. 1926) 14 F.2d 776, 778 ; *Banner Metals, Inc. v. Lockwood* (1960) 178 Cal. App. 2d 643, 659, 3 Cal. Rptr. 421 .

(n3)Footnote 3. *See Cubic Corp. v. Marty* (1986) 185 Cal. App. 3d 438, 448-449, 229 Cal. Rptr. 828 ; *see also Goodyear Tire & Rubber Co. v. Miller* (S.D. Cal. 1926) 14 F.2d 776, 778 .

(n4)Footnote 4. *Lab. Code* § 2870(a).

(n5)Footnote 5. *Lab. Code* § 2870(b).

(n6)Footnote 6. *Lab. Code* § 2871.

(n7)Footnote 7. *Lab. Code* § 2871.

(n8)Footnote 8. *Lab. Code* § 2871.

(n9)Footnote 9. *Lab. Code* § 2871.

(n10)Footnote 10. *Lab. Code* § 2872.

(n11)Footnote 11. *Lab. Code* § 2872.

(n12)Footnote 12. *Lab. Code* § 2872.

(n13)Footnote 13. *Armorlite Lens Company v. Campbell* (S.D. Cal. 1972) 340 F. Supp. 273, 275 .

(n14)Footnote 14. *Armorlite Lens Company v. Campbell* (S.D. Cal. 1972) 340 F. Supp. 273, 275 ; *see Winston Research Corp. v. Minnesota Mining & Mfg. Co.* (9th Cir. [Cal.] 1965) 350 F.2d 134, 145-146 .

(n15)Footnote 15. *See* discussion in [1], *above*.

(n16)Footnote 16. *See Cubic Corp. v. Marty* (1986) 185 Cal. App. 3d 438, 448-449, 229 Cal. Rptr. 828 ; *see* generally *Civ. Code* §§ 1550(3), 1595, 1605.



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PART C. EMPLOYEE INVENTIONS

4-70 California Employment Law § 70.24

AUTHOR: By James Buyoucos, J.D.

§ 70.24 FORM--Complaint by Employer to Establish Ownership Rights in Invention and for Damages and Injunctive Relief

[1] Comment

The following complaint may be used by an employer to establish the employer's ownership rights in an invention created by an employee. It requests a declaratory judgment¹ concerning the employer's ownership of the invention.

The complaint alleges (1) plaintiff's capacity (Paragraph 1); (2) an employment relationship between plaintiff and defendant (Paragraph 2); (3) the creation of an invention (Paragraphs 3 and 4); (4) plaintiff's ownership rights in the invention based on either the fact that the employee was hired to invent the type of invention in issue,² or that the employee contractually agreed to assign his or her rights in the invention to the employer (Paragraph 5);³ (5) the presence of an actual controversy sufficient to support declaratory relief (Paragraph 6);⁴ (6) the type of relief requested (Paragraph 7); and (7) the necessity and propriety of such relief (Paragraph 8).

Depending on the facts of a given case, an employer may wish to allege additional causes of action and entitlement to injunctive relief and damages.⁵

[2] Form SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[or other as appropriate]

_____, [name],)
Plaintiff,)
vs.)
_____, [name(s)], Defendant(s).)
)
)

NO. _____
COMPLAINT FOR DECLARATORY RELIEF
[Code Civ. Proc. § 1060]

Plaintiff alleges:

- [1. _____ (*Allege identity and capacity of plaintiff, e.g., Plaintiff _____ (name) is, and at all times herein mentioned was, a corporation organized and existing under the laws of the state of California, and doing business in California*).]
2. On or about _____ [*date*], defendant _____ [*name*] was employed by plaintiff as a(n) _____ [*describe employment, e.g., electronics engineer for plaintiff's business, which consists of developing and manufacturing products for the aerospace industry*].
3. On or about _____ [*date*], defendant _____ [*name*] created an invention consisting of the following: _____ [*describe invention, e.g., an electronic device for guiding unmanned space missiles*].
4. _____ [*Describe circumstances surrounding invention, e.g., The invention was created by the defendant during working hours as a part of the defendant's duties of employment with the plaintiff*].
5. This invention is the rightful property of the plaintiff in that _____ [*allege basis for ownership claim, e.g., the invention was created by the defendant as part of his/her employment duties as an inventor and/or defendant assigned all ownership rights in the invention to the plaintiff under a contract, a copy of which is attached to this complaint as Exhibit _____ and made a part of it by reference*].
6. An actual controversy has arisen and now exists between plaintiff and defendant in that plaintiff contends, and defendant denies, that plaintiff is the rightful owner of the above described invention and therefore entitled to all rights inherent in such ownership.
7. Plaintiff desires a judicial determination of the respective rights of plaintiff and defendant with respect to the invention. In particular, plaintiff desires a declaration that plaintiff is the owner of the invention.
8. Such a declaration is necessary and appropriate at this time in order that plaintiff may ascertain his/her/its rights with respect to the invention so that _____ [*describe employer's needs in this regard, e.g., it may put the invention to use in its business with the knowledge that it is the rightful owner of the invention*].

WHEREFORE, plaintiff prays judgment against cross defendant as follows:

1. For a judicial determination of plaintiff's ownership of the above described invention;
2. For all costs of suit incurred in this action; and
3. For such other and further relief as the court may deem proper.

[signature]

Attorney for Plaintiff

Legal Topics:

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

Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms Trade Secrets &

Unfair CompetitionGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment
ContractsConditions & TermsTrade Secrets & Unfair CompetitionEmployee InventionsLabor & Employment
LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionTrade
SecretsTrade Secrets LawOwnership RightsGeneral Overview

FOOTNOTES:

(n1)Footnote 1. *See generally Code Civ. Proc. § 1060*; California Forms of Pleading and Practice, "Declaratory Relief."

(n2)Footnote 2. *See* discussion in § 70.20.

(n3)Footnote 3. *See* discussion in § 70.23.

(n4)Footnote 4. *See Code Civ. Proc. § 1060*.

(n5)Footnote 5. *See* discussion in § 70.21.



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4-70 California Employment Law §§ 70.25 through 70.29

AUTHOR: By James Buyoucos, J.D.

[Reserved]

§§ 70.25[Reserved]



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4-70 California Employment Law § 70.30

AUTHOR: By James Buyoucos, J.D.

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Legal Topics:

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

Labor & Employment LawEmployment RelationshipsGeneral OverviewTortsBusiness TortsUnfair Business
PracticesGeneral OverviewTrade Secrets LawOwnership RightsGeneral Overview



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4-70 California Employment Law § 70.31

AUTHOR: By James Buyoucos, J.D.

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61 Cal. Jur. 3d, *Unfair Competition*, §§ 11, 15, 16-121.

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Torts Business Torts Unfair Business
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PART D. BIBLIOGRAPHY

4-70 California Employment Law § 70.32

AUTHOR: By James Buyoucos, J.D.

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

Labor & Employment Law
Employment Relationships
General Overview
Torts
Business Torts
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Chapters 71 - 79 RESERVED

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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

4-80 California Employment Law 80.syn

AUTHOR: By Carol S. Sanders, J.D.

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FOOTNOTES:

(n1)Footnote *. Ms. Sanders is supervising attorney with Contra Costa Legal Assistance for the Elderly. Updates to this chapter are prepared by the Publisher's Editorial Staff.



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

4-80 California Employment Law Scope

AUTHOR: By Carol S. Sanders, J.D.

Scope

By Carol S. Sanders, J.D.n* SCOPE

This chapter discusses unemployment and state disability insurance law. Part A provides an overview of unemployment insurance law, and discusses the relationship between the federal and state systems, the kinds of employment that are subject to unemployment insurance requirements, the employees and employers covered by the law, and the administration and enforcement of the law by the Employment Development Department. Part B discusses the reports and contributions that employers are required to make under unemployment insurance law, assessments against employers, and remedies available for overpayment of contributions.

Part C discusses claims for unemployment compensation benefits, including conditions of eligibility for benefits and disqualifying factors. Claims procedures are set forth in detail, including procedures for use by employers in protesting payment of benefits. Part D discusses eligibility requirements and claims procedures for state disability benefits.

Parts E and F discuss procedures for review of an award or denial of unemployment or disability benefits. Part E discusses administrative review by the Appeals Division of the Employment Development Department, including the Unemployment Insurance Appeals Board. Part F covers judicial review.

FOOTNOTES:

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CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.01

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§ 80.01 Federal-State System

The unemployment insurance program was initiated in 1935 by the Social Security Act. The current version of that program is the Federal Unemployment Tax Act.ⁿ¹ That Act imposes a tax on subject private employers with respect to individuals in their employ, equal to a specified percentage of the total wages for employment paid by the employer during the calendar year.ⁿ² Each state can mitigate the tax by establishing its own unemployment insurance program meeting federal guidelines.ⁿ³

The United States Department of Labor is the federal agency responsible for ensuring that state unemployment laws comply with the mandatory federal criteria set out by Congress.ⁿ⁴ State programs approved by the Secretary of Labor are eligible to be financed in part by grants from the United States.ⁿ⁵ The Secretary of Labor must approve a state's unemployment compensation law if it meets with the requisite conditions, and must certify to the Secretary of the Treasury each state whose law has been approved.ⁿ⁶

Although Congress intended the states to have broad freedom in setting up the types of unemployment compensation programs they wished, it also directed each state to meet certain fundamental requirements for approval of the state plans.ⁿ⁷ Thus, the Secretary of Labor may make no certification for payment to any state unless the Secretary finds that the law of that state meets specified conditions, including methods of administration that are reasonably calculated to insure full payment of unemployment compensation when due,ⁿ⁸ payment of benefits solely through public employment offices and other approved agencies,ⁿ⁹ an opportunity for a fair hearing for individuals whose claims are denied,ⁿ¹⁰ payment of money received in the state unemployment fund to the Secretary of the Treasury to the credit of the Unemployment Trust Fund,ⁿ¹¹ and the making of required reports.ⁿ¹²

FOOTNOTES:

(n1)Footnote 1. *See* 26 U.S.C. § 3301 *et seq.*

(n2)Footnote 2. *See* 26 U.S.C. § 3301.

(n3)Footnote 3. *See* 26 U.S.C. § 3302 (crediting contributions paid by employer into state unemployment fund

against federal tax due); *City of Sacramento v. State of California* (1984) 156 Cal. App. 3d 182, 187, 203 Cal. Rptr. 258 (disapproved on other grounds in *County of Los Angeles v. State of California* (1987) 43 Cal. 3d 46, 48, 233 Cal. Rptr. 38, 729 P.2d 202); *Campos v. Employment Development Dept.* (1982) 132 Cal. App. 3d 961, 966-967, 183 Cal. Rptr. 637 .

(n4)Footnote 4. See 26 U.S.C. § 3304; 42 U.S.C. § 503.

(n5)Footnote 5. See 42 U.S.C. §§ 501-504, 1101-1109; see also *California Dep't of Human Resources Development v. Java* (1971) 402 U.S. 121, 125, 91 S. Ct. 1347, 28 L. Ed. 2d 666; *City of Sacramento v. State of California* (1984) 156 Cal. App. 3d 182, 187, 203 Cal. Rptr. 258 .

(n6)Footnote 6. 26 U.S.C. § 3304(c); see 42 U.S.C. § 503; see also 20 C.F.R. § 601 (procedures for approval of state unemployment compensations laws).

(n7)Footnote 7. See *N.Y. Tel. Co. v. N.Y. State DOL* (1979) 440 U.S. 519, 537-538, 543 n.42, 99 S. Ct. 1328, 59 L. Ed. 2d 553; *Campos v. Employment Development Dept.* (1982) 132 Cal. App. 3d 961, 967, 183 Cal. Rptr. 637 .

(n8)Footnote 8. See 42 U.S.C. § 503(a)(1); *California Dep't of Human Resources Development v. Java* (1971) 402 U.S. 121, 125, 91 S. Ct. 1347, 28 L. Ed. 2d 666 (automatic suspension of benefits on appeal by employer from an initial determination of eligibility as violative of federal requirement of full payment of unemployment compensation "when due").

(n9)Footnote 9. See 42 U.S.C. § 503(a)(2).

(n10)Footnote 10. See 42 U.S.C. § 503(a)(3).

(n11)Footnote 11. See 42 U.S.C. § 503(a)(4).

(n12)Footnote 12. See 42 U.S.C. § 503(a)(6).



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Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.02

AUTHOR: By Carol S. Sanders, J.D.

§ 80.02 Governing California Law

[1] Generally

The Unemployment Insurance Code consists of general provisionsⁿ¹ and nine Divisions. Unemployment and disability compensation are both covered under Division 1.ⁿ² Part 1 of Division 1 contains primarily unemployment compensation provisions, and a few provisions that relate to disability compensation.ⁿ³ Part 2 of Division 1 contains most of the disability compensation provisions.ⁿ⁴ Also included under Division 1 are provisions governing extended unemployment compensation,ⁿ⁵ and federal-state extended compensation.ⁿ⁶

State regulations and interpretations applicable to unemployment and disability compensation are contained in *Title 22 California Code of Regulations, sections 125.1-3271.1*.

[2] Applicability of Unemployment Compensation Provisions to Disability Compensation Provisions

Except as otherwise provided, the provisions and definitions of Part 1 of Division 1 of the Unemployment Insurance Code,ⁿ⁷ relating primarily to unemployment compensation, are applicable to disability compensation under Part 2.ⁿ⁸ In case of any conflict between the provisions of Part 1 and Part 2, the provisions of Part 2 prevail with respect to disability benefits, and the provisions of Part 1 prevail with respect to unemployment compensation benefits.ⁿ⁹ Specified provisions under Part 1 relating to financing of the unemployment insurance system are expressly made inapplicable to disability compensation under Part 2.ⁿ¹⁰

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code §§ 1-21.*

(n2)Footnote 2. *See Unemp. Ins. Code §§ 100-4751.*

(n3)Footnote 3. *See Unemp. Ins. Code §§ 100-2128.*

(n4)Footnote 4. *See Unemp. Ins. Code §§ 2601-3272.*

(n5)Footnote 5. *See Unemp. Ins. Code §§ 3501-3751.*

(n6)Footnote 6. *See Unemp. Ins. Code §§ 4001-4751.*

(n7)Footnote 7. *See Unemp. Ins. Code §§ 100-2128.*

(n8)Footnote 8. *See Unemp. Ins. Code § 2602(a).*

(n9)Footnote 9. *See Unemp. Ins. Code § 2602(a).*

(n10)Footnote 10. *See Unemp. Ins. Code § 2602(b).*



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Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.03

AUTHOR: By Carol S. Sanders, J.D.

§ 80.03 Purposes of Law

The Unemployment Insurance Code was enacted to provide for the compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum.ⁿ¹ The policy favoring payment of unemployment compensation is based not only on the needs of the individual unemployed worker, but also on the economic interests of the people of California as a whole, which are served by preventing destabilization of purchasing power, and ensuring final consumption of goods and services. Neither private charity nor local relief can prevent the effects of unemployment.ⁿ²

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 100; Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 313, 316, 113 Cal. Rptr. 374, 521 P.2d 110 .*

(n2)Footnote 2. *See Unemp. Ins. Code § 100.*



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CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.04

AUTHOR: By Carol S. Sanders, J.D.

§ 80.04 Nature and Source of Unemployment Compensation Benefits

The California Unemployment Insurance Compensation Program provides for payment of insurance benefits over an extended period of time to persons who find themselves unemployed through no fault of their own.ⁿ¹ Rules governing eligibility for unemployment compensation are discussed in §§ 80.30-80.37. The amount of benefits depends on the worker's earnings during the calendar quarter (out of a base period of four quarters)ⁿ² in which the worker's wages were highest. The benefit amounts depend on when the claim is filed:

- For new claims filed with an effective date on or after January 1, 1992, and before January 1, 2002, the amount ranges from a low of \$40 per week to a high of \$149 per week, when the earnings in the applicable quarter did not exceed \$4966.99.ⁿ³ If the earnings exceeded \$4966.99, the weekly benefit amount is 39% of the earnings divided by 13, but in no case may it exceed \$230.ⁿ⁴

- For new claims filed with an effective date beginning on or after January 1, 2002, and prior to January 1, 2003, the amount ranges from a low of \$40 per week to a high of \$96 per week, when the earnings in the applicable quarter did not exceed \$2,781.99.ⁿ⁵ If the earnings exceeded \$2781.99, the weekly benefit amount is 45% of the earnings divided by 13, but in no case may it exceed \$330.ⁿ⁶

- For new claims filed with an effective date beginning on or after January 1, 2003, the amount ranges from a low of \$40 per week to a high of \$70 per week, when the earnings in the applicable quarter did not exceed \$1832.99.ⁿ⁷ If the earnings exceeded \$1,832.99, the weekly benefit amount is 50% of the earnings divided by 13, but in no case may it exceed the applicable of the following:ⁿ⁸

(1) \$370 for new claims filed with an effective date beginning on January 1, 2003, and before January 1, 2004.

(2) \$410 for new claims filed with an effective date beginning on January 1, 2004, and before January 1, 2005.

(3) \$450 for new claims filed with an effective date beginning on January 1, 2005.

Benefits are payable for up to 26 weeksⁿ⁹ and may be extended for an additional 13 weeks during certain periods of high unemployment.ⁿ¹⁰ Payment of federal-state extended compensation may thereafter be available.ⁿ¹¹ Under certain circumstances, additional benefits may be available during a period of training or retraining.ⁿ¹²

Benefits are paid from the State Unemployment Fund, which is a special fund, separate from all public money or funds of the state.ⁿ¹³ It consists of funds collected from private employers,ⁿ¹⁴ and money credited to the state's account in the federal Unemployment Trust Fund.ⁿ¹⁵ The amount of money an employer is required to pay into the state fund is based in part on the employer's base payroll during a specified period, the benefits paid to terminated employees that are charged to the employer's reserve account, and the overall balance of the State Unemployment Fund.ⁿ¹⁶

For a discussion of employer contributions and reserve accounts, see Part B (§§ 80.20-80.25).

FOOTNOTES:

(n1)Footnote 1. *See generally Unemp. Ins. Code §§ 1251-1265.9* (eligibility and disqualifications for employment).

(n2)Footnote 2. *See Unemp. Ins. Code § 1275* ("base period" defined); *see also* discussion in § 80.31[3].

(n3)Footnote 3. *Unemp. Ins. Code § 1280(a)*.

(n4)Footnote 4. *Unemp. Ins. Code § 1280(a)*.

(n5)Footnote 5. *Unemp. Ins. Code § 1280(b)*.

(n6)Footnote 6. *Unemp. Ins. Code § 1280(b)*.

(n7)Footnote 7. *Unemp. Ins. Code § 1280(c)*.

(n8)Footnote 8. *Unemp. Ins. Code § 1280(c)*.

(n9)Footnote 9. *See Unemp. Ins. Code § 1281(b)(1)*.

(n10)Footnote 10. *See Unemp. Ins. Code §§ 3501-3751* (extended unemployment compensation).

(n11)Footnote 11. *See Unemp. Ins. Code §§ 4001-4751*.

(n12)Footnote 12. *See Unemp. Ins. Code §§ 1266-1274.10*.

(n13)Footnote 13. *See Unemp. Ins. Code §§ 1521, 1525*.

(n14)Footnote 14. *See Unemp. Ins. Code §§ 976-994* (employer contributions).

(n15)Footnote 15. *See 42 U.S.C. §§ 501, 1101*.

(n16)Footnote 16. *See Unemp. Ins. Code §§ 976-994* (contribution rates), 1025-1032 (reserve accounts); *California Dep't of Human Resources Development v. Java* (1971) 402 U.S. 121, 125, 91 S. Ct. 1347, 28 L. Ed. 2d 666 .



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CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.05

AUTHOR: By Carol S. Sanders, J.D.

§ 80.05 Requirement That Employer-Employee Relationship Exists

Only "employers," as defined in the Unemployment Insurance Code, are required to contribute to the Unemployment Fund.ⁿ¹ As further discussed in § 80.07 [1], an employer is any "employing unit" that, for some portion of a day within the current or preceding calendar year, had in "employment" one or more "employees," as those terms are defined in the Code, and pays wages for employment in excess of \$100 during any calendar quarter. The statutory definitions of the term "employment" are discussed in § 80.06. The term "employee" is discussed in § 80.07 [2]. Thus, an individual that engages only "independent contractors," rather than "employees" is not required to participate in the unemployment insurance system.ⁿ²

Under the Unemployment Insurance Code, common law rules, as well as statutory definitions, apply in determining whether an employer-employee relationship exists.ⁿ³ Common law rules regarding existence of an employer-employee relationship are fully discussed in Chapter 30. Briefly stated, the most significant factor in determining whether an employer-employee relationship exists is the right of the principal to control the manner and means of accomplishing a desired result.ⁿ⁴ If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists.ⁿ⁵ Secondary factors to be considered in determining whether an individual performing services is an employee within the meaning of the Unemployment Insurance Code, or an independent contractor, are whether he or she is engaged in a distinct occupation or business, the kind of occupation (i.e., whether the kind of work is usually done under a principal's direction or by a specialist without supervision), the degree of skill required, whether the principal or workmen supplied the tools and place of work, the length of time for which services are to be performed, the method of payment, whether the work is part of the principal's regular business, and whether the parties believed they were creating an employer-employee relationship.ⁿ⁶

A writ of administrative mandamus proceeding to challenge the decision of the California Unemployment Insurance Appeals Board that an employer-employee relationship exists for purposes of the Unemployment Insurance Code is barred by the California Constitution,ⁿ⁷ by statute,ⁿ⁸ and by the holding of *Modern Barber Colleges*.ⁿ⁹ To seek judicial review of an administratively determined employee status, the employer must pay assessed unemployment insurance contributions, claim a refund, and, following the denial of any of that claim, file an action for refund in the

superior court.n10

An "independent contractor" is a person who is engaged in an independent employment or occupation, responsible to his or her principal only for the result and not for the manner or means by which it is accomplished.n11

There is a rebuttable presumption that professional services provided by consultant attorneys, physicians, dentists, engineers, architects, accountants, and various types of scientists are rendered as independent contract work, and do not constitute "employment" for purposes of the Unemployment Insurance Code, unless a contract agreement exists that establishes an employer-employee relationship.n12

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 976.*

(n2)Footnote 2. *See Tomlin v. California Emp. Com. (1947) 30 Cal. 2d 118, 122-123, 180 P.2d 342 ; Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686 (overruled on other grounds in People v. Sims (1982) 32 Cal. 3d 468, 479-480 fn. 8, 186 Cal. Rptr. 77, 651 P.2d 321).*

(n3)Footnote 3. *See Unemp. Ins. Code §§ 606.5(a), 621(b); see also discussion in § 80.07.*

(n4)Footnote 4. *See Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd. (1991) 235 Cal. App. 3d 1363, 1371, 1 Cal. Rptr. 2d 64 ; Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 950, 88 Cal. Rptr. 175, 471 P.2d 975 ; see also 22 Cal. Code Reg. §§ 621(b)-1, 4304-1 (rules applicable in determining employment relationship under Unemployment Insurance Code).*

(n5)Footnote 5. *Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 950, 88 Cal. Rptr. 175, 471 P.2d 975 ; Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686 ; see also In re Brown (9th Cir. 1984) 743 F.2d 664, 667 ; Southwest Research Institute v. Unemployment Insurance Appeals Board (2000) 81 Cal. App. 4th 705, 709-710, 96 Cal. Rptr. 2d 769 (worker's adherence to federally dictated work protocol, alone, not enough to establish status as employee rather than independent contractor).*

(n6)Footnote 6. *See Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd. (1991) 235 Cal. App. 3d 1363, 1371, 1 Cal. Rptr. 2d 64 ; see also Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949, 88 Cal. Rptr. 175, 471 P.2d 975 (citing Rest. Agency § 220). See also Messenger Courier Ass'n of Americas v. Cal. Unempl. Ins. App. Board (2009) 175 Cal. App. 4th 1074, 1088-1096, 96 Cal. Rptr. 3d 797 (trial court properly denied declaratory relief to employer associations that would have invalidated precedential decision by Unemployment Insurance Appeals Board, applying criteria in Borello to determine that employers had incorrectly treated messengers as independent contractors, rather than common-law employees, for purposes of payment of unemployment insurance contributions for them, and assessing penalties against employer, where Board's decision applied proper legal standards and was entitled to precedential effect); Air Couriers Int'l v. Employment Dev. Dep't (2007) 150 Cal. App. 4th 923, 932-939, 59 Cal. Rptr. 3d 37 (trial court properly determined that drivers were employees, not independent contractors, where trial court used proper legal standard in evaluating evidence (using Borello), and where evidence showed employer exerted control over drivers to coordinate and supervise company's basic function of timely delivery of packages, and secondary factors also pointed to finding of employee status).*

(n7)Footnote 7. *Cal. Const. art. XIII, § 32.*

(n8)Footnote 8. *Unempl. Ins. Code § 1851.*

(n9)Footnote 9. *Modern Barber Colleges v. Cal. Emp. Stab. Com. (1948) 31 Cal.2d 720, 192 P.2d 916 .*

(n10)Footnote 10. *First Aid Servs. of San Diego, Inc. v. Calif. Employment Devel. Dept. (2005) 133 Cal. App. 4th 1470, 2005 Cal. App. LEXIS 1746, *9.*21 .*

(n11)Footnote 11. *Cal. Emp. Com. v. L.A. etc. News Corp. (1944) 24 Cal. 2d 421, 424, 425, 150 P.2d 186 .*

(n12)Footnote 12. *See Unemp. Ins. Code § 656; see discussion under § 80.06[2][a].*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.06

AUTHOR: By Carol S. Sanders, J.D.

§ 80.06 Subject Employment and Excluded Services

[1] Subject Employment

[a] Generally

"Employment," as used in the unemployment and disability provisions, means service, including service in interstate commerce, performed by an employee for wages or under any contract of hire, written or oral, express or implied.ⁿ¹ For disability benefit purposes, special definitions are applicable to domestic service,ⁿ² to services performed for certain public entities and health facilities,ⁿ³ and to services of clerk-carriers in the employ of the United States Postal Service.ⁿ⁴ In addition, as discussed in [b] through [f], below, certain types of services are specifically included in the statutory definition of "employment."

[b] Certain Artistic or Literary Services

For purposes of the unemployment compensation and disability benefit provisions of the Unemployment Insurance Code only,ⁿ⁵ "employment" includes any service in an artistic or literary capacity performed by an individual pursuant to a collective bargaining agreement between an employer and a labor organization in the motion picture, radio, or television industry if the employer has the right to control and direct the services to be performed and the individual is defined as an employee under the terms of the collective bargaining agreement.ⁿ⁶

[c] Certain Out-of-State Services

[i] Service Localized in California

"Employment" includes an individual's entire service, performed within, or both within and without, California if the service is "localized" in California.ⁿ⁷ Service is localized if it is performed entirely within California,ⁿ⁸ or if it is performed both within and outside the state, but the service performed outside the state is incidental to the individual's service within the state.ⁿ⁹ For example, service is "localized" within California if the service rendered outside the state

is temporary or transitory in nature, or consists of isolated transactions.n10

[ii] Base of Operations or Individual's Residence Located in California

"Employment" also includes an individual's entire service that is not localized in any state if some of the service is performed in California and if (1) the base of operations is located in California, or (2) if there is no base of operations, the place from which the service is directed or controlled is located in California.n11 Services performed in other states or in Canada and directed or controlled in California will be included as "employment" if the service is not covered under the unemployment compensation law of any other state or of Canada.n12

If the base of operations or place from which nonlocalized service is directed or controlled is not in any state in which some part of the service is performed, the service will still be included as "employment" if the individual performing the service resides in California.n13

[iii] Services Deemed Performed in California

"Employment" includes an individual's entire service, if the service is deemed performed in California by virtue of an arrangement made pursuant to the unemployment and disability compensation provisions, and does not include any service which by virtue of such an arrangement is deemed performed in another state.n14

[iv] Services Performed on American Vessel or Aircraft, or for American Employer by United States Citizen

Provided the employer has specified connections with California, and other conditions are met, "employment" also includes services performed on or in connection with American vessels or aircraft operating within, or within and without, the United States,n15 and services performed outside the United States or Canada by a United States citizen for an American employer.n16

[d] Agricultural Employment

Agricultural labor is expressly included as "employment" under the Unemployment Insurance Code.n17

[e] Substitute and Assistant Workers

Each individual employed to perform or to assist in performing the work of any individual employed by an employing unit is deemed to be employed by that employing unit for all purposes of the unemployment and disability compensation provisions, whether or not he or she was hired or paid directly by the employing unit, if the employing unit had actual or constructive knowledge of the work.n18

[f] Nonprofit Services Excluded Under Federal Unemployment Tax Act

Under the Federal Unemployment Tax Act, service is excluded from "employment" if it is performed in the employ of a tax-exempt religious, charitable, educational, or other nonprofit organization as described in specified provisions of the Internal Revenue Code.n19 If this is the *sole* reason for the exclusion under the Federal Unemployment Tax Act, the service will be included as "employment" for purposes of the unemployment and disability compensation provisions of the state Unemployment Insurance Code, unless that service is otherwise excluded under *Unemployment Insurance Code Section 634.5*.n20 For discussion of services excluded under Section 634.5, see [2], *below*.

[2] Excluded Services

[a] Generally

"Employment" does not include the following types of service:

1. Domestic service in a private home unless cash remuneration of \$1000 or more is paid to individuals employed in the domestic service in any calendar quarter in the calendar year or the preceding calendar year;n21
2. Work performed by a domestic worker for whom an employment agency (as defined in *Civil Code Section 1812.501(a)(3), (h)*) procures, offers, refers, provides, or attempts to provide domestic work in a private home, if all of the factors listed in *Unemployment Insurance Code Section 687.2* characterize the nature of the relationship between the employment agency and the domestic worker;n21.1
3. Service as a transcriber of depositions, court proceedings, and hearings performed away from the office of the person or organization obligated to produce a transcript of these proceedings;n22
4. Service performed by a child under the age of 18 years in the employ of a parent, or service performed by an individual in the employ of his or her son, daughter, or spouse, except to the extent that the employer and employee have elected to make contributions to the Unemployment Compensation Disability Fund;n23
5. Certain federal service and service performed in the employ of any other state or its political subdivisions;n24
6. Service under any unemployment compensation system established by a law of the United States;n25
7. Service performed in the employ of either a candidate for public office or a committee (as defined in *Government Code Section 82013*) in connection with an election campaign;n26
8. Service performed by the officers and directors of a corporation who are the sole shareholders of the corporation, or the officers and directors of a corporation engaged in agriculture who are shareholders, or an officer of a corporation who is the sole shareholder or the only shareholder other than his or her spouse, if the corporation is not subject to the Federal Unemployment Tax Act;n27
9. Newspaper or magazine delivery or distribution service performed by individuals under the age of 18 years, unless the individual has regular full-time work to which attendance at school is incidental.n28
10. Service performed by an individual in the sale of newspapers or magazines to ultimate consumers, under an arrangement whereby the sale is at a fixed price, and the individual's compensation is based on the retention of the excess of the price over the amount at which the newspapers or magazines are charged to the individual.n29
11. Service performed as a real estate broker, mineral, oil and gas, cemetery, or yacht broker or as a real estate, cemetery, direct sales or yacht salesperson, if (a) the individual is licensed under appropriate provisions of the Business and Professions or Harbors and Navigation Code or is engaged in the trade or business of primarily in-person demonstrations and sales presentations of consumer products in the home or sales on a buy-sell, deposit-commission, or similar basis, for resale by the buyer or any other person in the home or other than from a retail or wholesale establishment; (b) substantially all of the remuneration is directly related to sales or other output rather than to the number of hours worked; and (c) the services are performed pursuant to a written contract which provides that the individual will not be treated as an employee for state tax purposes;n30

12. Service performed as a golf caddy;n31
13. Service performed as an elected or appointed official in any calendar quarter in the employ of a nonprofit corporation or association that is not subject to the Federal Unemployment Tax Act,n32 if the remuneration for those services does not exceed \$100 per month;n33
14. Service performed by baseball players in the employ of baseball clubs pursuant to a contract or agreement under which the baseball player performs for expenses and a share of the profits of the club, rather than for a fixed salary;n34
15. Service performed by free-lance jockeys or exercisers who are regularly licensed by the California Horse Racing Board;n35
16. Service performed by professional athletes who are neither citizens nor residents of the United States or of any state when they come to California for occasional or incidental professional engagements;n36 and
17. Professional services performed by a consultant working as an independent contractor.n37

For purposes of the exclusion of professional consulting services from the definition of "employment," there is a rebuttable presumption that services provided by attorneys, physicians, dentists, engineers, architects, accountants, and the various types of physical, chemical, natural, and biological scientists are rendered as independent contractors.n38 The rebuttable presumption does not apply to individuals who enter into a contract agreement with the recipient of the professional services that establishes an employer-employee relationship.n39 However, a contract between a nonprofit, licensed, primary care clinic, as defined in *Health and Safety Code Section 1204(a)*, and a licensed physician, surgeon, osteopathic physician and surgeon, podiatrist, optometrist, or psychologist does not constitute an employer-employee relationship if the contract stipulates that the professional services rendered to the clinic are by an independent contractor.n40

[b] Exclusions Contingent on Similar Exclusions Under Federal Unemployment Tax Act

"Employment" does not include specified types of services, as long as they are similarly excluded from the definition of "employment" in the Federal Unemployment Tax Act.n41 Currently, all of the specified services are similarly excluded under the Federal Unemployment Tax Act.n42 The excluded services are the following:

1. Domestic service in a local college club or chapter of a college fraternity or sorority, unless cash remuneration of \$1000 or more is paid to individuals employed in the domestic service in any calendar quarter in the calendar year or in the preceding calendar year;n43
2. Service not in the course of the employing unit's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for the service is \$50 or more and the individual is regularly employed by the employing unit to perform the service;n44
3. Service performed in any calendar quarter in the employ of certain organizations exempt from federal income tax, if the remuneration for the service is less than \$50;n45
4. Service performed in the employ of a school, college, or university by an enrolled and regularly-attending student or, under certain circumstances, by the student's spouse;n46
5. Services performed by full-time students employed by certain organized camps;n47

6. Service performed in the employ of a foreign government (including service as a consular or other officer or employee or a nondiplomatic representative);ⁿ⁴⁸

7. Service performed in the employ of an instrumentality wholly owned by a foreign government if the service is similar in character to that performed in foreign countries by employees of the United States Government or its instrumentalities, and the foreign government grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and its instrumentalities.ⁿ⁴⁹

8. Service performed in the employ of an international organization;ⁿ⁵⁰

9. Service performed as a student nurse in the employ of a hospital or nurses' training school by an individual enrolled in and regularly attending a nurses' training school chartered or approved pursuant to state law, and service performed as an intern in the employ of a hospital by an individual who has completed a four-year course in a medical school chartered or approved pursuant to state law;ⁿ⁵¹

10. Service performed by individuals under the age of 22 years who are enrolled in certain nonprofit or public educational institutions that combine academic instruction with work experience, if the service is an integral part of the program, and the institution has so certified to the employer, unless the program was established for or on behalf of an employer or group of employers;ⁿ⁵²

11. Service performed in the employ of a hospital by a patient of the hospital;ⁿ⁵³ and

12. Service performed on or in connection with a foreign vessel or aircraft when outside the United States.ⁿ⁵⁴

[c] Excluded Services for Public Entities or Nonprofit Organizations

Special considerations apply to public entities defined by *Unemployment Insurance Code* section 605 and to nonprofit organizations defined by *Unemployment Insurance Code* section 608.ⁿ⁵⁵ With respect to these employers, the general exclusions described in [2], above, are not applicable except for those for domestic service,ⁿ⁵⁶ family service,ⁿ⁵⁷ service under an unemployment compensation system,ⁿ⁵⁸ and the contingent exclusions set forth in *Unemployment Insurance Code* sections 639-648.ⁿ⁵⁹ In addition, *Unemployment Insurance Code* section 634.5 lists certain exclusions that are only applicable to public entities and/or nonprofit organizations, as defined in the Code.

[3] Included and Excluded Services During Same Pay Period

If the services performed during one-half or more of any pay period by an employee constitute employment, all the services of the employee for that period are deemed to be employment.ⁿ⁶⁰ If services performed during one-half or more of any pay period do not constitute employment, none of the services of the employee for that period are deemed to be employment.ⁿ⁶¹ For purposes of this provision, "pay period" means a period of not more than 31 consecutive days for which a payment of remuneration is ordinarily made to the employee by the person employing him or her.ⁿ⁶²

If an individual performs services during a pay period which are in part exempt and in part subject employment, the employer must maintain accurate records that fairly reflect and segregate the included and excluded time in each pay period.ⁿ⁶³

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code* § 601.

(n2)Footnote 2. *See Unemp. Ins. Code § 2606.5.*

(n3)Footnote 3. *See Unemp. Ins. Code § 2606.*

(n4)Footnote 4. *See Unemp. Ins. Code § 2606.4.*

(n5)Footnote 5. *See Unemp. Ins. Code §§ 100-2600 (unemployment compensation), 2601-3272 (disability compensation).*

(n6)Footnote 6. *Unemp. Ins. Code § 601.5; see Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 950-953, 88 Cal. Rptr. 175, 471 P.2d 975 (writers subject to control of television producer in revision of teleplays, and referred to as "employees" in collective bargaining agreement between writers guild and television producers association, as "employees" of producer for purposes of unemployment compensation benefits); cf. Mark Hopkins, Inc. v. Cal. Emp. Etc. Com. (1948) 86 Cal. App. 2d 15, 18, 193 P.2d 792 (band leader rather than hotel operator as employer of musicians for purposes of employment compensation liability, even though hotel operator was named as employer under contract prescribed by musicians' union, since band leader had complete control over musicians).*

(n7)Footnote 7. *See Unemp. Ins. Code § 602(a).*

(n8)Footnote 8. *Unemp. Ins. Code § 603(a).*

(n9)Footnote 9. *Unemp. Ins. Code § 603(b).*

(n10)Footnote 10. *Unemp. Ins. Code § 603(b).*

(n11)Footnote 11. *Unemp. Ins. Code § 602(b)(1).*

(n12)Footnote 12. *See Unemp. Ins. Code § 603.5.*

(n13)Footnote 13. *See Unemp. Ins. Code § 602(b)(2).*

(n14)Footnote 14. *Unemp. Ins. Code § 604.*

(n15)Footnote 15. *See Unemp. Ins. Code § 609.*

(n16)Footnote 16. *See Unemp. Ins. Code § 610; see also Unemp. Ins. Code § 125.4 (definition of American employer).*

(n17)Footnote 17. *See Unemp. Ins. Code § 611.*

(n18)Footnote 18. *Unemp. Ins. Code § 606; see also 22 Cal. Code Reg. § 606-1 (constructive knowledge of substitute or assistant employment).*

(n19)Footnote 19. *See 26 U.S.C. § 3306(c)(8); see also 26 U.S.C. § 501(c)(3) (tax-exempt nonprofit organizations described).*

(n20)Footnote 20. *Unemp. Ins. Code § 608.*

(n21)Footnote 21. *Unemp. Ins. Code § 629(a); see also 22 Cal. Code Reg. § 629-1 (definition of domestic service in private home). For disability benefit purposes, "employment" includes domestic service in a private home, local college club, or chapter of a college fraternity or sorority for which cash remuneration of \$750 or more is paid for the same time period. see Unemp. Ins. Code § 2606.5(a). For discussion of disability benefits, see pt. D, §§ 80.60-80.70.*

(n22)Footnote 21.1. *Unemp. Ins. Code § 629(b).*

(n23)Footnote 22. *Unemp. Ins. Code § 630.*

(n24)Footnote 23. *Unemp. Ins. Code § 631; see also 22 Cal. Code Reg. § 631-1* (what constitutes family employment). For discussion of elective coverage, *see § 80.07[1][d]*.

(n25)Footnote 24. *See Unemp. Ins. Code § 632.*

(n26)Footnote 25. *See Unemp. Ins. Code § 635.*

(n27)Footnote 26. *See Unemp. Ins. Code § 636.*

(n28)Footnote 27. *See Unemp. Ins. Code § 637; see also 26 U.S.C. § 3301 et seq.* (Federal Unemployment Tax Act). In addition, in a private corporation, any individual who is an "employee" pursuant to *Unemp. Ins. Code § 621(a)* and who is the sole shareholder, or the only shareholder other than his or her spouse, may file a statement electing to be excluded from disability coverage for benefits and contributions. *Unemp. Ins. Code § 637.1.*

(n29)Footnote 28. *Unemp. Ins. Code § 649(a).*

(n30)Footnote 29. *See Unemp. Ins. Code § 649(b).* Such service is excluded from the definition of employment regardless of whether the individual is guaranteed a minimum amount of compensation or is entitled to be credited with unsold newspapers or magazines turned back. *see Unemp. Ins. Code § 649(b).* Individuals whose services in the sale of newspapers or magazines constitute exempt employment include door-to-door salespersons, newsstand operators, street peddlers, and route carriers.

(n31)Footnote 30. *See Unemp. Ins. Code § 650.*

(n32)Footnote 31. *See Unemp. Ins. Code § 651.*

(n33)Footnote 32. *See 26 U.S.C. § 3301 et seq.*

(n34)Footnote 33. *Unemp. Ins. Code § 652.*

(n35)Footnote 34. *Unemp. Ins. Code § 653; see also 22 Cal. Code Reg. § 653-1* (status of baseball players).

(n36)Footnote 35. *Unemp. Ins. Code § 654.*

(n37)Footnote 36. *Unemp. Ins. Code § 655.*

(n38)Footnote 37. *Unemp. Ins. Code § 656.*

(n39)Footnote 38. *Unemp. Ins. Code § 656.*

(n40)Footnote 39. *Unemp. Ins. Code § 656.*

(n41)Footnote 40. *Unemp. Ins. Code § 656.*

(n42)Footnote 41. *See Unemp. Ins. Code § 638; see also 26 U.S.C. § 3301 et seq.* (Federal Unemployment Tax Act).

(n43)Footnote 42. *See 26 U.S.C. § 3306(c).*

(N44)Footnote 43. *Unemp. Ins. Code § 639; 26 U.S.C. § 3306(c)(2)* (similar exclusion under Federal Unemployment Tax Act).

(n45)Footnote 44. *Unemp. Ins. Code* § 640; *see* 22 Cal. Code Reg. § 640-1 (defining "service not in course of employing unit's trade or business"); 26 U.S.C. § 3306(c)(3) (similar exclusion under Federal Unemployment Tax Act).

(n46)Footnote 45. *See Unemp. Ins. Code* § 641; *see* 22 Cal. Code Reg. § 641-1 (allocation of remuneration of less than \$50 in employment of organization exempt from federal income tax); 26 U.S.C. § 3306(c)(10)(A) (similar exclusion under Federal Unemployment Tax Act); *see also* 26 U.S.C. §§ 501(a), 521 (description of organizations exempt from income taxation).

(n47)Footnote 46. *See Unemp. Ins. Code* § 642; 22 Cal. Code Reg. § 642(a)-1 (extent of student employee exemption); 26 U.S.C. § 3306(c)(10)(B) (similar exclusion under Federal Unemployment Tax Act); *see also Davenport v. Unemployment Ins. Appeals Bd.* (1994) 24 Cal. App. 4th 1695, 1699-1700, 30 Cal. Rptr. 2d 214 (job need not be directly related to student's field of study for exclusion to apply).

(n48)Footnote 47. *See Unemp. Ins. Code* § 642.1; 26 U.S.C. § 3306(c)(20) (similar exclusion under Federal Unemployment Tax Act).

(n49)Footnote 48. *Unemp. Ins. Code* § 643; *see* 26 U.S.C. § 3306(c)(11) (similar exclusion under Federal Unemployment Tax Act).

(n50)Footnote 49. *See Unemp. Ins. Code* § 644; 26 U.S.C. § 3306(c)(12) (similar exclusion under Federal Unemployment Tax Act).

(n51)Footnote 50. *Unemp. Ins. Code* § 644.5; *see* 26 U.S.C. § 3306(c)(16) (similar exclusion under Federal Unemployment Tax Act).

(n52)Footnote 51. *Unemp. Ins. Code* § 645; *see* 26 U.S.C. § 3306(c)(13) (similar exclusion under Federal Unemployment Tax Act).

(n53)Footnote 52. *See Unemp. Ins. Code* § 646; 26 U.S.C. § 3306(c)(10)(C) (similar exclusion under Federal Unemployment Tax Act).

(n54)Footnote 53. *Unemp. Ins. Code* § 647; *see* 26 U.S.C. § 3306(c)(10)(D) (similar exclusion under Federal Unemployment Tax Act).

(n55)Footnote 54. *See Unemp. Ins. Code* § 648; 26 U.S.C. § 3306(c)(4) (similar exclusion under Federal Unemployment Tax Act).

(n56)Footnote 55. *See Unemp. Ins. Code* § 634.5.

(n57)Footnote 56. *See Unemp. Ins. Code* § 629.

(n58)Footnote 57. *See Unemp. Ins. Code* § 631.

(n59)Footnote 58. *See Unemp. Ins. Code* § 635.

(n60)Footnote 59. *See Unemp. Ins. Code* § 634.5.

(n61)Footnote 60. *Unemp. Ins. Code* § 607.

(n62)Footnote 61. *Unemp. Ins. Code* § 607.

(n63)Footnote 62. *Unemp. Ins. Code* § 607.

(n64)Footnote 63. *See* 22 Cal. Code Reg. § 607-1.



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.07

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§ 80.07 Covered Employees and Employers

[1] Employers

[a] Applicability of Common Law Rules

[i] Generally

Except in the case of "temporary services employers" and employers who "loan" employees to other employers,ⁿ¹ the question of whether an individual or entity is the employer of specific employees is determined under common law rules concerning the existence of an employer-employee relationship.ⁿ² For discussion of common law rules defining the employer-employee relationship, see Chapter 30.

[ii] Exceptions: Lease or Loan of Employees

The common law rules regarding "borrowed" employees do not apply under the Unemployment Insurance Code.ⁿ³ Instead, under the Code, an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer, and retains the specified indicia of control over the workers and the conditions of employment, will be considered a "temporary services employer" or a "leasing employer."ⁿ⁴ In such cases, the temporary services employer or leasing employer is regarded as the "employer" of the individual performing the services for purposes of the Unemployment Insurance Code.ⁿ⁵ If the employing unit is not a temporary services employer or leasing employer, but pays wages to the individual, it will be regarded as the agent of the client or customer, which will be regarded as the employer of the individual.ⁿ⁶

In some instances, an employer will "loan" an employee to another employer, and direction and control of the manner and means of performing the service changes to the employer to whom the employee is loaned. Under these circumstances, determination of the "employer" of the loaned employee depends on who paid remuneration to the employee. The loaning employer continues to be the employer if he or she continues to pay remuneration to the employee, whether or not reimbursed by the other employer.ⁿ⁷ If the employer to whom the employee is loaned pays

remuneration to the employee for the services performed, that employer is considered the employer for the purposes of that remuneration, regardless of whether the loaning employer also pays remuneration to the employee.n8

[b] General Definition of "Employer"

"Employer" means any employing unit that for some portion of a day has within the current calendar year or had within the preceding calendar year in "employment"n9 one or more "employees"n10 and pays "wages"n11 for employment in excess of \$100 during any calendar quarter.n12 An "employing unit" is any individual or type of organization that has in its employ one or more individuals performing services for it within California.n13

A new employing unit is not created by acquisition or change in the form of the organization of an existing business enterprise, if there is continuity of control of the enterprise.n14 Two or more businesses may constitute a single employing unit if they are united by factors of control, operation, and use.n15

"Employer" includes employing units for which services are performed that are included in "employment" solely for the purposes of the disability compensation provisions under *Unemployment Insurance Code sections 2601-3272*.n16

In addition, certain types of employing units are specifically included in the definition of "employer," as discussed in [c], below.

[c] Specific Employing Units Included Under Definition of "Employer"

[i] Motion Picture and Broadcasting Industry

"Employer" includes any employing unit that, pursuant to a collective bargaining agreement between an employer and a labor organization in the motion picture, radio, or television industry, pays wages as provided in *Unemployment Insurance Code Section 926.5* (liability of prior employer for wages assumed by successor employer).n17

[ii] Employers of Private Domestic Workers

"Employer" includes any employing unit that employs individuals to perform domestic service in a private home, local college club, or local chapter of a college fraternity or sorority and that pays cash wages of \$1,000 or more for that service during any calendar quarter in the calendar year or the preceding calendar year.n18 Solely for the purposes of the disability benefit provisions under *Unemployment Insurance Code Sections 2601-3272*, "employer" also means an employing unit that pays cash wages of \$750 or more for the above-specified domestic services.n19

Any employing unit that qualifies as an employer of individuals performing the above-specified private domestic service may not be treated as an employer with respect to wages paid for any service other than the specified domestic service, unless the employing unit also qualifies as an employer with respect to the other service under Sections 675 (general definition of "employer"), 676 (services included in "employment" for purposes of disability benefit provisions), 677 (services included in "employment" by public entity), or 678 (inclusion as "employers" of certain employing units in the motion picture, radio, or television industry).n20

[iii] Employers of Domestic Workers Providing In-Home Supportive Services

"Employer" also means any employing unit that employs individuals to perform domestic service comprising in-home supportive services under *Welfare and Institutions Code Sections 12300-12314* and that pays cash wages of \$1000 or more (or, solely for the purposes of the disability benefit provision, pays cash wages of \$750 or more) for this service during any calendar quarter in the calendar year or the preceding calendar year, and is one of the following:n21

1. The recipient of the specified domestic services, if the state or county makes or provides for direct

payment to a provider chosen by the recipient or to the recipient for the purchase of the services subject to the provisions of *Welfare and Institutions Code Section 12302.2*;

2. The individual or entity with whom a county contracts to provide in-home supportive services; or

3. Any county that hires and directs in-home supportive personnel in accordance with established county civil service requirements or merit system requirements for those counties not having civil service systems.

[iv] Contractor for Work of Authorship

"Employer" also means any person contracting for the creation of a specially ordered or commissioned work of authorship when the parties expressly agree in a written instrument signed by them that the work will be considered a work made for hire, as defined in the federal copyright law,ⁿ²² and the ordering or commissioning party obtains ownership of all of the rights comprised in the copyright in the work.ⁿ²³ The ordering or commissioning party is the employer of the author of the work for the purposes of unemployment compensation benefits.ⁿ²⁴

[d] Elective Employer Coverage

Under certain circumstances, an employing unit not otherwise subject to the unemployment compensation and disability benefit provisions of the Unemployment Insurance Code because it is not included in the definition of "employer" may, after filing a written election, receive approval by the Director of Employment Development to become an employer for a period of not less than two calendar years.ⁿ²⁵ Provisions governing such an election, and termination thereof, are set forth in *Unemployment Insurance Code Sections 701-713*.

In addition, any employing unit that is an employer for purposes of unemployment compensation may file with the director a written election to cover, for purposes of disability compensation, services performed by all eligible employees who meet all of the following requirements:ⁿ²⁶

1. They are California residents;
2. Their services are covered under the unemployment compensation laws of another state that does not have a disability insurance program; and
3. They are either (a) part of a labor organization, where the election is the result of a negotiated agreement between the employer and the recognized employee organization; or (b) not a part of a labor organization, where the election is requested by a written petition signed by a majority of the employees to be covered by the election.

[e] Public Entities

Service performed in the employ of a state or political subdivision, or an instrumentality of either, is excluded from the definition of "employment" under the Federal Unemployment Tax Act.ⁿ²⁷ However, such service is included in the definition of employment under the Unemployment Insurance Code unless there is some other basis for exclusion,ⁿ²⁸ and public entities, including the State of California and all of its political subdivisions and instrumentalities, are included in the definition of "employer" under the Code.ⁿ²⁹

[2] Employees

[a] Covered Employees

"Employee" means all of the following:

1. Any officer of a corporation;n30
2. Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee;n31
3. Any individual, other than an individual who is an employee under Paragraphs (1) and (2), *above*, who performs services for remuneration for any employing unit if the contract of service contemplates that substantially all of these services are to be performed personally by the individual in any of the following capacities:n32
 - a. As an agent driver or commission-driver engaged in distributing specified food products or laundry or drycleaning services, for his or her principal;n33
 - b. As a traveling or city salesperson, other than as an agent-driver or commission driver, engaged on a full-time basis in the solicitation on behalf of, and the transmission to, his or her principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations;n34 or
 - c. As a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by the person that are required to be returned to the person or a person designated by him or her;
4. Any individual who is an employee pursuant to *Unemployment Insurance Code Sections 601.5* (certain service in an artistic or literary capacity in the motion picture, radio or television industry)n35 or 686 (persons contracting in writing for creation of "works made for hire," as defined in the Copyright Act)n36 and
5. Any individual whose services are in subject employment pursuant to an election for coverage under *Unemployment Insurance Code Sections 701-713*.n37

An individual is not included in the term "employee" under the provisions of Paragraph (3), *above*, n38 if he or she has a substantial investment in facilities used in connection with the performance of those services, other than in facilities for transportation, or if the services are in the nature of a single transaction that is not part of a continuing relationship with the employing unit for whom the services are performed.n39

"Employee" also means any individual who is an employee, pursuant to *Labor Code Section 2750.5* (raising a rebuttable presumption that certain workers are employees rather than independent contractors),n40 of a person who holds, or does not hold but is required to obtain, a valid state contractor's license pursuant to *Business and Professions Code Section 7000 et seq.* (Contractors License Law).n41

Even though no state contractor's license is required for contracting work performed on federal land, the employee status presumption, contained in *Lab. Code § 2750.5* and incorporated into *Unemp. Ins. Code §§ 621.5 and 13004.5*, does apply in that situation.n42 For the provisions defining an employer/employee relationship to determine employer liability for tax withholding and contributions to the unemployment and disability funds, the Unemployment Insurance Code is applied with the same effect and to the same extent as though work had not been performed on federal land.n43

[b] Exclusion of Directors of Corporations or Associations

"Employee" does not include a director of a corporation or association performing services in his or her capacity as a director,ⁿ⁴⁴ unless the director is engaged in services included in "employment" pursuant to *Unemployment Insurance Code Sections 605, 608, 709, and 710*, relating to public entities or nonprofit organizations.ⁿ⁴⁵

FOOTNOTES:

(n1)Footnote 1. *See* discussion under [ii] below.

(n2)Footnote 2. *See Unemp. Ins. Code § 606.5(a); see also* discussion in § 80.05.

(n3)Footnote 3. *See Unemp. Ins. Code § 606.5(a).*

(n4)Footnote 4. *See Unemp. Ins. Code § 606.5(b).*

(n5)Footnote 5. *See Unemp. Ins. Code § 606.5(c).*

(n6)Footnote 6. *See Unemp. Ins. Code § 606.5(c).*

(n7)Footnote 7. *See Unemp. Ins. Code § 606.5(d).*

(n8)Footnote 8. *See Unemp. Ins. Code § 606.5(d).*

(n9)Footnote 9. *See* discussion in § 80.06.

(n10)Footnote 10. *See* discussion in [2], below.

(n11)Footnote 11. *See Unemp. Ins. Code §§ 926-940* (items included and excluded from "wages"); *see also* discussion in § 80.21[3].

(n12)Footnote 12. *Unemp. Ins. Code § 675.*

(n13)Footnote 13. *Unemp. Ins. Code § 135(a).*

(n14)Footnote 14. *Unemp. Ins. Code § 135.1(a); see Unemp. Ins. Code § 135.1(b), (c)* (factors indicating control and continuity of control).

(n15)Footnote 15. *See Unemp. Ins. Code § 135.2(a).*

(n16)Footnote 16. *See Unemp. Ins. Code § 676; see also Unemp. Ins. Code § 2606* ("employment" for purposes of disability compensation provisions).

(n17)Footnote 17. *Unemp. Ins. Code § 678.*

(n18)Footnote 18. *Unemp. Ins. Code § 682(a).*

(n19)Footnote 19. *See Unemp. Ins. Code § 684(a); see also Unemp. Ins. Code § 2606.5* (inclusion of certain domestic service under definition of "employment" for disability benefit purposes).

(n20)Footnote 20. *Unemp. Ins. Code §§ 682(b), 684(b).*

(n21)Footnote 21. *Unemp. Ins. Code §§ 683, 685.*

(n22)Footnote 22. *See 17 U.S.C. § 101.*

(n23)Footnote 23. *Unemp. Ins. Code* § 686.

(n24)Footnote 24. *Unemp. Ins. Code* § 686.

(n25)Footnote 25. *See Unemp. Ins. Code* § 701.

(n26)Footnote 26. *Unemp. Ins. Code* § 702.6.

(n27)Footnote 27. *See 26 U.S.C.* § 3306(c)(7).

(n28)Footnote 28. *See Unemp. Ins. Code* § 605.

(n29)Footnote 29. *See Unemp. Ins. Code* §§ 605(b), 677.

(n30)Footnote 30. *Unemp. Ins. Code* § 621(a).

(n31)Footnote 31. *Unemp. Ins. Code* § 621(b); *see 22 Cal. Code Reg.* §§ 621(b)-1, 4304-1; *see also* discussion in § 80.05. For discussion of common law rules for determining employer-employee relationship, *see* Chapter 30.

(n32)Footnote 32. *Unemp. Ins. Code* § 621(c)(1); *see 22 Cal. Code Reg.* § 621(c)-1(a) (factual situations illustrative of specified occupational groups).

(n33)Footnote 33. *See In re Brown* (9th Cir. 1984) 743 F.2d 664, 667 (drivers transporting produce in trucks owned or leased by carrier as employees of carriers rather than independent contractors, and carriers as liable for unemployment and disability compensation tax).

(n34)Footnote 34. *Metric Man, Inc. v. Unemployment Ins. Appeals Bd.* (1997) 59 Cal. App. 4th 1041, 1046, 69 Cal. Rptr. 2d 569 (based on express language of *Unemp. Ins. Code* § 621, EDD and UIAB properly applied seven-part test to determine whether salesperson was employee; superior court's findings upheld as supported by substantial evidence).

(n35)Footnote 35. *See § 80.06[1][b]*.

(n36)Footnote 36. *Unemp. Ins. Code* 621(d); *see 17 U.S.C. 101. See also [1][c][iii], above.*

(n37)Footnote 37. *See Unemp. Ins. Code* § 621(e); *see also [1][d], above.*

(n38)Footnote 38. *See Unemp. Ins. Code* § 621(c)(1).

(n39)Footnote 39. *Unemp. Ins. Code* § 621(c)(2).

(n40)Footnote 40. *See* discussion in ch. 30.

(n41)Footnote 41. *Unemp. Ins. Code* § 621.5; *see Hunt Building Corp. v. Bernick* (2000) 79 Cal. App. 4th 213, 219-220, 93 Cal. Rptr. 2d 883 .

(n42)Footnote 42. *Hunt Building Corp. v. Bernick* (2000) 79 Cal. App. 4th 213, 221, 93 Cal. Rptr. 2d 883 .

(n43)Footnote 43. *Hunt Building Corp. v. Bernick* (2000) 79 Cal. App. 4th 213, 221, 93 Cal. Rptr. 2d 883 .

(n44)Footnote 44. *Unemp. Ins. Code* § 622(a).

(n45)Footnote 45. *See Unemp. Ins. Code* § 622(a); *see also Unemp. Ins. Code* § 622(b), (c) (services constituting "services in capacity as director").



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.08

AUTHOR: By Carol S. Sanders, J.D.

§ 80.08 Administration and Enforcement of Law by Employment Development Department

[1] Responsibilities Generally

California's Unemployment Fund and the payment of benefits to unemployed workers from that fund is administered by the Employment Development Department (EDD) of the State Health and Welfare Agency.ⁿ¹

[2] Rulemaking and Other Duties of Director of EDD

[a] Generally

The Director of the EDD is responsible for adopting, amending, or repealing regulations for the administration of the EDD's functions.ⁿ² The Director must also make reports as required by the Secretary of Labor,ⁿ³ and may by authorized regulations prescribe the information required to be reported to the EDD by employing units.ⁿ⁴

[b] Dissemination of Materials

On request, the EDD must provide its rules, regulations, guidelines, bulletins, manuals, standards of general application, or the departmental responsibilities under any state or federal law, along with any subscription service necessary to assure prompt receipt of additional amendments to any of the above materials.ⁿ⁵ Documents properly classified as confidential are exempt from this provision requirement.ⁿ⁶ A fee must be charged to cover costs of reproduction and postage.ⁿ⁷

[3] Appeals Division

The Appeals Division of the EDD includes the California Unemployment Insurance Appeals Board and the administrative law judges.ⁿ⁸ For a full discussion of the authority and powers of the Appeals Division, see Part E (§§ 80.80-80.88).

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code §§ 301-301.7.*

(n2)Footnote 2. *Unemp. Ins. Code § 305; see Unemp. Ins. Code § 127* ("authorized regulations" are those promulgated pursuant to the provisions of *Gov. Code §§ 11340-11346*); 22 Cal. Code Reg. § 305-3 (procedures for promulgation and change of regulations); *see also Unemp. Ins. Code § 305.6* (effectiveness of regulations adopted by previous agencies).

(n3)Footnote 3. *Unemp. Ins. Code § 320.*

(n4)Footnote 4. *Unemp. Ins. Code § 320.5.*

(n5)Footnote 5. *Unemp. Ins. Code § 307.*

(n6)Footnote 6. *Unemp. Ins. Code § 307.*

(n7)Footnote 7. *Unemp. Ins. Code § 307.*

(n8)Footnote 8. *Unemp. Ins. Code § 315.*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.08A

AUTHOR: By Carol S. Sanders, J.D.

§ 80.08A Employment Taxpayer's Bill of Rights

In 1995, in an effort to assist employers in making determinations regarding which employees are subject to employment taxes, the California legislature passed the "Employment Taxpayer's *Bill of Rights*."ⁿ¹ First, this law sets up a development and education program directed at taxpayer and industry groups, as well as EDD audit and compliance staff, to identify and correct forms, procedures, regulations and laws which are confusing.ⁿ² Second, it provides employers who are assessed taxes and penalties a defense if their failure to report or pay taxes was based on advice it received from the EDD,ⁿ³ (if these sections are certified by the United States Secretary of Labor pursuant to *section 3303 of Title 26 of the United States Code*).ⁿ⁴ Third, effective January 1, 1997, it authorizes the settlement of civil employment tax disputes.ⁿ⁵

Employers may avoid liability for taxes, interest or penalties if they reasonably relied on written advice obtained as follows:ⁿ⁶

1. The employer requested, in writing, advice from EDD regarding taxability of a certain transaction or activity and the specific facts and circumstances were described in the request; and
2. EDD responded in writing, providing advice about the taxability in question; and
3. The employer did not remit taxes, in reasonable reliance on the advice given; and
4. The liability for taxes occurred before the EDD modified or rescinded the advice by sending written notice of the modification or rescission; and
5. The tax consequences expressed in the advice were not subsequently changed by statute or case law, a change in a federal administrative ruling on which the advice was based or a material change in the circumstances relating to the taxpayer.

In order to seek relief under this section, the taxpayer must file with the EDD a copy of the request for advice and the advice given, a statement under penalty of perjury setting forth the facts on which the claim is based and such other information as required by the EDD.ⁿ⁷ If this law is not made operative as set forth in *Unemployment Insurance Code section 1234*, then only relief from penalties and interest will be available.ⁿ⁸

Under *Unemployment Insurance Code section 1236*, any disputed civil tax matter under *Unemp. Ins. Code §§ 1126 et seq.* (assessments), 1176 et seq. (refunds and overpayments), and 1221 et seq. (administrative appellate review) may be settled under the following conditions:

1. If the disputed matter involves \$7,500 or less, the director may approve a settlement. However, if an appeal has been filed with the appeals board, and it has been assigned to an administrative law judge, and a notice of hearing has been issued, the administrative law judge must approve the appeal. If the decision of the administrative law judge is appealed, the appeals board must approve the settlement, and a scheduled hearing on the proposed settlement may be continued until the California Attorney General completes a review, which must be within 30 days of receipt.ⁿ⁹
2. If the proposed settlement involves a reduction in tax and penalties of \$5,000 or less, it may be approved by the director and the administrative law judge or appeals board, without submission to the Attorney General.ⁿ¹⁰ Otherwise, the Attorney General's determination that the settlement is reasonable is required.ⁿ¹¹
3. The public record of settlements under this section may not include information that relates to any trade secret, patent, process, or the like, that would adversely affect the taxpayer or the national defense.ⁿ¹²
4. All settlements under this section shall be final and nonappealable, except in cases of fraud or misrepresentation of a material fact.ⁿ¹³

For purposes of this section the term settlement is defined as "a compromise on the amount of tax liability, consistent with the reasonable evaluation of the costs and risks associated with litigation of these matters."ⁿ¹⁴ Any settlements involving a reduction of tax or total penalties in excess of \$500 require the director to keep, as a public record, the following information: the names of the parties to the settlement; the amount involved; the amount payable or refundable due to the settlement; a statement of the reasons why settlement is in the best interests of the state; and the Attorney General's written statement regarding the reasonableness of the settlement.ⁿ¹⁵ Other than the settlements required to be maintained as a public record, settlements under this section constitute confidential tax information.ⁿ¹⁶ Finally, if the settlement involves the classification of a worker as an employee or an independent contractor, the settlement may also include an agreement on the prospective classification of that worker or any other worker similarly situated.ⁿ¹⁷

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code §§ 1231-1236.*

(n2)Footnote 2. *See Unemp. Ins. Code § 1231.*

(n3)Footnote 3. *See Unemp. Ins. Code §§ 1233, 1234.*

(n4)Footnote 4. *See Unemp. Ins. Code § 1234.*

(n5)Footnote 5. *See Unemp. Ins. Code § 1236.*

(n6)Footnote 6. *See Unemp. Ins. Code § 1233(b).*

(n7)Footnote 7. *See Unemp. Ins. Code § 1233(c).*

(n8)Footnote 8. *See Unemp. Ins. Code § 1233(j).*

(n9)Footnote 9. *See Unemp. Ins. Code § 1236(a).*

(n10)Footnote 10. *See Unemp. Ins. Code § 1236(a)(3).*

(n11)Footnote 11. *See Unemp. Ins. Code § 1236(a)(2).*

(n12)Footnote 12. *See Unemp. Ins. Code § 1236(c).*

(n13)Footnote 13. *See Unemp. Ins. Code § 1236(d).*

(n14)Footnote 14. *See Unemp. Ins. Code § 1236(h).*

(n15)Footnote 15. *See Unemp. Ins. Code § 1236(c).*

(n16)Footnote 16. *See Unemp. Ins. Code § 1236(e).*

(n17)Footnote 17. *See Unemp. Ins. Code § 1236(f).*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.09

AUTHOR: By Carol S. Sanders, J.D.

§ 80.09 Use of Information Obtained

[1] Confidentiality

[a] Generally

Except as otherwise specifically provided in the Unemployment Insurance Code,ⁿ¹ information obtained in the administration of the Code is confidential, not open to the public, and for the exclusive use and information of the Director of the EDD in the discharge of his or her duties.ⁿ² Furthermore, information released to authorized entities in accordance with other provisions of the Unemployment Insurance Code is not admissible in evidence in any action or special proceeding, other than one arising out of the provisions of the Unemployment Insurance Code or one described in Unemployment Code Section 1095.ⁿ³ The information may be tabulated and published in statistical form for use by federal, state, and local governmental departments and agencies, and the public, except that the name of the employing unit or of any worker may never be divulged in the course of the tabulation or publication.ⁿ⁴ Wagesⁿ⁵ and amounts required to be deducted and withheldⁿ⁶ may not be disclosed except as provided by the Revenue and Tax Code.ⁿ⁷ Any employee or his or her representative may receive the employee's wage information on written request by the employee. That information must be provide without charge.ⁿ⁸ Any person who knowingly accesses, uses, or discloses any confidential information without authorization is guilty of a misdemeanor.ⁿ⁹

Any public officer or employee who improperly discloses confidential information obtained in the administration of the Unemployment Insurance Code is subject to criminal penalties, including fines and imprisonment in the county jail.ⁿ¹⁰

For a full discussion of an employee's privacy rights, see Chapters 50 and 51.

[b] Medical Records Related to Disability Claims

Special rules of confidentiality apply to medical records of the EDD obtained pursuant to the disability benefit provisions of the Unemployment Insurance Code.ⁿ¹¹ These records are confidential, except to the extent necessary for proper administration of the disability benefit provisions, or as provided elsewhere in law.ⁿ¹² They are not otherwise to

be published or open to public inspection in any manner that would reveal the identity of the claimant or family member, or the nature or cause of his or her disability.ⁿ¹³ Medical records that are disclosed must be disclosed only in accordance with *Unemployment Insurance Code Section 1095*, and in any case must remain confidential.ⁿ¹⁴

[2] Purposes for Which Information May Be Used

[a] Generally

The director of the EDD must permit the use of any information in his or her possession to the extent necessary for certain specified purposes.ⁿ¹⁵ The director may require reimbursement for all direct costs incurred in providing this information, with specified exceptions.ⁿ¹⁶

Some of the purposes for which information must be provided are directly related to implementation of the unemployment compensation and disability benefits provisions of the Unemployment Insurance Code, such as to enable an employee to properly present a claim for benefits,ⁿ¹⁷ to acquaint a worker with his or her existing or prospective right to benefits,ⁿ¹⁸ to enable an employer to fully discharge his or her obligations or safeguard his or her rights under the unemployment compensation or disability benefit provisions,ⁿ¹⁹ or to enable an employer to receive a reduction in contribution rate.ⁿ²⁰

Other purposes are related to assisting the EDD and other agencies to carry out their functions,ⁿ²¹ including, for example:

- To enable federal, state, or local government departments or agencies, to determine an individual's entitlement to public benefits.ⁿ²²
- To enable state and local governmental departments or agencies to seek legal remedies in connection with the unlawful application for or receipt of relief or to enable the collection of expenditures for assistance services provided in accordance with the Welfare and Institutions Code.ⁿ²³
- To enable the Division of Labor Standards Enforcement to seek criminal, civil, or administrative remedies in connection with the failure to pay or the unlawful payment of wages.ⁿ²⁴
- To assist federal, state, and local governmental departments or agencies in the administration of the victims of crime program or in the location of victims of crime who are entitled to restitution.ⁿ²⁵
- To provide federal, state, or local government departments or agencies with wage and claim information (excluding unemployment benefit information) to assist in the collection of restitution, fines, penalties, assessment, and fees and of delinquent or defaulted guaranteed student loans.ⁿ²⁶
- To assist an authorized governmental agency, such as county district attorney or office of the Attorney General, in the investigation of workers' compensation insurance fraud.ⁿ²⁷
- To provide public employment retirement systems in California with earnings information of any individual who has applied for or is receiving a disability income or allowance from a public retirement system.ⁿ²⁸
- To enable federal, state, or local governmental departments to administer child support enforcement programsⁿ²⁹ and to assist in collecting monies owed for welfare services and support.ⁿ³⁰
- To verify information on private postsecondary and vocational school administrators, staff, and

students in schools being investigated for violation of *Education Code Section 94700 et seq.*ⁿ³¹

- To provide information to tax officials of Mexico under reciprocal agreements.ⁿ³²
- To enable city and county planning agencies to develop economic forecasts for planning purposes.ⁿ³³
- To enable the Contractors' State License Board to verify the employment history of an individual applying for licensure.ⁿ³⁴
- To provide a peace officer with the Division of Investigation in the Department of Consumer Affairs information when the officer has been designated by the Chief of the Division of Investigations and requests this information in the course of and in part of an investigation into the commission of a crime or other unlawful act when there is reasonable suspicion to believe that the crime or act may be connected to the information requested and would lead to relevant information regarding the crime or unlawful act.^{n34.1}
- To enable the Labor Commissioner of the Division of Labor Standards Enforcement in the Department of Industrial Relations to identify unlawfully uninsured employers.^{n34.2}
- To enable the Chancellor of the California Community Colleges to obtain quarterly wage data commencing January 1, 1993, on students who have attended one or more community colleges to assess the impact of education on the employment and earnings of students, to conduct the annual evaluation of district-level and individual college performance in achieving priority educational outcomes, and to submit the required reports to the Legislature and the Governor.^{n34.3}
- To enable the Public Employees' Retirement System to seek criminal, civil, or administrative remedies in connection with the unlawful application for or receipt of benefits provided under *Gov. Code § 20000 et seq.*^{n34.4}

Nothing in *Unemployment Insurance Code Section 1095*, authorizing the use of information obtained in the administration of the Unemployment Insurance Code for specified purposes, may be construed to authorize or permit the use of information by any private collection agency.ⁿ³⁵

Under federal law, a state unemployment compensation agency must disclose to the appropriate federal or state agencies certain confidential information relating to the individual's eligibility for benefits under the supplemental nutrition assistance program,ⁿ³⁶ and child support obligations.ⁿ³⁷

[b] Information to Federal Agencies Concerned with Public Employment

The Director of the EDD must make available, on request, to any agency of the United States government charged with the administration of public works or assistance through public employment, information relating to recipients of unemployment compensation, including their name and address, their ordinary occupation and employment status, and their rights to further state unemployment or disability compensation.ⁿ³⁸

[c] Exchange of Information With Other Governmental Agencies

The EDD may exchange information with other governmental departments and agencies, both federal and state, which are concerned with unemployment insurance, the relief of unemployed or destitute individuals, or legislation arising out of an employment relationship, and with other departments or agencies as the department deems necessary or desirable

for the proper administration of unemployment and disability compensation.ⁿ³⁹

The EDD is required to permit the use of information in its possession to enable the Division of Labor Standards Enforcement (DLSE) to seek criminal, civil, or administrative remedies in connection with the failure to pay, or the unlawful payment of, wages under *Labor Code Sections 200 et seq.* and *1720 et seq.*ⁿ⁴⁰ For discussion of DLSE enforcement of wage and hour laws, *see* Chapter 5.

When requested by the State Department of Social Services, the Franchise Tax Board, or the Parent Locator Service, the EDD is required to compare information it collects from new employees under *Unemployment Insurance Code Section 1088.5* and *Revenue and Taxation Code Section 19271*,ⁿ⁴¹ with information it receives from those agencies for purposes of locating delinquent payors of child support payments, or others having a support obligation.ⁿ⁴² This information can also be provided to the Franchise Tax Board.ⁿ⁴³ Similarly, the EDD must permit the use of information in its possession to enable federal, state, or local governmental departments to administer child support enforcement programs under the Social Security Act.ⁿ⁴⁴ The EDD must also provide the State Department of Developmental Service with wage and employee information that will assist in the collection of money owed for support under the Welfare and Institutions Code.ⁿ⁴⁵

In addition, the director of the EDD must provide other governmental departments or agencies with information concerning any individuals who are delinquent or in default on guaranteed student loans, or who owe repayment of funds received through other financial assistance programs administered by that commission. For this purpose, the EDD is not permitted to release any information concerning unemployment insurance benefits.

[d] Information to Law Enforcement Agencies

When there is reasonable suspicion that the information would lead to relevant evidence in the investigation of a felony, the director of the EDD must provide any law enforcement agency certain identifying information about any victim, suspect, missing person, potential witness, or person for whom a felony arrest warrant has been issued when so requested by a state investigator or peace officerⁿ⁴⁶ or specified federal law enforcement officers.ⁿ⁴⁷

[e] Information to Tax Officials of Mexico

If a reciprocal agreement with the national taxing officials of Mexico exists, the director of the EDD must provide employment tax information to the Mexican officials. A "reciprocal agreement" means a formal agreement to exchange information between national taxing officials of Mexico and taxing authorities of the State Board of Equalization, the Franchise Tax Board, and the Employment Development Department. Such agreements must be limited to exchange of essential tax administration information.ⁿ⁴⁸

FOOTNOTES:

(n1)Footnote 1. *See* discussion in [2], *below*.

(n2)Footnote 2. *Unemp. Ins. Code § 1094(a)*; *see Unemp. Ins. Code § 2111*.

(n3)Footnote 3. *Unemp. Ins. Code § 1094(b)*; *see* [2][a], [b], *below*, for discussion of *Unemp. Ins. Code § 1095* (permitting use of information for specified purposes by various state and county service agencies).

(n4)Footnote 4. *Unemp. Ins. Code § 1094(c)*.

(n5)Footnote 5. *See Unemp. Ins. Code § 13009* (definition).

(n6)Footnote 6. *See Unemp. Ins. Code § 13020*.

(n7)Footnote 7. *Unemp. Ins. Code § 1094(d); see Rev. & Tax Code § 19501 et seq.* (disclosure).

(n8)Footnote 8. *Unemp. Ins. Code § 1094(e).*

(n9)Footnote 9. *Unemp. Ins. Code § 1094(f).*

(n10)Footnote 10. *See Unemp. Ins. Code §§ 2111, 2122.*

(n11)Footnote 11. *See Unemp. Ins. Code § 2601 et seq.*

(n12)Footnote 12. *Unemp. Ins. Code § 2714.*

(n13)Footnote 13. *Unemp. Ins. Code § 2714.*

(n14)Footnote 14. *Unemp. Ins. Code § 2714.*

(n15)Footnote 15. *See Unemp. Ins. Code § 1095.*

(n16)Footnote 16. *Unemp. Ins. Code § 1095; see Unemp. Ins. Code § 1095(a)-(e)* (exceptions).

(n17)Footnote 17. *See Unemp. Ins. Code § 1095(b).*

(n18)Footnote 18. *See Unemp. Ins. Code § 1095(c).*

(n19)Footnote 19. *See Unemp. Ins. Code § 1095(d).*

(n20)Footnote 20. *See Unemp. Ins. Code § 1095(e).*

(n21)Footnote 21. *See Unemp. Ins. Code § 1095(a).*

(n22)Footnote 22. *Unemp. Ins. Code § 1095(f), (g); see also 42 U.S.C. § 503(d)* (mandatory disclosure by state unemployment compensation agency to appropriate federal or state agencies of certain confidential information in its records relating to individual's eligibility for benefits under supplemental nutrition assistance program).

(n23)Footnote 23. *Unemp. Ins. Code § 1095(h); see Welf. & Inst. Code § 10000 et seq.*

(n24)Footnote 24. *Unemp. Ins. Code § 1095(k); see Lab. Code §§ 200 et seq., 1720 et seq.*

(n25)Footnote 25. *Unemp. Ins. Code § 1095(m), (n).*

(n26)Footnote 26. *Unemp. Ins. Code § 1095(n).*

(n27)Footnote 27. *Unemp. Ins. Code § 1095(o).*

(n28)Footnote 28. *Unemp. Ins. Code § 1095(j).*

(n29)Footnote 29. *Unemp. Ins. Code § 1095(l).*

(n30)Footnote 30. *Unemp. Ins. Code § 1095(s); see Welf. & Inst. Code §§ 4775 et seq., 7200 et seq., 7500 et seq.*

(n31)Footnote 31. *Unemp. Ins. Code § 1095(p).*

(n32)Footnote 32. *Unemp. Ins. Code § 1095(q).*

(n33)Footnote 33. *Unemp. Ins. Code § 1095(r).*

(n34)Footnote 34. *Unemp. Ins. Code § 1095(v)*; see *Bus. & Prof. Code § 7068*.

(n35)Footnote 34.1. *Unemp. Ins. Code § 1095(w)*.

(n36)Footnote 34.2. *Unemp. Ins. Code § 1095(x)*. See *Lab. Code § Section 90.3*.

(n37)Footnote 34.3. *Unemp. Ins. Code § 1095(y)*. See *Educ. Code § 84754.5*.

(n38)Footnote 34.4. *Unempl Ins. Code § 1095(z)*.

(n39)Footnote 35. *Unemp. Ins. Code § 1095(t)*.

(n40)Footnote 36. See *42 U.S.C. § 503(d)*.

(n41)Footnote 37. See *42 U.S.C. § 503(e)*.

(n42)Footnote 38. See *Unemp. Ins. Code § 321*.

(n43)Footnote 39. See *Unemp. Ins. Code § 322*.

(n44)Footnote 40. *Unemp. Ins. Code § 1095(k)*.

(n45)Footnote 41. See *discussion under § 80.20[2A]*.

(n46)Footnote 42. See *Fam. Code §§ 17505, 17506*.

(n47)Footnote 43. See *Unemp. Ins. Code § 1088.5(f)(4)*.

(n48)Footnote 44. See *Unemp. Ins. Code § 1095(l)*; see also *42 U.S.C. § 651 et seq.*; *§ 80.20[2B]*.

(n49)Footnote 45. See *Unemp. Ins. Code § 1095(s)*.

(n50)Footnote 46. See *Penal Code § 830.1, 830.2* (definitions).

(n51)Footnote 47. See *Unemp. Ins. Code § 1095(i)*; see also *Unemp. Ins. Code § 2714* (disclosure of medical records).

(n52)Footnote 48. See *Unemp. Ins. Code § 1095(q)*.



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.10

AUTHOR: By Carol S. Sanders, J.D.

§ 80.10 Invalidity of Waiver or Assignment of Benefits

Any waiver by any person of any benefit or right under the Unemployment Insurance Code is invalid, and the benefits are not subject to assignment, release, or commutation, except as provided by *Unemployment Insurance Code Section 1255.7* (deduction of child support obligations from unemployment compensation benefits), *Unemployment Insurance Code Section 1345* (redirection of disability insurance voluntary plan benefits to cover cost of employee-paid benefits), and *Unemployment Insurance Code Section 2630* (deduction of child support obligations from state disability benefits).n1 Any agreement by any individual in the employ of any person or concern to pay all or any portion of the unemployment or disability compensation benefits required of the employer is void.n2

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 1342.*

(n2)Footnote 2. *See Unemp. Ins. Code § 1342.*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.11

AUTHOR: By Carol S. Sanders, J.D.

§ 80.11 Criminal Violations and Penalties

Violations of Chapter 10 of the Unemployment Insurance Code are punishable, with certain exceptions, by imprisonment in the county jail for up to one year, imprisonment in state prison, a fine of up to \$20,000, or by both a fine and imprisonment, at the discretion of the court.ⁿ¹ These violations, which may be charged as either misdemeanors or felonies,ⁿ² include:

1. False statements or representations or failure to disclose material facts, or use of a false name, false social security number, or other false identification, to obtain, increase, reduce, or defeat a benefit or payment;ⁿ³
2. False statements or representations or failure to disclose material facts to lower or avoid a required contribution or avoid becoming or remaining subject to the statutes governing unemployment and disability compensation benefits;ⁿ⁴
3. False statements or representations or failure to disclose material facts to obtain or increase benefits or payments under the unemployment insurance law of another state;ⁿ⁵
4. Making a greater deduction from a worker's wages than the contribution required for the purpose of paying any required contribution;ⁿ⁶
5. Failing to appear, testify, or produce documents required at any hearing;ⁿ⁷
6. Failing or neglecting to make required records available for inspection by the EDD or to furnish reports required by the director;ⁿ⁸
7. Conniving or conspiring to aid an individual to obtain benefits he or she is not entitled to by withholding information or failing to report relevant information;ⁿ⁹

4-80 California Employment Law § 80.11

8. Failing or refusing to make any contributions due;n10
9. Failing to register as an employing unit or to submit required returns and reports;n11
10. Failing to pay deductions withheld from workers' wages;n12
11. Agreeing to pay disability contributions for workers without deduction from the workers' wages but failing to do so;n13
12. Failing to withhold deductions and contributions in trust;n14
13. Disclosing confidential information;n15
14. Reporting or registering a fictitious employer, a fictitious employee, or fictitious wages;n16
15. Falsely reporting amounts of wages earned or the time period in which wages are earned;n17
16. Aiding in, procuring, counselling, advising, or coercing the preparation or presentation of a fraudulent return, reports, affidavit, claim, or other document;n18
17. Violating any statute or regulation governing unemployment or disability compensation benefits;n19 and
18. Failing to file any return or report or supply any information, making a false return, reports, or statement, or supplying false information, to evade any tax imposed by the Unemployment Insurance Code.n20

Willful failure to collect, account for, and pay over any amount required to be withheld, is a felony punishable by a fine of up to \$20,000, by imprisonment in the state prison, or by both the fine and imprisonment, at the discretion of the court.n21

Any person who, with or without intent to evade lawful requirements, fails to file a return, supply required information, makes a false or fraudulent return or statement, or supplies false information, is liable for a civil penalty and is also guilty of a misdemeanor (but not a felony), and may be either fined, imprisoned for not more than one year, or both fined and imprisoned, at the discretion of the court.n22

It is also unlawful to do any of the following:n23

1. Falsely certify the medical condition of any person to obtain disability insurance benefits, including family temporary disability insurance benefits,n24 whether for the maker or for any other person;
2. Knowingly present or cause to be presented any false or fraudulent written or oral statement supporting a claim for disability insurance benefits, including family temporary disability insurance benefits;
3. Knowingly solicit, receive, offer, pay, or accept any consideration, in the form of money or otherwise, as compensation or inducement for soliciting a claimant to apply for disability insurance benefits, including family temporary disability insurance benefits, unless the payment is lawful under *Business and Professions Code Section 650*; or

4. Knowingly assist, abet, solicit, or conspire with anyone engaging in any of the unlawful acts described in 1. through 3., above.ⁿ²⁵

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code* § 2122.

(n2)Footnote 2. *See People v. Booker* (1994) 21 Cal. App. 4th 1517, 1524, 26 Cal. Rptr. 2d 715 .

(n3)Footnote 3. *Unemp. Ins. Code* § 2101; *People v. Booker* (1994) 21 Cal. App. 4th 1517, 1523, 26 Cal. Rptr. 2d 715 (*Unemp. Ins. Code* § 2122, not *Unemp. Ins. Code* § 2117, is punishment statute for violations of *Unemp. Ins. Code* § 2101).

(n4)Footnote 4. *Unemp. Ins. Code* § 2101.5.

(n5)Footnote 5. *Unemp. Ins. Code* § 2102.

(n6)Footnote 6. *Unemp. Ins. Code* § 2103.

(n7)Footnote 7. *Unemp. Ins. Code* § 2104.

(n8)Footnote 8. *Unemp. Ins. Code* §§ 2105, 2106.

(n9)Footnote 9. *Unemp. Ins. Code* § 2107.

(n10)Footnote 10. *Unemp. Ins. Code* § 2108.

(n11)Footnote 11. *Unemp. Ins. Code* § 2109.

(n12)Footnote 12. *Unemp. Ins. Code* § 2110.

(n13)Footnote 13. *Unemp. Ins. Code* § 2110.3.

(n14)Footnote 14. *Unemp. Ins. Code* §§ 2110.5, 2110.7.

(n15)Footnote 15. *Unemp. Ins. Code* § 2111.

(n16)Footnote 16. *Unemp. Ins. Code* § 2114.

(n17)Footnote 17. *Unemp. Ins. Code* § 2115.

(n18)Footnote 18. *Unemp. Ins. Code* § 2121.

(n19)Footnote 19. *Unemp. Ins. Code* § 2112.

(n20)Footnote 20. *Unemp. Ins. Code* § 2117.5.

(n21)Footnote 21. *Unemp. Ins. Code* § 2118.5.

(n22)Footnote 22. *Unemp. Ins. Code* § 2117; *see People v. Booker* (1994) 21 Cal. App. 4th 1517, 1523, 26 Cal. Rptr. 2d 715 .

(n23)Footnote 23. *Unemp. Ins. Code* § 2116.

(n24)Footnote 24. For discussion of family temporary disability insurance benefits, *see* Ch. 8, § 8.23[5].

(n25)Footnote 25. *Unemp. Ins. Code* § 2116(d).



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.12

AUTHOR: By Carol S. Sanders, J.D.

§ 80.12 Self-Employment Assistance Program

[1] Purpose of Program

The traditional system of unemployment compensation is primarily designed to provide income support for individuals who are temporarily laid off or expect to be unemployed for a short time.ⁿ¹ Because increasing numbers of workers are losing their jobs permanently due to rapid technological change, elimination of trade barriers, and similar causes, they need more than the basic income support provided by unemployment compensation to reenter the workforce.ⁿ² Therefore, the Legislature has established a program of allowances, training, and support services, for eligible dislocated workers who wish to become self-employed in their transition back into the workforce.ⁿ³

This program, known as the "Self-Employment Assistance Program," (the program)ⁿ⁴ enables an unemployed individual to engage on a fulltime basis in self-employment activities that will lead to establishing a business and becoming self-employed, while receiving a weekly allowance that is equal to regular unemployment compensation benefits.ⁿ⁵

[2] Eligibility for Participation

To be eligible to participate in the program, an individual must meet the following requirements:

1. Be eligible to receive regular unemployment compensation benefits;ⁿ⁶
2. Have been identified pursuant to an automated profiling system as likely to exhaust regular unemployment compensation benefits;ⁿ⁷
3. Have been approved for participation by the EDD;ⁿ⁸
4. Participate in entrepreneurial training, business counseling, and technical assistance as required by the EDD;ⁿ⁹ and

5. Be engaged on a fulltime basis in activities related to establishing a business and becoming self-employed.ⁿ¹⁰

An individual is prohibited from participating in the program if his or her prior employer is the primary user of the services of the individual's new business.ⁿ¹¹ Employers may not coerce employees into participating in the program.ⁿ¹²

[3] Conditions for Receipt of Allowances

Allowances under the programⁿ¹³ are paid at the same interval, on the same terms, and subject to the same conditions as regular unemployment compensation benefits,ⁿ¹⁴ with the following exceptions:

1. The requirements regarding availability for work, active search for work, and refusal to accept work do not apply to any week that an individual is in training or engaged in self-employment activities.ⁿ¹⁵
2. Income earned by an individual while engaged in self-employment activities is not construed as wages and will not cause the individual's benefits (either regular unemployment compensation benefits or allowances paid under the program) to be denied or reduced.ⁿ¹⁶
3. An individual is disqualified for benefits for any week in which the individual fails to participate in required activities, including training, related to establishing a business and becoming self-employed.ⁿ¹⁷

[4] Effective Dates

The provisions establishing and governing the program apply to weeks beginning after the later of either January 1, 1995, or, if the program requires approval by the United States Department of Labor, the date of that approval.ⁿ¹⁸ These provisions terminate as of the week ending December 5, 1998.ⁿ¹⁹

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code § 1300.*

(n2)Footnote 2. *Unemp. Ins. Code § 1300.*

(n3)Footnote 3. *Unemp. Ins. Code § 1300.*

(n4)Footnote 4. *Unemp. Ins. Code § 1301(a).*

(n5)Footnote 5. *Unemp. Ins. Code §§ 1301(a), 1302.*

(n6)Footnote 6. *Unemp. Ins. Code § 1304(a).*

(n7)Footnote 7. *Unemp. Ins. Code § 1304(b).*

(n8)Footnote 8. *Unemp. Ins. Code § 1304(c).*

(n9)Footnote 9. *Unemp. Ins. Code § 1304(d).*

(n10)Footnote 10. *Unemp. Ins. Code § 1304(e).*

(n11)Footnote 11. *Unemp. Ins. Code § 1307.*

(n12)Footnote 12. *Unemp. Ins. Code § 1307.*

(n13)Footnote 13. *See Unemp. Ins. Code § 1302.*

(n14)Footnote 14. *Unemp. Ins. Code § 1303.*

(n15)Footnote 15. *Unemp. Ins. Code § 1303(a).*

(n16)Footnote 16. *Unemp. Ins. Code § 1303(b).*

(n17)Footnote 17. *Unemp. Ins. Code § 1303(c).*

(n18)Footnote 18. *Unemp. Ins. Code § 1308.*

(n19)Footnote 19. *Unemp. Ins. Code § 1308.*



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CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law § 80.13

AUTHOR: By Carol S. Sanders, J.D.

§ 80.13 Family Temporary Disability Insurance Benefits

Effective January 1, 2004,ⁿ¹ employees eligible to take family care leaveⁿ² under the federal Family Medical Leave Act (FMLA)ⁿ³ or the California Family Rights Act (CFRA),ⁿ⁴ to care for a seriously ill child,ⁿ⁵ spouse, parent,ⁿ⁶ or domestic partner,ⁿ⁷ or to bond with a new child, are eligible to receive up to six weeks of wage replacement benefits.ⁿ⁸

The Paid Family Care Leave Act applies to leave taken after July 1, 2004.ⁿ⁹ The benefits are paid through employee contributions to the disability insurance program.ⁿ¹⁰

Benefits begin after a seven-day waiting period.ⁿ¹¹ Family Temporary Disability Insurance (FTDI) leave must be taken concurrently with leave taken under the FMLA and the CFRA.ⁿ¹² As a condition of an employee's initial receipt of family temporary disability insurance benefits during any 12-month period in which the employee is eligible for the benefits, an employer may require an employee to take up to two weeks of earned but unused vacation leave before the employee's initial receipt of the benefits. If an employer requires the employee to take vacation leave, that portion of the vacation leave not exceeding one week will be applied to the required seven-day waiting period.ⁿ¹³

The weekly benefit amount is the amount provided in *Unemp. Ins. Code* § 2655.ⁿ¹⁴ The maximum amount payable to an individual during any disability benefit period for family temporary disability insurance is six times his or her weekly benefit amount. However, in no case can the total amount of benefits payable be more than the total wages paid to the individual during his or her disability base period.ⁿ¹⁵

An individual is not eligible for family temporary disability insurance benefits under the following circumstances:

- With respect to any day he or she received unemployment compensation benefits under *Unemp. Ins. Code* § 100 *et seq.* or under an unemployment compensation act of any other state or the federal government;ⁿ¹⁶
- With respect to any day of unemployment and disability for which he or she received or is entitled to

receive "other benefits" in the form of cash benefits as defined in *Unemp. Ins. Code* § 2629(b);n17

- With respect to any day he or she is entitled to receive state disability insurance benefits under *Unemp. Ins. Code* § 2601 *et seq.* or under a disability insurance act of any other state;n18 or
- With respect to any day another family member is able and available for the same period of time that the individual is providing the required care.n19

If an individual falsely certifies the medical condition of any person to obtain family temporary disability insurance benefits, with the intent to defraud, whether for the maker or for any other person, the director must assess a penalty against the individual in the amount of 25 percent of the benefits paid as a result of the false certification.n20

FOOTNOTES:

(n1)Footnote 1. *See* Stats. 2002, Ch. 901, § 7.

(n2)Footnote 2. *See Unemp. Ins. Code* § 3302(b) (defining "family care leave" as either (1) leave because of the birth of a child of the employee or the employee's domestic partner, the placement of a child with an employee in connection with the adoption or foster care of the child by the employee or domestic partner, or the serious health condition (per *Unemp. Ins. Code* § 3302(f)) as an illness, injury, impairment, or physical or mental condition involving inpatient care in hospital, hospice, or residential health care facility, or continuing treatment or continuing supervision by health care provider, (per *Gov. Code* § 12945.2) of a child of the employee, spouse or domestic partner; or (2) leave to care for a parent, spouse, or domestic partner who has a serious health condition).

(n3)Footnote 3. 29 *U.S.C.* § 2611 *et seq.*

(n4)Footnote 4. *Gov. Code* § 12945.2.

(n5)Footnote 5. *See Unemp. Ins. Code* § 3302(a) (defining "child" as biological, adopted, or foster son or daughter, stepson or stepdaughter, legal ward, son or daughter of a domestic partner, or son or daughter of an employee who stands in loco parentis to that child).

(n6)Footnote 6. *See Unemp. Ins. Code* § 3302(c) (defining "parent" as a biological, foster, or adoptive parent, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child).

(n7)Footnote 7. *See Unemp. Ins. Code* § 3302(d) ("domestic partner" has same meaning as defined in *Fam. Code* § 297).

(n8)Footnote 8. *Unemp. Ins. Code* § 3301(a), (d) (no more than six weeks of benefits can be paid within any 12-month period).

(n9)Footnote 9. Stats. 2002, ch. 901, § 7.

(n10)Footnote 10. *Unemp. Ins. Code* § 3301(a); *see Unemp. Ins. Code* § 984(a)(2)(B) (worker contributions to cover cost of family temporary disability insurance benefits).

(n11)Footnote 11. *Unemp. Ins. Code* § 3303(a).

(n12)Footnote 12. *Unemp. Ins. Code* § 3303(f).

(n13)Footnote 13. *Unemp. Ins. Code* § 3303(g).

(n14)Footnote 14. *Unemp. Ins. Code* § 3301(b); see § 80.66[1].

(n15)Footnote 15. *Unemp. Ins. Code* § 3301(c).

(n16)Footnote 16. *Unemp. Ins. Code* § 3303(b).

(n17)Footnote 17. *Unemp. Ins. Code* § 3303(c); see § 80.64[2].

(n18)Footnote 18. *Unemp. Ins. Code* § 3303(d); see § 80.60 et seq.

(n19)Footnote 19. *Unemp. Ins. Code* § 3303(e).

(n20)Footnote 20. *Unemp. Ins. Code* § 3305.



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CHAPTER 80 Unemployment and State Disability Insurance

Part A. OVERVIEW OF UNEMPLOYMENT INSURANCE LAW

4-80 California Employment Law §§ 80.14through 80.19

AUTHOR: By Carol S. Sanders, J.D.

[Reserved]

§§ 80.14[Reserved]



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part B. REPORTS, CONTRIBUTIONS, AND ASSESSMENTS

4-80 California Employment Law § 80.20

AUTHOR: By Carol S. Sanders, J.D.

§ 80.20 Reports & Registration

[1] Work Records

Every employing unit must keep an accurate work record of all workers and their status (employed, on layoff, or on leave of absence), the wages paid to each worker, and other matters specified in EDD regulations.ⁿ¹

[2] Filing Returns and Reports

Each employer must file with the director within the time required for payment of employer contributionsⁿ² a return and a report of wages paid to his or her workers in the form and containing the information prescribed by the Director of the EDD.ⁿ³ Domestic service employers can file their report of unemployment contributions by telephone.^{n3.1} Beginning January 1, 1997, for reports of wages for the 1997 calendar year and thereafter, the report of wages must include the full first name of the employee and the total wages^{n3.2} paid to each employee.^{n3.3}

The employer must also file with the director within the time required for payment of worker contributionsⁿ⁴ a return identifying the employer and its account number, stating the total amount of worker contributions due, and such other information as the director prescribes, in the form prescribed by the director.ⁿ⁵

Special procedures apply if the director determines that an employer reporting wages pursuant to *Unemployment Insurance Code Section 1088* or other applicable sections is not the correct employer of the employees whose wages are reported.ⁿ⁶

The penalty imposed for failure, without good cause, to file a required return and report of wages within a prescribed time is set forth in *Unemployment Insurance Code Section 1112.5*.

In addition to the returns and reports of wages and worker contributions, each employer must file with the director an annual reconciliation return showing the total amount of wages,^{n6.1} employer contributions,^{n6.2} and worker contributions,^{n6.3} as well as amounts withheld as California personal income tax,^{n6.4} and any other information

required by the director.^{n6.5} This return is due the first day of January following the close of the prior calendar year; it is delinquent if not filed by the last day of January.^{n6.6} The penalty for failure to file this return is set forth in *Unemployment Insurance Code Section 1117*.

The director may extend the time for filing the return and reports required by *Unemployment Insurance Code Section 1088*, described above, as well as the time for payment of worker contributions, if the governor has declared a state of emergency. Any extension applies only to employers prevented from filing or paying by the conditions giving rise to the state of emergency.^{n6.7}

[2A] New Employee Report

In addition to information reported in the return and report of wages,ⁿ⁷ effective July 1, 1998, employers are required to file with the EDD specified information on new employees.ⁿ⁸ The EDD is authorized to use the information obtained to administer the Unemployment Insurance Code, employment security and worker's compensation programs, locate individuals for purposes of establishing paternity and establishing, modifying, and enforcing child support obligations, provide information to the Franchise Tax Board for purposes of tax enforcement, and verify the eligibility of applicants for, and recipients of, specified federal public assistance programs.ⁿ⁹

Employers must report the hiring of any new employee who works in California and to whom the employer anticipates paying wages.ⁿ¹⁰

Specifically, employers are required to report:ⁿ¹¹

- The employee's name, address, and social security number;
- The employer's name, address, state employer identification number, if any, and federal taxpayer identification number; and
- The first date the employee worked.

Employers must submit their reports within 20 days of hiring any employee whom the employer is required to report, or, if the employers transmit their reports magnetically or electronically, by two monthly transmissions not less than 12 days or more than 16 days apart.ⁿ¹²

Employers may provide this information by submitting a copy of the employee's W-4 form, a form provided by the EDD, or any other hiring document transmitted by first-class mail, magnetically, or electronically.ⁿ¹³

The EDD may assess a fine for each failure to timely report the hiring of any employee, unless the failure is due to good cause.ⁿ¹⁴

[2B] Report of Payments of \$600 or More as Compensation for Services

Effective January 1, 2000, any service-recipient who is required to make an informational return to the Internal Revenue Service in accordance with *I.R.C. section 6041* (informational returns for payments to another person that equal or exceed \$600 made in the course of trade or business) must file with the EDD specified information on payments that equal or exceed \$600 in any year, or on contracts providing for such payments, made to a service-provider as compensation for services.^{n14.1}

"Service-recipient" means any individual, person, corporation, association, partnership, or agent thereof, doing business in California, deriving business income from sources within California, or in any manner in the course of a trade or

business subject to the laws of California.n14.2"Service-provider" means an individual who is not an employee of the service-recipient for California purposes and who receives compensation or executes a contract for services performed for that service-recipient within or outside California.n14.3

Specifically, service-recipients are required to report:n14.4

- The service-provider's full name and social security number.
- The service-recipient's name, business name, address, telephone number, federal and state employer identification numbers, social security number, or other identifying number as required by the EDD.
- The date the contract is executed, or if no contract, the date payments in the aggregate first equal or exceed \$600.
- The total dollar amount of the contract, if any, and the contract expiration date.

Service-recipients must submit their reports to the EDD within 20 days of the earlier of first making payments that in the aggregate equal or exceed \$600 in any year to a service-provider, or entering into a contract or contracts with a service-provider providing for payments that in the aggregate equal or exceed \$600 in any year.n14.5

This information may be released only for the purposes establishing, modifying, or enforcing child support obligations,n14.6 and for child support collection purposes,n14.7 or to the Franchise Tax Board for tax enforcement purposes and for administering the provisions of the Family Code.n14.8n15

[3] Statements and Notices Required of Employer

Employers must post and maintain certain notices regarding benefits in places readily accessible to all employees.n17.1 Employers with employees covered only for unemployment insurance must post a notice to employees (Form DE 1857D) informing employees of their rights to unemployment insurance.n17.2 Employers with employees covered only for disability insurance must post a notice to employees (Form DE 1858) informing employees of their rights to disability insurance.n17.3 Employers with employees covered for both unemployment and disability insurance must post a notice (Form 1857A Rev. 30 (9/94)) informing employees of their rights to both types of benefits.n17.4

Whenever an employer discharges, lays off, or places an employee on leave of absence, the employer must give the employee both of the following notices no later than the effective date of the employer's action:n17.5

1. A pamphlet ("For Your Benefit" Pamphlet DE 2320) informing employees of the California unemployment and disability insurance programs; and
2. Written notice regarding the change in the employee's status that contains at the minimum the employer's name, the employee's name, the employee's social security number, the date of the action, and whether the action was a discharge, a layoff, a leave of absence, or a change in status from employee to independent contractor.

Employers must provide every new employee with a pamphlet ("State Disability Insurance Provisions," DE 2515 Rev. 42 (1/92)) summarizing the disability insurance program. The employer must also give this pamphlet to every employee who becomes disabled due to pregnancy or who becomes ill, injured, or hospitalized due to causes unrelated to work.n17.6

EDD also publishes a notice to employees (Form DE 35) which advises employees of their employer's obligation to

send a copy of their W-4 forms to the IRS under the following circumstances: if the employee claims in excess of ten withholding exemptions; the employee claims to be exempt and the employer expects wages subject to withholding to exceed \$200 per week; the employee makes material alterations on the form; or, the employee admits that the information given on the W-4 is false. While the EDD states that this must be given to affected employees in its 1995 pamphlet entitled "California Employer's Guide 1995" (Form DE 44), there is no statute, regulation or case which requires this notice.

Employers must, pursuant to regulations, furnish an employee with a written statement showing the excess of the worker contributions required for tips included in the employee's federal income tax tip report^{n17.7} over the worker contributions withheld with respect to the employee's wages generally.^{n17.8} Employers must file a copy of the statement with the director of the EDD.^{n17.9} An employer that fails to furnish the statement is liable for the excess worker contributions.^{n17.10}

The representative of an insolvent or deceased employing unit must give notice within 30 days after assuming office of the identity of the employing unit and the representative, and such other information as required by the director of the EDD.ⁿ¹⁸

[4] Availability of Records to Director

The employer must provide a sworn statement of matters contained in records and authorization for disclosure of accounts kept within certain financial institutions, on demand of the director of the EDD, administrative law judge, or deputy.ⁿ¹⁹ The records must be open to inspection and subject to being copied by the director or his or her authorized representative at any time during the employing unit's business hours.ⁿ²⁰ Any claimant or his or her authorized representative at a hearing before a deputy or administrative law judge or the appeals board must be supplied with information from the records to the extent necessary for the proper presentation of the claim.ⁿ²¹ Failure to keep and furnish required records or reports necessary for proper disposition of a claim for benefits in any unemployment compensation or disability benefits proceeding will result in the conclusive presumption that the claimant is entitled to the maximum total amount of benefits payable, unless it is established by other evidence deemed sufficient by the director that a lesser total amount of benefits is properly due the claimant.ⁿ²²

For a discussion of the restrictions on the use of information, see § 80.09.

[5] Registration With EDD

Within 15 days after becoming an employer, an employing unit must register with the EDD on the prescribed form.ⁿ²³ Any employing unit that fails to register with the EDD because of intentional disregard or intent to evade *Unemployment Insurance Code* § 100 et seq. or authorized regulations is subject to a penalty of \$100 for each nonreported employee.ⁿ²⁴ This penalty is in addition to the penalty for failure to make a return.ⁿ²⁵ The number of unreported employees is the highest number of employees determined by the EDD to have been engaged by the employer during any single calendar quarter included in the assessment issued under *Unemployment Insurance Code* Section 1126 for failure to make a return.ⁿ²⁶

FOOTNOTES:

(n1)Footnote 1. See *Unemp. Ins. Code* § 1085; 22 Cal. Code Reg. §§ 1085-1-1085-2 (recordkeeping requirements); see also *Unemp. Ins. Code* § 1096 (appointment of agent by multiple employers to prepare and file records and reports).

(n2)Footnote 2. See *Unemp. Ins. Code* § 1110(a) (due and delinquent date of employer contributions).

(n3)Footnote 3. *Unemp. Ins. Code* § 1088(a)(1); see 22 Cal. Code Reg. § 1088-1(a); see also *Unemp. Ins. Code* § 1116 (final returns and report of wages when quitting business).

(n4)Footnote 3.1. *See Unemp. Ins. Code § 1118.*

(n5)Footnote 3.2. *See Unemp. Ins. Code § 13009* for definition of "wages."

(n6)Footnote 3.3. *Unemp. Ins. Code § 1088(a)(2).*

(n7)Footnote 4. *See Unemp. Ins. Code § 1110(b)* (time for payment of worker contributions).

(n8)Footnote 5. *Unemp. Ins. Code § 1088(b); 22 Cal. Code Reg. § 1088-1(b).*

(n9)Footnote 6. *See Unemp. Ins. Code § 1127.5.*

(n10)Footnote 6.1. *See Unemp. Ins. Code §§ 976, 976.6.*

(n11)Footnote 6.2. *See Unemp. Ins. Code §§ 976, 976.6.*

(n12)Footnote 6.3. *See Unemp. Ins. Code § 984.*

(n13)Footnote 6.4. *See Unemp. Ins. Code § 13020.*

(n14)Footnote 6.5. *Unemp. Ins. Code § 1088(e).*

(n15)Footnote 6.6. *Unemp. Ins. Code § 1088(e).*

(n16)Footnote 6.7. *Unemp. Ins. Code § 1111.5*

(n17)Footnote 7. *See Unemp. Ins. Code § 1088; see also [1], above.*

(n18)Footnote 8. *See Unemp. Ins. Code § 1088.5(a), (h); see Unemp. Ins. Code § 1088.5(g)* ("employer" includes labor union hiring hall).

(n19)Footnote 9. *Unemp. Ins. Code § 1088.5(f); see Welf. & Inst. Code § 11478.51* (exchange of information with Department of Social Services, Franchise Tax Board, and Parent Locator Service), discussed in § 80.09[2][c].

(n20)Footnote 10. *Unemp. Ins. Code § 1088.5(b); see Unemp. Ins. Code § 1088.5(c)* (exceptions for federal employees and for state employees performing intelligence and counterintelligence functions).

(n21)Footnote 11. *Unemp. Ins. Code § 1088.5(d)(4).*

(n22)Footnote 12. *Unemp. Ins. Code § 1088.5(d)(1), (2); see Unemp. Ins. Code § 1088.5(d)(3)* (rules for multi-state employers).

(n23)Footnote 13. *Unemp. Ins. Code § 1088.5(d)(5).*

(n24)Footnote 14. *Unemp. Ins. Code § 1088.5(e).*

(n25)Footnote 14.1. *See Unemp. Ins. Code § 1088.8(a).*

(n26)Footnote 14.2. *Unemp. Ins. Code § 1088.8(b)(1).*

(n27)Footnote 14.3. *Unemp. Ins. Code § 1088.8(b)(2).*

(n28)Footnote 14.4. *Unemp. Ins. Code § 1088.8(c).*

(n29)Footnote 14.5. *Unemp. Ins. Code § 1088.8(c).*

(n30)Footnote 14.6. *See Fam. Code § 17400.*

(n31)Footnote 14.7. *See Rev. & Tax Code § 19271 et seq.*

(n32)Footnote 14.8. *Unemp. Ins. Code § 1088.8(e).*

(n33)Footnote 15. [Reserved]

(n34)Footnote 17.1. *Unemp. Ins. Code § 1089; 22 Cal. Code Reg. § 1089-1(b), (c).*

(n35)Footnote 17.2. *Unemp. Ins. Code § 1089; 22 Cal. Code Reg. § 1089-1(b)(1), (c).*

(n36)Footnote 17.3. *Unemp. Ins. Code § 1089.*

(n37)Footnote 17.4. *Unemp. Ins. Code § 1089; 22 Cal. Code Reg. § 1089-1(b)(2), (c).*

(n38)Footnote 17.5. *Unemp. Ins. Code § 1089; 22 Cal. Code Reg. § 1089-1(b)(3), (d).*

(n39)Footnote 17.6. *Unemp. Ins. Code § 1089.*

(n40)Footnote 17.7. *See I.R.C. § 6053(a).*

(n41)Footnote 17.8. *Unemp. Ins. Code § 1088.6.*

(n42)Footnote 17.9. *Unemp. Ins. Code § 1088.6.*

(n43)Footnote 17.10. *Unemp. Ins. Code § 1088.6.*

(n44)Footnote 18. *See Unemp. Ins. Code § 1090.*

(n45)Footnote 19. *Unemp. Ins. Code § 1092.*

(n46)Footnote 20. *Unemp. Ins. Code § 1092.*

(n47)Footnote 21. *Unemp. Ins. Code § 1092.*

(n48)Footnote 22. *See Unemp. Ins. Code § 1093.*

(n49)Footnote 23. *Unemp. Ins. Code § 1086.*

(n50)Footnote 24. *Unemp. Ins. Code § 1126.1(a).*

(n51)Footnote 25. *Unemp. Ins. Code § 1126.1(a); see Unemp. Ins. Code § 1126; see discussion in § 80.22[2][a].*

(n52)Footnote 26. *Unemp. Ins. Code § 1126.1(b).*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part B. REPORTS, CONTRIBUTIONS, AND ASSESSMENTS

4-80 California Employment Law § 80.21

AUTHOR: By Carol S. Sanders, J.D.

§ 80.21 Employer Contributions to Unemployment Fund

[1] Generally

Employer contributions to the Unemployment Fundⁿ¹ accrue and become payable by every employer, except an employer for which services are performed that are included in "employment" solely for purposes of disability compensation,ⁿ² for each calendar year with respect to "wages" paid for "employment," as defined by the Unemployment Insurance Code.ⁿ³

Contributions to the Unemployment Fund must be paid by the employer; they may not be deducted in whole or in part from the wages of individuals in the employer's employ.ⁿ⁴ Most employers with a positive reserve account balance are also required to make contributions to the Employment Training Fund.ⁿ⁵

Specified entities that have elected to become employers for purposes of unemployment compensation coverageⁿ⁶ may elect, in lieu of the contributions generally required of employers, alternative methods of financing contributions to the Unemployment Fund.ⁿ⁷ Provisions governing such alternative financing are set forth in *Unemployment Insurance Code Sections 801-806*.

Except as provided in *Unemployment Insurance Code Section 976.5(b)*,ⁿ⁸ in addition to other contributions required, every employer, except one to which *Unemployment Insurance Code Section 976.5(c)* is applicable,ⁿ⁹ may submit a voluntary unemployment insurance contribution for the purpose of redetermining its unemployment insurance contribution rate.ⁿ¹⁰ No redetermination of a contribution rate will be made unless the voluntary contribution is submitted as required in *Unemployment Insurance Code Section 1110(c)*, and no redetermination will reduce an employer's unemployment insurance contribution rate by more than three rates as provided in *Unemployment Insurance Code Section 977*.ⁿ¹¹

[2] Contribution Rate

The employer's contribution rate is based on the ratio between the employer's net balance of its reserves¹² and his or

her average base payroll, as set forth in the contribution rate table under *Unemployment Insurance Code Section 977*.ⁿ¹³ Different contribution rate schedules apply, depending on the balance in the Unemployment Fund on September 30 of any calendar year.ⁿ¹⁴

[3] Wages as Basis of Contribution

[a] Included Remuneration

As used in the context of contributions and reports, except as discussed in [b], *below*, "wages" means all remuneration payable to an employee for personal services, whether by private agreement or consent or by force of statute, including commissions and bonuses, and the reasonable cash value of all remuneration payable to an employee in any medium other than cash.ⁿ¹⁵ Other included forms of remuneration are set forth in *Unemployment Insurance Code Sections 926.5* (remuneration by certain successor employers in motion picture, radio, and television industry for personal services to prior employer), *927* (certain tips), and *928.5* (employer contributions to certain deferred compensation plans).

[b] Excluded Remuneration

For purposes of determining the amount of employer contributions, any remuneration for employment paid to an individual in excess of \$7,000 in any calendar year is excluded from the definition of "wages."ⁿ¹⁶ Other specified forms of remuneration that are not included as wages are set forth under *Unemployment Insurance Code Sections 929* and *931-939*. Examples of excluded forms of remunerations are employee business expenses;ⁿ¹⁷ certain payments made under a plan or system established by employer to provide benefits for sickness or accident disability, medical or hospitalization expenses, or death;ⁿ¹⁸ and payments under certain trusts, annuity plans, pensions, or deferred compensation plans.ⁿ¹⁹ Certain of these exclusions are contingent on the existence of similar exclusions under the Federal Unemployment Tax Act.ⁿ²⁰

[4] Reserve Accounts

[a] Generally

The director of the EDD is required to maintain separate records of the amounts paid into the Unemployment Fund by each employer or chargeable to the employer as benefits paid.ⁿ²¹ These accounts are known as "reserve accounts." However, neither the employer nor his or her employees are granted prior claims or rights to the amount contributed by the employer to the Fund, either on his or her own behalf or on behalf of the employees; instead, the amounts in the Fund are pooled and are available for payment of benefits to any person who is entitled to them, regardless of the source of the funds.ⁿ²²

[b] Credits

The separate reserve account maintained for each employer is credited with all the contributions paid on the employer's behalf,ⁿ²³ and interest earned by the Unemployment Fund is credited to each positive reserve employer account in proportion to the amount the account bears to the total of all positive reserve accounts.ⁿ²⁴ Other items credited to each employer reserve account are set forth under *Unemployment Insurance Code Section 1026(d)*.

[c] Charges

Unemployment compensation benefits paid to an unemployed individual during any benefit year are charged against the separate account of the individual's employer during his or her base period.ⁿ²⁵ If the unemployed individual was employed by more than one employer during his or her base period, unemployment compensation benefits paid to the individual are charged against the respective reserve accounts of the employers in the proportion that the individual's

total wages paid by each employer bears to the individual's total wages paid in employment for all employers during the base period.ⁿ²⁶

If it is ruled that the claimant was disqualified from receiving unemployment benefits for voluntarily leaving employment without good cause or being discharged for misconduct, or for other specified reasons, benefits paid to the claimant subsequent to the termination of employment due to the disqualifying reasons may not be charged to the account of the employer, except as provided in Section 1026 relating to multiple employers during the employee's base period, unless the employer failed to furnish required information to the EDD within the prescribed time limits.ⁿ²⁷ For a discussion of disqualifications from receiving unemployment compensation benefits, see §§ 80.35, 80.36. If an employee leaves the employer's employ to take a better job and is then terminated from that position, any benefits to which he or she is entitled are not chargeable to the first employer's account.^{n27.1}

Other items charged to each employer reserve account are set forth under *Unemployment Insurance Code Section 1026(e)*.

[d] Annual Statements of Account

At least once each year, the director must furnish each employer with an itemized statement of the charges to the reserve account, and a statement of the reserve account showing the credits and charges, the net balance of the reserve account, and the contribution rate for the applicable rating period.ⁿ²⁸

[e] Protest of Charges

Except as to corrections of charges made by the director,ⁿ²⁹ the contribution rate and other items shown on the statement of charges or account are final unless a protest is filed.ⁿ³⁰

Procedures for filing a written protest on any item shown on the account are set forth in *Unemployment Insurance Code Section 1034*.^{n30.1} The director of the EDD must give notice of his or her action on the protest.ⁿ³¹ The employer must pay the contribution at the rate shown in the statement while the protest is pending, and if the rate is reduced, the amount of overpayment must be promptly credited or refunded.ⁿ³²

The employer may not protest a charge to its reserve account on the grounds that a claimant was ineligible for unemployment benefits unless the employer filed a timely appeal regarding the benefit claim.ⁿ³³ For discussion of procedures regarding benefit claims, see § 80.39.

[f] Transfer of Reserve Accounts

If an employing unit acquires the organization, trade, or business of another employer (or substantially all of the assets or a distinct and severable portion of the assets of another employer), and continues the organization, trade, or business (or a distinct and severable portion thereof) without substantial reduction of personnel, the acquiring employer may apply for transfer of the acquired employer's reserve account within 90 days of the acquisition.ⁿ³⁴ The EDD is required to give notice of a denied application,ⁿ³⁵ and the applicant may seek review of the denial.ⁿ³⁶ For discussion of review procedures, see § 80.24.

[5] Civil Action to Prevent Collection Prohibited

No injunction, writ of mandate, or other legal or equitable process may issue in any suit, action, or proceeding in any court against the state or any state officer to prevent or enjoin the collection of any contribution sought to be collected under the provisions of the Unemployment Insurance Code.ⁿ³⁷

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 1521.*

(n2)Footnote 2. *See Unemp. Ins. Code §§ 676, 2606* ("employment" for purposes of disability compensation provisions); *see also Unemp. Ins. Code § 702.6*, discussed in § 80.07[1][d].

(n3)Footnote 3. *See Unemp. Ins. Code § 976; see also Unemp. Ins. Code §§ 1110* (due and delinquent dates of contribution), 1111 (extensions of time for payment), 1112 (penalties for nonpayment), 1113 (interest on delinquent contributions), 1115 (collection of contributions jeopardized by insolvency or substantial delinquency). For discussion of what constitutes employment, *see § 80.06*. For discussion of what constitutes wages, *see [3], below*.

(n4)Footnote 4. *See Unemp. Ins. Code § 976.*

(n5)Footnote 5. *See Unemp. Ins. Code §§ 976.6, 976.8*. Note that *Unemp. Ins. Code § 976.6* is repealed by its own terms on January 1, 2002, unless the Legislature extends or repeals this date before January 1, 2002.

(n6)Footnote 6. *See discussion in § 80.07[1][d].*

(n7)Footnote 7. *See Unemp. Ins. Code §§ 801* (nonprofit organizations), 802 (state or other public entities), 803(a) (other elective employers who qualify for elective financing under *Unemp. Ins. Code §§ 701-713*); *see also Unemp. Ins. Code § 805* (election of reimbursement financing by unregistered nonprofit organization).

(n8)Footnote 8. This refers to calendar years in which contribution rate schedules E and F in *Unemp. Ins. Code § 977* are in effect, or calendar years to which the emergency solvency surcharge provided in *Unemp. Ins. Code § 977.5* is in effect.

(n9)Footnote 9. *Unemp. Ins. Code § 976.5(c)* applies to an employer (1) not eligible for a contribution rate other than that provided in *Unemp. Ins. Code § 982*; or (2) with a negative reserve account balance on the computation date; or (3) who was notified prior to September 1 of any unpaid amount owed to the EDD that is not the subject of a timely petition for reassessment pending before the Appeals Board on September 30 preceding the year to which a contribution rate is applicable.

(n10)Footnote 10. *Unemp. Ins. Code § 976.5(a).*

(n11)Footnote 11. *Unemp. Ins. Code § 976.5(a).*

(n12)Footnote 12. *See discussion of employer reserve accounts in [4], below.*

(n13)Footnote 13. *See Unemp. Ins. Code § 977(a).*

(n14)Footnote 14. *See Unemp. Ins. Code § 977(b)(1)-(7); see also Unemp. Ins. Code §§ 977.5* (contributions payable at emergency solvency surcharge rate if Unemployment Fund falls below specified percentage of subject wages), 980 (exclusions in determining Unemployment Fund balance), 980.5 (inclusions in determining Unemployment Fund balance), 982 (qualifications for reduced contribution rate).

(n15)Footnote 15. *Unemp. Ins. Code § 926.*

(n16)Footnote 16. *See Unemp. Ins. Code § 930; see also Unemp. Ins. Code §§ 930.I, 930.5* (certain types of remuneration to be included in determining whether \$7,000 limit has been exceeded).

(n17)Footnote 17. *See Unemp. Ins. Code § 929.*

(n18)Footnote 18. *See Unemp. Ins. Code §§ 931, 933, 938.*

(n19)Footnote 19. *See Unemp. Ins. Code § 934.*

(n20)Footnote 20. *See Unemp. Ins. Code § 939; see also 26 U.S.C. § 3306(b)* (exclusions from definition of "wages" under Federal Unemployment Tax Act).

(n21)Footnote 21. *Unemp. Ins. Code § 1025.*

(n22)Footnote 22. *See Unemp. Ins. Code § 1025.*

(n23)Footnote 23. *See Unemp. Ins. Code § 1026(a).*

(n24)Footnote 24. *Unemp. Ins. Code § 1026(c).*

(n25)Footnote 25. *Unemp. Ins. Code § 1026(b).* For discussion of the "base period," *see § 80.31[3].*

(n26)Footnote 26. *See Unemp. Ins. Code § 1026(b).*

(n27)Footnote 27. *See Unemp. Ins. Code § 1032; see also Unemp. Ins. Code §§ 1030* (employer's right to notify department of reason for claimant's leaving), 1256 (disqualification for voluntary quitting without good cause or discharge for misconduct). *See also § 80.39.*

(n28)Footnote 27.1. *See Unemp. Ins. Code § 1032.*

(n29)Footnote 28. *Unemp. Ins. Code § 1033.*

(n30)Footnote 29. *See Unemp. Ins. Code § 1036.*

(n31)Footnote 30. *See Unemp. Ins. Code § 1034; 22 Cal. Code Reg. § 1034-1.*

(n32)Footnote 30.1. *Unemp. Ins. Code § 1034; R L. Management Co. v. Nagel (1997) 58 Cal. App. 4th 1285, 1290-1292, 68 Cal. Rptr. 2d 801* (Section 1034's provision that employer's contribution rate is final unless challenged within 120 days of mailing (unless EDD on own initiative makes adjustment before expiration of rating period) is applicable statute of limitations rather than general three-year statute of limitations (*see Unemp. Ins. Code § 1178*)).

(n33)Footnote 31. *See Unemp. Ins. Code § 1035; see also Unemp. Ins. Code § 1036* (notice of correction of errors).

(n34)Footnote 32. *See Unemp. Ins. Code § 1037.*

(n35)Footnote 33. *See Unemp. Ins. Code § 1034.*

(n36)Footnote 34. *See Unemp. Ins. Code §§ 1051-1060.*

(n37)Footnote 35. *See Unemp. Ins. Code § 1055.*

(n38)Footnote 36. *See Unemp. Ins. Code § 1222.*

(n39)Footnote 37. *Unemp. Ins. Code § 1851; see Cal. Const., art. XIII, § 32; see also Lorco Properties Inc. v. Department of Benefit Payments (1976) 57 Cal. App. 3d 809, 815, 129 Cal. Rptr. 312 .*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part B. REPORTS, CONTRIBUTIONS, AND ASSESSMENTS

4-80 California Employment Law § 80.22

AUTHOR: By Carol S. Sanders, J.D.

§ 80.22 Assessments

[1] When Assessments May Be Made

Assessments of the amount of contributions due from an employing unit may be made by the EDD when an employer fails to make a return or report at all,ⁿ¹ or makes an unsatisfactory return or report.ⁿ²

[2] Penalties and Interest

[a] Penalties for Failure to File or Filing Deficient Return or Report

A ten-percent penalty, based on the assessed amount of contributions due, is added if a return or report was not made,ⁿ³ or if a deficient return or report was due to negligence or intentional disregard of the return requirements.ⁿ⁴ For purposes of this penalty, "negligence" is defined as the failure to exercise the degree of care that a reasonably prudent person would exercise in similar circumstances in the performance or observance of a duty.^{n4.1} The failure to act may, but need not, be caused by carelessness or oversight.^{n4.2}

Negligence includes, but is not limited to, an employer's failure to (1) maintain accurate and complete records of wages paid, taxes withheld, and taxes paid; (2) maintain records substantiating deductions from wages; (3) maintain records substantiating a claim that unreported payments to employees are loan repayments; (4) determine whether an individual is an employee or an independent contractor; or (5) seek a ruling from the EDD if an individual's status as employee or independent contractor is questionable.^{n4.3}

"Intentional disregard" means purposely or deliberately paying little or no attention to requirements.^{n4.4} It includes, but is not limited to, (1) failure to report wages merely because it constitutes nuisance bookkeeping; (2) reporting employees under FICA but not under the California Unemployment Insurance Code merely because the employees have only a remote possibility of obtaining benefits; (3) failure to seek a ruling on a worker's status as employee or independent contractor or to report the worker as an employee after being advised by an accountant to do so; (4) failure to report an employee's wages after being informed by the EDD that the worker is indeed an employee; or (5) failure to report an

employee by an employer who should have been aware or was aware of reporting requirements.n4.5

[b] Penalties Involving Fraud

If an employing unit's failure to timely make a return or any part of an assessed deficiency is due to fraud or an intent to evade the return requirements, a penalty of 50 percent of the amount of contributions assessed must be added to the assessment.n5 This penalty is in addition to any penalties for failure to make a return or filing a deficient return.n5.1

An additional penalty of 50 percent of the amount of contributions assessed must be added to any assessment that includes the penalty for fraud or intent to evade, if an employer paid wages and failed to provide required information returns.n5.2 This penalty is in addition to any penalties for failure to make a return or filing a deficient return.n5.3

Any individual or business entity found to have exchanged money on behalf of an employer to conceal the payment of wages and thereby avoid the payment of unemployment or disability contributions is assessed the unpaid contributions or taxes.n5.4 This penalty applies only when there is evidence that the party that exchanged the money knew that the employer intended to use the cash proceeds from the exchange to conceal the payment of wages and avoid required contributions.n5.5 An individual who is assessed liability under Unemployment Code section 1128.1 is personally liable for that charge.n5.6 If a business entity is assessed this liability, any officer, major stockholder, or other person having charge of the affairs of the business shall be personally liable.n5.7 The liability extends to the contributions, withholdings penalties and interest due and unpaid by the employer, other than those penalties assessed under Unemployment Code section 1128.n5.8

[c] Interest

The amount of each assessment bears interest at the rate and by the method established by *Revenue and Taxation Code Section 19521* from a specified date after the month or quarter for which the contributions were due until the date of payment.n6

[2A] Number of Assessments and Offsets

One or more assessments may be made for the amount due for one or for more than one period and overpayments may be offset against underpayments.n7 Thus, the EDD may make a single assessment for multiple reporting periods, and full payment of the assessment is a precondition to further administrative or judicial review.n8

[3] Notice

The director must give to the employing unit against whom an assessment is made a written notice of the assessment pursuant to the service requirements set forth in *Unemployment Insurance Code Section 1206*.n9

[4] When Assessments Become Final and Delinquent

An assessment other than a jeopardy assessmentn10 becomes delinquent if it is not paid on or before the date it becomes final.n11 A penalty of 10 percent of the amount of the delinquent assessment exclusive of interest and penalties is added.n12n13

An assessment becomes final within 30 days of service of notice of the assessment, unless a petition for reassessment is filed within that time, or within an additional period granted by an administrative law judge.n14 If a petition for reassessment is filed, an assessment becomes final at the expiration of 30 days following an administrative law judge's decision, or at the expiration of an additional period granted by the appeals board, if an appeal is not filed within that time.n15 If an appeal to the appeals board has been made, the assessment becomes final 30 days after the petitioner has been served notice of the order or decision.n16 However, if a decision of the administrative law judge or the appeals

board requires an adjustment of an assessment by granting a portion of a petition or by increasing an assessment, the assessment is final 30 days after the director of the EDD serves on the petitioner a statement of amounts due setting forth the adjusted liability.ⁿ¹⁷

[5] Jeopardy Assessment

Special procedures apply when the director of the EDD finds that the collection of any contributions will be jeopardized by delay.ⁿ¹⁸ The amount of a jeopardy assessment is immediately delinquent, and penalties apply if payment is not made, or security for payment is not provided, within 30 days of service of a jeopardy assessment.ⁿ¹⁹ Procedures for petitioning for a reassessment of a jeopardy assessment are set forth in *Unemployment Insurance Code Section 1221*.

[6] Cancellation of Erroneous Assessments

An erroneous assessment or a portion of it may be cancelled by the director of the EDD when no petition for reassessment has been filed.ⁿ²⁰ If a petition for reassessment has been filed, the assessment may be cancelled if made prior to the mailing of a decision of the administrative law judge,ⁿ²¹ or, if an order or decision of an administrative law judge or of the Appeals Board has been issued on any grounds not on the merits, the cancellation may be made if it is approved by the Appeals Board.ⁿ²²

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 1126*.

(n2)Footnote 2. *See Unemp. Ins. Code § 1127*.

(n3)Footnote 3. *See Unemp. Ins. Code § 1126*.

(n4)Footnote 4. *See Unemp. Ins. Code § 1127*.

(n5)Footnote 4.1. 22 Cal. Code Reg. § 1127-1(a).

(n6)Footnote 4.2. 22 Cal. Code Reg. § 1127-1(a).

(n7)Footnote 4.3. 22 Cal. Code Reg. § 1127-1(a)(1)-(5).

(n8)Footnote 4.4. 22 Cal. Code Reg. § 1127-1(b).

(n9)Footnote 4.5. 22 Cal. Code Reg. § 1127-1(b)(1)-(5).

(n10)Footnote 5. *Unemp. Ins. Code § 1128(a)*.

(n11)Footnote 5.1. *Unemp. Ins. Code § 1128(a); see Unemp. Ins. Code §§ 1126, 1127; see also* discussion in [a], *above*.

(n12)Footnote 5.2. *Unemp. Ins. Code § 1128(b); Unemp. Ins. Code § 13050* (withholding of California personal income tax).

(n13)Footnote 5.3. *Unemp. Ins. Code § 1128(b); see Unemp. Ins. Code §§ 1126, 1127; see also* discussion in [a], *above*.

(n14)Footnote 5.4. *See Unemp. Ins. Code § 1128.1(a)*.

(n15)Footnote 5.5. *See Unemp. Ins. Code § 1128.1(c)*.

(n16)Footnote 5.6. *See Unemp. Ins. Code § 1735.1(a).*

(n17)Footnote 5.7. *See Unemp. Ins. Code § 1735.1(a).*

(n18)Footnote 5.8. *See Unemp. Ins. Code § 1735.1(a).*

(n19)Footnote 6. *See Unemp. Ins. Code § 1129.*

(n20)Footnote 7. *Unemp. Ins. Code § 1130.*

(n21)Footnote 8. *Masi v. Nagle (1992) 5 Cal. App. 4th 608, 613, 7 Cal. Rptr. 2d 423 ; see discussion in § 80.23[1][b].*

(n22)Footnote 9. *See Unemp. Ins. Code § 1131; see also Unemp. Ins. Code § 1132 (time for serving notice).*

(n23)Footnote 10. For discussion of jeopardy assessments, *see [5], below.*

(n24)Footnote 11. *See Unemp. Ins. Code § 1135.*

(n25)Footnote 12. *See Unemp. Ins. Code § 1135.*

(n26)Footnote 13. [Reserved]

(n27)Footnote 14. *See Unemp. Ins. Code § 1222.*

(n28)Footnote 15. *See Unemp. Ins. Code § 1224(a)(1).*

(n29)Footnote 16. *See Unemp. Ins. Code § 1224(b).*

(n30)Footnote 17. *Unemp. Ins. Code § 1224(a)(2), (b).*

(n31)Footnote 18. *See Unemp. Ins. Code § 1137(a); see also Unemp. Ins. Code §§ 1137.1 (findings on which jeopardy assessment may be made).*

(n32)Footnote 19. *See Unemp. Ins. Code § 1137(a), (b).*

(n33)Footnote 20. *See Unemp. Ins. Code § 1136(a).*

(n34)Footnote 21. *See Unemp. Ins. Code § 1136(b).*

(n35)Footnote 22. *See Unemp. Ins. Code § 1136(c).*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part B. REPORTS, CONTRIBUTIONS, AND ASSESSMENTS

4-80 California Employment Law § 80.23

AUTHOR: By Carol S. Sanders, J.D.

§ 80.23 Refunds and Overpayments

[1] Claims for Credit or Refund of Overpayment

[a] Generally

The director of the EDD is required to make credits or refunds of erroneously or illegally collected contributions.ⁿ¹ Claims for credit or refund must be filed with the director for any overpayment within one of the following time periods, whichever expires later:ⁿ²

1. Within three years from the last day of the calendar month following the close of the calendar quarter for which the overpayment was made;
2. Six months after an assessment made under *Unemployment Insurance Code Sections 1126-1142* becomes final;ⁿ³ or
3. 60 days from the date of overpayment.

Failure to file a claim within the prescribed time limits results in a waiver of any demand against the state or the director for the overpayment.ⁿ⁴ However, the director may make a refund or allow credits on his or her own initiative prior to the expiration of those time periods, even if no claim is filed.ⁿ⁵ Every claim for refund or credit must be in writing and must state the specific grounds on which the claim is founded.ⁿ⁶

No refund of employer contributions paid pursuant to *Unemployment Insurance Code Section 976.5*ⁿ⁷ can be made unless the payment is made by an employer described in *Unemployment Insurance Code Section 976.5(c)* (voluntary contributions), or the amount paid is less than or exceeds the amount needed to change the employer's contribution rate.^{n7.1}

[a.1] Payment Is Precondition to Claim for Refund

Following a final decision denying a petition for reassessment, a claim for refund may be made on payment of the amount of the assessment.^{n7.2} Payment of the amount of assessment, including interest and penalties, is a precondition to further administrative or judicial review.^{n7.3}

The requirement that the taxpayer pay the assessment can create a "Catch-22" situation for the taxpayer when his or her financial situation requires that the taxpayer pay an assessment in installments rather than a lump sum. This situation occurs because an administrative refund claim must be filed within certain time limits after an alleged overpayment,^{n7.4} and the failure to bring action within the time specified following denial of the refund claim constitutes a waiver of any demand on account of alleged overpayments.^{n7.5} Thus, the taxpayer may encounter the following dilemma: if the taxpayer files a claim for refund when each payment is made, the claim will be dismissed as premature; but if the taxpayer waits until the entire tax is paid, the claim for refund of the first installment payments will be dismissed as too late.^{n7.6}

Presumably, a financially strapped taxpayer may negotiate a partial payment plan with a stipulation by the EDD to toll the statute of limitations and there may be sound equitable and practical reasons for the EDD to accept partial payments.^{n7.7} Nevertheless, assuming the EDD would not agree to accept partial payments in exchange for a stipulation to toll the statute of limitations, because payment of assessments as a precondition to review is a statutory requirement, even a severe financial hardship would not permit judicial intervention.^{n7.8}

[b] Deemed Claims Following Payment of Challenged Assessments

Payment of the assessed amount prior to a decision at the petition, administrative law judge, or appeals board level will constitute deemed claims for refund, and the assessment proceeding will automatically become a review proceeding arising from the deemed denial of the claim.ⁿ⁸

[2] Denial of Claim

The director must give notice to the claimant whenever he or she denies a claim for refund or credit in whole or in part.ⁿ⁹ If the director fails to serve notice within 60 days after a claim is filed, the claim may be considered denied by the claimant.ⁿ¹⁰

If the claim is denied, review may be sought.ⁿ¹¹ Failure to seek review within the prescribed time limits results in a waiver of any demand on account of the overpayment.ⁿ¹² For a discussion of administrative review procedures, see § 80.24.

[3] Reversal of Erroneous Denial

Erroneous denial of a claim for refund or credit, including a claim deemed made and denied,ⁿ¹³ may be reversed by the director prior to expiration of the period within which a petition for review of denial of the claim may be filed,ⁿ¹⁴ or, if petition for review of denial of the claim has already been filed or deemed filed, prior to the mailing of a decision by the administrative law judge.ⁿ¹⁵ For a discussion of administrative review procedures, see § 80.24.

[4] Recovery of Erroneous Refund

Erroneously made refunds must be assessed and recovered by the director.ⁿ¹⁶ The usual procedures regarding assessments apply to assessments of erroneous refunds.ⁿ¹⁷ For a discussion of assessment procedures, see § 80.22.

FOOTNOTES:

(n1)Footnote 1. See *Unemp. Ins. Code* §§ 1177, 1178(b).

(n2)Footnote 2. *Unemp. Ins. Code § 1178(a), (b).*

(n3)Footnote 3. *See discussion in § 80.22[4], [5].*

(n4)Footnote 4. *Unemp. Ins. Code § 1179(a).*

(n5)Footnote 5. *Unemp. Ins. Code § 1178(b).*

(n6)Footnote 6. *See Unemp. Ins. Code § 1179.*

(n7)Footnote 7. *See discussion in § 80.21[1].*

(n8)Footnote 7.1. *Unemp. Ins. Code § 1178(e).*

(n9)Footnote 7.2. *See Unemp. Ins. Code § 1178(d).*

(n10)Footnote 7.3. *Masi v. Nagle (1992) 5 Cal. App. 4th 608, 613, 7 Cal. Rptr. 2d 423 .*

(n11)Footnote 7.4. *See Unemp. Ins. Code § 1178(b); see also [a], above.*

(n12)Footnote 7.5. *Unemp. Ins. Code § 1241(a).*

(n13)Footnote 7.6. *See Masi v. Nagle (1992) 5 Cal. App. 4th 608, 615, 7 Cal. Rptr. 2d 423 .*

(n14)Footnote 7.7. *See Masi v. Nagle (1992) 5 Cal. App. 4th 608, 615, 7 Cal. Rptr. 2d 423* (installment plan may in some cases offer best prospect for taxing authority to collect full amount without putting taxpayer out of business).

(N15)Footnote 7.8. *See Masi v. Nagle (1992) 5 Cal. App. 4th 608, 615, 7 Cal. Rptr. 2d 423* (citing *Modern Barber Co. v. Cal. Emp. Stab. Com. (1948) 31 Cal. 2d 720, 730, 192 P.2d 916*).

(n16)Footnote 8. *See Unemp. Ins. Code § 1179.5(a), (b).*

(n17)Footnote 9. *See Unemp. Ins. Code § 1180; see also Unemp. Ins. Code § 1206* (service of notice requirements).

(n18)Footnote 10. *See Unemp. Ins. Code § 1222.*

(n19)Footnote 11. *See Unemp. Ins. Code § 1222.*

(n20)Footnote 12. *See Unemp. Ins. Code § 1179(b), (c); see Unemp. Ins. Code §§ 1222* (time for filing petition for review by administrative law judge), *1224* (time for filing appeal with Unemployment Insurance Appeals Board).

(n21)Footnote 13. *See [1][b], above* for discussion of deemed claims.

(n22)Footnote 14. *See Unemp. Ins. Code § 1180.5(a)(1).*

(n23)Footnote 15. *See Unemp. Ins. Code § 1180.5(a)(2).*

(n24)Footnote 16. *See Unemp. Ins. Code § 1184.*

(n25)Footnote 17. *See Unemp. Ins. Code § 1184.*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part B. REPORTS, CONTRIBUTIONS, AND ASSESSMENTS

4-80 California Employment Law § 80.24

AUTHOR: By Carol S. Sanders, J.D.

§ 80.24 Administrative Appellate Review

[1] Subjects and Levels of Appellate Review

There are two levels of administrative appellate review of (1) the denial of a protest of charges to an employer's reserve account,ⁿ¹ (2) a notice of denial of an application for transfer of a reserve account,ⁿ² (3) a notice of assessment,ⁿ³ (3) the denial of a claim for refund or credit,ⁿ⁴ and (4) any notice under specified code sections made or given by the Director of Employment Development.ⁿ⁵ The first level consists of a review by an administrative law judge,ⁿ⁶ and the second consists of a review by the Unemployment Insurance Appeals Board.ⁿ⁷

For a full discussion of administrative appellate procedures, see Part E (§§ 80.80-80.88).

[2] Review by Administrative Law Judge

[a] Review Other Than of Jeopardy Assessments

Within 30 days of service of a notice of assessment (other than a jeopardy assessment), a denial of a claim for refund or credit, or other specified notices under the Unemployment Insurance Code, or within an additional 30 days if granted by the administrative law judge, a petition for review or reassessment may be filed with an administrative law judge.ⁿ⁸

If a petition for review or reassessment is properly filed, an administrative law judge must review the matter, and, if requested by the petitioner, must grant a hearing.ⁿ⁹

[b] Review of Jeopardy Assessment

A petition for reassessment of a jeopardy assessment must be filed within 10 working days after notice of jeopardy assessment.ⁿ¹⁰ The director may require a deposit of security to stay collection activities while the petition is being reviewed.ⁿ¹¹ On review, the administrative law judge holds a preliminary hearing to determine the reasonableness and validity of levying a jeopardy assessment.ⁿ¹²

If the administrative law judge or the board decides that a jeopardy assessment should not have been levied, the assessment automatically becomes, and has the effect of, an assessment on failure to make a return pursuant to *Unemployment Insurance Code section 1126* or a deficiency assessment pursuant to *Unemployment Insurance Code section 1127*, whichever is applicable.ⁿ¹³ For a discussion of assessments, *see* § 80.22.

If the administrative law judge or the board decides that the assessment was properly levied, this decision must be incorporated in any decision rendered following the hearing.ⁿ¹⁴ All other issues raised by a petition for reassessment including, but not limited to, the appropriateness of the amount assessed, must be determined at a hearing scheduled and held pursuant to *Unemployment Insurance Code sections 1223* and *1224*.ⁿ¹⁵

[3] Review by Unemployment Insurance Appeals Board

[a] Filing Appeal

Within 30 days after service of notice of the administrative law judge's decision, the petitioner or director may file an appeal with the Unemployment Insurance Appeals Board.ⁿ¹⁶ For good cause, the Board may extend the appeal period.ⁿ¹⁷ If the administrative law judge fails to serve notice of the decision on a petition for review of the denial of a claim for refund of credit within 60 days after the petition is filed, the petitioner may consider the petition denied and file the appeal.ⁿ¹⁸

[b] Effect of Failure to File Appeal

If an appeal is not filed within the time required, the decision of the administrative law judge on the petition is final in every case at the expiration of the period.ⁿ¹⁹

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 1034; see also* discussion in § 80.21[4][e].

(n2)Footnote 2. *See Unemp. Ins. Code § 1055; see also* discussion in § 80.21[4][f].

(n3)Footnote 3. *See Unemp. Ins. Code §§ 1221* (notice of jeopardy assessment), *1222* (notice of assessment); *see also* discussion in § 80.22.

(n4)Footnote 4. *See Unemp. Ins. Code §§ 1180, 1222; see also* discussion in § 80.23[2].

(n5)Footnote 5. *See Unemp. Ins. Code § 1222*.

(n6)Footnote 6. *See* discussion under [2], *below*.

(n7)Footnote 7. *See* discussion under [3], *below*.

(n8)Footnote 8. *See Unemp. Ins. Code § 1222; see also* 22 *Cal. Code Reg. § 5008* (form and substance of petition).

(n9)Footnote 9. *See Unemp. Ins. Code § 1223*.

(n10)Footnote 10. *Unemp. Ins. Code § 1221(a)*.

(n11)Footnote 11. *See Unemp. Ins. Code § 1137(b)*. A failure to deposit such security does not, however, affect the employer's appeal rights. *see Unemp. Ins. Code § 1137(b)*.

(n12)Footnote 12. *See Unemp. Ins. Code § 1221(b), (c)*.

(n13)Footnote 13. *See Unemp. Ins. Code § 1221(c).*

(n14)Footnote 14. *See Unemp. Ins. Code § 1221(c).*

(n15)Footnote 15. *See Unemp. Ins. Code § 1221(d).*

(n16)Footnote 16. *Unemp. Ins. Code § 1224(a).*

(n17)Footnote 17. *Unemp. Ins. Code § 1224(a).*

(n18)Footnote 18. *See Unemp. Ins. Code § 1224(a); see also 22 Cal. Code Reg. § 5008* (form and substance of appeal).

(n19)Footnote 19. *See Unemp. Ins. Code § 1224(a)(1).*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part B. REPORTS, CONTRIBUTIONS, AND ASSESSMENTS

4-80 California Employment Law § 80.25

AUTHOR: By Carol S. Sanders, J.D.

§ 80.25 Judicial Review

[1] Generally

A decision of the Unemployment Insurance Appeals Board is final, except for such action as may be taken by a judicial tribunal as permitted or required by law.ⁿ¹ If a request for review may be taken, the appeals board must attach to its decision an explanation of the party's right to seek review.ⁿ²

For a full discussion of judicial review procedures, see Part F (§§ 80.100-80.102).

[2] Actions Challenging Denial of Claim for Refund or Credit

No suit or proceeding may be maintained in any court for the recovery of contributions, interest, or penalties alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been filed.ⁿ³ For a discussion of claims for refund or credit, see § 80.23[1].

An action against the director of the EDD challenging the denial of a claim for refund or credit must be brought within 90 days after service of the Unemployment Insurance Appeals Board's notice of decision, or an extended period not exceeding two years granted by the director on written request.ⁿ⁴ The action may be brought in a court of competent jurisdiction in the County of Sacramento (or in any city or city and county in which the Attorney General has an office)ⁿ⁵ for the recovery of the whole or any part of the amount with respect to which the claim has been denied.ⁿ⁶ Failure to bring an action within the specified time period constitutes a waiver of any demand against the state on account of alleged overpayments.ⁿ⁷ If the Unemployment Insurance Appeals Board fails to serve notice of its decision on the appeal within 90 days after an appeal is filed, the claimant may consider the claim denied and may bring an action against the director.ⁿ⁸

If judgment is rendered for the plaintiff, the judgment amount must be first credited on any contributions, interest, and penalties due from the plaintiff, and the balance refunded to the plaintiff.ⁿ⁹

[3] Other Actions

With specified exceptions, discussed below, a party's right to seek judicial review from a decision of the Unemployment Insurance Appeals Board must be exercised not later than six months after the date of the board's decision or the date on which the decision is designated as a precedent decision, whichever is later.ⁿ¹⁰

In the case of Appeals Board decisions involving a protest of charges under *Unemployment Insurance Code section 1034*ⁿ¹¹ or an application for transfer of reserve account under *Unemployment Insurance Code sections 1051-1055*,ⁿ¹² proceedings for judicial review must be brought within 90 days after service of the Appeals Board's notice of decision, or an extended period not exceeding two years granted by the director of the EDD on written request.ⁿ¹³

Special filing and other procedures apply to a suit to challenge a decision of the Appeals Board denying an exemption as a church or religious organization.ⁿ¹⁴

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code § 410*.

(n2)Footnote 2. *Unemp. Ins. Code § 410*.

(n3)Footnote 3. *Unemp. Ins. Code § 1241(a)*.

(n4)Footnote 4. *See Unemp. Ins. Code § 1241(a)*.

(n5)Footnote 5. *See Code Civ. Proc. § 401*.

(n6)Footnote 6. *Unemp. Ins. Code § 1241(a)*.

(n7)Footnote 7. *Unemp. Ins. Code § 1241(a)*.

(n8)Footnote 8. *See Unemp. Ins. Code § 1241(a)*.

(n9)Footnote 9. *Unemp. Ins. Code § 1242*.

(n10)Footnote 10. *Unemp. Ins. Code § 410*. For discussion of precedent decisions, see § 80.85[2].

(n11)Footnote 11. *See § 80.21[4][e]* for discussion of protests.

(n12)Footnote 12. *See § 80.21[4][f]* for discussion of transfers of reserve accounts.

(n13)Footnote 13. *See Unemp. Ins. Code § 1243*.

(n14)Footnote 14. *See Unemp. Ins. Code § 1241(b), (c)*.



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part B. REPORTS, CONTRIBUTIONS, AND ASSESSMENTS

4-80 California Employment Law §§ 80.26through 80.29

AUTHOR: By Carol S. Sanders, J.D.

[Reserved]

§§ 80.26[Reserved]



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.30

AUTHOR: By Carol S. Sanders, J.D.

§ 80.30 "Unemployment" as Basis for Benefits

[1] Definition of "Unemployed" Individual

To qualify for unemployment benefits, an individual must be "unemployed" as that term is defined in the Unemployment Insurance Code.ⁿ¹ An individual is "unemployed" in any week during which he or she meets *any* of the following conditions:ⁿ²

1. The individual performs no services and with respect to which no wages are payable to him or her;ⁿ³
2. The individual worked less than full time, if the wages payable to the individual with respect to the week, when reduced by \$25 or 25 percent of the wages payable, whichever is greater, do not equal or exceed the individual's weekly benefit amount;
3. The individual would, except for the requirement of a one-week waiting period of unemployment,ⁿ⁴ be eligible for benefits under *Unemployment Insurance Code Section 1253.5* (partial benefits for unemployed individual who becomes unable to work due to physical or mental illness or injury);ⁿ⁵
4. The individual performs full-time work for five days as a juror, or as a witness under subpoena; or
5. The individual works less than his or her normal weekly hours of work for the individual's regular employer under a work-sharing plan adopted by the employer to reduce employment in lieu of layoffs.^{n5.1}

For benefit purposes, "week" means seven consecutive days commencing at 12:01 a.m. Sunday and ending 12 midnight the following Saturday.ⁿ⁶

[2] Distinctions Between Total Unemployment and Partial Unemployment

As required by statute,ⁿ⁷ EDD regulations distinguish between procedures applicable to partially and totally unemployed individuals.ⁿ⁸

A partially unemployed individual is a person who during a week (1) was employed by a regular employer, (2) worked less than his or her normal customary full-time hours for his or her regular employer because of lack of full-time work, and (3) was continuously attached to his or her regular employer in that no severance of the employer-employee relationship occurred.ⁿ⁹ Notwithstanding this definition, a person who receives benefits under *Unemployment Insurance Code Section 1279.5* (relating to shared work) during a benefit year may not receive benefits as a partially unemployed person with respect to any week in that benefit year while in an employment status with the regular employer who initiated the shared work program.ⁿ¹⁰ Moreover, a person may not claim benefits as a partially unemployed individual if the EDD determines that the individual has been laid off for a period in excess of two consecutive weeks.ⁿ¹¹

Special provisions govern partially and totally unemployed commercial fishermen.ⁿ¹²

[3] "Wages" for Purposes of Defining "Unemployed"

Unemployment Insurance Code Section 1252(a)(1) defines an individual as "unemployed" in any week during which the individual performs no services and with respect to which "no wages are payable to him or her."ⁿ¹³ For this purpose only, "wages" includes any and all compensation for personal services whether performed as an employee, an independent contractor, a juror, or a witness, but does not include any payment received by a member of the National Guard or reserve component of the armed forces for inactive duty training, annual training, or emergency state active duty.ⁿ¹⁴ For discussion of whether certain benefit payments made by employers constitute "wages" for this purpose, see § 80.37.

To constitute "payable" wages, the wages must be "payable at once," and the employer must be under an unequivocal and present obligation to pay wages to the employee pursuant to the contract of hire.ⁿ¹⁵

FOOTNOTES:

(n1)Footnote 1. See *Unemp. Ins. Code §§ 1251, 1253*.

(n2)Footnote 2. *Unemp. Ins. Code §§ 1252(a), 1279.5(a)*.

(n3)Footnote 3. See [3], *below*, for discussion of what constitutes "wages" for purposes of definition of "unemployed" individual.

(n4)Footnote 4. See *Unemp. Ins. Code § 1253(d)*; see also *discussion under § 80.32[1]* (conditions of eligibility).

(n5)Footnote 5. See *discussion under § 80.33[3]*.

(n6)Footnote 5.1. See *22 Cal. Code Reg. §§ 1279.5-1-1279.5-10* regarding work sharing plans.

(n7)Footnote 6. See *22 Cal. Code Reg. § 1253-1*; see also *Unemp. Ins. Code § 143* ("week" means period of seven consecutive days as prescribed by authorized regulation).

(n8)Footnote 7. See *Unemp. Ins. Code § 1252(b)*.

(n9)Footnote 8. See *22 Cal. Code Reg. § 1252-1* (partially employed individuals).

(n10)Footnote 9. See *22 Cal. Code Reg. § 1252-1(a)*; see also *22 Cal. Code Reg. § 1326-7* (employer's responsibility to give partially unemployed workers notice of reduced earnings on prescribed form).

(n11)Footnote 10. *See* 22 Cal. Code Reg. § 1252-1(b)(1).

(n12)Footnote 11. *See* 22 Cal. Code Reg. § 1252-1(b)(2).

(n13)Footnote 12. *See Unemp. Ins. Code* §§ 1252.1, 1252.2; 22 Cal. Code Reg. §§ 1252.1-1, 1252.2-1.

(n14)Footnote 13. *See* [1], *above*.

(n15)Footnote 14. *Unemp. Ins. Code* § 1252(c).

(n16)Footnote 15. *See Carlsen v. Unemp. Ins. Appeals Bd.* (1976) 64 Cal. App. 3d 577, 586, 134 Cal. Rptr. 581 (no wages payable to claimant who was laid off as carpenter, because corporation he formed was not under obligation to pay for his services as president and had never done so for over 9 years).



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.31

AUTHOR: By Carol S. Sanders, J.D.

§ 80.31 Minimum Earnings Requirement

[1] Requirement

An otherwise eligible individual cannot establish a valid claim or a "benefit year"ⁿ¹ during which benefits are payable for new claims unless during his or her "base period"ⁿ² the individual has met one of the following conditions:ⁿ³

1. He or she has been paid wages for employment by employers of not less than \$1,300 during the quarter of the base period in which his or her wages were the highest; or
2. He or she has been paid wages for employment by employers of not less than \$900 during the quarter of the base period in which his or her wages were the highest, *and* has been paid wages for employment by employers during the entire base period equal to 1.25 times the amount he or she was paid during the quarter in which his or her wages were the highest.

The definitions of the terms "employment" and "employer" for this purpose are discussed in §§ 80.06-80.07. For definition of the term "wages," see discussion in § 80.21[3]. For purposes of the minimum earnings requirement (as well as computation of benefit amounts), "wages" also includes wages that are due to an individual but that are not paid within the time limit provided by law.ⁿ⁴

If the base period of a new claim includes wages that were paid before the effective date of, and not used in the computation of an award for, a previous valid claim, the new claim is valid only if, during the 52-week period beginning with the effective date of the previous valid claim, either (1) the individual earned or was paid sufficient wages to meet the eligibility requirements set forth in paragraphs 1. and 2., *above*, and performed some work;ⁿ⁵ or (2) he or she did not receive unemployment compensation benefits, was disabled, and was entitled to receive disability benefits pursuant to *Unemployment Insurance Code Section 2601 et seq.*, *Labor Code Section 3201 et seq.*, any workers' compensation law, any employer's liability law, or the disability insurance law of any other state or of the federal government.ⁿ⁶

If an individual has a subsequent new claim and the previous valid claim was filed under *Unemployment Insurance Code 1275(b)*,ⁿ⁷ the new claim is valid only if, during the 52-week period beginning with the effective date of the previous claim, either of the following applies:ⁿ⁸

(1) The individual earned or was paid sufficient wages to meet eligibility requirementsⁿ⁹ and performed some work.ⁿ¹⁰

(2) The individual did not receive unemployment benefits and was disabled and was entitled to receive disability benefits under Unemployment Code § 2601 *et seq.* or *Labor Code § 3200 et seq.*, under any workers' compensation law, under employer's liability law, or under any disability insurance law of any other state or the federal government.

For purposes of a subsequent new claim, "wages" includes all compensation for personal services performed as an employee for the purpose of meeting the eligibility requirements of *Unemployment Insurance Code § 1281(a)*.ⁿ¹¹

In determining whether a new claimⁿ¹² or a subsequent new claimⁿ¹³ is valid, the following amounts are considered "wages" for purposes of determining whether the employee has met the minimum earnings requirements:ⁿ¹⁴

1. Twice the amount that the individual was entitled to receive during the 52-week period under the state disability insurance provisions;
2. Twice the amount that the individual was entitled to receive during the 52-week period under the workers' compensation provisions of the Labor Code; and
3. Twice the amount that the individual was entitled to receive during the 52-week period under any workers' compensation law, employer's liability law, or disability insurance law of any other state or of the federal government.

[2] "Benefit Year" Defined

A "benefit year" with respect to any individual means the 52-week period beginning with the first day of the week for which the individual first files a valid claim for benefits, and thereafter the 52-week period beginning with the week for which the individual again files a valid claim after termination of his or her last preceding benefit year.ⁿ¹⁵ Wages used in determining benefits payable to an individual during any benefit year may not be used in determining that individual's benefits in any subsequent benefit year.ⁿ¹⁶

[3] "Base Period" Defined

Both the minimum earnings requirement and the computation of benefit awards are based on wages paid during the "base period."ⁿ¹⁷ The "base period" refers to a specified period of four calendar quarters ending prior to the beginning of the benefit year,ⁿ¹⁸ as follows:ⁿ¹⁹

1. For benefit years beginning in October, November, or December, the base period is the four calendar quarters ending in the next preceding month of June.
2. For benefit years beginning in January, February, or March, the base period is the four calendar quarters ending in the next preceding month of September.
3. For benefit years beginning in April, May, or June, the base period is the four calendar quarters ending

in the next preceding month of December.

4. For benefit years beginning in July, August, or September, the base period is the four calendar quarters ending in the next preceding month of March.

For any new claim filed on or after April 3, 2011,ⁿ²⁰ if an individual cannot establish a claim under *Unemployment Insurance Code* § 1275(a), "base period" means the following:ⁿ²¹

(1) For benefit years beginning in October, November, or December, the four calendar quarters ended in the next preceding month of September.

(2) For benefit years beginning in January, February, or March, the four calendar quarters ended in the next preceding month of December.

(3) For benefit years beginning in April, May, or June, the four calendar quarters ended in the next preceding month of March.

(4) For benefit years beginning in July, August, or September, the four calendar quarters ended in the next preceding month of June.

The quarter with the highest wages will be used to determine the individual's weekly benefit amount.ⁿ²² Wages used in the determination of benefits payable to an individual during any benefit year may not be used in determining that individual's benefits in any subsequent benefit year.ⁿ²³

[4] "Perform Some Work" Defined

A valid new claim under *Unemp. Ins. Code* § 1277(a) or *Unemp. Ins. Code* § 1277.1(a) requires that in addition to satisfying wage requirements,ⁿ²⁴ the claimant must perform some work.ⁿ²⁵ The plain meaning of "perform some work" is to furnish services. In *Molnar* the court noted that the legislative history of the statute manifested an intent to conform the statute to federal law, which required both wage and work components; the court also pointed out that the most recent amendment supports this conclusion by establishing a narrow exception to the work requirement for persons who become disabled after filing a claim.ⁿ²⁶ Seeking employment is not equivalent to performing work.ⁿ²⁷ Further, the court distinguished work (the rendering of services) from salary continuation (benefit imparted without regard to the rendering of services). An involuntarily terminated employee is not working if he or she actually performs no work, regardless of whether or not the employee elects to receive a salary continuance plan rather than a lump sum severance package.ⁿ²⁸

FOOTNOTES:

(n1)Footnote 1. *See* [2], *below*.

(n2)Footnote 2. *See* [3], *below*.

(n3)Footnote 3. *Unemp. Ins. Code* § 1281(a)(3) (applicable to new claims filed with an effective date beginning on or after January 1, 1992).

(n4)Footnote 4. *Unemp. Ins. Code* § 1281(d). For discussion of time limits for payment of wages, *see* ch. 4.

(n5)Footnote 5. *See* [4], *below*.

(n6)Footnote 6. *See Unemp. Ins. Code* § 1277.

(n7)Footnote 7. *See* [3], *below*.

(n8)Footnote 8. *Unemp. Ins. Code* § 1277.1.

(n9)Footnote 9. *See Unemp. Ins. Code* § 1281(a).

(n10)Footnote 10. For discussion of "perform some work," *see* [4], *below*.

(n11)Footnote 11. *Unemp. Ins. Code* § 1277.1(b).

(n12)Footnote 12. *See Unemp. Ins. Code* § 1277.

(n13)Footnote 13. *See Unemp. Ins. Code* § 1277.1.

(n14)Footnote 14. *See Unemp. Ins. Code* § 1277.5. These benefits are not, however, considered "wages" for purposes of computing benefit amounts. *see Unemp. Ins. Code* § 1277.5.

(n15)Footnote 15. *Unemp. Ins. Code* § 1276.

(n16)Footnote 16. *Unemp. Ins. Code* § 1275(a).

(n17)Footnote 17. *See Unemp. Ins. Code* §§ 1275, 1280, 1281.

(n18)Footnote 18. *See* [2], *above*.

(n19)Footnote 19. *Unemp. Ins. Code* § 1275(a).

(n20)Footnote 20. Earlier if the EDD implements the technical changes necessary to establish claims under the alternate base period, as specified in *Unemployment Insurance Code* § 1275(c).

(n21)Footnote 21. *Unemp. Ins. Code* § 1275(b).

(n22)Footnote 22. *See Unemp. Ins. Code* § 1280.

(n23)Footnote 23. *Unemp. Ins. Code* § 1275(b).

(n24)Footnote 24. *See* [1], *above*.

(n25)Footnote 25. *Unemp. Ins. Code* §§ 1277(a), 1277.1(a); *Molnar v. Unemployment Ins. Appeals Bd.* (1997) 57 Cal. App. 4th 1448, 1450, 67 Cal. Rptr. 2d 771 (*Unemp. Ins. Code* § 1277(a) (new claims) clearly and unambiguously requires that employee perform some work).

(n26)Footnote 26. *Molnar v. Unemployment Ins. Appeals Bd.* (1997) 57 Cal. App. 4th 1448, 1451, 1453, 67 Cal. Rptr. 2d 771 .

(n27)Footnote 27. *Molnar v. Unemployment Ins. Appeals Bd.* (1997) 57 Cal. App. 4th 1448, 1451-1452, 67 Cal. Rptr. 2d 771 (plaintiff's reliance on *Funk v. Sperry Corp.* (9th Cir. 1988) 842 F.2d 1129 misplaced; *Funk* determined nothing more than that employer satisfied contractual obligation to employee by advising employee that his primary obligation during last several months of employment was to seek other employment).

(n28)Footnote 28. *Molnar v. Unemployment Ins. Appeals Bd.* (1997) 57 Cal. App. 4th 1448, 1450-1453, 67 Cal. Rptr. 2d 771 (back pay cases are irrelevant in new claim context; back pay cases consider compensation for past work periods in which pay would have been earned but for employer's wrongful actions; issue before court related to payments intended to mitigate against future loss of income).



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.32

AUTHOR: By Carol S. Sanders, J.D.

§ 80.32 Conditions of Eligibility

[1] Generally

Unemployment Insurance Code Section 1253 provides that an unemployed individualⁿ¹ is eligible to receive unemployment compensation benefits with respect to any week only if the director of the EDD finds that the following are true:

1. A claim for benefits with respect to that week has been made in accordance with authorized regulations;ⁿ²
2. The individual has registered for work and thereafter continued to report at a public employment office or such other place as the director may approve;ⁿ³
3. The individual was able to work and available for work for that week;ⁿ⁴
4. The individual has been unemployed for a waiting period of one week as defined in *Unemployment Insurance Code Section 1254*, unless the waiting period has been waived pursuant to *Government Code Section 8571*;ⁿ⁵
5. The individual conducted a search for suitable work in accordance with specific and reasonable instructions of a public employment office;ⁿ⁶ and
6. The individual has participated as required in reemployment activities.^{n6.1}

[2] Availability for Work

[a] Generally

"Availability for work" within the meaning of *Unemployment Insurance Code Section 1253(c)* requires that claimants be willing to accept suitable work that they have no good cause for refusing, and that they make themselves available to a substantial field of employment.ⁿ⁷ If the claimant shows good cause for restricting his or her labor market, the burden shifts to the EDD to prove unavailability to a substantial field of employment.ⁿ⁸

Availability for work includes being legally, as well as physically, available to accept employment.^{n8.1} Therefore, an alien who has no work authorization from the federal Immigration and Naturalization Service (INS) is not available for work as required by *Unemployment Insurance Code Section 1253(c)*, and the EDD may deny benefits on this basis.^{n8.2} An alien's eligibility for benefits generally under *Unemployment Insurance Code Section 1264*, which restricts benefits to aliens based on their status at the time that previous services were performed, is not relevant to the determination of whether an alien is legally available for work at the time he or she applies for benefits.^{n8.3}

The requirement that the claimant be "available for work" is distinct from the requirement that the claimant conduct a search for suitable work.ⁿ⁹ "Availability" reflects a concern not as to the search for work but as to the restrictions the claimant imposes on the work that he or she will accept.ⁿ¹⁰

[b] Good Cause for Unavailability

Situations in which good cause for refusing work has been found include unavailability to work on weekends because of parenting responsibilities;ⁿ¹¹ unavailability to work on certain days because of religious observance;ⁿ¹² return by migrant workers to their homes in Texas when seasonal work ended and workers were unable to secure other employment or affordable housing in California;ⁿ¹³ declining a suitable civil service position when applicant had conscientious objections to loyalty oath required;ⁿ¹⁴ and refusal by a law student seeking part-time employment of work that would conflict with her school requirements.ⁿ¹⁵

[c] Partial Availability

Ordinarily, the individual must be able to work and available for work for the entire week in order to be eligible for that week.ⁿ¹⁶ However, an otherwise eligible individual who is unavailable for part of the week due to physical or mental illness or injury must be paid proportionate benefits for the days in that week during which he or she is available for work and able to work.ⁿ¹⁷ If an individual is unavailable to work for part of a week due to observance of religious holidays, constitutional considerations mandate that the individual not be denied benefits for the entire week, and that benefits be apportioned on a daily, rather than on a weekly basis.ⁿ¹⁸

[3] Search for Suitable Work

[a] Duty of Claimant and Department

To be eligible for unemployment compensation benefits, the individual must conduct a search for suitable work in accordance with specific and reasonable instructions of a public employment office.ⁿ¹⁹ The claimant must adopt a course of action reasonably designed to result in his or her prompt employment in suitable work, considering the customary methods of obtaining work and the current condition of the labor market.ⁿ²⁰ When the EDD is better situated than the claimant to know customary methods of obtaining work and the current condition of the labor market, the claimant may rely on its advice or that of another state agency to which the EDD has referred the claimant.ⁿ²¹ Thus, an applicant for benefits fulfills his or her duty to seek work if he or she follows with reasonable diligence the specific and reasonable seek-work instructions of a public employment office.ⁿ²²

[b] What Constitutes "Suitable Work"

"Suitable work" means work in the individual's usual occupation for which he or she is reasonably fitted, regardless of whether or not it constitutes "employment" for purposes of applicability of the Unemployment Insurance Code.ⁿ²³

In determining whether the work is work for which the individual is reasonably fitted, the director must consider the degree of risk involved to the individual's health, safety, and morals; physical fitness; prior training, experience, and earnings; length of unemployment; prospects for securing local work in his or her customary occupation; the distance of the available work from the individual's residence; and such other factors as would influence a reasonably prudent person in the individual's circumstances.ⁿ²⁴

[c] Unsuitable Work

"Suitable" employment does not include employment with an employer who does not:ⁿ²⁵

1. Possess an appropriate state license to engage in his or her business, trade, or profession; or
2. Withhold or hold in trust the employee contributions required by the unemployment compensation disability benefits provisions and does not transmit all such employee contributions to the department for the Disability Fund as required by *Unemployment Insurance Code Section 986*;ⁿ²⁶ or
3. Carry either workers' compensation insurance or possess a certificate of self-insurance as required by the workers' compensation provisions of the Labor Code.ⁿ²⁷

[d] Refusal to Accept Unsuitable Work

Benefits may not be denied to an otherwise eligible and qualified individual who refuses to accept unsuitable employment as defined in *Unemployment Insurance Code Section 1258.5*.ⁿ²⁸ In addition, no work or employment may be deemed suitable and benefits may not be denied to any otherwise eligible and qualified individual for refusing new work under any of the following conditions:

1. If the position offered is vacant due directly to a strike, lockout, or other labor dispute;ⁿ²⁹ or
2. If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;ⁿ³⁰ or
3. If, as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.ⁿ³¹

[4] Requirement of One-Week Waiting Period

To be eligible for unemployment benefits for a given week, an individual must have been unemployed for a waiting period of one week as defined in *Unemployment Insurance Code Section 1254*, unless the Governor has waived the waiting period because of war or a state of emergency, pursuant to *Government Code Section 8571*.ⁿ³² For this purpose, no week may be counted as a week of unemployment unless it occurs within the benefit yearⁿ³³ that includes the week with respect to which the individual claims payment of unemployment compensation benefits.ⁿ³⁴ However, this requirement may not interrupt the payment of those benefits for consecutive weeks of unemployment.ⁿ³⁵ The week immediately preceding a benefit year, if part of one uninterrupted period of unemployment that continues into the benefit year is deemed, for the purposes of the *Unemployment Insurance Code Section 1254* only, to be within that benefit year as well as within the preceding benefit year.ⁿ³⁶

■ ILLUSTRATION

Claimant first becomes unemployed on January 1 and remains unemployed for the remainder of the month. On January 12, Claimant files a claim for unemployment compensation benefits for the week of January 8, thereby commencing a benefit year. The week of January 1 will count as Claimant's waiting

period under *Unemployment Insurance Code Section 1254* for purposes of claiming benefits for the week of January 8 and subsequent consecutive weeks of unemployment.

A week is also not counted as a "week of unemployment" for purposes of the waiting-period requirement if unemployment compensation benefits have been paid with respect to that week.ⁿ³⁷ Finally, to be counted as a "week of unemployment," the individual must have been eligible for unemployment compensation benefits with respect to that week in all respects, except for the requirement of *Unemployment Insurance Code Sections 1253(d)* (requirement of unemployment for waiting period of one week) and 1281 (minimum earnings requirement).ⁿ³⁸

[5] Participation in Reemployment Activities

To be eligible for unemployment benefits for a given week, an individual must have participated as required in reemployment activities, such as orientation and assessment, if the individual has been identified by an automated profiling system as likely to exhaust regular unemployment benefits.ⁿ³⁹ This requirement does not apply to any individual who has shown good cause for failure to participate.ⁿ⁴⁰

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 80.30[1].

(n2)Footnote 2. *See* 22 Cal. Code Reg. §§ 1253(a)-1; 1326-1-13 (claims filing procedures for unemployment compensation benefits); *see also* discussion in §§ 80.38, 80.39.

(n3)Footnote 3. *See also* 22 Cal. Code Reg. § 1253(b)-1 (except for partial claims, claimant must report in person absent good cause or unless EDD determines that there is little likelihood of jobs being listed with EDD and that EDD's efforts would be unproductive).

(n4)Footnote 4. *See* 22 Cal. Code Reg. § 1253(c)-2; *see also* discussion in [2], *below*.

(n5)Footnote 5. *See* [4], *below*.

(n6)Footnote 6. *See* discussion in [3], *below*.

(n7)Footnote 6.1. *See* discussion in [5], *below*.

(n8)Footnote 7. *See Sanchez v. Unemployment Ins. Appeals Bd.* (1977) 20 Cal. 3d 55, 67, 141 Cal. Rptr. 146, 569 P.2d 740 ; *Rios v. Employment Development Dept.* (1986) 187 Cal. App. 3d 489, 493, 231 Cal. Rptr. 732 ; *cf. Unemp. Ins. Code § 1257(b)* (refusal without good cause of suitable work offered to eligible claimant as basis for disqualification); *see* § 80.36[1][b] for discussion of disqualification for refusing to accept suitable work.

(n9)Footnote 8. *See Sanchez v. Unemployment Ins. Appeals Bd.* (1977) 20 Cal. 3d 55, 70-71, 141 Cal. Rptr. 146, 569 P.2d 740 ; *Rios v. Employment Development Dept.* (1986) 187 Cal. App. 3d 489, 494, 231 Cal. Rptr. 732 .

(n10)Footnote 8.1. *Gutierrez v. Employment Development Dept.* (1993) 14 Cal. App. 4th 1791, 1799, 18 Cal. Rptr. 2d 705 ; *see also Alonso v. State of California* (1975) 50 Cal. App. 3d 242, 249-250, 123 Cal. Rptr. 536 .

(n11)Footnote 8.2. *Gutierrez v. Employment Development Dept.* (1993) 14 Cal. App. 4th 1791, 1799, 18 Cal. Rptr. 2d 705 ; *see also Alonso v. State of California* (1975) 50 Cal. App. 3d 242, 249-250, 123 Cal. Rptr. 536 .

(n12)Footnote 8.3. *Gutierrez v. Employment Development Dept.* (1993) 14 Cal. App. 4th 1791, 1799, 18 Cal. Rptr. 2d 705 ; *see also Alonso v. State of California* (1975) 50 Cal. App. 3d 242, 249-250, 123 Cal. Rptr. 536 . For discussion of the eligibility of aliens generally, *see* § 80.34[1].

(n13)Footnote 9. *See Unemp. Ins. Code § 1253(e); see also* discussion in [3], below.

(n14)Footnote 10. *See Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 113-114, 172 Cal. Rptr. 194, 624 P.2d 244 .*

(n15)Footnote 11. *See Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal. 3d 55, 70, 141 Cal. Rptr. 146, 569 P.2d 740 .*

(n16)Footnote 12. *See Sherbert v. Verner (1963) 374 U.S. 398, 404-406, 83 S. Ct. 1790, 10 L. Ed. 2d 965* (disqualification from unemployment compensation benefits because of unavailability for work on certain days due to religious observance as unconstitutional infringement on free exercise of religion); *Jaffe v. Unemployment Ins. Appeals Bd. (1984) 156 Cal. App. 3d 719, 723-724, 202 Cal. Rptr. 812* (unemployed teacher could be denied unemployment compensation benefits for two days he was unavailable for work because of observing high holy days of his religion, but could not constitutionally be denied benefits for entire week); *see also Frazee v. Illinois Dep't of Employment Sec. (1989) 489 U.S. 829, 834-835, 109 S. Ct. 1514, 103 L. Ed. 2d 914* (unconstitutional infringement of free exercise of religion to deny unemployment compensation benefits to nondenominational Christian who refused temporary position that would have required him to work on Sunday, based on sincerely held religious belief that he could not work on "the Lord's day"). For a discussion of religious observance as good cause for *leaving* employment or for refusing to obey employer's rules, see § 80.35[4][h][i], [5][c].

(n17)Footnote 13. *See Rios v. Employment Development Dept. (1986) 187 Cal. App. 3d 489, 231 Cal. Rptr. 732 ; see also Unemp. Ins. Code § 611* (agricultural labor included in definition of "employment").

(n18)Footnote 14. *See Syrek v. California Unemployment Insurance Appeals Board (1960) 54 Cal. 2d 519, 530-531, 7 Cal. Rptr. 97, 354 P.2d 625 .*

(n19)Footnote 15. *See Glick v. Unemployment Ins. Appeals Bd. (1979) 23 Cal. 3d 493, 500-501, 153 Cal. Rptr. 1, 591 P.2d 24 ; See also § 80.33[6]* for discussion of when student available for part-time work may be considered available for work under *Unemp. Ins. Code § 1253(c)*.

(n20)Footnote 16. *See Unemp. Ins. Code § 1253(c); see also 22 Cal. Code Reg. § 1253-1* (for benefit purposes, "week" means seven consecutive days commencing at 12.01 a.m. Sunday and ending 12 midnight on following Saturday); *Unemp. Ins. Code § 143* ("week" means period of seven consecutive days as prescribed by authorized regulation).

(n21)Footnote 17. *See Unemp. Ins. Code § 1253.5; see also discussion under § 80.33[3].*

(n22)Footnote 18. *See Jaffe v. Unemployment Ins. Appeals Bd. (1984) 156 Cal. App. 3d 719, 725, 202 Cal. Rptr. 812* (teacher who was unavailable for work two days during one week due to religious observance as entitled to week's benefit amount minus two-sevenths of amount).

(n23)Footnote 19. *Unemp. Ins. Code § 1253(e); see 22 Cal. Code Reg. §§ 1253(e)-1, 1253(e)-2; cf. Unemp. Ins. Code § 1257(b)* (disqualification for refusing without good cause to accept suitable employment or failing to apply for suitable employment when notified by public employment office); *see § 80.36[1][b]* for discussion of disqualification for refusing suitable employment.

(n24)Footnote 20. *See 22 Cal. Code Reg. § 1253(e)-1(a); see also Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 115, 172 Cal. Rptr. 194, 624 P.2d 244 (Unemp. Ins. Code § 100, requiring that claimants make all reasonable efforts to secure employment on their own behalf, as imposing no greater seek-work requirement than under Unemp. Ins. Code § 1253(e)).*

(n25)Footnote 21. *See Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 112,*

172 Cal. Rptr. 194, 624 P.2d 244 .

(n26)Footnote 22. See *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal. 3d 101, 117, 172 Cal. Rptr. 194, 624 P.2d 244 .

(n27)Footnote 23. See also *Unemp. Ins. Code* § 1258; see § 80.06[1] for discussion of subject employment.

(n28)Footnote 24. *Unemp. Ins. Code* § 1258; see also *Sanchez v. Unemployment Ins. Appeals Bd* (1977) 20 Cal. 3d 55, 63, 141 Cal. Rptr. 146, 569 P.2d 740 (suitable work requirements reflect legislative policy that claimants may not be required to accept every job opportunity which may become available).

(n29)Footnote 25. *Unemp. Ins. Code* § 1258.5.

(n30)Footnote 26. See Part D for discussion of disability benefits.

(n31)Footnote 27. *Unemp. Ins. Code* § 1258.5(c); see *Lab. Code* § 3200 *et seq.* (workers' compensation provisions).

(n32)Footnote 28. See *Unemp. Ins. Code* § 1259(d)-(f); see also discussion in [c], above.

(n33)Footnote 29. *Unemp. Ins. Code* § 1259(a). For discussion of eligibility of strikers for benefits, see § 80.34[5].

(n34)Footnote 30. *Unemp. Ins. Code* § 1259(b).

(n35)Footnote 31. *Unemp. Ins. Code* § 1259(c).

(n36)Footnote 32. See *Unemp. Ins. Code* § 1253(d).

(n37)Footnote 33. See *Unemp. Ins. Code* § 1276 ("benefit year" defined); see also discussion in § 80.31[2].

(n38)Footnote 34. *Unemp. Ins. Code* § 1254(a).

(n39)Footnote 35. *Unemp. Ins. Code* § 1254(a).

(n40)Footnote 36. *Unemp. Ins. Code* § 1254(a); see also 22 Cal. Code Reg. § 1254-1 (allocation of week of unemployment which falls between two benefit years).

(n41)Footnote 37. *Unemp. Ins. Code* § 1254(b).

(n42)Footnote 38. *Unemp. Ins. Code* § 1254(c).

(n43)Footnote 39. *Unemp. Ins. Code* § 1253(f); see also *Unemp. Ins. Code* § 1300 *et seq.* and discussion in § 80.12.

(n44)Footnote 40. *Unemp. Ins. Code* § 1253(f).



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.33

AUTHOR: By Carol S. Sanders, J.D.

§ 80.33 Factors Not Affecting Eligibility

[1] Detention

An unemployed individual who is in all respects otherwise eligible for unemployment compensation benefits may not be deemed ineligible for any week in which, for not exceeding two working days, he or she cannot reasonably be expected to work because he or she was unlawfully detained,ⁿ¹ or was lawfully detained or arrested, but the charge against him or her was subsequently dismissed.ⁿ²

A determination of benefits made after a claimant has been lawfully detained but prior to dismissal of charges may, if no appeal has been filed, be reconsidered by the EDD within 15 days from the date that the charge is dismissed.ⁿ³

For discussion of disqualification for benefits resulting from an employee's absence due to an incarceration followed by a conviction, see § 80.35[4][g], [5][d][ii].

[2] Uncompensated Days Off Pursuant to Collective Bargaining Agreement in Longshoring Operations

An unemployed individual who is in all respects otherwise eligible for unemployment compensation benefits may not be deemed ineligible for any week in which, pursuant to the provisions of a collective bargaining agreement, he or she is allowed not more than one uncompensated day off in that week or is allowed not more than one uncompensated holiday on one day in that week if the following conditions are met:ⁿ⁴

1. The individual is employed in longshoring operations;
2. The individual's employer regularly offers employment to individuals employed in such operations seven days a week; and
3. The individual is able to work and available for work for six days of the week, except as provided under *Unemployment Insurance Code sections 1253.1* (unlawful detention)ⁿ⁵ or 1253.12 (death in

immediate family).n6

[3] Physical or Mental Illness or Injury

Notwithstanding the eligibility requirement of availability for work under *Unemployment Insurance Code section 1253(c)*,n7 if an individual is, in all other respects, eligible for benefits and he or she becomes unable to work due to a physical or mental illness or injury for one or more days during the week, that individual must be paid unemployment compensation benefits at the rate of one-seventh the weekly benefit amount payable for that week for each day that he or she is available for work and able to work.n8 The individual is not entitled to benefits for any day during that week which he or she is unable to work due to the physical or mental illness or injury.n9

[4] Court-Related Duties

For purposes of the requirement that an individual must be available for work,n10 an unemployed individual who is in all respects otherwise eligible for unemployment compensation benefits may not be deemed to be unavailable for work for any week in which he or she is unable to work solely because he or she is serving on a grand or petit jury, or is responding to a subpoena.n11 For purposes of the requirement that an individual must have conducted a search for suitable work,n12 an individual may not be disqualified from receiving benefits for any week solely because he or she is before any court pursuant to a lawfully issued summons to appear for jury duty.n13

[5] Emergency Hospitalization

For purposes of the requirement that an individual must have conducted a search for suitable work,n14 an individual may not be disqualified from receiving benefits for any week solely because he or she was hospitalized for treatment of an emergency or life-threatening condition.n15

[6] Availability for Part-Time Work Only

An unemployed individual may not be disqualified for eligibility for unemployment compensation benefits *solely* on the basis that he or she is only available for part-time work.n16 If an individual restricts his or her availability to part-time work, he or she may be considered to be able to work and available for work, pursuant to *Unemployment Insurance Code Section 1253(c)*, if it is determined that all of following conditions exist:n17

- (1) The claim is based on the part-time employment.n18
- (2) The claimant is actively seeking and is willing to accept work under essentially the same conditions that existed while the wage credits were accrued.n18
- (3) The claimant imposes no other restrictions and is in a labor market in which a reasonable demand exists for the part-time services he or she offers.n19

For discussion of disqualification for benefits resulting from leaving work to attend school, see § 80.35[4][h][vi].

[7] Death in Immediate Family

An unemployed individual who is in all respects otherwise eligible for unemployment compensation benefits will not be deemed ineligible for any week in which the individual cannot reasonably be expected to work because there has been a death in his or her immediate family.n20 If the death occurred in the state in which the individual resides, he or she will be excused from the "availability for work" requirement for a period not exceeding two working days.n21 If the death occurred outside of the state in which the individual resides, the claimant will be excused from the availability requirement for a period not exceeding four working days.n22

EDD regulations define "immediate family" as the claimant's spouse, or registered domestic partner,^{n22.1} or the parent, stepparent, foster parent, grandparent, child, foster child, grandchild, brother, sister, son-in-law, or daughter-in-law of the claimant or the claimant's spouse or registered domestic partner, whether or not they live in a common household.ⁿ²³

[8] Unexpired Leave Time On Discharge From Armed Services

An unemployed individual who has been discharged from any branch of the United States armed services and who is in all respects otherwise eligible for unemployment compensation benefits will not be deemed ineligible in any week for which he or she has unexpired leave time for which he or she has been compensated on discharge.ⁿ²⁴

[9] WARN Act Violation

Payments to an individual by an employer who fails to provide the advance notice of facility closure required by the federal Worker Adjustment Renotification and Training (WARN) Act (29 U.S.C. § 2101 *et seq.*) may not be construed to be wages or compensation for personal services under *Unemployment Insurance Code section 100 et seq.* Benefits payable under *Unemployment Insurance Code section 100 et seq.* may not be denied or reduced because of the receipt of payments related in any way to an employer's violation of the WARN Act.ⁿ²⁵

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code § 1253.1(a)*; *see 22 Cal. Code Reg. § 1253.1-1* (definition of "unlawfully detained").

(n2)Footnote 2. *Unemp. Ins. Code § 1253.1(b)*.

(n3)Footnote 3. *See Unemp. Ins. Code § 1253.1(c)*.

(n4)Footnote 4. *Unemp. Ins. Code § 1253.2*.

(n5)Footnote 5. *See discussion in [1], above.*

(n6)Footnote 6. *See discussion in [7], below.*

(n7)Footnote 7. *See discussion under § 80.32[2].*

(n8)Footnote 8. *Unemp. Ins. Code § 1253.5*.

(n9)Footnote 9. *Unemp. Ins. Code § 1253.5*; *see also Unemp. Ins. Code § 1252(a)(3)* (eligible individual who becomes unable to work due to physical or mental illness or injury as "unemployed"). For discussion of partial availability, *see § 80.32[2][c]*.

(n10)Footnote 10. *See Unemp. Ins. Code § 1253(c)*; *see also discussion under § 80.32[2]*.

(n11)Footnote 11. *Unemp. Ins. Code § 1253.6*.

(n12)Footnote 12. *See Unemp. Ins. Code § 1253(e)*; *see also discussion under § 80.32[3]*.

(n13)Footnote 13. *Unemp. Ins. Code § 1253.7(a)*.

(n14)Footnote 14. *See Unemp. Ins. Code § 1253(e)*; *see also discussion under § 80.32[3]*.

(n15)Footnote 15. *Unemp. Ins. Code § 1253.7(b)*.

(n16)Footnote 16. *Unemp. Ins. Code § 1253.8*. Prior to January 1, 2002, § 1253.8 prohibited disqualifying an unemployed individual solely on the basis that he or she is a student.

(n17)Footnote 17. *Unemp. Ins. Code § 1253.8*. For discussion of the requirement of available for work, *see* § 80.32[2].

(n18)Footnote 18. *Unemp. Ins. Code § 1253.8(a)*.

(n19)Footnote 18. *Unemp. Ins. Code § 1253.8(b)*. For discussion of minimum previous earnings requirement for eligibility benefits, *see* § 80.31.

(n20)Footnote 19. *Unemp. Ins. Code § 1253.8(c)*.

(n21)Footnote 20. *See Unemp. Ins. Code § 1253.12*.

(n22)Footnote 21. *See Unemp. Ins. Code § 1253.12(a)*.

(n23)Footnote 22. *See Unemp. Ins. Code § 1253.12(b)*.

(n24)Footnote 22.1. Registered domestic partners are defined in *Family Code § 297*.

(n25)Footnote 23. 22 Cal. Code Reg. § 1253.12-1.

(n26)Footnote 24. *Unemp. Ins. Code § 1253.15*.

(n27)Footnote 25. *Unemp. Ins. Code § 1265.1*; for discussion of the WARN Act generally, *see* 60.03[3][s].



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CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.34

AUTHOR: By Carol S. Sanders, J.D.

§ 80.34 Ineligible Persons

[1] Aliens

Unemployment compensation benefits are not payable on the basis of services performed by an alien unless the alien is an individual who (1) was lawfully admitted for permanent residence at the time the services were performed, (2) was lawfully present for purposes of performing the services, or (3) was permanently residing in the United States under color of law at the time the services were performed, including an alien who was lawfully present as a result of the application of certain provisions of the federal Immigration and Nationality Act.ⁿ¹ The Unemployment Insurance Code specifies special procedures to be followed when an alien who has applied for temporary residence status files a claim for, or has been paid, unemployment insurance benefits.ⁿ²

However, even an alien who falls into one of the three categories discussed above may not be eligible for benefits.^{n2.1} If an alien has no work authorization from the federal Immigration and Naturalization Service (INS) when he or she applies for benefits, he or she is not legally available for work as required by *Unemployment Insurance Code section 1253(c)*, and the EDD may deny benefits on that basis.^{n2.2}

[2] Persons Applying for Benefits From Another State

An individual is not eligible for unemployment compensation benefits on account of unemployment for any week or part of any week with respect to which he or she has received or is seeking employment benefits under an unemployment compensation law of any other state or of the United States.ⁿ³ If the appropriate agency of the other state or of the United States finally determines that the individual is not entitled to unemployment compensation benefits, the person is no longer rendered ineligible for benefits under California law.ⁿ⁴

[3] School Employees During Recesses and Breaks

With certain limited exceptions, persons employed in an educational institution by a nonprofit organization or a public entity as defined by *Unemployment Insurance Code section 605*, are not entitled to unemployment compensation

benefits during holiday recesses, between-term breaks, vacations, and paid sabbaticals when there is a contract or reasonable assurance that the employee will perform services for the educational institution after the break or vacation.ⁿ⁵ For this purpose, "reasonable assurance" includes, but is not limited to, an offer of employment or assignment made by the educational institution, provided that the offer or assignment is not contingent on enrollment, funding, or program changes.ⁿ⁶ An individual who has been notified that he or she will be replaced and does not have an offer of employment or assignment to perform services for an educational institution is not considered to have reasonable assurance.ⁿ⁷

[4] Persons Employed in Seasonal Sports Events

In the case of individuals performing services substantially all of which consist of participation in seasonal sports or athletic events, unemployment compensation benefits are not payable for unemployment during the period between two successive sports seasons or similar periods, if the individual performed services in the first of these seasons or periods, and there is a reasonable assurance that the individual will perform services in the subsequent season or period.ⁿ⁸

[5] Strikers

An individual is not eligible for unemployment compensation benefits if he or she left work because of a trade dispute.ⁿ⁹ Such an individual remains ineligible for the period during which he or she continues to be out of work because the trade dispute is still in active progress in the establishment in which the individual was employed.ⁿ¹⁰ The disqualification imposed by *Unemployment Insurance Code section 1262* on individuals who leave employment because of a trade dispute is not contingent on the merits of the controversy.^{n10.1} To be ineligible under *Unemployment Insurance Code section 1262*, the individual must have both (1) voluntarily left or remained away from work (the volitional test), and (2) left or remained away because of a trade dispute (causational test).ⁿ¹¹ The form of cessation of employment is not controlling; what matters is what precedes it in terms of causation and volitional conduct.^{n11.1} When an independent, intervening act of another so disrupts the chain of causation as to render the leaving involuntary, the causation and volitional tests tend to overlap.^{n11.2}

Under the "volitional" test, the claimant is not disqualified.ⁿ¹² Under the "causational" test, "there must be a direct causal connection between the trade dispute and the leaving of work."ⁿ¹³ The [unemployment insurance] act does not disqualify an employee from receiving benefits in all cases where his unemployment results directly or indirectly from a labor dispute. ...ⁿ¹⁴ Thus, for example, if an employee leaves work during a trade dispute in reaction to new and onerous work conditions, the new conditions and not the trade dispute may be cause of the unemployment.ⁿ¹⁵ As another example, if an employee of an employer that processes perishable goods becomes unemployed as a result of an offensive lockout because the union will not give assurances of no strike activity, the employer's election not to operate, rather than the trade dispute, is the cause of the unemployment.ⁿ¹⁶

If only part of the employees in one bargaining unit go on strike and the remaining employees are laid off for lack of work, the laid-off employees may nonetheless be ineligible for unemployment benefits if the selective withholding of services by only some union members can be considered a matter of strike strategy by the entire bargaining unit.ⁿ¹⁷ However, if employees in one bargaining unit are laid off as a consequence of a strike by employees in a separate unit with whom the laid-off employees have no relationship, the laid-off employees may be entitled to unemployment benefits.ⁿ¹⁸

If an employer permanently replaces a striker, the striker may become eligible for benefits as a result of that replacement.ⁿ¹⁹ If, however, the employee's job remains open and the employee fails to return to work, he or she is not eligible for benefits.ⁿ²⁰

When a selective strike is carried out by a union against an employer within a multiemployer bargaining unit or association, and employers who have not been struck retaliate by locking out their employees, the question arises

whether locked-out union employees of the nonstruck employers are ineligible to receive unemployment compensation benefits under *Unemployment Insurance Code section 1262*. Ineligibility has been found when it was understood or reasonably foreseeable that a strike against any one of the employer members would be treated as a strike against all, as, for example, when the multiemployer group negotiates on an industry-wide basis for a master contract binding on all employers.ⁿ²¹ However, when individual employers retain their right to separately negotiate individual contracts, each is a distinct bargaining unit notwithstanding that they band together on a geographical or industry-wide basis to impose a general lockout when any one employer is subjected to strike action. Under such circumstances, the nonstriking employees are innocent victims of a trade dispute who may not be deprived of their unemployment benefits.ⁿ²²

The restriction on eligibility for unemployment compensation benefits in the case of trade disputes manifests the state's desire to maintain neutrality in labor disputes and not to require the employer to subsidize, through its contributions to the Unemployment Compensation Fund, the use of the strike as an economic weapon against it.ⁿ²³ One court of appeal has held that *Unemployment Insurance Code section 1262* does not unconstitutionally discriminate against strikers who join together in a work stoppage as the result of a reduction in wages and benefits. This is true even though the individual employees might have had good cause for leaving work under *Unemployment Insurance Code section 1256*, and thus have been eligible for benefits, had they not joined together in the strike.^{n23.1}

[6] Recipients of Temporary Total Disability Indemnity

An individual is not eligible for unemployment compensation benefits or extended duration benefits for the same day or days of unemployment for which he or she receives benefits in the form of cash payments for temporary total disability indemnity, under a workers' compensation law or employer's liability law of this state, of any other state, or of the federal government.ⁿ²⁴ If the cash payments are less than the amount the individual would otherwise receive as unemployment compensation benefits or extended duration benefits, the individual is entitled to receive for that day or days, if otherwise eligible, unemployment compensation benefits or extended duration benefits reduced by the amount of the cash payments.ⁿ²⁵ If the indemnity payments render the individual ineligible to receive benefits for only part of a week of unemployment, the individual is entitled to an amount of benefits computed by reducing his or her weekly benefit amount by the amount of indemnity received for that week.ⁿ²⁶

[7] Persons Convicted of Making False Statements

Any individual criminally convicted under *Unemployment Insurance Code Section 2101* of willfully making a false statement or knowingly failing to disclose a material fact to obtain or increase any unemployment or disability compensation benefit forfeits any rights to benefits for the week in which the criminal complaint was filed and for the 51 consecutive calendar weeks which immediately follow that week.ⁿ²⁷ If a subsequent order under *Penal Code Section 1203.4* allows the individual to withdraw his or her plea of guilty and to enter a plea of not guilty, sets aside the verdict of guilty, or dismisses the criminal complaint, a forfeiture of benefits may extend no later than the effective date of that order and, if the period of forfeiture has not previously expired, the forfeiture of benefits terminates as of the effective date of the order.ⁿ²⁸ In addition, an individual who is so convicted for false statements or nondisclosures in connection with obtaining or increasing unemployment compensation, extended duration benefits, or federal-state extended benefits is disqualified from receiving such benefits for the week in which the criminal complaint was filed, or any subsequent week for which the individual is first otherwise in all respects eligible for the benefits, and for 14 subsequent weeks for which the individual is otherwise in all respects eligible.ⁿ²⁹ No disqualification may be applied to any week if all or any portion of the week is beyond the three-year period next succeeding the date of the filing of the criminal complaint.ⁿ³⁰

A plea or verdict of guilty, or a conviction following a plea of nolo contendere, is deemed to be a conviction for the above purposes, irrespective of whether an order granting probation or other order is made suspending the imposition of the sentence or whether sentence is imposed but execution of sentence is suspended.ⁿ³¹ The EDD is required to suspend payments to an individual, effective on the date of filing of a criminal complaint under *Unemployment*

Insurance Code Section 2101.n32

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 1264(a)*. The statute specifically refers to 8 U.S.C. § 1182(d)(5) (temporary parole into United States of certain aliens) and former 8 U.S.C. § 1153(a)(7) (conditional entry of certain aliens fleeing persecution). For discussion of minimum previous earning requirements, see § 80.31.

(n2)Footnote 2. *See Unemp. Ins. Code § 1264(d)-(g)*.

(n3)Footnote 2.1. *See Gutierrez v. Employment Development Dept. (1993) 14 Cal. App. 4th 1791, 1799, 18 Cal. Rptr. 2d 705 ; see also Alonso v. State of California (1975) 50 Cal. App. 3d 242, 249-250, 123 Cal. Rptr. 536 .*

(n4)Footnote 2.2. *See Gutierrez v. Employment Development Dept. (1993) 14 Cal. App. 4th 1791, 1799, 18 Cal. Rptr. 2d 705 ; see also Alonso v. State of California (1975) 50 Cal. App. 3d 242, 249-250, 123 Cal. Rptr. 536 .* For discussion of the requirement of availability for work, see § 80.32[2].

(n5)Footnote 3. *Unemp. Ins. Code § 1255.*

(n6)Footnote 4. *Unemp. Ins. Code § 1255.*

(n7)Footnote 5. *See Unemp. Ins. Code § 1253.3(b)-(i); see also Unemp. Ins. Code §§ 1451-1454* (exceptions applicable to nonprofessional employees of specified state special schools); *see also Cervisi v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 635, 639, 256 Cal. Rptr. 142* (assignments given hourly instructors that depended on adequate class enrollment did not constitute "reasonable assurance" of continued employment and instructors were entitled to unemployment benefits for the period between fall and spring semesters); *Board of Education v. Unemployment Ins. Appeals Bd. (1984) 160 Cal. App. 3d 674, 682-683, 206 Cal. Rptr. 788* (ineligibility of teacher for summer recess unemployment benefits); *Russ v. Unemployment Ins. Appeals Bd. (1981) 125 Cal. App. 3d 834, 846-848, 178 Cal. Rptr. 421* (teacher had "reasonable assurance" of post-recess employment when district informed her in writing of intent to rehire her in fall, notwithstanding contingency of lack of funding).

(n8)Footnote 6. *Unemp. Ins. Code § 1253.3(g)*.

(n9)Footnote 7. *Unemp. Ins. Code § 1253.3(g)*.

(n10)Footnote 8. *See Unemp. Ins. Code § 1253.4.*

(n11)Footnote 9. *Unemp. Ins. Code § 1262.*

(n12)Footnote 10. *Unemp. Ins. Code § 1262; see also Unemp. Ins. Code § 1262.5* (EDD's duty to investigate trade disputes); *Baker v. General Motors Corp. (1986) 478 U.S. 621, 634-635, 106 S. Ct. 3129, 92 L. Ed. 2d 504* (National Labor Relations Act (NLRA) section protecting workers' associational rights does not preempt state from disqualifying workers for unemployment benefits because of financial support given to strike activity); *Ohio Bureau of Employment Services v. Hodory (1977) 431 U.S. 471, 482-88, 97 S. Ct. 1898, 52 L. Ed. 2d 513* (NLRA as not preempting state's right to either authorize or prohibit unemployment compensation benefits to striking workers).

(n13)Footnote 10.1. *See Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1044, 256 Cal. Rptr. 513 ; see also Martinez v. California Unemployment Ins. Appeals Bd. (1988) 206 Cal. App. 3d 1385, 1391, 1392, 254 Cal. Rptr. 461 .*

(n14)Footnote 11. *Campos v. Employment Development Dept. (1982) 132 Cal. App. 3d 961, 966-967, 183 Cal. Rptr. 637 ; see Bunny's Waffle Shop v. Cal. Emp. Com. (1944) 24 Cal. 2d 735, 740, 151 P.2d 224 ; see also Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1045, 256 Cal. Rptr. 513 ; Martinez v. California*

Unemployment Ins. Appeals Bd. (1988) 206 Cal. App. 3d 1385, 1390, 254 Cal. Rptr. 461 .

(n15)Footnote 11.1. See *Acuff v. Unemployment Ins. Appeals Bd.* (1989) 208 Cal. App. 3d 1038, 1048, 256 Cal. Rptr. 513 .

(n16)Footnote 11.2. See *Acuff v. Unemployment Ins. Appeals Bd.* (1989) 208 Cal. App. 3d 1038, 1045, 256 Cal. Rptr. 513 .

(n17)Footnote 12. See *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal. 2d 321, 327-328, 109 P.2d 935 (but holding, under facts of case, that claimants had voluntarily left their work).

(n18)Footnote 13. *Bunny's Waffle Shop v. Cal. Emp. Com.* (1944) 24 Cal. 2d 735, 740, 151 P.2d 224 .

(n19)Footnote 14. *Bunny's Waffle Shop v. Cal. Emp. Com.* (1944) 24 Cal. 2d 735, 740, 151 P.2d 224 .

(n20)Footnote 15. See *Bunny's Waffle Shop v. Cal. Emp. Com.* (1944) 24 Cal. 2d 735, 740-741, 151 P.2d 224 .

(n21)Footnote 16. See *Coast Packing Co. v. Cal. Unemp. Ins. Appeals Bd.* (1966) 64 Cal. 2d 76, 79-81, 48 Cal. Rptr. 854, 410 P.2d 358 .

(n22)Footnote 17. See *Chrysler Corp. v. Cal. Emp. etc. Com.* (1953) 116 Cal. App. 2d 8, 18-19, 253 P.2d 68 .

(n23)Footnote 18. See *Chrysler Corp. v. California Unemp. Ins. Appeals Board* (1962) 199 Cal. App. 2d 683, 687-696, 18 Cal. Rptr. 843 .

(n24)Footnote 19. See *Ruberoid Co. v. California Unemployment Ins. Appeals Board* (1963) 59 Cal. 2d 73, 78-79, 27 Cal. Rptr. 878, 378 P.2d 102 ; see also 22 Cal. Code Reg. § 1256-21(j) (employment relationship does not ordinarily sever during strike).

(n25)Footnote 20. See *Isobe v. Unemployment Ins. Appeals Bd.* (1974) 12 Cal. 3d 584, 116 Cal. Rptr. 376, 526 P.2d 528 .

(n26)Footnote 21. See *Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal. 3d 770, 773, 782, 163 Cal. Rptr. 619, 608 P.2d 707 ; *McKinley v. California Emp. Etc. Com.* (1949) 34 Cal. 2d 239, 244-245, 209 P.2d 602 .

(n27)Footnote 22. See *Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd.* (1987) 190 Cal. App. 3d 1515, 1530, 236 Cal. Rptr. 78 ; see also *Pacific Maritime Assn. v. Unemployment Ins. Appeals Bd.* (1985) 169 Cal. App. 3d 568, 578-579, 215 Cal. Rptr. 408 (neither volitional or causational test met when longshoremen whose union was engaged in selective work stoppages were not scheduled to work during period in question and did not walk off job or expressly refuse employment, notwithstanding their failure to repudiate work stoppage policy or to seek employment that became available as result of work stoppages).

(n28)Footnote 23. See *Acuff v. Unemployment Ins. Appeals Bd.* (1989) 208 Cal. App. 3d 1038, 1045, 256 Cal. Rptr. 513 ; *Martinez v. California Unemployment Ins. Appeals Bd.* (1988) 206 Cal. App. 3d 1385, 1393, 254 Cal. Rptr. 461 ; see also *National Broadcasting Co. v. Unemployment Ins. Appeals Bd.* (1979) 95 Cal. App. 3d 550, 555, 157 Cal. Rptr. 207 .

(n29)Footnote 23.1. See *Acuff v. Unemployment Ins. Appeals Bd.* (1989) 208 Cal. App. 3d 1038, 1051, 256 Cal. Rptr. 513 ; see § 80.35 [4] for discussion of *Unemp. Ins. Code* § 1256.

(n30)Footnote 24. *Unemp. Ins. Code* § 1255.5(a).

(n31)Footnote 25. *See Unemp. Ins. Code § 1255.5(a).*

(n32)Footnote 26. *See Unemp. Ins. Code § 1255.5(b).*

(n33)Footnote 27. *Unemp. Ins. Code § 1263(a).*

(n34)Footnote 28. *See Unemp. Ins. Code § 1263(a).*

(n35)Footnote 29. *Unemp. Ins. Code § 1263(b).*

(n36)Footnote 30. *See Unemp. Ins. Code § 1263(b).*

(n37)Footnote 31. *Unemp. Ins. Code § 1263(d).*

(n38)Footnote 32. *Unemp. Ins. Code § 1263(c).*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.35

AUTHOR: By Carol S. Sanders, J.D.

§ 80.35 Disqualification for Voluntary Quitting or Discharge for Misconduct

[1] Generally

Unemployment Insurance Code Section 1256 provides that an individual is disqualified for unemployment compensation benefits if the director of the EDD finds that the individual (1) left his or her most recent work voluntarily without good cause,ⁿ¹ or (2) has been discharged for misconduct connected with his or her most recent work.ⁿ²

[2] Presumption of Nondisqualifying Conduct

Under *Unemployment Insurance Code Section 1256*, an individual is presumed to have been discharged for reasons other than misconduct and not to have voluntarily left work without good cause unless the employer has given written notice to the contrary to the EDD, setting forth facts sufficient to overcome the presumption.ⁿ³ The presumption under Section 1256 is rebuttable.ⁿ⁴ The presumption controls the burden of proof at each level of appeal, even if it is deemed rebutted at the lower level.ⁿ⁵

[3] Definition of "Most Recent Work"

For the purposes of disqualifications based on an individual leaving his or her most recent work without good cause or being discharged from his or her most recent work for misconduct, "most recent work" is that work in which a claimant last performed compensated services either:ⁿ⁶

1. Prior to and nearest the date of filing a valid new, reopened, or additional claim for unemployment compensation benefits; a valid primary, reopened, or additional claim for extended duration benefits; or a valid application, or reopened or additional claim for federal-state extended benefits;ⁿ⁷ or
2. During the calendar week for which a continued claim is filed.ⁿ⁸

[4] Voluntarily Leaving Work Without Good Cause**[a] What Constitutes "Voluntary" Leaving**

Whether an individual leaves work voluntarily or involuntarily within the meaning of *Unemployment Insurance Code Section 1256* depends on which party initiated a termination or suspension of employment.ⁿ⁹ That is, the determination of whether an employee has terminated his or her employment voluntarily or involuntarily depends on whether the employer or the employee is the "moving party" in the termination.ⁿ¹⁰ An employer who refuses to permit an able and willing employee to continue working or the employer who is unable to provide continuing work is the moving party, and the employee in such a situation is deemed to be involuntarily unemployed due to a discharge or layoff.^{n10.1} If the employee left employment while continued work was available, then the employee is the moving party.^{n10.2} Therefore, a voluntary leaving occurs only when work is available and the employee leaves work of his or her own free will.ⁿ¹¹

An employee who leaves work when asked by the employer to either resign or be fired, or who resigns rather than agree to a forced leave of absence, is not deemed to have "voluntarily" left his or her work.ⁿ¹² Likewise, if an employer discharges an employee but gives him or her the option of remaining a few days longer, and the employee elects to leave immediately, the leaving will be regarded as involuntary.ⁿ¹³

■ ILLUSTRATIONS

The following are examples of "voluntary" leaving:ⁿ¹⁴

1. The employee resigns in anticipation of a discharge or layoff and before the employer takes any action.
2. The employee resigns, but delays the effective date at the employer's request.
3. The employee resigns effective as of a future date, the employer accepts the resignation and makes a firm offer to a potential replacement or incurs substantial expenses in recruiting or other efforts to obtain a replacement, and the employee subsequently attempts unsuccessfully to withdraw the resignation before its effective date. (However, if the employer *terminates the employee's employment* prior to the effective date of the resignation and does not pay any wages beyond the date of termination, the leaving becomes involuntary.)
4. The employee leaves work before the effective date of a discharge and is not paid beyond the last date actually worked. (However, if the employee leaves work on the effective date of discharge but prior to the end of the normal work day, there is a discharge rather than an involuntary leaving, even if the employee is paid for that day's work.)

[b] "Constructive" Quit

A constructive voluntary leaving occurs when the employee engages in a voluntary act or course of conduct that leaves the employer no reasonable alternative but to discharge the employee, and which the employee knew or reasonably should have known would result in unemployment.ⁿ¹⁵ However, the employee is not required to comply with an unreasonable order of an employer, and a discharge in such circumstances would be a discharge for reasons other than misconduct and not a constructive voluntary leaving.ⁿ¹⁶

■ ILLUSTRATION 1:

Employee A is a truck driver for Employer. Employee A's driver's license is revoked by the state because of a drunk driving condition. Employer discharges Employee A because he is no longer able to continue operating Employer's truck. Employee A's conduct constitutes a constructive voluntary leaving.ⁿ¹⁷

■ ILLUSTRATION 2:

Employee B refuses to join a labor union within the required time limit or to pay union dues as required by the terms of a collective bargaining agreement between Employer and the labor union representing Employer's employees. Employer discharges Employee B as required by the terms of the agreement. Employee B's conduct constitutes a constructive voluntary leaving.ⁿ¹⁸

[c] "Good Cause" Defined

The meaning of the term "good cause" as used in *Unemployment Insurance Code Section 1256* has been extensively construed by the courts.ⁿ¹⁹ Broadly speaking, "good cause" means an adequate cause that comports with the purposes of the Unemployment Insurance Code and with other laws.ⁿ²⁰ The concept of good cause cannot be arbitrarily limited; it must take account of real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for actions, and always the element of good faith.ⁿ²¹ Accordingly, good cause for leaving work means such a cause as justifies an employee's voluntarily leaving the ranks of the employed and joining the ranks of the unemployed; the quitting must be for such a cause as would reasonably motivate in a similar situation the average able-bodied and qualified worker to give up his or her employment with its certain wage rewards in order to enter the ranks of the compensated unemployed.ⁿ²² Good cause may exist for reasons that are personal and not connected to the employment situation, but those reasons must be imperative and compelling in nature.ⁿ²³

For discussion of good cause applied to various factual examples, see [f] through [h], *below*. For a discussion of "good cause" applied to discharges based on an employee's refusal to follow the employer's rules or orders, see [5][c], *below*.

For purposes of determining whether benefits paid should be charged to the employer's individual account, if the claimant voluntarily leaves without notifying the employer of the reasons for leaving, and the employer timely submits facts concerning the leaving, the leaving is presumed to be without good cause.ⁿ²⁴

[d] Duty to Preserve Employment Relationship

Prior to leaving work, the claimant has a duty to attempt to preserve the employment relationship. Failure to do so negates what would otherwise constitute good cause.ⁿ²⁵ This duty may be satisfied by reasonable steps, including, but not limited to, any of the following:ⁿ²⁶

1. Seeking an adjustment of the problem by allowing the employer an opportunity to remedy the situation if the employer can reasonably do so;
2. Seeking a leave of absence or transfer to other employment with the same employer if it is likely to remedy the problem and if the claimant knew or should have known that a leave or a transfer probably would have been granted had one been requested; or
3. Taking steps within his or her own control, such as hiring a sitter for child care to solve a child care problem, or joining a car pool or repairing an automobile or purchasing a replacement vehicle to solve a transportation problem.ⁿ²⁷

[e] Determination of Good Cause as Question of Law

Whether a claimant left his or her employment for "good cause" as this term is used in *Unemployment Insurance Code Section 1256* is a question of law that must be answered in relation to the particular facts of each case.ⁿ²⁸

[f] Situations Deemed Good Cause by Statute

[i] Compulsory Retirement

By statute, an individual whose employment is terminated under the compulsory retirement provisions of a collective bargaining agreement may not be deemed to have left work without good cause.ⁿ²⁹ Furthermore, EDD regulations point out that an employee who leaves work because of an employer's policy of compulsory retirement, regardless of whether such retirement is required by a collective bargaining agreement, has not left work "voluntarily" and therefore is not disqualified under *Unemployment Insurance Code Section 1256*.ⁿ³⁰

By contrast, an individual who exercises an option for early retirement solely or primarily because of monetary inducements will be regarded as having left work voluntarily without good cause.ⁿ³¹ However, an individual whose decision to elect early retirement is substantially motivated by certain other factors, such as his or her age or health and the likelihood that his or her job will be abolished, may under the facts of a particular case establish "good cause" for electing early retirement.ⁿ³²

The Unemployment Insurance Appeals Board found that good cause did not exist in a case in which an employee, whose job was not in jeopardy from his employer's restructuring process, accepted the employer's offer of a bonus to retire 6 months early. The employee chose early retirement for two reasons: his concern that his job might be subject to restructuring sometime in the future, and his desire to prevent the reassignment, downgrading, or potential layoff of an employee with lesser seniority. The first reason was not good cause because it was purely speculative rather than imperative and compelling. The second reason was not good cause because the restructuring process included protection against layoffs, and there was no evidence that the employee would have displaced any other employee had he remained at his job.^{n32.1}

For further discussion of good cause issues raised by exercising an option for early retirement, see [h][xv], below.

[ii] Election to Be Laid Off Under Collective Bargaining Agreement

An individual will be deemed to have left his or her most recent work with good cause if he or she elects to be laid off in place of an employee with less seniority pursuant to a provision in a collective bargaining agreement that provides that an employee with more seniority may elect to be laid off in place of an employee with less seniority when the employer has decided to lay off employees.ⁿ³³

[iii] Deprivation of Equal Employment Opportunities

An individual who terminates his or her employment may not be deemed to have left work without good cause if the employer operated so as to deprive the individual of equal employment opportunities because of his or her race, color, religious creed, sex, national origin, ancestry, or physical handicap.ⁿ³⁴ However, the restriction against deeming an individual to have left work without good cause does not apply if the deprivation was based on a bona fide occupational qualification or applicable security regulations established by the United States or California,ⁿ³⁵ or if the individual fails to make reasonable efforts to provide the employer with an opportunity to remove any unintentional deprivation of the individual's equal employment opportunities.ⁿ³⁶

"Employment opportunities," for purposes of the above provision, include, but are not limited to, assignments to jobs, work atmosphere, compensation (including fringe benefits), promotions, transfer, upgrading, rights and duties of employees under work rules, and the terms, conditions, or privileges of employment.ⁿ³⁷ EDD regulations state that this provision is to be construed in harmony with and subject to applicable and controlling federal and California law on the subject of equal employment opportunity.ⁿ³⁸ For discussion of equal employment opportunity laws generally, see Chapters 40-44.

[iv] Sexual Harassment

An individual will be deemed to have left his or her most recent work with good cause if the director finds that the individual left employment because of sexual harassment, provided that the individual has taken reasonable steps to preserve the working relationship.ⁿ³⁹ No steps may be required if the director finds it would have been futile to do so.ⁿ⁴⁰ For purposes of eligibility for unemployment compensation, unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature constitutes sexual harassment when any of the following occur:ⁿ⁴¹

1. Submission to the conduct is made either explicitly or implicitly a term or condition of an individual's employment;
2. Submission to or rejection of the conduct by an individual is used as the basis for employment decisions affecting the individual; or
3. The conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Findings of fact and law by the director will not collaterally estop adjudication of the issue of sexual harassment in another forum.ⁿ⁴²

For discussion of the prohibition against sexual harassment under equal employment opportunity laws, see Chapter 41.

[v] Accompanying Spouse to Another Location

Under *Unemployment Insurance Code section 1256*, an individual may be deemed to have left work with good cause if leaving employment to accompany a spouse or domestic partner to a place from which it is impractical to commute to the employment.ⁿ⁴³ This provision was added to section 1256 in 1982.ⁿ⁴⁴ Since the statutory provision states that such leaving "may" be deemed for good cause,ⁿ⁴⁵ the provision is permissive, rather than mandatory.ⁿ⁴⁶ Thus, the EDD could under the terms of the statute determine in a particular case that a claimant did not leave for "good cause." However, EDD regulations provide that a claimant who leaves his or her most recent work to accompany or join a spouse at another location from which it is impractical to commute is deemed to have left for good cause if he or she did so for any of several reasons relating to the health and welfare of the family, including preservation of family unity.ⁿ⁴⁷

The definition of "spouse" for purposes of *Unemployment Insurance Code section 1256* includes not only persons who are married, but those whose marriage is "imminent."ⁿ⁴⁸

Even in the absence of a legally recognized or imminent marriage, a claimant who leaves his or her job for domestic reasons may be able to establish entitlement to benefits if other compelling circumstances exist that make the voluntary leaving akin to an involuntary departure.ⁿ⁴⁹ For example, the California Supreme Court has held that evidence that an employee left her position to accompany a nonmarital partner to another state in order to maintain the familial relationship that the couple had established with their child supported the trial court's finding that the claimant had left her work for good cause.ⁿ⁵⁰

Ordinarily, unemployment benefits paid to an unemployed individual are charged to the reserve account of his or her employer during the base period.ⁿ⁵¹ However, although an individual who leaves work to accompany a spouse or domestic partner may, under the circumstances discussed here, be entitled to receive unemployment insurance benefits,ⁿ⁵² any benefits awarded to an employee under such circumstances will not be charged to the employer's reserve account unless he or she failed to provide information regarding the claim to the EDD within specified time limits.ⁿ⁵³

For discussion of charges against reserve accounts for benefits paid, see § 80.21[4][c]. For discussion of procedures for submission of facts by employers regarding an employee's eligibility for benefits, see § 80.39[4], [5][b], [6][d].

[g] Absence Due to Incarceration Followed by Conviction Deemed Without Good Cause

If the employment of an individual is terminated due to absence from work for a period in excess of 24 hours because of the individual's incarceration, and the individual is convicted of the offense for which he or she was incarcerated, or of any lesser included offense, the individual is deemed to have left work voluntarily without good cause.ⁿ⁵⁴ A plea or verdict of guilty, or a conviction following a plea of *nolo contendere*, is deemed to be a conviction for these purposes irrespective of whether imposition of the sentence is suspended pursuant to an order granting probation or other order, or whether sentence is imposed but execution of the sentence is suspended.ⁿ⁵⁵

A determination as to whether a complainant who was terminated because of incarceration left work for good cause made prior to a conviction or other final disposition of the criminal complaint or accusation may, if no appeal has been taken from the determination, for good cause be reconsidered by the EDD during the benefit year or extended duration period to which the determination relates.ⁿ⁵⁶

[h] Application of Good Cause Principles to Factual Examples

[i] Religious or Ethical Reasons

The infringement of the *First Amendment* guarantee of religious freedom is substantial if the state conditions receipt of unemployment compensation benefits on conduct proscribed by religious belief, or denies benefits because of conduct mandated by religious belief.ⁿ⁵⁷ Accordingly, good cause for leaving employment exists if the nature of the work becomes contrary to the claimant's religious beliefs.ⁿ⁵⁸ EDD regulations provide that if an individual has, or after working for a time acquires, a conscientious objection to the work conditions or assigned work based on religious beliefs founded on the tenets or beliefs of a church, sect, denomination, or other religious group, or on ethical or philosophical grounds, the individual's leaving his or her work based on religious beliefs or other grounds is with good cause if all of the following conditions are met:ⁿ⁵⁹

1. If religious beliefs are involved, the tenets or beliefs of the religious group expressly forbid the adherent from engaging in the assigned work or meeting the work conditions;
2. The conscientious objection is bona fide and not a sham or a means of avoiding work;
3. The individual has, whenever feasible, sought other means, such as transfer to other work, to resolve the conscientious objection before voluntarily leaving the work;
4. The work or work conditions have a direct, rather than an indirect or incidental, relationship to the individual's religious, ethical, or philosophical beliefs; and
5. The individual was not aware of the objectionable aspects of the work at the time he or she was hired, or the conscientious objection arose later when the individual first acquired the belief on which the objection is based.

■ ILLUSTRATION

Employee objects to liquor based on religious beliefs and belongs to a religion that expressly forbids its adherents from working in any place where liquor is sold. Employee works in a restaurant. At the time he was hired, the restaurant served no alcoholic beverages; however, subsequently Employer applied for a license to sell alcoholic beverages in the restaurant. The restaurant is part of a chain of several restaurants in the area; other outlets do not serve alcoholic beverages. Employee requests that Employer transfer him

to another restaurant in the chain in which Employee could work without violating his religious beliefs. Employer refuses the requested transfer, although it has no valid business reason for doing so. Employee leaves the work due to adherence to religious beliefs. Employee's leaving is for good cause.ⁿ⁶⁰

The same constitutional considerations apply in the context of discharge of a claimant for refusal to work certain hours because of religious convictions adopted after beginning employment;ⁿ⁶¹ and unavailability for work because of religious observance.ⁿ⁶²

[ii] Concerns for Health, Safety, or Morals

A claimant leaves work with good cause if a reasonable person genuinely desirous of remaining employed would have left work due to an undue risk of injury or illness caused by health reasons, physical impairment, impairment of hearing, speech, or vision, pregnancy, unsanitary conditions, temperature or ventilation problems, adverse weather or climate conditions, or other working conditions, or for a reasonably foreseeable and substantially probable serious risk to his or her morals.ⁿ⁶³

"Undue risk of injury or illness" means a reasonably foreseeable and substantial probability of incurring any injury or illness that would require hospitalization or the services of a physician for proper medical care, or would cause any degree of permanent disability, and that meets any one of the following conditions:ⁿ⁶⁴

1. The risk on the particular job is more hazardous than normal for the occupation or industry;
2. The risk is more hazardous for the claimant than for other employees because of circumstances peculiar to the claimant; or
3. The claimant establishes that he or she has a reasonable basis to believe that the working conditions would cause a reasonably foreseeable and substantial probability of incurring an injury or illness that would require hospitalization or the services of a physician for proper medical care, or would cause a degree of permanent disability, even though the risk is normal for the occupation or industry, excluding conditions inherent in the nature of the work that the claimant must accept.

Mere concern with one's health or safety is not sufficient to justify good cause for leaving work.ⁿ⁶⁵ However, a reasonable, good faith, and honest fear of *undue* harm to one's health and safety from the work environment and conditions of employment falls within the ambit of good cause for voluntary termination of employment.ⁿ⁶⁶ Under EDD regulations, a physician's advice or objective factors showing detriment to health or safety such as a prior adverse medical history are a reasonable basis for a claimant's belief.ⁿ⁶⁷ However, medical evidence is not an absolute prerequisite to a finding of good cause. For example, a court upheld a finding of good cause based on the claimant's concerns that an established risk of lead poisoning in the work environment contributed to his stomach problems, even though there was no medical evidence that these problems in fact resulted from lead poisoning.ⁿ⁶⁸ Good cause for voluntary termination also existed when the claimant had a good faith belief that working in an enclosed, poorly ventilated room filled with coworkers' smoke had a carcinogenic effect on his health, even though he produced no medical evidence that his health had been adversely affected.ⁿ⁶⁹

The claimant must have taken reasonable steps under the circumstances to preserve the employment relationship such as seeking sick leave where health factors are involved, or other leave if available, or a transfer to other available work the claimant can perform.ⁿ⁷⁰ Also, the individual must ordinarily use existing grievance procedures prior to leaving work due to an objection to working conditions in order to have good cause for leaving.ⁿ⁷¹ However, if the individual has reasonable grounds to believe that an immediate threat of serious injury or illness exists due to a working condition, the individual has good cause to refuse to work and if necessary leave work without first using an existing grievance procedure, since immediate protective action is necessary.ⁿ⁷²

An individual who fraudulently fails to disclose or materially misrepresents his or her health or physical condition at the time of hire negates what would otherwise be good cause for that individual to leave work due to the health reasons if the employer could have lawfully refused to hire the individual had the condition been disclosed.ⁿ⁷³

The EDD has adopted special rules applicable to a claimant addicted to alcohol or other drugs. Such a claimant has good cause to leave work if he or she has competent professional advice that entry into a treatment facility or program is necessary and cannot be accomplished unless work ceases, or that the work is a factor in the addiction or poses an undue risk of injury or illness related to the addiction.ⁿ⁷⁴ Good cause is not negated by an addicted claimant's failure to request a leave of absence or sick leave, since the claimant may not be sufficiently rational, or may fear that such a request would have a negative effect on the job or future employment.ⁿ⁷⁵ A claimant who has previously had leave for these same reasons from the employer, however, has no good cause for not requesting leave.ⁿ⁷⁶ For discussion of an employer's duty to accommodate persons addicted to alcohol or drugs under certain circumstances, see Chapter 41. For a discussion of pregnancy leave and accommodation, see Chapter 8.

An employee's reasonable belief that continued work will cause serious risk to his or her morals may also constitute good cause for leaving.ⁿ⁷⁷ This would be the case when an employee is required to engage in immoral, dishonest, illegal, or unethical acts, or discriminate against minorities, or is subjected to improper advances from co-workers or the employer.ⁿ⁷⁸ For example, good cause exists when a salesperson leaves after unsuccessfully objecting to the employer's requirement that false and misleading sales pitches be used, or a cannery inspector leaves after unsuccessfully objecting to the employer's insistence that products known to fall below standards set by law be approved.ⁿ⁷⁹ For a discussion of good cause for leaving based on conscientious objection, see [i], above.

Health and safety concerns may also be relevant in determining whether an employee who is terminated for refusing to follow an employer's rules has been discharged for misconduct within the meaning of *Unemployment Insurance Code section 1256*.ⁿ⁸⁰ For discussion, see [5][c], below.

[iii] Pregnancy

EDD regulations provide that if a claimant leaves work voluntarily due to pregnancy, the leaving is with good cause if pregnancy rendered the claimant unable to continue work.ⁿ⁸¹ Inability to continue work is usually established by a physician's advice but is also present if a claimant has a history of miscarriages or difficult pregnancies, or if there is a threat to the health or safety of the fetus, or if objective factors exist such as heavy lifting or other strenuous tasks that are required in the work.ⁿ⁸² Some pregnant women may be able to do light work, and the claimant must request a transfer to such work if it is available; if she fails to do so, her leaving work due to pregnancy will be without good cause.ⁿ⁸³

If the claimant leaves due to an employer rule requiring pregnant women to leave work, or to accept leave of absence due to pregnancy required by employer rule, the leaving is involuntary and not disqualifying.ⁿ⁸⁴

For discussion of equal employment opportunity rules relating to pregnancy, see Chapter 41. For a discussion of pregnancy leave and accommodation, see Chapter 8.

[iv] Dissatisfaction With Earnings

An individual who leaves work due to dissatisfaction with some aspect of wages has left work with good cause if the leaving of work is for any one or any combination of the following reasons:ⁿ⁸⁵

1. The wages paid by the employer are less than the minimum wages required by federal or state law and the employer refuses to pay the requisite minimum wages;ⁿ⁸⁶

2. The individual has no reasonable assurance of payment of wages when due, or the employer repeatedly does not pay wages when due, or the employer wilfully refuses to pay wages when due;ⁿ⁸⁷
3. The individual is notified of a transfer or demotion to another position with the employer at a substantial reduction in pay,ⁿ⁸⁸ or under any condition that renders the other position not "suitable employment" under *Unemployment Insurance Code sections 1258, 1258.5, or 1259*.ⁿ⁸⁹
4. The employer substantially breaches the employment agreement with an employee as to the agreed rate of pay; or
5. The employer makes substantial misrepresentations to the employee as to the duties, hours, working conditions, or wages for the job.

An individual who leaves work due to dissatisfaction with some aspect of wages has left work without good cause if the leaving is for any one or any combination of the following reasons:ⁿ⁹⁰

1. The individual knew the wages at the time of hire, but later leaves work because the wages are not commensurate with his or her experience, or are less than wages paid in prior employment, or are less than prevailing wages paid for similar work in the locality;
2. The work has incidental expenses that the employer has no duty to provide for, such as special clothing, tools, or gasoline, and that are customarily paid for by the employer, minor in amount, or compensated for by other remuneration such as bonuses;
3. The employer demands reasonable periodic deductions from the individual's wages for cash shortages, or breakage or loss of equipment caused by the individual's culpable negligence or willful dishonesty;ⁿ⁹¹
4. The individual's request for a wage increase was denied by the employer, if the wages paid were not substantially less than the prevailing rate for similar work in the locality and the employer's refusal was not a breach of the contract of hire or an act of discrimination.ⁿ⁹²
5. The employer refuses to make an advance on wages, unless the advance is required by the employer's rules; or
6. The individual leaves work because it is compensated on a commission or piece-rate basis but the compensation is not substantially less than the prevailing wage for similar work in the locality and the method of compensation is customary in the industry or occupation, or the individual fails to work for a reasonable time in order to determine the level of compensation.

Moreover, workers who leave their jobs because of a trade dispute are ineligible for unemployment benefits under *Unemployment Insurance Code section 1262*.^{n92.1} notwithstanding the fact that the trade dispute was precipitated by a wage cut.^{n92.2} In such cases, *Unemployment Insurance Code section 1256*, which expressly incorporates a "good cause" standard, does not come into play.^{n92.3}

[v] Transportation Difficulties

An individual who leaves work because of distance or other problems of transportation to work does so with good cause if a reasonable person genuinely desirous of retaining employment and similarly situated would have been compelled to leave work after having sought without success all reasonable alternatives by which to provide transportation to

work.n93

An individual leaves with good cause if all of the following conditions exist:n94

1. The transportation problem resulted from a substantial change in the customary means of transportation; change of circumstances beyond the claimant's control such as a health problem; or a change in work shifts or work hours by the employer, a change in the employer's place of business, or a change of the claimant's place of residence for compelling reasons;
2. Neither private nor public transportation is reasonably available when all pertinent factors are considered, such as ease or difficulty of access to transportation facilities, distance to work, travel time, cost of transportation in relation to earnings, the individual's age and physical condition, safety risks that may result from use of the available transportation, and local customs and practices; and
3. Prior to leaving work, the claimant explored without success reasonable alternatives, such as carpools, transfer to a different shift or more convenient location with the same employer, or a temporary leave of absence pending the availability of suitable transportation.

[vi] Attendance At School

Leaving employment to attend school full-time is generally without good cause, since the unemployment insurance system cannot be used to subsidize an employee's education.n95

However, an individual does have good cause for voluntarily leaving work to attend a school or training course if any of the following conditions exist:n96

1. The employer has requested that the individual participate in the school or training course;
2. Prior to obtaining the most recent work, the individual had been enrolled in certain approved retraining or training courses; continuing the work would require termination of the course, and the employer does not or cannot adjust the individual's hours of work to allow continuation of the work and the course; or
3. The individual was legally required to attend school due to compulsory attendance requirements based on age, and could not arrange to continue working for the same employer while attending school.

For a discussion of student status as good cause for unavailability, see § 80.32[2]; for a discussion of student status as not affecting eligibility, see § 80.33[6].

[vii] Domestic Circumstances

A claimant may leave employment with good cause if he or she left due to compelling circumstances relating to the health, care, or welfare of the claimant's family if the claimant has taken reasonable steps to preserve the employment relationship.n97 Examples of compelling circumstances include care of a critically ailing spouse, relocation to a different climate to facilitate the health of a family member for whom the claimant is primarily responsible, and inability to secure alternative childcare arrangements for minor children for whom the claimant is primarily responsible.n98

An unemancipated minor leaves work with good cause if he or she is compelled by a parent to accompany the parent to another locality, making commuting to work impossible or impractical.n99

For a discussion of when accompanying a spouse to another location constitutes good cause, see [f][v], above.

[viii] Leave of Absence

The effect of an individual's being unemployed subsequent to a so-called "leave of absence" pursuant to an agreement reached with the employer is assessed according to the terms of the agreement.

For example, the agreement may amount to an actual termination of the employment, with the employee receiving a promise of reemployment only if there is a job available when the "leave" expires. If, under those circumstances, the employee takes the leave voluntarily and for personal reasons only, he or she is disqualified for unemployment compensation benefits during the leave period and thereafter if reemployment is denied at the end of the period.ⁿ¹⁰⁰

In a true leave of absence, the employer and employee are in agreement that active work will resume when the leave expires. The employee is unemployed during the leave period, and is disqualified during that period if he or she left voluntarily without good cause. However, if the job is terminated by the employer during the leave, the employee's consequent unemployment at the expiration of the leave has been caused by the employer, and the employee is accordingly not disqualified as having left voluntarily without good cause.ⁿ¹⁰¹

An employee who may have good cause to leave work temporarily, but who refuses a true leave of absence offered by the employer has voluntarily left work without good cause.ⁿ¹⁰² Similarly, good cause for leaving work is nullified if the employee fails to request a leave of absence, and (1) the employer has an established leave of absence policy about which the employee knew or should have known, (2) the employer would probably have granted the leave, (3) an effort by the employee to maintain the employment relationship would have been reasonable under the circumstances, and (4) the leave of absence would have preserved the employment relationship.ⁿ¹⁰³

[ix] Anticipation of Discharge

A worker who resigns in anticipation that he or she is about to be discharged is deemed to have voluntarily left his or her employment.ⁿ¹⁰⁴ and thus may be denied unemployment benefits unless he or she otherwise had "good cause" for resignation.ⁿ¹⁰⁵ However, a finding merely that the worker left "in anticipation of discharge" is not conclusive on the issue of whether he or she had good cause to leave. Thus, an employee who is subjected to illegal discrimination or harassment at the workplace, and in good faith believes that this discrimination will continue as long as he or she remains, has good cause to leave the employment voluntarily.ⁿ¹⁰⁶

For a discussion of deprivation of equal employment opportunities as deemed good cause for leaving under *Unemployment Insurance Code section 1256.2*, see [f][iii], above.

[x] Working Conditions

An individual who leaves work due to mere personal dislike, distaste, or minor inconvenience caused by working conditions leaves without good cause. If the working conditions are so unsatisfactory as to be intolerable to a reasonable person genuinely desirous of retaining employment and if prior to leaving the individual had taken steps to preserve the job,ⁿ¹⁰⁷ there is good cause for leaving the work.ⁿ¹⁰⁸

A claimant leaves work for good cause if he or she leaves because of work requirements that violate the agreement of hire, impose duties beyond those of the employee's occupation, or reassign work to or from another employee to make changes in the distribution of workload among employees, if those requirements cause undue hardship to or discriminate against the individual worker, or are unreasonable under the circumstances.ⁿ¹⁰⁹

A claimant who leaves work because he or she objects to an employer's rule that applies to all or a group of employees

leaves without good cause unless the rule (1) is enforced only against the claimant and harasses the claimant, who suffers significant inconvenience; (2) creates undue hardship for the claimant; or (3) is unreasonable.ⁿ¹¹⁰ An employer's rule is unreasonable if (1) the claimant is unable to comply because of his or her physical limitations that are apparent or known to the employer or the employer's representative, (2) the rule imposes a new and unreasonable burden on the claimant, (3) the rule is not designed to protect or preserve the employer's business interests, (4) the claimant reasonably and in good faith believes compliance would violate the law, or would cause an undue risk of injury or illness.ⁿ¹¹¹

A claimant who leaves work because he or she objects to the method or manner of work performance or to the quality or quantity of the work required or to materials used in the work leaves without good cause unless one or more of the following circumstances are present:ⁿ¹¹²

1. The employer uses a method or manner of work that is not customary and that reduces or will reduce the claimant's earning power;
2. The methods and quality of work are inferior and adversely affect the reputation and integrity of workmanship that is an essential feature of the claimant's occupation;
3. The claimant will suffer a potential loss of job skills due to a low quantity of work;
4. The employer substantially increases the quantity of work required without increasing wages; or
5. The work involves an undue risk of injury or illness, or a serious risk to morals.ⁿ¹¹³

A claimant leaves work with good cause if he or she leaves due to a course of conduct by another employee or a supervisor that subjects the claimant to continued abuse, endangers the claimant's health or safety by conduct such as actual or threatened violence or acts affecting the mental well-being of the claimant, causes demands for an unreasonable quantity of work to be produced by the claimant, or unreasonably discriminates against the claimant.ⁿ¹¹⁴ Mere annoyance with or general dislike of another employee or a supervisor does not constitute good cause for leaving employment.ⁿ¹¹⁵

Generally, if an individual leaves work due to a complaint or objection to working conditions, and there is an existing grievance procedure to review the complaint or objection, the individual has voluntarily left work without good cause unless a grievance has been filed and there is an unreasonable delay in the disposition of the grievance.ⁿ¹¹⁶ Exceptions to the requirement of grievance-filing apply when good cause exists under *Unemployment Insurance Code section 1256.2* because an employer intentionally deprives the employee of equal employment opportunities,ⁿ¹¹⁷ or if the conditions involve a risk of serious injury or illness.ⁿ¹¹⁸

[xi] Transfer to Other Work

A claimant who either resigns or elects to be laid off or discharged rather than accept a transfer to other work has voluntarily left work.ⁿ¹¹⁹ The leaving is without good cause if the transfer is to reasonably related work at a comparable rate of pay.ⁿ¹²⁰ Leaving work rather than accepting a transfer is with good cause under any of the following conditions:ⁿ¹²¹

1. The work is unrelated to the last work and to any work within the claimant's prior training, experience, or qualifications;
2. The transfer would cause the claimant to lose proficiency in his or her highest skill (unless the transfer is a return to work previously performed and the claimant's work in a new position has been

unsatisfactory);

3. The transfer would cause the claimant to suffer a substantial wage reduction;n122 or

4. The transfer is to work that the claimant cannot perform due to health, safety, or morals factors.n123

A claimant leaves work for good cause if he or she leaves because of the employer's refusal or failure to make a claimant's requested transfer when the refusal or failure is the result of a misrepresentation of the claimant's work or due to discrimination by the employer against the claimant, or when the claimant has requested the transfer for compelling reasons such as health, safety, or morals.n124

[xii] Time

In order for good cause to exist for a claimant leaving work due to the time requirements of employment, discussed below, there must be a compelling reason for leaving as a result of the time requirements, and the claimant must have informed the employer of the reason for leaving, and given the employer a reasonable opportunity to adjust the situation.n125 If those conditions are satisfied, an individual leaves work for good cause if any of the following conditions exist:n126

1. An unreasonable requirement that an employee work on a particular day, holiday, or number of days in a week;n127

2. Split shifts, or a work schedule that lacks uniformity as to beginning and ending times, or to the number of hours worked each day, week, or month;n128

■ ILLUSTRATION

Employee works as a service station attendant on a split-shift basis from 7:00 a.m. to 11:00 a.m. and 4:00 p.m. to 8:30 p.m., Monday through Friday. Travel from home to work requires a 45-minute commute. Employee attempts to rest between shifts, but Employer does not permit resting on the premises and there is no other place where Employee could reasonably have been expected to rest. Employee voluntarily leaves work. Employee's leaving is for good cause because the requirement that the employee be away from home for 15 hours a day is a compelling reason for voluntarily leaving work.n129

3. Overtime, part-time, or full-time employment, seasonal employment shift, and temporary employment.n130

[xiii] Disciplinary Action by Employer

Unreasonable disciplinary action by an employer may give rise to good cause for leaving if the employee prior to leaving does everything reasonable to preserve the employment relationship.n131 Disciplinary action may be unreasonable if it was for conduct that was not work-related, or for violating a rule of which the employee had no knowledge or that imposed unreasonable new burdens, or if it was excessive under the circumstances, violated the employee's constitutional rights, imposed an undue risk of injury or illness, was part of a pattern of hostility or abuse toward the employee, or did not timely follow the employee's act or omission.n132 Good cause for leaving may also exist when the employer makes a demand for restitution for shortages, breakages, or loss of equipment that was either of minor consequence or the result of an isolated incident of mere inefficiency, inability, or ordinary negligence (as opposed to gross negligence or willfulness), or when the amount of restitution required to be paid at any one time is unreasonable in view of the employee's financial circumstances.n133

[xiv] Prospects of Other Work

An individual who leaves work to seek other work does not have good cause for leaving unless he or she leaves part-time work to seek full-time work because the part-time work prevents an effective search for full-time work.ⁿ¹³⁴ An individual who leaves work to accept other work has good cause for leaving if there was a definite assurance of employment in another substantially better job that is at least as permanent as the job the individual leaves, or if other circumstances establish that a reasonable person genuinely desirous of retaining employment would have left to accept the other work.ⁿ¹³⁵ A hope or speculative expectation of obtaining a new job is not sufficient to establish good cause for leaving work.ⁿ¹³⁶

A claimant who leaves a job due to obtaining a new job by false representations of capability to perform the work and is discharged from the new job for lack of such capability has left the first job without good cause.ⁿ¹³⁷

Leaving permanent full-time work to take temporary work generally is without good cause.ⁿ¹³⁸ However, there may be good cause if an individual leaves a nonseasonal permanent job to return on recall to seasonal work in which the individual has accumulated substantial rights. Leaving temporary work to accept permanent work is generally with good cause, as is leaving part-time work to accept full-time permanent employment.ⁿ¹³⁹ Conversely, leaving full-time work to accept part-time work is without good cause unless the individual has compelling reasons for taking part-time work, such as protection of health.ⁿ¹⁴⁰

[xv] Optional Early Retirement

An individual who exercises an option for early retirement prior to compulsory retirement ordinarily leaves the most recent work without good cause in the absence of other factors.ⁿ¹⁴¹ However, an individual whose decision to elect early retirement is substantially motivated by a factor other than monetary inducements may have good cause for leaving work if a reasonable person genuinely desirous of retaining employment would nevertheless have retired under the circumstances.ⁿ¹⁴² Other factors that may motivate early retirement include, but are not limited to, the individual's age or health,ⁿ¹⁴³ abolition of the individual's job, the individual's wages at the time of early retirement,ⁿ¹⁴⁴ the degree of encouragement of early retirement given an individual by supervisory personnel, and whether a transfer or leave of absence was available that would have met the individual's needs.ⁿ¹⁴⁵

The Unemployment Insurance Appeals Board found that good cause did not exist in a case in which an employee, whose job was not in jeopardy from his employer's restructuring process, accepted the employer's offer of a bonus to retire 6 months early. The employee chose early retirement for two reasons: his concern that his job might be subject to restructuring sometime in the future, and his desire to prevent the reassignment, downgrading, or potential layoff of an employee with lesser seniority. The first reason was not good cause because it was purely speculative rather than imperative and compelling. The second reason was not good cause because the restructuring process included protection against layoffs, and there was no evidence that the employee would have displaced any other employee had he remained at his job.^{n145.1}

For a discussion of compulsory retirement as good cause for leaving work, see [f][i], *above*.

[xvi] Union Relations

An employee does not have good cause for leaving work because of a refusal to join, retain membership in, or pay an agency service fee to a bona fide labor organization that has a collective bargaining agreement with the employer that provides that union membership or fee payment is a condition of hire or continued employment.ⁿ¹⁴⁶ An individual's personal objection to unions generally or specifically, or to union practices and policies, is not good cause for leaving work unless based on a bona fide conscientious objection.ⁿ¹⁴⁷ If an employee is not required to join a union or pay a fee as a condition of hire or continued employment under a collective bargaining agreement, refusal to join or pay a fee is not good cause for leaving work, unless the individual's refusal is based on a bona fide conscientious objection *or* the

individual is threatened with and has a reasonable fear of, or is subjected to, physical injury to force him or her to join or to remain a member of a union.n148

An individual who voluntarily leaves work as required by a union rule to which an employer has not agreed voluntarily leaves work without good cause.n149

■ILLUSTRATION

Employee is a member of the Sailors Union, sailing under a Class B permit. Employee leaves ship after 90 days on his own initiative, due to a union rule that requires Class B permit sailors to leave ship after 90 days. Employer has not agreed to the union rule. Employee's leaving is without good cause since Employee could have remained on ship except for the union rule to which Employer was not a party.n150

An individual who leaves work because of union disciplinary action taken against the individual due to an infraction of a union rule or other offense against union discipline has voluntarily left work without good cause if the action of the union is not arbitrary or capricious and if the individual has an opportunity to protest the union charge through any customary union procedure.n151

Other union-related reasons for leaving work that may constitute good cause include leaving because of an employer's violation of a collective bargaining agreement provision,n152 employer discrimination due to an employee's union relations or activity,n153 union intimidation of the employee,n154 or changes by an employer in the wages or hours or work required under the terms of a collective bargaining agreement.n155

For discussion of eligibility issues relating to strikes, see § 80.34[5].

[xvii] Other Circumstances

Other circumstances that may raise the issue of whether good cause existed for leaving employment include leaving to participate in an apprenticeship training program,n156 leaving due to lack of proper equipment to perform work,n157 nonutilization of skills,n158 or leaving due to personal affairs such as financial difficulties or legal matters,n159

[5] Discharge for Misconduct

[a] What Constitutes "Misconduct"

The term "misconduct" as used in *Unemployment Insurance Code section 1256* is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior that the employer has the right to expect of an employee, or in carelessness or negligence of such degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.n160 EDD regulations provide that misconduct exists if all of the following elements are present:n161

1. The claimant owes a material duty to the employer under the contract of employment;
2. There is a substantial breach of that duty;
3. The breach is a willful or wanton disregard of that duty; and
4. The breach disregards the employer's interests and injures or tends to injure the employer's interests.

Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity,

inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not misconduct.ⁿ¹⁶² Since the policy of the Unemployment Insurance Code is to provide benefits to persons unemployed through no fault of their own,ⁿ¹⁶³ "fault" is the basic element to be considered in interpreting and applying the code sections on unemployment compensation. The determination of fault is not concluded by a finding that the discharge was justifiedⁿ¹⁶⁴ or that the employer had a "right" to discharge the employee.ⁿ¹⁶⁵ The employee's conduct must evince culpability or bad faith. A claimant may not be denied benefits solely on the basis of a good faith error in judgment.ⁿ¹⁶⁶

The burden of establishing misconduct is on the employer.ⁿ¹⁶⁷

[b] Requirement That Misconduct Be Connected With Most Recent Work

To disqualify a claimant from receiving unemployment benefits, the misconduct must be "connected with" the most recent work.ⁿ¹⁶⁸ Misconduct is connected with work if the activity injures or tends to injure the employer's interests.ⁿ¹⁶⁹ Generally, the activity constituting misconduct occurs on the job. However, certain off-the-job activity, often involving illegal or criminal activity, may constitute misconduct if as a consequence of that activity there is injury to the employer's interests, such as reputational interests.ⁿ¹⁷⁰

Preemployment activity will rarely constitute misconduct connected with the most recent work.ⁿ¹⁷¹ However, if the employee is discharged for falsifying his or her work application by concealing information about preemployment activity that would have precluded the initial hiring, the discharge may be considered to be for misconduct.ⁿ¹⁷²

There is no misconduct connected with work if the only basis for a discharge is a collective bargaining agreement requiring that an employee who is expelled or suspended from the union must be discharged. However, if the employer would have discharged the employee for the misconduct even if there had been no expulsion or suspension from the union, then the discharge for misconduct is connected with the most recent work.ⁿ¹⁷³

In the case of a trade dispute, activity by an employee that injures or tends to injure the employer's interests is misconduct "connected with" work, since the employment relationship during the dispute is merely suspended rather than terminated.ⁿ¹⁷⁴ For a discussion of trade disputes as a basis for disqualification for benefits, see § 80.34[5].

[c] Relationship of "Good Cause" to Discharges Based on Refusal to Obey Employer's Rules or Orders

A claimant's violation of his or her employer's rules or refusal of a work assignment will not constitute misconduct rendering the claimant ineligible for unemployment benefits if the claimant's reasons for objecting to the rules or the assignment would have constituted "good cause" for resigning under *Unemployment Insurance Code section 1256*.ⁿ¹⁷⁵ Because *Unemployment Insurance Code section 1256* does not disqualify employees who leave employment voluntarily with good cause, it does not disqualify those who take the less drastic step of refusing a work assignment for good cause. Accordingly, once the employer has proven that the claimant willfully refused a reasonable order, the claimant has an opportunity to show that his or her refusal was for good cause.ⁿ¹⁷⁶ For a discussion of what constitutes "good cause" for voluntarily terminating employment, see [4], above.

Situations in which it was found that discharge was not based on misconduct because there was good cause for not complying with an employer's rule or order include the following:

1. Refusal to perform certain assignments based on the good-faith belief that compliance would endanger the health or safety of the claimantⁿ¹⁷⁷ or of others;ⁿ¹⁷⁸
2. Refusal to work certain hours because of religious convictions adopted after beginning employment;ⁿ¹⁷⁹

3. Refusal to sign a statement that resume, to be submitted by employer as part of bid for government contract, could never be used by competition;ⁿ¹⁸⁰ and

4. Noncompliance with a company rule in order to perform work more effectively.ⁿ¹⁸¹

Under regulations promulgated by the EDD, violation of an employer's rules may constitute misconduct if the rule is reasonable, the individual knew or should have known the rule, and the violation is willful or wanton, material, and substantially injures or tends to injure the employer's interests.ⁿ¹⁸² The regulations specifically discuss employer rules relating to clothes and appearance,ⁿ¹⁸³ gambling or game playing,ⁿ¹⁸⁴ employment of married persons,ⁿ¹⁸⁵ handling of and accountability for money,ⁿ¹⁸⁶ use of motor vehicles,ⁿ¹⁸⁷ removal of the employer's property from the premises,ⁿ¹⁸⁸ safety,ⁿ¹⁸⁹ purchase of goods by employees in retail merchandise establishments,ⁿ¹⁹⁰ and time clocks.ⁿ¹⁹¹

Noncompliance with an employer's orders may constitute insubordination amounting to misconduct only if those orders are both lawful and reasonable.ⁿ¹⁹² Refusal to obey an employer's order does not constitute misconduct in any of the following circumstances:ⁿ¹⁹³

1. The employee was unable to comply with an order because of physical limitations that are known or apparent to the employer or its representative;
2. Compliance with the order would impose a new and unreasonable burden on the employee;
3. The order is unreasonable because it does not relate to or affect the employer's business interests;
4. The employee reasonably and in good faith believes that compliance would violate the law, objects or makes a reasonable attempt to object to the employer, and the employer makes no reasonable effort to explain the basis for the order to the employee;ⁿ¹⁹⁴
5. The employee reasonably believes compliance with the order would cause an undue risk of injury or illness; or
6. The employee has a reasonable and good-faith doubt that the individual issuing the order has authority to do so.

Insubordination constituting misconduct may also occur if the employee commits an act that exceeds the authority granted to him or her by the employer.ⁿ¹⁹⁵

The Unemployment Insurance Appeals Board has held that it is insubordination constituting misconduct for an employee working in a dangerous environment to refuse to submit to a regularly scheduled drug test required by his or her employer.^{n195.1} A court of appeal has upheld this decision.^{n195.2} However, the court of appeal did not phrase the issue in terms of "insubordination." Instead, the court concluded that the employee's refusal was misconduct because it was a willful violation of a reasonable rule that demonstrated a wanton disregard for the employer's business interests.^{n195.3} The court reasoned that requiring employees working in a hazardous environment, even in jobs that would not be considered safety-sensitive in a different location, to take periodic drug tests is a reasonable requirement that does not violate the employee's right to privacy.^{n195.4}

[d] Other Situations Giving Rise to Issues of Misconduct

[i] Absence From Work

An employee may be discharged from work for misconduct based on unexcused absences, failure to comply with existing procedures governing requests for extension of a leave of absence, continued absence after the purpose for which an indefinite leave of absence was granted has been accomplished, and giving false reasons to obtain a leave of absence.ⁿ¹⁹⁶

Unexcused absences constitute misconduct if (1) the employee had no real, substantial, and compelling reasons for the absence and the employer has not condoned the absence by failing to warn or reprimand the employee on the occurrence of prior similar absences,ⁿ¹⁹⁷ or (2) the employee has not with reasonable promptness notified the employer of the absence and the reasons for it, if notice is reasonably feasible, and there is no real, substantial, and compelling reason to excuse the failure to give notice.ⁿ¹⁹⁸

Prior warnings by the employer do not negate the compelling reasons for the absence, and are pertinent only if the employee does not have compelling reasons.ⁿ¹⁹⁹ A compelling reason for an unexcused absence may also justify failure to give notice to the employer as, for example, when a member of the employee's family dies.ⁿ²⁰⁰

[ii] Absence Due to Incarceration

Termination of employment because of an employee's incarceration for more than 24 hours, followed by conviction or a plea of guilty or nolo contendere, constitutes a voluntary leaving without good cause rather than a discharge.ⁿ²⁰¹ Termination of employment because of incarceration constitutes a discharge, *not* based on misconduct, under any of the following circumstances: (1) incarceration for a period of less than 24 hours, (2) incarceration for any period in lieu of a fine that the individual was unable to pay due to indigency, or (3) incarceration followed by a verdict of not guilty of the offense, or any lesser included offense, for which the individual was incarcerated.ⁿ²⁰² In the case of incarceration because of inability to pay a fine, the individual is regarded as having lost his or her job because of indigency rather than because of a voluntary criminal act.ⁿ²⁰³ In the case of incarceration followed by a verdict of not guilty, the incarceration is involuntary, and the employee has left work through no fault of his or her own.ⁿ²⁰⁴ If an employee is discharged due to the commission of the illegal act itself, rather than for absence from work caused by incarceration due to the illegal act, the rules governing discharge due to an illegal act apply.ⁿ²⁰⁵ For a discussion of discharge due to an illegal act itself, see [v], *below*.

[iii] Failure to Perform Work Properly or Neglect of Duty

An individual's failure to perform work properly or neglect of duty is willful and constitutes misconduct if he or she intentionally, knowingly, or deliberately fails to perform, or performs in a grossly negligent manner, or repeatedly performs negligently after prior warning or reprimand and in substantial disregard of the employer's interests.ⁿ²⁰⁶

Inability or incapacity to perform the job or inefficient performance is not misconduct, unless it is due to the individual's willful failure to perform to the best of his or her abilities.ⁿ²⁰⁷ If an employee's inadequate performance is the result of circumstances within his or her control and the employee does nothing to improve the performance, there is a willful failure to perform adequately which constitutes misconduct.ⁿ²⁰⁸ Inefficiency may be misconduct if the employee previously demonstrated the ability to do better, work performance has substantially deteriorated, and there is no reasonable explanation for the deterioration.ⁿ²⁰⁹

■ ILLUSTRATION

For the first three years of employment as a precision assembler, Employee's work had been entirely satisfactory, but then had deteriorated. Employee has no excuse other than the fact that her poor eyesight had hampered her in doing close work. Employee refuses to consult an optometrist because she is unwilling to wear corrective lenses. Employer discharges employee. Employee's discharge is for misconduct since the reasons for her inefficiency are within her power to control and the failure is

willful.n210

Failure to produce the required quantity of work is misconduct if the employee was capable of meeting the employer's reasonable quantity standards, but continually failed to do so after reprimands or warnings.n211

A single incident of grossly negligent work performance or failure to work constitutes misconduct.n212 In contrast, misconduct based on ordinary negligent performance requires repeated negligent performance after prior warning or reprimand, in substantial disregard of the employer's interest, and the ability and capacity on the part of the employee to perform satisfactorily.n213

In the case of discharge because of an employee's involvement in an accident or near-accident, there is no misconduct unless the employee's actions were grossly or substantially negligent.n214

■ILLUSTRATIONS

Employee 1, a taxicab driver, has been involved in a series of six accidents within a short period of time while driving his cab, and has repeatedly violated traffic laws. Employer had given Employee a safety course and discussed preventive measures after each accident. Shortly after a later accident, Employer is held liable in damages and discharges Employee 1. The action of Employee 1 is misconduct because it is clearly substantial, prejudicial to the employer's interests, and not the result of mere inefficiency.n215

Employee 2, also a cab driver, was involved in a minor accident when, on route to pick up a passenger, a person hailed her from the opposite side of the street. The cab driver glanced toward the person hailing her, in accordance with a company policy requiring drivers to report cab requests to the company dispatcher, and the accident occurred as a consequence of looking away from the line of traffic. Employer discharges Employee 2. The action of Employee 2 is not misconduct, but at most a good faith error in judgment in an attempt to carry out company policy.n216

[iv] Tardiness

The employee's obligation to arrive at work on time is an implied obligation that the employer does not have to set forth at the time of hire.n217 Tardiness is misconduct if it results in a substantial breach and disregard of the duty owed to the employer and shows a willful or wanton disregard of and injures or tends to injure the employer's interests.n218 Examples of tardiness constituting misconduct include (1) repeated inexcusable tardiness despite a recent warning that discharge may result, (2) an instance of unexcused tardiness combined with violations of other employer standards and prior warnings, and (3) a single instance of inexcusable tardiness that causes reasonably foreseeable substantial injury to the employer's interest.n219

■ILLUSTRATION

Employee is a chemist responsible for operating controls to insert catalytic agents at several steps during a factory production process. The work cannot proceed without the addition of the catalysts. Employee has never before been tardy at work but one day shows up two hours late without excuse, resulting in the loss of valuable production and the payment of wages for nonproductive time on line. Employer discharges Employee for this single instance of tardiness. Employee's discharge was for misconduct even though for only a single instance of tardiness not preceded by reprimands or warnings, since the substantial loss to Employer was foreseeable.n220

Being tardy by only a minute or two on several occasions, in a context that does not affect the employer's operations, will be viewed as a minor infraction and not so unreasonable as to constitute misconduct.n221

If an employee has a compelling reason for tardiness, his or her discharge cannot be for misconduct, regardless of

previous instances of tardiness or prior reprimands and warnings.n222 Mere personal inconvenience, failure to allow ample traveling time to work, oversleeping, or missing the bus are not reasonable excuses for repeated tardiness.n223

[v] Violation of Law

Criminal acts or other violations of law committed outside of working hours and away from the employer's premises usually will not be misconduct "in connection with" the work unless the employee uses information obtained from the work to carry out the crime or violation, or there is some other substantial connection with the work.n224

■ ILLUSTRATION

Employee, a television repairperson, while repairing a television set in the customer's home, notes the layout of the home and the property in it. That night, Employee returns and steals property from the customer's home. Employee is subsequently convicted of the theft. Employer discharges Employee. Employee's violation of law is misconduct due to the clear connection with the work even though the act was off-duty and away from Employer's premises.n225

An employee's on-the-job criminal act or other violation of law is misconduct if the act is substantial in nature, regardless of the employer's prior warnings or reprimands.n226 If the act is minor, it is not misconduct unless it occurs after prior warnings or reprimands by the employer for similar acts.n227 In no event will an employee's criminal act or other violation of law be misconduct for purposes of disqualifying the employee for unemployment benefits if the employer had ordered, participated in, or condoned the employee's action.n228

One court of appeal has suggested that off-duty drug or alcohol use with no on-the-job impairment may be work-connected if the employee works in a safety-sensitive position, if the employee's conduct would undermine public trust and damage the employer's reputation, or if a federally-imposed safety program requires the employee to submit to a drug test.n228.1

[vi] Other Activities Constituting Misconduct

Other activities or situations that may constitute misconduct in connection with the employee's most recent work include:

1. Acts or statements detrimental to the employer's interest, including disparaging remarks about the employer or the employer's business, and aiding the employer's competitor;n229
2. Dishonest acts in connection with the work, such as falsification of records, willful misappropriation of the employer's funds, or conversion of the employer's property;n230
3. Garnishment of the employee's wages causing a disruption to or a burden on the employer;n231
4. On-the-job intoxication or use of intoxicants, unless the intoxication-induced behavior was the product of an irresistible compulsion or a total inability to abstain, or if the use or consumption of intoxicants was permitted or condoned by the employer;n232
5. Refusal to take a periodic drug test, if the employee works in a hazardous environment or safety-sensitive position;n232.1
6. Poor relations with co-employees on the job, including inexcusable fighting, use of offensive language, or dishonesty;n233 or

7. Union-related acts that are illegal, or that violate the collective bargaining agreement or an employer rule or standard of behavior that the employer has a right to enforce.ⁿ²³⁴

[6] Duration of Disqualification

An individual disqualified under *Unemployment Insurance Code Section 1256* for voluntarily leaving work without good cause or for discharge for misconduct, under a determination transmitted to him or her by the EDD, is ineligible to receive unemployment compensation benefits for the week in which the act that causes the disqualification occurs and continuing until the individual has, subsequent to that act and registration for work, performed service in bona fide employment for which remuneration is received equal to or in excess of five times his or her weekly benefit amount.ⁿ²³⁵

FOOTNOTES:

(n1)Footnote 1. *See* discussion in [4], *below*.

(n2)Footnote 2. *See* discussion in [5], *below*; *see also* *Unemp. Ins. Code § 100* (policy of Code is to provide benefits to persons who are unemployed "through no fault of their own").

(n3)Footnote 3. *Unemp. Ins. Code § 1256*; *see also* *Unemp. Ins. Code § 1327* (notice by employer of facts affecting claimant's eligibility).

(n4)Footnote 4. *Unemp. Ins. Code § 1256*.

(n5)Footnote 5. *See O'Connell v. Unemployment Ins. Appeals Bd.* (1983) 149 Cal. App. 3d 54, 59, 196 Cal. Rptr. 505 .

(n6)Footnote 6. *Unemp. Ins. Code § 1256.3*; *see also* 22 Cal. Code Reg. § 1256-2 (further defining "most recent work").

(n7)Footnote 7. For discussion of types of claims, *see* § 80.38.

(n8)Footnote 8. For discussion of continued claims, *see* § 80.38[4].

(n9)Footnote 9. 22 Cal. Code Reg. § 1256-1(d).

(n10)Footnote 10. *Morgan v. Unemployment Ins. Appeals Bd.* (1992) 4 Cal. App. 4th 762, 767, 6 Cal. Rptr. 2d 34 .

(n11)Footnote 10.1. *See* 22 Cal. Code Reg. § 1256-1(c), (d); *see also* *In re Mitchell* (1994) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-479.

(n12)Footnote 10.2. *Morgan v. Unemployment Ins. Appeals Bd.* (1992) 4 Cal. App. 4th 762, 767, 6 Cal. Rptr. 2d 34 ; *see also* *In re Mitchell* (1994) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-479.

(n13)Footnote 11. 22 Cal. Code Reg. § 1256-1(d); *see* 22 Cal. Code Reg. § 1256-1(b).

(n14)Footnote 12. *See* 22 Cal. Code Reg. § 1256-1(d).

(n15)Footnote 13. *See* 22 Cal. Code Reg. § 1256-1(d).

(n16)Footnote 14. 22 Cal. Code Reg. § 1256-1(d).

(n17)Footnote 15. 22 Cal. Code Reg. § 1256-1(f).

(n18)Footnote 16. *See* 22 Cal. Code Reg. § 1256-1(f); *see also* *Steinberg v Unemployment Ins. Appeals Bd.* (1978) 87 Cal. App. 3d 582, 585, 151 Cal. Rptr. 133 (discussing doctrine of "constructive quit").

(n19)Footnote 17. *See* 22 Cal. Code Reg. § 1256-1(f).

(n20)Footnote 18. *See* 22 Cal. Code Reg. § 1256-1(f).

(n21)Footnote 19. *See* *Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal. 3d 575, 584, 205 Cal. Rptr. 501, 685 P.2d 61 .

(n22)Footnote 20. *Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal. 3d 1, 5, 192 Cal. Rptr. 134, 663 P.2d 904 .

(n23)Footnote 21. *Gibson v. Unemployment Ins. Appeals Bd.* (1973) 9 Cal. 3d 494, 499 fn. 8, 108 Cal. Rptr. 1, 509 P.2d 945 .

(n24)Footnote 22. *Zorrero v. Unemployment. Ins. Appeals Bd.* (1975) 47 Cal. App. 3d 434, 439, 120 Cal. Rptr. 855 ; *see also* 22 Cal. Code Reg. § 1256-3(b) (similarly defining "good cause").

(n25)Footnote 23. *See* *MacGregor v. Unemployment Ins. Appeals Bd.* (1984) 37 Cal. 3d 205, 209, 207 Cal. Rptr. 823, 689 P.2d 453 ; 22 Cal. Code Reg. § 1256-3(b).

(n26)Footnote 24. *See* *Unemp. Ins. Code § 1030(d)*. For discussion of employer's right to submit facts regarding claimant's termination of employment, *see* § 80.39[4], [6].

(n27)Footnote 25. 22 Cal. Code Reg. § 1256-3(c).

(n28)Footnote 26. 22 Cal. Code Reg. § 1256-3(c).

(n29)Footnote 27. *See, e.g., Zorrero v. Unemployment Ins. Appeals Bd.* (1975) 47 Cal. App. 3d 434, 120 Cal. Rptr. 855 (supermarket employee without good cause in leaving work because of having to commute four hours roundtrip by public transportation after his car broke down, since he could have repaired his car or purchased a new one, or sought a transfer to a store nearer his home). For a discussion of transportation conditions giving rise to good cause, *see* [h][v], below.

(n30)Footnote 28. *See* *MacGregor v. Unemployment Ins. Appeals Bd.* (1984) 37 Cal. 3d 205, 209, 207 Cal. Rptr. 823, 689 P.2d 453 ; *Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal. 3d 575, 585, 205 Cal. Rptr. 501, 685 P.2d 61 ; *Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal. 3d 1, 6, 192 Cal. Rptr. 134, 663 P.2d 904 .

(n31)Footnote 29. *Unemp. Ins. Code § 1256*; *see also* *Unemp. Ins. Code § 1030(e)* (charge against employer's account of benefits paid to compulsorily retired individual). For discussion of charges against employer's account for benefits paid, *see* § 80.39[4][b].

(n32)Footnote 30. *See* 22 Cal. Code Reg. § 1256-17(b); *see also* discussion in [a], above. For discussion of legal restrictions on compulsory retirement policies under age discrimination laws, *see* ch. 41.

(n33)Footnote 31. *See* 22 Cal. Code Reg. § 1256-17(c).

(n34)Footnote 32. *See* 22 Cal. Code Reg. § 1256-17(d).

(n35)Footnote 32.1. *In re Mitchell* (1994) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-479.

(n36)Footnote 33. *Unemp. Ins. Code § 1256* (codifying holding in *Stanford v. Unemployment Ins. Appeals Bd.*

(1983) 147 Cal. App. 3d 98, 102-104, 195 Cal. Rptr. 1).

(n37)Footnote 34. *Unemp. Ins. Code* § 1256.2.

(n38)Footnote 35. *Unemp. Ins. Code* § 1256.2(a).

(n39)Footnote 36. *Unemp. Ins. Code* § 1256.2(b); *see also Morrison v. California Unemployment Ins. Appeals Bd.* (1976) 65 Cal. App. 3d 245, 253, 134 Cal. Rptr. 916 (noting requirement of appropriate protest in finding good cause for quitting when employer failed, after demand, to correct unlawful wage disparities between male and female employees); *Prescod v. Unemployment Ins. Appeals Bd.* (1976) 57 Cal. App. 3d 29, 37, 41, 127 Cal. Rptr. 540 (good cause for leaving when employee was rehired after maternity leave at lower grade resulting in loss of promotional opportunity; approved and contrary holding disapproved in *Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal. 3d 575, 586-587, 205 Cal. Rptr. 501, 685 P.2d 61).

(n40)Footnote 37. 22 Cal. Code Reg. § 1256.2-1(a).

(n41)Footnote 38. 22 Cal. Code Reg. § 1256.2-1(b).

(n42)Footnote 39. *Unemp. Ins. Code* § 1256.7.

(n43)Footnote 40. *Unemp. Ins. Code* § 1256.7.

(n44)Footnote 41. *See Unemp. Ins. Code* § 1256.7.

(n45)Footnote 42. *Unemp. Ins. Code* § 1256.7.

(n46)Footnote 43. *Unemp. Ins. Code* § 1256; *see also Unemp. Ins. Code* §§ 1030(a)(4), 1032(c) (nonchargeability against employer's reserve account of benefits paid to employee who left work to accompany spouse or domestic partner).

(n47)Footnote 44. *See* 1982 Stats., ch. 1073, § 1.

(n48)Footnote 45. *See Unemp. Ins. Code* § 1256.

(n49)Footnote 46. *See Unemp. Ins. Code* § 15.

(n50)Footnote 47. *See* 22 Cal. Code Reg. § 1256-12(b)(2); *see also* 22 Cal. Code Reg. § 1256-10(c)(6) (preservation of family unity as good cause generally).

(n51)Footnote 48. *Unemp. Ins. Code* § 1256; *see* 1982 Stats., ch. 1073, § 13 (stating legislative intent behind amendment to *Unemp. Ins. Code* § 1256); *Altaville Drug Store, Inc. v. Employment Development Department* (1988) 44 Cal. 3d 231, 237, 242 Cal. Rptr. 732, 746 P.2d 871 ; 22 Cal. Code Reg. § 1256-12(b)(1); *see also Unemp. Ins. Code* §§ 1032, 3701(a), 4701(a) (in determining whether employer's reserve account should be charged for benefits paid, "spouse" includes person to whom marriage is imminent); *cf. Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal. 3d 1, 3-10, 192 Cal. Rptr. 134, 663 P.2d 904 (no good cause for leaving employment to accompany nonmarital partner, when marriage is not imminent, and there are insufficient indications of need to preserve permanent and lasting familial relationship).

(n52)Footnote 49. *See Norman v. Unemployment Ins. Appeals Bd.* (1983) 34 Cal. 3d 1, 10, 192 Cal. Rptr. 134, 663 P.2d 904 .

(n53)Footnote 50. *See MacGregor v. Unemployment Ins. Appeals Bd.* (1984) 37 Cal. 3d 205, 207, 212-214, 207 Cal. Rptr. 823, 689 P.2d 453 ; *see also* 22 Cal. Code Reg. § 1256-10(c)(6).

(n54)Footnote 51. *See Unemp. Ins. Code § 1026(b); see also* discussion in § 80.21[4][c].

(n55)Footnote 52. *See Unemp. Ins. Code § 1256.*

(n56)Footnote 53. *See Unemp. Ins. Code § 1032; see also Unemp. Ins. Code § 1030* (time limits for submitting facts relating to reason for termination of employment).

(n57)Footnote 54. *Unemp. Ins. Code § 1256.1(a).*

(n58)Footnote 55. *Unemp. Ins. Code § 1256.1(a).*

(n59)Footnote 56. *Unemp. Ins. Code § 1256.1(b); see also Jefferson v. Unemployment Ins. Appeals Bd. (1976) 59 Cal. App. 3d 72, 77-78, 130 Cal.Rptr. 405* (deemed lack of good cause for leaving employment due to incarceration as not depriving claimant of due process).

(n60)Footnote 57. *See Thomas v. Review Bd., Ind. Empl. Sec. Div. (1981) 450 U.S. 707, 717-718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 .*

(n61)Footnote 58. *See Thomas v. Review Bd., Ind. Empl. Sec. Div. (1981) 450 U.S. 707, 711-712, 718-719, 101 S. Ct. 1425, 67 L. Ed. 2d 624* (good cause for leaving work after transfer to department involved in production of armaments when religious beliefs prevented claimant from participating in production of war materials).

(n62)Footnote 59. 22 Cal. Code Reg. § 1256-6(b).

(n63)Footnote 60. *See* 22 Cal. Code Reg. § 1256-6, Example 1.

(n64)Footnote 61. *See Hobbie v. Unemployment Appeals Commission (1987) 480 U.S. 136, 139-141, 107 S. Ct. 1046, 94 L. Ed. 2d 190 ; see also* discussion under [5][c], below.

(n65)Footnote 62. *See Sherbert v. Verner (1963) 374 U.S. 398, 404-406, 83 S. Ct. 1790, 10 L. Ed. 2d 965 ; Jaffe v. Unemployment Ins. Appeals Bd. (1984) 156 Cal. App. 3d 719, 722-724, 202 Cal. Rptr. 812 .* For discussion of good cause for unavailability, see § 80.32[2][b].

(n66)Footnote 63. 22 Cal. Code Reg. § 1256-15(b).

(n67)Footnote 64. *See* 22 Cal. Code Reg. § 1256-15(c).

(n68)Footnote 65. 22 Cal. Code Reg. § 1256-15(d)(1).

(n69)Footnote 66. *Rabago v. Unemployment Ins. Appeals Bd. (1978) 84 Cal. App. 3d 200, 210-211, 148 Cal. Rptr. 499 ; see* 22 Cal. Code Reg. § 1256-15(d)(1).

(n70)Footnote 67. 22 Cal. Code Reg. § 1256-1(d)(1).

(n71)Footnote 68. *Rabago v. Unemployment Ins. Appeals Bd. (1978) 84 Cal. App. 3d 200, 210-211, 148 Cal. Rptr. 499 .*

(n72)Footnote 69. *See McCrocklin v. Employment Development Dep't (1984) 156 Cal. App. 3d 1067, 1072-1073, 205 Cal. Rptr. 156 .*

(n73)Footnote 70. 22 Cal. Code Reg. § 1256-15(b).

(n74)Footnote 71. *See* 22 Cal. Code Reg. § 1256-21(e).

(n75)Footnote 72. *See* 22 Cal. Code Reg. § 1256-15(b).

(n76)Footnote 73. 22 Cal. Code Reg. § 1256-15(b).

(n77)Footnote 74. 22 Cal. Code Reg. § 1256-15(d)(2).

(n78)Footnote 75. 22 Cal. Code Reg. § 1256-15(d)(2).

(n79)Footnote 76. 22 Cal. Code Reg. § 1256-15(d)(2).

(n80)Footnote 77. *See* 22 Cal. Code Reg. § 1256-15(e).

(n81)Footnote 78. *See* 22 Cal. Code Reg. § 1256-15(e).

(n82)Footnote 79. *See* 22 Cal. Code Reg. § 1256-15(e).

(n83)Footnote 80. *See Amador v. Unemployment Ins. Appeals Bd. (1984) 35 Cal. 3d 671, 683, 200 Cal. Rptr. 298, 677 P.2d 224 .*

(n84)Footnote 81. 22 Cal. Code Reg. § 1256-15(d)(3).

(n85)Footnote 82. 22 Cal. Code Reg. § 1256-15(d)(3).

(n86)Footnote 83. *See* 22 Cal. Code Reg. § 1256-15(d)(3).

(n87)Footnote 84. *See* 22 Cal. Code Reg. § 1256-15(d)(3).

(n88)Footnote 85. 22 Cal. Code Reg. § 1256-22(b).

(n89)Footnote 86. For a discussion of minimum wages requirements, *see* Chapter 2.

(n90)Footnote 87. For a discussion of rules regarding time and place for payment of wages, *see* Chapter 4.

(n91)Footnote 88. *See, e.g., Bunny's Waffle Shop v. Cal. Emp. Com. (1944) 24 Cal. 2d 735, 743, 151 P.2d 224 (25% pay cut as constituting good cause for leaving); cf. Maitland v. Employment Development Dept. (1982) 130 Cal. App. 3d 331, 333-334, 181 Cal. Rptr. 587 (7 2/3 % pay cut after probationary period as insufficient to constitute good cause for leaving).*

(n92)Footnote 89. *See discussion under § 80.32[3]* for discussion of what constitutes suitable work.

(n93)Footnote 90. 22 Cal. Code Reg. § 1256-22(c).

(n94)Footnote 91. For discussion of when employer may deduct from employee's wages for cash shortage, breakage, or loss of equipment, *see* Chapter 4.

(n95)Footnote 92. However, if the employer's act is discriminatory, such as a denial of like wages to the individual for like work performed by other employees of like seniority, the individual's leaving of work for such discrimination is for good cause. *see* [f][iii], above, for discussion of deprivation of equal employment opportunities as "good cause" for leaving work. *see* Chapter 41 for discussion of federal and state equal pay laws.

(n96)Footnote 92.1. *See discussion under § 80.34[5].*

(n97)Footnote 92.2. *See Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1045, 256 Cal. Rptr. 513* (trade dispute resulted because employer required that employees accept 7.8 percent wage reduction and a

total wage and benefit reduction of 14.8 percent); *Martinez v. California Unemployment Ins. Appeals Bd.* (1988) 206 Cal. App. 3d 1385, 1390-1394, 254 Cal. Rptr. 461 (wage cut amounted to 27 to 33 percent reduction in earnings for employees, and wage cuts in combination with reduced benefits comprised 34 to 41 percent earnings reduction).

(n98)Footnote 92.3. See *Acuff v. Unemployment Ins. Appeals Bd.* (1989) 208 Cal. App. 3d 1038, 1050, 256 Cal. Rptr. 513 .

(n99)Footnote 93. 22 Cal. Code Reg. § 1256-8(b).

(n100)Footnote 94. 22 Cal. Code Reg. § 1256-8(c); see also *Zorrero v. Unemployment Ins. Appeals Bd.* (1975) 47 Cal. App. 3d 434, 438-440, 120 Cal. Rptr. 855 (supermarket employee without good cause in leaving work because of having to commute four hours roundtrip by public transportation after his car broke down, since he could have repaired his car or purchased a new one, or sought a transfer to a store nearer his home).

(n101)Footnote 95. See *Perales v. Department of Human Resources Dev.* (1973) 32 Cal. App. 3d 332, 337, 108 Cal. Rptr. 167 ; 22 Cal. Code Reg. § 1256-5(b).

(n102)Footnote 96. 22 Cal. Code Reg. § 1256-5(c).

(n103)Footnote 97. See 22 Cal. Code Reg. § 1256-10(b).

(n104)Footnote 98. See 22 Cal. Code Reg. § 1256-10(c), Examples 1 and 2 and comments thereto.

(n105)Footnote 99. See 22 Cal. Code Reg. § 1256-11(a).

(n106)Footnote 100. See *Lewis v. Unemployment Ins. Appeals Bd.* (1976) 56 Cal. App. 3d 729, 741, 128 Cal. Rptr. 795 .

(n107)Footnote 101. See *Lewis v. Unemployment Ins. Appeals Bd.* (1976) 56 Cal. App. 3d 729, 742, 128 Cal. Rptr. 795 ; 22 Cal. Code Reg. § 1256-16(b).

(n108)Footnote 102. 22 Cal. Code Reg. § 1256.16(c).

(n109)Footnote 103. 22 Cal. Code Reg. § 1256-16(d).

(n110)Footnote 104. See 22 Cal. Code Reg. § 1256-1(d)(1); see also *Morgan v. Unemployment Ins. Appeals Bd.* (1992) 4 Cal. App. 4th 762, 767, 6 Cal. Rptr. 2d 34 (substantial evidence supported voluntary severance finding when employee, believing that termination was imminent, chose to resign in exchange for guaranteed employment up to certain date; employer's testimony that employee would have been fired in any event was insufficient to overcome employee's resignation).

(n111)Footnote 105. See *Unemp. Ins. Code § 1256*.

(n112)Footnote 106. See *Sanchez v. Unemployment Ins. Appeals Bd.* (1984) 36 Cal. 3d 575, 585-587, 205 Cal. Rptr. 501, 685 P.2d 61 (discrimination and harassment because of employee's union and "whistle-blowing" activities; disapproving contrary holding in *Warriner v. Unemployment Ins. Appeals Bd.* (1973) 32 Cal. App. 3d 353, 108 Cal. Rptr. 153); see also *Prescod v. Unemployment Ins. Appeals Bd.* (1976) 57 Cal. App. 3d 29, 127 Cal. Rptr. 540 (discrimination following return from maternity leave).

(n113)Footnote 107. For discussion of duty to preserve employment relationship, see [d], above.

(n114)Footnote 108. 22 Cal. Code Reg. § 1256-23(b).

(n115)Footnote 109. *See* 22 Cal. Code Reg. § 1256-23(c) (listing circumstances under which requirements are unreasonable).

(n116)Footnote 110. 22 Cal. Code Reg. § 1256-23(d).

(n117)Footnote 111. *See* 22 Cal. Code Reg. § 1256-23(d). For discussion of undue risk or injury or illness as good cause for leaving work, see [ii], above; for discussion of discharge based on failure to obey employer's rules as discharge for misconduct, see [5][c], below.

(n118)Footnote 112. 22 Cal. Code Reg. § 1256-23(e).

(n119)Footnote 113. *See* [ii], above, for discussion of undue risk of injury or illness as good cause for leaving employment.

(n120)Footnote 114. 22 Cal. Code Reg. § 1256-23(f).

(n121)Footnote 115. 22 Cal. Code Reg. § 1256-23(f).

(n122)Footnote 116. *See* 22 Cal. Code Reg. § 1256-21(e).

(n123)Footnote 117. *See* discussion under [f][iii], above.

(n124)Footnote 118. *See* 22 Cal. Code Reg. § 1256-21(e). For discussion of health or safety reasons as good cause, see [ii], above.

(n125)Footnote 119. 22 Cal. Code Reg. § 1256-23(g)(1).

(n126)Footnote 120. 22 Cal. Code Reg. § 1256-23(g)(1).

(n127)Footnote 121. 22 Cal. Code Reg. § 1256-23(g)(2).

(n128)Footnote 122. *See* [iv], above, for discussion of dissatisfaction with wages as good cause for leaving employment.

(n129)Footnote 123. *See* [ii], above, for discussion of health, safety, or morals as good cause for leaving employment.

(n130)Footnote 124. *See* 22 Cal. Code Reg. § 1256-23(g)(3). For discussion of health, safety, or morals as good cause for leaving employment, see [ii], above.

(n131)Footnote 125. *See* 22 Cal. Code Reg. § 1256-20(b).

(n132)Footnote 126. 22 Cal. Code Reg. § 1256-20(c).

(n133)Footnote 127. *See* 22 Cal. Code Reg. § 1256-20(c)(1). Such a requirement is reasonable if it is necessary for the conduct of the employer's business and is not unusual, arbitrary, or imposed for the purpose of harassment of the employee. *see* 22 Cal. Code Reg. § 1256-20(c)(1), comments. A change in the work schedule, even though not unreasonable, may give rise to good cause for leaving work if other factors are present, such as, for example, the employee's inability to obtain adequate care for his or her children under the new schedule. *see* 22 Cal. Code Reg. § 1256-20(c)(1), Example 1; *see also* [vii], above, for discussion of domestic circumstances as good cause for leaving work.

(n134)Footnote 128. *See* 22 Cal. Code Reg. § 1256-20(c)(2). Mere preference, inconvenience, or slight hardship as a result of an employee's objection to or insistence on the hours of work is not a compelling reason for leaving work.

see 22 Cal. Code Reg. § 1256-20(c)(2), comments.

(n135)Footnote 129. See 22 Cal. Code Reg. § 1256-20(c)(2), Example 2.

(n136)Footnote 130. See 22 Cal. Code Reg. § 1256-20(c)(3). If an individual works less than full-time, such as temporary or part-time work, he or she has a compelling reason for leaving work if he or she is prevented from seeking other work while working less than full-time. see 22 Cal. Code Reg. § 1256-20(c)(3), comments; see also [xiv], below, for discussion of good cause for leaving work based on prospects of other employment. Ordinarily, an individual working part-time has ample opportunity to seek additional work. see 22 Cal. Code Reg. § 1256-20(c)(3), comments, Example 4. An employee who works part-time for health-related reasons may have good cause for leaving if the employer subsequently requires that the employee change to a full-time schedule. see 22 Cal. Code Reg. § 1256-20(c)(3), Example 3; see also [ii], above, for discussion of health-related reasons as good cause for leaving.

(n137)Footnote 131. See 22 Cal. Code Reg. § 1256-7(d).

(n138)Footnote 132. See 22 Cal. Code Reg. § 1256-7(d)(1)-(7), (9).

(n139)Footnote 133. See 22 Cal. Code Reg. § 1256-7(d)(8); see also discussion in Chapter 4.

(n140)Footnote 134. 22 Cal. Code Reg. § 1256-19(b).

(n141)Footnote 135. 22 Cal. Code Reg. § 1256-19(c); see also 22 Cal. Code Reg. § 1256-19(c)(3) (also listing factors relevant to determining whether new job is substantially better than old job).

(n142)Footnote 136. 22 Cal. Code Reg. § 1256-19(c)(1).

(n143)Footnote 137. 22 Cal. Code Reg. § 1256-19(c)(2).

(n144)Footnote 138. 22 Cal. Code Reg. § 1256-19(c)(2).

(n145)Footnote 139. 22 Cal. Code Reg. § 1256-19(c)(2).

(n146)Footnote 140. See 22 Cal. Code Reg. § 1256-19(c)(2); see also [ii], above, for discussion of health reasons as good cause for leaving work.

(n147)Footnote 141. 22 Cal. Code Reg. § 1256-17(c).

(n148)Footnote 142. 22 Cal. Code Reg. § 1256-17(c), (d).

(n149)Footnote 143. See [ii], above, for discussion of health as good cause for leaving work.

(n150)Footnote 144. See [iv], above, for discussion of dissatisfaction with wages as good cause for leaving work.

(n151)Footnote 145. 22 Cal. Code Reg. § 1256-17(d).

(n152)Footnote 145.1. In re Mitchell (1994) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-479.

(n153)Footnote 146. 22 Cal. Code Reg. § 1256-21(b)(1).

(n154)Footnote 147. See 22 Cal. Code Reg. § 1256-21(b)(1); *Evenson v. Unemployment Ins. Appeals Bd.* (1976) 62 Cal. App. 3d 1005, 1016-1018, 133 Cal. Rptr. 488 (denial of benefits proper when claimant persisted in refusing to pay modest union dues despite warnings of discharge; good faith dissatisfaction with union as immaterial).

(n155)Footnote 148. See 22 Cal. Code Reg. § 1256-21(b)(2).

(n156)Footnote 149. 22 Cal. Code Reg. § 1256-21(c).

(n157)Footnote 150. *See* 22 Cal. Code Reg. § 1256-21(c), Example 1.

(n158)Footnote 151. 22 Cal. Code Reg. § 1256-21(d).

(n159)Footnote 152. 22 Cal. Code Reg. § 1256-21(f).

(n160)Footnote 153. *See* 22 Cal. Code Reg. § 1256-21(g).

(n161)Footnote 154. *See* 22 Cal. Code Reg. § 1256-21(h).

(n162)Footnote 155. *See* 22 Cal. Code Reg. § 1256-21(i).

(n163)Footnote 156. *See* 22 Cal. Code Reg. § 1256-4.

(n164)Footnote 157. *See* 22 Cal. Code Reg. § 1256-13.

(n165)Footnote 158. *See* 22 Cal. Code Reg. § 1256-14.

(n166)Footnote 159. *See* 22 Cal. Code Reg. § 1256-18.

(n167)Footnote 160. *Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal. 3d 671, 678, 200 Cal. Rptr. 298, 677 P.2d 224 .

(n168)Footnote 161. 22 Cal. Code Reg. § 1256-30(b).

(n169)Footnote 162. *Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal. 3d 671, 678, 200 Cal. Rptr. 298, 677 P.2d 224 ; 22 Cal. Code Reg. § 1256-30(d).

(n170)Footnote 163. *See Unemp. Ins. Code* § 100.

(n171)Footnote 164. *Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal. 3d 671, 678, 200 Cal. Rptr. 298, 677 P.2d 224 .

(n172)Footnote 165. *See* 22 Cal. Code Reg. § 1256-30(e).

(n173)Footnote 166. *Amador v. Unemployment Ins. Appeals Bd.* (1984) 35 Cal. 3d 671, 678-679, 681, 200 Cal. Rptr. 298, 677 P.2d 224 (refusal to perform work which employee reasonably and in good faith believed would jeopardize health of others as not misconduct).

(n174)Footnote 167. *See Cerberonics, Inc. v. Unemployment Ins. Appeals Bd.* (1984) 152 Cal. App. 3d 172, 176, 199 Cal. Rptr. 292 ; *see also Unemp. Ins. Code* § 1256 (claimant presumed to have been discharged for reasons other than misconduct unless employer gives written notice to contrary to EDD), discussed in [2], above.

(n175)Footnote 168. *See Unemp. Ins. Code* § 1256; 22 Cal. Code Reg. § 1256-33(a).

(n176)Footnote 169. *See* 22 Cal. Code Reg. § 1256-33(a).

(n177)Footnote 170. *See* 22 Cal. Code Reg. § 1256-33(b)(1). For discussion of criminal acts as misconduct, see [v], below.

(n178)Footnote 171. *See* 22 Cal. Code Reg. § 1256-33(c)(1).

(n179)Footnote 172. *See* 22 Cal. Code Reg. § 1256-33(c)(2).

(n180)Footnote 173. *See* 22 Cal. Code Reg. § 1256-33(e)(1).

(n181)Footnote 174. *See* 22 Cal. Code Reg. § 1256-33(e)(2).

(n182)Footnote 175. *See Amador v. Unemployment Ins. Appeals Bd. (1984) 35 Cal. 3d 671, 680, 200 Cal. Rptr. 298, 677 P.2d 224 .*

(n183)Footnote 176. *See Amador v. Unemployment Ins. Appeals Bd. (1984) 35 Cal. 3d 671, 680-681, 200 Cal. Rptr. 298, 677 P.2d 224 ; Moore v. Unemployment Ins. Appeals Bd. (1985) 169 Cal. App. 3d 235, 242, 215 Cal. Rptr. 316 .*

(n184)Footnote 177. *See Moore v. Unemployment Ins. Appeals Bd. (1985) 169 Cal. App. 3d 235, 215 Cal. Rptr. 316 (refusal to work in radioactive work area).*

(n185)Footnote 178. *See Amador v. Unemployment Ins. Appeals Bd. (1984) 35 Cal. 3d 671, 680-681, 200 Cal. Rptr. 298, 677 P.2d 224 (histotechnician's refusal to perform laboratory procedure based on conviction that her lack of qualification to perform procedure would impair proper diagnosis and thus endanger health of patients).*

(n186)Footnote 179. *See Hobbie v. Unemployment Appeals Commission (1987) 480 U.S. 136, 143-144, 107 S. Ct. 1046, 94 L. Ed. 2d 190 ; See also § 80.32[2][b] for discussion of refusal to accept employment because of religious reasons.*

(n187)Footnote 180. *See Cerberonics, Inc. v. Unemployment Ins. Appeals Bd. (1984) 152 Cal. App. 3d 172, 177, 199 Cal. Rptr. 292 .*

(n188)Footnote 181. *See Delgado v. Unemployment Ins. Appeals Bd. (1974) 41 Cal. App. 3d 788, 116 Cal. Rptr. 497 (grocery checker's failure to follow rule that each sale be individually recorded, motivated by her desire to assist customers more efficiently).*

(n189)Footnote 182. 22 Cal. Code Reg. § 1256-42(b).

(n190)Footnote 183. *See* 22 Cal. Code Reg. § 1256-42(c).

(n191)Footnote 184. *See* 22 Cal. Code Reg. § 1256-42(d).

(n192)Footnote 185. *See* 22 Cal. Code Reg. § 1256-42(e).

(n193)Footnote 186. *See* 22 Cal. Code Reg. § 1256-42(f).

(n194)Footnote 187. *See* 22 Cal. Code Reg. § 1256-42(g).

(n195)Footnote 188. *See* 22 Cal. Code Reg. § 1256-42(h).

(n196)Footnote 189. *See* 22 Cal. Code Reg. § 1256-42(i).

(n197)Footnote 190. *See* 22 Cal. Code Reg. § 1256-42(j).

(n198)Footnote 191. *See* 22 Cal. Code Reg. § 1256-42(k).

(n199)Footnote 192. *See* 22 Cal. Code Reg. § 1256-36(b)(1).

(n200)Footnote 193. *See* 22 Cal. Code Reg. § 1256-36(b)(1)(A)-(F).

(n201)Footnote 194. Whether or not compliance would in fact be a violation of law is not determinative. 22 Cal. Code Reg. § 1256-36(b)(1)(E).

(n202)Footnote 195. *See* 22 Cal. Code Reg. § 1256-36(b)(2).

(n203)Footnote 195.1. *In re Hayes* (1990) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-470.

(n204)Footnote 195.2. *See American Federation of Labor v. Unemployment Ins. Appeals Bd. (1994) 23 Cal. App. 4th 51, 57, 67, 28 Cal. Rptr. 2d 210 .*

(n205)Footnote 195.3. *American Federation of Labor v. Unemployment Ins. Appeals Bd. (1994) 23 Cal. App. 4th 51, 61-62, 28 Cal. Rptr. 2d 210 .*

(n206)Footnote 195.4. *See American Federation of Labor v. Unemployment Ins. Appeals Bd. (1994) 23 Cal. App. 4th 51, 61-62, 28 Cal. Rptr. 2d 210* (housekeeper on offshore oil drilling platform).

(n207)Footnote 196. *See* 22 Cal. Code Reg. § 1256-31(b).

(n208)Footnote 197. *See* 22 Cal. Code Reg. § 1256-31(c)(1).

(n209)Footnote 198. *See* 22 Cal. Code Reg. § 1256-31(c)(2).

(n210)Footnote 199. *See* 22 Cal. Code Reg. § 1256-31(c), comments.

(n211)Footnote 200. *See* 22 Cal. Code Reg. § 1256-31(c), comments.

(n212)Footnote 201. *See Unemp. Ins. Code § 1256.1(a); 22 Cal. Code Reg. § 1256-31(d)(1); see also* discussion in [4][g], *above*.

(n213)Footnote 202. 22 Cal. Code Reg. § 1256-31(d)(1).

(n214)Footnote 203. *See* 22 Cal. Code Reg. § 1256-31(d), comments.

(n215)Footnote 204. *See* 22 Cal. Code Reg. § 1256-31(d), comments.

(n216)Footnote 205. *See* 22 Cal. Code Reg. § 1256-31(d), comments.

(n217)Footnote 206. 22 Cal. Code Reg. § 1256-38(a).

(n218)Footnote 207. *See* 22 Cal. Code Reg. § 1256-38(b)(1).

(n219)Footnote 208. 22 Cal. Code Reg. § 1256-38(b)(1).

(n220)Footnote 209. 22 Cal. Code Reg. § 1256-38(b)(1).

(n221)Footnote 210. *See* 22 Cal. Code Reg. § 1256-38(b)(1), Example 2.

(n222)Footnote 211. *See* 22 Cal. Code Reg. § 1256-38(b)(2).

(n223)Footnote 212. *See* 22 Cal. Code Reg. § 1256-38(c) (detailing factors involved in gross negligence).

(n224)Footnote 213. *See* 22 Cal. Code Reg. § 1256-38(d)(1).

(n225)Footnote 214. *See* 22 Cal. Code Reg. § 1256-38(e) (detailing relevant factors in determining whether accident is due to employee's negligence).

(n226)Footnote 215. *See* 22 Cal. Code Reg. § 1256-38(e), Example 7.

(n227)Footnote 216. *See* 22 Cal. Code Reg. § 1256-38(e), Example 8.

(n228)Footnote 217. 22 Cal. Code Reg. § 1256-40(b).

(n229)Footnote 218. *See* 22 Cal. Code Reg. § 1256-40(c).

(n230)Footnote 219. *See* 22 Cal. Code Reg. § 1256-40(c).

(n231)Footnote 220. *See* 22 Cal. Code Reg. § 1256-40, Example 5.

(n232)Footnote 221. *See* 22 Cal. Code Reg. § 1256-40, Example 1.

(n233)Footnote 222. *See* 22 Cal. Code Reg. § 1256-40(d)(1)(B), (2).

(n234)Footnote 223. *See* 22 Cal. Code Reg. § 1256-40(d)(2).

(n235)Footnote 224. *See* 22 Cal. Code Reg. § 1256-43(b).

(n236)Footnote 225. *See* 22 Cal. Code Reg. § 1256-43(b), Example 2.

(n237)Footnote 226. 22 Cal. Code Reg. § 1256-43(c).

(n238)Footnote 227. 22 Cal. Code Reg. § 1256-43(c).

(n239)Footnote 228. *See* 22 Cal. Code Reg. § 1256-43(c).

(n240)Footnote 228.1. *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1994) 23 Cal. App. 4th 51, 60, 28 Cal. Rptr. 2d 210 (holding that refusal by employee in hazardous work environment to take periodic drug tests is violation of reasonable rule and hence misconduct).

(n241)Footnote 229. *See* 22 Cal. Code Reg. § 1256-32.

(n242)Footnote 230. *See* 22 Cal. Code Reg. § 1256-34.

(n243)Footnote 231. *See* 22 Cal. Code Reg. § 1256-35. Note, however, that the employee may not lawfully be discharged for a garnishment resulting from a single judgment or indebtedness. *see Lab. Code* § 2929; 15 U.S.C. § 1674; 22 Cal. Code Reg. § 1256-35(a), comments; *see also* discussion in ch. 4.

(n244)Footnote 232. *See* 22 Cal. Code Reg. § 1256-37. Note, however, that this regulation appears to be partially superseded by the enactment of *Unemp. Ins. Code* § 1256.5(a), which provides a separate disqualification for the use of intoxicants caused by an irresistible compulsion. *see* discussion in § 80.36[2].

(n245)Footnote 232.1. *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1994) 23 Cal. App. 4th 51, 61-62, 28 Cal. Rptr. 2d 210 (housekeeper on offshore oil drilling platform).

(n246)Footnote 233. *See* 22 Cal. Code Reg. § 1256-39; *see also* 22 Cal. Code Reg. § 1256-36(b)(4) (use of offensive language toward employer or employer's representative as insubordination constituting misconduct).

(n247)Footnote 234. *See* 22 Cal. Code Reg. § 1256-41.

(n248)Footnote 235. *Unemp. Ins. Code* § 1260(a); *see Ghent v. Unemployment Ins. Appeals Bd.* (1986) 183 Cal. App. 3d 1167, 1172-1174, 228 Cal. Rptr. 631 (excluding from definition of "bona fide employment" services performed

in county workfare program as condition of receiving welfare benefits); *see also* 22 Cal. Code Reg. § 1260(a)-1 (factors to be considered in determining whether employment is "bona fide").



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.36

AUTHOR: By Carol S. Sanders, J.D.

§ 80.36 Other Disqualifications

[1] False Statements or Refusal to Accept Suitable Employment

[a] False Statements

[i] Conduct Causing Disqualification

An individual is disqualified for unemployment compensation benefits if he or she willfully, for the purpose of obtaining unemployment compensation benefits, either made a false statement or representation, including, but not limited to, using a false name, false social security number, or other false identification, with actual knowledge of its falsity, or withheld a material fact in order to obtain any unemployment compensation benefits.n1

[ii] Duration of Disqualification

The duration of disqualification for making false statements or withholding material facts depends on whether the individual has been paid any benefit amount as a result of the false statement or representation.n2 An individual who has been disqualified under *Unemployment Insurance Code Section 1257(a)* (but not convicted under *Unemployment Insurance Code Section 2101*), and who has not been paid any benefit amount as a result of his or her false statement or representation, is ineligible to receive unemployment compensation benefits for two weeks beginning with (1) the week in which the EDD mails or personally serves the determination of disqualification, or (2) any subsequent week for which he or she is first otherwise in all respects eligible for benefits.n3 The individual is also ineligible for not more than 13 subsequent weeks for which he or she is otherwise in all respects eligible for benefits.n3.1

An individual who has been disqualified under *Unemployment Insurance Code Section 1257(a)* (but not convicted under *Unemployment Insurance Code Section 2101*), but who has been paid any benefit amount as a result of his or her false statement or representation, is ineligible to receive unemployment compensation benefits for five weeks beginning with (1) the week in which the EDD mails or personally serves the determination of disqualification, or (2) any subsequent week for which he or she is first otherwise in all respects eligible for benefits.n3.2 The individual is also

ineligible for not more than 10 subsequent weeks for which he or she is otherwise in all respects eligible for benefits.^{n3.3}

In either situation, no disqualification applies to any week if any portion of that week falls beyond the three-year period next succeeding the date of the mailing or personal service of the determination of disqualification.^{n3.4}

[b] Refusal to Accept Suitable Employment

[i] Conduct Causing Disqualification

An individual is disqualified for unemployment compensation benefits if he or she, without good cause, refused to accept suitable employment when offered or failed to apply for suitable employment when notified by a public employment office.ⁿ⁴ For a discussion of what constitutes suitable employment, see § 80.32[3][b].

The eligibility requirement under *Unemployment Insurance Code section 1253(c)* that the claimant be available for workⁿ⁵ is related to the disqualification for refusing suitable employment in that an employee who declines work that is *not* "suitable" will not be regarded as "unavailable" for work on that basis.ⁿ⁶

[ii] Duration of Disqualification

An individual disqualified under *Unemployment Insurance Code section 1257(b)* for refusal to accept suitable employment, under a determination transmitted to him or her by the EDD, is ineligible to receive unemployment compensation benefits for not less than two nor more than 10 consecutive weeks beginning with (1) the week in which the cause of the disqualification occurs, if the individual registers for work in that week, or (2) the week subsequent to the occurrence of the cause of disqualification in which the individual first registers for work, if he or she does not register for work in the week in which the cause of disqualification occurs.ⁿ⁷

[c] Successive or Concurrent Disqualifications

The Unemployment Insurance Code provides the director with some flexibility in fixing the length of disqualification when a claimant is subject to more than one disqualification under *Unemployment Insurance Code section 1257* for false statements or refusal to accept suitable employment. Unemployment Insurance Code section 1261 provides that when successive disqualifications under section 1257 occur, the period of ineligibility provided for in *Unemployment Insurance Code section 1260*ⁿ⁸ may be extended by the director for an additional period not to exceed eight additional weeks. On the other hand, *Unemployment Insurance Code section 1260(e)* provides that an individual who is subject to a disqualification imposed under *Unemployment Insurance Code section 1257(b)*, for failure to accept suitable employment, may, if otherwise in all respects eligible for unemployment compensation benefits, concurrently serve a disqualification imposed under *Unemployment Insurance Code section 1257(a)*, for making false statements.

[2] Use of Intoxicants

[a] Generally

An individual is disqualified for unemployment compensation benefits if either of the following occur:ⁿ⁹

1. The director finds that the individual was discharged from his or her most recent work for chronic absenteeism due to intoxication, reporting to work while intoxicated, using intoxicants on the job, or gross neglect of duty while intoxicated, when any of these incidents is caused by an irresistible compulsion to use or consume intoxicants, including alcoholic beverages; or
2. He or she otherwise left his or her most recent employment for reasons caused by an irresistible

compulsion to use or consume intoxicants, including alcoholic beverages.

[b] Duration of Disqualification

An individual disqualified for intoxication under *Unemployment Insurance Code section 1256.5(a)* because of his or her compulsion to use intoxicants, under a determination transmitted to him or her by the EDD, is ineligible to receive unemployment compensation benefits for the week in which the separation of employment occurs and continuing until (1) he or she has performed service in bona fide employment for which remuneration is received equal to or in excess of five times his or her weekly benefit amount, or (2) a physician or authorized treatment program administrator certifies that the individual has entered into and is continuing in, or has completed, a treatment program for his or her condition and is able to return to employment.ⁿ¹⁰

[c] Requirement That Disqualified Individual Be Advised of Disability Benefits

The EDD must advise each individual disqualified because of intoxication pursuant to *Unemployment Insurance Code section 1256.5* of any disability benefits available and, if assistance in locating an appropriate treatment program is requested, refer the individual to appropriate county drug or alcohol program administrator.ⁿ¹¹ For a discussion of disability benefits available for treatment of intoxication-related conditions, see § 80.65[2].

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code § 1257(a)*.

(n2)Footnote 2. *See Unemp. Ins. Code § 1260(c), (d)*.

(n3)Footnote 3. *Unemp. Ins. Code § 1260(c)*.

(n4)Footnote 3.1. *Unemp. Ins. Code § 1260(c)*.

(n5)Footnote 3.2. *Unemp. Ins. Code § 1260(d)*.

(n6)Footnote 3.3. *Unemp. Ins. Code § 1260(d)*.

(n7)Footnote 3.4. *Unemp. Ins. Code § 1260(c), (d)*.

(n8)Footnote 4. *Unemp. Ins. Code § 1257(b)*.

(n9)Footnote 5. *See discussion under § 80.32[2]*.

(n10)Footnote 6. *See Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal. 3d 55, 62-63, 67, 141 Cal. Rptr. 146, 569 P.2d 740 .*

(n11)Footnote 7. *Unemp. Ins. Code § 1260(b)*.

(n12)Footnote 8. *See discussion in [a][ii] and [b][ii], above.*

(n13)Footnote 9. *Unemp. Ins. Code § 1256.5(a)*.

(n14)Footnote 10. *Unemp. Ins. Code § 1256.5(b)*.

(n15)Footnote 11. *See Unemp. Ins. Code § 1256.5(c)*.



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.37

AUTHOR: By Carol S. Sanders, J.D.

§ 80.37 Effect of Remuneration During Period of Unemployment on Amount of Benefits

[1] Reduction of Benefits by Amount of Retirement Pay

[a] Generally

With certain exceptions, discussed in [c], below, the amount of unemployment compensation benefits payable to an individual for any week that begins in a period when that individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment based on the individual's previous work is reduced (but not below zero) by an amount equal to the amount of the periodic payment that is reasonably attributable to that week.ⁿ¹

The amount of the offset is not limited to the increase in pension benefits earned during the base period, but includes the entire pension payment.ⁿ² However, pensions paid to a claimant on a single lump-sum basis will not be offset against unemployment compensation benefits.ⁿ³

[b] Relationship With Federal Law

The California pension offset provisions are required under federal law as a condition of certification for its state unemployment compensation programⁿ⁴ and are operative only as long as they are federally mandated.ⁿ⁵ The reduction in benefits may not exceed the offset required under federal law.ⁿ⁶

[c] Exceptions to Reduction Requirement

The reduction applies only if the periodic payment is under a plan maintained or contributed to by a base period or chargeable employer,ⁿ⁷ and, in the case of payments not made under the Social Security Act or the federal Railroad Retirement Act, the services performed after the beginning of the base period (or remuneration for those services) affect eligibility for or increase the amount of the periodic payments.ⁿ⁸

The reduction does not apply if the individual has made any contribution to the pension, retirement or retired pay, annuity, or other similar periodic payments.ⁿ⁹

[2] Payments by Employer to Supplement Unemployment Compensation; Severance or Dismissal Pay

Payments to an individual under a plan or system established by an employer that makes provisions for employees generally, or for a class or group of employees, for the purpose of supplementing unemployment compensation benefits may not be construed to be wages or compensation for personal services, and unemployment or state disability benefits may not be denied or reduced because of the receipt of payment under these arrangements or plans.ⁿ¹⁰ Payments under an employer plan to supplement benefits other than unemployment compensation benefits are not within the scope of this provision and may be construed to constitute wages or compensation for personal services.ⁿ¹¹ The payment of "severance" or "dismissal" pay made pursuant to a collective bargaining agreement has been construed to constitute employer supplementation of unemployment compensation benefits.ⁿ¹²

[3] Vacation Pay

Payments to an individual for vacation pay that was earned but not paid for services performed prior to termination of employment may not be construed to be wages or compensation for personal services, and unemployment or state disability benefits may not be denied or reduced because of the receipt of these payments.ⁿ¹³

[4] Holiday Pay

If an individual is laid off for a definite period, payments made for holiday pay for any holiday occurring in a week during which the individual was unemployed are deemed wages received for the week in which the individual returns to work from the layoff if the payments are not made until the individual returns to work.ⁿ¹⁴ Such payments are deemed wages received for the week in which the holiday falls if the payments are made prior to the individual's return to work from the layoff.ⁿ¹⁵ However, if the holiday pay (or the holiday pay plus any wages for part-time work during the week of the holiday), after the reduction of the holiday pay and/or wages by the greater of \$25 or 25 percent,^{n15.1} exceeds the individual's weekly benefit amount, the individual is not considered unemployed during the week of the holiday and these allocation rules do not apply.^{n15.2}

■ ILLUSTRATION 1:

X earns \$200 per day and has a weekly benefit amount (WBA) of \$230 per week. During one week, X receives two days' holiday pay (\$400) and does not work the other three days of that week. X is not entitled to benefits for that week because his wages (\$400 reduced by 25 percent, or \$300) are more than his WBA of \$230, and he is therefore not regarded as unemployed during that week.^{n15.3}

■ ILLUSTRATION 2:

Y earns \$75 per day and has a weekly benefit amount (WBA) of \$200 per week. During one workweek, Y receives two days' holiday pay (\$150) and does not work the other three days of that week. Y is deemed unemployed and entitled to benefits during that week because her wages (\$150 reduced by 25 percent, or \$112.50) are less than her WBA of \$200. Therefore, if Y returns to work after the holiday and is paid her \$150 holiday pay, the holiday pay would be allocated as wages to the week of her return to work.^{n15.4}

Payments to an individual for holiday pay that was earned but not paid prior to an *indefinite* layoff, a termination of employment, or commencement of unemployment caused by disability may not be construed to be wages or compensation for personal services for purposes of the unemployment and state disability compensation provisions, and benefits payable under those provisions may not be denied or reduced because of the receipt of such payments.ⁿ¹⁶

[5] Sick Pay

Payments to an individual for sick pay that was earned but not paid for services performed prior to termination of employment may not be construed to be wages or compensation for personal services for purposes of the unemployment and state disability compensation provisions, and benefits payable under those provisions may not be denied or reduced because of the receipt of such payments.ⁿ¹⁷

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 1255.3(a); see also 26 U.S.C. § 3304(a)(15)* (mandating pension offset by state unemployment compensation program).

(n2)Footnote 2. *Rivera v. Becerra* (9th Cir. [Cal.] 1983) 714 F.2d 887, 893-894 ; *cert. denied* sub nom. *International Union, United Auto, Aerospace & Agr. Implement Workers of America v. Donovan*, 465 U.S. 1099 (1984) ; *see Evans v. Unempl. Ins. Appeals Bd.* (1985) 39 Cal. 3d 398, 409-410, 216 Cal. Rptr. 782, 703 P.2d 122 .

(n3)Footnote 3. *See Evans v. Unempl. Ins. Appeals Bd.* (1985) 39 Cal. 3d 398, 409-410, 216 Cal. Rptr. 782, 703 P.2d 122 ; *see also 26 U.S.C. § 3304(a)(15)* (requiring offsets of "pensions ... or any other similar *periodic* payment").

(n4)Footnote 4. *See 26 U.S.C. § 3304(a)(15)*. For discussion of relationship between the state and federal unemployment compensation laws generally, *see § 80.01*.

(n5)Footnote 5. *See Unemp. Ins. Code § 1255.3(b)*.

(n6)Footnote 6. *See Evans v. Unempl. Ins. Appeals Bd.* (1985) 39 Cal. 3d 398, 409-410, 216 Cal. Rptr. 782, 703 P.2d 122 (intent of legislature in enacting *Unemp. Ins. Code § 1255.3* was to provide for compliance with letter of federal law, and nothing more).

(n7)Footnote 7. *See Unemp. Ins. Code § 1255.3(c)(1)*.

(n8)Footnote 8. *Unemp. Ins. Code § 1255.3(c)(2); see also Unemp. Ins. Code § 1255.3(e)* (retroactivity of certain amendments to exception).

(n9)Footnote 9. *Unemp. Ins. Code § 1255.3(d)(1); see also Unemp. Ins. Code § 1255.3(d)(2)*.

(n10)Footnote 10. *See Unemp. Ins. Code § 1265*.

(n11)Footnote 11. *See Cooper v. Unemployment Ins. Appeals Bd.* (1981) 118 Cal. App. 3d 166, 168, 170, 173 Cal. Rptr. 255 (*Unemp. Ins. Code § 1265* not applicable to sick leave benefits paid to employees during periods of disability pursuant to a collective bargaining agreement).

(n12)Footnote 12. *See Powell v. California Dep't of Employment* (1965) 63 Cal. 2d 103, 109, 45 Cal. Rptr. 136, 403 P.2d 392 ; *Citroen Cars Corp. v. Unemployment Ins. Appeals Bd.* (1980) 107 Cal. App. 3d 945, 949-950, 165 Cal. Rptr. 924 ; *see also Unemp. Ins. Code § 1265.9* (severance or terminal pay to individual terminated from employment as result of expansion of specified federal park may not be construed to be wages).

(n13)Footnote 13. *See Unemp. Ins. Code § 1265.5*. For discussion of payment of vacation pay on termination of employment, *see ch. 4*.

(n14)Footnote 14. *See Unemp. Ins. Code § 1265.6*.

(n15)Footnote 15. *See Unemp. Ins. Code § 1265.6*.

(n16)Footnote 15.1. *See Unemp. Ins. Code § 1252(a); See also § 80.30[1]*.

(n17)Footnote 15.2. 22 Cal. Code Reg. § 1265.6-1(b); *Unemp. Ins. Code* § 1252(a); see § 80.30[1].

(n18)Footnote 15.3. 22 Cal. Code Reg. § 1265.6-1(b).

(n19)Footnote 15.4. 22 Cal. Code Reg. § 1265.6-1(b).

(n20)Footnote 16. See *Unemp. Ins. Code* § 1265.6.

(n21)Footnote 17. See *Unemp. Ins. Code* § 1265.7; cf. *Cooper v. Unemployment Ins. Appeals Bd.* (1981) 118 Cal. App. 3d 166, 168, 170, 173 Cal. Rptr. 255 (sick leave benefits to employees during periods of disability pursuant to a collective bargaining agreement as reducing amount of state disability benefits).



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.38

AUTHOR: By Carol S. Sanders, J.D.

§ 80.38 Types of Claims

[1] Generally

EDD claim processing regulations refer to five different types of claims, as further described below:

1. New claims;n1
2. Additional claims;n2
3. Reopened claims;n3
4. Continued claims;n4 and
5. Partial claims.n5

[2] New Claim

A "new claim" for unemployment compensation benefits means an application for the establishment of a benefit yearn6 and a computation of the maximum benefits payable and the weekly rate.n7

[3] Additional Claim

An "additional claim" for unemployment compensation benefits means an application that certifies to the beginning date of a period of unemployment under the following circumstances:n8

1. The period of unemployment falls within a previously established benefit year, extended duration period, or extended benefit period; and

2. A break of one or more weeks has occurred in the claim series as a result of intervening employment.

A break in the claim series from intervening employment occurs if the claimant (1) filed a continuedⁿ⁹ or partial claimⁿ¹⁰ for a week during which he or she was ineligible under *Unemployment Insurance Code section 1279* because of excessive earnings from services performed in employment during that week; (2) was ineligible to file a claim for a week because he or she was not unemployed, as defined in *Unemployment Insurance Code section 1252*;ⁿ¹¹ or (3) failed to file a continued claim or partial claim for a week during which he or she performed compensated services in employment.ⁿ¹²

[4] Reopened Claim

A "reopened claim" for unemployment compensation benefits means an application that certifies to the beginning date of a period of employment that (1) falls within a previously established benefit year, extended duration period, or extended benefit period; and (2) follows any of the following:ⁿ¹³

1. A period of one or more weeks for which the claimant failed to file a continued claimⁿ¹⁴ or partial claimⁿ¹⁵ and during which the claimant did not perform services in employment; or
2. A period of one or more weeks for which the claimant was ineligible for benefits for a definite period and for which continued claims or partial claims were filed, *unless* with respect to any week during that period, the claimant was ineligible for benefits pursuant to *Unemployment Insurance Code section 1252* (defining "unemployed"),ⁿ¹⁶ or section 1279 (unemployment compensation benefits during partial employment)ⁿ¹⁷ due to excessive earnings from services performed in employment that week.ⁿ¹⁸

A reopened claim may not be filed by a claimant who is any of the following:ⁿ¹⁹

- (1) Under a disqualification for a fixed period pursuant to *Unemployment Insurance Code §§ 1257(b)* or *1261*, unless he or she has appealed the disqualification pursuant to *Unemployment Insurance Code § 1257(a)*.
- (2) Ineligible for benefits for an indefinite period pursuant to *Unemployment Insurance Code §§ 1253(a)*, *(b)* or *(c)* or *Unemployment Insurance Code §§ 1253.3, 1253.4, 1255.3, 1255.5, 1256, 1262, or 1264*, unless he or she has appealed the disqualification.
- (3) Awaiting an eligibility decision by the department on a prior claim filed in the same benefit year or extended benefit period.

[5] Continued Claim

A "continued claim" for unemployment compensation benefits means an application to serve a waiting period or for the receipt of benefits that certifies to a week of unemployment.ⁿ²⁰

[6] Partial Claim

A "partial claim" for unemployment compensation benefits is a claim for partial benefits by a partially unemployed individual.ⁿ²¹ "First partial claim" and "subsequent partial claim" for partial unemployment compensation benefits mean an application for a determination of eligibility for partial benefits that certifies to the completion of one week of partial unemployment either to satisfy a week of the waiting period requirementⁿ²² or to claim partial benefits for a compensable week or two compensable weeks.ⁿ²³

The employer of a partially unemployed individual is required, within five days after the termination of any payroll week, to give the individual a notice of reduced earnings on a prescribed form.ⁿ²⁴

When a claimant has filed partial claims for two consecutive weeks during which he or she performed no services for the regular employer, he or she may not file a partial claim for a subsequent week of unemployment until he or she again performs services for the regular employer. For any subsequent weeks in which the claimant is ineligible to file partial claims, he or she may, if unemployed, file continued claims.ⁿ²⁵

FOOTNOTES:

(n1)Footnote 1. *See* 22 Cal. Code Reg. § 1326-2; *see also* discussion in [2], *below*.

(n2)Footnote 2. *See* 22 Cal. Code Reg. § 1326-4; *see also* discussion in [3], *below*.

(n3)Footnote 3. *See* 22 Cal. Code Reg. § 1326-5; *see also* discussion in [4], *below*.

(n4)Footnote 4. *See* 22 Cal. Code Reg. § 1326-6; *see also* discussion in [5], *below*.

(n5)Footnote 5. *See* 22 Cal. Code Reg. § 1326-8; *see also* discussion in [6], *below*.

(n6)Footnote 6. For definition of "benefit year," *see* § 80.31[2].

(n7)Footnote 7. 22 Cal. Code Reg. § 1326-2(a); *see* § 80.39[1] for discussion of claim-filing procedures.

(n8)Footnote 8. 22 Cal. Code Reg. § 1326-4(a).

(n9)Footnote 9. *See* discussion in [5], *below*.

(n10)Footnote 10. *See* discussion in [6], *below*.

(n11)Footnote 11. *See* discussion in § 80.30.

(n12)Footnote 12. 22 Cal. Code Reg. § 1326-4(a)(2).

(n13)Footnote 13. 22 Cal. Code Reg. § 1326-5(a); *see also* 22 Cal. Code Reg. §§ 1326-5(b) (filing reopened claim), 1326-5(c) (when reopened claim may not be filed).

(n14)Footnote 14. *See* discussion in [5], *below*.

(n15)Footnote 15. *See* discussion in [6], *below*.

(n16)Footnote 16. *See* discussion under § 80.30.

(n17)Footnote 17. *See* discussion under § 80.32[2][c].

(n18)Footnote 18. If the claimant is ineligible for either of the latter reasons, an additional claim would be filed following the end of the period of ineligibility. *see* discussion in [2], *above*.

(n19)Footnote 19. 22 Cal. Code Reg. § 1326-5(c).

(n20)Footnote 20. 22 Cal. Code Reg. § 1326-6(a); *see also* 22 Cal. Code Reg. § 1326-6(b)-(f) (procedure for filing continued claims). For discussion of required one-week waiting period, *see* § 80.32[4].

(n21)Footnote 21. *See* § 80.32[2][c] for discussion of partial employment.

(n22)Footnote 22. *See* § 80.32[4] for discussion of requirement of waiting period of week of unemployment.

(n23)Footnote 23. 22 Cal. Code Reg. § 1326-8(a); *see also* 22 Cal. Code Reg. § 1326-8(b) (filing and content of first or subsequent partial claim).

(n24)Footnote 24. *See* 22 Cal. Code Reg. § 1326-7.

(n25)Footnote 25. 22 Cal. Code Reg. § 1326-8(c). For discussion of continued claims, *see* [5], *above*.



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.39

AUTHOR: By Carol S. Sanders, J.D.

§ 80.39 Claims Procedures

[1] Generally

Claims for unemployment compensation benefits must be made in accordance with authorized regulations of the director.ⁿ¹

There are five steps for handling a typical unemployment insurance claim:ⁿ²

1. The claimant files a new claim for unemployment insurance by reporting in person to a field office of the EDD.
2. Two weeks later, or as otherwise directed by the EDD, the claimant reports in person to the EDD field office to file a continued claimⁿ³ and is interviewed as to eligibility and benefit rights. If, after examining documents submitted by the claimant and by the claimant's employer,ⁿ⁴ the claims interviewer finds the claimant to be eligible, he or she is credited for the one-week waiting periodⁿ⁵ and is thereafter paid for one week.
3. In the fifth week, the claimant, to be paid for the third and fourth weeks of unemployment, files by mail a "continued claim" form,ⁿ⁶ certifying that he or she continues to meet all eligibility requirements. The claim form is reviewed by the EDD and, if the claimant is found eligible, payment is mailed to the claimant. The process is repeated every two weeks thereafter until the date of the claimant's next scheduled eligibility review, as described in the next paragraph.
4. The claimant is periodically required to report in person for eligibility reviews by the EDD, as scheduled.
5. If at any time a question arises as to the claimant's eligibility, the claimant may be required to report in

person for an in-depth interview, followed by a written determination by the EDD regarding the claimant's eligibility or ineligibility.ⁿ⁷

Generally, the first "week of unemployment" for which an individual is eligible to receive unemployment benefits^{n7.1} is defined by EDD regulations as the week of unemployment in which an individual registers in person at an employment office before closing on Friday of that week.^{n7.2} Thus a claimant must ordinarily report to the EDD and file his or her claim during the week following the one week period.^{n7.3} However, EDD regulations permit late filing of a claim for "good cause," as set forth in the regulations.^{n7.4} An employer's failure to inform an employee of his or her potential eligibility for benefits is not, in itself, good cause for delay in filing a claim.^{n7.5} In any case, a claim may not be filed more than 13 weeks after the end of the benefit year during which the unemployment occurred.^{n7.6}

Unemployment Insurance Code section 1342.1 requires that an individual filing a claim be advised that the benefits he or she will receive are subject to federal taxes and that he or she may elect to have tax withheld or may need to make estimated tax payments and may wish to change his or her previous withholding amounts.

[2] Payment or Denial of Claims

Except as otherwise provided, the EDD must promptly pay benefits if it finds the claimant is eligible or must promptly deny benefits if it finds the claimant is ineligible.ⁿ⁸ For a discussion of payments of benefits pending an appeal, see § 80.41.

Benefits are paid through public employment offices or through such other agency as may be prescribed by authorized regulations of the director.ⁿ⁹ The EDD generally mails benefit checks to claimants after a determination of eligibility.ⁿ¹⁰ Benefits to eligible minors may be paid directly to them.ⁿ¹¹ Payment of benefits to a deceased or legally declared incompetent person may be paid to such persons as appear to the Director of Employment Development to be legally entitled to receive them, in accordance with authorized regulations.ⁿ¹²

[3] Notice to Last Previous Employer of New or Additional Claim

The EDD must give notice of the filing of a new or additional claimⁿ¹³ to the employing unit by which the claimant was last employed immediately preceding the filing of the claim.ⁿ¹⁴ However, the EDD need not give notice of an additional claim if (1) the claim is the result of the filing of a partial claim,ⁿ¹⁵ (2) there has not been a subsequent employing unit that is designated as the last employer, and (3) there is no separation issue.ⁿ¹⁶

[4] Submission of Facts by Last Previous Employer Following Notice of Claim

[a] Facts Affecting Claimant's Eligibility

Within 10 days after the mailing of notice of a new or additional claim, the last previous employing unit must submit any facts then known which may affect the claimant's eligibility for benefits, including, but not limited to, facts pertaining to eligibility under *Unemployment Insurance Code section 1256* (disqualification for voluntary leaving without good cause or discharge for misconduct).ⁿ¹⁷ The 10-day period may be extended for good cause.ⁿ¹⁸

If after the 10-day period the employing unit acquires knowledge of facts that may affect eligibility of the claimant and that could not reasonably have been known within the 10-day period, the employing unit must, within 10 days of acquiring the knowledge, submit the facts to the EDD.ⁿ¹⁹ The 10-day period for submission of after-acquired facts may also be extended for good cause.ⁿ²⁰

The employer may also submit facts knowledge of which was acquired after a determination of eligibility by the EDD.ⁿ²¹

EDD regulations prescribe the form and contents of any submission of facts by an employer.ⁿ²²

[b] Facts Relating to Whether Employer's Account May Be Charged

An employer who was the claimant's last previous employer, and therefore entitled to notice of a new or additional claim for unemployment compensation benefits by a claimant under *Unemployment Insurance Code Section 1327*,ⁿ²³ may, within 10 days after mailing of the notice, submit to the EDD any facts within its possession disclosing whether the claimant left the employer's employ voluntarily and without good cause or left under one of the following circumstances:ⁿ²⁴

- The claimant was discharged from the employment for misconduct connected with his or her work;ⁿ²⁵ or
- The claimant's discharge or quitting from his or her most recent employer was the result of an irresistible compulsion to use or consume intoxicants;ⁿ²⁶ or
- The claimant was a student employed on a temporary basis and whose employment began within, and ended with his or her leaving to return at the close of his or her vacation period; or
- The claimant left the employer's employ to accompany his or her spouse or to join the spouse at a place from which it is impractical to commute to the employment,ⁿ²⁷ and to which a transfer of the claimant by the employer is not available.ⁿ²⁸
- The claimant left the employer's employ to protect the claimant or his or her children from domestic violence abuse.

The period during which the employer may submit these facts may be extended by the director for good cause.ⁿ²⁹ If the director finds any of the above facts to be true, benefits paid to the claimant generally will not be charged against the employer's reserve account, unless the employer failed to furnish the information specified by Section 1030 or unless that ruling is reversed by a reconsidered ruling.ⁿ³⁰

Leaving work without good cause or being discharged for misconduct is both a basis for not charging the employer's reserve account,ⁿ³¹ and a basis for disqualification of the claimant for eligibility for benefits.ⁿ³² However, in the case of a claimant who left work to accompany a spouse or domestic partner to a place from which it is impractical to commute, the claimant may be eligible for benefits;ⁿ³³ but if transfer by the employer was unavailable, the employer's reserve account will not be charged.ⁿ³⁴ Such good-cause "domestic quits" were excepted from charges against the employer's account because it was felt to be fundamentally unfair for employers to have their individual unemployment insurance taxes increased for reasons beyond their control. Under *Unemployment Insurance Code Section 1032*, the cost of this kind of quit is shifted from the individual employer's account to the balancing account.ⁿ³⁵

In 1995, Unemployment Code Section 1032 was amended to further provide that an employer's reserve account will not be charged if the employee left the employer's employ to take a substantially better job. However, Unemployment Code Section 1030(a) was not amended to provide for submission of facts to the EDD regarding whether an employee has left for a better job. Nevertheless, an employer should submit such facts within 10 days after the EDD's notice of a new claim in order to prevent benefits paid to such a claimant from being charged to the employer's reserve account.^{n35.1}

[c] Effect of Submission or Nonsubmission of Facts

There is a rebuttable presumption that the individual has left or been discharged for nondisqualifying reasons unless the employer has given written notice to the contrary to the EDD in accordance with *Unemployment Insurance Code*

section 1327, setting forth facts sufficient to overcome the presumption.ⁿ³⁶

For purposes of *Unemployment Insurance Code section 1030*, setting forth the circumstances of employment termination under which benefits paid will not be charged to the employer,ⁿ³⁷ it is presumed that there is no good cause for voluntarily leaving if the claimant does not notify the employer of the reasons for leaving, and the employer submits all of the facts within its possession concerning the leaving within the applicable time period.ⁿ³⁸ If, however, the employer fails to submit the information specified in *Unemployment Insurance Code section 1030* within the applicable time period, any benefits paid will be charged against the employer's account, regardless of whether it is ultimately determined that the claimant's employment terminated under one of the circumstances specified in that section.ⁿ³⁹

■ CONSULTANT'S COMMENT:

The literal terms of *Unemployment Insurance Code section 1328* provide that the employer will receive no notice of an EDD determination of eligibility unless the employer submits facts responsive to the underlying claim within the allotted 10-day periods. The absence of notice of the determination, in turn, will preclude the opportunity to file an appeal of the eligibility determination. Thus, an employer that wishes to contest a claim must satisfy the terms of *Unemployment Insurance Code section 1327* to preserve its right to participate in the administrative process. Similarly, an employer that does not wish to contest a claim, but wishes to receive notice of the EDD eligibility determination, should return the underlying EDD notice of claim (Form DE 1101) with the fact section either left blank or marked to indicate that the employer does not contest the receipt of benefits but wants notice of all future determinations and proceedings regarding the claim. *Commentary by Kirby Wilcox.*

[5] Determination of Eligibility

[a] Generally

The EDD must consider any facts submitted by an employer pursuant to *Unemployment Insurance Code section 1327*ⁿ⁴⁰ and, if benefits are claimed subsequent to the filing of the new or additional claim, make a determination as to the claimant's eligibility for benefits.ⁿ⁴¹ If the EDD identifies any potential eligibility question, based on either the facts submitted by the employer or other facts of which the EDD becomes aware, the EDD will notify the claimant to appear in person for an in-depth interview on all eligibility issues raised prior to making its determination.ⁿ⁴²

The EDD must promptly notify the claimant and any employer who prior to the determination has submitted any facts pursuant to *Unemployment Insurance Code section 1327* of the determination and reasons for the determination.ⁿ⁴³ The EDD must also notify the employer of any subsequent modification of the determination.ⁿ⁴⁴

For a discussion of procedures for appealing a determination, see § 80.40.

[b] Submission of Facts by Employer After Notice of Determination

If after notice of a determination the employing unit acquires knowledge of facts that may affect the eligibility of the claimant and such facts could not reasonably have been known within the 10-day period provided by *Unemployment Insurance Code section 1327*,ⁿ⁴⁵ the employing unit must within 10 days after acquiring that knowledge submit the facts to the EDD.ⁿ⁴⁶ The 10-day period for submission of after-acquired facts may also be extended for good cause.ⁿ⁴⁷

For a discussion of reconsidered determinations, of eligibility, see [7], below.

[6] Computation of Benefits

[a] Generally

On the filing of a new claim for benefits, the EDD must promptly make a computation on the claim that sets forth the maximum amount of benefits potentially payable during the benefit year, and the weekly benefit amount.ⁿ⁴⁸

For purposes of computation of benefits under the "base period,"^{n48.1} all of the following apply:^{n48.2}

- Computation using the last four completed calendar quarters is based on available wage information processed as of the close of business on the day preceding the date of application.
- If the wage information is not already in the EDD's system, the department must request the information from the employer, and the employer must, within 10 days after the EDD mails the request, transmit to the EDD information on the employee's wages and any other information relevant to the request. The 10-day period may be extended for good cause.
- If the EDD does not receive wage and other relevant information requested from the employer, the department must accept an affidavit of wages and other relevant information from the claimant in accordance with authorized regulations.
- A determination of benefits made for a claim filed on or after April 3, 2011,^{n48.3} must be adjusted when the quarterly wage report from the employer is received if that information causes a change in the determination.
- Except in the event of fraud, if it is determined that any information provided by the claimant on an affidavit is erroneous, no penalty or refund of benefits will be imposed on the claimant for the period prior to the calendar week in which an employer provides subsequent wage information.

[b] Notice of Computation

The EDD must promptly notify the claimant of the computation.ⁿ⁴⁹ The EDD must also notify each of the claimant's base period employersⁿ⁵⁰ of the computation after the payment of the first weekly benefit.ⁿ⁵¹ The EDD must promptly notify each of the claimant's base period employers of the computation on the claim that sets forth the number of weeks that the claimant will be eligible for benefits in the benefit year, the weekly benefit amount, and the maximum amount of benefits potentially payable during the benefit year, based on a determination of eligibility.ⁿ⁵²

[c] Protest of Computation

The claimant and any base period employer to whom a notice of computation or recomputation is given may, within 20 days after the mailing of personal service of the notice, protest the accuracy of the computation or recomputation.ⁿ⁵³ The 20-day period may be extended for good cause, including but not limited to mistake, inadvertence, surprise, or excusable neglect.ⁿ⁵⁴ The EDD must consider any protest and must promptly notify the claimant and the base period employer submitting the protest of the recomputation or denial of recomputation.ⁿ⁵⁵

For a discussion of procedures for appealing a denial of recomputation, see § 80.40.

[d] Submission of Facts by Base Period Employer Not Entitled to Notice of Claim

[i] Facts Relating to Whether Employer's Reserve Account May Be Charged

A base period employern⁵⁶ who is entitled to receive notice of computation under *Unemployment Insurance Code section 1329* will not have received notice of the filing of the new or additional claim if the employer was not the claimant's last previous employer.ⁿ⁵⁷ Such a base period employer may, within 15 days after the mailing of the notice of computation, or any extension of that period for good cause, submit to the EDD facts relating to reasons why that

employer's reserve account should not be charged for any benefits paid.ⁿ⁵⁸ The reasons for not charging such an employer's reserve account are identical to those applicable to the last previous employer,ⁿ⁵⁹ except that an employer other than the last previous employer may not avoid charges against its reserve account based on the claimant's discharge or resignation as the result of an irresistible compulsion to use intoxicants.ⁿ⁶⁰ Benefits paid will be charged against the employer's account as provided by *Unemp. Ins. Code 1026*;^{n60.1} benefits will likewise be charged against the employer's account if it fails to submit facts within the prescribed time.ⁿ⁶¹

The EDD must consider these facts together with any other information in its possession, and promptly notify the employer of its ruling as to the cause of the termination of the claimant's employment.ⁿ⁶²

For a discussion of procedures for appealing a ruling as to the cause of the termination of the claimant's employment, see § 80.40.

[ii] Facts Affecting Claimant's Eligibility

Any base period employer (including the last previous employer) must, within 15 days after mailing of a notice of computation, submit to the EDD any facts then known that he or she was not previously required to submit under *Unemployment Insurance Code Section 1327*.ⁿ⁶³ If after the 15-day period the employing unit acquires knowledge of facts that may affect the eligibility of the claimant and these facts could not reasonably have been known within the period, the employing unit must, within 10 days of acquiring such knowledge, submit the facts to the EDD.ⁿ⁶⁴ Both the 15- and 10-day periods may be extended for good cause.ⁿ⁶⁵

The EDD must make a determination or reconsidered determination of the claimant's eligibility based on the facts submitted by the base period employers, and must promptly notify the claimant and the base period employer submitting the facts of the determination or reconsidered determination and the reasons therefor.ⁿ⁶⁶

[6A] Notice of Determination of Eligibility

The EDD must promptly serve notice personally or by mail of any determination of eligibility for benefits under *Unemployment Insurance Code Section 621 et seq.* (unemployment compensation), *Unemployment Insurance Code Section 3501 et seq.* (extended unemployment compensation), or *Unemployment Code Section 4001 et seq.* (federal-state extended compensation) on the claimant and on any employer or employing unit that, prior to the determination, furnished the EDD with information regarding the claimant's eligibility pursuant to *Unemployment Insurance Code Sections 1327 and 1331*. However, failure to serve the notice does not affect the determination of eligibility.^{n66.1} "Notice" is notification that apprises the party of a determination of eligibility and allows that party to respond accordingly.^{n66.2}

If the EDD is or should be aware that the notice was not received by the party to whom it was addressed (for example, because the United States Postal Service returns the notice to the EDD), the EDD must reissue the notice when it can determine a corrected mailing address for the affected party or otherwise ensure receipt.^{n66.3} The affected party may appeal the notice pursuant to *Unemployment Insurance Code Sections 1328 and 1332(b) and (c)*.^{n66.4}

[7] Reconsideration of Determinations or Computations

[a] Reconsideration of Determination

The EDD may for good cause reconsider any determination within 15 days after an appeal to an administrative law judge is filed.ⁿ⁶⁷ If no appeal is filed, the EDD may for good cause reconsider any determination within 20 days after mailing or personal service of the notice of determination.ⁿ⁶⁸ The EDD may, if a claimant has not filed an appeal to an administrative law judge from any determination that finds that a claimant is ineligible or disqualified, for good cause also reconsider the determination during the benefit year or extended duration period or extended benefit period to

which the determination relates.ⁿ⁶⁹

No individual designated by the director to reconsider appealed determinations may be the same individual who made the initial determination in the same matter.ⁿ⁷⁰

The EDD must give notice of any reconsidered determination to the claimant and to any employer or employing unit that received notice under *Unemployment Insurance Code Sections 1328* (notice to last previous employer of determination of eligibility)ⁿ⁷¹ and 1331 (notice to base period employer who submitted facts after receiving notice of computation).ⁿ⁷² The reconsidered determination must indicate the reasons therefor.ⁿ⁷³

For discussion of procedures for appealing a reconsidered determination, see § 80.40.

[b] Reconsideration of Computation

The EDD may for good cause reconsider any computation or recomputation during the benefit year or extended duration period to which the notice of computation or recomputation relates.ⁿ⁷⁴ However, the EDD may not reconsider any recomputation with respect to any issue considered or under consideration in an appeal taken from a denial of recomputation.ⁿ⁷⁵ The EDD must promptly notify the claimant and each of the claimant's base period employers of the recomputation.ⁿ⁷⁶ The claimant and any base period employer may protest the accuracy of the recomputation as prescribed in *Unemployment Insurance Code Section 1330*.ⁿ⁷⁷

[c] Reconsideration in Case of Fraud

The statutory time limits within which the EDD may reconsider any determination, ruling, or computation, and any statutory provisions that otherwise restrict or prevent such reconsideration, do not apply in any case of fraud, misrepresentation, or willful nondisclosure.ⁿ⁷⁸

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code § 1326*; see 22 Cal. Code Reg. §§ 1326-1-1326-11 (claims procedures); See also § 80.38 for discussion of types of claims.

(n2)Footnote 2. See 22 Cal. Code Reg. § 1326-1(b).

(n3)Footnote 3. See § 80.38[5] for discussion of continued claim.

(n4)Footnote 4. See discussion in [4], [5][b], and [6][d], below for discussion of submissions by employer.

(n5)Footnote 5. See *Unemp. Ins. Code § 1253(d)* (requirement of one-week waiting period); see also discussion under § 80.32[4].

(n6)Footnote 6. See discussion in § 80.38[5].

(n7)Footnote 7. See [5], below, for discussion of determination of eligibility.

(n8)Footnote 7.1. See *Unemp. Ins. Code § 1253*; see also discussion in § 80.32[1].

(n9)Footnote 7.2. See 22 Cal. Code Reg. § 1253-2.

(n10)Footnote 7.3. See *Unemp. Ins. Code §§ 1253, 1254*; 22 Cal. Code Reg. § 1253-2.

(n11)Footnote 7.4. See 22 Cal. Code Reg. §§ 1253-4, 1253-8, 1326-8.

(n12)Footnote 7.5. *See Wang v. Unemployment Ins. Appeals Bd.* (1990) 225 Cal. App. 3d 412, 419-420, 275 Cal. Rptr. 237 (claimant's two-year delay in filing was unreasonable under circumstances).

(n13)Footnote 7.6. *See* 22 Cal. Code Reg. § 1326-10(c); *Wang v. Unemployment Ins. Appeals Bd.* (1990) 225 Cal. App. 3d 412, 420-421, 275 Cal. Rptr. 237 .

(n14)Footnote 8. *Unemp. Ins. Code* § 1326.

(n15)Footnote 9. *See Unemp. Ins. Code* § 1339(a).

(n16)Footnote 10. *See* 22 Cal. Code Reg. § 1326-1.

(n17)Footnote 11. *See Unemp. Ins. Code* § 1340.

(n18)Footnote 12. *See Unemp. Ins. Code* § 1341; 22 Cal. Code Reg. § 1341-1.

(n19)Footnote 13. *See* discussion in § 80.38[1], [2].

(n20)Footnote 14. *Unemp. Ins. Code* § 1327.

(n21)Footnote 15. *See* § 80.38[5] for discussion of partial claim.

(n22)Footnote 16. *Unemp. Ins. Code* § 1327.

(n23)Footnote 17. *Unemp. Ins. Code* § 1327. For discussion of disqualifications under *Unemp. Ins. Code* § 1256, see § 80.35.

(n24)Footnote 18. *Unemp. Ins. Code* § 1327.

(n25)Footnote 19. *Unemp. Ins. Code* § 1327.

(n26)Footnote 20. *Unemp. Ins. Code* § 1327.

(n27)Footnote 21. *See Unemp. Ins. Code* § 1328; *see also* discussion under [5][b], below.

(n28)Footnote 22. *See* 22 Cal. Code Reg. § 1333-1.

(n29)Footnote 23. *See* discussion under [3], *above*.

(n30)Footnote 24. *Unemp. Ins. Code* § 1030(a).

(n31)Footnote 25. For discussion of good cause for voluntarily leaving and discharge for misconduct, see § 80.35.

(n32)Footnote 26. *See* discussion in § 80.36[2].

(n33)Footnote 27. *See Unemp. Ins. Code* § 1256.

(n34)Footnote 28. For a discussion of circumstances under which leaving employment to accompany spouse constitutes good cause, see § 80.35[4][f][v].

(n35)Footnote 29. *Unemp. Ins. Code* § 1030(a).

(n36)Footnote 30. *See Unemp. Ins. Code* § 1032; *see also Unemp. Ins. Code* § 1026 (exception); § 80.21[4][c] for discussion of charges against employer's reserve account.

(n37)Footnote 31. *See Unemp. Ins. Code § 1032.*

(n38)Footnote 32. *See Unemp. Ins. Code § 1256; see also discussion under § 80.35.*

(n39)Footnote 33. *See Unemp. Ins. Code § 1256* (accompanying spouse as deemed good cause for purposes of claimant's eligibility); *see also discussion under § 80.35[4][f][v].*

(n40)Footnote 34. *See Unemp. Ins. Code § 1032(c).*

(n41)Footnote 35. *See Altaville Drug Store, Inc. v. Employment Development Department (1988) 44 Cal. 3d 231, 235-236, 242 Cal. Rptr. 732, 746 P.2d 871 .*

(n42)Footnote 35.1. *See Unemp. Ins. Code § 1032.*

(n43)Footnote 36. *See Unemp. Ins. Code § 1256; see also discussion in § 80.35[2].*

(n44)Footnote 37. *See discussion in [b], above.*

(n45)Footnote 38. *See Unemp. Ins. Code § 1030(d).*

(n46)Footnote 39. *See Unemp. Ins. Code § 1032.*

(n47)Footnote 40. *See discussion under [4], above.*

(n48)Footnote 41. *Unemp. Ins. Code § 1328.*

(n49)Footnote 42. *See 22 Cal. Code Reg. § 1326-1(b)(4).*

(n50)Footnote 43. *See Unemp. Ins. Code § 1328; see [7] below for discussion of reconsideration.*

(n51)Footnote 44. *See 22 Cal. Code Reg. § 1328-1(a).*

(n52)Footnote 45. *See discussion under [4][a], above.*

(n53)Footnote 46. *Unemp. Ins. Code § 1328.*

(n54)Footnote 47. *See Unemp. Ins. Code § 1328.*

(n55)Footnote 48. *Unemp. Ins. Code § 1329(a).*

(n56)Footnote 48.1. *See Unemp. Ins. Code § 1275; see discussion at § 80.31[3], above.*

(n57)Footnote 48.2. *Unemp. Ins. Code § 1329.5.*

(n58)Footnote 48.3. *See Unemp. Ins. Code § 1275(b), discussed at § 80.31[3], above.*

(n59)Footnote 49. *Unemp. Ins. Code § 1329(a).*

(n60)Footnote 50. For definition of "base period," *see § 80.31[3].*

(n61)Footnote 51. *Unemp. Ins. Code § 1329(a).*

(n62)Footnote 52. *Unemp. Ins. Code § 1329(b).* For eligibility requirements, *see Unemp. Ins. Code § 1266 et seq. ; for discussion of eligibility requirements, see §§ 80.32-80.36, above .*

(n63)Footnote 53. *Unemp. Ins. Code § 1330.*

(n64)Footnote 54. *See Unemp. Ins. Code § 1330.*

(n65)Footnote 55. *Unemp. Ins. Code § 1330.*

(n66)Footnote 56. For definition of "base period," see § 80.31[3].

(n67)Footnote 57. *See Unemp. Ins. Code § 1327; see also* discussion in [4], above.

(n68)Footnote 58. *See Unemp. Ins. Code §§ 1030(b), 1032.*

(n69)Footnote 59. *See* discussion in [4][b], above.

(n70)Footnote 60. *See Unemp. Ins. Code § 1032(f); compare Unemp. Ins. Code § 1030(a)(2) with Unemp. Ins. Code § 1030(b).*

(n71)Footnote 60.1. *See § 80.21[4][c].*

(n72)Footnote 61. *See Unemp. Ins. Code § 1032.*

(n73)Footnote 62. *See Unemp. Ins. Code § 1030(c).*

(n74)Footnote 63. *Unemp. Ins. Code § 1331; see also* discussion under [4][a], above.

(n75)Footnote 64. *Unemp. Ins. Code § 1331.*

(n76)Footnote 65. *Unemp. Ins. Code § 1331.*

(n77)Footnote 66. *Unemp. Ins. Code § 1331.* For discussion of reconsidered determinations, *see* [7], below.

(n78)Footnote 66.1. *Unemp. Ins. Code § 1332(a).*

(n79)Footnote 66.2. *Unemp. Ins. Code § 1332(a)(1).*

(n80)Footnote 66.3. *Unemp. Ins. Code § 1332(a)(2).*

(n81)Footnote 66.4. *Unemp. Ins. Code § 1332(a)(2); see* discussion in [7][a], [b], below, and § 80.40.

(n82)Footnote 67. *Unemp. Ins. Code § 1332(b).* For discussion of appeals, *see* § 80.40.

(n83)Footnote 68. *Unemp. Ins. Code § 1332(b).* For discussion of notice of determination, *see* [5][a], above.

(n84)Footnote 69. *Unemp. Ins. Code § 1332(b).*

(n85)Footnote 70. *See Unemp. Ins. Code § 1332(b).*

(n86)Footnote 71. *See* discussion under [3], above.

(n87)Footnote 72. *Unemp. Ins. Code § 1332(b).* For discussion of notice of computation to base period employer *see* [6][b], above. For discussion of submission of facts by base period employer who received notice of computation, *see* [6][d], above.

(n88)Footnote 73. *See Unemp. Ins. Code §§ 1328, 1331.*

(n89)Footnote 74. *Unemp. Ins. Code § 1332(c)*.

(n90)Footnote 75. *See Unemp. Ins. Code § 1332(c)*.

(n91)Footnote 76. *Unemp. Ins. Code § 1332(c)*.

(n92)Footnote 77. *Unemp. Ins. Code § 1332(c)*. For discussion of protest of computation or recomputation, *see* [6][c], *above*.

(n93)Footnote 78. *See Unemp. Ins. Code § 1332.5*.



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.40

AUTHOR: By Carol S. Sanders, J.D.

§ 80.40 Appeals

[1] To Administrative Law Judge

The claimant and any employer who has submitted any facts in connection with an eligibility determination (or reconsidered determination) or protested a computation may appeal the EDD's determination or denial of recomputation to an administrative law judge.ⁿ¹ The appeal must be filed within 20 days from the mailing or personal service of the notice of determination, reconsidered determination,ⁿ² or denial of recomputation.ⁿ³ The director of the EDD is deemed an interested party to any appeal.ⁿ⁴

After affording a reasonable opportunity for fair hearing, the administrative law judge must, unless the appeal is withdrawn, affirm, reverse, modify, or set aside the determination.ⁿ⁵ The claimant, any employer becoming a party to the appeal by submitting a protest or information, and the director must be promptly notified in writing of the administrative law judge's decision, together with the reasons for the decision.ⁿ⁶ The decision is final unless, within 20 days after the mailing of the decision, further appeal is made to the Unemployment Insurance Appeals Board pursuant to *Unemployment Insurance Code Section 1336*.ⁿ⁷

Both the 20-day period for appealing to the administrative law judge and the 20-day period for filing to the Appeals Board may be extended for good cause, including, but not limited to, mistake, inadvertence, surprise, or excusable neglect.ⁿ⁸

1. Because the standards for awarding unemployment benefits are favorable to claimants, opposition to such claims is likely to fail in many cases;

2. Opposing the unemployment claim may create significant animosity, which effectively "persuades" the former employee to file a wrongful discharge action when he or she might not otherwise have done so;

3. Statements (or misstatements) of fact by witnesses under oath in unemployment insurance hearings may be admitted as "prior testimony" in subsequent wrongful discharge litigation,^{n9.1} even though the unemployment insurance determination itself has no collateral estoppel effect;^{n9.2} and

4. Taking an overrated (and perhaps misstated) opposition to a claim that the EDD otherwise routinely grants might create a basis for an employee's argument that the employer breached the duty of good faith and fair dealing.

■ CONSULTANT'S COMMENT:

The filing of an application for unemployment insurance benefits by a potential wrongful discharge plaintiff presents a difficult choice for the potential defendant-employer. On the one hand, the employer may wish to oppose the application (1) to avoid any appearance of weakness; (2) to avoid triggering higher rates of payroll unemployment insurance taxes; and (3) to attempt to learn the possible theory of the employee's potential wrongful discharge case by participating in unemployment insurance hearings and conducting thorough witness examinations.ⁿ⁹ On the other hand, the employer may wish not to oppose the unemployment application for one or more of the following reasons:

1. Because the standards for awarding unemployment benefits are favorable to claimants, opposition to such claims is likely to fail in many cases;

2. Opposing the unemployment claim may create significant animosity, which effectively "persuades" the former employee to file a wrongful discharge action when he or she might not otherwise have done so;

3. Statements (or misstatements) of fact by witnesses under oath in unemployment insurance hearings may be admitted as "prior testimony" in subsequent wrongful discharge litigation,^{n9.1} even though the unemployment insurance determination itself has no collateral estoppel effect;^{n9.2} and

4. Taking an overrated (and perhaps misstated) opposition to a claim that the EDD otherwise routinely grants might create a basis for an employee's argument that the employer breached the duty of good faith and fair dealing.

Given the serious downside risks of opposing unemployment insurance applications, employers should consider their choice with care. *Commentary by Kirby Wilcox.*

[2] To Appeals Board

[a] Generally

The director or any party to a decision by an administrative law judge may appeal the decision to the Unemployment Insurance Appeals Board.ⁿ¹⁰ The Appeals Board may order the taking of additional evidence and may affirm, reverse, modify, or set aside the decision of the administrative law judge.ⁿ¹¹ The Appeals Board must promptly notify the director and the parties to any appeal of its order or decision.ⁿ¹²

For a discussion of Appeals Board procedures, see Part E (§§ 80.80-80.88). For discussion of judicial review of Appeals Board decisions, see Part F (§§ 80.100-80.102).

[b] Time Limit on Appeals Board Decisions

The decision of the Appeals Board on an appeal from the decision of an administrative law judge regarding

unemployment benefits must be rendered within 60 days after the submission of the appeal unless the Board requires the taking of further evidence.ⁿ¹³ If the Appeals Board requires the taking of further evidence, the hearing must be commenced within 60 days after the submission of the appeal, and the decision of the Board must be mailed within 60 days after completion of the hearing.ⁿ¹⁴

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code §§ 1328, 1330, 1331, 1332(b); see also* 22 Cal. Code Reg. § 1328-1(b) (appeal of modified determination).

(n2)Footnote 2. *Unemp. Ins. Code § 1328.*

(n3)Footnote 3. *See Unemp. Ins. Code § 1330* (denial of recomputation may be made in manner prescribed in *Unemp. Ins. Code § 1328*).

(n4)Footnote 4. *Unemp. Ins. Code § 1328.*

(n5)Footnote 5. *Unemp. Ins. Code § 1334.*

(n6)Footnote 6. *Unemp. Ins. Code § 1334.*

(n7)Footnote 7. *Unemp. Ins. Code § 1334.*

(n8)Footnote 8. *See Unemp. Ins. Code §§ 1328, 1334.*

(n9)Footnote 9.1. *See generally Evid. Code §§ 780(h), 1202, 1220, 1222, 1235.*

(n10)Footnote 9.2. *See Unemp. Ins. Code § 1960; see also* discussion in § 80.88.

(n11)Footnote 9. Note that unemployment insurance decisions and findings of fact are not binding and may not be used as evidence in any separate action between the employer and the employee. *see Unemp. Ins. Code § 1960; see also* discussion in § 80.88.

(n12)Footnote 9.1. *See generally Evid. Code §§ 780(h), 1202, 1220, 1222, 1235.*

(n13)Footnote 9.2. *See Unemp. Ins. Code § 1960; see also* discussion in § 80.88.

(n14)Footnote 10. *Unemp. Ins. Code § 1336.*

(n15)Footnote 11. *Unemp. Ins. Code § 1336.*

(n16)Footnote 12. *Unemp. Ins. Code § 1336.*

(n17)Footnote 13. *Unemp. Ins. Code § 1337.*

(n18)Footnote 14. *Unemp. Ins. Code § 1337.*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.41

AUTHOR: By Carol S. Sanders, J.D.

§ 80.41 Payment of Benefits During Appeal Procedure

[1] Prior to Final Decision on Appeal

Except as discussed below, if an appeal is filed, benefits with respect to the period prior to the final decision on the appeal may be paid only after the decision.ⁿ¹

If benefits for any week are payable in accordance with a determination by the EDD irrespective of any decision on the issues set forth in the appeal, those benefits must be promptly paid regardless of the appeal.ⁿ² If an administrative law judge affirms a determination allowing benefits, the benefits must be promptly paid regardless of any appeal that may thereafter be taken and regardless of any action taken by the Unemployment Insurance Appeals Board under *Unemployment Insurance Code Section 1336*ⁿ³ or otherwise by the director, Appeals Board, or other administrative body or by any court.ⁿ⁴ Likewise, if benefits for any week are payable in accordance with a determination by the EDD, or an administrative law judge issues a decision allowing benefits, the benefits must be promptly paid regardless of any appeal, and regardless of any action taken by the Appeals Board pursuant to *Unemployment Insurance Code Sections 412 or 413* (transfer or removal of proceedings by Appeals Board).ⁿ⁵ If a determination or decision allowing benefits is finally reversed, no employer account may be charged with benefits paid because of that determination or decision, except as provided in *Unemployment Insurance Code Section 1026* (charges and credits on employer's reserve account).ⁿ⁶

The payment of unemployment benefits when they are first administratively allowed is mandated by the federal requirement that states that methods of administering an unemployment compensation program must be reasonably calculated to ensure full payment of benefits "when due."ⁿ⁷

[2] On Appeals Board Decision Allowing Benefits

If the Unemployment Insurance Appeals Board issues a decision allowing benefits, the benefits must be paid regardless of any further action taken by the director, the Appeals Board, or any other administrative agency, and regardless of any appeal or mandamus, or other proceeding in the courts.ⁿ⁸ If the decision of the Appeals Board is finally reversed or set

aside, no employer's account may be charged with the benefits paid, except as provided in *Unemployment Insurance Code Section 1026* (allowable charges against employer's reserve account).n9

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code § 1335*.

(n2)Footnote 2. *Unemp. Ins. Code § 1335(a)*.

(n3)Footnote 3. *See discussion under § 80.40[2]*.

(n4)Footnote 4. *Unemp. Ins. Code § 1335(b)*.

(n5)Footnote 5. *Unemp. Ins. Code § 1335(c)*.

(n6)Footnote 6. *Unemp. Ins. Code § 1335(b), (c)*. For a discussion of allowable charges and credits on employer's reserve account, see § 80.21[4].

(n7)Footnote 7. *See 42 U.S.C. § 503(a)(1); California Dep't of Human Resources Development v. Java (1971) 402 U.S. 121, 125, 91 S. Ct. 1347, 28 L. Ed. 2d 666 ; see also Los Angeles Unified School Dist. v. Livingston (1981) 125 Cal. App. 3d 942, 946, 178 Cal. Rptr. 680* (prompt payment requirement pending appeal may not be enjoined, even though school district that chose method of financing without "noncharging" account provisions will bear charge if final decision determines benefits erroneously paid).

(n8)Footnote 8. *Unemp. Ins. Code § 1338*.

(n9)Footnote 9. *Unemp. Ins. Code § 1338*. For discussion of allowable charges against employer's reserve account, see § 80.21[4].



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CHAPTER 80 Unemployment and State Disability Insurance
Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law § 80.42

AUTHOR: By Carol S. Sanders, J.D.

§ 80.42 Liability for Overpayment of Benefits

[1] Generally

Any person who is overpaid any amount as unemployment compensation benefits is liable for the amount overpaid unless any of the following applies:

1. The overpayment was not due to fraud, misrepresentation, or willful nondisclosure on the part of the recipient, the overpayment was received without fault on the part of the recipient, and recovery of the overpayment would be against equity and good conscience;n1
2. The recipient of the overpayment cooperates with the EDD in an investigation that results in either of the following;n1.1
 - a. The assessment against an employer of the penalty for inducing, soliciting, or coercing an employee to file a false claim for benefits;n1.2 or
 - b. A prosecution or other action taken to impose the penalty for aiding in, procuring, counselling, advising, or coercing the preparation or presentation of a fraudulent document;n1.3 or
3. The EDD determines that it is in the interest of justice to waive all or part of the liability because the overpayment was a direct result of inducement, solicitation, or coercion by the recipient's employer.n1.4

In determining fault, the EDD considers the nature and cause of the overpayment and the capacity of the recipient to recognize the error resulting in overpayment.n2 A claimant is at fault if the claimant receives or retains benefits that he or she knew or reasonably should have known he or she was not entitled to receive.n3 A claimant is also at fault if he or she negligently reports or fails to report information that results in an overpayment.n4 The claimant is not at fault if the

benefits were retained because of a good faith reliance on a departmental error.ⁿ⁵

Even if the claimant is not at fault in receiving the benefits, he or she will be liable for overpayment unless recovery would be contrary to "equity and good conscience."ⁿ⁶ EDD regulations provide detailed guidelines for determining whether recovery of an overpayment would be against equity and good conscience.ⁿ⁷ If the overpayment resulted from a decision by an administrative law judge or the Appeals Board that reversed a previous decision granting benefits, the claimant is not required to repay the overpayment unless the EDD gave notice to the claimant that his or her entitlement to benefits had been appealed and that he or she may be required to repay the benefits in the event of reversal on appeal.ⁿ⁸ If the notice is given, recovery is appropriate unless there has been a change of position by the claimant or the recovery will cause extraordinary hardship.ⁿ⁹

If the claimant has detrimentally changed his or her position in reliance on the benefit payments, the recovery of an overpayment of benefits is deemed to be against good equity and conscience.ⁿ¹⁰ A claimant will be considered to have detrimentally changed his or her position in reliance on the receipt of benefits if the claimant has taken any reasonable action or incurred a necessary financial obligation in the conduct of his or her affairs that the claimant would not have taken or incurred had he or she not received the benefits.ⁿ¹¹

Recovery of an overpayment is also against equity and good conscience, and will be waived, if it would impose "extraordinary hardship" on the claimant or his or her family.ⁿ¹² In making this determination, the EDD considers the claimant's family income and assets.ⁿ¹³ The regulations set forth detailed guidelines for determining whether or not recovery would result in "extraordinary hardship" in a given case.ⁿ¹⁴

No determination of overpayment may be based on the disallowance by the Workers' Compensation Appeals Board of a claim of lien filed under *Labor Code Section 4903(g)* (lien on workers' compensation award for unemployment or state disability benefits), or on the allowance, or approval of a compromise and release agreement providing for the allowance, of a lien for less than the amount claimed as a lien.ⁿ¹⁵

[2] Effect of Administrative Law Judge's Affirmation of Award or Appeals Board Determination of Eligibility

No person may be liable for the amount of benefits received if the benefits were paid pursuant to an administrative law judge's decision that affirmed the initial determination by the EDD or in accordance with a final decision of the Appeals Board, regardless of any further appeal.ⁿ¹⁶ An employer's experience rating account may not be charged with any benefits erroneously or unlawfully paid, except as provided in *Unemployment Insurance Code Section 1026* or *1144*.ⁿ¹⁷

[3] Assessment for False Statement

If the director finds that an individual has been overpaid unemployment compensation benefits because he or she willfully, for the purpose of obtaining such benefits, either made a false statement or representation, with actual knowledge of the falsity, or withheld a material fact, the director must assess against the individual an amount equal to 30 percent of the overpayment amount, and the assessments must be deposited in the Benefit Audit Fund.ⁿ¹⁸ Any employer that induces, solicits, or coerces an employee to file a false or fraudulent claim for benefits will be assessed a penalty equal to 100 percent of both the amount of the overpayment and the 30 percent assessment against the employee.^{n18.1}

[4] Notice of Overpayment and Assessment Determination

If the EDD determines that an overpayment is probable, it must notify the claimant of the probable overpayment, the claimant's right to request that the EDD waive the overpayment, and the standards for obtaining such a waiver.ⁿ¹⁹ The

EDD is required to assist and advise the claimant in meeting his or her obligation to furnish the EDD with all information necessary for it to determine whether there is an overpayment and whether the claimant is entitled to a waiver, and to establish a repayment schedule.ⁿ²⁰

The director must determine the amount of the overpayment of unemployment compensation benefits and any assessment, and notify the liable person of the basis of the overpayment determination.ⁿ²¹ The notice must include the amount of the overpayment, the cause of the overpayment, the reasons for denial of waiver if waiver is denied, the terms of the repayment schedule established by the EDD, and information regarding the claimant's right to appeal the determination to an administrative law judge.ⁿ²² In the absence of fraud, misrepresentation, or willful nondisclosure, notice of the overpayment determination must be mailed or personally served no later than one year after the close of the benefit year in which the overpayment was made, or six months after the date a backpay award was made, whichever is later.ⁿ²³

[5] Appeal of Overpayment Determination

Within 20 days from the date of mailing or serving of the notice of overpayment, the person affected may file an appeal to an administrative law judge.ⁿ²⁴ The director is an interested party to any such appeal.ⁿ²⁵ The administrative law judge, after affording reasonable opportunity for a fair hearing, must, unless the appeal is withdrawn, affirm, reverse, modify, or set aside the findings set forth in the notice of overpayment.ⁿ²⁶ The party and the director must be notified of the administrative law judge's decision, together with the reasons for the decision.ⁿ²⁷

The decision of an administrative law judge is final unless within 20 days from the date of notification or mailing of the decision a further appeal is initiated to the Unemployment Insurance Appeals Board pursuant to *Unemployment Insurance Code Section 1336*.ⁿ²⁸ The Appeals Board must review an appeal from an overpayment determination as provided in *Unemployment Insurance Code sections 1336 and 1337* and determine what amount, if any, may be recovered.ⁿ²⁹

Both 20-day periods for appeal may be extended for good cause, which includes, but is not limited to, mistake, inadvertence, surprise, or excusable neglect.ⁿ³⁰

For a discussion of appeal procedures, see Part E (§§ 80.80-80.88). For a discussion of judicial review of Appeals Board decisions, see Part F (§§ 80.100-80.102).

[6] Recovery of Overpayments

[a] Civil Action

A civil action against the liable person for recovery of the overpayment amount may be filed by the director within one year after the following dates, or, in cases where the individual has been overpaid benefits due to fraud, misrepresentation, or nondisclosure as described in *Unemployment Insurance Code section 1375.1*,^{n30.1} within three years of the following dates, whichever is applicable:ⁿ³¹

1. The mailing or personal service of the notice of determination of overpayment, if the person affected does not file an appeal to an administrative law judge;
2. The mailing of the decision of the administrative law judge if the person affected does not initiate a further appeal to the Appeals Board; or
3. The date of the decision of the Appeals Board.

[B] Summary Judgment in Cases of Overpayment Because of Fraud

The director may initiate proceedings for a summary judgment against the liable person if the director has found that the overpayment may not be waived under *Unemployment Insurance Code section 1375* because it was due to fraud, misrepresentation, or willful nondisclosure on the part of the recipient.ⁿ³² The clerk of the court must, on the filing of a certificate by the director setting forth specified facts, immediately enter a judgment for the State of California against the liable person for the amount due set forth in the certificate, which includes the assessmentⁿ³³ plus interest from the date that the initial determination of overpayment was made.ⁿ³⁴

Summary judgment proceedings must be commenced within three years after the overpayment becomes final.ⁿ³⁵ For this purpose, an overpayment becomes final and due and payable, after (1) the liable person has not filed an appeal pursuant to *Unemployment Insurance Code section 1377*, (2) the liable person has filed an appeal to the administrative law judge and the administrative law judge's decision has become final, or (3) the liable person has filed an appeal to the Unemployment Insurance Appeals Board and the Appeals Board's decision has become final because the liable person has not sought judicial review within the six-month period provided by *Unemployment Insurance Code section 410*.ⁿ³⁶

The director may reduce or vacate a summary judgment by filing a certificate to that effect with the clerk of the proper court.^{n36.1}

From the time of recording, a judgment obtained pursuant to the summary judgment procedure constitutes a lien against the real or personal property of the liable person for ten years.ⁿ³⁷

[c] Offset

The director may offset the amount of the overpayment received by the liable person against any amount of unemployment compensation or disability benefits to which the person may become entitled within six years after the date of mailing or personal service of the notice of the overpayment determination.ⁿ³⁸

[d] Execution

A judgment for overpayment obtained pursuant to a civil actionⁿ³⁹ or summary judgmentⁿ⁴⁰ and properly recorded constitutes a lien against all real or personal property of the liable person in that county owned by the liable person at the time of recording or acquired thereafter until the lien expires.ⁿ⁴¹ From the time of recording, the lien has the force, effect, and priority of a judgment lien and continues for ten years, unless sooner released or discharged.ⁿ⁴² The lien may be extended for additional ten-year periods by recording a new abstract before expiration of the previous ten-year period.ⁿ⁴³ Execution will issue on the judgment on the request of the director in the same manner as execution may issue on other judgments.ⁿ⁴⁴

If an abstract of a judgment for overpayment of benefits is recorded as provided in *Unemployment Insurance Code section 1379.5*, and the lien, including any interest, cost, and penalty, has been satisfied in full, the EDD must do all of the following, as provided in *Code of Civil Procedure section 724.050* (governing satisfaction of money judgments generally):^{n44.1}

1. File an acknowledgment of satisfaction of judgment with the court;
2. Serve an acknowledgment of satisfaction of judgment on the claimant personally or by mail; and
3. Record an acknowledgment of satisfaction of judgment in the office of the county recorder where the abstract of judgment is recorded.

If an acknowledgment of satisfaction of judgment is recorded, the cost of recording is an obligation of the claimant and

may be collected from the claimant in any manner provided by law for the collection of benefit overpayments.^{n44.2} If the claimant pays the judgment by check, the EDD need not take any of the actions specified above regarding acknowledgment of satisfaction until the check has been paid by the financial institution on which it was drawn.^{n44.3}

[7] No Liability for Overpayment Resulting From Backpay Award

No person may be liable for the amount of benefits received for any period for which the person also received an award or settlement of backpay resulting from an action or grievance for wrongful discharge, if the amount of the backpay award or settlement was reduced by the amount of unemployment compensation benefits received.ⁿ⁴⁵ When the amount of the backpay award or settlement was reduced by the amount of benefits received, the employer must pay to the Unemployment Fund an amount equal to the amount subtracted from the backpay award or settlement for benefits received by the person in order to reimburse the fund.ⁿ⁴⁶ When an individual has been awarded or receives backpay, the amount of the backpay constitutes wages paid in the period for which it was awarded.ⁿ⁴⁷

Any mediator or arbitrator who is a party to a backpay award or settlement must report the award or payment to the EDD.ⁿ⁴⁸

For discussion of wrongful discharge, see Chapters 60-63.

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code § 1375(a)*; 22 Cal. Code Reg. § 1375-1(a).

(n2)Footnote 1.1. *Unemp. Ins. Code § 1375(b)*.

(n3)Footnote 1.2. *See Unemp. Ins. Code § 1144*; see [3], below.

(n4)Footnote 1.3. *See Unemp. Ins. Code § 2121*; see § 80.11.

(n5)Footnote 1.4. *Unemp. Ins. Code § 1375(c)*.

(n6)Footnote 2. 22 Cal. Code Reg. § 1375-1(c).

(n7)Footnote 3. 22 Cal. Code Reg. § 1375-1(c).

(n8)Footnote 4. 22 Cal. Code Reg. § 1375-1(c).

(n9)Footnote 5. 22 Cal. Code Reg. § 1375-1(c).

(n10)Footnote 6. *See Unemp. Ins. Code § 1375(a)*; 22 Cal. Code Reg. § 1375-1(a)(3); *see also Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 313, 322-323, 113 Cal. Rptr. 374, 521 P.2d 110* (standard of "equity and good conscience" involves panoramic vision encompassing all factors persuasive of good conscience; sole ground that claimant was notified of possibility of liability as not justifying recoupment under *Unemp. Ins. Code § 1375*).

(n11)Footnote 7. *See* 22 Cal. Code Reg. § 1375-1(d).

(n12)Footnote 8. 22 Cal. Code Reg. § 1375-1(d)(1).

(n13)Footnote 9. 22 Cal. Code Reg. § 1375-1(d)(1).

(n14)Footnote 10. 22 Cal. Code Reg. § 1375-1(d)(2).

(n15)Footnote 11. 22 Cal. Code Reg. § 1375-1(d)(2).

(n16)Footnote 12. 22 Cal. Code Reg. § 1375-1(d)(3).

(n17)Footnote 13. 22 Cal. Code Reg. § 1375-1(d)(3).

(n18)Footnote 14. *See* 22 Cal. Code Reg. § 1375-1(d)(3).

(n19)Footnote 15. *See Unemp. Ins. Code § 1375.3.*

(n20)Footnote 16. *Unemp. Ins. Code § 1380.*

(n21)Footnote 17. *Unemp. Ins. Code § 1380; see § 80.21[4]* for discussion of charges against employer's account.

(n22)Footnote 18. *Unemp. Ins. Code § 1375.1.*

(n23)Footnote 18.1. *Unemp. Ins. Code § 1144(a); see Unemp. Ins. Code §§ 1375, 1375.1.*

(n24)Footnote 19. 22 Cal. Code Reg. § 1375-1(e); *see* discussion in [1], *above*, regarding circumstances under which EDD will not collect overpayment.

(n25)Footnote 20. 22 Cal. Code Reg. § 1375-1(e).

(n26)Footnote 21. *Unemp. Ins. Code § 1376.*

(n27)Footnote 22. *See* 22 Cal. Code Reg. § 1375-1(g). For discussion of appeal, *see* [5], *below*.

(n28)Footnote 23. *Unemp. Ins. Code § 1376.*

(n29)Footnote 24. *Unemp. Ins. Code § 1377.*

(n30)Footnote 25. *Unemp. Ins. Code § 1377.*

(n31)Footnote 26. *Unemp. Ins. Code § 1377.*

(n32)Footnote 27. *Unemp. Ins. Code § 1377.*

(n33)Footnote 28. *See Unemp. Ins. Code § 1377.*

(n34)Footnote 29. *Unemp. Ins. Code § 1378.*

(n35)Footnote 30. *Unemp. Ins. Code § 1377.*

(n36)Footnote 30.1. Discussed under [3], *above*.

(n37)Footnote 31. *See Unemp. Ins. Code § 1379(a).*

(n38)Footnote 32. *See Unemp. Ins. Code § 1379(b).*

(n39)Footnote 33. *See* discussion under [3], *above*.

(n40)Footnote 34. *See Unemp. Ins. Code § 1379(b).*

(n41)Footnote 35. *Unemp. Ins. Code § 1379(b).*

(n42)Footnote 36. *Unemp. Ins. Code § 1379(b).*

(n43)Footnote 36.1. *See Unemp. Ins. Code § 1379(c).*

(n44)Footnote 37. *See Unemp. Ins. Code § 1379.5; see also Unemp. Ins. Code § 1381* (enforcement of collection of judgment obtained under *Unemp. Ins. Code § 1379(a)* or *(b)*).

(n45)Footnote 38. *Unemp. Ins. Code § 1379(d); see also Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 313, 327-328, 113 Cal. Rptr. 374, 521 P.2d 110* (offset provisions as not conflicting with federal requirement under 42 U.S.C. § 503(a)(1) of full payments of unemployment compensation benefits when due).

(n46)Footnote 39. *See* discussion under [a], above.

(n47)Footnote 40. *See* discussion under [b], above.

(n48)Footnote 41. *See Unemp. Ins. Code § 1379.5.*

(n49)Footnote 42. *See Unemp. Ins. Code § 1379.5; see also Unemp. Ins. Code § 1381* (enforcement of judgment obtained under *Unemp. Ins. Code § 1379(a)*).

(n50)Footnote 43. *See Unemp. Ins. Code § 1379.5.*

(n51)Footnote 44. *See Unemp. Ins. Code § 1379.5.*

(n52)Footnote 44.1. *See Unemp. Ins. Code § 1379.6(a).*

(n53)Footnote 44.2. *See Unemp. Ins. Code § 1379.6(b).*

(n54)Footnote 44.3. *See Unemp. Ins. Code § 1379.6(c).*

(n55)Footnote 45. *Unemp. Ins. Code § 1382.*

(n56)Footnote 46. *Unemp. Ins. Code § 1382.*

(n57)Footnote 47. *Unemp. Ins. Code § 1382.*

(n58)Footnote 48. *See Unemp. Ins. Code § 1382; see also Oliver v. Unemployment Ins. Appeals Bd. (1983) 143 Cal. App. 3d 215, 217, 191 Cal. Rptr. 694* (award of backpay in settlement of unlawful discharge as "wages" for purposes of computing benefits under *Unemp. Ins. Code § 1277* for period after discharge but prior to filing of claim); *Kauffman v. Sidereal Corp.* (9th Cir. [Or.] 1982) *695 F.2d 343, 347* (unemployment benefits received by successful plaintiff in Title VII employment discrimination action may not be offset against backpay award).



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part C. CLAIMS FOR UNEMPLOYMENT COMPENSATION BENEFITS

4-80 California Employment Law §§ 80.43 through 80.59

AUTHOR: By Carol S. Sanders, J.D.

[Reserved]

§§ 80.43[Reserved]



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part D. CLAIMS FOR DISABILITY INSURANCE BENEFITS

4-80 California Employment Law § 80.60

AUTHOR: By Carol S. Sanders, J.D.

§ 80.60 Generally

[1] Statutes and Regulations Covering Disability Benefits

The disability compensation provisions are contained in Part 2 of Division 1 of the Unemployment Insurance Code.ⁿ¹ State regulations and interpretations applicable to unemployment and disability compensation are contained in *Title 22 California Code of Regulations, sections 2601-1 et seq.* For a discussion of applicability of unemployment compensation provisions to disability compensation provisions, see § 80.02[2].

[2] Nature and Source of Disability Benefits

[a] State Disability Plan

"Disability benefits," as that term is used in the Unemployment Insurance Code, are money payments payable under the *Unemployment Insurance Code sections 2601-3272* to either of the following:

- (a) An eligible unemployed individual with respect to his or her wage losses due to unemployment as a result of illness or other disability, resulting in that individual being unavailable or unable to work.ⁿ²
- (b) An eligible individual with respect to his or her wage losses who is unable to work due to caring for a seriously ill or injured family member or bonding with a minor child within one year of the birth or placement of the child in connection with foster care or adoption.^{n2.1}

Contributions are made by covered employeesⁿ³ into a special fund known as the Unemployment Compensation Disability Fund (Disability Fund)ⁿ⁴ at a rate based on a percentage of the worker's wages.ⁿ⁵ Each employer is required to withhold the required contributions to the disability fund from its employees' wages and transmit them to the EDD along with the employer's contributions to the Unemployment Fund.ⁿ⁶ Unlike unemployment benefits,ⁿ⁷ state disability benefits paid to employees are not charged against the employer's reserve account.ⁿ⁸

Unemployment compensation disability insurance is distinguished from the worker's compensation programⁿ⁹ in that, among other things, under worker's compensation, the injury must be work-related to be compensable,ⁿ¹⁰ whereas under the disability program benefits are payable because of wage loss due to nonwork-related disabilities.ⁿ¹¹ For discussion of the scope of workers' compensation coverage, see Chapter 20.

[b] Nonindustrial Disability Insurance for State Employees

State employees are eligible for nonindustrial disability benefits on the same terms and conditions as specified for disability compensation benefits generally.ⁿ¹² Contributions under this insurance program are paid into the Disability Fund by the State of California, rather than by the worker.ⁿ¹³

[c] Voluntary Plans

An employer or a majority of its employees employed in California may elect to have a voluntary plan for the payment of disability benefits, in lieu of the state disability plan.ⁿ¹⁴ Employers and employees who maintain an approved voluntary plan are exempt from the usual contribution requirements, although the plan is required to make specified payments to the state disability fund.ⁿ¹⁵ Requirements for approval and administration of voluntary plans are set forth under *Unemployment Insurance Code sections 3251-3272*.

An employee denied benefits under an approved plan may appeal the denial in the same manner as provided for an appeal on a claim for benefits payable out of the Disability Fund.ⁿ¹⁶ For discussion of appeal of denial of disability benefits, see § 80.70.

[3] Purpose

The purpose of the disability compensation provisions is to compensate in part for the wage loss sustained by any individual unable to work due to the employee's own sickness or injury, the sickness or injury of a family member, or the birth, adoption, or foster care placement of a new child, and to reduce to a minimum the suffering caused by unemployment resulting from the sickness or injury or birth, adoption or foster care placement. The disability compensation provisions must be construed liberally in aid of their declared purpose.ⁿ¹⁷

FOOTNOTES:

(n1)Footnote 1. See *Unemp. Ins. Code* §§ 2601-3272.

(n2)Footnote 2. *Unemp. Ins. Code* § 140.5(a).

(n3)Footnote 2.1. *Unemp. Ins. Code* § 140.5(b).

(n4)Footnote 3. See *Unemp. Ins. Code* § 2901.

(n5)Footnote 4. See *Unemp. Ins. Code* § 3001.

(n6)Footnote 5. See *Unemp. Ins. Code* § 984.

(n7)Footnote 6. See *Unemp. Ins. Code* § 986.

(n8)Footnote 7. See *Unemp. Ins. Code* § 1026(b).

(n9)Footnote 8. See *Unemp. Ins. Code* § 2603.

(n10)Footnote 9. See *Lab. Code* §§ 3200 et seq.

(n11)Footnote 10. *See Lab. Code § 3600(a).*

(n12)Footnote 11. *See Unemp. Ins. Code § 140.5* (definition of "disability benefits").

(n13)Footnote 12. *See Unemp. Ins. Code §§ 2781-2783.*

(n14)Footnote 13. *See Unemp. Ins. Code § 2783(b), (c).*

(n15)Footnote 14. *See Unemp. Ins. Code § 3251.*

(n16)Footnote 15. *See Unemp. Ins. Code § 3252(a), (b).*

(n17)Footnote 16. *Unemp. Ins. Code § 3264; see also Safeway Stores, Inc. v. Superior Court (1987) 190 Cal. App. 3d 713, 717-719, 235 Cal. Rptr. 636* (employee's action based on failure to properly investigate her disability claim and wrongful denial of disability benefits under voluntary plan as essentially claim for denial of benefits for which exclusive remedy was administrative appeal provided for under *Unemp. Ins. Code § 3264*).

(n18)Footnote 17. *See Unemp. Ins. Code § 2601.*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part D. CLAIMS FOR DISABILITY INSURANCE BENEFITS

4-80 California Employment Law § 80.61

AUTHOR: By Carol S. Sanders, J.D.

§ 80.61 Subject Employment

[1] Generally

Pursuant to *Unemployment Insurance Code section 2602(a)*, for purposes of disability compensation, "employment" means service included in "employment" as defined by the unemployment compensation provisions.ⁿ¹ However, special definitions apply to service for public entities,ⁿ² service performed in the employ of corporations, community chests, funds, or foundations in connection with the operation of certain health facilities,ⁿ³ service performed as a clerk carrier in the employ of the United States Postal Service,ⁿ⁴ and domestic services.ⁿ⁵ In addition, for purposes of disability compensation only, "employment" does not include services performed as an intermittent or adjunct instructor at a postsecondary educational institution meeting the requirements of *Education Code section 94885 et seq.*, pursuant to a written agreement containing specified provisions.ⁿ⁶ It also does not include services performed by certain incarcerated individuals and wards in the custody of the Department of Youth Authority.ⁿ⁷

[2] Self-Employment

Self-employed individuals who earn "profits" as distinguished from "wages" are not part of the disability system unless they have elected coverage and make their own contributions pursuant to *Unemployment Insurance Code Section 708.5*.ⁿ⁸

FOOTNOTES:

(n1)Footnote 1. See *Unemp. Ins. Code §§ 601-611, 629-656* (definition of "employment" and excluded services under unemployment compensation provisions). For discussion of covered employment under unemployment compensation provisions, see § 80.06.

(n2)Footnote 2. See *Unemp. Ins. Code § 2606(a)(1)-(4)*.

(n3)Footnote 3. See *Unemp. Ins. Code § 2606(b)*.

(n4)Footnote 4. *See Unemp. Ins. Code § 2606.4.*

(n5)Footnote 5. *See Unemp. Ins. Code § 2606.5.*

(n6)Footnote 6. *See Unemp. Ins. Code § 633.*

(n7)Footnote 7. *See Unemp. Ins. Code §§ 633.1, 2680.*

(n8)Footnote 8. *See Simon v. Unemployment Insurance Appeals Bd. (1987) 193 Cal. App. 3d 1076, 1079, 238 Cal. Rptr. 589* (self-employed claimant not entitled to benefits when self-employed at time of injury and not making contributions, even though she had previously contributed to fund as employee within disability base period).



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part D. CLAIMS FOR DISABILITY INSURANCE BENEFITS

4-80 California Employment Law § 80.62

AUTHOR: By Carol S. Sanders, J.D.

§ 80.62 What Constitutes "Disability"

Disability benefits are payable to covered individuals who are "disabled" within the meaning of the Unemployment Insurance Code.ⁿ¹ An individual is deemed disabled on any day during which he or she, because of a physical or mental condition, is unable to perform his or her regular or customary work.ⁿ² The term "disability" or "disabled" includes the following:

1. Illness or injury, whether physical or mental, including any illness or injury resulting from pregnancy, childbirth, or related medical condition;ⁿ³
2. Inability to work because of a written order from a state or local health officer to an individual infected with, or suspected of being infected with, a communicable disease;ⁿ⁴
3. Acute alcoholism being medically treated or, to the extent specified in *Unemployment Insurance Code Section 2626.1*, resident status in an alcoholic recovery home;ⁿ⁵ and
4. Acute drug-induced illness being medically treated or, to the extent specified in *Unemployment Insurance Code Section 2626.2*, resident status in a drug-free residential facility.ⁿ⁶

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 2627.*

(n2)Footnote 2. *Unemp. Ins. Code § 2626(a); see also Unemp. Ins. Code § 2626(c)* (regular and customary work for individual having completed vocational rehabilitation plan under *Lab. Code § 4635 et seq.* is only employment for which individual was retrained under plan).

(n3)Footnote 3. *Unemp. Ins. Code § 2626(b)(1); see also Gov. Code § 12945(a)* (mandating minimum disability leave available for pregnant employees). For discussion of required pregnancy leave, *see* Chapter 8.

(n4)Footnote 4. *Unemp. Ins. Code § 2626(b)(2).*

(n5)Footnote 5. *Unemp. Ins. Code § 2626(b)(3).*

(n6)Footnote 6. *Unemp. Ins. Code § 2626(b)(4).*



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4-80 California Employment Law § 80.63

AUTHOR: By Carol S. Sanders, J.D.

§ 80.63 Eligibility for Benefits

A disabled individual is eligible to receive disability benefits equal to one-seventh of his or her weekly benefit amountⁿ¹ for each full day during which he or she is unemployed due to a disability only if the director finds that:ⁿ²

1. The individual has made a claim for disability benefits as required by authorized regulations;ⁿ³
2. The individual has been unemployed and disabled for a waiting period of seven consecutive days during each disability benefit period with respect to which waiting period no disability benefits are payable;ⁿ⁴
3. Except as provided in *Unemployment Insurance Code Sections 2626.1* (alcoholic recovery home residents), *2626.2* (drug-free residential facility residents), and *2709* (individuals depending entirely on healing by prayer or spiritual means under auspices of duly authorized religious practitioner), the individual has submitted to such reasonable examinations as the director of the EDD may require for the purpose of determining his or her disability; and
4. Except with respect to individuals receiving temporary worker's compensation benefits,ⁿ⁵ the individual has filed a certificate as required by *Unemployment Insurance Code Sections 2708* (certificate by physician, dentist, podiatrist, or, with respect to a normal pregnancy or childbirth, nurse-midwife or nurse-practitioner) or *2709* (certificate by authorized religious practitioner).ⁿ⁶

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 80.66[1].

(n2)Footnote 2. *Unemp. Ins. Code* § 2627.

(n3)Footnote 3. *See* § 80.67 for discussion of procedures for making disability benefit claims.

(n4)Footnote 4. *See* § 80.66[2] for discussion of disability benefit period.

(n5)Footnote 5. *See Unemp. Ins. Code* § 2708.1; 22 *Cal. Code Reg.* § 2708.1-1 (for individual entitled to disability benefits reduced by amount of temporary workers' compensation received, evidence of receipt of temporary workers' compensation benefits as sufficient).

(n6)Footnote 6. *See Unemp. Ins. Code* § 2627(d); *see also Lab. Code* § 3209.3 (definition of "physician").



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Part D. CLAIMS FOR DISABILITY INSURANCE BENEFITS

4-80 California Employment Law § 80.64

AUTHOR: By Carol S. Sanders, J.D.

§ 80.64 Ineligibility for Benefits

[1] Entitlement to Unemployment Compensation Benefits

An individual is not eligible for disability benefits with respect to any period for which the director finds that he or she has received or is entitled to receive unemployment compensation pursuant to the provisions of *Unemployment Insurance Code sections 100-2128* or under an unemployment compensation act of any other state or of the federal government.ⁿ¹ For discussion of eligibility requirements for unemployment benefits, see §§ 80.30-80.37.

[2] Entitlement to Other Benefits

With specified exceptions, an individual is not eligible for disability benefits for any day of unemployment and disability for which he or she has received, or is entitled to receive "other benefits" in the form of cash payments.ⁿ² "Other benefits" means temporary disability indemnity under a workers' compensation law, and temporary disability benefits under any state or federal employer's liability law. "Other benefits" also means a maintenance allowance paid pursuant to *Labor Code Section 139.5*.ⁿ³ Beginning in 1994, "other benefits" includes permanent disability benefits for the same injury under a state or federal workers' compensation law.^{n3.1}

Except for a maintenance allowance paid pursuant to *Labor Code Section 139.5*, if these "other benefits" are less than the amount an individual would otherwise receive as disability benefits, he or she is entitled to receive, for that day, if otherwise eligible, disability benefits reduced by the amount of the "other benefits."ⁿ⁴ An individual is entitled to receive, for any day, if otherwise eligible, unemployment disability benefits reduced by the amount of a maintenance allowance paid pursuant to *Labor Code Section 139.5* and permanent disability indemnity if he or she elects to receive the maximum permanent disability indemnity pursuant to *Labor Code Section 139.5(d)(2)*, and the sum of the maintenance allowance and permanent disability indemnity is less than the amount an individual would otherwise receive as unemployment disability benefits.ⁿ⁵

Note:

Labor Code § 139.5 was repealed effective January 1, 2009.^{n5.1}

Nothing in the foregoing provisions may be construed to authorize the delay of payment of unemployment compensation disability benefits except when the claimant is currently in receipt of other benefits or when the EDD has received notice that the claimant's employer or insurer has agreed to commence the payment of other benefits.ⁿ⁶

[3] Employee Covered by Approved Voluntary Plan

Except as otherwise provided in *Unemployment Insurance Code Section 2601 et seq.*, an employee covered by an approved voluntary planⁿ⁷ at the commencement of a disability benefit period is not entitled to benefits from the Disability Fund.ⁿ⁸ Payment of benefits is the liability of the plan under which the employee was covered at the commencement of the disability benefit period, regardless of any subsequent disabling condition that may occur during that period.ⁿ⁹ The EDD Director must prescribe authorized regulations to allow benefits to individuals simultaneously covered by one or more approved voluntary plans and the Disability Fund.^{n9.1}

[4] Felony-Related Disability

An individual who commits a crime is ineligible for disability benefits if the individual is disabled due to an illness or injury that is caused by or arises from the commission of, arrest for, investigation of, or prosecution of, any crime resulting in a felony conviction.ⁿ¹⁰ A plea or verdict of guilty or a conviction following a plea of nolo contendere or no contest is considered a felony conviction whether or not the court issues an order granting probation or suspending the imposition or execution of any sentence.ⁿ¹¹ This ineligibility for benefits applies only with respect to convictions rendered after 1993, regardless of when the disability commenced or the benefits were paid.ⁿ¹²

[5] Incarcerated Individuals

An individual is not eligible for disability benefits for any day during which he or she is incarcerated in any federal, state, or municipal penal institution, jail, medical facility, public or private hospital, or in any other place because of a criminal violation of a federal, state, or municipal law or ordinance.ⁿ¹³ "Incarceration" includes any time spent in the custody of law enforcement authorities on adjudication or conviction by a court of competent jurisdiction.ⁿ¹⁴ This ineligibility for benefits applies only to periods of incarceration beginning after 1993.ⁿ¹⁵

EDD regulations imposed similar restrictions prior to 1993.ⁿ¹⁶

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code* § 2628.

(n2)Footnote 2. *Unemp. Ins. Code* § 2629(a).

(n3)Footnote 3. *See Unemp. Ins. Code* § 2629(b)(1), (2); *see also Edgar v. Workers' Compensation Appeals Bd.* (1998) 65 Cal. App. 4th 1, 19-20, 76 Cal. Rptr. 2d 83 (industrially injured California Highway Patrol officer's one-year leave of absence salary under former *Lab. Code* § 4800 was in lieu of temporary disability benefits or maintenance allowance payments under *Lab. Code* § 139.5, but not in lieu of Vocational Rehabilitation Maintenance Allowance payable under *Lab. Code* § 139.5, and CHP was not entitled to credit against cap on vocational rehabilitation services it was required to provide during period disabled officer received leave of absence benefits while participating in vocational rehabilitation).

Note: *Labor Code* § 139.5 was repealed effective January 1, 2009. *See Lab. Code* § 139.5(l); Stats. 2004, ch. 34, §§ 4, 5.

(n4)Footnote 3.1. *Unemp. Ins. Code* § 2629(b)(3).

(n5)Footnote 4. *See Unemp. Ins. Code § 2629(c); see also 22 Cal. Code Reg. § 2708.1-1.*

(n6)Footnote 5. *Unemp. Ins. Code § 2629(d).*

(n7)Footnote 5.1. *See Lab. Code § 139.5(l); Stats. 2004, ch. 34, §§ 4, 5.*

(n8)Footnote 6. *Unemp. Ins. Code § 2629.1(a); see also Unemp. Ins. Code § 2629.1(b)* (specifying when disability payments must begin). The EDD's right to reimbursement from an employer or its insurer for disability benefits paid is set forth in *Unemp. Ins. Code § 2629.1(c)-(f)*. Liens that may be asserted by the EDD for disability benefits paid against any recovery by the worker from a third party or for any sums to be paid as worker's compensation are governed by *Lab. Code § 3865* and *Lab. Code §§ 4903(f) and 4904*, respectively.

(n9)Footnote 7. *See discussion in § 80.60[2][c].*

(n10)Footnote 8. *Unemp. Ins. Code § 3253.*

(n11)Footnote 9. *Unemp. Ins. Code § 3253.*

(n12)Footnote 9.1. *Unemp. Ins. Code § 3253.*

(n13)Footnote 10. *Unemp. Ins. Code § 2681(a).*

(n14)Footnote 11. *Unemp. Ins. Code § 2681(b).*

(n15)Footnote 12. *Unemp. Ins. Code § 2681(c).*

(n16)Footnote 13. *Unemp. Ins. Code § 2680(a).*

(n17)Footnote 14. *Unemp. Ins. Code § 2680(a).*

(n18)Footnote 15. *Unemp. Ins. Code § 2680(b).*

(n19)Footnote 16. *See 22 Cal. Code Reg. § 2601-1(m) before amendment effective 12/31/93.*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

Part D. CLAIMS FOR DISABILITY INSURANCE BENEFITS

4-80 California Employment Law § 80.65

AUTHOR: By Carol S. Sanders, J.D.

§ 80.65 Disqualifications

[1] False Statements

An individual is disqualified from receiving disability benefits if he or she has willfully, for the purpose of obtaining benefits, either made a false statement or representation, with actual knowledge of the falsity, or withheld a material fact in order to obtain any disability benefits.ⁿ¹

An individual who is receiving benefits but is suspected of fraud is entitled to an eligibility review before the EDD decides whether to terminate his or her benefits.^{n1.1}

[2] Dipsomania or Drug Addiction

An individual is disqualified from receiving disability benefits while he or she is confined, pursuant to commitment or court order or certification, in an institution or other place as a dipsomaniac, drug addict, or "sexual psychopath."ⁿ²

[3] Disqualification Under Unemployment Compensation Provisions

An individual will be presumed ineligible to receive disability benefits if he or she is disqualified from receiving unemployment compensation benefits under specified sections of the unemployment compensation provisions,ⁿ³ unless the individual establishes to the satisfaction of the director that he or she is suffering a bona fide illness or injury or claiming a period of family care leave and the director finds that there is good cause for paying disability benefits.ⁿ⁴ However, a person disqualified from receiving unemployment compensation benefits for leaving work because of a trade disputeⁿ⁵ is not disqualified from receiving disability benefits if otherwise eligible.ⁿ⁶

For a discussion of disqualifications from receiving unemployment compensation benefits, see §§ 80.35, 80.36.

[4] Prohibition Against Disqualification on Day of Death

An individual is not disqualified for disability benefits for the day on which he or she or a family member^{n6.1} for whom the individual is providing care dies, if the individual is otherwise eligible.ⁿ⁷

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 2675(a).*

(n2)Footnote 1.1. 22 Cal. Code Reg. § 2675-1; *see § 80.68[3]* for discussion.

(n3)Footnote 2. *Unemp. Ins. Code § 2678.* Note that the special statutory provisions for commitment of sexual psychopaths or "mentally disordered sex offenders" (former *Welf. & Inst. Code §§ 6300-6331*) have been repealed. *see* Stats. 1981, ch. 928, § 2.

(n4)Footnote 3. *See Unemp. Ins. Code §§ 1256* (quitting work without good cause or being fired for work-connected misconduct), *1257* (making false statement or failing to report material fact or refusing without good cause to accept suitable employment), *1260, 1261* (duration of disqualifications), *1263* (conviction for false statements or concealments).

(n5)Footnote 4. *Unemp. Ins. Code § 2676.*

(n6)Footnote 5. *See Unemp. Ins. Code § 1262.*

(n7)Footnote 6. *Unemp. Ins. Code § 2677.*

(n8)Footnote 6.1. *See Unemp. Ins. Code § 3300 et seq.* for definition.

(n9)Footnote 7. *Unemp. Ins. Code § 2679.*



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4-80 California Employment Law § 80.66

AUTHOR: By Carol S. Sanders, J.D.

§ 80.66 Amount of Benefits

[1] Weekly Benefit Amount

The weekly benefit amount depends on the amount of wages earned in the quarter of the individual's disability base period during which his or her wages are the highest and ranges from a minimum of \$50 to a maximum of \$336, for periods of disability beginning after 1990.ⁿ¹ An individual must have earned at least \$300 in wages for employment during the disability base period to establish a valid claim for disability benefits.ⁿ² Determination of weekly wages when payments are irregular is covered under *Unemployment Insurance Code Section 2657*.

[2] Maximum Benefits During One Disability Period

The maximum amount of benefits payable to an individual during any one disability benefit period is 52 times his or her weekly benefit amount, but in no case more than the total wages paid to the individual during his or her disability base period.ⁿ³

A "disability benefit period" means the continuous period of unemployment and disability beginning with the first day with respect to which the individual files a valid claim for disability benefits.ⁿ⁴ Two consecutive periods of disability due to the same or related cause or condition and separated by a period of not more than 14 days is considered as one disability benefit period.ⁿ⁵ Performance of work other than one's regular and customary work, such as light or part-time work, may not cause an interruption of the period of disability even though it extends beyond 14 days.ⁿ⁶ Once the first disability period is interrupted, even for only a day or an hour, a second disability period may arise if the employee is thereafter disabled by a cause *unrelated* to the first disability. The "not more than 14 day" requirement under *Unemployment Insurance Code Section 2608* has no application to unrelated causes of disability.ⁿ⁷ However, if the claimant suffers an unrelated disability *during* an initial disability period, a second disability period does not arise, even if the second disability continues beyond the date that the individual would have returned to work from the first disability.ⁿ⁸

[3] Reduction of Benefit Amount by Amount of Wages Received

Disability benefits will be reduced by the receipt of wages during the period of disability.ⁿ⁹ Although benefits from an employer to supplement unemployment compensation benefits may not be construed as wages,ⁿ¹⁰ sick leave benefits paid during a period of disability do constitute wages.ⁿ¹¹ For a full discussion of forms of remuneration that constitute wages for purposes of reducing benefit amount, see § 80.37.

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 2655; see also Unemp. Ins. Code §§ 2610-2612* (definitions of "disability base period").

(n2)Footnote 2. *See Unemp. Ins. Code § 2652; see also Simpson v. Unemployment Ins. Comp. Appeals Bd.* (1986) 187 Cal. App. 3d 342, 353-354, 231 Cal. Rptr. 690 (wages for employment in public sector cannot be used in determining eligibility for disability insurance benefits).

(n3)Footnote 3. *Unemp. Ins. Code § 2653.*

(n4)Footnote 4. *Unemp. Ins. Code § 2608.*

(n5)Footnote 5. *Unemp. Ins. Code § 2608; 22 Cal. Code Reg. § 2608-1.*

(n6)Footnote 6. *See Unemp. Ins. Appeals Bd. Prec. Disability Dec. No. 385, 388.*

(n7)Footnote 7. *See Bilyeu v. Unemployment Ins. Appeals Bd.* (1982) 130 Cal. App. 3d 657, 663, 664, 181 Cal. Rptr. 837 .

(n8)Footnote 8. *See Bilyeu v. Unemployment Ins. Appeals Bd.* (1982) 130 Cal. App. 3d 657, 664, 181 Cal. Rptr. 837 .

(n9)Footnote 9. *See Unemp. Ins. Code § 2656.*

(n10)Footnote 10. *See Unemp. Ins. Code § 1265.*

(n11)Footnote 11. *See Cooper v. Unemployment Ins. Appeals Bd.* (1981) 118 Cal. App. 3d 166, 170-171, 173 Cal. Rptr. 255 .



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CHAPTER 80 Unemployment and State Disability Insurance

Part D. CLAIMS FOR DISABILITY INSURANCE BENEFITS

4-80 California Employment Law § 80.67

AUTHOR: By Carol S. Sanders, J.D.

§ 80.67 Claim Procedures

[1] Filing Claim

Claims for disability benefits must be made in accordance with authorized regulations of the EDD.ⁿ¹ A first claim must be filed not later than the 41st consecutive day following the first compensable day of unemployment and disability with respect to which the claim is made, unless the filing period is extended by the EDD for good cause.ⁿ² The claim must be accompanied by a certificate of disability by an authorized health care practitionerⁿ³ on a form furnished by the EDD.ⁿ⁴ The claimant must have been examined by a physician during some portion of the first eight consecutive days of unemployment.ⁿ⁵ However, if medical treatment or examination is delayed due solely to reasons beyond the claimant's control, the claimant may backdate an otherwise valid claim.ⁿ⁶

Claims may be filed by mail, unless a personal appearance or examination is required.ⁿ⁷

Special procedures apply to the filing of a claim for benefits owed to a deceased personⁿ⁸ or a person mentally unable to file a claim.ⁿ⁹

[2] Determination on Claim

Within two working days of receipt of notice of the filing of the claim,ⁿ¹⁰ or, if the claimant's service has been terminated, within five days after termination, whichever is later, the individual's last employer must notify the EDD of any information known to him or her that may bear on the claimant's eligibility.ⁿ¹¹

The EDD must consider the facts submitted by the employer, make a determination as to the claimant's eligibility for benefits, and promptly notify the claimant of the determination and the reasons for it.ⁿ¹² The claimant may appeal from an adverse determination.ⁿ¹³ For discussion of administrative appeal procedures, see § 80.70.

[3] Computation of Benefit Amounts

[a] Generally

Except for certain claims made under an approved self-insured plan,ⁿ¹⁴ on the filing of a claim for disability benefits, the EDD must promptly make a computation on the claim, which must set forth the maximum amount of benefits potentially payable during the disability benefit period and the weekly benefit amount,ⁿ¹⁵ and must promptly notify the claimant of the computation.ⁿ¹⁶

[b] Protest of Computation

Within 20 days after the mailing or personal service of the notice of computation, or an extended period granted for good cause, the claimant may protest the accuracy of the computation.ⁿ¹⁷ The EDD must consider the protest and promptly notify the claimant of the recomputation or denial of recomputation.ⁿ¹⁸ The claimant may appeal from a notice of denial,ⁿ¹⁹ or may protest the accuracy of the recomputation. The director of the EDD is an interested party to any appeal.ⁿ²⁰

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 2706; 22 Cal. Code Reg. § 2706-1. Unemployment Insurance Code section 1342.1* requires that an individual filing a claim be advised that the benefits he or she will receive are subject to federal taxes and that he or she may elect to have tax withheld or may need to make estimated tax payments and may wish to change his or her previous withholding amounts.

(n2)Footnote 2. *See Unemp. Ins. Code § 2706.1; see also Gruschka v. Unemployment Ins. Appeals Bd. (1985) 169 Cal. App. 3d 789, 791-793, 215 Cal. Rptr. 484* (good cause includes mistake, inadvertance, surprise, or excusable neglect, such as not filing claim for more than three months after injury based on good faith belief that union benefits must be exhausted first); *cf. Wang v. Unemployment Ins. Appeals Bd. (1990) 225 Cal. App. 3d 412, 420, 275 Cal. Rptr. 237* (good cause does not include employee's unawareness of right to seek unemployment benefits coupled with unreasonable delay under circumstances).

(n3)Footnote 3. *See Unemp. Ins. Code §§ 2708, 2709* (persons authorized to certify disability).

(n4)Footnote 4. *Unemp. Ins. Code § 2706.1.*

(n5)Footnote 5. *See 22 Cal. Code Reg. § 2706-1.*

(n6)Footnote 6. *See Unemp. Ins. Appeals Bd. Prec. Disability Dec. No. 434.*

(n7)Footnote 7. *See 22 Cal. Code Reg. § 2706-4.*

(n8)Footnote 8. *See Unemp. Ins. Code § 2705; 22 Cal. Code Reg. § 2705.1; see also Unemp. Ins. Code § 1341; 22 Cal. Code Reg. § 1341-1* (payment of benefits due deceased person to person legally entitled to benefits).

(n9)Footnote 9. *See Unemp. Ins. Code § 2705.1; 22 Cal. Code Reg. § 2705.1-1.*

(n10)Footnote 10. *See Unemp. Ins. Code § 2707* (notice to employer of claim).

(n11)Footnote 11. *Unemp. Ins. Code § 2707.1.*

(n12)Footnote 12. *Unemp. Ins. Code § 2707.2.*

(n13)Footnote 13. *See Unemp. Ins. Code § 2702.2.*

(n14)Footnote 14. *See Unemp. Ins. Code § 2707.3(b).*

(n15)Footnote 15. *See* § 80.66 for discussion of benefit amounts.

(n16)Footnote 16. *See Unemp. Ins. Code* § 2707.3(a).

(n17)Footnote 17. *Unemp. Ins. Code* § 2707.4.

(n18)Footnote 18. *Unemp. Ins. Code* § 2707.4.

(n19)Footnote 19. *Unemp. Ins. Code* § 2707.4; *see* § 80.70 for discussion of administrative appeal procedures.

(n20)Footnote 20. *See Unemp. Ins. Code* § 2707.4.



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CHAPTER 80 Unemployment and State Disability Insurance

Part D. CLAIMS FOR DISABILITY INSURANCE BENEFITS

4-80 California Employment Law § 80.68

AUTHOR: By Carol S. Sanders, J.D.

§ 80.68 Reconsideration

[1] Generally

The EDD may for good cause reconsider any determination prior to the filing of an appeal from that determination or within 30 days after an appeal to an administrative law judge is filed.ⁿ¹ The claimant must be promptly notified of any reconsidered determination and may appeal from the reconsideration.ⁿ²

[2] Reconsideration of Computation

The EDD may for good cause reconsider a computation or recomputation of benefits due a claimantⁿ³ within one year from the beginning date of the disability benefit period to which the notice of computation or recomputation relates.ⁿ⁴ However, no recomputation may be considered with respect to any issue considered or under consideration in an appeal taken from a denial of recomputation.ⁿ⁵ The EDD must promptly notify the claimant of the recomputation, and the claimant may protest the accuracy of the recomputation.ⁿ⁶

[3] Eligibility Review for Claimant Suspected of Fraud

An individual is disqualified from receiving benefits if he or she has willfully, for the purpose of obtaining benefits, either made a false statement or representation with actual knowledge of its falsity or withheld a material fact.ⁿ⁷ If the EDD has information leading the director to suspect that the claim of an individual receiving disability benefits is fraudulent, the director may terminate the benefits, but not before giving the individual the opportunity to appear at an in-house review of the individual's continuing eligibility for benefits, at which the individual has an opportunity to be heard in person and refute the EDD's information.ⁿ⁸ The EDD must notify the individual by mail at least 10 days before the date of the review.ⁿ⁹ Once the review has taken place, the EDD must issue its determination of the individual's continuing eligibility in writing within 10 working days after the date of the review.ⁿ¹⁰ The individual then may appeal the determination.ⁿ¹¹

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code* § 2707.5(a).

(n2)Footnote 2. *Unemp. Ins. Code* § 2707.5(a). For discussion of appeal procedures, see § 80.70.

(n3)Footnote 3. See § 80.67[3] for discussion of computation of disability benefits.

(n4)Footnote 4. *Unemp. Ins. Code* § 2707.5(b).

(n5)Footnote 5. *Unemp. Ins. Code* § 2707.5(b).

(n6)Footnote 6. See *Unemp. Ins. Code* § 2707.5(b). For discussion of protest of recomputation, see § 80.67[3][b].

(n7)Footnote 7. *Unemp. Ins. Code* § 2675(a); see discussion in § 80.65[1].

(n8)Footnote 8. 22 Cal. Code Reg. § 2675-1(a), (b).

(n9)Footnote 9. 22 Cal. Code Reg. § 2675-1(c).

(n10)Footnote 10. 22 Cal. Code Reg. § 2675-1(j)(1).

(n11)Footnote 11. 22 Cal. Code Reg. § 2675-1(j)(5); see discussion in § 80.70.



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Part D. CLAIMS FOR DISABILITY INSURANCE BENEFITS

4-80 California Employment Law § 80.69

AUTHOR: By Carol S. Sanders, J.D.

§ 80.69 Overpayments

Any person who is overpaid any amount as disability benefits is liable for the amount overpaid unless (1) the overpayment was not due to fraud, misrepresentation, or willful nondisclosure on the part of the recipient, and (2) the overpayment was received without fault on the part of the recipient, and its recovery would be against equity and good conscience.ⁿ¹ Procedures for determining and recovering overpayments, and for challenging overpayment claims, are set forth in *Unemployment Insurance Code Sections 2735.1 et seq.*

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code § 2735.*



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4-80 California Employment Law § 80.70

AUTHOR: By Carol S. Sanders, J.D.

§ 80.70 Administrative Review

[1] Levels of Review

As in the case of unemployment compensation benefits,ⁿ¹ there are two levels of administrative review available to a claimant aggrieved by an order or decision of the EDD relating to disability benefits: review by an administrative law judge,ⁿ² and, thereafter, review by the Unemployment Insurance Appeals Board.ⁿ³

[2] Appeal to Administrative Law Judge

Within 20 days after the mailing or personal service of notice of decision from the EDD, or within an extended period granted for good cause, the claimant has a right to appeal to an administrative law judge from the EDD's determination of a claim,ⁿ⁴ denial of computation or recomputation of a claim,ⁿ⁵ reconsideration of or refusal to reconsider a claim,ⁿ⁶ or determination of overpayment.ⁿ⁷ The director is an interested party to the appeal.ⁿ⁸

The procedures for hearing and decision by an administrative law judge with regard to disability benefit claims are governed by *Unemployment Insurance Code Sections 1334-1335*.ⁿ⁹ For a discussion of procedures for hearing and decision by an administrative law judge with regard to benefit claims, see §§ 80.40[1], 80.83.

Special procedures apply to a determination by an administrative law judge when there is a dispute whether benefits are payable from the Disability Fund or from a voluntary plan.ⁿ¹⁰

[3] Appeal to Appeals Board

The procedures on appealing a decision by an administrative law judge involving a disability compensation benefit claim to the Unemployment Insurance Appeals Board are governed by *Unemployment Insurance Code Sections 1336-1338*.ⁿ¹¹ For general discussion of procedures before the Appeals Board, see Part E, §§ 80.80-80.88.

The decision of an administrative law judge regarding a disability compensation overpayment determination may be

appealed from within 20 days of notification or mailing of the decision, or within a period extended for good cause.n12

The Appeals Board may also determine disputes as to whether benefits are payable from the Disability Fund or from a voluntary plan.n13

FOOTNOTES:

(n1)Footnote 1. *See* discussion in § 80.40.

(n2)Footnote 2. *See Unemp. Ins. Code §§ 2707.2, 2707.4, 2707.5, 2712, 2737.*

(n3)Footnote 3. *See Unemp. Ins. Code §§ 401-413, 1336-1338* (procedure before Unemployment Insurance Appeals Board), 2602(a)(procedures regarding unemployment compensation applicable to disability claims, except as otherwise provided), 2712, 2712.5, 2737 (specific provisions regarding certain disability appeals).

(n4)Footnote 4. *See Unemp. Ins. Code § 2707.2.* For discussion of claim determination procedures, *see* § 80.67[2].

(n5)Footnote 5. *See Unemp. Ins. Code § 2707.4.* For discussion of computation and recomputation procedures, *see* § 80.67[3].

(n6)Footnote 6. *See Unemp. Ins. Code § 2707.5.* For discussion of reconsideration procedures, *see* § 80.68.

(n7)Footnote 7. *See Unemp. Ins. Code § 2737; see also* discussion in § 80.69.

(n8)Footnote 8. *See Unemp. Ins. Code §§ 2707.2, 2707.4, 2707.5, 2737.*

(n9)Footnote 9. *See Unemp. Ins. Code § 2602* (unemployment compensation provisions generally applicable to disability compensation provisions, with specified exceptions).

(n10)Footnote 10. *See Unemp. Ins. Code §§ 2712, 2712.5; see also* 22 Cal. Code Reg. § 2712-1 (procedures when source of disability benefits disputed).

(n11)Footnote 11. *See Unemp. Ins. Code § 2602* (unemployment compensation provisions generally applicable to disability compensation provisions, with specified exceptions).

(n12)Footnote 12. *See Unemp. Ins. Code §§ 2737, 2738.*

(n13)Footnote 13. *See Unemp. Ins. Code § 2712.*



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4-80 California Employment Law §§ 80.71 through 80.79

AUTHOR: By Carol S. Sanders, J.D.

[Reserved]

§§ 80.71 [Reserved]



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
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Part E. APPEALS DIVISION OF EMPLOYMENT DEVELOPMENT DEPARTMENT

4-80 California Employment Law § 80.80

AUTHOR: By Carol S. Sanders, J.D.

§ 80.80 Organization and Jurisdiction of Appeals Division

The Appeals Division of the EDD includes the California Unemployment Insurance Appeals Board (hereafter called the "Appeals Board") and its clerical staff and assistants, and the administrative law judges and their supervisors, clerical staff, and assistants.ⁿ¹ The Appeals Board and the administrative law judges have jurisdiction to review department determinations of both unemployment compensation issues and disability compensation issues. For a discussion of the types of determinations subject to administrative appellate review under the unemployment compensation provisions, *see* Part B (§§ 80.20-80.25) and Part C (§§ 80.30-80.42). For a discussion of the types of determinations subject to administrative appellate review under the disability compensation provisions, *see* Part D (§§ 80.60-80.70).

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code* § 315.



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4-80 California Employment Law § 80.81

AUTHOR: By Carol S. Sanders, J.D.

§ 80.81 Organization and Authority of Appeals Board

[1] Board Membership

The Appeals Board consists of seven members, two of whom are attorneys admitted to practice in California.ⁿ¹ One member is appointed by the Speaker of the Assembly, and one member is appointed by the Senate Rules Committee.ⁿ² The Governor appoints the other five members, subject to approval of the Senate, and designates the chairman of the Appeals Board from its membership.ⁿ³

[2] Rulemaking

The Appeals Board may promulgate, amend, or rescind rules pertaining to hearing appeals and other matters falling within its jurisdiction.ⁿ⁴

[3] Transfer, Removal, and Remand of Proceedings

The Appeals Board may on its own motion transfer proceedings to another administrative law judgeⁿ⁵ and either prior to or after the mailing of an administrative law judge's decision, remove proceedings to itself for review and decision.ⁿ⁶ It may set aside the decision of an administrative law judge and remand the proceedings to another administrative law judge for review and decision.ⁿ⁷ HALLEX is a purely internal manual and as such the guidelines set forth therein have no legal force and are not binding.ⁿ⁸

[4] Delegation by Appeals Board of Powers and Authority

For the purpose of any investigation, hearing, or proceeding under the unemployment compensation and disability compensation provisions of the Unemployment Insurance Code,ⁿ⁹ the Appeals Board may delegate its power to any deputy administrative law judge, or other person properly authorized by it in writing.ⁿ¹⁰ The Appeals Board may also delegate to any one of its members or to a special examiner or administrative law judge the taking or hearing of evidence in any case before it.ⁿ¹¹

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code* § 401.

(n2)Footnote 2. *Unemp. Ins. Code* § 401.

(n3)Footnote 3. *Unemp. Ins. Code* § 401.

(n4)Footnote 4. *See Unemp. Ins. Code* § 411; *see also* 22 *Cal. Code Reg.* §§ 5000-5011 (general rules), 5100 et seq. (rules governing proceedings before appeals board).

(n5)Footnote 5. *See Unemp. Ins. Code* § 412(a)(1).

(n6)Footnote 6. *See Unemp. Ins. Code* §§ 412(a)(2) (transfer prior to mailing of decision); 413(a)(2) (after mailing of decision).

(n7)Footnote 7. *See Unemp. Ins. Code* § 413(a)(1).

(n8)Footnote 8. *Moore v. Apfel* (2000 9th Cir.) 216 *F.3d* 864, 868-869 .

(n9)Footnote 9. *See Unemp. Ins. Code* § 100 et seq.

(n10)Footnote 10. *See Unemp. Ins. Code* § 1959.

(n11)Footnote 11. *See Unemp. Ins. Code* § 407.



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4-80 California Employment Law § 80.82

AUTHOR: By Carol S. Sanders, J.D.

§ 80.82 Administrative Law Judges

[1] Appointment by Board

The Appeals Board appoints and directs the activities of one or more impartial administrative law judges.ⁿ¹ The Appeals Board also appoints a chief administrative law judge who must be a member in good standing of the California State Bar.ⁿ²

[2] Duties of Chief Administrative Law Judge

The chief administrative law judge serves as the chief executive of the Appeals Board in the administration of the activities of administrative law judges and their staff.ⁿ³ The chief administrative law judge's duties also include maintaining a continuous review of the decisions of administrative law judges from which no appeal is taken to uncover decisions that appear inconsistent with the law, with established judicial decisions, with prior decisions of the Appeals Board, or with each other, and recommending these cases to the Appeals Board for certification to itself for a further hearing.ⁿ⁴

[3] Duties of Administrative Law Judges

Administrative law judges hear and render decisions in every matter in which a petition is filed with, or an appeal is taken to, an administrative law judge under the provisions of the Unemployment Insurance Code.ⁿ⁵ No administrative law judge may participate in any case in which he or she is an interested party.ⁿ⁶

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 404.*

(n2)Footnote 2. *See Unemp. Ins. Code § 405.*

(n3)Footnote 3. *Unemp. Ins. Code § 406(a).*

(n4)Footnote 4. *Unemp. Ins. Code* § 406(b).

(n5)Footnote 5. *See Unemp. Ins. Code* § 404.

(n6)Footnote 6. *Unemp. Ins. Code* § 404; *see 22 Cal. Code Reg.* § 5060(a)(i).



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4-80 California Employment Law § 80.83

AUTHOR: By Carol S. Sanders, J.D.

§ 80.83 Appeal and Hearing Procedure

[1] Generally

The manner in which disputed claims, appeals, and petitions are presented, the reports required from the claimant and from any employing unit, and the conduct of hearings and appeals must be in accordance with rules prescribed by the Appeals Board.ⁿ¹

[2] Form, Filing, and Service of Appeal

An appeal to either an administrative law judge or the Appeals Board need not be formal, but must be in writing signed by the appellant or his or her authorized agent.ⁿ² Each appeal must include the appellant's name, exclusive of any representative, the appellant's employer account number, if any, the appellant's mailing address, the name and mailing address of any representative filing the appeal, and the name and social security number of any claimant who is a party.ⁿ³ The EDD provides simple forms that may be used to file an appeal to an administrative law judge or to the Appeals Board.

A document is deemed filed on the date it is sent.ⁿ⁴ The Appeals Board must serve an appeal, or its contents, no later than the time required for service of the notice of hearing the appeal.ⁿ⁵

[3] Consolidation of Cases for Hearing

Cases before an administrative judge with respect to which the alleged facts and the points of law are the same must be consolidated for hearing,ⁿ⁶ provided that no substantial right of any party will be prejudiced.ⁿ⁷ Cases before the Appeals Board involving similar facts and circumstances may also be consolidated.ⁿ⁸

[4] Recording and Transcribing Proceedings

A full and complete record must be kept of all proceedings in connection with disputed claims.ⁿ⁹ All testimony at any

hearing on a disputed claim arising under the unemployment compensation and disability compensation provisions of the Unemployment Insurance Code must be recorded and, when feasible, should be recorded by a reporter in shorthand or by machine writing.ⁿ¹⁰ The testimony need not be transcribed unless the disputed claim is further appealed.ⁿ¹¹

[5] Administering Oaths, Taking Depositions, Certifying Official Acts, and Issuing Subpoenas

In any proceeding, hearing, investigation, or in the discharge of the duties of the Appeals Board, any of its members, an administrative law judge, and any authorized employee designated by it may administer oaths, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records.ⁿ¹² Witnesses subpoenaed pursuant to *Unemployment Insurance Code Section 1953* are allowed the same fees as those prescribed in *Government Code Section 68093* relating to proceedings in the superior courts.ⁿ¹³ Currently, witness fees in superior court actions are \$35 per day, and mileage fees for round-trip travel are \$0.20 per mile.ⁿ¹⁴

Obedience to subpoenas may be enforced by application to the superior court as set forth under *Government Code Section 11180 et seq.*ⁿ¹⁵

[6] Privilege Against Self-Incrimination

No person may be excused from attending and testifying or from producing books and other records as required by a subpoena issued under *Unemployment Insurance Code Section 1953* on the ground that the required testimony or evidence, documentary or otherwise, may tend to incriminate the person or subject him or her to a penalty or forfeiture.ⁿ¹⁶ However, a person may not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which the person is compelled, after having claimed the privilege against self-incrimination, to testify or produce evidence.ⁿ¹⁷

[7] Rules of Evidence

The Appeals Board and its representatives and administrative law judges are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, but may conduct the hearings and appeals in a manner appropriate to ascertain the substantial rights of the parties.ⁿ¹⁸ Any relevant evidence is admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, even if such evidence might be inadmissible over objection in a civil action.ⁿ¹⁹ Thus, affidavits by persons as to facts within their personal knowledge would qualify as competent evidence provided the opposing party's right to cross-examine is fully protected.ⁿ²⁰

Generally, testimony given at the hearing and subject to cross-examination is entitled to greater weight than hearsay statements, whether or not those statements are in affidavit form.ⁿ²¹ There are at least two exceptions to this practice. First, sworn direct testimony may be disbelieved if it appears unreliable, contradictory, or inherently improbable.ⁿ²² Second, in cases involving the child support intercept program,ⁿ²³ an affidavit by a district attorney concerning an appellant's child support arrearage may be given greater weight than an appellant's sworn testimony unsupported by documentary evidence.ⁿ²⁴

Official or judicial notice may be taken in proceedings before an administrative law judge, or before the Appeals Board.ⁿ²⁵

[8] Participation by Telephone

The Appeals Board must permit a party or representative to participate in a hearing by telephone on the party's or representative's request and showing a good cause.ⁿ²⁶

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 1951; see also 22 Cal. Code Reg. §§ 5000-5011 (general rules), § 5100 et seq. (rules governing proceedings before Appeals Board).*

(n2)Footnote 2. *See 22 Cal. Code Reg. § 5008(c)(vi).*

(n3)Footnote 3. *22 Cal. Code Reg. § 5008(b); see 22 Cal. Code Reg. § 5008(c) (optional information).*

(n4)Footnote 4. *See 22 Cal. Code Reg. § 5000(gg) ("filing" defined); see also 22 Cal. Code Reg. 5007 (time limitations).*

(n5)Footnote 5. *22 Cal. Code Reg. § 5008(e); see 22 Cal. Code Reg. § 5000(aaa) (board need not serve document on party that filed it).*

(n6)Footnote 6. *See Unemp. Ins. Code § 1951.*

(n7)Footnote 7. *See 22 Cal. Code Reg. § 5053.*

(n8)Footnote 8. *See 22 Cal. Code Reg. § 5100.*

(n9)Footnote 9. *Unemp. Ins. Code § 1952.*

(n10)Footnote 10. *Unemp. Ins. Code § 1952.*

(n11)Footnote 11. *Unemp. Ins. Code § 1952; see also 22 Cal. Code Reg. § 5010 (party's right to transcript on appeal to Appeals Board).*

(n12)Footnote 12. *Unemp. Ins. Code § 1953; see 22 Cal. Code Reg. §§ 5058 (witnesses and subpoenas at proceedings before administrative law judge), 5062 (conduct of hearing and evidence before administrative law judge).*

(n13)Footnote 13. *See Unemp. Ins. Code § 1956.*

(n14)Footnote 14. *See Gov. Code § 68093.*

(n15)Footnote 15. *Unemp. Ins. Code § 1954.*

(n16)Footnote 16. *Unemp. Ins. Code § 1955.*

(n17)Footnote 17. *Unemp. Ins. Code § 1955; see also Escamilla v. Superior Court (1969) 271 Cal. App. 2d 730, 733-735, 76 Cal. Rptr. 704 (witness charged with grand theft and compelled to testify regarding use of stolen funds at her husband's unemployment compensation hearing after asserting privilege against self-incrimination as thereafter immune from prosecution, even though criminal proceedings were pending and she had appeared voluntarily at hearing).*

(n18)Footnote 18. *Unemp. Ins. Code § 1952.*

(n19)Footnote 19. *See 22 Cal. Code Reg. § 5062(c).*

(n20)Footnote 20. *See Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 598, 155 Cal. Rptr. 63 .*

(n21)Footnote 21. *See In re Chwilka (1994) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-478.*

(n22)Footnote 22. *See In re Chwilka (1994) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-478.*

(n23)Footnote 23. *See Unemp. Ins. Code § 1255.7; Welf. & Inst. Code § 11350.5.*

(n24)Footnote 24. *In re Chwilka* (1994) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-478.

(n25)Footnote 25. *See 22 Cal. Code Reg. § 5009.*

(n26)Footnote 26. *Unemp. Ins. Code § 1951.*



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part E. APPEALS DIVISION OF EMPLOYMENT DEVELOPMENT DEPARTMENT

4-80 California Employment Law § 80.84

AUTHOR: By Carol S. Sanders, J.D.

§ 80.84 Right to Representation by Counsel

Any individual claiming benefits in proceedings before the Appeals Board or its authorized representative may be represented by counsel or an agent.ⁿ¹ However, on penalty of fine, the counsel or agent may not charge or receive for their services more than an amount approved by the Appeals Board.ⁿ² The California Code of Regulations does not specify approved fee amounts. Instead, the regulations state that if an agent charges a fee for representing a claimant and an issue regarding the amount of the fee is raised by the claimant, the agent, or the administrative law judge, the agent shall receive no more for the agent's services than an amount approved by the administrative law judge.ⁿ³ That approved amount, in turn, may be reviewed by the Appeals Board.ⁿ⁴

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code § 1957; but see Staley v. California Unemployment Ins. App. Bd. (1970) 6 Cal. App. 3d 675, 678, 86 Cal. Rptr. 294* (indigent claimant has no constitutional right to be represented by state-appointed counsel).

(n2)Footnote 2. *See Unemp. Ins. Code § 1957; see also Unemp. Ins. Code § 1957.5* (forms for individual to authorize counsel or agent to represent him or her before Appeals Board, administrative law judges or authorized representatives).

(n3)Footnote 3. *22 Cal. Code Reg. § 5011.*

(n4)Footnote 4. *22 Cal. Code Reg. § 5011.*



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CHAPTER 80 Unemployment and State Disability Insurance
Part E. APPEALS DIVISION OF EMPLOYMENT DEVELOPMENT DEPARTMENT

4-80 California Employment Law § 80.85

AUTHOR: By Carol S. Sanders, J.D.

§ 80.85 Decisionmaking Process of Appeals Board

[1] Cases Assigned or Considered by Board as a Whole

[a] Assigned Cases

The chairperson assigns cases before the Appeals Board to any two members for consideration and decision on a rotating basis. The decision of the two members assigned to the case is the decision of the Appeals Board, unless the two members do not concur. In that case, the chairperson or another board member designated by the chairperson is assigned to the panel and must resolve the impasse.ⁿ¹

[b] Cases Decided by Board as a Whole

The Appeals Board meets as a whole to consider and decide cases that present issues of first impression or that will enable the board to achieve uniformity of decisions by the respective members.ⁿ² In addition, a case may be considered and decided by the Board as a whole at the request of any member of the Board.ⁿ³

[2] Precedent Decisions

The Appeals Board, acting as a whole, may by majority vote designate certain of its decisions as precedents.ⁿ⁴ The director of the EDD and the Appeals Board administrative law judges are controlled by these precedents except as modified by judicial review.ⁿ⁵

If a final judgment of a court of competent jurisdiction reverses or declares invalid a precedent decision, the Appeals Board, acting as a whole, must modify the precedent decision to conform in all respects to the judgment of the court.ⁿ⁶ The modified precedent decision then supersedes the prior precedent decision for all purposes.ⁿ⁷

The Appeals Board may make a reasonable charge to defray the costs of publication and distribution of its precedent decisions and index of precedent decisions.ⁿ⁸ The Appeals Board must promptly notify the director, the administrative

law judges, and all other subscribers to the precedent decisions if a precedent decision is modified to conform to a judgment of a court.ⁿ⁹

If the Appeals Board issues decisions other than precedent decisions, anything incorporated in those decisions must be physically attached and made a part of the decisions.ⁿ¹⁰

Any interested person or organization may bring an action for declaratory relief in the superior court to obtain a judicial declaration as to the validity of any precedent decision of the Appeals Board.ⁿ¹¹ For a discussion of actions to obtain a judicial declaration as to the validity of a precedent decision, *see* § 80.101.

[3] Form and Content of Decisions

All decisions and orders of the Appeals Board must be in writing.ⁿ¹² The decisions must contain a statement of the facts on which the decision is based, along with a statement of the decision itself and the reasons for it.ⁿ¹³ If the Appeals Board issues decisions other than those designated as precedent decisions, anything incorporated in those decisions must be physically attached to and be made a part of the decisions.ⁿ¹⁴

FOOTNOTES:

(n1)Footnote 1. *See Unemp. Ins. Code § 409.*

(n2)Footnote 2. *See Unemp. Ins. Code § 409.*

(n3)Footnote 3. *See Unemp. Ins. Code § 409.*

(n4)Footnote 4. *See Unemp. Ins. Code § 409; 22 Cal. Code Reg. § 5109(a).*

(n5)Footnote 5. *Unemp. Ins. Code § 409; cf. Unemp. Ins. Code § 1960* (nonbinding effect of Appeals Board decisions in separate or subsequent actions or proceedings before arbitrator, court, or judge); *see discussion under § 80.88.*

(n6)Footnote 6. *Unemp. Ins. Code § 409.1.*

(n7)Footnote 7. *Unemp. Ins. Code § 409.1.*

(n8)Footnote 8. *Unemp. Ins. Code § 409.*

(n9)Footnote 9. *Unemp. Ins. Code § 409.1.*

(n10)Footnote 10. *Unemp. Ins. Code § 409.*

(n11)Footnote 11. *Unemp. Ins. Code § 409.2.*

(n12)Footnote 12. *Unemp. Ins. Code § 408.*

(n13)Footnote 13. *Unemp. Ins. Code § 409.*

(n14)Footnote 14. *Unemp. Ins. Code § 409.*



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CHAPTER 80 Unemployment and State Disability Insurance
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4-80 California Employment Law § 80.86

AUTHOR: By Carol S. Sanders, J.D.

§ 80.86 Finality of Board of Appeals Decision Absent Judicial Review

A decision of the Appeals Board is final, except for action that may be taken by a judicial tribunal as permitted or required by law.ⁿ¹ If a request for review may be taken, the Appeals Board must attach to its decision an explanation of the party's right to seek review.ⁿ² For a discussion of judicial review of Appeals Board decisions, *see* Part F.

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code* § 410.

(n2)Footnote 2. *Unemp. Ins. Code* § 410.



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4-80 California Employment Law § 80.87

AUTHOR: By Carol S. Sanders, J.D.

§ 80.87 Costs, Penalties for Bad Faith or Unreasonable Appeals, and Interest

No costs may be awarded in hearings on appeal by the Appeals Board.ⁿ¹ However, if in the opinion of the Appeals Board the claimant or an employer has acted in bad faith and without reasonable basis for appeal, a penalty not exceeding 10 percent of the amount finally awarded on the appeal may be taxed against and deducted from the award by the Appeals Board, and may be placed in the Unemployment Fund.ⁿ² If the penalty is assessed against an employer, his or her reserve account will be debited with the amount of the assessed penalty.ⁿ³ For a discussion of charges against an employer's reserve account, *see* § 80.21[4][c].

The Appeals Board has held that a claimant is not entitled to recover interest on unemployment insurance benefits previously denied by the EDD but ordered by an administrative law judge.ⁿ⁴ Interest may only be awarded by a superior court in a judicial action reviewing the administrative denial of benefits.ⁿ⁵

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code* § 1958.

(n2)Footnote 2. *Unemp. Ins. Code* § 1958.

(n3)Footnote 3. *Unemp. Ins. Code* § 1958.

(n4)Footnote 4. *In re Kalem* (1993) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-476; *see also* *Aguilar v. Unemployment Ins. Appeals Bd.* (1990) 223 Cal. App. 3d 239, 245-246, 272 Cal. Rptr. 696 ; *Civ. Code* § 3287(a).

(n5)Footnote 5. *In re Kalem* (1993) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-476; *see also* *Aguilar v. Unemployment Ins. Appeals Bd.* (1990) 223 Cal. App. 3d 239, 245-246, 272 Cal. Rptr. 696 ; *Civ. Code* § 3287(a). For discussion of interest available in judicial actions, *see* § 80.102[3][a][vi].



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
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4-80 California Employment Law § 80.88

AUTHOR: By Carol S. Sanders, J.D.

**§ 80.88 Nonbinding Effect of Findings, Judgments, or Final Orders in Judicial or Arbitration Proceedings
Between Employee and Employer**

Any finding of fact or law, judgment, conclusion, or final order made by a hearing officer, administrative law judge, or any person with the authority to make findings of fact or law in any action or proceeding before the Appeals Board is not conclusive or binding in any separate or subsequent action or proceeding, and may not be used as evidence in any separate or subsequent action or proceeding between an individual and his or her present or prior employer brought before an arbitrator, court, or judge of California or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.ⁿ¹ Thus, for example, an Appeals Board decision finding that an employee was discharged for misconduct does not collaterally estop the employee from relitigating the reasons for discharge in a civil action for wrongful termination.ⁿ²

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code* § 1960.

(n2)Footnote 2. *Pichon v. Pacific Gas & Elec. Co.* (1989) 212 Cal. App. 3d 488, 503, 260 Cal. Rptr. 677 . For discussion of wrongful termination, *see* chs. 60-63.



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4-80 California Employment Law §§ 80.89 through 80.99

AUTHOR: By Carol S. Sanders, J.D.

[Reserved]

§§ 80.89[Reserved]



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part F. JUDICIAL REVIEW

4-80 California Employment Law § 80.100

AUTHOR: By Carol S. Sanders, J.D.

§ 80.100 Appeal From Appeals Board Decision Generally

[1] Time Limits

[a] Generally

With specified exceptions, discussed below, a party's right to seek judicial review from an Appeals Board decision must be exercised not later than six months after the date of the Board's decision or the date on which the decision is designated as a precedent decision, whichever is later.ⁿ¹

[b] Exceptions to Six-Month Time Limit

Actions challenging a denial of a claim for refund or credit by the Appeals Board, or challenging a decision of the Appeals Board involving a protest under *Unemployment Insurance Code section 1034* (protest of charges to reserve account) or an application for transfer of reserve account under *Unemployment Insurance Code sections 1051-1055*, must be filed within 90 days of the service of the notice of decision unless an extension, not exceeding two years, is granted by the director of the EDD on written request.ⁿ² For a discussion of judicial review procedures on denial of a claim for refund or credit, see § 80.25[2].

Special filing and other procedures apply to a suit to challenge a decision of the Appeals Board denying an exemption as a church or religious organization.ⁿ³

[c] Equitable Tolling

When a petition for administrative mandate to review benefit determinations by the Appeals Board^{n3.1} shows on its face that it is barred by the applicable statute of limitations, the petitioner may plead facts showing an excuse, tolling, or some other basis for avoiding the statutory bar to avoid the six-month time limit.^{n3.2} Three factors determine whether a statute of limitations is equitably tolled in a particular case:^{n3.3}

- (1) Timely notice to defendants.
- (2) Lack of prejudice to defendants in gathering evidence to defend against the claim.
- (3) Good faith and reasonable conduct by plaintiffs.

Thus, for example, in *Tarkington v. Cal. Unemployment Ins. Appeals Board*, n3.4 union member-employees, after the Board denied claims for unemployment benefits during the lockout period, filed a joint petition against two grocers that had locked them out in a labor dispute. The trial court found that the employers were improperly joined, and the employees proceeded against one employer in the original case and filed a second petition against the other employer. That employer claimed the petition was untimely filed under *Unemployment Insurance Code § 410*. The court found the timely notice requirement was met, because the first petition was filed within the statutory period and alerted the employer in the second claim of the need to begin investigating the facts forming the basis for the second claim. The lack of prejudice prerequisite was met, because the allegations regarding the second employer's conduct in the joint petition mirrored the allegations in the second petition, and both petitions sought the same relief, *i.e.*, a reversal of the Board's decision denying unemployment benefits to locked-out employees. The good faith and reasonable conduct requirement was met, because, although the employees filed the second petition more than two years after filing the joint petition, almost all of the elapsed time was attributable to the time used by the trial court to issue its rulings, and when the employees finally learned of the court's decision on the issue of joinder, they filed the second petition less than two weeks later. The delay was not unreasonable or in bad faith, especially in light of the protracted nature of the underlying litigation. Thus, the doctrine of equitable tolling applied and tolled the six-month statute of limitations.

[2] Right of Director to Seek Judicial Review

The director of the EDD has the right to seek judicial review from a decision of the Appeals Board whether or not he or she appeared or participated in the appeal to the administrative law judge or to the Appeals Board.n4

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code § 410*. For discussion of precedent decisions, see § 80.85[2].

(n2)Footnote 2. *See Unemp. Ins. Code §§ 1241(a)* (actions challenging denial of claim for refund or credit), 1243 (actions challenging Appeals Board decision involving protests or applications for transfer of reserve account).

(n3)Footnote 3. *See Unemp. Ins. Code § 1241(b), (c)*.

(n4)Footnote 3.1. *See § 80.102, below*.

(n5)Footnote 3.2. *Tarkington v. Cal. Unemployment Ins. Appeals Board* (2009) 172 Cal. App. 4th 1494, 1502-1503, 92 Cal. Rptr. 3d 131 .

(n6)Footnote 3.3. *Tarkington v. Cal. Unemployment Ins. Appeals Board* (2009) 172 Cal. App. 4th 1494, 1503, 92 Cal. Rptr. 3d 131 .

(n7)Footnote 3.4. *Tarkington v. Cal. Unemployment Ins. Appeals Board* (2009) 172 Cal. App. 4th 1494, 1503-1508, 92 Cal. Rptr. 3d 131 .

(n8)Footnote 4. *Unemp. Ins. Code § 410*.



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part F. JUDICIAL REVIEW

4-80 California Employment Law § 80.101

AUTHOR: By Carol S. Sanders, J.D.

§ 80.101 Judicial Review of Precedent Decision of Appeals Board

Any interested person or organization may bring an action for declaratory relief in the superior court to obtain a judicial declaration as to the validity of any precedent decision of the Appeals Board.ⁿ¹ Such proceedings are governed by the general provisions of the Code of Civil Procedure relating to declaratory relief.ⁿ²

Statutory construction is a matter of law for the courts, and administrative interpretations must be rejected when contrary to statutory intent. However, because of the agency's expertise, its view of a statute or regulation that it enforces is entitled to great weight, unless such view is clearly unauthorized or erroneous.ⁿ³

An interested person or organization suing for declaratory relief under *Unemployment Insurance Code* section 409.2 need not be one of the original parties under the precedent decision. However, a judicial declaration of invalidity of a precedent decision obtained by a third person does not alter the rights of the original parties as determined by the Appeals Board. If the original party brings the declaratory action, the court may review the administrative record and "reverse" the Board's decision, altering the outcome between those parties.ⁿ⁴

FOOTNOTES:

(n1)Footnote 1. *Unemp. Ins. Code* § 409.2. For discussion of precedent decisions of Appeals Board, see § 80.85[2].

(n2)Footnote 2. *Unemp. Ins. Code* § 409.2; see *Code Civ. Proc.* §§ 1060-1062.5 (provisions governing declaratory relief); see generally California Forms of Pleading and Practice, "Declaratory Relief."

(n3)Footnote 3. *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal. 3d 101, 111, 172 Cal.Rptr. 194, 624 P.2d 244 .

(n4)Footnote 4. *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal. 3d 101, 110-111, 172 Cal. Rptr. 194, 624 P.2d 244 .



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Part F. JUDICIAL REVIEW

4-80 California Employment Law § 80.102

AUTHOR: By Carol S. Sanders, J.D.

§ 80.102 Review of Benefit Determinations by Administrative Mandate Proceedings

[1] Generally

Decisions of the Appeals Board relating to the unemployment or disability compensation benefits may be reviewed by the superior court in an administrative mandate proceeding.ⁿ¹

For a full discussion of procedures for review of administrative proceedings by administrative mandate, see California Forms of Pleading and Practice, "Public Administrative Law," Part IV.

[2] Scope of Review

[a] Generally

The inquiry in an administrative mandate proceeding extends to whether the agency proceeded without or in excess of its jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion.ⁿ² Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.ⁿ³

[b] By Superior Court: Independent Judgment Test

The right of eligible individuals to receive unemployment benefits has been held to be in the nature of a "property right."ⁿ⁴ Likewise, the employer's right to free from erroneous charges against its reserve account has been held to be a fundamental vested right.ⁿ⁵ Therefore, in a mandate proceeding, the superior court must exercise its independent judgment on the evidence in the administrative record when reviewing a decision of the Appeals Board regarding entitlement to benefits.ⁿ⁶ In such cases, abuse of discretion based on lack of evidentiary support for the Board's findings will be established if the court determines that the findings are not supported by the weight of the evidence.ⁿ⁷ The "substantial evidence" test does not apply to review of the Board's determination by the superior court.ⁿ⁸

[c] By Appellate Court: Substantial Evidence Test

When an appellate court reviews the trial court's judgment in an administrative mandate proceeding, the substantial evidence test applies.ⁿ⁹ Under this standard, the scope of appellate review is limited to a determination of whether the trial court's decision is supported by substantial, credible, and competent evidence.ⁿ¹⁰ Trial court findings that are contrary to those of the Appeals Board will not be overturned for evidentiary insufficiency if they are substantially supported.ⁿ¹¹

A different standard of review applies to the trial court's conclusions if the facts are undisputed and the court must determine an issue of law.ⁿ¹² In that case, if the facts clearly require a conclusion different from that reached by the trial court, the latter's conclusions may be disregarded by the appellate court.ⁿ¹³

The substantial evidence test also does not apply if the trial court admitted relevant evidence that could not, in the exercise of reasonable diligence, have been produced or that was improperly excluded at the administrative hearing.ⁿ¹⁴ In that case, the appellate court may consider the new evidence under an independent judgment standard, in the nature of a limited trial de novo.ⁿ¹⁵

[3] FORM--Petition by Worker for Writ of Mandate to Review Decision Denying Unemployment or Disability Compensation Benefits**[a] Comment****[i] Use of Form**

The form of petition for writ of mandate set forth in [b], below, is for use by an unemployed or disabled worker to seek judicial review of a decision of the Unemployment Insurance Appeals Board denying, or affirming a decision denying, a claim for unemployment or disability compensation benefits.ⁿ¹⁶

For a discussion of review by administrative mandate of benefit eligibility claims, see [1] and [2], above. For a form for use by an employer in reviewing a decision to grant unemployment benefits, see [4], below. For a discussion and general forms of petition for administrative mandate, alternative writ of mandate, and related forms, see California Forms of Pleading and Practice, ch. 358, *Mandate and Prohibition* (Matthew Bender).

[ii] Time for Filing

The right to seek judicial review from an Appeals Board decision must be exercised not later than six months after the date of the Appeals Board's decision or the date on which the decision is designated as a precedent decision, whichever is later.ⁿ¹⁷

[iii] Administrative Record

All or part of the administrative record of the proceedings may be filed with the petition or with respondent's points and authorities or pursuant to court order.ⁿ¹⁸ The cost of preparing the record is borne by the petitioner, unless a statute prescribes otherwise, or the petitioner is proceeding in forma pauperis, in which case the respondent bears the cost of preparing the transcript if the transcript is necessary to a proper review.ⁿ¹⁹

[Iv] Allegations and Verification

The form of petition set forth in [b], below alleges (1) petitioner's name and residence (Paragraph 1); (2) respondents' names and capacities (Paragraphs 2, 3); (3) the name and capacity of the real party in interest as an employing unit (Paragraph 4);ⁿ²⁰ (4) the facts establishing petitioner's eligibility for unemployment or disability compensation benefits

(Paragraphs 5, 6);n21 (5) petitioner's filing of a claim for benefits (Paragraph 7);n22 (6) the administrative determinations that the claimant was ineligible for benefits (Paragraphs 8, 9, 11);n23 (7) the grounds justifying issuance of a writ of mandate (Paragraphs 10, 12);n24 (8) the exhaustion of administrative remedies (Paragraph 13);n25 (9) the absence of a plain, speedy, and adequate remedy in the ordinary course of law (Paragraph 14);n26 and (10) if appropriate, petitioner's entitlement to attorney's fees under *Government Code Section 800* (Paragraph 15).n27

The petition must be verified by the party beneficially interested in issuance of the writ (that is, the claimant).n28

[v] Attorney's Fees

In any civil action to review the award, finding, or other determination of any administrative proceeding (except proceedings resulting from actions of the State Board of Control), the prevailing complainant may recover reasonable attorney's fees if he or she establishes that the award, finding, or other determination was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof acting in his or her official capacity.n29 The amount of the fees that may be recovered from the public entity may not exceed \$7,500, computed at \$100 per hour, and the complainant may not recover such fees unless he or she is personally obligated to pay them.n30

[vi] Prejudgment Interest on Wrongfully Denied Unemployment Benefits

Prejudgment interest is recoverable on unemployment insurance benefits payable under a wrongfully denied claim.n30.1 This interest is properly awarded by a superior court in an action to review the administrative denial of benefits.n30.2

A court of appeal has held that there are no statutes that prevent the payment of interest on unemployment benefits and that entitlement to interest therefore depends on the applicability of *Civil Code Section 3287(a)*. Under that statute, a claimant must satisfy three conditions for the recovery of interest in a mandamus action against the state: (1) there must be an underlying monetary obligation; (2) the recovery must be certain or capable of being made certain by calculation; and (3) the right to recovery must vest on a particular day.n30.3 These criteria are satisfied with respect to unemployment insurance benefits because: (1) unemployment benefits are a monetary obligation that can be enforced by a claimant in a mandamus proceeding; (2) the amount to which a particular claimant is entitled can be calculated with certainty by reference to fixed schedules; and (3) the right to payment of benefits vests when the claimant has established the facts that entitle the claimant to the benefits.n30.4

[b] Form SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [name],)
Petitioner,)
vs.)
UNEMPLOYMENT INSURANCE APPEALS)
BOARD, CALIFORNIA EMPLOYMENT DEVEL-)
OPMENT DEPARTMENT, and)
_____, [name], as Director of Em-)
ployment Development,)
Respondents; _____ [name],)
Real Party in Interest.

NO. _____
PETITION FOR WRIT OF MANDATE
[Code Civ. Proc. § 1094.5; Unemp. Ins. Code § 410]

Petitioner alleges:

1. Petitioner, _____, is, and at all times relevant herein has been, a resident of the County of

_____ in California.

2. Respondent EMPLOYMENT DEVELOPMENT DEPARTMENT (hereinafter called "the Department") is a department in the Health and Welfare Agency of the State of California charged with the responsibility of administering the provisions of the Unemployment Insurance Code relating to unemployment and disability compensation benefits. Respondent _____ [name] is the Director of Employment Development, who is the chief executive officer of the Department.

3. Respondent UNEMPLOYMENT INSURANCE APPEALS BOARD (hereinafter called "the Appeals Board") and its employees constitute the Appeals Division of the Department. Under *Unemployment Insurance Code Section 1336*, the Appeals Board has discretion to review a decision of the Department concerning whether a claimant is entitled to _____ [unemployment or disability] compensation benefits under the provisions of that Code and is required to hold a hearing and take evidence in its proceedings to make that determination.

4. Real Party in Interest, _____ [name] (hereinafter called "the employer") is, and at all times herein mentioned was, _____ [specify capacity, e.g., a corporation organized and existing under the laws of California, with its principal place of business located in _____ County, California, and engaged in the business of _____ (specify)].

5. From _____ [date] to _____ [date], petitioner _____ [was or has been] employed by the employer at its place of business at _____ [street address and city], California as a _____ [full or part] time _____ [specify title or position], and while so employed was paid wages sufficient to qualify him/her for _____ [unemployment or disability] compensation benefits.

[EITHER]

6. [Allege facts establishing eligibility for unemployment compensation benefits, e.g., On _____ [date], petitioner resigned from his/her employment with the employer. Petitioner was forced to resign from his/her employment because _____ set forth facts showing "good cause" for leaving previous employment, within meaning of *Unemp. Ins. Code § 1256*, as discussed in § 80.35). After that date, (until _____ (date), petitioner has performed no services for the employer or for any other person or entity and has received no wages within the meaning of the Unemployment Insurance Code, but has remained able to work and available for work and has conducted a search for suitable work in accordance with instructions of an office of the Department].

[OR]

6. [Allege facts establishing eligibility for disability compensation benefits, e.g., On _____ [date], petitioner _____ (set forth facts showing that petitioner is disabled within meaning of *Unemp. Ins. Code § 2626*, e.g., sustained a broken arm and other serious injuries in an automobile accident in the City of _____, County of _____, California), as a result of which petitioner was rendered unable to perform his/her regular and customary work as _____ (specify work duties) and has been unemployed and received no wages or other compensation from that date until _____ (specify date or the present time)].

[CONTINUE]

7. On _____ [date], petitioner duly filed a claim for _____ [unemployment or disability] compensation benefits [accompanied by the required physician's certification of disability as required by the Department] at a public employment office of the Department located at _____ [address] [where he/she registered for employment]. Petitioner has complied with all other requirements for claiming such benefits.

[EITHER]

8. The claim was denied by an examiner of the Department on _____ [date], on the ground petitioner was disqualified from receiving _____ [unemployment or disability] compensation benefits for the reason(s) that _____ [specify], and on _____ [date], petitioner received a written notice of this determination. A copy of the determination is attached to and made a part of this Petition as Exhibit _____.

[OR]

8. The claim was granted by the Department on _____ [date], and petitioner and the employer were notified of this determination on _____ [date].

[CONTINUE]

9. On _____ [date], _____ [petitioner or the employer] filed an appeal with an administrative law judge who, by a written decision dated _____, _____ [affirmed or reversed] the examiner's determination. A copy of the decision is attached to and made a part of this Petition as Exhibit _____.

[10. *If administrative law judge's decision resulted in a denial of benefits, allege:* In _____ (affirming or reversing) the examiner's determination and ruling, the administrative law judge _____ (specify, e.g., abused his/her discretion and/or acted in excess of his/her jurisdiction) in concluding that petitioner was not entitled to benefits because _____ (specify). This conclusion is contrary to the weight of the evidence in that _____ (specify).]

11. On _____ [date], _____ [petitioner or the employer] filed an appeal with the respondent Appeals Board. A hearing on the appeal was held on _____ [date]. [A copy of the record of the hearing on appeal is attached hereto as Exhibit _____ and incorporated by reference.] Thereafter, on _____ [date], the Appeals Board _____ [affirmed the administrative law judge's decision denying petitioner benefits or reversed the administrative law judge's decision awarding petitioner benefits] and notified petitioner accordingly. A copy of the Appeals Board's written decision is attached to and made a part of this petition as Exhibit _____.

12. In _____ [affirming or reversing] the decision of the administrative law judge, the Appeals Board _____ [specify, e.g., abused its discretion and acted in excess of its jurisdiction in that _____ (specify basis for overturning decision, e.g., the Appeals Board found that _____ (specify). Such finding is contrary to the weight of the evidence in that _____ (specify)].

13. Petitioner has exhausted his/her administrative remedies in that, under the provisions of *Unemployment Insurance Code section 410*, the decision of the Appeals Board is final, except for action that may be taken by a judicial tribunal as

permitted or required by law.

14. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law to compel the Appeals Board to reverse its decision and to grant petitioner's claim for _____ [unemployment *or* disability] compensation benefits and no remedy at all unless this petition is granted.

[15. *If attorney's fees under Gov. Code § 800 sought, allege:* The decision of respondent(s) was arbitrary and capricious in that _____ (*specify*). As an incident of bringing and maintaining this proceeding, petitioner has become and is obligated personally to pay to his/her counsel _____ (*name*) attorney's fees _____ (exceeding \$7,500 *or* in the sum of \$ _____).]

WHEREFORE, petitioner prays as follows:

1. That this court issue an alternative writ of mandate ordering respondent Appeals Board

(a) To set aside its decision _____ [*specify, e.g., affirming the decision of the administrative law judge's affirmation of the determination of the Director of Employment Development that the petitioner* _____ (*specify substance of affirmed determination*)], and that petitioner is ineligible for _____ [unemployment *or* disability] compensation benefits, and ordering respondent Appeals Board to grant these benefits, or

(b) In the alternative, to show cause before this court at a time and place to be fixed by the court why it has not done so [and directing respondent to file with this court the record of all proceedings in this matter before the respondent and the administrative law judge];

2. That, after hearing on the order to show cause, this court issue a peremptory writ of mandate to the same effect as the alternative writ except for the order to show cause;

3. For costs of suit incurred in this proceeding;

[4. For reasonable attorney's fees, pursuant to *Government Code section 800*;] and

5. For such other and further relief as the court may deem proper.

Dated: _____ [signature]
 _____ Attorney for Petitioner

VERIFICATION

I, _____ [name], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [date and place]

[signature]

[4] FORM--Petition by Employer for Writ of Mandate to Review Decision Granting Unemployment Compensation Benefits

[a] Comment

[i] Use of Form

The form of petition for writ of mandate set forth in [b], below, is for use by an employer to seek review of a decision of the Appeals Board affirming an award of unemployment benefits, or reversing a decision to deny such benefits.ⁿ³¹

The director of the EDD also has the right to seek judicial review from a decision of the Appeals Board whether or not he or she appeared or participated in the appeal to the administrative law judge or to the Appeals Board.ⁿ³²

For discussion of time limits for filing the petition,ⁿ³³ preparation and filing of the administrative record,ⁿ³⁴ and recovery of attorney's fees,ⁿ³⁵ see the comments in [3][a][ii], [iii], [v], above.

For a discussion of review by administrative mandate of benefit eligibility claims, see [1] and [2], above. For a discussion and general forms of petition for administrative mandate, alternative writ of mandate, and related forms, see California Forms of Pleading and Practice, "Public Administrative Law," Part IV.

[ii] Allegations and Verification

The form of petition set forth in [b], below alleges (1) petitioner's name and residence (Paragraph 1); (2) respondents' names and capacities (Paragraphs 2, 3); (3) the name and capacity of the former employee as real party in interest (Paragraph 4); (4) the facts relating to termination of the former employee's employment (Paragraphs 5, 6);ⁿ³⁶ (5) the employee's filing of a claim for benefits and petitioner's filing of a statement of reasons why the employee is ineligible for benefits (Paragraph 7);ⁿ³⁷ (6) the administrative determinations that the claimant was eligible for benefits (Paragraphs 8, 9, 11);ⁿ³⁸ (7) the grounds justifying issuance of a writ of mandate (Paragraphs 10, 12);ⁿ³⁹ (8) the exhaustion of administrative remedies (Paragraph 13);ⁿ⁴⁰ (9) petitioner's beneficial interest in issuance of the writ and the absence of a plain, speedy, and adequate remedy in the ordinary course of law (Paragraph 14);ⁿ⁴¹ and (10) if appropriate, petitioner's entitlement to attorney's fees under *Government Code section 800* (Paragraph 15).ⁿ⁴²

The petition must be verified by the party beneficially interested in issuance of the writ (that is, the employer).ⁿ⁴³

[b] Form [*Caption. see form in [3][b], above.]*

Petitioner alleges:

1. Petitioner, _____ [*name*] is, and at all times herein mentioned was, _____ [*specify capacity, e.g., a corporation organized and existing under the laws of California, with its principal place of business located in _____ County, California, and engaged in the business of _____ (specify)*].

2. [*Capacity of Employment Development Department and Director of Employment Development as respondents. see form in [3][b], above, Paragraph 2.]*

3. [*Capacity of Unemployment Insurance Appeals Board, as respondent. see form in [3][b], above, Paragraph 3.]*

4. Real Party in Interest, _____ [*name*] (hereinafter called "the claimant"), is, and at all times relevant herein has been, a resident of the County of _____ in California.

4-80 California Employment Law § 80.102

5. From _____ [date] to _____ [date], claimant was employed by petitioner at its place of business at _____ [street address and city], California as a _____ [full or part] time _____ [specify title or position].

6. On _____ [date], _____ [allege facts concerning termination of employment, establishing claimant's ineligibility for unemployment benefits, e.g., petitioner terminated claimant for misconduct connected with his or her employment, consisting of the following: _____ (specify)].

7. On or about _____ [date], claimant filed a claim for unemployment compensation benefits at a public employment office of the Department located at _____ [address]. On _____ [date], respondent Department notified petitioner of claimant's claim for unemployment benefits. A copy of the notice is attached hereto as Exhibit _____ and incorporated herein by reference. On _____ [date], petitioner submitted to respondent Department a statement of facts showing claimant's ineligibility for unemployment benefits, pursuant to *Unemployment Insurance Code section 1327*. A copy of petitioner's statement is attached hereto as Exhibit _____ and incorporated herein by reference.

[EITHER]

8. The claim was denied by an examiner of the Department on _____ [date], on the ground that claimant was disqualified from receiving unemployment compensation benefits for the reason(s) that _____ [specify], and on _____ [date], petitioner received a written notice of this determination. A copy of the determination is attached to and made a part of this Petition as Exhibit _____.

[OR]

8. The claim was granted by the Department on _____ [date], and petitioner and claimant were notified of this determination on _____ [date]. A copy of the determination is attached to and made a part of this Petition as Exhibit _____.

[CONTINUE]

9. On _____ [date], _____ [petitioner or the claimant] filed an appeal with an administrative law judge who, by a written decision dated _____, _____ [affirmed or reversed] the examiner's determination. A copy of the decision is attached to and made a part of this Petition as Exhibit _____.

[10. If administrative law judge's decision resulted in a granting of benefits, allege: In _____ (affirming or reversing) the examiner's determination and ruling, the administrative law judge _____ (specify, e.g., abused his/her discretion and/or acted in excess of his/her jurisdiction) in concluding that claimant was entitled to benefits because _____ (specify). This conclusion is contrary to the weight of the evidence in that _____ (specify).]

11. On _____ [date], _____ [petitioner or the claimant] filed an appeal with the respondent Appeals Board. A hearing on the appeal was held on _____ [date]. [A copy of the record of the hearing on appeal is attached hereto as Exhibit _____ and incorporated by reference.] Thereafter, on _____ [date], the Appeals Board _____ [affirmed the administrative law judge's decision awarding the claimant benefits or reversed the administrative law judge's decision denying the claimant

benefits] and notified petitioner accordingly. A copy of the Appeals Board's written decision is attached to and made a part of this petition as Exhibit _____.

12. In _____ [affirming *or* reversing] the decision of the administrative law judge, the Appeals Board _____ [*specify, e.g.,* abused its discretion and acted in excess of its jurisdiction in that _____ (*specify basis for overturning decision, e.g.,* the Appeals Board found that _____ (*specify*)). Such finding is contrary to the weight of the evidence in that _____ (*specify*)].

13. Petitioner has exhausted his/her administrative remedies in that, under the provisions of *Unemployment Insurance Code section 410*, the decision of the Appeals Board is final, except for action that may be taken by a judicial tribunal as permitted or required by law.

14. Petitioner is beneficially interested in the issuance of the writ sought herein in that the decision of the respondent Appeals Board to grant unemployment compensation benefits to the claimant is unlawful and, pursuant to *Unemployment Insurance Code section 1026(b)*, will result in a wrongful debit to petitioner's reserve account in the State Unemployment Fund in the amount of the benefits to be paid to the claimant. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law to compel the Appeals Board to reverse its decision and to deny the claimant's claim or to compel respondents Department and _____ [*name*] to refrain from debiting petitioner's reserve account for the benefits awarded to the claimant, and no remedy at all unless this petition is granted.

[15. *If appropriate, allege facts showing petitioner's entitlement to attorney's fees under Gov. Code § 800 . see form in [3], [b], above, Paragraph 15.]*

WHEREFORE, petitioner prays as follows:

1. That this court issue an alternative writ of mandate ordering respondent Appeals Board

(a) To set aside its decision _____ [*specify, e.g.,* affirming the decision of the administrative law judge that claimant is eligible for unemployment compensation benefits], and ordering respondent Appeals Board to deny the claimant's claim for unemployment compensation benefits and to direct the respondent Department not to charge any such benefits against petitioner's reserve account based on this claim, or

(b) In the alternative, to show cause before this court at a time and place to be fixed by the court why it has not done so [and directing respondent to file with this court the record of all proceedings in this matter before the respondent and the administrative law judge];

2. That, after hearing on the order to show cause, this court issue a peremptory writ of mandate to the same effect as the alternative writ except for the order to show cause;

3. For costs of suit incurred in this proceeding;

[4. For reasonable attorney's fees, pursuant to *Government Code section 800*;] and

5. For such other and further relief as the court may deem proper.

Dated: _____

_____ [*signature*]

Attorney for Petitioner

[*Verification.* see form in [3][b], above.]

[5] Class Actions

[a] Generally

California's judicial policy is to allow potential class action plaintiffs to have their action measured on its merits to determine whether trying their suits as a class action would bestow the requisite benefits upon the litigants and the judicial process to justify class action litigation.ⁿ⁴⁴ To effect this judicial policy, the California Supreme Court has mandated that a complaint for class action consideration, if at all possible, be allowed to survive the pleading stages of litigation.ⁿ⁴⁵ Because the sustaining of demurrers without leave to amend represents the earliest possible determination of the propriety of class action litigation, it should be looked upon with disfavor.ⁿ⁴⁶

[b] Exhaustion of Remedies

In putative class actions, the issue of exhaustion of remedies may arise in the context of whether any or only some of the putative class members have exhausted administrative remedies. The relevant inquiry is whether the available administrative remedies provide classwide relief. If the remedies do provide classwide relief, then at least one plaintiff must exhaust them before litigation may proceed. If the remedies do not provide classwide relief, then no plaintiff need exhaust them before suing.ⁿ⁴⁷

FOOTNOTES:

(n1)Footnote 1. See *Code Civ. Proc.* § 1094.5; see, e.g., *Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal. App. 3d 586, 591-592, 155 Cal. Rptr. 63 (unemployment compensation); *Bilyeu v. Unemployment Ins. Appeals Bd.* (1982) 130 Cal. App. 3d 657, 660, 181 Cal. Rptr. 837 (disability compensation); see also *Gilles v. Department of Human Resources Development* (1974) 11 Cal. 3d 313, 316, 113 Cal. Rptr. 374, 521 P.2d 110 (complaint for declaratory and injunctive relief involving construction of unemployment compensation provisions for recovery of benefit overpayment treated as petition for administrative mandate).

(n2)Footnote 2. *Code Civ. Proc.* § 1094.5(b).

(n3)Footnote 3. *Code Civ. Proc.* § 1094.5(b). see *Kazensky v. City of Merced* (1998) 65 Cal. App. 4th 44, 48-49, 76 Cal. Rptr. 2d 356 ("[t]he penalty imposed by an administrative body will not be disturbed in a mandamus proceeding unless an abuse of discretion is demonstrated" and "[n]either an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed," even when superior court exercises its independent judgment on evidence in determining whether agency abused its discretion in finding misconduct, and concluding that city did not abuse its discretion in terminating two mechanics who repeatedly violated city's personnel rules).

(n4)Footnote 4. See *Thomas v. Emp. Stab. Com.* (1952) 39 Cal. 2d 501, 504, 247 P.2d 561 .

(n5)Footnote 5. See *Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal. 3d 770, 780, 163 Cal. Rptr. 619, 608 P.2d 707 .

(n6)Footnote 6. See *MacGregor v. Unemployment Ins. Appeals Bd.* (1984) 37 Cal. 3d 205, 211-212, 207 Cal. Rptr. 823, 689 P.2d 453 (review of denial of unemployment insurance benefits); *Interstate Brands v. Unemployment Ins. Appeals Bd.* (1980) 26 Cal. 3d 770, 774-782, 163 Cal. Rptr. 619, 608 P.2d 707 (review of grant of unemployment insurance benefits); *Bilyeu v. Unemployment Ins. Appeals Bd.* (1982) 130 Cal. App. 3d 657, 661, 668, 181 Cal. Rptr. 837 (review of denial of disability benefits).

(n7)Footnote 7. *See Code Civ. Proc. § 1094.5(c).*

(n8)Footnote 8. *See Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 599, 155 Cal. Rptr. 63 ; Code Civ. Proc. § 1094.5(c).*

(n9)Footnote 9. *See Cervisi v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 635, 638, 256 Cal. Rptr. 142 ; Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 599, 155 Cal. Rptr. 63 .*

(n10)Footnote 10. *See Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 585, 205 Cal. Rptr. 501, 685 P.2d 61 ; see also Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 599, 155 Cal. Rptr. 63 (if credible evidence supports superior court's findings, contrary evidence is disregarded).*

(n11)Footnote 11. *See Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 108, 172 Cal. Rptr. 194, 624 P.2d 244 .*

(n12)Footnote 12. *See Amador v. Unemployment Ins. Appeals Bd. (1984) 35 Cal. 3d 671, 685, 200 Cal. Rptr. 298, 677 P.2d 224 (whether employee had good cause for refusing to work or for leaving work as issue of law).*

(n13)Footnote 13. *See Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 585, 205 Cal. Rptr. 501, 685 P.2d 61 .*

(n14)Footnote 14. *See Code Civ. Proc. § 1094.5(e).*

(n15)Footnote 15. *See Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 596, 155 Cal. Rptr. 63 .*

(n16)Footnote 16. *See Code Civ. Proc. § 1094.5(a); Unemp. Ins. Code § 410.*

(n17)Footnote 17. *See Unemp. Ins. Code § 410.* For discussion of precedent decisions, *see § 80.85[2].*

(n18)Footnote 18. *See Code Civ. Proc. § 1094.5(a).*

(n19)Footnote 19. *See Code Civ. Proc. § 1094.5(a).*

(n20)Footnote 20. *See Unemp. Ins. Code § 135(a).*

(n21)Footnote 21. *See §§ 80.30-80.37 for discussion of eligibility for unemployment compensation benefits. see §§ 80.61-80.65 for discussion of eligibility for disability compensation benefits.*

(n22)Footnote 22. *See Unemp. Ins. Code §§ 1326 (filing of claim for unemployment compensation benefits), 2706, 2706.1 (filing of claim for disability compensation benefits).*

(n23)Footnote 23. *See Unemp. Ins. Code § 410 (finality of Appeals Board decision and judicial review); see also Code Civ. Proc. § 1094.5(a) (types of administrative determinations subject to review by mandate).*

(n24)Footnote 24. *See Code Civ. Proc. §§ 1086, 1094.5(b), (c).*

(n25)Footnote 25. *See Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291-296, 109 P.2d 942 .*

(n26)Footnote 26. *See Code Civ. Proc. § 1086.*

(n27)Footnote 27. *See discussion in [v], below.*

(n28)Footnote 28. *See Code Civ. Proc. § 1086; see also Code Civ. Proc. §§ 446, 2015.5 (form of verification).*

(n29)Footnote 29. *Gov. Code* § 800.

(n30)Footnote 30. *Gov. Code* § 800.

(n31)Footnote 30.1. *Aguilar v. Unemployment Ins. Appeals Bd.* (1990) 223 Cal. App. 3d 239, 245-246, 272 Cal. Rptr. 696 .

(n32)Footnote 30.2. *Aguilar v. Unemployment Ins. Appeals Bd.* (1990) 223 Cal. App. 3d 239, 241, 246 n.4, 272 Cal. Rptr. 696 (noting EDD's assertion that administrative law judge has no power to award interest, but not necessarily accepting it, and emphasizing that in instant case, interest was awarded by superior court judgment). *See also* In re Kalem (1993) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-476 (administrative law judge cannot award interest).

(n33)Footnote 30.3. *Aguilar v. Unemployment Ins. Appeals Bd.* (1990) 223 Cal. App. 3d 239, 242-245, 272 Cal. Rptr. 696 (citing *Tripp v. Swoap* (1976) 17 Cal. 3d 671, 681-682, 131 Cal. Rptr. 789, 552 P.2d 749). For discussion and forms regarding *Civ. Code* § 3287(a), *see* California Forms of Pleading and Practice, ch. 177, *Damages*, pt. II.

(n34)Footnote 30.4. *Aguilar v. Unemployment Ins. Appeals Bd.* (1990) 223 Cal. App. 3d 239, 245, 272 Cal. Rptr. 696 .

(n35)Footnote 31. *See Code Civ. Proc.* § 1094.5(a); *Unemp. Ins. Code* § 410.

(n36)Footnote 32. *Unemp. Ins. Code* § 410.

(n37)Footnote 33. *See Unemp. Ins. Code* § 410.

(n38)Footnote 34. *See Code Civ. Proc.* § 1094.5(a).

(n39)Footnote 35. *See Gov. Code* § 800.

(n40)Footnote 36. *See* §§ 80.30-80.37 for discussion of eligibility for unemployment compensation benefits.

(n41)Footnote 37. *See Unemp. Ins. Code* §§ 1326, 1327.

(n42)Footnote 38. *See Unemp. Ins. Code* § 410 (finality of Appeals Board decision and judicial review); *see also Code Civ. Proc.* § 1094.5(a) (types of administrative determinations subject to review by mandate).

(n43)Footnote 39. *See Code Civ. Proc.* §§ 1086, 1094.5(b), (c).

(n44)Footnote 40. *See Abelleira v. District Court of Appeal* (1941) 17 Cal. 2d 280, 291-296, 109 P.2d 942 .

(n45)Footnote 41. *See Code Civ. Proc.* § 1086.

(n46)Footnote 42. *See* discussion in [v], below.

(n47)Footnote 43. *See Code Civ. Proc.* § 1086; *see also Code Civ. Proc.* §§ 446, 2015.5 (form of verification).

(n48)Footnote 44. *Tarkington v. Cal. Unemployment Ins. Appeals Board* (2009) 172 Cal. App. 4th 1494, 1510, 92 Cal. Rptr. 3d 131 .

(n49)Footnote 45. *Tarkington v. Cal. Unemployment Ins. Appeals Board* (2009) 172 Cal. App. 4th 1494, 1510, 92 Cal. Rptr. 3d 131 . *See La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal. 3d 864, 868-869, 97 Cal. Rptr. 849, 489 P.2d 1113 ; *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 816, 94 Cal. Rptr. 796, 484 P.2d 964 ; *Daar v. Yellow Cab Co.* (1967) 67 Cal. 2d 695, 716-717, 63 Cal. Rptr. 724, 433 P.2d 732 ; *Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal. 3d 93, 121, 81 Cal. Rptr. 592, 460 P.2d 464 .

(n50)Footnote 46. *Tarkington v. Cal. Unemployment Ins. Appeals Board* (2009) 172 Cal. App. 4th 1494, 1511-1512, 92 Cal. Rptr. 3d 131 (premature for trial court to make determinations pertaining to class suitability on employer's demurrer to petition for administrative mandamus challenging denial of unemployment benefits after lockout by employer; action involved single set of facts, *i.e.*, allegations pertaining to employer's selective lockout and illegal hiring of locked-out employees, one question of law common to all class members, *i.e.*, whether employees who could not work because of employer's lockout fell under ambit of *Unemp. Ins. Code* § 1262, and one institutional practice, *i.e.*, denial of benefits to locked-out employees by EDD and Board; individual questions of amount of benefits, if any, to which each claimant was entitled did not predominate over common factual allegations and legal questions).

(n51)Footnote 47. *Tarkington v. Cal. Unemployment Ins. Appeals Board* (2009) 172 Cal. App. 4th 1494, 1508-1510, 92 Cal. Rptr. 3d 131 (union member-employees, after Board denied claims for unemployment benefits during lockout period, filed for writ of administrative mandate on behalf of class of employees, against grocer that locked them out in labor dispute; decisions by ALJ and Board upholding EDD's denial of benefits to petitioners squarely addressed legal issue of whether employees who could not work because of lockout fell within ambit of *Unemp. Ins. Code* § 1262 regarding labor disputes (*see* § 80.34[5], *above*) and were not entitled to unemployment benefits, and by giving Board opportunity to consider situation, use its expertise, decide issue, and render litigation unnecessary, petitioners fulfilled all purposes of exhaustion doctrine).



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California Employment Law

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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part F. JUDICIAL REVIEW

4-80 California Employment Law §§ 80.103 through 80.109

AUTHOR: By Carol S. Sanders, J.D.

[Reserved]

§§ 80.103 [Reserved]



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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part G. BIBLIOGRAPHY

4-80 California Employment Law § 80.110

AUTHOR: By Carol S. Sanders, J.D.

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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

CHAPTER 80 Unemployment and State Disability Insurance

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AUTHOR: By Carol S. Sanders, J.D.

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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE
CHAPTER 80 Unemployment and State Disability Insurance
Part G. BIBLIOGRAPHY

4-80 California Employment Law § 80.112

AUTHOR: By Carol S. Sanders, J.D.

§ 80.112 Law Reviews and Legal Periodicals

California Supreme Court Survey, A Review of Decisions: December 1980-February 1981, "Scope of Review: *California Unemployment Insurance Code Section 409.2*; Pacific Legal Foundation v. California Unemployment Insurance Appeals Board," 8 *Pepperdine L. Rev.* 1153 (1981).

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DIVISION VIII UNEMPLOYMENT AND STATE DISABILITY INSURANCE

Chapter 81- 90 RESERVED

4-81 - 90 California Employment Law Chapter 81- 90

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DIVISION IX ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 90 Arbitration of Employment Disputes

4-90 California Employment Law 90.syn

AUTHOR: By Paul W. Cane, Jr., J.D.

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§§ 90.22 through 90.29 [Reserved]

§ 90.30 Legal Periodicals

§ 90.31 Legal Texts

By Paul W. Cane, Jr., J.D. n*

FOOTNOTES:

(n1)Footnote *. Paul Cane is a partner in the San Francisco office of Paul, Hastings, Janofsky & Walker LLP. He is a graduate of Dartmouth College and Boalt Hall School of Law, a former law clerk to Hon. Lewis F. Powell Jr., the editor-in-chief of Lindemann & Grossman's *Employment Discrimination Law* (3d ed. 1996), and co-author of *An Employer's Guide to the Americans With Disabilities Act* (1991).



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DIVISION IX ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 90 Arbitration of Employment Disputes

4-90 California Employment Law Scope

AUTHOR: By Paul W. Cane, Jr., J.D.

Scope

By Paul W. Cane, Jr., J.D. n SCOPE*

This chapter discusses the effect of arbitration agreements on a variety of employment issues. The chapter first discusses the applicability of the Federal Arbitration Act to employment contracts generally, and the Act's preemptive scope. It then discusses the effect of arbitration provisions in collective bargaining agreements on individuals' rights to bring private lawsuits. The chapter next discusses the enforceability of individual arbitration agreements in private litigation, including the five theories most often employed by plaintiffs in resisting enforceability. The chapter then discusses issues of appellate review and the collateral estoppel effect of arbitration awards. The chapter concludes with a discussion of the effect of an arbitration agreement on litigation by the Equal Employment Opportunity Commission.

FOOTNOTES:

(n2)Footnote *. Paul Cane is a partner in the San Francisco office of Paul, Hastings, Janofsky & Walker LLP. He is a graduate of Dartmouth College and Boalt Hall School of Law, a former law clerk to Hon. Lewis F. Powell Jr., the editor-in-chief of Lindemann & Grossman's *Employment Discrimination Law* (3d ed. 1996), and co-author of *An Employer's Guide to the Americans With Disabilities Act* (1991).



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DIVISION IX ALTERNATIVE DISPUTE RESOLUTION
CHAPTER 90 Arbitration of Employment Disputes
Part A. STATUTORY AUTHORITY FOR ENFORCING ARBITRATION AGREEMENTS

4-90 California Employment Law § 90.01

AUTHOR: By Paul W. Cane, Jr., J.D.

§ 90.01 Federal Law

The Federal Arbitration Act (FAA)ⁿ¹ provides that a "written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."ⁿ²

The United States Supreme Court has held that the FAA is a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of [the Act] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act [The Act] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."ⁿ³ The Court has further held that by enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."ⁿ⁴ Further, when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court.ⁿ⁵

Federal arbitration law has powerful preemptive force. When parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.ⁿ⁶ Thus, for example, neither a court nor the California Labor Commissioner has jurisdiction to adjudicate a complaint for overtime if the employee has signed an employment contract agreeing to arbitrate any employment-related controversies,ⁿ⁷ so long as the arbitration clause is in a contract involving interstate commerce.ⁿ⁸ The contract need not mention interstate commerce. An employment contract involves commerce under § 2 of the FAA simply if the transaction, in fact, involves interstate commerce, regardless of the parties' subjective intent when they signed the agreement.ⁿ⁹

In *Circuit City Stores, Inc. v. Adams*, ⁿ¹⁰ the United States Supreme Court reversed the Ninth Circuit's holdingⁿ¹¹ that the Federal Arbitration Act does not apply to labor or employment contracts. The employee in *Circuit City* had

completed a required employment application that contained a dispute resolution agreement requiring employees to submit all claims and disputes to binding arbitration. The employee later sued the employer in state court for sexual harassment, retaliation, constructive discharge, and intentional infliction of emotional distress under FEHA,ⁿ¹² and sexual orientation discrimination. The employer petitioned in federal district court to stay the state court proceedings and compel arbitration. The district court granted the employer's petition, but the Ninth Circuit reversed on the ground that the FAA did not apply. The United States Supreme Court reversed the Ninth Circuit, disapproved the Ninth Circuit's earlier holding in *Craft v. Campbell Soup Co.*,ⁿ¹³ and held that the FAA applies to labor and employment contracts and excludes from its coverage only contracts of employment of transportation workers.ⁿ¹⁴ The Court then remanded to the Ninth Circuit to decide whether the arbitration contract was unenforceable for other reasons. On remand, the Ninth Circuit found the arbitration provision in the employment contract to be an unconscionable contract of adhesion under California law and again reversed the district court.ⁿ¹⁵

Arbitration contracts are enforceable under state law, and parties are free to enter into contracts providing for arbitration under state law rather than the FAA.ⁿ¹⁶ The United States Supreme Court has held that while "the FAA preempts state laws which require a judicial forum for the resolution of claims which the contracting parties agree to resolve by arbitration[,] ... it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself."ⁿ¹⁷ The Court observed that "[w]here ... the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed although the Act would otherwise permit it to go forward."ⁿ¹⁸ In other words, parties are free to contract around the FAA by incorporating state arbitration rules into their agreements.ⁿ¹⁹

In *Harden v. Roadway Package System*,ⁿ²⁰ the plaintiff had signed a pre-dispute arbitration agreement with his employer. After his termination, he filed a complaint alleging race discrimination under the FEHA. The employer moved to compel arbitration, relying almost exclusively on federal authorities under the FAA. In the wake of *Circuit City*, the Ninth Circuit held that it lacked authority to compel arbitration because the plaintiff was a transportation worker engaged in interstate commerce and therefore the agreement was exempt under the FAA. The court also refused to apply California state law in the alternative, because the employer had based its motion to compel on the FAA, not state law, and had not invoked the California Arbitration Act or any California cases supporting enforcement of the state statutory equivalent of the FAA.ⁿ²¹

■ PRACTICE TIP:

Harden presents a trap for the unwary. The employer moved to compel arbitration without making clear that it was moving under the FAA and, in the alternative, under state arbitration law. When the FAA was held inapplicable, the motion failed entirely because it did not clearly invoke the state arbitration statute. When drafting arbitration agreements and motions to compel arbitration, it is normally important to employers to invoke both the FAA and, in the alternative, state law.

The FAA does not confer federal question jurisdiction under 28 U.S.C. § 1331. Rather, there must be an independent basis for jurisdiction, such as diversity of citizenship under 28 U.S.C. § 1332.ⁿ²²

Legal Topics:

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

Labor & Employment Law Collective Bargaining & Labor Relations Arbitration General Overview Labor & Employment Law Collective Bargaining & Labor Relations Arbitration Authority

FOOTNOTES:

(n1)Footnote 1. 9 U.S.C. § 1 et seq.

(n2)Footnote 2. See 9 U.S.C. § 2.

(n3)Footnote 3. *Moses H. Cone Hosp. v. Mercury Constr.* (1983) 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 .

(n4)Footnote 4. *Preston v. Ferrer* (2008) 128 S. Ct. 978, 981, 169 L. Ed. 2d 917 ; *Southland Corp. v. Keating* (1984) 465 U.S. 1, 10-11, 104 S. Ct. 852, 79 L. Ed. 2d 1 ; *see also Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26-33, 111 S. Ct. 1647, 114 L. Ed. 2d 26, 37-42 (ADEA action subject to compulsory arbitration under *Federal Arbitration Act*); *Perry v. Thomas* (1987) 482 U.S. 483, 490-491, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (Act preempts *Lab. Code* § 229, providing that employees may bring civil action to collect unpaid wages notwithstanding any private agreement to arbitrate); *cf. Wright v. Universal Maritime Serv. Corp.*, (1998) 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 (noting that any collective bargaining agreement [CBA] to arbitrate must be "particularly clear," and holding that CBA in this case did not contain clear and unmistakable waiver of covered employees' rights to judicial forum for federal claims of employment discrimination, but declining to decide whether waiver would be enforceable; distinguishing *Gilmer* as involving individual's waiver of his own rights, rather than union's waiver of rights of represented employees).

(n5)Footnote 5. *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006) .

(n6)Footnote 6. *Preston v. Ferrer* (2008) 128 S. Ct. 978, 981, 983-989, 169 L. Ed. 2d 917 .

(n7)Footnote 7. *Perry v. Thomas* (1987) 482 U.S. 483, 490-491, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (Act preempts *Lab. Code* § 229, providing that employees must bring civil action to collect unpaid wages notwithstanding any private agreement to arbitrate); *see Baker v. Aubry* (1989) 216 Cal. App. 3d 1259, 1266, 265 Cal. Rptr. 381 .

(n8)Footnote 8. *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal. App. 4th 1276, 58 Cal. Rptr. 3d 5, 2007 Cal. App. LEXIS 611, *12-*20 (employee was obligated to arbitrate unpaid wages claim under *Lab. Code* § 229, where record was more than sufficient to support finding, as matter of law, that employment contract involved interstate commerce).

(n9)Footnote 9. *Allied-Bruce Terminix Companies v. Dobson* (1995) 513 U.S. 265, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753 ; *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal. App. 4th 1276, 58 Cal. Rptr. 3d 5, 2007 Cal. App. LEXIS 611, *19 .

(n10)Footnote 10. *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 .

(n11)Footnote 11. *See Circuit City Stores, Inc. v. Adams* (9th Cir. 1999) 194 F.3d 1070 .

(n12)Footnote 12. *Gov. Code* § 12900 *et seq.*

(n13)Footnote 13. *Craft v. Campbell Soup Co.* (9th Cir. 1999) 177 F.3d 1083 .

(n14)Footnote 14. *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 113, 121 S. Ct. 1302, 149 L. Ed. 2d 234 . *See also Circuit City Stores, Inc. v. Najd* (9th Cir. 2002) 294 F.3d 1104, 1106-1107 (Supreme Court decision in *Adams* directly forecloses argument that FAA exempts all employment contracts from FAA coverage; *Adams* held exemption only applies to employment contracts of transportation workers). *See Ruiz v. Sysco Food Services* (2004) 122 Cal. App. 4th 520, 536-537, 18 Cal. Rptr. 3d 700 (because employee's substantive tort claims did not hinge on performance of his specific job duties, but rather extended to more generalized issue of manner in which investigation of his termination was conducted under CBA, there was no need for appellate or trial courts to resolve question of whether employee should be considered to be transportation worker within meaning of FAA; arbitration of tort claims compelled under California law).

(n15)Footnote 15. *Circuit City v. Adams* (9th Cir. 2002) 279 F.3d 889 ; for discussion of unconscionability, *see* §

90.20[1].

(n16)Footnote 16. *Volt Information Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 478-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 . See also *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal. 4th 376, 383-393, 25 Cal. Rptr. 3d 540, 107 P.3d 217 (FAA did not preempt application of California law to arbitration agreement providing that it would be governed by California law and that designation of California law would not be deemed election to preclude application of FAA; court could properly deny arbitration under *Code Civ. Proc.* § 1281.2(c), providing exception for requirement that court order arbitration on petition by party to arbitration agreement).

(n17)Footnote 17. *Volt Information Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 478-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (internal citations omitted).

(n18)Footnote 18. *Volt Information Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 .

(n19)Footnote 19. See *Wolsey Ltd. v. Foodmaker, Inc.* (9th Cir. 1998) 144 F.3d 1205, 1209 , quoting *Volt Information Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior Univ.* (1989) 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 .

(n20)Footnote 20. *Harden v. Roadway Packaging Sys.* (9th Cir. 2001) 249 F.3d 1137 .

(n21)Footnote 21. *Harden v. Roadway Packaging Sys.* (9th Cir. 2001) 249 F.3d 1137, 1140-1141 .

(n22)Footnote 22. *Circuit City Stores, Inc. v. Najd* (9th Cir. 2002) 294 F.3d 1104, 1106 ; see, e.g., *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.* (1983) 460 U.S. 1, 25, n.32, 103 S. Ct. 927, 74 L. Ed. 2d 765 .



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DIVISION IX ALTERNATIVE DISPUTE RESOLUTION
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4-90 California Employment Law § 90.02

AUTHOR: By Paul W. Cane, Jr., J.D.

§ 90.02 State Law

Arbitration agreements generally are enforceable under California state law.ⁿ¹ There is a strong public policy in favor of arbitration. Arbitration agreements are valid, irrevocable, and enforceable, except on grounds that exist at law or in equity for the revocation of any contract. Thus, under California law, as under federal law, an arbitration agreement may be invalidated only for the same reasons as other contracts.ⁿ²

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsArbitration ClausesLabor & Employment LawCollective Bargaining & Labor RelationsArbitrationGeneral OverviewLabor & Employment LawCollective Bargaining & Labor RelationsArbitrationEnforcement

FOOTNOTES:

(n1)Footnote 1. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 97-98, 99 Cal. Rptr. 2d 745, 6 P.3d 669 ; *Blake v. Ecker* (2001) 93 Cal. App. 4th 728, 741, 113 Cal. Rptr. 2d 422 .

(n2)Footnote 2. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 98, 99 Cal. Rptr. 2d 745, 6 P.3d 669 ; *Blake v. Ecker* (2001) 93 Cal. App. 4th 728, 741, 113 Cal. Rptr. 2d 422 . For discussion of *Armendariz*, see § 90.20[1].



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DIVISION IX ALTERNATIVE DISPUTE RESOLUTION
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4-90 California Employment Law §§ 90.03 through 90.09

AUTHOR: By Paul W. Cane, Jr., J.D.

[Reserved]

§§ 90.03[Reserved]



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DIVISION IX ALTERNATIVE DISPUTE RESOLUTION
CHAPTER 90 Arbitration of Employment Disputes
Part B. ENFORCEABILITY OF ARBITRATION AGREEMENTS

4-90 California Employment Law § 90.10

AUTHOR: By Paul W. Cane, Jr., J.D.

§ 90.10 Collective Bargaining Arbitration Agreements

[1] Relationship to Statutory Claims, Generally

The interrelationship between statutory claims and the rights and remedies under collective bargaining agreements is unresolved. Employees argue that the statutory forum is available notwithstanding any arbitration agreement in a collective bargaining agreement. Employers argue that, at least in some circumstances, a collective bargaining agreement can require arbitral resolution of statutory claims.

[2] Federal Law

[a] In General

In *14 Penn Plaza LLC v. Pyett*,ⁿ¹ the United States Supreme Court held that a provision in a collective bargaining agreement that clearly and unmistakably required union members to arbitrate claims arising under the Age Discrimination in Employment Act of 1967 (ADEA)ⁿ² was enforceable, and the Court's decision in *Alexander v. Gardner-Denver Co.*,ⁿ³ did not forbid enforcement of the arbitration provision. The union and an association of which the employer was a member collectively bargained in good faith and agreed that employment-related discrimination claims, including claims brought under the ADEA, would be resolved in arbitration. The freely-negotiated term between the union and the association qualified as a condition of employment subject to mandatory bargaining.ⁿ⁴ The CBA's arbitration provision had to be honored unless the ADEA itself removed the particular class of grievances from the NLRA's broad sweep, which the United States Supreme Court has held it does not.ⁿ⁵ Nothing in the ADEA suggested a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative, and the CBA met the requirement that an agreement to arbitrate statutory anti-discrimination claims be explicitly stated in the collective bargaining agreement.ⁿ⁶ The agreement to arbitrate ADEA claims was not the waiver of a "substantive right" as that term was employed in the ADEA.ⁿ⁷ The NLRA provided the union and the association with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age discrimination claims in the ADEA. Thus, there was no legal basis for the Court to strike down the arbitration clause in the CBA, which was freely negotiated by the

union and the association, and which clearly and unmistakably required the employees to arbitrate age discrimination claims. The CBA's arbitration provision was also fully enforceable under the *Gardner-Denver* line of cases,ⁿ⁸ because those decisions involved the issue of whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. The employees had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve the claims; thus, the arbitration in those cases was held not to preclude subsequent statutory actions.ⁿ⁹

In *Wright v. Universal Maritime Serv. Corp.*,ⁿ¹⁰ the United States Supreme Court considered whether a general arbitration clause in a collective bargaining agreement (CBA) requires an employee to use the arbitration procedure for an alleged violation of the Americans With Disabilities Act (ADA). The plaintiff was a longshoreman who had tried to return to work, on the approval of his doctor, after settling a claim for permanent disability. The Fourth Circuit concluded that the CBA's general arbitration provision was sufficiently broad to encompass a statutory claim arising under the ADA, and the provision was enforceable.ⁿ¹¹ The Supreme Court considered the case because its precedents arguably sent mixed messages. In *Alexander v. Gardner-Denver Co.*,ⁿ¹² the Court had held that an employee does not forfeit the right to a judicial forum for claimed discriminatory discharge if the employee first pursues the grievance to final arbitration under the nondiscrimination clause of the CBA.ⁿ¹³ An arbitration award may have evidentiary significance, but not preclusive effect, the Court had held.ⁿ¹⁴ But in *Gilmer v. Interstate/Johnson Lane Corp.*,ⁿ¹⁵ the Court had held that a claim under the Age Discrimination in Employment Act (ADEA) could be subject to compulsory arbitration pursuant to an arbitration provision in a securities registration form.ⁿ¹⁶

In *Wright*, the Court found it unnecessary to resolve this arguable tension. The Court held that *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is sufficiently important to be protected against anything less than an explicit union waiver in a CBA. Assuming (without deciding) that an employee's right to litigate statutory discrimination claims is waivable in a CBA,ⁿ¹⁷ the Court held that the waiver must be clear and unmistakable. The CBA in *Wright* did not meet this standard because the arbitration clause was very general, providing for arbitration of matters under dispute; this language could be understood to mean only matters in dispute under the CBA, and the CBA did not elsewhere contain its own specific anti-discrimination provision or an explicit incorporation of statutory anti-discrimination requirements. Because the collective bargaining agreement did not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination, the Court did not decide whether such a waiver would be enforceable.ⁿ¹⁸ The Court also noted that the presumption of arbitrability found in the Labor Management Relations Act does not extend beyond the reach of its principal underlying rationale, which is that arbitrators are in a better position than courts to interpret a CBA. Because the cause of action asserted in *Wright* arose out of the ADA rather than the CBA and was distinct from any right conferred by the CBA, the presumption of arbitrability did not apply.ⁿ¹⁹

In *Doyle v. Raley's Inc.*,ⁿ²⁰ a case decided before the Supreme Court decision in *Wright*, the Ninth Circuit concluded that the general arbitration clause in the plaintiff's CBA did not waive the plaintiff's right to seek judicial resolution of ADA, ADEA, and FEHA claims. The CBA terms in issue were substantially similar to those in *Gardner-Denver*, and did not state statutory claims were included in the scope of the arbitration clause. Assuming *arguendo* that statutory claims may be brought within the purview of collectively bargained-for arbitration, the Ninth Circuit concluded that the CBA's arbitration clause must, at a minimum, state that statutory discrimination claims are subject to arbitration.ⁿ²¹

On the other hand, in *Operating Engineers Local Union No. 3 v. Newmont Mining Corp.*,ⁿ²² the employer resisted arbitration of the termination of a former employee's employment, arguing that although the occurrence that led to the termination occurred while the collective bargaining agreement was still in force, the agreement had expired by the time of the termination, so arbitration was no longer required. The Ninth Circuit held that even if the termination was a significant part of the dispute, so was the alleged misconduct in falsifying a tool request form leading to the termination. The parties agreed in the CBA to arbitrate the issue of the tool request, and that misconduct occurred, if at all, prior to the expiration of the CBA. Denying arbitration would deprive the union of the benefit of its bargain.

In *Association of Flight Attendants v. Mesa Air Group*,^{n22.1} an association of flight attendants had collective bargaining agreements with an employer, and labor relations between the employer and the association were governed by the Railway Labor Act (RLA).^{n22.2} After the employer changed scheduling for flight attendants from one set of FAA regulations to another, the Ninth Circuit held that the employer carried its burden of showing that its change was arguably justified by the CBAs, so that the dispute was minor within the meaning of the RLA, and had to be decided in arbitration. "Major disputes" under the RLA generally result from attempts by labor or management to impose new obligations or create new rights and must be settled through an extended bargaining process. "Minor disputes" generally result from attempts to enforce existing contractual obligations and rights and are subject to exclusive binding arbitration before the National Railroad Adjustment Board.^{n22.3} The CBAs did not explicitly establish which set of regulations was to be applied to flight attendant schedules, and residual authority clauses in the CBAs gave the employer authority and rights to manage its operations and direct its flight attendants' work force to the extent not expressly restricted by the CBA.^{n22.4}

Written arbitration provisions in interstate commercial transactions are enforceable under the Federal Arbitration Act. The FAA therefore applies to determine the scope of arbitration provisions in contracts with Financial Industry Regulatory Authority-member firms.^{n22.5}

When determining whether a collective bargaining agreement containing an arbitration clause covers a particular issue, an arbitrator is not limited to the four corners of the CBA in interpreting its terms. The arbitrator also may rely on industrial common law, *i.e.*, the practices of the industry and the shop, which is equally a part of a collective bargaining agreement although not expressed in it.ⁿ²³ When an arbitrator uses his or her knowledge of the industrial common law to infer a requirement from a CBA when the CBA is silent on that particular point, the arbitrator is not adding new terms to the agreement but is simply finding the inferred term already in the agreement, albeit only implied.ⁿ²⁴ Thus, for example, an arbitrator did not exceed his authority in inferring a duty to bargain about whether a hospital could impose a mandatory flu vaccination requirement on its nurses from a CBA's preamble and union recognition clause, in light of his understanding of the foundational labor law principle that management must bargain with recognized union representatives over terms and conditions of employment, which is embodied in both statutory and judge-made law and has become well-established in all industries with unionized employees, including the health care industry.ⁿ²⁵

For an arbitration provision in a collective bargaining agreement to be enforceable, the party against whom the provision is sought to be enforced must have been a signatory to the agreement.ⁿ²⁶

[b] Presumption of Arbitrability

In the *Steelworkers Trilogy*,ⁿ²⁷ the United States Supreme Court held that national labor policy favors arbitration, and courts should apply a presumption in favor of arbitration to disputes arising from collective bargaining agreements. The Court reaffirmed this principle more recently in *AT&T Technologies, Inc. v. Communications Workers of America*,ⁿ²⁸ holding that the presumption of arbitrability recognizes the greater institutional competence of arbitrators in interpreting collective bargaining agreements, furthers the national labor policy of peaceful resolution of labor disputes and best accords with the parties' presumed objectives in pursuing collective bargaining. In *United Steel Workers v. Ret. Income Plan for Hourly-Rated Employees of ASARCO, Inc.*,ⁿ²⁹ the Ninth Circuit held that the presumption of arbitrability applied to laid-off workers' claims that they were entitled to retirement benefits under a collective bargaining agreement, even though they were retired and no longer employed.ⁿ³⁰

[3] State Law

Some cases suggest that an employee may not be compelled to arbitrate a statutory discrimination claim under the FEHAⁿ³¹ pursuant to an arbitration clause in a collective bargaining agreement that requires the employer to arbitrate all employment-related claims.ⁿ³² In *Torrez v. Consolidated Freightways Corp. of Del.*,ⁿ³³ a case that preceded the United States Supreme Court's opinion in *Wright v. Universal Maritime Serv. Corp.*,ⁿ³⁴ the court took notice of

Alexander v. Gardner-Denver Co.,ⁿ³⁵ and other cases,ⁿ³⁶ in which the United States Supreme Court held that a plaintiff was not precluded from filing a Title VII lawsuit against his or her employer by having earlier submitted a claim to final arbitration under a collective bargaining agreement. In *Torrez*, the court reasoned that an agreement limiting contractual remedies to a particular forum, such as an arbitral forum, does not affect the employee's statutory rights, which are unrelated to collective activities.ⁿ³⁷

But in a case that followed *Wright, Vasquez v. Superior Court*,ⁿ³⁸ the court suggested that a union-negotiated waiver of statutory rights to a judicial forum might be enforceable if clear and unmistakable.ⁿ³⁹

In *Camargo v. California Portland Cement Co.*,ⁿ⁴⁰ the court of appeal held there is no collateral estoppel of FEHA claims by an arbitration award under a collective bargaining agreement, unless the CBA clearly and unmistakably provides for binding arbitration of an employee's statutory FEHA claims and the arbitration is conducted pursuant to procedures allowing for the full litigation and fair adjudication of the FEHA claims.ⁿ⁴¹

In *Ruiz v. Sysco Food Services*,ⁿ⁴² the Court of Appeal held that an employee's tort claims of defamation, false light, public disclosure of private facts, and intentional and negligent infliction of emotional distress, all arising out of an investigation into an incident at work and the employee's termination and subsequent reinstatement, were subject to arbitration under the collective bargaining agreement. The defamation and emotional distress allegations arose in connection with and were inextricable from the actual disciplinary or investigative procedures involved, as set forth in the CBA. It would be necessary to engage in an interpretation of the CBA to determine whether the investigation and publications were actionable under the stringent standards applicable to defamation claims (actual malice) and emotional distress (conduct outside the bounds of what a civilized society will tolerate).ⁿ⁴³

On the other hand, a California court of appeal held that regardless of whether a collective bargaining agreement (CBA) included a broad arbitration provision, it was not binding on an employee and a class of employees suing their employer for various statutory violations. The plaintiffs alleged an unfair business practices cause of actionⁿ⁴⁴ and two statutory and regulatory wage claims, *i.e.*, violations of provisions of the Labor Code and wage orders issued by the Industrial Welfare Commission pertaining to itemized wage-statementsⁿ⁴⁵ and rest periods.ⁿ⁴⁶ The court held that the union could not waive the employees' right to bring statutory labor-rights claims in court and those claims did not arise under the CBA. The court also found that the plaintiffs were not precluded from bringing their statutory claims to court by the fact that the union had already grieved the rest-break issue under the CBA. The itemized wage-statement claim had not been grieved, and, in any event, the prior submission of certain statutory claims (including California's laws protecting rest periods and wage-stub itemization) to final and binding arbitration did not bar a subsequent lawsuit, because the employees had not waived their statutorily protected rights to a judicial resolution.ⁿ⁴⁷

In *Flores v. Axxis Network & Telecommunications, Inc.*,ⁿ⁴⁸ employees of a contractor that performed work for a city under an agreement between the city, a trades council and various craft unions, sued their employer for failing to pay statutory prevailing wages as required by the agreement. The Court of Appeal found that the trial court properly denied the employer's motion to compel arbitration under the grievance and arbitration provision of the agreement. The arbitration provision did not meet the requirement for a waiver of arbitration under a collective bargaining agreement that it be "clear and unmistakable" that the parties intended to waive a judicial forum for statutory claims.ⁿ⁴⁹ Further, *Labor Code Section 229* did not require that the employees' claims be arbitrated, because the agreement itself carved out an exception from arbitration for alleged violations of prevailing wage laws.ⁿ⁵⁰

In a public employment case, the court held that arbitration of a labor grievance pursuant to the terms of a collective bargaining agreement cannot have a binding effect on an employee's claims for violation of a statute, unless the agreement explicitly states that it will. The employee pursued a grievance through binding arbitration in accordance with the terms of a memorandum of understanding between her public employer and her union. She then sued her employer for retaliation in violation of *Labor Code Section 1102.5*. The court held that because the memorandum of understanding made no reference to statutory claims and the grievance procedure was seemingly limited to ascertaining

whether the employer had violated the terms of the memorandum, it could not operate as a waiver of the employee's rights to pursue her statutory claims in court.ⁿ⁵¹

When the arbitration provision of a collective bargaining agreement is ambiguous, the court may consider extrinsic evidence to aid its interpretation of whether the agreement compels arbitration, including evidence of the parties' intent in light of earlier negotiations, later conduct, related agreements, and industrywide custom.ⁿ⁵²

[4] Effect on Constitutional Claims

In *Service Employees International Union Local 1000 v. Dept. of Personnel Administration*,ⁿ⁵³ a union entered into various collective bargaining agreements with the state, which allowed distribution of union materials, literature, and information and which contained grievance and arbitration procedures. In the agreements, the union agreed that any literature posted or distributed on site would not be, *inter alia*, of a partisan political nature. After the state refused to permit work site distribution of material supporting a ballot proposition, the union sued, alleging that the state's interpretation of the disputed contractual language constituted a deprivation of the union's federal and state constitutional right to freely communicate with its members and such a general policy operated as a prior restraint on free speech. The Court of Appeal held that the trial court properly sustained the state's demurrer on the ground that the union was first required to arbitrate the question of whether the materials were of a partisan political nature within the meaning of prohibitory language in the collective bargaining agreement. The court rejected the union's contention that arbitration was too slow and cumbersome when constitutional rights hung in the balance, and that the exhaustion requirement had to be excused to avoid the irreparable injury involved in suspending its right to free speech. Thus, the union's failure to exhaust its arbitration remedy barred its premature civil action.ⁿ⁵⁴

Legal Topics:

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

Contracts Law Contract Conditions & Provisions Arbitration Clauses Labor & Employment Law Collective Bargaining & Labor Relations General Overview Labor & Employment Law Collective Bargaining & Labor Relations Arbitration Authority Labor & Employment Law Collective Bargaining & Labor Relations Arbitration Enforcement

FOOTNOTES:

(n1)Footnote 1. *14 Penn Plaza v. Pyett* (2009) 129 S. Ct. 1456, 173 L. Ed. 2d 398, 2009 U.S. LEXIS 2497, *16-*49 .

(n2)Footnote 2. 29 U.S.C. § 621 *et seq.*

(n3)Footnote 3. *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 .

(n4)Footnote 4. 29 U.S.C. § 159(a). *See Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB* (1991) 501 U.S. 190, 199, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (arrangements for arbitration of disputes are terms or conditions of employment and mandatory subject of bargaining); *Steelworkers v. Warrior & Gulf Nav. Co.* (1960) 363 U.S. 574, 578, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (arbitration of labor disputes under collective bargaining agreements is part and parcel of collective bargaining process itself); *Textile Workers v. Lincoln Mills of Ala.* (1957) 353 U.S. 448, 455, 77 S. Ct. 912, 1 L. Ed. 2d 972 (agreement to arbitrate grievance disputes is *quid pro quo* for agreement not to strike).

(n5)Footnote 5. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26-33, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (nothing in the text of the ADEA or its legislative history explicitly precludes arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (ADEA does not preclude arbitration of claims brought under statute).

(n6)Footnote 6. See *Wright v. Universal Maritime Serv. Corp.* (1998) 525 U.S. 70, 80, 119 S. Ct. 391, 142 L. Ed. 2d 361 .

(n7)Footnote 7. See *Wright v. Universal Maritime Serv. Corp.* (1998) 525 U.S. 70, 80, 119 S. Ct. 391, 142 L. Ed. 2d 361 .

(n8)Footnote 8. See *McDonald v. West Branch* (1984) 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (federal court could not accord preclusive effect to unappealed arbitration award in case brought under 42 U.S.C. § 1983, because arbitrator's authority derived solely from contract, so that arbitrator did not have authority to enforce § 1983 when that provision was left unaddressed by arbitration agreement); *Barrentine v. Arkansas-Best Freight System, Inc.* (1981) 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (employee could bring action in federal district court alleging violation of minimum wage provisions of Fair Labor Standards Act after having unsuccessfully submitted wage claim based on same underlying facts to joint grievance committee pursuant to provisions of his union's collective-bargaining agreement, because unsuccessful arbitration did not preclude federal lawsuit).

(n9)Footnote 9. See *14 Penn Plaza v. Pyett* (2009) 129 S. Ct. 1456, 173 L. Ed. 2d 398, 2009 U.S. LEXIS 2497, *33-*46 (apart from their narrow holdings, *Gardner-Denver* line of cases included broad dicta highly critical of use of arbitration for vindication of statutory antidiscrimination rights, which skepticism, however, rested on misconceived view of arbitration that Court had since abandoned).

(n10)Footnote 10. *Wright v. Universal Maritime Serv. Corp.* (1998) 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 .

(n11)Footnote 11. *Wright v. Universal Maritime Serv. Corp.* (1997) 121 F.3d 702 , *vacated and remanded*, *Wright v. Universal Maritime Serv. Corp.* (1998) 525 U.S. 70, 82, 119 S. Ct. 391, 142 L. Ed. 2d 361 .

(n12)Footnote 12. *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 .

(n13)Footnote 13. *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 49-50, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (grievance is designed to vindicate contractual right under CBA; lawsuit under Title VII asserts independent statutory rights accorded by Congress).

(n14)Footnote 14. *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 58-59, n.20, 94 S. Ct. 1011, 39 L. Ed. 2d 147 .

(n15)Footnote 15. *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 .

(n16)Footnote 16. *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (relying on federal policy favoring arbitration embodied in Federal Arbitration Act, Court held that statutory claims may be subject of arbitration agreement, enforceable under FAA).

(n17)Footnote 17. *Wright v. Universal Maritime Serv. Corp.* (1998) 525 U.S. 70, 119 S. Ct. 391, 396, 142 L. Ed. 2d 361 (Court did not reach question of enforceability of pre-dispute agreement in CBA to arbitrate employment discrimination claims).

(n18)Footnote 18. *Wright v. Universal Maritime Serv. Corp.* (1998) 525 U.S. 70, 119 S. Ct. 391, 397, 142 L. Ed. 2d 361 (language that grievance procedure is "intended to cover all matters affecting wages, hours, and other terms and conditions of employment" is not sufficiently explicit, particularly in light of language stating that anything not included in agreement will not be construed as part of agreement).

(n19)Footnote 19. See 29 U.S.C. § 185.

(n20)Footnote 20. *Doyle v. Raley's, Inc.* (9th Cir. 1998) 158 F.3d 1012 .

(n21)Footnote 21. *Doyle v. Raley's Inc.* (9th Cir. 1998) 158 F.3d 1012, 1014-1015 (collecting cases and noting then-existing circuit split); *see also* *Albertson's Inc. v. United Food and Commercial Workers Union* (9th Cir. 1998) 157 F.3d 758, 760-762 (because employees had independent statutory right to pursue FLSA claims in court, it was irrelevant whether claims might be arbitrable under CBA).

(n22)Footnote 22. *Operating Engineers Local Union No. 3 v. Newmont Mining Corp.* (9th Cir. 2007) 476 F.3d 690, 692-694 .

(n23)Footnote 22.1. *Association of Flight Attendants v. Mesa Air Group* (9th Cir. 2009) 567 F.3d 1043 .

(n24)Footnote 22.2. 45 U.S.C. § 151 *et seq.*

(n25)Footnote 22.3. *Association of Flight Attendants v. Mesa Air Group* (9th Cir. 2009) 567 F.3d 1043, 1047 .

(n26)Footnote 22.4. *Association of Flight Attendants v. Mesa Air Group* (9th Cir. 2009) 567 F.3d 1043, 1046-1050 .

(n27)Footnote 22.5. *Valentine Capital Management, Inc. v. Agahi* (2009) 174 Cal. App. 4th 606, 613-627, 94 Cal. Rptr. 3d 526 (defendant-former employees could not point to anything in former employer's complaint or other pleadings or admissible evidence from which court could infer that work they allegedly performed, trade secrets they allegedly misappropriated, use to which they allegedly put those trade secrets, or parties' alleged defamation of each other arose out of party's activities as associated person of FINRA member).

(n28)Footnote 23. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 581-82, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 ; *Virginia Mason Hospital v. Washington State Nurses Assn.* (9th Cir. 2007) 511 F.3d 908, 915 .

(n29)Footnote 24. *Virginia Mason Hospital v. Washington State Nurses Assn.* (9th Cir. 2007) 511 F.3d 908, 915 . *See SFIC Props., Inc. v. Intl. Assn. of Machinists* (9th Cir. 1996) 103 F.3d 923, 926-27 .

(n30)Footnote 25. *Virginia Mason Hospital v. Washington State Nurses Assn.* (9th Cir. 2007) 511 F.3d 908, 914-915 .

(n31)Footnote 26. *See, e.g., See, e.g., District Council No. 16 of the Int'l Union of Painters & Allied Trades, Glaziers, Architectural Metal & Glass Workers, Local 1621 v. B & B Glass, Inc.* (9th Cir. 2007) 498 F.3d 926, 929-932 (because plaintiff union had no agreement with employer it sought to take to arbitration, and it could not show that employer against whom it filed its claim controlled company doing work in California, union could not compel employer to arbitrate).

(n32)Footnote 27. *United Steelworkers of America v. American Manufacturing Co.* (1960) 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 ; *United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960) ; *United Steelworkers of America v. Enterprise Wheel & Car Corp.* (1960) 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960) .

(n33)Footnote 28. *AT&T Technologies, Inc. v. Communications Workers of America* (1986) 475 U.S. 643, 649-650, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) .

(n34)Footnote 29. *United Steel Workers v. Ret. Income Plan for Hourly-Rated Employees of ASARCO, Inc.* (9th Cir. 2008) 512 F.3d 555, 559-563 .

(n35)Footnote 30. *See also Cleveland Electric Illuminating Co. v. Utility Workers, Local 270* (6th Cir. 2006) 440

F.3d 809, 814 (presumption of arbitrability applied to disputes over retirees' benefits if parties contracted for benefits in collective bargaining agreement, specifically rejecting argument that retirees posed no threat of economic disruption); *United Steelworkers of America v. Canon, Inc.* (3d Cir. 1978) (explicitly applying presumption of arbitrability when union filed grievance on behalf of group of retirees).

(n36)Footnote 31. *Gov. Code § 12900 et seq.*

(n37)Footnote 32. *Torrez v. Consolidated Freightways Corp. of Del.* (1997) 58 Cal. App. 4th 1247, 68 Cal. Rptr. 2d 792 ; see *Vargas v. Gromko* (N.D. Cal. 1997) 977 F. Supp. 996, 999-1001 .

(n38)Footnote 33. *Torrez v. Consolidated Freightways Corp. of Del.* (1997) 58 Cal. App. 4th 1247, 1256-1260, 68 Cal. Rptr. 2d 792 .

(n39)Footnote 34. *Wright v. Universal Maritime Serv. Corp.* (1998) 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 ; see [1], above.

(n40)Footnote 35. *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 .

(n41)Footnote 36. See also *Barrentine v. Arkansas-Best Freight Sys.* (1981) 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (truck driver may pursue claims under FLSA, notwithstanding unsuccessful participation in grievance procedures mandated by collective bargaining agreement); *McDonald v. West Branch* (1984) 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (plaintiff may pursue civil rights action under 42 U.S.C. § 1983 after adverse arbitration decision).

(n42)Footnote 37. *Torrez v. Consolidated Freightways Corp. of Del.* (1997) 58 Cal. App. 4th 1247, 1258, 68 Cal. Rptr. 2d 792 .

(n43)Footnote 38. *Vasquez v. Superior Court* (2000) 80 Cal. App. 4th 430, 95 Cal. Rptr. 2d 294 .

(n44)Footnote 39. *Vasquez v. Superior Court* (2000) 80 Cal. App. 4th 430, 433-436, 95 Cal. Rptr. 2d 294 .

(n45)Footnote 40. *Camargo v. California Portland Cement Co.* (2001) 86 Cal. App 4th 995, 103 Cal. Rptr 2d 841 .

(n46)Footnote 41. *Camargo v. California Portland Cement Co.* (2001) 86 Cal. App. 4th 995, 1018-1019, 103 Cal. Rptr. 2d 841 .

(n47)Footnote 42. *Ruiz v. Sysco Food Services* (2004) 122 Cal. App. 4th 520, 18 Cal. Rptr. 3d 700 .

(n48)Footnote 43. *Ruiz v. Sysco Food Services* (2004) 122 Cal. App. 4th 520, 531, 18 Cal. Rptr. 3d 700 .

(n49)Footnote 44. See *Bus. & Prof. Code § 17200*, discussed at § 70.03.

(n50)Footnote 45. See *Lab. Code § 226*, discussed at § 4.03.

(n51)Footnote 46. See *Lab. Code § 226.7*; 8 Cal. Code Reg. § 11070(12), discussed at § 3.24.

(n52)Footnote 47. *Zavala v. Scott Bros. Dairy, Inc.* (2006) 143 Cal. App. 4th 585, 49 Cal. Rptr. 3d 503, 2006 Cal. App. LEXIS 1513, *11-*23 .

(n53)Footnote 48. *Flores v. Axxis Network & Telecommunications, Inc.* (2009) 173 Cal. App. 4th 802, 93 Cal. Rptr. 3d 1, 2009 Cal. App. LEXIS 640, *5-*22 .

(n54)Footnote 49. *Flores v. Axxis Network & Telecommunications, Inc.* (2009) 173 Cal. App. 4th 802, 93 Cal.

*Rptr. 3d 1, 2009 Cal. App. LEXIS 640, *5-*18 . See also Wright v. Universal Maritime Service Corp. (1998) 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 ; Vasquez v. Superior Court (2000) 80 Cal. App. 4th 430, 95 Cal. Rptr. 2d 294 .*

(n55)Footnote 50. *Flores v. Axxis Network & Telecommunications, Inc. (2009) 173 Cal. App. 4th 802, 93 Cal. Rptr. 3d 1, 2009 Cal. App. LEXIS 640, *18-*22 .*

(n56)Footnote 51. *Marcario v. County of Orange (2007) 155 Cal. App 4th 397, 399, 403-407, 65 Cal. Rptr. 3d 903 .*

(n57)Footnote 52. *Hartnell Community College Dist. v. Superior Court (2004) 124 Cal. App. 4th 1443, 1449-1452, 22 Cal. Rptr. 3d 410* (undisputed extrinsic evidence showed that arbitration agreement in collective bargaining agreement was intended by parties to provide for arbitration on written request of grievant after exhaustion of grievance review process, and did not provide community college district with unilateral power to decide arbitrability of grievances).

(n58)Footnote 53. *Service Employees Internat. Union Local 1000 v. Dept. of Personnel Administration (2006) 142 Cal. App. 4th 866, 48 Cal. Rptr. 3d 457 .*

(n59)Footnote 54. *Service Employees Internat. Union Local 1000 v. Dept. of Personnel Administration (2006) 142 Cal. App. 4th 866, 869-876, 48 Cal. Rptr. 3d 457 .*



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California Employment Law

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DIVISION IX ALTERNATIVE DISPUTE RESOLUTION
CHAPTER 90 Arbitration of Employment Disputes
Part B. ENFORCEABILITY OF ARBITRATION AGREEMENTS

4-90 California Employment Law § 90.20

AUTHOR: By Paul W. Cane, Jr., J.D.

§ 90.20 Individual Arbitration Agreements

[1] Private Litigation

[a] *Gilmer v. Interstate/Johnson Lane Corp.*

In a series of cases involving employees of securities brokerage firms, courts have indicated that agreements to arbitrate employment discrimination claims are generally enforceable and preclude judicial enforcement of statutory equal employment opportunity rights.ⁿ¹ Although these brokerage arbitration cases have been followed in interpreting arbitration agreements in other industries, they may have less application to the securities industry in the future. Effective January 1, 1999, the Securities and Exchange Commission approved a rule change filed by the National Association of Securities Dealers to amend Rule 10201 of the NASD's Code of Arbitration Procedure to remove the requirement that employees of broker-dealers arbitrate statutory claims of employment discrimination. The rule change will modify the current requirement that associated persons arbitrate all disputes arising out of their employment or termination of employment with a member broker-dealer.

In *Gilmer v. Interstate/Johnson Lane Corp.*,ⁿ² the United States Supreme Court held that arbitration agreements generally do not conflict with or hinder the purposes and policies of equal employment opportunity laws.ⁿ³ In addition, several federal EEO statutes encourage the use of alternative means of dispute resolution, including arbitration, to resolve discrimination disputes.ⁿ⁴ Before *Gilmer*, the Supreme Court had held arbitration agreements to be enforceable with respect to claims arising under several federal statutes advancing important public policies not related to employment discrimination.ⁿ⁵ In *Gilmer*, the Court held that an age discrimination action under ADEAⁿ⁶ was subject to compulsory arbitration pursuant to an arbitration agreement contained in a securities registration application. The Court declared that compulsory arbitration of ADEA claims is not inconsistent with the ADEA's statutory framework and underlying purposes, primarily because of the following reasons:ⁿ⁷

- (1) Neither the text of the ADEA nor its legislative history precludes arbitration.
- (2) The ADEA is flexible, in that it actually encourages informal methods of resolving claims.ⁿ⁸

(3) Arbitration does not undermine the EEOC's role because an individual claimant could still file an EEOC charge, even if he or she could not file a judicial action thereafter.

The *Gilmer* Court distinguished its prior cases⁹ holding that an arbitration clause in a collective bargaining agreement does not preclude a subsequent statutory claim. It explained that, "[T]he arbitration in those cases understandably was held not to preclude subsequent statutory actions" because, among other things, the employees therein agreed to arbitrate only their contract-based claims, not their statutory claims.¹⁰ The Court also pointed out that those cases did not involve application of the Federal Arbitration Act (FAA),¹¹ which "reflects a 'liberal federal policy favoring arbitration agreements.'" ¹²

[b] The *Craft* Line of Cases

Notwithstanding *Gilmer*, plaintiffs have contested the enforceability of arbitration agreements on various theories. One of these, recognized by the Ninth Circuit in *Craft v. Campbell Soup Co.*,¹³ was that employment arbitration agreements are not enforceable under the FAA. That theory did not survive the United States Supreme Court's holding in *Circuit City v. Adams*.¹⁴

[c] The *Duffield* Line of Cases

A second theory under which plaintiffs contest the enforceability of arbitration agreements is that the Civil Rights Act of 1991 ("CRA"), which granted a jury--trial right for Title VII claims, impliedly exempted discrimination claims from FAA coverage. That theory prevailed in *Duffield v. Robertson Stephens & Co.*¹⁵ In *Duffield*, the Ninth Circuit concluded that the 1991 Act strengthened Title VII, which after 1991 had included a jury-trial right, and precluded the compulsory arbitration of Title VII claims as a condition of employment. Relying on legislative history, the court held that Congress intended to prohibit in the 1991 Act mandatory requirements under which prospective employees agree as a condition of employment to surrender their rights to litigate future Title VII claims in a judicial forum.¹⁶ While the 1991 Act contained language encouraging the alternative resolution of disputes "where appropriate" and to "the extent authorized by law," the *Duffield* court said that this was limited to situations in which (1) arbitration furthers the purpose and objective of the CRA--by affording victims of discrimination an opportunity to present their claims in an alternative forum, a forum they find desirable--not by forcing an unwanted forum on them; and (2) the parties knowingly and voluntarily elect to use those methods.¹⁷ Pre-dispute agreements, according to the *Duffield* court, do not meet that test. The *Duffield* court held, however, that the plaintiff was still required to arbitrate breach of contract, deceit, and intentional infliction of emotional distress claims, which do not arise under the discrimination laws.¹⁸

In *Circuit City Stores, Inc. v. Nadj*,¹⁹ the Ninth Circuit distinguished *Duffield*, holding that a claim brought under California's FEHA, and not under Title VII, is arbitrable. The court found plaintiff's failure to allege violation of Title VII had foreclosed reliance on Title VII's enforcement scheme. Thus, Title VII's preclusion of arbitration did not apply to plaintiff's FEHA claim.²⁰

In *Equal Employment Opportunity Commission v. Luce, Forward, Hamilton & Scripps*,²¹ the Ninth Circuit, en banc, held that the Circuit had erred in *Duffield* in concluding that the Civil Rights Act of 1991 precludes mandatory arbitration of Title VII claims. The court acknowledged that after the United States Supreme Court's decision in *Gilmer*,²² the decision in *Duffield* stood alone and all of the other circuits had concluded that Title VII does not bar compulsory arbitration agreements.²³ The court also held that a right to jury trial does not preclude compulsory arbitration of Title VII claims.²⁴

Many state courts have rejected *Duffield*'s reasoning as unsound. For example, in *24 Hour Fitness, Inc. v. Superior Court*,²⁵ a sexual harassment suit brought under the FEHA, the court of appeal rejected plaintiff's suggestion that her claims were rendered nonarbitrable by the Ninth Circuit's holding in *Duffield*. The *24 Hour Fitness* court explained that

Duffield is not binding on the Court of Appeal and that it was inconsistent with the thrust of California cases such as *Brookwood v. Bank of America* n26 and *Spellman v. Securities, Annuities & Ins. Services*, n27 both of which held that statutory discrimination claims under the FEHA are arbitrable.ⁿ²⁸ The California Supreme Court in *Armendariz v. Foundation Health Psychcare Services* n29 similarly dismissed *Duffield* as unpersuasive. Some courts have even said that *Duffield* is irreconcilable with the United States Supreme Court's holding in *Circuit City*.ⁿ³⁰

[d] The *Lai* Line of Cases

Some Ninth Circuit cases have taken a third approach to finding discrimination claims not arbitrable under an arbitration agreement. In those cases, the Ninth Circuit has declared that an arbitration agreement that would cover statutory discrimination claims at a minimum must spell out specifically that statutory claims are intended to be covered in order to ensure a "knowing and voluntary" agreement. In *Prudential Ins. Co. of America v. Lai*,ⁿ³¹ the court acknowledged that the federal EEO laws do not preclude an employee from entering into a binding agreement to arbitrate statutory employment discrimination claims, but the court held such an agreement is not enforceable unless there is "a knowing agreement to arbitrate," which thereby waives the judicial remedies afforded by Title VII and related state statutes.ⁿ³² The court noted that although the Civil Rights Act of 1991 included a provision "encouraging" the use of alternative means of dispute resolution, including arbitration, to resolve employment discrimination claims,ⁿ³³ legislative history indicated that this provision was intended to encourage arbitration to supplement, and not supplant, the remedies afforded by Title VII, and that arbitration was encouraged only if the parties knowingly and voluntarily agreed to use this method of resolution.ⁿ³⁴ Examining the documents involved, the *Lai* court held that the plaintiffs could not have understood from the securities registration application form they signed that they were agreeing to arbitrate sex discrimination suits because the form did not purport to describe the types of disputes that were to be subject to arbitration. Further, even if the plaintiffs had signed a contract containing the NASD arbitration clause, it would not have put them on notice that they were bound to arbitrate Title VII claims because it did not even refer to employment disputes. The court therefore concluded that the plaintiffs were not bound by any valid agreement to arbitrate these employment disputes because they did not knowingly contract to forego their statutory remedies in favor of arbitration.ⁿ³⁵

In a later Ninth Circuit case, *Renteria v. Prudential Ins. Co. of America*,ⁿ³⁶ the employer moved to compel arbitration of sexual harassment claims pursuant to a provision in a securities registration application form virtually identical to the one involved in *Lai*. At the time the *Renteria* plaintiff signed the form, the NASD arbitration clause was the same as that in effect at the time the plaintiffs in *Lai* signed their forms. The single difference was that the registration form in *Renteria* stated that the plaintiff was bound to arbitrate disputes listed in the NASD Code, "as may be amended from time to time." The court, however, found that such language did not cure the flaws that it found with the documents in *Lai*, because the contract still failed to describe the disputes that the parties were agreeing to arbitrate.ⁿ³⁷ Also, even though the NASD Code had been amended to put members on notice that employment disputes were subject to mandatory arbitration by the time the plaintiff was terminated and brought her sexual harassment claims, the court stated that the knowing waiver required under *Lai* must be measured from the time the plaintiff signed the form, and not from the time of her termination or from the time she filed suit.ⁿ³⁸

The Ninth Circuit, however, has not uniformly applied the holding in *Lai* to the arbitration of all statutory employment claims. In *Kuehner v. Dickinson & Company*,ⁿ³⁹ the Ninth Circuit refused to apply the *Lai* "knowing agreement to arbitrate" standard to claims under the FLSA. The court noted that Congress had the power to enact statutes which either precluded the waiver of a plaintiff's right to a judicial forum or imposed restrictions on the enforcement of arbitration contracts. However, the court also noted that the plaintiff carried the burden of proving that Congress intended to restrict the enforcement of contracts to arbitrate under any particular statute.ⁿ⁴⁰ The court ultimately concluded that *Lai* had identified a narrow congressional restriction on the enforcement of agreements to arbitrate Title VII claims, but that no similar limitations upon arbitration appeared in the text or legislative history of the FLSA.ⁿ⁴¹

At least one district court within the Ninth Circuit has not required that an arbitration agreement specifically reference

the ADA to satisfy the "knowing agreement" standard. In *Golenia v. Bob Baker Toyota*,ⁿ⁴² the plaintiff signed an employment agreement that contained an arbitration clause.ⁿ⁴³ Plaintiff also signed an acknowledgment of receipt of an employee handbook which set forth the arbitration requirement. Finally, plaintiff signed a form entitled Acknowledgment of Receipt of Arbitration Policy, which referred plaintiff to the descriptions in the employment agreement and the employee handbook regarding arbitration. The arbitration clause itself specifically required the arbitration of any dispute "arising from, related to, or having any connection with my seeking employment with, employment by, or other association with the Company."ⁿ⁴⁴

In opposing arbitration, plaintiff first argued that he did not read the arbitration clause before executing the various documents evidencing the arbitration agreement. The court held that plaintiff could not rely on his failure to read the contract, because the contract contained a boldface, all-caps admonition not to sign the contract prior to reading and understanding its content. Citing *Lai*, the plaintiff also argued that the arbitration clause was unenforceable because it did not specifically mention the ADA. The court concluded that *Lai* did not require that an arbitration agreement specifically name the statute or describe the category of statutes whose procedures are to be waived.ⁿ⁴⁵ Instead, the court held, an arbitration agreement referencing "employment disputes" was sufficient to put the plaintiff on notice that all employment claims, including those under the ADA, were to be arbitrated.

In *Nelson v. Cyprus Bagdad Copper Corp.*,ⁿ⁴⁶ the Ninth Circuit held that the *Lai* waiver standard applies to cases under the ADA. To forfeit the right to a judicial forum under the ADA, the plaintiff must knowingly agree to arbitration. This requirement means that the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question.ⁿ⁴⁷

In *Kummetz v. Tech Mold, Inc.*,ⁿ⁴⁸ the arbitration agreement was held unenforceable because it did not meet this standard. By signing an employment information booklet acknowledgment, the employee did not knowingly agree to arbitrate employment discrimination claims brought under the ADA, since the acknowledgment did not notify the employee that the handbook contained an arbitration provision and did not mention or imply anything about employment-related disputes, civil rights statutes, or waivers of remedies.ⁿ⁴⁹ Further, the acknowledgment contained language negating the idea that the booklet amounted to or included a contractual agreement by stating that: (1) it did not constitute an employment contract and the employee remained an at-will employee; and (2) the policies, practices, and benefits in the booklet were subject to change at any time, without notice, at the sole and unlimited discretion of the employer. These clauses clearly implied that the booklet contained a set of non-contractual policies unilaterally established by the employer.ⁿ⁵⁰

In a case that preceded *Lai*, *Spellman v. Securities, Annuities & Ins. Services, Inc.*,ⁿ⁵¹ a California court of appeal followed the reasoning in *Gilmer* and held that an arbitration provision contained in a securities registration application signed by the plaintiff precluded the plaintiff from bringing a civil action for alleged race discrimination under the FEHA.ⁿ⁵² The NASD arbitration clause applied to disputes "arising out of or in connection with the business of [parties subject to the rules]." The court rejected the plaintiff's argument that since the wrongful termination/racial discrimination claim did not involve "business transactions," it was not subject to arbitration under the rules. The court broadly interpreted the language of the rule and found that the wrongful conduct alleged directly involved important aspects of the plaintiff's employment and business activities and thus was within the intent of the arbitration clause.ⁿ⁵³

Even after *Lai*, the California state courts adhered to the logic of *Spellman*. In *Brookwood v. Bank of America, NT & SA*,ⁿ⁵⁴ a California court of appeal criticized and distinguished the Ninth Circuit's holding in *Lai*. The court rejected the plaintiff's contentions that she did not "knowingly" sign an arbitration agreement by signing a registered representative agreement and a U-4 form, both of which contained compulsory arbitration clauses, and that the contract should be rescinded for unilateral mistake. The court noted that the plaintiff's sole authority for promoting her unilateral mistake theory was the "unfortunate choice of words" in *Lai* stating that statutory discrimination claims can be arbitrated only when such a procedure was "knowingly accepted" by the plaintiff.ⁿ⁵⁵ The court also rejected Brookwood's argument that *Lai* created a different standard of the law of contract revocation in allowing introduction of extrinsic evidence of a

party's subjective intent. The court pointed out that the court in *Lai* made a narrow ruling based on narrow arbitration clauses that did not indicate that they referred to employment disputes. In contrast, the court in *Brookwood* stated that the clauses signed by the plaintiff were broad in scope and unmistakably applied to her causes of action.ⁿ⁵⁶ The *Brookwood* court went further, criticizing *Lai* as inconsistent with United States Supreme Court authority to the extent that it "purport[ed] to create a federal contractual standard for arbitration clauses" rather than allowing application of the state standard.ⁿ⁵⁷

In *Cione v. Foresters Equity Servs., Inc.*,ⁿ⁵⁸ a California court of appeal criticized and distinguished *Lai* and *Renteria*.ⁿ⁵⁹ The plaintiff brought a wrongful termination suit against a former employer which was a member of the NASD. The defendant moved to compel arbitration, alleging that it was a third party beneficiary of a mandatory arbitration clause contained in the plaintiff's Form U-4. The trial court denied the motion, concluding that the parties' written employment agreement was an integrated contract that did not incorporate the arbitration provision of the Form U-4 or otherwise provide for arbitration.

The court of appeal reversed and directed the trial court to order arbitration. To decide whether or not employment dispute claims are arbitrable, a court must determine each of the following:ⁿ⁶⁰

- (1) Whether an agreement to arbitrate existed;
- (2) Whether the employer waived its right to compel arbitration; and if not
- (3) Whether the plaintiff's claims are within the scope of the arbitration agreement.

Applying state law contract formation principles, the court concluded that the plaintiff agreed to arbitrate by executing Form U-4 (which contained an express arbitration clause) when he registered with NASD. The court rejected the plaintiff's contentions that the integration clause in the written employment contract superseded a Form U-4 arbitration agreement, or that the employer waived the right to compel arbitration by signing the agreement.ⁿ⁶¹ In evaluating the scope of the arbitration agreement, the court rejected the plaintiff's position that arbitration could not be compelled on the ground that the record contained no evidence that the plaintiff knowingly waived his rights to judicial adjudication of employment discrimination claims.ⁿ⁶²

- (1) Set forth the scope of the disputes subject to arbitration, and specifically mention discrimination claims arising under state and federal law;
- (2) Specify the waiver of the right to a jury trial; and
- (3) Refrain from placing any unnecessary restrictions on the procedures and substantive remedies that otherwise would apply in court litigation.

Whatever the vitality of *Lai* and *Renteria* may be, the practitioner can avoid the issue through careful drafting. Out of an abundance of caution the drafter should:

- (1) Set forth the scope of the disputes subject to arbitration, and specifically mention discrimination claims arising under state and federal law;
- (2) Specify the waiver of the right to a jury trial; and
- (3) Refrain from placing any unnecessary restrictions on the procedures and substantive remedies that otherwise would apply in court litigation.

Commentary by Kirby Wilcox.

The *Spellman-Brookwood-Cione* approach applies *a fortiori* to claims other than discrimination claims. The presumption is in favor of arbitrability.ⁿ⁶³ California's public policy is that arbitration agreements are to be liberally construed, and arbitration of a dispute will be ordered unless the agreement clearly does not apply to the dispute in question.ⁿ⁶⁴ Under this policy of liberal construction, one California court of appeal has held that an agreement to arbitrate "any dispute of any kind whatsoever, regarding the meaning, interpretation or enforcement" of the employment contract required arbitration of a claim that plaintiff was terminated in violation of public policy and that the termination breached the implied covenant of good faith and fair dealing.ⁿ⁶⁵ The court reasoned that the broad agreement to arbitrate any dispute regarding enforcement of the contract clearly included the claim for breach of the implied covenant of good faith and fair dealing, which is part of every contract.ⁿ⁶⁶ The court also stated that the other claims involved duties arising by operation of law, which were allegedly breached during the employment relationship. Because the parties at least arguably intended to arbitrate those claims as well, the doubt must be resolved in favor of arbitration.ⁿ⁶⁷

[e] Unconscionability and the *Armendariz* Line of Cases

Unconscionability is the fourth theory under which some arbitration agreements are attacked. "[A]n arbitration agreement must be enforced on the basis of state law standards that apply to contracts in general."ⁿ⁶⁸ Thus, written arbitration agreements are generally enforceable under California law and are revocable only on grounds such as duress or fraud, that are grounds for revoking any contract.ⁿ⁶⁹ For example, in one case, a court of appeal held that a compulsory predispute arbitration agreement is not invalid just because it is required as a condition of employment or offered on a "take it or leave it" basis.ⁿ⁷⁰ "Put another way, ... the mandatory nature of an arbitration agreement does not, by itself, render the agreement unenforceable."ⁿ⁷¹ Unilateral mistake is a defense only when that mistake is known to the other party and is encouraged or fostered by that party; ignorance of a contractual provision is not a proper basis for avoidance of that provision.ⁿ⁷²

The mere fact that an agreement is a standardized contract does not make the agreement unconscionable. For example, an arbitration agreement contained in a preprinted form prepared by an employer and presented to an applicant on a take-it-or-leave-it basis with no opportunity to negotiate was part of an adhesion contract, but it was not unconscionable. The adhesive nature of a contract does not always make it procedurally unconscionable. Any procedural unfairness inherent in an adhesion agreement in an employment context was limited, because the arbitration provision was not buried in a lengthy employment agreement. Rather, it was contained on the last page of a seven-page employment application, underneath the heading "Please Read Carefully, Initial Each Paragraph and Sign Below." It was set forth in a separate, succinct (four-sentence) paragraph that the applicant initialed, affirming she had seen it. Further, procedural unconscionability alone does not render an agreement unenforceable, and the use of "I agree" language in the agreement, which provided that "all disputes" arising out of employment "will be submitted to binding arbitration," did not make the agreement substantively unconscionable as unilateral.^{n72.1}

As noted above, unconscionability has both procedural and substantive elements.ⁿ⁷³ The procedural element focuses on the unequal bargaining positions and hidden terms common in the context of adhesion contracts.ⁿ⁷⁴ particularly factors such as surprise and oppression.ⁿ⁷⁵ *Surprise* involves the extent to which the supposedly agreed-on terms are hidden in a prolix preprinted form drafted by the party seeking to enforce the disputed term.ⁿ⁷⁶ *Oppression* results when there is no real negotiation of contract terms because of unequal bargaining power.ⁿ⁷⁷ For oppression to exist under these criteria, the party challenging the provision must not have been able to obtain the goods or services from an alternative source.ⁿ⁷⁸ Unequal bargaining power may exist even between a corporate employer and a successful and sophisticated corporate executive when the executive is required to sign a standard nonnegotiable employment contract presented to him or her after accepting employment, and even after having negotiated extra benefits under a separate agreement.ⁿ⁷⁹

The substantive element, in general, addresses contract terms that are so one-sided as to "shock the conscience," or that

impose harsh or oppressive terms.ⁿ⁸⁰

To deny enforcement of a contract on grounds of unconscionability, both procedural and substantive unconscionability must exist.ⁿ⁸¹ A relatively larger degree of one of the elements of unconscionability may compensate for a relatively smaller degree of the other.ⁿ⁸² Agreements (even adhesion agreements) that merely are forum-shifting devices are not unconscionable. Where, however, arbitration agreements unfairly create or destroy substantive rights, some courts have declined to enforce them, either in part (particularly where a severability clause exists), or in their entirety.

In *Armendariz v. Foundation Health Psychcare Services, Inc.*,ⁿ⁸³ the California Supreme Court announced a set of guidelines for recurring unconscionability issues. The Court concluded that claims brought under the California Fair Employment and Housing Act (FEHA) are arbitrable if the arbitration permits an employee to vindicate his or her statutory rights.ⁿ⁸⁴ The Court articulated the five minimum requirements for lawful arbitration of nonwaivable statutory civil rights in the workplace pursuant to a mandatory employment arbitration agreement, finding that an arbitration agreement is lawful if it does each of the following:ⁿ⁸⁵

- Provides for neutral arbitrators.
- Provides for more than minimal discovery.
- Requires a written award.
- Provides for all of the types of relief that would otherwise be available in court.
- Does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.

However, the Court found two provisions of the arbitration agreement unconscionable and, consequently, the entire agreement unenforceable.ⁿ⁸⁶ The offending provisions were that the agreement (1) required arbitration only for the claims of the employee, the weaker party;ⁿ⁸⁷ and (2) limited the remedies available to the employee, including denying the employee statutorily imposed remedies such as punitive damages and attorneys fees.ⁿ⁸⁸ The Court also concluded that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court.ⁿ⁸⁹

In *Blake v. Ecker*,ⁿ⁹⁰ the court held that *Armendariz* rules apply retroactively.ⁿ⁹¹ In this case the arbitration provision required the employee to arbitrate all claims against the employer except workers' compensation claims, but did not require the employer to arbitrate claims against the employee. The court of appeal remanded and instructed the trial court to apply the unconscionability analysis in *Armendariz* to this case.ⁿ⁹²

Following *Armendariz*, in *Pinedo v. Premium Tobacco Stores, Inc.*,ⁿ⁹³ the court refused to compel arbitration. A former employee alleged four causes of action: One for constructive discharge based on workplace harassment, two for violations of the FEHA, and one for intentional infliction of emotional distress. The court concluded that the arbitration provision in the contract at issue was at least as unconscionable as the one presented in *Armendariz*. For example, it limited the recovery the employee could obtain to the amount of wages paid to the employee for the last six months prior to termination less unemployment benefits or pay from another job. In addition, it precluded recovery based on statutory claims—including recovery of damages contemplated within FEHA—and foreclosed recovery of statutory attorney's fees. The court also found that the provisions in the contract requiring the employee to travel for the arbitration and requiring the employee to pay all arbitration fees was potentially more oppressive than those in *Armendariz*. Finally, the court held that the agreement was inherently one-sided because the limitation on damages applied only to damages awarded in favor of the employee, not to damages claimed by the employer.ⁿ⁹⁴

In *Circuit City v. Adams*,ⁿ⁹⁵ the employee was required as a condition of employment to complete an application that contained a dispute-resolution agreement. The agreement required employees to submit all claims and disputes to binding arbitration, but had no similar requirement for the employer. Under the dispute-resolution rules for employees, the amount of damages was restricted, with back pay limited to one year, front pay to two years, and punitive damages to the greater of the amount of front and back pay awarded or \$5,000. The employee was required to split the costs of the arbitration, including the daily fees of the arbitrator, the cost of a reporter to transcribe the proceedings, and the expense of renting the room in which the arbitration was held, unless the employee prevailed and the arbitrator decided to order the employer to pay the employee's share of the costs.ⁿ⁹⁶ When Adams sued the employer in state court alleging sexual harassment, retaliation, constructive discharge, intentional infliction of emotional distress, and discrimination based on sexual orientation, the employer petitioned in federal court to stay the state court proceedings and compel arbitration.

After the Supreme Court rejected the Ninth Circuit's threshold analysis of FAA coverage,ⁿ⁹⁷ the case returned to the Ninth Circuit for consideration of other issues. The Ninth Circuit held that under *Armendariz*, the arbitration agreement was unconscionable.ⁿ⁹⁸ The court found the arbitration agreement procedurally unconscionable as a contract of adhesion because it was a standard-form contract, drafted by the employer as the party with superior bargaining power. Further, the contract required the employee as the other party to either adhere to its terms without modification or reject the contract entirely.ⁿ⁹⁹ The court then found the agreement to be substantively unconscionable. The agreement unilaterally forced employees to arbitrate claims against the employer without requiring the employer to arbitrate claims against employees, limited the relief available to employees, and imposed a strict statute of limitations on arbitrating claims that would deprive employees of the benefit of the continuing violation doctrine available in FEHA suits.ⁿ¹⁰⁰ The court also took issue with the requirement that the employee split the arbitrator's fees with the employer.ⁿ¹⁰¹

On the other hand, in *Circuit City v. Ahmed*,ⁿ¹⁰² a later version of Circuit City's arbitration program was enforced. Here the arbitration agreement allowed employees to opt out of the arbitration program for a period of time after it was announced. Thus, they had a meaningful choice not to participate in the program. The Ninth Circuit found the genuine opt-out possibility to be dispositive. Because of the opt-out provision, the agreement was not procedurally unconscionable. The court found further that the arbitration agreement also lacked any other indicia of procedural unconscionability. The terms of the agreement were clearly spelled out in written materials and a videotape presentation; the employee was encouraged to contact the employer's representatives or consult an attorney prior to deciding whether to participate in the program; and he was given 30 days to decide whether to participate in the program.ⁿ¹⁰³

In *Circuit City Stores, Inc. v. Mantor*,ⁿ¹⁰⁴ the Ninth Circuit revisited the Circuit City arbitration agreement and found it unenforceable under California law of unconscionability. The court found the agreement procedurally unconscionable because, unlike the situation in *Circuit City v. Najd*,ⁿ¹⁰⁵ and *Circuit City v. Ahmed*,ⁿ¹⁰⁶ in which both Najd and Ahmed had a meaningful opportunity to opt-out of the arbitration program, the plaintiff in *Mantor* had no such meaningful opportunity.ⁿ¹⁰⁷ The court also found the agreement substantively unconscionable based on the provisions concerning the statute of limitations, class actions, cost-splitting and Circuit City's unilateral power to modify or terminate the arbitration agreement.ⁿ¹⁰⁸ The court then held that the unconscionable provisions could not be severed and the agreement was unconscionable in its entirety.ⁿ¹⁰⁹ The Ninth Circuit again considered the issue in a follow-up to *Mantor*, and held that the holding in *EEOC v. Luce, Forward, Hamilton & Scripps*,ⁿ¹¹⁰ (that the Civil Rights Act of 1991 did not preclude employers from requiring employees to arbitrate future Title VII claims as a condition of employment) did not alter the landscape of procedural unconscionability in the Ninth Circuit, and did not implicitly undermine the decision in *Mantor I*, that Circuit City's arbitration agreement was procedurally unconscionable under California law.ⁿ¹¹¹

In *Davis v. O'Melveny & Myers*,ⁿ¹¹² the Ninth Circuit held that a law firm's dispute resolution program was both procedurally and substantively unconscionable. The court found that the program was written by a sophisticated

employer, and there were no factors of adhesion, such as surprise or concealment. However, the program was "take it or leave it," with no opt-out provision, leaving an employee only the options of being subject to the program or leaving.ⁿ¹¹³ The court also found provisions of the program substantively unconscionable and not severable. A provision requiring that an employee notify the employer within one year when any claim is known to the employee or with reasonable effort should have been known was oppressive, because it shortened the time to bring employment-related statutory claims. Further, a confidentiality provision was substantively unconscionable, because it favored the employer. A non-mutual provision exempting the employer from arbitration for claims by the employer for injunctive or other equitable relief for violations of the attorney-client privilege or work product doctrine or disclosure of other confidential information also was substantively unconscionable, because it was too broad and one-sided. Finally, an all-inclusive bar to administrative actions was unconscionable as contrary to public policy. Because the program contained four substantively unconscionable or void terms, they could not be stricken or excised without gutting the agreement.ⁿ¹¹⁴

In *O'Hare v. Municipal Resource Consultants*,ⁿ¹¹⁵ an action for wrongful discharge and age discrimination in violation of FEHA,ⁿ¹¹⁶ the court found an arbitration agreement both procedurally and substantively unconscionable. The agreement was substantively unconscionable because it required the employee to arbitrate all of his claims, expressly permitted the employer to file a lawsuit seeking injunctive and equitable relief against him, and was silent about requiring the employer to arbitrate any other claim it may have had against him.ⁿ¹¹⁷ Also, the agreement was silent on the issue of the allocation of costs but explicitly incorporated the rules of the American Arbitration Association, which require the parties to equally bear the expenses of arbitration unless they agree otherwise or the arbitrator directs otherwise, and to equally bear the arbitrator's compensation unless they agree otherwise or the law provides otherwise.ⁿ¹¹⁸ The court did not reach the issue of whether the provision of the agreement denying the employee any right to discovery was unconscionable.ⁿ¹¹⁹ The court concluded that substantive unconscionability so otherwise permeated the arbitration provision that it should not be enforced.ⁿ¹²⁰ The court also found procedural unconscionability despite the lack of extrinsic evidence about the negotiations, if any, preceding the execution of the employment contract, because the contract itself created a sufficient inference of procedural unconscionability.ⁿ¹²¹

In *Little v. Auto Stiegler, Inc.*,ⁿ¹²² an employee was required to sign an arbitration agreement providing that awards exceeding \$ 50,000.00 would, at either party's written request within 20 days after issuance, be subject to reversal and remand, modification, or reduction following review of the record and arguments of the parties by a second arbitrator who must, as far as practicable, proceed according to the law and procedures applicable to appellate review by the California Court of Appeal. Following *Armendariz*, the California Supreme Court found the provision unconscionable. The Court first found procedural unconscionability because the employer had imposed an adhesive arbitration agreement on the employee.ⁿ¹²³ The Court then found substantive unconscionability because the employer, as the party imposing arbitration, mandated a post-arbitration arbitral proceeding wholly or largely to its benefit at the expense of the employee without any legitimate commercial need.ⁿ¹²⁴ The Court found the unconscionable portion severable from the agreement as a whole because there was only a single unconscionable provision (the one-sided arbitration appeal), no contract reformation was required, and there was no indication the state of the law was sufficiently clear at the time the agreement was signed to conclude that the appellate arbitration provision was drafted in bad faith.ⁿ¹²⁵

In *Ontiveros v. DHL Express (USA), Inc.*,ⁿ¹²⁶ the court found an arbitration agreement in an employment agreement unconscionable because (1) it required the employee to share the costs of the arbitration; (2) it did not provide for adequate discovery; and (3) it limited the employee's remedies and extended the employer's remedies under statute. The appellate court found first that the arbitration agreement was a contract of adhesion and therefore procedurally unconscionable. The employee denied knowing she had signed an agreement to arbitrate disputes until after she filed her lawsuit, and the undisputed circumstances in which she received and signed the arbitration agreement, including her receipt of the arbitration agreement in a one-page document in a binder file along with numerous other employment-related documents, the lack of time for any real review of the documents, and the failure of anyone to explain the significance of the agreement, supported her assertion. The court also found that the provision requiring the arbitrator to decide enforceability issues was substantively unconscionable.ⁿ¹²⁷ The court then went on to find that the

provision of the arbitration agreement that the employee and the employer would equally share filing fees and the fees and costs of the arbitrator, with certain caps on the employee's share, was unconscionable, because when an employer imposes mandatory arbitration as a condition of employment, as in *Ontiveros*, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense the employee would not be required to bear if he or she were free to bring the action in court. The cap contained in the agreement on the total amount payable by the employee was irrelevant, because the employee could not be required to pay fees unique to arbitration.ⁿ¹²⁸ The discovery provisions of the arbitration agreement were substantively unconscionable, because they improperly limited discovery in a FEHA action to the extent that they were likely to deprive the employee of adequate discovery, given that the employer was presumably in possession of the vast majority of evidence that would be relevant to employment-related claims against it.ⁿ¹²⁹ Finally, the trial court did not abuse its discretion when it refused to sever the unconscionable provisions and determined, instead, that the entire agreement is unenforceable, given the multiple unlawful provisions.ⁿ¹³⁰

In *Sanchez v. Western Pizza Enterprises, Inc.*,ⁿ¹³¹ the Court of Appeal held that an arbitration agreement was procedurally and substantively unconscionable. There was a degree of procedural unconscionability in two respects, which indicated that the employees' decision to enter into the arbitration agreement likely was not a free and informed decision but was marked by some degree of oppression and unfair surprise. First, the inequality in bargaining power between low-wage employees and their employer made it likely the employees felt at least some pressure to sign the arbitration agreement. Second, the arbitration agreement suggested there were multiple arbitrators from which to choose, but failed to mention that the designated arbitration provider included only one arbitrator, which rendered the arbitrator selection process illusory and created a significant risk that the employer, as a "repeat player" before the same arbitrator, would reap a significant advantage. Further the arbitrator selection provision was substantively unconscionable.

In *Olvera v. El Pollo Loco, Inc.*,ⁿ¹³² the court found an arbitration agreement that the employer instituted and presented to the employees was unenforceable, as it was both procedurally and substantively unconscionable. It was procedurally unconscionable in two respects. First, the inequality in bargaining power between the low-wage employees and their employer made it likely the employees felt at least some pressure to sign the acknowledgment and agree to the new dispute resolution policy, whatever they understood that policy to be. Second, the employees' agreement to be bound by the new dispute resolution policy was not an informed decision. The description provided in the explanatory materials was misleading because it described the new policy as one of required mediation rather than required arbitration. The actual new policy appeared in much smaller type than the explanatory materials, and in English only, while the misleading explanatory materials appeared in English and Spanish, which exacerbated the effect of the misrepresentation and made it more likely that the employees would be misled. In light of the totally inaccurate and misleading explanatory materials, the court concluded that the degree of procedural unconscionability was high. The court also found that a class arbitration waiver in the agreement was substantively unconscionable. The class arbitration waiver would have insulated the employer from employee class actions and class arbitrations on behalf of all of the employees who signed the acknowledgment, many of whom presumably were low-wage earners. A class action or class arbitration may be the most effective way, and perhaps the only effective way, for those employees to vindicate their statutory rights,ⁿ¹³³ particularly as many of those employees were low-wage earners with limited English language skills who were likely ill-informed of their statutory rights.ⁿ¹³⁴ Moreover, the waiver was unfairly one-sided because it benefited only the employer, which was unlikely to sue its employees in a class action lawsuit.ⁿ¹³⁵ Thus, the high degree of procedural unconscionability of the arbitration agreement as a whole, together with the substantive unconscionability of the class arbitration waiver, rendered the waiver provision unconscionable.

In *Armendariz*, the Court held that an arbitration agreement's silence on the issue of who will bear the costs of arbitration does not mean that the employee would be statutorily compelled to share the arbitration costs,ⁿ¹³⁶ and that the imposition of such costs renders the arbitration agreement unenforceable. Instead, the courts will infer from the silence an agreement that the employer bear the arbitration forum costs.ⁿ¹³⁷ In *Green Tree Financial Corp. v. Randolph*,ⁿ¹³⁸ the United States Supreme Court held that the silence of an arbitration agreement regarding the

purchase of a motor home on who would bear the costs of arbitration alone was insufficient to render the agreement unenforceable because the risk that the weaker party would be saddled with prohibitive costs was too speculative to justify invalidation of the agreement. The Court found that when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.ⁿ¹³⁹ Although *Green Tree* did not elaborate on the kinds of cost sharing arrangements that would be unenforceable, dicta in that case and several federal cases interpreting itⁿ¹⁴⁰ suggest that federal law requires only that employers not impose "prohibitively expensive" arbitration costs on the employee and that determination of whether such costs have been imposed are to be made on a case-by-case basis.ⁿ¹⁴¹ *Armendariz*, on the other hand, categorically imposes costs unique to arbitration on employers when unwaivable rights pursuant to a mandatory employment arbitration agreement are at stake.ⁿ¹⁴² In *Little*, the California Supreme Court found that *Green Tree* did not require that states comply with federal arbitration cost sharing standards, or that the FAA requires state courts to adopt precisely the same means as federal courts to ensure that the vindication of public rights will not be stymied by burdensome arbitration costs.ⁿ¹⁴³ In *Yuen v. Superior Court*,ⁿ¹⁴⁴ the court held that in arbitration proceedings governed by the Federal Arbitration Act,ⁿ¹⁴⁵ the arbitrator should decide whether the arbitration agreement permits consolidation of two arbitration proceedings.

In *McManus v. CIBC World Markets Corp.*ⁿ¹⁴⁶ the court held first that the California definition of unconscionability and the requirements of *Armendariz* were not preempted to the extent that they conflicted with the federal system of arbitration created by the SEC's adoption of form U-4 and its signature requirements and the commission's approval of the NASD and NYSE arbitration rules pursuant to its regulatory authority.ⁿ¹⁴⁷ The court then held that because the employee was bound by the offer letter and the form U-4 as a condition of employment, the arbitration agreements were adhesive and procedurally unconscionable.ⁿ¹⁴⁸ However, the court found that the agreements were not substantively unconscionable and that the trial court should grant the employer's motion to compel arbitration.ⁿ¹⁴⁹ The court found that the fee provision created a risk that the employee would be required to pay unreasonable costs at the time the employer imposed mandatory arbitration clauses as a condition of employment, and therefore it was unenforceable. However, the court found that provision severable and the remainder of the agreement enforceable. The court found that a mandatory arbitrator selection process was not unconscionable because the employee presented no evidence that the NASD or NYSE arbitration procedures would entail a "repeat player effect" and that employees were allowed to participate in the selection process. The court also found that neither the lack of a requirement that the arbitrator be a lawyer or retired judge nor the discovery procedures rendered the agreement unconscionable.

In *Kinney v. United Healthcare Services*,ⁿ¹⁵⁰ an action for sexual harassment and retaliation, the Court of Appeal used the traditional unconscionability analysisⁿ¹⁵¹ to find that the employer's agreement requiring mandatory arbitration of all disputes brought by the employee, but allowing the employer to bring suit in court, was an unconscionable adhesion contract and thus was unenforceable.ⁿ¹⁵² The court found procedural unconscionability based on the unequal bargaining powers of the parties and on the circumstances surrounding the employee's receipt of the employee handbook containing the arbitration provision, including the necessity of her immediately acknowledging receipt.ⁿ¹⁵³ The court also found that the agreement was substantively unconscionable, or "so one-sided as to 'shock' the conscience," because the arbitration obligation was unilateral.ⁿ¹⁵⁴ The court noted that unilateral limitations on the employee's discovery and damages added to the unconscionable nature of the agreement. Although the court acknowledged that there is a strong public policy favoring arbitration, it concluded that the policy is manifestly undermined by provisions in arbitration clauses, such as this one, which fail to satisfy even a "modicum of bilaterality" and "seek to make the arbitration process itself an offensive weapon in one party's arsenal."ⁿ¹⁵⁵

Similarly, another court of appeal found an agreement to arbitrate to be unconscionable because the agreement bound the employee to arbitrate all claims, but allowed the employer to go to court on its claims. Also, the agreement deprived the employee of the right to recover punitive damages, equitable relief, attorney's fees and costs, and it limited the period for bringing any action to one year.ⁿ¹⁵⁶

In *Martinez v. Master Protection Corp.*,ⁿ¹⁵⁷ the court held an arbitration agreement procedurally and substantively

unconscionable. It found the agreement procedurally unconscionable because it was an essential part of a "take it or leave it" employment condition, without more. The employee was required to execute the agreement as a prerequisite of his employment, and there was no evidence that the employee had any opportunity to negotiate or refuse to sign the arbitration agreement. The court also found the agreement substantively unconscionable because of each of the following:

- It lacked mutuality because it required employees to arbitrate claims for unpaid wages, wrongful termination, employment discrimination and the like, which employees are most likely to assert against the employer, while simultaneously permitting the employer to litigate in court the claims it is most likely to assert against its employees, i.e., claims involving trade secrets, misuse or disclosure of confidential information and unfair competition.
- It unacceptably imposed costs on the employee he would not be required to bear in a judicial forum, because it required parties to split the cost of the arbitration and to post fees in advance of the hearing.
- Its provision of a six-month statute of limitations unlawfully restricted the employee's ability to vindicate his civil and statutory rights, because it required assertion of all statutory and common law claims covered by the agreement within six months of the date the claim arose, and deemed the claim void and waived if the party asserting the claim failed to do so, even if there was a federal or state statute of limitations that would have given more time to pursue the claim.

Since the unconscionable provisions could not be severed from the agreement, the court found the agreement unconscionable and unenforceable.ⁿ¹⁵⁸

Similarly, in *Fitz v. NCR Corp.*,ⁿ¹⁵⁹ the court found provisions of an arbitration agreement procedurally and substantively unconscionable and concluded that the unconscionable provisions could not be severed. The court found the agreement procedurally unconscionable because the employer's arbitration policy was presented in a take it or leave it manner, presenting a high degree of oppressiveness. The court found the agreement substantively unconscionable because the arbitration policy compelled arbitration of claims more likely to be brought by the employee, the weaker party, but exempted from arbitration the types of claims more likely to be brought by the employer, the stronger party.

By contrast, in *24 Hour Fitness v. Superior Court*,ⁿ¹⁶⁰ the employer presented an arbitration agreement to an employee on a take-it-or-leave-it basis. But the agreement was enforced because there was no proof of substantive unconscionability. The arbitration clause here applied equally to the employer and to the employee; it allowed both parties substantially the same array of discovery procedures available in civil actions; and did not create an imbalance in remedies potentially available to either side.ⁿ¹⁶¹ The plaintiff offered alternative grounds to void the arbitration agreement, including lack of mutuality and illusoriness. The court rejected these claims as well. The court said that employer's power to amend the contract did not render it illusory, because written notice was required to amend, and the provision would be construed to require the employer to exercise the right fairly and in good faith.ⁿ¹⁶²

Similarly, in *Roman v. Superior Court*,^{n162.1} the arbitration agreement was enforceable even though it was part of a contract of adhesion that consisted of a preprinted employment application form prepared by the employer and presented to the applicant on a take-it-or-leave-it basis with no opportunity to negotiate. Any procedural unfairness inherent in an adhesion agreement in the employment context was limited. The arbitration provision was not buried in a lengthy employment agreement. Rather, it was contained on the last page of a seven-page employment application, underneath the heading "Please Read Carefully, Initial Each Paragraph and Sign Below." It was set forth in a separate, succinct (four-sentence) paragraph that the applicant initialed, affirming she had seen it. Whatever measure of procedural unconscionability may have been present in a case involving an adhesive employment agreement between parties with unequal bargaining power, procedural unconscionability alone did not render the agreement unenforceable. There was no substantive unconscionability, because the "I agree" language in an agreement providing that "all

disputes" arising out of employment "will be submitted to binding arbitration," did not make the arbitration provision unilateral, and the agreement was bilateral. Further, the arbitration agreement did not limit the employee's statutory FEHA rights or impose an undue limitation on discovery. In *Armendariz*, the Supreme Court rejected an employee's similar claim that a purportedly inadequate provision for discovery in an arbitration agreement was a proper ground for denying arbitration of FEHA claims. In *Roman*, the AAA's employment dispute rules applicable to the arbitration proceeding expressly authorized the arbitrator to order "such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration." There appeared to be no meaningful difference between the scope of discovery approved in *Armendariz* and that authorized by the AAA employment dispute rules, certainly not the role of the arbitrator in controlling the extent of actual discovery permitted. Requiring the employee to arbitrate "all disputes" not resolved internally did not prevent her from asserting administrative claims with the DFEH and the California Labor Commissioner. Finally, although the arbitration agreement itself did not mention costs, at the time the agreement was signed, the AAA rules, incorporated by reference into the agreement, provided the costs of the arbitration would be divided equally among the parties. Even if the 1997 AAA cost provisions governed and the cost-splitting provision was substantively unconscionable, it did not provide a basis to void the arbitration agreement. The court, in its discretion, could refuse to enforce the contract as a whole if it is permeated by the unconscionability, it could strike any single clause or group of clauses that were so tainted or were contrary to the essential purpose of the agreement, or it could simply limit unconscionable clauses so as to avoid unconscionable results. In *Armendariz*, the court found two factors weighed against severance of the unlawful provisions. First, the arbitration provision contained "more than one unlawful provision," suggesting a "systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage." Second, the agreement's lack of mutuality permeated the entire agreement, requiring not just severance of the provision, but a reformation and augmentation of the agreement. Neither factor was present in *Roman*, and the interests of justice were furthered by severance of the cost provision, which, if it was unconscionable, was plainly "collateral to the main purpose of the contract."

■ PRACTICE TIP--EMPLOYEE'S PERSPECTIVE:

While courts continue to wrestle with difficult questions presented by employers' use of mandatory, pre-dispute agreements requiring arbitration of statutory claims as a condition of employment, plaintiffs' counsel should scrutinize them carefully. If an agreement unreasonably "stacks the deck" in favor of the employer, it may well not have the intended binding effect on the employee. Thus, if the employer has access to a judicial forum but the employee doesn't, or if the "arbitration" is really no more than summary review of the dispute in a forum controlled by the employer and the employee is forced to pay any portion of the forum fees, or if the agreement is otherwise overreaching and arguably unconscionable, careful consideration should be given to filing the claim in state court. Under these circumstances it may well be advisable also to include a claim for a declaration that the arbitration agreement--which the employer will undoubtedly assert as a defense--is unenforceable. *Commentary by John M. True, III.*

In *Nyulassy v. Lockheed Martin Corp.*, n163 the court applied *Armendariz* to a post-employment arbitration agreement. The employee had been employed by the employer's predecessor. The employee and the employer's predecessor entered into an agreement to settle a wrongful termination action, which included a new employment agreement containing entered into by the parties at the time of the settlement, which included a mandatory arbitration provision. The employee later sued the employer alleging demotion in retaliation for protected workplace activity. The employer moved to compel arbitration and stay all proceedings, based on the mandatory arbitration clause in the employment agreement. The trial court denied arbitration on the ground that the arbitration agreement was unconscionable. The Court of Appeal agreed with the trial court that the agreement was substantively unconscionable, because it unilaterally required the employee only to arbitrate his employment claims, and the parties' agreement to arbitrate disputes concerning the validity, interpretation, or enforcement of the settlement agreement did not infuse an element of bilaterality into the employment agreement. The arbitration agreement also required the employee to submit to discussions with his supervisors in advance of, and as a condition precedent to, having his dispute resolved through binding arbitration, which suggested that the employer would receive a free peek at plaintiff's case, thereby obtaining an

advantage if and when plaintiff were to later demand arbitration. Finally, the unilateral arbitration clause limited the time the employee had to assert a claim to a maximum of 180 days of the date of his employment termination or another dispute or controversy first arose, shortened, in some instances, from the time for filing a legal action by a period of more than three and one-half years.ⁿ¹⁶⁴ The arbitration agreement was not procedurally unconscionable due to surprise, because the employee was represented by an attorney at the time he executed the settlement agreement and employment agreement. The court then rejected the contention that, as a general proposition, *Armendariz* expressly excepted the circumstance in which an employer and employee entered into a binding arbitration agreement after a dispute had arisen, *i.e.*, "postdispute." Further, although the settlement agreement including the arbitration provisions was a postdispute agreement, the employment agreement was not because it contemplated that the parties were starting a new employer-employee relationship with specific terms. But the court ultimately found the arbitration agreement procedurally unconscionable because, although the employee was represented by an attorney and did negotiate a "good cause" termination provision, there was oppression in the mandatory employment arbitration agreement.ⁿ¹⁶⁵ Finally, the court found that the unconscionable provisions were not severable.ⁿ¹⁶⁶

[f] Whether a Contract Is Formed

A final attack on arbitration agreements focuses more generally on whether a contract has been formed in the first instance. To be enforceable, the employee must assent to the arbitration agreement. In *Romo v. Y-3 Holdings, Inc.*,ⁿ¹⁶⁷ the employee had signed an acknowledgment of receipt of the employee handbook, which contained an arbitration agreement. However, the arbitration agreement contained separate lines for signature by the employee and employer, neither of which had been signed. The court held that the employee's signature on the acknowledgment did not bind her to the terms of arbitration contained within the handbook, since the arbitration agreement was severable from the employee's agreement to be bound by the benefits, policies, rules and procedures in the remaining sections of the handbook.ⁿ¹⁶⁸ Similarly, in *Mitri v. Arnel Management Co.*,ⁿ¹⁶⁹ the employee handbook stated that all employees were required to sign an arbitration agreement as a condition of employment. Two employees who sued their employer on sexual discrimination, harassment and related claims signed acknowledgments of receiving the handbook, but the employer did not produce separate arbitration agreements signed by the employees. The Court of Appeal held that the documents prepared by the employer, which were the employee handbook and the signed acknowledgments of receipt, failed to show an express bilateral contract was entered into through which the parties agreed to arbitrate. The employee handbook's arbitration provision only placed the employees on notice that they would be called upon to sign a separate binding arbitration agreement; thus, the provision in the handbook and subsequent performance did not constitute a unilateral contract of binding arbitration. The acknowledgment receipt forms signed by each employee did not constitute evidence of each employee's acquiescence to the arbitration agreement provision in the employee handbook, because there was no reference in the acknowledgment receipt form to an agreement by the employee to abide by the arbitration agreement provision in the handbook.

On the other hand, the Ninth Circuit has held that the employee need not have signed an agreement to arbitrate; a provision in a written employment manual is sufficient if sufficiently accepted or ratified by the employee.ⁿ¹⁷⁰

In *Metters v. Ralphs Grocery Co.*,ⁿ¹⁷¹ even though the employee had signed a dispute resolution form entitled "Notice of Dispute & Request for Resolution," the court would not compel arbitration of his racial discrimination and harassment complaints, on the grounds that a contract had not been formed. The dispute resolution form did not look like a contract and did not alert the employee that he was agreeing to binding arbitration. The arbitration provisions of the form were confusing and full of legalistic references to an unattached policy, which the form explained applied to "covered disputes," but failed to define those disputes. It further explained that "covered disputes" would be resolved through "voluntary mediation and/or mandatory final and binding arbitration" if not resolved by informal means. Under the policy, the employee had no real choice to avoid arbitration if he wanted the employer to take action on his complaint. However, because the complaint was for discrimination under the FEHA, the employer's duty to investigate promptly was affirmative and mandatory, not dependent on whether the employee agreed to arbitration.ⁿ¹⁷²

In *Circuit City Stores, Inc. v. Nadj*, n173 the employee claimed that a dispute resolution agreement mandating arbitration of employment disputes was not a valid contract because he never assented to it and it lacked consideration. The court found that although the employer was not required to submit any of its claims against employees to arbitration, the employer's promise to submit to arbitration and to forego the option of a judicial forum for a specified class of claims constituted sufficient consideration. As to the employee's assent, the court found that the circumstances permitted an inference that the employee assented by failing to exercise his right to opt out of the program. This was further supported by the employee's signed acknowledgment of receipt of the agreement, which clearly stated the significance of his failure to opt out and described in detail the mechanism by which he could express his disagreement. The explicit opportunity to review the agreement with an attorney highlighted the legal effect of the agreement. The employer communicated in detail and in writing the effect of the employee's acceptance on his right to bring claims against his employer. The employer made clear that opting out of the agreement would have no effect on the employment relationship. Finally, the employee had thirty days to review the agreement and mull over whether to opt out of it. Thus, inaction was indistinguishable from overt acceptance.n174

[g] Waiver

[i] Waiver of Arbitration

Even when an enforceable agreement exists, prudent counsel will promptly assert arbitrability in order to guard against a finding of waiver. In *Davis v. Continental Airlines, Inc.*, n175 a sexual harassment case brought under the California Fair Employment and Housing Act, the court declined to compel arbitration pursuant to the employer's internal grievance procedure. In the trial court, the defendants argued that the plaintiff was required to resolve her dispute by following the steps in a company appeal procedure specified in an employee handbook. The trial court denied defendants' motion to compel arbitration on the alternative grounds that: (1) The employee handbook did not set forth a mandatory agreed procedure as an alternative to court litigation, and (2) the defendants waived any right to compel arbitration by unreasonably delaying their motion until after obtaining extensive discovery from the plaintiff. The court of appeal affirmed on the ground of waiver, and did not reach the issues of whether the employee handbook set forth a binding agreement to arbitrate.n176 Noting that no single test exists to determine waiver of the right to compel arbitration, the court concluded that waiver may be found when the party seeking arbitration has done any of the following:n177

- (1) Previously taken steps inconsistent with an intent to invoke arbitration;
- (2) Unreasonably delayed in seeking arbitration; or
- (3) Acted in bad faith or with willful misconduct.

The *Davis* court also summarized the applicable standard of review. Despite the heavy burden of proof on the party arguing waiver (which should not lightly be inferred given the public policy favoring arbitration), a trial court's determination that the right to compel arbitration has been waived ordinarily involves a question of fact, which is binding on the appellate court if supported by substantial evidence. An appellate court may not reverse a trial court's finding of waiver unless the record as a matter of law compels a finding of nonwaiver.n178 The court concluded that the trial court could reasonably infer that defendants had unreasonably delayed their motion to compel arbitration in order to take advantage of court discovery procedures to learn plaintiff's strategies, evidence, and witnesses and to limit the plaintiff to a particular version of the facts. Conflicting inferences are for the trial court to resolve, and in this case the record supported the trial court's implicit rejection of defense counsel's claim that the bulk of discovery was conducted to ascertain the plaintiff's knowledge of the arbitration procedure.n179

In *Ferguson v. Countrywide Credit Industries, Inc.*, n180 following *Armendariz*, the Ninth Circuit held an arbitration agreement unconscionable under California law. The court first found procedural unconscionability because the

arbitration agreement was imposed as a condition of employment, was non-negotiable, and placed the employee in a position of unequal bargaining power.¹⁸¹ The court then found substantive unconscionability because the agreement compelled arbitration of the claims employees are most likely to bring against the employer, but exempted from arbitration the claims the employer was most likely to bring against its employees. The agreement imposed multiple fees on the employee, meaning that arbitration would cost the employee thousands of dollars, and it required a split of the arbitrator's fees. Also, the employer failed to effectively modify the arbitration agreement to include a revised fee scheme. And although the discovery provisions, alone, were not unconscionable, in the context of an agreement unduly favoring the employer at every turn, their inclusion reaffirmed the court's belief that the agreement as a whole was substantively unconscionable.¹⁸² The court concluded that the lack of mutuality regarding the types of claims requiring arbitration, the fee provisions, and the discovery provisions so permeated the arbitration agreement and so "tilt[ed] the playing field" that the court could not sever its offending provisions.¹⁸³

The California Supreme Court has set forth the factors to be considered under California law to determine whether arbitration has been waived:¹⁸⁴

- Whether the party's actions are inconsistent with the right to arbitrate.
- Whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate.
- Whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay.
- Whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings.
- Whether important intervening steps, such as taking advantage of judicial discovery procedures not available in arbitration, had taken place.
- Whether the delay affected, misled, or prejudiced the opposing party.

While an employee's failure properly to initiate arbitration under the AAA rules may make it more difficult for the employee to establish waiver, it does not foreclose the assertion by the employee, as it does in the assertion of breach of the agreement as a defense to mandatory arbitration.¹⁸⁵ Waiver focuses on the actions of the party charged with waiver. The employee's conduct may bear upon the factors listed above, but a fact finder could reasonably determine that the employer waived its right independently of whether the employee perfected a request for arbitration.¹⁸⁶

Waiver is an equitable doctrine, and courts can apply it to redress injustice when technical requirements prevent the court from otherwise providing adequate legal remedies.¹⁸⁷ In federal courts, any examination of whether the right to compel arbitration has been waived must be conducted in light of the strong federal policy favoring enforcement of arbitration agreements.¹⁸⁸

In a non-employment case, the court held that a party who enters into a pre-dispute agreement to arbitrate does not waive the right to resort to arbitration merely because the party first attempts to air the grievance in court. At most, such an effort might lead to a waiver of that party's right to thereafter enforce the arbitration agreement against an unwilling opposing party.¹⁸⁹

[ii] Waiver of Class Arbitration

A class action waiver in an arbitration agreement may be unconscionable. For example, in *Murphy v. Check 'N Go of*

California, Inc.,ⁿ¹⁹⁰ a former employee brought a class action against the employer for alleged misclassification of salaried retail employers as exempt. The employer moved to compel arbitration under the employer's dispute resolution agreement, which every employee was required to sign, which contained a provision that no covered claim could be arbitrated as a class action, and which did not exclude wage and hour claims from coverage. The court of appeal first found that a court, rather than an arbitrator, could decide whether the agreement was unconscionable.ⁿ¹⁹¹ The court then held that the class action waiver was unconscionable. The plaintiff made the factual showing articulated in *Gentry v. Superior Court*,ⁿ¹⁹² of the real world obstacles to the vindication of class members' rights to overtime pay through individual arbitration, including the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill-informed about their rights, and that the waiver was patently one-sided.ⁿ¹⁹³ Because at least two aspects of the arbitration agreement are unconscionable, *i.e.*, the provision for arbitrator determinations of unconscionability issues and the class action waiver, the trial court did not abuse its discretion in concluding that the arbitration agreement was permeated by an unlawful purpose and that the agreement as a whole should not be enforced.ⁿ¹⁹⁴

[h] Judicial Review

The scope of judicial review of arbitration agreements is extremely narrow.ⁿ¹⁹⁵ Whether the parties can create a "designer" standard contemplating greater appellate review is unresolved. Although the Ninth Circuit has held that the parties could do so, as long as a well-understood and well-accepted standard is chosen,ⁿ¹⁹⁶ one California court of appeal has held otherwise.ⁿ¹⁹⁷

California courts have consistently held that the decisions of arbitrators are not generally reviewable for errors of fact or law. Courts will not review the validity of the arbitrator's reasoning or the sufficiency of the evidence supporting the arbitrator's award.ⁿ¹⁹⁸ Further, an arbitrator's decision is not reviewable even when the arbitration agreement constrains the arbitrator to decide according to the rule of law.ⁿ¹⁹⁹ Thus, the parties to an arbitration agreement cannot render an arbitrator's decision reviewable for errors of law merely by providing in the agreement that the arbitrator must apply California law. Instead, the parties may obtain court review of the merits of the arbitrator's decision only if the arbitration agreement expressly provides that the arbitrator's errors of law are reviewable in court.ⁿ²⁰⁰

In keeping with California's strong public policy favoring arbitration, it is appropriate to give collateral estoppel effect to findings made during an arbitration, provided that the arbitration had the elements of an adjudicatory procedure and that the customary elements required for the application of the doctrine of collateral estoppel are met.ⁿ²⁰¹

[i] [Reserved]

[j] Nonsignatory to Arbitration Agreement

The federal courts have identified five theories pursuant to which an arbitration agreement can be enforced by or against a nonsignatory as limited exceptions to the general rule under the Federal Arbitration Act (that arbitration is a contractual right available only to signatories to the agreement):ⁿ²⁰²

- 1) Incorporation by reference;
- 2) Assumption;
- 3) Agency;
- 4) Veil-piercing/alter ego;
- 5) Estoppel.

In *Alliance Title Co. v. Boucher*, n203 a California court of appeal considered whether equitable estoppel applied to compel a former employee to arbitrate employment-related claims against a nonsignatory to his arbitration agreement. After the employee was hired and had executed the arbitration agreement, the employer transferred its operations and assets to another corporate entity with which it shared a common parent. Under both federal and California decisional authority, a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are intimately founded in and intertwined with the underlying contract obligations.n204 By relying on contract terms in a claim against a nonsignatory defendant, even if not exclusively, a plaintiff may be equitably estopped from repudiating the arbitration clause contained in that agreement. The focus is on the nature of the claims asserted by the plaintiff against the nonsignatory defendant. That the claims are cast in tort rather than contract does not enable a plaintiff to avoid the arbitration clause. In *Alliance Title*, the former employee's claims against the nonsignatory defendant relied on, made reference to, and presumed the existence of the employment agreement with the former employer, so that the former employee was equitably estopped from avoiding arbitration of his causes of action against the nonsignatory defendant.

On the other hand, in *Matthau v. Superior Court*, n205 an arbitration agreement in a talent agency's contracts with a deceased actor was found not to be enforceable against either the actor's son or a loan out company, neither of whom were signatories. The contracts, which contained an arbitration clause, provided that the talent agency would receive commissions on all compensation received by the actor under motion picture employment contracts negotiated or procured by the agency, including compensation received through "loan out" companies through which the actor rendered acting services. After the actor's death, the son succeeded to the actor's rights and ceased to pay the commission. The talent agency sought specific performance of the agreement to arbitrate. The court found the arbitration agreement unenforceable as against the son and the loan out company, because they were not parties to any agreement with the talent agency, and none of the circumstances in which a nonsignatory could be bound by another person's agreement to arbitrate existed.n206

[k] Sovereign Immunity

Indian tribes are entitled to claim sovereign immunity as a defense to legal actions against them. As a matter of federal law, an Indian tribe is subject to suit only when Congress has authorized the suit or the tribe has waived its immunity.n207 This immunity extends to a tribe's commercial activities,n208 including its employment relationships.n209 Sovereign immunity may not be waived by implication.n210

When a tribe consents to arbitration it makes a limited waiver of its sovereign immunity.n211 A waiver is ineffective if the person purportedly waiving immunity lacks authority to do so.n212 However, an otherwise ineffective waiver may become binding if it is later ratified by the tribe's governing body.n213

In *Big Valley Band of Pomo Indians v. Superior Court*,n214 employees who had been terminated from employment at a casino operated by an Indian tribe sued the tribe for breach of contract. The contracts included an arbitration clause. The complaint adequately alleged that the tribe waived sovereign immunity by ratifying each contract,n215 but the court held the waiver to be limited to a petition to compel arbitration or to enforce an arbitration award, thus requiring that the breach of contract action be dismissed.n216

[l] Effect of Anti-SLAPP Statute

Code of Civil Procedure section 425.16, commonly known as the anti-SLAPP statute, provides for a special motion to strike a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech (under the United States or California Constitution) in connection with a public issue. In connection with arbitration claims, a special motion to strike under section 425.16 is not authorized for an arbitration claim filed only in an agreed arbitral forum and not asserted by the claimant in a complaint, cross-complaint or petition

filed in court.ⁿ²¹⁷

[2] Effect on EEOC

In *EEOC v. Waffle House, Inc.*,ⁿ²¹⁸ the employee had signed an employment agreement providing for arbitration of employment-related disputes. He was later discharged after suffering a seizure at work. Although he did not initiate arbitration proceedings, he did file a timely discrimination charge with the EEOC alleging that his discharge violated the ADA. The EEOC then filed an enforcement action against the employer in federal court, to which the employee was not a party, requesting injunctive relief, specific relief designed to make the employee whole, including back pay, reinstatement, and compensatory damages, and punitive damages for malicious and reckless conduct.ⁿ²¹⁹ The employer petitioned to stay the EEOC action and compel arbitration. The Fourth Circuit held that the arbitration agreement did not foreclose the enforcement action because the EEOC was not a party to the contract, but that the EEOC was precluded from seeking victim-specific relief in court because the policy goals expressed in the FAA required giving some effect to the arbitration agreement.

The Supreme Court, however, held that the agreement did not bar the EEOC from pursuing victim-specific judicial relief in an enforcement action under ADA.ⁿ²²⁰ The Court found that following the 1991 amendments to Title VII,ⁿ²²¹ the EEOC has authority to bring suit to enjoin an employer from engaging in unlawful employment practices, and to pursue reinstatement, back pay, and compensatory or punitive damages. Neither Title VII, nor the ADA, nor case law suggests that the existence of an arbitration agreement between private parties materially changes the EEOC's statutory function or the remedies otherwise available.ⁿ²²² Further, because the EEOC was not a party to the contract and did not agree to arbitrate its claims, the Federal Arbitration Act's pro-arbitration policy goals could not require the agency to relinquish its statutory authority to pursue victim-specific relief, regardless of the forum that the employer and employee have chosen to resolve their disputes.ⁿ²²³

Legal Topics:

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

Contracts Law Contract Conditions & Provisions Arbitration Clauses Labor & Employment Law Collective Bargaining & Labor Relations Arbitration General Overview

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 27-32, (ADEA); *Mago v. Shearson Lehman Hutton, Inc.* (9th Cir. 1992) 956 F.2d 932, 935 (Title VII); *Spellman v. Securities, Annuities & Ins. Servs., Inc.* (1992) 8 Cal. App. 4th 452, 460-463, 10 Cal. Rptr. 2d 427 (FEHA); *Hall v. Nomura Sec. International* (1990) 219 Cal. App. 3d 43, 48-51, 268 Cal. Rptr. 45 (FEHA and common-law wrongful termination).

(n2)Footnote 2. *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26, (ADEA).

(n3)Footnote 3. See *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 27-32, 111 S. Ct. 1647, 114 L. Ed. 2d 26, (ADEA).

(n4)Footnote 4. See 42 U.S.C. § 12212 (Americans With Disabilities Act ("ADA")); Pub. L. No. 102-166, § 118 (Civil Rights Act of 1991, which applies to Title VII, ADA, ADEA, and 42 U.S.C. § 1981).

(n5)Footnote 5. See *Rodriguez de Quijas v. Shearson/American Express* (1989) 490 U.S. 477, 483, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (Securities Act of 1933, 15 U.S.C. § 77a et seq.); *Shearson/American Express, Inc. v. McMahon* (1987) 482 U.S. 220, 226-227, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (Securities Exchange Act, 15 U.S.C. § 78j(b); Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq.); *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 625-626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (Sherman Act, 15 U.S.C. § 1

et seq.).

(n6)Footnote 6. 29 U.S.C. § 621 *et seq.*; for discussion of the ADEA generally, *see* §§ 40.21, 41.31, 43.11.

(n7)Footnote 7. *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 27-29, 111 S. Ct. 1647, 114 L. Ed. 2d 26 .

(n8)Footnote 8. *See* 29 U.S.C. § 626(b) (conciliation, conference, and persuasion); *see also* discussion in § 40.21[2] and ch. 42, pt. C.

(n9)Footnote 9. *See e.g., Barrentine v. Arkansas-Best Freight Sys.* (1981) 450 U.S. 728, 736, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (FLSA civil action not waived by prior unsuccessful arbitration of wage claim); *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 47, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (Title VII civil action not foreclosed by prior submission of race discrimination claim to final arbitration under collective bargaining agreement nondiscrimination clause). For discussion of the effect of collective bargaining agreement arbitration provisions on equal employment opportunity laws, *see* § 90.10.

(n10)Footnote 10. *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 32, 111 S. Ct. 1647, 114 L. Ed. 2d 26 ; *see Wright v. Universal Maritime Serv. Corp.* (1998) 525 U.S. 70, 80, 119 S. Ct. 391, 397, 142 L. Ed. 2d 361 (assuming without deciding that pre-dispute agreement in CBA to arbitrate statutory employment discrimination claims is enforceable, waiver must be clear and unmistakable).

(n11)Footnote 11. 9 U.S.C. § 1 *et seq.*; *see* § 90.01.

(n12)Footnote 12. *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (quoting *Mitsubishi Motors v. Soler Chrysler-Plymouth* (1985) 473 U.S. 614, 625, 105 S. Ct. 3346, 87 L. Ed. 2d 444); *see Morris, Arbitration After Gilmer*, 38 *Prac. Law.* 71 (June, 1992).

(n13)Footnote 13. *Craft v. Campbell Soup Co.* (9th Cir. 1999) 177 F.3d 1083, 1090 .

(n14)Footnote 14. *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 , discussed in § 90.01.

(n15)Footnote 15. *Duffield v. Robertson Stephens & Co.* (9th Cir. 1998) 144 F.3d 1182 .

(n16)Footnote 16. *Duffield v. Robertson Stephens & Co.* (9th Cir. 1998) 144 F.3d 1182, 1189-1199 (because every securities industry employer requires employees to sign Form U-4, form is especially violative of Congress' limitations).

(n17)Footnote 17. *Duffield v. Robertson Stephens & Co.* (9th Cir. 1998) 144 F.3d 1182, 1191-1197 (court did not reach issues such as whether agreement to arbitrate was knowing, whether arbitration process is adequate to vindicate Title VII rights, and whether Form U-4 is unconscionable); *compare Rosenberg v. Merrill Lynch (D. Mass. 1998)* 995 F. Supp. 190, 203 (1991 Act precludes compulsory arbitration of Title VII claims under Form U-4) *with Johnson v. Hubbard Broad, Inc. (D. Minn. 1996)* 940 F. Supp. 1447, 1457-1458 (reaching opposite conclusion despite noting indications to contrary in Act's legislative history) *and EEOC v. Frank's Nursery & Crafts, Inc. (E.D. Mich. 1997)* 966 F. Supp. 500, 504 (compulsory arbitration of Title VII claims, notwithstanding 1991 Act's legislative history, does not violate federal law or policy).

(n18)Footnote 18. *Duffield v. Robertson Stephens & Co.* (9th Cir. 1998) 144 F.3d 1182, 1203 .

(n19)Footnote 19. *Circuit City Stores, Inc. v. Najd* (9th Cir. 2002) 294 F.3d 1104 .

(n20)Footnote 20. *Circuit City Stores, Inc. v. Najd* (9th Cir. 2002) 294 F.3d 1104, 1107 .

(n21)Footnote 21. *Equal Employment Opportunity Commission v. Luce, Forward, Hamilton & Scripps* (9th Cir. 2003) 345 F.3d 742, 746-753 .

(n22)Footnote 22. *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 .

(n23)Footnote 23. See, e.g. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1st Cir. 1999) 170 F.3d 1, 10-11 ; *Desiderio v. NASD* (2d Cir. 1999) 191 F.3d 198, 205 ; *Seus v. John Nuveen & Co.* (3d Cir. 1998) 146 F.3d 175, 183 ; *Hooters of Am., Inc. v. Phillips* (4th Cir. 1999) 173 F.3d 933, 937 ; *Mouton v. Metropolitan Life Ins. Co.* (5th Cir. 1998) 147 F.3d 453, 455 ; *Alford v. Dean Witter Reynolds, Inc.* (5th Cir. 1991) 939 F.2d 229, 230 ; *Koveleskie v. SBC Capital Mkts., Inc.* (7th Cir. 1999) 167 F.3d 361, 365 ; *Patterson v. Tenet Healthcare, Inc.* (8th Cir. 1997) 113 F.3d 832, 837 ; *Todd-Watkins v. Continental Airlines, Inc.* (9th Cir. 1999) 1999 U.S. App. LEXIS 2627 *2, n.1 ; *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (10th Cir. 1994) 39 F.3d 1482, 1487 ; *Weeks v. Harden Mfg. Corp.* (11th Cir. 2002) 291 F.3d 1307, 1315-1316 ; *Bender v. A.G. Edwards & Sons, Inc.* (11th Cir. 1992) 971 F.2d 698, 699 (per curiam); *Borg-Warner Protective Servs. Corp. v. EEOC* (D.C. Cir. 2001) 245 F.3d 831, 835 . See also *Farac v. Permanente Med. Group* (N.D. Cal. 2002) 186 F. Supp. 2d 1042, 1045 ; *Scott v. Burns Int'l Sec. Servs., Inc.* (D. Hawaii 2001) 165 F. Supp. 2d 1133, 1137-1138 .

(n24)Footnote 24. *Equal Employment Opportunity Commission v. Luce, Forward, Hamilton & Scripps* (9th Cir. 2003) 345 F.3d 742, 750 . See also *Desiderio v. NASD* (2d Cir. 1999) 191 F.3d 198, 205 ; *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1st Cir. 1999) 170 F.3d 1, 11 .

(n25)Footnote 25. *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal. App. 4th 1199, 78 Cal. Rptr. 2d 533 .

(n26)Footnote 26. *Brookwood v. Bank of America* (1996) 45 Cal. App. 4th 1667, 53 Cal. Rptr. 2d 515 .

(n27)Footnote 27. *Spellman v. Securities, Annuities & Ins. Services* (1992) 8 Cal. App. 4th 452, 10 Cal. Rptr. 2d 427 .

(n28)Footnote 28. *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal. App. 4th 1199, 1210 n.9, 78 Cal. Rptr. 2d 533 .

(n29)Footnote 29. *Armendariz v. Foundation Health Psychcare Servs.* (2000) 24 Cal. 4th 83, 95, 99 Cal. Rptr. 2d 745 .

(n30)Footnote 30. See *Farac v. Permanente Med. Group*, (N.D. Cal. 2002) 186 F. Supp. 2d 1042, 1045 ("Two California district court opinions have concluded that *Circuit City* overruled *Duffield* This Court agrees") (citation omitted); *Eftekhari v. Peregrine Financials & Securities, Inc.* (N.D. Cal. 2001) 2001 U.S. Dist. LEXIS 16087, *25 ("Under the decision in *Circuit City*, because he agreed to arbitrate, plaintiff is compelled to arbitrate not only the attachment action but also his Title VII employment discrimination claim"); *Olivares v. Hispanic Broadcasting Corp.*, (C.D. Cal. 2001) 2001 U.S. Dist. LEXIS 5760 *2 ("Therefore, in light of the Supreme Court's pronouncement in *Circuit City*, the Ninth Circuit's decision in *Duffield* should not preclude arbitration of Plaintiffs FEHA or CFRA claims"). For discussion of *Circuit City*, see § 90.01.

(n31)Footnote 31. *Prudential Ins. Co. of Am. v. Lai* (9th Cir. 1994) 42 F.3d 1299 , cert. denied, 516 U.S. 812 (1995) .

(n32)Footnote 32. *Prudential Ins. Co. of Am. v. Lai* (9th Cir. 1994) 42 F.3d 1299, 1304 , cert. denied, 516 U.S. 812 (1995) .

(n33)Footnote 33. *Prudential Ins. Co. of Am. v. Lai* (9th Cir. 1994) 42 F.3d 1299, 1304 , cert. denied, 516 U.S. 812 (1995) .

(n34)Footnote 34. *See* Pub. L. No. 102-166, § 118.

(n35)Footnote 35. *Prudential Ins. Co. of Am. v. Lai* (9th Cir. 1994) 42 F.3d 1299, 1304 , cert. denied, 516 U.S. 812 (1995) .

(n36)Footnote 36. *Renteria v. Prudential Ins. Co. of Am.* (9th Cir. 1997) 113 F.3d 1104 .

(n37)Footnote 37. *Renteria v. Prudential Ins. Co. of Am.* (9th Cir. 1997) 113 F.3d 1104, 1106-1107 .

(n38)Footnote 38. *See Renteria v. Prudential Ins. Co. of Am.* (9th Cir. 1997) 113 F.3d 1104, 1106-1107 .

(n39)Footnote 39. *Kuehner v. Dickinson & Co.* (9th Cir. 1996) 84 F.3d 316 .

(n40)Footnote 40. *See Kuehner v. Dickinson & Co.* (9th Cir. 1996) 84 F.3d 316, 319 .

(n41)Footnote 41. *See Kuehner v. Dickinson & Co.* (9th Cir. 1996) 84 F.3d 316, 320 .

(n42)Footnote 42. *Golenia v. Bob Baker Toyota* (S.D. Cal. 1996) 915 F. Supp. 201 .

(n43)Footnote 43. *See Golenia v. Bob Baker Toyota* (S.D. Cal. 1996) 915 F. Supp. 201, 202 .

(n44)Footnote 44. *See Golenia v. Bob Baker Toyota* (S.D. Cal. 1996) 915 F. Supp. 201, 205 .

(n45)Footnote 45. *See Golenia v. Bob Baker Toyota* (S.D. Cal. 1996) 915 F. Supp. 201, 205 .

(n46)Footnote 46. *Nelson v. Cyprus Bagdad Copper Corp.* (9th Cir. 1997) 119 F.3d 756 .

(n47)Footnote 47. *Nelson v. Cyprus Bagdad Copper Corp.* (9th Cir. 1997) 119 F.3d 756, 760-762 (unilateral promulgation by employer of arbitration provisions in employee handbook does not constitute knowing agreement to waive right to judicial determination of ADA claims despite employee's signing acknowledgment of receipt of handbook).

(n48)Footnote 48. *Kummetz v. Tech Mold, Inc.* (9th Cir. 1998) 152 F.3d 1153 .

(n49)Footnote 49. *Kummetz v. Tech Mold, Inc.* (9th Cir. 1998) 152 F.3d 1153, 1155 .

(n50)Footnote 50. *Kummetz v. Tech Mold, Inc.* (9th Cir. 1998) 152 F.3d 1153, 1155 (fact that acknowledgment stated that employee had read and agreed to contents of booklet insufficient because acknowledgment contained no explicit reference to arbitration or waiver of right to sue); *compare Patterson v. Tenet Healthcare, Inc.* (8th Cir. 1997) 113 F.3d 832, 835 (arbitration clause on separate page in handbook effective because employee had been required to remove that page from handbook and sign and return it to employer).

(n51)Footnote 51. *Spellman v. Securities, Annuities & Ins. Services, Inc.* (1992) 8 Cal. App. 4th 452, 10 Cal. Rptr. 2d 427 .

(n52)Footnote 52. *Spellman v. Securities, Annuities & Ins. Services, Inc.* (1992) 8 Cal. App. 4th 452, 460-463, 10 Cal. Rptr. 2d 427 .

(n53)Footnote 53. *Spellman v. Securities, Annuities & Ins. Services, Inc.* (1992) 8 Cal. App. 4th 452, 460, 10 Cal. Rptr. 2d 427 ; *see Cione v. Foresters Equity Servs., Inc.* (1997) 58 Cal. App. 4th 625, 639-643, 68 Cal. Rptr. 2d 167 (no waiver of right to arbitrate based on integration clause of written employment agreement; Form U-4 arbitration clause not superseded by employment agreement). For discussion of the applicability of the FAA to employment contracts generally, *see* § 90.01.

(n54)Footnote 54. *Brookwood v. Bank of America, NT & SA* (1996) 45 Cal. App. 4th 1667, 1673-1674, 53 Cal. Rptr. 2d 515 .

(n55)Footnote 55. *Brookwood v. Bank of America, NT & SA* (1996) 45 Cal. App. 4th 1667, 1673-1674, 53 Cal. Rptr. 2d 515 .

(n56)Footnote 56. *Brookwood v. Bank of America, NT & SA* (1996) 45 Cal. App. 4th 1667, 1673-1674, 53 Cal. Rptr. 2d 515 .

(n57)Footnote 57. *Brookwood v. Bank of America, NT & SA* (1996) 45 Cal. App. 4th 1667, 1673-1674, 53 Cal. Rptr. 2d 515 .

(n58)Footnote 58. *Cione v. Foresters Equity Servs., Inc.* (1997) 58 Cal. App. 4th 625, 68 Cal. Rptr. 2d 167 .

(n59)Footnote 59. *Cione v. Foresters Equity Servs., Inc.* (1997) 58 Cal. App. 4th 625, 640-641, 645, 68 Cal. Rptr. 2d 167 (Renteria and Lai are contrary to weight of authority).

(n60)Footnote 60. *Cione v. Foresters Equity Servs., Inc.* (1997) 58 Cal. App. 4th 625, 634, 68 Cal. Rptr. 2d 167 ; see *Wojcik v. Aetna Life Ins. and Annuity Co.* (N.D. Ill. 1995) 901 F. Supp. 1282, 1286 .

(n61)Footnote 61. *Cione v. Foresters Equity Servs., Inc.* (1997) 58 Cal. App. 4th 625, 634-639, 68 Cal. Rptr. 2d 167 ; *O'Donnell v. First Investors Corp.* (S.D. N.Y. 1995) 872 F. Supp. 1274, 1277 (employment contract does not supersede Form U-4 arbitration agreement, which is separate contract).

(n62)Footnote 62. *Cione v. Foresters Equity Servs., Inc.* (1997) 58 Cal. App. 4th 625, 641-642, 68 Cal. Rptr. 2d 167 (questions concerning construction and scope of arbitration clauses are governed by federal law and must be addressed with healthy regard for federal policy favoring arbitration; determining parties' intent to arbitrate is matter of law).

(n63)Footnote 63. See, e.g., *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal. App. 4th 1105, 1136, 88 Cal. Rptr. 2d 664 (rejecting plaintiff's argument that compulsory predispute arbitration provisions have same effect as illegal exculpatory clauses because generalized attacks on arbitration are out-of-step with current strong endorsement of arbitration, quoting *Gilmer v. Interstate/Johnson Lane Corp.* (1991) 500 U.S. 20, 30, 111 S. Ct. 1647, 114 L. Ed. 2d 26); See also § 90.20.

(n64)Footnote 64. *Vianna v. Doctors' Management Co.* (1994) 27 Cal. App. 4th 1186, 1189, 33 Cal. Rptr. 2d 188 (noting comparable federal policy, as applied to similar contract in *Merrick v. Writers Guild of Am., West, Inc.* (1982) 130 Cal. App. 3d 212, 217-219, 181 Cal. Rptr. 530). The federal policy is discussed in § 90.01.

(n65)Footnote 65. *Vianna v. Doctors' Management Co.* (1994) 27 Cal. App. 4th 1186, 1189-1190, 33 Cal. Rptr. 2d 188 . See also *Buckhorn v. St. Jude Heritage Medical Group* (2004) 121 Cal. App. 4th 1401, 1406-1407, 18 Cal. Rptr. 3d 215 (terminated former employee's tort claims for defamation and interference with prospective business advantage based on events occurring after his termination were subject to arbitration under employment contract because claims were rooted in contractual relationship between parties).

(n66)Footnote 66. *Vianna v. Doctors' Management Co.* (1994) 27 Cal. App. 4th 1186, 1189, 33 Cal. Rptr. 2d 188 ; for discussion of the implied covenant of good faith and fair dealing generally, see § 60.06.

(n67)Footnote 67. *Vianna v. Doctors' Management Co.* (1994) 27 Cal. App. 4th 1186, 1190, 33 Cal. Rptr. 2d 188 .

(n68)Footnote 68. *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal. 4th 951, 971-972, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (citations omitted); cf. *First Options of Chicago, Inc. v. Kaplan* (1995) 514 U.S. 938, 944, 115 S.

Ct. 1920, 131 L. Ed. 2d 985 (when deciding whether parties agreed to arbitrate dispute, courts generally should apply ordinary state-law principles); *Davis v. O'Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066, 1072 (in assessing whether arbitration agreement or clause is enforceable, court should apply ordinary, state-law principles governing formation of contracts).

(n69)Footnote 69. See *Code Civ. Proc. § 1281*.

(n70)Footnote 70. *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal. App. 4th 1105, 1122-1127, 88 Cal. Rptr. 2d 664 .

(n71)Footnote 71. *Lagatree v. Luce, Forward, Hamilton & Scripps* (1999) 74 Cal. App. 4th 1105, 1122, 88 Cal. Rptr. 2d 664 (compulsory nature of arbitration agreement does not render agreement unenforceable on grounds of coercion or for lack of voluntariness).

(n72)Footnote 72. See *Brookwood v. Bank of Am., NT & SA* (1996) 45 Cal. App. 4th 1667, 1673-1674, 53 Cal. Rptr. 2d 515 .

(n73)Footnote 72.1. *Roman v. Superior Court* (2009) 172 Cal. App. 4th 1462, 1470-1471, 92 Cal. Rptr. 3d 153 . For discussion of the mutuality requirement for arbitration agreements, see § 90.21[6], below.

(n74)Footnote 73. *Fitz v. NCR Corp.* (2004) 118 Cal. App. 4th 702, 713, 13 Cal. Rptr. 3d 88 ; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal. App. 4th 1519, 1532-1533, 60 Cal. Rptr. 2d 138 . See *Martinez v. Master Protection Corp.* (2004) 118 Cal. App. 4th 107, 113, 12 Cal. Rptr. 3d 663 (both procedural and substantive unconscionability are required to invalidate arbitration clause).

(n75)Footnote 74. *Fitz v. NCR Corp.* (2004) 118 Cal. App. 4th 702, 713, 13 Cal. Rptr. 3d 88 ; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal. App. 4th 1519, 1532, 60 Cal. Rptr. 2d 138 . See *Martinez v. Master Protection Corp.* (2004) 118 Cal. App. 4th 107, 113, 12 Cal. Rptr. 3d 663 (procedural unconscionability focuses largely on oppression and manner in which agreement was negotiated).

(n76)Footnote 75. *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal. App. 4th 154, 171, 90 Cal. Rptr. 3d 818 ; *Kinney v. United Healthcare Services* (1999) 70 Cal. App. 4th 1322, 1329, 83 Cal. Rptr. 2d 348 .

(n77)Footnote 76. *Kinney v. United Healthcare Services* (1999) 70 Cal. App. 4th 1322, 1329, 83 Cal. Rptr. 2d 348 ; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal. App. 4th 1519, 1532, 60 Cal. Rptr. 2d 138 .

(n78)Footnote 77. *Kinney v. United Healthcare Services* (1999) 70 Cal. App. 4th 1322, 1329-1330, 83 Cal. Rptr. 2d 348 ; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal. App. 4th 1519, 1532, 60 Cal. Rptr. 2d 138 .

(n79)Footnote 78. *Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal. App. 4th 1659, 1667, 18 Cal. Rptr. 2d 563 (small loan borrowers, many of whom did not feel they could qualify for bank loans, met non-alternative source requirement); see *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal. App. 3d 758, 771-772, 259 Cal. Rptr. 789 (establishing requirement in context of challenging IRA account fees as unconscionable); but see *Spinello v. Amblin Entertainment* (1994) 29 Cal. App. 4th 1390, 1395-1396, 34 Cal. Rptr. 2d 695 (rejecting *Dean Witter* analysis in cases involving arbitration clauses).

(n80)Footnote 79. *Stirlen v. Supercuts, Inc.* (1997) 51 Cal. App. 4th 1519, 1532, 60 Cal. Rptr. 2d 138 .

(n81)Footnote 80. *Fitz v. NCR Corp.* (2004) 118 Cal. App. 4th 702, 713, 13 Cal. Rptr. 3d 88 ; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal. App. 4th 1519, 1532-1533, 60 Cal. Rptr. 2d 138 ; *Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal. App. 4th 1659, 1664, 18 Cal. Rptr. 2d 563 . See *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal. App. 4th 154, 171, 90 Cal. Rptr. 3d 818 (substantive unconscionability focuses on overly harsh or

one-sided terms); *Martinez v. Master Protection Corp.* (2004) 118 Cal. App. 4th 107, 113, 12 Cal. Rptr. 3d 663 (substantive unconscionability focuses on terms of agreement and presence of overly harsh, or one-sided results).

(n82)Footnote 81. *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal. App. 4th 154, 171, 90 Cal. Rptr. 3d 818; *Fitz v. NCR Corp.* (2004) 118 Cal. App. 4th 702, 714, 13 Cal. Rptr. 3d 88; *Kinney v. United Healthcare Services* (1999) 70 Cal. App. 4th 1322, 1329, 83 Cal. Rptr. 2d 348; *Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal. App. 4th 1659, 1664, 18 Cal. Rptr. 2d 563.

(n83)Footnote 82. *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal. App. 4th 154, 171, 90 Cal. Rptr. 3d 818; *Fitz v. NCR Corp.* (2004) 118 Cal. App. 4th 702, 714, 13 Cal. Rptr. 3d 88; *Martinez v. Master Protection Corp.* (2004) 118 Cal. App. 4th 107, 113, 12 Cal. Rptr. 3d 663; *Kinney v. United Healthcare Services* (1999) 70 Cal. App. 4th 1322, 1329, 83 Cal. Rptr. 2d 348; *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal. App. 3d 758, 768, 259 Cal. Rptr. 789 (decided in context of challenging IRA account fees as unconscionable); *but see Spinello v. Amblin Entertainment* (1994) 29 Cal. App. 4th 1390, 1396, 34 Cal. Rptr. 2d 695 (rejecting *Dean Witter* analysis in cases involving arbitration clauses). *See Davis v. O'Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066, 1072 (courts apply sliding scale; the more substantively oppressive a contract term is, the less evidence of procedural unconscionability is required to conclude that term is unenforceable, and vice versa).

(n84)Footnote 83. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669.

(n85)Footnote 84. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 93-96, 99 Cal. Rptr. 2d 745, 6 P.3d 669.

(n86)Footnote 85. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 102, 99 Cal. Rptr. 2d 745, 6 P.3d 669.

(n87)Footnote 86. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 114-115, 120-121, 99 Cal. Rptr. 2d 745, 6 P.3d 669.

(n88)Footnote 87. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 119, 99 Cal. Rptr. 2d 745, 6 P.3d 669.

(n89)Footnote 88. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 103-104, 99 Cal. Rptr. 2d 745, 6 P.3d 669.

(n90)Footnote 89. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 110-111, 99 Cal. Rptr. 2d 745, 6 P.3d 669.

(n91)Footnote 90. *Blake v. Ecker* (2001) 93 Cal. App. 4th 728, 113 Cal. Rptr. 2d 422.

(n92)Footnote 91. *Blake v. Ecker* (2001) 93 Cal. App. 4th, 728, 740-741, 93 Cal. App. 4th 728, 113 Cal. Rptr. 2d 422.

(n93)Footnote 92. *Blake v. Ecker* (2001) 93 Cal. App. 4th, 728, 741-747, 93 Cal. App. 4th 728, 113 Cal. Rptr. 2d 422.

(n94)Footnote 93. *Pinedo v. Premium Tobacco Stores, Inc.* (2000) 85 Cal. App. 4th 774, 102 Cal. Rptr. 2d 435.

(n95)Footnote 94. *Pinedo v. Premium Tobacco Stores, Inc.* (2000) 85 Cal. App. 4th 774, 781, 102 Cal. Rptr. 2d 435.

(n96)Footnote 95. *Circuit City v. Adams* (9th Cir. 2002) 279 F.3d 889.

(n97)Footnote 96. *Circuit City v. Adams* (9th Cir. 2002) 279 F.3d 889, 891-892 .

(n98)Footnote 97. *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 ; see § 90.01.

(n99)Footnote 98. *Circuit City v. Adams* (9th Cir. 2002) 279 F.3d 889, 893-895 .

(n100)Footnote 99. *Circuit City v. Adams* (9th Cir. 2002) 279 F.3d 889, 893 .

(n101)Footnote 100. *Circuit City v. Adams* (9th Cir. 2002) 279 F.3d 889, 893-895 .

(n102)Footnote 101. *Circuit City v. Adams* (9th Cir. 2002) 279 F.3d 889, 894 , citing *Cole v. Burns Int'l Sec. Servs.* (D.C. Cir. 1997) 105 F.3d 1465, 323 U.S. App. D.C. 133 (unlawful to require employee, through mandatory arbitration agreement, to share costs of arbitration).

(n103)Footnote 102. *Circuit City v. Ahmed* (9th Cir. 2002) 283 F.3d 1198 .

(n104)Footnote 103. *Circuit City v. Ahmed* (9th Cir. 2002) 283 F.3d 1198, 1199-1200 . See also *Circuit City Stores, Inc. v. Najd* (9th Cir. 2002) 294 F.3d 1104, 1108 (same agreement with opt-out provision as in *Ahmed* found not unconscionable).

(n105)Footnote 104. *Circuit City Stores, Inc. v. Mantor* (9th Cir. 2003) 335 F.3d 1101 .

(n106)Footnote 105. *Circuit City v. Najd* (9th Cir. 2002) 294 F.3d 1104, 1108 .

(n107)Footnote 106. *Circuit City v. Ahmed* (9th Cir. 2002) 283 F.3d 1198, 1200 .

(n108)Footnote 107. *Circuit City v. Mantor* (9th Cir. 2003) 335 F.3d 1101, 1106-1107 (although he was given "opt-out" form by which he could elect not to participate in arbitration program, Circuit City management impliedly and expressly pressured employee not to opt-out, and resorted to threatening his job outright should he exercise his putative "right" to opt-out).

(n109)Footnote 108. *Circuit City v. Mantor* (9th Cir. 2003) 335 F.3d 1101, 1107-1109 .

(n110)Footnote 109. *Circuit City v. Mantor* (9th Cir. 2003) 335 F.3d 1101, 1109 .

(n111)Footnote 110. *EEOC v. Luce, Forward, Hamilton & Scripps* (9th Cir. 2003) 345 F.3d 742 , discussed at § 90.20[1][c], above.

(n112)Footnote 111. *Circuit City Stores, Inc. v. Mantor* (9th Cir. 2005) 417 F.3d 1060, 1064 .

(n113)Footnote 112. *Davis v. O'Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066 .

(n114)Footnote 113. *Davis v. O'Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066, 1073-1075 .

(n115)Footnote 114. *Davis v. O'Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066, 1075-1084 .

(n116)Footnote 115. *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal. App. 4th 267, 132 Cal. Rptr. 2d 116 .

(n117)Footnote 116. *Gov. Code § 12900 et seq.*

(n118)Footnote 117. *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal. App. 4th 267, 273-279, 132 Cal. Rptr. 2d 116 .

(n119)Footnote 118. *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 279-280, 132 Cal. Rptr. 2d 116 .*

(n120)Footnote 119. *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 280-282, 132 Cal. Rptr. 2d 116 .*

(n121)Footnote 120. *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 282, 132 Cal. Rptr. 2d 116 .*

(n122)Footnote 121. *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 282-284, 132 Cal. Rptr. 2d 116 .*

(n123)Footnote 122. *Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979 .*

(n124)Footnote 123. *Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1071, 130 Cal. Rptr. 2d 892, 63 P.3d 979 .*

(n125)Footnote 124. *Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1071-1074, 130 Cal. Rptr. 2d 892, 63 P.3d 979 .*

(n126)Footnote 125. *Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1074-1076, 130 Cal. Rptr. 2d 892, 63 P.3d 979 .*

(n127)Footnote 126. *Ontiveros v. DHL Express (USA), Inc. (2008) 164 Cal. App. 4th 494, 79 Cal. Rptr. 3d 471 .*

(n128)Footnote 127. *See discussion of this aspect of Ontiveros at § 40.20[1][e], below .*

(n129)Footnote 128. *Ontiveros v. DHL Express (USA), Inc. (2008) 164 Cal. App. 4th 494, 510-511, 79 Cal. Rptr. 3d 471 , citing Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 110-111, 99 Cal. Rptr. 2d 745, 6 P.3d 669 .*

(n130)Footnote 129. *Ontiveros v. DHL Express (USA), Inc. (2008) 164 Cal. App. 4th 494, 511-514, 79 Cal. Rptr. 3d 471 . See also Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 716-718, 13 Cal. Rptr. 3d 88 .*

(n131)Footnote 130. *Ontiveros v. DHL Express (USA), Inc. (2008) 164 Cal. App. 4th 494, 514-515, 79 Cal. Rptr. 3d 471 .*

(n132)Footnote 131. *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 171-178, 90 Cal. Rptr. 3d 818 .*

(n133)Footnote 132. *Olvera v. El Pollo Loco, Inc. (2009) 173 Cal. App. 4th 447, 93 Cal. Rptr. 3d 65, 2009 Cal. App. LEXIS 618, *10-*21 .*

(n134)Footnote 133. *See Gentry v. Superior Court (2007) 42 Cal. 4th 443, 457-463, 64 Cal. Rptr. 3d 773, 165 P.3d 556 ; Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 161, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 . For discussion of class arbitration waivers generally, see § 90.20[1][b][ii], below.*

(n135)Footnote 134. *See Gentry v. Superior Court (2007) 42 Cal. 4th 443, 461, 64 Cal. Rptr. 3d 773, 165 P.3d 556 .*

(n136)Footnote 135. *See Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 161, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 .*

(n137)Footnote 136. See *Code Civ. Proc.* § 1284.2.

(n138)Footnote 137. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 113, 99 Cal. Rptr. 2d 745, 6 P.3d 669 .

(n139)Footnote 138. *Green Tree Financial Corp. v. Randolph* (2000) 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373 .

(n140)Footnote 139. *Green Tree Financial Corp. v. Randolph* (2000) 531 U.S. 79, 91-92, 121 S. Ct. 513, 148 L. Ed. 2d 373 .

(n141)Footnote 140. See *Circuit City Stores v. Adams* (9th Cir. 2002) 279 F.3d 889 ; *Cooper v. MRM Investment Company* (M.D. Tenn. 2002) 199 F. Supp. 2d 771, 781 ; *Ball v. SFX Broadcasting, Inc.* (N.D.N.Y. 2001) 165 F. Supp. 2d 230 (all holding that "prohibitively expensive" standard in *Green Tree* does not affect validity of categorical position that employer should pay the costs of mandatory employment arbitration of statutory claims). See *Blair v. Scott Specialty Gases* (3d Cir. 2002) 283 F.3d 595, 609 ; *Nelson v. Insignia/ESG, Inc.* (D.D.C. 2002) 215 F. Supp. 2d 143 ; *Bradford v. Rockwell Semiconductor Systems Inc.* (4th Cir. 2001) 238 F.3d 549 (all holding that *Green Tree* requires case-by-case analysis based on such factors as employee's ability to pay arbitration fees and differential between projected arbitration and litigation fees). See *Mildworm v. Ashcroft* (E.D.N.Y. 2002) 200 F. Supp. 2d 171 ; *Boyd v. Town of Hayneville* (M.D. Ala. 2001) 144 F. Supp. 2d 1272 (holding that information presented by employee before arbitration was too speculative to warrant invalidation of arbitration agreement, while retaining jurisdiction to reconsider cost issue after arbitration).

(n142)Footnote 141. *Little v. Auto Stiegler* (2003) 29 Cal. 4th 1064, 1083-1084, 130 Cal. Rptr. 2d 892, 63 P.3d 979 .

(n143)Footnote 142. *Little v. Auto Stiegler* (2003) 29 Cal. 4th 1064, 1084, 130 Cal. Rptr. 2d 892, 63 P.3d 979 .

(n144)Footnote 143. *Little v. Auto Stiegler* (2003) 29 Cal. 4th 1064, 1081-1085, 130 Cal. Rptr. 2d 892, 63 P.3d 979 .

(n145)Footnote 144. *Yuen v. Superior Court* (2004) 121 Cal. App. 4th 1133, 1137-1139, 18 Cal. Rptr. 3d 127 .

(n146)Footnote 145. 9 U.S.C. § 1 et seq.

(n147)Footnote 146. *McManus v. CIBC World Markets Corp.* (2003) 109 Cal. App. 4th 76, 134 Cal. Rptr. 2d 446, 2003 Cal. App. LEXIS 769 .

(n148)Footnote 147. *McManus v. CIBC World Markets Corp.* (2003) 109 Cal. App. 4th 76, 134 Cal. Rptr. 2d 446, 2003 Cal. App. LEXIS 769, *12-20 .

(n149)Footnote 148. *McManus v. CIBC World Markets Corp.* (2003) 109 Cal. App. 4th 76, 134 Cal. Rptr. 2d 446, 2003 Cal. App. LEXIS 769, *21-24 .

(n150)Footnote 149. *McManus v. CIBC World Markets Corp.* (2003) 109 Cal. App. 4th 76, 134 Cal. Rptr. 2d 446, 2003 Cal. App. LEXIS 769, *24-46 .

(n151)Footnote 150. *Kinney v. United Healthcare Services* (1999) 70 Cal. App. 4th 1322, 83 Cal. Rptr. 2d 348 .

(n152)Footnote 151. See *Stirlen v. Supercuts, Inc.* (1997) 51 Cal. App. 4th 1519, 1531-1532, 60 Cal. Rptr. 2d 138 (analysis considers both substantive and procedural components).

(n153)Footnote 152. *Kinney v. United Healthcare Services* (1999) 70 Cal. App. 4th 1322, 1330-1333, 83 Cal.

Rptr. 2d 348 .

(n154)Footnote 153. *Kinney v. United Healthcare Services (1999) 70 Cal. App. 4th 1322, 1329, 83 Cal. Rptr. 2d 348 .*

(n155)Footnote 154. *Kinney v. United Healthcare Services (1999) 70 Cal. App. 4th 1322, 1330, 83 Cal. Rptr. 2d 348 .*

(n156)Footnote 155. *Kinney v. United Healthcare Services (1999) 70 Cal. App. 4th 1322, 1330-1333, 83 Cal. Rptr. 2d 348 .*

(n157)Footnote 156. *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1536-1542, 60 Cal. Rptr. 2d 138 ; see also Kinney v. United Healthcare Services (1999) 70 Cal. App. 4th 1322, 1330-1333, 83 Cal. Rptr. 2d 348 (arbitration was mandatory for employee, but employer could file suit in court; employee's damages and discovery were limited, employer's were not).*

(n158)Footnote 157. *Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 113-118, 12 Cal. Rptr. 3d 663 .*

(n159)Footnote 158. *Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 119, 12 Cal. Rptr. 3d 663 .*

(n160)Footnote 159. *Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 715-728, 13 Cal. Rptr. 3d 88 .*

(n161)Footnote 160. *24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1212, 78 Cal. Rptr. 2d 533 (sexual harassment).*

(n162)Footnote 161. *24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1213, 78 Cal. Rptr. 2d 533 .*

(n163)Footnote 162. *24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1213-1214, 78 Cal. Rptr. 2d 533 .*

(n164)Footnote 162.1. *Roman v. Superior Court (2009) 172 Cal. App. 4th 1462, 1470-1478, 92 Cal. Rptr. 3d 153 .*

(n165)Footnote 163. *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 16 Cal. Rptr. 3d 296 .*

(n166)Footnote 164. *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1282-1283, 16 Cal. Rptr. 3d 296 .*

(n167)Footnote 165. *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1284-1286, 16 Cal. Rptr. 3d 296 .*

(n168)Footnote 166. *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1287-1288, 16 Cal. Rptr. 3d 296 .*

(n169)Footnote 167. *Romo v. Y-3 Holdings, Inc. (2001) 87 Cal. App. 4th 1153 .*

(n170)Footnote 168. *Romo v. Y-3 Holdings, Inc. (2001) 87 Cal. App. 4th 1153, 1158 .*

(n171)Footnote 169. *Mitri v. Arnel Management Co. (2007) 157 Cal. App. 4th 1164, 1169-1173, 69 Cal. Rptr. 3d 223 .*

(n172)Footnote 170. *Nghiem v. NEC Electronic, Inc.* (9th Cir. 1994) 25 F.3d 1437, 1439-1440 (also finding employee's institution of arbitration proceeding precluded challenge to binding effect of arbitration).

(n173)Footnote 171. *Metters v. Ralphs Grocery Co.* (2008) 161 Cal. App. 4th 696, 701-704 .

(n174)Footnote 172. *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal. App. 4th 1021, 1035-1036, 127 Cal. Rptr. 2d 285 ; Gov. Code, § 12940(j)(1) (k).

(n175)Footnote 173. *Circuit City Stores, Inc. v. Najd* (9th Cir. 2002) 294 F.3d 1104 .

(n176)Footnote 174. *Circuit City Stores, Inc. v. Najd* (9th Cir. 2002) 294 F.3d 1104, 1108-1109 .

(n177)Footnote 175. *Davis v. Continental Airlines, Inc.* (1997) 59 Cal. App. 4th 205, 69 Cal. Rptr. 2d 79 .

(n178)Footnote 176. *Davis v. Continental Airlines, Inc.* (1997) 59 Cal. App. 4th 205, 207, 69 Cal. Rptr. 2d 79 (although answer inartfully indicated arbitration requirement, defendants conducted substantial discovery before seeking to compel arbitration; six months elapsed between filing answers and motion to compel arbitration).

(n179)Footnote 177. *Davis v. Continental Airlines, Inc.* (1997) 59 Cal. App. 4th 205, 211-212, 69 Cal. Rptr. 2d 79 ; see *Christensen v. Dewor Devs.* (1983) 33 Cal. 3d 778, 781-782, 191 Cal. Rptr. 8, 661 P.2d 1088 (Supreme Court affirmed trial court's finding that plaintiff waived right to arbitrate because discovery used to obtain unfair advantage relevant to arbitration given that discovery was ordinarily unavailable); see also *Kaneko Ford Design v. Citipark, Inc.* (1988) 202 Cal. App. 3d 1220, 1228-1229, 249 Cal. Rptr. 544 (plaintiff filed stay application for arbitration simultaneously with complaint for mechanic's lien, did nothing to implement application for over five months, during which plaintiff participated in settlement negotiations, did not notify defendant of intent to seek arbitration, and obtained information about defendant's legal strategies from answer to the complaint).

(n180)Footnote 178. *Davis v. Continental Airlines, Inc.* (1997) 59 Cal. App. 4th 205, 211-212, 69 Cal. Rptr. 2d 79 ; cf. *Keating v. Superior Court* (1982) 31 Cal. 3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192 , reversed in part on other grounds sub nom. *Southland Corp. v. Keating* (1984) 465 U.S. 1 ; *Doers v. Golden Gate Bridge Dist.* (1979) 23 Cal. 3d 180, 185, 151 Cal. Rptr. 837, 588 P.2d 1261 (reversing trial court's finding of waiver, holding as matter of law that mere filing of complaint does not by itself necessarily waive plaintiff's right to compel arbitration).

(n181)Footnote 179. *Davis v. Continental Airlines, Inc.* (1997) 59 Cal. App. 4th 205, 211-213, 69 Cal. Rptr. 2d 79 .

(n182)Footnote 180. *Ferguson v. Countrywide Credit Industries, Inc.* (9th Cir. 2002) 298 F.3d 778 .

(n183)Footnote 181. *Ferguson v. Countrywide Credit Industries, Inc.* (9th Cir. 2002) 298 F.3d 778, 783-784 .

(n184)Footnote 182. *Ferguson v. Countrywide Credit Industries, Inc.* (9th Cir. 2002) 298 F.3d 778, 784-787 .

(n185)Footnote 183. *Ferguson v. Countrywide Credit Industries, Inc.* (9th Cir. 2002) 298 F.3d 778, 787-788 .

(n186)Footnote 184. *St. Agnes Med. Ctr. v. PacifiCare of Cal.* (2003) 31 Cal. 4th 1187, 8 Cal. Rptr. 3d 517, 82 P.3d 727, 733 . See *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1124-1126 (district court erred in determining employer waived its right to arbitrate dispute with employee, where none of *St. Agnes* factors supported waiver); *Roman v. Superior Court* (2009) 172 Cal. App. 4th 1462, 1478-1479, 92 Cal. Rptr. 3d 153 (employer did not engage in conduct inconsistent with arbitration by, without mentioning arbitration, filing demurrer and serving objections to discovery requests and serving and filing motion in superior court to compel employee's deposition, where employer filed notice of petition to compel arbitration little more than two months after employee filed her complaint, no substantive discovery responses had been served by either side, and no formal hearings had taken place on discovery issues, and discovery requests employer served were authorized under AAA rules; litigation expenses incurred by

employee in serving and filing objections to discovery requests and opposing demurrer and motion to compel her deposition were insufficient, by themselves, to support finding of waiver).

(n187)Footnote 185. For discussion of breach of the agreement as a defense, *see* § 90.20[1][i](ii).

(n188)Footnote 186. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1124-1125 (district court properly considered whether employer waived its right to compel arbitration, notwithstanding employee's failure to file claim with AAA, because arbitration is matter of private contract law).

(n189)Footnote 187. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1125. *See Toscano v. Greene Music* (2004) 124 Cal. App. 4th 685, 21 Cal. Rptr. 3d 732, 738 (object of equity is to do right and justice, and powers of court of equity are not cribbed or confined by rigid rules of law).

(n190)Footnote 188. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1125-1126.

(n191)Footnote 189. *Kalai v. Gray* (2003) 109 Cal. App. 4th 768, 773-777, 135 Cal. Rptr. 2d 449.

(n192)Footnote 190. *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal App. 4th 138, 67 Cal. Rptr. 3d 120, 2007 Cal. App. LEXIS 1722. To view Court of Appeal of briefs related to the *Murphy* case that are available on Lexis.com, go to 2006 CA App. Ct. Briefs 14442.

(n193)Footnote 191. *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal App. 4th 138, 67 Cal. Rptr. 3d 120, 2007 Cal. App. LEXIS 1722, *8-*14.

(n194)Footnote 192. *Gentry v. Superior Court* (2007) 42 Cal. 4th 433, 64 Cal. Rptr. 3d 773, 165 P.3d 556.

(n195)Footnote 193. *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal App. 4th 138, 67 Cal. Rptr. 3d 120, 2007 Cal. App. LEXIS 1722, *14-*19. *See also Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal. App. 4th 154, 167-171, 90 Cal. Rptr. 3d 818 (class arbitration waiver was contrary to public policy and unenforceable under *Gentry* factors, where employee's statutory rights to reimbursement of job expenses and to receive minimum wage were unwaivable; any individual recovery was likely to be modest; potential for retaliation against members of class who litigated or arbitrated individually was significant; and plaintiff presented evidence that most drivers were immigrants with limited English language skills who were likely to be unaware of their legal rights); *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal. App. 4th 1277, 1288-1299, 90 Cal. Rptr. 3d 539 (class arbitration waiver was unconscionable with respect to alleged violations of state meal and rest period laws given modest size of potential individual recovery, potential for retaliation against members of class, and fact that absent members of class may have been ill-informed about their rights). For discussion of *Gentry*, *see* § 5.40[1].

(n196)Footnote 194. *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal App. 4th 138, 67 Cal. Rptr. 3d 120, 2007 Cal. App. LEXIS 1722, *19-*21. *See also Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal. App. 4th 154, 178-181, 90 Cal. Rptr. 3d 818 (class arbitration waiver and unconscionable arbitrator selection clause, considered together, indicated effort to impose on employee forum with distinct advantages for employer, so that arbitration agreement was permeated by unlawful purpose and denial of employer's motion to compel arbitration was proper); *Franco v. Athens Disposal Co., Inc.* (2009) 171 Cal. App. 4th 1277, 1288-1303, 90 Cal. Rptr. 3d 539 (because arbitration agreement contained unconscionable class arbitration waiver and also precluded plaintiff from seeking civil penalties on behalf of other employees, contrary to PAGA, agreement as whole was tainted with illegality and was unenforceable).

(n197)Footnote 195. *See 9 U.S.C. § 1 et seq.; Code Civ. Proc. § 1286.2(a)-(f)* (grounds justifying vacation of arbitration award); *see also Jones v. Humanscale Corp.* (2005) 130 Cal. App. 4th 401, 408, 29 Cal. Rptr. 3d 881 (limited grounds whereby court may vacate or correct arbitration award under *Code Civ. Proc.* §§ 1286.2, 1286.6); *California Faculty Ass'n v. Superior Court* (1998) 63 Cal. App. 4th 935, 952-953, 75 Cal. Rptr. 2d 1 (discussing

exceptions to general rules governing scope of review in cases in which parties have expressly restricted arbitrator's powers and holding, in tenure dispute, that arbitrator strayed beyond scope of parties' agreement by resolving issues parties did not agree to arbitrate).

(n198)Footnote 196. *LaPine Technology Corp. v. Kyocera Corp.* (9th Cir. 1997) 130 F.3d 884 .

(n199)Footnote 197. *Crowell v. Downey Community Hospital Foundation* (2002) 95 Cal. App. 4th 730, 115 Cal. Rptr. 2d 810 (court declined to consider *LaPine Technology Corp. v. Kyocera Corp.* as directly on point) (citation omitted).

(n200)Footnote 198. See *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 6, 11, 10 Cal. Rptr. 2d 183, 832 P.2d 899 .

(n201)Footnote 199. *Marsch v. Williams* (1994) 23 Cal. App. 4th 238, 244-245, 28 Cal. Rptr. 2d 402 ; *Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal. App. 4th 576, 587-590, 19 Cal. Rptr. 2d 295 .

(n202)Footnote 200. *Baize v. Eastridge Companies, LLC* (2006) 142 Cal. App. 4th 293, 300-302, 47 Cal. Rptr. 3d 763 (despite possible errors of law by arbitrator, trial court properly confirmed arbitration award to former employee in wrongful termination action, where, while arbitration agreement expressly limited arbitrator to application of California law, it did not expressly expand scope of judicial review, and there was no suggestion arbitrator purported to apply any law other than that of California).

(n203)Footnote 201. See *Kelly v. Vons Companies* (1998) 67 Cal. App. 4th 1329, 1335, 79 Cal. Rptr. 2d 763 (issues adjudicated during labor arbitration given collateral estoppel effect in employee's subsequent lawsuit for fraud and negligent misrepresentation); Rest. 2d Judgments, 84(3)(b); see also *People v. Sims* (1982) 32 Cal. 3d 468, 479, 186 Cal. Rptr. 77, 651 P.2d 321 (findings made during administrative hearing may collaterally estop party from relitigating issues in later action if hearing possessed "judicial character"). For a discussion of the distinction between collateral and judicial estoppel, see § 41.51[2][a][vi]. For a discussion of collateral estoppel in the context of the law governing that particular action, see generally Ch. 43.

(n204)Footnote 202. *Alliance Title Co. v. Boucher* (2005) 127 Cal. App. 4th 262, 268, 25 Cal. Rptr. 3d 440 . See, e.g., *Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd.* (3d Cir. 1999) 181 F.3d 435, 445-446 ; *Thomson-CSF, S.A. v. American Arbitration Ass'n.* (2d Cir. 1995) 64 F.3d 773, 776 ; *MS Dealer Service Corp. v. Franklin* (11th Cir. 1999) 177 F.3d 942, 947 ; *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.* (11th Cir. 1993) 10 F.3d 753, 757 .

(n205)Footnote 203. *Alliance Title Co. v. Boucher* (2005) 127 Cal. App. 4th 262, 267-272, 25 Cal. Rptr. 3d 440 .

(n206)Footnote 204. See, e.g., *Choctaw Generation Ltd. v. American Home Assur.* (2d Cir. 2001) 271 F.3d 403, 406-408 ; *Grigson v. Creative Artists Agency* (5th Cir. 2000) 210 F.3d 524, 527-531 ; *MS Dealer Service Corp. v. Franklin* (11th Cir. 1999) 177 F.3d 942, 946-948 ; *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.* (11th Cir. 1993) 10 F.3d 753, 756-757 ; *Hughes Masonry v. Greater Clark County School Bldg.* (7th Cir. 1981) 659 F.2d 836, 838 ; *McBro Planning & Development Co. v. Triangle Elec. Constr. Co., Inc.* (11th Cir. 1984) 741 F.2d 342, 344 ; *Metalclad Corp. v. Ventana Environment Organizational Partnership* (2003) 109 Cal. App. 4th 1705, 1716-1717, 1 Cal. Rptr. 3d 328 . See also *Sam Reisfeld & Son Import Company v. S.A. Etco* (5th Cir. 1976) 530 F.2d 679, 681 .

(n207)Footnote 205. *Matthau v. Superior Court* (2007) 151 Cal. App. 4th 593, 60 Cal. Rptr. 3d 93 .

(n208)Footnote 206. *Matthau v. Superior Court* (2007) 151 Cal. App. 4th 593, 598-604, 60 Cal. Rptr. 3d 93 .

(n209)Footnote 207. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 ; *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal. App. 4th 1185, 1191, 35 Cal. Rptr. 3d 357 .

(n210)Footnote 208. *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.* (1998) 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 ; *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal. App. 4th 1185, 1191, 35 Cal. Rptr. 3d 357 .

(n211)Footnote 209. *See Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal. App. 4th 1185, 1189, 35 Cal. Rptr. 3d 357 .

(n212)Footnote 210. *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 ; *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal. App. 4th 1185, 1196, 35 Cal. Rptr. 3d 357 .

(n213)Footnote 211. *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal. App. 4th 1185, 1191, 35 Cal. Rptr. 3d 357 . *See C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.* (2001) 532 U.S. 411, 423, 121 S. Ct. 1589, 149 L. Ed. 2d 623 .

(n214)Footnote 212. *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal. App. 4th 1185, 1191, 35 Cal. Rptr. 3d 357 ; *Warburton/Buttner v. Superior Court* (2002) 103 Cal. App. 4th 1170, 1188, 127 Cal. Rptr. 2d 706 .

(n215)Footnote 213. *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal. App. 4th 1185, 1191, 35 Cal. Rptr. 3d 357 . *See Smith v. Hopland Band of Pomo Indians* (2002) 95 Cal. App. 4th 1, 9, 115 Cal. Rptr. 2d 455 .

(n216)Footnote 214. *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal. App. 4th 1185, 35 Cal. Rptr. 3d 357 .

(n217)Footnote 215. *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal. App. 4th 1185, 1191-1193, 35 Cal. Rptr. 3d 357 .

(n218)Footnote 216. *Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal. App. 4th 1185, 1193-1196, 35 Cal. Rptr. 3d 357 .

(n219)Footnote 217. *Sheppard v. Lightpost Museum Fund* (2006) 146 Cal. App. 4th 315, 321-324, 52 Cal. Rptr. 821 .

(n220)Footnote 218. *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 .

(n221)Footnote 219. *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 122 S. Ct. 754, 758-759, 151 L. Ed. 2d 755 .

(n222)Footnote 220. *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 122 S. Ct. 754, 759-760, 151 L. Ed. 2d 755 .

(n223)Footnote 221. *See 42 U.S.C. § 2000e et seq.*

(n224)Footnote 222. *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 122 S. Ct. 754, 759-761, 151 L. Ed. 2d 755 .

(n225)Footnote 223. *EEOC v. Waffle House, Inc.* (2002) 534 U.S. 279, 122 S. Ct. 754, 764, 151 L. Ed. 2d 755 .



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California Employment Law

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DIVISION IX ALTERNATIVE DISPUTE RESOLUTION
CHAPTER 90 Arbitration of Employment Disputes
Part B. ENFORCEABILITY OF ARBITRATION AGREEMENTS

4-90 California Employment Law § 90.21

AUTHOR: By Paul W. Cane, Jr., J.D.

§ 90.21 Procedural Requirements

[1] Minimum Requirements

In *Armendariz v. Foundation Health Psychcare Services, Inc.*,ⁿ¹ the California Supreme Court held that arbitration of claims under the FEHAⁿ² is subject to certain minimal requirements:

- (1) The arbitration agreement may not limit the damages normally available under the statute.ⁿ³
- (2) There must be discovery sufficient to adequately arbitrate the statutory claim.ⁿ⁴
- (3) There must be a written arbitration decision and judicial review sufficient to ensure the arbitrators comply with the requirements of the statute.ⁿ⁵
- (4) The employer must pay all types of costs unique to arbitration.ⁿ⁶

These requirements were founded on the premise that certain statutory rights are unwaivable.ⁿ⁷ The Court concluded that the FEHA was enacted for public reasons and the rights it conferred on employees were not waivable, and these requirements were necessary to enable an employee to vindicate these unwaivable rights in an arbitration forum.ⁿ⁸

In *Little v. Auto Stiegler, Inc.*,ⁿ⁹ the California Supreme Court concluded that claims under *Tameny v. Atlantic Richfield Co.*,ⁿ¹⁰ prohibiting an employer from terminating an employee for a reason contrary to public policy, are subject to the same minimum requirements. The Court found that a *Tameny* claim is almost by definition unwaivable, because an employment agreement requiring employees to waive claims that they were terminated in violation of public policy would itself be contrary to public policy.ⁿ¹¹

On the other hand, in *Giuliano v. Inland Empire Personnel, Inc.*,ⁿ¹² the California Court of Appeal held that *Armendariz* does not apply to a claim that is not based on the FEHA or a fundamental public policy that is tied to a

constitutional or statutory provision. The claim in *Giuliano* was for unpaid wages at the time of termination under *Labor Code section 229*. However, the court found that the employee's contract claim for a \$5 million to \$8 million bonus and a \$500,000 severance payment was distinguishable from statutory overtime or minimum wage claims at issue in cases cited by Giuliano: the cases cited involved rights that were fundamental public policies tied to a constitutional or statutory provision.¹³

[2] Gateway Issues of Arbitrability

[a] Who Determines Arbitrability

The question may arise as to whether the court or the arbitrator should determine arbitrability. The federal law of arbitrability under the Federal Arbitration Act ("FAA") governs the allocation of authority between courts and arbitrators.¹⁴ The FAA requires federal district courts to direct parties to proceed to arbitration on issues as to which an arbitration agreement has been signed, and limits courts' involvement to determining (1) whether a valid agreement to arbitrate exists, and, if it does, and (2) whether the agreement encompasses the dispute at issue.¹⁵

Challenges to a contract's validity are considered by the arbitrator in the first instance.¹⁶ However, when the issue is the arbitration provision itself, the court must decide whether the arbitration provision is invalid and unenforceable. When a party specifically challenges arbitration provisions as unconscionable and hence invalid, the court determines whether the arbitration provisions are unconscionable, applying the relevant state contract law principles. This rule applies even when the express terms of the arbitration agreement delegate that determination to the arbitrator. Further, when an arbitration agreement delegates the question of the validity of the agreement to the arbitrator, a dispute as to whether the agreement to arbitrate arbitrability is itself enforceable is for the court to decide as a threshold matter.^{16.1}

Courts properly exercise jurisdiction over claims raising defenses existing at law or in equity for the revocation of the arbitration clause itself.¹⁷ Thus, for example, where a former employee did not dispute the validity of the employment agreement or the arbitration provision in it, but, instead, challenged enforcement of an arbitration clause on the grounds that the employer breached the agreement to arbitrate and therefore had no right to enforce the clause or, alternatively, that the employer's conduct amounted to a waiver of the right to arbitrate, those contractual defenses to enforcement of the arbitration clause, *i.e.*, breach and waiver, were properly heard and decided by the district court.¹⁸

In California, parties to a contract, including an employment contract, may agree that the arbitrator may determine the scope of his or her authority, and the arbitrability of a dispute may itself be subject to arbitration if the parties have so provided in their contract. However, the court must still examine the contract to ascertain whether the parties have so provided.¹⁹ Further, if the party resisting arbitration is not denying that it agreed to an arbitration provision, but instead is claiming the provision is unenforceable, such as due to illegality or fraud in the inducement, the arbitrator must decide the question. However, if the party is claiming it never agreed to the arbitration provision at all, for example, due to forgery or fraud in the factum, a court must consider the claim. With regard to the specific question of who should decide a party's claim of unconscionability in light of arbitration provisions empowering the arbitrator to determine arbitrability, if the resisting party admits it knowingly agreed to the arbitration provision, it may be required to arbitrate the unconscionability claim. But if the resisting party claims it never knowingly agreed to the provision, the party cannot be required to arbitrate anything, including arbitrability, until a court has made a threshold determination that the party did agree to arbitrate something.²⁰

In *Ontiveros v. DHL Express (USA), Inc.*,²¹ although the arbitration agreement provided that the arbitrator had exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of the agreement, the Court of Appeal affirmed the trial court's finding that the trial court had jurisdiction to determine arbitrability, because the arbitration provision was contained in a contract of adhesion, so that the provision was unconscionable and therefore unenforceable. The employee denied knowing she had signed an agreement to arbitrate disputes until after she filed her lawsuit, and the undisputed circumstances in which she received and signed the

arbitration agreement, including her receipt of the arbitration agreement in a one-page document in a binder file along with numerous other employment-related documents, the lack of time for any real review of the documents, and the failure of anyone to explain the significance of the agreement, supported her assertion. In dicta, the Court of Appeal expressed concern about the potential for the inequitable use of such arbitration provisions in areas, such as employment, in which the parties are not at arm's length and do not have equal bargaining power. The court opined that in situations such as employment, in which one party tends to be a repeat player, the arbitrator has a unique self-interest in deciding that a dispute is arbitrable. Further, the fact that an employer repeatedly appears before the same group of arbitrators may convey distinct advantages over the individual employee, including knowledge of the arbitrators' temperaments, procedural preferences, styles, etc., and the arbitrators' cultivation of further business by taking a "split the difference" approach to damages.ⁿ²²

In *Sanchez v. Western Pizza Enterprises*,ⁿ²³ citing a California Supreme Court opinion, *Discover Bank v. Superior Court*,ⁿ²⁴ and a Court of Appeal opinion,ⁿ²⁵ the Court of Appeal held that under California law, the question whether an arbitration agreement is unenforceable, in whole or in part, based on general contract law principles, is a question for the court to decide, rather than an arbitrator. This includes the determination whether an arbitration agreement is unconscionable or contrary to public policy.ⁿ²⁶ The court recognized that some Court of Appeal opinions have suggested without holding that the enforceability of an arbitration agreement is a question for the arbitrator to decide if the arbitration agreement "clearly and unmistakably" so provides.ⁿ²⁷ However, the court did not decide whether such a clear and unmistakable provision would be enforceable, because the arbitration agreement at issue did not clearly state that the arbitrator would decide whether the arbitration agreement was enforceable. Rather, the provision that the arbitrator would resolve any disputes over the interpretation or application of the arbitration agreement did not appear to encompass disputes concerning the enforceability of the arbitration agreement based on unconscionability, public policy, or other grounds. Accordingly, the court concluded, consistent with the rule stated in *Discover Bank* that the question whether the arbitration agreement was enforceable based on general contract law principles, including the question whether it was unconscionable or contrary to public policy, was for the court to decide rather than an arbitrator.

[b] Factors in Determining Arbitrability

In *Omar v. Ralphs Grocery Co.*,ⁿ²⁸ the court found that when a party raises an arbitration agreement and moves to compel arbitration, the trial court may consider only two "gateway issues" of arbitrability:ⁿ²⁹

- (1) Whether there is an agreement to arbitrate between the parties.ⁿ³⁰
- (2) Whether the agreement covered the dispute at issue.ⁿ³¹

In *Omar*, the Court of Appeal reversed the trial court's order denying arbitration and remanded for the trial court to decide whether there is an enforceable arbitration agreement between the parties. The trial court did not rule on the gateway issues of arbitration, but merely determined that triable issues of fact existed regarding the enforceability of the arbitration agreement. If the trial court were to find an enforceable arbitration agreement between the parties, it would then be required to determine the second gateway issue, *i.e.*, whether the claims were covered by the agreement.ⁿ³²

In *Balandran v. Labor Ready, Inc.*,ⁿ³³ female temporary laborers who sued their employer, a staffing agency, for discriminatorily failing to refer them for employment with third parties because of their sex, were not required to arbitrate their claim. The temporary laborers were required to sign an application agreeing that they would not be considered employed until they were assigned to work on a job, and that they would arbitrate any disputes arising out of employment, including discrimination claims. However, according to the court, the pre-employment discrimination claims did not arise out of their "employment" and, therefore, the arbitration provision did not apply to the plaintiffs' claims. Likewise, language requiring the arbitration of "all other employment-related issues" did not compel arbitration, because that language plainly applied only to employment-related issues arising out of employment. As plaintiffs were never employed, the arbitration clause did not apply.

[c] Defenses to Mandatory Arbitration

Under the Federal Arbitration Act, arbitration clauses in contracts are valid, irrevocable, and enforceable, except upon grounds existing at law or in equity for the revocation of any contract.ⁿ³⁴ Thus, under the FAA, a party may challenge the validity or applicability of the arbitration provision by raising the same defenses available to a party seeking to avoid the enforcement of any contract.ⁿ³⁵ Contract-based challenges are governed by applicable state law.ⁿ³⁶

Under California law, breach or repudiation of a contract by one party, excuses nonperformance by the other.ⁿ³⁷ However, in *Cox v. Ocean View Hotel Corp.*,ⁿ³⁸ the Ninth Circuit found that the employee, who asserted breach or repudiation of the arbitration provision as a defense to the employer's motion to compel arbitration under the contract, failed to first establish that he properly initiated arbitration so that the employer could not have repudiated the agreement. The agreement properly incorporated applicable rules of the American Arbitration Association into the agreement, and a letter to a supervisor did not constitute a proper demand for arbitration under those rules. Although the arbitration clause did not explicitly articulate the requirement of formally initiating arbitration proceedings with the AAA, the employee consented to the terms of the agreement he signed, and the fact that he was hired for a managerial position and represented by counsel at the time he made his flawed request for arbitration reinforced that view. Further, the court refused to apply equitable estoppel to prevent the employer from denying that the employee-initiated arbitration because of its own refusal to arbitrate on his request. There was no indication the employer intended that the employee rely on a letter to him refusing his initiation of arbitration to his detriment, nor did the employee assert that he believed the employer intended him to rely, or did in fact rely, on the letter.ⁿ³⁹

Waiver is another defense that may be asserted. For discussion of waiver in the arbitration agreement generally, *see* § 90.20[1][g], *above*. For discussion of waiver of defenses to arbitration, *see* [4], *below*.

[3] Conflicting Arbitration Provisions

Multiple employment-related agreements may govern an employment relationship and contain conflicting arbitration provisions. For example, in *Parker v. McCaw*,ⁿ⁴⁰ an employment agreement and a stock incentive agreement arising from the same employment both contained arbitration provisions. However, the agreements conflicted in the number of arbitrators required, with the employment agreement requiring only one and the stock incentive agreement requiring three. The trial court consolidated arbitration proceedings under the agreements and ordered that they proceed before only one arbitrator.ⁿ⁴¹ The court of appeal found that the trial court erred by resolving the conflicting arbitration provisions in favor of a single arbitrator. Under these circumstances, the right to a three-arbitrator panel was a substantial contractual right.ⁿ⁴² The court found that a three-arbitrator panel would minimize the risk of factual or legal error, which error generally is not reviewable pursuant to the law of arbitration.ⁿ⁴³ A three-arbitrator panel would also allow the arbitrators to hear, consider, and weigh the evidence and arguments presented by the parties, and participate in consultation and deliberation collectively.ⁿ⁴⁴

[4] Waiver of Defenses to Arbitration

If a plaintiff opposes a motion to compel arbitration under an employment agreement, the plaintiff must raise any defenses to arbitration at the time the defendant moves to compel arbitration. If the plaintiff fails to raise those defenses at that time, they will be waived.ⁿ⁴⁵

[5] Arbitrator's Disclosure Obligations

[a] State Law

The California Legislature directed the California Judicial Council to adopt ethical standards for all neutral arbitrators effective July 1, 2002.ⁿ⁴⁶ In response, the Judicial Council promulgated the California Ethics Standards for Neutral Arbitrators in Contractual Arbitration.ⁿ⁴⁷ The standards require arbitrators to make comprehensive disclosures of

potential grounds for disqualification.

The standards establish minimum standards of conduct for neutral arbitrators in contractual arbitration, and are intended to guide the conduct of arbitrators, to inform and protect participants in arbitration, and to promote public confidence in the arbitration process.ⁿ⁴⁸ They contain detailed disclosure requirements.ⁿ⁴⁹ By statute, California also requires that in an arbitration pursuant to an arbitration agreement, the proposed neutral arbitrator must disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial.ⁿ⁵⁰ Included on the statutory list of required disclosures are any matters required to be disclosed by the ethics standards for neutral arbitrators adopted by the Judicial Council.ⁿ⁵¹ The standards supplement and expand the statutory disclosure requirements.ⁿ⁵² The proposed arbitrator must disclose all matters required to be disclosed to all parties in writing within 10 calendar days of service of notice of the proposed nomination or appointment.ⁿ⁵³

One concern the Standards address is the bias, or appearance of bias, that may flow from one side in an arbitration being a source or potential source of additional employment, and thus additional income, for the arbitrator. Thus, Standard 12 prohibits the arbitrator from entertaining or accepting an offer of employment as a lawyer, expert witness, or a consultant from a party or lawyer in the pending arbitration.ⁿ⁵⁴ However, it permits the arbitrator to entertain offers from the parties or their lawyers to serve in other capacities, if the arbitrator discloses that intent. Further, it grants the parties the right to disqualify the arbitrator based on such a disclosure.ⁿ⁵⁵ The arbitrator's failure to make the required disclosure of other employment precludes the arbitrator from entertaining or accepting any offer of employment from the parties or their lawyers from the time of appointment until the conclusion of the arbitration.ⁿ⁵⁶ In all cases, the proposed arbitrator must disclose whether he or she is serving as a neutral arbitrator in another prior or pending noncollective bargaining case involving a party to the current arbitration or a lawyer for a party.ⁿ⁵⁷ This duty of disclosure is a continuing one.ⁿ⁵⁸ If an arbitrator subsequently becomes aware of a matter that must be disclosed, the arbitrator must disclose that matter to the parties in writing within 10 calendar days after the arbitrator becomes aware of the matter.ⁿ⁵⁹ The continuing duty to disclose service in another pending case involving the parties or their lawyers is obviated if the arbitrator has made the disclosure of the intent to entertain those offers as required by standard 12(b).ⁿ⁶⁰ Thus, the obligation to disclose in this context can be summarized as follows:ⁿ⁶¹

1. If, while a current arbitration is pending, the arbitrator intends to entertain other offers of employment from the parties or their lawyers, the arbitrator must disclose that intention in writing within 10 calendar days of service of notice of the arbitrator's proposed nomination or appointment.ⁿ⁶²
2. If the disclosure is made and the arbitrator is not disqualified by a party, the arbitrator may accept the offers without the need for any further disclosure.ⁿ⁶³
3. If, however, the arbitrator does not disclose an intent to entertain additional offers from the parties or their lawyers, the arbitrator cannot accept any such offer until the current arbitration is concluded.ⁿ⁶⁴
4. If, despite this prohibition, the arbitrator accepts an offer, the arbitrator must disclose that fact to the parties in the current arbitration in writingⁿ⁶⁵ within 10 calendar days.ⁿ⁶⁶

On a showing that the arbitrator failed timely to disclose a ground for disqualification of which he or she was aware, California law requires the vacating of any award rendered by the arbitrator.ⁿ⁶⁷

In *Ovitz v. Schulman*,ⁿ⁶⁸ the parties submitted to contractual arbitration an employment dispute and other claims. The arbitrator failed to timely disclose in both his initial disclosure statement and then by accepting a subsequent appointment in another arbitration without first disclosing that he was the proposed arbitrator for another arbitration (where the law firm representing one of the parties in the instant arbitration represented one of the parties in the new arbitration).ⁿ⁶⁹ The court held that the arbitration award had to be vacated because, within the time required for disclosure, the arbitrator failed to disclose two grounds of which he was aware that would otherwise justify

disqualification, *i.e.*, his intent to entertain offers of employment from the parties' attorneys, and his subsequent acceptance of that employment.ⁿ⁷⁰ Although the party who sought disqualification did not challenge the arbitrator within 15 days of his initial disclosure as required by law, she did not waive her right to challenge him because of his failures to timely disclose.ⁿ⁷¹

In *Advantage Medical Services, LLC v. Hoffman*,ⁿ⁷² the trial court properly granted a petition to vacate an interim arbitration award in a dispute involving, *inter alia*, allegedly unpaid wages. Substantial evidence supported the trial court's finding that a person aware of the circumstances could reasonably have entertained a doubt that the arbitrator would be able to be impartial.ⁿ⁷³ The arbitrator granted the employer's request to permit a representative of its insurer to attend the arbitration without requiring the employer to disclose to the employee or to the arbitrator the identity of the representative or of the insurer, finding that the employee was not entitled to specific information regarding the insurer after the employee refused to agree to the presence of the insurer's representative without first being provided identifying information. At the hearing on the employer's motion for summary judgment, the insurer's counsel stated her appearance as coverage counsel for the insurer. The arbitrator made no disclosure regarding his or his law firm's business involvement with the insurer, despite specific requests to identify the insurer's counsel and the arbitrator's duty of inquiry.ⁿ⁷⁴ Substantial evidence showing a business relationship between the arbitrator and his law firm and the insurer could have caused a person aware of the facts to reasonably entertain a doubt that he would be able to be impartial.ⁿ⁷⁵ However, the trial court erred by granting a petition requesting that the court order the arbitrator disqualified under *Code Civ. Proc. § 1281.91*, because the petition was not filed until after he issued the interim award.ⁿ⁷⁶ The right of a party to disqualify a proposed neutral arbitrator is waived if the party fails to timely serve the notice, unless the proposed nominee or appointee makes a material omission or material misrepresentation in his or her disclosure. In no event may a notice of disqualification be given after a hearing of any contested issue of fact relating to the merits of the claim or after any ruling by the arbitrator regarding any contested matter.ⁿ⁷⁷

[b] Federal Law

The Federal Arbitration Act (FAA) permits the vacating of an arbitration award only on a showing of "evident partiality" by the arbitrator.ⁿ⁷⁸ When the issue is the arbitrator's failure to disclose, the Ninth Circuit interprets "evident partiality" to mean that the undisclosed facts must create a "reasonable impression of partiality."ⁿ⁷⁹ In a case involving state law, the FAA does not preempt *Code Civ. Proc. § 1286.2(a)(6)(A)*.ⁿ⁸⁰

[6] Mutuality Requirement

When an employer enters into an arbitration agreement with its employees, it must itself participate in properly initiated arbitration proceedings or forego its right to compel arbitration. An employer cannot compel a former employee to honor an arbitration agreement of which it is itself in material breach.ⁿ⁸¹

With regard to an arbitration agreement contained in an application for employment, absent some indicia that arbitration is limited to the employee's claims against the employer, the use of "I agree" language in an arbitration clause that expressly covers "all disputes" creates a mutual agreement to arbitrate all claims arising out of the applicant's employment. Despite whatever elements of procedural unconscionability may be present in employment adhesion contracts, the agreement to arbitrate does not lack mutuality of obligation so as to make it substantively unconscionable.^{n81.1}

[7] Time Limitations

In *Pearson Dental Supplies, Inc. v. Superior Court*,ⁿ⁸² the employment agreement between the employer and the employee contained a mandatory arbitration provision for all employment-related claims, and a provision that any employment-related dispute had to be submitted to binding arbitration within one year from the date the dispute arose or the employee or employer first became aware of facts giving rise to the dispute. The agreement further provided that if

any employment-related dispute was not timely submitted to binding arbitration, the claim would become void and would be considered waived to the fullest extent allowed by law. After the employer terminated the employee's employment, the employee filed an age discrimination complaint under the FEHA with the Department of Fair Employment and Housing and then a lawsuit, both of which were timely filed. The employee then declined the employer's demand to submit the claim to binding arbitration pursuant to the agreement and resisted the employer's petition to compel arbitration on the ground that the employer waived its right to arbitration by participating in the litigation. The trial court granted the employer's petition. The arbitrator granted the employer's motion for summary judgment on the ground that plaintiff failed to timely seek arbitration under the agreement, thus waiving his claim.

The court of appeal held that the arbitrator's award did not violate public policy by shortening time limitations provided under the FEHA.ⁿ⁸³ Under the FEHA, an aggrieved employee must file an administrative complaint within one year from the date of the discriminatory act.; a civil action must be filed within one year from the date the administrative agency issues a "right to sue" letter.ⁿ⁸⁴ The court distinguished *Pearson* from *Martinez v. Master Protection Corp.*,ⁿ⁸⁵ in which the appellate court reversed the trial court's order granting the employer's petition to compel arbitration, concluding that the arbitration agreement was procedurally and substantively unconscionable under *Armendariz*. The grounds of substantive unconscionability included that the agreement unduly shortened the statute of limitations under FEHA and the Labor Code by requiring the employee to notify the employer of all statutory and common law claims within six months of the date the claim arose. Failure to do so forfeited the claims, even if a federal or state statute would have provided a longer period.ⁿ⁸⁶ The employee in *Martinez* filed a claim for national origin discrimination under FEHA, which, as noted *above*, required that the administrative charge be filed within one year from the date of the discriminatory act, and a civil action within one year of the date on which the administrative agency issued a "right to sue" letter. Under the Labor Code, which provided the bases for the employee's causes of action for unpaid wages and penalties, the employee had three or four years to assert the claims sued upon.

In *Pearson*, the court found that *Armendariz* did not invalidate arbitral limitation periods shorter than the FEHA period because it did not consider the issue. However, *Armendariz* did posit the framework by which to evaluate such a limitation period: whether the period is sufficient to protect a plaintiff's ability to vindicate a statutory discrimination claim.ⁿ⁸⁷ The court refused to read *Martinez* to hold that an arbitral limitation period shorter than the FEHA's is per se unenforceable. Rather, the court read *Martinez* as concluding that the six-month limitation period in that case was unconscionable as compared to the "significantly longer" period for FEHA claims and the three-and-four-year statutory periods applicable to the employee's Labor Code claims, and found *Martinez* distinguishable based on the severity of the truncated limitation period involved: Six months as opposed to one year. The court also distinguished *Martinez* based on the procedural posture. In *Martinez*, the question arose in connection with determining whether to order arbitration in the first place, and the court did not evaluate whether, in fact, the six-month period was sufficient to permit the employee to investigate, prepare, and litigate his FEHA and other statutory claims. In *Pearson*, the issue arose after court-ordered arbitration had occurred. In initially opposing arbitration, the employee did not contend that the one-year limitation period was unconscionable, so that the issue was not litigated prearbitration. Further, the one-year period was more than adequate for plaintiff to vindicate his FEHA rights, had he timely submitted to arbitration.ⁿ⁸⁸

The court also distinguished several Ninth Circuit decisions finding a one-year limitations period in an arbitration agreement to be substantively unconscionable, because each found that a one-year time limit potentially deprived the plaintiff of the ability to proceed upon a theory of continuing violations.ⁿ⁸⁹ In *Pearson*, plaintiff's claim was based upon one discrete act, *i.e.*, his discharge, and he could not proceed upon a theory of a continuing violation of statutory rights.ⁿ⁹⁰

The court concluded that the agreement's requirement to commence arbitration within one year after the dispute arose was comparable to the one-year period within which a plaintiff must file a lawsuit for statutory discrimination after obtaining a right-to-sue letter from the DFEH, and that the one-year arbitral limitation period was not per se unreasonable as compared to the limitations period for bringing a federal employment discrimination claim under Title

VII of the Civil Rights Act of 1964.ⁿ⁹¹

Legal Topics:

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

Contracts Law Contract Conditions & Provisions Arbitration Clauses Labor & Employment Law Collective Bargaining & Labor Relations Arbitration General Overview Labor & Employment Law Collective Bargaining & Labor Relations Arbitration Authority

FOOTNOTES:

(n1)Footnote 1. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669 .

(n2)Footnote 2. *Gov. Code § 12900 et seq.*

(n3)Footnote 3. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 103, 99 Cal. Rptr. 2d 745, 6 P.3d 669 .

(n4)Footnote 4. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 106, 99 Cal. Rptr. 2d 745, 6 P.3d 669 . See also *Martinez v. Master Protection Corp.* (2004) 118 Cal. App. 4th 107, 118-119, 12 Cal. Rptr. 3d 663 (provision of arbitration agreement which, absent demonstration of substantial need, restricted discovery to single deposition, not including depositions of expert witnesses, and single document request, did not improperly and unfairly deprive employee of ability to prepare and prove his case. *but see* *Fitz v. NCR Corp.* (2004) 118 Cal. App. 4th 702, 715-719, 13 Cal. Rptr. 3d 88 (curtailment of discovery under arbitration agreement limiting discovery to sworn deposition statements of two individuals and any expert witnesses expected to testify at hearing and requiring exchange of all exhibits and list of potential witnesses at least two weeks in advance of hearing, prohibiting any other discovery unless arbitrator found compelling need to allow it, did not have mutual effect and did not provide employee with sufficient discovery to vindicate her rights, because employer already had in its possession many documents relevant to employment discrimination case as well as having in its employ many of relevant witnesses; distinguishing *Armendariz*, by finding that in *Armendariz*, employer had imposed on its employees arbitration agreement that by reference incorporated all rules in California Arbitration Act, granting parties essentially same discovery rights, remedies, and procedures as if subject matter of arbitration were pending before superior court [*Code Civ. Proc.* § 1283.05(a)]).

(n5)Footnote 5. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 106, 99 Cal. Rptr. 2d 745, 6 P.3d 669 .

(n6)Footnote 6. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 113, 99 Cal. Rptr. 2d 745, 6 P.3d 669 .

(n7)Footnote 7. See *Civ. Code* §§ 1668 (all contracts having the object, directly or indirectly, to exempt anyone from responsibility for his or her own fraud, or willful injury to person or property of another, or violation of law, whether willful or negligent, are against policy of law), 3513 (anyone may waive advantage of law intended solely for his or her benefit, but law established for public reason cannot be contravened by private agreement).

(n8)Footnote 8. *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 100-101, 99 Cal. Rptr. 2d 745, 6 P.3d 669 .

(n9)Footnote 9. *Little v. Auto Stiegler, Inc.* (2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979 .

(n10)Footnote 10. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330 . For discussion of wrongful termination claims under *Tameny* generally, see Chapter 60.

(n11)Footnote 11. *Little v. Auto Stiegler, Inc.* (2003) 29 Cal. 4th 1064, 1076-1081, 130 Cal. Rptr. 2d 892, 63 P.3d 979 .

(n12)Footnote 12. *Giuliano v. Inland Empire Personnel, Inc.* (2007) 149 Cal. App. 4th 1276, 58 Cal. Rptr. 3d 5, 2007 Cal. App. LEXIS 611, *20-*27 .

(n13)Footnote 13. See *Brooklyn Savings Bank v. O'Neil* (1945) 324 U.S. 697, 706-707, 65 S. Ct. 895, 89 L. Ed. 1296 (employee's statutory right to liquidated damages for employer's violation of overtime compensation laws under the Fair Labor Standards Act may not be waived); *Barrentine v. Arkansas-Best Freight System, Inc.* (1981) 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (employee's right to judicial forum for minimum wage law violation claim under Fair Labor Standards Act may not be waived, notwithstanding denial of claim in arbitration under collective bargaining agreement); *Association of Community Organizations for Reform Now v. Department of Industrial Relations* (1995) 41 Cal. App. 4th 298, 300, 48 Cal. Rptr. 2d 486 (California's minimum wage laws are not unconstitutional as applied to plaintiff, political advocacy group).

(n14)Footnote 14. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1119 ; *Chiron Corp. v. Ortho Diagnostic Sys., Inc.* (9th Cir. 2000) 207 F.3d 1126, 1131 .

(n15)Footnote 15. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1119 ; *Chiron Corp. v. Ortho Diagnostic Sys., Inc.* (9th Cir. 2000) 207 F.3d 1126, 1130 .

(n16)Footnote 16. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1119 . See also *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 445-446, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 .

(n17)Footnote 16.1. *Jackson v. Rent-A-Center West, Inc.* (9th Cir. 2009) 581 F.3d 912, 2009 U.S. App. LEXIS 20133, *4-*15 .

(n18)Footnote 17. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1119-1120 .

(n19)Footnote 18. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1119-1121 .

(n20)Footnote 19. *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 Cal. App. 4th 494, 503, 79 Cal. Rptr. 3d 471 , citing *Freeman v. State Farm Mut. Auto. Ins. Co.* (1975) 14 Cal. 3d 473, 480, 121 Cal. Rptr. 477, 535 P.2d 341 .

(n21)Footnote 20. *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 Cal. App. 4th 494, 507-508, 79 Cal. Rptr. 3d 471 . See also *Bruni v. Didion* (2008) 160 Cal. App. 4th 1272, 1286-1291, 73 Cal. Rptr. 3d 395 .

(n22)Footnote 21. *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 Cal. App. 4th 494, 503-508, 79 Cal. Rptr. 3d 471 .

(n23)Footnote 22. *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 Cal. App. 4th 494, 505-506, 79 Cal. Rptr. 3d 471 , quoting *Mercuro v. Superior Court* (2002) 96 Cal. App. 4th 167, 178, 116 Cal. Rptr. 2d 671 .

(n24)Footnote 23. *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal. App. 4th 154, 165-166, 90 Cal. Rptr. 3d 818 .

(n25)Footnote 24. *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 . See also *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal. 4th 1334, 1365, 82 Cal. Rptr. 3d 229, 190 P.3d 586 .

(n26)Footnote 25. See *Balandran v. Labor Ready, Inc.* (2004) 124 Cal. App. 4th 1522, 1530, 22 Cal. Rptr. 3d 441 .

(n27)Footnote 26. *Sanchez v. Western Pizza Enterprises, Inc.* (2009) 172 Cal. App. 4th 154, 166, 90 Cal. Rptr. 3d 818. See also *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, 171, 30 Cal. Rptr. 3d 76, 113 P.3d 1100.

(n28)Footnote 27. See *Ontiveros v. DHL Express (USA), Inc.* (2008) 164 Cal. App. 4th 494, 503 & n.2, 79 Cal. Rptr. 3d 471; *Bruni v. Didion* (2008) 160 Cal. App. 4th 1272, 1286-1288, 1290-1291, 73 Cal. Rptr. 3d 395; *Baker v. Osborne Development Corp.* (2008) 159 Cal. App. 4th 884, 893-894, 71 Cal. Rptr. 3d 854; *Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal. App. 4th 138, 144-145, 67 Cal. Rptr. 3d 120.

(n29)Footnote 28. *Omar v. Ralphs Grocery Co.* (2004) 118 Cal. App. 4th 955, 13 Cal. Rptr. 3d 562.

(n30)Footnote 29. *Omar v. Ralphs Grocery Co.* (2004) 118 Cal. App. 4th 955, 960, 13 Cal. Rptr. 3d 562. See also *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed. 2d 491 (in determining whether to compel arbitration under particular arbitration agreement, court must determine two gateway questions of whether agreement is enforceable against parties as valid and binding and whether agreement applies to dispute).

(n31)Footnote 30. See, e.g., *American Federation of State, County & Municipal Employees v. Metropolitan Water District* (2005) 126 Cal. App. 4th 247, 257-260, 24 Cal. Rptr. 3d 285 (although absence of words "arbitration," "arbitrate" or "arbitrator," was not determinative factor in deciding whether agreement was one for arbitration, memorandum of understanding was not an agreement to arbitrate where employee grievance procedure did not provide for final and binding decision by hearing officer).

(n32)Footnote 31. *Balandran v. Labor Ready, Inc.* (2004) 124 Cal. App. 4th 1522, 1528-1530, 22 Cal. Rptr. 3d 441 (sex discrimination claims of female temporary laborers against service employing them to work for third parties, i.e., that the service discriminated in not sending them out to jobs as it did men, did not require arbitration under provision requiring arbitration of disputes arising out of employment, because arbitration clause plainly applied only to employment-related issues and plaintiffs were never employed).

(n33)Footnote 32. *Omar v. Ralphs Grocery Co.* (2004) 118 Cal. App. 4th 955, 961, 13 Cal. Rptr. 3d 562.

(n34)Footnote 33. *Balandran v. Labor Ready, Inc.* (2004) 124 Cal. App. 4th 1522, 1528-1530, 22 Cal. Rptr. 3d 441.

(n35)Footnote 34. 9 U.S.C. § 2.

(n36)Footnote 35. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1121; *Brown v. Dillard's, Inc.* (9th Cir. 2005) 430 F.3d 1004, 1010.

(n37)Footnote 36. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1121 (parties selected California law to govern resolution of disputes arising out of employment agreement).

(n38)Footnote 37. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1121; *Brown v. Dillard's, Inc.* (9th Cir. 2005) 430 F.3d 1004, 1010.

(n39)Footnote 38. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1121-1122.

(n40)Footnote 39. *Cox v. Ocean View Hotel Corp.* (9th Cir. 2008) 533 F.3d 1114, 1122-1124.

(n41)Footnote 40. *Parker v. McCaw* (2005) 125 Cal. App. 4th 1494, 1503-1508, 24 Cal. Rptr. 3d 55.

(n42)Footnote 41. See *Code Civ. Proc. § 1281.3*, allowing consolidation of arbitration proceedings arising from the same transaction or occurrence.

(n43)Footnote 42. *Parker v. McCaw* (2005) 125 Cal. App. 4th 1494, 1506-1507, 24 Cal. Rptr. 3d 55. See *Code*

Civ. Proc. § 1281.3 (in consolidating arbitration proceedings, if arbitration agreements contain inconsistent provisions, court must resolve conflicts and determine rights and duties of various parties to achieve substantial justice under circumstances).

(n44)Footnote 43. *Vandenberg v. Superior Court* (1999) 21 Cal. 4th 815, 831, 88 Cal. Rptr. 2d 366, 982 P.2d 229 .

(n45)Footnote 44. *Parker v. McCaw* (2005) 125 Cal. App. 4th 1494, 1506-1507, 24 Cal. Rptr. 3d 55 .

(n46)Footnote 45. *See, e.g., Cummings v. Future Nissan* (2005) 128 Cal. App. 4th 321, 327-330, 27 Cal. Rptr. 3d 10 (plaintiff was obliged to raise unconscionability challenge when she initially resisted arbitration; by failing to raise challenge until appeal of arbitrator's award, she forfeited claim that bilateral provision for second level of review of arbitration award was unconscionable on its face, as well as other challenges to provisions of contractual arbitration clause which by her own admission she did not first raise until her effort to confirm initial award).

(n47)Footnote 46. *Code Civ. Proc. § 1281.85(a)*.

(n48)Footnote 47. Cal. Rules of Court, Appendix, Div. VI, Stds. 1 et seq. *See Ovitiz v. Schulman* (2005) 133 Cal. App. 4th 830, 833, 35 Cal. Rptr. 3d 117 .

(n49)Footnote 48. Std. 1(a).

(n50)Footnote 49. *See* Stds. 7, 8, & 12.

(n51)Footnote 50. *Code Civ. Proc. § 1281.9(a)*.

(n52)Footnote 51. *Code Civ. Proc. § 1281.9(a)(2)*.

(n53)Footnote 52. *Code Civ. Proc. § 1281.85(a)*; Std. 7(a); *see also* Cal. Rules of Court, Appendix, Div. VI, foll. Std. 7, Official Comment to Standard 7.

(n54)Footnote 53. *Code Civ. Proc. § 1281.9(b)*. *See also* Stds.7(c), 12(b).

(n55)Footnote 54. Std. 12(a).

(n56)Footnote 55. *See* Std. 12(b) (in addition to disclosures required by Stds. 7 and 8, within ten calendar days of service of notice of proposed nomination or appointment, proposed arbitrator must disclose to all parties in writing if, while arbitration is pending, he or she will entertain offers of employment or new professional relationships in any capacity other than as lawyer, expert witness, or consultant from party or lawyer for party, including offers to serve as dispute resolution neutral in another case; party may disqualify arbitrator based on disclosure by serving notice of disqualification in manner and time specified in *Code Civ. Proc. § 1281.91(b)*).

(n57)Footnote 56. Std. 12(c).

(n58)Footnote 57. Std. 7(d)(4)(A)(I).

(n59)Footnote 58. Std. 7(f); *see* Std. 9(a).

(n60)Footnote 59. Std. 7(c).

(n61)Footnote 60. Std. 7(b)(2).

(n62)Footnote 61. *Ovitiz v. Schulman* (2005) 133 Cal. App. 4th 830, 841, 35 Cal. Rptr. 3d 117 .

(n63)Footnote 62. Std. 12(b).

(n64)Footnote 63. Std. 7(b)(2).

(n65)Footnote 64. Std. 12(c).

(n66)Footnote 65. Std. 7(d)(4)(A)(I).

(n67)Footnote 66. Std. 7(c).

(n68)Footnote 67. *Code Civ. Proc.* § 1286.2(a)(6)(A).

(n69)Footnote 68. *Ovitz v. Schulman* (2005) 133 Cal. App. 4th 830, 838-845, 35 Cal. Rptr. 3d 117 .

(n70)Footnote 69. *Ovitz v. Schulman* (2005) 133 Cal. App. 4th 830, 838-845, 35 Cal. Rptr. 3d 117 .

(n71)Footnote 70. *Ovitz v. Schulman* (2005) 133 Cal. App. 4th 830, 844-845, 35 Cal. Rptr. 3d 117 . *See Code Civ. Proc.* § 1286.2(a)(6)(A). *See also* Stds. 12(b), 7(d)(4)(A)(I), 7(c).

(n72)Footnote 71. *Ovitz v. Schulman* (2005) 133 Cal. App. 4th 830, 844-845, 35 Cal. Rptr. 3d 117 (waiver rule of *Code Civ. Proc.* § 1281.91(c) applies only when proposed arbitrator has made requisite disclosures).

(n73)Footnote 72. *Advantage Medical Services, Inc. v. Hoffman* (2008) 160 Cal. App. 4th 806, 72 Cal. Rptr. 3d 935 .

(n74)Footnote 73. *See Code Civ. Proc.* § 1281.9(a)(6); Std. 7(d)(14).

(n75)Footnote 74. *See* Std. 9(a) (requiring person nominated or appointed as arbitrator to make reasonable effort to inform himself or herself of matters required to be disclosed under Stds. 7 and 8); *Code Civ. Proc.* § 1281.85(a) (incorporating Std. 9(a)).

(n76)Footnote 75. *Advantage Medical Services, Inc. v. Hoffman* (2008) 160 Cal. App. 4th 806, 816-819, 72 Cal. Rptr. 3d 935 .

(n77)Footnote 76. *Advantage Medical Services, Inc. v. Hoffman* (2008) 160 Cal. App. 4th 806, 819-820, 72 Cal. Rptr. 3d 935 .

(n78)Footnote 77. *Code Civ. Proc.* § 1281.91(c). *See also* Std. 10(a)(4) (providing for disqualification if party becomes aware that arbitrator has made material omission or material misrepresentation in his or her disclosure and, within 15 days after becoming aware of omission or misrepresentation and within time specified in *Code Civ. Proc.* § 1281.91(c), party serves notice of disqualification clearly describing material omission or material misrepresentation and how and when party became aware of omission or misrepresentation).

(n79)Footnote 78. 9 U.S.C. § 10(a)(2). *See Ovitz v. Schulman* (2005) 133 Cal. App. 4th 830, 833, 35 Cal. Rptr. 3d 117 .

(n80)Footnote 79. *Schmitz v. Zilveti* (9th Cir. 1994) 20 F.3d 1043, 1046 ; *see also Commonwealth Corp. v. Casualty Co.* (1968) 393 U.S. 145, 149, 89 S. Ct. 337 ; *Ovitz v. Schulman* (2005) 133 Cal. App. 4th 830, 833, 35 Cal. Rptr. 3d 117 .

(n81)Footnote 80. *Ovitz v. Schulman* (2005) 133 Cal. App. 4th 830, 848-855, 35 Cal. Rptr. 3d 117 .

(n82)Footnote 81. *See Brown v. Dillard's, Inc.* (2005) 430 F.3d 1004, 1009-1013 (employer lost its right to compel arbitration under employer-compelled arbitration program when it breached arbitration agreement by refusing to

arbitrate after employee requested arbitration, and then by removing employee's action to federal court and moving to compel arbitration).

(n83)Footnote 81.1. *Roman v. Superior Court* (2009) 172 Cal. App. 4th 1462, 1471-1475, 92 Cal. Rptr. 3d 153 . For discussion of substantive and procedural unconscionability, see § 90.20[1][e], above.

(n84)Footnote 82. *Pearson Dental Supplies, Inc. v. Superior Court* (2008) 166 Cal. App. 4th 71, 82 Cal. Rptr. 3d 154 .

(n85)Footnote 83. For discussion of procedural requirements under the FEHA, see Chs. 42 (administrative agency requirements), 43 (civil actions).

(n86)Footnote 84. *Gov. Code* §§ 12960(d), 12965(b).

(n87)Footnote 85. *Martinez v. Master Protection Corp.* (2004) 118 Cal. App. 4th 107, 12 Cal. Rptr. 3d 663 .

(n88)Footnote 86. *Martinez v. Master Protection Corp.* (2004) 118 Cal. App. 4th 107, 112, fn. 2, 117, 12 Cal. Rptr. 3d 663 .

(n89)Footnote 87. *Pearson Dental Supplies, Inc. v. Superior Court* (2008) 166 Cal. App. 4th 71, 83-84, 82 Cal. Rptr. 3d 154 . See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 106-107, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (parties may agree to less than full discovery, but agreed-upon discovery must be sufficient to adequately arbitrate statutory claim).

(n90)Footnote 88. *Pearson Dental Supplies, Inc. v. Superior Court* (2008) 166 Cal. App. 4th 71, 84, 82 Cal. Rptr. 3d 154 .

(n91)Footnote 89. See *Davis v. O'Melveny & Myers* (9th Cir. 2007) 485 F.3d 1066, 1076-1077 (arbitration provision barring claims not brought within one year of when they were first known or should have been known was substantively unconscionable because it effectively precluded plaintiff from proceeding on theory of "continuing violations"); *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165, 1175 (requirement that employee initiate arbitration within one year was substantively unconscionable because employee in sexual harassment action forewent possibility of relief under continuing violations doctrine and benefit provision flowed only to employer); *Circuit City Stores, Inc. v. Adams* (9th Cir. 2002) 279 F.3d 889, 894 (one-year limitations period on initiating arbitration was unconscionable for several reasons, including that it deprived plaintiff in sexual harassment lawsuit of benefit of continuing violation doctrine available in FEHA suits).

(n92)Footnote 90. *Pearson Dental Supplies, Inc. v. Superior Court* (2008) 166 Cal. App. 4th 71, 84, 82 Cal. Rptr. 3d 154 .

(n93)Footnote 91. *Pearson Dental Supplies, Inc. v. Superior Court* (2008) 166 Cal. App. 4th 71, 85-86, 82 Cal. Rptr. 3d 154 (record left no doubt that one-year arbitral limitation period gave plaintiff adequate time to vindicate his FEHA claim in arbitration). For discussion of the administrative exhaustion requirement under Title VII, see Ch. 42; for discussion of the time limits for filing civil actions under Title VII, see Ch. 43.



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DIVISION IX ALTERNATIVE DISPUTE RESOLUTION
CHAPTER 90 Arbitration of Employment Disputes
Part B. ENFORCEABILITY OF ARBITRATION AGREEMENTS

4-90 California Employment Law §§ 90.22 through 90.29

AUTHOR: By Paul W. Cane, Jr., J.D.

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§§ 90.22[Reserved]



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CHAPTER 90 Arbitration of Employment Disputes
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For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsArbitration ClausesLabor & Employment LawCollective Bargaining & Labor RelationsArbitrationGeneral Overview



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CHAPTER 90 Arbitration of Employment Disputes

Part C. BIBLIOGRAPHY

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